No. 100999-2

SUPREME COURT
OF THE STATE OF WASHINGTON

GABRIEL PORTUGAL, et al.,

Respondents,

v.

FRANKLIN COUNTY,

Defendant,

and

JAMES GIMENEZ,

Appellant.

BRIEF OF RESPONDENTS

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A. INTRODUCTION

Our Legislature enacted the Washington Voting Rights Act, RCW 29A.92, ("WVRA") in 2018 to allow local governments to modify their election systems and provide voters suffering from vote dilution the ability to seek relief in Washington courts. Under the WVRA, voters that face dilution based on their race, ethnicity, or membership in a language minority group can provide notice and seek redress in court. If a violation of the law is found, alternative electoral systems—including single-member district, rank choice voting, and/or cumulative voting systems—may be ordered as a remedy.

James Gimenez, whose own entry into the underlying case was instigated by one of Franklin County's ("County") own Commissioners, even though the County settled the respondents'[1] WVRA claims against the County, challenges the WVRA. Gimenez claims the WVRA creates a racial preference

[1] Respondents are individual Latino voters in Franklin County ("Latino Voters").

system that harms majority voters.

While Latino Voters believe that Gimerez's claims are procedurally barred for reasons enumerated *infra*, they note that Gimenez misreads the WVRA. Moreover, to accept the logic of his argument would render any remedial civil rights statute violative of the Washington Constitution. The WVRA is constitutional under article I, § 12 and is a valid expression of legislative authority to ensure that "[e]lections shall be free and equal…" Wash. Const. art. I, § 19. Similar enactments have been upheld under the Fourteenth Amendment's Equal Protection Clause.

Latino Voters ask that this Court affirm the trial court's decision and declare the WVRA constitutional, and award fees pursuant to the statute against Gimenez, Clint Didier, and the County.

B. STATEMENT OF THE CASE[2]

[2] Gimenez's Statement of the Case, Br. of Appellant ("BA") 6-8, is argumentative, contrary to RAP 10.3(a)(5) and

Franklin County has a long history of tension between the white and Latino populations. Latinos, specifically Mexican Americans, moved to the County in the 1940s, hired as workers on the Hanford Reservation. *See* Kate Brown, *Only Part of the Story Is Being Told About the Police Shooting in Pasco*, Time (Mar. 3, 2015), https://time.com/3729247/police-shooting-pasco-history/ ("Brown"). These Latino workers, however, were not allowed to live onsite in Benton County, and rather were forced to reside over 50 miles away in Franklin County. *Id*.

East Pasco was the only area in the County open to non-white persons. The area lacked basic services such as trash collection, water or sewer lines, and policing. *Id*. During this period, Latinos could not get housing loans, nor access to any other services or accommodations in areas outside of East Pasco. *Id*. Businesses in the area even encouraged unlawful targeting

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does not provide a fair recitation of the facts and procedures in this case. Latino Voters provide this fairer Statement of the Case accordingly.

and arrests of Latinos. *Id*.

Decades later, discrimination in the Tri-Cities, and Franklin County in particular, persists. As of 2010, 18% of minority buyers were subject to high interest housing loans compared to only 1.8% of white buyers. *Id*. Property improvements to Pasco, the County's largest city, occurred primarily in white neighborhoods, rather than in the predominantly Latino downtown Pasco. Tyrone Beason, *Pasco Seeks Healing, and Change, in the Wake of a Fatal Police Shooting*, Seattle Times (Aug. 25, 2016) https://www.seattletimes.com/pacific-nw-magazine/pasco-seeks-healing-and-change-in-the-wake-of-a-fatal-police-shooting/ ("Beason").

Latinos in the County are less likely to have high school diplomas and bachelor's degrees than white residents. American Community Survey 2020 5-year Estimate Subject Tables, Educational Attainment, Franklin County, Washington, https://data.census.gov/cedsci/table?q=Franklin%20County,%2

0Washington%20Education&g=0500000US53021&tid=ACSST5Y2020.S1501 (last visited on August 24, 2022). Over twice the number of Latinos in the County compared to white residents live below the poverty line. *Id*. Indeed, white residents within the County had a median income of $80,233 compared to the median income of $56,321 for Latinos. *Id*.

Recent events highlight continued tensions between the Latino and white community. In 2015, the predominantly white local Pasco police shot Mexican farmworker Antonio Zambrano-Montes seventeen times, killing him. *See Brown*, *supra*. This shooting led to weeks of demonstrations in the County. Tyrone Beason, *Family of a Mexican Farmworker Fatally Shot by Police in Pasco Receives a $750,000 Settlement*, Seattle Times (Dec. 20, 2018), https://www.seattletimes.com/pacific-nw-magazine/a-settlement-is-reached-in-lawsuit-over-the-2015-death-of-mexican-farmworker-antonio-zambrano-montes/. The County itself took months to investigate the shooting, facing criticism for their lack of objectivity. Oliver Laughland, *Pasco*

Police Officers who Shot Antonio Zambrano-Montes Not Questioned for Months, The Guardian (July 1, 2015), https://www.theguardian.com/us-news/2015/jul/02/pasco-police-officers-who-shot-antonio-zambrano-montes-not-questioned-for-months. Other Pasco officials denied any issues with the treatment of the Latino community by local law enforcement. *See Beason, supra*.

County officials have added to racial tensions by voicing racist ideologies. The Franklin County Coroner shared a post on his social media propounding white supremacy. Jake Dorsey, *Franklin County Coroner Posted a 'White Power' Meme. Some Say His Apology Isn't Enough*, Yakima Herald (Mar. 15, 2018), https://www.yakimaherald.com/news/local/franklin-county-coroner-posted-a-white-power-meme-some-say-his-apology-isn-t-enough/article_3b232aa8-2871-11e8-8f6b-03319b4b7e81.html. During his campaign, defendant Commissioner Clint Didier indicated he wanted to secure borders and would "work with ICE." Wendy Culverwell,

Franklin County Face-off Debates Pot Ban, TRAC Future, Immigrant Crackdown, Tri-City Herald (July 21, 2018), https://www.tri-cityherald.com/news/local/article214985235.html. Latino residents also report recent exclusion from the electoral redistricting process with public meetings and materials not being available in Spanish, despite the County's Latino majority. *Franklin County Latino Population Wants More Redistricting Information in Spanish*, NWPB News (Oct. 15, 2021), https://www.nwpb.org/2021/10/15/franklin-county-latino-population-wants-more-redistricting-information-in-spanish/.

While Latinos in the County continue to experience discrimination in a variety of areas such as education, housing, and employment, *supra,* the County's Latino population has only continued to grow. CP 5. At the time that Latino Voters filed suit, Latinos constituted over one-third of the County's voting age population. *Id*.

Despite a large Latino population, County Latinos have

not been able to elect candidates of choice for the County Commission. In its history, a Latino candidate has never been elected to the Commission. CP 2.

Latino Voters filed the present action in April 2021 in the Franklin County Superior Court after providing the proper notice to the County. CP 1-18. They alleged that the use of an at-large method of election for County Commissioner districts had the effect of diluting Latino votes, preventing Latino Voters from electing their candidates of choice. *Id*. To remedy this damage to Latino Voters' rights, they requested that the trial court impose single-member district elections for County Commissioner seats. CP 34.

The case was aggressively litigated. Latino Voters moved for summary judgment, CP 32-167, and the trial court granted that motion on September 13, 2021. CP 258-59. That order was vacated, CP 349-50, after the Commissioners claimed that their counsel misapprehended their wishes and agreed to summary judgment without their consent. CP 341. Latino Voters then

moved for summary judgment a second time, CP 682-699, which the County sought to delay. CP 820-27.

Six months after the start of the suit and over the objection of Latino Voters, the trial court allowed Gimenez to intervene in the case represented by current counsel. CP 351-52. This followed Commissioner Didier's unsuccessful attempt to intervene as an "independent citizen," represented by Gimenez's current counsel, despite already being a *party* to the case as a County Commissioner. *See* CP 260-66; 300 ("Mr. Didier intends to intervene in his personal capacity as a citizen, voter and prospective future candidate for the Franklin County Commission.").

As required by CR 24(c), Gimenez filed a proposed answer to support his intervention. In that answer, Gimenez invoked the Uniform Declaratory Judgment Act, RCW 7.24, ("UDJA"), to have the WVRA declared unconstitutional. CP

302.[3]

In November 2021, Gimenez filed a CR 12(c) motion for judgment on the pleadings facially challenging the constitutionality of the WVRA. CP 357-376. Gimenez contended: (1) Latino Voters lack standing under the WVRA; (2) the WVRA was repealed by implication; (3) the WVRA violates Article I, § 12 of the Washington Constitution; and (4) the WVRA violates the United States Constitution Fourteenth Amendment's Equal Protection Clause. Despite challenging the constitutionality of the WVRA, Gimenez failed to serve our Attorney General with a copy of the proceeding.

The trial court denied Gimenez's motion on January 3, 2022. CP 678-81. In doing so, the trial court held that (1) the WVRA was not repealed by implication by the Legislature by subsequent legislation; (2) the WVRA, as a remedial statute, grants standing to voters who are members of a race, color, or

[3] *See infra* footnote 14.

language minority group and is "not limited to those who are a minority within the specific county in question"; and (3) that the WVRA does not violate the Washington or United States Constitutions. *Id*. In finding the WVRA constitutional, the trial court noted that Gimenez's facial challenge failed because "Intervenor has failed to establish that there are no set of circumstances where the WVRA would be valid." *Id*. at 680. The trial court also found its ruling consistent with the Ninth Circuit's decision in *Higginson v. Becerra*, 786 F. App'x 705 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2807 (U.S. May 26, 2020), where the court found the California Voting Rights Act, Cal. Elections Code § 14025, ("CVRA"), an enactment akin to the WVRA, constitutional under the Fourteenth Amendment's Equal Protection Clause. *Id.* at 3-4.[4]

[4] Following the denial of his motion, and despite several hearings and extensive motion practice, Gimenez became inactive in the suit. RP (6/13/22):8. Latino Voters will be filing a supplemental designation of clerk's papers and a motion relating to the report of proceedings in accordance with this Court's Clerk's letter of September 9, 2022. Latino Voters have

Before the trial court's ruling on the second summary judgment motion, after extensive negotiations, the County and Latino Voters entered into a settlement that provided for Commissioner districts. CP 1292-93. In May 2022, the County Commissioners, including Commissioner Didier, voted in a public meeting to approve that settlement.

Notwithstanding the settlement that he voted to approve, Commissioner Didier then privately worked with Gimenez and his counsel to subvert the settlement. *See* CP __ ("Francis, Clint alerted me that you might be discussing settlement. I certainly don't expect client to stand in way of a favorable resolution…"). As part of this plan, Gimenez had the audacity to seek attorney fees from Latino Voters pursuant to CR 11, CP 655-68, when Latino Voters filed a December 2021 motion to dismiss because Gimenez failed to notify the Attorney General of his

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left blank certain CP citations, but those will be provided once the supplemental clerk's papers are paginated.

constitutional challenge. CP 643-51. *See* CP __ (In an email communication to Latino Voters, Gimenez's counsel stated: "While I note that I think I might legitimately tally other additional hours as responsive to that Motion, Mr. Gimenez will consider his concerns resolved for payment of $9,850.").

At a hearing held on May 9, 2022, Judge Alex Ekstrom entered the agreed order implementing the settlement terms. CP 1300-04. Gimenez appeared at this hearing and tried unsuccessfully to delay or forestall the entry of the order. He failed in that effort because his motion for sanctions was denied as untimely and because Latino Voters' position that such notice was necessary was entirely reasonable.

On June 8, 2022, Gimenez appealed to this Court. CP 1316.

C. SUMMARY OF ARGUMENT

Appellant Gimenez misinterprets the plain language of the WVRA that confers standing on Latino Voters. Under that statute, Hispanic voters, as is true for other voting rights

enactments, are a protected group under the statute that was designed to remedy institutional voter dilution in local governments. The WVRA was not repealed by implication by a 2022 statute on local government redistricting, but rather was consistent with it.

Gimenez's facial challenge to the constitutionality of the WVRA fares no better. Gimenez fails to prove its unconstitutionality under article I, § 12 beyond a reasonable doubt where the statute does not implicate a privilege but falls within the plenary legislative power over the conduct of elections. Moreover, the WVRA is reasonable as a remedial enactment to prevent unjust voter dilution as to Hispanic voters in local government elections.

The WVRA, like the FVRA and CVRA, does not violate the Equal Protection Clause of the Fourteenth Amendment. Applying a rational basis analysis, rather than strict scrutiny, the WVRA's remedial purpose is not unconstitutional.

This Court should award fees at trial and on appeal to the

Latino Voters in accordance with the WVRA's explicit direction, or under CR 11/RCW 4.84.185 because Gimenez's appeal is frivolous or advanced for an illegitimate purpose. Gimenez, or Commissioner Didier, should pay the fee award.

D. ARGUMENT[5]

(1) Gimenez Fundamentally Misinterprets the WVRA and This Court Should Reject His Misinterpretation

Gimenez makes what amounts to a statutory interpretation argument to claim that the WVRA was repealed by implication or, if not, Latino Voters lack standing to invoke its remedies. BA 8-35. That argument is based in grammatical gyrations and ignores both a plain reading of WVRA's language, purpose, and history.

In interpreting the WVRA, this Court is guided by its well-known principles of statutory interpretation. Statutory

[5] Gimenez's argument, broken up in his introduction (BA 1-4) and multiple argument sections (BA 8-53), is often difficult to follow. Latino Voters have responded to what appears to be Gimenez's argument.

interpretation is a question of law, which this Court reviews *de novo*. *W. Telepage, Inc. v. City of Tacoma Dep't of Fin.*, 140 Wn.2d 599, 607, 998 P.2d 884 (2000). "In interpreting statutory provisions, the primary objective is to ascertain and give effect to the intent and purpose of the Legislature in creating the statute." *State v. Watson*, 146 Wn.2d 947, 954, 51 P.3d 66 (2002). "To determine legislative intent," this Court "look[s] first to the language of the statute." *Id*. "If a statute is clear on its face, its meaning is to be derived from the plain language of the statute alone." *Id*. The text of the statute itself is the "bedrock principle of statutory interpretation." *Fed. Home Loan Bank of Seattle v. Credit Suisse Sec. (USA) LLC*, 194 Wn.2d 253, 258, 449 P.3d 1019 (2019).

(a) Background to WVRA's Enactment and Purpose

The WVRA was enacted into law following two federal Voting Rights Act, 42 U.S.C. § 1973 ("FVRA"), lawsuits in the state in which Latino residents successfully challenged

discriminatory at-large election systems in Yakima and Pasco. *See Montes v. City of Yakima*, 40 F. Supp. 3d 1377 (E.D. Wash. 2014);[6] *Glatt v. City of Pasco*, Case No. 4:16-CV-05108-LRS (E.D. Wash. Jan. 27, 2017) (*see* Appendix).

The Legislature has the power under the state Constitution to enact anti-discrimination statutes and prescribe the political form of the State's local governments. Washington courts have consistently held that "[t]he Legislature's power to enact a statute is unrestrained except where, either expressly or by fair inference, it is prohibited by the state and federal constitutions." *Washington State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 300-01, 174 P.3d 1142 (2007) (quoting *State ex rel. Citizens Against Tolls v. Murphy*, 151 Wn.2d 226, 248, 88 P.3d 375 (2004)). *Nothing* in the Washington

[6] In *Montes*, the district court specifically found a FVRA § 2 violation in Yakima's at-large voting system for its City Council. That court had little difficulty in finding that Hispanic voters had standing to raise the challenge or that Hispanic voters rights were diluted by Yakima's electoral system.

Constitution, particularly article I, § 19, restrains such legislative authority.

In fact, our Constitution explicitly supports the Legislature's enactment of the WVRA. Article I, § 19 states that "[a]ll Elections shall be free and equal, and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Indeed, "[t]his court has recognized that the Washington Constitution goes further to safeguard the right to vote than does the federal constitution." *Madison v. State*, 161 Wn.2d 85, 96, 163 P.3d 757 (2007). This section grants the Legislature power to affirmatively ensure that elections in Washington are fair for all voters, as it did by enacting the WVRA.

Article XI, § 5, similarly provides support for the Legislature's enactment of the WVRA. Section 5 grants the Legislature with power over general and uniform laws related to the election of county board of commissioners and other local offices. *Spokane County v. State*, 196 Wn.2d 79, 469 P. 3d 1173

(2020). Local political subdivisions are just that, entities created by the state, the structure of which, subject to constitutional limitations, are restricted appropriately by state law.

The 2018 Legislature found, due to Washington's increasingly diverse population, that the prevalence of at-large election systems for local governmental bodies prescribed by Washington laws "in some cases… resulted in an improper dilution of voting power for these minority groups." RCW 29A.92.005. Since local governments did not have the power to change their electoral systems on their own, the WVRA provided a method for governments to do so to remedy vote dilution. *Id*. The WVRA also permits voters to sue for a court-ordered remedy of changing the election process for the local government after providing notice and attempting to cooperate with the jurisdiction. RCW 29A.92.060-.70, .110.

Public testimony supporting the bill noted that the WVRA would improve voter participation and allow communities to elect candidates that understood and represented their needs.

Senate Bill Report, SB 6002, at 4-5. Specifically, supporters noted that elections systems did not match the rapidly changing demographics of the state. *Id*. Witnesses testified that minorities faced disadvantages so great that they even lost to opponents who withdrew their candidacy. *Id*.

Proponents made clear that the WVRA did not "mandate one particular system" of elections. *Id.* at 4. They noted that elections systems apart from district-based elections could be implemented and provide opportunities for increased voter representation. *Id*. at 5. ("Ranked choice voting has led to the breaking of numerous glass ceilings for representation in other jurisdictions."). In allowing such flexibility for remedial elections systems, proponents hoped to provide a "roadmap and timetable for collaboration on solutions" allowing jurisdictions a "pathway around litigation." *Id.*

The WVRA provides a narrow test specifically tailored to determine whether electoral schemes deny minority voters an opportunity to elect their preferred candidates. *See* RCW

29A.92.030(2). A violation of the WVRA is established if "(a) Elections in the political subdivision exhibit polarized voting; and (b) Members of a protected class . . . do not have an equal opportunity to elect candidates of their choice as a result of the dilution or abridgement of [their rights]." RCW 29A.92.030(1).

The test adopted by the WVRA takes elements from the FVRA and CVRA[7] but with notable changes. The WVRA adopts two of the three threshold elements for vote dilution under the FVRA set out in *Thornburg v. Gingles,* 478 U.S. 30, 106 S. Ct. 2752, 92 L. Ed. 2d 25 (1986), specifically requiring a showing of racially polarized voting. *See* RCW 29A.92.010(3).

Like the CVRA, the WVRA does not require a showing of "compactness." Rather, the Legislature determined that geographic segregation is not necessary for a showing of race-based vote dilution and that the WVRA contemplates larger

[7] Unlike the stricter WVRA, the CVRA only requires a showing of racially polarized voting in a jurisdiction for a violation to exist. *See* Cal. Elec. Code § 14028(a).

inquiries into what makes members of a class unable to elect candidates of choice due to local conditions. *Compare* Cal. Elec. Code § 14027(c) and RCW 29A.92.030(2).

Further, unlike the FVRA and the CVRA,[8] the WVRA allows for a variety of remedies, including but not limited to, single-district elections. RCW 29A.92.040, 29A.92.110. Any remedial map must be approved by the court prior to its implementation. RCW 29A.92.110(1).

