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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

ROGELIO MONTES and MATEO
ARTEAGA,

Plaintiffs,

vs.

CITY OF YAKIMA; MICAH
CAWLEY, in his official capacity as
Mayor of Yakima; and MAUREEN
ADKISON, SARA BRISTOL, KATHY
COFFEY, RICK ENSEY, DAVE Ettl,
and BILL LOVER, in their official
capacity as members of the Yakima City
Council,

Defendants.

NO. 12-cv-3108-TOR

RESPONSE TO PLAINTIFFS'
MOTION TO STRIKE SECOND
SUPPLEMENTAL REPORT OF
PETER MORRISON, Ph.D.

NOTED FOR HEARING: August 13,
2014

WITHOUT ORAL ARGUMENT

I. INTRODUCTION

Defendants respectfully request that this Court deny Plaintiffs' Motion to Strike the Second Supplemental Report of Peter Morrison, Ph.D., which was submitted with Defendants' reply in support of their summary judgment motion.¹ ECF No. 86-1. Plaintiffs ask this Court to strike Dr. Morrison's declaration without explaining what it is actually in it. Instead, Plaintiffs baldly declare that the submission of Dr. Morrison's declaration is "sandbagging" and "highly prejudicial." *Pls.' Mot. to Strike* at 1, 4. However, a thoughtful read of the declaration shows that Plaintiffs' appeals to prejudice are unfounded.

II. STATEMENT OF FACTS

Since Defendants' expert demographer Dr. Morrison submitted his first report in this case almost a year-and-a-half ago, Plaintiffs have been aware of his opinion that Plaintiffs' proposed redistricting plans cause the votes of eligible voters in one district to carry far more weight than a vote in another district. ECF No. 69-5 [Expert Report of Peter Morrison, Ph.D. disclosed March 22, 2013]. In his deposition, Dr. Morrison testified that Plaintiffs' expert, William Cooper, made no apparent attempt to reduce the misweighting of voting strength when creating his plans:

¹ Along with their motion to strike, Plaintiffs also filed a stipulated motion to expedite. ECF No. 88. Defendants recognize that this Court has not yet ruled on the motion to expedite. However, in the interest of convenience and to reserve their opposition, Defendants preemptively submit this response in anticipation of this Court granting the motion to expedite.

1 So it's all a matter of recognizing the traditional redistricting criteria,
2 all of them, and trying to achieve some reasonable balance among
3 them. And it requires on the part of the person doing it first of all
4 recognizing them all, which I have said Mr. Cooper has overlooked
5 several and seems to be, seems not to understand what they are, and
6 secondly, achieving some balance among them in a way that one can
articulate what the balance is and what the rationale was. And again
that that is another step where I haven't seen any evidence that
occurred in what Mr. Cooper did.

7 ECF No. 69-9 [Deposition Transcript of Dr. Morrison] at 167:5-15.

8 Defendants' summary judgment motion asks this Court to dismiss
9 Plaintiffs' claim for failing to consider electoral equality—a constitutionally-
10 protected principle—under the first *Gingles* factor. *See generally* ECF No. 69. In
11 particular, Defendants fault Mr. Cooper for not attempting to achieve a balance
12 among traditional redistricting criteria and constitutional norms.

13 Dr. Morrison's declaration submitted with Defendants' summary judgment
14 reply illustrates an attempt to achieve the balance that Dr. Morrison referred to in
15 his deposition. Dr. Morrison concludes that attempting to reduce the electoral
16 imbalance in Mr. Cooper's plans is in tension with Mr. Cooper's goal of creating
17 a majority-minority district. Dr. Morrison's declaration is a concrete illustration
18 of the premise underlying Defendants' summary judgment motion: Plaintiffs
19 cannot satisfy the first *Gingles* factor unless they grossly imbalance the voting
20 strength of eligible voters across the City.

21 **III. ARGUMENT**

22 Rule 37(c)(1) provides that a party who fails to disclose information as
23 required by Rule 26(a) or (e) may not rely on that information on a motion, a
24 hearing, or at trial “unless the failure was substantially justified or was harmless.”
25

1 Plaintiffs do not explain why the disclosure of Dr. Morrison's declaration
2 will result in any meaningful prejudice. His short declaration simply illustrates an
3 attempt to balance electoral equality with other constitutional norms and
4 traditional redistricting criteria. Mr. Cooper's failure to attempt this balance has
5 long been an issue in this case. Defendants' summary judgment motion seeks
6 dismissal of Plaintiffs' claim because Mr. Cooper did not attempt this balance and
7 Dr. Morrison's declaration complements Defendants' summary judgment motion
8 by illustrating what it might look like to attempt this balance.

9 Moreover, since the beginning of this case Plaintiffs have almost certainly
10 understood that in order to create a single-member district with an eligible voter
11 population that is more than 50% Latino, the demography of the City requires that
12 the absolute number of eligible voters in that district must be small compared to
13 other districts. Increasing the absolute number of eligible voters in that district
14 requires changing the district's boundaries to incorporate non-Latino eligible
15 voters. This, in turn, curbs Plaintiffs' ability to create a majority-minority district.
16 This negative correlation is self-evident in the City's demographic data.

17 This case stands in contrast to *Yeti by Molly, Ltd. v. Deckers Outdoor*
18 *Corp.*, 259 F.3d 1101 (9th Cir. 2001), cited by Plaintiffs. There, the defendant
19 identified an expert witness but did not disclose *any* report from that expert until
20 28 days before trial. *Id.* at 1105. In this case, Plaintiffs have been aware of Dr.
21 Morrison's criticism of Mr. Cooper's neglect of electoral equality for more than a
22 year-and-a-half. Dr. Morrison's latest declaration was submitted with Defendants'
23 summary judgment reply to show that balancing electoral equality with other
24 principles and criteria is not an abstract concept, but an actual exercise that could
25

1 have been (and was not) performed by Mr. Cooper. In sum, Plaintiffs have not
2 demonstrated any unfair surprise that warrants the striking of Dr. Morrison's
3 declaration.

4 **IV. CONCLUSION**

5 For the reasons given above, Defendants respectfully request that this
6 Court deny Plaintiffs' Motion to Strike the Second Supplemental Expert Report
7 of Peter Morrison, Ph.D.

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9
10 RESPECTFULLY SUBMITTED this 8th day of August, 2014.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington, that on the date noted below, a true and correct copy of the foregoing was delivered and/or transmitted in the manner(s) noted below:

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DATED this 8th day of August, 2014

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