



Northern
California



Southern California

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Via Email

Fresno County Board of Supervisors
Fresno County Hall of Records
2281 Tulare Street, Room 301
Fresno, CA 93721
Clerk/BOS@co.fresno.ca.us

Fresno County Redistricting Advisory Commission
County Administrative Office
2281 Tulare Street, Room 304
Fresno, CA 93721
FresnoCounty2021Redistricting@fresnocountyca.gov

Re: Supervisorial Redistricting Process

Dear Members of the Fresno County Board of Supervisors and Members of the Fresno County Redistricting Advisory Commission:

The American Civil Liberties Union Foundation of Northern California and the American Civil Liberties Union Foundation of Southern California write to address comments made by some members of the Fresno Board of Supervisors (Board) regarding their intent to keep the existing supervisorial districts largely the same during this redistricting cycle by only changing the districts at the margins to balance the population.¹ These comments are extremely concerning because this approach prioritizes maintaining the core of existing districts over mandatory criteria, something prohibited by federal law and by the Fair and Inclusive Redistricting for Municipalities and Political Subdivisions (FAIR MAPS) Act (hereinafter, the Fair Maps Act).² This approach also defeats the purpose of the redistricting process: to periodically redraw district boundaries to provide residents with fair representation.

¹ During the April 13, 2021, Fresno County Board of Supervisors meeting, Supervisors stated that, as part of the 2021 redistricting process, they expected only minor changes to the existing Fresno County supervisorial map. *See* Agenda Item 6 starting at 1:07:45, *available at* http://fresnocounty.granicus.com/player/clip/804?view_id=1&redirect=true. For example, Supervisor Buddy Mendes said that the 2021 redistricting process was simply about “tweaking” or “moving over” somewhere “between 3 to 5 census tracts.” *Id.* at 1:15:37. He noted that during the 2010 redistricting process, any district line changes mostly occurred in District 5 where “the census tract boundaries basically moved slightly to the North East...just slightly.” *Id.* at 1:16:03. Supervisor Nathan Magsig stated that he was saddened that his district will likely be impacted the most with the redistricting process and if he could, he would “keep the lines exactly as they are because [he] appreciate[s] the opportunity to serve everyone in [his] district.” *Id.* at 1:36:52. Supervisor Brian Pacheco echoed the sentiment that the redistricting process would result in little change because he did not expect “wholesale changes” in the Fresno County districts lines. *Id.* at 1:45:40. Lastly, Supervisor Steve Brandau foreshadowed to the public that the Fresno County district map would only “shift relatively slightly” because of some “border changes based on population growth.” *Id.* at 1:51:52.

² Cal. Elec. Code § 21500 *et. seq.* (relevant provisions for counties).

The Board adopted the 2011 district map using 2010 data and under a different legal landscape. Unlike this cycle, in 2011 the Board was not explicitly required to keep communities of interest together or to engage in a robust outreach and education campaign to solicit public testimony. In 2011, line drawers in California were only required to ensure equality of population and to avoid vote dilution. They were permitted to consider traditional redistricting principles but could ignore them completely and could place as much or as little weight as they wanted on other factors, including undemocratic factors such as protecting incumbents by largely maintaining existing lines. Because the Board adopted the current map under a different legal scheme, the Board may well be in violation of the Fair Maps Act if it decides to adopt a map that simply balances the population of the existing map.³ We urge the Fresno County Advisory Redistricting Commission (Advisory Commission) to instead start with a blank slate when drafting a district map and allowing testimony from the public about communities of interest in Fresno County to guide line-drawing. Similarly, we urge the Board to adopt a map that keeps these communities of interest together and that does not dilute the vote of any protected groups.

I. Decennial Redistricting and Traditional Redistricting Principles

The Board's interest in maintaining the current lines by only slightly adjusting them to bring the districts within the allowable population deviation reflects a basic misunderstanding of the decennial redistricting process. Equality of population is not important for its own sake. Instead, equality of population serves the larger goal of decennial redistricting: to "achiev[e] fair and effective representation for all citizens." *Reynolds v. Sims*, 377 U.S. 533, 565-56, 560-61 (1964) (noting that "the fundamental principle of representative government in this country" mandates "equal representation for equal numbers of people"). The purpose of periodic redistricting is to "maintain[] a reasonably current scheme of legislative representation" that reflects not just population changes, but also reflects communities of interest and any changes over time in other demographic trends. *See id.* at 583-84.

