Nos. 23-35595 & 24-1602

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN SOTO PALMER, et al.,

Plaintiffs-Appellees

v.

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

Defendants-Appellees

and

JOSE TREVINO, ISMAEL G. CAMPOS, and State Representative ALEX YBARRA,

Intervenors-Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
No. 3:22-cv-5035
Hon. Robert S. Lasnik

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PLAINTIFFS-APPELLEES AND URGING AFFIRMANCE ON THE ISSUES ADDRESSED HEREIN

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TABLE OF CONTENTS

PAGE

TABLE OF CONTENTS (continued): **PAGE**

TABLE OF AUTHORITIES

CASES: **PAGE**

CASES (continued): **PAGE**

CASES (continued): **PAGE**

CONSTITUTION:

STATUTES: **PAGE**

LEGISLATIVE HISTORY:

RULE:

INTEREST OF THE UNITED STATES

This case presents important questions concerning vote-dilution claims under Section 2 of the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10301. The Attorney General is charged with enforcing the VRA on behalf of the United States, 52 U.S.C. 10308(d), and has a substantial interest in the statute's proper interpretation. Accordingly, the United States files this brief under Rule 29(a) of the Federal Rules of Appellate Procedure.

STATEMENT OF THE ISSUES

After a bench trial, the district court ruled that Legislative District 15 (LD-15), as enacted by Washington in 2022, dilutes the voting strength of Latino voters in violation of Section 2 of the VRA.

On appeal, the United States addresses the following questions and takes no position on other issues before the Court:

1. Whether a district in which Latinos compose a majority of the citizen voting-age population (CVAP) can dilute their voting strength in violation of Section 2 of the VRA.

2. Whether, and how, evidence that partisanship rather than race explains polarized voting patterns can defeat a vote-dilution claim under Section 2 of the VRA.

STATEMENT OF THE CASE

A. Statutory Background

Section 2 of the VRA imposes a "permanent, nationwide ban on racial discrimination in voting." *Shelby Cnty. v. Holder*, 570 U.S. 529, 557 (2013). Section 2 prohibits voting practices or procedures that "result[] in a denial or abridgement of the right . . . to vote on account of race or color" or language-minority status. 52 U.S.C. 10301(a), 10303(f)(2). A discriminatory "result" is established if:

> based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens . . . in that its members 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).

Section 2 requires "a 'functional' view of the political process." *Thornburg v. Gingles*, 478 U.S. 30, 45 (1986) (quoting S. Rep. No. 417, 97th Cong., 2d Sess. 30 n.120 (1982) (Senate Report)). "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts

with social and historical conditions to cause an inequality in the opportunities enjoyed by" minority voters "to elect their preferred representatives." *Id.* at 47.

To challenge a districting plan under Section 2 as impermissibly diluting voters' electoral opportunity, plaintiffs must satisfy three "preconditions": (1) that plaintiffs' minority group "is sufficiently large and geographically compact" that it could "constitute a majority in a single-member district"; (2) that the minority group "is politically cohesive"; and (3) "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 50-51; *Allen v. Milligan*, 599 U.S. 1, 18-19 (2023). These preconditions are needed to establish that the minority group could elect a representative of its choice, but "'the challenged districting thwarts [them]' at least plausibly on account of race." *Milligan*, 599 U.S. at 19 (quoting *Growe v. Emison*, 507 U.S. 25, 40 (1993)).

Once plaintiffs satisfy the preconditions, the court must determine whether the "totality of circumstances" supports a finding of vote dilution. 52 U.S.C. 10301(b). Certain factors, enumerated in the Senate Report to Congress's 1982 amendments to Section 2, "will often

be pertinent to certain types of § 2 violations, particularly to vote dilution claims," though "other factors may also be relevant and may be considered." *Gingles*, 478 U.S. at 45 (citing Senate Report 29-30). The Senate Factors include the jurisdiction's history of discrimination, the extent of racially polarized voting in its elections, the effects of discrimination on minority-group members, racial appeals in political campaigns, and minority-group candidates' electoral success. *Id.* at 44-45 (citing Senate Report 28-29). Ultimately, the district court must conduct "an intensely local appraisal" of the challenged plan and "a searching practical evaluation of the 'past and present reality'" in the jurisdiction. *Id.* at 78-79 (first quoting *White v. Regester*, 412 U.S. 755, 769-770 (1973); and then quoting Senate Report 30).

B. Factual and Procedural Background

Washington entrusts legislative redistricting to the Washington State Redistricting Commission. Wash. Const. Art. II, § 43. The Washington Legislature approves the Commission's maps, with a limited time and super-majority requirement to modify them. *Id.*

§ 43(7). Following the 2020 Census, the Commission completed a districting plan that the Legislature approved in 2022. 1-ER-18.[1]

Five Latino registered voters from Washington's Yakima Valley challenged the plan for "crack[ing] apart Yakima County's Latino population between Districts 14 and 15." 3-ER-352. Plaintiffs thus alleged dilution of Latino voting strength in LD-15, in violation of Section 2 of the VRA. 3-ER-354, 388-390; 2-ER-236, 271-272.

