IN THE SUPREME COURT OF WISCONSIN
No. 2021AP1450-OA

Billie Johnson, Eric O'Keefe, Ed Perkins
and Ronald Zahn,

Petitioners,

v.

Wisconsin Elections Commission, Marge Bostelmann in her official capacity as a member of the Wisconsin Elections Commission, Julie Glancey in her official capacity as a member of the Wisconsin Elections Commission, Ann Jacobs in her official capacity as a member of the Wisconsin Elections Commission, Dean Knudson in his official capacity as a member of the Wisconsin Elections Commission, Robert Spindell, Jr. in his official capacity as a member of the Wisconsin Elections Commission and Mark Thomsen in his official capacity as a member of the Wisconsin Elections Commission,

Respondents.

Petition for Original Action in the Wisconsin Supreme Court

APPENDIX IN SUPPORT OF BRIEF OF *AMICI CURIAE* BLACK LEADERS ORGANIZING FOR COMMUNITIES, VOCES DE LA FRONTERA, THE LEAGUE OF WOMEN VOTERS OF WISCONSIN, CINDY FALLONA, LAUREN STEPHENSON, REBECCA ALWIN, LAUREN STEPHENSON, REBECCA ALWIN, HELEN HARRIS, WOODROW WILSON CAIN, II, NINA CAIN, TRACIE Y. HORTON, PASTOR SEAN TATUM, MELODY MCCURTIS, BARBARA TOLES, and EDWARD WADE, JR.

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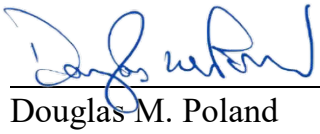
CERTIFICATION OF APPENDIX

I hereby certify that filed with this brief, either as a separate document or as a part of this brief, is an appendix that complies with § 809.19(2)(a) and that contains, at a minimum: (1) a table of contents; (2) the findings or opinion of the circuit court; (3) a copy of any unpublished opinion cited under § 809.23(3)(a) or (b); and (4) portions the record essential to an understanding of the issues raised, including oral or written rulings or decisions showing the circuit court's reasoning regarding those issues.

I further certify that if this appeal is taken from a circuit court order or judgment entered in a judicial review of an administrative decision, the appendix contains the findings of fact and conclusions of law, if any, and final decision of the administrative agency.

I further certify that if the record is required by law to be confidential, the portions of the record included in the appendix are reproduced using one or more initials or other appropriate pseudonym or designation instead of full names of persons, specifically including juveniles and parents of juveniles, with a notation that the portions of the record have been so reproduced to preserve confidentiality and with appropriate references to the record.

Dated this 7th day of September, 2021. Signed:



Douglas M. Poland

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WISCONSIN

BLACK LEADERS ORGANIZING FOR COMMUNITIES, VOCES DE LA FRONTERA, the LEAGUE OF WOMEN VOTERS OF WISCONSIN, CINDY FALLONA, LAUREN STEPHENSON, REBECCA ALWIN, HELEN HARRIS, WOODROW WILSON CAIN, II, NINA CAIN, TRACIE Y. HORTON, PASTOR SEAN TATUM, MELODY MCCURTIS, BARBARA TOLES, and EDWARD WADE, JR.,

Plaintiffs,

v.

ROBERT F. SPINDELL, JR., MARK L. THOMSEN, DEAN KNUDSON, ANN S. JACOBS, JULIE M. GLANCEY, MARGE BOSTELMANN, in their official capacity as members of the Wisconsin Elections Commission, MEAGAN WOLFE, in her official capacity as the Administrator of the Wisconsin Elections Commission,

Defendants.

Civil Action
File No. 3:21-cv-00534-jdp-ajs-eec

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Plaintiffs Black Leaders Organizing for Communities, Voces de la Frontera, the League of Women Voters of Wisconsin, Cindy Fallona, Lauren Stephenson, Rebecca Alwin, Helen Harris, Woodrow Wilson Cain, II, Nina Cain, Tracie Y. Horton, Pastor Sean Tatum, Melody McCurtis, Barbara Toles, and Edward Wade, Jr., bring this First Amended Complaint for Declaratory and Injunctive Relief against defendants Robert F. Spindell, Jr., Mark L. Thomsen, Dean Knudson, Julie M. Glancey, Ann S. Jacobs, and Marge Bostelmann, in their official capacities as members of the Wisconsin Elections Commission, and against defendant Meagan Wolfe, in her official capacity as

the Administrator of the Wisconsin Elections Commission, (collectively, "Defendants"), under 42 U.S.C. § 1983, 52 U.S.C. § 10301, and 28 U.S.C. § 2284(a), and state and allege as follows:

INTRODUCTION

Wisconsin's current state legislative districts were adopted by the Wisconsin State Legislature and signed by Wisconsin's Governor as 2011 Wisconsin Act 43, and later modified by a federal court in *Baldus v. Members of the Government Accountability Board*, 862 F. Supp. 2d 860, 863 (E.D. Wis. 2012). The current districts are based on state population and demographic data collected by the U.S. Census Bureau in 2010. On August 12, 2021, the U.S. Census Bureau released Wisconsin's state population data (Public Law 94-171 data) from the 2020 Census. As those data reveal, Wisconsin gained 199,243 residents in the past decade, a population shift that has rendered the existing state legislative districts unequally populated, and therefore malapportioned under state and federal law. More specifically, the current state legislative districts violate the basic democratic tenet of "one person, one vote,"[1] and therefore violate Plaintiffs' rights under the Fourteenth Amendment to the U.S. Constitution.

Moreover, the Milwaukee-area State Assembly districts violate Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, by packing Black voters in six districts with Black voting age population ("BVAP") percentages well in excess of what is needed to provide an equal opportunity for Black voters to elect their preferred candidate, and simultaneously cracking other Black voters from these districts, and placing them instead in districts that feature a white bloc voting against their preferred candidates. A seventh majority-BVAP district can instead be drawn to provide Black voters with an equal opportunity to elect their preferred candidates, and to remedy this unlawful vote dilution.

[1] *See Reynolds v. Sims*, 377 U.S. 533, 562–64 (1964); *See also Baker v. Carr*, 369 U.S. 186, 207-208 (1962).

The malapportionment became actionable in this Court with the Census Bureau's release of the 2020 Federal Census count of Wisconsin's population, and, with the Public Law 94-171 data now released, it is clear precisely where population shifts have occurred within the state. *See Arrington v. Elections Bd.*, 173 F. Supp. 2d 856, 860 (E.D. Wis. 2001). Indeed, on August 13, 2021, six Wisconsin residents who intend to advocate and vote for Democratic Party of Wisconsin candidates in the coming 2022 primary and general elections filed a complaint in this Court, alleging that current Wisconsin state legislative districts are unconstitutionally malapportioned based on the 2020 Census data. *See Hunter, et al. v. Bostelmann, et al.*, No. 21-cv-00512 (W.D. Wis.).

Plaintiffs in this action include nonprofit organizations that have members and constituencies whose votes are diluted because they live in districts that are now overpopulated in violation of their constitutional rights, as well as individual voters who suffer the same harm. Plaintiffs therefore seek a declaratory judgment that the current state legislative districts violate the United States Constitution; a permanent injunction barring Defendants from holding future elections under the current scheme for Wisconsin State Senate and State Assembly districts; and an order implementing new state legislative districts that adhere to the requirements of federal and state law should the Legislature and Governor fail to adopt such districts through the legislative process. Plaintiffs also include Black voters whose votes for Milwaukee-area State Assembly districts are diluted in violation of Section 2 of the Voting Rights Act, along with a nonprofit organization with affected constituents for whom it advocates.

The Wisconsin Constitution requires new legislative districts to be drawn in light of the U.S. Census Bureau's release of 2020 census data, the United States Constitution requires that those districts be drawn in a way that corrects the vote dilution that exists in the current State Assembly plan. The primary duty for reapportionment rests with the state legislature, with a new plan to be approved by the governor. *State ex Rel. Reynolds v. Zimmerman*, 22 Wis. 2d 544, 556-59, 126

N.W.2d 551 (1964). However, in every past decade since the 1980s when there has been a partisan divide among the Senate, the Assembly, and/or the Governor, there has been a legislative impasse requiring judicial intervention. *See Prosser v. Elections Bd.*, 793 F. Supp. 859 (W.D. Wis. 1992); *Wis. State AFL-CIO v. Elections Bd.,* 543 F. Supp. 630 (E.D. Wis. 1982); *Baumgart v. Wendelberger*, Nos. 01–C–0121 & 02–C–0366, 2002 WL 34127471 (E.D. Wis. May 30, 2002), *amended by* 2002 WL 34127473 (E.D. Wis. July 11, 2002). The Senate and Assembly currently have majorities of elected Republican representatives, whereas the Governor is a Democrat.

Since Governor Evers assumed office in January 2019, the Governor and the Legislature have disagreed on many significant policy issues that appear to fall along partisan political lines, such as the Governor's Administration's orders requiring Wisconsinites to remain at home and later, use face-coverings, during the COVID-19 pandemic;[2] the appropriate use of federal aid for COVID relief;[3] limiting the authority of public health entities;[4] vaccination requirements by employers or other entities;[5] Department of Transportation policy;[6] and raffle and sweepstakes laws;[7] among others.[8] The low likelihood of the Legislature and the Governor reaching agreement on a redistricting plan for state legislative districts in the 2020 cycle is further reflected in the current Legislature's

[2] *Wis. Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900, and 2021 Senate Joint Resolution 3 (terminating 2021 Executive Order #104), available at https://docs.legis.wisconsin.gov/2021/related/enrolled/sjr3.

[3] See, *e.g.*, veto messages for 2021 AB232, AB234, AB235, AB236, AB237, AB238, AB239, AB240, AB241, AB243, and SB183, available at https://docs.legis.wisconsin.gov/2021/related/veto_messages.

[4] See veto messages for 2021 AB1, available at https://docs.legis.wisconsin.gov/2021/related/veto_messages.

[5] *Id.*

[6] See veto messages for 2019 AB273 and AB284, available at https://docs.legis.wisconsin.gov/2019/related/veto_messages.

[7] See veto messages for 2019 SB292 and SB43, available at https://docs.legis.wisconsin.gov/2019/related/veto_messages.

