

Exhibit B

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

1 elect representatives of their choice.” 52 U.S.C. § 10301(b). The essence of a § 2
2 claim, as set forth in seminal case *Thornburg v. Gingles*, 478 U.S. 30 (1986), is “that
3 a certain electoral law, practice, or structure interacts with social and historical
4 conditions to cause an inequality in the opportunities enjoyed by [minority] and
5 [majority] voters to elect their preferred representatives.” 478 U.S. at 47.
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7 On September 2, 2016, the court approved entry of the parties’ Partial Consent
8 Decree wherein Pasco admitted liability and consented to the court’s finding that the
9 City’s existing at-large method of electing all its members to the Pasco City Council
10 violated § 2 of the VRA by diluting the electoral power of Pasco’s Latino voters.
11 (ECF No. 16 at 10). The Partial Consent Decree fully resolves the issue of liability.
12 The court enjoined the Defendants from conducting future elections under that
13 system “or any other election method that violates Section 2 of the Voting Rights
14 Act.” (ECF No. 16 at 12). The Partial Consent Decree did not mandate a particular
15 remedy.
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17 Now pending are the parties’ proposed remedial plans (filed as cross-motions at
18 ECF Nos. 21, 25) after they failed to reach agreement on this aspect of the case. On
19 December 7, 2016, the court held oral argument. Present on behalf of Plaintiff were
20 Brendan Monahan, Emily Chiang, La Rond Baker, Gregory Landis, and Cristin
21 Aragon. Present on behalf of Defendants, City of Pasco were John Safarli, Leland
22 Kerr, and Casey Bruner.
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1 The parties' motions are supported by declarations, reports, and data of highly
2 experienced demographic and redistricting experts: Richard L. Engstrom, Ph.D.
3 (ECF Nos. 23, 29); William S. Cooper (ECF Nos. 24, 28, 32); and Peter A. Morrison,
4 Ph.D. (ECF No. 26, Ex. 13; ECF Nos. 33, Exs. 1 and 2).

5 There are three electoral formats commonly used by municipal governments in
6 the United States: at-large systems, single-member district systems, and "mixed" or
7 "hybrid" systems. *See Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 981 F.Supp.
8 751, 757 (E.D.N.Y. 1997). "In an at-large system, all members of the legislative
9 body are elected from a district that includes all members of the electorate. In a
10 single-member district system, the legislators are elected from compact, contiguous
11 and essentially equipopulous districts. In a mixed system, some members of the
12 legislature are elected from single-member districts, while other members, usually a
13 smaller number, are elected at large. In a typical mixed system, the districts cover
14 the entire municipality. Thus, each voter is represented both by one or more
15 legislators elected from a district and one or more legislators elected at large." *Id.*

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

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

5 **A. Pasco's Demographics**

6 **1. Latino Population**

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8 The City of Pasco, is located in south central Washington and is one of three
9 cities that make up the Tri-Cities region. Its geography encompasses approximately
10 38.7 square miles. (ECF No. 28 at 2). Pasco's population nearly doubled between
11 2000 and 2010. (ECF No. 24 at 4). Its adjusted population based on the 2010
12 decennial U.S. Census is 62,452. *Id.* More recent population estimates of the
13 Washington Office of Financial Management indicate the population is 70,560.
14 (ECF No. 24 at 6). According to the 2010 Census, the City is 54.02%² Latino and
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18 ¹ Plaintiff objects to this data on the sole basis that it was submitted for the first
19 time along with Defendants' Reply. (ECF No. 34). The court declines to strike the
20 data or that portion of the Reply relying upon this new information absent evidence
21 of prejudice.

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

1 Given that a significant portion of the City's population is Latino and young,
2 trends show and experts forecast the LCVAP to increase in the coming years. (ECF
3 No. 33, Ex. at 2). Mr. Morrison predicts the LCVAP is likely to exceed 40% by
4 2021. *Id.*

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

6 Pasco is a non-charter code city with a council-manager form of government.
7 (ECF No. 25 at 3). The Mayor and Mayor Pro Tempore are chosen by
8 councilmembers. (ECF No. 25 at 5). While the Mayor presides over Council
9 meetings, the role is "for ceremonial purposes." *Id.* (quoting Wash.Rev.Code §
10 35A.13.030).
11

12 The Pasco City Council consists of seven members. When the last City Council
13 election was held, the City was utilizing an at-large, numbered "place system" for
14 electing councilmembers to serve staggered four-year terms. (ECF No. 31 at 10).
15 Five of the seven positions (identified as Positions 1 through 5) were tied to
16 geographical residency districts. Candidates for Positions 1 through 5 were required
17 to reside in their respective geographical residency districts. In the August primary,
18 voters narrowed the field of candidates for the district in which they resided. The top
19 two candidates in each district proceeded in the general election, which was
20 conducted at-large and the candidate receiving a majority of votes won. Positions 6
21 and 7 were both at-large positions, in that voters citywide narrowed the field of
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1 candidates for each seat in the primary and then voted for one of two candidates for
2 each position in the general election. Washington state law requires that “all voters
3 of a code city be permitted to vote in each city council race at the general election.”
4 Wash. AGO 2016 NO. 1 (Wash.A.G.), 2016 WL 439289 (Jan. 28, 2016)(discussing
5 Wash.Rev.Code §35A.12.180).³ The key features of Pasco’s election scheme were
6 the combination of: 1) a numbered place system; 2) a top two primary system; and
7 3) at-large general elections for every seat with a majority vote rule. *See* ECF No.
8 23 at ¶ 10.

9
10 In 2015, Plaintiff Brenda Glatt, a Latina, was a candidate for Pasco City Council
11 at-large Position 6. In the general election, she was defeated decisively by non-
12 Latino candidate Matt Watkins despite her strong support from Latino voters. (ECF
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14
15 ³ The statute provides that voters of the “entire city may vote at the general election
16 to elect a councilmember” of a district, “unless the city had prior to January 1, 1994,
17 limited the voting in the general election” to voters residing in the district.
18 Wash.Rev.Code §35A.12.180. The role the Supremacy Clause of Article VI of the
19 U.S. Constitution plays herein is acknowledged by the parties and this court. *See*
20 *Cleveland Cnty. Ass'n for Gov't by the People v. Cleveland Cnty. Bd. of Comm'rs*,
21 142 F.3d 468, 477 (D.C.Cir.1998) (per curiam) (“[I]f a violation of federal law
22 necessitates a remedy barred by state law, the state law must give way; if no such
23 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

1 The Partial Consent Decree includes key concessions establishing the three
2 *Gingles* preconditions for a violation of § 2, which are: (1) the minority group is
3 sufficiently large and geographically compact to constitute a majority in a single-
4 member district, (2) the minority group is politically cohesive, and (3) the majority
5 group votes sufficiently as a bloc⁴ to enable it, in the absence of special
6 circumstances, “usually to defeat the minority's preferred candidate.” *Thornburg v.*
7 *Gingles*, 478 U.S. 30, 50–51 (1986). Specifically, the Partial Consent Decree states:

9 (12)...Pasco’s large Latino population is sufficiently numerous and compact to
10 form a majority in at least one single-member district, is political[ly] cohesive,
11 and the non-Latino majority votes sufficiently as a block to defeat a Latino
12 preferred candidate.

