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UNITED STATES DISTRICT COURT

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

DEFENDANTS' SUMMARY JUDGMENT MOTION

Telephonic Argument
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I. INTRODUCTION

Plaintiffs are attempting to prove their Section 2 vote dilution claim by neglecting electoral equality (the relative voting power of each eligible voter), which is a "fundamental idea[] of democratic government." *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964). Under Section 2, Plaintiffs must propose redistricting plans that attempt to balance traditional districting principles—including electoral equality. Yet Plaintiffs' expert witness William Cooper did not even try to achieve such a balance. Plaintiffs have therefore failed to carry their burden under Section 2 and this Court should dismiss Plaintiffs' claim.

In the alternative, this Court should dismiss this case on the ground of illegality because Plaintiffs' claim violates Section 2's prohibition on minority vote dilution. By ignoring electoral equality, Mr. Cooper's proposed redistricting plans create a gross misallocation of eligible voters among districts, *i.e.*, some districts contain a disproportionately large number of eligible voters. This results in the dilution of voting strength among eligible minority voters who reside in these districts. As such, this Court should dismiss Plaintiffs' claim for violating Section 2's ban on minority vote dilution.

Lastly, and also in the alternative, Plaintiffs' claim amounts to unconstitutional gerrymandering. Mr. Cooper admitted in his deposition that he did not attempt to balance electoral equality with other traditional districting principles. Thus, he necessarily subordinated this principle to ethnicity. Plaintiffs cannot justify this subordination by asserting a compelling state interest (that Plaintiffs are attempting to remedy a Section 2 violation) because no violation has yet been established. Plaintiffs cannot utilize an unlawful practice in an attempt to

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prove the alleged existence of a different unlawful practice. Accordingly, this Court should dismiss Plaintiffs' claim violating the Fourteenth Amendment to the United States Constitution.

II. LEGAL BACKGROUND

Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, provides that "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed 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 plaintiff may prove a Section 2 violation "if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens . . . in that its members 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).

Section 2 prohibits vote dilution. *Thornburg v. Gingles*, 478 U.S. 30, 45 n.10 (1986). In *Gingles*, the Supreme Court explained that one form of vote dilution may result from the use of at-large elections because "where minority and majority voters consistently prefer different candidates, the majority, by virtue of its numerical superiority, will regularly defeat the choices of minority voters." *Id.* at 48 (footnote omitted). The *Gingles* Court announced the two-part standard for proving this form of vote dilution. First, a plaintiff must establish three preconditions, also known as the *Gingles* factors. The first *Gingles* factor requires that a plaintiff show "the minority group . . . is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.*

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at 50. Such districts are referred to as "majority-minority" districts, "demonstration districts," or "*Gingles* district[s]." *Old Person v. Brown*, 312 F.3d 1036, 1045 n.7 (9th Cir. 2002); *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 850 n.1 (5th Cir. 1999); *Perez v. Perry*, 891 F. Supp. 2d 808, 837 (W.D. Tex. 2012).

In the Ninth Circuit, "along with every other circuit to consider this issue," citizen voting-age population ("CVAP")[1] is the "appropriate measure to use in determining whether an additional effective majority-minority district can be created." *Cano v. Davis*, 211 F. Supp. 2d 1208, 1233 (C.D. Cal. 2002); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 429 (2006) ("*LULAC*") ("[T]he parties agree that the relevant numbers must include citizenship. This approach fits the language of § 2 because only eligible voters affect a group's opportunity to elect candidates.") Put differently, a plaintiff can satisfy the first *Gingles* factor if it is possible to create a hypothetical redistricting plan that contains at least one single-member district in which the protected class comprises a majority of adult citizens.

A plaintiff must establish the first *Gingles* factor by proposing "illustrative plans" that contain at least one majority-minority district. *See, e.g.*, *Fairley v. Hattiesburg*, 584 F.3d 660, 669 (5th Cir. 2009). The illustrative plan should contain a number of districts equal to the number of seats on the elected body that

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[1] This motion and the accompanying Statement of Material Facts use the following terms interchangeably: (1) citizen voting-age population or CVAP; (2) adult citizens; and (3) eligible voters.

