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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

REPLY IN SUPPORT OF
DEFENDANTS' MOTION FOR
SUMMARY JUDGMENT

Telephonic Argument
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I. INTRODUCTION

Plaintiffs' response relies almost exclusively on the argument that because no court has squarely characterized electoral equality as a traditional redistricting criterion, the relative voting strength of adult citizens has no place within Section 2 litigation. However, this contention does not defeat Defendants' summary judgment motion. The Supreme Court has recognized that total population equality—which Plaintiffs acknowledge is both a constitutional precept and a traditional redistricting criterion—is significant only because it usually serves as a proxy for electoral equality. Accordingly, electoral equality must be given the same weight as total population equality under the first *Gingles* factor's compactness inquiry. Because Plaintiffs failed to attempt to balance electoral equality along with other traditional redistricting criteria and constitutionally-protected principles, this Court should dismiss Plaintiffs' claim for failing to satisfy their burden under the first prong of *Gingles*.

The remainder of Plaintiffs' response consists mostly of misrepresentations and distortions of Defendants' arguments. It remains undisputed, however, that Plaintiffs' expert, William Cooper, wholly ignored the extreme variance in the value of a vote among most of his proposed plans.¹ Plaintiffs try to justify this

¹ As explained in Defendants' summary judgment motion, Mr. Cooper attempted to equalize the number of eligible voters (and thus the value of votes) throughout his districts in Hypothetical Plan E. However, Mr. Cooper testified that he did not believe Hypothetical Plan E should be used to satisfy the first *Gingles* factor or as a remedy. ECF No. 68 [Defendants' Statement of Material Facts at ¶ 32]. More

neglect by arguing that voting strength does not matter in Section 2 litigation. As demonstrated below, however, this contention cannot be squared with either the Supreme Court's pronouncements on electoral equality or Section 2's prohibition on minority vote dilution.

II. ARGUMENT

A. **Plaintiffs Misrepresent Defendants' Argument Regarding Electoral Equality**

Defendants' summary judgment motion contends that this Court should dismiss Plaintiffs' claim under Section 2 of the Voting Rights Act, 42 U.S.C. § 1973,² because Plaintiffs have failed to carry their burden under the first *Gingles*

importantly, Mr. Cooper equalized the number of eligible voters while ignoring the total population distribution among his districts, which is simply substituting one neglected principle for another.² Defendants' summary judgment motion inadvertently omitted a portion of the language from 42 U.S.C. § 1973(a): "No voting qualification or prerequisite to voting or 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) (omitted language italicized); *compare* ECF No. 67 at 2.

² Defendants' summary judgment motion inadvertently omitted a portion of the language from 42 U.S.C. § 1973(a): "No voting qualification or prerequisite to voting or 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

factor's compactness inquiry by wholly disregarding electoral equality. Although Plaintiffs engage this argument at points throughout their response, Plaintiffs frequently conflate Defendants' position with the debate over the proper measurement to apportion districts. These are two distinct issues. As such, Defendants seek to clarify their position before addressing Plaintiffs' substantive responses.

Plaintiffs begin their response by asserting that the Ninth Circuit has "expressly rejected" the "legal premise" on which Defendants' summary judgment motion "rests." *Pls.' Mot.* at 1. By "legal premise," Plaintiffs are referring to the use of citizen, voting-age population ("CVAP") as an apportionment basis. The Ninth Circuit rejected this "legal premise" in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990) by holding that total population (*i.e.*, population regardless of age or citizenship) must be used to apportion districts.³

race or color." 42 U.S.C. § 1973(a) (omitted language italicized); *compare* ECF No. 67 at 2.

³ Defendants note, however, that the mandatory use of total population as an apportionment basis conflicts with both the Fourth and Fifth Circuits, which permit either CVAP or total population to be used. *See Daly v. Hunt*, 93 F.3d 1212, 1227 (4th Cir. 1996) (concluding that "representational equality is at least as important as electoral equality in a representative democracy" and holding that the choice of apportionment basis is "quintessentially a decision that should be made by the state, not the federal courts"); *Chen v. City of Houston*, 206 F.3d 502, 526, 528 (5th Cir. 2000) (approving of *Daly* and declining to follow *Garza*,

1 However, Plaintiffs err by asserting that Defendants' summary judgment
 2 motion "rests" on this "legal premise." *Pls.' Mot.* at 1. It does not. Defendants do
 3 not dispute that Plaintiffs are obligated to create districts with roughly equal total
 4 populations under the first *Gingles* factor. ECF No. 67 [Defendants' Summary
 5 Judgment Motion] at 9, 14. Rather, Defendants' motion contends that electoral
 6 equality is a constitutionally-protected principle that must be given significance
 7 comparable to total population equality within the first *Gingles* factor's
 8 compactness inquiry. Therefore, Plaintiffs may not apportion districts based on
 9 total population under the first *Gingles* factor while completely ignoring the
 10 extreme CVAP imbalances among Mr. Cooper's districts.

