November 30, 2021

Sent via email

South Carolina Association of Counties
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Re: Supplemental Information on Post-2020 Census Redistricting in South Carolina

Dear Mr. Winslow and Mr. Rainwater:

On August 24, 2021, the NAACP Legal Defense and Educational Fund, Inc. ("LDF"),[1] American Civil Liberties Union ("ACLU"), South Carolina State Conference of the NAACP ("South Carolina NAACP"), League of Women Voters of South Carolina (the "LWV-SC"), South Carolina Appleseed Legal Justice Center, and South Carolina Progressive Network Education Fund wrote (1) to share information with the South Carolina Association of Counties ("SCAC") about the post-2020 redistricting process; (2) to remind counties of their affirmative obligations to comply with the U.S. Constitution and Section 2 of the Voting Rights Act ("Section 2"); and (3) to share recommendations for meaningfully involving community members in a transparent redistricting

[1] 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.

process.[2] LDF, ACLU, the South Carolina NAACP, and the LWV-SC, joined by the ACLU of South Carolina and South Carolina Association of Black Communities, now write to supplement that letter with additional considerations in response to information—sometimes inaccurate or incomplete—being presented to SCAC member counties by Mr. Frank Rainwater of the South Carolina Office of Revenue and Fiscal Affairs ("RFA"),[3] as well as our experiences and those of partners with respect to redistricting across South Carolina localities, such as in Lancaster, Columbia, York, and elsewhere. In a public presentation in Beaufort County on October 27, Mr. Rainwater stated that he and the RFA are assisting approximately 30 (of South Carolina's 46) counties, 12 municipalities, and other entities with redistricting.[4] Accordingly, the potential impact of inaccurate and incomplete information in Mr. Rainwater's presentations is significant.

I. Ensuring Transparency in the Redistricting Process

First, we strongly encourage you to push each local body with redistricting responsibilities to publicize the timing of its redistricting process. Otherwise, meaningful participation by members of the public, for whom redistricting has profound importance, may be impossible. Jurisdictions should, at minimum, publish their intended schedules for (i) considering proposed maps (both maps proposed by the public and maps proposed by officials), (ii) receiving public input on proposed maps, and (iii) adopting those maps. This information should be posted prominently on official websites (for example, on the official bodies' respective home pages), distributed on social media, and shared through news outlets. Jurisdictions' published redistricting schedules should be kept up-to-date in the event of any changes or delays. As of this letter, far too few county and city websites include information on redistricting schedules.[5]

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[2] Letter from LDF, et al., to S.C. Assoc. of Counties (Aug. 24, 2021), https://www.naacpldf.org/wp-content/uploads/8.24.2021_Letter-to-SC-Association-of-Counties_Final.pdf ("August 24 letter").

[3] *October 27, 2021, County Council/Redistricting Workshop*, Beaufort County, S.C., https://beaufortcountysc.new.swagit.com/videos/142409; *2020 Redistricting Benchmark Report: Oconee County*, S.C. Revenue & Fiscal Affairs (Sept. 27, 2021) (on file with authors).

[4] *October 27, 2021, County Council/Redistricting Workshop, supra* note 3, at 4:22–4:38.

[5] For example, our review of the official websites for Lancaster, Richland, Lexington, and York Counties on November 21, 2021, revealed no news or announcements regarding those counties' redistricting processes or timelines.

Jurisdictions should also provide opportunities for the public to provide feedback within a reasonable time after maps are proposed and always before adoption. At minimum, residents and other interested parties should be given opportunities to provide feedback in writing, in-person, and remotely. This is important because of the continuing concerns about the in-person accessibility of hearings due to COVID-19, as well as the need for working people and caretakers to participate in the process outside of business hours.

Mr. Rainwater and the RFA have also encouraged counties to adopt guidelines for their redistricting processes in advance of map-drawing.[6] We agree with this recommendation. Guidelines are a critical element of any redistricting process because they enable the public to understand the criteria officials are considering when they assess and develop redistricting maps. We reiterate our August 24 letter's guidance on some of the baseline requirements that should be included in these criteria. We further agree that jurisdictions must identify their principles before beginning the process of mapping. Courts—including the U.S. Supreme Court—have frowned upon post-hoc justifications for drawing district lines.[7]

II. Ensuring that the Substance of Local Redistricting Activities Complies with the Law and Redistricting Principles

As our August 24 letter made clear, state or local legislative bodies responsible for redistricting must ensure that any maps they adopt comply with both the U.S. Constitution's "One Person, One Vote" mandate[8] and the Voting Rights Act's "nationwide ban on racial discrimination in voting."[9]

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[6] *October 27, 2021, County Council/Redistricting Workshop*, *supra* note 3, at 15:02–16:18

[7] *See, e.g., Ala. Leg. Black Caucus v. Alabama*, 575 U.S. 254, 274 (2015) (disregarding the purported justification that district boundaries were drawn to follow "highway lines" because following highways "was not mentioned in the legislative redistricting guidelines").

