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January 9, 2022

Alderman Scott Spiker
City of Milwaukee
City Hall
200 E. Wells Street, Room 205
Milwaukee, WI 53202

Re: Redistricting Process

Dear Alderman Spiker:

You asked for an opinion regarding whether using race or ethnicity as the primary driver of the City's redistricting efforts runs afoul of the Equal Protection Clause along the lines of *Shaw v. Reno* and subsequent Supreme Court decisions. You also asked this office to opine more globally regarding legal concerns that the Council should keep in mind as it embarks on round two of the redistricting process. We are pleased to provide you with the following responses.

THE EQUAL PROTECTION CLAUSE

The Equal Protection Clause provides that "[n]o State shall ... deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. Its central purpose is to prevent the States from purposefully discriminating between individuals on the basis of race. *Shaw v. Reno*, 509 U.S. 630, 642, 113 S. Ct. 2816, 2824, 125 L. Ed. 2d 511 (1993) (citing *Washington v. Davis*, 426 U.S. 229, 239, 96 S. Ct. 2040, 2047, 48 L.Ed.2d 597 (1976).[1] In the seminal racial

[1] Your question specifically inquired about using race *or* ethnicity in redistricting as it relates to the Equal Protection Clause. The terminology used throughout this section is primarily that of race. However, the United States Supreme Court in *Miller v. Johnson*, 515 U.S. 900, 115 S. Ct. 2475, 132 L. Ed. 2d 762 (1995), a significant Equal Protection Clause redistricting case, used the terms race and ethnicity in equal context when discussing them as "'inherently suspect" classifications'" that require the "'most exacting judicial examination.'" *See id.* at 904 *(quoting Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 291, 98 S. Ct. 2733, 2748, 57 L.Ed.2d 750 (1978) ("'Racial and ethnic distinctions of any sort are inherently suspect and thus call for the most exacting judicial examination.... This perception of racial and ethnic distinctions is rooted in our Nation's constitutional and demographic history.'").

gerrymandering case of *Shaw*, the United States Supreme Court examined whether the State of North Carolina had created an unconstitutional racial gerrymander in its redistricting plan. *Id.* at 636. The Court held that "a plaintiff challenging a reapportionment statute under the Equal Protection Clause may state a claim by alleging that the legislation, though race-neutral on its face, rationally cannot be understood as anything other than an effort to separate voters into different districts on the basis of race, and that the separation lacks sufficient justification." *Id*. at 649. Although there was no direct evidence that the districts were race-based, the Court recognized an Equal Protection Clause claim based on the allegation that the reapportionment scheme was so irrational on its face that it could be understood only as an effort to racially segregate voters. *Id.* at 658.

Following *Shaw*, it remained unclear what the standard of review was under the new racial gerrymandering doctrine given the procedural posture of the *Shaw* case at the motion to dismiss stage. Only two years later, the Court in *Miller v. Johnson*, 515 U.S. 900, 903, 115 S. Ct. 2475, 2482, 132 L. Ed. 2d 762 (1995), had a chance to revisit the issue when analyzing the constitutionality of Georgia's congressional redistricting plan. The Court first found that race was the "predominant, overriding factor" explaining the legislature's decision to attach to the challenged district various appendages containing dense majority-black populations. *Id.* at 920. In doing so, it relied upon various pieces of circumstantial evidence, including that the district court had found it was "'exceedingly obvious'" that the shape of the district, together with relevant racial demographics, was a deliberate attempt to bring black populations into the district. *Id.* at 917. The Court also relied on the district court's factual finding that the State acquiesced to the Justice Department's demands for its "maximization agenda" for three black-majority districts. *Id.* at 917-18. After concluding that race was the predominant, overriding factor, the Court turned to the secondary question of whether the redistricting plan could withstand strict scrutiny. *Id.* at 920.

To satisfy strict scrutiny in this instance, the Court required the State to demonstrate that its redistricting legislation was narrowly tailored to achieve a compelling interest. *Id.* at 920. In applying that standard, the Court found that the redistricting plan at issue failed to meet the vigorous requirements of strict scrutiny. *Id.* at 921. Although the Court recognized that there is a "'significant state interest in eradicating the effects of past racial discrimination'" *id.* at 920 (quoting *Shaw,* 509 U.S. at 656), the Court determined that the State's true interest was "creating a third majority-black district to satisfy the Justice Department's preclearance demands." *Id.* at 921. The Court held that "compliance with federal antidiscrimination laws cannot justify race-based districting where the challenged district was not

reasonably necessary under a constitutional reading and application of those laws." *Id.*

More recent United States Supreme Court decisions have helped to clarify the standards established in *Shaw* and *Miller*. Most significantly, in *Cooper v. Harris*, 137 S. Ct. 1455, 197 L. Ed. 2d 837 (2017), the Court examined the redrawing of two congressional districts in North Carolina. An uncontested record in the case showed that the State's mapmakers, "purposefully established a racial target: African–Americans should make up no less than a majority of the voting-age population." *Id.* at 1468. Various representatives "repeatedly told their colleagues that District 1 had to be majority-minority, so as to comply with the VRA." *Id.* As a result, the Court upheld the district court's finding that race predominated in drawing the district at issue. *Id.* at 1469.

