November 30, 2021

Sent via email

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Rep. Chris Murphy
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Re: Supplemental Comments on the House Judiciary Committee's Proposed State House Redistricting Plan

Dear Speaker Lucas, Speaker Pro Tempore Pope, Majority Leader Simrill, Minority Leader Rutherford, Chair Murphy, and House Judiciary Committee Members:

The NAACP Legal Defense and Educational Fund, Inc. ("LDF"), American Civil Liberties Union ("ACLU"), South Carolina State Conference of the NAACP ("SC NAACP"), and ACLU of South Carolina write to supplement the oral testimony that we provided during the House Judiciary Committee's Redistricting Ad Hoc Committee's ("Redistricting Committee") November 10,

2021 hearing,[1] as well as the initial set of supplemental comments we provided on November 15.[2] Here, we offer additional comments on the House's proposed redistricting plan for the 124 members of the South Carolina House of Representatives, as amended by the House Judiciary Committee on November 16, as we indicated that we would continue to do on November 10. We recognize the House staff for its work in developing its initial proposal, as well as the representatives who have continued working on the plan through the amendments adopted on November 16. However, despite these amendments, and due in part to the House's continued lack of transparency during all stages of the redistricting process, we continue to have serious concerns about several of the map's components, as described herein.

First, we continue to have grave concerns about accountability and transparency. Throughout this cycle, several of the present signatories have written to the Redistricting Committee and House leadership to (1) recommend ways for the Redistricting Committee and the House of Representatives to involve their constituents and organizations that serve them during *all* stages of the redistricting process,[3] (2) reiterate our concerns because of the Redistricting Committee's failure to provide transparency about key redistricting processes,[4] and (3) pose basic questions about how the Redistricting Committee intended to remedy transparency and public-input concerns.[5] In these letters, as well as our October 8 letter accompanying the

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[1] On November 12, we emailed the Redistricting Committee written comments reflecting the oral testimony that President Murphy of the SC NAACP and Leah Aden of the LDF provided on November 10. *Testimony on Proposed House Redistricting Plans*, (Nov. 10, 2021) (Testimony of Brenda Murphy), https://www.naacpldf.org/wp-content/uploads/Testimony-of-President-Brenda-Murphy-SC-NAACP-House-Redistricting-Hearing-on-11-10-21-final.pdf; *Testimony on the Public's Proposed on Proposed House Redistricting Plans*, (Nov. 10, 2021) (Testimony of Leah C. Aden), https://www.naacpldf.org/wp-content/uploads/Testimony-of-Leah-Aden-LDF-House-Redistricting-Hearing-on-11-10-21-final.pdf.

[2] On November 15, we emailed the Redistricting Committee supplemental comments on its proposed state House Redistricting Plan. Letter from LDF, et al., to the S.C. House of Representatives Judiciary Comm.'s Redistricting Ad Hoc Comm. (Nov. 15, 2021), https://www.naacpldf.org/wp-content/uploads/Supplemental-Comments-on-House-2021-Working-Draft-Plan-11-15-21.pdf.

[3] Letter from LDF, et al., to the S.C. House Judiciary Comm.'s Redistricting Ad Hoc Comm. (Aug. 30, 2021), https://www.naacpldf.org/wp-content/uploads/Follow-Up-Letter-to-SC-House-Redistricting-Ad-Hoc-Committee-8-30-21.pdf (hereinafter "August 30 Letter"); Letter from LDF, et al., to the S.C. House of Representative Judiciary Comm.'s Redistricting Ad Hoc Comm. (Aug. 9, 2021), https://www.naacpldf.org/wp-content/uploads/Letter-to-SC-House-Redistricting-Ad-Hoc-Committee_08.09.2021_final.pdf.

[4] August 30 Letter, *supra* note 3.

[5] Letter from LDF, et al., to the S.C. House of Representative Judiciary Comm.'s Redistricting Ad Hoc Comm. (Sept. 27, 2021), https://www.naacpldf.org/wp-

submission of our proposed state House and U.S. Congressional redistricting plans,[6] we also repeatedly emphasized that the public must have an opportunity to respond to proposed maps before any such maps were finalized or approved.[7]

Consistent with those objections and because of the House's continuing shortcomings in providing adequate public-input opportunities, we wrote to you on November 19 to reiterate our recommendations as the full body considers redistricting proposals and plans.[8] We also reiterated our concerns about the lack of transparency and posed basic questions for how the House and Judiciary Committee plan to proceed during the current redistricting cycle.

