



# United States Bankruptcy Court District of Massachusetts

Frank J. Bailey  
United States Bankruptcy Judge

**Diversity on the Bench**  
**December 6, 2017**



: I will cover today:

**Part 1: How diverse are the judges on the Bankruptcy Bench?**

**Part 2: Why does it *matter* if the Bankruptcy Bench is diverse?**

**Part 3: What can we do to increase diversity on the Bankruptcy Court bench?**

The U.S. system of bankruptcy is the best in the world

***“As tough as the last few years have been, the American economy has responded a bit more effectively than other economies, and bankruptcy is a big part of that.”***

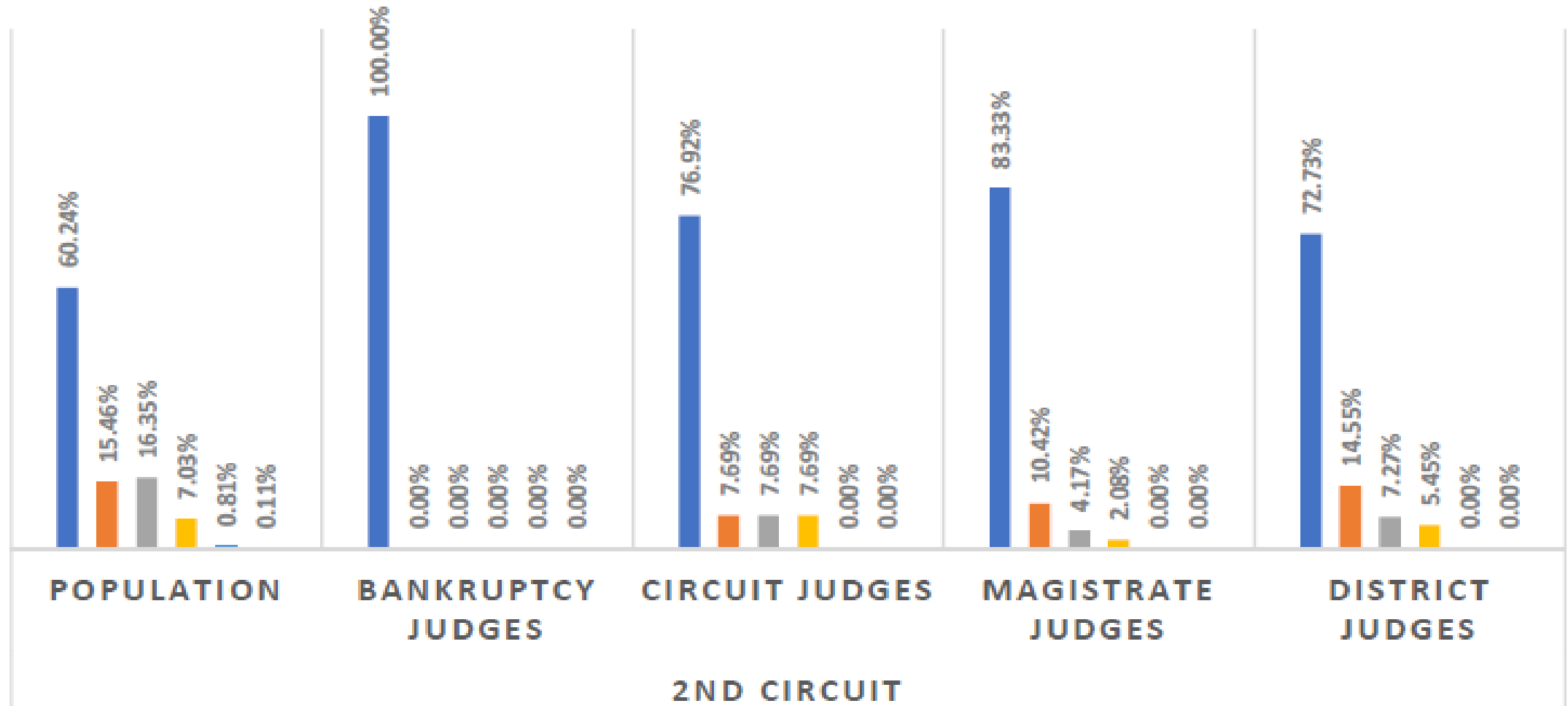
Prof. David Skeel, U. Penn. Law School

# Part 1. Does the Bankruptcy Bench “Look Like” the Population It Serves?

- The NCFTJ/JD did a study: Compare the Racial Profile of Federal Judges to the Racial Profile of the general population
- Use 2013 Census Data and 2013 Data on Judges from the Administrative Office
- Please note: **we have made progress since 2013!**

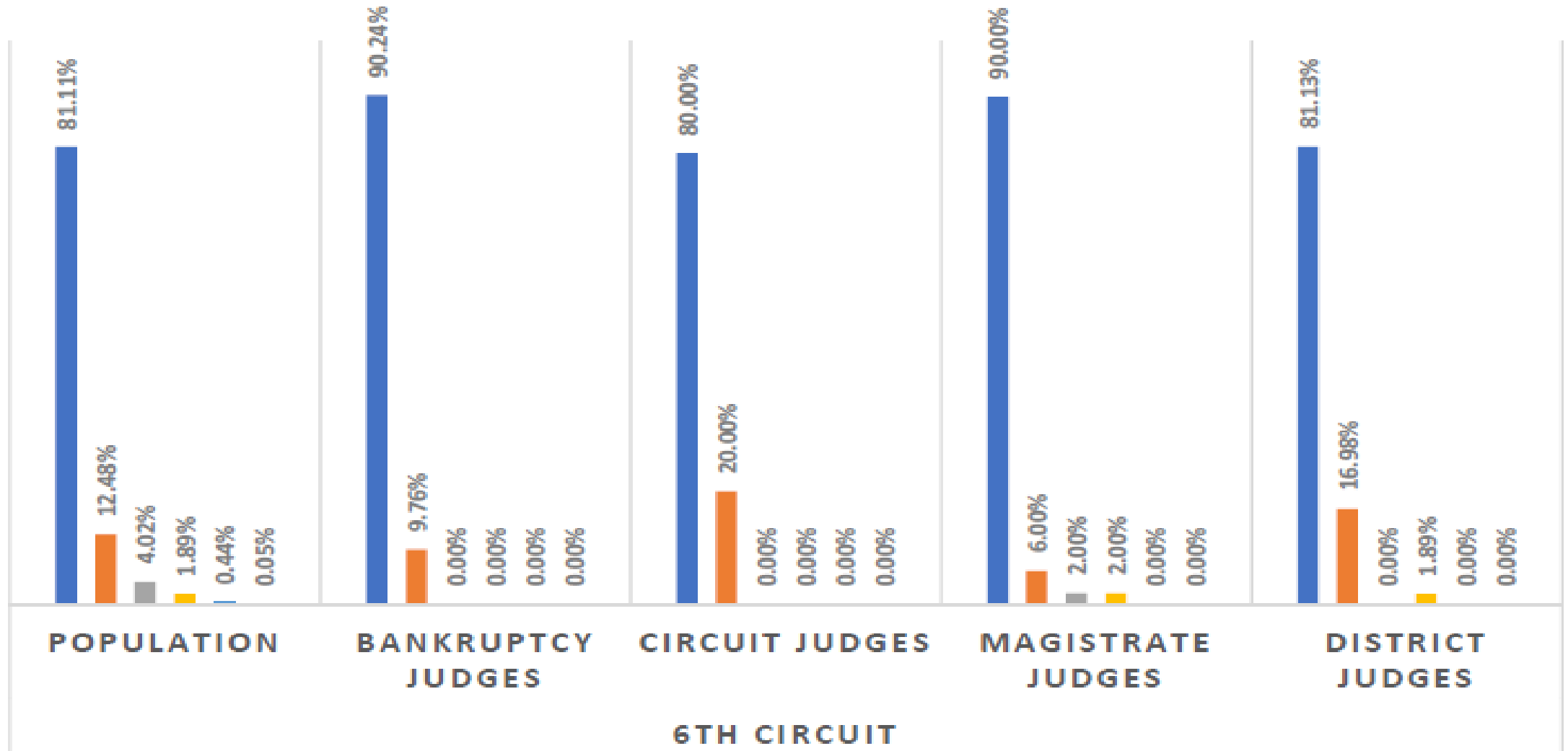
## 2ND CIRCUIT

■ Caucasian ■ African American ■ Hispanic ■ Asian ■ Native American ■ Pacific Islander



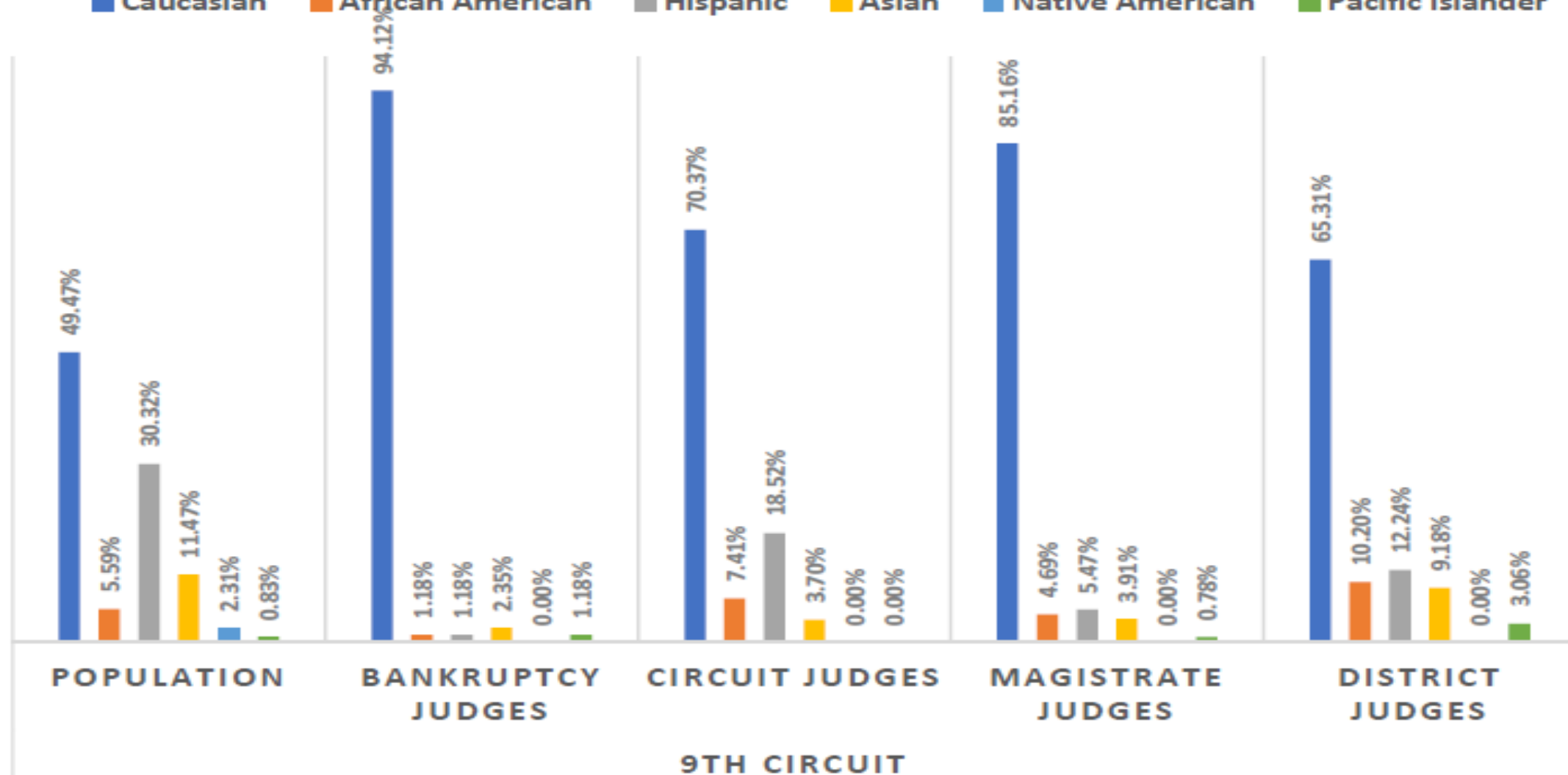
## 6TH CIRCUIT

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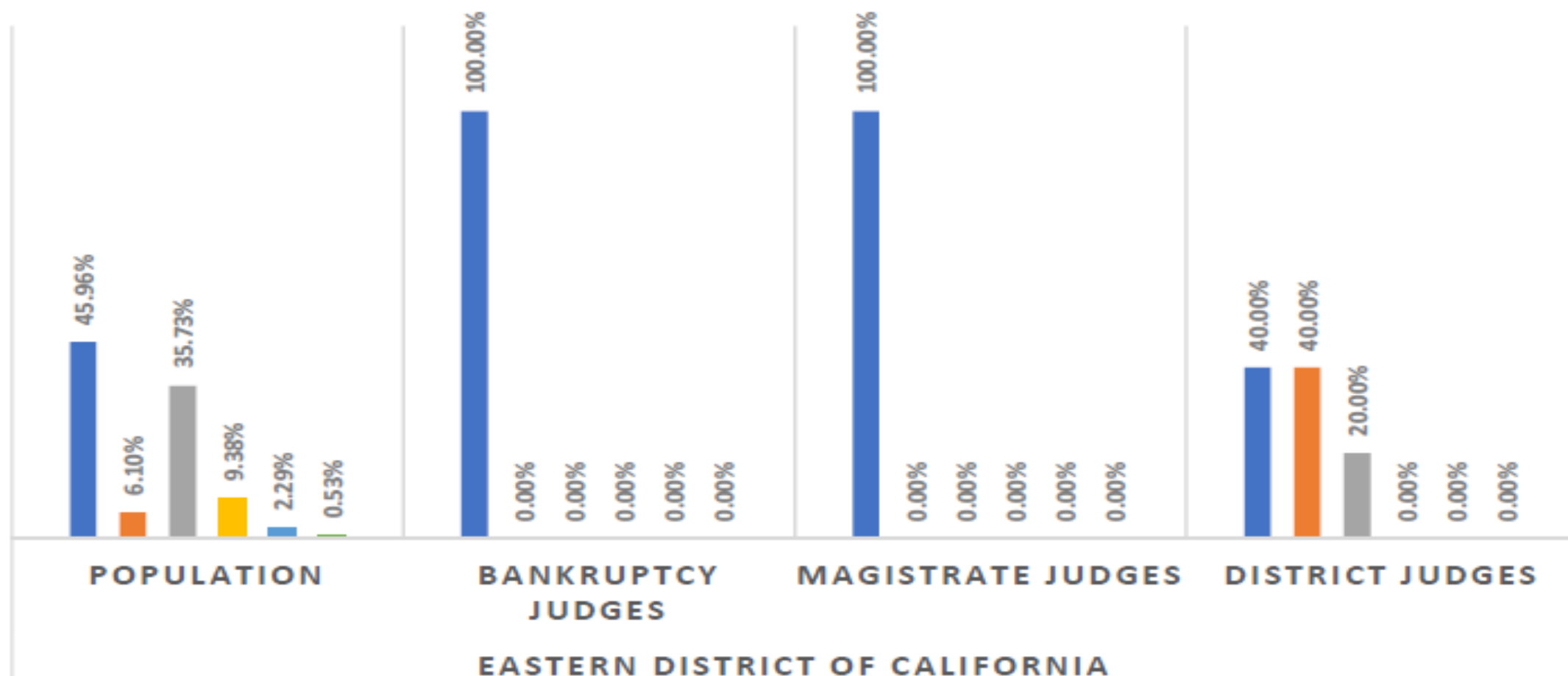
## 9TH CIRCUIT

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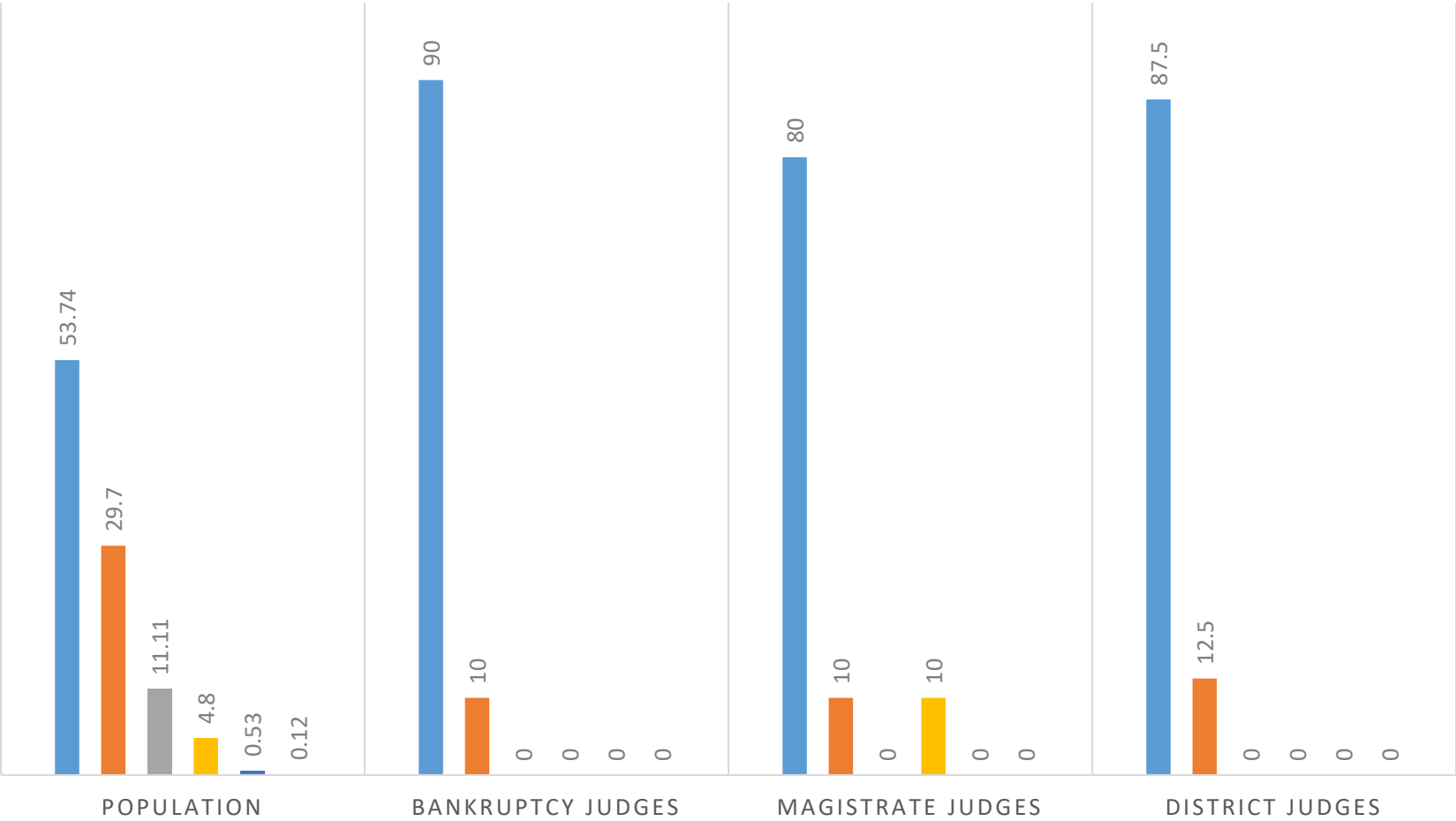
## EASTERN DISTRICT OF CALIFORNIA (SACRAMENTO AREA)

■ Caucasian ■ African American ■ Latino/Hispanic ■ Asian ■ Native American ■ Pacific Islander



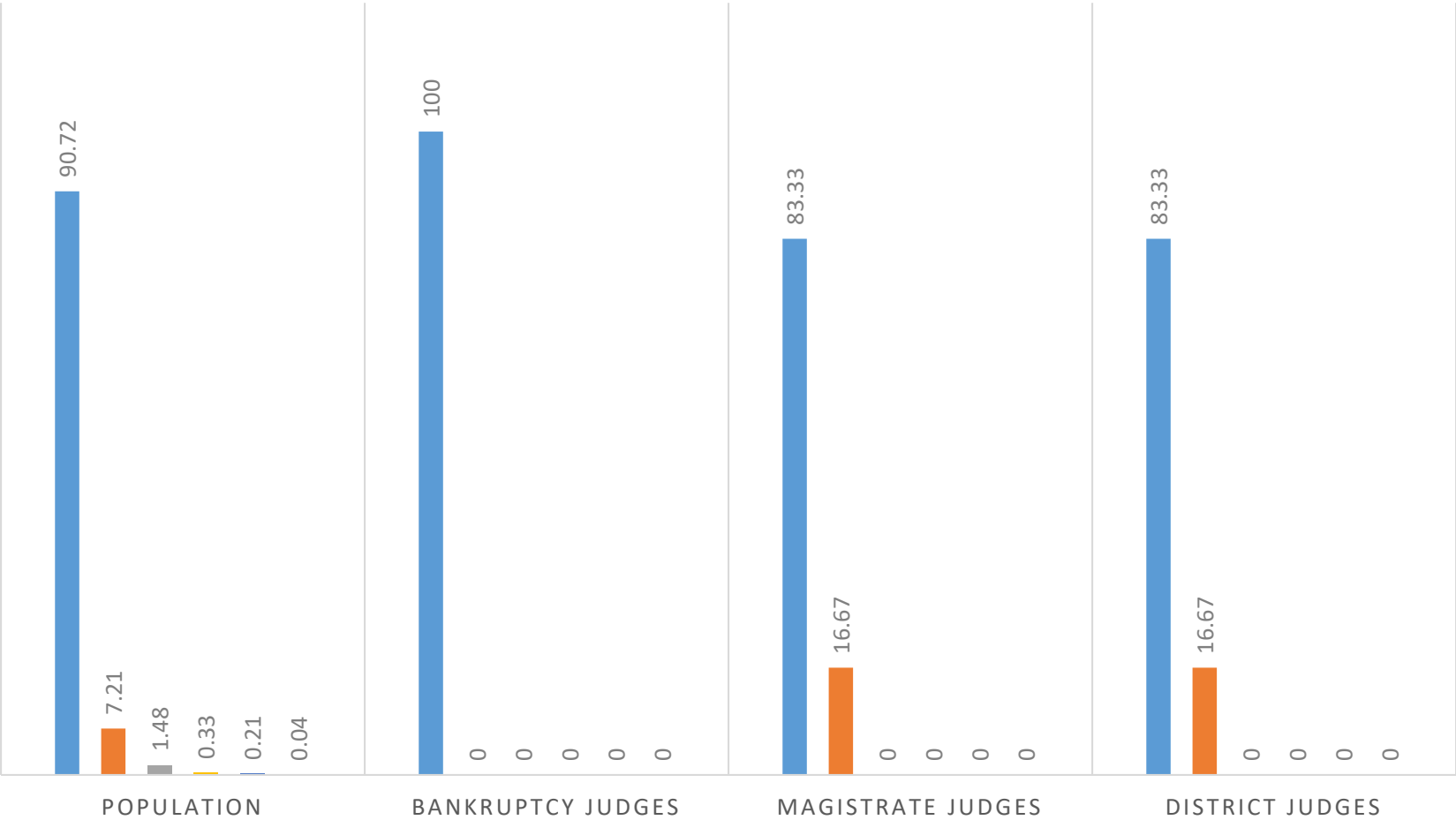
# NORTHERN DISTRICT OF GEORGIA

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



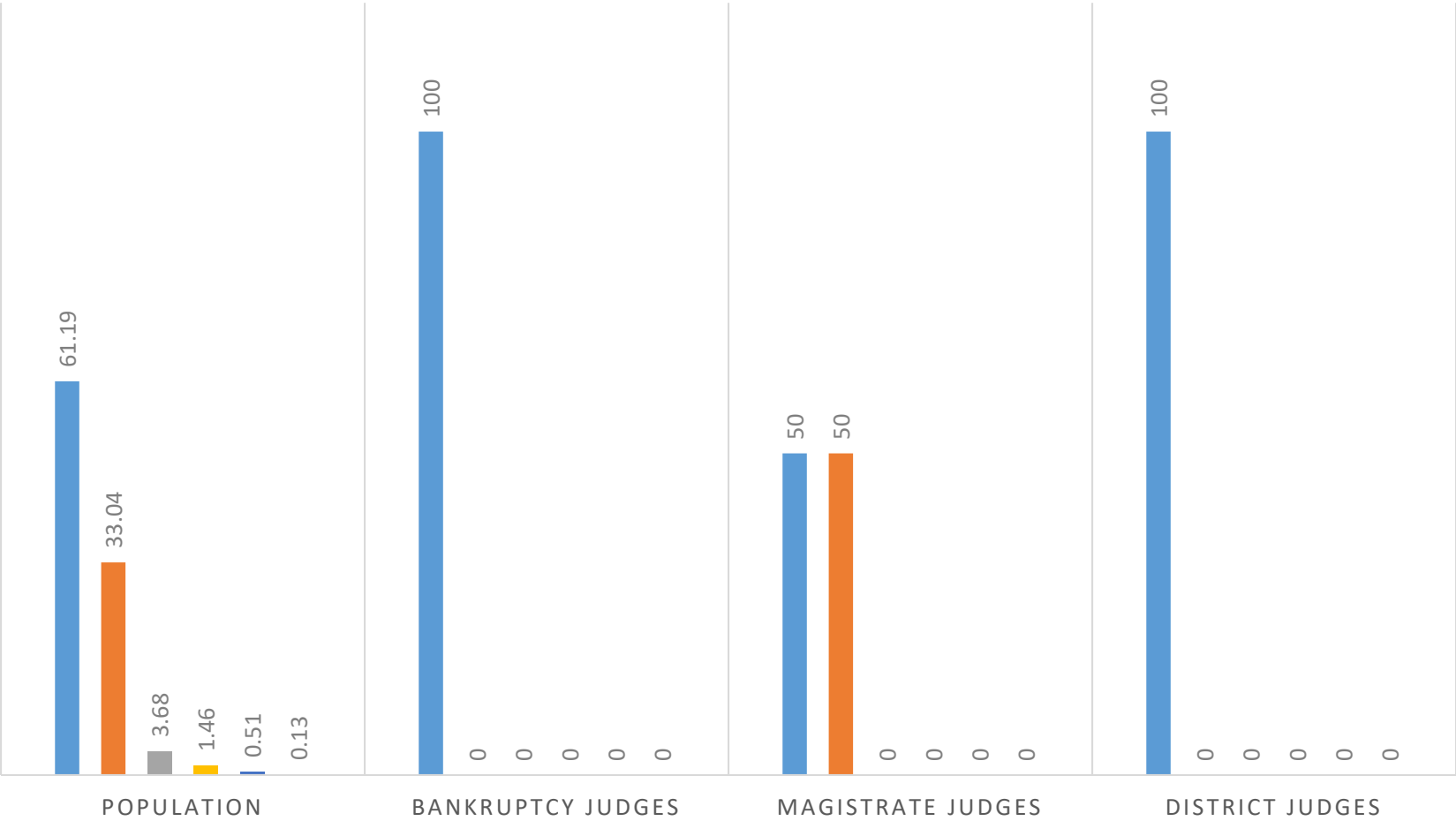
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Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



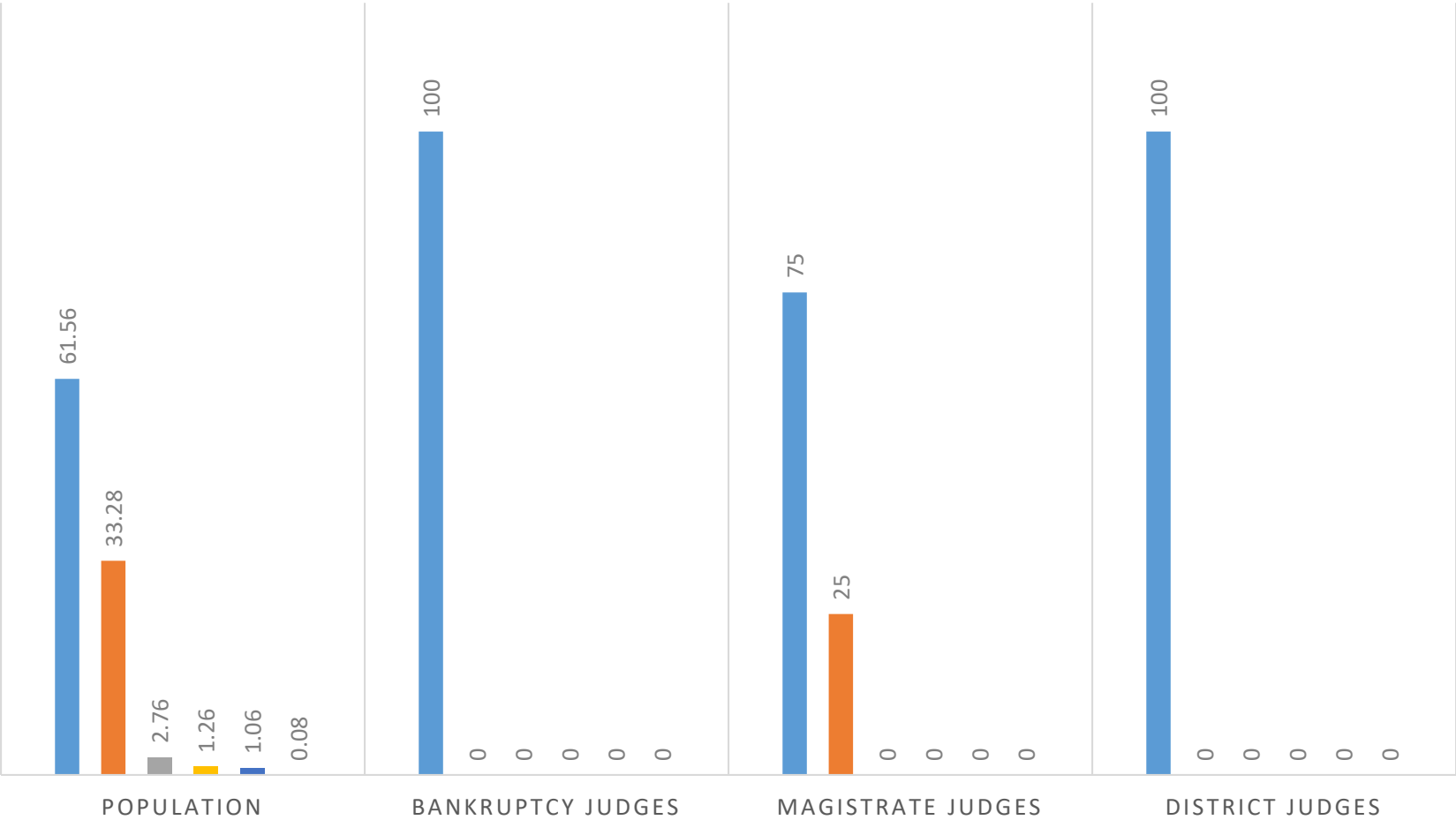
# MIDDLE DISTRICT OF ALABAMA

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



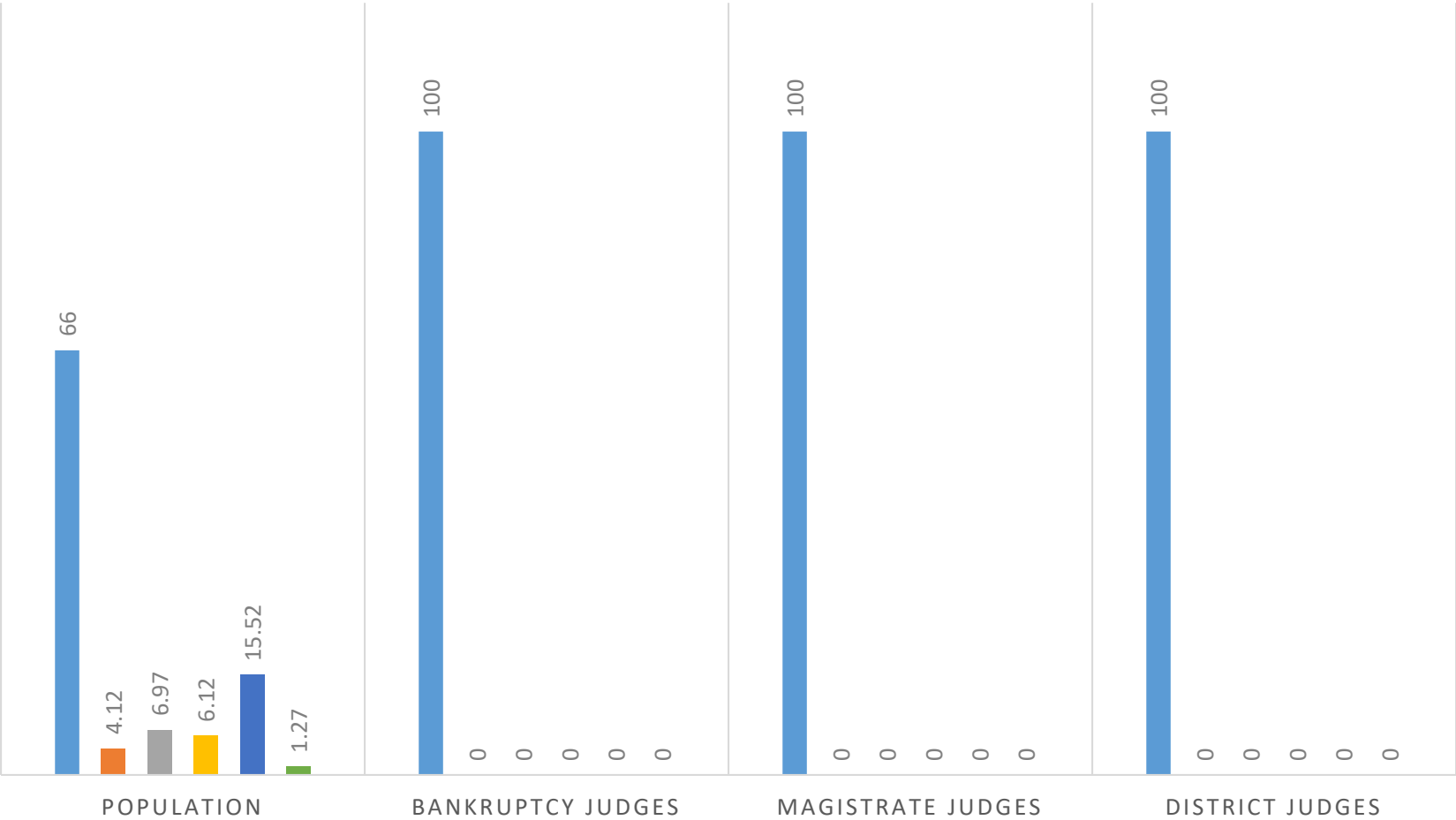
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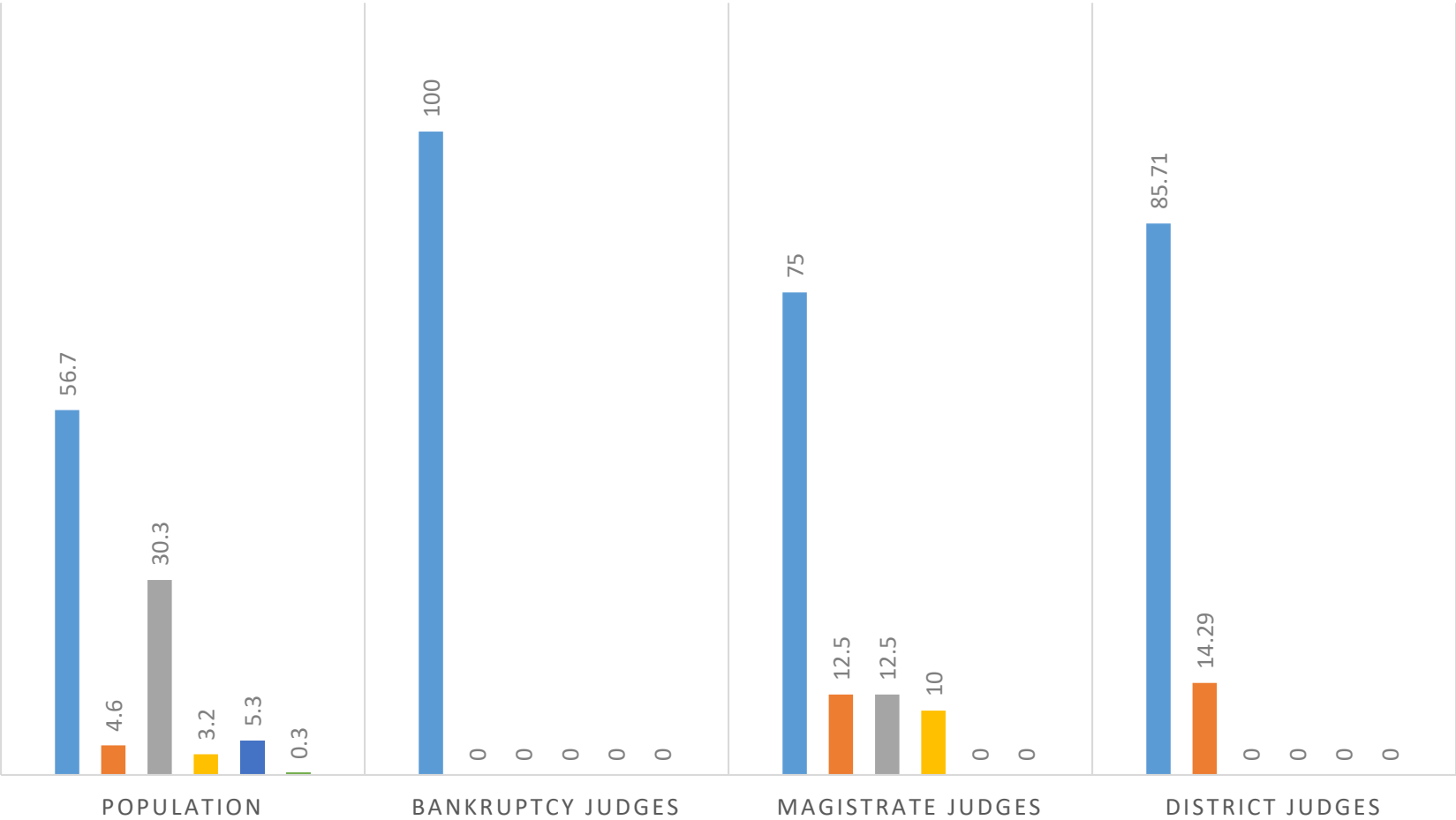
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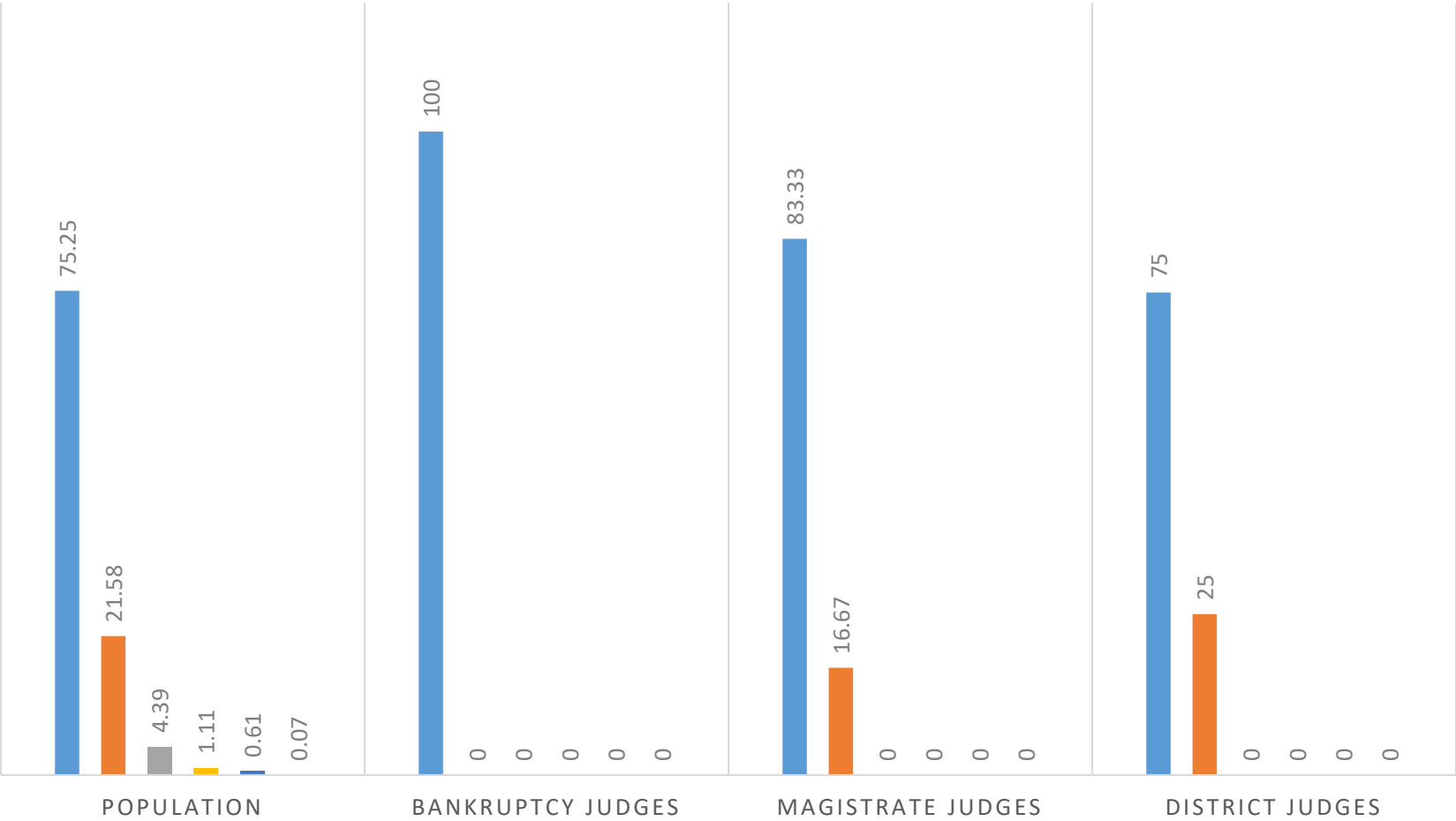
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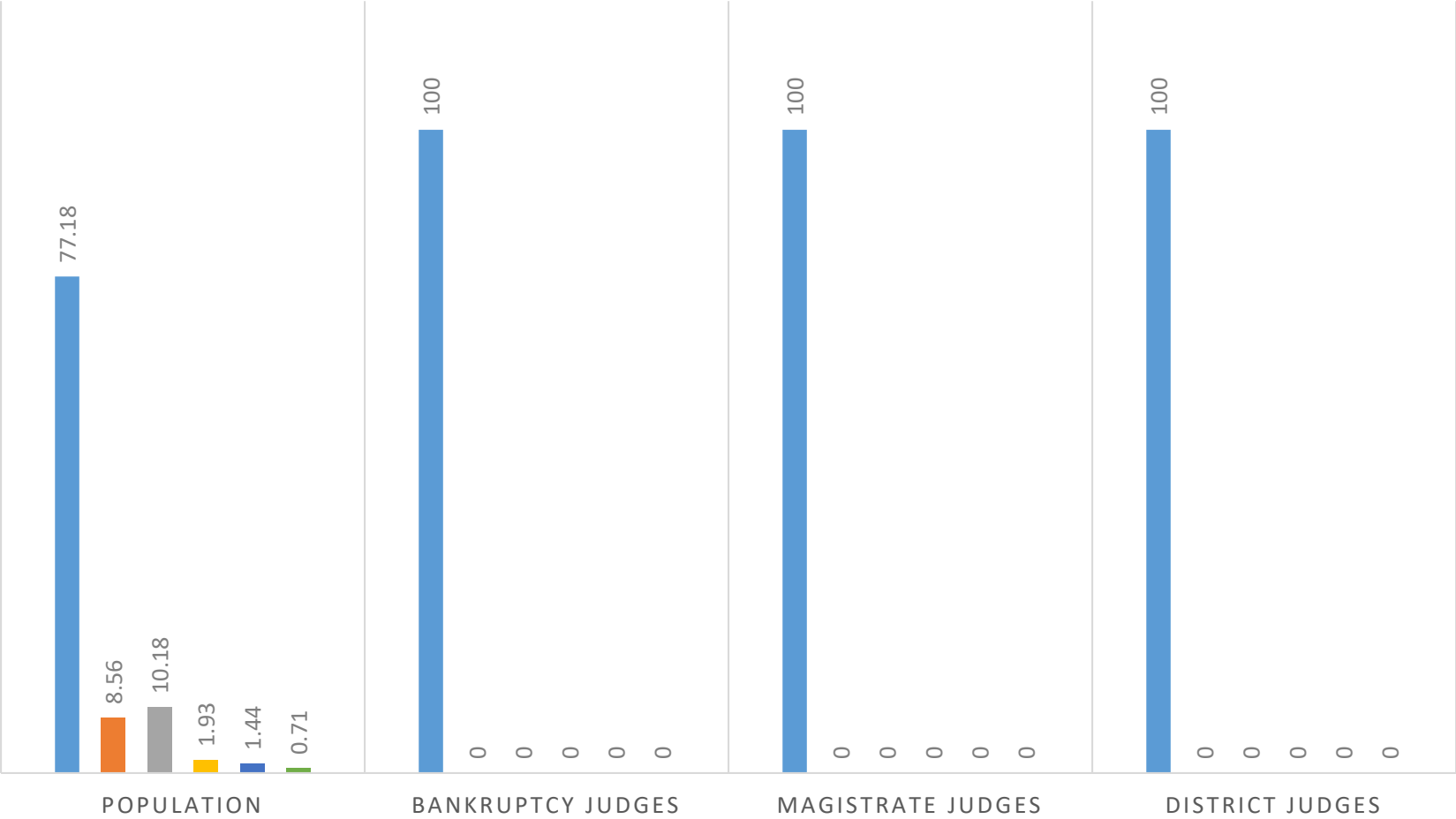
# EASTERN DISTRICT OF ARKANSAS

