

HONORABLE THOMAS O. RICE

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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

AMENDED STATEMENT OF
MATERIAL FACTS IN SUPPORT
OF DEFENDANTS' RESPONSE
TO PLAINTIFFS' MOTION FOR
SUMMARY JUDGMENT

Telephonic Argument
August 18, 2014 – 9:00 A.M.
Call-in Number: (888) 273-3658
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1 Pursuant to Local Rule 56.1, Defendants submit this **Amended** Statement
2 of Material Facts in support of their Response to Plaintiffs' Motion for Summary
3 Judgment.

4 **AMENDMENT**

5 Defendants file this Amended Statement of Material Facts to address the
6 requirement of Local Rule 56.1(b) that “[a]ny party opposing a motion for
7 summary judgment must file with its responsive memorandum a statement . . .
8 setting for the specific facts which the party asserts establishes a genuine issue of
9 material fact precluding summary judgment. *Each fact must explicitly identify any*
10 *fact(s) asserted by the moving party which the opposing party disputes or*
11 *clarifies.”* (emphasis added).

12 With a few exceptions identified below, Defendants do not challenge the
13 facts that are set forth in Plaintiffs' Statement of Undisputed Material Facts.
14 Instead, Defendants seek to defeat Plaintiffs' Summary Judgment Motion by
15 presenting facts that were omitted from Plaintiffs' Statement of Undisputed
16 Material Facts and by challenging Plaintiffs' interpretation of the legal analysis
17 required under Section 2 vote dilution claims. The facts omitted by Plaintiffs are
18 presented in this Statement of Material Facts, and Defendants' Summary
19 Judgment Motion sets forth the genuine issues that are created by these facts.

20 Defendants, however, do dispute some of the facts contained in Plaintiffs'
21 Statement of Undisputed Material Facts. These disputes are described in
22 Paragraphs 14-17 and 19 below.

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1. Background

1. The City of Yakima adopted its current election system after voters approved a Charter amendment in November 1976. *Declaration of John A. Safarli* (“*Safarli Decl.*”), *Exhibit A* [Charter amendment signed December 6, 1976.]

2. In 1980, the City’s overall population was 49,826. *Safarli Decl., Ex. B* [Declaration of William S. Cooper dated February 1, 2013] at ¶ 13. The Latino population was 3,470. *Id.*

3. In August 2011, Proposition 1 was placed on the City ballot. *Safarli Decl., Ex. C* [excerpts from the City’s election file on Proposition No. 1]. Proposition 1 would have “abandon[ed] and abolish[ed] the current districting for election of council members, consisting of four districts and three at-large positions, and adopt[ed] districting for election of council members consisting of seven districts; providing that each council member shall be elected by the voters of his or her district.” *Id.* at 2. The proposition failed, receiving only 41.50% of the vote. *Id.*

4. In a letter dated December 14, 2010, Mary Baechler of Central Washington Progress wrote a letter to the City Council urging that Proposition 1 be placed on the City ballot in February 2011. *Safarli Decl., Ex. D.* Ms. Baechler wrote, “Let our voters decide on our form of government!” *Id.*

5. In August 2011, Plaintiff Rogelio Montes ran for a seat on the City Council. *Safarli Decl., Ex. E* [excerpts from Yakima County’s election results from August 2011]. Mr. Montes ran for the District 2 position, which

1 encompasses the southern region of the City. *Safarli Decl., Ex. F* [depiction of the
2 City's four nomination districts]. Mr. Montes had two opponents: Rich Marcley
3 and Sara Bristol. *Safarli Decl., Ex. E*. Mr. Montes received the least amount of
4 votes of any candidate. *Id.*

5 6. Plaintiff Mateo Arteaga is the director of the Educational
6 Opportunities Center at Central Washington University. *Safarli Decl., Ex. G*
7 [excerpts of Mr. Arteaga's deposition transcript].

8 7. Over the course of two years of litigation, Defendants have produced
9 over 340,000 pages' worth of documents in response to Plaintiffs' discovery
10 requests. *Safarli Decl.* at ¶ 9.

