

Case No. S272036

**IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA**

LISA MORENO, JYNAIA BADIE, NANXUN ZHOU CONROY, BRUCE
L. BIALOSKY, and SYLVESTOR BLAND

Petitioners,

v.

CITIZENS REDISTRICTING COMMISSION,

Respondent.

**REPLY TO PRELIMINARY OPPOSITION OF CALIFORNIA
CITIZENS REDISTRICTING COMMISSION TO EMERGENCY
PETITION FOR WRITS OF PROHIBITION AND MANDATE**

HARMEET K. DHILLON (SBN: 207873)
MARK P. MEUSER (SBN: 231335)
MICHAEL A. CUMBO (SBN: 271283)
DHILLON LAW GROUP INC.
177 Post Street, Suite 700
San Francisco, California 94108
Telephone: (415) 433-1700
Facsimile: (415) 520-6593
Attorneys for Petitioners

TABLE OF CONTENTS

INTRODUCTION	5
A. The Commission’s Acknowledged Secret Meetings with Special Interest Groups Violate Government Code Section 8253.	8
1. The VRA Subcommittee	9
2. The Outreach and Engagement Subcommittee	12
B. The Commission Acknowledges It Is Drawing Maps Based on Secret Analyses	21
C. The Commission’s Independence Conflicts With Its Choice to Rely On a Law Firm That Represents the California Legislature and One Party’s Incumbent Officials, Candidates, and PACs	26
D. The Petition is Timely, Appropriate, and Seeks Proper Relief	30
CONCLUSION	32
CERTIFICATE OF COMPLIANCE	33
CERTIFICATE OF SERVICE.....	34

TABLE OF AUTHORITIES

Cases

Brandt v. Board of Supervisors

(1978) 84 Cal.App.3d 598..... 31

Clark v. City of Hermosa Beach,

(1996) 48 Cal. App. 4th 1152, 1170–71, 56 Cal. Rptr. 2d 223..... 28

Legislature v. Padilla

(2020) 9 Cal.5th 867 8, 18

Mallon v. City of Long Beach

(1958) 164 Cal.App.2d 178..... 30

Wilson v. Eu,

(1992) 1 Cal. 4th 707 32

Statutes

Code Civ. Proc. § 2018.030 25

Gov. Code § 8253..... 18

Gov. Code § 8253(a)(3)..... passim

Gov. Code § 8253(a)(7)..... passim

Other Authorities

Brooke Staggs, *Rep. Katie Porter’s seat could lose some voters in redistricting. Where will they go?* (Apr. 15, 2021),

<https://www.ocregister.com/2021/04/15/rep-katie-porters-seat-could-lose-some-voters-in-redistricting-where-will-they-go/>..... 27

Maxwell Palmer and Benjamin Schneer, <i>Racially Polarized Voting Analysis for the Virginia Redistricting Commission</i> , Aug. 31, 2021 (“Virginia RPV Analysis”), available at https://virginiaredistricting.org/2021/Data/Publications/palmer_schneer_rpv_report.pdf	22
Olga Pierce and Jeff Larson, <i>How Democrats Fooled California’s Redistricting Commission</i> , Dec. 11, 2011, available at www.propublica.org/article/how-democrats-fooled-californias-redistricting-commission	8
Public Records Act Request	5
Redistricting Commission Refuses To Release Legal Memos, Dec. 2, 2021, available at https://www.detroitnews.com/story/news/politics/2021/12/02/michigan-redistricting-commission-refuses-release-legal-memos/8835117002/	22
Victor Hugo, <i>Lés Miserables</i> 399 (Random House 1940)	6

INTRODUCTION

To put an end to self-serving backroom deals, California's voters amended the state's Constitution and laws to periodically create a Citizens Redistricting Commission to conduct decennial redistricting in full view of the public, and to work independently from the Legislature's conflicted reach. For an ephemeral government entity comprising unelected amateur officials untethered to the oversight of the executive branch of state government, this structure and process was essential for the public to trust its sensitive work in the absence of other checks and balances.

The only questions before the Court concern the transparency and independence of the current Commission, not questions of the commissioners' character, intent, or productivity. Accordingly, the Commission's self-praise in the Opposition is irrelevant. The Petition is instead concerned with a pattern and practice of secret meetings and concealed voter analyses, and the influence on the Commission of conflicted counsel for the Legislature and one party's candidates. The salient facts are not in dispute.

On November 22, in response to a Public Records Act Request, the Commission belatedly produced copies of damning commissioner notes taken in nonpublic meetings of which there was no other record, and this suit was filed eight days late, after Thanksgiving. The Commission has

ceased its productions and declined to answer questions about the records already produced and yet to be produced. Because the Commission did not produce the key records until November 22, Petitioners could not have filed suit any earlier. Ideally, Petitioners would have had the benefit of a complete production of records in response to its requests before filing suit, and ideally the Commission would have discussed the records it was producing to avoid suit over the obvious violations they revealed. But the Commission had exclusive control over the timing of its productions and its response to our questions, and it chose delay and silence. “The last thing that owls wish is a candle.” Victor Hugo, *Lés Miserables* 399 (Random House 1940).

In its Opposition, the Commission now admits that, as alleged, it met with interest groups outside of public meetings to discuss the work of the Commission. It also acknowledges that an outside consultant conducted a study of racial voting patterns that was used to draw district maps that, as alleged, it refuses to publish. The Opposition also doesn’t dispute that the Commission’s counsel, as alleged, is a partisan firm catering to Democrat candidates and committees, and in fact represents the Legislature itself—from which the Commission was specifically created to be independent. This same counsel is claiming the consultant’s voting analyses used by the

Commission to draw maps are *its* work product, and are somehow both published and protected from publication.

Employing lawyerly sophistry and circumlocutions, the Commission's arguments are as simple as they are bold:

- It is too busy and important for judicial oversight (“an untimely and unnecessary distraction as the Commission presses to finish its important work,” Opp. at 9);
- There is nothing wrong with secret meetings and analyses; and
- This Court is powerless to do anything to uphold the Commission's independence from the influence counsel beholden to the same parties from which the Commission was created to be independent.

If true, then—notwithstanding contrary provisions of the California Constitution and Government Code, as modified by two statewide measures enacted through the will of a majority of California's voters—the transparency and independence of the Citizens Redistricting Commission is a farce. If this hadn't been investigated and revealed as a practice long ago, it would be more surprising. See Olga Pierce and Jeff Larson, *How Democrats Fooled California's Redistricting Commission*, Dec. 11, 2011,

available at www.propublica.org/article/how-democrats-fooled-californias-redistricting-commission (attached as Exhibit 1).

* * * *

In short, this Court and this proceeding is the public’s last resort to uphold the essential independent nature and transparent functioning of the Commission, as required and intended by the California Constitution and Government Code. The only remedy on this issue that Petitioners seek is for the Commission to fulfill its existing requirements under the law: to publish a clear and complete record of each meeting outside of a public Commission in which commissioners discussed redistricting with special interest groups.

A. The Commission’s Acknowledged Secret Meetings with Special Interest Groups Violate Government Code Section 8253.

The Commission’s transparency framework “reflects a policy judgment that the public should have the opportunity to be involved throughout the redistricting process.” *Legislature v. Padilla*, (2020) 9 Cal. 5th 867, 877. The Commission’s Opposition discusses the work of two Commission subcommittees, a “subcommittee on VRA Compliance”, which was tasked with learning about and advising the full Commission regarding how to comply with the federal Voting Rights Act in drawing district lines . . . and a subcommittee on Outreach and Engagement, which

was tasked with advising the Commission on the development and implementation of a program to fulfill its statutory mandate to establish ‘a thorough outreach program to solicit broad public participation in the redistricting public review process.’” Opp. at 11-12. The work of these two subcommittees blatantly violated the Government Code provisions addressing the workings of the Commission, which explicitly state: “Commission members and staff may not communicate with or receive communications about redistricting matters from anyone outside of a public hearing.” Gov. Code 8253(a)(3).

1. The VRA Subcommittee

The Commission would not have violated section 8253 if its VRA subcommittee studied the requirements of the VRA on their own, or collected guides, papers, articles, books, etc., hired counsel or other experts to educate them, or if their discussions about the general requirements of the VRA were simply done at a public hearing of the subcommittee. The commissioners’ own notes of these meetings establish the VRA Compliance subcommittee did *not*, in fact, simply educate themselves “about the legal requirements imposed by the Voting Rights Act (VRA) and the best means of ensuring that the Commission’s maps would meet those legal requirements.” (Opp. at 12.)

Instead, as the Opposition concedes, the subcommittee held closed-door meetings of which the public was not given prior notice, in which they met with special interest groups and persons, including: “law professors and other VRA experts,” “one of the former Chairs of the 2010 Commission”, and minority community representatives. (Opp. at 12.) As summarized in the Petition, these meetings included unrecorded, closed-door audiences with:

- the National Association of Latino Elected and Appointed Officials (Petition at 31);
- a meeting with counsel to the prior Commission, who advised against publishing their voting analyses (*id.*);
- a law school professor who became a White House Senior Policy Advisor on Voting rights a few months later, who used Virginia as an example of how to draw a legislative district with 50% African Americans as “a way to covertly pack (or “pick”) afr ams under cover of VRA” (*id.* at 32.);
- a meeting in which the Commission was advised to publish general racial voting information that the public could replicate anyway but hide its analysis of specific “hot spot” districts (*id.*);
- and a meeting with the Black Census and Redistricting Hub, in which a commissioner recorded that there are “probably not any areas to have dense enough pop to build a majority black district”

and advice to “look for small isolated black community,” and a note to try “not to isolate [the 37th District] in a dissimilar district” (*id.* at 33);

- a meeting in which the Commission was advised how “to identify where minority voters may constitute a majority and then suggest[ing] the CRC direct a racially polarized voting (RPV) analysis at those areas”—while redacting the email from Commissioner Sadhwani that prompted this response (*id.* at 34);
- and instruction how racially polarized voting increases “downballot” [i.e., lower, local positions] and how the Commission “can use crossover vote to shave down and not pack a dist[ri]ct.” (*Id.*)

These meetings were “secret.” There was no prior notice to the public that the meetings would occur or what they would discuss, no ability for the public to observe or participate, and no recording or minutes made of the meetings. That commissioners reported after the fact that a meeting had occurred, or that some of the participants in these secret meetings subsequently made presentations at a public meeting does not make the prior non-noticed, non-public, and non-recorded, subcommittee meetings with various special interest groups any less secret or unlawful.

The Opposition includes a statement that the generally applicable Bagley-Keene Open Meeting Act of 1967 doesn’t require two-commissioner subcommittees to hold public meetings and, therefore, “none

of the Commission’s two-person advisory subcommittees were required to hold their meetings in public.” Opp. at 11. That would be true if Bagley-Keene were the only applicable law. The requirement in section 8253(a) enacted in 2008 and specifically addressing the Commission, however, also applies and *bars* nonpublic discussion of redistricting with “anyone” who does not work for the Commission. The canons of statutory construction dictate that a more specific standard and one created later in time supersede more general and earlier rules.

There is no practical or legal reason the Commission’s VRA subcommittee could not have notified the public of its meetings, held a public meeting, and made an official record of its meetings, or refrained from discussing redistricting at their secret meetings, or limited themselves to discussing redistricting with Commission staff or contractors retained for that purpose – all of which would have complied with section 8253(a)(3).

2. The Outreach and Engagement Subcommittee

The Commission’s Opposition also describes in detail the illegal work of its “Outreach and Engagement subcommittee.” Opp. at 13. The Commission contends at first that this committee’s purpose was to develop “an outreach program to educate people about the importance of redistricting and to encourage as much public participation as possible in

that process, as mandated by Government Code section 8253, subdivision (a)(7).” (*Id.*)

The relevant sentence in section 8253 states, in full, “The commission shall establish and implement an open hearing process for public input and deliberation that shall be subject to public notice and promoted through a thorough outreach program to solicit broad public participation in the redistricting public review process.” Gov. Code § 8253(a)(7). This sentence succinctly makes explicit that there is a distinction between “implement[ing] an open hearing process for public input and deliberation . . . subject to public notice” and an “outreach program to solicit broad public participation in the redistricting public review process.” Consistent with the text and spirit of section 8253(a)(3) as well as common sense, the Commission must *receive* public input about redistricting in a public hearing, whereas the Commission can *issue* communications merely asking the public to participate in the public review process outside of public hearings.

Nevertheless, under the claimed banner of “outreach” -- supposedly *asking* the public to participate in the process but not *receiving* public input and thus exempt from the public meeting requirement in section 8253 -- the Commission acknowledges the Outreach and Engagement subcommittee indeed *received* “advice of those with prior experience with these issues,

including local community and business leaders, public officials, and civic, philanthropic, nonprofit and government entities, in order to learn how best to educate and engage different communities throughout the state.” (Opp. at 14.) The only thing transparent about this nonpublic receipt of public input is the name of the subcommittee: Outreach *and Engagement*, revealing that the committee did not just conduct outreach, it *engaged* with favored groups of its choosing to receive their input, outside of a public meeting, and then invited *some* select groups to make presentations to the full Commission. (*Id.*) The Commission was thus manipulating the public comment record to promote favored groups, and not “solicit[ing] broad public participation in the redistricting public review process.” Gov. Code § 8253(a)(7).

In the Commission’s own words, this was just “the first phase, which occurred primarily from October 2020 through January 2021” whereas “[i]n the second phase, the Commission launched its actual outreach efforts[.]” Opp. at 14-15 (underscoring added). Even this “actual outreach” phase is suspect. The commissioners did not simply solicit a broad swath of people to participate in the Commission’s public meetings. Instead, it divided the state into 11 “outreach zones” and two Commissioners assigned to each zone led regional “outreach” efforts. (*Id.* at 15.) In the Opposition, the Commission explains, the commissioners contacted “various nonprofits”

and “nearly 50 statewide organizations.” (Id.) The Opposition does not include any information about how the Commission chose the lucky nonprofits and organizations to be personally invited and encouraged to contribute their views. This confirms that a presentation featured in the Petition was one such presentation. (Opp. at 15, citing Petition at 28.) However, the reason the Petition featured this particular example of “outreach” was that it began with a presentation of the host group’s input (requests) for how the Commission should redistrict their region. Accordingly, the Commission’s nonpublic receipt of this information violated section 8253.

The Commission also includes several tortured arguments about the meaning and application of 8253(a). First, it argues that holding non-public invitation only meetings with cherry-picked interest groups, “[f]ar from *depriving* the public of an opportunity to participate in the redistricting process, . . . were all directed towards *improving* the public’s opportunity to participate in that process.” (Opp. at 17.) The Commission’s argument would be shocking if it were not laughable. Section 8253 requires the Commission to discuss redistricting with members of the public in public hearings so all can see who is trying to influence the Commission, and what they are saying. This is essential for public trust in the work of this peculiar

but powerful institution, itself largely insulated from democracy, checks and balances, and accountability.

Second, the Opposition inconceivably claims that section 8253's statement that "Commission members and staff may not communicate with or receive communications about redistricting matters from anyone outside of a public hearing" does not mean what we think it means. The Commission instead proposes that section 8253(a)(3)'s public hearing requirement for "communications about redistricting matters" conflicts with section 8253(a)(7), which states: "The commission shall establish and implement an open hearing process for public input and deliberation that shall be subject to public notice and promoted through a thorough outreach program to solicit broad public participation in the redistricting public review process." Gov. Code 8253(a)(7). As noted above, in one sentence section 8253 harmonizes and confirms the whole: public *input* must be received at a public hearing, and the Commission must solicit broad public participation in its process. The Commission sees instead a conflict, the absurd result of which is that—rather than soliciting broad public participation—it is empowered by section 8253(a)(7) to selectively invite favored groups to provide private input, obliterating both Section 8253(a)(3) and the first half of the sentence in section 8253 upon which they rely. Rather, perhaps the words mean what they say and say what they

mean: the commission must solicit broad public participation in its meetings, which members of the public are permitted to provide its input in full sight of the rest of the public.

Even the Commission's blinkered proposed harmonization of a conflict that doesn't exist wouldn't save it from its own misfeasance. The Commission "construes the prohibition on communications between Commissioners, staff, and third parties outside of a public hearing to apply only to communications that relate directly to "redistricting," that is to the actual process and activity of "drawing district boundaries." Opp. at 19. Even so construed, 8253(a)(3) would control public input "about" "drawing district boundaries" and would not save the Commission's secret meetings. To recap, those meetings included discussions of how to draw a legislative district with 50% African Americans as "a way to covertly pack afr ams under cover of VRA" (Petition at 32.); discussion of "areas to have dense enough pop to build a majority black district" and advice to "look for small isolated black community," and a note to try "not to isolate [the 37th Disrtict] in a dissimilar district" (*id.* at 33); how "to identify where minority voters may constitute a majority and then suggest[ing] the CRC direct a racially polarized voting (RPV) analysis at those areas" (*id.* at 34); how the Commission "can use crossover vote to shave down and not pack a dist[rict]" (*id.*); and a presentation by one interest group for how the

Commission should redistrict their region. (Petition at 28.) The nonpublic meetings with select outside parties to discuss whether to try again to change the Commission’s timeline for completing the redistricting process, presumably altering public comment periods, see Opp. at 21, n. 4, are yet further examples of public input about redistricting that should have been held in a public meeting, but which the Commission dismisses as not “substantive” and therefore not subject to section 8253(a)(3).

The Opposition takes pains to establish that redistricting, the purpose and activity of the aptly named Citizens *Redistricting* Commission, refers to the process of adjusting voting district lines. (Opp. at 19-20.) Further, “arranging public hearings, soliciting public participation, and hiring staff and consultants” is not “redistricting”, to which the Commission asserts section 8253(a)(3)’s public hearing requirement applies. Opp. at 21 (citing *Legislature v. Padilla* (2020) 9 Cal.5th 867, 872).) First, as noted above, the secret input received from those chosen by the Commission to provide that input did not constitute “arranging public hearings, soliciting public participation, and hiring staff and consultants.”