Before trial, Washington conceded that plaintiffs could satisfy the *Gingles* preconditions and demonstrate that LD-15 violated Section 2's results test. WA-SER-103-108. Intervenors-defendants-appellants (intervenors) defended the districting plan at trial. *See* Docs. 197, 215. As relevant here, intervenors argued that the district court could "simply hold that, as a matter of sound logic, Hispanic voters have equal opportunity to participate in the democratic process and elect

[1] Citations to "__-ER-__" refer to the volume and page numbers of the intervenor-appellants' Excerpts of Record. "WA-SER-__" refers to the page numbers in the Supplemental Excerpts of Record filed with the State of Washington's Answering Brief. "Doc. __, at __" refers to documents as numbered on the district court's docket, No. 3:22-cv-5035 (W.D. Wash.), and page numbers within those documents. "Br. __" refers to Intervenor-Appellants' Opening Brief (July 1, 2024).

candidates as they choose because LD-15 is already majority Hispanic by CVAP." Doc. 215, at 10; *see* 1-ER-18-19 (finding Hispanic CVAP of "approximately 51.5%" in LD-15).[2] Intervenors also argued that plaintiffs could not satisfy the second and third *Gingles* preconditions because "partisanship [w]as the driver of polarization" and the defeat of Latino voters' preferred candidates, "not race itself." Doc. 215, at 18.

After a bench trial, the district court held that LD-15 violated Section 2's results test: "the boundaries of LD 15, in combination with the social, economic, and historical conditions in the Yakima Valley region, result[] in an inequality in the electoral opportunities enjoyed by white and Latino voters in the area." 1-ER-45. Among other conditions, the court found "ample historical evidence of discriminatory English literacy tests, English-only election materials, and at-large systems of election that prevented or suppressed Latino voting" in the region. 1-ER-28. The court noted that Latinos in LD-15 faced "literacy and language barriers that prevent full access to the electoral process." 1-ER-29. And it found "significant socioeconomic disparities between

[2] The parties and district court used "Latino" and "Hispanic" interchangeably. *See* Docs. 212, 214, 215, 218.

Latino and white residents of the Yakima Valley region . . . with regard to income, unemployment, poverty, voter participation, education, housing, health, and criminal justice," arising from "decades of discrimination against Latinos in the area." 1-ER-32. The court rejected intervenors' arguments that the existing size of the Latino population in LD-15 or the supposed causal role of partisanship defeated plaintiffs' claim. 1-ER-42-43.

The district court then conducted remedial proceedings and ordered the implementation of a new districting plan. *See* 1-ER-5.

SUMMARY OF ARGUMENT

1. This Court should reject intervenors' argument that Section 2 claims necessarily fail, besides certain narrow exceptions, when plaintiffs' minority group composes a numerical majority in the challenged district. Section 2 entails a functional, fact-intensive review of election practices and political processes. Accordingly, the Supreme Court has recognized that minority voters may need more than a bare majority in a given district in order to have effective political opportunity. Courts of appeals likewise have ruled for plaintiffs whose groups were the numerical majority in the districts at issue.

Such rulings are consistent with Section 2's original understanding. The statute builds on key decisions in which plaintiffs demonstrated vote dilution despite their groups being the largest populations in their jurisdictions. By contrast, intervenors' position would frustrate Section 2's purposes and invite discriminatory mischief by creating a safe harbor for districts that give minority voters narrow, ineffective population majorities. Moreover, intervenors' position is unsupported by case law, and they disregard the precedent that makes Section 2 relief available to plaintiffs with population majorities.

2. This Court should also reject intervenors' argument that courts must consider partisanship under the second and third *Gingles* preconditions. Those preconditions are simple descriptive inquiries, limited to asking how voters vote, not why they voted the way they did. *Gingles* established that considerations like partisanship are properly considered only among the totality of the circumstances.

Accepting intervenors' argument would create tension with this Court's decisions, which apply the *Gingles* preconditions by focusing on actual voting patterns and which disfavor inquiries into the subjective reasons for voters' choices. Adopting intervenors' approach would also

place this Court on the outlier side of an unbalanced divide in circuit authority. Only the Fifth Circuit permits considering partisanship under the *Gingles* preconditions. That approach blurs the difference between the preconditions and the totality inquiry, and it is difficult to reconcile with *Allen v. Milligan*, 599 U.S. 1 (2023), the Supreme Court's most recent reaffirmation of the *Gingles* framework.

ARGUMENT

I. A districting plan can dilute minority voting strength in violation of Section 2 despite plaintiffs' minority group composing a numerical majority in the challenged district.

