No. 23-484

In The Supreme Court of the United States

JOSE TREVINO, ET AL.,

Petitioners,

V.

SUSAN SOTO PALMER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari Before Judgment to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONERS

JASON B. TORCHINSKY
Counsel of Record
PHILLIP M. GORDON
DREW C. ENSIGN
ANDREW PARDUE
CALEB ACKER
HOLTZMAN VOGEL
BARAN TORCHINSKY &
JOSEFIAK PLLC
15405 John Marshall Highway
Haymarket, VA 20169
(540) 341-8808 (telephone)
(540) 341-8809 (facsimile)
jtorchinsky@holtzmanvogel.com
pgordon@holtzmanvogel.com
densign@holtzmanvogel.com
apardue@holtzmanvogel.com
cacker@holtzmanvogel.com

DALLIN B. HOLT
BRENNAN A. R. BOWEN
HOLTZMAN VOGEL
BARAN TORCHINSKY &
JOSEFIAK PLLC
Esplanade Tower IV
2575 East Camelback Road
Suite 860
Phoenix, AZ 85016
(602) 388-1262 (telephone)
(540) 341-8809 (facsimile)
dholt@holtzmanvogel.com
bbowen@holtzmanvogel.com

ANDREW R. STOKESBARY
CHALMERS, ADAMS, BACKER
& KAUFMAN, LLC
701 Fifth Avenue, Suite 4200
Seattle, WA 98104
(206) 207-3920 (telephone)
dstokesbary@chalmersadams.com

Counsel for Petitioners

LANTAGNE LEGAL PRINTING
801 East Main Street Suite 100 Richmond, Virginia 23219 (800) 847-0477

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"[T]he ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race." *Johnson* v. *De Grandy*, 512 U. S. 997, 1014 n. 11 (1994). Flouting this bedrock principle, the district court invalidated a majority-minority Hispanic citizen voting-age population district under Section 2 of the Voting Rights Act ("VRA")—after it elected a Hispanic Republican in a thirty-five-point landslide over a White Democrat—because the district does not reliably elect putative (majority-)minority-preferred candidates—*i.e.*, Democrats. That holding makes a mockery of §2 and warrants this Court's review.

Because the §2 merits holdings are indefensible, Respondents understandably focus their efforts on jurisdictional arguments. Those efforts are unavailing. Both Representative Alex Ybarra and district resident Jose Trevino are injured by the district court's injunction and have standing to challenge it. Specifically, Representative Ybarra has Article III standing on at least two grounds: (1) one of the remedial maps forces him into a primary in which he would not have to participate but for the district court's decision; and (2) the other four proposed alternative maps would make his reelection campaign costlier and more difficult. Mr. Trevino, as a resident of LD-15, has a constitutional right not to have the boundaries of his district drawn by impermissible and excessive consideration of race—a result that the district court's decision effectively guarantees. Mr. Trevino thus also has Article III standing to challenge that decision.

This case is inextricably linked with *Garcia* v. *Hobbs*, No. 23-467, and this Court should therefore consider them together. Accordingly, this Court should follow the course it took recently in *Ardoin*: grant the writ of certiorari before judgment, hold this case in abeyance pending the outcome in *Garcia*, and stay the remedial proceedings in *Soto Palmer* v. *Hobbs*, No. 3:22-cv-05035. See *Ardoin* v. *Robinson*, 142 S. Ct. 2892 (2022). Certiorari before judgment is rare, but less so in redistricting cases. Where, as here, a related constitutional claim goes directly to this Court, the §2 appeal sensibly should do the same.

1. Petitioners have standing to seek appellate review. "[A]n intervenor's right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor that he fulfills the requirements of Art[icle] III." *Diamond* v. *Charles*, 476 U. S. 54, 68 (1986). That entails fulfilling the three traditional elements: "(1) a concrete and particularized injury, that (2) is fairly traceable to the challenged conduct, and (3) is likely to be redressed by a favorable decision." *Va. House of Delegates* v. *Bethune-Hill*, 139 S. Ct. 1945, 1950 (2019). "[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." *Rumsfeld* v. *Forum for Academic & Institutional Rights, Inc.*, 547 U. S. 47, 52 n. 2 (2006). Here, both Representative Ybarra and Mr. Trevino independently and individually have Article III standing.[1] Neither

[1] Additionally, Washington Senator Nikki Torres has moved to intervene in the *Soto Palmer* remedial proceedings, because the Plaintiff-Respondents' proposed remedy maps threaten to

claims any institutional injury nor undertakes to defend the interests of the State of Washington.

