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Dear Members of the Independent Redistricting Commission:

I have written three letters previously to this commission in an effort to be helpful. The letters were on May 28, June 6, and June 11, 2013. Since the commission now has its full membership, I thought it might be useful for me to provide a single letter that gives an updated version of my suggestions in the previous letters and my oral testimony.

**Why Am I Interested in the Success of this Commission?** I am not a member of AGR. My interest in the success of this commission arises from my belief that, if successful, the independent commission process now being used in Austin will be a model for many cities nationwide. I believe this is a desirable result. For 38 years I have represented state and local governments in redistricting, including virtually all of the largest cities in Texas. Beginning in 1992, I also taught election law (including redistricting) at the University of Texas Law School until my retirement in 2012. My experience representing elected officials has gradually convinced me that these officials really have no business drawing the districts from which they are elected. A written account of the reasons for this conclusion and of the use of redistricting commissions nationwide can be found in *Redistricting Need Not Be an Essentially Political Process: Independent Commissions for Cities*, a manuscript written by me which will be published later this year as an article in the Election Law Journal. I will gladly provide any of you with a copy of the manuscript if you wish.

In 2011, I drafted the provision for the independent commission that eventually became a part of Proposition 3 and the Austin city charter. I modeled it on the independent commission that successfully drew the state legislative and congressional districts in California. The decision to use the California model came after my evaluation (as part of my law school work) of all of the autonomous redistricting commissions used by the various states (22 commissions) and fifty largest cities (five commissions). The experience in California is discussed fully in a recent report by the League of Women Voters. I have sent Ms. Gutierrez a copy of this report. I am certain

that she will gladly provide you a copy if you wish. There are many, many materials available on the California experience, but the League's report is a good place to obtain an overall view. Many of the materials created and used by the California commission are available online. Some of these may be helpful, but how the redistricting process unfolds in Austin depends entirely on you. You will determine the process and make the decisions for the residents of our city.

I am not seeking to become legal counsel or staff for this commission because I am too old to go through another round of contested redistricting. My advice to AGR, the city auditor, the applicant review panel and to this commission has been freely given. I want to help you succeed. Hopefully the following recommendations will be useful to you as you undertake this important task.

**Learning From California.** In May, the law school, LBJ School and AGR jointly hosted a panel discussion that included a member of the California Redistricting Commission. I moderated this discussion. Our guest, Mr. Angelo Ancheta, assured me that he is willing to return to Austin to meet with the Austin Independent Commission. I urge that you consider inviting him (or another member of the California Redistricting Commission) to meet with you in open session and to answer questions about the California experience.

**Schedule of Commission Action.** This commission has complete control over its schedule. Insofar as Proposition 3 sets certain deadlines (e.g. that the eight commissioners shall appoint the remaining six commissioners by June 30 and the commission shall adopt a final plan no later than December 1, 2013)), these dates are not binding. Subsection 3 (B) provides "If the date of the city election is moved, then the dates in this article shall be adjusted to ensure the commission has sufficient time to draw the lines prior to the election date." This provision was added because (1) the original deadlines in the charter amendment were set in 2011 in anticipation of May, 2014 elections and (2) once it appeared that the city council might submit a proposal to move the city elections to November (from May) the provision was needed to give this commission as much flexibility as possible. As you are aware, Proposition 1 passed and the elections have been moved to November, 2014.

Taking 4-6 months to draw the districts and receive preclearance under the Voting Rights Act (i.e. the end of 2013) is about right anyway, but the deadlines in Proposition 3 are not firm. The real legal deadlines arise effectively from other parts of the charter that govern when a prospective candidate may begin raising money and must file for election. By adopting final districts at or about the end of 2013, this commission leaves ample time for prospective candidates to assess their election chances in the 10 new districts. If this commission's

timeframe begins slipping too far into 2014, however, the commission could confront a situation in which a court could be asked (and find it necessary) to move the other charter dates (as occurred recently for 2012 state elections).

