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HON. THOMAS O. RICE

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ROGELIO MONTES and MATEO ARTEAGA,

Plaintiffs,

v.

CITY OF YAKIMA; MICAH CAWLEY, in his capacity as Mayor of Yakima; & MAUREEN ADKISON, SARA BRISTOL, KATHY COFFEY, RICK ENSEY, DAVE ETTL, & BILL LOVER, in their capacity as members of the Yakima City Counsel,

Defendants.

No. CV-12-3108-TOR

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

NOTED FOR HEARING: August 18, 2014

Telephonic Argument
August 18, 2014 - 9:00 a.m.
Call in number: (888) 273-3658
Access Code: 2982935
Security Code: 3018

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I. INTRODUCTION

Although nearly 42% of the City of Yakima's population is Latino, the City has never—in its entire history—elected a Latino to the City Council. In fact, the only Latina who was ever appointed to the City Council lost when she ran for election for the first time, prompting debate over whether she was "too Latino" to be elected. The demographic and electoral patterns in Yakima reflect a City in which residents vote along racial lines to consistently defeat Latino-preferred candidates.

Plaintiffs file this lawsuit under Section 2 of the Voting Rights Act seeking vindication of Latinos' right to participate in the political process in Yakima on equal footing. Section 2 calls for a multistep inquiry into the extent to which a given election system dilutes the minority vote. Rarely is that inquiry so easily answered as it is here. The undisputed facts demonstrate that Latinos in Yakima can comprise a majority of eligible voters in at least one single-member City Council district to provide them an opportunity to elect their candidates of choice, an opportunity they have long been denied under the current at-large election system due to consistent and pervasive racial bloc voting. The question under Section 2 is not whether Yakima's at large voting system is *intended* to deny Latinos equal opportunity, but rather whether the system has the *effect* of doing so. And here there can be no question that it does.

An examination of the past and present political reality in Yakima only confirms the Voting Rights Act violation. Yakima Latinos have been subject

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to a history of official voting-related discrimination, from the imposition of literacy tests in the 1960s to the lack of Spanish-language access to elections as recently as 2004. Indeed, Yakima Latinos bear the lingering effects of discrimination in a variety of areas, including education, healthcare, and employment. Yakima's voting procedures bear all the hallmarks of an election system that systematically enhances the opportunity for discrimination against Latinos, and minority and non-minority candidates alike discuss local elections in racial terms. As Yakima's Latino population continues to grow at record rates, its culture of race-based electoral division persists, to the detriment of minority voters.

Yakima's at-large election system invites the very discriminatory voting practices the Voting Rights Act of 1965 sought to stamp out. The record before the Court is compelling and undisputed. On this record, Plaintiffs respectfully ask the Court to grant summary judgment in their favor.

II. BACKGROUND

This case is brought under Section 2 of the Voting Rights Act by two Latino citizens and voters in the City of Yakima. The City uses a hybrid at-large system, whereby each of the seven members of the City Council, whether or not they are assigned to a residency district, are elected in individual, head-to-head at-large contests. Statement of Undisputed Material Facts In Support of Plaintiffs' Mot. for Summ. J. ¶¶ 1-10 (July 1, 2014) ("SUMF").

Latinos comprise nearly 42% of Yakima's total population. SUMF ¶ 13. Over one-third of the City's voting age population is Latino, and nearly a quarter of its citizen voting age population is Latino. *Id.* ¶¶ 15, 23. The vast

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majority of Yakima's Latino population is concentrated on the east side of town, in an area that encompasses slightly more than 9 square miles. *Id.* ¶ 27. Yakima's Latino voters not only tend to live in the same part of town, they also consistently vote for the same candidates. In nine out of ten recent elections involving a Latino and non-Latino candidate, a majority of Latino voters chose the Latino candidate. *Id.* ¶ 162.

Despite the existence of a compact, cohesive Latino population in East Yakima, no Latino has ever been elected to the City Council. SUMF ¶ 165. In every election since 2009 involving a Latino and non-Latino candidate, the non-Latino candidate prevailed, and did so by winning a majority of the non-Latino vote. *Id.* ¶¶ 115-64.

III. ARGUMENT

A. Summary Judgment Standard

The purpose of summary judgment is to avoid unnecessary trials when there is no dispute as to the material facts before the Court. *Nw. Motorcycle Ass'n v. U.S. Dep't of Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). Summary judgment is therefore appropriate when there is no genuine issue as to any material fact, and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a); *Posey v. Lake Pend Oreille Sch. Dist. No. 84*, 546 F.3d 1121, 1126 (9th Cir. 2008). A party may seek summary judgment with respect to all or any part of a claim. Fed. R. Civ. P. 56(a).

Once the moving party has met its initial burden of proving that no genuine issue of material fact exists, the burden shifts to the opposing party to establish otherwise. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475

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U.S. 574, 586 (1986). The party opposing summary judgment must go beyond the pleadings to designate specific facts establishing a genuine issue for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The opposing party thus "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586. It must present significant probative evidence tending to support its claim or defense. *Intel Corp. v. Hartford Accident & Indem. Co.*, 952 F.2d 1551, 1558 (9th Cir. 1991); *accord United States v. $133,420.00 in U.S. Currency*, 672 F.3d 629, 638 (9th Cir. 2012) ("[A] conclusory, self-serving affidavit, lacking detailed facts and any supporting evidence, is insufficient to create a genuine issue of material fact[.]") (internal quotation marks and citation omitted). Bare allegations, speculations, or conclusions, as well as inadmissible evidence or even a "scintilla" of evidence, will not meet this burden. *See Nelson v. Pima Cmty. Coll.*, 83 F.3d 1075, 1081 (9th Cir. 1996); *Columbia Pictures Indus., Inc. v. Prof'l Real Estate Investors, Inc.*, 944 F.2d 1525, 1529 (9th Cir. 1991), *aff'd*, 508 U.S. 49 (1993); *Forsberg v. Pac. Nw. Bell Tel. Co.*, 840 F.2d 1409, 1419 (9th Cir. 1988).

B. Overview of Section 2 of the Voting Rights Act

The Voting Rights Act of 1965 is one of this nation's seminal pieces of legislation. As the Supreme Court has recognized: "Passage of the Voting Rights Act of 1965 was an important step in the struggle to end discriminatory treatment of minorities who seek to exercise one of the most fundamental rights of our citizens: the right to vote." *Bartlett v. Strickland*, 556 U.S. 1, 10 (2009). In accordance with this goal, Section 2 of the Voting Rights Act

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prohibits minority vote dilution. The question posed by a Section 2 claim is "whether, as a result of the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986) (internal quotation marks and citation omitted). Here, Plaintiffs contend that Yakima's at-large election system forecloses Latinos from electing candidates of their choice.

1. Legal Standard for Establishing a Violation of Section 2 of the Voting Rights Act

Section 2 of the Voting Rights Act, as amended, provides that no "standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a).

A violation of Section 2 is established "if, based on the totality of circumstances, it is shown that . . . [members of the minority group] have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). "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 black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47.

The Supreme Court has "long recognized" that at-large voting schemes have the potential to "operate to minimize or cancel out the voting strength of

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racial minorities in the voting population." *Id*. (internal quotation marks, citation, and alterations omitted) (citing cases). In particular, an at large voting system will operate to negate a minority community's voting strength "where minority and majority voters consistently prefer different candidates" and "the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters." *Id*. at 48.

