No. 23A862

In the Supreme Court of the United States

JOSE TREVINO, ISMAEL G. CAMPOS, AND STATE REPRESENTATIVE ALEX YBARRA,

Applicants,

v.

SUSAN SOTO PALMER ET AL.,

Respondents.

Applicants' Reply in Support of Their Emergency Application to the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit, For A Stay of Judgment and Injunction

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GLOSSARY

Term/Abbreviation	Definition
Commission	Washington State's bipartisan, independent Redistricting Commission created by Wash. Const. art. II, §43(2).
CVAP	Citizen Voting Age Population.
Enacted Map	The now-permanently enjoined Washington State Legislative Map, as drawn by the Commission and amended by the Washington State Legislature in February 2022.
HCVAP	Hispanic Citizen Voting Age Population.
LD-15	Legislative District 15 of Washington's State Legislative Map, as enacted.
Remedial Map	The new Washington State Legislative Map as ordered by the district court in its remedial order/injunction issued on March 15, 2024.
State	The State of Washington, as appearing in this litigation and represented by the Attorney General.
Secretary	The Secretary of State of Washington.
VRA	Voting Rights Act, 52 U.S.C. §10301 *et seq*.

INTRODUCTION

The judgment and injunction below make a mockery of the Voting Rights Act ("VRA") and bedrock principles of federalism. The district court endorsed a challenge to a district where Hispanic voters were already a majority without any finding that the majority was hollow or a façade. It made no effort to analyze—or even acknowledge—the margin of the landslide victory of a Hispanic candidate in the causation analysis that §2 demands. In an apparent first in the *entire history* of the VRA, the district court purported to "cure" dilution of minority voting strength by affirmatively diluting it further—reducing the challenged LD-15 from 52.6% to 50.2% HCVAP. And it adopted a remedial map that made sweeping and wanton changes to the map enacted by the State of Washington—altering 13 districts when Plaintiffs themselves conceded that a "complete and comprehensive" remedy could be had by altering only four.

The decision below thus rests on grotesque contortions of the VRA—all for transparent partisan gains—which are wholly irreconcilable with this Court's precedents interpreting it. This Court should grant a stay to prevent two million Washingtonians from being required to vote in districts whose boundaries have been senselessly refashioned based on these manifest errors.

Given these pervasive errors, Respondents predictably rely heavily on standing arguments to shield them from review. At their base, those arguments rest on the premise that Mr. Trevino cannot assert that his Fourteenth Amendment rights are being violated by the Remedial Map because the State has decided to acquiesce in the

judgment below. But the Equal Protection Clause is a guarantee *against* state action—not a grant of authority for the State to nullify citizens' constitutional rights through the expedient of strategic surrender in litigation. Thus, while *Hollingsworth v. Perry*, 570 U.S. 693 (2013) stands for the proposition that individuals cannot premise standing to appeal on a generalized interest in upholding the validity of state law, it does not preclude—or even purport to address—individuals premising their standing to appeal based on violation of *their own individual constitutional rights*. And *United States v. Hays*, 515 U.S. 737, 744–45 (1995) make plain that such injuries are cognizable and establish Article III standing.

Similarly, unlike the legislators in *Wittman v. Personhuballah*, Representative Ybarra has submitted "evidence that an alternative to the Enacted Plan (including the Remedial Plan) will reduce the relevant intervenors' chances of reelection." 578 U.S. 539, 545 (2016). He therefore has standing to appeal as well.

REASONS FOR GRANTING THE STAY

I. APPLICANTS HAVING ARTICLE III STANDING TO APPEAL

Respondents do not provide any reason for why Applicants' individual harms are not cognizable in this case. Rather, they simply fall back on *Hollingsworth v. Perry*, 570 U.S. 693 (2013). But they misread and overstate *Hollingsworth*'s holding. The holding of that case is not, as Respondents seem to think, a *per se* rule that an intervenor never has standing to defend a law in the State's absence because an individual intervenor has no duty to enforce a given law. Instead, *Hollingsworth* held merely that an individual does not have interest in implementation where the intervenor does not have otherwise a "personal stake" in the outcome of the suit. *Id*. at

706. In other words, that interest *alone* is not cognizable, but *Hollingsworth* does not foreclose that an intervenor may assert a *separate* cognizable and individualized interest (as here). There is thus a critical distinction between (1) a generalized interest in the implementation/validity of a state law; and (2) a personal stake in vindicating one's own concrete individual rights. *Hollingsworth* did not even *address* the latter. Obviously, Respondents' *per se* rule that a party without enforcement/implementation power cannot appeal would vitiate individual voters' ability to fight for their "personal stake," *i.e.*, their individual rights, in these types of voting rights cases. It is a massive overreading of *Hollingsworth* to hold otherwise. That case does not apply where (as here) a distinct, concrete, and *individualized* interest is sufficiently asserted. The Application shows that Mr. Trevino and Rep. Ybarra have done so.

