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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

ROGELIO MONTES and MATEO ARTEAGA, Plaintiffs, vs. 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 MEMORANDUM IN SUPPORT OF DEFENDANTS' PROPOSED REMEDIAL REDISTRICTING PLAN AND INJUNCTION

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BACKGROUND

On August 22, 2014, this Court concluded that the City Council's current election system violates Section 2 of the Voting Rights Act, 42 U.S.C. § 1973, because it is not "'equally open to participation' by members of the Latino minority." ECF No. 108 at 3. This Court ordered the parties to meet and confer and, if possible, submit a joint proposed injunction and joint remedial redistricting plan. *Id*. at 108. The parties were directed to submit separate proposals if they were unable to agree on terms. *Id*.

On September 23, 2014, Defendants provided Plaintiffs with their proposal, which is identical to the proposal submitted presently. That same day, Plaintiffs advised Defendants they intended to propose "Illustrative Plan 1," the very first hypothetical redistricting plan that Plaintiffs' expert, William Cooper, created during the liability phase of this case. ECF No. 66-1 at 124 (map of Illustrative Plan 1). On September 25, the parties met and conferred regarding their respective plans and possible terms of an injunction, but were unable to reach agreement on any issue. The City Council then held a special public meeting on September 30, 2014, where it passed a resolution formally adopting the proposal set forth below.

DEFENDANTS' PROPOSAL

A. Description of Defendants' Proposed Remedial Plan

Defendants' Proposed Remedial Plan contains five single-member districts (Districts 1-5) and two at-large positions (Mayor and Assistant Mayor). The map of Defendants' Proposed Remedial Plan is attached as Exhibit A to the Declaration of Francis S. Floyd filed in support of this memorandum. Exhibit B

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to the Declaration of Francis S. Floyd is an identical map but depicts the current residences of City Council incumbents.

Defendants' Proposed Remedial Plan was adopted by the City Council through a resolution passed during a special public meeting held on September 30, 2014. The resolution is attached as Exhibit C to the Declaration of Francis S. Floyd. A video recording of the special public meeting is available online at the City's website.[1]

Under Defendants' Proposed Remedial Plan, the five district elections will follow a "numbered post" format, which requires candidates to file for a particular seat and compete only against other candidates who are running for the same seat. Candidates running for a district seat must reside within the geographical boundaries of that district. If more than two candidates file for a district seat, then the City will hold a primary election to narrow the field to the top two candidates. Only voters who reside in the district may vote in that district's primary election. The two candidates with the highest vote totals in the district's primary election will then advance to the district's general election. As in the primary election, only voters who reside in the district may vote in that district's general election. In order to win the district's general election, a candidate must receive a simple majority of the votes cast in the head-to-head election. Councilmembers elected to district positions will serve four-year terms.

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[1] http://205.172.45.10/Cablecast/Public/Show.aspx?ChannelID=2&ShowID=6338 (last visited Oct. 3, 2014).

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The two at-large positions will be elected through a system identical to Washington State's "Top 2 Primary" system.[2] Both at-large positions will be contested in the same year. Unlike the district positions, the at-large positions will not follow a "numbered post" format. Instead, all candidates who have filed for an at-large position will appear in a single list on the general election ballot. No primary election will be held for the at-large positions. Each voter will receive only one vote, and may cast that vote for any candidate on the list. The candidate who receives the most votes will be elected Mayor, and the candidate who receives the second-most votes will be elected Assistant Mayor. The at-large positions will be chosen on a plurality basis, meaning that a candidate may be elected Mayor or Assistant Mayor even if he or she does not receive a simple majority of the votes. At-large Councilmembers will serve four-year terms. The roles of Mayor and Assistant Mayor, as set forth in Article II, Section 3 of the Yakima City Charter and various sections of the Yakima Municipal Code, shall remain unchanged.

Defendants' plan contains a majority-minority district (also referred to as an "opportunity district"). The opportunity district corresponds with District 1 in Defendants' plan and will be up for election in 2015. Under Defendants' preferred statistical methodology and using the most recently available data from the 2008-2012 American Community Survey 5-Year Estimates, District 1's

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[2] *See* https://wei.sos.wa.gov/agency/osos/en/voters/Pages/top_2_primary.aspx (last visited Oct. 3, 2014).