2. Representative Ybarra first has standing because the lower court's decision and accompanying orders will force him to compete in a primary against two other incumbents if the district court adopts one of the proposed remedial maps (Proposal 5). That is a "'direct stake' in the outcome of their appeal" that establishes standing. *Hollingsworth* v. *Perry*, 570 U. S. 693, 706 (2013).

For individual legislators, this Court has insisted upon the existence of an individualized injury—*i.e.*, a harm that "zeroe[s] in on an[] individual Member." *Arizona State Legislature* v. *Arizona Independent Redistricting Comm'n*, 576 U. S. 787, 802 (2015). Standing is established where a legislator has "been singled out for specifically unfavorable treatment as opposed to other Members of their respective bodies." *Raines* v. *Byrd*, 521 U. S. 811, 821 (1997). In contrast, individual legislators may not assert an institutional injury, *i.e.*, a harm that "necessarily" impacts all Members of the legislative body "equally." *Arizona State Legislature*, 576 U. S., at 802 (quoting *Raines*, 521 U. S., at 821).

Here, the district court's injunction, along with the proposed remedial maps occasioned as a direct result of that injunction, singles out Representative Ybarra for individualized injury. Remedial Proposal 5 moves Representative Chris Corry, an incumbent

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redistrict her out of her own district, force primaries, and destroy the majority-minority district she currently represents. See *Soto Palmer* v. *Hobbs*, No. 3:22-cv-05035, ECF No. 253.

currently representing constituents in LD-14 of the Enacted Plan, into LD-13, which already has two incumbent House Members: Alex Ybarra and Tom Dent. Trende Report, *Soto Palmer*, No. 3:22-cv-05035, ECF No. 251, at 66. This awkward situation would force Representative Ybarra into a lose-lose: either (1) move out of his lifelong home in Quincy into a district without an incumbent (*e.g.*, proposed LD-15); or (2) risk a primary contest against another sitting representative of his own party. Representative Corry could challenge Representative Ybarra for Position 2 (which Representative Ybarra currently holds), or—if Representative Corry files for Position 1—Representative Dent (the current Position 1 incumbent) might challenge Representative Ybarra for Position 2.[2]

That contentious mess is the direct result of the district court's errant §2 decision and would not occur but for that decision. These three incumbents have "been singled out for specially unfavorable

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[2] Each Washington legislative district has two House seats, labeled "Position 1" and "Position 2." A candidate, when filing, chooses which of the two Positions for which to run. For the 2024 election cycle, Representative Ybarra already filed for Position 2 in enacted LD-13 on January 15, 2023 (available at https://apollo.pdc.wa.gov/public/registrations/registration?registration_id=50417), Representative Dent filed for Position 1 in enacted LD-13 on August 1, 2023 (available at https://apollo.pdc.wa.gov/public/registrations/registration?registration_id=54249), and Representative Corry filed for Position 1 in enacted LD-14 on January 12, 2023 (available at https://apollo.pdc.wa.gov/public/registrations/registration?registration_id=50396). Were the district court to impose Plaintiff-Respondents' Remedial Plan 5, Representative Corry would need to refile in remedial LD-13.

treatment as opposed to other Members of their respective bodies." *Raines*, 521 U. S., at 821. Being redistricted out of one's seat entirely by redistricting (meaning the legislator's home address is moved to a different district or two districts are collapsed into one, forcing a primary between two incumbents) obviously qualifies as a deprivation of one's seat. See *id.* The proceedings below therefore work to deprive Representative Ybarra of his very "seat . . . after [his] constituents ha[ve] elected [him]." See *id.*

This Court has now twice reserved for future determination whether "harms centered on more difficult election campaigns are cognizable." *Bethune-Hill*, 139 S. Ct., at 1956 (citing *Wittman* v. *Personhuballah*, 578 U. S. 539, 545 (2016)). This Court should now answer that question in the affirmative for situations like Representative Ybarra's, where redistricting leaves one particular Member more vulnerable, because such redistricting constitutes unfavorable treatment specific to that individual Member, not impacting all Members equally.

