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October 22, 2023

VIA ELECTRONIC MAIL

TO: Senator Phil Berger
President Pro Tempore, North Carolina Senate
Representative Timothy Moore
Speaker, North Carolina House of Representatives
Members, Senate Standing Committee on Redistricting and Elections
Members, House Standing Committee on Redistricting

CC: Senator Dan Blue,
Senate Democratic Leader
Representative Robert T. Reives, II
House Democratic Leader

Re: Racially Polarized Voting in North Carolina and its Effect on the 2023 Redistricting Plans

Dear Sirs:

We write in response to the invitation of Chairs Hise and Hall, in the Senate and House Redistricting Committee meetings on October 19, 2023, to bring forward information concerning racially polarized voting in North Carolina that would compel the drawing of districts under Section 2 of the Voting Rights Act (“VRA”). We took the invitation of both the Senate and House Redistricting Committees seriously and in good faith, and offer the enclosed analysis accordingly.

As an initial point, our preliminary analysis indicates that it is possible to draw reasonably configured *Gingles* demonstrative districts¹ in many areas throughout North Carolina with high concentrations of Black voters. Because it is possible to draw many such districts throughout the state, these areas of North Carolina must be studied as part of the redistricting process to determine if racially polarized voting is preventing minority voters from electing

¹ A *Gingles* demonstrative district is a reasonably configured district that contains over 50% of minority voting age population. Such a district satisfies the first precondition laid out in *Thornburg v. Gingles*, 478 U.S. 30 (1986), which articulates the standard for evaluating vote dilution under Section 2 of the VRA.

candidates of their choice. We again urge, as a group of more than 20 civil society organizations did in our October 3 Letter,² that the General Assembly change course and conduct a fulsome, robust racially polarized voting analysis in these areas of North Carolina. This is the only way the General Assembly can be sure to fulfill its obligations to comply with the VRA and protect minority voters from unlawful vote dilution everywhere in the state—obligations the U.S. Supreme Court reaffirmed in its decision in *Allen v. Milligan*³ from June of this year.

The *Gingles* framework lays out three preconditions to establishing VRA liability in a redistricting plan. *First*, “the minority group must be able to demonstrate that it is sufficiently large and compact to constitute a majority in a single-member district.”⁴ *Second*, “the minority group must be able to show that it is politically cohesive”⁵ – that is to say, that the minority group typically votes for the same candidates. *Third*, “the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority’s preferred candidate.”⁶ If these preconditions are established, the finder of fact must examine the totality of the circumstances to examine whether the vote dilution established by the preconditions is the result of discrimination. Importantly, the VRA requires an “‘intensely local appraisal’ of the electoral mechanism at issue[.]”⁷ Thus, sweeping assertions that there exists no racially polarized voting in the state as whole, based upon erroneous and, at the very least, outdated data, falls short of what the VRA requires.

Our preliminary analysis of the maps released on October 18th indicates that the North Carolina legislature will fall short of the VRA’s requirements without further analysis. For example, ***at a minimum, it is readily apparent that the State Senate plan contained in Senate Bill 758 would unlawfully dilute the voting strength of Black voters in northeast North Carolina in Senate Districts 1 & 2, in violation of the VRA.***

The northeastern-most Senate districts proposed in Senate Bill 758, labeled as Senate Districts 1 & 2, both prevent Black voters from electing a candidate of their choice, despite both having sizable Black populations. Attached to this letter as **Appendix A** is a racially polarized voting study concerning electoral outcomes across a variety of election environments in Proposed Senate Districts 1 & 2 (the corresponding districts in the current State Senate plan). This racially polarized voting study demonstrates that Black voters in this area of North Carolina vote cohesively, that Black voters and white voters in this area of North Carolina consistently prefer different candidates, and that white voters typically defeat Black voters in electing candidates in the Proposed Senate Districts 1 & 2. In short, **Appendix A** confirms

² Available at <https://southerncoalition.org/wp-content/uploads/2023/10/Letter-2023-North-Carolina-Redraw.pdf>.

