MEMORANDUM

To: Virginia Redistricting Commission

From: Legal Counsel (Chris Bartolomucci, Kareem Crayton, Gerry Hebert, Bryan Tyson)

Subject: Voting Rights Act Legal Primer

Date: September 12, 2021

FROM ALL COUNSEL:

Background on Section 2 of the Voting Rights Act

Section 2 of the Voting Rights Act[1] applies nationwide. Congress passed Section 2 to help effectuate the Fifteenth Amendment's guarantee that no citizen's right to vote shall "be denied or abridged . . . on account of race, color, or previous condition of servitude."[2] In 1982, the act was amended in response to the Supreme Court's decision in *City of Mobile v. Bolden*, where the Court held that in order to challenge discriminatory voting practices, plaintiffs had to prove intentional discrimination on the basis of race, rather than simply demonstrating that a policy had a racially discriminatory effect.[3] In response to this decision, Congress amended the act to allow liability premised upon discriminatory impact rather than discriminatory intent. Section 2 prohibits what is referred to as "minority vote dilution"—the minimization or canceling out of minority voting strength. Section 2(a) of the Act prohibits any electoral practice or procedure that "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 group]."[4] Section 2(b) specifies that the right to vote has been abridged or denied if,

> based on a totality of circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a [racial or language minority group] in that its members have less opportunity than other members of the electorate to participate in the political processes and to elect representatives of their choice.[5]

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[1] 42 U.S.C. § 1973.
[2] U.S. Const. amend. XV.
[3] Other factors included such evidence as a history of discrimination, divisive campaign efforts, and how many minority legislators had been elected in a region.
[4] 42 U.S.C. § 1973(a).
[5] *Id*. § 1973(b).

Section 2 thus prohibits any practice or procedure that, interacting with social and historical conditions, impairs the ability of a protected minority group to elect its candidates of choice on an equal basis with other voters.

How to Avoid a Section 2 Claim in Redistricting

In the context of redistricting, where Section 2 has been applied most frequently, the law poses the following question: When and how must a State draw district lines to avoid diluting the voting power of a protected minority group?[6] Or, more specifically, when must a State create "majority-minority" districts—districts in which a minority group constitutes an effective voting majority?

On its face, Section 2 does not provide a clear framework to answer these questions. In 1986, in *Thornburg v. Gingles*,[7] however, the Supreme Court tried to articulate such a framework. Under the test created in *Gingles*, the first step in determining whether a majority-minority district is mandated by Section 2 is to ask the following three questions:

(1) Is the minority group "sufficiently large and geographically compact to constitute a majority" in a single-member district?[8]

(2) Is the minority group "politically cohesive?"

(3) Does the white majority vote "sufficiently as a bloc to enable it—in the absence of special circumstances…—usually to defeat the minority's preferred candidate?"[9]

If the answer to any of these questions is "No," then Section 2 does not require the state to create a majority-minority district.

A negative answer to first prong of the *Gingles* test means that a minority group or combined minority groups could not have constituted an effective voting majority in any reasonably drawn alternative district, and therefore the minority's voting preferences could not be satisfied under any plan. A negative answer to either the second or the third prongs means that there is no "legally significant racially polarized voting" to be remedied—either minority voters have not sufficiently coalesced behind a particular set of candidates or white voters have not usually voted

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[6] At times, for brevity's sake, this memo refers to a "protected minority group" or a "minority group" or a "minority" as shorthand for a racial- or language-minority group whose members are protected by the Voting Rights Act.

[7] 478 U.S. 30, 50 (1986).

[8] The test enunciated in *Gingles* originally applied only to challenges brought against multi-member districting plans. In 1993, however, the Court made clear that the three-pronged *Gingles* test applies to single-member districting schemes as well. *See Growe v. Emison*, 507 U.S. 25, 40 (1993).

