Marc Elrich
County Executive

OFFICE OF THE COUNTY ATTORNEY

Marc P. Hansen
County Attorney

MEMORANDUM

TO: Redistricting Commission Members

FROM: Erin J. Ashbarry
        Associate County Attorney

DATE: March 9, 2021

RE: Legal Issues in Redistricting:
        1.   Traditional Districting Criteria
        2.   Substantially Equal Population: One Person, One Vote
        3.   The Voting Rights Act of 1965 and Racial Gerrymandering
        4.   Equal Protection Clause and Racial Gerrymandering
        5.   Constitutional Challenges to Political Gerrymandering

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This memo's purpose is to provide the Commission with a legal road map of its duties. The County Charter's requirements for Council districts are terse: the Commission must create **seven** districts[1] that are: (1) compact in form, (2) composed of adjoining territory, and (3) substantially equal in population.[2]

Council districts the Commission creates must also comply with federal laws mandating equality in voting: the 14th and 15th Amendments to the U.S. Constitution and the Voting Rights Act. The 14th Amendment's Equal Protection Clause mandates that electoral districts be of nearly equal population so that each person's vote has equal weight in the election of their representative.[3] The Equal Protection Clause also prohibits using race as the predominant factor

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[1] In the November 2020 election, County voters approved Question C on the ballot to amend the County's Charter to: expand the County Council to consist of 11, rather than the current 9, Councilmembers; **increase from 5 to 7 the number of Council districts**; and elect 7 Councilmembers by district and 4 Councilmembers at large.

[2] Section 103 of the Montgomery County Charter states: "Each [Council] district shall be compact in form and be composed of adjoining territory. Populations of the council districts shall be substantially equal."

[3] The Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution states, "no State shall . . . deny to any person within its jurisdiction the equal protection of the laws." *See also Voinovich v. Quilter*, 507 U.S. 146, 160-61 (1993).

in districting to intentionally segregate voters based upon their race and lessen the weight of their vote.[4] The 15th Amendment of the U.S. Constitution also prohibits abridging the right to vote on the basis of race.[5] The Voting Rights Act, enacted in 1965 to enforce the 15th Amendment,[6] prohibits the denial, on the basis of race or color, of the equal opportunity to participate in the political process and elect candidates of their choice.

As you create the seven districts that are compact in form, composed of adjoining territory, and substantially equal in population, you must be solicitous of the Voting Rights Act's prohibition against voting procedures that have the purpose or effect of abridging the right to vote based on race, but mindful of the Equal Protection Clause's prohibition against intentionally segregating voters based upon race.

I. TRADITIONAL DISTRICTING CRITERIA: COMPACTNESS, CONTIGUITY, AND OTHERS

Over the years, the courts have identified a number of valid considerations when drawing districts. These include: (1) compactness, (2) contiguity, (3) respect for political subdivisions, (4) community shared interests, (5) geography, and even (6) avoiding contests between incumbents or protection of incumbency.[7] Two of these considerations are mandatory under our Charter: compactness and contiguity. These two factors are intended to prevent political gerrymandering.[8]

A. Compactness

When reviewing our Charter's compactness requirement, the Maryland Court of Special Appeals looked to cases construing an identical compactness requirement in the State Constitution.[9]

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[4] *See Bush v. Vera,* 517 U.S. 952, 959 (1996); *Shaw v. Reno,* 509 U.S. 630, 641-643 (1993).

[5] The Fifteenth Amendment states, "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

[6] *See In re Legislative Redistricting of the State,* 370 Md. 312, 326 n.8 (2002).

[7] *See Miller v. Johnson,* 515 U.S. 900, 916 (1995); *Abrams v. Johnson,* 521 U.S. 74, 98 (1997).

[8] *In re Legislative Districting,* 299 Md. 658, 675 (1982). The term gerrymander "was given birth in 1812 following a cartoonist's drawing of a Massachusetts legislative district that he described as appearing like a 'salamander.' An astute observer suggested that the district might more properly be described as a 'gerrymander' after then Governor of Massachusetts Eldridge Gerry who had a role, albeit a minor one, the construction of the district." *In re Legislative Districting,* 299 Md. at 676 n. 8.

