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THE HONORABLE MARY K. DIMKE

9 UNITED STATES DISTRICT COURT  
10 EASTERN DISTRICT OF WASHINGTON

11 MARISSA REYES, LEAGUE OF  
12 UNITED LATIN AMERICAN CITIZENS,  
13 LATINO COMMUNITY FUND,

14 Plaintiffs,

15 v.

16 BRENDA CHILTON, in her official  
17 capacity as Benton County Auditor and  
18 Canvassing Review Board member, ANDY  
19 MILLER, in his official capacity as Benton  
20 County Canvassing Review Board member,  
21 XAN AUGEROT, in his official capacity as  
22 Benton County Canvassing Review Board  
23 member, CHARLES ROSS, in his official  
24 capacity as Yakima County Auditor and  
25 Canvassing Review Board Member,  
26 JOSEPH BRUSIC, in his official capacity  
27 as Yakima County Canvassing Review  
Board member, RON ANDERSON in his  
official capacity as Yakima County  
Canvassing Review Board member, SKIP  
MOORE, in his official capacity as Chelan  
County Auditor and Canvassing Review  
Board member, DOUGLAS SHAE, in his  
official capacity as Chelan County  
Canvassing Review Board member, BOB  
BUGERT in his official capacity as Chelan  
County Canvassing Review Board member,

Defendants.

No. 4:21-cv-05075-MKD

**DEFENDANTS' REPLY  
SUPPORTING MOTION  
FOR SUMMARY  
JUDGMENT**

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1 **I. INTRODUCTION**

2 Plaintiffs’ principal evidence is an arithmetic calculation the Supreme Court  
3 holds creates a “distorted picture.” *Brnovich v. Democratic Nat’l Comm.*, 141 S. Ct.  
4 2321, 2345 (2021). A lot more is needed to prove Voting Rights Act and  
5 constitutional claims, and plaintiffs lack evidence their claims demand. Plaintiffs  
6 nonetheless resist summary judgment by disputing that Rule 56 applies to them *at*  
7 *all*, by confusing the legal principles governing their claims, and by relying on  
8 lawyer statements to disavow their own sworn statements regarding injunctive relief.

9 **II. ARGUMENT**

10 Summary judgment may be entered against voting rights claims. *See Lee v.*  
11 *City of Los Angeles*, 908 F.2d 1175, 1186 (9th Cir. 2018); *Valladolid v. City of*  
12 *National City*, 976 F.2d 1293, 1295 (9th Cir. 1992). Despite plaintiffs’ attempt to  
13 disavow interrogatory answers about the injunction they seek, Dkt. 155 at 3 n.1, the  
14 only sworn statements on the matter remain plaintiffs’ answers that they seek to  
15 enjoin defendant counties’ implementation of the signature verification statute, *see*  
16 Dkt. 123-40 at 4, 123-41 at 4, 123-42 at 6, 123-43 at 5-6. Plaintiffs cannot meet their  
17 steep burden of proof, and summary judgment should be granted against their (A)  
18 results-based Voting Rights Act claim, (B) intentional discrimination claims, and  
19 (C) fundamental rights and procedural due process claims.

20 **A. Plaintiffs’ Results-Based Voting Rights Act Claim Fails.**

21 Plaintiffs’ results-based Voting Rights Act claim requires proof that defendant  
22 counties’ signature verification “interacts with surrounding racial discrimination in  
23 a meaningful way” and is not “better explained by other factors independent of race.”  
24 *Farrakhan v. Washington*, 338 F.3d 1009, 1018 (9th Cir. 2003) (quotations omitted).  
25 In evaluating the totality of circumstances bearing on this question, the guideposts  
26 in *Brnovich* matter more than the Senate factors in *Thornburg v. Gingles*, 478 U.S.  
27 30 (1986). *See* Dkt. 120 at 11 (citing cases). Plaintiffs’ claim fails.

1           1.     The *Brnovich* Guideposts Do not Show an Unequal Voting System.

2           Each *Brnovich* guidepost validates the counties’ signature verification  
3 practices, which impose a small burden on voters, were commonplace in 1982, work  
4 for at least 98.75% of Latino voters, are part of an open voting system, and help  
5 prevent fraud. Dkt. 120 at 11-14. Plaintiffs’ response arguments are unavailing.