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is subject to the vote dilution claim. *See Overton v. Austin*, 871 F.2d 529, 543 (5th Cir. 1989); *Hones v. Ahoskie*, 998 F.3d 1266, 1270-72 (4th Cir. 1993). A divided three-judge panel of the Ninth Circuit has held that districts must be apportioned based on population—that is, the population of each district should be equal with some limited deviation (also referred to as "representational equality"). *Garza v. County of Los Angeles*, 918 F.2d 763, 774-76 (9th Cir. 1990); *but see id.* at 778-88 (Kozinski, J., dissenting) (discussing Supreme Court precedent in detail and concluding that the Fourteenth Amendment's one person, one vote principle requires "electoral equality," *i.e.*, apportionment based on eligible voters); *Chen v. City of Houston*, 206 F.3d 502, 528 (5th Cir. 2000) (holding that the use of representational or electoral equality was a "political choice" left to the state or local government).

The second *Gingles* factor—which is not at issue in this motion—is that "the minority group must be able to show that it is politically cohesive." *Gingles*, 478 U.S. at 51. The third and final *Gingles* factor—also not at issue here—is that "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." *Id.* After establishing the threshold requirements, courts are to "consider the 'totality of the circumstances' and to determine, based 'upon a searching practical evaluation of the past and present reality,'" whether the political process is equally open to minority voters." *Id.* at 79 (quoting S. Rep. No. 97-417, at 22, 30 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 200, 208). This inquiry, also known as the Senate factors, is not raised in this motion.

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III. ARGUMENT

A. Legal Standard for Summary Judgment

Summary judgment may be granted to a moving party who demonstrates "that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the initial burden of demonstrating the absence of any genuine issues of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). The burden then shifts to the non-moving party to identify specific genuine issues of material fact which must be decided by a jury. *See Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986).

B. Plaintiffs' Burden Under the First *Gingles* Factor Requires an Attempt to Balance Traditional Districting Principles

Under the first *Gingles* factor, a plaintiff must show "the minority group . . . is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50; *Abrams v. Johnson*, 521 U.S. 74, 91-92 (1997) (holding that Section 2 does not require the creation of "a district that is not 'reasonably compact.'") (quoting *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994)). "In the equal protection context, compactness focuses on the contours of district lines." *LULAC*, 548 U.S. at 433. "Under § 2, by contrast, the injury is vote dilution, so the compactness inquiry embraces difference considerations." *Id.*

"While no precise rule has emerged governing § 2 compactness, the 'inquiry should take into account 'traditional districting principles such as maintaining communities of interest and traditional boundaries.'" *LULAC*, 548 U.S. at 433 (quoting *Abrams*, 521 U.S. at 92). The first *Gingles* factor is not

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satisfied if a plaintiff fails to adequately consider these principles when proposing redistricting plans. *See Reed v. Town of Babylon*, 914 F. Supp. 843, 872 (E.D.N.Y. 1996) ("Plaintiffs' failure to give any regard to key districting criteria in drawing their plan is in and of itself sufficient grounds for the Court to conclude that plaintiffs have failed to carry their burden under the first *Gingles* precondition."); *Jeffers v. Tucker*, 847 F. Supp. 655, 661 (E.D. Ark. 1994) (dismissing Section 2 claim because plaintiffs' proposed redistricting plans did not observe traditional districting principles).

This compactness inquiry must be conducted under the first *Gingles* factor for another reason: During the liability phase, Section 2 plaintiffs should be required to show "the existence of a workable remedy" that complies with traditional districting principles. *Nipper v. Smith*, 39 F.3d 1494, 1533 (11th Cir. 1994). The Eleventh Circuit in *Nipper* explained that the Supreme Court's decision in *Holder v. Hall*, 512 U.S. 874 (1994), affirms that "a court cannot determine whether the voting strength of a minority group has been impermissibly diluted without having some alternative electoral structure in mind for comparison. Thus, 'where there is no objective and workable standard for choosing a reasonable benchmark by which to evaluate a challenged voting practice, it follows that the voting practice cannot be challenged as dilutive under § 2.'" *Nipper*, 39 F.3d at 1533 (citing *Holder*, 512 U.S. at 881); *accord Barnett v. City of Chicago*, 141 F.3d 699, 702 (7th Cir. 1998) ("[T]he plaintiff must show that there is a feasible alternative to the defendant's map, an alternative that does a better job of balancing the relevant [districting] factors, although the fine-tuning of the alternative can be left to the remedial stage of the litigation."); *United*