13

14 (17) The majority of voters in Pasco are white and have historically engaged in
15 bloc voting favoring non-Latino candidates....

16 (18) There is a pattern of racially polarized voting in the City of Pasco City
17 Council elections. The voting patterns and the presently mandated at-large
18 general election of all City Council candidates make it very difficult for the
19 Latino community to elect candidates of their choice. Although other minority
20 candidates have been elected to the City Council, as a result of racially polarized
21 bloc voting, no Latino candidate has ever won an opposed election to the Pasco
22 City Council. The first Latina to serve on the City Council was Luisa Torres. She
23 was appointed to the Council in 1989. Luisa ran for election in 1989 but was
24 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).

1 election were both defeated in the November 2015 general election.
2 (ECF No. 16 at 5-8).

3 In conceding liability, Pasco also concedes there is “sufficient evidence” to
4 conclude that “based on the totality of circumstances,” the challenged electoral
5 process impermissibly impairs the minority group's ability to elect representatives
6 of its choice. *Gingles*, 478 U.S. at 44–45; *see also Ruiz v. City of Santa Maria*, 160
7 F.3d 543, 550 (9th Cir. 1998) (adopting the *Gingles* two-step analysis). Specifically,
8 the Partial Consent Decree states as follows:
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10 (22)...[T]here is sufficient evidence of disparities to show inequality in
11 opportunities between the white and Latino populations and that the existing at-
12 large election system for the Pasco City Council has excluded Latinos from
13 meaningfully participating in the political process and diluted their vote such that
14 Latinos are unable to elect candidates of their choice to the City Council...In
15 order to remedy the City of Pasco’s Section 2 violation, the City must adopt a
16 new election system.

17 (ECF No. 16 at 8).

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

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

1 Ex. 10). Under this plan, six of the councilmembers would be elected by the voters
2 in each of the City's six "single-member districts" ("SMD"); a seventh seat would
3 be elected at-large. The geographic residency districts divide the entire territory
4 within Pasco city limits into six instead of five geographic districts. Three districts
5 (Districts 1, 2 and 6) are majority-minority districts in which Latinos constitute more
6 than 50% of that district's eligible and registered voters. (ECF No. 26, Ex. 13 at 2;
7 ECF No. 33 at 5; ECF No. 33, Ex. 1 at 4). The new district boundaries align with
8 58 out of 67 existing precincts. (ECF No. 33, Ex. 2 at 4). The City's map and "Table
9 1" of demographic data (based upon the 2010-2014 5-year ACS estimates) are
10 reproduced in Appendix A attached to this decision.
11

12 The Latino share of eligible voters based upon figures from the 2010-2014 5-
13 year ACS estimate for Position 1 was 54.0%; Position 2, 52.3%; Position 3, 27.3%;
14 Position 4, 23.6%; Position 5, 13.0%; and Position 6, 56.0%. (ECF No. 26, Ex. 13
15 at 5). The parties agree that the City's plan provides three majority-minority
16 "opportunity" districts (Positions 1, 2, and 6), and at least one district in which
17 Latinos are not a majority but have a Latino voting age population exceeding 25%.
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19 The court notes that Plaintiff has not had the opportunity to respond or offer
20 their own expert analysis of Mr. Morrison's statistical analysis of current registered
21 voters by District contained in "Table 2" at ECF No. 33, Ex. 1, based upon 2016
22 data from the Franklin County Auditor's Office. (ECF No. 33, Ex. 1)(Morrison First
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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

1 therefore one of our most fundamental rights. *See Reynolds v. Sims*, 377 U.S. 533,
2 562 (1964) (describing the right to exercise the franchise in a free and unimpaired
3 manner as “preservative of other basic civil and political rights”). Although great
4 progress has been made, “voting discrimination still exists; no one doubts that,” and
5 § 2 of the Voting Rights Act remains a crucial “permanent, nationwide ban,” *Shelby*
6 *Cnty. v. Holder*, 133 S.Ct. 2612, 2619 (2013), on “even the most subtle forms of
7 discrimination,” *Chisom v. Roemer*, 501 U.S. 380, 406 (1991) (Scalia, J., dissenting).
8 Federal courts have a vital role in protecting the right “to participate equally in the
9 political process.” *Gingles*, 478 U.S. at 80. Though vital, this role is limited. The
10 following key principles guide the court’s analysis and decision.
11

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

14 Where, as here, a violation of § 2 has been established, “courts should make an
15 affirmative effort to fashion an appropriate remedy for that violation.” *Monroe v.*
16 *City of Woodville, Mississippi*, 819 F.2d 507, 511 n. 2 (5th Cir.1987) (per curiam),
17 *cert. denied*, 484 U.S. 1042 (1988); *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1022
18 (8th Cir. 2006)(the district court's “first and foremost obligation...is to correct the
19 Section 2 violation.”). The legislative history of the VRA states:
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21 The basic principle of equity that the remedy fashioned must be commensurate
22 with the right that has been violated provides adequate assurance, without
23 disturbing the prior case law or prescribing in the statute mechanistic rules for
24 formulating remedies in cases which necessarily depend upon widely varied
proof and local circumstances. The court should exercise its traditional equitable

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

3 S.Rep. No. 417 at 31, 97th Cong., 2d Sess. 44, reprinted in 1982 U.S.Code Cong. &
4 Admin.News at 208 (footnote omitted). In sum, “the [district] court has not merely
5 the power but the duty to render a decree which will so far as possible eliminate the
6 discriminatory effects of the past as well as bar like discrimination in the future.”
7 *Ketchum v. Byrne*, 740 F.2d 1398, 1412 (7th Cir.1984) (quoting *Louisiana v. United*
8 *States*, 380 U.S. 145, 154 (1965)), cert. denied sub nom. *City Council v. Ketchum*,
9 471 U.S. 1135 (1985); see also, *Dillard v. Crenshaw Cnty.*, 831 F.2d 246, 252 (11th
10 Cir.1987)(A court “cannot authorize an element of an election proposal that will not
11 with certitude completely remedy the Section 2 violation.”).

12
13 A complete § 2 remedy does not mean that a remedial plan must guarantee
14 electoral success for Latinos. The plan must provide “a genuine opportunity ‘to
15 exercise an electoral power that is commensurate with its population.’” *U.S. v.*
16 *Village of Port Chester*, 704 F.Supp.2d 411, 449 (S.D.N.Y. 2010) (quoting *LULAC*
17 *v. Perry*, 548 U.S. 399, 428 (2006)); see also *Johnson v. De Grandy*, 512 U.S. 997,
18 1014 n.11 (1994) (“[T]he ultimate right of § 2 is equality of opportunity, not a
19 guarantee of electoral success for minority-preferred candidates of whatever race.”);
20 *Bone Shirt*, 461 F.3d at 1023 (“The defendants' argument that the remedial plan must
21 provide some sort of guarantee that Indian-preferred candidates will be elected is
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1 not persuasive; all that is required is that the remedy afford Native-Americans a
2 realistic opportunity to elect representatives of their choice.”).

