No. 24-2603

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

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.

On Appeal from the United States District Court
for the Western District of Washington
Case No. 3:22-cv-5152
Hon. Robert S. Lasnik, Hon. David G. Estudillo, Hon. Lawrence J.C. VanDyke

APPELLANT'S REPLY BRIEF

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INTRODUCTION

The State's arguments are at war with themselves, rendering its mootness arguments untenable and unserious. On the one hand, it boldly contends (at 1) that the "panel's mootness ruling was plainly correct." Yet it also begrudgingly concedes (at 21) that "[t]o be sure … if this Court were to reverse the liability ruling in *Soto Palmer* … then Garcia's claim would present a live controversy." The State further admits (at 21) that "[i]f this Court reverses the *Soto Palmer* [judgment], … [then] this case should be remanded for a determination on the merits"—*i.e.*, that this case would apparently revive from currently being moot to suddenly being unmoot. The State's Amici are even more explicit on this point, contending (at 10) that reversal in *Soto Palmer* would "unmoot[]" this case, though arguing that no such "unmootness" can purportedly obtain here because the *Soto Palmer* appeal is putatively a "longshot."

These admissions are tantamount to confessing error. After all, "[a] case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Knox v. SEIU, Local 1000*, 567 U.S. 298, 307 (2012) (quotation marks omitted). It is hardly "impossible" that this Court will reverse in *Soto Palmer*. The *Knox*

standard for mootness thus *cannot* be met and reversal is required.

More to the point: the three-judge district court certainly lacked authority to conclude that it was "impossible" that its member's judgment in *Soto Palmer* would be invalidated when this Court (or the Supreme Court) exercised appellate review. Indeed, the central premise of appellate review is that district courts are *not* the final arbiter on the correctness of their own decisions. They cannot, for example, simply declare their decisions 100% unassailable on appellate review and dismiss other Article III cases and controversies on that basis.

The three-judge district court was thus plainly *in*correct to hold this case moot when appellate proceedings in *Soto Palmer* had scarcely begun. *Moore v. Harper* made this clear by holding that a challenge to a district map is *not* moot where action by an appellate court could result in the map "again tak[ing] effect." 600 U.S. 1, 15 (2023). And the State explicitly admits (at 21) that reversal in *Soto Palmer* would have just that effect.

Quite tellingly, the State does not even *acknowledge* the Supreme Court's/*Knox*'s "impossible … to grant effective relief" standard—let alone advance *any* argument that such an exacting standard was satisfied here. Indeed, the word "impossible" cannot be found in its brief.

The State thus effectively concedes that reversal is required under *Knox*.

Moreover, the State is wrong that this Court could putatively "preserve" the mootness of the judgment below by holding this case in abeyance and affirming in *Soto Palmer* first. Because the Supreme Court could still reverse in *Soto Palmer* even if this Court were to affirm, it *still* would not be "impossible" for federal courts to grant effective relief in this case if this Court were to affirm in *Soto Palmer*.

The manifest potential for appellate reversal in *Soto Palmer* aside, this case is independently not moot in any event because Mr. Garcia's constitutional injury from racial classification remains live now even if *Soto Palmer* had completed all appellate review. Indeed, Mr. Garcia's injury exists today in *exacerbated* form since the district court did not lift a finger to remedy the prior race-based sorting injury of the Enacted Map, and instead aggravated that injury by piling *yet more race-based line-drawing* into the creation of the Remedial LD-14 in which Mr. Garcia resides. One cannot "moot" an injury by intensifying its severity.

The district court was *completely explicit* about augmenting the prior magnitude of the raced-based sorting, expressly declaring its "fundamental goal of the remedial process" was race-based rejiggering of

Yakima Valley's population. *Palmer v. Hobbs*, No. 3:22-cv-05035-RSL, 2024 U.S. Dist. LEXIS 50419, at *10 & n.7 (W.D. Wash. Mar. 15, 2024). But the State will not even deign to *acknowledge* this conceded "fundamental goal" in *Soto Palmer*—let alone explain how it does not leave Mr. Garcia's injuries not merely intact but, in fact, *aggravated*.

The State's arguments instead rely on the facile premise that whenever a challenged governmental action is replaced by another one, then the challenge to the original action *always* becomes moot by the superseding action. But that simply is not the law. *Northeast Florida Chapter of Associated Gen. Contractors of Am. v. City of Jacksonville, Florida ("Jacksonville")*, 508 U.S. 656 (1993)) in particular, makes this perfectly clear. It simply "does [not] matter that the new [map] differs in certain respects from the old one"; as long as the "challenged conduct continues" and Mr. Garcia is affected "in the same fundamental way," then the case is not moot. *Id* at 662 & n.3.