³ 143 S. Ct. 1487 (2023).

⁴ *Gingles*, 478 U.S. at 50.

⁵ *Id.* at 51.

⁶ *Id.*

⁷ *Milligan*, 143 S. Ct. at 1503 (citing *Gingles*, 478 U.S. at 79).

that the second and third *Gingles* preconditions are satisfied in Proposed Senate Districts 1 & 2.

As discussed above, it is possible to draw reasonably configured *Gingles* demonstrative districts in several areas of North Carolina, each of which would satisfy the first *Gingles* precondition. This includes the areas covered by Proposed Senate Districts 1 & 2. When combined with the analysis laid out in **Appendix A**, this shows that all three *Gingles* preconditions are established in the area covered by Proposed Senate Districts 1 & 2, and when combined with North Carolina’s pervasive history of discrimination in voting, makes clear that ***enacting Proposed Senate Districts 1 & 2 would violate the VRA.***

Because the *Gingles* preconditions are established, the General Assembly has a clear obligation to protect Black voters from vote dilution, by configuring VRA-compliant districts ***before*** the county clusters. As the North Carolina Supreme Court held two decades ago in *Stephenson v. Bartlett*⁸: “[T]o ensure full compliance with federal law, legislative districts required by the VRA shall be formed *prior to* creation of non-VRA districts”⁹ and those districts must be drawn to give minority voters an opportunity to elect a representative of their choice.

Furthermore, the U.S. Supreme Court has made clear that the General Assembly can comply with the VRA by drawing Black opportunity districts that are either majority-minority districts or, where possible, functioning “crossover districts” that are below 50%+ Black Voting Age Population but still provide Black voters with an equal opportunity to elect a candidate of their choice. In other words, “Section 2 allows States to choose their own method of complying with the Voting Rights Act, which may include drawing crossover districts.”¹⁰ This has been confirmed as an appropriate remedy in recent VRA cases, particularly where a crossover district better adheres to traditional redistricting criteria. *See, e.g., Remedial Order, Allen v. Milligan*, Case. No. 2:21-cv-01530 at Dkt. 311 at 6 (Oct. 5, 2023) (holding that a non-majority-minority district remedied a VRA violation).¹¹

The General Assembly has just such a choice available to it in the alternative cluster configurations for this area that the General Assembly used in the current Senate Districts 1 & 3 when enacting the 2022 remedial plan.¹² Current Senate Districts 1 & 3 involve the exact same counties as Proposed Senate Districts 1 & 2, and thus choosing between them ***affects no other districts proposed in Senate Bill 758.*** And Current Senate Districts 1 & 3 would provide Black voters in this area with an opportunity to elect a candidate of their choice. Also contained in **Appendix A** is a racially polarized voting study examining elections in Current

⁸ 355 N.C. 354 (2002).

⁹ *Id.* at 383.

¹⁰ *Bartlett v. Strickland*, 556 U.S. 1, 23 (2009).

¹¹ Available at <https://southerncoalition.org/wp-content/uploads/2023/10/10.5.23-Milligan-Remedial-Order-1.pdf>.

¹² This can be seen in the cluster choices made available to the General Assembly, available at <https://webservices.ncleg.gov/ViewDocSiteFile/38491>.

Senate Districts 1 & 3. This study confirms again that Black voters and white voters in this area each vote cohesively and that they prefer different candidates. But contrary to Proposed Senate Districts 1 & 2, Black voters are not always defeated by white voters in Current Senate Districts 1 & 3. Instead, Current Senate District 3 gives Black voters a reasonable opportunity to elect a candidate of their choice.

As **Appendix A** demonstrates, Black voters would not have won in every single electoral environment in Current Senate District 3, but Black voters are provided a reasonable, equal opportunity to elect candidates of their choosing. Current Senate Districts 1 & 3 accomplished this outcome while respecting the *Stephenson* clusters *just as well as the Proposed Districts*.

