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DATE: March 24, 2022

RE: Redistricting Legal Requirements ***UPDATE***

Updating our March 21, 2022 memorandum of law, and in particular sections II (B) and (C) (set forth below for convenience), the United States Supreme Court issued a *per curiam* opinion yesterday pertaining to redistricting and the application of the Section 2 of the federal Voting Rights Act. *Wisconsin Legislature, et al. v. Wisconsin Elections Commission, et al.*, 595 U.S. ___ (2022).

The Court confirmed its prior rulings that the intentional use of race as the predominant redistricting criterion in the creation of electoral districts is subject to strict scrutiny. The Court again assumed that compliance with Section 2 is a compelling interest that can justify the predominant use of race in the design of electoral districts: "Thus, our precedents hold that a State can satisfy strict scrutiny if it proves that its race-based sorting of voters is narrowly tailored to comply with the VRA." (Slip Op. at 3.)

In the case, the legislative redistricting process in Wisconsin reached an impasse and the parties turned to the Wisconsin Supreme Court. The court invited the parties and intervenors to propose maps that complied with the State Constitution, the Federal Constitution, and the Voting Rights Act of 1965 (VRA), 52 U. S. C. §10301 *et seq*., and that otherwise minimized changes from the current maps. Subsequently, the

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court issued a decision selecting the Assembly and Senate maps that the Governor had proposed.

The Governor's map intentionally created seven majority-black districts—one more than the current map, allegedly to comply with the VRA. The court recognized that the Governor's intentional creation of a seventh majority Black district triggered strict scrutiny. The Governor justified the district on the basis that the existing six majority Black districts could be reconfigured into seven, which was proportional to the relevant population in the area. No district-specific evidence concerning the second and third Gingles preconditions was analyzed. *Thornburg v. Gingles*, 478 U. S. 30 (1986). The Wisconsin Supreme Court stated: "[W]e cannot say for certain on this record that seven majority-Black assembly districts are required by the VRA" (Slip Op. at 5) but selected the Governor's map because it scored best on the "least change" criteria. Slip Op. at 4, Sotomayor, J., dissenting.

The United States Supreme Court reversed. The Court reviewed and clarified its holding in *Cooper* v. *Harris*, 581 U. S. ___ (2017): "We said in *Cooper* that when a State invokes §2 to justify race-based districting, 'it must show (to meet the "narrow tailoring" requirement) that it had 'a strong basis in evidence' for concluding that the statute required its action. 581 U. S., at ___ (slip op., at 3)." Slip Op. at 4. The Court held that neither the Governor nor the Wisconsin Supreme Court satisfied that requirement. Slip Op. at 6. The per curiam decision concludes: "The question that our VRA precedents ask and the court failed to answer is whether a race-neutral alternative that did not add a seventh majority-black district would deny black voters equal political opportunity." Slip Op. at 7.

The decision has no application to redistricting in which traditional criteria predominate, including the consideration of compact communities of interest as defined, resulting the concentration of minority voters in a contiguous, compact district.

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Excerpts from March 21, 2022 Memorandum of Law

II. DISCUSSION OF REDISTRICTING CRITERIA

B. Federal Voting Rights Act.

Section 2 of the Voting Rights Act, 52 U.S.C. § 10301, prohibits electoral systems, including redistrictings, that dilute minority voting rights by denying minorities an equal opportunity to nominate and elect candidates of their choice.[1]

In practical terms, this means that if there is a population of minority voting-aged citizens in the City that is in a 1) geographically compact area that could elect a representative if concentrated in a district, and 2) the minority population has been politically cohesive, but

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[1] Section 2 of the Voting Rights Act provides:

> (a) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b) of this section.
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> (b) A violation of subsection (a) of this section is established, if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivisions are not equally open to participation by members of a class of citizens protected by subsection (a) of this section 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. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided,* That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

3) bloc voting by the majority has prevented minority voters from electing candidates of their choice, the City may be exposed to liability under section 2's "totality of the circumstances test" if it does not create a district in which the minority has a fair chance to elect a candidate of its choice. *Thornburg v. Gingles*, *supra*, 478 U.S. at 50-51.

In 2009, the U.S. Supreme Court clarified that a government entity drawing electoral districts has *no obligation* under Section 2 to draw a district that concentrates minority voters unless members of that minority group comprise more than 50% of the citizen voting age population of the district (*i.e.,* the eligible voters). *Bartlett v. Strickland,* 556 U.S. 1, 19-20 (2009).[2] The Court affirmed that a governmental entity may *choose* to draw minority influence or coalitional districts, but in doing so it is subject to the proscription on racial gerrymandering, discussed below. Any such district must be justified based on other, non-racial considerations, such as non-racial social and economic characteristics that identify the group as a community of interest (see discussion below).

