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VIA EMAIL

To: Sen. Phil Berger
President Pro Tempore, North Carolina Senate
Rep. Tim Moore
Speaker, North Carolina House of Representatives
Sen. Daniel, Sen. Hise, and Sen. Newton
Co-Chairs, Senate Standing Committee on Redistricting and Elections
Rep. D. Hall, Chair
House Standing Committee on Redistricting

CC: Sen. Dan Blue, Senate Democratic Leader
Rep. Robert T. Reives, II, House Democratic Leader
Members, Senate Standing Committee on Redistricting and Elections
Members, House Standing Committee on Redistricting

Senators and Representatives,

The undersigned respectfully submit this letter to bring to the attention of the legislative leadership, Members of the Senate Standing Committee on Redistricting and Elections, Members of the House Standing Committee on Redistricting, and, indeed, the entire legislative body, certain areas of concern within the county clustering option maps you introduced on Tuesday, October 5, 2021. The Committee Chairs stated that these maps represent the only legally compliant county clustering options in which ultimate district lines will be drawn. We disagree.

In *Stephenson v. Bartlett*, the North Carolina Supreme Court developed a methodology for how counties should be grouped together to form county clusters.¹ Under *Stephenson*, first, districts must be drawn to satisfy Section 2 of the Voting Rights Act (“VRA”) to ensure voters of color have an equal opportunity to participate in the political process and elect their candidates of choice. Only after that analysis is performed and those districts are drawn may any work be done to harmonize and maximize compliance with North Carolina’s Whole County Provision (“WCP”).²

¹ *Stephenson v. Bartlett*, 355 N.C. 354 (2002); *Stephenson v. Bartlett*, 357 N.C. 301 (2003).

² We do not concede that your interpretation of the *Stephenson* criteria after the first step—drawing VRA-required districts—is correct.



Although the *Stephenson* criteria outlines a process for how counties are grouped together to create districts, there is still discretion regarding the choices about how and where to group counties. Consequently, these individual choices can result in different county grouping options that directly affect political opportunities and voting power for voters of color. We will be monitoring your choices with respect to county clusters closely, as well as the impact of those choices. But even now, we can identify serious problems with your judgment being used in this redistricting process, including but not limited to gross mischaracterizations of applicable law.

I. The North Carolina General Assembly Continues to Flout Well-Established Redistricting Law

At this point, we have only seen draft district lines for the aforementioned clusters presented by your Committees, which create some (but not all) districts and thus do not constitute full maps. As a result, this letter does not and cannot address all potential violations of the North Carolina Constitution, the federal Voting Rights Act, or the North Carolina Supreme Court’s instructions in the *Stephenson* cases. Our intent here is to bring to your attention the potential problems in the county clustering maps from which you have indicated you intend to choose. We also seek to highlight, once again, the erroneous legal interpretation under which you appear to be operating, just as in last decade’s redistricting cycle. Absent a material change in direction, we may have further critiques or concerns. However, it is not too late to remedy these issues and embark on a redistricting process that will comply with applicable law.

1. The North Carolina Legislature Is Already Violating the *Stephenson* Instructions

Because this body is erroneously avoiding the use of all racial data, you per se cannot comply with *Stephenson*. Without that data, you cannot assess what districts are required under the VRA and draw those districts first as required. The failure to consider racial data is deeply problematic for other legal and policy grounds, but in this letter, we focus on the potential county clusters where it is unlikely that a district that will provide voters of color an equal opportunity to elect their preferred candidates can be produced by the county cluster.

The North Carolina Supreme Court has been unequivocal: *Stephenson* mandates that “districts required by the VRA be drawn first.”³ Indeed, the Supremacy Clause of the United States Constitution requires federal law compliance be prioritized. In order to determine whether it is necessary to draw VRA districts, the Legislature must determine the level of racially polarized voting in the relevant geographical area.⁴ Without any analysis of racial voting data, you are making it impossible to assess whether VRA districts are required and violating the plain rule in *Stephenson*. Thus, to comply with *Stephenson* and the VRA, we believe the Legislature must conduct a regionally-focused racially polarized voting (“RPV”) study to determine if there is legally significant racially polarized voting. If there is that level of racially polarized voting,

³ *Stephenson v. Bartlett*, 355 N.C. 354, 383 (2002).

