

October 3, 2023

VIA ELECTRONIC MAIL

TO: Representative Tim Moore, Speaker, North Carolina House of Representatives
Senator Phil Berger, President Pro Tempore, North Carolina Senate
Chairs of the Senate Standing Committee on Redistricting and Elections (Senator Warren Daniel, Senator Ralph Hise, Senator Paul Newton)
Chair of the House Standing Committee on Redistricting (Representative Destin Hall)

CC: Senate Minority Leader Senator Dan Blue,
House Minority Leader Representative Robert T. Reives, II
Members, Senate Standing Committee on Redistricting and Elections
Members, House Standing Committee on Redistricting

Re: Redistricting Criteria for 2023 Redraw of Congressional and State Legislative Maps

Dear Legislators:

We write in advance of the North Carolina General Assembly's upcoming redraw of our state's Congressional, State House, and State Senate voting districts.

Fair redistricting is fundamental to representative democracy. To carry out its charge to redistrict fairly and lawfully, the General Assembly must adopt redistricting criteria consistent with the U.S. Supreme Court's recent decision in *Allen v. Milligan* and reflective of the values expressed by North Carolina's voters.

North Carolina Voters Reject Partisan Gerrymandering

Redistricting criteria for any redraw must comply with applicable law and be consistent with the values, interests, and needs of North Carolina's electorate. A recent survey shows that an overwhelming majority—nearly 90%—of North Carolinians oppose partisan gerrymandering, and 70% believe gerrymandering is a major problem here.¹ This is largely consistent with the public commentary heard by the Joint Redistricting Committees during the 2021 redistricting cycle in hearings throughout this state.² North Carolinians want fair maps, and an end to the shameful and damaging history of manipulation of voting plans in North Carolina.

Any attempt to use partisan criteria in drawing North Carolina's state legislative and Congressional maps in 2023, as was intentionally done in 2021, would contravene the will of North Carolina's electorate. History also tells us that achieving partisan gain by targeting the voting power of Black and Brown communities runs afoul of Constitutional protections and

¹ RepresentUS, *Poll: ~90% of N.C. Voters Oppose Gerrymandering*, <https://act.represent.us/sign/poll-90-nc-voters-oppose-gerrymandering>.

² See WRAL, Editorial: Citizens are speaking up to legislators. Adopt non-partisan redistricting now. <https://www.wral.com/editorial-citizens-are-speaking-up-to-legislators-adopt-non-partisan-redistricting-now/19888485/> (Sept. 22, 2021).

fundamentally contravenes government based upon equal opportunity for all voters to elect candidates of their choice.³

Redistricting Criteria Must Consider Race

The Supreme Court's recent reaffirmation of Section 2 of the Voting Rights Act, as a protection for minority voters, requires the North Carolina legislature to proactively consider race in redistricting to protect against illegal vote dilution for North Carolina's Black and Brown voters.

On June 8, 2023, the Supreme Court of the United States issued a landmark decision in *Allen v. Milligan*, affirming a lower court decision that Alabama's 2021 Congressional plan unlawfully diluted the votes of Black voters by denying them a second district in which they had a reasonable opportunity to elect a candidate of their choice.⁴ Writing for the majority, Chief Justice John Roberts upheld the longstanding framework for establishing racial vote dilution under Section 2 of the Voting Rights Act, first laid out in a North Carolina case known as *Thornburg v. Gingles*, 478 U.S. 30 (1986). In the ruling, Chief Justice Roberts rejected a plethora of arguments from Alabama in defense of its Congressional map that would "remake [the Court's] § 2 jurisprudence,"⁵ and unambiguously announced that the Voting Rights Act remains the law of the land. Importantly, the Supreme Court rejected Alabama's "race-neutral" proposed legal standard for proving Section 2 violations. On September 26, 2023, the Supreme Court also rejected Alabama's efforts to circumvent its obligations under the Voting Rights Act, reinforcing the importance that even remedial plans must strictly adhere to the requirements of the Voting Rights Act.⁶

