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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

RESPONSE TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Telephonic Argument
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I. INTRODUCTION

Section 2 vote dilution claims "require[] 'an intensely local appraisal of the design and impact' of the contested electoral mechanisms." *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986) (quoting *White v. Regester*, 412 U.S. 755, 769 (1973)). Each claim depends on the "trial court's particular familiarity with the indigenous political reality" and a "searching practical evaluation of the 'past and present reality'" of the challenged jurisdiction. *Gingles*, 478 U.S. at 79; *id.* at 45 (quoting S. Rep. No. 97-417, at 30 (1982), *reprinted in* 1982 U.S.C.A.A.N. 177, 190). Despite the complex and "fact-intensive" nature of vote dilution claims, Plaintiffs argue that they are entitled to summary judgment. *Gingles*, 478 U.S. at 46.

They are mistaken. Plaintiffs' motion is premature and relies on a slanted and incomplete presentation of the factual record and case law interpreting Section 2 vote dilution claims. In general, vote dilution claims are not amenable to pretrial determinations. This case, however, is especially incompatible with such a disposition.

Genuine issues of material fact preclude summary judgment on each component of Plaintiffs' burden. First, summary judgment is not warranted for any of the three *Gingles* factors. Plaintiffs' interpretation of the *Gingles* factors is flawed, as it reduces application of the factors to a rote mathematical exercise and ignores the Supreme Court's mandate that vote dilution claims should not be "based on abstract manipulation of numbers," and that "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *Holder v. Hall*, 512 U.S. 874, 955 (1994); *Voinovich v. Quilter*, 507 U.S. 146, 158 (1993). For this reason, Plaintiffs have failed to carry their burden under the

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first *Gingles* factor and summary judgment should be granted in favor of Defendants, not Plaintiffs. *See* Part III.D.1, *infra*; *see also* ECF No. 67 [Defendants' Summary Judgment Motion]. Notwithstanding Plaintiffs' failure to satisfy the first prong of *Gingles*, all three individual *Gingles* factors present genuine issues of material fact that demand further examination and analysis beyond what can be accomplished at the summary judgment phase.

Second, this Court should deny summary judgment as to the Senate factors, also known as the "totality of the circumstances" analysis. *Gingles*, 478 U.S. at 46. This analysis is not a mere formality. Yet Plaintiffs' treatment of the Senate factors is oversimplified and superficial, and offers a cursory examination of the evidentiary record. Upon closer examination, each Senate factor is far from undisputed. Whether taken as a whole or as individual factors, Plaintiffs are not entitled to summary judgment on the totality of the circumstances analysis.

In summary, this Court should either grant summary judgment in favor of Defendants on the first *Gingles* factor, or deny Plaintiffs' motion for summary judgment on all grounds and allow this case to proceed to trial, where a full opportunity to examine "all the circumstances in the jurisdiction" will be afforded. S. Rep. No. 97-417, at 27.

II. BACKGROUND

The City of Yakima adopted its current election system after voters approved a Charter amendment in November 1976. *Statement of Material Facts* ("*SMF*") at ¶ 1. At that time, less than 3,500 Latinos resided in the City, which had an overall population approaching 50,000. *SMF* at ¶ 2.

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35 years later, Proposition No. 1 was placed on the City ballot in August 2011. *SMF* at ¶ 3. This proposition would have abolished the City's election system and replaced it with seven single-member districts—the same relief sought by this lawsuit. *Id.* As a proponent of Proposition No. 1 urged the City Council, "Let our voters decide on our form of government!" *SMF* at ¶ 4. And they did: The proposition was rejected, receiving only 41.5% of the vote. *SMF* at ¶ 3.

One year after Proposition No. 1 failed, Plaintiffs Rogelio Montes and Mateo Arteaga sued the City and the seven Councilmembers who were serving at the time[1] under Section 2 of the Voting Rights Act, 42 U.S.C. § 1972. ECF No. 1 [Plaintiffs' Complaint]. Mr. Montes is a City resident who finished last among three candidates in an August 2011 district primary election for a seat on the City Council. *SMF* at ¶ 5. Mr. Arteaga is a City resident and director of the Educational Opportunities Center at Central Washington University. *SMF* at ¶ 6. Multiple law firms and non-profit legal advocacy groups represent Plaintiffs.

During two years of litigation, Defendants have produced more than 340,000 pages' worth of documents in response to Plaintiffs' numerous and broad discovery requests. *SMF* at ¶ 7. Plaintiffs have retained four expert witnesses from around the country, who combined have produced 11 reports totaling 342

[1] Since then, the only change has been the resignation of Councilmember Sara Bristol, who was replaced by an appointee, Thomas Dittmar.

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pages, not including curriculum vitae attached to the reports.[2] *SMF* at ¶ 8. Defendants have retained three experts who have produced 8 reports totaling 212 pages, also not including curriculum vitae.[3] *SMF* at ¶ 9. Despite the size and complexity of this litigation and the nature of the claim at issue, Plaintiffs now seek summary judgment, contending that there are no genuine issues remaining for trial. Plaintiffs' motion should be denied.

III. ARGUMENT

A. Summary Judgment Standard

"Summary judgment is appropriate only if the pleadings, the discovery, disclosure materials on file, and affidavits show that there is no genuine dispute as to any material fact and that the moving party is entitled to judgment as a matter of law." *Sprint PCS Assets, L.L.C. v. City of Palos Verdes Estates*, 583 F.3d 716, 720 (9th Cir. 2009) (citing Fed. R. Civ. P. 56(c)). Summary judgment should be granted "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986).

"[T]o avoid summary judgment, the non-movant need only 'designate specific facts showing that there is a genuine issue for trial.'" *Makaeff v. Trump*

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[2] Plaintiffs retained William Cooper for the first *Gingles* factor, Dr. Richard Engstrom for the second and third *Gingles* factors, and Dr. Luis Fraga and Dr. Frances Contreras for the Senate factors. *SMF* at ¶ 8.

[3] Defendants retained Dr. Peter Morrison for the first *Gingles* factor, Dr. John Alford for the second and third *Gingles* factors, and Dr. Stephan Thernstrom for the Senate factors.

