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Arkansas

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November 24, 2021

Arkansas Board of Apportionment
c/o Arkansas Secretary of State - Elections Division
Room 25, Arkansas State Capitol
500 Woodlane Street
Little Rock, AR 72201

Gov. Hutchinson, Sec. Thurston, & Gen. Rutledge:

The ACLU of Arkansas is a nonpartisan, nonprofit organization dedicated to preserving and defending the rights guaranteed to all Arkansans by the United States and Arkansas Constitutions and civil rights laws. We correspond today with another public comment concerning state legislative redistricting. While we commend the state's efforts on this complex task, we urge the Board to resolve substantial flaws in the currently proposed House and Senate maps. In particular, the Arkansas Board of Apportionment ("the Board" or "the BOA") has proposed maps that, among other things, severely underrepresent Black Arkansans and thus fail to comply with Section 2 of the Voting Rights Act of 1965 ("VRA"). Furthermore, the Board has failed to create an effective Hispanic majority-minority district in Northwest Arkansas, unnecessarily divided communities of interest (as detailed in numerous public comments), and failed to keep its promise to conduct this redistricting process in a fully accountable manner.

Most importantly, the proposed House and Senate maps released by the Board on October 29, 2021 do not satisfy Section 2 of the VRA, meaning that the maps fail to satisfy both federal law and the Board's own guiding criteria in this redistricting process.¹ "Section 2 can require the creation of . . . majority-minority districts in which a minority group composes a numerical, working majority of the voting-age population."² One crucial factor in determining whether a proposed redistricting plan complies with Section 2 of the VRA is whether there is rough "proportionality" between "the number of majority-minority voting districts [and the] minority members' share of the relevant population."³ Courts assess "proportionality statewide,"⁴ that is, they assess whether the percentage of majority-minority districts statewide are roughly proportional to either the total population or voting-age population of the minority group statewide.⁵

According to the 2020 Census, Black people make up 16.5% of the total population in Arkansas. The BOA's proposed House map, however, creates only 11 majority-Black districts out of 100 total statewide, meaning it substantially underrepresents Black Arkansans. It is possible, however, to

¹ See Arkansas Board of Apportionment, *Redistricting Standards and Requirements*, <https://arkansasredistricting.org/about-the-process/redistricting-criteria-2/> (last visited Nov. 19, 2021) (the Board stating that it would abide by nine criteria in the current round of state legislative redistricting, the second of which is compliance with the VRA) [hereinafter BOA, *Redistricting Standards and Requirements*].

² *Jeffers v. Beebe*, 895 F. Supp. 2d 920, 930 (E.D. Ark. 2012) (quoting *Bartlett v. Strickland*, 556 U.S. 1, 13 (2009)) (alterations omitted).

³ *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 940 n.12 (8th Cir. 2018); see also *LULAC v. Perry*, 126 S. Ct. 2594, 2619 (2006); *Stabler v. Cty. of Thurston, Neb.*, 129 F.3d 1015, 1021 (8th Cir. 1995).

⁴ *LULAC*, 126 S. Ct. at 2619.

⁵ See *Stabler*, 129 F.3d at 1022.

create 16 reasonably compact majority-Black House districts out of 100 total statewide, thereby achieving rough proportionality. Similarly, the BOA's proposed Senate map creates just 4 majority-Black districts out of 35 total statewide, constituting only 11.4% of all Senate districts and thus again severely underrepresenting Black Arkansans. Yet, it is possible to create a map with 5 reasonably compact majority-Black Senate districts out of 35 total statewide, which would constitute 14.3% of all Senate districts and therefore come much closer to matching the percentage of Black Arkansans statewide. As such, there are alternative possible maps in both the House and Senate that would clearly "result[] in less disparity than the [proposed BOA] plan and more closely approximate[] rough, or substantial proportionality"—especially when considering that Black Arkansans should not "continue to bear the burden of underrepresentation under the [proposed] scheme while the white majority enjoys overrepresentation."⁶

Governor Hutchinson has claimed that the BOA's proposed House map creates 13 majority-minority districts.⁷ However, two of these supposedly majority-minority districts are illusory. The true number of minority opportunity districts in the BOA's proposed House map is actually 11. First, the BOA's proposed House map purports to create a new majority-Hispanic district at HD 9, but this claim is unfounded. HD 9 fails to constitute a majority-Hispanic district even under the BOA's own terms: it has a Hispanic voting-age population percentage ("HVAP") of less than 50% (47.6% HVAP). The Hispanic citizen-voting age population percentage ("HCVAP") in this district—that is, the percentage of adult citizens in the BOA's proposed HD 9 who are Hispanic—is just 27.8%, considerably lower than the 47.6% HVAP figure. In determining whether or not HD 9 is likely to perform for Hispanic-preferred candidates, HCVAP is a far more probative figure than HVAP because non-citizens are not eligible to vote. Given that the BOA's proposed HD 9 has a HCVAP well below 30%, the proposed district is not an effective majority-Hispanic district in any sense, nor is it at all likely to allow Hispanic voters to elect their preferred candidates.

