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March 14, 2002

Minneapolis Redistricting Commissioner
c/o City Clerk
Room 302, City Hall
350 South Fifth Street
Minneapolis, MN 55415

Re: Redistricting Voter Dilution Issues

Dear Commissioner:

In this document, I have attempted to set out additional guidance regarding redistricting requirements that will apply to your efforts and duties on behalf of the City. This provides a framework for consideration of voter dilution issues developed in reapportionment cases related to court challenges under Section 2 of the Voting Rights Act, and under the Fourteenth Amendment guarantee of equal protection under the federal constitution. In the narrow sense, "reapportionment" refers to the mathematical process of decennial congressional reapportionment by reassigning a given number of seats in a legislative body to established districts, usually in accordance with an established formula. The cases often also refer to boundary drawing as reapportionment; however, "redistricting" for the Commission's purposes refers to the process of drawing ward boundaries.

Assuming conformity with equal population requirements, redistricting plans must avoid discrimination against racial or language minorities. Redistricting must not violate Section 2 of the Voting Rights Act or the Equal Protection Clause. The first section of this document addresses the Equal Protection doctrine, followed by a section addressing the Voting Rights Act Section 2 and other vote dilution issues.

EQUAL PROTECTION CLAUSE OF THE 14th AMENDMENT

A districting plan must not violate the Equal Protection Clause of the 14th Amendment of the federal constitution. When drawing a district to avoid a violation of Section 2 of the Voting Rights Act, you must take care not to create a racial gerrymander that runs afoul of the Equal

Protection Clause of the 14th Amendment. You may consider race in drawing districts. However, race may not be the predominant factor in districting as discussed below. As the Supreme Court recognized in Shaw v. Reno, 509 U.S. 630 (1993):

> [R]edistricting differs from other kinds of state decision making in that the legislature is always aware of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination. ...[W]hen members of a racial group live together in one community, a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes. The district lines may be drawn, for example, to provide for compact districts of contiguous territory, or to maintain the integrity of political subdivisions.

509 U.S. at 646 (slip op. at 14).

As a result, as you review the census data, one of the factors you may consider in drawing ward and park district boundaries is race.

Avoid Drawing a Racial Gerrymander

When a state creates a majority-minority district without regard to "traditional districting principles," the district will be subject to strict scrutiny and probably thrown out. Shaw v. Reno, 509 U.S. 630 (1993); Miller v. Johnson, 515 U.S. 900 (1995); Bush v. Vera, 517 U.S. 952 (1996). In order for majority-minority districts to stand up in court, drawing a racial gerrymander should be avoided. Pursuant to the authority of the Supreme Court in Shaw v. Reno, the first step toward avoiding drawing a racial gerrymander is to be aware of bizarre shapes. 509 U.S. at 647-48 (slip op. at 15-16).

The Court said that a redistricting plan that is so bizarre on its face that it is unexplainable on grounds other than race demands the same strict scrutiny under the Equal Protection Clause given to other state laws that classify citizens by race. 509 U.S. at 644 (slip op. at 12).

To avoid districts with bizarre shapes, you will want to draw districts that are compact. As Justice O'Connor said in Rush v. Vera, 517 U.S. 952 (1996):

> A § 2 district that is reasonably compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries, may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless "beauty contests."

517 U.S. at___, 116 S. Ct. at 1960.

If the Commission follows the requirements of Charter Chapter 1, Section 3.2, and draws boundaries containing "contiguous compact territory", this problem can be avoided.

Race May Not Be Your Dominant Motive

Even if the shapes of districts are reasonably compact and do not look bizarre, they may nevertheless run afoul of the Equal Protection Clause if race is the dominant motive for the way that the lines were drawn.

