Nos. 23-35595, 24-1602

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN SOTO PALMER, et al.,

Plaintiffs–Appellees,

v.

STEVEN HOBBS, et al.,

Defendants–Appellees,

and

JOSE A. TREVINO, et al.,

Intervenor–Defendants–Appellants.

On Appeal from the United States District Court for the
Western District of Washington, Case No. 3:22-cv-5035-RSL
The Honorable Robert S. Lasnik, U.S. District Court Judge

APPELLEE STATE OF WASHINGTON'S ANSWERING BRIEF

ROBERT W. FERGUSON
Attorney General

CRISTINA SEPE, WSBA #53609
Deputy Solicitor General
ANDREW R.W. HUGHES, WSBA #49515
Assistant Attorney General
800 Fifth Avenue, Suite 2000
P.O. Box TB-14
Seattle, WA 98104-3188
Cristina.Sepe@atg.wa.gov
Andrew.Hughes@atg.wa.gov
Attorneys for Appellee State of Washington

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

Other Authorities

I. INTRODUCTION

After Washington adopted its 2020 redistricting plan, Plaintiffs–Appellees sued, arguing that Legislative District 15 (LD 15) in central Washington violated Section 2 of the Voting Rights Act (VRA) by denying Hispanic voters an equal opportunity to elect candidates of their choice. Three individuals—Intervenors–Appellants here—sought to intervene to defend LD 15. The district court denied mandatory intervention, finding that they had no special interest in the district's boundaries, but allowed permissive intervention. The district court also joined the State of Washington to the case. The State initially defended against the plaintiffs' claims, but after the State's expert concluded that the *Gingles* preconditions were met, and in light of multiple recent lawsuits in the same area finding federal and state VRA violations, the State ultimately conceded that it had no basis to dispute Plaintiffs' Section 2 results claim.

Following a trial and careful review of the evidence, the district court ruled for Plaintiffs. The court gave Washington's Legislature time to enact a revised map, but it declined. The court then invited the parties to submit proposed maps, appointed a special master, and ultimately adopted a revised version of a map proposed by Plaintiffs. Intervenors asked this Court to stay the remedial map, but it denied the motion, finding that the applicants likely lack standing to appeal. The Supreme Court

also denied Intervenors' stay application. Intervenors now appeal the merits of the district court's judgment and remedy. This Court should affirm for several reasons.

First, Intervenors lack standing to appeal. Private parties lack standing to appeal a judgment invalidating a state law that they have no role in enforcing or implementing. Intervenors have no such role as to LD 15, so they have no interest in the district's boundaries that differs from that of any other Washingtonian. Seeking to evade this, they hinge their standing to appeal on claims of injury from the remedy imposed, but even if those claims were valid, they would provide no basis to challenge the underlying liability finding. And in any case, Intervenors' claims of harm from the remedial order are doubly flawed: they never asserted during the remedial process that the map adopted by the district court was a racial gerrymander, and even if they had, they do not colorably allege any injury from the remedial map.

Second, Intervenors' argument that the district court lacked jurisdiction to decide the VRA claims under 28 U.S.C. § 2284 is refuted by text, precedent, and history. Every court to consider Intervenors' jurisdictional argument has rejected it.

Third, even if Intervenors have standing, their remaining hodgepodge of arguments amount to meritless factual disagreements with the district court, reviewed for clear error. The crux of their factual argument is that LD 15 was already majority Hispanic and recently elected a Hispanic candidate, so it must satisfy the

VRA. But courts uniformly agree that majority-minority districts do not automatically comply with the VRA—results matter. And here, the district court found, based on extensive evidence, that candidates preferred by Hispanic voters would usually lose in LD 15. The recent election of one Hispanic candidate did not contradict that finding because all of the evidence—including Intervenors' own expert report—showed that the Hispanic candidate was not preferred by Hispanic voters in LD 15. Contrary to Intervenors' implication, just because a candidate belongs to a racial group does not mean that they are preferred by that group.

The district court reached the amply supported conclusion that LD 15 violates the VRA and adopted a map that remedies that violation. The map empowers Hispanic voters in remedial LD 14 to elect the candidates of their choice and also united other communities of interest. This Court should affirm the judgment and remedy. Otherwise, voters will suffer real harm from voting in a district in which they have been denied the equal opportunity to elect candidates of their choice.

II. STATEMENT OF ISSUES

1. Whether Intervenors have standing to appeal when they have no role in the enforcement or implementation of the challenged legislative district?

2. Whether a single-judge district court has jurisdiction to decide a Section 2 Voting Rights Act claim under 28 U.S.C. § 2284?

3. Whether the district court clearly erred in its determination that enacted Legislative District 15 violated Section 2?

4. Whether the district court abused its discretion in adopting a legislative map that remedies the Section 2 violation?

III. STATEMENT OF THE CASE

A. The Washington Redistricting Commission and Adoption of Legislative District 15

Washington's Constitution provides for a bipartisan Redistricting Commission to draw state legislative and congressional districts. The Commission consists of four voting members and one non-voting chairperson. *See* Wash. Const. art. II, § 43(2). The voting members are appointed by the leaders of the two largest political parties in each house of the Legislature. *Id.* For the 2021 redistricting cycle, the four voting Commissioners were April Sims (appointed by House Democrats), Brady Piñero Walkinshaw (Senate Democrats), Paul Graves (House Republicans), and Joe Fain (Senate Republicans).

Under Washington law, the Commission must agree, by majority vote, to a redistricting plan by November 15 of the redistricting year, and then transmit the plan to the Legislature. Wash. Rev. Code § 44.05.100(1); Wash. Const. art. II, § 43(2). Thus, the Commission cannot propose a plan without bipartisan agreement amongst the Commissioners. The Legislature then has 30 days to amend the plan. Wash Rev. Code § 44.05.100(2). The redistricting plan becomes final upon the

Legislature's approval of any amendment or after expiration of the 30-day window for amending the plan, whichever occurs sooner. Wash Rev. Code § 44.05.100(3).

The 2021 Commission was the first in State history to grapple with Section 2 of the Voting Rights Act. The 2020 Census showed dramatic growth of Washington's Hispanic population, centered in the Yakima Valley region. *See* WA-SER-122.[1] In the years leading up to 2021, three separate cases found violations of the federal Voting Rights Act or Washington Voting Rights Act related to local elections in that region. In *Montes*, a federal district court concluded that Yakima's at-large voting system for city council elections violated Section 2 of the VRA. *Montes v. City of Yakima*, 40 F. Supp. 3d 1377 (E.D. Wash. 2014). The court reviewed evidence regarding the three *Gingles* factors and concluded that each was satisfied with respect to Latino voters in Yakima. *Montes*, 40 F. Supp. 3d at 1390-1407. The court also found that the totality of the circumstances demonstrated that the City's electoral process was not equally open to Latino voters. *Id*. at 1408-14. In *Glatt*, a challenge to Pasco's at-large voting system, a federal district court entered a consent decree in which the parties stipulated to each *Gingles* factor as well as a finding that the totality of the circumstances showed an exclusion of Latinos from meaningfully participating in the political process. *See* ECF No. 16 ¶¶ 15-22, Partial

[1] Filings from the *Soto Palmer* district court docket not included as Supplemental Excerpts of Record will be short cited as *Soto Palmer*, ECF No. __.

Consent Decree, *Glatt v. City of Pasco*, No. 4:16-cv-05108-LRS (E.D. Wash. Sep. 2, 2016); *see also* ECF No. 40, at 29, Mem. Op. and Order, *Glatt v. City of Pasco*, No. 4:16-cv-05108-LRS (E.D. Wash. Jan. 27, 2017) (WA-SER-220-289); WA-SER-122. And in *Aguilar v. Yakima County*, No. 20-2-0018019 (Kittitas Cnty. Super. Ct.), a challenge to the at-large voting system used in Yakima County, the court approved a settlement agreement finding that the conditions for a violation of the Washington Voting Rights Act had been met in Yakima County, including a showing of racially polarized voting. WA-SER-290-300; WA-SER-122

On September 21, 2021, after the Commission received Census data, the four voting Commissioners released their first proposed legislative maps. WA-SER-122 Shortly thereafter, the Senate Democratic Caucus retained Dr. Matt Barreto of the UCLA Voting Rights Project to evaluate the extent of racially polarized voting in the Yakima Valley and assess the proposed maps' compliance with the VRA. 3-ER 435. In his analysis, Dr. Barreto concluded there was "clear" evidence "of racially polarized voting" in the Yakima Valley. 3-ER-451. He opined that to comply with the VRA, the Commission needed to include a district with a majority-Hispanic citizen voting age population (CVAP) that allowed Latino voters to elect candidates of their choice. 3-ER-452-458.

Following this report, Commissioners Sims and Walkinshaw released new proposed maps designed to better comply with the VRA by increasing the Hispanic

CVAP in the Yakima Valley district that eventually became Legislative District (LD) 15, while also improving on the previous maps in other respects. *See* WA-SER-205-207; *see also* WA-SER-202, 208. Meanwhile, Commissioners Fain and Graves obtained a legal opinion arguing that a majority-minority district in the Yakima Valley was not legally necessary. The opinion noted that it was primarily a legal analysis and that the authors had not "conduct[ed] factual research regarding demographic trends, voting behavior, [or] election results[.]" WA-SER-209.

The Commissioners negotiated extensively in an effort to reach bipartisan compromise. The Commissioners ultimately voted unanimously to approve a legislative redistricting plan consisting primarily of an agreed set of partisan metrics, which was then translated by staff into a map. WA-SER-176-177, 178, 183, 197-198.

The Legislature exercised its statutory prerogative to make minor amendments to the Plan, making changes to LD 15 without altering its demographic make-up. WA-SER-122 ¶ 75. On February 8, 2022, the Legislature passed House Concurrent Resolution 4407, adopting the amended redistricting plan. H. Con. Res. 4407, 67th Leg., Reg. Sess. (Wash. Feb. 2, 2022) (enacted). Upon passage, the Legislature's amended redistricting plan became State law. Wash. Rev. Code § 44.05.100.

B. The *Soto Palmer* and *Garcia* Lawsuits Challenging Legislative District 15

In January 2022, Plaintiffs filed this suit, alleging that LD 15 diluted Hispanic voting strength in violation of Section 2 of the Voting Rights Act. 3-ER-350-393. They alleged an intent claim and a results claim. The case was assigned to Judge Lasnik of the Western District of Washington.

Nearly two months later, in March 2022, a different plaintiff, Benancio Garcia, filed his own lawsuit alleging that LD 15 was a racial gerrymander in violation of the Fourteenth Amendment. *Garcia v. Hobbs*, No. 3:22-cv-05152-RSL-DGE-LJCV (W.D. Wash. Mar. 15, 2022), ECF No. 1. That case was assigned to a panel of Judge Lasnik, Chief Judge Estudillo of the Western District of Washington, and Judge VanDyke of the Ninth Circuit.

Two weeks after *Garcia* was filed, three individuals, Intervenor–Defendants–Appellants here—represented by the same counsel as Mr. Garcia—moved to intervene in *Soto Palmer* to defend LD 15 against the Section 2 claim. The district court denied their request for intervention as of right, finding that Intervenors failed to "identif[y] any direct and concrete injury that has befallen or is likely to befall them if plaintiffs' Section 2 claim is successful." *Soto Palmer v. Hobbs*, No. 3:22-cv-05035-RSL, 2022 WL 2111115, at *2 (W.D. Wash. May 6, 2022) (provided at WA-SER-152-161). Nonetheless, the court granted permissive intervention. *Id.* at *5. At the same time, the court ordered the State of Washington joined as a party "to

ensure that the Court has the power to provide the relief plaintiffs request[.]" *Soto Palmer v. Hobbs*, No. 3:22-cv-05035-RSL, 2022 WL 18359429, at *3 (W.D. Wash. May 6, 2022) (provided at WA-SER-162-166).

