Federal Compliance Consulting LLC
11808 Becket Street
Potomac, Maryland 20854
301-762-5272
240-536-9192 fax

Bruce L. Adelson
CEO/Attorney at Law
badelson1@comcast.net
badelsonfcc@verizon.net

Admitted to Practice:
DC, MD, MI, VA (inactive)

December 8, 2021

Marguerite Mary Leoni
General Counsel, Sand Diego Independent Redistricting Commission
NIELSEN MERKSAMER PARRINELLO GROSS & LEONI LLP
2350 Kerner Boulevard, Suite 250
San Rafael, California 94901

:

Dear Ms. Leoni:

We have been asked for our opinion of the San Diego County Independent Redistricting Commission's (IRC) Draft map 13a v.11 (aka, Final Working Draft Map).

In sum, the draft map does not appear to have the purpose or effect of diluting minority voting strength. The map appears to retain Latinos' ability to elect preferred candidates in D1 while also appearing to create a viable minority opportunity to elect district in D4. However, D3 and D5 appear to provide only a 40% opportunity to elect for Latinos. These districts are discussed in more detail below.

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 (reduce or divide) or pack (overconcentrate)) a geographically discrete 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.

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.

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. The commission's RPV consultants prepared "Racially Polarized Voting Analyses of San Diego County, " subsequent reports, and power point presentations (PPT), all of which are collectively referred to herein as the report. The report is used herein to inform our opinions.

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.

The most legally relevant elections in VRA analysis are "endogenous elections" with minority and white candidates running for the same offices (San Diego County Board of Supervisor district elections). Endogenous elections are the most probative in assessing whether white bloc voting exists to usually prevent minorities from electing their preferred candidates.

Board of Supervisor (BOS) elections are non-partisan elections to a County legislative body. The exogenous statewide elections discussed in the report are mostly partisan, such as those for governor, attorney general, and U.S. Senator.

The academic literature in statistical analysis of election results consistently observes that voting behavior differs substantially between partisan and nonpartisan elections (See: Schaffner and Streb 2002, Wright 2008, Bernhard and Freeder 2020, or Lim and Snyder 2015). In non-partisan elections, voters are more likely to use non-partisan election specific information cues, such as incumbency status, in making their decisions than they typically do in partisan elections. In addition, the academic literature holds that voters are likelier to abstain in non-partisan elections than they are for partisan races. For this opinion, we focus on the BOS non-partisan endogenous election results as the most relevant and probative of voter behavior and minority voters' history of electing their preferred candidates to the BOS.

As the report attests, minority voters have enjoyed some success, especially in benchmark D1, in electing their preferred BOS candidates. Across all five benchmark BOS districts, the two largest minority groups, Latinos and Asians, elected their BOS candidates of choice in most elections from 2012-2020. Latino voters elected their BOS candidates in 10 of 18 elections while Asians elected their candidates of choice in about 14 of 18 elections.

Benchmark District 1

Map 13a v.11 contains District 1 that is substantially similar to its counterpart under the current, benchmark BOS districting plan.

Benchmark BOS districts have the following 2020 Census populations by BOS district.

| District | Non-Hispanic or Latino | | | | | | | Hispanic or Latino |
	White	Black or African American	American Indian or Alaska Native	Asian	Native Hawaiian or Other Pacific Islander	Some Other Race	Two or More	
1	16.8%	5.3%	0.2%	12.6%	0.4%	0.4%	3.4%	60.8%
2	54.8%	4.9%	0.6%	5.8%	0.4%	0.6%	5.9%	27.1%
3	46.5%	2.2%	0.2%	22.9%	0.2%	0.6%	5.7%	21.6%
4	45.7%	7.1%	0.3%	12.5%	0.4%	0.7%	5.4%	28.1%
5	50.6%	2.6%	0.7%	6.8%	0.5%	0.5%	5.0%	33.3%
County	43.1%	4.4%	0.4%	12.1%	0.4%	0.6%	5.1%	33.9%

According to the RPV consultants' report, District 1 (D1) minority voters elected their BOS candidates of choice 100% of the time in analyzed BOS elections from 2012-2020. In addition, as the report provides, across all five BOS districts, the two largest minority groups, Latino and Asian voters elected their BOS candidates of choice in most elections from 2012-2020. Latino voters elected their BOS candidates in 10 of 18 elections while Asians elected their candidates of choice in about 14 of 18 elections.

The Voting Rights Act does not choose winners among minority groups or favor one minority over another. A preferred candidate of a minority group may win and defeat the preferred candidate of another minority group. In addition, the candidate of choice of two of three (Latinos, Blacks, and Asians) minority groups may similarly prevail as the candidate of choice in an election.