Ultimately, the WVRA fulfills the Legislature's constitutional duty to provide for free and equal elections through general and uniform laws. Further, "[a]s political subdivisions of the state, municipal corporations are subordinate to the legislature which, limited only by the constitution, has absolute control over the entities it has created, including the geographical extent of their jurisdiction and the powers they

[8] Notably, under the CVRA, district-based election systems are the only remedy available when a violation has been found.

may exercise." *King Cnty. Water Dist. No. 54 v. King Cnty. Boundary Review Bd.*, 87 Wn.2d 536, 540, 554 P.2d 1060 (1976).

In adopting the WVRA, the Legislature debated and weighed the political, legal, and societal issues regarding discriminatory voting in the State. The Legislature determined that vote dilution in local subdivisions was a problem necessitating a remedy. The remedy enacted by the Legislature provided local governments the freedom to select between at-large and single member districts except where racially polarized voting existed.

The WVRA's enactment was a policy decision that does not offend our Constitution. Indeed, the Legislature had the power to ban at-large voting altogether if it so desired, as other state legislatures have done. *See, e. g.*, N.M. Stat. Ann. § 3-12-1.1 (". . . members of governing bodies, excluding mayors, of municipalities having a population in excess of ten thousand shall reside in and be elected from single-member districts.").

The Legislature's power to enact laws governing the electoral structure of its political subdivisions is broad. The WVRA is a correct and legal expression of such power, as the trial court correctly interpreted.

(b) Latino Voters Have Standing

Contrary to Gimenez's argument, BA 20-35, Latino Voters have standing under the WVRA. Gimenez's assertion that somehow Latino Voters are not a class of voters affected by the County's longstanding dilution of their voting power or are not "minority" is simply nonsense, and his argument is utterly unsupported by authority or logic. The WVRA incorporates the federal definition of a protected class. RCW 29A.92.010(5). The FVRA defines "language minorities" as "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage." 52 U.S.C. § 10310(c)(3). Such groups clearly include Latinos.

Further, Latinos have long been accepted as a racial and language minority group under the FVRA. *See League of United*

Latin American Citizens v. Perry, 548 U.S. 399, 428, 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006) (finding that Latinos possessed an electoral opportunity protected by § 2 of the FVRA); *See, e.g.*, *Perez v. Abbott*, 253 F. Supp. 3d 864 (W.D. Tex. 2017); *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 712 (S.D. Tex. 2017) (finding that Latinos as a class make up a politically cohesive minority within Pasadena); *Mi Familia Vota v. Abbott*, 497 F. Supp. 3d 195, 216 (W.D. Tex. 2020) ("the Court concludes Plaintiffs show a prima facie case that Exemption 8 imposes a discriminatory burden on members of the Black and Latino protected classes because of their race."). Indeed, Pasco Latinos were recognized as a protected class when Pasco entered into a consent decree admitting that Pasco's at-large method of election for city council "resulted in the unlawful dilution of the Latino population's vote in violation of Section 2 of the Voting Rights Act." *Glatt*, *supra* at 8, ¶ 20. Plainly, if Latino voters in Pasco, the largest city in the County, are within the definition of protected class, Latino Voters in the County are as well.

The WVRA plainly intended its definition of protected class to mirror that used in the FVRA, a definition which clearly includes Latinos. Gimenez's lengthy and tenuous attempts at proving otherwise ignore this clear language and intent and thus must fail.

(c) The 2022 Local Government Redistricting Statute Did Not Impliedly Repeal the WVRA

Gimenez offers a tenuous and unsupported grammatical analysis to show the WVRA mandates that districts be drawn on racial lines as a predicate to claiming that the WVRA has been repealed by implication. BA 8-20. But not only is his so-called analysis meritless, it fails to recognize that the WVRA and the local government redistricting statute can readily be harmonized. RCW 29A.76.010 did not repeal the WVRA.

At the outset, repeal by implication is disfavored in Washington law. *State v. Peterson*, 198 Wn.2d 643, 647-48, 498 P.3d 937 (2021); *Tollycraft Yachts Corp. v. McCoy*, 122 Wn.2d 426, 439, 858 P.2d 503 (1993); *Our Lady of Lourdes Hosp. v.*

Franklin Cnty., 120 Wn.2d 439, 450, 842 P.2d 956 (1993). For repeal by implication to occur:

> [T]he later act must cover the entire subject matter of the earlier legislation, be complete in itself, and be intended to supersede prior legislation on the subject, and the two acts must be so clearly inconsistent and so repugnant to each other that they cannot be reconciled.

Id. at 450.

Here, Gimenez argues that the local government redistricting criteria in RCW 29A.76.010, enacted in 2022 as part of Laws of 2022, ch. 48, § 1, "repealed" the WVRA when it stated that in redistricting, "population data may not be used for purposes of favoring or disfavoring any racial group or political party." RCW 29A.76.010(4)(d). But Gimenez fails to show that RCW 29A.76.010 contradicts the WVRA. Rather, the statutory language of RCW 29A.76.010(4)(d) clearly works in concert with the WVRA.

RCW 29A.76.010(4) outlines general redistricting criteria. Rather than *repeal* the WVRA, subdivision (4)(d) provides the

starting principle of voting fairness which the WVRA expands on. Indeed, the Legislature clearly outlined the intent of the WVRA stating:

> The legislature finds that electoral systems that deny race, color, or language minority groups an equal opportunity to elect candidates of their choice are inconsistent with the right to free and equal elections as provided by Article I, section 19 and Article VI, section 1 of the Washington state Constitution as well as protections found in the Fourteenth and Fifteenth amendments to the United States Constitution. The well-established principle of "one person, one vote" and the prohibition on vote dilution have been consistently upheld in federal and state courts for more than fifty years.

RCW 29A.92.005.

Further, RCW 29A.76.010 is referenced more than once in the WVRA. *See*, *e.g.*, RCW 29A.92.050, RCW 29A.92.120. These statutes were meant to complement each other, rather than supersede, contradict or repeal the other.

(2) The WVRA Is Constitutional under State and Federal Constitutional Principles

(a) Applicable Standards for Gimenez's Constitutional Challenge

On the central question of WVRA's constitutionality, Gimenez has an extraordinarily heavy burden, a burden he ignores in his brief. "If possible, a court must construe a statute as constitutional." *State v. Farmer*, 116 Wn.2d 414, 419–20, 805 P.2d 200 (1991). "A statute is presumed to be constitutional and the challenger bears the burden of establishing the unconstitutionality of the legislation beyond a reasonable doubt." *Brower v. State*, 137 Wn. 2d 44, 52, 969 P.2d 42 (1998). That is a principle of deference to legislative authority. *Island County v. State*, 135 Wn.2d 141, 147, 955 P.2d 377 (1998).

Moreover, Gimenez's is a facial challenge to the WVRA. "Facial claims are generally disfavored." *Woods v. Seattle's Union Gospel Mission*, 197 Wn.2d 231, 240, 481 P.3d 1060 (2021), *cert. denied*, 142 S. Ct. 1094 (Mar. 21, 2022). When addressing facial challenges to the constitutionality of a statute, the focus is on whether the statute's language violates the constitution, not whether the statute would be unconstitutional "as applied" to the facts of a particular case. *Tunstall ex rel.*

Tunstall v. Bergeson, 141 Wn.2d 201, 220, 5 P.3d 691 (2000). A facial challenge must be rejected unless there are *no* set of circumstances in which the statute can constitutionally be applied. *Id*.; *Woods*, 197 Wn.2d at 240.

Gimenez fails to meet the standard for a facial challenge to the WVRA.[9] He has not demonstrated that beyond a reasonable doubt there is no set of facts under which the WVRA is constitutional. Notably, by focusing on one remedy under the law—the ordering of single-member districts—Gimenez has not demonstrated that the WVRA cannot be applied constitutionally in any instance. Absent proof of the unconstitutionality of every possible remedy and its application provided by the WVRA, Gimenez's challenge must fail. Further, Gimenez fails to show that the WVRA is unconstitutional under article I, § 12 or the Equal Protection Clause of the Fourteenth Amendment.

[9] Although Gimenez did not bring an as-applied challenge to the law, the facts of this case and the districting plan agreed upon in settlement does not support a finding that the WVRA is unconstitutional.

(b) Washington Constitution Article I, § 12

Gimenez claims the WVRA violates article I, § 12, the Washington Constitution's privileges and immunities clause. BA at 50-53. He is wrong.

Article I, § 12 provides:[10]

> No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

This Court has concluded that article I, § 12 was designed to foreclose special "favoritism" by government toward particular individuals or companies; the clause was adopted during a period of distrust towards laws that served special interests and was "to limit the sort of favoritism that ran rampant during the territorial

[10] This Court's principles for interpreting constitutional provisions are well-established. This Court looks to the plain text of the Constitution and accords that text a reasonable construction based on the ordinary meaning of the words when they were drafted and in historical context. *Wash. Water Jet Workers Ass'n v. Yarbrough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004), *cert. denied*, 543 U.S. 1120 (Jan. 24, 2005); *Westerman v. Cary*, 125 Wn.2d 277, 288, 892 P.2d 1067 (1994).

period." *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 775, 317 P.3d 1009 (2014) (internal citation omitted).

Article I, § 12 is distinct in perspective from the Equal Protection Clause of the Fourteenth Amendment. "Our framers' concern with avoiding favoritism toward the wealthy clearly differs from the main goal of the equal protection clause, which was primarily concerned with preventing discrimination against former[ly enslaved persons]." *Grant Cnty. Fire Prot. Dist. No. 5 v. City of Moses Lake*, 150 Wn.2d 791, 808, 83 P.3d 419 (2004) (internal citation omitted); *see also*, *Martinez-Cuevas v. DeRuyter Bros. Dairy, Inc.*, 196 Wn.2d 506, 515-18, 475 P.3d 164 (2020). Put another way, "the federal constitution is concerned with majoritarian threats of invidious discrimination against nonmajorities, whereas the state constitution protects as well against laws serving the interest of special classes of citizens to the detriment of the interests of all citizens." *Grant Cnty.*, 150 Wn.2d at 806-07. As one commentator noted:

> … one might expect that the state provision would have a harder "bite" where a small class is given a special benefit, with the burden spread among the majority. On the other hand, the Equal Protection Clause would bite harder where majority interests are advanced at the expense of minority interests.

Johnathan Thompson, *The Washington Constitution's Prohibition on Special Privileges and Immunities: Real Bite for "Equal Protection" Review of Regulatory Legislation*?, 69 Temp. L. Rev. 1247, 1251 (1996).

This Court has applied a straightforward two-part test for determining if a constitutional violation is present. First, a court must determine if the government has conferred a distinct benefit with respect to a fundamental right upon a favored individual or group. Next, the court must determine if there is a reasonable explanation for such favored treatment. *Ockletree*, 179 Wn.2d at 783. That reasonable grounds test also consists of two prongs – whether the law applies equally to all persons within a designated class, and whether there is a reasonable ground for distinguishing between those who fall within the class and those who do not. *Id*.

As discussed *infra*, because Gimenez fails to meet the first step in the analysis, the Court need not reach the second step and any reasonable ground analysis.

(i) No "Privilege" Is Conferred by the WVRA

This Court noted long ago that privileges and immunities within the meaning of article I, § 12:

> pertain alone to those fundamental rights which belong to the citizens of the state by reason of such citizenship. These terms, as they are used in the constitution of the United States, secure in each state to the citizens of all states the right to remove to and carry on business therein; the right, by usual modes, to acquire and hold property, and to protect and defend the same in the law; the rights to the usual remedies to collect debts, and to enforce other personal rights; and the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempt from. Cooley, Constitutional Limitations (6th ed.) 597. By analogy these words as used in the state constitution should receive a like definition and interpretation as that applied to them when interpreting the federal constitution.

State v. Vance, 29 Wash. 435, 458, 70 P. 34 (1902). A "special privilege" has been found in numerous settings historically.[11]

More recently, this Court concluded in *Grant County* that the petition method of annexation did not involve a fundamental attribute of citizenship because the Legislature had plenary authority over local government annexation methods, and the method at issue was advisory only. 150 Wn.2d at 813-16. *See also, Ventenbergs v. City of Seattle*, 163 Wn.2d 92, 178 P.3d 960

[11] *E.g.*, *Ex parte Camp*, 38 Wash. 393, 397, 80 P. 547 (1905) (holding that city ordinance prohibiting any one from peddling fruits and vegetables within city, but exempting farmers who grew produce themselves violated article I, § 12 as granting privilege to class of citizens); *City of Spokane v. Macho*, 51 Wash. 322, 325, 98 P. 755 (1909) (holding ordinance regulating employment agencies unconstitutional because it imposed criminal penalties upon one party, but imposed no penalties for others in like circumstances); *City of Seattle v. Dencker*, 58 Wash. 501, 504, 108 P. 1086 (1910) (invalidating an ordinance as unconstitutional under article I, § 12 because it imposed tax upon sale of goods by automatic devices that was not imposed upon merchants selling same class of goods); *State v. W. W. Robinson Co.*, 84 Wash. 246, 250, 146 P. 628 (1915) (invalidating statutes that exempted cereal and flouring mills from an act imposing onerous conditions on other similarly situated persons and corporations).

(2008) (hauler did not have a fundamental right to haul garbage, a particular public service, and such a right was delegated to municipalities.); *Am. Legion Post No. 149 v. Dep't of Health*, 164 Wn.2d 570, 192 P.3d 306 (2008) (prohibition on smoking within a place of employment was not a fundamental right of carrying on a business).[12]

Gimenez fails to meet the first prong of the two-step analysis. CP 680-81. A "privilege" for the purpose of Art. I, §12 analysis refers "to those fundamental rights which belong to the citizens of [Washington] by reason of such citizenship." *Ockletree*, 179 Wn.2d at 778 (quoting *State v. Vance*, 29 Wash. 435, 458, 70 P. 34 (1902)). "A privilege is not necessarily created

[12] By contrast, in *Ockletree*, this Court concluded that a fundamental right was implicated by a religious employer exemption from the Washington Law Against Discrimination. The Court's majority (expressed in the opinion of Justice Stephens) concluded that the right to be free from discriminatory practices was a fundamental right. 179 Wn.2d at 794-97. In *Martinez-Cuevas*, the Court concluded that the right to work and earn a wage was fundamental. 196 Wn.2d at 522.

every time a statute allows a particular group to do or obtain something." *Am. Legion Post No. 149*, 164 Wn.2d at 606–07.

Gimenez confuses the right to vote with the Legislature's authority to regulate the electoral process. This Court has said that the right to vote is a fundamental right. *Foster v. Sunnyside Valley Irr. Dist.*, 102 Wn.2d 395, 404, 687 P.2d 841 (1984).[13]

But the right to vote is not implicated by legislative regulation of the electoral process. For example, in *Brower*, this Court discerned no implication to the right to vote in legislation authorizing construction of a football/soccer stadium that contained a referendum provision and that required the sports team to reimburse the expense of a referendum election. 137 Wn.2d at 62-64. Similarly, in *Grant County*, this Court determined that legislation addressing the methodology for annexation did not implicate the fundamental right of voting

[13] In *Madison*, this Court concluded that the disenfranchisement of felons was not unconstitutional under article I, § 12. 161 Wn.2d at 97-98.

where the Legislature had plenary over the boundaries of municipal corporations. 150 Wn.2d at 813-14; *see also*, *Carlson v. San Juan Cnty.*, 183 Wn. App. 354, 374, 333 P.3d 511 (2014) (County's decision to reduce the number of commissioners from six to three did not violate art. I, § 12 "because residency districts do not infringe on the right to vote or the right to participate in an election").

The WVRA addresses the electoral process that is a plenary legislative prerogative and provides a *remedial measure* for those communities whose own "right to vote" is undermined by vote dilution. This remedial statute does not prevent any citizen from exercising their right to vote[14] and *any* voter can start a cause of action under its provisions. RCW 29A.92.080, RCW 29A.92.090. Thus, no fundamental right is at stake here.

[14] Although Gimenez claims that "[t]he statute can only grant the benefit to the newly created protected class by denying that right to anyone not in the protected class," BA 53, he provides no support for this claim. This is because the WVRA does not assign any specific rights to minority voters.

(ii) WVRA's Provisions Are Remedial and Reasonable

In *Ockletree,* this Court discussed the second facet of the article I, § 12 test at length, concluding that there were no rational economic or regulatory grounds for distinguishing between religious and secular entities in the application of the anti-discrimination policies of RCW 49.60. 179 Wn.2d at 794-804. There is a straightforward rationale for the WVRA—to root out institutional bias against minority voters embedded in the structure of Washington local governments. The WVRA upholds article I, § 19 of our Constitution.

(c) The WVRA Satisfies the Fourteenth Amendment's Equal Protection Clause

Gimenez also asserts that the WVRA violates the Fourteenth Amendment. BA 35-41. But his assertion is baseless, particularly where similar challenges to the FVRA and CVRA have been rejected, and he *admits* that FVRA § 2 has been interpreted to forestall minority vote dilution. BA 38. Moreover, he is wrong in claiming that strict scrutiny applies to the analysis.

BA 41-50.

This Court's equal protection analysis is straightforward. Equal protection requires those similarly situated to be treated alike. *State v. Shawn P.*, 122 Wn.2d 553, 559-60, 859 P.2d 1220 (1993). The Court looks first to the nature of judicial review of the legislative classification at issue. In the context of redistricting, strict scrutiny is triggered "when a state actor has classified an individual based on that individual's membership in a racial group." *Higginson v. Becerra*, 363 F. Supp. 3d 1118, 1126 (S.D. Cal.), *aff'd*, 786 F. App'x 705 (9th Cir. 2019).

Gimenez is wrong in asserting that strict scrutiny applies to a facial challenge to the WVRA. A statute that merely mentions race does not mean that the statute is automatically subject to strict scrutiny. *Higginson*, 786 F. App'x at 707 ("Plaintiff's allegations [that the California Voting rights Act constitutes a racial gerrymander] do not trigger strict scrutiny."). *See also*, *Wisconsin Legislature v. Wisconsin Elections Comm'n*, __ U.S. __, 142 S. Ct. 1245, 1248, 212 L. Ed. 2d 251 (2022);

Cooper v. Harris, __ U.S. __, 137 S. Ct. 1455, 1464, 197 L. Ed. 2d 837 (2017); *Bush v. Vera*, 517 U.S. 952, 958, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996) (plurality) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race."). Further, Gimenez's argument does not support the inference that the state actors who passed the WVRA nor the County who adopted the map in question classified Gimenez into a district because of his membership in a particular racial group. Further, the WVRA does not create a districting system that classifies voters on the basis of race and Gimenez has failed to show such language. Gimenez assertions clearly do not trigger strict scrutiny.

A rational basis need only be established for most classifications. *Id*. at 560-61. As to that test, this Court explained:

> The rational relationship test is the most relaxed and tolerant form of judicial scrutiny under the equal protection clause. Under this test, the legislative classification will be upheld unless it rests on grounds wholly irrelevant to achievement of

> legitimate state objectives. The burden of proving the legislative classification unconstitutional is upon the party challenging the legislation. That party has the heavy burden of overcoming a presumption that the statute is constitutional. We generally will not declare a statute unconstitutional unless it appears unconstitutional beyond a reasonable doubt.

Id. at 561.

