August 24, 2021

Sent via email

South Carolina School Boards Association
111 Research Drive
Columbia, S.C. 29203
Sprice@scsba.org

Re: The Upcoming Redistricting Cycle in South Carolina

Dear Mr. Price:

The NAACP Legal Defense and Educational Fund, Inc. ("LDF"),[1] American Civil Liberties Union, South Carolina State Conference of the NAACP, League of Women Voters of South Carolina ("LWV-SC"), South Carolina Appleseed Legal Justice Center, and South Carolina Progressive Network Education Fund write to notify you that we are closely following the redistricting cycle in South Carolina and are available to serve as a resource. As nonprofit, nonpartisan civil rights and racial justice organizations, our aim is to ensure the adoption of fair and nondiscriminatory redistricting plans. Among other considerations, we are monitoring the redistricting process on the state and local level to ensure equality of access to representation for all residents, as well as the non-dilution of voting strength of racial minority voters. We are also encouraging the legislative bodies responsible for redistricting to create

[1] Since its founding in 1940, 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.

meaningful opportunities to ensure that all residents' voices are heard and included at all stages of the redistricting process.

To this end, as South Carolina School Boards Association ("SCSBA") members prepare for the imminent redistricting cycle, we write to (1) share brief background about the redistricting process; (2) remind legislative bodies responsible for redistricting of their baseline affirmative obligations to comply with the U.S. Constitution and Section 2 of the Voting Rights Act; and (3) recommend how to involve community members and ensure transparency in the redistricting process. We would welcome the opportunity to speak with you and any SCSBA members, consultants, or technical staff who play a role in the redistricting process.

I. Brief Background on the Redistricting Process in South Carolina

Redistricting encompasses the process by which states and the jurisdictions within them redraw the district maps that shape congressional, state, and local power for at least the next ten years. Where district lines are drawn may determine where residents can vote, whom they can vote for, and even how responsive elected officials are to constituents' needs.

Under South Carolina law, jurisdictions are mandated to reapportion their districts after each decennial census.[2] As detailed below, this mandate requires legislative bodies responsible for redistricting to balance the population of their residents as equally as possible. The U.S. Census Bureau conducted the decennial census in 2020, and it recently began to release decennial data necessary for redistricting so that legislative bodies responsible for redistricting can fulfill their obligations.[3]

The South Carolina General Assembly is responsible for creating redistricting plans for the state's U.S. Congressional seats, and the South

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[2] S.C. Const. art. VIII § 3

[3] On August 12, 2021, the U.S. Census Bureau released data in a "legacy format"—essentially an older, less user-friendly presentation that may require mapmakers to do some additional work sorting and organizing the data before they can start drawing lines. *See U.S. Census Bureau Statement on Release of Legacy Format Summary Redistricting Data File*, (Mar. 15, 2021), https://www.census.gov/newsroom/press-releases/2021/statement-legacy-format-redistricting.html. The same redistricting data will be re-released in a more user-friendly format no later than September 30, 2021. These August 12 and September 30 data sets, though packaged differently, will contain the same numbers.

Carolina House and Senate are each responsible for plans impacting their chamber's respective districts.[4] This means they will set the criteria, deadlines, processes for public input, and other procedures for congressional and state-level redistricting. The Senate Judiciary Redistricting Committee held public hearings on redistricting criteria and communities of interest across the state from July 27 through August 12, 2021.[5] The House Redistricting Ad Hoc Committee will hold public hearings across the state from September 8 through October 4, 2021.[6]

Under the General Assembly's enactment of Act No. 283 in 1975 ("Home Rule Act"), county and local governmental bodies are responsible for redrawing some districts in their jurisdictions. Local redistricting will determine who represents residents in their city and county councils and other elected local bodies. A county council, for example, is responsible for drawing its district lines. And a city council will also be responsible for drawing its district lines. To meet these obligations, local bodies will also need to set their own redistricting processes and schedules. And certain upcoming deadlines—for example, the beginning of partisan primary filings for city councils and some school districts on March 16, 2022—may factor into decisions around the schedule for developing local redistricting plans.

II. Compliance with the U.S. Constitution and Voting Rights Act's Mandates

To ensure equality of representation—a cornerstone of our democracy—the U.S. Constitution's Fourteenth Amendment requires states and localities to balance the populations of people among districts at *all* levels of government. To ensure that racial minority voters have equality of opportunity to elect their preferred candidates, Section 2 of the Voting Rights Act prohibits states and localities from drawing electoral lines with the purpose or effect of diluting the voting strength of voters of color. That is, the Voting Rights Act requires that voters of color be provided equal opportunities to elect representatives of their choice not only for state-level representative bodies, but also for city and county

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[4] For more information about the upcoming House and Senate redistricting processes, see *Redistricting Process South Carolina 2021: Summary*, LWC-SC (last updated Aug. 7, 2021), https://my.lwv.org/south-carolina-state/article/redistricting-process-sc-2021-your-summary-%E2%80%94who-what-when.