11 Moreover, *Garza* and this case are both procedurally and substantively
 12 distinct. In *Garza*, the County of Los Angeles had appealed the District Court's
 13 remedial order imposing a redistricting plan that apportioned districts based on
 14 total population. *Garza*, 918 F.2d at 768. The County challenged the plan because
 15 it used total population rather than CVAP as an apportionment basis. *Id.* at 773.
 16 The *Garza* majority viewed the County's challenge as requiring a binary choice⁴
 17 between total population and CVAP as an apportionment basis.

18 Although the majority chose the former, it would be misconceived to
 19 argue—as Plaintiffs do—that *Garza* permits Section 2 plaintiffs to entirely ignore

21 explaining that the Supreme Court has offered a "compelling rejection" of the
 22 *Garza* majority view that districts must be apportioned based on total population)
 23 (citing *Burns v. Richardson*, 384 U.S. 73, 92 (1966)).

24 ⁴ As noted, other Circuits have left the choice up to local governments. *Daly*, 93
 25 F.3d at 1227; *Chen*, 206 F.3d at 526-28.

1 electoral equality under the first *Gingles* factor's compactness analysis. That issue
2 was not before the *Garza* court because the County was challenging the
3 apportionment basis used in a court-ordered remedial redistricting plan. The
4 County was not arguing that the plaintiffs have failed to carry their burden under
5 the first *Gingles* factor, as Defendants do here. And although Defendants cite to
6 then-Judge Kozinski's dissent in *Garza*, Defendants do so to highlight his
7 discussion of Supreme Court precedent that recognizes electoral equality as a
8 constitutionally-protected principle.

9 Defendants' summary judgment motion "rests" on electoral equality as a
10 constitutional precept, not as an apportionment basis. *Pls.' Mot.* at 1. Thus,
11 Plaintiffs err by claiming that *Garza* "all but forecloses Defendants' claim that a
12 districting plan must take voting population disparities into account."⁵ *Pls.' Mot.*
13 at 5. Because Defendants' argument acknowledges the use of total population as
14
15

16 ⁵ Plaintiffs also misrepresent Defendants' argument by citing *Kalson v. Paterson*,
17 542 F.3d 281 (2d Cir. 2008) as analogous support to suggest that Defendants'
18 argument in this case is "meritless" and "insubstantial." *Pls.' Resp.* at 10 n.2.
19 However, *Kalson* involved a challenge to New York State's congressional
20 districts from a registered voter who argued that Article I, Section 2 of the
21 Constitution required members of the House of Representatives to be elected
22 from districts that had equal voting-age populations (not *citizen*, voting-age
23 populations). The Second Circuit rejected this claim, which is entirely different
24 from Defendants' argument in this case.
25

1 an apportionment basis, the Ninth Circuit's *Garza* decision does not undermine
2 Defendants' position.

3 **B. Electoral Equality is a Constitutionally-Protected Principle That**
4 **Cannot Be Ignored Under the First *Gingles* Factor's Compactness**
5 **Inquiry**

6 Plaintiffs' primary counterargument is that no court has held that electoral
7 equality is a traditional redistricting criterion, and therefore it has no place within
8 the first *Gingles* factor's compactness analysis. *Pls.' Mot.* at 2-10. However, the
9 absence of a court squarely classifying electoral equality as a traditional
10 redistricting criterion does not defeat Defendants' summary judgment motion
11 because electoral equality has a historical and constitutional pedigree that requires
12 its inclusion within the first *Gingles* factor.