The WVRA satisfies the applicable rational basis analysis, particularly in a facial challenge, because it is race neutral and nondiscriminatory. States have broad authority to adopt statues that are designed "to eliminate racial disparities through race neutral means." *Higginson*, 786 F. App'x at 707 (quoting *Tex. Dept. of Housing and Community Affs. v. Inclusive Cmties Project, Inc.*, 576 U.S. 519, 135 S. Ct. 2507, 192 L. Ed. 2d 514 (2015); *see also, Smith v. Robbins*, 528 U.S. 259, 275 (2000) ("[O]ur established practice, rooted in federalism, [is] allowing the States wide discretion, subject to the minimum requirements of the Fourteenth Amendment, to experiment with solutions to difficult problems of policy."). Here, the Legislature had broad

authority to adopt the WVRA, and to provide any voter with the ability to challenge an allegedly discriminatory districting system.

A violation of the WVRA is established only when "(a) [e]lections in the political subdivision exhibit polarized voting; and (b) [m]embers of a protected class or classes do not have an equal opportunity to elect candidates of their choice as a result of the dilution or abridgment of the rights of members of that protected class or classes." RCW 29A.92.030. Nowhere in the text of the law does the WVRA establish a "racial quota system," nor does it call for racial classification in the analysis or evaluation of at-large electoral systems. Indeed, where and when racially polarized voting within the electorate combines with the design of the electoral system and in so doing, harms white voters, the WVRA provides them the same remedy as any other group. This is because the WVRA does not single out any individual racial groups and only refers to "race" and "protected class" in a general sense.

Gimenez's claims regarding the WVRA have already been rejected by other courts. In *Higginson*, the Ninth Circuit affirmed the findings of the lower federal court and agreed with the California court in *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660 (2006), *cert denied*, 552 U.S. 974 (Oct. 15, 2007), that upheld the CVRA. There, the California Court of Appeal compared the CVRA to the FVRA and upheld the CVRA finding that the statute was race neutral and advanced a legitimate government interest: curing vote dilution. *Id*. Modesto argued that the CVRA was unconstitutional because of its use of race to "identify the polarized voting that cause vote dilution" is "reverse discrimination" and an "unconstitutional affirmative action benefiting only certain racial groups. *Id*. It also contended that the CVRA should be subject to strict scrutiny because it involves race. The California Court of Appeal rejected these arguments, explaining that "a statute is [not] automatically subject to strict scrutiny because it involves race consciousness even though it does not discriminate among individuals by race

and does not impose any burden or confer any benefit on any particular racial group or groups." *Id*. at 681. This Court should find the same.

Second, Gimenez's argument regarding "compactness" misstates the law. BA 41-44. The United States Supreme Court has *never* suggested that FVRA § 2 is constitutional only because of the compactness requirement of *Gingles I*. *See Perry*, 548 U.S. to 430 ("To be sure, § 2 does not forbid the creation of a noncompact majority-minority district."). The *Gingles* preconditions, including compactness, are not required to uphold the constitutionality of the VRA, but are mandated by the *text* of the statute. *Gingles*, 478 U.S. at 50 & n.17 (viewing its three preconditions as required by § 2's text). The Legislature's ability to provide additional protections outside of FVRA § 2 is within its broad discretion. A lack of compactness is not the linchpin that Gimenez asserts.

The WVRA is a narrowly tailored law that furthers a compelling governmental interest, ensuring that there is not

racial discrimination in voting. It is well settled that remedying discrimination in voting is a compelling governmental interest and that states have a compelling interest in protecting fundamental rights like the right to vote. *Cooper,* 137 S. Ct. at 1469; *Madison,* 161 Wn.2d at 95; *South Carolina v. Katzenbach,* 383 U.S. 301, 86 S. Ct. 803, 15 L. Ed. 2d 769 (1966).

It is also true that a finding of racially polarized voting alone, would not trigger a violation of the WVRA. Indeed, it may be the case that a political subdivision exhibits racially polarized voting, but members of the protected class are able to elect candidates of choice. This, however, is not the case in the County. The reason that this two-part test is important is because it is not over-inclusive nor under-inclusive. Not all political subdivisions that exhibit racially polarized voting will trigger a violation because the protected class in these areas are able to elect candidates of choice or too few in number to have electoral strength even without the racially polarized voting.

Additionally, arguments regarding the application of strict

scrutiny are focused on when a district map or remedy has been adopted, not when a plaintiff is challenging an election administration law as facially unconstitutional. Indeed, in *Shaw v. Reno*, 509 U.S. 630, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993) and *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 137 S. Ct. 788, 197 L. Ed. 2d 85 (2017), the challengers in both cases brought an action against district plans that had been adopted. Racially gerrymanders only occur when "a political subdivision 'intentionally assign[s] citizens to a district on the basis of race without sufficient justification.' *Abbott v. Perez*, __ U.S. __, 138 S. Ct. 2305, 2314, 201 L. Ed. 2d 714 (2018) (citing *Shaw v. Reno*, 509 U.S. 630, 641, 113 S. Ct. 2816, 125 L. Ed. 2d 511 (1993))." *Higginson*, 786 F. App'x at 706.

Here, Gimenez's facial challenge to the WVRA has not alleged any facts concerning any motivations for placing himself or any other voter in a particular electoral district. "[A] plaintiff alleging racial gerrymandering bears the burden 'to show ... that race was the predominant factor motivating the legislature's

decision to place a significant number of voters within or without a particular district.'" *Miller v. Johnson*, 515 U.S. 900, 916, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995). The United States Supreme Court "has consistently described a claim of racial gerrymandering as a claim that race was improperly used in the drawing of the boundaries of one or more *specific electoral districts, see, e.g., Shaw,* 509 U.S. at 649, and has described the plaintiff's evidentiary burden similarly." *Alabama Legislative Black Caucus v. Alabama,* 575 U.S. 254, 255, 135 S. Ct. 1257, 191 L. Ed. 2d 314 (2015).

There is no language in the WVRA that mandates electoral districts be drawn on the basis of race. *See* RCW 29A.92.110. That aside, any remedial district map adopted by this Court to remedy the vote dilution proved would consider race for a proper purpose: remedying historical and current racial discrimination in voting. *Shaw* and its progeny enjoin redistricting plans when the drafters have "improperly" utilized the race of voters to divvy them up among districts with the goal to dilute the votes of one

or more racial groups. With the WVRA, like the FVRA, race conscious redistricting is permitted in the limited context of remedying past and current racially discrimination in voting with the challenged jurisdiction. As with mis-applying strict scrutiny, Gimenez confuses disparate lines of voting rights legal precedents.

Regardless, *Shaw* is no help for Gimenez here. The WVRA does not require political subdivisions to use race as a predominate factor, nor does it allow political subdivisions to use race as the predominate factor. The WVRA does not permit political subdivisions to use race however they may see fit in remedying vote dilution. States are permitted to consider race in districting plans so long as they do not confer benefits or disadvantages to any particular race, and do not use race as the sole factor in decision-making. *See Miller*, 515 U.S. at 947 ("Race-conscious practices a State may elect to pursue, of course, are not as limited as those it may be required to pursue. *See Voinovich v. Quilter*, 507 U.S. 146, 156, 113 S. Ct. 1149, 122

L. Ed. 2d 500 (1993) '[F]ederal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law. But that does not mean that the State's powers are similarly limited. Quite the opposite is true....')"). The enactment of the WVRA does not offend Equal Protection and is constitutional.

(3) Gimenez's Constitutional Challenge Fails Because the Attorney General Was Not Notified of It

RCW 7.24.110 (*see* Appendix) requires the Attorney General to be served with a copy of the proceeding in cases where a statute is alleged be unconstitutional, stating when "a statute, ordinance or franchise is alleged to be unconstitutional, the attorney general *shall* also be served with a copy of the proceeding and be entitled to be heard." (emphasis added). *See Clark v. Seiber*, 49 Wn.2d 502, 503, 304 P.2d 708 (1956) ("The purpose of this provision is to protect the public, should the parties be indifferent to the result. The state is interested in the constitutionality of its statutes as they affect the public

welfare.").

Here, there is no question that Gimenez seeks a declaration by this Court that the WVRA is unconstitutional.[15] He never served the Attorney General.

The requirement that the Attorney General be served is *mandatory*, a prerequisite to court jurisdiction, as this Court has held since at least 1938. *Parr v. City of Seattle*, 197 Wash. 53, 56, 84 P.2d 375 (1938); *Leonard v. City of Seattle*, 81 Wn.2d 479, 480-84, 503 P.2d 741 (1972); *Kendall v. Douglas, Grant, Lincoln & Okanogan Counties Pub. Hosp. Dist. No. 6*, 118

[15] Gimenez's is a UDJA action. When submitting his initial motion to intervene, Gimenez was required to attach a "pleading setting forth the claim or defense for which intervention is sought." CR 24(c). Gimenez's attached pleading outlined two proposed counterclaims brought specifically *under the UDJA*. CP __. One proposed counterclaim specifically asked the trial court to grant declaratory judgement that the WVRA is unconstitutional. CP __. Although the exhibit was never formally entered into the docket as a pleading, Gimenez's intent remained clear, to obtain judgment, under the UDJA declaring the WVRA unconstitutional. His subsequent motion for judgment on the pleadings simply reiterated his previous request for a declaration of the WVRA's constitutionality.

Wn.2d 1, 11-12, 820 P.2d 497 (1991). *See also, Camp Finance LLC v. Brazington*, 133 Wn. App. 156, 160-61, 135 P.3d 946 (2006) (dismissing action); *Jackson v. Quality Loan Serv. Corp.*, 186 Wn. App. 838, 846, 347 P.3d 487, *review denied*, 184 Wn.2d 1011 (2015) (same).

Gimenez's declaratory action is barred by his failure to comply with RCW 7.24.110.

(4) Gimenez and Commissioner Didier Are Responsible for the Latino Voters' Attorney Fees and Costs at Trial and On Appeal

(a) Latino Voters Are Entitled to a Fee Award

Latino Voters are entitled to a fee award at trial and on appeal from Gimenez and Didier.[16] A prevailing party may recover attorneys fees on appeal when authorized by statute, equity, or the parties' agreement. *Pierce Cnty. v. State*, 159

[16] As part of the settlement terms, the County agreed to pay $350,000, in three equal, yearly payments to compensate Latino Voters' attorneys for litigation in the trial court. This settlement amount did not include time and expense incurred litigating with Gimenez.

Wn.2d 16, 50, 148 P.3d 1002 (2006). The WVRA specifically permits an award of attorney fees in any action to enforce the WVRA to prevailing plaintiffs. RCW 29A.92.130. Washington law also allows a court to award attorney fees where claims are frivolous and advanced without reasonable cause. CR 11; RCW 4.84.185. Under CR 11 and the statute, the standard for what constitutes a frivolous claim is essentially identical – a claim is sanctionable if it cannot be supported by any rational argument on the law or facts, or is interposed for an improper purpose. Philip A. Talmadge, et al., *When Counsel Screws Up: The Imposition and Calculation of Attorney Fees as Sanctions*, 33 Seattle U. L. Rev. 437 (2010).

In this appeal, Gimenez advances arguments that contradict basic understandings of the case law and statutes he cites. To prove the WVRA's unconstitutionality, Gimenez engages in a shaky and incomprehensible grammatical analysis of the WVRA and the FVRA ignoring the longstanding, common usage of voting rights terms. To prove a violation of article I, §

12, Gimenez attempts to paint any kind of equal distribution of privileges as inherently unequal. To prove that the WVRA was repealed by implication, Gimenez ignores the WVRA's clear incorporation of and reference to the very statute he claims repealed it. Taken as a whole, the entirety of the appeal by Gimenez is frivolous and is taken for the illicit purpose of disrupting the settlement between the Latino Voters and the County remedying the County's past deliberate dilution of voting power of Hispanic voters.

(b) The Fee Award Should Be Paid Jointly by Gimenez and Didier

Latino Voters are entitled to a fee award in this case to address Gimenez's collateral attack on the WVRA-based settlement between Latino Voters and the County. Not only must Gimenez pay such fees under the WVRA, or CR 11/RCW 4.84.185, Commissioner Didier, who is a named party in the suit in their official capacity, should also be held responsible for any fee award where he was in cahoots with Gimenez's action

designed to torpedo the WVRA settlement with Latino Voters.

Commission Didier not only encouraged, but explicitly directed these proceedings. Of course, Gimenez makes no mention of Didier's role in prompting his collateral attack on the settlement here. Gimenez's counsel sought to intervene in the trial court proceedings on behalf of Commissioner Didier but when Latino Voters responded that Commissioner Didier was already a party, the strategy shifted, and intervention was sought for Gimenez instead. Moreover, the County's litigation strategy in the underlying case was specifically tailored to allow Commissioner Didier to induce Gimenez's intervention as a private citizen. CP 344. Commissioner Didier's involvement in Gimenez's intervention was transparent to all those involved in the matter. The trial court in its January 3, 2022, order denying Gimenez's motion for judgment on the pleadings even explicitly named Didier as the intervenor. CP 678.

Didier wasted judicial time and resources with his duplicitous tactics. In September 2021, County attorneys crafted

a plan to submit to summary judgment to allow for Commissioner Didier's private intervention. CP 344-45. The County then quickly changed position, necessitating time and resources to be spent on motion practice and hearings to reverse the previously unchallenged summary judgment. Commissioner Didier wasted further judicial resources during the settlement of the case, promptly communicating with Gimenez who in turn attempted to thwart settlement and even coerce payment[17] from Latino Voters. CP __.

Throughout this lawsuit, Commissioner Didier, aided by the County, has used Gimenez to frivolously challenge the constitutionality of the WVRA. As such, Commissioner Didier, or the county itself, should also be required to pay Latino Voters' attorney fees at trial and on appeal.

(c) Latino Voters Are Entitled to Fees on Appeal

[17] Specifically Gimenez threatened and filed a motion for sanctions pursuant to CR 11. After briefing and two continued hearings, this motion was denied by the trial court.

Insofar as the Latino Voters are entitled to fees below for the reasons enumerated herein, they are entitled to fees on appeal. RAP 18.1(a).

E. CONCLUSION

In enacting the WVRA, the Legislature enacted monumental remedial voting rights protections to effectuate the guarantees in the Washington Constitution. This Court should declare the WVRA constitutional and grant Latino Voters their costs on appeal, including reasonable attorney fees.

This document contains 9,340 words, excluding the parts of the document exempted from the word count by RAP 18.17.

DATED this 12th day of September, 2022.

Respectfully submitted,

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APPENDIX

RCW 7.24.110:

When declaratory relief is sought, all persons shall be made parties who have or claim any interest which would be affected by the declaration, and no declaration shall prejudice the rights of persons not parties to the proceeding. In any proceeding which involves the validity of a municipal ordinance or franchise, such municipality shall be made a party, and shall be entitled to be heard, and if the statute, ordinance or franchise is alleged to be unconstitutional, the attorney general shall also be served with a copy of the proceeding and be entitled to be heard.

ORIGINAL FILED

JAN 07 2022

MICHAEL J. KILLIAN
FRANKLIN COUNTY CLERK

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF FRANKLIN

GABRIEL PORTUGAL, BRANDON PAUL MORALES, JOSE TRINIDAD CORRAL, and LEAGUE OF UNITED LATIN AMERICAN CITIZENS, Plaintiffs, v. FRANKLIN COUNTY, a Washington Municipal Entity, and CLINT DIDIER, RODNEY J. MULLIN, and LOWELL J. PECK, in their official capacities as Members of the FRANKLIN COUNTY BOARD OF COMMISSIONERS, Defendants.	NO. 21-2-50210-11 ORDER DENYING MOTION FOR JUDGMENT ON THE PLEADINGS

This matter came before the court for hearing on December 13, 2021 on Intervenor, Clint Didier's, Motion for Judgment on the Pleadings. At the time of the hearing, the court granted One America's unopposed Motion to File Amicus Brief. After considering the motion, Plaintiffs' Response, Intervenor's Reply, the amicus brief filed by One America

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and the arguments of counsel, the court finds that Intervenor's Motion for Judgment on the Pleadings should be denied.

Intervenor first asks the court to take judicial notice of the fact that Latino residents make up a majority rather than a minority of residents in Franklin County and, for that reason, the court should find that the plaintiffs in this case lack standing to bring this action. However, this court finds that the Intervenor's reading of the Washington Voting Rights Act, which is clearly a remedial statute, limiting consideration to the specific county in question, is too narrow. The Washington Voting Rights Act (WVRA) specifically states that "protected class" means a class of voters who are members of a race, color or language minority group, as defined by the federal voting rights act. Therefore, the court finds that standing to proceed is not limited to those who are a minority within the specific county in question. Further, counsel for the Plaintiffs has also pointed out that Latinos actually make up a minority of the eligible voters in Franklin County. Counsel for Intervenor did not contest this assertion. Since the WVRA specifically refers to "voters" who are members of a race, color or language minority, these Plaintiffs have standing as members of a protected class under the statute even accepting Intervenor's narrow reading of its provisions.

This court also finds that the WVRA does not violate the Equal Protection Clause of the United States Constitution. First, the WVRA is not itself a district plan and no specific district boundaries have been adopted. Therefore, the issue of unconstitutional racial gerrymandering is, at best, premature.

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The Intervenor has made a facial challenge to the constitutionality of the WVRA. Such challenges are disfavored and in order to prevail, Intervenor must establish that no set of circumstances exists where the statute would be valid. *United States v. Salerno,* 481 U.S. 739, 745 (1987). See also *Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 451 (2008). After reviewing the pleadings in this matter, this court finds that the Intervenor has failed to establish that there are no set of circumstances where the WVRA would be valid.

Intervenor relies in large part on the assertion that the WVRA lacks the requirement of what has been termed "compactness" and therefore violates the Equal Protection provisions of the United States Constitution. Intervenor relies in large part on the U.S. Supreme Court case of *Thornburg v. Gingles,* 478 U.S. 30 (1986) as support for this position. However, a careful reading of the *Gingles* case indicates that the compactness requirement that the record was referring to had to do with compliance with the section 2 of the Federal Voting Rights Act rather than being any type of constitutional requirement. Consequently, the court finds no authority for the assertion that the legislature's decision not to include a compactness requirement in the WVRA renders it violative of the Equal Protection Clause of the federal Constitution.

Finally, this court finds that the WVRA does not violate the Privileges and Immunities clause of the Washington State Constitution. The WVRA is essentially identical to the California Voting Rights Act that was reviewed by the Ninth Circuit Federal Court of Appeal and found to be constitutional in *Higgins v. Becerra,* 786 Fed. Appx. 705

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(9th Cir. 2019). As pointed out, states have wide authority to adopt measures designed "to eliminate racial disparities through race-neutral means." *Id.* at 707. Consistent with the Ninth Circuit, this court finds that the WVRA, while race conscious, does not discriminate based on race. The court further finds that the WVRA represents a closely tailored, race-neutral means to accomplish its legitimate goals as a remedial statute and, therefore passes the rational basis review standard applicable in this case.

Based on the foregoing analysis, the court finds that the Intervenor's Motion for Judgment on the Pleadings should be denied.

So Ordered, this 3rd Day of January 2022

Judge Cameron Mitchell

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SENATE BILL REPORT
SB 6002

As of January 11, 2018

Title: An act relating to establishing a voting rights act to promote equal voting opportunity in certain political subdivisions and establishing a cause of action to redress lack of voter opportunity.

Brief Description: Enacting the Washington voting rights act of 2018.

