Nos. 23-35595 & 24-1602

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN SOTO PALMER, et al.,
Plaintiff-Appellees,
v.
STEVEN HOBBS, in his official capacity as Secretary of State of Washington, and the STATE OF WASHINGTON,
Defendant-Appellees,
and
JOSE TREVINO, ISMAEL G. CAMPOS, and State Representative ALEX YBARRA,
Intervenor-Defendant-Appellants.

On Appeal from the United States District Court
for the Western District of Washington
Case No. 3:22-cv-05035
Hon. Robert S. Lasnik

INTERVENOR-APPELLANTS' CONSOLIDATED REPLY BRIEF

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GLOSSARY

Term	Definition
Intervenors / Appellants	Three Hispanic voters who intervened as defendants in the district court (Jose Trevino, Alex Ybarra, and Ismael G. Campos), who are Appellants here
Enacted Map	The permanently enjoined Washington State Legislative Map, as drawn by the Commission and adopted by the Legislature in February 2022
CVAP	Citizen Voting Age Population
HCVAP	Hispanic Citizen Voting Age Population
LD-15	Washington Legislative District 15 of the Enacted Map
Remedial Map	The new Washington State Legislative Map as ordered by the district court on March 15, 2024
State / Appellees	The State of Washington, as appearing in this litigation and represented by the Attorney General
Plaintiffs / Appellees	The group of voters who originally brought this Section 2 case and prevailed at the district court on the merits, who are Appellees here
Commission	Washington State's bipartisan, independent Redistricting Commission created by Wash. Const. art. II, § 43(2)
VRA	The Voting Rights Act, 52 U.S.C. § 10301 *et seq*.

INTRODUCTION

Appellees spill considerable ink attempting to portray the merits and remedial decisions below as unremarkable, humdrum applications of Section 2 of the Voting Rights Act ("§2"). They are anything but. For example—and for the first time ever—a federal district court adopted a remedy that purports to cure putative dilution of minority voting strength by intentionally reducing the citizen voting age population ("CVAP") of that minority group—i.e., putatively curing dilution with dilution.

The State admits (at 54) that no court has done as much previously and that "it may seem odd at first blush." But that conceded oddity—which results from the remedy being an oxymoronic contradiction in terms—looks no better on second review. Indeed, deeper scrutiny is the last thing from which the Remedial Map would benefit. If insufficient Hispanic voting strength is the §2 violation, a further reduction of that strength by importing voters of other races cannot be the "cure." It is the disease.

Both Appellees' contrary view rests on their ill-disguised premise that the §2 violation is actually an insufficient number of members of a particular party being *elected* rather than insufficient Hispanic voting strength—hence a remedy that dilutes Hispanic CVAP makes perfect sense in their mind as long as it moves the partisan needle in the "right" direction. But §2 is "not a guarantee" of partisan success, *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994)—particularly where

those outcomes can apparently only be achieved by perpetrating the very race-based dilution §2 prohibits. And the implicit premise of the remedy—that Hispanic voters can only elect a voter of "their" choice by diluting their votes with those of other racial groups who will purportedly effectuate "their" choice better than Hispanic voters themselves—is as paternalistic and odious as it is legally erroneous.

In contrast to the State, Plaintiffs attempt to provide examples of courts' adopting similar cure-dilution-with-dilution §2 remedies. But their boil-the-ocean effort produced only decisions that are manifestly inapposite, such as a cite to a *racial gerrymandering* claim involving packing (not dilution) under the Equal Protection Clause, which everyone agrees is rightly remedied by breaking up the racially packed district. *See* Pls.' Br.67 (citing *Bethune-Hill v. Virginia State Bd. of Elections*, 368 F. Supp. 3d 872, 887–88 (E.D. Va. 2019)).

The sweep of the changes adopted by the Remedial Map is also unprecedented—and *far* exceeds what the Supreme Court permits. In *Upham v. Seamon*, the Supreme Court held that a district court abused its discretion by redrawing *four* out of twenty-seven districts to remedy objections to *only two*. 456 U.S. 37, 38, 40–41 (1982). But here the district court redrew *thirteen* out forty-nine districts to remedy a violation in *just one* district. That abuse of discretion is particularly egregious because Plaintiffs admitted that their other remedial maps—which changed as few as *four* districts—would each constitute "a complete and

comprehensive remedy." 2-ER-183. By issuing an injunction that went beyond giving "complete and comprehensive" relief, the district court gravely abused its discretion under *Upham*. *Lamb-Weston, Inc. v. McCain Foods, Ltd.*, 941 F.2d 970, 974 (9th Cir. 1991) ("An overbroad injunction is an abuse of discretion."). And a heightened abuse of discretion standard—not clear error, as the Plaintiffs wrongly claim—is the standard for the court-drawn remedial map. *See Connor v. Finch*, 431 U.S. 407, 414 (1977).

The district court's merits analysis is nearly as unprecedented as its remedial order. No federal district court has ever previously upheld a challenge to a single majority-minority district and then been itself upheld by an appellate court without the majority-minority in question being found to be "hollow" or a mere "façade." The closest any such decision has come to being affirmed was when a panel of the Fifth Circuit upheld such a determination before the en banc court vacated that decision and granted en banc rehearing, with the case becoming moot before the full court could complete the job of reversing the errant district court. *Thomas v. Bryant*, 938 F.3d 134 (5th Cir. 2019), *vacated as moot* 961 F.3d 800 (2020) (en banc). And while some stray district courts have held as much without encountering (let alone surviving) appellate review, those decisions violate the text of §2 and the Supreme Court's seminal *Gingles* framework, which presupposes that the challenged district is *not* already a majority-minority district.

Given the severe legal deficiencies pervading the district court's unprecedented orders, Appellees unsurprisingly seek refuge in jurisdictional arguments. Those attempts to evade this Court's review are unavailing, particularly in light of Appellees' concessions.

Neither Appellee disputes that plaintiffs have standing to challenge electoral maps when the plaintiffs reside in the district at issue and are classified based of their race. And both further admit that, under this Court's decision in *Atay v. Cnty. of Maui*, 842 F.3d 688 (9th Cir. 2016), "independent, individualized harm *may* support standing for an intervenor to appeal." Pls.' Br.28; *accord* State's Br.25 ("[T]here are many other cases where intervenor-defendants have a personal stake and thus standing to appeal."). And Intervenor Jose Trevino has alleged just such harms—indeed the very *same* type of harms that established Plaintiffs' standing here.

Plaintiffs attempt (at 28) to defeat standing to appeal by arguing that Mr. Trevino "has not alleged with any specificity that he has been racially classified in the remedial map" because Intervenors have purportedly not proven that Remedial LD-14 was an unconstitutional racial gerrymander. That argument fails on two levels: (1) The Supreme Court has made clear that the classification *itself* inflicts cognizable injury establishing Article III standing, rather than requiring that the classification be unconstitutional; and (2) Plaintiff's argument improperly conflates the standing inquiry with the merits, since the Court "must accept—for standing

purposes—[the] allegations" of Intervenors as to the merits. *Arizona v. Yellen*, 34 F.4th 841, 849 (9th Cir. 2022). Indeed, standing is particularly obvious here because Mr. Trevino's standing is the mirror image of Plaintiffs' standing—both rely on their status as Hispanic voters in the challenged/remedial district to assert their claims. And to the extent there was ever any doubt that the plaintiff-versus-intervenor-defendant distinction is irrelevant for standing purposes, *Atay* obliterated it.

