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MEMORANDUM

To: Commissioners Graves and Fain, Washington Redistricting Commission
From: Rob Maguire, Harry Korrell, and David Nordlinger
Date: November 4, 2021
Subject: Legal Analysis of Arguments Regarding Creation of a Majority-Minority District

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I. INTRODUCTION

You asked us to evaluate Dr. Matt Barreto's Assessment of Voting Patterns in Central / Eastern Washington and Review of Federal Voting Rights Act, Section 2 Issue ("the Assessment"), dated October 19, 2021, proposing a majority-minority district be drawn in a five-county region. Since then, both Democratic Commissioners have proposed revised maps including the "Yakama Reservation" district suggested by the Assessment. This memorandum responds to the arguments pressed by the Assessment, summarizes the law regarding the creation of majority-minority districts, and discusses some of the evidence courts have considered in evaluating to majority-minority districts under the Equal Protection Clause of the U.S. Constitution. As we discussed, our analysis is predominantly legal, rather than factual, and we have not endeavored to conduct factual research regarding demographic trends, voting behavior, election results, or the other factual assertions in the Assessment.

II. SUMMARY

§ 2 does not require the creation of the majority-minority district advocated by the Assessment. The Assessment advocates creation of a new majority-minority legislative district spread across a five-county region in Central and Eastern Washington, arguing that doing so is required by § 2 of the Voting Rights Act, 42 U.S.C. § 1973 ("§ 2"). As explained below, the Assessment's arguments have fundamental flaws. Contrary to the Assessment's assertions, § 2 does not require the creation of the proposed majority-minority district.

If this district is challenged under the Equal Protection Clause of the Constitution, a court will likely review the State's decision to draw this district with strict scrutiny. While creation of a majority-minority district is not required, § 2 and the Equal Protection Clause of the U.S. Constitution allow states to create majority-minority districts, provided that traditional, race-

neutral districting criteria are not "subordinated" to race. Courts adjudicating Equal Protection Clause challenges to the creation of majority-minority districts look at several categories of evidence in deciding whether a redistricting plan is so predominantly race-based that it triggers "strict scrutiny" under the Equal Protection Clause: the shape of the district, direct evidence (testimony and contemporaneous communications) of legislative intent, and the data used to evaluate and draw potential districts. In this case, there is strong direct evidence that race is the predominant motivating factor for this proposed district, and so a court will likely adjudicate an Equal Protection Clause challenge to this district by applying strict scrutiny. There has been no critical analysis of the Assessment despite members of the Commission redrawing their maps on the basis of race. For example, both districts proposed by the Assessment set an approximate 60% minority CVAP threshold, yet the Commissions has not asked whether approximately 60% CVAP is needed to give Latino voters a functional majority. This lack of questioning of the Assessment will not survive strict scrutiny.

The Commission lacks a strong basis in evidence to believe the State would be in violation of § 2 unless it draws a district on the basis of race. The Assessment does not establish violations of the three *Gingles* preconditions. As an initial matter, both the "Yakima-Columbia River Valley" and the "Yakama Reservation" districts are not compact. The districts take slices from four and five counties respectively. They both have tortured shapes that include finger-like extensions into certain Latino-communities, and they divide communities of interest, particularly the Hanford Site from the Tri-Cities. As to the second *Gingles* precondition, the Assessment has not made a sufficient showing that Latino voters at the precinct level across the five-county region will form a coalition when voting for a state representative. Additionally, as the "Yakama Reservation" district intends to form a coalition of Latino and Native American voters, there must be a heightened level of scrutiny. Again, no such analysis of the proposed coalition has been conducted by the Commission. Finally, the third *Gingles* precondition is not met because a race-neutral, Democrat-leaning district can readily be created in Yakima County. There can be no § 2 liability where a race-neutral district can prevent legally significant racial bloc voting. The Assessment shows that the Democratic Commissioners have already proposed race-neutral, Democrat-leaning districts; and the Republican Commissioners contend that their proposed maps similarly create competitive districts in the region. Because § 2 does not require these proposed majority-minority districts, if one of the two districts is drawn in the final map it should not survive strict scrutiny.