Similarly, *Bethune-Hill* featured an attempt to "stand in for the State." *Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1951 (2019). And this Court there recognized the same distinction in *Hollingsworth*: *i.e.*, there is a fundamental difference between "standing to represent the State's interests[,]" *id.* (citing *Hollingsworth*, 570 U.S. at 710), and an intervenor's assertion of "standing in its own right[,]" *id.* at 1953. But since the Virginia House of Delegates lacked the latter, this Court instructed that courts would need to look not for institutional injuries but instead for "harms … suffered by individual legislators or candidates." *Id.* at 1956.

Accordingly, *Hollingsworth* and *Bethune-Hill* preclude standing where intervenors assert *solely* injures to the State or other public institution. The normal rules of Article III, however, remain applicable where an intervenor asserts a cognizable

individual injury (a "personal stake," in the words of the *Hollingsworth*, or "harms … suffered by individual[s]," in the words of the *Bethune-Hill*). Because Mr. Trevino and Rep. Ybarra have done so here, they both have Article III standing to appeal.

Three final points in reply to Respondents on standing. *First*, Plaintiffs make the baffling claim (at 1) that Applicants "do not even *assert* that they have standing to challenge the district court's liability determination and injunction against the enacted map." But the harm from the Remedial Map is necessarily premised on the underlying §2 liability determination—the injunction and Remedial Map would never exist but for those decisions. Because that §2 holding thus directly causes Applicants cognizable harm, it is fair game to challenge under Article III.

Second, the State complains (at 19) that Applicants are asking this Court to "*presume* that the district court's entered remedy violates the Fourteenth Amendment." But that's exactly what courts are *supposed* to do when analyzing questions of standing—they "assume *arguendo* the merits of [the party's] legal claim." *Parker v. D.C.*, 478 F.3d 370, 377 (D.C. Cir. 2007), *aff'd* 554 U.S. 570 (2008); *Warth v. Seldin*, 422 U.S. 490, 500 (1975) ("[S]tanding in no way depends on the merits."). In any event, the district court explicitly admitted that race predominated its Remedial Map and that map does not satisfy strict scrutiny. See App.30-31.

To apply Respondent's overreading of *Hollingsworth* here would bless the ever-escalating breakdown in norms in which political actors transparently engage in litigatory surrender to achieve desired policy ends. This case is an illustrative example: The Washington Attorney General, in the middle of a hotly contested gubernatorial

primary and displeased with the map enacted by the Commission and Legislature according to State law, acquiesced in Plaintiffs' strategy and refused to defend the map. In so doing, the State, through its lawyers, abandoned its duty to the public interest, including protecting the rights of individuals like Mr. Trevino. The legal result of this must be that Mr. Trevino is permitted to continue pursuing vindication of his *own* Fourteenth Amendment rights in this lawsuit (and not in some other).

At the same time, the Remedial Map imposes costs of time and money and a harder reelection on Rep. Ybarra, for which he has pointed to record evidence. *Wittman*, 578 U.S. at 545. These monetary and political costs simply are injuries in fact. He faces more than a "dollar's worth of harm[,]" *United States v. Texas*, 143 S. Ct. 1964, 1977 (2023) (Gorsuch, J., concurring), and a "more difficult reelection campaign[,] *Bethune-Hill*, 139 S. Ct. at 1956.

Third, Plaintiffs bizarrely suggest (at 10-11) that standing is lacking because the Remedial Map does not "demonstrate[] racial classification of him [Mr. Trevino.]" But *no legislative* map has ever engaged in *individual* racial classification; instead racial gerrymanders draw map lines on the basis of race, which has *always* been sufficient to establish standing. See, *e.g.*, *Hays*, 515 U.S. at 744–45. Plaintiffs' apparent belief that the district court needed to classify Mr. Trevino *by name* to inflict cognizable harm on him flirts with absurdity.