Second, in creating **HD 34**, the BOA's proposed map would eliminate Mississippi County's existing majority-Black district (HD 55 in the existing map) by reducing substantially the Black population in that district. The BOA's proposed HD 34 has a Black voting-age population ("BVAP") of 48.9%, in a district where racially polarized voting estimates suggest that the BVAP would need to exceed 50% to provide meaningful opportunity for Black voters to elect their candidates of choice. The BOA's proposed HD 34 thus no longer has a BVAP of more than 50%, nor is it likely to elect Black-preferred candidates. The BOA did not need to eliminate what used to be an effective majority-Black district in Mississippi County in order to create a majority-Black district in West Memphis (which the BOA has proposed as HD 35); it is possible to create a map that comports with traditional districting principles that includes majority-Black districts in both Mississippi County and West Memphis. Consequently, the BOA's proposed House map actually creates only 11 majority-minority districts, not 13—the same number of majority-minority districts that are in the existing map.

Ultimately, the BOA could have created House and Senate maps that both (1) comport with traditional districting criteria and (2) contain more majority-Black districts than the proposed maps. Alternative maps would better achieve rough proportionality in both the House and Senate without overrepresenting Black Arkansans. If the BOA votes to adopt its proposed House and Senate maps in spite of these alternatives—when the proposed BOA maps will severely underrepresent Black Arkansans—this will constitute violations of Section 2 of the VRA.

Finally, the BOA has failed to honor its commitment—which it has repeatedly articulated—to a transparent redistricting process.⁸ As Chief Justice Betty Dickey, the BOA's redistricting coordinator,

⁶ *Id.* at 1022.

⁷ Transcript of BOA Meeting at 4 (Little Rock, Oct. 29, 2021) ("I was pleased with the map that will be presented on the House side, we'll go from 11 majority-minority districts to 13. And, as part of this, we'll have the first in history majority Latino district in Northwest Arkansas. And so all of that combined would give us 13 majority-minority districts. The Senate map would remain at four. But this is historic in nature in terms of access and making sure that we continue equal access by all populations of our state.").

⁸ See, e.g., Transcript of BOA Public Hearing at 2 (Monticello, July 29, 2021) (Justice Dickey: The redistricting staff are "committed to transparency and fairness[.]"); Transcript of BOA Public Hearing at 25 (Bentonville, Aug. 5, 2021) (Justice Dickey: "[T]hat's our goal. Fairness [and] transparency."); Transcript of BOA Public Hearing at 21 (Little Rock, Aug. 24, 2021) (Douglas House: The Board is "there to ensure that it's done, as Justice Dickey said, openly,

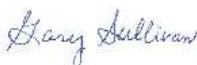
has averred: “We want to be transparent, and we want to be fair, and we want you to judge us based on these criteria.”⁹ Justice Dickey further asked the public to hold the BOA accountable for this promise: “Beware of anything where you see a finger or an odd shape and ask about it. Take us to task on that because it is our intention to be transparent and fair to everyone.”¹⁰

The public listened to this request. Hundreds of public comments have been submitted to the Board to date, with more posted each day. Fairness and transparency, though, require the Board to actively engage with this feedback—to answer questions, respond to comments, and revise the maps. Moreover, despite the request in our October 20, 2021 letter, the Board has not released a schedule of its intended timeline for revising and voting on the proposed maps.¹¹ This has compounded the Board’s earlier transparency failures, such as declining to allow remote testimony at the public hearings despite the ongoing pandemic and neglecting to publish answers to questions submitted through its public comment portal. We once again urge the Board to provide a detailed timeline and specific and public responses to the community’s feedback once the 30-day comment period has ended.

To be sure, the redistricting process is difficult. But it is the task of public officials to serve the public, and doing so here requires the Board to go back to the drawing board. In our previous letters to this Board, we stated clearly that the BOA’s maps must, at a minimum, satisfy the Voting Rights Act and fairly reflect the political power of voters of color. The proposed maps do not comply with Section 2 of the VRA and substantially underrepresent Black Arkansans, and the Board has not yet engaged in a meaningfully transparent process. Nevertheless, we welcome the opportunity to work cooperatively with the Board in an effort to revise the proposed legislative maps. Moving forward, we hope the Board will ensure that all Arkansans are adequately represented consistent with Arkansas’ obligations under federal law and with this Board’s public standards.

We appreciate your public service.

Respectfully,



Gary Sullivan

fairly, comply with all federal and state laws, and is completely transparent.”); Transcript of BOA Meeting at 6, 24 (Little Rock, Oct. 29, 2021) (Attorney General Rutledge: “[U]ltimately, that’s who we need to hear from, are the people that are impacted, and to make sure that we are doing our job and holding us accountable.”) (Governor Hutchinson: There “might always be something we miss and that’s the reason we want to be transparent.”)

⁹ Transcript of BOA Public Hearing at 27 (Jonesboro, Aug. 19, 2021) (cleaned up).

¹⁰ Transcript of BOA Public Hearing at 27 (Helena, Aug. 12, 2021) (cleaned up).

¹¹ In her response to our October 20 letter to the Board, Justice Dickey declined to offer a detailed timeline for the process of releasing proposed maps, collecting and responding to public comments, and finalizing the maps. See Letter from Justice Dickey to Gary Sullivan, ACLU of Arkansas Legal Director (Oct. 26, 2021) (“Other than the statement in the Arkansas Constitution, and the Board’s announced deadline, timelines are based on the completion of tasks and not on the calendar.”)