It is important to note that Section 2 plaintiffs do *not* need to prove that a jurisdiction specifically *designed* its election system to discriminate against the minority population—only that the voting system challenged has a discriminatory *effect*. *Id*. at 35. In other words, "Section 2 requires proof only of a discriminatory result, not of discriminatory intent." *Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 594 (9th Cir. 1997).

In *Gingles*, the Supreme Court established the well-known framework governing Section 2 claims. To establish a Section 2 claim, a plaintiff must establish three "necessary preconditions": (1) the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) the minority group must be "politically cohesive," and (3) the majority must vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 478 U.S. at 50-51. These are commonly called the three "*Gingles* factors" or "*Gingles* preconditions."

A plaintiff who establishes these preconditions has very likely established a violation of Section 2. "[I]t will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but

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still have failed to establish a violation of § 2." *NAACP v. City of Niagara Falls, N.Y.*, 65 F.3d 1002, 1019 n.21 (2d Cir. 1995).

To confirm what establishment of the *Gingles* factors suggests—a jurisdiction with a voting system that impermissibly impairs minority voting strength—the court proceeds to examine the totality of the circumstances to determine whether minorities have been denied equal participation in the political process and the ability to elect representatives of their choice. *Abrams v. Johnson*, 521 U.S. 74, 91 (1997). In conducting this inquiry, the Court considers both "past and present reality." *Gingles*, 478 U.S. at 45 (internal quotation marks and citation omitted). In particular, the Court will consider the seven principal factors set forth in the Senate Judiciary Committee Report accompanying the 1982 amendments to Section 2 of the Voting Rights Act, the so-called "Senate Factors." *Id.* at 44-45 (citing S. Rep. No. 97-417 at 28-29 (1982), 1982 U.S.C.C.A.N. 177, 206-07 (the "Senate Report")). Those factors are:

> 1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
>
> 2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
>
> 3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

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> 4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
>
> 5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
>
> 6. whether political campaigns have been characterized by overt or subtle racial appeals; [and]
>
> 7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Id. at 36-37 (quoting S. Rep. No. 97-417, at 28-29). The Senate Report also explicates two additional considerations that may have probative value:

> [1.] whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group[; and]
>
> [2.] whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Id. at 37 (quoting S. Rep. No. 97-417, at 29). While the Senate Factors provide a helpful framework, they are "neither comprehensive nor exclusive." *Id.* at 45. Accordingly, plaintiffs "need not prove a majority of these factors, nor even any particular number of them in order to sustain their claims." *Ga. State Conference of NAACP v. Fayette Cnty.*, 950 F. Supp. 2d 1294, 1298 (N.D. Ga. 2013); *see also Gomez v. City of Watsonville*, 863 F.2d 1407, 1412 (9th Cir. 1988) (noting these factors are not intended to be "used as a mechanical 'point counting' device," and "[t]he failure of plaintiff to establish any particular factor is not rebuttal evidence of no violation") (internal quotation marks,

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citation, and alterations omitted). To the contrary, "these factors are simply guideposts in a broad-based inquiry in which district judges are expected to roll up their sleeves and examine all aspects of the past and present political environment in which the challenged electoral practice is used." *Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 956 F. Supp. 326, 331 (E.D.N.Y. 1997), *aff'd*, 180 F.3d 476 (2d Cir. 1999).

C. There Is No Genuine Dispute of Material Fact that Plaintiffs Have Satisfied the Three *Gingles* Preconditions

The legal analysis required is complex on its face, but boils down to a simple, commonsense test. First, if the at-large election system were changed to a district-based system, could one draw a majority-minority district that would provide the minority group an opportunity to elect its candidates of choice? And second, absent that change, is the white majority systematically voting down the minority community's candidate of choice? Here, as manifested by the fact that no Latino has ever been elected to the City Council—the answer is clearly "yes."

1. Yakima's Latino Population Is Sufficiently Large and Geographically Compact to Allow for the Creation of at Least One Latino-Majority District (*Gingles 1*)

To establish the first *Gingles* precondition, Plaintiffs must show the existence of a Latino population that is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50.

The first part of this inquiry—size—presents a simple mathematical question: In the relevant geographic area, do minorities make up more than 50

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percent of the eligible voters? *Bartlett*, 556 U.S. at 18. "That rule provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2." *Id.* To satisfy this requirement, plaintiffs must establish that there is a potential single member district (the "demonstration district") in which a majority of the citizen voting age population ("CVAP") is Latino. *See Cano v. Davis*, 211 F. Supp. 2d 1208, 1233 (C.D. Cal. 2002) ("The Ninth Circuit, along with every other circuit to consider the issue, has held that CVAP is the appropriate measure to use in determining whether an additional effective majority-minority district can be created."), *aff'd*, 537 U.S. 1100 (2003).

The second part of the inquiry "refers to the compactness of the minority population, not to the compactness of the contested district." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433 (2006); *see also Houston v. Lafayette Cnty., Miss.*, 56 F.3d 606, 611 (5th Cir. 1995) (district courts must "focus[] on the size and concentration of the minority population, rather than only on the shape of the districts in the plaintiff residents' specific proposals"). At the same time, a geographically compact proposed district provides evidence that the first *Gingles* precondition has been satisfied. *See Shaw v. Hunt*, 517 U.S. 899, 916 (1996) (finding no Section 2 violation where "no one looking at [the district] could reasonably suggest that the district contains a 'geographically compact' population of any race").

The first *Gingles* precondition is easily satisfied here. It simply cannot be disputed that it is possible to draw at least one geographically compact district in which Latino voters form a majority of the district. Indeed,

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Plaintiffs' demographic expert William S. Cooper has provided not one, but *five* illustrative districts in which Latino voters are sufficiently numerous and geographically compact to allow for a majority-minority district in Yakima.

a. Numerosity

Mr. Cooper used data from the 2010 Census and from multiple years of the American Community Survey ("ACS") to draw five demonstrative maps for the City of Yakima. SUMF ¶¶ 29-30. "The ACS is the only source of data regarding citizenship produced by the Census Bureau." *Fabela v. City of Farmers Branch, Tex.*, No. 3:10-CV-1425-D, 2012 WL 3135545, at *1 (N.D. Tex. Aug. 2, 2012). The ACS estimates population by sampling approximately three million households annually. *Id.*

"[T]he smallest geographic unit for which the Census provides data is the census block, which is approximately equivalent to a city block. The Census also provides data at the block group level, which is the aggregation of anywhere from a few census blocks to as many as over one hundred census blocks." *Id.* at 5. Because the special tabulation of ACS data provides only block group estimates of citizen voting age population, block-level estimates of the Latino Citizen Voting Age Population ("LCVAP") must be disaggregated and specifically calculated. *See* SUMF ¶¶ 31-32; *Benavidez v. City of Irving, Tex.*, 638 F. Supp. 2d 709, 716 (N.D. Tex. 2009) ("[C]alculating the HCVAP for illustrative districts composed of census blocks necessarily requires some extrapolation and assumptions, because block level data on citizenship is not available.").

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Mr. Cooper employed two methods to determine block-group level estimates of the LCVAP of each demonstration district.[1] Method 1, Mr. Cooper's preferred method, allocates both the Hispanic and non-Hispanic block group citizen voting age population to census blocks based on the complete count block-level voting age Hispanic and non-Hispanic population, according to the 2010 Census. Method 2, preferred by Defendants' expert Dr. Peter Morrison, allocates just the Hispanic citizen voting age population to the block level and imputes the value of the non-Hispanic citizen voting age population at the block level. SUMF ¶ 32.