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Univ., LLC, 736 F.3d 1180, 1189 (9th Cir. 2013) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 324 (1986)). Courts view the facts, and all reasonably inferences therefrom, in the light most favorable to the non-moving party. *Scott v. Harris*, 550 U.S. 372, 378 (2007). Resolving evidentiary disputes, such as making credibility determinations and weighing evidence, is inappropriate at the summary judgment stage. *Oswalt v. Resolute Indus.*, 642 F.3d 856, 861 (9th Cir. 2011) (citing *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

B. Plaintiffs' Overview of Section 2 is Incomplete

Defendants generally concur with Plaintiffs' articulation of the analytical framework of Section 2 vote dilution claims. Defendants agree that a Section 2 vote dilution claim calls for a two-part inquiry, composed of three *Gingles* factors and nine Senate factors, also known as the totality of the circumstances analysis. *Gingles*, 478 U.S. at 50; S. Rep. No. 97-417, at 28-29. Defendants also agree that Plaintiffs are not required to establish discriminatory intent. *Gingles*, 478 U.S. at 71. And Defendants do not dispute that under the first *Gingles* factor, the measure of a majority-minority district is citizen, voting-age population ("CVAP"). *Cano v. Davis*, 211 F. Supp. 2d 1208, 1233 (C.D. Cal. 2002).

In other respects, however, Plaintiffs' recitation of the Section 2 analysis is lacking. First, although the Supreme Court has acknowledged that at-large elections may result in vote dilution, it has also made clear that "electoral devices, such as at-large elections, may not be considered *per se* violative of § 2." *Gingles*, 478 U.S. at 46. Instead, "[p]laintiffs must demonstrate that, under the totality of the circumstances" of each case, "the devices result in unequal access to the electoral process." *Id.*

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Second, "[f]ailure to maximize" the voting power of a minority group "cannot be the measure of § 2." *Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994). The statute "'does not establish a right to proportional representation,'" *Chisom v. Roemer*, 501 U.S. 380, 393 (1991) (quoting S. Rep. No. 97-417, at 27), nor is it "a guarantee of success for minority-preferred candidates." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 428 (2006) ("*LULAC*").

Third, although some courts have opined that "'it will be only the very unusual case'" in which a plaintiff satisfies the *Gingles* factors but does not establish the Senate factors, the totality of the circumstances analysis is not a mere formality. *Pls.' Mot.* at 6-7 (quoting *NAACP v. City of Niagara Falls*, 65 F.3d 1002, 1019 n.21 (2d Cir. 1995)). In fact, the case Plaintiffs quote is an example of a plaintiff demonstrating the *Gingles* factors but ultimately losing on the Senate factors. *Niagara Falls*, 65 F.3d at 1005. "Satisfaction of [the *Gingles*] 'preconditions' is necessary, but not sufficient to establish liability under § 2." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 849 (5th Cir. 1993) (internal citations omitted) (quoting *Voinovich*, 507 U.S. at 158).

Fourth, contrary to the thrust of Plaintiffs' motion, analysis of a Section 2 vote dilution claim is not a rote mathematical exercise. Vote dilution claims should not be "based on abstract manipulation of numbers," *Holder*, 512 U.S. at 955, nor should they be "wedded, nor hamstrung by, blind adherence to statistical outcomes." *United States v. City of Euclid*, 580 F. Supp. 2d 584, 596 (N.D. Ohio 2008). The Supreme Court has mandated that "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim." *Voinovich*,

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507 U.S. at 158. Instead, each Section 2 claim fits uniquely within the "broader legal principles described in *Gingles*." *City of Euclid*, 580 F. Supp. 2d at 596. Plaintiffs' misconceived formulaic approach departs from the Supreme Court's guidance and disregards the accompanying legal and constitutional ramifications.

C. Section 2 Claims Are Not Amenable to Summary Judgment

Given the particularized nature of each Section 2 claim, it is not surprising that "[s]ummary judgment . . . is usually inappropriate in § 2 cases." *Bone Shirt v. Hazeltine*, No. 01-3032-KES, 2004 U.S. Dist. LEXIS 28778, at *24 (D. S. D. Jan. 22, 2004) (citing *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 940 (7th Cir. (1988)). The Supreme Court has held that vote dilution claims require "particular familiarity with the indigenous political reality" of the challenged jurisdiction. *Gingles*, 478 U.S. at 79. Summary judgment proceedings are unsuited to provide this holistic understanding. Section 2 requires a "searching practical evaluation of the 'past and present reality'" that pleadings, discovery, and declarations alone cannot provide. S. Rep. No. 97-417, at 30 (quoting *White*, 412 U.S. at 760-70); *see also id.* at 31 (evaluations of Section 2 claims "necessarily depend upon widely varied proof and local circumstances").

Because vote dilution "requires an 'intensely local appraisal'" of the challenged jurisdiction, Plaintiffs' summary judgment is premature. *LULAC*, 548 U.S. at 437 (quoting *Gingles*, 478 U.S. at 79). Rather than allow consideration of "all the circumstances in the jurisdiction," Plaintiffs ask this Court to resolve this case based on a slanted and incomplete presentation of the record. S. Rep. No. 97-417, at 27. In general, Section 2 cases do not lend themselves to summary judgment. As demonstrated below, however, this case is particularly incompatible with such an outcome.

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D. Summary Judgment is Improper as to All Three *Gingles* Factors

This Court should deny Plaintiffs' summary judgment as to all three *Gingles* factors. Under the first *Gingles* factor, this Court should actually grant summary judgment for Defendants. *See* ECF No. 67 [Defendants' Summary Judgment Motion]. In creating their proposed redistricting plans, Plaintiffs did not attempt to balance electoral equality with other traditional districting criteria. As a result, Plaintiffs have failed to satisfy their burden under the first *Gingles* factor. Alternatively, summary judgment should be granted in Defendants' favor because Plaintiffs' claim violates Section 2's prohibition on minority vote dilution and because Plaintiffs' proposed redistricting plans would amount to unconstitutional gerrymandering. Even if this Court does not grant summary judgment for Defendants, there are genuine issues of material fact under the first *Gingles* factor that require further analysis beyond what summary judgment proceedings allow.

Summary judgment is also unwarranted under the second *Gingles* factor. The parties' experts on this subject, Dr. Alford and Dr. Engstrom, flatly disagree with each other on whether Latino voters are cohesive. Moreover, the analysis of Plaintiffs' own expert, Dr. Engstrom, suggests the absence of Latino voter cohesion in the primary elections for 2009, 2011, and 2013. Furthermore, Dr. Alford has submitted scatterplots, which are visual representations of data contained in each precinct, namely the percentage of residents who are Latino and the percentage of votes cast for the Latino candidate. Although Dr. Engstrom dismissed them, scatterplots have been relied on by plaintiffs' experts in other vote dilution cases. Weighing the probative value of these scatterplots, as well as resolving disagreements between experts and other evidentiary conflicts, are tasks

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best left for trial. Accordingly, genuine issues of material fact remain for the second *Gingles* factor.