II. THE DECISIONS BELOW REST ON PATENT ERRORS THAT THIS COURT WOULD LIKELY REVERSE

A. This Court Would Likely Reverse the District Court's Holding That LD-15 Violated the VRA

As Applicants explained, the district court's merits holding that LD-15 violates

§2 is plainly wrong. Respondents' counterarguments are unavailing.

Challenge to Majority-Minority District. Neither set of Respondents even attempts to explain how Plaintiffs' theory of liability could comport with the *actual text* of §2. Where a minority group is a majority by CVAP in a district—and the majority is not hollow or a mere façade—then that group necessarily does not have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. §10301(b). By outnumbering all other groups by CVAP, *by definition* they have at least an equal—indeed *better*—opportunity than *all other groups*, who they can simply outvote. If presented with this issue, this Court would likely follow §2's actual text, rather than errant lower court decisions that violate it.

Compactness. Respondents do not contest that the district court's actual compactness analysis relied only on expert submissions' analyzing the compactness of the illustrative maps' geography, rather than "*compactness of the minority population*." *LULAC v. Perry*, 548 U.S. 399, 433 (2006) (emphasis added). That error violates *Perry*. In addition, Respondents fail to answer Applicants' argument that the highly generalized stereotypes relied upon by the district court would have compelled a conclusion that the district in *Perry* was compact. This Court held otherwise. *Id.* at 432.

Causation. Neither set of Respondents denies that the district court did not "*even disclose* the margin of [Senator Torres's] victory—let alone attempt to analyze it" as part of the §2 causation inquiry. App.10. Without even attempting to analyzing that "most probative evidence," the district court committed legal error that would

independently require a vacatur and remand. *Ruiz v. City of Santa Maria*, 160 F.3d 543, 553 (9th Cir. 1998).

B. The Remedial Map Rests on Egregious Error and Would Almost Certainly Be Reversed by This Court

This Court would also reverse the district court's adoption of the Remedial Map if the Ninth Circuit were to affirm and this Court granted review.

Curing Dilution with Dilution. Neither set of Respondents identifies a *single instance in the entire history of the VRA* in which a court has purported to "remedy" a §2 vote-dilution violation by affirmatively diluting the CVAP of the relevant minority group. See App.22-23. Nor do they identify a prior instance where any VRA plaintiff has ever had the chutzpah even to *ask* for such a dubious remedy.

Thus, while Respondents go to great lengths to characterize the affirmative-dilution remedy here as a typical, humdrum VRA remedy, it is in truth entirely without precedent. And even assuming that such a remedy could ever be appropriate, Respondents do not deny that its adoption here rests on a *single conclusory sentence* in the remedial order. See App.23; ADD-36. If such a cure-dilution-with-dilution remedy could *ever* be justified, the single sentence supplied here plainly fails to do so.

Moreover, Plaintiffs do not even attempt to explain how the district court's cure-dilution-with-dilution remedy could be reconciled with this Court's decisions in *Bartlett v. Strickland*, 556 U.S. 1, 15 (2009) and *Cooper v. Harris*, 581 U.S. 285 (2017). Plaintiffs ignore Applicants' argument entirely. And the State implausibly argues (at 32) that that the principles governing §2 have nothing "to say about what remedies are appropriate once a violation is found." But that remedy-has-no-connection-to-

liability premise is precisely the sort of upside-down reasoning that led to the district court's affirmative-dilution "remedy." When the VRA prohibits something outright, it does not simultaneously authorize that otherwise-unlawful action as a putative remedy. A court cannot "remedy" a §2 violation by taking an action that itself would independently violate §2.

Needless Changes to Enacted Map. The district court made no genuine effort to comply with this Court's decisions in *Upham v. Seamon*, 456 U.S. 37 (1982) and *Abrams v. Johnson*, 521 U.S. 74 (1997), which require minimization of changes to the enacted map as a fundamental mandate of federalism. Instead, the district court adopted a *maximalist* approach—both in terms of districts redrawn and the partisan changes occasioned (virtually all in one direction). Indeed, the sweep of those changes is so indefensible that the State—despite fighting Applicants on virtually *every* other issue—is reduced to sheepishly "tak[ing] [no] position on whether any remedial map proposed by any party made changes more expansive" than necessary. State Opp.31. The State appears to have taken the aphorism "if you can't say something nice …" to extreme lengths here—all the way up to abandoning its duty to defend State law against unlawful and gratuitous federal usurpation.