While the parties' experts have different preferred methodologies, the differing approaches are immaterial—under either method, it is possible to draw at least one majority-LCVAP district. To illustrate the point, Mr. Cooper created five demonstrative plans, all of which include one single-member district in which Latinos comprise at least 52% of the citizen voting age population based on the most recent ACS data. *See* SUMF ¶¶ 37, 48, 59, 70,

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[1] Mr. Cooper initially determined the rates of Latino citizenship in each of his demonstration districts based on the *2007-2011 ACS 5-Year Estimates*. SUMF ¶ 29. The Census Bureau subsequently released the *2008-2012 ACS 5-Year Estimates*, and the 2008-2012 special tabulation block group citizenship estimates by race and ethnicity were released in January 2014. Accordingly, Mr. Cooper updated the citizenship statistics reported in his 2013 expert reports. *Id.* ¶¶ 18, 30.

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70. The table below reflects the LCVAP of District 1 in each of Mr. Cooper's demonstrative maps. *See id.*

	Method 1	Method 2
Illustrative Plan 1	54.51%	52.52%
Illustrative Plan 2	54.70%	52.67%
Hypothetical Plan A	55.53%	53.27%
Hypothetical Plan B	59.30%	56.31%
Hypothetical Plan C	57.74%	57.48%

As a means of cross-checking and corroborating these LCVAP estimates, Mr. Cooper calculated the number of Spanish surname registered voters ("SSRV") in each illustrative district. Mr. Cooper obtained from the Yakima County Elections Division a list of all registered voters in the City of Yakima as of March 2014, and he matched that list to a list of over 12,000 Spanish surnames prepared by the U.S. Department of Justice ("DOJ") to determine the number of registered voters with Spanish surnames. SUMF ¶¶ 24-25, 33-34. Mr. Cooper's SSRV calculations indicate that Latinos comprise a majority of registered voters in *at least one* district in each of his demonstrative plans, and in some instances, they comprise a majority in two districts. *See id.* ¶¶ 37-38, 48-49, 59-60, 70, 79.

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District	SSRV Percentage
Illustrative Plan 1	
District 1	52.78%
District 2	53.35%
Illustrative Plan 2	
District 1	52.76%
District 2	52.93%
Hypothetical Plan A	
District 1	55.51%
District 2	52.39%
Hypothetical Plan B	
District 1	56.33%
District 2	36.42%
Hypothetical Plan C	
District 1	60.77%
District 2	38.76%

The data and calculations above prove that Plaintiffs "can draw a demonstration district that contains greater than 50% Hispanic CVAP." *Farmers Branch*, 2012 WL 3135545, at *6. There is no dispute that in relying upon 2010 Census data along with ACS data, Mr. Cooper used "the most accurate data readily available" to calculate the LCVAP estimates in each district. *Id.* at *7; *see also Benavidez*, 638 F. Supp. 2d at 729 (noting that

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"ACS data *is* Census data" that "must be" relied upon). Mr. Cooper calculated the LCVAP estimates using population data from the "presumptively reliable 2010 Census" and Hispanic citizenship data from the five-year (2008-2012) ACS. *Farmers Branch*, 2012 WL 3135545, at *7 ("[T]he five-year ACS is the most reliable version of the ACS for analyzing small populations."). Mr. Cooper further calculated the LCVAP estimates in each demonstration district using two methods, including one endorsed by Defendants' expert. SUMF ¶ 32. Both methods yield estimates well in excess of 50% LCVAP in each demonstration district.

Defendants can hardly dispute that the numerosity requirement of the first *Gingles* precondition is satisfied. Defendants' expert Dr. Morrison testified that a district with an estimated 50.13% LCVAP is "likelier than not" a majority-Hispanic district. SUMF ¶ 98; *see Bartlett*, 556 U.S. at 19-20 ("[A] party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent."). And so long as his preferred method is used—as Mr. Cooper did—Dr. Morrison has little doubt that demonstrative districts with estimated LCVAPs ranging from 52.52% to 57.48% do, indeed, constitute majority-Hispanic districts. *See* SUMF ¶¶ 99-100.

Moreover, Dr. Morrison concedes that it is possible to create at least *two* districts in the City of Yakima in which Latinos comprise a majority of registered voters. SUMF ¶¶ 102-03. And for good reason. "None of the[] alleged statistical deficiencies" Dr. Morrison complains of with respect to ACS data "applies to the SSRV data" that Plaintiffs rely upon to corroborate the

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accuracy of Mr. Cooper's LCVAP estimates. *Farmers Branch*, 2012 WL 3135545, at *7. "This is so because the SSRV data are a count of actual registered voters rather than an estimate based on a sample of the population; therefore, the SSRV data do not have a margin of error." *Id.*; *see also* SUMF ¶ 104 (Defendants' expert John Alford testified that "a registered voter majority is probably a better indicator of having a majority district than is the CVAP number").

In short, the mathematical threshold set out in the first *Gingles* precondition is easily cleared. All that is required is the potential of creating a single majority-LCVAP district, and here Plaintiffs have offered multiple demonstration districts where the Latino eligible voter population is well in excess of a majority. Accordingly, Plaintiffs have satisfied the numerosity requirement of the first *Gingles* precondition.

b. Compactness

There is also no question that Latinos in Yakima are geographically compact such that one can draw a reasonably compact majority-minority district. Nearly three-quarters (72.54%) of Yakima's Latino population resides east of 16th Avenue, in an area that encompasses a little more than one-third (9.78 square miles) of the 28-square mile area of Yakima. SUMF ¶ 27. Similarly, a significant portion of the Latino citizen voting age population in Yakima resides east of 16th Avenue as well; all 2010 Census block groups with 40% or more LCVAP are located in this area. *Id.* ¶ 28.

Defendants' expert Dr. Morrison does not dispute compactness. SUMF ¶ 106. Based on his observation of the geographic concentration of Latinos in

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Yakima, along with his analysis of Plaintiffs' demonstration districts, he testified that the Latino population in Yakima "certainly is geographically compact, no question about it." *Id.* ¶ 105.

In considering compactness, the Court considers the minority community in question, not the specific demonstration districts Plaintiff provides. *See Houston*, 56 F.3d at 611. That said, Plaintiffs' demonstration districts confirm Dr. Morrison's testimony that there is "no question" Yakima's Latino population is geographically compact. On their face, the demonstration districts drawn by Mr. Cooper are geographically compact. SUMF ¶¶ 41, 52, 63, 72, 81. What the plain eye can see is confirmed by quantitative measures of compactness. *Id.* ¶¶ 40, 42, 51, 53, 62, 64, 73, 82. Indeed, Plaintiffs' demonstration districts are comparable to other electoral districts in Washington, including those in the cities of Pasco and Spokane, and those in the Washington state legislative and congressional plans. *Id.* ¶¶ 92-95.

Finally, Plaintiffs' demonstrative plans are not only compact, they also comport with other traditional districting principles, including population equality, contiguity, respect for existing official geographic boundaries, and incumbent protection. *See Shaw v. Reno*, 509 U.S. 630, 647 (1993) (identifying compactness, contiguity, and preservation of political subdivision boundaries as traditional districting principles); *Easley v. Cromartie*, 532 U.S. 234, 248 (2001) (identifying incumbent protection as legitimate districting principle); *Benavidez*, 638 F. Supp. 2d at 728 (noting that plaintiffs demonstrative districts "comport with traditional districting principles of population equality and respect for existing official geographic boundaries").