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States v. Village of Port Chester, 704 F. Supp. 2d. 411, 421 (S.D.N.Y. 2010) ("To demonstrate the existence of the first *Gingles* precondition in an at-large system, the Plaintiffs must be able to draw illustrative single-member districts *following traditional redistricting principles* to show that the Hispanic population is sufficiently large and compact so as to constitute a majority in a single-member district.") (emphasis added).[2]

The testimony of Mr. Cooper supports the use of the "workable remedy" requirement. *Nipper*, 39 F.3d at 1533. Mr. Cooper testified that Illustrative Plans 1 and 2 and Hypothetical Plan A were "illustrative plans," while Hypothetical Plans B and C were created "solely for the purpose of meeting *Gingles* I" (Hypothetical Plans D and E, in contrast, were not intended to be used either to satisfy the first *Gingles* factor or as remedies). (Statement of Material Facts ("SMF") at ¶ 32.) Indeed, Mr. Cooper testified that he believed Illustrative Plans 1 and 2 and Hypothetical Plan A would be a starting point in the remedy phase. (SMF at ¶ 41 n.6.)

In sum, the first *Gingles* factor's compactness requirement dictates that the redistricting plans proposed in the liability phase by a Section 2 plaintiff must attempt to balance traditional districting principles. *LULAC*, 548 U.S. at 433. This compliance is also required because a "workable remedy" (*i.e.*, a proposed redistricting plan that balances traditional redistricting criteria) must be demonstrated under the first *Gingles* factor. *Nipper*, 39 F.3d at 1533.

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[2] The Ninth Circuit has recognized, but not explicitly adopted, the Seventh and Eleventh Circuit's "remedy requirement." *Earl Old Person v. Brown*, 312 F.3d 1036, 1050-51 (9th Cir. 2002).

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C. Electoral Equality is Among the Principles That Plaintiffs Must Attempt to Balance Under the First *Gingles* Factor

Electoral equality—the relative weight of each adult citizen's vote—is a "fundamental idea[] of democratic government." *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964); *Reynolds v. Sims*, 377 U.S. 533, 567 (1964) ("[T]he basic principle of representative government remains, and must remain, unchanged – the weight of a citizen's vote cannot be made to depend on where he lives."); *Chapman v. Meier*, 420 U.S. 1, 24 (1975) ("All citizens are affected when an apportionment plan provides disproportionate voting strength, and citizens in districts that are underrepresented lose something even if they do not belong to a specific minority group."); *Lockport v. Citizens for Community Action*, 430 U.S. 259, 265 (1977) ("In voting for their legislators, all citizens have an equal interest in representative democracy, and . . . the concept of equal protection therefore requires that their votes be given equal weight."); *Board of Estimate v. Morris*, 489 U.S. 688, 701 (1989) ("In calculating the deviation among districts, the relevant inquiry is whether 'the vote of any citizen is approximately equal in weight to that of any other citizen.'") (quoting *Reynolds v. Sims*, 377 U.S. 533, 579 (1964)).

Furthermore, the Supreme Court has explained that "[t]he overriding objective must be substantial equality of population among the various districts, *so that* the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Reynolds*, 377 U.S. at 579 (emphasis added); *see also Garza*, 918 F.2d at 778-88 (Kozinski, J., dissenting) (discussing importance of electoral equality in Supreme Court precedent). Accordingly, under the first

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Gingles factor, a plaintiff's proposed redistricting plans must attempt to balance electoral equality and other traditional districting criteria.

