Sent via email

Redistricting Ad Hoc Committee
Judiciary Committee
South Carolina House of Representatives
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Re: Duty to Comply with the U.S. Constitution and Voting Rights Act and Recommendations for Transparency, Public Involvement, and Fair Representation in South Carolina's Redistricting Process

Dear Chair Jordan and Committee Members:

In preparing for the imminent redistricting cycle, 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, South Carolina Appleseed Legal Justice Center, and South Carolina Progressive Network Education Fund write to remind the Redistricting Ad Hoc Committee of its baseline affirmative obligations to comply with the U.S. Constitution and Section 2 of the Voting Rights Act.[2] Officials

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[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.

[2] On Monday, August 2, 2021, certain present signatories sent a letter to the Senate Judiciary Redistricting Subcommittee also urging them to adhere to their obligations to comply with federal law. LDF, *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, and Fair Representation* (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/.

must ensure equality of access to representation to *all* South Carolinians, as well as non-dilution of the voting strength of South Carolina's racial minority voters where relevant conditions exist. We also encourage the Committee to create meaningful opportunities for all residents to engage in *each* phase of the redistricting process—both in person and remotely, and both before and after receiving the U.S. Census data, beginning in mid-August and no later than September 30, 2021. Based on statements made at this Committee's August 3 meeting, the undersigned have serious concerns that the Committee plans to proceed without needed public input and based on redistricting criteria that, in certain cases discussed below, are too limiting, not informed by public input, and contrary to federal law.

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

To ensure equality of access to representation—a cornerstone of our democracy—the U.S. Constitution's Fourteenth Amendment requires states to balance the populations of people among districts at *all* levels of government. To ensure that racial minority voters have the opportunity to elect their preferred candidates, Section 2 of the Voting Rights Act prohibits states and other bodies responsible for redistricting from drawing electoral lines with the intent or effect of diluting the voting strength of voters of color. Accordingly, this Committee must ensure that any maps it adopts comply with the "One Person, One Vote" mandate of the Fourteenth Amendment's Equal Protection Clause[3] and Section 2's "nationwide ban on racial discrimination in voting."[4]

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

The "One Person, One Vote" principle provides that redistricting schemes that weaken the voting power and representation of residents of one area of a state as compared to others elsewhere in the same state cannot withstand

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[3] *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.").

[4] *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 . . . .").

constitutional scrutiny.[5] 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 . . . ."[6] Since *Reynolds*, "the seats in both houses of a bicameral state legislature must be apportioned on a population basis."[7]

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."[8] State and local legislative bodies, by comparison, *may* have population deviations within plus or minus 5% of the mathematical mean.[9] Impermissible deviations from population equality among districts may elicit malapportionment lawsuits, requiring the Legislature to show that an adopted plan legitimately advances a rational state policy formulated "free from any taint of arbitrariness or discrimination."[10]

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," and accordingly, affirmed that an appropriate metric for assessing population equality across districts is total population—counting *all* residents, regardless of their citizenship or

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5 *See Reynolds*, 377 U.S. at 567–68.

6 *Id.* at 565–66.

7 *Id.*

8 *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).

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

10 *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 . . . .'").

registered-voter status.[11] 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."[12] Accordingly, "[t]oday, all States use total-population numbers from the census when designing congressional and state-legislative districts . . . ."[13]

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."[14] 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.[15]

After establishing these preconditions, a "totality of circumstances" analysis determines whether minority voters "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[16] Because of South Carolina's stark patterns of voting along racial lines,[17] which strikes at the heart of a potential minority vote

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[11] *Evenwel v. Abbott*, 136 S. Ct. 1120, 1132 (2016).

[12] *Id.* at 1131.

[13] *Id.* at 1124.

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

[15] *Id.*

[16] 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).