[8] See veto messages for 2021 SB39 (sports and extracurriculars by charter school students), and 2021 SB38 (return to offices for state employees during COVID-19 pandemic), available at https://docs.legis.wisconsin.gov/2021/related/veto_messages; and veto messages for 2019 AB4 (tax policy), AB53 (student directory data definition), AB76 (training hours for nurse aids), and AB179, AB180, AB182, and AB183 (abortion care policy), available at https://docs.legis.wisconsin.gov/2019/related/veto_messages.

frequent resort to the courts to challenge executive action in lieu of seeking political compromise. *See, e.g.*, *Wis. Legislature v. Palm*, 2020 WI 42, 391 Wis. 2d 497, 942 N.W.2d 900; *Wis. Legislature v. Evers*, No. 2020AP608-OA (Wis. Apr. 6, 2020) (attached as Exhibit 1); *Fabick v. Evers*, 2021 WI 28 (Legislature filed a brief as *amicus curiae* in support of a challenge to the Governor's emergency powers); *Bartlett v. Evers*, 2020 WI 68, 393 Wis. 2d 172, 945 N.W.2d 685 (Legislature filed a brief as *amicus curiae* in support of a challenge to the Governor's veto authority). Indeed, legislative leadership has already retained private counsel in preparation for redistricting litigation this year. *See Waity v. Vos*, No. 21-CV-589 (Dane Co. Cir. Ct. Apr. 29, 2021) (holding void *ab initio* contracts for redistricting litigation counsel signed in December 2020) (copy attached as Exhibit 2), *petition for bypass granted sub nom Waity v. LeMahieu*, No. 2021-AP-802 (Wis. July 15, 2021) (attached as Exhibit 3), *and decision stayed sub nom Waity v. LeMahieu*, No. 2021-AP-802 (attached as Exhibit 4). The pending action by Wisconsin residents who support the Democratic Party and its candidates for elected office, and the Legislature's motion to intervene in that case, as well as the Legislature's motion to intervene in this case, further diminishes the chances that the Legislature and Governor will reach a compromise on new legislative districts.

Consequently, past practice, the current partisan divide in Wisconsin's government, and the pending action by Democratic voters alleging a malapportionment in state legislative districts all strongly indicate that legislative impasse over new state legislative districts will occur, and that once again the federal court will be required to resolve the conflict. Indeed, without this Court's intervention, the 2022 elections will proceed under plans that are not only malapportioned in violation of the U.S. Constitution, but pursuant to a State Assembly plan that violates Section 2 of the Voting Rights Act.

JURISDICTION AND VENUE

1. This Court has subject matter jurisdiction under 28 U.S.C. §§ 1331, 1343(a)(3) and (4), 1357, and 2284 to hear the claims for legal and equitable relief arising under the federal constitution and the Voting Rights Act. It also has general jurisdiction under 28 U.S.C. §§ 2201 and 2202, the Declaratory Judgments Act, to grant the declaratory relief requested by Plaintiffs.

2. This action challenges the constitutionality of the apportionment of Wisconsin's legislative districts, found in Chapter 4 of the Wisconsin Statutes and revised as ordered by the U.S. District Court for the Eastern District of Wisconsin in *Baldus v. Members of the Wisconsin Government Accountability Board*, 849 F. Supp. 2d 840 (E.D. Wis. 2012) (per curiam) (three-judge panel). The current state legislative district boundaries were based on the 2010 census of the state's population, now superseded by the 2020 census. This action likewise challenges the Milwaukee-area State Assembly districts as violating Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, by diluting Black voters' ability to elect the candidates of their choice through packing and cracking of Black voters across districts.

3. 28 U.S.C. § 2284(a) requires that a district court of three judges hear redistricting cases. In 1982, 1992, and 2002, three-judge panels convened pursuant to 28 U.S.C. § 2284 resolved complaints like this one, developing redistricting plans for the state legislature in the absence of valid plans adopted by the Legislature and enacted with the Governor's approval. *See Prosser*, 793 F. Supp. 859; *AFL-CIO*, 543 F. Supp. 630; *Baumgart v. Wendelberger*, 2002 WL 3412747, *amended by* 2002 WL 34127473.

4. This Court has personal jurisdiction over all Defendants. Defendants Spindell, Thomsen, Knudson, Glancey, Jacobs, Bostelmann, and Wolfe are state officials who reside in Wisconsin and perform official duties in Madison, Wisconsin.

5. Venue is proper in this Court under 28 U.S.C. §§ 1391(b) and (e). At least two of the defendants resides in the Western District of Wisconsin, and Defendants are state officials performing official duties in Madison, Wisconsin. Members of two Plaintiff organizations reside and vote in this district, and two Individual Plaintiffs, Stephenson and Alwin, also reside and vote in this district.

PARTIES

Plaintiffs

6. Plaintiffs include three nonprofit groups, each with members or constituents who are citizens, residents, and qualified voters of the United States of America and the State of Wisconsin, residing in various counties and legislative districts, including in now-overpopulated districts (the "Organizational Plaintiffs").

7. Plaintiff Black Leaders Organizing for Communities ("BLOC") is a nonprofit project established in 2017 to ensure a high quality of life and access to opportunities for members of the Black community in Milwaukee and throughout Wisconsin. BLOC is a year-round civic-engagement organization that has a robust field program to get out the vote and do civic education work door-to-door with community members and through its fellowship program. During 2018 BLOC made 227,000 door attempts in Milwaukee, targeting Black residents to exercise their right to engage in civic participation including voting. BLOC trains its constituents on the civics process and on different ways to make their voices heard, including (but not limited to) voting in each election. BLOC is regarded and used by members of the African-American community in Milwaukee as a resource and conduit through which they can become more engaged in and advocate for rights and political representation for members of their community.

8. Plaintiff Voces de la Frontera ("Voces") is a nonpartisan, nonprofit, non-stock corporation organized under the laws of the State of Wisconsin with its principal office located at 515 S. 5th St., in the City of Milwaukee, Milwaukee County, Wisconsin. Voces, a community-based organization currently with over one thousand dues-paying members, was formed in 2001 to advocate on behalf of the rights of immigrant and low-income workers. Voces currently has chapters in Milwaukee, Racine, Waukesha, Sheboygan, Walworth County, Madison, West Bend, Manitowoc, and Green Bay. Voces is dedicated to educating and organizing its membership and community members to exercise their right to vote as protected by the Constitution and the Voting Rights Act of 1965. Voces has sought legal redress in multiple cases to protect the voting rights of Wisconsin's Latino voters, including challenging discriminatory legislative districts (as recently as in *Baldus* in 2011) and voter registration and photo ID requirements. Voces seeks to maximize eligible-voter participation through its voter-registration efforts and encourage civic engagement through registration and voting.

9. Plaintiff League of Women Voters of Wisconsin ("LWVWI") is a nonpartisan, nonprofit, non-stock corporation organized under the laws of the State of Wisconsin with its principal office located at 612 West Main St., Suite 200, in the City of Madison, Dane County, Wisconsin. LWVWI is an affiliate of The League of Women Voters of the United States, which has 750 state and local Leagues in all 50 states, the District of Columbia, Puerto Rico, the Virgin Islands, and Hong Kong. LWVWI works to expand informed, active participation in state and local government, giving a voice to all Wisconsinites. LWVWI, a nonpartisan community-based organization, was formed in 1920, immediately after the enactment of the Nineteenth Amendment granting women's suffrage. LWVWI is dedicated to encouraging its members and the people of Wisconsin to exercise their right to vote as protected by the Constitution and the Voting Rights Act of 1965. The mission of LWVWI is to promote political responsibility through informed and active

participation in government and to act on select governmental issues. LWVWI seeks to maximize eligible-voter participation through its voter-registration efforts and encourage civic engagement through registration and voting. LWVWI works with and through 20 local Leagues in the following cities, counties, and areas throughout Wisconsin: Appleton, Ashland/Bayfield Counties, Beloit, Dane County, Door County, the Greater Chippewa Valley, Greater Green Bay, Janesville, the La Crosse area, Manitowoc County, Milwaukee County, the Northwoods, Ozaukee County, the Ripon area, Sheboygan County, the Stevens Point area, the St. Croix Valley, the Whitewater area, Winnebago County, and the Wisconsin Rapids area. These local Leagues have approximately 2,800 members, all of whom are also members of LWVWI. LWVWI has prosecuted lawsuits in state and federal courts in Wisconsin to vindicate the voting and representational rights of Wisconsin voters; this includes actions in this Court, such as *Swenson v. Bostelmann*, 20-cv-459-wmc (W.D. Wis. 2020), and *Lewis v. Knudson*, 20-cv-284 (W.D. Wis. 2020).

10. Organizational Plaintiffs' members and constituents include voters who reside in various State Senate and Assembly districts across Wisconsin, including districts that are now overpopulated. Because they live in state legislative districts that were approximately equal in population with the other state legislative districts at the time the current districts were configured in 2011, but that are now overpopulated as a result of the state population count released by the Census Bureau on April 26, 2021, their votes are now diluted compared with voters in districts that are now underpopulated. This vote dilution constitutes a specific and personal injury to each voter in an overpopulated district that can be addressed by a federal court. *See Reynolds*, 377 U.S. at 561; *Baker*, 369 U. S. at 206.

11. Plaintiffs also include individual voters ("Individual Plaintiffs") who reside either in now-overpopulated districts or in districts that violate Section 2 of the Voting Rights Act. The residency of Individual Plaintiffs in three overpopulated districts is summarized here:

Individual Plaintiff	**State Assembly District**	**Population compared to 2020 Census ideal**	**State Senate District**	**Population compared to 2020 Census ideal**
Cindy Fallona	AD5	+13.26%	SD2	+2.77%
Lauren Stephenson	AD76	+20.41%	SD26	+13.00%
Rebecca Alwin	AD79	+17.13%	SD27	+9.47%

12. Individual Plaintiff Cindy Fallona resides in Wisconsin Assembly district 5 and State Senate district 2. Fallona has lived at this residence for over three decades and is a regular voter in Wisconsin elections. Fallona intends to vote in 2022 and is registered at this residence, with no plans to register at a different address.

13. Individual Plaintiff Lauren Stephenson resides in Wisconsin Assembly district 76 and State Senate district 26. Stephenson has lived at this residence for over six years and is a regular voter in Wisconsin elections. Stephenson intends to vote in 2022 and is registered at this residence, with no plans to register at a different address.

