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To: Redistricting Advisory Commission
From: Ana Schumacher, Assistant County Attorney
Re: Legal Reference for the 2021 El Paso County Redistricting Advisory Commission (the “Commission”)

1. What is Redistricting?

Redistricting is the process of redrawing district boundaries to guarantee equal voter representation through equal, or equivalent population counts, while also preserving the voting rights of recognized minority groups.¹

2. Why is the Census Important?

The United States framers of the Constitution chose population as the basis for sharing political power; at the time, the concept was highly innovative as many countries still divided power based on wealth or land.² The 2020 Census is the 24th U.S. Census since the first U.S. Census in 1790.

3. Why is Redistricting Reviewed Following a Decennial Census?

The United States decennial census indicates population increases or decreases over the last decade. Redistricting following the Census allows for the equalization of the population in single member districts³ to ensure equal voter representation.

4. What is Different this Redistricting Cycle?

There are three major differences this redistricting cycle:

¹Patrick Graves, *Redistricting 101: How Census Data Affect Elections*, January 2020, <https://comptroller.texas.gov/economy/fiscal-notes/2020/jan/redistricting.php> (last visited April 28, 2021).

²See generally, United States Census Bureau, *Why We Conduct the Decennial Census*, <https://www.census.gov/programs-surveys/decennial-census/about/why.html> (last visited April 12, 2021).

³A single member district is the most common and best-known electoral system in America. See *Single Member Districts*, Fair Vote, <http://archive.fairvote.org/?page=765> (last visited April 30, 2021). In a single member plurality system, an area is divided into a number of geographically defined voting districts, each off which is represented by a single elected official. *Id.* Voters only vote for their district’s representative, with the candidate receiving the most votes, winning the election. *Id.*

- a) In 2013, the U.S. Supreme Court held Section 4(b) of the Voting Rights Act, the formula that determined which jurisdictions based on past discriminatory practices were required to seek federal approval to any changes in voting procedures, unconstitutional which in effect rendered Section 5 (the preclearance process) ineffective until such times as Congress institutes a new formula based on current conditions that justify the requirement for preclearance.⁴ Resultantly, preclearance for redistricting is not required this cycle.
- b) Second, in December 1975, Congress enacted Public Law (P.L.) 94-171 which requires the U.S. Census Bureau to release data used to draw districts. The U.S. Census Bureau is required to release this data to the states by April 1 of the year following the decennial census; however, this cycle, redistricting data will be released on or before September 30, 2021.⁵
- c) Lastly, because the U.S. Census was conducted amidst a global pandemic, the U.S. Census Bureau turned to different strategies to garner more complete Census participation, which for the first time included an invitation for families to respond to the census online.⁶ Despite the unique public health challenges, the U.S. Census Bureau reports that it is confident in its results.⁷

5. **Where do We Begin?**

When a new census requires redistricting, it is a common practice to start with the plan used in the prior map and change the boundaries of the prior districts, only as needed to comply with the one person, one vote mandate and to achieve other desired ends.⁸

6. **What does One Person, One Vote Mean?**

The U.S. Supreme Court has consistently made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the

⁴ See *Shelby County v. Holder*, 570 U.S. 529 (2013).

⁵ See United States Census Bureau, *Redistricting Data Program Management*, March 16, 2001, <https://www.census.gov/programs-surveys/decennial-census/about/rdo/program-management.html> (last visited April 28, 2021); C-SPAN, *Census Bureau News Conference on 2020 Count*, April 26, 2021, <https://www.c-span.org/video/?511255-1/census-bureau-news-conference-2020-count> (last visited April 29, 2021).

⁶ See generally, C-SPAN, *Census Bureau News Conference on 2020 Count*, April 26, 2021, <https://www.c-span.org/video/?511255-1/census-bureau-news-conference-2020-count> (last visited April 28, 2021).

