Sent via email

Senate Judiciary Redistricting Subcommittee
South Carolina Legislature
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Re: Duty to Comply with the U.S. Constitution and Voting Rights Act and Recommendations for Transparency, Public Involvement, and Fair Representation in South Carolina's Redistricting Process

Dear Chair Rankin and Subcommittee Members:

In preparing for the imminent redistricting cycle, the NAACP Legal Defense and Educational Fund, Inc.,[1] American Civil Liberties Union, South Carolina State Conference of the NAACP, League of Women Voters of South Carolina, South Carolina Appleseed Legal Justice Center, and South Carolina Progressive Network Education Fund write to remind the Senate Judiciary Redistricting Subcommittee of its baseline affirmative obligations to comply with the U.S. Constitution and Section 2 of the Voting Rights Act ("VRA"). In particular, officials must ensure equality of access to representation to *all* South Carolinians, and the non-dilution of the voting strength of South Carolina's racial minority voters where relevant conditions exist. We also encourage the Subcommittee to create meaningful opportunities for all residents to engage in each phase of the redistricting process—before, during, and after receiving census data.

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[1] Since its founding in 1940, the NAACP Legal Defense and Educational Fund, Inc. ("LDF") has used litigation, policy advocacy, public education, and community organizing strategies to achieve racial justice and equity in political participation, education, economic justice, and criminal justice. Throughout its history, LDF has worked to enforce and promote laws and policies that increase access to the electoral process and prohibit voter discrimination, intimidation, and suppression. LDF has been fully separate from the National Association for the Advancement of Colored People ("NAACP") since 1957, though LDF was originally founded by the NAACP and shares its commitment to equal rights.

I. The Subcommittee Must Ensure Compliance with the U.S. Constitution and Section 2 of the Voting Rights Act's Mandates.

To ensure equality of access to representation—a cornerstone of our democracy—the U.S. Constitution's Fourteenth Amendment requires states to balance the populations of people among districts at all levels of government. To ensure that racial minority voters have the opportunity to elect their preferred candidates, Section 2 of the VRA prohibits states and other bodies responsible for redistricting from drawing electoral lines with the intent or effect of diluting the voting strength of voters of color. Accordingly, this Subcommittee must ensure that any maps it adopts comply with the "One Person, One Vote" mandate of the Fourteenth Amendment's Equal Protection Clause[2] and Section 2's "nationwide ban on racial discrimination in voting."[3]

A. Fulfilling the "One Person, One Vote" Requirement

The "One Person, One Vote" principle provides that redistricting schemes that weaken the voting power and representation of residents of one area of a state as compared to others elsewhere in the same state cannot withstand constitutional scrutiny.[4] In *Reynolds v. Sims*, the Supreme Court explained that: "[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race . . . or economic status . . . ."[5] Since *Reynolds*, "the seats in both houses of a bicameral state legislature must be apportioned on a population basis."[6]

Maps may violate this principle if a legislative body's districts impermissibly deviate from population equality. Absent certain circumstances,

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[2] *Reynolds v. Sims*, 377 U.S. 533, 565–68 (1964); *id.* at 558 (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963) ("The conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments can mean only one thing—one person, one vote."); *see* U.S. Const. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws").

[3] *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 557 (2013); 52 U.S.C. § 10301(a) ("No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied . . . 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 . . . .").

[4] *See Reynolds*, 377 U.S. at 567–68.

[5] *Id.* at 565–66.

[6] *Id.*

congressional districts must have equal population "as nearly as practicable."[7] State and local legislative bodies, by comparison, may have population deviations within plus or minus five percent of the mathematical mean.[8] Impermissible deviations from population equality among districts may elicit malapportionment lawsuits, requiring the Legislature to show that an adopted plan legitimately advances a rational state policy formulated "free from any taint of arbitrariness or discrimination."[9]

In the 2016 case of *Evenwel v. Abbott*, the U.S. Supreme Court reminded states that, because "representatives serve all residents, not just those eligible or registered to vote," the appropriate metric for assessing population equality across districts is total population—counting all residents, regardless of their citizenship or registered-voter status.[10] In cases dating back to at least 1964, "the Court has consistently looked to total-population figures when evaluating whether districting maps violate the Equal Protection Clause by deviating impermissibly from perfect population equality."[11] Accordingly, "[t]oday, all States use total-population numbers from the census when designing congressional and state-legislative districts . . . ."[12]

B. Complying with Section 2 of the Voting Rights Act

Section 2 demands that South Carolina's racial minority voters have an equal opportunity "to participate in the political process and elect candidates of their choice," in light of the state or locality's demographics, voting patterns,

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[7] *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964); *Karcher v. Daggett*, 462 U.S. 725, 730–31 (1983) (holding that congressional districts must be mathematically equal in population, unless a deviation from that standard is necessary to achieve a legitimate state objective).