A district in which a minority group composes a numerical majority of the voting-age or citizen voting-age population can dilute minority voting strength in violation of Section 2. In district court, intervenors argued that Section 2 categorically bars claims involving such districts. *See* Doc. 215, at 10. Modifying that broad position, intervenors now argue that a Section 2 claim fails "[b]y definition" when the minority group is a numerical majority in the challenged district unless one of three narrow exceptions is met. Br. 40, 42-45.

First, the group's majority is "hollow" because it is a majority of voting-age population, not *citizen* voting-age population. Br. 42

(quoting *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 429, 441 (2006) (*LULAC*)). Second, the group currently faces "governmental barrier[s] to poll access," "such as literacy tests or barriers to registration." Br. 43. Third, the group's majority in the challenged district reflects "packing," while the group is being "crack[ed]" in other districts as "part of a larger multi-district scheme to dilute minority voting strength." Br. 44-45. According to intervenors, none of these exceptions applies, so plaintiffs' claim "necessarily" fails. Br. 45.

Intervenors' position is incorrect. The "essence" of Section 2 claims is the "interact[ion]" between the challenged voting practice and "social and historical conditions" that causes an "inequality" in the political opportunity open to voters of different races. *Allen v. Milligan*, 599 U.S. 1, 17 (2023) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986)). As courts have long recognized, such social and historical conditions—whether or not they include *current* governmental obstacles to poll access—may suppress minority voters' political participation to a degree that even a CVAP majority in a district does not give such voters equal political opportunity under Section 2.

Here, the district court rejected intervenors' categorical bar, reasoning that a "Latino CVAP of slightly more than 50% is insufficient to provide equal electoral opportunity where past discrimination, current social/economic conditions, and a sense of hopelessness keep Latino voters from the polls in numbers significantly greater than white voters." 1-ER-42. In declining to adopt intervenors' proposed bar, the district court instead took a "'functional' view of the political process" and applied the "flexible, fact-intensive" inquiry that Section 2 requires. *Gingles*, 478 U.S. at 45-46 (quoting Senate Report 30 n.120).

A. Section 2's fact-intensive inquiry focuses on the practical effectiveness of minority voting strength, including race-based social and historical conditions that diminish it.

1. The Supreme Court's functional view of the political process in Section 2 cases has entailed the recognition that a minority group may need to be more than a bare numerical majority in a district to have effective political opportunity. The Court has said that "[p]lacing [minority] voters in a district in which they constitute *a sizeable and therefore 'safe' majority* ensures that they are able to elect their candidate of choice." *Voinovich v. Quilter*, 507 U.S. 146, 154 (1993) (emphasis added). Whether a given majority in a given district

"minimize[s] or maximize[s] minority voting strength . . . depends entirely on the facts and circumstances of each case." *Id.* at 154-155.

Accordingly, the Court has explained in the context of Section 2's remedies that the statute can require creating "majority-minority districts," defined as districts in which "a minority group composes a numerical, *working* majority of the voting-age population." *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) (plurality opinion) (emphasis added); *see also Abbott v. Perez*, 585 U.S. 579, 587 (2018) (explaining Section 2 can require creating districts "in which minority groups form 'effective majorities'" (alteration and citation omitted)).

Similarly, in a case evaluating Hispanic voting strength in Dade County, Florida, the Court's focus was on those districts in which Hispanic voters already formed "an *effective* voting majority." *Johnson v. De Grandy*, 512 U.S. 997, 1014 (1994) (emphasis added) (citing *De Grandy v. Wetherell*, 815 F. Supp. 1550, 1580 (N.D. Fla. 1992) (three-judge court), *aff'd in part, rev'd in part, Johnson*, 512 U.S. 997).[3] And

[3] The districts considered effective all had "Hispanic supermajority" voting-age populations of at least 64%. *See Wetherell*, 815 F. Supp. at 1580.

the Court upheld as consistent with Section 2 a district court's remedial plan that created a district with 55% Black registered voters because "the probability of electing a candidate [was] below 50% when the percentage of black registered voters [was] 50%." *Abrams v. Johnson*, 521 U.S. 74, 94 (1997).[4]

The Supreme Court also has recognized that it is "possible for a citizen voting-age majority to lack real electoral opportunity." *LULAC*, 548 U.S. at 428. In *LULAC*, the Court reviewed two versions of a Texas congressional district. Before redistricting, the Latino CVAP was 57.5%; redistricting cut the Latino CVAP to 46%, with a Latino VAP of "just over 50%." *Id.* at 423-424. The prior version provided real "electoral opportunity," but the later version did not. *Id.* at 428-429. To gauge whether the versions of the district provided electoral opportunity to Latino voters, the Court relied not on arbitrary numerical thresholds, but on election results. The prior version of the

[4] As in *Abrams*, "decisions remedying § 2 violations regularly produce districts well above the 50% threshold." *See Thomas v. Bryant*, 938 F.3d 134, 170 n.7 (5th Cir. 2019) (*Thomas II*) (Higginson, J., concurring) (collecting cases), *vacated as moot sub nom. Thomas v. Reeves*, 961 F.3d 800 (5th Cir. 2020) (en banc).

district provided electoral opportunity because "the Latino candidate of choice . . . won the majority of the district's votes in 13 out of 15 elections for statewide officeholders" in the latest election. *Id.* at 428.

