HONORABLE THOMAS O. RICE

Francis S. Floyd, WSBA No. 10642
ffloyd@floyd-ringer.com
John A. Safarli, WSBA No. 44056
jsafarli@floyd-ringer.com
FLOYD, PFLUEGER & RINGER, P.S.
200 W. Thomas Street, Suite 500
Seattle, WA 98119-4296
Tel (206) 441-4455
Fax (206) 441-8484
Attorneys for Defendants

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

DEFENDANTS' RESPONSE TO STATEMENT OF INTEREST OF THE UNITED STATES OF AMERICA

INTRODUCTION

On August 18, 2014, the United States filed a Statement of Interest urging this Court to deny Defendants' summary judgment motion. ECF No. 99. During the telephonic hearing on the parties' cross-motions for summary judgment, Defendants asked this Court to allow Defendants to file a written response to the Statement of Interest. This Court granted Defendants' request. ECF No. 98.

ARGUMENT

A. The United States Confirms the Constitutional Significance of Electoral Equality

Defendants' summary judgment motion argues that electoral equality is a constitutionally-protected doctrine that a Section 2 plaintiff must balance with other constitutional principles and traditional redistricting criteria under the first prong of *Gingles*. *See* ECF No. 67, 85. The United States acknowledges the constitutional gravity of electoral equality throughout its Statement of Interest. ECF No. 99 at 6 (describing electoral equality as one of two "dual ideals" served by the "principle of one-person, one-vote"); *id.* at 9 (referring to "equality of representation" and "equality of voting power" as "twin goals"). The United States' discussion of electoral equality provides further support that this principle is a well-established constitutional doctrine.

Moreover, the United States' treatment of electoral equality reveals Plaintiffs' flawed approach to the first *Gingles* factor. The United States acknowledges that electoral equality is a constitutional "goal[]" and "ideal[]," yet Plaintiffs' own expert witness admitted that he did not attempt to balance electoral equality in his plans, and Plaintiffs have argued strenuously that they are free to totally ignore the "goal[]" and "ideal[]" of electoral equality under the first *Gingles* factor. ECF No. 99 at 6, 9. The constitutional significance of electoral

FLOYD, PFLUEGER & RINGER P.S.
200 WEST THOMAS STREET, SUITE 500
SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484

equality—acknowledged by the United States and verified by Supreme Court precedent—cannot be reconciled with Plaintiffs' approach to the first *Gingles* precondition in this case.

B. The United States Misrepresents the Arguments in Defendants' Summary Judgment Motion

The United States' Statement of Interest fails to accurately characterize the central contentions of Defendants' summary judgment motion. The United States asserts that Defendants believe "that using total population as the basis for apportionment is unconstitutional." ECF No. 99 at 6 n.2. Not so. Defendants recognize in the opening pages of their summary judgment motion that in the Ninth Circuit, "districts *must* be apportioned based on population." ECF No. 67 at 4 (emphasis added). Defendants reiterate this acknowledgement in their reply. ECF No. 85 ("Defendants do not dispute that Plaintiffs are obligated to create districts with roughly equal total populations under the first *Gingles* factor.") Contrary to the United States' claim, Defendants do not dispute the use of total population as an apportionment basis.

The United States also alleges that Defendants contend "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." ECF No. 99 at 2. This is another straw-man argument raised by the United States. Nowhere in their briefing have Defendants argued that Plaintiffs must propose such a plan.

Defendants *are* arguing that a Section 2 plaintiff's evidentiary burden under the first *Gingles* factor requires some attempt to reduce the imbalance in electoral equality while adhering to other constitutional principles and traditional

FLOYD, PFLUEGER & RINGER P.S.
200 WEST THOMAS STREET, SUITE 500
SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484

redistricting criteria (including the use of total population as an apportionment basis). Mr. Cooper's admitted failure to consider electoral equality confirms that Plaintiffs completely disregarded this doctrine in their attempt to satisfy the first *Gingles* precondition.

Indeed, the data presented by Mr. Cooper show that the maximum citizen voting-age population ("CVAP") deviations[1] in his plans that he considers viable are between 60 to 70%. These are extremely high deviations that exemplify electoral inequality and a complete failure to consider this constitutionally-protected doctrine. Moreover, because of Mr. Cooper's failure, this Court does not know whether it is possible to create a plan with a majority-minority district that has a lower maximum CVAP deviation. As a result, Plaintiffs have failed to satisfy their evidentiary burden under the first *Gingles* factor and this Court should dismiss their claim.

Defendants further argue that the existing maximum CVAP deviations of 60 to 70% in Mr. Cooper's viable plans are unacceptably high and violate Section 2's prohibition on minority vote dilution and amount to unconstitutional racial gerrymandering. ECF No. 67 at 13-17; ECF No. 85 at 10-16. In sum, the United States has misstated the central contentions of Defendants' summary judgment motion.

---

[1] That is, the absolute value of the range between the district with the greatest negative deviation from the mean CVAP in a plan with seven districts and the district with the greatest positive deviation from that mean.

FLOYD, PFLUEGER & RINGER P.S.
200 WEST THOMAS STREET, SUITE 500
SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484

C. The Supreme Court Has Not Endorsed Plaintiffs' Approach to Satisfying the First *Gingles* Factor

The United States cites *Gaffney v. Cummings*, 412 U.S. 735 (1973) for the proposition that "[t]he Supreme Court has explicitly recognized that population-based redistricting need not precisely equalize voting power." ECF No. at 9. The Supreme Court in *Gaffney* noted that the 1970 census showed the congressional districts in New York, California, and Illinois had CVAP variations of 29%, 25% and 20%, respectively. *Gaffney*, 412 U.S. at 748 n.13. Relying on this excerpt from *Gaffney*, the United States suggests that "[d]espite 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." ECF No. 99 at 9.