Second, as the Commission knows, last year’s *Padilla* matter involved a request for this Court to adjust certain statutory deadlines due to the delay in the release of the federal census data, in order to “preserve the public’s right to provide input on electoral district maps before those maps

are finalized.” *Padilla*, 9 Cal.5th at 878. It is a pro-transparency decision. The case did not address a dispute over the application of section 8253(a)(3). Indeed, that section is not cited in the decision, which instead focuses on the period for public comment *on draft maps* set forth in section 8253(a)(7).

In perhaps the most provocative argument in the Opposition, the Commission proclaims that Section 8253(a)(3)’s requirement that communications by members of the public with the Commission “about redistricting matters” must take place in public hearings does not apply to anything the Commission did before “the actual ‘redistricting public review process’ in September 2021.” (Opp. at 21.) This disturbing argument flies in the face of not only the plain letter of Section 8253, but the entire Commission transparency regime and the whole point it was created. For Commission counsel to advance this theory betrays not only a profound ignorance of the Commission’s transparency laws, but a hostility to it. It is also perplexingly inconsistent with the statements every commissioner dutifully read (whether or not observed) at the beginning of their nonpublic “outreach and engagement” presentations. That statement explained that Commission members and staff were prohibited from communicating with or receiving “communications about redistricting matters from anyone outside of a public hearing” and stating “the Commission will not be taking

any public input during these educational presentations.” See *04.05.2021*

Valley Industry and Commerce Association (VICA),

<https://youtu.be/Jh2WZHV99c> at 9:02 to 9:30.

* * * *

The Commissions’ attempted dissection of section 8253 would transform it from an essential safeguard the people approved--for a unique institution of unelected and unappointed members with a fleeting existence and highly sensitive duties--to a superfluous dead letter that permitted unlimited secret liaisons between commissioners and interest groups, even the Legislature and individual candidates or parties, so long as they took place before the Commission published maps, or if the Commission sent the invitation to the secret meeting in the name of “outreach and engagement.” This concerning position suggests an attitude toward transparency that left the Commission oblivious to its duties to the public for the first half of its fleeting existence, when it received biased information from favored groups before opening the doors to the teeming masses to have a few minutes’ audience so they could feel like they were fully and equally participating in the Commission’s process. Based on the notes provided by the Commission just 18 days ago, it appears this attitude is entrenched and, with the assistance of counsel, has leapt across the years from the defunct 2010 Commission to tarnish the 2020 Commission’s proceedings.

B. The Commission Acknowledges It Is Drawing Maps Based on Secret Analyses

The Opposition's answer to Petitioners' request that it disclose any analyses commissioned or received by the CRC about voting patterns, including racially polarized voting is inconsistent, incoherent, and incorrect. The Commission simultaneously asserts that the requested analyses have already been disclosed in the form of maps that reflect their results, Opp. at 24 ("precisely the analyses that the Petition has accused the Commission of "concealing" and that it requests be made public"), but it also asserts that there are additional analyses used to create maps that the Commission refuses to publish. Opp. at 25-26.

The analyses in question are based on public voting data and are being used to produce public maps, in a map production process that the law demands be fully transparent. As demonstrated in the Petition and its exhibits, commissioners' notes reveal that the analyses are being withheld from the public under a bogus claim of attorney work product in order to protect the Commission from criticism. Indeed, the Opposition itself indicates that published maps are based on the analyses being withheld just because the same analyses were also given to counsel: "These [published Commission] maps incorporate and memorialize the RPV analyses that the Commission's counsel has been relying upon in advising the Commission with respect to its obligations under the Voting Rights Act." (Opp. at 24.)

This, too, is consistent with the commissioners' notes, which reflect extensive, non-privileged, discussions about voting analyses with other parties about how the Commission can use the analysis to draw maps, in addition to non-privileged discussions of how the analysis can be concealed by counsel, as it was in 2010 and as the Commission is doing here.

Though the Opposition refers to a common practice among states of concealing such analyses, this is not the universal practice. *See* Maxwell Palmer and Benjamin Schneer, *Racially Polarized Voting Analysis for the Virginia Redistricting Commission*, Aug. 31, 2021 ("Virginia RPV Analysis"), available at

https://virginiaredistricting.org/2021/Data/Publications/palmer_schneer_rpv_report.pdf (Exhibit 2).

At this time, there is litigation in Michigan as to whether its redistricting commission must publish its voter analysis, after some commissioners noted the analyses were simply historical, and not privileged legal advice. Craig Mauger and Beth LeBlanc, *Michigan Redistricting Commission Refuses To Release Legal Memos*, Dec. 2, 2021, available at

<https://www.detroitnews.com/story/news/politics/2021/12/02/michigan-redistricting-commission-refuses-release-legal-memos/8835117002/>

(Exhibit 3.) As more states move from redistricting conducted by self-interested legislatures to independent citizens redistricting commissions,

related issues such as the public's right in such a system to see the underlying facts shaping the drawing of maps, are emerging issues.

It is clear that the 2010 Commission concealed its underlying analyses under a claim of attorney work product and this Commission, which is only the second one, has continued that practice upon the advice of counsel. The Opposition contends the commissioners' "notes do not reflect any 'decision' by the VRA Compliance subcommittee to treat the RPV analysis as confidential, much less any nefarious scheme to do so in order 'to deprive opposition of targets to criticize' the Commission. (See Petition, p. 37.) (Opposition at 26, n.5.) There are multiple curious aspects to this contention.

First, the commissioners' notes include the following, from VRA subcommittee meetings in October and November 2020: The 2010 Commission counsel "treated Matt Barretto [voting analysis consultant] as an expert witness – his info became privileged." (Columbo Decl., Ex. 5 at 13.) "Matt B[arretto] 2010 RPV analysis kept confidential to deprive opposition of targets to criticize. It remains confidential as long as we want it to be." (*Id.* at 3.) This is on the same page of notes that discuss an example of "a way to pack (or pick) Af[frican] Am[ericans] under the cover of VRA." (*Id.*)

Second, who has decided to keep the analyses confidential? Was it a vote of the Commission? Or a decision by Commissions Counsel? In the Michigan example above, there was at least a commission vote, as well as a dissent and an opportunity for the public to consider and challenge the decision—the hallmark of a transparent process. Here, we only have the representation of counsel that the analysis is theirs and will not be published, even though the Commission apparently used the analysis to publish maps.

Third, the Opposition further elevates the question of who exactly is making redistricting decisions. The Commission is tasked by the law with drawing lines, but here appears to be operating at the direction of counsel. The Commission has published maps while publicly discussing the influence of counsel's advice on those maps as it similarly acknowledges in its Opposition that counsel advises it how to draw the maps.

As to the claim that counsel is providing legal advice, here too the specifics other than that conclusory statement are absent. Counsel may of course advise that if maps are drawn a certain way, the Commission will be sued. But here there appears to be something more in play, i.e., that counsel is instructing the Commission how to draw the maps. What has been missing from the record so far is any corollary advice that racial gerrymandering is illegal, as the Commission seems to be saying they've

been told what to do even though they won't disclose what they've been told or the basis for what they've been told.

Respecting the need of any client to have privileged advice, Petitioners only ask that the underlying information on which the map drawing is based be published, even though counsel also used that information. The Commission's assertion of the work product doctrine is flawed in several ways

First, the Opposition's argument begins with the contradictory assertion that the analysis petitioners seek has already effectively been published:

the Commission posted on its website four maps showing the results of racially polarized voting (RPV) analyses . . . as well as a map showing the areas in the state in which racially polarized voting was found to exist in all three sets of districts. . . . These maps incorporate and memorialize the RPV analyses that the Commission's counsel has been relying upon in advising the Commission with respect to its obligations under the Voting Rights Act — precisely the analyses that the Petition has accused the Commission of “concealing” and that it requests be made public. The Commission has not “commissioned or received” any other “analyses of voting patterns, including racially polarized voting.”

Opp. at 24. Accordingly, the analyses appear to have not just been used by counsel to formulate its advice, but also given separately and directly to the map makers to draw lines.

Something does not become protected just because it is given to an attorney, protections can be waived, and selective/strategic waiver is

disfavored. While attorney work product may not lose its protection if shared with allied parties, the fact that an attorney used an analysis alongside others who effectively published the information (as the Opposition claims) may waive the privilege. Here, the Opposition suggests strategic or selective waiver of the privilege. In any event, the work product doctrine is not absolute, and Code Civ. Proc. § 2018.030 allows an exception for injustice (or, in federal rule 26(b)(3)(A)(ii), substantial need for the information and undue hardship obtaining the equivalent).

Finally, a future claim that the Commission's work violates the federal Voting Rights Act or the federal Constitution would be heard in federal court, where federal privilege law applies – and it is narrower than California's protections for attorney work product, requiring that the material in question be created in anticipation of litigation.

C. The Commission's Independence Conflicts With Its Choice to Rely On a Law Firm That Represents the California Legislature and One Party's Incumbent Officials, Candidates, and PACs

California's citizens specifically created the independent CRC to wrest control of redistricting from the grip of the Legislature, which used redistricting to protect incumbent legislators. The CRC chose to retain Strumwasser and Woocher, LLP, whose attorneys serve the Legislature and democratic party officials, candidates, and partisan political committees—

all of whom have a strong interest in how the CRC draws district lines. This betrays and subverts the intended independence of the CRC from the Legislature and incumbent officials. The Opposition does not dispute that Strumwasser & Woocher, LLP, the Commission's redistricting counsel, ordinarily derives its income from the California Legislature and Democratic officials, candidates, and PACs.

The Opposition refers to the firm attorneys' duty of loyalty, a concept in the California's Rules of Professional Conduct. Rule 1.7 addresses conflicts of interest and the duty of undivided loyalty. These rules require disclosure and written conflict waivers in many circumstances, including "represent[ing] a client if there is a significant risk the lawyer's representation of the client will be materially limited by the lawyer's responsibilities to or relationships with another client," Rule 1.7(b), or where there is "a significant risk that a lawyer's ability to consider, recommend or carry out an appropriate course of action for the client will be materially limited as a result of the lawyer's other responsibilities, interests, or relationships, whether legal, business, financial, professional, or personal." Comment 4 to Rule 1.7.

The Commission contends that Strumwasser and Woocher made the required disclosures to it. The Opposition makes no mention of disclosures to and waivers from other clients arising from the firm's representation of

the Commission. Those clients include Rep. Katie Porter, whose district the Commission proposed changing at one point, to shift 30,000 votes to a new district, which could help or hurt Rep. Porter. This prompted Rep. Porter to “encourage[] residents to make their voices heard now” by lobbying the Commission. *See Brooke Staggs, Rep. Katie Porter’s seat could lose some voters in redistricting. Where will they go?* (Apr. 15, 2021), <https://www.ocregister.com/2021/04/15/rep-katie-porters-seat-could-lose-some-voters-in-redistricting-where-will-they-go/>

In addition to bar rules, common law provides a conflict of interest rule:

“A public officer is impliedly bound to exercise the powers conferred on him with disinterested skill, zeal, and diligence and primarily for the benefit of the public.... [¶] ... [¶] Actual injury is not the principle the law proceeds on. Fidelity in the agent is what is aimed at, and as a means of securing it the law will not permit him to place himself in a position in which he may be tempted by his own private interests to disregard those of his principal. This doctrine is generally applicable to private agents and trustees, but to public officers it applies with greater force, and sound policy requires that there be no relaxation of its stringency in any case that comes within its reason....”

Clark v. City of Hermosa Beach, 48 Cal. App. 4th 1152, 1170–71, 56 Cal. Rptr. 2d 223, 234 (1996), *as modified on denial of reh'g* (Sept. 11, 1996); *id.* at 1171 (“The public is entitled to have its representatives perform their duties free from any personal or pecuniary interest that might affect their judgment.”).

Other ethical rules similarly prohibit ostensibly independent parties from sharing contractors of their choice with those from whom they must remain independent. For example, in campaign finance law, a person making an expenditure to advocate for the election of a candidate does not do so independently, and therefore triggers severe consequences, if he or she “retains the services of a person who provides either the candidate or the committee supporting or opposing the ballot measure with professional services related to campaign or fundraising strategy for the current campaign” 2 CCR 18225.7(d)(3).

Similarly, a redistricting commission meant to be independent but sharing counsel with the Legislature and one party’s incumbent officials, candidates and PACs, is problematic because (a) counsel cannot give undivided loyalty to both the Commission and its other clients where the Commission is making decisions that could substantially help or hurt the other clients; and (b) the Commission was created to give the public more confidence in the redistricting process and its democracy by insulating the

Commission from counsel's other clients, to whom he owes zealous and undivided loyalty. Where an agency such as this, which has no democratic accountability or executive branch supervision that could operate as an effective check and balance, the people's only recourse is to this Court. For all of the reasons noted in the earlier sections of this Reply, there is good cause to question the firm's influence on the Commission.

D. The Petition is Timely, Appropriate, and Seeks Proper Relief

The Petition in this matter was filed eight days after the Commission's partial production of documents in response to a Public Records Act request, documents which revealed evidence of the concerning violations at the core of the Petition. That evidence shows both a pattern and practice of secret non-public meetings to obtain guidance from favored interest groups, and as demonstrated in the Opposition a willful hostility to the controlling transparency provisions in the Government Code. Moreover, because this Commission will soon disband before being succeeded in 9 years by another set of commissioners, it is vital that the Court clarify the applicable rules, disabusing the Commission of notions that could poison the next Commission – just as the bad practices of the 2010 Commission were quickly transmitted to this one despite the fresh start. The requested relief is therefore necessary to prevent any further violations by this Commission, and future violations by its successors.

The Opposition's quotation and citation of authority holding a court of equity cannot enjoin "that which in good faith has been discontinued in the absence of any evidence that the acts are likely to be repeated in the future," Opp. at 22 (citing *Mallon v. City of Long Beach* (1958) 164 Cal.App.2d 178, 190), is simply remarkable considering the Opposition's multiple bizarre arguments that the Commission's secret meetings about redistricting did not violate a rule that requires communications about redistricting to be made in a public hearing. With that opinion uncorrected, there is a virtual certainty this Commission and the next will repeat the violation. This Commission's work is not done yet, and so long as it has work to do or defend before it dissolves, the public has a strong interest in the correction of this stubborn Commission's misapprehension of its duties.

Similarly, the Opposition's argument that "a writ of mandate will ordinarily not issue 'merely in anticipation that the party will refuse to perform the duty when the time comes', id. (citing *Brandt v. Board of Supervisors* (1978) 84 Cal.App.3d 598, 601).) is inapposite because in this matter the Commission had denied the existence of the duty, found in section 8253(a)(3), or its application to nearly all of its activity.

Indeed, the Opposition's questioning of the Court's power is odd considering the Court has the power to take over the Commission's work

entirely and create the maps itself, as it has had to do before. See *Wilson v. Eu*, 1 Cal. 4th 707 (1992).

CONCLUSION

Petitioners have no recourse other than turning to this Court for relief to bring the Commission into compliance with the law and honor its duty to operate transparently and independently, in the time remaining before its work is done.

Respectfully submitted,

By: /s/Harmeet K. Dhillon

Harmeet K. Dhillon
Mark P. Meuser
Michael A. Columbo
Attorneys for Petitioners

Dated: December 10, 2021

CERTIFICATE OF COMPLIANCE

In accordance with the California Rules of Court, Rule 8.204,
I, Harmeet K. Dhillon, hereby certify that the foregoing was produced on a
computer using 13-point Times New Roman font, and according to the
word count function of the word processing program used, this brief
contains 5,856 words.

I declare under penalty of perjury under the laws of the state of
California that the foregoing is true and correct.

Dated December 10, 2021

/s/ Harmeet K. Dhillon
Harmeet K. Dhillon, Esq.

CERTIFICATE OF SERVICE

I hereby certify that on December 10, 2021, a true and accurate copy of the foregoing motion was served on counsel for the Respondent by electronic service via True Filing, a court-approved vendor.

Anthony Pane
Chief Counsel
California Citizens Redistricting Commission
721 Capitol Mall, Suite 260
Sacramento, CA 95814
anthony.pane@crc.ca.gov

Date: December 10, 2021

/s/ Harmeet K. Dhillon

EXHIBIT "1"

Defend the facts. Support ProPublica. [DONATE](#)

REDISTRICTING

How Democrats Fooled California's Redistricting Commission

To get the districts they wanted, Democrats organized groups that said they represented communities, but really represented the party.

by Olga Pierce and Jeff Larson, Dec. 21, 2011, 8:38 p.m. EST



This spring, a group of California Democrats gathered at a modern, airy office building just a few blocks from the U.S. Capitol. The meeting was House members only — no aides allowed — and the mission was seemingly impossible.

In previous years, the party had used its perennial control of California's state Legislature to draw district maps that protected Democratic incumbents. But in 2010, California voters put redistricting in the hands of a citizens' commission where decisions would be guided by public testimony and open debate.

The question facing House Democrats as they met to contemplate the state's new realities was delicate: How could they influence an avowedly nonpartisan process? Alexis Marks, a House aide who invited members to the meeting, warned the representatives that secrecy was paramount.

“Never say anything AT ALL about redistricting — no speculation, no predictions, NOTHING,” Marks wrote in an email. “Anything can come back to haunt you.”

In the weeks that followed, party leaders came up with a plan. Working with the Democratic Congressional Campaign Committee — a national arm of the party that provides money and support to Democratic candidates — members were told to begin “strategizing about potential future district lines,” according to another email.

The citizens’ commission had pledged to create districts based on testimony from the communities themselves, not from parties or statewide political players. To get around that, Democrats surreptitiously enlisted local voters, elected officials, labor unions and community groups to testify in support of configurations that coincided with the party’s interests.

When they appeared before the commission, those groups identified themselves as ordinary Californians and did not disclose their ties to the party. One woman who purported to represent the Asian community of the San Gabriel Valley was actually a lobbyist who grew up in rural Idaho, and lives in Sacramento.

In one instance, party operatives invented a local group to advocate for the Democrats’ map.

California’s Democratic representatives got much of what they wanted from the 2010 redistricting cycle, especially in the northern part of the state. “Every member of the Northern California Democratic Caucus has a ticket back to DC,” said one enthusiastic memo written as the process was winding down. “This is a huge accomplishment that should be celebrated by advocates throughout the region.”

