Montana Legislative Services Division

Legal Services Office

TO: Districting and Apportionment Commission

FROM: K. Virginia Aldrich, Staff Attorney

RE: Context Regarding HaystaqDNA's Final Report on Racial Bloc Voting

DATE: May 19, 2022

This memorandum was prepared as background information for the Districting and Apportionment Commission (Commission), and it does not represent any opinion or action on the part of the Commission.

I. Context for HaystaqDNA's Racial Bloc Voting Analysis

A. Relevant Legal Background

As discussed in the May 2020 memo, § 2 of the Voting Rights Act of 1965 (VRA) prohibits any state or political subdivision from imposing any voting qualification, standard, practice, or procedure that results in the denial or abridgment of any United States citizen's right to vote on account of race, color, or membership in a language minority group.[1] The abridgment of the right to vote includes a racial or language group having "less opportunity than other members of the electorate . . . to participate in the electoral process and to elect representatives of their choice."[2] This may include the dilution of a minority's voting power through the districting process.[3]

Judicial determination of whether there is a violation of § 2 of the Voting Rights Act is a two-step process. First, plaintiffs must prove the existence of three threshold conditions. These were first identified in *Thornburg v. Gingles*[4]:

> (1) The minority group must be sufficiently large and geographically compact to constitute a majority in a single-member district;
> (2) The minority group must be politically cohesive; and
> (3) The majority group votes sufficiently as a bloc to enable it—in the absence of special circumstances—to usually defeat the minority's preferred candidates.[5]

These three factors are necessary to show that the minority group has the potential to elect a representative of its own choice in a possible district, but racially polarized voting prevents it from doing

[1] 52 U.S.C. § 10301.
[2] *Id.*
[3] *Allen v. St. Bd. of Elections*, 393 U.S. 544, 569 (1969) (citations omitted).
[4] 478 U.S. 30 (1986), 50-51.
[5] *Id.* at 51.

so in the district as actually drawn because it has been submerged in a larger majority voting population.[6]

If any of these three preconditions is not present, there is no § 2 violation. However, if all three of these factors are present, courts proceed to the second step of the analysis. A violation of § 2 may be found if, as a result of the challenged practice or structure:

> based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) 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. . . .[7]

Assessment of the "totality of the circumstances," is discussed further in the May 2020 legal memo, but it is a fact-intensive inquiry.

B. *Gingles* Preconditions

The first *Gingles* precondition requires that the minority group be sufficiently large and geographically compact to constitute a majority in a single-member district.

In *Bartlett v. Strickland*, the Supreme Court rejected claims that a group's ability to influence elections was cognizable under § 2, requiring the plaintiffs to show that they were sufficiently numerous, e.g., more than 50% of the voting age population, to create a majority in a compact single-member district.[8] The Ninth Circuit has held that the appropriate measure of geographical compactness is "eligible minority voter population, rather than total minority population."[9] Note, also, that "compactness" for purposes of § 2 means the compactness of the minority group whose vote is being diluted.[10] This is different than the traditional redistricting criteria of compactness.

The second *Gingles* precondition requires that the minority group be politically cohesive. In its May 6 Report, HaystaqDNA reported that they "found evidence of racial bloc voting in each of the five regions" they analyzed.[11] This is evidence pertaining to the second *Gingles* precondition. Had HaystaqDNA found that there was *not* evidence of racial bloc voting in those regions, the second precondition would have failed with respect to those regions, and there would not be additional § 2 considerations for the Commission to take into account in drawing districts in these areas. However, because HaystaqDNA found evidence of racially polarized voting, the Commission should continue to evaluate whether members of the minority group have less opportunity than other members of the electorate to participate in the electoral process and to elect representatives of their choice.

