

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
ROBERT O’SHEA, CHAIRMAN OF THE)	
WARD 6 DEMOCRATIC COMMITTEE, ET)	
AL.,)	
)	
Plaintiffs,)	Civil Action No. 1:22-cv-12048-PBS
)	
v.)	
)	
BOSTON CITY COUNCIL,)	
)	
Defendant.)	
_____)	

**ASSENTED-TO MOTION FOR LEAVE TO FILE SUR-REPLY IN
OPPOSITION TO PLAINTIFFS’ MOTION FOR PRELIMINARY INJUNCTION**

Pursuant to Local Rule 7.1(B)(3), the Defendant, the Boston City Council (“Council”), moves for leave to file a sur reply in opposition to Plaintiffs’ Motion for Preliminary Injunction. The Plaintiffs assent to this motion. In support of this motion, the Council states as follows:

1. Plaintiffs filed a motion for preliminary injunction in Suffolk Superior Court on November 2, 2022, and supplemented the motion with a second memorandum on November 21, 2022. After this matter was removed to Federal court, Plaintiffs re-filed their motion for preliminary injunction on January 12, 2023 (Dkt. No. 21). The Council filed its opposition on January 17, 2023 (Dkt. No. 25). Plaintiffs filed a reply in support of their motion on January 27, 2023 (Dkt. No. 27). The Court has scheduled a hearing on the preliminary injunction motion for March 14, 2023 (Dkt. No. 24).

2. The Council seeks leave to file a sur-reply, attached hereto as **Exhibit A**, that briefly addresses the arguments raised by the Plaintiffs for the first time in their reply. This sur-reply will assist the Court in making a fair and fully-informed decision on the pending motion for preliminary injunction.

3. The hearing on this matter is scheduled for March 14, 2023, so the Court will have ample opportunity to review this sur-reply in advance of the hearing date.

4. The Plaintiffs assent to this motion.

WHEREFORE, the Council respectfully requests that the Court grant it leave to file the sur-reply attached hereto as Exhibit A in opposition to the Plaintiffs' motion for preliminary injunction.

Respectfully submitted,

BOSTON CITY COUNCIL

By their attorneys,

/s/ Lon F. Povich

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February 21, 2023

RULE 7.1(A)(2) CERTIFICATION

I certify that counsel have conferred and have attempted in good faith to resolve or narrow the issues raised in this motion, and that Plaintiffs assent to this motion.

/s/ Christina S. Marshall

Christina S. Marshall

CERTIFICATE OF SERVICE

I certify that a true and accurate copy of this document was filed through the Electronic Case Filing system, and will be served upon the attorney of record for each party registered to receive electronic service on this 21st day of February 2023.

/s/ Christina S. Marshall
Christina S. Marshall

on or before February 27, 2023.¹ These amendments are not, as Plaintiffs claim, “mere technicalities,” *see* Reply at 2, but in fact materially change the relief requested by the Plaintiffs. Regardless of the merits of Plaintiffs’ anticipated motion to amend their complaint or their allegations as amended a second time, the fact is that Plaintiffs’ pleadings remain substantively and procedurally insufficient at this stage in the case to merit the “extraordinary” relief of a preliminary injunction. *Wash. Tr. Advisors, Inc. v. Arnold*, -- F. Supp. 3d --, 2022 WL 17630520, at *4 (D. Mass. Dec. 13, 2022).

In their Reply, Plaintiffs also seek new and different relief: they now assert that they have always argued that “the November 2022 redistricting ordinance was unlawfully and unconstitutionally put into place by the duly authorized Legislative and Executive Branches of the City of Boston.” Reply at 1.² And building off of this new theory of the case, Plaintiffs seek new relief, asking this Court to enjoin the *implementation*, not just the *enactment*, of the 2022 Plan. *Id.* at 8. Again, having failed to name any defendant other than the Council, Plaintiffs seek relief that cannot be granted. But even if their complaint were amended to name the proper defendant(s), Plaintiffs supply no reasonable alternative to the 2022 Plan. At the parties’ Rule 16 conference, Plaintiffs suggest that the City revert to the districting plan that was in place prior to November 2022. However, Plaintiffs have failed to refute the Council’s argument that the earlier plan was rendered manifestly unconstitutional by the significant change in distribution of Boston’s population as revealed by the 2020 census. *See* Opposition at 3, 25. This alone is reason enough to deny the requested injunction. *See Capability Grp., Inc. v. Am. Exp. Travel*

¹ The City Council has addressed Plaintiffs’ incorrect belief that they may file this amendment as of right, despite having already amended their complaint once, in a separate filing. Motion for Clarification of Scheduling Order Deadlines (Dkt. No. 44). At the parties’ Rule 16 conference on January 16, 2023, the Court allowed Plaintiffs to file a motion to amend the complaint on February 27, not a second amended complaint.