[17] *See*, *e.g.*, *McConnell*, 201 F. Supp. 2d at 643 ("Voting in South Carolina continues to be racially polarized to a very high degree . . . in all regions of the state and in both primary elections and general elections."); *see also*, *e.g.*, *United States v. Charleston Cty., S.C.*, 365 F.3d 341, 350 (4th Cir. 2004) (county voting "is severely and characteristically polarized along racial lines"); *Jackson v. Edgefield Cty., S.C. Sch. Dist.*, 650 F. Supp. 1176, 1196 (D.S.C. 1986)

dilution claim,[18] South Carolina's legislature must be attuned to its obligations under Section 2 of the Voting Rights Act.

Indeed, federal courts have found that prior South Carolina redistricting plans reflected legislators' self-interests and failed to create majority-minority opportunity districts as Section 2 requires. For example, in 2002 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."[19]

The Committee 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.[20] Of many examples, an 1892 South Carolina voter registration law "is estimated to have disfranchised 75 percent of South Carolina's [B]lack voters."[21] Three years later, the State's 1895 Constitution "was a leader in the widespread movement to disenfranchise [eligible Black citizens]."[22] Indeed, until 1965, South Carolina enforced both a literacy test and a property test that were "specifically designed to prevent

(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.").

[18] *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).

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

[20] 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).

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

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

[Black people] from voting."[23] 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.[24] Before Senator Tim Scott's historic election in 2014, *no* Black candidate had been elected to state-wide office in South Carolina since Reconstruction.[25]

This is also South Carolina's first redistricting cycle *without* the protections of Section 5 of the Voting Rights Act, which played a critical role in safeguarding against proposed retrogressive voting plans—plans that made the ability for racial minority voters to participate politically worse off than the existing plans—in prior redistricting cycles.[26] 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,[27] 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."[28] Three of these objections specifically challenged post-census House redistricting plans in three redistricting cycles in 1971, 1981, and 1994, including maps that would have resulted in the fragmentation and dilution of Black voting strength.[29] Without preclearance, this Committee 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.[30]

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[23] *Id.* at 310.

[24] *See id.* at 307.

[25] 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 20, at 649.

[26] *See Shelby*, 570 U.S. at 557.

[27] 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).

[28] *Id.*; Ruoff, *supra* note 20, at 645, 655-57; *see* 52 U.S.C. § 10304(b).

[29] *Voting Determination Letters for South Carolina*, *supra* note 27; Ruoff, *supra* note 20, at 678.

[30] 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.

Failure to comply with Section 2's requirements during this redistricting cycle would again expose the State of South Carolina or its constituent jurisdictions to costly litigation. For example, lawmakers in Charleston County spent $2 million unsuccessfully defending against a Section 2 claim.[31] After losing the lawsuit, the County paid an additional $712,027 in plaintiffs' attorneys' fees and costs.[32]

Whether or not Section 2 conditions can be met, the U.S. Constitution protects against maps that intentionally "pack" Black voters into districts with unnecessarily high Black populations or "crack" them into districts with unnecessarily low ones—both stratagems that can illegitimately elevate race over other considerations and diminish the political power of Black voters.[33]

Moreover, where legal conditions are not sufficient for the creation of majority-minority opportunity districts under Section 2, this body should

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See United States v. Charleston Cty., 316 F. Supp. 2d 268, 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.

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

[32] 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)).

[33] *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.").

prioritize the creation of minority influence and minority coalition districts.[34] 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."[35] 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, this Committee must not fail to fulfill its affirmative obligations under Section 2 and the U.S. Constitution. It must proactively assess whether redistricting lines dilute minority voters' ability to elect candidates of their choice or otherwise intentionally relegate Black voters into districts that minimize their political power.

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Ultimately, this Committee 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."[36] 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.[37]

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

The maps that the Legislature will consider over the coming months will likely be in place for at least the next decade. They will be foundational to residents' access to political representation and to eligible voters' access to the right to vote for candidates of choice for congressional, legislative, and local

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[34] *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").

[35] *Gingles*, 478 U.S. at 79.

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

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

governing bodies. No one is more qualified than the public to discern which maps allow (or do not allow) communities to have a voice and a choice in the process of electing their representatives. Accordingly, *any* maps that the Legislature proposes or otherwise considers must reflect South Carolina in all its diversity. We share the below recommendations to assist the Committee in meeting this significant responsibility.