[9] *Ajamian v. Montgomery County,* 99 Md. App. 665, 690 (1994). Art. III, § 4 of the Maryland Constitution requires that "[e]ach [state] legislative district shall . . . be compact in form."

[T]he ideal of compactness, in geometric terms, is a circle, with the perimeter of a district equidistant from its center. With the possible exception of Colorado, however, no jurisdiction has defined or applied the compactness requirement in geometric terms. On the contrary, most jurisdictions have concluded that the constitutional compactness requirement, in a state legislative redistricting context, is a relative rather than an absolute standard.[10]

Compactness is a requirement for a close union of territory rather than a requirement dependent upon a district being of any particular shape or size. But it is subservient to the federal constitutional requirement of substantial equality of population among districts.[11]

B. Contiguity

Like our Charter, the State Constitution also has a contiguity requirement.[12] "The contiguity requirement mandates that there be no division between one part of a district's territory and the rest of the district; in other words, contiguous territory is territory touching, adjoining and connected, as distinguished from territory separated by other territory."[13]

Contiguity is also subservient to the federal constitutional requirement of equality of population among districts.[14]

II.   SUBSTANTIALLY EQUAL POPULATION: ONE PERSON, ONE VOTE

The Equal Protection Clause of the Fourteenth Amendment requires that state and local districts assure that one citizen's vote is approximately equal in weight to that of every other citizen, also known as the "one person, one vote" principle. This means that the government must give each qualified voter an equal opportunity to participate in an election, "and when members of an elected body are chosen from separate districts, each district must be established on a basis that will ensure, as far as is practicable, that equal number of voters can vote for

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[10] *In re Legislative Districting*, 299 Md. 658, 676 (1982).

[11] *See In re Legislative Districting*, 299 Md. 658, 680 n.14 (1982).

[12] Art. III, § 4 of the Maryland Constitution states that "[e]ach [state] legislative district shall consist of adjoining territory."

[13] *In re Legislative Districting*, 299 Md. 658, 675 (1982).

[14] *See In re Legislative Districting*, 299 Md. 658, 680 (1982).

proportionally equal numbers of officials."[15]

      Over time, the courts have established a formula for analyzing the "maximum population deviation" among districts for legislatively-enacted redistricting plans for state or local representatives.[16] The court first creates a hypothetical ideal district by dividing the total population[17] of the political unit (state, city, or county) by the total number of district-elected representatives who serve that population (in our case, that number is 7). Then the court adds together the percentage population variation of the largest and smallest district in comparison to the ideal district. If that figure is under 10% the court regards the difference as *de minimis* and is unlikely to find an Equal Protection violation. If that figure is over 10% the court regards the difference as presumptively invalid and the government must provide substantial justification to sustain the plan.[18] Finally, there is a level of population disparity beyond which the government can offer no possible justification. Although it is not clear precisely what that upper level is, the Supreme Court has stated that a maximum deviation of 16.4% "may well approach tolerable limits."[19]

      The Commission should strive to create districts which meet the formula described above. In our case, the hypothetical ideal district is the total county population divided by 7. The sum of the percentage variation of the largest and smallest district in comparison to that ideal district should be under 10%.

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[15] *Hadley v. Junior College Dist. of Metro. Kansas City*, 397 U.S. 50, 56 (1970).

[16] The Supreme Court has repeatedly recognized that congressional apportionment plans, which are tested under Art. I, § 2 of the United States Constitution, are subject to stricter standards of population equality than are state or local legislative districting plans, which are tested under the Equal Protection Clause of the Fourteenth Amendment. *See Daly v. Hunt*, 93 F.3d 1212, 1216 n.5 (4th Cir. 1996). Court ordered apportionment plans must also meet more exacting standards. *See id.* at 1217 n.7

[17] The courts have often used total population as the pertinent measure rather than voting-age population. The use of *total* population advances "representational equality," ensuring "that all constituents, whether or not they are eligible to vote, have roughly equal access to their elected representatives to voice their opinions or otherwise to advance their interests." *Daly v. Hunt*, 93 F.3d 1212, 1223 (4th Cir. 1996). In contrast, the use of *voting age* population advances "electoral equality," ensuring "that, regardless of the size of the whole body of constituents, political power, as defined by the number of those eligible to vote, is equalized as between districts holding the same number of representatives. It also assures that those eligible to vote do not suffer dilution of that important right by having their vote given less weight than that of electors in another location." *Id.*

[18] *See Daly v. Hunt*, 93 F.3d 1212, 1217-18 (4th Cir. 1996). Unlike a § 2 Voting Rights Act case (described below), the plaintiff need not demonstrate that the malapportionment actually lessened his ability to participate in the political process or to receive equally effective access to an elected representative. The harm is presumed in one person, one vote cases.