The Court then turned to the more substantial question of whether the redistricting could survive strict scrutiny. *Id* The Court noted that it has long assumed that complying with the Voting Rights Act ("VRA") is a compelling interest and "that race-based districting is narrowly tailored to that objective if a State had 'good reasons' for thinking that the Act demanded such steps." *Id.* Put otherwise, under the strict scrutiny standard, the Court would not simply take the State's word that the VRA required the redistricting steps taken. *See id.* The Court then examined whether North Carolina had good reasons for thinking the VRA required drawing the district as a majority-minority district to avoid Section 2 liability for vote dilution. *Id.*

Thornburg v. Gingles, 478 U.S. 30, 106 S. Ct. 2752, 92 L.Ed.2d 25 (1986), established three threshold conditions for proving vote dilution under § 2 of the VRA. *See id.* at 50–51. First, a "minority group" must be "sufficiently large and geographically compact to constitute a majority" in some reasonably configured legislative district. *Id.* at 50. Second, the minority group must be "politically cohesive." *Id*. at 51. And third, a district's white majority must "vote [ ] sufficiently as a bloc" to usually "defeat the minority's preferred candidate." *Id.* In applying the *Gingles* principles, the Court in *Cooper* found that electoral history provided no evidence that a § 2 plaintiff could demonstrate the third prerequisite—effective white bloc-voting. *Cooper,* 137 S. Ct. at 1470. As such, the *Cooper* Court upheld the district court's conclusion that North Carolina's use of race as the predominant factor in designing District 1 did not withstand strict scrutiny. *Id.* at 1472.

The aforementioned cases—and particularly the *Cooper* decision—provide important guidance to any legislative body engaged in the redistricting process. Whatever its good intentions, a legislative body cannot simply assume that a

redistricting plan seeking to increase voting power for a historically underrepresented group is, *per se*, constitutional. Rather, the cases clearly establish that a redistricting plan in which race or ethnicity is the predominant factor comports with the Equal Protection Clause only when the plan can survive strict scrutiny, i.e., where it is narrowly tailored to achieve a compelling government interest.

A legislative body may cite compliance with the VRA as a compelling government interest; however, in order to survive the extremely rigorous strict scrutiny standard, in such a scenario the body must be able to support that contention with specific facts in the record establishing that it had good reason to believe the VRA demanded such steps. A sufficient record would thus, at minimum, address the three *Gingles* principles outlined above. Alternatively, if VRA compliance is not the legislative body's compelling interest for considering race when redistricting, the record should reflect whatever the other compelling interests are.

FURTHER CONSIDERATIONS

In addition to compliance with the Equal Protection Clause, you have asked our office to look more globally at any other legal issues that the Council should keep in mind as it moves forward with the redistricting process. Other considerations for the Council include:

A. The Voting Rights Act

As the preceding section explained, when a redistricting plan that seeks to empower a historically underrepresented group is challenged via the Equal Protection Clause, the legislative body advancing the plan may sometimes turn to the VRA to defend its actions. Yet even when that is not the case, compliance with the VRA remains an important consideration. The Common Council must therefore be cognizant of the VRA's requirements when finalizing any redistricting plan. *See, e.g.*, *Abbott v. Perez*, 138 S. Ct. 2305, 2315, 201 L.Ed. 2d 714 (2018) (explaining that "[s]ince the Equal Protection Clause restricts consideration of race and the VRA demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to 'competing hazards of liability.'" (internal citations omitted)).

Section 2 of the VRA prohibits the City from imposing a "voting qualification or prerequisite to voting, or standard, practice or procedure to deny or abridge the right to vote on account of race or color." 52 U.S.C. § 10301 (a). Most VRA challenges allege vote dilution; that is, that members of a race or language minority are split

up from each other and combined with members of a majority group, effectively limiting the ability of the minority group to elect a candidate of its choice.

VRA claims are evaluated based on the totality of the circumstances:

> A violation . . . is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the…political subdivision are not equally open to participation by members of a [racial, color, or language minority group] 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 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.
>
> 52 U.S.C. § 10301 (a).