This Court should thus hold it has jurisdiction and reverse the judgments below.

ARGUMENT

I. INTERVENORS HAVE STANDING TO BRING THESE APPEALS

A. The Racial Classification Inherent in the Judgment Below Inflicts Cognizable Injury on Intervenor Jose Trevino

Mr. Trevino has suffered the *same* type of injury from which Plaintiffs have derived their Article III standing: i.e., being a voter in the illegal district at issue. Here, Mr. Trevino is a voter residing in Granger, which was specifically moved from Enacted LD-15 to Remedial LD-14 as part of the district court's self-described "fundamental goal" to "unite the Latino community of interest in the region[,]" 1-ER-8 & n.7. That racial classification establishes Mr. Trevino's standing to appeal.

The Supreme Court has repeatedly held that racial classification of voters in a district during map-drawing *by itself* inflicts cognizable Article III injury: "The racial classification itself is the relevant harm in th[is] context." *Alexander v. S.C.*

State Conf. of the NAACP, 602 U.S. 1, 38 (2024). Thus, "[w]here a plaintiff resides in a racially gerrymandered district, … the plaintiff has been denied equal treatment … and therefore has standing to challenge" the district. *United States v. Hays*, 515 U.S. 737, 744–45 (1995). It is therefore enough to "reside[]" in the district—ergo specific "personal[]" classification (the rule suggested by Plaintiffs) is unnecessary.

Contrary to Appellees' contentions, such harms are not "generalized grievances" but rather "fundamental injury" to the "individual rights of a person." *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (*Shaw II*). Indeed, neither Plaintiffs nor the State cite a *single case* in which being a resident of a district the boundaries of which are being challenged as illegal on racial grounds has *ever* been held to be advancing a non-justiciable generalized grievance, rather than harms to the "individual rights of a person." *Id.* There is no reason for this case to be the first.

Here, the district court incontestably engaged in racial classification in its drawing the remedial district. The court's self-proclaimed "fundamental goal" was to "unite the Latino community of interest in the region[,]" 1-ER-8 & n.7, including Mr. Trevino's town of Granger. Drawing a district—here, Remedial LD-14—on the explicit and specific basis of uniting *Latino communities of interest* is the very definition of racial classification in redistricting.

Plaintiffs attempt to evade this straightforward application of Supreme Court precedent by advancing (at 28-29) the curious argument that Mr. Trevino (a resident and one-time mayor of Granger) was not racially classified, but "the entire city of Granger" was instead. In Plaintiffs' view, Mr. Trevino could only have standing if "he [were] *personally* subject to racial classification," Pls.' Br.28 (emphasis added)—for which only personal classification by name would apparently suffice. Plaintiffs (at 25) even go so far as to place "racial classification" in scare quotes given the putative lack of personal classification.

As an initial matter, Plaintiffs do not identify *any* case that could satisfy their standard—i.e., where a mapmaker singled out voters *by name* when drawing districts. Certainly no federal court ever required as much for standing in *Alexander*, *Hays*, *Shaw II*, or any of the myriad other cases in which courts have found standing based merely on being a resident of the relevant district rather than specific personal classification. That makes perfect sense considering it has been black-letter law for decades that that a person who "resides in a racially gerrymandered district" has "standing to challenge" it. *Hays*, 515 U.S. at 744–45. As long as *Hays* and the legion of cases like it remain good law, Appellees' arguments must be rejected.[1]

[1] Plaintiffs curiously contend (at 25) that Intervenors' standing arguments are "newly raised." To begin with, standing *to appeal* is obviously a new issue that was not presented below, where Intervenors were not plaintiffs and were not required to establish standing, particularly *to appeal*. But while standing to appeal may be a new

Appellees also appear to argue that even if the district court engaged in racial classification, it was not a sufficiently intense use of race to create cognizable injury. The State argues (at 27-28) that the racial classification here does not support standing because Intervenors purportedly failed to demonstrate that "the district court actually engaged in racial gerrymandering," adding that "race may be considered as a factor in remedying a Section 2 violation without violating the Equal Protection Clause." Plaintiffs similarly contend (at 29) that standing is lacking because race did not "predominate[]" in the drawing of Remedial LD-14 and "the remedial map would not even prompt, let alone fail, strict scrutiny."

These arguments fail for two related reasons. *First*, "the racial classification *itself* is the relevant harm." *Alexander*, 602 U.S. at 38 (emphasis added). Intervenors thus need only show that Mr. Trevino was racially classified—not that the racial classification was unconstitutional or surpassed some threshold of intensity. That much is apparent from the judgment in *Alexander*, which held that the plaintiffs' racial gerrymander claim failed on the *merits*, but did not go on to dismiss the case

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argument, the bases for that standing are the very same interests that Intervenors relied upon to intervene in this case. *See* FER-10–11 (granting intervention and acknowledging that "Intervenors Trevino and Campos claim 'an interest in ensuring that any changes to the boundaries of [their] districts do not violate their rights to 'the equal protection of the laws' under the Fourteenth Amendment.'"). So while those underlying interests might be "newly raised" in support of Intervenors' standing *to appeal*—how could they be otherwise?—they were squarely presented below as the interests supporting intervention.

for lack of standing, *id.* at 39—which would be required if Appellees' arguments here were correct.

Second, by demanding that Intervenors establish that the district court's use of race was unlawful, Appellees improperly conflate the standing and merits inquiries. It is well-established that "standing in no way depends on the merits." *Warth v. Seldin*, 422 U.S. 490, 500 (1975). For that reason, this Court has held that issues of standing must be resolved by viewing the dispute "through [Trevino's] eyes" and "must accept—for standing purposes—[the] allegations" that the remedial map is unconstitutional. *Yellen*, 34 F.4th at 849; *accord FEC v. Ted Cruz for Senate*, 596 U.S. 289, 298 (2022) ("For standing purposes, we accept as valid the merits of [the] legal claims."). Appellees' arguments that the district court's use of race was lawful thus cannot defeat Intervenors' *standing* to appeal even if they were correct (and they aren't).[2]

[2] Plaintiffs' contentions (at 29, 68) that their expert "did not consider race or racial demographics in drawing the remedial plans" and "did not use political, partisan, racial, or electoral data when map drawing" are irrelevant because the district court—the actual drawer of the Remedial Map—admitted that it did so as its "fundamental goal." 1-ER-8 & n.7. As the relevant line-drawer, *its* use of race is the relevant one for standing purposes.

Plaintiffs' denials are also incoherent. How could Dr. Oskooii possibly have formed an opinion as to whether remedial maps actually remedied the §2 violation found by the district court without considering such directly relevant factors? The very premise of Plaintiffs' claim was that LD-14 diluted Hispanic voting strength by failing to elect Democrats as the putative choice of Hispanic voters. The only *possible* way to ascertain whether a remedial map could remedy that alleged

B. Mr. Trevino's Status As An Intervenor-Defendant, Rather Than A Plaintiff, Does Not Defeat His Standing To Appeal

Shifting tacks, Appellees further argue that even if Mr. Trevino has cognizable injury based on the Remedial Map's racial classification that would convey standing if he were a plaintiff, that he nonetheless lacks standing to appeal as an Intervenor-Defendant because the State has declined to take an appeal (and indeed actively advocates for the judgment entered against it). That argument is directly contrary to this Court's decision in *Atay*, which specifically rejected the argument that intervenor-defendants "lack independent standing to defend the constitutionality of the [challenged law] where the relevant public officials have chosen not to." 842 F.3d at 695–97.

