UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

ROGELIO MONTES, et al., Plaintiff, v. CITY OF YAKIMA, et al., Defendants.	NO: 12-CV-3108-TOR FINAL INJUNCTION AND REMEDIAL DISTRICTING PLAN

BEFORE THE COURT are the parties' proposed injunctive orders (ECF Nos. 113 and 117) and amicus curiae's third alternative (ECF No. 126). This matter was submitted for consideration without oral argument. The Court has reviewed the briefing, the record, and files herein, and is fully informed.

BACKGROUND

This is an action to remedy a violation of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301 (previously codified at 42 U.S.C. § 1973). Plaintiffs filed suit in 2012 alleging that Yakima's existing at-large electoral system diluted Latino

voting strength and deprived Latinos of their right to elect representatives of their choosing for Yakima city council. On August 22, 2014, the Court granted Plaintiffs' Motion for Summary Judgment, concluding that there was no genuine issue of material fact, that the Latino minority's votes were being unlawfully diluted under the at-large voting system, and that Plaintiffs were entitled to judgment as a matter of law. ECF No. 108. The Court directed the parties to meet, confer, and submit a joint proposed injunction and remedial districting plan. However, the parties were unable to reach an agreement on a joint proposal and have submitted competing remedial districting plans. The Court also accepted an amicus curiae brief from FairVote, a non-profit organization that proposes a third alternative plan.[1] ECF No. 126. The Court summarizes the existing electoral system and these proposed plans.

A. Yakima Demographics

According to the 2010 Census, the City of Yakima ("City") had a population of 91,067. ECF No. 90 at ¶ 15. The Latino population was 37,587, or 41.27% of the total population. ECF No. 65 at ¶ 13. The non-Latino white population was

[1] FairVote explains that its mission "is to inform and advocate for fairer political representation through reforms that include election methods other than winner-take-all systems." ECF No. 126 at 2 n.1.

47,523, or 52.18% of the total population. *Id.* Using the *2008–2012 ACS 5-Year Estimates*, Plaintiffs have calculated the Latino citizen voting-age population (CVAP) to be 22.66% of the total CVAP in Yakima and rising. ECF Nos. 65 at ¶ 23; 118-1 at 3, 12-13. Defendants' expert has calculated the Latino CVAP to be 22.97%. ECF No. 114 at 4-5. Defendants' expert and Plaintiffs' expert do not agree on the exact manner by which to calculate the Latino CVAP. *Id.* at 2 n.1. The slight difference between their calculations, however, is not material to the Court's ultimate resolution of this case.

B. The Existing Electoral System in Yakima

The City currently utilizes an at-large election system to fill the seven seats on the Yakima City Council. Four of these seats, designated Positions 1, 2, 3 and 4, are geographically-defined and have residency restrictions attached. Candidates running for one of these seats must reside in a geographic district corresponding to their seat number. Such districts are generally called "single-member districts." The remaining three seats, designated Positions 5, 6 and 7, have no residency restrictions. Candidates running for one of these seats may reside anywhere within the City. All seats are allotted a four-year term. Terms for all seven seats are staggered, with elections to fill expiring terms held every two years.

Elections follow a "numbered post" format, meaning that candidates file for a particular seat and compete only against other candidates who are running for the

same seat. In the event that more than two candidates file for a particular seat, the City conducts a primary election to narrow the field to the top two candidates. If the seat is one of the four single-member district seats, only voters who reside in the district corresponding to that seat may vote in the primary. If the seat is an unrestricted at-large seat, all voters residing within the City may cast a vote. The two candidates with the highest vote totals in the primary will then advance to a general election.

The general election is essentially a collection of individual at-large races (three or four, depending upon which terms are expiring in a given election year). The two candidates running for each seat compete head-to-head, with the candidate amassing the most votes winning the seat. All registered voters in the City may cast one vote in each head-to-head race, regardless of whether the seat at issue is residency-restricted. In order to win election under this system, a candidate must garner a simple majority of the votes cast in his or her head-to-head race.

As the Court held, this system unlawfully dilutes the votes of Latinos. ECF No. 108. This system, which essentially converts each of the seven city council seats to a city-wide majority-takes-all election, has the effect of denying Latinos the equal opportunity to participate in the political process and to elect candidates of their choice.

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C. Defendants' Proposed Plan

Defendants, the City of Yakima, Mayor Micah Cawley, and the other six members of the Yakima City Council, have proposed a remedial electoral system that would include five single-member district positions and two at-large positions. ECF No. 113. Like the existing system, the five single-member district seats would follow a numbered-post format whereby a candidate files for a particular seat. A candidate could only seek election in the district within which he or she resides. If more than two candidates file for any given single-member district seat, the City would hold a primary and the top two candidates would advance to the general election. Unlike the current system, only voters living within the geographic district would be allowed to vote for a particular single-member district candidate in the general election—the same voting restrictions imposed at the primary. The candidate who receives a simple majority in the general election would be elected to the council.

Under Defendants' proposal, the two at-large positions would be filled in a single election by way of "limited voting."[2] There would be no primary for the at-

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[2] For a discussion of limited voting, *see generally* Richard L. Engstrom, *Cumulative and Limited Voting: Minority Electoral Opportunities and More*, 30 ST. LOUIS U. PUB. L. REV. 97 (2010); Todd Donovan & Heather Smith,

large seats. Instead, each candidate who filed for office would appear on a single ballot at the general election. *Id.* at 3. Each voter in the City would cast a single vote for any of the candidates listed. The two candidates who receive the most votes would be elected to the two at-large positions.[3]

Under this proposal, all council members would be elected to staggered, four-year terms, and all council members currently serving would be allowed to serve out the remainder of their terms. In 2015, four of the five single-member district seats would stand for election. In 2017, the fifth single-member district seat and the two at-large seats would stand for election. The City would continue to employ a Council-Manager form of city government.

Proportional Representation in Local Elections: A Review, WASH. STATE INST. FOR PUB. POLICY (Dec. 1994).

