

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROGELIO MONTES; MATEO
ARTEAGA,

Plaintiffs -
Appellees,

v.

CITY OF YAKIMA; MICAH
CAWLEY, in his official capacity as
Mayor of Yakima, MAUREEN
ADKISON, in her official capacity
as a member of the Yakima City
Council; SARA BRISTOL, in her
official capacity as a member of the
Yakima City Council; KATHY
COFFEY, in her official capacity as
a member of the Yakima City
Council; RICK ENSEY, in his
official capacity as a member of the
Yakima City Council; DAVE ETTL,
in his official capacity as a member
of the Yakima City Council; BILL
LOVER, in his official capacity as a
member of the Yakima City Council

Defendants -
Appellants.

No. 15-35309

D.C. No. 2:12-cv-03108-TOR
U.S. District Court for Eastern
Washington, Spokane

Plaintiffs-Appellees' Opposition to
Defendants-Appellants' Emergency
Motion Under Circuit Rule 27-3

TABLE OF CONTENTS

	Page
I. INTRODUCTION.....	1
II. FACTUAL BACKGROUND	3
A. The City Takes 112 Days to Seek an “Emergency” Stay	3
B. The New Election System Has Already Been Implemented by the County Auditor and There Is No Time Left to Reverse Course.....	4
III. ARGUMENT	6
A. The City’s Motion Is Procedurally Deficient.....	6
B. A Party Seeking a Stay Pending Appeal Has a “Heavy Burden” of Proof.....	8
C. The City Has No Likelihood of Success on the Merits.....	9
1. The City Premises Its Appeal on an Argument Foreclosed by This Court’s Precedents	10
2. The Mere Existence of Evenwel Does Not Show the City Is Likely to Prevail on the Merits	12
3. The City’s Prior Election System Had the Same Alleged “Infirmary” as the City Claims Plague the Remedial Plan.....	13
D. The City Has Not Shown Irreparable Injury	14
E. A Stay Would Result in Grievous Injury to Other Parties Interested in the Proceeding and Is Contrary to the Public Interest	16
1. Granting a Stay Would Result in Serious Injury to Plaintiffs and the Yakima Community at Large	16
2. A Stay Would Cause Electoral Chaos	18
IV. THE CITY’S ALTERNATIVE REQUEST TO STAY THE APPEAL	20
V. CONCLUSION	20

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>Beame v. Friends of the Earth</i> , 434 U.S. 1310 (1977).....	8
<i>Benavidez v. City of Irving, Tex.</i> , 638 F. Supp. 2d 709 (N.D. Tex. 2009)	13
<i>Chen v. City of Hous.</i> , 206 F.3d 502 (5th Cir. 2000)	11
<i>Daly v. Hunt</i> , 93 F.3d 1212 (4th Cir. 1996)	11
<i>E.E.O.C. v. Harris Farms, Inc.</i> , 2006 WL 1881236 (E.D. Cal. July 5, 2006).....	9
<i>Elrod v. Burns</i> , 427 U.S. 347 (1976).....	17
<i>Fabela v. City of Farmers Branch, Tex.</i> , 2012 WL 3135545 (N.D. Tex. Aug. 2, 2012)	13
<i>Frank v. Walker</i> , 14A352, __ U.S. __, 2014 WL 5039671 (Oct. 9, 2014)	19
<i>Garza v. County of Los Angeles</i> , 918 F.2d 763 (9th Cir. 1990)	2, 10, 11
<i>Gieg v. DDR, Inc.</i> , 407 F.3d 1038 (9th Cir. 2005)	12
<i>Gould v. Mut. Life Ins. Co. of N.Y.</i> , 790 F.2d 769 (9th Cir. 1986)	7
<i>Hamer v. Campbell</i> , 358 F.2d 215 (5th Cir. 1966)	15
<i>Harris v. Graddick</i> , 593 F. Supp. 128 (M.D. Ala. 1984).....	17