III. THE PROPOSED MAJORITY-MINORITY DISTRICT

The Assessment advocates the creation of a majority-minority legislative district spanning at least four counties across Central and Eastern Washington. The Assessment argues that there is a growing, concentrated Latino population in a five-county region of Central Washington, that a sufficiently large and contiguous majority-minority Latino district can be drawn, and that there is racially polarized voting in this five-county region. Therefore, the Assessment states that § 2 of the Voting Rights Act compels a minority-majority district and the only way to comply with this requirement is to draw a district that has a Latino citizen voting age population (CVAP) over 50%. It proposes an option of two majority-minority Latino districts: (1) "Yakima-Columbia River Valley" with a 60% Latino CVAP; and (2) "Yakama Reservation" with a 52% Latino CVAP plus a 7.8% Native American CVAP. Both Democratic Commissioners revised their

proposed maps to include the "Yakama Reservation" district without any changes. There are fundamental flaws with the Assessment's arguments as well as strong concerns regarding the swift manner in which the Assessment's map was adopted without critical questioning.

The fact that it is possible to create the proposed district does not mean it is required by § 2. *See Johnson v. DeGrandy*, 512 U.S. 997 (1994) (maximization of majority-minority districts not required by VRA). For § 2 to require the creation of a majority-minority district, it must be the case that Washington would violate § 2 if it failed to create such a district. *See Bartlett v. Strickland*, 556 U.S. 1, 129 S. Ct. 1231 (2009) (plurality opinion) (rejecting state's claim that creation of minority crossover district was justified where state could not demonstrate violation of § 2 in absence of such a district). The analytical framework for such a claim is well-established, *see, e.g.*, NAT'L CONFERENCE OF STATE LEGISLATURES, REDISTRICTING LAW 2010, 54-64 (Nov. 2009); BRUCE M. CLARKE & ROBERT TIMOTHY REAGAN, REDISTRICTING LITIGATION: AN OVERVIEW OF LEGAL, STATISTICAL, AND CASE-MANAGEMENT ISSUES, 14-18 (2002), and the Assessment has not demonstrated that creation of either one of its proposed districts is necessary to avoid a violation of § 2.

To establish that §2 would be violated in the absence of a new majority-minority district, a party must show (1) that the minority group is sufficiently large and geographically compact to constitute a majority in the district, (2) that the minority group is politically cohesive, and (3) that bloc voting by the white majority usually defeats the minority's preferred candidate. *Thornburg v. Gingles*, 478 U.S. 30, 50-51, 106 S. Ct. 2752 (1986). If these three necessary preconditions are not satisfied, there is no violation of § 2. *Bartlett*, 55 U.S. at 10, 129 S. Ct. 1231 ("only when a party has established the *Gingles* requirements does a court proceed to analyze whether a violation has occurred based on the totality of the circumstances"). If a plaintiff challenging under §2 meets its burden as to all three *Gingles* preconditions, then a court will look at the totality of the circumstances to determine if "as a result of the challenged practice or structure, [the minorities at issue] do not have an equal opportunity to participate in the political process and to elect candidates of their choice." *Gingles*, 478 U.S. at 44, 106 S. Ct. 2752. Only then would a court determine that there has been a violation of § 2. *E.g., Growe v. Emison*, 507 U.S. 25, 40, 113 S. Ct. 1075 (1993).

The Assessment calls for the creation of a district predominantly motivated by race, and as such a court should review with strict scrutiny if a plaintiff makes an Equal Protection Clause challenge. It lacks the deep, fact-specific analysis required to assess § 2 violation claims and is wrong that the three *Gingles* preconditions are satisfied.

(1) Race is the Predominant Motivating Factor in Drawing this District and A Court will Likely Review the Decision to Draw this District with Strict Scrutiny

The Equal Protection Clause bars redistricting on the basis of race without sufficient justification. *Abbott v. Perez*, 138 S. Ct. 2305, 2314, 201 L. Ed. 2d 714 (2018) (citing *Shaw v. Reno*, 509 U.S. 630, 641, 113 S. Ct. 2816 (1993)). Given that the Voting Rights Act often compels the consideration of race in redistricting, the intentional creation of majority-minority districts does not necessarily violate the Equal Protection Clause. *Bush v. Vera*, 517 U.S. 952, 958, 116 S. Ct. 1941 (1996); *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994), *aff'd in part,*

appeal dismissed in part, 515 U.S. 1170, 115 S. Ct. 2637 (1995). However, "[r]acial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination . . . ." *Miller v. Johnson*, 515 U.S. 900, 904, 115 S. Ct. 2475 (1995) (quoting *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291, 98 S. Ct. 2733 (1978) (opinion of Powell, J.)).