[19] *Mahan v. Howell*, 410 U.S. 315, 329 (1973).

III. VOTING RIGHTS ACT OF 1965 AND RACIAL GERRYMANDERING

While creating districts substantially equal in population, the Commission must be aware of Section 2 of the Voting Rights Act of 1965 (the "VRA"),[20] which prohibits any law or practice which results in a denial or abridgement of the right to vote based upon race.[21] A plaintiff can establish a violation of the VRA by proving that:

> **based on the totality of circumstances,** . . . the political processes leading to nomination or election in the . . . political subdivision are not equally open to participation by members of a [protected class] 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.[22]

Taken as a whole, the VRA "prohibits any practice or procedure that, interacting with social and historical conditions, impairs the ability of a protected class to elect its candidate of choice on an equal basis with other voters."[23]

Opportunity is the touchstone under the VRA; the statute only protects the plaintiffs' right to equal opportunity or equal access to the political process.[24] It does not entitle any of the protected classes to be represented by a member of its own group.[25] Under the statute, no group has a right to electoral victory.[26] In the same vein, the statute also does not entitle any group of

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[20] 52 U.S.C. § 10301(b).

[21] Prior to a 1982 amendment, a plaintiff had to prove discriminatory intent. Now, a Section 2 plaintiff need not prove that the challenged law was enacted with a racially discriminatory intent, but only that the law has a discriminatory result. *Thornburg v. Gingles*, 478 U.S. 30, 43-44 (1986).

[22] 52 U.S.C. § 10301(b) (emphasis added).

[23] *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993) (quotation omitted).

[24] *See Johnson v. De Grandy*, 512 U.S. 997 (1994).

[25] *Lodge v. Buxton*, 639 F.2d 1358, 1374 (5th Cir. 1982), *aff'd sub nom.*, *Rogers v. Lodge*, 458 U.S. 613, 624-26 (1982).

[26] *See Whitcomb v. Chavis*, 403 U.S. 124, 153-55 (1971).

persons to have their political clout maximized.[27]

The opportunity to participate in the political process is affected when a minority group's voice at the polls is diluted "either by the dispersal of [a minority group] into districts in which they constitute an ineffective minority of voters or from the concentration of [the minority group] into districts where they constitute an excessive majority."[28]

As described below, courts interpreting the VRA review many factors to analyze whether the right to equal opportunity or access to the political process is impaired.

A. The Three Preconditions to Suit Under the VRA

To establish vote dilution in violation of the VRA, a minority group must establish the existence of three threshold conditions: 1) the minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district; 2) the minority group must be politically cohesive; and 3) the white majority votes sufficiently as a bloc to enable it to usually defeat the minority's preferred candidate.[29] The plaintiffs' failure to sustain their burden of proof on any one of these three factors is fatal to their case because, in their absence, the court cannot consider the structure or device being discharged to be the cause of the minority's inability to elect its preferred candidate.[30]

B. The "Totality of the Circumstances" Test: Factors Reviewed by Courts to Decide Whether Members of a Minority Group Have Less Opportunity to Participate in the Political Process Than Others

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[27] *See Bartlett v. Strickland,* 2009 U.S. LEXIS 1842 28, 129 S. Ct. 1231, 1243 (2009); *Johnson v. De Grandy,* 512 U.S. 997 (1994).

[28] *Voinovich v. Quilter,* 507 U.S. 146, 154 (1993). *See also League of United Latin American Citizens v. Perry,* 548 U.S. 299 (2006) (finding portion of Texas redistricting plan violated Section 2 of Voting Rights Act because it diluted voting strength of minorities).