Sponsors: Senators Saldaña, Billig, Palumbo, Frockt, Rolfes, Van De Wege, Liias, Ranker, Keiser, Pedersen, Hunt, Wellman, Conway, Chase, McCoy, Dhingra, Kuderer, Hasegawa, Nelson, Carlyle and Mullet.

Brief History:
Committee Activity: State Government, Tribal Relations & Elections: 1/10/18.

Brief Summary of Bill

- Creates a state voting rights act to protect the equal opportunity for minority groups to participate in local elections and elect candidates of choice.
- Creates a cause of action and authorizes courts to order appropriate remedies for a violation of the voting rights act, including redistricting within a political subdivision.
- Authorizes local governments to change their election systems to remedy potential violations of the act.

SENATE COMMITTEE ON STATE GOVERNMENT, TRIBAL RELATIONS & ELECTIONS

Staff: Samuel Brown (786-7470)

Background: Federal Voting Rights Act of 1965 (VRA) - Section 2. The VRA prohibits discriminatory practices in state and local elections, based on the protections provided under the Fifteenth Amendment to the Constitution. Special protections extend to members of a racial, color, or certain language minority group.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Section 2 of the VRA (Section 2) prohibits any voting practice or procedure that effectively impairs the equal opportunity for members of a minority group to participate in the nomination and election of candidates. A violation may be shown based on the totality of circumstances of the election process that resulted in a discriminatory impact on a minority group. Proof of intentional discrimination is not required to show a violation. Section 2 does not create a right for minority groups to be proportionally represented in elected offices.

Vote dilution claims under Section 2 allege that the method of drawing voting districts has the discriminatory effect of dispersing minority votes throughout the districts, weakening the minority group's ability to influence the election. Vote dilution claims have also been raised in jurisdictions holding at-large general elections for bodies with multiple positions.

Local Elections. Local governments are responsible for periodically changing their voting districts to account for population shifts. Within eight months after receiving federal census data, a local government must prepare a plan for redistricting its election districts. Each district must be relatively equal in population, compact, and geographically contiguous. The plan should also try to preserve existing communities of related and mutual interest. The census data may not be used to favor any racial or political group in redistricting.

Alternative Proportional Voting Systems. Several jurisdictions have adopted alternative systems for allocating votes to voters to determine the winner of an election. These systems are known as alternative proportional voting systems, and include:

- limited voting, where a voter receives fewer votes than there are candidates to elect;
- cumulative voting, where a voter receives as many votes as there are candidates to elect, but may cast multiple votes for a single candidate; and
- single transferrable or ranked choice voting, where a voter ranks candidates in order of preference, and votes are transferred to lower-ranked candidates who are not elected on first-place votes if a majority is not reached.

Summary of Bill: The Washington Voting Rights Act (Act) is established. A jurisdiction violates the Act when elections exhibit polarized voting and where members of a protected class do not have an equal opportunity to participate in the political process or elect their preferred candidate or influence electoral outcomes.

Definitions and Scope. A protected class includes voters who are members of a race, color, or language minority group. The Act applies to elections held within counties, cities, towns, school districts, fire protection districts, port districts, and public utility districts (political subdivisions). Cities or towns with fewer than 1000 people and school districts with fewer than 250 students may not be sued for violations of the Act.

Redistricting. Any political subdivision may take corrective action to change its election system in order to remedy a potential violation of the Act. The remedy may include implementation of a district-based election system, which includes a method of electing candidates from within a district that is a divisible part of the subdivision. The remedy may also include an alternative proportional voting method, such as limited voting, cumulative voting, or single transferrable voting. Districts must be reasonably equal in population,

compact, and geographically contiguous, must coincide with natural boundaries, and must preserve communities of related and mutual interest as much as possible.

The political subdivision must provide notice to the community of its proposed change to its election system. If 5 percent or more of residents, or 500 or more residents, whichever is fewer, are of limited English proficiency, the notice must be provided in languages residents can understand.

If the subdivision adopts a new election plan between the date of the general election and January 15 of the following year, it must implement the plan at the next general election. If the plan is adopted during the remaining period of the year, the plan must be implemented at the general election of the following year. Any subdivision that implemented a district-based election system must prepare a redistricting plan within eight months of receiving federal census data.

Notice of Potential Violation. Any person may notify the political subdivision of their intent to challenge the election system. The notice must describe the alleged violation and a possible remedy. The person bringing the notice and subdivision must work in good faith to implement a remedy that provides members of the protected class or classes equal opportunity to elect candidates of their choice.

Any person may file an action against the subdivision under the Act if the subdivision does not adopt a remedy within 180 days. If the subdivision receives a different notice within the initial 180-day period, it has an additional 90 days to respond from the date the second notice was received.

No notice of a potential violation of the Act may be submitted before July 19, 2018.

Legal Action. If no remedy is adopted, any person may file a lawsuit alleging a violation of the Act within that subdivision. The claim has two elements:

- the subdivision's elections show polarized voting, meaning a difference of choice between voters of a protected class and other voters in the election; and
- members of the protected class do not have an equal opportunity to elect members of their choice or influence the outcome of an election.

The protected class does not have to be geographically compact or concentrated to constitute a majority in any proposed or existing district. Intent to discriminate is not required to show a violation under the Act. Members of different protected classes may file an action jointly if their combined electoral preferences differ from the rest of the electorate.

Court Procedures and Process. The action may be filed in the superior court of the county in which the political subdivision is located. If the action is against a county, it may instead be filed in the superior court of either of the two nearest judicial districts. The trial must be set for no later than one year after the filing of a complaint, with a corresponding discovery and motions calendar. For purposes of the statute of limitations, a cause of action under the Act arises every time there is an election under a districting method that is the subject of the court action.

To determine the existence of polarized voting, the court may only analyze the elections conducted prior to the legal action, including the election of candidates, ballot measure elections, and elections that affect the rights and privileges of the protected class. Election of candidates who are members of the protected class does not preclude a court from finding the existence of polarized voting.

Remedies. The court may order appropriate remedies for a violation, including requiring the subdivision to redistrict, create a district-based election system, or implement an alternative proportional voting system.

If the court issues a final order between the date of the general election and January 15 of the following year, the order applies to the next general election. If the court issues a final order between January 16 and the next general election date, the order only applies starting from the general election of the following year.

The court may award attorneys' fees and costs to a prevailing plaintiff. Prevailing defendants may be awarded certain costs, but not attorney's fees.

Immunity From Suit. If the subdivision modifies its electoral system and obtains a court order that the remedy is in compliance with the Act, or if the jurisdiction implements a court-ordered remedy, no legal action may be brought against the subdivision for four years alleging a violation of the Act so long as the subdivision does not modify the system in the remedy.

Political subdivisions which have modified their electoral systems in the previous decade in response to a federal VRA claim may not be sued under the Act until redistricting after the 2020 census is completed.

Appropriation: None.

Fiscal Note: Available.

Creates Committee/Commission/Task Force that includes Legislative members: No.

Effective Date: Ninety days after adjournment of session in which bill is passed.

Staff Summary of Public Testimony: PRO: Some localities recognize they could do better in ensuring representation for all, and this bill eliminates barriers to making those changes. This allows jurisdictions to take the lead and provides a process for working in good faith from the same set of data toward a remedy. This will improve democratic participation, particularly in cities with demonstrable racially polarized voting. This is a better bill than past years that is more inclusive of stakeholder feedback. Notice provisions will ensure that everyone in communities know what proposed solutions are before they are implemented. The bill provides a roadmap and timetable for collaboration on solutions and does not mandate one particular system. This creates a pathway around litigation. I lost an election to a candidate who dropped off the ballot as a result of polarized voting, which would be rectified under this bill. After living under dictatorship, watching people vote and exercise their voice was exciting, but the makeup of elected bodies has not kept pace with community

changes. Districting would give communities the opportunity to elect candidates who understand their needs and build trust in local governments.

Alternative proportional voting methods are important because there can be wide discrepancies in district election participation. Ranked choice voting leads to increased turnout. Multiple counties use vendors for their election systems that can process ranked choice voting elections. Ranked choice voting has led to the breaking of numerous glass ceilings for representation in other jurisdictions.

When elected officials authentically understand and represent their communities, voters feel more connected to their government. This bill is necessary to protect the rights of Washington voters. This bill is consistent with the state's longstanding commitment to provide everyone an equal opportunity to participate in our civil processes. This will inspire more students, who are the next generation of leaders, to get involved in politics.

OTHER: County auditors are committed to remedying civil rights violations and underrepresentation, but have concerns about the inclusion of alternative proportional voting methods. A requirement that an alternative proportional voting method is the only way to solve the problem in the jurisdiction is requested. The Secretary of State supports the goals of the bill, but is concerned that ranked choice voting would be costly, confusing, and unpopular with voters.

Persons Testifying: PRO: Senator Rebecca Saldaña, Prime Sponsor; Dulce Gutierrez, Deputy Mayor, City of Yakima; Alex Hur, OneAmerica; Elisabeth Smith, ACLU; Eric Gonzalez, Washington State Labor Council; Graciella Villanueva, citizen; Ubah Aden, citizen; Alma Chacon, citizen; Gregory Christopher, Tacoma/Pierce County NAACP and Tacoma Ministerial Alliance; Krist Novoselic, FairVote; Colin Cole, FairVote Washington; George Cheung, FairVote Washington; Rosa Rice-Pelepko, Associated Students of Western Washington University; RaShelle Davis, Governor's Office; Marsha Chien, Office of the Attorney General; Oskar Zambrano, Progreso.

OTHER: Dolores Gilmore, Kitsap County Auditor; Julie Anderson, Washington Association of County Auditors; Lori Augino, Office of the Secretary of State.

Persons Signed In To Testify But Not Testifying: PRO: Stuart Halsan, FairVote; Pastor Arthur Banks, Political Destiny & Tacoma Ministerial Alliance; Cindy Black, Fix Democracy First; Jessica Vavrus, Washington State School Directors' Association; Salvador Salazar Cano, University of Washington, Bothell; David Morales, Commission on Hispanic Affairs.

OTHER: David Williams, Association of Washington Cities.

FINAL BILL REPORT
ESSB 6002

C 113 L 18
Synopsis as Enacted

Brief Description: Enacting the Washington voting rights act of 2018.

Sponsors: Senate Committee on State Government, Tribal Relations & Elections (originally sponsored by Senators Saldaña, Billig, Palumbo, Frockt, Rolfes, Van De Wege, Liias, Ranker, Keiser, Pedersen, Hunt, Wellman, Conway, Chase, McCoy, Dhingra, Kuderer, Hasegawa, Nelson, Carlyle and Mullet).

Senate Committee on State Government, Tribal Relations & Elections
House Committee on State Government, Elections & Information Technology

Background: Federal Voting Rights Act of 1965 (VRA) - Section 2. The VRA prohibits discriminatory practices in state and local elections, based on the protections provided under the Fifteenth Amendment to the Constitution. Special protections extend to members of a racial, color, or certain language minority group.

Section 2 of the VRA (Section 2) prohibits any voting practice or procedure that effectively impairs the equal opportunity for members of a minority group to participate in the nomination and election of candidates. A violation may be shown based on the totality of circumstances of the election process that resulted in a discriminatory impact on a minority group. Proof of intentional discrimination is not required to show a violation. Section 2 does not create a right for minority groups to be proportionally represented in elected offices.

Vote dilution claims under Section 2 allege that the method of drawing voting districts has the discriminatory effect of dispersing minority votes throughout the districts, weakening the minority group's ability to influence the election. Vote dilution claims have also been raised in jurisdictions holding at-large general elections for bodies with multiple positions.

Local Elections. Local governments are responsible for periodically changing their voting districts to account for population shifts. Within eight months after receiving federal census data, a local government must prepare a plan for redistricting its election districts. Each district must be relatively equal in population, compact, and geographically contiguous. The plan should also try to preserve existing communities of related and mutual interest. The census data may not be used to favor any racial or political group in redistricting.

This analysis was prepared by non-partisan legislative staff for the use of legislative members in their deliberations. This analysis is not a part of the legislation nor does it constitute a statement of legislative intent.

Alternative Proportional Voting Systems. Several jurisdictions have adopted alternative systems for allocating votes to voters to determine the winner of an election. These systems are known as alternative proportional voting systems, and include:

- limited voting, where a voter receives fewer votes than there are candidates to elect;
- cumulative voting, where a voter receives as many votes as there are candidates to elect, but may cast multiple votes for a single candidate; and
- single transferrable or ranked choice voting, where a voter ranks candidates in order of preference, and votes are transferred to lower-ranked candidates who are not elected on first-place votes if a majority is not reached.

Summary: The Washington Voting Rights Act (Act) is established. A jurisdiction violates the Act when elections exhibit polarized voting and where there is a significant risk members of a protected class do not have an equal opportunity to elect candidates of choice as a result of dilution or abridgement of their rights.

Definitions and Scope. A protected class includes voters who are members of a race, color, or language minority group. The Act applies to elections held within counties, cities, towns, school districts, fire protection districts, port districts, and public utility districts (political subdivisions). Cities or towns with fewer than 1000 people and school districts with fewer than 250 students may not be sued for violations of the Act.

Redistricting. Any political subdivision may take corrective action to change its election system in order to remedy a potential violation of the Act. The remedy may include implementation of a district-based election system, which includes a method of electing candidates from within a district that is a divisible part of the political subdivision. Districts must be reasonably equal in population, compact, and geographically contiguous, must coincide with natural boundaries, and must preserve communities of related and mutual interest as much as possible.

The political subdivision must provide notice to the community of its proposed change to its election system. If 5 percent or more of residents, or 500 or more residents, whichever is fewer, are of limited English proficiency, the notice must be provided in languages residents can understand.

If the political subdivision adopts a new election plan between the date of the general election and January 15 of the following year, it must implement the plan at the next general election. If the plan is adopted during the remaining period of the year, the plan must be implemented at the general election of the following year.

The political subdivision must obtain a court order certifying that the remedy complies with the Act and was prompted by a plausible violation of the Act. A political subdivision must provide data and analysis used in developing its proposed remedy submitted for court approval. Courts must apply a rebuttable presumption for declining a political subdivision's proposed remedy, and all facts and reasonable inferences must be viewed in favor of those opposing the proposed remedy. Any political subdivision that implemented a district-based election system must prepare a redistricting plan within eight months of receiving federal census data.

Notice of Potential Violation. Any voter who resides in the political subdivision may notify the political subdivision of the voter's intent to challenge the election system. The notice must describe the alleged violation and a possible remedy. The person bringing the notice and the political subdivision must work in good faith to implement a remedy that provides members of the protected class or classes equal opportunity to elect candidates of their choice.

Any person may file an action against the political subdivision under the Act if the political subdivision does not adopt a remedy within 180 days or, if after July 1, 2021, within 90 days. No notice of a potential violation of the Act may be submitted before July 19, 2018.

Legal Action. If no remedy is adopted, any voter who resides in the political subdivision may file a lawsuit alleging a violation of the Act within that political subdivision. The claim has two elements:

- the political subdivision's elections show polarized voting, meaning a difference of choice between voters of a protected class and other voters in the election; and
- members of the protected class do not have an equal opportunity to elect members of their choice or influence the outcome of an election.

The protected class does not have to be geographically compact or concentrated to constitute a majority in any proposed or existing district. Intent to discriminate is not required to show a violation under the Act. Members of different protected classes may file an action jointly if their combined electoral preferences differ from the rest of the electorate.

Court Procedures and Process. The action may be filed in the superior court of the county in which the political subdivision is located. If the action is against a county, it may instead be filed in the superior court of either of the two nearest judicial districts. The trial must be set for no later than one year after the filing of a complaint, with a corresponding discovery and motions calendar. For purposes of the statute of limitations, a cause of action under the Act arises every time there is an election under a districting method that is the subject of the court action.

To determine the existence of polarized voting, the court may analyze elections in the political subdivision, including the election of candidates, ballot measure elections, and elections that affect the rights and privileges of the protected class. Elections conducted prior to the filing of the action are more probative. Election of candidates who are members of the protected class does not preclude a court from finding the existence of polarized voting.

Remedies. The court may order appropriate remedies for a violation, including requiring the political subdivision to redistrict or create a district-based election system. The court may order the political subdivision to hold elections for its governing body in the same year as elections for federal or statewide elected offices.

If the court issues a final order between the date of the general election and January 15 of the following year, the order applies to the next general election. If the court issues a final order between January 16 and the next general election date, the order only applies starting from the general election of the following year.

The court may award attorneys' fees and costs to a prevailing plaintiff. Prevailing defendants may be awarded certain costs, but not attorney's fees.

Immunity From Suit. If the political subdivision modifies its electoral system and obtains a court order that the remedy is in compliance with the Act, or if the jurisdiction implements a court-ordered remedy, no legal action may be brought against the political subdivision for four years alleging a violation of the Act so long as the political subdivision does not modify the system in the remedy.

Political subdivisions which have modified their electoral systems in the previous decade in response to a federal VRA claim may not be sued under the Act until redistricting after the 2020 census is completed.

Other Provisions. A political subdivision must publish online the outcome, summary, and legal costs of any court action.

Votes on Final Passage:

Senate	29	19	
House	52	46	(House amended)
Senate	29	20	(Senate concurred)

Effective: June 7, 2018

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BERTHA ARANDA GLATT,
Plaintiff,
v.
CITY OF PASCO, *et al.*,
Defendants.

Case No. 4:16-CV-05108-LRS

MEMORANDUM OPINION AND ORDER

I. INTRODUCTION

On August 4, 2016, Plaintiff, Brenda Glatt, filed a Complaint against the City of Pasco and its City Council members in their official capacities alleging that the City's "at large election method of electing Pasco City Council members violates Section 2 of the Voting Rights Act… 52 U.S.C. § 10301." (ECF No. 1 at 9). Section 2 of the Voting Rights Act (VRA) prohibits the imposition of a "voting qualification or prerequisite to voting or standard, practice, or procedure...which results in a denial or abridgement of the right of any citizen...to vote on account of race or color." 52 U.S.C. § 10301(a). A violation of § 2 is established if, "based on the totality of circumstances," the challenged electoral process is "not equally open to participation by members of a [racial minority group] in that its members have less opportunity than other members of the electorate to participate in the political process and to

elect representatives of their choice." 52 U.S.C. § 10301(b). The essence of a § 2 claim, as set forth in seminal case *Thornburg v. Gingles*, 478 U.S. 30 (1986), is "that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and [majority] voters to elect their preferred representatives." 478 U.S. at 47.

On September 2, 2016, the court approved entry of the parties' Partial Consent Decree wherein Pasco admitted liability and consented to the court's finding that the City's existing at-large method of electing all its members to the Pasco City Council violated § 2 of the VRA by diluting the electoral power of Pasco's Latino voters. (ECF No. 16 at 10). The Partial Consent Decree fully resolves the issue of liability. The court enjoined the Defendants from conducting future elections under that system "or any other election method that violates Section 2 of the Voting Rights Act." (ECF No. 16 at 12). The Partial Consent Decree did not mandate a particular remedy.

Now pending are the parties' proposed remedial plans (filed as cross-motions at ECF Nos. 21, 25) after they failed to reach agreement on this aspect of the case. On December 7, 2016, the court held oral argument. Present on behalf of Plaintiff were Brendan Monahan, Emily Chiang, La Rond Baker, Gregory Landis, and Cristin Aragon. Present on behalf of Defendants, City of Pasco were John Safarli, Leland Kerr, and Casey Bruner.

