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MEMORANDUM

TO: MEMBERS, Redistricting Task Force

CC: MAYOR LONDON N. BREED
MEMBERS, Board of Supervisors
MEMBERS, Elections Commission
JOHN ARNTZ, Director, Department of Elections

FROM: ANDREW SHEN *AS*
ANA FLORES *Ana Flores*
Deputy City Attorneys

DATE: September 27, 2021

RE: Legal Requirements for Redistricting - 2021

In this memorandum, we provide an overview of the legal requirements that govern the redrawing of supervisorial district lines by the Redistricting Task Force (“Task Force”). While in this memorandum we present a general discussion of these issues, the City Attorney’s Office will be available to provide you with additional information you may need about these requirements on request.

SUMMARY

The Task Force must adhere to three main principles that the United States Constitution (the “Constitution”), the Federal Voting Rights Act (the “VRA”), and the San Francisco Charter (the “Charter”) have established. First, the Constitution and the Charter require the Task Force to draw districts that are generally equal in population. Second, the VRA prohibits the Task Force from drawing district lines that dilute the voting power of racial or language minorities. Although the Task Force may take race into account for the purpose of complying with the VRA, the Constitution prohibits the Task Force from considering race as the predominant factor when redrawing district lines. Third and finally, the Charter requires the Task Force to consider communities of interest and use adjusted census figures, if available, when drawing district lines. The Charter does not define “communities of interest,” but the California Constitution and the Elections Code define communities of interest as populations that share common social or economic interests, rather than any groups defined by political affiliations.

DISCUSSION

The Charter vests the Task Force with the responsibility of redrawing supervisorial district boundaries by April 15, 2022. (S.F. Charter § 13.110(d).) When performing this responsibility, the Task Force must comply with the legal requirements established by the Constitution, the VRA, and the Charter.

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The Charter adopts the legal requirements for supervisorial district lines that are mandated by the Constitution and the VRA. The Charter also imposes additional requirements. Specifically, the Charter provides:

Districts must conform to all legal requirements, including the requirement that they be equal in population. Population variations between districts should be limited to 1 percent from the statistical mean unless additional variations, limited to 5 percent of the statistical mean, are necessary to prevent dividing or diluting the voting power of minorities and/or to keep recognized neighborhoods intact; provided, however, that the redistricting provided for herein shall conform to the rule of one person, one vote, and shall reflect communities of interest within the city and county. Census data, at the census block level, as released by the United States Census Bureau, statistically adjusted by the Bureau to correct the unadjusted census counts for any measured undercount or overcount of any subset of the population according to the bureau's Accuracy and Coverage Evaluation or other sampling method, shall be used in any analysis of population requirements and application of the rule of one person one vote. In the event such adjusted census data, at the census block level, are not released by the Bureau, population data, at the census block level, adjusted by the California Department of Finance for any measured undercount or overcount may be used.

(*Id.*)

Further, recently enacted amendments to the California Elections Code that apply to redistricting in charter cities, adopted through Assembly Bill 1276 (2020), do not displace the criteria set forth in the Charter. (*See* Cal. Elec. Code, §§ 21620-30.) In particular, while Elections Code Section 21621 sets forth a substantially similar set of redistricting criteria, it also provides that these criteria do not apply to “to a charter city that has adopted comprehensive or exclusive redistricting criteria in its city charter.” (Cal. Elec. Code, § 21621(e).) Section 21621(e) defines “comprehensive or exclusive” as those criteria that provide two or more traditional criteria for redistricting other than the requirement that districts be equal in population. Since San Francisco is a charter city, and the Charter already requires the Task Force to utilize such traditional criteria – preventing minority vote dilution, keeping neighborhoods intact, and reflecting communities of interest – in addition to population equality, the Task Force must continue to apply the Charter's criteria for the current redistricting process.

A. Equal in Population – The Rule of One Person One Vote

The Equal Protection Clause of the Fourteenth Amendment requires “substantial equality of population among the various [local legislative] districts.” (*Reynolds v. Sims* (1964) 377 U.S. 533, 579.) In other words, local legislative districts must substantially comply with the rule of one person, one vote. Over the years, the United States Supreme Court has established that a local redistricting plan complies with this constitutional requirement if the population variance between the largest and smallest districts is less than ten percent. (*Evenwel v. Abbott* (2016) 577 U.S. 937, 136.S.Ct. 1120, 1124.) If the difference in population between the largest and smallest districts is more than ten percent, then the redistricting plan would likely violate the Equal Protection Clause.