[29] *See Abbott v. Perez,* -- U.S. --, 138 S. Ct. 2305, 2330-31 (2018); *League of United Latin American Citizens v. Perry,* 548 U.S. 399, 425 (2006); *Thornburg v. Gingles,* 478 U.S. 30, 50-51 (1986). Although these preconditions apply in cases which attack purely at-large, mixed at-large/district, and purely district systems, *Growe v. Emison,* 507 U.S. 25, 40 (1993), the proof will vary in each case. For example, as to the first factor, if plaintiffs are challenging the use of a multimember (at-large) district, they will have to show that "within each contested multimember district there exists a minority group that is sufficiently large and compact to constitute a single-member district." *Thornburg,* 478 U.S. at 50 n.16. On the other hand, plaintiffs challenging a single-member districting plan "might allege that the minority group is sufficiently large and compact to constitute a single-member district that has been split between two or more . . . single-member districts, with the effect of diluting the potential strength of the minority vote. *Id.*

[30] *See Thornburg v. Gingles,* 478 U.S. 30, 48-51 (1986).

A plaintiff's satisfaction of the three necessary preconditions does not, by itself, prove a VRA violation. Under the statute, a plaintiff still has the burden of proving, "based on the totality of circumstances," the challenged electoral practice or structure results in an electoral system that is not equally open to participation by members of the plaintiff's class.[31] Plaintiff must show that members of plaintiff's class have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.[32] The statute itself identifies only "one circumstance which may be considered" – the extent to which minorities are elected over time to determine whether a district plan prohibits participation by a group or class. Over time, the Supreme Court has identified many other factors as relevant for a court to review in a VRA claim.

1.   The Senate Factors

The Supreme Court reviews the following factors, identified by the Senate in 1982 when it amended the VRA, to determine whether a political process is open to participation by minorities:

1.   Any history of discrimination touching the right to register, vote, or otherwise participate in the democratic process;

2.   The extent of any racially polarized voting;

3.   The use of any election devices (*e.g.*, majority vote requirements) which may lead to discrimination against minorities;

4.   Evidence of exclusion of minorities from candidate slating procedures;

5.   The extent to which the socioeconomic effects of past discrimination affect the ability of minorities to participate in the democratic process;

6.   Whether campaigns have been characterized by overt or subtle racial appeal; and

7.   The extent to which members of the minority group have been elected to public office in the jurisdiction.[33]

Two other factors with some "probative value" are:

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[31] *See Abbott*, ___ U.S. at ___; 138 S. Ct. 2305, 2331 (2018).
[32] *See Johnson v. De Grandy*, 512 U.S. 997, 1011-12 (1994).
[33] *See Thornburg v. Gingles*, 478 U.D. 30, 45-46 (1986).

1.   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

2.   Whether the policy underlying the state or political subdivision's use of such voting qualification, pre-requisite to voting, or standard, practice or procedure is tenuous.[34]

There is no requirement that any particular number of factors be proved or that a majority of them point one way or another.

2.   The Causation Factor

Courts may also consider evidence as to whether race-neutral reasons caused a lack of electoral success for minority groups. Courts have held that plaintiffs cannot prevail on a VRA claim if there is significant probative evidence that whites voted as a bloc for reasons unrelated to racial animus or racial antagonism (for example, party affiliation, organizational disarray, lack of funds, etc.).[35] In other words, a minority's lack of success in an election may be due to race-neutral reasons and not because of a lack of minority opportunity to participate that is the hallmark of a VRA violation.

3.   The Proportionality Factor

Another relevant consideration is whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area.[36] Although "proportionality" or "rough proportionality" is not a "safe harbor" for defendants, the Supreme Court has recognized that it is a strong indication that minority voters have equal opportunity "to participate in the political process and elect representative of their choice."[37]

4.   The "Packing" or "Cracking" of the Minority Vote

"Packing" and "cracking" can also be factors relevant to the "totality of the

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[34] S. Rep. No. 417 at 28-29 (footnotes omitted), *reprinted in*, 1982 U.S. Code Cong. & Admin. News. (2d sess.) at 206- 207.