That is precisely the case here: Mr. Garcia was racially classified and districted under the Enacted Map and remains so under the Remedial Map—with the only difference being that the magnitude of the race-based sorting is *even greater* now than before. As in *Jacksonville*,

"[t]his is *a fortiori* case" of a live controversy that is not moot. *Id.* at 662.

The State's response to *Jacksonville* is to dismiss it as a voluntary-cessation-only case. But this Court has applied that binding precedent to hold that a case is not moot at all when the original injury persists under the superseding action—without *any* reference to the voluntary cessation exception. *See Cuviello v. City of Vallejo*, 944 F.3d 816, 824 (9th Cir. 2019). *Jacksonville* is thus *not* limited to the voluntary-cessation context, but instead provides a general mootness standard that applies here—under which reversal is required.

The fundamental unseriousness of the State's mootness arguments is amply demonstrated by its striking and abject refusal to wrestle *whatsoever* with Judge VanDyke's dissent below. The most that the State will do (at 16) is merely acknowledge the *existence* of that dissent, without disclosing *any* of its reasoning, on mootness or the merits. At no point in its argument section (at 19-42) does the State even *cite* that cogent dissent—let alone attempt to demonstrate *any* flaws in its (wholly ignored) analysis. If the State had *any* persuasive responses to Judge VanDyke's forceful reasoning, it would have advanced them prominently. Instead, crickets. But, in fairness, what could the State have said?

This Court should take the State's demonstrated inability to engage with Judge VanDyke's dissent for the implicit concession it is—*i.e.*, if the State had *any* colorable responses to the compelling arguments raised by a member of this Court, it would have raised them. Instead, in law, as in life, "silence is most eloquent." *Edmonds v. Compagnie Generale Transatlantique*, 443 U.S. 256, 266–67 (1979).

In addition to reversing the mootness-based dismissal, this Court should resolve the question of whether race predominated in the drawing of LD-15 of the Enacted Map. The district court has already effectively resolved that issue on a complete record following a full-blown trial, and did so in a manner that leaves little doubt as to what result a remand would yield. In its own words, the majority conducted "a full analysis of the record" and, on that basis, rejected the dissent's contention "that race predominated in the drawing of LD 15." 1-ER-7-8 & n.4.

Where the district court has already performed "a full analysis of the record" on an issue, a remand so that the court could convert its all-but-explicit resolution of an issue into an explicitly-explicit holding would be a pointless and wasteful exercise. No further factual development will occur, and the question is simply whether this Court will need to apply

the law to that same fully developed record now or in a subsequent appeal following a futile remand. This Court should do so now to avoid manifest waste of judicial and private resources.

On the merits, race plainly predominated in the drawing of LD-15. The record makes utterly plain—and the State does not meaningfully contest—that *no map* would have been approved without drawing LD-15 as a majority-Hispanic district. This use of race was the *sine qua non* of the Enacted Map's approval. As such, it was the criterion that "could not be compromised." *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 189 (2017) (quoting *Shaw v. Hunt*, 517 U.S. 899, 907 (1996) (*Shaw II*)). Race thus predominated. *Id.* This Court should hold as much and remand for application of strict scrutiny.

ARGUMENT

I. THIS CASE IS NOT MOOT

The State asks (at 20) this Court to track the Fifth Circuit's phrasing on mootness: A legal challenge to a district map is moot when "the current district lines will neither be used nor operate as a base for any future election." *Thomas v. Reeves*, 961 F.3d 800, 801 (5th Cir. 2020) (en banc). Both the State's arguments fail even under its own cherry-

picked standard: (1) the plausible reversal[1] in *Soto Palmer* would mean, everyone seems to agree, that "the current district lines" (i.e., Enacted LD-15) *will* "be used"; and (2) the original map's racially gerrymandered lines "operate[d] as a base" from which the district court layered on even more racial gerrymandering. Far from satisfying *Thomas*'s "neither … nor" standard, this is a "both … and" case. Even on the State's own terms, Mr. Garcia's claim is not moot.

[1] Amici (at 10) argue that the appeal in *Soto Palmer* is too much of a "longshot" to potentially "unmoot[]" this case. That contention ignores (1) this Court's decision in *Aiay v. County of Maui*, 842 F.3d 688 (9th Cir. 2016), which refutes Amici's standing arguments, (2) that the *Soto Palmer* court enacted a cure-dilution-with-dilution remedy that has *never* been adopted before by any federal court anywhere, and (3) its merits decision is correspondingly dubious.

