

## REDISTRICTING AND THE WISCONSIN SUPREME COURT'S APPROACH

### Prepared by NAACP General Counsel and Lawyer's Committee

Wisconsin is no stranger to gerrymandering. Over the last several decades, this state has seen its maps routinely drawn to protect political interests, rather than to ensure fair representation for its voters. State officials have been in and out of court to defend these maps but have routinely lost and been forced to redraw multiple districts.<sup>1</sup> Today, with lawsuits currently underway in both federal and state court, Wisconsin again finds itself forced to defend its redistricting plans in court. Meanwhile, the real purpose of redistricting, providing representation for all of Wisconsin's residents, particularly Black and Brown Wisconsinites who are the most marginalized in our state, is left by the wayside.

The Wisconsin State Conference of the NAACP ("Wisconsin NAACP"), as one of Wisconsin's oldest civil rights organizations, is dedicated to advancing racial equality in our state. Fundamental to this work is fighting for a democracy that is just and fairly serves all Wisconsinites. Far too frequently Wisconsin has failed in this endeavor, leaving the voting strength of Black communities diluted through "packing", the over-concentrating of Black voters in just a few districts, or "cracking", the splitting of Black voters across several district. These unlawful practices weaken Wisconsin's democracy by skewing democratic power along racial lines. They also perpetuate historical exclusion of Black voters by preventing them from having the same opportunity to elect representatives of their choice as non-minority voters.

During the 2020 redistricting cycle, the Wisconsin NAACP's goal has been to ensure that this mapmaking process not only complies with the law, namely Section 2 of the Voting Rights Act ("VRA"), but also that the maps that are ultimately drawn properly provide for fair representation for Black voters. To this end we have spoken publicly, issued statements and submitted testimony seeking to highlight the need to ensure adequate representation for Black communities. Today, in the wake of the Wisconsin Supreme Court's recent decision to follow a "least change" approach,<sup>2</sup> we are obliged to, once again, speak up to demonstrate the suspect nature of the ongoing process in Wisconsin and its harmful effects on Black Wisconsinites.

Section 2 of the VRA establishes, on the part of redistricting bodies, an affirmative obligation to ensure that voters of color are given an equal opportunity "to participate in the political process and elect candidates of their choice . . ."<sup>3</sup> While mapmakers must not draw districts where race unconstitutionally predominates,<sup>4</sup> this is a decidedly race-conscious endeavor.<sup>5</sup> Map drawers must

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<sup>1</sup> See e.g., *Prosser v. Elections Bd.*, 793 F. Supp. 859 (W.D. Wis. 1992); *Baumgart v. Wendelberger*, 2002 WL 34127471 (E.D. Wis. 2002); and *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

<sup>2</sup> *Johnson v. Wisconsin Elections Commission*, No. 2021AP1450-0A, 40 (Nov. 30, 2021).

<sup>3</sup> *Thornburg v. Gingles*, 478 U.S. 30, 34 (1986).

<sup>4</sup> See *Bush v. Vera*, 517 U.S. 952, 958-59 (1996) (holding that "[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race" but when "other legitimate districting principles were 'subordinated to race'), quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

<sup>5</sup> See *Shaw v. Reno*, 509 U.S. 630, 646 (1993) (stating that "the legislature always is *aware* of race when it draws district lines" which is "race consciousness [but] does not lead inevitably to impermissible race discrimination").

ensure that Black communities and other communities of color are drawn into districts that do not pack or crack our populations and dilute our voting strength.<sup>6</sup>

Striking the right balance can be challenging, but the Supreme Court has laid out clearly when Section 2 requires the creation of Black majority districts.<sup>7</sup> In *Thornburg v. Gingles*, the Supreme Court set out three “preconditions” for where there is likely to be a violation of Section 2 that mandates the drawing of a Black majority district. Voters of color must first “demonstrate that [they are] sufficiently large and geographically compact to constitute a majority in a single-member district.”<sup>8</sup> Second, voters of color must be a “politically cohesive” community which, third, “usually [has their] . . . preferred candidate” defeated because “the white majority votes sufficiently as a bloc. . . .”<sup>9</sup> Preconditions two and three are typically referred to as racial bloc or racially polarized voting.