⁷ *Id.*

⁸ *Cooper v. Harris*, 581 U.S. 1492 (2017).

jurisdiction.⁹ The requirement that districts¹⁰ have approximately equal populations is the background rule against which redistricting takes place.¹¹

Some jurisdictions aim to have a total deviation of less than 5%; however, a deviation of less than 10% is still likely to be found to have met constitutional requirements.¹²

7. **Who Counts?**

Each district's population should account for all residents in that district, not just those eligible or registered to vote.¹³

8. **Aside from Representative Districts Having Equal or Nearly, Equal Populations, what Else is Important?**

The Fourteenth (Equal Protection Clause) and Fifteenth Amendment to the U.S. Constitution, along with the Federal Voting Rights Act of 1965, are the bedrock for the two primary requirements governing redistricting.¹⁴ Aside from having equal or nearly equal populations, Section 2 of the Voting Rights Act ("Section 2"), as amended, requires that districts be drawn in a manner that neither has the purpose nor will have the effect of denying or abridging the right to vote on the basis of race, color or language group.¹⁵ Minority voters who allege "vote dilution" or a Section 2 violation must show that the electoral structure operates to minimize or cancel out their ability to elect their preferred candidates.

9. **What Does a Court Consider in a Vote Dilution Claim?**

To legally challenge newly adopted redistricting boundaries on the basis of an alleged Section 2 violation, minority voters will need to meet the "*Gingles*" threshold which is that:

⁹ *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 676 (Tex. S.D. 2017).

¹⁰ The Fifth Circuit declined to rule on whether the one person, one vote applies to El Paso Justice of the Peace Precincts. *Romero v. Coldwell*, 455 F.2d 1163 (5th Cir. 1973). In *Romero*, appellants asserted that the linchpin was that a justice of the peace asserts constitutionally granted county-wide jurisdiction over criminal and civil matters; however, the court said that the question is neither settled or clear under Texas law. *Id.* at 1165. Therefore, to the extent the County of El Paso is able, it will use the one person, one vote rule for Justice of the Peace Precincts.

¹¹ *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 273 (2015).

¹² Due to the inherent difficulty in measuring factors that may account for small deviations from strict mathematical equality, attacks on deviation under 10% will succeed only rarely, in unusual cases. *Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S.Ct. 1301, 1307 (2016). States may deviate somewhat from perfect population equality to accommodate traditional districting objectives; where the maximum population between the largest and smallest district is less than 10%, a state or local legislative map presumptively complies with the one person, one-vote rule. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1121 (2016).

¹³ In *Evenwel v. Abbott*, the U.S. Supreme Court noted that the Framers of the Constitution and the Fourteenth Amendment comprehended that representatives serve all residents, not just those eligible to vote. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1123 (2016).

¹⁴ Texas Legislative Council, *Texas Redistricting*, <https://redistricting.capitol.texas.gov/reqs#basic-section>, (last visited April 12, 2020).

¹⁵ *Id.*; 52 U.S.C. §10301.

- (a) A minority group must be sufficiently large¹⁶ and geographically compact to constitute a majority in a single-member district; and
- (b) A minority group must be politically cohesive¹⁷; and
- (c) The majority must vote sufficiently as a block that will usually be able, absent special circumstances, such as a minority candidate running unopposed, be able to defeat the minority's preferred candidate.¹⁸

If the plaintiff can show the three aforementioned factors, a court considers the totality of the circumstances and whether the minority can demonstrate that it has less opportunity than other voters to participate in the political process and elect their representatives of choice.¹⁹ In doing so, the Court will also consider the "Senate Report" factors that accompanied the 1982 amendments to the Voting Rights Act.²⁰

10. What is Gerrymandering?

In 1812, Elbridge Gerry, the Governor of Massachusetts, approved congressional districts that the legislature drew to the benefit of the Democratic-Republican Party.²¹ The term "gerrymander" was birthed soon thereafter when an outraged Federalist newspaper called out the misshapen salamander looking districts.²² Hence, the term "gerrymander."²³ By 1840, the gerrymander became a recognized force in party politics whereby a party attempts to gain power which is not proportionate to its numerical

