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UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF WASHINGTON

ROGELIO MONTES and MATEO ARTEAGA, Plaintiffs, v. CITY OF YAKIMA, et al., Defendants.	Case No. 12-CV-3108-TOR STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

The United States respectfully submits this Statement of Interest pursuant to 28 U.S.C. § 517, which authorizes the Attorney General to attend to the interests of

the United States in any pending suit. Given the Attorney General's broad authority to enforce the Voting Rights Act, *see* 42 U.S.C. § 1973j(d), the United States has a strong interest in the resolution of this matter, which implicates the interpretation of Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. Specifically, this case raises important questions about the appropriate population standard that a plaintiff should use when drawing illustrative election districts to establish that a city's at-large election system dilutes minority voting strength in violation of Section 2.

The defendants argue, among other things, that a plaintiff cannot prevail under Section 2 unless its illustrative districts contain approximately equal numbers of people and approximately equal numbers of eligible voters. The limited purpose of this Statement is to explain why defendants' interpretation of Section 2 lacks merit and therefore cannot support a grant of summary judgment in their favor. This Statement does not address any other issue pending before this Court.

I. BACKGROUND

The City of Yakima is governed by a seven-member city council. Members are elected at large to staggered four-year terms, and the city holds elections every two years. The city also uses a non-partisan top-two primary election system to nominate candidates for the general election. Candidates for four seats are nominated by election within four single-member residency districts, and candidates for the other three seats are nominated at large.

According to the 2010 Census, the city has a total population of 91,067 persons. Latinos make up 41.3% of the city's total population and 33.4% of the city's voting-age population. According to estimates from the 2008-2012 American

Community Survey, Latinos constitute approximately 22.7% of the city's citizen voting-age population.

Plaintiffs allege that no Latino candidate has ever been elected to the Yakima city council.

* * *

Two Latino voters brought this suit in 2012. They allege that the city's at-large method of electing its city council violates Section 2 by diluting the votes of Latino citizens. Compl., ECF No. 1.

Under Section 2, a claim of vote dilution ordinarily requires proof of three threshold conditions set forth in *Thornburg v. Gingles*, 478 U.S. 30, 47-49 (1986).[1] The first of these so-called *Gingles* preconditions requires the minority group "to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Id.* at 50.

To establish the first *Gingles* precondition in this case, the plaintiffs produced seven illustrative redistricting plans, each containing seven single-member districts, and each including at least one district in which Latino citizens would constitute a majority of the citizen voting-age population of that district. Ps.' Mot. Summ. J., ECF No. 64 at 17; Ps.' Statement of Undisputed Facts re Mot. Summ J., ECF No. 65 at 8-9.

The first five of the plaintiffs' illustrative redistricting plans used total population as the basis for apportioning the districts, so that each district in those

[1] This Statement of Interest does not address the second and third *Gingles* preconditions.

five plans contains approximately equal numbers of persons. Even though those districts are relatively equal in total population, there are differences among the plaintiffs' illustrative districts in citizen voting-age population. The majority-Latino districts contain fewer citizens of voting age than the majority-Anglo districts.

The plaintiffs' sixth and seventh illustrative redistricting plans used total citizen population and total citizen voting-age population, respectively, as the basis for apportioning the districts. Each district in those two plans contains approximately equal numbers of citizens or citizens of voting age. In those plans, however, there are differences among the districts in total population. The majority-Latino districts in those plans contain more total population than the majority-Anglo districts.

On July 1, 2014, the parties filed cross motions for summary judgment. Among other things, the defendants argue that they are entitled to summary judgment because the plaintiffs have not satisfied the first *Gingles* precondition. They contend that the first *Gingles* precondition requires the plaintiffs to use *both* total population and citizen voting-age population when drawing illustrative redistricting plans, so that each district in an illustrative plan is approximately equal in *both* total population and citizen voting-age population. Defs.' Mot. Summ. J., ECF No. 67.