Finally, this Court should deny summary judgment as to the third *Gingles* factor. Plaintiffs assume that the defeat of Latino candidates in City elections has been caused by the behavior of the non-Latino voting bloc. However, other courts have ruled out voter polarization because of low voter turnout amongst the minority group. Because the phenomenon of low turnout is present in this case, it would be premature to grant summary judgment without giving due consideration to all the evidence and analysis relevant to the third *Gingles* factor. Additionally, Plaintiffs assert that the levels of crossover voting (*i.e.*, majority support for minority candidates) in the City are simply inadequate. Plaintiffs arrive at this conclusion by comparing statistics in this case with those from other cases. This mechanical exercise ignores the Supreme Court's mandate that vote dilution claims require an intensely local appraisal of each jurisdiction, not a mathematical appraisal of statistical outcomes. As such, Plaintiffs are not entitled to summary judgment on the third *Gingles* factor.

1. Creation of a Majority-Minority District—*Gingles* Factor 1

Under the first *Gingles* factor, "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. Plaintiffs claim they are entitled to summary judgment on this factor because Plaintiffs' expert, Mr. Cooper, has proposed several redistricting plans that contain a majority-minority district (*i.e.*, a hypothetical single-member district in which the citizen, voting-age population ("CVAP") is more than 50% Latino). *Pls.' Mot.* at 9-18. Plaintiffs also claim that Mr. Cooper's plans are geographically compact,

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contiguous, adhere to representational equality (*i.e.*, the proposed plans are all within a 10% maximum population deviation range) and provide incumbency protection. *Pls.' Mot.* at 11-18. Based on this, Plaintiffs assert that "[i]t simply cannot be disputed" that the first *Gingles* factor has been satisfied. *Pls.' Mot.* at 9.

Not so. Plaintiffs have entirely disregarded electoral equality, which is one of several traditional redistricting criteria and a constitutionally-protected principle. Electoral equality embodies the Supreme Court's directive that a citizen's vote should carry about the same weight as any other citizen's vote regardless of where a citizen resides. *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). By his own admission, Mr. Cooper gave no consideration to electoral equality in almost all of his plans.[4] Specifically, he failed to take notice of the extreme variance in the value of a vote from one proposed district to another (*i.e.*, the degree of electoral imbalance), or which protected groups were destined to cast votes that would, as a consequence, be undervalued or overvalued depending on

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[4] In his April 2013 report, Mr. Cooper did roughly equalize the number of citizens among the districts in Hypothetical Plan D and the number of adult citizens in Hypothetical Plan E. *SMF* at ¶ 10. But these are not exercises in balancing traditional redistricting criteria. They merely substitute one neglected criterion for another by disregarding the equal allocation of total population among districts in favor of equalizing the allocation of all citizens or citizen voting-age population among districts. Because Defendants previously submitted the entirety of Mr. Cooper's April 2013 report, *see* ECF No. 69-6, Defendants submit only excerpts in support of their response to Plaintiffs' summary judgment motion.

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their district of residence. Mr. Cooper simply failed to heed electoral imbalance. Indeed, he acknowledged that he "didn't look at that question carefully" in Illustrative Plans 1 and 2 and Hypothetical Plans A, B, and C. *SMF* at ¶ 11; *see also* ECF No. 67 [Defendants' Summary Judgment Motion] at 10-13.[5] Consequently, with the exception of Hypothetical Plans D and E, Mr. Cooper's plans would severely overvalue or undervalue a citizen's vote, depending on where that citizen happened to reside.

At worst, Mr. Cooper's rote mathematical exercise to attain a statistical outcome means that Plaintiffs have failed to carry their burden under the first *Gingles* factor, which necessitates this Court's dismissal of Plaintiffs' claim. At best, his admitted disregard for balancing electoral equality and other redistricting criteria demands further examination and analysis that exceeds what summary judgment proceedings provide.

As Defendants have set forth more fully in their summary judgment motion, Mr. Cooper's neglect of electoral equality should result in the dismissal of Plaintiffs' claim. ECF No. 67. The first *Gingles* factor requires Plaintiffs to propose redistricting plans that contain "reasonably compact" districts. *De Grandy*, 512 U.S. at 1008. Compactness under Section 2 "'should take into account traditional districting principles.'" *Id.* (quoting *Abrams*, 521 U.S. at 92).

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[5] References to the page numbers in Defendants' previously-filed Summary Judgment Motion and Statement of Material Facts are to the page numbers as they appear in the footer of the document.

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This Section 2 compactness inquiry is different from the equal protection compactness inquiry. *LULAC*, 548 U.S. at 433.

Electoral equality is among these traditional districting criteria and is a constitutionally-protected principle. The Supreme Court has made clear that "[w]hatever the means of accomplishment, the overriding objective must be substantial equality of population [*i.e.*, representational equality] 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 [*i.e.*, electoral equality]." *Reynolds*, 377 U.S. at 579 (emphasis added); *see also* ECF No. 67 at 8-9 (further discussion). In other words, electoral equality is the overriding goal and representational equality is a means to that end.

Defendants are not contending that Mr. Cooper's plans must contain "[m]athematical exactness" of the allocation of both total population and eligible voters. *Reynolds*, 377 U.S. at 577. However, Mr. Cooper is not free to simply "ignore traditional districting principles" in pursuit of drawing a hypothetical district with a LCVAP over 50%. *Sensely v. Albritton*, 385 F.3d 591, 598 (5th Cir. 2004) (affirming lower court's ruling that the plaintiff failed to satisfy the first *Gingles* factor because the proposed redistricting plans did not give due consideration to traditional districting criteria). Rather, Mr. Cooper must attempt to avoid the collateral misweighing of citizens' votes in different districts. He clearly did not. For example, as Dr. Morrison demonstrated in his initial report, voters in Districts 6 and 7 from Mr. Cooper's Illustrative Plan 1 would exercise only 48% of the political power that the voters in District 1 would exercise. *SMF* at ¶ 12. Furthermore, nearly all of Mr. Cooper's plans have a maximum deviation

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of eligible voter allocation between 60% to 70%. *See* ECF No. 67 at 10 (table listing maximum deviation for each plan).[6] This degree of imbalance is unnecessary, yet Mr. Cooper allows for it by subordinating electoral equality to Latino ethnicity. For this reason, summary judgment on the first *Gingles* factor should be granted not to Plaintiffs but to Defendants.