In Miller v. Johnson, 515 U.S. 900 (1995), the Supreme Court shifted its focus away from the shape of the district, saying that plaintiffs challenging a racial gerrymander need not prove that a district has a bizarre shape. The shape of the district is relevant, not because bizarreness is a necessary element of the constitutional wrong, but because it may be persuasive circumstantial evidence that race was the Legislature's dominant motive in drawing district lines. Where district lines are not so bizarre, plaintiffs may rely on other evidence to establish race-based redistricting. 515 U.S. at 912-13.

In Georgia's case, the Legislature's correspondence with the Justice Department throughout the preclearance process demonstrated that race was the dominant factor the Legislature considered when drawing the 11th District. The Court found that the Legislature had considered "traditional race-neutral districting principles," such as compactness, contiguity, and respect for political subdivisions and communities of interest, but that those principles had been subordinated to race in order to give the 11th District a Black majority. 515 U.S. at 919-20. The Court subjected the district to strict scrutiny and struck it down. 515 U.S. at 920-27.

Beware of Using Race as a Proxy for Political Affiliation

To support an argument that partisan politics, and not race, was the dominant motive in drawing district lines, beware of using racial data as a proxy for political affiliation. The Texas Legislature was found to have done that in the 1990s, and three of its congressional districts were struck down.

Under the 1990 reapportionment of seats in Congress, Texas was entitled to three additional congressional districts. The Texas Legislature decided to draw one new Hispanic-majority district in South Texas, one new African American majority district in Dallas County (District 30), and one new Hispanic-majority district in the Houston area (District 29).

Plaintiffs challenged 24 of the State's 30 congressional districts as racial gerrymanders. The federal district court struck down three, Districts 18, 29, and 30, Vera v. Richards, 861 F. Supp. 1304 (S.D. Tex. 1994).

The Supreme Court upheld the district court's finding to the contrary, holding that race was the predominant factor. The Legislature's redistricting system had election data and other political information at the precinct level, but it had race data down to the 24 block level. The district lines closely tracked the racial block data. The Court found that, to the extent there was political manipulation, race was used as a proxy for political affiliation. It was race that predominated.

Bush v. Vera, 517 U.S. 952,___,116 S. Ct. 194 I, 1959-61 (1996). The Court subjected the districts to strict scrutiny and struck them down. 517 U.S. at___ 116 S. Ct. at 1961-62.

In developing its record therefore, the Commission should consider addressing all its reasons for the drawing of boundaries, and not focus mainly on race.

Follow Traditional Districting Principles

As the preceding discussion shows, one way to avoid drawing a racial gerrymander that runs afoul of the Equal Protection Clause is to follow traditional districting principles including compactness and contiguity. Before drawing any plan, you should consider referencing the requirements of state law and the Charter and consider whether to adopt additional districting principles to govern your plans.

Strict Scrutiny is Almost Always Fatal

If traditional districting principles are subordinated to race in order to create a majority-minority district, it is likely the districting will be struck down in court. A racial gerrymander is subject to strict scrutiny under the Equal Protection Clause of the 14th Amendment. Shaw v. Reno, 509 U.S. 630 (1993). To survive strict scrutiny, a racial classification must be narrowly tailored to serve a compelling governmental interest. Id.

So far, the Supreme Court has considered remedying past discrimination, avoiding retrogression in violation of Section 5 of the Voting Rights Act, and avoiding a violation of Section 2 of the Voting Rights Act to be possible compelling governmental interests. During the 1990s, however, no racial gerrymander was explicitly found by the Supreme Court to have been sufficiently narrowly tailored to achieve any of these compelling governmental interests. See, e.g.. Shaw v. Reno, 509 U.S. 630 (1993); Miller v. Johnson, 515 U.S. 900 (1995); Bush v. Vera, 517 U.S. 952 (1996); contra, King v. State Board of Elections, 979 F. Supp. 582 (N.D. Ill. 1996), vacated memo sub nom. King v. Illinois Board of Elections, 117 S. Ct. 429, on remand 979 F. Supp. 619 (N.D. Ill. 1997), aff'd memo 118 S. Ct. 877 (1998).