[3] Defendants have abandoned an earlier proposed aspect of their plan to name the candidate who receives the most votes in the at-large election as Mayor and the candidate with the second-most votes as Assistant Mayor. ECF No. 136 at 1. Under the current proposal, the Mayor would be elected from among the council members at the first council meeting in accordance with the Yakima City Charter. ECF No. 119.

Under Defendants' proposed plan, the City would be geographically divided into five districts of roughly equal population. *Id.* at 5. One of those districts, District 1, would be a majority Latino district, which Defendant's term an "opportunity district." The District 1 seat would stand for election in 2015. The Defendants' plan also includes what they term an "influence district," District 5, which would have a "substantial" Latino CVAP. *Id.* at 9-10. Defendants propose that District 5's council member would not stand for election until 2017.

The relevant demographics of the districts in Defendants' plan are as follows:

District	Total Pop.	Total CVAP	Latino CVAP	Latino share of CVAP
1	18,363	7,305	3,905	53.46%
2	18,579	13,074	1,581	12.09%
3	17,917	12,981	1,377	10.61%
4	18,422	12,583	2,559	20.34%
5	17,786	9,061	3,212	35.45%

ECF No. 114 at 4.

D. FairVote's Proposed Plan

FairVote has submitted a proposal to the Court that is a variation of the Defendants' proposed plan. ECF No. 126. Under FairVote's proposal, Yakima

would be divided into four single-member districts and would elect three at-large seats in a single limited voting election. Like Defendants' plan, FairVote proposes a plan they contend would include one majority Latino geographic district.

Under FairVote's plan, the single vote, limited voting method would be used to elect three council members in an at-large election, with no primary, and the first, second, and third place finishers would all be elected to the city council. FairVote argues that this method "better promotes meaningful participation by all voters, fair representation in a diverse community, and self-correcting flexibility as the composition of electorates change." *Id.* at 5.

FairVote advocates for three at-large council seats, instead of two as Defendants have suggested, because the percentage of votes needed to elect a minority candidate to one of the available seats would decrease, thereby increasing the likelihood of a minority candidate's success. The percentage of votes that a minority candidate must have in order to be guaranteed to win one of the open seats is known as the "threshold of exclusion." Mathematically, the threshold of exclusion is calculated as one divided by the sum of the number of seats available plus one, plus one vote:

$$\text{Threshold of Exclusion} = \frac{1}{(\text{seats} + 1)} + 1 \text{ vote}$$

In an election with two at-large seats available, as Defendants have suggested, the threshold of exclusion is 33.3% plus one vote. FairVote observes that under Defendants' plan, the threshold of exclusion is too high for a Latino-preferred candidate to win either one of the seats. *Id.* at 7. With only 19.9 % of the registered voters, as FairVote estimates, the Latino vote cannot meet the 33.3% plus one vote, threshold of exclusion needed in order to win an at-large seat on the council. *Id.* at 11.

In an election with three at-large seats available, as FairVote advocates, the threshold of exclusion drops to 25% plus one vote. *Id.* FairVote contends that Defendants' plan should be modified to include three at-large, non-staggered seats so that "a Latino-preferred candidate could be reliably elected to at least one of those three at-large seats." *Id.* at 12. FairVote suggests that if voters unequally split their votes between the majority-preferred candidates and there are cross-over votes (non-Latino voters casting their votes for Latino-preferred candidates), a minority preferred candidate can be elected. *See id.* at 8, 11–12.

FairVote did not provide a proposed district map for the four single-member districts it proposes. In their reply briefing, Defendants have provided the Court with a proposed four-district map in order to implement FairVote's plan. ECF No. 138-2. That map includes one district with a significant Latino CVAP population (49.26%), but not a majority. *Id.*

E. Plaintiffs' Proposed Plan

Plaintiffs have proposed the plan they introduced in their Motion for Summary Judgment. ECF No. 117. Plaintiffs' plan would follow a numbered post format. The plan would create seven single-member districts and no at-large seats. Like Defendants' proposed single-member districts, a candidate could only seek election in the district within which he or she resides. If more than two candidates file for any given single-member district seat, the City would hold a primary and the top two candidates would advance to the general election. Also like Defendants' plan, and unlike the current system, only voters living within the geographic district would be allowed to vote for a particular single-member district candidate in the general election. The candidate who receives a simple majority in the general election would be elected to the council.

Under Plaintiffs' plan, council members would have four-year, staggered terms. However, unlike Defendants' plan, Plaintiffs have proposed that all seven seats stand for election in 2015. The staggered system would be preserved by having even-numbered seats stand for election again in 2017 for full four-year terms; odd-numbered seats would stand for election again in 2019. The relevant demographics of Plaintiffs' proposed plan are as follows:

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District	Total Pop.	Total CVAP	Latino CVAP	Latino share of CVAP
1	12,533	4,998	2,625	52.52%
2	13,358	5,527	2,506	45.34%
3	12,859	8,653	2,181	25.21%
4	13,175	7,676	2,075	27.03%
5	12,683	8,702	1,071	12.31%
6	13,176	9,625	685	7.12%
7	13,283	9,823	1,491	15.81%

ECF No. 114 at 5.[4]

[4] These numbers are taken from Defendants' calculations of the demographics of Plaintiffs' proposed districts. Plaintiffs' calculations indicate the districts contain CVAP percentages of 54.51% (Dist. 1), 46.31% (Dist. 2), 24.80% (Dist. 3), 26.69% (Dist. 4), 12.21% (Dist. 5), 7.11% (Dist. 6), and 15.14% (Dist. 7). ECF No. 118-1 at 3. The Court uses Defendants' numbers in evaluating all the proposed plans to provide numerical consistency. The slight difference between the parties' calculations is not material to the Court's resolution of this case.