⁴ *Thornburg v. Gingles*, 478 U.S. 30, 55 (1986).



and if any cluster which you claim is required under strict compliance with *Stephenson* produces a district in which voters of color would not be able to elect their preferred candidate, then you must draw a VRA district first and only then engage in developing clusters around that district.⁵ As discussed below, your claims that RPV studies done in 2011 and the *Covington* court’s ruling in 2016⁶ somehow negate the possibility that any VRA districts may be necessary today, in 2021, is plainly wrong.

2. The North Carolina General Assembly Is Grossly Misinterpreting *Covington v. North Carolina* and Other Precedent from Last Cycle

Sen. Hise and Rep. Hall are factually incorrect in representing that courts last decade ruled that racially polarized voting in North Carolina does not exist. In the most relevant case, *Covington v. North Carolina*, the federal court that invalidated 28 North Carolina legislative districts as unconstitutional racial gerrymanders in fact stated the opposite.⁷ The court acknowledged that there were two reports before the Legislature indicating there was statistically significant racially polarized voting in the state⁸, but the bipartisan panel of federal judges excoriated the Legislature for “failing to evaluate whether there was a strong basis of evidence for the third *Gingles* factor in any potential VRA district.”⁹ That is, the court acknowledged the “general finding regarding the existence of [] racially polarized voting,” but said the Legislature had to do a deeper inquiry, which “is exactly what Defendants did not do.”¹⁰ This body seems bound and determined to make the same legal mistake again this redistricting cycle by once again abdicating its responsibility to do the analysis it is required by law to do. If this Legislature declines to meet its obligations under *Stephenson* to determine and draw districts required by the VRA first, it should be prepared for a court to ultimately draw the maps needed for elections next year.

Second, no case from the last redistricting cycle overturns or otherwise renders null *Stephenson*’s requirement that the Legislature draw VRA districts first. In a meeting of the Joint Redistricting and Elections Committee on August 12, 2021, the Committee Chairs, in response to Senator Clark’s question about complying with the VRA, stated that RPV analysis was not necessary due to “the 2019 decisions.”¹¹ The 2019 Superior Court decision *Common Cause v. Lewis* found that compliance with the VRA was not a plausible excuse to a charge of partisan

⁵ *Stephenson v. Bartlett*, 355 N.C. 354 (2002) (holding legislative districts required by the VRA be formed prior to the creation of non-VRA districts to ensure redistricting plans “ha[ve] no retrogressive effect upon minority voters.”).

⁶ *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016).

⁷ *Id.* at 169-170 (finding that Defendants’ “reports conclude that there is evidence of racially polarized voting in North Carolina [.]”).

⁸ *Id.*

⁹ *Id.* at 167.

¹⁰ *Id.* at 167-68.

¹¹ NCGA Redistricting, 2021-08-12 Committee (Joint), YOUTUBE (Aug. 13, 201), <https://www.youtube.com/watch?v=gSm2OhE7Slk&t=718s>.



gerrymandering.¹² It did *not* hold that the General Assembly may completely ignore racial voting data when drawing districts following the release of U.S. Census data. As a result, *Lewis* in no way alters *Stephenson*'s mandate that the Legislature first draw VRA districts with the assistance of racial voting data analysis.

Lastly, no other federal law or Supreme Court decision compels or even allows this body to ignore racial data in drawing district lines. The Supreme Court decision *Cooper v. Harris* explains that states *can* use racial data in redistricting to comply with the VRA.¹³ In 2017, the Supreme Court found that the creation of two North Carolina congressional districts violated the federal Constitution because map drawers had used racial data in ways *not required* by the VRA.¹⁴ *Cooper* found that map drawers were using the VRA as an excuse to pack far more Black voters into a district than was necessary for VRA compliance; it did not state that the use of racial data is unconstitutional in every circumstance.¹⁵ In fact, *Cooper* demonstrates the very necessity of using racial voting data. It is impossible to determine what demographic configuration is sufficient for VRA compliance without analyzing racial voting data.

