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December 7, 2021

President Lewis E. Reed
Board of Alderman
City Hall, Room 230
1200 Market Street
St. Louis, Missouri 63103

RE: Board Bill 101

President Reed,

The City of St. Louis is currently divided into 28 electoral wards, respectively electing 28 members to comprise our Board of Aldermen. In 2012, the people of the City of St. Louis voted to approve an amendment to the City Charter requiring that the Board of Alderman be reduced to 14 members in 2022 and the wards redrawn accordingly. Pursuant to Article I, Section 3 of the City Charter, "[b]eginning January 1, 2022, and thereafter, the city shall be divided into 14 wards, which ward boundaries shall be based upon the 2020 decennial census of the United States of America, and each decennial census thereafter, and corrected ward boundaries shall be established by ordinance." As such, a newly drawn map has been proposed by the Board of Aldermen's Legislative Committee, redistricting the City into the required 14 wards.

You requested that the City Counselor's Office analyze whether the proposed map is likely to survive a challenge under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution related to the "one person, one vote" requirement or Section 2 of the Voting Rights Act of 1965 as amended. I examined the law and other documents made available to me by your office[1] in connection with rendering this opinion. Based on the foregoing, I am of the opinion, under existing law, that the proposed map satisfies the "one person, one vote" requirement and

[1] I received what had been described as a substantially complete map by the Board on November 22, 2021. I received further data on November 29, December 1, December 3, and December 6, 2021.

One Person, One Vote

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides that no State shall "deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amdt. 14, § 1. The United States Supreme Court has interpreted this clause to impose additional requirements with respect to reapportionment plans. Specifically, the Court established that dilution of an individual's vote through malapportionment of population in individual districts may pose constitutional issues. Reynolds v. Sims, 377 U.S. 533, 575–76 (1964). For example, some deviations from mathematical equality among districts may be sufficient to establish a *prima facie* case of invidious discrimination under the Fourteenth Amendment. Gaffney v. Cummings, 412 U.S. 735, 745 (1973). This principle is more commonly known as the "one person, one vote" requirement. Notably, State and City requirements likewise address population equality. See 82.150, RSMo ("[a]ll wards . . . shall contain as nearly an equal number of inhabitants as may be practicable."); see also Charter Art. I, § 3 (proposed wards "shall . . . contain as nearly as may be the same number of inhabitants.")

Missouri courts recognize "that it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters," and that "[m]athematical exactness or precision is hardly a workable constitutional requirement." Preisler v. Kirkpatrick, 528 S.W.2d 422, 424–25 (Mo. 1975) (citing Reynolds v. Sims, 377 U.S. 533 (1964)). The United States Supreme Court has held that a total percentage deviation of ward population of 10% or less will pass constitutional muster. Voinovich v. Quilter, 507 U.S. 146 (1993). Such deviation constitutes a minor deviation. Brown v. Thomson, 462 U.S. 835, 842 (1983). However, even deviations greater than 10% may be upheld if sufficiently justified by the governmental entity creating the districts. See, e.g., Mahan v. Howell, 410 U.S. 315 (1973) (upholding greater than 16% deviation to preserve existing political boundaries); see also Voinovich, 507 U.S. at 161 (1993). It should be noted that the Supreme Court has explicitly endorsed the use of total population in consideration of this particular principle. Evenwel v. Abbott, 136 S. Ct. 1120, 1123 (2016).

According to the 2020 Census, the City of St. Louis has a total population of 301,578. Dividing the total population by fourteen—for each of the wards—the ideal population per ward is 21, 541. As adopted by the Board of Aldermen's Legislation Committee, Board Bill 101 establishes a population deviation among wards of 9.84%. The population deviation is within range of what is constitutionally sufficient, and any challenge based on failure to ensure equality of population in the proposed wards is unlikely to succeed based on controlling precedent.

Section 2 of the Voting Rights Act of 1965 as amended

Section 2 of the Voting Rights Act prohibits any political subdivision from imposing a qualification or prerequisite, or other standard, practice, or procedure which impedes the right of any citizen to vote on account of their race or color. 52 U.S.C. § 10301. In practice, violations of Section 2 occur when an electoral practice or procedure minimizes or cancels out the voting strength of members of racial or language minority groups in the voting population, also known as "vote dilution, which occurs when "the voting strength of a politically cohesive minority is diluted by either (1) fragmenting minority voters among several districts so that a majority bloc can usually outvote the minority[,]" or "(2) packing the minority into one or several districts so that the minority's influence

is minimized in its neighboring districts." Bone Shirt v. Hazeltine, 461 F.3d 1011, 1018 (8th Cir. 2006) (internal citations omitted). The United States Supreme Court established that three preconditions need exist in order for a vote dilution claim to potentially prevail:

(1) the racial group is sufficiently large and geographically compact to constitute a majority in a single-member district;

(2) the racial group is politically cohesive; and

(3) the majority votes as a bloc to enable it to usually defeat a minority group's preferred candidate.