13 As Plaintiffs recognize, at least one traditional redistricting criterion—
14 “population equality” (*i.e.*, total population regardless of age or citizenship)—is a
15 “basic constitutional principle.” *Pls.' Mot.* at 3. Electoral equality, however, has
16 an arguably greater constitutional heritage than total population equality. Indeed,
17 the Supreme Court has recognized that total population equality is critical because
18 it normally serves as a proxy for electoral equality: “Whatever the means of
19 accomplish[ing]” the “arrange[ment] of legislative districts,” the “overriding
20 objective must be equality of population among the various districts, *so that* the
21 vote of any citizen is approximately equal in weight to that of any other citizen in
22 the State.” *Reynolds v. Sims*, 377 U.S. 533, 578-79 (1964) (emphasis added); *see*
23 *also Gaffney v. Cummings*, 412 U.S. 735, 746 (1973) (“So, too, if it is the weight
24 of a person's vote that matters, total population – even if stable and accurately
25 taken – may not actually reflect that body of voters *whose votes must be counted*

1 *and weighed for purposes of reapportionment, because ‘census persons’ are not*
2 *voters.’”) (emphasis added).*

3 The *Reynolds* Court took great pains to express its disapproval of extreme
4 electoral imbalance:

5 [I]f a State should provide that the votes of citizens in one part of the
6 State should be given two times, or five times, or 10 times the weight
7 of votes of citizens in another part of the State, it could hardly be
8 contended that the right to vote of those residing in the disfavored
9 areas had not been effectively diluted. It would appear extraordinary
10 to suggest that a State could be constitutionally permitted to enact a
11 law providing that certain of the State’s voters could vote two, five, or
12 10 times for their legislative representatives, while voters living
elsewhere could vote only once. And it is inconceivable that a state
law to the effect that, in counting votes for legislators, the votes of
citizens in one part of the State would be multiplied by two, five, or
10, while the votes of persons in another area would be counted only
at face value, could be constitutionally sustainable.

13 *Id.* at 562-63.

14 Thus, Supreme Court precedent plainly establishes that electoral equality is
15 a constitutionally-protected principle: “Diluting the weight of votes because of
16 place of residence impairs basic constitutional rights under the Fourteenth
17 Amendment just as much as invidious discrimination based on factors such as
18 race or economic status” *Reynolds*, 377 U.S. at 566.

19
20 Plaintiffs will likely object that, regardless of the constitutional significance
21 of electoral equality, courts have not included it among the traditional
22 redistricting criteria and it therefore does not belong within the first *Gingles*
23 factor’s compactness analysis. However, at least one court has used language that
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25

1 strongly suggests a willingness to consider additional elements.⁶ For example, in
 2 *Johnson v. Miller*, 922 F. Supp. 1556 (S.D. Ga. 1995), the majority of a three-
 3 judge panel explained that it declined to draw a second majority-minority district
 4 under Section 2 of the Voting Rights Act because to do so would “require us to
 5 subordinate Georgia’s traditional districting policies and consider race
 6 predominantly, to the exclusion of *constitutional norms* and common sense.” *Id.*
 7 at 1566 (emphasis added).

8 As explained above, total population equality is both a constitutional tenet
 9 and a traditional redistricting criterion that derives its significance because it is
 10 normally a proxy for electoral equality. *Reynolds*, 377 U.S. at 578-79; *Gaffney*,
 11 412 U.S. at 746. As such, electoral equality should be given the same weight as
 12 total population within the first *Gingles* factor.

13 Additionally, the Supreme Court has indicated that the criteria and norms
 14 used in redistricting cases can evolve over time: “Lower courts can and assuredly
 15 will work out more concrete and specific standards for evaluating state legislative
 16 apportionment schemes in the context of actual litigation.” *Reynolds*, 377 U.S. at
 17 578. Given the unusual demographics of the City, this case presents an

18
 19 ⁶ To be sure, Defendants do not concede that electoral equality is necessarily
 20 excluded from the category of traditional redistricting criteria. As Plaintiffs point
 21 out, these criteria are important because “they are objective factors that may
 22 serve to defeat a claim that a district has been gerrymandered on racial lines.”
 23 *Pls.’ Mot.* at 3 (quoting *Shaw v. Reno*, 509 U.S. 630, 647 (1993)). Electoral
 24 equality can be mathematically measured, and is thus an “objective factor[]” that
 25 may also indicate the presence of a racial gerrymander. *Shaw*, 509 at 647.

1 opportunity to acknowledge the status of electoral equality as a constitutionally-
2 protected principle that belongs within the first *Gingles* factor.