The Supreme Court's June 8 decision in *Milligan* is particularly important now because, in that decision, the Court rejected many of the positions advanced by North Carolina legislators in the 2021 and 2022 remedial redistricting processes:

- First, the Supreme Court made clear that establishing compliance with the Voting Rights Act, and avoiding unlawful racial vote dilution, relies on the consideration of racial data. As Chief Justice Roberts wrote, "Section 2 itself demands consideration of race. The question whether additional majority-minority districts can be drawn, after all, involves a quintessentially race-conscious calculus." *Milligan*, slip. op. at 23 (internal citations omitted). Throughout the 2021 redistricting process, leaders in the General Assembly repeatedly attested that they could not look at racial data, going so far as to adopt a redistricting criterion that expressly barred the consideration of any such information in

³ See, e.g., *N.C. Conf. of the NAACP v. McCrory*, 831 F.3d 204, 233 (Finding the North Carolina Legislature enacted the 2013 omnibus election law to "entrench itself . . . by targeting voters who, based on race, were unlikely to vote for the majority party. Even if done for partisan ends, that constituted racial discrimination.").

⁴ The full opinion is available at https://www.supremecourt.gov/opinions/22pdf/21-1086_1co6.pdf.

⁵ *Milligan*, slip. op. at 15

⁶ See Order, Case No. 23A241 (Sept. 26, 2023), available at https://www.supremecourt.gov/orders/courtorders/092623zr1_kjfm.pdf.

constructing the maps.⁷ As this position clearly contravenes direction in *Milligan*, the General Assembly must alter its criteria from 2021 to allow consideration of race in a way that will protect North Carolinians against illegal vote dilution.

- Second, the Supreme Court reaffirmed that Section 2 itself requires “an intensely local appraisal of the electoral mechanism at issue[.]” Slip. op. at 11 (internal citations omitted). This position directly contradicts the General Assembly’s contentions that racially polarized voting should be evaluated on a statewide basis, and its repeated reliance on a prior redistricting decision using outdated data to skirt its responsibilities in assessing whether legally significant racially polarized voting exists in specific areas of this state. The holding in *Milligan* makes clear that the General Assembly must conduct a sensitive, localized analysis in areas where minority voters could constitute a majority in a reasonably-configured district for purposes of compliance with the Voting Rights Act.
- Third, the Supreme Court confirmed that traditional redistricting criteria cannot be used as a Trojan horse to subvert the protections of the Voting Rights Act, and that courts will not engage in a “beauty contest” of maps to evaluate what is required by Section 2. Slip. op. at 13. The General Assembly repeatedly asserted in 2021 and 2022 that the *Stephenson* clusters could not be disturbed even to draw Voting Rights Act-compliant districts. The *Stephenson* opinion makes clear that county clusters are to be determined only after drawing Voting Rights Act districts where they are required: “To ensure compliance with federal law, legislative districts required by the VRA shall be formed prior to the creation of non-VRA districts.” *Stephenson*, 355 N.C. at 383 (emphasis added). At base, the requirements of the Voting Rights Act cannot be superseded by state choices with respect to traditional redistricting criteria, and the Voting Rights Act and traditional redistricting criteria, including respect for North Carolina’s Whole County Provision, can harmoniously coexist.

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We provide this information in the sincere hope that the North Carolina Legislature will pursue in good faith compliance with all current, binding legal protections for voters this redistricting cycle to enact voting plans that will accurately and fairly assess the will of North Carolina’s electorate, and provide an equal opportunity for all voters to elect candidates of their choice in the coming decade.

Respectfully,

ACLU of North Carolina
Action NC
Common Cause North Carolina
Common Defense of North Carolina
Common Defense

⁷ See 2021 Redistricting Criteria, available at <https://webservices.ncleg.gov/ViewDocSiteFile/38467> (“Data identifying the race of individuals or voters shall not be used in the construction or consideration of districts”).

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Forward Justice Action Network
League of Women Voters North Carolina
North Carolina Voters for Clean Elections
North Carolina Asian Americans Together (NCAAT)
NC Counts Coalition
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