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County of San Diego Independent Redistricting Commission
1600 Pacific Highway, Room 402
San Diego, CA 92101

Dear Commissioners:

In redistricting, compliance with the Voting Rights Act of 1965 (VRA) is one of the non-negotiable tasks for the County of San Diego Independent Redistricting Commission (IRC). To enable and inform such compliance, the IRC requested a legal opinion concerning the report (Report) entitled, "Racially Polarized Voting Analyses of San Diego County," by Dr. Christian Grose, Dr. Natalie Masuoka, and Dr. Jordan Carr Peterson, and the report's application to the IRC's redistricting of San Diego County's Board of Supervisors districts.

In short, the Report found "evidence of racially polarized voting in San Diego County between "Latino voters and non-Hispanic white voters; and Asian voters and non-Hispanic whites." The frequency and magnitude of racially polarized voting (RPV) in San Diego County varies by geography, election, and election year.

Indeed, RPV is not present in all County elections. There are also several elections in which minority voters successfully elected candidates of their choice and were not blocked from doing so by white voters, such as District 1 Latino voters electing Board of Supervisors (BOS)candidates of their choice 100% of the time over the past decade. The Report further produced evidence that Latino, Asian, and Black voters vote mostly cohesively, generally supporting the same candidates.

In this letter we provide the federal legal background the IRC must traverse in creating BOS districts, the context for how the IRC should use the Report, and advice on proceeding with redistricting while complying with applicable federal law.

Legal Background

The U.S. Supreme Court, in its key decision of *Thornburg v. Gingles*, 478 U.S. 30 (1986), decided that one of the most important factors in a VRA analysis of redistricting plans is "the extent to which voting in the elections of the state or political subdivision is racially polarized." The Report concludes that racially polarized voting is present in San Diego County, to varying degrees and geography.

What are the practical implications of the racially polarized voting conclusion?

Section 2 of the Voting Rights Act of 1965 prohibits, among other things, any electoral practice or procedure that minimizes or cancels out the voting strength of members of racial or language minority groups in the voting population. This phenomenon is known as vote dilution. Redistricting plans cannot crack or pack a geographically concentrated minority community across districts or within a district in a manner that dilutes minority voting strength.

In *Thornburg v. Gingles*, the Supreme Court set out the framework for challenges to such dilutive redistricting practices or procedures. In *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321, 2337 (2021), the Supreme Court described *Gingles* as "our seminal § 2 vote dilution case" and recognized that "[o]ur many subsequent vote dilution cases have largely followed the path that *Gingles* charted."

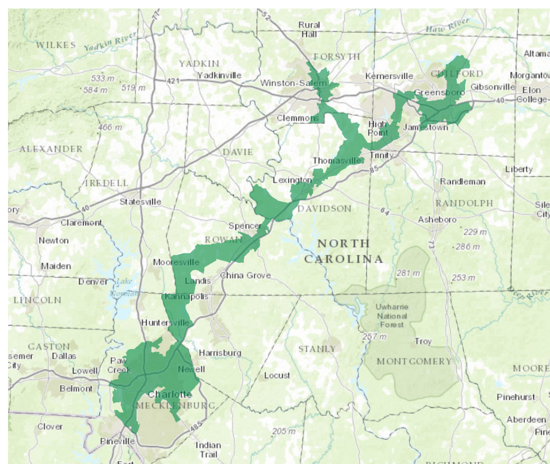
Analysis begins by considering whether the three *Gingles* preconditions exist. First, the minority group must be sufficiently large and geographically compact to constitute a majority of the voting age population or a minority coalition with other similarly situated groups in a single-member district. Second, the minority group must be politically cohesive in supporting the same candidates. Third, the majority must vote sufficiently as a bloc to enable it usually to defeat the minority group's preferred candidate.

Consideration of the first Gingles precondition also demands evaluation of "traditional districting principles such as maintaining communities of interest and traditional boundaries." *League of United Latin Am. Citizens v. Perry* , 548 U.S. 399, 433, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006). Maintaining the compactness of majority minority areas and communities is essential in assessing the *Gingles* factors.