Summary judgment in Defendants' favor on the first *Gingles* factor is also warranted because Mr. Cooper's plans violate Section 2's guarantee against minority vote dilution. That is, Mr. Cooper's plans merely replace one alleged violation of Section 2 with another sure violation. Specifically, Mr. Cooper's proposed plan would result in the severe reduction of the voting strength of members of ethnic minority groups who live outside the majority-minority districts. *See* ECF No. 67 at 13-15; ECF No. 68 at 18-19. Because "the *Gingles* factors cannot be applied mechanically and without regard to the nature of the claim," this dilutive effect cannot be brushed aside. *Voinovich*, 507 U.S. at 158. Plaintiffs' heavy reliance on "abstract manipulation of numbers," *Holder*, 512 U.S. at 955, and "blind adherence to statistical outcomes," *City of Euclid*, 580 F. Supp. at 596, has resulted in the unlawful "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.

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[6] Defendants' Summary Judgment Motion and accompanying Statement of Material Facts contain an in-depth discussion of the data from each of Mr. Cooper's plans. ECF No. 67 at 10-12; ECF No. 68 [Defendants' Statement of Material Facts] at 3-6, 8-12, 19-21.

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Lastly, summary judgment in Defendants' favor on the first *Gingles* factor is warranted because Mr. Cooper subordinated electoral equality (and, in the case of Hypothetical Plans D and E, representational equality) to ethnicity, which amounts to unconstitutional gerrymandering *unless* Plaintiffs can satisfy strict scrutiny. *LULAC*, 548 U.S. at 475 (Stevens, J., dissenting) (citing *Bush v. Vera*, 517 U.S. 952, 958-59 (1996) (plurality)). Although there may be a compelling interest in complying with the requirements of Section 2 *after a violation has been found*, there has been no violation established in this case. *LULAC*, 548 U.S. at 475. Plaintiffs cannot utilize unconstitutional gerrymandering in an attempt to satisfy the first *Gingles* factor.

This Court should grant summary judgment in Defendants' favor on the first *Gingles* factor. Even if it does not, Mr. Cooper's neglect of electoral equality raises genuine issues of material fact that preclude summary judgment. Based on the record in this case, there is reason to doubt the mathematical possibility of creating a redistricting plan that (1) contains a majority-minority district; (2) equalizes the total population within each district within plus or minus 5% of the ideal; and (3) balances traditional redistricting criteria by, among other things, avoiding the gross devaluation of votes imposed by Mr. Cooper's rote mathematical exercise to attain a statistical outcome. There is clear tension among these three criteria. Given the complexity of the issues, the breadth of the factual record, and the competing opinions of the experts, it would be misguided to attempt to resolve that tension on summary judgment. It can hardly be claimed that there are "no genuine issues of material fact remaining for trial" under the first *Gingles* factor. *Thomas v. City of Beaverton*, 379 F.3d 802, 807 (9th Cir.

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2004). Accordingly, summary judgment on the first *Gingles* factor should either be granted in Defendants' favor or denied as to both parties.

2. Latino Voter Cohesion—*Gingles* Factor 2

Under the second *Gingles* factor, "the minority group must be able to show that it is politically cohesive." *Gingles*, 478 U.S. at 51. That is, the minority group must have "expressed clear political preferences that are distinct from those of the majority." *Gomez v. City of Watsonville*, 863 F.2d 1407, 1415 (9th Cir. 1988). Plaintiffs claim that "[f]rom any angle," voter cohesion has been conclusively established. *Pls.' Mot.* at 23.

The record does not support this assertion. First, Plaintiffs' and Defendants' experts flatly disagree on whether voter cohesion has been established in this case. Defendants' expert Dr. John Alford testified that "[m]y conclusion is . . . we haven't established cohesion." *SMF* at ¶ 13. Plaintiffs' expert, Dr. Richard Engstrom, in contrast, testified that "yes, the Latinos in Yakima are politically cohesive." *Id.* This disagreement, standing alone, is reason to deny summary judgment on the second *Gingles* factor. *Thomas v. Newton Int'l Enters.*, 42 F.3d 1266, 1270 (9th Cir. 1994) ("Expert opinion evidence is itself sufficient to create a genuine issue of disputed fact sufficient to defeat a summary judgment motion.")

Second, Dr. Engstrom's own results suggest the absence of Latino voter cohesion. In the 2009 primary election involving Sonia Rodriguez, Dr. Engstrom's calculations establish a point estimate for Latino support of Ms. Rodriguez at 52.9% with a vast confidence interval of 15.1% to 82.5%. *SMF* at ¶ 14. In other words, Dr. Engstrom's results show that there is a 95% chance that the true value of Latino voter cohesion is somewhere between 15.1% to 82.5%.

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This enormous confidence interval suggests that, at best, it is unclear whether Latinos "expressed clear political preference[]" for Ms. Rodriguez in the primary election. *Gomez*, 863 F.2d at 1415.

The same phenomenon occurred in the 2009 primary election involving Benjamin Soria—a 59.5% point estimate with a confidence interval of 16.5% to 83.8%—and the 2011 primary election involving Plaintiff Rogelio Montes—a 53.5% point estimate with a confidence interval of 16.8% to 82.8%. *SMF* at ¶¶ 15-16.

Further doubts arose when Dr. Engstrom produced a supplemental report in December 2013 after City Council primary elections were held earlier that year. Two of these primary elections involved Latinos, Isidro Reynaga and Enrique Jevons. In the first election, Dr. Engstrom's point estimate for Mr. Reynaga's support among Latino voters was 67.4% with a wide confidence interval of 45.9% to 81.4%. *SMF* at ¶ 17. In the second election, the point estimate for Latino support of Mr. Jevons was 39.2% with a confidence interval of 25.9% to 49.9%.[7] *SMF* at ¶ 18.

Dr. Alford responded by providing his independent ecological inference results, which paint a different picture than Dr. Engstrom. Dr. Alford demonstrated the Latino vote appears to be evenly split among the Latino candidate and the two non-Latino candidates. Mr. Reynaga received 53.3% of the Latino vote, but the other 46.7% was divided among the two non-Latino

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[7] According to Dr. Engstrom's own results, none of the candidates in this primary received a majority of the Latino vote.

