



**LAWYERS FOR
CIVIL RIGHTS
BOSTON**

October 17, 2021

The Honorable William N. Brownsberger
Chair, Senate Committee on Redistricting
24 Beacon St.
Boston MA, 02133

Dear Chair Brownsberger:

Thank you for your ongoing attention to the redistricting process and for your willingness to consider community input. We write today to address two legal issues that have arisen over the past several weeks, which we believe afford the Legislature greater flexibility in the line-drawing process, particularly in the Lawrence/Haverhill and Brockton/Randolph/Stoughton areas.

I. Greater Flexibility Where Evidence Of A Voting Rights Violation Has Been Identified (Lawrence/Haverhill)

We appreciate that in certain instances you have identified the need to be race-conscious in drawing districts, where failure to do so would risk violating the federal Voting Rights Act of 1965 (VRA). For example, you have noted Lawrence/Haverhill as one such area.

We write to highlight that where the Legislature has identified the need for remedial action, it has a great degree of flexibility in determining exactly where the district lines are drawn. As you know, one of the elements that must be shown to establish a VRA violation is the ability to draw a “majority-minority” district. *Thornburgh v. Gingles*, 478 U.S. 30, 49 (1986). But this does not mean that the ultimate remedy must in all cases meet this requirement. The 50% + 1 condition helps establish the necessity for remedial relief, but it need not always be present in the ultimate solution.

Put another way, the “majority-minority” *Gingles* requirement is a threshold pre-condition, a formalistic rule meant in part to ensure that some form of relief will be possible – but it is not the same as the remedy itself. Numerous courts have noted this fundamental distinction between a threshold inquiry and the ultimate relief. *See, e.g., Pope v Albany*, 687 F.3d 565, 575 (2d Cir. 2012) (“a simple majority rule usefully serves at the outset to screen out cases in which there is no point in undertaking a full [VRA] analysis. Toward that end, it asks a preliminary question; it does not attempt to answer the ultimate one.”); *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1019 (8th

Cir. 2006) (the majority-minority pre-condition is simply “to prove that a solution is possible, and not necessarily to present the final solution to the problem” (citing *Gingles*, 478 U.S. at 50 n.17)). For this reason, districts that are drawn at the pleading stage are often referred to as “illustrative districts” – *i.e.*, they are meant to illustrate what *can* be done, not in the end what *must* be done.¹

Once the likelihood of a VRA violation has been established, the formalistic pleading rules no longer govern; instead, the question becomes how best to create an effective remedy. In answering this inquiry, courts – and legislatures acting proactively – have broad flexibility, guided by the ultimate goal of ensuring that communities of color have “equal opportunity to participate in the political processes and to elect candidates of their choice.” *Gingles*, 478 U.S. at 44 (citation omitted). As the Supreme Court has repeatedly noted, Congress intended for the VRA to be grounded in the practical realities of political life, allowing for “a searching practical evaluation of the past and present reality, and on a functional view of the political process.” *Id.* at 45 (internal quotations omitted) (quoting S. Rep. No. 97-417 at 30 n.120).

To put the issue in a concrete context: just because part of the evidence establishing the need for remedial relief in the Lawrence/Haverhill area is that it is possible to create a majority-minority district there does not mean that, in this fact-specific context, the Legislature is bound to draw that exact district as a remedy. Rather, what the Legislature should now determine is what will best create an effective district (or districts) in the area. That may be a district where the Latinx voting-age population constitutes a majority, but it could also be one where the population approaches that threshold. Even in areas where polarized voting exists, there will be non-minority “crossover” voters, such that an effective district can often be created even without a numerical majority.²

This flexibility at the remedial stage also allows the Legislature to consider where communities of interest should be maintained. While the overriding remedial goal must be to create an

¹ See, e.g., *United States v. Port Chester*, 704 F. Supp. 2d 411, 439 (S.D.N.Y. 2010). Further demonstrating this same point, in some cases the ultimate relief in a VRA case may not include districts at all. See *id.* at 448 (allowing cumulative voting as a remedy) (citing cases). Plaintiffs in such a case will still have to demonstrate the 50% + 1 pre-condition at the outset, but the parties and the court are not limited to that remedy at the remedial stage.