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Heart of Atlanta Motel, Inc. v. United States</i> , 85 S. Ct. 1 (1964)	9
<i>Keller v. Gilliam</i> , 454 F.2d 55 (5th Cir. 1972)	15
<i>Lair v. Bullock</i> , 697 F.3d 1200 (9th Cir. 2012)	14
<i>Leiva–Perez v. Holder</i> , 640 F.3d 962 (9th Cir. 2011)	15
<i>Md. Citizens for a Representative General Assembly v. Governor of</i> <i>Md.</i> , 429 F.2d 606 (4th Cir. 1970)	19
<i>Mich. Coal. of Radioactive Material Users, Inc. v. Greipentrog</i> , 945 F.2d 150 (6th Cir. 1991)	9
<i>NAACP v. New York</i> , 413 U.S. 345 (1973)	9, 17
<i>Natural Res. Def. Council, Inc. v. Sw. Marine Inc.</i> , 242 F.3d 1163 (9th Cir. 2001)	7
<i>Nken v. Holder</i> , 556 U.S. 418 (2009)	8
<i>Purcell v. Gonzalez</i> , 549 U.S. 1 (2006)	19
<i>Rakovich v. Wade</i> , 834 F.2d 673 (7th Cir. 1987)	7
<i>Republican Party of North Carolina v. Hunt</i> , 841 F. Supp. 722 (E.D.N.C. 1994), <i>aff'd as modified sub nom.</i> , 27 F.3d 563 (4th Cir. 1994)	17, 18

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Reynolds v. Sims</i> , 377 U.S. 533 (1964).....	16
<i>Ruckelshaus v. Monsanto Co.</i> , 463 U.S. 1315, 1317-18 (1983)	8
<i>Ryan v. Editions Ltd. W.</i> , 2013 WL 417814 (N.D. Cal. Feb. 1, 2013)	7
<i>Serv. Employees Int'l Union Local 1 v. Husted</i> , 698 F.3d 341 (6th Cir. 2012)	19
<i>Shelby Cnty., Ala. v. Holder</i> , 133 S. Ct. 2612 (2013).....	17
<i>South Carolina v. Katzenbach</i> , 383 U.S. 301 (1966).....	17
<i>Tacey Goss P.S. v. Barnhart</i> , 2013 WL 4761024 (W.D. Wash. Sept. 4, 2013)	8, 9
<i>Taylor v. Monroe County Bd. of Supervisors</i> , 421 F.2d 1038 (5th Cir. 1970)	15
<i>Thornburg v. Gingles</i> , 478 U.S. 30 (1986).....	13
<i>Veasey v. Perry</i> , 769 F.3d 890 (5th Cir. 2014)	19
<i>Wallace v. House</i> , 377 F. Supp. 1192 (W.D. La. 1974)	15
<i>Wesberry v. Sanders</i> , 376 U.S. 1 (1964).....	16
<i>Williams v. Rhodes</i> , 393 U.S. 23 (1968).....	8

TABLE OF AUTHORITIES
(continued)

	Page(s)
<i>Winston-Salem/Forsyth Cnty. Bd. of Educ. v. Scott</i> , 404 U.S. 1221 (1971).....	8
STATUTES	
42 U.S.C. § 1973.....	1
RCW 29A.04.311.....	4
RCW 29A.16.040.....	5
RCW 29A.24.050.....	5
RCW 29A.24.131.....	5
RCW 29A.32.210 <i>et seq.</i>	5
RCW 29A.40.070.....	5
RCW 29A.76.010.....	12
RULES	
Circuit Rule 27-3.....	2, 6, 7
Fed. R. App. P. 8.....	2, 7
Fed. R. App. P. 8(a)(1).....	6
Fed. R. App. P. 8(a)(2)(A)(i)	6

I. INTRODUCTION

Latinos make up 42% of the City of Yakima’s population but no Latino has *ever* been elected to the City Council. In August 2014, the District Court applied well-established law to the undisputed facts and held that the effective exclusion of Latinos from the political process in Yakima violated Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973. Last February, *four months ago*, the District Court issued an order adopting a seven single-member district election system to replace the City’s at-large election system to cure this violation (the “Remedial Plan”).

Over the next four months, the City Council repeatedly confirmed that it would not seek to stay the Remedial Plan. Indeed, in May, it even formally *voted* not to seek a stay. The City’s conscious and deliberate inaction had consequences. The Yakima County Auditor (the “Auditor”) rightly implemented the Remedial Plan. The new system also created a surge of excitement and engagement in the political process. More Latinos filed to run for City Council than ever before. And because only Latino candidates applied to run in the new First District, Yakima is poised—for the first time ever—to elect a Latino to the City Council.

Now, suddenly, four months after the District Court adopted the Remedial Plan, after the candidate filing deadline passed, on the cusp of Yakima electing its

first Latino to City Counsel, and the week before the first ballots are mailed to voters, the City has abruptly reversed course and moved this Court for an “emergency” stay. With all due respect, the motion should be denied.