11 8. Plaintiffs have retained four expert witnesses: William Cooper of
12 Virginia (first *Gingles* factor); Dr. Richard Engstrom of North Carolina (second
13 and third *Gingles* factors); Dr. Luis Fraga of Seattle, Washington (Senate factors);
14 and Dr. Frances Contreras of San Diego, California (Senate factors). These four
15 experts have produced 11 reports combined totaling 342 pages, not including the
16 curriculum vitae attached to their reports. *Safarli Decl.* at ¶ 9.

17 9. Defendants have retained three experts: Dr. Peter Morrison of
18 Massachusetts (first *Gingles* factor); Dr. John Alford of Houston, Texas (second
19 and third *Gingles* factor); and Dr. Stephan Thernstrom of Virginia (Senate
20 factors). Defendants' experts have produced 8 reports totaling 212 pages, not
21 including the curriculum vitae attached to their reports. *Safarli Decl.* at ¶ 9.

22 **2. The First *Gingles* Factor**

23 10. Plaintiffs' expert Mr. Cooper proposed several redistricting plans,
24 including Hypothetical Plans D and E. *Safarli Decl., Ex. H* [excerpts of the
25

1 Supplemental Declaration of William S. Cooper dated April 19, 2013]. In
 2 Hypothetical Plan D, Mr. Cooper roughly equalized the allocation of all citizens
 3 among his districts. In Hypothetical Plan E, he roughly equalized the allocation of
 4 the citizen, voting-age population among his districts. *Id.*

5 11. In his deposition, Mr. Cooper was asked whether he was “concerned
 6 about electoral imbalance as it relates to the voters” in Illustrative Plans 1 and 2
 7 and Hypothetical Plans A, B, and C. *Safarli Decl., Ex. I* at 137:12-21. Mr. Cooper
 8 answered that “[he] didn’t look at that question carefully.” *Id.* at 137:22.

9 12. In his initial report, Defendants’ experts Dr. Peter Morrison
 10 calculated that voters from Districts 6 and 7 in Mr. Cooper’s Illustrative Plan 1
 11 would exercise only 48% of the political power that the voters in District 1 would
 12 exercise. *Safarli Decl., Ex. J* [excerpts of the Expert Report of Peter Morrison,
 13 Ph.D.] at ¶¶ 40-41.

14 **3. The Second Gingles Factor**

15 13. Defendants’ and Plaintiffs’ expert witnesses disagree on whether
 16 Latino voters in the City are politically cohesive. Defendants’ expert Dr. Alford
 17 testified that “[m]y conclusion is we’re – we haven’t established cohesion.”
 18 *Safarli Decl., Ex. K* at 137:4. Dr. Alford also testified that, given the wide
 19 confidence intervals in the analysis of Plaintiffs’ expert witness Dr. Richard
 20 Engstrom, “[w]e’re just not that confident” that Dr. Engstrom’s point intervals
 21 establish cohesiveness. *Id.* at 118:4. He further testified that Dr. Engstrom’s point
 22 estimates are “not something we are confident of.” *Id.* at 118:13-14. Dr.
 23 Engstrom, in contrast, testified that “[i]n my opinion, yes, the Latinos in Yakima
 24 are politically cohesive.” *Safarli Decl., Ex. L* at 70:18-19.

1 14. In his initial report, Dr. Engstrom determined that in the 2009
2 primary election involving Sonia Rodriguez, the point estimate for Latino voter
3 support for Ms. Rodriguez was 52.9% with a confidence interval of 15.1% to
4 82.5%. *Safarli Decl., Ex. M* [Report of Richard L. Engstrom, Ph.D., dated
5 February 1, 2013] at 15.

6 **DISPUTED FACT ASSERTED BY PLAINTIFFS:** Contrary to ¶ 118 in
7 Plaintiffs' Statement of Undisputed Material Facts, it is not clear that Ms.
8 Rodriguez was the "candidate of choice for Latino voters" in the primary election,
9 given Dr. Engstrom's confidence intervals.

10 15. He also determined that in the 2009 primary election involving
11 Benjamin Soria, the point estimate for Latino voter support for Mr. Soria was
12 59.5% with a confidence interval of 16.5% to 83.8%. *Safarli Decl., Ex. M* at 15.