3 The City contains the type of “demographic abnormality” that then-Judge
4 Kozinski referenced in his *Garza* dissent. *Garza*, 918 F.2d at 781. That is, there
5 are “significant demographic variations in the proportion of voting age citizens to
6 total population.” *Id.* As Defendants’ expert demographer, Dr. Peter Morrison has
7 shown in his declaration filed along with this reply, the City’s “demographic
8 abnormality” results in a manifest tension between creating a majority-minority
9 district and reducing the imbalance in eligible voter allocation among Mr.
10 Cooper’s districts. *Statement of Material Facts in Support of Defendants’ Reply*
11 (August 5, 2014), ¶¶ 1-4. Because of this conflict, Dr. Morrison has concluded
12 that reducing the maximum CVAP deviation to 24% or 30% (from the current
13 levels in Mr. Cooper’s plans of 60% to 70%, but still well above the 10%
14 maximum total population deviation typically allowed by courts) would make it
15 mathematically impossible to create a majority-minority district under the first
16 *Gingles* factor. *Id.* at ¶ 3. Accordingly, this case is well-suited to “work out more
17 concrete and specific standards” regarding electoral equality within the first
18 *Gingles* factor. *Reynolds*, 377 U.S. at 578.

19 Finally, recognizing the importance of electoral equality would be
20 consistent with the Supreme Court’s guidance that, whatever “concrete and
21 specific standards” courts may adopt over time, the “overriding objective must be
22 substantial equality of population among the various districts, *so that* the vote of
23 any citizen is approximately equal in weight to that of any other citizen in the
24 State.” *Reynolds*, 377 U.S. at 578-79 (emphasis added). Requiring that Plaintiffs
25

1 account for electoral equality under the first *Gingles* factor would fulfill that
2 objective.

3 **C. Defendants Have Not Conceded That Their Current Election**
4 **System Suffers From Electoral Imbalance**

5 Plaintiffs claim that Defendants have “concede[d]” that their “primary
6 electoral districts suffer from the same electoral imbalance they argue nullifies
7 Plaintiffs’ demonstrative plans.” *Pls. Mot.* at 8. This is misleading. The City’s
8 primary districts are relevant to only four of seven City Council positions, and
9 only if three or more candidates are running for one of those seats. ECF No. 68
10 [Defendants’ Statement of Material Facts] at ¶¶ 1-4. Although the City’s four
11 districts have some variation in the number of eligible voters, this does not mean
12 that the City “suffers” from the same fatal flaw as Plaintiffs’ proposed
13 redistricting plans. *Id.*

14 To the contrary, the City’s current election system precludes any potential
15 electoral imbalances because the entire city electorate chooses all seven
16 Councilmembers during the general elections. The Supreme Court has indicated
17 that electoral imbalance does not exist in such at-large systems. *See Hadley v.*
18 *Junior College District*, 397 U.S. 50, 58 (1970) (“Since all the officials in that
19 case were elected at large, the right of each voter was given equal treatment.”)
20 Accordingly, Plaintiffs’ attempt to equate the City’s current election system with
21 their proposed redistricting plans falls short.

22 **D. Plaintiffs Confuse Two Different Types of Vote Dilution**

23 Plaintiffs deny that their claim should be dismissed on the alternative basis
24 of illegality. Plaintiffs argue that Defendants “claim of illegality is premature”
25 because “Defendants cannot credibly argue that Plaintiffs’ Section 2 claim
necessitates only one kind of remedy and therefore Plaintiffs have necessarily

1 violated Section 2 merely by bringing the claim.” *Pls.’ Mot.* at 11. However,
2 Plaintiffs have established that they intend to pursue “only one kind of remedy.”
3 *Id.* Mr. Cooper, testified that he believed only three of his seven proposed
4 redistricting plans should be a starting point in the remedy phase. ECF No. 68
5 [Defendants’ Statement of Material Facts] at 16 n.6. Each of these three plans are
6 composed of seven, single-member districts with one majority-minority district.
7 All three plans, moreover, contain extreme imbalances in the allocation of eligible
8 voters. *Id.* at 12, 17. Thus, Defendants can “credibly argue” that Plaintiffs’
9 Section 2 claim requires only one type of remedy because Plaintiffs have
10 proposed only one type. *Pls.’ Mot.* at 11.

11 Next, Plaintiffs deny that their proposed plans will have any illegal dilutive
12 effect on minorities in the City. *Pls.’ Mot.* at 11. In support, Plaintiffs primarily
13 rely on a case involving a redistricting plan that contained two majority-minority
14 districts. *Gomez v. Watsonville*, 863 F.2d 1407, 1414 (9th Cir. 1988). The District
15 Court rejected the redistricting plan on the ground that most Latinos resided
16 outside those districts. *Id.* Presumably, the District Court disapproved of the plan
17 because this Latino majority would not have the same putative opportunity to
18 elect their candidate of choice as Latinos living within the two majority-minority
19 districts. In overturning the District Court’s ruling, the Ninth Circuit explained the
20 plaintiffs needed only to show that Latinos were “capable of constituting a
21 majority in at least one district” and that “[d]istricting plans with some members
22 of the minority group outside the minority-controlled districts are valid.” *Id.*

