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Mayor Kerri Howell and  
Members of the City Council  
50 Natoma Street  
Folsom CA  
via electronic mail

Dear Mayor Howell and Members of the City Council:

Without the benefit of the usual notice supplementing the agenda packet, the City has posted comments that appear to have been distributed to a majority of council members, including those of former city attorney Bruce Cline, urging the Council to reject the “preferred map” that resulted from the prior session of today’s meeting. We share his most of his objections and respect his decision not to advocate for his own map. The public should draw this map, with the Council faithfully interpreting the public’s assessment of its communities of interests and of the clearest boundaries, while complying with the legal requirements of nondiscrimination against protected classes, equality of population, compactness and contiguity. Instead, the Council members pursued their own political self-preservation at the expense of every legally required criterion.

Mayor Howell has stated that no one will sue the City in the next few months (1/11/22 tr. 87:39), while simultaneously excusing the failure to solicit public input due to an alleged “threat” of litigation (*id.*, 69:33). Both statements are misleading and cannot excuse or explain the Council’s disregard for its constituents’ input. The City is in court. It forfeited the right to draw its own boundaries and set its own election sequence on September 27, 2021. Like Mr. Cline, my clients prefer that the community draw the map, not to draw the map, but generally the Court does give serious consideration to proposals made by the plaintiffs. After at least \$1 million in fees and expenses, mostly going to defense council, the court ordered a map stipulated by West Contra Costa USD that was very similar to the one attached to the complaint, which was served with a proposal to settle for \$20,000. More recently, Victorville City Council unanimously adopted a map of majority-Latino districts that I drew, in preference to drafts proposed by their own demographer, for whom I have the highest

regard. So, the Council should not assume that the Court will accept its map over our objections.

My clients are not going to negotiate in public, but my prior letter stated some principles. Much as we prefer a map drawn by the community, any further efforts by the Council to manage that process must respect the role of the Court in approving the remedy. The Council has already taken far too much time, but it has failed to exhaust the public's commitment to doing this job right. What the Council needs more of is transparency. Draft maps should be fairly presented. Comments should be posted in one location, map versions should not be removed, and revisions should be clearly timestamped. Summaries and rough transcripts of each hearing should be posted. The delay has already cost my clients a great deal of additional effort and expense, so any further attempts to design an alternative to a litigated remedy should reflect any agreed schedule and reimbursement of those costs.

There are very large inconsistencies in official City projections of growth South of 50, with the May 2021 estimate claiming that almost one-fifth of the city's residents would be in the territory that had 950 people on census day. We are willing to support a judicial dispensation from the new bans on mid-decade redistricting and on updating census data, which might provide some flexibility in accepting a one-time map. But the court is unlikely to grant that relief without our consent, so it would be productive to negotiate, instead of impugning my clients' motives (and choice of attorney).

## SUMMARY

At the first two hearings, two different demographers warned the Council to keep population variance within 1 or 2 percent. 9/14/21 tr. 1:03:13, 10/12/21, tr. 64:52. Perhaps the Council thought the public would forget, because at the January 11, 2022 meeting (tr. 85:16), the same demographer suggested 4 to 5 percent. Last week, the Council unanimously chose to defy Supreme Court decisions and to treat 10% as a "safe harbor." None of this flexibility will be used for purposes authorized by state law – greater respect for neighborhoods, more compact districts, or clearer boundaries. The "preferred map" achieves none of those goals. Without court approval, the Council attempted to circumvent the demand to base population equality on the 2020 census, but 10% is nowhere near enough to offset future growth. In the words of member Kozlowski, the Council spent almost three hours "squeezing a balloon," directing dozens of "trades," "swaps," as well as ten "grabs" and two "snags," ignoring warnings from the demographer that it "looks funny." *e.g.*, 2/8/22, tr. 122:33 ("grab the stuff - that tiny bit"), 148:55 ("just grab them"), 186:52 ("grab... looks funny").

Neighborhoods were not just split, they were "squished." 2/8/22 tr. 164:32 Several streets were "isolated," as if they didn't go to parks, schools, and libraries with adjoining neighborhoods. e.g. 2/8/22, tr. 123:58, 124:15, 150:40 Another "little community" is "all by itself anyway," so move it to separate two nearby members. *Id.*, 183:25.

The vocabulary reveals a Council that has lost interest in following the law or serving their constituents. The Supreme Court has warned against consideration of future growth requires a high degree of accuracy" and "systematic application," lest it open [an] avenue for subterfuge." Kirkpatrick v. Preisler (1969) 394 U.S. 526, 535. Your attorneys will be unable to explain to the court why you disregarded the warnings of your own demographer, unanimously resolving that "staying as close as possible to 10%" was a "guiding principle." 1/11/22, tr. 122:44. *But see Cox v. Larios* (2004) 542 U.S. 947, 950 (10% not a safe harbor) While courts may consider projected population as part of a remedy to benefit a protected class (Garza v. County of Los Angeles (1990) 918 F.2d 763, 772), the Constitution does not allow "conjectural" changes to census data. Karcher v. Daggett (1983) 462 U.S. 725, 732 n. 4.