[9] *Gingles*, 478 U.S. 30, 51. The second and third prongs together are generally referred to as "racially polarized voting."

to defeat the candidates preferred by minority voters. In *Gingles*, the Supreme Court declared that one purpose of the inquiry into racially polarized voting is "to ascertain whether minority group members constitute a politically cohesive unit. . . . A showing that a significant number of minority group members usually vote for the same candidates," the Court explained, "is one way of proving the political cohesiveness necessary to a vote dilution claim."[10] As the Supreme Court has explained, satisfying the first and second prongs together "establish[es] that the minority has the potential to elect a representative of its own choice in some single-member district," and satisfying the second and third prongs together "establish[es] that the challenged districting [plan] thwarts a distinctive minority vote by submerging it in a larger white voting population. . . . Unless these points are established, there neither has been a wrong nor can be a remedy."[11]

The *Gingles* requirements do not complete courts' Section 2 inquiries. Even if the answer to all three *Gingles* questions is "Yes," the court must still determine whether, under the "totality of circumstances," the minority group has less opportunity than whites to participate in the political process and to elect representatives of its choice. Only when all these conditions are met must a minority opportunity district be created. Although courts have considered a variety of circumstances in making this determination,[12] one factor is particularly important: the "proportionality" or lack thereof, between the number of majority-minority districts and the minority's share of the state's relevant population. It would be very difficult, for example, for a minority group to win a Section 2 case if it constituted 20 percent of the population but effectively controlled 30 percent of the state's districts.

The Supreme Court analyzed the proportionality factor in 1994 in *Johnson v. De Grandy*.[13] The Court assumed for the purposes of deciding *De Grandy* that all three of the *Gingles* factors were satisfied, yet it rejected the plaintiffs' Section 2 claim. As the Court explained, the totality of circumstances did not support a finding of dilution because the "minority groups constitute effective voting majorities in a number of

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[10] *Gingles*, 478 U.S. 30, 56.

[11] *Growe v. Emison*, 507 U.S. 25, 40–41 (citations omitted).

[12] For example, courts consider the following factors, derived from the Senate report accompanying the 1982 amendments to the Voting Rights Act: the extent of any history of official discrimination with respect to the minority's right to vote; the extent to which potentially discriminatory voting practices or procedures, like majority voting requirements or anti–single shot provisions, have been used; if there is a candidate-slating process, whether minority candidates have been denied access to it; the extent of any discrimination against minorities in education or other areas, which might hinder effective participation in the political process; whether political campaigns have been characterized by racial appeals; the extent to which minority group members have been elected to public office; whether there is a lack of responsiveness on the part of elected officials to the minority groups' particularized needs; and whether the policy supporting the use of the voting policy or practice is tenuous. *Gingles*, 478 U.S. 30, 36–38 (citing the Senate report).

[13] 512 U.S. 997 (1994).

. . . districts substantially proportional to their share in the population."[14] Section 2, in other words, does not mandate that a state create the maximum possible number of majority-minority districts.[15] Although rough proportionality does not automatically protect a state from liability under Section 2, it is a strong "indication that minority voters have an equal opportunity, in spite of racial polarization, 'to participate in the political process and to elect representatives of their choice.'"[16] As Justice O'Connor explained in a separate opinion, proportionality "is always relevant evidence in determining vote dilution, but it is never itself dispositive."[17]

Although these cases provide a helpful framework for analyzing potential Section 2 claims, many issues concerning the interpretation of Section 2 remain unresolved. Important aspects of these cases were disputed amongst the Justices, and changes in the Court's composition may make it unwise to assume that what has been supported in the past would necessarily receive similar backing today. Even setting aside the changes in the Court's composition, many critical issues have simply never been fully addressed by the highest Court, or have been discussed only in the vaguest terms providing only murky guidance. With respect to the second and third *Gingles* prongs, there are major questions about what constitutes "legally significant racially polarized voting" and what evidence should be used when analyzing it. As for the "fourth prong" enunciated in *De Grandy*, the Court has left open a number of questions relating to the proper measure of "substantial" or "rough" proportionality.

As lower courts have stepped in to fill these voids, they have given different—even conflicting—answers to many of these questions. It is therefore impossible to give a definitive account of what Section 2 requires in every State and in every conceivable circumstance. There is no substitute for consulting the Section 2 case law that applies within one's particular jurisdiction. It is possible, however, to broadly discuss some of the important issues that one should consider when drawing minority districts and how to do so to avoid violating Section 2.