Amici (at 14) also bizarrely contend that "Appellant all but concedes that without a reversal in *Soto Palmer*, this case is moot." That ignores Intervenors' lengthy argument that an "alternative … path" to reversing the mootness determination below exists entirely aside from the *Soto Palmer* appeal. *See* Opening Br. 5. That is no stray argument, but rather developed in detail as Section I.A. of Mr. Garcia's Opening Brief (at 22-34).

That Amici contend that Mr. Garcia has "all but concede[d]" a point that he actually contests as fully *one half* of his mootness arguments is illustrative of the liberties that Amici take with the record, law, and arguments presented.

A. The State's and Amici's "Unmootness" Doctrine Does Not Exist

The State and *Soto Palmer* Plaintiffs endorse a novel "unmootness" doctrine. That theory goes like this: A plaintiff's challenge to a law might become moot by a court's decision in another case invalidating that law, but if that second court is later reversed, the plaintiff's challenge becomes "unmoot." The State characterizes it (at 21) such: "if this Court were to reverse the liability ruling in *Soto Palmer*, so that the originally enacted LD 15 came back into effect, *then* Garcia's claim would present a live controversy." (Emphasis added). Or again (at 34): "this Court's decision in *Soto Palmer* could resuscitate [Mr. Garcia's] claim." In other words, the State contends that this case is merely *currently* moot—thus not constituting a "case or controversy"—but its justiciability could resurrect in Lazarus-like fashion were this Court or the Supreme Court eventually to reverse in *Soto Palmer*.

Soto Palmer Plaintiffs even use the word "unmoot," accepting its premise but insisting that Mr. Garcia's claim will not be unmooted because (in their view) the *Soto Palmer* appeal is a "longshot." *See* Soto Palmer Amici Br. 10 ("Nor can this case be unmooted by the filing of a longshot appeal in *Soto Palmer* by parties who lack standing to appeal.").

In other words, *Soto Palmer* Plaintiffs also theoretically agree that a reversal in *Soto Palmer* (which they wrongly consider impossible) *would* "unmoot" Mr. Garcia's claim. This view is confirmed by the State's oblique statement (at 16) that "[t]o the extent that any questions remain about the finality of the *Soto Palmer* decision, however, this case should be held in abeyance pending the resolution of *Soto Palmer*." Questions certainly remain about the finality of *Soto Palmer*. But that neither means Mr. Garcia's case is moot and could become unmoot, nor does it counsel abeyance.

But as Mr. Garcia has already noted, this novel concept of unmootness "is not how mootness or appeals work." Opening Br. 35. "A case once mooted cannot later be 'unmooted,' and if a court order can still result in the reimposition of a plaintiff's original injury—as could still happen here—then the case was never moot at all." *Id.* That is to say, if one court could reimpose the plaintiff's original injury, as here, then another court may still order "effective relief" by precluding that possibility. *Knox*, 567 U.S. at 307.

There's simply no such thing as "unmootness." Mootness is binary: A case is either moot or it isn't. There is no "currently moot but subject

to potential resuscitation later depending on how another pending case comes out" third option. Mootness cannot be like Westley in the Princess Bride—*i.e.*, "only mostly dead" but subject to potential resuscitation by miracle workers.

Instead, when an appellate court's reversal could "unmoot" a claim, then it was never "impossible for a court to grant any effectual relief" in the first place. *Knox*, 567 U.S. at 307 (quotation marks omitted). The potential for appellate reversal prevents *Knox*'s "impossibility" standard from being satisfied in the first instance.

B. *Moore v. Harper* Directly Applies

The State contends (at 1) that the "district drawn by the Commission no longer exists." But the district certainly exists—dependent on the decision in the pending *Soto Palmer* litigation. The district is therefore a kind of Schrödinger's map, in limbo while *Soto Palmer* continues. Under *Moore v. Harper*, that alone means this case is not moot. *Moore v. Harper* is almost startingly on point and gave a very straightforward rule: If a federal court's decision *could* snap a district map back in place, then a plaintiff's claim against that map is not moot to begin with. *See Moore v. Harper*, 600 U.S. 1, 15 (2023) (finding no

mootness where the Court's potential reversal would result in the originally challenged 2021 North Carolina maps "again tak[ing] effect.").