The parties' motions are supported by declarations, reports, and data of highly experienced demographic and redistricting experts: Richard L. Engstrom, Ph.D. (ECF Nos. 23, 29); William S. Cooper (ECF Nos. 24, 28, 32); and Peter A. Morrison, Ph.D. (ECF No. 26, Ex. 13; ECF Nos. 33, Exs. 1 and 2).

There are three electoral formats commonly used by municipal governments in the United States: at-large systems, single-member district systems, and "mixed" or "hybrid" systems. *See Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 981 F.Supp. 751, 757 (E.D.N.Y. 1997). "In an at-large system, all members of the legislative body are elected from a district that includes all members of the electorate. In a single-member district system, the legislators are elected from compact, contiguous and essentially equipopulous districts. In a mixed system, some members of the legislature are elected from single-member districts, while other members, usually a smaller number, are elected at large. In a typical mixed system, the districts cover the entire municipality. Thus, each voter is represented both by one or more legislators elected from a district and one or more legislators elected at large." *Id.*

In this case, the Pasco City Council has adopted a "mixed" or "hybrid" 6-1 remedial plan redrawing its voting districts and utilizing a scheme in which six members are elected from districts and a single position is elected at-large. The primary issue is whether the remedial plan is legally acceptable. If it is, the parties agree deference is owed to the Pasco City Council's legislative judgment. If it is

not, Pasco concedes the court has authority to judicially impose Plaintiff's proposal with seven single-member geographic residency districts. This Memorandum Opinion and Order approves the City's remedial plan, directs its implementation, and denies the Plaintiff's request for permanent injunction, but retains jurisdiction.

II. BACKGROUND

As with all cases under the Voting Rights Act, this one is driven by the facts. The City of Pasco has conceded that its current City Council election scheme violates § 2. The key factual conclusions supporting the court's finding of liability are contained in the Partial Consent Decree. (ECF No. 16). Because of their length, the stipulated facts and findings in the Partial Consent Decree are incorporated by reference.

The parties have decided that the public interest is best served by efforts to settle this litigation thus avoiding "protracted, costly, and potentially divisive litigation." (ECF No. 16 at ¶ 23). The experience of courts applying the Voting Rights Act confirms that it is one the most difficult and intricate responsibilities a district court will confront. *See e.g., Patino v. City of Pasadena*, 2017 WL 68467 (S.D.Tex. Jan. 6, 2017) (after rulings on motions to dismiss and for summary judgment, district court held a 7-day trial involving 16 witnesses and 468 exhibits resulting in a 111-page decision). The parties' experts largely rely on the same sources of data, with the exception that the Defendants' expert, Mr. Morrison, has also supplied analysis

based upon recently obtained data from the Franklin County Auditor's Office.[1] (ECF No. 33, Ex. 1). The experts' methodologies differ and variances in their data exists, however these differences are not material to the court's decision. No party has requested a trial or evidentiary hearing on the facts.

A. Pasco's Demographics

1. Latino Population

The City of Pasco, is located in south central Washington and is one of three cities that make up the Tri-Cities region. Its geography encompasses approximately 38.7 square miles. (ECF No. 28 at 2). Pasco's population nearly doubled between 2000 and 2010. (ECF No. 24 at 4). Its adjusted population based on the 2010 decennial U.S. Census is 62,452. *Id.* More recent population estimates of the Washington Office of Financial Management indicate the population is 70,560. (ECF No. 24 at 6). According to the 2010 Census, the City is 54.02%[2] Latino and

[1] Plaintiff objects to this data on the sole basis that it was submitted for the first time along with Defendants' Reply. (ECF No. 34). The court declines to strike the data or that portion of the Reply relying upon this new information absent evidence of prejudice.

[2] Defendants' expert indicates more recent estimations of the Latino share of the total population include 45.02% (based upon the 5-year 2010-2014 American

40.44% non-Hispanic White. (ECF No. 24 at 5). The 2010 Census data adjusted for annexations estimates that Pasco has a population under age 18 that is 66.47% Latino and 25.48% non-Hispanic White. (ECF No. 24 at 5).

Mr. Morrison estimates Pasco's Spanish-surnamed voter registration is 31.8% as of October 2016. (ECF No. 33, Ex 1 at 3, ¶9; Ex. 2 at 4-5). This statistic is an estimate of Latino registered voters in Pasco.

2. Citywide Latino Citizen Voting-Age Population

The American Community Survey ("ACS"), produced by the U.S. Census Bureau, provides two estimates of the Latino citizen voting-age population ("LCVAP") (residents that are legally able to vote) in Pasco. The first is based upon a five-year survey for 2010-2015 and the second is based on the one-year survey for 2015. The one-year estimate accounts for Pasco's city limits as of 2015. (ECF No. 33, Ex. 1 at 2). The estimates for LCVAP are 31.9% of the citywide eligible voter population (5-year estimate), 32.09% (5-year estimate adjusted), and 38.5% (2015 1-year estimate). The 2015 estimate is most current and includes recent annexations, however, the five-year estimate (which does not take into account the 2014 and 2015 annexations) is more statistically reliable.

Community Survey estimate) and 49.7% (the 2015 1-year American Community Survey estimate). (ECF No. 24 at 7, ¶¶21-22).

Given that a significant portion of the City's population is Latino and young, trends show and experts forecast the LCVAP to increase in the coming years. (ECF No. 33, Ex. at 2). Mr. Morrison predicts the LCVAP is likely to exceed 40% by 2021. *Id.*

B. Pasco's 5-2 Method of Electing its City Council

Pasco is a non-charter code city with a council-manager form of government. (ECF No. 25 at 3). The Mayor and Mayor Pro Tempore are chosen by councilmembers. (ECF No. 25 at 5). While the Mayor presides over Council meetings, the role is "for ceremonial purposes." *Id.* (quoting Wash.Rev.Code § 35A.13.030).

The Pasco City Council consists of seven members. When the last City Council election was held, the City was utilizing an at-large, numbered "place system" for electing councilmembers to serve staggered four-year terms. (ECF No. 31 at 10). Five of the seven positions (identified as Positions 1 through 5) were tied to geographical residency districts. Candidates for Positions 1 through 5 were required to reside in their respective geographical residency districts. In the August primary, voters narrowed the field of candidates for the district in which they resided. The top two candidates in each district proceeded in the general election, which was conducted at-large and the candidate receiving a majority of votes won. Positions 6 and 7 were both at-large positions, in that voters citywide narrowed the field of

candidates for each seat in the primary and then voted for one of two candidates for each position in the general election. Washington state law requires that "all voters of a code city be permitted to vote in each city council race at the general election." Wash. AGO 2016 NO. 1 (Wash.A.G.), 2016 WL 439289 (Jan. 28, 2016)(discussing Wash.Rev.Code §35A.12.180).[3] The key features of Pasco's election scheme were the combination of: 1) a numbered place system; 2) a top two primary system; and 3) at-large general elections for every seat with a majority vote rule. *See* ECF No. 23 at ¶ 10.

In 2015, Plaintiff Brenda Glatt, a Latina, was a candidate for Pasco City Council at-large Position 6. In the general election, she was defeated decisively by non-Latino candidate Matt Watkins despite her strong support from Latino voters. (ECF

[3] The statute provides that voters of the "entire city may vote at the general election to elect a councilmember" of a district, "unless the city had prior to January 1, 1994, limited the voting in the general election" to voters residing in the district. Wash.Rev.Code §35A.12.180. The role the Supremacy Clause of Article VI of the U.S. Constitution plays herein is acknowledged by the parties and this court. *See Cleveland Cnty. Ass'n for Gov't by the People v. Cleveland Cnty. Bd. of Comm'rs,* 142 F.3d 468, 477 (D.C.Cir.1998) (per curiam) ("[I]f a violation of federal law necessitates a remedy barred by state law, the state law must give way; if no such violation exists, principles of federalism dictate that state law governs.").

No. 23 at ¶ 20).

The next municipal election will be in November 2017, at which time four (4) of the seats on the Pasco City Council are presently up for election.

C. Pasco's Efforts Toward Election Change

Four years ago a Voting Rights Act case was filed against the city of Yakima, Washington, a town of 91,000, just 80 miles from Pasco. As in this case, the complaint contended the city's at-large electoral system of electing city councilmembers violated § 2. In August 2014, judgment was entered in favor of Plaintiffs. *Montes v. City of Yakima*, 40 F.Supp.3d 1377 (E.D.Wash., Aug. 22, 2014).

The record evidences that since 2014, Pasco has been responsive to the concern that its election system had a disproportionate impact on the Latino vote. In 2014, Pasco hired a demographer. In March 2015, the City Council modified its district boundaries to provide 2 majority-minority districts "with the goal of providing for equal voting opportunity for all citizens" (ECF No. 26, Ex. 2 at 1). In May 2015, the City Council enacted Resolution No. 3635 declaring its intent to pursue a district-based election system and further declaring its continuing intent to provide equal voting opportunities for all its citizens, and to provide equitable and proportional representation. (ECF No. 16 at ¶ 6)(ECF No. 26, Exs. 4-5). However, state law mandating at-large general elections put the City in the proverbial position between a rock and a hard spot. This position was confirmed in the State Attorney General's

Office response to the City's query about the legality of modifying the at-large election scheme to avoid a violation of § 2. (ECF No. 26, Ex. 10); Wash. AGO 2016 NO. 1 (Wash.A.G.), 2016 WL 439289 (Jan. 28, 2016) ("code cities in Washington…face difficult decisions and potential legal risk regardless of what course they choose…Either course of action, whether to adhere to state law or to depart from it, may be subject to challenge in court."). Pasco continued to seek change by helping draft legislation (Senate Bill 6129) which would have allowed Pasco to avoid the restrictions of Wash.Rev.Code §35A.12.180. (ECF No. 25 at 9) The mayor testified before the state senate in favor of the bill, but the bill did not pass. *Id*. at 9-10.

Months prior to filing this lawsuit, the American Civil Liberties Union (ACLU) of Washington notified Pasco that it believed its election system violated federal law. Pasco began consulting with the ACLU. The City felt the lawsuit was necessary "as the only available means to bring the force of federal law to remedy the problem that exists as a result of state law." (ECF No. 26, Ex. 10 at 2).

As stated in the Partial Consent Decree, "there is no evidence of any discriminatory motive or intent by the non-Latino population in exercising their own rights to vote." (ECF No. 16 at 8, ¶ 20). There is no evidence in the record of a history of official discrimination against Latinos.

D. Partial Consent Decree Stipulations

The Partial Consent Decree includes key concessions establishing the three *Gingles* preconditions for a violation of § 2, which are: (1) the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district, (2) the minority group is politically cohesive, and (3) the majority group votes sufficiently as a bloc[4] to enable it, in the absence of special circumstances, "usually to defeat the minority's preferred candidate." *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986). Specifically, the Partial Consent Decree states:

> (12)…Pasco's large Latino population is sufficiently numerous and compact to form a majority in at least one single-member district, is political[ly] cohesive, and the non-Latino majority votes sufficiently as a block to defeat a Latino preferred candidate.
> ….
> (17) The majority of voters in Pasco are white and have historically engaged in bloc voting favoring non-Latino candidates….
> (18) There is a pattern of racially polarized voting in the City of Pasco City Council elections. The voting patterns and the presently mandated at-large general election of all City Council candidates make it very difficult for the Latino community to elect candidates of their choice. Although other minority candidates have been elected to the City Council, as a result of racially polarized bloc voting, no Latino candidate has ever won an opposed election to the Pasco City Council. The first Latina to serve on the City Council was Luisa Torres. She was appointed to the Council in 1989. Luisa ran for election in 1989 but was defeated by a non-Latina candidate. The only other Latino to serve on the City Council was also first appointed to the City Council, Saul Martinez. He subsequently ran unopposed, which enabled him to retain his seat.
> (19) In 2015, six Latinos ran for two positions on [the] City Council. Despite strong support of Latino voters, the two Latinas who survived the primary

[4] Racially polarized voting means "a consistent relationship between [the] race of the voter and the way in which the voter votes." *Gingles*, 478 U.S. at 53 n. 21 (internal citations and quotations omitted).

election were both defeated in the November 2015 general election.

(ECF No. 16 at 5-8).

In conceding liability, Pasco also concedes there is "sufficient evidence" to conclude that "based on the totality of circumstances," the challenged electoral process impermissibly impairs the minority group's ability to elect representatives of its choice. *Gingles*, 478 U.S. at 44–45; *see also Ruiz v. City of Santa Maria*, 160 F.3d 543, 550 (9th Cir. 1998) (adopting the *Gingles* two-step analysis). Specifically, the Partial Consent Decree states as follows:

> (22)…[T]here is sufficient evidence of disparities to show inequality in opportunities between the white and Latino populations and that the existing at-large election system for the Pasco City Council has excluded Latinos from meaningfully participating in the political process and diluted their vote such that Latinos are unable to elect candidates of their choice to the City Council…In order to remedy the City of Pasco's Section 2 violation, the City must adopt a new election system.

(ECF No. 16 at 8).

E. Council Approval of 6-1 Hybrid Single-Member/At-Large Plan

After entry of the Partial Consent Decree, the City Council held public hearings to evaluate three alternative systems for future elections including alternatives with two, one, and no at-large positions. (ECF No. 26, Ex. 10). On September 19, 2016, the Council voted in favor of an election system comprised of six districts and one at–large seat. (ECF No. 21). On October 10, 2016, the Council approved Ordinance No. 4315 creating the "6-1" redistricting plan. (ECF No. 26,

Ex. 10). Under this plan, six of the councilmembers would be elected by the voters in each of the City's six "single-member districts" ("SMD"); a seventh seat would be elected at-large. The geographic residency districts divide the entire territory within Pasco city limits into six instead of five geographic districts. Three districts (Districts 1, 2 and 6) are majority-minority districts in which Latinos constitute more than 50% of that district's eligible and registered voters. (ECF No. 26, Ex. 13 at 2; ECF No. 33 at 5; ECF No. 33, Ex. 1 at 4). The new district boundaries align with 58 out of 67 existing precincts. (ECF No. 33, Ex. 2 at 4). The City's map and "Table 1" of demographic data (based upon the 2010-2014 5-year ACS estimates) are reproduced in Appendix A attached to this decision.

The Latino share of eligible voters based upon figures from the 2010-2014 5-year ACS estimate for Position 1 was 54.0%; Position 2, 52.3%; Position 3, 27.3%; Position 4, 23.6%; Position 5, 13.0%; and Position 6, 56.0%. (ECF No. 26, Ex. 13 at 5). The parties agree that the City's plan provides three majority-minority "opportunity" districts (Positions 1, 2, and 6), and at least one district in which Latinos are not a majority but have a Latino voting age population exceeding 25%.

The court notes that Plaintiff has not had the opportunity to respond or offer their own expert analysis of Mr. Morrison's statistical analysis of current registered voters by District contained in "Table 2" at ECF No. 33, Ex. 1, based upon 2016 data from the Franklin County Auditor's Office. (ECF No. 33, Ex. 1)(Morrison First

Supplemental Report). Mr. Morrison estimates the Latino share of registered voters district-wide are: Position 1 (58.5%); Position 2 (61.6%); Position 3 (41.4%); Position 4 (40.9%); Position 5 (38.2%); Position 6 (61.7%). *Id*.

The City Council's Ordinance states that this alternative was preferred over other proposals due to: 1) "its providing three Latino citizen-voter-age majority districts, the same number as possible under the ACLU's preferred seven district plan;" 2) "the plan providing greater opportunities for voters to influence the number of elections for members of the City Council and for voters to have the opportunity to run for seats on the City Council"; and 3) "the possibility of greater continuity of government and ease in implementation." (ECF No. 26, Ex. 10 at 2). There is no evidence that the adoption of this plan was motivated by racial animus.

F. Plaintiff's Proposed 7-0 Plan

Plaintiff opposes the plan passed by Pasco and proposes an alternative dividing the City into seven single-member residency districts and no at-large position. The Plaintiff's map and table of demographic data is reproduced in Appendix B attached to this Order. Like the City's plan, Plaintiff's plan also provides three majority-minority districts and one district, in which the LCVAP exceeds 25%, which Plaintiff characterizes as an "influence district."

III. LEGAL STANDARDS

The vote is one of the most critical features of a representative democracy and

therefore one of our most fundamental rights. *See Reynolds v. Sims*, 377 U.S. 533, 562 (1964) (describing the right to exercise the franchise in a free and unimpaired manner as "preservative of other basic civil and political rights"). Although great progress has been made, "voting discrimination still exists; no one doubts that," and § 2 of the Voting Rights Act remains a crucial "permanent, nationwide ban," *Shelby Cnty. v. Holder*, 133 S.Ct. 2612, 2619 (2013), on "even the most subtle forms of discrimination," *Chisom v. Roemer*, 501 U.S. 380, 406 (1991) (Scalia, J., dissenting). Federal courts have a vital role in protecting the right "to participate equally in the political process." *Gingles*, 478 U.S. at 80. Though vital, this role is limited. The following key principles guide the court's analysis and decision.

A. General Remedial Powers under the VRA and the Complete and Full Remedy Standard

Where, as here, a violation of § 2 has been established, "courts should make an affirmative effort to fashion an appropriate remedy for that violation." *Monroe v. City of Woodville, Mississippi*, 819 F.2d 507, 511 n. 2 (5th Cir.1987) (per curiam), *cert. denied*, 484 U.S. 1042 (1988); *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1022 (8th Cir. 2006)(the district court's "first and foremost obligation...is to correct the Section 2 violation."). The legislative history of the VRA states:

> The basic principle of equity that the remedy fashioned must be commensurate with the right that has been violated provides adequate assurance, without disturbing the prior case law or prescribing in the statute mechanistic rules for formulating remedies in cases which necessarily depend upon widely varied proof and local circumstances. The court should exercise its traditional equitable

> powers to fashion the relief so that it completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and to elect candidates of their choice.

S.Rep. No. 417 at 31, 97th Cong., 2d Sess. 44, reprinted in 1982 U.S.Code Cong. & Admin.News at 208 (footnote omitted). In sum, "'the [district] court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future.'" *Ketchum v. Byrne*, 740 F.2d 1398, 1412 (7th Cir.1984) (*quoting Louisiana v. United States*, 380 U.S. 145, 154 (1965)), *cert. denied sub nom. City Council v. Ketchum*, 471 U.S. 1135 (1985); *see also*, *Dillard v. Crenshaw Cnty.*, 831 F.2d 246, 252 (11th Cir.1987)(A court "cannot authorize an element of an election proposal that will not with certitude completely remedy the Section 2 violation.").

A complete § 2 remedy does not mean that a remedial plan must guarantee electoral success for Latinos. The plan must provide "a genuine opportunity 'to exercise an electoral power that is commensurate with its population.'" *U.S. v. Village of Port Chester*, 704 F.Supp.2d 411, 449 (S.D.N.Y. 2010) (*quoting LULAC v. Perry*, 548 U.S. 399, 428 (2006)); *see also Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994) ("[T]he ultimate right of § 2 is equality of opportunity, not a guarantee of electoral success for minority-preferred candidates of whatever race."); *Bone Shirt*, 461 F.3d at 1023 ("The defendants' argument that the remedial plan must provide some sort of guarantee that Indian–preferred candidates will be elected is

not persuasive; all that is required is that the remedy afford Native-Americans a realistic opportunity to elect representatives of their choice.").