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candidates. *SMF* at ¶ 19. Mr. Jevons, meanwhile, received a minority of the Latino vote (45.4%), while the non-Latino candidates receive a combined 54.7% of the Latino vote.[8] *SMF* at ¶ 20. Dr. Alford concluded that the analysis of the 2013 primaries "continues the pattern of weak to non-existent minority cohesion that was evident" from the earlier election results. *SMF* at ¶ 21.

Plaintiffs claim that these elections show that "a Latino majority routinely cast[s] its vote for a single, preferred candidate." *Pls.' Mot.* at 23. This is a dubious claim. As Dr. Alford testified, "We're just not that confident" that Dr. Engstrom's point estimates demonstrate cohesiveness. *SMF* at ¶ 13. Weighing this evidence and resolving the disagreement between the parties' experts precludes summary judgment on the second *Gingles* factor.

Further genuine issues of material fact exist regarding the evidentiary value of the scatterplots offered by Dr. Alford in his March 2013 report. *SMF* at ¶ 24. These scatterplots are visual representations of data for each precinct within the

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[8] While Dr. Alford's and Dr. Engstrom's results were similar for the 2009 and 2011 elections, Dr. Alford's point estimates and confidence intervals for these 2013 primary elections noticeably differed from those of Dr. Engstrom. *SMF* at ¶¶ 22-23. Although Dr. Alford testified that he would be "amenable to testify based on Dr. Engstrom's results," the underlying causes for the differences in ecological inference results from the 2013 primaries were discussed but not conclusively identified. *SMF* at ¶ 23. Dr. Alford believed that the differences likely "reflect[ed] more than just normal differences in [ecological inference] estimation." *Id.*

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City. *Id.* The x-axis represents the percentage of Latino population in each precinct, which is found in data provided by the Census Bureau. *Id.* The y-axis represents the percentage of overall votes cast within each precinct for the alleged Latino candidate of choice; this voting data is publicly available through Yakima County. *Id.* A visual examination of these scatterplots indicates that precincts with similar Latino populations vote at different levels for the Latino candidates. *Id.*

Dr. Alford concluded in his March 2013 report that, with one exception, these scatterplots do not exhibit "a classic pattern of polarization." *SMF* at ¶ 24. Dr. Engstrom dismisses the evidentiary value of these scatterplots, even though they were used in recent litigation by another plaintiffs' expert. *SMF* at ¶ 25. Dr. Alford's scatterplots demonstrate that precincts with the same concentration of Latinos often cast a different percentage of their vote for the Latino candidate. *SMF* at ¶ 24. Along with the questionable ecological inference results from 2009, 2011, and 2013 primaries, the scatterplots intuitively suggests the absence of a "clear political preference[]" for Latino candidates. *Gomez*, 863 F.2d at 1415.

In summary, Plaintiffs are not entitled to summary judgment on the second *Gingles* factor. The parties' experts disagree as to whether Latino voters are polarized, and the results of Dr. Engstrom's and Dr. Alford's ecological inference analysis from the 2009, 2011, and 2013 primary elections suggests the absence of Latino voter cohesion. Additionally, the probative value of the scatterplots offered by Dr. Alford should be weighed at trial, not at the summary judgment phase. Finally, granting summary judgment on the second *Gingles* factor—or any other *Gingles* factor—would preclude the "searching practical evaluation of the

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'past and present reality'" required by Section 2 vote dilution jurisprudence. S. Rep. No. 97-417, at 30 (quoting *White*, 412 U.S. at 760-70).

3. Minority-Preferred Candidates Defeated by Majority Bloc-Voting—*Gingles* Factor 3

Under the third *Gingles* factor, "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it – in the absence of special circumstances, such as the minority candidate running unopposed – usually to defeat the minority's preferred candidate." *Gingles*, 478 U.S. at 51 (internal citations omitted). Plaintiffs assert that there are no genuine issues of material fact regarding the third *Gingles* factor because (1) "every single Latino candidate (and Proposition 1) was defeated" in the elections analyzed by Dr. Engstrom and Dr. Alford, and (2) "[t]he average crossover vote for the Latino candidate or Proposition 1 was less than 30%, and in three instances it was less than 16%."[9] *Pls.' Mot.* at 24.

As a pure factual matter, Defendants do not disagree with either proposition. Nevertheless, Plaintiffs are not entitled to summary judgment on the third *Gingles* factor. This factor entails a showing that the "defeat" of the

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[9] Plaintiffs' own results show that Mr. Jevons received less than half of the non-Latino vote (11.4%) *and* considerably less than half of the Latino vote (39.2%). ECF No. 65 [Statement of Undisputed Material Facts in Support of Plaintiffs' Summary Judgment Motion] at ¶ 155. This indicates that Mr. Jevons was not a strongly-supported candidate among any ethnic group. In that race, the candidate who received the most Latino votes was actually Carole Folsom-Hill (49.7%), a non-Latino. *Id.* at ¶ 154.

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"minority's preferred candidate" is caused by the "white majority" voting bloc, and not by some other cause. *Gingles*, 478 U.S. at 51. Plaintiffs' logic is that (a) the Latino candidate received less than a majority of the non-Latino vote and (b) the Latino candidate was defeated, therefore (c) the non-Latino voting bloc caused the defeat. However, this logic excludes other possible causes of the Latino candidate's defeat, including low voter turnout among Latinos. *See Salas v. Southwest Texas Junior College Dist.*, 964 F. 2d 1542, 1555-56 (5th Cir. 1992) (affirming trial court's conclusion that "the true cause for lack of Hispanic electoral success was not unequal electoral opportunity, but rather the failure of Hispanic voters to take advantage of that opportunity").[10]

Voter turnout is germane to this case: As Dr. Alford concluded in his initial report, Latinos comprise only 18.5% of registered voters but only 7% of actual voters. *SMF* at ¶ 26. Indeed, Dr. Alford pointed out that, based on ecological inference estimates, Ms. Rodriguez would have won her general election against Dave Ettl if Latino voters made up 16% of actual voters, a level comparable to

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[10] To be clear, Defendants are not arguing that lower turnout among Latino voters precludes a finding of Latino voter cohesion under the second *Gingles* factor. Plaintiffs cite two Ninth Circuit decisions, *Gomez v. City of Watsonville*, 863 F.2d 1407 (9th Cir. 1988) and *United States v. Blaine County*, 363 F.3d 897 (9th Cir. 2004), which suggest that lower Latino turnout does not preclude the satisfaction of the second *Gingles* factor. *Pls.' Mot.* at 19. Defendants are arguing instead that lower turnout among Latino voters undermines Plaintiffs' case for the third *Gingles* factor.