The two cases then proceeded with: (1) the *Soto Palmer* Plaintiffs challenging LD 15 under Section 2; (2) the *Soto Palmer* Intervenors arguing that LD 15 complied with Section 2; (3) the *Garcia* Plaintiff challenging LD 15 under the Fourteenth Amendment; (4) the State of Washington defending LD 15.

The State of Washington prepared to defend against both challenges to LD 15. To that end, the State sought out a highly respected expert, Dr. John Alford, with a history primarily of working for government defendants in VRA cases, including as an expert witness in recent challenges to Texas's congressional and state legislative maps, Louisiana's congressional map, Georgia's congressional map, and Kansas' congressional map. *See* 3-ER-490-491.

After carefully reviewing the evidence, Dr. Alford submitted an expert report concluding that the three *Gingles* preconditions appeared to be met. 3-ER-460-512.[2] He concluded that the first *Gingles* precondition was met because "the Hispanic Citizen Voting Age Population (HCVAP) exceeds 50%, both in the current Legislative District 15 as enacted, and in the alternative demonstrative

[2] Expert reports were admitted as the direct testimony of experts. *Soto Palmer*, ECF No. 187.

configurations" propounded by *Soto Palmer* Plaintiffs. 3-ER-463. He noted that these districts are compact both in terms of their "visual appearance" and "by the summary indicators for compactness" highlighted by Plaintiffs' expert, Dr. Loren Collingwood. 3-ER-463. Under the second *Gingles* precondition, Dr. Alford concluded that Hispanic "voter cohesion is stable in the 70 percent range across election types, suggesting consistent moderate cohesion." 3-ER-476-477. And under the third *Gingles* factor, Dr. Alford concluded that "non-Hispanic White voters demonstrate cohesive opposition to" Hispanic preferred candidates in partisan elections, and that this "opposition is modestly elevated when those [Hispanic-preferred] candidates are also Hispanic," although he also noted that "in contests without a party cue, non-Hispanic White voters do not exhibit cohesive opposition to Hispanic candidates[.]" 3-ER-477. Finally, in examining electoral performance, Dr. Alford concluded that Hispanic-preferred candidates would usually lose in LD 15. 3-ER-477. In short, Dr. Alford concluded that for partisan elections, racially polarized voting exists such that white voters in LD 15 will generally vote as a bloc to defeat the candidates preferred by Hispanic voters.

Based on Dr. Alford's conclusions, the factual findings in other recent federal and state VRA cases in the Yakima area, and other record evidence, the State notified the parties and Court that it had concluded that it could no longer "dispute at trial that *Soto Palmer* Plaintiffs have satisfied the three *Gingles* preconditions for

pursuing a claim under Section 2 of the VRA based on discriminatory results[,]" or "that the totality of the evidence test likewise favors the *Soto Palmer* Plaintiffs[.]" WA-SER-92[3] However, the State vigorously disputed that the Redistricting Commission either intentionally diluted the Hispanic vote in violation of Section 2 or racially gerrymandered LD 15 in violation of the Fourteenth Amendment. The State presented evidence and argument opposing those claims at trial.

C. The *Soto Palmer* District Court Determines Legislative District 15 Violates Section 2, and the *Garcia* District Court Dismisses the Racial Gerrymandering Case as Moot

On August 10, 2023, Judge Lasnik issued a Memorandum of Decision in *Soto Palmer*, finding that LD 15 had the effect of discriminating against Hispanic voters by denying them the equal right to elect candidates of their choice. *Soto Palmer v. Hobbs*, 686 F. Supp. 3d 1213 (W.D. Wash. 2023) (1-ER-14-45). Following the Supreme Court's reaffirmance of the *Gingles* framework in *Allen v. Milligan*, 599 U.S. 1 (2023), Judge Lasnik analyzed the *Gingles* factors and concluded that the *Soto Palmer* Plaintiffs had satisfied them all. *Soto Palmer*, 686 F. Supp. 3d at 1224-27.

[3] As explained in more detail below, the election of Senator Nikki Torres from LD 15 did not alter the State's conclusion because the evidence showed that Senator Torres was not the candidate of choice of Hispanic voters in LD 15 and because a single election did not appreciably alter the robust evidence of racially polarized voting highlighted by each party's experts. *Infra* at pp. 42-43.

On the first *Gingles* factor, Judge Lasnik pointed to numerous "reasonably configured" districts presented by Plaintiffs that afforded Hispanic voters "a realistic chance of electing their preferred candidates[.]" *Id.* at 1224. On the second *Gingles* factor, Judge Lasnik noted that "[e]ach of the experts who addressed this issue, including Intervenors' expert, testified that Latino voters overwhelmingly favored the same candidate in the vast majority of the elections studied[,]" with "statistical evidence show[ing] that Latino voter cohesion is stable in the 70% range across election types and election cycles over the last decade." *Id*. at 1226. And on the third *Gingles* factor, Judge Lasnik highlighted both Plaintiffs' and the State's experts conclusion "that white voters in the Yakima Valley region vote cohesively to block the Latino-preferred candidates in the majority of elections (approximately 70%)[,]" and that "Intervenors d[id] not dispute the data or the opinions offered by" either. *Id.* at 1226.

Turning to the totality-of-circumstances analysis, Judge Lasnik found that seven of the nine Senate Factors "support the conclusion that the bare majority of Latino voters in LD 15 fails to afford them equal opportunity to elect their preferred candidates." *Id.* at 1234. Thus, the court concluded, although "things are moving in the right direction thanks to aggressive advocacy, voter registration, and litigation efforts that have brought at least some electoral improvements in the area, it remains the case that the candidates preferred by Latino voters in LD 15 usually go down in

defeat given the racially polarized voting patterns in the area." *Id.* (footnote omitted). Accordingly, the court entered judgment for Plaintiffs and ordered a remedial process to adopt a new legislative map. *Id.* at 1235-36.

Intervenors appealed the district court's decision on the merits in September 2023. 4-ER-576. Intervenors moved to stay that order and the remedial process, raising most of the merits arguments they raise here, including that the district court: improperly found vote dilution in a majority-minority district; considered only the compactness of Plaintiffs' proposed maps and failed to consider the compactness of the Hispanic population; failed to give due weight to the election of a particular state senator; failed to consider whether racially polarized voting was a product of partisanship, rather than race itself; and was wrongly subjecting the Intervenors to a race-based remedial process. *Soto Palmer v. Hobbs*, No. 23-35595 (9th Cir. Dec. 5, 2023), DktEntry 34-1. The Ninth Circuit motions panel unanimously denied the motion. *Soto Palmer v. Hobbs*, No. 23-35595 (9th Cir. Dec. 21, 2023), DktEntry 45.

Meanwhile, Intervenors petitioned the Supreme Court for certiorari before judgment. That petition raised essentially the same arguments as their prior stay motions. *See* Pet. at 21-35, *Trevino v. Soto Palmer*, U.S. No. 23-484 (U.S. Nov. 3, 2023). The Court denied their petition on February 20, 2024. *Trevino v. Palmer*, 144 S. Ct. 873 (2024).

After Judge Lasnik issued his order invalidating LD 15, the *Garcia* court issued an opinion on September 8, 2023, dismissing the case as moot. *Garcia v. Hobbs*, 691 F. Supp. 3d 1254 (W.D. Wash. 2023). Mr. Garcia has appealed that ruling, and that appeal (No. 24-2603) is set to be heard by the same merits panel as these consolidated appeals. DktEntry 76, No. 23-35595 (9th Cir Jun. 25, 2024).

D. The *Soto Palmer* District Court Adopts a Map Remedying the Section 2 Violation

Under Washington law, modifying a legislative plan requires reconvening the Redistricting Commission, which in turn requires "an affirmative vote in each house of two-thirds of the members . . . ." Wash. Rev. Code § 44.05.120(1).

In its ruling enjoining the enacted plan, the district court provided the Legislature (and any reconvened Commission) approximately five months to complete this process. *Soto Palmer*, 686 F. Supp. 3d at 1236. But once it became clear that the Legislature was unlikely to reconvene the Commission, the district court ordered the parties to begin a remedial process in parallel with the Legislature. 2-ER-227. This was prescient: the Legislature never reconvened the Commission.

As part of its parallel process, the district court directed the parties to submit proposed remedial maps and identify candidates to serve as a special master. 2-ER-228. Plaintiffs proposed five remedial maps to the district court, and the parties submitted special master candidates. *Soto Palmer*, ECF Nos. 244, 245. Neither the State nor Intervenors submitted proposed remedial maps by the court's deadline. In

the State's case, as the State explained, this was because article II, section 43 of Washington's Constitution and Wash. Rev. Code § 44.05.120 provide a single mechanism for the State to propose redistricting plans: through the reconvened Redistricting Commission. 2-ER-230-231. It is unclear why Intervenors chose not to propose a map.

Over the following weeks, the district court appointed Karin Mac Donald, a respected, non-partisan redistricting expert to serve as the special master, 2-ER-179-181, and all parties had an opportunity to fully brief their positions on the proposed remedial maps, *Soto Palmer*, ECF Nos. 248, 250, 251, 252, 254. As the State explained, because the State had no basis to "dispute Plaintiffs' assertion that each map 'is a complete and comprehensive remedy to Plaintiffs' Section 2 harms[,]' [it] defer[red] to the Court on which remedial map best provides Latino voters with an equal opportunity to elect candidates of their choice while also balancing traditional redistricting criteria and federal law." 2-ER-170. However, the State urged the district court to carefully consider any input from the Yakama Nation, whose reservation and historic lands lie within the affected area. 2-ER-171.

On February 9, the district court heard oral argument on Plaintiffs' remedial proposals and Intervenors' objections. *See Soto Palmer*, ECF No. 265. Then, on February 23, nearly three months *after* the court-ordered due date for remedial proposals, Intervenors for the first time submitted their own proposed map. 2-ER-

61-84. On March 8, at Intervenors' request, the district court held a half-day evidentiary hearing at which the parties presented testimony from their experts and other witnesses. *Palmer v. Hobbs*, No. 3:22-cv-05035-RSL, 2024 WL 1138939, at *1 (W.D. Wash. Mar. 15, 2024) (1-ER-4). "The Court also reached out to the Confederated Tribes and Bands of the Yakama Nation ('Yakama Nation'), soliciting their written input and participation at the March 8th evidentiary hearing." *Id.*

On March 15, the district court ordered a new map, with a redrawn, newly labeled LD 14. In a detailed order, the court explained that the remedy it adopted was necessary to remedy the VRA violation it previously found. *Id.* at *1-2. Although acknowledging that "the Latino citizen voting age population of LD 14 in the adopted map is less than that of the enacted district," the court explained that "the new configuration provides Latino voters with an equal opportunity to elect candidates of their choice to the state legislature, especially with the shift into an even-numbered district, which ensures that state Senate elections will fall on a presidential year when Latino voter turnout is generally higher." *Id.* at*2. Although Intervenors try to characterize this reduction in Hispanic CVAP as "dilution," the unchallenged evidence was that enacted LD 15 did not permit Hispanic voters to elect candidates of their choice, while the new LD 14 will. *Compare Soto Palmer*, 686 F. Supp. 3d at 1226-27, *with* WA-SER-005.

