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FROM: Marguerite Mary Leoni

DATE: March 21, 2022

RE: Redistricting Legal Requirements

I. INTRODUCTION.

The City of Santa Barbara Independent Redistricting Commission (IRC) has requested a memorandum of law discussing the criteria applicable to the pending 2020 Census-based update redistricting of the City of Santa Barbara's City Council districts. Because you have asked for a memorandum of law, I refrain from analyzing the facts and testimony presented to the IRC to preserve the appearance and fact of the City's neutrality in the redistricting process. The Chairperson of the IRC, the Honorable Judge Melinda Johnson (Ret.) has indicated that the panel will make determinations of fact and findings of law to support its ultimate redistricting decisions.[1]

Two significant background events guide this analysis:

[1] As required by the City Charter and the Stipulated Judgment in *Banales v. City of Santa Barbara*, cited below, the IRC comprises three judges who are not residents of Santa Barbara County: Chair Johnson, the Honorable Judge Elizabeth A. White (Ret.), and the Honorable Judge Abraham Khan (Ret.).

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A. Stipulated Order and Judgment in *Banales et. al. v. City of Santa Barbara, Santa Barbara Superior Court Case No. 1468167*

The 2015 Stipulated Order and Judgment in *Banales et. al. v. City of Santa Barbara, Santa Barbara Superior Court Case No. 1468167,* establishing by-district elections in Santa Barbara, which have been incorporated into the City Charter, Art. XIII, § 1301 by a November 2018 vote of the City's electors. ("Stipulated Judgment".) The Stipulated Judgment requires the post-2020 Census redistricting to be accomplished by a redistricting commission "in accordance with the criteria set forth in Paragraph 2, …." Paragraph 2 provides:

> 2. Electoral District Map. The [2015] electoral district map required [to be adopted by the City Council] in Paragraph 1 [of the stipulated judgment] shall be designed ***in accordance with applicable federal and State law***, including, without limitation, ***the CVRA***, the ***Constitutions of the United States and of the State of California***, the ***federal Voting Rights Act of 1965, as amended, 52 U.S.C. §§ 10301***, et seq., ***the criteria set forth in California Elections Code section 21620***, and such other criteria as have been held by the courts to be legitimate redistricting criteria. The intent of the Parties is the electoral district map shall include two electoral districts in which Latino eligible voters constitute a majority of the eligible voters according to the most recently available relevant estimates from the Census Bureau's American Community Survey, ***tailored to the greatest extent possible in a manner consistent with the applicable law*** described in the immediately preceding sentence, ***so as to address any issue of vote dilution***. (Emphasis added.)[2]

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[2] A stipulated judgment is a contract and must be construed under the rules applicable to any other contract. *In re Tobacco Cases I,* 186 Cal.App. 4th 42, 47 (2010). The principles are succinctly stated in *Jamieson v. City Council of the City of Carpinteria*, 204 Cal. App. 4th 755, 761-62 (2012). In construing a contract, a court must give effect to the parties' intentions. Civ. Code § 1636; *Harris v. Klure,* 205 Cal.App. 2d 574, 577 (1962). For purposes of ascertaining the parties' intent, the court first looks to the language of the contract itself. Civ. Code § 1637; *Pendleton v.*

The CVRA, as incorporated into Paragraph 2 of the Stipulated Judgment, requires the implementation of "appropriate remedies, including the imposition of district-based elections, that are tailored to remedy" a violation[3], but does not otherwise specify districting criteria.