Statewide, Democrats had been expected to gain at most a seat or two as a result of redistricting. But an internal party projection says that the Democrats will likely pick up six or seven seats in a state where the party’s voter registrations have grown only marginally.

“Very little of this is due to demographic shifts,” said Professor Doug Johnson, a fellow at the Rose Institute in Los Angeles. Republican areas actually had higher growth than Democratic ones. “By the numbers, Republicans should have held at least the same number of seats, but they lost.”

As part of a national look at redistricting, ProPublica reconstructed the Democrats’ stealth success in California, drawing on internal memos, emails, interviews with participants and map analysis. What emerges is a portrait of skilled political professionals armed with modern mapping

software and detailed voter information who managed to replicate the results of the smoked-filled rooms of old.

The losers in this once-a-decade reshaping of the electoral map, experts say, were the state's voters. The intent of the citizens' commission was to directly link a lawmaker's political fate to the will of his or her constituents. But as ProPublica's review makes clear, Democratic incumbents are once again insulated from the will of the electorate.

Democrats acknowledge that they faced a challenge in getting the districts they wanted in densely populated, ethnically diverse Southern California. The citizen commission initially proposed districts that would have endangered the political futures of several Democratic incumbents. Fighting back, some Democrats gathered in Washington and discussed alternatives. These sessions were sometimes heated.

"There was horse-trading throughout the process," said one senior Democratic aide.

The revised districts were then presented to the commission by plausible-sounding witnesses who had personal ties to Democrats but did not disclose them.

Commissioners declined to discuss the details of specific districts, citing ongoing litigation. But several said in interviews that while they were aware of some attempts to mislead them, they felt they had defused the most egregious attempts.

"When you've got so many people reporting to you or making comments to you, some of them are going to be political shills," said commissioner Stanley Forbes, a farmer and bookstore owner. "We just had to do the best we could in determining what was for real and what wasn't."

Democrats acknowledge the meetings described in the emails, but said the gatherings "centered on" informing members about the process. In a statement to ProPublica, Rep. Zoe Lofgren, head of California's delegation, said that members, "as citizens of the state of California, were well within their rights to make comments and ensure that voices from communities of interest within their neighborhoods were heard by the Commission."

"The final product voted on by the Commission was entirely out of the hands of the Members," said Lofgren. "They, like any other Californian, were able to comment but had no control over the process."

"At no time did the Delegation draw up a statewide map," Lofgren said. ([Read Lofgren's full statement.](#))

California's Republicans were hardly a factor. The national GOP stayed largely on the sidelines, and individual Republicans had limited success

influencing the commission.

“Republicans didn’t really do anything,” said Johnson. “They were late to the party, and essentially non-entities in the redistricting process.”

Fed-up voters create a commission

The once-a-decade redistricting process is supposed to ensure that every citizen’s vote counts equally.

In reality, politicians and parties working to advance their own interests often draw lines that make an individual’s vote count less. They create districts dominated by one party or political viewpoint, protecting some candidates (typically incumbents) while dooming others. They can empower a community by grouping its voters in a single district, or disenfranchise it by zigging the lines just so.

Over the decades, few party bosses were better at protecting incumbents than California’s Democrats. No Democratic incumbent has lost a Congressional election in the nation’s most populous state since 2000.

As they drew the lines each decade, California’s party bosses worked in secret. But the oddly shaped districts that emerged from those sessions were visible for all to see. Bruce Cain, a legendary mapmaker who now heads the University of California’s Washington center, once drew an improbable-looking state assembly district that could not be traversed by car. (It crossed several impassable mountains.)

Cain proudly told the story of the district, which was set up for one of the governor’s friends. Cain said he justified the odd shape by saying it pulled together the state’s largest population of endangered condors. “It wasn’t legitimate on any level,” Cain recalled.

The 2010 ballot initiative giving the citizen commission authority over Congressional districts was sold to voters as a game changer. Not surprisingly, it was strenuously opposed by California’s Democrats, who continue to control the Statehouse.

No fewer than 35 Democratic politicians — including Minority Leader Nancy Pelosi — and their allies spent a total of \$7 million to campaign against the proposition. The effort included mailings from faux community groups that derided the commission’s \$1 million annual budget as “bureaucratic waste.” Despite this effort, Californians voted 61 percent to 39 percent to wrest federal redistricting from the hands of state lawmakers.

Immediately, Democrats began organizing to influence the citizen commission. There were numerous opportunities.

According to civics textbooks, the aim of redistricting is to group “communities of interest” so that residents in a city, neighborhood or ethnic group wield political power by voting together. The commission took an expansive view of this concept, ultimately defining a “community of interest” as anything from a neighborhood to workers on the same commute, or even areas sharing “intense beach recreation.”

This gave savvy players an opening to draw up maps that benefited one party or incumbent and then find — or concoct — “communities of interest” that justified them.

Democrats set out to do exactly that.

On March 16, members of the California delegation gathered at Democratic Party offices to discuss how to handle redistricting. They agreed that congressmen from the various regions of California — North, South and Central — would meet separately to “create a plan of action,” according to an email recounting the day’s events by Alexis Marks, the House aide. Among the first tasks, Marks wrote, was determining “how to best organize communities of interest.”

Democrats were already working “BEHIND THE SCENES” to “get info out” about candidates for the job of commission lawyer who were viewed as unfriendly. “I’ll keep you in the loop, but do not broadcast,” Marks wrote.

“The CA delegation has been broken down into regions that will be discussing redistricting at the member level,” read another party email from late March. “Members will be asked to present ideas on both issues” — communities of interest and district lines — “and will be asked to come to some consensus about how to adopt a regional strategy for redistricting.”

Over the next several weeks, California Democrats huddled with Mark Gersh, the party’s top mapmaking guru. Officially, Gersh works with the Foundation for the Future, a nonprofit whose declared goal is “to help Democrats get organized for the fight of the decade; the fight that will determine Democratic fortunes in your state and in Washington, D.C. for years to come: Redistricting!”

The foundation is well funded for this fight. Its supporters include longtime supporters of the Democratic Party: the American Federation of State, County and Municipal Employees as well as the American Association for Justice (previously known as the Association of Trial Lawyers of America). The foundation was launched in 2006 when Nancy Pelosi’s office worked with both groups to start it.

Neither Gersh nor participants would describe in detail what was discussed at the meetings. But from Marks’ emails and other sources, it is

clear that California's Democrats sat down together to discuss mutually agreeable districts that would protect incumbents.

The value of coordinating efforts to influence the commission cannot be overstated. If each Democrat battled separately for the best district, it was likely that one Congress member's gain would harm countless colleagues. Creating Congressional districts is a lot like a Rubik's cube: Each change reshapes the entire puzzle. The Democrats' plan was to deliver synchronized testimony that would herd the commission toward the desired outcomes. If it worked perfectly, the commissioners might not even know they had been influenced.

Over the summer, Marks sent out more than 100 emails about redistricting, according to multiple recipients of the messages. According to House records, Marks earned \$112,537 in 2010 in her post as deputy director of the California Democratic delegation. That makes her a federal employee. But although many of the messages were sent during the work day, a spokesman insisted Marks did so in her after-hours role as a political staffer for Democrats. They were sent from a Gmail account. Lofgren's office did not make Marks available for comment, citing policy that staffers do not speak on the record. Instead, they pointed to Rep. Lofgren's statement.

Federal employees are not allowed to do campaign work on government time, or use government resources, according to House ethics rules.

The emails alerted staff and legislators when the commission was scheduled to discuss their districts and they encouraged them to have allies testify to "community of interest" lines that supported their maps.

Marks told members they would be asked to raise money for a legal challenge if things didn't work out. The delegation, she said, was working with Marc Elias, who heads an organization called the National Democratic Redistricting Trust. (The trust shares a website with The Foundation for The Future.)

Last year the trust persuaded the Federal Election Commission to allow members to raise money for redistricting lawsuits without disclosing how the money was spent, how much was raised, and who had given it.

The commission blinds itself

Back in California, the commission was getting organized. Its first task was to pick commissioners. The ballot initiative excluded virtually anyone who had any previous political experience. Run for office? Worked as a staffer or consultant to a political campaign? Given more than \$2,000 to a candidate in any year? "Cohabitated" for more than 30 days in the past year with anyone in the previous categories? You're barred.

More than 36,000 people applied. The state auditor's office winnowed the applicants to a group of 60 finalists. Each party was allowed to strike 12 applicants without explanation. Then, the state used Bingo-style bouncing balls in a cage to pick eight commissioners — three Republicans, three Democrats and two people whose registration read "decline to state" (California-speak for independent). The randomly selected commissioners then chose six from the remaining finalists to complete the panel.

The result was a commission that included, among others, a farmer, a homemaker, a sports doctor and an architect. Previous redistrictings had been executed by political pros with intimate knowledge of California's sprawling political geography. The commissioners had little of that expertise — and one of their first acts was to deprive themselves of the data that might have helped them spot partisan manipulation.

The law creating the commission barred it from considering incumbents' addresses, and instructed it not to draw districts for partisan reasons.

The commissioners decided to go further, agreeing not to even look at data that would tell them how prospective maps affected the fortunes of Democrats or Republicans. This left the commissioners effectively blind to the sort of influence the Democrats were planning.

One of the mapping consultants working for the commission warned that it would be difficult to competently draft district lines without party data. She was overruled.

The lack of political data was "liberating," said Forbes, the commissioner. "We had no one to please except ourselves, based on our best judgment."

"I think," he said, "we did a pretty good job."

The commission's judgments on how to draw lines, Forbes and others said, was based on the testimony from citizens about communities of interest.

"We were provided quite a number of maps from various organizations," said another commissioner, attorney Jodie Filkins-Webber. If the groups were basing their maps on political data to favor one party, "they certainly did not tell us that."

"Districts could have been drawn based on voter registration," Filkins-Webber said, "but we would never have known it."

The commission received a torrent of advice — a total of 30,000 separate pieces of testimony and documents. Records suggest the commission never developed an effective method for organizing it all. The testimony was kept in a jumble of handwritten notes and computer files. The commissioners were often left to recall testimony by memory.

The difficulties in digesting and weighing the reams of often-conflicting testimony enhanced the value of people or groups who came bearing draft maps.

“Other people offered testimony; we offered solutions,” said Stuart Waldman, president of the Valley Industry and Commerce Association, a powerful business group outside Los Angeles that persuaded the commission to adopt its Congressional map for the San Fernando Valley.

How Democrats locked down Northern California

Redistricting is a chess game for people with superb spatial perception. Sometimes, anchoring a single line on a map can make everything fall into place.

According to an internal memo, Democrats recognized early on that they could protect nearly every incumbent in Northern California if they won a few key battles. First, they had to make sure no district crossed the Golden Gate Bridge. Then, they had to draw a new seat that pulled sufficient numbers of Democrats from Contra Costa County into a district that included Republicans from the San Joaquin Valley.

The man with the most to lose was Rep. Jerry McNerney, who represented an octopus-shaped district that had scooped in Democrats from the areas east of San Francisco. McNerney’s prospects seemed particularly dismal. Early in the year, he made The Washington Post’s [national list of top 10 likely redistricting victims](#).

Republicans moved first, attempting to create a district that would keep San Joaquin County whole and pick up conservative territory to the south. But then a previously unknown group calling itself OneSanJoaquin entered the fray.

OneSanJoaquin described itself as a nonprofit, but records show it is not registered as such in any state. It has no identifiable leadership but it does have [a Facebook page](#), called OneSanJoaquin, created by the Google account OneSanJoaquin.

The page was posted in early April, just as the commission began taking testimony. Its entries urged county residents to download maps and deliver pre-packaged testimony.

On the surface, the OneSanJoaquin page seemed to be serving Republicans’ interests. But Democrats were one move ahead and understood that a united valley would inevitably lead to a Democratic-leaning district. (Republicans apparently did not understand that federal voting rights requirements ruled out their proposed district, since it would have interfered with the Latino district to the south. That misconception

was encouraged by the maps on the OneSanJoaquin page, which were drawn to make this look possible.)

In fact, the only way to make a district with “one San Joaquin” was to pull in the Democrats in eastern Contra Costa — the far reaches of San Francisco’s Bay-area liberals.

The author of OneSanJoaquin’s maps was not identified on the Facebook page, but ProPublica has learned it was Paul Mitchell, a redistricting consultant hired by McNerney.

Transcripts show that more than a dozen people delivered or sent the canned testimony to the commission, which accepted it without question. There’s no sign that commissioners were aware some of the letters had been downloaded from the mysterious OneSanJoaquin page.

After the commission finished, McNerney announced he was moving to the newly created San Joaquin district to run for re-election. It was a huge improvement for him. In 2010, he barely won his district, beating his opponent by just one point. If the 2010 election were re-run in his new district, he would have won by seven points, according to the Democrats’ internal analysis. (McNerney’s office did not respond to requests for comment.)

Summing up the story, an internal Democratic memo said the GOP had been decisively out-manuevered “Their hope was to create a Republican Congressional seat,” the memo said. “Their plan backfired.”

“McNerney ends up with safer district than before,” Mitchell’s firm tweeted, after McNerney announced his candidacy in his new district. “Wow! How did he do that?”

An under-funded commission

While players attempting to influence the process were well funded, the commission struggled with a lack of time and money. They responded, in part, by reducing citizens’ opportunities for input.

The budget for the whole map drawing undertaking was just over \$1 million. At first, the commission had its public hearings transcribed — then the money ran out and they stopped.

The commissioners received \$300 per day as compensation and were eligible for reimbursement of travel and out of pocket expenses. Most kept their day jobs at the same time they tried to juggle their roles as commissioners.

It was a grueling schedule, with 35 public hearings taking place over just three months. “I had three days off between” April and August, said

Commissioner Filkins-Webber, who maintained her legal practice while serving. “I was working basically on average 18 hours a day.”

The commissioners also had to deal with public anger. The Tea Party in California decided to use the hearings as a forum to protest the Voting Rights Act, for instance, and at one hearing got so rowdy that police intervened.

Experts hired by the commission to actually draw the maps were also overworked and underpaid. Half a dozen times the meeting transcripts contain references to map drawers working overnight to prepare maps.

Overwhelmed by the task at hand, the commission decided to essentially shut down public participation halfway through the process. After the first round of drafts, which were widely criticized and abandoned, the commission stopped releasing formal drafts. More importantly, commissioners stopped holding hearings, which meant the next draft was prepared without public input.

The commission moved its meetings to Sacramento, not far from where party bosses had once gathered in secret to set the lines. The commission’s meetings were webcast to the public. But only those with the resources and time could participate.

“You have to ask yourself, who has the money to send people up to Sacramento like that,” said Eugene Lee, voting rights project director at the Asian Pacific American Legal Center, which was active in organizing grassroots participation in the redistricting process.

“We didn’t have the money to do that. No way.”

The commission released no further drafts. In July, it made public a “draft final.” Voters had two weeks to submit comments before it became final. Most of those comments came from insiders who had been closely watching the Sacramento meetings.

Southern California Democrats also win

For those who could stay engaged, the Sacramento phase of the commission’s work proved rewarding. One politician who benefited was Southern California Congresswoman Judy Chu.

When it appeared that Chu would get an unfavorable district late in the game, a group with ties to the congresswoman went before the commission in Sacramento and convinced the commissioners to draw a favorable map that included her political stronghold, a town called Rosemead. Chu enjoyed broad support in Rosemead, where she was first elected to the school board in 1992 and later served in the state assembly.

The group, which called itself the Asian American Education Institute, worked with Paul Mitchell, the same consultant who helped engineer the triumph of Northern California Democrats.

Records show that crucial last-minute testimony in favor of Chu's district was delivered by Jennifer Wada, who told commissioners she was representing the institute and the overall Asian-American community. Wada did not mention that she lives and works as a registered lobbyist in Sacramento, 400 miles from the district, or that she grew up in rural Idaho, where most of her family still lives. Wada says she was hired by the institute to "convey their concerns about Asian and Pacific Islander representation" to the commission.

The second witness was Chris Chaffee, who said he was a consultant for the institute and an employee of Redistricting Partners, Mitchell's firm.

Commissioners accepted this map without asking a basic question: Who, exactly, was the Asian American Education Institute representing?

The group's tax records show it had no full-time employees. Its website is barebones, and clicking on the "get active" button on the home page leads nowhere, simply returning users to the home page.

There's another interesting feature of the Web site: the domain name is registered to a man named Bill Wong, a political consultant who has worked on multiple Chu campaigns, as well as her husband's successful bid for Judy Chu's old state assembly seat. Chu paid Wong \$5,725 for consulting work in 2010, FEC records show. Her husband, Mike Eng, donated \$4,500 to the Asian American Education Institute in 2010 and 2011.

The institute, said Wong, "argued to keep communities of interest together. Since Rep. Chu has been a strong advocate for Asian communities, it would make sense for her to represent them." Wong added that he "discussed redistricting with a number of Asian-American legislators."

An email obtained by ProPublica shows Amelia Wang, Chu's chief of staff, telling Chu and Bill Wong about testimony submitted by another Asian group, Coalition of Asian Pacific Americans for Fair Redistricting, which also intervened at the last minute to offer similar maps. In case that didn't do the trick, Mitchell himself went before the commission, urging the commissioners to accept the maps submitted by the institute (his employer) and the coalition.

And that's what the commission did, incorporating proposed lines for both groups and drawing a map that included Rosemead in Chu's new district.

Wang told ProPublica that Chu's office and the institute "did communicate about keeping communities of interest together, including Rosemead. However, Rep. Chu did not hire Bill Wong for redistricting or to testify on her behalf before the commission."

"Rep. Chu has represented a united Rosemead city since 2001," said Wang, "it would have been a tragic mistake to divide it."

Though the process turned out well for Chu, it didn't work out so well for the town of South El Monte.

To make room for Rosemead in Chu's district, South El Monte — 85 percent Latino — got bumped into another district across the mountains that is much less Latino, and much more affluent.

The town's mayor, Luis Aguinaga, says the new lines "don't make sense." South El Monte is now split off from sister communities in the San Gabriel Valley — including North El Monte and El Monte.