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

7
8 A remedy for a § 2 violation must not itself be enacted with the discriminatory
9 intent of diluting the Latino vote. *Dillard v. Crenshaw Cnty., Ala.*, 831 F.2d 246,
10 249 (11th Cir. 1987); *Edge v. Sumter Cnty. School Dist.*, 775 F.2d 1509, 1510 (11th
11 Cir. 1985). There is no evidence the at-large election scheme here was conceived
12 as a tool of racial discrimination.⁵ *C.f., Patino v. City of Pasadena*, 2017 WL 68467
13 (S.D.Tex., January 6, 2017).

14 **B. Judicial Deference**

15
16 Where the Pasco City Council has exercised its political and policy judgment in
17 preparing and passing the Ordinance behind Defendants’ remedial scheme, the
18 proposal is properly characterized as a “legislative” plan. *See e.g., Wise v. Lipscomb*,

19
20 ⁵ Although proof of discriminatory intent is not dispositive, when it exists, it is not
21 irrelevant in assessing the totality of the circumstances. Plaintiff’s contention that
22 intent is “irrelevant” here acknowledges that there is no “concrete evidence” of
23 discriminatory intent at play in this case. (ECF No. 31 at 10).

1 437 U.S. 535, 538 (1978) (upholding system as a valid legislatively enacted plan,
2 despite the absence of an express grant of legislative power to the City Council to
3 change the election system); *Jenkins v. City of Pensacola*, 638 F.2d 1249, 1252 (5th
4 Cir. 1981)(conceding that on balance, the plan was “better viewed as a legislative
5 plan” rather than court-ordered, where the plan, which called for seven single-
6 member districts and three at-large districts, was formally adopted by ordinance after
7 liability was established and the court directed the parties to submit proposals).
8 Plaintiff makes no argument to the contrary.

10 Federal courts are reluctant to interfere with legislative decisions of governing
11 bodies especially when they concern issues as sensitive as those regarding who
12 votes, how they vote, and what districts they vote in. The Supreme Court has
13 cautioned that “redistricting and reapportioning legislative bodies is a legislative task
14 which the federal courts should make every effort not to pre-empt.” *Wise v.*
15 *Lipscomb*, 437 U.S. 535, 539 (1978) (plurality) (White, J.); *see also*, *Connor v.*
16 *Finch*, 431 U.S. 407, 414–15 (1977); *Chapman v. Meier*, 420 U.S. 1, 27 (1975);
17 *White v. Weiser*, 412 U.S. 783, 794–95 (1973); *Upham v. Seamon*, 456 U.S. 37, 39
18 (1982).

20 The role of the court in fashioning a remedy for a violation of the Constitution
21 was delineated by the Supreme Court in *Wise v. Lipscomb*, where the court said “it
22 is ... appropriate, whenever practicable, to afford a reasonable opportunity for the
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1 legislature to meet constitutional requirements by adopting a substitute measure
2 rather than for the federal court to devise and order into effect its own plan.” *Wise*,
3 437 U.S. at 540; *see also United States v. Brown*, 561 F.3d 420, 435 (5th Cir. 2009)
4 (“[A]t least in redistricting cases, district courts must offer governing bodies the first
5 pass at devising a remedy.”). This court’s role is similar in fashioning a remedy for
6 a violation of the Voting Rights Act. Where a legislative body proposes a plan which
7 completely remedies the § 2 violation and is not unconstitutional or otherwise illegal,
8 then that plan “will ... be the governing law,” even if it is not the plan the court would
9 have chosen. *Wise*, 437 U.S. at 540; *see also, Upham v. Seamon*, 456 U.S. 37, 39
10 (1982)(“a court must defer to legislative judgments on reapportionment as much as
11 possible”); *Perry v. Perez*, 132 S.Ct. 934, 941 (2012)(the legislative plan “serves as
12 a starting point for the district court.”); *Williams v. City of Texarkana, Ark.*, 32 F.3d
13 1265, 1268 (8th Cir. 1994)(“If an appropriate legislative body offers a remedial plan,
14 the court must defer to the proposed plan unless the plan does not completely remedy
15 the violation or the proposed plan itself constitutes a section two violation.”);
16 *Seastrunk v. Burns*, 772 F.2d 143, 151 (5th Cir. 1985)(“Thus, even where a legislative
17 choice of policy is perceived to have been unwise, or simply not the optimum choice,
18 absent a choice that is either unconstitutional or otherwise illegal under federal law,
19 federal courts must defer to that legislative judgment.”); *McGhee v. Granville Cnty.*,
20 *N.C.*, 860 F.2d 110, 115 (4th Cir. 1988) (“[A] reviewing court must ... accord great
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1 deference to legislative judgments about the exact nature and scope of the proposed
2 remedy...”); *Dickinson v. Indiana State Election Bd.*, 933 F.2d 497, 501 n. 5 (7th Cir.
3 1991) (the court “must, wherever practicable, afford the jurisdiction an opportunity
4 to remedy the violation first, ... with deference afforded the jurisdiction's plan if it
5 provides a full, legally acceptable remedy.... But if the jurisdiction fails to remedy
6 completely the violation or if a proposed remedial plan itself constitutes a § 2
7 violation, the court must itself take measures to remedy the violation.”); *Tallahassee*
8 *Branch of NAACP v. Leon Cnty., Fla.*, 827 F.2d 1436, 1438 (11th Cir. 1987)
9 (“[F]ederal courts must defer to the judgment of a state legislative body in the area
10 of reapportionment. Principles of federalism and common sense mandate deference
11 to a plan which has been legislatively enacted.”).

12
13 Plaintiff suggests the applicable legal standard in this case is the more stringent
14 one where “[t]he Supreme Court has directed the use of single-member districts to
15 remedy Section 2 violations unless there are compelling reasons not to use them.”⁶
16 (ECF No. 21 at 8-9)(*quoting Montes v. City of Yakima*, 2015 WL 11120964, at *9
17 (E.D.Wash. 2015)). However, the broad reach of the Voting Rights Act supports a
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20 ⁶ The quoted reference from *Montes*, in its entirety, reads as follows: “*When a*
21 *district court is required to fashion a remedy*, the Supreme Court has directed the
22 use of single-member districts unless there are compelling reasons not to use
23 them.” 2015 WL 11120964, at *9 (E.D.Wash. 2015)(emphasis added).
24

1 broad view of permissible remedies. To be clear, the Supreme Court has not
2 mandated single-member districts in all instances. It has stated “a *court drawn plan*
3 should prefer single member districts over multi-member districts, absent persuasive
4 justification to the contrary.” *Wise v. Lipscomb*, 437 U.S. 535, 540 (1978)(emphasis
5 added). Supreme Court precedent does not dictate remedial preferences for
6 legislative bodies; it requires deference to them so long as they meet the special
7 standards that are applicable.
8

9 **C. Preemption of State Law**

10 In reviewing a remedial plan, “a district court should not preempt the legislative
11 task nor intrude upon state policy any more than necessary.” *Upham v. Seamon*, 456
12 U.S. 37, 41–42 (1982) (per curiam) (*quoting White v. Weiser*, 412 U.S. 783, 794–
13 795 (1973)). This consideration is relevant here, where, state law proscribes at-large
14 general elections. Accordingly, a legislative remedy entitled to deference must not
15 *unnecessarily* conflict with this legislative judgment of the state of Washington. *See*
16 *e.g., Large v. Fremont Cnty., Wyo.*, 670 F.3d 1133 (10th Cir. 2012)(emphasis
17 added)(affirming rejection of deference to locally-devised plan where County’s
18 desired plan unnecessarily conflicted with Wyoming state law).
19