¹⁶ In order to show that the minority group is sufficiently large and geographically compact enough to constitute a majority in a single member district, there needs to be a showing of the "the possibility to create more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Rodriguez v. Harris County*, 964 F. Supp. 2d 686, 724 (S.D. Tex. 2013). To satisfy the numerosity requirement, one looks at whether the minority citizen voting age population (MCVAP) makes up more than 50% of the citizen voting age population (CVAP) in the geographic area. *Id.* at 726. Citizen voting age data can be obtained from the American Community Survey completed annually by the Census Bureau. *Id.* 726-729.

¹⁷This factor refers to the extent to which a group of voters shares the same beliefs, ideals, principles, agendas, and concerns, "such that they are generally united behind or coalesce around particular candidates and issues." For example, the minority group has a preferred candidate or usually votes for the same candidate. *See Rodriguez v. Harris County*, 964 F. Supp. 2d 686, 754 (S.D. Tex. 2013).

¹⁸ *Id.*

¹⁹ *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006).

²⁰ *Rodriguez v. Harris County*, 964 F. Supp. 2d 686, 699-700 (S.D. Tex. 2013). The Senate Committee on the Judiciary issued a report to accompany the 1982 extension of certain provisions of the Voting Rights Act. The "Senate Report" factors are as follows: (1) the history of voting-related discrimination in the State or political subdivision; (2) the extent to which voting in the elections of the State or political subdivision is racially polarized; (3) the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group; (4) the degree to which members of the minority group have been denied access to the candidate slating process; (5) the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; (6) the use of overt or subtle racial appeals in political campaigns; (7) the extent to which members of the minority group have been elected to public office in the jurisdiction; (8) whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and (9) whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice, or procedure is tenuous.

²¹ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2494-2495 (2019).

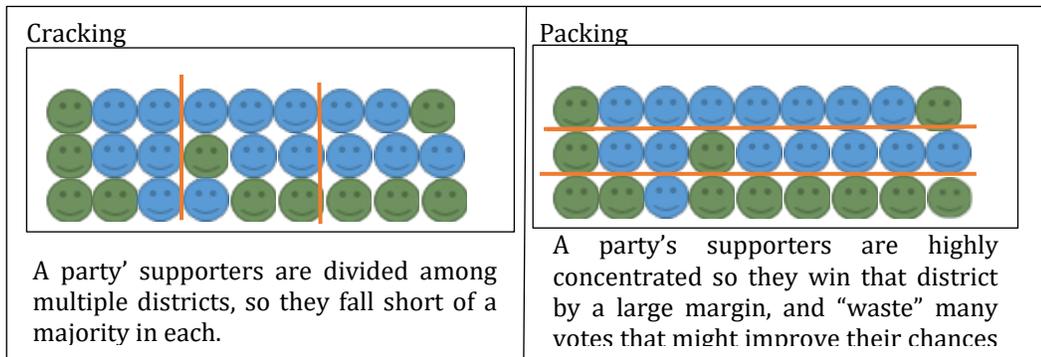
²² *Id.*

²³ *Id.*

strength through legislation enacted for the formation of election districts.²⁴ Today, gerrymandering remains an ongoing threat to redistricting and the electoral process.²⁵

11. How Can the Commission Avoid Gerrymandering?

The Commission should not “crack” or “pack” minority voters when engaging in the redistricting process.²⁶



12. What is Racial Gerrymandering?

Even when population among legislative districts is relatively equal, racial gerrymandering, a districting plan that diminishes the effectiveness of the votes of racial minorities, is unconstitutional.²⁷ Despite legislative protections, in every redistricting cycle since 1970, Texas has been found to have violated [the Voting Rights Act] with racially gerrymandered districts.²⁸ When voters are assigned on the basis of race, the State engages in the offensive and demeaning assumption that voters of a particular race, because of their race, “think alike, share the same political interests, and will prefer the same candidates at the polls.”²⁹

