

Nos. 21-1533, 21-2431

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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Latasha Holloway, et al.,

*Plaintiffs-Appellees,*

v.

City of Virginia Beach, et al.,

*Defendants-Appellants.*

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On Appeal from the United States District Court  
for the Eastern District of Virginia  
Case No. 2:18-cv-00069  
The Honorable Raymond A. Jackson

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**Appellants' Amended Opening Brief**

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## **CORPORATE DISCLOSURE STATEMENT**

Defendants-Appellants are the City of Virginia Beach; the Virginia Beach City Council; Donna Patterson, in her official capacity as General Registrar of the City of Virginia Beach; Robert Dyer, in his official capacity as the Mayor of Virginia Beach; Rosemary Wilson, in her official capacity as Vice Mayor of Virginia Beach; Patrick Duhaney, in his official capacity as City Manager of Virginia Beach; and Rocky Holcomb, Michael Berlucchi, Barbara Henley, Louis Jones, John Moss, Aaron Rouse, Guy Tower, Linwood Branch, and Sabrina Wooten, in their official capacities as members of the Virginia Beach City Council.

None of the Defendants-Appellants are a publicly held corporation or other publicly held entity, and no publicly owned parent corporation owns any stock in any of the Defendants-Appellants. There is no publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation. Defendants-Appellants are not trade associations. This case does not arise out of a bankruptcy proceeding.

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## PRELIMINARY STATEMENT

This case under Section 2 of the Voting Rights Act was brought by two Black voters (“Plaintiffs”) asserting that the at-large method of electing Virginia Beach City Council members dilutes the votes of Black, Hispanic or Latino, and Asian voters, whom they label, together, “HBA” or “Minority” voters. Not one person of Hispanic or Asian descent joined the lawsuit. Neither this Court nor the Supreme Court has approved Plaintiffs’ coalitional theory, and the Sixth Circuit rejected it 25 years ago as incompatible with the Act’s plain text, structure, and purpose. *See Nixon v. Kent Cnty.*, 76 F.3d 1381 (6th Cir. 1996) (en banc). Meanwhile, those courts endorsing coalitional claims have set a high bar for establishing coalitional “cohesion,” demanding proof that majorities of each alleged constituency share candidate preferences with members of their own constituency and the others. The Supreme Court has confirmed that, if coalitional claims are even cognizable, a “higher-than-usual” need for this showing “obviously” applies. *Grove v. Emison*, 507 U.S. 25, 40-41 (1993).

Yet Plaintiffs failed to present a single estimate of Asian or Hispanic cohesion. In fact, the unrebutted testimony below established that members of the Filipino community, the City’s largest Asian group, often vote against Black-preferred candidates. Undeterred by the Supreme Court’s condemnation of the assumption “that members of the same racial group...think alike, share the same political interests, and will prefer the same candidates at the polls,” *Shaw v. Reno*, 509 U.S. 630, 647 (1993), Plaintiffs insisted that members of *different* groups share these attributes simply because they are not white. And they persisted in

demanding an injunction against the at-large system even after the Virginia General Assembly effectively repealed it, ensuring that it will never govern another election.

The district court's ruling in Plaintiffs' favor was erroneous. The court lacked jurisdiction to advise that a repealed system violates the Act. It erroneously concluded that two Black voters may press a coalitional claim predicated on an alleged injury to tens of thousands of non-party "Minority" voters without establishing the elements of third-party standing. It misread Section 2's guarantee of racial equality to protect the supposed political coalition of persons sharing no racial or ethnic common denominator—even though the court-appointed special master concluded that it is not "statistically possible to determine the voting behavior of African-American, Asian-American, and Hispanic populations individually." SJA235. The court applied a relaxed cohesion standard where the Supreme Court commanded a strict standard. And, ultimately, it gave its imprimatur to a misguided and affirmatively harmful effort to utilize persons of Hispanic and Asian descent instrumentally to advance the cause of a group that cannot on its own meet the Section 2 criteria (an undisputed point the district court still, somehow, got wrong). Coalitional claims are "fraught with risks." *LULAC, Council No. 4434 v. Clements*, 986 F.2d 728, 785 n.43 (5th Cir. 1993) ("*LULAC*"). They should not be allowed. And, certainty, *this* one should not be allowed. The Court should reverse.