But we have not received answers to any of these straightforward questions. Accordingly, we now again request your responses to the following questions:

1. How, if at all, did the Judiciary Committee incorporate maps and data submitted by the public into its "2021 House Redistricting Plan as Amended" or into the maps that it considered on November 16? For example, we have not received from the Judiciary Committee or become aware of any response or substantive reactions to our coalition's proposed alternative House map—which corrects malapportionment issues, complies with the Voting Rights Act ("VRA"), and respects traditional redistricting principles, all while also preserving incumbents.

2. Along the same lines, does the House of Representatives or the Judiciary Committee intend to hold public hearings in which testimony and public comment can be provided on any new House map that incorporates amendments before any map is approved or finalized?

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content/uploads/Follow-Up-Letter-to-SC-House-Redistricting-Ad-Hoc-Committee.9.27.2021_final.pdf.

[6] Letter from LDF, et al., to the S.C. House of Representatives Judiciary Comm.'s Redistricting Ad Hoc Comm. (Oct. 8, 2021), https://www.naacpldf.org/wp-content/uploads/Letter-to-H-Redistricting-Ad-Hoc-Comm-Submitting-Congressional-and-House-Maps-10-8-21.pdf.

[7] *Id.*; August 30 Letter, *supra* note 3.

[8] On November 19, we emailed House leadership with recommendations for transparency and public involvement in South Carolina's redistricting, as well as requested responses to several questions about how the House plans to proceed moving forward during the redistricting process. Letter from LDF, et al., to Rep. James H. "Jay" Lucas, Speaker, S.C. House of Representatives, et al. (Nov. 19, 2021) (on file with authors).

Because we first raised these same questions more than a week ago, **we request responses by 12:00 p.m. on Wednesday, December 1**.

Second, we have repeatedly reminded the Judiciary Committee and the Redistricting Committee that federal case law permits state legislative maps to have population deviations within a range of plus or minus 5%, or 10% overall.[9] In other words, there is a rebuttable presumption that maps with deviations *under* 10% are constitutional. Indeed, the U.S. Supreme Court has long made clear, with respect to state-legislative and local-government redistricting, that "minor deviations from mathematical equality . . . are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State."[10] Under U.S. Supreme Court precedent, "a maximum population deviation under 10% falls within this category of minor deviations."[11]

The Redistricting Committee, however, has attempted to cast doubt on this controlling caselaw by asserting that state maps may only have population deviations within plus or minus 2.5% or 5% overall. But this claim rests on a misreading of the sole case that this view's primary proponent, Rep. Weston Newton, has relied upon. The district court opinion in *Cox v. Larios* confirmed what the caselaw already made clear: deviations that are below 10% overall create a rebuttable presumption of constitutionality.[12] Indeed, the U.S. Supreme Court summarily affirmed this decision,[13] which Rep. Newton ignores. Instead,

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[9] *See Reynolds v. Simms*, 377 U.S. 533, 568 (1964) ("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).

[10] *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).

[11] *Brown*, 462 U.S. at 842.

[12] 305 F. Supp. 2d 1335, 1139 (N.D. Ga. 2004) (three-judge panel) (per curium).

[13] *Cox v. Larios*, 542 U.S. 947 (2004).

Rep. Newton solely focuses on a single passage in Justice Steven's concurrence—which Rep. Newton misinterprets—to reject adopting a standard with total population deviations up to a total of 10%.[14] But that concurrence (which only one other justice joined) does not change binding federal case law; it only provides guidance that population deviations of less than 10% may not be a safe harbor in all cases if the evidence shows that a map with slightly lower deviations was drawn with impermissible discriminatory intent and served no legitimate redistricting interest. In other words, the presumption of constitutionality for plans with deviations under 10% may be rebutted by evidence of invidious discrimination.[15] Nothing in *Larios* diminishes any of the caselaw that presumptively permits state maps to have population deviations up to a 10% total based on a nondiscriminatory and legitimate interest.[16]

This is so because "[t]he 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] 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.[18] The presumption of constitutionality for state-legislative maps with a total deviation under 10% can potentially be rebutted, as it was in *Larios*, when the state policies or objectives that cause the deviations are "taint[ed]" by "arbitrariness or discrimination."[19] In *Larios*, for example, the district court held that the presumption of constitutionality was rebutted

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[14] Wednesday, November 10, 2021 – 12:00 p.m. – House Judiciary Committee – House Redistricting Ad Hoc Committee, S.C. House 2:42:45–2:43:50 (Nov. 10, 2021), https://www.scstatehouse.gov/video/archives.php.

[15] *See Larios*, 542 U.S. at 949–50 (2004) (Stevens, J., concurring, joined by Breyer, J.) (explaining that federal case law does not create an irrebuttable "safe harbor for population deviations of less than 10 percent, within which districting decisions could be made for any reason whatsoever," in the context of a case arising from a redistricting map drawn with impermissible partisan intent "to place two incumbents of the opposite party in the same district" when doing so was supported by "no neutral justification").

