

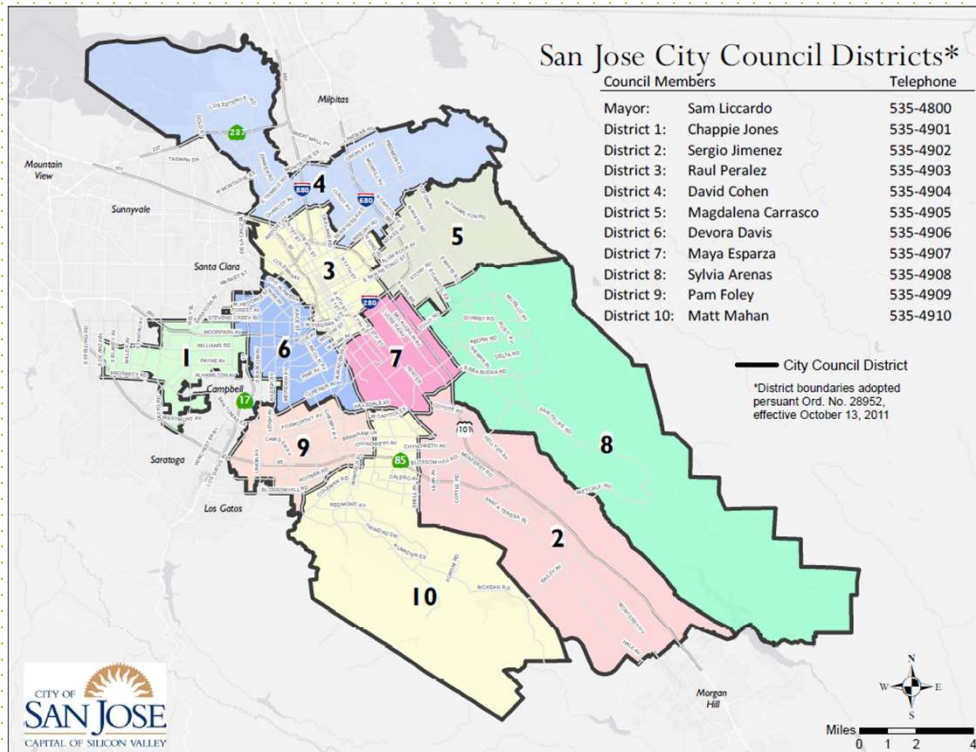


# Redistricting Law and Redistricting Criteria

City of San Jose Redistricting Advisory Commission  
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Angelo Ancheta  
angelo@ancheta.law

# Overview



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Sources of Law

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Federal Constitutional and Statutory Requirements

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Redistricting Criteria

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Strategies for Legal Compliance

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Q & A

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Not Covering Communications, Timelines, or Public Education and Input Requirements



## Sources of Law

- Federal Constitution & Case Law
- Federal Voting Rights Act of 1965
- California Fair Maps Act and Election Code Amendments
  - Exemptions for Charter Cities Re Redistricting Criteria
  - “Traditional Redistricting Principles”
- San Jose City Charter
- San Jose City Council Resolution (Oct. 27, 2020)

# Federal Requirements

- 14th Amendment – Equal Protection Clause
  - Population Equality Requirements
  - Limitations on Race-Based Redistricting
- 15th Amendment
  - Prohibits Intentional Discrimination Based on Race
- Voting Rights Act of 1965
  - Section 2 and Minority Vote Dilution (Intentional and Non-Intentional)
  - Case Law: *Thornburg v. Gingles*



# Population Equality

- Federal Case Law: Districts should be “substantially equal” in population
  - State and local districts, unlike congressional districts, do not need to be near “absolute equality”
- Population Basis: Total Population
  - All Residents, Not Just Citizens, Voting-Age Citizens, or Voters
    - Cal. Elec. Code § 21621(a)(1)
  - Census Data Will Be Adjusted to Place Incarcerated Individuals at Last Known Address
    - Statewide Database Will Adjust 2020 Census Data
    - Cal. Elec. Code § 21621(a)(2) Mandates Use of Adjusted Prisoner Data

