June 30, 2023

Legislative Committee on Reapportionment
Room 303, State House
11 South Union Street
Montgomery, Alabama 36130
district@al-legislature.gov

Dorman Walker
Counsel for the Committee Chairs
445 Dexter Avenue, Suite 8000
Montgomery, AL 36104-3864
dwalker@balch.com

Re: Congressional Redistricting Remedial Plan

Dear Reapportionment Committee Members:

Campaign Legal Center ("CLC") is a nonpartisan, nonprofit organization committed to advancing democracy through law. We write this letter to provide context for the Committee's consideration in crafting a remedial plan to correct the existing congressional plan's violation of Section 2 of the Voting Rights Act ("VRA").

A map derived from a brief written by CLC has been proposed by some as a potential remedial plan. But the Committee must understand the context in which that plan arose. Additionally, we wish to dispute the claim that the VRA Plaintiffs' map may be unconstitutional. It is not.

On July 18, 2022, CLC submitted an *amicus curiae* brief to the Supreme Court in support of Plaintiffs in *Allen v. Milligan*. CLC's brief opposed the State's argument that it would violate the Equal Protection Clause's prohibition on racial gerrymandering if it were to draw two congressional districts with Black voting age population ("BVAP") majorities, such as the

demonstrative plans offered by the Plaintiffs. As CLC explained in its *amicus* brief, when a redistricting plan—like the current unlawful Alabama congressional plan—has racially discriminatory effects, the Legislature (and the Court) necessarily must be conscious to race in remedying that discrimination.

Nevertheless, the State contended that Section 2 of the VRA was only constitutional if it were interpreted to be applied in an entirely race-blind manner. That was not the law at the time the State filed its Supreme Court brief. And as the Supreme Court's decision in *Allen v. Milligan* makes clear, that is not the law today. As CLC explained in its *amicus* brief, the argument advanced by the State—that the Legislature cannot consider race in seeking to prevent racial discrimination—"is a remarkable perversion of the Fourteenth Amendment, which, it bears reminding, was ratified in response to the Civil War, slavery, and political suppression of, among others, Black Alabamians."

Accordingly, CLC included illustrative plans in its *amicus* brief to show that *even if* the State's position were to become the law, the State still passed over numerous alternatives that would have improved opportunities for Black voters while accommodating purported desires to keep the Gulf Coast/Mobile region whole in a single district and retain the cores of prior districts.

The Supreme Court has now issued its decision and has explicitly rejected the State's contention that the Legislature can sacrifice the electoral opportunities of Black voters in Mobile in the name of maintaining the Gulf Coast region in a single district. "We do not find the State's argument persuasive," the Court wrote, agreeing with the district court's assessment that the testimony in the State's favor on this point was "partial, selectively informed, and poorly supported." *Allen v. Milligan*, Slip Op. at 12-13. Likewise, the Court rejected the State's argument that minimizing disruption to existing districts was a legitimate consideration to overcome the need to draw an additional Black opportunity district. *Id.* at 13-14.

Keeping the Gulf Coast region whole and minimizing changes to existing districts were the purported State justifications that prompted the creation of CLC's illustrative plans in its *amicus* brief. With the Supreme Court now having rejected the premise of the State's arguments, the Legislature has a duty to ensure that the remedial plan it adopts "completely remedies the prior dilution of minority voting strength and fully provides equal opportunity for minority citizens to participate and *to elect candidates of their choice*." *White v. State of Alabama*, 74 F.3d 1058, 1069 n.36 (11th Cir. 1996) (emphasis in original).

We wish to make two points with respect to the remedial process in which the Committee is currently engaged.

First, as explained above, the illustrative plans from CLC's *amicus* brief were drawn in response to arguments advanced by the State that the Supreme Court has now flatly rejected. While the Legislature has flexibility in drawing a remedial plan, this Committee should engage a qualified expert to analyze any potential remedial districts against a robust set of past election data to ensure the remedial districts will indeed function to provide Black voters the rights Section 2 of the VRA guarantees them.

In particular, CLC's *amicus* brief was submitted prior to the November 2022 elections. A cursory review of the 2022 results for just Jefferson County suggests that there is considerably less crossover voting among white voters when the candidate preferred by Black voters is Black rather than white. As courts have routinely explained, among the most probative elections in assessing vote dilution are "elections that include minority candidates." *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282, 1301 (11th Cir. 2020).