23 Defendants are not alleging that Plaintiffs’ Section 2 claim has the same
24 dilutive effect present in *Gomez*. There, the District Court believed that the
25 plaintiffs’ redistricting plan was diluting the Latino vote because it forced some

1 Latinos to reside in non-majority-minority districts, where they would not have
2 the same ostensible capability to elect their candidate of choice. Here, Plaintiffs’
3 proposed redistricting plans are dilutive because they contain extreme CVAP
4 variances among each district. As a result, eligible minority voters who reside in
5 districts with a high number of overall eligible voters will have their voting
6 strength “debased” by virtue of where they reside. *Reynolds*, 377 U.S. at 567.
7 This is “not a legitimate reason for . . . diluting the efficacy of [their] vote,” *id.* at
8 567, and it violates Section 2’s prohibition on “trad[ing] off the rights of some
9 members of a racial group against the rights of other members of that group.”
10 *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 437 (2006).
11 Thus, Plaintiffs’ reliance on *Gomez* does not defeat Defendants’ illegality claim.

12 Plaintiffs then argue that their claim does not have a dilutive effect because
13 Asians and Native Americans in the City are too few to comprise a hypothetical
14 majority-minority district and, therefore, those groups could not satisfy the first
15 *Gingles* factor of a potential Section 2 claim. *Pls.’ Mot.* at 13-14. Again, this
16 conflates two different concepts of vote dilution. Defendants are not arguing that
17 Plaintiffs’ proposed redistricting plans dilute the voting strength of these minority
18 groups by failing to create a majority-minority district for Asians or a majority-
19 minority district for Native Americans. Instead, Defendants contend that these
20 minority voters—no matter how few—will have their votes “shortchanged”
21 because Plaintiffs’ proposed redistricting plans would force them to reside in
22 districts with disproportionately high numbers of other eligible voters. *Board of*
23 *Estimate v. Morris*, 489 U.S. 688, 698 (1989).

24 In sum, Plaintiffs have failed to refute Defendants’ illegality argument. By
25 completely ignoring electoral equality in their attempt to satisfy the first *Gingles*

factor, Plaintiffs' claim violates Section 2's own prohibition on minority vote dilution.

E. Plaintiffs' Arguments Regarding Defendants' Racial Gerrymander Claim Are Unpersuasive

Plaintiffs contend that Defendants' racial gerrymandering argument fails due to the absence of an explicit allegation that ethnicity was the "predominant factor" motivating Mr. Cooper's creation of his proposed redistricting plans. *Pls.' Mot.* at 14-15. The record, however, establishes that ethnicity was, in fact, the overriding principle guiding Mr. Cooper's efforts.

In his deposition, Mr. Cooper admitted that his work involved "aggregat[ing] the most heavily Latino contiguous areas so [he] could boost the Latino share among whatever number of voting-age citizens that proposed district happen to encompass." ECF No. 68 [Defendants' Statement of Material Facts] at ¶ 36. Mr. Cooper then stated that he "looked at other factors" such as "precinct lines," but he did not articulate the weight that he gave to each factor. *Id.* at ¶ 38. However, he admitted that he did not assign any significance to electoral equality: When asked if he considered "electoral imbalance" in the creation of his viable redistricting plans,⁷ he admitted that he "didn't look at that question carefully." *Id.* at ¶ 44. The maximum CVAP deviations among his viable plans (ranging

⁷ By "viable redistricting plans," Defendants are referring to Mr. Cooper's Illustrative Plans 1 and 2 and Hypothetical Plans A, B, and C. Mr. Cooper stated that his other plans, Hypothetical Plans D and E, should not be relied on to satisfy the first *Gingles* factor and would not be appropriate remedies. ECF No. at 68 at ¶ 32.

1 between 60% to more than 70%) establish that he likely did not reflect on this
2 question at all. ECF No. 67 [Defendants' Summary Judgment Motion] at 10.

3 Mr. Cooper, of course, did not testify outright that ethnicity was the
4 "predominant factor" motivating the creation of his plans. *Miller v. Johnson*, 515
5 U.S. 900, 916 (1995). But his "substantial disregard," *Miller*, 515 U.S. at 928
6 (O'Connor, J., concurring), for electoral equality can only be explained by a
7 predominant concern for ethnicity—that is, by a drive to "aggregate the most
8 heavily Latino contiguous areas so [he] could boost the Latino share among
9 whatever number of voting-age citizens that proposed district happen to
10 encompass." ECF No. 68 at ¶ 36.