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citizen voting-age population ("CVAP") is 53.46% Latino.[3] Declaration of Peter Morrison, Ph.D. ("Morrison Decl."), Table 2. As set forth in Dr. Morrison's declaration, this 53.46% figure is the maximum limit for the Latino share of CVAP in a five-district plan. Morrison Decl., ¶ 3.

Defendants' plan also contains a district with a substantial Latino CVAP percentage (also referred to as an "influence district"), which corresponds to District 5. The influence district will be up for election in 2017. Under Defendants' methodology, District 5's CVAP is 35.4% Latino as of 2010. Morrison Decl., Table 2. According to Dr. Morrison, District 5's CVAP will be 45.5% Latino by 2020, which would be equal to the current Latino CVAP percentage in Plaintiffs' influence district.[4] Morrison Decl., ¶ 9. Put differently,

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[3] Under Plaintiffs' preferred statistical methodology, District 1's CVAP is 54.66% Latino. Defendants refer to Plaintiffs' statistical methodology only to show that the Latino CVAP percentage in Defendants' opportunity district is higher under Plaintiffs' methodology compared to Defendants' methodology. However, as Defendants have maintained throughout this litigation, Plaintiffs' methodology is flawed. Morrison Decl., n. 1. The Supplemental Expert Report of Peter Morrison, Ph.D., dated April 9, 2013, thoroughly explains the failings of the approach relied on by Mr. Cooper. Dr. Morrison's supplemental report was not included as an exhibit to any of the parties' summary judgment briefings. Defendants have attached it to the Declaration of Peter Morrison, Ph.D. filed in support of this memorandum.

[4] This comparison is made using Defendants' methodology.

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in just six years, Latinos will exert as strong a force in Defendants' influence district as they now would in Plaintiffs' influence district. *Id*. Because District 5 will not be up for election until 2017 under Defendants' proposal, that Latino voting strength will have reached 43% by 2017 according to Dr. Morrison's projection. *Id*.

The five districts in Defendants' plan are nearly equipopulous. The largest negative deviation from the total population mean is -2.35% and the largest positive deviation is 2.01% for a total population deviation of 4.36%, well under the established 10% benchmark threshold. Morrison Decl., Table 2. The single-member districts in Defendants' Proposed Remedial Plan are geographically compact, contiguous, and avoid splitting precinct boundaries wherever possible. Morrison Decl., ¶ 3. These features accord with the Washington State Constitution. *See* WASH. CONST., Art. II, § 43(5).

Defendants' plan disregards incumbency protection. Four incumbents are located within one district (District 2) while two other incumbents are located in another district (District 4). Only one district contains a single incumbent. Neither the opportunity district nor the influence district in Defendants' plan contain any incumbents.

B. Defendants' Proposed Injunction

Under Defendants' proposed injunction, no further Council elections would be held pursuant to the City Council's current election system. All Councilmembers currently serving on the Council would be permitted to serve out the remainder of their terms. In 2015, four of the five district positions would stand for election (Positions 1, 2, 3, and 4). In 2017, the fifth district position

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(Position 5) and the two at-large positions would stand for election. The current system for choosing a Mayor, as codified in Article II, Section 2 of the Yakima City Charter and Section 1.24.010 of the Yakima Municipal Code, will remain in place until the first at-large elections are held during the 2017 elections.

The existing Council-Manager Plan of City Government, as codified throughout Article II of the Yakima City Charter, will not be eliminated or modified. Additionally, the current process of redividing the City's districts after the publication of the decennial federal census will remain unchanged as set forth in Article II, Section 1, Subsection B(1) of the Yakima City Charter, except that the City shall be redivided by ordinance into five districts rather than four and the concentration of eligible Latino voters in Districts 1 and 5 will not be reduced any more than is necessary to apportion the five districts equally based on total population.

ARGUMENT AND AUTHORITY

A. Standard for Determining an Adequate Remedy for a Section 2 Violation

Courts begin their remedy-phase evaluation under Section 2 of the Voting Rights Act by first considering the defendant's proposed remedy. *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 749-50 (N.D. Ohio 2009) ("*Euclid Sch. Bd.*") (citing *Wise v. Lipscomb*, 437 U.S. 535, 539-41 (1979) (plurality); *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1022 (8th Cir. 2006)). If the defendant's plan is legally acceptable, the court should adopt it. *Wise*, 437 U.S. at 541; *Cottier v. City of Martin*, 551 F.3d 733, 744 (8th Cir. 2008). "Redistricting is a legislative task that federal courts 'should make every effort not to pre-empt.'"

