Nos. 23-35595 & 24-1602

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

SUSAN SOTO PALMER, et al.,
Plaintiffs-Appellees,

v.

STEVEN HOBBS, in his official capacity as Secretary of State of Washington, and the STATE OF WASHINGTON,
Defendants-Appellees,
and

JOSE TREVINO, ISMAEL G. CAMPOS, and State Representative ALEX YBARRA,
Intervenor-Defendants-Appellants

On Appeal from the United States District
Court for the Western District of Washington
No. 3:22-cv-05036
Hon. Robert S. Lasnik

PLAINTIFFS-APPELLEES' ANSWERING BRIEF

Chad W. Dunn
Sonni Waknin
UCLA VOTING RIGHTS PROJECT
3250 Public Affairs Building
Los Angeles, CA 90095
(310) 400-6019
chad@uclavrp.org
sonni@uclavrp.org

Thomas A. Saenz
Ernest Herrera
MEXICAN AMERICAN LEGAL
DEFENSE AND EDUCATION FUND
643 S. Spring St., 11th Fl.
Los Angeles, CA 90014
(213) 629-2512
tseanz@maldef.org
eherrera@maldef.org

Edwardo Morfin
MORFIN LAW FIRM, PLLC
2602 N. Proctor St., Ste. 205
Tacoma, WA 98407
(509) 380-9999

Mark P. Gaber
Aseem Mulji
Simone Leeper
Benjamin Phillips
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Ste. 400
Washington, DC 20005
(202) 736-2200
mgaber@campaignlegal.org
amulju@campaignlegal.org
sleeper@campaignlegal.org
bphillips@campaiginlegal.org

Annabelle E. Harless
CAMPAIGN LEGAL CENTER
55 W. Monroe St., Ste. 1925
Chicago, IL 60603
aharless@campaignlegal.org

Counsel for Plaintiffs-Appellees

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INTRODUCTION

After a year and a half of litigation and a four-day trial, the district court found that Legislative District 15 ("LD15") in Washington's Yakima Valley violated Section 2 of the Voting Rights Act. Through its searching analysis, the district court found that the boundaries of LD15, "in combination with the social, economic, and historical conditions" in the region, deprived Latino voters of an equal opportunity to elect candidates of choice. The court then conducted a robust remedial process and selected a map that remedied the Section 2 violation.

The government defendants declined to appeal. Only Intervenor-Defendant-Appellants ("Intervenors") did. But these three individuals—present in the case by permissive intervention only—lack standing. They are not harmed by the remedial map, and they barely even attempt to establish standing to appeal the district court's liability ruling.

Intervenors' merits arguments are also unavailing, and they identify no clear error in the district court's analysis. Instead, they provide a litany of half-baked arguments belied by the record, precedent, and their own expert's testimony.

Intervenors are part of a tangled web of political forces using this appeal for partisan goals. The kitchen-sink approach in Intervenors' brief reveals the fundamental reality that the district court adhered to precedent and issued findings

that are not clearly erroneous. Intervenors have no standing to appeal its decision, and their many arguments are meritless.

JURISDICTION

This case was properly tried before a single-judge district court with jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3)–(4), 1357, 42 U.S.C. § 1983, and 52 U.S.C. § 10301 *et seq*. The district court also had general jurisdiction under 28 U.S.C. §§ 2201 and 2202, the Declaratory Judgments Act, and Federal Rules of Civil Procedure 57 and 65 to grant Plaintiffs declaratory and injunctive relief.

This Court lacks subject matter appellate jurisdiction because neither the State nor the Secretary of State have appealed, and Intervenors—three private individuals granted permissive intervention below—have no standing to appeal. *See United States v. Texas*, 599 U.S. 670, 675 (2023) ("Under Article III, a case or controversy can exist only if a plaintiff has standing to sue—a bedrock constitutional requirement that this Court has applied to all manner of important disputes.").

ISSUES PRESENTED

1. Whether Intervenors have standing to appeal the liability or remedial decisions of the district court where they lack any concrete or particularized legally-protected interest in the litigation.
2. Whether the district court's findings that the *Gingles* preconditions were satisfied were clearly erroneous when they were based on unrebutted expert

and lay witness testimony establishing the compactness of the Latino community and the existence of racially polarized voting in the region.

3. Whether the district court's findings that the totality of the circumstances do not afford an equal opportunity for Latino voters to elect candidates of choice were clearly erroneous when they were based on unrebutted expert and lay testimony about past and current discrimination.

4. Whether the district court's selection of Map 3B is clearly erroneous where the remedial district complies with federal and state law, respects traditional redistricting principles, provides the Latino community an opportunity to elect candidates of their choice, and remedies the cracking of the Latino community of interest, but has a slightly lower Hispanic Citizen Voting Age Population ("HCVAP") than the enacted LD15.

STATEMENT OF THE CASE

I. Redistricting in Washington State.

Article II, section 43 of the Washington Constitution assigns redistricting to a bipartisan Commission consisting of four voting Commissioners and one non-voting chair. The majority and minority leaders in both legislative houses each appoint one of the four voting Commissioners, who in turn vote to appoint the nonvoting chair. Wash. Const. art. II, § 43(2).

At least three Commissioners must approve state legislative and congressional redistricting plans and submit them to the Legislature no later than November 15th of the redistricting year. Wash. Const. art. II, § 43(6). The Legislature then has 30 days during the next regular or special session to adopt, by two-thirds vote, amendments affecting no more than two percent of any district's population. *Id.* § 43(7). The plans take effect upon amendment (if any) or after the 30-day period expires, whichever comes first. *Id.*; RCW § 44.05.100.

II. Washington enacts LD15 in violation of Section 2.

The 2021 Commission included Commissioners April Sims (appointed by the House Democratic Caucus), Brady Piñero Walkinshaw (appointed by the Senate Democratic Caucus), Paul Graves (appointed by the House Republican Caucus), and Joe Fain (appointed by Senate Republican Caucus). 2-PL-SER-318 at ¶¶70–71.

In June 2021, the state Attorney General's office educated the Commissioners about Section 2's requirements and recommended they consult a statistical expert to assess racially polarized voting and identify minority-preferred candidates to aid in drawing an opportunity district where required. 5-PL-SER-745–765. After the release of the Census Bureau's P.L. 94-171 data, the four Commissioners began drawing legislative districts and announced their first public map proposals in September 2021. 2-PL-SER-318 at ¶74.

Soon thereafter, the Senate Democratic Caucus hired Dr. Matt Barreto, a nationally-renowned expert on Latino voting patterns, to conduct a statistical assessment of the *Gingles* preconditions. 4-PL-SER-533 at 620:2–23. Dr. Barreto identified a large and compact geographic concentration of Latino voters in the Yakima Valley area and ran statistical analyses of a dozen prior election contests in the region from 2012 to 2020—all showing significantly polarized voting between white and Latino voters. 5-PL-SER-767–782. In every contest he analyzed, Dr. Barreto identified the candidate preferred by Latino voters. 5-PL-SER-783. He also offered four reasonably configured maps that would give Yakima Valley Latinos a real opportunity to elect candidates of their choice. 5-PL-SER-773, 811–812.

Every Commissioner received Dr. Barreto's analysis. 5-PL-SER-793–812. In response, Commissioners Sims and Walkinshaw released new public map proposals to comply with Section 2. 5-PL-SER-837–840. Although Commissioners Sims and Walkinshaw publicly encouraged their Republican counterparts to agree to a VRA-compliant district in the Yakima Valley region, they abandoned the effort privately as "it became very clear, very quickly, that was not going to happen." 4-PL-SER-497 at 790:10–14. More concerned with securing partisan advantage elsewhere in the state, the two Democratic Commissioners instead gave Republican Commissioner Paul Graves the pen to draw the Yakima Valley districts however he pleased and assured him they would vote for whatever districts he drew, regardless

of racial makeup or compliance with Section 2. 4-PL-SER-497 at 790:15–20, 498 at 791:7–16.

Commissioner Graves set out to draw a district in the Yakima Valley region that had a very slight majority HCVAP but would not in fact perform to elect Latino candidates of choice—a scheme he hoped would "protect against any lawsuit" brought under Section 2. 5-PL-SER-813–814. The legislative redistricting plan he ultimately drew, which the Commission approved, and the Legislature enacted, had no Latino opportunity district. 3-ER-394–427, 428–434. That plan's LD15 had a HCVAP of about 50.02% (based on then-available 2019 CVAP estimates) with boundaries that cracked Latino communities along the Lower Yakima Valley, resulting in far less than equal opportunity for Latinos to elect their preferred candidates, particularly in light of the lower voter turnout and registration rates of Latinos included in the district. 2-PL-SER-323 at ¶97; 1-ER-29–30; 4-PL-SER-609–611 at 73:14–75:25 (Dr. Collingwood); 4-PL-SER-629–630 at 134:12–135:4 (Dr. Estrada); 3-ER-422–425; 5-PL-SER-703–705.

In January 2022, Plaintiffs sued to challenge LD15, which has the *façade* of an opportunity district but results in dilution of Latino electoral opportunity in

violation of Section 2 of the Voting Rights Act.[1] Defendants included Secretary of State Steven Hobbs (who took no position on the merits) and the State's legislative leaders (who were dismissed). The State of Washington was later joined to defend the maps. 1-ER-14, n.3.

III. Commissioner Graves and Representative Stokesbary recruit third parties to both challenge and defend LD15.

In March 2022, a third party, Benancio Garcia III, also filed suit against Secretary Hobbs to challenge LD15 as a racial gerrymander under the Fourteenth Amendment. The case was assigned to Judge Lasnik as a related matter before going to a three-judge district court. *See* 28 U.S.C. § 2284. 1-ER-14. Secretary Hobbs took no position, and the State was joined as a defendant. Like Plaintiffs, Mr. Garcia sought to invalidate LD15 and have a new valid plan enacted in its place. 5-PL-SER-857–858 at ¶¶72–77.

The circumstances surrounding Mr. Garcia's case, however, are unusual. His attorneys include Representative Drew Stokesbary, a state House member who voted *for* the challenged legislative redistricting plan, 3-PL-SER-337 at 65:18–66:19, (and also represents Intervenors). Representative Stokesbary is a friend and former colleague of Commissioner Graves. 4-PL-SER-495–96 at 718:18–719:15; 3-PL-

[1] In addition to their discriminatory results claim, Plaintiffs also assert that LD15 was intentionally drawn to dilute Latino voting power in violation of Section 2. The district court did not rule on this claim.

SER-413–414 at 204:25–205:2. The trial record shows that Commissioner Graves (who *drew* LD15) was also the chief architect of Mr. Garcia's claim *challenging* that district. He worked not only to line up potential counsel and raise funds to litigate the case but also recruited Mr. Garcia himself as its sole plaintiff. 5-PL-SER-814–823. Despite testifying that he tried to "light the fire" to have this racial gerrymandering claim filed to forestall relief in Plaintiffs' Section 2 action, he did not actually believe the claim was meritorious. 3-PL-SER-413–414 at 204:9–205:13, 416 at 287:4–6 ("Q. You don't believe the maps are a racial gerrymander, do you? A. No, I don't think so.").[2]

The tangled web of connections does not end there. Both Representative Stokesbary and Commissioner Graves are affiliated with an organization called the Citizen Action Defense Fund ("CADF"). 5-PL-SER-824–830, 835–836. Indeed, Representative Stokesbary co-founded and served as President and a Director of CADF, while Commissioner Graves is a director. *Id*. CADF is involved in and was used as a strategy and funding vehicle for both the *Soto Palmer* and *Garcia* cases. In his role as President and Director of CADF, Representative Stokesbary strategized and raised money to litigate both *Soto Palmer* and *Garcia*, including creating a slide

[2] Despite his entanglement in both *Soto Palmer* and *Garcia*, Commissioner Graves filed an amicus brief in this case supporting reversal. Doc.42.1. Notably, two of the four voting Commissioners did not join the amicus brief.

deck and legal memo for "prospective donors" to the cases. 5-PL-SER-824–830. Using his CADF email address, Representative Stokesbary emailed several Republican state legislators about case strategy and fundraising, including an arrangement with Fair Lines America Foundation, a GOP-aligned redistricting group, which agreed to set up a Washington affiliate "that will pay 100% of its proceeds to litigation expenses here in WA." *Id*. Indeed, the legal memo notes that "CADF expects to enter into a partnership with a 501(c)(3) tax-exempt organization to help fund this litigation." 5-PL-SER-836. Representative Stokesbary mentioned wanting to "keep CADF's logo off these materials given Paul's involvement in the Commission and CADF." 5-PL-SER-824–830.

Despite this hesitation, Representative Stokesbary's memo describes the group's machinations in *Soto Palmer* and *Garcia* as a "two-pronged legal effort" at achieving a desired partisan outcome in LD15. 5-PL-SER-835. The CADF memo outlines the strategy to fund and challenge the district drawn by its own Director, Commissioner Graves, as an unconstitutional racial gerrymander in *Garcia*, while "opposing Plaintiffs' VRA claims and legal arguments" in *Soto Palmer. Id*. The memo made the group's ultimate goal crystal clear to funders and interested parties, stating that if *Soto Palmer* fails and "if *Garcia* is successful, LD15 could be redrawn to stay reliably Republican until 2030." 5-PL-SER-836. It also proclaimed that "if *Palmer* is fully litigated, it could eventually present several legal questions to a

friendly Supreme Court that would give the Court an opportunity to reshape how the VRA operates across the country." 5-PL-SER-836.[3]

Attempting to further this partisan goal, two weeks after filing *Garcia* to challenge LD15, Representative Stokesbary filed a motion to intervene in this case on behalf of Jose Trevino, Ismael Campos, and LD13 state representative Alex Ybarra ("Intervenors"), all seeking to *defend* LD15. The district court allowed permissive intervention, but denied all three individuals intervention as of right, finding that they lack a concrete interest in the litigation. 2-ER-277–78.

Seven months after intervening to defend LD15, counsel for Intervenors attempted to add a crossclaim on Intervenors' behalf *challenging* LD15 as a racial gerrymander. 3-PL-SER-425–478. But Intervenors themselves testified that they wanted LD15 to remain unaltered and that it was not a racial gerrymander. 3-PL-SER-355 at 21:5–7 ("Q: And would it be your goal that the map, in fact, not change as a result of this litigation? A: Yes."); 3-PL-SER-371 at 121:4–10 ("Q: And you voted in favor of the plan; correct? A: Yes. Q: And can I assume that you stand by that vote? A: Yes. Q: So do you understand the map that you voted on to be an illegal racial gerrymander? A: No."). As part of this convoluted scheme, Intervenors'

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[3] Notwithstanding CADF's and its officers' extensive involvement on behalf of Intervenors in this litigation, CADF filed an amicus brief supporting Intervenors on July 8, 2024. Doc.44.1.

counsel represented to the court that if Intervenors' crossclaim was added, Mr. Garcia would dismiss his separate suit challenging LD15. 3-PL-SER-418.

However, Mr. Garcia testified that he was never consulted about dismissing his claim, did not wish to do so, and was unaware of his counsels' role in *Soto Palmer*. 3-PL-SER-332 at 46:7–12, 47:8–12, 333 at 50:2–17, 335 at 59:12–61:14, 337 at 65:18–66:19. As a result of Mr. Garcia's testimony and counsels' attempt to represent two sets of clients with opposite views of the legality of LD15, the State filed a motion for an inquiry into potential conflicts in the representation scheme. 3-PL-SER-389–403. Soon thereafter, Mr. Garcia's counsel filed an errata attempting to significantly revise Mr. Garcia's testimony to their benefit. 3-PL-SER-378–387. The court held an inquiry hearing, required the Intervenors and Mr. Garcia to file affidavits, and struck the errata filed on Mr. Garcia's behalf as sham testimony. 3-PL-SER-388; 3-PL-SER-375. The court ultimately denied Intervenors' attempt to belatedly add the same claim their counsel was litigating separately on Mr. Garcia's behalf. 3-PL-SER-404–408.

