

May 17, 2021

Sent via email

House and Governmental Affairs Committee
Louisiana House of Representatives
Box 94062
Baton Rouge, LA 70804

**Re: Support for Expansion in Louisiana Supreme Court from
Seven Single-Member Districts to Nine Single-Member
Districts in SB 163**

Dear Chairman Stefanski, Vice Chair Duplessis, and Members of the House Governmental Affairs Committee:

The NAACP Legal Defense and Educational Fund, Inc. (“LDF”) writes to express our support for the proposal in Senate Bill (“SB”) 163¹ to place a constitutional amendment on the October 9, 2021 ballot to expand the size of the Louisiana Supreme Court from seven members to nine members, each elected from one district (“single-member district”).² However, we believe that implementation of this expansion should not be delayed until 2025, as currently proposed in SB 163.

It is critical that Louisiana’s communities of color are fairly represented on the Louisiana Supreme Court. The Louisiana Supreme Court has expansive jurisdiction to review judgments of the courts of appeal in every civil and criminal action filed in state court in Louisiana, which is where the vast majority of cases are heard.³ In civil cases, the Supreme Court has plenary authority to review not only legal conclusions, but also may review factual conclusions.⁴ The decisions made by the Louisiana Supreme Court have profound consequences for all Louisianans and have the potential to affect every aspect of life. The Louisiana Supreme Court has recently heard cases (or may soon hear cases)

¹ See SB 163, Reengrossed (as passed by Senate Apr. 27, 2021) (“SB 163”).

² A similar proposal to expand the Louisiana Supreme Court to nine members was proposed in House Bill 425 (2021).

³ Over 95% of all cases heard in the United States are in state (not federal) court. See *Legislative Assaults on State Courts*, Brennan Center for Justice (Jan. 24, 2020), <https://bit.ly/2Qh1SIP>.

⁴ Louisiana Constitution, Art. V, Sec. 5(C).

implicating a wide range of critically important issues, including, among other things, the death penalty; ensuring fair and non-discriminatory policing and administration of justice; whether Louisianans on parole or probation or with past felony convictions are entitled to vote; the extent to which Louisianans have access to health care; and protections for workers and employees; just to name a few.

I. Three Single-Member Districts Can Be Drawn Under A Nine-Single-Member District Supreme Court Map in Which the Voting Power of Black Voters Is Not Minimized.

In expanding the size of the Supreme Court, as SB 163 contemplates, and as this body is well aware, the Legislature must undertake its affirmative obligation to ensure that new districts comply with Section 2 of the Voting Rights Act (“Section 2”), which the U.S. Supreme Court has ruled applies to the Louisiana Supreme Court districts,⁵ as well as to comply with other legal requirements. Under Section 2, the Legislature must ensure that Black and other voters of color have an equal opportunity “to participate in the political process and elect candidates of their choice” where the demographics, voting patterns, and other circumstances are present. *See Thornburg v. Gingles*, 478 U.S. 30, 34 (1986).

The U.S. Supreme Court has determined that district maps may be unlawful when the following preconditions are satisfied: (1) a district can be drawn in which the minority community is sufficiently large and geographically compact to constitute a majority in a single-member illustrative district (i.e., a majority-minority district); (2) the minority group is cohesive in its support for its preferred candidates; and (3) in the absence of majority-minority districts, candidates preferred by the minority group would usually be defeated due to the political cohesion of non-minority voters for their preferred candidates.⁶ *See Gingles*, 478 U.S. at 47-52 (these three preconditions are referred to as the “*Gingles* preconditions”). After a plaintiff establishes the three *Gingles* preconditions, a “totality of circumstances” analysis is required to determine whether minority voters “have less opportunity than other members of the

⁵ *See Chisom v. Roemer*, 501 U.S. 380 (1991).

⁶ The second and third conditions are commonly referred to as racial bloc or racially polarized voting.

electorate to participate in the political process and to elect representatives of their choice.” 52 U.S.C. § 10301(b); *see also LULAC v. Perry*, 548 U.S. 399, 425 (2006); *Gingles*, 478 U.S. 30.⁷

Based on an analysis by LDF, there are indicia that it is possible to draw three single-member districts, in which Black voters comprise the majority, in a Supreme Court map with nine single-member districts, while preserving substantial equality of population in all nine single-member districts and satisfying other criteria.⁸ Key among these indicia is that Louisiana has a well-documented history and ongoing record of racially polarized voting,⁹ which goes to the heart of why single-member districts continue to be necessary to ensure that voters of color can elect candidates of their choice, including for the Supreme Court.¹⁰ Moreover, Louisiana’s demographics reflect that 58.8% of its statewide population is white; 41.2% is nonwhite or Latino; and 32.1% is Black,¹¹ and in light of where Black people reside in the state and indicia of

⁷ The Fifth Circuit has recognized that “it will be only the very unusual case in which the plaintiffs can establish the . . . *Gingles* factors but still have failed to establish a violation of § 2 under the totality of the circumstances.” *Clark v. Calhoun Cty.*, 21 F.3d 92, 96 (5th Cir. 1994).

⁸ While judicial districts are not required to comply with the principle of one person, one vote as a matter of constitutional law, *see Wells v. Edwards*, 347 F. Supp. 453, 455-56 (M.D. La. 1972), *aff’d*, 409 U.S. 1095 (1973), population equality is an equitable consideration. *Clark v. Roemer*, 777 F. Supp. 445, 453 (M.D. La. 1990). The Supreme Court’s decisions have established, as a general matter, that an apportionment plan with a maximum population deviation between the largest and smallest districts of no more than 10% is consistent with the principle of one person, one vote. *Brown v. Thomson*, 462 U.S. 835, 842 (1983); *see also White v. Regester*, 412 U.S. 755, 761-64 (1973).

