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 PLAINTIFFS' PROPOSED REMEDIAL PLAN AND FINAL INJUNCTION

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

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

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

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

INTRODUCTION

On October 6, 2014, this Court invited the parties to file responses to the competing proposed injunctive orders. ECF No. 120. Defendants now submit this memorandum and ask this Court to adopt Defendants' Proposed Remedial Plan as set forth in their Proposed Final Judgment and modified by their subsequent correspondence to this Court. ECF Nos. 116, 119.

Defendants' Proposed Remedial Plan provides the most complete and inclusive remedy for the Section 2 violation found by this Court. Defendants' proposal offers an immediate opportunity for Latinos to elect their candidate of choice and allows at least two more opportunities as the City's Latino demographic matures and increases in size. Plaintiffs' proposal, in contrast, is frozen in time. It effectively caps the number of City Council positions available to Latinos at two, which fails to accommodate the pace of Latinos' growing presence in the City.

Defendants' Proposed Remedial Plan also lays the groundwork for Latinos to elect an at-large representative through limited voting, which will enable all Latinos in the City to have a political voice. Plaintiffs' proposal, on the other hand, effectively disenfranchises the Latinos residing in five of Plaintiffs' seven districts. By insisting solely on single-member districts, Plaintiffs' plan will silence the political voice of nearly 60% of the eligible Latino voters in City elections.

Lastly, Defendants' Proposed Remedial Plan maintains some at-large representation, which honors the City Council's longstanding practice and legitimate, nondiscriminatory political desire to ensure that some

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

Councilmembers represent the entire City. Plaintiffs' proposal balkanizes the City into merely seven single-member districts and will result in Councilmembers who are accountable only to their very small and limited geographic constituency. Defendants' plan does not adopt a "winner-takes-all" approach for their at-large elections. Instead, Defendants propose a limited voting system, in which the two candidates are determined by a plurality vote rule. This provides Latinos with an opportunity to elect at-large candidates by reducing the ability of non-Latinos to win every seat.

Defendants submit that their Proposed Remedial Plan is constitutionally and legally acceptable and request that this Court to adopt it. However, if this Court is not inclined to accept Defendants' Proposed Remedial Plan, Defendants ask this Court to adopt the proposal outlined in FairVote's *amicus curiae* brief. The plan submitted by FairVote is a variation of Defendants' Proposed Remedial Plan. Both plans enfranchise all Latinos in the City, regardless of the district in which they reside, and both plans avoid carving up the entire City into seven geographic fiefdoms. Additionally, FairVote's proposal offers two immediate opportunities for Latinos to elect their candidate of choice. The table below compares the three proposals:

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200 WEST THOMAS STREET, SUITE 500
SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484

	Defendants' Proposal	FairVote's Proposal	Plaintiffs' Proposal
Configuration	5/2	4/3	7/0
At-large representation?	Yes	Yes	No
Political voice given to all Latinos?	Yes	Yes	No
Number of positions immediately obtainable with mathematical certainty	1	2	2
Maximum number of positions obtainable assuming continued historical crossover voting patterns	3	2	2
Likely number of positions controlled by Latinos with demographic maturation	3	2	2

In sum, Defendants ask this Court to adopt Defendants' Proposed Remedial Plan as the most complete remedy that cures the Section 2 violation, provides an immediate opportunity for Latino voters, accommodates the demographic maturation of the City's Latinos, provides political influence for Latinos across the entire City, and assures that the interests of the entire City are addressed. In the alternative, Defendants' request that this Court adopt FairVote's proposal, which is also a superior alternative to Plaintiffs' all-single-member district plan.

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

DESCRIPTION OF PROPOSALS

A. Defendants' Proposed Remedial Plan

Before this Court are three different proposals to remedy the Section 2 violation as found by this Court. The first proposal, submitted by Defendants on October 3 and modified by subsequent correspondence on October 5, includes five single-member districts and two at-large positions elected on a limited-voting basis. By creating a single-member district with a Latino share of the citizen, voting-age population ("CVAP") at 53.46%, Defendants' Proposed Remedial Plan offers an immediate opportunity for Latinos to elect their candidate of choice and cures the Section 2 violation.

Within the next two election cycles, the Latino share of citywide eligible voters will have nearly reached the threshold of exclusion figure of 33.3% for a two-seat limited voting system, which will offer Latinos a realistic opportunity for a second position on the City Council. Declaration of Peter Morrison, Ph.D. in Support of Defendants' Response ("Morrison Decl.") at ¶ 7. The threshold of exclusion identifies the percentage of minority voters in a limited voting system who must vote in order to elect a candidate of choice—assuming that there is no majority crossover voting.