6           First, plaintiffs contend that signature verification is burdensome because it  
7 disparately impacts Latinos. Dkt. 155 at 9-10. But *Brnovich* instructs courts to use  
8 burden size to evaluate a disparate impact—not the other way around. *Brnovich*, 141  
9 S. Ct. at 2338. “[T]he concept of a voting system that is ‘equally open’ and that  
10 furnishes an equal ‘opportunity’ to cast a ballot must tolerate the usual burdens of  
11 voting.” *Brnovich*, 141 S. Ct. at 2338 (citation omitted). Plaintiffs’ critique that  
12 defendant counties do not provide cure forms in Spanish, Dkt. 155 at 10, ignores that  
13 Yakima County does and faces the same claims as Benton County and Chelan  
14 County, which undisputedly are not required to do so. Plaintiffs also rely  
15 inappropriately on complaint allegations when they need expert testimony. *See* Dkt.  
16 155 at 10 (citing the complaint for a factual assertion). These distractions aside,  
17 signing a ballot with a signature matching a voter registration file imposes a small  
18 burden on *all* voters for the reasons defendants explained—cases hold the burden of  
19 signing election materials is small; defendant counties educate voters on the  
20 signature requirement; and defendant counties provide voters opportunity to cure by  
21 mail, email, FAX, dropbox, or in-person visit. Dkt. 120 at 11-12.

22           Second, plaintiffs dispute that Washington’s signature verification  
23 requirement existed in 1982. Dkt. 155 at 11-12. Plaintiffs simply are wrong.  
24 Washington had no-excuse absentee voting requiring signature verification before  
25 1983. *See* Supp. Castillo Decl. Ex. A (Rev. Code. Wash (1981) § 29.36.010, .060.  
26 And while they quibble with the meaning of a Florida statute, plaintiffs do not  
27 dispute signature verification was common around the country in 1982. Reply

1 Statement ¶ 16. That leaves plaintiffs to complain that in-person voting is no longer  
2 *required* in Washington. Dkt. 155 at 11. But in-person voting is still *available* to all  
3 voters on election day and for 18 days before. *See* RCW 29A.40.160(1).

4 Third, plaintiffs seek to dodge *Brnovich*'s holding that “[a] policy that appears  
5 to work for 98% or more of voters to whom it applies—minority and non-minority  
6 alike—is unlikely to render a system unequally open.” 141 S. Ct. at 2345. They slice  
7 their statistics to compare the share of Latino ballots among the total number of  
8 rejected ballots, Dkt. 155 at 12, but this is just another way of dividing percentages,  
9 which is precisely what *Brnovich* instructs courts not to do, *Brnovich*, 141 S. Ct. at  
10 2345. Plaintiffs also contend that ballot rejections could have changed an election  
11 result in a small Yakima County town. Dkt. 155 at 12. This *could* be true, as  
12 doubtlessly *it could* have been for some small Arizona town in *Brnovich*. But there  
13 is no *evidence* that this is *actually* the case since it is undisputed that plaintiffs’ expert  
14 rendered no opinion on the geographical distribution of rejected ballots within  
15 Yakima County or any other county. Reply Statement ¶ 113.

16 Fourth, plaintiffs contend that Washington’s voting system is not generally  
17 open. Dkt. 155 at 13. This wrongly seeks to turn the openness of vote-by-mail into  
18 a liability while ignoring Washington’s 18-day period of mail *and* in-person voting.  
19 RCW 29A.40.070(1), .160(1).