[16] *Id.*

[17] *Brown*, 462 at 843 (alterations in original).

[18] *Id.*

[19] *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 id.* at 852 (Brennan, J., dissenting) ("Acceptable reasons . . . must be 'free from any taint of arbitrariness or discrimination . . . .'").

because the State of Georgia's mappers pursued overriding objectives that "*were* plainly driven by both arbitrariness and discrimination."[20]

A state or local entity can also justify deviations larger than 10% when these deviations "may be necessary to permit the States to pursue other legitimate objectives[.]"[21] 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.[22] 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 were necessary to maintain the integrity of political subdivisions, a nondiscriminatory and non-arbitrary goal, and thus did not exceed "tolerable constitutional limits."[23]

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 lower deviations that are transparently the result of invidious discrimination or impermissible arbitrariness in the redistricting process may be subject to more searching judicial review. In any malapportionment case, the ultimate determination will be fact-specific.

Your colleagues in the Senate also recognize that state redistricting plans may have population deviations within plus or minus 5% of the mathematical mean, or 10% overall. Indeed, the 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%)."[24]

Yet the House is insistent on arbitrarily imposing a standard that limits population deviations to within plus or minus 2.5%, or 5% overall, despite the controlling caselaw, the Supreme Courts' guidance that greater deviations may be necessary to accomplish legitimate and nondiscriminatory redistricting ends, and the higher maximum deviation standard of 10% used by the Senate.[25] Several House members have unsuccessfully sought to ensure that the state House map would comply with the 10% overall population deviation range

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20 *See Larios*, 305 F. Supp. 2d at 1139

21 *Brown*, 462 at 842.

22 410 U.S. 315, 329 (1973).

23 *Id.*

24 *2021 Senate Redistricting Guidelines*, Senate Judiciary Comm. (Sept. 17, 2021), https://redistricting.scsenate.gov/planproposal.html.

25 November 10 Redistricting Committee Hearing, *supra* note 14.

established by federal courts, not the arbitrary 5% population deviation range preferred by some members of the Redistricting Committee. As Rep. King explained in the November 16 meeting, the arbitrary imposition of a lower deviation standard may have a disproportionate impact on Black voters because of concerns about the U.S. Census undercount and impair compliance with the Voting Rights Act.[26]

During the Redistricting Committee's November 10 hearing, Rep. Elliot also pointed to the South Carolina NAACP's proposed map as support for the lower population deviations because it uses plus or minus 2.5% of the mathematical mean, or 5% overall for population deviations. But our coalition respectfully informs you that this standard was *only* used to demonstrate that it is possible to protect VRA compliance with effective opportunity and influence districts, comply with other legitimate redistricting principles like communities of interest ("COIs") and compactness, *and* comply with each of the House's criteria, including protecting incumbents. It should not be interpreted as any endorsement of the House's arbitrarily low deviation range.

In addition, the House's proposed map falls short for other reasons, including because the Judiciary Committee's amended plan does not address the specific concerns that we identified in our November 10 testimony and November 15 supplemental comments,[27] which are described below in more detail.

Third, the proposed boundary lines for **House Districts 102, 103,** and **111** continue to put at risk the ability of Black voters in Berkeley and Charleston Counties to continue to elect their preferred representative in these districts, which we raised on November 15.[28] Under the House's amended proposal, COIs

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[26] *Id.* at 18:00–22:00; *Tuesday, November 16, 2021 – 12:00 p.m. – Full Judiciary Committee*, S.C. House 34:42–35:25 (Nov. 16, 2021), https://www.scstatehouse.gov/video/archives.php ("As you all have tried to preserve majority minority districts it has become harder to do that as populations have not grown or moved into other areas. In order to create and preserve majority minority districts, I feel that moving the deviation to ten percent versus five percent will give an opportunity for groups who would like to elect someone from a minority community have a more likely chance in electing those people.").

For one of the many studies raising concerns about the undercount and its disproportionate impact on people of color, see Diane Elliott, Steven Martin, Jessica Shakespeare, and Jessica Kelly, *Simulating the 2020 Census*, Urban Institute (Nov. 2021), https://www.urban.org/research/publication/simulating-2020-census-miscounts-and-fairness-outcomes/view/full_report.

[27] November 10 Testimony, *supra* note 1; November 15 Supplemental Comments, *supra* note 2.

[28] November 15 Supplemental Comments, *supra* note 2, at 1–2.

containing Black voters, which have been electing candidates of choice under the districts in the 2010 benchmark map, will be paired with precincts comprised predominantly of white voters. The House has proposed these boundary lines without showing that white voters in these precincts share similar voting patterns and otherwise are a COI with Black voters in these areas.