IV. LD15 elects no Latino-preferred candidates in 2022.

Discovery in *Soto Palmer* and *Garcia* proceeded in tandem throughout 2022. Meanwhile, the LD15 primary and general elections took place in August and November, respectively. No race was competitive. 4-PL-SER-538–539 at 641:8–642:2. Republican candidates for the two open LD15 House seats ran entirely

unopposed. *Id.* In the Senate, longtime white incumbent Senator Honeyford unexpectedly retired three days *after* the close of candidate filing (which if done sooner might have prompted more candidates) and endorsed Republican candidate Nikki Torres. 5-PL-SER-831–833.

Senator Torres also ran unopposed in the primary. She faced nominal opposition in the general only because someone managed to garner enough primary write-in votes to appear on the ballot. 3-PL-SER-350 at 255:15–256:25. That Democratic candidate, Lindsay Keesling, ran an anemic campaign, spending $4,000 total, *less than five percent* of Senator Torres's campaign. 3-PL-SER-348–349 at 247:23–248:13, 249:6–250:3; 4-PL-SER-531–32 at 604:6–605:21, 539 at 641:8–642:2.

Moreover, turnout among Latinos in the off-cycle state Senate election was abysmal. Of those voting, only 32.5% were Latino and 61.6% of the electorate was white. 3-ER-433. At trial, Drs. Matt Barreto and Loren Collingwood testified that the Latino voters who did participate supported Ms. Keesling while white voters overwhelmingly preferred Senator Torres. 3-ER-428–434 (analysis showing around 70% of Latino voters opposed Torres, while 87.5% of white voters supported her, demonstrating "clearly racially polarized voting"); 4-PL-SER-612 at 76:10–20, 536–538 at 639:24–641:2; 5-PL-SER-834.

V. The district court hears substantial evidence that LD15 violates Section 2.

After discovery closed, *Soto Palmer* was tried concurrently with *Garcia* in June 2023, except that *Soto Palmer* began one day before the start of the three-judge proceeding. The district court "heard live testimony from 15 witnesses, accepted the deposition testimony of another 18 witnesses, considered as substantive evidence the reports of the parties' experts, [and] admitted 548 exhibits into evidence." 1-ER-15.

To meet *Gingles* I, Plaintiffs' expert Dr. Collingwood provided three illustrative plans showing it was easy to draw a "reasonably configured" majority-Latino district in the Yakima Valley region. 1-ER-21-22. Dr. John Alford, the State's expert, agreed, noting that they were "among the more compact demonstration districts [he'd] seen in thirty years." 1-ER-22. Witnesses familiar with the region confirmed that Latinos there form a geographically compact community of interest. 1-ER-22–23; 5-PL-SER-541 at 647:9–16, 542 at 658:4–24 (Dr. Barreto); 5-PL-SER-504 at 831:5–24, 512–13 at 847:24–848:16 (Portugal).

Every expert who evaluated *Gingles* II, "*including Intervenor's expert*, testified that Latino voters overwhelmingly favored the same candidate in the vast majority of the elections studied." 1-ER-23 (emphasis added). Dr. Collingwood used ecological inference to estimate the preferences of Latino and white voters in 26 elections from 2012 to the most recent LD15 election in 2022, including nonpartisan

and partisan races, and elections featuring Latino candidates. 4-PL-SER-604–605 at 65:7–66:8, 612–613 at 76:4–77:8. He found that Latinos voted cohesively for the same candidates in all 26 elections he analyzed, and thus opined that there is a "high" level of cohesion among Latino voters in the Yakima Valley. 4-PL-SER-605 at 66:9–24; 3-ER-407–410, 428–434. The State's expert, Dr. Alford, replicated these results. 3-ER-466–469; 4-PL-SER-515–518 at 853:5–14, 855:1–3, 867:9–868:3. Intervenors' expert, Dr. Mark Owens, found cohesion among Latino voters in 10 of the 11 elections he analyzed from 2018-2020. 3-ER-521; 4-PL-SER-522–528 at 583:5–589:2. Finally, Dr. Barreto's analysis also found that Latino voters consistently preferred the same candidates in the 12 elections he analyzed from 2012-2020. 4-PL-SER-535 at 632:10–19; 5-PL-SER-800–808.

Other testimony confirmed these findings. Commissioner Graves' map-drawer, Anton Grose, testified that he would have had to "close[] [his] eyes" while drawing districts in the region to not see the clear pattern of strong cohesive Latino support for certain candidates, and white support for opposing candidates. 4-PL-SER-574 at 381:8–15, 568–570 at 375:1–377:8, 573 at 380:16–23, 586–587 at 393:25–394:1. Mr. Gabriel Portugal, President of the Tri-Cities LULAC, testified that Latinos in the region prefer the same candidates "because they think that they best represent . . . Latino concerns" and that Latinos in the region share experiences that explain their cohesive political preferences. 4-PL-SER-502–505 at 828:13–15,

830:11–831:24, 832:11–1, 513–514 at 848:5–7, 849:14–16, 508 at 838:21. Plaintiffs' expert Dr. Josué Estrada, a historian and central Washington resident, similarly found that the area's Latinos have shared histories, migration patterns, working conditions, and political movements, further supporting a finding of Latino cohesion in the region. 5-PL-SER-670–681.

The court also heard substantial evidence of white bloc voting, satisfying *Gingles* III. In 24 of the 26 elections he analyzed, Dr. Collingwood found levels of racially polarized voting "at the 70- to 80-percent level, on either side of the racial or ethnic divide," and that white voters consistently vote as a bloc to defeat Latino-preferred candidates. 4-PL-SER-605 at 66:15–17; 3-ER-394–95, 410, 428–433. He also conducted a performance analysis of ten recent statewide elections and found that Latino-preferred candidates lose in seven out of ten (70%) elections in LD15. 3-ER-411–418; 4-PL-SER-608–609 at 72:17–73:13. Dr. Alford confirmed these results, finding white bloc voting in exactly the sort of partisan contests that take place in LD15. 4-PL-SER-515 at 853:15–20, 517 at 867:20–23. Dr. Barreto testified that the question of whether there is racially polarized voting in Yakima Valley is "not at all" close. 4-PL-SER-540–541 at 646:15–647:8. Dr. Owens neither examined white bloc voting (except a single election contest) nor disputed these findings. 1-ER-24; 4-PL-SER-521 at 579:10–13, 530 at 601:4–11.

Finally, the court heard expert and lay witness testimony from several individuals familiar with the Yakima Valley region's history, political context, and past and present-day discrimination against Latino voters and candidates. This included Plaintiffs' expert Dr. Estrada, a specialist in Latino history and voter suppression in Washington State; State Senator Rebecca Saldaña, who is in regular contact with Yakima Valley voters; Plaintiff Susan Soto Palmer, a former House candidate in LD14; Plaintiff Faviola Lopez; and Mr. Portugal.

Plaintiffs presented evidence of a long history of official, voting-related racial discrimination (Factor 1) including English literacy tests, failure to provide federally-required bilingual election materials, and dilutive at-large election systems. 1-ER-27–29. Plaintiffs also presented data showing that the practices of off-year elections for state Senate and the use of at-large, nested districts for state House may enhance the opportunity for discrimination against Latinos in the region (Factor 3). 1-ER-29–30. Moreover, the record demonstrated that Latinos in the region continue to bear the effects of discrimination (Factor 5), including "present-day disparities with regard to income, unemployment, poverty, voter participation, education, housing, health, and criminal justice," 1-ER-31; 4-PL-SER-601 at 50:2–4, 629–630 at 134:12–135:4. Plaintiffs also presented evidence of numerous racial appeals (Factor 6) in the region, 1-ER-32–33, and that only "a 'very, very small number'" of Latino candidates had been elected "compared to the number of

representatives elected over time," demonstrating a lack of success of minority candidates in the jurisdiction (Factor 7). 1-ER-33. Finally, Plaintiffs presented both expert and lay witness testimony cataloguing the "significant lack of responsiveness on the part of elected officials to the particularized needs of Latinos in the Yakima Valley region" (Factor 8). 1-ER-34–35.

VI. The district court concludes that LD15 violates Section 2.

On August 10, 2023, the district court ruled that LD15 violated Section 2 and enjoined its further use. 1-ER-15. The court found all three *Gingles* preconditions satisfied based on undisputed or consistent findings of the parties' experts. 1-ER-18–26, 42–43. The court also did a searching assessment of each relevant Senate Factor in the totality of the circumstances inquiry, finding that Senate Factors 1, 2, 3, 5, 6, 7, and 8 weighed in Plaintiffs' favor. 1-ER-26–40. Based on the "extensive record" and an intensively local appraisal of "the distinct history of and economic/social conditions facing Latino voters in the Yakima Valley region," the court concluded that the enacted LD15 fails to afford Latinos equal opportunity to elect their preferred candidates. 1-ER-15, 39–40, 44.

VII. The district court imposes a remedial map.

Following its liability decision, the court provided an opportunity for Washington's Redistricting Commission, which drew the enacted map, to be reconstituted to draw the remedial district, and also established a parallel remedial

process to ensure that a new map would be adopted by the Secretary of State's March 25, 2024, deadline. 2-ER-224–26. In doing so, the court made clear that the goal of the remedial process was "to provide equal electoral opportunities for both white and Latino voters in the Yakima Valley region," keeping in mind the social, economic, and historical conditions discussed in the court's opinion and traditional redistricting principles. 2-ER-178.

Intervenors—only granted permissive intervention in the district court—filed a notice of appeal on September 8, 2023. 3-ER-573. Secretary Hobbs and the State of Washington—the defendants below—did not appeal. On the same day, the three-judge court in *Garcia* issued a decision dismissing the case as moot given the *Soto Palmer* court's finding that LD15 violated Section 2. *Garcia v. Hobbs*, 691 F.Supp.3d 1254 (W.D. Wash. 2023). On November 3, 2023, Intervenors filed a petition for certiorari before judgment with the Supreme Court, seeking to bypass the Ninth Circuit's appellate review. *See Trevino v. Soto Palmer*, No. 23-484 (Nov. 3, 2023). On December 5, 2023—four months after the district court issued its decision and injunction—Intervenors filed a motion with the Ninth Circuit to stay the district court's injunction and remedial proceedings. *Susan Palmer, et al. v. Jose Trevino, et al.*, No. 23-35595 (9th Cir. Dec. 5, 2023), Doc.34-1.

On December 21, 2023, a motions panel of the Ninth Circuit denied Intervenors' motion for a stay, citing Intervenors' failure to satisfy the stay factors

set forth in *Nken v. Holder*, 556 U.S. 418, 434 (2009). *Id*., Doc.45. Intervenors then filed a motion to hold their own appeal in abeyance, pending the district court's remedial proceedings and their Supreme Court petition, *id*., Doc.48, which the Ninth Circuit granted. *Id*., Doc.59. Thereafter, the Supreme Court denied Intervenors' petition for certiorari before judgment on February 20, 2024. *Trevino v. Soto Palmer*, 144 S. Ct. 873 (2024) (Mem).[4]

In the meantime—and following the Ninth Circuit's denial of Intervenors' motion to stay the remedial proceedings—the district court held a robust remedial process. Pursuant to the district court's remedial order, on December 1, 2023, Plaintiffs submitted five maps, each Section 2-compliant. 1-ER-3, 83–85; 2-PL-SER-269–295; 2-PL-SER-296–303. As Plaintiffs' expert and map-drawer Dr. Kassra Oskooii explained, he drew the remedial maps to unify the population centers from East Yakima to Pasco and the cities in the Lower Yakima Valley that the district court identified as a community of interest. 2-PL-SER-271. In doing so, Dr. Oskooii started with the enacted map and then made the changes necessary to achieve this goal while adhering to the redistricting criteria in Washington law, traditional redistricting principles, equal population mandates, and respecting other communities of

[4] The same day, the Supreme Court also declined to take jurisdiction in *Garcia v. Hobbs*, 144 S. Ct. 994 (2024) (Mem), remanding the case back to the district court for any appeal to proceed through the Ninth Circuit.

interest—including the desires of the Yakama Nation. 2-PL-SER-271–272. Dr. Oskooii removed all racial and political data from view in the redistricting program and considered neither racial data nor political data in drawing the remedial maps. *Id.*; 1-PL-SER-5–6 at 28:3–29:8, 9 at 32:12–16, 19 at 47:16–21. Nor was he otherwise familiar with the racial or political characteristics of the region's geography. *Id.* No other party submitted proposed remedial maps by the court's deadline.

In response to criticism from Intervenors, on January 5, 2024, Plaintiffs submitted slightly revised versions of their five maps that eliminated nearly all incumbent displacement in the districts surrounding LDs 14 and 15. 1-ER-3; 1-PL-SER-126–170. All parties, as well as the Intervenors, the Yakama Nation, and the Court, identified the importance of keeping the Yakama Nation Reservation and its off-reservation trust lands and fishing villages, to the extent practicable, together in a single district. 1-ER-3–4; 2-ER-62–63, 66–69; 1-PL-SER-22–23 at 67:6–68:13, 102–113. The remedial process continued throughout early 2024 with additional briefing and expert reports, the appointment of a special master, oral argument on the district court's preferred map, and an evidentiary hearing on March 8, 2024, at which expert and lay witnesses testified. 1-ER-2–4. In the lead-up to the evidentiary hearing (and nearly three months after the initial deadline), Intervenors submitted a map, but their expert testified it was not meant to remedy the Section 2 violation. 1-PL-SER-33 at

95:18–25. Moreover, the Intervenors' map split the Yakama Nation Reservation between two districts, failing to respect the Nation's basic request, as well as the State's preferences. 1-PL-SER-40–42; 16–17 at 39:16–40:4.

Following the evidentiary hearing, on March 15, 2024, the district court ordered in place Plaintiffs' Map 3B, which remedied the Section 2 violation while respecting traditional redistricting criteria, including the priority of the Washington Redistricting Commission to unite the Yakama Nation Indian Reservation with its off-reservation trust lands in Klickitat County near to and along the Washington/Oregon border. 1-ER-4–6.

On March 18, 2024, Intervenors filed an emergency stay motion in the Ninth Circuit, which a motions panel denied, concluding that Intervenors had failed to demonstrate standing. Doc.18.1. On March 25, 2024, Intervenors filed an application for a stay with the U.S. Supreme Court, which the Court denied on April 2. Doc.21.1.

Following the denial of Intervenors' stay request, counsel for Intervenors and Mr. Garcia moved to intervene in this litigation on behalf of *yet another* client with potential conflicts—state Senator Nikki Torres. Doc.24.1. This motion was denied by both the district court and the Ninth Circuit. Doc.29.1. Intervenors and Mr. Garcia then filed a motion to consolidate *Soto Palmer* and *Garcia*, which was denied. Doc.37.1.

SUMMARY OF THE ARGUMENT

After a thorough trial and robust remedial process, the State of Washington declined to appeal, and Intervenors lack standing to appeal in the State's place. First, no Intervenor even plausibly has standing to challenge the district court's liability ruling—a ruling that did not compel Intervenors to do or not do anything. Second, Intervenors are not harmed by the remedial district: Intervenor Ybarra will not face a harder reelection, Intervenor Trevino was not racially classified, and Intervenor Campos was completely unaffected. Furthermore, the tangled web of political interests and policy preferences driving Intervenors' participation in this suit demonstrates the importance of Article III standing requirements that ensure only appellants who face actual cognizable harms come before this Court.