Plaintiffs notably agree that, under *Atay*, "independent, individualized harm *may* support standing for an intervenor to appeal." Pls.' Br.28 (citing *Atay*, 842 F.3d at 696). And, as set forth above and previously, the district court's racial classification inflicts precisely such "independent, individualized harm." The State does not even attempt to distinguish *Atay* and admits (at 25) that it stands for the proposition that "intervenors must have interests that have been adversely affected by each judgment they seek to appeal." But again, the district court's judgment does just that by its racial classification.

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violation would be to consider the very factors that Plaintiffs deny that he considered. Any other approach is nonsensical.

Ignoring *Atay*, the State argues (at 2) that Trevino lacks standing to appeal because he has "no role in enforcing or implementing" the remedial map. But that was also incontestably true of intervenor-defendants in *Atay*—who also played no role in enforcing or implementing Maui's ban on genetically engineered crops. *See* 842 F.3d at 696. Yet they still had standing to appeal. *Id.* at 695–97. The same result should occur here.

Plaintiffs also invoke the "to do or refrain from doing anything" rule from *Hollingsworth*. Pls.' Br.26 (quoting *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013)). That proposition fails on its own terms: the Remedial Map *requires* Trevino to cast votes in a district drawn by racial classifications, rather than a district free of them.

In any event, this "do or refrain from doing anything" standard applies where intervenors are attempting to "stand in for the State." *Virginia House of Delegates v. Bethune-Hill*, 587 U.S. 658, 663 (2019). But here Trevino is not asserting any injury to the State, but rather, as Plaintiffs helpfully put it (at 28), vindicating his own "independent, individualized harm," which "may support standing for an intervenor to appeal." Pls.' Br.28 (citing *Atay*, 842 F.3d at 696) (emphasis removed). And again, the same could have been said in *Atay*: nothing in the challenged law there *required* those intervenor-defendants to grow organic crops that could be subject to cross-pollination from genetically engineered crops. But the fact that the

challenged judgment forced them to farm in a jurisdiction where such genetically engineered crops were grown established standing to appeal even though Maui refused to defend its own ordinance. *Atay*, 842 F.3d at 696. So too here.

One final point of clarification. Intervenors restate that they are not asserting standing based on Mr. Garcia's standing in his distinct case. *See* State's Br.20 (misconstruing Intervenors' reference to Mr. Garcia as a "red herring"). Rather, as Intervenors explained, Mr. Garcia provides an example of how standing works in this context to challenge the use of race in drawing electoral districts. In the same way Mr. Garcia has been injured in his case, so too has Mr. Trevino been injured here. It makes no sense to treat the individual injuries differently simply because of the side of the "v." on which they appear. *Atay* makes that plain.

It has never been Intervenors' contention that they had standing in this case based on Mr. Garcia's case/injury. But the fact that Mr. Garcia's standing is uncontested is deeply illustrative of why Mr. Trevino has standing too.

C. Alex Ybarra Has Individual Legislator Standing

Alex Ybarra also has standing because he faces a "costlier" and "more difficult election campaign[,]" an injury this Court should recognize. *See Bethune-Hill*, 587 U.S. at 671 (citing *Wittman v. Personhuballah*, 578 U.S. 539, 545 (2016)). Plaintiffs get stuck on the quantum of injury to Representative Ybarra and the 2024 election cycle. But the issue is not the quantum of injury—even one dollar of injury

is cognizable under Article III—but the *fact* of injury. And Appellees' arguments that more-difficult campaigns are not cognizable fail for the reasons set forth previously. *See* Opening Br.35-36.

Plaintiffs also argue that Rep. Ybarra lacks standing because he is running unopposed in 2024. Pls.' Br.31. Notably, that fact is not in the record. It is also unavailing: Appellees ignore that, if left to stand, the Remedial Map will also be used for 2026, 2028, and 2030 and do not even attempt to argue that a more difficult reelection campaign then would fail to create cognizable injury.

Finally, it is revealing of just how far Appellees are stretching the standing precedents when the State argues (at 30) that Mr. Trevino and Rep. Ybarra are "mere bystanders" to the Remedial Map—even though it specifically affects the district in which Mr. Trevino votes and the district that Rep. Ybarra represents. In the State's view, voters have no interest in the district in which they vote and elected officials have no interest in the district they represent. That contention is as counterintuitive as it is unsupported.

D. Intervenors' Harms Flow From the Merits Decision

Plaintiffs also strangely contend that even if Intervenors have a cognizable injury resulting from the Remedial Map sufficient to challenge it, they cannot contest the merits decision that was the but-for and proximate cause of that map and their resulting injuries. They thus allege (at 28) that "Intervenors make no contention that

they have standing to challenge the district court's liability order and injunction of the map alone."

But Intervenors have repeatedly made clear that the remedial order's racial classification flows directly from the liability order—that's how cases, and especially §2 cases, work. As Intervenors stated in their opening brief, the district court's remedial race-based actions followed inexorably from its VRA holding, since "compliance with the Voting Rights Act ... pulls in the opposite direction" of the Equal Protection Clause because it "insists that districts be created precisely because of race." *Abbott v. Perez*, 585 U.S. 579, 586 (2018). In other words, but for the liability order, the §2 race-based remedy would not exist. The district court itself believed that the violation—thus, the liability—was in part that the "Latino community of interest" from Yakima to Pasco was not "unite[d]." 1-ER-8. Accordingly, it was the "fundamental goal of the remedial process" to address that violation. 1-ER-8 n.7. Liability and remedy are by nature linked in §2, because "a district court's remedial proceedings bear directly on and are inextricably bound up in its liability findings." *Wright v. Sumter Cty. Bd. of Elections & Registration*, 979 F.3d 1282, 1302–03 (11th Cir. 2020). And the Supreme Court has long recognized that the *Gingles* preconditions—i.e., the merits of §2 liability—are about whether there "has been a wrong" or there "can be a remedy." *Growe v. Emison*, 507 U.S. 25, 41 (1993).

This Court too has rejected the premise that a non-governmental party can only have cognizable interests in the remedial phase of litigation and cannot have protectable interests with respect to the merits. In a unanimous en banc decision, this Court held that intervenors who would be harmed by invalidation of governmental actions had protectable interests that permitted them to seek intervention as to *merits* issues, and not just remedial ones. *See Wilderness Soc'y v. United States Forest Serv.*, 630 F.3d 1173, 1178 n.1, 1180–81 (9th Cir. 2011) (en banc) ("A putative intervenor will generally demonstrate a sufficient interest for intervention of right … *as in all cases*, if it will suffer a practical impairment of its interests as a result of the … litigation.") (quotation marks and citation omitted) (emphasis added).