20 **D. Totality of the Circumstances**

21 As stated above, the court must consider whether Defendants’ remedial plan is
22 legally unacceptable because it fails to remedy the particular dilution violation or
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24

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

- 6 (1) “the extent of any history of official discrimination in the state or political
7 subdivision that touched the right of the members of the minority group to
8 register, to vote, or otherwise to participate in the democratic process;”
- 9 (2) “the extent to which voting in the elections of the state or political
10 subdivision is racially polarized;”
- 11 (3) “the extent to which the state or political subdivision has used unusually
12 large election districts, majority vote requirements, anti-single shot
13 provisions, or other voting practices or procedures that may enhance the
14 opportunity for discrimination against the minority group;”
- 15 (4) “if there is a candidate slating process, whether the members of the
16 minority group have been denied access to that process;”
- 17 (5) “the extent to which members of the minority group in the state or political
18 subdivision bear the effects of discrimination in such areas as education,
19 employment and health, which hinder their ability to participate
20 effectively in the political process;”
- 21 (6) “whether political campaigns have been characterized by overt or subtle
22 racial appeals;”
- 23 (7) “the extent to which members of the minority group have been elected to
24 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

1 Report contained in bill amending Voting Rights Act).

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

10 **E. At-Large Plans are not Per Se Illegal**

11 Both parties acknowledge that at-large plans are not per se unlawful. *Gingles*,
12 478 U.S. at 46 (“[E]lectoral devices, such as at-large elections, may not be
13 considered per se violative of § 2. Plaintiffs must demonstrate that, under the totality
14 of the circumstances, the devices result in unequal access to the electoral process.”).
15 “At-large procedures that are discriminatory in the context of one election scheme
16 are not necessarily discriminatory under another scheme.” *U.S. v. Dallas Cnty.*
17 *Comm’n, Dallas Cnty., Ala.*, 850 F.2d 1433, 1438-39 (11th Cir. 1988) (citation and
18 quotations omitted).

20 **IV. ANALYSIS – REMEDIAL PLAN**

21 The gravamen of the § 2 violation herein is that the Pasco City Council has until
22 now operated under an at-large “place system” for electing *all seven* City Council
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24

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

4 The court begins with a look at how political life in Pasco would structurally
5 differ under the City's hybrid 6-1 remedial plan. First, Pasco's plan provides Latinos
6 with "rough proportionality" in their voting influence, in that it provides for three
7 majority-minority districts, instead of the former two. *See Johnson v. De Grandy*,
8 512 U.S. 997, 1019 (1994)(describing majority-minority districts as remedial
9 devices relying upon a "quintessentially race-conscious calculus aptly described as
10 the 'politics of second best.'"). Next, whereas run-off primaries (district-based for 5
11 position) combined with at-large elections previously determined all *seven* positions,
12 the 6-1 plan provides for six single-member district-based general elections, instead
13 of none. As before, Position 7 remains at-large, untied to any district and elected by
14 the citywide population. Pasco residents would have the opportunity to run or vote
15 for just two positions on the Council, instead of all seven under the former election
16 scheme, or just one under Plaintiff's proposal. Thus, the new election scheme retains
17 its use of numbered positions, a top-two primary, and majority vote general
18 elections, but limits their application to specifically drawn districts for all but one
19 seat.
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23 The court's task is to determine whether, under the totality of the circumstances
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1 present in Pasco, this combination of single district elections and a single at-large
2 position, viewed as a whole (and not simply focusing on the one at-large seat), offers
3 a complete remedy and provides undiluted opportunity for Latino citizens to
4 participate in the political process and to elect candidates of their choice.

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

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

2 **A. Proportionality**

3 Defendants emphasize that the City's remedial plan has reconfigured the
4 residency districts to achieve "rough proportionality," where Latinos are a majority
5 of the registered and eligible voting populations in three districts (or 42.85% of the
6 total seats). This is a higher proportion than the Latino share of the citywide voting
7 age population, 38.5%. The Supreme Court has noted that "[p]roportionality' as
8 the term is used [in the totality of circumstances analysis] links the number of
9 majority-minority voting districts to minority members' share of the relevant
10 population." *Johnson v. De Grandy*, 512 U.S. 997, 1014 n.11 (1994).
11 Proportionality has evolved from relevant evidence for liability determinations in §
12 2 cases, to a convenient, frequently used redistricting tool aimed to redress vote
13 dilution. Both proposals before the court recognize the creation of three majority-
14 minority districts provides Latinos with a realistic opportunity to elect
15 representatives of their choice. This is "obviously an indication that minority voters
16 have an equal opportunity, in spite of racial polarization, 'to participate in the
17 political process and elect representatives of their choice.'" *De Grandy*, 512 U.S. at
18 1020.

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22 Nevertheless, the Supreme Court has admonished that while proportionality is
23 always a relevant factor in the totality of the circumstances inquiry, the court is not
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1 to place undue emphasis on it. *LULAC v. Perry*, 548 U.S. 399, 436 (2006). This is
2 because there is no general requirement that all remedies include rough
3 proportionality (although the facts may dictate it, as they do here), proportionality
4 may not be used as a safe harbor, and it is “not to be pursued at the cost of fracturing
5 effective coalitional districts.” *Covington v. North Carolina*, 316 F.R.D. 117, 133
6 (M.D.N.C. Aug. 11, 2016)(appeal pending); *see also*, *U.S. v. Euclid City School Bd.*,
7 632 F.Supp.2d 740, 753 (N.D. Ohio 2009) (rejecting assertion that a remedy must
8 result in roughly proportional representation, as “[s]uch a contention confuses the
9 use of proportionality as one tool through which a reviewing court determines the
10 possible existence of vote dilution on the one hand, with a guarantee of proportional
11 representation on the other ... [t]he former is common sense, the latter is prohibited
12 by statute.”).

13
14
15 The degree of value assigned to proportionality may vary with the facts.
16 Undoubtedly, Pasco has considered its neighbor’s experience in devising a remedy
17 with proportionality in this case. In *Montes v. City of Yakima*, the mechanism
18 diluting the Latino vote was identical to that in this case: a numbered place system
19 with an at-large “city-wide majority takes all election” for all seven city council
20 seats. 2015 WL 11120964, *2 (E.D.Wash. 2015). The City of Yakima had proposed
21 a remedial electoral system that would include five single-member district positions
22 and two at-large positions. *Id.* at *2. Under the proposal, the two at-large positions
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1 would be filled in a single election by way of “limited voting” and without a primary.
2 “Instead, each candidate who filed for office would appear on a single-ballot at the
3 general election,” and “each voter in the City would cast a single vote for any of the
4 candidates listed.” *Id.* The two candidates garnering the most votes would be
5 elected. *Id.* The court concluded the City’s proposal was not entitled to deference
6 as it was neither “effective” nor a “full” remedy for several reasons. First, Yakima’s
7 proposal posed unnecessary conflicts with state law mandating primaries. *Id.* at *5-
8 *7. Second, it failed to provide rough proportionality.⁷ *Id.* at *8. These facts
9 distinguish this case from *Montes* and other cases⁸ Plaintiff cites in a significant way.
10
11