This Court in *Wittman* looked to "evidence that an alternative to the Enacted Plan (including the Remedial Plan) will reduce the relevant intervenors' chances of reelection." 578 U. S., at 545. Representative Ybarra has shown just that.

3. Representative Ybarra's reelection chances are also directly harmed by Plaintiff-Respondents' proposed remedial maps. If this Court agrees that reduced reelection chances constitute an Article III injury, the question is whether "an alternative to the Enacted Plan (including the Remedial Plan) will

reduce the relevant intervenors' chances of reelection." *Id.* For Representative Ybarra, that means asking whether the Plaintiff-Respondents' remedial maps offered in the district court would trigger "costlier or more difficult election campaigns," *Bethune-Hill*, 139 S. Ct., at 1956. Although this Court has not imposed a minimum threshold of cost or difficulty, its standing principles generally recognize that even "a dollar or two" of injury establishes Article III standing. *Sprint Communications Co.* v. *APCC Services, Inc.*, 554 U. S. 269, 289 (2008).

Petitioners' expert for the remedial proceedings produced numbers showing that "[Plaintiff-Respondents'] maps do not merely create a new, more heavily Democratic district in southern Washington. They do so by weakening several Republican incumbents in unrelated portions of the map." Trende Report, ECF No. 251, at 40–41. One such incumbent is Representative Ybarra. Plaintiff-Respondents' Proposals 1, 2, 3, and 4 increase the estimated Democrat vote share in Representative Ybarra's home district of LD-13. *Id.*, at 79–82. Therefore, Representative Ybarra likely will have to engage in additional spending (*e.g.*, campaigning for the new voters added to LD-13) and will, by definition, face a more difficult reelection campaign under each of those maps.

4. Like all Americans, Petitioner Jose Trevino possesses an individual constitutional right under the Equal Protection Clause not to be intentionally and unjustifiably sorted by race. *Abbott* v. *Perez*, 138 S. Ct. 2305, 2314 (2018). The district court's invasion of that right through its decision therefore causes

him injury, giving him Article III standing to seek appellate review to reverse it.

Mr. Trevino lives in enacted (and enjoined) LD-15. From the beginning, Mr. Trevino has asserted he has an individual Fourteenth Amendment right affected by this §2 litigation, namely, not to be gerrymandered on the basis of race or ethnicity. But the district court's decision will likely result in intentional alteration of Mr. Trevino's district on race-based grounds, as the district court utilizes race to remedy the purported §2 violation. As this Court has recognized, "compliance with the Voting Rights Act . . . pulls in the opposite direction" of the Equal Protection Clause because it "insists that districts be created precisely because of race." *Id.* That is particularly true in this litigation because the political and demographic reality of the Yakima Valley region makes such a redrawing impossible without racial targets.

The district court's race-based rejiggering of Mr. Trevino's district thus causes "fundamental injury" to Mr. Trevino's "individual rights." *Shaw* v. *Hunt*, 517 U. S. 899, 908 (1996) (quoting *Goodman* v. *Lukens Steel Co.*, 482 U. S. 656, 661 (1987)). Indeed, Respondents do not dispute that Mr. Trevino (like Mr. Garcia in the related litigation) would have Article III standing to challenge LD-15 as enacted by the Washington Legislature as an unconstitutional racial gerrymander. But the injury recognized in *Shaw* does not disappear when the institution wielding the racial gerrymandering pen is a court rather than a legislature. Article III standing exists to challenge the resulting gerrymander however it arises.