13 **DISPUTED FACT ASSERTED BY PLAINTIFFS:** Contrary to ¶ 127 in
14 Plaintiffs' Statement of Undisputed Material Facts, it is not clear that Mr. Soria
15 was the "candidate of choice for Latino voters" in the primary election, given Dr.
16 Engstrom's confidence intervals.

17 16. Dr. Engstrom further determined that in the 2011 primary election
18 involving Rogelio Montes, the point estimate for Latino voter support for Mr.
19 Montes was 53.5% with a point estimate of 16.8% to 82.8%. *Safarli Decl., Ex. M*
20 at 15.

21 **DISPUTED FACT ASSERTED BY PLAINTIFFS:** Contrary to ¶ 135 in
22 Plaintiffs' Statement of Undisputed Material Facts, it is not clear that Mr. Montes
23 was the "candidate of choice for Latino voters" in the primary election, given Dr.
24 Engstrom's confidence intervals.

1 17. In his supplemental report dated December 17, 2013, Dr. Engstrom
2 determined that in the 2013 primary election involving Isidro Reynaga, the Latino
3 voter support for Mr. Reynaga was 67.4% with a confidence interval of 45.9% to
4 81.4%. *Safarli Decl., Ex. N* [Supplemental Report of Richard L. Engstrom, Ph.D.
5 dated December 7, 2013] at 6.

6 **DISPUTED FACT ASSERTED BY PLAINTIFFS:** Contrary to ¶ 150 in
7 Plaintiffs' Statement of Undisputed Material Facts, it is not clear that Mr.
8 Reynaga was the "candidate of choice for Latino voters" in the primary election,
9 given Dr. Alford's confidence intervals.

10 18. Dr. Engstrom determined that in the 2013 primary election involving
11 Enrique Jevons, the Latino voter support for Mr. Jevons was 39.2% with a
12 confidence interval of 25.9% to 49.9%. *Safarli Decl., Ex. N* at 6.

13 19. Dr. Alford responded to Dr. Engstrom's report by producing his own
14 supplemental report dated January 17, 2014, which contain the results of his
15 independent ecological inference analysis. *Safarli Decl., Ex. O*. Dr. Alford
16 determined that in the 2013 primary election involving Mr. Reynaga, the Latino
17 voter support for Mr. Reynaga was 53.3% with a confidence interval of 38.6% to
18 62.3%. *Safarli Decl., Ex. O* at 3.

19 **DISPUTED FACT ASSERTED BY PLAINTIFFS:** Contrary to ¶ 150 in
20 Plaintiffs' Statement of Undisputed Material Facts, it is not clear that Mr.
21 Reynaga was the "candidate of choice for Latino voters" in the primary election,
22 given Dr. Alford's confidence intervals.

1 20. Dr. Alford determined that in the 2013 primary election involving
2 Mr. Jevons, the Latino voter support for Mr. Jevons was 45.4% with a confidence
3 interval of 33.3% to 58.7%. *Safarli Decl., Ex. O* at 3.

4 21. In his supplemental report, Dr. Alford concluded that the analysis of
5 the 2013 primaries “continues the pattern of weak to non-existent minority
6 cohesion that was evident” from the earlier election results. *Safarli Decl., Ex. O* at
7 3.

8 22. In his initial report dated March 22, 2013, Dr. Alford determined that
9 the results of his analytical methods for the 2009 and 2011 primary and general
10 City Council elections were “substantively very similar” to Dr. Engstrom’s
11 results. *Safarli Decl., Ex. P* at 7. When asked in his deposition whether he would
12 be “amenable to testify based on Dr. Engstrom’s results” given that his results
13 were “substantively very similar to Dr. Engstrom’s [ecological inference]
14 analysis,” Dr. Alford responded, “Sure.” *Safarli Decl., Ex. K* at 179:21-25.

15 23. However, Dr. Alford’s point estimates and confidence intervals for
16 the 2013 primaries noticeably differed from those of Dr. Engstrom. *See* ¶¶ 17-20,
17 *infra*. The underlying causes for the differences in ecological inference results
18 from the 2013 primaries were discussed but not conclusively identified. *Safarli*
19 *Decl., Ex. K* at 177:21-179:20. Dr. Alford believed that the differences likely
20 “reflect[ed] more than just normal differences in [ecological inference]
21 estimation.” *Id.* at 178:16-18.