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

21 ⁸ Rough proportionality was also absent in both of the rejected legislated hybrid
22 proposals in *Harvell v. Blytheville Sch. Dist. No. 5*, 126 F.3d 1038 (8th Cir. 1997)
23 and *U.S. v. Osceola Cnty, Fla*, 474 F.Supp.2d 1254, 1256 (M.D. Fla. 2006).
24

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

3 **B. Racial Polarization**

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

12 The court rejects Plaintiff's invitation to hold that the findings on liability,
13 including the existence of racially polarized voting, automatically dictates the
14 eradication of all at-large seats for the Pasco City Council. *See* ECF No. 21 at 10.
15 None of the cases cited by Plaintiff support such a bright-line rule. Such an
16 interpretation would eliminate either court or legislative discretion and simply wrap
17 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. Marengo*
18 *Cnty. Comm'n*, 643 F.Supp. 232 (S.D.Ala. 1986), *aff'd*, 811 F.2d 610 (11th
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1 Cir.1987)(stating this interpretation “would annihilate a court’s ability to examine
2 on an ad hoc basis the totality of the circumstances presented and thereby to fashion
3 an equitable remedy which does not intrude upon state policy more than necessary
4 to meet the specific constitutional violations involved.”).

5 The impressive body of voting rights jurisprudence confirms that relief against
6 racially polarized bloc voting can utilize a hybrid election scheme without violating
7 § 2. See e.g., *Solomon v. Liberty Cnty. Comm’rs*, 221 F.3d 1218, 1225 (11th Cir.
8 2000)(en banc)(finding no clear error in district court’s decision holding that
9 county’s use of at-large election scheme did not violate § 2, despite high degree of
10 racially polarized voting and “vestiges of official discrimination” in the county);
11 *Tallahassee Branch of NAACP v. Leon Cnty., Fla.*, 827 F.2d 1436 (11th Cir. 1987),
12 *cert. denied*, 488 U.S. 960 (1988) (affirming deference to legislatively adopted
13 mixed plan consisting of five single-member districts and two at large); *Calderon v.*
14 *Ross*, 584 F.2d 66 (5th Cir. 1978), *modified on rehearing*, 589 F.2d 909 (1979)
15 (approving 5-2 plan); *Paige v. Gray*, 473 F.Supp. 137, 158 (M.D.Ga.
16 1977)(approving court-devised 6-1 hybrid remedial plan for city commissioners of
17 the city of Albany, Georgia, allowing retention of a single at-large position slotted
18 for the mayor); *U.S. v. Euclid City School Bd.*, 632 F.Supp.2d. 740 (N.D.Ohio
19 2009)(approving city school board’s limited voting proposal and retention of at-large
20 elections as remedy for § 2 violation); *U.S. v. City of Euclid*, 523 F.Supp.2d 641
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(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

1 on behalf of the community as a whole).

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

12 Five futile elections is enough to establish legally significant evidence of racially
13 polarized voting in Pasco. However, minority cohesion and polarized voting was
14 not present in the three contests in 2005. For example, that year, Joe Cruz was the
15 Latino candidate for at-large Position 7. In the primary, he received 48.2% of the
16 Latino and 33.7% of the non-Latino vote. He lost the general election by just 53
17 votes, and received an estimated 40.7% of the Latino vote and 49.7% of the non-
18 Latino vote. (ECF No. 23 at ¶¶ 23-24). Other election evidence that non-Latino
19 voters are willing to support Latino candidates exists, including in the 2015 primary
20 election, where Latino candidates received 39.5% of the non-Latino vote. (ECF No.
21 23, Table).

1 Though isolated election observations do not undermine § 2 liability, the
2 evidence pertaining to polarization involves patterns that are not consistently
3 extreme (such as 90% favoring one candidate and 90% favoring another). The
4 evidence also does not suggest there are insurmountable barriers to coalition
5 building. Expert evidence on citywide and district crossover voting is somewhat
6 sparse,⁹ however, at oral argument both parties acknowledged crossover voting and
7 the potential for coalition building exists.
8

9 The evidence that voting in Pasco tends to be racially polarized, the degree of
10 political cohesion, and the evidence of crossover voting factor into the court's
11 totality of the circumstances analysis and decision.
12

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

14 In both Defendants' and Plaintiff's plans, Latinos are in the minority in four out
15 of seven positions and their "political fortunes remain tied to the interests of other
16 voters."¹⁰ *Hall v. Virginia*, 385 F.3d 421, 431 (4th Cir. 2004). Plaintiff contends the
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18 ⁹ Defendants' expert does indicate that the rationale for the 6-1 plan includes that
19 "current and anticipated future numbers assure Latinos across the city the increasing
20 prospect of forming useful coalitions with non-Latino voters to elect a fourth favored
21 candidate of choice." (ECF No. 26, Ex. 3 at ¶ 11).

22 ¹⁰ The court notes that in the three districts where Latinos are not a majority, the
23 Latino voter demographics are not insignificant fractions. *See Appendix A*. Using
24

1 “one difference” between the two proposals is that the City’s at-large position denies
2 Latinos the “meaningful opportunity to win election now” (ECF No. 31 at 9) whereas
3 a compact district would provide for the “immediate removal of dilutive effect.”
4 (ECF No. 31 at 7). If Plaintiff’s argument is that the very existence of one at-large
5 position will enable the white majority voters of Pasco to control four Council seats
6 instead of three, this proposition is akin to arguing Latino votes will be diluted unless
7 their effect is maximized. But the law does not require such a result. Dilution cannot
8 be inferred from the mere failure to guarantee minority voters maximum political
9 influence. *Johnson v. De Grandy*, 512 U.S. 997, 1017 (1994). Nothing in the Voting
10 Rights Act requires maximizing possible voting strength.
11

12 Indeed, there are no legal benchmarks for this court to compare and determine
13 how much influence a minority group should have. Even if having a smaller
14 residency district could increase a minority group's influence, it is difficult to discern
15 when an at-large component causes legal injury by diluting the minority group's
16 influence and when the minority group is merely seeking more influence than is
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19 the 2010-2014 5-year ACS estimates, which do not account for Pasco’s city limits,
20 Defendants’ expert estimates the LCVAP as: 27.3% (District 3); 23.6% (District 4);
21 and 13.0% (District 5)). Defendants estimates the current percentage of Latino
22 registered voters (based upon 2016 data) for these districts are: 41.4% (District 3),
23 40.9% (District 4), and 38.2% (District 5), (ECF No. 33, Ex. 1)
24

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

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

17 A minority group that is too small to form a majority may be able to join with
18 other voters to elect a candidate it supports. However, such groups will be obliged
19 “to pull, haul, and trade to find common political ground” with other voters in the
20 district. *De Grandy*, 512 U.S. at 1020. At this moment in time, this dynamic exists
21 in both Pasco’s at-large position and Plaintiff’s proposed “influence district”
22 (Position 5), where the Latino population is in the minority. Whereas, the citywide
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1 Latino share of registered voting population is approximately 30% (*compare* ECF
2 No. 21-2 at 3 (29.81%) with ECF No. 33-1 at 4 (31.8%)), the LCVAP in Plaintiff's
3 proposed residency district is estimated to be 27.25%, which Plaintiff concedes is at
4 least "comparable" (ECF No. 31 at 8) to the citywide statistic. Based upon trends
5 showing an ever increasing Latino voting age population, both parties predict these
6 levels of influence increasing and shifting over the next decade. The court cannot
7 and need not decide which seat (Defendants' Position 7 or Plaintiff's Position 5) will
8 most quickly accommodate favorable change for Latinos in Pasco.