A finding of a §2 violation thus triggers a race-based remedial process that alone grants standing to individuals like Mr. Trevino who will be subject to the resulting gerrymandering. The ongoing remedial process occurring in this case, then, is not dispositive as to standing, but it is illustrative. The district court invalidated LD-15 and purported to order the creation of a new map that safeguards victory for the candidate supported by a majority of Hispanic voters (*i.e.*, a Democrat). And although the district court's decision obscures these central facts, Plaintiff-Respondents' proposed remedial maps make them manifest. Specifically, in order to produce districts more favorable to Democrats, Plaintiff-Respondents ludicrously propose to remedy putative dilution of Hispanic voting strength in LD-15 by diluting it further. Tellingly, every one of the Plaintiff-Respondents' five proposals decreases the Hispanic Citizen Voting Age Population ("HCVAP") in the proposed opportunity district from an estimated 52.6% in 2021 population numbers to anywhere from 46.9% to 51.7%. Trende Report, ECF No. 251, at 70. None of this is accidental, but rather the surgical use of racial gerrymandering and cynical exploitation of the VRA to achieve partisan ends. See *id.*, at 25 ("[T]he maps nevertheless carve out Hispanic areas and Democratic areas with razor-like accuracy across a wide swath of south-central Washington, creating appendages that wrap into heavily Hispanic and Democratic areas in order to build the district.").

This Court has indicated that this sort of racial sorting is per se harmful, regardless of justification: "While appreciating that a racial classification causes 'fundamental injury' to the 'individual rights

of a person,' we have recognized that, under certain circumstances, drawing racial distinctions is permissible where a governmental body is pursuing a 'compelling state interest.'" *Shaw*, 517 U. S., at 908 (citation omitted) (quoting *Goodman*, 482 U. S., at 661). That fundamental injury, justified or not (and Petitioners will show on the merits that it was not justified here), is a cognizable one establishing Article III standing. And because "standing in no way depends on the merits," *Warth* v. *Seldin*, 422 U. S. 490, 500 (1975), it is sufficient for present purposes that Mr. Trevino has more than plausibly alleged that the district court's race-based remedies will violate his constitutional rights.

Hollingsworth v. *Perry*, 570 U. S. 693 (2013), does not defeat Petitioners' standing. Those intervening proponents of the Proposition 8 ballot initiative sought to defend that law by appealing when California officials declined. *Id.*, at 705. This Court noted that the intervenors' "only interest in having the District Court order reversed was to vindicate the constitutional validity" of a state law. *Id.*, at 706. Such interest was insufficient to maintain a live Article III controversy because the intervenors had no "'personal stake' in defending its enforcement that [was] distinguishable from the general interest of every citizen" of the state. *Id.*, at 707.

Here, Mr. Trevino is not attempting to "stand in for the State[,]" *Bethune-Hill*, 139 S. Ct., at 1951, to vindicate the State's sovereign and generalized interest in the constitutional validity of a law. To the contrary, he is asserting fundamental injury to his individual rights. The State does not even possess any such rights that Mr. Trevino could assert by

proxy. Instead, the likelihood of being sorted on the basis of race gives Mr. Trevino precisely the sort of "personal stake" in this litigation that supports standing—a stake that is not shared by all Washingtonians but only those within the Yakima Valley at risk of that specific constitutional harm. In this way, Mr. Trevino should be viewed as the mirror-image equivalent of a Fourteenth Amendment plaintiff seeking protection from constitutional harm in federal court. Plaintiffs do not stand in the shoes of the State; they seek only to vindicate their individual rights. Because Mr. Trevino's Fourteenth Amendment right not to be sorted by race "pull[ed] in the opposite direction" of Soto Palmer's Voting Rights Act claim, *Abbott*, 138 S. Ct., at 2314, he naturally intervened on the side of the State. But now, regardless of the State's presence, the remedial proceedings work to deprive Mr. Trevino of his individual rights, so he has standing now to proceed.

5. Respondents cannot thus jurisdictionally escape the district court's legal and factual errors, nor do they persuade that the district court acted within the §2 jurisprudential norm.

First, and most basically, the district court erred by finding an HCVAP majority-minority district, where the majority-minority group has access to voting and which is not a façade district, violates §2—particularly where that district has most recently elected a minority candidate in a hugely lopsided victory. That error alone warrants this Court's review.