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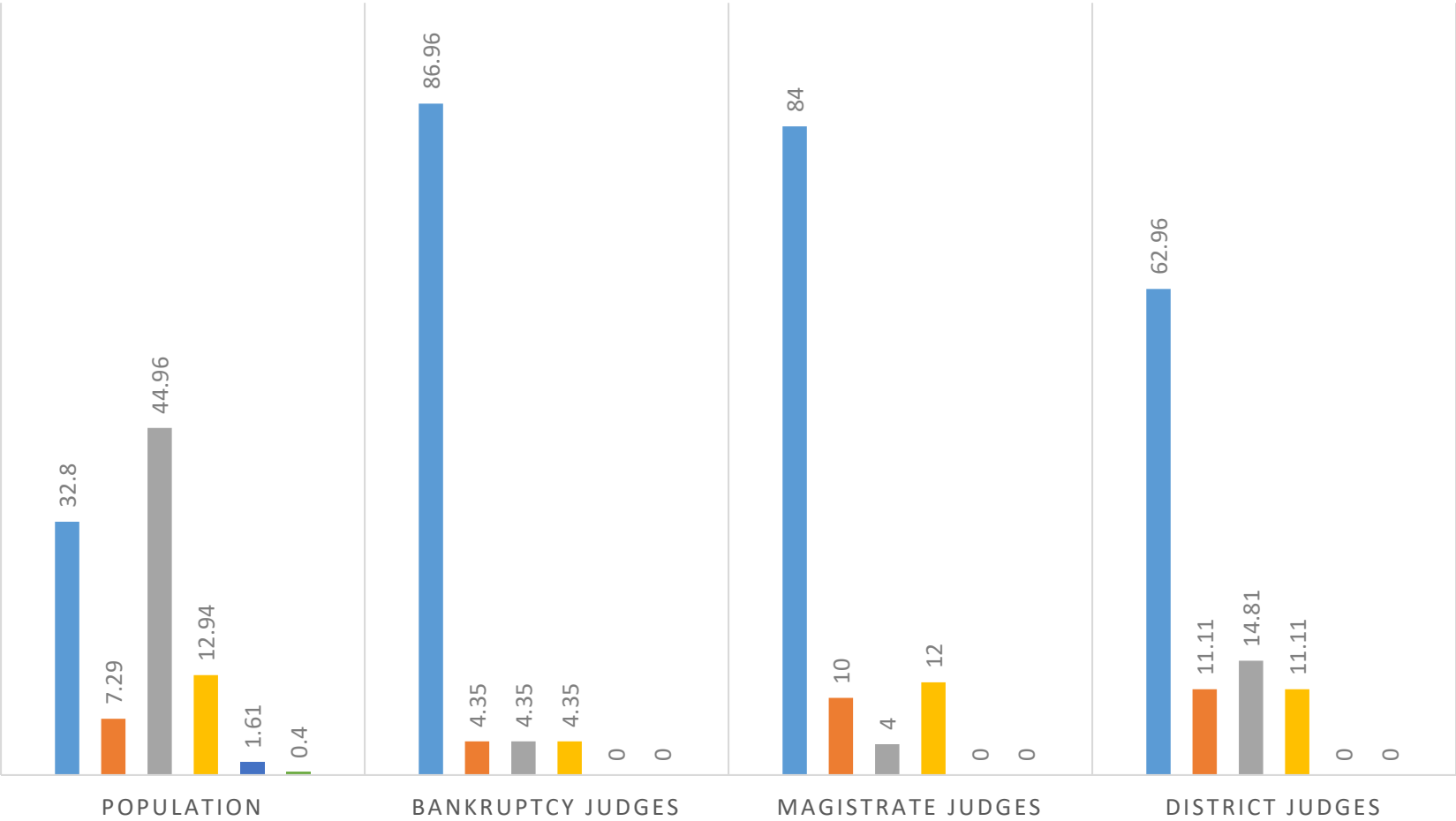
# WESTERN DISTRICT OF ARKANSAS

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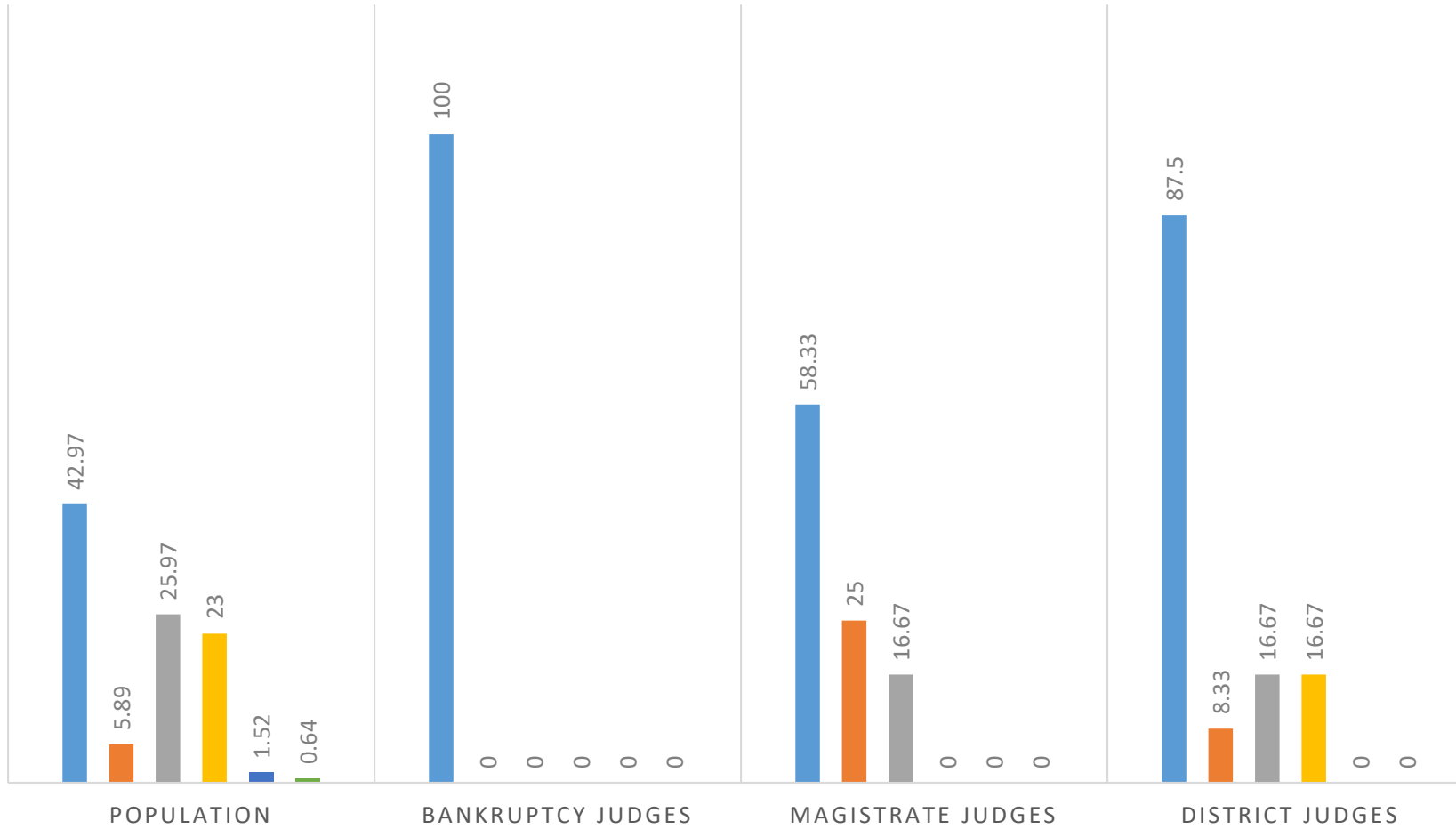
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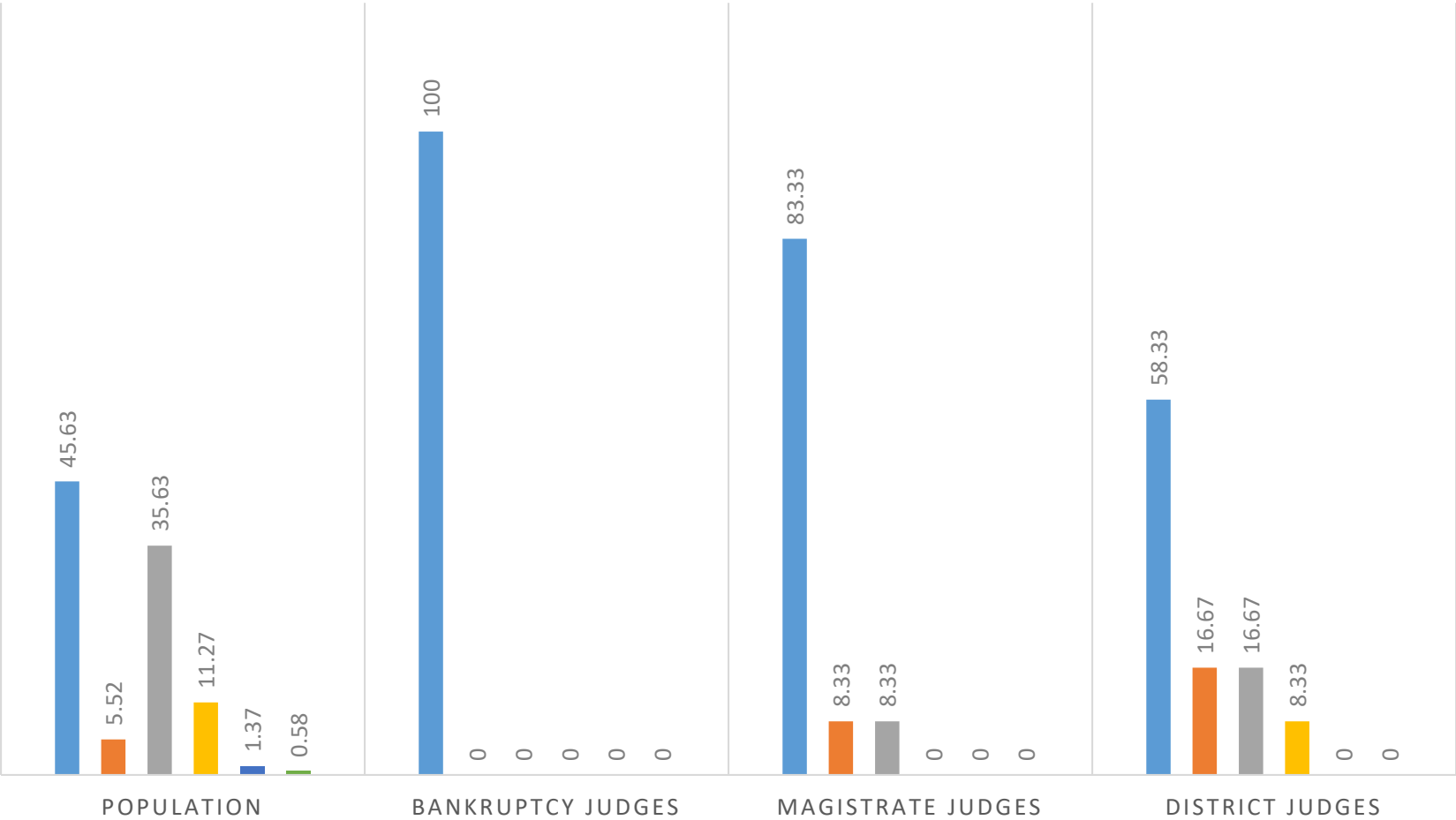
# NORTHERN DISTRICT OF CALIFORNIA

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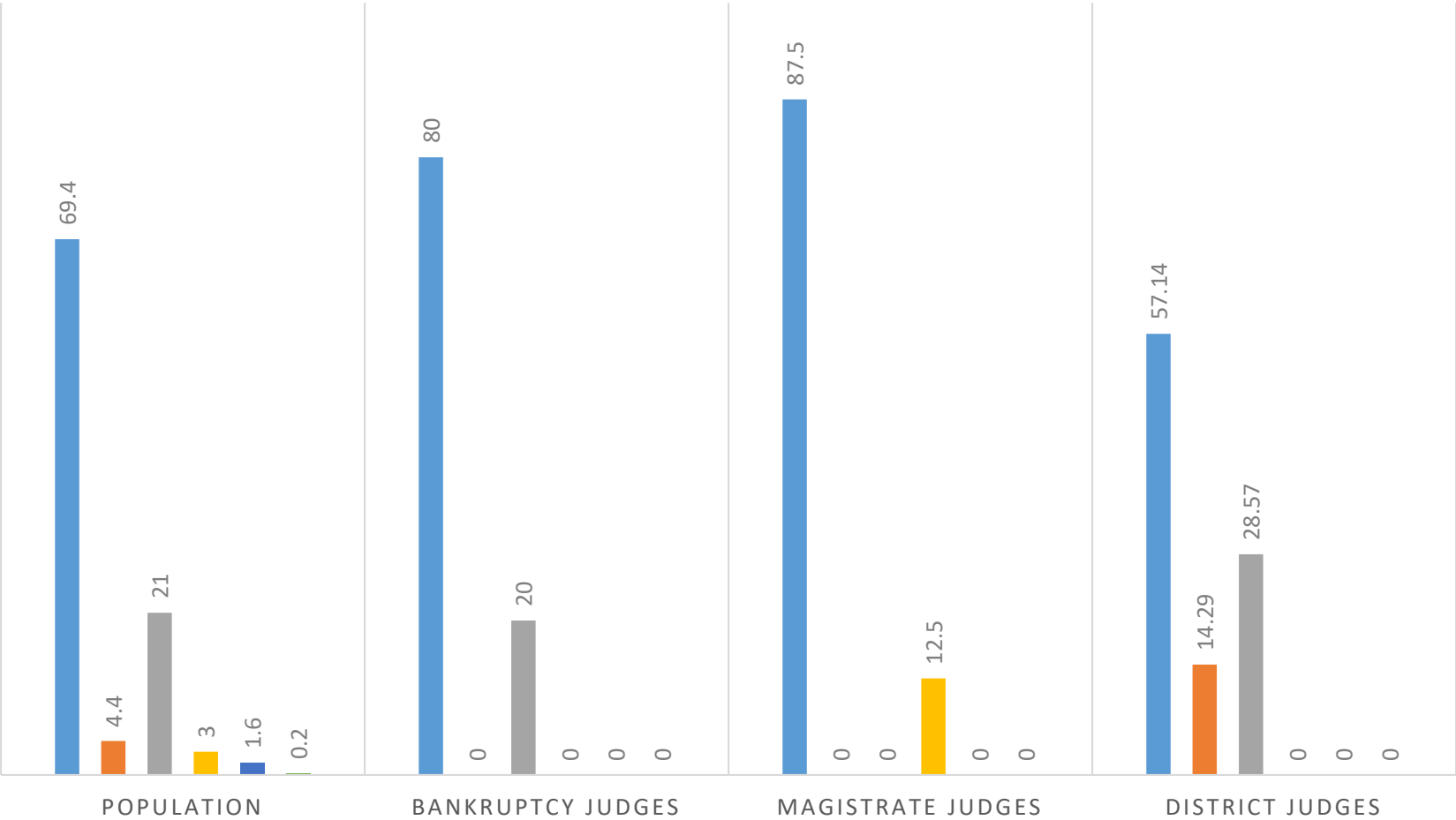
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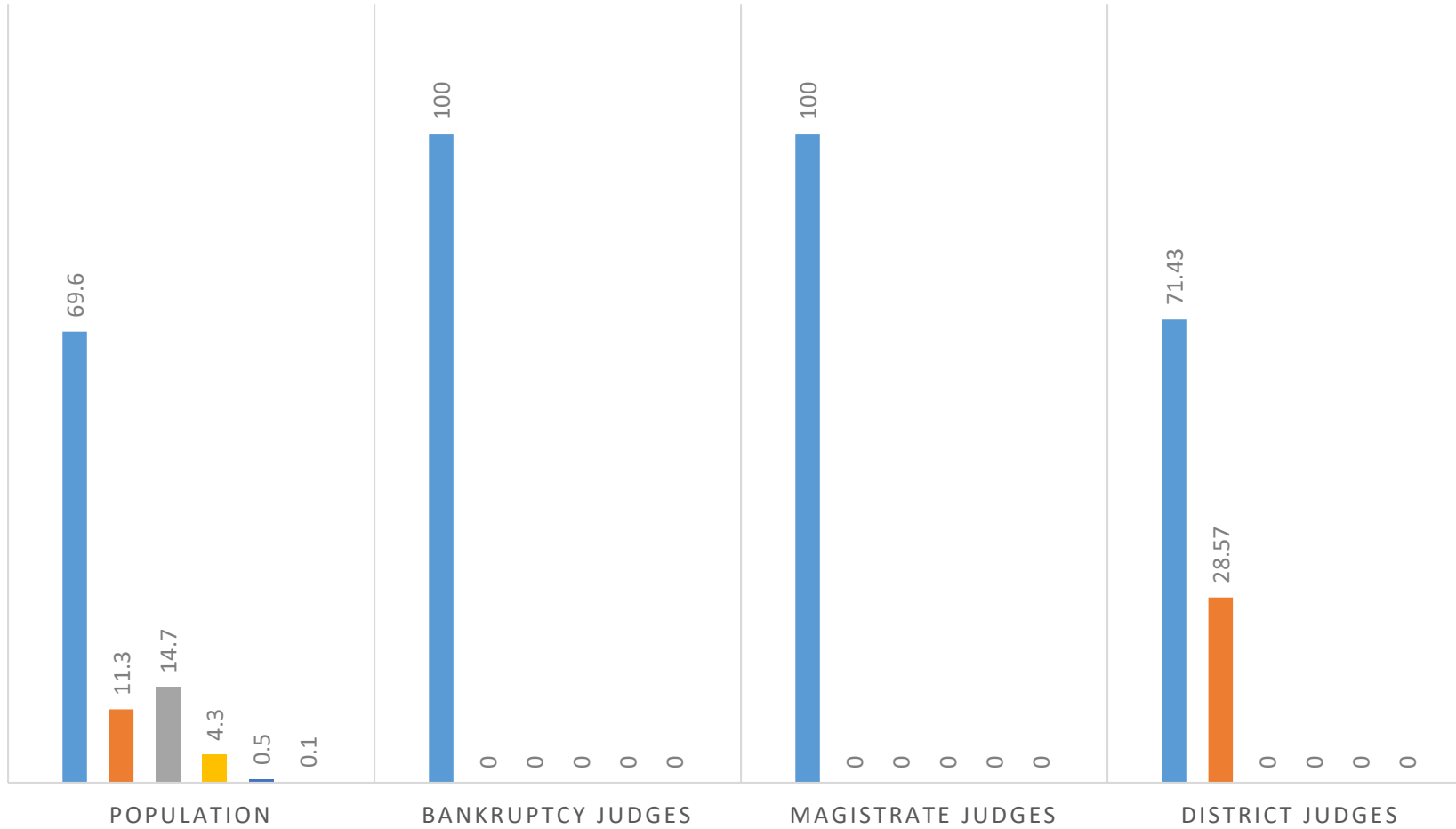
# DISTRICT OF COLORADO

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



# DISTRICT OF CONNECTICUT

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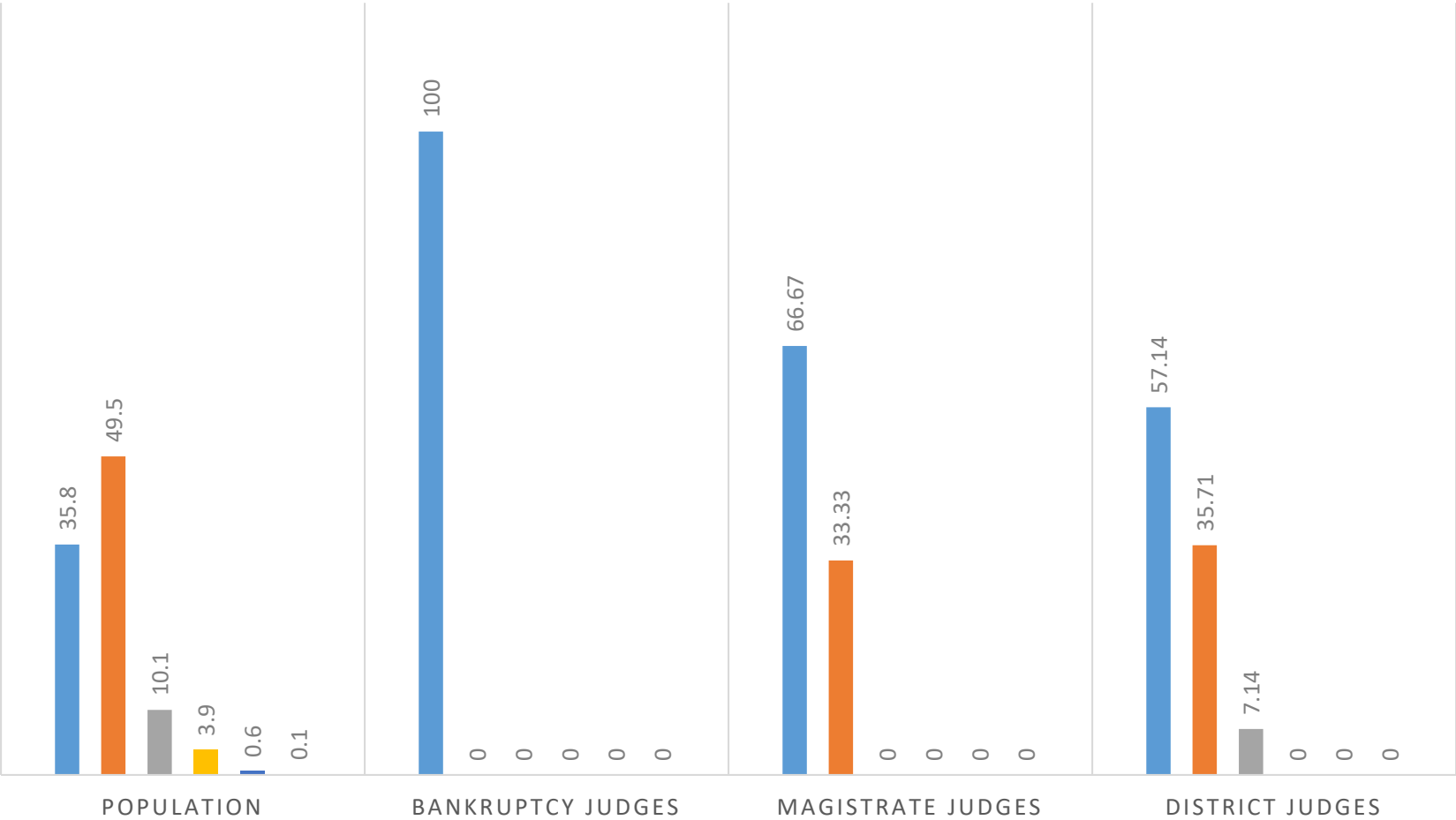
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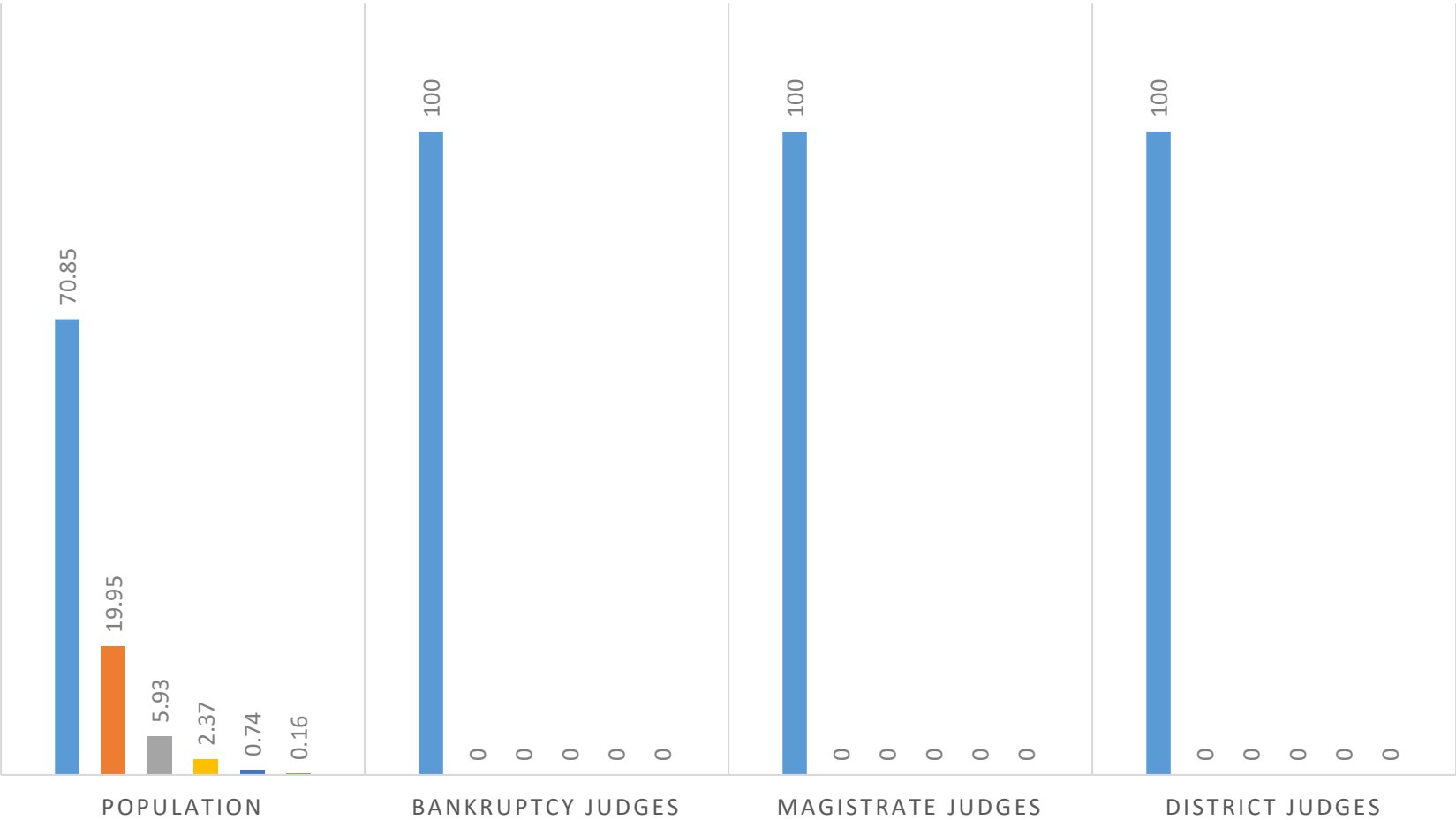
# DISTRICT OF COLUMBIA

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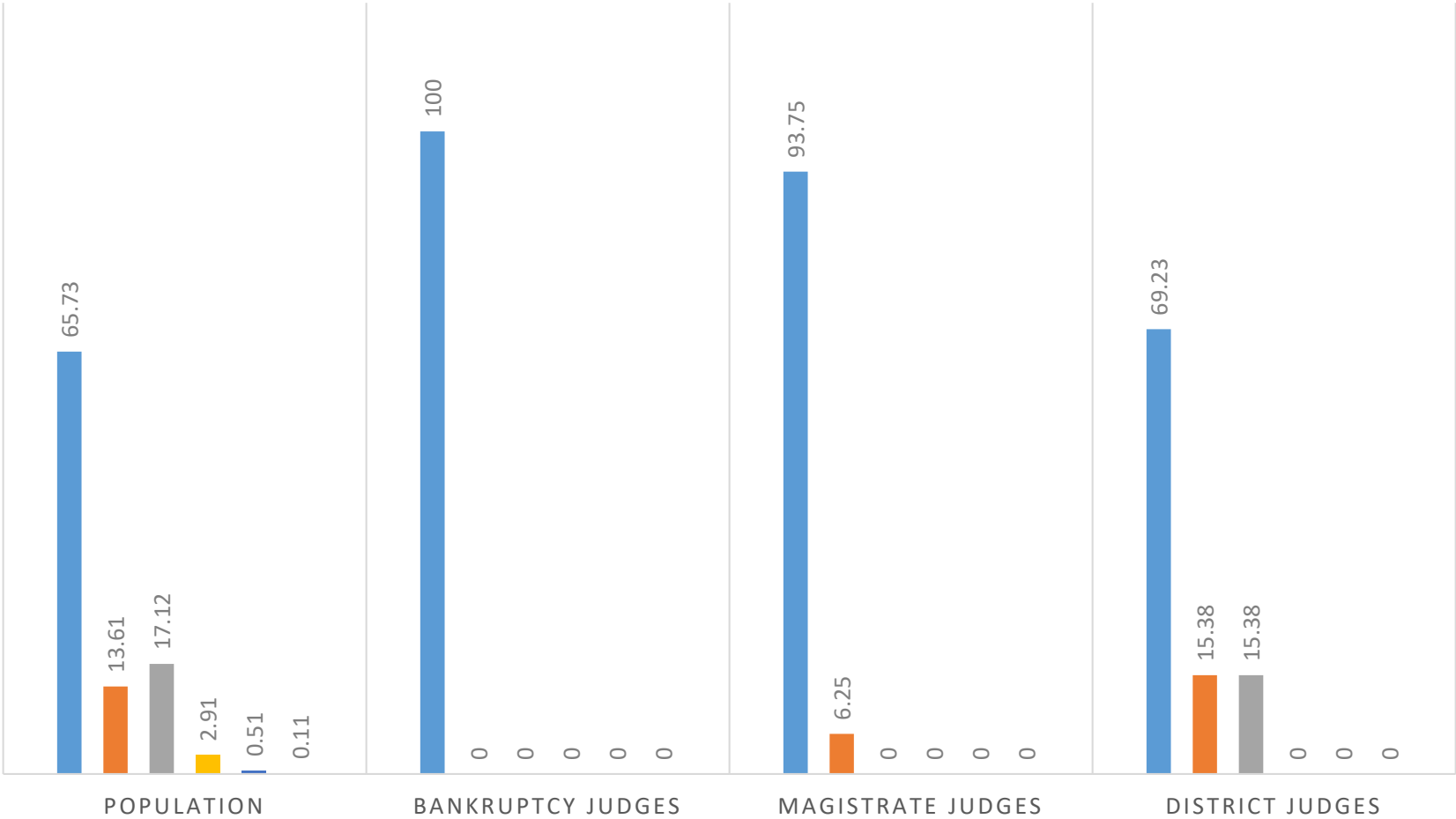
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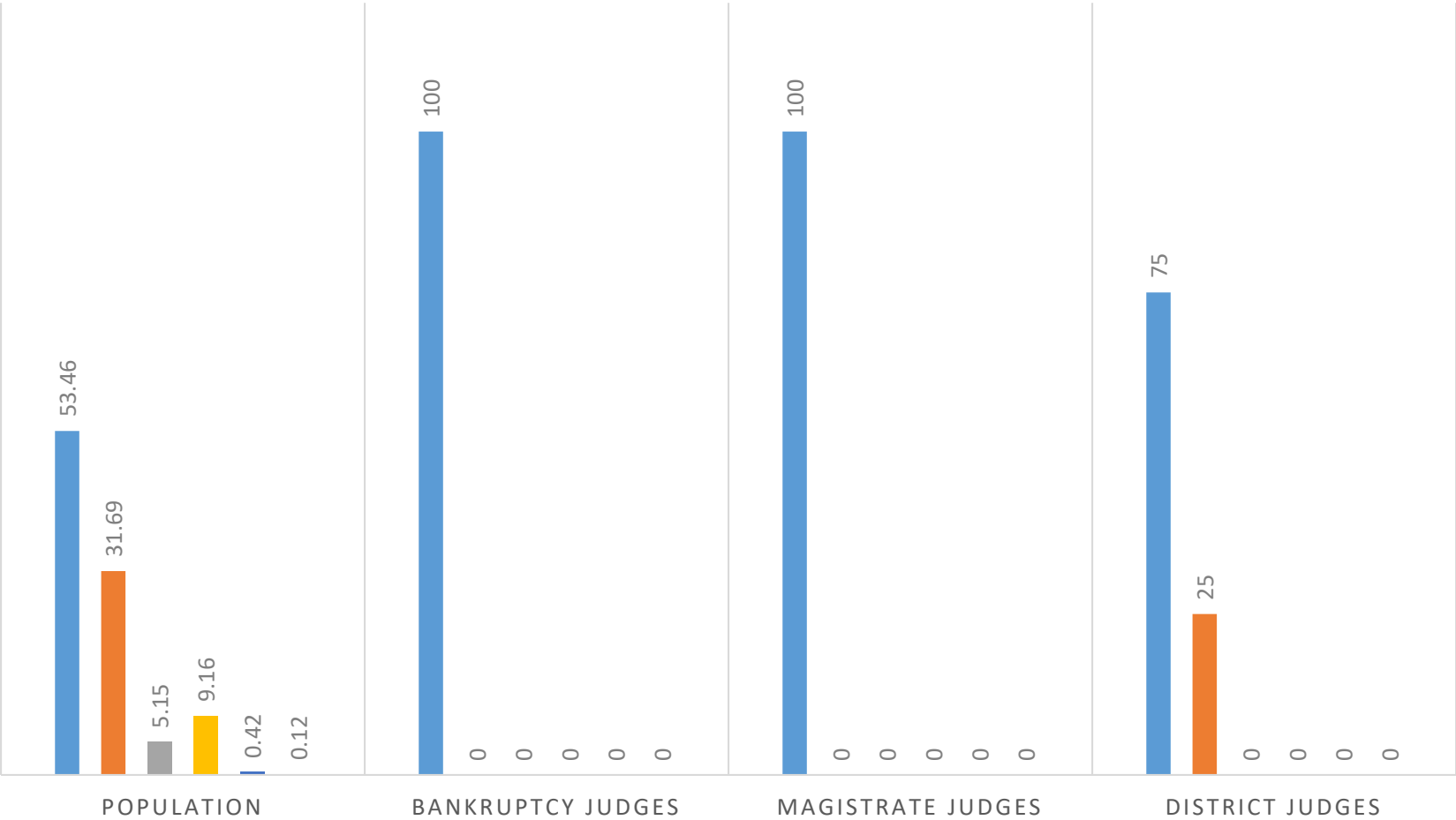
# MIDDLE DISTRICT OF FLORIDA

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



# MIDDLE DISTRICT OF GEORGIA

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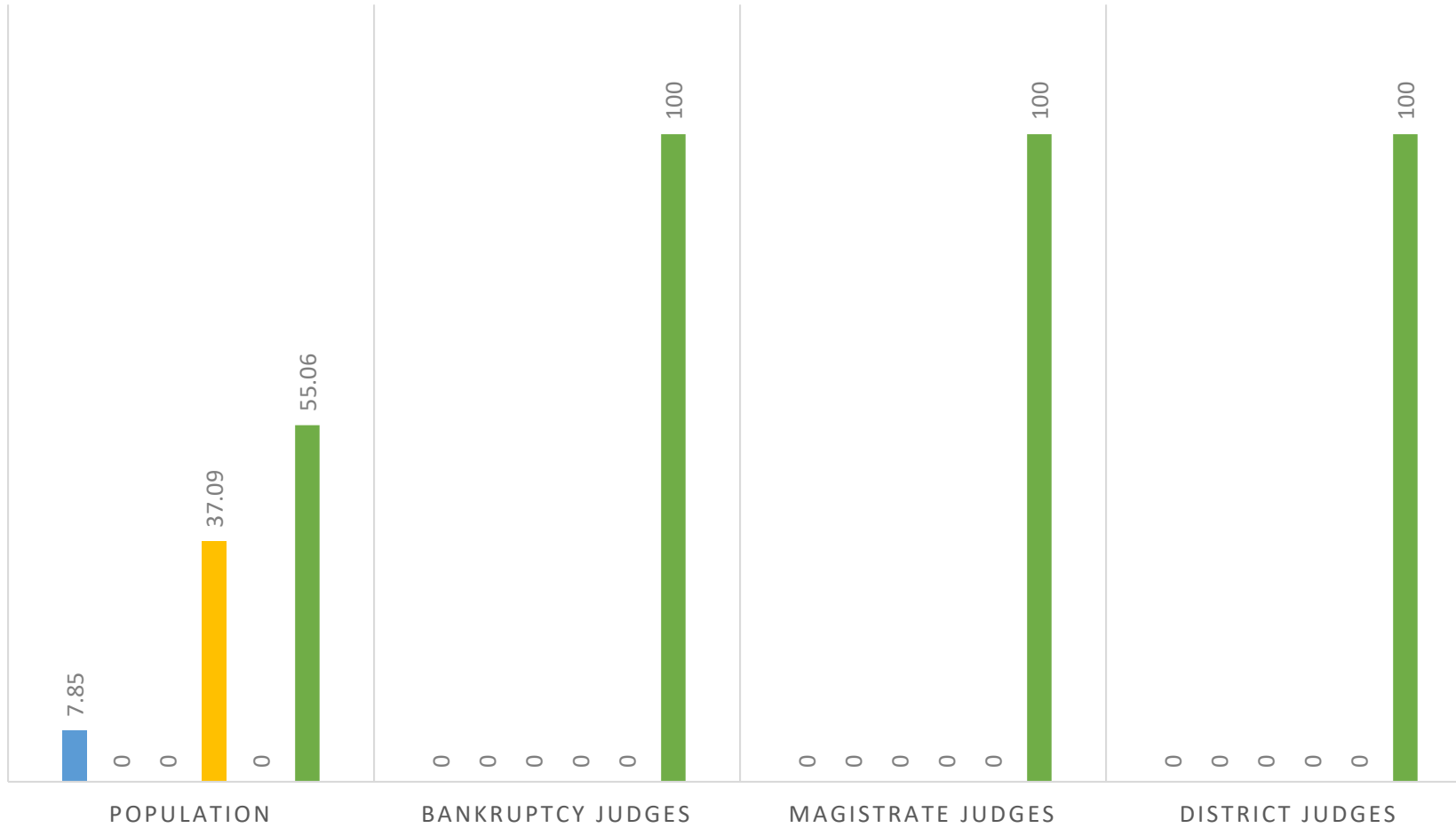
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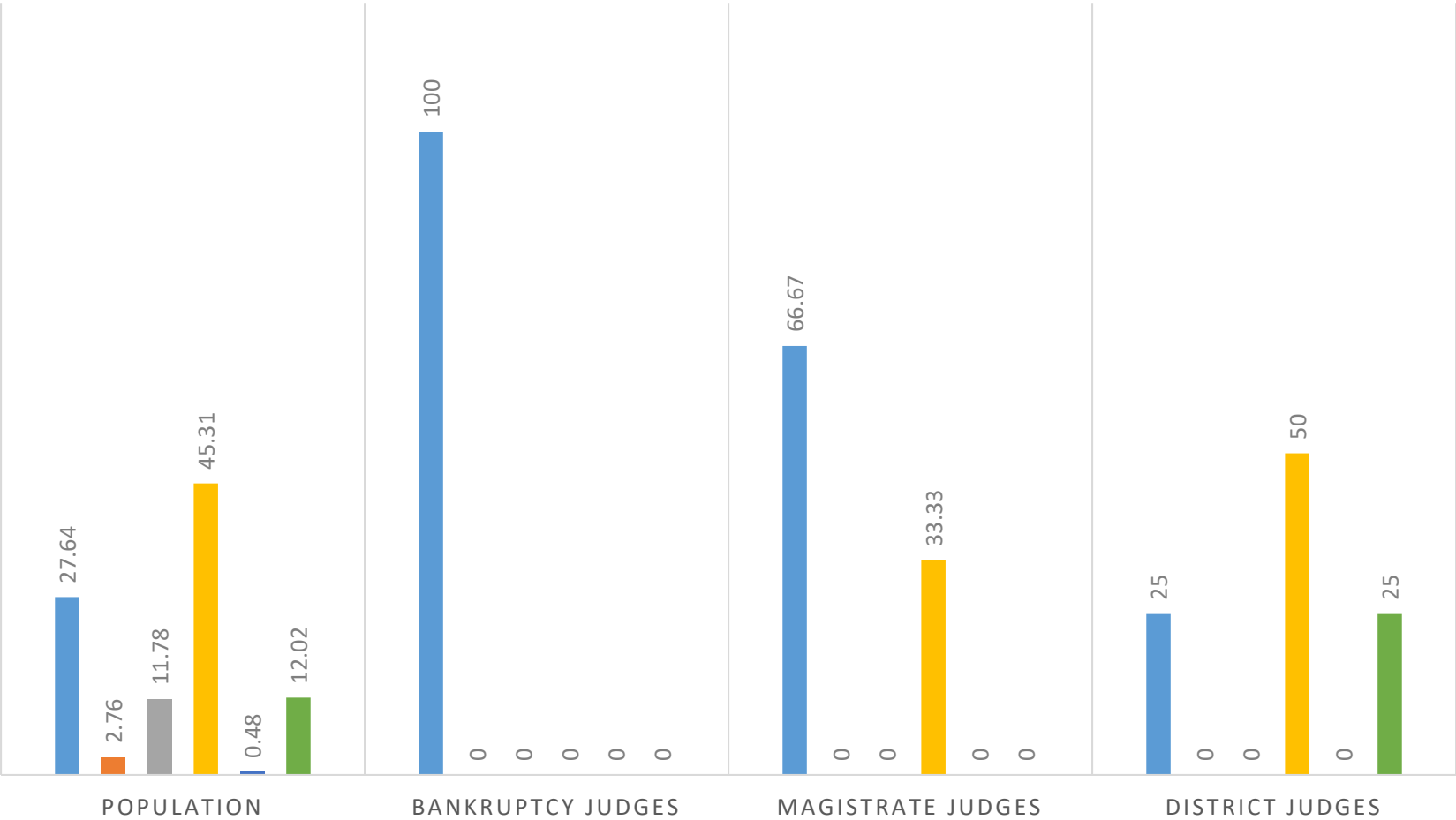
# DISTRICT OF GUAM

■ Caucasian ■ African American ■ Latino/Hispanic ■ Asian ■ Native American ■ Pacific Islander