In reviewing an Equal Protection Clause challenge to a redistricting decision, courts will apply a two-step analysis. First, a plaintiff challenging under the Equal Protection Clause bears the burden of proving that race was the predominant motivating factor in drawing the district. *Vera*, 517 U.S. at 959, 116 S. Ct. 1941; *Hunt v. Cromartie*, 526 U.S. 541, 547, 119 S. Ct. 1545 (1999). There are three principal categories of evidence at a plaintiff's disposal to make this showing: (1) district shape and demographics, (2) testimony and correspondence stating the legislative motives, and (3) the nature of the data used. *See Shaw v. Hunt*, 517 U.S. 899, 905, 116 S. Ct. 1894 (1996); *Vera*, 517 U.S. at 961-63, 116 S. Ct. 1941; *Miller*, 515 U.S. at 916, 115 S. Ct. 2475.

Second, if a court finds that race was the predominant motivating factor in drawing the district, the burden shifts to the state to prove that the proposed district serves a compelling interest and is narrowly tailored. *Cooper v. Harris*, 137 S. Ct. 1455, 1464, 197 L. Ed. 2d 837 (2017). Simply put, the state's decision to draw district lines predominantly on the basis of race must withstand strict scrutiny. It is well established that compliance with § 2 is a compelling state interest. *Abbott*, 138 S. Ct. at 2315, 201 L. Ed. 2d 714 (citing *Bethune-Hill v. Virginia State Bd. Of Election*, 137 S. Ct. 788, 800-01, 197 L. Ed. 2d 85 (2017); *Shaw II*, 517 U.S. at 915, 116 S. Ct. 1894). However, that does not relieve a state of its burden of showing its decision was narrowly tailored. For a state to meet its burden, it must show that it had a "strong basis in evidence" to conclude that § 2 required its action. *Cooper*, 137 S. Ct. at 1464, 197 L. Ed. 2d 837 (quoting *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 278, 135 S. Ct. 1257, 1274 (2015)). A district drawn predominantly based on race is not narrowly tailored if a state does not carefully evaluate whether a §2 plaintiff could establish the *Gingles* preconditions in a new district created without race-based sorting. *Id.* at 1471. Additionally, a state's action must be narrowly tailored to remedy the anticipated harm and not go beyond that goal. *See Shaw I*, 509 U.S. at 655, 113 S. Ct. 2816 (stating that a reapportionment plan would not be narrowly tailored if it went beyond the goal of avoiding retrogression).

There is overwhelming, likely undisputed, direct evidence that race is the predominant motivating factor in drawing this district. On September 21, 2021, in anticipation of their November 15, 2021, deadline, all four Commissioners proposed legislative district maps. Not a single map contained either district proposed by the Assessment. On October 19, 2021, Dr Matt Barreto released the Assessment. Three days later, both the Democratic Commissioners stated their intent to provide new maps in response to the Assessment. Commissioner Walkinshaw stated, "I think for me, as the first ever Latino commissioner, it has been extremely important for me to lift up and elevate Hispanic voters, and undo patterns of racially polarized voting, particularly in the Yakima Valley." Melissa Santos, *Proposed WA redistricting maps may violate Voting Rights Act*, Crosscut (Oct. 21, 2021, 11:16 AM), https://crosscut.com/politics/2021/10/proposed-wa-redistricting-maps-may-violate-voting-rights-act. Both Commissioners proposed revised maps on October 25, 2021, including the Assessment's "Yakama Reservation" district without any major alterations to its boundaries.

Upon issuing revised maps, the Washington State Senate Democrats publicly stated that any new map "must include a majority-Hispanic district in the Yakima Valley or face a likely successful lawsuit in federal court for non-compliance with the federal Voting Rights Act[]." Senate Democrats, *Walkinshaw releases new VRA-Compliant Legislative map,* (Oct. 26. 21), https://senatedemocrats.wa.gov/blog/2021/10/26/following-new-analysis-commissioner-walkinshaw-releases-new-legislative-map-compliant-with-voting-rights-act/. Because race is the predominant motivating factor for this district, a Court will likely review the decision to draw this district with strict scrutiny.