14. Individual Plaintiff Rebecca Alwin resides in Wisconsin Assembly district 79 and State Senate district 27. Alwin has lived at this residence for over 25 years and is a regular voter in Wisconsin elections. Alwin intends to vote in 2022 and is registered at this residence, with no plans to register at a different address.

15. Individual Plaintiffs also include Black voters whose votes are diluted in violation of Section 2 of the Voting Rights Act by placing them in Milwaukee-area Assembly districts that are either packed with excessively high numbers of Black voters—well above what is necessary to afford them an equal opportunity to elect their preferred candidates—or cracked from districts

containing other Black voters, where their voting power is instead overwhelmed by a white bloc voting in opposition to their candidates of choice.

16. Plaintiff Helen Harris is an African-American citizen of the United States and of the State of Wisconsin. She is a resident and registered voter in Milwaukee County in Assembly District 22. Ms. Harris has been unable to elect candidates of her choice to the Wisconsin State Assembly despite strong electoral support for those candidates from other African-American voters in her community. An additional BVAP majority district could be drawn including the Milwaukee County portion of Assembly district 22, including Ms. Harris's residence, to provide a remedy for the existing Section 2 violation. The apportionment of six majority-minority districts to the sufficiently numerous and geographically compact Black voting age population in the Milwaukee region, as opposed to the seven such districts required by the Voting Rights Act, dilutes Ms. Harris's voting power and affords her less opportunity than other members of the electorate to participate in the political process and to elect a representative of her choice to the Wisconsin State Assembly.

17. Plaintiff Woodrow Wilson Cain, II, is an African-American citizen of the United States and of the State of Wisconsin. He is a resident and registered voter in the Village of Brown Deer, in Milwaukee County, in Assembly District 24. Mr. Cain has been unable to elect candidates of his choice to the Wisconsin State Assembly despite strong electoral support for those candidates from other African-American voters in his community. An additional BVAP majority district could be drawn including the Village of Brown Deer, including Mr. Cain's residence, to provide a remedy for the existing Section 2 violation. The apportionment of six majority-minority districts to the sufficiently numerous and geographically compact Black voting age population in the Milwaukee region, as opposed to the seven such districts required by the Voting Rights Act, dilutes Mr. Cain's voting power and affords him less opportunity than other members of the electorate to participate in the political process and to elect a representative of his choice to the Wisconsin State Assembly.

18. Plaintiff Nina Cain is an African-American citizen of the United States and of the State of Wisconsin. She is a resident and registered voter in the Village of Brown Deer, in Milwaukee County, in Assembly District 24. Ms. Cain has been unable to elect candidates of her choice to the Wisconsin State Assembly despite strong electoral support for those candidates from other African-American voters in her community. An additional BVAP majority district could be drawn including the Village of Brown Deer, including Ms. Cain's residence, to provide a remedy for the existing Section 2 violation. The apportionment of six majority-minority districts to the sufficiently numerous and geographically compact Black voting age population in the Milwaukee region, as opposed to the seven such districts required by the Voting Rights Act, dilutes Ms. Cain's voting power and affords her less opportunity than other members of the electorate to participate in the political process and to elect a representative of her choice to the Wisconsin State Assembly.

19. Plaintiff Tracie Y. Horton is an African-American citizen of the United States and of the State of Wisconsin. She is a resident and registered voter in the Village of Brown Deer, in Milwaukee County, in Assembly District 24. Ms. Horton has been unable to elect candidates of her choice to the Wisconsin State Assembly despite strong electoral support for those candidates from other African-American voters in her community. An additional BVAP majority district could be drawn including the Village of Brown Deer, including Ms. Horton's residence, to provide a remedy for the existing Section 2 violation. The apportionment of six majority-minority districts to the sufficiently numerous and geographically compact Black voting age population in the Milwaukee region, as opposed to the seven such districts required by the Voting Rights Act, dilutes Ms. Horton's voting power and affords her less opportunity than other members of the electorate to participate in the political process and to elect a representative of her choice to the Wisconsin State Assembly.

20. Plaintiff Pastor Sean Tatum is an African-American citizen of the United States and of the State of Wisconsin. He is a resident and registered voter in the Village of Brown Deer, in

Milwaukee County, in Assembly District 24. Pastor Tatum has been unable to elect candidates of his choice to the Wisconsin State Assembly despite strong electoral support for those candidates from other African-American voters in his community. An additional BVAP majority district could be drawn including the Village of Brown Deer, including Pastor Tatum's residence, to provide a remedy for the existing Section 2 violation. The apportionment of six majority-minority districts to the sufficiently numerous and geographically compact Black voting age population in the Milwaukee region, as opposed to the seven such districts required by the Voting Rights Act, dilutes Pastor Tatum's voting power and affords him less opportunity than other members of the electorate to participate in the political process and to elect a representative of his choice to the Wisconsin State Assembly.

21. Plaintiff Melody McCurtis is an African-American citizen of the United States and the State of Wisconsin. She is a resident and registered voter in the City of Milwaukee, in Assembly District 18. Ms. McCurtis is denied an equal opportunity to vote for candidates for the Wisconsin State Assembly because she is packed in District 18, where her vote is of lesser value because African Americans are concentrated there. The apportionment of six BVAP majority districts to the sufficiently numerous and geographically compact Black population in the Milwaukee area, as opposed to seven BVAP majority districts required by the Voting Rights Act, dilutes Ms. McCurtis's voting power.

22. Plaintiff Barbara Toles is an adult African-American citizen of the United States and the State of Wisconsin. She is a resident and registered voter in the City of Milwaukee, in Assembly District 17. Ms. Toles is denied an equal opportunity to vote for candidates for the Wisconsin State Assembly because she is packed in District 17, where her vote is of lesser value because African Americans are concentrated there. The apportionment of six BVAP majority districts to the sufficiently numerous and geographically compact Black population in the

Milwaukee area, as opposed to seven BVAP majority districts required by the Voting Rights Act, dilutes Ms. Toles's voting power.

23. Plaintiff Edward Wade, Jr., is a 51-year-old African-American citizen of the United States and the State of Wisconsin. He is a resident and registered voter in the City of Milwaukee, in Assembly District 12. Mr. Wade is denied an equal opportunity to vote for candidates for the Wisconsin State Assembly because he is packed in District 12, where his vote is of lesser value because African Americans are concentrated there. The apportionment of six BVAP majority districts to the sufficiently numerous and geographically compact Black population in the Milwaukee area, as opposed to seven BVAP majority districts required by the Voting Rights Act, dilutes Mr. Wade's voting power.

Defendants

24. Defendants Robert F. Spindell, Jr., Mark L. Thomsen, Dean Knudson, Julie M. Glancey, Ann S. Jacobs, and Marge Bostelmann are sued in their official capacities as the members of the Wisconsin Elections Commission ("WEC").

25. Defendant Meagan Wolfe is sued in her official capacity as the Administrator of the WEC.

26. The WEC has the responsibility for the administration and enforcement of Wisconsin laws "relating to elections" including Chapters 5 to 10 and 12. Wis. Stat. § 5.05(1). This includes the election every two years of Wisconsin's representatives in the State Assembly and every four years its representatives in the State Senate. The WEC provides support to local clerks in each of Wisconsin's 72 counties, in administering and preparing for the election of members of the Wisconsin Legislature.

27. Defendant Wolfe, as commission administrator, is the chief election officer of the state. Wis. Stat. § 5.05(3g).

FACTS AND CONSTITUTIONAL PROVISIONS RELATED TO MALAPPORTIONMENT

28. The U.S. Constitution requires that the members of the Wisconsin Legislature be elected on the basis of equal representation. *Arrington*, 173 F. Supp. 2d at 860 (citing U.S. Const. art. I, § 2). The State Senate and Assembly districts must therefore be reapportioned after each Federal Census to be substantially equal in population.

29. The Due Process Clause of the Fifth Amendment to the U.S. Constitution provides that "[n]o person shall … be deprived of life, liberty, or property, without due process of law."

30. The Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution provides, in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

This provision guarantees to the citizens of each state the right to vote in state elections, and that each citizen shall have substantially equal legislative representation regardless of what part of the state they live in, giving each person's vote equal power. *Reynolds*, 377 U.S. 533, 561-68 (1964).

31. 2011 Wisconsin Act 43 divided the official state population determined by the 2010 Census into 33 Senate districts and 99 Assembly districts with relatively equal populations. The revisions ordered by the court *Baldus* in 2012 did not disturb this approximate equality, despite modifying two Assembly districts. In 2012, each Senate district contained a population of approximately 172,333 residents, and each Assembly district contained a population of approximately 57,444. A copy of Chapter 4 of the Wisconsin Statutes, embodying 2011 Wisconsin Act 43, is attached as Exhibit 5.

32. The 2012 state legislative elections, and every subsequent biennial legislative election, including the November 6, 2020 election, have been conducted under the district

boundaries created by Act 43, as modified by *Baldus*. The next regular state legislative primary election is scheduled for August 9, 2022, and the next regular state legislative general election is scheduled for November 8, 2022.[9]

33. The Bureau of the Census, U.S. Department of Commerce, conducted a decennial census of Wisconsin and of all the other states in 2020 under Article I, Section 2, of the U.S. Constitution.

34. Under 2 U.S.C. §§ 2a and 2c and 13 U.S.C. § 141(c), the Census Bureau on April 26, 2021 announced and certified the actual enumeration of the population of Wisconsin at 5,893,718 as of April 1, 2020, a population increase of approximately 200,000 people from the 2010 census. A copy of the Census Bureau's Apportionment Population and Number of Representatives, by state, is attached as Exhibit 6.

35. Based on the 2020 Census, the precise ideal population for each Senate district in Wisconsin is 178,598 and for each Assembly district 59,533 (each an increase compared to the same figures from 2010).

36. The 2020 Census's P.L. 94-171 data, released August 12, 2021, demonstrate that Wisconsin's population has not grown uniformly across all 33 Senate and 99 Assembly districts. The data reveal substantial population disparities, indicating which districts are now over- and underpopulated in reference to the 2020 Census's "ideal" district populations for Wisconsin's Senate and Assembly districts.

37. Because of population shifts over the past decade, the 2011 state legislative districts now give some Wisconsinites' votes more weight than others. Voters living in Assembly district

[9] "Upcoming Elections," Wisconsin Elections Commission, available at: https://elections.wi.gov/elections-voting/elections.