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With population deviations ranging from 5.44 (Illustrative Plan 2) to 9.55 (Hypothetical Plan A), *see* SUMF ¶¶ 43, 54, 65, 74, 83, all of the demonstrative plans are comfortably within the accepted 10% population deviation range for state legislative and local redistricting plans. *See Brown v. Thomson*, 462 U.S. 835, 842 (1983) ("Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within th[e] category of minor deviations."); *White v. Regester*, 412 U.S. 755, 764 (1973). All of the districts in Plaintiffs' demonstrative plans are contiguous. *See* SUMF ¶¶ 39, 50, 61, 71, 80. Districts in each plan are regularly shaped and generally follow primary road and precinct lines, and all of the districts are drawn along existing Census block lines. SUMF ¶¶ 44-45, 55-56, 66-67, 75-76, 84-85; *see also Benavidez*, 638 F. Supp. 2d at 728. Finally, each of Plaintiffs' demonstrative plans provides that five out of seven incumbent City Councilmembers will be the sole incumbents in their districts. SUMF ¶¶ 46, 57, 68, 77, 86.

In sum, Plaintiffs have provided multiple compact demonstration districts in which Latinos would comprise a majority of eligible voters. Given the size and concentration of the Latino population in Yakima, drawing such a district requires no great feat of cartography—one must simply draw a district around the significant Latino population of East Yakima. Because Plaintiffs have shown that the Latino population is sufficiently large and geographically compact to constitute a majority-minority district in Yakima, they have met the first prong of *Gingles.*

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2. Yakima's Latino Population Is Politically Cohesive and Its Elections Are Characterized by Racially Polarized Voting (*Gingles 2* and *3*)

While the first *Gingles* precondition establishes whether a Section 2 remedy is available, the second and third *Gingles* factors work together to establish whether a Section 2 remedy is necessary—i.e., whether the minority community can elect its preferred candidates without establishment of a majority-minority district. Specifically, the second and third *Gingles* factors examine whether Yakima's minority population is politically cohesive and whether elections in Yakima are characterized by racially polarized bloc voting.

To determine whether a minority community exhibits political cohesiveness (*Gingles* 2), the court must consider "whether the minority group has expressed clear political preferences that are distinct from those of the majority." *Gomez*, 863 F.2d at 1415. This simply requires a showing that " a significant number of minority group members *usually* vote for the same candidates." *Gingles*, 478 U.S. at 56 (emphasis added). It is reversible error for a district court to "focus[] on low minority voter registration and turnout as evidence that the minority community was not politically cohesive." *Gomez*, 863 F.2d at 1416; *see also Benavidez*, 638 F. Supp. 2d at 725 ("[L]ow minority voter turnout does not militate against finding a Section 2 violation.").[2]

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[2] "[I]f low voter turnout could defeat a section 2 claim, excluded minority voters would find themselves in a vicious cycle: their exclusion from the political process would increase apathy, which in turn would undermine their

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In identifying the minority candidate of choice for purposes of this inquiry, the Ninth Circuit utilizes a test that is both "brightline" and flexible. No anecdotal evidence is needed to establish which candidate is the minority candidate of choice. *Ruiz v. City of Santa Maria*, 160 F.3d 543, 552 (9th Cir. 1998). The court can instead look to vote totals to make this determination. *Id.* Notably, this does not require proof that a given candidate received more than 50% of the minority community's vote. *Id.* Instead, in the Ninth Circuit, "a candidate who receives sufficient votes to be elected if the election were held only among the minority group in question qualifies as minority-preferred." *Id.*

As to the third *Gingles* precondition, "a white bloc vote that *normally* will defeat the combined strength of minority support plus white 'crossover' votes rises to the level of legally significant white bloc voting." *Gingles*, 478 U.S. at 56 (emphasis added); *see also Old Person v. Cooney*, 230 F.3d 1113, 1122 (9th Cir. 2000) (recognizing that "usually" defeating the minority-preferred candidate could mean "more than half of the time"). There is no strict mathematical threshold as to the required degree of white bloc voting, because "[t]he amount of white bloc voting that can generally 'minimize or cancel' [minority] voters' ability to elect representatives of their choice . . . will vary from district to district." *Gingles*, 478 U.S. at 56 (citation omitted); *see*

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ability to bring a legal challenge to the discriminatory practices, which would perpetuate low voter turnout, and so on." *United States v. Blaine Cnty., Mont.*, 363 F.3d 897, 911 (9th Cir. 2004).

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also Blaine Cnty., 363 F.3d at 911 (rejecting blanket numerical threshold for white bloc voting). The fact that "[n]o Hispanic had ever been elected as mayor or city council member under the at-large system" being challenged provides powerful evidence of racial bloc voting. *Gomez*, 863 F.2d at 1417.

"Elections between white and minority candidates are the most probative in determining the existence of legally significant white bloc voting." *Old Person*, 230 F.3d at 1123-24. "The general reasoning behind this conclusion is that non-minority elections do not provide minority voters with the choice of a minority candidate and thus do not fully demonstrate the degree of racially polarized voting in the community." *Ruiz*, 160 F.3d at 552-53.

Both Plaintiffs' expert, Dr. Engstrom, and Defendants' expert, Dr. Alford, agree that Latinos in Yakima prefer different candidates than non-Latinos; they simply disagree about the legal significance of the undisputed facts. As discussed below, under well-established precedent, the substantial racial polarization in Yakima elections plainly suffices for purposes of the *Gingles* analysis.

Dr. Engstrom and Dr. Alford examined nine recent elections in which voters in Yakima were presented with a choice between or among Latino and non-Latino candidates. SUMF ¶¶ 110, 146. These included seven primary and general elections for Yakima City Council (endogenous elections) as well as the Washington Supreme Court election involving Justice Gonzalez and the most recent Yakima School Board election involving a Latino candidate

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(exogenous elections).[3] *Id.*; *see Citizens for a Better Gretna v. City of Gretna, La.*, 834 F.2d 496, 502 (5th Cir. 1987) (approving the use of exogenous elections in a *Gingles* analysis, and noting that *Gingles* "suggests flexibility in the face of sparse data"). In addition, they analyzed voter preferences on City of Yakima Proposition 1 in the primary election of 2011, which would have required a change in the city council election system from at-large to district-based elections. SUMF ¶ 110; *Gomez*, 863 F.2d at 1415 ("[W]hether a racial group is politically cohesive depends on its demonstrated propensity to vote as a bloc for candidates or issues popularly recognized as being affiliated with the group's particularized interests.") (internal quotation marks and citation omitted).

Dr. Engstrom applied a statistical analysis called ecological inference ("EI") to estimate the percentage of Latino and non-Latino voters who voted for the Latino candidate (or Proposition 1) in each election. SUMF ¶ 111. His report provides a specific point estimate of each group's support for a particular candidate or proposition, which is the "best estimate," in that is "the value most likely to be the true value." *Id.* Dr. Engstrom also reports the corresponding confidence intervals, which identify the range of estimates within which we can be 95 percent confident, statistically, that the true value of

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[3] "In the abstruse language of redistricting, the term 'endogenous elections' refers to elections for the particular office and district that is at issue. 'Exogenous elections' are those held for other offices conducted in the same approximate geographic area." *Cano*, 211 F. Supp. 2d at 1235 n.29.