⁹ *See, e.g., Terrebonne Par. Branch NAACP v. Jindal*, 274 F. Supp. 3d 395 (M.D. La. 2017), *rev’d sub nom. Fusilier v. Landry*, 963 F.3d 447 (5th Cir. 2020); *Hall v. Louisiana*, 108 F. Supp. 3d 419 (M.D. La. 2015); *Nw. Austin Mun. Util. Dist. No. One v. Mukasey*, 573 F. Supp. 2d 221, 251 (D.D.C. 2008) (As of 2006, “not one redistricting plan for the Louisiana House of Representatives had ever been precleared as originally submitted.”); *St. Bernard Citizens For Better Gov’t v. St. Bernard Par. Sch. Bd.*, No. 02-2209, 2002 WL 2022589 (E.D. La. Aug. 26, 2002).

¹⁰ *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 499 (5th Cir. 1987) (“Racially polarized voting is the linchpin of a § 2 vote dilution claim.”); *McMillan v. Escambia County*, 748 F.2d 1037, 1043 (5th Cir. 1984) (“[RPV] will ordinarily be the keystone of a dilution case”); *see also Clark v. Calhoun County*, 88 F.3d 1393, 1397 (5th Cir. 1996); *Gingles*, 478 U.S. at 48 n.15; *Westwego Citizens for Better Gov’t v. City of Westwego*, 946 F.2d 1109, 1122 (5th Cir. 1991).

¹¹ *See 2019-2015 Five-Year American Community Survey*, United States Census Bureau. Louisiana’s eligible voter population (or citizen voting age population) is 62.5% white, 37.5%

shared common interests, among other considerations, drawing three out of nine single-member districts in which voters of color have an opportunity to elect candidates of their choice is possible.¹²

Therefore, if SB 163 becomes law, the state legislature must ensure that this expanded body does not diminish the voting power of voters of color and that they are afforded an opportunity to participate equally and elect candidates of their choice in compliance with Section 2 of the Voting Rights Act.

II. An Expansion in the Supreme Court to Nine Single-Member Districts Should Not Be Delayed Until 2025.

The current draft of SB 163 provides that the expansion in the Supreme Court shall not take effect until 2025¹³ and leaves discretion to the legislature to “set forth the specific method of transitioning to nine single-member districts.”¹⁴

At least three seats on the Supreme Court will be up for an election prior to 2025, because three of the current Supreme Court Justices—who are elected for ten-year terms¹⁵—were most recently elected prior to 2015.¹⁶ If implementation of the expansion in the Supreme Court to nine single-member districts is delayed until 2025, then three of the nine Justices would be elected to ten-year terms under an obsolete and dilutive structure *after* Louisiana voters

nonwhite and/or Latino, and 31.5% Black. *Id.* These numbers are consistent with the 2010 Census. *See 2010 P.L. 94 Redistricting Data*, United States Census Bureau.

¹² There is currently only one majority-Black Supreme Court district. There is ongoing litigation alleging that it is possible—and mandated by Section 2 of the Voting Rights Act—to provide a second-majority Black district under the existing a seven-member structure (as compared to a nine-member structure proposed in SB 163), based on demographic data from 2010. *See Louisiana State Conference of the NAACP v. State of Louisiana*, No. 3:19-cv-479 (M.D. La. 2019). Of note, there also has been litigation seeking to create a second majority-Black district for the six single-member district congress, as there currently only is one majority-Black district. *See Johnson v. Ardoin*, No. 3:18-cv-625 (M.D. La. 2018).

¹³ *See* SB 163, Sec. 3.

¹⁴ *See id.*, Sec. 1, amendments to Louisiana Constitution, Art. V, Sec. 4(B).

¹⁵ *See* Louisiana Constitution, Art. V, Sec. 3.

¹⁶ The Chief Justice John L. Weimer (Fifth District) and Associate Justice Jefferson D. Hughes III, (Sixth District) were elected in 2012, and Associate Justice Scott J. Crichton (Second District) was elected in 2014.

had enacted a constitutional referendum to expand the Supreme Court to nine single-member districts.

SB 163's proponents have provided no justification to delay implementation of SB 163's provisions until 2025. This delay would result in multiple elections under a dilutive structure that denies fair representation to Louisiana's voters of color. In light of the likelihood that cases concerning significant issues will come before the Louisiana Supreme Court in the coming years, the decision to delay implementation—and diminish the voices of voters of color on the Supreme Court for up to four years—could also have profound policy implications that could severely shape Louisiana's jurisprudence. Therefore, it is critical that SB 163 be amended to provide that any expansion in the size of the Louisiana Supreme Court take effect prior to the 2022 election.

* * *

Please feel free to contact Michael Pernick at (917) 790-3597 or by email at mpernick@naacpldf.org with any questions or to discuss these issues in more detail. We also commend you to digest *Power on the Line(s): Making Redistricting Work for Us*,¹⁷ a guide for community partners and policy makers who intend to engage in the redistricting process at all levels of government.

Sincerely,

/s/ Michael Pernick

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¹⁷ 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://bit.ly/3ogg6pS>.

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NAACP Legal Defense and Educational Fund, Inc. (“LDF”)

Since its founding in 1940, LDF has used litigation, policy advocacy, public education, and community organizing strategies to achieve racial justice and equity in education, economic justice, political participation, 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.