² “[A] reply brief is not the proper place to raise new arguments” *Shea v. United States*, 976 F.3d 63, 80 n.12 (1st Cir. 2020) (quoting *United States v. Bradstreet*, 207 F.3d 76, 80 n.1 (1st Cir. 2000)).

Related Servs. Co., 706 F. Supp. 2d 146, 160 (D. Mass. 2010), *aff'd*, 658 F.3d 75 (1st Cir. 2011) (declining to issue requested preliminary injunction where plaintiff failed to “identify meaningful injunctive relief”).

B. Plaintiffs’ Vote Dilution Claim Under the VRA Remains Hopelessly Flawed.

Despite their efforts to save it, Plaintiffs’ VRA claim concerning alleged vote dilution in District 4 remains hopelessly flawed. In their Reply, they do not attempt to satisfy the requisite *Gingles* factors. Reply at 2-3. Most importantly, they do not attempt to claim that a white majority exists in District 4 and votes as a bloc in a manner that usually defeats a Black minority group’s preferred candidates. *Thornburg v. Gingles*, 478 U.S. 30 (1986). Of course, Plaintiffs cannot make that claim because Black voters continue to significantly outnumber white voters in District 4. See Dr. L. Handley, *An Analysis of Voting Patterns by Race and an Assessment of Minority Voters’ Opportunities to Elect Candidates in Recent Boston Municipal Elections* (Draft 2.0) (“Handley Report”) at 18, Table 5 (attached to the Affidavit of Michelle Goldberg at Exhibit D) (Under the City’s 2022 Plan, Black voters in District 4 make up 52.1% of the population, and white voters make up only 14.5%). Moreover, Black voters absolutely maintain their ability to elect the candidate of their choice under the 2022 Plan. Affidavit of Moon Duchin (“Duchin Aff.”) at ¶¶ 10-11, 15-17 (opining that minority group’s candidate of choice will continue to win “handily” in District 4).

Unable to make the traditional and requisite *Gingles* argument, Plaintiffs baldly state that “any reduction in the black vote in District 4 is catastrophic to the only black majority district in the City.” Reply at 2. But the Supreme Court roundly rejected that kind of argument in *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254 (2015), albeit in the context of a claim under section 5 of the VRA. Nonetheless, the Court was quite clear: the VRA does not

require a jurisdiction to “maintain a particular numerical minority percentage.” *Id.* at 275. Rather, it requires a jurisdiction “to maintain a minority’s ability to elect a preferred candidate of choice.” *Id.* Here, Plaintiffs have not demonstrated—and given the demographics, cannot demonstrate—that the Black voting population in District 4 has experienced any real change in its ability to elect the candidate of its choice. *Id.* at 276 (VRA prohibits only “those diminutions of a minority group’s proportionate strength that strip the group within a district of its existing ability to elect its candidates of choice”). Indeed, the available evidence establishes that Black voters in District 4 have experienced *no* electoral change as a result of the City’s adoption of the 2022 Plan. Duchin Aff. at ¶¶ 10-11, 15-17. Therefore, Plaintiffs’ VRA claim must fail.

Perhaps aware of the weakness of their claim, Plaintiffs offer an additional and novel argument, claiming that an alleged violation of the OML can be transformed into a violation of the VRA because it affects “Section 2 protected language minority groups who are residents and voters in Boston.” Reply at 2. There are multiple problems with this claim. The City will focus on only two. First, Plaintiffs apparently intend—assuming that they are successful in amending their complaint—to assert their section 2 claim on behalf of Black voters in District 4. Reply at 2. But they have not established that Black voters in District 4 are a protected language minority group as defined by the VRA. *See* 28 C.F.R. § 55.1 (defining language minority group as including those of “American Indian, Asian American, Alaskan Natives or of Spanish heritage”). Second, and perhaps more importantly, Plaintiffs have asserted no basis whatsoever to support their novel legal theory that a state OML claim can somehow be converted into a federal voter dilution claim, which has very specific—and here, unmet—evidentiary requirements. Plaintiffs cannot bootstrap one unproven state claim to prop up an unproven federal claim.