What Constitutes a Majority?

The first prong of the *Gingles* test asks whether the minority group is "sufficiently large . . . to constitute a [] majority" in a district. But the *Gingles* Court also repeatedly referred to "effective voting majorit[ies]."[18] As a result, there has been some disagreement among lower courts as to the proper definition of "majority" for purposes of *Gingles'* first prong. Can a group constitute an "effective voting majority" even if it accounts for less than 50 percent of the population in a district? Conversely,

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[14] *Id*. at 1024.

[15] *Id*. at 1017.

[16] *Id*. at 1020 (citing Voting Rights Act, 42 U.S.C. § 1973).

[17] *Id*. at 1025 (O'Connor, J., concurring).

[18] See *Thornburg v. Gingles*, 478 U.S. 30, 38 (1986).

can a group account for more than 50 percent of the population but still not constitute an "effective voting majority" capable of electing their preferred candidates over the opposition of most of the white voters in the district?

The Court answered the first question in *Bartlett v. Strickland*.[19] Resolving a question that had divided the lower courts for many years, the Court held that in order to satisfy the first *Gingles* factor, a minority group must constitute more than 50 percent of the voting-age population in a proposed majority-minority district. Concerned with developing a judicially manageable standard, the Court held that Section 2 of the Voting Rights Act requires that minority voters must make up more than 50 percent of the voting age population in a district to qualify as a group capable of electing a candidate of its choice. The Court, with Justice Kennedy writing for the majority, held that "the majority-minority rule relies on an objective, numerical test: Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area? This rule provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with § 2."[20]

As a result, if a minority group constitutes less than 50 percent of the population in a hypothetical district, it cannot prevail on a Section 2 claim, even if the group would be able to regularly elect the candidate of its choice with the reliable support of "cross-over" white voters. Under *Bartlett*, while legislators remain permitted to draw such cross-over districts, they are not required by the Voting Rights Act to do so. *Bartlett* made clear that a numerical majority is a necessary condition for satisfying *Gingles*' first prong, but it did not resolve the question of how much beyond a mere numerical majority-minority voters must be in a district in order to elect their candidate of choice. If, for example, white voters are more cohesive than black voters, the threshold for an effective majority could be substantially greater than 50 percent. As one court explained, an opportunity district is "one in which a black majority has a practical opportunity to elect the candidate of its choice. A simple majority is not always sufficient to provide this opportunity."[21]

Similarly, in *LULAC v. Perry*[22] the Court found that influence districts are not required by section 2. These districts are areas where a minority group, although too small to control an election, is of sufficient size to "influence" the politics of the district in some way or to influence the representative who will ultimately be elected from the district, even though most members of the minority group will have voted against that representative. The Court found that "while the presence of districts 'where minority voters may not be able to elect a candidate of choice but can play a

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[19] *Bartlett v. Strickland*, 129 S. Ct. 1231 (2009).
[20] *Id.* at 1245.
[21] *African Am. Voting Rights Legal Defense Fund, Inc. v. Villa*, 54 F.3d 1345, 1348 n.4 (8th Cir. 1995).
[22] *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006).

substantial, if not decisive, role in the electoral process' is relevant to the § 5 analysis, the lack of such districts cannot establish a § 2 violation."[23]

Compactness

In addition to asking whether a minority group is "sufficiently large," the first prong of the *Gingles* test also asks whether a minority group is "sufficiently . . . geographically compact" to constitute a majority in a new district. In *LULAC v. Perry*, the Supreme Court clarified that *Gingles*' compactness requirement applies to plaintiffs and states alike. As part of a challenged redistricting plan, Texas had dismantled a pre-existing, geographically compact majority-minority Latino congressional district, and replaced it with a district that stretched more than 300 miles that combined two geographically separated groups of Latinos with divergent needs and interests. *LULAC* held that, just as a minority group must demonstrate they are sufficiently large and geographically compact to constitute a majority in a district, a state similarly cannot dismantle a compact majority-minority district and remedy the Section 2 violation by replacing it with "a district that combines two far flung segments of a racial group with disparate interests."[24]

For some time, there have been two competing definitions of compactness. Some advocates think of "compactness" as a question of geometry. These advocates, whether they use a mathematical formula or they "eyeball" it, analyze a district's compactness in terms of its shape on a map. In particular, they are likely to focus on the regularity or jaggedness of the district's edge and the degree to which the district's territory is dispersed around its center. The smoother a district's border, and the more its shape resembles a square or a circle rather than a spider or a string bean, the more likely it will be deemed "compact" under this view.