The State concedes (at 21) that "if this Court were to reverse the liability ruling in *Soto Palmer*, *so that the originally enacted LD 15 came back into effect*, then Garcia's claim would present a live controversy." (Emphasis added). This is a tacit—though explicit in its phrasing—acceptance of the rubric of *Moore*'s "again take effect" rule. *Moore,* 600 U.S. at 15. But the State then insists the case is nonetheless moot; it just could become "unmoot." To the contrary: *Moore* accords fully with Mr. Garcia's contention that "unmootness" does not exist; if the law/map *could* snap back due to a federal appellate court decision, a plaintiff's claim against that law or map is not moot. It could only become moot when it is no longer possible for that law or map to spring back into existence.

Amici debate (at 16-17) an entirely irrelevant point about the status of injunctive relief then in force in *Moore*, but the Supreme Court's legal point was about whether the Supreme Court's own decision on appeal could reimpose the original map. There is therefore no distinction between *Moore* and the present appeal.

The State, meanwhile, attempts (at 31) to avoid *Moore* by deploying a new rule (even more novel than "unmootness"): Reversal by the Supreme Court, in the State's view, must be the "*only way* the petitioners could obtain the relief they wanted." (Emphasis added). This ham-fisted attempt to add an element to the Supreme Court's test in *Moore* makes no sense: What does an exclusivity element have to do with whether a claim is moot or not? The only test that make sense is whether a reversal *could* reinstate a harm. And that is precisely the test the *Moore* Court adopted: "Were we to reverse the judgment in *Harper I* … the 2021 plans enacted by the legislative defendants would again take effect." 600 U.S. at 15.

The same result should obtain here: Were this Court (or the Supreme Court down the road) to reverse the judgment in *Soto Palmer*, LD-15 "would again take effect." *Id.* Just as the claim wasn't moot in *Moore*, Mr. Garcia's isn't here either.

C. The Original Racial Gerrymander "Operates as a Base" for the Remedial Map's Racial Gerrymander

Mr. Garcia's racial classification under the Equal Protection Clause remains live because the Remedial Map layered the same exact kind of racial classification onto the Enacted Map that injures Mr. Garcia. The

redistricting Commissioners expressly adopted a Hispanic CVAP percentage target (50-percent-plus-one), a target that the *Soto Palmer* district court found—in part—wanting. So the court took the Enacted LD-15 as a baseline, then made it the court's "fundamental goal of the remedial process" to "unite the Latino community of interest in the region[,]" which includes the Hispanic voters in Mr. Garcia's hometown of Grandview. *See Palmer v. Hobbs*, No. 3:22-cv-05035-RSL, 2024 U.S. Dist. LEXIS 50419, at *10 & n.7 (W.D. Wash. Mar. 15, 2024). In other words, (1) the Enacted LD-15 "operate[d] as a base" from which the district court drew its Remedial Map, and (2) on top of which the district court layered yet-more racial sorting of its own devising. *See Thomas*, 961 F.3d at 801. Per the Supreme Court, where a new law "is sufficiently similar to the repealed [law] that it is permissible to say that the challenged conduct continues," then the controversy is not mooted by the change at issue, and a federal court retains jurisdiction. *Jacksonville*, 508 U.S. at 662 n.3.

Amici ignore *Jacksonville* entirely. And the State offers a facile distinction (at 28) that the Supreme Court there was "applying the voluntary cessation doctrine." But the holding of *Jacksonville* turns on

the continued existence of the injury at issue—not the identity of the actor that performed the putative mooting. Following this bedrock principle, this Court has explicitly applied the *Jacksonville* standard to non-voluntary-cessation cases, such as this one. In *Cuviello v. City of Vallejo*, for example, this Court held that a change in the law did *not* moot an action where it merely "lessen[ed] the asserted harm caused by the permit requirement, [but] it d[id] not eliminate it." 944 F.3d at 824. And this Court did so without *any* reference to voluntary cessation doctrine. *Id.* Instead, the continued persistence of the original injury (albeit in lessened form) meant that "Cuviello's appeal [wa]s not moot," *id.*—not that the case was moot in a conventional sense but saved from mootness under the voluntary-cessation exception. The same result should obtain here where Mr. Garcia's racial-sorting-based injury not only continues to exist, but does so in *exacerbated* form, rather than being "lessen[ed]." *Id.*

Jacksonville and *Cuviello* thus establish that a case is *not* moot where the original injury continues to exist in some kindred form under the superseding law. Under that standard, reversal is required here.