Fourth, there are no meaningful changes in the Judiciary Committee's amended plan to proposed **House Districts 6, 7, 8, and 9**, based on a comparison of the initial iteration of the Redistricting Committee's map compared to the Judiciary Committee's latest version. Failing to make necessary changes will continue to crack Black voters in the communities within these districts, particularly in the City of Anderson in Anderson County.[29] As we conveyed on November 15, the import of the proposed boundary lines in these districts is to render Black voters with little to no ability to influence elections in these areas of the State.[30]

Fifth, along the same lines, as we also conveyed on November 15, Black voters in the South Florence community continue to be cracked among **House Districts 59 and 60**.[31]

Sixth, the Judiciary Committee's proposed plan continues to pair a number of representatives of choice for Black voters, forcing incumbents to compete against one another, including **House Districts 70, 77, and 93**. This has happened even though our coalition's proposed plan showed this body a way to meet its constitutional and statutory obligations and respect other redistricting principles *without* pairing such incumbents.

Seventh, the Judiciary Committee's proposed plan continues to receive substantial pushback because of the impact of its changes on Black voters in Orangeburg.

Eighth, some representatives have incorrectly asserted that the House's map(s)—both the initial version proposed by the Redistricting Committee and the latest version by the Judiciary Committee—better protect Black voters than the SC NAACP based only on the number of districts comprised of a majority

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[29] Based on our understanding, the Judiciary Committee's latest map only changes a few blacks in House Districts 6 and 10, which are far away from the City of Anderson.

[30] November 15 Supplemental Comments, *supra* note 2, at 2–3.

[31] *Id.* at 3 n.4.

(above 50%) of Black voters ("majority-Black districts").[32] This claim, as we conveyed more than two weeks ago, however, is inaccurate and an incomplete view of the proposed maps.[33] Based on our analysis, the Judiciary Committee's amended House map contains 22 majority-Black districts and 10 districts where Black voters are between 40% and 50% of the population ("Black opportunity districts"), for a total of 32 districts where Black voters may have meaningful opportunities to participate in the political process and elect candidates of their choice. By contrast, the map proposed by our coalition contains 20 majority-Black districts and 15 Black opportunity districts, for a total of 35 districts where Black voters may have meaningful opportunities to participate in the political process and elect candidates of their choice.[34]

Ninth, we continue to have concerns about two key aspects of the House's developments on its proposed plan. We are not aware that the House has performed any racially polarized voting analyses to determine whether a majority-Black district or some other configuration is necessary and sufficient to ensure against non-dilution of Black voting strength in *any* area of the state. Accordingly, we request answers to the following three questions:

1. Has the House, Judiciary Committee, or Redistricting Committee, performed any analysis of racially polarized voting patterns in developing its plan?

2. If so, will the respective body publicize the results of that analysis?

3. And how is that analysis reflected in the Judiciary Committee's latest plan?

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[32] November 16 Judiciary Committee Hearing, *supra* note 26, at 48:00–37:18.

[33] November 15 Supplemental Comments, *supra* note 2, at 4.

[34] These totals are based on the Redistricting Committee's practice in assessing district demographics using the Census Bureau's non-Hispanic U.S. Department of Justice Black ("NH DOJ Black") category, which counts as "Black" individuals who self-identify as Black alone or as Black and white. We add that another appropriate metric for assessing demographics in a district or jurisdiction 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. The AP Black 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 v. Ashcroft*, 539 U.S. 461 473 n.1 (2003). The AP Black category is a more inclusive definition of Black than the non-Hispanic single-race Black category—the narrowest category of "Black"—or the NH DOJ Black category, both of which the Census also reports.

We are also concerned that the Judiciary Committee's proposed map is severely non-competitive and pre-determines the outcomes of elections for House seats.[35]

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We appreciate the opportunity to bring these areas of concerns to your attention and encourage you to revisit them. As we continue to review the House's proposed plan and any others that it develops, we will provide further comments as we identify other concerns.

Please contact Leah Aden, Deputy Director of Litigation at the Legal Defense Fund, at laden@naacpldf.org, and Somil Trivedi, Senior Staff Attorney at the ACLU, at strivedi@aclu.org, with any questions or to discuss these issues in more detail. We look forward to hearing from you soon and working together for the people of South Carolina.

Sincerely,

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[35] *House Staff Map #2*, Dave's Redistricting, https://davesredistricting.org/maps#viewmap::87e75faa-da18-4e6d-8baf-e22251e47573 (last accessed Nov. 29, 2021).

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Cc: South Carolina House Redistricting Ad Hoc Committee