Remedying past discrimination has traditionally been asserted as a justification for a governmental entity to adopt a racial classification. See, e.g., Richmond v. J.A. Crosun Co., 488 U.S. 469, 491-93 (1989); Wygant v. Jackson Bd. of Ed., 476 U.S. 267, 280-82 (1986). In the context of redistricting, this justification has not yet proved sufficient. In Shaw v. Reno, the Supreme Court warned that the State must have "a strong basis in evidence for concluding that remedial action is necessary," 509 U.S. 630, 656(slip op. at 24), and that "race-based districting, as a response to racially polarized voting, is constitutionally permissible only when the State employs sound districting principles, and only when the affected racial group's residential patterns afford the opportunity of creating districts in which they will be in the majority." 509 U.S. at 657 (slip op. at 25) (internal citations and quotations omitted). North Carolina failed to meet this standard, and its 12th congressional district was struck down. Shaw v. Hunt, 517 U.S. 899, 116 S. Ct. 1894 (1996).

In Bush v. Vera, 517 U.S. 952 (1996), the Court found that the district lines drawn by the Texas Legislature were not justified as an attempt to remedy the effects of past discrimination, since there was no evidence of present discrimination other than racially polarized voting.

The Commission can meet the requirements of Equal Protection and consider race, if race is one of the factors the Commission considers, as well as the requirements of the Charter and state law.

SECTION 2 OF THE VOTING RIGHTS ACT

The Federal Voting Rights Act, 42 U.S.C. Section 1973 (1982), also provides a legal basis for claims of voter dilution. Section 2 provides that "no voting ...practice ...shall be imposed by any... political subdivision in a manner which results in a denial or abridgement of the right of any citizen ...to vote on account of race or color, or [membership in a language minority groups 'protected by the Act] " Section 2(b) requires the court to examine the "totality of the circumstances" before finding a violation of the Act. The U.S. Supreme Court has interpreted the amended Section in Thornburg v. Gingles, 478 U.S. 103 (1986).

Section 2 has been used to attack reapportionment and redistricting plans on the ground that they discriminated against Blacks or Hispanics and abridged their right to vote by diluting the voting strength of their population in the state.

The 1982 amendments clarified that the Act prohibits conduct "which results in a denial or abridgement" of rights of racial and language minorities. Pub.L. No. 97-205, § 3, June 29, 1982, 96 Stat. 134, codified as amended at 42 U .S.C. § 1973. The amendment states:

> A violation of [section 2] is established if, based on the totality of the circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by [section 2] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class.have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973 (b).

Even if the one person, one vote requirement is satisfied, the plan is subject to challenge if the apportionment scheme operates to minimize or cancel out voting potential of racial or ethnic minorities. The intent of the legislature in drawing the lines for the most part is irrelevant. The inquiry is directed toward the results and is based on the totality of the circumstances. East Jefferson Coalition For Leadership and Development v. Parish of Jefferson, 691 F. Supp. 991, 996 (E.D. La. 1988). This "results" test involves a "searching and practical inquiry into the 'past

and present reality' of the circumstances existent in the challenged jurisdiction". East Jefferson Coalition For Leadership and Development v. Parish of Jefferson, 691 F. Supp. at 997 (citing White v. Regester, 412 U.S. at 769-770). This is a flexible test which turns on the facts of each particular case.

In Thornburg v. Gingles, 478 U.S. 30, (1986) the U.S. Supreme Court analyzed North Carolina's legislative districts in a challenge under Section 2 of the Voting Rights Act. Black citizens of North Carolina who were registered voters brought suit in Federal District Court, challenging one single member and six multimember districts on the grounds that the redistricting plan impaired black citizens' ability to elect representatives of their choice. The District Court applied the "totality of the circumstances" test set forth in §2(b) and held that the redistricting plan violated §2(a) because it impaired the opportunity of black voters to participate in the political process and to elect representatives of their choice in all of the disputed districts. The state Attorney General and others appealed to the U.S. Supreme Court with respect to five of the multimember districts.