# DISTRICT OF HAWAII

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



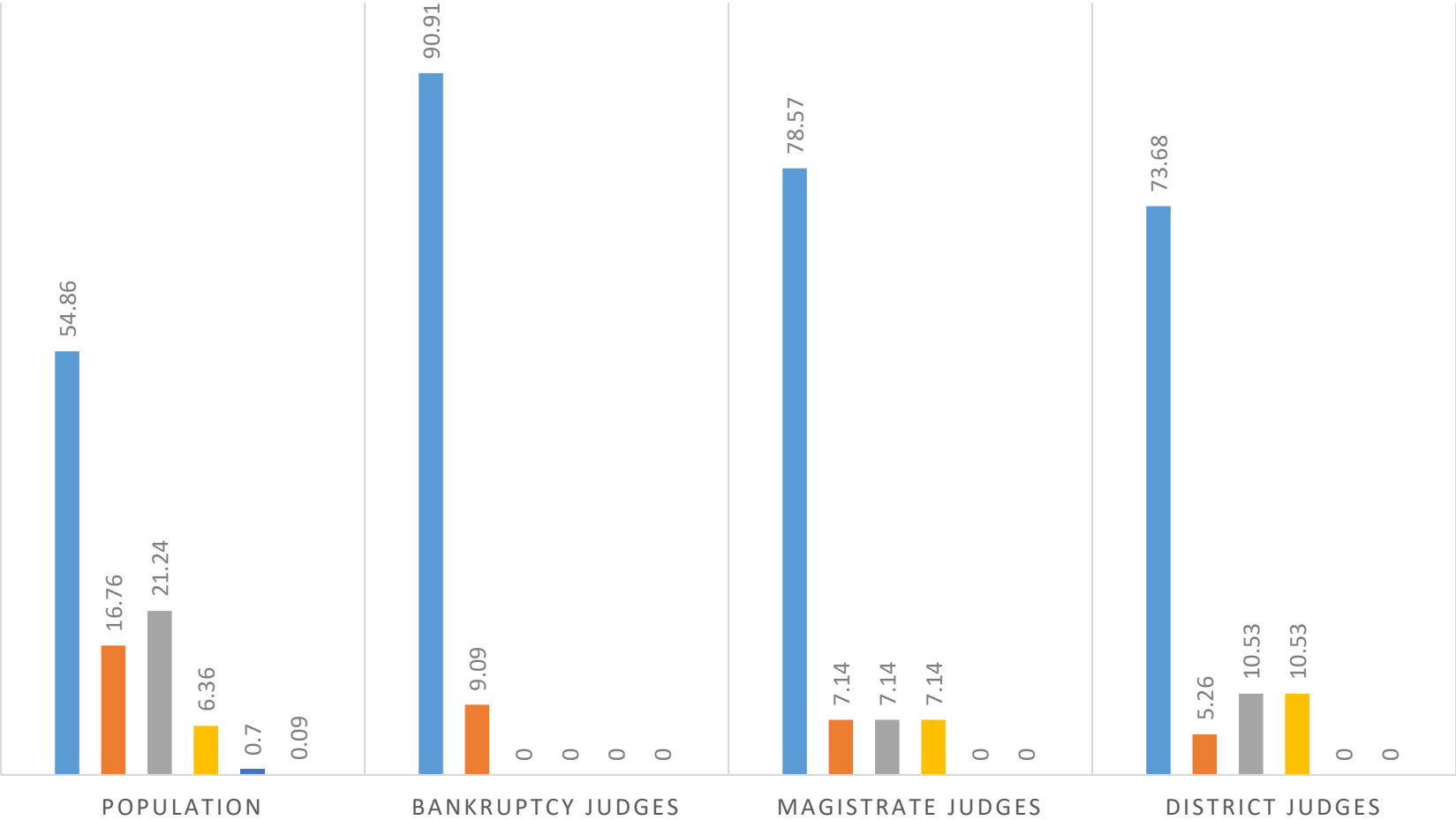
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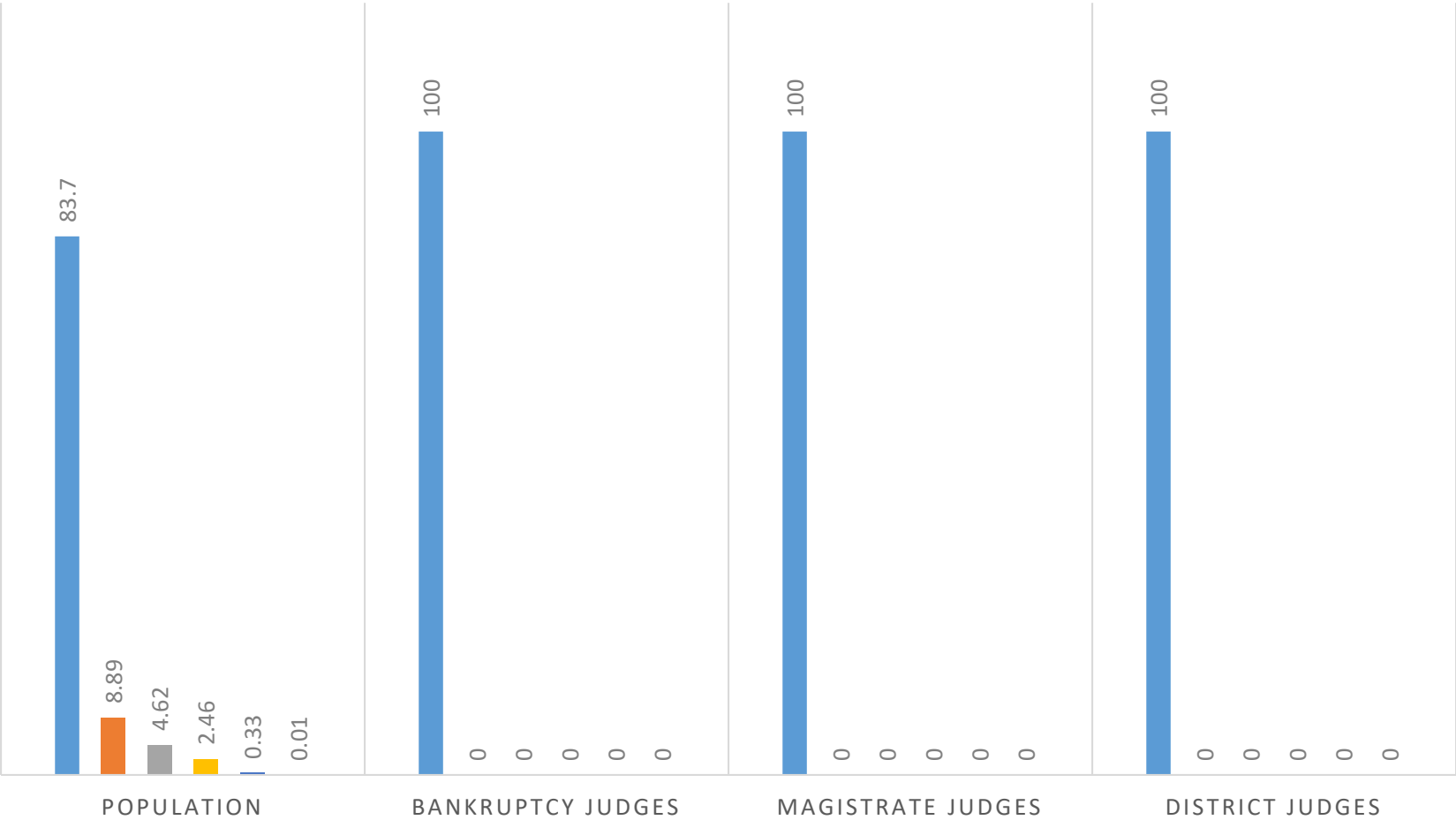
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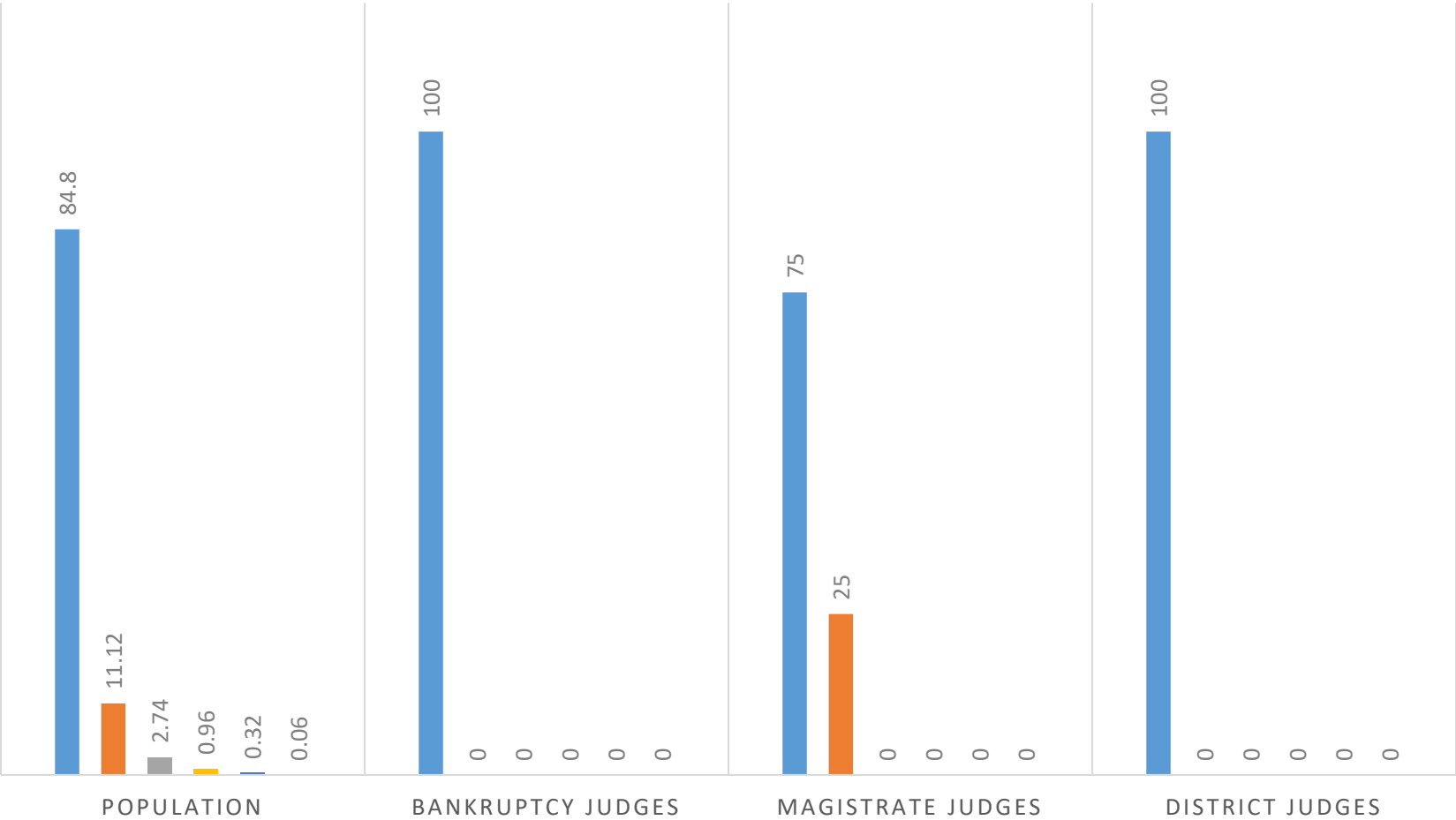
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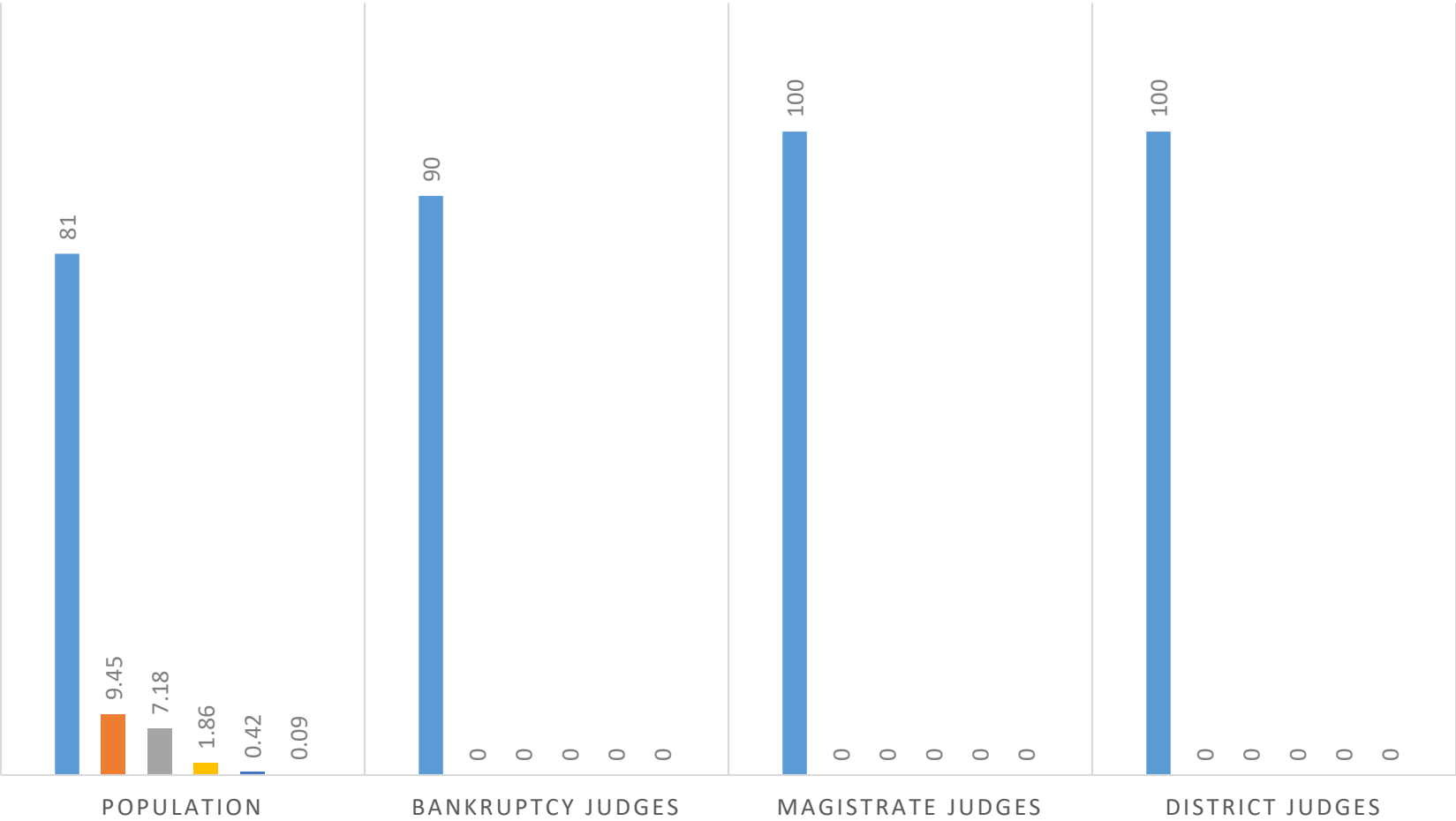
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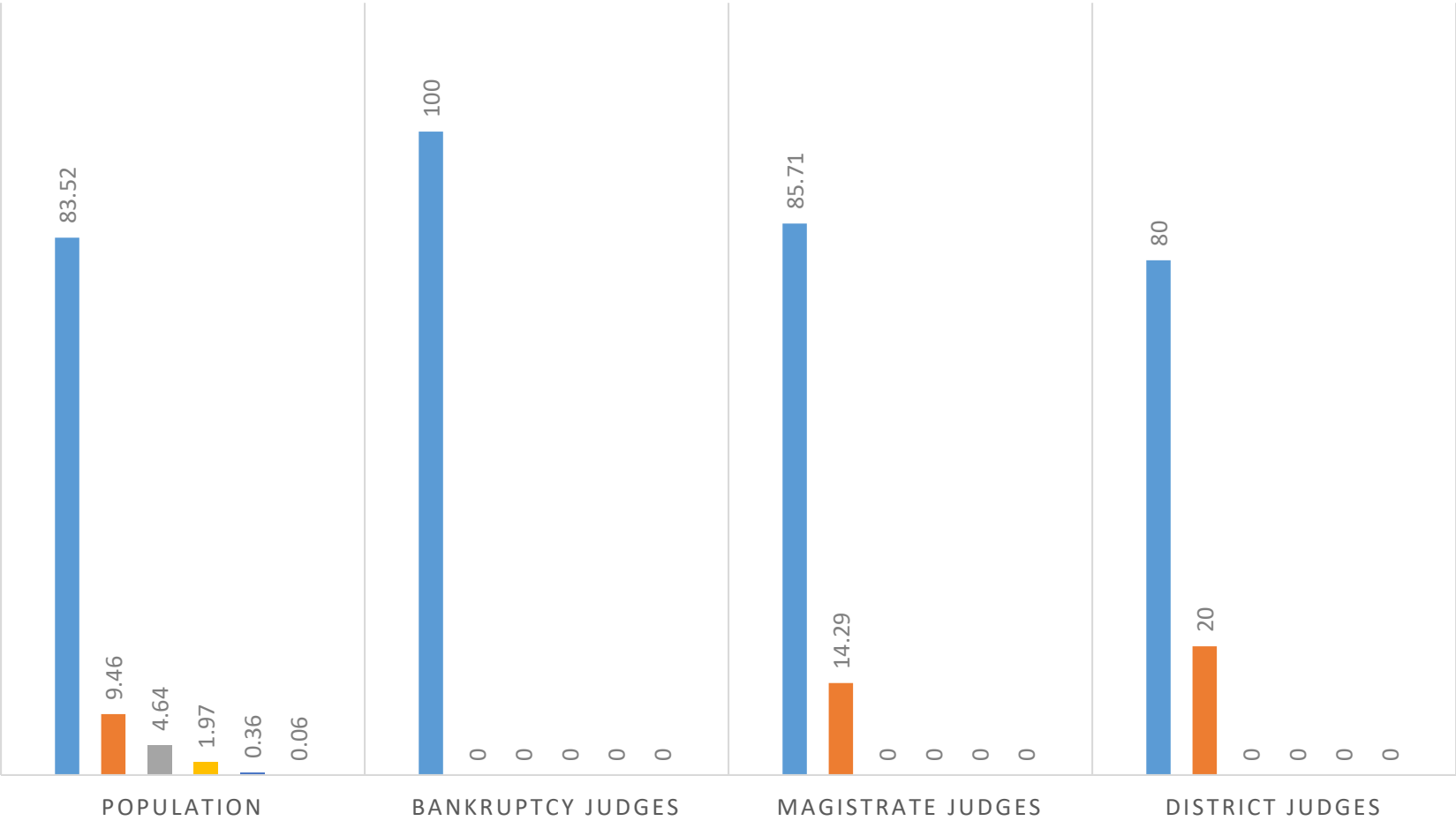
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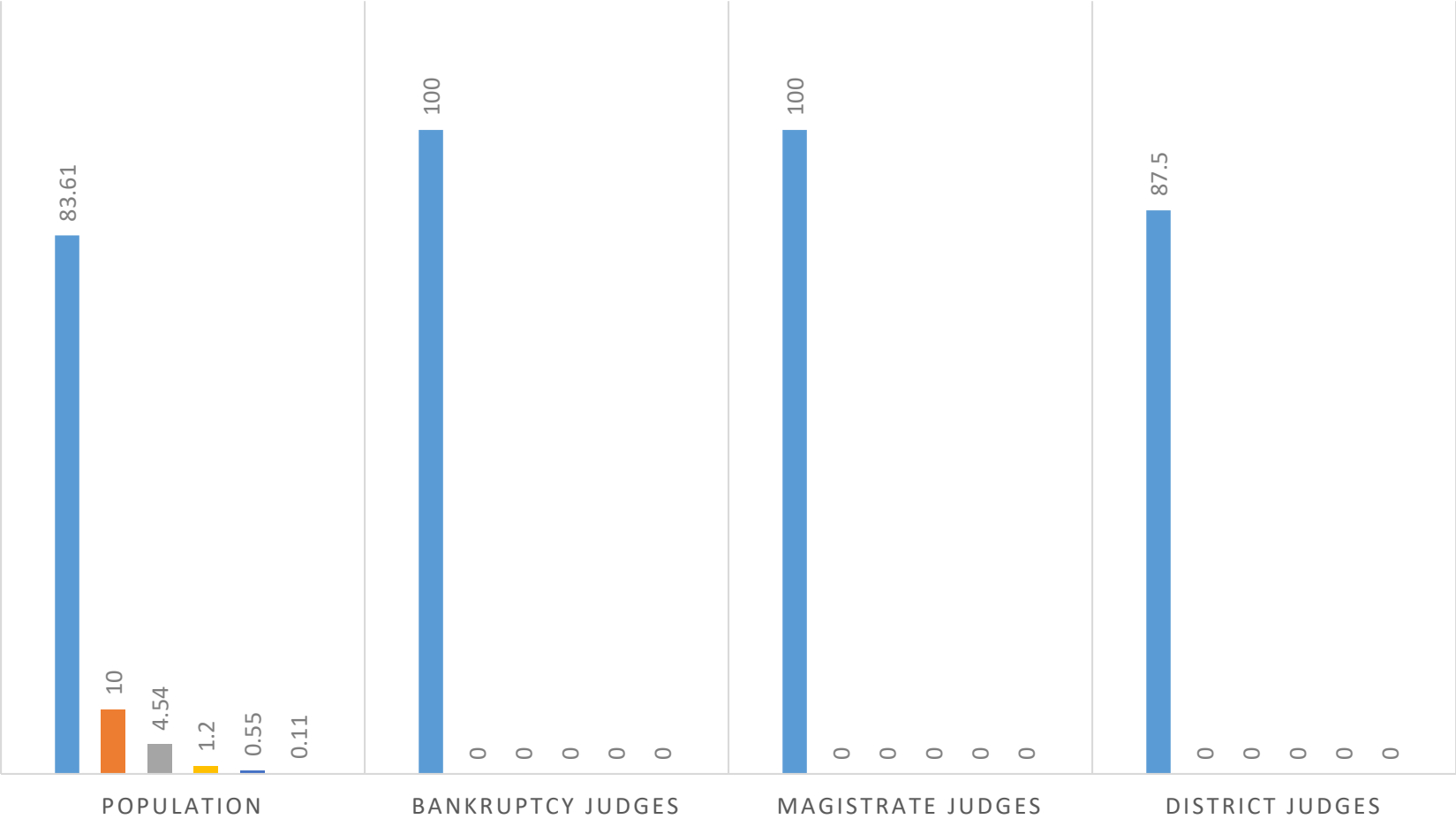
# SOUTHERN DISTRICT OF INDIANA

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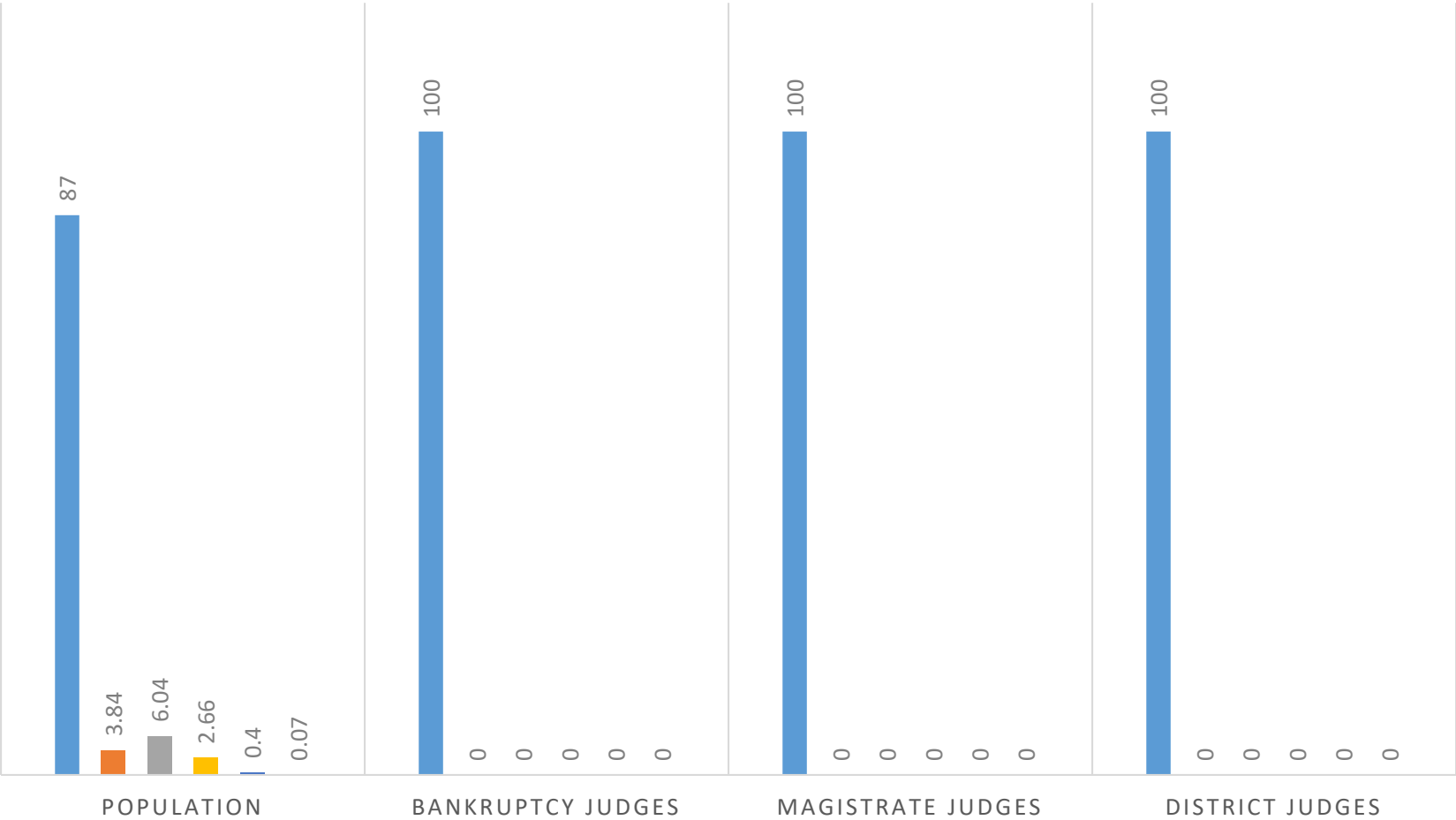
# NORTHERN DISTRICT OF IOWA

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



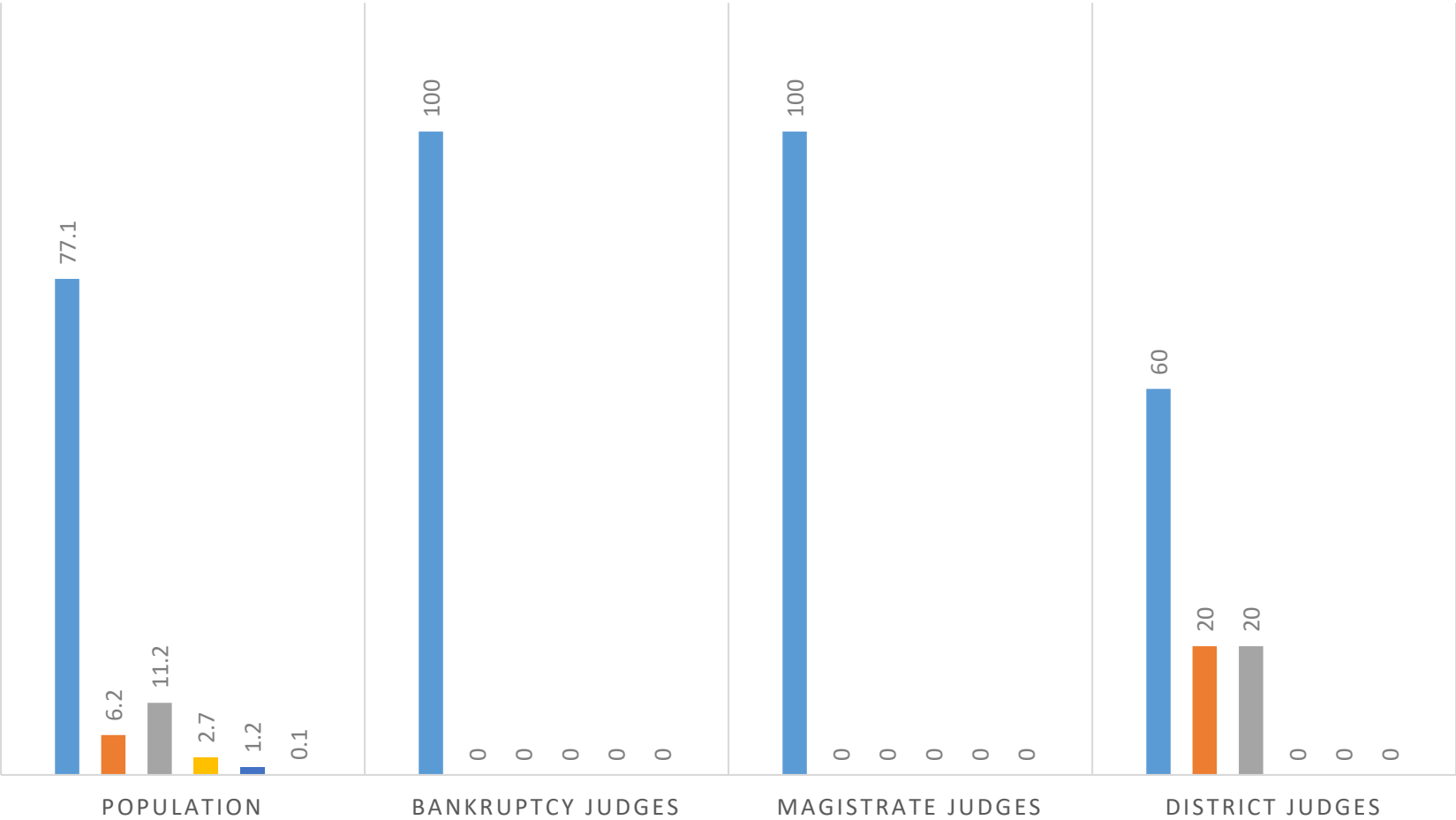
# SOUTHERN DISTRICT OF IOWA

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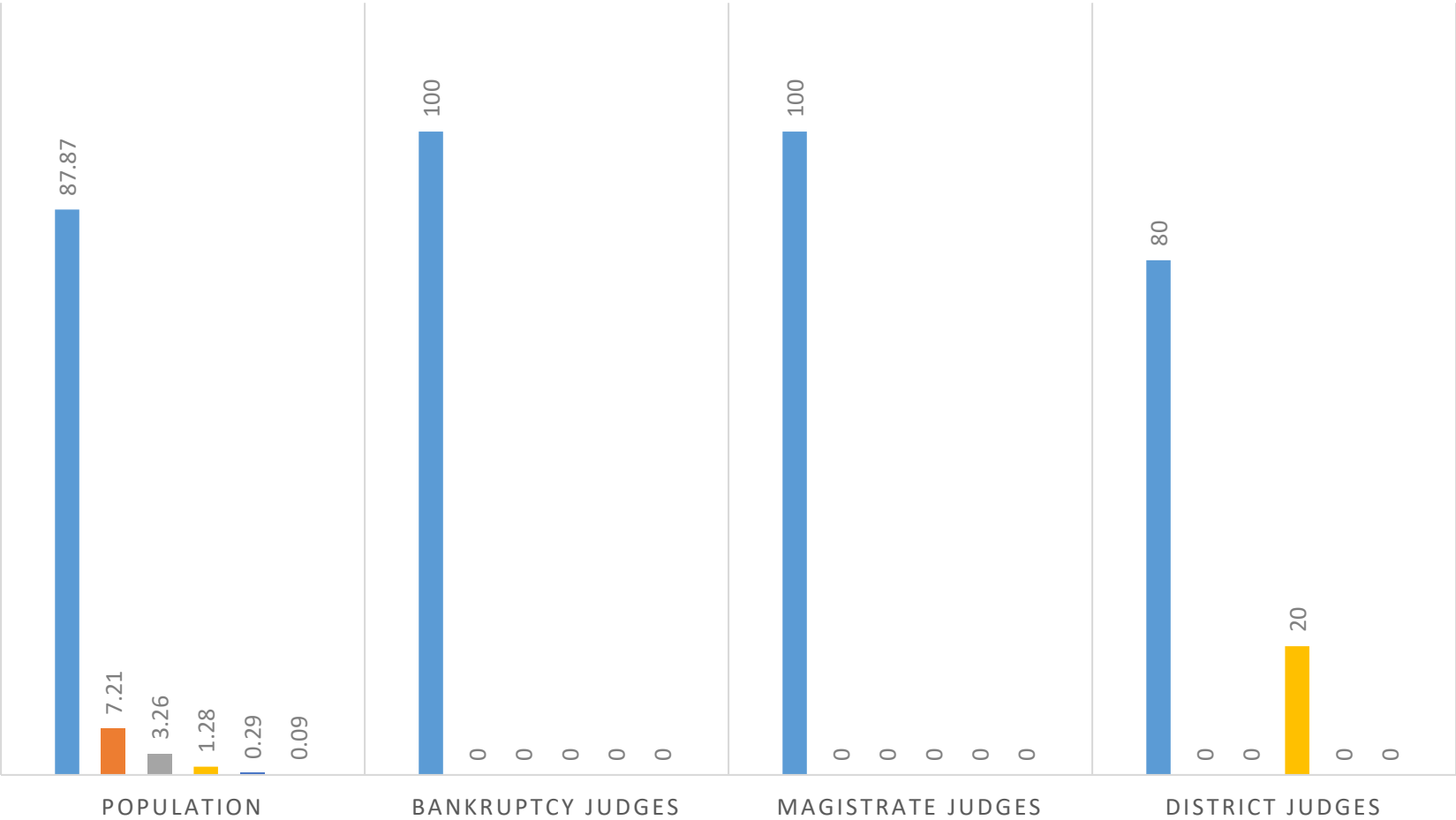
# DISTRICT OF KANSAS

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



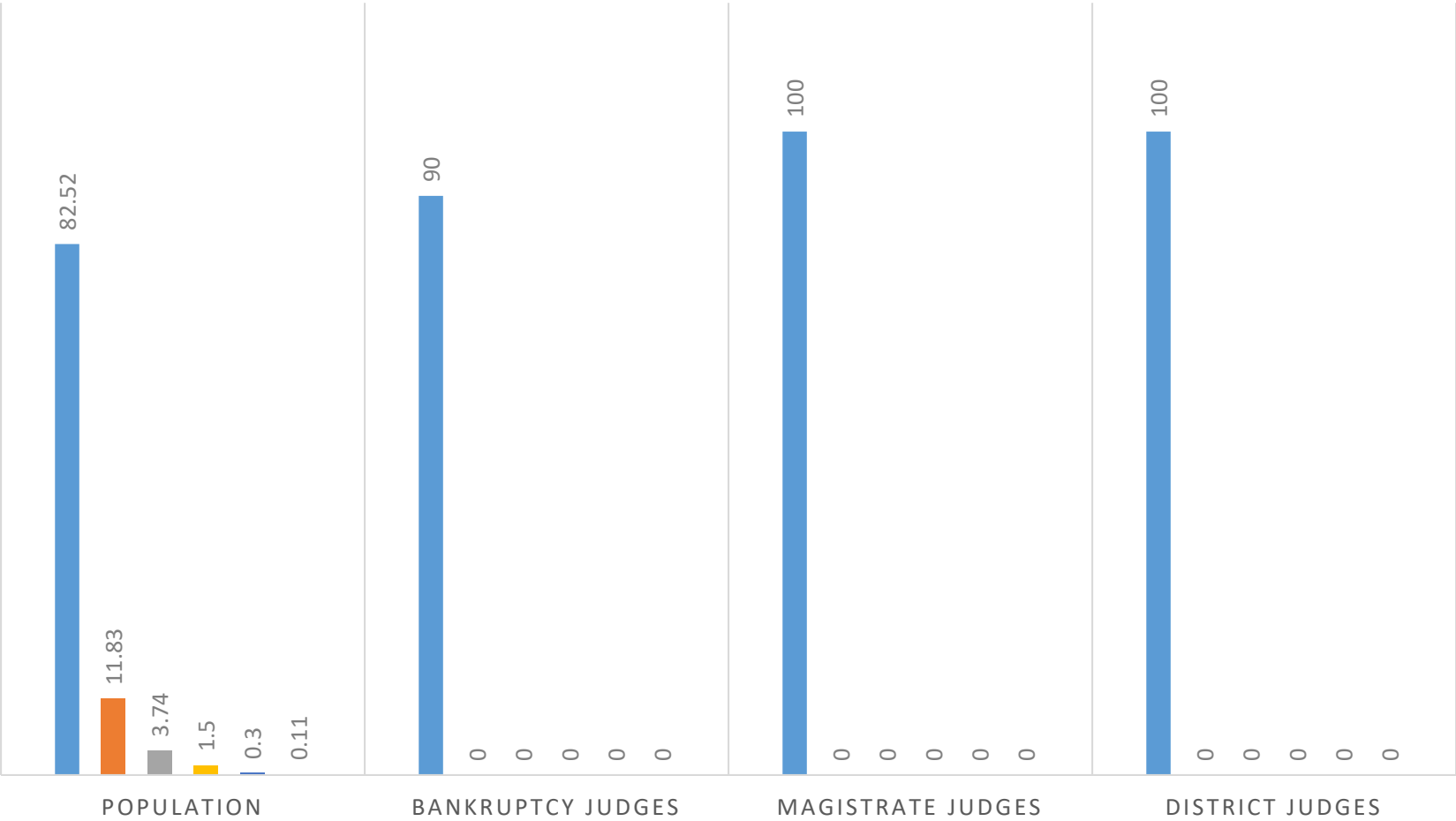
# EASTERN DISTRICT OF KENTUCKY

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



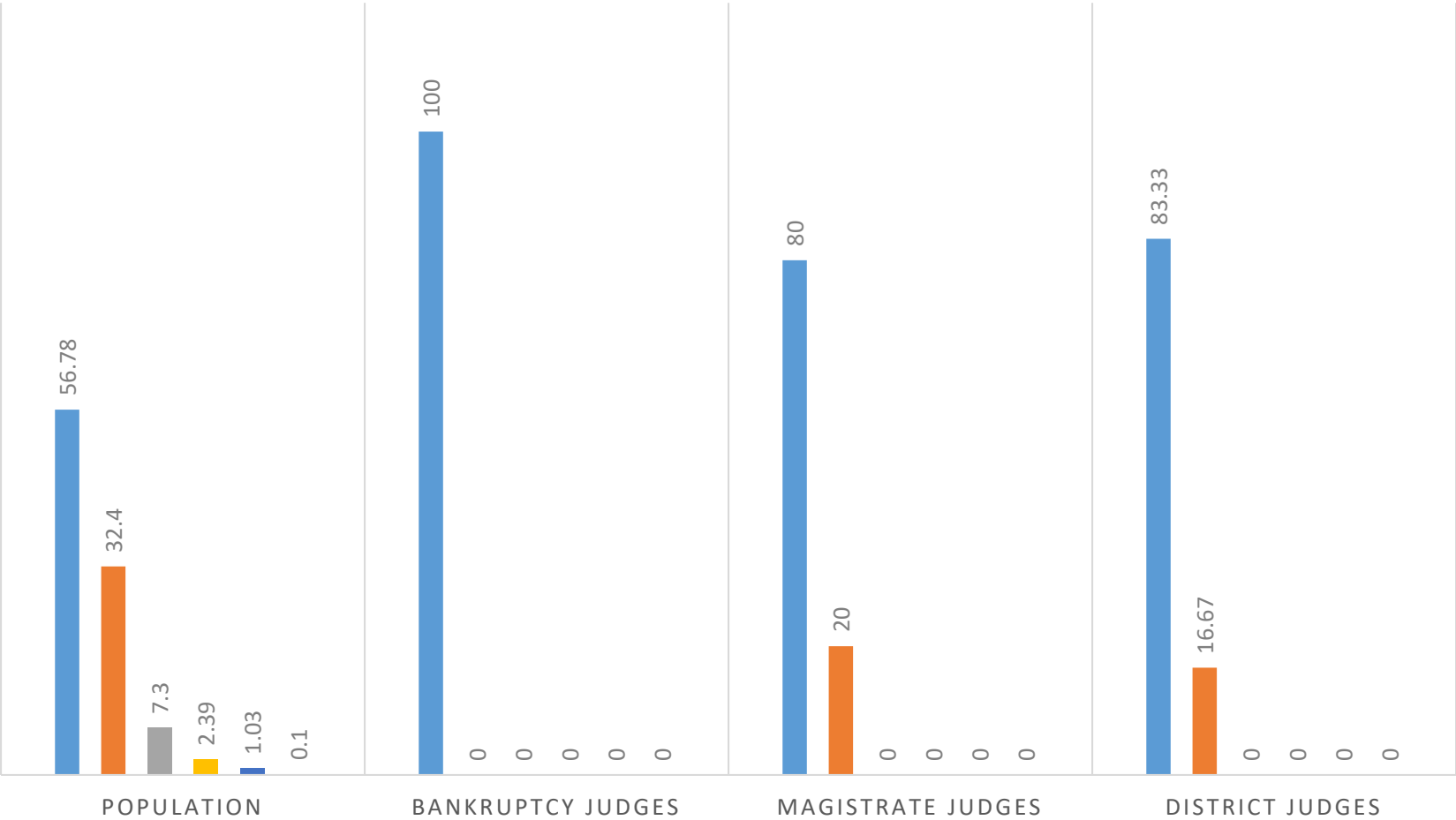
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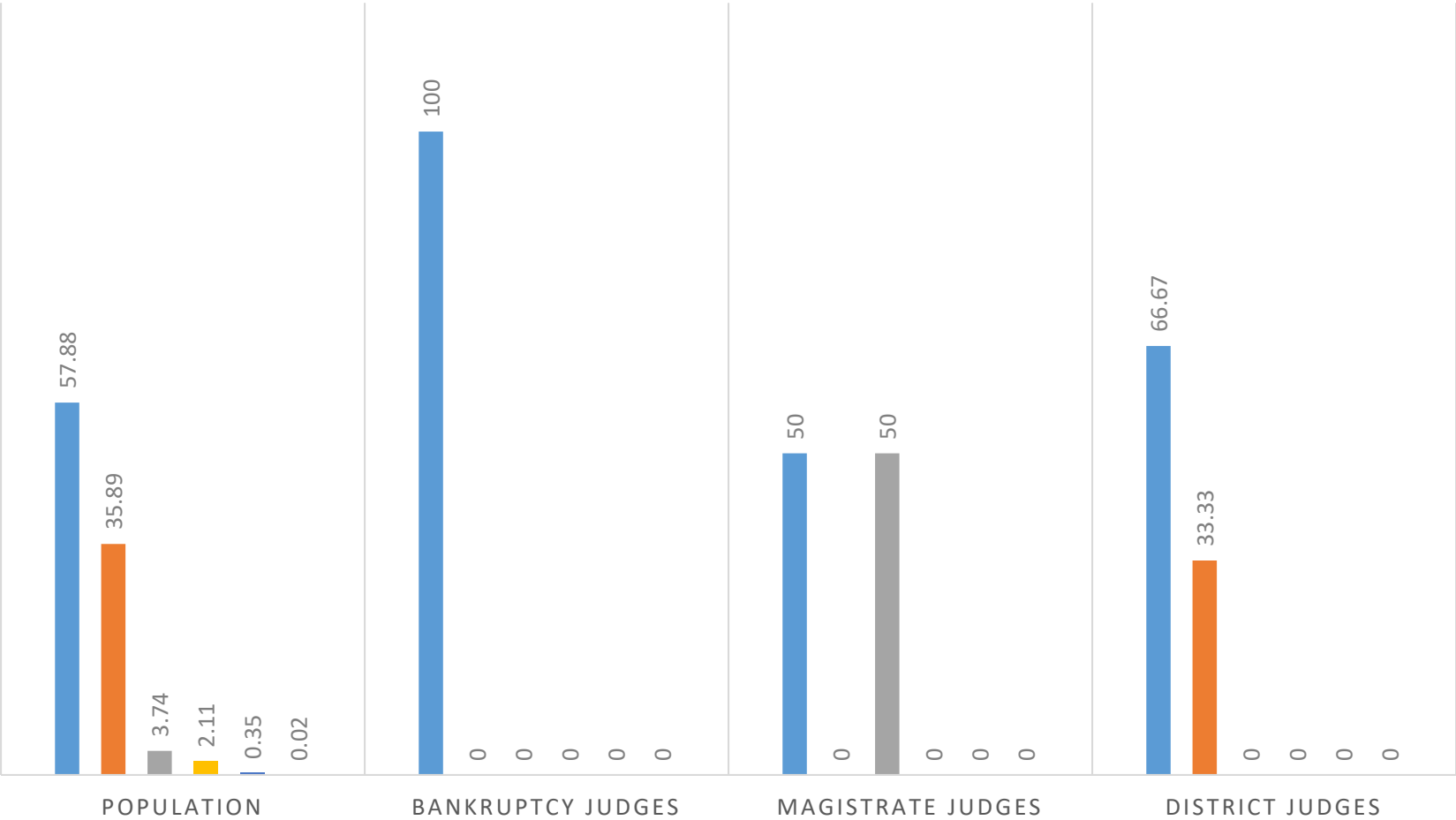
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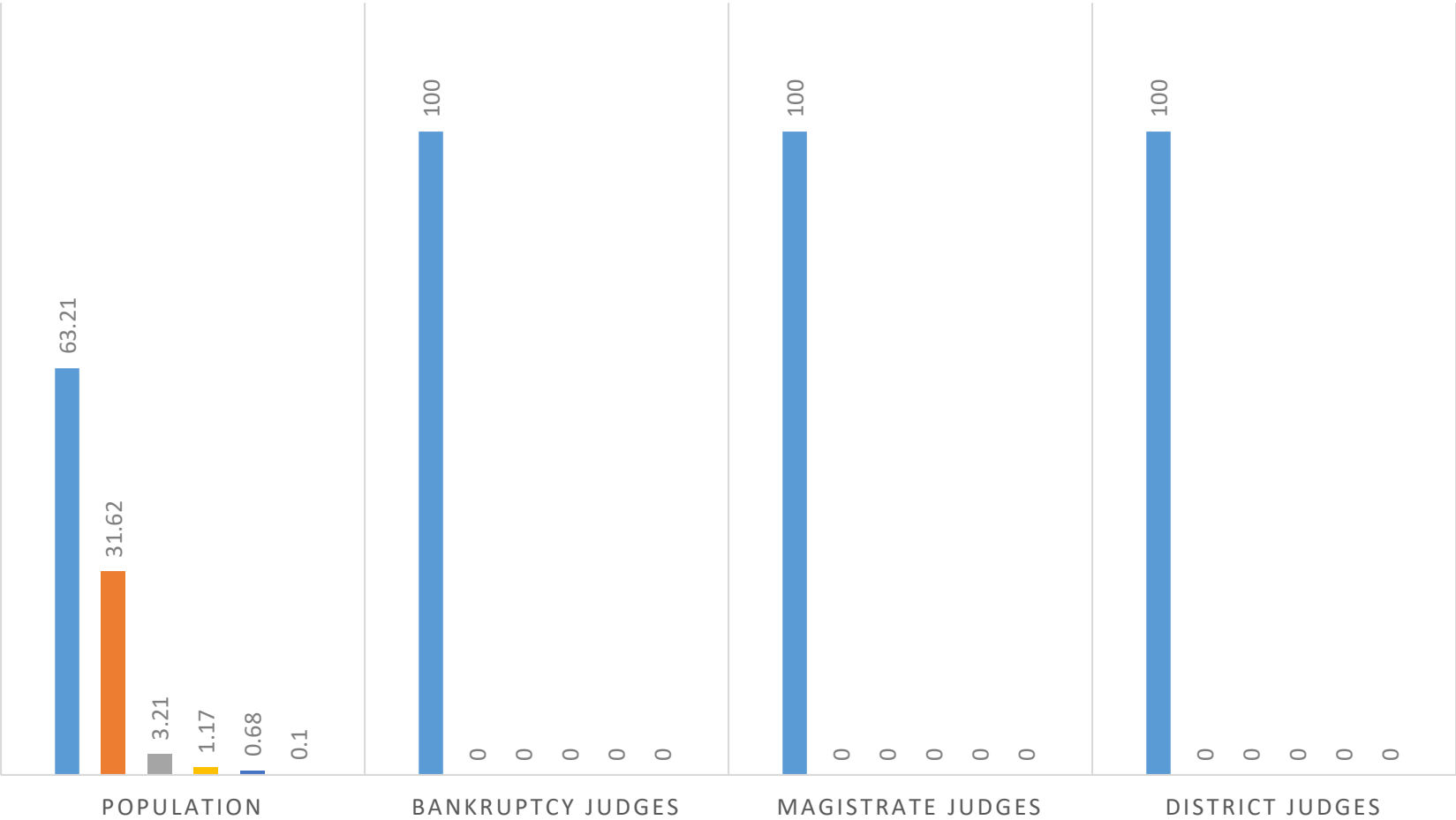
# MIDDLE DISTRICT OF LOUISIANA