For that reason, racially gerrymandered districting schemes, like all laws that classify citizens on the basis of race, are constitutionally suspect.³⁰ Similarly, when redistricting is so bizarre on its face that it’s unexplainable on grounds other than race, Courts have demanded the same close scrutiny given to other laws that classify citizens by race.³¹

13. Is it Illegal for the Commission to Consider Race or Try to Correct Past Wrongs when Redrawing District Lines?

²⁴ *Id.*

²⁵ For a more illustrative explanation of gerrymandering, please watch Christina Greer’s, TED-Ed-*Gerrymandering: How Drawing Jagged Lines Can Impact an Election*, <https://www.youtube.com/watch?v=YcUDBgYodIE> (last visited April 29, 2021).

²⁶ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2492 (2019).

²⁷ 31B Tex. Jur. Elections § 45.

²⁸ *Veasey v. Abbott*, 830 F.3d 216, 240 (5th Cir. 2016)(en banc).

²⁹ *Miller v. Johnson*, 515 U.S. 900, 911 (1995).

³⁰ *Shaw v. Hunt*, 517 U.S. 899, 904 (1996).

³¹ *Miller v. Johnson*, 515 U.S. 900, 905 (1995).

The constitutional wrong occurs when race becomes the “dominant and controlling” consideration.³² The Fourteenth Amendment forbids the use of race as “predominant” district boundary-drawing “factor” unless boundaries are “narrowly tailored” to achieve a “compelling state interest.”³³ A state’s interest in remedying past or present discrimination may in the proper case, justify the use of racial distinctions; however, for that interest to rise to the level of a “compelling interest” required to satisfy strict scrutiny, the government must satisfy two conditions.³⁴ First, the discrimination must be “identified discrimination.”³⁵ Second, the institution that makes the racial distinction, in this case, the County, must have a “strong basis in evidence” to conclude that remedial action is necessary before embarking on an affirmative-action program.³⁶

14. What is Partisan Gerrymandering and is it Illegal?

Partisan gerrymandering is not illegal; however, the Supreme Court has acknowledged that it’s possible for partisan gerrymandering to go too far.³⁷ The risk with what has been coined as “extreme partisan gerrymandering” is that it allows politicians to choose their voters rather than the other way around.³⁸

15. What Factors Should the Commission Consider When Redistricting?³⁹

Aside from satisfying the one person, one vote requirement and complying with all applicable laws, the Commission should strive for compact districts drawn using traditional redistricting principles.⁴⁰

A. **Compactness** refers to the compactness of the of the minority population as opposed to the district.⁴¹ The first *Gingles* factor does not require an aesthetic ideal of compactness, but rather that the minority population be sufficiently compact to constitute a majority in a single-member district.⁴² It’s important to note, that when the geographic dispersal of the minority community means a reasonably compact

³² *Shaw v. Hunt*, 517 U.S. 899, 904-905 (1996).

³³ *Ala. Legis. Black Caucus v. Alabama*, 574 U.S. 254, 258 (2015).

³⁴ *Shaw v. Hunt*, 517 U.S. 899, 909 (1996).

³⁵ *Id.*

³⁶ *Shaw v. Hunt*, 517 U.S. 899, 910 (1996).

³⁷ *See Rucho v. Common Cause*, 139 S. Ct. 2484 (2019). In a 5:4 decision in 2019, the U.S. Supreme Court held that a determination of whether partisan gerrymandering goes too far is a political question beyond the reach of federal courts.

³⁸ J. Gerald Herbert and Megan P. McAllen, *Redistricting in the Post-2010 Cycle: Lessons Learned*, 39 Hum. Rts. 10 (2012-2013), available at

https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2012_vol_39_/winter_2012_-_vote/redistricting_inthepost-2010cyclelessonslearned/ (last visited April 30, 2021).