E. Plaintiffs' Conspiratorial Aspersions Are Irrelevant and Meritless

Plaintiffs also devote (at 7-11, 24, 33-37) inordinate breath raising conspiratorial insinuations about the motivations of Intervenors and their counsel. That effort produces more heat than light.

At their base, Plaintiffs' haphazard insinuations amount to an allegation that parties with aligned interests coordinated on a multi-pronged strategy to advance those shared interests. Such coordination among parties with common interests is utterly *ubiquitous* in federal court litigation and hardly constitutes an "unsavory" or "tangled web" (at 24, 35)—or any of the other pejoratives that Plaintiffs casually

cast about. In any event, Plaintiffs never suggest that any of these flimsy insinuations actually affect the merits of any issue presented here in any way. That Plaintiffs devote exorbitant space to these ultimately irrelevant issues is inadvertently revealing of the weakness of their other arguments.

More to the point, the district court already examined these *precise* issues and held there was no there there. While Plaintiffs otherwise extol the district court's decisions, they ignore that the district court *specifically* considered all of these putative conflict issues and explicitly held that the various "clients' litigation positions are not directly adverse to each other." FER-8.

Plaintiffs' recycling of those baseless allegations in the teeth of the district court's adverse holding is thus little more than a sour-grapes attempt at misdirection. If Plaintiffs believe that the district court's explicit no-conflict finding was in error and wish to advance the contrary position to this Court, they were obliged to acknowledge that holding and appeal it specifically.

As to the State's claims that its own litigation strategy is irrelevant and unassailable, the Supreme Court has not deemed inconsequential the question of how courts should react to a government entity's intentional surrender in litigation to achieve desired policy outcomes. To the contrary, the Supreme Court has granted petitions for writs of certiorari quite recently in two cases featuring the same kind of strategic government surrender: *Arizona v. San Francisco*, 596 U.S. 763 (2022), and

Arizona v. Mayorkas, 143 S. Ct. 1312 (2023). And four Justices have rightly questioned "this tactic of '[law]making-by-collective-acquiescence.'" *San Francisco*, 596 U.S. at 766 (Roberts, C.J., concurring, joined by Thomas, Alito, and Gorsuch, JJ.) (citation omitted). Indeed, the State has gone well past the mere acquiescence of *San Francisco* and *Mayorkas* and instead is *actively collaborating* with Plaintiffs here in ensuring that the adverse judgment entered *against it* survives appellate review. Such unseemly tactics are plainly on the Supreme Court's radar, and quite properly so.

II. THE APPELLEES CANNOT SAVE THE NOVEL AND DISRUPTIVE REMEDIAL MAP

Appellees' defense of the district court's Remedial Map is scant and relies heavily on a baseless waiver argument. The United States tellingly does not even deign to attempt a defense, and for good reason: the Remedial Map is as unprecedented as it is excessive. It has already drawn the attention of one Supreme Court Justice for its novel enterprise "purport[ing] to correct the lack of Hispanic opportunity by imposing a remedial map that made the district 'substantially more Democratic,' but slightly less Hispanic." *Alexander*, 602 U.S. at 60 (Thomas, J., concurring in part).

Before turning to the specific remedial issues, it is important to clarify one overarching issue: the standard of review. "A district court's decision to grant a permanent injunction involves factual, legal, and discretionary components.

Therefore, [this Court] evaluate[s] a decision to grant such relief under several different standards of review." *Walters v. Reno*, 145 F.3d 1032, 1047 (9th Cir. 1998). This Court "review[s] the district court's legal conclusions *de novo*." *Scott v. Pasadena Unified Sch. Dist.*, 306 F.3d 646, 653 (9th Cir. 2002). "Any factual findings supporting the decision to grant the injunction [are] reviewed for clear error." *Id.* And the scope of an injunction is reviewed for abuse of discretion. *Walters*, 145 F.3d at 1047. Importantly, "[a]n overbroad injunction is an abuse of discretion." *Lamb-Weston, Inc.*, 941 F.2d at 1140.

Plaintiffs repeatedly assert (at 64, 77, 83) that the only applicable standard of review is whether the Remedial Map was "clearly erroneous." Not so: The correct standard of review for a court-drawn remedial map is a heightened abuse of discretion standard, *see Connor*, 431 U.S. at 414, and any error of law underlying the remedial decision "constitutes an abuse of discretion[,]" *United States v. Lopez*, 913 F.3d 807, 825 (9th Cir. 2019). Even though an abuse-of-discretion standard applies here, however, Plaintiffs never even *acknowledge* that standard, let alone make any arguments under it. And to the extent that their clear-error arguments could be repackaged under the proper standard of review, they lack merit.

A. The Remedial Map's Indefensible Disruption Has Gone Undefended

State officials are supposed to draw electoral maps rather than federal courts. For that reason, court-ordered reapportionment plans are subject to stricter

standards; the cardinal principle is that federal courts *must* follow State policy as much as possible and limit disruptions so that they are no "more than necessary" to remedy the alleged VRA violation. *Upham*, 456 U.S. at 41–42.

The district court's Remedial Map flouts this mandate in an unprecedented manner—and certainly *far* beyond the violation in *Upham*, which found unlawful the redrawing *four* out of twenty-seven districts to remedy violations found in *just two*. 456 U.S. at 37–38, 40. Here, however, it is undisputed that the Remedial Map (1) changed thirteen districts all over the map, as far as Western and North Central Washington; (2) moved half-a-million Washingtonians into new districts; (3) displaced multiple incumbents; and (4) materially changed the partisan balance of two districts, LD-12 and LD-17, in favor of the Democrats. Every single change was gratuitous and wanton.

Plaintiffs never seriously rebut Intervenors' arguments on this front, and the State refuses even to hazard a defense of the indefensible. Plaintiffs attempt to deal with the arguments piecemeal, like incumbent displacement, but do not and cannot contend with the Supreme Court's central requirements. Nor do they wrestle with their own explicit and pivotal concession below, which is dispositive here: That *each* of their five proposed maps would constitute a "complete and comprehensive remedy to Plaintiffs' Section 2 harms." 2-ER-183.

Most notably of all, Plaintiffs simply do not—because they cannot—rebut Intervenors' comparison of the Remedial Map to Plaintiffs' *own* Maps 4 and 5. Plaintiffs do not even *mention the existence* of either map, save to observe in a footnote (at 73 n.30) that Map 4 contained the same configuration of LD-14 as Map 3. Plaintiffs' own maps demonstrate that the extent of the Remedial Map's changes was gratuitous and unnecessary. The Remedial Map thus cannot survive under *Upham*.

Sensing as much, Plaintiffs predictably fall back (at 84) on their standing arguments—again. They later (at 86) make the irrelevant argument about whether Dr. Trende's map was a remedy. But the comparison to Dr. Trende's map is to show a Democrat could be elected in the district without upending a quarter of the Enacted Map, as the district court did. That hardly undermines Intervenors' arguments that the changes of the Remedial Map were "more than necessary." *Upham*, 456 U.S. at 41–42.