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



# WESTERN DISTRICT OF LOUISIANA

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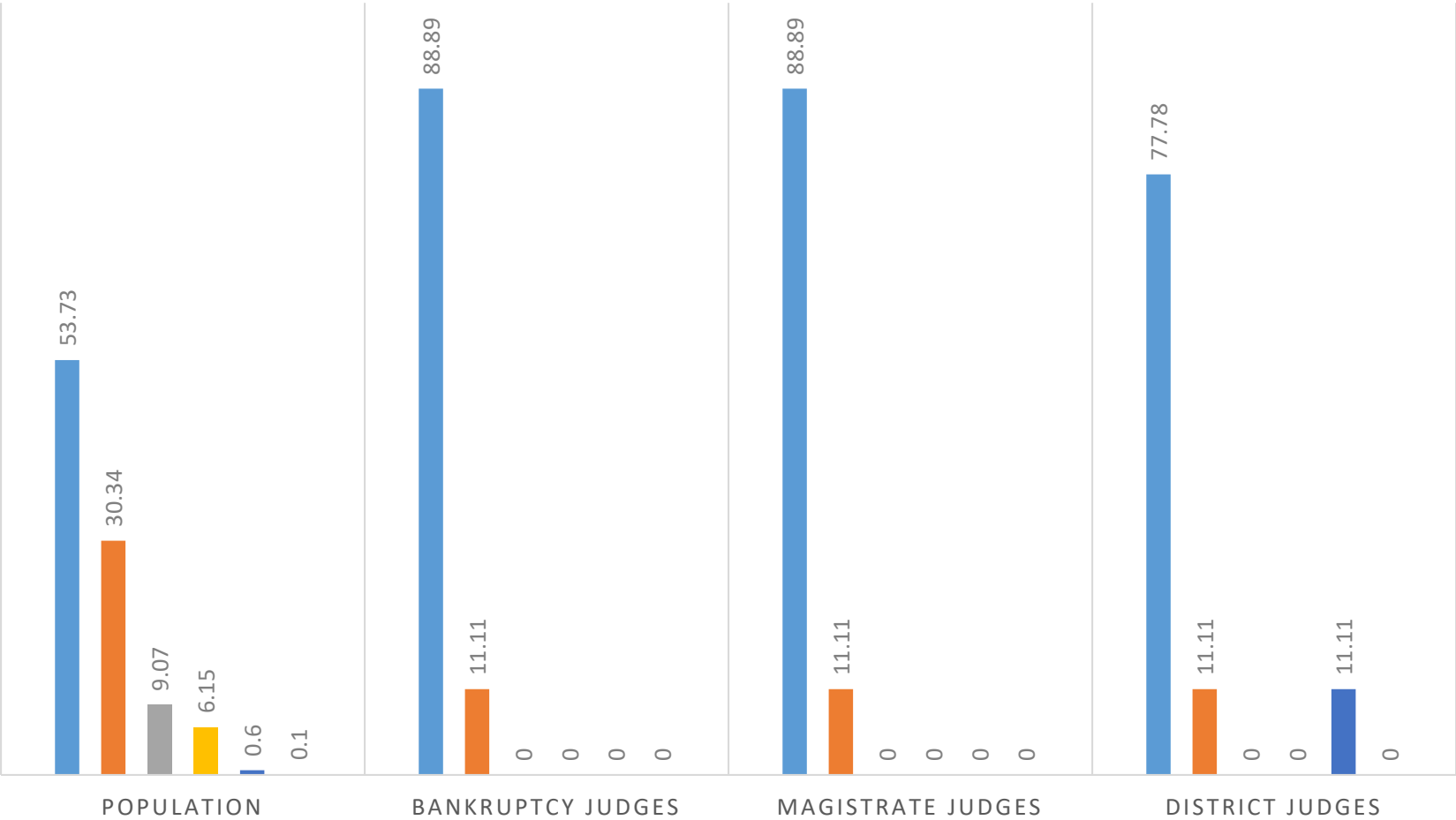
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Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



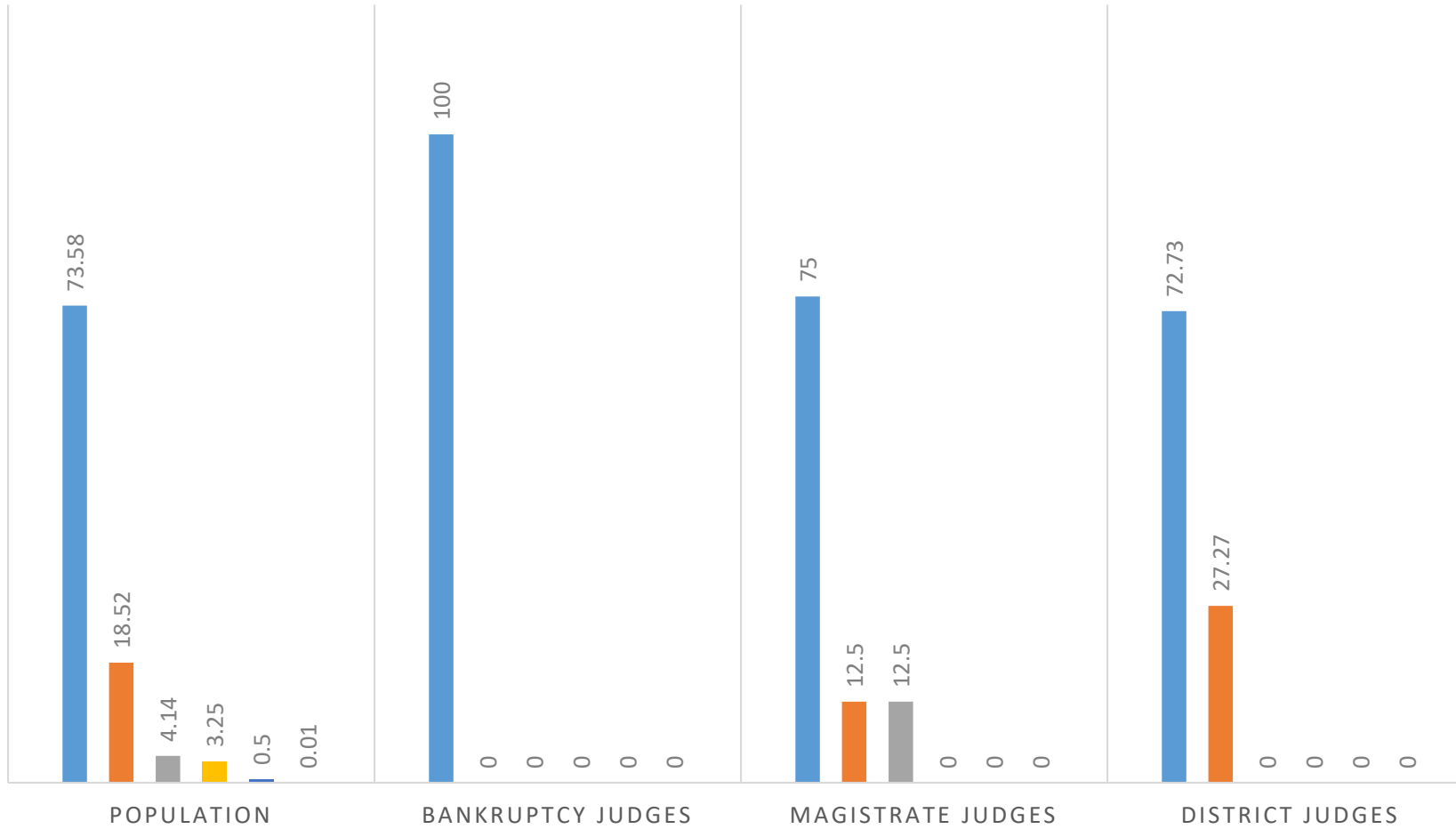
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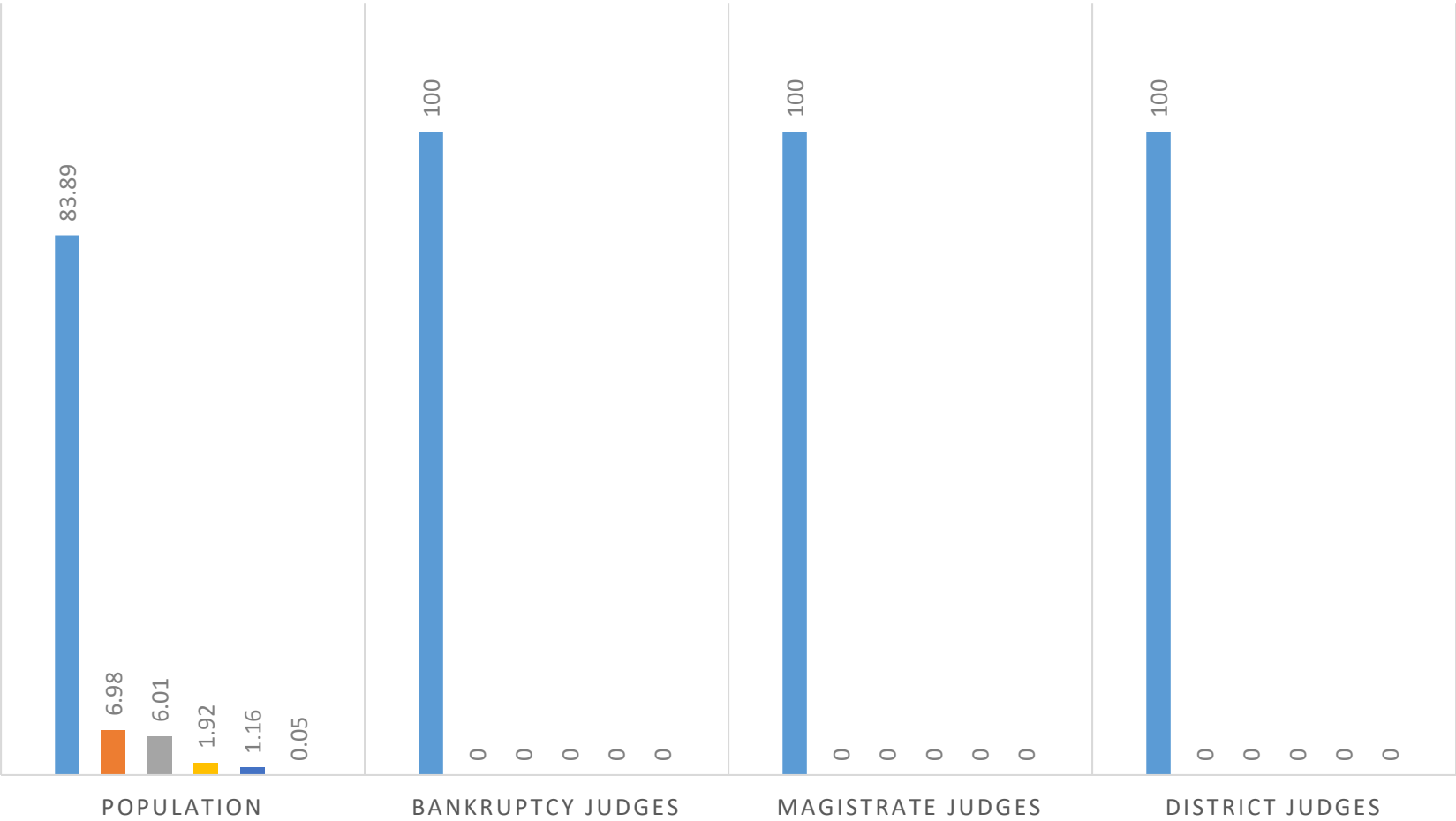
# EASTERN DISTRICT OF MICHIGAN

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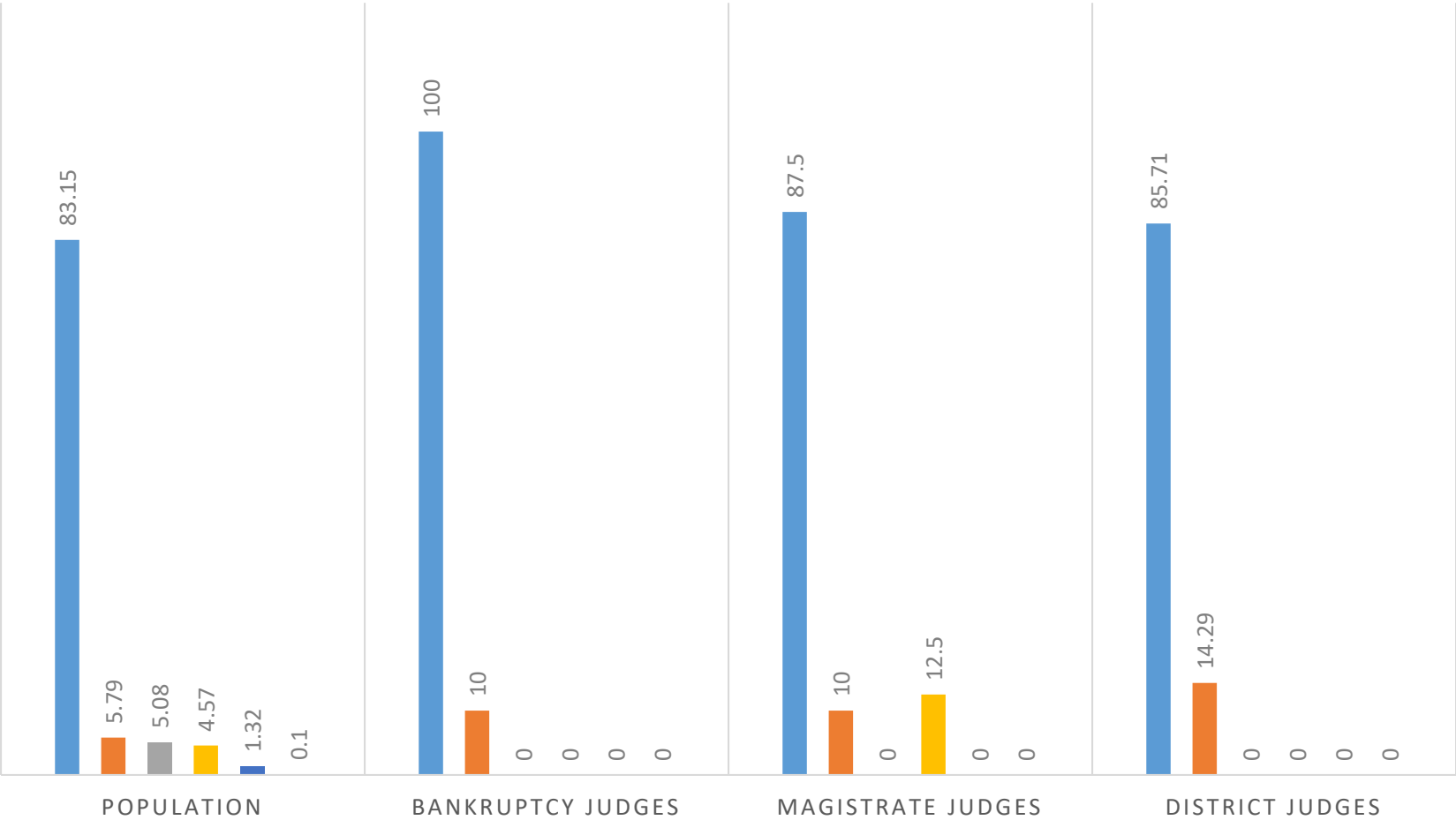
# WESTERN DISTRICT OF MICHIGAN

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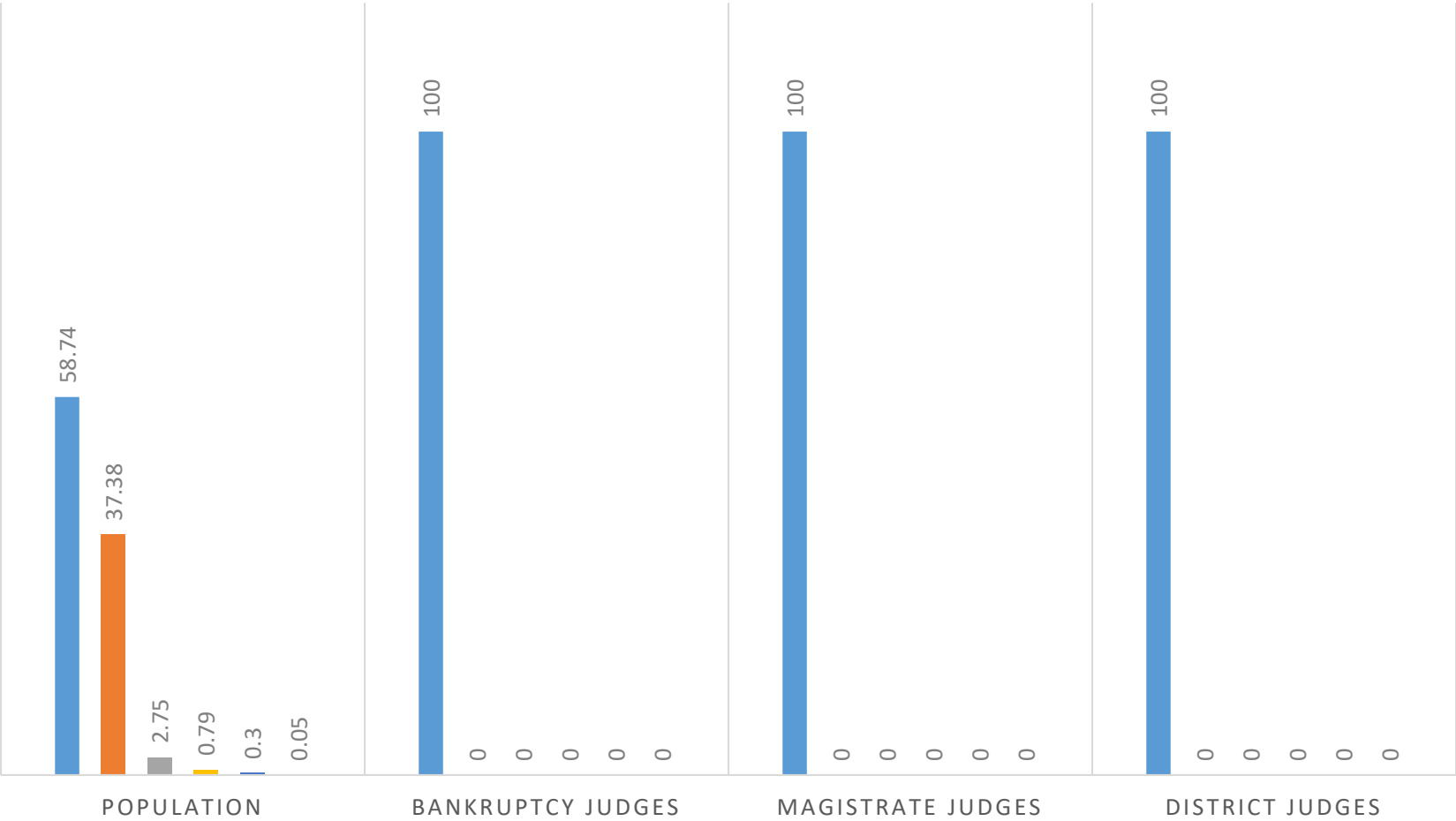
# DISTRICT OF MINNESOTA

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



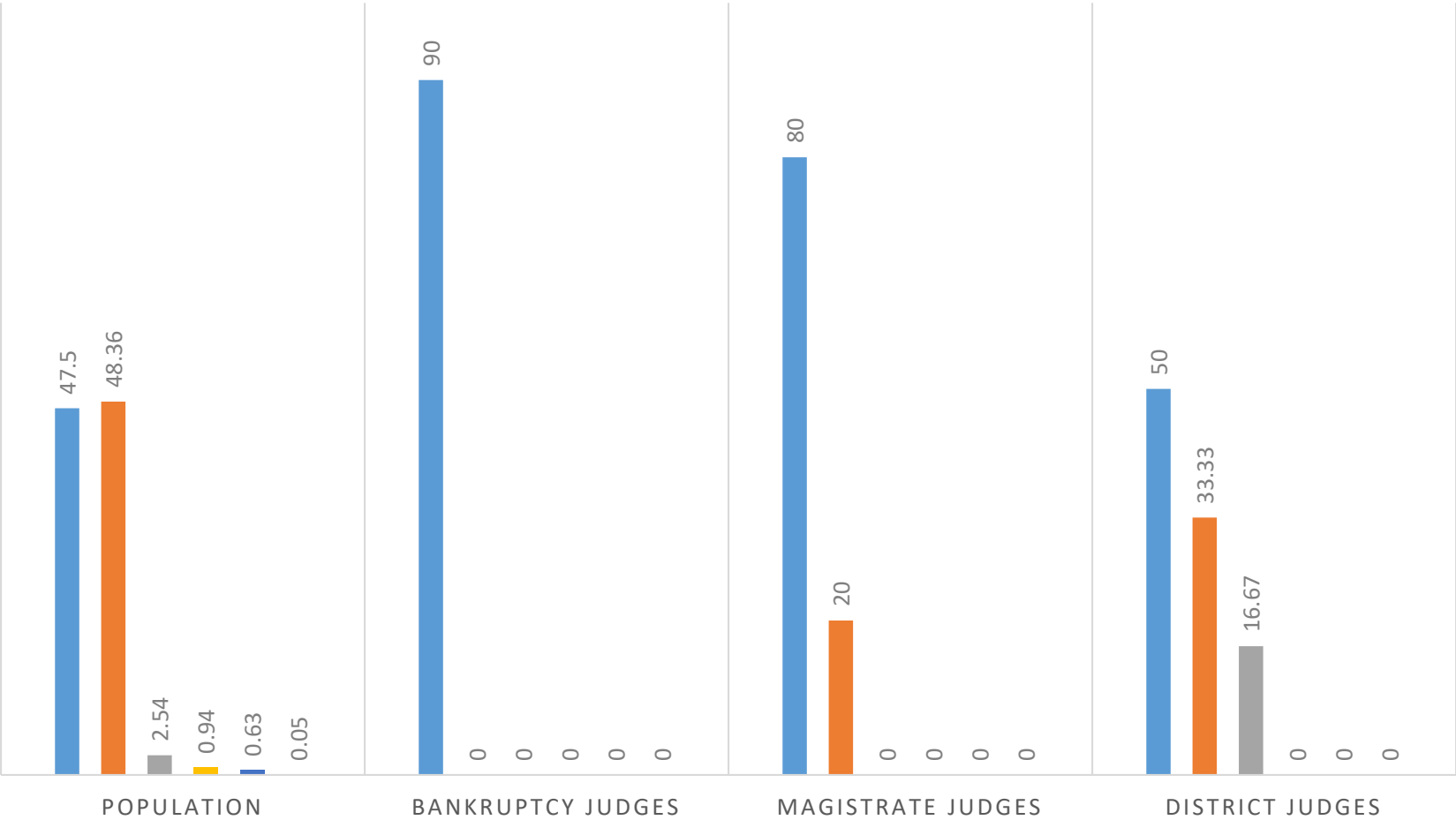
# NORTHERN DISTRICT OF MISSISSIPPI

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



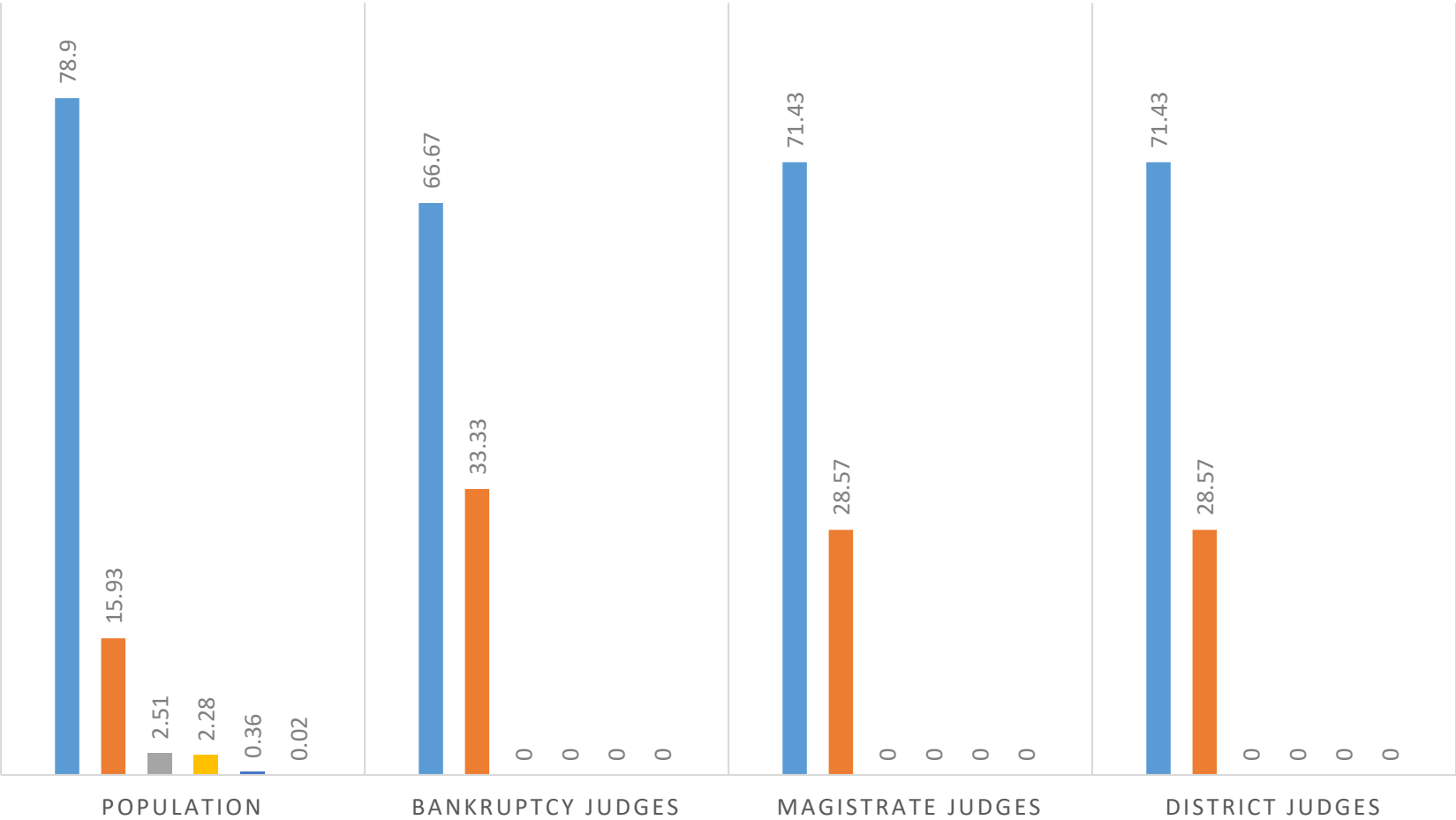
# SOUTHERN DISTRICT OF MISSISSIPPI

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



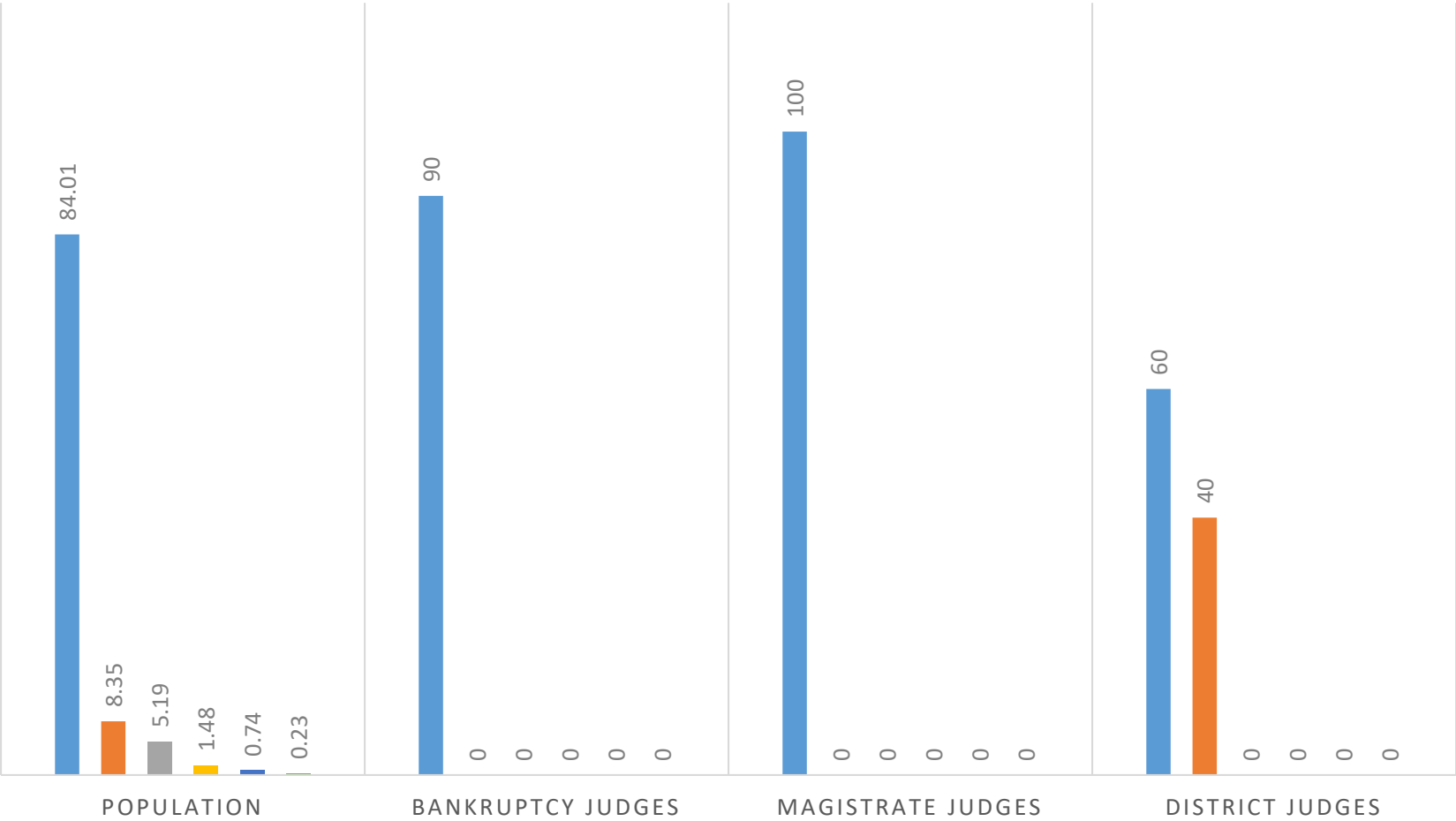
# EASTERN DISTRICT OF MISSOURI

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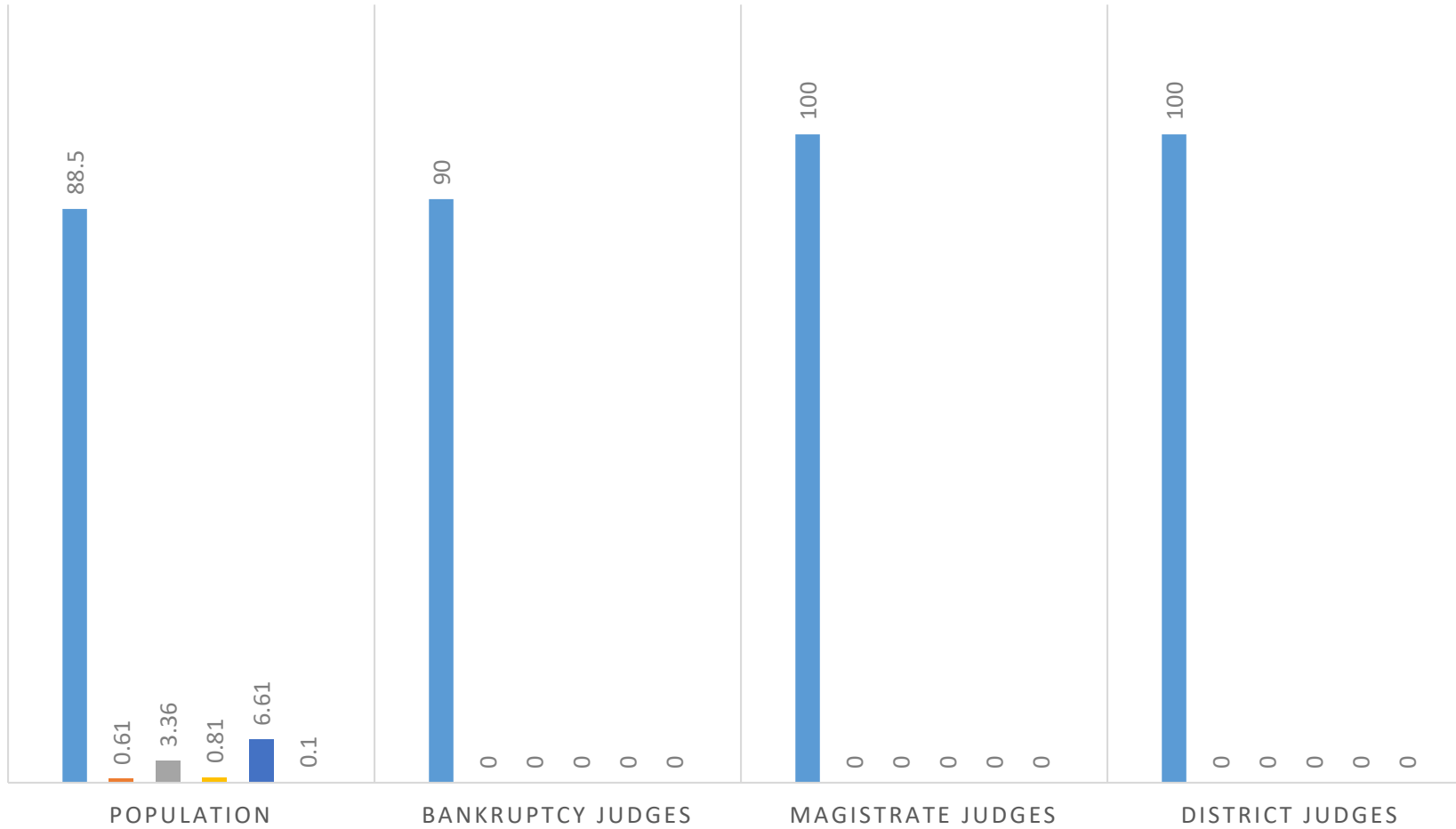
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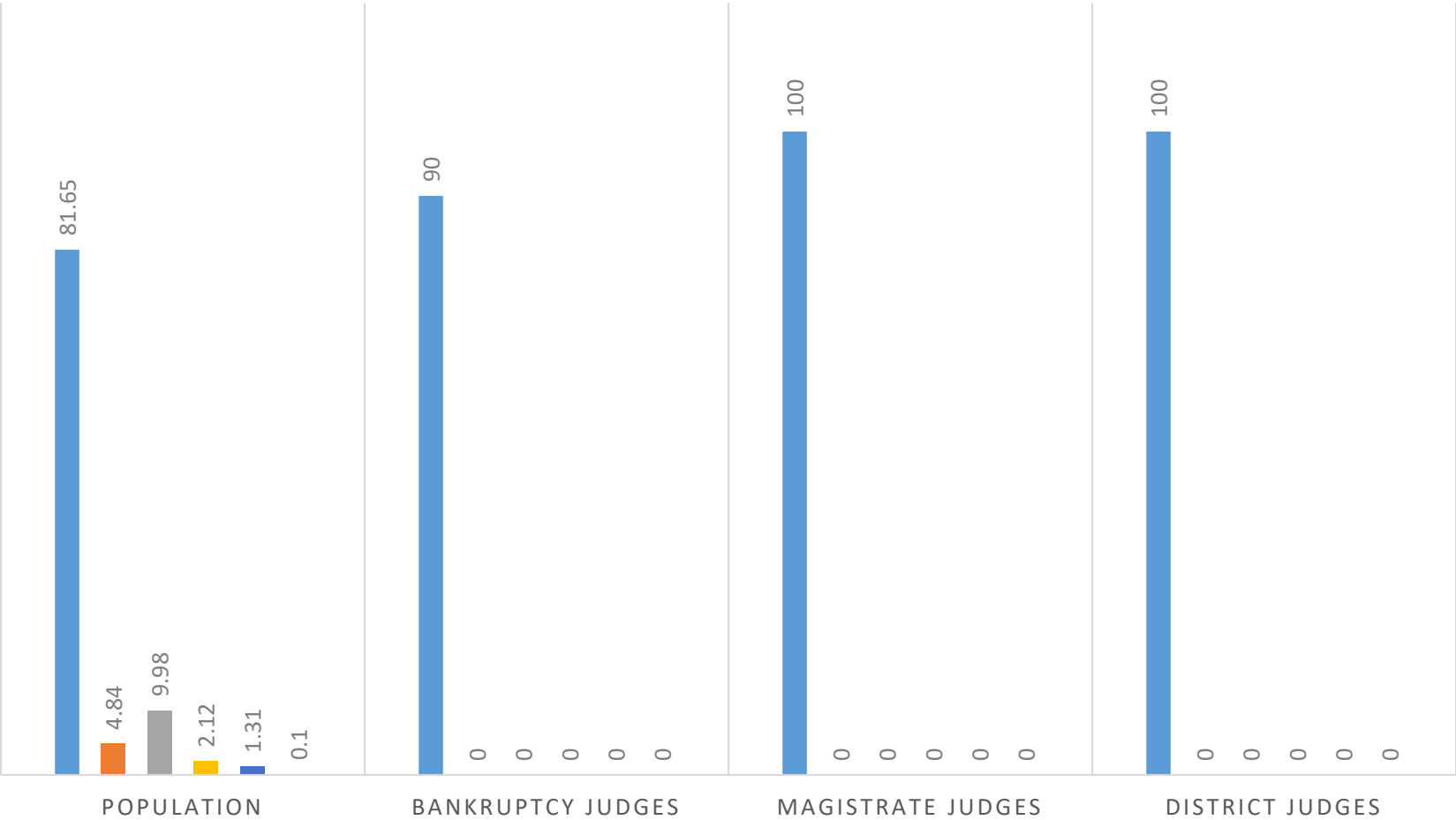
# DISTRICT OF MONTANA