DISCUSSION

I. Whether the Court owes deference to Defendants' proposed plan

The Supreme Court has often "recognized that 'reapportionment is primarily a matter for legislative consideration and determination, and that judicial relief becomes appropriate only when a legislature fails to reapportion according to federal constitutional requisites in a timely fashion after having had an adequate opportunity to do so.'" *White v. Weiser*, 412 U.S. 783, 794–95 (1973) (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)); *accord Garza v. Cnty. of L.A.*, 918 F.2d 763, 776 (9th Cir. 1990). "[I]n choosing among plans, a district court should not pre-empt the legislative task nor 'intrude upon state policy any more than necessary.'" *Weiser*, 412 U.S. at 795 (quoting *Whitcomb v. Chavis*, 403 U.S. 124, 160 (1971)). Thus, when choosing between two possible plans, "[t]he only limits on judicial deference to state apportionment policy . . . [are] the substantive constitutional and statutory standards to which such state plans are subject." *Upham v. Seamon*, 456 U.S. 37, 42 (1982) (per curiam) (discussing *Weiser*). A district court must therefore defer to a lawful legislative plan that fully remedies a violation of Section 2 of the Voting Rights Act. On the other hand, any legislative plan which would fail to survive a challenge under the standards applicable to Section 2 does not remedy the violation and deserves no such deference. *Id.* at 40–41 (affirming that "a court must defer to the legislative judgments the plans reflect"

absent "any finding of a constitutional or statutory violation with respect to those districts").

Therefore, the Court must first evaluate Defendants' plan to determine (1) whether it is a lawful legislative plan, and (2) whether it fully remedies the Section 2 violation—that is, whether Defendants' proposed plan would survive a Section 2 challenge in its own right. If the Court concludes that the plan is both a lawful legislative act and that it remedies the violation, the Court must accept the plan. However, if the Court concludes either that Defendants' proposed plan is not a lawful legislative act or that it does not fully remedy the violation, the Court may not afford the plan any deference. *See id.* at 39 ("Although a court must defer to legislative judgments on reapportionment as much as possible, it is forbidden to do so when the legislative plan would not meet the special standards of population equality and racial fairness that are applicable to court-ordered plans."); *Garza*, 918 F.2d at 776 (concluding that the district court was not required to defer to a plan because "the proposal was not an act of legislation; rather, it was a suggestion by some members of the Board").

A. Conflict with Washington State law

Plaintiffs contend that Defendants' plan deserves no deference because the proposed limited voting election scheme is unlawful under Washington State law. Defendants' counter that Washington State law does not "expressly forbid" their

proposed plan, and "in any event, a state statute may 'give way' to remedy a Section 2 violation." ECF No. 136 at 2.

District courts are not required to defer to a plan that is not a lawful act of legislation. *See Wise v. Lipscomb*, 437 U.S. 535, 545 (1978) (White, J.); *Garza*, 918 F.2d at 776. Where a proposed plan runs contrary to controlling state law, that "plan [is] not the equivalent of a legislative Act of reapportionment performed in accordance with the political processes of the community in question." *Wise*, 437 U.S. at 545.

The Supreme Court was split over this issue in *Wise*. Justice White wrote an opinion stating that a district court need not defer to the plan proposed by the city of Dallas because Dallas did not have authority under state law to reapportion itself. *Id.* at 544–45 (discussing *E. Carroll Parish Sch. Bd. v. Marshall*, 424 U.S. 636 (1976)). Justice Powell wrote a concurring opinion stating that district courts must defer to "local legislative judgments . . . even if . . . [the Court's] examination of state law suggests that the local body lacks authority to reapportion itself." *Id.* at 547.

The Court finds persuasive the Tenth Circuit's evaluation of these competing contentions in *Large v. Fremont County*, 670 F.3d 1133 (10th Cir. 2012). Specifically, "federal courts owe their deference first and foremost to legislators of sovereign States, and only through them to local governmental

entities." *Id.* at 1142. As such, the Court owes its deference to the policy choices made by Washington State in defining electoral systems allowable at the local level. If the plan proposed by Defendants conflicts with the policy choices of the Washington State legislature, it is owed no deference.[5]

Defendants are correct that state law must sometimes yield to afford an effective remedy under the Voting Rights Act. The Supremacy Clause requires that state law be abrogated where doing so is necessary to remedy a violation of the

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[5] Moreover, Justice Powell's concurring opinion noted a difference between lawful procedure and lawful effect, stating that where "the specific plans proposed . . . would have unlawful effect" legislative judgment is tainted and "the normal presumption of legitimacy afforded the balances in legislative plans . . . could not be indulged." 437 U.S. at 549. As such, Justice Powell was asserting that legislation with lawful effect must be afforded deference regardless of the propriety of the process of implementation because of the inherent power of elected bodies to legislate when the need arises. However, where the result of legislation has an unlawful effect, no deference is due. The case *sub judice* falls within the latter category. Defendants' plan is owed no deference under either standard articulated in *Wise* because, as the Court explains *infra*, it has an unlawful effect.

Voting Rights Act. *See Arizona v. Inter Tribal Council of Ariz. Inc.*, 133 S.Ct. 2247, 2256 (2013) ("[Federal legislation] so far as it extends and conflicts with the regulations of the State, necessarily supersedes them." (quoting *Ex part Siebold*, 100 U.S. 371, 384 (1879)); *Large*, 670 F.3d at 1145 ("In remedial situations under Section 2 where state laws are *necessarily* abrogated, the Supremacy Clause appropriately works to suspend those laws because they are an *unavoidable obstacle* to the vindication of the federal right." (emphasis in original)). However, where it is not necessary to abrogate state law, *see Weiser*, 412 U.S. at 795, the Court must respect the legislation of the State of Washington.