In sum, this commission has essentially full control over its schedule. Perhaps the greatest impact of this flexibility at the moment is the commission's right to take time to get a qualified staff. The experience in other jurisdictions (e.g. San Diego, Arizona, Colorado and California) has consistently shown that the selection of redistricting counsel and technical staff is one of the commission's most vital and potentially controversial decisions. A mistake in hiring staff can make an enormous difference in the redistricting plan approved by this commission and the acceptance of that plan by the diverse groups citywide. Rushing to fill these staff slots in order to begin hearings as soon as possible would be a major mistake. A fully qualified staff should be in place to assist this commission through its hearing process and thus have access to the same public testimony that affects this commission's decisions.

The commission's hearing and redistricting process is set out based on what has worked best elsewhere. Subsection 3 (K) (7) divides the process into eight stages:

1. The commission shall hold at least two preliminary public hearings in each of the four county commissioner precincts (8 hearings) to "solicit broad public participation."
2. The commission shall vote on a "preliminary plan" for the city's 10 districts.
3. Written comment on the preliminary plan shall be taken for at least 14 days.
4. The commission shall hold at least one public hearing on the preliminary plan in each of the four county commissioner precincts (four hearings). These hearings shall be geographically dispersed.
5. The commission shall vote on a proposed final plan for the city's 10 districts.
6. The commission shall hold at least two further hearings (one north and one south of Lady Bird Lake) on this proposed final plan.
7. Written comments on the proposed final plan shall be taken for at least five days.
8. The commission shall vote on a final plan and submit it for preclearance.

Proposition 3 is specific and binding about the stages of the process that must be followed, but not about either the beginning of the hearing process or the timetable for commission action. Experience has shown that these hearings and written comments after adoption of a preliminary plan and a proposed final plan are important to allow a meaningful response to all interest groups. Proposition 3 establishes the minimum for this process, but it leaves this commission with ultimate discretion to make the process even more extensive if necessary.

**Non-partisan.** A recent news story suggested that the current commission consists of more Democrats than Republicans. I am unsure of the accuracy of this identification, but it is immaterial. City of Austin elections are nonpartisan. Each member of this commission has been selected for his or her impartiality. Austinites expect such impartiality.

**The Voting Rights Act.** As most of you are aware, Austin is a jurisdiction subject to Section 5 of the Voting Rights Act. It cannot enforce a “change” in its election practice (including new election districts) without first receiving “preclearance” from the federal government or the courts.

At present a case (Shelby County, Ala. v United States) challenging the constitutionality of Section 5 of the Voting Rights Act is pending at the United States Supreme Court. A decision is expected shortly. A ruling that Section 5 is unconstitutional will affect the redistricting process in Austin, but not the requirement that the city’s final redistricting plan must not discriminate against minority voters. Even if Section 5 (and its requirement for preclearance) is stuck down by the Court, Section 2 of the Voting Rights Act and the 14th and 15th amendments to the United States Constitution will remain in effect. Any final redistricting plan that discriminates in potential violation of these continuing legal requirements will be challenged in state or federal court regardless whether Section 5 is still in effect.

Assuming that Section 5 of the VRA remains in effect and that the commission seeks preclearance under the federal law by submitting the final redistricting plan for review by the U.S. Department of Justice (rather than to file suit in the District of Columbia against DOJ as Texas did in 2011), the preclearance requirement should not affect the timetable for Austin elections. By law, DOJ can object to a new redistricting plan only if it acts within 60 days of the submission of the plan for review. However, this timetable is misleading. First, it begins running only after the plan has been submitted to DOJ. Thus, putting together the extensive material (e.g election analysis of minority opportunity districts; transcripts of commission proceedings) required in the submission may delay the actual submission for weeks unless expedited by the preparation of as much information as possible before the plan is finally approved. Second, DOJ can delay its response by another 60 days by requesting the jurisdiction (i.e. Austin) to submit additional information. This additional 60 days, like the first period, only begins running once DOJ receives the additional information. Third, DOJ does not want to affect the scheduling of elections and may expedite the review process when necessary. I have seen preclearance review under Section 5 take as long as six months or as short as 24 hours.