C. Plaintiffs’ New Litany of Quotations, Taken out of Context, Do Not Advance Their Equal Protection Claim Where the Challenged Districts Remain Largely Unchanged

At this late stage of the process, Plaintiffs cite a string of Councilor statements they claim demonstrates a discriminatory purpose underlying the 2022 Plan. Reply at 5-6. But these statements, taken out of context and prior to the Council being further educated on the topic of redistricting law, do little to advance plaintiffs’ Equal Protection claim. *See, e.g., Miller v. Johnson*, 515 U.S. 900, 916 (1995) (local legislatures will “almost always be aware of racial demographics” in redistricting); *cf. Brnovich v. Democratic Nat’l Comm.*, -- U.S. --, 141 S. Ct. 221 (2021) (rejecting “cat’s paw” theory of attributing alleged racial animus of one legislator to entire legislative body). The proof, as they say, is in the pudding. Here, the Council ultimately adopted districts that changed just enough to satisfy equal population requirements, swapping only a handful of precincts in Districts 2, 3 and 4 and leaving the borders and demographics of those challenged districts largely unchanged. *See Duchin Aff.* at Figures 1 and 2; *see also Handley Report* at 17, 18, Table 5 (“[t]here is very little difference in the demographic composition of the districts”). Without substantial change in the existing map, it is virtually impossible for plaintiffs to demonstrate that “race was the *predominant factor* motivating the legislature’s decision to place a *significant number of voters* within or without a particular district.”³ *Miller*, 515 U.S. at 916 (emphasis added).

In fact, the existing evidence is directly contrary. The City’s expert—Professor Moon Duchin of the Jonathan M. Tisch College of Civic Life at Tufts University—explains that the 2022 Plan demonstrated a “great degree of consideration” for traditional redistricting principles.

³ As just one example, plaintiffs cite a comment by Chair Braedon that Districts 3 was an “opportunity district” that should be “strengthened” by pushing the non-white population closer to 65% as a matter of “political aspiration.” Reply at 5. But that did not happen. The white population in District 3 barely budged, actually increasing slightly. It was 41.5% under the prior plan, and 41.9% under the 2022 Plan.

Duchin Aff. at ¶ 19. For example, the 2022 Plan reflected compactness (reasonable district shapes) and contiguity (connected district land area). *Id.* at ¶¶ 7, 19. But the overwhelming emphasis in the 2022 Plan was on core retention: that is, voters generally remained in the same districts under the new plan. *Id.* at ¶¶ 7, 19. As Professor Duchin points out, of 675,647 Boston residents, the vast majority—626,100 people—will have the same district assignment under the 2022 Plan. *Id.* at Figure 1. In District 3, for example—where several Plaintiffs reside and which is the focus of Plaintiffs’ claims—85.2% of the voting population will remain in the same district. *Id.* Indeed, Professor Duchin notes that the 2022 Plan reflects “a level of deference to prior district boundaries (i.e., extremely high core retention) that may be the highest I have seen in any redistricting plan in the country.” *Id.* at ¶ 19. Contrary to Plaintiffs’ claims that the 2022 Plan included “aggressive” and “catastrophic” changes that “destroyed” neighborhoods, therefore, the evidence is that the changes were minor and at the margins. That is insufficient to establish that race predominated the Council’s decision-making, particularly in light of “the sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments.” *Miller*, 515 U.S. at 916.

Moreover, the Council was *required* under the VRA to consider race in drawing District 4 (as well as the necessary changes to neighboring Districts 3 and 5) because District 4 was already an effective district for Black voters. Thus, race was always going to be part of the Council’s redistricting conversation and the comments Plaintiffs cite simply reflect the Council’s good faith concerns about meeting their VRA obligations. For example, certain Councilors were concerned about improperly “packing” the Black voter population in District 4, in violation of the VRA. *See, e.g.*, Reply at 5 (Councilor Arroyo quoted as stating, “District 4, frankly, I think the Voting Rights Act is clear on this, cannot pack more people of color into it, it has to become

a more white district”). Some Councilors also wondered if they could create additional “opportunity” districts, in which cohesive minority groups could elect the candidates of their choice. *See, e.g.*, Reply at 5 (Chair Braedon quoted as stating, “we’re trying to strengthen the, actually, we’re trying to balance the racial minority, the total minority numbers between District 3 and District 4, to try to get a little more, increase the opportunity in District 3”). Because of VRA mandates, these conversations take place in every redistricting effort. *See, e.g., Abbott*, -- U.S. --, 138 S. Ct. at 2315 (“At the same time that the Equal Protection Clause restricts the consideration of race in the districting process, compliance with the [VRA] pulls in the opposite direction: It often insists that districts be created precisely because of race”). And Councilors must be free to voice their VRA-related concerns with their fellow Councilors, their experts, advocates and the general public. Moreover, as Professor Duchin points out, the comments Plaintiffs cite were made before she and the Council’s other experts had the opportunity to make presentations to the Council, explaining the requirements and limits of the VRA. Duchin Aff. at ¶¶ 21-22. In addition to being free to express their VRA concerns, local legislators must also be granted time and space to educate themselves on what can and cannot be done within the redistricting process.