[8] *Reynolds v. Sims*, 377 U.S. 533, 565–68, 558 (1964) (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.").

[9] *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 . . . .").

A. Affirmative Obligations under the U.S. Constitution to Ensure Equality of Population

In our previous correspondence with the SCAC, we explained that state and local redistricting maps may have population deviations within plus or minus 5% of the mathematical mean, or 10% overall.[10] Higher deviations from population equality are not categorically prohibited, but they may elicit malapportionment lawsuits, requiring the legislative body responsible for redistricting to justify the deviations by showing that they legitimately advance a rational state policy formulated "free from any taint of arbitrariness or discrimination."[11]

It has come to our attention that Mr. Rainwater and the RFA have advised counties to ensure that their maps stay within an even lower deviation range of plus or minus 2.5%, or 5% overall.[12] Mr. Rainwater's advice on this matter, however, is incorrect. The U.S. Supreme Court has long made clear, with respect to state and local redistricting, that "minor deviations from mathematical equality . . . are insufficient to make out a prima facie case of

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[10] *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) (explaining that "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% are presumed to violate the "one person, one vote" principle, requiring the state or locality to justify them). In addition, South Carolina law also establishes a 10% overall deviation for county councils. S.C. Code Ann. § 4-9-90.

[11] *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").

[12] *Oct 27, 2021, County Council/Redistricting Workshop*, *supra* note 3, at 18:04–19:48 (Mr. Rainwater displaying a slide that reads: "RFA recommends a deviation range of 5%."); *id.* at 21:06–21:50 (Mr. Rainwater stating: "The Court's standard is you have to be 10 percent or less. If you're at 9 percent, that may be okay, but you can still be subject to challenge. If somebody wants to challenge you on that, and they can draw a better plan that gets it to 5, or 4, or 3 percent, you're at risk on that. . . . Some counties, the State General Assembly, the Senate plan is adopting a 5% deviation, and that's our recommendation, to shoot for 5% . . . ."). In addition, contrary to Mr. Rainwater's assertion, the South Carolina Senate's adopted redistricting guidelines state that "population deviations of individual districts shall be within plus (+) or minus (-) five percent (5%) of the ideal population and within an overall range of less than ten percent (10%)." 2021 Senate Redistricting Guidelines, Senate Judiciary Comm. (Sept. 17, 2021), https://redistricting.scsenate.gov/planproposal.html.

invidious discrimination under the Fourteenth Amendment so as to require justification by the State."[13] Under U.S. Supreme Court precedent, "a maximum population deviation under 10% falls within this category of minor deviations."[14]

If a state or local redistricting plan is challenged in court and plaintiffs can show that the plan's population deviations exceed 10%, the burden shifts to the state or locality to justify these deviations under a rational state policy.[15] But, even then, the state or local entity can still justify deviations larger than 10% when they "may be necessary to permit the States to pursue other legitimate objectives[.]"[16] "The ultimate inquiry" in a state or local malapportionment challenge "is whether the legislature's plan 'may reasonably be said to advance [a] rational state policy' and, if so, 'whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits.'"[17]

In *Mahan v. Howell*, for example, the U.S. Supreme Court upheld the constitutionality of a Virginia legislative plan with a 16.4% maximum deviation.[18] The Court observed that such a high deviation "may well approach tolerable limits," but found that, under the circumstances of that case, the plan's deviations did not discriminate and were necessary to maintain the integrity of political subdivisions, and thus did not exceed "tolerable constitutional limits."[19]

Of course, this does not mean counties should expect the courts to bless 16% deviations in all cases. As stated above, any deviation of 10% or more must be justified, and the ultimate determination in any malapportionment case will be fact-specific. Thus, the "the fact that a 10% or 15% variation from the norm

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13 *Gaffney*, 412 at 745 (upholding a legislative redistricting plan in which districts deviated from each other by 7.83% because "minor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State"); *see also Avery v. Midland Cty., Tex.*, 390 U.S. 474, 484–85 (1968) (holding "that the Constitution permits no *substantial* variation from equal population in drawing districts for units of local government having general governmental powers over the entire geographic area served by the body") (emphasis added).

14 *Brown*, 462 U.S. at 842.

15 *Id.* at 843.

16 *Id.* at 842.

17 *Id.* at 843 (alterations in original).

18 410 U.S. 315, 329 (1973).