The relentless pursuit of maximizing population deviation was indeed an avenue for the subterfuge. Without notice to the public, the demographer surreptitiously showed the Council a quick flash of five blue dots at several points during last week's session. The purpose was to warn the Council of the predominant factor in drawing these lines – ensuring that they each lived in their own district, custom-designed with little regard for the criteria mandated by state and federal law.

#### THE HEARINGS HAVE BEEN PROTRACTED AND NONPARTICIPATORY

Before I became involved, the City Manager interdicted a petition submitted to the Council more than two years ago, criticizing the California Voting Rights Act (CVRA) and indicating that any further discussion of city governance would be with her, not the elected council members. Although distributed by the Folsom Area Democratic Club (not one of my clients), more than 40% of these petitioners are not Democrats, and they live in every part of the City. N-48-20 has been rescinded. Tolling stopped as of July 1, 2021, so the safe harbor for the Council to create its own remedy expired on September 27, 2021.

The Council held its first hearing on September 14, 2021, it was already impossible to complete voluntary compliance within the deadline. The Council promised that it would treat the formal statutory hearings as "workshops," at which the public "could roll up its sleeves." Less formal meetings with dialogue and interaction

with the demographer has worked well in other jurisdictions. My clients' restraint relied upon the representation that three of these hearings would occur during the safe harbor, with the final hearing in November 2021. Transcript, 9/14/21, 1:33:44. The second hearing, on October 11, 2021 delayed the third hearing two days, and postponed action until December 2021. Tr. 10/11/21, 24:16.

Last week, Mayor Howell told Cheryl Davis that there would be no public access to the demographer except during the 3-minute comment period. This is an almost unprecedented restriction, which burdens constituents trying to understand how to work Dave's Redistricting. On January 11, 2022 (tr. 133:35), the mayor had been emphatic that there would be no changes to maps "on the fly," because the Council had not reviewed the maps in advance, presumably in closed session.

The Council has made it almost impossible to follow this process. Shortly before last week's session, the Council indicated that the Cline map had been revised, without indicating whether the revised map had been posted for seven days. The map was an important contribution, but no one could know which version was being considered. After the meeting, the Council revealed that the revision was submitted on the day of the hearing. The city attorney stated that the Council was considering a prior version, which my clients did not understand at the time.

#### MAPS HAVE NOT BEEN FAIRLY PRESENTED

The analysis of the "preferred map" purports to rely on 2010 decennial census and 2013-2017 ACS survey data. Dave's Redistricting uses 2015-2019 ACS survey data, but not adjusted for the reallocation of incarcerated persons, which is particularly critical in the case of Folsom. The failure to make this adjustment resulted in a number of Black adult citizens in North Folsom that exceeded Mr. Cline's expectation. It also significantly deflated Asian CVAP in districts that do not include the prison on all maps, including the Cline and Dooley Maps, that the city presented using this software. NDC rendered its own maps on Maptitude, which reflected the adjustment (but NDC's tabulations may also reflect improper calculations that the Courts have criticized). NDC rendered the Dooley map on Maptitude on February 7, 2022, but failed to publish the results.

#### "RETAINING THE CURRENT COUNCIL" IS NOT A VALID CRITERION

My clients are not out to prevent an at-large member from seeking election by one of the new districts. We are not promoting a particular challenger, nor are we protecting YK Chalamcherla, as Mayor Howell has accused. We respect that the

overwhelming majority of Asian-American electors supported him in 2020 and expect the high-Asian district to elect in 2024, as indicated by Elections Code, Section 10010(b). We are not protecting Mr. Chalamcherla, we simply seek to give the Asian-American community an equal opportunity to influence council elections, which is a basic purpose of single-member districts.

In this context, the colloquy among members Rodriguez and Koslowski and the City Attorney

The voters would want us to keep our seats. Why would we not make adjustments so that we can retain the council we currently have?

Mike adds:

Separate YK and Sarah? Rosario, there's nothing stopping us from doing that.

The City Attorney concludes:

The mapping process, the council is also required to consider is also required to consider citizen input and also the citizen input and also the citizens' wishes which include citizens' wishes which include electing all five council members at various election members at various election elections to serve on the city elections to serve on the city council. 2/8/22, tr. 196:43

## CONCLUSION

Single-member districts improve an election method that was popularized a century ago to marginalize immigrants and other ethnic and racial minorities. The at-large members serve out their terms and are free to compete where they live. Success in the previous method of election is not a license to gerrymander. So explicit an attempt to subvert the basic purpose of the statute may appeal to your political supporters, but it will not hold up in court.

Sincerely,

A handwritten signature in black ink that reads "Scott Rafferty". The signature is written in a cursive, slightly slanted style.

Scott J. Rafferty

Sincerely,

A handwritten signature in black ink that reads "Scott Rafferty". The signature is written in a cursive, flowing style.

Scott J. Rafferty