20 Fifth, plaintiffs dispute what courts have made indisputable—that the state has  
21 an interest in thwarting fraud and that signature verification furthers that interest.  
22 *See Brnovich*, 141 S. Ct. at 2340, 2348; *Crawford v. Marion Cnty. Election Bd.*, 553  
23 U.S. 181, 190-97 (2008); *Frank v. Walker*, 768 F.3d 744, 749-50 (7th Cir. 2014);  
24 *Lemons v. Bradbury*, 538 F.3d 1098, 1104 (9th Cir. 2008). Plaintiffs claim defendant  
25 counties’ personnel lack adequate training for this purpose. Dkt. 155 at 6, 14. But  
26 they have no evidence of inadequate staff training—only that certain canvassing  
27 board members (who only review signatures staff already determined not to match)

1 received informal training, that certain canvassing board members relied on law  
2 enforcement academy training, and that a retired canvassing board member could  
3 not recall precise details of the training he received. *See* Dkt. 155 at 14 (citing  
4 record). Plaintiffs also assume an absence of prosecutions means an absence of  
5 fraud. To the contrary, signature verification identifies suspicious ballots. Mr.  
6 Reyes’s rejected signature and the voter registration signature of his father are in the  
7 record. *See* Dkt. 137-3. The county’s cure letter to him ensured that he—and not a  
8 family member—voted his ballot. Dkt. 126-5 at 2. The same is true with the family  
9 of plaintiff’s declarant Pablo Alcantar. His declaration signature is in the record, Dkt.  
10 155-10 at 4, as are the strikingly similar signatures appearing on his family member’s  
11 ballots and the strikingly dissimilar signatures submitted as cures when Yakima  
12 rightly flagged the ballot declaration signatures as mismatches, Fisher Supp. Decl.  
13 Ex. A. Rejection of these ballots shows Washington’s law working as it should.

14 2. The Gingles Factors Do not Show an Unequal Voting System.

15 The parties agree that *Gingles* factors one and five—concerning the extent of  
16 past discrimination and current effects—are the most salient. *Compare* Dkt. 155 at  
17 15-17, *with* Dkt. 120 at 14-15, 16. Plaintiffs’ contentions about these factors,  
18 however, misapply the facts and law.

19 Begin with factor one. Yakima County now does more to reach voters in  
20 Spanish than it does to reach voters in English, and plaintiffs dispute only Yakima  
21 County’s reasons for doing this. Reply Statement ¶ 39. Plaintiffs’ own authority  
22 considers the events in the 1960s and 1970s that they point to as “only marginally  
23 relevant” because, even nine years ago, they were long past. *Montes v. City of*  
24 *Yakima*, 40 F. Supp. 3d 1377, 1410 (E.D. Wash. 2014). That leaves plaintiffs to rely  
25 heavily on Yakima’s litigation history. There are three problems with doing so. First,  
26 the history is attenuated. *Montes* cited Yakima County’s then-10-year-old consent  
27 decree. That decree is now nearly 19 years old. *See* Dkt. 125-1 at 8. Second, *Montes*

1 recites no facts bearing on a history of discrimination that would be susceptible to  
2 judicial notice. *See* Fed. R. Evid. 201(b)(1). Third, a prior settlement precludes no  
3 defendant because “settlements ordinarily occasion no issue preclusion.” *Arizona v.*  
4 *California*, 530 U.S. 392, 414 (2000) (emphasis omitted).

5 Next consider factor five. The parties dispute whether socioeconomic  
6 disparities must cause Latinos’ diminished participation in politics. *Compare* Dkt.  
7 155 at 16, *with* Dkt. 120 at 16. Defendants have it right. The Supreme Court directed  
8 courts to consider effects of discrimination “*which hinder* [minorities’] ability to  
9 participate effectively in the political process.” *Gingles*, 478 U.S. at 37. And the  
10 Ninth Circuit emphasized that “proof of causal connection between the challenged  
11 voting practice and a prohibited discriminatory result is crucial.” *Gonzalez v.*  
12 *Arizona*, 677 F.3d 383, 405 (9th Cir. 2012). Factor five is “a means of identifying  
13 voting practices that have the effect of shifting racial inequality from the surrounding  
14 social circumstances into the political process.” *Farrakhan*, 338 F.3d at 1020.  
15 Causation is key. Plaintiffs lack any evidence of it other than a bare statement in an  
16 expert’s *rebuttal* report, *see* Dkt. 100-2 ¶ 22, which is inadmissible to support their  
17 *prima facie* case. Indeed, plaintiffs lack not only evidence connecting socioeconomic  
18 disparity to reduced political participation—they lack broad evidence that Latinos  
19 participate less in politics. *See* Dkt. 155 at 16 (describing turnout in only one Yakima  
20 County election).