Within a similar timeframe, the LCVAP percentage in Defendants' influence district will have reached the same level currently contained in Plaintiffs' influence district. Morrison Decl., Tbl. 2. Thus, Defendants' proposal would institute an enduring cure that would offer Latinos realistic opportunities to elect one at-large Councilmember and two district Councilmembers.

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SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484

Defendants' Proposed Remedial Plan allows Councilmembers to serve out the remainder of their terms, but offers almost no incumbency protection for the four current district representatives who will stand for reelection in 2015 under Defendants' proposal. The current three at-large representatives would need to compete for two at-large positions in 2017 (which would have the likely effect of splitting the non-Latino vote), step down from their current at-large position early and contest a seat against an incumbent in District 4 or District 5 in 2015, or decline to run for reelection altogether. Moreover, Defendants' opportunity district (District 1, up for election in 2015) and Defendants' influence district (District 2, up for election in 2017) contain no incumbents. Lastly, Defendants' Proposed Order explicitly requires future redistricting efforts to preserve the Latino share of the eligible voter population in Districts 1 and 5 when apportioning the total population among the districts.

B. Plaintiffs' All-Single-Member District Plan

Plaintiffs' proposal, which they have not modified since Mr. Cooper introduced it nearly 20 months ago, would simply divide the City into seven single-member districts. Candidates would contest each district on a "winner-takes-all" basis. Plaintiffs would have all seven positions appear on the 2015 ballot and would restart the current staggered-term system by having the Councilmembers elected to the even-numbered positions for terms of two years. Candidates would then contest the even-numbered seats in 2017, with the winners serving four-year terms.

As measured by CVAP, Plaintiffs' plan contains one opportunity district and one influence district. As measured by registered voters, however, their plan

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200 WEST THOMAS STREET, SUITE 500
SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484

purports to include two opportunity districts. In the remaining five districts in Plaintiffs' plan, the Latino share of CVAP ranges from 7.11% (District 6) to 26.69% (District 4). According to estimates from Defendants' expert witness, Dr. Peter Morrison, the Latino share of CVAP in District 4 will only reach 35.1% by 2027. Morrison Decl., Tbl. 3.

There is no doubt that the other five districts in Plaintiffs' plan will remain under the control of non-Latinos for the foreseeable future. Nearly 60% of Latino eligible voters currently reside in those five districts. Morrison Decl., ¶ 11. Plaintiffs' plan is myopically focused on empowering fewer than half the City's Latinos while depriving most Latinos of a meaningful political voice.

C. FairVote's Proposal

On October 20, this Court granted FairVote's motion for leave to file an *amicus curiae* brief, which FairVote filed shortly thereafter. ECF Nos. 125, 126. FairVote's proposal is similar to Defendants' in that both plans contain a blend of district and at-large positions. As in Defendants' Proposed Remedial Plan, the at-large representatives are chosen on a limited-voting basis. This is a critical feature absent from Plaintiffs' plan, which requires all candidates to be elected on a "winner-takes-all," single-member district basis. Both Defendants' plan and FairVote's plan incorporate limited voting, which enhances minority voting opportunities to elect at-large representatives. Additionally, FairVote also encourages a voter-education campaign to inform City voters about limited voting. Defendants would not object to such a campaign.

FairVote proposes three at-large positions, rather than the two. Under the threshold-of-exclusion model presented by Plaintiffs' expert, Dr. Richard

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200 WEST THOMAS STREET, SUITE 500
SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484

Engstrom, increasing the number of at-large positions from two to three reduces the threshold of exclusion from 33.3% to 25.0%. ECF No. 118-1 (Ex. 2 at 5). According to Mr. Cooper, the Latino share of citywide eligible voters has already reached 26.54% and is continuing to grow. ECF No. 118-1 (Ex. 3 at ¶ 3). As such, FairVote's proposal results in at least one at-large position that is immediately electable by Latinos.

FairVote did not submit a map along with their proposal. However, Dr. Morrison has determined that a four-district map can be created with one district in which Latinos would be a majority of registered voters in the forthcoming election. Morrison Decl., ¶ 16. This became clear when, on October 3, Plaintiffs revealed the figures supporting their proposed plan. ECF No. 118-1 (Ex. 1). In two of Plaintiffs' seven districts, Latinos are a majority of the registered voters. *Id.* Combining these two districts would create a single, larger district in which Latinos would remain a majority of registered voters. Morrison Decl., ¶ 16. However, because this district would contain approximately two-sevenths of the City's overall total population, the district's total population figure would need to be adjusted slightly to bring its share of the overall total population closer to one-fourth. *Id.* This reduction can be accomplished while preserving the majority of registered Latino voters in the district.[1] *Id.* The concentration of registered Latino voters could also be increased by reassigning a small portion of this single, larger district with a slightly lesser concentration of Latino registrants to neighboring districts when balancing out the total population figures. *Id.* Thus, FairVote's

[1] As part of their reply, Defendants intend to submit a four-district map demonstrating the possibility of creating such a district.