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a group's support for a candidate falls. *Id.* Dr. Alford has no dispute with the estimates derived from Dr. Engstrom's analysis, and is willing to testify based on Dr. Engstrom's point estimates and confidence intervals. *Id.* ¶ 114; *see also Farmers Branch*, 2012 WL 3135545, at *9 ("Because the disagreement lies instead in the legal significance of the data, the court will rely on Dr. Engstrom's results to determine whether plaintiffs have met the second and third prong of the *Gingles* test.").

Dr. Engstrom's EI estimates prove that Latino voters in Yakima vote along racial lines. In all but one election in which voters were faced with a choice between a Latino and non-Latino candidate, the Latino candidate was the clear candidate of choice among Latino voters. *See* SUMF ¶ 162. In the four decisive elections, Latino cohesion was overwhelming: 92.8% of Latinos voted for Sonia Rodriguez in the general election, 92.7% of Latinos voted for Ben Soria in the general election, 98.2% of Latinos voted in favor of Proposition 1, and 70.1% of Latinos voted for Graciela Villanueva. SUMF ¶¶ 121, 130, 139, 158; *see Farmers Branch*, 2012 WL 3135545, at *11 (point estimates between 67.7% and 88.1% "establish overwhelming support by Hispanics for the Hispanic candidates").[4] Even in primary elections involving multiple candidates (and thus a higher degree of voter dispersion), a Latino majority routinely cast its vote for a single, preferred candidate. SUMF ¶¶ 118, 127, 135, 143, 150. From any angle, it is evident that a "significant number of

[4] Even Defendants' expert characterized 70.1% cohesion as "moderate" cohesion. SUMF ¶¶ 158-59.

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minority group members usually vote for the same candidates," *Gingles*, 478 U.S. at 56, satisfying the second prong of the *Gingles* analysis. *Cf. Citizens for a Better Gretna*, 834 F.2d at 502 (finding that estimate as low as 49% of the minority vote for the minority candidate "reveal[s] a 'significant number' of blacks" voting for that candidate) (quoting *Gingles*, 478 U.S. at 56).

Plaintiffs have also established a pattern of non-Latino bloc voting. The average crossover vote for the Latino candidate or Proposition 1 was less than 30%, and in three instances it was less than 16%. *See* SUMF ¶¶ 119, 122, 128, 131, 136, 140, 144, 151, 155, 160. Indeed, in just one instance did the non-Latino vote for the Latino candidate break 40%, and the analyzed elections did not reveal a *single instance* in which a majority of non-Latinos voted for a Latino candidate or Latino-supported ballot measure. *Id.* ¶¶ 163-64. This plainly constitutes racial bloc voting. *See Gingles*, 478 U.S. at 59 (noting that district court properly found "a substantial majority of white voters would rarely, if ever, vote for a black candidate" where "[i]n the primary elections, white support for black candidates ranged between 8% and 50%, and in the general elections it ranged between 28% and 49%").

The election results speak for themselves. The unassailable fact is that every single Latino candidate (and Proposition 1) was defeated. This was true regardless of the office at issue (city council seat, judgeship, or school board position), regardless of the year in which the election was held (2009, 2011, 2012, or 2013), and regardless of whether the Latino candidate was an incumbent or a newcomer. Even Justice Gonzalez, who handily won the statewide election for a seat on the Washington Supreme Court, lost the vote

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within the City of Yakima. SUMF ¶ 145. As discussed above, the *Gingles* test is flexible—"legally significant white bloc voting" means the non-Latino vote usually operates to defeat the combined vote of Latinos and white cross-over voters. *Gingles*, 478 U.S. at 51, 56. Here, not only has non-Latino bloc voting *usually* defeated the minority-preferred candidate, it has *always* done so. The proof could not be more stark—not a single Latino has been elected to the Yakima City Council under the at-large election system. SUMF ¶ 165.

The pattern of voter preferences observed in Yakima is entirely consistent with voting patterns seen in those cases in which courts have found legally sufficient racially polarized voting. For instance, in *Old Person*, 230 F.3d at 1127, the Ninth Circuit found "legally significant" racially polarized voting where the minority candidate was defeated by white bloc voting "in 86% of the contests in the four districts challenged on appeal and in 64% of the contests in the eight districts challenged at trial." *See also id.* ("In no case listed above does the rate at which Indian-preferred candidates are defeated by white bloc voting fall below 50%; in the contests that are most probative of white bloc voting, the percentages are far above that threshold."). Consistent with *Gingles*, the Ninth Circuit rejected the State's preferred standard that "white bloc voting *cannot* satisfy the third *Gingles* factor when at least 22% to 38% of white voters 'cross over' and vote for the minority-preferred candidate." *Id.*[5] Here, even if we assume that 60% of the non-Latino majority

[5] In *Old Person*, the Ninth Circuit "assume[d], as did the district court, that at least 60% of the white majority must vote for a candidate to constitute a white

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must vote against the Latino candidate to constitute white bloc voting, the Latino candidate or Latino-preferred ballot measure was defeated by white bloc voting in no less than 80% of the election contests analyzed.

In *Goosby*, 956 F. Supp. at 350, the district court found minority cohesion in satisfaction of the second *Gingles* prong where in all but one Town Board election, "a majority of blacks supported a particular Democratic candidate." Moreover, the Second Circuit affirmed the district court's finding of a "persistent pattern of racially polarized voting," *id.* at 351, on the basis of the following undisputed facts:

> (1) a black Democrat candidate who ran for the Town Board always was the most preferred candidate among black voters; (2) the black Democrat received over 50% of the black vote in every election but one; (3) in every Town board election but one there was at least one minority-preferred candidate; and (4) every minority-preferred candidate for the Town Board lost to the majority-preferred candidate as a result of white voters voting for candidates not supported by black voters.

Goosby v. Town Bd. of Town of Hempstead, N.Y., 180 F.3d 476, 492 (2d Cir. 1999). Here, similar to *Goosby*, (1) when a Latino candidate ran for any position in the elections analyzed, he or she was the most preferred candidate among Latino candidates in all but one instance; (2) the Latino candidate received over 50% of the Latino vote in every election but one; (3) in all but

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bloc." *Id.* at 1127. Four years later, the Ninth Circuit rejected the contention that "white voter cohesion levels [must] surpass 60 percent," as it "flatly ignores the test laid out in *Gingles*." *Blaine Cnty.*, 363 F.3d at 911.

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one of the elections analyzed there was one minority-preferred candidate; and (4) every minority-preferred candidate lost to the majority-preferred candidate as a result of non-Latino voters voting for candidates not supported by Latino voters. *See* SUMF ¶¶ 115-64.

In *Campos v. City of Baytown, Tex.*, 840 F.2d 1240, 1248-49 (5th Cir. 1988), the Fifth Circuit affirmed the district court's finding of a Section2 violation where only three out of eight elections demonstrated white bloc voting. Moreover, when the defendant in *Campos* pointed to the relatively high level of white crossover vote for one Latino candidate (Delgado) as evidence that "whites do not vote as a bloc," the court noted "[t]he argument misses the point," as "*Gingles* does not require total white bloc voting." *Id.* at 1249. In fact, the court highlighted the Delgado election as a "good example" of bloc voting under the *Gingles* test: "[D]espite overwhelming minority support (83%), the whites voted as a bloc (63%) to defeat him. The fact that Delgado had support of 37% of the whites, and came relatively close to winning, does not mean that there was not determinative white bloc voting. Instead, the white bloc voting defeated the combined strength of minority votes plus white crossover votes." *Id.* Not only are the estimates reported in *Campos* similar to the estimates reported here, here Plaintiffs have presented significantly more elections demonstrating comparable levels of bloc voting. And just like the Delgado election, the elections involving Sonia Rodriguez and Ben Soria are emblematic of racial bloc voting: despite overwhelming Latino support (nearly 93%) for each of these candidates, non-Latinos voted as a bloc (43% and 31%, respectively) to defeat them. SUMF ¶¶ 121-23, 130-32.