21 Last, Plaintiffs point to polarized voting, at-large voting and purported racial  
22 appeals. Dkt. 155 at 17. They provide no explanation how these topics have a  
23 “logical bearing” to their challenge to the counties’ signature verification processes.  
24 *Brnovich*, 141 S. Ct. at 2338.

25 “[A] bare statistical showing of disproportionate *impact* on a racial minority  
26 does not satisfy the § 2 ‘results’ inquiry.” *Smith v. Salt River Project Agric.*  
27 *Improvement & Power Dist.*, 109 F.3d 586, 595 (9th Cir. 1997). Yet plaintiffs have

1 nothing more than this. Each *Brnovich* factor points against them. For the first  
2 *Gingles* factor, they have dated court cases. For the fifth *Gingles* factor, they fail to  
3 show hindered political participation, much less to connect it to socioeconomic  
4 disparities. The remaining *Gingles* factors likewise provide no support. Plaintiffs’  
5 results-based Voting Rights Act claim fails.

6 **B. Plaintiffs’ Intentional Discrimination Claims Fail.**

7 Plaintiffs lack direct evidence of intent or evidence under *any* of the factors in  
8 *Village of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252 (1977). Dkt.  
9 120 at 20-22. Plaintiffs respond with three unavailing arguments.

10 First, plaintiffs contend that intentional discrimination claims “are not suited  
11 for . . . summary judgment.” Dkt. 155 at 18. Plaintiffs cite two cases. *See id.* The  
12 first—*Arlington Heights*—concerned an appeal from a bench trial, did not contain  
13 the words “summary judgment” and does not support plaintiffs’ assertion. *See*  
14 *Arlington Heights*, 429 U.S. at 254. The second *affirmed* a district court’s *grant* of  
15 summary judgment in a voting case alleging intentional discrimination. *See Greater*  
16 *Birmingham Ministries v. Sec’y of State for State of Alab.*, 992 F.3d 1299, 1337 (11th  
17 Cir. 2021). In any event, Ninth Circuit cases affirming summary dismissal of  
18 intentional discrimination claims undercut plaintiffs’ assertion. *See, e.g., Mendiola-*  
19 *Martinez v. Arpaio*, 836 F.3d 1239, 1262 (9th Cir. 2016).

20 Second, plaintiffs assert direct discrimination. They misunderstand the law  
21 and facts.

22 Plaintiffs begin by saying that defendant counties rejected ballot declaration  
23 signatures signed with Latino-sounding first and last names at a rate higher than the  
24 rate at which they rejected ballots signed with only Latino-sounding last names. Dkt.  
25 155 at 18-19. This ignores that statistical evidence of discriminatory intent must be  
26 “stark.” *Arlington Heights*, 429 U.S. at 267; *see also* Dkt. 120 at 21 (explaining that  
27 “stark” means ratios of 200-to-1 or 400-to-5). The subtle differences in plaintiffs’

1 statistics, *see* Dkt. 79-1 at 8 (Table 1), do not show “a clear pattern, unexplainable  
2 on grounds other than race.” *Arlington Heights*, 429 U.S. at 266.

3 Plaintiffs next contend that former Yakima commissioner Ron Anderson  
4 requested to know Spanish surname voting statistics. Dkt. 155 at 19. In implying his  
5 motive, they ignore the answer why Mr. Anderson requested the statistics:

6 I don’t remember. . . . I have to say, sir, I’m an advocate  
7 for getting as many Latinos registered to vote as  
8 possible. . . . I grew up in the Lower Valley which means  
9 that there is a great population of . . . Hispanics there. I  
10 went to school with—half of my class was Hispanic. I’m  
well versed in that culture. And I’m trying—I’ve always  
11 tried to get them to register. Get registered—do whatever  
I needed to get more surnamed Spanish speakers—  
12 surname people to get registered to vote.

13 Supp. Castillo Decl. Ex. B (Anderson Tr.) 105:20-106:9. Mr. Anderson’s reasons  
14 aside, requesting to know where Latino voters live has nothing to do with  
15 intentionally rejecting ballots on account of race in Yakima County—or anywhere.