Plaintiffs' Map 4—which Plaintiffs ignored—was less disruptive while having the *exact same* shape as Remedial LD-14. It altered three fewer districts, moved 50,000 fewer people, and did not flip LD-12's partisan nature. Map 5—wholly ignored by Plaintiffs—was *far* less disruptive than Maps 3 or 4. It (1) changed only four districts, localized and limited to Southeast Washington, without disrupting new counties, (2) moved only two hundred thousand people, (3) paired

no Senate incumbents, and (4) made no material partisan changes. These "complete and comprehensive remed[ies]," as Plaintiffs labeled them, 2-ER-183, were less disruptive than the adopted Remedial Map. The district court's rejection of those more-restrained remedies thus necessarily means that its Remedial Map changes that were "more than necessary" in violation of *Upham*, 456 U.S. at 41–42.

B. Appellees Provide No Precedent for the Remedial Map's Lowering of the HCVAP Because None Exists

Intervenors happily stand by their "bold claim" (Pls.' Br.68) that a VRA remedial district lowering the minority CVAP in question to cure putative dilution has *never been ordered by any court*. The State, to its credit, accepts this basic fact that the district court's cure-dilution-with-dilution remedy is utterly without precedent. The State even admits (at 54) that "it may seem odd at first blush that the remedial district has a lower Hispanic CVAP than the original district." That is a choice understatement.

Despite conceding the lack of *any* equivalent remedy *ever*, the State strangely (at 54) faults Intervenors for "not point[ing] to any authority to support the proposition" that such a remedy is "*per se* unacceptable." But how could they? No federal court has *ever* ordered such a remedy—and perhaps no court has never even been *asked* to enter one. There unsurprisingly is no precedent specifically condemning such a never-before-seen remedy as "*per se* unacceptable."

But under ordinary remedial principles, the district court's dilutive remedy is indefensible. A judicial "remedy must ... be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 353 (2006) (citation omitted). But here the district court's remedy does not attempt to cure the inadequacy found in the district court's merits decision—i.e., *insufficient* Hispanic voting strength in the district. Instead, it *perpetuates* that inadequacy by further reducing the HCVAP. The district court's abuse of discretion is particularly apparent here because court-drawn maps, unlike other remedies, are subject to "higher standards." *Chapman v. Meier*, 420 U.S. 1, 26 (1975).

But even under ordinary standards, perpetuating the putative violation—here *diluting* Hispanic voting strength—is simply irreconcilable with the concept of a "remedy." It is akin to "curing" a patient's cancer by injecting him with more cancerous cells. When more of the disease is offered as the putative cure, the "curer" needs to get out of the remedial business.

In contrast to the State, Plaintiffs scoured case law far and wide to find *some* district court decision awarding remotely equivalent relief. That vain attempt produced nothing of the sort. While Plaintiffs cite (at 69) numerous cases that purportedly granted similar relief, none actually did.

The district court decision in *Bethune-Hill* they wrongly present as a counterexample was not even a §2 vote dilution case but rather one challenging racial gerrymandering in the form of intentional *packing* of minority votes in a district under the Equal Protection Clause. *See Bethune-Hill*, 368 F. Supp. 3d at 887–88. *Of course* remedial orders that destroy racial gerrymanders *packing* minorities into districts lower the district's CVAP—that happens all the time, because such remedies cure *intentionally packed* maps.

The remedy in *Bethune-Hill* would thus only have been equivalent if it attempted to cure illegal packing *with more packing*. Where *concentrated* minority voting strength is the VRA violation, it makes perfect sense that the resulting remedy would lower the minority CVAP of the packed district so that minority groups are not denied equal opportunity. But where *dilution* of minority voting strength in a single district is the violation, such a dilutive remedy is incoherent—and illegal.

Moreover, the VRA claim here is one of voting dilution under the results-based test. A vote dilution claim is "analytically distinct" from a racial gerrymandering claim, following a "different analysis." *Alexander*, 602 U.S. at 38 (citation omitted). Not a single other case cited by Plaintiffs in their brief involved the lowering of minority CVAP or VAP as a VRA remedy for a §2 violation. *See, e.g.*, *Wilson v. Eu*, 823 P.2d 545, 559 (Cal. 1992) (approving on the merits a map with minority VAPs less than 50% under §2 but saying nothing about lowering

CVAP to remedy a §2 violation). The deep irony is that it is the remedial map that actually *cracks apart* the Hispanic population of the Yakima Valley as a putative remedy for vote dilution.

But even assuming that a cure-dilution-with-dilution remedy were *ever* legally permissible, Appellees offer no meaningful defense of the cursory rationale offered for that remedy here. Once again, "the court below offered just one sentence supporting that unprecedented remedy: 'Although the Latino citizen voting age population of LD 14 in the adopted map is less than that of the enacted district, the new configuration provides Latino voters with an equal opportunity to elect candidates of their choice to the state legislature.'" Opening Br.78 (quoting 1-ER-6).

That single sentence is wholly conclusory. It offers no meaningful explanation of why such an unprecedented remedy was warranted here, and instead merely regurgitates the legal standard/operative language of §2. If such a counter-intuitive remedy were *ever* appropriate, it would require *a lot more* reasoning than just this conclusory sentence. Appellees *never* attempt to explain how this single sentence could suffice to justify this never-before-seen remedy.

As to the HCVAP itself, Intervenors are not "misleading" the Court about the district's HCVAP. Pls.' Br.65 n.26. Whether the 2021 or 2022 numbers are used, the HCVAP is lower under the Remedial Map compared with the Enacted Map. No

apples-to-apples comparison could refute that the conceded fact that the "remedial district has a lower Hispanic CVAP than the original district." State's Br.54.[3]

As to the *Bartlett*/*Cooper* question of coalition districts, Plaintiffs simply misunderstand *Bartlett* and Intervenors' argument thereunder. The remedial district *lowered* the HCVAP precisely *because* the original majority-HCVAP did not satisfy the VRA in the district court's view, and only by creating the remedial *coalition* could the Yakima-based district comport with §2. The Hispanic majority in the Enacted Map failed to elect the Democrat candidate, so the district court *had to* inject Democrat voters (of other races/ethnicities) into the district, lowering the HCVAP in the process. That, by definition, is a *coalition* remedy.

Therefore, the district court *did* "grant[] special protection to a minority group's right to form political coalitions." *Bartlett v. Strickland*, 556 U.S. 1, 15 (2009). The Remedial Map is nothing other than a concession that the minority group—absent a coalition with Native Americans—was *not* sufficiently large to make up a *working* majority in a reasonably shaped district. Accordingly, "§2 simply does not apply." *Cooper v. Harris*, 581 U.S. 285, 305 (2017).

[3] Even if it were relevant, the 2021 numbers are more certain because they flow from the Census Bureau's 2020 decennial calculations.

C. The Remedial Map Is an Unconstitutional Racial Gerrymander

1. Intervenors Preserved Their Racial Gerrymander Argument

Once again seeking to evade this Court's review, Appellees argue that Plaintiffs waived their argument that the district court's Remedial Map was a racial gerrymander. Not so.

The district court did not indicate that it was planning to adopt a variation of one of Plaintiff's remedial maps, specifically Map 3A, until February 9, when it informed counsel that it was scheduling "[a]n evidentiary hearing regarding remedial proposals, in particular, Remedial Map 3A," for March 8. ECF No. 266 at 1. This was weeks after *all* briefing on remedies was closed. Intervenors thus never had an opportunity to brief a challenge to the maps the district court had proposed—including, in particular, Map 3A, which effectively became the Remedial Map once finally adopted.