Other errors abound. Plaintiff-Respondents never adduced a viable remedy, which two circuit courts require for *Gingles I.* See *Nipper* v. *Smith*, 39 F.3d 1494, 1530–1531 (CA11 1994) (en banc), cert. denied, 514 U. S. 1083 (1995); *Sanchez* v. *Colorado*, 97 F.3d 1303, 1311 (CA10 1996), cert. denied, 520 U. S. 1229 (1997); see also *Shirt* v. *Hazeltine*, 461 F.3d 1011, 1025 (CA8 2006) (Gruender, J. concurring). Also on that precondition, the district court focused on the compactness of the district, not the compactness of the minority population within the district—failing to make any required findings about the spatial distance between Hispanic communities in the Yakima Valley region, instead relying on generalized and ubiquitous experiences that would connect most Hispanic communities across the country, contra *LULAC* v. *Perry*, 548 U. S. 399, 433–435 (2006). Fourth, the district court failed to determine whether any polarized voting resulting in the (majority-)minority-preferred candidate losing elections was on account of race or on account of partisanship, a question splitting the Justices of this Court in *Thornburg* v. *Gingles*, 478 U. S. 30 (1986), itself, and which has since caused a circuit split. Contrast *LULAC* v. *Clements*, 999 F.2d 831, 856 (CA5 1993), with *Goosby* v. *Town Bd. of Town of Hempstead, N.Y.*, 180 F.3d 476 (CA2 1999), and *United States* v. *Charleston County, S.C.*, 365 F.3d 341 (CA4 2004).

Finally, in evaluating the totality of the circumstances, the district court found a violation based on facts that would apply to *almost every jurisdiction in the country*: (i) the general history of discrimination in the State's past unconnected to the present reality; (ii) moderate polarized voting in one

kind of election; (iii) some regular burdens of voting; (iv) the admitted socioeconomic disparities between Whites and Hispanics; (v) one instance of one candidate invoking illegal immigration as a political issue; (vi) past Hispanic electoral success less than proportional to the Hispanic population in the region; (vii) one-off instances of "white voter antipathy"; and (viii) elected Republicans' declining to support all legislation the district court considered Hispanic-supported. ECF No. 218, at 15–24. If those ubiquitous conditions are enough to satisfy the VRA's totality requirement—and if a widespread Hispanic population showing weak voting cohesion satisfies the preconditions—it is difficult to imagine a jurisdiction in America that is not currently in violation.

The procedural posture also demands this Court's review. The docket decisions of the single-judge district court in this case and a majority of the three-judge district court worked to deprive the latter of its jurisdiction and abdicate its obligation to hear valid constitutional claims.

The merits warrant this Court's review as a general matter, and the procedural morass warrants this Court's review before judgment.

CONCLUSION

For these reasons, Petitioners respectfully request that this Court grant the writ of certiorari before judgment, hold this case in abeyance pending the outcome in *Garcia*, No. 23-467, and stay the remedial proceedings in *Soto Palmer* v. *Hobbs*, No. 3:22-cv-05035.

January 2, 2024 Respectfully submitted,

JASON B. TORCHINSKY
Counsel of Record
PHILLIP M. GORDON
DREW C. ENSIGN
ANDREW PARDUE
CALEB ACKER
HOLTZMAN VOGEL
BARAN TORCHINSKY &
JOSEFIAK PLLC
15405 John Marshall Highway
Haymarket, VA 20169
(540) 341-8808 (telephone)
(540) 341-8809 (facsimile)
jtorchinsky@holtzmanvogel.com
pgordon@holtzmanvogel.com
densign@holtzmanvogel.com
apardue@holtzmanvogel.com
cacker@holtzmanvogel.com

DALLIN B. HOLT
BRENNAN A. R. BOWEN
HOLTZMAN VOGEL
BARAN TORCHINSKY &
JOSEFIAK PLLC
Esplanade Tower IV
2575 East Camelback Road,
Suite 860
Phoenix, AZ 85016
(540) 341-8808 (telephone)
(540) 341-8809 (facsimile)
dholt@holtzmanvogel.com
bbowen@holtzmanvogel.com

ANDREW R. STOKESBARY
CHALMERS, ADAMS, BACKER &
KAUFMAN, LLC
701 Fifth Avenue, Suite 4200
Seattle, WA 98104
(206) 813-9322 (telephone)
dstokesbary@chalmersadams.com

Counsel for Petitioners