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

proposal offers two immediate opportunities for Latinos to elect their candidate of choice: The first through limited voting for the three at-large positions, and the second through a district in which Latinos are the majority of registered voters.

FairVote's proposal also does not address the transition from the existing system. However, the fairest and least disruptive transition would be to allow the Councilmembers to serve out the remainder of their terms and hold elections in 2015 for the four district positions and elections in 2017 for the three at-large positions. This would not require any restarting of the current staggered-term system. The only changes would be to the district boundaries and the method by which the at-large representations are chosen.

ARGUMENT

Plaintiffs argue that Defendants' proposal is legally unacceptable for three reasons. First, Plaintiffs contend that a component of Defendants' Proposed Remedial Plan violates state law. Whatever the merits were of this argument, the issue is moot because Defendants have withdrawn this non-essential component of their proposal.

Second, Plaintiffs assert that Defendants' proposal would perpetuate Latino vote dilution by including some at-large positions on the City Council. At-large elections, however, are not *per se* illegal and Defendants' Proposed Remedial Plan utilizes a limited voting method that, under the circumstances of this case, provides Latinos with a favorable opportunity to elect their candidate of choice. Defendants' proposed at-large positions do not perpetuate Latino vote dilution.

Third, Plaintiffs argue that this Court should reject Defendants' Proposed Remedial Plan because it does not immediately provide Latinos with a number of

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

opportunity districts commensurate with the Latino share of the City's eligible voters. This is not a basis for automatically rejecting Defendants' proposal. However, even if this Court was concerned with adopting a plan that offers immediate proportionality, Plaintiffs' insistence on maximizing the number of opportunity districts is not the only path. FairVote's proposal, which immediately provides two positions (one at-large and one district) in which Latinos could elect their candidate of choice, is a superior and immediate alternative to Plaintiffs' all-single-member district plan.

A. Defendants' Plan Does Not Violate State Law

As originally proposed, Defendants' Proposed Remedial Plan would have designated the two-large representatives as Mayor and Assistant Mayor. ECF No. 116 at ¶ 6. During the parties' discussions about their respective proposals, Plaintiffs never objected to or suggested that this part of Defendants' proposal might violate state law. Instead, Plaintiffs waited until they filed their proposal to raise this criticism. ECF No. 117 at 5.

Although the challenged method of selecting Mayor and Assistant Mayor is contemplated by state law, *see* RCW 35A.13.033, Defendants withdrew this component to avoid controversy over a nonessential part of their proposal. ECF No. 116. Plaintiffs' contention that Defendants' plan is not entitled to deference because it violates state law is moot.

B. The Inclusion of Two At-Large Positions in Defendants' Plan Does Not Violate Section 2

Plaintiffs contend that the presence of two at-large positions in Defendants' Proposed Remedial Plan conflicts with Section 2 because "maintaining two at-

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200 WEST THOMAS STREET, SUITE 500
SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484

large seats preserves the very minority vote dilution that requires remediation." ECF No. 117 at 6. Contrary to Plaintiffs' position, at-large positions are not automatically illegal. Moreover, Defendants' proposal removes the elements of at-large elections that this Court found "blunt[ed] the effectiveness of voting cohesively for one candidate," namely the use of numbered posts, "winner-takes-all" contents, and the head-to-head competitions. ECF No. 108 at 57. In fact, by preserving at-large representation, Defendants' plan is more inclusive than Plaintiffs because it allows Latinos across the City to exercise political influence. Plaintiffs' proposal is only concerned with Latinos fortunate to live in two out of Plaintiffs' seven districts.

Plaintiffs' examples of courts "routinely" rejecting mixed plans are unpersuasive. ECF No. 117 at 6. In *Buchanan v. Jackson*, which Defendants already distinguished in their initial memorandum, *see* ECF No. 113 at 15-16, the city's plan granted broad executive authority to the at-large representatives but conferred ordinary legislative power to the district representatives. *Buchanan*, 683 F. Supp. 1537, 1541 (W.D. Tenn. 1988). . The city's plan also maintained a majority-vote requirement for all positions, which "effectively preclude[d] a black candidate from being elected" to the powerful at-large positions. *Id.* at 1543. Here, Defendants' Proposed Remedial Plan neither bestows special status on the at-large representatives nor maintains the "winner-take-all" requirement. Each proposed remedial plan requires individual and careful examination, rather than the one-size-fits-all approach advocated by Plaintiffs. *Buchanan*, 683 F. Supp. at 1541 (quoting *Dillard v. Crenshaw Cnty.*, 831 F.2d 246, 250 (11th Cir. 1987)).