19 *Id.*

is approved in one State has little bearing on the validity of a similar variation in another State."[20]

But counties should take care not to sacrifice legitimate redistricting considerations, including Voting Rights Act ("VRA") compliance, for the sake of maintaining unnecessarily low deviations, such as the range suggested by Mr. Rainwater. Indeed, the U.S. Supreme Court has warned that "[a]n unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations" and lead jurisdictions to inappropriately ignore other "factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement."[21] Mr. Rainwater himself clarified, in his October 27 presentation, that "you may have to go higher, or a little bit lower on the deviation to help communities of interest, or one of these other factors."[22] It is therefore important that counties give the RFA's 5% deviation recommendation little or no weight because it has no basis in law.

i. Additional "One Person, One Vote" Considerations with Respect to Incarcerated and Detained Persons

We also understand that Mr. Rainwater may be raising the issue of what is referred to as "prison-based gerrymandering." Prison-based gerrymandering arises when people who are incarcerated or detained in jails or prisons are inaccurately counted as residents of those facilities for redistricting purposes, rather than being counted at their homes. As discussed above, the Fourteenth Amendment's Equal Protection Clause requires districts to have substantially equal numbers of people, within presumptively permissible deviation ranges. Prison-based gerrymandering skews districting maps and undermines the goals of attaining population equality because incarcerated people are counted as residents of places where they neither legally nor practically reside. This practice inflates the populations of districts where prisons are located and deflates the populations of districts from which incarcerated people originated. Under this practice, incarcerated people are counted in districts where they are often barred from voting or otherwise participating in civic, social, or economic life, and where elected officials do not consider them as bona fide constituents.

We share the RFA's concern about prison-based gerrymandering's distorting effects. Indeed, several signatories of this letter have advocated for

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[20] *Swann v. Adams*, 385 U.S. 440, 445 (1967).

[21] *Brown*, 462 U.S. at 842 (quoting *Gaffney*, 412 U.S. at 749).

[22] *October 27, 2021, County Council/Redistricting Workshop*, *supra* note 3, at 33:00–33:08.

solutions to prison-based gerrymandering, either by ensuring that the Census counts incarcerated people as residents of their pre-incarceration home addresses, or that states reallocate incarcerated people to their home addresses when drawing redistricting maps.[23] At least 200 local jurisdictions, as of 2019, have avoided or mitigated prison-based gerrymandering.[24] And at least twelve states have done so as of November 2021.[25]

We are concerned, however, by the RFA's suggestion that state jail or prison populations should be *excluded* entirely from a county's population base for purposes of local redistricting. The solutions we support change *where* incarcerated people are counted—not *whether* they are counted. Foundationally, under the U.S. Constitution's "one person, one vote" principle, everyone has an equal right to representation, and thus everyone should be included in the population base for redistricting maps.[26] This is because, as the U.S. Supreme Court recognized in *Reynolds v. Sims*, "the fundamental principle of representative government in this country is one of equal representation for equal numbers of people."[27] Regardless of age, voting eligibility, or citizenship, every person has the same fundamental right to access and petition their elected

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[23] *See, e.g.*, LDF, to R.I. Special Comm'n on Reapportionment (Nov. 12, 2021), https://www.naacpldf.org/wp-content/uploads/LDF-Letter-to-RI-Reapportionment-Commission-re-Prison-Based-Gerrymandering-11-12-21.pdf; *LDF and Co-Counsel File Lawsuit Challenging Pennsylvania's Prison-Based Gerrymandering Scheme*, LDF (Feb. 27, 2021), https://www.naacpldf.org/press-release/ldf-and-co-counsel-file-lawsuit-challenging-pennsylvanias-prison-based-gerrymandering-scheme/; Brief of Amici Curiae NAACP Legal Def. & Educ. Fund, Inc., et al. in Supp. of Pls.-Appellees & Affirmance, *Davidson v. City of Cranston, R.I.*, No. 16-1692 (1st Cir. Aug. 31, 2016), https://www.naacpldf.org/wp-content/uploads/LDF-andCivil-Rights-Groups-Amicus-Brief-in-Davidson-v.-Cranston.pdf; Letter from Leah C. Aden, LDF, to Karen Humes, U.S. Census Bureau (Sept. 1, 2016), https://www.naacpldf.org/wp-content/uploads/NAACP-LDF-Letter-to-Chief-Humes-of-the-Census-Bureau_0-1.pdf; Brief of the Howard Univ. School of Law Civil Rights Clinic, et al., as Amici Curiae Supporting Respondents, *Fletcher v. Lamon*e, No. 8:11-cv-03220 (D. Md. Dec. 2, 2011); Decision/Order, Index No. 2310-2011, *Little v. LATFOR* (N.Y. Sup. Ct. Aug. 4, 2011), https://www.nyclu.org/sites/default/files/releases/order%2520on%2520intervention.pdf.

[24] *Local Governments that Avoid Prison-Based Gerrymandering*, Prison Policy Initiative (Jan. 7, 2019), https://www.prisonersofthecensus.org/local/.

[25] *Momentum is Building to End Prison-Based Gerrymandering*, Prison Policy Initiative (2021), https://www.prisonpolicy.org/graphs/momentum.html.