When evaluating how to create districts with large minority populations, the IRC may not "reach out" to grab a minority community simply to add minority population to a given district. The U.S. Supreme Court has been very clear that such "reach outs" raise suspicions of a racial gerrymander, a redistricting decision based predominantly on race that violates the U.S. Constitution's 14th Amendment and its equal protection guarantee.

For example, the Supreme Court struck down a North Carolina redistricting because the design of a "serpentine" district was nothing if not race-centric, and could not be justified as a reasonable attempt to comply with the VRA. Shaw v. Reno (Shaw II), 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207.

That district is pictured below:



"A district that reaches out to grab small and apparently isolated minority communities [as the district above does] is not reasonably compact." *League of United Latin Am. Citizens*, 584 U.S. at 402, 126 S.Ct. 2594.

While the second *Gingles* precondition asks only whether minority voters generally vote as a cohesive group, the third precondition assesses whether "a bloc-voting [white] majority can routinely outvote the minority, thereby impair[ing] the ability of a protected class to elect candidates of its choice. " *Johnson v. De Grandy* , 512 U.S. 997, 1007, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994). Critically, the salient inquiry under the third *Gingles* precondition is not whether white candidates do or do not usually defeat minority candidates, but whether minority-preferred candidates, whatever their race, usually lose.

The Report correctly focuses on BOS elections also known as "endogenous elections" with minority and white candidates running for the same offices (here, elections for the San Diego County Board of Supervisors) as the most probative in assessing whether white bloc voting exists to satisfy the third *Gingles* precondition. While not as instructive as endogenous elections, "exogenous elections," those elections for offices other than those for County supervisor, still hold some probative value.

If all three *Gingles* preconditions exist, consideration next proceeds to an analysis of the totality of the circumstances in San Diego County. This analysis incorporates factors enumerated in the U.S. Senate Report that accompanied the 1982 Voting Rights Act Amendments, S. Rep. No. 97-417, at 28-29 (1982), which are generally known as the "Senate Factors." These factors are themselves drawn from earlier case law. Id. at 28 nn. 112-113.

The factors include:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;

2. the extent to which voting in the elections of the state or political subdivision is racially polarized;

3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;

4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;

5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;

6. whether political campaigns have been characterized by overt or subtle racial appeals; and

7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

The Senate Report also identified two additional factors that have probative value in some cases:

• whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and

• whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

Gingles describes a review of the totality of the circumstances that requires a "searching practical evaluation of the past and present reality" of a jurisdiction's electoral system that is "intensely local," "fact-intensive," and "functional" in nature. 478 U.S. at 45-46, 62-63, 79. VRA liability depends on the unique factual circumstances of each case and the totality of the circumstances in the particular jurisdiction in question. Thus, for example, the Supreme Court found that Texas's use of multimember state legislative districts impermissibly diluted minority voting strength, see *White v. Regester*, 412 U.S. 755, 765-70 (1973), while also concluding that Indiana's use of multimember state legislative districts did not, *Whitcomb v. Chavis*, 403 U.S. 124, 148-55 (1971).

Pursuant to Section 2 of the Voting Rights Act of 1965, districts must be created to provide people, without regard to their race, color, or membership in a language minority group, with the opportunity to elect candidates of choice to overcome cohesive racial bloc voting by white voters that prevents them from doing so.

A racial bloc voting analysis, such as the Report includes, is used to determine whether minority voters are politically cohesive, voting together to support minority community preferred candidates and whether white voters bloc vote to usually defeat minority preferred candidates.

The RPV analysis determines whether voting is racially polarized, and candidates preferred by a politically cohesive minority group are usually defeated by non-minority voters not supporting these candidates. If so, a district(s) that offers minority voters an opportunity to elect their candidates of choice must be drawn. If such districts already exist, and minority-preferred candidates are winning only because these districts exist, then these districts must be maintained in a manner that continues to provide minority voters with an opportunity to elect their preferred candidates.