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200 WEST THOMAS STREET, SUITE 500
SEATTLE, WA 98119-4296
TEL 206 441-4455
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All the plans rejected in the other cases cited by Plaintiffs would have required the at-large representatives to be elected on a "winner-take-all" basis. *Harvell v. Blytheville School District*, 126 F.3d 1038 (8th Cir. 1997); *United States v. Dallas Cnty. Comm.*, 850 F.2d 1433 (11th Cir. 1988); *United States v. Osceola Cnty.*, 474 F. Supp. 2d 1254 (M.D. Fla. 2006); *League of United Latin Am. Citizens, Council No. 4836 v. Midland Indep. Sch. Dist.*, 648 F. Supp. 596 (W.D. Tex. 1986). Indeed, the rejected plan in *Osceola County* would have increased the number of commissions from five to seven precisely to add two "winner-take-all" at-large seats. *Id.* at 1254-55.

Plaintiffs also fail to mention the ample countervailing examples of courts approving hybrid plans. *See, e.g., James v. Sarasota*, 611 F. Supp. 25 (M.D. Fla. 1985) (adopting a plan with three single-member districts and two at-large positions); *Hines v. Ahoskie*, 998 F. 2d 1266 (4th Cir. 1993) (two districts with two representatives each elected "by a plurality vote" and a fifth at-large representative); *Tallahassee Branch of the NAACP v. Leon Cnty.*, 827 F.2d 1436 (11th Cir. 1987) (five single-member districts and two at-large positions); *NAACP v. City of Columbia*, 850 F. Supp. 404 (D.S.C. 1993) (four single-member districts and three at-large positions). As these cases demonstrate, "no particular election scheme is required by Section 2." *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 752 n.11 (N.D. Ohio 2009) ("*Euclid Sch. Bd.*").

Plaintiffs acknowledge that Defendants' Proposed Remedial Plan eliminates various features of the previous at-large elections, but assert that Defendants' proposed at-large elections still do not provide a meaningful chance for Latinos to elect their candidate of choice. ECF No. 117 at 9-10. Plaintiffs base

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

their claim on "threshold of exclusion" analysis provided by their expert witness, Dr. Engstrom. ECF No. 118-1 (Ex. 2 at 2-4). As Dr. Engstrom explains regarding limited voting, the threshold of exclusion is a useful guideline for establishing when a minority group is guaranteed to elect a candidate of choice, regardless of whether it receives any majority crossover voting.

Dr. Engstrom opines that "Latinos must comprise 33.33% of the electorate in order for their preferred candidate to win an at-large seat without the support of non-Latino voters." ECF No. 117 at 9. Although this figure is greater than the current Latino share of eligible voters, the inexorable Latino demographic growth in the City is beyond dispute. Projections provided by Defendants' expert, Dr. Peter Morrison, establish that citywide LCVAP will reach 30.7% by 2021, placing them within effective reach of the threshold of exclusion when candidates will contest the at-large positions for a second time.[2] Morrison Decl., Tbl. 1. By then, even a modest degree of crossover voting (common in City Council contests[3]) will afford Latinos a meaningful opportunity to elect their candidate of choice.

Furthermore, this system of selecting candidates is not untested in the City. Previous Latino candidates would have achieved electoral success had Defendants' Proposed Remedial Plan been implemented. Dave Ettl and Sonia Rodriguez were the top two votegetters in a three-candidate primary for Position

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[2] FairVote's proposal of three at-large positions requires a threshold of exclusion of 25%, which has already been met according to Mr. Cooper. ECF No. 118-1 (Ex. 3 at ¶ 3).

[3] *See* ECF No. 65 at ¶¶ 119, 122, 128, 131, 136, 151, 155.

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200 WEST THOMAS STREET, SUITE 500
SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484

5 in 2009. ECF 65 at ¶¶ 120-121. Bill Lover and Benjamin Soria were the top two votegetters in a four-candidate primary for Position 7 in 2009. *Id.* at ¶¶ 124, 126. Plaintiffs may cite the 2013 election cycle where Isidro Reynaga and Enrique Jevons both failed to emerge from a three-person primary contest. These elections do not negate the legitimacy of a modified at-large system. "[T]he ultimate right of Section 2 is equality of opportunity, not a guarantee of electoral success." *League of United Am. Citizens v. Perry*, 548 U.S. 399, 437 (2006). The 2009 elections demonstrate that limited voting will create such an opportunity for Latinos.