2. Courts of appeals have permitted Section 2 claims in bare-majority scenarios, without restricting plaintiffs to the three narrow circumstances that intervenors posit. For instance, the Fifth Circuit has long "rejected any per se rule that a racial minority that is a majority in a political subdivision cannot experience vote dilution." *Thomas v. Bryant*, 919 F.3d 298, 309 (5th Cir. 2019) (*Thomas I*) (quoting *Monroe v. City of Woodville*, 881 F.2d 1327, 1333 (5th Cir. 1989)). That court thus declined to stay a judgment that a Mississippi legislative district with "an African-American majority" of 50.7% violated Section 2. *Id.* at 302, 316.

Similarly, the Eleventh Circuit upheld Section 2 relief against a Georgia county school board and rejected the argument that "a heightened burden ought to apply in this case because blacks outnumber whites in Sumter County." *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1306 (11th Cir. 2020).

The Eighth Circuit likewise held that an at-large voting plan for a school district violated Section 2 despite a Black voting-age population in the district of 50.3%. *See Missouri State Conf. of NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 932-934 (8th Cir. 2018) (*Missouri State Conf.*).

And the D.C. Circuit held that a district court erred by dismissing a Section 2 claim regarding ward boundary changes that reduced "the African-American proportion of the population from 68.7% to 62.3%," because the reduction "might deprive African Americans of an 'effective' or 'safe' voting majority in that ward." *See Kingman Park Civic Ass'n v. Williams*, 348 F.3d 1033, 1040-1042 (D.C. Cir. 2003) (affirming, despite error, due to plaintiffs' deficient summary-judgment showing on other issues); *see also Pope v. County of Albany*, 687 F.3d 565, 575 n.8 (2d Cir. 2012) (acknowledging Section 2 allows claims against "bare majority-minority districts" because "low voter registration and turnout rates" may trace to historical discrimination); *but see, e.g.*, *Salas v. Southwest Tex. Junior Coll. Dist.*, 964 F.2d 1542, 1550, 1555 (5th Cir. 1992) (holding that trial record showed Hispanic registered-voter majority was sufficient for equal opportunity in challenged district, while also

"hold[ing] that a protected class that is also a registered voter majority is not foreclosed, as a matter of law, from raising a vote dilution claim").

These decisions recognize that minority voters may face "actual impediments and disadvantages" that reduce their voting strength relative to their apparent population numbers. *Missouri State Conf.*, 894 F.3d at 934; *Pope*, 687 F.3d at 575 n.8. The Eleventh Circuit, for instance, noted the Georgia county's "long, painful history of discrimination," as well as the resulting "significant socioeconomic disparities" and "depressed political participation" of Black residents. *See Wright*, 979 F.3d at 1308; *see also Missouri State Conf.*, 894 F.3d at 933-934 (accounting for area's "history of discrimination and disenfranchisement" and "the way that those historical problems may still affect the district's political landscape"). Such disparities furnish "a compelling way to explain why a protected class constituting a bare majority in the challenged jurisdiction may nevertheless win relief under § 2." *Thomas II*, 938 F.3d at 169 (Higginson, J., concurring).

3. Generally barring Section 2 relief because a minority group already has a narrow population majority in the challenged district, as intervenors urge, would be inconsistent with Section 2's original

understanding. In 1982, Congress amended Section 2 and drew heavily on two decisions: *White v. Regester*, 412 U.S. 755 (1973), and *Zimmer v. McKeithen*, 485 F.2d 1297 (5th Cir. 1973) (en banc). *White* supplied the language now codified at 52 U.S.C. 10301(b). *See Milligan*, 599 U.S. at 12-13; Senate Report 2 (explaining Congress was "codifying" *White*). *Zimmer*, for its part, distilled the factors that Congress intended to guide Section 2's totality-of-the-circumstances inquiry. *See Gingles*, 478 U.S. at 36 n.4; Senate Report 28-29 & n.113. These cases thus illustrate the "functional view of the political process" that Congress wanted the amended Section 2 to entail. *See* Senate Report 30 n.120 (internal quotation marks omitted).

Both *White* and *Zimmer* involved plaintiffs from minority groups that were the largest populations in the jurisdictions at issue. *White* held that the use of a multimember legislative district in Bexar County, Texas, diluted the voting strength of Mexican Americans, even though they were the largest population in the county. *See* 412 U.S. at 756-759; *Graves v. Barnes*, 343 F. Supp. 704, 733 (W.D. Tex. 1972) (three-judge court), *aff'd in relevant part sub nom. White*, 412 U.S. 755 (explaining Mexican American population exceeded white population).