On the merits, the district court did not clearly err in its finding that the enacted LD15 violated Section 2. The district's bare majority HCVAP does not insulate it from challenge, because what matters is a real opportunity to elect, not a specific racial target. The district court's *Gingles* analysis was not clear error—the region has a compact Latino community, and high levels of racially polarized voting identified by all experts. The totality of the circumstances evidence was detailed and largely unrebutted, and the causal connections between factors that Intervenors insist upon are unsupported by precedent.

The district court's remedial selection also was not clearly erroneous. The remedial map has a slightly lower HCVAP than the enacted map, but actually provides an opportunity to elect, which is the legal standard. Nor is the remedial map a racial gerrymander, an argument Intervenors waived by not raising below. The district was drawn without consideration of race, and among the many priorities of the remedial process, race did not predominate. The remedial map remedied the Section 2 violation, properly adhered to state and federal law and traditional redistricting principles, and honored the requests of the Yakama Nation.

STANDARD OF REVIEW

This Court "'[d]efer[s] to the district court's superior fact-finding capabilities,'" and "review[s] for clear error the district court's findings of fact, including its ultimate finding whether, under the totality of the circumstances, the challenged practice violates § 2." *Gonzalez v. Arizona*, 677 F.3d 383, 406 (9th Cir. 2012) (internal citation omitted); *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986); *North Carolina v. Covington*, 585 U.S. 969, 979 (2018) (applying clear error review to court's remedial map). As a result, if the "district court's account of the evidence is plausible in light of the record…in its entirety, [an appellate] court may not reverse" even if it is "convinced that…it would have weighed the evidence differently." *Anderson v. Bessemer City*, 470 U.S. 564, 573–74 (1985). The Court

"review[s] de novo the district court's legal determinations and mixed findings of law and fact." *Gonzalez*, 677 F.3d at 406.

ARGUMENT

I. Intervenors lack standing to appeal.

Intervenors lack standing to appeal both the Section 2 liability determination and the remedial map. To establish standing, a litigant must demonstrate "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992) (internal quotations omitted). "As the [Supreme] Court has repeatedly recognized, to appeal a decision that the primary party does not challenge, an intervenor must independently demonstrate standing." *Virginia House of Delegates v. Bethune-Hill*, 587 U.S. 658, 663 (2019) (internal citation omitted); *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013). This ensures that "the decision to seek review . . . is not to be placed in the hands of 'concerned bystanders,' who will use it simply as a 'vehicle for the vindication of value interests.'" *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (internal citation omitted); *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 381 (2024) (Article III standing "screens out" those with "only a general legal, moral, ideological, or policy objection").

Intervenors have not alleged any harms sufficient to establish standing to appeal the remedial map, and none of their alleged harms even plausibly give them

standing to appeal the district court's liability determination. Neither baseless assertions of "financial cost and political difficulty," nor newly raised and unsupported "racial classification" claims can establish concrete and particularized injury necessary for Article III standing. Intervenor-Appellants' Opening Brief, Doc.38.3 at 20 ("App.Br."). In denying Intervenors' motion for a stay, a Motions Panel of this Court agreed, concluding that "Appellants have not carried their burden to demonstrate that they have the requisite standing to support jurisdiction at this stage of the proceedings." Doc.18.1 at 2. They still have not.

A. No Intervenor has standing to challenge the district court's liability determination.

In granting Intervenors only permissive intervention, the district court expressly found that "intervenors lack a significant protectable interest in this litigation." 2-ER-283. Two of the three Intervenors, Ybarra and Campos, *do not even reside or vote* in the enacted LD15 or the remedial LD14, and thus have no possible cognizable interest in the district's configuration. *United States v. Hays*, 515 U.S. 737, 744–45 (1995). Indeed, Intervenors barely attempt to establish standing to appeal the lower court's liability decision and injunction, focusing their (unavailing) arguments only on the remedial map.

Below, Intervenors Campos and Trevino asserted an interest "in ensuring that any changes to the boundaries of [their] districts do not violate their rights to 'the equal protection of the laws'" and "that Legislative District 15 and its adjoining

districts are drawn in a manner that complies with state and federal law." 2-ER-277. But neither has been racially classified,[5] and a blanket interest in "proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits [the Intervenors] than it does the public at large[,] does not state an Article III case or controversy." *Lujan*, 504 U.S. at 573-74; *Allen v. Wright*, 468 U.S. 737, 754–55 (1984).

Moreover, the district court did not order Intervenors "to do or refrain from doing anything." *Hollingsworth*, 570 U.S. at 705 (holding that non-governmental intervenor-defendants lack standing to appeal); *Republican Nat'l Comm. v. Common Cause R.I.*, 141 S. Ct. 206 (2020) (Mem.) (denying stay of consent decree between state officials and plaintiffs because "no state official has expressed opposition" and intervenor "lack[s] a cognizable interest in the State's ability to enforce its duly enacted laws") (internal quotations omitted). Intervenors have no role in enforcing state statutes or implementing the remedial plan, and "a disagreement, however sharp" is insufficient to establish standing. *Diamond*, 476 U.S. at 62. Thus, Intervenors' only interest in reversing the district court's liability determination and injunction of the enacted map is "to vindicate the [] validity of a generally applicable

[5] Certainly, the district court's *liability* order cannot plausibly have racially classified Intervenors, nor do they so allege.

[Washington] law"—a "generalized grievance . . . insufficient to confer standing." *Hollingsworth*, 570 U.S. at 706.

In response to this fatal lack of standing, Intervenors now contend they can appeal the district court's liability decision because *any* Section 2 win would "inexorably" require a remedy based on racial classifications. App.Br. 29. This argument is triply flawed. First, the premise is incorrect; a Section 2 liability decision does not necessitate a racial classification. Indeed, the Supreme Court has recently rejected Intervenors' assumption, reaffirming that race *consciousness* in map drawing is not automatically racial predominance. *Allen v. Milligan*, 599 U.S. 1, 24, 33, 41 (2023) ("[t]he contention that mapmakers must be entirely 'blind' to race has no footing in our § 2 case law").[6] Second, even if *some* Section 2 remedies might be improper, that would not create standing to challenge the entire notion of Section 2 liability. Third, even if Intervenors could show that the particular remedy in this case was somehow improper (and they cannot), it *still* would not follow that the liability ruling was improper.

Moreover, Intervenors waived their racial gerrymandering claim with regard to the remedial map. *See infra* III.B. But even if they had standing to raise it,

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[6] Although redefining Section 2's reach may be Intervenors' goal, it is not the law. *See* 5-PL-SER-836 (describing this case as a vehicle for the Supreme Court to limit the reach of the VRA or "even [to decide it] is unconstitutionally vague"); *see also*, App.Br. 29.

"standing is not dispensed in gross; rather, [Intervenors] must demonstrate standing for each claim that they press and for each form of relief that they seek." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 431 (2021). Intervenors make *no contention* that they have standing to challenge the district court's liability order and injunction of the map alone. Rather, they contend *only* that the particular remedial map imposed by the district court harms them. App.Br. 33. Intervenors cannot bootstrap standing to appeal the district court's liability order and injunction onto their purported standing to belatedly claim the remedial map is a racial gerrymander.

B. Mr. Trevino was not racially sorted in the remedial map.

Mr. Trevino has not alleged with any specificity that he has been racially classified in the remedial map. While independent, individualized harm *may* support standing for an intervenor to appeal, that harm must be sufficiently alleged. *Atay v. Cnty. of Maui*, 842 F.3d 688, 696 (9th Cir. 2016). The appellants in *Atay* described "specific" economic, environmental, and recreational harms that came "directly" from appellee's conduct. *Id.* at 697. Mr. Trevino has alleged no such specific harm; the allegations that he was personally subject to racial classification are belied by the record. The only evidence Intervenors' point to is that the entire city of Granger, where Mr. Trevino happens to live, was included in the remedial district, and an

allegation that the district court considered uniting a community of interest as a "fundamental goal." App.Br. 28.[7]

But neither demonstrates racial classification of Mr. Trevino, let alone the particularized and concrete harm necessary for Article III standing. *Hays*, 515 U.S. at 745 ("[A]bsent specific evidence" showing a voter has been subject to racial classification, the voter "would be asserting only a generalized grievance against governmental conduct of which he or she does not approve"); *Cooper v. Harris*, 581 U.S. 285, 290 (2017); *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016). Nothing about the remedial map suggests that race predominated, and Intervenors waived this argument by not making it below. *See infra* III.B. To the contrary, Plaintiffs' mapping expert "did not consider race or racial demographics in drawing the remedial plans." 2-PL-SER-273. Thus, the remedial map would not even prompt, let alone fail, strict scrutiny. *Allen*, 599 U.S. at 41.

Lacking arguments to support their own standing, Intervenors bring up a different party in a different case who happens to be represented by the same counsel. App.Br. 30. But whether Mr. Garcia has standing to challenge the enacted LD15 as a racial gerrymander in a separate case has no bearing on whether Mr. Trevino has

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[7] This misleading argument omits the finding below that the community of interest is "based on more than just race," 1-ER-22, and misrepresents the court's remedial process, which considered the community of interest as one of several criteria in choosing a remedial district. 1-ER-5–6.

standing to appeal here. The "one-for-all" standing rule cannot impute any standing arguments in the *Garcia* district court to Intervenors on appeal.

Nor does Mr. Trevino's hypothetical standing to challenge the now-enjoined enacted map as a racial gerrymander (while also *defending it* here), *see* App.Br. 30, have any bearing on his standing in this appeal. In contrast, Plaintiffs alleged concrete and particularized harms resulting from the enacted LD15, and the district court found that *Plaintiffs had indeed suffered those harms*. 1-ER-44. This is a far cry from the unsupported assertion—raised for the first time on appeal—that Mr. Trevino was racially classified because the city in which he lives was included in LD14 in the remedial map. Mr. Trevino cannot establish standing on appeal.

C. Representative Ybarra faces no harm from the remedial map.

Intervenor Ybarra's status as a legislator also does not confer standing. Individual legislators have "no standing unless their own institutional position" is affected. *Newdow v. United States Cong.*, 313 F.3d 495, 498–99 (9th Cir. 2002). Nothing in this litigation impacts Representative Ybarra's institutional position or powers, and he is only one legislator of many, without the ability to assert harm on behalf of others. *Virginia House of Delegates*, 587 U.S. at 667. Nor does Representative Ybarra have standing based on his contention that the remedial map will result in a "costlier and more difficult general election campaign." App.Br. 34. No official is guaranteed reelection or particular district lines, and to assert standing,

a litigant "must do more than simply allege a nonobvious harm." *Virginia House of Delegates*, 587 U.S. at 663 (citing *Wittman v. Personhuballah*, 578 U.S. 539, 543-45 (2016)). Intervenors cannot.

To begin, Representative Ybarra's reelection campaign is uncontested. In the recent August 6 primary, Representative Ybarra was the *only candidate* for LD13 House position 2, and he received over 97% of the vote.[8] Despite this, Intervenors assert that because of the new map, Representative Ybarra "is expending and will continue to expend additional resources," App.Br. 35, but they provide no record evidence for this claim. In fact, Representative Ybarra has so far spent considerably *less* than in previous cycles.[9] Nor is spending funds to voluntarily campaign for reelection in one's own district enough to establish standing to challenge a remedial map. Representative Ybarra would spend more than $3.76 campaigning in LD13 even if his district did not change. For instance, in 2022, when Representative Ybarra also ran unopposed, he still spent over $132,000 campaigning. *Id.*

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[8] Aug. 6, 2024 Primary Results, Legislative District 13, Washington Secretary of State, https://results.vote.wa.gov/results/20240806/legislativedistrict13.html (last visited Aug. 15, 2024). Official election results are judicially noticeable. *Mont. Green Party v. Jacobsen*, 17 F.4th 919, 927 (9th Cir. 2021).

[9] *See* Candidates: Legislative District 13-House, Washington Public Disclosure Commission, https://www.pdc.wa.gov/political-disclosure-reporting-data/browse-search-data/candidates?jurisdiction=LEG+DISTRICT+13+-+HOUSE&jurisdiction_type=Legislative (last visited Aug. 19, 2024).

Furthermore, the partisan lean of Representative Ybarra's district is no different in the remedial map: LD13 went from 63.85% Republican in the enacted plan, to 63.21% Republican in Map 3B. 1-PL-SER-168. Intervenors provide no record evidence to explain why this 0.64% difference in partisan performance in a district that still favors the Republican by over 13% (and is uncontested) means that Representative Ybarra will "by definition face a more difficult reelection campaign." App.Br. 36. The Supreme Court has rejected just such an argument, holding that an assertion of a more difficult reelection was not enough to sustain an appeal from Congressmen who had "not identified record evidence establishing their alleged harm." *Wittman*, 578 U.S. at 545.[10]

If anything, the record suggests that the remedial map *better* reflects Representative Ybarra's wishes for his own district boundaries: it adds specific communities to his district that he testified he desired and removes areas he did not. 3-PL-SER-360 at 79:12–80:11. Intervenors have thus not established any electoral

[10] As Intervenors acknowledge, the Supreme Court has not held that redistricting resulting in harder or costlier campaigns supports a cognizable injury. App.Br. 36 n.4. Caselaw suggests it does not. *See City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 672 (E.D. Pa. 1980) ("A [legislator] suffers no cognizable injury, in a due process sense or otherwise, when the boundaries of his district are adjusted by reapportionment . . . a representative has no like interest in representing any particular constituency."); *Corman v. Torres*, 287 F. Supp. 3d 558, 569–70 (M.D. Pa. 2018); *Toth v. Chapman*, No. 1:22-CV-00208, 2022 WL 821175, at *10 (M.D. Pa. Mar. 16, 2022).

or financial harm to Representative Ybarra. Indeed, based on his own testimony, the new map *helps* rather than *harms* his interests.

An individual legislator may have standing when "singled out for specially unfavorable treatment," in an official capacity, *Raines v. Byrd*, 521 U.S. 811, 821 (1997), or when completely barred from running for reelection, *Bates v. Jones*, 127 F.3d 870 (9th Cir. 1997). But none of those situations apply to Representative Ybarra here. If having new constituents alone established standing, *every legislator* would be able to sue over almost any changes to their district at least every ten years. That cannot be so.

D. Intervenors' political and policy aims do not confer standing.

Standing is not dispensed for policy reasons. *Spokeo, Inc.*, 578 U.S. at 338. Intervenors invoke the structural makeup of the Washington Redistricting Commission, the procedural history of this case, the current gubernatorial race, and a vague reference to the "very concept of federalism" to argue that they should have standing, because, if they do not, then they cannot continue this appeal. App.Br. 36–37. But that is not how standing works. *All. for Hippocratic Med.*, 602 U.S. at 370 ("The 'assumption' that if these plaintiffs lack 'standing to sue, no one would have standing, is not a reason to find standing.'") (quoting *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 227 (1974)).

Intervenors suggest that this suit somehow represents both a federal infringement on the State's right to conduct redistricting and also a state infringement on Intervenors' federal constitutional rights. App.Br. 36–37. Neither is so. Redistricting occurs pursuant to the Washington Constitution, but no alleged drive for "bipartisan consensus," App.Br. 37, can supersede federal law. Moreover, after finding a Section 2 violation, the district court gave the legislature an opportunity to reconvene the Commission to draw a remedial map, imposing one only after the legislature failed to do so. 1-ER-2–3, 44. Nothing in this interplay between federal and state law manufactures standing for Intervenors. *Hollingsworth*, 570 U.S. at 706.