The City’s motion fails for a host of procedural and substantive reasons. First, and most obviously, the motion is procedurally deficient. Though it had ample time to do so, the City did not seek a stay before the District Court in the first instance, as required by FRAP 8 and Circuit Rule 27-3. Even if the motion were considered on the merits, the City cannot meet its burden of showing its entitlement to the extraordinary equitable relief it seeks. The City has no likelihood of success on the merits, as it seeks a stay based on an argument this Court squarely rejected in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990). In other words, the City postulates a world in which the law is different than it is, and then claims that—in *that* world—it is likely to prevail on the merits.

Nor will the City face irreparable injury if it is required to remedy its violation of the Voting Rights Act. By contrast, Plaintiffs—and the public—will suffer grievous harm if the hard-fought right of Yakima’s Latino community to participate in City politics on equal footing is snatched away at the last second. The County election administration and the public have significant reliance interests in the orderly administration of the impending August 4 election, which is

effectively already underway. The candidate filing period has closed and the first ballots will be mailed by June 19, before this motion can be decided. Allowing the City to wait until the last possible moment and then rewarding that delay with “emergency” relief would result in utter chaos and confusion. The Court should deny the City’s motion in no uncertain terms.

II. FACTUAL BACKGROUND

On August 22, 2012, Plaintiffs filed this lawsuit challenging the City’s at-large voting system for City Council elections under Section 2 of the Voting Rights Act of 1965 (“Section 2”). On August 22, 2014, the District Court granted summary judgment in Plaintiffs’ favor, denied Defendants’ cross-motion, and ordered the parties to submit a proposed remedial plan. Declaration of William B. Stafford (“Stafford Decl.”), Ex. A. On February 17, 2015, the Court ordered the City to adopt a district-based election system with all seats up for election in the August 4, 2015 primary. *Id.*, Ex. B. The Court entered a final judgment in Plaintiffs’ favor that same day. *Id.*, Ex. C.

A. The City Takes 112 Days to Seek an “Emergency” Stay

The City waited to file this motion until 112 days after it was ordered to implement a new election system. Throughout that period, the City contemplated seeking a stay of the election but repeatedly chose not to do so. *See id.*, Ex. D

(news article noting that, although the City was appealing, it would not be seeking a stay of the Remedial Plan). Indeed, “the [C]ouncil . . . ‘reached an understanding’ in executive session April 3rd that an attempt to delay the new system was off the table.” *Id.*, Ex. E. On April 14th, City Council members informed the public that they “expect the [election] system to be implemented this year” and that the “wheels are in motion[.]” *Id.* On May 26, the Council formally “voted against asking for a partial stay in the upcoming elections.” *Id.* Ex. F.

It wasn’t until June 2, 2015, that the Council abruptly reversed course and decided to seek a stay of the upcoming election. *Id.*, Ex. G. It then waited another week, until June 9, to actually file its “emergency” motion.

B. The New Election System Has Already Been Implemented by the County Auditor and There Is No Time Left to Reverse Course

While the City elected not to seek a stay, the Auditor acted. On March 18, 2015, the Auditor announced that it would implement the Remedial Plan by “purging” the old election system from the Auditor’s database and replacing it with the new electoral map, redrawing various precincts, notifying the local political parties of the changes, and updating voter registration. *See* Stafford Decl., Ex. H.

The primary election is on August 4, 2015. RCW 29A.04.311. The fair administration of an election is no small undertaking and requires extensive advance preparation, notice to interested parties, and careful attention to detail,

none of which can occur overnight. State and local law set out mandatory pre-election deadlines. Numerous, internal administrative deadlines also must be met. As set out in the attached Declaration of Yakima County Elections Manager Kathy Fisher (“Fisher Decl.”), most of these deadlines *have already passed*.

As stated above, the Auditor changed precinct boundaries to implement the Remedial Plan, in advance of the April 27, 2015 pre-election deadline for making such changes. RCW 29A.16.040. The candidate filing deadline was May 15, 2015. RCW 29A.24.050.¹ On May 18 (the deadline for candidates to withdraw), the Auditor drew lots to determine candidate placement on the ballot. *See id.*, Ex. J, at 5; RCW 29A.24.131. In accordance with certain procedural requirements, the County then prepared the local voters’ pamphlet, RCW 29A.32.210 *et seq.*, which will be distributed by June 19. Stafford Decl., Ex. K; Fisher Decl. ¶ 6.