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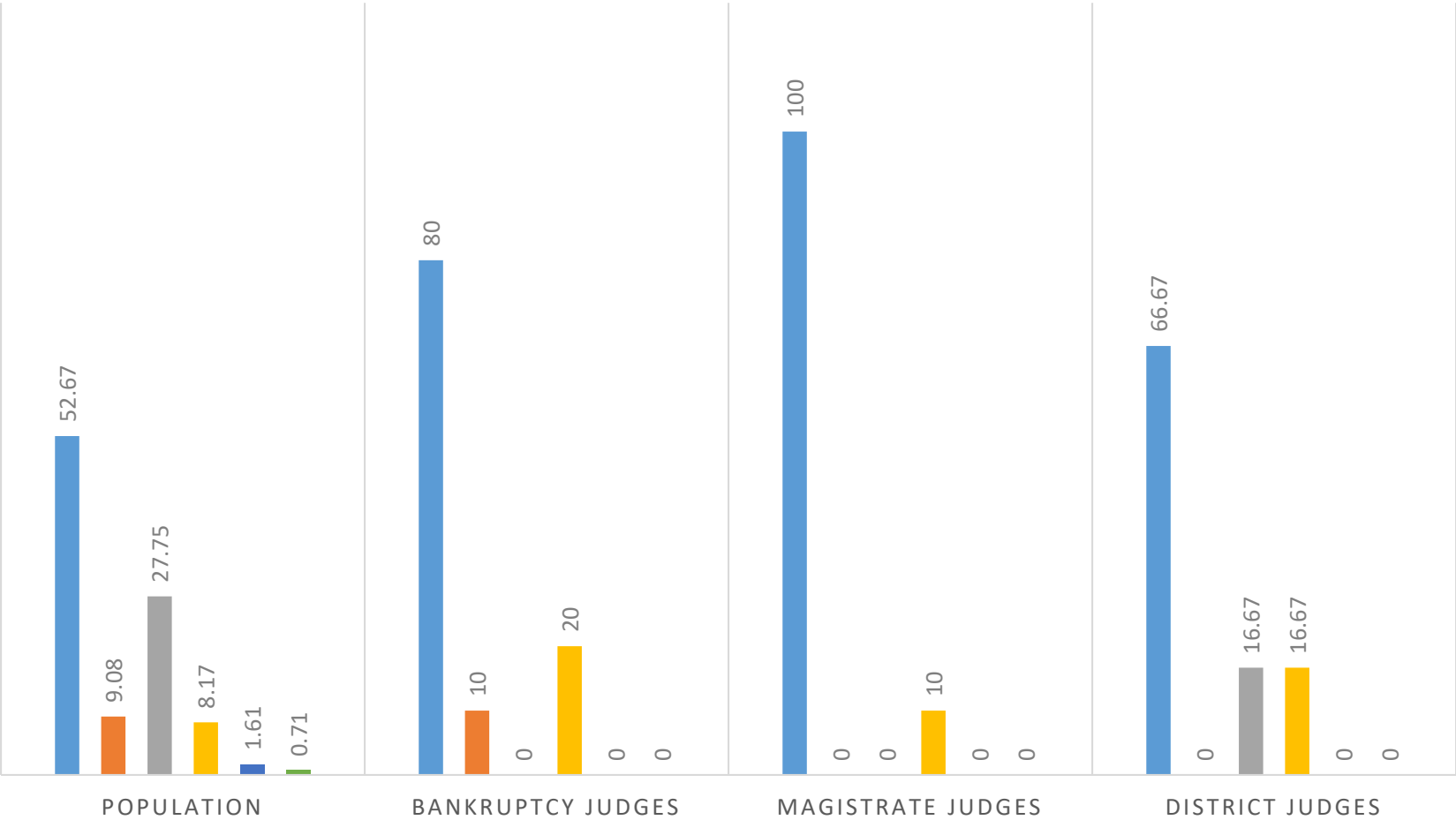
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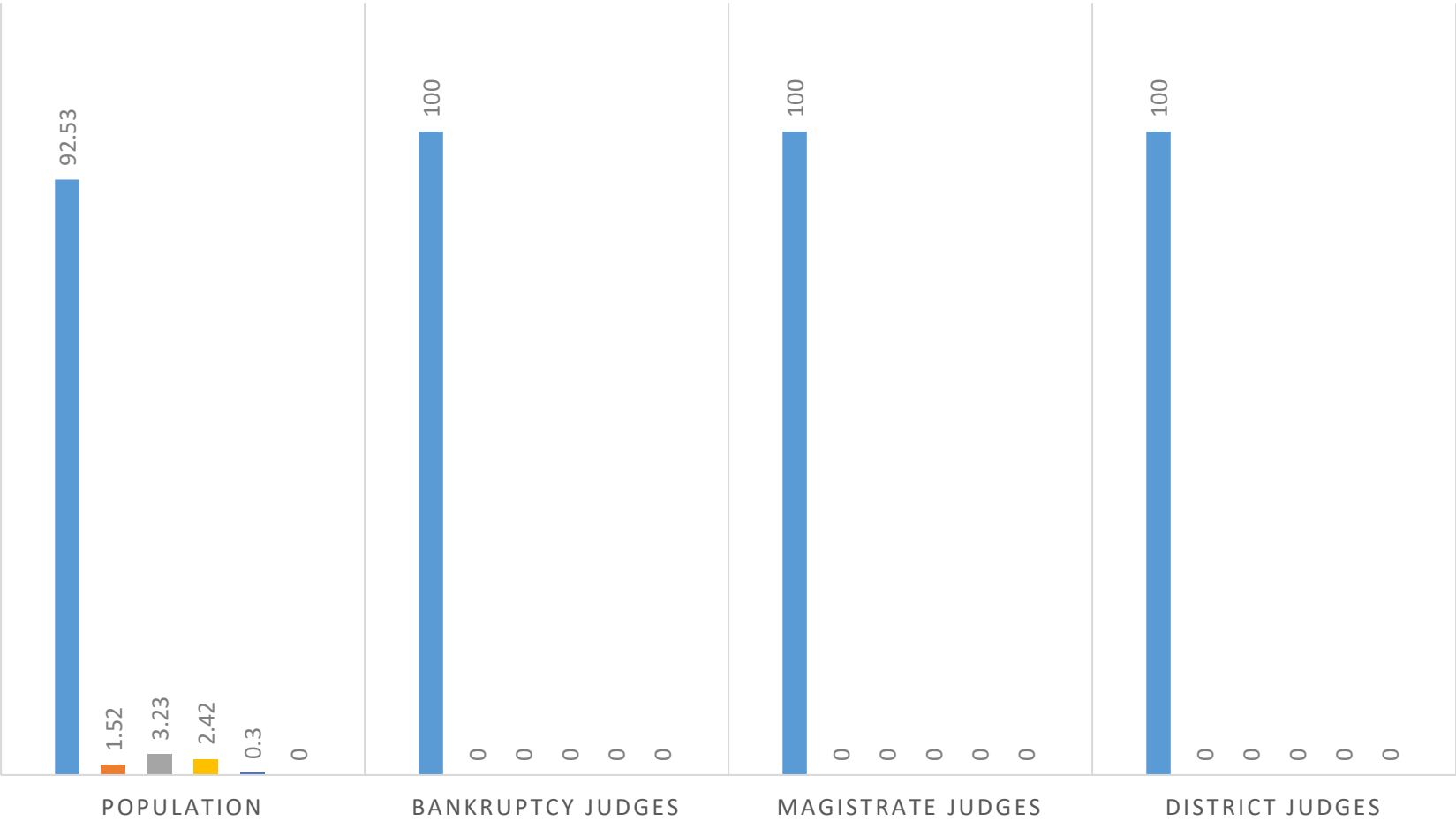
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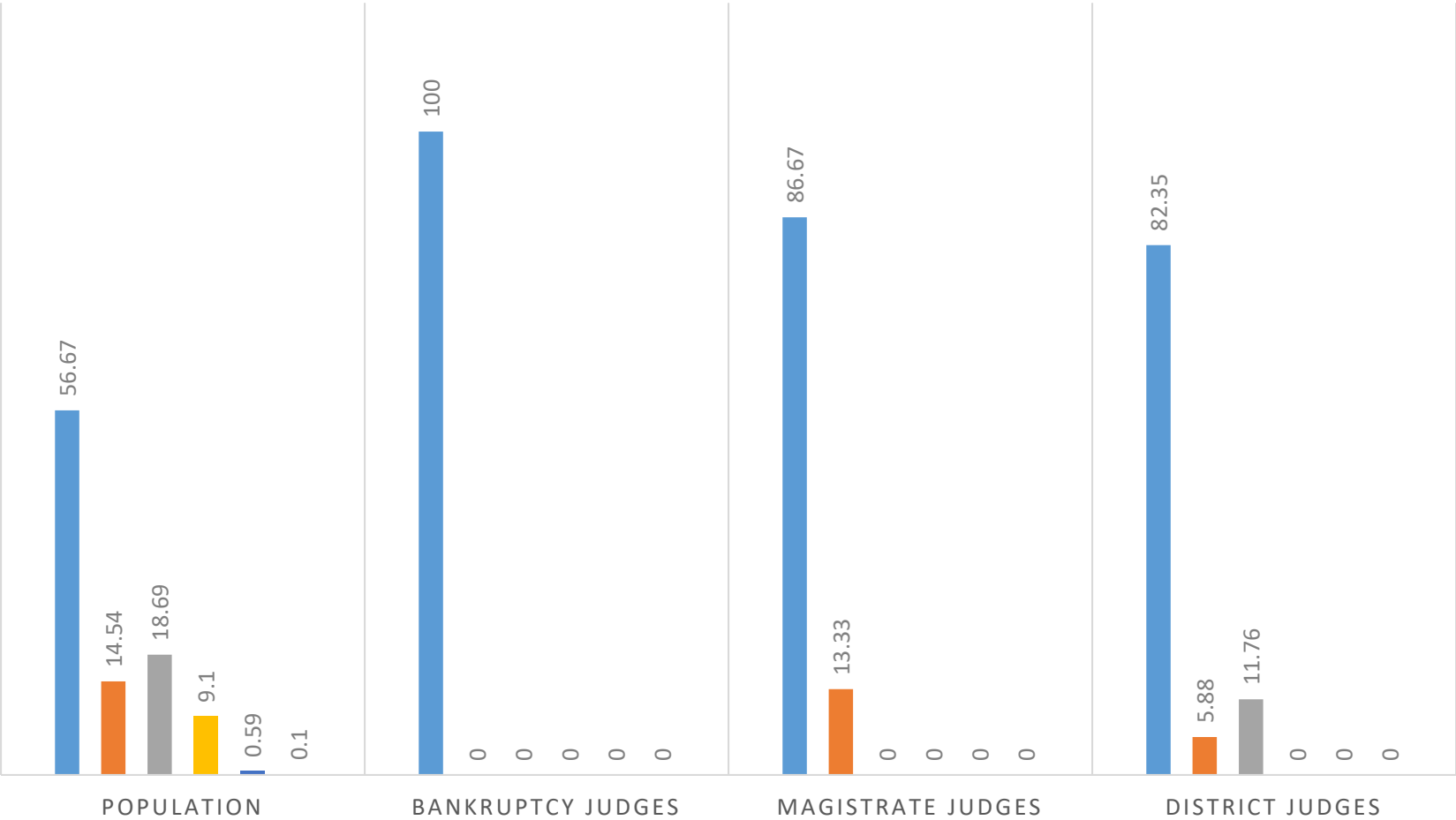
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Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



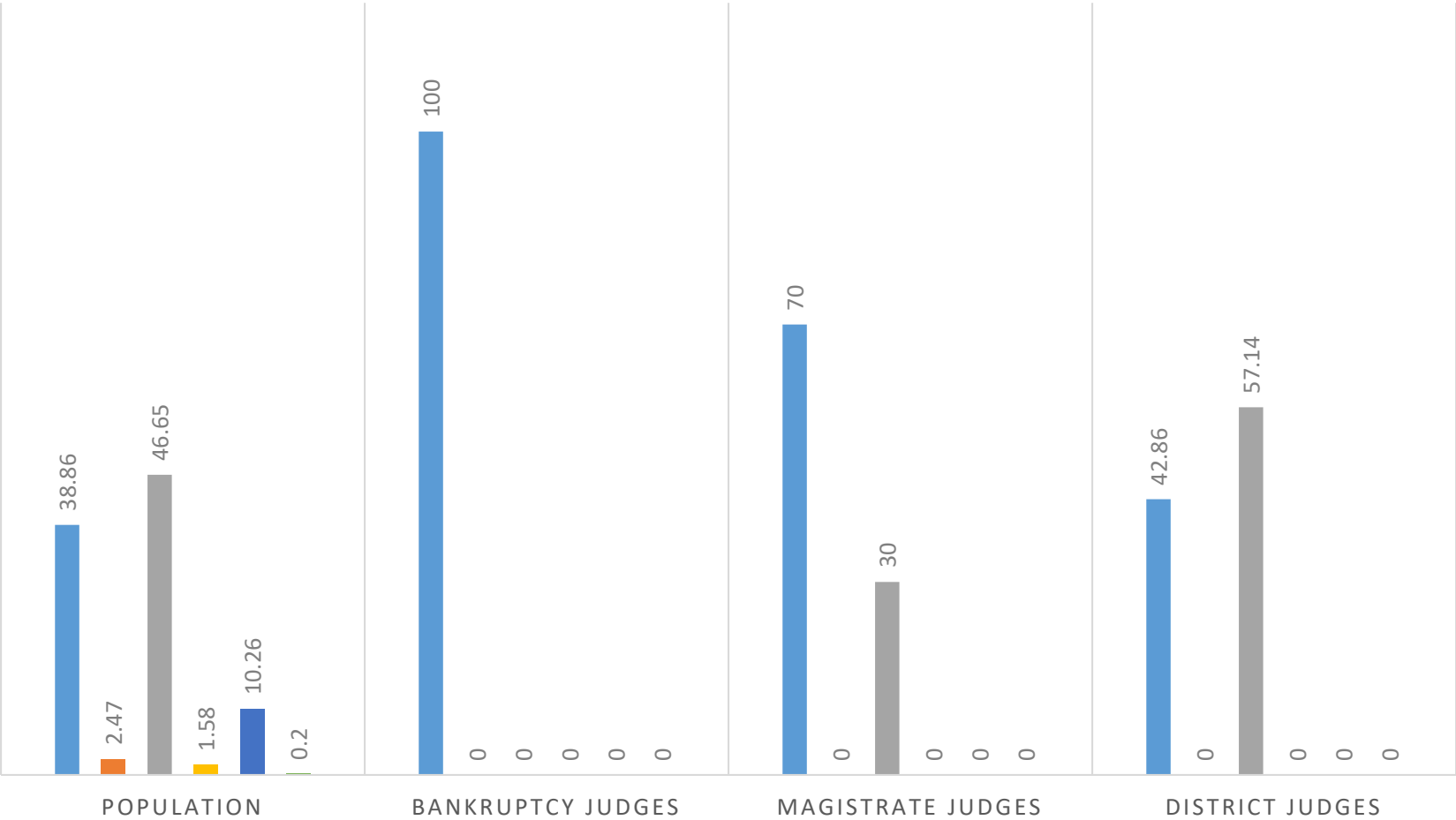
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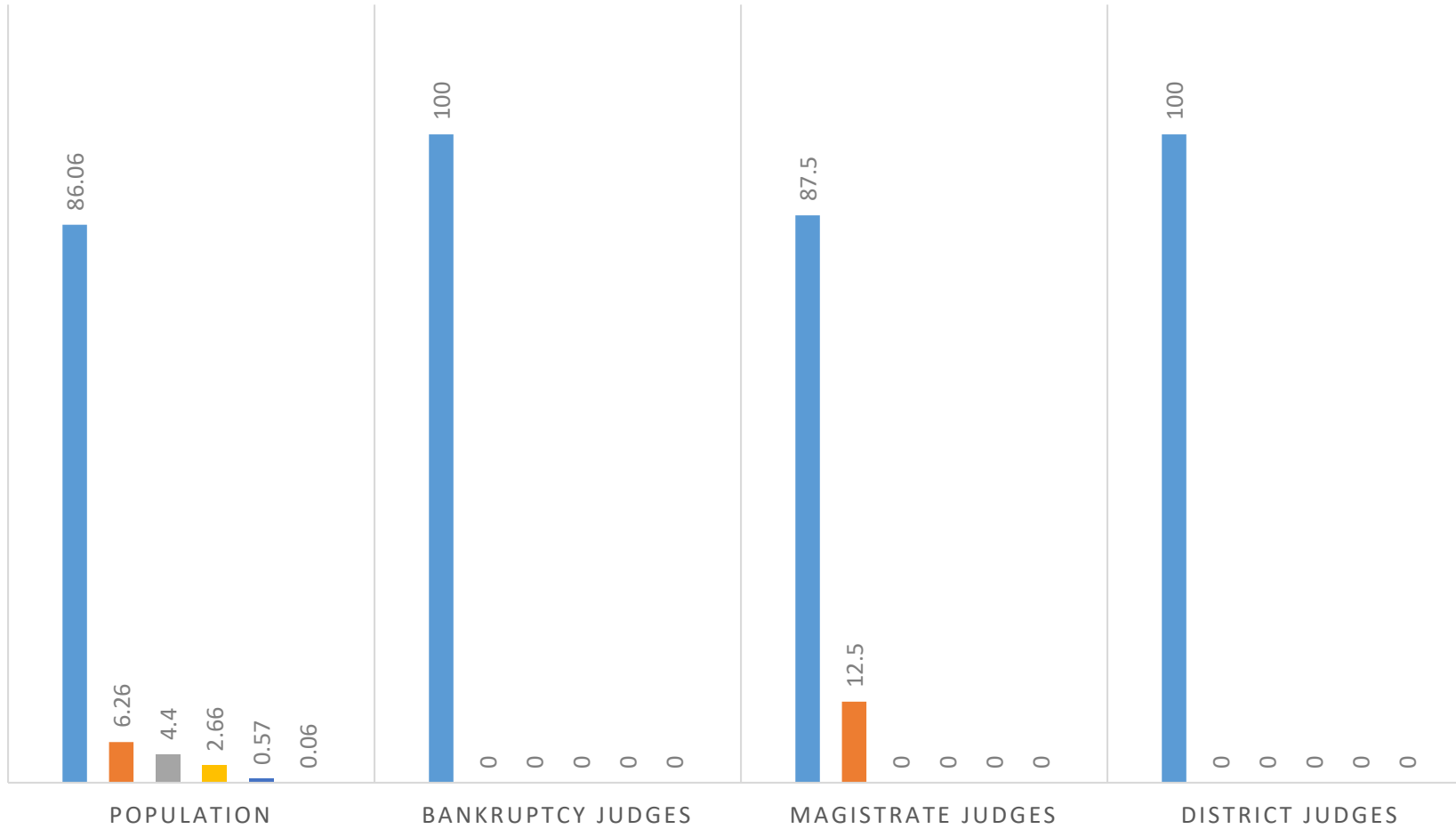
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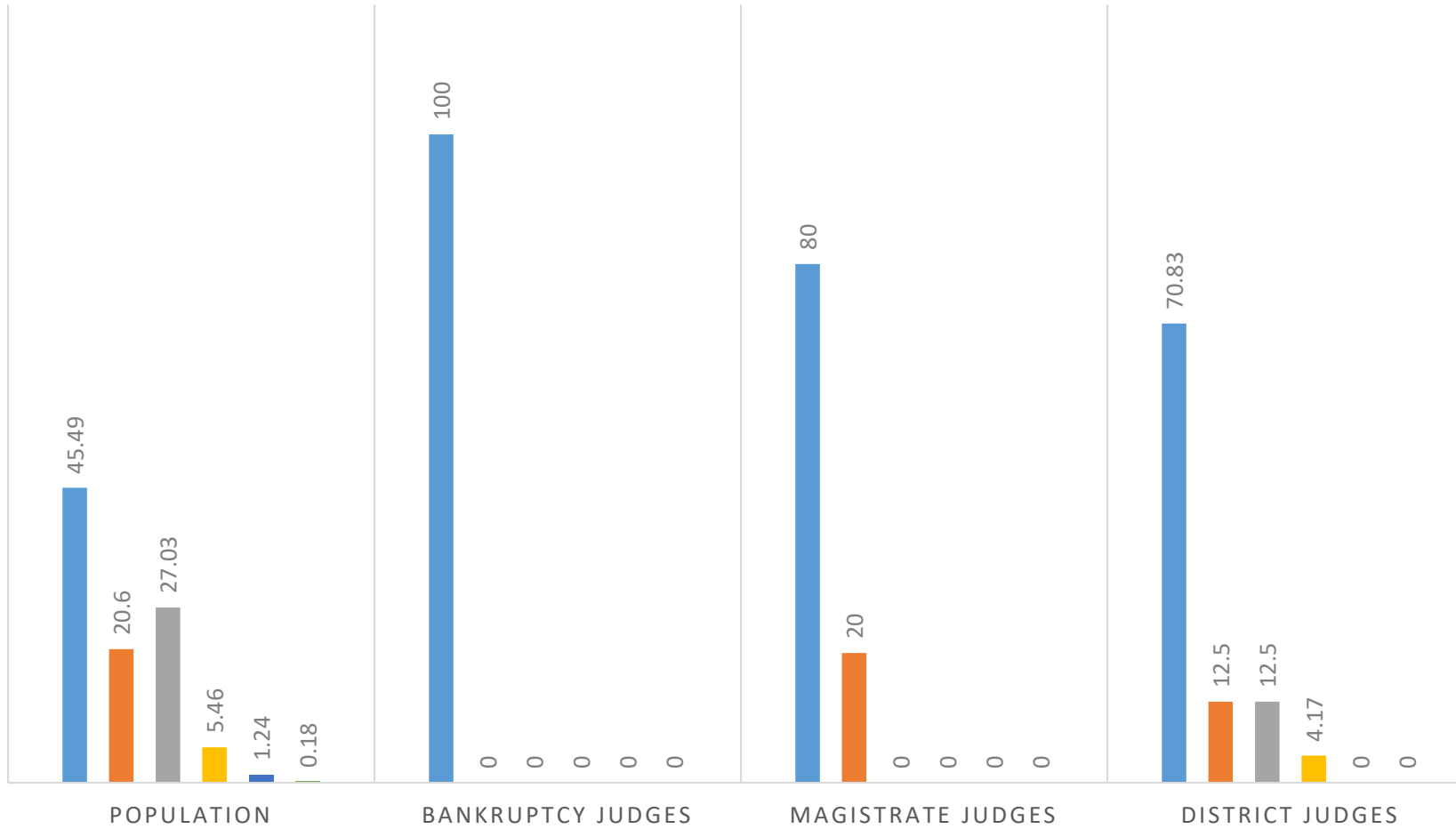
# NORTHERN DISTRICT OF NEW YORK

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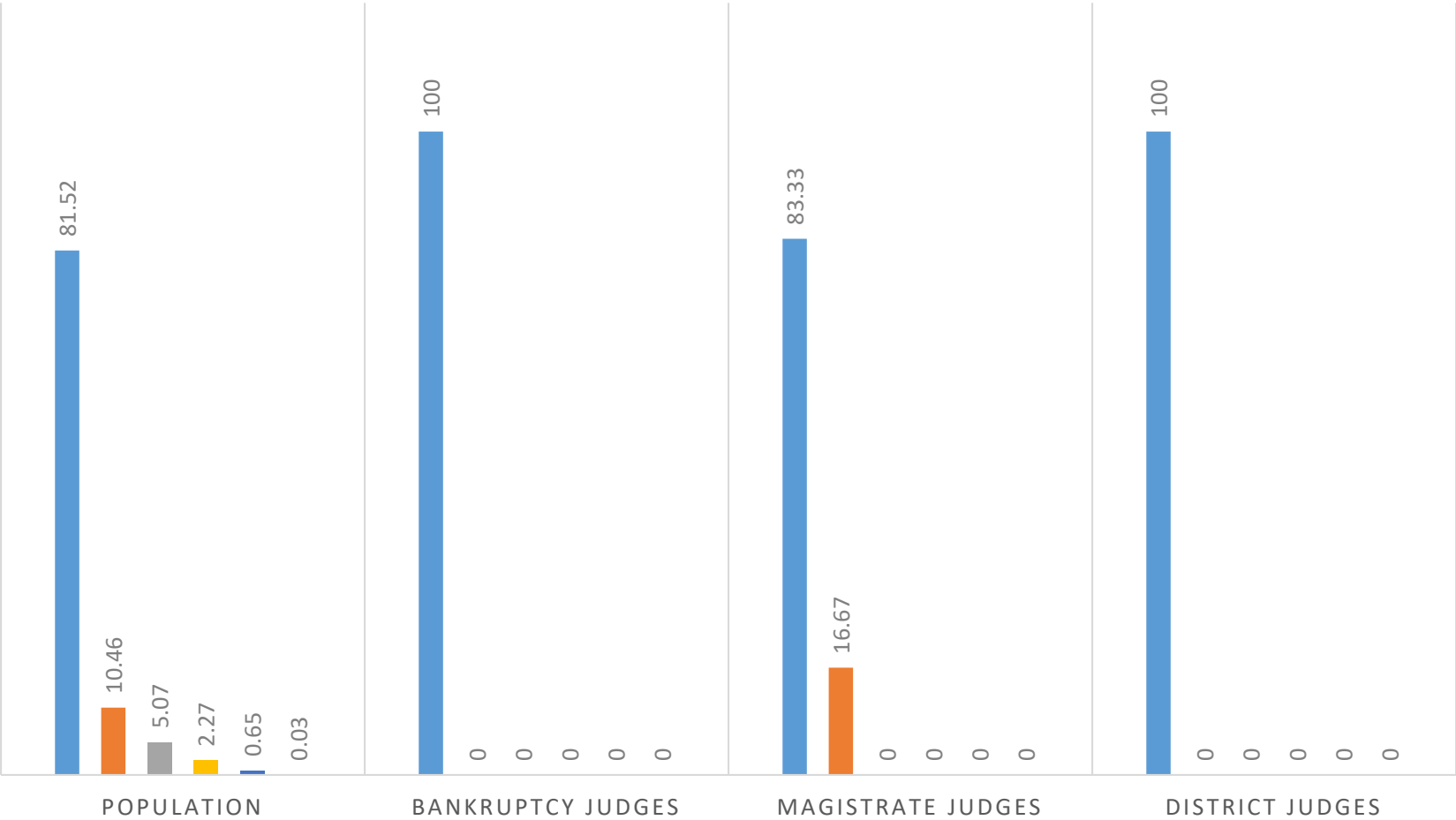
# SOUTHERN DISTRICT OF NEW YORK

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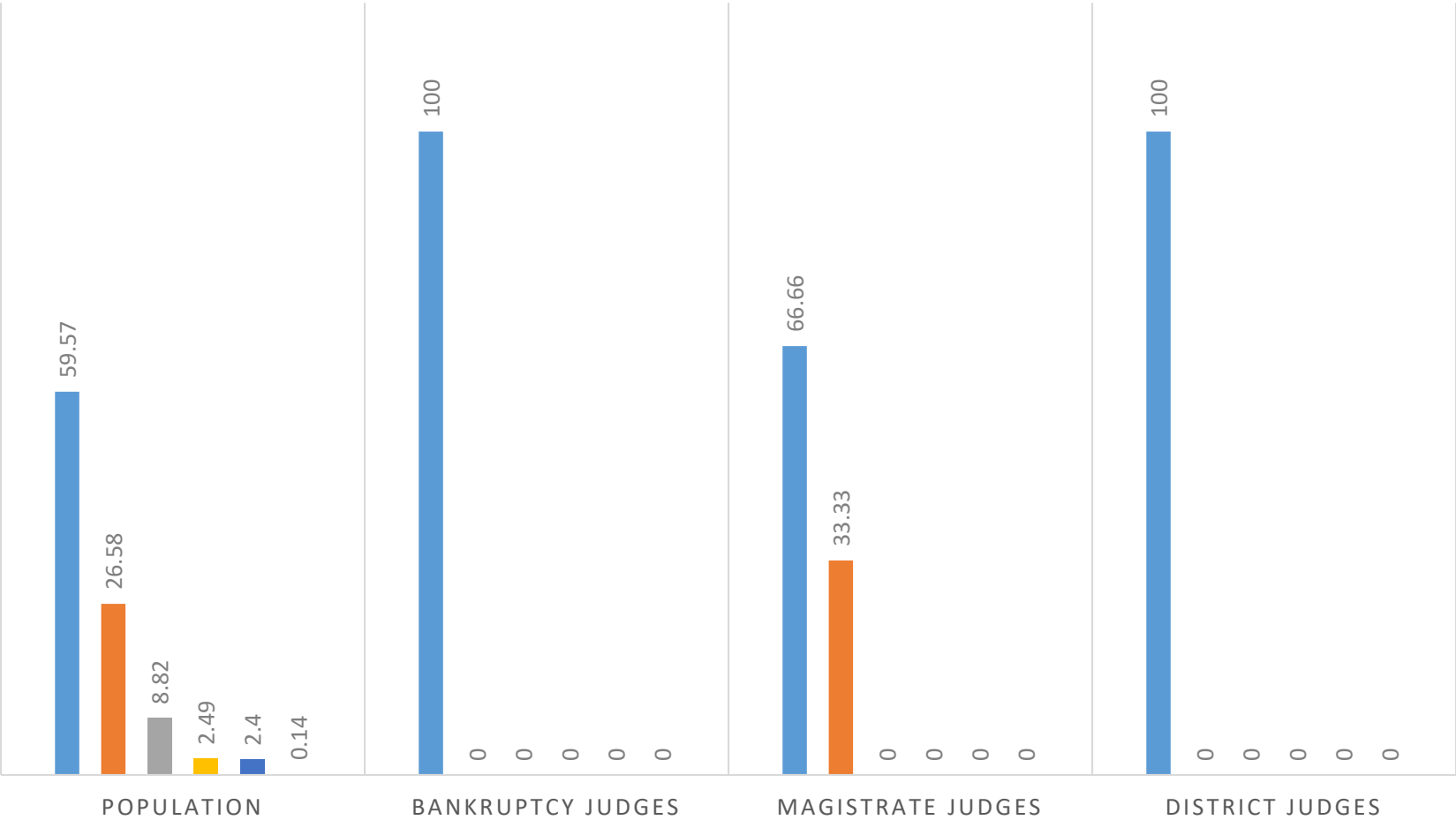
# WESTERN DISTRICT OF NEW YORK

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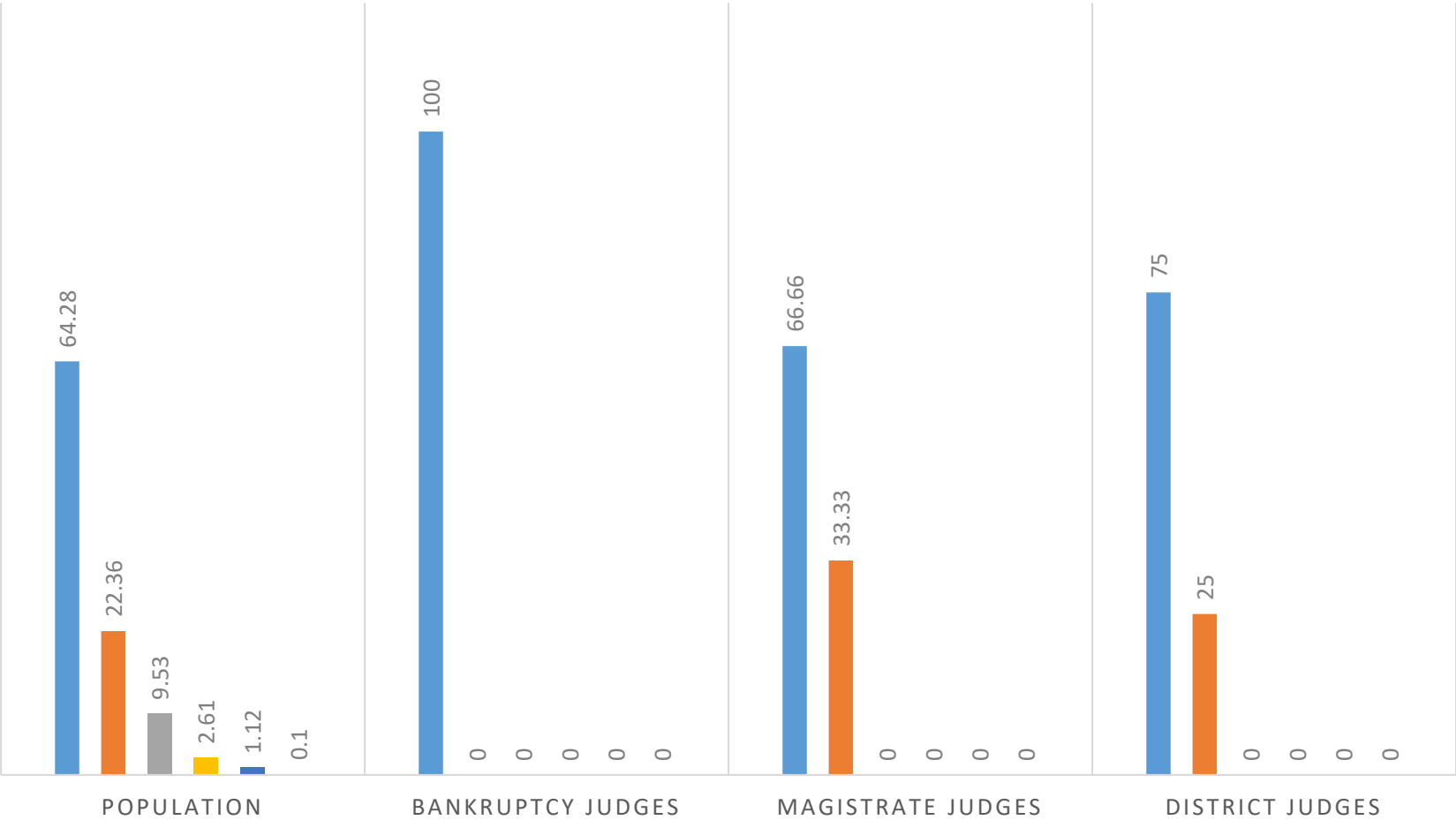
# EASTERN DISTRICT OF NORTH CAROLINA

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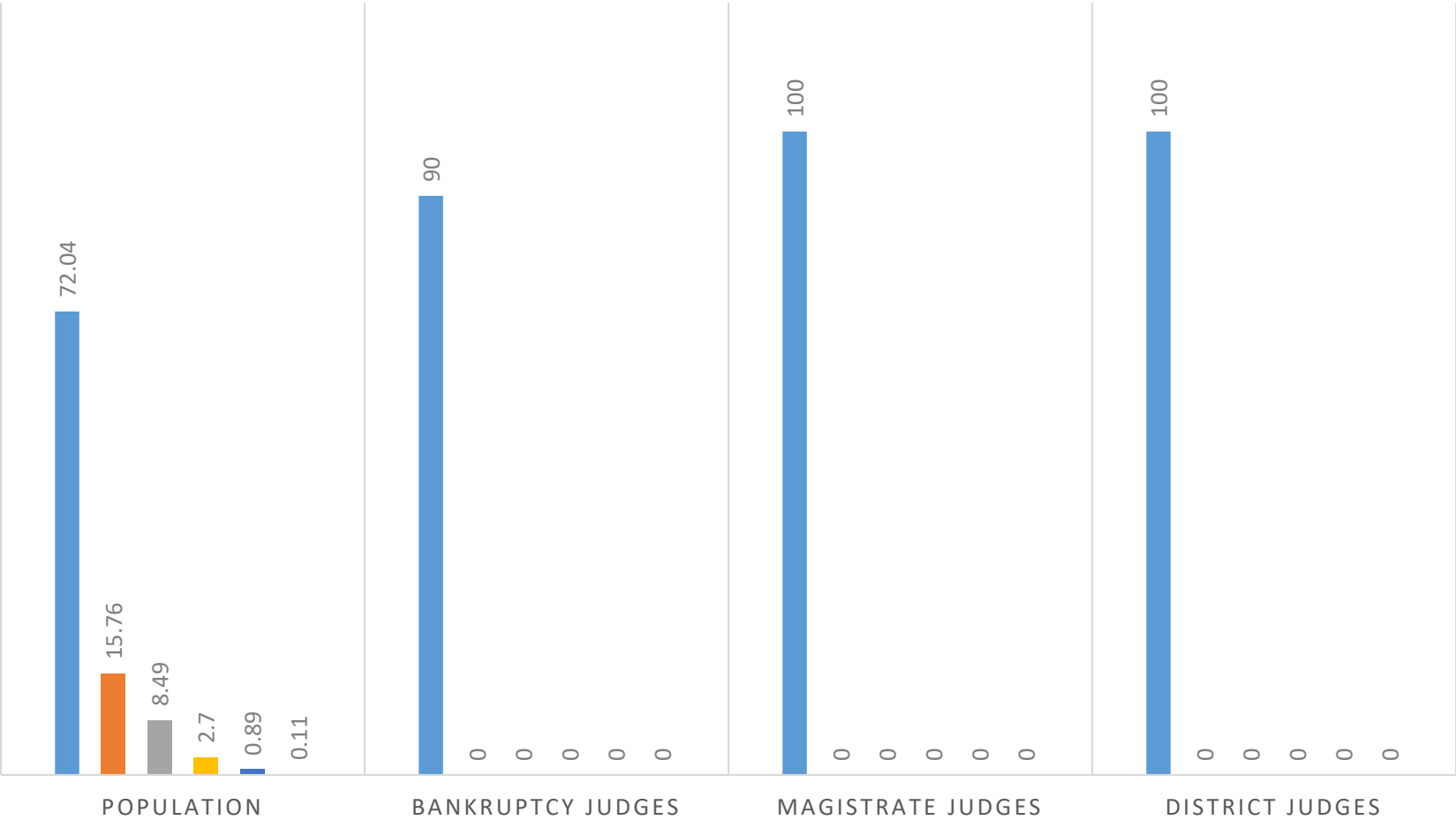
# MIDDLE DISTRICT OF NORTH CAROLINA

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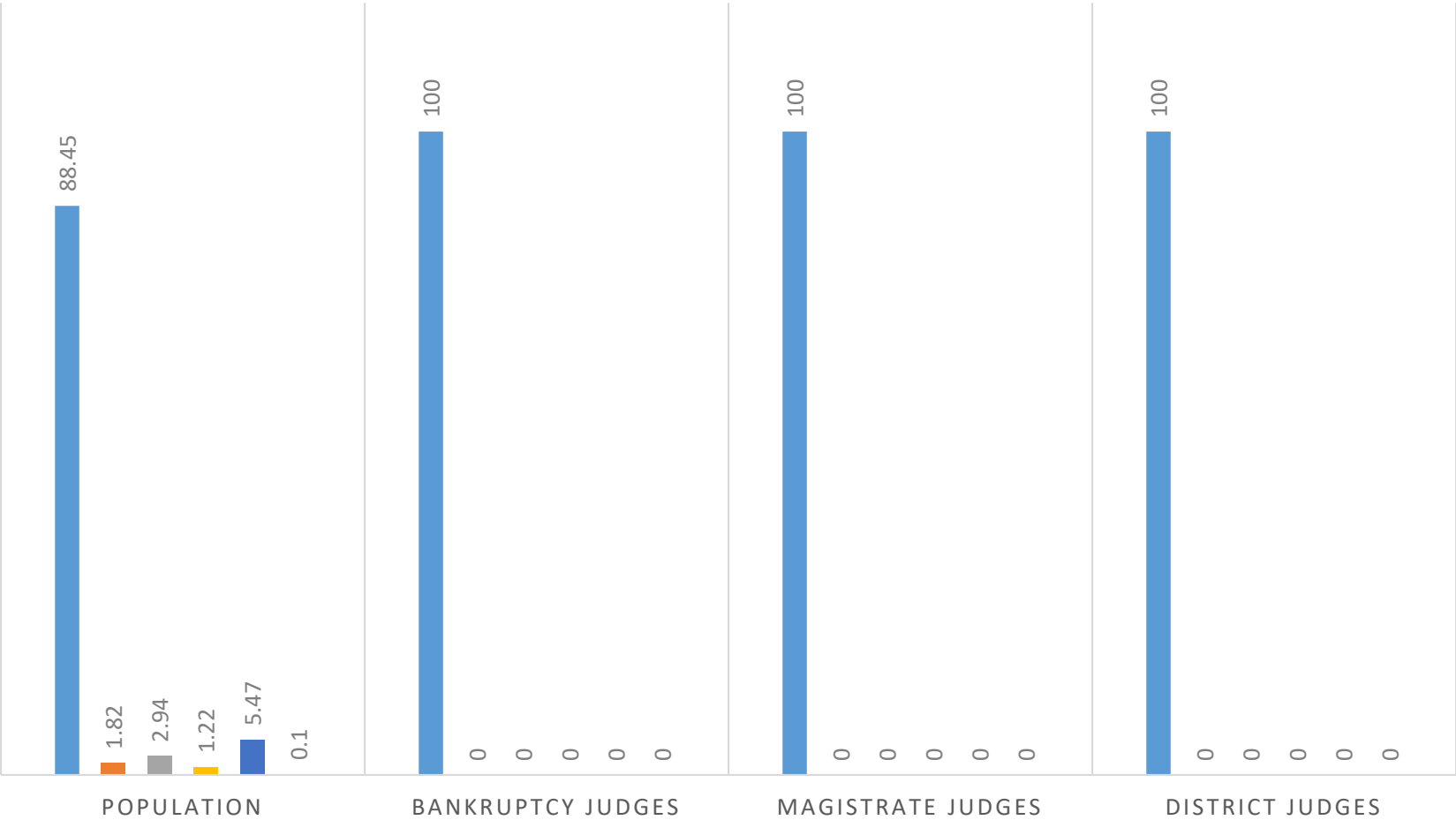
# WESTERN DISTRICT OF NORTH CAROLINA

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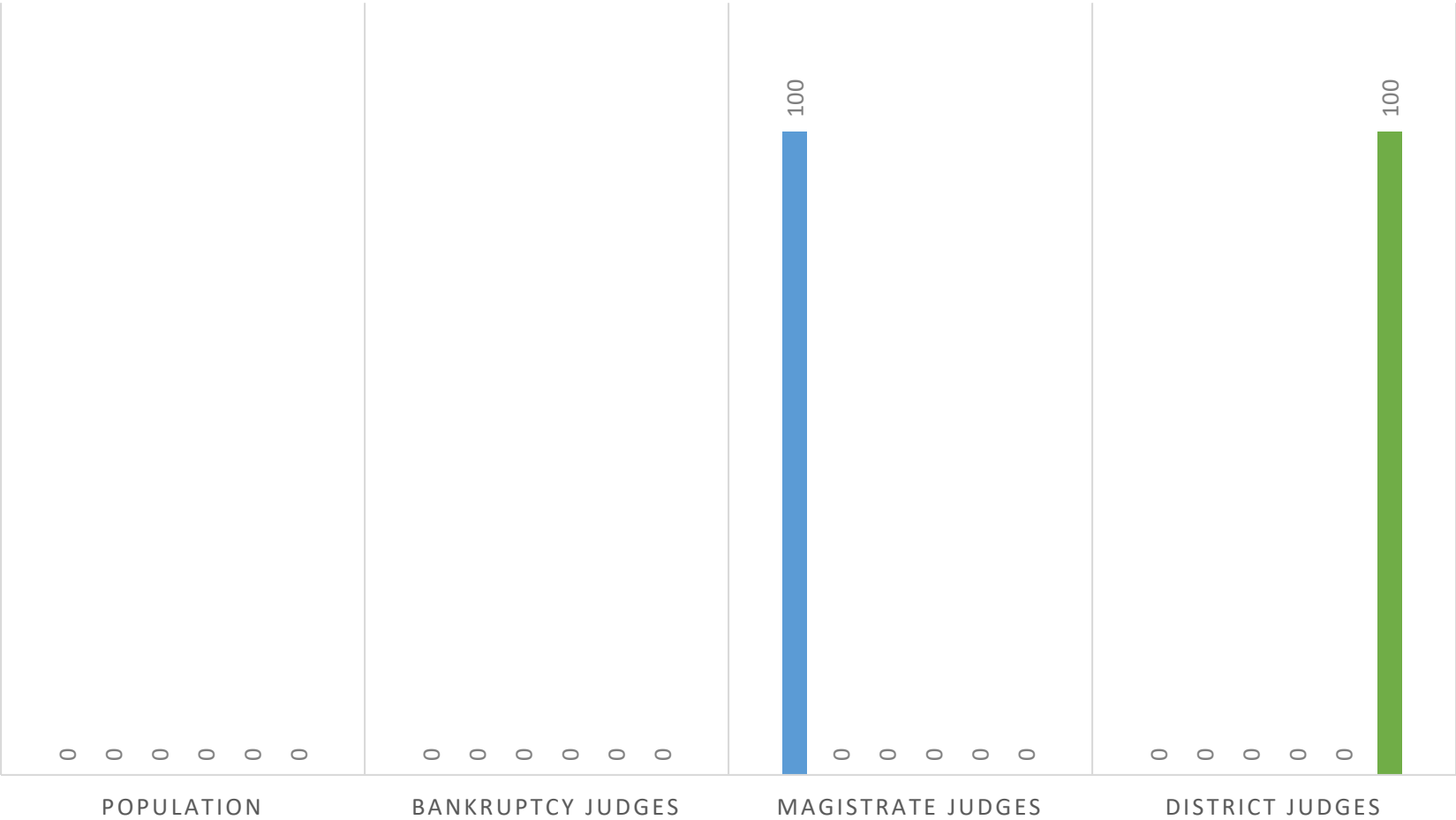
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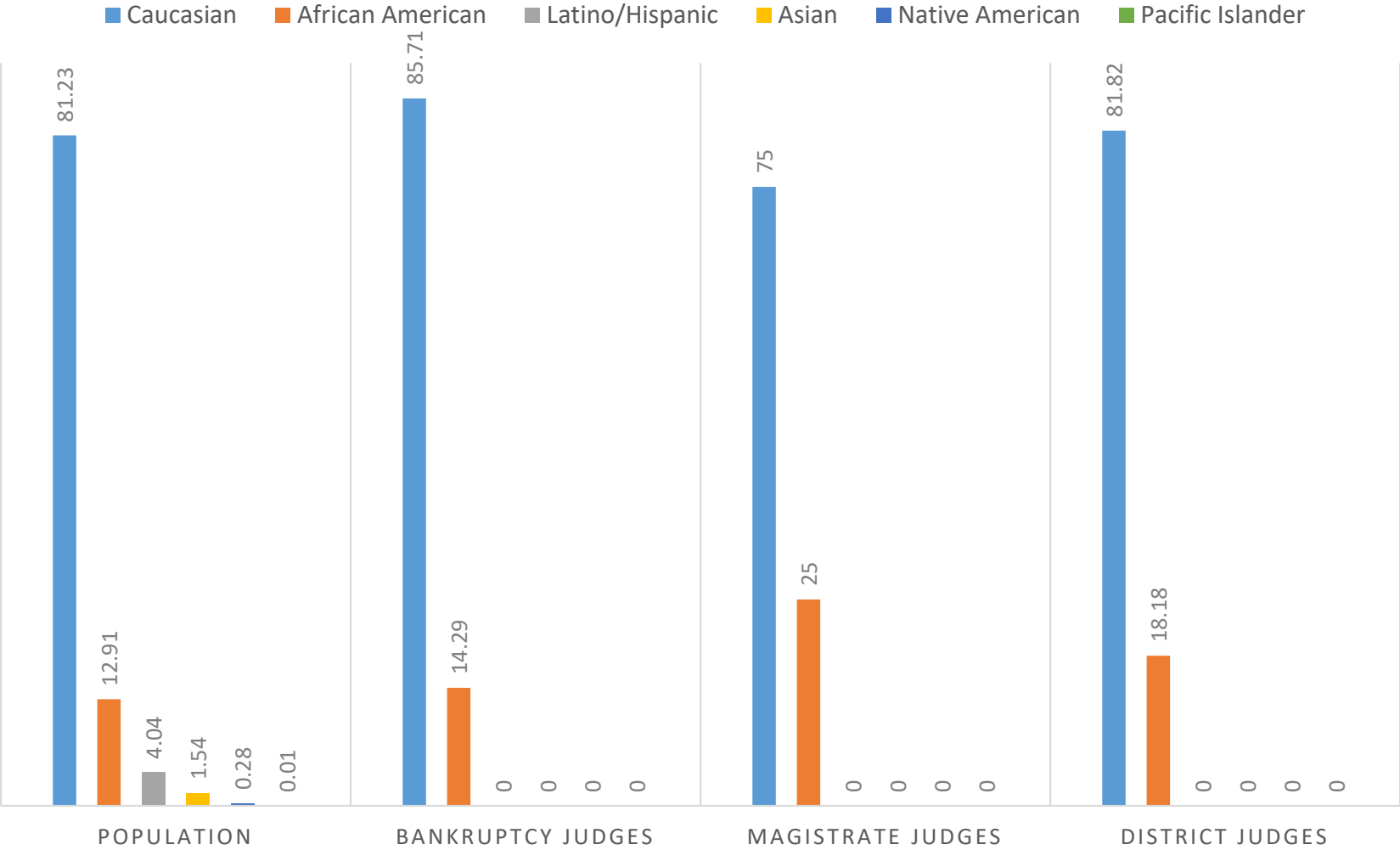


