SPLC Southern Poverty Law Center

Fighting Hate
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Seeking Justice

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Sent via email

Georgia Senate
Georgia House of Representatives
State Capitol
206 Washington St. SW
Atlanta, GA 30334

Re: Redistricting of County Commissions and County Boards of Education

Dear Senator or Representative:

The Southern Poverty Law Center ("SPLC") and the law firm of Walden Macht & Haran LLP write to remind you of your obligations to comply with the Fourteenth Amendment of the U.S. Constitution and Section 2 of the Voting Rights Act of 1965 ("VRA"). You are responsible for considering and approving local legislation "affecting the composition, form, procedure for election or appointment . . . of the county governing authority."[1] The obligation is critically important as district lines determine, among other things, where residents vote, for whom they can vote, and how responsive elected officials are to constituents' needs.

We are actively involved in the local redistricting cycle in Georgia, including the monitoring of proposed county commission and county boards of education plans. As a nonprofit, nonpartisan civil rights organization, SPLC is a catalyst for racial justice in the South and beyond, working in partnership with communities to dismantle white supremacy, strengthen intersectional movements, and advance the human rights of all people. In furtherance of this mission, SPLC works to ensure the adoption of fair and nondiscriminatory redistricting plans that provide equal access to representation, including at the local level.

As the General Assembly considers redistricting plans for county commissions and county boards of education, we remind you of your obligation to comply with federal law, and we recommend best practices for involving community members for public transparency and accountability. We provide this guidance to help you mitigate the risk of costly and unnecessary litigation. Failure to adhere to federal law in the redistricting process risks depriving Georgians of their constitutional and statutory rights and exposing the State to extremely burdensome legal fees. We strongly encourage you to take steps prior to enacting any redistricting plan to ensure that plans meet constitutional and statutory requirements.

[1] *See* Ga. Const. art. 9, § 2, ¶ 1(c)(2).

I. You Must Comply with the U.S. Constitution's and Voting Rights Act's Mandates

Over the past ten years, Georgia's population has grown significantly and seen dramatic demographic and geographic shifts. The 2020 census shows that the State's population grew by over 1 million new residents, more than 10%.[2] The population changes are far from evenly distributed. Redrawing district lines will be necessary to comply with the Fourteenth Amendment's "one person, one vote" principle and Section 2 of the VRA.

According to the 2020 census, Georgia's population looks much different than it did in 2010. Black, Hispanic, Asian, and multiracial Georgians account for all the population growth. The Black population grew the most in absolute terms: 367,319. And the Asian population grew the most proportionally: 52.6%, or 163,988. The Hispanic population also saw a significant increase. It grew by 269,768, or 31.6%, meaning more than 1 in 10 Georgians are now Hispanic. At the same time, Georgia's non-Hispanic white population shrank both proportionally and in absolute terms by 51,764. In short, the State is almost majority non-white, if not already, with 50.06% of residents identifying as non-Hispanic white, down from 55.88% in 2010.

Geographically, people have flocked to the metro Atlanta area, often from rural Georgia. Most of the population increase is in five metro Atlanta counties. That is 525,202 new residents in those counties. The growth was largely driven by new Black residents, as over 300,000 moved into the metro Atlanta area. Contrasting this metro area growth, 67 counties lost population. This was most pronounced in South Georgia.

These shifts have already led to historic electoral results. In the last five years, three counties elected their first Black sheriffs. Georgia's first female Asian state senator was elected. And 20 Black women have been elected to state, county, and municipal offices.

In view of the 2020 census, many of Georgia's current county commission and county school board districts are untenable. We provide the following reminders and guidance on how to comply with the Fourteenth Amendment and Section 2 of the VRA as you craft and consider county-level reapportionment plans—a task vital to the health and legitimacy of democracy. Only with meaningful representation can local government be what it is supposed to be: close to the people, responsive to local concerns.

A. Observing the "One Person, One Vote" Requirement Under the Fourteenth Amendment of the U.S. Constitution

You must comply with the doctrine of "one person, one vote," which requires electoral districts at all levels of government be "of nearly equal population so that each person's vote may be given equal weight in the election of representatives."[3] In 1962, the Supreme Court articulated "one person, one vote"—a principle derived from the "conception of political

[2] The 2020 census information referred to in this letter can be found at https://www.census.gov/library/stories/state-by-state/georgia-population-change-between-census-decade.html.

[3] *Connor v. Finch*, 431 U.S. 407, 416 (1977).

equality" embeded in the U.S. Constitution.[4] Applying this principle, *Reynolds v. Sims* holds that the Equal Protection Clause of the Fourteenth Amendment requires equal population apportionment.[5]

Redistricting plans presumptively violate this doctrine if the population deviation between districts is greater than 10%.[6] But that does not mean that a plan with a maximum deviation less than 10% gets a free pass. Even when population deviations are less than 10%, the deviation must be based on "legitimate objectives," as opposed to discriminatory or partisan reasons.[7]

We urge you to follow these constitutional requirements. Districts with impermissible population deviations and/or district lines based on illegitimate objectives deprive Georgians of equal representation and give rise to malapportionment lawsuits.