Others take a more "functional" approach to compactness, which analyzes the distribution of a district's population in relation to such features as topography (mountain ranges, rivers, bays, etc.), lines of communication and transportation, recognized neighborhoods, and local government boundaries. This approach asks whether candidates or legislators could explain to their constituents the boundaries of their districts in simple, common-sense terms, based on recognizable geographic referents. An example might be a district containing a particular and easily recognized part of a county with discernable borders. Under a functional notion of compactness, the question is not whether the district is aesthetically pleasing when viewed "vertically" (as on a map), but whether it makes sense to the person on the street, looking "horizontally."

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[23] *LULAC*, 548 U.S. at 446 (internal citations omitted).
[24] *Id*. at 433.

Compactness is measured differently in Section 2 cases than in racial-gerrymandering cases brought under the Fourteenth Amendment. In racial-gerrymandering cases, the Court has at times referred to geometric shape and objective measures of jaggedness and dispersion, and at other times focused on whether the use of race subordinated other more functional concerns, such as respect for city and county lines and for recognizable communities of interest. But *LULAC* held that—unlike the racial-gerrymandering cases, which focus on the shape of the district—the "first *Gingles* condition refers to the compactness of the minority population, not to the compactness of the contested district."[25]

The Supreme Court in *LULAC* noted that "no precise rule has emerged governing § 2 compactness" but emphasized the need to recognize several of the non-geographic factors. For example, the Court emphasized the importance for compactness of shared political and cultural interests in addition to geographic concerns. The compactness standard of the first *Gingles* prong, therefore, includes both geographic factors, traditional non-geographic components like historical boundaries and man-made elements, and an awareness of communities of interest, even within recognized minority groups.[26]

ADDITIONAL LEGAL BACKGROUND FROM DEMOCRATIC COUNSEL

To ensure that the Commission's plan does not violate Section 2, the Commission needs to identify those existing Senate and House of Delegate districts those districts in which a minority group constitutes an effective voting majority. Such districts should be analyzed to ensure that racially polarized voting exists in the district and that the minority group is "sufficiently large and geographically compact to constitute a majority" in a single-member district. As noted above, this first prong of *Gingles* is met if a minority group or combined minority groups constitute an effective voting majority in any reasonably drawn alternative district.

ADDITIONAL LEGAL BACKGROUND FROM REPUBLICAN COUNSEL

Compliance with Section 2 matters because, if the Commission "separates [] citizens into different voting districts on the basis of race," without sufficient justification, its maps violate the Equal Protection Clause.[27] The Supreme Court has also explained that "The harms that flow from racial sorting 'include being personally subjected to a racial classification as well as being represented by a legislator who believes his

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[25] 548 U.S. 399, 433 (quotation marks omitted).
[26] *Id.*
[27] *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017) (quoting *Miller v. Johnson*, 515 U. S. 900, 911 (1995)).

primary obligation is to represent only the members of a particular racial group.'"[28] While map-drawers are always aware of racial information,[29] map-drawers cannot subordinate traditional redistricting criteria below racial considerations because then race predominates.[30]

Drawing districts required by Section 2 is generally considered to be a sufficient reason to allow race to take a more significant role in the decision making process about the location of particular district boundaries.[31] But that government interest only applies when the districts are actually required by Section 2.

Further, the Section 2 analysis proceeds for each redistricting cycle and does not consider maintaining existing performing districts apart from the *Gingles* inquiry. While preclearance under Section 5 prohibited "retrogression," or not decreasing the number of majority-minority districts, it no longer applies to Virginia.[32]

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FROM ALL COUNSEL:

We recognize that the above legal principles show that the law of redistricting is complex and fact-intensive. The following sources of factual data will guide the Commission through this process: the 2020 Census; the racially polarized voting analysis conducted by Dr. Maxwell Palmer; taking past election results and applying them to newly created districts to determine if the new districts provide minority voters with an opportunity to elect their candidates of choice.