Following the district court's remedial order, Intervenors filed a second motion for a stay in this Court, raising arguments related not only to the remedial order, but to the district court's seven-month-old liability order that the Supreme Court already declined to stay. DktEntry 4.1, *Soto Palmer v. Hobbs*, No. 24-1602 (9th Cir. Mar. 18, 2024). A second, separate Ninth Circuit motions panel again unanimously denied that motion, explaining that Intervenors had not "carried their burden to demonstrate they have the requisite standing to support jurisdiction at this stage of the proceedings." DktEntry 18.1, No. 24-1602 (9th Cir. Mar. 22, 2024). In a last-ditch effort to deny Hispanic voters relief in time for the 2024 elections, Intervenors then sought a stay from the Supreme Court. *See* App. for Stay, *Trevino v. Soto Palmer*, U.S. No. 23A862 (U.S. Mar. 25, 2024). The Court denied that stay application with no dissents noted. *Trevino v. Palmer*, 144 S. Ct. 1133 (2024).

In two consolidated appeals, Intervenors now seek to overturn the district court's liability judgment or, failing that, at least the court's remedy.

IV. SUMMARY OF ARGUMENT

This Court should dismiss Intervenors' consolidated appeals because Intervenors lack standing. When Intervenors joined this lawsuit, they lacked a significant protectable interest in the litigation. And they have no personal stake in the judgment because they have no role in the enforcement of LD 15. Although they now hinge their standing entirely on the remedy ordered by the district court, they

cannot claim retrospective standing based on the purported harms of the district court's remedy, nor do they plausibly allege any personal injury based on the remedial map. Intervenors also implore the Court to ignore their jurisdictional deficiency, falsely accusing the State of collusive litigation tactics. But Intervenors' allegations are as wrong as they are irrelevant: there was no collusion here, but even if there were, there is no collusion exception to standing.

In the alternative, the Court should affirm the judgment entered and the remedy adopted by the district court. Intervenors' throwaway argument that the district court lacked jurisdiction to hear the Section 2 challenge is refuted by text, history, and precedent applying 28 U.S.C. § 2284.

Intervenors' remaining arguments are equally meritless. Intervenors' primary contention is that LD 15 was already a majority Hispanic district and that a Hispanic senator was elected under that map, supposedly refuting any VRA violation. But here, the district court found, based on significant evidence, including undisputed expert testimony, that candidates Hispanic voters preferred would generally lose their races. The election of one Hispanic candidate in LD 15 didn't change this analysis, especially because that candidate was not the candidate of choice for Hispanic voters.

Finally, the district court's adopted map remedies the Section 2 violation. Evidence from both Plaintiffs' and Intervenors' experts supported that, in contrast

to enacted LD 15, Hispanic-preferred candidates tended to win in the version of LD 14 adopted by the court. Intervenors allege that a federal court's consideration of race in *remedying* a Section 2 claim resulted in a racial gerrymander. But they fail to show that consideration of race predominated in the district court's decision and ignore that complying with the VRA is a compelling interest.

This Court should dismiss the appeals for lack of jurisdiction or affirm.

V. STANDARD OF REVIEW

A district court's "determination whether the [Section] 2 requirements are satisfied must be upheld unless clearly erroneous." *League of United Latin Am. Citizens* (*LULAC*) *v. Perry*, 548 U.S. 399, 427 (2006). Under clear error review, this Court "will affirm a district court's factual finding unless that finding is illogical, implausible, or without support in inferences that may be drawn from the record." *Bax v. Drs. Med. Ctr. of Modesto, Inc.*, 52 F.4th 858, 865 (9th Cir. 2022) (quoting *United States v. Hinkson*, 585 F.3d 1247, 1263 (9th Cir. 2009) (en banc)).

VI. ARGUMENT

A. Intervenors Lack Standing to Appeal

"Federal courts are under an independent obligation to examine their own jurisdiction, and standing is perhaps the most important of the jurisdictional doctrines." *United States v. Hays*, 515 U.S. 737, 742 (1995) (cleaned up). Here, because the State does not appeal the district court's judgment and remedy,

"[I]ntervenor[s'] right to continue a suit in the absence of the party on whose side intervention was permitted is contingent upon a showing by the intervenor[s] that [they] fulfill[] the requirements of Art. III." *Diamond v. Charles*, 476 U.S. 54, 68 (1986). And parties seeking to invoke a court's jurisdiction "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 appeal two separate decisions—the district court's liability judgment and remedial order—and must thus demonstrate independent standing for each. But they lack standing to appeal either.

Before discussing in detail why Intervenors lack standing, it is important to dispense with one red herring they raise. Intervenors initially suggest that they need not show standing, because only one party need demonstrate standing, and, they assert, Mr. Garcia has standing to bring his case and appeal. Opening Br. at 26-27. But Mr. Garcia alleged that the *enacted* LD 15 was an unconstitutional racial gerrymander; Intervenors sought intervention *to defend* LD 15 as lawful. Whether Mr. Garcia has standing to appeal his entirely different claim in his separate case says nothing about whether Intervenors possess standing for their entirely different claim. Intervenors cite no case, and the State is aware of none, in which a court held that a party in one appeal need not show standing because a party raising different claims in a consolidated appeal had standing.

1. Intervenors lack standing to appeal the district court's liability judgment because they have no role in its enforcement

Intervenors lack standing to appeal the district court's liability judgment, which does not require them to do or refrain from doing anything. As the district court found in denying mandatory intervention and instead granting permissive intervention, "intervenors lack a significant protectable interest in this litigation[.]" *Palmer*, 2022 WL 2111115, at *4 (WA-SER-161). Lacking a concrete interest in the outcome of this suit, they now lack standing to appeal.

Hollingsworth v. Perry, 570 U.S. 693 (2013), is dispositive. There, two couples challenged California's Proposition 8, which prohibited same-sex couples from marrying. *Id.* at 702. They sued state officials responsible for enforcing the law, but "[t]hose officials refused to defend the law[.]" *Id.* And so "[t]he district court allowed petitioners—the official proponents of the initiative—to intervene to defend it." *Id.* (citation omitted). Following trial, the district court declared Proposition 8 unconstitutional and enjoined its enforcement.

After the district court judgment, the *Hollingsworth* intervenors were in precisely the same position as Intervenors here. Having lost on the merits, and with state officials electing not to appeal, intervenors sought to continue their defense via an appeal of their own. *Id.* But the Supreme Court dismissed the intervenors' appeal,

holding that they lacked standing to challenge the injunction enjoining state officials from enforcing Proposition 8. *Id.* at 715.

As the Supreme Court explained, "standing 'must be met by persons seeking appellate review, just as it must be met by persons appearing in courts of first instance.'" *Id.* at 705 (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 64 (1997)). The district court's order only "enjoined the state officials named as defendants from enforcing" Proposition 8, but did "not order[intervenors] to do or refrain from doing anything." *Id.* Thus, intervenors "had no 'direct stake' in the outcome of their appeal." *Id.* at 705-06 (quoting *Arizonans for Official English*, 520 U.S. at 64); *see also Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 385 (2024) (holding plaintiffs lacked standing to challenge regulation that did "not require[] the plaintiffs to do anything or to refrain from doing anything").

The Court reached a similar result in *Virginia House of Delegates v. Bethune-Hill*, 587 U.S. 658 (2019), holding that the Virginia House of Delegates, which had previously intervened and defended legislative redistricting, lacked standing to appeal after the state's Attorney General declined to do so. The Court reasoned that the House, as a single chamber of a bicameral legislature, had "no standing to appeal the invalidation of the redistricting plan separately from the State of which it is a part." *Id.* at 662.

What was true for the initiative sponsors in *Hollingsworth* and the Virginia House of Delegates in *Bethune-Hill* is even more true for the three voters who intervened in this case. They "have no role—special or otherwise—in the enforcement of [LD 15]. They therefore have no 'personal stake' in defending its enforcement that is distinguishable from the general interest of every citizen" of Washington. *Hollingsworth*, 570 U.S. at 707 (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)). Nor, as the district court already found, do they have "standing in [their] own right" to defend the Commission and the Legislature's adoption of legislative maps. *Bethune-Hill*, 587 U.S. at 666; *see* 2-ER-280.

Turning to the individual Intervenors, Mr. Trevino is the only one who even lives in LD 15, but he has no role in implementation or enforcement of LD 15. *Hollingsworth*, 570 U.S. at 707. Mr. Trevino explicitly hinges his standing on "the district court's judgment and order adopting the Remedial Map," in which he contends "[t]he district court's rejiggering of his district was explicitly race-based." Opening Br. at 28. But even if that were true, his alleged injury—a supposed racial classification—stems entirely from the district court's remedial order. Put another way, if the district court's liability order were exactly the same, but its remedial order had adopted Intervenors' proposed maps, Mr. Trevino would have no grounds whatsoever to claim he had been subject to a gerrymander. He thus obviously lacks standing to appeal the liability judgment. Mr. Trevino tries to elide this problem by

asserting that the alleged racial classifications in the remedial order "flowed from" the court's liability judgment. *Id.* at 29. But there were lots of ways the district court could have enacted a remedy that didn't affect Mr. Trevino in the slightest. The harm he alleges now is not in any sense an inevitable outcome of the district court's judgment. In short, he does not allege injury traceable to the liability order, and thus lacks standing to appeal. *See W. Virginia v. Env't Prot. Agency*, 597 U.S. 697, 718 (2022) ("In considering a litigant's standing to appeal, the question is whether it has experienced an injury 'fairly traceable to the *judgment below*.'" (internal quotation marks omitted)).

Mr. Ybarra serves in Washington's Legislature from Legislative District 13, but he has no connection to LD 15 or its enforcement. Mr. Ybarra "has not identified any legal basis for [his] claimed authority to litigate on the State's behalf." *Bethune-Hill*, 587 U.S. at 663. Nor has Mr. Ybarra ever sought to participate in this litigation in anything but his personal capacity. 2-ER-298, 301 (intervention motion describing Mr. Ybarra's interest as an elected official running for re-election in a separate district); *see Hollingsworth*, 570 U.S. at 713 ("When the proponents sought to intervene in this case, they did not purport to be agents of California.").

As for the final Intervenor, Mr. Campos, Intervenors do not try to even claim he has standing. Opening Br. at 27 n.3. He lives and votes in a different district and has no role in the implementation or enforcement of LD 15.

Intervenors warn that applying *Hollingsworth* here would mean intervenors would never be accorded individual standing to defend laws. Opening Br. at 32. But precedent is clear: intervenors must have interests that have been adversely affected by each judgment they seek to appeal. *See Organized Vill. of Kake v. United States Dep't of Agric.*, 795 F.3d 956, 963 (9th Cir. 2015) (*en banc*). And there are many other cases where intervenor–defendants have a personal stake and thus standing to appeal. *See, e.g., id.* at 966 (intervening state had a stake in defending enforcement because the challenged rule "directly affect[ed] the size of Alaska's statutory entitlement to receipts from timbering[]"); *Atay v. County of Maui*, 842 F.3d 688, 696 (9th Cir. 2016) (five individuals with organic, non-genetically engineered farms had independent standing to defend ballot initiative banning cultivation of genetically engineered plants); *Kim v. Hanlon*, 99 F.4th 140, 158 (3d Cir. 2024) (local political party had standing to vindicate its own associational rights in challenge to state law giving preferred ballot treatment to candidates endorsed by local political party). But here, Intervenors' only claim of harm on appeal—from alleged racial gerrymandering by the district court—is based on the district court's remedial order, not its liability judgment. While that claim fails to generate standing even as to the remedial order for reasons detailed below, it is plainly insufficient to create standing to appeal the liability judgment. *TransUnion*, 594 U.S. at 431 ("[S]tanding is not dispensed in gross[.]"). Intervenors do not even claim harm from

the district court's liability judgment. As to that judgment, Intervenors' standing claim necessarily fails because they "have no role—special or otherwise—in [the] enforcement [of LD 15]. They have no 'personal stake' in defending its enforcement that is distinguishable from the general interest of every [ ] citizen" of Washington. *Hollingsworth*, 570 U.S. at 707.

