UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUSAN SOTO PALMER, *et al.*, Plaintiffs – Appellees, v. STEVEN HOBBS, in his official capacity as Secretary of State of Washington, and the STATE OF WASHINGTON, Defendants – Appellees, and JOSE TREVINO, ISMAEL G. CAMPOS, and State Representative ALEX YBARRA, Intervenor-Defendants – Appellants.	Nos. 24-1602 & 23-35595 D.C. No. 3:22-cv-5035 U.S. District Court for Western Washington, Tacoma **APPELLANTS' JOINT REPLY IN SUPPORT OF JOINT MOTION TO CONSOLIDATE**
Benancio Garcia III, Plaintiff – Appellant, v. STEVEN HOBBS, in his official capacity as Secretary of State of Washington, and the STATE OF WASHINGTON, Defendants – Appellees,	No. 24-2603 D.C. No. 3:22-cv-5152 U.S. District Court for Western Washington, Tacoma

REPLY IN SUPPORT OF JOINT MOTION TO CONSOLIDATE

The overlap between the appeals in question is patent: they (1) both involve the same State legislative map and (2) both involve questions of the legality of the use of race in redistricting—*i.e.*, whether the excessive consideration of race or the failure to consider race sufficiently comported with federal law, respectively. Indeed, the overlap was so significant—and the benefits from consolidation so obvious—that two district courts heard the dyad of *Soto Palmer* and *Garcia* in a single trial without fanfare. And following that trial, the two remained so obviously and inextricably intertwined that a majority of the *Garcia* panel dismissed that action as moot specifically because of the *Soto Palmer* judgment that had been issued a few weeks earlier. Those same judicial economies that impelled the shared trial below make consolidation equally warranted here.

None of the contrary arguments advanced by Plaintiffs or the State provide any reason to deviate from the approach that prevailed below.

I. As an initial matter, the State's motion to hold *Garcia* in abeyance is procedurally improper and should be rejected on that ground alone. By asking for an abeyance, the State is incontestably seeking

"affirmative relief" in a response to a motion, an endeavor governed by Fed. R. App. P. 27(a)(3)(B). But FRAP 27 specifically requires for any such request that "[t]he title of the response must alert the court to the request for relief." *Id.* The State failed to do so, thereby forfeiting any right to obtain that affirmative relief.

Plaintiff-Appellees, in piggybacking on the State's improper motion, commit the same FRAP 27 violation. *See* Doc. 35.1 at 2 (adopting the State's "suggest[ion]" that "the *Garcia* appeal should be held in abeyance" without following FRAP 27's rules for requesting affirmative relief). This violation is well-trodden ground for Plaintiffs: their January 13, 2024 opposition to placing No. 23-35595 in abeyance pending the remedial proceedings below committed the same transgression by seeking dismissal on standing grounds. *See* No. 23-35595, Doc. 49 at 4–5. This Court properly granted the request for abeyance and ignored Plaintiffs' procedurally inappropriate request for affirmative relief. *See* No. 23-35595, Doc. 59. This Court should do so again.

Odder still is the fact that the *Soto Palmer* Plaintiffs are not party to Mr. Garcia's appeal and are thus asking for affirmative relief in a case *to which they are not even a party*. For such a request to be even

conceivably appropriate, these appeals would already have to have been consolidated such that the *Soto Palmer* Plaintiffs would not be non-parties seeking relief. *Soto Palmer* Plaintiffs' opposition to consolidation thus paradoxically treats consolidation as if it had already been granted—or else they surely would have attempted to explain how they could obtain relief from this Court in an appeal to which they were not even a party. That *Soto Palmer* Plaintiffs treat the two cases as so inextricably intertwined that they could seek relief in the other in which they are non-parties without even commenting on that procedural oddity is itself deeply revealing about the extent of the overlap here.

II. Next, the State's fixation on putative efficiency of an abeyance undermines Mr. Garcia's right to prosecute his own case in at least two ways.

First, the State attempts to dispose of—through the present motions practice—one of Mr. Garcia's appellate arguments about mootness, namely, that his appeal is not moot because the *Soto Palmer* appeal remains ongoing. This was Mr. Garcia's first argument in his Jurisdictional Statement at the Supreme Court, *see* Juris. Statement at 21–27, *Garcia v. Hobbs*, No. 23-467 (Oct. 31, 2023), and it will remain one

of his arguments in his present appeal which the Supreme Court directed him to present to this Court.

The State's request for abeyance in Mr. Garcia's appeal, then, amounts to nothing less than asking for Mr. Garcia's request for consolidation to be denied because his appeal will purportedly fail on the merits. In essence, the State's request for an abeyance in lieu of consolidation is premised on the merits being so overwhelmingly in its favor that it is entitled to a summary affirmance. But resolving the merits of Mr. Garcia's appeal is the whole point of appellate review here. The State's attempt to short circuit the process by seeking an abeyance premised on its eventual self-prophesied victory puts the cart before the horse.