Paragraph 2 of the Stipulated Judgment also expresses the parties' intent that the districting plan include two electoral districts in which Latino eligible voters constitute a majority of the eligible voters, tailored "to the greatest extent possible in a manner consistent with the applicable law" and with "the goal of addressing any issue of vote dilution". "Applicable law" is discussed below. Vote dilution occurs when "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. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).[4]

The 2015 districting plan included two electoral districts in which Latino eligible voters (i.e., citizens of voting age, or CVAP sometimes herein) constituted a majority according to the then-most

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Ferguson, 15 Cal. 2d 319, 323 (1940). If the language is clear and explicit, and does not involve an absurdity, it controls interpretation. Civ. Code § 1638; *WDT-Winchester v. Nilsson*, 27 Cal.App. 4th 516, 528 (1994). Strained interpretations or constructions must be avoided. *American Internat. Underwriters Ins. Co. v. American Guarantee & Liability Ins. Co*., 181 Cal.App. 4th 616, 629 (2010) Terms and conditions not found in the wording of the agreement cannot be added by the court. *Katz v. Haskell,* 196 Cal.App. 2d 144, 158 (1961).

[3] The Stipulated Order expressly disclaims liability. Paragraph 10 provides: "This stipulation pertains to disputed Claims under a statute, the CVRA, and is not intended to be, and shall not be construed as an admission by any Party of any violation of any statute or law or constitution, or any other improper or wrongful conduct."

[4] See discussion of *Thornburg v. Gingles*, below. Minority voters may have a claim for vote dilution under the "results" test of Section 2 of the federal Voting Rights Act if certain conditions are met, including that the minority groups can form the majority of the relevant voters in a single member district.

recently available relevant estimates from the Census Bureau's American Community Survey ("ACS").[5]

B. FAIR MAPS Act

Elections Code section 21620 et seq., referenced above in the Stipulated Judgment, Paragraph 2 was significantly amended in 2019.[6] At the time of the Stipulated Judgment, the statutory redistricting criteria applicable to Charter Cities were malleable and discretionary. See former Elec. Code § 21620.[7] The FAIR MAPS Act created several

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[5] Courts have considered cases in which the law imposed a non-retrogression standard requiring the maintenance of minority voting strength in a jurisdiction under changed factual circumstances. Notably, all parties to the *Banales* judgment agree that under the most recently available estimates from the Census Bureau's American Community Survey, the 2015 districting plan does not contain any majority Latino CVAP districts. Also, the parties agree it is not possible to create a map that includes two districts in which Latino eligible voters constitute a majority that is consistent with legal requirements. Only one is possible. Both districts are represented by Council members of Latino ethnicity and while there has not been statistical analysis of racial voting patterns, nobody disputes these Council members are the chosen candidates of Latino voters. Compare C*olleton County Council v. McConnell*, 201 F.Supp. 2d 618, 660 (D.S.C. 2002) (three-judge court) ("Under the benchmark plan, just over 50% of the total population of District 7 is black, but the current BVAP falls just below the 50% mark. Additionally, the district has lost so much population (-15.06% deviation) that the parties agree it can no longer be drawn with at least 50% total black population or black voting age population, without improper racial gerrymandering. However, all parties agree that the BVAP in District 7 is still high enough for it to be an equal opportunity district and the district is currently represented by a black incumbent."); see also *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009) (effective crossover voting districts in which minority voters are not the majority, can be evidence of an equal opportunity to elect for minority voters.); see also, *Id.* at 33 (Souter, J. dissenting) ("[T]hreshold population sufficient to provide minority voters with an opportunity to elect their candidates of choice is elastic, and proportions will likely shift in the future, as they have in the past.")

[6] Fair And Inclusive Redistricting for Municipalities And Political Subdivisions Act (Stats. 2019, Chapter 557; AB 849.)

[7] Former section 21620 provided in relevant part:

> After the initial establishment of the districts, the districts shall continue to be as nearly equal in population as may be according to the latest federal

new procedural and substantive requirements applicable to chartered cities in connection with redistricting.[8] In 2020, the Legislature further clarified the application of the FAIR MAPS Act to chartered cities in Assembly Bill 1276. The FAIR MAPS Act and AB 1276 adopted and prioritized detailed redistricting criteria for chartered cities.