Nor does the reasonable choice by the State not to appeal infringe Intervenors' Fourteenth Amendment rights or give Intervenors the ability to appeal instead. Intervenors' lack of standing is not the "very issue" that "underla[id] two recent grants of certiorari," as they claim. App.Br. 37–38 (citing *Arizona v. San Francisco*, 142 S. Ct. 1926 (2022); *Arizona v. Mayorkas*, 143 S. Ct. 1312, 1312 (2023)). To begin, the question presented in the Arizona cases was whether states should be permitted to intervene to defend certain nationwide immigration rules when the United States ceased to defend them on appeal following a change in administration. *San Francisco*, 142 S. Ct. at 1928; *Mayorkas*, 143 S. Ct. at 1312. But Intervenors here are only three private individuals, and at issue is the legality of a single state

legislative district. Moreover, there has been no change in administration during this litigation, nor did the State of Washington "reverse[] course and opt[] to voluntarily dismiss [] appeals" that it had previously brought, or circumvent required administrative procedures to do so. *San Francisco*, 142 S. Ct. at 1928. Indeed, the State defended against Plaintiffs' Section 2 discriminatory results claim until the evidence became insurmountable and continued to defend against Plaintiffs' discriminatory intent claim (which the lower court did not reach). A state's choice not to appeal a liability decision is not collusion. *Hollingsworth*, 570 U.S. at 702. As such, Intervenors' claims of "collusive conduct" by the Washington Attorney General, App.Br. 37, have no basis in reality and do not confer standing.

Intervenors' personal and political desires to overturn the district court's liability finding or to have a different remedial map cannot displace the State's decision of whether or not to appeal a judgment against it. And for good reason. Standing doctrine exists to ensure that Article III courts are adjudicating only actual cases and controversies, and not being used by third parties to vindicate their own partisan or policy interests. *See Hollingsworth*, 570 U.S. at 715. The unsavory web of connections between Intervenors, Amicus CADF, and Commissioner Graves demonstrates precisely why this is so important. While the CADF amicus brief distorts history and repeatedly cites the wrong law as the basis for this suit, *e.g.*, Doc.44.1 at 12, it does get one thing right: the "purely partisan results of elections

are far outside th[e] ambit" of the federal judiciary. *Id.* at 6; *Rucho v. Common Cause*, 588 U.S. 684, 721 (2019). But partisan election interests have formed the basis for CADF's and Intervenors' involvement in this suit from the beginning.

In his triple roles as state representative, counsel for Intervenors, and president of CADF, in April 2022 Representative Stokesbary noted his concern that the *Soto Palmer* litigation could result in a "safe Democratic district in Central WA." 5-PL-SER-827. To combat this, he circulated a memo—appearing on CADF letterhead and identifying Commissioner Graves as a director of the organization—to solicit funds for Intervenors' participation in *Soto Palmer* that had "as much to do with the political context as the legal issues." *Id.* at 825-26. The "legal implications" included the effect of the VRA on partisan outcomes and how the case could be used to "reshape how the VRA operates across the county," while the "political implications" included how "LD15 could be redrawn to stay reliably Republican until 2030." 5-PL-SER-836. These partisan motivations demonstrate that Intervenors' involvement has always been a "vehicle for the vindication of value interests," and a far cry from any injury sufficient for Article III standing. *Diamond*, 476 U.S. at 62 (internal citation omitted).

II. The district court did not clearly err in its Section 2 liability finding.

A. The single-judge district court properly heard Plaintiffs' Section 2 challenge.

This case was properly tried before a single-judge district court. 28 U.S.C. § 2284(a) provides that a three-judge court shall be convened "when an action is filed challenging the constitutionality of the apportionment of congressional districts or the apportionment of any statewide legislative body." A suit involving only a statutory claim, as here, does not trigger § 2284. *See, e.g.*, *Chestnut v. Merrill*, 356 F. Supp. 3d 1351, 1354 (N.D. Ala. 2019); *Johnson v. Ardoin*, No. 18-625-SDD-EWD, 2019 WL 2329319, at *3 (M.D. La. May 31, 2019*); Ariz. Minority Coalition for Fair Redistricting v. Ariz. Independent Redistricting Comm'n*, 366 F. Supp. 2d 887, 894–95 (D. Ariz. 2005). Courts have read § 2284 this way for good reason: it is what the text says.

Intervenors ignore this commonsense reading of § 2284, applying the phrase "challenging the constitutionality of" to only congressional apportionment but not legislative. App.Br. 25. In support, they present an abridged version of the statute and cite a single Fifth Circuit concurrence. *Id.* (citing *Thomas v. Reeves*, 961 F.3d 800, 810 (5th Cir. 2020) (Willet, J., concurring)). But Judge Willet's analysis is fatally flawed. *Thomas*, 961 F.3d at 801-10 (Costa, J., concurring). Basic interpretation rules show that "challenging the constitutionality of" applies to congressional *and* legislative apportionment. This is so because of the "series-

qualifier principle," which is "just a fancy label for describing how a normal person would understand section 2284(a)." *Id.* at 803.[11]

This reading accords with the statute's history. It was enacted to enable three-judge panels to hear constitutional challenges to certain state laws. *Id.* at 807. In 1976, to address the increasing burden on the Supreme Court's docket, Congress amended the statute by "vastly reduc[ing] the category of cases for which a three-judge court is mandated." *Kalson v. Paterson*, 542 F.3d 281, 287 (2d Cir. 2008). It would thus make little sense to interpret § 2284 to instead *expand* three-judge courts to statutory claims, and to suggest that Congress did so through an inartful deployment of the word "the." *Thomas*, 961 F.3d at 808. Intervenors' "avant-garde view," *id.* at 802, would mean a three-judge court is required for any challenge to legislative districts, but only for a constitutional challenge to congressional districts. That nonsensical result is contrary to the text and history of § 2284. Perhaps that is why Intervenors repeatedly conceded below that Plaintiffs' Section 2 claim should proceed only before a single-judge district court. 3-PL-SER-420 ("Intervenors do not demand a three-judge court to hear Plaintiffs' statutory claims"); 2-PL-SER-306–309 at 8:10–10:9 (Intervenors' counsel explaining that three-judge panel would

[11] In the only other case Intervenors cite, this Court remanded a matter to be heard before a three-judge court *because it included a constitutional claim*. *Lopez v. Butz*, 535 F.2d 1170, 1172 (9th Cir. 1976).

be appropriate *if* a constitutional claim were added); 5-PL-SER-829 (Representative Stokesbary stating "*Palmer* is a statutory challenge, not a constitutional one, so we likely won't get a 3-judge panel.").

B. The district court did not clearly err in finding that LD15 violated Section 2 despite having a majority HCVAP.

The district court did not clearly err in finding a Section 2 violation notwithstanding LD15's bare majority of Latino voters. A majority-minority district can dilute the minority's voting power where, as here, the minority lacks a real opportunity to elect their candidates of choice. *See, e.g.*, *Perez v. Abbott*, 253 F. Supp. 3d 864, 880 (W.D. Tex. 2017) ("[T]he existence of a majority HCVAP in a district does not, standing alone, establish that the district provides Latinos an opportunity to elect, nor does it prove non-dilution."); *Pope v. Cnty. of Albany*, 687 F.3d 565, 575 n.8 (2d Cir. 2012) ("[T]he law allows plaintiffs to challenge legislatively created bare majority-minority districts on the ground that they do not present the 'real electoral opportunity' protected by Section 2.") (internal quotations omitted); *Mo. State Conference of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 934 (8th Cir. 2018) ("[M]inority voters do not lose VRA protection simply because they represent a bare numerical majority within the district."); *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1041 (D.C. Cir. 2003); *Monroe v. City of Woodville*, 881 F.2d 1327, 1333 (5th Cir. 1989). The Supreme Court has further recognized that it is "possible for a *citizen voting-age majority* to lack real electoral opportunity,"

LULAC v. Perry, 548 U.S. 399, 428 (2006) (emphasis added), and, as the district court held, "the evidence shows that that is the case here." 1-ER-41.

Intervenors incorrectly characterize a façade district as only one in which a group has a majority under one metric (such as VAP)—but not under another (such as CVAP). App.Br. 42. Similarly, they describe a "hollow" majority CVAP district as one in which only "governmental barrier[s] to poll access" restrict the participation of minority voters. *Id.* at 43. But these artificially narrow definitions of a façade or hollow majority are not supported by precedent.[12] Rather, courts must "take a 'functional' view of the political process and conduct a searching and practical evaluation of reality" in determining Section 2 liability. *Gingles*, 478 U.S. at 66 (internal citations omitted).[13]

Intervenors altogether ignore this searching evaluation conducted below, rejecting the district court's findings, and contending that "if a group constitutes a

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[12] In support of their cramped view of Section 2, Intervenors cite a single *dissenting* judge in a case *affirming* a finding of a Section 2 violation in a 50.8% Black district after carefully considering the evidence. *Thomas v. Bryant*, 938 F.3d 134, 140 (5th Cir. 2019). This decision was subsequently vacated only because the underlying dispute became moot. *Thomas*, 961 F.3d at 801.

[13] In assessing the district court's searching evaluation, Intervenors omit key evidence. Witnesses testified to numerous barriers to Latino political participation. For example, the court heard testimony that "Latinos that lack the language, lack the knowledge, and again have the extra fear of" reprisal from employers for voting, "they shy away. And it's really difficult, more difficult." 4-PL-SER-511 at 841:10–13.

majority of the citizen-age voting population, then it necessarily possesses *at least* an equal 'opportunity . . . to participate in the political process and to elect representatives of their choice.'" App.Br. 40 (emphasis and internal quotations in original). But contrary to Intervenors' insistence, the analysis is not "just math": the district court found that, in the *particular area included* in the enacted version of LD15, "[a] majority Latino CVAP of slightly more than 50% is insufficient to provide equal electoral opportunity where past discrimination, current social/economic conditions, and a sense of hopelessness keep Latino voters from the polls in numbers significantly greater than white voters." 1-ER-41. This finding accords with extensive evidence presented at trial, including evidence that LD15 cracked the Latino community of interest "in Yakima, Pasco, [and] along the highways and rivers in between." 1-ER-23; 4-PL-SER-616–618 at 82:25–84:12 ("[W]hite voting power was higher in the included precincts, even though they're high-density Latino, relative to the excluded precincts."); 3-ER-424–425; 4-PL-SER-505–506 at 832:18–833:1 ("[I]f they would have done a better job to make sure that we're not split in the community . . . that would be ideal for representation."); 1-ER-34 n.10 ("[T]he Section 2 claim is based on allegations that the boundaries of LD 15 were drawn in such a way that it cracked the Latino vote."); *Perez*, 253 F. Supp. 3d at 887–88 (fracturing politically active communities had "the foreseeable

effect of depressing Latino turnout"). Intervenors do not show that this finding was clear error.

Intervenors' attempt to reduce the district court's assessment to one of partisan outcomes, App.Br. 42–43, highlights their misunderstanding of Section 2. The district court's inquiry, consistent with precedent, was of the "electoral opportunities" for Latino voters. 1-ER-44. The district court found "that white voters in the Yakima Valley region vote cohesively to block the Latino preferred candidates"—"candidates who are responsive to the needs of the Latino community," "who support unions, farmworker rights, expanded healthcare, education, and housing options, etc.," 1-ER-24, 43—thereby denying Latino voters "real electoral opportunity." *LULAC*, 548 U.S. at 428. That the Latino-preferred candidates, in this case, aligned with one party does not turn the district court's assessment into a partisan one. The district court did not err in its application of precedent to assess Latino electoral opportunity.

The amicus brief submitted by Commissioner Graves argues that the bare majority HCVAP LD15 is lawful because it represented the Commissioners' best efforts to comply with the law. Doc.42.1 at 7. But even if that is true, a Section 2 results claim does not depend on map-drawers' intentions, nor on achieving a specific HCVAP target. Rather, such claims turn on whether the map provides an

equal opportunity to minority voters, and the district court correctly held that the enacted LD15 did not.

C. The district court did not clearly err in finding that Plaintiffs satisfied the three *Gingles* preconditions.

1. The district court did not clearly err in finding that Plaintiffs satisfied the compactness requirement of the first *Gingles* precondition.

The district court properly found that Plaintiffs satisfied the compactness requirement of the first *Gingles* precondition. 1-ER-21–23. Intervenors argue that "the district court . . . analyzed compactness solely in terms of the districts' geographic boundaries rather than the compactness of the minority populations in the area." App.Br. 50. This argument has no merit.

In *LULAC*, the Supreme Court held that a Texas congressional district stretching from the Mexican border to Austin was not reasonably compact for Section 2 purposes because of the "enormous geographical distance" separating the two pockets of Latino communities and the "disparate needs and interests" of those communities. 548 U.S. at 435. In so doing, the Court "emphasize[d] it is the enormous geographic[] distance separating the Austin and Mexican-border communities, coupled with the disparate needs and interests in these populations—not either factor alone—that renders District 25 noncompact for § 2 purposes." *Id.*;

id. at 424 (concluding that another district stretching 500 miles satisfied *Gingles* I where its Latino population had shared interests).[14]

Here, neither factor is present. The district court concluded that the region's Latino population is geographically proximate and has shared needs. 1-ER-21–23. This finding was based on testimony from numerous expert and lay witnesses regarding the linked geography and common interests specific to Latino residents in the Yakima Valley, including a shared history of discrimination, language and language access issues, policy concerns, housing access issues, working conditions, commuting patterns, community organizations, religion, migration patterns, and more. 4-PL-SER-501 at 826:6–20, 503–506 at 830:4–833:25, 508 at 838:16–25, 512–513 at 847:24–848:16, 514 at 849:3–16 (Portugal); 4-PL-SER-543–544 at 661:15–662:3, 545 at 663:13–24 (Dr. Barreto); 4-PL-SER-621–637 at 126:19–142:10 (Dr. Estrada); 4-PL-SER-650 at 179:9–19 (Senator Saldaña); 5-PL-SER-661–744. Relying on this detailed evidence, the district court concluded that the communities had shared "experiences and concerns," along with "socio-economic status, education, employment, health, and other characteristics," *LULAC*, 548 U.S.

[14] Intervenors claim that the district court omitted the distance between communities in the region. App.Br. 55. However, the district court directly addressed Intervenors' argument about the "80+ miles" separating Yakima from Pasco (also much smaller than the distance at issue in *LULAC*) and rejected it. 1-ER-22–23.

at 424 (internal quotation marks omitted), and "form a community of interest based on more than just race." 1-ER-22–23, 27–36, 39–40.

Intervenors sidestep this intensely local appraisal and instead offhandedly label the Yakima Valley Latino community's shared socio-economic disparities and characteristics as "ubiquitous" to "all Hispanic communities across the country." App.Br. 53.[15] But Intervenors' bare assertions cannot erase the detailed record evidence upon which the Court based its decision, establishing the similar needs, interests, and geographic proximity of the Latino community *in the Yakima Valley*. *See, e.g.,* 1-ER-22–23, 26–44; 5-PL-SER-670–681. As such, Intervenors fail to show how the district court clearly erred. Their own expert, Dr. Mark Owens, "acknowledged at trial that he does not know anything about the communities in the Yakima Valley region other than what the maps and data show," 1-ER-23 n.7, and testified that he had no opinion on whether LD15 was compact. 4-PL-SER-529 at 599:10–15.

2. The district court did not clearly err by failing to analyze the cause of racially polarized voting.

The district court did not err by failing to analyze the cause of racially polarized voting in the Yakima Valley. Intervenors do not dispute that Latino voters are cohesive (*Gingles* II), and that white voters vote as a bloc to routinely defeat the

[15] Intervenors provide no support for this flippant claim, which is incorrect and irrelevant.

preferred candidate of Latino voters (*Gingles* III), but instead argue that any polarization is "caused by partisanship rather than race." App.Br. 58. Intervenors are wrong on the law and facts.