Moreover, the deadline for the County to mail ballots to overseas and military voters is just three days away, on June 19. *Id.*; RCW 29A.40.070. Thus, before this motion is decided and any resulting order requiring a return to the City’s at-large electoral system could be implemented, ballots for the August primary will have been printed and mailed by the Auditor. Fisher Decl. ¶ 6.

¹ A record number of Latinos filed to run for City Council this year. Stafford Decl., Ex. I. Because only Latino candidates are running in District 1, Yakima is poised to elect a Latino to the City Council for the first time in its history.

Finally, the ballot for local (i.e., non-military, non-overseas) voters, which must be mailed to voters no later than July 15, has already been finalized and sent to the County's printing contractor. *Id.* ¶¶ 3, 7. Any changes would require the County to create a new database that would then need to be tested as mandated by state law—a process that takes weeks. *Id.* ¶ 3. And because other cities in Yakima County are part of the same database, *id.* ¶ 5, Yakima's election system cannot be altered without disrupting these other jurisdictions' upcoming elections as well.

III. ARGUMENT

A. The City's Motion Is Procedurally Deficient

As an initial matter, the Court should deny the City's "emergency" motion because the City did not present it to the District Court in the first instance.

Federal Rule of Appellate Procedure 8(a)(1) requires that a motion to stay judgment or an order of the district court pending appeal must ordinarily be filed in the district court. A party can skip that step and ask this Court for a stay only upon a showing that "moving first in the district court would be impracticable." FRAP 8(a)(2)(A)(i). Per Circuit Rule 27-3, a party that files an emergency motion must state whether "all grounds advanced in support" of the motion were presented to the district court and, if not, "why the motion should not be remanded or denied."

The City labors under the misapprehension that the District Court lacks

jurisdiction to stay an issued injunction pending appeal. Mot. at 3. But a district court most assuredly *can* stay an injunctive order pending appeal. See *Natural Res. Def. Council, Inc. v. Sw. Marine Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001).²

At no point—in the months since the District Court adopted the Remedial Plan—did the City move the District Court for a stay. Under FRAP 8 and Circuit Rule 27-3, it should have done so. The City claims that the “basis for seeking a stay arose only after the Supreme Court noted probable jurisdiction in *Evenwel* [v. *Abbott*, No. 14-940].” Mot. at 2. But the “basis” for a stay was apparent long before then. *Evenwel* has been pending since February 2—*before* the District Court adopted the Remedial Plan. See Mot., App. § A. All that happened since is the announcement that the Supreme Court will further consider the issues in *Evenwel* next term, issues that are (as discussed below), irrelevant to this appeal.

This motion is not properly before the Court. The City has known that it could seek a stay to stop the Remedial Plan from going forward (if it wanted to do so) since the very day it was adopted by the District Court (February 17). The City’s months-long delay in seeking a stay does not create an “emergency” that

² See also *Ryan v. Editions Ltd. W.*, 2013 WL 417814, at *1 (N.D. Cal. Feb. 1, 2013) (“The court clearly retains jurisdiction to resolve . . . a motion to stay pending appeal.”) (citing *Gould v. Mut. Life Ins. Co. of N.Y.*, 790 F.2d 769, 773 (9th Cir. 1986)); *Rakovich v. Wade*, 834 F.2d 673, 673-74 (7th Cir. 1987) (“[T]he trial court reserves the power to make orders appropriate to preserve the status quo while the appeal is pending.”) (internal citations omitted).

obviates the need for the City to follow this Court's rules.³

B. A Party Seeking a Stay Pending Appeal Has a “Heavy Burden” of Proof

A stay is “extraordinary relief” for which the moving party bears a “heavy burden.” *Winston-Salem/Forsyth Cnty. Bd. of Educ. v. Scott*, 404 U.S. 1221, 1231 (1971) (Burger, C.J., in chambers). An appealing party has no *right* to a stay, even if it “might otherwise suffer irreparable injury.” *Tacey Goss P.S. v. Barnhart*, 2013 WL 4761024, at *4 (W.D. Wash. Sept. 4, 2013).

