



AMERICAN CIVIL LIBERTIES UNION

Arkansas

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Arkansas Board of Apportionment
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 non-profit, nonpartisan organization dedicated to preserving, defending and protecting the rights of all Arkansans as guaranteed by the U.S. and Arkansas Constitutions and civil rights laws. We correspond today to remind you of your affirmative obligations to comply with the Voting Rights Act of 1965 (“VRA”) and the U.S. Constitution when considering new maps in the upcoming redistricting process, in follow-up to our August 24 letter. We realize that you are aware of the demographic changes that have occurred in the state over the past decade. As Arkansans have emphasized at every public town hall held across the state, the BOA should ensure that the redistricting process gives voters of color equal opportunities to elect their candidates of choice.

I. Maps Must Comply with the Voting Rights Act of 1965

Section 2 of the VRA requires that voters of color have an equal opportunity “to participate in the political process and to elect representatives of their choice.”¹

Section 2 requires the Board of Apportionment to assess where it must draw districts to provide minority voters with an effective opportunity to elect their preferred candidates. Assessing minority voting opportunities requires this Board to conduct a sensitive and “intensely local appraisal” of the “totality of the circumstances,” under a “functional view of the political process.”² This entails attention not only to the demographic composition of districts, but also to other factors such as “participation rates and the degree of cohesion and crossover voting.”³

This requirement bans vote dilution, i.e., the practice of minimizing or canceling out voting strength of certain minority groups so that they are unable to elect candidates of their choice. Vote dilution can take many forms, including cracking, or

¹ 52 USC §10301(b).

² See *Thornburg v. Gingles*, 478 U.S. 30, 79, 45 (1986)(internal citations and quotation marks omitted).

³ Bernard Grofman, Lisa Handley, David Lublin, *Drawing Effective Minority Districts: A Conceptual Framework and Some Empirical Evidence*, 79 N.C. L. Rev. 1383, 1415 (2001).

“fragmenting the minority voters among several districts where a bloc-voting majority can routinely outvote them,” or packing, where minority voters are placed into “one or a small number of districts to minimize their influence in the districts next door.”⁴

A Section 2 violation may require states to draw majority-minority districts. A map may violate the Section 2 prohibition on vote dilution if certain preconditions (“the *Gingles* preconditions”) are established:

1. a district can be drawn in which a minority group is sufficiently large and geographically compact to constitute a majority;
2. the minority group is politically cohesive; and
3. the white majority voters vote sufficiently as a bloc to usually defeat the minority group’s preferred candidate.⁵

If the *Gingles* preconditions are met, a “totality of circumstances” analysis must be conducted to determine whether minority voters have less opportunity than other members of the electorate to elect candidates of their choice. Some of the factors that may be considered in this analysis (referred to as the “Senate factors”) include the history of official voting-related discrimination, the extent to which voting in elections is racially polarized, and the extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, which hinders their ability to participate effectively in the political process.⁶ These factors are neither comprehensive nor exclusive, and other factors may be considered.⁷

Federal courts have noted the history of racially polarized voting, in particular, in the Arkansas Delta region.⁸ “The surest indication of race-conscious politics is a pattern of racially polarized voting.”⁹ Our preliminary analysis shows that racially polarized voting likely continues to persist at a statewide level in 2021. Given these background conditions, the BOA should be especially attuned to compliance obligations under the VRA.

II. Maps Must Comply with the U.S. Constitution

The maps that are drafted in this redistricting cycle must also comply with the U.S. Constitution. Chief among these constitutional constraints are the requirement of population equality and the prohibition against racial gerrymandering.

⁴ *Johnson v. De Grandy*, 512 U.S. 997, 1007 (1994).

⁵ *Thornburg v. Gingles*, 478 U.S. 30, 34 (1986).

⁶ S. Rep. No. 97-417, 97th Cong., 2d Sess. at 28-29 (1982).

⁷ *Id.*

⁸ See *Whitfield v. Democratic Party of State of Ark.*, 890 F.2d 1423 (1989).

⁹ *Harvell v. Blytheville School Dist. No. 5*, 71 F.3d 1382 (1995).

Maps that are adopted by the BOA must comply with the principle of “one person, one vote.” For state legislative districts, this requires “substantially equal” populations between districts.¹⁰

The BOA must also ensure that it does not engage in racial gerrymandering when drafting maps. While race may be used in certain, narrowly circumscribed ways (such as compliance with the VRA), the Fourteenth Amendment prohibits racial considerations from predominating over other factors in drawing district lines, unless the use of race is narrowly tailored to achieve a compelling state interest.¹¹ If a state invokes the VRA to justify using race as a predominant factor in redistricting, it must show that it had a “strong basis in evidence” for making the race-based decision.¹²

The BOA should also be wary of attempts to mechanically increase or artificially maintain the same percentage of Black voters in districts already electing candidates preferred by Black voters, all under the guise of VRA compliance. **This type of simplistic, race-based redistricting would likely constitute an illegal racial gerrymander.** The Supreme Court has explicitly rejected these types of end-runs around the Constitution. For example, in *Cooper v. Harris*, the Court rejected North Carolina’s attempt to redraw a congressional district by adding more Black voters so that the new Black voting age population in the district exceeded a specific racial threshold.¹³ Although North Carolina attempted to justify this decision by claiming that it was necessary to ensure that the new district would continue to provide Black voters an equal opportunity to elect their candidates of choice, the Court held that the new district could not pass constitutional muster because the State did not “carefully evaluate whether a plaintiff could establish the *Gingles* preconditions” and “too far downplay[ed] the significance of a longtime pattern of white crossover voting in the area.”¹⁴ These blunt attempts to pack minority voters should be rejected.