See Thornburg v. Gingles, 478 U.S. 30, 49 (1986). Whether any of the above elements are satisfied is extremely fact-specific and "cannot be applied mechanically and without regard to the nature of the claim." Johnson v. De Grandy, 512 U.S. 997, 1007 (1994) (*quoting* Voinovich v. Quilter, 507 U.S. 146, 158 (1993)).

In the City of St. Louis, black voters comprise a sufficiently large and geographically compact block to constitute a majority in a single-member district.[2] According to the 2020 Census, the overall population of the City is 301,578, with 247,574 persons of voting age. With 14 wards, the average ward should contain approximately 21,541 persons with 17,684 voters, of which 10,771 persons or 8,843 voters are needed to constitute a majority. In the City of St. Louis, 46.4% of the overall population (139,932 persons) and 40.01% of voting age citizens (99,043 persons) are black, which far exceeds the necessary population to constitute a majority in a single-member district. Given the general density of black voters in North St. Louis and areas of South St. Louis, the first element is likely satisfied. Regarding the second and third prerequisites, courts typically look to expert analysis to make these determinations. See Bone Shirt v. Hazeltine, 461 F.3d 1011, 1020 (8th Cir. 2006) (finding BERA and Homogenous Precinct Analysis satisfies the Daubert standard and "accept[ing] the use of these methods as reliable evidence in determining the second and third Gingles preconditions."). However, based on the information made available to me, a challenger would have a difficult time meeting these preconditions.

Even if all three preconditions above were proven, Section 2(b) requires a court analyze the "totality of the circumstances" in that jurisdiction to determine whether the "political processes leading to nomination or election . . . are not equally open to participation by members of a [the protected] class of citizens . . . 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." 52 U.S.C. § 10301(b). Several non-exhaustive factors are relevant to evaluating whether, under the totality of the circumstances, protected class members have less opportunity to effectively participate in the

[2] It bears noting that, per the 2020 United States Census, there are approximately 10,994 Asian and 11,254 Hispanic or Latino persons of voting age who reside in the City, which both exceed the necessary population to constitute a majority in a single-member district. However, it is my understanding, from documents received during this analysis, that the Board attempted to draw a Hispanic or Latino district, and the population was not sufficiently compact. A review of the proposed map with overlay reveals, on its face, that the same is true for the Asian population.

political process. The United States Supreme Court and United States Court of Appeals for the Eighth Circuit precedent generally identify (1) the extent to which elections are racially polarized and (2) the extent to which minorities are elected under the challenged scheme as prominent factors in the totality of the circumstances analysis. See Bone Shirt v. Hazeltine, 461 F.3d 1011, 1022 (8th Cir. 2006); Harvell v. Blytheville Sch. Dist., 71 F.3d 1382, 1386 (8th Cir. 1995) (en banc); Thornburg v. Gingles, 478 U.S. 30, 51, n. 15 (1986). Voting behavior which demonstrates a trend away from racially polarized voting and an increase in the election of minority candidates weigh in favor of a finding of equal opportunity as required by the Voting Rights Act. Although not itself dispositive, proportional opportunity to elect candidates has also been found relevant to the totality of the circumstances as well. See African Am. Voting Rights Legal Defense Fund v. Villa, 54 F.3d 1345 (8th Cir. 1995); Corbett v. Sullivan, 202 F. Supp. 2d 972 (E.D. Mo. 2002)) Corbett v. Sullivan, 202 F. Supp. 2d 972, 985 (E.D. Mo. 2002) (citing De Grandy, 512 U.S. at 1025 (O'Connor, J., concurring)).

The City is able to present strong evidence that voters form effective voting blocs in a number of districts roughly proportional the minority voters' respective shares in the voting age population and under the totality of the circumstances provides minority voters with equal opportunity. See Johnson v. DeGrandy, 512 U.S. 99 (1994); African Am. Voting Rights Legal Defense Fund v. Villa, 54 F.3d 1345 (8th Cir. 1995). In addition, proposed wards A-E have a smaller overall population than other wards within a permissible deviation. The United States Court of Appeals for the Eighth Circuit previously held that safe black wards which contained smaller populations than other wards represent an enhancement rather than a dilution of the black vote. Id. at 356–57. If the proposed map were challenged, the City's position would be strengthened by evidence that voting trends demonstrate a reduction in racially polarized voting and an increase in the election of minority preferred candidates. Additionally, the racial composition of elected officials in the City of St. Louis reflects a history of sustained proportional representation under the 28 ward scheme. In 1995, the United States Court of Appeals for the Eighth Circuit held that there exists twenty years of sustained proportional representation in the City (1971 - 1991). Id. at 1345. Further, the percent of black elected alderpersons among the Board of Aldermen has generally tracked the percent of black voting age persons in the City.

