



Northern
California

December 8, 2021

Via E-mail

Fresno City Council
c/o Clerk of the City Council
2600 Fresno Street
Fresno, CA 93721
clerk@fresno.gov

Re: Fresno City Council Redistricting Process, Agenda Item No. 21-995

Dear Honorable Members of the Fresno City Council:

The American Civil Liberties Union Foundation of Northern California (ACLU-NC) writes to express concern about the Fresno City Council's position to not consider several public maps that drew out sitting councilmembers from current districts. The Fresno City Council reasoned that, for compliance purposes, its city charter requires proposed maps to protect incumbency; otherwise, the city council cannot consider the proposed maps. But such reasoning is not well-founded.

This redistricting cycle, line drawers in California must comply with both the federal Voting Rights Act and the Fair and Inclusive Redistricting for Municipalities and Political Subdivisions (FAIR MAPS) Act (hereinafter, the Fair Maps Act or the Act).¹ Among other things, the Act sets forth mandatory substantive redistricting criteria that must be taken into account when a local government prepares the redistricting plan and drafts and considers maps. These substantive requirements apply to charter cities like Fresno City unless a city charter "provides *two or more* traditional criteria for redistricting other than the requirement that districts be equal in population."² Fresno City's charter does not meet these conditions. Moreover, home rule authority under the California Constitution does not mean charter cities like Fresno can

¹ Cal. Elec. Code § 21620 *et. seq.* (relevant provisions for charter cities).

² Cal. Elec. Code § 21621(e) (emphasis added).

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never be subject to state laws that concern or regulate municipal affairs such as elections or redistricting. It also does not mean that the Fresno City Council can subordinate mandatory redistricting criteria under the Fair Maps Act to the city charter’s single redistricting criterion. For the reasons articulated below, the Fresno City Council must meaningfully consider all public maps that comply with the Fair Maps Act, including those that draw out sitting incumbents.

I. The Fresno City Council was wrong when it failed to consider maps that did not protect incumbent councilmembers.

a. The Fresno City Council claims that its city charter supersedes the Fair Maps Act’s substantive redistricting criteria.

During the November 4, 2021, and December 2, 2021 public hearings, Counsel Chris Skinnel advised that under his interpretation, the city charter requires that councilmembers not be drawn out of their districts.³ Under Counsel Skinnel’s interpretation of the Fair Maps Act vis-à-vis the city charter, “as long as it’s possible to adopt a map that complies with both, there is no justification for ignoring the charter requirement” for incumbency protection.⁴ Relying on this interpretation, the Fresno City Council took the unprecedented position that its city charter supersedes the mandatory redistricting criteria of the Fair Maps Act and, based on this position, declined to consider any public proposed map that drew out incumbents from their districts. As a result, the Fresno City Council never considered for adoption public maps 101 through 110, leaving the Council only to decide among the three consultant-produced maps and public map 111. This was wrong and the Fresno City Council should revisit public maps 101 through 110 and meaningfully consider them as part of its redistricting process.

b. Because the city charter does not trigger the Fair Maps Act’s safety valve, the Act’s criteria apply to Fresno City.

The Fair Maps Act criteria applies to both general law and charter cities, unless a charter city has “adopted comprehensive or exclusive redistricting criteria in its city charter.”⁵ “[C]omprehensive or exclusive’ means either that the city’s charter excludes consideration of redistricting criteria other than those that are identified in the city charter or that the city’s charter

³ Fresno City Council Regular Meeting, Agenda Item No. 21-802 at 09:37:11 to 09:38:32; 09:39:05 to 09:39:27 (Nov. 4, 2021), available at http://fresno.granicus.com/player/clip/1006?view_id=1&redirect=true; Fresno City Council Public Hearing, Agenda Item No. 21-889 at 10:17:10 to 10:17:30 (Dec. 2, 2021) (hereinafter December 2, 2021 Hearing”), available at <https://cmac.tv/show/fresno-city-council-meeting-12-2-21/>.

⁴ December 2, 2021 Hearing at 10:17:10 to 10:17:28.

⁵ Cal. Elec. Code § 21621(e).

provides *two or more* traditional criteria for redistricting other than the requirement that districts be equal in population.”⁶ Traditional redistricting criteria “are numerous.” *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S.Ct. 788, 799 (2017). They include communities of interest, compactness, contiguity, and following natural, artificial, and political subdivision boundaries.⁷ See, e.g., *Evenwel v. Abbot*, 136 S. Ct. 1120, 1124 (2016) (listing traditional redistricting principles).