2. Intervenors assert only generalized grievances against the district court's remedy and never challenged the remedial map as a racial gerrymander below

As just noted, Intervenors do not even attempt to demonstrate an Article III injury underlying their appeal of the district court's liability judgment. Intervenors' standing argument hinges entirely on the notion that they are affected by the subsequent *remedy* ordered by the district court. They claim that the changes directed by the district court's remedial order injured Mr. Trevino because they were race-based and injured Mr. Ybarra because they supposedly made his reelection more difficult (never mind that he's running unopposed).[4] Intervenors' arguments fail on multiple grounds.

First, during the remedial process, Intervenors never raised concerns that Plaintiffs' proposed maps or the remedial map ultimately adopted by the district

[4] *See* Wash. Sec'y of State, *Primary 2024*, https://voter.votewa.gov/CandidateList.aspx?e=888; Wash. Sec'y of State, *August 6, 2024 Primary, Legislative District 13*, https://results.vote.wa.gov/results/20240806/legislativedistrict13.html.

court would be an unconstitutional racial gerrymander. *See, e.g.*, WA-SER-050 Instead, Intervenors complained that the maps were overtly partisan and further *diluted* Hispanic voting strength. *See, e.g.*, WA-SER-050 They lodged their racial gerrymandering criticism of the adopted map for the first time in the stay briefing before this Court. DktEntry 6.1 at 38-40, No. 24-1602. They have inadequately preserved this issue and thus waived it. *Cf. Wood v. Milyard*, 566 U.S. 463, 473 (2012) ("[A]ppellate courts ordinarily abstain from entertaining issues that have not been raised and preserved in the court of first instance."). Thus, even if this claim were valid, it would provide no basis for standing because Intervenors cannot raise it here. The Supreme Court just reiterated that race may be considered as a factor in remedying a Section 2 violation without violating the Equal Protection Clause. *Allen*, 599 U.S. at 41 ("[T]his Court and the lower federal courts have repeatedly applied the effects test of § 2 as interpreted in *Gingles* and, under certain circumstances, have authorized race-based redistricting as a remedy for state districting maps that violate § 2."); *see also id.* at 30 ("Section 2 itself demands consideration of race." (internal quotation marks omitted)). And "absent specific evidence" showing Intervenors have been subject to racial classifications, Intervenors "assert[] only a generalized grievance" against the district court's remedy of which they do not approve. *Hays*, 515 U.S. at 745.

Intervenors pull a few quotes from the district court's remedial order out of context to allege that the district court here engaged in particularly egregious gerrymandering to remedy the Section 2 violation it found, but as further detailed below, *infra* at pp. 56-62, none of their arguments come anywhere close to showing that the district court actually engaged in racial gerrymandering. Indeed, Intervenors refute their own argument, asserting later that partisanship—not race—was the driving force behind the district court's decision-making. *See, e.g.*, Opening Br. at 87 ("If partisan changes through Washington were not the point, it is simply incomprehensible why the district court adopted a Map 3 variant."). Thus, Intervenors come nowhere near showing that they suffered any injury from racial gerrymandering.

Mr. Trevino tries to overcome his lack of standing by arguing that he would have had standing if he had "challenge[d] LD-15 as approved by the Washington Legislature as an unconstitutional racial gerrymander." Opening Br. at 30. Maybe. But he didn't. And his standing to bring a hypothetical claim he never brought says nothing about his standing in this appeal. *See Blum v. Yaretsky*, 457 U.S. 991, 999 (1982) ("Nor does a plaintiff who has been subject to injurious conduct of one kind possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject."); *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996) ("If the right to complain of *one* administrative

deficiency automatically conferred the right to complain of *all* administrative deficiencies, any citizen aggrieved in one respect could bring the whole structure of state administration before the courts for review. That is of course not the law.").

Like Mr. Trevino, Mr. Ybarra's standing argument focuses on the remedial order, which he claims will saddle him with "a costlier and more difficult general election campaign." Opening Br. at 34, 36 n.4. Courts, however, have consistently rejected Mr. Ybarra's theory. *See, e.g.*, *City of Philadelphia v. Klutznick*, 503 F. Supp. 663, 672 (E.D. Pa. 1980) (legislators suffered no cognizable injury when their district boundaries were adjusted); *LULAC v. Abbott*, No. 3:21-cv-00259-DCG-JES-JVB, 2022 WL 4545757, at *5 (W.D. Tex. Sept. 28, 2022) (plaintiff "who pleads mere proximity to a diluted or gerrymandered district—or some connection between that district's boundaries and vote dilution or racial gerrymandering in [his] own district—does not thereby have standing to challenge the neighboring district"); *cf. Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 824 (2015) (a "core principle of republican government" is "that the voters should choose their representatives, not the other way around"). Mr. Ybarra is simply not entitled to have his district shaped a certain way.

Even if a redrawn district could suffice as injury in some cases, Mr. Ybarra cannot credibly claim injury from "a costlier and more difficult general election campaign" here. Opening Br. at 34, 36 n.4. For one, has failed to submit a declaration

or any evidence showing that his reelection was made more difficult in the redrawn district. *See Wittman v. Personhuballah*, 578 U.S. 539, 545 (2016) (assuming without deciding intervenor representatives' standing arguments that their districts would "be flooded with Democratic voters" and reduce their reelection chances were legally cognizable and rejecting the arguments given the lack of record evidence). And he cannot credibly assert injury-in-fact because *he is running unopposed*. *See supra* at p. 26 n.4. Thus, whatever (not-in-the-record) "resources" he may have expended "to introduce himself to his new constituents and campaign for their votes," *id.* at 46, were expended voluntarily. A party who "incur[s] . . . costs voluntarily" cannot claim an Article III injury from those costs. *Twitter, Inc. v. Paxton*, 56 F.4th 1170, 1176 (9th Cir. 2022).

Intervenors have no personal stake in this lawsuit. Whatever their disagreements with the district court, they are "mere bystander[s]" to this dispute. *All. for Hippocratic Med.*, 602 U.S. at 379.

3. Intervenors' claims of collusion are both wrong and irrelevant to standing

Moving well beyond any concept of the law, Intervenors implore the Court to ignore their burden to establish Article III standing, claiming that "a denial of standing would permit a collusive end-run around the Washington Constitution and create irreparable harm to the very concept of federalism." Opening Br. at 47 (capitalization omitted).

To start, Intervenors' seething accusations about the allegedly "collusive" nature of the Attorney General's litigation strategy, Opening Br. at 37, 76, are hogwash. The Attorney General's Office has represented multiple state parties over the course of this suit, including the Secretary of State and state legislative leaders (for whom the Attorney General's Office successfully secured dismissal). 2-ER-288-290. Once the State of Washington itself was joined as a party, it diligently worked to evaluate Plaintiffs' claims and any potential defenses, including by hiring a renowned VRA defense expert. Following extensive discovery, the State declined to defend LD 15 at trial after the evidence—including all parties' expert reports—showed that enacted LD 15 likely did dilute Hispanic votes.[5] And the State was correct, as the district court found. This is precisely what parties should do—particularly those charged with representing the public's interest.

Intervenors' allegation of collusion also presupposes that the district court was in on the alleged conspiracy too. Because the district court was the one who ultimately ruled in Plaintiffs' favor here, and only after a full trial in which Intervenors' themselves vigorously defended against VRA liability. And the district

[5] While the State declined to defend against Plaintiffs' Section 2 "effects" claim, it successfully defended against Plaintiffs' Section 2 "intent" claim. Plaintiffs did not raise their intent claim in their closing, nor on appeal, and have thus waived it. S*ee United States v. Carlson*, 900 F.2d 1346, 1349 (9th Cir. 1990); *Estate of Cornejo ex rel. Solis v. City of Los Angeles*, 618 F. App'x 917, 920 (9th Cir. 2015).

court was the one who adopted the remedial map, again following a lengthy process in which Intervenors submitted evidence and extensive briefing, and participated in an evidentiary hearing. The allegation makes no sense.

Intervenors' arguments are not only factually absurd, they are legally irrelevant. "[S]tanding is a 'bedrock constitutional requirement that . . . has applied to all manner of important disputes.'" *All. for Hippocratic Med.*, 602 U.S. at 378. It flows directly from Article III's "Cases" or "Controversies" requirement and serves the fundamental goal of preserving separation of powers. *Id.* Which is to say, even if Intervenors could show collusion, that would not create an exception from the constitutional standing requirement.

B. The District Court Had Jurisdiction Over This Case

Intervenors' lack of standing means that this Court lacks jurisdiction over this appeal. But, contrary to Intervenors' claims, there is no serious argument that the district court lacked jurisdiction. Intervenors make a fringe atextual and ahistorical argument that only a three-judge panel may rule on a Section 2 redistricting claim under 28 U.S.C. § 2284. Opening Br. at 25. No court has ever held as much. To the contrary, if Intervenors' position were correct, it would mean that countless VRA decisions have been handed down by courts who lacked power to render them, and that the Supreme Court has repeatedly erred in affirming such judgments. *See, e.g.*,

Allen, 599 U.S. at 16, 42 (affirming "[t]he judgment[ ] of the [single-judge] [d]istrict [c]ourt for the Northern District of Alabama"). This is clearly not right.

Section 2284(a) provides: "A district court of three judges 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." As required by the statute, a three-judge court was empaneled for Mr. Garcia's Fourteenth Amendment challenge, but this case, raising only a statutory challenge, was heard before a single judge.

Intervenors claim this was error, but they cite no case holding that § 2284 requires a three-judge panel for VRA claims. Opening Br. at 25. Instead, they rely on a single concurring out-of-circuit opinion that argued that "[t]he statute allegedly contains an extra 'the.'" *Thomas v. Reeves*, 961 F.3d 800, 802 (5th Cir. 2020) (Costa, J., concurring). According to Judge Willett's concurrence in *Thomas*, on which Intervenors rely, the word "'the' . . . sets the last phrase ['the apportionment of any statewide legislative body'] apart" from the modifier "constitutionality of," "indicating that § 2284(a) requires three judges for *all* apportionment challenges to state maps, not just constitutional challenges." *Thomas*, 961 F.3d at 813 (Willett, J., concurring). But Judge Willett's concurrence is not the law. In fact, a greater number of the *Thomas* en banc panel joined a separate concurrence *expressly refuting* Judge Willett's reasoning. *Thomas*, 961 F.3d at 802 (Costa, J., concurring) ("explain[ing]

why a plain reading of the three-judge statute as well as its ancestry reject the unprecedented notion that statutory challenges to state legislative districts require a special district court[]"). And the reason is clear: "Congress . . . does not . . . hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns, Inc.*, 531 U.S. 457, 468 (2001). A plain reading of § 2284 requires three-judge courts *only* for constitutional challenges to legislative apportionment. Intervenors' anemic argument to wipe away nearly forty years of VRA case law does not merit reversal.