Additionally, electoral equality must be accounted for and preserved insofar as possible because it is protected by the Fourteenth Amendment to the United States Constitution. Although the Ninth Circuit in *Garza* held that the apportionment basis of a redistricting plan must be total population rather than eligible voters, *id.* at 773-76, the Court did not squarely address whether the allocation of eligible voters may be ignored entirely—and the Supreme Court has strongly indicated that it may not. *Morris*, 489 U.S. at 698 ("The personal right to vote is a value in itself, and a citizen is, without more and without mathematically calculating his power to determine the outcome of an election, shortchanged if he may vote for only one representative when citizens in a neighboring district, of equal population, vote for two; or to put it another way, if he may vote for one representative and the voters in another district half the size also elect one representative.") The decision of the majority in *Garza*, moreover, conflicts with precedent from other Circuits. *Compare Chen*, 206 F.3d at 528.

As such, a Section 2 plaintiff must attempt to avoid gross imbalances in electoral equality within proposed redistricting plans because electoral equality is both a traditional districting principle and protected by the Fourteenth Amendment.

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D. Mr. Cooper Made No Attempt to Balance Electoral Equality with Any Other Traditional Districting Criteria

Mr. Cooper's failure to consider electoral equality is readily apparent from the figures in his proposed redistricting plans. The following chart shows the maximum deviation of eligible voter allocation in the twelve plans created by Mr. Cooper:

Plan	Maximum Deviation of Eligible Voter Allocation
Illustrative Plan 1	65.78%
Illustrative Plan 2	63.44%
Hypothetical Plan A	65.78%
Hypothetical Plan B	71.31%
Hypothetical Plan C	75.12%
Hypothetical Plan D	45.67%
Hypothetical Plan E	4.87%
Illustrative Plan 1 (updated)	63.98%
Illustrative Plan 2 (updated)	61.47%
Hypothetical Plan A (updated)	62.96%
Hypothetical Plan B (updated)	67.72%
Hypothetical Plan C (updated)	70.72%

(SMF at ¶¶ 19, 33, 59.)

For nearly all of these plans, the maximum deviation of eligible voter allocation is well above the 10% threshold that the Supreme Court uses as a ceiling for total population allocation. *See Brown v. Thomson*, 462 U.S. 835, 842-43 (1983) (redistricting plans with maximum total population deviation greater than 10% creates prima facie case of discrimination).

The only plan with a reasonable maximum eligible voter deviation is Hypothetical Plan E, which Mr. Cooper created solely in response to Dr.

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Morrison's expert report. (SMF at ¶ 32.) But Mr. Cooper misjudged the concerns raised by Dr. Morrison: Instead of attempting to balance the number of eligible voters with other traditional redistricting factors, Mr. Cooper assumed that Dr. Morrison was suggesting that the districts be apportioned based on eligible voters. As a result, Mr. Cooper roughly equalized the number of eligible voters in each district in Hypothetical Plan E, which caused the maximum deviation for total population to become 81.43%. (SMF at ¶ 34.) Thus, rather than attempt to balance total population and the number of eligible voters with other traditional districting principles, Hypothetical Plan E simply substituted one neglected principle for another.

Mr. Cooper's testimony confirmed that he completely disregarded the gross misallocation of eligible voters in Illustrative Plans 1 and 2 and Hypothetical Plans A, B, and C. He testified that, among these plans, he only considered the variance in total population. (SMF at ¶ 39.) When asked directly whether he was concerned about "electoral imbalance" in Illustrative Plans 1 and 2 and Hypothetical Plans A, B, and C, Mr. Cooper responded that "he didn't look at that question carefully." (SMF at ¶ 44.) Mr. Cooper may have been putting it lightly: The existence of maximum eligible voter deviations between 60% to 70% indicate that Mr. Cooper did not consider the question whatsoever, despite the persistence of this issue in Section 2 litigation.[3]

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[3] *Garza*, 918 F.2d at 781 (Kozinski, J., dissenting) ("In most cases, of course, the distinction between the two formulations makes no substantive difference: Absent significant demographic variations in the proportion of voting age citizens to total population, apportionment by population will assure equality of voting strength

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Mr. Cooper testified that the gross misallocation of eligible voters "really cannot be dealt with" if a proposed redistricting plan is apportioned based on total population. (SMF at ¶ 42.) But Mr. Cooper did not even *attempt* to reduce with the imbalance of eligible voters or explain how reducing this imbalance would impact other features of his proposed redistricting plan, such as the creation of a majority minority district. These failures formed the basis of Dr. Morrison's criticism that Mr. Cooper "seems to be totally unaware of what was happening with the damage that was being done to the weighting of votes across the city" in his proposed redistricting plans.[4] (SMF at ¶¶ 47, 52-54.)