Indeed, one need look no further than Plaintiffs' own submissions to understand that the changes were wanton and far beyond what was necessary—with Plaintiffs themselves conceding that "complete and comprehensive" relief could be had by a map that changed only *four* districts, rather than the *thirteen* altered by the Remedial Map. ADD-182, 186-87; see also Appendix (reproducing changes of Maps 3, 4,

and 5). None of this is disputed. Nor do Plaintiffs even attempt to answer Applicants' argument that "the violation [in *Upham*], was redrawing *four* out of 27 districts to remedy objections to only *two*. But here the district court redrew *13* out of 49 districts to remedy a violation in a *single one*." App.32. The Remedial Map here is thus unlawful *a fortiori*.

Plaintiffs also contend (at 29) that the map was narrowly tailored because it affected "*fewer than 5.5%*" of Washingtonians. That is deeply misleading. The sole challenged district—LD-15—contained only 2.04% of the State's population. The district court's remedy moved almost *three times* that many people. And *more than 25%* of the State's population lives in districts altered by the Remedial Map (*i.e.*, 13 out of 49 districts). If such expansive changes here are no truly "more than necessary," *Upham*, 456 U.S. at 41–42, this Court owes *Upham* a decent burial.

Remedial District is a Racial Gerrymander. The remedial district's shape is outright bizarre. Although Respondents expend considerable ink denying it, the "octopus slithering on the ocean floor" is an exceptionally apt description of its freakish shape. Respondents' apparent view that thousands of words are worth more than a single picture here blinks the inescapable conclusion that the single picture makes manifest. See App.29; see also Appendix (reproducing Remedial Map LD-14).

But in truth the district's Lovecraftian octopoid shape hardly matters anymore. The district court *explicitly* admitted that its "fundamental goal" was to engage in race-based line-drawing, ADD-36, 38 n.7.: *i.e.*, to embrace with unvarnished enthusiasm as an objective *above all others* this "sordid business, this divvying us up by

race." *Perry*, 548 U.S. at 511 (Roberts, C.J., concurring in part and dissenting in part). That admission renders the remedial district's shape—though truly bizarre—irrelevant given the district court's own admissions that race predominated the drawing of its contours.

Although Respondents struggle mightily against this elementary and inexorable premise, as a matter of basic language a "fundamental goal" is a *predominant one*. And because the district court—in its own words—made race-based objectives a predominant feature of the Remedial Map's crafting, it is subject to strict scrutiny—under which it fails. See App.30.[1]

III. THERE IS A REASONABLE PROBABILITY THAT FOUR JUSTICES WILL CONSIDER THESE ISSUES SUFFICIENTLY MERITORIOUS TO GRANT CERTIORARI

The judgment below invalidates the Enacted Map of a state and makes radical and gratuitous changes to it. That alone is enough to justify certiorari on importance grounds. See*, e.g.*, *Maricopa Cnty. v. Lopez-Valenzuela*, 574 U.S. 1006, 1007 (2014) (Thomas, J., respecting denial of certiorari). Indeed, the enormous importance of the issues presented in redistricting cases is why Congress has provided for *mandatory* appellate jurisdiction in this Court for many such cases. See 28 U.S.C. §§ 2284, 1253.

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[1] Although Respondents contend that this issue was not raised below, the State itself is compelled to admit (at 33 n.11) that Intervenors did so in their motion to intervene. Credit to the State for its honesty. But admitting the issue was in fact raised below is fatal to any waiver argument. Moreover, Plaintiffs do not deny (at 36) that Applicants raised the issue at the March 8 evidentiary hearing. And the district court's schedule cut off all legal briefing *well before* Map 3B was even submitted by Plaintiffs on March 13. ECF No. 288; see also ECF No. 230 at 3 (deadline for legal memoranda was January 5, the same day Plaintiffs unveiled 3A, ECF No. 254-1 at 31; thus no legal arguments could have been made against either Maps 3A or 3B).

The March 8 evidentiary hearing was thus Applicants' *only* opportunity to argue that Map 3B was an unconstitutional racial gerrymandering before the March 15 decision—and Respondents do not dispute that Applicants did so at that hearing, thereby preserving the issue. Waiver does not exist where a party explicitly raises an issue to the district court in the only vehicle made available to it.