A simple example demonstrates the error in the State's approach to mootness generally and *Jacksonville* specifically. Suppose a would-be

contractor brings a Fourteenth Amendment challenge to a state policy that automatically awards 10 extra points on a 100-point scale to bidders that are majority-minority businesses and, while the case is pending, the state replaces the 10-point bonus with a 20-point one. Under the State's bright-line arguments here, the challenge to the 10-point bonus would automatically and irrevocably become moot simply because it has been replaced with something else—*anything* else. Yet the original injury continues to exist—indeed, in *aggravated* form. *Jacksonville* makes clear that no mootness exists in that circumstance.

Nor would it change the character of the injury if the change from the 10-point to a 20-point bonus was occasioned by a state court holding that the state law mandated the 20-point bonus rather than by a change in state statutory law or administrative policy. *Jacksonville* and *Cuviello* make plain that where the original injury continues to exist—even in *lessened* form—then a case is not moot. The identity of the change agent does nothing to alter the nature of the injury—and thus whether an Article III "case or controversy" continues to exist.

That is just so here. While the injury is not so easily quantifiable in numerical terms as 10- and 20-point bonuses, the inescapable facts here

are that (1) *all* of the original race-based sorting of the Enacted Map persists in the Remedial Map, since the district court expressly started with the former to draw the latter and made no attempt whatsoever to expunge the original race-based sorting, and (2) the district court added yet more raced-based sorting on top of the Enacted Map, with its "fundamental goal" of achieving an explicitly raced-based objective. *Palmer*, No. 3:22-cv-05035-RSL, 2024 U.S. Dist. LEXIS 50419, at *10 & n.7. Under *Cuviello*, Mr. Garcia's claim would not be moot even if his injury had been "lessens[ed]" by the Remedial Map. 944 F.3d at 824. That his race-sorting-based injury instead continues to exist in *heightened* form here makes this case not moot *a fortiori*.

Notably, Judge VanDyke made this point expressly in his dissent, explaining the obvious illogic of the majority's reasoning that "an order directing the State to consider race *more* has 'granted … complete relief' to a plaintiff who complains the State shouldn't have considered race *at all*." 1-ER-29 (VanDyke, J., dissenting). If the State had any answer to that reasoning, offered by a member of this Court, it undoubtedly would have raised it prominently in its Answering Brief. Its abject failure to

provide any response—or indeed to quote even a *word* of Judge VanDyke's dissent—should tell this Court all that it needs to know.

More generally, the State argues (at 24) that the district court's remedial proceedings constituted a break in the "chain of causation" from the original racial gerrymander to the *a fortiori* gerrymander of the Remedial Map. But this, again, repeats the State's same mistake, namely, characterizing the injury as the precise boundaries of the district, instead of the racial sorting itself. That is exactly wrong. *North Carolina v. Covington*, 585 U.S. 969, 976 (2018) ("[I]t is the segregation of the plaintiffs—not the legislature's line-drawing as such—that gives rise to their claims."); *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 38 (2024) ("The *racial classification itself* is the relevant harm in [the racial gerrymandering] context." (emphasis added)).[2]

[2] Amici (at 11-12, 20) also strangely fault Mr. Garcia for not anticipating in his Complaint the special Remedial Map adopted by the district court—which did not yet exist—and challenging it specifically. But the question for mootness is not whether Mr. Garcia's complaint specifically challenged the Remedial Map resulting from *Soto Palmer*, but rather whether it is now "impossible for a court to grant any effectual relief." *Knox*, 567 U.S. at 307 (quotation marks omitted).

Mr. Garcia was thus not required to amend his complaint to challenge the Remedial Map specifically. Instead, he need only demonstrate that it is not impossible for him to obtain "any effectual relief" at all with respect to his original injury to avoid mootness. *Id.*

In support of its intervening event idea, the State cites to *New York State Rifle & Pistol Association, Inc. v. City of New York, New York*, 140 S. Ct. 1525 (2020) (per curiam). The State's citation is once again self-defeating. That case is inapposite exactly because of the language quoted: that the intervening change gave "the *precise relief*" that those petitioners had asked for, i.e., permission for them to transport certain weapons. *Id.* at 1526 (emphasis added). But that implicates the whole point of this appeal: Mr. Garcia did *not* receive "precise relief" from racial gerrymandering from the district court's augmented racial gerrymandering. The layering on of racial classification is the opposite of a break in the chain of causation. The State gets stuck (at 25) on the two cases—*Soto Palmer* and *Garcia*—being "entirely different action[s]," but that is an arbitrary distinction without a difference when it comes to the *injury to Mr. Garcia*.