In ruling on the City's motion to stay, the Court considers four factors: (1) whether the City has made a strong showing that it is likely to succeed on the merits; (2) whether the City will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Id.* (citing *Nken v. Holder*, 556 U.S. 418, 434 (2009)). This Court generally applies a “sliding scale balancing test in deciding motions to stay where a stronger showing of one element may offset a

³ The City's claim of “emergency” is belied by its lackadaisical approach to filing this motion. See *Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317-18 (1983) (Blackmun, J., in chambers) (the “failure to act with greater dispatch tends to blunt [a] claim of urgency and counsels against the grant of a stay”); *Beame v. Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (Marshall, J., in chambers) (“The applicants' delay in filing their petition and seeking a stay vitiates much of the force of their allegations of irreparable harm.”); *Williams v. Rhodes*, 393 U.S. 23, 28 (1968) (explaining that the Court previously rejected one party's application for a stay “principally because of [their] failure to move quickly to obtain relief”).

weaker showing of another.” *Id.* (collecting cases). But the scale only slides so far: A party seeking a stay *must* demonstrate irreparable injury. *Id.*

Where a party seeks to stay enforcement of an act of Congress, a court must act with “utmost circumspection” and grant a stay only in the most extraordinary and compelling circumstances. *Heart of Atlanta Motel, Inc. v. United States*, 85 S. Ct. 1, 2 (1964) (Black, J., in chambers). This is especially true here because the City seeks to contravene the will of Congress that “voting restraints on account of race or color should be removed as quickly as possible in order to open the door to the exercise of constitutional rights conferred almost a century ago.” *NAACP v. New York*, 413 U.S. 345, 354 (1973) (internal quotation marks omitted).

C. The City Has No Likelihood of Success on the Merits

A party seeking a stay pending appeal “will have greater difficulty demonstrating a likelihood of success on the merits” than one seeking a preliminary injunction because there is “a reduced probability of error” in a decision of the district court based upon complete factual findings and legal research. *Mich. Coal. of Radioactive Material Users, Inc. v. Greipentrog*, 945 F.2d 150, 153 (6th Cir. 1991). Moreover, “the movant is always required to demonstrate more than the mere ‘possibility’ of success on the merits.” *Id.*; *E.E.O.C. v. Harris Farms, Inc.*, 2006 WL 1881236, at *15 (E.D. Cal. July 5, 2006)

(denying motion because “Defendant has not shown a strong probability of success on appeal and, at most, has shown a possibility of success on appeal”).

1. The City Premises Its Appeal on an Argument Foreclosed by This Court’s Precedents

The City does not dispute the basic substance of the District Court’s ruling, its factual findings, or its application of the law governing Section 2 claims. It omits altogether the host of reasons, laid out at length in the District Court’s orders, why the District Court granted summary judgment to Plaintiffs and adopted the Remedial Plan. Rather, the City raises a single ground for a stay, based on a legal premise no court has ever adopted and that this Court has rejected. The City complains that the District Court adopted single-member districts apportioned on the basis of total population, as opposed to citizen voting age population (“CVAP”). It does not claim this was an error under the law as it exists. And for good reason—this Court (and state law) *mandate* the use of total population. Rather, the City speculates that the Supreme Court will announce a new rule of law that has never been endorsed by a single court and require the use of CVAP to apportion districts. There are several obvious flaws with the City’s position.

Most obviously, this Court has *expressly* rejected the City’s basic premise. In *Garza*, 918 F.2d 763, this Court was asked to decide whether a court-ordered reapportionment plan—designed as a remedy after the plaintiffs had established

Section 2 liability—was constitutionally invalid because it “employ[ed] statistics based upon the total population of the County, rather than the voting population.” *Id.* at 773. As the City does here, the *Garza* defendants argued that a redistricting plan based on population alone in which Latinos are concentrated in one district “unconstitutionally weights the votes of citizens in that district more heavily than those of citizens in other districts.” *Id.* The Court specifically rejected the claim because “districting on the basis of voting capability . . . would constitute a denial of equal protection to the[] Hispanic plaintiffs and rejection of a valued heritage” of population equality. *Id.* at 776. *Garza* sets forth its reasoning for districting based on total population rather than voting population, citing the framers’ intent, Supreme Court precedent, and the significant constitutional implications of discounting non-voters in constructing a district plan. *Id.* at 774-75.⁴

Garza ends the analysis. This Court unequivocally held that total population is the proper apportionment base and that the use of voting population is contrary to equal protection principles. The City is not likely to succeed on the merits of an appeal to this Court based on a position contrary to this Court’s settled precedent.

⁴ The only other Courts of Appeal to have considered the issue have, likewise, rejected the claim that districting plans based on total population violate equal protection principles. See generally *Chen v. City of Hous.*, 206 F.3d 502 (5th Cir. 2000); *Daly v. Hunt*, 93 F.3d 1212 (4th Cir. 1996).