The ordinary meaning of § 2284 is that three-judge panels are required only for *constitutional challenges* to the apportionment of congressional districts or statewide legislative bodies, as any "person on the street would read it[.]" *Thomas*, 961 F.3d at 802. Courts uniformly read the statute that way. *See, e.g.*, *Rural W. Tenn. African-American Affairs Council v. Sunquist*, 209 F.3d 835, 838 (6th Cir. 2000) ("Because the amended complaint contained no constitutional claims [and only the Section 2 claim remained], the three-judge court disbanded itself."); *Chestnut v. Merrill*, 356 F. Supp. 3d 1351, 1354 (N.D. Ala. 2019) ("A claim solely alleging a Section 2 violation falls outside a plain reading of § 2284. Such a claim is neither a constitutional challenge nor 'when otherwise required by Act of Congress.'"); *Johnson v. Ardoin*, No. 3:18-cv-00625-SDD-EWD, 2019 WL 2329319, at *3 (M.D. La. May 31, 2019); *Grant v. Raffensperger*, No. 1:22-cv-00122-SCJ, 2022 WL 1516321, at *7 (N.D. Ga. Jan. 28, 2022); *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d

976, 980 (D.S.D. 2004). Indeed, the Supreme Court has parenthetically described § 2284 as "providing for the convention of [a three judge] court whenever an action is filed challenging the constitutionality of apportionment of legislative districts[.]" *Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. 253, 257 (2016).

This reading is not only consistent with the plain text, it is also consistent with "the series-qualifier canon of construction[,]" in which "a modifier like 'constitutionality of' usually applies to each term in a series of parallel terms." *Thomas*, 961 F.3d at 803 (Costa, J., concurring) (citing Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 147 (2012); *Porto Rico Ry., Light & Power Co. v. Mor*, 253 U.S. 345, 348 (1920)).

But "[e]ven if an extra definite article opens the door ever so slightly to some ambiguity, section 2284(a)'s statutory history slams it back shut." *Thomas*, 961 F.3d at 807 (Costa, J., concurring). In enacting the current language of § 2284, "Congress was . . . narrowing the reach of the three-judge statute[,]" which had previously applied to a broader range of cases involving constitutional challenges. *Id.* at 808; *see also* S. Rep. No. 94-204, at 1-2 (1975), 1976 U.S.C.C.A.N. 1988, 2000 ("Subsection (a) . . . continue[s] the requirement for a three-judge court in cases challenging the constitutionality of any statute apportioning congressional district or apportioning any statewide legislative body."). "It is implausible (to put it mildly) that while otherwise contracting the statute, Congress decided to expand it beyond

constitutional challenges for the first time." *Thomas*, 961 F.3d at 808 (Costa, J., concurring).

In all, "[t]he plain meaning of the statute's text, uniform caselaw applying the statute, the statutory history, and the rule that three-judge statutes should be construed narrowly" all compel the conclusion that three-judge district courts "are not required for a suit raising only statutory challenges to state legislative districts." *Id.* at 810 (Costa, J., concurring). Intervenors' § 2284 jurisdiction claim is a moonshot—not a serious argument meriting reversal.

C. The District Court's Liability Determination Was Supported by the Evidence

Intervenors raise numerous objections to the district court's liability finding. While the State—based on the findings of a renowned defense expert, relevant case law from other VRA litigation in the Yakima area, and other evidence in the record—has no basis to dispute the district court's finding, the State will primarily leave it to Plaintiffs–Appellees to argue that the district court's liability judgment was correct.

Nonetheless, the State emphasizes a few points to highlight some flaws in Intervenors' assertions of error.

1. Although Intervenors do their darndest to frame their arguments in legal terms, at bottom they allege nothing more than a passel of factual errors. The district court's factual findings are each subject to clear error review. *LULAC*, 548 U.S.

at 427. Because Intervenors cannot show the district court erred in its interpretation of the evidence—let alone *clearly* erred—their liability appeal lacks merit.

2. Intervenors wrongly contend that Section 2 of the Voting Rights Act *only* applies where a group constitutes a minority of the citizen voting-age population, "unless the majority is a mere façade." Opening Br. at 39. Not only has no court ever so held, but the Supreme Court has said explicitly that "it may be possible for a citizen voting-age majority to lack real electoral opportunity[.]" *LULAC*, 548 U.S. at 428. That "may be possible" language is key: like almost everything else in a VRA case, whether a population has an equal opportunity to elect candidates of its choice "is peculiarly dependent upon the facts of each case[.]" *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (plurality opinion) (quotation omitted). It "requires an intensely local appraisal of the design and impact of the contested electoral mechanisms" *Id.* (quotation omitted). Here, the district court reviewed the evidence and concluded, based on the totality-of-circumstances factors, that Hispanic voters in the Yakima Valley area did not have an equal opportunity to elect candidates of their choice. In particular, the district court concluded that "Senate Factors 1, 2, 3, 5, 6, 7, and 8"—that is: (1) a history of official discrimination in the Yakima region, (2) the extent of racially polarized voting, (3) voting practices that enhance the opportunity for discrimination, including off-year elections and nested districts, (5) the continuing effects of anti-Hispanic discrimination, (6) the

use of racial appeals in political campaigns in the Yakima area, (7) the lack of success of Hispanic candidates in the Yakima area, and (8) the demonstrated lack of responsiveness of elected officials to Hispanic constituents—"all support the conclusion that the bare majority of Latino voters in LD 15 fails to afford them equal opportunity to elect their preferred candidates." *Soto Palmer*, 686 F. Supp. 3d at 1234. Based on the testimony of local witnesses and experts, the district court identified numerous "social . . . and historical conditions in the Yakima Valley region[]" that "impair[] the ability of Latino voters in that area to elect their candidate of choice on an equal basis with other voters." *Id.* at 1233, 1235. These included, for example, "ample evidence . . . that Latino voters in the Yakima Valley region faced official discrimination that impacted and continues to impact their rights to participate in the democratic process[,]" "socioeconomic disparities between Latino and white residents" that drive turnout disparities among voters, "race-based appeals" in local elections, and a lack of success of Hispanic candidates in local elections. *Id.* at 1227-30. Intervenors try to flyspeck these factual findings, Opening Br. at 70-75, but come nowhere near showing the court's overall conclusion was clearly erroneous. *See infra* at pp. 36-52.

Instead, like other litigants in the same situation, Intervenors "attempt to avoid the clear-error standard" by "fram[ing] their . . . challenge to liability as a legal one." *Thomas v. Bryant*, 919 F.3d 298, 308 (5th Cir. 2019). They suggest it was improper

for the district court to find a Section 2 violation because LD 15 is majority-Hispanic by CVAP, absent, perhaps a few narrow, ad hoc exceptions. Opening Br. at 39-45; *see also* Redistricting Commissioners' Amici Br. at 7-8. But they don't cite any case for their proposed rule, and they simply ignore case law to the contrary. *See*, *e.g.*, *Perez v. Abbott*, 253 F. Supp. 3d 864, 880 (W.D. Tex. 2017); *Moore v. Leflore Cnty. Bd. of Election Comm'rs*, 502 F.2d 621, 624 (5th Cir. 1974); *Thomas*, 919 F.3d at 309 ("Given the statutory mandate to focus on the 'totality of circumstances' . . . it is not surprising that numerous courts have found dilution of the voting power of a racial group in districts where they make up a majority of the voting population."); *Jeffers v. Tucker*, 847 F. Supp. 655, 660 (E.D. Ark. 1994) ("In order to compensate for historically low rates of voter registration and turnout, minorities must have something more than a mere majority even of voting age population in order to have a reasonable opportunity to elect a representative of their choice.") (quotation omitted).

"This per se rule [Intervenors] advocate—a bar on vote dilution claims whenever the racial group crosses the 50% threshold[,]" *Thomas*, 919 F.3d at 308—has been repeatedly rejected by courts. *LULAC*, 548 U.S. at 428; *see also Salas v. Sw. Texas Jr. Coll. Dist.*, 964 F.2d 1542, 1550 (5th Cir. 1992) ("[W]e hold that a protected class that is also a registered voter majority is not foreclosed, as a matter of law, from raising a vote dilution claim."); *Pope v. County of Albany*, 687 F.3d

565, 575 n.8 (2d Cir. 2012); *Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1041 (D.C. Cir. 2003); *Missouri State Conf. of the Nat'l Ass'n for the Advancement of Colored People v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 934 (8th Cir. 2018). Instead, as the Supreme Court just put it, whether a district is "equally open" to minority voters turns not simply on whether minority voters make up 50%+1 of the voters, but whether "minority voters face—unlike their majority peers—bloc voting along racial lines, arising against the backdrop of substantial racial discrimination within the State, that renders a minority vote unequal to a vote by a nonminority voter." *Allen*, 599 U.S. at 25. And this, of course, "must be determined 'based on the totality of circumstances.'" *Id.* at 26 (quoting 52 U.S.C. § 10301(b)).

Intervenors do not and cannot show that the district court misapplied the law or any precedent. Intervenors merely disagree with how the district court weighed the evidence in evaluating the Senate Factors guiding the totality of circumstances analysis. *See Soto Palmer*, 686 F. Supp. 3d at 1234 ("[T]he evidence shows that . . . [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.").

Not only does the evidence support the district court's finding that a bare majority was insufficient in light of social, economic, and historical factors that

depress Hispanic turnout, but Intervenors' "suggested approach would undermine section 2's effectiveness," as this Court has explained:

> After all, "[l]ow voter registration and turnout have often been considered evidence of minority voters' lack of ability to participate effectively in the political process." Thus, if low voter turnout could defeat a section 2 claim, excluded minority voters would find themselves in a vicious cycle: their exclusion from the political process would increase apathy, which in turn would undermine their ability to bring a legal challenge to the discriminatory practices, which would perpetuate low voter turnout, and so on.

United States v. Blaine Cnty., Montana, 363 F.3d 897, 911 (9th Cir. 2004) (citation omitted) (quoting *Gomez v. City of Watsonville*, 863 F.2d 1407, 1416 n.4 (9th Cir. 1988)). This Court should reject Intervenors' invitation to narrow the Voting Rights Act.

3. Intervenors contend that the district court further erred by failing to treat it as essentially dispositive that, in the only contested election held in LD 15, "a Hispanic candidate won by a 35.6% margin." Opening Br. at 46.

But the VRA guarantees the right of minorities voters "to elect representatives *of their choice*." 52 U.S.C. § 10301(b) (emphasis added). It does not mean, as Intervenors suggest, that any Hispanic elected official is good enough for Hispanic voters, regardless of the voters' actual preferences. *See LULAC*, 548 U.S. at 423-29, 442 (finding dilution of Hispanic vote in a district designed to protect Hispanic Republican incumbent who was not the candidate of choice of Hispanic voters).

The fact is, every *Gingles* expert in this case, *including Intervenors' own expert*, "testified that Latino voters [in LD 15] overwhelmingly favored the same candidate in the vast majority of the elections studied." *Soto Palmer*, 686 F. Supp. 3d at 1225. But, because of white bloc voting in the other direction, Hispanic voters' preferred candidates rarely win. *Id.* at 1226.