But at the first possible opportunity, Plaintiffs did object to those maps as unconstitutional racial gerrymanders. Specifically, Intervenors' concerns that the Proposed Map (Map 3A) was a racial gerrymander were raised promptly after the district court indicated to the Parties in this case on February 9 that the court was considering using Plaintiffs' Proposal 3A as the basis for the Remedial Map the court would draw itself.

There was thus no "sandbagging," Pls.' Br.71, or "misstat[ing] the record," *id*. at 73 n.30. Considering all legal briefing was cut off on January 5, ECF No. 230, when Map 3A was first proposed, ECF No. 254-1, the March 8 hearing was the Intervenors' *only* opportunity to argue Map 3A was an unconstitutional racial gerrymander before the March 15 decision. Counsel for Intervenors spent some time during that hearing examining whether impermissible racial sorting had occurred in the drafting of Plaintiffs' proposed maps off of which the district court was planning to base its remedy. *See* FER-3–7 (examining Dr. Oskooii and raising the question of whether the Proposed Map 3A racially sorted the Hispanic communities in East Yakima and Pasco). The district court therefore knew Intervenors' objection to that proposal on that basis when it considered what map to adopt or draw, yet still adopted the Remedial Map. Intervenors' contention is thus preserved.

2. The Remedial Map Violates the Constitution

On the merits, the disputed fact of whether Dr. Oskooii relied on race in drawing the proposal for the remedial map does not matter. Dr. Oskooii did not adopt the Remedial Map—the *district court did*. *See also supra* at 9 n.2 (explaining the logical inconsistency of Plaintiffs' contention). If that court relied on race as the predominant motivation for drawing the Remedial Map, then that map is presumptively unconstitutional. And the district court unambiguously did just that,

outright *admitting* that uniting the Hispanic population was the "fundamental goal" of the remedial process. 1-ER-8 & n.7.

The State is correct (at 59) that considering race is not *per se* verboten for crafting §2 violations. But where, as here, race predominates in the governmental decision at issue, the map must pass strict scrutiny, or it is unconstitutional. *See Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 188–89 (2017). Even assuming the district court had a compelling interest in race-based redistricting, its disruptive and novel actions cannot be considered "narrowly tailored" to such a goal. *See id*. at 193.

The district court, however, never even considered whether its remedy could satisfy strict scrutiny. At a minimum, a remand is required to address the issue in the first instance. But given the completely gratuitous nature of the sweeping changes of the Remedial Map and the truly bizarre "octopus slithering along the ocean floor" configuration of the Remedial LD-14, this Court should simply reverse outright. 2-ER-131.

III. THE ULTIMATE FINDING OF DILUTION SHOULD BE REVERSED

The district court's errors are hardly limited to the Remedial Map, however, and instead pervade the merits decision that required the creation of that map. For all of the reasons explained previously, the §2 liability decision below should be reversed.

A. This Court Faces Two Reasonable Readings of Section 2284's Three-Judge Panel Requirement

Plaintiffs breathlessly label Intervenors' 28 U.S.C. § 2284(a) argument on the three-judge panel requirement "fringe" and not "serious." Pls.' Br.32. But they surely must concede that Judge Willett—himself no unserious or fringe jurist—is correct at least as to the baseline notion that "[t]here are two ways to interpret [§ 2284(a)]." *Thomas*, 938 F.3d at 186 (Willett, J., dissenting). It is inarguable that there are two textually permissible ways to read the statute. *Id*. Both readings are feasible. For the reasons explained by Judge Willett, Intervenors' reading of §2284(a) is correct.

B. The Text of Section 2 Bars Plaintiffs' Dilution Claim against the Enacted Majority-Minority District

As Intervenors explained previously, where a district is majority-minority by CVAP and the majority-minority group has equal access to the polls, the district cannot violate §2. Opening Br.39-45. Indeed, as seen in this very litigation, no valid remedy was ever possible, since the court's only "remedy" was of the cure-dilution-with-dilution sort.

The United States does not actually dispute that there are some majority-minority districts not susceptible to challenge under §2. Rather, it simply disagrees with what exceptions apply, asking this Court to adopt this standard: A majority-minority district can *always* be challenged, in its view, *unless* the district already

gives the majority-minority voters a "sizeable" and "safe" majority that "ensures that they are able to elect their candidate of choice." U.S. Br.11 (quoting *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993)). In other words, according to the United States, a challenge to a majority-minority district is barred if and only if the minority group has a de facto guarantee of electoral success for minority-preferred candidates.

That contention flouts §2's text and binding Supreme Court precedent. Section 2(b) *expressly disavows* mandating particular race-based electoral outcomes: "[N]othing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population." 52 U.S.C. § 10301(b). The United States further misconstrues the Supreme Court's "safe" and "ensures" language in *Voinovich*. The *Voinovich* Court was considering whether the original *creation* of the majority-minority district was legal, and was simply opining that *legislatures* might choose to attempt to ensure minority candidate success themselves. It thus explained that the district court "held that § 2 prohibits the creation [by the Legislature] of majority-minority districts unless such districts are necessary to remedy a statutory violation. We disagree." *Voinovich*, 507 U.S. at 155. Instead, "Section 2 contains no *per se* prohibitions against particular types of districts: It says nothing about majority-minority districts, districts dominated by certain political parties, or even districts based entirely on partisan political concerns." *Id*.

Worse than just misreading *Voinovich*, the United States' proposed test—that *only* majority-minority districts that *ensure* minority candidate success comport with §2—is wholly incompatible with the Supreme Court's statement in *De Grandy*: "the ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates." 512 U.S. at 1014 n.11. Reading §2 to *mandate* a "sizeable" and "safe" majority is thus not even arguably compatible with *De Grandy*.

Accordingly, the test for whether a majority-minority district can be challenged under §2 must be whether the majority-minority group does not have "equality of opportunity" to elect its candidate (such as because of a façade, denial of access to the polls, or cracking), *not* the United States' test: whether the majority group does not have a "*guarantee* of electoral success for minority-preferred candidates[,]" *De Grandy*, 512 U.S. at 1014 n.11 (emphasis added).

Accordingly, no circuit court has held, as the United States here wishes, that a Section 2 claim to be cognizable in the absence of a hollow or façade majority, access to the polls, or cracking.[4] The only circuit court panel that did quickly drew a grant of rehearing en banc—and was then vacated on mootness grounds before the

[4] Although the district court was not clear on what precise basis it made its §2 finding, a "cracking" claim can only be remedied by, obviously, *increases* to the cracked minority in question inside the challenged district. Plaintiffs alleged "cracking," 2-ER-269 ¶ 274, but never followed through on their claim. It is thus incorrect for them to state that "[t]he district court found that LD15 violated Section 2 because it cracked cohesive Latino voters." Pls.' Br.71.

full court could reverse the wayward panel decision. *Thomas*, 938 F.3d 134, *vacated as moot* 961 F.3d 800 (2020) (en banc). Ensuring that §2 is not a guarantee of electoral success is mandated by §2's text and Supreme Court precedent, including *Gingles* itself, which presupposes the absence of a majority. *See* Opening Br.40-41.