76—where the population is 20.41% greater than the ideal population based on the 2020 Census—have their votes diluted. This is particularly true compared to voters in other districts like Assembly district 10—now 11.60% *less* populated than the ideal district population. Voters in the 37 other overpopulated districts suffer similar harm: Assembly districts 79, 5, 78, and 80 have grown overpopulated in the past decade (with populations now 17.13%, 13.26%, 12.78%, and 10.58% over the ideal district population, respectively). Other districts are now underpopulated, giving voters who reside there an outsized voice in electing their state representative. Assembly districts 18, 16, and 8, for example, now have populations 11.00%, 9.73%, and 9.30% below the ideal population of 59,533, respectively, based on the 2020 Census.

38. The same population growth imbalances affect Senate districts, with some voters suffering vote dilution and others benefitting from heightened voting efficiency. Senate district 26 has grown to exceed the current ideal district population of 178,598 by 13.00%; Senate district 27 by 9.47%; and Senate district 16 by 7.78%. Meanwhile Senate district 6 is now underpopulated by 9.25% relative to the ideal Senate district size and Senate districts 4, 3, and 22 are 8.62%, 4.43%, and 4.19% below the ideal size.

39. This facial malapportionment of state legislative districts dilutes the voting strength of Individual Plaintiffs residing in the overpopulated districts: the weight or value of each voter in a relatively overpopulated district is, by definition, less than that of any voter residing in a relatively underpopulated district.

40. Article IV, section 3, of the Wisconsin Constitution assigns the Legislature and Governor responsibility for enacting a constitutionally valid plan for the state's legislative districts.

41. In each of the previous four decades, when control over Wisconsin's government has been divided between members of the Republican and Democratic Parties, however, the

Legislature and Governor have not met that responsibility. Instead, a federal court has established district boundaries to ensure the constitutional guarantees for citizens and voters.

42. In the most recent round of decennial redistricting in 2011, the Legislature and Governor did enact a legislative district plan, but that plan, too, required judicial intervention to give Wisconsin a legally compliant legislative district map.

43. The legislature elected in November 2020 convened for the first time on January 4, 2021. Both the Senate and Assembly are controlled by Republican majorities, while the Governor is a Democrat. Each time in the past four decades that Wisconsin has had divided partisan control when redistricting was required, the political branches have failed to reach a compromise, requiring a federal court to step in and assume the constitutionally mandated reapportionment of state legislative districts. *See Prosser,* 793 F. Supp. 859; *AFL-CIO,* 543 F. Supp. 630; *Baumgart*, 2002 WL 34127471, *amended by* 2002 WL 34127473. The low likelihood of an enacted redistricting plan in the current cycle is evidenced by the Legislature's recent preference for litigation over legislation, as described in detail above.

44. The deadline for new districts to be in place is driven by the 2022 elections for state legislative seats. The date of the primary for these elections is dictated by state statute, and in 2022 will be August 9. Because there are a number of steps leading up to an election, however, new districts must be set no later than March 15, 2022. This is the statutory deadline for the WEC to notify county clerks of which offices will be voted on, and where information about district boundaries can be found. This notice informs potential candidates of district boundaries, so they can begin circulating nomination papers for signature by voters within those districts on April 15, 2022. Wis. Stat. § 8.15(1). The statutory deadline for completed nomination papers to be submitted to the WEC is June 1, 2022. *Id.* The WEC must then certify which candidates have qualified for ballot access, followed by ballot design, testing, printing, and then distribution of absentee ballots,

which must begin no later than 47 days election day. *See* Wis. Stat. § 7.15. Thus, while the primary election occurs in August, new districts must be in place several months before that date for the WEC to comply with state law, and so that candidates may appear on the ballot for the election on that date.

LEGAL BACKGROUND RELATED TO VOTING RIGHTS ACT SECTION 2 CLAIM

45. Section 2 of the Voting Rights Act, 52 U.S.C. § 10301(a), prohibits any "standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . . ." A violation of Section 2 is established if it is shown that "the political processes leading to [a] nomination or election" in the jurisdiction "are not equally open to participation by [minority voters] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b).

46. The dilution of Black voting strength "may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority." *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986).

47. In *Gingles*, the Supreme Court identified three necessary preconditions ("the *Gingles* preconditions") for a claim of vote dilution under Section 2 of the Voting Rights Act: (1) the minority group must be "sufficiently large and geographically compact to constitute a majority in a single-member district"; (2) the minority group must be "politically cohesive"; and (3) the majority must vote "sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate." 478 U.S. at 50-51.

48. After the preconditions are established, the statute directs courts to assess whether, under the totality of the circumstances, members of the racial group have less opportunity than

other members of the electoral to participate in the political process and to elect representatives of their choice. 52 U.S.C. § 10301(b). The Court has directed that the Senate Report on the 1982 amendments to the Voting Rights Act be consulted for its non-exhaustive factors that the court should consider in determining if, in the totality of the circumstances in the jurisdiction, the operation of the electoral device being challenged results in a violation of Section 2.

49. The Senate Factors include: (1) the history of official voting-related discrimination in the state or political subdivision; (2) the extent of which voting in the elections of the state or political subdivision is racially polarized; (3) the extent to which the state or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group; (4) the exclusion of members of the minority group from candidate slating processes; (5) the extent to which the minority group bears the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; (6) the use of overt or subtle racial appeals in political campaigns; and (7) the extent to which members of the minority group have been elected to public office in the jurisdiction.

50. Nevertheless, "there is no requirement that any particular number of factors be proved, or that a majority of them point one way or the other." *United States v. Marengo Cty. Comm'n*, 731 F.2d 1546, 1566 n.33 (11th Cir. 1984) (quoting S. Rep. No. 97-417, at 29 (1982)); *see also id.* ("The statute explicitly calls for a 'totality-of-the-circumstances' approach and the Senate Report indicates that no particular factor is an indispensable element of a dilution claim.").

FACTUAL BACKGROUND RELATED TO SECTION 2 CLAIM

51. Wisconsin Act 43 created six Assembly districts that have a majority Black voting age population in the Milwaukee area. Those districts are heavily Black and pack the vast majority of Milwaukee's Black population in them, while at the same time leaving other Black voters,

including those in Milwaukee wards 33 and 34, and the Village of Brown Deer, cracked in districts featuring white bloc voting against minority preferred candidates.

52. District 10 has a BVAP of 59.4%, and has been represented by Democratic state representative David Bowen, a Black man, since 2015. Rep. Bowen has run unopposed for his seat in every election since he won the 2014 primary for the district.

53. District 11 has a BVAP of 65.5% and has been represented by Democratic state representative Dora Drake, a Black woman, since 2021. Rep. Drake defeated her Republican opponent by a margin of 84.6% to 15.2% in the 2020 general election. From 2017 to 2021, District 11 was represented by Democratic state representative Jason Fields, a Black man, who ran unopposed in both the 2016 and 2018 general elections. From 2013 to 2017, District 11 was represented by Democratic state representative Mandela Barnes, a Black man, who ran unopposed in the both the 2012 and 2014 general elections.

54. District 12 has a BVAP of 60.6% and has been represented by Democratic state representative LaKeshia Myers, a Black woman, since 2019. Rep. Myers defeated her Republican opponent by a margin of 81.7% to 18.1% in the 2020 general election, and ran unopposed in the 2018 general election. In the 2018 Democratic primary election, Rep. Myers defeated then-incumbent Democratic Rep. Fred Kessler, a white man, by a margin of 59.3% to 40.7%. Rep. Kessler ran unopposed in the 2012, 2014, and 2016 general elections.

55. District 16 has a BVAP of 55.6% and has been represented by Democratic state representative Kalan Haywood, a Black man, since 2019. In the 2020 general election, Rep. Haywood faced no major party opponent, defeating an independent candidate by a margin of 88.9% to 10.8%. Rep. Haywood was unopposed in the 2018 general election. Prior Democratic state representative Leon Young, a Black man, ran unopposed in the 2012, 2014, and 2016 general elections.

56. District 17 has a BVAP of 68.4% and has been represented by Democratic state representative Supreme Moore Omokunde, a Black man, since 2021. Rep. Omokunde defeated his Republican opponent by a margin of 85.9% to 13.9% in the 2020 general election. From 2017 to 2021, District 17 was represented by Democratic state representative David Crowley, a Black man, who ran unopposed in the 2018 and 2016 general elections. Prior Democratic state representative LaTonya Johnson, a Black woman, defeated her independent challengers by a margin of 87.5% to 12.5% in the 2014 general election and 84.7% to 14.9% in the 2012 general election.

57. District 18 has a BVAP of 60.7% and has been represented by Democratic state representative Evan Goyke, a white man, since 2013. Rep. Goyke ran unopposed in the 2014, 2016, 2018, and 2020 general elections. Rep. Goyke defeated his Libertarian Party challenger in the 2012 general election by a margin of 87.9% to 11.6%.

58. Wisconsin Act 43 "packs" Black voters in Districts 10, 11, 12, 16, 17, and 18, where they constitute an excessive majority, and "cracks" Black voters in other parts of the Milwaukee area, such as Milwaukee City wards 33 and 34, and the Village of Brown Deer, dispersing them in Districts 22 and 24—centered in heavily white suburban areas of Ozaukee, Washington, and Waukesha Counties—where white bloc voting prevents Black voters from having an equal opportunity to elect their candidates of choice.

59. District 22 has a white voting-age population ("WVAP") of 84.3% and a BVAP of 7.0%, and stretches from the Town of Erin and the Village of Richfield in Washington County, south to the Town of Lisbon, and the Villages of Menomonee Falls, Lannon, and Butler in Waukesha County, and into the City of Milwaukee, where it picks up two wards—Milwaukee City wards 33 and 34. The Waukesha County and Washington County portions of the district are heavily white and vote heavily Republican. The Milwaukee County portion of District 22 has a BVAP of

43.3% (35.7% in ward 33 and 52.8% in ward 34), and votes heavily Democratic. The Milwaukee County portion of District 22 borders District 12, one of the BVAP majority districts.