I do not think it will take more than 60 days after submission (probably much shorter) to obtain preclearance of this commission’s redistricting plan because I am confident that this

commission will heed the advice of VRA counsel and will draw fair, nondiscriminatory districts. You also will be helped because DOJ is now in a lax period (after the surge of redistricting submissions after the 2011 census) and should be able to expedite a Section 5 review.

**Staff.** There is no more important decision for this commission than its selection of staff. It is important for this commission to move quickly, but responsibly to hire its own staff.

*As a starting point, it is important to recognize that the charter amendment in Proposition 3 prohibits this commission from hiring current or former city employees for its staff.* Realistically, the commission has needed to rely temporarily on city employees or consultants as the commission was selected and organized. Ms. Gutierrez has provided valuable assistance to the Applicant Review Panel and this commission. Ms. Romero is a former student of mine from the University of Texas Law School and remains a source of pride to me. Syd Falk is a former law partner. He is a very knowledgeable and skilled lawyer and my personal friend. However all of these three fine persons are, and hope to remain, employees or consultants for the City of Austin; not for this commission. They are merely assigned to help this commission as a part of their duties for the city. As a result, they operate with a perpetual conflict of interest. This commission has no effective control over the timing or quality of their work or over the confidentiality of commission affairs or communications.

Maintaining the separation of this commission from city employees is required by the wording and intent of Proposition 3. Although the use of some city personnel may be necessary from time to time to fill gaps in staffing and assure that this commission is moving smoothly, no past or current city employees should be in a position to directly or indirectly affect this commission's decisions about what is best for the residents of Austin.

Executive Director. I urge this commission to make its first hire an executive director. When I made this recommendation on June 13th, Commissioner Mariano Diaz-Miranda correctly asked me what the executive director would do. The executive director would assure that this commission is fully supported in all of its efforts – i.e. assuring that the instructions of the commission are fully and quickly carried out, that the commission is timely making the decisions that it must make, that the logistics of hearing locations are arranged, that the relationship with the city remains at arms-length, that legal counsel and consultants are used effectively, and that the remainder of the staff is acting responsibly and with integrity. The executive director can arrange (or conduct) interviews for the other staff positions, such as Voting Rights Act Counsel and technical mapping consultant as directed. Ms. Gutierrez is trying to perform some of these duties now, while also meeting her other duties for the city.

The executive director should be experienced in managing persons, including professionals, and in supporting a body like the commission. He or she should not be an administrative assistant, but should have such help if necessary. The objective should be to get a qualified person who is willing to put aside his or her other affairs for 4-6 months and become a vital part of this process. At this time, I do not believe that the position of executive director should be full-time.

There are many persons who would be willing to serve in this capacity for several months – especially retired academic or business professionals. The University of Texas is a particularly fertile ground for finding someone, including existing faculty, who would want to take a few months from their current activity to help this commission. Perhaps some of the persons who applied to serve on the commission (but were not selected) would be interested in serving as executive director. Although there are persons who I would recommend from the university or community, I do not, however, have any specific person in mind. Mostly I wanted at this point to dissuade you from following the lead from the city staff that you essentially post to hire an administrative employee like the city would do. This would be a mistake. There must be an affirmative effort (akin to the publicizing of the application process for membership on the commission) to find a satisfactory executive director. The person's capability should extend to the evaluation of the work being done by others for this commission. His or her integrity and loyalty to this commission and its mission are of utmost importance. The commission must trust the executive director to be its representative and its eyes and ears.

Legal Counsel. Redistricting law, especially compliance with the Voting Rights Act, is an area of specialization. Very few attorneys know the law sufficiently to give this commission the assistance it needs (many attorneys will answer that, if hired, they will learn the law). Please do not fall for this representation. I have seen some of this state's best lawyers make fools of themselves when dealing with redistricting issues because they lacked the requisite prior experience. For this reason, the charter amendment adopted in Proposition 3 mandates that "the commission shall require that at least one of the attorneys hired by the commission has demonstrated extensive experience and expertise in implementation and enforcement of the federal Voting Rights Act" (Subsection 3 [k] [5]). On the other hand, many of the attorneys who are experts on redistricting law are identified primarily with one political party or interest group or another. Many essentially make a living doing primarily redistricting (i.e. many of the same redistricting attorneys have appeared in the major state and local redistricting lawsuits for the past 4-5 decades). This is possible because some of the issues and the litigation last far beyond the year or so after the census. Some of these attorneys could successfully put aside this partisan or factional interest for this commission; some probably could not do so even if they tried. Moreover, the choice of a legal counsel will be very visible and will carry with it a

perception of how impartial this commission intends to be. Therefore, I advise hiring an attorney who has the requisite experience, but has not been identified with a particular party, interest group or faction in the past.