## **STATEMENT OF JURISDICTION**

Jurisdiction in the district court was proper under 28 U.S.C. §§ 1331 and 1342(a). The district court issued an injunction on March 31, 2021, and Defendants appealed on April 29, 2021. JA1278. This Court subsequently held that appeal in abeyance pending final judgment, which has since been issued and separately appealed. This Court has jurisdiction under 28 U.S.C. § 1291.

## **STATEMENT OF ISSUES**

1. Is this case moot?
2. Do two Black Plaintiffs have standing to assert alleged interests of Asian and Hispanic voters?
3. Does Section 2 protect “coalitions” of different groups, and, if so, what legal standards apply to such a claim?
4. Did the district court commit legal or clear error in its Section 2 analysis?
5. Is an injunction ordering Virginia Beach to comply with Section 2 sufficiently definite?

## STATEMENT OF THE CASE

### A. Factual Background

1. Virginia Beach is Virginia’s most populous city. JA1153. It assumed its current form in 1963 when the City “consolidated with adjoining Princess Anne County, which was both rural and urban.” *Dusch v. Davis*, 387 U.S. 112, 113 (1967); JA1153. The Virginia General Assembly—which regulates the City’s elections—attempted “to produce a plan which would be acceptable to the voters in the half of the county which was rural and to those in the half which was urban and which would, at the same time, win the support of the voters in the old city.” *Davis v. Dusch*, 205 Va. 676, 677 (1964); JA1154-55. But its original effort, allocating members to the City Council through a borough system, “was invalidated in 1965 under the one-person, one-vote principle.” JA1155; *Dusch*, 387 U.S. at 114.

In response, the General Assembly instituted a system of at-large voting. JA1155. The Council comprises eleven members. Four, including the mayor, were elected at large without regard to residence, and seven were elected at-large but were required to reside, respectively, one in each of seven residency districts.<sup>1</sup> *Dusch*, 387 U.S. at 114; JA1151. This system also faced an equal-protection challenge, but the Supreme Court rejected it, finding the system “makes no distinction on the basis of race, creed, or economic status or

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<sup>1</sup> Because Plaintiffs do not contend the mayor should be elected from a single-member district, this brief refers to the residency scheme as having three at-large positions.

location,” bore no hint of “invidious discrimination,” and served the City’s “compelling need” to create “a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside.” *Dusch*, 387 U.S. at 115-17.<sup>2</sup>

The at-large system was used through the November 2020 councilmanic elections and is the system challenged in this case. The City, however, has periodically examined whether to recommend a change to the General Assembly. For example, “[i]n 1990, the City conducted a ‘comprehensive review...,’ seeking ‘views from every conceivable interested party as to the best manner to provide representation for the citizens of the City.’” JA1157 (citation omitted). As the district court recounted, “[t]he City declined proposals for race-based single-member districts that ‘stretched nearly all the way across the City, and in many instances’ were ‘only a block wide or came together at a single point.’” JA1157 (citation omitted). The Eastern District of Virginia “also rejected these racial gerrymanders and the Voting Rights Act lawsuit that sought to impose them.” JA1157.

The City also has redrawn its residency districts after the release of each decennial census to maintain them at substantially equal population. In 2011, the City adopted a new residency plan, including one residency district drawn

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<sup>2</sup> The district court’s assertion that “Defendants’ [sic] have not proffered a reasonable explanation for designing such system,” JA1277, is therefore perplexing. *See* Dist.Ct.Dkt.237 at 1-3.

with a near majority racial and ethnic minority populations. JA1276. The U.S. Department of Justice precleared the plan under Section 5 of the Act. JA2184.