At the time CLC submitted its *amicus* brief, the only election featuring a Black candidate reported in publicly available redistricting tools was the 2018 Lieutenant Governor election. Now that the 2022 election data is available, it is critical that this new data be carefully examined by a qualified expert in assessing any remedial proposal. This is especially so because at least four statewide contests in 2022 featured Black candidates favored by Black voters, including Will Boyd (U.S. Senate), Yolanda Flowers (Governor), Wendell Major (Attorney General), and Pamela Laffitte (Secretary of State). These candidates received a substantially lower vote share among Jefferson County voters than did Black-preferred white candidates in prior elections. The inclusion of portions of Shelby County in the illustrative district further erodes their vote totals. Prior elections from 2008 to 2014 included Black candidates who failed to carry even Jefferson County, let alone relevant portions of Shelby County.

The Legislature must engage a qualified expert to assess whether potential remedial districts will actually perform for Black voters, given all the available data. Most importantly, the apparent pattern of significant drop-off in support among white voters when the candidate preferred by Black voters is Black rather than white is a critical factor that must be examined in fashioning an adequate remedial district. Indeed, the district court has already determined that polarized voting in Alabama necessitates remedial districts with majority or near-majority Black voting age population. The 2022 election

results in Jefferson County underscore the district court's determination in that regard.

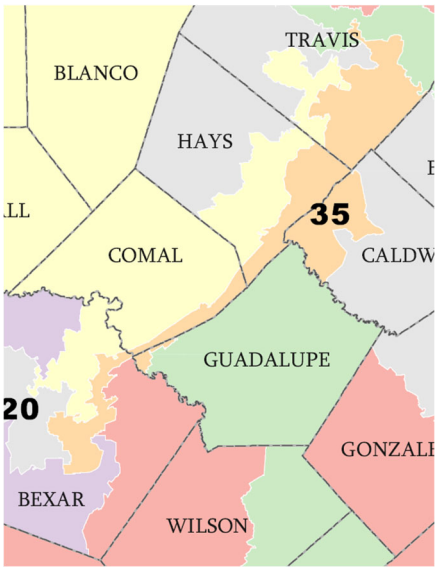
Second, any suggestion that it would be an unconstitutional racial gerrymander if the Legislature were to adopt two majority BVAP districts—such as the districts proposed by the VRA Plaintiffs—is unfounded. To begin, the district court already rejected the contention that Plaintiffs' demonstrative districts were racial gerrymanders. This alone answers the question. Moreover, it is apparent on the face of the VRA Plaintiffs' proposed map that traditional districting criteria, not race, are the predominant motivation. In that map, District 2 contains twelve whole counties, with splits of just three counties. Likewise, District 7 contains eleven whole counties, with splits of just three counties. Very few precincts are split in the entire statewide plan. The proposed districts are both visually and mathematically compact—more so than other districts included in the existing plan. They adhere to the communities of interest endorsed by the Supreme Court in its decision in *Milligan*. An inquiry into racial gerrymandering looks to the "predominant motive for the design of the district as a whole," and not merely "particular portions of the lines." *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 192 (2017). Districts that have over three-quarters of their territory comprised of whole counties, like those proposed by the VRA Plaintiffs, cannot plausibly be labeled racial gerrymanders.

Two districts previously adjudicated by the Supreme Court help illustrate that the VRA Plaintiffs' proposed map is not a racial gerrymander. On the left below is a North Carolina congressional district invalidated as a racial gerrymander in *Cooper v. Harris*, 581 U.S. 285 (2017). On the right is a Texas congressional district (District 35) that the Supreme Court upheld as supported by a substantial basis in evidence that its configuration was necessary to comply with Section 2 of the VRA. *See Abbott v. Perez*, 138 S. Ct. 2305, 2331-32 (2018).

[IMAGES ON NEXT PAGE]

***Cooper* Invalidated District**

***Perez* Upheld District**



No district in the VRA Plaintiffs' proposal bears resemblance to the district invalidated in *Cooper*, or for that matter other districts that courts have invalidated as racial gerrymanders. And it far exceeds Texas District 35—upheld by the Supreme Court—in its adherence to traditional districting principles. Nothing about the VRA Plaintiffs' proposed plan suggests that it includes districts drawn predominantly on the basis of race. The plan would not trigger, let alone fail, strict scrutiny were it ever challenged in Court.

The Legislature has an obligation to conduct a data-driven analysis of whether the remedial map it adopts fully cures the VRA violation affirmed by the Supreme Court. Given the Supreme Court's clear rejection of the State's arguments, the law requires a remedial plan that provides real and durable electoral opportunities for Black voters in Alabama.

Sincerely,

Mark P. Gaber
Senior Director, Redistricting
Campaign Legal Center
1101 14th St. NW, Ste. 400
Washington, DC 20005
mgaber@campaignlegalcenter.org