II. DISCUSSION OF REDISTRICTING CRITERIA

A. Population Equality.

1. Constitutional Standard.

The FAIR MAPS Act provides that "the council districts shall be substantially equal in population as required by the United States Constitution". Federal constitutional law holds that a total deviation of less than ten percent from exactly equal population is presumed to be constitutionally valid and gives local redistricters latitude to pursue other legitimate and nondiscriminatory goals in the redistricting process. *Gaffney v. Cummings,* 412 U.S. 735 (1973); *Mahan v. Howell,* 410 U.S. 315 (1972). State law incorporates this constitutional standard. Cal. Elec. Code § 21621(a).

The 10 percent rule is not a safe harbor under the Constitution; while it creates a *presumption* of validity, that presumption can be overcome in the right circumstances. *See, e.g., Larios v. Cox,* 300 F. Supp. 2d 1320 (N.D. Ga. 2004), *aff'd*, *Cox v. Larios,* 542 U.S. 947 (2004) (< 10% deviation invalid, because it was caused by

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> decennial census or, if authorized by the charter of the city, according to the federal mid-decade census. The districts shall comply with the applicable provisions of the federal voting rights act of 1965, section 1973 of title 42 of the united states code, as amended. In establishing the boundaries of the districts, the council may give consideration to the following factors: (1) topography, (2) geography, (3) cohesiveness, contiguity, integrity, and compactness of territory, and (4) community of interest of the districts.
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> *1999 Cal AB 186, 1999 Cal Stats. Ch. 429*

[8] The City of Santa Barbara is chartered city organized and operating under the authority of Article XI, Section 3 of the California Constitution. (Gov. Code, §34101.)

illegitimate partisan discrimination). Nevertheless, such cases are rare, and the criteria prescribed by the FAIR MAPS Act are the types that the Supreme Court has held will justify deviations with the 10 percent window. See *Karcher v. Daggett,* 462 U.S. 725 (1983); *Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. 253 (2016).

2. Basis for Determining Population Equality.

State law sets the basis for determining population equality. See *Evenwel v. Abbott*, 578 U.S. 54, 60 n.3 (2016) (noting California's adjustment to the total-population numbers from the Census); *Assembly of Cal. v. United States Dep't of Commerce*, 968 F.2d 916, 918 n.1 (9th Cir. 1992) ("The states are not obliged to use official census data when drawing their state legislative districts, [citations omitted]".).

California law *requires* chartered cities to calculate population equality based on the most recent Census Bureau redistricting release, specifically citing Public Law 94-171, but as adjusted by the Statewide Database to reassign persons incarcerated in state prisons to their last know place of residence. Cal. Elec. Code § 21621(a); see Cal. Elec. Code § 21003.

B. Federal Voting Rights Act.

Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, prohibits electoral systems, including redistrictings, that dilute minority voting rights by denying minorities an equal opportunity to nominate and elect candidates of their choice.[9]

[9] Section 2 of the Voting Rights Act provides:

> (a) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b) of this section.

In practical terms, this means that if there is a population of minority voting-aged citizens in the City that is in a 1) geographically compact area that could elect a representative if concentrated in a district, and 2) the minority population has been politically cohesive, but 3) bloc voting by the majority has prevented minority voters from electing candidates of their choice, the City may be exposed to liability under section 2's "totality of the circumstances test" if it does not create a district in which the minority has a fair chance to elect a candidate of its choice. *Thornburg v. Gingles*, *supra*, 478 U.S. at 50-51.

In 2009, the U.S. Supreme Court clarified that a government entity drawing electoral districts has *no obligation* under Section 2 to draw a district that concentrates minority voters unless members of that minority group comprise more than 50% of the citizen voting age population of the district (*i.e.,* the eligible voters). *Bartlett v. Strickland,* 556 U.S. 1, 19-20 (2009).[10] The Court affirmed that a governmental

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> (b) A violation of subsection (a) of this section is established, if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivisions are not equally open to participation by members of a class of citizens protected by subsection (a) of this section 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.