Prioritize Public Involvement, Including by Allowing Remote Testimony in All Committee Hearings: The 10 Public Hearings scheduled from September 8 through October 4, 2021 are a positive first step in fulfilling this Committee's obligations to create meaningful opportunities for public engagement in the redistricting process. However, the signatories to this letter are concerned about the lack of any opportunities for members of the public to participate remotely in any but the final of these hearings on October 4. This decision is especially concerning given that the Committee's reasons for denying opportunities to testify remotely at the first nine meetings appear to rest entirely on purported logistical "difficulties."[38]

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

- ***Allow remote participation in all public hearings.*** During the Committee's first meeting on August 3, Chair Jordan acknowledged that remote testimony is "a great tool to allow folks to participate,"[39] and conceded that testifying remotely would likely be the only "opportunity to participate in the process" for "anyone who couldn't get to the public input meetings in person."[40] Chair Jordan also acknowledged that he and Representative Brandon Newton, a member of this Committee, were familiar with the Microsoft Teams platform from their service on the Election Law Subcommittee and that it was "a great

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38 *See* South Carolina Legislature, *Video archives by meeting time*, https://www.scstatehouse.gov/video/archives.php (last visited Aug. 6, 2021) (click on link titled "Tuesday, August 3, 2021 10:30 am, House Judiciary Committee -- House Redistricting Ad Hoc Committee").

39 *Id.* at 6:49–6:51.

40 *Id.* at 5:54–6:23; *id.* at 6:51–7:04 ("So that is kind of the idea of that October 4th [meeting], to give anyone for any reason that couldn't be at the in-person meetings, there's your opportunity to come and participate in the process.").

tool" that "works most of the time."[41] Nonetheless, citing purported "difficulties,"[42] Chair Jordan announced that the Committee will deny members of the public any opportunity to testify remotely until the Committee's final meeting on October 4, 2021.[43] Providing only one opportunity—at the *end* of the Committee's deliberative process—is gravely insufficient. Members of the public who cannot travel or take time off to attend Committee hearings should be provided multiple opportunities, as early as possible, to respond to maps proposed by this Committee, to offer legally compliant alternatives to Committee proposals, and to have this body consider any such alternatives, as well as otherwise engage in robust discussion with members of the public about proposed maps.

- The Committee should reconsider this decision and ensure that the option to testify remotely is available at *each* of its meetings, as the Committee's Senate counterparts have done.[44] Especially in light of the Legislature's ample budget for redistricting, there is no reason the Committee cannot engage a technical specialist to operate Microsoft Teams or another videoconferencing platform if the Committee's members feel that they lack the technical proficiency to do so themselves.[45]

- ***Continue to host regular public hearings and publish adequate notice and documentation of all such meetings***. The public should be granted sufficient and accessible notice of hearings at least 7-10

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[41] *Id.* at 6:30–6:48.

[4242] *Id.* at 5:10–5:14 (Chair Jordan stating: "As we've all experienced in this new era, virtual certainly is a good thing. It does not come without its difficulties.").

[43] *Id.* at 6:02–6:32; *see* South Carolina House of Representatives, *Tentative Public Hearing Schedule*, https://redistricting.schouse.gov/docs/Tenative%20Public%20Hearing%20Schedule.pdf (last visited Aug. 6, 2021).

[44] *See* South Carolina Legislature, Senate Judiciary Committee, *Press Release: S.C. Senate Begins Redistricting Public Hearings* (July 23, 2021), https://redistricting.scsenate.gov/docs/Updated%20Press%20Release%20-%20Senate%20Judiciary%20Redistricting%20Subcommittee%20-%20Public%20Hearing%20Process%2007-23-21.pdf ("You may attend the public hearings and speak either online or in person.").