"We're always on the same side, always fighting for the same issues," Aguinaga said. "On this side of the San Gabriel Valley we have a voice. If we're apart it will be much harder to be heard."

Other communities lost, too.

Outside Los Angeles, residents of what's known as Little Saigon begged the commission to undo what they saw as decades of discrimination and put the U.S.'s largest Vietnamese community together in one district. Instead, the community was split in two — a result of testimony by supporters of Rep. Loretta Sanchez, including a former staffer and one of her wedding guests, to get her a safe district. A large section of Little Saigon ended up in a district with Long Beach, a town that is 1 percent Vietnamese.

"Residents who live in Little Saigon share the same needs, but if they're in two different districts they may not be represented," said Tri Ta, a City Council member from the area.

"This district is characterized by the Port of Long Beach," the commission writes in its final report, "one of the world's busiest seaports and the area's largest employer."

"It does not make sense to put the area known as Little Saigon in a district with Long Beach," Ta said. "The two areas are distinctively different."

"Congresswoman Sanchez believed strongly throughout the redistricting process that the population growth of the Latino community should be accurately reflected in the newly drawn congressional districts," said Adrienne Elrod, Sanchez's Chief of Staff, in a statement, "She's glad that

members of the Orange County community shared her views, and as a result, was pleased to see them take an active role."

Paul Mitchell, the consultant whose work had such a large impact on the commission's decisions, said voters benefited from the work done by him and others deeply involved in the process. The commissioners, he said, "knew some of the testimony was being fabricated by outside groups. But what were they to do? They couldn't create a screen of all testimony and ferret out all the biases."

The work he did on behalf of his diverse group of clients, he said, "created better maps — regardless of if they came with the additional benefit of helping some local city, union, or incumbent that was the client," Mitchell said.

"My only regret is that we didn't do more."

Correction, Dec. 21, 2011: This story originally stated that the Asian population of Long Beach was less than 1 percent. It has been corrected to say that the Vietnamese population of Long Beach is 1 percent. The story also previously stated that Rep. Judy Chu previously served as a state senator. In fact, she served in the state assembly. This story originally stated the commission worked for free, with a small stipend for expenses. It has been corrected to say, the commissioners received \$300 per day as compensation and were eligible for reimbursement of travel and out of pocket expenses. This story incorrectly described Doug Johnson as a professor at Claremont McKenna's Rose Institute. In fact, he is a fellow at the Institute.



Olga Pierce

Olga Pierce is a reporter at ProPublica, specializing in data-driven stories.

🐦 @olgapierce



Jeff Larson

Jeff Larson is a reporter at ProPublica.

🐦 @thejefflarson

EXHIBIT "2"

Racially Polarized Voting Analysis for the Virginia Redistricting Commission

Maxwell Palmer and Benjamin Schneer

8/31/2021

Executive Summary

We analyzed racially polarized voting (RPV) in Virginia using recent statewide elections. We find that while there is evidence of racially polarized voting in Virginia at the state level, there is significant variation in the level of polarization, including geographic areas where voting is not polarized. Minority voters, including African American, Hispanic, and Asian voters, vote cohesively for Democratic candidates. On the other hand, support for Democratic candidates by White voters varies across the state. Areas with no or very low levels of racially polarized voting include much of Northern Virginia and parts of Central Virginia and Hampton Roads.

What is Racially Polarized Voting?

The landmark case *Thornburg v. Gingles* set forth a three-part test to determine violations of Section 2 of the Voting Rights Act due to vote dilution. Section 2 prohibits voting practices that deny groups of citizens an equal opportunity to elect candidates of their choice, and, post *Thornburg v. Gingles*, Section 2 challenges must show “(a) that the minority group at issue is ‘sufficiently large and geographically compact to constitute a majority in a single member district,’ (b) that the minority group is ‘politically cohesive,’ and (c) that the surrounding majority group usually votes as a bloc to defeat the minority’s preferred candidate.”¹

In this report, our concern is not with vote dilution in general but rather with racially polarized voting, which could be said to comprise parts (b) and (c) of the above test. Racially polarized voting (RPV) occurs when the majority group and a minority group vote differently, for example when “Black voters and White voters vote differently.”² Importantly, all that RPV requires is for a racial minority to systematically prefer one candidate while a majority group prefers another — this can and does occur without any racially discriminatory intent on the part of voters, officials or anyone else.

In practice, identifying RPV will amount to answering two key questions. First, is each group of interest *cohesive* in their voting behavior? To determine this, we identify whether clear majorities of a minority group support the same candidate — that is, we seek to determine if the minority group(s) of interest in a geographic location have a candidate of choice.

Second, conditional on the existence of a candidate of choice for Minority voters, do White voters support or oppose this candidate and to what extent are they cohesive in doing so?

Given these questions, efforts to identify the extent of RPV in the Commonwealth of Virginia require understanding how different racial groups vote. In a world without secret ballots, such an effort would be

¹Yishaiya Abosch, Matt A. Barreto, and Nathan D. Woods, “An Assessment of Racially Polarized Voting for and against Latino Candidates in California,” Voting Rights Act Reauthorization of 2006: Perspectives on Democracy, Participation, and Power, (2007): p. 108.

²See Bernard Grofman, “Multivariate Methods and the Analysis of Racially Polarized Voting: Pitfalls in the Use of Social Science by the Courts,” Social Science Quarterly 72, no. 4 (1991): p. 827. This is itself a quote from *Thornburg v. Gingles* at 53 n. 21.

straightforward; we could simply tally up candidate totals by voters' race for the state and for any geographic regions we chose. However, because under a secret ballot we do not observe individual vote choices we must instead estimate group-level voting behavior from the available aggregate-level data from precincts and localities.

To estimate group-level voting behavior from aggregate vote and population totals in precincts, we employ ecological inference (EI), a well-known and widely accepted statistical method.³ We use ecological inference techniques to estimate the share of each ethnic group that votes for each candidate (and we account for but do not report the share of each group that votes, e.g., turnout).⁴

How to Use This Analysis

Below, we discuss the data used in this analysis and then present key results. We begin with statewide results, and then show variation across Virginia by region, congressional district, state legislative district, and locality. Our complete results, including for individual districts not shown in this report, are included in a supplementary data file.

This report and the supplementary data can be used to identify where there is racially polarized voting across the Commonwealth of Virginia. This can be useful when drawing minority opportunity districts. In places with high levels of racially polarized voting, a larger minority population may be needed in order to create a district where the minority group can successfully elect their candidates of choice. In contrast, in places where there are low levels of racially polarized voting, or where there is no racially polarized voting, the minority group can be a smaller share of the district and still elect their candidates of choice.

Data Sources

To perform ecological inference for the RPV analysis, we draw upon two key sources of data: (1) Historical election results recorded in each precinct, and (2) historical citizen voting age population (CVAP) data, which allows us to ascertain the composition of the population in each precinct. Due to changes to precinct boundaries that occur over time, linking election results to precinct shape files can be time consuming and difficult, and is not feasible in all cases.

Elections Data

We estimate ecological inference models using several different statewide elections at different levels of geography, including by region, congressional district, state legislative district, and locality.⁵ We focus primarily on the 2016 presidential election, the 2017 elections for governor, lieutenant governor, and attorney general, and the 2018 election for U.S. Senate. We also include a more limited analysis of the 2020 presidential and U.S. Senate elections. In addition to analyzing general election results, we also include the 2017 Democratic primary for lieutenant governor. Primaries can have limited utility for analyzing racially polarized voting, because the existence of RPV in the primary does not mean that there is RPV in the general election, and the lack of RPV in the primary also does not mean that there is not RPV in the general election. Furthermore, the electorates in partisan primaries and in general elections are very different. However, the presence of RPV in primaries may be useful to the Commission when considering different ways to draw particular districts.

³Gary King, *A Solution to the Ecological Inference Problem* (Princeton University Press, 2013).

⁴For more details on ecological inference, see Appendix A.

⁵When estimating models at the district level, such as for a single congressional district, we use statewide election results, but we only include precincts located in that particular district. This allows for comparability across districts, because the candidates are the same in each model.

For the 2016⁶, 2017⁷, and 2018⁸ elections, we use precinct-level election results and shape files from the Voting and Election Science Team (VEST). These files include general election results. To examine the 2017 Democratic Primary election, we obtained precinct-level primary election results from the Virginia Department of Elections.⁹ Following the method used in the VEST data, we allocated absentee votes (recorded only at the locality level) to precincts in proportion to the number of non-absentee votes cast in each precinct. For 2020, in which we analyze results based on election totals at the locality level, we also used data from the Virginia Department of Elections.¹⁰

Population Data

We use citizen voting age population (CVAP) data from the American Community Survey (ACS) to determine population by race in each precinct.¹¹ The ACS reports CVAP data by block-group, which we aggregate to precincts for each year. For the 2020 elections, we use locality-level population data.

We define racial groups for our analysis in two ways. First, for statewide analyses, we include four different racial/ethnic groups: White, Black, Hispanic, and Asian voters. The Hispanic group includes people of all races who identify as Hispanic. Second, for regional and district-level analyses, we include only two groups: White and Minority voters, where Minority includes all groups except non-Hispanic Whites.¹²

Racially Polarized Voting Results

At the state level, elections in Virginia exhibit consistent racially polarized voting. Figure 1, below, plots the ecological inference results for five statewide elections. In the plot, the estimated level of support for the Democratic candidate for each group is marked with a circle. The horizontal lines on either side of the circles mark the bounds of the 95% confidence intervals, which reflect uncertainty in the estimate. We interpret these plots in two steps. First, the cluster of points on the right side of the plot show that large majorities of African American, Hispanic, and Asian voters supported the Democratic candidate in each election. For example, in the 2016 presidential election, we estimate that about 92% of African American voters supported Hillary Clinton. The results are similar across all five elections. This is evidence that African American, Hispanic, and Asian voters have a clear *candidate of choice* in each election. Additionally, large majorities of voters of all three groups support the same candidate in each election, indicating that these groups vote together cohesively.

Second, we examine voting patterns among White voters. In each election, a minority of White voters supported the Democratic candidate (the candidate of choice of African American, Hispanic, and Asian voters), and a majority voted against this candidate and supported the Republican candidate. This is evidence of racially polarized voting. However, it is also important to note the degree of opposition to the minority groups' candidate of choice in each election. In the 2016 presidential election, 36% of White voters supported the Democratic candidate. In contrast, in the 2018 Senate election, 44% did so.

We now turn to racially polarized voting across different regions in Virginia. We present results for seven of the eight regions defined by the Virginia Redistricting Commission.¹³ We exclude the Southwest region, because it is more than 90% White.

⁶Voting and Election Science Team, 2018, "2016 Precinct-Level Election Results", <https://doi.org/10.7910/DVN/NH5S2I>, Harvard Dataverse, V67

⁷Voting and Election Science Team, 2019, "2017 Precinct-Level Election Results", <https://doi.org/10.7910/DVN/VNJAB1>, Harvard Dataverse, V5

⁸Voting and Election Science Team, 2019, "2018 Precinct-Level Election Results", <https://doi.org/10.7910/DVN/UBKYRU>, Harvard Dataverse, V45

⁹Virginia Department of Elections, Historical Election Results, available at https://apps.elections.virginia.gov/SBE_CSV/ELECTIONS/ELECTIONRESULTS/

¹⁰We provide a full explanation for this approach later in our report.

¹¹U.S. Census Bureau, 2021. "Citizen Voting Age Population by Race and Ethnicity".

¹²Combining groups is necessary due to the small number of precincts in some districts, as well as the very small populations of some racial/ethnic groups in many areas of the state.

¹³Virginia Redistricting Commission Public Hearings FAQs, p.4

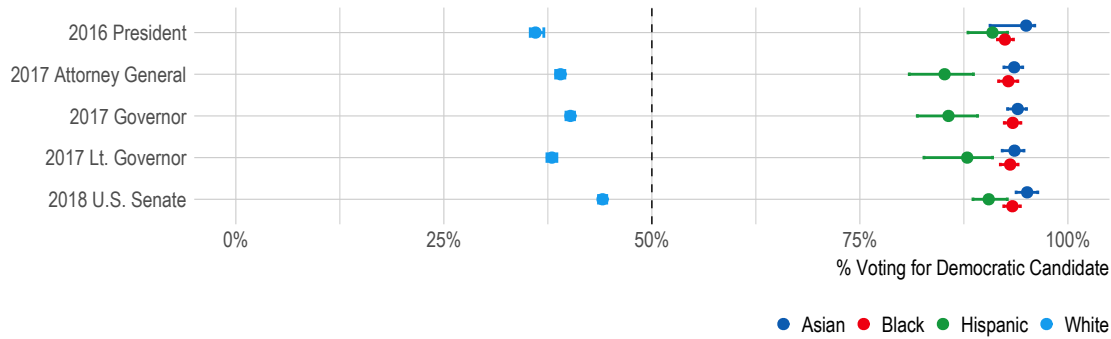


Figure 1: Ecological Inference Results — Statewide

Figure 2, below, presents two maps. The top map shows the average percentage of Minority voters supporting the Democratic candidate across the 2016–2018 statewide elections. The bottom map shows the average percentage of White voters supporting the Democratic candidate. Comparing the two maps illustrates where there is racially polarized voting.¹⁴

First, the top map is uniformly blue, indicating that on average more than 70% of Minority voters supported the Democratic candidate. This is evidence that Minority voters in every region have clear candidates of choice, and are cohesive in supporting these candidates.

In contrast, there is significant variation in the bottom map. We see very low levels of support for Democratic candidates in the Eastern and Southside regions, low levels of support in the Valley, West Central, and Hampton Roads regions, 40-50% support in the Central region, and 50-60% support in Northern Virginia. This indicates that voters are not polarized in Northern Virginia, and only a small majority of White voters support Republican candidates in the Central region.

We see a similar pattern when looking at results by Congressional District in Figure 3. Minority voters consistently support Democratic candidates, but support from White voters varies. In the 1st, 5th, 6th, and 7th Districts, White voters support Democratic candidates with 30-40% of the vote. In contrast, in the 2nd, 3rd, 4th, and 10th Districts, White voters are close to split; they support Democratic candidates with 40-50% of the vote. Finally, in the 8th and 11th Districts, a majority of White voters support Democratic candidates and there is no evidence of racially polarized voting.¹⁵

Figure 4 and Figure 5 present average levels of support for Democratic candidates from Minority voters and White voters by State Senate and House of Delegates districts. Appendix B provides zoomed-in maps focusing on the districts in each region. As before, Minority voters consistently support Democratic candidates. The maps of White voters, however, show variation in support for Minority-preferred candidates across the legislative districts.¹⁶

¹⁴All maps in this report present the average results for the five statewide general elections included in this analysis. Results for each individual election for each region or district are available in the supplementary data.

¹⁵We exclude the 9th Congressional District, which is more than 90% White.

¹⁶We exclude all districts that are more than 90% White.