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Finally, in *Farmers Branch*, another recent case in which Dr. Engstrom testified for the plaintiffs and Dr. Alford testified for the defendants, the court emphasized that neither the point estimates nor the confidence intervals for non-Latino votes in favor of Latino candidates exceeded 50%, *Farmers Branch*, 2012 WL 3135545, at *12, and concluded that "plaintiffs have satisfied the second and third prongs of *Gingles*," *id.* at *13. The same holds true for Yakima elections, SUMF ¶ 164, compelling a conclusion of racially polarized voting in satisfaction of *Gingles*.

In sum, the voting patterns in Yakima demonstrate that Latino and non-Latino voters "consistently prefer different candidates," and the majority has not just "regularly" but *uniformly* "defeat[ed] the choices of minority voters." *Gingles*, 478 U.S. at 48. Based on the undisputed evidence above, Plaintiffs have satisfied the second and third *Gingles* preconditions.

Thus, summary judgment is warranted with respect to the three *Gingles* preconditions.

D. There Is No Genuine Dispute of Fact that, Under the Totality of Circumstances, Latino Residents of Yakima Have a Diminished Opportunity to Participate in the Political Process and to Elect Representatives of Their Choice

As with establishing the *Gingles* preconditions, Plaintiffs bear the burden of showing that the "totality of circumstances" demonstrates vote dilution. *Johnson v. De Grandy*, 512 U.S. 997, 1009-12 (1994). That being said, "[c]ourts have recognized that 'it will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of Section 2 under the totality of the

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circumstances.'" *Fayette Cnty.*, 950 F. Supp. 2d at 1313 (citation omitted) (collecting cases).

While "[n]o formula for aggregating the factors applies in every case," *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1574 (11th Cir. 1984), courts have set forth clear guidance regarding the weight of certain factors. "[T]he most important Senate Report factors bearing on § 2 challenges to multimember districts are the 'extent to which minority group members have been elected to public office in the jurisdiction' and the 'extent to which voting in the elections of the state or political subdivision is racially polarized.'" *Gingles*, 478 U.S. at 51 n.15 (citation omitted). "Indeed, courts have found vote dilution based solely on the existence of these two factors." *Fayette Cnty.*, 950 F. Supp. 2d at 1325 (citing authorities). While the presence of the other Senate factors might be supportive of a vote dilution challenge, they are "*not essential to*" such a claim. *Gingles*, 478 U.S. at 51 n.15.

This is not a "very unusual case." The two most critical Senate Factors are easily established, and at least four others weigh strongly in Plaintiffs' favor.[6]

[6] Plaintiffs have additional evidence, including lay witness testimony, they have developed and intend to present at trial with respect to the Senate Factors. For purposes of summary judgment, Plaintiffs present to the Court here the most compelling, objective undisputed facts.

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1. No Latino Has Ever Been Elected to the City Council (Senate Factor 7)

Under this factor the Court considers the "'extent to which members of the minority group have been elected to public office in the jurisdiction.'" *Gingles*, 478 U.S. at 37 (quoting S. Rep. No. 97-417, at 29). And in this case, that analysis can be accomplished swiftly: no Latino has *ever* been elected to the Yakima City Council. SUMF ¶ 165. In fact, only one Latino—Sonia Rodriguez—has ever been appointed to the Yakima City Council, and she lost her seat when she subsequently ran for election. *Id.* ¶ 166. "This weighs heavily in favor of vote dilution." *Fayette Cnty.*, 950 F. Supp. 2d at 1320 (considering jurisdiction where no African-American had ever been elected to relevant bodies); *see also McMillan v. Escambia Cnty., Fla.*, 748 F.2d 1037, 1045 (5th Cir. 1984) (finding vote dilution where no African-American had been elected to county commission or school board); *see also Large v. Fremont Cnty., Wyo.*, 709 F. Supp. 2d 1176, 1221 (D. Wyo. 2010) ("The Court finds it significant that only one Indian, Keja Whiteman, has ever been elected to the County Commission."); *Johnson v. Halifax Cnty.*, 594 F. Supp. 161, 165–66 (E.D.N.C. 1984) ("Not one black person has been elected to the Halifax County Board of County Commissioners in this century.").

In short, courts are not blind to the obvious. Where a jurisdiction has *never* elected a minority under a challenged electoral system, Senate Factor 7 "weighs strongly in favor of vote dilution." *Fayette Cnty.*, 950 F. Supp. 2d at 1322.

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2. Racially Polarized Voting (Senate Factor 2)

Senator Factor 2 fits hand in glove with Senate Factor 7. "Although no factor is indispensable, . . . racially polarized voting will ordinarily be the keystone of a dilution case." *McMillan*, 748 F.2d at 1043; *see also Marengo Cnty. Comm'n*, 731 F.2d at 1567 ("The surest indication of race-conscious politics is a pattern of racially polarized voting.").

Here, as discussed above with respect to the second and third *Gingles* factors, there is unquestionably racially polarized voting in Yakima. Dr. Engstrom's analysis, discussed *supra* Section III.C.2, establishes that bloc voting by other members of the electorate consistently defeated Latino-preferred candidates. *See Farmers Branch*, 2012 WL 3135545, at *13 ("Plaintiffs have proved that the City Council elections in 2007, 2008, 2009, and 2011 were moderately to highly racially polarized, because Hispanic candidates received support from an estimated 54.1% to 88.1% of Hispanic voters compared to only 2.0% to 42.1% of non-Hispanic voters."). Moreover, although Proposition 1's proposed change to Yakima's at-large election system received near unanimous support from Latino voters (98.2%), only 36.2% of the non-Latino majority supported the change, and the Proposition was defeated, receiving less than 42% of the overall vote. SUMF ¶¶ 138-41.

The undisputed evidence further demonstrates that Yakima voters continue to vote along racial lines across the ballot. Although Graciela Villanueva was the clear candidate of choice among Latinos for Yakima School Board, she was not the choice of non-Latino voters, and she was handily defeated. SUMF ¶¶ 157-61. And while Justice Gonzalez was the clear

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candidate of choice for Latino voters in Yakima--and won the statewide election to the Washington Supreme Court--he was defeated within Yakima city limits, winning only 39% of the Yakima vote. *Id.* ¶ 142-45.

Plaintiffs respectfully submit that the evidence related to these two factors is so compelling—so stark—that the Court could grant summary judgment to Plaintiffs without even considering the other Senate Factors. *See Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1022 (8th Cir. 2006) (totality-of-the-circumstances test satisfied simply through proof of racially polarized voting and absence of any elected Native–American); *Campos*, 840 F.2d at 1249 (totality of circumstances test met where "there was racially polarized voting, . . . the Blacks and Hispanics suffer the lingering socio-economic effects of past official discrimination, and . . . no minority has ever been elected to the Baytown City Council"). In any event, those other factors also strongly support Plaintiffs' vote dilution claim.