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

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

3 Socioeconomic disparities alone do not show that minorities do not have equal
4 access to the political process. *Veasey v. Abbott*, 830 F.3d 216, 275 (5th Cir. 2016).
5 Evidence that might suggest socioeconomic disparities impede electoral
6 participation include reduced levels of voter registration, lower voter turnout among
7 minority voters, costly campaign financial expenditures for at-large elections,
8 evidence of minorities being discouraged from running for office because of the cost
9 of an at-large campaign, or evidence minority voters are hindered in registering,
10 casting ballots, qualifying to run, and campaigning for public office. The parties
11 have not offered this evidence. Instead, the record suggests that Latinos have run
12 for political office in Pasco and, as Plaintiff indicates, "...the Latino
13 community...has repeatedly *produced and supported* candidates for office." (ECF
14 No. 21 at 3 (emphasis added)). This does not suggest a lack of access to the political
15 process. Though socioeconomic impediments no doubt exist, the court finds there
16 is an insufficient basis to conclude that socio-economics and cost would be
17 significant impediments to Latino participation in the single at-large election
18 provided for in the City's remedial plan.
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22 As for the potential for coalition building, there is plenty of room for
23 disagreement. Plaintiff contends coalitions are more likely to occur and to assist
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1 Latino voting strength in a compact district where voters are “more likely to find
2 common ground” because “they share common interests driven by geography: their
3 children attend the same schools and play in the same parks they use the same
4 libraries and roads, and they walk under the same streetlights.” (ECF No. 31 at 8).
5 However, critics of pure district-based election forms cite the fact they can produce
6 a balkanizing effect, splintering communities and having the unintended effect of
7 increasing racial divides. The Supreme Court has warned about these social and
8 political costs of dividing communities along racial lines in the name of improving
9 electoral systems. *See, e.g., Shaw v. Reno*, 509 U.S. 630, 657 (1993) (observing that
10 “[r]acial gerrymandering, even for remedial purposes, may balkanize us into
11 competing racial factions; it threatens to carry us further from the goal of a political
12 system in which race no longer matters...”). Considering the shape of Plaintiff’s
13 District 5 (Appendix B and ECF No. 24 at 13), it is reasonable to question how the
14 shape and size of that geographic unit would encourage a greater sense of cohesion
15 or shared identity over that of the city at-large. *See discussion*, Lani Guinier, Groups,
16 Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes,
17 71 TEX. L.REV. 1589, 1603 (1993).

20 Defendants counter that the proposed single at-large position is “the next-best
21 electoral opportunity” for Latinos in Pasco. They contend the inclusion of the at-
22 large district: 1) provides “city-wide representation and accountability”; 2) avoids
23

1 the “political ‘balkanization’ that can occur in exclusively single-member district
2 cities and provide greater city-wide unity”; 3) gives “candidates the option to run for
3 one of two seats”; 4) “double[s] the number of times a given citizen could vote for
4 representation on the council”; 5) gives “Latinos who reside in non-majority-
5 minority districts an eventual opportunity to elect their candidate of choice, whereas
6 Latinos in an exclusively SMD plan may never have that opportunity if they reside
7 in a non-majority-minority district”; and 6) provides “more flexibility to address the
8 City’s changing demographics during periods in between redistricting.” (ECF No.
9 30 at 7-8). Defendants’ expert also explains that “[s]cholarly studies suggest that
10 these new prospects – three ‘opportunity districts’ plus a fourth citywide ‘influence’
11 opportunity – might energize Latinos to register and turn out to vote in future
12 elections” as competitiveness has been shown to be “among the strongest correlations
13 of voter turnout.” (ECF No. 26, Ex. 13 at ¶ 12).

14
15
16 These competing contentions are an inescapable part of redistricting
17 controversies. While vote dilution is a comparative inquiry, the court must be
18 cautious not “pre-empt” the legislative task. *Wise v. Lipscomb*, 437 U.S. 535, 539
19 (1978) (plurality) (White, J.). The essence of Plaintiff’s attack on the single at-large
20 position is that it fails to maximize Latino influence for purposes of forging an
21 advantageous coalition. *Given the facts herein*, most importantly the redesign of the
22 election scheme for the other six districts, the court is not persuaded that the size or
23
24

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

3 **D. Majority Vote Requirement and Anti-single Shot Provisions**

4 Dr. Engstrom identifies the majority vote requirement and inability to engage in
5 “bullet” or “single shot” voting¹¹ as “two features of the at-large arrangement which
6 enhance the ability of a majority of voters to dilute the votes of the Latino minority
7 in Pasco.” (ECF No. 23 at ¶ 10). These features persist in both proposals whether
8 the election is district-based or includes an at-large component. However, the
9 dilutive effects of these features are minimized where there is only a single at-large
10 position, compared to an at-large election for every seat (the arrangement Dr.
11 Engstrom was referring to in his report). In a majority rule system there will always
12 be an inherent disadvantage to the minority struggling for political power.
13
14

15 **E. Tiebreaks**

16 Plaintiff contends the problem with the retention of an at-large position is
17

18 ¹¹ With single-shot voting, “a group of voters can cast[] one vote, if they wish, for
19 the candidate favored by the group, and not cast[] any of their remaining votes for
20 any other candidate. By withholding their remaining votes from the candidates
21 competing with their preferred choice, minority voters have a better chance to
22 finish among the top...candidates and win one of the...seats.” (ECF No. 23 at ¶
23 26).
24

1 compounded by the fact that geographic districts are evenly split between three
2 majority-Latino and three majority-White districts. Plaintiff speculates that with this
3 even split, the at-large position will become a “critical” “swing vote” or “decisive
4 vote” on issues “on which the two populations are divided.” (ECF No. 27 at 11-12).
5 This court is unwilling to make a speculative assessment on the outcome of political
6 events based upon the odd number of seats and number of majority-minority
7 districts, especially considering the court’s analysis is focused upon ensuring
8 opportunity, not control. There is no evidence that any member of the City Council,
9 including the selected mayor, has more power or authority than any other member.
10 Unlike in the case cited by Plaintiff, *Harper v. City of Chicago Heights*, 223 F.3d
11 593, 600 (7th Cir. 2000), the position of mayor is not slotted for the at-large position
12 and there is no evidence of the frequent needed for a tie-breaking vote. Nor can the
13 court anticipate there will be tie votes where there is no evidence suggesting that
14 elected officials are unresponsive to the needs of the minority community or that
15 representatives are politically unresponsive to Latino voter interests. Here, there
16 simply is no risk of the “*unacceptable* gravitation of power” to any single position.
17 *Dillard v. Crenshaw Cnty.*, 831 F.2d 246 (11th Cir. 1987)(emphasis added)(rejecting
18 at-large chairperson position on the Council given the possibility of an unacceptable
19 gravitation of enhanced power to the position and ultimately agreeing upon a rotation
20 feature).
21
22
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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

1 elections. The flexibility in election forms that many other states¹² have long
2 accorded their municipalities, supports the obvious fact that one form does not suit
3 all. Each form has possible advantages and disadvantages. *See City of Tucson v.*
4 *State*, 229 Ariz. 172, 174 (2012) (Arizona Supreme Court recognizing that “although
5 at-large members are responsible to electors in the entire city, this may diminish
6 attention to the interests of particular neighborhoods or groups; district-based
7 elections, in contrast, assure representation from different geographic areas but may
8 elevate particular interests over citywide ones.”). The fact Washington State has
9 maintained laws imposing an at-large electoral scheme on municipalities is a factor
10 this court considers in the calculus here. *Houston Lawyers Ass’n v. Attorney General*
11 *of Texas*, 501 U.S. 419, 426-427 (1991)(“[T]he State’s interest in maintaining an
12 electoral system...is a legitimate factor to be considered by courts among the totality
13 of circumstances...”).