16 Plaintiffs last contend that defendant counties “continued to apply the  
17 signature verification process in the same manner even after being presented with  
18 information that there was a racially disparate impact.” Dkt. 155 at 19. This supposes  
19 what defendants’ expert showed is wrong—that race explains why counties reject  
20 voter ballot declarations. *See* Dkt. 122-1 ¶ 12. To the contrary, voter age and  
21 experience better explain rejection rates. *Id.* And it ignores the Washington State  
22 Auditor’s finding of “no evidence of bias when counties accepted or rejected  
23 ballots.” Dkt. 123-37. Factual flaws aside, it is not enough to show “awareness of  
24 the consequences . . . for the affected group . . . or that [defendants] acted with  
25 indifference to the effect on that group.” *United States v. Carrillo-Lopez*, 68 F.4th  
26 1133, 1139 (9th Cir. 2023) (quotations omitted); *see also Personnel Adm’r of Mass.*  
27 *v. Feeney*, 442 U.S. 256, 279 (1979). Intentional discrimination requires defendants  
to act “at least in part because of, not merely in spite of, its adverse effects upon an  
identifiable group.” *Carrillo-Lopez*, 68 F.4th at 1139 (quotations omitted).

1           Third, plaintiffs claim circumstantial evidence comprising an expert’s opinion  
2 that implicit bias affected Internet survey-takers and Yakima County’s change to  
3 batch-approval of staff recommendations about ballot declaration signatures. Dkt.  
4 155 at 20. Each contention is invalid.

5           Begin with implicit bias. If plaintiffs’ expert Kassra Oskooii survives a  
6 *Daubert* motion, Dkt. 101, his findings about implicit bias relate only to Internet  
7 survey-takers and not defendant counties. *See* Oskooii Tr. 164:3-7 (“Q. Do you have  
8 an opinion on whether ballot signature reviewers in Benton County, Chelan County,  
9 and Yakima County election offices are biased. A. I have not had the pleasure to  
10 meet those election workers and study them in specific.”). In any event, *implicit* bias  
11 does not prove *intentional* discrimination. *Yu v. Idaho State Univ.*, No. 4:15-CV-  
12 00430-REB, 2020 WL 2835750, at \*28 (D. Idaho May 31, 2020), *aff’d*, 15 F.4th  
13 1236 (9th Cir. 2021) (“Dr. Zorwick apparently would suggest that even the most  
14 egalitarian individuals . . . can be unaware of their unconscious bias . . . but still be  
15 intentionally racist. That simply makes no sense.”).

16           Next, consider Yakima County’s 2020 change to batch voting on staff  
17 recommendations about ballot declarations. This does not “spark suspicion.”  
18 *Arlington Heights*, 429 U.S. at 270. Washington law allows canvassing boards to  
19 vote on “ballot[s] . . . included in a batch or on a report of ballots.” RCW  
20 29A.60.050; *see also* WAC 434-262-015. It is undisputed that the procedural change  
21 led Yakima to adopt its policy of permitting either the county elections director,  
22 Kathy Fisher, or bilingual coordinator, Martha Jimenez, to veto a signature mismatch  
23 challenge and immediately accept a ballot. Reply Statement ¶¶ 73, 74, 78. Plaintiffs  
24 do not explain how this policy change *helps* their claims of intentional  
25 discrimination. There is no way it does.

26           Plaintiffs’ intentional discrimination claims should be dismissed on summary  
27 judgment for lack of supporting evidence.

1 **C. Plaintiffs’ Fundamental Rights and Procedural Due Process Claims Fail.**

2 It is undisputed that election staff in each county begin processing ballots as  
3 soon as they are received, that ballots are subjected to a multi-tier review using the  
4 WAC standard, and that cure notices are sent promptly. *See* Reply Statement ¶¶ 49-  
5 53, 60-64, 71-75. Binding authority holds that signing elections materials with a  
6 matching signature imposes only a small burden on voters. *See Ariz. Democratic*  
7 *Party v. Hobbs*, 18 F.4th 1179, 1188 (9th Cir. 2021); *Lemons*, 538 F.3d at 1104. And  
8 binding authority holds that the counties have an interest in preventing fraud.  
9 *Brnovich*, 141 S. Ct. at 2340, 2348. This dooms plaintiffs’ fundamental rights and  
10 procedural due process claims. Plaintiffs make five unavailing responses.

