



November 4, 2021
City of El Cajon City Council
200 Civic Center Way
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*Transmitted via electronic mail
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cc: City of El Cajon City Clerk
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Re: City Council Redistricting Process

Dear Mayor and Members of the El Cajon City Council:

It has come to our attention that the City Council on October 26, 2021, voted to proceed to the draft map phase of the City's mandated decennial redistricting process without demographer services or the drafting of new maps for consideration. The Council plans instead to only consider its existing map, adopted in 2017. Even though the Council stated that it will continue to accept draft maps from the public, the gesture appears to be meaningless as the Council cannot properly analyze, and therefore consider, any maps that deviate from the City's current map without demographer services. Furthermore, multiple Councilmembers made statements at the Oct. 26, 2021 City Council meeting that made clear they intend to adopt the City's current map at the completion of the hearing process.¹

¹ During the October 26, 2021, El Cajon City Council meeting, Councilmembers stated that they believed the current district map was fine and that no alterations are needed because 1) the City just created its districts in 2017, 2) the 2020 Census data does not show major changes, in their opinion, 3) the district populations remain within the 10% across-district deviation threshold, and 4) people don't like to change districts. See Agenda Item 11 starting at 35:00:00, available at <https://elcajonca.new.swagit.com/videos/142353>. For example, Mayor Wells said at the beginning of the discussion, "For me, there has been little change. I like the map that we have because it cuts the City into four fairly equal parcels, and I don't see a need to change it." *Id* at 45:47. Mayor Wells later stated, "I'm confident we're going to end up choosing the map that we already have, and I can't see wasting the public's money [on demographer services] just to pacify and make people feel better about the process." *Id* at 1:14:34. In response, Councilman Ortiz stated, "I agree with you Mr. Mayor in that not a lot has changed.... We shouldn't be changing it if not much has changed." *Id* at 1:18:41. At the conclusion of the discussion, Councilmember Kendrick stated, "I like the idea of continuing with what we have right now just because there hasn't been much change or any new developments that have come into the City over the last few years and people remember what district they're in.... So, I'm good with the map we have right now." *Id* at 1:19:37.

California Common Cause is writing to inform the Council that its current course of action may violate the Fair and Inclusive Redistricting for Municipalities and Political Subdivisions (FAIR MAPS) Act.

The Council adopted its 2017 district map using 2010 U.S. Census data and 2017 American Community Survey demographic estimates and under a different legal landscape. Unlike this decennial redistricting cycle, in 2017 the Council was not explicitly required to apply ranked criteria and keep communities of interest together. In 2017, government bodies drawing district lines were only required to ensure equality of population and to avoid vote dilution. They were permitted to consider traditional redistricting principles but could ignore them completely and could place as much or as little weight as they wanted on other factors, including undemocratic factors such as protecting incumbents.

By contrast, today the FAIR MAPS Act requires the Council to satisfy a variety of complex priorities, including one – keeping communities of interest whole – that can only be met by hearing from and acting on community testimony and public map submissions. The Council, however, has functionally eliminated any meaningful consideration of how public testimony might result in changes to district lines, and any meaningful consideration of public map submissions, by foregoing demographer services that would allow them to analyze public testimony and public mapping submissions and, if necessary, draft new maps based on population and demographic shifts or Community of Interest testimony.

These concerns are not theoretical. Council has already received substantial public testimony from El Cajon’s Middle Eastern community,² which has advocated for alterations to current district boundaries to keep their community of interest whole. Given that keeping communities of interest whole is the second-ranked state-law criteria in the FAIR MAPS Act, this immediately suggests the current maps may not satisfy the requirements of state law.

We urge the Council to undertake redistricting properly, as hundreds of cities and all 58 California counties will do in 2021-2022. In so doing, the Council should accept and properly analyze maps submitted by the public and should produce its own draft maps that are based on community of interest testimony. Ultimately, we urge the Council to adopt a map that complies with state and federal law by keeping communities of interest together and by not diluting the vote of any racial or ethnic groups in the city.

I. Decennial Redistricting and Importance of Traditional Redistricting Principles

The Council appears to be under the impression that it can keep the City’s district maps the same because the population totals of the districts remain balanced following the 2020 Census.³ This reflects a misunderstanding of the decennial redistricting process. Equality of population is important but not the entire enterprise. Instead, equality of population is one factor contributing toward the larger goal of decennial redistricting: to “achiev[e] fair and effective representation for

² The City’s meeting summaries for its July 14, 2021 and September 8, 2021 pre-draft map redistricting hearings show that the vast majority of public testimony came from the Middle Eastern community and that many from the Middle Eastern community advocated for alterations to the current Council District lines. Additionally, the Programs Manager of the Majdal Center in El Cajon spoke on behalf of hundreds of the Majdal Center’s Arab members and El Cajon residents at the October 26, 2021 City Council meeting in support of a draft map they submitted that alters the City’s current district boundaries to better unify Arab communities of interest.