Senator Torres' election did not singlehandedly repudiate that trend. Rather, there was sufficient evidence for the Court to conclude that Senator Torres was not the candidate of choice of Hispanic voters, but was elected *in spite of* Hispanic voter preferences. Intervenors concede as much, noting that Plaintiffs' expert found that only 32% of Hispanic voters voted for Senator Torres—meaning Hispanic voters preferred her opponent by a margin of *over two-to-one*. Opening Br. at 12 (citing 3-ER-431). Even Intervenors' own expert concluded that a majority of Hispanic voters in LD 15—52%—voted *against* Senator Torres. *Soto Palmer*, 686 F. Supp. 3d at 1225; 3-ER-543.[6]

Another reason not to base a *Gingles* analysis on the single election involving Senator Torres, while ignoring all other elections, is that the evidence showed it was

[6] Intervenors' claim that the district court failed to consider Senator Torres' victory in conducting its analysis (Opening Br. at 56, 60) is flatly wrong. *See Soto Palmer*, 686 F. Supp. 3d at 1225-26 (explaining that Senator Torres' election did not by itself undermine "the statistical evidence show[ing] that Latino voter cohesion is stable in the 70% range across election types and election cycles over the last decade[]").

not a typical one. Senator Torres' opponent was a political novice, ran as a write-in candidate in the primary, and spent less than five percent of what Senator Torres spent. WA-SER-189-190. For largely the same reasons, Intervenors' attempt to argue—for the first time on appeal—that Senator Torres' margin of victory makes a remedy mathematically impossible, misses the mark. Opening Br. at 47-48. There is simply no way to know with certainty how an experienced, well-funded, Hispanic-preferred candidate might have performed in a hypothetical election (or how such a candidate might have affected voter turnout). In any event, in light of the evidence in the record, the district court did not clearly err in finding that the 2022 election demonstrated "moderate cohesion that was consistent with the overall pattern of racially polarized voting." *Soto Palmer*, 686 F. Supp. 3d at 1225.[7]

Lurking beneath Intervenors' argument is the suggestion that the district court's orders were nakedly partisan efforts to benefit Democrats. *See, e.g.*, Opening Br. at 16 ("Although the district court's opinion engages in some circumlocution

[7] To the extent Intervenors' reply brief might rely on the results of the August 6, 2024, legislative primary elections, such reliance would be misplaced because primary elections provide inferior evidence in VRA cases. *See Alexander v. South Carolina State Conference of the NAACP*, 144 S. Ct. 1221, 1248 (2024) ("Data from [a primary election] is far less informative because far fewer voters turn out"). The LD 14 election exemplifies why the Supreme Court categorizes primary election data as "inferior," with a voter turnout rate of only 33.5%—the third lowest in Washington. *Id.*; *see* Wash. Sec'y of State, *August 6, 2024 Primary Results*, https://results.vote.wa.gov/results/20240806/turnout.html.

about what precisely Hispanic voters' 'preferred candidates' means in practice, the district court's opinion cannot be coherently understood except as holding that 'preferred candidates' means 'Democratic candidates' in all relevant circumstances."), 46 ("The court simply assumed a viable claim based on Democrats' failure to win a sufficient number of elections."). Here again, Intervenors fail to address the actual evidence—including their own expert's testimony—which showed that Hispanic voters in the Yakima Valley area cohesively and consistently preferred Democratic candidates, WA-SER-184-188, 3-ER-521, while their white counterparts cohesively and consistent voted against Democratic candidates. *Soto Palmer*, 686 F. Supp. 3d at 1225-27. Certainly the fact that Hispanic voters in the Yakima Valley area prefer Democratic voters may mean here that the VRA ultimately benefits Democrats. But this is not universally true. *Id.* at 1226 n.8 ("In southern Florida, for example, an opportunity district for Latinos would have to perform well for Republicans rather than for Democrats."); *see also* WA-SER-191-192 (testimony noting majority Latino districts where Republicans are the candidates of choice). Moreover, as the district court rightly found, a minority group does not "waive[] its statutory protections simply because its needs and interests align with one partisan party over another." *Soto Palmer*, 686 F. Supp. 3d at 1235.

4. Intervenors take issue with the district court's conclusion that Plaintiffs demonstrated compactness under *Gingles* I. But they offer nothing more than their *ipse dixit* to suggest the court's conclusion was clearly erroneous.

The *Gingles* I factor acts whether "[t]he minority group [is] sufficiently large and compact to constitute a majority in a reasonably configured district[.]" *Wisconsin Legislature v. Wisconsin Elections Comm'n*, 595 U.S. 398, 402 (2022). There is no dispute here that Plaintiffs presented numerous reasonably configured districts in which Hispanic voters were a workable majority. *See, e.g.*, *Soto Palmer*, 686 F. Supp. 3d at 1225 ("[P]laintiffs' expert on the statistical and demographic analysis of political data[ ] presented three proposed maps that perform similarly or better than the enacted map when evaluated for compactness and adherence to traditional redistricting criteria . . . The State's redistricting and voting rights expert, Dr. John Alford, testified that plaintiffs' examples are 'among the more compact demonstration districts [he's] seen' in thirty years." (second brackets original) (quoting WA-SER-201). This closely parallels how the Supreme Court analyzed compactness in *Allen*, 599 U.S. at 20 (finding *Gingles I* satisfied where "the maps submitted by one of plaintiffs' experts . . . 'perform[ed] generally better on average than' did" the enacted map and "[p]laintiffs' maps also satisfied other traditional districting criteria" (second alteration in original)).

Intervenors nonetheless contend the district court erred by failing to consider whether Hispanic communities within the district were compact. Opening Br. at 50-55. But the district court made factual findings on this very point, explaining that not only are Yakima and Pasco connected by a more-or-less continuous string of largely Hispanic communities, but that those communities shared many cultural and political similarities:

> [T]he evidence in the case shows that Yakima and Pasco are geographically connected by other, smaller, Latino population centers and that the community as a whole largely shares a rural, agricultural environment, performs similar jobs in similar industries, has common concerns regarding housing and labor protections, uses the same languages, participates in the same religious and cultural practices, and has significant immigrant populations. The Court finds that Latinos in the Yakima Valley region form a community of interest based on more than just race. While the community is by no means uniform or monolithic, its members share many of the same experiences and concerns regardless of whether they live in Yakima, Pasco, or along the highways and rivers in between.

Soto Palmer, 686 F. Supp. 3d at 1225. Intervenors don't dispute any of this.

Rather, they move the goalposts, and say that these connections are too general and not supported by detailed factual findings. Given the number of commonalities identified by the court and the geographic connectedness of the communities, it's frankly hard to see how *any* minority population could be compact under Intervenors' view of things. Perhaps, then, Intervenors' argument can best be understood as faulting the district court for not showing its work better, and explaining on a more granular level how it reached the conclusion that the various

communities along I-82 are similar. *See, e.g.*, WA-SER-200 (witness testimony explaining commonalities of communities along I-82). But what they don't do is point this Court to *any* evidence that the district court was wrong. They don't identify any evidence suggesting that Hispanic voters in, say, Pasco, are in fact "isolated" from Hispanic voters in, say, Yakima. *See LULAC*, 548 U.S. at 433 ("A district that 'reaches out to grab small and apparently isolated minority communities' is not reasonably compact.") (quoting *Bush v. Vera*, 517 U.S. 952, 979 (1996)). They don't identify any evidence "regarding the different characteristics, needs, and interests of" communities in the Yakima Valley area. *Id.* at 402. Simply put, aside from churlish accusations of stereotyping, they don't offer anything to rebut the district court's factual findings regarding compactness.

5. Intervenors fault the district court for purportedly not considering whether partisanship, as opposed to race, was driving outcomes in local elections. Opening Br. at 55-62. But this argument is wrong on both the facts and the law. As a legal matter, "[i]t is the *difference* between the choices made by blacks and whites—not the reasons for that difference—that results in blacks having less opportunity than whites to elect their preferred representatives. Consequently . . . only the correlation between race of voter and selection of certain candidates, not the causes of the correlation, matters." *Gingles*, 478 U.S. at 63; *see also id.* at 100 (O'Connor, J., concurring) (opining that partisanship is irrelevant in

the analysis of racially polarized voting under the *Gingles* factors, although it may be relevant in "the overall vote dilution inquiry"); *see also Soto Palmer*, 686 F. Supp. 3d at 1226-27 (collecting cases).[8]

As a factual matter, contrary to Intervenors' claims, the district court explicitly *did* consider partisanship as part of its totality-of-circumstances analysis. *See id.* at 1226 ("While the Court will certainly have to determine whether the totality of the circumstances in the Yakima Valley region shows that Latino voters have less opportunity than white voters to elect representatives of their choice on account of their ethnicity (as opposed to their partisan preferences), that question does not inform the political cohesiveness or bloc voting analyses."). As the court explained, quoting Justice O'Connor's concurrence in *Gingles*, there was no reason "the 'candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made the candidate the preferred choice of the minority group.'" *Id.* at 1235 (quoting *Gingles*, 478 U.S. at 100) (O'Connor, J., concurring). That is, white voters reject Hispanic-preferred candidates for the same reason Hispanics prefer them. In short, the evidence showed that Hispanic voters "prefer candidates who are responsive to the needs of the Latino

[8] *Smith v. Salt River Project Agricultural Improvement & Power District*, 109 F.3d 586 (9th Cir. 1997), on which Intervenors rely (Opening Br. at 57), did not concern a dilution claim or racially polarized voting.

community whereas their white neighbors do not. The fact that the candidates identify with certain partisan labels does not detract from this finding." *Soto Palmer*, 686 F. Supp. 3d at 1235. Intervenors make no effort to explain why the district court's factual findings were wrong.[9]

6. Finally, Intervenors nitpick the district court's factual findings and weighing of the evidence under the totality-of-circumstances test, accusing the Court of overemphasizing certain facts and relying in part on supposed hearsay (to which they did not object at trial). Opening Br. at 70-75. But Intervenors' quibbles around the margins come nowhere near showing that the district court clearly erred.

Here, again, the State will leave it to Plaintiffs to address the specific evidence they adduced at trial. But the State highlights two key holes in Intervenors' argument.

First, unlike Plaintiffs, Intervenors declined to present any expert or even any local witnesses to address conditions in the Yakima Valley area. As a result, Intervenors have essentially no affirmative evidence they can cite to show that Hispanic voters in the area are free from structural disadvantages that undermine

[9] And although not relied on by the district court, the State's expert, Dr. John Alford, concluded that "non-Hispanic White voters demonstrate cohesive opposition to" Hispanic-preferred candidates in partisan elections, and that this "*opposition is modestly elevated when those [Hispanic-preferred] candidates are also Hispanic*." 3-ER-477 (emphasis added). Dr. Alford's conclusion thus lends support to the notion that race is, at a minimum, an exacerbating factor in driving racially polarized voting.

their voting power. *See United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1569 (11th Cir. 1984) ("[W]hen there is clear evidence of present socioeconomic or political disadvantage resulting from past discrimination, as there was in this case, the burden is not on the plaintiffs to prove that this disadvantage is causing reduced political participation, but rather is on those who deny the causal nexus to show that the cause is something else.").

Second, Intervenors simply ignore recent cases finding that circumstances in the Yakima Valley area dilute Hispanic voting power. In *Montes v. City of Yakima*, for example, the district court concluded that "[t]he totality of the circumstances (as framed by the Senate Factors) demonstrates that the City[of Yakima]'s electoral process is not equally open to participation by Latino voters[.]" 40 F. Supp. 3d at 1407 (capitalization omitted). In particular, as the court did here, the *Montes* court pointed to a history of apparent Voting Rights Act violations in the area, a lack of success of Hispanic-preferred candidates driven by racially polarized voting, seemingly neutral (and fairly widespread) voting practices that structurally disadvantaged the minority population, and "marked disparities in socio-economic status" that "evidence . . . discrimination[.]" *Id*. at 1409-14.