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1 *Goosby v. Town Bd. of Hempstead*, 981 F. Supp. 751, 755 (E.D.N.Y. 1997)
2 (quoting *Wise*, 437 U.S. at 539).
3 "When evaluating a defendant's proposal, a court is not to inquire whether
4 the defendants have proposed the very best available remedy, or even whether the
5 defendants have proposed an appealing one." *Euclid Sch. Bd.*, 632 F. Supp. 2d at
6 750; *see also McGhee v. Granville Cnty.*, 860 F.2d 110, 115 (4th Cir. 1988)
7 ("Where, however, the legislative body does respond with a proposed remedy, a
8 court may not thereupon simply substitute its judgment of a more equitable
9 remedy for that of the legislative body.") (citing *Upham v. Seamon*, 456 U.S. 37,
10 42 (1982)); *United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 447-48
11 (S.D.N.Y. 2010) ("[S]o long as the choice [of the governing legislative body] is
12 consistent with federal statutes and the Constitution . . . [a] district court may not
13 substitute its own remedial plan for defendant's legally acceptable one, even if it
14 believes another plan would be better."); *Seastrunk v. Burns*, 772 F.2d 143, 146
15 (5th Cir. 1985).
16 Instead, the court "may only consider whether the proffered remedial plan
17 is legally unacceptable because it violates anew constitutional or statutory voting
18 rights – that is, whether it fails to meet the same standards applicable to an
19 original challenge of a legislative plan in place." *McGhee*, 860 F.2d at 115. If
20 the defendant's plan is not legally acceptable, the district court must craft its own
21 plan. *Euclid Sch. Bd.*, 632 F. Supp. 2d at 751. The court may, but is not required
22 to, rely on alternatives proposed by the plaintiff. *Id.* Even when fashioning its
23 own plan, however, the court "must, to the greatest extent possible, effectuate the
24 policies and preferences expressed in the defendant's remedial plan." *Id.* (citing
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Upham, 456 U.S. at 41-42; *Cane v. Worcester Cnty.*, 35 F.3d 921, 928 (4th Cir. 1994)).

B. Defendants' Proposed Remedial Plan Remedies the Section 2 Violation Found by this Court

A legally acceptable plan remedies the existing Section 2 violation without creating a new one. *Euclid Sch. Bd.*, 632 F. Supp. 2d at 752. Any valid remedy must afford a minority the opportunity to elect a minority-favored candidate. *Id.* This generally requires that a plan should include a "majority-minority district." *Georgia State Conference of the NAACP v. Fayette Cnty. Bd. of Comm'rs*, 996 F. Supp. 2d 1353, 1358 (N.D. Ga. 2014); *Kimble v. Ctny. of Niagara*, 826 F. Supp. 664, 670 (W.D.N.Y. 1993) ("Once a violation of the act has been admitted or proved, a remedial districting plan should restore those opportunities to minority voters. This may be accomplished through the creation of a majority-minority voting district that maximizes the opportunity of members of the affected group to elect representatives of their choice to government officers.")

Some courts have measured this "majority-minority" figure using voting-age population. *See, e.g.*, *Fayette Cnty.*, 996 F. Supp. 2d at 1360; *United States v. City of Euclid*, 523 F. Supp. 2d 641, 644-46 (N.D. Ohio 2007). In the Ninth Circuit, citizen voting-age population ("CVAP") is the standard measure to determine whether a Section 2 plaintiff has satisfied the first *Gingles* factor during the liability phase. *Romero v. City of Pomona*, 883 F.2d 1418, 1425-26 (9th Cir. 1989), *abrogated on other grounds by Townsend v. Holman Consulting Corp.*, 929 F.2d 1358, 1363 (9th Cir. 1990) (en banc). Accordingly, Defendants

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propose that the CVAP standard be utilized in the remedy phase. Plaintiffs appear to have used this standard in their plan as well.

Defendants' Proposed Remedial Plan remedies the Section 2 violation because it creates one district in which the majority of the CVAP is Latino (District 1). In fact, the percentage of eligible voters who are Latino is higher in Defendants' District 1 (53.46%) than in Plaintiffs' District 1 (52.52%). *See* Morrison Decl., Table 1. Defendants also have examined registered voter data and determined that as of mid-2014, Latinos comprise 52.7% of the registered voters in District 1. Morrison Decl., ¶ 3. Accordingly, Defendants' Proposed Remedial Plan is legally sufficient because it does not "fail[] to meet the same standards applicable to an original challenge of a legislative plan in place." *McGhee*, 860 F.2d at 115; ECF No. 108 at 14 ("[D]rawing a minority district in which minority voters represent more than 50% of all eligible voters confirms that an effective remedy can be fashioned.")