II. SUMMARY JUDGMENT STANDARD

Under Rule 56 of the Federal Rules of Civil Procedure, a court shall grant summary judgment "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *accord Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986). In

deciding whether there is a genuine issue of material fact, the court must draw all justifiable inferences in the nonmoving party's favor and accept the nonmoving party's evidence as true. *Anderson*, 477 U.S. at 255. To determine which facts are "material," a court must look to the substantive law on which each claim rests. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A "genuine issue" is one whose resolution could establish an element of a claim or defense and, therefore, could affect the outcome of the action. *Id*.

III. ARGUMENT

The plaintiffs' use of total population as the basis for the apportionment of its illustrative redistricting plans is consistent with Supreme Court and Ninth Circuit precedent and is therefore an appropriate method of apportionment to satisfy the first *Gingles* precondition. *See Reynolds v. Sims*, 377 U.S. 533 (1964) (holding that districts *may* be apportioned based on total population); *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990) (holding, specifically in the Section 2 context, that districts *must* be apportioned based on total population rather than voting-age population when the difference matters). As a result, the Court should reject the defendants' argument and deny their motion for summary judgment on this issue.

A. Illustrative plans that use total population as the basis for apportioning single-member districts are not unconstitutional.

No court has ever required a plaintiff to use anything other than total population as the basis for apportioning single-member districts in order to satisfy the first *Gingles* precondition in a vote-dilution case. The Supreme Court and lower courts have ruled on the issue of what apportionment bases for redistricting single-member districts are appropriate, holding that using total population as the basis for

apportionment is acceptable. Moreover, the Ninth Circuit requires it in some circumstances.

Using Total Population to Apportion Districts is Permissible Under Supreme Court Precedent.

In *Reynolds* and its progeny, the Supreme Court consistently has recognized that it is permissible for a municipality to apportion based on total population rather than citizen voting age population in order to satisfy the Equal Protection Clause's one-person, one-vote requirement. The *Reynolds* Court held that "the Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." 377 U.S. at 568. Although total population figures were the basis of comparison among the districts at issue in that case, the Court did not address whether total population figures would be the *only* permissible measure of the "population" in drawing district lines. As the Court later noted in *Burns v. Richardson*, 384 U.S. 73, 91 (1966), the discussion in *Reynolds* "carefully left open the question what population was being referred to," addressing "substantial equivalence in terms of voter population or citizen population, making no distinction between the acceptability of such a test and a test based on total population." *See Reynolds*, 377 U.S. at 577.

The rule of population equality "is a principle designed to prevent debasement of voting power." *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969). But the Court in *Reynolds* indicated that the principle of one-person, one-vote serves the dual ideals of equality of representation and voter equality. *See, e.g.*, *Reynolds*, 377 U.S. at 565-566 ("the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment"); *id.* at 565 ("Full and effective participation by all citizens in state government requires, therefore, that

each citizen have an equally effective voice in the election of members of his state legislature."). In many cases, the goals of one-person, one-vote and voter equality will be advanced regardless of whether a jurisdiction draws district lines based on total population figures or citizen voting age population figures because each figure is often a good proxy for the other. But in some cases, such as here, the choice between the two sets of numbers will have a material effect on how districts may be drawn.

The Supreme Court has never held that jurisdictions must use one particular measure of population in state or local districting; it has instead indicated that that choice should be left to states. In *Burns*, the Court rejected an argument that the Equal Protection Clause's guarantee of one-person, one-vote required the State of Hawaii to use total population figures rather than registered voter figures in drawing district lines. 384 U.S. at 92. It held, rather, that the decision whether to include groups such as "aliens, transients, short-term or temporary residents, or persons denied the vote for conviction of crime in the apportionment base by which [a state's] legislators are distributed and against which compliance with the Equal Protection Clause is to be measured ... involves choices about the nature of representation with which [the Court had] been shown no constitutionally founded reason to interfere." *Id*. The *Burns* reasoning demonstrates that a state is not forbidden from using total population figures to draw districts.

The Ninth Circuit Has Held That Using Total Population to Apportion Single-Member Districts is Appropriate, and, in Some Circumstances, Required.

