NYCLU

Nassau County

Testimony of the New York Civil Liberties Union, Nassau County Region

before

the Nassau County Temporary Districting Advisory Commission

regarding

Proposed Redistricting Plans for the Nassau County Legislature

Wednesday, November 16, 2022

The New York Civil Liberties Union ("NYCLU") respectfully submits the following testimony regarding the proposed redistricting maps submitted by the Republican Commissioners of the Nassau County Redistricting Commission. The New York Civil Liberties Union is a non-profit, non-partisan organization with more than 85,000 members and supporters and is the New York State affiliate of the American Civil Liberties Union. The NYCLU is dedicated to the principles of liberty and equality enshrined in the United States and New York State Constitutions. In support of those principles, the NYCLU has repeatedly litigated on behalf of voters in cases involving the right of electoral suffrage under both state and federal law over the course of many decades.

The map identified as "Nassau Plan 5" and proposed by the Commission's Republican members (the "Republican Map") shows strong indicia of racial gerrymandering and the dilution of Black, Latinx, and Asian voting strength. In doing so, the Republican Map likely violates some or all of the following: the United States Constitution, the New York State Constitution,[1] Section 2 of the Voting Rights Act of 1965, the Municipal Home Rule Law, and the John R. Lewis Voting Rights Act of New York. The Republican Map and its related data and memoranda were published on November 10, 2022. The public hearing on the Commission's draft maps is being held on Wednesday, November 16, 2022. That leaves only four business

[1] The protections against racial discrimination in voting provided by the New York State Constitution are at least co-extensive with the 14th and 15th Amendments to the United States Constitution. Moreover, the New York State Constitution also includes express protections for the right to vote (N.Y. Const. Art. 1 § 1; Art. II § 1) that exceed the protections of the United States Constitution and interact with the state constitutional Equal Protection Clause (N.Y. Const. Art. I, § 11) and the state constitution's heightened protections for free speech and association (Art. I, § 8) to offer further protections against racial discrimination in voting.

days between the two—hardly enough time for the thorough analysis required to evaluate whether and to what extent a proposed redistricting plan affords fair representation under the law. However, the Republican Map has some fatal flaws that are obvious even within the limited time available to evaluate it. This Commission should reject it and work cooperatively and transparently to draw a map that comports with the law and provides fair representation for Nassau County's communities of color.

The Republican Map is an impermissible racial gerrymander. The Republican Map increases the number and concentration of Black voters in Legislative District 1 to create a Black-majority district, even though Black voters are already able to elect their candidates of choice in that district as a Black plurality.[2] The Voting Rights Act does not require this packing of Black voters. It is evidence of intentional racial vote dilution in violation of the United States and New York State Constitutions, as well as the Voting Rights Act of 1965. Where a jurisdiction seeks to draw majority-Black districts to comply with the Voting Rights Act, the United States Supreme Court has held that the jurisdiction must show that compliance *necessitates* those districts; it is not sufficient to show "only that the VRA *might* support race-based districting." *Wisconsin Legislature v. Wisconsin Elections Commission*, 142 S. Ct. 1245, 1249 (2022) (per curiam). To support the development of majority-minority districts, a jurisdiction must determine whether all three preconditions for a finding of racial vote dilution are present. *Id.* at 1248. Court then must consider whether under the totality of circumstances there is inequality of opportunity in the ability of racial minority voters to elect their preferred candidates. The three preconditions are whether (1) the minority group at issue is sufficiently numerous and compact to constitute a majority in a single-member district; (2) the group at issue is politically-cohesive; and (3) a majority group votes sufficiently as a bloc to enable it to usually defeat the minority group's preferred candidate. *Id.* (citing *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986)).

In *Cooper v Harris*, the United States Supreme Court found North Carolina's congressional plan improperly turned two districts in which Black voters formed the plurality of the districts into majority-Black districts, packing Black voters into those two districts to make the surrounding districts safer for white voters to elect their preferred candidates (i.e., Republican candidates). The Court explained that candidates supported by Black voters were already winning there even without a majority, meaning that a Voting Rights Act challenger could not satisfy the third *Gingles* factor. The Court held the plan was a racial gerrymander because the state lacked "a strong basis in evidence" for believing that the Voting Rights Act required majority-minority districts. 137 S. Ct. 1455, 1464 (2017). In *Wisconsin Legislature*, the U.S. Supreme Court reversed a Wisconsin Supreme Court decision imposing a redistricting plan that created additional majority-Black districts in the state legislative map. In that case, the state had a map that showed the additional districts were possible, but had not done any analysis of

[2] A file named "NassauCountyRedistrictingReport_20221110.pdf" was published with the Republican Map. In that report, Skyline Consulting wrote: "Under the existing map, Nassau County has no Voting-Age Non-Hispanic Black (NHB18) majority districts." According to both that report and the demographic data published with the Republican Map, titled "Nassau_Plan5_And_Existing_Demographics.pdf," the existing map has a Non-Hispanic Black Voting Age Population of 46%, which the Republican Map increases to 51%.

whether and to what extent polarized voting necessitated the creation of the additional districts. 142 S. Ct. at 1249.

Here, there is every indication that Black voters are able to elect their candidates of choice in District 1—a district that is currently plurality-Black and super-majority Black-and-Latinx. Certainly, there is no evidence that the preferred candidates of Black voters in District 1 are usually defeated. Packing more Black voters into District 1 to form a majority-Black district is not necessary to remedy a Voting Rights Act violation. The memorandum from the consultants that drew the Republican Map—Skyline Consulting—expressly disclaims: "At this point we have not performed or studied any analysis that indicates whether Section 2 requires that this district be created." Absent any evidence that the Voting Rights Act requires a Black-majority district, it is clear that the Republican Map uses the Voting Rights Act as a pretext for racial gerrymandering by packing Black and Latinx voters into District 1. This evidence of impermissible racial motivation leaves an enduring stain on this process.