16 **G. Totality of the Circumstances**

17 Changes in an election system invariably bring about results that cannot be
18 predicted with any degree of accuracy. When placed in the position of reviewing a
19 legislatively enacted remedial plan which has yet to be locally tested, the court must
20

21 ¹² *See e.g.*, Ariz.Rev.Statutes §§ 9–232.04, 9–273 (allowing non-charter cities and
22 towns to choose between at-large and district-based council elections); Fla. Stat., §
23 124.011.

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

3 Vote dilution cases are circumstantial evidence cases often challenging at-large
4 voting schemes. While case law offers some direction, it is nearly impossible to
5 locate analogous cases when the test is so heavily fact-driven. For this reason, the
6 court is unable to “follow in the footsteps of” the six representative cases Plaintiff
7 suggests. They are all inapposite because they involved different legal standards
8 applicable to judicially ordered plans,¹³ or involved legislative proposals lacking
9 proportionality,¹⁴ or occurred in places with significantly more deplorable histories
10 of “open and unabashed” discrimination in all areas including the voting laws
11
12
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16 ¹³ See e.g., *U.S. v. Dallas Cnty Comm’n, Dallas Cnty., Ala*, 850 F.2d 1433, 1438-39
17 (11th Cir. 1988) (judicially created plan imposed remedy creating five single-
18 member districts, including one “swing” district, where there was strong evidence
19 African American candidates would not be able to compete for an at-large seat);
20 *Chapman v. Meier*, 420 U.S. 1 (1975) (striking down court-ordered reapportionment
21 that had a total deviation of 20.14%).

22 ¹⁴ *Montes v. City of Yakima*, 2015 WL 11120965 (E.D.Wash. 2015); *U.S. v. Osceola*
23 *Cnty, Fla*, 474 F.Supp.2d 1254, 1256 (M.D. Fla. 2006).
24

1 themselves, economics and social life.¹⁵ Even in the case of *Williams v. City of*
2 *Texarkana, Ark.*, 861 F.Supp. 771 (W.D.Ark. 1993), where it was agreed the remedy
3 would be judicially imposed, the court did *not* hold that the City’s proposed 6-1 plan
4 was unlawful or would not remedy the Voting Rights Act violation. 861 F.Supp. at
5 772 (W.D.Ark. 1993)(deciding the 7-0 plan was the plan “more prudent” because it
6 presented the “greatest potential for” proportionate representation and “less potential
7 for provoking continuing dispute, which would not be in the best interests of the
8 citizens...”); *see also*, *Williams v. City of Texarkana, Ark.*, 32 F.3d 1265 (8th Cir.
9 1994)(leaving validity of the 6-1 plan, chosen by the electorate after the court
10 imposed the 7-0 plan, for future determination of the district court should a challenge
11 be mounted).

12
13 The case law illustrates the fact there is no single “correct” way to design a
14 government; sometimes there are competing interests which can’t be reconciled;
15 there is no clear formula as to how much voting strength an individual citizen should
16 have; and it is not the role of the court to “calibrate democracy in the vain search for
17 an optimum solution.” *Evenwel v. Abbott*, 136 S.Ct. 1120, 1140 (2016). The “full”
18 and “complete” remedy standard is not a standard that lends itself to application with
19
20

21
22 ¹⁵ *Dillard v. Crenshaw Cnty.*, 649 F.Supp. 289 (M.D.AL. 1986)(class action lawsuit
23 involving challenge to at-large systems in nine counties).

1 mathematical exactitude.

2 In reviewing Pasco's remedial plan the court has considered on one side of the
3 scale lies a history of not a single Latino ever having electoral success in a contested
4 Council election, the presence of racially polarized elections, and a socio-economic
5 divide. On the other side of the scale is proportionality, the absence of discriminatory
6 voting practices and intent, viable policies underlying the 6-1 plan, the participation
7 of Latinos in elections, crossover voting, demographics in a state of flux, and
8 officials' responsiveness. The court concludes the totality of the circumstances,
9 judged by the record before this court, make it possible to reconcile the retention of
10 a single at-large seat. Under Pasco's remedial plan, Latinos possess an equal
11 opportunity to elect representatives and to participate in the political process, which
12 was previously denied to them under the all at-large election scheme.
13
14

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

18 **V. IMPLEMENTATION**

19 The Pasco City Council did not vote on how the proposal should be
20 implemented, leaving this decision to the court. The court orders immediate
21 implementation and orders that every seat be up for election in 2017, with four
22 positions (Positions 1, 3, 4 and 6) elected to a 4-year term, and for this election only,
23
24

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

1 adjustments more difficult and less likely to occur voluntarily. For some concerns,
2 a judicial remedy is absent and “relief must come through an aroused popular
3 conscience that sears the conscience of the people’s representatives.” *Baker v. Carr*,
4 369 U.S. 186, 269 (1962).

5 As a final note, the court commends the parties and the ACLU for their
6 collaboration prior to and subsequent to the filing of this lawsuit. Through their
7 sincere cooperation, most importantly, this case has been decided in time to
8 effectuate change before the next election.
9

10 **ACCORDINGLY, IT IS HEREBY FINALLY ADJUDGED AND**
11 **ORDERED:**

12 1. Plaintiff’s Motion for Entry of Plaintiff’s Proposed Remedial Plan (**ECF**
13 **No. 21**) is **DENIED**. Defendants’ Motion for Entry of Proposed Remedial Plan and
14 Final Injunction (**ECF No. 25**) is **GRANTED**.
15

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

18 3. The City of Pasco is ordered to take all steps necessary to implement the
19 plan in order to place all seven positions up for election in 2017 and thereafter,
20 provided, however, that the City may revise the districts based on annexations,
21 deannexations, and population changes reflected in the decennial census and at
22 appropriate times in the future when necessary to conform to the law.
23
24

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.