With these legal deficiencies in your approach explained, we now turn to areas of concern in the county cluster maps introduced on Tuesday. We note at the outset that the authors of the paper presenting possible county clusters explicitly did not look at the first step in *Stephenson* – drawing VRA districts.¹⁶ Thus, while this paper and methodology may be informative, they cannot substitute for the legislative analysis required by North Carolina and federal law. Indeed, it would not be algorithmically possible to do the kind of “intensely local appraisal”¹⁷ necessary to determine whether a district was required under Section 2 of the VRA.

II. Certain Areas in the North Carolina Senate Cluster Maps Require Examination for VRA Compliance

a. Cluster in Greene/Wayne/Wilson

One of the Senate county clusters that you designate as required under an “optimal” county grouping map for the Senate districts appears to violate the VRA. Cluster “Q1” is a district comprised of three counties that would likely deprive voters of color of the opportunity to elect their candidate of choice. In the current Senate map, Senate District 4 is comprised of Halifax, Edgecombe and Wilson Counties, and the Black voting age population (“BVAP”) in

¹² *Common Cause v. Lewis*, No. 18 CVS 014001, at *345 (N.C. Sup. Ct. Sept. 3, 2019).

¹³ *Cooper v. Harris*, 137 S. Ct. 1455, 1464 (2017).

¹⁴ *Id.* at 1472.

¹⁵ *Id.* at 1470-71.

¹⁶ Christopher Cooper, et al., *NC General Assembly County Clusterings from the 2020 Census*, QUANTIFYING GERRYMANDERING (Aug. 17, 2021), <https://sites.duke.edu/quantifyinggerrymandering/files/2021/08/countyClusters2020.pdf> (last visited Oct. 7, 2021).

¹⁷ *Thornburg v. Gingles*, 478 U.S. 30, 79 (1986).



that district is 47.46% using benchmark data. Black voters have the ability to elect their candidate of choice in this district.

In a county group analysis where race is not considered at all, we are concerned that you will propose that Senate District 4 be comprised going forward of Green, Wayne, and Wilson Counties. A district comprised of those 3 counties would be only 35.02% BVAP. If Section 5 were still in place, we are certain that such a change to that district would constitute impermissible retrogression and not be approved. We have done some initial analysis of racially polarized voting in those 3 new counties that would comprise Senate District 4. Examining racially contested statewide elections¹⁸ in these counties shows two things: using a number of different analytic approaches, the Black candidate is overwhelmingly supported by Black voters and white voters offer very little support for Black candidates. That is, voting is racially polarized. And most importantly, in those counties, were the electoral outcomes to be determined just by voting there, the Black candidates would have been defeated. Thus, the racially polarized voting is legally significant. We urge you to perform a formal RPV analysis in these counties before dictating that the Senate district must be comprised of these 3 counties.

Moreover, knowing as you do (or certainly do now) that there is a concentration of Black voters who, in concert with a small number of non-Black voters in the original configuration of the district (Wilson, Edgecombe and Halifax) are able to elect their candidate of choice, “if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective crossover district[],” you would likely be subjecting the State to liability under the Fourteenth and Fifteenth Amendments.¹⁹

b. Cluster in Hoke/Robeson/Scotland

We are also concerned that in the absence of racial data analysis, the proposed Senate district comprised of Hoke, Robeson, and Scotland Counties may not be in compliance with the Voting Rights Act. This county cluster would create a new District 21 out of what were previously sections of Senate Districts 13, 21, and 25. In North Carolina’s current map, District 21 is 42.15% BVAP using benchmark data, and Black voters in that district have the ability to elect their candidate of choice.

A district composed of Hoke, Robeson, and Scotland counties would be only 29.63% BVAP. Our initial review of recent racially-contested elections suggests that voting in these counties is highly racially polarized. Drawing a district with such a low BVAP might deprive

¹⁸ We examined the 2020 race for Chief Justice of the North Carolina Supreme Court involving a Black candidate, Cheri Beasley, and a white candidate, Paul Newby. We examined the 2020 race for Commissioner of Labor involving a Black candidate, Jessica Holmes, and a white candidate, Joshua Dobson. We examined the 2016 race for Treasurer involving a Black candidate, Dan Blue III, and a white candidate, Dale Folwell. And we examined the 2016 race for Lieutenant Governor, involving a Black candidate, Linda Coleman, and two white candidates, Dan Forest and Jacki Cole.