The Ninth Circuit in *Garza* followed Supreme Court precedent in finding that use of total population as a basis for apportionment is constitutionally permissible.[2] In *Garza*, the county defendant challenged a court-ordered redistricting plan that created a Hispanic majority district as a remedy for a violation of Section 2 of the Voting Rights Act, arguing that the remedial plan unconstitutionally weighed votes of citizens in that district more heavily than those in other districts. 918 F.2d at 773. The majority in *Garza* rejected the county's contention that under *Reynolds*, the district court was required to formulate a remedy in which each one of the districts had an equal number of eligible voters. *Id*. at 774-775. The *Garza* majority held that although Supreme Court precedent "seems to permit states to consider the distribution of the voting population as well as that of the total population in constructing electoral districts," 918 F.2d at 774 (citing *Burns*, 384 U.S. at 91-92), it "does not ... *require* states to do so." *Id*. (emphasis in original). Accordingly, the *Garza* majority ruled that a court-approved plan designed to equalize the total number of persons in each district satisfied *Reynolds*. *Id*.

[2] Other than the Ninth Circuit, two other courts of appeals (the Fifth and the Fourth Circuits) have also considered and rejected claims identical to defendants' claims that using total population as the basis for apportionment is unconstitutional. *See Chen v. City of Houston*, 206 F.3d 502, 523 (5th Cir. 2000), cert. denied, 532 U.S. 1046 (2001) and *Lepak v. City of Irving*, 453 Fed.Appx. 522 (5th Cir. 2011), cert. denied, 133 S.Ct. 1725 (2013); *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996).

The *Garza* majority further found that when it results in population inequality, the use of citizen voting-age population as the basis for apportionment burdens the right to equal representation and would therefore "constitute a denial of equal protection." *Id.* at 774-776. "The purpose of redistricting is not only to protect the voting power of citizens" but also equally "to ensure equal representation for equal numbers of people." *Id.* at 775 (internal quotation marks and citations omitted).

B. Constitutional values are furthered by the use of total population.

The use of total population supports the constitutional values of equality and of representative government. Population equality will not always accommodate the twin goals of equality of representation and equality of voting power in precisely equal measure. As the population of a district changes, the figures on which apportionment is based are inherently imprecise. The inhabitants of a district who at the time of apportionment may not be citizens or eligible to vote may become eligible voters before reapportionment occurs. *Gaffney v. Cummings*, 412 U.S. 735, 744-746 & n.10.

The Supreme Court has explicitly recognized that population-based redistricting need not precisely equalize voting power. *Gaffney* observed that even though decennial apportionments are based primarily on census figures, "[t]he proportion of the census population too young to vote or disqualified by alienage or nonresidence varies substantially among the States and among localities within the States." 412 U.S. at 746-747. The Court noted that the 1970 Census, for example, showed that "New York has a 29% variation in age-eligible voters among its congressional districts, while California has a 25% and Illinois a 20% variation." *Id.* at 747 n.13. The Court recognized that population-based apportionment would by

necessity include individuals who were not eligible to vote, including "aliens, nonresident military personnel, [and] nonresident students." *Id.* at 747. Despite these disparities, the Court was not concerned that the practice in these states of apportioning districts on the basis of total population violated the Fourteenth Amendment. On the contrary, the Court cited the inherent imprecision in population-based apportionment as the reason why "[f]air and effective representation ... does not depend solely on mathematical equality among district populations. There are other relevant factors to be taken into account and other important interests that states may legitimately be mindful of." *Id.* at 748-749 (footnote omitted).

The rule of population equality is designed in part to prevent "diminution of access to elected representatives." *Kirkpatrick*, 394 U.S. at 531. Under the representative form of government, an elected official represents all persons residing within his or her district, whether or not they are eligible to vote and whether or not they voted for the official in the preceding election. *Davis v. Bandemer*, 478 U.S. 109, 132 (1986) (plurality). Because elected officials represent all individuals in their jurisdiction, population equality therefore "assures that all persons living within a district – whether eligible to vote or not – have roughly equal representation in the governing body." *Garza*, 918 F.2d at 781.