The issues under section 2 are myriad[3]. In addition, at the margins, the conditions necessary to establish a right to section 2

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[2] *See also Reyes v. City of Farmers Branch, Tex.,* 586 F.3d 1019, 1023-24 (5th Cir. 2009) (rejecting a claim that the omission of the word "citizen" from *Strickland* indicates that only a majority of *total* voting age population be shown, rather than a majority of *citizen* voting age population, is necessary); *Romero v. City of Pomona,* 883 F.2d 1418, 1425-26 (9th Cir. 1989) (affirming district court's dismissal of a section 2 claim where the district court found that "After taking into consideration factors such as eligible voting age and citizenship, the evidence conclusively establishes that neither Hispanics nor blacks can constitute a majority of the voters of any single member district[,]" and rejecting plaintiffs argument that total population should have been considered instead), *overruled in part on other grounds by Townsend v. Holman Consulting Corp.,* 914 F.3d 1136, 1141 (9th Cir. 1990).

[3] Of course, minority groups that are not able to form the majority in a single member district are entitled to protection from intentional discrimination. See *Bartlett v. Strickland, supra*, 556 U.S. at 20 & 24; *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006) (*"LULAC"*); *Garza v. Cty. of L.A.*, 918 F.2d 763, 769 (9th Cir. 1990) ("We hold that, to the extent that *Gingles* does require a majority showing, it does so only in a case where there has been no proof of intentional dilution of minority voting strength. We affirm the district court on the basis of its holding

protection may "cross the line" into prohibited racial gerrymandering, discussed in the next section.

C. No Racial Gerrymandering.

This is not an express criterion in state law. Rather, it is a requirement of the U.S. Constitution as interpreted by the United States Supreme Court. This criterion generally prohibits using race as the "predominant" criterion in drawing districts, combined with the subordination of other considerations, unless such "predominance" is narrowly-tailored to advance a compelling state interest. *Shaw v. Reno,* 509 U.S. 630 (1993); *Bush v. Vera,* 517 U.S. 952 (1996); *Miller v. Johnson,* 515 U.S. 900 (1995); *Cooper v. Harris*, 137 S. Ct. 1455, 1463-64 (U.S.

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that the County engaged in intentional discrimination at the time the challenged districts were drawn.") The United States Department of Justice in reviewing redistricting plans takes the view that racial animus need not be the sole or even "a" motivating factor if finding intentional discrimination:

> 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.
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> > 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).
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> […] 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.

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", Sept. 1, 2021, p. 10.

2017); *Abbott v. Perez*, 138 S. Ct. 2305, 2314-15 (U.S. 2018). It does not, however, prohibit all consideration of race in redistricting. *Easley v. Cromartie,* 532 U.S. 234, 241 (2001).

Compliance with section 2 may appear to conflict with the Supreme Court cases holding that, if race predominates over other traditional redistricting criteria, the City may run afoul of the prohibition against racial gerrymandering. The Court, however, has repeatedly assumed—without ever having expressly held—that a race-based district may be created, if necessary, to avoid a violation of section 2. *See, e.g., Abbott*, 183 S. Ct. at 2315; *Cooper*, 137 S. Ct. at 1464; *Shaw*, 509 U.S. at 655-56; *Bush*, 517 U.S. at 952; *Growe v. Emison,* 507 U.S. 25, 37-42 (1993); *Miller*, 515 U.S. at 920-21.

For this exception to justify the use of race as the predominant factor in drawing a district, the redistricting entity must have had a "strong basis in evidence" at the time it drew the district for concluding that creating a racially based district was reasonably necessary to comply with section 2. *See Shaw v. Hunt,* 517 U.S. 899, 908-10 (1996); *Abbott*, 138 S. Ct. at 2315; *Cooper*, 137 S. Ct. at 1465; *Ala. Legislative Black Caucus v. Ala.*, 575 U.S. 254, 278 (2015); *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797 (2017). In addition, the districts in question must be "narrowly tailored to comply with § 2." *Bush,* 517 U.S. at 982. This latter criterion requires that "the district must not subordinate traditional districting principles to race substantially more than is 'reasonably necessary' to avoid § 2 liability." *Id.* at 979. The Supreme Court has also clarified, over several cases decided in the last decade, that the "strong basis in evidence" that is required cannot be *pro forma* or rely on "rules of thumb," assumptions, or mechanical thresholds, as was generally done in the past; to justify the predominant use of race, actual analysis—typically in the form of racially-polarized voting analysis—is required.

On the other hand, if the district is not required to comply with section 2, for example because the minority group cannot form a majority in a single member district or polarized voting is not evident, using race as the predominant criterion in creating a district may run afoul of the prohibition against racial gerrymandering. However, the

minority group may constitute a "community of interest" under traditional principles and be entitled to consideration under state redistricting mandates.