A few examples may help explain how to apply these legal principles in protecting existing minority opportunity districts under Section 2 and when the law requires the creation of new minority opportunity districts. Each example is provided, then comments from each group of counsel is provided beneath it.

1. Assume that a current senate of House of Delegate district is majority black in voting age population. If such district has been identified as one in which there is racially polarized voting, then the three *Gingles* prongs have been met and the

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[28] *Id.*

[29] *Shaw v. Reno*, 509 U. S. 630, 646 (1993).

[30] *Bethune-Hill*, 137 S.Ct. at 797.

[31] The Supreme Court has repeatedly assumed, without deciding, that compliance with federal statutory law is a compelling government interest that addresses the race-focused nature of the decision making. *See, e.g., Ala. Legislative Black Caucus v. Alabama*, 575 U.S. 254, 278 (2015).

[32] *Shelby County v. Holder*, 570 U.S. 529 (2013) did away with the coverage formula that applied Section 5 to particular states and political subdivisions.

district must be retained in any new plan in a manner that black voters continue to have an effective voting majority (*i.e.*, they can elect their candidates of choice).

FROM DEMOCRATIC COUNSEL:

Note that this does not necessarily require that the Commission maintain the district as a majority black VAP district. Rather, the district as redrawn by the Commission must continue to provide black voters with an effective voting majority.

FROM REPUBLICAN COUNSEL:

All three *Gingles* prongs must be met for both determining the maintenance of the district and for the new district that will be drawn. If a single racial group cannot constitute the majority in a new district, then the district is not required by Section 2 and cannot be drawn on the basis of race.

2. Assume that in a current Senate or House district black voters constitute 45% of a district's voting age population (VAP) and racially polarized voting exists. Assume further that the district could easily be redrawn in a manner that black voters would be a majority of the VAP (in other words, that black voters would be an effective voting majority in a reasonably drawn alternative district). Thus, all three *Gingles* preconditions would be met.

FROM DEMOCRATIC COUNSEL:

This hypothetical 45% black VAP district must also be maintained as a district in which black voters would be an effective voting majority to avoid a violation of Section 2. Note, that this does not require the redrawing of the 45% black district in a manner that converts it to a majority black VAP district. If a district at 45% black VAP is already providing black voters with effective control of a district, increasing the black VAP in such a district could constitute "packing", another form of vote dilution.

FROM REPUBLICAN COUNSEL:

If the district cannot be drawn with 50% or more Black VAP, it is not required by Section 2. If the district at 45% Black VAP is already providing Black voters with effective control of a district, the Commission can choose to maintain that district, but is not required to draw it by Section 2. Packing claims under Section 2 cannot succeed unless the single racial category is greater than 50%.

3. Assume that a new district is drawn and it is 40% black and 15% Hispanic (55% minority).

> ### FROM DEMOCRATIC COUNSEL:
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> If the geographic area of this new district is one in which Dr. Palmer notes has exhibited racially polarized voting (*i.e.,* minority voters are politically cohesive (generally support the same candidates)), then the Commission is legally required to draw such a district to avoid violating Section 2.
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> ### FROM REPUBLICAN COUNSEL:
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> Under *Bartlett*, if a single racial category is less than 50%, then Section 2 does not require that district to be drawn, even if racially polarized voting exists. While the Commission can certainly choose to draw a district like this, it is not *required* to do so by Section 2 and thus cannot allow race to drive the decision making to create a 55% minority district that involves coalitions among minority groups.

FROM BOTH COUNSEL:

4. What if the Commission's map-drawers create a district that is 40% black and 60% white (and that it is not possible to create a district that is greater than 50% black in this area)? Assume further that Dr. Palmer's analysis shows that black voters are completely cohesive at a 100% level. Assume Dr. Palmer's analysis further shows further that 40% of the whites in this area vote for minority (*i.e.*, black) candidates. In such a district, black voters would be able to elect their candidate of choice due to the support of cross-over voting by white voters. In this example, the Commission is not <u>required</u> to draw such a cross-over district under Section 2 because *Bartlett v. Strickland* made clear that a numerical majority is a necessary condition for establishing *Gingles'* first prong. Nevertheless, the Commission is <u>permitted</u> to draw such a district if it makes the policy choice to do so.