On that note, no one is trying to get into "Judge Lasnik's mind." State's Br. 27. There is no need here: The district court was perfectly forthcoming about its explicit racial motivations, declaring forthrightly its "fundamental goal of the remedial process" to "unite the Latino community of interest in the region." *Palmer*, No. 3:22-cv-05035-RSL,

2024 U.S. Dist. LEXIS 50419, at *10 & n.7. No mind reading is required to discern that racial motivation—only page reading of the district court's own remedial order.

The State bafflingly contends (at 26) that an injunction requiring the district to be redrawn without any consideration of race is "a different" remedy than an injunction that the district be drawn in a way that does not violate the Equal Protection Clause. That contention betrays a deep misunderstanding of that Clause. The use of race in drawing a district causes "'fundamental injury' to the [Equal Protection] 'individual rights of a person.'" *Shaw II*, 517 U.S. at 908 (quoting *Goodman v. Lukens Steel Co.*, 482 U.S. 656, 661 (1987)). Maybe the use of race ends up justified, but that's a merits determination, not a jurisdictional one. Nor does the State's hairsplitting satisfy its heavy burden to demonstrate that it was "impossible for a court to grant any effectual relief." *Knox*, 567 U.S. at 307 (quotation marks omitted).

In explaining that the gravamen of his claim is the sorting on the basis of race itself, not the precise contours of the underlying line-drawing per se or the motivations for the use of race, Mr. Garcia analogized to the Takings Clause context, where a plaintiff who has lost

one dollar because of the government's taking of the plaintiff's property has standing to challenge that action even if the government wins on the merits that the taking was justified. Opening Br. 26-27.

The State missed the point of that analogy and instead tries to discount it based on the type of relief at issue —prospective versus money damages. That's irrelevant; Mr. Garcia's point was that a plaintiff has standing to sue *even if* the government's constitutional harm (whether racial sorting or the taking of property) is ultimately justified and the plaintiff loses on the merits. *See E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 665 (9th Cir. 2021) ("[A] plaintiff can have standing despite losing on the merits."); *accord Estate of Boyland v. USDA*, 265, 913 F.3d 117, 123 (D.C. Cir. 2019) ("Whether a plaintiff has a legally protected interest that supports standing does not require that he show he will succeed on the merits; if it did, every merits loss would amount to a lack of standing.").

Indeed, this Court views the dispute "through [Garcia's] eyes" and "must accept—for [jurisdictional] purposes—[his] allegations" of unconstitutionality. *Arizona v. Yellen*, 34 F.4th 841, 849 (9th Cir. 2022); *accord FEC v. Ted Cruz for Senate*, 596 U.S. 289, 298 (2022) ("For

standing purposes, we accept as valid the merits of appellees' legal claims.").

In open rebellion to that well-established law, Amici claim (at 12-13) that Mr. Garcia *cannot* "simply ask this Court to assume that the *Soto Palmer* district court violated the U.S. Constitution in imposing a map that remedied the Section 2 violation." But that is in fact precisely what courts are required to do when deciding standing questions: "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 sub nom. D.C. v. Heller*, 554 U.S. 570 (2008). The State thus cannot defeat jurisdiction here by advancing merits-based arguments that the explicit and intentional use of race in drawing the Remedial Map comports with the Equal Protection Clause.

II. THIS COURT SHOULD FORGO A FUTILE REMAND

The State feigns disbelief that Mr. Garcia would ask this Court to review the district court's legal conclusion that a "full analysis" of the facts from trial shows that race did not predominate in the creation of LD-15. *See* 1-ER-7, 8 n.4. But that is what this Court does: review legal conclusions for error.

To be sure, the more-typical practice of appellate courts is to decline to reach the merits when an appeal is of a dismissal for mootness. The district court did dismiss the case on mootness grounds. But this case is the unusual one where, despite dismissing the case on mootness grounds, the three-judge court expressly telegraphed its views of the merits based on a complete record resulting from a full-blown trial. This Court has previously recognized that "[a] remand is not necessary 'where a complete understanding of the issues may be had by the appellate court without the necessity of separate findings.'" *Nat'l Ass'n of Wheat Growers v. Bonta*, 85 F.4th 1263, 1282 (9th Cir. 2023) (quoting *Richmond Elks Hall Ass'n v. Richmond Redev. Agency*, 609 F.2d 383, 385–86 (9th Cir. 1979)); *see also In re Pintlar Corp.*, 133 F.3d 1141, 1145 (9th Cir. 1998) ("Remand is not necessary where the issue has been fully briefed on appeal, the record is clear and *remand would impose needless additional expense and delay*.") (emphasis added).