[10] *See also Reyes v. City of Farmers Branch, Tex.,* 586 F.3d 1019, 1023-24 (5th Cir. 2009) (rejecting a claim that the omission of the word "citizen" from *Strickland* indicates that only a majority of *total* voting age population be shown, rather than a majority of *citizen* voting age population, is necessary); *Romero v. City of Pomona,* 883 F.2d 1418, 1425-26 (9th Cir. 1989) (affirming district court's dismissal of a section 2 claim where the district court found that "After taking into consideration factors such as eligible voting age and citizenship, the evidence conclusively establishes that neither Hispanics nor blacks can constitute a majority of the voters

entity may *choose* to draw minority influence or coalitional districts, but in doing so it is subject to the proscription on racial gerrymandering, discussed below. Any such district must be justified based on other, non-racial considerations, such as non-racial social and economic characteristics that identify the group as a community of interest (see discussion below).

The issues under section 2 are myriad[11]. In addition, at the margins, the conditions necessary to establish a right to section 2

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of any single member district[,]" and rejecting plaintiffs argument that total population should have been considered instead), *overruled in part on other grounds by Townsend v. Holman Consulting Corp.,* 914 F.3d 1136, 1141 (9th Cir. 1990).

[11] Of course, minority groups that are not able to form the majority in a single member district are entitled to protection from intentional discrimination. See *Bartlett v. Strickland, supra*, 556 U.S. at 20 & 24; *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006) ("*LULAC")*; *Garza v. Cty. of L.A.*, 918 F.2d 763, 769 (9th Cir. 1990) ("We hold that, to the extent that *Gingles* does require a majority showing, it does so only in a case where there has been no proof of intentional dilution of minority voting strength. We affirm the district court on the basis of its holding that the County engaged in intentional discrimination at the time the challenged districts were drawn.") The United States Department of Justice in reviewing redistricting plans takes the view that racial animus need not be the sole or even "a" motivating factor if finding intentional discrimination:

> A concurring opinion in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), provides a useful example of intentional discrimination without racial animus.
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> > Assume you are an anglo homeowner who lives in an all-white neighborhood. Suppose, also, that you harbor no ill feelings toward minorities. Suppose further, however, that some of your neighbors persuade you that having an integrated neighborhood would lower property values and that you stand to lose a lot of money on your home. On the basis of that belief, you join a pact not to sell your house to minorities. Have you engaged in intentional racial and ethnic discrimination? Of course you have. Your personal feelings toward minorities don't matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood. *Id*. at 778 n.1 (Kozinski, J., concurring in part and dissenting in part); see also *N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016).
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> […] So, for example, if a jurisdiction purposefully reduces minority voting strength in order to protect an incumbent elected official, the fact that

protection may "cross the line" into prohibited racial gerrymandering, discussed in the next section.

C. No Racial Gerrymandering.

This is not an express criterion in state law. Rather, it is a requirement of the U.S. Constitution as interpreted by the United States Supreme Court. This criterion generally prohibits using race as the "predominant" criterion in drawing districts, combined with the subordination of other considerations, unless such "predominance" is narrowly-tailored to advance a compelling state interest. *Shaw v. Reno,* 509 U.S. 630 (1993); *Bush v. Vera,* 517 U.S. 952 (1996); *Miller v. Johnson,* 515 U.S. 900 (1995); *Cooper v. Harris*, 137 S. Ct. 1455, 1463-64 (U.S. 2017); *Abbott v. Perez*, 138 S. Ct. 2305, 2314-15 (U.S. 2018). It does not, however, prohibit all consideration of race in redistricting. *Easley v. Cromartie,* 532 U.S. 234, 241 (2001).

Compliance with section 2 may appear to conflict with the Supreme Court cases holding that, if race predominates over other traditional redistricting criteria, the City may run afoul of the prohibition against racial gerrymandering. The Court, however, has repeatedly assumed—without ever having expressly held—that a race-based district may be created, if necessary, to avoid a violation of section 2. *See, e.g., Abbott*, 183 S. Ct. at 2315; *Cooper*, 137 S. Ct. at 1464; *Shaw*, 509 U.S. at 655-56; *Bush*, 517 U.S. at 952; *Growe v. Emison,* 507 U.S. 25, 37-42 (1993); *Miller*, 515 U.S. at 920-21.