[5] *Id.* at 1.

[6] *Id.* at 3.

councils, school boards, and other elected local bodies. The legislative bodies responsible for redistricting must therefore ensure that any maps they adopt comply with the "One Person, One Vote" mandate of the Fourteenth Amendment's Equal Protection Clause[7] and the Voting Rights Act's "nationwide ban on racial discrimination in voting."[8]

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 or locality as compared to others elsewhere in the same state or locality cannot withstand constitutional scrutiny.[9] In *Reynolds v. Sims*, the U.S. 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 . . . ."[10] Since *Reynolds*, "the seats in both houses of a bicameral state legislature must be apportioned on a population basis."[11]

Maps may violate this principle if a legislative body's districts impermissibly deviate from population equality. Absent certain circumstances, congressional districts must have equal population "as nearly as practicable."[12] State and local legislative bodies, by comparison, may have population deviations within plus or minus 5% of the mathematical mean.[13] Impermissible

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[7] *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.").

[8] *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 . . . .").

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

[10] *Id.* at 565–66.

[11] *Id.*

[12] *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).

[13] *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

deviations from population equality among districts may elicit malapportionment lawsuits, requiring the legislative body responsible for redistricting to show that an adopted plan legitimately advances a rational state policy formulated "free from any taint of arbitrariness or discrimination."[14]

In the 2016 case of *Evenwel v. Abbott*, the U.S. Supreme Court acknowledged the longstanding principle that "representatives serve all residents, not just those eligible or registered to vote."[15] Relying on this principle, the Court affirmed that an appropriate metric for assessing population equality across districts is total population—counting *all* residents.[16] 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."[17]

Relying on total population is necessary to ensure that elected officials are responsive to an equal number of residents, as well as that their residents have an equal ability to "make their wishes known" to them.[18] On the local level,

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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% most likely violate the "one person, one vote" principle).

14 *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 . . . .'").

15 *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016).

16 *Id.*

17 *Id.* at 1131; *see also id.* at 1124 (Accordingly, "[t]oday, all States use total-population numbers from the census when designing congressional and state-legislative districts . . . .").

18 *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."); *accord Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 137 (1961); *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'

for example, municipalities provide key governmental services to all their residents, including fire protection, public safety, sanitation, public health, parks and recreation, education, and other traditional public services provided by local governments.[19]

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, history, and other factors under the "totality of circumstances."[20] 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.[21]

After establishing these three 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."[22] Because of South Carolina's stark patterns of voting along racial lines,[23] which strikes at the heart of a potential minority vote

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free access to elected representatives impermissibly burdens their right to petition the government.").

[19] *See e.g.*, *Holt Civic Club v. Tuscaloosa*, 439 U.S. 60, 74 (1978) (explaining "basic municipal services" that cities are responsible for providing); *Nat'l League of Cities v. Usery*, 426 U.S. 833, 851 (1976) (describing some traditional public services performed by local governments), *overruled on other grounds by Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985); *see also Plyler v. Doe*, 457 U.S. 202 (1982) (same for public education to children).

[20] *See Thornburg v. Gingles*, 478 U.S. 30, 34 (1986).

[21] *Id.*

[22] 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).

[23] *See*, *e.g.*, *McConnell*, 201 F. Supp. 2d at 643; *see also*, *e.g.*, *United States v. Charleston Cty., S.C.*, 365 F.3d 341, 350 (4th Cir. 2004) (county voting "is severely and

dilution claim,[24] the legislative bodies responsible for redistricting must be attuned to their obligations under Section 2 of the Voting Rights Act.

Indeed, federal courts have found that prior South Carolina redistricting plans reflected legislators' self-interests and failed to create majority-minority opportunity districts as Section 2 requires. In 2002, for example, the U.S. District Court for South Carolina noted that evidence of racially polarized voting statewide "overwhelmingly demonstrate[d]" the need to create majority-Black legislative and congressional districts—that is, minority voters being "generally politically cohesive" to vote together as a bloc and the majority of voters "vote sufficiently as a bloc to defeat the minority's preferred candidate."[25] In making this determination, the District Court also found that "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."[26]

The U.S. Department of Justice has also prevented the adoption of racially discriminatory redistricting plans at the state and local level in South Carolina. Up until June 25, 2013, Section 5 of the Voting Rights Act played a critical role in safeguarding against proposed plans that were retrogressive—that is, plans that weakened the ability of racial minority voters to participate politically as compared with the existing plans. With Section 5's protections in place, the State of South Carolina and all of its sub-jurisdictions were required to show their redistricting plans (and other voting changes) neither had a discriminatory purpose nor discriminatory effect. The Department, for example,

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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.").