For at least two reasons, *Gaffney* does not undermine Defendants' argument that Plaintiffs in this case must attempt to balance electoral equality with other constitutional doctrines and traditional redistricting criteria under the first *Gingles* factor. First, the apportionment of a state's congressional districts is controlled by Section 2 of the Fourteenth Amendment, whereas state and local apportionments are governed by the Equal Protection Clause. *See Garza v. County of Los Angeles*, 918 F.2d 763, 785 (9th Cir. 1990) (Kozinski, J., dissenting) (citing *Reynolds v. Sims*, 377 U.S. 533 (1964) and explaining that "[i]f [Section 2 of the Fourteenth Amendment] were meant to govern state legislative apportionments, the principle of one person one vote, based on a separate part of the [F]ourteenth [A]mendment, would be superfluous."). Even if the *Gaffney* Court tolerated high maximum CVAP deviations among states' congressional districts, this does not confer upon a Section 2 plaintiff challenging a state or local

FLOYD, PFLUEGER & RINGER P.S.
200 WEST THOMAS STREET, SUITE 500
SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484

election system a license to totally disregard electoral equality when proposing redistricting plans.

Second, the states' congressional districts that were considered in *Gaffney* existed under the status quo. In contrast, Plaintiffs in this case seek the installment of a new election system that would *create* unacceptably high maximum CVAP deviations among districts where none existed before (deviations, it bears noting, that are more than twice the size of anything considered in *Gaffney*). These deviations, moreover, would result in the debasement of minority voting strength, specifically among Latinos. *See* ECF No. 67 at 13. Contrary to the United States' suggestion, *Gaffney* does not countenance Plaintiffs' approach to satisfying the first *Gingles* factor.

CONCLUSION

The Statement of Interest filed by the United States materially misrepresents the arguments set forth in Defendants' summary judgment motion. The Statement of Interest does not undercut Defendants' motion and, if anything, supports it by confirming the constitutional significance of electoral equality.

RESPECTFULLY SUBMITTED this 19th day of August, 2014.

s/ Francis S. Floyd
Francis S. Floyd, WSBA No. 10642
ffloyd@floyd-ringer.com
John A. Safarli, WSBA No. 44056
jsafarli@floyd-ringer.com
FLOYD, PFLUEGER & RINGER, P.S.
200 W. Thomas Street, Suite 500
Seattle, WA 98119-4296
Tel (206) 441-4455
Fax (206) 441-8484
Attorneys for Defendants

CERTIFICATE OF SERVICE

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

Sarah Dunne La Rond Baker ACLU OF WASHINGTON FOUNDATION 901 Fifth Avenue, Suite 630 Seattle, WA 98164 (206) 624-2184 dunne@aclu-wa.org lbaker@aclu-wa.org	*Counsel for Plaintiffs*	☐ VIA EMAIL ☐ VIA FACSIMILE ☐ VIA MESSENGER ☐ VIA U.S. MAIL ☒ VIA CM/ECF SYSTEM
Joaquin Avila THE LAW FIRM OF JOAQUIN AVILA P.O. Box 33687 Seattle, WA 98133 (206) 724-3731 jgavotingrights@gmail.com	*Counsel for Plaintiff Rogelio Montes* *Pro Hac Vice*	☐ VIA EMAIL ☐ VIA FACSIMILE ☐ VIA MESSENGER ☐ VIA U.S. MAIL ☒ VIA CM/ECF SYSTEM
Laughlin McDonald ACLU FOUNDATION, INC. VOTING RIGHTS PROJECT 230 Peachtree Street, Suite 1440 Atlanta, GA 30303-1227 (404) 523-2721 lmcdonald@aclu.org	*Counsel for Plaintiff Mateo Arteaga* *Pro Hac Vice*	☐ VIA EMAIL ☐ VIA FACSIMILE ☐ VIA MESSENGER ☐ VIA U.S. MAIL ☒ VIA CM/ECF SYSTEM
Kevin J. Hamilton William B. (Ben) Stafford Abha Khanna PERKINS COIE LLP 1201 Third Avenue, Suite 4900 Seattle, WA 98101-3099 (206) 359-8000 khamilton@perkinscoie.com	*Counsel for Plaintiffs*	☐ VIA EMAIL ☐ VIA FACSIMILE ☐ VIA MESSENGER ☐ VIA U.S. MAIL ☒ VIA CM/ECF SYSTEM

FLOYD, PFLUEGER & RINGER P.S.
200 WEST THOMAS STREET, SUITE 500
SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484

wstafford@perkinscoie.com
akhanna@perkinscoie.com

Pamela Jean DeRusha U.S. ATTORNEY'S OFFICE 920 W. Riverside, Ste. 300 P.O. Box 1494 Spokane, WA 99210-1494 (509) 353-2767 USAWAE.PDeRushaECF@usdoj.gov	*Interested Party*	☐ VIA EMAIL ☐ VIA FACSIMILE ☐ VIA MESSENGER ☐ VIA U.S. MAIL ☒ VIA CM/ECF SYSTEM

In addition, courtesy copies have been emailed to the following parties:

Victor J. Williamson victor.williamson@usdoj.gov
Attorney
Voting Section
Civil Rights Division
United States Department of Justice

DATED this 19th day of August, 2014

s/ Yalda Biniazan
Yalda Biniazan, Legal Assistant

FLOYD, PFLUEGER & RINGER P.S.
200 WEST THOMAS STREET, SUITE 500
SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484