The City also ignores Washington law, which *requires* the use of total population in drawing electoral districts. *See* RCW 29A.76.010 (Each city must redistrict “based on population information from the most recent federal decennial census” such that each district “shall be as nearly equal in population as possible to each and every other such district comprising the municipal corporation”). The fact that state law requires the use of total population when drawing districts presents yet another obstacle to the City’s chances of prevailing on appeal.

2. The Mere Existence of *Evenwel* Does Not Show the City Is Likely to Prevail on the Merits

Nor does *Evenwel* salvage the City’s appeal. The City fails to acknowledge key differences between *Evenwel* and this case. The claim in *Evenwel* is that (contrary to the practice of jurisdictions around the country), the United States Constitution requires local jurisdictions to use CVAP as the apportionment base of electoral districts. Mot., App. § A, at 3. The City is not presenting that specific argument on appeal, because it waived any such argument by disclaiming it.⁵

What the City argued instead is that “electoral equality” is a “traditional redistricting principle” that a Section 2 plaintiff must “attempt to balance” as part

⁵ *See* Stafford Decl., Ex. L, at 8-9 (“Defendants do not dispute that Plaintiffs are obligated to create districts with roughly equal total populations Defendants’ summary judgment motion ‘rests’ on electoral equality as a constitutional precept, not as an apportionment basis.”); *Gieg v. DDR, Inc.*, 407 F.3d 1038, 1046 n. 10 (9th Cir. 2005) (The court will not consider arguments first raised on appeal).

of the Section 2 framework (specifically, as to the first of the three factors set out in *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986)). See Stafford Decl., Ex. M, at 8-9. That is not an assertion raised in *Evenwel*, which is not a Section 2 lawsuit, and thus *Evenwel* has no relevance to the City’s appeal in this case.

Indeed, the City has not and cannot cite a single case requiring consideration of electoral equality in establishing the first *Gingles* factor. No court has ever held that Section 2 plaintiffs must demonstrate that electoral equality was considered in drawing demonstrative maps. In fact, the only courts to have considered the claim the City advances here have—like the District Court—rejected it.⁶

The City cannot demonstrate it is likely to prevail, as there is no authority to support the basis of its appeal.

3. The City’s Prior Election System Had the Same Alleged “Infirmary” as the City Claims Plague the Remedial Plan

The City’s motion, in any event, rests on a basic logical incoherency. The City asks the Court to reinstate the electoral system struck down by the District Court. But Yakima’s primary electoral districts (aside from violating Section 2) were apportioned using *total population* (not CVAP) and thus suffer from the same

⁶ *Fabela v. City of Farmers Branch, Tex.*, 2012 WL 3135545, at *6 n.13 (N.D. Tex. Aug. 2, 2012) (rejecting claim that existence of many non-voters in districts “precludes a finding of a violation of section 2”); *Benavidez v. City of Irving, Tex.*, 638 F. Supp. 2d 709, 714 (N.D. Tex. 2009) (“[T]otal population (not CVAP) is . . . the proper measure for equalizing the size of districts”).

“defect” the City argues renders the Remedial Plan unconstitutional.⁷ Mot. at 11; Stafford Decl., Ex. M, at 12 n.4; *id.*, Ex. N, ¶ 33 (43.33% overall deviation for prior plan based on CVAP). The City’s own argument, in other words, impeaches the very relief it seeks: If total population is impermissible as an apportionment base, then running a primary election using the old election system would be equally unconstitutional. Mot. at 11. Indeed, if the City is entitled to a stay, then every upcoming election in Washington (and, for that matter, the country) should be stayed, because *every* electoral district is drawn on the basis of total population.⁸

D. The City Has Not Shown Irreparable Injury

Nor has the City shown that it will suffer any irreparable injury if a stay is not granted. The City must show a “probability”—not just a *possibility*—of irreparable injury in the absence of a stay. *Lair v. Bullock*, 697 F.3d 1200, 1214 (9th Cir. 2012) (emphasis added). This the City cannot do.

⁷ It perhaps goes without saying that Defendants raised no objection to the City’s use of total population to apportion the districts under which the current City Council was elected until long after this lawsuit was filed.