As an initial matter, the speed with which Commissioners moved to draw a district solely on the basis of race is concerning. The Commissioners have not asked any questions of the Assessment's assertions, data, or proposals. As Justice Alito stated in *Abbott*, "one group's demands alone cannot be enough" because that group "may come to have an overly expansive understanding of what § 2 demands." 138 S. Ct at 2334, 201 L. Ed. 2d 714. It is beyond the purview of this memo to conduct statistical analysis, but there are at least four major question marks that the Commission has not assessed.

First, the approximate 60% minority CVAP threshold for the majority-minority district is unexplained. Both districts presented by the Assessment set an approximate 60% minority CVAP threshold. In the §5 context, the Supreme Court has been skeptical of percentage thresholds. *Compare Bethune-Hill*, 137 S.Ct. at 802, 197 L. Ed. 2d 85 (upholding a percentage threshold for one district where the legislature had a good reason to be fear retrogression if the black voting age population fell below 55%), *with Alabama Legislative Black Caucus*, 575 U.S. at 279, 135 S. Ct. 1257 (holding the legislature's plan was not narrowly tailored because its goal was to maintain a minority population percentage rather than ask what percentage was needed to maintain a minority's ability to elect candidates of its choice). The Assessment claims that not drawing this district will violate § 2's vote dilution prohibition. Yet, there has been no analysis that a 60% minority CVAP is needed to provide Latino voters a functional majority. In fact, Commissioner Walkinshaw's first proposed district would have voted for President Biden by a 6,299 margin despite a 43.2% Latino CVAP. The adoptions of an approximate 60% minority CVAP threshold without more analysis and questioning is arbitrary and not narrowly tailored.

Second, the "Yakama Reservation" district's boundaries are explicitly drawn to include both Latino and Native American voters; yet there has been no analysis presented for the combined bloc of Native Americans and Latino voters in the five-county region. The Assessment presented two options for a majority-minority district: (1)"Yakima-Columbia River Valley" with a 60% Latino CVAP; and (2) "Yakama Reservation" with a 52% Latino CVAP plus a 7.8% Native American CVAP. The Democratic Commissioners' current proposals include the "Yakama Reservation" district: combining Latino and Native American voters to get to that approximate 60% minority CVAP threshold. Even if there is good reason to believe there would be a § 2 violation as to Latino voters, that does not mean that the State can sort Native American voters into the district. Yet, there is no analysis regarding the combination of Latino and Native American voters. And while keeping the Yakama Reservation in one district is laudable, putting the Yakama Reservation in this proposed majority-minority district is neither a race-neutral decision nor a narrowly tailored remedy for any alleged § 2 violation suffered by Latino voters.

Third, the Assessment relied upon data from the 2019 American Community Survey (ACS) 1-year data set instead of the more recent and comprehensive 2020 Census data set. Generally, the ACS's goal is measuring changes in social and economic characteristics; the 2020 Census's goal is to provide counts of people for congressional apportionment. To that end, while the 2020 Census is a comprehensive assessment from all individuals in the United States, the 2019 ACS 1-year data derive from a sample of the population. The two data sets contain differences on highly relevant numbers to the § 2 analysis. Compared to the 2019 ACS 1-year data, 2020 Census data shows a higher Latino, and lower White, population in Yakima County. For example, the 2020 Census shows a Yakima County Latino population of 130,049 compared to 125,816 presented by the 2019 ACS 1-Year survey. The contours of the proposed majority-minority map depend on population numbers, which in turn depend on what dataset is used. But there has been no discussion as to why the "Yakama Reservation" district boundaries were not drawn using the 2020 Census data or what margins of error were accounted for when using the less comprehensive 2019 ACS 1-Year.

Fourth, the Assessment lacks the type of detailed local analysis required to adjudicate fact-dependent § 2 cases. The Assessment analyzes primarily statewide elections, but makes no showing whether those elections are consistent across all five counties in other elections. For example, the "Yakama Reservation" district includes current Legislative District 13, but there is no assessment whether Latino voters in Legislative District 13 vote in a bloc against Representative Ybarra. If Legislative District 13 voters do not suffer a § 2 violation, then it is unclear how including those voters in this district is narrowly tailored. This is just one example of the local analysis that the Commissioners lack to form a good reason to believe the State will face § 2 liability unless this district is drawn. And no doubt an expert could raise a number of additional questions about the assessment's data, or lack thereof; but that critical assessment has not been conducted by the Commission.