Likewise, *Zimmer* held that a Louisiana parish's at-large voting scheme diluted Black voting strength even though a majority of the parish's population was Black. *See* 485 F.2d at 1300.

Among other considerations, *White* noted the "invidious discrimination and treatment in the fields of education, employment, economics, health, politics and others" that Mexican Americans had faced in Texas. 412 U.S. at 768 (quoting *Graves*, 343 F. Supp. at 733). Bexar County had segregated Mexican Americans in "poor housing," and they endured economic, "cultural and language barrier[s]" inhibiting participation in "political life." *Ibid.* Accordingly, *White* affirmed that the districting scheme diluted their voting strength. *Id.* at 769-770. *Zimmer* reached the same result in light of the "protracted history of racial discrimination" and the persistence of discrimination's "debilitating effects" that the Black plaintiffs there had shown. *See* 485 F.2d at 1306 (citing *Graves*, 343 F. Supp. at 733). Neither decision limited its analysis to the circumscribed inquiry intervenors urge here.

Section 2 thus arose from decisions finding vote dilution, notwithstanding a narrow numerical advantage for plaintiffs' groups, given the social and historical conditions of the communities at issue.

4. It would frustrate Section 2's purposes and invite discriminatory mischief if Section 2's results test were construed generally to tolerate districts that give a minority group a slim population majority—even when those districts rarely or never elect the group's preferred candidates.

For instance, the district at issue in *LULAC v. Perry* was the subject of litigation again after the next redistricting cycle. *See Perez v. Abbott*, 253 F. Supp. 3d 864, 884-885 (W.D. Tex. 2017) (three-judge court). In that cycle, Texas's mapmakers "took care to maintain . . . HCVAP levels above 50% . . . while simultaneously manipulating the population of the district to decrease its potential effectiveness for Latinos." *Id.* at 884. They "exclude[d] politically active Hispanics" while including "lower-turnout Hispanics" and "Anglos with comparatively higher turnout rates." *Id.* at 884-885; *id.* at 890 (holding that district violated Section 2's results test). Section 2 should not be interpreted in a manner that encourages such discriminatory practices.

B. Intervenors' proposed restrictions on Section 2 claims in bare-majority scenarios lack merit.

Intervenors cite no case standing for their position (Br. 40) that, "[b]y definition, if a group constitutes a majority of the citizen-age

voting population," it "necessarily" possesses equal political opportunity that satisfies Section 2. Intervenors do not engage with the numerous circuit decisions rejecting that position. Nor do intervenors cite any case that limits Section 2 claims in bare-majority scenarios like the present to the three narrow circumstances intervenors delineate. Intervenors rely instead on unpersuasive readings of inapt authority.

To start, intervenors misread the first *Gingles* precondition—that the minority group is numerous enough to "*constitute a majority* in a single-member district"—as confirmation that the challenged district must currently *lack* a numerical majority. Br. 40 (quoting *Gingles*, 478 U.S. at 50). The first precondition simply serves to establish that the minority group is big enough and compact enough that it "has the potential to elect" its preferred representative. *Growe v. Emison*, 507 U.S. 25, 40 (1993). Otherwise, plaintiffs could not say that the challenged districting plan caused their electoral defeats—for instance, because the minority group was too small or scattered over too large an area to ever win anyway. *See Pope*, 687 F.3d at 575 (explaining that first precondition "usefully serves at the outset to screen out cases in which there is no point in undertaking a full Section 2 analysis").

Intervenors likewise overread the third precondition—that the "*white majority* votes sufficiently as a bloc . . . usually to defeat the minority's preferred candidate"—to mean that there must currently be a "white majority" in the challenged district. Br. 41 (quoting *Gingles*, 478 U.S. at 51). *Gingles* spoke in those terms because it concerned multimember legislative districts in North Carolina, where "blacks constituted about 22.4% of the total state population" and the districts had substantial white majorities. 478 U.S. at 40.

Gingles elsewhere formulated the third precondition as "legally significant white bloc voting," defined as "a white bloc vote that normally will defeat the combined strength of minority support plus white 'crossover' votes." 478 U.S. at 56. And it explained that "[t]he amount of white bloc voting that can generally 'minimize or cancel' [minority] voters' ability to elect representatives of their choice, however, will vary from district to district according to a number of factors." *Ibid.* (quoting Senate Report 28). Plaintiffs may satisfy the third precondition in cases such as this, as shown by the circuit decisions cited above. *See* pp. 14-16, *supra*.