Justice Brennan imposed three preconditions to a legally substantial impairment of a plaintiff's ability to elect candidates of their choice or to effectively participate in the political process must be met. These three preconditions must be met before a court must proceed to detailed analysis of a plan:

1. The claimant minority must establish that it is sufficiently large and geographically compact to constitute a majority in a single member district.

2. Plaintiffs must show that the group to which they belong is politically cohesive.

3. The minority voters must show that the majority votes block, absent special circumstances (such as minority candidate running unopposed), to defeat a minority's preferred candidate. Id, 478 U.S. at 50-51.

Once these three preconditions are satisfied, Justice Brennan said that a court must consider several additional "objective factors" in determining the "totality of the circumstances" surrounding an alleged violation of Section 2. The additional factors to be examined to decide whether there is a diminution of minority political opportunity is contained in the report of the Senate Judiciary Committee on the bill that became the 1982 amendment to the Voting Rights Act. In Thornburg v. Gingles, 478 U.S. 30, 44-45 (1986), the Supreme Court confirmed that these typically are relevant factors to a Section 2 claim. The list appears in S. Rep. No. 417, 97th Cong., 2d Sess. 28-29 reprinted in 1982 U.S. Code Congo & Admin. News 177, 205-07 and consists of the following factors:

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, 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, prohibitions against single shot voting, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority;

4. If there is a candidate slating process where 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 past 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 used overt or subtle racial appeals;

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

Other facts which have had probative value are whether there is a significant lack of responsiveness on the part of elected officials to the particular needs of the minority group members and whether the state or political subdivision's use of voting qualifications, prerequisite to voting, or standard, practice or procedure is tenuous. The above list is not intended to be exhaustive. Local circumstances may make other factors relevant. Moreover, plaintiffs are not required to prove any particular number of factors or that a majority of factors point a particular way to establish a violation. East Jefferson Coalition v. Jefferson Parish, 691 F. Supp. at 997.

In *Gingles*, the Court threw out all of the challenged multimember districts, except one where Black candidates had sometimes managed to get elected. This challenge was supported by evidence showing dilution of Black citizens' votes through a long history of official discrimination against Blacks with respect to their voting franchise, employing at different times a poll tax, a literacy test, a prohibition against bullet voting, and historic evidence under the "totality of the circumstances".

The Court has since held that the three preconditions also apply to Section 2 challenges to single-member districts. Growe v. Emison, 507 U.S. 25, 40-41 (1993).

In order to minimize a claim of a Section 2 violation, you should be prepared with empirical data to show what is "reasonable and fair" under "the totality of the circumstances," because your plan may be invalidated for putting either too few or too many members of a minority group into a given district. This inquiry is obviously fact intensive, and complex, given the analytical framework set out in Gingles. The Commission can effectively address this issue by utilizing the

traditional districting principles and developing a record to support any determinations by the Commission that any of the factors apply.

Another important concept arising out of efforts to protect minority voting rights is awareness of the risk of "packing". "Packing" (concentration of a minority into certain districts) may also result in dilution. The Department of Justice has generally accepted a threshold packing figure of 65%. Courts have considered packing up to 80% to be acceptable. See, Rybicki v. State Bd. of Elections of Ill., 574 F. Supp. 1147, 1152 (N.D. Ill. 1984). The Rybicki court acknowledged that packing of greater than 80% must be analyzed together with other factors to determine whether it is, in fact unlawful.

The First Circuit adopted this approach as well. In Latino Political Action Committee v. City of Boston, 784 F.Supp. 407 (1st Cir. 1986), the court declined to find that an 82% packing figure was automatically unreasonable and denied equal access to the electoral process. The court stated that insofar that a packing figure is somewhat higher, it could reflect a lessened degree to which minority voters had similar voting preferences or a lessened degree to which they voted as a bloc. Again, the totality of the circumstances must be considered.