Ultimately, the 2022 Plan speaks for itself. It made very few changes from the previous map. The district borders largely stayed the same. Duchin Aff. at Figures 1 and 2. The residents within those borders largely stayed the same. *Id.* at Figure 2. And the district demographics largely stayed the same. Handley Report at 18, Table 5. As a result, the electoral outcomes of the 2022 Plan are statistically likely to remain the same. Handley Report at 17, 18 and Tables 4 and 6. With so little change, it is hard to imagine that there would be opportunity

for the kind of “aggressive” racial balancing plaintiffs have alleged, no matter what certain Councilors may have said during the districting process.

D. Plaintiffs Still Have Not Established any OML Violation Sufficient to Support the Extraordinary Relief Sought.

Next, Plaintiffs turn to their OML claims, again with two apparently new arguments. First, Plaintiffs pivot to focus on their allegation that the Council did not provide “language services to minority residents,” and thus it “effectively shut minority voters out of the process.” Reply at 3. But Plaintiffs have again failed to provide any authority for the claim that not providing interpretation services at Council meetings is a violation of the OML, even after this legal deficiency was noted in the Council’s Opposition. *See* Opposition at 21 n.10. That is because there is no legal authority for this claim: the OML does not require the provision of language services. *See generally* G.L. c. 30A, §§ 18-25.

Second, Plaintiffs appear to ask this Court to abstain from any determination under the OML, because that “issue . . . is best addressed by the State and local officials.” Reply at 4. Certainly, if the Plaintiffs would like to withdraw their OML claims in this case and proceed only on their VRA and Equal Protection claims, the City Council will not oppose that request. In any case, Plaintiffs have failed to establish any violation of the OML that was not cured, or any violation sufficient to support the extraordinary relief they request here, the nullification of the 2022 Plan. *City of Revere v. Mass. Gaming Comm’n*, No. 14-CV-3253, 2019 WL 4017027, at *2, 5 (Mass. Super. Ct. 2019) (would be an “abuse of discretion” to invalidate agency action on the basis of even a “handful” of potential OML violations).

E. Conclusion

For the reasons set forth above and in the Council’s Opposition, the Council respectfully requests that this Court deny Plaintiffs’ motion for a preliminary injunction.

By its attorneys,

/s/ Lon F. Povich

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Dated: February 21, 2023

CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of this document was filed through the Electronic Case Filing system, and will be served upon the attorney of record for each party registered to receive electronic service on this 21st day of February 2023.

/s/ Christina S. Marshall

Christina S. Marshall

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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)	
BOSTON CITY COUNCIL,)	
)	
	Defendants.)	
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AFFIDAVIT OF MOON DUCHIN

I, Moon Duchin, on oath hereby do depose and say as follows:

1. I am a Professor of Mathematics, and a Senior Fellow in the Jonathan M. Tisch College of Civic Life, at Tufts University. At Tisch College, I am the director and principal investigator of an interdisciplinary research group called the MGGG Redistricting Lab. My areas of research and teaching include the structure of census data, computational redistricting, and the mathematical study of elections. In 2019, I was awarded a major grant from the National Science Foundation to study *Network Science of Census Data*.

2. I am compensated at \$400/hour for my work in this case. I have previously written reports and provided testimony by deposition, at hearings, and at trial in redistricting cases in North Carolina, Pennsylvania, Wisconsin, Alabama, South Carolina, Texas, and Georgia.¹ All work in this report was completed by me and by research assistants working under

¹ *NC League of Conservation Voters, et al. v. Hall, et al.* No. 21-cvs-500085 (Wake Cty. Sup. Ct. 2021); *Carter v. Chapman*, No. 7 MM 2022, 2022 WL 702894 (Pa. Mar. 9, 2022); *Johnson v. Wis. Elections Comm'n*, No. 2021AP1450- OA, 2022 WL 621082 (Wis. Mar. 3, 2022); *Milligan, et al. v. Merrill, et al.*, Case No. 2:21-cv-01530-AMM and *Thomas, et al. v. Merrill, et al.*, Case No. 2:21-cv-01531-AMM (N.D. Ala. 2021); S.C. NAACP et al. v. Alexander, et al., Case No. 3- 21-cv-03302-MBS-TJH-RMG (D.S.C. 2022) (three-judge ct.); TX NAACP et al. v. Abbott, Case No. 1:21-CV-00943-RP-JES-JVB; *Georgia State Conf. of the NAACP, et al. v. State of Georgia, et al.*, No. 21-cv-5338-ELB-SCJ-SDG (N.D. Ga.); *Common Cause, et al. v. Raffensperger*, No. 22-cv-90-ELB-SCJ-SDG (N.D. Ga.).

my direct supervision.

