

MEMORANDUM

TO: City of Pensacola Districting Commission

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DATE: October 12, 2021

RE: Redistricting Process

BACKGROUND

The City of Pensacola is currently undergoing the process of redistricting in accordance with the city charter following the 2020 Census Results. This memo will address some of the factors that will arise in this process including what impact race will have in this process.

ANALYSIS

There are basic principles as it relates to the redistricting process. Namely, the key principle is that of "One Person, One Vote". Adopted by the court in 1962, One-person, one-vote means that representative districts should roughly be the same size in population so that in selection of each representative, each voter's vote will count roughly on equal terms.¹ Supreme court cases that followed underscored the significance of drawing districts of roughly equal populations by requiring that it be done as nearly as may be practicable. State and municipal governments must make an honest "good faith effort" to construct districts of equal population sizes. **One person one vote requires population to be the most significant factor in redistricting per the 14th Amendment.**² Other important considerations include non-dilution of minority voting strength, census blocks, compactness, contiguity, preservation of communities of interest, and recognition of significant boundaries.

¹ Baker v. Carr, 369 U.S. 186(1962).

² Gray v. Sanders, 372 U.S. 368 (1963)

The United States Supreme Court (USSC) in applying the one person, one vote standard, has considered deviations between districts that are 10% or less to be "de minimis" or minimal. Deviations between districts that are greater than 10% are acceptable only if they can be justified "based in legitimate considerations incident to the effectuation of a rational state policy".³ The City Charter is more restrictive and requires that no such deviation may exceed five percent (5%) of the average population for all City Council districts according to the figures available from the most recent census⁴.

Another factor in redistricting that the City is juggling is that of race and its relation to the process. Specifically, the City aims to maintain two majority minority districts. When race is used as a factor of classification in state action, the Equal Protection Clause (14th Amendment) of the US Constitution will come into play. If race is used as a classification, it must meet the "Strict Scrutiny" test. Strict scrutiny is a constitutional standard if a law does or may infringe upon a fundamental constitutional right, such as the right to vote, in order to be ok, state must show that they have a "compelling state interest." This means that the law must be narrowly tailored to accomplish that interest, and the least restrictive means must be used to accomplish the interest. Additionally, Redistricting plans are required to comply with Section 2 of the Voting Rights Act or VRA. The act requires an analysis of changes in the district that may have the effect of diluting the strength of minority voters; districts can't be drawn in a way that dilutes or minimizes the voting strength of racial and other minorities. Section 2 of the VRA is violated if black and white voters are impeded such as to cause an inequality in the inability to elect their preferred candidates. Legitimate state interests of providing for compact districts of contiguous territory and maintaining the integrity of political subdivisions have been recognized. The goal is to create logical and compact geographic patterns.

³ Mahan v. Howell, 410 US 315 (1973).

⁴ City of Pensacola Charter, Section 6.08(d)(1).

Race consciousness does not lead inevitably to impermissible race discrimination. However, voting districts can't rely too heavily on race when re-drawing districts. Although the courts have stopped short of holding that 'the intentional creation of majority-minority districts, without more, always gives rise to an equal protection claim,' in the cases where it has been raised, the courts did determine the facts were sufficient to survive a motion to dismiss⁵. More recent cases have defined the limits and depths of the goal of representation of a minority group should roughly equal that of the minority group population.⁶ Courts have recognized that in the redistricting process legislative bodies should be aware of racial demographics, but that race should not "predominate" and subordinate traditional redistricting without a "compelling" reason. States and municipal governments may recognize racial factors, provided its action is directed toward some common relevant interest.⁷ For example, one factor that was looked at to see if districts were drawn for purely racial reasons or to dilute the minority vote has been the shape of the district. In *Bush v. Vera*, the shape of a district was so irregular it was determined it couldn't have been derived by any other means but to include or exclude a race.⁸ Districts should not be contorted geographically into irregular or non-compact forms to arrive at either "equal population" or "minority district" criteria.

Traditional redistricting principles to keep in mind include areas should be drawn as nearly equal in population as possible, areas should be contiguous, city should have rational configuration taking into account factors such as compactness and major roads, areas should not unnecessarily divide areas of concentrated minority populations or drastically discriminate against a political party, current areas should be maintained (retained) where feasible, and area boundaries should take into consideration communities of interest and keeping communities intact. It is also recommended that to the extent possible, districts should follow census blocks. Although, it is permissible to consider non-dilution of minority voting strength and party affiliation, race may not be the pre-dominant reason for drawing

⁵ *Shaw v. Reno*, 509 US 630 at 649 (1993)

⁶ *Shaw v. Hunt*, 517 US 899 (1996).

⁷ *Miller v. Johnson*, 515 US 900 (1995).

⁸ *Bush v. Vera*, 517 US 952 (1996).

district lines. Reapportionment authorities must be cognizant of the racial composition of a block of residents, district lines must not be drawn so as to dilute or enhance the vote of a racial minority. Racial gerrymandering, is a prohibited action of intentionally dividing districts on the basis of race.⁹

Regardless of whether it is being used positively or negatively, if race becomes a predominate reason for the decision-making, it is not permissible without a compelling state interest and sufficient narrow tailoring. A North Carolina redistricting case was overturned when in an effort to comply with Section 5 of the VRA, the state "created" a second majority-minority district, in another seemingly unrelated part of the state, in order to establish further equity to minorities. However, it was determined that race was still used predominantly, and the court held that the state had not met the strict scrutiny standard as the action was not narrowly tailored to accomplish the equity sought. This involved a district created with such an irregular shaped boundary no other explanation existed and it was undisputed that it was created predominantly based on race. The Court noted, the right to an undiluted vote belongs to an individual, not to the minority as a group, and the vote dilution suffered by individuals in a particular area is not remedied by creating a majority-black district somewhere else in the state.¹⁰

CONCLUSION

The overriding principle of the redistricting process is that of "One Person, One Vote." Factors to be considered include those outlined in the city charter. Additionally, factors such as race can be considered in the drawing of district boundaries. However, race cannot be the predominant factor used in the process. Any classification on race must withstand the strict scrutiny standard of the Equal Protection Clause. There must be a compelling state interest, the actions of the state must be narrowly tailored to accomplish that interest, and the least restrictive means must be used to further that interest. This in no way means that race isn't a permissible consideration in the redistricting process but that there are limits and parameters to its use.

⁹ Shaw v. Reno, 509 US 630 (1993).

¹⁰ Shaw v. Hunt, 517 US 899 (1996).