³ See October 26, 2021 City Council Agenda Report, Item 11., Section Next Steps: which states “Because the census results showed that the existing districts remain balanced, the City Council has the option to simply retain the existing map without preparing and holding hearings on alternative maps.”

all citizens.” *Reynolds v. Sims*, 377 U.S. 533, 565-56, 560-61 (1964). The purpose of periodic redistricting is to “maintain[] a reasonably current scheme of legislative representation” that reflects not just population changes, but also reflects communities of interest and any changes over time in other demographic trends. *See id.* at 583-84.

Line drawers use a series of tools in addition to equality of population to draft maps that “observe and advance neutral democratic values.” *See Bethune-Hill v. Va. State Bd. of Elec.*, 141 F. Supp. 3d 505, 534-35 (E.D. Va. 2015), *affirmed in part, vacated in part*, 137 S. Ct. 788 (2017). Indeed, line drawers are permitted to deviate from perfect equality of population precisely to accommodate these principles. *See Reynolds*, 377 U.S. at 578-79 (indicating when divergence from the strict population standard is constitutionally permissible). The redistricting priorities that courts have made clear are at play, other than simple population balance, include communities of interest, compactness, contiguity, and following natural, artificial, and political subdivision boundaries. Cal. Elec. Code § (c); *see also Evenwel v. Abbot*, 136 S. Ct. 1120, 1124 (2016) (listing traditional redistricting principles). Contiguity and compactness, for example, facilitate political organization, electoral campaigning, and constituent representation by binding geographic communities of interest together. *Karcher v. Daggett*, 462 U.S. 725, 756 (1983) (noting importance of compactness); *Bethune-Hill*, 141 F. Supp. 3d at 536-37 (noting importance of contiguity). Courts in turn have found that preserving neighborhoods and “communities of interest is important because the sense of community derived from established governmental units tends to foster effective representation.” *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 690 (D. Ariz. 1992) (quotations omitted). Without these criteria, line drawers would be free to engage in “indiscriminate redistricting” which would be “little more than an open invitation to partisan gerrymandering.” *Reynolds*, 377 U.S. at 578-79.

While courts have for decades uplifted the importance of traditional redistricting principles, they have spoken disapprovingly of political criteria such as incumbency protection and partisan gerrymandering. *See, e.g., Johnson v. Miller*, 922 F. Supp. 1556, 1565 (S.D. Ga. 1995) (three-judge court) (noting that incumbency protection is a politicized factor); *Ariz. State Leg. v. Ariz. Indep. Redist. Com’n*, 576 U.S. 787, 791 (2015) (noting that partisan gerrymanders “are incompatible with democratic principles”) (quotations omitted). Courts also recognize that some incumbents are improperly motivated to keep district lines the same precisely to protect their seats. *Evenwel*, 136 S. Ct. at 1123 (observing the problem that legislators have “scant incentive to adopt new maps that might put them out of office”); *Reynolds*, 377 U.S. at 583 (recognizing that even redistricting only once a decade has drawbacks because it leads “to the development of resistance to change on the part of some incumbent legislators”). Because incumbency protection and partisan gerrymandering defy the basic principle that “voters should choose their representatives, not the other way around,” *Ariz. State Leg.*, 576 U.S. at 824, courts have subordinated these criteria to traditional redistricting principles, *see, e.g., Johnson*, 922 F. Supp. at 1565 (subordinating incumbency protection to communities of interest); *Ga. State Conf. of the NAACP v. Fayette Cnty. Bd. of Com’rs*, 996 F. Sup. 2d 1353, 1363 (N.D. Ga. 2014) (noting that “when incumbent protection has been considered, courts have routinely treated this principle as a *distinctly subordinate* consideration to the other traditional redistricting principles”) (quotations excluded, emphasis in original). The Council must do the same this cycle.

II. New State Legislation and the Case Law on Discretionary vs. Mandatory Redistricting Criteria

Although courts have highlighted the importance of traditional redistricting criteria, these criteria were discretionary for decades, including in 2017 when El Cajon transitioned to a district-based election system. *Compare Miller v. Bd. of Super. of Santa Clara Cnty.*, 63 Cal. 2d 343, 345 n.1

(1965) (listing discretionary criteria in place for county redistricting at the time), *with* Cal. Elec. Code § 21621 (2019) (amended 2020) (listing the same discretionary criteria for city redistricting).

In 2019, however, the California Legislature passed the FAIR MAPS Act, requiring cities to draw council districts that ensure substantial equality of population and comply with the federal Voting Rights Act, and then, in ranked order of priority: create districts that are geographically contiguous, keep communities of interest and neighborhoods whole, use boundaries that are easily identifiable and understandable by residents, and are compact. Cal. Elec. Code § 21621(c). The FAIR MAPS Act further requires the Council to engage in a robust outreach and education campaign to encourage public participation and solicit testimony about communities of interest in the City. *Id.* §§ 21627, 21627.1, 21628.