The enormous maximum eligible voter deviations in Mr. Cooper's plans, coupled with Mr. Cooper's own deposition testimony, establish that he

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and vice versa. Here, however, we *do* have a demographic abnormality, and the selection of an apportionment base does make a material difference: Apportionment by population can result in unequally weighted votes, while assuring equality in voting power might well call for districts of unequal population.")

[4] Plaintiffs may assert that the City Council's current electoral system suffers from imbalances in the allocation of total population, eligible voters, or both. This argument would be misguided because, regardless of the allocation of total population and eligible voters among the City's existing four districts, all seven Councilmembers must be chosen in the general election on a citywide basis. In other words, the electoral base for each Councilmember includes all eligible voters in the City. This eliminates any question of disproportionate voting strength.

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completely disregarded electoral equality. As a result, Plaintiffs have failed to carry their burden under the first *Gingles* factor and this Court should accordingly dismiss Plaintiffs' claim.

E. Mr. Cooper's Failure to Account for Electoral Equality Results in the Dilution of the Voting Strength of Latinos, Asians, and Native Americans Living Outside of Districts 1 and 2

Alternatively, this Court should dismiss Plaintiffs' claim on the grounds of illegality: By proposing redistricting plans that neglect of electoral equality, and presumably intending to rely on them in a potential remedy phase, Plaintiffs are violating Section 2's prohibition on vote dilution. As Dr. Morrison explained in his expert report, the voting power of eligible voters from ethnic and racial minorities (including Latinos) would be systematically devalued if they lived outside of Districts 1 and 2. (SMF at ¶ 26.)

This phenomenon as it applies to Latinos is apparent from Mr. Cooper's own figures. For example, in Illustrative Plan 1, Districts 1 and 3 each contain about 1/5th of the City's Latino eligible voters (2279.36 and 2171.92, respectively). (SMF at ¶¶ 19, 21.) But District 3 contains about twice as many eligible voters as District, which renders the vote of a Latino adult citizen residing in District 3 worth about half the vote of a Latino adult citizen from District 1. (SMF at ¶ 19.) In fact, in every redistricting plan proposed by Mr. Cooper, a majority of eligible Latino voters live *outside* of Districts 1 and 2. (SMF at ¶¶ 19, 33, 59.)

This dilutive effect also applies to Asians and Native Americans who reside in certain parts of the City. Although Dr. Morrison did not present data on

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Asians and American Indians in his reports, he testified that he had "analyzed the data" and concluded that "it's obvious that [vote dilution] would be the effect." (SMF at ¶ 55.) The data referred to by Dr. Morrison are contained within U.S. Census Bureau's 2007-2011 American Community Survey 5-Year Estimate, which Mr. Cooper cited in his reports. (SMF at ¶ 55 n.7.) Tabulating these data would reveal that a majority of voting-age American Indians and Asians reside outside of Districts 1 and 2 from Mr. Cooper's hypothetical plans. (*Id.*) As such, Plaintiffs' claim disadvantages a majority of voting-age American Indians and Asians because they are concentrated in districts where a vote carries far less weight relative to other districts.

The Supreme Court has read Section 2 to "prohibit practices that result in 'vote dilution,'" *Thornburg v. Gingles*, 478 U.S. 30 (1986), understood as distributing politically cohesive minority voters through voting districts in ways that reduce their potential strength." *Bartlett v. Strickland*, 556 U.S. 1, 28 (2009) (plurality). However, that is what Plaintiffs' proposed redistricting plans would accomplish: Conferring additional voting power on certain members of a minority group while diluting the voting power of other members. The Supreme Court has forbidden this practice: "[A] State may not trade off the rights of some members of a racial group against the rights of other members of that group." *LULAC*, 548 U.S. at 437. Yet this unlawful trade-off would result from Plaintiffs' proposed redistricting plans. Indeed, Mr. Cooper himself recognized that his own proposed redistricting plans would allocate "a lot of noncitizens in districts 1 and 2, [and]

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then people in other parts of the city are not given an opportunity to have their votes count as much as those who are citizens in districts 1 and 2." (SMF at ¶ 43.)