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their share of registered voters. *SMF* at ¶ 27. Summary judgment is inappropriate on the third *Gingles* factor because the extent of low Latino voter turnout has not been fully explored and its evidentiary value cannot be determined at the summary judgment stage.

Second, summary judgment is improper because the non-Latino voter crossover is relevant to this case. Plaintiffs cite several cases in which the statistics appear to be similar to this case, in particular the range of non-Latino crossover votes between 30% to 40%. *Pls. Mot.* at 25-28. However, Plaintiffs' discussion overlooks a fundamental component of Section 2 vote dilution claims: Although the courts arrived at the result that voter polarization existed, they did so only after an intensive local appraisal of the facts on the ground. Plaintiffs err by simply comparing statistics in this case with those in other cases. *See Gingles*, at 94-95 (O'Connor, J., concurring in judgment) ("[T]here is no indication that Congress intended to mandate a single, universally applicable standard for measuring undiluted minority voting strength, regardless of local conditions . . ."). The relevancy of crossover voting in the City may not simply be dismissed out of hand.

As they have with the first two *Gingles* factors, Plaintiffs attempt to satisfy the third *Gingles* factor through an "abstract manipulation of numbers," *Holder*, 512 U.S. at 955, and that is "wedded" to and "hamstrung by, blind adherence to statistical outcomes." *City of Euclid*, 580 F. Supp. 2d at 596. Section 2 vote dilution claims require more than this. *Gingles*, 478 U.S. at 79. Given the extensive factual record, the disagreement amongst experts, and the complexity of

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the issues raised in this case, summary judgment in Plaintiffs' favor is plainly not warranted on any of the *Gingles* factors.

E. Genuine Issues of Material Fact Exist Regarding the Senate Factors

As with the *Gingles* factors, it is premature for this Court to decide whether the Senate factors weigh in favor of Plaintiffs. Analysis of a Section 2 vote dilution claim does not terminate after an examination of the *Gingles* factors. Courts must also carefully consider the "totality of the circumstances in order to determine whether the result of the challenged practice is that the political processes are equally open." S. Rep. No. 97-417, at 67. "Courts are to conduct this analysis on the basis of a variety of objective factors concerning the impact of the challenged practice and the social and political context in which it occurs." *Id.* at 67.

"A totality of the circumstances inquiry is necessarily fact-intensive and requires 'an intensely local appraisal of the design and impact of the contested electoral mechanisms[,] . . . a searching practical evaluation of the past and present reality[,] . . . and a functional view of political life.'" *Ross v. Texas Educ. Agency*, No. H-08-3049, 2009 U.S. Dist. LEXIS 89596, at *20 (S.D. Tex. Sept. 28, 2009) (quoting *NAACP v. Fordice*, 252 F.3d 361, 366-67 (5th Cir. 2001)).

Despite the "fact-intensive" and "intensely local" nature of the Senate factors analysis, Plaintiffs claim that summary judgment is appropriate. They are wrong. Summary judgment on the Senate factors would preclude the very "searching practical evaluation" that is required by Section 2. S. Rep. No. 97-417, at 30. Moreover, despite this Court's provision for overlength briefs, *see* ECF No. 60, summary judgment prevents Defendants from presenting the full body of evidence in support of their case.

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Plaintiffs also suggest that summary judgment on the Senate factors is appropriate because this is "not a 'very unusual case.'" *Pls.' Mot.* at 29. However, Plaintiffs take this quote out of context: "[I]t will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of § 2 under the totality of circumstances." *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1135 (3d Cir. 1993). This language suggests that the Senate factors are usually satisfied *if* the plaintiffs have already established the *Gingles* factors. Plaintiffs have not done so in this case, and there are genuine issues of material fact that preclude summary judgment on the *Gingles* factors. Accordingly, it is premature for Plaintiffs to conclude that this is an "unusual case." *Jenkins*, 4 F.3d at 1135.

Finally, Plaintiffs acknowledge that they have "additional evidence" to present at trial, but argue that the Senate factors can be satisfied on the limited facts presented in their motion. *Pls.' Mot.* at 29 n.6. This approach contradicts the very nature of the Senate factors inquiry, which calls for an examination of the *totality* of the circumstances, not just some of the circumstances.

1. Success of Minority Candidates—Senate Factor 7

Plaintiffs argue that they have satisfied the seventh *Gingles* factor simply because no Latino has been elected to the City Council. *Pls. Mot.* at 31. This oversimplifies the seventh Senate factor, which requires a "thoughtful look" at the electoral history of Latinos within the City. *Sanchez v. Colorado*, 97 F.3d 1303, 1324 (10th Cir. 1996). Plaintiffs fail to deliver this. For example, Plaintiffs do not analyze or offer any evidence regarding the viability of each Latino candidate for City Council and his or her campaign, or the qualifications of the Latino candidate's opponents. *See, e.g., Rollins v. Fort Bend Indep. Sch. Dist.*, 89 F.3d

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1205, 1220-21 (5th Cir. 1996) (discussing probative value of strength of candidates and their campaigns).

Furthermore, Plaintiffs neglect to discuss the electoral success of Latinos in neighboring or encompassing local jurisdictions, such as the election of Jesse Palacios in 1998 and reelection in 2002 as Yakima County Commissioner, or Vickie Ybarra's election 2003 to the Yakima School Board of Directors. *SMF* at ¶¶ 28. Courts have ruled that such elections are relevant to the seventh Senate factor, but Plaintiffs here simply attempt to sweep them aside. *See, e.g., Meza v. Galvin*, 322 F. Supp. 2d 52, 72 (D. Mass. 2004) (acknowledging the relevance of minority candidate success in exogenous elections within context of seventh Senate factor). Contrary to Plaintiffs' assertions, the seventh Senate factor is not open-and-shut.

2. Presence of Racially-Polarized Voting—Senate Factor 2

As demonstrated above, significant questions of material fact exist as to whether Plaintiffs have satisfied the third *Gingles* factor, *i.e.*, whether Plaintiffs have sufficiently demonstrated racially-polarized voting. *See* Part III.D.3, *infra*. Because summary judgment is inappropriate on the third *Gingles* factor, it is similarly inappropriate on the seventh Senate factor.

