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**Opinion of the 2021 Redistricting Plan for the County of San Diego Board  
of Supervisors' Compliance with the Voting Rights Act**

December 13, 2021

Marguerite Mary Leoni  
General Counsel, Sand Diego Independent Redistricting Commission  
NIELSEN MERKSAMER PARRINELLO GROSS & LEONI LLP  
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Dear Ms. Leoni:

We have been asked for our opinion of the 2021 Redistricting Plan for the County of San Diego Board of Supervisors' Compliance with the Voting Rights Act.

In sum, the final 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 District 1 (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 14<sup>th</sup> 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 most BOS elections, approximately 14 of 18 elections.

### **Benchmark District 1**

The final map 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%
<b>County</b>	<b>43.1%</b>	<b>4.4%</b>	<b>0.4%</b>	<b>12.1%</b>	<b>0.4%</b>	<b>0.6%</b>	<b>5.1%</b>	<b>33.9%</b>

According to the RPV consultants' report, 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 14<sup>th</sup> 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 14<sup>th</sup> 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

### **Final Map**

In approving the Final Map, the IRC made several adjustments that appear not to impair or dilute Black, Asian, and Latino voters from electing their candidates of choice.

D1 remains the only single race majority-minority supervisory district. In the final map, the Latino D1 CVAP (52.5%) is virtually identical to the 52% CVAP in benchmark D1. In addition, there is insufficient compact minority population to create a second majority-minority district in total population and CVAP.

In addition, the IRC prioritized race neutral redistricting priorities such as keeping communities of interest together, uniting and preserving historic, and traditional neighborhoods and compact minority communities.

Such a focus complies with U.S. Supreme Court precedent. For example: The recognition of nonracial communities of interest reflects the principle that a State may not “assum[e] from a group of voters’ race that they ‘think alike, share the same political interests, and will prefer the same candidates at the polls.’” *LULAC v. Perry*, 548 U.S. 399 (2006) and *Shaw v. Reno*, 509 U.S. 630, 647 (1993). Such community based, race neutral redistricting also avoids setting arbitrary percentages of minority voters to be assigned to any given district. Such racial considerations are disfavored by the Supreme Court. *Cooper v. Harris*, 137 S. Ct. 1455, 197 L.Ed.2d 837 (2017)

The commission's RPV consultants opine that final map D1 appears to enable minority voters to elect candidates of choice in exogenous elections in 100% of elections analyzed, identical to the benchmark D1, without legally cognizable RPV and white bloc voting. rates of success identical to the benchmark D1. However, the consultants' report does not address D1 minority voters' ability to elect in endogenous BOS elections, the most pertinent, relevant elections.

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.

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).

The IRC may legally create coalition districts, consisting of Latino, Black, and Asian people, as will be seen below, *Gingles* appears not to apply to the IRC's final 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 usually 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 commission approved coalition districts 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.

Benchmark D1 has a total minority CVAP of 72.5% while the CVAP of the final map is 72.3%. 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).

D4 is similarly a majority-minority coalition district in total population, VAP (52.2%) but not CVAP (47.8%) excluding the Native American population. Source: RPV consultants PPT. The RPV consultants state:

... the IRC chose to include the entire cities and communities of La Mesa, Lemon Grove, and Rancho San Diego in 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...

The IRC moved Spring Valley, Paradise Hills, Casa de Oro/Mt Helix and Rancho San Diego from D2 to D4. All of these cities and towns are historic communities of interest with strong common ties. The IRC chose to keep them together in this minority plurality district.

Public comments so confirm:

Also bring Paradise Hills and Spring Valley back into D4. Splitting Paradise Hills from other parts of Southeast San Diego divides the Black community. Paradise Hills is a historic Black neighborhood that is being isolated from the Black community in City Heights, Encanto, Lemon Grove, La Mesa, and Spring Valley in the most recent version of the map. Spring Valley and Paradise Hills have one of the highest concentrations of Black residents in the County and should be included with other Black business and cultural centers in Lemon Grove and the Southeastern port of the City of San Diego.