[26] *Calvin v. Jefferson County Bd. of Commissioners*, 172 F. Supp. 3d 1292, 1303 (N.D. Fla. 2016) (characterizing this right as "the interest in being represented on an equal footing with one's neighbors").

[27] *Sims*, 377 U.S. at 560–61.

representatives.[28] Indeed, "the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives."[29] At the local level, ensuring that redistricting maps are based on the county or a locality's total population is necessary to ensure that elected officials are responsive to an equal number of residents and that all residents have an equal ability to "make their wishes known" to them.[30] Excluding incarcerated people from the localities' population bases in redistricting would potentially undermine these rights and longstanding principles of representation, especially for county jails, where a large proportion of persons are likely local residents.

For these reasons, we suggest that counties consider alternative solutions. Instead of excluding incarcerated or detained persons from the population base for redistricting, counties should either (1) obtain incarcerated people's home addresses from prison or jail officials and assign as many people as possible to their home addresses, when those addresses are within the county; or (2) distribute the total incarcerated population within the county equally across all districts, rather than concentrating them at the prison location or excluding them altogether. These solutions would mitigate, though not resolve, the distorting effects of prison-based gerrymandering on local legislative maps, while also ensuring that every person is counted in such maps.

B. Affirmative Obligations Under Section 2 of the Voting Rights Act

In general, Mr. Rainwater's above-mentioned October 27 presentation in Beaufort County accurately described counties' federal redistricting obligations under the U.S. Constitution's "one person, one vote" population equality principle and non-dilution of racial minority voting strength under Section 2.[31]

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[28] *Evenwel v. Abbott*, 136 S. Ct 1120, 1132 (holding that history, precedent, and practice demonstrate that total-population apportionment is appropriate because elected "representatives serve all residents, not just those eligible or registered to vote").

[29] *E. R. R. Presidents Conf. v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961).

[30] *Id*; *see Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1967) (explaining that "[e]qual representation for equal number of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives."); *see also Garza v. County of Los Angeles*, 918 F.2d 763, 775 (9th Cir. 1990) (explaining how all residents have a "right to petition their government for services" and "[i]nterference with individuals' free access to elected representatives impermissibly burdens their right to petition the government.").

[31] *October 27, 2021, County Council/Redistricting Workshop*, *supra* note 3, at 7:08–11:00, 25:02–27:10, 31:47–33:17.

As Mr. Rainwater noted, Section 2 requires consideration of race in redistricting, within constitutionally prescribed limits. In addition to these obligations, Mr. Rainwater also accurately described some state traditional redistricting principles that should be considered in redrawing the lines, such as contiguity, compactness, communities of interest, respecting core areas of districts, and keeping voting precincts whole.[32] He also correctly advised that these secondary redistricting principles must yield in the event of any conflict with the U.S. Constitution or Section 2.

However, further context and some corrections are appropriate with respect to Mr. Rainwater's discussion of racial vote dilution. As we stated in our August 24 letter, any jurisdiction conducting redistricting has an obligation not to dilute Black voting strength under both the U.S. Constitution and the VRA. For this redistricting cycle, preclearance under Section 5 of the VRA is not in effect, as it was immobilized by *Shelby County, Ala. v. Holder*, the 2013 case in which the U.S. Supreme Court held Section 4(b)'s coverage formula for preclearance unconstitutional.[33] But Section 2 of the VRA and the Fourteenth and Fifteenth Amendments to the U.S. Constitution still apply.[34]

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[32] *Id.* at 11:00–15:00.

[33] *Shelby County, Ala.*, 570 U.S. 529.

[34] Mr. Rainwater also suggested in his Beaufort County presentation that a map precleared under Section 5 in a previous redistricting cycle could be immunized from later challenge under Section 2 on the basis that it had been precleared. This is incorrect. A precleared map pre-*Shelby County* can still be subject to challenge under Section 2 and on constitutional grounds. That is because preclearance determinations by the U.S. Department of Justice ("DOJ") are based on compliance with Section 5 of the VRA, which employs a different legal standard than Section 2. Under Section 5, the DOJ objected to maps that were "retrogressive," meaning that the new map would weaken the ability of Black voters to participate in the democratic process, as compared to the previous map. *Beer v. United States*, 425 US 130, 141 (1976); *see also About Section 5 of the Voting Rights Act*, U.S. Dept. of Justice (Sept. 11, 2021) https://www.justice.gov/crt/about-section-5-voting-rights-act. Notwithstanding Section 5's protections, a court may alternatively, or additionally, find that a map violates Section 2 if it is found to dilute minority voting strength based on an analysis under the framework established by the Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30 (1986), regardless of whether the map is retrogressive when compared to the benchmark map. In other words, a map may violate Section 5 alone, Section 2 alone, or both Sections 2 and 5. The Supreme Court in no uncertain terms has "refuse[d] to equate a Section 2 vote dilution inquiry with the Section 5 retrogression standard." *Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003).