[8] *See Reynolds*, 377 U.S. at 568 ("The Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races."); *see also Gaffney v. Cummings*, 412 U.S. 735, 744–45 (1973) ("minor deviations from mathematical equality among state legislative districts" are not constitutionally suspect, but "larger variations from substantial equality are too great to be justified by any state interest"); *Brown v. Thomson*, 462 U.S. 835, 842 (1983) (holding that apportionment plans with a maximum population deviation among districts of less than 10% are generally permissible, whereas disparities in excess of 10% most likely violate the "one person, one vote" principle).

[9] *Roman v. Sincock*, 377 U.S. 695, 710 (1964); *see Brown*, 462 U.S. at 847–48 (stating that "substantial deference" should be given to a state's political decisions, provided that "there is no 'taint of arbitrariness or discrimination'"); *see also Brown*, 462 U.S. at 852 (Brennan, J., dissenting) ("Acceptable reasons . . . must be 'free from any taint of arbitrariness or discrimination . . . .'").

[10] 136 S. Ct. 1120, 1132 (2016).

[11] *Id.* at 1131.

[12] *Id.* at 1124.

history, and other factors under the "totality of the circumstances."[13] Redistricting maps may dilute people of color's voting power, violating Section 2, if: (1) a district can be drawn in which the minority community is sufficiently large and geographically compact to constitute a majority; (2) the minority group is politically cohesive; and (3) in the absence of a majority-minority district, candidates preferred by the minority group would usually be defeated due to the political cohesion of non-minority voters for their preferred candidates.[14]

After establishing these preconditions, a "totality of circumstances" analysis determines whether minority voters "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[15] Because of South Carolina's stark patterns of voting along racial lines,[16] which strikes at the heart of a potential minority vote dilution,[17] South Carolina's legislature must be attuned to its obligations under Section 2 of the Voting Rights Act.

Indeed, federal courts have found that prior South Carolina Senate redistricting plans pursued legislators' self-interest and failed to create majority-minority districts as Section 2 requires. For example, in 2002 the U.S.

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13 *See Thornburg v. Gingles*, 478 U.S. 30, 34 (1986).

14 *Id.*

15 52 U.S.C. § 10301(b); *Colleton Cty. Council v. McConnell*, 201 F. Supp. 2d 618, 632 (D.S.C. 2002) (quoting *Gingles,* 478 U.S. at 47) ("[Section] 2 prohibits the implementation of an electoral law that 'interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.'"); *see also LULAC v. Perry*, 548 U.S. 399, 425 (2006) (describing the operation of the "totality of the circumstances" standard in the vote-dilution claims).

16 *See, e.g.*, *McConnell*, 201 F. Supp. 2d at 643 ("Voting in South Carolina continues to be racially polarized to a very high degree . . . in all regions of the state and in both primary elections and general elections."); *see also, e.g.*, *United States v. Charleston Cty., S.C.*, 365 F.3d 341, 350 (4th Cir. 2004) (county voting "is severely and characteristically polarized along racial lines"); *Jackson v. Edgefield Cty., S.C. Sch. Dist.*, 650 F. Supp. 1176, 1196 (D.S.C. 1986) (observing that "the outcome of each [election] could be statistically predicted and reasonably explained by the race of the voters"); *id.* at 1198 ("The tenacious strength of white bloc voting usually is sufficient to overcome an electoral coalition of black votes and white 'crossover' votes.").

17 *Gingles*, 478 U.S. at 48 n.15; *see also Johnson v. De Grandy*, 512 U.S. 997, 1007 (1994) (explaining that racially polarized voting increases the potential for discrimination in redistricting, because "manipulation of district lines can dilute the voting strength of politically cohesive minority group members"); *N. Carolina State Conf. of NAACP v. McCrory*, 831 F.3d 204, 221 (4th Cir. 2016) (noting that racially polarized voting is "[o]ne of the critical background facts of which a court must take notice" in Section 2 cases); *Collins v. City of Norfolk, Va.*, 816 F.2d 932, 936-38 (4th Cir. 1987) (emphasizing that racially polarized voting is a "cardinal factor[]" that "weigh[s] very heavily" in determining whether redistricting plans violate Section 2 by denying Black voters equal access to the political process).