[35] *See Goosby v. Town Bd. of Town of Hempstead, N.Y.*, 180 F.3d 476, 493 (2nd Cir. 1999); *Uno v. City of Holyoke*, 72 F.3d 973, 981-83 & 986-87 (1st Cir. 1995).

[36] *See League of United Latin American Citizens v. Perry*, 548 U.S. 399, 426 (2006).

[37] *See Johnson v. De Grandy*, 512 U.S. 997, 1019-20 (1994).

circumstances" analysis of a VRA claim. "Packing" occurs when politically cohesive minority voters are concentrated within a district to create a super-majority, in a situation where their numbers are large enough to constitute a majority to two or more districts. At the other end of the spectrum is "cracking" or "fragmenting;" this is when minority voters are spread out over several districts so they do not amount to a majority to any one district. Packing and cracking have legal significance in that they dilute the vote of minority voters and deprive them of the equal opportunity to participate in the political process and elect the candidates of their choice.[38]

IV. EQUAL PROTECTION CLAUSE AND RACIAL GERRYMANDERING

Where governments feel pressure under the VRA to create majority-minority districts to ensure minority voters may elect a candidate on an equal basis with other voters, governments must be wary of the Equal Protection Clause's prohibition against intentionally segregating voters based upon race.[39] The following rules have emerged through a series of Supreme Court cases.[40]

The government may consider race as a factor in districting, but it cannot be the predominant motivating factor. If race is the predominant motivating factor, the court will subject the plan to "strict scrutiny" and require the government to demonstrate a compelling government interest to support its predominant consideration of race. The government may subordinate traditional districting criteria (discussed above) to race only if there is a compelling governmental interest.

Compliance with the VRA is a compelling governmental interest (allowing predominant consideration of race), but the government must have **strong evidence** that VRA liability is present.[41] (In other words, the government must have strong evidence that a minority group could establish the three preconditions to a VRA violation and under the totality of the circumstances, their opportunity to participate is not equal to other groups.)

Even then, the government must narrowly tailor its plan — race may not be a predominant factor **substantially more than reasonably necessary to avoid VRA liability.** For example, districts must still be reasonably compact because VRA does not require the

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[38] *See Voinovich v. Quilter,* 507 U.S. 146, 153-154 (1993).

[39] The Supreme Court characterized the Equal Protection Clause and VRA as "competing hazards of liability" for any legislature engaged in redistricting: the Equal Protection Clause restricts the consideration of race, while the VRA demands consideration of race. *See Abbott v. Perez,* ___ U.S. ___, 138 S.Ct. 2305, 2315 (2018).

[40] *See Hunt v. Cromartie,* 526 U.S. 541 (1999); *Shaw v. Hunt (Shaw II),* 517 U.S. 899 (1996); *Bush v. Vera,* 517 U.S. 952 (1996); *Miller v. Johnson,* 515 U.S. 900 (1995); and *Shaw v. Reno (Shaw I),* 509 U.S. 630 (1993).

[41] *Cooper v. Harris,* ___ U.S. ___, 137 S. Ct. 1455, 1464 (2017).

government to create districts that are not reasonably compact. On the other hand, a district created need not be the most compact (need not have the least amount of irregularity) to be least restrictive alternative.

V.   CONSTITUTIONAL CHALLENGES TO POLITICAL GERRYMANDERING

For decades, the Supreme Court's decisions on political gerrymandering were fraught with disagreement over whether constitutional challenges to political gerrymandering present a legal issue – or a "justiciable claim" – for the Court, or whether it is a "political question," or an issue best left for resolution by the political branch of government. Although the Supreme Court at one point recognized that political gerrymandering could give rise to an equal protection clause violation, the Court's frustration with the lack of a viable test for courts to apply boiled over in *Rucho v. Common Cause*, __ U.S. __, 139 S.C.t 2484 (2019). In *Rucho*, the Supreme Court declared that questions of political gerrymanders are not "justiciable" or subject to resolution in the courts. The case effectively closes the door to legal challenges based solely upon political gerrymanders.

cc: Marc P. Hansen, County Attorney
Edward B. Lattner, Division Chief, Government Operations, Office of the County Attorney
Jeff Zyontz, Esq.