Plaintiffs may argue for the adoption of their plan because it contains one majority-minority district (an opportunity district) and another district (an influence district) that may become a second majority-minority district, thereby better representing Latinos, who comprise over one-fifth of the City's CVAP and nearly one-fifth of the City's registered voters. However, this difference does not render Defendants' Proposed Remedial Plan legally inadequate. A plan is not unacceptable "merely because it will not *necessarily* result in rough proportional representation." *Euclid Sch. Bd.*, 632 F. Supp. 2d at 753 (citing *Johnson v. De Grandy*, 512 U.S. 997, 1013-14 (1994)); *see also* 42 U.S.C. § 1973(b) ("[N]othing in this section establishes a right to have members of a protected

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class elected in numbers equal to their proportion in the population."); ECF No. 108 at 6.

Defendants, too, have proposed an influence district (District 5) in which Latinos comprise 35.4% of eligible voters under Dr. Morrison's methodology. Morrison Decl., Table 2. In this district, Latinos comprise 32.2% of current registered voters. Morrison Decl., ¶ 3. Dr. Morrison estimates that by 2020, Latinos in Defendants' influence district (District 5) will constitute 45% of eligible Latino voters, which is the same percentage they now constitute in Plaintiffs' influence district. Morrison Decl., ¶ 9. By 2017 (when District 5 is up for election, Latinos will comprise 43% of eligible voters. *Id*. Furthermore, Defendants' plan is superior to Plaintiffs in that Districts 1 and Districts 5 in Defendants' Proposed Remedial Plan contain a combined 56.3% of all eligible Latino voters in the City. Morrison Decl., ¶ 10. Districts 1 and 2 in Plaintiffs' plan, in contrast, contains only 40.6% of the City's eligible Latino voters. *Id*. Under Defendants' Proposed Remedial Plan, therefore, a larger share of the City's eligible Latino voters would be represented by a Councilmember from either the opportunity or influence district. *Id*.

In sum, Defendants' Proposed Remedial Plan would survive a Section 2 challenge because it creates a district in which a majority of eligible voters and registered voters are Latino. It also creates an influence district where, by the influence district is even up for election, Latinos' share of eligible voters will nearly equal Latinos' current share in Plaintiffs' influence district. Therefore, Defendants' Proposed Remedial Plan should be adopted because it remedies the

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existing Section 2 violation without creating a new one. *Euclid Sch. Bd.*, 632 F. Supp. 2d at 752; *McGhee*, 860 F.2d at 115.

C. The Elimination of All At-Large Positions Is Not Required

Plaintiffs may argue that Defendants' Proposed Remedial Plan is legally insufficient because it maintains two at-large positions. During their meet and confer, Plaintiffs contended that a Section 2 remedy is not complete unless every at-large position is eliminated. This position misrepresents relevant precedent. True, "single-member districts are strongly preferred for judicially crafted remedies." *Euclid Sch. Bd.*, 632 F. Supp. at 751 n. 10 (citing *Citizens for Good Gov't v. City of Quitman*, 148 F.3d 472 (5th Cir. 1998)). "A court must be mindful, however, that, *when reviewing a defendant's proposed remedy*, the same preference *does not apply*." *Id.* (emphasis added); *see also NAACP v. Kershaw Cnty.*, 838 F. Supp. 237, 242 (D.S.C. 1993) ("[L]egislative-proposed mixed plans are not *per se* violative of Section 2; to the contrary, they are acceptable.")

In *Wise*, the plurality opinion explained that courts "will be held to stricter standards . . . than will a state legislature" when crafting redistricting plans. *Wise*, 437 U.S. at 541 (citing *Connor v. Finch*, 431 U.S. 407, 414 (1977)). "Among other requirements, a court-drawn plan should prefer single-member districts over multimember districts, absent persuasive justification to the contrary." *Id.* (citing *Connor v. Johnson*, 402 U.S. 690, 692 (1971)). However, the plurality opinion concluded that plans submitted by local governments are entitled to substantial deference and need not contain only single-member districts. *Id.*; *McDaniel v. Sanchez*, 452 U.S. 130, 139 (1981) ("[R]eapportionment plans prepared by

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1 legislative bodies may employ multimember districts.") (citing *Finch*, 431 U.S. at
2 414).