And even where review is still discretionary, this Court routinely grants it—even certiorari before judgment. See, *e.g.*, *Ardoin v. Robinson*, 142 S. Ct. 2892, 2892 (2022) (granting certiorari before judgment and stay).

Importance aside, review is further warranted because the decisions below "conflict[] with relevant decisions of this Court." S. Ct. R. 10(c). As explained above, the district court's affirmative-dilution remedy directly conflicts with this Court's decisions in *Bartlett* and *Cooper*. Plaintiffs do not even attempt to argue otherwise, and the State's attempted distinction lacks merit. *Supra* at 7-8.

Similarly, *Arizona v. San Francisco*, 142 S. Ct. 1926 (2022) and *Arizona v. Mayorkas*, 143 S. Ct. 1312 (2023) underscore cert. worthiness here. The State does not even attempt to argue otherwise (ignoring both cert. grants entirely). And Plaintiffs' attempt (at 12) to distinguish those cases on their facts is unavailing. The issue of whether collusive surrenders can extinguish the rights of third parties is squarely presented here (as there) and continues to warrant this Court's review. And it does so in the context of individual rights no less than when state interests are at issue.

Similarly, the district court's maximalist redrawing and the Ninth Circuit's stay denial squarely conflict with this Court's decisions in *Upham* and *Hays*, respectively. They too warrant review.

Finally, although Respondents quibble about the circuit split on causation, they do not deny that this Court's fractured decision in *Gingles* left that issue open and that the lower courts have divergent approaches as a result. That issue is directly presented here because, if analysis of partisanship-versus-racial causation is

required, the district court's refusal to consider the margin of Senator Torres's victory is patent error and outcome dispositive here.

For all of these reasons, there is at least a reasonable probability that this Court would grant certiorari if the Ninth Circuit were to affirm.

IV. THE REMAINING FACTORS SUPPORT ISSUING A STAY

Respondents' arguments regarding the remaining factors largely rest on their merits arguments and fail for those reasons.

This stay application will be the final word on the 2024 legislative elections boundaries in Washington State. A grant would mean those elections will proceed under the map drawn by the independent, bipartisan Commission, adopted by the State Legislature, and already used for the 2022 state elections. A denial would mean that the elections will proceed under the district court's novel, disruptive, and HCVAP-lowering Remedial Map. A grant would prevent the irreparable harm to Mr. Trevino's Fourteenth Amendment rights not to be sorted by his ethnicity and would further prevent Rep. Ybarra from incurring particularized political harm that cannot be redressed with damages.

The most important question raised by the Secretary is the *Purcell* one. But Respondents greatly overstate the burden on the Secretary and counties, mostly arising out of his failure to distinguish between the implementation of a *new map* and the *re-implementation* of the *old map*. If this Court grants a stay this coming week, election officials will have plenty of time to re-implement the Enacted Map ahead of the candidate filing period in May. Whatever work needs to be done to put the Enacted Map back in place will take *less* time—not more—and it has been only two

weeks since the adoption of the Remedial Map. And the Secretary has had ample notice of this stay request and has no one to blame but himself for failure to prepare for the possibility that a stay might be granted.

Similarly, the onerous "technical" issues raised by the State/Secretary (at 12-14) are all about "re-drawn" and "new" maps and shapefiles. But a stay would not implicate these concerns, because of all that work was done for the Enacted Map already—all the way back in 2022. In other words, no new work even needs to be done post-stay. To the extent the State/Secretary argues (at 22) that there is no "undo" button available, that argument is self-refuting. If the State officials could complete the work described in the last two weeks, they could just do it again—in reverse—over the next two weeks, with plenty of time to spare before the May 6 candidate filing period begins. Nor is the work at issue here onerous or complicated; it is just rote administrative work of plugging in the information based on the 2022 Enacted Map—which it already did back in 2022. And the Attorney General's inability to surrender his way to his desired policy objectives—which eluded him through the democratic processes—is not cognizable prejudice.

Applicants agree with Respondents that the Secretary and counties would need about four weeks to implement a *new* map. But not the Enacted Map. Considering that putting the map that had been used in 2022 back in place will be no Herculean task, it will not "require heroic efforts by [] state and local authorities in the next few weeks" to ensure the rest of the 2024 cycle proceeds without a hiccup. *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring). Finally, a stay at

this point is early enough that it will not inflict upon the public any "voter confusion[,]" as the voters will be voting in the same districts in 2024 where they previously voted in 2022. *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006). A stay will thus *prevent* the voter confusion that the Remedial Map would otherwise inflict.