My name is Mustafa Nizam and I live in Vista, CA. I am writing to you in concern of District 4, the proposed BIPOC district. In the Final Working Draft Map, the Black community of interest is completely fractured into three separate districts by removing Paradise Hills, Spring Valley, and Rancho San Diego out of District 4. By swapping

these areas for Clairemont Mesas, you are depriving the Black community of their voice and the decades-long need for Black representation in San Diego county. District 4 is not currently a BIPOC empowerment district. The Black community has intentionally and continuously been marginalized and divided.

These cities and towns are also traditional refugee and immigrant communities with significant minority populations. Rancho San Diego, 75.3% White CVAP and Casa de Oro/Mt Helix, 68.5% CVAP, are majority White communities. Moving these communities from D2 to D4 necessitated a population balancing shift from D4. As a remedy, the IRC moved El Cajon from D4 to D2.

According to the 2020 Census, El Cajon has a total population of 106,215, of whom 58% are Non-Hispanic White. 29% are foreign born, 6.0% are Black, and 3.2% are Asian. In the 2020 Census, Arabs are not considered a separate racial group, making the task of enumerating their population and locating where they live difficult. The IRC did not have definitive population data for the County's Arab population and the IRC's RPV consultants had no data on their voting behavior.

For its information, the IRC relied upon public comments, anecdotal information, and their Voting Rights Counsel for guidance about Chaldeans, the Voting Rights Act, and redistricting. The undersigned counsel attended the December 9-11 meeting, listened to, and analyzed the public comments, including but not limited to those of the Chaldean community

During an IRC public meeting on December 9-11, 2021 representatives of the Chaldean community from El Cajon advocated for their community to be kept together in one district. They requested that El Cajon, where public speakers attested the majority of their community lived, be kept together and moved to D2. A Chaldean community submitted map confirms that most of the Chaldean community, as represented by churches, markets, and social service centers is located in El Cajon.

Chaldeans are Arab-Americans, many of whom came to the United States from Iraq and the Middle East. The IRC recognized that as Arab people, Chaldeans are covered by the Voting Rights Act, which prohibits discrimination based on race, color, or minority language. Federal courts have decided that Arab Americans are entitled to such discrimination protections. For example, in 2003, the United States sued the City of Hamtramck, Michigan, alleging Voting Rights Act discrimination at polling places against Arab citizens based on race or color. In a consent decree, a federal court cited the Voting Rights act and ordered the municipal officials to stop their discriminatory practices. directed at Arab Americans. (*United States of America v. Hamtramck*, No. 0073541 (U.S. District Court for the Eastern District of Michigan, 2003).

To accommodate the Chaldean requests and to keep this community together in one district in El Cajon, the IRC placed El Cajon in District 2.



Numerous public comments support moving El Cajon to D2 and the rest of the East County:

Our family goes to school, church and work in El Cajon and east county. We all vote together as a community.

Don't separate El Cajon and the rest of east county. This will separate our community and our voice.

Please keep Chaldean[s] together. El Cajon is home to Chaldean[s].

We want to keep El Cajon in East county.

As Chaldean American citizens in the amazing community of the East County we are 70000 Chaldean American and we strongly stand against of the division of our community... By this decision you are making us silent and taking our rights away! Do not divide us!

The community shifts between D2 and D4 as described above did not affect D4's status as an apparently viable opportunity to elect district for minorities. In the RPV consultants 12/11/21 PPT, "EVALUATION OF 2021 REDISTRICTING PLAN FOR THE COUNTY OF SAN DIEGO BOARD OF SUPERVISORS (VOTED ON 12/11/2021)," the consultants concluded that:

District 4 is a district in which candidates preferred by voters of color have an opportunity to be elected. For District 4, in 80% of exogenous elections analyzed, the Latino candidate of choice wins. • Analysis also shows that Latino candidates of choice who have an opportunity to be elected in district 4 were supported by Black voters, Latino voters, and Asian American voters in coalition.

