



# **AN OVERVIEW OF THE STANDARDS ESTABLISHED BY THE LAW AND BY THE BOARD OF SUPERVISORS FOR FAIRFAX COUNTY’S 2021 REDISTRICTING**

**Prepared for the 2021 Redistricting Advisory Committee**

The document is not an exhaustive look at all the requirements for Fairfax County’s redistricting but is intended to provide a summary of the law and the goals, criteria, and policies the Board of Supervisors articulated in the Redistricting Resolution it adopted on February 23, 2021.

## **I. THE REQUIREMENT FOR PROPORTIONAL REPRESENTATION**

**“To say that a vote is worth more in one district than in another would . . . run counter to our fundamental ideas of democratic government.”**  
**– *Reynolds v. Sims*, 377 U.S. 533, 563–64 (1964)**

The Equal Protection Clause of the U.S. Constitution requires that all citizens’ votes be weighted equally, a requirement familiar to us all as the “one person, one vote” principle. That requirement applies not just to the federal government but also to state and local governments, including county governing bodies and school boards. Additionally, Virginia law – both the Constitution and Virginia statutes – explicitly demand proportional representation for local election districts, requiring that they be constituted “as to give, as nearly as is practicable, representation in proportion to the population of the district.”

The population of Fairfax County is continually growing, but the growth is uneven. Some districts gain residents rapidly while others grow more slowly. Every ten years, after each decennial census, the boundaries of the County’s election districts must be adjusted to account for this uneven growth. Redistricting must be done using the most recent decennial population figures from the United States Bureau of the Census, as adjusted by the Virginia Division of Legislative Services.

Fairfax County is currently divided into nine local election districts from which the voters elect most members of the Board of Supervisors and the Fairfax County School Board. The Chairman of the Board of Supervisors and three members of the School Board are elected “at large” (by all voters in the County). State law allows the County to have as few as five election districts or as many as 11. The legal authority and responsibility to redraw the boundaries of local election districts rests with the Board of Supervisors. The Board has appointed the Redistricting Advisory Committee to prepare redistricting plans for its consideration. The Redistricting Advisory Committee is a centerpiece of the Board’s extensive efforts to engage the public as much as possible in the redistricting process.

To comply with the mandates for proportional representation, governments must make “an honest and good faith effort” to construct districts as close to equal population as is practicable. That said, the law does not demand mathematical perfection. The courts have allowed deviations from strict population equalization in election districts if the deviations are attributable to factors the courts have deemed “legitimate” and “related to effectuating rational state policy.”

If the difference between the most and least populated districts in a local redistricting plan is less than 10 percent, the federal courts will presume that the plan satisfies the equal population requirements of the equal protection clause. To ensure that plans submitted for its consideration have the benefit of that presumption, the Board’s Redistricting Resolution states that the Board will not consider redistricting plans that would result in a maximum population deviation that is ten percent or more. However, the judicial presumption does not insulate a plan from attack and invalidation just because it stays below the ten percent threshold. The presumption can be overcome with proof that the deviation, even if less than ten percent, was attributable to improper factors.

## **II. DEVIATIONS FROM THE REQUIREMENT FOR PROPORTIONAL REPRESENTATION IN ACCORDANCE WITH TRADITIONAL REDISTRICTING PRINCIPLES AND VIRGINIA LAW**

Among the legitimate reasons for deviating from population equality are “traditional redistricting principles” that have been recognized by the courts. Each of the following traditional redistricting principles is required by the law and/or is enumerated in the Board’s Redistricting Resolution as a factor the Board will consider when adopting a new districting plan. Therefore, the law and the Board’s Resolution collectively instruct that Redistricting Committee should concentrate on these factors to the extent districts in its proposed plans deviate from population equality:

Compactness and contiguity. Virginia Constitutional and statutory law expressly require the County’s election districts to be compact and contiguous. Compactness refers to the shape of the district. Courts have not agreed on a single measure of compactness. Contiguity requires that all parts of a district be connected geographically, subject to commonsense exceptions, for example for islands. That exception would apply to the piece of the County within Fairfax City where the courthouse is located.

Preservation of political boundaries. The Board’s Redistricting Resolution identifies existing geographical and political boundaries, including but not limited to incorporated town boundaries, as factors it will consider in evaluating proposed plans. The Redistricting Resolution encourages plans based on existing voting precinct boundaries, and where changes are necessary, precincts shall be divided along census block boundaries. These Board policies recognize that, by law, election district lines and precinct boundaries in Virginia must follow “clearly defined and observable boundaries.” Using existing precincts as the building blocks for a redrawn district ensures that the district lines will satisfy that law.