Indeed, federal courts—including the Supreme Court—have repeatedly held that district maps violated Section 2 even though those maps had been precleared by the DOJ under Section 5. *See, e.g.*, *LULAC v. Perry*, 548 U.S. 399, 480 (2006) (holding that Texas's congressional redistricting plan violated Section 2 of the VRA, notwithstanding the fact that the plan had been

To comply with Section 2, local jurisdictions must ensure that, under the totality of circumstances, racial minority voters, such as Black South Carolinians, have an equal opportunity to participate in the electoral process and to elect representatives of their choice.[35] Depending on local conditions, Section 2 will require jurisdictions to draw districts that provide minority voters with an effective opportunity to elect their preferred candidates. Sometimes, but not always, effective "minority opportunity districts" will also be "majority-minority districts"—that is, single-member districts in which Black voters, or other racial minority voters, are a majority (more than 50% of the voting-age population).[36] Developing effective districts requires a sensitive and "intensely local appraisal" of the "totality of the circumstances," under a "functional view of the political process."[37] This entails attention not only to the demographic

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precleared by DOJ under Section 5 following the 2000 Census); *St. Bernard Citizens For Better Gov't v. St. Bernard Par. Sch. Bd.*, No. CIV.A. 02-2209, 2002 WL 2022589, at *2 n.2 (E.D. La. Aug. 26, 2002) (declaring a school board redistricting plan invalid under Section 2, notwithstanding the fact that the plan had been precleared by the DOJ); *Benavidez v. Irving Indep. Sch. Dist.*, No. 3:13-CV-0087-D, 2014 WL 4055366, at *19 (N.D. Tex. Aug. 15, 2014) (noting that "the Supreme Court has repeatedly recognized that § 2 and § 5 have different aims with different requirements, and that a change that is permissible under § 5 may in fact violate § 2").

[35] 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*, 548 U.S. at 425 (describing the operation of the "totality of the circumstances" standard in the vote-dilution claims).

[36] *Gingles*, 478 U.S. at 50–51, 46 (holding that vote dilution in violation of Section 2, which may require the creation of a majority-minority district, can be shown where, first, a racial minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district"; second, where the racial minority group is "politically cohesive"; third, "the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate"; and, finally, where the plaintiffs "demonstrate that, under the totality of the circumstances, the [challenged electoral system or] devices result in unequal access to the electoral process"); *see also Bartlett v. Strickland*, 556 U.S. 1, 26 (2009) ("Only when a geographically compact group of minority voters could form a majority in a single-member district has the first Gingles requirement been met.").

[37] *Gingles*, 478 U.S. at 79, 45 (internal quotation marks and citation omitted); *but see Cooper v. Harris*, 137 S. Ct. 1455, 1472 (2017) (rejecting the argument that "whenever a legislature can draw a majority-minority district, it must do so," because there are circumstances in which "a crossover district would also allow the minority group to elect its favored candidates.").

composition of districts, but also to other factors such as "participation rates and the degree of cohesion and crossover voting."[38]

In the October 27 RFA presentation to Beaufort County, Mr. Rainwater suggested that, to provide an opportunity for Black voters to elect candidates of their choice under Section 2, districts should categorically be drawn with at least 51-52% Black voting-age population, while "you don't want to get too much above 60[%], because then you're starting to pack the voters into one area . . . ."[39] This statement is inaccurate both legally and practically. Indeed, to show that dilution may be occurring in a jurisdiction, the U.S. Supreme Court requires Section 2 plaintiffs to show that a hypothetical, illustrative district could be developed in which racial minority voters are geographically compact and can form the majority (50%+1) in that district.[40] However, to determine the sufficiency of a *remedy* for that dilution, where it exists, there is no numerical threshold of minority population that every jurisdiction or every *effective* minority opportunity district must meet.[41] The Section 2 inquiry into whether

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[38] Bernard Grofman, Lisa Handley & David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. Rev. 1383, 1415 (2001); *see also id.* at 1415–16 ("South Carolina is a particularly useful state in which to examine participation rates by race as the state actually collects this data—there is no need to estimate black and white registration or turnout rates.").

[39] *October 27, 2021, County Council/Redistricting Workshop*, *supra* note 3, at 24:15–24:32.

[40] In the context of Section 2 litigation, when plaintiffs of color challenge an electoral system or districting plan on the grounds that it interacts with relevant circumstances to result in vote dilution, the plaintiffs must establish that an alternative map can be drawn in which minority voters "make up more than 50 percent of the voting-age population in the relevant geographical area." *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009); *see Gingles*, 478 U.S. at 50–51. But this litigation standard does *not* mean that every effective opportunity district drawn by a state or local jurisdiction must be over 50% in minority population.