We agree that the final map D4 appears to provide a strong opportunity to elect district for Latinos, together with Black and Asian people voting in coalition to elect their preferred candidates in exogenous elections.

However, as the RPV consultants reports and power points reveal, San Diego County largest minority groups Latinos, Asians, and Blacks, do not consistently vote cohesively for the same candidate. It is not unusual for one County minority group's preferred candidate to win and by contrast, for the preferred candidate for two of three minority groups to win.

D5 is a majority-minority coalition district in total population and VAP but not CVAP (39.5%): Latinos 29.6%, Asian 6.2%, and Black 3.7% Native Americans are not included because the small size of this population (0.9% CVAP) will have no dispositive, measurable impact on my opinion.

In addition, the commission's RPV consultants did not analyze Native American and Pacific Islander voting behavior so no opinions are offered about these groups' voting and electoral history. According to the RPV consultants, D5 minorities appear to elect Latino exogenous candidates of choice in 40% of elections they analyzed, a figure identical to the most recent maps considered by the IRC. Consultants' report does not address Asians' ability to elect candidates of choice as part of a D5 coalition of minority groups. Asians are the second largest minority group in D5 and San Diego County.

D3 is known as the coastal district, and includes Coronado, Carlsbad, Solana Beach, Del Mar, Encinitas, and north San Diego city. D3 is majority White with a minority CVAP of approximately 28%. The RPV consultants opine that D3 Latinos elect preferred candidates in 40% of analyzed elections. The commission's RPV consultants did not analyze Native American and Pacific Islander voting behavior so no opinions are offered about these groups' voting and electoral history. According to the RPV consultants, D3 minorities appear to elect Latino exogenous candidates of choice in 40% of elections they analyzed, a figure identical to the most recent maps considered by the IRC.

Consultants' report does not address Asians' ability to elect candidates of choice as part of a D3 coalition of minority groups. Asians are the largest minority group in D3 and second largest in San Diego County. 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.

However, while Latino voters elected their BOS preferred candidates in 10 of 18 elections from 2012-2020, Asians elected their candidates of choice in 14 of 18 of the same elections, according to the consultants RPV analyses. The consultants' report does not address minority voters' estimated ability to elect preferred BOS candidates (endogenous candidates) in the new districts.

## **Conclusion:**

In their final map, the IRC preserved and united 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).

The final map does not appear to have the purpose or effect of diluting minority voting strength. The final map appears to protect Latinos’ ability to elect preferred candidates in D1. D1’s Latino CVAP is virtually identical to that of benchmark D1. The final map also appears to create a solid minority opportunity to elect in D4 as the RPV consultants surmise in their report.

However, D3 and D5 afford Latino voters 40% chance of electing exogenous candidates of choice. In the benchmark districts, as discussed above, no endogenous analysis and no Asian and Black coalitional analysis is provided by the IRC’s consultants.

Concerning Districts 2, 3, and 5, consultants state:

Districts 2, 3, and 5 in the 2021 Redistricting Plan for the County of San Diego Board of Supervisors are districts where Latino voters are not likely to have the opportunity to elect Latino candidates of choice. In these three districts, Latino candidates of choice demonstrate the ability to advance out of the primary election, but the analysis of general elections finds that Latino candidates of choice win only 40% of the time in districts 3 and 5 and 0% of the time in district 2.

Districts 2, 3, and 5 are all white-majority districts with district 2 being 68.8% white CVAP, district 3 being 68.8% white CVAP, and district 5 being 56.4% white CVAP.

District 3 has the largest Asian CVAP of any district in the 2021 map with 14.3% Asian CVAP. District 5 has the 2nd highest Latino CVAP of the five districts in the 2021 Redistricting Plan for the County of San Diego Board of Supervisors.

We agree based on the consultants’ analyses about minorities ability to elect exogenous candidates of choice in all five districts. 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.

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