Preservation of communities of interest. The Board’s Redistricting Resolution identifies this as a factor the Board will consider in evaluating proposed plans. The Resolution defines a “community of interest” as “a neighborhood or geographically defined group of people living in an area who share similar social, cultural, and economic interests. Present and planned use of land and public facilities are relevant to defining communities of interest. A community of interest does not include a community based upon political affiliation or relationship with a political party.”

Existing districts and incumbent representation on local public bodies that may be affected by redistricting. The Board’s Redistricting Resolution also identifies these traditional redistricting principles as factors it will consider in evaluating proposed plans. These principles promote a requirement of Virginia law specific to the Urban County Executive form of government, under which Fairfax County operates: When the Board of Supervisors changes district boundaries to meet the tests of equitable population distribution among the districts, the changes must be made “with a minimum disruption of the then existing district pattern of service.” Local public bodies that are required by law to have members representing each election district include the Board of Supervisors, the School Board, and the Planning Commission.

The General Assembly also has adopted criteria for Congressional and General Assembly districts. Although not applicable to local districts, they may be relevant in evaluating what constitutes state policy that could justify deviations from strict equality among districts. The state criteria allow a deviation of no more than five percent.

### **III. RACE, ETHNICITY, LANGUAGE MINORITIES, AND REDISTRICTING**

In redrawing districts to rebalance populations, the Board of Supervisors, and thus the Redistricting Advisory Committee, must also ensure compliance with federal and state laws prohibiting discrimination. The federal Voting Rights Act (VRA) and the state Rights of Voters laws prohibit districts from being drawn in such a way that the result is a denial or abridgement of the right to vote on account of race, color, or status as a member of a “language minority group,” which includes persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage. At the same time, the Equal Protection Clause of the 14<sup>th</sup> Amendment to the U.S. Constitution has been interpreted as prohibiting districts from being drawn to segregate citizens into districts based on race without sufficient justification, a practice the courts have dubbed “racial gerrymandering.” These requirements are the most complicated and, as a result, most frequently litigated areas of redistricting law. The U.S. Supreme Court has acknowledged that “[s]ince the Equal Protection Clause restricts consideration of race and the Voting Rights Act (VRA) demands consideration of race, a legislature attempting to produce a lawful districting plan is vulnerable to competing hazards of liability.”

Where the federal VRA, its state-law progeny, and the Supreme Court’s cases call for the consideration of race in redistricting, those calls must be interpreted narrowly and consistently with the requirements of the 14<sup>th</sup> amendment. The courts treat racial and ethnic classifications of any sort as “inherently suspect” and courts subject such classifications to the strictest level of judicial scrutiny. Consideration of race in

redistricting will only survive such scrutiny if the racial considerations are narrowly tailored to serve a compelling interest.

VRA Sections 2 and 5 are worded almost the same as Virginia Code §§ 24.2-126 and 24.2-129 of the Virginia Rights of Voters laws, respectively. Because these two Virginia Code sections only took effect on July 1, 2021, no court has interpreted them or ruled on them, and to date no other authoritative guidance based on these laws exists. However, the wording of these laws was so clearly based on VRA Sections 2 and 5 we can look to court opinions and U.S. Department of Justice regulations and guidance to help us understand and apply them.

Section 2 of the Voting Rights Act and Virginia Code § 24.2-126, in the context of redistricting, prohibit voting dilution. When minority and majority voters consistently prefer different candidates, two methods of districting have been used to dilute minority votes in violation of these constitutional and statutory guarantees. One method has been to concentrate minority voters into districts to reduce the numbers of districts where they might be able to elect representatives of their choice. A second method takes the opposite approach, fragmenting minority voters among different districts so that their numbers are reduced below what would be necessary for them to elect representatives of their choice.

When courts consider alleged violations of Section 2, they first look at three threshold issues before reaching the ultimate question of whether the districting plan impermissibly dilutes minority voting. The courts have found that unless there is a conjunction of all three of these factors, the districting plan is not responsible for thwarting minority voters' ability to elect representatives of their choice.

The first threshold issue is whether the minority group is sufficiently large and geographically compact that an election district of an appropriate size and shape could be drawn where the Citizen Voting Age Population ("CVAP") of the minority group composes a numerical, working majority of the CVAP. A locality is not required to create another election district, even if adding a district would create a majority-minority district. To satisfy this threshold requirement the minority group must be sufficiently large and geographically compact to compose a numerical, working majority using the existing number of districts.