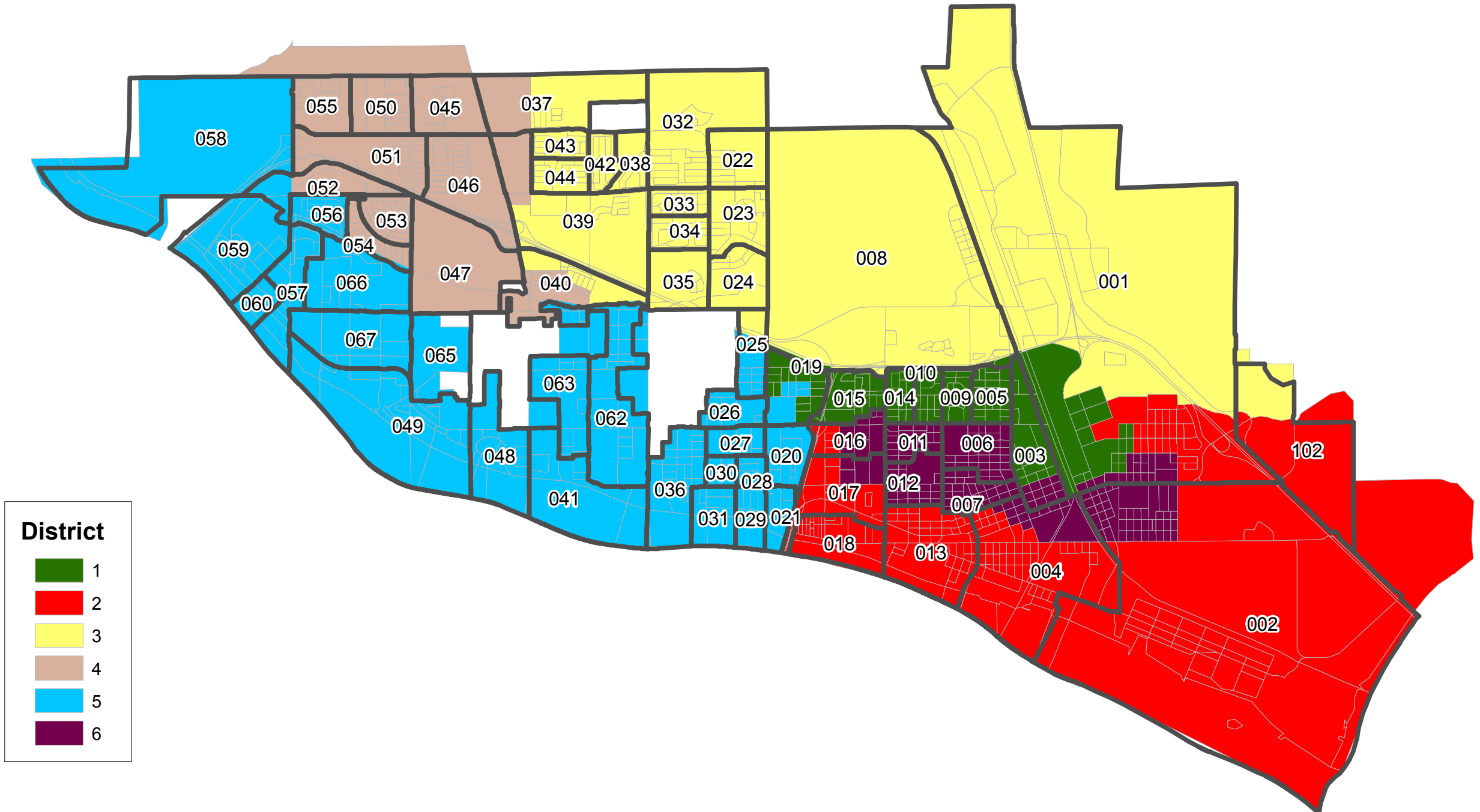
DATED THIS 27th day of January, 2017.

s/Lonny R. Suko

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

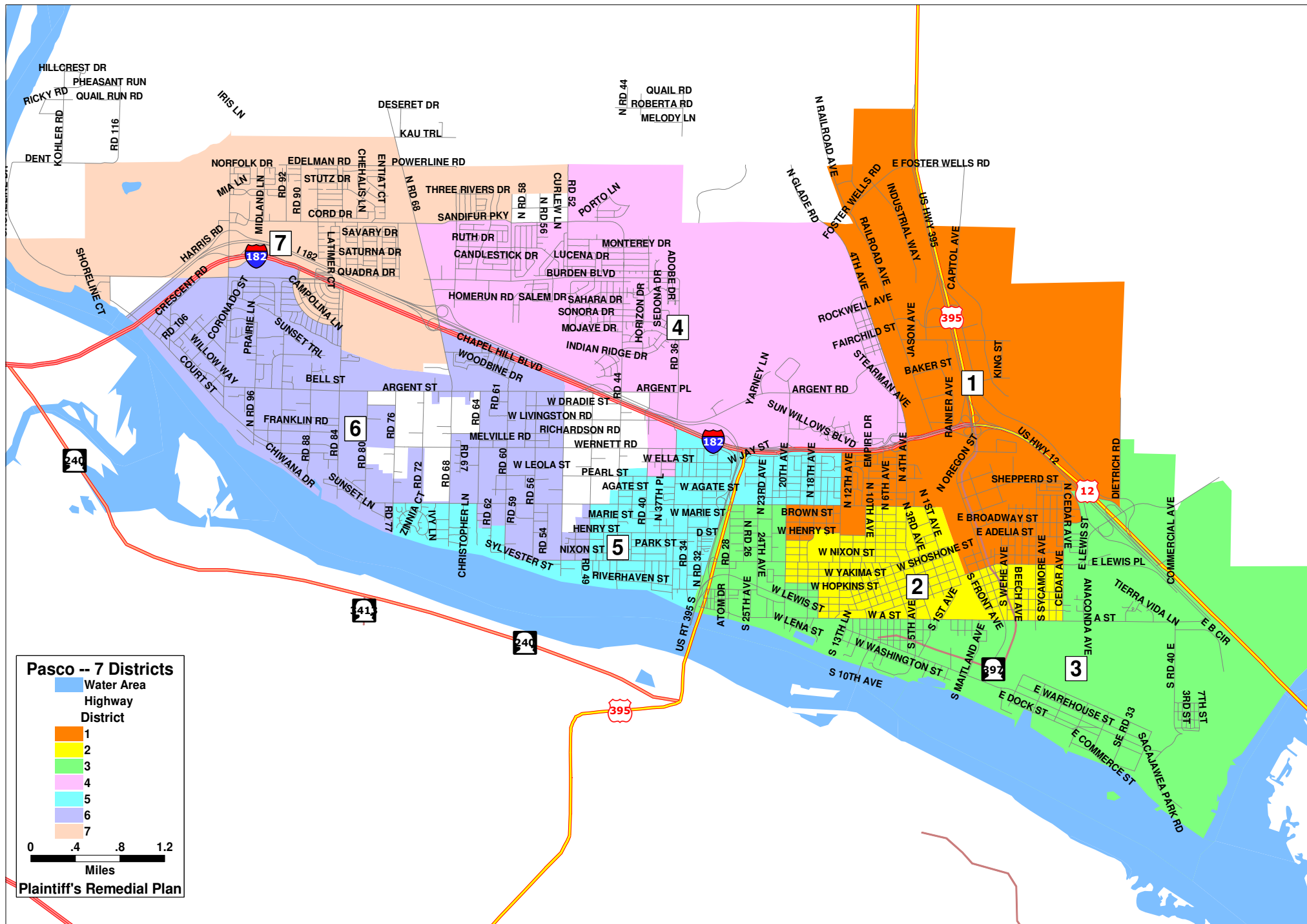
APPENDIX A

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%
<i>Total deviation from ideal:</i>				9.55%
Note: Equalizes 2010 population (census enumerated) within 2016 city limits.				

APPENDIX B



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