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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ROGELIO MONTES and MATEO ARTEAGA,

Plaintiffs,

v.

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

Defendants.

NO. 12-CV-3108 TOR

PLAINTIFFS' REPLY IN SUPPORT OF MOTION FOR ENTRY OF PROPOSED REMEDIAL PLAN AND FINAL INJUNCTION

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I. INTRODUCTION

Consistent with the Court's finding of a Section 2 violation, Defendants seemingly acknowledge that, in Yakima, a system in which the Latino minority's voting preferences are submerged in head-to-head elections against those of the non-Latino majority "effectively disenfranchises" Latino voters and "silence[s] the[ir] political voice." ECF No. 129 at 1. Defendants further propose that an effective remedy should fully capture Latino voting strength now and in the future, while alleging that Defendants' proposed plan, and not Plaintiffs', will offer greater Latino voting opportunities. Defendants' proposed remedy, however, violates state law and, at the same time, fails to advance the very goals Defendants embrace. Plaintiffs' proposal, by contrast, provides Yakima's Latino voters with the certainty of an effective remedy within the bounds of state and federal law.[1]

II. ARGUMENT

After Plaintiffs called to Defendants' attention their failure to amend the resolution proposing a remedial plan, ECF No. 127 at 2, Defendants were quick to rectify the apparent oversight, calling a special meeting to formally withdraw their proposal for the election of Mayor and Assistant Mayor. *See* Video, Yakima City Council Special Meeting, http://205.172.45.10/Cablecast/Public/Show.aspx?ChannelID=2&ShowID=6414. But fixing this "nonessential" part of Defendants' plan, ECF No. 119, hardly cures the

[1] Plaintiffs submit this consolidated reply to both Defendants' Response Brief (ECF No. 129) and FairVote's Amicus Curiae Brief (ECF No. 126).

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essential failings of their proposed remedy. Defendants' flawed analysis of Plaintiffs' proposal, moreover, does nothing to advance their cause.

A. Washington Law Does Not Allow Limited-Voting Election Schemes

The linchpin of both Defendants' and FairVote's proposed remedial schemes is the at-large election of at least two members of the City Council based on a limited-voting method. Both Defendants and FairVote spend a significant number of pages extolling the virtues of such a system. But, as outlined by Plaintiffs, ECF No. 127 at 4-7, this proposed election system is simply not permitted under state law. Accordingly, whatever the academic merits of limited voting, it cannot and should not be adopted by the Court.

At least two provisions of Washington law specifically prohibit Defendants' proposed limited-voting system. First, RCW 35.18.020(2) requires that "[c]andidates shall run for specific positions." Defendants' proposed plan, however, allows candidates to run for multiple seats in a single election. Indeed, Defendants indicate they specifically sought to eliminate the use of "numbered posts," in which "candidates run for a specific seat," ECF No. 108 ("Op.") at 50, in fashioning their proposed system. ECF No. 129 at 10; *see also* Op. at 3 (a "numbered post" format means that "candidates file for a particular seat and compete only against other candidates who are running for the same seat"). RCW 35.18.020(2) would be rendered meaningless if candidates could simultaneously run for several positions on a particular body. Second, RCW 29A.52.210 "establish[es] the holding of a primary . . . as a uniform procedural requirement to the holding of city . . . elections." *See also* Wash. Att'y Gen. Op. 2001 No. 4, 2001 WL 798706, at *5 (2001) (noting that

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"[l]ocal government primaries are required" by predecessor statute). Defendants' proposal, however, would eliminate the primary altogether for the two at-large City Council positions. Instead, an unlimited number of candidates would proceed directly to the general election to vie for two available seats, in violation of the "uniform" requirement for local elections. Thus, Defendants' erroneous assertion that "Washington is silent on using limited voting in local elections," ECF No. 129 at 15, manifests their failure to examine the limits of their legislative authority under state law.

