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## MEMORANDUM

TO: Honorable Chair and Members of the Commission

cc: Lora Fleming, Chief of Staff  
Kathy J. Steinman, Deputy City Attorney

FROM: Craig A. Steele

DATE: November 12, 2021

SUBJECT: Preliminary Analysis of Draft Council District Maps

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As requested by the Commission at your meeting on November 9, 2021, we have performed a preliminary legal review of the three draft district maps that remain under consideration by the Commission. Those maps are numbered 70727/77602 (referred to as “Collaboration”), 72525 (“Chair’s map”), and 74956 (“Clairemont United”)<sup>1</sup> in the “Districtr” system. Staff have provided to us a preliminary demographic analysis of each map, and a comparison analysis to the current City of San Diego City Council district map.

This review was necessarily preliminary due to the short time frame provided to us. Once the Commission designates a map and files it with the City Clerk, as you know, the process is not complete. During the course of the remaining public hearings prior to final action, it is expected that the Commission will still make adjustments to the map it chooses. Indeed, the purpose of the public hearing process is to take evidence from the public and additional analysis from staff and your consultant and, if necessary, adjust district boundaries if needed based on the information presented to you during the hearings, including further legal and demographic analysis. Adjustments to the map should be expected before final adoption.

As the Commission is aware, the over-arching purpose of your work is to ensure that voting districts are substantially equal in population so that the weight of the vote of any citizen in a given district is approximately equal in weight to that of any other citizen in the district.<sup>2</sup>

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<sup>1</sup> The parenthetical labels were taken from the discussion during the Zoom meeting and are included for reference only.

<sup>2</sup> *Reynolds v. Sims*, (1964) 377 U.S. 533, 579.

This task is governed by a hierarchy of laws; the map you choose must comply with the United States Constitution, the City Charter, and the federal Voting Rights Act<sup>3</sup> (“VRA”), as well as provisions of state law.

The fundamental constitutional requirement for any map is that all districts must be substantially equal in population. Section 5.1 of the City Charter localizes that requirement, providing that each district must, as nearly as practicable, contain one-ninth of the population of the City as reflected in the latest U.S. Census. Generally, a total population deviation of 10% or less from the optimum is considered to be legally acceptable, and each of the three maps’ population deviation is below that. Thus, all three maps meet the “substantially equal population” test and the requirements of City Charter Section 5.1.

Next, the Commission is required to apply the substantive factors for districts, and the limitations imposed, in the City Charter. Section 5.1 of the City Charter provides, as relevant here:

“Each redistricting plan shall provide fair and effective representation for all citizens of the City, including racial, ethnic, and language minorities, and be in conformance with the requirements of the United States Constitution and federal statutes. To the extent it is practical to do so, districts shall: preserve identifiable communities of interest; be geographically compact - populous contiguous territory shall not be bypassed to reach distant populous areas; be composed of whole census units as developed by the United States Bureau of the Census; be composed of contiguous territory with reasonable access between population centers in the district; and not be drawn for the purpose of advantaging or protecting incumbents.”

I have not participated in either drawing the proposed maps or the public hearing process leading up to them. Thus, I have no first-hand knowledge of the Commission’s application of the Charter’s factors and limitations to this point. I suggest that Commissioners focus some attention on whether the proposed maps are all geographically compact and contiguous. The work that has been done, I am informed, to better align district boundaries with significant geographic or public infrastructure features is a helpful step in better protecting communities of interest. I am not aware of any evidence-based allegation that any proposed map was drawn for the purpose of advantaging or protecting incumbents. So it would appear

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<sup>3</sup> as amended 52 U.S.C. §§ 10301, *et. seq.*

that the Commission is well-positioned to meet the requirements of the City's Charter after you go through the required public hearing process.

As you apply the factors and limitations of the City Charter, you must do so in a way that complies with the VRA. This memorandum is not intended to be an exhaustive description of the VRA requirements. I understand the Commission already had a presentation on the VRA and the *Thornburgh v. Gingles* factors which I will not repeat here. Given the urgency of moving this process along to meet the important deadlines that have been established for your work, I discuss only the concepts that are particularly relevant to this redistricting. Section 2 of the VRA prohibits the use of voting practices or procedure that discriminate on the basis of race or color, or the voter's membership in a language minority group. As relevant to redistricting, the United States Supreme Court has held:

"The essence of a Section 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by [minority] and white voters to elect their preferred representatives." <sup>4</sup>

Courts have occasionally invalidated purposeful discrimination by elections officials, but I am aware of no credible evidence that any intentional discrimination has occurred in your process to date. So far, the Commission and map's authors have articulated strong race-neutral policy reasons for the adjustment of proposed district boundaries. Commissioners should continue to publicly articulate the policy reasons for the choices you make throughout your process. The number of districts that have a majority of citizens of voting age population ("CVAP") made up of individuals of minority groups remains the same between the 2011 adopted map and each of the proposed 2020 maps currently under consideration. A brief look at the current makeup of the City Council indicates that voters have elected minority candidates from some of the current districts, and it appears likely that voters of different minority groups have combined votes to elect minority candidates of their choice. In the context of re-districting, however, the more frequent question is whether a districting plan will dilute the voting power of minority groups in individual districts. The Supreme Court in *Gingles* defined illegal dilution under the VRA as the "dispersal" of minority voters into a number of districts in which they become "ineffective minorities," or the "concentration" of minority voters into districts where they become "an excessive majority."<sup>5</sup> This standard led to the "cracking and packing" analogy I know Commissioners have heard about.

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<sup>4</sup> *Thornburgh v. Gingles*, (1986) 478 U.S. 30, 47

<sup>5</sup> *Id.* at 46, n. 11

For the most part, I think there are compelling arguments to defend the legal compliance of the three draft maps under consideration, especially given the policy and population deviation reasons that explain some shifts from previous boundaries. I expect that further analysis, evidence, and written documentation will bolster that record as your process continues.

However, every draft map can be improved, and these maps are no different. Commissioners and the public should regard the Commission's designation and filing of one draft map as the beginning, not the end, of a process that will yield effective and legally compliant final district maps. In particular, I respectfully direct Commissioners' attention to addressing areas where it appears that minority voters' opportunity to elect the candidates of their choice may be reduced somewhat because of population shifts. The example of where this may be occurring in the draft maps is the reduction of Latino CVAP in proposed District 9 as compared to the existing District condition, on all three maps. During your public hearing process and deliberation, it will be important to fine tune the map you choose as much as possible to protect such voters' rights. Those adjustments **do not** have to be made at your meeting on Saturday, but may be made during the public hearing process before adoption of a final map.

I am happy to address further questions with Commissioners individually as you proceed, if necessary.

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