Line drawers use a series of tools in addition to equality of population to draft maps that "observe and advance neutral democratic values." *See Bethune-Hill v. Va. State Bd. of Elec.*, 141 F. Supp. 3d 505, 534-35 (E.D. Va. 2015), *affirmed in part, vacated in part*, 137 S. Ct. 788 (2017). Indeed, line drawers are permitted to deviate from perfect equality of population precisely to accommodate these principles. *See Reynolds*, 377 U.S. at 578-79 (indicating when divergence from the strict population standard is constitutionally permissible). They include communities of interest, compactness, contiguity, and following natural, artificial, and political subdivision boundaries. Cal. Elec. Code § 21500(c); *see also Evenwel v. Abbot*, 136 S. Ct. 1120, 1124 (2016) (listing traditional redistricting principles). Contiguity and compactness, for example, facilitate political organization, electoral campaigning, and constituent representation by binding geographic communities of interest together. *Karcher v. Daggett*, 462 U.S. 725, 756 (1983) (noting importance of compactness); *Bethune-Hill*, 141 F. Supp. 3d at 536-37 (noting importance of contiguity). Courts in turn have found that preserving neighborhoods, political subdivisions, and "communities of interest is important because the sense of community derived from established governmental units tends to foster effective representation." *Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 690 (D. Ariz. 1992) (quotations omitted). Without these criteria, line drawers would be free to engage in "indiscriminate redistricting" which would be "little more than an open invitation to partisan gerrymandering." *Reynolds*, 377 U.S. at 578-79.

³ During the 2011 redistricting process, the Board appointed an advisory redistricting commission but ultimately rejected the group's map recommendations. *See* Kurtis Alexander, "Fresno Co. Supes End Stalemate on district," THE FRESNO BEE (Aug. 30, 2011) available at: <https://www.fresnobee.com/news/local/community/clovis-news/article19512345.html>. At the time, at least one Board member indicated that "she wanted to shuffle around as few people as possible." *Id.*

While courts have for decades uplifted the importance of traditional redistricting principles, they have spoken disapprovingly of individualized, political criteria such as incumbency protection and partisan gerrymandering. *See, e.g., Johnson v. Miller*, 922 F. Supp. 1556, 1565 (S.D. Ga. 1995) (three-judge court) (noting that incumbency protection is a politicized factor); *Ariz. State Leg. v. Ariz. Indep. Redist. Com'n*, 576 U.S. 787, 791 (2015) (noting that partisan gerrymanders “are incompatible with democratic principles”) (quotations omitted). Courts also recognize that some incumbents are improperly motivated to keep district lines the same precisely to protect their seats. *Evenwel*, 136 S. Ct. at 1123 (observing the problem that legislators have “scant incentive to adopt new maps that might put them out of office”); *Reynolds*, 377 U.S. at 583 (recognizing that even redistricting only once a decade has drawbacks because it leads “to the development of resistance to change on the part of some incumbent legislators”). Because incumbency protection and partisan gerrymandering defy the basic principle that “voters should choose their representatives, not the other way around,” *Ariz. State Leg.*, 576 U.S. at 824, courts have subordinated these criteria to traditional redistricting principles, *see, e.g., Johnson*, 922 F. Supp. at 1565 (subordinating incumbency protection to communities of interest); *Ga. State Conf. of the NAACP v. Fayette Cnty. Bd. of Com'rs*, 996 F. Sup. 2d 1353, 1363 (N.D. Ga. 2014) (noting that “when incumbent protection has been considered, courts have routinely treated this principle as a *distinctly subordinate* consideration to the other traditional redistricting principles”) (quotations excluded, emphasis in original). The Board and Advisory Commission must do the same this cycle.