Further, the United States Court of Appeals for the Eighth Circuit held that where the number of districts with an effective voting majority of minority voters is proportional to the minority voters' share of the voting population, there is strong, though not dispositive, evidence, that minority voters have equal opportunity to participate in the political process. See Johnson v. De Grandy, 512 U.S. 997, 1000 (1994). The guideline for an "effective voting majority" in the context of determining a safe district in the proportionality analysis can be found when either 65% of the total population[3] or 60% of the voting age population within a district is of the minority group. The supermajority standard addresses the "widely accepted understanding" that minorities must have something more than a mere majority to have a reasonable opportunity to elect a representative of their choice. Ketchum v. Byrne, 740 F.2d 1398 (7th Cir. 1984). As a general rule, use of voting age population statistics is appropriate for this inquiry. Id. at 1413; see also City of Rome v. United States, 446 U.S. 156, 186 n. 22 (1980); City of Port Arthur, Texas, v. United States, 517 F. Supp. 987, 1015–18

[3] Specifically, this metric is derived by augmenting a simple majority with an additional 5% for a young population, 5% for low voter registration, and 5% for low voter turnout.

(D.D.C. 1981).

Under the proposed map, more than 60% of the voting age population in wards A, B, C, and D are black and these districts may be effective minority wards. Wards E, H, and L, which have the next highest proportion of black voters, do not meet the 60%. Existing data demonstrates black voters constitute a numeric majority in ward E (52.25%), and a plurality in ward H (46.48%) and ward L (47.2%). Notably, in the past general election an overwhelming number of precincts located in whole or in part in ward E and in ward H, and more than half of the voting precincts located in whole or in part in ward L, voted for Tishaura Jones for Mayor, who was the predominantly preferred candidate among the majority black voting precincts in North St. Louis. This raises an inference that minority voters still have reasonable opportunity to elect their candidate of choice in these proposed wards.

It also bears noting that the City of St. Louis faced, and survived, a Voting Rights Act challenge to its ward redistricting in relatively recent history. Several alderpersons sued the Mayor, President of the Board of Aldermen, and Board of Aldermen, contending the City's 1991 redistricting plan violated the Voting Rights Act and the U.S. Constitution in that it "'pack[ed]' and 'crack[ed]' black voters for the purpose and with the effect of minimizing the electoral potential of black voters." African Am. Voting Rights Legal Defense Fund v. Villa, 54 F.3d 1345, 1348 (8th Cir. 1995). The court defined a "safe ward" as "one in which a black majority has a practical opportunity to elect the candidate of its choice. A simple majority is not always sufficient to provide this opportunity." Id. at n. 4 (citing Ketchum, 740 F.2d at 1415). The Eighth Circuit concluded that "60% of the voting age population or 65% of the total population is reasonably sufficient to provide black voters with an effective majority." Villa, 54 F.3d at 1348. The issue was whether the voting age population (endorsed by the City and relied on by the District Court) or the total population (endorsed by the plaintiffs) should be weighed to determine proportionality between wards and population as part of the totality of the circumstances analysis. Id. at 1349. The Eighth Circuit held that, under Johnson v. De Grandy, it was appropriate to measure proportionality through the voting age population. Id. at 1352. Ultimately, the Eighth Circuit held the 1991 plan demonstrated sustained proportionality which indicated the minority group could effectively participate in the political process under the totality of circumstances. Id. I am of the opinion that the proposed map would survive such a challenge as well.

Because of the focus on demographics in the Voting Rights Act analysis above, I find it prudent to address the part that the constitutional prohibition on racial gerrymandering plays in the analysis. The Fourteenth Amendment to the United States Constitution and Missouri Constitution, see Mo. Const. Art. I, § 2, require equal protection. United States Supreme Court precedent provides that reapportionment plans that racially gerrymander will be subject to strict scrutiny. Shaw v. Reno, 509 U.S. 630, 641 (1993). The United States Supreme Court considered whether the "deliberate segregation of voters into separate districts on the basis of race" violated those voters' constitutional rights. Id. at 641. Ultimately, the Court held that "redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification" articulates a claim upon which relief can be granted under the Equal Protection Clause. Id. at 642. In this analysis, in order to establish a racial gerrymandering claim it is a plaintiff's burden to show that race was the predominant factor motivating the legislature's

decision to place a significant number of voters within or without a particular district. Miller v. Johnson, 515 U.S. 900, 916 (1995).

If the proposed map were challenged, the City is able to present sufficient evidence that traditional race-neutral redistricting principles were the prevailing focus in reapportionment. For example, the City's position would be strengthened by evidence that the Board undertook its redistricting efforts by vigorously engaging with the community and providing weight to community requests for neighborhood continuity; evidence that the Board considered the workload of Alderpersons elected to represent wards in North St. Louis such as requests through the Citizens Service Bureau, economic development incentives, and tax abatement; and the bill sponsors' view that an anticipated increase in North St. Louis residents will result based on commercial improvement and home buyers' programs to drafting wards in that area with a population below the ideal average.

This opinion is limited in the following respects: (i) opinions expressed herein are limited to the laws of the State of Missouri and the federal laws of the Unites States as they exist on the date of this opinion; and (ii) opinions expressed herein are limited to the information and data made available to this Office.

As previously discussed, I understand that you intend to circulate this opinion to the Board of Alderman and provide express approval for such distribution to that subset of clients of the Office.

Regards,

Sheena Hamilton
City Counselor

cc: The Honorable Tishaura O. Jones