Plaintiffs then assert that the evidence related to the second and seventh Senate factors is so "compelling" that this Court should simply grant summary judgment without examining the other Senate factors. *Pls.' Mot.* at 32. This argument falls short for several reasons. First, Plaintiffs' one-sided presentation of the evidence is not as "compelling" as they suggest: As shown above, Defendants have presented evidence (and will present additional evidence at trial) that dispute the second and seventh Senate Factors.

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Second, Plaintiffs highlight two cases where the courts ostensibly concluded that the totality of the circumstances test was satisfied based on only the second and seventh Senate factors. *Pls.' Mot.* at 32 (citing *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1022 (8th Cir. 2006); *Campos v. Baytown*, 840 F.2d 1240 (5th Cir. 1988)). Even if Plaintiffs have properly interpreted these cases, at least one court (and likely both) arrived at their conclusions on appeal from trial, not from summary judgment. *Bone Shirt*, 461 F.3d at 1017 ("The district court conducted a nine-day trial . . .").

3. History of Official Voting-Related Discrimination—Senate Factor 1

Under the first Senate factor, Plaintiffs focus on (1) a 45-year-old legal challenge to the Yakima County Auditor's administration of an English-language literacy requirement for voter eligibility that was formerly a part of Washington State's Constitution,[11] and (2) a Consent Decree entered into between the Department of Justice ("DOJ") and Yakima County in 2004 regarding the County's compliance with Section 203 of the Voting Rights Act.[12] *Pls.' Mot.* at 32-35. Plaintiffs claim that first Senate factor therefore "weighs heavily in favor of Plaintiffs." *Id.* at 35.

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[11] *Mexican-American Federation-Washington State v. Naff*, 299 F. Supp. 587 (1969), *vacated by Jimenez v. Naff*, 400 U.S. 986 (1971).

[12] Section 203 "requires certain jurisdictions to provide bilingual voting materials." *Padilla v. Lever*, 463 F.3d 1046, 1056 (9th Cir. 2006) (Pregerson, J., dissenting) (citing 42 U.S.C. § 1973aa-1a).

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Plaintiffs give a superficial treatment of these two events. First, prior to the Supreme Court's decision in *Oregon v. Mitchell*, 400 U.S. 112 (1970), a three-judge panel in *Naff* determined that the plaintiffs "failed to establish any factual or legal basis for injunctive relief against the defendants." 299 F. Supp. at 593. Moreover, the *Naff* panel noted that "all registrars and deputy registrars," including the registrar and deputy registrars of Yakima County, "are presently following the directive contained in the [Washington State Attorney General's June 15, 1967] opinion that no literacy tests should be administered to applicants to register to vote." *Id.* at 592.

The *Naff* panel also ruled that "plaintiffs were able to establish one isolated incident where what might be called a literacy test was, in fact, administered." *Id.* at 593. This incident, moreover, occurred in Zillah City Clerk Office's, not in Yakima County. *Id.* The evidence showed that this incident "was designed to assist [the plaintiff] rather than to hinder her in her application to register." *Id.* This incident is not "strong evidence of historical official discrimination against Latinos." *Pls.' Mot.* at 34.

Plaintiffs' reference *Gomez v. City of Watsonville* on this point is inapposite, as the Ninth Circuit cited to a decision from the California Supreme Court that extensively discussed the troubled history and effects of the voter eligibility requirement of English-language literacy. 863 F.2d 1407, 1419 (9th Cir. 1998) (citing *Castro v. California*, 466 P.2d 244 (Cal. 1970)). No such record exists here.

Although Plaintiffs cite *Goosby v. Town Bd. of the Town of Hempstead*, 956 F. Supp. 326 (E.D.N.Y. 1997), other jurisdictions have ruled that evidence of

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an alleged history of discrimination was "too remote in time to establish a present impediment to minority participation in the political process." *Barnett v. City of Chicago*, 969 F. Supp. 1359, 1446 (N.D. Ill. 1997) (examining 25-year-old event), *rev'd in part on other grounds*, *Barnett v. City of Chicago*, 141 F.3d 699 (7th Cir. 1998). Of note, the *Barnett* court reached its conclusion after "testimony and exhibits" at trial, and not summary judgment. *Id.*

Plaintiffs also cite the Consent Decree between the DOJ and Yakima County that supposedly show more "discriminatory voting practices." *Pls.' Mot.* at 34-35. However, neither Plaintiffs nor their Senate factors expert Dr. Fraga provided any evidence of the County's underlying deficiencies that led to Consent Decree. Plaintiffs are speculating that the County was engaged in voting-related discrimination.

4. Practices That May Enhance the Opportunity for Discrimination—Senate Factor 3

Plaintiffs focus on voting practices in the City: (1) numbered posts; (2) staggered terms; (3) residency requirements for districts; and (4) majority vote requirements. *Pls.' Mot.* at 35. Plaintiffs then cite cases where these practices were found to be indicative of vote dilution. *Id.* at 35-38. Plaintiffs conclude that the third Senate factor *ipso facto* favors Plaintiffs because the City "employs" similar "devices." *Id.* at 38. This reasoning does not stand up to scrutiny.

Plaintiffs rely on certain cases where courts evaluated certain voting practices only after holding a bench trial, which provides the opportunity to conduct the "'searching practical evaluation of past and present reality'" that Section 2 requires. *Fabela v. City of Farmers Branch*, No. 3:10-cv-1425-D, 2012 U.S. Dist. LEXIS 108086, at *8 (N.D. Tex. Aug. 2, 2012) (quoting *Westwego*

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Citizens for Better Gov't v. City of Westwego, 946 F.2d 1109, 1120 (5th Cir. 1991)); *see also Benavidez v. City of Irving*, 638 F. Supp. 2d 709, 726 (N.D. Tex. 2009). Instead of allowing for a similar "'intensely local appraisal of the design and impact' of the contested electoral mechanisms," Plaintiffs seek to foreclose this process. *Gingles*, 478 U.S. at 79 (quoting *Rogers v. Lodge*, 458 U.S. 613, 622 (1982)).

Plaintiffs' approach would not allow for evidence that the provisions were implemented before there was a significant Latino population in Yakima, which would reduce the significance of the third Senate factor in this case. *Martin v. Allain*, 658 F. Supp. 1183, 1194 (S.D. Miss. 1987) ("Although it is obvious that abolition of the majority vote requirements and post system without adoption of anti-single-shot voting laws would make it easier in some situations for black candidates to be elected, this Court cannot hold that these provisions as they now exist discriminate against blacks per se."); *Askew v. City of Rome*, 127 F.3d 1355, 1386 (11th Cir. 1997) (holding that third Senate factor had "diminished importance" because the practices were not "implemented for a discriminatory purpose"). Plaintiffs also suggest that the practice of using numbered posts is an "anti-single-shot" practice, even though "[t]here are no anti-single-shot voting law" in the City. *Martin*, 658 F. Supp. at 1194. Summary judgment is not warranted on the third Senate factor.