[24] *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).

[25] *See Colleton Cty. Council*, 201 F. Supp. 2d at 642.

[26] *Id.* (emphasis added).

determined that the 1994 redistricting plan for the City of Bennettsville in Marlboro County was retrogressive because of the proposed reduction of the Black population in one district.[27] While the Department acknowledged that protecting incumbents may be a relevant redistricting consideration, "it may not be accomplished at the expense of minority voting potential."[28]

As another example, the Department objected to the 2001 redistricting plan for Sumter County because it would lead to retrogression that "was easily avoidable" based on an alternative plan "that met all of its legitimate criteria while maintaining the minority community's electoral ability" in a district.[29] Similar concerns also led to the Department's objection to the 2001 redistricting plan for the City of Charleston in Berkely and Charleston counties. That plan, concluded the Department, unnecessarily drew into a majority-minority district an area experiencing rapid white population growth that would evolve into a district that would diminish minority voters' equal opportunity to elect candidates of their choice in the next city council election.[30]

Any legislative bodies responsible for redistricting 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 and ongoing record of denying and abridging the voting rights of Black and other voters of color through various discriminatory voting rules.[31] Of many examples,

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[27] Letter from Deval L. Patrick, Assistant Att'y Gen., U.S. Dep't of Justice, Civil Rights Div., to Helen T. McFadden (Feb. 6, 1995), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/SC-2060.pdf.

[28] *Id.* at 3 (internal citations omitted).

[29] Letter from Ralph F. Boyd, Jr., Assistant Att'y Gen., U.S. Dep't of Justice, Civil Rights Div., to Charles T. Edens, Chairperson, Sumer County Council (June 27, 2002), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/SC-2130.pdf.

[30] Letter from R. Alex Acosta, Acting Assistant Att'y Gen., U.S. Dep't of Justice, Civil Rights Div., to Francis I. Cantwell, Regan Cantwell and Stent (Oct. 12, 2001), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/SC-2110.pdf.

[31] Mark A. Posner, *Current Conditions of Voting Rights* Discrimination, The Leadership Conference on Civil and Human Rights (Aug. 16, 2021), http://civilrightsdocs.info/pdf/voting/vra/2021/VRAA-2021-StateReport-SouthCarolina.pdf; LDF, *Democracy Diminished: State and Local Threats to Voting Post Shelby County, Alabama v. Holder*, (last updated June 22, 2021), https://www.naacpldf.org/wp-content/uploads/LDF_01192021_DemocracyDiminished-4b_06.24.21v2.pdf; 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),

an 1892 South Carolina voter registration law "is estimated to have disfranchised 75 percent of South Carolina's [B]lack voters."[32] Three years later, the State's 1895 Constitution "was a leader in the widespread movement to disenfranchise [eligible Black citizens]."[33] Until 1965, South Carolina enforced both a literacy test and a property test that were "specifically designed to prevent [Black people] from voting."[34] And, after the Voting Rights Act's enactment in 1965, South Carolina promptly challenged the Act's constitutionality, continuing its historical practice of working to deny equal voting rights to Black voters.[35] Before Senator Tim Scott's historic election in 2014, *no* Black candidate had been elected to state-wide office in South Carolina since Reconstruction.[36]

This is also South Carolina's first redistricting cycle without the critical protections of Section 5 of the Voting Rights Act described above. With preclearance in place, "discriminatory changes in voting practices or procedures in South Carolina" elicited over 120 objections from the U.S. Department of Justice,[37] including at least 27 objections between 1970 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."[38] Indeed, between 1972 and 2010, the Department filed 26 objections to South Carolina school district election methods, nominations, and redistricting maps, 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

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https://weblaw.usc.edu/students/journals/rlsj/issues/assets/docs/issue_17/05_%20South_Carolina_Macro.pdf.

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

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

34 *Id.* at 310.

35 *See id*. at 307.

36 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 31, at 649.

37 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).

