March 23, 2022

VIA PDF E-MAIL

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Re: Demand to Reconsider Resolution No. 22-013 (Adoption of Redistricting Map 103) to Comply with the FAIR MAPS Act

Dear Mayor Constantine & Members of the City Council:

I write on behalf of Steve Tate, Swanee Edwards, Brian Sullivan, and Kathy Sullivan, residents and registered voters of Morgan Hill, to demand that you comply with California's FAIR MAPS Act, Elec. Code §§ 21601-21609, by reconsidering the illegal map that the Council adopted on March 2, 2022, before the deadline to complete the redistricting process, April 17, 2022.

The illegality of Map 103 could not be more patently obvious—indeed, both the City's consultants, National Demographics Corporation, and the City Attorney advised the Council as much. The FAIR MAPS Act specifies a particular list of criteria to be followed in municipal redistricting and the "order of priority" in which those criteria should be considered. The top criteria, of course—based as they are on supreme federal law—are compliance with the equal population requirements of the Fourteenth Amendment and with the federal Voting Rights Act, 52 U.S.C. § 10301. *See* Elec. Code § 21601(a)-(b).

Assuming those two criteria are met, however, the foremost criterion specified by the Act is that "[t]o the extent practicable, council districts shall be geographically contiguous." Elec. Code § 21601(c)(1). Map 103 fails this basic requirement. Indisputably—as the City's demographic consultants explicitly advised the Council—District D is geographically non-contiguous.

We understand that the Council was acting under an apparent threat of litigation and, further, that it was advised that it could adopt Map 103 because the requirement of contiguity is qualified by the phrase "to the extent practicable." However, neither argument remotely justifies the adoption of that illegal map.

As to the threat of litigation, the City would have faced no risk of liability under the equal population requirements if it had adopted any of the other proposed maps, nor would it have faced any threat of litigation under the Voting Rights Act. As to the latter point, the United States Supreme Court has held that liability under the VRA is not triggered unless it is possible to draw a district in which members of a given minority group constitute of at least 50% of the citizen voting age population (*i.e.*, eligible voters). *See Bartlett v. Strickland*, 556 U.S. 1, 19-20 (2009). Obviously, such a district cannot be drawn in Morgan Hill, as evidenced by the fact that no district in Map 103 exceeds 30% Latino citizen voting age population.[1] Thus, any claim that the Voting Rights Act justifies the non-contiguity of District D is wholly without merit.

We recognize that members of the public supporting Map 103 urged that District D should be drawn in its current configuration to unify a purported "community of interest." Initially, this community of interest was identified as Latino voters, but drawing a district based "predominantly" on this racial consideration, when not required by the Voting Rights Act, constitutes unconstitutional gerrymandering. *See, e.g., Abbott v. Perez*, 138 S. Ct. 2305, 2334 (2018).

The supporters thereafter shifted gears to try to identify the purported community of interest in less explicitly racial terms, such as "renters." Factually-speaking, this recharacterization is highly dubious,

[1] Even if such a district could be drawn, that would not be the end of the inquiry—the Voting Rights Act still might not require the drawing of such a district. However, the failure to meet this basic criterion is would be fatal to any claim under the act. *See, e.g., Romero v. Pomona*, 883 F.2d 1418, 1422 (9th Cir. 1989); *Overton v. Austin*, 871 F.2d 529, 538 (5th Cir. 1989).

suggesting that it is pretextual. For one thing, the members of the public suggesting this community of interest did not identify any geographic location for this community of renters other than simply the District they sought. Moreover, District D has the lowest proportion of renters of any District in Map 103.

But, ultimately, the plausibility of this or any other so-called community of interest is beside the point. Even if were actually bona fide, it would not justify the City's violation of the contiguity requirement of the FAIR MAPS Act. In the "order of priority" specified in the Act, contiguity ranks above minimizing the division of communities of interest.

We also recognize that Map 103's supporters have latched onto the fact that contiguity is required only "to the extent practicable" to argue that it is not an absolute requirement. And, of course, it isn't. It is conceivable (though hard to imagine, realistically) that the contiguity requirement might have to be violated to a limited extent to comply with a *higher-ranked* criterion—*i.e.*, the equal population requirement or the Voting Rights Act. But that is not the case in Morgan Hill, as reflected in the fact that there were five other focus maps presented for the Council's consideration on March 2 that complied with those federal requirements *and* the contiguity requirement.

The phrase "to the extent practicable" does not, however, permit the Council to ignore contiguity in favor of a *lower-ranked* criterion; to conclude otherwise entirely defeats the purpose of prescribing the order of priority in the first instance. (We would note, moreover, that the directive to minimize the division of communities of interest is also to be followed only "to the extent practicable," *see* Elec. Code § 21601(c)(2), in recognition of the fact that it, too, must sometimes yield to higher-ranked criteria, such as the contiguity requirement.)

The illegality of Map 103 is transparent and indisputable. We therefore urge the Council to reconsider the adoption of that map before the deadline for the Council to adopt a final redistricting map on

April 17. After that date, the Council loses jurisdiction to make changes without a court order, and my client will have to consider alternative legal avenues.

Should you have any questions, please do not hesitate to contact me at 415/389-6800 or by e-mail at cskinnell@nmgovlaw.com.

Sincerely,

Christopher E. Skinnell

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