3 Subsequent cases have consistently held that plans crafted by local
4 governments are entitled to the same deference, even if the plans are submitted in
5 response to court order. In *Potter v. Washington County*, 653 F. Supp. 121 (N.D.
6 Fla. 1986), the court held that the county's proposed plan was not a court-ordered
7 plan that would "require close scrutiny and the fashioning of a nearly optimal
8 apportionment plan." *Id*. at 125. Although the county's plan was proposed in
9 response to a court order, that "d[id] not change the character of the defendants'
10 plan." *Id*. "[U]nder the interpretation of the United States Supreme Court, both
11 defendants' plan[s] . . . are legislative plans, submitted by entities whose basic
12 function is to make decisions of political policy." *Id*.

13 In *Tallahassee Branch of NAACP v. Leon County*, 827 F.2d 1436 (11th Cir.
14 1997), the county admitted liability in response to a Section 2 lawsuit challenging
15 the county's at-large election system. The county commissioners drafted a plan
16 and presented it to the court, even though the county had no authority to
17 implement the plan without approval of the electorate through a referendum.
18 Even though the commission lacked such authority, the Eleventh Circuit held that
19 the proposed plan was legislatively enacted and entitled to deference. *See also*
20 *McMillan v. Escambia Ctny*., 559 F. Supp. 720, 723-24 (N.D. Fla. 1983)
21 (apportionment plan submitted by legislative body entitled to deference,
22 regardless of whether legislative body has power to enact such plan); *Jenkins v.*
23 *Pensacola*, 638 F.2d 1249 (5th Cir. 1981); *City of Euclid*, 523 F. Supp. 2d at 644
24
25

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(approving of a legislative remedial plan that contained a mix of single-member districts and at-large positions).

In this case, Defendants' Proposed Remedial Plan was fashioned in response to this Court's order, but was approved through the adoption of a resolution at a special public meeting of the City Council. Floyd Decl., Ex. C. The resolution sets forth legitimate reasons for maintaining at-large representation, namely the "important political goal[] and allow[ance] for effective governance by offering impartial representation that is concerned with issues affecting the entire City."[5] *Id*. at pgs. 3.

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[5] Although not legally probative, the *Yakima Herald-Republic*'s Editorial Board has repeatedly endorsed the preservation of at-large representation. On August 31, 2014, the Board wrote, "[T]he council needs citywide representation" and expressed its support for a mixed plan with five single-member districts and two at-large positions. *It's now time for Yakima to change to district voting*, YAKIMA HERALD REPUBLIC, August 31, 2014, available at http://www.yakimaherald.com/opinion/editorials/2449182-8/its-now-time-for-yakima-to-change-to (last visited Oct. 3, 2014).

About one month later, the Board wrote, "We believe that two at-large districts are reasonable in providing citywide representation on the council." *Council takes first step – more to go on district voting*. YAKIMA HERALD REPUBLIC, September 28, 2014, available at http://www.yakimaherald.com/opinion/editorials/2529882-8/council-takes-first-step-more-to-go (last visited Oct. 3, 2014).

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Defendants' plan is "submitted by [an] entit[y] whose basic function is to make decisions of political policy." *Potter*, 653 F. Supp. at 125. Defendants' decision to preserve at-large representation is a political choice and legislative judgment that was carefully considered by the City Council and ultimately expressed through its resolution adopted at the special public meeting on September 30. Floyd Decl., Ex. C. Accordingly, Defendants are not required to eliminate all at-large positions. *McDaniel*, 452 U.S. at 139; *Euclid Sch. Bd.*, 632 F. Supp. at 751 n. 10.

Furthermore, Defendants have proposed at-large elections that eliminate the majority-vote requirement and allow more than two candidates to compete in the general election. These features address this Court's concern that the City's use of numbered posts, the majority-vote requirement and the head-to-head competitions in at-large elections "blunts the effectiveness of voting cohesively for one candidate." ECF No. 108 at 57. Under Defendants' proposal, any candidate who seeks an at-large position will appear on a single list in the general election ballot. Voters may cast one vote for any candidate, and the top two vote-getters are elected Mayor and Assistant Mayor, respectively. This system, sometimes referred to as limited voting, is identical to Washington State's "Top 2 Primary" system and has been approved in the Section 2 context. *Moore v. Beaufort Cnty.*, 936 F.2d 159, 160 (4th Cir. 1991) ("Limited voting allows minorities to rally around a single candidate and improve his or her chance of