Similarly, in *Glatt v. Pasco*, the district court adopted the parties' stipulation that, under "'the totality of the circumstances' analysis, there is sufficient evidence of disparities to show inequality in opportunities between the white and Latino

populations and that the existing at-large election system for the Pasco City Council has excluded Latinos from meaningfully participating in the political process and diluted their vote[.]" WA-SER-228; *see also* WA-SER-297 (adopting stipulation that "[t]here is sufficient evidence from which the Court could find that the at-large system of electing Yakima County Commissioners violates the Washington Voting Rights Act."); *Portugal v. Franklin County*, 530 P.3d 994, 1004 (Wash. 2023) (noting that Franklin County, Washington "conceded the WVRA violation" based on its system of electing county councilmembers "because they could not make a contrary argument 'in good faith[,]'" after which "[t]he trial court granted partial summary judgment" in plaintiffs' favor).

While these cases address different electoral districts, and different voting practices, than the instant case, they each ultimately turn on whether political and social factors in the Yakima Valley area combine to dilute Hispanic voters' voting power. In each case, the court found they did. Each concluded that under the totality of circumstances, Hispanic voters in the Yakima Valley area "have less opportunity than the majority to participate in the political process and to elect representatives of their choosing." *Montes*, 40 F. Supp. 3d at 1408 (paraphrasing 52 U.S.C. § 10301); *see also* Wash. Rev. Code § 29A.92.030 (Washington VRA: "A political subdivision is in violation of this chapter when it is shown that . . . Members of a protected class or classes do not have an equal opportunity to elect candidates of their choice as a

result of the dilution or abridgment of the rights of members of that protected class or classes."). It's hard to see how the district court clearly erred in this case when its findings echo those of every other judge who has examined the question.

Intervenors contend that the district court erred because the district court's findings of barriers impacting Hispanic voters in the Yakima area "would apply to almost every single jurisdiction in America with a modestly sizeable Hispanic population." Opening Br. at 74. But the fact that Hispanics nationwide have been subject to pervasive discrimination does not render the VRA unenforceable in the Yakima area. And it does not change the fact that Hispanic Washingtonians have, for far too long, faced systemic racism that has undermined their economic, social, and political power.

D. The District Court's Remedial Order Was Supported by the Evidence

Intervenors also challenge the district court's remedy. To succeed on this appeal, they must show that the district court clearly erred in adopting the remedial map. *See North Carolina v. Covington*, 585 U.S. 969, 979 (2018). They cannot.

1. The remedial map remedies the VRA violation because, unlike its predecessor map, it empowers Hispanic voters to elect the candidates of their choice

Intervenors' repeated contention that the remedial map further dilutes the Hispanic vote, Opening Br. at 76-80, may briefly sound compelling, but it fails as an argument because it is contrary to the evidence. Again, the Voting Rights Act

guarantees the right of minority voters "to elect representatives of their choice." 52 U.S.C. § 10301. Here, the undisputed evidence showed that Hispanic voters in former LD 15 couldn't do that because of racially polarized voting: while they voted cohesively for particular candidates, non-Hispanic voters voted cohesively in the other direction, resulting in the Hispanic-preferred candidates losing. *Soto Palmer*, 686 F. Supp. 3d at 1225-27. What's more, the evidence shows that this racially polarized voting reflected and reinforced a longstanding (if slowly improving) pattern of discrimination against Hispanic voters in the Yakima Valley area, resulting in "less opportunity" for Hispanic voters "to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301; *Soto Palmer*, 686 F. Supp. 3d at 1227-35. This is the Section 2 violation the district court was tasked with remedying.

The undisputed evidence shows that the new LD 14 likely succeeds in remedying it. Plaintiffs' expert demonstrated that, in contrast to enacted LD 15, Hispanic-preferred candidates would likely usually win in the version of LD 14 ultimately adopted by the district court. WA-SER-005 And for all his criticisms of Plaintiffs' maps, Intervenors' expert agreed. 2-ER-78-79.[10] The new LD 14 thus remedies the Section 2 violation.

[10] Because Plaintiffs' (and ultimately the court's) remedial district changed the numbering of the relevant district from 15 to 14, interpreting Figure 11 of Intervenors' expert report at 2-ER-78, requires comparing enacted district 15 with

Intervenors do not—and cannot—dispute this. And while it may seem odd at first blush that the remedial district has a lower Hispanic CVAP than the original district (primarily because the remedial district incorporates the Yakama Nation, while the original district excluded it), Intervenors to not point to any authority to support the proposition that a remedy that nominally reduces minority CVAP, but increases minority voters' ability to elect candidates of their choice, is *per se* unacceptable. And it is easy to think of contrary examples: for example, a district with a higher CVAP that included large numbers of minority voters who rarely or never vote, could be less likely to elect candidates of the minority group's choice than a district with a lower CVAP that swept in minority voters who routinely vote.

Lacking evidence or on-point authority, Intervenors instead try to analogize this case to *Bartlett v. Strickland*, 556 U.S. 1 (2009), and *Cooper v. Harris*, 581 U.S. 285 (2017). Opening Br. at 79-80. Both are inapposite. The language Intervenors quote concerns whether the first *Gingles* precondition is satisfied—i.e., whether Section 2 liability may attach. *See Bartlett*, 556 U.S. at 12 ("This case turns on whether the first *Gingles* requirement can be satisfied when the minority group makes up less than 50 percent of the voting-age population in the potential election district."); *Cooper*, 581 U.S. at 305 (under "the first *Gingles* precondition . . . [w]hen

---

remedial district 14.

a minority group is not sufficiently large to make up a majority in a reasonably shaped district, § 2 simply does not apply[]").[11] Neither case has anything to say about what remedies are appropriate once a violation is found, as here.

Intervenors also try to place weight on Judge Thomas' single-justice concurrence in *Alexander v. S.C. State Conference of the NAACP*, in which he criticized the district court by name for its supposedly "dismissive attitude toward non-Democratic members of minority groups." 144 S. Ct. 1221, 1264 (2024) (Thomas, J., concurring). Obviously, Justice Thomas' lone concurrence, offering passing criticism without the benefit of the full record and briefing, is not the law.

2. Intervenors waived their argument that the remedial Legislative District 14 is a racial gerrymander, and even if they had not, considerations of race did not predominate in the district court's remedy

During the remedial process, Intervenors never raised concerns that any of Plaintiffs' proposed maps or the remedial map adopted by the district court would be an unconstitutional racial gerrymander. Instead, Intervenors complained that the maps were overtly partisan and further *diluted* Hispanic voting strength. *See*, *e.g.*, WA-SER-050 They lodged their racial gerrymandering criticism of the adopted map

[11] In this case, as detailed in the district court's order (and notwithstanding Intervenors' attempt to re-write *Gingles'* first precondition, *supra* at pp. 30-31), it is essentially undisputed that Hispanic voters in the Yakima Valley area are "sufficiently large to make up a majority in a reasonably shaped district . . . ." *Cooper*, 581 U.S. at 305.

for the first time in the stay briefing before this Court. DktEntry 6.1 at 38-40, No. 24-1602.[12] They have inadequately preserved this issue and thus waived it. *Cf. Wood v. Milyard*, 566 U.S. 463, 473 (2012) ("[A]ppellate courts ordinarily abstain from entertaining issues that have not been raised and preserved in the court of first instance.").

But even had Intervenors preserved this argument, they fall woefully short of the high bar they must clear to overturn the district court's remedial map. To allege, let alone prove, a racial gerrymandering claim, "the burden of proof . . . is a demanding one." *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) (internal quotation marks omitted). And courts apply a presumption of good faith, given that "[t]he distinction between being aware of racial considerations and being motivated by them may be difficult to make." *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

Intervenors' argument requires a "two-step analysis." *Cooper*, 581 U.S. at 291. "First, [they] must prove that race was the predominant factor motivating the [court's] decision to place a significant number of voters within or without a particular district." *Id*. (internal quotation marks omitted). To make this showing, they would have to show the district court "subordinated other factors—

[12] As noted above in the standing section, Intervenors raised the specter of racial gerrymandering in a single paragraph in their motion to intervene filed back in March 2022. 2-ER-301. But they did not raise a gerrymandering argument in opposition to Plaintiffs' multiple proposed maps.

compactness, respect for political subdivisions, partisan advantage, what have you—to racial considerations." *Id*. (internal quotation marks omitted). It is not enough that race played a role in decision-making—it must overwhelm other factors. *See Easley*, 532 U.S. at 253 (finding no evidence of racial predominance in a legislator's statement that a map provided "geographic, racial and partisan balance" because at worst "the phrase shows that the legislature considered race, along with other partisan and geographic considerations[]").

"Second, if racial considerations predominated over others, the design of the district must withstand strict scrutiny." *Cooper*, 581 U.S. at 292. At this stage in the inquiry, the burden "shifts to the" party defending the map to establish that any "race-based sorting of voters serves a compelling interest and is narrowly tailored to that end." *Id*. (internal quotation marks omitted). Courts have long considered compliance with the VRA to be a compelling interest. *Id.*

Intervenors ignore this demanding standard, and make essentially no effort to satisfy it. Instead, their argument is based on two things: their hired expert's characterization of the new LD 14's shape as octopus-like (Opening Br. at 80-81) and the district court's conclusion that the district's shape was necessary to remedy the enacted map's division of a Hispanic community of interest in the Yakima Valley area (Opening Br. at 92-93).

Intervenors not only vastly overstate the strangeness of the district's shape, they also ignore obvious, non-racial explanations for its shape. *See* Opening Br. at 82. For example, both the northwest and southwest legs are necessary to keep together Reservation and Off-Reservation Trust Land of the Yakama Nation—a recognized community of interest whose preservation in a single district all parties agreed was a critical goal. *Palmer*, 2024 WL 1138939, at *2-3; *see* WA-SER-037; 2-ER-67 (maps of Trust Lands).[13] And the small appendage at the northernmost point of the district goes into the City of Yakima, the population center of the district, and is necessary to grab enough population for the district. Similarly, Intervenors not only disregard that uniting communities of interest is a well-recognized—indeed, *statutorily mandated*—redistricting criterion, Wash. Rev. Code § 44.05.090, they also ignore evidence and testimony that the district was reasonably compact and initially drawn by Plaintiffs' map drawing expert without considering race or racial demographics. *See, e.g.*, WA-SER-008; WA-SER-065.