As previously noted, a minority group making a claim under Section 2 of the VRA must first satisfy the three *Gingles* preconditions: (1) the minority group in question must be sufficiently large and geographically compact to otherwise create a majority-minority district (meaning, in this context, that the minority group must represent more than 50% of the voting age population, *Bartlett v. Strickland*, 556 U.S. 1, 13-18, 129 S. Ct. 1231, 173 L.Ed. 2d 173 (2009)); (2) the minority group must be politically cohesive in terms of voting patterns; i.e., it must tend to vote as a bloc: and (3) the majority group votes sufficiently as a bloc to enable it, in the absence of special circumstances, to defeat the minority's preferred candidate. *Gingles*, 478 U.S. at 30.

Neither the proposed maps currently in the relevant file nor the map previously adopted by the Council and then vetoed by Mayor Barrett appear to present the Council with a third majority-minority Hispanic/Latinx aldermanic district (that is, a district in which Hispanic/Latinx individuals presently represent over 50% of the voting age population).[2] As previously stated, the VRA does not require creation of influence districts or coalition districts; only majority-minority districts by voting age. *Bartlett*, 556 U.S. at 13-18. For this reason, the maps do not appear to meet the first *Gingles* threshold requirement, and thus render the likelihood of a successful

[2] As of the completion of this opinion, this includes maps and related documents contained in CC File No. 211396, Attachments 1-17.

VRA challenge unlikely. In fact, the reverse could be true in the event any proposed map attempted to create a district of influence/crossover district while diluting either of the two existing Hispanic/Latinx majority-minority districts (over 50% voting age population).

B. Wisconsin Law

Any aldermanic redistricting plan also has to comply with redistricting requirements set forth in state law. In this instance, Wis. Stat. § 62.08(1) establishes three requirements to which municipalities must adhere when adopting their aldermanic districts: (1) the districts must be as compact in area as possible; (2) the districts must contain, as nearly as practicable by combining whole wards, an equal number of inhabitants according to the most recent decennial federal census of population; and (3) the districts must be contiguous, except in cases where a territory is an island, or where a territory is wholly surrounded by another city or water (neither exception is applicable in Milwaukee).

Although the language of the equal population requirement in Wis. Stat. § 62.08(1) provides that districts must contain, as nearly as practicable by combining whole wards, an equal number of inhabitants, municipalities have some degree of flexibility in meeting this requirement. Wis. Stat. § 5.15, the statute governing the adoption of wards, provides that aldermanic districts must be "substantially equal in population." *See* Wis. Stat. § 5.15 (1)(a)2 and (2)(bm) and (c). "Substantially equal in population" is the same standard that the U.S. Supreme Court has adopted with regard to determining whether a redistricting plan meets the equal population requirement set forth in the equal protection clause of the Fourteenth Amendment. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 84 S. Ct. 1362 (1964). This federal equal population requirement is usually referred to as the "one person, one vote rule." The U.S. Supreme Court has concluded that a local redistricting plan has presumptively complied with the one person, one vote rule when the maximum population deviation between the largest and smallest districts is less than 10%. *Evenwel v. Abbott*, 578 U.S. 54, 60, 136 S. Ct. 1120 (2016).

While the Supreme Court has determined that maximum population deviations between the largest and smallest districts of less than 10% are presumptively constitutional, note that this does not necessarily mean than maximum population deviations of larger than 10% are presumptively unconstitutional. The Court has stated that "viable local governments may need considerable flexibility in municipal arrangement if they are to meet changing societal needs, and… a desire to preserve the integrity political subdivisions may justify an apportionment plan which departs from numerical equality." *Abate v. Mundt*, 403 U.S. 182, 185, 91 S.

Ct. 1904 (1971) (citations omitted). To that end, the Court discussed how a slightly greater percentage deviation may be more tolerable for a local government redistricting plan than it would be for congressional and state legislative districts. *Id.* The Court did not go so far as to state that certain geographic areas or political interests are entitled to disproportionate representation. However, the Court did opine that the particular circumstances and needs of a local community as a whole may sometimes justify departures from strict equality. *Id.* Thus, depending on the factual circumstances, there could potentially be instances where a court would determine that a maximum population deviation of greater than 10% complies with an equal population requirement. That being said, there will always come a point at which a redistricting plan's maximum population deviation is large enough that a court would deem it noncompliant with equal population requirements.

C. Additional Redistricting Principles

In addition to the Equal Protection Clause, the VRA, and relevant state law, the Council should be aware that other redistricting principles exist that are often discussed in federal case law. The one person, one vote rule is one such principle, and is discussed in the preceding section. Other principles include ensuring that the political subdivisions, such as aldermanic districts, are compact and contiguous (which are also requirements in state law, as set forth above), that communities of interest are preserved, and that districts are drawn in such a way as to avoid crossing existing boundaries and political subdivisions.

If you have any additional questions regarding these issues, please do not hesitate to contact the undersigned.

Very truly yours,

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