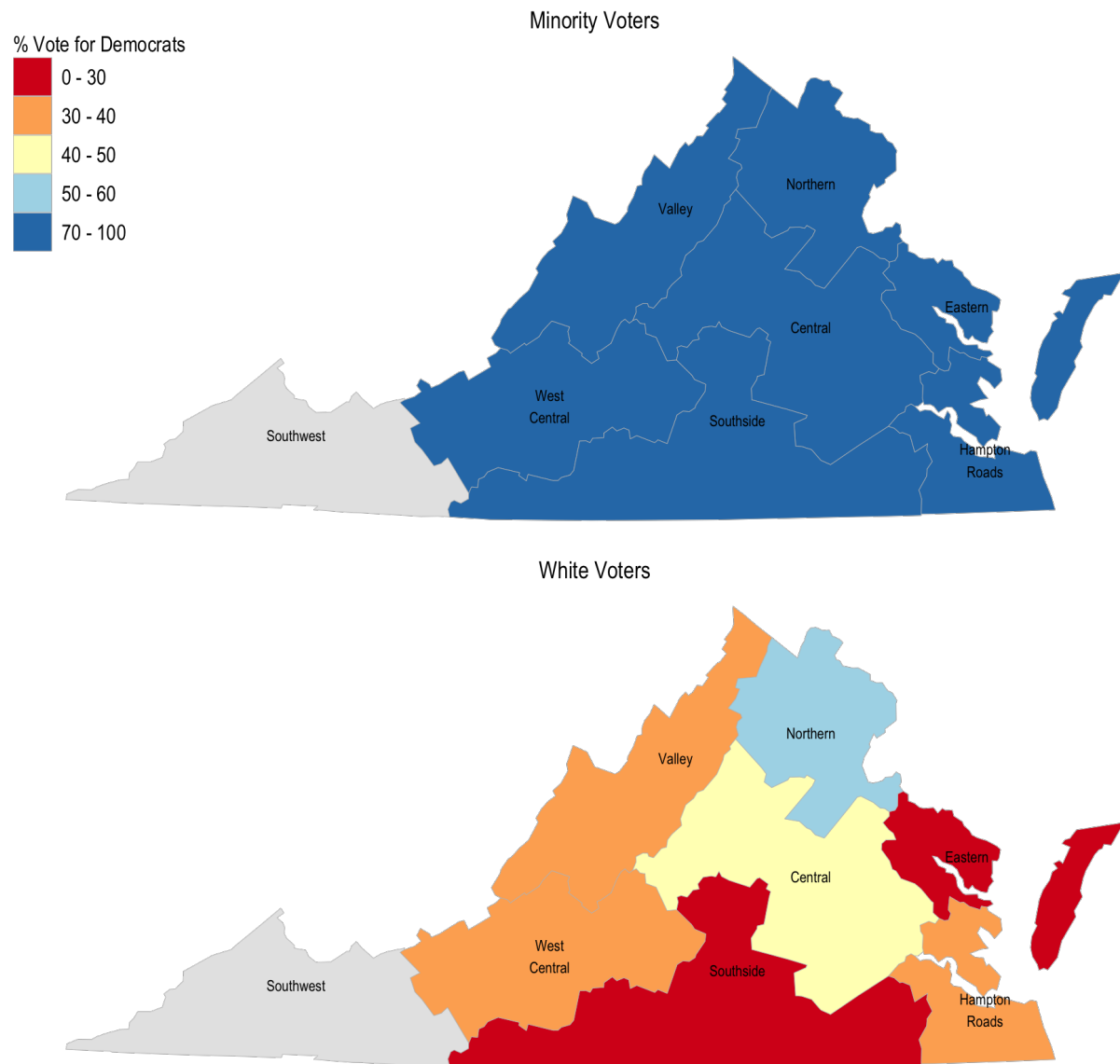


Figure 2: Ecological Inference Results — Regional

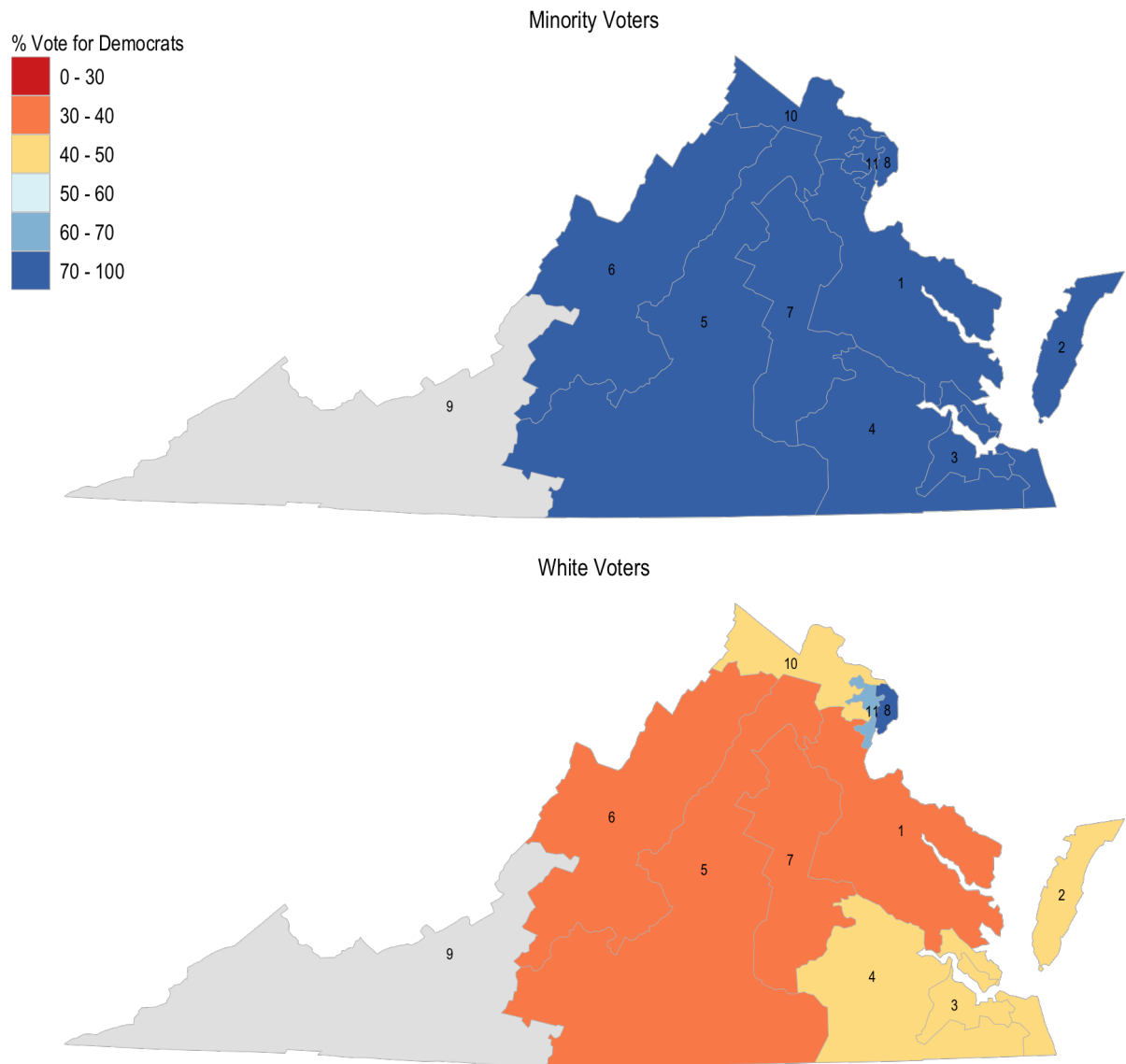


Figure 3: Ecological Inference Results — Congressional Districts

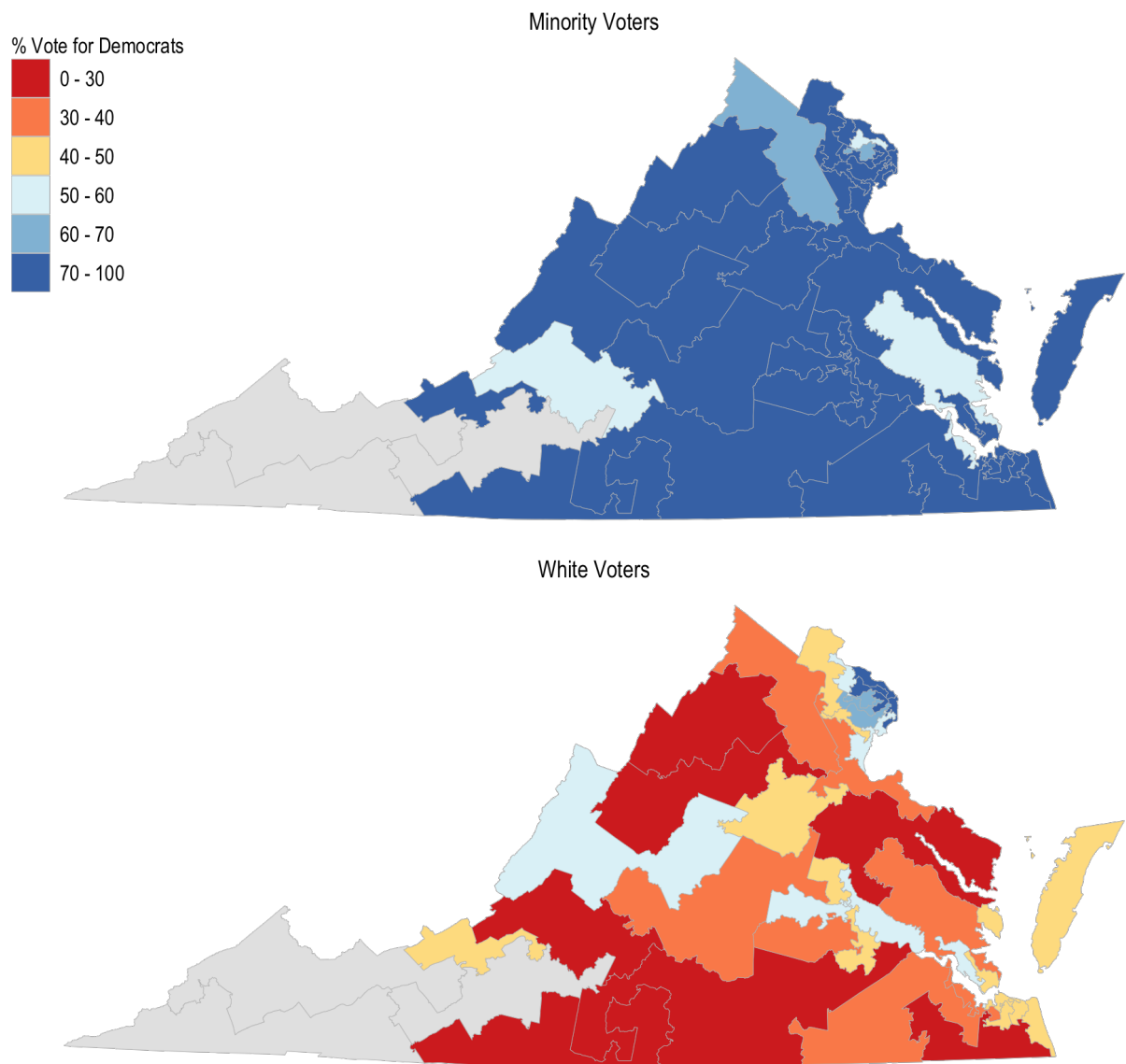


Figure 4: Ecological Inference Results — Senate Districts

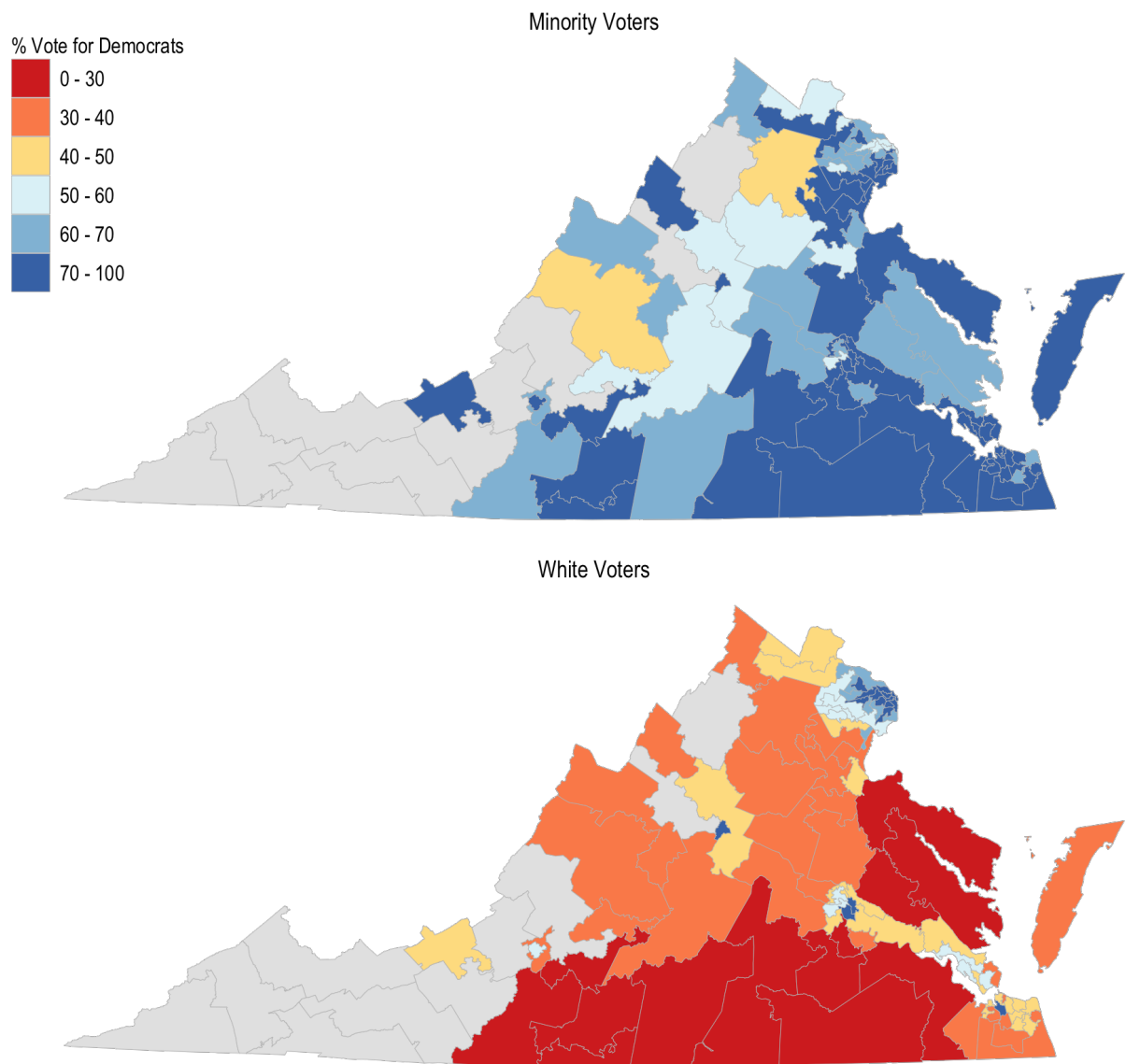


Figure 5: Ecological Inference Results — House Districts

To more clearly illustrate the variation in racially polarized voting across the congressional and state legislative districts, we plot the average percentage of voters supporting the Democratic candidate across the 2016–2018 statewide elections in Figure 6, below, for each congressional district with at least 40% Minority voting age population.¹⁷ As in Figure 1, the average estimate for each group is represented by a circle, and the horizontal lines on either side indicate a 95% confidence interval reflected uncertainty in the estimate. For the congressional districts, the plot shows that majorities of Minority and White voters in districts 8 and 11 both supported the Democratic candidate. In contrast, in districts 3, 4, and 10, there is evidence of somewhat racially polarized voting as a majority of White voters opposed the Minority candidate of choice.

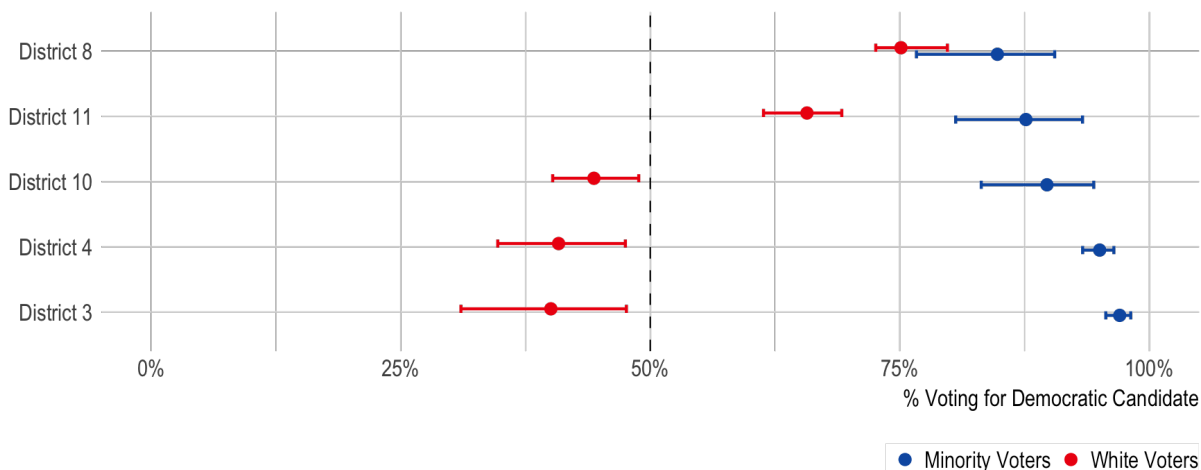


Figure 6: Ecological Inference Results — Congressional Districts

Figure 7 shows the same results for State Senate districts. For many of the estimates, the error bars here are much larger, and in some cases as so wide that it is hard to say anything meaningful about polarization in the district. This is due to the smaller number of precincts in each district or the distribution of Minority voters within the district. For example, in District 35, the confidence interval for Minority voters is very wide. However, the confidence interval from White voters is narrower and above 50%, indicating that a majority of White voters supported the Democratic candidate in that district. In Districts 30 and 39, we estimate that majorities of both groups support Democratic candidates, indicating no racially polarized voting. In Districts 33, 9, 36, 1, 29, 13, 6, 7, 5, 16, and 2, a clear majority of Minority voters support the Democratic candidate, but the confidence interval for White voters spans across 50%. We cannot draw a confident conclusion about the level of racially polarized voting in these districts from this election. Finally, in District 18, we see clear evidence of racially polarized voting.

We see similar patterns in the results for House of Delegates districts in Figure 8. In some districts, such as 71, 69, 89, and 44, we see clear evidence that majorities of both groups support Democratic candidates. In most of the other districts in the top and middle part of the figure, the confidence intervals are too broad to draw a conclusion about racially polarized voting in the districts. For most of the districts at the bottom of the figure, we see evidence of racially polarized voting.

Finally, Figure 9 shows the same analysis for localities with at least 30 precincts and at least 20% Minority voting age population. Across all localities in the figure, we see that a large majority of Minority voters support the Democratic candidate. In Arlington County, Richmond City, and Fairfax County, a majority of White voters also supported the Democratic candidate. In Norfolk City, Loudoun County, Hampton City, Newport News City, Henrico County, Prince William County, and Portsmouth City, the confidence interval for the percentage of White voters supporting the Democratic candidate spans the 50% line. In the remaining localities in the lower part of the figure, majorities of White voters oppose the Minority candidate of choice,

¹⁷Voting age population data from the 2020 Census. Results for all districts available in the supplementary data file.