2. As of the 2010 Census, white residents composed 64.49% of the City's population (and 67.38% of the voting-age population), Black residents 19.00% (18.10%), Hispanic residents 6.62% (5.64%), and Asian residents 6.01% (6.30%). JA1159. Members of these disparate minority groups are not significantly concentrated in any portion of the City. JA2187-90; JA0675-78. In particular, the Asian population is widely distributed within the City. JA0677; JA0716.

Through the Civil Rights Era, Virginia Beach, like most southern jurisdictions, imposed *de jure* and *de facto* discrimination against Black residents. The City regrets these injustices. However, the Asian and Hispanic communities are relatively new to the City and do not share that history. JA2277; JA1057-59; JA1001-02. The largest of the Asian communities is the "vibrant Filipino community," which has grown in the City largely by consequence of the Naval presence there. JA1160; JA1057. Multiple trial witnesses—including the City's redistricting consultant, leaders of the Filipino community, and an expert in local politics—testified that the Filipino community is conservative, leans Republican, is largely Roman Catholic and pro-life, and supports a strong military. JA0858-60; JA0334; JA0359; JA0717; JA0722-23; JA1003; JA2269-70; JA2293-94. They testified that the Filipino community does not regularly support candidates preferred by the Black community, who are typically Democratic and lean progressive. JA0860. This testimony went un rebutted.



Portions of Virginia Beach are represented in the Virginia House of Delegates by Delegate Kelly Fowler, a Hispanic and Filipina, whose district is majority white. JA0319-20. The current Virginia Beach circuit clerk of court, an at-large-elected official, is also Filipina. JA1168. A Filipino, Ron Villanueva, was previously elected to the City Council, JA1151, as was a Hispanic, Rita Bellitto, JA1262.<sup>3</sup> Plaintiffs presented no evidence that anyone of Asian or Hispanic descent has ever lost a Virginia Beach election to a white candidate.<sup>4</sup>

The district court's findings show that members of the Asian communities generally enjoy a socio-economic status comparable with, if not better than, that of whites. Among other things, "the City had overutilized Asian-American owned business" in public contracting. JA1268. "Asian students perform at the same, or higher, rate compared to white students," and Asian high-school graduation rates are comparable with white rates. JA1249. More Asian than white graduates go on to college. JA1250. Asian household income exceeds white household income. JA1251. White and Asian home-ownership rates are almost identical. JA1252.

## **B. Procedural History**

1. In November 2017, one Black Plaintiff, Latasha Holloway, filed a *pro se* complaint in the Richmond Division of the Eastern District of Virginia

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<sup>3</sup> The district court's assertion that Defendants "offered no evidence of her ethnicity," JA1262, is clearly erroneous. *See* JA2638.

<sup>4</sup> One Filipina candidate, Kelly Fowler, defeated a Filipino, Ron Villanueva, in a 2017 House of Delegates contest.

against Virginia Beach, the City Council, its members, and other officials (Defendants or the City) under Section 2 of the Act. The complaint made no mention of a multi-racial coalition. JA0037. On February 12, 2018, the case was transferred to the Norfolk Division. JA0045. The case underwent a lengthy period of delay through a series of miscellaneous motions and an improper interlocutory appeal. *See* JA0001-0036.

2. In November 2018, two Black candidates, Sabrina Wooten and Aaron Rouse, prevailed in contested councilmanic races. Neither then knew of this lawsuit, JA0506; JA2429, and there is no evidence that it impacted the election.

A week after the election, an amended complaint was filed, this time by counsel from the Campaign Legal Center on behalf of two Black voters, Ms. Holloway and Georgia Allen. JA0049. The amended complaint alleged a new theory, that the “current at-large scheme impermissibly denies Black, Hispanic or Latino, and Asian-American voters (“Minority Voters”) an equal opportunity to participate in the political process and to elect representatives of their choice.” JA0047. It alleged that the combined “Minority” population “is sufficiently numerous and geographically compact to form a majority of the total population and citizen voting age population in at least two single-member City Council districts in a demonstrative 10-district plan.” JA0055. No members of the Asian or Hispanic communities joined the case, and Plaintiffs testified that they made no effort to obtain such participation. JA0524; JA0171.