# 14<sup>th</sup> Amendment: Population Equality

- Federal Case Law: Total Plan Deviation Should Be <10%
  - Consultant and Redistricting Software Will Keep Running Calculations
  - Calculation:
    - (1) Calculate Ideal District Size: Divide Total Population by Number of Seats
    - (2) Calculate Deviation Range: Subtract Smallest District From Largest District
    - (3) Total Plan Deviation = Divide Deviation Range by Ideal District Size
- Redistricting Body Can Go Below 10%, but Must Have Strong Justifications for Exceeding 10%



## 14th Amendment: Prohibitions on Racial Gerrymandering

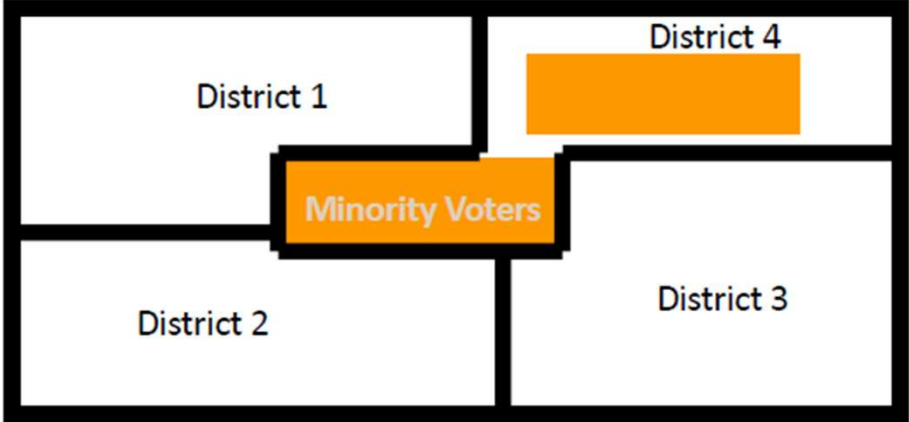
- Race and Ethnicity Can Be Considered as Factors and Can Be Used to Comply with the Federal Voting Rights, But
- If Race is the Predominant Factor, or As a Result of Considering Race, the Districts Are Very Oddly Shaped, then the Lines may be Unconstitutional
  - Voting Rights Act Compliance Can Justify Districts
  - Considering Multiple Factors in Addition to Race (Race Doesn't Predominate) Can Justify Districts

# 15th Amendment: Prohibitions on Intentional Discrimination Based on Race

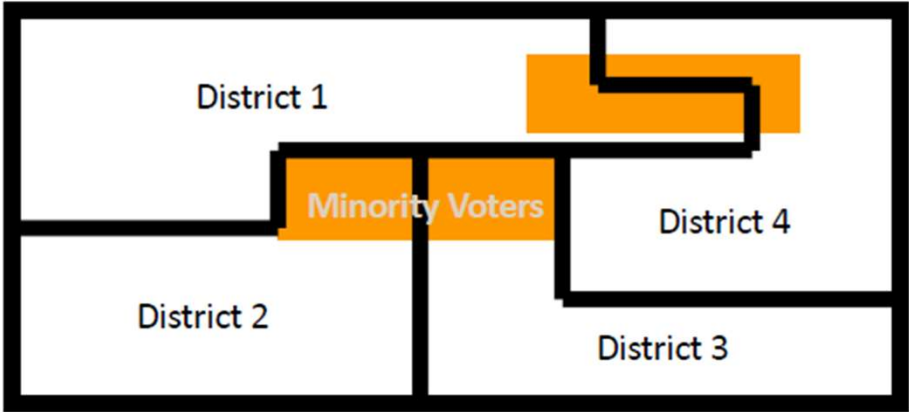
- **Typical Forms of Discrimination in Redistricting:**
  - **Packing:** Combining as many minority voters into one district as possible to prevent them from affecting elections in other districts
  - **Cracking:** Dispersing a minority population into several districts to prevent them from exercising electoral influence or control within one or more districts



# Packing



# Cracking



# Federal Voting Rights Act

- Section 2 Prohibits Minority Vote Dilution in Redistricting
  - Covers racial minorities and “language minorities” (Latinos, Asian Americans, Native Americans)
    - Populations not covered by VRA might still be kept together through neighborhoods or communities of interest
  - Typically Occurs Through Packing or Cracking Minority Populations That Could Be in Majority-Minority Districts
  - Extensive Case Law Beginning with *Thornburg v. Gingles* (1986)
  - VRA Compliance is Essentially Defensive
    - No Clear Affirmative Requirements, but Anticipating Potential Lawsuits and Preventing Violations Under *Gingles*