In benchmark D1, the only single race majority-minority BOS district, there is no legally significant racially polarized voting (RPV) and no white bloc voting to prevent minorities from usually electing their preferred BOS candidates, as the report provides. This ability to elect BOS candidates of choice must be preserved in a new D1 with substantially the same population and geographic area as in the benchmark map. There is no legal justification for creating a new majority-minority D1 to overcome white bloc voting, which does not exist in benchmark D1 BOS elections during the past decade.

In the absence of consistent white bloc voting, a draft D1 majority-minority district can only be legally justified by examining whether the commission included compact, historic, geographically discrete minority communities and communities of interest in draft D1 to adhere to "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). Keeping such compact minority communities together is permissible while also respecting the U.S. Constitution's 14th Amendment one person, one vote and equal protection requirements.

Indeed, creating majority-minority districts arbitrarily, without analytical supporting evidence, are uniformly considered to be constitutionally infirm as the Supreme Court repeatedly held during last decade's redistricting cycle. See: *Bethune-Hill v. Virginia State Board of Elections* (Docket #15-680, 2017), *Cooper v. Harris*, 137 S. Ct. 1455, 197 L.Ed.2d 837 (2017), and *Alabama Legislative Black Caucus v. Alabama*, 135 S. Ct. 1257 (2015).

To avoid racial predomination and 14th Amendment issues, the IRC can maintain geographically compact, concentrated, traditional minority communities. Uniting them through geography, shared culture and community rather than race-based criteria and assumptions is a traditionally accepted practice where the IRC can avoid what the Supreme Court disapproved of here:

> a reapportionment plan that includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid. *Shaw v. Reno – Id*

> … to draw … a district connecting concentrations of Georgia's dispersed minority population would require us to subordinate Georgia's traditional districting policies and consider race predominantly, to the exclusion of both constitutional norms and common sense. *Miller v. Johnson*, 515 U.S. 900 (1995)

In addition, Supreme Court decisions about population deviations provide helpful guidance about applying traditional redistricting criteria, such as preserving communities of interest. Creating new majority-minority districts reflecting minority group population growth can also be legally sustainable. *Abbott v. Perez*, 585 U.S. ___ (2018).

The Court has regularly held that "[a]ny number of consistently applied legislative policies might justify some population variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives" *Reynolds v. Sims*, 377 U.S. 533 (1964). *Mahan v. Howell*, 410 U.S. 315 (1973), *Brown v. Thomson*, 462 U.S. 835 (1983), and *Voinovich v. Quilter*, 507 U.S. 146 (1993), *Karcher v. Daggett*, 462 U.S. 725 (1983) and *Harris v. Arizona Independent Redistricting Commission*, 136 S. Ct. 1301, 194 L. Ed. 2d 497 (2016). Emphasis Added

Map 13a v.11

D1 remains the only single race majority-minority supervisory district. In draft map 13a v.11, the Latino D1 CVAP (51.1%.) is slightly lower than the 52% CVAP in benchmark D1.

Benchmark D1 has a total minority CVAP of 72.5% while the CVAP of 13a v.11 is 72.2.% These numbers do not include the Native American population because of its small size (0.2% CVAP) and the commission's consultants not analyzing this group's voting behavior. The CVAP numbers also do not include people of two or more races because the small size of this population relative to the single race CVAP population of more than 70% will have no dispositive impact on my opinion. The U.S. Department of Justice includes people of multiple races in its analysis and evaluation of redistricting plans for Voting Rights Act compliance (Guidance under Section 2 of the Voting Rights Act, 52 U.S.C. 10301, for redistricting and methods of electing government bodies, September 1, 2021).

In 13a v.11, D2 has Latino CVAP of 16.7%, 8.9% Asian American CVAP, and 3.9% Black CVAP. Native Americans are not included because the small size of this population (0.2% CVAP) will have no dispositive, measurable impact on my opinion. In addition, the commission's RPV consultants did not analyze Native American voting behavior. (All district specific statistics provided by the report).

In 13a v.11, D5 is a majority-minority coalition district in total population (55%) and VAP (51.%) but not CVAP (42.3%). Native Americans are not included because the small size of this population (0.8 % CVAP) will have no dispositive, measurable impact on my opinion. In addition, the commission's RPV consultants did not analyze Native American voting behavior. D4 is also a minority plurality coalition district, with Latino, Black, and Asian CVAP of 43.5%

In California and in other states that comprise the jurisdiction of the U.S. Court of Appeals for the Ninth Circuit, coalition districts may be used to evaluate compliance with Voting Rights Act Section 2 through the Gingles factors. *Romero v. City of Pomona*, 883 F.2d 1418 (9th Cir. 1989) and *Badillo v. City of Stockton, Cal.,* 956 F.2d 884 (9th Cir. 1992).