A majority of the U.S. Supreme Court has concluded that this type of causation argument is not pertinent to assessing racially polarized voting. *Gingles*, 478 U.S. at 51, 62–63, 74 (plurality) (the "legal concept of racially polarized voting incorporates neither causation nor intent" and "the reasons [Latino] and white voters vote differently have no relevance to the central inquiry of § 2"); *id.* at 100 (O'Connor, J., concurring) (agreeing, along with three other justices, that where statistical evidence shows minority political cohesion and assesses prospects of winning, "defendants cannot rebut this showing by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race"); *Allen*, 599 U.S. at 19 (explaining that the third *Gingles* precondition "establish[es] that the challenged districting thwarts a distinctive minority vote at least plausibly on account of race" (internal quotation marks omitted) (bracket in original)).[16]

[16] Intervenors claim Section 2's "on account of" language requires racial causation. But as the Supreme Court recently affirmed, "'[i]t is patently clear that Congress has used the words 'on account of race or color'" in the Act to mean 'with respect to' race or color, and not to connote any required purpose of racial discrimination.'" *Allen*, 599 U.S. at 25 (internal citation omitted).

This Court has likewise so held. *Old Person v. Cooney*, 230 F.3d 1113, 1128 (9th Cir. 2000) (noting *Gingles* plurality rejected this argument); *United States v. Blaine Cnty., Mont.*, 363 F.3d 897, 910, 912 & n.21 (9th Cir. 2004) (holding that in vote dilution claims, "evidence of racial bloc voting provides the requisite causal link between the voting procedure and the discriminatory result" and that plaintiffs do not have "the additional burden of proving that white bloc voting is due to discriminatory motives"); *Gomez v. City of Watsonville*, 863 F.2d 1407, 1415–16 (9th Cir. 1988) ("The court should have looked only to *actual voting patterns* rather than speculating as to the reasons why.") (emphasis in original). Intervenors contend that this Court has required a causal connection in Section 2 cases but misconstrue the Court's precedent. App.Br. 57 (quoting *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997)). In *Smith*, the court assessed the presence or absence of a causal connection by considering whether, under the Senate Factors, the totality of circumstances supported finding a Section 2 violation.[17] 109 F.3d at 595–96; *Blaine Cnty.*, 363 F.3d at 912 n.21 (expressly rejecting Intervenors' reading of *Smith*).

In any event, the district court expressly considered Intervenors' partisanship argument and found it factually incorrect, 1-ER-23–26, 23 n.8, 42–43, and

[17] Intervenors also cite *Gonzalez*, 677 F.3d at 405, but that case is consistent with the treatment of a causal connection in *Blaine County* and *Smith*.

Intervenors identify no clear error in that conclusion. Intervenors argue that "polarized voting among ethnic groups only existed for . . . partisan contests between a White Democrat and a White Republican." App.Br. 58. But this claim is belied by the record. For starters, it requires pretending that *at least 16 probative elections* in the region, including state legislative and nonpartisan elections featuring Latino versus white candidates, simply do not exist. 3-ER-400, 407–11. But excluding these elections has no support in the law. Rather, as Intervenors admit, elections between Latino and white candidates are "precisely the sort that this Court has made plain provide[] the 'most probative evidence.'" App.Br. 60 (citing *Ruiz v. City of Santa Maria*, 160 F.3d 543, 553 (9th Cir. 1998)).

That is especially so here, where a *partisan state legislative district* is being challenged. Plaintiffs' expert Dr. Collingwood analyzed 11 state legislative contests in the region featuring a Latino candidate versus a white candidate. In 10 of 11, the Latino candidate was the candidate of choice of Latino voters, and in all 11 the Latino-preferred candidate was defeated by white bloc voting. 3-ER-400, 408–09, 430–33. Moreover, the State's expert Dr. Alford—who routinely testifies on behalf of state governments defending against Section 2 claims—confirmed these results, and persuasively testified about "a real ethnic effect on voting in this area." 4-PL-SER-515–516 at 853:15–854:15.

In addition, Dr. Collingwood's analysis demonstrated that Latino-preferred candidates were defeated by white bloc voting in numerous *nonpartisan* races. 3-ER-408–09 (showing loss of at least five Latino-preferred candidates with Spanish surnames in nonpartisan races, all but one of whom were Latino, due to white voting patterns); 1-ER-23–24.[18] And Intervenors' own expert found that in the 2020 Superintendent of Public Instructions race, "the Latino vote in the Yakima Valley region did not coalesce around the Democratic candidate, but rather around his [Latina] Republican opponent [Maia Espinoza]." 1-ER-23–24, n.7. Nevertheless, Ms. Espinoza lost the election due to white voting patterns. *Id.*; 3-ER-408–09.

Moreover, if polarization in the region were due to partisanship and not race, under Intervenors' logic, one would not expect racial appeals, particularly in nonpartisan races. *Gingles*, 478 U.S. at 40 (noting that racial appeals "encourage[] voting along color lines by appealing to racial prejudice."). However, such examples abound in the region.[19] Intervenor Trevino attributed his 2015 loss in the Granger mayoral race to a rumor spread during the campaign that he "was going to fire all the white people in the city." 3-PL-SER-483–484. Mr. Trevino also attributed his

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[18] In one of the races, the Latino-preferred candidate (also Latina) won statewide, but would have lost in the Yakima Valley region itself due to white bloc voting. 3-ER-409. This further demonstrates polarized voting in the area.

[19] The record also contains numerous examples of racial appeals in partisan elections 5-PL-SER-723–729; 1-ER-32–33.

loss in the nonpartisan countywide races for 2014 Yakima County Clerk, 2018 Yakima County Commissioner District 3, and his pulling out of the 2020 appointment process for a vacant Yakima County Board seat to negative coverage in the Yakima Herald-Republic. *Id*. at 485–489. He commented that his white opponents in those races did not receive similar treatment, and that he was the "only [candidate] they picked on" because "it was easier to pick on the Republican Mexican than anyone else." *Id*.

In addition to these examples, at least five other recent nonpartisan races in the region, most with Latino candidates, featured racial appeals. 5-PL-SER-723–29. Plaintiff Soto Palmer, who ran for a seat on the nonpartisan Yakima County Board in 2018 and lost due to polarized voting, experienced hostility while campaigning in predominantly white towns that was so severe, she had to replace herself with white campaign surrogates for fear of her safety. 4-PL-SER-551–554 at 293:15–296:1; 5-PL-SER-727; *Garza v. Cnty. of Los Angeles*, 756 F. Supp. 1298, 1351 (C.D. Cal. 1990) (citing evidence of hostile responses from white voters as racial appeals). And Intervenors' counsels' other client, Benancio Garcia, testified to racial discrimination he faced from the Washington State Republican Party as a Latino candidate running for Congress in the Yakima Valley. In Mr. Garcia's own words, this discrimination

"greatly affected th[e] election, the outcome, and suppressed the Latino vote." 3-PL-SER-339–340, 343.[20]

Intervenors next claim that the district court ignored the victory of candidate Nikki Torres in LD15 in 2022, including the "actual vote margins" in the race. App.Br. 60–61. But this argument requires skipping entire paragraphs of the Court's opinion. Based on the evidence at trial, including the vote margin, the district court found that the election confirmed the overall statistical evidence of racially polarized voting, with Latino voters cohesively voting for the *losing* candidate Lindsey Keesling, and white voters cohesively preferring Ms. Torres, the winning candidate. 1-ER-23–26; 3-ER-428–434; 4-PL-SER-536–538 at 639:24–641:2, 612 at 76:10–20; 5-PL-SER-834.[21]

Furthermore, Latino turnout in the off-cycle LD15 Senate election was abysmal, minimizing any value of the "actual vote margins" Intervenors deem dispositive. Of those voting, only 32.5% were Latino, whereas 61.6% of the electorate was white. 3-ER-433. Thus, Intervenors' constant refrain that Ms. Torres

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[20] Mr. Garcia's testimony demonstrates that even within the Washington Republican Party, white Republicans are favored over Latino Republicans.

[21] Intervenors cite their expert, Dr. Owens, to support the allegation that "polarization existed only in White-vs-White-candidate elections." App.Br. 59, 58 n.9. But his analysis does not support this conclusion. Dr. Owens examined white voting patterns in *only one election contest*, 4-PL-SER-521 at 579:10–13, and admitted he had no reason to doubt that white voters overwhelm the preferences of Hispanic voters. 4-PL-SER-530 at 601:4–11.

(a candidate opposed by Latino voters) won by 35 points simply highlights *the harm* of the enjoined district. *LULAC*, 548 U.S. at 440 (noting that "Latinos diminishing electoral support" for a Latino candidate "indicates their belief he was 'unresponsive to the particularized needs of the members of the minority group'").[22]

Even if the 2022 election did not confirm the pattern of racially polarized voting, it is only *one election*. One contest cannot outweigh the findings of all four experts in the case that Latino voters cohesively prefer the same candidates, and that those candidates are continually defeated by white bloc voting over a decade of elections in the region. *Gingles*, 478 U.S. at 57 ("a pattern of racial bloc voting that extends over a period of time is more probative of a claim that a district experiences legally significant polarization than are the results of a single election").

This is particularly so because the 2022 election in LD15 is subject to the "special circumstances" doctrine, under which courts discount the probative value of elections that are "not representative of the typical way in which the electoral process functions." *Ruiz*, 160 F.3d at 557–58; *Gingles*, 478 U.S. at 75–76. The 2022 election in LD15 took place during the pendency of VRA litigation and featured a

[22] Intervenors assume that because Ms. Torres is Latina, she *must* be the Latino-preferred candidate. That assumption is as offensive as it is incorrect. A minority *candidate* is not automatically the minority *candidate of choice*. *LULAC*, 548 U.S. at 438–41; *Ruiz*, 160 F.3d at 551 ("[A] candidate is not minority-preferred simply because the candidate is a member of the minority") (collecting cases).

severely underfunded Latino-preferred candidate nominated as a write-in. *Gingles*, 478 U.S. at 75–76 (finding such elections can "work[] a one-time advantage . . . in the form of unusual organized political support by white leaders").[23] Ms. Keesling, the write-in candidate in the primary, spent only $4,000 in the general election, less than five percent of what Senator Torres spent on her campaign. 4-PL-SER-531–532 at 604:6–605:21(Dr. Owens). Both House races in LD15 were also uncontested. 4-PL-SER-538 at 641:8–21 (Dr. Barreto). As Dr. Barreto testified, "when you see uncontested races, or underfunded candidates, it's because those elections are not winnable for that [group]." 4-PL-SER-538 at 641:8–642:2 (Dr. Barreto).

As a result, Intervenors cannot show that the district court clearly erred by failing to analyze the cause of racially polarized voting.

D. The district court did not clearly err in its totality of the circumstances analysis.

The district court's totality of the circumstances analysis was not clear error. Intervenors' objections to the district court's totality-of-the-circumstances Senator Factors analysis are meritless.

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[23] Plaintiffs filed their lawsuit months before Ms. Torres declared her candidacy, which was followed three days later by the retirement of longtime white incumbent Jim Honeyford. Honeyford then endorsed Ms. Torres. 5-PL-SER-831–833.

1. The district court did not err in the legal standard it applied or the factual findings it made regarding Senate Factors 1 and 5.

Intervenors argue that the district court "failed to analyze causation as Section 2 requires," App.Br. 64, but they are wrong on both the law and the facts. To begin, Intervenors assert that Plaintiffs "must show proof of 'causal connection between the challenged voting practice and a prohibited discriminatory result.'" *Id*. Section 2 requires no such separate showing, and the district court incorporated it into its totality analysis. Even so, Plaintiffs made it here. *See infra* II.D.1; 1-ER-15, 26–40, 44 (district court's totality assessment finding that "the boundaries of LD15, in combination with the social, economic, and historical conditions in the Yakima Valley region, results in an inequality in the electoral opportunities enjoyed by white and Latino voters in the area")

Intervenors next argue that Plaintiffs must demonstrate a causal connection between Senate Factors 1 and 5 and the ability of the minority group to participate in the political process. App.Br. 64–67. Not so. *See, e.g., LULAC v. Clements*, 986 F.2d 728, 750 (5th Cir. 1993) (Plaintiffs must demonstrate both depressed political participation and socioeconomic inequality, but "need not prove any causal nexus between [the two]"); *U.S. v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1567–69 (11th

Cir. 1984) (same).[24] Nonetheless, Plaintiffs met this burden, and the district court found that racial discrimination and disparities past and present "continue[] to impact [Latinos'] rights to participate in the democratic process" in the Yakima Valley region. 1-ER-27–29, 31–32. Intervenors' arguments otherwise lack merit.

Senate Factor 1

In its analysis of Factor 1, the district court considered extensive expert and lay testimony, *see*, *e.g.*, 4-PL-SER-625–628 at 130:6–133:15 (Dr. Estrada); 4-PL-SER-652 at 181:4–16 (Senator Saldaña); 4-PL-SER-509–510 at 839:16–840:7 (Portugal), establishing a long history of official, voting-related racial discrimination including English literacy tests, failure to provide federally required bilingual election materials, and dilutive at-large election systems. 1-ER-27-29; 5-PL-SER-681–703. The court found this evidence illustrated "that historic barriers to voting have continuing effects on the Latino population" and "prevent full access to the electoral process." 1-ER-28–29. As the district court recognized, the extensive official discrimination and its continued impact are not nullified because of some progress "following decades of community organizing and multiple lawsuits

[24] Intervenors wrongly cite *Gonzalez* for their contentions about showing causal connection. *Gonzalez* held that the plaintiffs failed to meet their burden because they "adduced no evidence" that the challenged practice "(*whether or not* interacting with the history of discrimination and racially polarized voting)" resulted in less opportunity to elect. 677 F.3d at 407 (emphasis added). Not so here.

designed to undo a half century of blatant anti-Latino discrimination." 1-ER-28; *Gingles v. Edmisten*, 590 F. Supp. 345, 361 (E.D.N.C. 1984), *aff'd in part*, *rev'd in part sub nom. Gingles*, 478 U.S. 30.

Senate Factor 5

Intervenors similarly complain that a "causal connection" is missing between the lasting effects of discrimination and participation in the political process, but the Senate Report from which the factors derive *explicitly disclaims* the need to demonstrate such a connection. S. Rep. No. 97-417, at 29 n.114 (1982) ("Where these conditions are shown, and where the level of [minority] participation in politics is depressed, plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.").

Nonetheless, myriad witnesses, including Dr. Estrada, Senator Saldaña, Plaintiff Soto Palmer, and Mr. Portugal testified to the continuing effects of past discrimination in the region, establishing "that decades of discrimination against Latinos in the area has had lingering effects, as evidenced by present-day disparities with regard to income, unemployment, poverty, voter participation, education, housing, health, and criminal justice." 1-ER-31–32; 5-PL-SER-706–723; 4-PL-SER-554 at 296:9–17, 565 at 307:12–18 (Soto Palmer); 4-PL-SER-655 at 199:5–14 (Saldaña); 4-PL-SER-507 at 835:11–19, 510–511 at 840:18–841:14 (Portugal). In addition, trial testimony demonstrated that the region's Latino population

participates in the political process at significantly lower rates than whites, as indicated by lower voter turnout and registration rates. 4-PL-SER-601 at 50:2–4 (Dr. Collingwood); 4-PL-SER-629–630 at 134:12–135:4 (Dr. Estrada); 3-ER-422–425; 5-PL-SER-703–705; 1-ER-31–32. Intervenors did not dispute any of this evidence at trial. 1-ER-31. The court thus concluded Intervenors' causation argument was "belied by the record," which showed that "the observed disparities hinder and limit the ability of Latino voters to participate fully in the electoral process," and the factor "weighs heavily in plaintiffs' favor." 1-ER-29–32.