For this exception to justify the use of race as the predominant factor in drawing a district, the redistricting entity must have had a "strong basis in evidence" at the time it drew the district for concluding that creating a racially based district was reasonably necessary to comply with section 2. *See Shaw v. Hunt,* 517 U.S. 899, 908-

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incumbent protection was a motivating factor – or even the primary motivating factor – does not mean a plan is lawful. See, e.g., *LULAC*, 548 U.S. at 440; *Garza*, 918 F.2d at 771.

U.S. Department of Justice, "Guidance under Section 2 of the Voting Rights Act, 52 U.S.C. 10301, for redistricting and methods of electing government bodies", Sept. 1, 2021, p. 10.

10 (1996); *Abbott*, 138 S. Ct. at 2315; *Cooper*, 137 S. Ct. at 1465; *Ala. Legislative Black Caucus v. Ala.*, 575 U.S. 254, 278 (2015); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017). In addition, the districts in question must be "narrowly tailored to comply with § 2." *Bush,* 517 U.S. at 982. This latter criterion requires that "the district must not subordinate traditional districting principles to race substantially more than is 'reasonably necessary' to avoid § 2 liability." *Id*. at 979. The Supreme Court has also clarified, over several cases decided in the last decade, that the "strong basis in evidence" that is required cannot be *pro forma* or rely on "rules of thumb," assumptions, or mechanical thresholds, as was generally done in the past; to justify the predominant use of race, actual analysis—typically in the form of racially-polarized voting analysis—is required.

On the other hand, if the district is not required to comply with section 2, for example because the minority group cannot form a majority in a single member district or polarized voting is not evident, using race as the predominant criterion in creating a district may run afoul of the prohibition against racial gerrymandering. However, the minority group may constitute a "community of interest" under traditional principles and be entitled to consideration under state redistricting mandates.

D. State Law Redistricting Criteria.

[1] Prioritization of criteria. State law requires consideration of criteria in the following order of priority (after compliance with federal law): (1) contiguity; (2) minimization of the division of communities of interest and neighborhoods; (3) identifiable boundaries that follow natural and artificial barriers, streets, and city boundaries; and (4) compactness.

[2] Contiguity. Under state law, contiguity is the highest priority criterion. Cal. Elec. Code § 21621(c)(1). It does not, however, define contiguity. For example, an unincorporated "island" could affect the contiguity of districts.

State law provides *some* further detail, though not much. It defines "contiguity" by exclusion, using two examples of non-contiguity:

"Areas that meet only at the points of adjoining corners are not contiguous. Areas that are separated by water and not connected by a bridge, tunnel, or regular ferry service are not contiguous." Cal. Elec. Code § 21621(c)(1). Of course, this still does not address unincorporated islands or many other aspects of contiguity.

"Contiguity" has long been a traditional districting criterion in California defined by facility of transportation and communication. The criterion was construed by the Supreme Court in *Wilson v. Eu*, 1 Cal. 4th 707 (1992) with a focus on connection through facility of transportation and communication. The courts presume that in enacting or amending statutes the Legislature is aware of, and legislates mindful of, existing judicial decisions. *Leider v. Lewis*, 2 Cal. 5th 1121, 1135 (2017).

In *Wilson*, the Court adopted a "functional" approach to the contiguity criterion viewing it in terms of supporting communities of interest. It accepted and endorsed the report of a panel of "Special Masters" who had been tasked by the Court with redrawing the State's congressional, assembly, senate and board of equalization districts following the Governor's veto of a legislatively adopted plan. That report discussed contiguity at some length. In particular, the reported noted: "It assumes meaning when seen in combination with concepts of 'regional integrity' and 'community of interest.' … In addition, 'social and economic interests common to the population of an area,' e.g., 'an urban area, a rural area, an industrial area or an agricultural area,' [citation] should be considered." *Wilson*, 1 Cal. 4th at 761.