Plaintiffs point to two statutory provisions which call into question the validity of the limited voting scheme Defendants propose. ECF No. 127 at 4–5, 6–7. First, RCW 35.18.020(2) provides that "councilmembers may be elected on a citywide or townwide basis, or from wards or districts, or any combination of these alternatives. Candidates shall run for specific positions." Plaintiffs contend this last sentence is incompatible with a limited voting electoral format where candidates run in a general election for any of two or three at-large positions. ECF No. 127 at 4–5. In opposition, Defendants contend that (1) this is a tortured reading of the statute, (2) the at-large positions will be specific, numbered seats, and (3) "candidates will obviously intend to run for a particular seat on the City

Council, regardless of whether the candidates know in advance which of the two [or three] seats they will ultimately win." ECF No. 136 at 1–2.

Second, RCW 29A.52.210 provides that city, town, and district primaries shall be nonpartisan and shall be held on the first Tuesday in August (pursuant to RCW 29A.04.311). It also provides that "[t]he purpose of this section is to establish the holding of a primary . . . as a uniform procedural requirement to the holding of city, town, and district elections. These provisions supersede any and all other statutes, whether general or special in nature, having different election requirements." RCW 29A.52.210. Plaintiffs argue this section of state law is incompatible with Defendants' proposed limited voting primary because there would be no primary elections in the proposed plan; everyone who filed for office would appear on the final ballot at the general election. ECF No. 127 at 6–7. Plaintiffs contend a combined reading of these two statutes allows for "only three types of city council elections in a city-manager system such as that used in Yakima: at-large elections in which candidates run for specific seats, district-based elections in which candidates run for specific seats, or a mixture of the two;" and each would require a primary to narrow the field down to two candidates. *Id.* at 7.

The cited statutes cast grave doubt upon the legality of Defendants' proposed plan. The Court is especially concerned with the lack of a primary in

face of the clear dictate of the Washington State legislature that primaries be "a uniform procedural requirement to the holding of city, town, and district elections." RCW 29A.52.210. Defendants have not offered a reading of this statute that is compatible with their proposed plan. Instead, they rely on the absence of any express prohibition to "limited voting" in the relevant statutes as evidence that such a system is not disallowed under Washington State law. Further, Defendants rely on cases from other states which have allowed limited voting but ignore that those states did not have laws similar to Washington's. While Washington State law is silent about limited voting, it is not silent on requiring primaries. Defendants have not reconciled this clear requirement with their proposed plan.

The Court also takes notice of a report by the Washington State Institute for Public Policy issued in 1994 upon the request of "[s]everal members of Washington's House of Representatives . . . to summarize the research on the role single member districts and other electoral arrangements may play in local government in increasing both voter turnout and representation of minority groups." Todd Donovan & Heather Smith, *Proportional Representation in Local Elections: A Review*, WASH. STATE INST. FOR PUB. POLICY (Dec. 1994), *available at* http://www.wsipp.wa.gov/ReportFile/1181. This report discussed limited and cumulative voting systems and suggested their use may facilitate minority

representation. Irrespective of the virtues that limited voting could bring to cities like Yakima, however, the Washington State legislature has not yet implemented any form of limited or cumulative voting.

"[A]ny remedy for a Voting Rights Act violation must come from within 'the confines of the state's system of government.'" *Dillard v. Baldwin Cnty. Comm'rs*, 376 F.3d 1260, 1268 (11th Cir. 2004) (quoting *Nipper v. Smith*, 39 F.3d 1494, 1533 (11th Cir. 1994) (en banc)). Where a proposed system finds no legal footing, nor occupies "a traditional and accepted place" in the states' election law landscape, a federal court does not have the authority to "impose it on a state government, regardless of the theoretical prospect of increasing minority voting strength." *Id*; *accord Large*, 670 F.3d at 1148 ("[W]here a local governmental body's proposed remedial plan for an adjudged Section 2 violation *unnecessarily* conflicts with state law, it is not a legislative plan entitled to deference by the federal courts." (emphasis in original)). The Court will not impose an electoral scheme that unnecessarily conflicts with state law, especially when Defendants' proposed plan also does not provide a presently effective remedy to the Section 2 violation.

B. Full and Effective Remedy

Under Defendants' proposed electoral system, Yakima would have five geographic districts and two at-large positions. The Court concludes that

Defendants' proposal would not fully remedy the Section 2 violation.

i. At-Large Positions

First, the at-large system, as proposed by the Defendants, does not afford a Latino-preferred candidate a chance to obtain one of the two seats available. As FairVote succinctly pointed out, with only 19.9 % of the registered voters as FairVote estimates, or 22.97% CVAP as Defendants estimate, the Latino vote cannot meet the 33.3% plus one vote threshold of exclusion needed in order to win one of the at-large council seats. ECF No. 126 at 11. Defendants' proposed at-large plan is flawed in the same manner as the current electoral system because it dilutes the Latino vote against the majority population.

Defendants tout their proposed plan as superior because they estimate the city-wide Latino CVAP will be 30.9% by 2021, giving Latinos a more powerful position in such a city-wide, at-large election. ECF Nos. 129 at 12; 131 at ¶ 7. This is not the correct measure for evaluating a Section 2 violation. Under the totality of the circumstances, "the proper inquiry is whether changing demographics demonstrate that Hispanics presently have the ability to elect [candidates of their choice], not whether they will have this ability in the future." *Ruiz v. City of Santa Maria*, 160 F.3d 543, 555 (9th Cir. 1998) (per curiam). The demographics of Yakima are changing, and time will tell if further balancing of the electoral map will be required after the 2020 census. However, future

demographics are irrelevant to the Court's present inquiry. The only relevant fact is that Defendants' proposed two-seat at-large plan does not afford the Yakima Latino population a *present* ability to participate in the political process.

ii. Single Member Districts

Second, Defendants' proposal for five geographic districts does not itself remedy the Section 2 violation. The percentage of Latino CVAP in District 1 would be 53.46%, giving Latinos a majority district where they have a chance to elect a representative of their choice. Defendants calculate the percentage of Latino CVAP in District 5 would be 35.45%, which Defendants contend makes that District an "influence district" where Latinos would constitute a "substantial" percentage of the CVAP. ECF No. 113 at 4, 10. But 35.45% is hardly enough of an influence to provide an equal opportunity to elect a Latino-preferred candidate, especially where, as the Court has found, the non-Latino majority has historically voted as a bloc against Latino candidates. ECF No. 108 at 43–48.