(2) The Assessment Does Not Demonstrate the Existence of a Geographically Compact Minority Group

A state cannot remedy a § 2 violation through the creation of a noncompact district. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 431, 126 S. Ct. 2594 (2006) (citing *Shaw II*, 517 U.S. at 916, 116 S. Ct. 1894). The Supreme Court has identified two critical concerns with relaxing the geographic compactness inquiry. First, there would be "serious constitutional concerns" by expanding the geographic area and forcing courts to predict political variables through race-based assumptions. *Bartlett*, 556 U.S. at 13, 129 S. Ct. 1231. Second, relaxing the geographic compactness inquiry creates the risk of substantially increasing the number of mandatory districts drawn predominantly with race in mind. *Id.* at 17 (quotations and citation omitted).

When analyzing whether a § 2 district is compact, a court will ask if "the proposed minority district reasonably comports with traditional districting principles such as contiguousness, population equality, maintaining communities of interest, respecting traditional boundaries, and providing protection to incumbents." *Montes v. City of Yakima*, 40 F.Supp.3d. 1377, 1392-93 (E.D.Wash. 2014). Courts consider the shape of the district in determining compactness. *See Shaw II*, 517 U.S. at 905-06, 116 S. Ct. 1894; *Cf. Kilbury v. Franklin Cty. ex rel. Bd. Of Cty.*

Com'rs, 151 Wash. 2d 552, 564, 90 P.3d 1071 (2004) ("as compact as possible does not mean as small in size as possible, but rather as regular in shape as possible.").

Both proposed districts have strained, non-compact shapes. The "Yakima-Columbia River Valley" district's shape is designed to capture three majority Latino populations: Yakima to Grandview along I82, Mattawa, and East Pasco. In order to include these Latino voters and exclude White voters, the district contains contortions on every boundary and contains three finger-like extensions. The shape cannot be explained by natural or artificial boundaries; evidenced by the fact it takes slices of four separate counties. The "Yakama Reservation" district, presently adopted by two Commissioners, is similarly strained. It contains large indents into both its northern and southern borders, such that it is essentially two districts separated by the Hanford Nuclear Site. The district's western portion is designed to include the Yakama Reservation, Yakima, and communities along I82; the district's north-east portion is designed to include Mattawa to Othello. Like the "Yakima-Columbia River" district, it contains a number of finger-like extensions into Othello, Wanapum Dam, and Yakima. The district is designed to avoid the most convenient route between Yakima and Mattawa; and instead adjoins the two districts by the Hanford Site. Again, this district's shape cannot be explained by natural or artificial boundaries: it slices from many separate counties, but fully incorporates no single county.

Both districts' strained shapes negatively impact surrounding districts. Proposed maps that incorporate the "Yakama Reservation" district show its implications on the Central and Eastern Washington area. For example, to accommodate this district, both Democrat Commissioners proposed maps that split the former Legislative District 13 between five other districts. Whereas Grant County is currently entirely incorporated into Legislative District 13, Commissioner Walkinshaw divides the County between four districts. These changes threaten incumbents in a number of surrounding districts. Yet, there has been no assessment whether a more narrowly tailored district can be drawn to accommodate these traditional districting principles.

Neither the "Yakima-Columbia River Valley" nor "Yakama Reservation" district can claim to maintain communities of interest. The districts divide a number of communities. The most jarring example is how both districts separate the Tri-Cities, especially Richland, from the Hanford Site. Inclusion of the Hanford Site in a majority-minority district does not seem to be necessary to remedy any § 2 violation: the 2020 Census data shows a very few Latino individuals live at the Hanford Site. As is well known, the Hanford Site is undergoing an extensive clean-up operation to remove contamination from its past nuclear operations. The Tri-Cities are located immediately down-river from the Site; and have a strong interest in its clean-up operations because they lay in the path of potential contamination. For decades this interest has been acknowledged and Richland's legislative district has included the Hanford Site. It defies traditional districting principles to strip Richland's representative from oversight of the Hanford Site. The only logical explanation for dividing the Hanford Site from Richland is that doing so makes both districts look less bizarre and non-compact. After all, the Hanford site is relatively large and sparsely populated. That cuts against the notion that either district is compact or narrowly tailored to remedy the alleged violation.