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1 election."); *see also Euclid Sch. Bd.*, 632 F. Supp. 2d at 755-57 (approving of
2 limited voting).[6]
3 Finally, this Court did not find—and Plaintiffs did not argue in their
4 summary judgment motion—that the current Councilmembers are unresponsive
5 to the needs of Latinos. Thus, Plaintiffs cannot challenge the continued use of at-
6 large positions by arguing that the City's previous at-large representatives were
7 indifferent to the Latino community, as no such finding exists in the record.
8 Plaintiffs may contend that the preservation of at-large positions would
9 have a dilutive effect on Latinos because the two at-large positions in Defendants'
10 Proposed Remedial Plan are designated Mayor and Assistant Mayor. But the
11 selection of such "unitary offices" on an at-large basis is not "*per se* illegal."
12 *Kershaw Cnty.*, 838 F. Supp. at 242 n.15. Instead, courts inquire as to whether
13 the offices are given expansive authority beyond that of a normal officeholder.
14 For example, *Buchanan v. City of Jackson*, 683 F. Supp. 1537 (W.D. Tenn.
15 1988), the City's proposed plan included three Administrative Commissioners
16 elected at-large and six District Commissioners were elected from single-member
17 districts. The Administrative Commissioners had various executive, employment,
18 law enforcement, and supervisory powers, including oversight over all
19
20 [6] *See also* Zachary Duffy, *Unequal Opportunity: Latinos and Local Political*
21 *Representation in Washington State* (Dec. 11, 2009) (Whitman College) (citing
22 research favorable to limited voting in context of minority elections), *available at*
23 http://walatinos.net/wp/wp-
24 content/uploads/2011/11/UnequalOpportunityZachDuffy.pdf (last visited Oct. 3,
25 2014).

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departments and offices in the city and hiring and firing of employees. Given the power held by these at-large Administrative Commissioners, the court concluded that the city's proposed plan would "allow[] blacks less opportunity than other members of the electorate to participate in the political process." *Id*. at 1544.

Here, the Mayor and Assistant Mayor wield no such authority. The City uses a Council-Manager Plan of City Government. The City Manager is the "chief executive officer and the head of the administrative branch of City government." Yakima City Charter, Art. II, § 7. The City Manager has extensive "powers and duties." Yakima City Charter, Art. II, § 9.

The Mayor's role, in contrast, is largely "ceremonial" and has no "regular administrative duties." Yakima City Charter, Art. II, § 3. The Assistant Mayor simply assumes the role of Mayor during any absences or disabilities. Yakima Municipal Code ("YMC") 1.24.010. In times of "public danger or emergency," the Mayor may "take command of the police, maintain order, and enforce the law"—but only if "authorized and directed by a majority vote of the Council." *Id*. The Mayor may appoint members of several minor committees and boards, but the appointees must be confirmed by the City Council. YMC 11.62.040 (historic preservation commission), 7.44.020 (board of trustees for Yakima Public Library), 1.42.025 (planning commission), 11.44.120 (board of appeals to determine "matters pertaining to plumbing installations"). The Mayor also sits on the board of trustees that manages the relief and pension fund for volunteer firefighters and reserve officers. YMC 1.91.055, 1.47.050. Lastly, the Mayor and Assistant Mayor receive higher salaries than other Councilmembers. YMC 2.20.094.

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1 Despite these differences, the Mayor and Assistant Mayor are still nothing
2 like the Administrative Commissioners in *Buchanan*, who supervised all
3 departments and offices of the county and oversaw a broad range of matters
4 affecting the county, such as the location and repair of public services and
5 infrastructure. *Buchanan*, 683 F. Supp. at 1542. Nor are the Mayor and Assistant
6 Mayor comparable to the "at-large chairperson" of the county committee in
7 *Dillard v. Crenshaw County*, 831 F.2d 246 (11th Cir. 1987), who had "no formal
8 enumeration of duties." *Id*. at 252. Nevertheless, the Eleventh Circuit rejected
9 the county's decision to preserve the position of chairperson because the previous
10 commissions, "over time skewed power heavily into the hands of the
11 chairperson" and there remained a risk of an "unacceptable gravitation of power
12 to the chairperson" under the county's plan. *Id*. Here, the Mayor and Assistant
13 Mayo roles are clearly defined and are almost entirely ceremonial.
14 The Mayor and Assistant Mayor are more akin to the Chair of the County
15 Council in *Kershaw County*, who had a "minimal" role and was "functionally
16 equivalent to any other Councilmember." *Kershaw Cnty*., 838 F. Supp. at 242, n.
17 15. The *Kershaw County* court upheld the proposal of an at-large Chair of the
18 County Council over the objection of the plaintiffs, who argued that African-
19 Americans were only 28.3% of the county's total population and would therefore
20 be "unable to elect a candidate of their choice to the position of Chair of County
21 Council." *Id*. at 241. The court rejected this argument, stating that it was "aware
22 of no authority for the proposition that such unitary offices are *per se* illegal" and
23 ruling that "legislative-proposed mixed plans are not *per se* violative of Section 2;
24 to the contrary, they are acceptable." *Id*. at 242.
25