60. District 22 has been represented by Republican state representative Janel Brandtjen, a white woman, since 2015. Rep. Brandtjen ran unopposed in the 2020 and 2016 general elections. In the 2018 general election, Rep. Brandtjen defeated her Democratic opponent, Aaron Matteson, by a margin of 64.3% to 35.7%. Mr. Matteson carried the Milwaukee County portion of the district, however, by a margin of 70.9% to 29.1%. In the 2014 general election, Rep. Brandtjen defeated her Democratic opponent, Jessie Read, by a margin of 70.1% to 29.9%. Ms. Read carried the Milwaukee County portion of the district, however, by a margin of 65.6% to 35.4%. Prior Republican state representative Don Pridemore, a white man, was unopposed in the 2012 general election.

61. District 24 has a WVAP of 77.5% and a BVAP of 12.3%. It stretches from Washington County, where it includes the Town and Village of Germantown, into Waukesha County, where it includes part of the Village of Menomonee Falls, into Ozaukee County, where it includes portions of the City of Mequon, into Milwaukee County, where it includes the Village of Brown Deer, the Village of River Hills, and part of the City of Glendale. The Village of Brown Deer has a significantly larger BVAP than the rest of District 24, at 38.2%. The Village of Brown Deer borders BVAP majority Districts 11 and 12.

62. District 24 has been represented by Republican state representative Daniel Knodl, a white man, since 2009. In the 2020 general election, Rep. Knodl defeated his Democratic opponent Emily Siegrist, a Latina woman, by a margin of 51.4% to 48.5%. But Siegrist carried the Village of Brown Deer, in Milwaukee County, by a margin of 71.1% to 28.9%. In the 2018 general election, Rep. Knodl defeated his Democratic opponent Emily Siegrist by a margin of 53.6% to 46.3%. But Siegrist carried the Village of Brown Deer, in Milwaukee County, by a margin of 69.8% to 30.2%.

Rep. Knodl ran unopposed in the 2014 and 2016 general elections. In the 2012 general election, Rep. Knodl defeated his Democratic opponent, Shan Haqqi, by a margin of 62.4% to 37.5%. But Haqqi carried the Village of Brown Deer, in Milwaukee County, by a margin of 58.8% to 42.2%.

63. By unpacking Districts 10, 11, 12, 16, 17, and 18's Black population and combining it with Black populations in the Village of Brown Deer, other parts of Milwaukee County, and including additional population in other areas of Milwaukee and Ozaukee Counties, the Wisconsin Legislature could have drawn seven BVAP majority districts, as required by Section 2 of the Voting Rights Act. A demonstrative plan showing seven BVAP majority districts is attached as Exhibit **7**.

Racially Polarized Voting

64. Black voters in the Milwaukee area are politically cohesive and overwhelmingly support Democratic candidates.

65. The white majority, particularly in Waukesha, Ozaukee, and Washington Counties, and parts of Milwaukee County, overwhelmingly supports Republican candidates, and votes as a bloc usually to defeat Black voters' candidates of choice.

66. For example, as the election returns for Districts 22 and 24 reported above show, the Republican incumbents carried the heavily white portions of their districts outside Milwaukee County by large margins, while losing by large margins the portions of the City of Milwaukee and the Village of Brown Deer contained in those districts, which have large Black populations.

67. Election results in homogenous precincts illustrate the racially polarized voting. Across the 37 Milwaukee City wards where BVAP exceeds 90%, Tony Evers (D) received 96.4% and Scott Walker (R) received 2.3% in the 2018 gubernatorial election. By contrast, Washington County has a WVAP of 92.4% and Scott Walker (R) received 72.2% and Tony Evers (D) received 26.5%. Waukesha County has a WVAP of 88.1%, and Scott Walker (R) received 66.1% and Tony

Evers (D) received 32.5%. Ozaukee County has a WVAP of 90.8%, and Scott Walker (R) received 62.7% and Tony Evers (D) received 35.9%.

68. Democratic primary elections in Milwaukee County, as well as nonpartisan county- and city-wide elections, demonstrate racially polarized voting as well. As a result, white voters vote sufficiently as a bloc to usually defeat Black voters' candidates of choice (absent the drawing of Section 2 compliant districts).

69. For example, the 2018 Democratic primary for Governor featured one Black candidate, Mahlon Mitchell. Across the 37 Milwaukee City wards where BVAP exceeds 90%, Mitchell received 77.5% of the vote, while Tony Evers received 11.8% of the vote in those same wards. By contrast, in the Village of Whitefish Bay, which has a WVAP of 85.9%, Mitchell received 10.5% of the vote, Evers received 46.9%, and other white candidates split the remaining votes. In Shorewood, which has a WVAP of 81.7%, Mitchell received 12.8% of the vote, Evers received 41.9% of the vote, and white candidates split the remaining votes. In Fox Point, which has a WVAP of 85.3%, Mitchell received 11.5% of the vote, Evers received 42.6% of the vote, and white candidates split the remaining votes. Mitchell lost the primary election to Evers statewide, and while he received a plurality of votes in Milwaukee County (35.2%), white candidates combined to receive 64.8% of the vote.

70. Likewise, in the 2020 election for Milwaukee City Comptroller, Aycha Sawa, a white woman, defeated Jason Fields, a Black man, by a margin of 50.4% to 49.2%. But Fields carried the 37 city wards with a BVAP of 90% or greater by a margin of 78.5% to 21.5%. Sawa, on the other hand, carried the 21 city wards with a WVAP of 80% or greater by a margin of 68.7% to 31.3%.

71. The 2016 election for Milwaukee City Comptroller also demonstrated racially polarized voting. Martin Matson, a white man, prevailed over Johnny Thomas, a Black man, by a

margin of 51.3% to 47.8%. But Thomas carried the 37 city wards with a BVAP of 90% or greater by a margin of 66% to 33%, while Matson carried the 21 city wards with a WVAP of 80% or greater by a margin of 62.4% to 37.6%.

72. As another example, in the 2021 primary for State Superintendent of Education, seven candidates ran, and two white women—Jill Underly and Deborah Kerr—advanced to the general election. The primary included a Black woman, Shandowlyon Hendricks-Williams. In Milwaukee County, Underly received 31.4%, Kerr received 22.4%, and Hendricks-Williams received 20.6%. Across the 37 Milwaukee City wards with a BVAP of 90% or greater, however, Hendricks-Williams received 50.8%, Underly received 9.8%, and Kerr received 17.7%. In the 21 Milwaukee City wards with a WVAP of 80% or greater, Underly received 48.2%, Hendricks-Williams received 15.7%, Sheila Briggs (a white woman) received 14.3%, and Kerr received 12.4%. Meanwhile, in the Fox Point, which has a WVAP of 85.3%, Underly received 30.1%, Kerr received 28.8%, Sheila Briggs (a white woman) received 17.4%, and Hendricks-Williams received 13.1%. In Shorewood, which has a WVAP of 81.7%, Underly received 50.2%, Briggs received 17.4%, Hendricks-Williams received 13.9%, and Kerr received 12.2%. And in Whitefish Bay, which has a WVAP of 85.9%, Underly received 36.7%, Kerr received 21.6%, Briggs received 17.2%, and Hendricks-Williams received 17.2%.

73. These and other election results illustrate a consistent trend of racially polarized voting, with white voters voting as a bloc to usually defeat Black voters' candidates of choice absent the imposition of Section 2 remedies.

Totality of Circumstances

74. A review of the totality of circumstances reveals that Black voters have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. 52 U.S.C. § 10301(b).

75. Wisconsin has a history of discriminatory voting practices. For example, a three-judge district court for the Western District of Wisconsin ruled in 2012 that Act 43 violated Section 2 of the Voting Rights Act with respect to its treatment of Latino voters in the State Assembly map in Milwaukee County. *See Baldus v. Members of the Government Accountability Board*, 862 F. Supp. 2d 860, 863 (E.D. Wis. 2012).

76. Moreover, a 2021 report by the U.S. House Administration Committee's Subcommittee on Elections found that voter purge mailers were disproportionately sent to areas in Wisconsin home to large Black voting populations, and those mailers were twice as likely to be wrong for Black versus white voters.

77. As explained above, voting in Milwaukee County and the surrounding counties is racially polarized.

78. Milwaukee has recent experience with voting practices that enhance the opportunity for discrimination against Black voters. The vast majority of Wisconsin's Black voters reside in the City of Milwaukee—the State's largest city. In the April 2020 election, held at the height of the COVID-19 pandemic, the City of Milwaukee had just *five* in-person polling sites (compared to the usual 180 sites), while the City of Madison—a less-populous and predominantly white city—had 66 in-person polling sites.

79. A study by the Brennan Center found that these poll closures depressed turnout in the City of Milwaukee by 8.6 percentage points (a one-third drop), with a disproportionate effect on Black voters, whose turnout was depressed by 10.2 percentage points. News reports show that voters in the City of Milwaukee—and particularly Black voters—waited in lines for hours to vote in the April 2020 election. *See* https://www.brennancenter.org/our-work/research-reports/did-consolidating-polling-places-milwaukee-depress-turnout (last accessed September 7, 2021).

80. A study published in 2019 found that Wisconsin's voter ID law, passed by the Legislature and signed into law by Governor Walker in 2011, and generally viewed as one of the strictest such laws in the United States, reduced turnout in Milwaukee and Dane Counties in the 2016 presidential election by up to one percentage point, deterring or preventing thousands of voters from casting their ballot. The study further found that African-American voters are more likely to have been deterred or prevented from voting by Wisconsin's strict voter ID law than white voters. *See* Michael G. DeCrescenzo & Kenneth R. Mayer, *Voter Identification and Nonvoting in Wisconsin – Evidence from the 2016 Election*, 18 ELECTION L.J. 342 (2019).

81. Black voters in Milwaukee also bear the effects of discrimination in employment, education, and health, which hinders their ability to participate effectively in the political process.

82. A 2020 Zippia study ranked Wisconsin the worst state in the nation for racial disparities, reporting a 48% home ownership gap, a 37% income gap, and a 16.7% education gap between Black and white residents of Wisconsin.

83. A 2019 report by the Center on Wisconsin Strategy, a UW-Madison based think tank, found that Wisconsin had the fourth worst disparity in the nation between Black and white infant mortality, the fourth worse disparity for child poverty, the worst disparity for 8th grade math scores, the second worst disparity for out-of-school suspensions, the worst disparity for bachelor's degrees, the second worst disparity for incarceration, the worst disparity for unemployment, the worst disparity for employment, the third worst disparity for income, and the eighth worst disparity for home ownership.