In some circumstances, the city legal staff can be of assistance (on issues such as city rules, open meetings, open records, etc.) when the advice is filtered through the executive director. **However, not on redistricting itself. The attorney advising the commission on compliance with state, charter and federal requirements for redistricting must be someone that has extensive experience with redistricting, will give this commission impartial but knowledgeable legal advice, has the trust of this commission, has worked recently with the DOJ on preclearance matters (so the person has the trust of the DOJ personnel), has no ties to the Austin city council, is available for this commission's meetings and hearings, and will be perceived by outside factions as impartial and without any personal agenda.**

There are several persons who can meet these criteria. At the risk of being presumptuous, however, I urge you to consider law professor Joseph Fishkin.

Technical Mapping Consultant. As was mentioned by Peck Young at the last commission meeting, the person needed to assist the commission on the technical aspects of mapping is someone who has actual experience with redistricting and access to (and experience using) the software specially designed for redistricting. Over recent decades the software used for redistricting has become more and more sophisticated and specialized. Many demographers have little or no knowledge of this software or how to use it. In terms of a public body like this commission, it is important to have a mapping system that permits direct use by the public (in drawing proffered districts or boundary changes) and a real time demonstration of the effect of any proposed district or change in a district.

One of the finest redistricting mapping systems in the country is operated by the Texas Legislative Council in support of state redistricting during the legislative process. It is called REDAppl. It permits members of the general public to use the same data as the legislators in viewing and drawing possible redistricting maps. On the other hand, redistricting at the state level is partisan and some aspects of the system (e.g. analysis of past election results) could not be used for Austin districts since the charter prohibits any district from being drawn to favor or discriminate against any person or group. All of you know that redistricting at the state level has been very political, but I believe the Legislative Council staff has remained apolitical. It has been used most recently by the federal court in San Antonio to map the remedial plans adopted by that court in lieu of the legislative enactments for the 2012 election.

I do not know that the Legislative Council would be willing to help a local government like Austin. I have presumed to make some inquiries. It appears possible that an interagency contract could be justified on the basis that this redistricting is happening in the middle of a decade and is being done by a commission (not a local government) to distinguish this circumstance from the approximately 600 jurisdictions redistricting in Texas during the first year of a decade.

A further advantage of the Legislative Council is that it is theoretically a “one-stop shop” as described on June 13th by Commissioner Anna Saenz. The Council’s legal counsels for redistricting are also supposed to be apolitical. I have known several of them for decades and their knowledge of redistricting law is great. Some help from one or more of these counsels is probably necessary to get the maximum value from REDAppl, but I do not recommend using them without other legal counsel also being available to the commission to assess their work and to speak frankly with the commission when necessary.

I would be remiss if I did not also mention Ms. Sherrie McCall at my former law firm (Bickerstaff, Heath, Delgado, Acosta). She is not an attorney. She came originally from the Texas Association of School Boards and has over two decades of experience in mapping for local government redistricting. Sherrie is outstanding and the software available to and used by her is even better in many ways than REDAppl for redistricting local governments. Sherrie is apolitical and conscientious. She has prepared hundreds of local government redistricting maps. I am unsure, however, that Sherrie can be available to this commission because the law firm is now providing legal assistance to the City of Austin. I do not believe that Sherrie has been involved in any of this work for the city, but this commission may decide that all employees of such a firm should effectively be ineligible for hiring by this commission. However, if this commission decides to consider some employees of such firms for employment, I strongly recommend exploring possible ways in which Sherrie and her redistricting system for local governments could be made available to this commission.