Of particular note, the Masters criticized "misshapen districts which bypass contiguous populated territory to join distant areas of population together—in some instances without adequate roads or other means of communication." *Id.* at 765 (emphasis added.) [12]

[12] Generally, the California interpretation of "contiguity" is a "functional" interpretation considering transportation. Other courts have rejected such an approach as anachronistic "While ease of travel within a district is a factor to consider when resolving issues of compactness and contiguity, resting the constitutional test of contiguity solely on physical access within the district ***imposes***

[3] Communities of interest and neighborhoods. After contiguity, the next highest priority criterion under state law is the direction "to the extent practicable", to minimize the division of "communities of interest" and "neighborhoods". Cal. Elec. Code § 21621(c)(2).

State law provides, "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." Cal. Elec. Code § 21621(c)(2) (emphasis added). Using this definition, a minority groups of whatever size can constitute a "community of interest" entitled to priority in redistricting considerations, even if not entitled to protection under section 2 of the federal Voting Rights Act because too small to constitute a majority in a single member district. The division of such groups with common social or economic interests must be minimized under the FAIR MAPS Act. Such interests might include businesses, housing types, social organizations, recreational facilities, language fluency, immigration status, etc.

The identification of "communities of interest" is not a question to be addressed in the abstract. It is a jurisdiction-specific inquiry; "the identification of a 'community of interest,' a necessary first step to 'preservation,' requires insights that cannot be obtained from maps or even census figures. Such insights require an understanding of the community at issue, which can often be acquired only through direct and extensive experience with the day-to-day lives of an area's residents." *Favors v. Cuomo*, 2012 U.S. Dist. LEXIS 36910, *27 (E.D.N.Y. Mar. 19, 2012) (footnote omitted). Thus, while maps, census figures, local planning areas, etc., may all be useful in helping to identify communities

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an artificial requirement which reflects neither the actual need of the residents of the district nor the panoply of factors which must be considered by the General Assembly in the design of a district. Short of an intervening land mass totally severing two sections of an electoral district, there is no *per se* test for the constitutional requirement of contiguity. Each district must be examined separately." *Wilkins v. West*, 264 Va. 447, 463-64, 571 S.E.2d 100, 109-10 (2002) (emphasis added). California courts have not taken that approach.

of interest, the public testimony provided at the public hearings required by the Elections Code will often provide the best source of information regarding such communities.

[4] **Easily identifiable boundaries.** The third criterion in priority under state law is that "Council district boundaries should be easily identifiable and understandable by residents. To the extent practicable, council districts shall be bounded by natural and artificial barriers, by streets, or by the boundaries of the city." Cal. Elec. Code § 21621(c)(3).

These are traditional redistricting criteria and self-explanatory.

[5] **Compactness.** Compactness is the lowest priority criterion of those enumerated in state law. Cal. Elec. Code § 21621(c)(4). Various definitions have been employed by courts over the years. *See Covington v. N.C.*, 316 F.R.D. 117, 138 n.20 & 140-41 (M.D.N.C. 2016) (discussing various approaches to compactness). The FAIR MAPS Act, however, provides that "council districts shall be drawn to encourage geographical compactness in a manner that nearby areas of population are not bypassed in favor of more distant populations." Cal. Elec. Code § 21621(c)(4). Thus, the focus is primarily on the compactness of the *population*, rather than the compactness of the *shape* of the district.

Note, however, that this criterion is subordinate to the requirement that "the geographic integrity" of a local community of interest be kept whole, so its application would clearly be secondary where evidence reflects a geographically irregular community of interest. See *King v. State Bd. of Elections*, 979 F. Supp. 619, 624 (N.D. Ill. 1997) discussing and sustaining the infamous "earmuff district" as a "community of interest" ("Second, 'most of the Chicago/Cook County Hispanic population is clustered in two dense enclaves, one on Chicago's near northwest side and one on the near southwest side.' Third, the two enclaves are less than one mile apart at their closest point. Fourth, this separation resulted from exogenous physical and institutional barriers--specifically, the east-west Eisenhower Expressway, the University of

Illinois-Chicago Circle campus, and various major medical institutions--and thus did not indicate the existence of two distinct communities.")