District Court for South Carolina noted that evidence presented against a proposed plan "overwhelmingly demonstrate[d] that the first two *Gingles* factors" needed to create majority-Black legislative and congressional districts—that is, a "history of official discrimination" affecting the right to vote and racial polarization—"are present statewide."[18]

The Subcommittee must be especially vigilant when redrawing maps because of historical and current realities that enhance the risk of racial discrimination in voting. South Carolina has a long record of denying and abridging the voting rights of Black and other voters of color through various discriminatory voting rules.[19] Of many examples, an 1892 South Carolina voter registration law "is estimated to have disfranchised 75 percent of South Carolina's [B]lack voters."[20] Three years later, the State's 1895 Constitution "was a leader in the widespread movement to disenfranchise [eligible Black citizens]."[21] Indeed, until 1965, South Carolina enforced both a literacy test and a property test that were "specifically designed to prevent [Black people] from voting."[22] And after the Voting Rights Act's enactment in 1965, South Carolina promptly challenged the Act's constitutionality, continuing its historical practice of trying to deny equal voting rights to Black voters.[23] Indeed, before Senator Tim Scott's historic election in 2014, *no* Black candidate had been elected to state-wide office in South Carolina since Reconstruction.[24]

This is also South Carolina's first redistricting cycle without the protections of Section 5 of the Voting Rights Act, which played a critical role in safeguarding against retrogressive voting plans in prior redistricting cycles.[25] With preclearance in place, "discriminatory changes in voting practices or procedures in South Carolina" elicited over 120 objections from the U.S.

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18 *See Colleton Cty. Council*, 201 F. Supp. 2d at 642.

19 John C. Ruoff and Harbert E. Buhl, *Voting Rights in South Carolina 1982-2006*, Southern California Review of Law and Social Justice, Vol. 17(2) 643 (2008).

20 *Condon v. Reno*, 913 F. Supp. 946, 949 (D.S.C. 1995).

21 *South Carolina v. Katzenbach*, 383 U.S. 301, 319 n.9 (1966).

22 *Id.* at 310.

23 *See id*. at 307.

24 Jamie Self, *Scott makes history: SC elects first African American to Senate*, The State (Nov. 4, 2014), https://www.thestate.com/news/politics-government/politics-columns-blogs/the-buzz/article13908368.html; *see* Ruoff, *supra* note 19, at 649.

25 *See Shelby*, 570 U.S. at 557.

Department of Justice,[26] including at least 27 objections between 1972 and 2002 in cases where a proposed state or local redistricting plan "ha[d] the purpose of or w[ould] have the effect of diminishing the ability of . . . citizens of the United States on account of race or color . . . to elect their preferred candidates of choice."[27] Without preclearance, this Subcommittee must facilitate a redistricting process that complies with federal mandates in force, including Section 2 of the Voting Rights Act and the Fourteenth and Fifteenth Amendments' prohibitions on racial discrimination.

Failure to comply with Section 2's requirements during this redistricting cycle would again expose the State of South Carolina or its constituent jurisdictions to costly litigation. For example, lawmakers in Charleston County spent $2 million unsuccessfully defending against a Section 2 claim.[28] After losing the lawsuit, the County paid an additional $712,027 in plaintiffs' attorneys' fees and costs.[29]

Even when Section 2 conditions are not met, the U.S. Constitution protects against maps that intentionally "pack" Black voters into districts with unnecessarily high Black populations or "crack" them into districts with unnecessarily low ones—both of which stratagems can illegitimately elevate race over other considerations and diminish the political power of Black voters.[30]

Although South Carolina has made progress since 1965, this Subcommittee must not fail to fulfill its affirmative obligations under Section 2 and the U.S. Constitution. It must proactively assess whether redistricting lines dilute minority voters' ability to elect candidates of their choice or otherwise

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[26] U.S. Department of Justice, *Voting Determination Letters for South Carolina*, https://www.justice.gov/crt/voting-determination-letters-south-carolina (last updated: Aug. 7, 2015).

[27] *Id.*; Ruoff, *supra* note 19, at 645, 655-57; *see* 52 U.S.C. § 10304(b).

[28] Order Granting Attorneys' Fees, *Moultrie v. Charleston Cty.*, No. 2:01-cv-00562-PMD (D.S.C. Aug. 8, 2005).