At the same time, Applicants will be irreparably harmed absent a stay. The "first two factors of the traditional standard are the most critical[,]" *Nken v. Holder*, 556 U.S. 418, 434 (2009), and are readily satisfied here, as discussed previously. And, regardless of whether racial classification is "permissible" in "certain circumstances," it *always* inflicts a "fundamental injury" to the racially classified individual's constitutional rights. *Shaw v. Hunt*, 517 U.S. 899, 908 (1996) (citation omitted).

Although in other cases "the line between racial predominance and racial consciousness can be difficult to discern," *Allen v. Milligan*, 143 S. Ct. 1487, 1510–11 (2023), this district court made that task easy for this Court here. It explained that the "fundamental goal of [its] remedial process" was *race-based*. ADD-36, 38 n.7. On top of that, the district court's process made *explicit* that "race for its own sake [was] the overriding reason for choosing one map over others." *Allen*, 143 S. Ct. at 1510 (citation and quotation marks omitted). That is because the district court had in front of it multiple maps that respected traditional districting criteria, performed for the putative Hispanic candidate of choice, and were far less disruptive than the chosen Remedial Map. See App.26-29. It chose otherwise.

The State also attacks a strawman by denying (at 40) that it was "part of a conspiracy." But Applicants never alleged any conspiracy or backroom agreement,

but rather that the Attorney General's actions have *collusive effect*. Which they plainly do: the Attorney General was able to achieve policy objectives through strategic surrender that would have been unavailable to him if he were defending Washington law—as he swore an oath to do. Moreover, the State's unwillingness to lift even a finger to prevent the maximal possible disruptions that the Remedial Map represents—which also just so happens to convey the greatest possible partisan advantage to the Attorney General's party and for which the Attorney General apparently cannot even muster a single word of defense—belies its "bunch of hooey" defense. See State Opp.39. That faux folksyism does little to conceal its highly sophisticated chicanery to achieve its desired ends through manipulation of federal courts.

The collusive nature of the tactics employed are further underscored by the lengths to which the State is going to *ensure* that its laws *remain invalidated*. Here the State makes no effort to conceal its view that its own victory would be the worst possible outcome from its perspective, which must be avoided at all costs. When victory is an unthinkably bad outcome and preserving an acquiesced-in defeat is a paramount goal, surmounting oaths of office and bedrock principles of democracy, that is the hallmark of collusive tactics at work.

CONCLUSION

Applicants' emergency application for stay of the district court's judgment and injunction should be granted.