Any proposal to remedy a § 2 violation must itself conform to § 2. *United States v. Dallas Cnty. Comm'n*, 850 F.2d 1433, 1437 (11th Cir. 1988), *cert. denied*, 490 U.S. 1030 (1990). A remedy "should be sufficiently tailored to the circumstances giving rise to the § 2 violation." *Id.*

A remedy for a § 2 violation must not itself be enacted with the discriminatory intent of diluting the Latino vote. *Dillard v. Crenshaw Cnty., Ala.*, 831 F.2d 246, 249 (11th Cir. 1987); *Edge v. Sumter Cnty. School Dist.*, 775 F.2d 1509, 1510 (11th Cir. 1985). There is no evidence the at-large election scheme here was conceived as a tool of racial discrimination.[5] *C.f., Patino v. City of Pasadena*, 2017 WL 68467 (S.D.Tex., January 6, 2017).

B. Judicial Deference

Where the Pasco City Council has exercised its political and policy judgment in preparing and passing the Ordinance behind Defendants' remedial scheme, the proposal is properly characterized as a "legislative" plan. *See e.g.*, *Wise v. Lipscomb*,

[5] Although proof of discriminatory intent is not dispositive, when it exists, it is not irrelevant in assessing the totality of the circumstances. Plaintiff's contention that intent is "irrelevant" here acknowledges that there is no "concrete evidence" of discriminatory intent at play in this case. (ECF No. 31 at 10).

437 U.S. 535, 538 (1978) (upholding system as a valid legislatively enacted plan, despite the absence of an express grant of legislative power to the City Council to change the election system); *Jenkins v. City of Pensacola*, 638 F.2d 1249, 1252 (5th Cir. 1981)(conceding that on balance, the plan was "better viewed as a legislative plan" rather than court-ordered, where the plan, which called for seven single-member districts and three at-large districts, was formally adopted by ordinance after liability was established and the court directed the parties to submit proposals). Plaintiff makes no argument to the contrary.

Federal courts are reluctant to interfere with legislative decisions of governing bodies especially when they concern issues as sensitive as those regarding who votes, how they vote, and what districts they vote in. The Supreme Court has cautioned that "redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978) (plurality) (White, J.); *see also, Connor v. Finch*, 431 U.S. 407, 414–15 (1977); *Chapman v. Meier*, 420 U.S. 1, 27 (1975); *White v. Weiser*, 412 U.S. 783, 794–95 (1973); *Upham v. Seamon*, 456 U.S. 37, 39 (1982).

The role of the court in fashioning a remedy for a violation of the Constitution was delineated by the Supreme Court is *Wise v. Lipscomb,* where the court said "it is ... appropriate, whenever practicable, to afford a reasonable opportunity for the

legislature to meet constitutional requirements by adopting a substitute measure rather than for the federal court to devise and order into effect its own plan." *Wise*, 437 U.S. at 540; *see also United States v. Brown*, 561 F.3d 420, 435 (5th Cir. 2009) ("[A]t least in redistricting cases, district courts must offer governing bodies the first pass at devising a remedy."). This court's role is similar in fashioning a remedy for a violation of the Voting Rights Act. Where a legislative body proposes a plan which completely remedies the § 2 violation and is not unconstitutional or otherwise illegal, then that plan "will ... be the governing law," even if it is not the plan the court would have chosen. *Wise*, 437 U.S. at 540; *see also, Upham v. Seamon*, 456 U.S. 37, 39 (1982)("a court must defer to legislative judgments on reapportionment as much as possible"); *Perry v. Perez*, 132 S.Ct. 934, 941 (2012)(the legislative plan "serves as a starting point for the district court."); *Williams v. City of Texarkana, Ark.*, 32 F.3d 1265, 1268 (8th Cir. 1994)("If an appropriate legislative body offers a remedial plan, the court must defer to the proposed plan unless the plan does not completely remedy the violation or the proposed plan itself constitutes a section two violation."); *Seastrunk v. Burns*, 772 F.2d 143, 151 (5th Cir. 1985)("Thus, even where a legislative choice of policy is perceived to have been unwise, or simply not the optimum choice, absent a choice that is either unconstitutional or otherwise illegal under federal law, federal courts must defer to that legislative judgment."); *McGhee v. Granville Cnty., N.C.*, 860 F.2d 110, 115 (4th Cir. 1988) ("[A] reviewing court must ... accord great

deference to legislative judgments about the exact nature and scope of the proposed remedy..."); *Dickinson v. Indiana State Election Bd.*, 933 F.2d 497, 501 n. 5 (7th Cir. 1991) (the court "must, wherever practicable, afford the jurisdiction an opportunity to remedy the violation first, ... with deference afforded the jurisdiction's plan if it provides a full, legally acceptable remedy.... But if the jurisdiction fails to remedy completely the violation or if a proposed remedial plan itself constitutes a § 2 violation, the court must itself take measures to remedy the violation."); *Tallahassee Branch of NAACP v. Leon Cnty., Fla.*, 827 F.2d 1436, 1438 (11th Cir. 1987) ("[F]ederal courts must defer to the judgment of a state legislative body in the area of reapportionment. Principles of federalism and common sense mandate deference to a plan which has been legislatively enacted.").

Plaintiff suggests the applicable legal standard in this case is the more stringent one where "[t]he Supreme Court has directed the use of single-member districts to remedy Section 2 violations unless there are compelling reasons not to use them."[6] (ECF No. 21 at 8-9)(*quoting Montes v. City of Yakima*, 2015 WL 11120964, at *9 (E.D.Wash. 2015)). However, the broad reach of the Voting Rights Act supports a

[6] The quoted reference from *Montes*, in its entirety, reads as follows: "*When a district court is required to fashion a remedy*, the Supreme Court has directed the use of single-member districts unless there are compelling reasons not to use them." 2015 WL 11120964, at *9 (E.D.Wash. 2015)(emphasis added).

broad view of permissible remedies. To be clear, the Supreme Court has not mandated single-member districts in all instances. It has stated "a *court drawn plan* should prefer single member districts over multi-member districts, absent persuasive justification to the contrary." *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978)(emphasis added). Supreme Court precedent does not dictate remedial preferences for legislative bodies; it requires deference to them so long as they meet the special standards that are applicable.

C. Preemption of State Law

In reviewing a remedial plan, "a district court should not preempt the legislative task nor intrude upon state policy any more than necessary." *Upham v. Seamon*, 456 U.S. 37, 41–42 (1982) (per curiam) (*quoting White v. Weiser*, 412 U.S. 783, 794–795 (1973)). This consideration is relevant here, where, state law proscribes at-large general elections. Accordingly, a legislative remedy entitled to deference must not *unnecessarily* conflict with this legislative judgment of the state of Washington. *See e.g., Large v. Fremont Cnty., Wyo*, 670 F.3d 1133 (10th Cir. 2012)(emphasis added)(affirming rejection of deference to locally-devised plan where County's desired plan unnecessarily conflicted with Wyoming state law).

D. Totality of the Circumstances

As stated above, the court must consider whether Defendants' remedial plan is legally unacceptable because it fails to remedy the particular dilution violation or

violates anew constitutional or statutory voting rights. This evaluation requires the court to consider "the totality of circumstances," 52 U.S.C. § 10301(b), through "a searching practical evaluation of the past and present reality and on a functional view of the political process." *Gingles*, 478 U.S. at 45 (internal quotations and citation omitted). The typical factors which may be probative of a violation of § 2 are:

(1) "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;"
(2) "the extent to which voting in the elections of the state or political subdivision is racially polarized;"
(3) "the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;"
(4) "if there is a candidate slating process, whether the members of the minority group have been denied access to that process;"
(5) "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;"
(6) "whether political campaigns have been characterized by overt or subtle racial appeals;"
(7) "the extent to which members of the minority group have been elected to public office in the jurisdiction;"
(8) "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;" and
(9) "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous."

Gingles, 478 U.S. 30, 45 (1986) (quoting Senate Judiciary Committee's Majority

Report contained in bill amending Voting Rights Act).

The most relevant of the so-called "Senate Factors" in the liability phase of this litigation were the second and third factors. Where the enacted remedial plan has not been utilized and there is no history by which to analyze the scheme, a mechanical review of these factors does not aid the court in determining whether the proposed plan meets the requirements of § 2. *Hines v. Mayor and Town Council of Ahoskie*, 998 F.2d 1266, 1272 (4th Cir. 1993). The pertinent factors are addressed in the Analysis, Section IV, below.

E. At-Large Plans are not Per Se Illegal

Both parties acknowledge that at-large plans are not per se unlawful. *Gingles*, 478 U.S. at 46 ("[E]lectoral devices, such as at-large elections, may not be considered per se violative of § 2. Plaintiffs must demonstrate that, under the totality of the circumstances, the devices result in unequal access to the electoral process."). "At-large procedures that are discriminatory in the context of one election scheme are not necessarily discriminatory under another scheme." *U.S. v. Dallas Cnty. Comm'n, Dallas Cnty., Ala.*, 850 F.2d 1433, 1438-39 (11th Cir. 1988) (citation and quotations omitted).

IV. ANALYIS – REMEDIAL PLAN

The gravamen of the § 2 violation herein is that the Pasco City Council has until now operated under an at-large "place system" for electing *all seven* City Council

seats in a place where the voices of minority voters in a racially polarized electorate have been drowned out by the will of majority voters. The City's enacted remedy is the court's starting point.

The court begins with a look at how political life in Pasco would structurally differ under the City's hybrid 6-1 remedial plan. First, Pasco's plan provides Latinos with "rough proportionality" in their voting influence, in that it provides for three majority-minority districts, instead of the former two. *See Johnson v. De Grandy*, 512 U.S. 997, 1019 (1994)(describing majority-minority districts as remedial devices relying upon a "quintessentially race-conscious calculus aptly described as the 'politics of second best.'"). Next, whereas run-off primaries (district-based for 5 position) combined with at-large elections previously determined all *seven* positions, the 6-1 plan provides for six single-member district-based general elections, instead of none. As before, Position 7 remains at-large, untied to any district and elected by the citywide population. Pasco residents would have the opportunity to run or vote for just two positions on the Council, instead of all seven under the former election scheme, or just one under Plaintiff's proposal. Thus, the new election scheme retains its use of numbered positions, a top-two primary, and majority vote general elections, but limits their application to specifically drawn districts for all but one seat.

The court's task is to determine whether, under the totality of the circumstances

present in Pasco, this combination of single district elections and a single at-large position, viewed as a whole (and not simply focusing on the one at-large seat), offers a complete remedy and provides undiluted opportunity for Latino citizens to participate in the political process and to elect candidates of their choice.

The Defendants contend the City's 6-1 hybrid plan complies with the law and was the result of a policy judgment, not an arbitrary choice or any intent to continue discriminative past practices. The only aspect of the City's plan Plaintiff contests is its at-large component for Position 7. Plaintiff contends the total elimination of any at-large component in the election system is necessary to "completely" and "fully" remedy the § 2 violation. In Plaintiff's view, the retention of any at-large seat puts that seat currently "functionally off-limits" to Latino voters, ECF No. 27 at 6, whereas her proposed single-member plan would "provide Latinos with *immediate influence*" in a fourth district. (ECF No. 31 at 2).

The nature of Plaintiff's challenge to Pasco's remedy expands upon its challenge to the former election scheme. Whereas Plaintiff contended the former at-large election scheme impeded the ability of Latino voters to elect representatives of their choice, i.e. their ability to *determine* city council elections, Plaintiff's argument now includes the contention that the remedy is unlawful because the citywide post impairs Latinos' ability to *influence* the outcome of the single position on the Council. This type of "influence dilution" claim is addressed in the totality of

circumstances analysis that follows.

A. Proportionality

Defendants emphasize that the City's remedial plan has reconfigured the residency districts to achieve "rough proportionality," where Latinos are a majority of the registered and eligible voting populations in three districts (or 42.85% of the total seats). This is a higher proportion than the Latino share of the citywide voting age population, 38.5%. The Supreme Court has noted that "'[p]roportionality' as the term is used [in the totality of circumstances analysis] links the number of majority-minority voting districts to minority members' share of the relevant population." *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994). Proportionality has evolved from relevant evidence for liability determinations in § 2 cases, to a convenient, frequently used redistricting tool aimed to redress vote dilution. Both proposals before the court recognize the creation of three majority-minority districts provides Latinos with a realistic opportunity to elect representatives of their choice. This is "obviously an indication that minority voters have an equal opportunity, in spite of racial polarization, 'to participate in the political process and elect representatives of their choice.'" *De Grandy*, 512 U.S. at 1020.

Nevertheless, the Supreme Court has admonished that while proportionality is always a relevant factor in the totality of the circumstances inquiry, the court is not

to place undue emphasis on it. *LULAC v. Perry*, 548 U.S. 399, 436 (2006). This is because there is no general requirement that all remedies include rough proportionality (although the facts may dictate it, as they do here), proportionality may not be used as a safe harbor, and it is "not to be pursued at the cost of fracturing effective coalitional districts." *Covington v. North Carolina*, 316 F.R.D. 117, 133 (M.D.N.C. Aug. 11, 2016)(appeal pending); *see also, U.S. v. Euclid City School Bd*, 632 F.Supp.2d 740, 753 (N.D.Ohio 2009) (rejecting assertion that a remedy must result in roughly proportional representation, as "[s]uch a contention 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 ... [t]he former is common sense, the latter is prohibited by statute.").

The degree of value assigned to proportionality may vary with the facts. Undoubtedly, Pasco has considered its neighbor's experience in devising a remedy with proportionality in this case. In *Montes v. City of Yakima*, the mechanism diluting the Latino vote was identical to that in this case: a numbered place system with an at-large "city-wide majority takes all election" for all seven city council seats. 2015 WL 11120964, *2 (E.D.Wash. 2015). The City of Yakima had proposed a remedial electoral system that would include five single-member district positions and two at-large positions. *Id*. at *2. Under the proposal, the two at-large positions

would be filled in a single election by way of "limited voting" and without a primary. "Instead, each candidate who filed for office would appear on a single-ballot at the general election," and "each voter in the City would cast a single vote for any of the candidates listed." *Id*. The two candidates garnering the most votes would be elected. *Id*. The court concluded the City's proposal was not entitled to deference as it was neither "effective" nor a "full" remedy for several reasons. First, Yakima's proposal posed unnecessary conflicts with state law mandating primaries. *Id*. at *5-*7. Second, it failed to provide rough proportionality.[7] *Id*. at *8. These facts distinguish this case from *Montes* and other cases[8] Plaintiff cites in a significant way.

[7] The *Montes* decision explains that Yakima had asserted the Latino citizen voting age population in Yakima was 22.97%, which meant "Latinos should, mathematically, hold 1.6 seats [on the seven member council] to be proportional to their share of the CVAP." *Montes*, 2015 WL 11120964, *8. The city's plan only provided one majority-minority district. *Id*. The court concluded the City's plan failed to accord proportionality because "Defendants' proposal only gives the Latino population an opportunity to attain one of the seven seats." *Id*. The court concluded proportionality was a "significant indicator of whether an electoral plan provides an adequate remedy…" *Id*.

[8] Rough proportionality was also absent in both of the rejected legislated hybrid proposals in *Harvell v. Blytheville Sch. Dist. No. 5*, 126 F.3d 1038 (8th Cir. 1997) and *U.S. v. Osceola Cnty, Fla*, 474 F.Supp.2d 1254, 1256 (M.D. Fla. 2006).

This factor favors Pasco's remedy; however, the analysis must proceed because proportionality is not the end-all be-all test for the remedy of a violation of § 2.

B. Racial Polarization

It has been stipulated and this court has found that voting in Pasco evidences racial polarization. In § 2 cases, racially polarized voting simply means that "the race of voters correlates with the selection of a certain candidate or candidates; that is, it refers to the situation where different races (or minority language groups) vote in blocs for different candidates." *Gingles*, 478 U.S. at 62. It "is the *difference* between choices made by [minorities] and whites – not the reasons for that difference" *Id*. at 63.

The court rejects Plaintiff's invitation to hold that the findings on liability, including the existence of racially polarized voting, automatically dictates the eradication of all at-large seats for the Pasco City Council. *See* ECF No. 21 at 10. None of the cases cited by Plaintiff support such a bright-line rule. Such an interpretation would eliminate either court or legislative discretion and simply wrap municipalities and "United States District Judges in a 'single-member strait jacket.'" *Paige v. Gray*, 437 F.Supp. 137, 171 (M.D.Ga. 1977); *see also*, *U.S. v. Maregno Cnty. Comm'n*, 643 F.Supp. 232 (S.D.Ala. 1986), *aff'd*, 811 F.2d 610 (11th

Cir.1987)(stating this interpretation "would annihilate a court's ability to examine on an ad hoc basis the totality of the circumstances presented and thereby to fashion an equitable remedy which does not intrude upon state policy more than necessary to meet the specific constitutional violations involved.").

The impressive body of voting rights jurisprudence confirms that relief against racially polarized bloc voting can utilize a hybrid election scheme without violating § 2. *See e.g., Solomon v. Liberty Cnty. Comm'rs*, 221 F.3d 1218, 1225 (11th Cir. 2000)(en banc)(finding no clear error in district court's decision holding that county's use of at-large election scheme did not violate § 2, despite high degree of racially polarized voting and "vestiges of official discrimination" in the county); *Tallahassee Branch of NAACP v. Leon Cnty., Fla.*, 827 F.2d 1436 (11th Cir. 1987), *cert. denied*, 488 U.S. 960 (1988) (affirming deference to legislatively adopted mixed plan consisting of five single-member districts and two at large); *Calderon v. Ross*, 584 F.2d 66 (5th Cir. 1978), *modified on rehearing*, 589 F.2d 909 (1979) (approving 5-2 plan); *Paige v. Gray*, 473 F.Supp. 137, 158 (M.D.Ga. 1977)(approving court-devised 6-1 hybrid remedial plan for city commissioners of the city of Albany, Georgia, allowing retention of a single at-large position slotted for the mayor); *U.S. v. Euclid City School Bd.*, 632 F.Supp.2d. 740 (N.D.Ohio 2009)(approving city school board's limited voting proposal and retention of at-large elections as remedy for § 2 violation); *U.S. v. City of Euclid*, 523 F.Supp.2d 641

(N.D.Ohio 2007)(remedying the §2 violation by replacing multi-seat at-large contest with hybrid 8-1 remedial plan providing eight single-member districts while retaining at-large council president position) ; *N.A.A.C.P. v. Kershaw Cnty., S.C.*, 838 F.Supp. 237 (D.S.C. 1993)(accepting hybrid remedial plan arising out of at-large method of electing members of city council with six single member districts and at-large election of chair of county council); *East Jefferson Coalition for Leadership and Development v. Parish of Jefferson*, 703 F.Supp. 28 (E.D.La. 1989)(approving 7-member council with six single–district members and one at-large member was sufficient to give voters a "realistic ability to influence the outcome of…elections," despite the fact none of the single-member districts created by the defendants' plan had a majority of African-Americans); *James v. City of Sarasota, Fla.*, 611 F.Supp. 25 (M.D. Fla. 1985) (approving mixed plan submitted by city with two commissioners elected at-large by plurality vote); *N.A.A.C.P. v. City of Statesville, N.C.*, 606 F. Supp. 569 (W.D.N.C. 1985) (approving jointly proposed replacement for at-large method of election with hybrid 6-2 plan, combining six district and two at-large voting methods); *Vecinos DeBarrio Uno et al., v. City of Holyoke et al*, 960 F.Supp. 515 (D.Mass. 1997)(holding that totality of circumstances established that city's hybrid ward and at-large voting system for city council did not deny Hispanics meaningful access on account of race and recognizing favorable policy underlying at-large component insuring representation

on behalf of the community as a whole).