Because "'the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim,'" this dilutive effect on minority voters should not be glossed over as a mere byproduct of Plaintiffs' attempt to create a majority-minority district under the first *Gingles* factor. *De Grandy*, 512 U.S. at 1007 (quoting *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993)). Here, the nature of Plaintiffs' Section 2 claim is in violation of Section 2 itself. "The statute does not protect *any* possible opportunity or mechanism." *Barlett*, 556 U.S. at 20 (plurality) (emphasis added). Instead, the Section 2 claim must not create its own dilutive effect. Section 2 guarantees that political processes be "equally open to participation." 42 U.S.C. § 1973(b). By grossly misallocating voting power among members of a minority group, Plaintiffs' claim undermines this guarantee. As such, Plaintiffs' claim should be dismissed on grounds of illegality because it violates Section 2's prohibition on vote dilution.

F. Mr. Cooper's Subordination of Electoral Equality to Ethnicity Is Impermissible Under the Fourteenth Amendment

This Court has another alternative basis to dismiss Plaintiffs' claim: Mr. Cooper's neglect of electoral equality constitutes unconstitutional gerrymandering under the Fourteenth Amendment to the United States Constitution. If race or ethnicity is the predominant factor motivating a redistricting proposal such that other, race-neutral districting principles were subordinated to racial or ethnic considerations, then strict scrutiny applies. *LULAC*, 548 U.S. at 475 (Stevens, J.,

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dissenting) (citing *Bush v. Vera*, 517 U.S. 952, 958-59 (1996) (plurality)). Under strict scrutiny analysis, the redistricting proposal must be narrowly tailored to serve a compelling state interest. *LULAC*, 548 U.S. at 475. Compliance with Section 2 may qualify as such as interest. *Id.* (citing *King v. Illinois Bd. of Elections*, 979 F. Supp. 619 (N.D. Ill. 1997), *aff'd* 522 U.S. 1087 (1998); *Vera*, 517 U.S. at 994 (O'Connor, J., concurring)).

Mr. Cooper's own proposed redistricting plans establish that he made no attempt whatsoever to balance electoral equality with other race-neutral traditional districting principles. Mr. Cooper was retained to create a hypothetical redistricting plan with at least one Latino majority-minority district. (SMF at ¶¶ 12-13.) This objective necessarily involves ethnicity as a factor motiving the creation of these plans. Indeed, Mr. Cooper acknowledged that "aggregat[ing] the most heavily Latino contiguous areas so [he] boost the Latino share among whatever number of voting-age citizens that proposed district happened to encompass" was a "factor" in his work. (SMF at ¶ 36.) He then qualified this statement by testifying that he "looked at other factors," such precinct lines and variance in the allocation of total population among districts. (SMF at ¶ 38.) But Mr. Cooper testified that he never attempted to reduce the imbalance in electoral inequality (except by creating Hypothetical Plan E, which did not attempt to achieve any balance and simply juxtaposed one neglected factor for another). (SMF at ¶ 44.)

As a result, electoral equality was subordinated to Mr. Cooper's predominant goal of using ethnicity in his proposed redistricting plans (and in the

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case of Hypothetical Plan E, representational equality was subordinated). This is permissible only under the limited circumstances of serving a compelling state interest. *Vera*, 517 U.S. at 958-59 (plurality). Plaintiffs may assert that Mr. Cooper's proposed redistricting plans are intended to remedy a Section 2 violation, and therefore serve such an interest. But this would put the cart before the horse: Plaintiffs have not proven that any Section 2 violation exists, and there is no interest in remedying a nonexistent violation. Plaintiffs cannot utilize an unlawful practice in an attempt to prove the alleged existence of a different unlawful practice. Accordingly, this Court should dismiss Plaintiffs' claim on constitutional grounds.

IV. CONCLUSION

For the reasons stated herein, Defendants respectfully request that this Court dismiss Plaintiffs' claim with prejudice.

RESPECTFULLY SUBMITTED this 1st day of July, 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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DATED this 1st day of July, 2014

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