Defendants contend that because District 1 in their proposed plan contains a higher percentage of Latinos than District 1 in Plaintiffs' proposed plan, their plan provides a better opportunity for Latinos to elect candidates of their choice. However, the packing (concentration) of a minority population into one district can minimize the influence that minorities will have in neighboring districts. *See Voinovich v. Quilter*, 507 U.S. 146, 154 (1993) ("[W]e have recognized that

'[d]ilution of racial minority group voting strength may be caused 'either' by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority.' (quoting *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986)). Under Defendants' plan, the Latino population in District 1 would be 53.46% of the CVAP. In the other districts, the Latino CVAP would be 12.09%, 10.61%, 20.34%, and 35.54%. None of these other districts would presently give the Latino population an equal opportunity to elect a Latino-preferred candidate or to truly influence the results of any district elections.

Like their attempts to strengthen the city-wide portion of their proposal, Defendants also assert that by 2020, Latinos will constitute 45.5% of the population in District 5. Again, the proper measure is the demographics as they affect Latino's opportunity to elect candidates now, not what changing demographics may yield in the future. *Ruiz*, 160 F.3d at 555. As such, in the system proposed by Defendants, Latinos would only have the present ability to elect a candidate in one of the five geographic districts.

iii. Rough Proportionality

Defendant's proposed system would also not afford Latinos a fair opportunity to obtain a number of seats roughly proportional to their population. An acceptable remedy need not maximize the electoral opportunities of a minority

group, *Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994), nor does a minority population have a right to proportional representation, 52 U.S.C. § 10301(b). However, the Supreme Court has identified rough proportionality as a relevant fact, in the totality of circumstances, when determining "whether members of a minority group have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Johnson*, 512 U.S. at 1000 (internal quotation marks and citation omitted). In fact, this Court would fail in its duty were it not "to ask whether the totality of facts, including those pointing to proportionality, showed that the new scheme would deny minority voters equal political opportunity." *Id.* 1013–14 (footnote omitted).

An electoral scheme does not violate Section 2 "where, in spite of continuing discrimination and racial bloc voting, minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population." *Id.* at 1000. Defendants assert that the Latino CVAP in Yakima is 22.97%. With seven city council positions, Latinos should, mathematically, hold 1.6 seats to be proportional to their share of the CVAP. As such, the Court finds that, in the totality of the circumstances, a factor to consider is whether a proposed plan provides equal electoral opportunity for the Latino population to attain one of the seven city council seats along with a genuine possibility to obtain a second seat.

As the Court has explained, Defendants' proposal only gives the Latino population an opportunity to attain one of the seven seats. Latinos are excluded from an equal opportunity in the two city-wide, at-large seats. These two seats effectively preserve the status quo that the Court has concluded violates Section 2 as it continues to allow non-Latino candidates to dominate those elections on a city-wide majority-takes-all basis. While Latinos would achieve a single majority geographic district, they would be excluded from having a present ability to influence any other district seat. There is no genuine possibility that Latino voters could elect a second candidate of their choosing.

Rough proportionality is a significant indicator of whether an electoral plan provides an adequate remedy to a Section 2 violation, and Defendants' plan does not provide a present opportunity for Latinos to obtain roughly proportional representation. Significantly, Defendants do not contend that their plan provides proportionality. Instead, Defendants state that "to the extent this Court is concerned with adopting a plan that contains a number of immediate election opportunities commensurate with the population of eligible Latino voters in the City, FairVote's proposal provides immediate proportionality . . . ." ECF No. 129 at 22. Thus, Defendants assert, the Court should adopt FairVote's plan because it "immediately offers two positions in which Latinos have a meaningful opportunity to elect their candidate of choice." *Id.*; *see also* ECF No. 136 at 7 ("If this Court is

concerned with providing immediate proportionality, then this Court should adopt the proposal set forth in FairVote's *amicus curiae* brief and the map attached to this reply [ECF No. 138-2].")

iv. FairVote's Alternative

FairVote's plan, while providing Latinos a slightly better chance at equal representation in the at-large seats, suffers even more problems than Defendants' plan. First, its use of limited voting is prohibited by the same legal impediment as Defendants' plan. Second, while FairVote would employ three city-wide at-large seats, dropping the threshold of exclusion to 25%, that number is still too high for a Latino-preferred candidate to win any one of the seats. With only 19.9% of the registered voters, as FairVote estimates, the Latino vote cannot meet the 25% plus one vote threshold of exclusion needed in order to win a seat on the council.[6]

Third, FairVote's proposal of four single-member districts only includes one district that contains a significant Latino CVAP population (49.26%). This is not a majority and, while it may be significantly influential, it does not presently assure Latinos an equal opportunity to elect a candidate of their choice. *See Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) ("Placing [minority] voters in a district in which

[6] The same holds true even if the Court applies the 22.97% Latino CVAP Defendants have calculated.

they constitute a sizeable and therefore 'safe' majority ensures that [minorities] are able to elect their candidate of choice." (quoting *Voinovich,* 507 U.S. at 154)).

Under FairVote's proposal, in total, Latinos would not presently have an equal opportunity to elect even a single candidate of their choice. In the particular circumstances of this case, the use of a hybrid at-large and single-member district electoral system yields the same fractured and unequal access to political office that is present in the current electoral system. This Court concludes that neither Defendants' nor FairVote's proposals offer a legally acceptable remedy under the circumstances of this case.