# Federal Voting Rights Act

- *Thornburg v. Gingles* (1986)
  - Three-Factor Test (“Gingles Factors”)
    - (1) Minority Group is Large and Geographical Compact (>50% of Citizen Voting Age Population)
    - (2) Minorities Usually Vote Cohesively to Support Preferred Candidates
    - (3) Non-Minority Voters Vote Together Against Minority-Preferred Candidates
    - Factors (2) + (3) often considered together as “Racially Polarized Voting” (RPV)
  - Totality of Circumstances (including past discrimination, electoral history)

# Federal Voting Rights Act

- Issues Under *Thornburg v. Gingles*
  - Resource Questions for Commission on Legal Counsel and Conducting Anticipatory Demographic and RPV Analyses
  - “Influence Districts” (Large minority populations < 50%) Are Not Available as Section 2 Claim, But Can Be Drawn by Redistricting Bodies
    - May present challenges on whether to create a single majority-minority district or spread groups among two or more influence districts -- not necessarily cracking
    - Might also be justified by Community of Interest Criterion, But Must Consider Non-Racial Factors as well
  - Minority Coalition Districts Are Allowed in 9th Circuit (includes California)
    - But Present Challenges for RPV Analyses and Large Number of Potential Options



# California Election Code

- Fair Maps Act and Recent Amendments
  - Exemptions: If City Charter “provides two or more traditional criteria for redistricting other than the requirement that districts be equal in population” – includes San Jose
  - Charter Cities Not Exempt From:
    - Population Equality Requirements
    - Federal/State Constitutional and Federal Voting Rights Act Requirements
      - Note: California Voting Rights Act Does Not Apply to Redistricting
    - Elec. Code Sec. § 21621(d)
      - “The council shall not adopt council district boundaries for the purpose of favoring or discriminating against a political party.”

## Fair Maps Act and “Traditional Redistricting Principles”

- Fair Maps Act Tracks and Ranks Commonly Articulated Criteria, Including:
  - (1) Contiguity
    - “Areas that meet only at the points of adjoining corners are not contiguous. Areas that are separated by water and not connected by a bridge, tunnel, or regular ferry service are not contiguous.”
  - (2) Maintaining Integrity of Neighborhoods and Local Communities of Interest
    - “A ‘community of interest’ is a population that shares common social or economic interests that should be included within a single district for purposes of its effective and fair representation. Communities of interest do not include relationships with political parties, incumbents, or political candidates.”
    - Be careful with racial and ethnic COIs to ensure constitutional compliance



## Fair Maps Act and “Traditional Redistricting Principles”

- (3) Bounding by natural and artificial barriers, by streets, or by the boundaries of the city
- (4) Compactness
  - “in a manner that nearby areas of population are not bypassed in favor of more distant populations”
    - Can use an “eyeball” test, or rely on mathematical or algorithmic measures available in software packages
- Be Aware that the Public May Set Different Priorities, Particularly Around District Shape and Compactness

## San Jose City Charter

- “In any redistricting, the Council shall make the Districts as nearly equal in population as may be practicable, and may, in establishing the boundaries of the Districts, give consideration to (a) natural boundaries, street lines and/or City boundaries; (b) geography; (c) cohesiveness, contiguity, integrity and compactness of territory; and (d) community of interests within each District.”



## San Jose City Council Resolution (Oct. 27, 2020)

- “Direct the Redistricting Commission to: (i.) Create Districts that provide racial minorities with an equal opportunity to participate in the political process, and that do not dilute or diminish their ability to elect candidates of choice whether alone or in coalitions with others . . . . (ii.) Educate Commission members on the importance of avoiding proposed maps that would result in ‘stacking’, ‘cracking’, or ‘packing’ communities of color and thereby reducing their voice in municipal governance.”

## Strategies for Legal Compliance

- Develop Rankings or Principles for Reconciling Conflicts Among Criteria
  - Federal Requirements Override State and Local Criteria
  - Consider Ranking Criteria
    - Example: Fair Maps Act (Cal. Elec. Code § 21621(c))
- Use smaller units, such as neighborhoods and communities of interest, as building blocks for larger units or districts
  - During public input process, try to identify units that can go together or should be in separate districts
- Articulate Rationales in Public Education Materials and Documentation of Maps



# Questions & Answers

Angelo Ancheta  
angelo@ancheta.law