2. The district court's findings on Senate Factor 3 did not rely on the usual burdens of voting.

Intervenors incorrectly claim that the district court's findings on Senate Factor 3 focused on "usual burdens of voting." App.Br. 68. Not so. For starters, Factor 3 requires analysis regarding "voting [] procedures that *may* enhance the opportunity for discrimination against [Latino voters in the Yakima Valley]." 1-ER-20. The district court did not hold that "the mere election of state legislators in a non-presidential year puts this factor on the side of finding a Section 2 violation." App.Br. 69. Rather, undisputed evidence demonstrated that "Latino voter turnout is at its lowest in off-year elections, enlarging the turnout gap between Latino and white voters in the area." 1-ER-29–30; 4-PL-SER-609–611 at 73:14–75:25 (Dr. Collingwood); 4-PL-SER-629–630 at 134:12–135:4 (Dr. Estrada); 3-ER-422–425; 5-PL-SER-703–705.

The court also found that the state's use of at-large districts to elect two state representatives can "further dilute minority voting strength," citing to *Gingles*' explanation of the harm of at-large districts. 1-ER-29; 4-PL-SER-534 at 621:2–20 (Dr. Barreto) (testifying that the nested multimember House district system makes it "more difficult to gain representation" and it would be "better to have two subdistricts, such as many states do"). The district court thus did not err in finding the Plaintiffs "produced unrebutted evidence of . . . electoral practices that may enhance the opportunity for discrimination against the minority group." 1-ER-30.

3. The district court did not commit legal or factual error in its assessment of Senate Factors 2, 6, 7, and 8.

Senate Factor 2: Racially Polarized Voting

As discussed *supra* II.C.2, multiple experts found that elections in the Yakima Valley region feature high levels of racially polarized voting, across election types and years. The district court did not clearly err in finding that this factor weighs heavily in Plaintiffs' favor.

Senate Factor 6: Use of Overt or Subtle Racial Appeals in Political Campaigns

Intervenors argue that "[t]he district court pointed to a single incident" of a racial appeal in its Factor 6 analysis. App.Br. 72. Not so. Intervenors ignore the court's finding that numerous "candidates in the Yakima Valley region during the past decade" have engaged in racial appeals. 1-ER-32. The district court explained that candidates used various "dog-whistles" which "avoid naming race directly but

manipulate racial concepts and stereotypes to invoke negative reactions in and garner support from the audience." 1-ER-32. In example, the court noted election communications that "equate 'immigrant' or 'non-citizen' with the derogatory term 'illegal' and then use those terms to describe the entire Latino community without regard to actual facts regarding citizenship and/or immigration status." *Id*. In making its findings, the court considered evidence offered by Plaintiffs regarding multiple racial appeals by nonpartisan and partisan candidates and elected officials at the local, county, and state levels in the region. 4-PL-SER-637–639 at 142:23–144:14; 5-PL-SER-723–729. This evidence also included testimony about racial appeals impacting Intervenor Trevino and Benancio Garcia. *See supra* II.C.2. The district court did not clearly err in its Factor 6 analysis.

Senate Factor 7: Extent to Which Latino Candidates Have Been Elected to Public Office in the Jurisdiction

Intervenors take issue with the district court's findings related to the election of Senator Torres, and Plaintiff Soto Palmer's experience of "blatant and explicit racial animosity while campaigning for a Latino candidate in LD 15." 1-ER-34; App.Br. 71. But the district court found that Ms. Soto Palmer's experience suggested "that Latino candidates may be at a disadvantage in their efforts to participate in the political process." 1-ER-34. And Senator Torres' election provides little probative value, as she was not the Latino-preferred candidate and her election came amidst "special circumstances" following the filing of this lawsuit. *See supra* II.C.2,

Moreover, Intervenors altogether ignore that the district court's Factor 7 findings were not limited to these two instances. 1-ER-34.

Indeed, the district court considered "the electoral success of others in the Yakima Valley region, including area legislators like Mary Skinner and Intervenor Alex Ybarra," but found that "in the history of Washington State, only three Latinos"—Mary Skinner, Alex Ybarra, and Nikki Torres—a "very, very small number" have been elected to any of the twelve state legislative seats across LDs 13, 14, 15, and 16. 1-ER-33; 4-PL-SER-639–640 at 144:19–145:12; 5-PL-SER-729–730; 3-ER-400, 407–11 (cataloguing numerous losses of Latino candidates). The record showed that Latino candidates' success even at the county commission level was also nearly non-existent. 1-ER-33–34.

In response, Intervenors argue that "the numerous cities in Yakima County with Hispanic mayors and city councilmembers," App.Br. 71, cancel out numerous and widespread Latino candidate losses. But as the district court noted, "[t]hat Latino candidates are successful in municipal elections where they make up a significant majority of an electorate that cannot be cracked, has little relevance to the Section 2 claim asserted here." 1-ER-34, n.10; 4-PL-SER-640–641 at 145:25–146:5, 645–646 at 165:19–166:3, 647 at 167:1–6. The district court accordingly did not clearly err in its Factor 7 analysis.

Senate Factor 8: Lack of Responsiveness of Elected Officials to the Needs of the Latino Community

The district court did not clearly err in its assessment of "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of Latinos in the Yakima Valley region." 1-ER-34–36.

First, in analyzing this Factor, the court considered testimony from multiple Latinos in the region that "their statewide representatives have not supported their community events…have failed to support legislation that is important to the community…do not support unions and farmworker rights, and were dismissive of safety concerns that arose following the anti-Latino rhetoric of the 2016 presidential election." 1-ER-34–35; 4-PL-SER-597–598 at 35:20–36:3, 591–592 at 24:13–25:5 (Lopez) ("I think if you look at our representatives, they don't look like or reflect the community that they serve. And they voted against a lot of, not only issues, but resources that would help our community as well."); 4-PL-SER-548 at 290:6–8, 549 at 291:3–23 (Soto Palmer); 4-PL-SER-499–500 at 822:24–823:1, 501 at 826:6–20 (Portugal). Intervenors cite the Washington Voting Rights Act (WVRA) as evidence that "Washington has made legislative efforts" to protect Latino political access, App.Br. 66, but fail to mention that no legislators from the Yakima Valley region voted for that legislation despite Latino advocacy for it. 4-PL-SER-548–549 at 290:6–291:2 (Soto Palmer); 4-PL-SER-592 at 25:8–22, 594 at 27:5–22 (Lopez).

Second, the court considered testimony from state Senator Saldaña who "realized that the then-senator from LD 15 was not supportive of or advocating for the issues she was hearing were important to the Yakima Valley Latino community." 1-ER-35. Intervenors emphasize that Senator Saldaña "represents Seattle, not the Yakima Valley." App.Br. 73. But that is the point. As Senator Saldaña testified, she "find[s] it very frustrating that [she], who ha[s] no direct connection with the Yakima Valley, [is] often the only person that's advocating for policies that support and benefit the people of the Yakima Valley." 4-PL-SER-657 at 201:13–17; 1-ER-35.

Third, the court relied on expert testimony assessing the nonresponsive voting records of the region's representatives including that, in 2022, "[o]f the forty-eight votes cast, only eight of them were in favor of legislation that LCA [the Latino Civic Alliance] supported." 1-ER-34–36. Intervenors complain that the evidence of legislative opposition to LCA-supported bills represents only the view of "a single progressive Hispanic advocacy organization." App.Br. 73. But that ignores additional evidence of unresponsiveness, including that senators from LDs 14, 15, and 16 uniformly opposed an update to the WVRA, which, in addition to being a bill promoted by the LCA, had the backing of 93 organizations including Latino groups like Casa Latina, the Commission on Hispanic Affairs, El Centro de la Raza, Radio KDNA, and the Tri-Cities LULAC. 5-PL-SER-734–735; 4-PL-SER-641–642 at 146:23–147:8.

Intervenors baselessly contend that the area's legislators are responsive because some of them allegedly supported a preferred policy once or twice. In particular, Intervenors cite unnamed "state budget appropriations for KDNA, a Spanish-language radio station in the Yakima Valley," App.Br. 73, 3-ER-567, and the support of LD14's senator and representatives for the "Real Hope Act," a 2014 law which was *opposed* by an LD15 representative and the state senators from LDs 15 and 16.[25] The district court rejected that these examples demonstrated responsiveness, because "[e]ven if one assumes that the elected officials from the Yakima Valley region voted for these successful initiatives, Intervenors do not acknowledge the years of community effort it took to bring the bills to the floor or that these [] initiatives reflect only a few of the bills that the Latino community supports." 1-ER-36. Having weighed the evidence, the court did not clearly err in its findings on Factor 8.

Ultimately, the district court tied the presence of the Senate Factors in the region to LD15's racially discriminatory impact. 1-ER-43. In light of the factual record, the State admitted "that under the totality of the circumstances, Hispanic voters in LD15 are less able to participate in the political process and elect candidates

[25] Washington State Legislature, SB 6523 – 2013-14, Roll Calls, *available at* https://apps.leg.wa.gov/billsummary/?BillNumber=6523&Year=2013&Initiative=false.

of their choice than white voters." 2-PL-SER-311–312. As such, the district court did not clearly err in its "intensely local appraisal" of the political process in the Yakima Valley region. *Allen*, 599 U.S. at 19.

III. The district court did not clearly err in its adoption of the remedial district.

"When devising a remedy to a § 2 violation, the 'first and foremost obligation [of the district court] is to correct the Section 2 violation.'" *United States v. Brown*, 561 F.3d 420, 435 (5th Cir. 2009) (quoting *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1022 (8th Cir. 2006)). Remedial plans "should be sufficiently tailored to the circumstances giving rise to the § 2 violation." *Brown*, 561 F.3d at 420. As such, courts have found that the district court "should exercise its traditional equitable powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength." S. Rep. No. 97-417, at 31 (1982); U.S. Code Cong. & Admin. News 1982 at 208; *United States v. Dallas Cnty. Comm'n,* 850 F.2d 1433, 1438 (11th Cir. 1988); *Brown*, 561 F.3d at 435. The remedial plan adopted by the district court did not err in ordering the adoption of the remedial LD14 because it remedies the Section 2 violation while complying with the U.S. Constitution and Washington's traditional redistricting principles.

A. The district court did not clearly err on account of the remedial district's HCVAP percentage.

The district court did not clearly err by adopting a remedial plan that allows Latino voters to elect candidates of choice simply because the district's HCVAP percentage is slightly lower than the enjoined district's.[26] App.Br. 76–80. Remedial districts must be crafted to ensure that "the remedy afford[s] [Latinos] a realistic opportunity to elect representatives of their choice." *Perez*, 253 F. Supp. 3d at 882 (quoting *Bone Shirt*, 461 F.3d at 1023). Courts do not have to create remedial districts meeting certain CVAP percentages, but instead must ensure that, considering the nature of the violation, the "proposed remedy does not dilute minority political strength." *Dillard v. Town of Louisville*, 730 F. Supp. 1546, 1549 (M.D. Ala. 1990); *Dallas Cnty. Comm'n,* 850 F.2d at 1438; *Brown*, 561 F.3d at 435. This is because whether a district remedies a Section 2 violation is not about a numerical racial target. *Cooper*, 581 U.S. at 306 (noting that Section 2 compliance does not demand "precise[]" minority population targets).[27] Rather, whether a

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[26] Intervenors mislead the Court about the remedial district's HCVAP, selectively comparing the *2021* HCVAP of the remedial district to the *2022* HCVAP of the enacted plan. *See* 2-ER-75, *cf.* 2-ER-87.

[27] Curiously, Intervenors told this Court and the Supreme Court that the issue on appeal would be whether a remedial district required *too many* Latino voters. Doc.2 at 2 ("The main issues on appeal surround whether Section 2 of the Voting Rights Act requires a district to be drawn with a super-majority Hispanic Citizen Voting Age Population so as to elect their candidates of choice"); *Trevino v. Soto Palmer*, No. 23-484, Petition for Writ of Certiorari at 8 ("The result of this litigation is a

district violates (or remedies a violation of) Section 2 "entails a functional analysis that is 'peculiarly dependent upon the facts of each case and requires an intensely local appraisal of the design and impact of the contested electoral mechanism.'" *Harding v. Cnty. of Dallas*, 948 F.3d 302, 309 (5th Cir. 2020) (quoting *Gingles*, 478 U.S. at 79).

In adopting Map 3B, the district court conducted such a "functional analysis" and cured vote dilution with a carefully tailored remedy that considered the nature of the original violation and complied with Section 2 of the Voting Rights Act, the U.S. Constitution, and Washington's traditional redistricting principles. 1-ER-4–6. At the liability stage of this case, the district court recognized that the *configuration* of the enacted LD15, which cracked cohesive Latino communities in the Yakima Valley, "in combination with the social, economic, and historical conditions in the Yakima Valley region," resulted in the enacted district having the effect of discrimination. 1-ER-44. Dr. Collingwood and the State's expert, Dr. Alford, found that under the enjoined LD15, white voters usually defeated the preferred candidates of Latino voters (70% of the time).[28] 1-ER-24. In contrast, both Plaintiffs' expert Dr.

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court-ordered remedial map that must essentially be comprised of a supermajority of Latinos"). Now they argue the opposite—that the district court's remedial district with less than a super-majority is illegal.

[28] Amici Commissioners Fain, Graves, and Augustine allege that the district court erred because U.S. Senator Murray received 43% of the vote share within the district. Doc.42.1 at 8. While the Commissioners provide no expert analysis on this point,

Collingwood and Intervenors' remedial expert Dr. Sean Trende agreed that Map 3B provides an opportunity for Latino voters in the district to elect candidates of their choice. 1-ER-5; 2-ER-76. Dr. Collingwood found that, under the remedial map's version of LD14 in the Yakima Valley, Latino voters in the region would have been able to elect their candidates of choice in 8 out of 8 analyzed elections. 1-PL-SER-38. The remedial plan also complies with federal and state law, respects traditional redistricting criteria, and unifies the "Latino community of interest that stretches from East Yakima, through the smaller Latino population centers along the Yakima River, to Pasco" that were cracked in the enjoined plan. 1-ER-4–5. The remedial LD14 is, therefore, sufficiently tailored to the circumstances giving rise to the Section 2 violation.

Intervenors' theory that a remedial district with lower HCVAP than the challenged district is per se vote dilution is nonsensical.[29] Vote dilution occurs when a minority group's voting strength has been minimized within a district such that they can no longer elect candidates of choice. *See Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 276 (2015). Instead of focusing solely on HCVAP

"Section 2 does not require that minority-preferred candidates would win some number of exogenous statewide elections in a proposed district." *Perez v. Abbott*, 253 F. Supp. 3d 864, 882 (W.D. Tex. 2017).

[29] Intervenors' own "proof-of-concept" map, App.Br. 89, had a lower HCVAP than the enacted plan.

percentages to determine dilution, as suggested by Intervenors, courts consider the degree of polarized voting and turnout. *See Perez* 253 F. Supp. 3d at 887–88 (finding that a district with 58.7% HCVAP that split politically active and cohesive Latino voting areas did not provide Latino voters an equal opportunity to elect candidates of choice compared to a districting plan that had a lower HCVAP). Here both experts determined that, considering the district's HCVAP, turnout, numbering, and polarized voting, the remedial LD14 provides Latino voters an equal opportunity to elect candidates of choice. *See* 1-ER-3, 5; 2-ER-76–78.