Second, not stopping at its attempt to dictate to Mr. Garcia *what* arguments he can make, the State in similar fashion wishes to dictate *when* he can make them. The State talks about efficiency and prejudice in its (improperly raised) request to delay Mr. Garcia's appeal indefinitely. But ultimately, Mr. Garcia has the right to pursue his appeal in the manner he pleases (within the strictures of this Court's procedural rules). Asking this Court to put Mr. Garcia's appeal in an indefinite

abeyance effectively denies him the right to appellate review that Congress gave him under 28 U.S.C. § 1291.

In any case, Mr. Garcia's concerns are not so much, as the State seems to think, premised on the 2026 elections. Rather, Mr. Garcia has already been racially gerrymandered and wishes to pursue his case to seek redress for that violation promptly on his own behalf. And although Mr. Garcia certainly does not wish for the 2026 elections to proceed under a racially gerrymandered map, he has made it quite clear that his primary goal in these proceedings is to receive federal court vindication of his individual constitutional rights under the Equal Protection Clause. "The *racial classification itself* is the relevant harm in [the racial gerrymandering] context." *Alexander v. South Carolina State Conference of the NAACP*, 602 U.S. __, __, 218 L. Ed. 2d 512, 541–42 (2023) (slip op. at 34) (emphasis added). Accordingly, abeyance does in fact delay that ultimate goal of Mr. Garcia's. Indeed, Mr. Garcia had already attempted to seek relief as quickly as possible by appealing directly to the Supreme Court and is currently in this Court only because that speedier route was closed by the Supreme Court.

For their part, Plaintiff-Appellees try to use their Response to question Intervenor-Appellants' standing in *Soto Palmer*. The present motion is no place to decide whether the "*Soto Palmer* appeal is doomed because Appellants lack standing." Dkt. 35.1 at 3. Indeed, the motions panel of this Court did not hold that Appellants definitely lacked standing, instead explicitly stating that the stay denial was "without prejudice to the parties renewing their respective arguments regarding appellants' standing, or to parties making any other jurisdictional arguments, before the panel eventually assigned to decide the merits of this appeal." No. 24-1602, Dkt. 18-1 at 2 (citing cases for the notion that merits panels make their own determinations on standing).

Last, Mr. Garcia would note that the merits of his claim remain relevant. He has simply recognized that the district court's dismissal was based solely on mootness. That is no meaningful "concession" as the State insists (Doc. 71 at 3), but rather simply a recognition of what the judgment below actually said. Recognizing that simple and obvious fact concedes nothing here.

To be clear, Mr. Garcia desires that his merits claims be resolved promptly on remand after he prevails on arguing that the mootness-

based dismissal rested on legal error. But he obviously cannot obtain that adjudication of the merits of his constitutional claim until he secures reversal of that dismissal on jurisdictional grounds.

Moreover, as this Court reviews mootness, it cannot completely ignore the issues underlying the merits, since for mootness purposes every court "must assume that the plaintiff will prevail" on the merits. *See Almaqrami v. Pompeo*, 933 F.3d 774, 779 (D.C. Cir. 2019). Mr. Garcia's mootness appeal will focus quite closely on the question of what a racial classification injury *is*, because whether he may seek redress for an Article III injury depends in large part on the nature of his racial harm. The merits panel for *Garcia*, then, will certainly be considering those pertinent parts of Mr. Garcia's racial gerrymandering claim and injury.

Indeed, the merits of Mr. Garcia's claim will necessarily be before this Court in *Soto Palmer* indirectly, since the district court's remedial map in *Soto Palmer* was explicitly built upon the map that Mr. Garcia challenged as a racial gerrymander. The district court then added yet more consideration of race atop what Mr. Garcia already alleged violated the Constitution. If the map challenged in *Garcia* was an

unconstitutional racial gerrymander, the *Soto Palmer* Remedial Map is one *a fortiori*. That interconnection further underscores why consolidation is warranted here.

CONCLUSION

Appellants' joint motion to consolidate should be granted.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(B) and Circuit Rule 27-1(1)(d) because this motion contains 1,446 words spanning 8 pages, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 27(a)(2)(B) and 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Century Schoolbook size 14-point font with Microsoft Word.

Dated: June 12, 2024

/s/ Jason Torchinsky
Jason Torchinsky

CERTIFICATE OF SERVICE

I hereby certify that on June 12, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will notify all registered counsel.

/s/ Jason B. Torchinsky
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