3. History of Official Voting-Related Discrimination (Senate Factor 1)

This Senate factor requires consideration of "'the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group . . . to participate in the political process.'" *Gingles*, 487 U.S. at 36 (quoting S. Rep. No. 97-417, at 28). The Ninth Circuit has made clear that district courts should consider "any relevant history or effects of discrimination committed by others," such as the state or county, and not just discrimination committed by the defendant political subdivision. *Gomez*, 863 F.2d at 1418.

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It is undisputed that Yakima County, which administers elections in the City of Yakima through its County Auditor, has demonstrated voting-related discrimination against Latinos in at least two documented instances. First, even after passage of the Voting Rights Act in 1965, literacy tests were regularly imposed upon Latinos in Yakima in accordance with Washington law. While the Washington Constitution used to provide that the ability to read and speak English was a prerequisite to voting, it did not specify in the manner in which literacy tests should be applied. SUMF ¶¶ 167; Declaration of Abha Khanna in Support of Pls.' Mot. for Summ. J. (July 1, 2014) ("Khanna Decl."), Ex. 13 at 386. Instead, literacy tests in the state were administered only if the registration officer was "not satisfied" with the applicant's sworn statement that he was able to read and speak English. *Id.* Section 101(a) of the Voting Rights Act of 1965, however, required that any literacy tests must be applied uniformly so as to guarantee all citizens the right to vote without discrimination as to race or color. *Id.* (Khanna Decl., Ex. 13 at 385-86). On June 15, 1967, Washington's Attorney General issued an Opinion stating that "[t]he federal government has prohibited [Washington's] discretionary approach," and directing all registrars within the state to discontinue the use of literacy tests "[u]ntil Washington provides for the administration of literacy tests on a uniform basis in conformity with federal law." *Id.* (Khanna Decl., Ex. 13 at 387).

The Yakima County Auditor did not comply. Over one year later, Mexican-American citizens filed suit under the Voting Rights Act challenging the Yakima County Auditor's continued practice of administering literacy tests

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to Latinos prior to registering them to vote. SUMF ¶ 168. When the district court ruled against the plaintiffs, they appealed to the U.S. Supreme Court. *Id.* ¶ 169-70. The Supreme Court ultimately remanded the case to the Eastern District of Washington in light of its ruling in *Oregon v. Mitchell*, 400 U.S. 112 (1970), in which it upheld Congress's ban on all literacy tests as a prerequisite to voting. The three-judge panel of the Eastern District of Washington subsequently ordered Yakima County officials to register the plaintiffs and all eligible voters without requiring them to demonstrate "the ability to read and speak the English language." SUMF ¶ 170. This history of Washington state law in combination with Yakima County's administration of literacy tests provides strong evidence of historical official discrimination against Latinos. *See Gomez*, 863 F.2d at 1419 (suggesting it would take "judicial notice of the pervasive discrimination against Hispanics in California, including discrimination, committed by the state government, that has touched the ability of California Hispanics to participate in the electoral process," and citing a state court case "declaring a California constitutional provision making the ability to read English a prerequisite for voting unconstitutional as applied to those literate in another language"); *Goosby*, 180 F.3d at 494 (indicating the district court properly found it "to be a 'fair inference' that a literacy test administered in Nassau County during the years 1922-1969 had a discriminatory impact on blacks").

Nor are Yakima County's discriminatory voting practices merely a relic of the past. As recently as 2004, DOJ sued Yakima County for failing to provide Spanish language materials and assistance for elections in accordance

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with Section 203 of the Voting Rights Act. SUMF ¶ 171. The parties subsequently entered into a Consent Decree in which Yakima County agreed to (1) provide translation of election-related materials; (2) disseminate Spanish language information regarding all elections; (3) provide trained bilingual (English/Spanish) election personnel to answer voting related questions by telephone; and (4) employ a Bilingual Election Program Coordinator for all elections in the County. *Id.* ¶ 172 (Khanna Decl., Ex. 18 at 432-43).

These instances of discriminatory voting practices on behalf of Washington state and Yakima County directly affected the ability of Latinos in the City of Yakima to cast a ballot. Accordingly, this factor weighs heavily in favor of Plaintiffs.

4. Election Practices that Enhance Discrimination (Senate Factor 3)

This factor considers the extent to which the City "'has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group.'" *Gingles*, 478 U.S. at 37 (quoting S. Rep. No. 97-417, at 29). The City of Yakima has a host of voting practices that enhance the opportunity for discrimination. Most notably, the City employs (1) numbered posts; (2) staggered terms; (3) residency requirements for districts; and (4) majority vote requirements.

First, and most notably, the City splits election of City Council members into seven individual, at-large contests. SUMF ¶ 2. By forcing voters to cast separate ballots for each City Council race—even though all seven seats are

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voted on "at large" in the general election—the City precludes Yakima's Latino minority from utilizing the technique of "single shot" voting to maximize its electoral strength. *Id.* ¶¶ 10-11.[7] As a result, "the use of numbered posts enhances vote dilution by defeating single-shot voting." *Fayette Cnty.*, 950 F. Supp. 2d at 1317; *see also Ruiz*, 160 F.3d at 555 (noting that the presence of an "anti-single-shot" provision cuts against a finding of vote dilution); *Farmers Branch*, 2012 WL 3135545, at *14 (same).

The City heightens the opportunity for discrimination by using staggered terms. SUMF ¶ 9. The use of staggered terms affects a minority community's ability to elect a representative of its choice because such an election device once again decreases its ability to utilize single-shot voting. *Fayette Cnty.*, 950

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[7] The Supreme Court has explained the concept of single shot voting as follows:

> Consider [a] town of 600 whites and 400 blacks with an at-large election to choose four council members. Each voter is able to cast four votes. Suppose there are eight white candidates, with the votes of the whites split among them approximately equally, and one black candidate, with all the blacks voting for him and no one else. The result is that each white candidate receives about 300 votes and the black candidate receives 400 votes. The black has probably won a seat. This technique is called single-shot voting. Single-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates.

City of Rome v. United States, 446 U.S. 156, 184 n.19 (1980) (internal quotation marks and citation omitted), *abrogated on other grounds by Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013).

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F. Supp. at 1317. Additionally, Yakima's residency requirement for four of its City Council positions favors a finding of vote dilution. *See* SUMF ¶¶ 5-6. Such requirements have the effect of increasing vote dilution because where "each council member [is] required to live in a separate district but with voting still at large," a residency requirement "—just like numbered posts—separates one contest into a number of individual contests." *City of Rome*, 446 U.S. at 185 n.21. In short, "[r]egardless of which method of separating elections into separate contests is considered," Yakima's "method of electing [councilmembers] through separate contests plainly favors vote dilution." *Fayette Cnty.*, 950 F. Supp. 2d at 1318.

Finally, the City's majority-vote requirement for each seat on the City Council only further enhances the opportunity for discrimination against Latinos. Regardless how many candidates run for given seat, only the top two candidates may appear on the ballot in the general election. SUMF ¶¶ 3-4. As a result, in order to win a seat on the City Council, a candidate must in effect win a majority of the votes cast city-wide. *Id.* ¶ 8. This requirement decreases the opportunity for a Latino candidate, for, even if he won a plurality of votes in the primary election, he "would still have to face the runner-up white candidate in a head-to-head [general] election in which, given bloc voting by race and a white majority, [he] would be at a severe disadvantage." *City of Rome*, 446 U.S. at 184 (internal quotation marks and citation omitted); *see also League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 986 F.2d 728, 749 (5th Cir. 1993) ("Majority vote requirements can obstruct the election of minority candidates by giving white voting majorities a 'second shot' at

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minority candidates who have only mustered a plurality of the votes in the first election."); *Benavidez*, 638 F. Supp. 2d at 726 ("The majority vote requirement is a textbook enhancing factor in at-large elections because it deprives minority voters of the opportunity to elect a candidate by 'single-shot' voting . . . ."). There can be little doubt that a majority vote requirement tends to strengthen the ability of the majority to "submerge the will of the minority" and thus "deny the minority's access to the system." *Rogers v. Lodge*, 458 U.S. 613, 627 (1982) (internal quotation marks omitted).