While Intervenors cite to Justice Thomas' mention of *Soto Palmer* in his *Alexander v. S.C. State Conf. of the NAACP* concurrence, 144 S. Ct. 1221, 1264 (2024), Justice Thomas' understanding of the Section 2 violation and remedy is not based on a functional analysis of the district. To begin, as the district court found, Senator Torres was in fact *not* the candidate of choice for Latino voters in the enacted district. *See supra* II.C.2. Moreover, the configuration of the remedial district (and its HCVAP) is a direct result of respecting the States' policy goals, rather than any racial or partisan target. *See infra* III.B.2. Indeed, neither race nor partisanship was a consideration: Plaintiffs' mapping expert did not use political, partisan, racial, or electoral data when map drawing. 1-ER-1; 2-PL-SER-276.

Regardless, Intervenors' bold claim that a remedial district with a lower voting age population (VAP) than an enacted district has never been ordered is incorrect.

Courts have ordered remedial plans with lower VAPs as long as the remedial districts allow voters to elect candidates of choice. *See, e.g., Bethune-Hill v. Virginia State Bd. of Elections*, 368 F. Supp. 3d 872, 887–88 (E.D. Va. 2019) (adopting a remedial district plan for eleven legislative districts that provided Black voters the ability to elect candidates of choice with drastically lower Black VAP including some districts lowering Black VAP *over fifteen percent*, from 60% and 56% to 47.36% and 41.93%). Courts have also approved minority districts with VAPs of 33.6%, 40.3%, 42.7%, 51%, and 51.8%, demonstrating "there is no bright-line rule for discerning an appropriate VAP level." *Puerto Rican Legal Def. & Educ. Fund, Inc. v. Gantt*, 796 F. Supp. 681, 694 (E.D.N.Y. 1992) (collecting cases). As such, Appellants arguments regarding numerical voting age population thresholds have no merit.

Intervenors also cite *Cooper* and *Bartlett v. Strickland*, 556 U.S. 1 (2009), for two propositions—that the inclusion of Native American voters created an impermissible coalition/cross-over remedial district and that no crossover voting is permitted in a remedial district. But neither case supports their contentions. *Cooper* and *Bartlett* concern whether Section 2 requires the creation of a cross-over district, not whether remedial plans that include over 50% majority of the harmed minority group may also include other minority voters. *Cooper*, 581 U.S. at 305 (summarizing *Bartlett*). In *Cooper,* the Supreme Court held that a district with a sub-majority minority population nonetheless complied with Section 2 because of greater white

"crossover" support for minority candidates in the region. *Id*. at 306. Intervenors' theory that Latino voters must make up a "working" majority in a remedial district such that they alone elect candidates of choice has already been rejected by the *Cooper* court. *Id*. (The idea that "whenever a [court] *can* draw a majority-minority district, it *must* do so—even if a crossover district would also allow the minority group to elect its favored candidates . . . is at war with our § 2 jurisprudence—*Strickland* included."); *Bethune-Hill*, 368 F. Supp. 3d at 887–88 (adopting remedial districts with less than 50% Black voting population because crossover voting enabled the districts to elect Black candidates of choice). Nonetheless, Intervenors did not present any evidence that the Latino majority in the enacted district does *not* make up a working majority of the voters. At bottom, Intervenors' speculation cannot disprove that the remedial district provides Latino voters with an equal opportunity to elect.

Notably, Native American voters are included in the remedial district in larger numbers based on the State's and *Intervenors' own preference* that as much of the Yakama Nation Reservation and off-reservation trust lands as practical be kept within one legislative district. *See* 2-PL-SER-183–184; 1-PL-SER-114–121; 1-ER-2–12. Intervenors cannot use their own stated preference to include the Yakama Nation Reservation and lands as a sword and shield. *See also infra* III.B.2.

The district court found that LD15 violated Section 2 because it cracked cohesive Latino voters, fractured communities of interest, and was drawn in a manner that would not permit Latinos to elect candidates of choice. 1-ER-39–40. The remedial LD14, which has a HCVAP of 51.04% and performs for Latino preferred candidates, remedies the Section 2 violation.

B. Intervenors' racial gerrymandering claim is waived and unsupported in law or fact.

1. Intervenors waived their racial gerrymandering claim.

Intervenors waived their claim that the remedial map is an unconstitutional racial gerrymander. "[O]rdinarily, [an appellate court] does not decide questions not raised or resolved in the lower court[s]." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992) (quoting *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (*per curiam*)) (second bracket in original). This is an axiomatic appellate rule: "[i]f a litigant believes that an error has occurred (to his detriment) during a federal judicial proceeding, he must object in order to preserve the issue. If he fails to do so in a timely manner, his claim for relief from the error is forfeited." *Pucket v. United States*, 556 U.S. 129, 134 (2009). An appellate court's authority to entertain a forfeited issue is "strictly circumscribed" because the district court "is ordinarily in the best position to determine the relevant facts and adjudicate the dispute." *Id.* This rule also prevents a litigant from "'sandbagging' the court—remaining silent about his objection and belatedly raising the error only if the case does not conclude in his

favor." *Id.* (quoting *Wainwright v. Sykes*, 433 U.S. 72, 89 (1977)). The Ninth Circuit considers arguments waived when raised for the first time on appeal. *See Hillis v. Heineman*, 626 F.3d 1014, 1019 (9th Cir. 2010) ("These arguments are raised for the first time on appeal, and because they were never argued before the district court, we deem them waived."); *Baccei v. United States*, 632 F.3d 1140, 1149 (9th Cir. 2011) ("[This Court] will not reframe an appeal to review what would be in effect a different case than the one decided by the district court."). "This general rule is supported by considerations of fairness and judicial efficiency." *United States v. Flores-Payon*, 942 F.2d 556, 558 (9th Cir. 1991) (quoting *United States v. Whitten*, 706 F.2d 1000, 1012 (9th Cir. 1983)).

At no point during the district court's lengthy remedial proceedings did Intervenors contend that any of Plaintiffs' proposed remedial maps were an unconstitutional racial gerrymander. Intervenors have had Plaintiffs' proposed remedial maps, and accompanying expert reports, since December 1, 2023. 2-ER-180–223; 2-PL-SER-269–303. Intervenors submitted a brief, accompanied by their own expert report, raising legal arguments why the district court should not adopt Plaintiffs' proposals. 2-PL-SER-187–268, 173–186. The district court held oral argument on February 9, 2024, during which Intervenors presented their objections to Plaintiffs' proposals. 1-PL-SER-69–100. In neither their brief nor at oral argument did Intervenors once contend that the district court would be imposing an

unconstitutional racial gerrymander were it to adopt any of Plaintiffs' proposed maps. Only on appeal have Intervenors ever argued that any of the remedial proposals considered by the district court were unconstitutional racial gerrymanders.[30]

In their Supreme Court briefing, Intervenors referred to a footnote in the State of Washington's briefing to purportedly show that they raised a claim of racial gerrymandering regarding the remedial map. *See* Int. S. Ct. Reply at 10 n.1. As the State put it, however, while Intervenors "raised the specter of racial gerrymandering in a single paragraph in their motion to intervene…they did not raise a gerrymandering argument in opposition to Plaintiffs' multiple proposed maps."

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[30] Intervenors cannot claim, as they attempted to do at the Supreme Court, that Plaintiffs first introduced maps with the remedial configuration of LD14 on January 5, 2024, and that they had no opportunity to argue that the proposed LD14 was a racial gerrymander. *See* Applicants' Reply in Support of Their Emergency Application ("Int. S.Ct. Reply") at 10 n.1, *Trevino v. Soto Palmer*, No. 23-484 (U.S. Mar. 30, 2024). That contention misstates the record and, if anything, merely highlights Intervenors' dilatory review of and response to Plaintiffs' initial introduction of map proposals which occurred on *December 1, 2023*, more than a month before briefing closed. 2-ER-180; 2-PL-SER-277–278. Two of Plaintiffs' December 1 maps, Maps 3 and 4, included the LD14 configuration that formed the basis of the adopted remedial map. *See id*. Intervenors responded to those proposals in their December 22, 2023, filing but made no mention of racial gerrymandering. 2-PL-SER-177–180. LD14 in Plaintiffs' subsequent Maps 3A and 3B was nearly identical to that of Map 3, containing changes only to surrounding districts in response to Intervenors' complaints about incumbent displacement and the district court's requests. 1-PL-SER-158; 1-ER-47–54.

State of Washington's and Secretary of State Steve Hobbs's Resp. to the Emergency Application at 33 n.11, *Trevino v. Soto Palmer*, No. 23-484 (U.S. Mar. 29, 2024).

Intervenors also contended that they had sufficiently raised a racial gerrymandering claim in the district court by asking Plaintiffs' expert a question about his awareness of racial demographics while drawing the map. Int. S. Ct. Reply at 10 n.1; Doc.16.1 at 19 n.4. But parties cannot raise legal claims by merely asking witnesses related questions in the absence of any argument. *See, e.g., Ledford v. Peeples*, 657 F.3d 1222, 1258 (11th Cir. 2011) ("A mere recitation of the underlying facts … is insufficient to preserve an argument; the argument itself must have been made below."); *City of Nephi v. Fed'l Energy Regulatory Comm'n*, 147 F.3d 929, 933 n.9 (D.C. Cir. 1998) (holding that an argument is not preserved by "merely informing the [district] court in the statement of facts in its opening brief [of the factual predicate for a claim]"). In any event, Dr. Oskooii's answer to the question was that he had not considered race at all in the map drawing. 1-PL-SER-19 at 47:6–25. This does not alert the district court to an argument that the map might be an unconstitutional racial gerrymander.

Intervenors' failure to raise their racial gerrymandering claim in the district court is especially fatal because the claim involves a fact-intensive assessment of a mapdrawer's intent. In *Bethune-Hill*, the Supreme Court declined an invitation to conclude, after correcting the district court's legal errors in adjudicating racial

gerrymandering claims, that various Virginia legislative districts were unconstitutional racial gerrymanders. *Bethune-Hill v. Virginia State Bd. Of Elections*, 580 U.S. 178, 192–93 (2017). "The District Court is best positioned to determine in the first instance the extent to which, under the proper standard, race directed the shape of these 11 districts. And if race did predominate, it is proper for the District Court to determine in the first instance whether strict scrutiny is satisfied." *Id.* at 193.

Here, unlike in *Bethune-Hill*, Intervenors never even claimed that any remedial proposal before the district court was a racial gerrymander. Intervenors cannot ask this Court to make factual findings regarding the mapdrawer's motivations in order to advance a legal claim that was never raised in the district court.[31] Indeed, Intervenors claimed in the district court that *partisanship* (not race) was the predominant motivation in the configuration of Plaintiffs' proposed remedial maps. 2-PL-SER-180–183 (contending that Plaintiffs proposed "an overtly partisan legislative map"); 1-PL-SER-76–77. Intervenors repeat that argument in their opening brief, now boldly contending that the *district court* was seeking partisan advantage in selecting a remedial map. App.Br. 85–86. But a party alleging a racial

[31] Unlike in *Bethune-Hill*, where the Supreme Court remanded to the district court to make racial gerrymandering factual findings after correcting the district court's legal errors, Intervenors would not be entitled to a remand here, having waived the claim below.

gerrymander must show "that race (not politics)" was the predominant consideration. *Cooper*, 581 U.S. 285 at 318. Intervenors cannot raise for the first time on appeal a racial gerrymandering contention that was "not raised before the district court [and is] inconsistent with positions employed there." *Momox-Caselis v. Donohue*, 987 F.3d 835, 841 (9th Cir. 2021).

2. Intervenors' racial gerrymandering claim is unsupported by the record.

Intervenors' racial gerrymandering claim is unsupported by the record. To show that a map is an unconstitutional racial gerrymander, a party must "prove that 'race was the predominant factor motivating the [mapdrawer's] decision to place a significant number of voters within or without a particular district.'" *Cooper*, 581 U.S. at 291 (quoting *Miller v. Johnson,* 515 U.S. 900, 919 (1995)). This showing "entails demonstrating that the [mapdrawer] "subordinated other factors—compactness, respect for political subdivisions, partisan advantage, what have you—to racial considerations." *Id*. (internal quotation marks omitted). The burden on the party claiming racial gerrymandering is "demanding." *Easley v. Cromartie*, 532 U.S. 234, 257 (2001). "The Equal Protection Clause does not prohibit misshapen districts. It prohibits unjustified racial classifications." *Bethune-Hill*, 580 U.S. at 189.

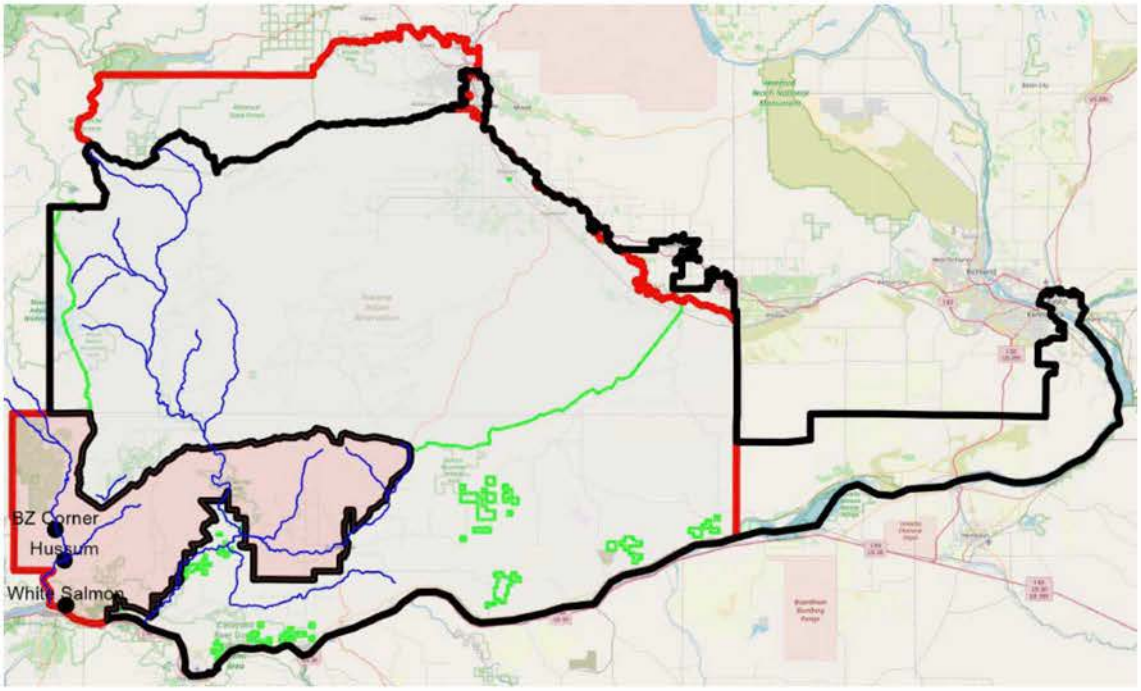
If the party succeeds in showing race was the predominant factor, "the design of the district must withstand strict scrutiny," with a compelling interest that is narrowly tailored. *Cooper*, 581 U.S. at 292. The Supreme Court "has long assumed

that one compelling interest is complying with operative provisions of the Voting Rights Act of 1965." *Id*. Intervenors' three-page argument falls woefully short of their burden—particularly here where Intervenors must show that the district court clearly erred. *Alexander v. S.C. State Conf. of the NAACP*, 144 S. Ct. 1221, 1240 (2024) (holding that appellate court will review racial gerrymandering "factual findings for clear error").