Though legally and statistically significant evidence of racial bloc voting exists in this case, voting is rarely, completely polarized. Dr. Engstrom analyzed eight primary and general election City Council contests from 2005, 2009, and 2015, the last three election cycles that presented voters with a choice between or among Latino and non-Latino candidates. (ECF No. 23 at ¶ 6). Racially polarized bloc voting existed in five of the contests, where Hispanic candidates received support from an estimated 58.3% to 86% of Latino voters compared to only 7.1% to 39.5% of non-Latino voters. Racially polarized voting occurred in *both* the district-based primaries and in the 2015 at-large general elections.

Five futile elections is enough to establish legally significant evidence of racially polarized voting in Pasco. However, minority cohesion and polarized voting was not present in the three contests in 2005. For example, that year, Joe Cruz was the Latino candidate for at-large Position 7. In the primary, he received 48.2% of the Latino and 33.7% of the non-Latino vote. He lost the general election by just 53 votes, and received an estimated 40.7% of the Latino vote and 49.7% of the non-Latino vote. (ECF No. 23 at ¶¶23-24). Other election evidence that non-Latino voters are willing to support Latino candidates exists, including in the 2015 primary election, where Latino candidates received 39.5% of the non-Latino vote. (ECF No. 23, Table).

Though isolated election observations do not undermine § 2 liability, the evidence pertaining to polarization involves patterns that are not consistently extreme (such as 90% favoring one candidate and 90% favoring another). The evidence also does not suggest there are insurmountable barriers to coalition building. Expert evidence on citywide and district crossover voting is somewhat sparse,[9] however, at oral argument both parties acknowledged crossover voting and the potential for coalition building exists.

The evidence that voting in Pasco tends to be racially polarized, the degree of political cohesion, and the evidence of crossover voting factor into the court's totality of the circumstances analysis and decision.

C. Compact vs. At-large; Size of the District and Influence

In both Defendants' and Plaintiff's plans, Latinos are in the minority in four out of seven positions and their "political fortunes remain tied to the interests of other voters."[10] *Hall v. Virginia*, 385 F.3d 421, 431 (4th Cir. 2004). Plaintiff contends the

[9] Defendants' expert does indicate that the rationale for the 6-1 plan includes that "current and anticipated future numbers assure Latinos across the city the increasing prospect of forming useful coalitions with non-Latino voters to elect a fourth favored candidate of choice." (ECF No. 26, Ex. 3 at ¶ 11).

[10] The court notes that in the three districts where Latinos are not a majority, the Latino voter demographics are not insignificant fractions. *See Appendix A*. Using

"one difference" between the two proposals is that the City's at-large position denies Latinos the "meaningful opportunity to win election now" (ECF No. 31 at 9) whereas a compact district would provide for the "immediate removal of dilutive effect." (ECF No. 31 at 7). If Plaintiff's argument is that the very existence of one at-large position will enable the white majority voters of Pasco to control four Council seats instead of three, this proposition is akin to arguing Latino votes will be diluted unless their effect is maximized. But the law does not require such a result. Dilution cannot be inferred from the mere failure to guarantee minority voters maximum political influence. *Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994). Nothing in the Voting Rights Act requires maximizing possible voting strength.

Indeed, there are no legal benchmarks for this court to compare and determine how much influence a minority group should have. Even if having a smaller residency district could increase a minority group's influence, it is difficult to discern when an at-large component causes legal injury by diluting the minority group's influence and when the minority group is merely seeking more influence than is

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the 2010-2014 5-year ACS estimates, which do not account for Pasco's city limits, Defendants' expert estimates the LCVAP as: 27.3% (District 3); 23.6% (District 4); and 13.0% (District 5)). Defendants estimates the current percentage of Latino registered voters (based upon 2016 data) for these districts are: 41.4% (District 3), 40.9% (District 4), and 38.2% (District 5), (ECF No. 33, Ex. 1)

legally guaranteed. The Supreme Court has repeatedly avoided ruling on the viability of influence dilution claims.

The goal of § 2 is not to guarantee success at the polls for minority-preferred candidates but to provide assurances of fairness in the electoral process. *De Grandy*, 512 U.S. at 1014; *see also*, *Nevett v. Sides*, 571 F.2d 209, 236 (5th Cir. 1978)("the equality involved is the equal opportunity to elect representatives. It is an effective equality, although not a guarantee of equality of result after all, the right to vote was protected, not the right to vote for the winning candidate."). The guarantee of § 2 is that a minority group will not be denied, on account of race or color, the ability "to elect its candidate of choice on an equal basis with other voters." *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993). As a result, the question here is not whether the Latino-preferred candidate will be elected to the at-large position, but whether the at-large component would give Latinos less opportunity than others in the electorate to form a majority and participate in the political process.

A minority group that is too small to form a majority may be able to join with other voters to elect a candidate it supports. However, such groups will be obliged "to pull, haul, and trade to find common political ground" with other voters in the district. *De Grandy*, 512 U.S. at 1020. At this moment in time, this dynamic exists in both Pasco's at-large position and Plaintiff's proposed "influence district" (Position 5), where the Latino population is in the minority. Whereas, the citywide

Latino share of registered voting population is approximately 30% (*compare* ECF No. 21-2 at 3 (29.81%) with ECF No. 33-1 at 4 (31.8%)), the LCVAP in Plaintiff's proposed residency district is estimated to be 27.25%, which Plaintiff concedes is at least "comparable" (ECF No. 31 at 8) to the citywide statistic. Based upon trends showing an ever increasing Latino voting age population, both parties predict these levels of influence increasing and shifting over the next decade. The court cannot and need not decide which seat (Defendants' Position 7 or Plaintiff's Position 5) will most quickly accommodate favorable change for Latinos in Pasco.

Plaintiff contends more difficult coalition-building, socioeconomics and cost are the reasons Latinos do not "have an opportunity to influence or win elections…in an at-large setting." (ECF No. 31 at 8). A socioeconomic disparity between Latinos and non-Latinos exists in Pasco. (ECF No. 24, Ex. B). This disparity also presents itself geographically "between predominantly Latino east Pasco and predominantly White west Pasco." (ECF No. 24 at 21, ¶59).

Plaintiff's expert Mr. Cooper opines that "the geographic and socio-economic divide would disadvantage campaign funding and get-out-the vote efforts for Latino candidates in an at-large election compared to an election in a geographically smaller and less populous single-member district." (ECF No. 24 at 21, ¶ 60). *See also,* ECF No. 27 at 10-11, ECF No. 28 at ¶ 19. These contentions are commonly made in voting rights cases. Generally speaking, many features of our political system, such

as majority vote requirements and the high costs of campaigning, combined with socio-economic disparities, often affect access to the political process.

Socioeconomic disparities alone do not show that minorities do not have equal access to the political process. *Veasey v. Abbott*, 830 F.3d 216, 275 (5th Cir. 2016). Evidence that might suggest socioeconomic disparities impede electoral participation include reduced levels of voter registration, lower voter turnout among minority voters, costly campaign financial expenditures for at-large elections, evidence of minorities being discouraged from running for office because of the cost of an at-large campaign, or evidence minority voters are hindered in registering, casting ballots, qualifying to run, and campaigning for public office. The parties have not offered this evidence. Instead, the record suggests that Latinos have run for political office in Pasco and, as Plaintiff indicates, "…the Latino community…has repeatedly *produced and supported* candidates for office." (ECF No. 21 at 3 (emphasis added)). This does not suggest a lack of access to the political process. Though socioeconomic impediments no doubt exist, the court finds there is an insufficient basis to conclude that socio-economics and cost would be significant impediments to Latino participation in the single at-large election provided for in the City's remedial plan.

As for the potential for coalition building, there is plenty of room for disagreement. Plaintiff contends coalitions are more likely to occur and to assist

Latino voting strength in a compact district where voters are "more likely to find common ground" because "they share common interests driven by geography: their children attend the same schools and play in the same parks they use the same libraries and roads, and they walk under the same streetlights." (ECF No. 31 at 8). However, critics of pure district-based election forms cite the fact they can produce a balkanizing effect, splintering communities and having the unintended effect of increasing racial divides. The Supreme Court has warned about these social and political costs of dividing communities along racial lines in the name of improving electoral systems. *See, e.g., Shaw v. Reno*, 509 U.S. 630, 657 (1993) (observing that "[r]acial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions; it threatens to carry us further from the goal of a political system in which race no longer matters…"). Considering the shape of Plaintiff's District 5 (Appendix B and ECF No. 24 at 13), it is reasonable to question how the shape and size of that geographic unit would encourage a greater sense of cohesion or shared identity over that of the city at-large. *See discussion*, Lani Guinier, Groups, Representation, and Race–Conscious Districting: A Case of the Emperor's Clothes, 71 TEX. L.REV. 1589, 1603 (1993).

Defendants counter that the proposed single at-large position is "the next-best electoral opportunity" for Latinos in Pasco. They contend the inclusion of the at-large district: 1) provides "city-wide representation and accountability"; 2) avoids

the "political 'balkanization' that can occur in exclusively single-member district cities and provide greater city-wide unity"; 3) gives "candidates the option to run for one of two seats"; 4) "double[s] the number of times a given citizen could vote for representation on the council"; 5) gives "Latinos who reside in non-majority-minority districts an eventual opportunity to elect their candidate of choice, whereas Latinos in an exclusively SMD plan may never have that opportunity if they reside in a non-majority-minority district"; and 6) provides "more flexibility to address the City's changing demographics during periods in between redistricting." (ECF No. 30 at 7-8). Defendants' expert also explains that "[s]cholarly studies suggest that these new prospects – three 'opportunity districts' plus a fourth citywide 'influence' opportunity – might energize Latinos to register and turn out to vote in future elections" as competiveness has been shown to be "among the strongest correlations of voter turnout." (ECF No. 26, Ex. 13 at ¶ 12).

These competing contentions are an inescapable part of redistricting controversies. While vote dilution is a comparative inquiry, the court must be cautious not "pre-empt" the legislative task. *Wise v. Lipscomb*, 437 U.S. 535, 539 (1978) (plurality) (White, J.). The essence of Plaintiff's attack on the single at-large position is that it fails to maximize Latino influence for purposes of forging an advantageous coalition. *Given the facts herein*, most importantly the redesign of the election scheme for the other six districts, the court is not persuaded that the size or

at-large nature of Position 7 adversely affects Latino potential to form a majority any more or less than a seventh compact district would.

D. Majority Vote Requirement and Anti-single Shot Provisions

Dr. Engstrom identifies the majority vote requirement and inability to engage in "bullet" or "single shot" voting[11] as "two features of the at-large arrangement which enhance the ability of a majority of voters to dilute the votes of the Latino minority in Pasco." (ECF No. 23 at ¶ 10). These features persist in both proposals whether the election is district-based or includes an at-large component. However, the dilutive effects of these features are minimized where there is only a single at-large position, compared to an at-large election for every seat (the arrangement Dr. Engstrom was referring to in his report). In a majority rule system there will always be an inherent disadvantage to the minority struggling for political power.

E. Tiebreaks

Plaintiff contends the problem with the retention of an at-large position is

[11] With single-shot voting, "a group of voters can cast[] one vote, if they wish, for the candidate favored by the group, and not cast[] any of their remaining votes for any other candidate. By withholding their remaining votes from the candidates competing with their preferred choice, minority voters have a better chance to finish among the top…candidates and win one of the…seats." (ECF No. 23 at ¶ 26).

compounded by the fact that geographic districts are evenly split between three majority-Latino and three majority-White districts. Plaintiff speculates that with this even split, the at-large position will become a "critical" "swing vote" or "decisive vote" on issues "on which the two populations are divided." (ECF No. 27 at 11-12). This court is unwilling to make a speculative assessment on the outcome of political events based upon the odd number of seats and number of majority-minority districts, especially considering the court's analysis is focused upon ensuring opportunity, not control. There is no evidence that any member of the City Council, including the selected mayor, has more power or authority than any other member. Unlike in the case cited by Plaintiff, *Harper v. City of Chicago Heights*, 223 F.3d 593, 600 (7th Cir. 2000), the position of mayor is not slotted for the at-large position and there is no evidence of the frequent needed for a tie-breaking vote. Nor can the court anticipate there will be tie votes where there is no evidence suggesting that elected officials are unresponsive to the needs of the minority community or that representatives are politically unresponsive to Latino voter interests. Here, there simply is no risk of the "*unacceptable* gravitation of power" to any single position. *Dillard v. Crenshaw Cnty.*, 831 F.2d 246 (11th Cir. 1987)(emphasis added)(rejecting at-large chairperson position on the Council given the possibility of an unacceptable gravitation of enhanced power to the position and ultimately agreeing upon a rotation feature).

F. Policy

Policy considerations certainly counsel restraint in this case.

There is no evidence that the policy behind Pasco's remedial plan is tenuous. The court has carefully considered the stated rationale underlying the legislative provision for the City's plan, to wit: 1) "its providing three Latino citizen-voter-age majority districts, the same number as possible under the ACLU's preferred seven district plan;" 2) "the plan providing greater opportunities for voters to influence the number of elections for members of the City Council and for voters to have the opportunity to run for seats on the City Council"; and 3) "the possibility of greater continuity of government and ease in implementation." (ECF No. 26, Ex. 10 at 2). There is no basis for this court to question the reasonableness of these stated interests and indeed, these are considerations that one would expect to give guidance in a remedial election scheme.

Municipal election systems with at least one at-large component are extremely common nationwide and used in nearly all of Washington's code cities for their city councils. (ECF No. 25 at 22, n. 20, citing http://mrsc.org/getdoc/c86e1df6-57ae-407e-ac6a-be4d0f0b28c1/Council-Election-by-Wards-or-Districts.aspx). State law, as it applies to Pasco, expresses a clear preference for at-large city councilmember

elections. The flexibility in election forms that many other states[12] have long accorded their municipalities, supports the obvious fact that one form does not suit all. Each form has possible advantages and disadvantages. *See City of Tucscon v. State*, 229 Ariz. 172, 174 (2012) (Arizona Supreme Court recognizing that "although at-large members are responsible to electors in the entire city, this may diminish attention to the interests of particular neighborhoods or groups; district-based elections, in contrast, assure representation from different geographic areas but may elevate particular interests over citywide ones."). The fact Washington State has maintained laws imposing an at-large electoral scheme on municipalities is a factor this court considers in the calculus here. *Houston Laywers Ass'n v. Attorney General of Texas*, 501 U.S. 419, 426-427 (1991)("[T]he State's interest in maintaining an electoral system…is a legitimate factor to be considered by courts among the totality of circumstances…").

G. Totality of the Circumstances

Changes in an election system invariably bring about results that cannot be predicted with any degree of accuracy. When placed in the position of reviewing a legislatively enacted remedial plan which has yet to be locally tested, the court must

[12] *See e.g.,* Ariz.Rev.Statutes §§ 9–232.04, 9–273 (allowing non-charter cities and towns to choose between at-large and district-based council elections); Fla. Stat., § 124.011.

be wary of making predictions, involving itself unnecessarily in political judgments, or directing unnecessary change. All precedent cautions judicial restraint in this area.

Vote dilution cases are circumstantial evidence cases often challenging at-large voting schemes. While case law offers some direction, it is nearly impossible to locate analogous cases when the test is so heavily fact-driven. For this reason, the court is unable to "follow in the footsteps of" the six representative cases Plaintiff suggests. They are all inapposite because they involved different legal standards applicable to judicially ordered plans,[13] or involved legislative proposals lacking proportionality,[14]or occurred in places with significantly more deplorable histories of "open and unabashed" discrimination in all areas including the voting laws

[13] *See e.g., U.S. v. Dallas Cnty Comm'n, Dallas Cnty., Ala*, 850 F.2d 1433, 1438-39 (11th Cir. 1988) (judicially created plan imposed remedy creating five single-member districts, including one "swing" district, where there was strong evidence African American candidates would not be able to compete for an at-large seat); *Chapman v. Meier*, 420 U.S. 1 (1975)(striking down court-ordered reapportionment that had a total deviation of 20.14%).

[14] *Montes v. City of Yakima*, 2015 WL 11120965 (E.D.Wash. 2015); *U.S. v. Osceola Cnty, Fla*, 474 F.Supp.2d 1254, 1256 (M.D. Fla. 2006).

themselves, economics and social life.[15] Even in the case of *Williams v. City of Texarkana, Ark.*, 861 F.Supp. 771 (W.D.Ark. 1993), where it was agreed the remedy would be judicially imposed, the court did *not* hold that the City's proposed 6-1 plan was unlawful or would not remedy the Voting Rights Act violation. 861 F.Supp. at 772 (W.D.Ark. 1993)(deciding the 7-0 plan was the plan "more prudent" because it presented the "greatest potential for" proportionate representation and "less potential for provoking continuing dispute, which would not be in the best interests of the citizens…"); *see also, Williams v. City of Texarkana, Ark*, 32 F.3d 1265 (8th Cir. 1994)(leaving validity of the 6-1 plan, chosen by the electorate after the court imposed the 7-0 plan, for future determination of the district court should a challenge be mounted).

The case law illustrates the fact there is no single "correct" way to design a government; sometimes there are competing interests which can't be reconciled; there is no clear formula as to how much voting strength an individual citizen should have; and it is not the role of the court to "calibrate democracy in the vain search for an optimum solution." *Evenwel v. Abbott,* 136 S.Ct. 1120, 1140 (2016). The "full" and "complete" remedy standard is not a standard that lends itself to application with

[15] *Dillard v. Crenshaw Cnty.*, 649 F.Supp. 289 (M.D.AL. 1986)(class action lawsuit involving challenge to at-large systems in nine counties).

mathematical exactitude.

In reviewing Pasco's remedial plan the court has considered on one side of the scale lies a history of not a single Latino ever having electoral success in a contested Council election, the presence of racially polarized elections, and a socio-economic divide. On the other side of the scale is proportionality, the absence of discriminatory voting practices and intent, viable policies underlying the 6-1 plan, the participation of Latinos in elections, crossover voting, demographics in a state of flux, and officials' responsiveness. The court concludes the totality of the circumstances, judged by the record before this court, make it possible to reconcile the retention of a single at-large seat. Under Pasco's remedial plan, Latinos possess an equal opportunity to elect representatives and to participate in the political process, which was previously denied to them under the all at-large election scheme.

The City's plan complies with the "full and complete" remedy standard and does not violate the Constitution or Voting Rights Act anew. Accordingly, the court defers to the City's plan.

V. IMPLEMENTATION

The Pasco City Council did not vote on how the proposal should be implemented, leaving this decision to the court. The court orders immediate implementation and orders that every seat be up for election in 2017, with four positions (Positions 1, 3, 4 and 6) elected to a 4-year term, and for this election only,

3 positions (Positions 2, 5 and 7) elected to a 2-year term of office. Prompt implementation is required for an effective remedy. This was recognized by the parties in the Partial Consent Decree and briefing schedule in this case. This option assures citizens will have their voices heard now.

VI. INJUNCTION

Plaintiff has proposed that the court order that the "City of Pasco is permanently enjoined from administering, implementing or conducting any future elections for the Pasco City Council in which members of the City Council are elected on an at-large basis, whether in a primary, general, or special election." The court denies this request. Future redistricting shall be done in a manner that complies with the terms and intent of this Judgment and the Partial Consent Decree entered on September 2, 2016, and otherwise complies with the provisions and requirements of the Voting Rights Act, 52 U.S.C. § 10301 et seq.

