



AMERICAN CIVIL LIBERTIES UNION

## Arkansas

@ACLUArkansas

August 24, 2021

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Arkansas Board of Apportionment  
c/o Arkansas Secretary of State - Elections Division  
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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 U.S. and Arkansas Constitutions and civil rights laws. We correspond today with a public comment concerning redistricting.

The right to vote is one of the most sacred civil liberties we have as citizens. Indeed, the U.S. Supreme Court has recognized that "the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights" and that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live."<sup>1</sup> Voting should be easy for every citizen and each vote should count with the same weight as other votes. As such, we ask the Board to ensure that the new maps provide all voters a fair and equal opportunity for representation, including ensuring that voters of color have the same opportunities as white voters to elect their candidates of choice, regardless of where voters live in the state or for whom they may vote.

To ensure equality of access to representation, the Fourteenth Amendment to the U.S. Constitution requires states to balance the population among districts at all levels of government. The Fourteenth Amendment mandates that the state apportion electoral districts according to "one person, one vote" and bars states from relegating voters of color into districts that minimize their political power.<sup>2</sup> Section 2 of the landmark Voting Rights Act of 1965 ("VRA") prohibits voting practices or procedures that discriminate based on race, color, or language minority,<sup>3</sup> whether or not an intent to discriminate is present.<sup>4</sup> More specifically, the drawing of

<sup>1</sup> *Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964).

<sup>2</sup> *Reynolds v. Sims*, 377 U.S. at 558 ("The concept of 'we the people' under the Constitution visualizes no preferred class of voters but equality among those who meet the basic qualifications."); see U.S. Const. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws").

<sup>3</sup> 52 U.S.C. §§ 10301, 10303(f).

<sup>4</sup> *Thornburg v. Gingles*, 478 U.S. 30, 74 (1986) ("Plaintiffs need not prove causation or intent in order to prove a prima facie case of racial bloc voting").

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legislative districts that have the intent or effect of diluting the voting strength of Black voters is unlawful.<sup>5</sup>

### **I. The Board Must Comply with Section 2 of the Voting Rights Act.**

The Board must ensure that racial minority voters in Arkansas have equal opportunity "to participate in the political process and to elect representatives of their choice."<sup>6</sup>

New maps may dilute the voting power of people of color and violate Section 2 if "(1) the racial group is sufficiently large and geographically compact to constitute a majority in a single-member district; (2) the racial group is politically cohesive; and (3) the majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."<sup>7</sup> After assessing these preconditions, courts then look at the "totality of circumstances" to determine whether a Section 2 violation has been established.<sup>8</sup>

Minority populations in Arkansas are already underrepresented in formal politics of the state, have been left behind from many of the economic opportunities of the past decade, and have likely been undercounted in the 2020 Census. We urge the Board of Apportionment to make every effort to follow the mandates of Section 2 of the Voting Rights Act and ensure that voters of color across the state, and particularly in the Delta and Central Arkansas regions, are given sufficient opportunity to elect representatives of their choice.

### **II. The Board Must Make all Phases of Redistricting Transparent and Accessible to the Public.**

The maps that the Board and the General Assembly will draw over the coming months will likely determine our legislative and congressional districts for the next ten years. These maps will serve as the foundation for access to political representation and to the right to vote for candidates of choice for federal, state, and local governing bodies. They will also be vital to municipalities and counties with respect to federal funding allocation and their own local redistricting. The public should have significant input into whether the Board's proposed maps allow (or do not allow) communities of interest to have a voice in the process of electing their representatives. Accordingly, the Board should consider and propose only those maps that adequately represent the diversity of Arkansas. We recommend prioritizing public involvement and transparency throughout the process so that all Arkansans have the chance to participate.

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<sup>5</sup> *Shelby Cty., Ala. v. Holder*, 570 U.S. 529, 557 (2013); 52 U.S.C. § 10301(a) ("No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied . . . in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color . . .").

<sup>6</sup> 52 U.S.C. § 10301(b).

<sup>7</sup> *LULAC v. Perry*, 548 U.S. 399, 425 (2006) (internal citations and quotations omitted).

<sup>8</sup> 52 U.S.C. § 10301(b); *Harvell v. Blytheville School Dist. No. 5*, 71 F.3d 1382, 1391 (8<sup>th</sup> Cir. 1995) (quoting *Gingles*, 478 U.S. at 47) (noting that electoral schemes that create an "inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives . . . run contrary to the intent and standard of Section 2").

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The Public Hearings held from July 29 through August 24, 2021, have been a positive first step in fulfilling the Board's obligations to create meaningful opportunities for public engagement in the redistricting process. We commend the Board for streaming these hearings, and we encourage this Board to continue to host regular public hearings throughout the redistricting process. In addition, we urge the Board to ensure that the next public hearing process allows for even more robust online public engagement given the ongoing pandemic. When collecting commentary on draft maps, the Board should allow remote participants to share live testimony and to have their questions answered in real-time.

Without transparency and meaningful opportunities for public participation, informed involvement by all Arkansans is not possible. The Board's redistricting website and public comment page is a step in the right direction. We further encourage the Board to publicize all data used to inform its redistricting plans, publish answers to all questions submitted via the online comment portal, and prohibit backroom negotiations.

Voting should be safe, secure, and fair. Individuals should have *equal* representation in voting with each vote counting the same. We ask that the Board ensure the new maps provide all Black voters with the same opportunities as white voters to elect their candidates of choice, regardless of where they live in the state. We will continue to monitor the work of the Board to ensure that it heeds these fundamental principles of democracy, representation, and equality and offer our support as you carry out this incredibly important work. Thank you for your consideration and for your service.

Respectfully,



Holly Dickson