II. The Fair Maps Act and Mandatory Redistricting Criteria

Although courts have highlighted the importance of traditional redistricting criteria, these criteria were discretionary for decades, including during the 2011 redistricting cycle. *Compare Miller v. Bd. of Super. of Santa Clara Cnty.*, 63 Cal. 2d 343, 345 n.1 (1965) (listing discretionary criteria in place at the time), *with* Cal. Elec. Code § 21500 (2019) (amended 2020) (listing the same discretionary criteria); *see also* A.B. 849 Assemb. Floor Analysis at 2 (Sep. 4, 2019) (noting that county redistricting criteria has been largely unchanged since 1947). In 2019, however, the California Legislature passed the Fair Maps Act,⁴ requiring counties to, in order of priority: ensure substantial equality of population, comply with Section 2 of the Voting Rights Act, and create districts that are geographically contiguous, maintain communities of interest, avoid dividing cities and census designated places, use boundaries that are easily identifiable and understandable by residents, and are compact. Cal. Elec. Code § 21500(a)-(c). The Fair Maps Act further requires the Board and Advisory Commission to engage in a robust outreach and education campaign to encourage public participation and solicit testimony about communities of interest in the County. *Id.* §§ 21507, 21507.1, 21508(a), (g).

Notably, preserving existing supervisorial lines has never been listed as a discretionary factor in state law. *See Miller*, 63 Cal. 2d at 345 n.1 (listing discretionary criteria in place in 1965 which did not include preserving existing districts); Cal. Elec. Code § 21500 (2019) (amended 2020) (same).⁵ Neither does the Fair Maps Act list this criterion as one of the ranked, mandatory factors. *See* Cal. Elec. Code § 21500. Instead, the Act explicitly prohibits many of the practices that animate the desire to keep existing lines largely the same. For example, the Fair Maps Act prohibits the Board from adopting a supervisorial map “for the purpose of favoring or discriminating against a political party.” *Id.* § 21500(d). The Fair

⁴ The Fair Maps Act was amended in 2020 by A.B. 1276.

⁵ State law in 1965 and in 2019 provided the following: “In establishing the boundaries of the [supervisorial] districts the board may give consideration to the following factors: (a) topography, (b) geography, (c) cohesiveness, contiguity, integrity, and compactness of territory, and (d) community of interests of the [supervisorial] districts.” Cal. Gov’t Code § 25001 (1964) (current version Cal. Elec. Code § 21500 (2021)); Cal. Elec. Code § 21500 (2019).

Maps Act also excludes incumbency protection and continuity of representation⁶ from the ranked criteria and is instead clear that “[c]ommunities of interest *do not* include relationships with political parties, incumbents, or political candidates.” Cal. Elec. Code § 21500(c)(2) (emphasis added).

Although prior to the passage of the Fair Maps Act courts had noted that jurisdictions may have their own, local redistricting criteria, these same courts disregarded these criteria when they conflicted with mandatory and permissive factors found in state and federal law. In *Luna v. County of Kern*, for example, the district court rejected Kern County’s argument that any remedial supervisorial district map had to remain as unchanged as possible from the 2011 map, particularly because doing so would violate Section 2 of the Voting Rights Act by fragmenting the Latino population. 291 F. Supp. 3d 1088, 1112 (E.D. Cal. 2018). Similarly, in *Garza v. County of Los Angeles*, the Ninth Circuit upheld a district court’s rejection of the 1981 Los Angeles County supervisorial district map because supervisors had prioritized incumbency protection even though that cracked a cohesive Latino community of interest. 918 F.2d 763, 771 (9th Cir. 1990). Finally, in *Miller*, the California Supreme Court rejected a supervisorial map because it was “readily apparent that the factors on which the board relie[d] in apportioning the districts [were] not the fundamental factors prescribed” in state law. 63 Cal. 2d at 349. Instead of following or considering state law factors, the board’s draft map was “primarily compelled by a desire and the result of an effort to preserve traditional political subdivisions,” a factor absent from state law at the time. *Id.* at 349. A court would no doubt also reject a Fresno County supervisorial map that prioritizes preserving existing lines, a factor absent from the Fair Maps Act, over mandatory factors, such as preserving communities of interest.