# DISTRICT OF THE NORTHERN MARIANA ISLANDS

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander

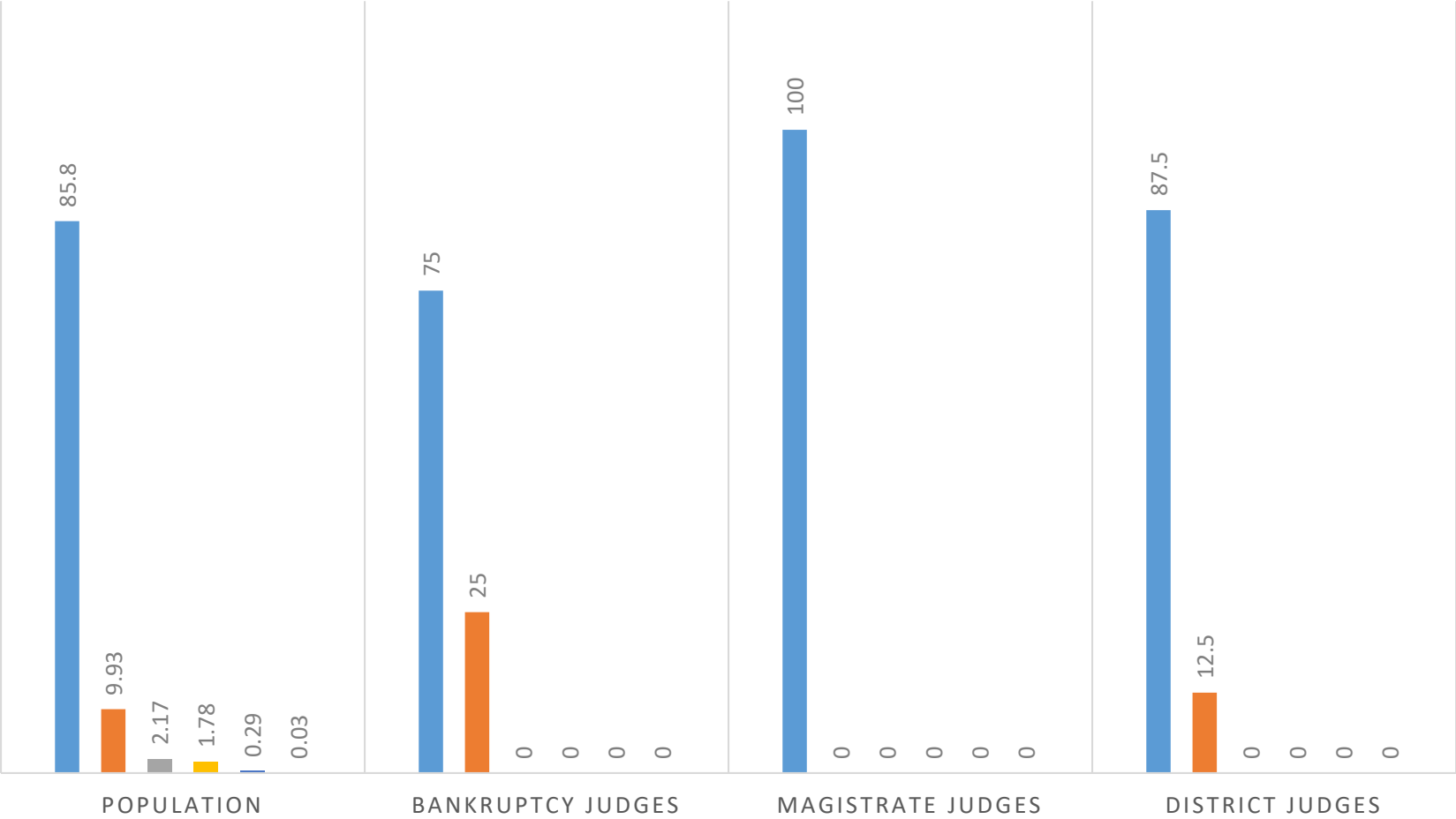


# NORTHERN DISTRICT OF OHIO



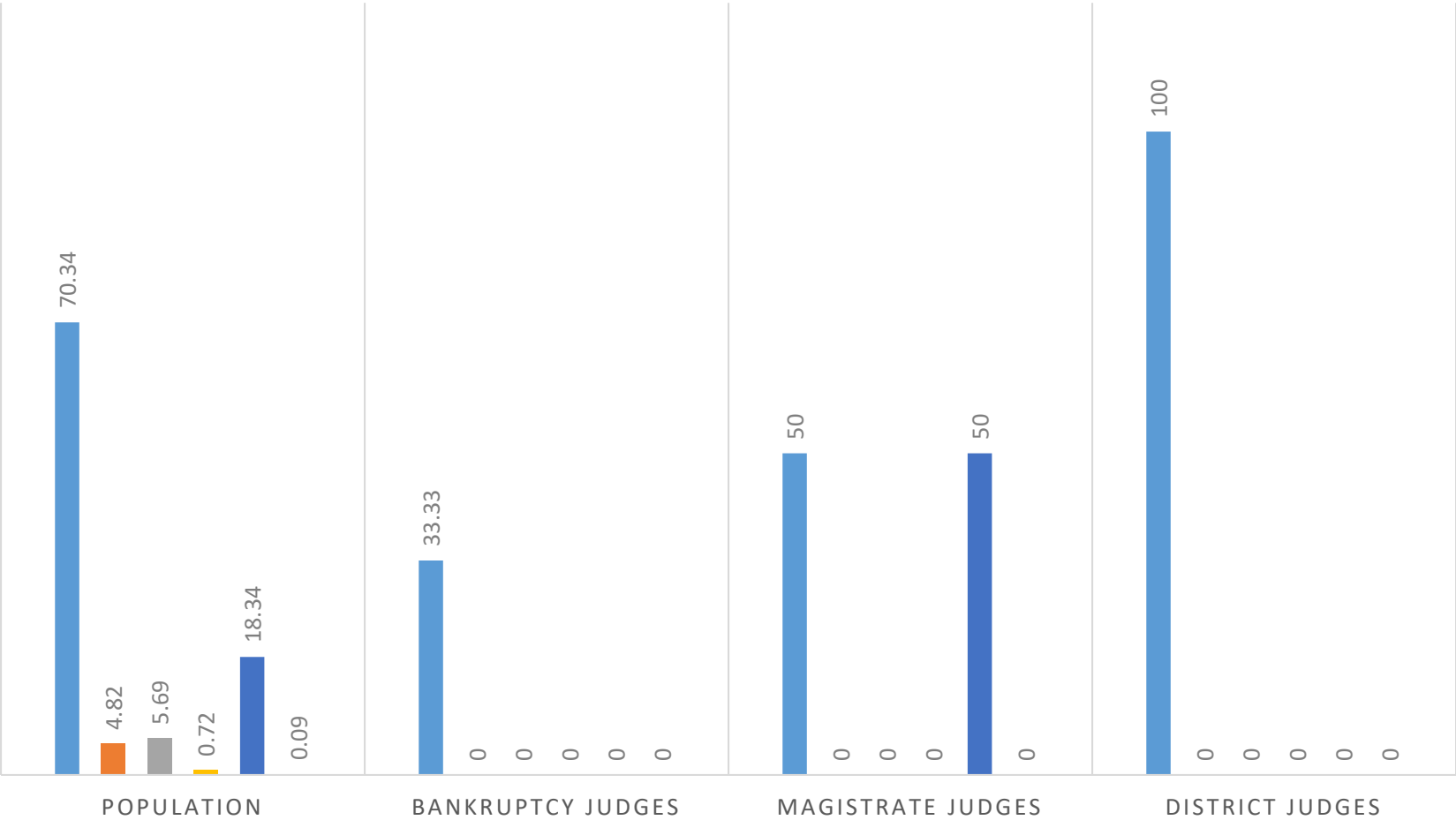
# SOUTHERN DISTRICT OF OHIO

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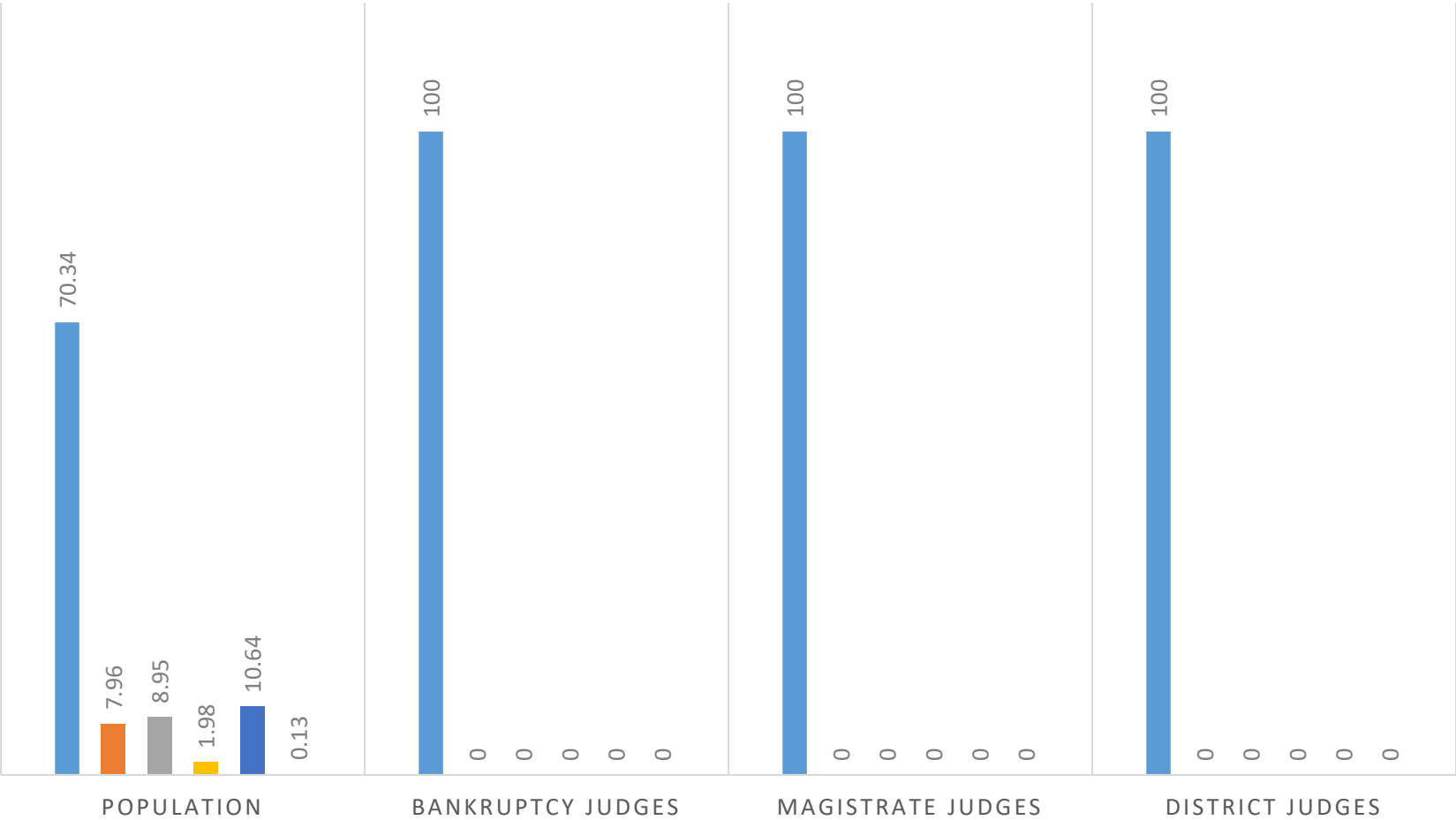
# EASTERN DISTRICT OF OKLAHOMA

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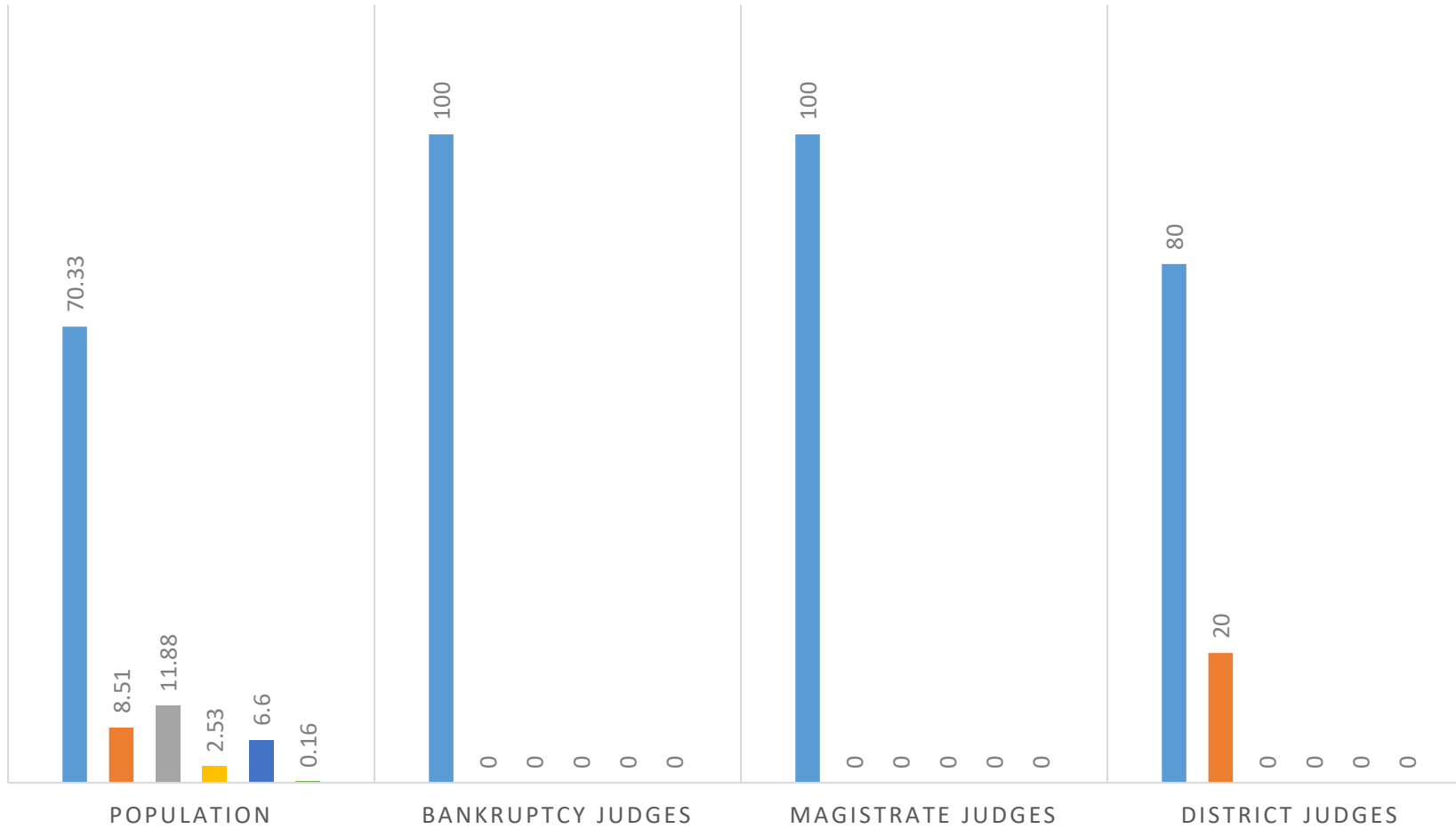
# NORTHERN DISTRICT OF OKLAHOMA

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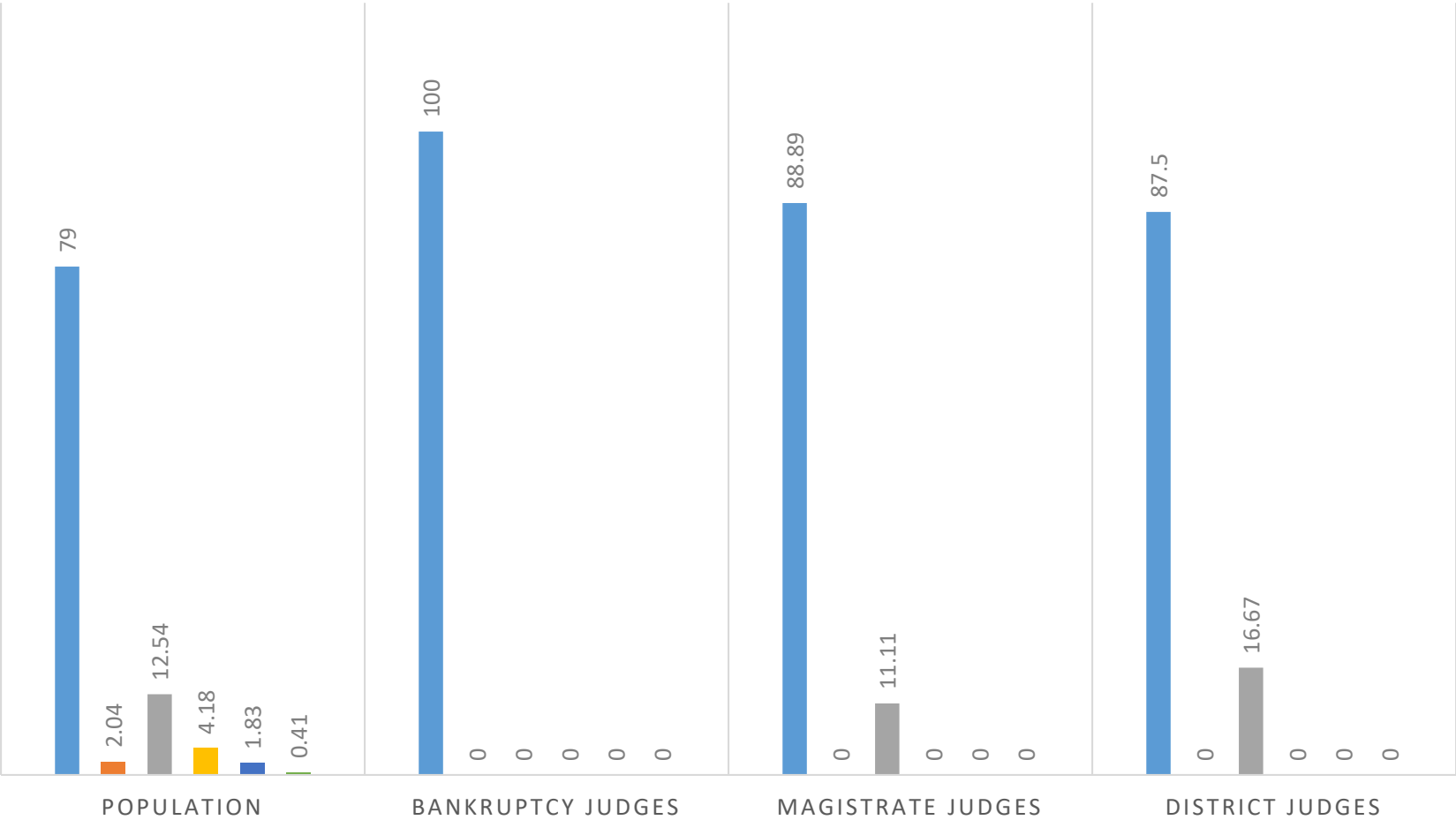
# WESTERN DISTRICT OF OKLAHOMA

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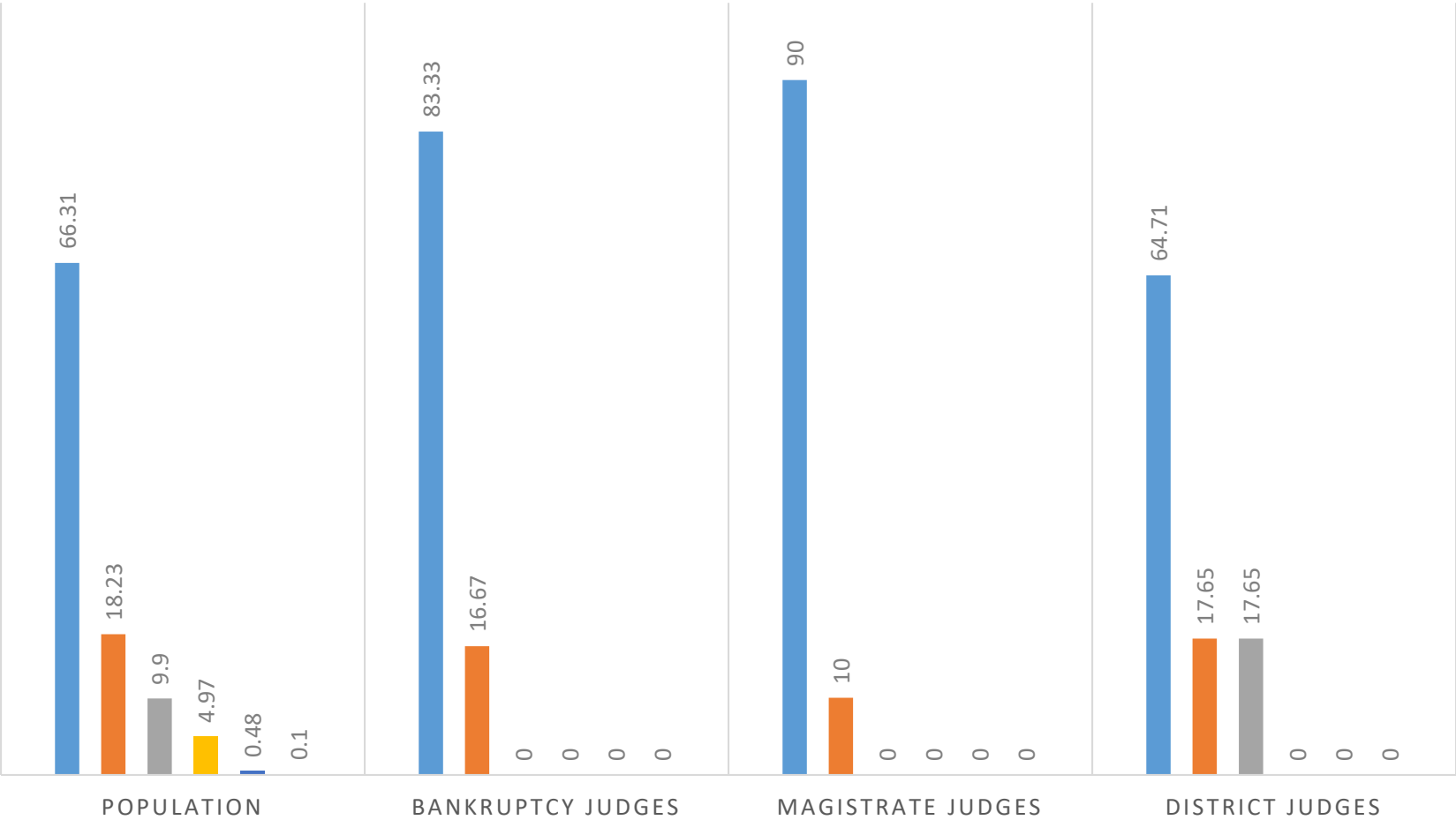
# DISTRICT OF OREGON

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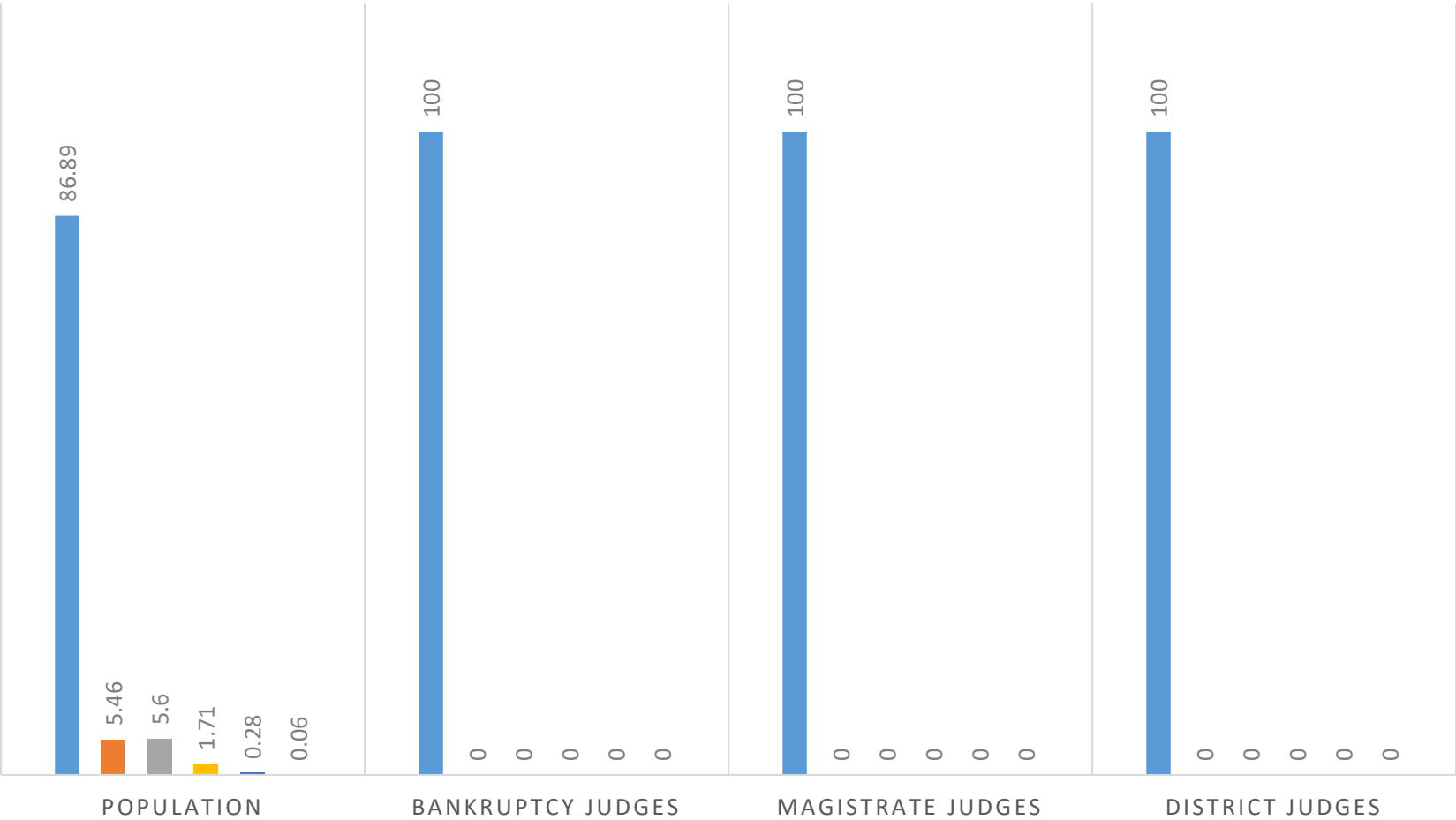
# EASTERN DISTRICT OF PENNSYLVANIA

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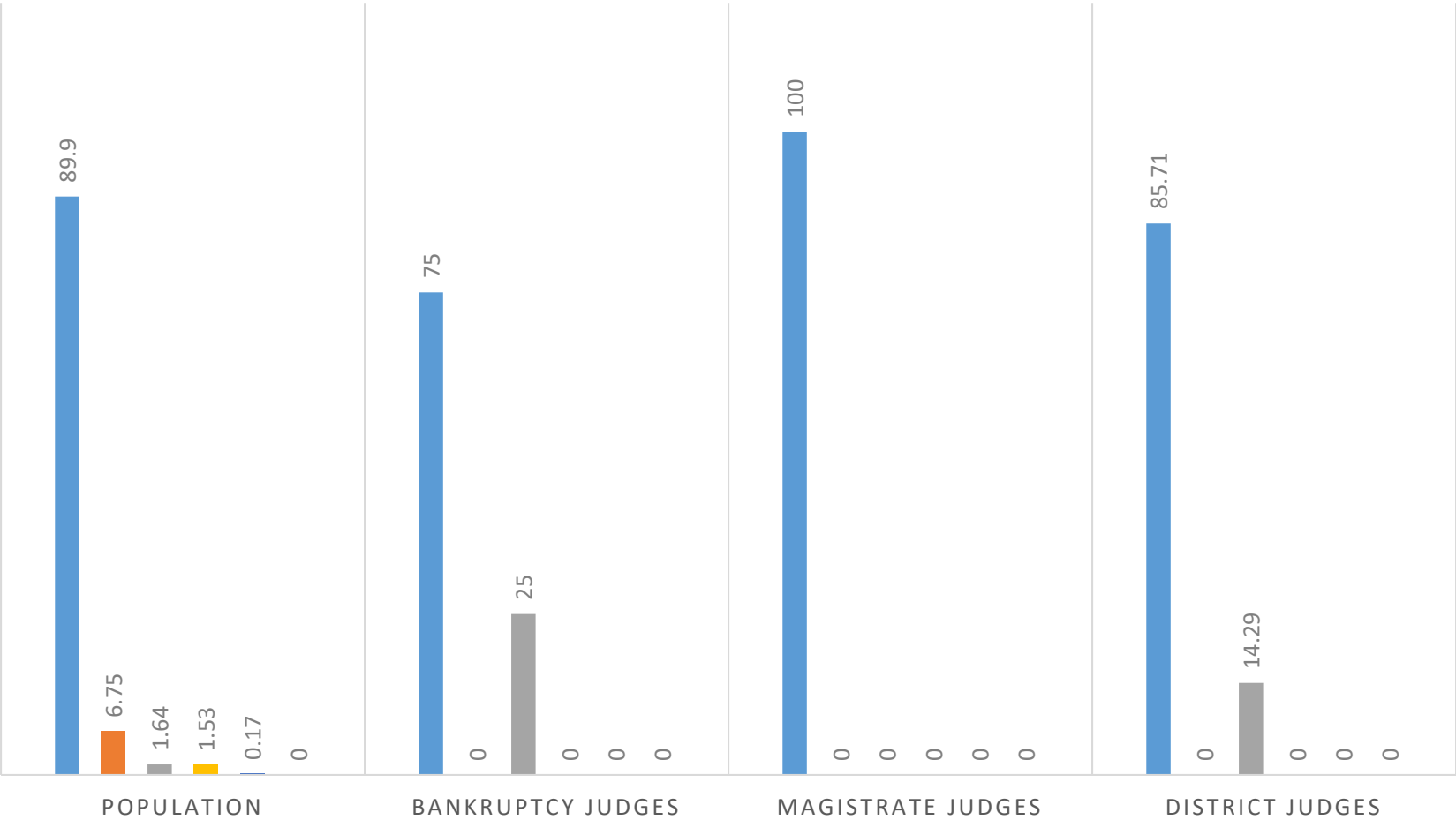
# MIDDLE DISTRICT OF PENNSYLVANIA

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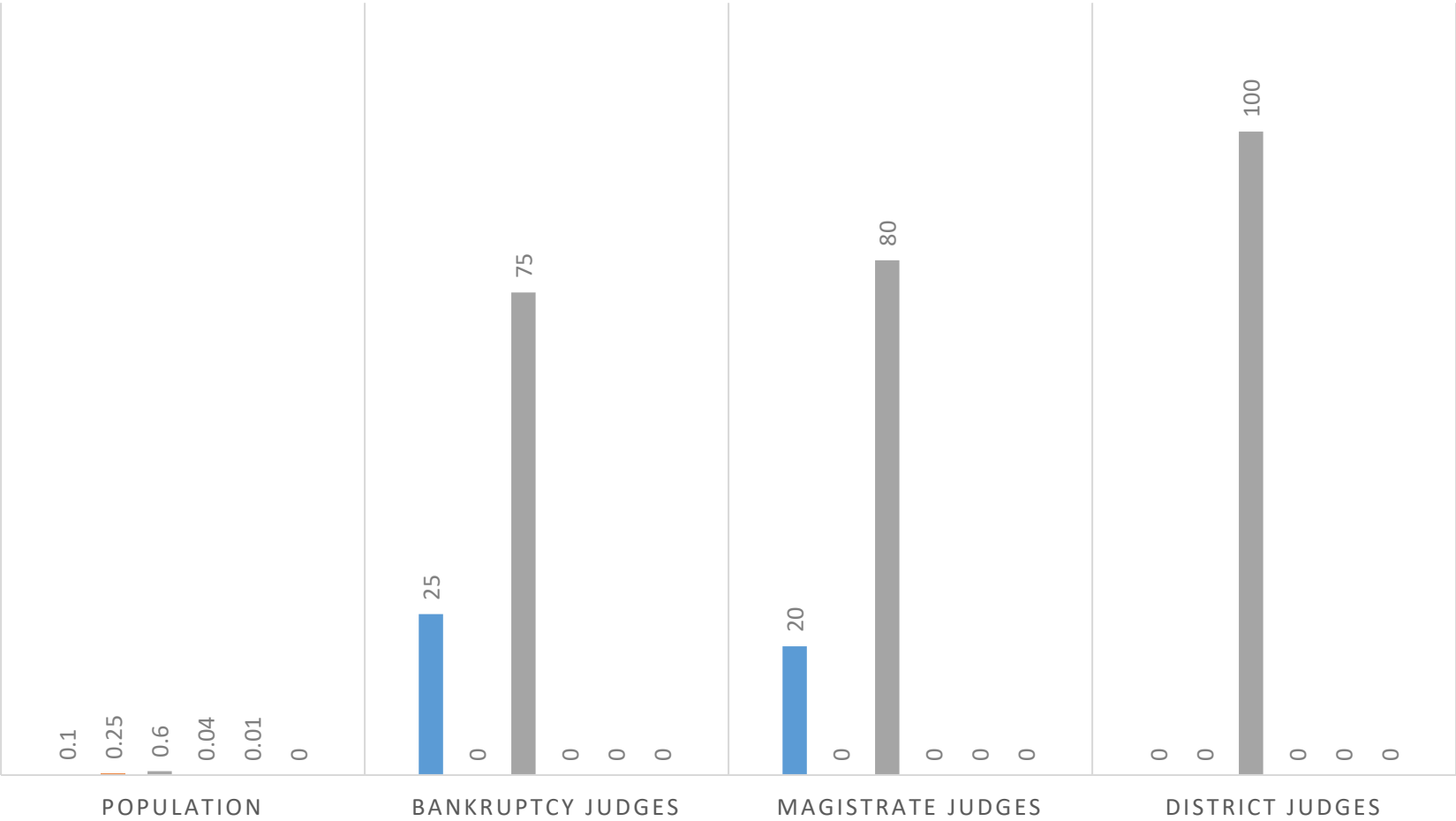
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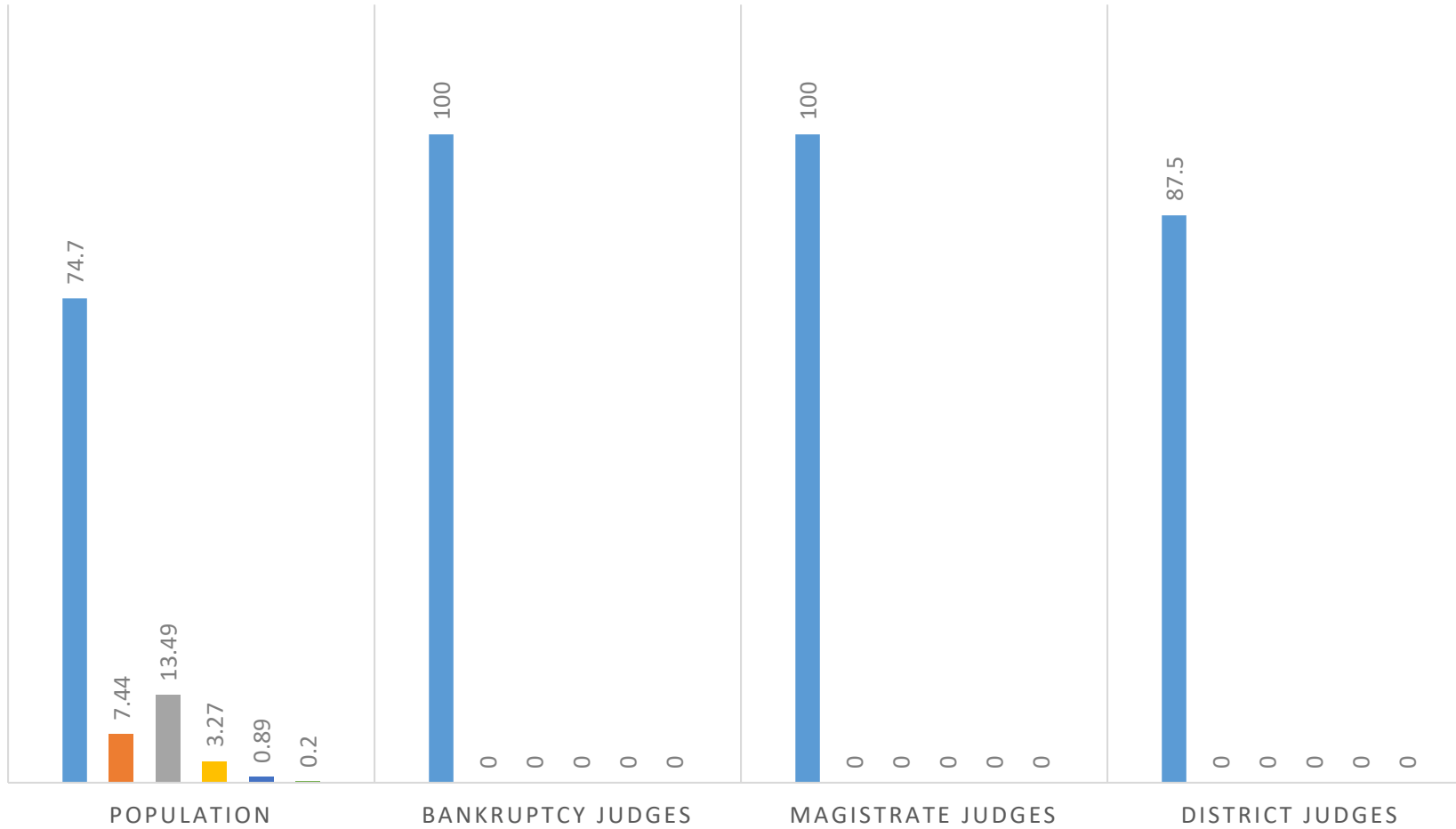
# DISTRICT OF PUERTO RICO

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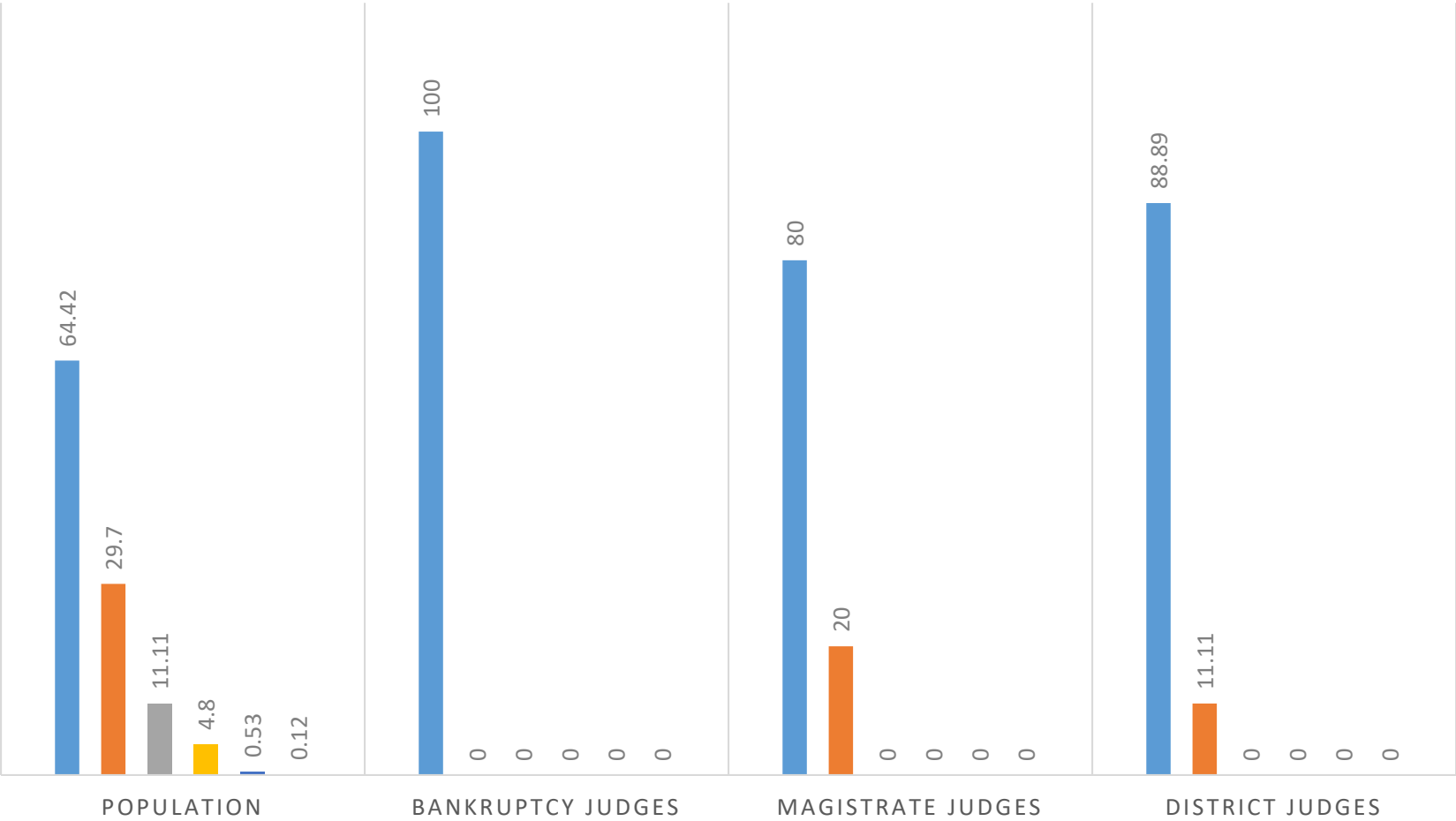
# DISTRICT OF RHODE ISLAND

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# DISTRICT OF SOUTH CAROLINA