[41] Indeed, districts that contain unnecessarily high minority populations without justification may be subject to challenge as racial gerrymanders. *See, e.g.*, *Bethune-Hill v. Va. State Bd. of Elections*, 137 S. Ct. 788, 797–802 (2017) (finding that the Virginia General Assembly conducted a functional analysis to establish that a 55% Black-voting age population threshold was appropriate in only one of 12 challenged districts, and remanding for further deliberations on the other 11 districts); *Bethune-Hill v. Va. State Bd. of Elections*, 326 F. Supp. 3d 128, 180 (E.D. Va. 2018) (on remand from the Supreme Court, ruling that 11 legislative districts were unconstitutional racial gerrymanders because "the legislature did not undertake any individualized functional analysis in [those] districts to provide 'good reasons to believe' that the 55% threshold was appropriate," as the narrow-tailoring component of strict scrutiny requires); *see also Ala. Leg. Black Caucus*, 575 U.S. at 275–78 (holding that the Voting Rights Act does not require districts to have "a particular numerical minority percentage," but concerns itself rather with "a minority's ability to elect a preferred candidate of choice").

minority voters are being denied an equal opportunity to participate in the electoral process and elect candidates of their choice is "an intensely local appraisal"[42] that "depends upon a searching practical evaluation of the 'past and present reality.'"[43] By its nature, Section 2 will not require the same result in every district.

Thus, jurisdictions must not mechanically employ demographic thresholds.[44] Nor must they minimize Black voters' electoral strength by "packing" Black voters into districts with unnecessarily high Black populations or by "cracking" Black voters into districts with insufficient populations to provide an opportunity to elect their preferred candidates. Doing either would likely run afoul of Section 2 and the U.S. Constitution.[45]

As these considerations highlight, counties and other local jurisdictions cannot simply ignore race when fulfilling their obligation to determine if unconstitutional or unlawful vote dilution is occurring; indeed, a jurisdiction "always is aware of race when it draws district lines[.]"[46] But jurisdictions must do so within the limits set by the U.S. Constitution and the VRA.[47]

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[42] *Gingles*, 478 U.S. 79.

[43] *Id.* at 45 (*quoting* S. Rep. No. 97-417, 97th Cong., 2nd Sess. 30 (1982), U.S.C.C.A.N. 1982, p. 208.)

[44] In assessing demographics in a district or jurisdiction, we also add that an appropriate metric is the Census Bureau's Any Part Black or "AP Black" category. This measure of the Black population, which the Census began using in 2000, counts as "Black" any person who self-identifies as Black alone or Black in combination with any other race or ethnicity, including those who also self-identify as Hispanic. This category is appropriate because, as the U.S. Supreme Court has explained, where Black voters are the only minority group whose exercise of the franchise is at issue, "it is proper to look at all individuals who identify themselves as black." *Georgia*, 539 U.S. at 473 n.1. The AP Black category is a more inclusive definition of Black than the non-Hispanic single-race Black category—which is the narrowest category of "Black,"—as well as the non-Hispanic U.S. Department of Justice Black category, which counts as "Black" individuals who self-identify as Black alone or as Black and white, both of which the Census also reports.

[45] *Ala. Leg. Black Caucus*, 575 U.S. at 278; *Bethune-Hill*, 137 S. Ct. at 797–802; *see also Bethune-Hill*, 326 F. Supp. 3d at 180.

[46] *Bethune-Hill*, 137 S. Ct. at 797 (quoting *Shaw v. Reno*, 509 U.S. 630, 646 (1993)).

[47] *See, e.g.*, *Ala. Leg. Black Caucus*, 575 U.S. at 278 (explaining that jurisdictions may use race as a predominant consideration in redistricting when they have a "strong basis in evidence" providing "good reasons to believe such use is required" to comply with a statute such as the Voting Rights Act).

C. Racial Bloc Voting and Other Necessary Analyses

The VRA also requires an assessment of whether there are racially polarized voting ("RPV") patterns.[48] This is the key consideration in determining the presence of racial vote dilution.[49]

As a general matter, racially polarized voting continues to exist in South Carolina.[50] That is, there exists a continued pattern of voting along racial lines in which voters of the same race tend to support the same candidate, who is different from the candidate supported by voters of a different race. For example, in the 2020 election for U.S. Senate, Jaime Harrison, the candidate of choice of Black voters across South Carolina, received only 25% of white voter support and was defeated, despite receiving 98% of Black voter support. Our analysis indicates a similar trend in other statewide elections, and in local elections in many parts of the State. For example, in the 2018 election for Secretary of State, our analysis shows that Melvin Whittenburg, the candidate of choice of Black voters across South Carolina, received only 23% of white voter support and was defeated, despite receiving 95% of Black voter support. In the 2018 election for State Treasurer, Rosalyn Glenn, the candidate of choice of Black votes across South Carolina, received only 21% of white voter support and was defeated, despite receiving 95% of Black voter support.