38 *Id.*; Ruoff, *supra* note 31, at 645, 655-57; *see* 52 U.S.C. § 10304(b).

race or color."[39] 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.[40]

Without preclearance, the legislative bodies responsible for redistricting must affirmatively 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.[41]

Failure to comply with Section 2's requirements during this redistricting cycle would again expose a county or municipality to costly litigation.[42] For example, in the 2000 redistricting cycle, lawmakers in Charleston County spent $2 million unsuccessfully defending against a Section 2 claim.[43] After losing the lawsuit, the County paid an additional $712,027 in plaintiffs' attorneys' fees and costs.[44]

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[39] *Voting Determination Letters for South Carolina*, *supra* note 37; *see* 52 U.S.C. § 10304(a).

[40] 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).

[41] As referenced above, though Section 2 does not require a showing of discriminatory intent, it also prohibits intentional discrimination in voting, and the analysis of such Section 2 claims mirror the test for raising such claims under the Fourteenth and Fifteenth Amendments. *See United States v. Charleston Cty.*, 316 F. Supp. 2d at 272 (D.S.C. 2003), *aff'd sub nom. United States v. Charleston Cty., S.C*., 365 F.3d 341 (4th Cir. 2004) ("Claims of intentional discrimination under Section 2 are assessed according to the standards applied to constitutional claims of intentional racial discrimination in voting."). Redistricting plans adopted and/or maintained with a discriminatory purpose may be intentionally discriminatory. *See Rogers v. Lodge*, 458 U.S. 613, 622-27 (1982). Governmental bodies may have more than one motive in their decision-making. *See Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Rarely can it be said that a legislature or administrative body operating under a broad mandate made a decision motivated solely by a single concern, or even that a particular purpose was the 'dominant' or 'primary' one."). And it is sufficient to show that "a discriminatory purpose [was] a motivating factor" in the challenged decision. *Id*. at 265-66.

[42] LDF, *The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation*, (Feb. 14, 2019), https://www.naacpldf.org/wpcontent/uploads/Section-2-costs02.14.19.pdf.

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

[44] 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

Whether or not Section 2 conditions can be met, the U.S. Constitution also 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 stratagems that can illegitimately elevate race over other considerations and diminish the political power of Black voters.[45]

Moreover, where legal conditions are not sufficient for the creation of majority-minority opportunity districts under Section 2, the legislative bodies responsible for redistricting should prioritize the creation of minority influence and minority coalition districts.[46] As the U.S. Supreme Court explained, compliance with the Voting Rights Act is a nuanced, fact-specific inquiry that requires an "intensely local appraisal" based "upon the facts of each case."[47] Simplistic and crude interpretations of the Act should not be used as a pretext to disadvantage communities of color. While South Carolina has made progress since 1965, the legislative bodies responsible for redistricting must not fail to fulfill their affirmative obligations under Section 2 and the U.S. Constitution. They must all proactively assess whether redistricting lines dilute minority voters' ability to elect candidates of their choice or otherwise intentionally relegate Black voters into districts that minimize their political power.

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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)).

45 *See*, *e.g.*, *Ala. Leg. Black Caucus v. Alabama*, 575 U.S. 254, 278 (2015); *Bethune-Hill v. Virginia State Bd. of Elections*, 326 F. Supp. 3d 128, 180 (E.D. Va. 2018) (three-judge court) (holding that 11 state legislative 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); *Smith v. Beasley*, 946 F. Supp. 1174, 1210 (D.S.C. 1996) (holding that districts for which a legislature imposes unnecessarily high BVAP targets will fail constitutional scrutiny, because Section 2 "does not require super-safe majority-minority districts of at least 55% BVAP," and explaining: "Such districts should be narrowly tailored so that each district is considered individually and lines are drawn so as to achieve a district where minority citizens have an equal chance of electing the candidate of their choice. Districts in which most minority citizens register and vote will not need 55% BVAP to elect a candidate of choice. To be narrowly tailored, such facts should be considered when district lines are drawn.").

46 *See, e.g.*, *Holloway v. City of Virginia Beach*, No. 2:18-CV-69, 2021 WL 1226554, at *18 (E.D. Va. Mar. 31, 2021) (explaining that "[t]wo or more politically cohesive minority groups can bring a claim as a coalition under Section 2").

47 *Gingles*, 478 U.S. at 79.

Ultimately, the legislative bodies responsible for redistricting 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."[48] 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.[49]

III. Legislative Bodies Responsible for Redistricting Must Ensure Public Involvement and Transparency During All Phases of Redistricting

In the coming months, the legislative bodies responsible for redistricting will consider maps that will likely be in place for at least the next ten years. They will be foundational to residents' access to political representation and to eligible voters' opportunity to elect candidates of their choice in 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. Any map that the legislative bodies responsible for redistricting propose or otherwise consider must therefore reflect their residents in all its diversity. As the legislative bodies responsible for redistricting develop these plans, we share the following recommendations to assist SCSBA members in meeting this significant responsibility.[50]

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

[49] 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.