ADDITIONAL COMMENT FROM REPUBLICAN COUNSEL:

This raises one issue that is important: If legally significant racially polarized voting does not exist in a particular area of the state (such as this example, where a significant number of white voters are supporting the minority community's preferred candidate), then race cannot be elevated above the other redistricting criteria that drive the creation of districts. In this circumstance, the Commission cannot allow race to be the deciding factor about where lines will be placed, especially if those decisions violate other principles of redistricting, such as keeping jurisdictions whole, following communities of interest, etc.

APPENDIX

Current Legislative Districts That Are Majority-Minority in VAP (black, Hispanic, Asian, etc.)

The following current Senate Districts are majority-minority: 1, 2, 5, 7, 9, 16, 18, 27, 29, 31, 33, 35, 36, 37, and 39. Of these Senate Districts, one is over 50% black VAP (18), 3 are over 40% black VAP (2, 5, and 9), and 1 is over 30% black VAP (1). Senate District 29 is over 30% Hispanic. Senate Districts 13, 33 and 34 are over 20% Asian VAP.

The following House of Delegate Districts are majority-minority: 2, 13, 31, 37-39, 43-44, 46, 49-50, 52-53, 63, 69-71, 74-75, 77, 80, 86-87, 89-90, 92 and 95. Of these Delegate Districts, 9 are over 50% black VAP (63, 70, 74-75, 77, 80, 90, 92 and 95), 3 are over 40% black VAP (69, 71, and 89), and 3 are over 30% black VAP (14, 60-61). The following House of Delegate Districts are over 30% Hispanic VAP: 50 and 52; and the following House of Delegate Districts are over 20% Hispanic VAP: 13, 38, 44 and 86.The following House of Delegate Districts are over 30% Asian VAP: 87; and the following House of Delegate Districts are over 20% Asian VAP: 32, 35, 37-41, 53, 67, and 86.

COMMENT FROM REPUBLICAN COUNSEL: The only relevant information in this appendix is districts that are currently over 50% voting age population of a single racial category.

Source: DLS Database and Dr. Palmer's database.

Legislative districts with Varying Degrees of Racially Polarized Voting.

FROM DEMOCRATIC COUNSEL:
According to Dr. Palmer's racially polarized voting analysis, the following Senate districts have some degree of racially polarized voting: 2, 5-7, 13, 16 and 18. According to Dr. Palmer's racially polarized voting analysis, the following House of Delegates districts have some degree of racially polarized voting: 2, 14, 21, 28, 31, 51, 60, 62, 63, 74, 75, 77, 79, 80, 84, 85, 90, 95 and 100.

FROM REPUBLICAN COUNSEL: The legal question is whether legally significant racially polarized voting exists, not whether "some degree" of racially polarized voting exists. Dr. Palmer's comments about each region are the relevant information.

Source: Dr. Palmer's RPV Analysis.

POLITICAL SUBDIVISIONS

Political subdivisions are among the geographic units on the map that are most commonly accorded respect in map drawing. Counties, cities, and towns are the most often referenced form of political subdivisions. Additional types of political subdivisions can include special purpose districts such as water districts or an independent school district (particularly where such a jurisdiction does not coincide with other political subdivisions).

The Guidelines adopted by this Commission declare that "[t]he integrity and priority of existing political subdivisions should be preserved to the extent possible by avoiding unnecessary divisions of those subdivisions." 2021 Redistricting Guidelines and Criteria ¶ 3(c)(i)(b). That directive requires the map-drawers to refrain from dividing existing political subdivisions where such division is not required to pursue a higher priority objective stated in the Guidelines.

With this in mind, we would propose the following direction to the map-drawers:

In accordance with the Commission Guidelines, map-drawers should take care to respect pre-existing political subdivisions. Maps should avoid or limit unnecessary divisions of subdivisions; such divisions are permitted to pursue higher priority considerations.

