

Commissioners:

One of the ideas that came out of the weekly conference calls with Gibson Dunn & Crutcher was to develop a list of issue questions we could use during this week's presentations of statewide maps. The attached document, which has been reviewed by Commissioners Barabba, Ancheta and Filkins-Webber, was prepared in response to this request.

You will immediately see that the potential areas of inquiry far exceed the amount of time we will have to follow-up on information we might wish to ask about the statewide maps, and as such, we will have to be highly selective in choosing the few, most appropriate ones for each presentation. This is not intended to be anything like "cross examination," but to the extent presenters provide information that is responsive to the areas identified in these questions, it will not only improve the quality of our map drawing, but also make the maps more defensible.

The questions serve another purpose as well: This document pulls together an excellent summary of the criteria the Commission needs to have in mind with respect to both the California Constitution and the Voting Rights Act. Please consider using it as a guide when assessing information and in your own deliberations around draft and final maps.

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EXAMPLES OF QUESTIONS FOR STATEWIDE MAPS

Topic: Equal Population

Note to commissioners: The federal equal-population requirement means Congressional districts should be as nearly equal as practicable, and for the reasons that we have advised you, this means that you should strive for no deviations among districts. The federal Constitution requires State legislative districts to have reasonably equal populations. Any deviations ultimately allowed by the Commission must be for a legitimate state policy, consistently applied, and as minimal as possible for purposes of satisfying that consistently applied, legitimate state policy. Compliance with the federal Voting Rights Act likely would be an appropriate reason for a limited deviation, but only if it was required to avoid a violation of section 2 or section 5.

Suggested questions:

1. What is the maximum deviation in population among districts in your (i) congressional plan, (ii) state assembly plan, (iii) state senate plan, (iv) Board of Equalization district plan?
2. What are the reasons for any deviation?
3. Is your reason for any deviations consistently applied to all of the districts?
4. Have you made a determination whether you could reduce the maximum population deviation among districts while still applying your justification for the deviations?
5. Did you exclude from your analysis of population equality any groups on the ground that they should be considered residents of other jurisdictions (e.g., prisoners, students, etc.)? Why? What is your authority for doing so?
6. How are your reasons documented in your written submission?
7. If your reasons are not documented, would you be willing to provide a supplemental written submission explaining your rationale for any deviations?
8. [If there has been an assertion that + or – 5% is allowed for state districts] Do you have a legal authority that you are relying on for your assertion? What specific case or other authority are you relying on?

Topic: Equal Protection / 14th Amendment

Note to commissioners: The 14th Amendment's Equal Protection Clause mandates that race may not be the sole or predominant factor used in drawing a district's lines (with the potential exception of complying with the federal Voting Rights Act). Race can be a factor used in redistricting so long as it is part of the overall mix of information used and race-neutral,

traditional redistricting criteria are the basis for drawing the districts. To the extent that the Commission is required to draw a district because of Section 5 or Section 2 of the Voting Rights Act, the use of race to do so may be allowed so long as the proposed district is done to avoid a violation.

Example questions:

1. Other than the districts covering California's section 5 counties, are you claiming that your proposed majority-minority districts are required under the Voting Rights Act? If so, which ones?
2. How did you determine that those districts were required by the Voting Rights Act?
3. For those majority-minority districts that have been drawn but are not required by the Voting Rights Act, what criteria did you use in determining to make them?
4. Have you created any influence districts, coalition districts, or cross-over districts?
 - a. What redistricting criteria did you use in developing those proposed districts?
 - b. Do any of those districts join geographically separated minority populations?
 - c. Do those districts minimize the division of cities and counties?
5. Do any of the districts in your plan join distant communities via corridors such as beaches, highways or waterways? If so, why did you decide to join these specific communities this way?
6. Are there any geographic boundaries contained within a single district that separate communities within the district from each other? If so, what are the reasons you made this choice?
7. How is your analysis documented in your written submission?
8. If your reasons are not documented, would you be willing to provide a supplemental written submission explaining your rationale for any deviations?