Pursuant to the VRA, redistricting plans cannot: crack (divide) or pack (concentrate) a geographically compact and discrete minority community across districts or within a district in a manner that dilutes their voting strength. "Cracking" refers to splintering minority populations into small pieces across several districts, so that a large minority group ends up with a very little chance to impact elections any single district. "Packing" refers to combining as many minority voters as possible into a few super-concentrated districts, and draining the population's voting power from anywhere else.

Redistricting bodies such as the IRC cannot simply set an arbitrary demographic racial target (e.g., 50% Black, Latino, or Asian voting age population for a district for any or all minority districts across the jurisdiction (*Alabama Legislative Black Caucus v. Alabama,* 135 S.Ct. 1257 (2015).

Instead, a district-specific, functional analysis is required to determine if a proposed district will provide minority voters with the ability to elect minority-preferred candidates to office. The U.S. Supreme Court has held that the U.S. Constitution requires a skeptical look at redistricting plans when race is the "predominant" reason for putting a significant number of people in or out of a district. The Fourteenth Amendment forbids use of race as the predominant district boundary-drawing factor.

Indeed, as the Court decided: "Alabama expressly adopted and applied a policy of prioritizing mechanical racial targets above all other districting criteria (save one-person, one-vote) [and] provides evidence that race motivated the drawing of particular lines in multiple districts… The record makes clear that both the District Court and the legislature relied heavily upon a mechanically numerical view [of minority race populations in districts]". (*Alabama Legislative Black Caucus v. Alabama,* 135 S.Ct. 1257 (2015) (emphasis added); see also, *Cooper v. Harris*, 137 S. Ct. 1455, 197 L.Ed.2d 837 (2017) ("To have a strong basis in evidence to conclude that [VRA] § 2 demands majority-minority districts], the State must carefully evaluate whether a plaintiff could establish the *Gingles* preconditions—including effective white bloc voting—in a new district created without those measures…. [A] belief that a [redistricting commission] was compelled to redraw a …. district as a majority-minority district rested not on a 'strong basis in evidence,' but instead on a pure error of law.")

The Report's Findings and Application to IRC Redistricting

The Report concludes that racially polarized voting is present in San Diego County.

> **"**The analysis of elections between 2012 and 2020 finds that racially polarized voting has occurred in at least one Supervisor election held in each of the five districts in San Diego County. We analyzed both primary and general elections. There is no general election if a candidate receives more than 50% in the primary. There is no primary and no general analyzed if a candidate ran unopposed…
>
> The analyses presented in this report show that racially polarized voting exists in San Diego County, but it also showed variation in the size and magnitude of such racial polarization. This variation includes the district/region of the county in which Latino-ability-to-elect district(s) may be drawn, the extent of coalition voting between Latino voters and other minority groups (Asian American and Black voters) in different parts of the county, and other contextual factors specific to each proposed district such as the magnitude of white crossover voting. "

However, the rates and frequency of RPV vary district to district. Indeed, RPV is not present in all elections and there are several elections in which minority voters successfully elected candidates of their choice. The Report further produced evidence that Latino, Asian, and Black voters vote mostly cohesively supporting the same candidates.

District 1 is the only current majority minority BOS district. Concerning District 1, the Report found:

> "In District 1, there were three contested elections since 2012 (two primaries and one general). In one of these three elections, there was evidence of racially polarized voting between Latino voters and non-Hispanic white voters; and between Asian American voters and non-Hispanic white voters. In two of these elections, there was not evidence of racially polarized voting across any groups."

Concerning Districts 2-5, the Report concluded:

- "In District 2, there were four contested elections since 2012. In two of these four elections, there was evidence of racially polarized voting between Latino and non-Hispanic white voters. In two of these four elections, there was not evidence of racially polarized voting between Latino and non-Hispanic white voters. In all four elections, there was evidence of racial polarization between Asian American and non-Hispanic white voters.