The third *Gingles* precondition requires evidence that the majority group votes sufficiently as a bloc to enable it—in the absence of special circumstances—to usually defeat the minority's preferred

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[6] *Cooper v. Harris*, 137 S. Ct. 1455, 1470 (2017).
[7] 52 U.S.C. § 10301.
[8] 556 U.S. 1 (2009).
[9] *Romero v. City of Pomona*, 883 F.2d 1418, 1426 (9th Cir.1989), overruled in part on other grounds by *Townsend v. Holman Consulting Corp*., 914 F.2d 1136, 1141 (9th Cir.1990).
[10] *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399 (2006), 433.
[11] HaystaqDNA, *Report on Racial Bloc Voting Analysis for the State of Montana*, (May 6, 2022), 13.

candidates. Statistical vote dilution analysis is performed after a particular map is drawn to provide insight into the effects of the proposed map. However, if the Commission chooses to perform vote dilution analysis on one or more proposed maps, the analysis should be completed before a final map is adopted so that the Commission may make changes, if warranted.

The current contract retains HaystaqDNA until May 23, 2023, and it provides that additional services, such as vote dilution analysis, may be performed under the hourly rate provided by the contractor. The hourly rates as provided by the contract are:

> Hourly rate for determining if proposed plans comply with Section 2 of the Voting Rights Act
> Executive Staff Member (CEO, President) – $450 per hour
> Senior Staff Member (Senior Vice President, Vice President) – $350 per hour
> Junior Staff Member (Senior Analyst, Analyst) – $200 per hour

HaystaqDNA has provided an estimated total cost for performing vote dilution analysis per map. HaystaqDNA noted that because much of the time spent in the racial bloc voting analysis consisted of "setting up the data and programming the code for the [racial bloc voting] analysis," additional analysis in the same regions "with a focus on proposed seats with a significant American Indian population would be estimated to be 10 hours of a Senior Data Analyst per map or approximately $2,000 per map. This would assume the same elections would be used."[12]

C. Conclusion

While HaystaqDNA's racial bloc voting analysis gives the Commission insight into whether the Commission must continue to evaluate the applicability of § 2 of the Voting Rights Act (VRA), compliance with the VRA does not justify race-based districting "where the challenged district was not reasonably necessary under a constitutional reading and application of those laws."[13] This requires the state to have a "strong basis in evidence" for the conclusion that it must draw a race-based district to comply with the VRA.[14] In other words, race-based districting is not reasonably necessary if a district fails any of the *Gingles* preconditions, and the Commission does not yet have data concerning the effect of any proposed map with respect to the third *Gingles* precondition.

If a state does not have sufficient reason to think it will transgress the VRA and it engages in race-based districting, it will be in violation of the Equal Protection Clause of the 14th Amendment of the United States Constitution, which prohibits racial gerrymandering. In a racial gerrymandering claim, the plaintiff must prove that "race was the *predominant* factor motivating the legislature's decision to place a significant number of voters within or without a particular district" (emphasis added).[15] This entails showing that other objective factors, such as traditional race-neutral redistricting criteria, were subordinated to race.[16]

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[12] HaystaqDNA, *Final Project Report on Racial Bloc Voting Analysis for the State of Montana*, (May 10, 2022), 2.
[13] *Miller v. Johnson*, 515 U.S. 900, 921.
[14] *Shaw v. Hunt*, 517 U.S. 899 (1996), 915.
[15] *Cooper*, 137 S. Ct. 1455, 1463 (citing *Miller*, 515 U.S. 900, 916).
[16] *Id.* at 1464.

Thus, at this time, the Commission should continue to ensure that race is not the dominant or controlling factor in the creation of districts, and the Commission should continue to ensure that it applies its adopted, race-neutral criteria in crafting each district.

In addition, HaystaqDNA suggested that if the Commission wishes to have minority dilution analysis performed on proposed maps and because finalized maps may prove difficult to adjust if changes are needed, the Commission may wish to draw districts in the regions analyzed in HaystaqDNA's racial bloc voting analysis first. This would make it easier to adjust populations if changes are necessary as a result of the analysis (and it would ensure that the contractor has time to analyze those portions of the maps while the Commission considers the remaining areas).

For additional information pertaining to the legal requirements of § 2 of the VRA and the Equal Protection Clause of the 14th Amendment of the United States Constitution, please see the May 2020 legal memo.