At the very least, the State does agree (at 21) that at least *some* remand would be necessary if this Court reverses in *Soto Palmer*: "If this Court reverses the *Soto Palmer* district court's liability judgment, the State agrees that this case should be remanded for a determination on

the merits." The only disagreement, then, is on the *scope* of the remand: whether it should include directions for the district court to (1) restate its predominance conclusion, prompting an appeal to this Court; or (2) proceed to strict scrutiny.

If this Court were to remand without resolving the predominance issue, it would simply delay the inevitable. The result on predominance is baked in—explicitly. The State does not—because it cannot—dispute, if this Court remanded for the district court to make a predominance remand, that: (1) no further factfinding or hearings would be needed due to the already-completed full trial on the merits; (2) the district court would find race did not predominate; (3) the district court would ground that finding in the same reasoning already stated at 1-ER-8 n.4; (4) Mr. Garcia would then file a notice of appeal; and (5) everyone here will be *back up here arguing the same issues on predominance*—just a year (or more?) later.

Furthermore, the State is flatly wrong (at 36) in its attempt to invoke 28 U.S.C. § 2284 to strip this Court of its normal appellate jurisdiction. This Court, as a court of review, is well within its jurisdiction to "determine whether LD 15 is constitutional" when procedurally

appropriate to do so. Nothing about § 2284 strips this Court of its ordinary appellate jurisdiction, which includes the authority to reach issues not formally resolved below. For the reasons already stated, this Court should proceed to predominance.

As to the merits, the State inaccurately claims (at 41-42) that the Supreme Court's decision in *Alexander v. South Carolina State Conference of the NAACP*, 14602 U.S. 1 (2024) changed the standard for Mr. Garcia's case. Not so—*Alexander* is a decision that, on its own terms, clarified the quantum of proof that racial gerrymander plaintiffs must meet *in the absence of direct evidence* of racial intent. For the obvious reasons shown in the record and ably described by Judge VanDyke, there were veritable mountains of *direct* evidence of predominance. *See* 1-ER-42–43. Indeed, Mr. Garcia did not even rely on indirect evidence, because abundant *direct* evidence existed. *Alexander*'s evidentiary threshold requirements for plaintiffs *in the absence of direct evidence* therefore do not apply to Mr. Garcia, so the standard has not changed.

In any event, the State fails to provide any basis to believe that *Alexander* would change the district court's *de facto* predominance

finding below. There is thus no need for a futile remand on account of *Alexander*.

On the merits topic of predominance, the State does not seriously endeavor to aver that race did not predominate, instead implausibly claiming (at 39) that the district court made "no factual findings" liable to review by this Court. But as recounted by Mr. Garcia in his opening brief, the panel majority expended substantial space and words to—in detail—endeavor to rebut Judge VanDyke's conclusions. *See* 1-ER-7 (opining that the panel majority "disagree[d] with the dissent's summary and interpretation of the facts surrounding the creation of LD 15" and that a "a full analysis of the record presented does not yield" that Appellant established an Equal Protection violation); 1-ER-8 n.4 (explaining why, in the panel majority's view and contra Judge VanDyke's, race did not predominate). Whether to draw LD-15 as a minority-majority district was the logjam for the Commissioners that precluded any drawing of the map until the four agreed to include the majority-minority district of LD-15, so the use of race was the factor that "could not be compromised." *Bethune-Hill*, 580 U.S. at 189 (quoting *Shaw II*, 517 U.S. at 907). And, quite tellingly, the State does not even *attempt*

to respond to Judge VanDyke's reasoning that race predominated—instead ignoring it entirely.

Because the Commissioners' own words and the sequence of events make plain that the use of race to draw LD-15 was *the* factor that "could not be compromised," *id.*, this Could should hold that race predominated in its drawing and remand for application of strict scrutiny.

III. ABEYANCE WOULD BE AN UNNECESSARY DELAY TO MR. GARCIA'S RELIEF

Both the State and *Soto Palmer* Plaintiffs ask this Court to place Mr. Garcia's claim in abeyance if this Court finds this case not moot (or, again, "unmooted"). *See* Soto Palmer Amici Br. 16 ("To the extent that any questions remain about the finality of the *Soto Palmer* decision, however, this case should be held in abeyance pending the resolution of *Soto Palmer*."); State's Br. 34 ("While Garcia is correct that this Court's decision in *Soto Palmer* could resuscitate his claim, that at best counsels in favor of holding his appeal in abeyance.").