The proposed districts are prime examples of the Supreme Court's stated concern with expanding the acceptable geographic area in making a compactness determination. The two districts cross into a number of counties and cover distant rural and urban communities. Such districts will force courts to predict political variables through race-based assumptions and create the risk of substantially increasing the number of mandatory districts drawn with race in mind. *See Bartlett*, 556 U.S. at 13, 129 S. Ct. 1231. Ultimately, there has been no assessment whether the Commission can draw a compact, Democrat-leaning district in Yakima County. It appears that this is entirely possible and it must be explored prior to any decision to draw a majority-minority district.

3) The Assessment Does Not Demonstrate the Existence of a Politically Cohesive Minority Group or a Politically Cohesive Coalition of Minority Groups

The second *Gingles* requirement is the existence of a politically cohesive minority group. Minority political cohesion cannot be assumed but must be specifically proven. *E.g.*, *Growe*, 507 U.S. at 41, 113 S. Ct. 1075; *Gingles*, 478 U.S. at 46, 106 S.Ct. 2752; *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 372 (S.D.N.Y. 2004), *aff'd*, 543 U.S. 997, 125 S. Ct. 627 (2004). That burden is heavier when the proposed minority group is combined with an additional minority group. Assuming without deciding that a minority-coalition can satisfy *Gingles*, the "Supreme Court has instructed that, when voting rights claims are based on a combination of distinct ethnic and language minority groups, 'proof of minority political cohesion is all the more essential' and must be held to a 'higher-than-usual' standard." *Rodriguez*, 308 F. Supp. 2d at 443 (quoting *Growe*, 507 U.S. at 41, 113 S. Ct. 1075).

The Assessment's main thrust is that Latino voters form a cohesive group for Democratic Party candidates generally. In making this argument, the Assessment does not analyze local elections, instead it looks at statewide elections in which Latinos voted primarily for winning candidates. While the Assessment points to *Montes* and the 2021 WVRA Yakima County Settlement as evidence that Latino voters form a cohesive group (and that there is racially polarized voting), both proposed districts extend well beyond the Yakima County boundaries. Political cohesion cannot be assumed. There is no questioning whether these statewide elections are representative of local elections. There has been no showing that Latino voters in rural areas share preferences with Latino voters in urban areas in different counties. And there has been no evidence presented that Latino voters in the different legislative districts, including Representative Ybarra's district, all form one cohesive group.

To compound the problem of a lack of analysis, the "Yakama Reservation" district proposes a coalition of Latino and Native Americans to meet an approximate 60% minority CVAP threshold. A district drawn with the intent of combining two different minority groups –Latino and Native American voters – requires a heightened showing that Native American voters will form a cohesive group with Latino voters in the five-county area. *See Rodriguez*, 308 F. Supp. 2d at 421 ("plaintiffs have not proven that Hispanics and blacks in the Bronx have 'worked together and formed political coalitions'") (quoting *Concerned Citizens of Hardee Cty. v. Hardee Cty. Bd. Of Comm'rs*, 906 F.2d 524, 527 (11th Cir. 1990)). The Assessment does not address this coalition. And the Commission has not conducted additional analysis regarding whether Native American voters will form a coalition with Latino voters across the five-county region.

At present there cannot be a good reason to believe the second *Gingles* precondition has been met where the Commission has not conducted analysis, let alone particularized analysis, of the issue.

4) The Analysis Shows That a Democrat-Leaning District Can Be Drawn in the Region Using Traditional Race-Neutral Districting Principles

The Assessment suggests the third *Gingles* precondition is met if there is "racially polarized voting." However, the appropriate question is not whether there is statistically significant racial bloc voting, but whether there is "legally significant racial bloc voting." *Covington v. North Carolina*, 316 F.R.D. 117, 170-71 (M.D.N.C. 2016), *aff'd*, 137 S. Ct. 2211, 198 L. Ed. 2d 655 (2017). Legally significant racial bloc voting occurs when the white majority group votes as a bloc "usually to defeat the minority's preferred candidate." *Growe*, 507 U.S. at 40, 113 S. Ct. 1075 (quoting *Gingles*, 478 U.S. at 50–51, 106 S. Ct. 2752). This analysis is both forward and backward looking. If either proposed district is drawn, the State will only survive strict scrutiny if it could show legally significant white bloc voting in a new, race-neutral district. *Cooper*, 137 S. Ct. at 1471, 197 L. Ed. 2d 837.