⁸ The City requests, in the alternative, that the Court stay elections in Districts 3, 4, and 7. Mot. at 12. The basis for this request is unexplained and unsupported. The City acknowledges that the District Court had authority to require that all seats go up for election in 2015, including seats that would have been up for election in 2017. Stafford Decl., Ex. O, at 3. The District Court explained why an effective remedy required putting all seats up for election in 2015. *Id.*, Ex. B, at 30-33. The City moved unsuccessfully for reconsideration. *Id.*, Ex. O, at 3. Its effort to obtain a reversal of a portion of the Order it deems “unjust” (Mot. at 8) through the guise of an “emergency” motion without full briefing on the merits should be rejected.

Requiring the City to comply with Section 2, or incumbents to stand for election in racially fair elections, can hardly constitute a cognizable injury. The City has no right to suspend the operation of Section 2, nor does it have a right to maintain a system of elections or a redistricting plan that has been found to violate Section 2. *See Wallace v. House*, 377 F. Supp. 1192, 1201 (W.D. La. 1974); *Taylor v. Monroe County Bd. of Supervisors*, 421 F.2d 1038, 1042 (5th Cir. 1970).

The City's motion rests on little more than its musings about the possible outcomes of *Evenwel* and the possible effect on this appeal of those possible outcomes. This hardly constitutes a showing that the City *will* suffer irreparable injury in the absence of a stay. On the contrary, it is rank speculation.

The City's claim that three incumbents will suffer irreparable injury because they would need to stand for reelection this year (which two of the three *chose not to do*) fails because no incumbent is entitled to remain in an office to which he or she was elected under an invalid election plan.⁹ The fact that their terms of office will be shortened does not constitute legal injury, let alone irreparable injury.

The City's inability to establish a probability of irreparable injury dooms its motion to stay. *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011) (“[S]tays

⁹ *See, e.g., Wallace v. House*, 377 F. Supp. at 1201 (no incumbent has a “vested right” to an illegally elected office); *Hamer v. Campbell*, 358 F.2d 215 (5th Cir. 1966) (same); *Keller v. Gilliam*, 454 F.2d 55, 57-58 (5th Cir. 1972) (approving the shortening of terms of office as a remedy for a voting rights violation).

must be denied to all petitioners who did not meet the applicable irreparable harm threshold, regardless of their showing on the other stay factors.”).

E. A Stay Would Result in Grievous Injury to Other Parties Interested in the Proceeding and Is Contrary to the Public Interest

1. Granting a Stay Would Result in Serious Injury to Plaintiffs and the Yakima Community at Large

In addressing this factor, the City fails to acknowledge the harm that a stay would cause Plaintiffs and the Latino community in Yakima.¹⁰ Its silence speaks volumes, and illustrates starkly the state of affairs that led to this lawsuit.

In contrast to the lack of harm the City will suffer if it is required to comply with Section 2 during this appeal, granting a stay would cause substantial injury to Plaintiffs because it would continue the denial of their equal voting rights. The right to vote is one of the most fundamental rights in our democratic system of government and is afforded special protection. *See Reynolds v. Sims*, 377 U.S. 533, 554-55, 562 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (“Other rights, even the most basic, are illusory if the right to vote is undermined”). Any

¹⁰ The City recognizes that a stay would harm current candidates. Mot. at 17-18. But absent from the City’s motion is evidence that it is even *possible* for the Auditor to implement the City’s preferred election system, reopen the candidate filing period, re-do the Voters Pamphlet, and reprint and mail out ballots in time for the August 4 primary. Moreover, the City’s belief that refunding candidates’ filing fees and telling them (in effect), “Thanks for your interest in participating in democracy” would “cure” any injury misapprehends the nature of the injury.

illegal impediment on the right to vote is an irreparable injury. *Elrod v. Burns*, 427 U.S. 347, 373 (1976); *Harris v. Graddick*, 593 F. Supp. 128, 135 (M.D. Ala. 1984) (where Section 2 is violated “[irreparable] injury is presumed by law”).

Congress has repeatedly indicated that voting rights are entitled to prompt protection. Congress enacted the Voting Rights Act of 1965 because prior civil rights acts failed to remedy discrimination in voting in a timely fashion. *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966), abrogated on other grounds by *Shelby Cnty., Ala. v. Holder*, 133 S. Ct. 2612 (2013). Responding to the “insidious and pervasive evil” of discrimination in voting, Congress has unequivocally expressed its intent “that voting restraints on account of race or color should be removed as quickly as possible.” *NAACP*, 413 U.S. at 354.

Plaintiffs have waited long enough to participate in a racially fair electoral system. So has the Yakima public, which has a fundamental interest in having elections conducted in compliance with the Voting Rights Act. When Section 2 is violated, the public at-large suffers irreparable injury. *Harris*, 593 F. Supp. at 135.