II. The Court Must Impose a Legally Acceptable Plan

In the absence of a valid legislative plan, the duty falls on the district court to impose a constitutionally acceptable plan that will remedy the Section 2 violation. *Chapman v. Meier*, 420 U.S. 1, 27 (1975). In choosing among possible remedial plans, a court must implement a plan that most closely approximates any proposed legislative plan, while still satisfying constitutional requirements and preventing a renewed Section 2 violation. *See Weiser*, 412 U.S. at 795–97. 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. *See Chapman*, 420 U.S. at 18–19 (reaffirming "an emphasis upon single-member

districts in court-ordered plans" absent "insurmountable difficulties" or "particularly pressing features calling for [another type of electoral system]").

Plaintiffs' proposed plan would create seven single-member districts. One of those districts, District 1, would have a majority-Latino CVAP (52.52%). District 2 in Plaintiffs' plan also has a substantial Latino population, in which Latinos constitute 45.34% of the CVAP. Latinos would constitute a quarter or more of the CVAP in two other districts (3 and 4). Plaintiffs' proposed plan affords Latinos the present ability to elect a Latino-preferred candidate in District 1 and a genuine possibility to elect a Latino-preferred candidate in District 2. This provides rough proportionality, as was discussed *supra*. Plaintiffs' proposal also avoids concentrating the Latino population into a single geographic district which would minimize the ability of Latinos to influence districts in which they are not the majority. Plaintiffs' proposal is lawful and meets the objectives of remedying the Section 2 violation. The boundaries of the single-member districts reflected in Plaintiffs' Illustrative Plan 1 are reasonably compact and are not in derogation of traditional redistricting principles. The total population deviation among districts is 6.33%, and therefore the proposed districts comply with the one person, one vote requirement of federal law. *See Brown v. Thomson*, 462 U.S. 835, 842–43 (1983) (concluding that an apportionment plan with a maximum population deviation under 10% is only a minor deviation from mathematical equality among voting

districts and is a prima facie indication that the districts are acceptable); *Reynolds*, 377 U.S. at 579 ("[T]he overriding objective must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen.").

Defendants contend the creation of majority-minority districts "sacrifices the voting opportunities of most Latinos at the expense of Latinos who are fortunate enough to reside in Plaintiffs' Districts 1 and 2." ECF No. 136 at 7. The Court previously rejected this argument when it found a Section 2 violation in this case. ECF No. 108 at 29–31. "Districting plans with some members of the minority group outside the minority-controlled districts are valid," and "[t]he fact that the proposed remedy does not benefit all of the Hispanics in the City does not justify denying any remedy at all." *Gomez v. City of Watsonville*, 863 F.2d 1407, 1414 (9th Cir. 1988).[7] In light of the fact that the alternative proposed remedies

[7] Defendants contend that *Gomez* is inapplicable in evaluating remedies because it only applies to satisfying the first *Gingles* factor. ECF No. 129 at 17 n.10; *see also* ECF No. 108 (Court's Order applying the three Section 2 preconditions articulated in *Thornburg v. Gingles*, 478 U.S. 30 (1986), to the facts of this case). Defendants argue further that *Gomez* "does not detract from Defendants' position that their plan is superior because [their proposed plan] extends an avenue of empowerment to all eligible Latino voters in the City." *Id.* As the Court has explained,

perpetuate the Section 2 violation, the Court concludes that the use of single-member districts is a valid remedy, even though some Latinos may live outside the majority-Latino districts, because it affords the Latino population an effective remedy, imperfect as it may be.

Defendants also object to Plaintiffs' proposed plan because they assert it amounts to gerrymandering. ECF No. 129 at 23. Defendants allege that the districts are drawn with race as the predominant factor and that the plan is not the least restrictive means by which to remedy the Section 2 violation. The Court previously rejected this argument as well. ECF No. 108 at 31–33. To the extent that race plays a role in the districting of Yakima, it does so both in Defendants' proposed plan and in Plaintiffs' proposed plan. Such consideration is only natural

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Defendants' plan does not afford a viable opportunity for Latinos to elect a councilmember in the at-large elections, and therefore it does not empower all Latinos in Yakima to elect a representative of their choice. Further, while *Gomez* specifically involved determining whether there was a Section 2 violation, the cited discussion came in the context of determining whether a valid remedial district could be formed (*Gingle*'s first factor). 863 F.2d at 1413–14. The Court finds the Ninth Circuit's reasoning in evaluating the validity of the proposed districts in *Gomez* persuasive in evaluating the validity of the proposed remedies in this case.

in remedying a historic denial of voting rights, but ensuring compliance with Section 2 is a compelling state interest. *See Bush v. Vera*, 517 U.S. 952, 977–78 (1996). It does not follow that Defendants' proposed remedy is "narrower" than Plaintiffs' proposed remedy. Districting that factors in race must not do so "more than is 'reasonably necessary' to avoid § 2 liability." *Id.* at 979. Plaintiffs' proposed plan—which factors in traditional districting concepts, such as compactness and equal population—does not factor in race more than is necessary.

Finally, Defendants object to the Plaintiffs' proposed plan because it would require all the city council seats to stand for election in 2015. Defendants assert that several factors compel the Court to avoid "invalidating" the elections of councilmembers who would not otherwise be up for election in 2015. ECF No. 136 at 11. Assuming that the Court is "invalidating" the elections of the

councilmembers,[8] the Court may do so where an unequal election system has substantially infringed upon a protected group's ability to affect the outcome of an election. *See, e.g.*, *Toney v. White*, 488 F.2d 310, 315 (5th Cir. 1973) (en banc). In determining how and when remedial measures should be implemented, the Court must "consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles." *Reynolds*, 377 U.S. at 585.

In this case, the constitutional infraction is one that goes to the core of the rights of citizens: the ability to equally participate in the political process. Latinos have been denied the equal opportunity to elect representatives of their choice in Yakima. This is balanced against the minor disruptive effect of requiring all city council positions to stand for election in 2015. Plaintiffs' remedial plan would not

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[8] The Court is not "invalidating" the elections because it is not requiring all candidates elected under the current system to immediately vacate their posts. All councilmembers will maintain their positions until completion of the normal election cycle this year. The fact that three councilmembers will have to stand for early election this year is not as much an invalidation of their appointment, but a matter of effectively and efficiently introducing an electoral system compliant with Section 2 of the Voting Rights Act of 1965.

call for immediate elections but would hold elections as normally scheduled for 2015. *Cf. Toney*, 488 F.3d at 316. Four councilmembers' positions are set to expire naturally in 2015 anyway. Thus, immediate implementation will cut three councilmembers' positions short by two years (effective January 1, 2016). Those council members may attempt to regain their seats under the new, constitutionally-valid electoral system.