"When the community suffers from racial polarization in voting—and especially when the system is supplemented by mechanisms such as majority vote requirement laws, anti-single shot voting laws, and numbered place laws—at-large systems can be potent tools for those seeking to deny minorities participation in the community's political operation." *Fayette Cnty.*, 950 F. Supp. 2d at 1318 (internal quotation marks and citation omitted). Because Yakima employs multiple devices in its City Council elections that enhance the potential for vote dilution, this factor weighs heavily in favor of Plaintiffs.

5. Effects of Past Discrimination (Senate Factor 5)

Senate Factor 5 examines "'the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process.'" *Gingles*, 478 U.S. at 37 (quoting S. Rep. No. 97-417, at 29). "Where disproportionate educational, employment, income level, and living conditions can be shown and where the level of minority participation in politics is depressed, 'plaintiffs need not

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prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.'" *Benavidez*, 638 F. Supp. 2d at 727 (quoting *Teague v. Attala Cnty., Miss.*, 92 F.3d 283, 294 (5th Cir. 1996)).

Socio-economic indicators display significant disparities between Latino and non-Latino residents in Yakima, as reflected in data from the *2010-2012 ACS 3-Year Estimates*. Latinos in Yakima are more than three times more likely to live below the poverty line than are white residents; indeed, nearly one-third (30.2%) of Yakima Latinos live below poverty level. SUMF ¶ 176. Median family income for Latinos is less than half of the median income for white families in Yakima. *Id.* ¶ 177. Per capita income is just $10,593 for Latinos and $29,586 for whites. *Id.* ¶ 178. While 63.7% of whites in Yakima own their own home, only 37.7% of Latinos are homeowners. *Id.* ¶ 179.

Latinos living in Yakima are also less likely to succeed in school. More than half of Latinos in Yakima (55.3%) do not have a high school diploma, compared to 12.4% of white residents. SUMF ¶ 173. This trend continues through higher education: twice as many white residents report having an associate's degree or attending some college as compared to Latino residents, and more than six times as many white residents have a Bachelor's degree or higher. *Id.* ¶¶ 174-75.

Latinos in Yakima lack health care at a significantly higher rate than whites. Over 57% of Latinos between the ages of 18 and 64 have no health insurance coverage, compared to 17.9% of whites. SUMF ¶ 180.

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Moreover, the rate at which the City of Yakima employs Latinos is abysmal. Although Latinos comprise over 33% of the working-age population, they comprise less than 15% of city employees. SUMF ¶¶ 181-83.

Finally, as Defendants' own expert has emphasized, voter turnout among Latinos is significantly lower than non-Latino turnout. *Id.* ¶ 113. This disparity in political participation "show[s] that effects of past discrimination still linger." *Windy Boy v. Cnty. of Big Horn*, 647 F. Supp. 1002, 1017 (D. Mont. 1986); *see also Gingles*, 478 U.S. at 69 ("[P]olitical participation by minorities tends to be depressed where minority group members suffer effects of prior discrimination such as inferior education, poor employment opportunities, and low incomes.").

In sum, there is no question that Yakima's Latino population suffers from disproportionate income level, educational, employment, and health care conditions, while at the same time experiencing depressed political participation at the polls. Accordingly, the undisputed evidence weighs in favor of Plaintiffs.

6. Racial Appeals in Campaigns (Senate Factor 6)

The sixth Senate Factor inquires into whether Yakima's elections have been characterized by "'overt or subtle racial appeals.'" *Gingles*, 478 U.S. at 37 (quoting S. Rep. No. 97-417, at 28-29). Racial appeals can take a variety of forms, from candidates' identification of their own ethnicity, *see United States v. Alamosa Cnty. Colo.*, 306 F. Supp. 2d 1016, 1025-26 (D. Colo. 2004), to the use of racially charged campaign issues, *see Goosby*, 956 F. Supp. at 342 (finding Senate Factor 6 established where campaign literature preyed on fears

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that African-American students would be bused to town schools and warned of urban encroachment from New York City).

Although overt political racism has decreased over time across the country, *see Marengo Cnty. Comm'n*, 731 F.2d at 1571, a recent Yakima City Council campaign involving Sonia Rodriguez was infused with race-based characterizations of the Latina candidate. On August 5, 2009, the Yakima Herald-Republic ran an article entitled "Rodriguez – Yakima council candidate." SUMF ¶ 184. The article addresses critiques leveled at Ms. Rodriguez that claim that her appointment to the City Council was an "affirmative action pick," and includes the candidate's own statement in response: "I'm also a mother, a lawyer, a homeowner, a business owner. I do bring a different perspective -- not just because I'm a member of the Latino community but because of all those things." *Id.* (Khanna Decl., Ex. 20 at 565). Soon after Ms. Rodriguez lost her election, another Yakima Herald-Republic article questioned whether the incumbent candidate "was too liberal or too Latino" to be elected in Yakima. SUMF ¶ 185 (Khanna Decl., Ex. 21 at 567); *see also id.* ("Was it the L word?"). Ms. Rodriguez's opponent in that election, current City Councilmember Dave Ettl, was quoted as saying, "She was put forward as the ethnic candidate that (Mayor Dave) Edler wanted on the council," and "there might have been some backlash." *Id.*

There is no question that Ms. Rodriguez's ethnicity was widely discussed in the course of the campaign. Where a Yakima elected official would unabashedly refer to a minority opponent as the "ethnic candidate," the

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present political environment of the City reveals and compounds the Section 2 violation.[8]

IV. CONCLUSION

All of the undisputed evidence points decidedly in favor of Plaintiffs' claim. The threshold *Gingles* preconditions are easily met: there are a number of ways to draw a Latino-majority district in Yakima, and under the current at-large system, the non-Latino majority routinely votes as a bloc to defeat the Latino minority's candidates of choice. The totality of circumstances both explains and reflects this ethnic political divide in Yakima. Yakima's present political reality is colored by a history of official discrimination at the polls, consistent racial bloc voting, and an election system that stacks the deck against minority voters. While Latinos in Yakima have disproportionately low education, income, and health care levels, they struggle under the at-large system to elect their preferred candidates—and to no avail. No Latino has ever been elected to the Yakima City Council.

For all of the foregoing reasons, Plaintiffs respectfully request that the Court declare the City of Yakima's at-large election system a violation of Section 2 of the Voting Rights Act and enjoin its use in any future elections.

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[8] The only Senate Factor not addressed here is Senate Factor 4, which analyzes the extent to which members of the minority group are excluded from a candidate slating process. *See Gingles*, 478 U.S. at 37 (quoting S. Rep. No. 97-417, at 28-29). As Yakima does not have a candidate slating process, Senate Factor 4 is not applicable to this case.

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses indicated on the Court's Electronic Mail Notice List.

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