Plaintiffs also suggest that Defendants' at-large election proposal is unappealing because of the "historic low turnout rates of Latinos in at-large elections." Pls.' Mot. at 9. As Dr. Engstrom opined in an earlier case, however, "[t]he increase in the Hispanic opportunity to elect a representative of their choice, including a Hispanic representative or two, under a cumulative voting arrangement is also likely to stimulate Hispanics to organize and mobilize more in a cumulative voting election." Declaration of Francis S. Floyd ("Floyd Decl."), Exhibit A at ¶ 25. Here, Defendants have proposed a limited, rather than cumulative, voting system, but that is unimportant. "It is the opportunity to elect, not the medium through which it is offered, that provides the stimulus to organize and mobilize."[4] *Id.* at ¶ 26.

[4] Additionally, Plaintiffs are selective in their reliance on low turnout rates. If Plaintiffs wish to criticize Defendants' modified at-large proposal by citing low voter turnout rates, then the parties' opportunity and influence districts should

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SEATTLE, WA 98119-4296
TEL 206 441-4455
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Dr. Engstrom's threshold of exclusion analysis also assumes that the Latino-preferred candidate will run against only two non-Latino candidates, and that non-Latinos will not cast any votes for the Latino-preferred candidate. ECF No. 118-1 (Ex. 2 at 3). As Dr. Engstrom has written, these are "worst-case assumptions, from the minority group's perspective, about the behavior of the other votes." Richard L. Engstrom, *Cumulative and Limited Voting: Minority Electoral Opportunities and More*, 30 ST. LOUIS U. L.J. 97, 103 (2010) (hereinafter "Engstrom").[5] "If the worst-case assumptions concerning the voting behavior of the other voters are violated, and it is hard to imagine an election in which they are not, the group at issue could be smaller and/or less cohesive in its preferences and still have a realistic opportunity to elect a representative or representatives of their choice." Engstrom at 108. Thus, a threshold of exclusion "does not identify a floor under which a group has no chance of electing a representative of its choice, only a floor for when it can, theoretically, do so without that candidate receiving any votes from other voters."[6] *Id.*

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also be considered in light of the same low voter turnout rates, which would call into question the efficacy of any remedial plan.

[5] For reference, Dr. Engstrom's entire article is attached to the Declaration of Francis S. Floyd as Exhibit B.

[6] As referenced above, non-Latino crossover voting is common in the City. *See* ECF No. 65 at ¶¶ 119, 122, 128, 131, 136, 151, 155. In at-large elections with more than two candidates, Latinos have received between 11.4% to 42.6% of non-Latino votes. *Id.* at ¶¶ 122, 128, 151, 155.

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200 WEST THOMAS STREET, SUITE 500
SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484

Plaintiffs are also critical of Defendants' limited voting proposal because it is supposedly "untested in Washington" and "would be in tension with state policy governing local election systems." ECF No. 117 at 10. However, Plaintiffs do not identify any statute or policy that would conflict with Defendants' proposal. At worst, Washington is silent on using limited voting in local elections, which is not a ground for disapproving Defendants' proposal.[7] *See United States v. Vill. of Port Chester*, 407 F. Supp. 2d 411, 449 (S.D.N.Y. 2010) ("The Court also does not find that the absence of cumulative voting in other New York villages means that Port Chester should get less deference, as Plaintiffs suggest.")

Lastly, Plaintiffs claim that Defendants' limited voting proposal "do[es] not address the barriers Latinos face in running for at-large positions in terms of money and resources." ECF No. 117 at 10. Plaintiffs omit a study conducted last year by the Yakima Herald-Republic establishing that increased spending in City Council contests—regardless of whether Latino candidates were running—did not translate into election victories.[8] Plaintiffs' claim also discounts Latino candidates with the resources and desire to represent the interests of the entire

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[7] If anything, Washington is receptive to limited voting, which it employs in statewide primaries.

[8] More campaign money doesn't always translate to victories, YAKIMA HERALD REPUBLIC, October 6, 2013, available at http://www.yakimaherald.com/news/livenews/1554961-8/more-campaign-money-doesnt-always-translate-to-victories (last visited Oct. 22, 2014).

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

City. In any event, Defendants' Proposed Remedial Plan addresses this concern by offering an immediate opportunity district and an influence district.