11 First, plaintiffs dispute that the *Anderson-Burdick* framework applies to their  
12 procedural due process claim. Dkt. 155 at 22-25. Some circuits apply the generalized  
13 test in *Matthews v. Eldridge*, 424 U.S. 319 (1976), to voting claims. But not the  
14 Ninth Circuit, which held that “the *Anderson/Burdick* approach is better suited to the  
15 context of election laws than is the more general *Eldridge* test.” *Arizona Democratic*  
16 *Party*, 18 F.4th at 1195 (quotations omitted). Plaintiffs’ statement that unspecified  
17 courts use the *Eldridge* test, Dkt. 155 at 23, invites error in this Circuit.

18 Second, plaintiffs assert that they “signed their ballot properly and returned  
19 their ballot properly” and that defendants’ contrary determinations exceed the usual  
20 burdens of voting. Dkt. 155 at 21. This thicket of an argument ignores two principles  
21—that elections officials may apply “uniform standards” to “produce different  
22 results” in signature verification, *Lemons*, 538 F.3d at 1107, and that the burden of  
23 a voting procedure is measured from the perspective of those who meet it, not those  
24 who fail to comply, *Ariz. Democratic Party*, 18 F.4th at 1188. Defendants accept  
25 more than 99% of voter signatures overall. A system that works for nearly every  
26 voter does not impose a severe burden, even if plaintiffs contend—with no  
27 evidence—that their two signatures should have been accepted.

1 Third, plaintiffs assert that signature verification does not thwart voter fraud.  
2 Dkt. 155 at 21-22. Plaintiffs’ opinion cannot be squared with an avalanche of cases  
3 recognizing otherwise or the record evidence in this case, as explained previously.

4 Fourth, plaintiffs contend that defendants’ signature verification is  
5 “standardless” despite WAC 434-379-020. Dkt. 155 at 23-25. This asks more than  
6 *Anderson-Burdick* requires. Defendant counties could constitutionally ask only  
7 whether a signature was “genuine.” *Lemons*, 538 F.3d at 1100. Washington’s  
8 standard is far more detailed. And it is undisputed that each county’s trained staff  
9 determines signatures are mismatching *before* any elected canvassing board  
10 member, whose training plaintiffs dispute, evaluates a ballot. Reply Statement ¶ 48,  
11 58, 70. Similarly, plaintiffs’ argument that no standards govern when Chelan County  
12 sends cure forms ignores the undisputed evidence that Chelan County sent  
13 Mr. Reyes a cure form the *very* day it received his ballot. *Id.* ¶ 89. In any case, some  
14 variation in applying a standard is normal and permissible. *See Lemons*, 538 F.3d at  
15 1107 (“[U]niform standards can produce different results.”).

16 Fifth, plaintiffs imply that the *Anderson-Burdick* framework should differ in  
17 this case because they are Latinos. *See* Dkt. 155 at 21, 22, 23. But plaintiffs cannot  
18 point to a meritless discrimination claim to bootstrap what is otherwise a claim about  
19 “the constitutionality of a *generalized* burden.” *Democratic Exec. Comm. of Fla. v.*  
20 *Lee*, 915 F.3d 1312, 1319 (11th Cir. 2019) (emphasis added).

### 21 III. CONCLUSION

22 Defendants’ Reply Statement of Material Facts Not in Dispute explains that  
23 nearly every fact remains undisputed. But even crediting only the facts plaintiffs  
24 *agree* are undisputed requires dismissal of plaintiffs’ claims on summary judgment  
25 as a matter of law.

1 DATED: July 14, 2023

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 14th day of July, 2023, I electronically filed the foregoing **DEFENDANTS’ REPLY SUPPORTING MOTION FOR SUMMARY JUDGMENT** with the Clerk of the Court using the CM/ECF system which will send notification of such filing to all parties in the case who are registered users of the CM/ECF system. I hereby certify that I have mailed by United States Postal Service the document to the following non-CM/ECF participants: None.



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Angela L. Craig

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