Intervenors invoke other Supreme Court authority that does little more to help their argument. They try to limit *LULAC v. Perry* to a holding that the presence of a *voting-age* majority in the challenged district will not bar relief if the minority group lacks a *citizen* voting-age majority. Br. 42. But *LULAC*'s fact-specific analysis did not establish that as a rule, and intervenors disregard *LULAC*'s recognition that it is "possible for a citizen voting-age majority to lack real electoral opportunity." 548 U.S. at 428.

Intervenors imply that *Bartlett*, 556 U.S. 1, bars relief here unless "literacy tests or barriers to registration" are shown. Br. 43. But *Bartlett* did not address that issue. It addressed an inversion of the present situation: whether a minority group *too small* to form a majority in a compact district may nevertheless seek Section 2 relief. *See Bartlett*, 556 U.S. at 13-14. The very passage intervenors quote (Br. 43)—*Bartlett*'s recognition that Section 2 can require remedial districts in which the minority group "composes a numerical, *working* majority" (*Bartlett*, 556 U.S. at 13 (emphasis added))—indicates that *Bartlett* is no bar to relief when a bare numerical majority falls short of a "working" one. *See* p. 12, *supra*.

Finally, intervenors cite an inapt dissenting opinion making the limited assertion that Section 2 claims in bare-majority scenarios like the present must specifically allege "packing or cracking." *Thomas II*, 938 F.3d 134, 181 (5th Cir. 2019) (Willett, J., dissenting), *vacated as moot sub nom. Thomas v. Reeves*, 961 F.3d 800 (5th Cir. 2020) (en banc). Setting aside that point's lack of merit,[5] it is academic here; plaintiffs alleged that Washington's districting plan "cracked apart Yakima County's Latino population between Districts 14 and 15." 2-ER-235. Instead, the Fifth Circuit's evaluations of the merits in *Thomas*—twice upholding a judgment that a district violated Section 2 notwithstanding a Black voting-age population just over 50%—support the district court's reasoning here. *See Thomas II*, 938 F.3d at 156, 159-164 (affirming judgment); *Thomas I*, 919 F.3d at 302, 316 (declining to stay judgment).

[5] The panel majority rejected the dissent's argument. *See Thomas II*, 938 F.3d at 158 (majority opinion) ("We find no statute or caselaw mandating that a plaintiff's allegations under § 2 include those terms.").

II. Partisanship is not a proper consideration under the *Gingles* preconditions.

Intervenors also argue that the district court erroneously applied the second and third *Gingles* preconditions because it "failed to evaluate whether voting was polarized on the basis of partisanship rather than race." Br. 55. The second and third preconditions do not require that evaluation. Intervenors demand a causation inquiry that has no place in the *Gingles* preconditions.

A. Purported non-racial causes of racially polarized voting, like partisanship, may be considered in the totality of circumstances but not under the *Gingles* preconditions.

1. The second and third *Gingles* preconditions are simple descriptive questions. The second precondition asks whether the minority group is "politically cohesive." *Allen v. Milligan*, 599 U.S. 1, 18 (2023) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986)). The third precondition asks whether "the white majority votes sufficiently as a bloc to enable it . . . to defeat the minority's preferred candidate." *Id.* at 18 (alteration in original) (quoting *Gingles*, 478 U.S. at 51). Together, they help to establish that it is the challenged districting scheme—and not, for instance, minority voters' heterogeneous preferences—that

causes the defeat of minority-preferred candidates "at least plausibly on account of race." *Id.* at 18-19.

In *Milligan*, for instance, the second and third preconditions were satisfied beyond "serious dispute" because "Black voters supported their candidates of choice with 92.3% of the vote"; "white voters supported Black-preferred candidates with 15.4% of the vote"; and "the candidates preferred by white voters . . . regularly defeat the candidates preferred by Black voters." 599 U.S. at 22 (quoting *Singleton v. Merrill*, 582 F. Supp. 3d 924, 1016-1018 (N.D. Ala. 2022), *aff'd sub nom. Milligan*, 599 U.S. 1). Those facts sufficed, even though they overlapped with partisan preference. *See Singleton*, 582 F. Supp. 3d at 1017 ("[B]lack voters overwhelmingly support[ed] the Democratic candidate and more than a majority of white voters cast[] a ballot for the Republican candidate." (citation omitted)).

The reasons why voters choose to vote in a polarized pattern are not a part of establishing or rebutting the *Gingles* preconditions. In *Gingles*, Justice Brennan, joined by three Justices, rejected such an inquiry altogether. *See* 478 U.S. at 63 ("[T]he reasons black and white voters vote differently have no relevance to the central inquiry of § 2.").