¹⁹ *Bartlett v. Strickland*, 556 U.S. 1, 24 (2009).



Black voters the opportunity to elect a candidate of their choice. We urge you to perform a formal RPV analysis for these three counties to determine if a VRA-compliant district is required for the new district in this area.

III. Certain Areas in the North Carolina House Cluster Maps Require Examination for VRA Compliance

a. Cluster in Sampson/Wayne

Our preliminary data analysis shows that a new House District 21 may be created out of a cluster composed of either Sampson and Wayne counties (“LL2”) or Duplin and Wayne counties (“KK2”). Our initial analysis indicates that the LL2 configuration is particularly problematic. Neither Sampson nor Wayne Counties individually have a high enough population to compose a single district under one person, one vote jurisprudence. However, the North Carolina General Assembly could create two House districts from a Wayne and Sampson County cluster.

Current House District 21 is composed of only portions of both Wayne and Sampson Counties. It is 39.00% BVAP using benchmark data and provides Black voters the opportunity to elect their candidate of choice. Our preliminary analysis was fairly conclusive – based on the statewide elections examined, voting in Sampson and Wayne Counties, together, is highly racially polarized and the Black candidates in statewide elections would not have won had the elections been determined in those counties alone. Thus, we believe this presents substantial evidence that there is legally significant racially polarized voting, and there may be a VRA district required to be drawn in this cluster; or if that is not possible under one-person, one-vote principles, this cluster cannot be used – it would not be compliant with Section 2 of the Voting Rights Act or *Stephenson*.

b. Cluster in Camden/Gates/Hertford/Pasquotank

One of the proposed multi-county single House districts in your proposed clusters is composed of Camden, Gates, Hertford, and Pasquotank Counties (Cluster “NN1” in “Duke_House_01,” “Duke_House_03,” “Duke_House_05” and “Duke_House_07”). The current district for this area, House District 5, is 44.32% BVAP using benchmark data, and Black voters have the opportunity to elect a candidate of their choice. A House district composed of Camden, Gates, Hertford, and Pasquotank Counties would be only 38.59% BVAP. Our analysis indicates that white voters are voting in bloc there and may be doing so in a way that would prevent a Black-preferred candidate from winning (and, thus, legally significant). More analysis must be done on this cluster to determine whether there is legally significant racially polarized voting, and, if so, a district composed of this county cluster might eliminate the ability of Black voters to elect a candidate of their choice and thus violate federal and state law.



IV. Conclusion

To be clear, in this letter, we are raising issues with the clusters you released on Tuesday, October 5, 2021. We can identify potential VRA issues where districts are dictated by groupings of whole counties or where, in a small 2-district cluster, we can observe voting patterns with sufficient certainty to identify a potential problem. However, we do not yet know how district lines will be drawn within counties or within multi-county, multi-district clusters. For example, we suspect that the way district lines are drawn in a Nash/Wilson House county grouping or Granville/Vance/Franklin House county grouping could be problematic. In short, this is a non-exhaustive list of concerns, particularly given the lack of draft maps at this moment. But this body should consider itself on notice for the need to perform RPV analysis in certain regions of the state and the need to examine racial data to ensure VRA compliance.

Importantly, we are not saying conclusively that VRA districts are required in the above county groupings; however, it cannot be ascertained without conducting an intensely local appraisal of voting conditions and a targeted RPV analysis, which you are required by law to undertake.²⁰ Without conducting any RPV analysis prior to grouping counties, the Legislature is departing from the requirements of the *Stephenson* criteria and may ultimately deny voters of color an equal opportunity to participate in North Carolina's elections. Therefore, by allegedly engaging in race-blind drawing, you violate not only the VRA but also *Stephenson* and our State's case precedent. It is neither appropriate nor required to draw districts race-blind. Rather, your current path ensures redistricting will once again be a tool used to harm voters of color, and we implore you to reconsider this path immediately.

If you have any questions, please do not hesitate to contact us.

Sincerely,

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²⁰ *Id.*