In denying the plaintiff's claim in Latino Political Action Committee v. City of Boston, the court noted that to some degree packing may actually help, rather than hurt, minority voters. A degree of packing is necessary where polarized voting exists to account for the fact that minority voters do not vote as completely cohesive blocs. In fact, the less cohesive the bloc, the more packing needed to assure a minority representative. On the other hand, the less polarized the voting, the less packing required. 784 F.2d at 414.

(Section 5 of the Voting Rights Act also requires certain jurisdictions to submit their proposed changes to the U.S. Attorney General for preclearance. 42 U.S.C. Section 1973c. The City of Minneapolis is not subject to this preclearance requirement at this time. The City could have the preclearance requirement imposed by a court, however, if a lawsuit challenged the reapportionment and the court directed future changes to be precleared through the Justice Department.)

The Fifteenth Amendment condemns racial gerrymandering, Gomillion v. Lightfoot, 364 U.S. 339 (1960), and the Fourteenth Amendment proscribes purposeful apportionment to minimize voting strengths of interest groups. White v. Regester, 412 U.S. 755 (1973); Whitcomb v. Chavis, 403 U.S. 124 (1971); Burns v. Richardson, 384 U.S. 73 (1966); Fortson v. Dorsey, 379 U.S. 433 (1965). Nevertheless, neither the Fifteenth nor the Fourteenth Amendment commands proportional racial or ethnic representation. City of Mobile v. Bolden, 446 U.S. 55, 63, 75 (1980). Furthermore, "the Constitution ...does not demand that each cognizable element of a constituency elect representatives in proportion to its voting strengths." Nevett v. Sides, 571 F.2d 209, 216 (5th Cir. 1978), cert. denied, 446 U.S. 951 (1980) (citing White v. Regester, 412 U.S. at 765-66).

CONCLUSION

The 14th Amendment of the U.S. Constitution, the Equal Protection Clause, has been interpreted as requiring "substantial equality of population." Reynolds v. Sims, 377 U.S. 533 (1964). This has been held to mean an overall range of less than 10%. See Chapman v. Meier, 470 U.S. 1 (1975); Connor v. Finch 431 U.S. 407 (1977); Brown v. Thomson, 462 U.S. 835, 842-43 (1983); Voinovich v. Quilter, 507 U. S. 146 (1993). Therefore, since a 5% deviation from the quota or ideal would yield a maximum overall range of 10%, the Charter's 5% deviation limit should satisfy Equal Protection Requirements, as long as other ward boundary standards are met.

Redistricting must avoid a plan which denies or abridges the rights of racial and language minorities. 42 U.S. C.A. § 1973 (1981). With respect to a minority which is sufficiently large and compact to constitute a majority in a ward that is politically cohesive, and whose preferred candidate would usually be defeated in voting by the white majority, a plan probably must be created which gives the minority a fair chance to win. Thornbury v. Gingles, 478 U.S. 30 (1986); Growe v. Emison, 507 U.S. 25 (1993).

Race may be considered in drawing the ward boundaries so that the political power of a racial minority is preserved and its voting power not diluted. However, there is no requirement in the Constitution or the Voting Rights Act of proportional representation of racial or ethnic minorities. City of Mobile v. Bolden, 466 U.S. 55 (1980).

Care must be taken to observe traditional districting principles including the requirements that each ward must consist of compact and contiguous territory, Mpls. Charter, Chapter 1, § 3. See Redistricting Commission materials containing state law and policies including the Minnesota Constitution, Minnesota Statutes and Rules, and the Minneapolis City Charter and the "Redistricting Requirements" section of the February 22, 2002 letter from the City Attorney to the Minneapolis Redistricting Commissioner.

Very truly yours,

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