FairVote's proposal fails for the same reason: state law does not allow their proposed "single vote/multi-winner district." ECF No. 126 at 1.[2] FairVote may be "familiar with the use of the single vote method in at-large

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[2] FairVote proposes a 4-3 plan in which three seats are elected at-large through limited voting and four seats are elected through single-member districts. ECF No. 126 at 10. FairVote has not submitted such a plan to the Court. Defendants promise to submit a 4-3 plan as part of their *reply*, ECF No. 129 at 7 n.1, which would be their third proposal in the last month, even though they have had the registered voter data they claim is critical to creating such a plan since at least February 2013. *See* ECF No. 66, Ex. 4, fig.9. To the extent Defendants contend the Court should defer to one or more of their proposals, they ask the Court to defer to a moving target and allow them not just a "first pass" at devising a remedy, *United States v. Brown*, 561 F.3d 420, 435 (5th Cir. 2009), but a second and third pass as well. Such an approach is as impractical as it is unsupported by applicable law.

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elections under the Voting Rights Act," *id.* at 1-2, but nothing in its brief indicates a familiarity (or even an attempt to engage) with Washington law. Although FairVote asserts that such voting schemes have "been approved by courts even when in tension with state law," *id.* at 20, the cases it cites are inapplicable. In *United States v. Village of Port Chester*, 704 F. Supp. 2d 411, 449 (S.D.N.Y. 2010), the court held that the defendants' proposed cumulative voting scheme was "not prohibited by New York law." By contrast, Washington law is not "silent on the issue," *id.*; it definitively requires candidates to run for specific positions. The other two cases cited by FairVote, moreover, note that VRA remedies may supersede state law only if *necessary* to remedy the VRA violation. *See Voinovich v. Quilter*, 507 U.S. 146, 159 (1993) (approving "preference for federal over state law" when plan's drafter "believed the two in conflict"); *Cleveland Cnty. Ass'n for Gov't by the People v. Cleveland Cnty. Bd. of Comm'rs*, 142 F.3d 468, 477 (D.C. Cir. 1998) ("[I]f a violation of federal law necessitates a remedy barred by state law, the state law must give way[.]"). This is consistent with the Tenth Circuit's holding in *Large v. Fremont County, Wyo.*, 670 F.3d 1133, 1145 (10th Cir. 2012), that no deference is accorded where "in the course of remedying an adjudged Section 2 violation a local governmental entity gratuitously disregards state laws—laws that need *not* be disturbed to cure the Section 2 violation." Here, neither Defendants nor FairVote contend that their proposed limited-voting schemes are necessary to remedy the VRA violation; they merely express a policy

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preference for limited voting.[3] But in deferring to their policy preference, the Court would defy the "'policy choices' of the dominant sovereign from which the local governmental entity's authority flows." *Id.* at 1148; *see also White v. Weiser*, 412 U.S. 783, 795 (1973) (federal courts in voting rights cases "should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions").

The Court should not adopt Defendants' proposal because it violates state law, and should instead adopt a plan using the "rule that single-member districts are to be used in judicially crafted redistricting plans." *Citizens for Good Gov't v. City of Quitman, Miss.*, 148 F.3d 472, 476 (5th Cir. 1998). Plaintiffs' proposed remedial plan is the only one before the Court that abides by state and federal law, and the rules governing court-ordered plans.

B. Limited Voting Is Unprecedented in Washington

Even if state law were ambiguous regarding the use of limited voting, neither Defendants nor FairVote disputes that limited voting is unprecedented in Washington. FairVote assures the Court that "[a]bout 100 jurisdictions in the United States elect officers using either ranked choice voting, cumulative voting, or the [proposed] single vote method." ECF No. 126 at 16. It fails to mention that none are in Washington—or anywhere close. FairVote's website lists the "Communities in America Currently Using Proportional Voting." *See* http://archive.fairvote.org/?page=2101. A mere four states have jurisdictions

[3] Indeed, FairVote concedes at the outset that "single-member districts are often used to remedy voting rights violations." ECF No. 126 at 5.

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with limited voting, and most jurisdictions are in Alabama. *Id.* Defendants ask the Court to impose an election system that is unprecedented not only in Washington, but the entire Ninth Circuit and the vast majority of the country.