Plaintiffs' opposition to Defendants' at-large, limited votingelections reveals their shortsighted approach to Latino voting opportunities. Although Plaintiffs' proposal purports to offer Latinos one opportunity district and one near-opportunity district as measured by CVAP, the remaining five districts in Plaintiffs' plan would not offer meaningful opportunities for Latino candidates to elect their candidate of choice. Indeed, Dr. Morrison's projections show that Plaintiffs' District 4, which contains the highest concentration of LCVAP outside of Districts 1 and 2, will achieve a LCVAP percentage of only 35.1% by 2027. Morrison Decl., Tbl. 3.

In effect, Plaintiffs are asking the Court to cap the number of seats that Latinos could meaningfully achieve at two and to guarantee the remaining five seats for non-Latinos. Although Defendants' plan incorporates the anticipated demographic maturation of the City's Latinos, Defendants' plan offers Latinos the potential of at least three seats that they could meaningfully achieve.[9] Moreover, Defendants' plan will allow candidates from Latino-controlled districts to represent a larger share of eligible Latino voters. Under Defendants' plan, Latinos will eventually control two out of five districts—currently 56.3% of the

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[9] Plaintiffs claim that Defendants' Proposed Remedial Plan is a "mirage" because subsequent redistricting will dilute Latino voting strength in Defendants' opportunity and influence districts. ECF No. 117 at 15 n.5. Plaintiffs overlook the part of Defendants' proposed order requiring that the preservation concentration of eligible Latino voters. ECF No. 116 at ¶ 10.

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SEATTLE, WA 98119-4296
TEL 206 441-4455
FAX 206 441-8484

City's eligible Latino voters—instead of two out of seven districts under Plaintiffs' plan—currently only 40.6% of the City's eligible Latino voters. ECF No. 114 (Declaration of Peter Morrison, Ph.D. in Support of Defendants' Proposed Remedial Plan) at ¶ 10.

Both Defendants' Proposed Remedial Plan and FairVote's proposal offer an additional advantage compared to Plaintiffs' plan. Carving a jurisdiction into all single-member districts, as Plaintiffs propose, "confine[s] the opportunity to elect to just those [minority] voters who reside within a [minority] opportunity district." Engstrom at 113. As noted by Dr. Morrison, nearly 60% of the City's eligible Latino voters reside outside of Plaintiffs' opportunity and influence districts. Morrison Decl., ¶ 11. Thus, under Plaintiffs' proposal, a majority of adult Latino citizens in the City would not have a meaningful opportunity to elect a representative of the group's choice for the foreseeable future. Plaintiffs' plan designates this group of Latino voters as losers in the "representational lottery" of all single-member district plans.[10] LANI GUINIER, THE TYRANNY OF THE

[10] Plaintiffs will likely note that the Ninth Circuit has held that "[d]istricting plans with some members of the minority group outside the minority-controlled districts are valid." *Gomez v. Watsonville*, 863 F.2d 1407, 1414 (9th Cir. 1988). The context of this pronouncement is inapplicable here. The Ninth Circuit was addressing the defendants' argument that the court should reject plaintiffs' demonstrative plan under the first *Gingles* factor because the plan located approximately 60% of eligible Latino voters outside the majority-minority districts. *Id.* The Ninth Circuit concluded that this was not a barrier to satisfying the first *Gingles* factor. *Id. Gomez* does not detract from Defendants' position that

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

MAJORITY: FUNDAMENTAL FAIRNESS IN REPRESENTATIVE DEMOCRACY 121 (1994).

In contrast, both Defendants' and FairVote's proposals avoid "trad[ing] off the rights of some members of a racial group against the rights of other members of that group." *League of United Am. Citizens v. Perry*, 548 U.S. 399, 437 (2006). Both proposals "provide all of the minority group's voters in a jurisdiction, regardless of where they reside, with an opportunity to participate in electing a representative of the group's choice, rather than just those residing in the majority-minority district." Engstrom at 114. As Dr. Engstrom has written, "[i]t would certainly be a rational policy choice to allow *all* of the minority voters to participate in the opportunity to elect representatives favored by their group." *Id.* (emphasis added). In this sense, Defendants' and FairVote's proposals provide a "full and complete remedy"[11] because "minority vote dilution in at-large system is a jurisdiction-wide problem; it affects all minority voters residing within a jurisdiction, not just those residing in a particular area that can provide the basis for a majority-minority [single-member district]." Engstrom at 114. Plaintiffs' plan is incomplete, as it excludes nearly 60% of the City's eligible Latino voters. The jurisdiction-wide problem of vote dilution is solved by affording all—not just some—eligible Latino voters a meaningful opportunity to elect their candidate of choice.

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their plan is superior because it extends an avenue of empowerment to all eligible Latino voters in the City.

[11] *Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1052 (D.S.D. 2004).