However, while the IRC can create coalition districts, as will be seen below, *Gingles* appears not to apply to the IRC's BOS map because of inconsistent minority group cohesion and candidate support, minority voters' success in electing BOS candidates of choice and candidates of choice in exogenous statewide elections, and the absence of white bloc voting to prevent minorities from <u>usually</u> electing their referred candidates. This lack of consistent inter-minority group cohesion means that San Diego County BOS coalition districts may not satisfy the second prong of the three *Gingles* factors, that minority groups must be "politically cohesive in supporting the same candidates." Therefore, plaintiffs challenging a commission approved coalition district under VRA Section 2 vote dilution prohibitions may be unable to do so successfully given the lack of *Gingles*-required consistent political cohesion across minority groups and the lack of usual white bloc voting.

In addition, there is insufficient compact minority population to create a second majority-minority district in total population and CVAP.

District 1

D1 contains compact, majority-minority or minority plurality communities that have longtime historic connections to each other and to the overall international border area, such as Barrio Logan, San Ysidro, National City, Chula Vista, Tijuana River Valley, and Otay. Their inclusion in D1 is supported by myriad public comments focusing on retaining traditional communities of interest and not racially polarized voting, including but not limited to:

> Having the South County areas as a Majority-Minority district will keep the traditional Latino Communities in the South Bay with other border communities with a significant Latino population.

> A district along the border would give voice to many of our South County residents with family and jobs on both sides of the border, and would allow for representation of the unique needs of this district - for example, the Tijuana river sewage crisis, gridlock at the ports of entry, and compassionate immigration policies that impact so many in this region.

> 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.

Finally, the commission's RPV consultants opine that D1 in 13a v.11 continues to enable minority voters to elect candidates of choice in exogenous elections at rates similar to the benchmark D1. However, the consultants' report does not address draft map D1 minority voters' ability to elect in endogenous BOS elections, the most pertinent, relevant elections. The consultants opine that Latinos, the single race majority in D1, appear to have 100% success electing exogenous candidates of choice.

Map 13a v. 11 Districts 2 and 3

As described by the RPV consultants, Draft D2:

… is in the eastern part of the County of San Diego. It includes the communities of Poway, Santee, Ramona, Jamul, Borrego Springs, and a number of areas in the southeast and east of the county along the Imperial County line. Its racial demographics are 66.5% white CVAP, 16.7% Latino CVAP, 8.9% Asian American CVAP, and 3.9% Black CVAP. This area, based on data on supervisor districts in the RPV report, had previously had evidence of white bloc voting to defeat Latino candidates of choice in supervisor primary elections…

Draft D3 is known as the coastal district, and includes Coronado, Carlsbad, Solana Beach, Del Mar, Encinitas, and north San Diego city. According to the report, D3 has a 68.8% White CVAP. The next largest racial group is Asian American at 14.3% CVAP.

The RPV consultants opine that D2 Latinos elect exogenous candidates of choice 0% of the time while D3 Latinos elect preferred candidates in 40% of analyzed elections. Their report does not address Asians' ability to elect candidates of choice as part of a D3 coalition of minority groups.

In addition, as the report provides, minority voters, Latinos, Asians, and Blacks, do not consistently vote cohesively for the same candidate. As we have seen, it is not unusual for one minority group's preferred candidate to win and by contrast, for the preferred candidate for two of three minority groups to win.

Map 13a v.11 Districts 4 and 5

D5 is a majority-minority coalition district in total population (55%) and VAP (51.%) but not CVAP (42.3%). According to the consultants' PPT, this district has Latino CVAP of 29.8%, Black CVAP of 3.7% and Asian CVAP of 6.2%. Draft D5 encompasses most of the area from benchmark D5. In one significant difference between the two, Draft D5 includes Escondido, a majority Latino city. Benchmark D5 minority voters had mixed success (Latinos, 33%, Asians 100%, and Blacks 0%) electing preferred candidates. Source: RPV consultants PPT.