Notably, preserving existing political district lines has never been listed as a discretionary factor in state law. *See Miller*, 63 Cal. 2d at 345 n.1 (listing discretionary criteria in place for county redistricting in 1965, which did not include preserving existing districts); Cal. Elec. Code § 21621 (2019) (amended 2020) (listing the same discretionary criteria for city redistricting).⁴ Nor does the FAIR MAPS Act list this criterion as one of the ranked, mandatory factors. *See* Cal. Elec. Code § 21621. Instead, the Act explicitly prohibits many of the practices that animate the desire to keep existing lines largely the same. For example, the FAIR MAPS Act prohibits the Council from adopting a district map “for the purpose of favoring or discriminating against a political party.” *Id.* § 21621(d). The FAIR MAPS Act also excludes incumbency protection and continuity of representation from the ranked criteria and is instead clear that “[c]ommunities of interest *do not* include relationships with political parties, incumbents, or political candidates.” Cal. Elec. Code § 21621(c)(2) (emphasis added).

Case law is clear on what courts do with maps that disregard mandatory criteria to protect incumbents. In *Garza v. County of Los Angeles*, the Ninth Circuit upheld a district court’s rejection of the 1981 Los Angeles County supervisorial district map because supervisors had prioritized incumbency protection even though that cracked a cohesive Latino community of interest. 918 F.2d 763, 771 (9th Cir. 1990). In *Miller*, the California Supreme Court rejected a supervisorial map because it was “readily apparent that the factors on which the board relie[d] in apportioning the districts [were] not the fundamental factors prescribed” in state law. 63 Cal. 2d at 349. Instead of following or considering state law factors, the board’s draft map was “primarily compelled by a desire and the result of an effort to preserve traditional political subdivisions,” a factor absent from state law at the time. *Id.* at 349. A court would likely reject an El Cajon map that prioritizes preserving existing lines, a factor absent from the FAIR MAPS Act, over mandatory factors, such as keeping communities of interest whole.

III. Council’s Obligations Under State Law

In adopting the FAIR MAPS Act and making traditional redistricting criteria mandatory, the California Legislature took the firm position that municipalities may not simply examine district lines every ten years to address malapportionment. Instead, line drawers must conduct a thorough process that, in the end, results in a map that satisfies a variety of priorities. The City has a legal obligation to draw Council districts that are contiguous, keep communities of interest and neighborhoods whole, use boundaries that are easily identifiable and understandable by residents, and are compact. Cal. Elec. Code § 21621(c).

⁴ State law in 2019 provided the following: “In establishing the boundaries of the council districts, the council may give consideration to all of the following factors: (1) Topography. (2) Geography. (3) Cohesiveness, contiguity, integrity, and compactness of territory. (4) Neighborhoods. (5) Community of interests of the council districts.” Cal. Elec. Code § 21621 (2019) (amended 2020).

The Council has heard significant public testimony from the City's Middle Eastern population – a community of interest with shared cultural, religious, and linguistic identities, a shared immigration history, and shared values – who have advocated for changes to the City's current district boundaries to keep their community of interest whole. The Council's decision to not consider alternative maps is thus concerning, as it suggests the Council has prioritized the maintenance of existing district lines over communities of interest, the second-ranked state-law redistricting criteria. The situation mirrors the cases cited above, in which courts invalidated maps that prioritized incumbents and existing lines over mandatory redistricting criteria.

To avoid violating the law and to ensure fair and effective representation in El Cajon, the Council must dispense of its misguided goal to maintain existing lines as much as possible. Instead, the Council must solicit and listen to public testimony with an open mind, map communities of interest in the City, supplement its understanding of the City's diversity and characteristics through other sources, like American Community Survey data, and work with consultants and demographers to draft a map that honors the City's communities and follows mandatory, ranked criteria. If the Council fails to comply with such requirements, it exposes itself to legal liability.

* * *

Redistricting inherently involves changes in current district lines. These changes can be large or small, depending on how representative the lines were during the City's initial districting, how much new community of interest testimony the City receives, how drastic changes to the City's population and neighborhoods have been since the last drawing of the district map, and whether the legal rules of the redistricting process have changed since that time. We urge the Council to recognize the inevitability of change, to follow the FAIR MAPS Act, and to engage in a good faith effort to adopt a new, fair City Council district map based on community participation. If you have any questions, please feel free to contact me at jstein@commoncause.org.

Sincerely,

A handwritten signature in black ink that reads "Jonathan Stein". The signature is written in a cursive, flowing style.

Jonathan Mehta Stein
Voting Rights Attorney and Executive Director
California Common Cause