The choice between the Proposed Senate Districts 1 & 2 and the Current Senate Districts 1 & 3 in northeast North Carolina should be a familiar one to the General Assembly. The General Assembly was faced with *precisely* the same choice in the 2022 remedial redistricting process. The 2021 Enacted Senate plan used the configuration found in Proposed Senate Districts 1 & 2; after that plan was struck down by the North Carolina Supreme Court, the General Assembly considered how to modify the Senate map to bring it into compliance with the court's order. Initially, the General Assembly did not plan to change this county grouping; however, after SCSJ, on behalf of Common Cause, pointed out the obvious harm to Black voting power in the General Assembly's choice of grouping, the General Assembly switched course and enacted Current Senate Districts 1 & 3.¹³ When presented with evidence of this threatened vote dilution in 2022, the General Assembly made the right decision: to fix the problem. We ask that the General Assembly make the same choice now, and protect Black voters as required by the VRA.

In closing, we note the extraordinary posture in which this limited analysis is offered. This is a remarkably compressed timeline for evaluating even a single statewide redistricting plan, let alone the four different plans that are currently under consideration in the General Assembly. The General Assembly released initial draft maps on October 18th, and per the Chairs' representations in committee the following day, intends to have passed State House, State Senate, and Congressional plans into law by October 25th.

This week-long period is not nearly enough time for the public to digest and analyze the maps, let alone propose changes. The General Assembly has long been aware that they would likely re-draw redistricting maps,¹⁴ and instead of conducting a full slate of public hearings and working to incorporate public input through a deliberate, careful process, you have instead chosen to go from an unveiling of the maps to their adoption in under a week. While the time to conduct an open process without delaying the primary has come and gone, we note

¹³ Available at <https://southerncoalition.org/wp-content/uploads/2023/10/2022.02.11-VRA-Required-Remedial-Districts-in-State-Legislative-Maps-1.pdf>, at page 9 (“any constitutional remedial map will have to utilize the alternative Senate cluster “Z1” for northeast North Carolina (one that protects the ability of Black voters to continue electing their candidate of choice)”).

¹⁴ <http://speakermoore.com/nc-supreme-court-delivers-rulings-reinstate-voter-id-affirm-legislatures-redistricting-authority-end-unconstitutional-felon-voting/>.

that any shortcomings in the 2023 redistricting process flow from this decision, and we urge you not to repeat it.

The fact that we write today concerning two specific Senate districts *cannot* and *should not* be read as an indication that there are no VRA concerns elsewhere in the maps under consideration; instead, the fact that a clear, impending violation could be identified even on this truncated timeline should be understood as a warning sign. Under the circumstances, these maps and the process by which they are being considered run an alarming, unjustifiable risk of violating the VRA.

We have also provided preliminary RPV analysis in **Appendix B** for counties with high Black Voting Age concentrations. Even this preliminary analysis, provided in the extremely limited time period which you have afforded for considering this information, still shows **extreme racially polarized voting in North Carolina's Black Belt**. The unlawful vote dilution in the geographic area discussed in this letter, as well as the potential for such dilution in areas across North Carolina, should be examined for all of the redistricting plans under current consideration by the General Assembly.

We hope the General Assembly will utilize this information and perform additional analysis so that it follows well-established law and ensures that minority voters in North Carolina have an equal opportunity to elect candidates of their choice. We are further hopeful that, in light of the recent guidance provided in *Milligan*, the General Assembly will not “misconstrue” what the law requires and take license to pack Black voters throughout the state, diminishing their voting influence overall, as has occurred in the past. *Covington v. North Carolina*, 316 F.R.D. 117, 168 (M.D.N.C.), *summary affirmed*, 137 S. Ct. 2211 (2017).

We would be happy to provide any additional information that may be helpful in this process.

Respectfully,

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Jeff Loperfido
Chris Shenton
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Counsel, Southern Coalition for Social Justice