But even if this Court accepted the United States' position on this threshold issue in the abstract, the United States has not actually offered any defense that *this district* was subject to challenge under §2.

C. Appellees Do Not Defend the District Court's Central Error on Compactness under *Gingles* I

No Appellee actually disputes a central error raised by Appellants: The district court analyzed the compactness of the districts' geographic boundaries rather than the compactness of the minority population in contravention to the Supreme Court's rule: "The first *Gingles* condition refers to the compactness of the minority population, not to the compactness of the contested district." *LULAC v. Perry*, 548 U.S. 399, 433 (2006).

Plaintiffs contend that a district is compact unless *both* (i) it separates Hispanic communities with "enormous geographical distances" *and* (ii) the respective communities have "disparate needs and interests." Pls.' Br.43 (quoting *LULAC*, 548 U.S. at 435). Plaintiffs, in other words, attempt to limit *LULAC* to only its particular facts, contending (at 43-44) that *LULAC*'s population-based compactness mandate only applies when both of those "factor[s] [are] present."

Not so. The Supreme Court's requirement that compactness be analyzed based on *population* rather than geographic boundaries is a *universal* legal mandate not limited to the particular facts of *LULAC*. Thus, while the existence of the two factors at issue demonstrated that the district in *LULAC* was not compact, the Supreme Court was hardly immunizing districts that lacked both particular factbound characteristics of the *LULAC* district from the generally applicable legal standard it explicated.

In any case, even assuming the Plaintiffs' two-element requirement were correct, the district court's analysis fails under it anyway. Intervenors have explained that the district court made no actual factual findings as to whether the eighty-miles-apart Hispanic communities share any needs and interests. Opening Br.53-54. Applying *LULAC*, the district court erred by attempting to "combine[] two farflung segments of a racial group with disparate interests." 548 U.S. at 433. It did so that a Democratic candidate would be elected; accordingly, "[u]nder the District Court's approach, a district would satisfy § 2 no matter how noncompact it was, so long as all the members of a racial group, added together, could control election outcomes." *Id*. at 432.

D. The District Court's Failure to Analyze the Cause of Polarization Is Fatal to the Judgment Below

The district court did not engage in any factfinding as to whether partisanship, not race, was the cause of polarized ethnic voting in the Yakima Valley. It was required to do so and did not, thereby necessarily committing reversible error.

This Court has expressly held, en banc, that a §2 claim requires proof of a "causal connection between the challenged voting practice and a prohibited discriminatory result." *Gonzalez v. Arizona*, 677 F.3d 383, 405 (9th Cir. 2012) (en banc) (citation omitted).

Thus, courts *must* "undertake the additional inquiry into the reasons for, or causes of," racial polarized voting "in order to determine whether they were the product of 'partisan politics' *or* 'racial vote dilution,' 'political defeat' *or* 'built-in bias.'" *LULAC v. Clements*, 999 F.2d 831, 853–54 (5th Cir. 1993) (en banc) (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)). That is because "[e]lectoral losses that are attributable to partisan politics … do not implicate the protections of § 2." *Nipper v. Smith*, 39 F.3d 1494, 1525 (11th Cir. 1994) (quoting *LULAC*, 999 F.2d at 863).

Once again, Plaintiffs attempt to limit adverse precedent to its narrow facts, contending (at 55 n.24) that *Gonzalez* does not apply here because in that case the plaintiffs "had adduced no evidence" of causation. But this Court's *legal standard* for evaluating evidence is obviously distinct from what the evidence in any particular

case demonstrated. *Gonzalez*—an *en banc* decision—demands *proof of causation* as a matter of law. This Court is bound by that holding, and not just in cases presenting the same narrow facts as *Gonzalez*. *See, e.g.*, *Barapind v. Enomoto*, 400 F.3d 744, 750–51 (9th Cir. 2005). And while the binding nature of dicta in panel opinions is the subject of some controversy in this circuit, *see Stein v. Kaiser Found. Health Plan, Inc.*, 115 F.4th 1244 (9th Cir. 2024) (en banc) (Forrest, J., concurring), it remains binding *law*.

Gonzalez's legal holding thus applies fully here where Plaintiffs offered insufficient evidence of causation and the district court refused to perform the relevant causation analysis at all. Nor was this effectively conceded error harmless: As established at trial by Drs. Owens and Alford and not rebutted by Appellees or the court below, partisanship, not race, drove polarization in many elections analyzed. Opening Br.58-60.

Knowing causation is a problem, Plaintiffs attempt to deflect via footnote (at 46 n.16), claiming that causation is not required because the Supreme Court in *Allen* said: "It is patently clear that Congress has used the words 'on account of race or color' in the Act to mean 'with respect to' race or color, and not to connote any required *purpose* of racial discrimination." *Allen v Milligan*, 599 U.S. 1, 25 (cleaned up) (emphasis added).

That contention conflates distinct concepts. Section 2 is a results-based standard that dispenses with the requirement of proving discriminatory *intent* of vote dilution. But §2 still requires race-based *causation* of vote dilution. Indeed, in a portion of this Court's en banc decision in *DNC v. Hobbs* left undisturbed by the Supreme Court, this Court held that "in both vote denial and vote dilution cases, *we require evidence of a causal relation* between a challenged voting qualification and any claimed statistical disparity between minority and white voters." 948 F.3d 989, 1044 (9th Cir. 2020) *overruled on other grounds sub nom. Brnovich v. DNC.*, 594 U.S. 647 (2021) (emphasis added). This Court thus specifically *requires* precisely the sort of causal analysis that the district court failed to perform.

Notably, while the district court did *say* it "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)," 1-ER-26, it never followed through to make that determination. Instead, the court handwaved away the entire question, saying (without providing any factual support from the trial record): "There is no evidence that Latino-preferred candidates in the Yakima Valley region are rejected by white voters for any reason other than the policy/platform reasons which made those candidates the preferred choice…." 1-ER-44.

But evidence was presented at trial, including by State's expert Dr. Alford, that cohesion was due to partisanship, not race. Opening Br.58-60 (recounting the mountains of evidence on this point). And whether this Court takes account of that in the preconditions or under totality, that was Dr. Alford's finding, which was not seriously disputed by the district court. At the very least, the district court did not "explain its reasoning with sufficient particularity" on this critical question to be affirmed. *See Westwego Citizens for Better Gov't v. Westwego*, 872 F.2d 1201, 1204 (5th Cir. 1989) (remanding for further proceedings when the district court failed to explain its VRA holding).

The United States takes issue with Intervenors' contention that the partisanship causation inquiry should settle this case regardless of whether it is considered under the preconditions or under totality. Its concern is that evidence of partisan voting preferences would have "priority over key evidence of race-conscious politics and racial discrimination." U.S. Br.34. But even under the United States's own preference—that partisan causation be evaluated under Senate Factor 2, see U.S. Br.27 (approvingly citing cases doing so)—the voting causation *is* given priority: The "most important" Senate factors are Factor 2, the extent of racially polarized voting, and Factor 7, the extent to which minority group members have been elected to public office in the jurisdiction. *Gomez v. Watsonville*, 863 F.2d

1407, 1413 (9th Cir. 1988) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 48 n.15 (1986)).