Apportionment based on population equality recognizes the representative's role in providing services to the residents of the district. An elected official therefore has a duty to ensure that the government addresses the concerns of his or her constituents, regardless of their ability to vote, and ensure that his or her district receives its fair share of equal government services. *See, e.g.*, *Garza*, 918 F.2d at

781 ("[a] principle of equal representation serves important purposes," including assuring "that constituents have more or less equal access to their elected officials" and assuring "that constituents are not afforded unequal government services depending on the size of the population in their districts.").

In sum, it is entirely appropriate for a jurisdiction to recognize that its government represents all people, including those who are ineligible to vote or who choose not to vote. *See Reynolds*, 377 U.S. at 560-561 ("the fundamental principle of representative government is one of equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a state").

C. Strict reliance on citizen voting age population would disrupt a broad range of well-established and valid apportionment systems.

Redistricting manuals relied on by states and local jurisdictions across the United States have long made clear that, in practice, total population is the standard baseline used to draw districts that comply with the one-person, one-vote requirement. For example, the "Guide to Redistricting" published by the Office of the Secretary of State Certification and Training Program and the Washington State Redistricting Commission, in partnership with the Washington County Election Administrators, *available at* http://www.sos.wa.gov/_assets/elections/RedistrictingGuide.pdf, revised October 2011, instructs that "[e]ach [county legislative authority] district shall comprise as nearly as possible equal portions of the population of the county." Yakima County's board of commissioner districts are, by ordinance, consistent with the criteria set forth in RCW 29A.76.010(4), in that, among other criteria, "the commissioner

districts are as nearly equal in population as possible." *See* Board of Yakima County Commissioners Ordinance No. 9-2011, *available at* http://www.yakimacounty.us/cmrs/ordinance/2011/9_2011.pdf. In fact, the City of Yakima's city charter requires, for its residency districts, that the "City shall be divided ... into four districts as nearly equal in population as practicable." Charter, Ordinance No. 261, Article II, Section 1(B)(1), *available at* http://www.codepublishing.com/WA/yakima/html/yakimach.html#II.1.

Additional examples can be found in the manual on reapportionment published by the National Conference of State Legislatures in advance of the 1990 redistricting cycle, which states that to measure population equality among districts, "a logical starting point is the 'ideal' district population," explaining that in "a single-member district plan, the 'ideal' district population is equal to the total state population divided by the total number of districts." National Conference of State Legislatures Reapportionment Task Force, *Reapportionment Law: The 1990s* at 18 (1989). This guidance was repeated during the 2000 redistricting cycle and 2010 redistricting cycle. *See, e.g.*, J. Gerald Hebert et al., *The Realist's Guide to Redistricting* at 1 (2000) ("Perhaps the most fundamental requirement the law imposes on redistricters is 'population equality'.... In practical terms, population equality means that each district in an apportionment plan should have roughly, if not precisely, the same number of people as every other district."); National Conference of State Legislatures, *Redistricting Law 2000* at 21 (1999) (same); J. Gerald Hebert, et al., *The Realist's Guide to Redistricting* at 1 (2d ed. 2010) (same); National Conference of State Legislatures, *Redistricting Law 2010* at 23 (2009) (same). A ruling that the use of total population as an apportionment measure is

unconstitutional not only would conflict with binding precedent, but also would be disruptive to normal redistricting.

IV. CONCLUSION

The plaintiffs' use of total population as the basis for drawing districts satisfies the first *Gingles* precondition because it is constitutionally acceptable as an apportionment method under binding Supreme Court precedent and is constitutionally mandated here under binding Ninth Circuit precedent. Accordingly, this Court should deny the defendants' motion for summary judgment on that issue.

RESPECTFULLY SUBMITTED this 18th day of August, 2014.

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CERTIFICATE OF SERVICE

I hereby certify that on August 18, 2014, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the email addresses indicated on the Court's Electronic Mail Notice List.

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