11 Moreover, Mr. Cooper's proposed redistricting plans are not exercises in
12 mere "race-conscious redistricting." *Miller*, 509 U.S. at 642. Race-conscious
13 redistricting cannot occur when a proposed redistricting plan is "so extremely
14 irregular on its face that it rationally can be viewed only as an effort to segregate
15 the races for purposes of voting, without regard for traditional districting
16 principles and without sufficiently compelling justification." *Id.* The maximum
17 CVAP deviations in Mr. Cooper's viable redistricting plans (between 60% to
18 70%) exemplify the severe variability that signals racial gerrymandering.

19 As the Fourth Circuit has noted, "[T]here is a level of population disparity
20 beyond which a state can offer no possible justification" other than racial
21 gerrymandering. *Daly*, 93 F.3d at 1218. Although the Fourth Circuit could not
22 identify "precisely what that upper level is," it noted that the Supreme Court "has
23 stated in dictum that a maximum deviation of 16.4% 'may well approach
24 tolerable limits.'" *Id.* (quoting *Mahan v. Howell*, 410 U.S. 315, 329 (1973)). Mr.
25 Cooper's maximum CVAP deviations of 60% to 70% far exceed this benchmark.

1 Mr. Cooper thus subordinated electoral equality to the “predominant factor” of
2 ethnicity. *Miller*, 515 U.S. at 917.

3 Plaintiffs cite *George State Conference of the NAACP v. Fayette County*
4 *Board of Commissioners*, 950 F. Supp. 2d 1294 (N.D. Ga. 2013) for the
5 proposition that courts should first determine whether the plaintiff has proven
6 their Section 2 claim before engaging in gerrymander analysis under the Equal
7 Protection Clause. *Pls.’ Mot.* at 16-17. In that case, however, the defendant had
8 argued that the plaintiff did not satisfy the first *Gingles* factor solely because
9 “race was the predominant consideration in creating the [plaintiff’s proposed
10 redistricting] plan.” *Fayette County*, 950 F. Supp. 2d at 1304. It does not appear
11 that the defendant presented any evidence that the plaintiff actually disregarded
12 traditional redistricting criteria or constitutional norms, which distinguishes
13 *Fayette County* from this case. As Defendants detailed in their summary
14 judgment motion, Mr. Cooper’s own figures establish extreme CVAP variances
15 among his districts. ECF No. 67 at 10. Thus, *Fayette County* did not address
16 whether a Section 2 plaintiff may use race or ethnicity as an overriding objective
17 in their proposed redistricting plans in the face of evidence that constitutional
18 precepts were completely ignored.

19 In any event, the District Court was careful to explain that the compactness
20 inquiry under the first *Gingles* factor is “distinct” from the gerrymander analysis.
21 *Fayette County*, 950 F. Supp. 2d at 1307. Even though the District Court
22 suggested that the gerrymander inquiry should be reserved until after a Section 2
23 claim has been adjudicated, the District Court emphasized that a Section 2
24 plaintiff must still prove during the liability phase that their proposed redistricting
25 plans satisfy the first *Gingles* factor’s compactness inquiry, *id.* at 1306-07, which

Defendants submit requires consideration of traditional redistricting criteria and constitutional norms, including electoral equality. Because Plaintiffs wholly ignored this “basic principle of representative government,” their claim should be dismissed for failing to satisfy the first *Gingles* factor or, in the alternative, because it violates Section 2’s prohibition on minority vote dilution. *Reynolds*, 377 U.S. at 555.

IV. CONCLUSION

It cannot reasonably be disputed that Plaintiffs’ expert, Mr. Cooper, completely neglected electoral equality when creating the proposed redistricting plans that Plaintiffs intend to rely on in this litigation. Plaintiffs attempt to excuse this by arguing that the relative voting strength of adult citizens has no place within Section 2 litigation. But this position cannot be squared with the Supreme Court precedent that confers constitutional protection on electoral equality; nor can it be reconciled with Section 2’s own prohibition on minority vote dilution. Accordingly, Defendants respectfully submit that this Court dismiss Plaintiff’s claim with prejudice.

RESPECTFULLY SUBMITTED this 5th day of August, 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:

Sarah Dunne
La Rond Baker
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FOUNDATION
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DATED this 5th day of August, 2014

s/ Yalda Biniazan
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