If a cohesive Black community exists and there is racially polarized voting, the Court then must look at a series of factors to determine if, under the totality of the circumstances, a redistricting plan is racially discriminatory. These “Senate Factors” cover a range of metrics of discrimination from a state’s history of discrimination in voting and racial appeals in political campaigns to the extent to which Black voters continue to face socioeconomic and educational discrimination, which impacts their access to voting.<sup>10</sup> At the heart of this determination is the extent to which Black voters are able to equally participate in a state’s democracy and, where they constitute a sufficiently large voting bloc, elect candidates of their choice.

Current conditions in Wisconsin establish the requirements described by the United States Supreme Court in *Gingles*.] Our state continues to be deeply unequal and racially segregated. Nearly 70% of Wisconsin’s Black population lives in Milwaukee and nearly 90% of Black Wisconsinites live in just six counties.<sup>11</sup> Additionally, our state currently has the highest rate of Black imprisonment in the country. Black individuals are incarcerated at twice the national rate<sup>12</sup> and nearly half of Wisconsin’s prison population is Black, compared with just six percent of the

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<sup>6</sup> See *Abbott v. Perez*, 138 S. Ct. 2305, 2314-15 (2018) (indicating that “federal law impose[s] complex and delicately balanced requirements regarding the consideration of race” such that race is considered to ensure proper representation for communities of color but not to effect the “minimizing or cancelling out [of] the voting potential of racial or ethnic minorities”), quoting *Mobile v. Bolden*, 446 U.S. 55, 66-67 (1980).

<sup>7</sup> *Gingles* sets out three “preconditions” for where there is likely to be a violation of Section 2. Voters of color must first “demonstrate that [they are] sufficiently large and geographically compact to constitute a majority in a single-member district.” *Id.* at 50. Second, voters of color must be a “politically cohesive” community which, third, “usually [has their] . . . preferred candidate” defeated because “the white majority votes sufficiently as a bloc . . . .” *Id.* at 51. Preconditions two and three are typically referred to as racial bloc or racially polarized voting.

<sup>8</sup> *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986).

<sup>9</sup> *Id.*

<sup>10</sup> Additional factors include “the extent to which members of the minority group have been elected to public office in the jurisdiction . . . 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.” *Id.* at 36-37 (quoting S.Rep., at 28-29, U.S. Code Cong. & Admin. News 1982, pp. 206-207).

able to file for candidacy, whether political campaigns are characterized by racial appeals, whether *Id.* at 36-37 (

<sup>11</sup> <https://www.dhs.wisconsin.gov/minority-health/population/afriamer-pop.htm>.

<sup>12</sup> Elliot Hughes, *New report shows Wisconsin has the highest rate of Black imprisonment in the U.S.*, MILWAUKEE JOURNAL SENTINEL (Oct. 19, 2021) <https://www.jsonline.com/story/news/2021/10/18/1-36-black-adults-wisconsin-prison-highest-nation/8454959002/>.

state population.<sup>13</sup> In part because of this massive disparity in incarceration, Wisconsin has the one of highest disparities between its Black and white populations along important vectors of equality such as median income, labor-force participation, and educational attainment.<sup>14</sup>

This deep inequality in our state seeps into our democracy, limiting the ability of Black communities to equally participate in our elections. As Wisconsin moves forward with redistricting, it is essential that Black voting strength is preserved if Black voters are to be able to equally participate in Wisconsin's democracy and elect candidates that will adequately represent our communities. However, contradicting these fundamental democratic principles, the Wisconsin Supreme Court has made clear that it will adopt a "least change" approach in redrawing Wisconsin's map.<sup>15</sup> While the Supreme Court claims it will make the changes "necessary to resolve constitutional or statutory deficiencies,"<sup>16</sup> the Wisconsin NAACP is deeply skeptical that the Court will do more than rectify the existing malapportionment. The Court's instance that it will adopt "neutral standards"<sup>17</sup> that will not "do anything more than secur[e] legal rights"<sup>18</sup> indicate an unwillingness to make the changes necessary to rectify any ongoing dilution of Black voting strength in Wisconsin.