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[48] *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*"*).

[49] *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).

[50] *See, e.g.*, *Colleton Cty. Council*, 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.").

Our analyses indicate similar patterns at the county-level in most parts of the state for these elections. That is, Black voter-supported candidates have been defeated because of too little white voter support in counties across the state, from Anderson and Greenville to York, Berkeley, Georgetown, and Charleston.

As the U.S. Supreme Court has observed, "no simple doctrinal test" governs RPV analysis because RPV "var[ies] according to a variety of factual circumstances" in a jurisdiction.[51] As a general matter, however, *Gingles* and its progeny instruct that RPV analyses should include, where available, elections in which voters have been presented with a choice between at least one candidate who is a member of the minority group at issue and at least one candidate who is not ("biracial elections").[52] In addition, where available, RPV analyses should include "endogenous elections," or elections conducted within the relevant jurisdiction and for the office at issue, although "exogeneous elections" for other offices can also be considered, either as a supplemental source of information or a substitute when no recent endogenous elections are available.[53]

Neither law nor social science specifies a minimum number of elections for analyzing RPV, although "a pattern of racial bloc voting that extends over a

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[51] *Gingles*, 478 U.S. at 58.

[52] *See, e.g.*, *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1020-21 (8th Cir. 2006); *S. Christian Leadership Conf. of Alabama v. Sessions*, 56 F.3d 1281, 1304 (11th Cir. 1995); *Westwego Citizens for Better Government v. City of Westwego*, 872 F.2d 1201, 1208 n.7 (5th Cir. 1989); *East Jefferson Coalition v. Jefferson*, 926 F.2d 487, 493 (5th Cir. 1991); *see also Ruiz v. City of Santa Maria*, 160 F.3d 543, 554 (9th Cir. 1998) ("Our rule [that a racially contested election is more probative than one that is racially uncontested] furthers the Voting Rights Act's goal of protecting the minority's equal opportunity to 'elect its candidate of choice on an equal basis with other voters.'") (quoting *Voinovich v. Quilter*, 507 U.S. 146, 153 (1993)); *U.S. v. Blaine Cnty, Montana*, 363 F.3d 897, 911 (9th Cir. 2004).

Among other data used in these analyses of the candidate preferences of Black and non-Black voters in the probative elections includes, for example, the numbers of votes cast for each of the candidates in each of the precincts in these elections, and the numbers of people, and the numbers of Black voters, who received ballots in these elections in each of the precincts, or, if that data is not available, were registered to vote at the time of these elections.

[53] *See, e.g.*, *Bone Shirt*, 461 F.3d at 1020–21; *Solomon v. Liberty Cty. Comm'rs*, 221 F.3d 1218, 1227 (11th Cir. 2000); *Johnson v. Hamrick*, 196 F.3d 1216, 1222 (11th Cir. 1999); *Citizens for a Better Gretna v. City of Gretna*, 834 F.2d 496, 502 (5th Cir.1987) ("[T]he district court properly considered exogenous elections as additional evidence of bloc voting—particularly in light of the sparsity of available data.").

period of time is more probative . . . than are the results of a single election."[54] In *Gingles*, the U.S. Supreme Court found evidence from three election cycles sufficient to establish RPV.[55] Moreover, other things being equal, courts generally consider recent elections more probative in establishing a pattern.[56]

Today, RPV analyses are performed using Ecological Inference ("EI"),[57] a methodology that has been widely accepted in Section 2 cases analyzing RPV.[58] EI is a mathematical technique that describes the relationship between the racial composition of the electorate and the votes each candidate receives. This relationship demonstrates the extent to which the race of the voters correlates with voter support for each candidate.[59] To be clear, today EI is the superior and more commonly accepted technique for conducting RPV analysis by courts, rather than the "Homogenous Precinct" ("HP") or Ecological Regression ("ER") techniques.

We are aware that Mr. Rainwater has referenced HP and ER in his presentations to Oconee and Marlboro counties.[60] We understand that Mr. Rainwater not only relied on these inferior techniques but that he also incorrectly performed RPV analyses using them. In Mr. Rainwater's Oconee and Marlboro presentations, for example, his analyses using homogenous precincts consisted of simply listing the percentage of registered voters by race—that is, Black, white, and "other"—the percentage of votes cast by registered voters over periods of time for specific county council districts for the winning candidate,

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54 *See Gingles*, 478 U.S. at 57.

55 *Id.* at 57 n.25, 61.

56 *See, e.g.*, *United States v. Charleston Cty.*, 318 F. Supp. 2d 302, 313 (D.S.C. 2002).