This proposed district will likely not survive strict scrutiny because a race-neutral, Democrat-leaning district can readily be drawn in Yakima County. The Assessment's message is clear that Latinos' preferred candidates are Democratic Party candidates generally. There is no indication or analysis that there are specific Latino-preferred candidates within the Democratic Party, or that there are local-preferred candidates that are not making it out of the Democratic Party primaries. Thus, if a new district in Yakima County, drawn by traditional districting principles, leans Democrat then that will negate legally significant racial bloc voting. Both Republican Commissioners believe they have already proposed competitive, race-neutral districts in the region; and, according to the Assessment, both Democrat Commissioners have already proposed race-neutral, Democrat districts. For example, Commissioner Walkinshaw's district would have had a 6,000 margin in favor of President Biden in the 2020 General election and the Assessment gives it a "Predict Dem" score of 52%. Because a Democratic district can be drawn in a race-neutral fashion, the third *Gingles* precondition cannot be met.

Additionally, the Assessment's data does not bear on the question of whether there is legally significant racial bloc voting. It references a number of elections, mostly by the Latino-preferred candidates. There is no analysis of legally significant bloc voting across the five-county region. Moreover, the data highlight racially polarized voting in homogenous precincts. There is no analysis at the precinct level, especially whether the homogenous precincts are representative of heterogenous precincts. The Commission cannot have strong reason to believe § 2 will be violated based on this brief analysis.

(5) There Has Been No Analysis of the Totality of the Circumstances Consideration

If a §2 plaintiff meets its burden of showing the presence of all three *Gingles* preconditions, a Court proceeds with a totality of the circumstances analysis. A plaintiff succeeds in making this showing if the evidence shows that "the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected class] . . . 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." *Gingles*, 478 U.S. at 36, 106 S. Ct. 2752 (quoting 42 U.S.C. §1973). Courts have looked to a number of factors compiled in the Senate Judiciary Committee Majority Report that accompanied the bill.

> "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.
>
> "Additional factors that in some cases have had probative value as part of plaintiffs' evidence to establish a violation are:
>
> "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.
>
> "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. at 36–37, 106 S. Ct. 2752 (quoting S.Rep., at 28–29, U.S.Code Cong. & Admin.News 1982, pp. 206–207.).

"[I]t will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to established a violation of § 2 under the totality of circumstance." *Nat'l Ass'n for Advancement of Colored People, Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp.3d 368, 378 (S.D.N.Y. 2020), *aff'd sub nom. Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021). But, § 2 does not "insulate minority candidates from defeat at the polls" and the totality of the circumstances analysis cannot merely be assumed. *Ibid*. There has been no evidence presented regarding the totality of the circumstances analysis. A number of factors weigh against creating this proposed district. For example, the Latino voters' preferred party has been entrenched in power at the state-level for quite some time. Presently, the Democratic Party controls the House, the Senate, and the Governor's Office; it also controls the Attorney General's Office. There should at least be an assessment of these factors before proposing a map based on race alone.

IV. POTENTIAL LIABILITY FROM PARTISAN GERRYMANDERING

If a majority-minority Latino district is drawn, the surrounding districts must be drawn to maintain their present incumbents to avoid engaging in unlawful partisan gerrymandering. Washington Constitution Article II, §42 bans partisan gerrymandering:"[t]he commission's plan shall not be drawn purposely to favor or discriminate against any political party or group." Washington State Statute provides the Commissioners with the appropriate factors that they must consider in redistricting, including that "[t]he commission's plan shall not be drawn purposely to favor or discriminate against any political party or group." RCW 44.05.090(5). As the Supreme Court stated, partisan gerrymandering "is incompatible with democratic principles." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506, 204 L. Ed. 2d 931 (2019) (quoting *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 576 U.S. 787, 791, 135 S.Ct. 2652, 2658 (2015)).

Presently, the Democratic Party controls the Washington State House, Senate, and Governor's Office. Power is firmly entrenched -- Washington State has not been a Republican Governor since 1985. Yet, proposed maps that include the majority-minority district go beyond accommodating the district; they actively seek to weaken surrounding Republican incumbents. Districts in Central Washington are stretched to King County, Vancouver, and Spokane. The majority using redistricting to strip the minority party of a meaningful opportunity to compete in Washington State's political process is exactly what the Washington Constitution bans. If the Commission or Legislature puts forward such a partisan map, there is a high risk that it will be challenged in Court.