To the extent the proponents of the Republican Map contend that a Black majority district rather than Black-Latinx coalition districts are required to satisfy the Voting Rights Act because Black and Latinx voters are not politically cohesive, there is simply no evidence in the record to support that proposition. Indeed, the statistical evidence of racial voting patterns in the record; public testimony; and official data on housing, education, employment, criminal justice, and social services show that the Black and Latinx populations have numerous indicators of political cohesion. Deliberate indifference to the common needs of the Black and Latinx communities is not a legitimate basis for failing to recognize that they are politically cohesive. Moreover, the statistical evidence of racial voting patterns in interracial contests in the record before this Commission indicates that the preferred candidates of Black and Latinx voters are usually defeated by a cohesive bloc of white voters.[3] In such situations, coalition districts—i.e., where two or more politically-cohesive minority groups form a majority in a single member district—are appropriate to remedy a potential violation of Section 2 of the Voting Rights Act. In the Second Circuit, coalition districts are an available and appropriate remedy where two or more politically cohesive racial minority groups are subject to racial vote dilution.[4] Black and Latinx coalition districts have been performing in the Nassau County Legislature for Black and Latinx

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[3] "'[I]nterracial elections are the best indicators of whether the white majority usually defeats the minority candidate,' because '[a] system that works for minorities only in the absence of white opposition is a system that fails to operate in accord with the law.'" *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 201 F.Supp.3d 1006, 1040 (E.D. Mo. 2016) (quoting *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1020-21 (8th Cir. 2006); *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382, 1389-90 (8th Cir. 1995)).

[4] *See Nat'l Ass'n for Advancement of Colored People, Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d 368, 379 (S.D.N.Y. 2020) ("'[D]iverse minority groups can be combined to meet VRA litigation requirements,' provided they are shown to be politically cohesive."), *aff'd sub nom. Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213 (2d Cir. 2021); *see also Pope v. County of Albany*, No. 11-CV-736, 2011 WL 3651114, at *3 (N.D.N.Y. Aug. 18, 2011), *aff'd, 687 F.3d 565* (2d Cir. 2012); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 374-75 (S.D.N.Y.), *aff'd*, 543 U.S. 997 (2004).

voters. After a decade of growth in the Black and Latinx share of Nassau County and a concomitant reduction in the white share, another coalition district is warranted.

That the Republican Map likely violates the Municipal Home Rule Law should be obvious to anyone who paid even a modicum of attention to the *Harkenrider* case. The requirements of the Municipal Home Rule Law are far stricter than the constitutional standards applied to the Congressional and State Senate maps that were invalidated in the *Harkenrider* case. The Municipal Home Rule Law *requires* county legislatures to take the following principles into account in the following order: (1) equipopulation within a margin of error of five percent; (2) non-dilution and non-retrogression of the voting strength of racial or language-minority groups; (3) contiguity; (4) compactness; (5) no favoring parties or incumbents; (6) *to the extent practicable*, maintaining cores of existing districts and respecting communities of interest, including respect for the boundaries of villages, cities, and towns; and (7) promoting the orderly administration of elections. These criteria are nearly identical to the constitutional criteria applied in *Harkenrider*, but the Municipal Home Rule Law imposes *mandatory* prioritization of these criteria in that rank order. The Republican Map at issue here is no better than the Democratic map at issue in that case, and is likely far worse due to the gratuitous packing of voters of color.

The Republican Map privileges maintaining the cores of existing districts to the exclusion of virtually all other criteria. As demonstrated above, the Republican map flagrantly disregards the non-dilution, non-retrogression criterion of the Municipal Home Rule Law—the law's second highest ranking criteria behind respect for the one-person, one-vote principle. In addition to gratuitously packing Black voters as noted above, the map ignores the substantial increases in the County's Black, Latinx, and Asian share of the County's population since the last map was drawn. This failure is especially egregious in light of the protection for influence districts required by the John R. Lewis Voting Rights Act of New York (NYVRA), Election Law § 17-206[2][b]. In such a district, as Justice O'Connor wrote in *Georgia v. Ashcroft* in 2004, an influence district is one where "minority voters may not be able to elect a candidate of choice but can play a substantial, if not decisive, role in the electoral process." Indeed, as a federal appeals court wrote over quarter-century ago: "Influence districts, on the other hand, are to be prized as a means of encouraging both voters and candidates to dismantle the barriers that wall off racial groups and replace those barriers with voting coalitions." *Uno v. City of Holyoke*, 72 F.3d 973, 991 (1st Cir. 1995). Although the NYVRA may be new, the concept of an influence district should be familiar to anyone who has worked in redistricting over the past three decades.

Although marginally more compact than the 2013 map, the proposed Republican map is not compact. The Municipal Home Rule Law clearly ranks compactness as a higher priority than preserving the cores of existing districts. The proposed Republican map simply compounds that the errors of the 2013 map. The Republican map also gratuitously splits the Village of Freeport—the state's second largest village and a majority-Latino and Black municipality. Moreover, there is no principle that supports privileging the preservation of existing district cores, particularly when the existing map is such a flagrant gerrymander in its own right. Allowing the preservation of existing cores to trump higher ranked priorities is both contrary to the statutory text and would frustrate the purpose of the Municipal Home Rule Law. Nothing in the text or legislative history of the Municipal Home Rule Law indicates an intent to grandfather-in flagrant violations.