84. For the 2018-19 school year, Wisconsin reported a 23-percentage-point gap between high school graduation rates for Black students (71%) and white students (94%)—the largest gap of any state in the nation, and second only to the District of Columbia. A 2020 study by the financial firm WalletHub ranked Wisconsin last in the nation for educational equality, citing

the graduation rate gap, the standardized test score gap, the college entrance exam score gap, and the college degree gap between white and minority populations.

85. The 2018 American Community Survey data showed that the unemployment rate among Black residents of Wisconsin was nearly three times that of white residents.

86. According to the Prison Policy Initiative, Black people account for 38% of all persons in Wisconsin jails and prisons, but just 6% of the State's population. Wisconsin's incarceration rate of Black people is one of the highest in the nation.

87. Wisconsin has severe health disparities between Black and white residents. Ozaukee County, which is predominantly white and has the second-highest median income in the states, ranked first for overall health of its residents in a 2019 report on health disparities by the Wisconsin Collaborative for Healthcare Quality. Milwaukee County, which has the vast majority of Wisconsin's Black population and has the highest rate of poverty in the state, ranked second to last among Wisconsin counties for the overall health of its residents. One measure showed that someone living in Milwaukee County was almost twice as likely to die before age 75 than someone living in Ozaukee County.

88. These disparities are reflected at the ballot box. The 2019 Center for Wisconsin Strategy study showed that while 74 percent of eligible white Wisconsin voters participated in the 2016 election, just 47% of Black voters did—the third largest gap in the country, behind only North and South Dakota.

89. Campaigns in the Milwaukee area and statewide have also featured overt and subtle racial appeals. For example, in the 2020 campaign for Assembly District 24, the Republican Party of Wisconsin sent voters a mailer attacking Democratic candidate Emily Siegrist, a Latina woman, for attending a Black Lives Matter protest over the police shooting of Jacob Blake in Kenosha. The mailer attacks Siegrist for taking her children to the protest, and describes in detail an alleged

assault committed by Blake. The mailer shows a doctored photo showing Siegrist holding up a made-up sign saying "Today I'm protesting to support abusers. Tomorrow? Who knows!!" It concluded by saying "Serial Protestor Emily Siegrist now supports men who abuse women."

90. In the 2020 election for President, Donald Trump aired an ad in Wisconsin accusing Joe Biden of "taking a knee"—a reference to peaceful protests of racial injustice started by football player Colin Kaepernick—in response to protests over the police shooting of Jacob Blake in Kenosha. The ad falsely accused Joe Biden of calling to defund the police. While showing the image of blond, white girl in pink, the narrator says that Trump will protect Wisconsin's families, not criminals.

91. On the day Deborah Kerr, a white woman, placed second in the February 2021 primary for State Superintendent of Schools—advancing to the general election—she tweeted that she had been called an n-word while in high school because "my lips were bigger than most." Kerr was widely seen as seeking votes from conservative Wisconsinites.

92. Although some Black candidates have had success in winning office in the Milwaukee area, most positions (outside of BVAP majority districts) are not held by Black people, and the number of Black officeholders has been far below number proportional to the Black population in recent and past history. For example, only two of out the eight current county government officials elected county-wide are Black. David Crowley, the current County Executive (elected in 2020), is the first Black person to ever elected to that office. The City of Milwaukee has only ever had one Black mayor: Marvin Pratt became acting mayor in 2004 upon the resignation of Mayor Norquist. He did not become mayor by election, however, and when he ran for a full term he was defeated in the 2004 general election by Tom Barrett, a white man. The Milwaukee region has no Black state representatives outside of the BVAP majority districts. The city of Milwaukee

currently has no Black alderpersons outside of BVAP majority districts. Milwaukee County has no Black supervisors outside of BVAP majority districts.

93. These and other factors demonstrate that the totality of circumstances show that Black voters have less opportunity than other voters to participate in the political process and elect their candidates of choice.

CLAIMS FOR RELIEF

COUNT I
Malapportionment in Violation of the Equal Protection Clause

94. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 93, above.

95. A state statute that effects district populations and boundaries that discriminate against citizens in highly populous legislative districts, by definition preferring voters in less populous legislative districts, violates the U.S. Constitution. The 2020 Census rendered the state's 2011 legislative districts unconstitutional, which harms or threatens to harm Plaintiffs' constitutional rights unless future elections under the current districts are enjoined.

96. Shifts in population and population growth have rendered the 33 Senate districts and 99 Assembly districts created by 2011 Wisconsin Act 43 and modified by *Baldus* no longer roughly equal in population, as required by the federal constitution. The population variations between and among the districts are substantial.

97. Organizational Plaintiffs' members and constituents who reside in the overpopulated 16th, 26th, and 27th Senate districts, among others, based on the existing district lines, are particularly underrepresented in comparison with the residents of other districts.

98. Organizational Plaintiffs' members and constituents who reside in the overpopulated 5th, 46th, 48th, 56th, 76th, 78th, 79th, and 80th Assembly districts, among others,

based on the existing district lines, are particularly underrepresented in comparison with the residents of other districts.

99. Multiple Individual Plaintiffs reside in State Senate and Assembly districts that are overpopulated, and therefore their votes are diluted compared to Wisconsin residents in districts that are now underpopulated.

100. If not otherwise enjoined or directed, the WEC will have no choice but to carry out its statutory responsibilities for administering the upcoming 2022 legislative elections based on the now unconstitutional Senate and Assembly districts adopted in 2011 Wisconsin Act 43.

101. The boundaries and the populations they define, unless modified, violate the principle of "one person, one vote" and do not guarantee that the vote and representation in the Wisconsin legislature for every citizen is equivalent to the vote and representation of every other citizen.

102. Plaintiffs and their members and constituents are also harmed because, until valid redistricting occurs, they cannot know in which Senate and Assembly district individuals will reside and vote. Therefore, they cannot effectively hold their representatives accountable for their conduct and policy positions advocated in office. Plaintiffs engage in accountability and voter-education efforts that are hindered by the lack of a valid redistricting plan because:

a. Their members and constituents who desire to influence the views of members of the Wisconsin Legislature or candidates for the Senate and Assembly are not able to communicate their concerns effectively because members of the legislature or legislative candidates may not be held accountable to those citizens as voters in the next election;

b. Potential candidates for the legislature will not be able to come forward, and be supported or opposed by Plaintiffs or their members, until potential candidates

know the borders of the districts in which they, as residents of the district, could seek office; and,

c. Plaintiffs' members and constituents who desire to communicate with and contribute financially to candidates for the legislature who may or will represent them, a right guaranteed by the First Amendment, are hindered from doing so until districts are correctly reapportioned;

103. Plaintiffs' members and constituents' rights are compromised because of the inability of candidates to campaign effectively and provide a meaningful election choice.

COUNT 2

Act 43 violates Section 2 of the Voting Rights Act, 52 U.S.C. § 10301

104. Plaintiffs incorporate by reference the allegations in paragraphs 1 through 103.

105. Section 2 of the Voting Rights Act prohibits the enforcement of any voting qualification or prerequisite to voting or any standard, practice, or procedure that results in the denial or abridgement of the right of any U.S. citizen to vote on account of race, color, or membership in a language minority group. 52 U.S.C. § 10301(a).

106. The current district boundaries of Assembly Districts 10, 11, 12, 16, 17, and 18 "pack" Black voters, while other Black voters, including those in Assembly Districts 22 and 24, are "cracked," resulting in dilution of the strength of the area's Black residents, in violation of Section 2 of the Voting Rights Act.

107. Under Section 2 of the Voting Rights Act, the Wisconsin Legislature was required to create a seventh majority BVAP district in which Black voters have the opportunity to elect their candidates of choice.

108. Black voters in the Milwaukee area are politically cohesive, and the elections in the area illustrate a pattern of racially polarized voting that allows the bloc of white voters usually to defeat Black voters' preferred candidates.

109. The totality of circumstances how that the current State Assembly plan has the effect of denying Black voters an equal opportunity to participate in the political process and to elect their candidates of choice, in violation of Section 2 of the Voting Rights Act, 52 U.S.C. § 10301.

110. Absent relief from this Court, Defendants will continue to engage in the denial of Plaintiffs' Section 2 rights.

RELIEF SOUGHT

WHEREFORE, Plaintiffs ask that the Court:

A. Declare that the current configuration of Wisconsin's 33 Senate districts and 99 Assembly districts, established by 2011 Wisconsin Act 43 and modified by *Baldus*, based on the 2010 Census, is unconstitutional and invalid and the maintenance of those districts for the August 2022 primary election and November 8, 2022 general election violates Plaintiffs' federal constitutional rights;

B. Declare that Act 43 violates Section 2 of the Voting Rights Act

C. Enjoin Defendants and the WEC's employees and agents, including the county clerks in each of Wisconsin's 72 counties and Wisconsin's 1,850 municipal clerks and election commissions, from administering, enforcing, preparing for, or in any way permitting the nomination or election of members of the Wisconsin Legislature from the unconstitutional Senate districts and unconstitutional Assembly districts that now exist in Wisconsin for the August 2022 primary election and November 2022 general election;

D. Establish a schedule that will enable the Court, in the absence of a constitutional state law, adopted by the Wisconsin Legislature and signed by the Governor in a timely fashion, to

adopt and implement new State Senate and Assembly district plans with districts substantially equal in population and that otherwise meet the requirements of the U.S. Constitution and statutes and the Wisconsin Constitution and statutes;

E. Order the adoption of a valid State Assembly plan that includes a seventh BVAP majority district;

F. Award Plaintiffs their costs, disbursements, and reasonable attorneys' fees incurred in bringing this action, pursuant to 42 U.S.C. § 1988 and 52 U.S.C. § 10310(e); and,

G. Grant such other relief as the Court deems proper.

Dated: September 7, 2021.

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U.S. Department of Justice

Guidance under Section 2 of the Voting Rights Act, 52 U.S.C. 10301, for redistricting and methods of electing government bodies

Published September 1, 2021

The Voting Rights Act of 1965 is a landmark civil rights law that protects our democratic process against racial discrimination. One of the key protections of the Voting Rights Act is Section 2, 52 U.S.C. § 10301, which is a permanent nationwide prohibition on voting practices that discriminate on the basis of race, color, or membership in a language minority group (as defined in Sections 4(f)(2) and 14(c)(3) of the Act, 52 U.S.C. §§ 10303(f)(2), 10310(c)(3)). Section 2 prohibits both voting practices that result in citizens being denied equal access to the political process on account of race, color, or membership in a language minority group, and voting practices adopted or maintained for the purpose of discriminating on those bases.