3. I have been provided by counsel with the following documents and materials.

- **PI Memo** (Plaintiffs' Supplemental Memorandum in Support of Application for Preliminary Injunction), dated November 2, 2022
- **Amended Complaint**, dated November 21, 2022
- **Handley Report** (Lisa Handley Analysis, Exhibit D of City of Boston Goldberg Affidavit), dated January 13, 2023
- **City of Boston Opposition**, dated January 17, 2023
- **Plaintiffs' Reply** (Plaintiffs' Reply to the Defendant's Opposition to Plaintiffs' Motion for Preliminary Injunction), dated January 27, 2023
- Shapefiles showing the legally enacted districts from before and after the 2022 redistricting process (called the **Benchmark Plan** and the **2022 Enacted Plan**, or simply Enacted Plan, respectively)

4. I have also relied upon publicly available data from the U.S. Census Bureau, particularly the PL94-171 release known as the Redistricting Data, and referred to below as 2020 Census data.

Background Facts

5. According to the 2020 Census data, the population of the City of Boston is 675,647. The City Council has 13 members, of whom 9 are elected from geographical districts.

6. In Fall 2022, the Council undertook its decennial redistricting. Besides the usual challenge of balancing population in districts that had grown malapportioned over time, a second challenge faced the Council: the city had just conducted an adjustment of its precincts for the first time in over 100 years. Since the districts are made of whole precincts, this also prevented districts from staying exactly as before.

7. In addition to equalizing population and using whole-precinct building blocks, the Council had to balance a number of other traditional districting principles, or "TDPs," including contiguity (connected land area) and compactness (reasonable shapes). Many consider core retention (preserving the district assignment of most voters) and related incumbency considerations to also merit inclusion among TDPs. Rounding these out are two TDPs that are

more complicated to quantify: respect for “communities of interest” and the safeguarding of electoral opportunity for members of minority groups, as articulated in the Voting Rights Act of 1965 and in racial gerrymandering jurisprudence drawn from the 14th Amendment.

8. The complaint in this case claims in part that race predominated over these traditional principles: “This Redistricting Plan was motivated by a desire to achieve ‘racial balancing’ between various Districts in the City of Boston. Primarily, the goal was to make white-majority districts less white, and African-American majority districts less black” (PI Memo, p. 1). The complaint alleges that the pursuit of these priorities led to “aggressive redistricting of boundaries along racial lines” (Amended Complaint, p. 20). In addition to the constitutional claim, Plaintiffs contend for VRA purposes that “any reduction in the black vote in District 4 is catastrophic to the only black-majority district in the City, especially when viewed in historical context” (Plaintiffs’ Reply, p. 2).