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

In sum, the inclusion of two at-large positions elected through a limited voting system does not violate Section 2. Courts may evaluate proposed remedial plans both "by difference from the old system" and "by prediction." *Dillard v. Crenshaw Cnty.*, 831 F.2d 246, 250 (11th Cir. 1987). The inexorable demographic growth of the eligible Latino voter population is more than a "prediction" and is certainly not a "wait-and-see approach," as Plaintiffs allege. ECF No. 117 at 14. Even accepting the "worst-case assumptions," Engstrom at 103, about the number of non-Latino candidates and the behavior of non-Latino voters, the City's eligible Latino voter population will nearly reach the threshold of exclusion before the at-large positions are contested for the second time under Defendants' Proposed Remedial Plan. Under FairVote's proposal, the threshold of exclusion has already been met. Of the three proposals before this Court, only Plaintiffs' plan fails to offer a complete remedy for all Latinos in the City by affording them a meaningful political voice.

C. Creating Less Than Seven Single-Member Districts Does Not Dilute Latino Voting Strength

Plaintiffs claim Defendants' plan violates Section 2 because it fails to offer the maximum number of single-member districts to Latinos. However, "[a] district court may reject the defendant's proposal under only one condition: if that proposal 'is legally unacceptable because it violates anew constitutional or statutory voting rights – that is, whether it fails to meet the same standards applicable to an original challenge of a legislative plan in place." *Euclid Sch. Bd.*, 632 F. Supp. 2d at 750 (quoting *McGhee v. Granville Cnty.*, 860 F.2d 110, 115 (4th Cir. 1988)). As the Supreme Court has explained, however, a plaintiff cannot

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

maintain a Section 2 claim solely on the basis that a local jurisdiction has not maximized minority voting strength. *Johnson v. De Grandy*, 512 U.S. 997, 1006 (1994) ("Failure to maximize cannot be the measure of § 2.") Under *Johnson*, it would be difficult for a putative plaintiff to challenge Defendants' Proposed Remedial Plan, were it implemented, under Section 2 for simply failing to maximize the number of Latino opportunity districts. Thus, Defendants' proposal does not necessarily "fail[] to meet the same standards applicable" to Plaintiffs' claim in this case. *Euclid Sch. Bd.*, 632 F. Supp. 2d at 750.

Nevertheless, Plaintiffs claim that Defendants' Proposed Remedial Plan is illegal because it fails a "proportionality analysis." ECF No. 117 at 13. That is, Plaintiffs assert that Defendants' proposal is unacceptable because it offers Latinos a "reasonable opportunity at just one seat out of seven," while Plaintiffs' proposal gives Latinos "an opportunity to elect their candidate of choice in two out of seven seats."[12] *Id.* This Court should reject this argument.

The Supreme Court in *Johnson* introduced the concept of proportionality ("the number of majority-minority voting districts to minority members' share of the population") into Section 2 claims, but only as a consideration under the Senate Factors. *Johnson*, 512 U.S. at 1014 n.11. Although the presence of

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[12] Ironically, Plaintiffs' "proportionality analysis" actually disfavors their own proposal over the coming years. Over a longer timeline, Plaintiffs' plan imposes a ceiling of two positions that are meaningfully available to Latinos, while Defendants' plan offers two district positions and at least one at-large position. Therefore, Defendants have better attuned their proposal to the demographic growth of the City's Latino population.

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

"proportionality" is not a "safe harbor" for local jurisdictions, its existence weighs against a finding of vote dilution in the liability phase of a Section 2 claim. *Id.* at 1020-21.

Plaintiffs mistakenly equate this holding in *Johnson* to the proposition that a remedial plan is illegal unless it immediately affords proportionality. As one court explained when confronting a similar contention, this argument "confuses the use of proportionality as one tool through which a reviewing court determines the possible existence of vote dilution on the one hand, with a guarantee of proportional representation on the other." *Euclid Sch. Bd.*, 632 F. Supp. 2d at 753 (citing *Solomon v. Liberty Cnty. Comm'rs*, 221 F.3d 1218, 1224 (11th Cir. 2000); *Johnson*, 512 U.S. at 1014 n. 11).

In *McGhee v. Granville County*, the Fourth Circuit rejected the plaintiffs' argument that the defendants' proposal was illegal because it did not provide the minority group "a chance to elect a number of commissioners that is commensurate with their portion of the population and with their voting strength." *Id.*, 860 F.2d at 113. The court held that this was a "legally erroneous standard[] against which to measure" the adequacy of a remedial plan. *Id.* at 118. The court began by noting that Section 2 expressly disavows the "right to have members of a protected class elected in numbers equal to their proportion in the population." 42 U.S.C. § 1973(b). In the liability phase of a Section 2 claim, this repudiation would prevent a finding of vote dilution "based solely on a lack of proportional representation." *McGhee*, 860 F.2d at 119.