**Criteria for Hiring.** The charter requires that this commission establish criteria for hiring. Among these criteria are that the commission must apply the conflicts of interest listed in subsection 3(1)(3). In addition, I suggest the following:

1. Executive Director – must have substantial experience at managing persons, including professionals, and providing support for a board of directors or other board similar to this commission. I believe at this time that the position can be part-time, but could change based on circumstances. The executive director should be motivated by a desire to play a pivotal role in the drawing of single-member districts, not in maximizing his or her remuneration or future employment.



2. Administrative Staff – one or more persons as needed over the next several months to provide support for the executive director. The executive director should make these choices. Whether this staff need be full-time is unknown to me. It is possible that the use of city employees may be necessary or convenient for this task as long as they have no opportunity to affect the redistricting process (e.g. typing, payroll, etc.)
3. Legal Counsel – must have demonstrated extensive experience and expertise in the enforcement and implementation of the federal Voting Rights Act, including recent experience in advising on redistricting and working with the representatives of the Voting Section of the Department of Justice. The legal counsel must also be willing to be available for commission meetings and hearings. This position is probably best handled by outsourcing to one of the qualified alternatives instead of by hiring as a commission employee.
4. Technical staff – must have extensive experience actually working with census data in a redistricting context and with redistricting software and must be willing to be available for commission meetings and hearings. This position also is probably best handled through outsourcing.
5. Mapping Technology – must be able to allow public access and use of the mapping technology and to provide real-time display of mapping changes and the effect of such changes on the population and racial and ethnic makeup of each district. The system must include census data converted to Travis County election districts and census data in its traditional form (e.g. blocks, block groups, etc.) and allow the overlay of Austin neighborhood information.

Cost is relevant to this commission's staff hiring decisions. One of the reasons that I have suggested using the Legislative Council is that this alternative seems to offer the best route for providing independence at a relatively low cost. As a former "redistricting counsel and consultant," I am acutely aware of the potential expense of obtaining outside legal counsel and technical staff. Nevertheless, the overriding objective must be to draw the ten districts in a knowledgeable, transparent, legal and competent manner. If this objective cannot be achieved without some initially unwanted costs, then the costs must be incurred. A flawed process and final map will ultimately be more costly (both actually and figuratively) than spending what is necessary during the process itself. Subsection 3 (K) (9) requires that the city council appropriate sufficient funds for operation of this commission. The initial determination of what is "sufficient" for the operation of this commission is in the reasonable judgment of this commission; not the council. A refusal of the city council to sufficiently fund this commission is a violation of the charter and the will of Austin residents.

Staffing decisions by this commission require nine votes.

**Conclusion.** It amazes me that there remain many persons, including some in local leadership positions, who continue to insist that this citizen commission will “crash and burn.” Some observers are skeptical that you can timely produce a fairly drawn plan for 10 single-member districts. Instead, they expect that this commission will be overwhelmed, that the holding of the 2014 elections will be jeopardized by a deadlocked commission and that the final redistricting map will be drawn by a state or federal court (i.e. the experience of the Texas Legislature in 2011). Many of these skeptics apparently feel that only elected politicians and their close supporters can properly draw election districts. I strongly disagree. More importantly, the voters of Austin disagreed by approving Proposition 3. Now the responsibility and the trust of all residents of our city fall on you. I am confident that you are up to the task.

Your task, however, will be difficult. It will be impossible to fully satisfy everyone who testifies before you. There probably will be many times when you are in consensus on what to do; but also many times when you disagree. The final redistricting plan must receive the affirmative vote of nine members of the commission. Mutual trust among the members of the commission is essential. The camaraderie among the commissioners of the California commission was a key to its success. I renew my suggestion that it might be good to rotate the chairmanship of the commission, thus reducing one potential point of internal friction.

Finally I wish to offer my congratulations. You were selected from among over 450+ eligible applicants based on your relevant analytical skills, ability to be impartial, residency in various parts of our city, and appreciation for the city’s diverse population. I am envious of your opportunity to serve on behalf of the residents of Austin at this historical time. Your task will be challenging, but the result will be important because it not only will establish the ten districts to be used in 2014, but will establish the baseline for decades thereafter.

Good luck.

Sincerely,

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