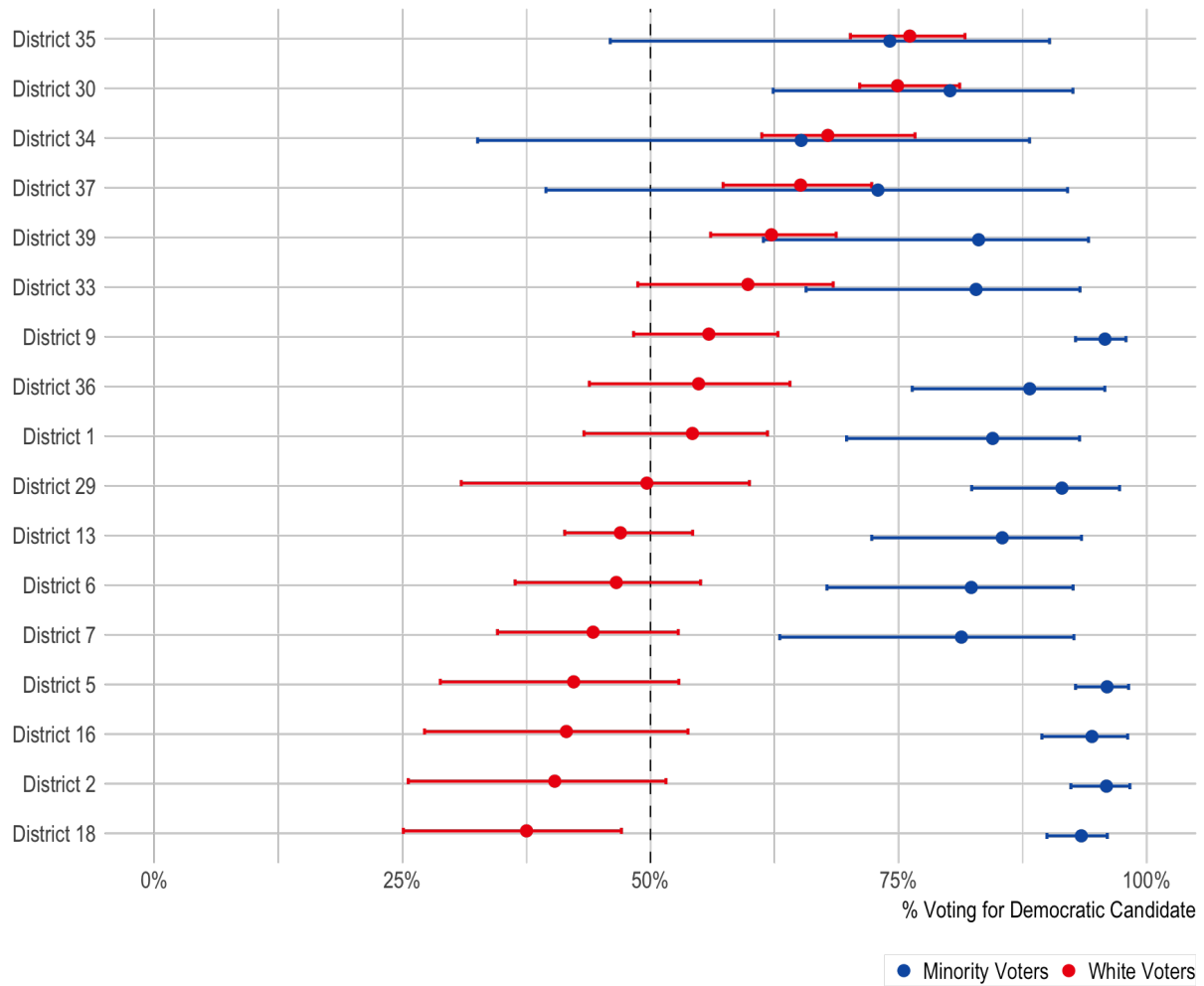


Figure 7: Ecological Inference Results — State Senate Districts

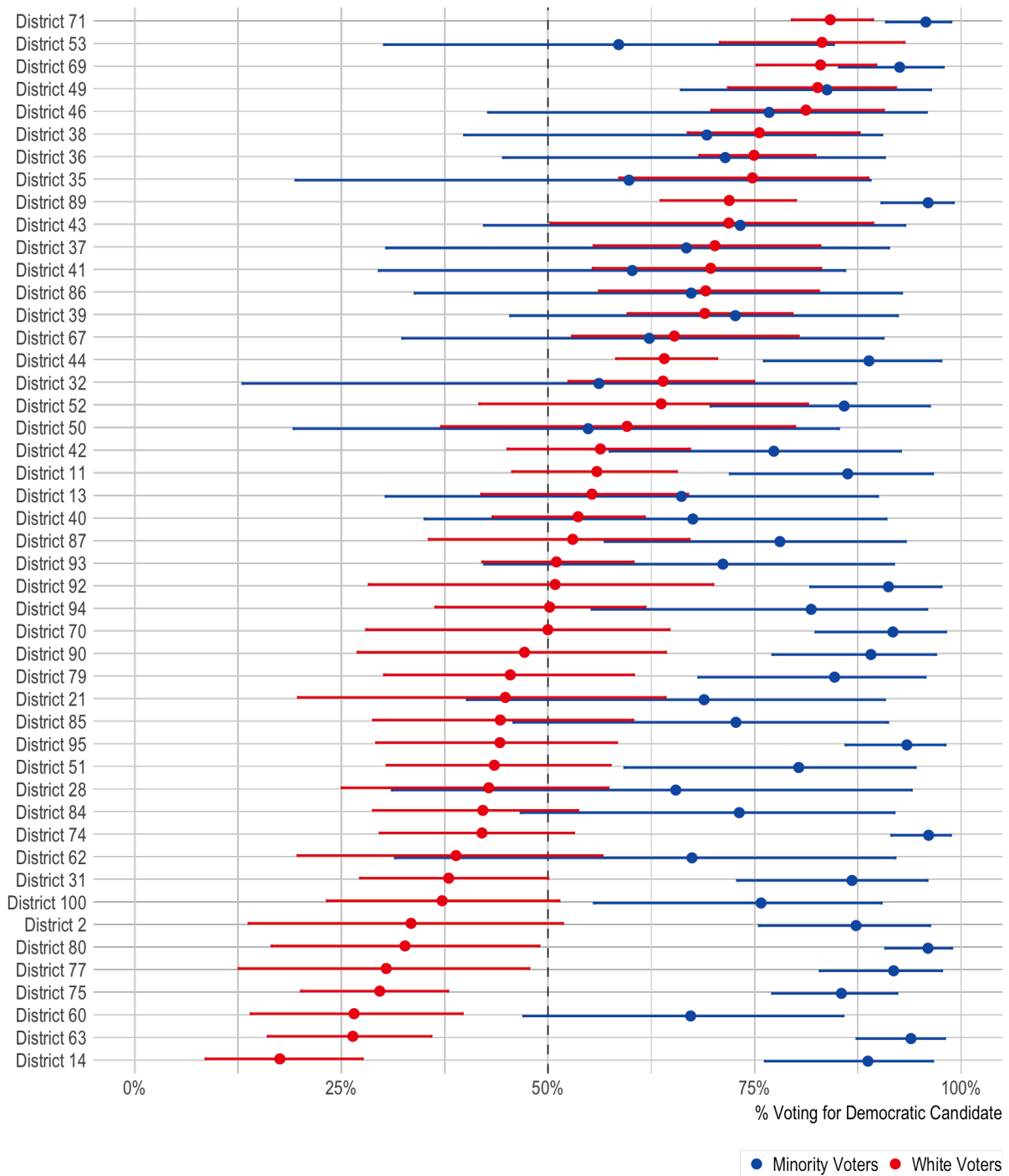


Figure 8: Ecological Inference Results — House of Delegates Districts

indicating racially polarized voting, with the exception of Spotsylvania County where the confidence interval for minority voters overlaps the 50% line.

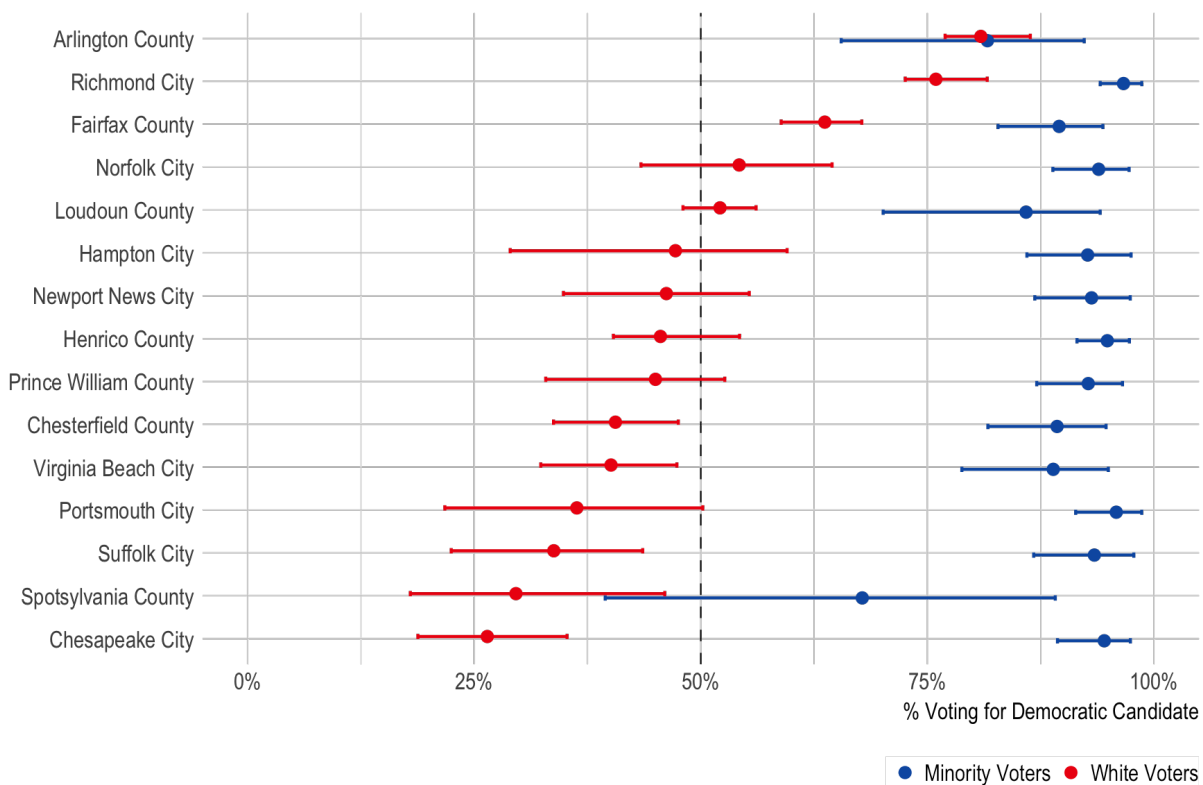


Figure 9: Ecological Inference Results — Localities

2020 Election Results

The 2020 General Election in Virginia was unprecedented due to the share of voters who voted by mail rather than at a polling place. From 2016 to 2018, an average of 12% of voters cast absentee ballots; in 2020 the number was 63%.¹⁸ This presents a unique challenge for making sound ecological inferences because absentee ballots in Virginia are tracked at the locality level rather than by precinct. As a result, we have much less information available to us about the geographic patterns of voter turnout and vote choice for the 2020 election. Given these limitations, we present our estimates for 2020 separately and with a word of caution that they contain additional uncertainties as compared to earlier years.

With less data available to us in 2020, we think it prudent to also estimate fewer parameters. We report results only at the state-wide level and just using two racial groups: White and Minority voters. We estimate that 64% of Minority voters supported the Democratic candidate in the presidential election. This is a large enough margin to conclude that Minority voters at the state-wide level were relatively cohesive in their support for the Democratic candidate. However, since 51% of White voters also voted for the Democratic Candidate, Minority voters did not meaningfully oppose the candidate of choice among Minority voters. There does not appear to be sufficient evidence to say that RPV occurred at the state-wide level in the 2020 Presidential Election.

For the 2020 Senate election, we estimate that 52% of White voters voted for the Democratic candidate in the U.S. Senate election and that 67% of Minority voters did so. Again, a majority of both White and Minority voters supported the Democratic candidate. Therefore, there is not sufficient evidence to conclude the existence of RPV in the 2020 Senate election at the state-wide level.

However, we urge caution at interpreting these results as amounting to a change in patterns of racially polarized voting at the state level when compared to earlier years. The use of locality-level data instead of precinct-level data may hide important within-locality variation that could provide evidence of racially polarized voting. Additionally, using this aggregate data prevents us from analyzing variation across the state.

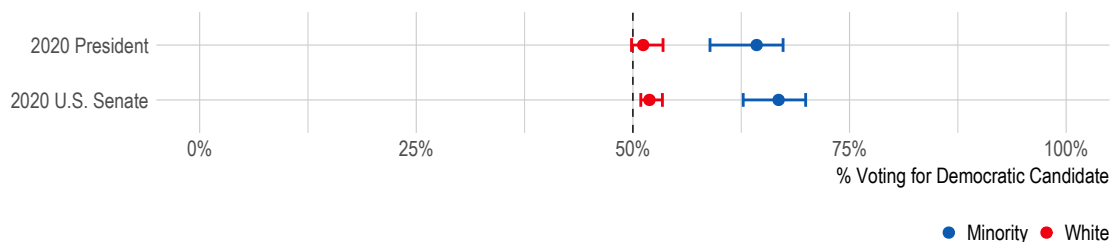


Figure 10: Ecological Inference Results 2020 General Election — Statewide

¹⁸Calculated from Virginia Department of Elections Data using elections for President, U.S. Senate, and U.S. House.

2017 Primary Election Results

The 2017 Democratic Primary Election for Lieutenant Governor provides a unique opportunity to examine RPV because it pitted a Black candidate, Justin Fairfax, against two White candidates, Susan Platt and Gene Rossi, in an open-seat race. Fairfax ultimately won the primary election race with 49% of the vote. Platt received 39% of the vote, and Rossi received 12%. This election allows us to analyze whether voter preferences generally follow the same patterns in a Democratic primary with Black and White candidates. We estimate that 67% of Black voters supported Fairfax in this election. In fact, at the state-wide level, Black voters supported Fairfax at substantially higher rates than any other racial group did. Asian voters also preferred Fairfax, with 49% supporting him in comparison with 42% support for Platt and the remainder for Rossi.

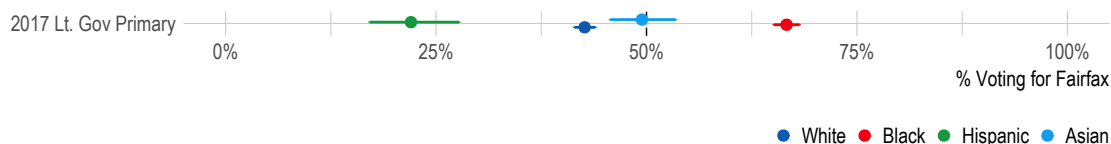


Figure 11: Ecological Inference Results 2017 Democratic Primary Election — Statewide

When examining variation in support for Fairfax by region, Minority voters gave a plurality of their support to Fairfax in every region, according to our estimates. Even in regions where less than 50% of Minority voters supported Fairfax, these voters still supported Fairfax at a higher rate than either of the other two candidates. In Hampton Roads, where the Minority population comprises slightly over 40% of the citizen-voting age population, we estimate that Fairfax received 68% of the vote among Minority voters.

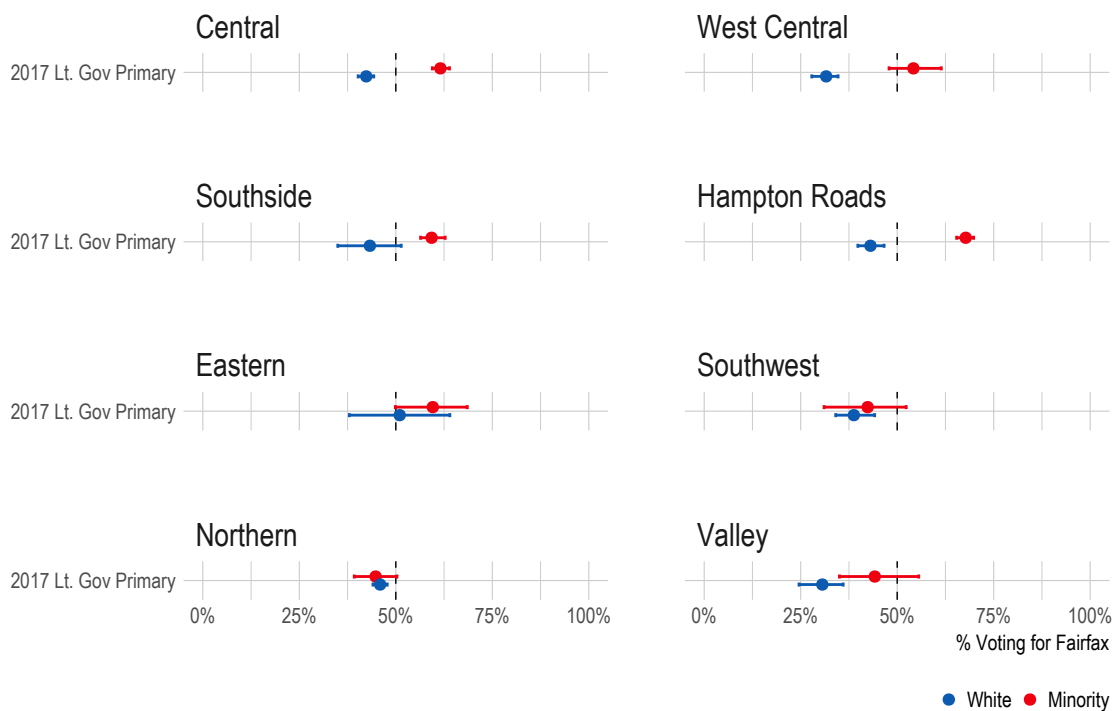


Figure 12: Ecological Inference Results 2017 Democratic Primary Election — Regions

Appendix A

Ecological inference combines the method of bounds,¹⁹ which produces deterministic bounds on the share of a minority group voting for a given representative, and ecological regression,²⁰ which makes use of how candidate support across precincts varies with a racial group’s population share. Ecological inference stands out as a method that incorporates both deterministic information (e.g., from method of bounds) as well as statistical information (e.g., from ecological regression) when seeking to estimate group-level voting behavior from aggregate data.

There are several different methods for estimating racially polarized voting using ecological inference. We use the RxC method, which allows us to estimate voting patterns for multiple groups (such as White, Black, Hispanic, and Asian voters) and actions (such as voting for the Democratic candidate, voting for the Republican candidate, or not turning out to vote).

An example helps illustrate the utility of ecological inference for determining RPV. Table 1 reports the state-wide citizen voting age population shares (CVAP) in Virginia along with the aggregate two-party vote share for the 2016 Presidential Election. For 2016, in each locality we observe aggregate vote shares and aggregate population shares (e.g., the bottom-most row and right-most columns in the table), but not the group level voting behaviors (e.g., the interior cells in the table). We use ecological inference to estimate the interior cells. With these group-level estimates in hand, we are in a position to evaluate the extent of RPV for the 2016 Presidential Election in Virginia.