Topic: Section 2 of VRA

Note to commissioners: Section 2 of the Voting Rights Act precludes the Commission from drawing districts that result in members of a protected group having less opportunity than other members of the electorate to participate in the electoral process and to elect representatives of their choice. Alleged violations of Section 2 must first meet all three so-called "*Gingles* preconditions"—namely, (1) a 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 majority must vote as a sufficient bloc to enable it in the absence of special circumstances to defeat the minority's preferred candidate. If all three *Gingles*

preconditions are met, then a court analyzing an alleged violation of Section 2 would consider the totality of the circumstances to determine whether the minority group has been denied an equal opportunity to participate in the political process and to elect candidates of its choice.

Example questions:

1. Does your proposed map include any district(s) drawn in order to avoid a violation of Section 2? Which one(s)?
2. Does your proposed district contain a majority-minority group?
 - a. What data did you use to determine the majority? VAP? CVAP? Where did you get your data? How is it documented?
 - b. Is the majority-minority group in the district geographically compact?
3. Did you perform a racially polarized voting analysis? Methodology? Results? How is it documented?
4. Do you have information about the “totality of the circumstances” requirement under the Voting Rights Act in connection with each majority-minority district that has been drawn? Proportionality? History of discrimination? Racial appeals in political campaigns? Members of minority group elected to office in the State from that geographic region? Lack of responsiveness of elected officials to particularized needs of members of minority group with respect to that geographic area? Where is your information on these factors? Where did you obtain this information? How is it documented?
5. Do your proposed maps create any coalition districts? Influence districts? Cross-over districts?
 - a. Where?
 - b. Legal basis for doing so?
 - c. Did you have to fragment any cities or counties to accomplish this?
 - d. Did you have to connect geographically separated minority populations to establish the district?
 - e. What data supports your proposal? How is it documented?
6. How is your analysis documented in your written submission?
7. If your reasons are not documented, would you be willing to provide a supplemental written submission explaining your rationale for any deviations?

Topic: Section 5 of VRA

Note to commissioners: Section 5 of the Voting Rights Act works to prevent retrogression in the status of minority voters in covered jurisdictions. Kings, Merced, Monterey, and Yuba Counties are covered jurisdictions. Section 5 requires that the federal government approve all voting-related changes made in covered jurisdictions. Before any proposed district maps can take effect, the maps must be precleared by either the United States Attorney General’s

Office or a United States District Court. The federal government will only preclear a map if it determines that the new map does not create retrogression in the status of minority voters and was not enacted for a discriminatory purpose. California will bear the burden of convincing the reviewers that the plan does not evidence retrogression.

To determine whether a plan is retrogressive, the federal government will conduct a holistic review of the status of minority voters under the new plan as compared to the plan previously in place. As instructed by the 2006 Amendments to the Federal Voting Rights Act, the reviewers will examine a wide variety of evidence to determine whether minority voters have lost any ground in their ability to elect their candidates of choice. While conducting their review, reviewers will consider census and CVAP data from 2000 and 2010, voter registration data, historical voter turnout, testimony from minority voters, testimony from representatives of minority voters, alternative districting plans, the inclusion of influence and majority-minority districts, and any other relevant information they receive to determine whether retrogression has occurred.

Example questions:

1. For each district that covers a Section 5 county, have you avoided retrogression for [Kings, Merced, Monterey, Yuba] County?
2. How does the racial breakdown of voters in the covered jurisdictions compare under the benchmark plan and your proposed plan?
3. Is there any evidence that retrogression of minority voting rights would take place under your proposed plan? How do you know this?
4. Did you consider other alternatives for avoiding retrogression that would have better complied with the criteria in the California Constitution regarding contiguity, respect for geographic integrity, and compactness?
5. Did you find retrogression to be unavoidable in any of the covered counties? If so please explain why you could not draw a less retrogressive plan.
6. Will your plan change minority groups' ability to influence the political process in the covered counties?
7. Does your plan create any majority-minority districts? Any influence districts? How do these districts affect minority groups' ability to elect candidates of their choice?
8. Are there any areas in the covered counties where minority groups are split between different districts? If so, why did you decide to split them?
9. Were there any groups of people that live in these districts that you decided not to count for districting purposes? Why did you decide not to include them? How did this alter your proposed district lines?