[29] Congressional Authority to Protect Voting Rights After Shelby County v. Holder: Hearing Before the Subcomm. on the Constitution, Civil Rights and Civil Liberties of the H. Comm. on Judiciary, 116th Cong. 14 (Sept. 24, 2019) (Written Testimony of Professor Justin Levitt) (citing Amended Judgment, Moultrie v. Charleston Cty., No. 2:01-0562 (D.S.C. Aug. 9, 2005))

[30] Ala. Leg. Black Caucus v. Alabama, 575 U.S. 254, 278 (2015); Bethune-Hill v. Va. State Bd. of Elections, 137 S. Ct. 788, 802 (2017) (finding 12 districts were unconstitutional racial gerrymanders because the legislature decided to make them all meet a 55% BVAP target for which there was no strong basis in evidence).

intentionally relegate Black voters into districts that minimize their political power.

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Ultimately, the Subcommittee must bear in mind that both the Voting Rights Act and the "one person, one vote" ideal embody fundamental principles of democracy, political representation, and constituent equity. "There can be no truer principle than . . . that every individual of the community at large has an equal right to the protection of government."[31] Additionally, dilutive redistricting plans that deprive Black voters of the opportunity to elect their preferred candidates have a direct impact on Black voters' access to representatives who will be responsive to the needs of their communities.[32]

II. This Subcommittee Must Ensure Public Involvement and Transparency During all Phases of Redistricting, and Should Model Best Practices for Local Government.

The maps that the Legislature will consider over the coming months will likely be in place for at least the next decade. They will be foundational to residents' access to political representation and to qualified citizens' access to the right to vote for candidates of choice for congressional, legislative, and local governing bodies. No one is more qualified than the public to discern which maps allow (or do not allow) communities to have a voice and a choice in the process of electing their representatives. Accordingly, any maps that the Legislature proposes or otherwise considers must reflect South Carolina in all its diversity. We share the below recommendations to assist the Subcommittee in meeting this significant responsibility.

Prioritize Public Involvement: Public Hearings scheduled from July 27 through August 12, 2021, are a positive first step in fulfilling this Subcommittee's obligations to create meaningful opportunities for public engagement in the redistricting process. We commend the Subcommittee for streaming these hearings and creating opportunities for both in-person and remote testimony, and encourage this body to host regular public hearings

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[31] Alexander Hamilton, 1 Records of the Federal Convention of 1787, p. 473 (M. Farrand ed. 1911).

[32] Testimony of Laughlin McDonald, American Civil Liberties Union Foundation, Before the House Committee on the Judiciary Subcommittee on the Constitution: The Voting Rights Act: The Continuing Need for Section 5, https://www.aclu.org/other/testimony-laughlin-mcdonald-director-aclus-voting-rights-project-house-judiciary-subcommittee (last visited July 29, 2021).

throughout the redistricting process. However, the signatories to this letter are concerned about the lack of sufficient notice prior to the first week of hearings, as the public was granted fewer than five business days to prepare testimony, including documentation of communities of interest, and other important materials that would enhance the value of these hearings.

Going forward, we urge the Subcommittee to adopt the following processes and safeguards for the benefit of all South Carolinians:

- ***Continue to host regular public hearings and publish adequate notice and documentation of all such meetings***. The public should be granted notice of at least 7-10 business days to allow communities to prepare meaningful testimony and supporting materials such as maps. To ensure that the voices of voters of color are heard, this Subcommittee should proactively post notice of public hearings in media outlets and local forums that serve communities of color.

- ***Incorporate public testimony into any redistricting principles the Subcommittee may adopt to supplement federal and constitutional redistricting requirements***. While secondary to affirmative federal obligations, traditional redistricting principles like compactness, contiguity, and maintaining communities of interest may also be considered to ensure that district lines serve South Carolinians equitably and do not unconstitutionally or illegally dilute minority voting strength. In 2011, the Senate and House redistricting subcommittees adopted guidelines reflecting these principles, and we encourage the Subcommittee to incorporate concerns and priorities raised in public testimony to craft similar principles for 2021.[33] In particular, we encourage the Subcommittee to formally adopt a holistic definition of "communities of interest" that reflects the diverse social, cultural, and economic dimensions of South Carolina's communities to prevent the dilution or erasure of communities of color.