This is not the first time the State has asked this Court to hold Mr. Garcia's case in abeyance. *See* State's Opp. to Mot. to Consolidate, Dkt. No. 11.1. This Court refused to do so previously, Dkt. No. 13, and should do so again.

Nor should the constitutional avoidance canon stop this Court or the lower court from reaching the merits now or later. That doctrine does not apply across one constitutional case into a different statutory case. The State attempts to fall back on this doctrine to defend the district court's incorrect choice to allow the fully briefed and heard-at-trial *Garcia* case to go undecided for weeks, only to issue *Soto Palmer* first in order to moot out Mr. Garcia's claim. That's not constitutional avoidance; that's constitutional abdication. Mr. Garcia advanced a claim that, pre-*Soto Palmer* decision, was incontestably within the district court's jurisdiction. And "federal courts' obligation to adjudicate claims within their jurisdiction [i]s virtually unflagging." *New Orleans Pub. Serv., Inc. v. Council of New Orleans*, 491 U.S. 350, 359 (1989).

The Constitution cannot be avoided when, as here, a Fourteenth Amendment plaintiff makes solely a constitutional claim in one case while a separate plaintiff makes a statutory claim in another. These are two cases. This is not a situation where one plaintiff brings *both* a statutory and constitutional challenge to a law. This is not a situation in which there was "no need to convene the three-judge court." *Hagans v. Lavine*, 415 U.S. 528, 545 (1974). The needed panel was convened here

for *Mr. Garcia*'s claim. Only docket (mis)management could dodge the claim at that point. The panel was obligated to resolve the live constitutional issue.

One helpful counter-hypothetical: Imagine if the panel majority had been inclined to *grant* relief to Mr. Garcia on the merits. Mooting the case based on the same docket coordination in that situation shows even more clearly how odd this is: Mr. Garcia would have *won* if the panel published their opinion *first* but would have *lost* if they chose to publish their opinion *second*. It is ridiculous to think Article III would permit a plaintiff's relief to be denied solely on the discretionary order of issuance of a decision. What actually happened is just as problematic.

Last, and most importantly, this is Mr. Garcia's case, and he has the right to pursue his claim and appeal in the manner he pleases (within the confines of this Court's procedural rules). If this Court finds his claim live, he should be given the opportunity to pursue it here and below.

IV. THE SECRETARY'S TIMING CONCERNS DO NOT AFFECT MR. GARCIA'S ARGUMENTS

Mr. Garcia does not disagree, as a general matter, with the Secretary's request (at 4) about timing, that this Court be "cognizant of election deadlines." But the *Purcell* principle is about just that—timing.

It is not a substantive doctrine that can bar relief at this point in the process on any of Mr. Garcia's arguments and claims at this Court or below. Accordingly, Mr. Garcia supports the Secretary's request that this Court not delay resolution of this case in a manner that would cause issues with the 2026 election cycle.

Ironically, it is the *State* and *Soto Palmer* Plaintiffs that now seek an *indefinite* delay that might implicate the Secretary's concerns. *Soto Palmer* Plaintiffs ask (at 27) this Court to (if finding the case not moot or "unmoot") hold this appeal "in abeyance pending final disposition in *Soto Palmer*." For its part, the State avers (at 34) that "this Court's decision in *Soto Palmer* could resuscitate "[Mr. Garcia's] claim," which if occurring "counsels in favor of holding his appeal in abeyance." As stated above, such an abeyance is neither necessary nor appropriate. It also directly contravenes the Secretary's positions.

Furthermore, as mentioned above, the State's position that a predominance remand is required is at odds with the Secretary's position. A futile remand on predominance would delay this case, for perhaps a year or more, and this litigation *will* then be knocking at the door of May 2026.

CONCLUSION

The district court's decision dismissing Mr. Garcia's claim as moot should be reversed or vacated. This Court should further exercise its discretion to reach and hold that race predominated in the drawing of the Enacted Map to streamline the process below.

Respectfully submitted,

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Dated: December 6, 2024

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CERTIFICATE OF SERVICE

I, Jason B. Torchinsky, hereby certify that I electronically filed the foregoing Appellant's Opening 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 December 6, 2024, which will send notice of such filing to all registered ACMS users.

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