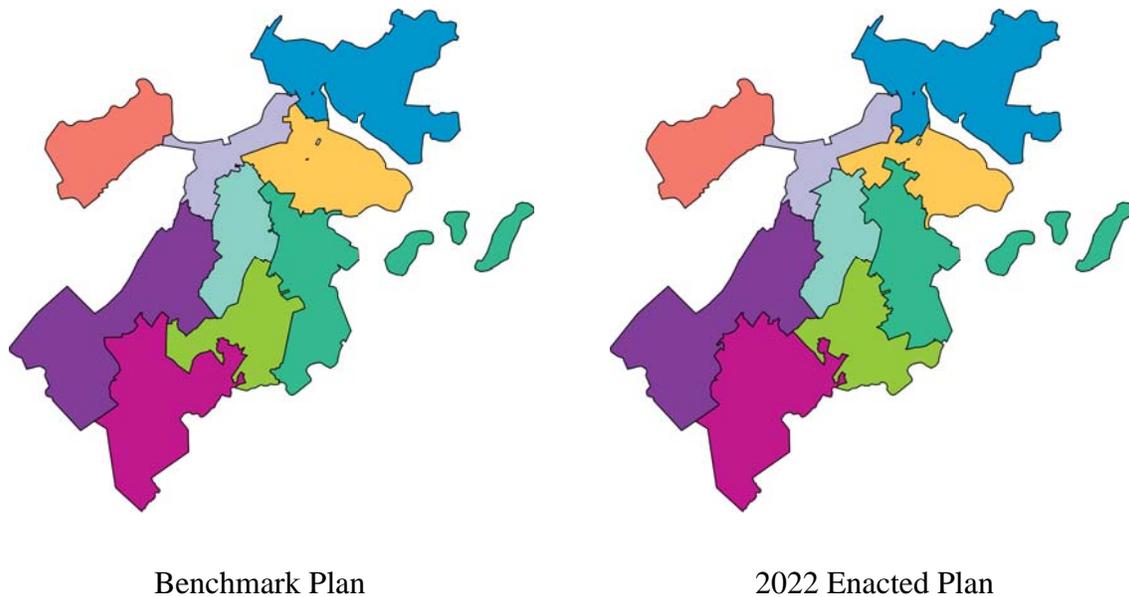


Figure 1: Of 675,647 Boston residents, the vast majority—626,100 people—will have the same geographical district assignment after redistricting that they did before. This is a remarkably high degree of *core retention*. In particular, 85.2% of the Bostonians who were assigned to District 3 before the redistricting are retained in the district.

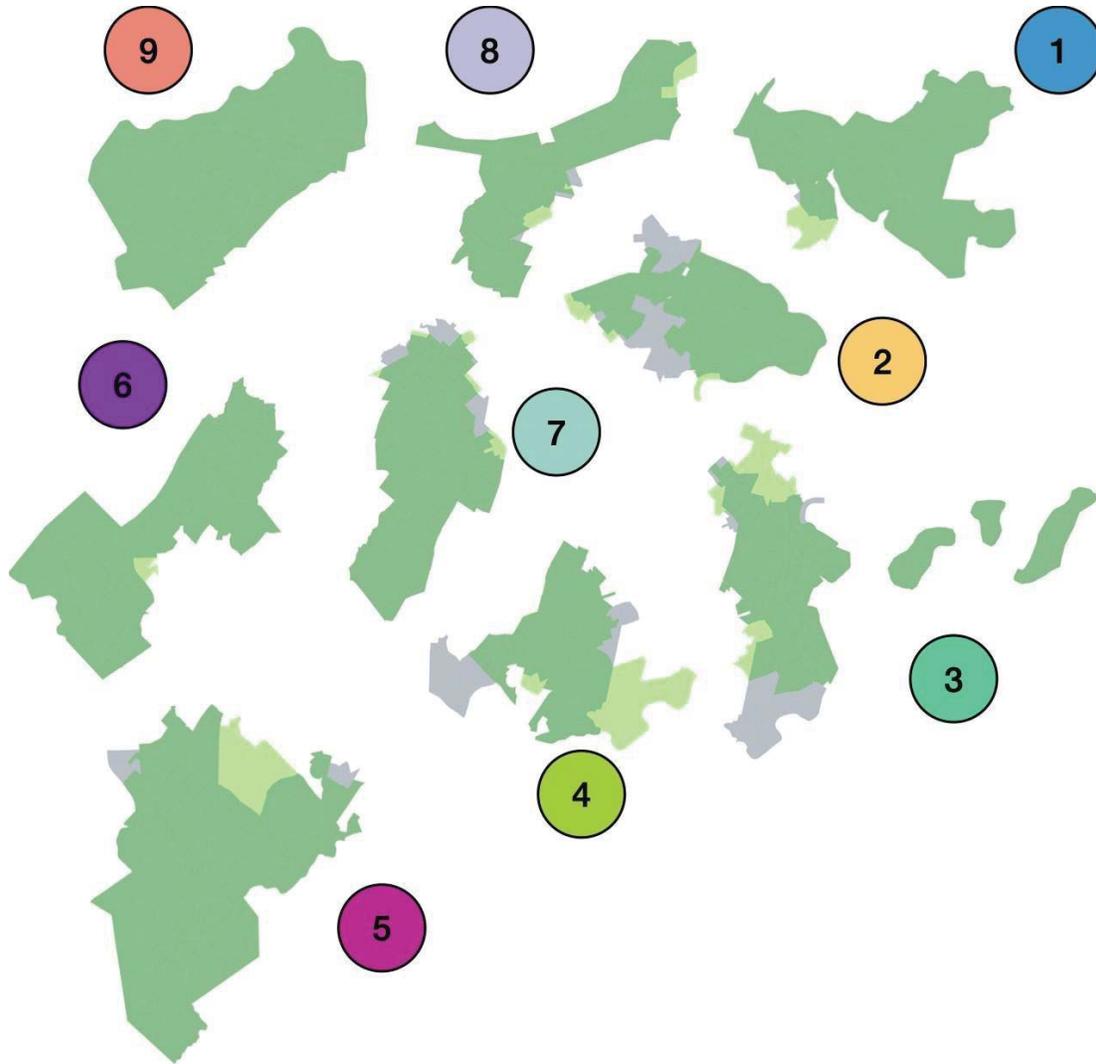


Figure 2: Before-and-after images are shown for each district. Pre-redistricting (“benchmark”) configurations are shown in gray and post-redistricting (“enacted”) configurations are shown in light green, so that the dark green regions represent the overlap. For instance, the figure suggests that District 2 had become overpopulated, and needed to shrink, while District 1 had become slightly underpopulated, and needed to grow. As this figure illustrates, the districts must fit together like a jigsaw puzzle, with changes to one district interacting with changes to neighboring districts.