Table 1: Virginia 2016 Presidential Election Ecological Inference, Two-Party Vote Shares

	D	R	CVAP Pct.
White	36.3%	63.7%	70.7%
Black	92.2%	7.8%	19.4%
Hispanic	90.0%	10.0%	5.2%
Asian	94.3%	5.7%	4.7%
Total	52.8%	47.2%	

We estimate that 92% of Black voters voted for Hillary Clinton, the Democratic candidate in the election. Given the high level of support for the candidate, it would appear non-controversial to say that Clinton was the candidate of choice for Black voters in Virginia in the 2016 Presidential election. Furthermore, the high degree of support for this candidate among Black voters would suggest cohesion. Among White voters, we estimate that 36% supported Clinton and 64% supported Trump. While in general RPV should not be thought of in binary or absolute terms, the gap in this example between the behavior of Black and Minority voters is sufficiently large as to suggest evidence of racially polarized voting at the state-wide level in this election.²¹

¹⁹Otis Dudley Duncan and Beverly Davis. “An alternative to ecological correlation.” American sociological review (1953).

²⁰Leo A. Goodman, “Some alternatives to ecological correlation.” American Journal of Sociology 64, no. 6 (1959): 610-625.

²¹Each of these estimates have confidence intervals only a few percentage points wide. For sake of clarity, we do not report the 95% confidence intervals in this table. They are (91%, 93%) for Black voters and (36%, 38%) for Minority voters.