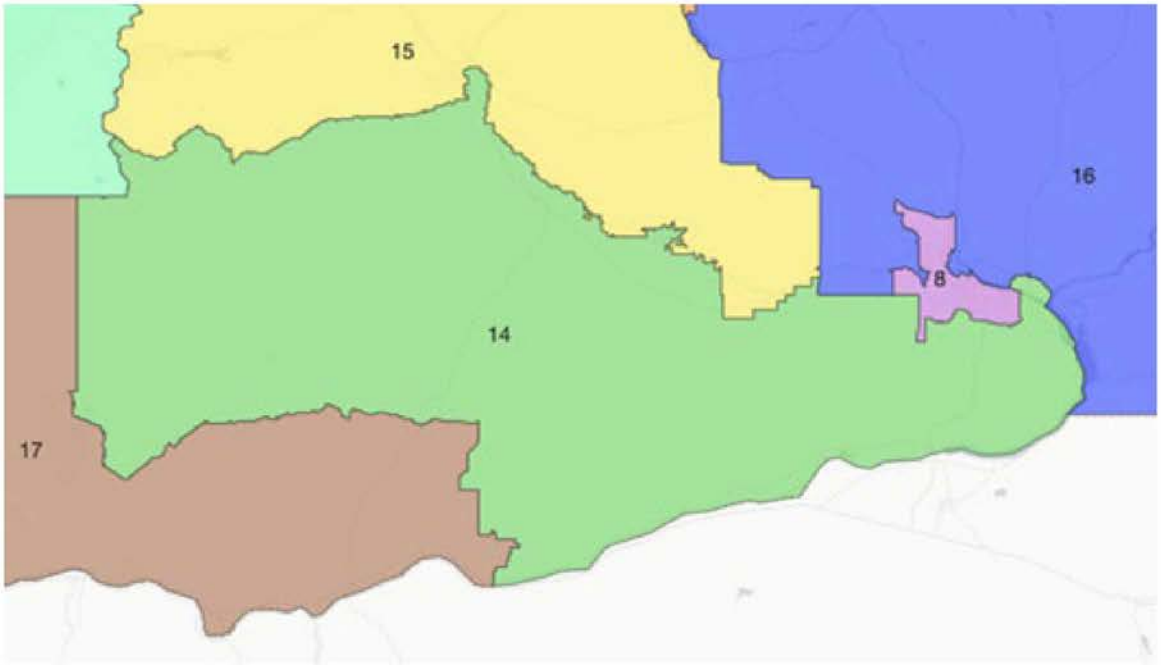
First, Intervenors cite no record evidence to support their contention that race predominated in the drawing of the remedial map—nor could they. The remedial map was drawn by Plaintiffs' expert Dr. Oskooii, who testified about his mapmaking process: "I did not consider race or racial demographics in drawing the remedial plans. I did not make visible, view, or otherwise consult any racial demographic data while drawing districts." 2-PL-SER-273; 1-PL-SER-139. He reiterated that testimony at the evidentiary hearing, testifying that he removed racial data from the mapdrawing program and was otherwise unaware of the racial demographics of the various communities. 1-PL-SER-5–6, 9, 19. By contrast, Intervenor's own expert testified to using race as a consideration in drawing Intervenor's illustrative map: "I think its admirable how Dr. Oskooii testifies he went about doing it, but my understanding is it's not how it's required to do. You don't have to be completely race blind, especially once a VRA violation is found." 1-PL-SER-26. The record

belies Intervenors' contention that the remedial map—which was drawn without consideration of any race data—somehow had race as its predominant motivation.

Second, Intervenors contend that the remedial district has a "bizarre shape" and resembles an "octopus slithering along the ocean floor," and on that basis flunks an "aesthetic test" and is "unexplainable but by race-based criteria." App.Br. 80–81 (internal quotation marks omitted). But the record reveals precisely why the district is shaped as it is, and it has nothing to do with including or excluding voters on account of their race. As Dr. Oskooii explained, the district's southwestern portion was added to include the Yakama Nation's off-reservation trust lands and fishing villages in the same district as its reservation—a traditional districting principle and something Intervenors repeatedly requested. 1-PL-SER-94–95, 114–121. Those areas of land are shown in green below:



2-ER-67. Indeed, the remedial map selected by the district court was a variation of another of Plaintiffs' proposed remedial maps, shown below in green:



2-PL-SER-273.

This looks nothing like an octopus, or any other "bizarre shape." App.Br. 81 (internal quotation marks omitted).[32] As Dr. Oskooii explained, Map 3 (which with minor changes became the remedial map) modified Map 1 by including almost all, rather than just some, of the off-reservation trust lands and fishing villages. 2-PL-SER-274–278; *see also* 2-ER-65 (map of trust lands). The resulting district shape

[32] This shows how Intervenors' contention that uniting Latino communities of interest in the region "wrought the sauntering cephalopod" is contrary to the record. App.Br. 82. At Intervenors' behest, Plaintiffs extended the district to include additional Yakama Nation tribal lands. Intervenors' contention that this was actually a method of adding Latino voters based upon race is misleading at best.

was a product of these modifications, necessary adjustments to ensure population equality, and minimizing political subdivision splits as required by Washington law. 1-PL-SER-9–11 at 32:22–34:12. Intervenors now object to features of the remedial map that were configured to address a concern *they* raised about including the maximum amount of tribal lands. *See also* 1-ER-7–8 (district court explaining map's purpose in maximizing inclusion of off-reservation trust lands). Intervenors' misleading representation about the factual record does not establish a racial gerrymandering violation.

Third, unable to dispute that Dr. Oskooii—the mapdrawer—did not consider race in drawing the remedial district, Intervenors contend that race unconstitutionally predominated in the district court's selection among the proffered maps—all of which the record reflects were drawn without consideration of race data. App.Br. 81–82. This is so, Intervenors contend, because the district court observed that a "fundamental goal of the remedial process" was to "*unite the Latino community* of interest in the region." App.Br. 81 (quoting 1-ER-08 n.7) (emphasis added by Intervenors). But the Section 2 violation was a result of the enjoined map cracking these Latino populations into two legislative districts. 1-ER-3–4. It is hardly surprising—and certainly not unconstitutional—that the district court would select as a remedy a map that resolved that cracking. Intervenors do not explain how this retroactively converts the *mapdrawer's* process into one in which race

predominated, nor how that factor alone could make race the predominant consideration.

Fourth, because strict scrutiny is not triggered, Intervenors' contention that the remedial map is not narrowly tailored is irrelevant. App.Br. 82–83. But their argument is also wrong. They contend that the map is not narrowly tailored because of their belief that it alters more districts than necessary, App.Br. 83–89, which they later insinuate the district court did for partisan reasons: "If partisan changes through Washington were not the point, it is simply incomprehensible why the district court adopted a Map 3 variant," App.Br. 87. These arguments are at loggerheads: the district court cannot flunk strict scrutiny for narrowly tailoring its use of *race* when Intervenors contend the district court was actually motivated by *partisanship*.[33]

Finally, Intervenors' contradictory, shifting positions in this litigation underscore the emptiness of their arguments. They ask this Court to reverse the district court's liability and remedial orders and to thereby resurrect the enacted LD15. But in the district court, Intervenors (belatedly) sought to plead a crossclaim alleging that the enacted district was itself an unconstitutional racial gerrymander. 3-PL-SER-404–408. Now, Intervenors want that district—the same district that Intervenors' counsels' other client still contends is an unconstitutional racial

[33] The district court was actually motivated by neither race nor partisanship, as the court well explains in its remedial decision. 1-ER-2–12.

gerrymander—to take effect. *See Garcia v. Hobbs*, 144 S. Ct. 994, at *1 (2024) (Mem.) (vacating for entry of fresh judgment from which an appeal may be taken to the Ninth Circuit).

C. The district court's remedial map alters the enacted plan no more than necessary to cure the violation.

The court committed no error in finding that Map 3B follows state and traditional redistricting criteria, respects the state's policy judgments, and alters the enacted plan no more than is necessary to remedy the Section 2 violation. In fashioning a Section 2 remedy, "a court, as a general rule, should be guided by the legislative policies underlying the existing plan, to the extent those policies do not lead to violations of the Constitution or the [VRA]." *Abrams v. Johnson*, 521 U.S. 74, 79 (1997). The district court's chosen remedy, Map 3B, does exactly this.

Plaintiffs' expert Dr. Oskooii drew all proposals, including Map 3B, by starting with the enacted plan and adjusting only as needed to remedy the violation while abiding by state and traditional redistricting principles. 1-PL-SER-129–130; 2-PL-SER-272. There is no dispute that the map has equally-populated districts within acceptable deviation; is reasonably compact, contiguous, and convenient; minimizes county, city, and precinct splits; and respects communities of interest consistent with Washington law. See RCW § 44.05.090; 1-PL-SER-138, 157–158; 2-ER-69.

Map 3B also "follow[s] the policies and preferences of the State," *Upham v. Seamon*, 456 U.S. 37, 41 (1982), including the State's desire to honor the Yakama Nation's wish to keep the Tribe's land and people in one district to the extent practicable. 1-PL-SER-101–113. Indeed, Map 3B includes in LD14 the entire tribal reservation, more than 96% of tribal off-reservation trust lands, and 13 out of 14 of the tribe's treaty fishing access sites along the Columbia River. 1-PL-SER-43–44; 1-PL-SER-11 at 34:8–12. Map 3B also has the largest number and share of Native American voting-age residents in LD14 as compared to the enacted map and Intervenors' proposal. 1-PL-SER-45. The district court did not clearly err in finding that Map 3B accomplishes these objectives while "avoid[ing] gratuitous changes[] to the enacted map." 1-ER-5; 1-PL-SER-23 at 68:8–13 (Representative from the Yakama Nation stating, "[w]e thank the court for its strong effort to preserve the Yak[a]ma Nation's stated interest in the remedial process.").[34] Intervenors' contrary arguments are meritless.

[34] Amici Commissioners Fain, Graves, and Augustine claim the remedial map ignores the Yakama Nation's wishes for the district by citing to a letter sent *prior* to the adoption of the remedial map. Doc.42.1 at 17 (citing 1-PL-SER-114–121). But *after* the letter was sent, the Yakama Nation provided information about certain off-reservation sites so the remedial plan could include those parcels. A Yakama Nation representative was provided an opportunity to object to the remedial maps and did not do so. *See* 1-PL-SER-101–113; 1-PL-SER-22–23 at 67:6–68:13.

First, Intervenors have no standing to raise this argument because only the State could be harmed by a court failing to adhere to its policy goals. The State has not appealed and has not contended its policy goals were infringed. Second, Intervenors' refrain that Map 3B alters 13 of the state's 49 legislative districts is unpersuasive. This fact is unsurprising given that the two districts at issue, LDs 14 and 15, are situated in the middle of the state and each border five and six districts with large areas of sparsely populated territory, respectively. Wash. State Redistricting Comm'n., Dist. Maps & Handouts (Legislative District Maps), https://perma.cc/P48S-4GD9; 1-ER-9; 2-PL-SER-275–278. But the magnitude of the changes made in the remedial plan is small. Dr. Oskooii's undisputed core retention analysis shows that Map 3B affects less than 5.5% of the state's roughly 7.7 million people. 1-PL-SER-170. In other words, the map retains 94.5% of Washingtonians in the same district as the enacted plan. *See Singleton v. Allen*, No. 2:21-CV-1291-AMM, 2023 WL 6567895, at *9 (N.D. Ala. Oct. 5, 2023) (ordering remedy with core population retention of 86.8%). Intervenors' other claims regarding the number of Washingtonians moved are also incorrect. App.Br. 85. They inflate by nearly 100,000 the number of affected people. 1-PL-SER-134–135.

Furthermore, Intervenors' complaints regarding incumbency are irrelevant. App.Br. 85. "[P]urely political considerations that might be appropriate for legislative bodies," like incumbent protection, "have no place in a plan formulated

by the courts." *Larios v. Cox*, 306 F. Supp. 2d 1214, 1218 (N.D. Ga. 2004) (internal citations omitted). Nor is incumbent protection among the state's redistricting criteria. RCW § 44.05.090. Nevertheless, Map 3B avoids incumbent displacement where possible. 1-PL-SER-150–151, 157; *Abrams*, 521 U.S. at 84 (upholding plan subordinating incumbent protection to other factors).

Intervenors' demand for a map with specific partisan performance is similarly misplaced. District courts have no duty to maintain specific political performance in a remedial plan. *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 563–64 (E.D. Va. 2016) ("[W]e have found no case holding that we must maintain a specific political advantage in drawing a new plan[.]"); *Bone Shirt*, 461 F.3d at 1024 (rejecting Defendants' argument the district court erred when adopting a remedial plan that "may result in a new [political] dynamic"). And because Washington prohibits favoring or disfavoring any political party, RCW § 44.05.090(5), Dr. Oskooii declined to consider any political, partisan, or electoral data while drawing his remedial proposals, including Map 3B. 1-ER-11; 1-PL-SER-274. Regardless, any slight changes in the partisan metrics of a district that may have come about due to balancing total population are not significant. This is clear in the analysis: Map 3B confers no gain or loss to any party beyond LDs 14 and 15, and the overall partisan tilt of the legislative map remains slightly Republican, just as in the enacted plan. 1-ER-11; 1-PL-SER-145–150.

Intervenors next argue that the availability of other mapping alternatives demonstrates that the district court erred, but this is not the case. First, no mapping proposal was suitable to Intervenors, and so their arguments here regarding the viability of Maps 4 and 5 are unserious. 2-PL-SER-175 ("Intervenor-Defendants' legal position is simple—this Court should reject Plaintiffs' remedial maps . . . ."). Intervenors next claim that Dr. Trende's illustrative map—which was submitted to the district court three months after the parties' deadline to submit remedial proposals—shows that a remedy could be ordered that entails fewer changes. But Dr. Trende's map is not actually a remedy to the Section 2 violation—nor did he suggest it was, 1-PL-SER-33 at 95:18–25—because it fails to unify the Latino community of interest that the enacted plan had unlawfully cracked, hampering Latino voters' ability to organize effectively to elect candidates of their choice. 1-ER-10; 1-PL-SER-40–41. The plan also suffered from additional flaws, including splitting the Yakama Reservation. 1-ER-10; 1-PL-SER-39–67. Such a map cannot serve as a reliable comparator.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's liability and remedial decisions.

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Respectfully submitted,

/s/ Chad W. Dunn
Chad W. Dunn
Sonni Waknin
UCLA VOTING RIGHTS PROJECT
3250 Public Affairs Building
Los Angeles, CA 90095
(310) 400-6019
chad@uclavrp.org
sonni@uclavrp.org

Thomas A. Saenz
Ernest Herrera
MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATION FUND
643 S. Spring St., 11th Fl.
Los Angeles, CA 90014
(213) 629-2512
tseanz@maldef.org
eherrera@maldef.org

Edwardo Morfin
MORFIN LAW FIRM, PLLC
2602 N. Proctor St., Ste. 205
Tacoma, WA 98407
(509) 380-9999

Mark P. Gaber
Aseem Mulji
Simone Leeper
Benjamin Phillips
CAMPAIGN LEGAL CENTER
1101 14th St. NW, Ste. 400
Washington, DC 20005
(202) 736-2200
mgaber@campaignlegal.org
amulju@campaignlegal.org
sleeper@campaignlegal.org
bphillips@campaiginlegal.org

Annabelle E. Harless
CAMPAIGN LEGAL CENTER
55 W. Monroe St., Ste. 1925
Chicago, IL 60603
aharless@campaignlegal.org

Counsel for Plaintiffs-Appellees

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I hereby certify that on August 30, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the Appellate Electronic Filing system, which will notify all registered counsel.

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Chad W. Dunn