- ***Provide meaningful opportunities for the public to review, provide comments on, and propose community maps***. Develop a mechanism for South Carolinians to submit written comments and

[33] South Carolina Legislature, South Carolina House Judiciary Redistricting Subcommittee, *Redistricting Guidelines 2011* (Apr. 13, 2011), https://redistricting.scsenate.gov/Documents/RedistrictingGuidelinesAdopted041311.pdf.

questions regarding the State's proposed maps, to submit alternative maps that are available to other members of the public, and to incorporate these maps into the legislative record.

Ensure Transparency: Informed involvement by all South Carolinians requires transparency and meaningful opportunities for public participation at all stages of the redistricting process. The Legislature's recently launched redistricting website[34] and the Subcommittee's social media accounts are first steps towards a transparent and inclusive process. We further encourage the Subcommittee to:

- ***Update the State's redistricting website daily***. These updates should include public meeting notices, proposed meeting agendas, and proposed maps, which should be posted at least a week before the legislature considers the map, along with all relevant district-level data associated with any proposed maps, including but not limited to demographic data. The identity of any expert or consultant the State engages to assist with the redistricting process should also be posted.

- ***Publicize all data used by the Legislature to inform its redistricting plans***. Make data available in real time, including any data released by the U.S. Census Bureau relevant to South Carolina and redistricting. This data should be publicized in a format that can be used by the public.

- ***Prohibit backroom negotiations***. To ensure transparency in the redistricting process, legislative decisionmakers must conduct all redistricting meetings, hearings, or other sessions in public, and permit members of the public to view and participate in the proceedings remotely.

Model Best Practices for Local Government Redistricting: Redistricting by the Legislature also sets the standard and tone for local redistricting in the State. Over the next three months, this Subcommittee can serve as an exemplar for other governing bodies charged with redistricting, particularly at the local level. As with state-level representative bodies, the Voting Rights Act also requires that voters of color be provided equal opportunities to elect

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[34] South Carolina Legislature, *South Carolina Redistricting 2021 - Senate Judiciary Committee*, https://redistricting.scsenate.gov/ (last visiting July 29, 2021).

representatives of their choice to city and county councils, school boards, and other elected local bodies.

This is particularly critical in light of prior violations at the local level. The U.S. Department of Justice filed 26 objections to South Carolina school district elections, nominations, and redistricting plans between 1972-2010, meaning that, on more than two dozen occasions, the Department was unable to conclude that a local South Carolina redistricting plan "neither ha[d] the purpose nor w[ould] have the effect of denying or abridging the right to vote on account of race or color."[35] At least two districts were found to have at-large election methods that interacted with social and historical conditions to dilute the voting strength of Black voters, in violation of Section 2.[36] To prevent racially discriminatory vote dilution at the local level in the 2021 redistricting cycle, consistent with its authority, the Legislature should model best practices and require all local entities charged with redistricting responsibilities to commit to following similar best practices.[37]

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Please feel free to contact Steven Lance at slance@naacpldf.org with any questions or to discuss these issues in more detail. We also urge you to review ***Power on the Line(s): Making Redistricting Work for Us***,[38] a guide for community partners and policy makers who intend to engage in the redistricting process at all levels of government. The guide provides essential information about the redistricting process, such as examples of recent efforts to dilute the voting power of communities of color and considerations for avoiding such dilution. The guide includes clear, specific, and actionable steps that community members and policy makers can take to ensure that voters of color can

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[35] U.S. Department of Justice, *Voting Determination Letters for South Carolina*, https://www.justice.gov/crt/voting-determination-letters-south-carolina (last updated: Aug. 7, 2015); *see* 52 U.S.C. § 10304(a).

[36] See *United States v. Charleston Cty*., 316 F. Supp. 2d 268 (D.S.C. 2003), *aff'd sub nom. United States v. Charleston Cty*., S.C., 365 F.3d 341 (4th Cir. 2004); *see United States v. Georgetown County School District*, No. 2:08- cv-00889 (D.S.C. 2008).

[37] *See Moye v. Caughman*, 217 S.E.2d 36 (1975) (finding that the South Carolina legislature has authority over school district redistricting plans).

[38] *See* NAACP Legal Defense and Educational Fund, Inc., Mexican American Legal Defense and Educational Fund, and Asian Americans Advancing Justice | AAJC, *Power on the Line(s): Making Redistricting Work for Us*, (2021), https://www.naacpldf.org/press-release/civil-rights-organizations-release-redistricting-guide-to-support-black-latino-and-aapi-communities-participation-in-crucial-process/.

meaningfully participate in the redistricting process and hold legislators accountable.

Sincerely,

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