The public interest in fair and open elections also “demands the opportunity to choose from among the most qualified candidates available for office.” *Republican Party of North Carolina v. Hunt*, 841 F. Supp. 722, 732 (E.D.N.C. 1994), *aff’d as modified sub nom.*, 27 F.3d 563 (4th Cir. 1994). As courts have

recognized, promoting an electoral environment more conducive to qualified minority candidates in turn likely increases the visibility of the elections and increases voter participation. *Id.* at 729. That is exactly what is happening in Yakima. The evidence in this case shows that Latino candidates were discouraged from running for office under the old, discriminatory at-large plan. After the Remedial Plan was implemented, more Latinos ran for City Council than ever before. Stafford Decl., Ex. I. The Latino community has mobilized to participate as never before. *Id.*, Ex. P. And if the stay is denied, a Latino *will* be elected to the City Council for the first time in Yakima’s history.

A stay would bring all this to a screeching halt. A stay would have the unfortunate result of continuing the effect of the City’s old election system—“the non-Latino majority in Yakima routinely suffocat[ing] the voting preferences of the Latino minority.” Stafford Decl., Ex. A, at 48. This is not a speculative harm. It is what happened in *every* Yakima election discussed in the record. *Id.* at 34-38.

2. A Stay Would Cause Electoral Chaos

Plaintiffs would hardly be alone in suffering prejudice should an emergency stay be granted. The County and the public have strong reliance interests in the orderly administration of the upcoming election that would be up-ended should the Court intervene at this extraordinarily late date. As set out in detail above (*supra*

at 4-6), the August 4 primary is effectively already underway. The deadline for mailing absentee ballots to overseas voters is three days away, on June 19. It is no longer possible to hold the election under a different system.

Courts have frequently denied equitable relief where a request for a stay/injunction was filed too close to an election: “[L]ast-minute injunctions changing election procedures are strongly disfavored.” *Serv. Employees Int’l Union Local 1 v. Husted*, 698 F.3d 341, 345 (6th Cir. 2012).¹¹ Indeed, just last fall, the Supreme Court vacated a stay granted in the Court of Appeals where, as here, a stay would change the rules of an election after “absentee ballots ha[d already] been sent out” to voters. *Veasey v. Perry*, 769 F.3d 890, 894-95 (5th Cir. 2014) (discussing ruling in *Frank v. Walker*, 14A352, __ U.S. __, 2014 WL 5039671 (Oct. 9, 2014)). And granting an application for a stay at the last minute would be of enormous (and unfair) benefit to incumbents. It would wipe out all the political organizing by other candidates under the court ordered plan and allow the incumbents to run under the preexisting plan with their opposition in disarray.

¹¹ See also *Purcell v. Gonzalez*, 549 U.S. 1, 5-6 (2006) (“[Conflicting] [c]ourt orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls.”); *Md. Citizens for a Representative General Assembly v. Governor of Md.*, 429 F.2d 606, 610 (4th Cir. 1970) (denying injunction three months before candidate filing deadline, citing the “disruption upon potential candidates, the electorate and the elective process”).

The City did not act promptly here, and Plaintiffs, the County election administration, and the public all have strong reliance interests at stake. For all of these reasons, the City's belated motion to stay should be denied.

IV. THE CITY'S ALTERNATIVE REQUEST TO STAY THE APPEAL

The City also seeks to stay the briefing schedule pending the resolution of *Evenwel*. Mot. at 6. If the Court stays the Remedial Plan, Plaintiffs object, as such a stay would foreclose them from securing any relief from the City's Section 2 violation in the foreseeable future. Plaintiffs do not believe *Evenwel*—whatever its outcome—is germane to the merits of this appeal. That said, if the City does not wish to prosecute its appeal until *Evenwel* is decided, even if the Court denies this motion, Plaintiffs would not oppose a stay of the briefing schedule, so long as City Council elections proceed as set out in the Remedial Plan.

V. CONCLUSION

For decades, Latinos in Yakima have not had an equal opportunity to participate in City Council elections. It is time for that wait to end. The City fails to meet its burden of establishing that the Court should grant an “emergency” stay of a remedial election system the District Court adopted four months ago. Respectfully, Plaintiffs submit that the Court should deny the motion.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Ninth Circuit by using the appellate CM/ECF system on June 16, 2015.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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