III. The Board Must Adopt a Map that Complies with Mandatory Criteria

In adopting the Fair Maps Act and making traditional redistricting criteria mandatory, the California Legislature took the firm position that counties may not simply tweak lines every ten years to address malapportionment. Instead, line drawers must conduct a thorough process that, in the end, results in a map that keeps communities of interest together. During prior redistricting cycles, Fresno County did not have to create districts that were contiguous, maintained communities of interest, and were compact. California law also did not explicitly prohibit the Board from favoring or discriminating against a political party, or from considering incumbency, partisan affiliation, and relationships with representatives. Because in 2011 and during prior redistricting cycles the Board was not required to consider now mandatory criteria,⁷ the current Board and the Advisory Commission are under no obligation to give any deference to existing district lines or to use them as a starting point.

A review of demographic changes over the past two decades strongly suggests that the Board has for decades prioritized largely maintaining existing lines over ensuring that lines capture communities of interest. In 2011, for example, the Board adopted a map almost identical to the 2001 supervisorial map

⁶ Some have framed the preservation of existing lines as an effort to maintain the relationships between the public and their representatives. Even if this were truly a concern about County residents and not about protecting incumbents, the California Legislature has determined that other criteria outweigh this concern. Cal. Elec. Code § 21500(c)(2) (excluding relationships with incumbents from the communities of interest assessment); *see also Rodriguez v. Harris Cnty., Tex.*, 964 F. Supp. 2d 686, 746 (S.D. Tex. 2013) (noting that redistricting criteria are often in tension with each other “such that adherence to one redistricting principle necessitates the subjugation of a competing principle”).

⁷ During the 2011 redistricting cycle, supervisors made comments indicating that they were considering now prohibited criteria. For example, then-Supervisor Susan Anderson prioritized maintaining relationships with her constituents, stating that “[t]here should not be one voter that comes out of my district[.]” Kurtis Alexander, “7 proposals for Fresno Co. supervisor districts,” THE FRESNO BEE (Jun. 7, 2011), [available at https://www.fresnobee.com/news/local/community/clovis-news/article19511334.html](https://www.fresnobee.com/news/local/community/clovis-news/article19511334.html).

notwithstanding the fact that between 2000 and 2010 the Latino population grew from 44 to 50.3 percent of the total Fresno County population.⁸ Redistricting data from the 2020 census shows that the Latino population has now grown to 53.6 percent, an almost 10 percent increase in the last 20 years. These demographic changes have not been uniform throughout the county. For example, between 2010 and 2019, the Latino population increased 2.5 percentage points in district 4 and increased 4.7 percentage points in district 2.⁹

Public testimony will no doubt confirm what the data suggest: that a new supervisorial map that is largely the same as the 2011 map and is, in turn, largely the same as the 2000 map does not take into account dramatic demographic shifts since 2000 and likely violates state law. To avoid violating the law and to ensure fair and effective representation in the County, the Board must dispense of its misguided goal to maintain existing lines as much as possible. The Advisory Commission must start fresh and, among other things: solicit and listen to public testimony with an open mind; start to understand the location of distinct neighborhoods and communities of interest in the County; look to American Community Survey data to identify which areas in the County have similar socioeconomic characteristics; and work with consultants to draft a map that captures these communities while following other mandatory, ranked criteria. If the Advisory Commission fails to comply with such requirements when drafting and recommending maps, it is incumbent on the Board to ensure that any final map complies with both state and federal law.

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Redistricting inherently involves changes in current district lines. These changes can be large or small, depending on how representative the lines were during prior redistricting cycles and how drastic changes have been since the last cycle. In this case, we know that the 2011 lines were drawn under an entirely different legal regime and that there have been drastic demographic changes in Fresno County in the past few decades. We urge the Board and the Advisory Commission to follow the Fair Maps Act and engage in a good faith effort to adopt a fair and equitable supervisorial district map. If you have any questions, please feel free to contact us at asalceda@aclunc.org and jgomez@aclusocal.org.

Sincerely,



Angélica Salceda
Democracy & Civic Engagement Director
ACLU Foundation of Northern California



Luis Ojeda
Regional Organizing & Program Manager
ACLU Foundation of Northern California



Julia A. Gomez
Staff Attorney
ACLU Foundation of Southern California

⁸ Data from the 2000 decennial census and the 2010 decennial census.

⁹ Using 2010 decennial census data and 2019 5-year American Community Survey data.