B. Complying with Section 2 of the Voting Rights Act

You must also comply with Section 2 of the VRA. Section 2 is the VRA's "sword," meant to enforce the Fifteenth Amendment's guarantee that the right to vote will not be abridged "on account of race, color, or previous condition of servitude."[8] It prohibits any "standard, practice, or procedure . . . 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 [or membership in a language minority group]."[9] Thus, in redistricting, it prohibits diluting the strength of voters of color.

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[4] *Gray v. Sanders*, 372 U.S. 368, 381 (1963).

[5] 377 U.S. 533, 568 (1964). *Evenwel v. Abbott* emphasizes the deep constitutional norm to use total population as the base for equalizing apportionment. 578 U.S. 54, 64 (2016). Scholars have noted that adopting an apportionment plan would likely still be presumptively unconstitutional where the maximum total population deviation exceeds 10% even when the citizen voting-age population deviation does not. *See* Jeff Zalesin, *Beyond the Adjustment Wars: Dealing with Uncertainty and Bias in Redistricting Data*, 130 Yale L.J. Forum 186, 208 (2020); Justin Levitt, *Citizenship and the Census*, 119 Colum. L. Rev. 1355, 1393 (2019); *see also Fourteenth Amendment-Equal Protection Clause- Voting Rights*-Evenwel v. Abbott, 130 Harv. L. Rev. 387, 391–96 (2016) (discussing relevant case law). Indeed, the Department of Justice has issued guidance that it will investigate apportionment plans that equalize on measures other than total population. *Guidance Under Section 2 of the Voting Rights Act, 52 U.S.C. 10301, for Redistricting and Methods of Electing Government Bodies*, U.S. Dep't of Justice, at 11 (Sept. 1, 2021), https://www.justice.gov/opa/press-release/file/1429486/download.

[6] *Voinovich v. Quilter*, 507 U.S. 146, 161 (1993); *Brown v. Thomson*, 462 U.S. 835, 842–43 (1983).

[7] *Brown*, 462 U.S. at 842; *see Mahan v. Howell*, 410 U.S. 315, 325 (1973) (reaffirming *Reynolds* that deviations from a strict population standard must be "based on legitimate considerations incident to the effectuation of a rational state policy"); *see also Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333, 341 (4th Cir. 2016) (collecting "legitimate considerations"); *Harris v. Arizona Indep. Redistricting Comm'n*, 578 U.S. 253, 259 (2016) (a plan cannot reflect a "predominance of illegitimate reapportionment factors"); *Cox v. Larios*, 542 U.S. 947, 950 (2004) (Stevens, J., concurring in summary affirmance) (striking down plan with maximum deviation less than 10% where the plan reflected deliberate partisan effort).

[8] U.S. Const. amend. XV, § 1.

[9] 52 U.S.C. § 10301(a). Section 2(b) further specifies when a Section 2(a) violation occurs: when, "based on the totality of circumstances, it is shown that the political processes leading to nomination or election . . . are not equally open to participation by members of a [protected] class of citizens." 52 U.S.C. § 10301(b). Section 2(b) was added in 1982 after the Supreme Court had held that Section 2 prohibited only invidious

As you consider maps, Section 2 compels you to preserve majority-minority opportunity districts that remain necessary and effective for voters of color to elect candidates of their choice. This applies to districts that meet three conditions: (1) when a racial minority can fit in a geographically compact district and would make up a majority in this hypothetical district[10] ; (2) when there is political cohesion in the racial minority group, as evidenced by consistent voting for the same candidates by members of the racial minority group; and (3) when bloc voting by the white majority in the challenged district enables the majority to usually defeat the racial minority's preferred candidate.[11]

When those three pre-conditions are met, a court will consider the totality of circumstances to determine if the challenged district passes muster under Section 2. The lodestar of this analysis is whether voters of color have less opportunity to elect representatives of their choice and effectively take part in the political process.[12] This involves a "searching practical evaluation of the past and present reality," looking to how the challenged district "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black [or other voters of color] and white voters to elect their preferred representatives."[13] A court will also compare the number of majority-minority districts and the racial minority's share of the population.[14]

It is therefore your obligation under federal law to refrain from "cracking" and "packing" districts—"fragmenting [or cracking] the minority voters among several districts where a bloc-voting majority can routinely outvote them," or "packing them into one or a small number of districts to minimize their influence in the districts next door."[15] Pursuant to the

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and purposeful discrimination; Congress believed that this burden was too high and contrary to the purpose of the law, and thus made clear that discriminatory effects were all that were required for a violation.