Dated: March 30, 2024

Respectfully submitted,

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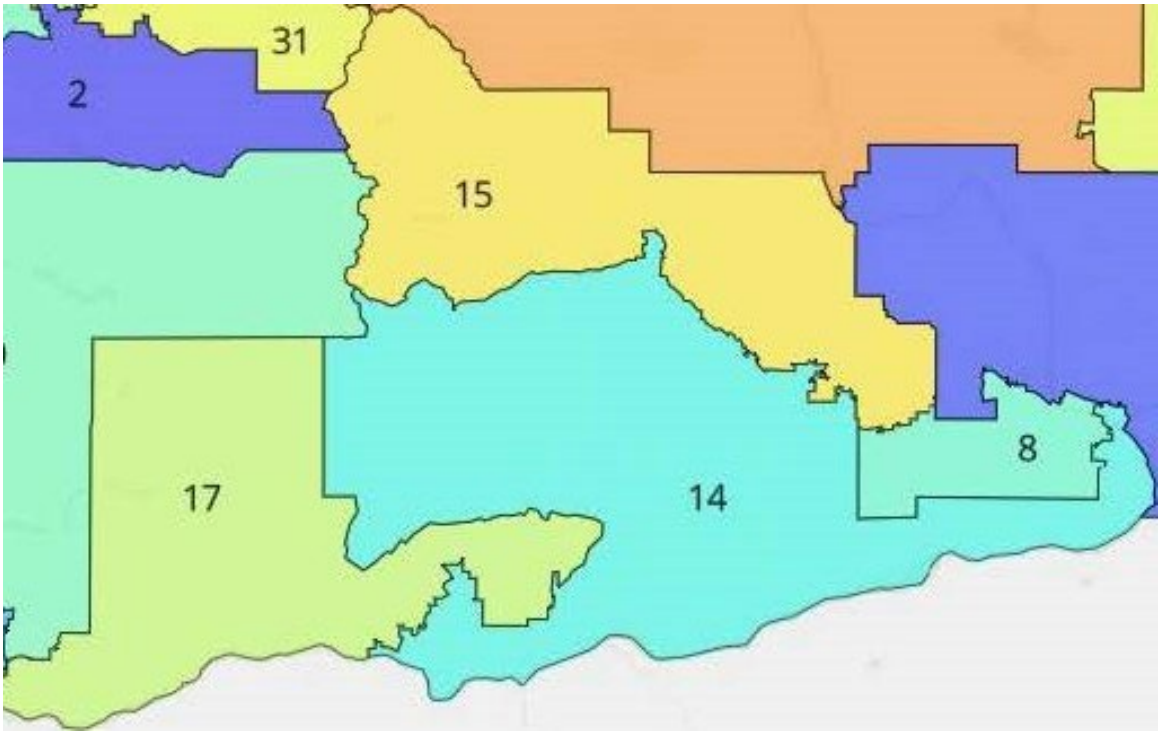
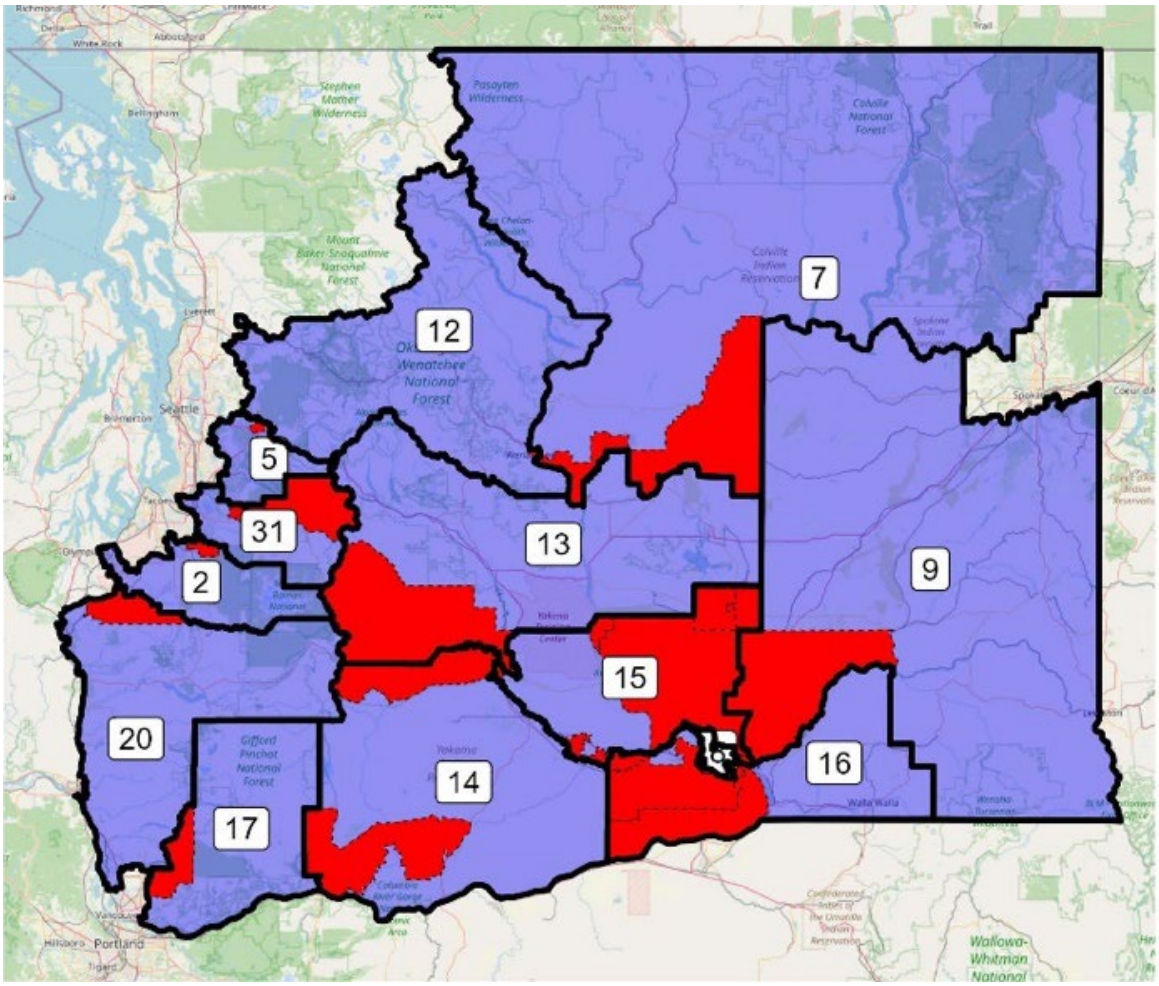
Remedial Map LD-14