III. Maps Must Fairly Reflect the Power of Voters of Color

Arkansas has seen a seismic demographic shift over the last ten years. Arkansas has the 13th highest Black population in the country.¹⁵ Per the 2020 Census—which likely undercounted minority populations¹⁶—Black Arkansans constitute the largest

¹⁰ *Reynolds v. Sims*, 377 U.S. 533, 568 (1964).

¹¹ See *Bethune–Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 801 (2017).

¹² *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 278 (2015).

¹³ 137 S. Ct. 1455, 1471 (2017).

¹⁴ *Id.*

¹⁵ See *Arkansas: 2020 Census*, CENSUS BUREAU, <https://www.census.gov/library/stories/state-by-state/arkansas-population-change-between-census-decade.html>. When counting the “Black alone” population, Arkansas has the 12th highest Black population in the country. When counting “Black alone or in combination” it has the 13th highest Black population in the country.

¹⁶ Communities of color have historically been undercounted in the decennial census. See, e.g., *Census shows multiracial boom*, ARK. DEMOCRAT GAZETTE (Aug. 15, 2021), <https://www.arkansasonline.com/news/2021/aug/15/census-shows-multiracial-boom/>.

minority group in the state, totaling 495,968 people or 16.5% of residents.¹⁷ Arkansas' Black population primarily resides in the southern and eastern regions of the state.

Despite these demographic trends, the maps adopted in the past redistricting cycle (which are currently in use) do not properly account for Black voting strength in Arkansas. While demographic thresholds by themselves are not determinative of whether districts afford minority voters an effective opportunity to elect their candidates of choice, they are an important consideration to note as we enter this phase of the redistricting cycle.¹⁸ Although race of elected officials does not always correlate to voter preference, it is also an important consideration in a Section 2 analysis under the totality of the circumstances.¹⁹ In Arkansas, only 12 out of 100 state House members and 3 out of 35 state Senate members are Black, which roughly corresponds to the number of state legislative districts under current maps that meet the requirements of § 2 of the Voting Rights Act in giving Black Arkansans the opportunity to elect representatives of their choice: 12 in the House, and 4 in the Senate.

IV. This Board has a Duty to Remain Publicly Accountable

As noted in our August 24 letter, we encourage the Board of Apportionment to consider and propose maps that represent the diversity of Arkansas and that are strongly supported by the public. We hope that the Board continues to provide opportunities for meaningful public engagement and input into the redistricting process and conduct its work in a transparent manner. Our constituents and partners around the state have expressed uncertainty and confusion about what the Board's timeline and plan for introducing new maps will be, as well as a strong desire to have their voices heard. Especially after the recent experience of the legislature's congressional map-drawing process, it is critical that this Board take affirmative measures to avoid gerrymandering, to ensure that communities of interest are adequately represented, and to make its map-drawing and approval process accountable and accessible to the public.

To that end, we ask the Board to immediately release a schedule of its intended timeline for proposing, receiving public comment on, revising, and voting on draft state legislative maps. This schedule should make clear the exact dates or range of dates that the Board intends to take the next steps of the map-

¹⁷ CENSUS BUREAU, *supra* note 15.

¹⁸ *Johnson v. De Grandy*, 512 U.S. 997, 1000 (1994) (noting that whether "minority voters form effective voting majorities in a number of districts roughly proportional to the minority voters' respective shares in the voting-age population" may not be "dispositive," it is a "relevant fact in the totality of circumstances to be analyzed" in a vote dilution case.).

¹⁹ One of the Senate factors that can be used to assess the totality of the circumstances when weighing a Section 2 violation is "the extent to which members of the minority group have been elected to public office in the jurisdiction." S. Rep. No. 97-417, 97th Cong., 2d Sess. at 28-29 (1982).

drawing process. It should also provide detail on how the public will be able to submit community-drawn maps and comment on the BOA's proposed maps.

To summarize, the ACLU of Arkansas reiterates that the Board of Apportionment must comply with the Voting Rights Act of 1965 as well as the Constitution when drawing new maps. We also seek information about the Board's timeline and plan for proposing state house and senate maps for the next decade. We will continue to monitor the Board's work and advocate for a fair and open legislative redistricting process that is responsive to community input.

We appreciate your public service.

Respectfully,

A handwritten signature in blue ink that reads "Gary Sullivan". The signature is written in a cursive style.

Gary Sullivan