VII. CONCLUSION

The task before the court is not one it has taken lightly. These issues do not lend themselves to easy analysis and no court has devised a formula to resolve the question of where the ideal solution lies for Pasco. Complicating the analysis, the facts are in a constant state of change. Legislative apportionment is an issue which justifies ongoing evaluation and adjustment by the executive and legislative branches of government, if necessary. Washington state law makes these

adjustments more difficult and less likely to occur voluntarily. For some concerns, a judicial remedy is absent and "relief must come through an aroused popular conscience that sears the conscience of the people's representatives." *Baker v. Carr*, 369 U.S. 186, 269 (1962).

As a final note, the court commends the parties and the ACLU for their collaboration prior to and subsequent to the filing of this lawsuit. Through their sincere cooperation, most importantly, this case has been decided in time to effectuate change before the next election.

ACCORDINGLY, IT IS HEREBY FINALLY ADJUDGED AND ORDERED:

1. Plaintiff's Motion for Entry of Plaintiff's Proposed Remedial Plan (**ECF No. 21**) is **DENIED**. Defendants' Motion for Entry of Proposed Remedial Plan and Final Injunction (**ECF No. 25**) is **GRANTED**.

2. The court herein approves, as a remedy for the § 2 violation, the City's remedial plan and the map reproduced in Appendix A.

3. The City of Pasco is ordered to take all steps necessary to implement the plan in order to place all seven positions up for election in 2017 and thereafter, provided, however, that the City may revise the districts based on annexations, deannexations, and population changes reflected in the decennial census and at appropriate times in the future when necessary to conform to the law.

4. In order to preserve the current staggered election plan for members of the City Council, Positions 1, 3, 4 and 6 will be elected for a four-year term. Positions 2 and 5 and the at-large seat (Position 7) will be initially elected to two-year terms and thereafter to four-year terms.

5. This decision and separately entered Judgment is binding upon all parties and their successors. Future redistricting shall be done in a manner that complies with the terms and intent of this Order and the Partial Consent Decree entered September 2, 2016, and complies with the Voting Rights Act.

6. Without affecting the finality of this final decision and its associated Judgment, the court retains jurisdiction of this cause through 45 days after the certification of the 2017 general election for the purpose of enforcing its orders, and if necessary, for the disposition of any remaining unresolved issues.

The District Court Executive is hereby directed to enter this Order, enter Judgment accordingly, and provide copies to counsel.

DATED THIS 27th day of January, 2017.

s/Lonny R. Suko

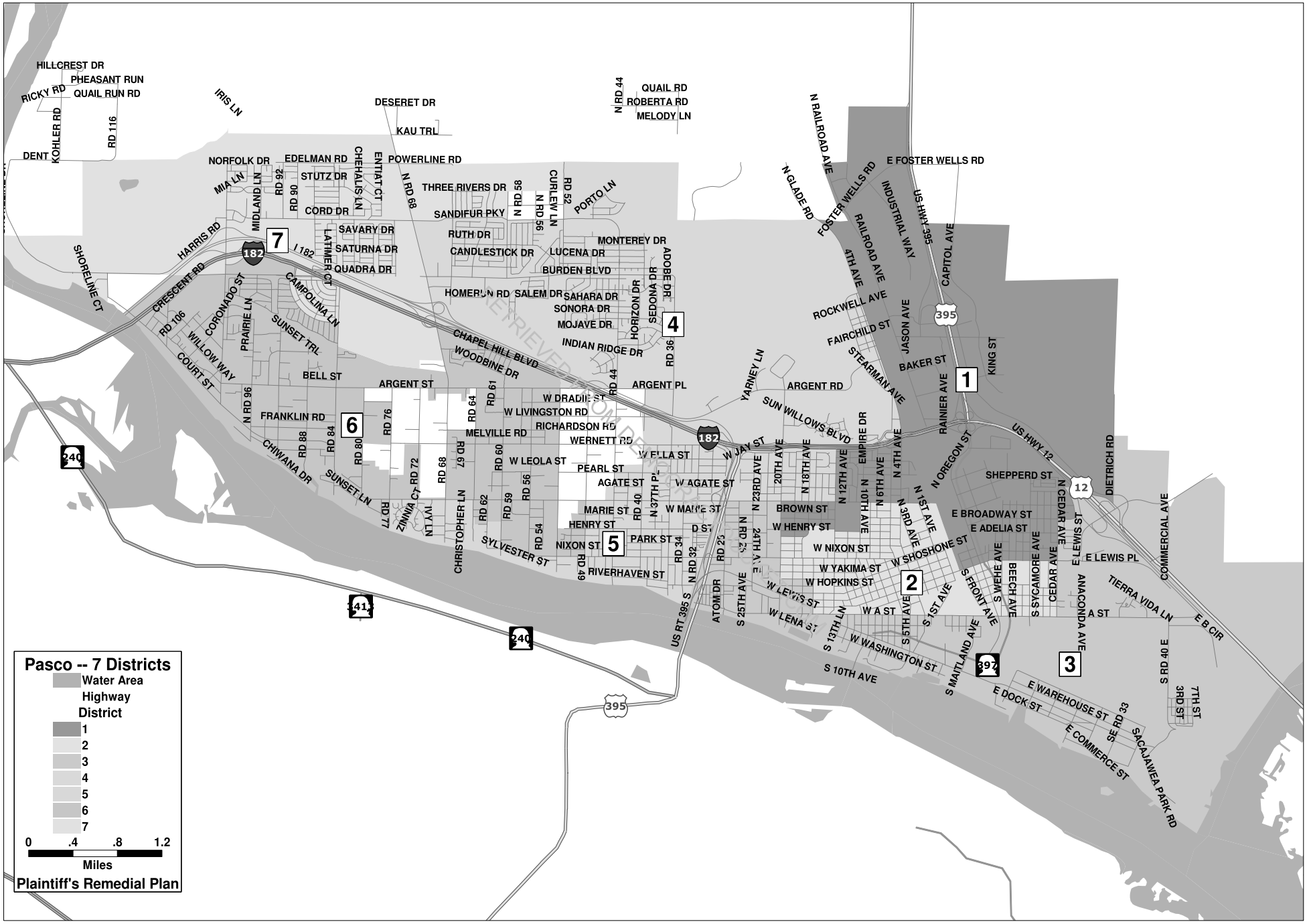
LONNY R. SUKO
SENIOR U.S. DISTRICT COURT JUDGE

APPENDIX A

City's Proposed Plan

Plan M8				
District	Total CVAP (2010-14)	Hispanic CVAP	Total Pop (2010)	% Hispanic CVAP
1	3,148	1,701	10,048	**54.0%**
2	3,488	1,825	10,009	**52.3%**
3	7,828	2,136	10,532	27.3%
4	6,535	1,542	10,062	23.6%
5	7,744	1,007	11,003	13.0%
6	3,998	2,239	10,798	**56.0%**
Total	**32,742**	**10,450**	**62,452**	31.9%
			Total deviation from ideal:	*9.55%*
Note: Equalizes 2010 population (census enumerated) within 2016 city limits.				

APPENDIX B


Pasco -- 7 Districts
Water Area
Highway
District
1
2
3
4
5
6
7
0 .4 .8 1.2
Miles
Plaintiff's Remedial Plan
HILLCREST DR
PHEASANT RUN
RICKY RD
QUAIL RUN RD
KOHLER RD
RD 116
DENT
IRIS LN
DESERET DR
KAU TRL
QUAIL RD
ROBERTA RD
MELODY LN
N RD 44
NORFOLK DR
EDELMAN RD
POWERLINE RD
MIA LN
STUTZ DR
CHEHALIS LN
ENTIAT CT
N RD 68
THREE RIVERS DR
CURLEW LN
PORTO LN
CORD DR
SANDIFUR PKY
N RD 56
RUTH DR
MONTEREY DR
CANDLESTICK DR
LUCENA DR
BURDEN BLVD
ADOBE DR
HORIZON DR
SEDONA DR
SAVARY DR
SATURNA DR
QUADRA DR
LATIMER CT
HARRIS RD
SHORELINE CT
CRESCENT RD
CORONADO ST
CAMPOLINA LN
PRAIRIE LN
SUNSET TRL
WILLOW WAY
COURT ST
RD 106
HOMER LN RD
SALEM DR
SAHARA DR
SONORA DR
MOJAVE DR
INDIAN RIDGE DR
CHAPEL HILL BLVD
WOODBINE DR
BELL ST
ARGENT ST
ARGENT PL
ARGENT RD
YARNEY LN
SUN WILLOWS BLVD
FRANKLIN RD
N RD 96
RD 76
RD 64
RD 61
W DRADLE ST
W LIVINGSTON RD
RICHARDSON RD
MELVILLE RD
WERNETT RD
W ELLA ST
W JAY ST
CHIWANA DR
SUNSET LN
RD 88
RD 84
RD 80
RD 72
RD 68
RD 67
RD 60
W LEOLA ST
PEARL ST
AGATE ST
W AGATE ST
RD 62
RD 59
RD 56
MARIE ST
W MARIE ST
HENRY ST
D ST
W HENRY ST
BROWN ST
CHRISTOPHER LN
SYLVESTER ST
RD 54
NIXON ST
PARK ST
W NIXON ST
RD 49
RIVERHAVEN ST
W YAKIMA ST
W SHOSHONE ST
W HOPKINS ST
W LEWIS ST
W LENA ST
W A ST
S 25TH AVE
S 13TH LN
S 1ST AVE
S 5TH AVE
S FRONT AVE
S WEHE AVE
BEECH AVE
S SYCAMORE AVE
CEDAR AVE
ANACONDA AVE
E LEWIS PL
TIERRA VIDA LN
E B CIR
A ST
S 10TH AVE
W WASHINGTON ST
S MAITLAND AVE
E DOCK ST
E WAREHOUSE ST
E COMMERCE ST
SE RD 33
S RD 40 E
7TH ST
3RD ST
SACAJAWEA PARK RD
COMMERCIAL AVE
E BROADWAY ST
E ADELIA ST
SHEPPERD ST
N OREGON ST
N CEDAR AVE
S LEWIS ST
DIETRICH RD
US HWY 12
N 1ST AVE
N 3RD AVE
N 4TH AVE
N 6TH AVE
N 10TH AVE
N 12TH AVE
N 18TH AVE
20TH AVE
N 23RD AVE
24TH AVE
EMPIRE DR
RAINIER AVE
BAKER ST
KING ST
JASON AVE
ROCKWELL AVE
FAIRCHILD ST
STEARMAN AVE
4TH AVE
RAILROAD AVE
INDUSTRIAL WAY
CAPITOL AVE
US HWY 395
N RAILROAD AVE
N GLADE RD
FOSTER WELLS RD
E FOSTER WELLS RD
US RT 395 S
ATOM DR
I 182
240
241
395
12
392
1
2
3
4
5
6
7

Population Summary Report

Pasco City Council --Plaintiff's Remedial Plan -- 7 districts

District	Population	Deviation	% Deviation	Latino	% Latino	NH White	% NH White	% Latino of all citizens
1	8724	-198	-2.22%	7292	83.59%	1074	12.31%	74.86%
2	8865	-57	-0.64%	7289	82.22%	1214	13.69%	72.78%
3	8587	-335	-3.75%	7161	83.39%	1195	13.92%	69.99%
4	9026	104	1.17%	2495	27.64%	5936	65.77%	30.88%
5	8980	58	0.65%	4697	52.31%	3816	42.49%	46.11%
6	9102	180	2.02%	2175	23.90%	6291	69.12%	19.85%
7	9168	246	2.76%	2626	28.64%	5731	62.51%	31.05%
Total	**62452**			**33735**	**54.02%**	**25257**	**40.44%**	**45.02%**

Ideal district size = 8,922

Total Deviation **6.51%**

District	18+_Pop	18+ Latino	% 18+ Latino	18+ NH White	% 18+ NH White	% Latino CVAP	% Latino of Registered Voters
1	5165	4062	78.64%	859	16.63%	54.78%	65.76%
2	5596	4301	76.86%	1013	18.10%	56.29%	65.33%
3	5187	4031	77.71%	995	19.18%	54.08%	61.73%
4	6090	1403	23.04%	4318	70.90%	27.37%	19.25%
5	6108	2661	43.57%	3091	50.61%	28.98%	27.25%
6	6365	1242	19.51%	4703	73.89%	14.24%	15.45%
7	6047	1483	24.52%	4043	66.86%	24.04%	20.36%
Total	**40558**	**19183**	**47.30%**	**19022**	**46.90%**	**32.02%**	**29.81%**

Note:

(1)% LCVAP calculated by disaggregating 2010-2014 ACS block group estimates for 18+ citizen Hispanics and Non-Hispanics to 2010 census blocks.
(3) Surname match of registered voters as of Nov. 30, 2015

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

BERTHA ARANDA GLATT,

Plaintiff,

v.

CITY OF PASCO, *et al.*,

Defendants.

Case No. 4:16-CV-05108-LRS

ORDER MODIFYING JANUARY 27, 2017 MEMORANDUM OPINION AND ORDER TO SUBSTITUTE REVISED REMEDIAL PLAN MAP AND DIRECTING ENTRY OF AMENDED JUDGMENT

BEFORE THE COURT is are the jointly filed Motions (ECF Nos. 43, 45) of the parties requesting the court's expedited hearing and exercise of its continuing jurisdiction to modify the Memorandum Opinion and Order, and Judgment entered on January 27, 2017. The court is fully advised in the premises having reviewed the Motions and the record.

ACCORDINGLY, IT IS HEREBY ORDERED that:

1. The parties Joint Motion to Expedite (ECF No. 43) and Joint Motion for Minor Modification to Memorandum Opinion and Order Re: Remedial Plan Map to Accommodate Minor Changes Requested by the Franklin County Auditor (ECF No. 45) are **GRANTED**.

2. The court herein modifies page 48, paragraph 2 of its January 27, 2017 Memorandum Opinion and Order to approve, as a remedy for the § 2 violation, the City Council District Map (April 2017) attached to *this* Order as **Exhibit A**. The Voting District Map attached to the January 27, 2017 decision at Appendix A, page 1 ("City's Proposed Plan"), shall be modified by **substitution** of the City Council District Map (April 2017), as attached to this Order as **Exhibit A**.

2. The Clerk of the Court shall enter an Amended Judgment modifying the last sentence of the first section of the Judgment entered January 27, 2017 ("other:") to read: "See ECF Nos. 40, 47."

3. All the remaining terms and conditions of the Memorandum Opinion and Order, and the Amended Judgment shall remain in full force and effect.

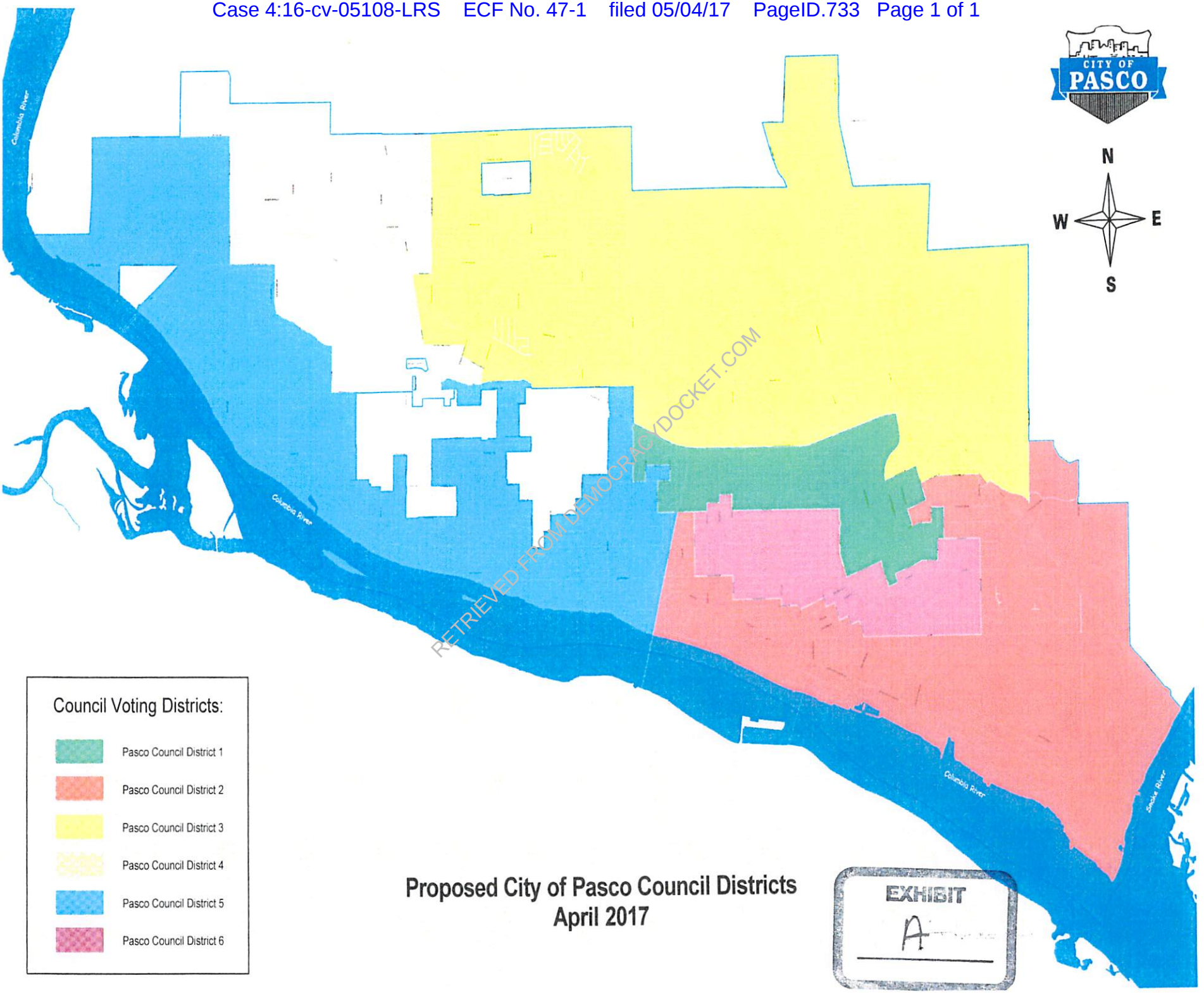
4. The City of Pasco is ordered to take all steps necessary to substitute and implement the attached *revised* voting district map as part of the plan approved by the court on January 27, 2017.

The District Court Executive is hereby directed to enter this Order, enter the Amended Judgment as directed in paragraph 2, and provide copies to counsel.

DATED THIS 4th day of May, 2017.

s/Lonny R. Suko

LONNY R. SUKO
SENIOR U.S. DISTRICT COURT JUDGE



DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the ***Brief of Respondents*** in Supreme Court Cause No. 100999-2 to the following parties:

Edwardo Morfin
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Seattle, WA 98121-3017

Original E-filed via appellate portal:
Supreme Court
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: September 12, 2022 at Seattle, Washington.

/s/ Matt J. Albers
Matt J. Albers, Paralegal
Talmadge/Fitzpatrick

TALMADGE/FITZPATRICK

September 12, 2022 - 2:18 PM

Transmittal Information

Filed with Court:	Supreme Court
Appellate Court Case Number:	100,999-2
Appellate Court Case Title:	Gabriel Portugal et al. v. Franklin County et al.
Superior Court Case Number:	21-2-50210-4

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Brief of Respondents

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