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But the Charter requires a stricter adherence to the rule of one person, one vote. The Task Force must generally limit population variations between districts to one percent from the statistical mean. (S.F. Charter § 13.110(d).) The statistical mean is the population of each district if San Francisco's population were evenly divided among its 11 districts. The Charter also authorizes the Task Force to draw districts with population variations up to five percent of the statistical mean "if *necessary* to prevent dividing or diluting the voting power of minorities and/or to keep recognized neighborhoods intact." (*Id.*, emphasis added.)

B. The Federal Voting Rights Act

The VRA protects the voting power of racial and language minorities. Specifically, the VRA prohibits governments from imposing or applying: (1) voting qualifications; (2) prerequisites to voting; or (3) standards, practices, or procedures that result in the denial or abridgement of the right to vote on account of race or color or because a person is a member of a language minority group. 52 U.S.C. § 10301(a). A violation of the VRA occurs if "based on the totality of the circumstances," a court concludes that there is a dilution of the voting power of racial or language minorities. (*Id.* at § 10301(b); *Abbott v. Perez* (2018) 138 S.Ct. 2305, 2315 ("Abbott").)

The United States Supreme Court has established a two-step analysis to determine whether a redistricting plan violates the VRA. First, the plaintiff must establish the following three "*Gingles* factors":

1. the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district;
2. the minority group is politically cohesive; and
3. in the absence of special circumstances, bloc voting by the majority usually defeats the minority group's preferred candidate.

(*Abbott, supra*, 138 S.Ct. at p. 2331, quoting *Thornburg v. Gingles* (1986) 478 U.S. 30, 50-51.)

Second, if a plaintiff establishes that these three conditions exist, then the plaintiff must prove that, under the totality of the circumstances, the district lines have been drawn to dilute the votes of the minority group. (*Abbott, supra*, 138 S.Ct. at p. 2312.) Vote dilution of a minority group can occur when the drawing of district lines devalues one citizen's vote as compared to others. (*Gill v. Whitford* (2018) 138 S.Ct. 1916, 1935 (conc. opn. of Kagan, J.)) Vote dilution by way of redistricting occurs when a district is "cracked" or "packed." "Cracking" occurs when members of a minority group are spread among as many districts as possible, keeping them a political minority in every district, rather than permitting them to concentrate their strength enough to elect representatives in some districts. (*Voinovich v. Quilter* (1993) 507 U.S. 146, 153.) "Packing" occurs when district lines are drawn so that the members of a minority group are concentrated into as few districts as possible. (*Id.* at p. 153-54.) Packing allows the minority group to elect representatives from those few districts, but it restricts the group's political power because its votes cannot be used to elect representatives in other districts in proportion to the group's numbers as a whole. (*Id.*)

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The Task Force must be aware of and collect information on the City's racial and language minority populations to determine if a potential plaintiff could satisfy the three conditions described above. Also, the Task Force must remain mindful of the City's racial and language minority populations when redrawing district lines to avoid cracking and packing.

C. Racial Gerrymandering and The Equal Protection Clause

Although the VRA requires that jurisdictions redrawing district lines be conscious of race to prevent vote dilution, the Equal Protection Clause of the Fourteenth Amendment prevents them, without sufficient justification, from "separat[ing] its citizens into different voting districts on the basis of race." (*Bethune-Hill v. Virginia State Bd. of Elections* (2017) 137 S.Ct. 788, 797 ("*Bethune-Hill*"), quoting *Miller v. Johnson* (1995) 515 U.S. 900, 920 ("*Miller*").) The Task Force must be aware of race when it draws district lines, just as it must be aware of a "variety of demographic factors" including age, economic status, and religious and political persuasion. (*Bethune-Hill, supra*, 137 S.Ct. 137 at p. 797, see *Shaw v. Reno* (1993) 509 U.S. 630, 646 ("*Shaw*").) But the Task Force must not make race a predominant motivating factor or place it "above traditional districting considerations in determining *which* persons [are] placed *in appropriately apportioned districts*." (*Alabama Legislative Black Caucus v. Alabama* (2015) 575 U.S. 254, 273 (emphasis in original).)