Plaintiffs' Map 3 (adopted as Remedial Map) Changes to Enacted Map



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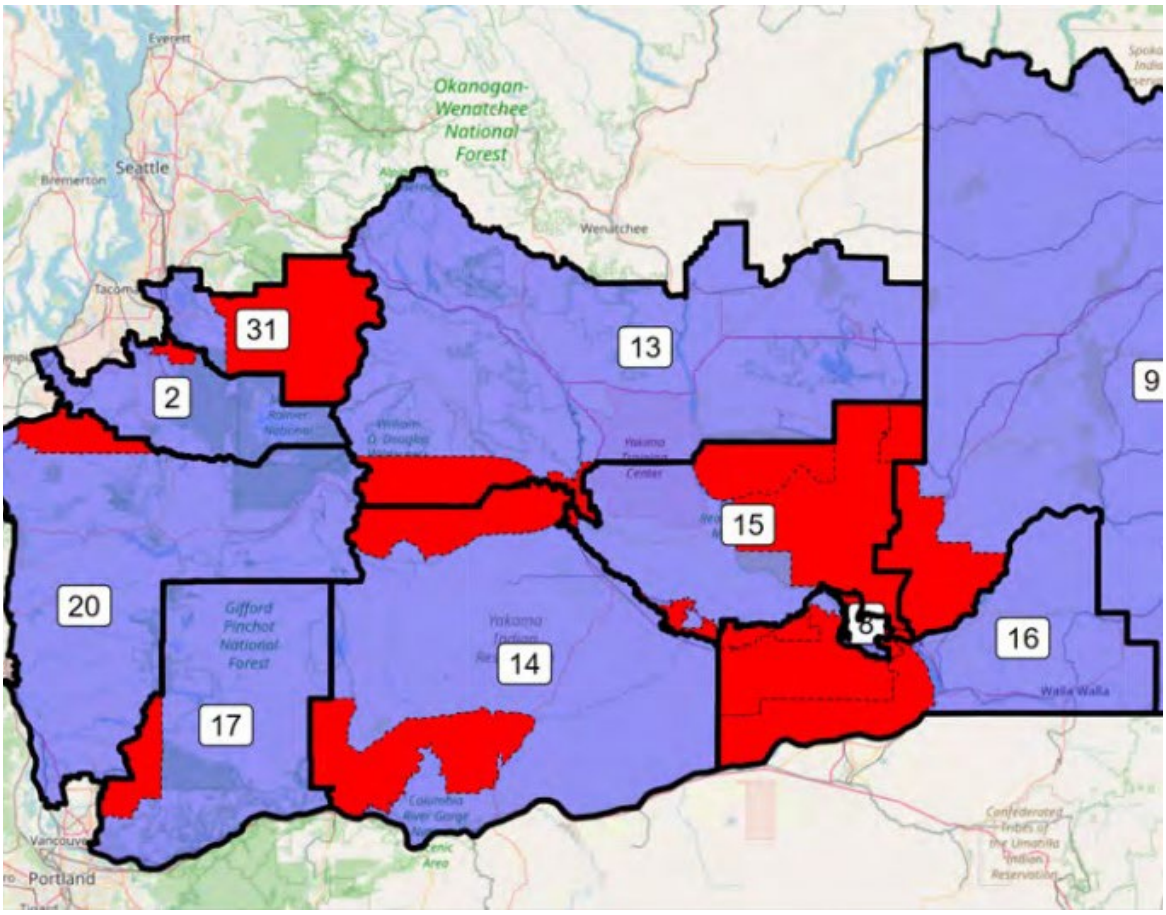

Plaintiffs' Map 5 Changes to Enacted Map