Further, the remedial electoral system herein ordered takes into account the mechanics and complexities of Washington State's election laws. Unlike the proposed at-large, limited voting system, the use of single-member districts is well-accepted as a valid electoral system in Washington, as is the procedure of modifying staggered councilmember positions at the next scheduled general election cycle. *See* RCW 35.18.020(2)–(4) (affording for initial staggering of terms and, upon changes in the number of council seats, for staggering at the next general election cycle).

Finally, this year's election cycle is not imminent.[9] *Cf. Reynolds*, 377 U.S. at 585. The City and its residents will have ample time to implement the remedial electoral system herein ordered. The only issue created in 2015 is a broader

[9] The primary election will occur in August, nearly six months after the issuance of this Order. RCW 29A.04.311.

electoral field during the initial implementation phase. Given the long-standing Section 2 violation, a broad electoral field only serves to assure that each citizen of voting age has the appropriate opportunity, under the new electoral scheme, to have his or her voice heard now. This compelling remedial goal outweighs any slight inconvenience to those three candidates that will be displaced after having been elected under a flawed system.[10]

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[10] In support of their argument, Defendants cite *Soules v. Kauaians for Nukolii Campaign Committee*, 849 F.2d 1176 (9th Cir. 1988). *Soules* was not an equal-protection or Voting Rights Act case. However, even under *Soules*, a court may invalidate an election after taking into account "equitable considerations in fashioning the appropriate remedy," and upon a proper balancing of the "severity of the alleged constitutional infraction" against the "countervailing equitable factors such as the extremely disruptive effect of election invalidation and the havoc it wreaks upon local political continuity." *Id.*; *see also Montana Chamber of Commerce v. Argenbright*, 226 F.3d 1049 (9th Cir. 2000). As the Court's discussion indicates, the equitable factors in this case support implementing the new electoral system in its entirety during the next electoral cycle.

ACCORDINGLY, IT IS ORDERED:

1. Plaintiffs' Motion for Entry of Proposed Remedial Plan and Final Injunction (ECF No. 117) is **GRANTED**. Defendants' Proposed Remedial Redistricting Plan(s) and Injunction (ECF No. 113, 129, 136) are **DENIED**.

2. The City of Yakima is permanently enjoined from administering, implementing, or conducting any future elections for the Yakima City Council in which members of the City Council are elected on an at-large basis, whether in a primary, general, or special election.

3. Beginning with the elections for the Yakima City Council to be held in 2015, and including the August 4, 2015 primary election and the November 3, 2015 general election, all elections for the Yakima City Council will be conducted using a system in which each of the seven members of the City Council is elected from a single-member district. Each councilmember must reside in his or her district, and only residents of a given district may vote for the councilmember position for that district.

4. The Court hereby adopts, as a remedy for the Section 2 violation, Plaintiffs' proposed Illustrative Plan 1. Maps and tables showing the boundaries of the new seven single-member districts and their populations are attached as Exhibit A.

5. Defendants shall take all steps necessary to implement the seven

single-member district plan attached as Exhibit A in order to allow single-member district based elections to proceed in 2015 and thereafter, provided that the City of Yakima may revise those districts based on annexations, de-annexations, and population changes reflected in the decennial census and at appropriate times in the future when necessary to conform to state and federal law.

6. In order to preserve the current staggered election plan for members of the City Council, the odd numbered districts will be set for a four-year election cycle and the even numbered districts will be set initially for a two-year term and thereafter for a four-year election cycle.

7. This 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 Judgment and the Court's August 22, 2014 Order, continues to provide for single-member districts, and complies with Section 2 of the Voting Rights Act.

8. Any requests by Plaintiffs for costs and fees shall be determined by the Court in accordance with Fed. R. Civ. P. 54(d).