The Wisconsin Supreme Court has justified its "least change" approach because it argues that any further action on its part would inject the Court into an inherently partisan process. But that reasoning ignores the state's history of hyper-partisan gerrymandering and racial exclusion that generated the existing maps, allowing less than half of Wisconsin's voters to determine those elected to about two-thirds of the seats in the state's three redistricting plans. Deliberately avoiding this reality under the guise of deference to the political forces that drew those discriminatory plans is not inaction. Rather, it is an explicit endorsement of those undemocratic principles that is express action by the Court to perpetuate discrimination against the majority of Wisconsin's electorate.

Moreover, keeping Wisconsin's maps largely as they currently stand will only reinforce the discriminatory nature of Wisconsin's politics and further marginalize Black communities. Black voting strength in Wisconsin is tenuous. Just this year Black voters were finally able to elect Black representatives to the Wisconsin Legislature roughly on par with their percentage of the population.<sup>19</sup> Yet, many of these legislators are new and the currently elected 10 Black state representatives and senators account for nearly one-third of the only 35 Black legislators who have been elected to the Wisconsin Legislature since 1848.<sup>20</sup>

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<sup>13</sup> *Id.*

<sup>14</sup> Adam McCann, *States with the Most Racial Progress*, WALLETHUB (Jan. 12, 2021) <https://wallethub.com/edu/states-with-the-most-and-least-racial-progress/18428>.

<sup>15</sup> *Johnson v. Wisconsin Elections Commission*, No. 2021AP1450-0A, 40 (Nov. 30, 2021).

<sup>16</sup> *Id.*

<sup>17</sup> *Id.* at 44.

<sup>18</sup> *Id.* at 43

<sup>19</sup> Briana Reilly, *New session rings historical level of Black representation to Wisconsin Legislature*, THE CAPITAL TIMES (Jan. 21, 2021) [https://madison.com/ct/news/local/govt-and-politics/new-session-brings-historic-level-of-black-representation-to-wisconsin-legislature/article\\_c7181e87-ae5-5a79-9e16-5d323482230a.html](https://madison.com/ct/news/local/govt-and-politics/new-session-brings-historic-level-of-black-representation-to-wisconsin-legislature/article_c7181e87-ae5-5a79-9e16-5d323482230a.html).

<sup>20</sup> *Id.*

Maintaining the core of existing maps continues the pattern of diluting Black voting strength. Districts in and around Milwaukee have high Black Voting Age Populations (“BVAP”).<sup>21</sup> This is in part due to the extensive racial segregation in the city, but these districts could have been drawn to better ensure that Black voting strength is not diluted. Several districts, under pre-2020 maps, also appear to crack Black voters by attaching parts of Black neighborhoods in Milwaukee to larger population blocs in the surrounding white suburbs.<sup>22</sup> This dilutes Black electoral strength and gives disproportionate electoral power to white communities.

However, there is still time to ensure Black voters have fair and equal electoral opportunity. The recently released maps by Governor Evers indicate that, if the Wisconsin Supreme Court is willing to do the work, a “least-change” approach need not necessarily continue to marginalize Black voters. The Governor’s maps move a smaller percentage of the population than those that were submitted by the Legislature and vetoed last month.<sup>23</sup> Moreover, the Governor’s maps do so while building another Black-majority district, as likely required by the VRA, ensuring that Black voters will continue to have equal opportunity to elect candidates of their choice in Wisconsin.

The Wisconsin NAACP needs more time to fully analyze these maps. But they seem like an important step in the right direction to provide greater opportunity for Black voters to participate than under the discriminatory, pre-2020 districting plans. Black voters deserve to be equal participants in Wisconsin’s democracy. We encourage the Wisconsin Supreme Court to recognize this and ensure that “least-change” does not mean further political marginalization of Black Wisconsinites in violation of federal law.

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<sup>21</sup> Malia Jones, *Packing, Cracking And the Art Of Gerrymandering Around Milwaukee*, WISCONTEXT (June 8, 2018) <https://www.wiscontext.org/packing-cracking-and-art-gerrymandering-around-milwaukee>.

<sup>22</sup> *Id.*

<sup>23</sup> Ruth Conniff, *Gov. Evers submits ‘least changes’ map to state Supreme Court*, WISCONSIN EXAMINER (Dec. 15, 2021) <https://wisconsinexaminer.com/brief/gov-evers-submits-least-changes-map-to-state-supreme-court/>.