In fact, FairVote's recommendation that "Yakima should conduct a voter education campaign to educate voters about the new voting plan," ECF No. 126 at 12, implicitly acknowledges that limited voting is novel and confusing. FairVote cites *Village of Port Chester*, in which the court held that the proposed cumulative voting system threatened to "perpetuat[e] the Section 2 violation" because it is "not a common form of voting," "relatively complex," and "not automatically understood by voters." 704 F. Supp. 2d at 451-52. The court accordingly conditioned its adoption of the plan on the parties' determination of the "necessary conditions for the non-discriminatory implementation of cumulative voting." *Id.* at 452; *see also id.* at 451 (cumulative voting is "counterproductive to correcting the Section 2 violation" without a voter education program, particularly "in a jurisdiction where vote dilution is due in part to historical discrimination in education and socio-economic factors"). Thus, even FairVote recognizes the pitfalls of imposing an untested election system in Yakima, including the particularly harmful effect it could have on the very Latino voters the remedy is meant to serve.

The Court should take pause before radically altering existing election systems established under Washington law. To be sure, Yakima's election system needs to change to comply with Section 2. But in remedying the City's VRA violation, the Court should adopt a system that clearly comports with state law, is familiar to voters, and is plainly sufficient under Section 2.

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Defendants' proposed limited-voting scheme fails on all of these counts.

C. Defendants Misrepresent Latino Voting Opportunities in the Proposed Plans

Defendants contend that their proposal "provides the most complete and inclusive remedy," whereas Plaintiffs' proposal "is frozen in time" and "fails to accommodate the pace of Latinos' growing presence in the City." ECF No. 129 at 1. Indeed, Defendants purport to chart the objective characteristics of each proposed plan, *id.* at 3, stating that Plaintiffs "effectively cap[] the number of City Council positions available to Latinos at two," *id.* at 1. But Defendants' analysis is fundamentally flawed, as a matter of both math and common sense.

First, Defendants rely on Dr. Morrison's projections to contend that the LCVAP percentage in Defendants' District 5 "will have reached the same level currently contained" in Plaintiffs' District 2 within the next two election cycles. ECF No. 129 at 4. In fact, while Plaintiffs' District 2 has an LCVAP of 45.34% (Method 2), Dr. Morrison's table indicates that it will take *four* election cycles for Defendants' District 5 LCVAP to reach that level. ECF No. 132, Attach. 1, tbl.2. In any event, Dr. Morrison's numbers do not add up. *See* Decl. of Abha Khanna in Supp. of Pls.' Reply Br. (Oct. 30, 2014), Ex. 1 ("Cooper 5th Supp. Decl."), ¶ 5. Dr. Morrison's projections for Defendants' District 5 substantially double count Latino voters who actually reside in surrounding districts, thereby overestimating the district's future LCVAP. *Id.* ¶¶ 5-14. This fatal flaw in Dr. Morrison's model renders his projections unreliable. *Id.* ¶ 5. Notably, even assuming Dr. Morrison's projections were accurate, by 2027 Latinos *still* would not constitute a voting majority in District 5, whether

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measured by LCVAP or registered voters, *id.* ¶ 17, whereas Plaintiffs' District 2 establishes a second Latino opportunity district *today*.[4]

Second, Dr. Morrison's claim that Plaintiffs' plan would dilute the voting strength of Latinos in Plaintiffs' Districts 3-7, ECF No. 132, Attach. 1, ¶ 11, assumes in error that district lines will remain fixed over future redistricting cycles. Because Plaintiffs' Districts 1, 2, and 4 roughly correspond to the east Yakima area encompassed by Defendants' Districts 1 and 5, by the time it is possible to draw a second Latino opportunity district under Defendants' Plan, it will almost certainly be possible to draw a third Latino opportunity district under Plaintiffs' Plan. Cooper 5th Supp. Decl. ¶¶ 18-19. Common sense dictates that as the Latino population grows, Plaintiffs' Districts 3 and 4 can be drawn to reflect their increased voting strength.