Section 2 covers any voting qualification or prerequisite to voting or standard, practice, or procedure related to voting. As relevant for purposes of this guidance, Section 2 covers methods of electing public officials. This coverage includes a variety of electoral practices, such as: 1) districting plans used in single-member district election systems or multi-member district election systems; 2) mixed election systems, e.g., any combination of single-member, multi-member and at-large seats, and any associated districting plans; and 3) at-large election systems.

Following the release of 2020 Census redistricting data, all fifty States and thousands of counties, parishes, municipalities, school districts, and special purpose districts will craft new districting plans. The Department of Justice will undertake its usual nationwide reviews of districting plans and methods of electing governmental bodies to evaluate compliance with Section 2. It is the Department's view that guidance identifying its general approach to Section 2 in this context would be useful. This guidance is not legally binding, nor is it intended to be comprehensive; rather, it is intended only to aid jurisdictions as they comply with Section 2.[1]

The discussion provides guidance concerning the following topics:

[1] In connection with the 2000 and 2010 Census redistricting cycles, the Department of Justice issued guidance concerning redistricting under Section 5 of the Voting Rights Act, 52 U.S.C. § 10304, which establishes preclearance requirements for voting changes in certain covered jurisdictions. 76 Fed. Reg. 7470 (February 9, 2011); 67 Fed. Reg. 5411 (January 18, 2001). In 1973, the Supreme Court held that redistricting is a "standard, practice, or procedure with respect to voting" within the meaning of Section 5. *Georgia v. United States*, 411 U.S. 526, 531-35 (1973). The Department's guidance focused on Section 5 because it was the provision under which the Department initially reviewed redistricting plans for covered jurisdictions. However, in 2013, the Supreme Court held that the coverage formula in Section 4(b) of the Act, 52 U.S.C. § 10303(b), which determines which jurisdictions are required to comply with Section 5, is now unconstitutional. *Shelby County v. Holder*, 570 U.S. 529, 557 (2013). Hence, as the Department has described previously, there are no jurisdictions currently covered by Section 5, and jurisdictions previously covered by the Section 4(b) formula do not need to seek preclearance for new voting changes, such as redistricting plans, absent enactment of a new coverage provision. At present, the only jurisdictions that need to seek preclearance for redistricting plans (or other changes in methods of election) are those covered for such changes by a current federal court order entered under Section 3(c) of the Act, 52 U.S.C. § 10302(c). The Department's prior guidance concerning redistricting under Section 5 is no longer operative. It may still be of assistance to jurisdictions in complying with Section 3.

Enforcement of Section 2 by the Department of Justice

Congress has charged the Attorney General with responsibility for enforcement of the Voting Rights Act on behalf of the United States. 52 U.S.C. § 10308(d). The Department of Justice has delegated that enforcement to the Assistant Attorney General for the Civil Rights Division. 28 C.F.R. § 0.50. The Division has in turn vested enforcement responsibility for the civil provisions of the Voting Rights Act and other federal voting rights laws in the Voting Section. Justice Manual § 8-2.271. The Division's decisions regarding initiation or settlement of litigation are committed to the Assistant Attorney General. 28 C.F.R. §§ 0.50, 0.160; Justice Manual § 8-2.270. The Division can also consider participating as amicus curiae in cases in any federal or state court that raise issues under Section 2 of the Voting Rights Act. *See, e.g.*, 28 U.S.C. § 517.

Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, prohibits discrimination in voting on the basis of race, color, or membership in a language minority group. This permanent, nationwide prohibition applies to any voting qualification or prerequisite to voting or standard, practice, or procedure, including districting plans and methods of election for governmental bodies. *Growe v. Emison*, 507 U.S. 25, 39-40 (1993).

As amended in 1982, Section 2 prohibits voting practices that result in citizens being denied equal access to the political process on account of race, color, or membership in a language minority group. It also continues to prohibit adopting or maintaining voting practices for the purpose of disadvantaging citizens on account of race, color, or membership in a language minority group. *Chisom v. Roemer*, 501 U.S. 380, 394 n.21 (1991). The essence of a discriminatory results claim alleging vote dilution is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by minority voters to elect their preferred representatives. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). Regardless of whether an electoral law or practice violates Section 2's results test, Section 2 also prohibits any electoral law, practice, or procedure enacted or maintained with the intent to disadvantage voters because of their race, color, or membership in a

language minority group. States and political subdivisions should take the Voting Rights Act's requirements into account when redrawing electoral maps, altering a method of election, or maintaining a method of election that could have the potential to discriminate.

The Department of Justice enforces Section 2 of the Voting Rights Act across the country. The Department's efforts to evaluate compliance with Section 2 and identify potential violations have a very broad scope. This work encompasses jurisdictions of all types that conduct elections for their governmental bodies. Thus, the Department reviews methods of election for U.S. House of Representatives seats, state legislatures, county commissions, city councils, school boards, judicial bodies, special governmental units with elected boards, and more. Likewise, the Department evaluates all kinds of methods of election, including at-large election systems, districting plans involving multi-member districts, districting plans using single-member districts, and mixed methods of election. The Department evaluates districting plans and methods of election for compliance with Section 2 regardless of whether those plans or methods were adopted by legislative bodies, local boards, redistricting commissions, state courts, or other governmental bodies. The Department's analysis of compliance with Section 2 is intensely localized insofar as it looks to the particular facts in each jurisdiction and that jurisdiction's method of election. Historically, the great majority of Section 2 cases brought by the Department have addressed concerns about racial discrimination in voting at the local level. The Department will monitor for compliance with Section 2 around the country in this decade, as it has in prior decades. [2]

When the Assistant Attorney General for the Civil Rights Division authorizes a Section 2 enforcement action, the Division seeks to resolve matters amicably and avoid protracted litigation where it is feasible to do so. [3]

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[2] Following release of the decennial census data, this work extends throughout each decade. The fact that the Department has not challenged a particular jurisdiction's method of election over any given time period does not constitute agreement that it complies with Section 2.

[3] Some examples of recent Section 2 enforcement matters involving methods of election for governmental bodies that were settled by consent decree include *United States v. City of West Monroe,* No. 3:21-cv-00988 (W.D. La. Apr. 14, 2021), ECF No. 4 (board of aldermen); *United States v. Chamberlain School District*, No. 4:20-cv-04084 (D.S.D. June 18, 2020), ECF No. 4 (school board); and *United States v. City of Eastpointe*, No. 2:17-cv-10079 (E.D. Mich. June 25, 2019), ECF No. 64 (city council).

The Department's Section 2 cases challenging methods of election for governmental bodies include actions against a variety of jurisdictions, including states, counties, municipalities, school districts, and special districts. [4]

The Department's cases under Section 2 have also challenged a variety of different methods of election, including at-large election systems, as well as district-based election systems and mixed election systems involving a combination of at-large elections and district elections. [5]

In the course of investigating and bringing enforcement actions under Section 2 of the Voting Rights Act, the Department applies well-established case law, which is briefly described below.

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4 *See, e.g., United States v. Texas*, No. 5:11-cv-00360 (W.D. Tex.), ECF No. 907 (state legislative and congressional districts); *United States v. Charleston County*, No. 2:01-cv-00155 (D.S.C.) (county commission); *United States v. Marion County*, No. 4:99-cv-00151 (M.D. Ga.) (county commission); *United States v. Morgan City*, No. 6:00-cv-01541 (W.D. La.) (city council); *United States v. City of Lawrence*, No. 1:98-cv-12256 (D. Mass.) (city council and school board); *United States v. Village of Port Chester*, No. 1:06-cv-15173 (S.D.N.Y.) (board of trustees); *United States v. Georgetown County School District*, No. 2:08-cv-00889 (D.S.C.) (school board); and *United States v. Upper San Gabriel Valley Municipal Water District*, No. 2:00-cv-07903 (C.D. Cal.) (board of directors for special purpose district).

5 *See, e.g., United States v. Blaine County*, No. 4:99-cv-00122 (D. Mont.) (at-large elections for county commission); *United States v. School Board of Osceola County*, No. 6:08-cv-00582 (M.D. Fla.) (single-member district plan for school board); *United States v. Crockett County*, No. 1:01-01129 (W.D. Tenn.) (multi-member district system for county commission); *United States v. South Dakota*, No. 3:00-cv-03015 (D.S.D.) (multi-member district in state legislative districting plan); *United States v. City of Euclid*, No. 1:06-cv-01652 (N.D. Ohio) (mixed at-large and ward method of election for city council).

Section 2 Analysis: Discriminatory Result

Section 2 of the Voting Rights Act prohibits, among other things, any electoral practice or procedure that minimizes or cancels out the voting strength of members of racial or language minority groups in the voting population. This phenomenon is known as vote dilution.

In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court set out the framework for challenges to such practices or procedures. In *Brnovich v. Democratic National Committee*, 141 S. Ct. 2321, 2337 (2021), the Supreme Court described *Gingles* as "our seminal § 2 vote-dilution case" and recognized that "[o]ur many subsequent vote-dilution cases have largely followed the path that *Gingles* charted."

Analysis begins by considering whether three *Gingles* preconditions exist. First, the minority group must be sufficiently large and geographically compact to constitute a majority of the voting-age population in a single-member district. Second, the minority group must be politically cohesive. And third, the majority must vote sufficiently as a bloc to enable it — in the absence of special circumstances, such as the minority candidate running unopposed — usually to defeat the minority group's preferred candidate.

If all three *Gingles* preconditions are present, consideration proceeds to an analysis of the totality of the circumstances in a jurisdiction. This analysis incorporates factors enumerated in the Senate Report that accompanied the 1982 Voting Rights Act Amendments, S. Rep. No. 97-417, at 28-29 (1982), which are generally known as the "Senate Factors." These factors are themselves drawn from earlier case law. *Id.* at 28 nn. 112-113. The factors include:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivision is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals; and
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

The Senate Report also identified two additional factors that have probative value in some cases:

- whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group; and
- whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.