The term "political subdivision" includes counties, independent cities, and towns in that order of priority. Special purpose districts (school districts, utility districts, and community college districts) may also be considered, provided that there is record evidence of these subdivisions. The shape and configuration of election districts shall not be included among the kinds of political subdivisions that map-drawers may recognize or respect in crafting districts.

COMMUNITIES OF INTEREST

Communities of Interest are a significant part of the analysis that supports the crafting of election districts. See 2021 Redistricting Guidelines and Criteria at pg. 5 ("Communities of interest are extremely important to the Commission, and the interest in preserving these communities is reflected in these guidelines."). By definition, a community of interest is a neighborhood or association of people who share concerns (which may be political or non-political) and who might benefit from being maintained in a single district. Another way of understanding a community of interest is that it is simply a way for a community to pursue their interests in common in the political system, and what makes it unique when compared to surrounding communities. They typically are defined by local community members themselves.

Under the Virginia Code, a community of interest "does not include a community based upon political affiliation or relationship with a political party, elected official, or candidate for office." Va. Code § 24.2-304.04(5).

Social, cultural, and economic groupings of Virginians can serve as the basis for their joint associations and activity both in and out of politics. Where these identities are geographically arranged, the law permits and encourages district lines that respect the expression of these identities, where practicable. The information provided through public input can help to refine the maps as they reach the more local (i.e., precinct) levels of map-drawing. This information also can be important in identifying mapping choices that ought to be avoided at the macro-level, particularly where proposed changes unnecessarily disrupt an existing community of interest.

The Guidelines adopted by this Commission state: "Neighborhoods or any geographically defined group of people living in an area who share similar social, cultural, and economic interests shall be maintained to the extent possible." 2021 Redistricting Guidelines and Criteria ¶ 3(c)(1)(e).

Recognizing that the attention to political subdivisions will be addressed in a separate guideline, we recommend an instruction to the map-drawers that the following illustrative list can be used for recognizing types of communities of interest in districts:

Neighborhoods (including those that share social/cultural/economic interests);

Unincorporated towns/villages;

Geographic divisions of a religious order (such as church parishes, wards, or other communities); and

Economic regions/districts (e.g., a business development district, historic preservation zone, or enterprise zone).

The Commission may choose to note and recognize additional communities of interest, provided that they are not defined by partisanship, incumbency, candidacy, or race (unless consideration of race is required by the Voting Rights Act). In all cases, the Commission should identify the information from the record, including public input, that supports their citing of a community of interest in making decisions about districts.

POLITICAL EQUITY

While the U.S. Supreme Court has declined to place limits on the role that partisanship (for advantage or disadvantage) can play in redistricting (*see Rucho v. Common Cause*, 139 S. Ct. (2019) (holding that partisan gerrymandering claims are not justiciable in federal court)), the Commonwealth has determined that "[a] map of districts shall not, when considered on a statewide basis, unduly favor or disfavor any political party." Va. Code § 24.2-304.04(8). The Commission itself has also adopted a political neutrality requirement: "Maps shall not favor or disfavor any political party." 2021 Redistricting Guidelines and Criteria ¶ 4.

The use of political information, including election returns and the location of incumbents, can be used appropriately for important purposes cited in the guidelines. See *id.* ("The Commission may review political data to ensure compliance with this political neutrality provision …"). These permissible purposes include assuring compliance with the Voting Rights Act (to determine when certain incumbents are the preferred candidate of a protected group of voters) and for checking for political equity (*e.g.,* not unduly disadvantaging a specific party).

The Commission has noted that political information may be considered in the process but has also directed that the location of an incumbent's home should not be part of the initial considerations in constructing districts. To balance the permitted uses of political information with the types of information about which the Commission has noted concerns, we would recommend giving the following directions to map-drawers:

Except as necessary for compliance with the Voting Rights Act, political information should not be part of the analysis supporting a map-drawer's work. To the extent this information is utilized for Voting Rights Act purposes, map-drawers should take care to explain its necessity to the lines that they drew. Political information should otherwise be used only as a final check to assess the effects of the map on the balance of political parties. Unless otherwise directed by the Commission, information about the location of incumbents should not be utilized to construct any election district in this process.