



MEMORANDUM OFFICE OF THE CITY ATTORNEY

DATE: December 30, 2021

TO: Honorable Chairperson and Members of the Commission

FROM: City Attorney's Office

SUBJECT: Legal Requirements for Measuring Population in Redistricting

At its November 8, 2021 meeting, the IRC asked for a briefing on legal requirements for measuring population in the redistricting process. In brief, the IRC should use the adjusted total population figures in the Statewide Database for purposes of assessing population deviation among districts. The IRC should use citizen voting age population for purposes of assessing whether it might need to create majority-minority districts under Section 2 of the Voting Rights Act ("VRA"). The memorandum that follows addresses the IRC's request.

FEDERAL REQUIREMENTS

I. Substantial Equality of Population/Equal Protection Clause

To ensure residents are equally represented, the U.S. Supreme Court has held that the Equal Protection Clause of the Fourteenth Amendment requires that districts have "substantial equality of population."¹ For local jurisdictions, some deviation in district populations is allowed.² Generally, deviations between the largest and smallest district of less than ten percent will be presumed constitutional, but can be proven to be unconstitutional.³ It is rare for maps with total deviations above ten percent to be justified.⁴

¹ *Reynolds v. Sims*, 377 U.S. 533, 579 (1964).

² *Brown v. Thompson*, 462 U.S. 835, 842-843 (1983).

³ *White v. Regester*, 412 U.S. 755, 764 (1973).

⁴ *Mahan v. Howell*, 410 U.S. 315, 325 (1973) (affirming deviation of 16.4 percent where the deviation was "based on legitimate considerations incident to the effectuation of a rational state policy").

Total population numbers from the most recent Census data—the 2020 Census redistricting data set—are the appropriate measure of population when considering whether a map satisfies the substantial equality of population requirement.⁵ The use of this population base comports with the basic principle that representatives “serve all residents, not just those eligible or registered to vote.”⁶

II. Federal Voting Rights Act

Section 2 of the VRA prevents discrimination against voters based on minority status, such as race, ethnicity, or particular languages.⁷ In *Thornburg v. Gingles*,⁸ the Supreme Court nullified multi-member districts in a North Carolina redistricting plan. The Court identified three criteria – the “*Gingles* factors” – that must be established to bring a claim of racial voter dilution under Section 2 of the VRA:

- (1) the minority group is a majority in a geographically compact district;
- (2) the minority group is politically cohesive; and
- (3) the majority votes sufficiently as a block such that it defeats the minority’s preferred candidate.⁹

In the Ninth Circuit, Citizen Voting Age Population (“CVAP”)—the number of persons who are eligible to register and vote—is the appropriate measure to determine whether an effective majority minority district can be created (the first of the three *Gingles* factors). See *Romero v. City of Pomona*, 883 F. 2d 1418, 1426 (9th Cir. 1989) (“[E]ligible minority voter population, rather than total minority population, is the appropriate measure of geographical compactness”), abrogated on other grounds, *Townsend v. Holman Consulting Corp.*, 914 F.2d 1136, 1141 (9th Cir.1990) (en banc); *Cano v. Davis*, 211 F.Supp.2d 1208, 1233 (C.D. Cal. 2002) *aff’d*, 537 U.S. 1100 (2003) (“The Ninth Circuit, along with every other circuit to consider the issue, has held that CVAP is the appropriate measure to use in determining whether an additional effective majority-minority district can be created.”). The second two *Gingles* factors are measured based on historical voting patterns.

⁵ *Evenwel v. Abbott*, 136 S.Ct. 1120, 1121 (2016) (holding that the Equal Protection Clause allows a state or locality to draw districts based on total population).

⁶ *Id.* at 1132.

⁷ 52 U.S.C. § 10301.

⁸ 478 U.S. 30 (1986).

⁹ *Id.* at 49-51.

CALIFORNIA REQUIREMENTS

Consistent with the Equal Protection Clause in the U.S. Constitution, the California Elections Code requires that district maps be drawn with substantially equal populations.¹⁰ Population equality, for purposes of state law, is measured based on the total population of residents in the most recent federal census.¹¹ California law also requires charter cities to use an adjusted version of the jurisdiction's total population to account for the proper location of incarcerated individuals.¹² These adjusted totals are available in the Statewide Database, California's official datasets for state and local redistricting.

Draft maps must include the total population, citizen voting age population, and racial and ethnic characteristics of the citizen voting age population for each district if available.¹³

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¹⁰ Cal. Elec. Code § 21621(a) (charter cities).

¹¹ *Id.* § 21621(a)(1) (charter cities).

¹² *Id.* § 21621(a)(2).

¹³ *Id.* § 21628(d)(2) (charter cities).