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In sum, Defendants' Proposed Remedial Plan need not eliminate all at-large positions because it is a legislative plan that is not subject to the same strictures as a judicially-crafted plan. Moreover, Plaintiffs have not shown, and this Court did not find, any lack of responsiveness on the part of previously-elected Councilmembers. Lastly, Defendants' plan adopts an at-large election identical to Washington State's "Top 2 Primary" system that eliminates the numbered post, majority vote, and head-to-head features of the City's previous at-large elections. Defendants' plan, moreover, does not alter the largely ceremonial roles of Mayor or Assistant Mayor. Defendants' Proposed Remedial Plan creates a majority-minority district while striking a balance between preserving citywide representation while addressing this Court's concerns about the use of potentially dilutive electoral mechanisms. Defendants' Proposed Remedial Plan complies with all relevant statutory and constitutional requirements and should be adopted.

D. Other Features of Defendants' Proposed Remedial Plan

Defendants' Proposed Remedial Plan contains two other notable features. First, the plan offers no meaningful incumbency protection. Four incumbents are located in one single-member district (District 2), while two incumbents are located in another district (District 3). Only one district contains a single incumbent (District 4). The opportunity district (District 1) and the influence district (District 5) do not contain any incumbents.

Even though "the Supreme Court has repeatedly recognized incumbency protection as a legitimate state goal," Defendants' Proposed Remedial Plan effectively disregards this interest. *Martinez v. Bush*, 234 F. Supp. 2d 1275 (S.D. Fla. 2002) (citing *Hunt v. Cromartie*, 526 U.S. 541, 549-51 (1999); *Karcher v.*

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1 *Daggett*, 462 U.S. 725, 740 (1983)). Defendants subordinated incumbency
2 protection in favor of other goals, including maximizing the ability of Latinos to
3 elect their candidate of choice by keeping the opportunity and influence districts
4 free of incumbents.

5 Second, Defendants' Proposed Remedial Plan allows incumbents to serve
6 out the remainder of their terms if they so choose. Although courts have wide
7 latitude to assign remedies for violations of Section 2, including invalidating local
8 elections, *see*, *e.g*., *Neal v. Coleburn*, 689 F. Supp. 1426, 1448 (E.D. Va. 1988),
9 the Ninth Circuit has considered ejecting elected officials from office to be a
10 "'drastic if not staggering' remedy" that has an "extremely disruptive effect."
11 *Soules v. Kauaians for Nukolii Campaign Comm*., 849 F.2d 1176, 1180 (9th Cir.
12 1988) (quoting *Bell v. Southwell*, 376 F.2d 659, 662 (5th Cir. 1967)). "'A federal
13 court reaching into the state political process to invalidate an election necessarily
14 implicates important concerns of federalism and state sovereignty. It should not
15 resort to this intrusive remedy until it has carefully weighed all equitable
16 considerations.'" *Id*. (quoting *Gjersten v. Board of Election Comm'rs*, 791 F.2d
17 472, 478 (7th Cir. 1986)).

18 As then-Judge Kennedy wrote, election invalidation "has been reserved for
19 instances of willful or severe violations of established constitutional norms."
20 *McMichael v. Cnty. of Napa*, 709 F.2d 1268, 1273 (9th Cir. 1983) (Kennedy, J.,
21 concurring) (citing *Griffin v. Burns*, 570 F.2d 1065, 1080 (1st Cir. 1978)). No
22 such determination has been made in this case. In fact, this Court explicitly
23 disavowed the suggestion that the City "engaged in any wrongdoing." ECF No.
24 108 at 48. This Court also did not rule, and Plaintiffs did not argue, that the
25

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Councilmembers were unresponsive to the needs of the Latino community. When these considerations are balanced with the "drastic" and "intrusive" nature of election invalidation, *Soules*, 849 F.2d at 1180, it is clear that ejecting incumbent Councilmembers is not warranted in this case.