- In District 3, there were six contested elections since 2012; and some showed evidence of racial polarization and some did not. In four of these six elections, there was evidence that a majority of Latino voters preferred a candidate that was different from a majority of non-Hispanic white voters. Two elections had Latino and non-Hispanic white voters

preferring the same candidate. Three elections in District 3 showed racial polarization between Asian American voters and non-Hispanic white voters, and three did not. Of those elections with polarization, in some the differences across racial groups was very small, and in others the differences were larger.

- In District 4, there were two contested elections since 2012. In one of these two elections, there was evidence of racially polarized voting between Latino and non-Hispanic white voters. In one of these two elections, there was not evidence of racial polarization between Latino and non-Hispanic white voters. In both elections, there was not evidence of racially polarized voting between Asian American voters and non-Hispanic white voters.

- In District 5, there were three contested elections since 2012. In all three elections, there was evidence of racially polarized voting between Latino and non-Hispanic white voters. In all three elections, there was no evidence of racially polarized voting between Asian American and non-Hispanic white voters.

- In 7 out of the 11 primary races analyzed, the Latino candidate of choice does not advance to the general election or win the seat. In 1 out of the 7 general election races analyzed, the Latino candidate of choice does not win.

  We also examined racial voting patterns between Black and non-Hispanic white voters. In 14 out of 18 Supervisor elections from 2012 to 2020, Black voters had a different candidate of choice than non-Hispanic white voters; and the Black candidate of choice did not win in 12 of 18 of these Supervisor elections. Further, Black voters vote in coalition with other minority voters."

<u>Going forward, what does all this mean?</u>

The IRC must be cognizant that RPV is present in San Diego County. In drawing districts, the IRC must take care to avoid cracking and packing minority populations but also respect compact, discrete traditional minority neighborhoods and communities within legal parameters.

The IRC should closely examine the possibility of creating districts with coalitions of voters who generally support the same candidates. As the Report shows, Latino, Asian, and Black voters generally vote cohesively to support the same candidates. There is also measurable white crossover support for the same minority candidates of choice.

From a minority voting opportunity perspective, the IRC has policy choices in creating districts. The IRC may consider creating Crossover Districts where minorities do not form a numerical majority but can still reliably control the outcome of the election with some non-minority voters "crossing over" to vote with the minority group(s).

The IRC may consider Influence Districts where a sizable number of minority voters, fewer than would allow minority group voters to control the result of the election when voting as a bloc, can influence the electoral outcome. The U.S. Supreme Court does not require the creation of such districts to comply with the VRA. However, many redistricting bodies choose to create such districts to expand electoral opportunities for federally protected minority communities and not risk being found guilty of intentional discrimination based on race or color, prohibited by the 14th Amendment.

To determine whether draft districts provide minority voters with the opportunity to elect candidates of choice, analysis will be needed to evaluate draft district configurations by analyzing election results and demographics to determine whether the districts effectively provide this opportunity and are not discriminatory.

District 1 minority voters' 100% success electing candidates of choice over the past decade means that although some RPV has been present in the District's BOS elections, white voters did not vote as a bloc to prevent minority voters electing their candidates of choice. Therefore, in the IRC's work, District 1 minority voters may not need an absolute majority to elect their candidates of choice. Indeed, pursuant to U.S. Supreme Court precedent, including the *Gingles* decision, it may be difficult to legally justify having a District 1 50% +1 majority minority district based on protecting minority voters' ability to elect candidates of choice. In the BOS elections from 2012-2020, there was no District 1 white bloc voting to impair or prevent minority voters being able to elect their candidates of choice. However, their ability to elect candidates of choice must be protected and maintained.

To do so and to create a new District 1, the IRC may retain District 1's historic, compact, and traditional Latino and minority language communities. Maintaining compact, traditional minority communities and neighborhoods can be an integral, defensible part of IRC redistricting, according to the U.S. Supreme Court. *League of United Latin Am. Citizens v. Perry* , 548 U.S. 399, 433, 126 S.Ct. 2594, 165 L.Ed.2d 609 (2006).