The second threshold issue is whether the minority group is politically cohesive. The courts caution that one cannot assume from a group of voters' race that they think alike, share the same political interests, and will prefer the same candidates at the polls. Traditionally, but not exclusively, the courts find that minority groups are politically cohesive when a significant number of minority group members usually vote for the same candidates. Similarly, political cohesion among voters in a minority group can be shown where they vote differently from majority voters.

The third threshold issue is whether the majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate.

If all three of these threshold conditions are met, then the courts will consider the “totality of circumstances” to determine whether the redistricting plan provides less opportunity for members of the relevant minority group to elect representatives of their choice than other members of the electorate have.

Virginia Code § 24.2-129 and Section 5 of the Voting Rights Act. VRA Section 5 no longer applies to Fairfax County (or to any other jurisdiction) as a result of a 2013 U.S. Supreme Court decision. Nonetheless, court opinions and other authoritative guidance about Section 5 are the best aids to interpretation of Virginia Code § 24.2-129, which is very similarly phrased.

Virginia Code § 24.2-129, like Section 5 before it, prohibits localities from making or administering certain changes in election practices (“covered practices”), including redistricting, unless the locality fulfills certain prerequisites. Specifically, Virginia Code § 24.2-129 requires the County to follow one of two allowable methods to “preclear” the new districting plan before it can be put into effect. The first method requires the County to provide public notice, comment, and hearings, plus a second round of publication and public comment if the Board makes changes in response to the initial public input. The second method parallels the preclearance process the County used for decades to obtain federal approval of election-related changes. Under this method, the Board submits a request to the Virginia Attorney General for review of the new district plan and for issuance of a certification of no objection. The Board’s schedule proposes to have the County Attorney file such a request after the Board has adopted the redistricting ordinance.

These prerequisites are designed to identify and block election practices that have the purpose or effect of denying or abridging the right to vote based on race or color or membership in a language minority group, or that will result in the retrogression in the position of members of a racial or ethnic group with respect to their effective exercise of the electoral franchise (their ability to elect representatives of their choice). Section 5 did not require a covered jurisdiction to maintain a particular numerical percentage of minorities in majority-minority districts. Rather, it required redistricting bodies to ask “to what extent must we preserve existing minority percentages in order to maintain the minority's present ability to elect its candidate of choice?”

Retrogression, by definition, requires a comparison of a jurisdiction's new voting plan with its existing plan. Fairfax County’s current districting plan is therefore the benchmark against which the “effect” of the new plan will be measured. Factors that the courts considered in deciding whether a redistricting plan complied with VRA Section 5 included the same considerations already reviewed in the context of other legal requirements. These factors include: Whether, and the extent to which, the proposed plan reduced minority voting strength, fragmented minority concentrations among different districts, or overconcentrated minorities in one or more districts; whether alternative plans satisfying the jurisdiction’s legitimate governmental interests existed, and whether they were considered; whether the proposed plan departed from objective redistricting criteria set by the submitting jurisdiction, ignored other relevant factors such

as compactness and contiguity, or displayed a configuration that inexplicably disregarded available natural or artificial boundaries; and, whether the plan was inconsistent with the jurisdiction's stated redistricting standards.

Although retrogressive effect alone violates the law, the circumstances surrounding the County's adoption of a redistricting plan also may be examined to determine whether any evidence of discriminatory purpose exists. Members of the Redistricting Advisory Committee should be aware that any public statements they make could be weighed in such an inquiry.

The Board's Redistricting Resolution affirms the Board's commitment to ensuring that the redistricting plan it ultimately adopts protects the rights of racial and language minority groups. The Resolution states that the Board will not consider redistricting plans that result in the denial or abridgement of the rights of any racial or language minority group to participate in the political process.

Racial Gerrymandering. However, the U.S. Supreme Court has made clear that race cannot be the "predominant factor" motivating a decision to place certain voters within or without one or more districts. Legislative bodies often act with a consciousness of race in their redistricting decisions and can do so without subjecting their actions to strict scrutiny. Race becomes the "predominant factor" in a redistricting decision when traditional race-neutral districting principles – discussed in Section II above – are subordinated to considerations of race. Even if a map complies with traditional redistricting principles, the courts may still find that race predominates "if race for its own sake is the overriding reason for choosing one map over others."

Consequently, any district lines found to be predominantly motivated by considerations of race are subject to "strict scrutiny" to evaluate whether the use of race was narrowly tailored to achieve a compelling state interest. The U.S. Supreme Court has never held that compliance with the VRA qualifies as a compelling reason, but it has repeatedly "assumed without deciding" that it does. The Supreme Court has held that consideration of race in making a districting decision is "narrowly tailored" if the body has "a strong basis in evidence" for believing that its decision is necessary to comply with the VRA.

**\*\* End \*\***