[45] *See* South Carolina Legislature, *Video archives by meeting time*, *supra* note 38 at 5:22–5:38 (Chair Jordan stating: "It seems like, and maybe it's partially my fault as a technically unsophisticated technology person, it doesn't come without a price as far as the logistics of getting it prepared, and having it work sometimes and not work other times, and again that's [the] user sometimes as well.").

business days to allow communities to prepare meaningful testimony and supporting materials, including proposed maps. To ensure that the voices of voters of color in particular are heard, this Committee 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 South Carolina residents.

- ***Revise and update the Committee's published redistricting principles based on public testimony and an accurate understanding of federal and state redistricting requirements***. We are concerned, *first*, that the Committee has adopted guidelines and criteria for the imminent redistricting cycle before conducting any hearings or receiving public input,[46] thus depriving the Committee of the opportunity to incorporate concerns and priorities raised in public testimony into such criteria.

- *Second*, the Committee's guidelines appear to misstate certain federal standards. For example, they appear to impose an unnecessarily low range of population deviation among districts,[47] which may impede the Legislature from meeting its statutory obligation to create majority-minority opportunity districts where required by Section 2.[48] The Committee's guidelines also mischaracterize constitutional standards when they state that race "shall not be the predominant factor in motivating the legislature's decisions concerning the redistricting plan."[49] In fact, as the U.S. Supreme Court has explained, a state *may* constitutionally use race as the predominant factor in redistricting when the state has "a strong basis in evidence" giving it "good reason to believe" that doing so is necessary to achieve a

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[46] S.C. House of Representatives, Judiciary Comm., Redistricting Ad Hoc Comm., *2021 Guidelines and Criteria for Congressional and Legislative Redistricting* (adopted Aug. 3, 2021), https://redistricting.schouse.gov/docs/2021%20Redistricting%20Guidelines.pdf.

[47] *Id.* at 2 ("In every case, efforts should be made to limit the overall range of deviation from the ideal population to less than five percent, or a relative deviation in excess of plus or minus two and one-half percent for each South Carolina House district."); *but see Voinovich v. Quilter*, 507 U.S. 146, 161 (1993) (noting that a plan with a maximum deviation under 10% is generally considered to fall within the category of permissible minor deviations).

[48] *See McConnell*, 201 F. Supp. 2d at 628 (citing *Abrams v. Johnson*, 521 U.S. 74, 90, 96 (1997)) ("In fashioning these constitutionally mandated equipopulous plans, the [redistricting authority] must comply with the racial-fairness mandates of § 2 of the Voting Rights Act . . . .").

[49] Redistricting Ad Hoc Comm., *Guidelines and Criteria*, *supra* note 46, at 2.

compelling state interest, such as compliance with Section 2 of the Voting Rights Act.[50] As written, the Committee's current guidelines on the role of non-dilution of minority voting strength in redistricting may impede such compliance.

- *Third*, the guidelines' inclusion of "Incumbency Considerations" as a criterion means that the Committee must take care not to elevate incumbency protection above federal mandates or other redistricting principles. While certainly secondary to affirmative federal obligations, other state traditional redistricting principles such as compactness, contiguity, and maintaining communities of interest should also be considered and given priority over ensuring incumbent protection to ensure that district lines serve South Carolinians equitably and do not unconstitutionally or illegally dilute minority voting strength. Indeed, protecting incumbents is not such a sacrosanct principle, particularly to the extent that it conflicts with requirements under the Voting Rights Act.[51] In a past redistricting cycle, the U.S. Department of Justice found that a South Carolina House of Representatives redistricting plan "gave little or no consideration to Section 2 of the Voting Rights Act," and, that, "[i]nstead, incumbency protection drove the process as the existing plan was altered only if all the affected representatives agreed."[52] Going forward, the Committee should scrupulously comply with the stricture in its guidelines that "incumbency considerations shall not

[50] *Ala. Leg. Black Caucus*, 575 U.S. at 254.