Appendix B

Northern Region

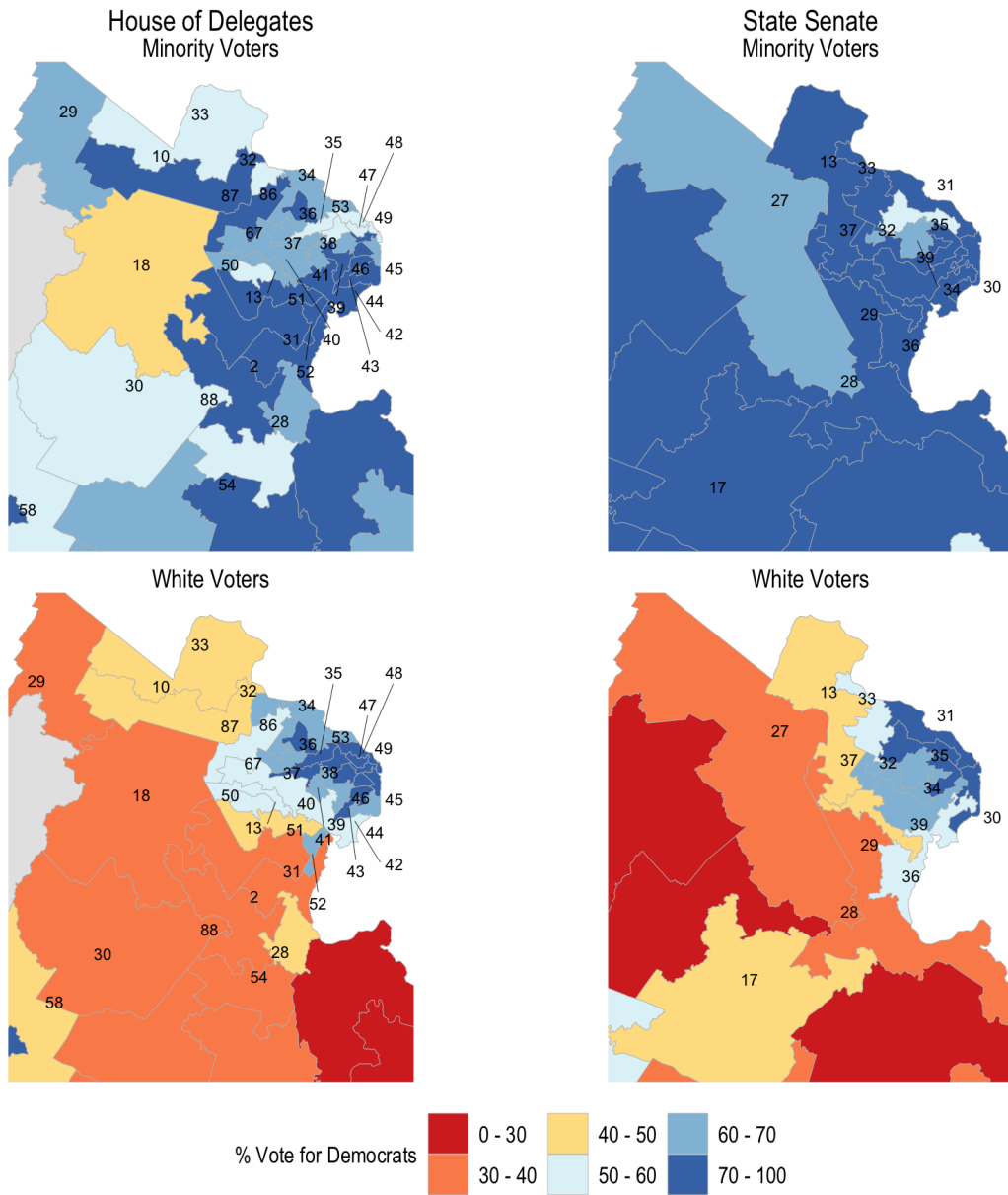


Figure 13: Ecological Inference Results — Northern Region

Valley Region

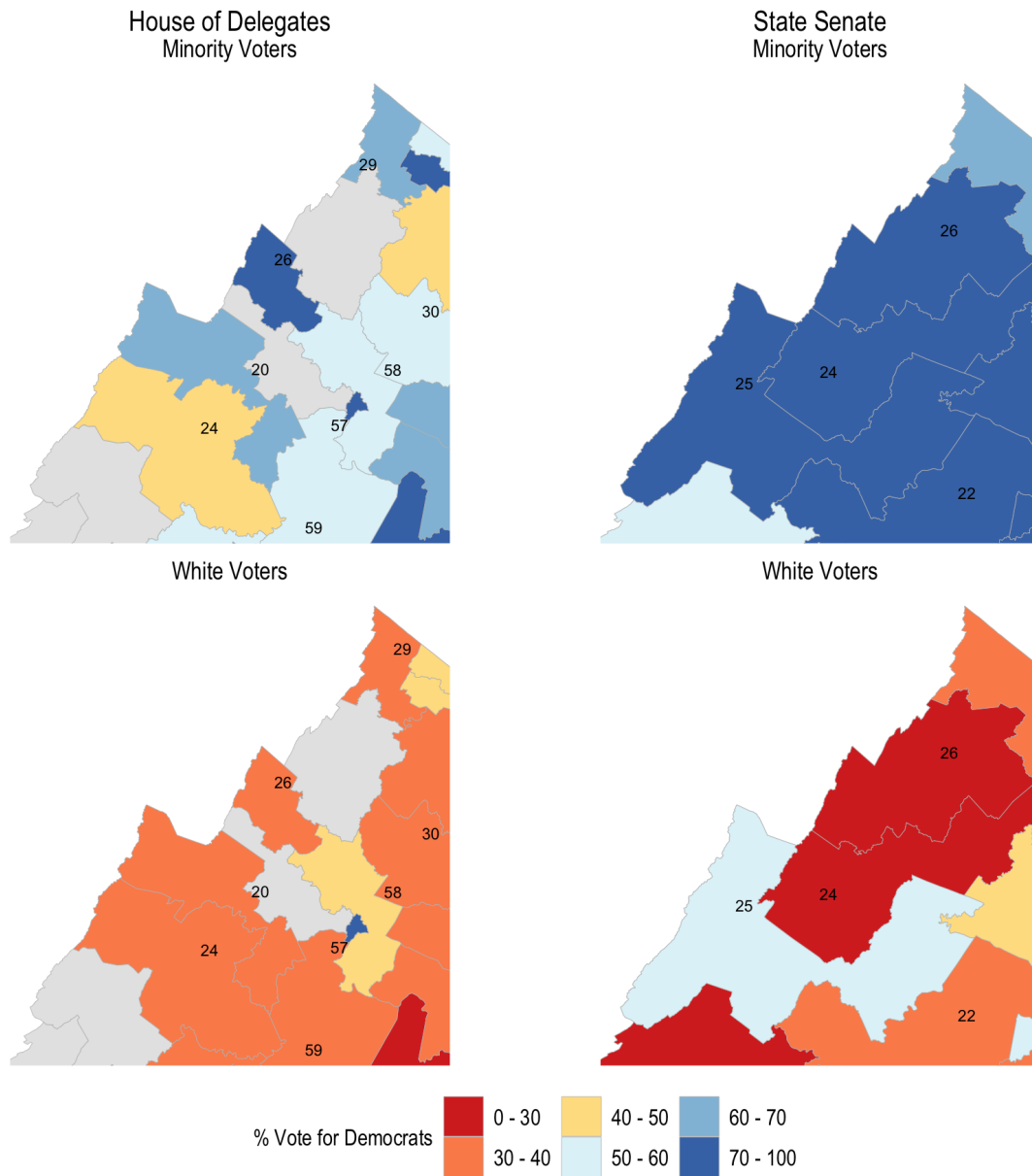


Figure 14: Ecological Inference Results — Valley Region

Central Region

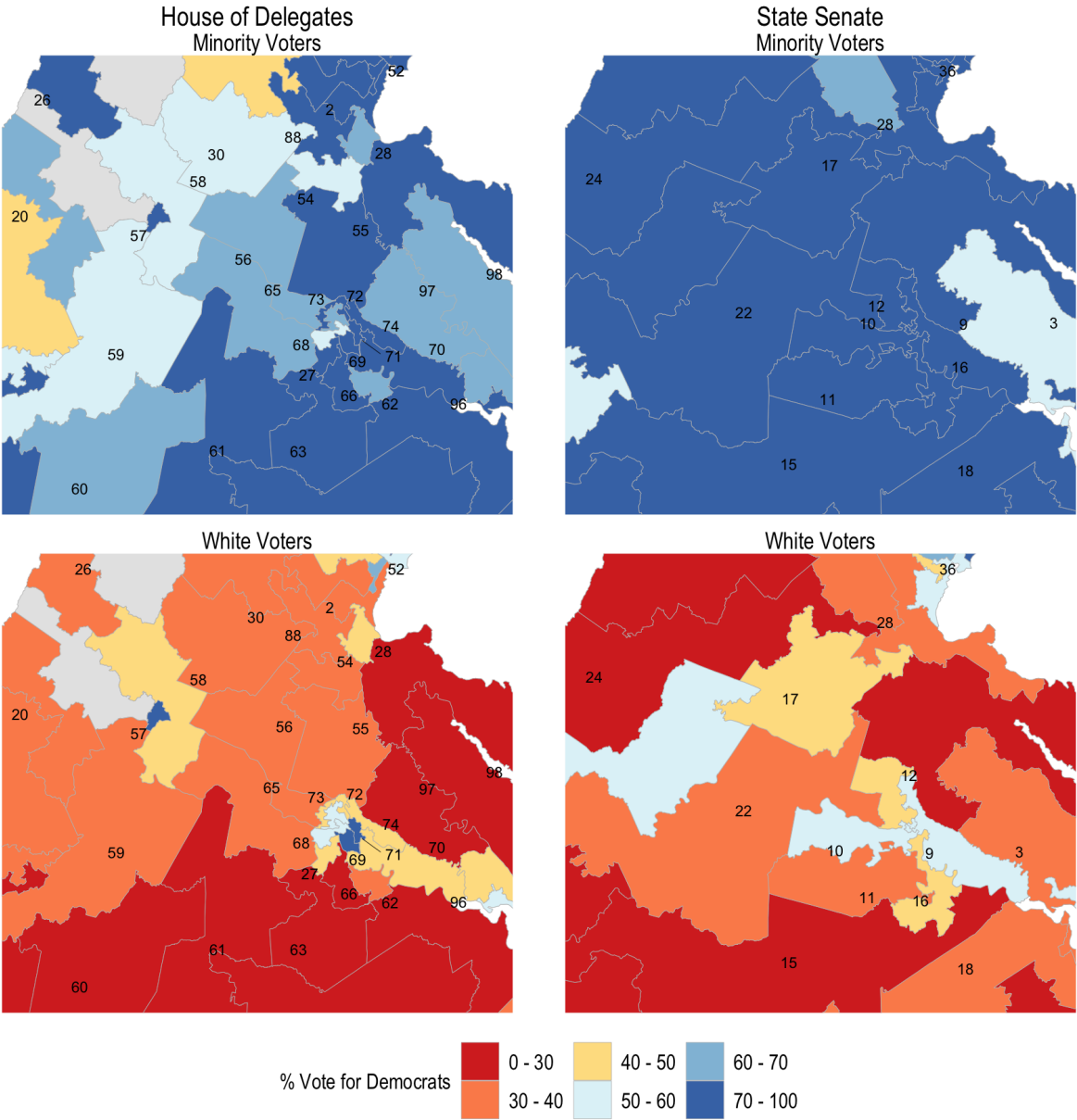


Figure 15: Ecological Inference Results — Central Region

Eastern Region

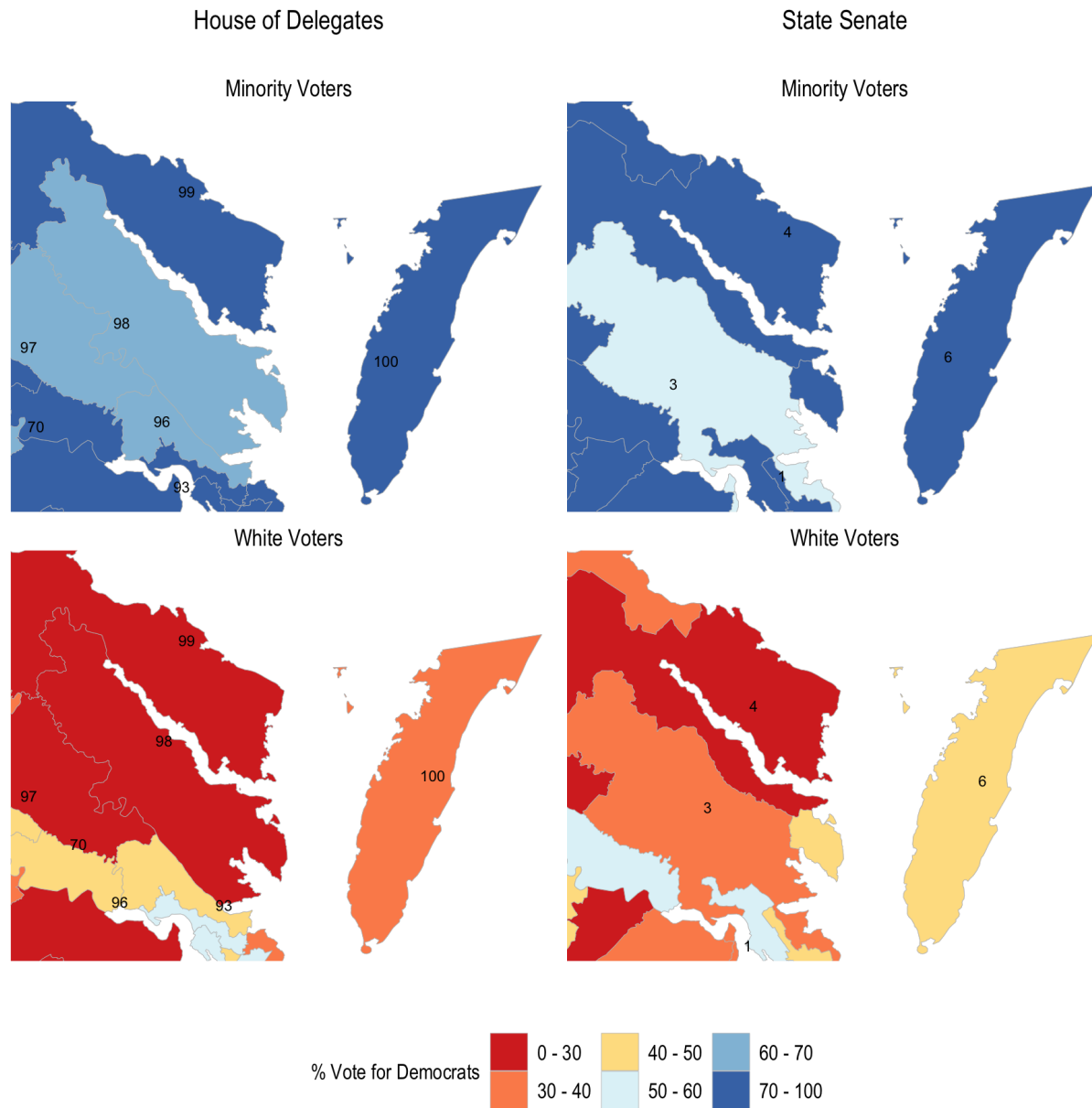


Figure 16: Ecological Inference Results — Eastern Region

Hampton Roads Region

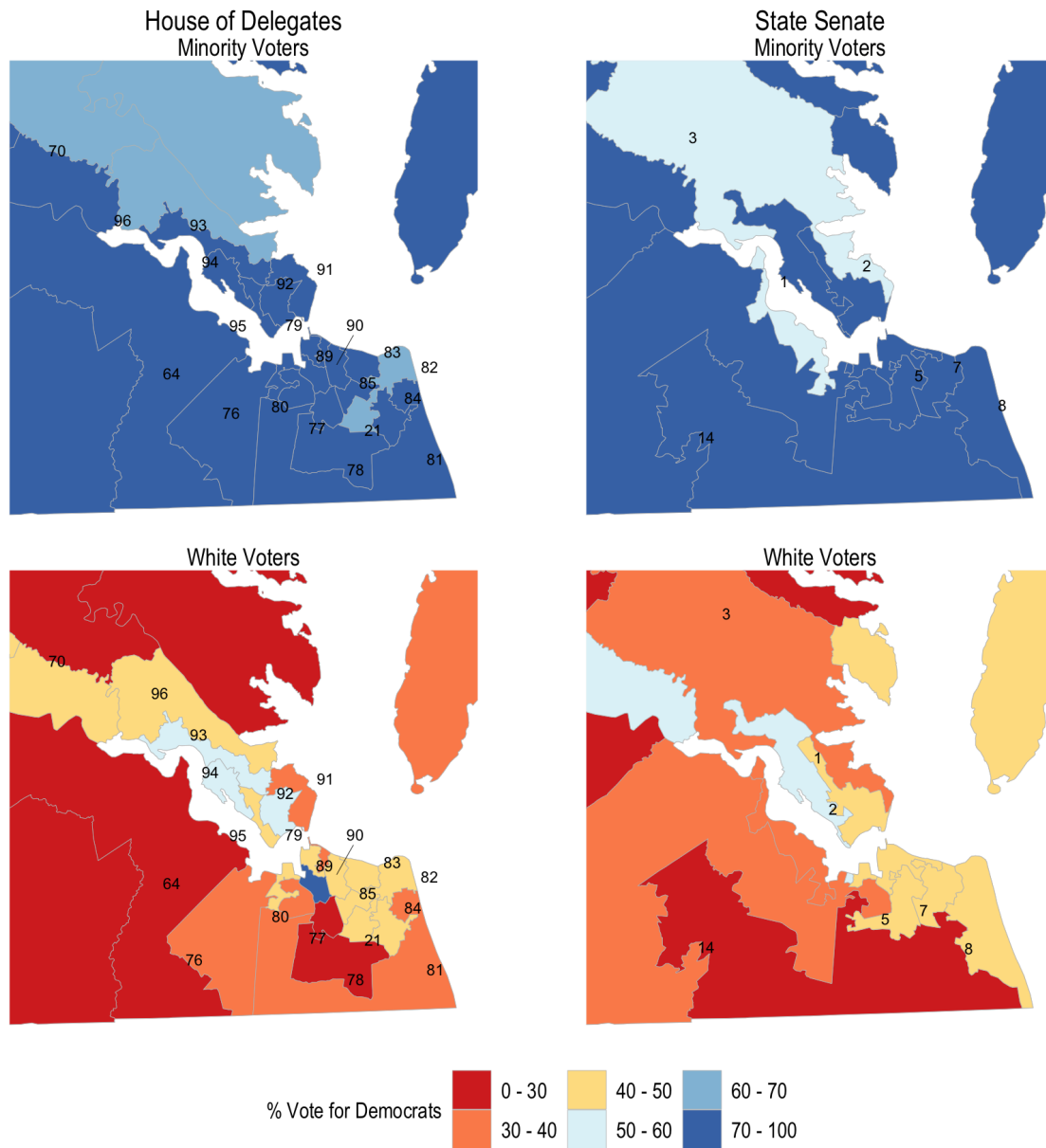


Figure 17: Ecological Inference Results — Hampton Roads Region

Southside Region

House of Delegates

State Senate

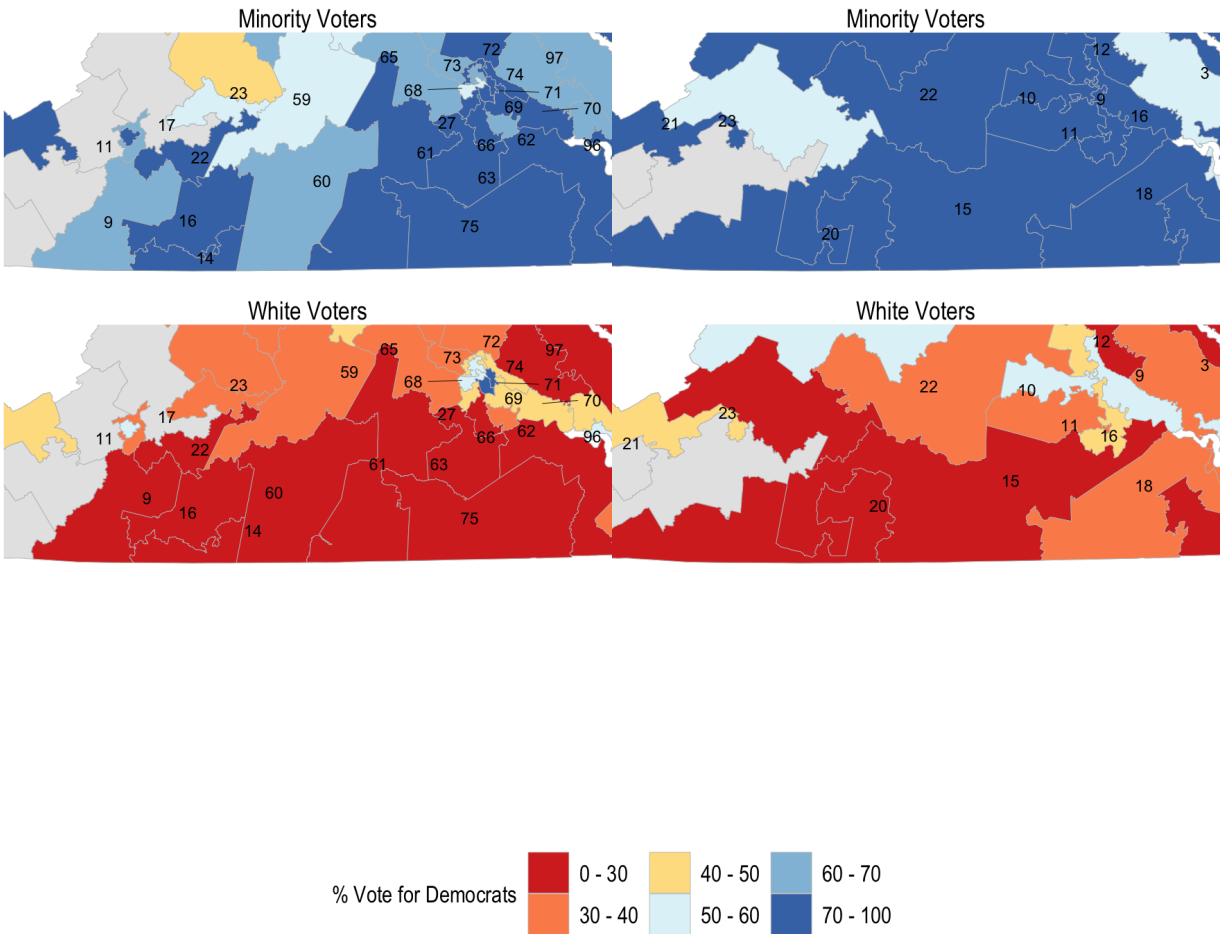


Figure 18: Ecological Inference Results — Southside Region

West Central Region

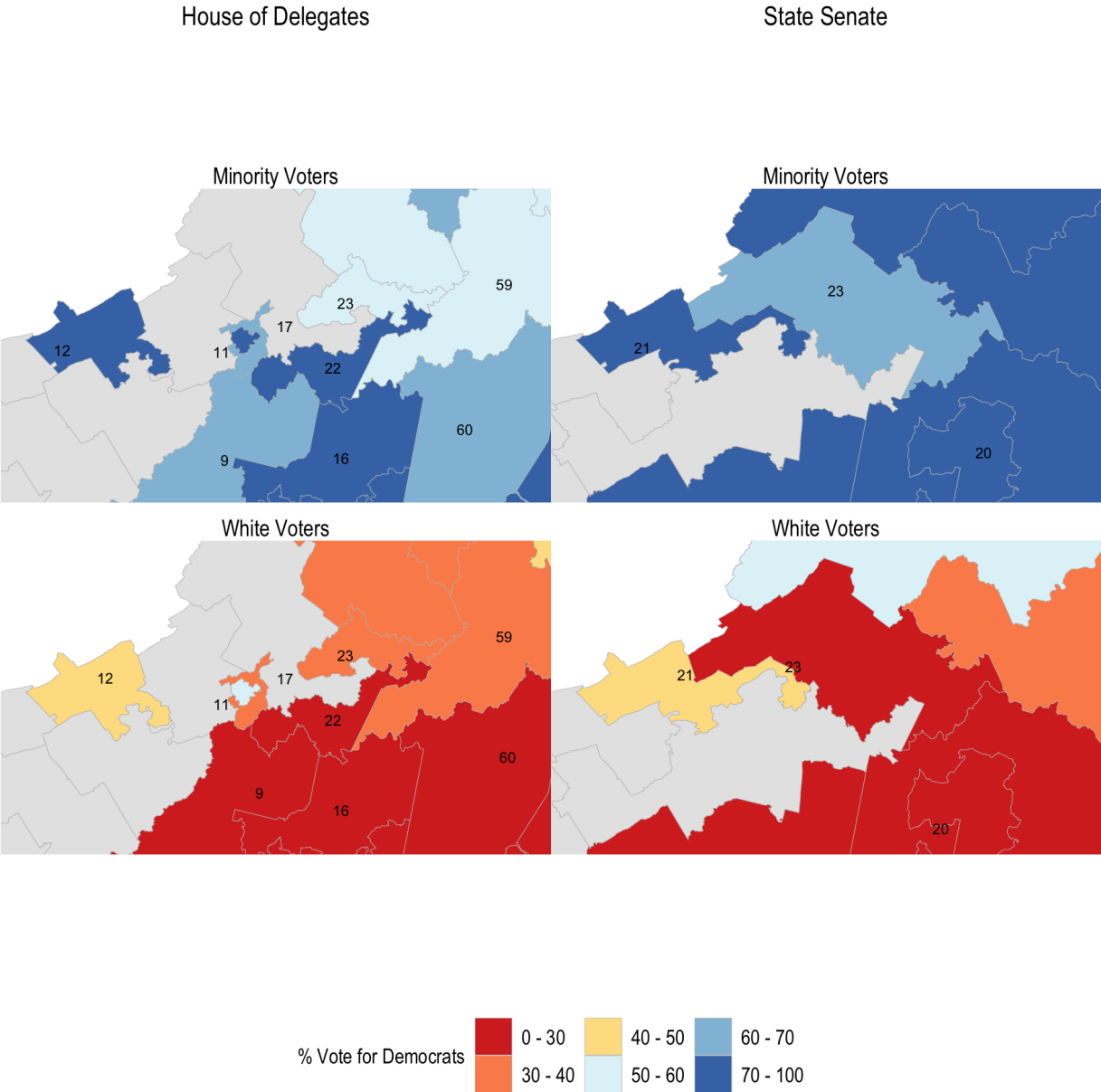


Figure 19: Ecological Inference Results — West Central Region

Southwest Region

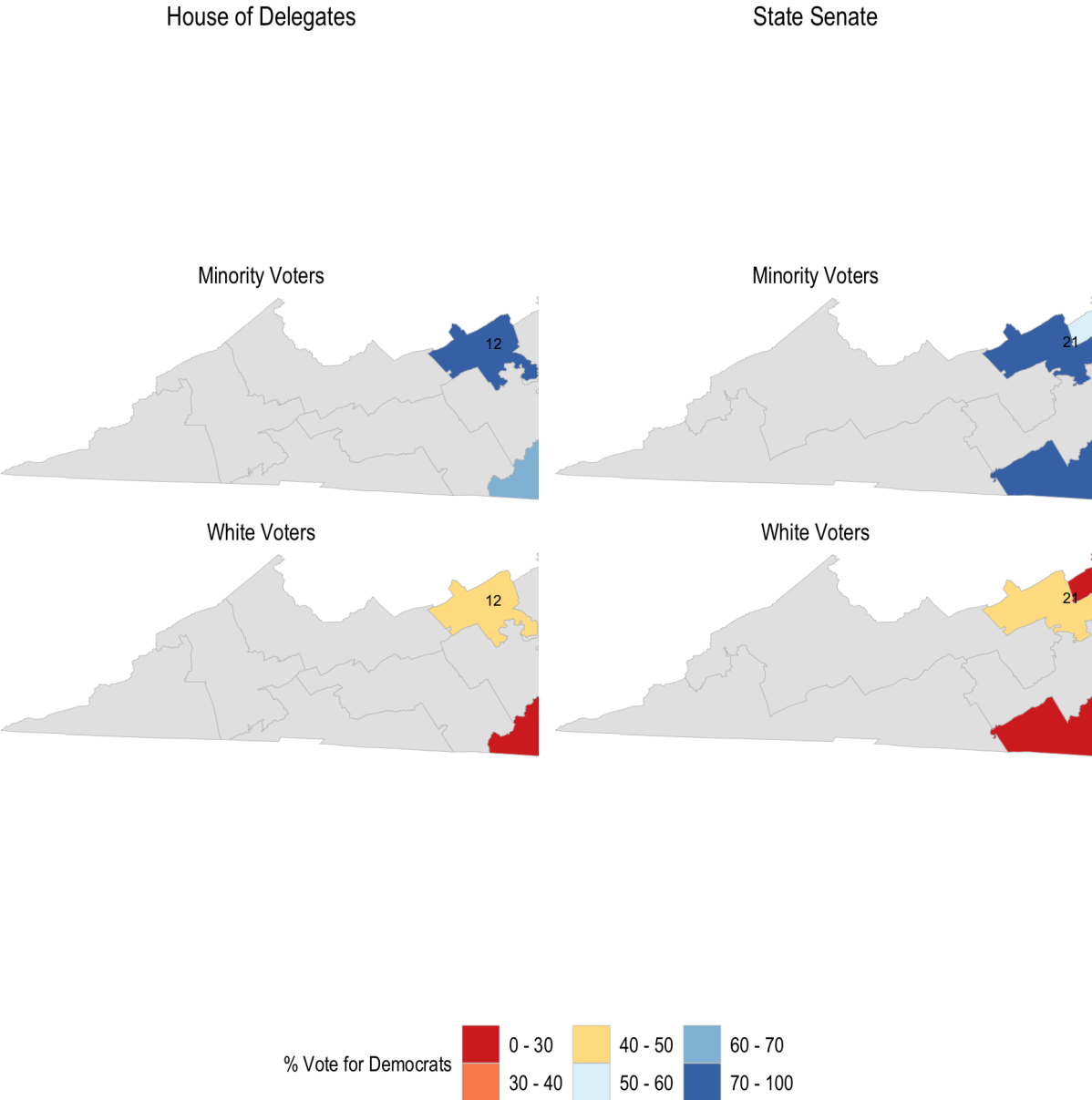


Figure 20: Ecological Inference Results — Southwest Region

EXHIBIT "3"

The Detroit News

POLITICS

Michigan redistricting commission refuses to release legal memos

Craig Mauger and Beth LeBlanc The Detroit News

Published 2:38 p.m. ET Dec. 2, 2021 | Updated 3:41 p.m. ET Dec. 2, 2021

Lansing — Michigan's Independent Citizens Redistricting Commission voted Thursday to continue to conceal two legal memos that were the subject of a controversial closed-door meeting in October.

After weeks of public debate and an hour of intense discussion, the commission voted 7-5 not to release the memos. The group's decision came after its lawyers said publishing the documents would be a "self-inflicted" wound and would go against attorney-client privilege, potentially creating legal problems for the redistricting effort down the road.

"It's like inviting the other team into your huddle," argued David Fink, local counsel for the commission.

Thursday's vote came as the redistricting commission was at a pivotal moment in its push to redraw Michigan's legislative lines. The group, created through a 2018 constitutional amendment, is expected to vote on maps in the coming weeks, and its own attorneys contend legal challenges are on the horizon.

Some experts and representatives of Michigan media outlets have argued the panel violated the Constitution by going into closed session on Oct. 27. The Constitution requires the commission to do its business in public.

The memos discussed during the 90-minute, private October meeting were titled "Voting Rights Act" and "The History of Discrimination in the State of Michigan and Its Influence on Voting."

Commissioners Steve Lett and Rebecca Szetela, two attorneys who also serve on the panel, said the information in the memos should not be subject to attorney-client privilege.

Lett described the memos as more "historical" in nature. In what appeared to be a reference to one of the documents, Lett said the information wasn't about litigation strategy. He said it focused on "things that we should be taking into account ... when drawing districts."

"There was nothing in there that I believe was privileged. There was quite a bit of historical comment in the paper that showed how Michigan had dealt with historically discriminatory voting in the past from the Civil War forward," Lett said.

After the meeting, Szetela declined to provide further information about what was in the memos.

"I am not going to expand upon that," she said on her contention that information didn't fall under attorney-client privilege.

The Michigan Constitution specifically says the commission "shall conduct all of its business at open meetings." Receiving advice on how to draw districts would likely fall under the requirement.

But after Thursday's meeting, Commissioner Dustin Witjes argued the commission was abiding by the separate Open Meetings Act, which allows government bodies to meet in secret under certain circumstances.

"As our attorneys have stated, they believe that it would potentially cause issues in the future. And I would have to agree with what our attorneys have stated," Witjes said about why he supported keeping the legal memos secret.

The commission's legal team passionately prodded the members not to release the documents, suggesting the move would come back to haunt them and provide an opportunity for other attorney-client communications to be published.

"It would be an extraordinary thing to do," Fink said at one point. "It would be effectively taking away your ability get good counsel."

The panel is about to pivot from map drawing to litigation, which it must take seriously, said Katherine McKnight, litigation counsel for the commission.

"It creates a problem for us that we don't need to have," McKnight said. "And it violates a right that we have that is protected. ... You have this right and you have it until you waive it."

Attorney General Dana Nessel, Secretary of State Jocelyn Benson and Democratic and Republican state lawmakers have called for the release of the memos.

Detroit News Editor and Publisher Gary Miles told commissioners Thursday the work of the panel would fail “unless the public knows it was done within the law and without secret or hidden agendas.”

"Your mandate as individuals, public servants, is to reinforce the confidence of the public in the integrity of this process," Miles said. "I urge you to do so by releasing the documents, secret documents that were discussed Oct. 27."

As the commission was meeting a block away, the Michigan Senate voted unanimously to amend the state's Open Meetings Act to clarify that the provisions allowing for a closed-door session do not apply to Michigan's Independent Citizens Redistricting Commission.

The bill was sponsored by Sen. Ed McBroom, R-Vulcan. It still has to go to the state House.

Senate Minority Leader Jim Ananich, D-Flint, said the legislation seeks to clarify the law and the commission's use of it to enter closed session Oct. 27. But he also noted his support for the commission.

"The Independent Citizens Redistricting Commission on its worst day is still a million times better for the people of Michigan than the best day of the old system, where Republicans drew the map in secret," Ananich said. "Zero public hearings. Zero public input."

The commission also voted Thursday not to release a recording of the Oct. 27 closed-door session. That vote was 8-4.

cmauger@detroitnews.com