Beyond that, relevant considerations include the availability and facility of transportation and communication between the people in a district, and between the people and their elected representatives. "Compactness does not refer to geometric shapes but to the ability of citizens to relate to each other and their representatives and to the ability of representatives to relate effectively to their constituency. Further, it speaks to relationships that are facilitated by shared interests and by membership in a political community, including a county or city." *Wilson v. Eu, supra*, 1 Cal. 4th at 762 (footnotes omitted).

This "functional view of compactness," however, should not be understood as a license to gerrymander. The shape of a district is important. In *Shaw v. Reno*, the U.S. Supreme Court stated that lack of compactness could evidence an attempt at racial gerrymandering. 509 U.S. at 647. The Court stated that "reapportionment is one area in which appearances do matter." *Id.* The Court warned that the creation of a district that includes members of the same race but who are otherwise widely separated by geographical and political boundaries bears an uncomfortable resemblance to "political apartheid." *Id. See also LULAC,* 548 U.S. at 433-35.

E. State Law Prohibition re Political Parties.

Historically, in the absence of a prohibition, legislative bodies have been understood to be able to consider "[a]ny other relevant criteria", so long as it is not discriminatory. *See Nadler v. Schwarzenegger*, 137 Cal. App. 4th 1327, 1339 (2006). State law, however, expressly provides that "[t]he council shall not adopt council district boundaries for the purpose of favoring or discriminating against a political party." Cal. Elec. Code § 21621(d).

F. Other Criteria – Incumbents.

Before this redistricting cycle, California Courts have generally permitted cities and counties to take "any relevant criterion" into account in redrawing district lines. *See Nadler v. Schwarzenegger*,

137 Cal. App. 4th at 1337-44 (2006). In *Griffin v. Board of Supervisors*, 60 Cal. 2d 751 (1964), the Supreme Court held that counties could rely on "additional considerations" beyond those identified in former Government Code § 25001—including considerations related to "police and fire protection, park and recreation services, street construction and maintenance, and the adoption and enforcement of local police measures such as those concerning sanitation, zoning, and the licensing of businesses." *Id*. at 756.

In 64 Ops. Cal. Atty Gen. 597 (1981), the Attorney General, construing the criteria in former Article XXI governing state legislative and constitutional redistricting, opined that "other criteria not in conflict with the constitution and laws of this state and of the United States may be 'appropriate' for consideration," *id*. at 609; that "[i]t is not feasible, of course, to scan the universe of 'other criteria' which may be appropriately considered under any given circumstances," *id*. at 618; and that "[a]ssuming that all constitutional criteria have been satisfied, the configuration of districts and consideration of appropriate nonconstitutional concerns are purely political questions," *id*.

No court has had the opportunity to rule whether that is still permissible under the FAIR MAPS Act.

Avoiding head-to-head contests between incumbents is a traditional and legitimate consideration in redistricting. *See, e.g., Tennant v. Jefferson County Comm'n*, 567 U.S. 758, 764 (2012); *Castorena v. City of Los Angeles,* 34 Cal. App. 3d 901, 913-14 (1973).

State law does not mention consideration of incumbents' residences as either permissible, or not.[13] Incumbents are mentioned in the context of "communities of interest": "[c]ommunities of interest do not include relationships with political parties, incumbents, or political candidates." Cal. Elec. Code § 21621(c)(2).

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[13] Instead, state law deals with this issue by providing that an incumbent serves out his or her term, even if redistricting means that he or she is no longer a resident of the district in which the councilmember was elected. *See* Cal. Elec. Code § 21626.

However, unlike the rules applicable to state legislative and congressional districts, and those drawn by local redistricting commissions, the Act does not explicitly forbid consideration of the residences of incumbents or candidates. Compare Cal. Const. Art. XXI, § 2(e), which governs congressional and state legislative redistricting, provides that "[t]he place of residence of any incumbent or political candidate shall not be considered in the creation of a map"; Elec. Code §§ 21534(b) & 21552(b), which govern the independent redistricting commissions for Los Angeles and San Diego Counties; Elec. Code § 23003(k), which governs redistricting by hybrid or independent commissions in local governments (other than charter cities).