Justice O'Connor, with three other Justices, agreed that defendants could not rebut the preconditions "by offering evidence that the divergent racial voting patterns may be explained in part by causes other than race." *Gingles*, 478 U.S. at 100 (O'Connor, J., concurring in judgment). But her concurrence allowed courts to consider non-racial reasons for apparent racial polarization among the totality of circumstances. *Ibid.* In particular, Justice O'Connor envisioned "a candidate preferred by the minority group in a particular election [being] rejected by white voters for reasons other than those which made that candidate the preferred choice of the minority group." *Ibid.* "Such evidence would suggest that another candidate, equally preferred by the minority group, might be able to attract greater white support in future elections." *Ibid.*[6]

[6] For example, plaintiffs may try to prove racially polarized voting by citing the results of an election involving a candidate that minority voters supported for his or her political positions but that white voters opposed because he or she was involved in a scandal. A candidate not affected by the scandal, but who still advocated the positions appealing to minority voters, might receive enough white support to win, undercutting the showing of racial polarization.

Accordingly, courts of appeals overwhelmingly have held that purported non-racial explanations for apparent racial polarization, such as partisanship, are properly considered only in Section 2's totality analysis, not the preconditions. *See, e.g.*, *United States v. Charleston Cnty.*, 365 F.3d 341, 347-348 (4th Cir. 2004); *Goosby v. Town Bd. of Hempstead*, 180 F.3d 476, 492-494 (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, 983-984 (1st Cir. 1995); *Nipper v. Smith*, 39 F.3d 1494, 1513-1514 (11th Cir. 1994) (en banc) (opinion of Tjoflat, C.J.); *but see League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 853–854 (5th Cir. 1993) (en banc). The preconditions thus are limited to "asking *how* voters vote, not *why* voters voted that way." *Sanchez*, 97 F.3d at 1313.

2. The district court correctly recognized that Justice Brennan's and Justice O'Connor's opinions establish the principle that alternate-cause arguments like intervenors' may be considered at the totality stage but not the preconditions stage. 1-ER-43-44. The court thus appropriately considered intervenors' partisanship argument in the

totality of circumstances, alongside such evidence as "significant past discrimination against Latinos, on-going impacts of that discrimination, racial appeals in campaigns, and a lack of responsiveness on the part of elected officials . . . to the needs of the Latino community." 1-ER-44.

The district court also correctly acknowledged the possibility Justice O'Connor left open: that the "candidate preferred by the minority group in a particular election was rejected by white voters for reasons other than those which made the candidate the preferred choice of the minority group." 1-ER-44 (quoting *Gingles*, 478 U.S. at 100). The court determined that the scenario contemplated by Justice O'Connor was not present: there was "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 [of Latinos]." *Ibid.* (identifying support for "unions, farmworker rights, expanded healthcare, education, and housing options, *etc.*"). The court's reasoning thus followed the path charted in *Gingles*.

B. Intervenors' arguments on partisanship's role in the *Gingles* analysis lack merit.

Intervenors tacitly invite this Court to join the outlier side of an unbalanced divide in circuit authority. Intervenors present as authoritative the decisions of the Fifth Circuit, the lone circuit court that permits an inquiry into partisanship under the *Gingles* preconditions. But this Court's decisions disfavor intervenors' approach, and the Fifth Circuit is an outlier that this Court should decline to follow.

1. Intervenors argue that the proper question as to racially polarized voting under the second and third preconditions is "whether the aggregate cause of differences in voting is the political identity of the minority-preferred candidate." Br. 57. Intervenors' approach is in significant tension with *United States v. Blaine County*, 363 F.3d 897 (9th Cir. 2004), which held that "it is actual voting patterns, not subjective interpretations of a minority group's political interests, that informs the political cohesiveness analysis" under the second *Gingles* precondition. *Id.* at 910. There, quantitative evidence strongly showed "American Indians were politically cohesive," but the defendant argued they were not cohesive "because there was no evidence that American

Indian voters have distinct political concerns." *Ibid.* This Court rejected that attempt to examine voters' reasons for their vote choices. *Ibid.* The Court also rejected inquiring into whether "white bloc voting was the result of racial bias in the electorate" under the third precondition, an inquiry only a step removed from that urged by intervenors. *Id.* at 912.

Moreover, none of this Court's decisions that intervenors cite (Br. 55-57) contemplates, much less condones, consideration of partisanship under the *Gingles* preconditions. First, in *Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988), this Court's reference to minority voters "express[ing] clear political preferences that are distinct from those of the majority" simply incorporated the standards for political cohesion. *Id.* at 1415. *Gomez* said nothing about the role that partisanship or other non-racial causes for polarized voting should play in the *Gingles* analysis.

In fact, *Gomez* undercuts intervenors' position. The district court had found that Hispanics in Watsonville were not politically cohesive because many Hispanics were "too apathetic" to vote. *Gomez*, 863 F.2d at 1415. This Court reversed, holding that the district court "should

have looked only to *actual voting patterns* rather than speculating as to the reasons why many Hispanics were apathetic." *Id.* at 1416. Like *Blaine County*, *Gomez* therefore disfavors intervenors' call to explore the reasons for voters' choices under the preconditions.