The Senate Factors are neither comprehensive nor exclusive, and other factors may also be relevant and may be considered. For example, the Supreme Court held in *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994), that proportionality of minority voters' representation in a single-member district plan is also a relevant fact in the totality of circumstances. A finding of vote dilution in violation of Section 2 does not require that a particular number or a majority of these factors is present in a jurisdiction.

Gingles describes a review of the totality of the circumstances that requires a "searching practical evaluation of the past and present reality" of a jurisdiction's electoral system that is "intensely local," "fact-intensive," and "functional" in nature. 478 U.S. at 45-46, 62-63, 79. Liability depends on the unique factual circumstances of each case and the totality of the circumstances in the particular jurisdiction in question. Thus, for example, the Supreme Court found that Texas's use of multimember state legislative districts impermissibly diluted minority voting strength, see *White v. Regester*, 412 U.S. 755, 765-70 (1973), while concluding that Indiana's use of multimember state legislative districts did not, *Whitcomb v. Chavis*, 403 U.S. 124, 148-55 (1971).

As the cases recognize, Section 2 vote-dilution violations can take several different forms. At-large election systems or multimember districts can submerge minority voters within a larger majority electorate that can effectively control all available positions. *Gingles*, 478 U.S. at 48-49. Districting plans may dilute minority voting strength by cracking or "fragmenting the minority voters among several districts where a bloc-voting majority can routinely outvote them" or by "packing them into one or a small number of districts to minimize their influence." *De Grandy*, 512 U.S. at 1007; *see also Gingles*, 478 U.S. at 46 n.11. Some plans may do both.

Section 2 Analysis: Discriminatory Intent

Section 2 of the Voting Rights Act also prohibits use of a redistricting plan or method of election adopted or maintained for a discriminatory purpose, which is the same prohibition imposed by the Fourteenth and Fifteenth Amendments.

The Department will examine the circumstances surrounding adoption or continued use of a redistricting plan or method of election to determine whether there is direct or circumstantial evidence of any discriminatory purpose of denying or abridging the right to vote on account of race, color, or membership in a language minority group. *See, e.g., White*, 412 U.S. at 765-70; *Rogers v. Lodge*, 458 U.S. 613, 623-27 (1982).

Direct evidence detailing a discriminatory purpose may be gleaned from the public statements of members of the adopting body or others who may have played a significant role in the process. *See, e.g., Busbee v. Smith*, 549 F. Supp. 494, 508 (D.D.C. 1982) (three-judge court), *aff'd*, 459 U.S. 1166 (1983). However, "smoking gun" or other stark evidence of intent is rare and is not required to establish a discriminatory purpose. The Department will also evaluate whether circumstantial evidence establishes a discriminatory intent. For example, in *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 440 (2006), the Supreme Court suggested that reducing Hispanic/Latino voting strength in a district because a growing Hispanic/Latino community appeared poised to vote out an incumbent "bears the mark of intentional discrimination."

When assessing evidence of a possible discriminatory purpose, the Department of Justice is guided by the Supreme Court's decision in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977); *see also Brnovich*, 141 S. Ct. at 2349 (citing the "familiar approach outlined in *Arlington Heights*").

Arlington Heights outlines a non-exhaustive list of factors relevant to this "sensitive inquiry": (1) The impact of the decision; (2) the historical background of the decision, particularly if it reveals a series of

decisions undertaken with discriminatory intent; (3) the sequence of events leading up to the decision; (4) whether the challenged decision departs, either procedurally or substantively, from the normal practice; and (5) contemporaneous statements and viewpoints held by the decisionmakers. 429 U.S. at 266-68. The Senate Factors (described above) may also provide evidence of discriminatory intent. *Rogers*, 458 U.S. at 620-21.

Discriminatory intent implies that the decisionmaker selected or reaffirmed a particular course of action at least in part because of, and not merely in spite of, its adverse effects upon an identifiable minority group. The Department of Justice will draw the normal inferences from the foreseeability of a discriminatory impact, and Section 2 does not require proof that one or more government actors are "racist" or bear racial animus. A concurring opinion in *Garza v. County of Los Angeles*, 918 F.2d 763 (9th Cir. 1990), provides a useful example of intentional discrimination without racial animus.

> Assume you are an anglo homeowner who lives in an all-white neighborhood. Suppose, also, that you harbor no ill feelings toward minorities. Suppose further, however, that some of your neighbors persuade you that having an integrated neighborhood would lower property values and that you stand to lose a lot of money on your home. On the basis of that belief, you join a pact not to sell your house to minorities. Have you engaged in intentional racial and ethnic discrimination? Of course you have. Your personal feelings toward minorities don't matter; what matters is that you intentionally took actions calculated to keep them out of your neighborhood.

Id. at 778 n.1 (Kozinski, J., concurring in part and dissenting in part); *see also N.C. State Conf. of the NAACP v. McCrory*, 831 F.3d 204, 222 (4th Cir. 2016). Discriminatory intent need only be one motivating factor behind the enactment or enforcement to violate Section 2. It need not be the only motivating factor. So, for example, if a jurisdiction purposefully reduces minority voting strength in order to protect an incumbent elected official, the fact that incumbent protection was a motivating factor — or even the primary motivating factor — does not mean a plan is lawful. *See, e.g., LULAC*, 548 U.S. at 440; *Garza*, 918 F.2d at 771.

Other Federal Law Governing Redistricting

Section 2 of the Voting Rights Act is the Department of Justice's principal tool to protect voters from racial discrimination regarding redistricting and methods of election for governmental bodies. The U.S. Constitution imposes additional requirements on redistricting plans beyond those in Section 2 of the Act. The Fourteenth Amendment prohibits substantial disparities or malapportionment in total population between electoral districts in the same districting plan (colloquially known as the "one-person, one-vote" principle). *Baker v. Carr*, 369 U.S. 186 (1962). The Fourteenth Amendment also prohibits certain forms of racial gerrymandering in drawing electoral districts. *Shaw v. Reno*, 509 U.S. 630 (1993).

The Department does not enforce these particular constitutional requirements directly through Section 2. However, the Department will consider these background constitutional requirements when enforcing Section 2. For example, malapportioned districts may facilitate vote dilution, and district boundaries drawn predominantly on the basis of race may provide evidence of discriminatory intent. In addition, the Department will consider whether any efforts to change the apportionment base for a districting plan to a measure other than total population (*e.g.*, to equalize eligible voter population between districts) may violate Section 2 if the resulting districting plan, "designedly or otherwise," will "operate to minimize or cancel out" the voting strength of racial minority groups. *Burns v. Richardson*, 384 U.S. 73, 88 (1966) (*quoting Fortson v. Dorsey*, 379 U.S. 433, 439 (1965)). *See* U.S. Amicus Brief at 32-35, filed in *Evenwel v. Abbott*, No. 14-940 (U.S. Sept. 25, 2015).

Finally, in any lawsuit in which the Department participates, it will propose remedies that are consistent with the requirements of the U.S. Constitution. [6]

[6] Beyond the requirements of Section 2 of the VRA, and the U.S. Constitution, districting plans and methods of election may be subject to other federal or state requirements as well. *See, e.g.*, 2 U.S.C. § 2c (requiring the use of single-member districts to elect members of the U.S. House of Representatives).

Use of 2020 Census Data

Consistent with past practice, the Department of Justice will evaluate districting plans and methods of election using the 2020 Census redistricting data set issued by the Census Bureau pursuant to Public Law 94-171, 13 U.S.C. § 141(c). The Census Bureau released the 2020 Census redistricting data to the States and the public on August 12, 2021. [7]

As in 2010 and 2000, the 2020 Census Public Law 94-171 data will include counts of persons who have identified themselves as members of more than one racial category. This reflects the October 30, 1997, decision by the Office of Management and Budget (OMB) to incorporate multiple-race reporting into the Federal statistical system. 62 Fed. Reg. 58,782. Likewise, on March 9, 2000, OMB issued Bulletin No. 00–02 addressing "Guidance on Aggregation and Allocation of Data on Race for Use in Civil Rights Enforcement." Part II of that Bulletin describes how such census responses will be allocated by Federal executive agencies for use in civil rights monitoring and enforcement.

The Department of Justice will follow both aggregation methods defined in Part II of the Bulletin. The Department's initial review will be based upon allocating any response that includes white and one of the five other race categories identified in the response. Thus, the total numbers for "Black/African American," "Asian," "American Indian/Alaska Native," "Native Hawaiian or Other Pacific Islander," and "Some other race" reflect the total of the single-race responses and the multiple responses in which an individual selected a minority race and white race.

The Department will then move to the second step in its application of the census data by reviewing the other multiple-race category, which is comprised of all multiple-race responses consisting of more than one minority race. Where there are significant numbers of such responses, the Department will, as

[7] In circumstances where states aim, pursuant to state law, to reallocate certain group quarters populations (such as individuals confined in correctional facilities), the Department will review these data as well.

required by both the OMB guidance and judicial opinions, allocate these responses on an iterative basis to each of the component single-race categories for analysis. *Georgia v. Ashcroft,* 539 U.S. 461, 473, n.1 (2003).

As in the past, the Department will analyze Hispanic/Latino persons as a separate minority group for purposes of enforcement of the Voting Rights Act, pursuant to Sections 2, 4(f)(2), and 14(c)(3) of the Act. 52 U.S.C. §§ 10301, 10303(f)(2), 10310(c)(3). The Census asks respondents to answer both the Hispanic origin question and the race question. A Hispanic/Latino tabulation of Census data includes those who respond affirmatively to the Hispanic origin question, irrespective of their response to the race question, e.g., white, a minority race, "some other race" or multiple races. If there are significant numbers of responses in a jurisdiction that self-identify as Hispanic/Latino and one or more minority races (for example, Hispanics/Latinos who list their race as Black/African American), the Department will conduct its initial analysis by allocating those responses to the Hispanic/Latino category and then repeat its analysis by allocating those responses to the relevant minority race category.

Complaints and Comments

Members of the public are encouraged to send any complaints or comments regarding possible violations of the federal voting rights laws to the Voting Section. This can include complaints or comments about methods of election or districting plans that may violate Section 2 of the Voting Rights Act. This can also include requests for the Department to consider participation in cases as amicus curiae on issues under the federal voting rights laws. Finally, this can include comments regarding this guidance document. Complaints and comments can be submitted online through the Civil Rights Division's website portal – civilrights.justice.gov. The Voting Section can also be reached through its toll-free number: (800) 253-3931.