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



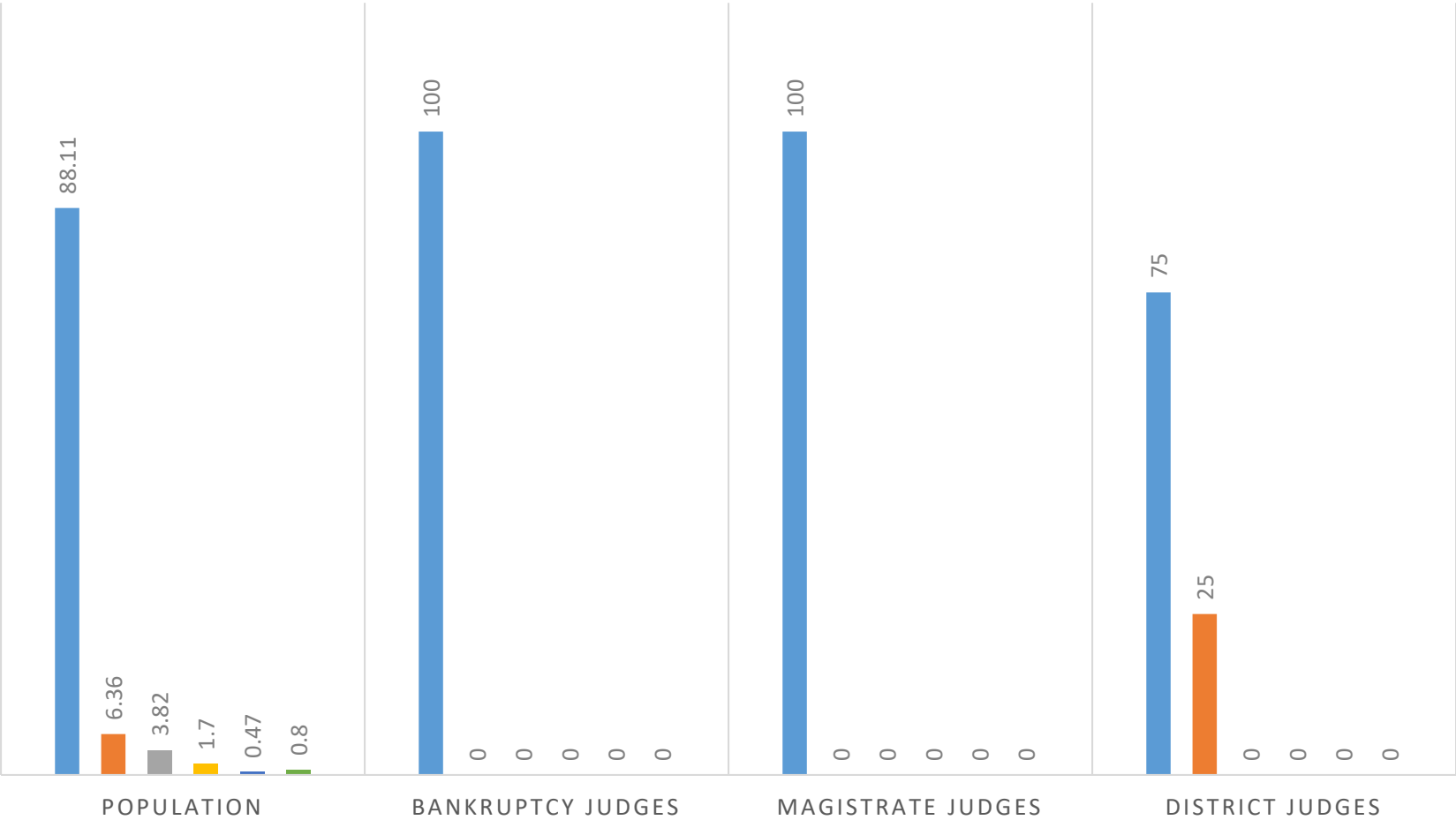
# DISTRICT OF SOUTH DAKOTA

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



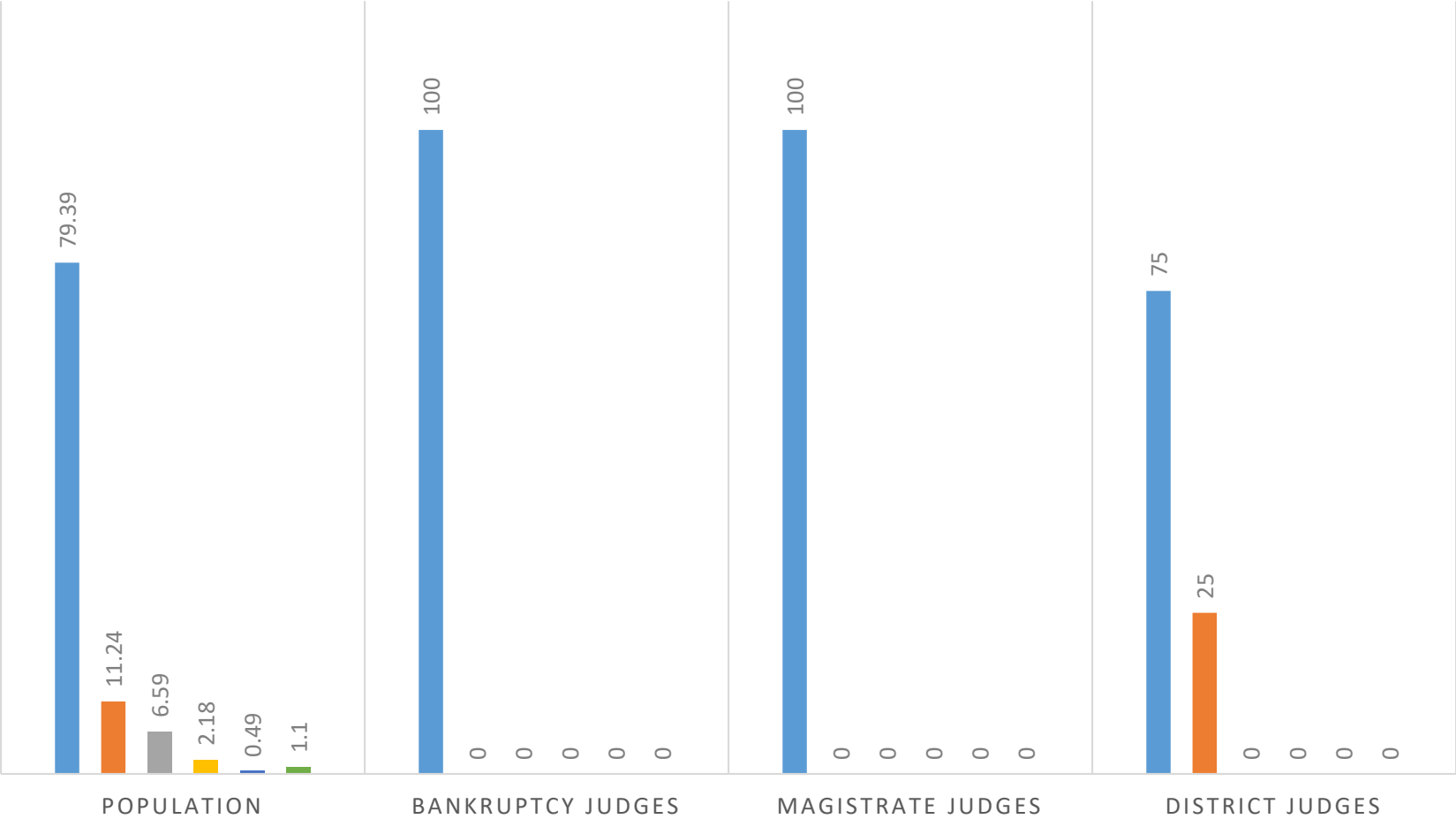
# EASTERN DISTRICT OF TENNESSEE

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



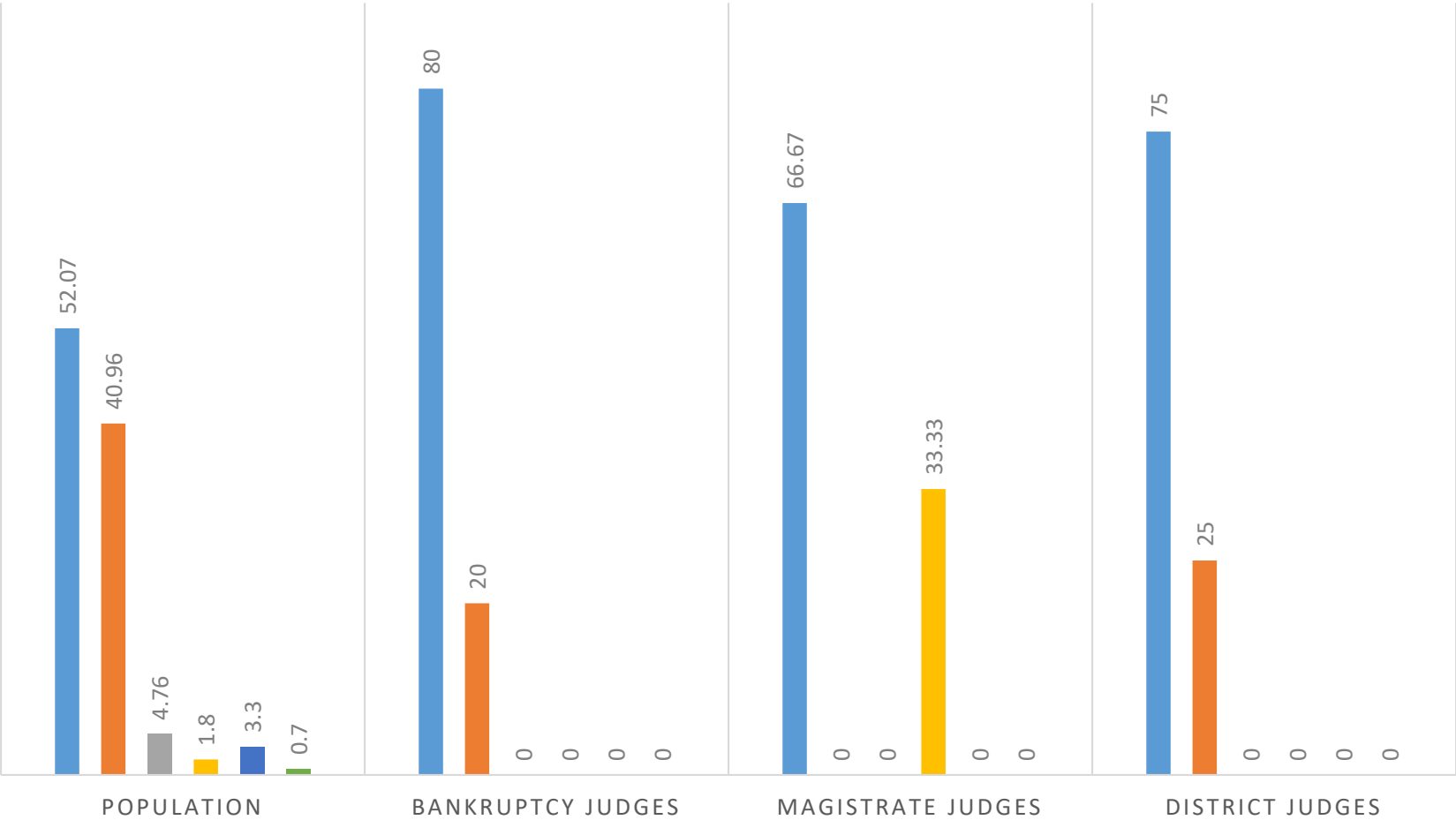
# MIDDLE DISTRICT OF TENNESSEE

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



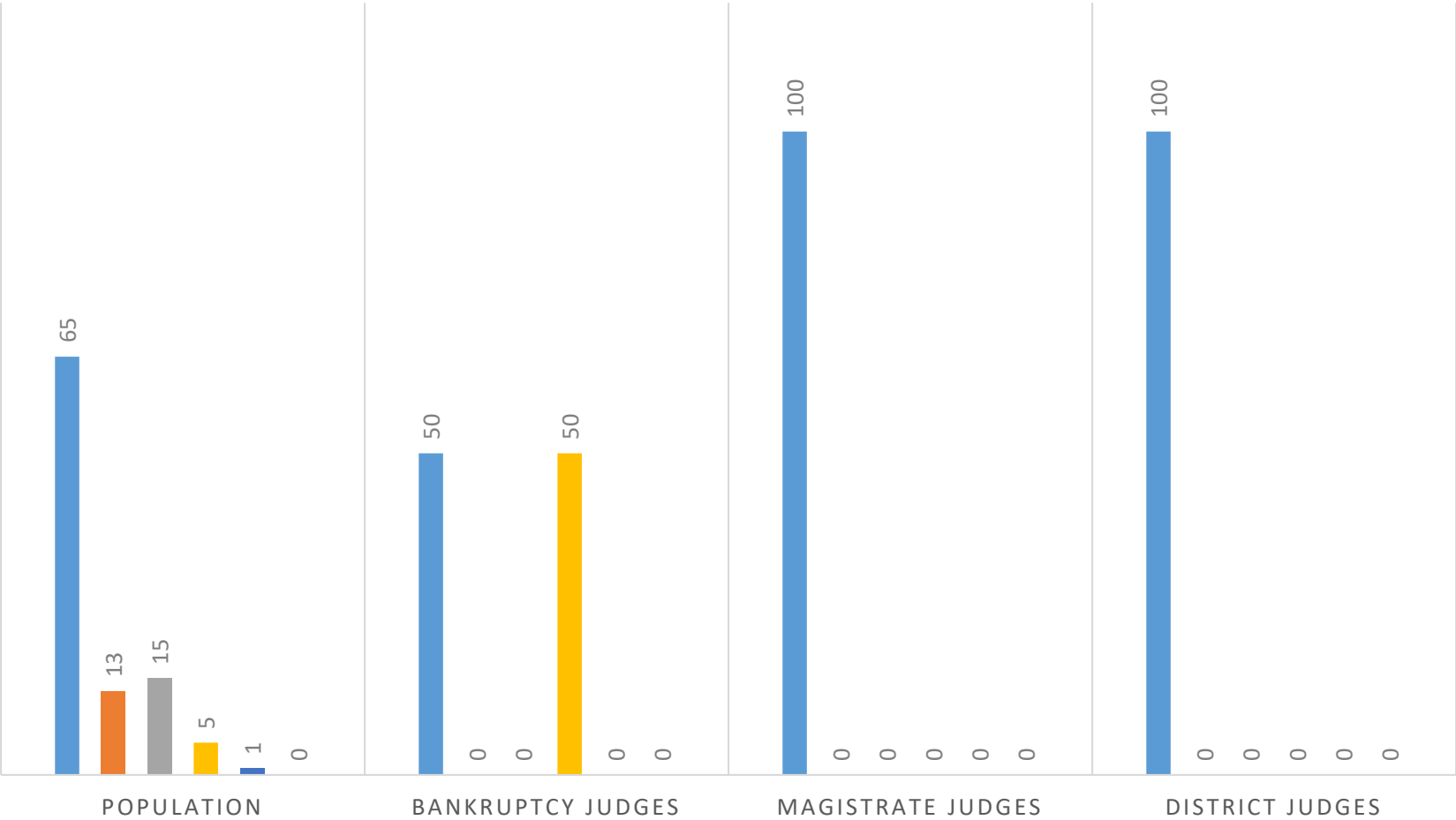
# WESTERN DISTRICT OF TENNESSEE

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



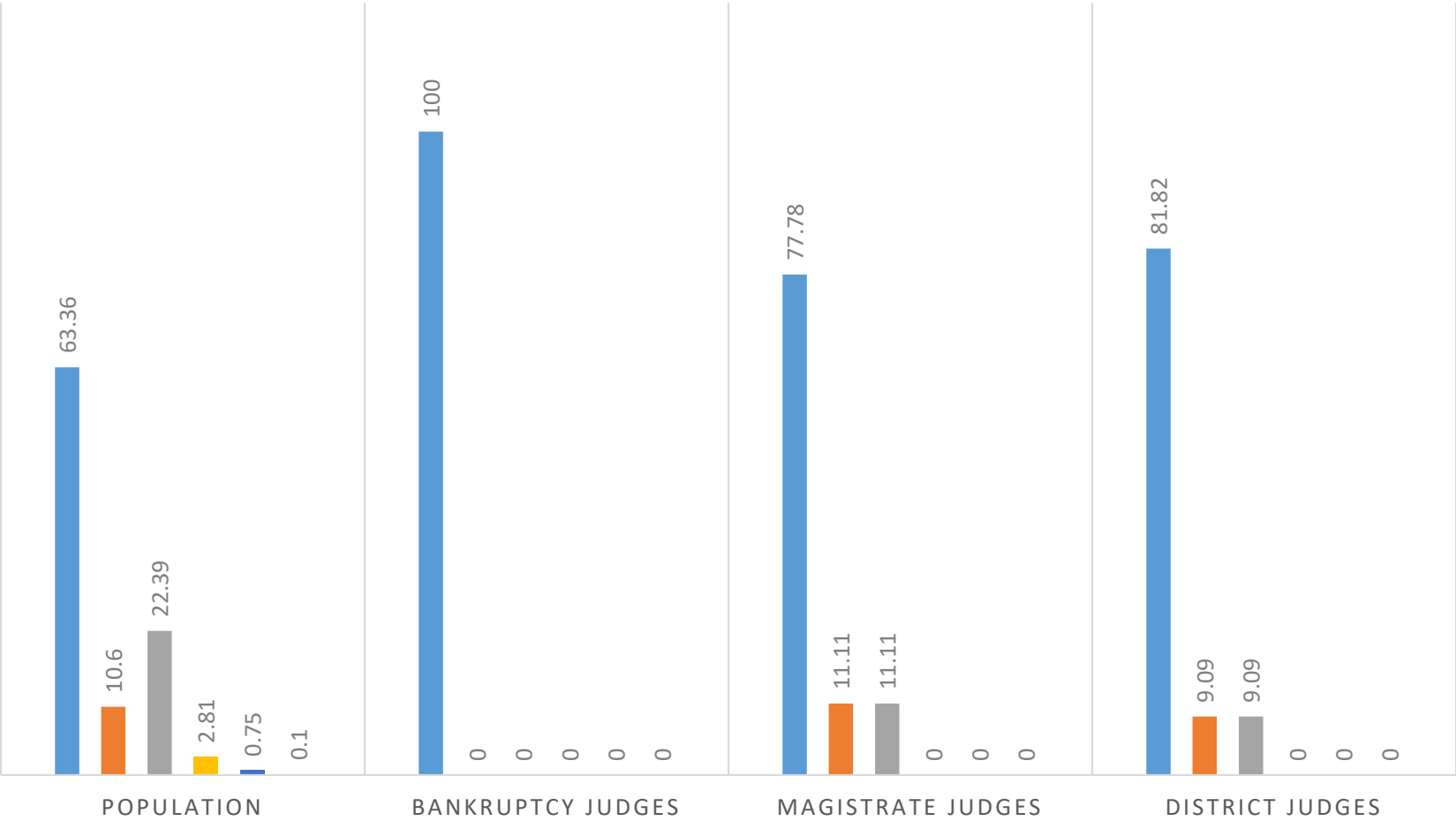
# EASTERN DISTRICT OF TEXAS

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



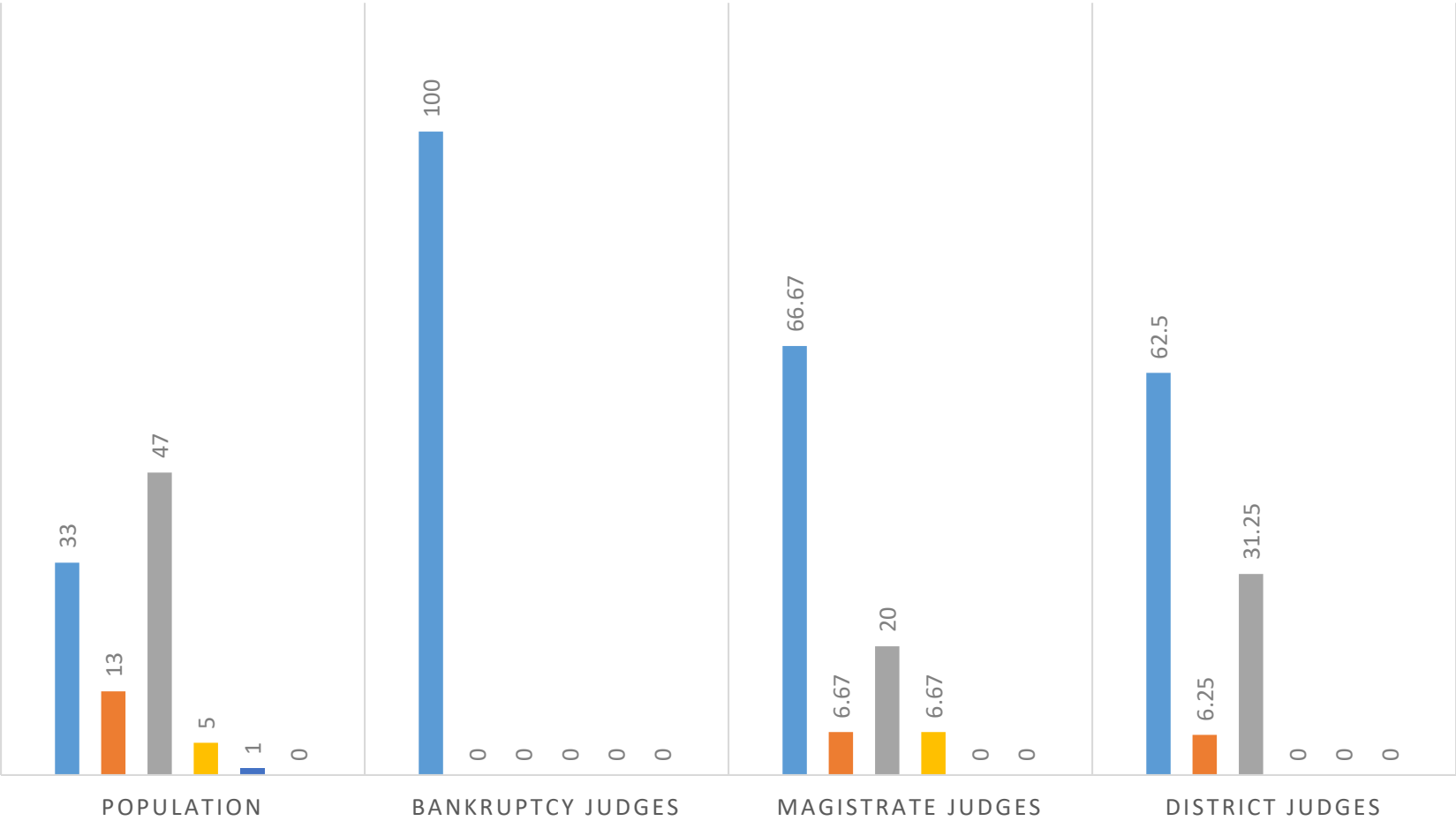
# NORTHERN DISTRICT OF TEXAS

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



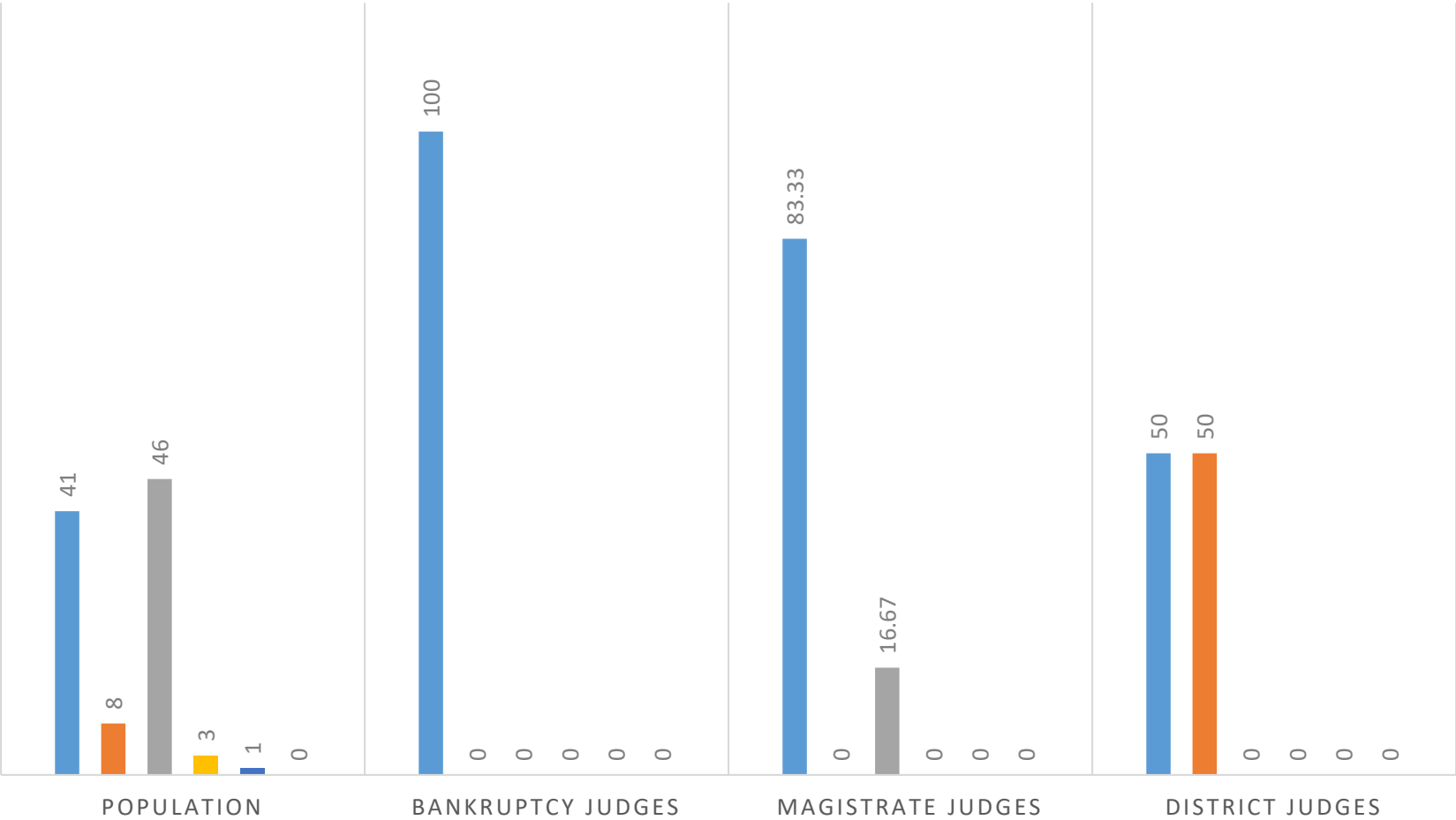
# SOUTHERN DISTRICT OF TEXAS

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



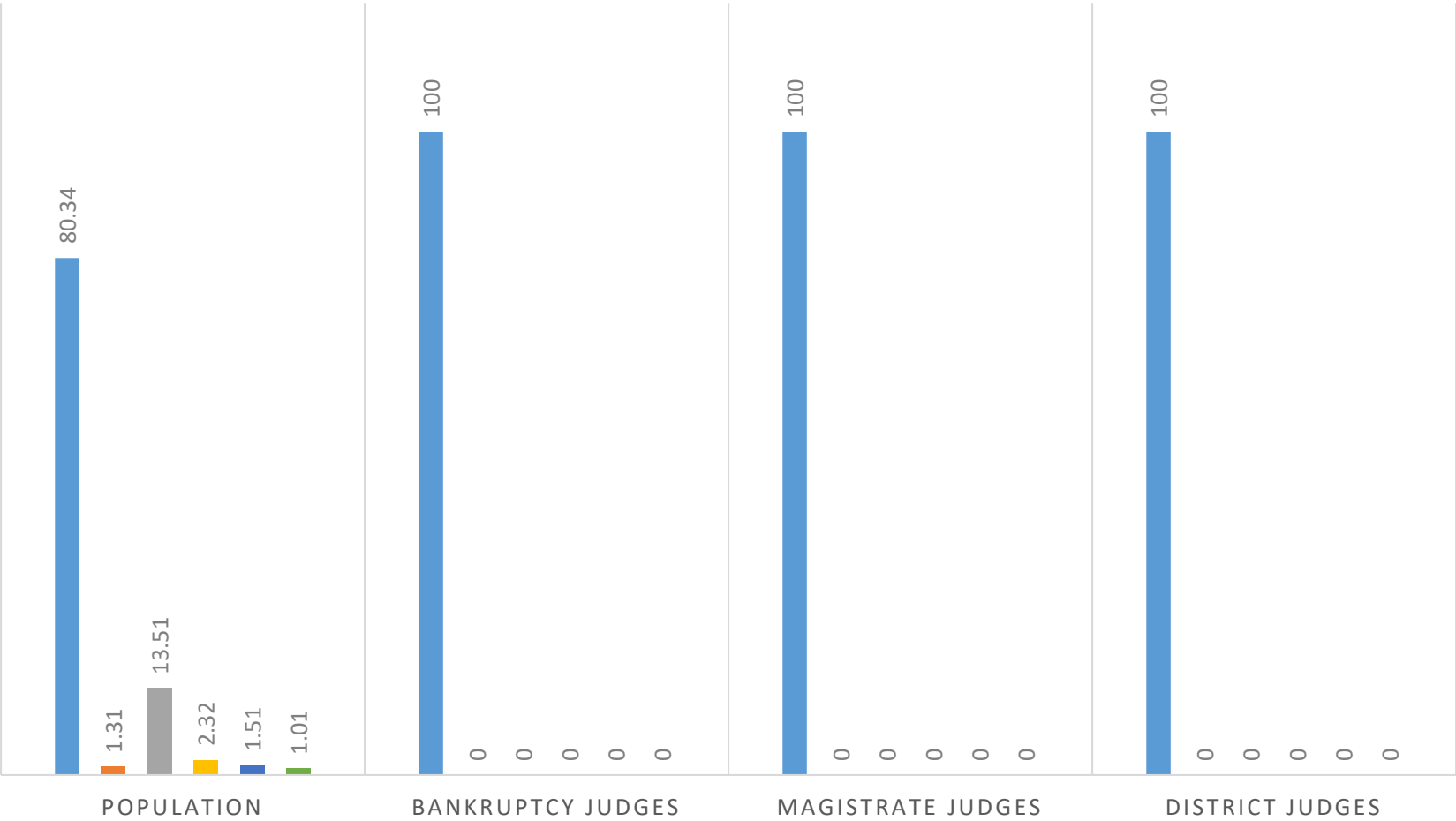
# WESTERN DISTRICT OF TEXAS

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



# DISTRICT OF UTAH

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



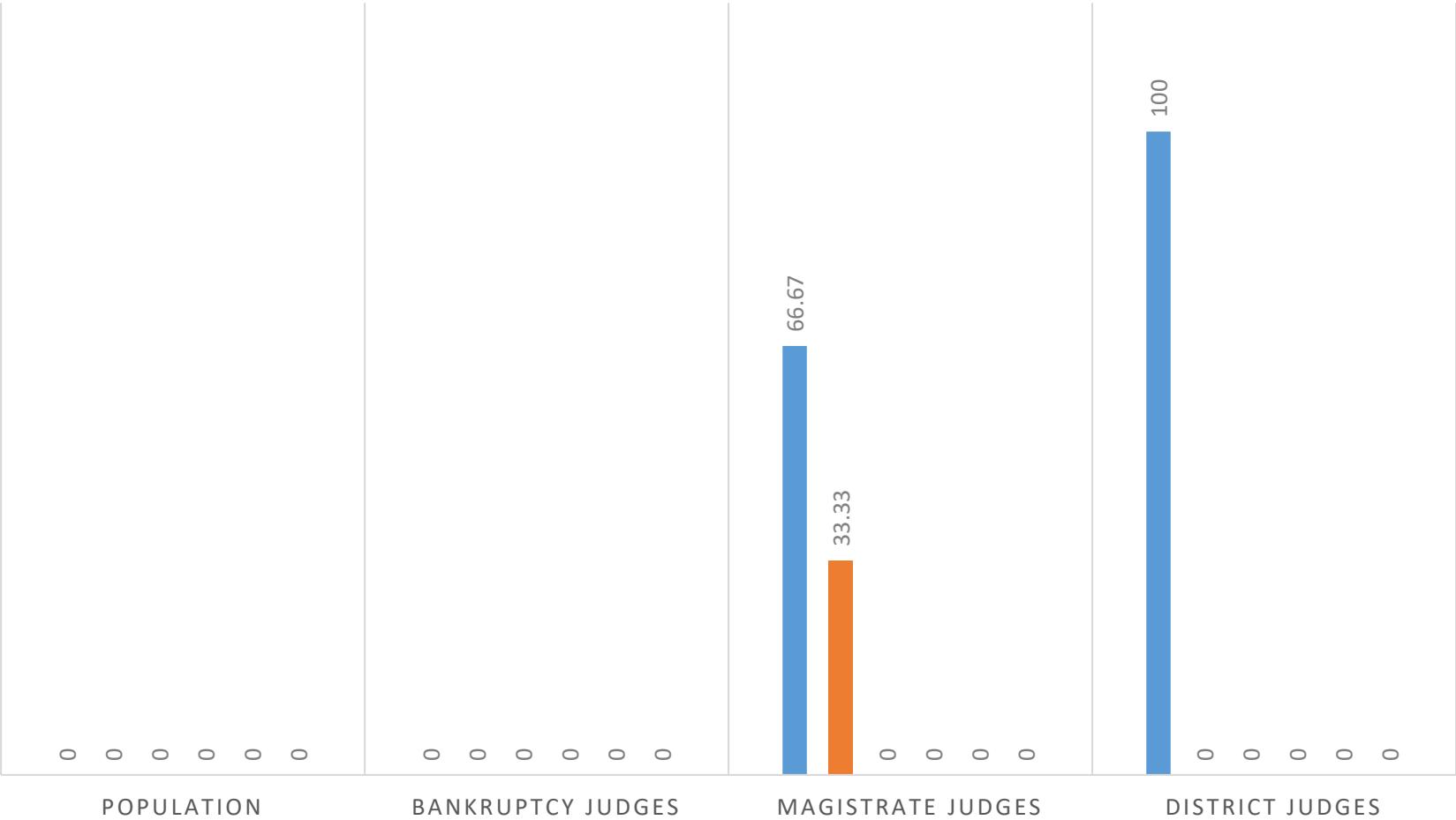
# DISTRICT OF VERMONT

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



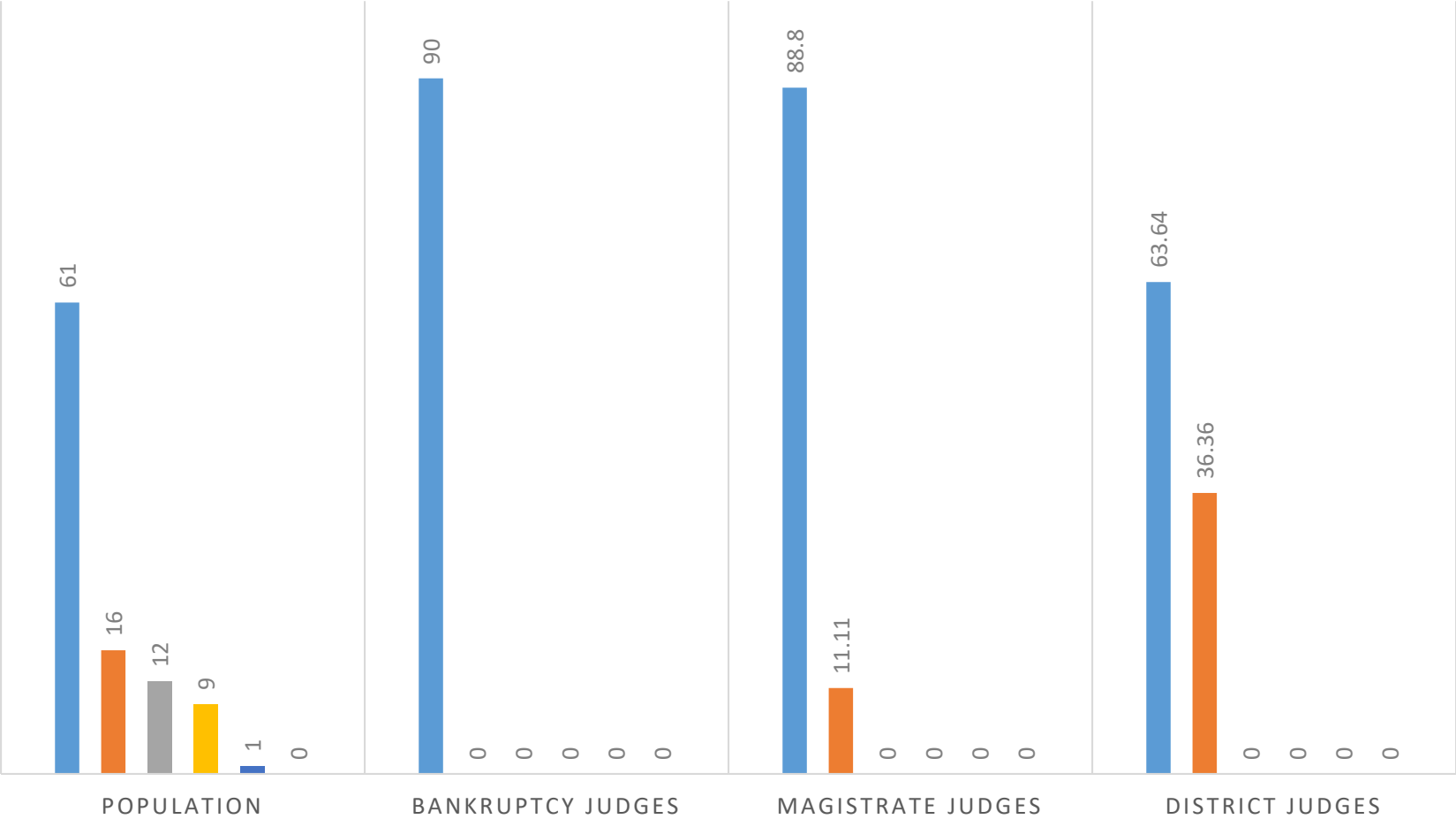
# DISTRICT OF THE VIRGINS ISLANDS

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



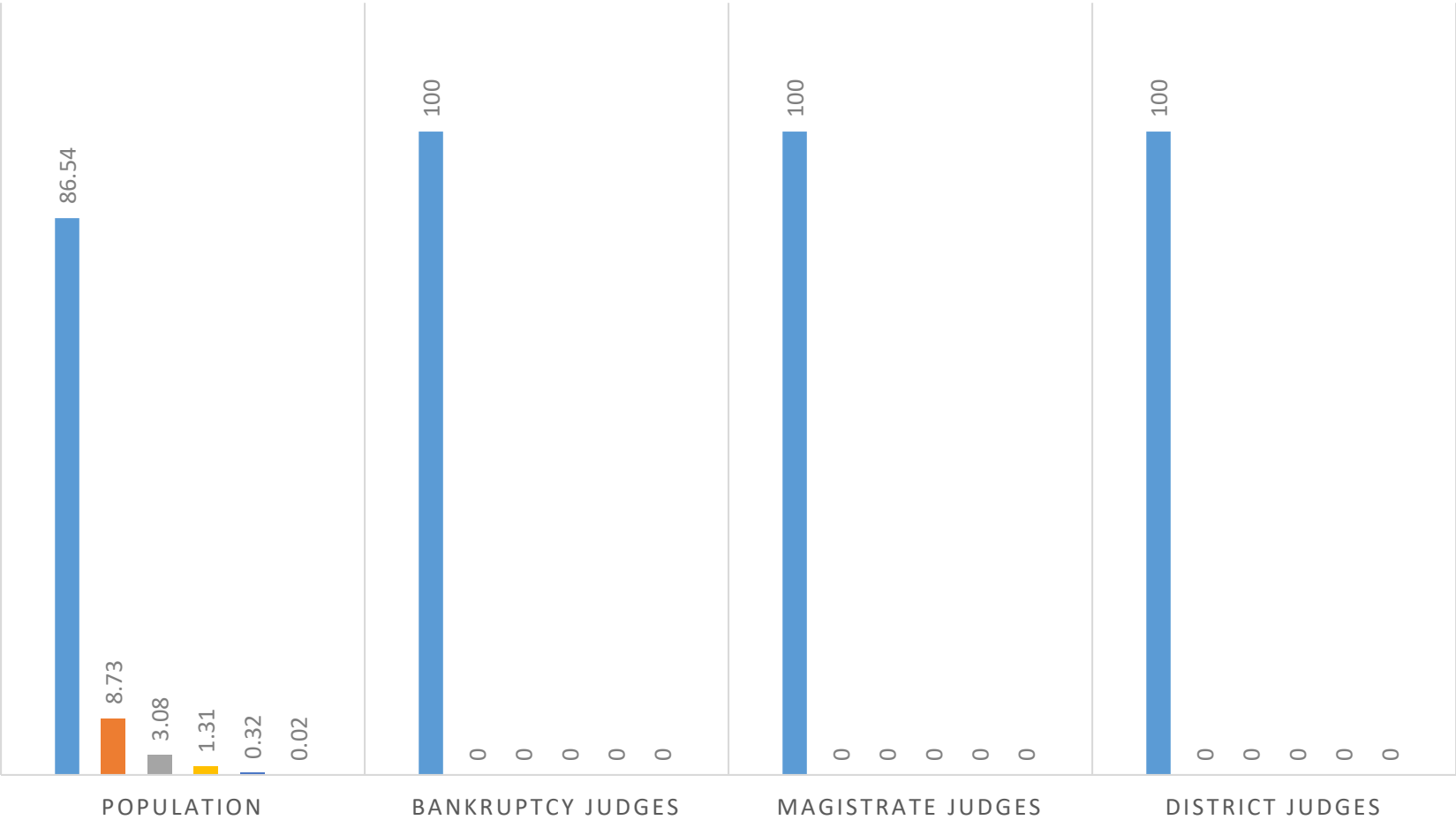
# EASTERN DISTRICT OF VIRGINIA

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



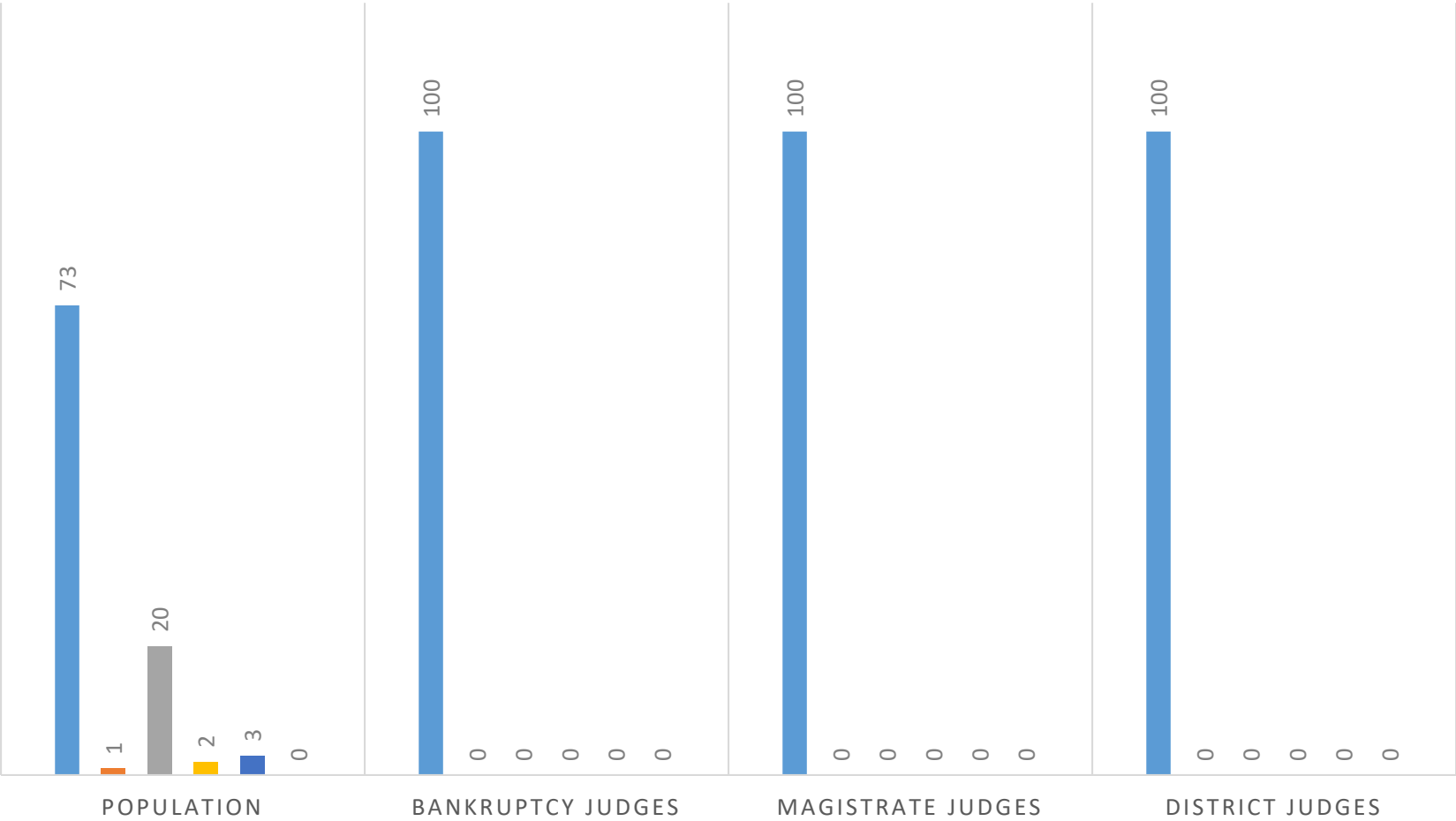
# WESTERN DISTRICT OF VIRGINIA

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



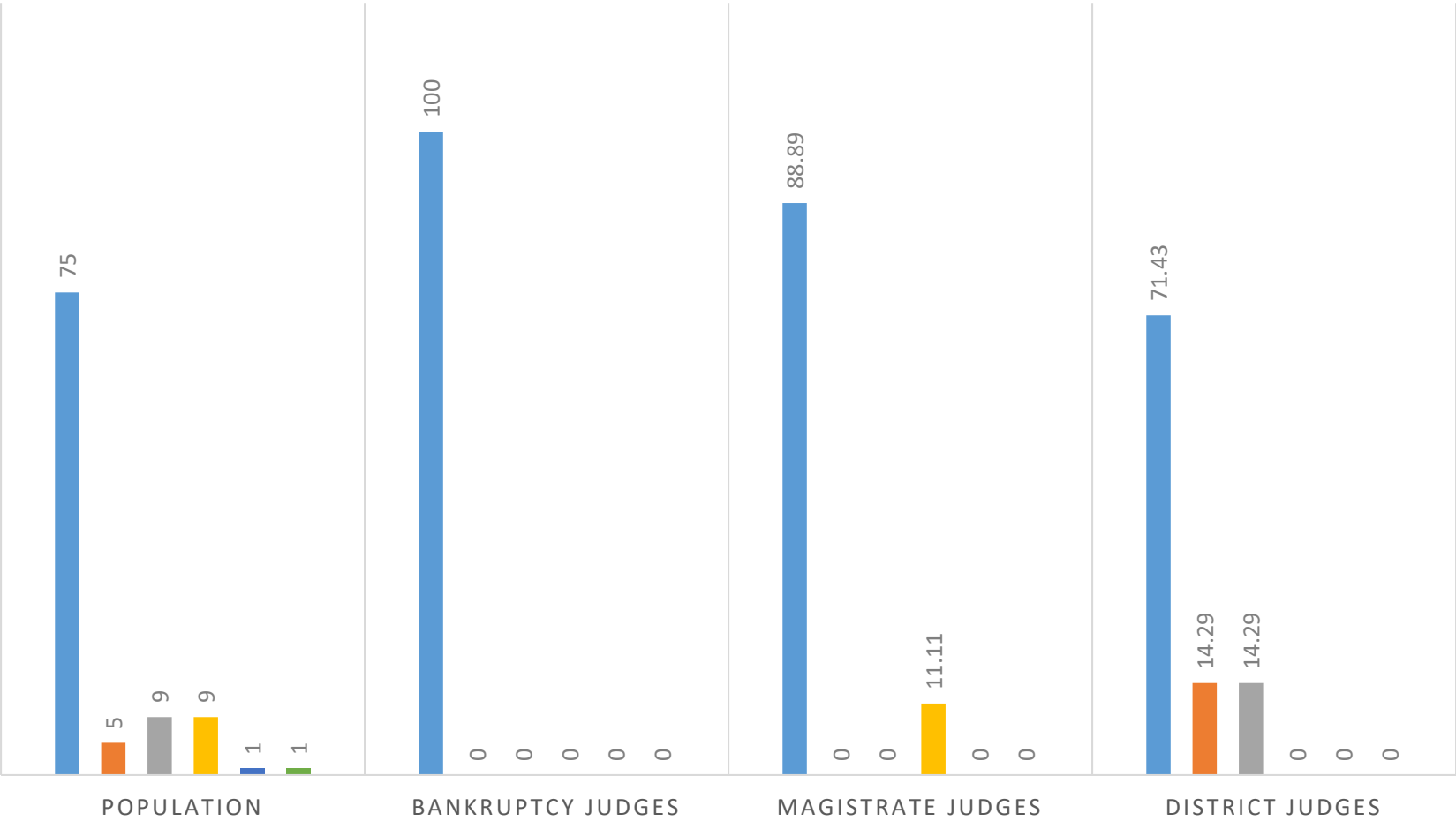
# EASTERN DISTRICT OF WASHINGTON

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



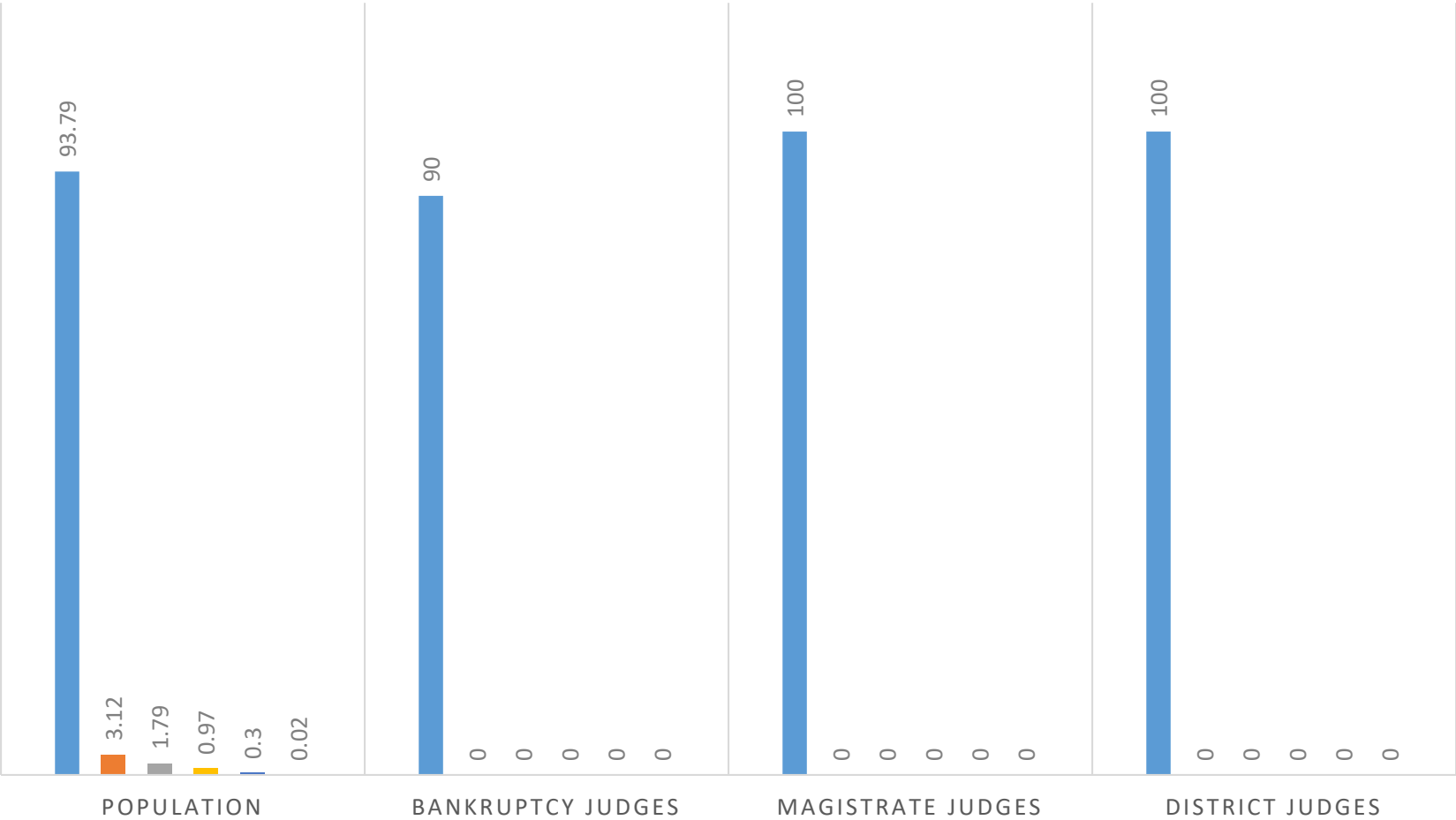
# WESTERN DISTRICT OF WASHINGTON

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



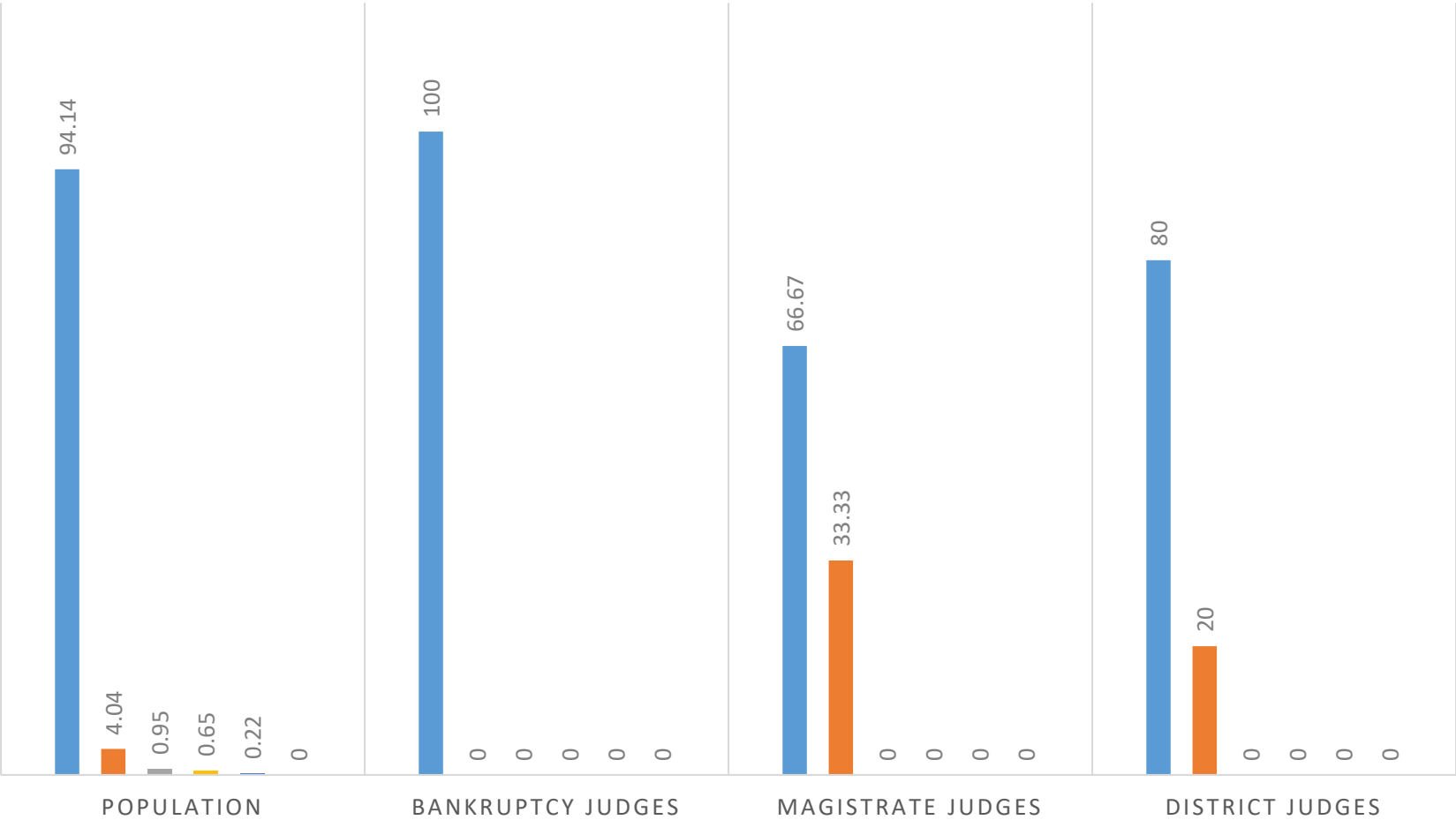
# NORTHERN DISTRICT OF WEST VIRGINIA

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



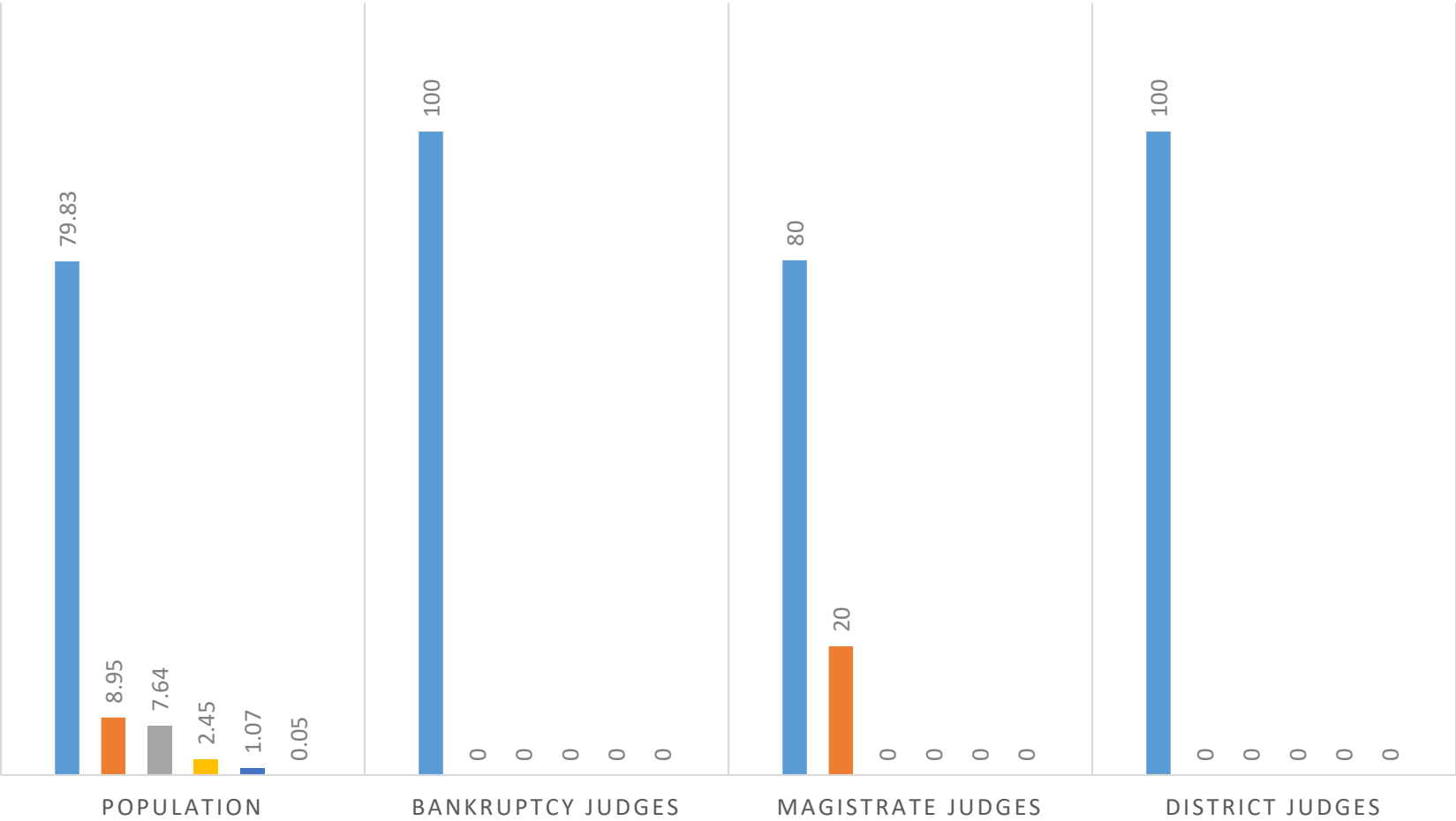
# SOUTHERN DISTRICT OF WEST VIRGINIA

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



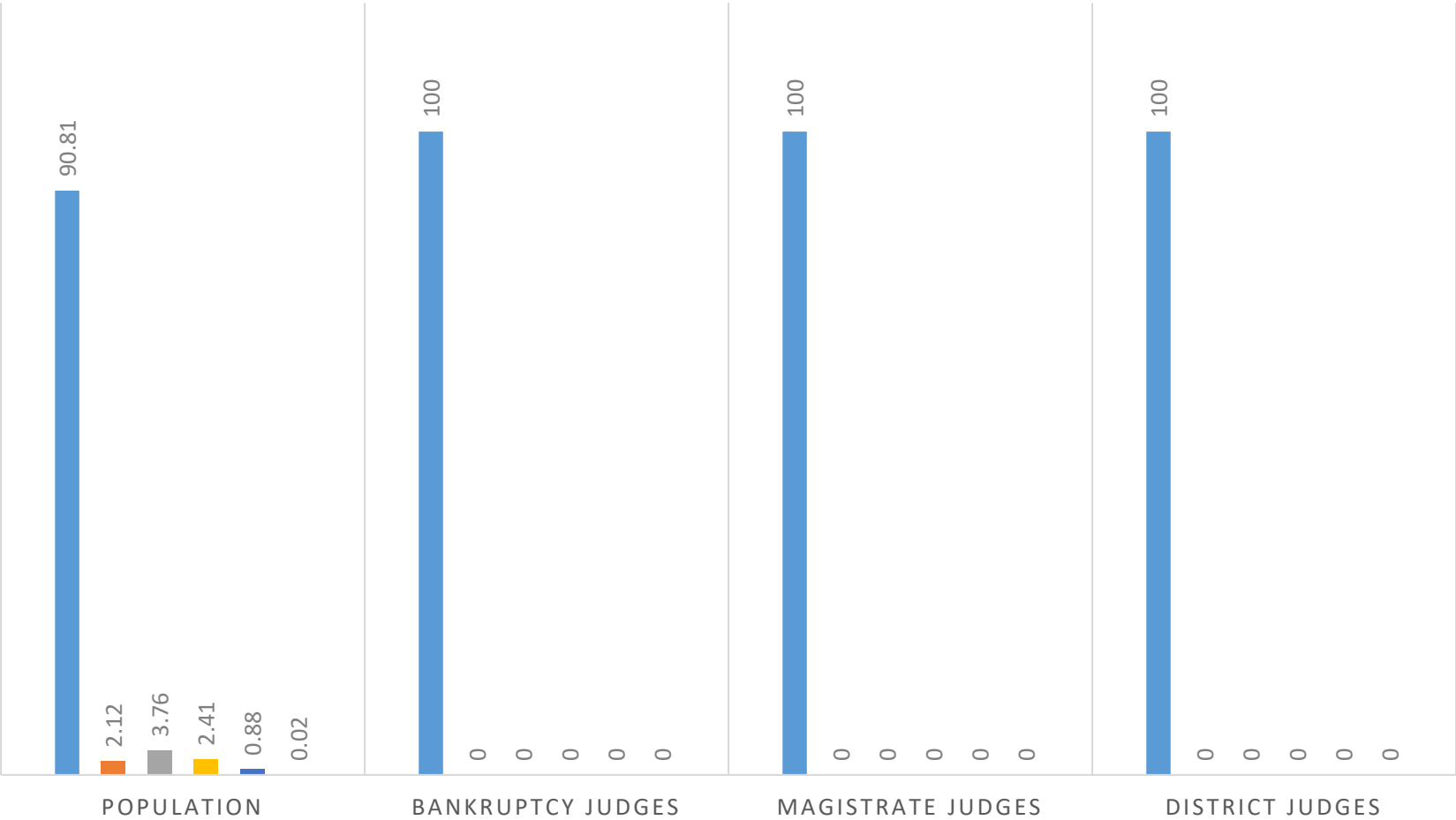
# EASTERN DISTRICT OF WISCONSIN

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



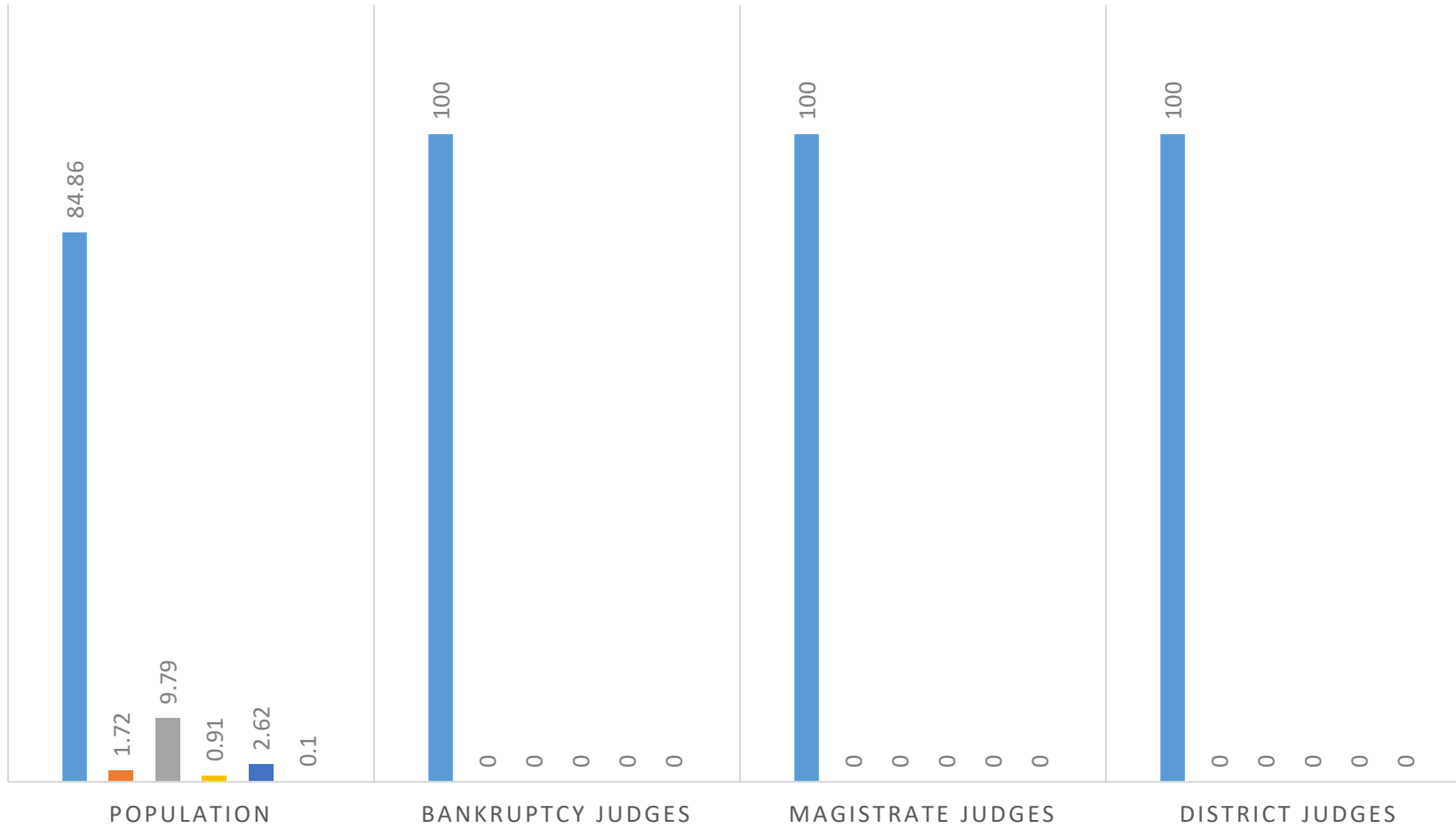
# WESTERN DISTRICT OF WISCONSIN

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



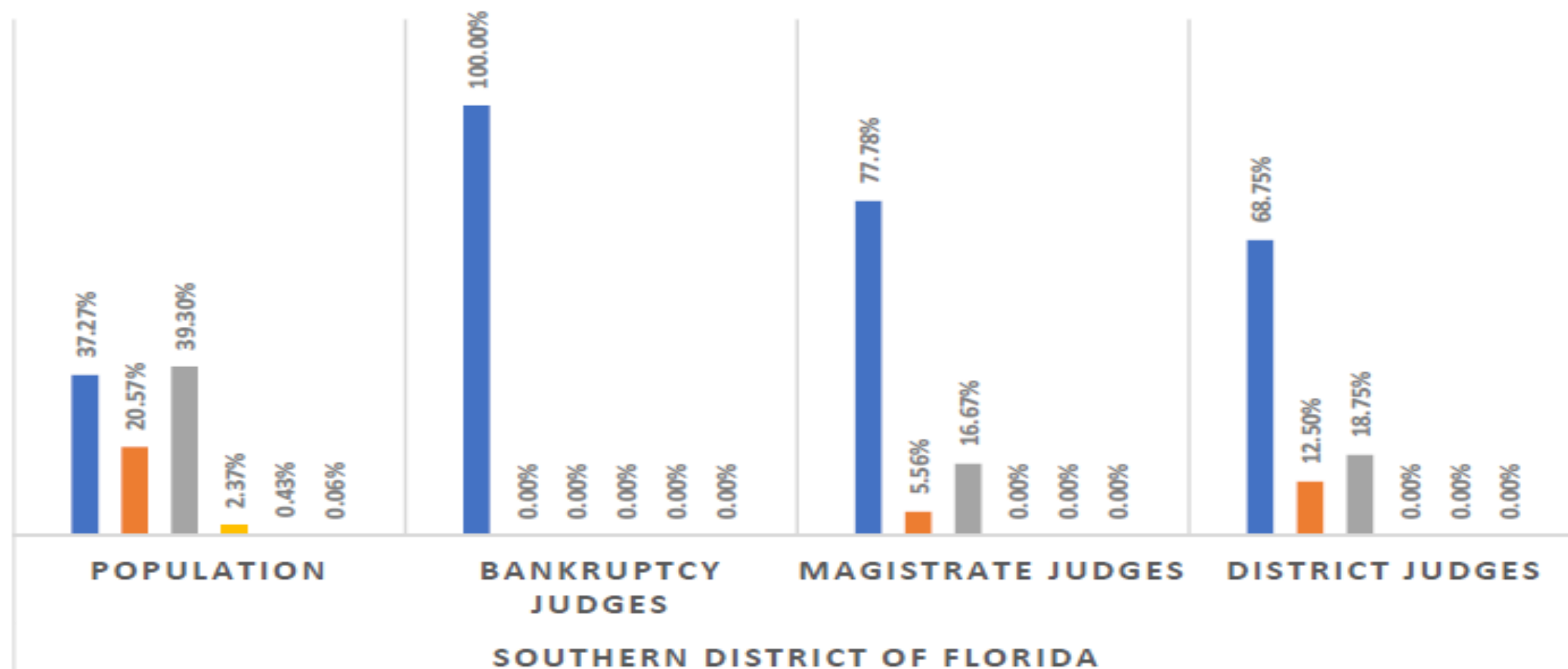
# DISTRICT OF WYOMING

■ Caucasian ■ African American ■ Latino/Hispanic ■ Asian ■ Native American ■ Pacific Islander



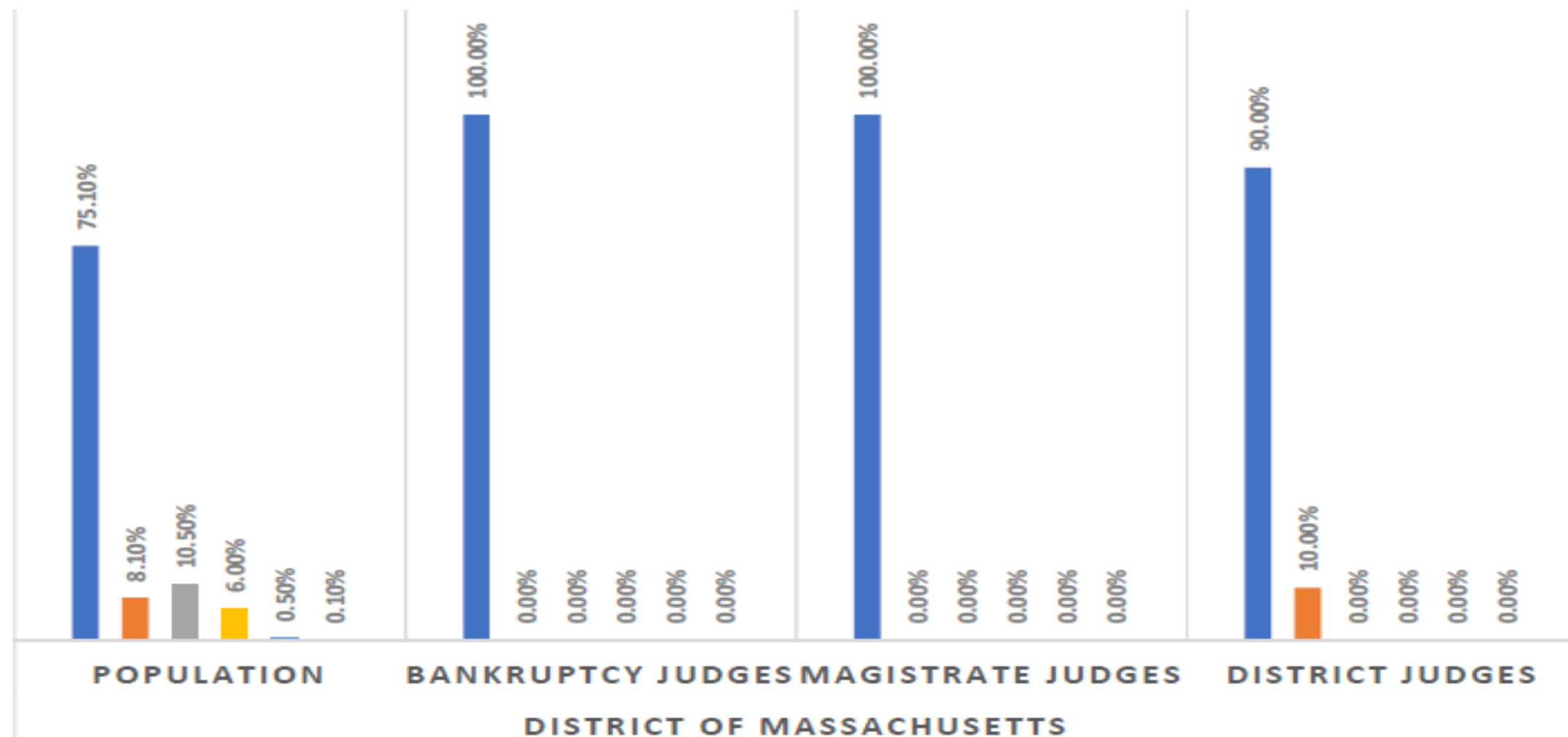
## SOUTHERN DISTRICT OF FLORIDA (MIAMI AREA)

■ Caucasian ■ African American ■ Latino/Hispanic ■ Asian ■ Native American ■ Pacific Islander



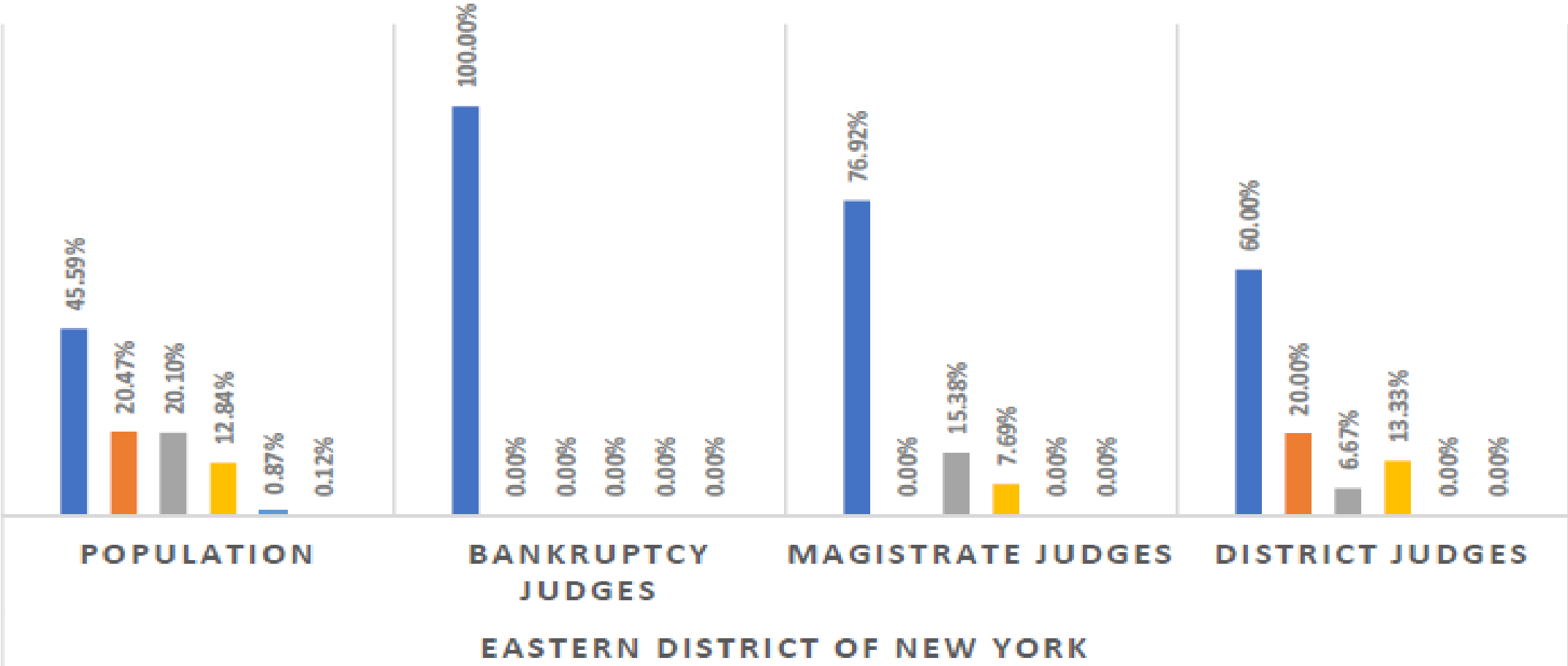
## DISTRICT OF MASSACHUSETTS

■ Caucasian ■ African American ■ Latino/Hispanic ■ Asian ■ Native American ■ Pacific Islander



# EASTERN DISTRICT OF NEW YORK (NEW YORK CITY AREA)

Caucasian African American Latino/Hispanic Asian Native American Pacific Islander



# PART 1 CONCLUSIONS:

- ❖ No, the judges on the Bankruptcy Bench *do not* look like the populations they serve – and are not close to doing so.
- ❖ Federal District Judges and Circuit Judges look **a lot more** like the populations they serve.
- ❖ Federal Magistrate Judges are also lagging behind on this metric

## Part 2. DOES HAVING A DIVERSE BAR AND BENCH MATTER?

Proposition: Diversifying the Bankruptcy Bench will help diversify the bankruptcy bar – “Pipeline Down”

Recent study: African American citizens receive *different* treatment from White lawyers than they do from African American lawyers

They are directed to ch. 13, while White debtors are directed to ch. 7, which *may be less advantageous (not always)*

See ***HOW THE BANKRUPTCY SYSTEM IS FAILING BLACK AMERICANS***, by Paul Kiel (ProPublica and Atlantic, September 2017).

# 7 vs. 13

Chapter 7 is:

- Quick
- Cheaper
- More relief

Chapter 13 is:

Slower  
More expensive  
Less relief

# Case Study: Novasha Miller, Memphis, TN

- Age 32, single mom, teenage sons, African American
- Job: food service worker, \$10.50/hour
- Does not own a home; high credit card debt
- She signed a one-year lease on an apartment that was so filled with mold (son has asthma) she had to break the lease
- Ended up with a \$5,500 judgment (plus attorneys fee) to pay and *shocking* collection efforts
- Garnishment of her paycheck

# Can Bankruptcy Help Ms. Miller?

- Chapter 7: after a few months the Debtor gets a *discharge* of almost all debts; **BUT** cost is \$1,000 up front
- Chapter 13: no up front cost, **BUT** costs \$3,000 over 5 years
- Ch. 13: *No discharge* unless she pays for 5 years
- In Memphis, where Ms. Miller lives, African American citizens are directed to chapter 13 at **5 times** the rate of White citizens with similar financial profiles
- And across the US, African American debtors are **more than twice** as likely to file chapter 13 as white debtors

# But, what if the lawyer is African American?

- Jerome Payne is one of very few African American debtor attorneys in Memphis
- His clientele is almost entirely African American and he files **mostly** chapter 7 cases for them
- **Very few ch. 13 debtors end up with a discharge**

***“Me being African American, and me understanding my community, maybe I’ve been more successful in showing them that this (chapter 13) is not the way you ought to go.”***

Jerome Payne

# PART 2 cont'd: Another Study

- Approximately 1,000,000 bankruptcy petitions filed per year
- 30% chapter 13 filings
- African Americans are *more likely* than debtors of other races to file Ch. 13
- Let's see why?

# Race, Attorney Influence, and Bankruptcy Chapter Choice (Lawless Study)

- Chapter choice (ch. 7 v. ch.13) – begins in the attorney's office
- Attorney is the guiding force in the type of chapter filing decision
- Local Legal Culture – attorneys' values drive chapter recommendation
  - What's best for the client *viewed through lenses of attorneys' values*
    - Morality and client's self-esteem – chapter 13
    - Best financial deal for clients – chapter 7



# Race and Attorney Influence

- STUDY 1 – 2007 data from the Consumer Bankruptcy Project (race as independent variable)

## Chapter 13 Rates by Race

<u>Race</u>	<u>Chapter 13 Rate</u>
African-American	54.7%
White	28.6%
Asian	24.4%
Other	23.8%
Hispanic	21.7%

# Race and Attorney Influence

Chapter 13 Filing Choice by Race (selected Judicial Districts)

		African	African	Non-African	Non-African	
		American	Americans	American		Americans
<u>Judicial District:</u>	<u>Cases:</u>	<u>in chapter 13:</u>	<u>cases:</u>	<u>in chapter 13:</u>		
Tennessee, Western	28		79%	19		58%
Alabama, Northern	16	75%	25		36%	
Ohio, Southern	15	67%	47		32%	
Mississippi, Southern	16		63%	11		18%
Georgia, Middle	15		60%	13		38%
Illinois, Northern	38		53%	45		16%
Georgia, Northern	27		52%	37		27%
Michigan, Eastern	35	37%	97		31%	
Districts w/ 15 or more						
African-American						
respondents		190		58%	294	30%
Districts w/ 1-14						
African-American						