57 *See generally* Gary King, *A SOLUTION TO THE ECOLOGICAL INFERENCE PROBLEM: RECONSTRUCTING INDIVIDUAL BEHAVIOR FROM AGGREGATE DATA*, 1, 15–16 (1997), available at https://gking.harvard.edu/files/gking/files/part1.pdf; Baodong Liu, *EI EXTENDED MODEL AND THE FEAR OF ECOLOGICAL FALLACY* (2007).

58 *See, e.g.*, *Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1003 (D.S.D. 2004); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 387–88 (S.D.N.Y. 2004); *Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1402 (E.D. Wash. 2014).

59 *See Gingles*, 478 U.S. at 53 n.20; *see also Garza v. County of Los Angeles*, 756 F. Supp. 1298, 1346 (C.D. Cal. 1990); *City of Yakima*, 40 F. Supp. 3d at 1402.

60 *See 2020 Redistricting Benchmark Report: Oconee County*, *supra* note 3, at 7–14; *2020 Redistricting Benchmark Report: Marlboro County*, S.C. Revenue & Fiscal Affairs 1,7, 13–14 (Oct. 18. 2021) (on file with authors).

and the party affiliation of the winning candidate.[61] Significantly, these analyses appear to be based only on *uncontested* elections in which the race of the candidate is unknown.[62] These analyses contrast fundamentally from what *Gingles* considered probative, which, as described above, was an examination of the candidate preferences of voters in biracial contested elections across multiple election cycles to reveal any differing candidate preferences by different racial groups.

These flawed analyses contextualize and explain why Mr. Rainwater incorrectly, though preliminarily, concluded that there is *no* evidence of RPV in Marlboro and Oconee counties.[63] On the contrary, as described above, RPV continues to exist throughout South Carolina, and based on our analyses, there is evidence of these patterns continuing to exist in both counties. Failure to perform a complete and appropriate Section 2 analysis could lead to the enactment of dilutive maps that expose counties and municipalities to costly and lengthy litigation.[64] For example, unsuccessfully defending a Section 2 lawsuit during the post-2000 redistricting cycle cost Charleston County $2 million during the pendency of litigation.[65] And, after losing the lawsuit, the county paid an additional $712,027 in plaintiffs' attorneys' fees and costs.[66] In Fayette County, Georgia, the Board of Commissioners and the Board of Education spent

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61 *See 2020 Redistricting Benchmark Report: Oconee County*, *supra* note 3, at 13; *2020 Redistricting Benchmark Report: Marlboro County*, *supra* note 60, at 13.

62 *Id*. Additionally, the analyses using ER described in these presentations also appear to suffer infirmities. Those analyses appear to have calculated the proportion of Black voters who supported Democratic candidates, thereby also failing to show whether voters of different racial groups had different candidate preferences in contested elections that featured at least one white and one Black candidate across multiple electoral cycles. *Id*. at 14.

63 *Id*.

64 *See, e.g.*, *The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation*, LDF 1, 3 (Sept. 19, 2021), https://www.naacpldf.org/wp-content/uploads/Section-2-costs-9.19.21-Final.pdf; *see also Voting Rights Act: Section 5 of the Act – History, Scope, and Purpose: Hearing* Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 92 (2005) ("Two to five years is a rough average" for the length of Section 2 lawsuits).

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

66 *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)).

over $1.11 million of taxpayers' dollars on legal fees defending a Section 2 claim challenging the County's discriminatory at-large voting scheme.[67]

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In closing, we reiterate that we are closely monitoring local redistricting in South Carolina. We encourage SCAC members to review ***Power on the Line(s): Making Redistricting Work for Us***,[68] 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 meaningfully participate in the redistricting process and hold legislators accountable. We also encourage members to review the U.S. Department of Justice's published guidance on Section 2 of the Voting Rights Act.[69]

We ask that this letter, as well as our August 24 letter, be transmitted to all SCAC member counties as soon as possible. County, SCAC, or RFA personnel should also feel free to contact Leah Aden at laden@naacpldf.org and/or any other signatory to this letter with any questions or to discuss these issues in more detail. Thank you for your attention to this matter, and we look forward to hearing from you soon.

Sincerely,

/s/ *Leah C. Aden*
Leah C. Aden, Deputy Director of Litigation
Stuart Naifeh, Manager of the Redistricting Project
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67 Tammy Joyner, *Fayette's Voting Fight Proves Costly*, Atlanta Journal-Constitution (Oct. 20, 2015), https://www.ajc.com/news/local-govt--politics/fayette-voting-fight-proves-costly/JBKp4T7SwLma2gWQJFfpBO/.

68 *See* LDF, 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/.

69 *Guidance under Section 2 of the Voting Rights Act, 52 U.S.C. 10301, for Redistricting and Methods of Electing Government Bodies*, U.S. Dept. of Justice (Sept. 1, 2021), https://www.justice.gov/opa/press-release/file/1429486/download.

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