³⁹ Traditional redistricting principles are not constitutionally required, but rather provide objective factors that may serve to defeat a claim that a district has been gerrymandered on racial lines. *See Shaw v. Reno*, 509 U.S. 630, 647 (1993). The *Shaw* Court also explained that a plan for a district of individuals of who belong to the same race, but who are otherwise widely separated by traditional redistricting principles, such as geography and political boundaries, and have little in common but the color of their skin, bears an uncomfortable resemblance to political apartheid. *Id.*

⁴⁰ *See generally, Bethune-Hill v. Va. State Bd. Of Elections*, 137 S. Ct. 788, 799 (2017) & *Rodriguez v. Harris County*, 964 F. Supp. 2d 686 (S.D. Tex. 2013).

⁴¹ *Kumar v. Frisco*, 475 F. Supp. 3d 439, 494 (E.D. Tex. 2020).

⁴² *Id.*

majority-minority district cannot be created, Section 2 does not require a majority-minority district.⁴³ In fact, a district that "reaches out to grab small and apparently isolated minority communities" is not reasonably compact.⁴⁴

1. **Preservation of Communities of Interest or Communities Defined by Actual Shared Interests.**

Though the term "communities of interest" is widely used, it's not clearly defined.⁴⁵ The U.S. Supreme Court has said that a "community of interest" is manifested by for example, shared broadcast and print media, public transport infrastructure, and institutions such as schools buses.⁴⁶

- a. Respects Traditional Boundaries.
- B. Contiguity. One could move between any two points within the district without crossing its boundary.⁴⁷ Requires that boundaries be connected unless the districts are separated by water.⁴⁸
- C. Avoids disruption to pre-existing electoral minority-opportunity districts.⁴⁹
- D. Respect for political subdivisions such as municipalities and towns.
- E. Avoids attempts to dislodge an incumbent political adversary.⁵⁰

⁴³ *Rodriguez v. Harris County*, 964 F. Supp. 2d 686, 737 (S.D. Tex. 2013).

⁴⁴ *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 408 (2006).

⁴⁵ *Kumar v. Frisco*, 475 F. Supp. 3d 439, 494 (E.D. Tex. 2020). In *Kumar*, the Court considered guidance from various sources and jurisdictions that included the following descriptions or attributes for "communities of interest":

- Communities of interest represent distinctive units which share common concerns with respect to one or more identifiable features such as geography, demography, ethnicity, culture, socio-economic status or trade.
- Shared socio-economic interests.
- Reflecting some characteristic that has an impact on the representational interests or priorities of voters, or on the way voters interact with each other or communicate with a representative.
- How people connect with each other, such as a neighborhood, people who attend the same schools, people who are members of the same organization, people who have the same political opinion, and people who are of the same socio-economic status.

⁴⁶ *Prejean v. Foster*, 227 F.3d 504, 513 (5th Cir. 2000).

⁴⁷ Angela Ledgerwood, *Red Plus Blue Equals Nineteen: GIS and Electoral Redistricting in the 2002 Congressional Elections for Pennsylvania* University of Edinburgh, Institute of Geography (May 1, 2014),

<https://cg4tx.org/wp-content/uploads/2017/05/Explanation-of-redistricting-principles.pdf> (last visited April 30, 2021).

⁴⁸ Donita Judge, *Demystifying Redistricting Through Community Engagement*, January 1, 2012, available at https://www.americanbar.org/groups/crsj/publications/human_rights_magazine_home/2012_vol_39/_wint_er_2012_-_vote/demystifying_redistrictingthroughcommunityengagement/ (last visited April 30, 2021).

⁴⁹ *Gonzalez v. Harris*, 601 Fed. Appx. 255, 259 (5th Cir. 2015). For a single-minority opportunity district, the standard for a minority opportunity district is majority CVAP for the particular minority group. *Perez v. Abbott*, 250 F. Supp. 3d 123, 134-135 (W.D. 2017).

⁵⁰ *Gonzalez v. Harris*, 601 Fed. Appx. 255, 259 (5th Cir. 2015); *Perez v. Abbott*, 253 F. Supp. 3d 864, 985 (5th Cir. 2017).