Finally, Defendants' endorsement of the continued use of at-large representation ignores several significant obstacles this system presents to Latino voters. For one, at-large elections leave Latino voters vulnerable to citywide vote dilution as a result of future annexations. *Id.* ¶ 22. Further, the stark socio-economic divide between Latinos and non-Latinos puts Latinos at a distinct disadvantage in citywide elections. *Id.* ¶ 25. Defendants point to a *Yakima Herald* report that "[m]ore campaign money doesn't always translate to victories." ECF No. 129 at 15 n.8. True, money may not *guarantee* wins, but

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[4] Defendants do not dispute that Plaintiffs' District 2 is a Latino opportunity district, and indeed acknowledge that it is "immediately obtainable" for the Latino-preferred candidate "with mathematical certainty." ECF No. 129 at 3.

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a long line of legal authority recognizes that "candidates generally must spend more money in order to win election in a multimember district than in a single-member district." *Thornburg v. Gingles*, 478 U.S. 30, 69-70 (1986).

Ultimately, the parties' briefs reveal significant uniformity in their respective goals. Both parties believe that Yakima should have two Latino opportunity districts as soon as possible, that over time Latinos should have access to a third seat, and that the election system should capture future growth in the Latino population. The question remains which system can best achieve all of these goals within the dictates of state and federal law. As argued above, only Plaintiffs' proposed remedial plan satisfies all of these criteria.

D. Defendants' Racial Gerrymandering Claim Is Disingenuous

Ironically, at the same time Defendants argue that Plaintiffs' proposal doesn't go far enough to protect Latino voting rights, they claim it goes beyond what is "reasonably necessary" under the VRA, "rais[ing] concerns about racial gerrymandering." ECF No. 129 at 23. This claim is not only unfounded, it rings hollow in light of Defendants' own proposal's treatment of race.

As an initial matter, Defendants assert, without any record citation whatsoever, that "ethnicity was clearly the 'predominant factor' motivating the creation of Plaintiffs' plan." *Id.* This bald assertion belies the "demanding" burden on those attacking a district plan as a racial gerrymander. *Easley v. Cromartie*, 532 U.S. 234, 241 (2001) (internal quotation marks omitted). It is also puzzling since Defendants openly admit that race was the predominant factor in their own plan, as they "maximized to [the] arithmetic upper limit" the concentration of Latinos in Defendants' District 1, ECF No. 114, tbl.1.

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Even more troubling is Defendants' proposed injunction, which creates a recipe for racial gerrymandering. Defendants would require "the concentration of eligible Latino voters in Districts 1 and 5 [to] not be reduced any more than is necessary to apportion the five districts equally based on total population." ECF No. 116 ¶ 10. Defendants' proposed use of a racial threshold that must be met, regardless of any actual analysis of racial voting patterns, is deeply problematic. Just this month a three-judge federal court struck down a redistricting plan where the legislature sought to ensure that a majority-minority district "maintained at least as large a percentage of African-American voters as had been present in the district under the Benchmark Plan." *Page v. Va. State Bd. of Elections*, No. 3:13cv678, 2014 WL 5019686, at *8 (E.D. Va. Oct. 7, 2014); *see also id.* at *17 ("[U]se of a BVAP threshold, as opposed to a more sophisticated analysis of racial voting patterns, suggests that voting patterns . . . were not considered individually.") (internal quotation marks omitted). Indeed, Defendants' proposed injunction further invites another Section 2 violation; Defendants would require that the LCVAP of Districts 1 and 5 not be reduced, no matter how high it gets, therefore packing Latino voters in these two districts even where Latino voters could comprise a majority in three districts. *See Gingles*, 478 U.S. at 46 n.11 ("Dilution of racial minority group voting strength may be caused by . . . the concentration of [minorities] into districts where they constitute an excessive majority.").

In sum, Defendants' baseless assertion that Plaintiffs' plan is a racial gerrymander reveals their own improper use of race in drawing districts.

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III. CONCLUSION

For all of the foregoing reasons, Plaintiffs respectfully request that the court adopt Plaintiffs' Proposed Remedial Plan.

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CERTIFICATE OF SERVICE

I certify that on October 30, 2014, I electronically filed the foregoing Plaintiffs' Reply in Support of Motion for Entry of Proposed Remedial Plan and Final Injunction with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following attorney(s) of record:

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I certify under penalty of perjury that the foregoing is true and correct.

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