Voting Rights Act Claim

9. The Voting Rights Act claim is put forward on behalf of Black voters in District 4:

There can be no doubt that District Four contains a minority group (African-Americans) that is sufficiently large and compact to constitute a majority in the District. The Redistricting Plan

approved by the City Council effective splits District Four, transferring African-American votes out of the district and receiving primarily white votes in return. This “cracking” of a historically African-American district will result in the dilution of the African-American vote in that District and critically endanger the opportunity to elect the minority’s preferred representative. (PI Memo, pp. 4-5)

10. The mention of Black population being “sufficiently large and compact” to be a majority is a reference to Gingles 1, the first of the three so-called “Gingles factors” that are preconditions for advancing VRA litigation. The other two required showings, known as Gingles 2 and 3, call for demonstrations of racially polarized voting. The minority group must be shown through statistical inference techniques to have a cohesive preference for particular candidates (Gingles 2), while the majority must be shown to vote as a bloc in a manner that usually defeats these preferred candidates (Gingles 3). But far from establishing these conditions, the Amended Complaint makes it clear that plaintiffs deny that evidence of racially polarized voting exists at all.

There has been no racial polarization regarding voting in the City, as was confirmed by Professor Wice, as can be seen from Councilor Baker’s re-election in his 63% non- white district, in the election of Secretary Galvin in the African-American majority of District 4, and in various other elections throughout the City. (Amended Complaint, ¶ 121)

Under the existing plan before redistricting, District 3 had a long history of electing African–American officials, and District 4 had a long history of electing white officials. There was no racial polarization of voting blocs in either district that would require redistricting based on race. (¶¶ 161-162)

There is no evidence in the record of racial polarization of votes in the City of Boston or in the affected districts. (¶ 173)

The Districts most affected by the redistricting legislation each have long histories of race-neutral elections, with white candidates winning elections in majority minority districts and minority candidates winning in majority white districts and precincts. (¶ 175)

11. Since the 1980s, these Gingles factors have been a fundamental precondition for advancing VRA claims, because they provide an indicator that the challenged configuration of districts creates a harm to minority voters that can be remedied with alternative district lines. Once the preconditions are met, liability is established by conducting a fuller *performance analysis* of districts, considering whether they provide effective opportunity for the minority group to elect candidates of choice.

12. The Council received information relevant to district performance from two different experts: myself and Dr. Lisa Handley. I was brought in to address the City Council Working Session on October 21, 2022 in my capacity as a local professor with domain expertise. Dr. Handley, as a consultant working for the City of Boston, addressed the City Council Working Session on October 25, 2022, and later provided a written report on her findings. Dr. Handley and I each independently concluded that the proposed District 4 map would not undermine the ability of Black voters in District 4 to elect candidates of their choice.

13. We each drew these conclusions from recent elections in which standard inference methods identify clear candidates of choice for Black voters. I offered the examples of Ayanna Pressley in the At-Large City Council elections of 2015 and 2017 as well as Kim Janey and Andrea Campbell in the Mayoral Primary of 2021. Handley also cited Janey and Campbell in the Mayoral Primary of 2021 as candidates of choice and described that election as “a good bellwether” (Handley Report, Goldberg p. 63).

14. Once contests have been identified that are probative of the preferences of the minority group, the test of effective opportunity is to see whether these candidates would have won their contest in the districts under consideration. This is sometimes called a “reconstituted” or “recompiled” election analysis.

15. To study this, I used standard techniques in spatial statistics to transfer election results from 2015-2021 onto the new districts.² I find that the candidate of choice wins handily in all three identified elections, as shown in Table 3.

	At-Large Council 2015	At-Large Council 2017	Mayoral Primary 2021
Benchmark 4	Pressley 5312	Pressley 7072	Janey 4073
	Wu 3272	Wu 4997	Campbell 3212
	Flaherty 3042	Flaherty 4046	Wu 1855
Enacted 4	Pressley 5417	Pressley 7544	Janey 4108
	Flaherty 3452	Wu 5452	Campbell 3083
	Wu 3319	Flaherty 5025	Essaibi George 2061

Table 3: The minor changes to District 4 in the 2022 redistricting process leave the performance analysis substantively unchanged—there are commanding showings by Black voters’ candidates of choice each time.