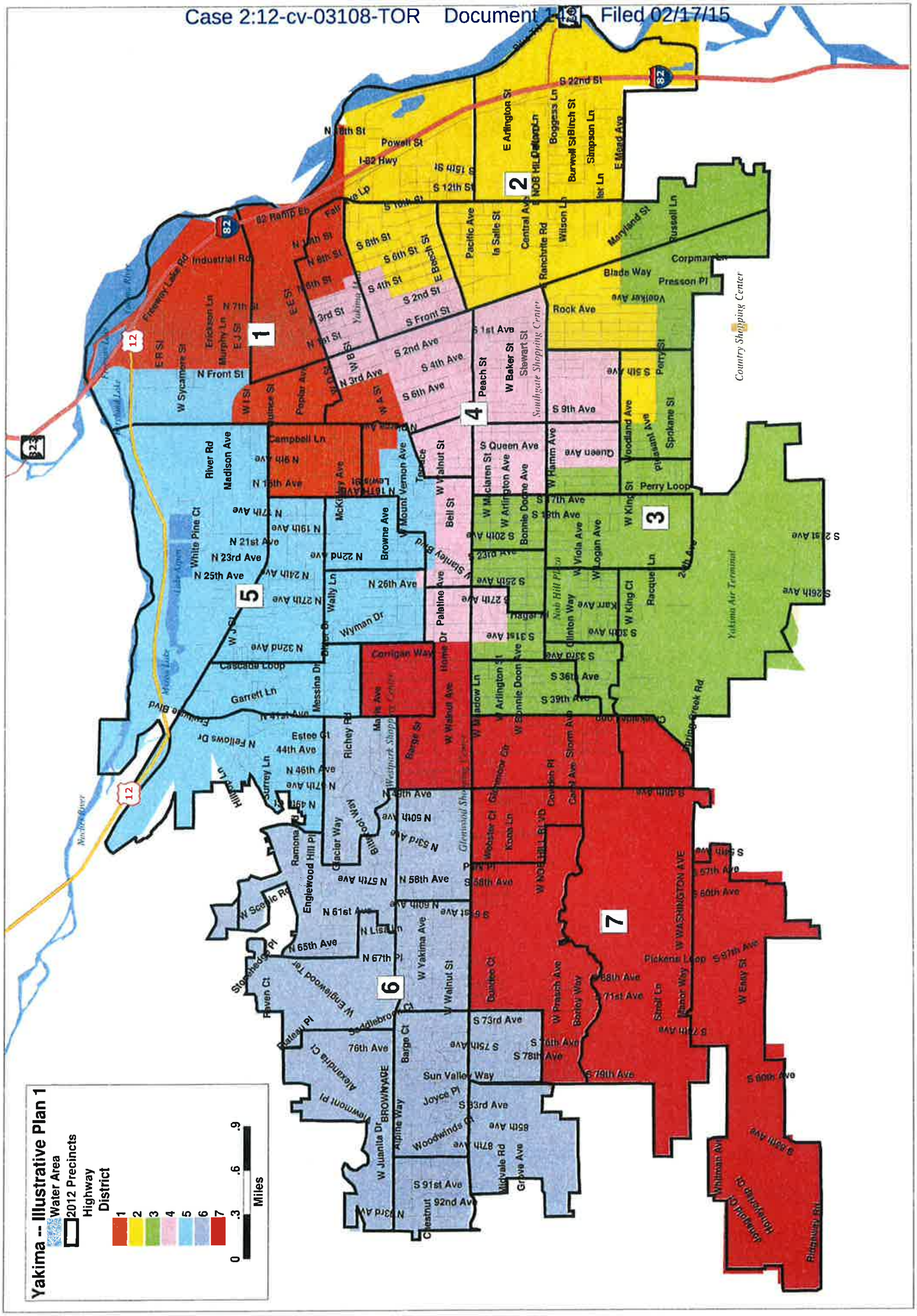
The District Court Executive is hereby directed to enter this Order, enter **Judgment** accordingly, and provide copies to counsel.

DATED February 17, 2015.

Thomas O. Rice

THOMAS O. RICE
United States District Judge

EXHIBIT A


Yakima -- Illustrative Plan 1
Water Area
2012 Precincts
Highway
District
1
2
3
4
5
6
7
0
.3
.6
.9
Miles
1
2
3
4
5
6
7
N Front St
Industrial Rd
Campbell Ln
Southgate Shopping Center
Country Shopping Center
Yakima Air Terminal
Westpark Shopping Center
Glenwood Shopping Center
S 22nd St
Rock Ave
Corrigan Way
Cascade Loop
Garrett Ln
Pickens Loop
W Washington Ave
W Nob Hill Blvd
Sun Valley Way
S 91st Ave

Population Summary Report

Yakima City Council --Illustrative Plan 1

District	Population	Deviation	% Deviation	Hisp.	% Hisp.	Minority	% Minority	Group Quarters Incarcerated	Group Quarters College Dorms	Group Quarters Military
1	12533	-497	-3.81%	9626	76.81%	10227	81.60%	0	0	0
2	13358	328	2.52%	9713	72.71%	10505	78.64%	273	0	0
3	12859	-171	-1.31%	4395	34.18%	5297	41.19%	0	91	0
4	13175	145	1.11%	5724	43.45%	6761	51.32%	778	0	0
5	12683	-347	-2.66%	3668	28.92%	4464	35.20%	0	0	0
6	13176	146	1.12%	1820	13.81%	2648	20.10%	0	0	0
7	13283	253	1.94%	2641	19.88%	3642	27.42%	58	0	0
Total	**91067**			**37587**	**41.27%**	**43544**	**47.82%**	**1109**	**91**	**0**
Ideal	**13030**									
Total Deviation			**6.33%**							

District	18+_Pop	18+ Hisp.	% 18+ Hisp.	18+ NH DOJ Indian	%18+ NH DOJ Indian	18+ Minority	% 18+ Minority	% Latino CVAP	% Latino Registered (of all registered)	% Latino Citizens (all ages)
1	7604	5335	70.16%	195	2.56%	5748	75.59%	54.51%	52.78%	71.93%
2	8545	5639	65.99%	182	2.13%	6182	72.35%	46.31%	53.35%	63.26%
3	9377	2564	27.34%	222	2.37%	3200	34.13%	24.80%	18.18%	32.22%
4	9716	3523	36.26%	334	3.44%	4301	44.27%	26.69%	25.24%	34.57%
5	9801	2152	21.96%	247	2.52%	2755	28.11%	12.21%	14.48%	20.17%
6	10175	1083	10.64%	125	1.23%	1612	15.84%	7.11%	6.91%	11.39%
7	10069	1541	15.30%	172	1.71%	2199	21.84%	15.14%	10.59%	23.24%
Total	**65287**	**21837**	**33.45%**	**1477**	**2.26%**	**25997**	**39.82%**	**22.66%**	**19.56%**	**34.34%**

Notes:

(1) Group quarters data are from the 2010 Advance Group Quarters File released by the Census Bureau on April 20, 2011
(2) With post-Census 2010 annexation affecting Districts 6 and 7, current city population is 91,208. Deviation is calculated based on ideal district size of 13,030 (91,208/7).
(3) % LCVAP calculated by disaggregating 2008-2012 ACS block group estimates for 18+ citizen Hispanics and Non-Hispanics to 2010 census blocks.
(4) % Latino registered based on Spanish surname match to registered voter list current through mid-March 2014
(5) % Latino citizen calculated by disaggregating 2008-2012 ACS block group estimates for citizen Hispanics and Non-Hispanics to 2010 census blocks.