In any event, the United States' concern about "priority" of racial-versus-partisan causation has no purchase here. The priority that the district court should have assigned to racial-versus-partisan causes is irrelevant because the district court never conducted that causal analysis to begin with. Priority within non-existing weighting is an academic issue at best.

It is also worth noting that every single one of the cases cited by the United States (at 27) correctly holds (in accordance with the text of §2) that partisanship as cause of polarization may defeat a Section 2 claim. *See, e.g.*, *United States v. Charleston Cnty.*, 365 F.3d 341, 349 (4th Cir. 2004) ("Certainly the reason for polarized voting is a critical factor in the totality analysis[.]").[5] Indeed, the Eleventh Circuit expressly took a "substantially similar" approach to the Fifth Circuit in *Clements* in allowing "a defendant to rebut proof of vote dilution by showing that losses by minority-preferred candidates are attributable to non-racial causes." *Nipper*, 39 F.3d at 1525, 1526.

[5] *Accord Goosby v. Town Bd. of Hempstead*, 180 F.3d 476, 493 (2d Cir. 1999); *Milwaukee Branch of the NAACP v. Thompson*, 116 F.3d 1194, 1199 (7th Cir. 1997); *Sanchez v. Colorado*, 97 F.3d 1303, 1313 (10th Cir. 1996); *Vecinos de Barrio Uno v. City of Holyoke*, 72 F.3d 973, 983–84 (1st Cir. 1995).

Accordingly, this "most important" factor either defeats the claim at the preconditions threshold or was erroneously discounted under totality. Because the text of §2 requires this analysis and therefore the omission "affected [the district court's] ultimate determination of no dilution," this Court should at the very least remand for this analysis to be completed. *See Old Person v. Cooney*, 230 F.3d 1113, 1128 (9th Cir. 2000); *see also id.* at 1130 (remanding on totality where the case was "sufficiently close" such that this Court could not "know whether or not the district court would have found dilution if it had correctly assessed the factor" in question).

E. Appellees Cannot Escape Nikki Torres's Victory Via the Special Circumstances Doctrine

Under the rubric of the other "most important" factor, minority electoral success, the special circumstances doctrine flatly does not apply to Senator Torres's 2022 victory—i.e., it cannot be used to hand-wave the landslide victory of a Hispanic candidate in a majority-Hispanic district. Plaintiffs' rationale here is that the losing Democrat, Keesling, ran a bad fundraising operation and qualified for the general election ballot through a primary election write-in campaign.[6]

But bad, underfunded, and/or write-in candidates are all "representative of the typical way in which the electoral process functions." *Ruiz v. City of Santa Maria*,

[6] Keesling was not a write-in candidate for the general election against Torres. The general election ballots gave no indication that Keesling had been a write-in candidate in the primary.

160 F.3d 543, 557 (9th Cir. 1998) (per curiam). Such ubiquitous factors in the 2022 election are not remotely akin to those in *Gingles* Supreme Court's exemplar list of "special circumstances," including "the absence of an opponent, incumbency, or the utilization of bullet voting." 478 U.S. at 57.

Plaintiffs' invocation of this doctrine—which the district court itself notably did not address *at all*—is yet another deflection, this time to get around dealing with Senator Torres's landslide victory in 2022. They know they cannot defend the district court's *explicit* legal equivalency between Nikki Torres's blowout victory and the hearsay "I'm racist" comment by one random voter. *See* Opening Br.71. The district court (at 1-ER-35) quite literally treated as equivalent for the purposes of §2 the thirty-five point victory of a Latina candidate over a White candidate with a one-off incident of racism experienced by Plaintiff Soto Palmer while knocking doors for a Latino candidate. This type of weighing facts in the "most important" Senate Factor 7 is clear error. *See Gingles*, 478 U.S. at 48 n.15. This is further exacerbated by the district court's total lack of even *acknowledging* the Torres-Keesling margin of victory. Plaintiffs cannot defend the district court's failure to follow *Ruiz* and give the endogenous, minority-versus-white, best-evidence election the great weight that this Court requires. *Ruiz*, 160 F.3d at 552 (labeling this precise genre of election the "most probative" for §2 analyses).

It's clear what Plaintiffs' real problem with Nikki Torres is: She was a Hispanic Republican woman who was a good candidate and beat a Democrat (soundly). Those aren't special circumstances; it's just superior candidate quality, which is an *ordinary* circumstance in politics—not a uniquely "special" one.

Plaintiffs' argument here simply reveals what this case has always been about: Plaintiffs want a §2 federal right for Nikki Torres not to have won and not to win in the future. So they exploited federal courts to achieve a result that was *soundly* outside their grasp at the ballot boxes. The irony of using *the Voting Rights Act* to defeat a minority candidate that prevailed *overwhelmingly* in a majority-minority district should not be lost on this Court.

F. Plaintiffs' Racial Appeals Argument Is As Irrelevant As It Is Revealing

Plaintiffs' exaggerations reach their zenith in their wrong allegation that racial appeals "abound" in political campaigns in the Yakima Valley. Pls.' Br.49. To the contrary, the district court—aside from its unsupported generalizations—pointed to *just one example* of an alleged racial appeal: A *Facebook post* by a candidate criticizing birthright citizenship. 1-ER-33 (avoiding describing the nature of the racial appeal). One "nutpicked" social media post cannot amount to "political campaigns [being] *characterized* by overt or subtle racial appeals." *Gingles*, 478 U.S. at 37 (emphasis added).

Knowing they have nothing, Plaintiffs instead (at 49-50) smugly try to score some cheap points by mischaracterizing Intervenor Trevino's critiques of the media. First off, the district court never raised or relied on these comments in its finding on this factor, and this Court is one of review, not first view. To the extent that Plaintiffs' aspersions are relevant at all, Mr. Trevino was criticizing the *press*, not political campaigns. Mr. Trevino's campaign did not make any *racial* appeals, nor did he point to racial appeals by campaigns. He was criticizing *the press* for possible racial disparate treatment *against his campaign*.

IV. The Secretary's Timing Concerns Do Not Affect Intervenors' Merits Arguments

Intervenors do not take issue with the Secretary's brief as to the timing of this appeal and agree that the Court should not take any action that would cause disruptions for the 2026 election cycle. That said, *Purcell* is a timing issue and no substantive bar on the relief Intervenors seek on appeal. Moreover, all elements of this case can be resolved well ahead of the likely May 2026 deadline for the Secretary.

Thus, to the extent that the Secretary is asking this Court not to unduly delay resolution of this case in a manner that would cause issues with the 2026 election, Intervenors support that request. But to the extent that the Secretary is suggesting that the upcoming 2026 election precludes relief for Intervenors, that contention is incorrect.

CONCLUSION

For all these reasons, the district court's orders should be reversed and the remedial map vacated.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Form 8. Certificate of Compliance for Briefs

9th Cir. Case Number(s): 23-35595 & 24-1602

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Signature: s/ Jason B. Torchinsky **Dated:** October 21, 2024

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I, Jason B. Torchinsky, hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate ACMS system on October 21, 2024, which will send notice of such filing to all registered ACMS users.

/s/ *Jason B. Torchinsky*
Jason B. Torchinsky