A plaintiff alleging racial gerrymandering bears the burden of showing either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose, that race was the predominant factor motivating the jurisdiction's districting decision. (*Bethune-Hill, supra*, 137 S.Ct. 137 at p. 797.) A jurisdiction can defeat a claim that a district has been gerrymandered on racial lines by showing that traditional districting principles or other race-neutral considerations are the basis for the challenged district boundaries and are not subordinate to race. (*Miller, supra*, 515 U.S. 900.) There are at least three factors that a court will consider to determine if race was the predominant factor in redrawing district lines. First, a court will look to the district's shape and demographics. (*Shaw, supra*, 509 U.S. at p. 647-48.) Second, a court will examine testimony and correspondence stating the legislative motives for drawing the district boundaries. (*Miller, supra*, 515 U.S. at p. 919.) Third, a court will also examine the nature of the redistricting data used by the body that approved the district lines. (*Bush v. Vera* (1996) 517 U.S. 952, 961-62.) Traditional race-neutral districting principles include, but are not limited to:

- compactness;
- contiguity;
- preservation of political subdivisions and geographical regions;
- preservation of cores of prior districts;
- protection of incumbents from contests with each other; and
- preservation of communities of interest.

(*Id.*; *Rucho v. Common Cause, supra*, 139 S.Ct. 2484.)

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When new lines are drawn, the Task Force is not required to consider all of these principles, but should use at least some to create new supervisorial districts. (*Id.*) Lastly, these principles are not necessarily equally important. For example, courts place comparatively greater weight on the compactness of a district, *i.e.*, whether the district boundaries are either irregularly or bizarrely shaped. (*Miller, supra*, 515 U.S. at p. 917; *Shaw, supra*, 509 U.S. at p. 646-47.)

D. Communities of Interest

The Charter also requires that the redrawing of supervisorial district lines “reflect communities of interest within the City and County.” (S.F. Charter § 13.110(d).) The Charter does not define “communities of interest,” and no court has considered what the term means in the context of the Charter. But the California Legislature recently adopted a definition of communities of interest for charter cities that have not adopted their own redistricting criteria. Though San Francisco has adopted its own exclusive redistricting criteria, the definition of a “community of interest” in Election Code Section 21621(c)(2) is instructive:

A community of interest is a population that shares common social or economic interests that should be included within a single district for purposes of its effective and fair representation. Communities of interest do not include relationships with political parties, incumbents, or political candidates.

The California Constitution also provides its own definition of a “community of interest” for state-level redistricting: “A community of interest is a contiguous population which shares common social and economic interests that should be included within a single district for purposes of its effective and fair representation.” (Cal. Const., art. 21, § 2(d)(4).) Examples of shared interests under the California Constitution’s definition include similar living standards or employment opportunities. (*Id.*) Courts have also examined similar terms in litigation regarding the VRA. While the Supreme Court has never conclusively defined this concept, federal courts have described “communities of interest” in various ways:

- as “a common thread” of “political, social, and economic interests,” (*id.*);
- as an area with common concerns with respect to geography, demography, ethnicity, culture, socio-economic status or trade, (*Smith v. Clark* (S.D. Miss. 2002) 189 F. Supp. 2d 529, 543); and
- as a place with “common employment, services, religion, economy, country of origin and culture,” (*Diaz v. Silver* (E.D.N.Y. 1997) 978 F. Supp. 96, 124).

The Task Force should consider similar factors in determining the existence of communities of interest during the redistricting process. The Task Force may identify communities of interest using statistical evidence, testimony from state and local government officials, marketing data, and anecdotal evidence produced at public hearings.

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E. Adjusted Census Figures

The Charter also requires the Task Force to use “[c]ensus data, at the census block level, as released by the United States Census Bureau, statistically adjusted by the Bureau to correct the unadjusted census counts for any measured undercount or overcount of any subset of the population according to the bureau’s Accuracy and Coverage Evaluation or other sampling method” in any analysis of a district’s population. (S.F. Charter § 13.110(d).) In addition, if the Census Bureau does not release such data, the Task Force may use “population data, at the census block level, adjusted by the California Department of Finance for any measured undercount or overcount” if such information becomes available. (*Id.*)

If the Census Bureau releases adjusted census figures for the 2020 census, and the Task Force determines that there is an insufficient period of time before April 15, 2022 to account for those adjustments, and the adjusted data demonstrates more than a five percent variance from the data initially used to redraw the district lines, then the Charter would provide additional time for the Task Force to complete the redistricting process. In that event, the Task Force would be required to redraw the district lines using the adjusted data by April 15, 2024. (S.F. Charter § 13.110(d).)

Please let us know if you have any questions related to the subject matter of this memorandum or would like any additional background information.