Next, intervenors invoke *Smith v. Salt River Project Agricultural Improvement & Power District*, 109 F.3d 586, 595 (9th Cir. 1997) (*Salt River*), to argue that plaintiffs must show causation. Br. 57. As with *Gomez*, that case had nothing to do with partisanship. *Salt River* concerned a special-purpose water district that limited voting to landowners, and its concern for causation was much more basic. 109 F.3d at 595. *Salt River* recited the need for a "causal connection between the challenged voting practice and [a] prohibited discriminatory result" only because the plaintiffs had "effectively stipulated to the nonexistence of virtually every circumstance" that might help their cause, even conceding the absence of racially polarized voting in the district's elections. *Id.* at 595-596 (alteration in original; citation omitted).

Lastly, *Ruiz v. City of Santa Maria*, 160 F.3d 543, 552 (9th Cir. 1998), is no more helpful to intervenors' argument. *See* Br. 57. *Ruiz*

dealt only with determining whether a given candidate is "minority-preferred." *Ruiz*, 160 F.3d at 551-552. Partisanship as an explanation for polarized voting was not at issue.

2. This Court should not follow *Clements*, 999 F.2d 831, intervenors' sole authority for considering partisanship at the preconditions stage. *Clements* has been an outlier in circuit authority for three decades and cannot be reconciled with *Gingles* and its progeny, especially after *Milligan*.

In *Clements*, the Fifth Circuit determined that plaintiffs failed to establish the third precondition, "racial bloc voting," because "the defeat of [minority]-preferred candidates was the result of the voters' partisan affiliation," not race. 999 F.2d at 877, 879 (analyzing Dallas County elections); *see also id.* at 882-884 (Harris County), 891-893 (Midland, Lubbock, and Ector counties). *Clements* turned the third precondition into a complex, inferential inquiry considering, among other factors, the relative performance of white and minority candidates, voters' use of straight-ticket voting, and the "substantive political positions" of defeated candidates. *Id.* at 877-880. *Clements* wielded that analysis to reject plaintiffs' claims under the third precondition, notwithstanding

that "black-preferred" candidates "always lost" because "the majority of white voters always voted" against them—a classic *Gingles* threshold showing. *Id.* at 877.

While the totality inquiry may be open to such evidence, expanding the preconditions inquiry "to ask not merely whether, but also why, voters are racially polarized . . . convert[s] the threshold test into precisely the wide-ranging, fact-intensive examination it is meant to precede." *Charleston Cnty.*, 365 F.3d at 348. Blurring the two inquiries sows confusion for both parties and courts.

Clements also is dubious in light of *Milligan*, which affirmed relief in circumstances that likely would have led *Clements* to deny relief. As noted, in *Milligan*, "black voters overwhelmingly support[ed] the Democratic candidate and more than a majority of white voters cast[] a ballot for the Republican candidate." *Singleton*, 582 F. Supp. 3d at 1017 (citation omitted). *Clements* rejected claims on such facts. If mere overlap between racial voting patterns and partisan preferences could defeat a Section 2 vote-dilution claim, as *Clements* had it, few such claims would be viable in the context of partisan general elections.

3. In a footnote, intervenors suggest it does not matter whether partisanship is considered under the preconditions or in the totality of circumstances. *See* Br. 57 n.8 ("Either way, where divergent results are caused by partisanship rather than race, the § 2 claim necessarily fails."). The order of operations is crucial. Considering partisan voting preferences at the threshold, in isolation from the Senate Factors that guide Section 2's totality inquiry, would give that evidence priority over key evidence of race-conscious politics and racial discrimination.

Courts considering partisanship among the totality of circumstances are able to contextualize it within a "searching practical evaluation" of realities in the jurisdiction. *Gingles*, 478 U.S. at 79 (quoting Senate Report 30). When they do so, "evidence of partisanship" may turn out to be "far from persuasive on its own terms." *Charleston Cnty.*, 365 F.3d at 353 (rejecting partisanship defense to Section 2 suit challenging county council's at-large system).

For instance, considering a town board's at-large elections, the Second Circuit rejected a partisanship defense after a searching review of the town's history and politics. *See Goosby*, 180 F.3d at 495-497. That review showed the racially exclusionary nature of the candidate-

selection practices employed by the town's dominant political party, as well as the indifference of board members from that party toward Black residents and their needs. *Ibid.* The full record thus revealed that simple partisanship did not best explain Black citizens' near-total exclusion from political opportunity in the town. *Id.* at 497. But if partisanship had to get priority treatment at the threshold—ahead of that searching factual review—the outcome might have been different, notwithstanding Black voters' exclusion from the town's politics.

CONCLUSION

For the foregoing reasons, this Court should affirm the district court's holdings on the issues addressed herein.

Respectfully submitted,

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FOR THE NINTH CIRCUIT

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