5. Effects of Past Discrimination That Hinder Minority Group's Ability to Participate in the Political Process—Senate Factor 5

As with the other Senate factors, Plaintiffs grossly oversimplify the fifth Senate factor, which asks whether Latinos in the City "bear the effects of discrimination in such areas as education, employment and health, which hinder

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their ability to participate effectively in the political process." S. Rep. No. 97-417, at 29. Plaintiffs claim that they must only show disparate socio-economic status in conjunction with depressed level of political participation, and that no "further causal nexus" need be shown. *Pls.' Mot.* at 39. Although this was the approach of the Fifth Circuit in *Teague v. Attala County*, 92 F.3d 283 (5th Cir. 1996), on which Plaintiffs rely, the Fifth Circuit came out differently on the same issues two months earlier in *Rollins v. Fort Bend Indep. Sch. Dist.*, 89 F.3d 1205 (5th Cir. 1996).

In *Rollins*, the Fifth Circuit affirmed the district court's conclusion that "socio-economic differences between minorities and whites do not prevent meaningful participation in the political process." *Id.* at 1220. Moreover, the panel recognized that "the district court satisfied its duty to discuss the evidence and the basis for its conclusion" after conducting a bench trial. *Id.* Plaintiffs seek to deny the discharge of that duty in this case.

Plaintiffs further oversimplify the fifth Senate factor by ignoring other decisions that give significant weight to the absence of evidence that the challenged jurisdiction caused the disparate socioeconomic conditions through discrimination. *Clarke v. City of Cincinnati*, C-1-92-278, 1993 U.S. Dist. LEXIS 21009, at *27 (N.D. Ohio July 8, 1993) ("While the effects of discrimination in such areas as education, employment and housing do hinder the ability of some African Americans personally to finance political campaigns, the defendants have neither created these conditions nor do they intentionally maintain them.")

Finally, there are genuine issues of material fact regarding whether Plaintiffs and their experts distinguished between Latinos who are recent

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immigrants and those who are citizens. This information is important to the analysis of the fifth Senate factor. *See, e.g.*, *Aldasoro v. Kennerson Litig*., 922 F. Supp. 339, 365 (S.D. Cal. 1995) ("Hispanics are characterized by lower socioeconomic status than Anglos, but many Hispanics in El Centro have immigrated recently from Mexico, a third world country, and naturally are characterized by lower socioeconomic status . . . Therefore, it is critical to distinguish between foreign born and native born Hispanics in addressing this Senate Factor. Plaintiffs' evidence failed to make this distinction.") In summary, it is premature to decide whether this Senate factor weights in favor of Plaintiff.

6. Racial Appeals in Campaigns—Senate Factor 6

In the last section of their Senate factors discussion, Plaintiffs cite references to Sonia Rodriguez's ethnicity and then assert that that the sixth Senate factor has been satisfied, *i.e.*, the City's political campaigns are "characterized by overt or subtle racial appeals." S. Rep. No. 97-417, at 29. Again, Plaintiffs oversimplify the evidence and analysis for the sixth Senate factor. First, Defendants' Senate factors expert, Dr. Thernstrom, disagrees with Dr. Fraga that the references to Ms. Rodriguez's ethnicity are the type of "racial appeals" contemplated by the Senate factors. *SMF* at ¶ 30.[13] This is another example of a larger pattern that has pervaded this case: Disagreement between Plaintiffs' and Defendants' experts, which is a basis for denying summary judgment. *Thomas*, 42

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[13] Because Defendants submitted Dr. Thernstrom's April 5, 2013 report in its entirety with their response to Plaintiffs' motion to exclude Dr. Thernstrom's testimony, ECF No. 74-3, Defendants are presently submitting only the relevant pages from the same report.

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F.3d at 1270 ("Expert opinion evidence is itself sufficient to create a genuine issue of disputed fact sufficient to defeat a summary judgment motion.")

Moreover, Plaintiffs offer no discussion as to whether the ethnicity of other candidates have been referenced in other City Council elections, or whether Ms. Rodriguez's campaign was "a single occurrence [that] cannot support a claim that political campaigns . . . are carried out through subtle or overt racial appeals." *McNeil v. Springfield*, 658 F. Supp. 1015, 132 (C.D. Ill. 1987). In short, Plaintiffs' perfunctory reference to Ms. Rodriguez's campaign does not adequately address the sixth Senate factor

7. Plaintiffs Offer No Discussion of Senate Factor 8 or 9

Absent from Plaintiffs' analysis of the Senate factors is any discussion of the eighth and ninth Senate factors. The eighth Senate factor asks, "[W]hether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group." S. Rep. No. 97-417, at 29. This factor invites a considerable range of issues, including economic, social, and political circumstances, and it is impractical to attempt to determine the evidentiary value of these issues when that evidence has not even been offered at the summary judgment stage. Accordingly, summary judgment on the totality of the circumstances analysis is unwarranted given the absence of any analysis or discussion on the eighth Senate factor.

Finally, the ninth Senate factor asks "whether the policy underlying the state or political subdivision's use of such voting . . . practice or procedure is tenuous." S. Rep. No. 97-417, at 29. Plaintiffs offer no analysis of this, either, despite one of their potential fact witnesses testifying in her deposition that there are benefits to "some" at-large representation. *SMF* at ¶ 31. Defendants intend to

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offer further testimony and evidence on this point, rendering summary judgment on the ninth Senate factor—and the totality of the circumstances test—improper.

IV. CONCLUSION

Plaintiffs' summary judgment motion should be denied, as it is premature and based on a distorted and fragmentary presentation of the factual record. Plaintiffs' approach to the *Gingles* factor reduces the application of the factors to a rote mathematical exercise and ignores the legal and constitutional ramifications of their single-minded focus on obtaining a statistical outcome. Moreover, by vastly oversimplifying the analysis of each Senate factors, Plaintiffs are attempting to preclude the very "searching practical evaluation" required by Section 2 vote dilution claims. *Gingles*, 478 U.S. at 79. Plaintiffs' motion should be denied.

RESPECTFULLY SUBMITTED this 22nd 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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