E. Electoral Equality

As Defendants have argued throughout this litigation, electoral equality—the principle that each individual's vote should carry approximately equal weight in every single-member district—is a constitutionally-protected principle that must be considered in the redistricting context, including under the first *Gingles* factor of a Section 2 claim. *See* ECF Nos. 67, 85, 100. By their own expert's admission, Plaintiffs have disregarded electoral equality. Their expert made no attempt to balance electoral equality with any other redistricting criteria or goal. Plaintiffs, therefore, failed to satisfy their burden under the first *Gingles* factor. Defendants have further argued that even if one attempts to balance electoral equality with other redistricting factors, the City's demographics makes it mathematically impossible to reduce electoral inequality to an acceptable level. ECF Nos. 86-1, 100.

By declining to rule that Plaintiffs must show that they simply attempted to consider electoral equality during the liability phase, this Court rejected Defendants' position. This Court ruled instead that "fine-tuning—including potential adjustments to achieve a higher degree of electoral equality between districts" was to "be left to the remedial stage of the litigation." ECF No. 108 at 29 (internal quotations omitted).

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1 Based on Plaintiffs' representations to Defendants, it does not appear that
2 Plaintiffs have made any effort whatsoever to moderate the electoral inequality in
3 their "Illustrative Plan 1." This would be consistent with the position Plaintiffs
4 have taken throughout this litigation: to wholly disregard the constitutionally
5 protected principle of electoral equality in the redistricting context.
6 Defendants, in contrast, have strived to balance electoral equality along
7 with other traditional redistricting criteria and principles. Defendants' Proposed
8 Remedial Plan addresses this constitutionally-protected principle by attempting to
9 reduce the severe imbalance in eligible voter populations across their single-
10 member districts while adhering to other requirements and characteristics (*e.g.*,
11 creating five single-member districts with one district containing an eligible
12 Latino voter population several points above the bare 50% threshold and another
13 district with an eligible Latino voter population greater than 33%; keeping the
14 total population deviation under 10%; avoiding strong incumbency protection;
15 and observing geographical compactness, contiguity, and respecting the integrity
16 of existing precinct boundaries insofar as possible). Adhering to these
17 requirements, Defendants reduced the maximum CVAP deviation to 52.45%.
18 Plaintiffs' Illustrative Plan 1, in contrast, incurs a maximum CVAP deviation of
19 61.40%.
20 Taking their efforts a step further, Defendants created an illustrative five-
21 district plan (not proposed as a remedy) that disregards all of the above
22 requirements except for limiting the total population deviation to under 10% and
23 creating a single-member district where Latinos constitute a bare majority
24 (50.04%) of eligible voters. Despite their efforts, Defendants found it impossible
25

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to reduce the maximum CVAP deviation below 48.24%. This map is attached as Appendix D to the Declaration of Dr. Morrison in Support of Defendants' Proposed Remedial Plan.

For the reasons set forth in Defendants' summary judgment briefing, as well as its Response to the Statement of Interest of the United States of America, a maximum CVAP deviation of 48.25% or 52.45% transgresses the constitutionally-protected principle that a citizen's vote should carry about the same weight as any other citizen's vote regardless of where a citizen resides. Additionally, these extremely high maximum CVAP deviations also violate the commands of Section 2 itself for the reasons argued in Defendants' filings. As Dr. Morrison has opined, the City's demographics likely make it impossible to create a single-member district that satisfies the first *Gingles* factor without running afoul of electoral equality. ECF No. 86-1.

Although Defendants' Proposed Remedial Plan contains an intolerably high degree of electoral inequality (but less than Plaintiffs' Illustrative Plan 1), Defendants recognize that this Court is unlikely to invalidate any proposed plan on this ground. Accordingly, Defendants submit their Proposed Remedial Plan and ask that this Court adopt it for the reasons set forth above.

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CONCLUSION

Defendants respectfully request that this Court adopt Defendants' Proposed Remedial Plan and Proposed Injunction, which is enclosed with this memorandum.

RESPECTFULLY SUBMITTED this 3rd day of October, 2014.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that on the date noted below, a true and correct copy of the foregoing was delivered and/or transmitted in the manner(s) noted below:

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