respondents		321		53%	1,260	30%
All Districts w/ no						
African American						
respondent					200	16%

# Race and Attorney Influence

Ch. 13 is also *less effective* for African Americans than for others

10 -14 months after filing, African Americans chapter 13 plans had a ***dismissal*** rate of 36.2% versus 25.5%.

# Race and Attorney Influence

- STUDY 2 Survey – How bankruptcy attorneys might guide people of different races into different chapters

Random sample of bankruptcy attorneys

Same profiles for two couples, except hints as to race

1/3 had “Todd and Allison” who attended First United Methodist church

1/3 had “Reggie and Latisha” who attended Bethel A.M.E. church

1/3 had debtors with initials “R. and L.” who attended a “church”

# Race and Attorney Influence

- STUDY 2 Finding – Attorneys contribute significantly to the racial gap in chapter choice

Couple:

Recommendation for Ch. 13 Filing:

“Reggie and Latisha” who attend  
Bethel A.M.E. church

47.4%

“R. and L.” who attend a church

36.2%

“Todd and Allison” who attend  
First United Methodist church

32.1%

# Race and Attorney Influence

Lawyers were provided goals in the study

Moral Obligation (repaying creditors under ch.13) v. Fresh Start (ch.7)

Lawyers Concluded:

- African Americans viewed as “people of good values” when chose to repay creditors (chapter 13)
- White debtors viewed as “people of good values” when chose the “clean slate” (chapter 7)

# Race and Attorney Influence

STUDY 2 - Competence by Race and Chapter Preference  
on scale of 1-9 (higher = more competent)

	<u>Expressed Preference for</u>	<u>Competence Index</u>
<b>African-American</b> ("Reggie and Latisha")	Chapter 7	4.88
	None	4.51
	<b>Chapter 13</b>	<b>5.31</b>
No Race Specified ("R & L")	Chapter 7	4.70
	None	4.50
	Chapter 13	4.47
<b>White</b> ("Todd & Allison")	<b>Chapter 7</b>	<b>5.36</b>
	None	4.76
	Chapter 13	4.32

# Back of the Envelope Math Costs to Debtors per Prof. Lawless

	<u># of Af/Am in Wrong Ch</u>	<u>Excess Cost in Att'y Fees</u>
2010	72,494	\$144,988,109
2013	47,942	\$95,883,554
2014	42,265	\$84,530,142
2015	38,046	\$76,091,896

# Part 2: CONCLUSIONS

Foregoing studies seem to tell us:

- African Americans may not get the same advantages from bankruptcy as non-African Americans
- African American lawyers may be better equipped to properly advise African American debtors

**Proposition:** we need to encourage more African American lawyers to enter bankruptcy practice area. But how?



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## PART 3: STRIVING FOR JUDICIAL DIVERSITY

How about developing the “pipeline” up?  
(recruit diverse lawyers and law students)

How about developing the “pipeline” down?  
(a diverse judge as role model)

# STRIVING FOR JUDICIAL DIVERSITY

## Judiciary Should Reflect (approx.):

- the demographic characteristics of the population it serves
  - gender, race, ethnicity, national origin, sexual orientation, gender identity, parental status, physical ability, religious affiliation or lack thereof, socio-economic background, veteran status and geography
- the diversity of the legal profession
  - broad experience across all areas of the law
  - representing clients along the socio-economic spectrum

# STRIVING FOR JUDICIAL DIVERSITY

## Reviewing: Where Do We Stand?

Women – 50% of U.S. population, but only 33% of magistrate & bankruptcy judges

People of Color – 40% of population, but

- only 15% of magistrate judges
- only **7%** of bankruptcy judges

# BRENNAN/ABA MANUAL, a resource for appointing judges

## Strategy #1: Diversifying the Applicant Pool

### Pipeline Building “Up”:

- Reach not only into law schools, but also target under-served and minority high school and college students
- Targeted Outreach to Young Attorneys – early consideration of doing bankruptcy practice and later career on the bench

# BRENNAN/ABA MANUAL

## Diversifying the Applicant Pool

### Recruitment of Candidates:

- Start Early – often times vacancies can be anticipated months in advance
- Identify and Task a Court Official with Coordination Recruitment Efforts
  - engage the Court staff and set recruitment goals
  - reach out to leadership at minority and affinity bar associations
  - reach out to community groups, law school alumni associations etc.
  - organize a panel of current judges discussing their work and pathway to the bench

# BRENNAN/ABA MANUAL

## Diversifying the Applicant Pool

### Vacancy Description and Dissemination:

- Develop a detailed vacancy description
- Post the vacancy before the Merit Panel Assembles (90 days to report results of search)
- Disseminate the Posting Widely
  - court websites
  - national, state, and local bar associations, minority and women's bar association
  - national and state affinity groups such as criminal defenders, prosecutors, government attorneys, and civil rights attorneys
  - alumni networks of national and local law schools, including minority and specialized student groups
  - national and local law firms
- Conduct outreach to Bar Leadership

# BRENNAN/ABA MANUAL

## Diversifying the Applicant Pool

### Merit Selection Panel Composition:

- Solicit diverse Merit Selection Panel Members
- Involve the Chief Judge
- Consider Increasing the Panel's size
- Make a Merit Selection Panel Members' Names Public
- Consult with Magistrate and Bankruptcy Judges on suggesting potential panel members

# BRENNAN/ABA MANUAL

## Strategy #2: Vetting & Selection (Clear & Transparent Process)

- Schedule organizational meeting to set clear goals before receiving applications:
  - formalize selection procedures – evaluation criteria, re-publication of notice, interviewing, voting
  - affirm judicial diversity as a goal
  - familiarize the panel with the work of the Court (duties can vary per jurisdiction)
  - **schedule Implicit Bias Training**
    - recent studies show all individuals are susceptible to unconscious biases
    - implicit bias training can mitigate biases

# BRENNAN/ABA MANUAL

## Vetting & Selection (Clear & Transparent Process)

- Interviews:
  - develop uniform interview questions
  - include a question facilitating a discussion of greater life experience
    - “Is there any aspect of your personal or professional background that you believe will be a particular asset to this court?”
  - provide ample time for a meaningful interview and standardize the length (at least 30 minutes)
  - take notes during interview

# BRENNAN/ABA MANUAL

## Vetting & Selection (Clear & Transparent Process)

- Deliberation and Voting:
  - review the definition of diversity, values, and evaluation criteria
  - carefully weigh experiences and recommendations
    - weigh skills and experience, not the candidate's title
    - no single legal experience should be determinative
    - avoid placing undue weight on the ranking of an applicant's law school
  - standardize conversations with references (checklist of questions)
  - articulate reasons for recommending candidates

THANK YOU!

Diverse College Students: Go to law school

Diverse Law Students: Practice bankruptcy law for a rewarding career

Diverse Lawyers: Apply for and become a Bankruptcy Judge!