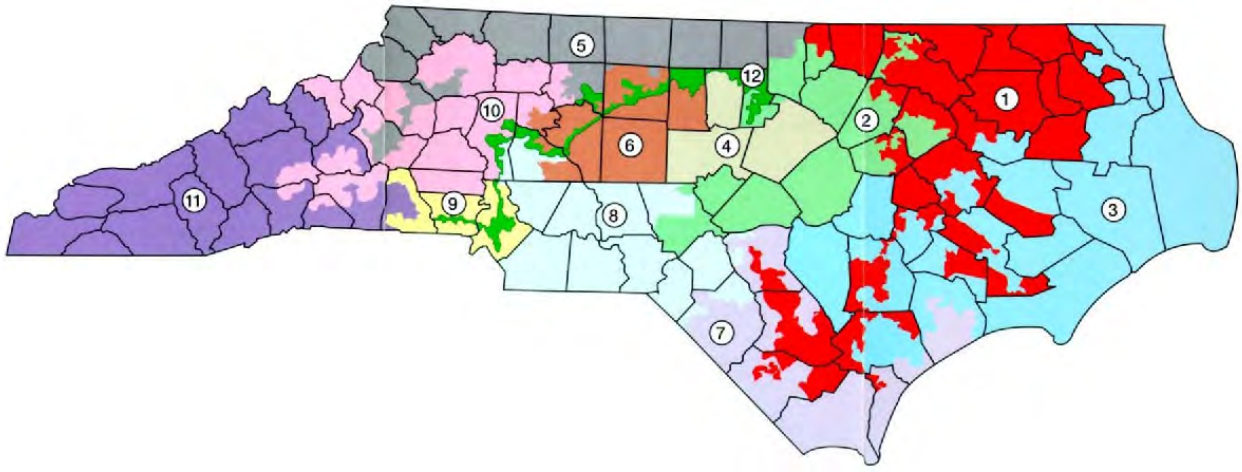
Intervenors falsely claim that "the district court . . . declar[ed] the map's 'fundamental goal' to be race-based sorting." Opening Br. 80 (partially quoting

[13] The need to keep together the Yakama Nation also helps explain why the remedial map has a lower Hispanic CVAP than the enacted map. It would have been very easy to create a VRA-compliant map with a high Hispanic CVAP by separating majority-Hispanic reservation communities like Wapato and Toppenish from the rest of the Yakama Reservation, but that would have violated the express wishes of the Yakama Nation and sundered an important community of interest. *See, e.g.*, 3-ER-456.

Remedial Order at 1-ER-08 n.7.). This badly misreads the order. Plaintiffs alleged that LD 15 violated Section 2 of the VRA by, in part, dividing a Hispanic community of interest in the Yakima Valley area. *Soto Palmer*, 686 F. Supp. 3d at 1220. Having found a violation, remedying it—including by uniting the Hispanic community of interest proved at trial—was obviously and appropriately a fundamental goal of the remedial map.

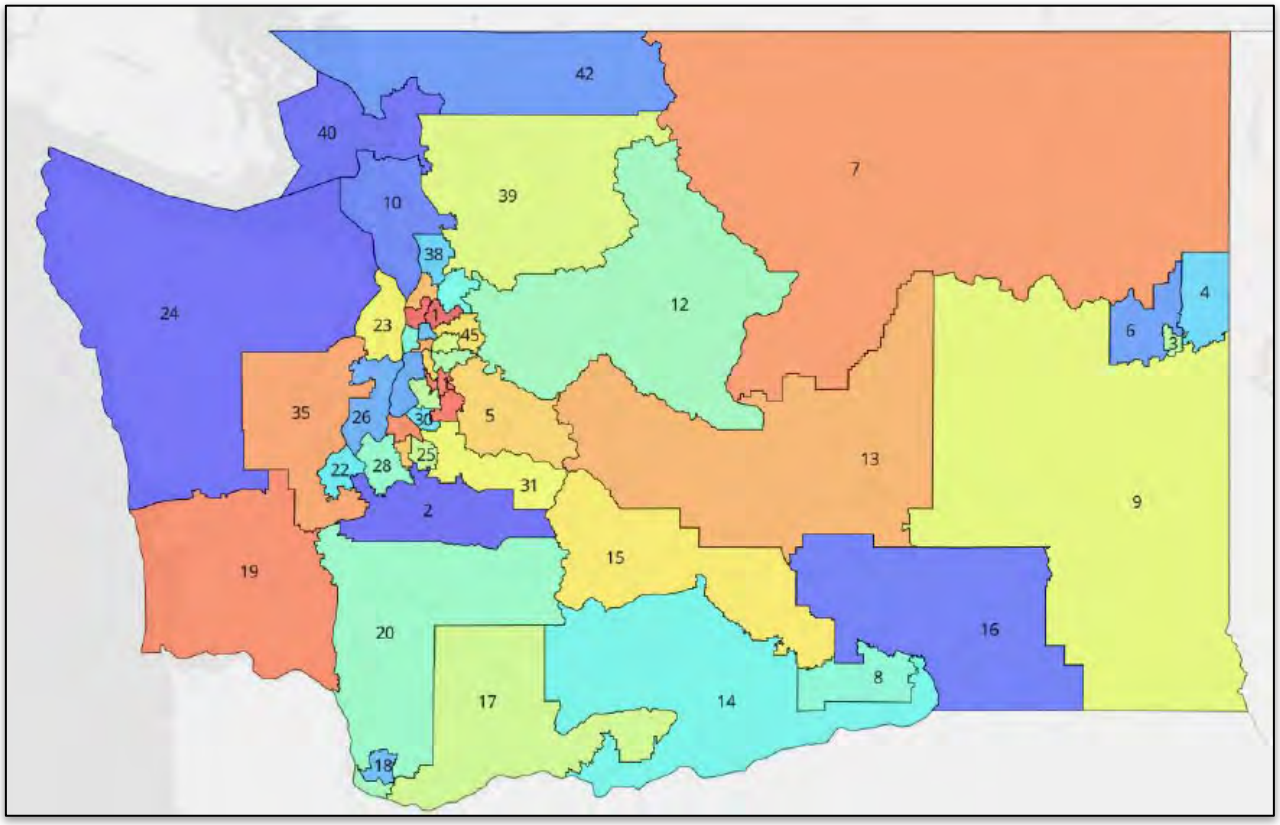
Moreover, Intervenors' central premise—that considering race is verboten in remedying a VRA violation—has been definitively rejected by the Supreme Court. *See Allen*, 599 U.S. at 32-33 ("The contention that mapmakers must be entirely 'blind' to race has no footing in our § 2 case law."); *id.* at 30 ("When it comes to considering race in the context of districting, we have made clear that there is a difference 'between being aware of racial considerations and being motivated by them.'" (quoting *Miller*, 515 U.S. at 916)). Further, Intervenors actively undermine their own argument, asserting that partisanship—not race—was the driving force behind the district court's decision-making. *See, e.g.*, Opening Br. at 87 ("If partisan changes through Washington were not the point, it is simply incomprehensible why the district court adopted a Map 3 variant."). Intervenors come nowhere near showing that race predominated over other redistricting criteria in Judge Lasnik's mind.

Intervenors attempt (Opening Br. at 81) to compare this case to *Shaw v. Reno*, 509 U.S. 630, 642 (1993), where North Carolina's congressional map was "so extremely irregular on its face" that plaintiffs could state an equal protection violation, and to *Bush v. Vera*, 517 U.S. 952, 974 (1996), in which the Court found that district shapes, likened to, *inter alia*, "a sacred Mayan bird" (internal quotation marks omitted), were evidence (although not proof) of racial predominance. *See also id.* at 974 ("Not only are the shapes of the districts bizarre; they also exhibit utter disregard of city limits, local election precincts, and voter tabulation district lines."). But even the quickest glance at District 12, a majority-minority district at issue in *Shaw*; Districts 18, 29, and 30 in *Bush*; and LD 14 adopted by the district court here, show why Intervenors cannot meet the extraordinarily high burden of establishing that race predominated here:



Shaw, 509 U.S. at 659 (App'x) (District 12 shaded in green).

Bush, 517 U.S. at 986 (App'x A-C) (Districts 18, 29, and 30).



WA-SER-004 (LD 14).

Intervenors' criticism of LD 14's boundaries further ignores the Supreme Court's recognition that "[t]he Constitution does not mandate regularity of district shape," and "the neglect of traditional districting criteria is merely necessary, not sufficient." *Bush*, 517 U.S. at 962. Instead, Intervenors must show that the district

court subordinated traditional districting criteria to race. *See id.*; *Miller*, 515 U.S. at 928 (O'Connor, J., concurring) ("plaintiff must show that the State has relied on race in substantial disregard of customary and traditional districting practices"). This is a showing Intervenors have not even tried to make.

Even if they could, that still wouldn't prove Judge Lasnik violated the Constitution. Instead, it would just mean the remedial map is subject to strict scrutiny. *Cooper*, 581 U.S. at 292. And if strict scrutiny did apply, the district court's remedial map would satisfy it. *See id.* ("This Court has long assumed that one compelling interest is complying with operative provisions of the Voting Rights Act of 1965[.]"). The new LD 14 serves the undeniably compelling interest of remedying a VRA violation, and, for the reasons detailed in his order, the new district is narrowly tailored to remedy the violation. *See Palmer*, 2024 WL 1138939, at *3-5.

3. The State takes no position on Intervenors' objections that the remedial map allegedly made overbroad changes

As noted above, the sole manner for Washington to propose or modify legislative districts is through the Redistricting Commission. As such, while the State sincerely doubts that Intervenors can show the district court *clearly erred* in adopting the map it did, *contra* Opening Br. at 83-89, the State has not taken a position as between remedial maps that comply with the VRA. *See* 2-ER-170 (because the State had no basis to "dispute Plaintiffs' assertion" that Plaintiffs' proposed maps remedies the Section 2 violation, the State "defer[red] to the Court

on which remedial map best provides Latino voters with an equal opportunity to elect candidates of their choice while also balancing traditional redistricting criteria and federal law"). The sole concern from the State's perspective is that the new map remedied the Section 2 violation. *Id.* The adopted map does so. Accordingly, the State take no further position on this point.[14]

VII. CONCLUSION

Intervenors' appeal should be dismissed for lack of jurisdiction. In the alternative, the district court's judgment and remedy should be affirmed.

RESPECTFULLY SUBMITTED this 30th day of August 2024.

ROBERT W. FERGUSON
Attorney General

/s/ Andrew Hughes
CRISTINA SEPE, WSBA #53609
Deputy Solicitor General
ANDREW R.W. HUGHES, WSBA #49515
Assistant Attorney General
800 Fifth Avenue, Suite 2000
P.O. Box TB-14
Seattle, WA 98104

[14] Intervenors spend a few sentences suggesting that the remedial plan might violate "Washington law that the districts 'provide fair and effective representation and [] encourage electoral competition' and 'not be drawn purposely to favor or discriminate against any political party or group[.]'" (Opening Br. at 96 (quoting Wash. Rev. Code § 44.05.090(5)). To the extent they contend the district court erred by violating Washington law, Intervenors have waived this argument both by failing to raise it below, s*ee generally* WA-SER-050, and by "fail[ing] to develop any argument on this front," *John-Charles v. California*, 646 F.3d 1243, 1247 n.4 (9th Cir. 2011). In any event, the remedial map does not violate Washington law merely because it makes slight changes to the partisan tilt of some districts.

Cristina.Sepe@atg.wa.gov
Andrew.Hughes@atg.wa.gov
Attorneys for Appellee State of Washington

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 23-3995; 24-1602

I am the attorney or self-represented party.

This brief contains 14,924 **words,** including _____ words manually counted in any visual images, and excluding the items exempted by FRAP 32(f). The brief's type size and typeface comply with FRAP 32(a)(5) and (6).

I certify that this brief *(select only one)*:

- ○ complies with the word limit of Cir. R. 32-1.
- ○ is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.
- ○ is an **amicus** brief and complies with the word limit of FRAP 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).
- ○ is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.
- ◉ complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
  - ☐ it is a joint brief submitted by separately represented parties.
  - ☒ a party or parties are filing a single brief in response to multiple briefs.
  - ☐ a party or parties are filing a single brief in response to a longer joint brief.
- ○ complies with the length limit designated by court order dated _____.
- ○ is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature /s/ Andrew Hughes **Date** 8/30/24

*(use "*s/[typed name]*" to sign electronically-filed documents)*