The Fourth Circuit rejected the notion that courts were free to then ignore this statutory disavowal in the remedy phase by "find[ing] invalid a proposed

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

legislative remedy which fell short of assuring approximate proportional representation and substitut[ing] one of its own which did." *Id.* at 119-120. "The practical consequence of uncoupling violation from remedy in this way would necessarily be to allow proportional representation to become in practical effect the 'right' protected by § 2." *Id.* at 120.

However, to the extent that this Court is concerned with adopting a plan that contains a number of immediate election opportunities commensurate with the population of eligible Latino voters in the City, FairVote's proposal provides immediate proportionality and is a superior alternative to Plaintiffs' all single-member district plan. It is a mathematical certainty that a four-district map can be created with one district in which Latinos are a majority of registered voters. Morrison Decl., ¶ 16. Plaintiffs have expressed their support for using registered-voter percentage as an alternative benchmark of an opportunity district. ECF No. 117 at 11-12. The threshold of exclusion for a three-seat, single-vote system is 25%, which the citywide LCVAP percentage has already exceeded according to Mr. Cooper. ECF No. 118-1 (Ex. 3 at ¶3). Thus, FairVote's proposal immediately offers two positions in which Latinos have a meaningful opportunity to elect their candidate of choice.

Additionally, FairVote's proposal sustains some form of at-large representation, which embodies the City Council's legitimate, nondiscriminatory political decision that at least some Councilmembers should be concerned with and accountable to the entire City. Even when choosing among plans other than those submitted by the local government, courts "must, to the greatest extent possible, effectuate the policies and preferences in the defendant's remedial

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

plan." *Euclid Sch. Bd.*, 632 F. Supp. 2d at 749-50. FairVote's proposal honors the City's political judgments, while Plaintiffs repudiate them.

Plaintiffs' insistence on maximizing the number of opportunity districts to provide immediate proportionality also raises concerns about racial gerrymandering. "Classification on the basis of race is constitutionally suspect—'whether or not the reason for the racial classification is benign or the purpose is remedial.'" *Georgia State Conference of the NAACP v. Fayette Cnty. Bd. of Comm'rs*, 996 F. Supp. 2d 1353, 1365 (N.D. Ga. 2014) (quoting *Shaw v. Hunt*, 517 U.S. 899, 904-05 (1996) ("*Shaw II*")). Although Plaintiffs' plan purports to consider some traditional redistricting criteria such as geographical compactness and approximate equality of total population, ethnicity was clearly the "predominant factor" motivating the creation of Plaintiffs' plan. *Miller v. Johnson*, 515 U.S. 900, 916 (1995). Under strict scrutiny review, Plaintiffs' plan must be "narrowly tailored to achieve a compelling interest." *Id.* at 920 (citing *Shaw v. Reno*, 509 U.S. 630, 653-57 (1993) ("*Shaw I*")). Remedying a Section 2 violation is assumed to be a compelling state interest. *Bush v. Vera*, 517 U.S. 952, 977 (1996) (plurality). A narrowly-tailored remedy "substantially addresses" the Section 2 violation, but does not do more than what is "reasonably necessary" to ensure compliance. *Id.* (internal quotation omitted).

Here, Defendants' Proposed Remedial Plan is narrowly tailored because it offers an immediate opportunity district and lays the groundwork for two additional positions on the City Council that Latinos will have a realistic chance of electing. To the extent this Court seeks to remedy the Section 2 violation by adopting a plan that ensures immediate electoral opportunities commensurate

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

with the Latino share of eligible voters, FairVote's proposal is also narrowly tailored because it provides immediate proportionality while avoiding the sacrifice of core political and democratic values. Plaintiffs' plan, in contrast, is not narrowly tailored because it purports to offer immediate proportionality while depriving most Latinos of a political voice and snuffing out the legitimate political principle of ensuring that some Councilmembers are elected by and accountable to the entire City. Plaintiffs' plan should be avoided because it elevates ethnicity more than is "reasonably necessary" to comply with Section 2. *Vera*, 517 U.S. at 977. This Court should adopt a more ethnically neutral and equally effective remedy.

CONCLUSION

Defendants respectfully request that this Court adopt Defendants' Proposed Remedial Plan or, in the alternative, adopt FairVote's proposal.

RESPECTFULLY SUBMITTED this 23rd day of October, 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

DATED this 23rd day of October, 2014

s/ Yalda Binizan
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