The City of Fresno is a charter city.⁸ The city charter includes a provision on “Eligibility, District Residence” that imposes residency requirements on elected or appointed councilmembers.⁹ In addition to requiring that each council member, “during that Councilmember’s term of office, reside within such Council district,” the charter also requires that “population disparity between districts...not exceed ten percent..., and no boundary shall be altered so as to exclude any incumbent from office prior to the expiration of that incumbent’s term.”¹⁰ Apart from equality of population and the reference to incumbents’ residency, the charter does not reference any other traditional redistricting criteria nor does it include a provision or declaration of intention that the charter exclude consideration of other redistricting principles.

This provision is not enough to trigger the Fair Maps Act safety valve for charter cities. As explained above, the charter-cities exception requires at least *two* enumerated criteria *other than* an equal population requirement. Accordingly, the “population disparity” requirement in the charter cannot satisfy the “two or more traditional criteria” requirement under the Act because it is an equal populous requirement. This leaves only the reference to incumbents’ residency. The Fresno City Council claims that its charter provision requires incumbency protection. Even if it does, this lone redistricting criterion is insufficient. There are numerous traditional redistricting criteria that the city could have adopted into its charter if it intended to prevail over general law. The city charter’s “Eligibility, District Residence” provision has not been amended since June 7, 1988. If the Fresno City Council intended its charter to supersede state law with respect to redistricting matters, it should have amended its charter to include “two or more traditional criteria for redistricting.” It did not.

⁶ *Id.* (emphasis added).

⁷ Cal. Elec. Code § 21500(c).

⁸ Cal. Gov. Code § 34101 (“Cities organized under a charter shall be ‘chartered cities.’”).

⁹ Fresno City Charter, Article III, sec 304.1.

¹⁰ *Id.*

- c. *The Fair Maps Act's mandatory criteria must be prioritized over the city charter's single criterion because local redistricting is a matter of statewide concern and the Legislature was clear that the Fair Maps Act applied to charter cities.*

The Fresno City Council cannot decline to consider maps simply because they do not protect incumbents because the Fair Maps Act's criteria reign over the city charter's. It is well established that “general law prevails over local enactments of a chartered city... where the subject matter of the general law is of statewide concern.” *People ex rel. Seal Beach Police Officers Assn. v. City of Seal Beach*, 36 Cal.3d 591, 600 (1984) (quoting *Professional Fire Fighters, Inc. v. City of Los Angeles*, 60 Cal.2d 276, 292 (1963)). Decennial redistricting is a matter of statewide concern. *See Jauregui v. City of Palmdale*, 226 Cal. App. 4th 781, 799 (2014) (“Given the history of our nation and California, there is a convincing basis for the Legislature to act in what otherwise be a local affair—city council elections.”). What is more, by including provisions specific to charter cities, the Legislature clearly intended the Act to apply to charter cities. *See, e.g., City of Redondo Beach v. Padilla*, 46 Cal.App.5th 902, 912 (2020), *review denied* (July 15, 2020) (noting that the Legislature “is usually quite specific when it intends...to include charter cities”). By enacting the Fair Maps Act and making it clear that it applied to charter cities, the Legislature signaled that redistricting was a matter of statewide concern. The Legislature took a firm position that cities cannot simply tweak lines every ten years to address malapportionment. This means that cities like Fresno—which could have but failed to adopt their own redistricting criteria—must first follow the criteria that the Legislature determined best advance the democratic value of fair and effective representation that underlies the larger goal of decennial redistricting. In other words, the Fresno City Council got the order of priorities wrong by subordinating the Fair Maps Act's criteria to the city charter's lone redistricting criterion.

II. Incumbency protection defies the basic principle that voters should select their representative, not the other way around.

In addition to being unlawful, the Fresno City Council's intent to protect incumbents as a primary redistricting goal is also bad public policy. While courts have for decades uplifted the importance of traditional redistricting principles, they have spoken disapprovingly of individualized, political criteria such as incumbency protection. *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). 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 v. Sims*, 377 U.S. 533, 583 (1964) (recognizing that even redistricting only

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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 defies the basic principle that “voters should choose their representatives, not the other way around,” *Ariz. State Leg. v. Ariz. Independent Redistricting Com’n*, 576 U.S. 787, 824 (2015), courts have subordinated this criterion 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). The Fresno City council must do the same this cycle.

* * *

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. We urge the Fresno City Council to meaningfully consider all public maps that comply with the Fair Maps Act, including those that draw out sitting incumbents. If you have any questions, please feel free to contact me.

Sincerely,



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

cc:

Councilmember Esmeralda Z. Soria
Councilmember Garry Bredefeld
Councilmember Luis Chavez
Councilmember Miguel Angel Arias
Councilmember Mike Karbassi
Councilmember Nelson Esparza
Councilmember Tyler Maxwell

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