[50] For additional references, see the present signatories' letters recently submitted to the Senate Judiciary Redistricting Subcommittee and House Redistricting Ad Hoc Committee. LDF et al., *Letter to the House Redistricting Ad Hoc Committee*, (Aug. 9 , 2021), https://www.naacpldf.org/news/ldf-sends-letter-to-the-south-carolina-house-redistricting-ad-hoc-committee-about-their-obligations-under-section-2-of-the-voting-rights-act-and-the-constitution/; LDF et al., *Letter to the Senate Judiciary Redistricting Subcommittee*, (Aug. 2, 2021), https://www.naacpldf.org/news/ldf-sends-letter-to-south-carolina-senate-judiciary-redistricting-subcommittee-on-their-duty-to-comply-with-section-2-of-the-voting-rights-act-and-recommendations-for-transparency-public-involvement/.

(1) **Create Formal Mechanisms for Public Involvement**: The legislative bodies responsible for redistricting should establish a formal mechanism that allows residents to provide meaningful input about proposed redistricting criteria, maps, and other redistricting procedures—during all stages of the redistricting process.

(2) **Prioritize Public Involvement**: The legislative bodies responsible for redistricting should adopt the following processes and safeguards for the benefit of their residents:

a. ***Conduct public hearings on redistricting guidelines and principles***. Receiving and considering public input on any redistricting guidelines and principles is a critical first step before any maps are drawn or considered.

b. ***Incorporate public testimony into any redistricting principles the legislative bodies responsible for redistricting may adopt to supplement federal and constitutional redistricting requirements***. While secondary to the affirmative federal obligations explained above, traditional redistricting principles like compactness, contiguity, and maintaining communities of interest may also be considered to ensure that district lines serve South Carolina residents equitably and do not unconstitutionally or illegally dilute minority voting strength. We specifically encourage the legislative bodies responsible for redistricting to formally adopt a holistic understanding of "communities of interest" that reflects the diverse social, cultural, and economic dimensions of the communities they serve to prevent the dilution of the voting strength of communities of color.

c. ***Host regular public hearings and publish adequate notice and documentation of all such meetings during all stages of the redistricting process***. To account for community members' caretaking, family, and work commitments and schedules, public meetings should be accessible and not ordinarily held during regular business hours. The public should be granted sufficient and accessible notice of hearings at least 7-10 business days in advance to allow communities to prepare meaningful testimony and

supporting materials, including proposed maps. To ensure that the voices of voters of color are heard, the legislative bodies responsible for redistricting should proactively post notice of public hearings in media outlets that serve communities of color and utilize social media platforms that reach a wide range of their residents.

d. Allow remote participation. Members of the public who cannot travel or take time off from work or other obligations to attend the legislative bodies responsible for redistricting's hearings in person, or who cannot attend due to health concerns, should be provided multiple opportunities, as early as possible, (1) to respond to maps proposed by the legislative bodies responsible for redistricting, (2) to offer legally compliant alternatives to the legislative bodies responsible for redistricting's proposals, (3) to have the legislative bodies responsible for redistricting consider any such alternatives and engage in robust discussion with members of the public about proposed maps through remote testimony options, and (4) a mechanism for written comments and questions to be incorporated into the record leading to the adoption of any final plan.

(3) Ensure Transparency: Informed involvement by all residents requires transparency and meaningful opportunities for public participation at all stages of the redistricting process. We further encourage the legislative bodies responsible for redistricting to:

a. Regularly update their websites about redistricting and share information on social media platforms. These updates should include public meeting notices, proposed meeting agendas, and proposed maps, which should be posted at least a week before the legislative bodies responsible for redistricting consider 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 legislative bodies responsible for redistricting engages to assist with the redistricting process should also be posted.

b. Publicize all data used by the legislative bodies responsible for redistricting 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.

c. Publish a tentative schedule for proposing or adopting maps. To allow opportunities for input and informed participation by interested residents, share a tentative schedule or timeline by which the legislative bodies responsible for redistricting are likely to consider or vote on maps with the public.

d. Prohibit backroom negotiations. To ensure transparency in the redistricting process, the legislative bodies responsible for redistricting 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.

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In addition to the guidance and recommendations in this letter, we also urge SCSBA members to review ***Power on the Line(s): Making Redistricting Work for Us***,[51] 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.

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[51] *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/.

We appreciate your consideration and time. Please feel free to contact John Cusick at jcusick@naacpldf.org with any questions or to discuss these issues in more detail. Otherwise, we will be in touch with you soon.

Sincerely,

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