16. Dr. Handley agrees:

Recompiled Bellwether Election Results for Proposed Plan An examination of [a table of results] indicates that proposed Districts 4 and 7 will continue to provide Black voters with an opportunity to elect their candidate of choice. The percentage of votes garnered by Janey declines slightly in District 4 and increases more substantially in District 7 compared to the Current Plan, but Janey easily carries both districts. The result for District 5 in the Proposed Plan is comparable to the Current Plan: Wu receives slightly more votes than Janey. Overall, Black voters’ candidate of choice, Janey, wins two districts and comes in a very close second place in a third district. This is precisely the same overall electoral outcome as under the Current Plan.

17. In my view, this directly contradicts the plaintiffs’ claim that the new configuration of District 4 will “critically endanger the opportunity to elect the minority’s preferred representative.” (PI Memo, pp. 4-5)

18. In summary, as regards the Voting Rights Act challenge, the precondition showing

² In particular, I used the MAUP package developed in my Lab to disaggregate election results to 2020 census blocks proportional to voting age population in each block. See <http://github.com/mggg/maup>. Prorating from precincts to blocks can produce fractional vote totals, but I have reported the totals rounded to the nearest whole number.

racially polarized voting has not been met by plaintiffs (who in fact deny that polarization exists); and performance analysis independently offered by two experts shows that enacted District 4 is in any case highly effective at providing electoral opportunity for Black voters to elect candidates of choice.

Equal Protection Claim

19. In the PI Memo, plaintiffs cite *Miller v. Johnson* (1995) to explain what must be demonstrated in a racial gerrymandering claim:

To make this showing, a plaintiff must prove that the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations. (PI Memo, p. 6)

In this instance, such a demonstration would be extremely difficult given the plan's great degree of consideration for traditional principles: not only respect for compactness and contiguity, but also a level of deference to prior district boundaries (i.e., extremely high core retention) that may be the highest I have seen in any redistricting plan in the country.

20. The plaintiffs write that “the Redistricting Plan **eviscerates** the neighborhoods in Districts 2, 3, and 4” (PI Memo p. 6-7, *emph. added*) and that “There is a **complete disruption** of District 3, by **removing the core** of its district from its historical home” (Amended Complaint ¶110, *emph. added*). These claims are completely inconsistent with the plan's core retention levels of 80.5%, 85.2%, and 88.0% in Districts 2, 3, and 4, respectively. Indeed, the district that lost the highest number of prior residents, District 2, had no choice but to slim down as it had become severely overpopulated due to population shifts since the last Census.

21. Finally, I will briefly address the comments attributed to individual City Councilors in the Plaintiffs' Reply, which are presented as evidence of racial predominance in decision-making. Plaintiffs cite thirteen informal remarks made in Working Sessions dated

September 30 to October 20, 2022.

22. Most of the comments are fairly vague but indicate that the Councilors had the impression that VRA compliance might require tuning of racial demographics. For instance, the most explicitly race-oriented of the comments cited by Plaintiffs is this one:

Councilor Breadon stated: “Both District 5 and District 3 are opportunity districts, and we need to ensure that they continue to be opportunity districts and strengthen them.” Councilor Baker responded: “And so opportunity being 60% of non-white?” Councilor Breadon responded: “60% of non-white or ideally pushing it up higher than that up to 65.” Council Baker queried: “Ideally, as a political aspiration?” Councilor Breadon responded: “Yes.” (at 1:09:07) (October 17, 2022, cited in Plaintiffs’ Reply, p. 5)

That is, at the time of this comment, the speaker appears to have believed that racial demographics are directly germane to an opportunity analysis. However, this comment precedes the presentations to the Council by myself and Dr. Handley, which emphasized that electoral history, not racial percentages, is at the heart of a performance analysis: I made this point myself on October 21; and Dr. Handley made entirely consonant remarks on October 25. Thus, any mistaken impression would have been corrected before final decisions were made. As an indication of that, note that District 3 was enacted with a non-White voting age population share of 58.1%—actually *reduced* from the benchmark level of 58.5%—which makes it clear that a target of 60-65% discussed briefly at the October 17 meeting was not ultimately influential in the choice of district lines.

23. In summary, the changes made from the benchmark to the enacted plan are nearly mathematically minimal, and the plan reflects a strong deference to traditional districting principles. The cited discussion of racial demographics by individual Councilors does not seem to be reflected in the final design of the plan.

Signed under the pains and penalties of perjury this 21st day of February, 2023.

A handwritten signature in black ink, appearing to read 'Moon Duchin', written over a horizontal line.

Moon Duchin