[51] *See*, *e.g.*, *Jeffers v. Clinton*, 756 F. Supp. 1195, 1199–1200 (E.D. Ark. 1990) ("The desire to protect incumbents, either from running against each other or from a difficult race against a black challenger, cannot prevail if the result is to perpetuate violations of the equal-opportunity principle contained in the Voting Rights Act"); *Dillard v. City of Greensboro*, 956 F. Supp. 1576, 1580–82 (M.D. Ala. 1997) (concurring with the Special Master's view "that incumbency protection is a legitimate factor, but one that is subordinate to the traditional districting criteria"); *see also Ketchum v. Byrne*, 740 F.2d 1398, 1408 (7th Cir. 1984) (expressing skepticism about incumbency protection in plans designed to remedy Voting Rights Act violations because "many devices employed to preserve incumbencies are necessarily racially discriminatory").

[52] U.S. Dep't of Justice, Civil Rights Division, *Ltr. from Deval Patrick, Assistant Attorney General, to the Honorable Robert J. Sheheen, Speaker of the S.C. House of Reps.* 8 (May 2, 1994), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/SC-1980.pdf.

influence the redistricting plan to such an extent as to overtake other redistricting principles."[53]

- ***Provide meaningful opportunities for the public to review, provide comments on, and propose community maps, including for those who are unable to attend meetings in person***. As referenced above, the undersigned encourage you to develop a mechanism for South Carolinians to submit written comments and questions regarding the State's proposed maps, to submit alternative maps that are available to other members of the public, and to incorporate these maps into the legislative record.

Ensure Transparency: Informed involvement by all South Carolinians requires transparency and meaningful opportunities for public participation at *all* stages of the redistricting process. The recently launched House of Representatives redistricting website is a first step towards a transparent and inclusive process.[54] We further encourage the Committee to:

- ***Update the Redistricting Ad Hoc Committee's redistricting website daily 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 legislature considers the map, along with all relevant district-level data associated with any proposed maps, including but not limited to demographic data. The identity of any expert or consultant the State engages to assist with the redistricting process should also be posted.

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

- ***Publish a tentative schedule for proposing or adopting maps***. To allow opportunities for input and informed participation by

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[53] Redistricting Ad Hoc Comm., *Guidelines and Criteria*, *supra* note 46, at 3.

[54] South Carolina Legislature, *South Carolina House of Representatives Redistricting 2021*, https://redistricting.schouse.gov/ (last visited Aug. 7, 2021).

interested South Carolinians, share with the public a tentative schedule or timeline by which the Committee is likely to consider or vote on maps.

Model Best Practices for Local Government Redistricting: Redistricting by the Legislature also sets the standard and tone for local redistricting in the State. Over the coming months, therefore, this Committee should serve as an exemplar for other governing bodies charged with redistricting, particularly at the local level. As with state-level representative bodies, the Voting Rights Act also requires that voters of color be provided equal opportunities to elect representatives of their choice to city and county councils, school boards, and other elected local bodies.

This is particularly critical in light of prior violations at the local level. The U.S. Department of Justice filed 26 objections to South Carolina school district election methods, nominations, and redistricting maps between 1972 and 2010, meaning that, on more than two dozen occasions, the Department was unable to conclude that a local South Carolina redistricting plan "neither ha[d] the purpose nor w[ould] have the effect of denying or abridging the right to vote on account of race or color."[55] 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.[56] To prevent racially discriminatory vote dilution at the local level in the 2021 redistricting cycle, consistent with its authority, the Legislature should model best practices and require all local entities charged with redistricting responsibilities to commit to following similar best practices.[57]

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Please feel free to contact John Cusick at Jcusick@naacpldf.org with any questions or to discuss these issues in more detail. We also urge you to review ***Power on the Line(s): Making Redistricting Work for Us***,[58] a guide for

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55 *Voting Determination Letters for South Carolina*, *supra* note 27; *see* 52 U.S.C. § 10304(a).

56 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).

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

58 *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),

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.

Sincerely,

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https://www.naacpldf.org/press-release/civil-rights-organizations-release-redistricting-guide-to-support-black-latino-and-aapi-communities-participation-in-crucial-process/.

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