10. Is there any population deviations in your proposed districts in the covered jurisdictions? If so, why? And how are minority voters affected by the population differences?
11. Are any of the districts in your proposed plan strangely shaped? If so, can the shapes be explained by natural or logical boundaries? If not, what motivated you to draw these districts in this way?
12. How is your analysis documented in your written submission?
13. If your reasons are not documented, would you be willing to provide a supplemental written submission explaining your rationale for any deviations?

Topic: Geographic Contiguity

Note to commissioners: There are several traditional districting criteria included in Article XXI, § 2(d) the California Constitution. Explicit and consistent reliance on these redistricting criteria can help avoid federal constitutional challenges while failure to comply with the criteria can invalidate the plan. Geographic contiguity is one of the listed criteria.

Example questions:

1. Does your plan include any non-contiguous districts? Why?

Topic: Geographic Integrity

Note to commissioners: Geographic integrity is another of the criteria included in the California Constitution. It requires map drawers to respect the geographic integrity of any city, county, city and county, local neighborhood, or local community of interest in a manner that *minimizes their division* to the extent possible. Further, the California Constitution specifically defines community of interest to be composed of (i) “a contiguous population” (ii) which “shares common social and economic interests” (iii) which are such that the population should be included within a single district for purposes of effective and fair representation. Again, explicit and consistent reliance on this factor can help avoid federal constitutional challenges while failure to appropriately follow this criteria could lead to invalidation of the plan.

Example questions:

1. How many divisions of cities and counties does your plan create?
2. Have you determined whether your plan minimizes, in the words of the California Constitution, to the extent possible the division of cities, counties, local neighborhoods, and local communities of interest?
3. What types of local communities of interest did you take into account when drawing your proposed districts?

- a. How did you determine where these local communities of interest were located?
 - b. Are each of your communities of interest composed of only a contiguous population? [Note to commissioners: The California Constitution requires that a community of interest be composed of “a contiguous population” which shares common social and economic interests.]
 - c. How did you determine that the criteria for communities of interest were satisfied? For instance, if you based the community of interest on those with similar living standards, how did you determine that? Or if you based the community of interest in part on the use of the same transportation facilities, how did you determine that? Or access to methods of communication?
4. What steps did you take to minimize the division of cities, counties, city and counties, local neighborhoods, and local communities of interest?
 5. Did you have to determine in any cases whether to preserve counties and cities over local neighborhoods or local communities of interest, or vice versa? What were the factors driving your choices?
 6. Did you favor certain local communities of interest over others? What were the factors that influenced your choices?
 7. Are there alternatives that can be drawn that accomplish your proposed districts while further minimizing fragmentation of geographic areas?
 8. How is your analysis documented in your written submission?
 9. If your reasons are not documented, would you be willing to provide a supplemental written submission explaining your rationale for any deviations?

Topic: Geographic Compactness

Note to commissioners: Geographic compactness is another of the criteria included in the California Constitution. It ensures that nearby areas of population are not bypassed for more distant population groups when drawing districts. Again, explicit and consistent reliance on this factor can help avoid federal constitutional challenges while failure to account for geographic compactness can invalidate the plan.

Suggested questions:

1. Have you applied any standard by which to establish geographic compactness in the districts that you have drawn? What was that standard?

2. When drawing the districts in your plan, did you ever bypass a nearby area of population to include a more distant group of people? If so, what motivated this decision?

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