Once the IRC satisfies the VRA minority population threshold needed so minority voters retain their ability to elect candidates of choice, the IRC may keep District 1's historic, traditional, and compact communities and neighborhoods together to be consistent with traditional districting principles. See, *League of United Latin Am. Citizens v. Perry, supra*. Such an effort is supported by numerous public comments retrieved from the IRC's website. They reveal significant community-based interest in maintaining cultural and language bonds, social interests, and traditional minority communities and neighborhoods currently in District 1.

For example,

Comments edited for space and relevance:

1. Dear Redistricting Commissioners: I am submitting this letter to you on the behalf of the Center on Policy Initiatives and 7 Latino community organizations/groups in the South Bay area to urge the Commission to adopt … supervisorial district lines that include a district where a majority of the citizen voting age population is Latino.

It is important for our Latino community in the South Bay area to ensure their representation in the new map that the County will adopt. Thank you,

2. Comment from resident of Logan Heights.

My community consists of many Latino cultures who are often very underrepresented. Our strong sense of community and similar values make us united. More broadly, my community is really all South County, from Barrio Logan all the way to the border.

I hope this commission draws a South County Border District that includes all of San Diego's border communities from San Ysidro across the international border. It is important that we have this type of district because it will ensure that our best interests are always at the forefront of conversations. It takes more that knowing the laws to effectively represent my community, we need people who also live in the same type of community and value what we value. A district along the border would give voice to so many of our South County residents with families and jobs on both sides of the border.

Our neighborhoods share so much in common. We face many of the same challenges which include quality education and pollution from the port and border. One of the biggest obstacles we face in sharing the district with Point Loma and Coronado is that our voices are rarely heard. We face constant racism in those communities and yet we are supposed to share the same district? Remember when Coronado thought it was okay to throw tortillas at the rival basketball team who happened to be comprised of all Latino kids and even went as far as to defend themselves with "tradition"? We are tired of this blatant disrespect for our voices, and it is time for you to fix it and make it fair. Working families in Latino South County deserve a strong, equal voice and we will not stop fighting until you make that happen.

3. Comment submitted by Director of San Diego ACCE on September 25, 2021.

Hi, … I'm the director of San Diego ACCE, the Alliance of Californians for Community Empowerment. I'm calling on in support that district one be a majority minority elect next district, a border district, that does not include Coronado and Point Loma.

We hope and urge that this commission draw a South County border district that includes all of San Diego's border communities across San Ysidro, all across the international border, this district along the border would give a voice for so many of our South Bay residents with families that have jobs on both sides of the border.

A district along the border would also ensure the cross-border priorities that matter greatly to all South County, and our truly sorry priorities that will having this district along the border would ensure cross border priorities that greatly matter to all South County, and are truly heard by the Board of Supervisors, the Tijuana River sewage crisis, pollution, and gridlock at the port of entry, compassionate immigration policies that embrace San Diego's diversity and immigrant roots. One of the biggest obstacles to having our voices heard is being in the same district as Point Loma and Coronado. These are not the same communities, do not share the same cultures, and an economics as Coronado if people are familiar the recent incident with the high school of Coronado, and just the, the cultural intensity insensitivity that does not align with predominantly Latino community.

4. Comment submitted by Resident of West Chula Vista on September 25, 2021.

Hi good afternoon. … I am resident of west Chula Vista. San Diego and I'm also the policy director with Environmental Health Coalition, just calling in to support.

I have lived in district one, the majority of my life growing up in Nestor right near San Ysidro, now living in West Chula Vista. I work for an organization that does a lot of work in Barrio Logan, Logan Heights, and you know, those communities have connections as far as culture, community of interest, and one of the big things that we are environmental justice community suffering from you know that heavy impacts of industry, and other polluters right near, you know, communities that are geographically not that far from us.

But in culture and in community of interest our worlds apart like Coronado and others, and Point Loma should not be in the same district as us because they are not dealing with the same issues, and they are not you know that they do not have the same challenges that we do.

We hope our letter opinion is helpful to the IRC. We are always available to answer questions and provide further advice and guidance.

Sincerely,

s/

Bruce L. Adelson
San Diego Independent Redistricting Commission Voting Rights Counsel