[10] *See Bartlett v. Strickland*, 556 U.S. 1, 19–20 (2009) (holding that the first condition of *Gingles* requires a hypothetical majority-minority voting-age district greater than 50 percent). The hypothetical district must also consider traditional redistricting principles, such as maintaining communities of interest and traditional boundaries. *Bush v. Vera*, 517 U.S. 952, 977 (1996). Further, different racial minority groups, such as Black and Hispanic, can likely be combined in assessing whether such a hypothetical district is possible. *See Nixon v. Kent Cnty.*, 76 F.3d 1381, 1393 (6th Cir. 1996); *Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988).

[11] *Thornburg v. Gingles*, 478 U.S. 30, 50–51 (1986).

[12] *Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994).

[13] *Gingles*, 478 U.S. at 47, 75–76. The Senate Report accompanying the 1982 amendment to the VRA identified seven non-exclusive factors to consider: the extent of any history of discrimination in the jurisdiction that touched the right of the members of the group of people of color to participate in the democratic process; the extent to which the jurisdiction uses devices that may enhance the opportunity for discrimination, such as majority vote requirements or anti-single shot provisions; whether the members of the racial minority group bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; whether political campaigns have been characterized by overt or subtle racial appeals; and, the extent to which members of the group of people of color have been elected to public office in the jurisdiction.

[14] *De Grandy*, 512 U.S. at 1020.

[15] *Id.* at 1007.

VRA and the U.S. Constitution, you may not use district lines to water down the voting power of a politically cohesive group of people of color.[16]

Finally, a court may find that a map violates Section 2 regardless of whether the map is retrogressive under of the VRA.[17] Relatedly, a previously precleared map under Section 5 of the VRA is not immune from scrutiny and may still violate Section 2. Given the population shifts and dispersions since 2010 apparent in the 2020 census, it is likely that legacy districts are not compliant with the U.S. Constitution or the VRA and must be redrawn.

We strongly encourage you to study and consider your obligations under Section 2 of the VRA prior to adopting county-level redistricting plans. Maps that deprive voters of color the opportunity to elect their preferred candidates are anathema to the guarantees of federal law and may be subject to vote dilution lawsuits.

II. You Must Provide Meaningful Opportunities for Public Engagement and Ensure Transparency in Local Redistricting.

Transparency and accountability are critical to a fair redistricting process. To that end, you must provide residents sufficient information and opportunity to voice their concerns and give meaningful input into the process of electing their representatives. We recommend the following to ensure the public is informed and can inform maps to reflect the diversity of Georgia's communities.

(1) Transparency:

a. **Timely update the General Assembly website with meeting notices and agendas, providing in-language materials for Georgia's limited English proficiency speakers and Georgians who require American Sign Language ("ASL") translations.** Meeting notices and agendas should be posted at least 48 hours prior to a hearing to give the public sufficient opportunity to prepare written or oral testimony and obtain transportation to the Capitol, if necessary.

b. **Timely update the General Assembly website with proposed legislation and accompanying data files.** Proposed legislation and data files should be posted alongside hearing notices and agendas 48 hours prior to a hearing to consider such proposed legislation and maps. At minimum, publicly posted data files should include information that accompanied proposed state legislative and Congressional district maps during the 2021 special legislative session. These include current and proposed map images, GIS shapefiles, written geographic descriptions of district lines, and corresponding census data tables with population and demographic summaries of each proposed district.

[16] *Voinovich*, 507 U.S. at 153–54.

[17] *See Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003) ("[The Supreme Court has] refuse[d] to equate a Section 2 vote dilution inquiry with the Section 5 retrogression standard.").

c. **Hearings should include translation services.** Translators should be provided to limited English proficiency residents and people with disabilities seeking to view hearings to consider redistricting plans.

(2) Public Testimony:

a. **Every hearing to consider a redistricting plan must include a public testimony portion.** Notice of public testimony during a hearing should be posted in each hearing notice and agenda 48 hours prior to the hearing.

b. **Permit—and encourage—virtual testimony options.** Oral testimony is one of the most effective ways to voice a concern and give input. But many residents are precluded from testifying in-person at the Capitol. This includes rural residents or residents who do not live in the metro-Atlanta area, people with disabilities, residents without consistent access to safe and reliable transportation, people who must work during hearing hours, and students. With high transmission rates of COVID-19 across the state, virtual testimony options are a safe and effective way to hear from diverse communities. The General Assembly must provide virtual testimony options for each hearing involving a redistricting plan. Virtual testimony options should be publicized in the hearing notice and agenda 48 hours prior to the hearing.

c. **Permit in-language testimony and provide English translations.** Limited English proficiency members of the public and people who use ASL should be able to give oral and written testimony in-language and the General Assembly should provide English translations of testimony for the public and those legislators who need them.

(3) Consider Public Input:

a. **Make public input part of the public record.** Incorporate public testimony into any redistricting principles you may adopt and explain on the public record how public input informed redistricting plans.

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We appreciate your consideration and time. Please contact Poy Winichakul at poy.winichakul@splcenter.org or (470) 597-3010 with any questions or to discuss these issues in more detail.

Respectfully,

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