Arguably, the fact that the Legislature declined to adopt such categorical language for charter cities, when the model already existed, suggests the consideration of incumbents is permissible, so long as it does not require the violation of any of the enumerated criteria. In fact, we would note that the traditional understanding of compactness as articulated by the California Supreme Court focuses on "the ability of citizens to relate to each other and their representatives and to the ability of representatives to relate effectively to their constituency." *Wilson*, 1 Cal. 4th at 762.

G. The Independent Redistricting Commission's Discretion.

The City's redistricting plan must comply with the statutory criteria in the order set by the Legislature in the FAIR MAPS Act. Nevertheless, the Commission retains significant discretion. Two of the areas in which the Commission retains discretion are discussed below.

First, State law does not expressly prohibit other good government considerations for redistricting from being considered, such as avoiding to the extent possible the deferral of the exercise of the right to vote because of rearrangement of district boundaries, or a minimal change approach provided all statutory criteria are met.

Second, within each prioritized category of criteria, the IRC retains discretion to make choices provided those choices are lawful and

not arbitrary or capricious, meaning the choices are applied fairly and supported by the record of the redistricting process. This may be significant in the Community of Interest criterion. State law requires that a properly established community of interest be "respected in a manner that minimizes its division." Importantly, the law does not prohibit any division of a community of interest, nor does it limit discretion in determining the groupings of communities of interest within the districting plan as a whole. And since a community of interest is a geographically specific inquiry, communities of interest often compete for territory. The Commission retains discretion to resolve that competition lawfully.

A legislatively adopted districting plan "is presumptively constitutional, and a party challenging the plan bears the burden of demonstrating it inevitably poses a total and fatal conflict with constitutional provisions." *Nadler v. Schwarzenegger*, 137 Cal. App. 4th 1327, 1332 (2006). In other words, a plaintiff must show "that no set of circumstances exists under which the enactment would be valid." *Id.* at 1338. "Courts will not declare such enactments invalid unless it appears the action taken was arbitrary, capricious or entirely lacking in evidentiary support. A court may not substitute its judgment for that of the legislative body merely because it doubts the wisdom of the action taken and must sustain the legislative enactment if there is any reasonable basis for it." *Griswold v. County of San Diego*, 32 Cal. App. 3d 56, 66 (1973) (citations omitted); see also *Nadler*, 137 Cal. App. 4th at 1338 (courts must uphold the plan "so long as the [council] could rationally have determined a set of facts that support it.").

Recently the Superior Court in San Luis Obispo County applied these principles to the Board of Supervisor's exercise of discretion in accommodating competing communities of interest (unification of the City of San Luis Obispo with Cal Poly v. combining small rural communities in a district) in the 2022 supervisorial redistricting plan. *SLO County Citizens For Good Government, Inc., et al. v. County of San Luis Obispo, et al.*, Superior Court of California in and for County of San Luis Obispo, Case No. 22CVP-0007 ("The Court is not persuaded that the Board misapplied the legal requirements of subdivision (c). Moreover, the Board received ample evidence addressing

the criteria in subdivision (c), and nothing in the record suggests that it acted arbitrarily or capriciously in weighing the evidence and arriving at its conclusions concerning these criteria. (See *Griffin, supra*, 32 Cal.App. 3d at pp. 66-67 [concluding the San Diego County Board of Supervisors did act arbitrarily or capriciously in evaluating the redistricting criteria set forth in former Government Code section 25001].) The Court concludes that Petitioners have not shown a probability of success on the merits with respect to the alleged violation of subdivision (c).".)

III. CONCLUSION.

The Independent Redistricting Commission's duties are governed by state and federal law, as well as the *Banales* Stipulated Judgment and City Charter. The IRC retains discretion within the law to apply statutory, common law, and practical considerations in reaching its decision regarding appropriate electoral district maps for the City of Santa Barbara.