² In that regard, we note that you have stated that you are relying on Citizen Voting Age Population (CVAP) as the benchmark for the *Gingles* “majority-minority” condition. As you know, that is a more conservative view of that requirement than caselaw demands; neither the U.S. Supreme Court nor the U.S. Court of Appeals for the First Circuit has ever held that CVAP is the necessary standard. See *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) (stating that the relevant inquiry is whether minority groups “make up more than 50 percent of the *voting-age population* in the relevant geographic area...”) (plurality opinion) (emphasis supplied). While the purpose of this letter is not to argue against reliance on CVAP, the fact that precedent does not dictate its use provides an additional reason why – particularly in this specific proactive context – the Legislature should not view itself as rigidly bound to create a 50% + 1 CVAP district.

effective district, VRA analysis requires “an intensely local appraisal of the design and impact” of district lines. *Gingles*, 478 U.S. at 79; *see also Voinovich v. Quilter*, 507 U.S. 146, 158 (1993) (“the *Gingles* factors cannot be applied mechanically”). We urge the Legislature to think broadly and flexibly in this regard, taking community input and feedback into account.

II. Greater Flexibility To Consider Communities Of Interest (Brockton/Randolph/Stoughton)

In a similar vein, even in areas where the Legislature does not believe that a VRA violation has been established, it still has great flexibility to keep communities of interest together, including where such communities overlap with racial or ethnic identity. And in fact failure to do so may itself constitute a legal violation.

As you know, traditional redistricting principles dictate that keeping communities of interest together is a factor that should be considered in line-drawing. “Communities of interest” is a broad and flexible term, encompassing the many different common threads that can bind residents together – whether those are cultural ties, political interests, economic characteristics, or background and heritage. Importantly, communities of interest may overlap with racial or ethnic identity. *See Carstens v. Lamm*, 543 F. Supp. 68, 91 (D. Colo. 1982) (communities of interest may include shared “demography, ethnicity, [and] culture”); *Smith v. Clark*, 189 F. Supp. 2d 529, 543 (S.D. Miss. 2002) (same). A city’s Chinatown, for example, might constitute a community of interest tied together by cultural events, shared interests, commerce, transportation, tourism, and the like. Residents of the area may be predominantly Asian-American. However, that fact alone would certainly not bar a legislature from keeping that community unified.

In fact, a legislature that purposefully avoids recognizing a community of interest where people of color dominate, out of an exaggerated fear of being accused of racial gerrymandering, risks liability for that stance. After all, many communities of interest include predominantly white people (*e.g.*, an Irish enclave or an Italian-American residential/commercial district). A legislature cannot recognize and respect those communities of interest, but then turn around and refuse to recognize those communities of interest where non-whites form the majority. That would itself constitute impermissible discrimination and be subject to legal challenge. In reality, the law allows both: recognition of communities of interest that are predominantly people of color, as well as communities of interest that are predominantly white.

To again place the matter in a concrete context: we believe that the Legislature can and must recognize and respect the communities of interest that exist in the Brockton/Randolph/Stoughton area. Residents of those cities are tied together through a shared interest in economic mobility and home ownership, along with common immigrant backgrounds. While it is also the case that those areas have a relatively high percentage of Black residents, recognition of the community of interest that binds them together is in no way impermissible for that reason. To the contrary,

refusing to consider those interests based on an overly-cautious concern that this would constitute impermissible racial gerrymandering would itself be a violation of the law, as outlined above.

III. Conclusion

In both of these areas, we believe that the Legislature has great flexibility to draw district lines that empower communities of color. We urge the Legislature to listen to community voices and exercise that flexibility in a way that best ensures that communities of color are afforded equal voting opportunity.

Thank you again for your time and attention to these critical matters.

Sincerely,

/s/ Iván Espinoza-Madrigal
Iván Espinoza-Madrigal
Executive Director

/s/ Oren Sellstrom
Oren Sellstrom
Litigation Director