D4 is similarly a majority-minority coalition district in total population, VAP (53.1%) but not CVAP (43.5%) Source: RPV consultants PPT. In their December 6 report, the RPV consultants state:

> … the IRC chose to include the entire cities and communities of La Mesa, Lemon Grove, and El Cajon into district 4 in the final map; as well as based on public input. This decision preserved these communities in their entirety and thus respected community boundaries. In addition, …. this decision to respect these community boundaries and include these full communities within district 4 also protects minority voting rights…

As the RPV report provides, minority voters, Latinos, Asians, and Blacks, do not consistently vote cohesively for the same candidate. As we have seen, it is not unusual for one minority group's preferred candidate to win and by contrast, for the preferred candidate for two of three minority groups to win.

Since there is insufficient Latino and Asian population to create an additional single race majority-minority total population and CVAP district, San Diego County BOS districts (other than D1) consist instead of coalitions of minority voters – Latinos, Asians, Blacks, People of Two-Races, Native Americans, and other Indigenous peoples. In such coalitions, minority groups may choose to vote cohesively to support the same candidates to increase their voting power. However, the consultants' RPV reports and PPTs reveal such cohesion is inconsistent in BOS elections.

As the RPV report provides, across all five BOS benchmark districts, the two largest minority groups, Latinos and Asians, elected their BOS candidates of choice in most elections from 2012-2020. Latino voters elected their BOS candidates in 10 of 18 elections while Asians elected their candidates of choice in about 14 of 18 elections. Furthermore, according to the consultants RPV reports and PPTs, Asians elected their preferred candidates in 6 out of 8 statewide exogenous elections while Latinos did so in 5 out of 7 statewide exogenous elections (2012-2020).

The lack of consistent inter-minority group cohesion means that San Diego County BOS coalition districts may not satisfy the second prong of the three *Gingles* factors, that minority groups must be "politically cohesive in supporting the same candidates." Therefore, plaintiffs challenging a commission approved coalition district under VRA Section 2 may be unable to do so successfully given the lack of *Gingles*-required consistent political cohesion across minority groups.

In the consultants' report, they opine that Latinos' candidates of choice in D4 and D5 win exogenous elections 80% and 40% of the time respectively. The report states that D4 Latinos' candidates of choice "may be supported" in coalition with Black and Asian voters.

However, the consultants' report does not address minority voters' estimated ability to elect preferred BOS candidates (endogenous candidates) in the new districts. These two districts have the highest minority CVAP of the five BOS districts other than D1, the only single race majority-minority BOS district.

Conclusion:

The draft map does not appear to have the purpose or effect of diluting minority voting strength.

13a v.11 appears to protect Latinos' ability to elect preferred candidates in D1. D1's Latino CVAP is slightly lower than in benchmark D1. However, in the absence of RPV and consistent white bloc voting, D1's minority VAP and CVAP could be lower to defend against claims of unconstitutional packing of minority voters. As an alternative to such an adjustment, the IRC may justify D1's population through evidence of D1 including compact, historic, geographically discrete majority-minority communities and communities of interest to adhere to "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).

13a v.11 appears to create a solid minority opportunity to elect D4 as the RPV consultants surmise in their report.

However, D3 and D5, both of which are minority plurality CVAP districts, afford Latino voters 40% chance of electing exogenous candidates of choice. In the benchmark districts, Latinos elected BOS candidates of choice in 50% and 33% of elections. As discussed above, no endogenous analysis and no Asian and Black coalitional analysis is provided. Nevertheless, the report does provide a hint of Asian ability to elect in D3 and D5 by estimating statewide exogenous election results: "In district 3, candidates in exogenous elections preferred by Asian American voters have a win rate of 67%, so they win [usually]. In district 5, candidates preferred by Asian-American voters rarely win with a win rate of only 33%."

Based on the RPV consultants' report, we cannot opine whether Asian voters, who elected their BOS preferred candidates in 5/6 and 3/3 BOS benchmark D3 and D5 elections respectively can continue to do so in the draft districts. The consultants further opine that: "… three districts in the final draft map (2, 3, and 5) are unlikely to be Latino opportunity-to-elect districts." We agree based on the consultants' exogenous analysis. But we cannot opine on these districts ability to elect in BOS elections and their potential ability to elect minority preferred BOS and exogenous candidates through coalitions of minority voters.

If the commission choses to adjust D3 and D5, the IRC would need to avoid race-based changes and instead explore, to the extent possible and practicable, adding compact, traditional, concentrated minority communities of interest that fit well with communities already included in these districts and thus adhere to "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).

We are always available to answer any questions or concerns.

Sincerely,

/s/

Bruce L. Adelson, Esq.

San Diego County Independent Redistricting Commission Voting Rights Act Counsel