22 24. Dr. Alford’s March 2013 initial report contained seven scatterplots,
23 which are visual representations of data for each precinct within the City. *Safarli*
24 *Decl., Ex. P* at 13-16. The x-axis represents the percentage of Latino population
25

1 in each precinct, which is found in data provided by the Census Bureau. *Id.* at 11.
2 The y-axis represents the percentage of overall votes cast within each precinct for
3 the alleged Latino candidate of choice; this voting data is publicly available
4 through Yakima County. *Id.* at 11. A visual examination of these scatterplots
5 indicates that precincts with similar Latino populations vote at different levels for
6 the Latino candidates. *Id.* at 13-16. Dr. Alford concluded in his March 2013
7 report that, with only one exception, these scatterplots do not exhibit “a classic
8 pattern of polarization.” *Id.* at 11.

9 25. In his reply report dated April 19, 2013, Dr. Engstrom dismissed the
10 evidentiary value of Dr. Alford’s scatterplots. *Safarli Decl., Ex. Q* at 9. Dr.
11 Engstrom discounted them even though scatterplots were relied on by Dr. Robert
12 R. Brischetto, who was retained by some plaintiffs in a different Section 2 vote
13 dilution case to analyze the second and third *Gingles* factors. *Safarli Decl., Ex. R*
14 [Declaration of Dr. Robert R. Brischetto, filed in *Perez v. Perry*, No. 5:11-cv-
15 00360-OLG-JES-XR (W.D. Tex.)] at 10.

16 **4. The Third *Gingles* Factor**

17 26. In his initial report from March 22, 2013, Dr. Alford determined that
18 Latinos are about 40% of the City’s overall population, but only 21.6% of the
19 City’s adult citizen population. *Safarli Decl., Ex. P* at 4. Latinos comprise 18.5%
20 of registered voters, but typically make up only 7% of actual voters. *Id.*

21 27. Dr. Alford concluded that this “low level of Hispanic turnout was
22 critical.” *Safarli Decl., Ex. P* at 9. For example, based on the ecological inference
23 estimates, Sonia Rodriguez would have won her election if Latino voters made up
24 16% of actual voters, a level comparable to their share of the registered voters. *Id.*

25

1 **5. The Senate Factors**

2 28. Jesse Palacios, a Latino, was elected as Yakima County
3 Commissioner in 1998 and re-elected in 2002. *Safarli Decl., Exs. S, T.* In 2002,
4 Mr. Palacios defeated Wylie G. Mills, receiving more than twice as many votes as
5 his opponent. *Safarli Decl., Ex. T.*

6 29. Vickie Ybarra was elected to the Yakima School Board of Directors
7 in 2003. *Safarli Decl., Ex. U.* She received 46.7% of the vote, while her opponent,
8 Steve Camerer, received 38.0%. *Id.*

9 30. In his initial report dated April 5, 2013, Dr. Thernstrom took issue
10 with Dr. Fraga's opinions regarding the alleged use of racial appeals in City of
11 Yakima elections. *Safarli Decl., Ex. V* at 37-39. Dr. Thernstrom concluded that
12 Dr. Fraga believes "[a]ny reference to the ethnic background of a candidate . . .
13 constitutes a 'racial appeal.'" *Id.* at 38. This view, according to Dr. Fraga, is
14 unreasonable. *Id.* at 37-39.

15 31. In her deposition, Plaintiffs' potential fact witness Luz Bazan
16 Gutierrez was asked, "Do you think there's any benefit from having an elected
17 official elected on a citywide basis?" *Safarli Decl., Ex. W* at 108:10-12. Ms.
18 Gutierrez responded, "I think it is better to have elections representatives within
19 each district and then have the three elected at large by everyone." *Id.* at 108:13-
20 15. To clarify her testimony, Ms. Gutierrez was asked, "You're saying there is a
21 benefit to having some at-large representation?" *Id.* at 108:24-109:1. Ms.
22 Gutierrez responded, "Some." *Id.* at 109:2.

1 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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DATED this 22nd day of July, 2014

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