The court (the Honorable Raymond A. Jackson, presiding) conducted a six-day bench trial in October 2020. At trial, Plaintiffs presented multiple alternative districting plans purporting to show that voting-age persons labeled “Minority” can constitute majorities in one or more single-member districts. JA1195-97. Additionally, Plaintiffs’ statistical expert, Dr. Spencer, overlaid the illustrative districts with past councilmanic election results and concluded the districts would improve electoral prospects of Black-preferred candidates because, in his view, they would “likely...benefit from cross-over support from white voters.” JA1581.

Dr. Spencer also provided statistical estimates of racial and ethnic voting patterns, but did not estimate patterns of the Asian and Hispanic communities. Rather, Dr. Spencer lumped Asian and Hispanic voters into an “All Minority” category, *see, e.g.*, JA1578, that also included Black voters (who constitute by far the largest of the three groups) and other racial minorities (such as Native Americans), JA443. Dr. Spencer testified that the Asian and Hispanic groups are too small and dispersed for purposes of estimating their voting preferences by standard means. JA0439-40. As discussed above, unrebutted qualitative evidence at trial showed divergent political preferences among Black, Asian, and Hispanic groups.

3. In November 2020, Ms. Wooten was reelected to her councilmanic seat. (Mr. Rouse did not stand for election, due to the City’s staggered terms.) No further elections are scheduled to occur until November 2022.

On March 18, 2021, the Virginia General Assembly changed Virginia Beach's electoral system, enacting Assembly House Bill 2198 (HB2198). The legislation provided that, "in a city or town that imposes district-based or ward-based residency requirements for members of the city or town council, the member elected from each district or ward shall be elected by the qualified voters of that district or ward and not by the locality at large." JA1139. Because seven of Virginia Beach's districts are subject to a "residency requirement," JA1150-51; JA1154, they became single-member districts as of January 1, 2022, HB2198's effective date, without federal-court intervention. However, by operation of the one-person, one-vote principle, the prior residency districts would be malapportioned. As a result, the impact of HB2198 is to render the at-large scheme unusable and to require the City to redistrict. Further, another new law, the Virginia Voting Rights Act, subjects a new redistricting plan to a state-level preclearance procedure to ensure minority communities have an equal opportunity to elect their preferred candidates. Va. Code § 24.2-129. On March 22, 2021, Defendants filed a notice of HB2198, asserting that the case was moot. JA1134.

4. On March 31, the district court released a 133-page opinion and order finding that Virginia Beach's at-large system violates Section 2, permanently enjoining the City from future use of the at-large system, and forbidding it from otherwise violating Section 2. JA1277. In a footnote, the court found that HB2198 does not moot the case. JA1147. The district court also concluded, *inter alia*, that coalitional claims are cognizable under Section 2,

JA1189, that members of each constituency in an alleged coalition need not participate as plaintiffs, JA1227, and that Plaintiffs need not provide estimates of voting preferences of members of each constituency to prove their claim, JA1230-31.

5. The City appealed, but this Court held the appeal in abeyance pending remedial proceedings in the district court and final judgment. The district court commenced remedial proceedings by receiving proposed remedial plans from the parties, and it subsequently appointed Dr. Bernard Grofman as special master. SJA215. On October 26, 2021, the district court provided the parties the report of Dr. Grofman. SJA220. Dr. Grofman's report proposed a remedial redistricting plan and analysis concerning that plan and the liability issues before the court. Dr. Grofman concluded, in relevant part, that "separating out the voting behavior of each individual group in the composite minority grouping is, for all practical purposes, impossible." SJA284. That conclusion was materially identical to the opinion of the City's remedial expert, Dr. Lisa Handley, a renowned Voting Rights Act expert, that an expert "cannot draw any conclusions about Asian or Hispanic voting preferences in Virginia Beach." SJA108. Only by accepting the unsupported assumption that these groups should be combined into one did Dr. Grofman conclude that the coalition is cohesive. *See* SJA290.

The parties filed two rounds of briefing in response to the special master's report. The City argued that Dr. Grofman's report confirmed that coalitional cohesion has not been established and that the court should dissolve its

injunction. Dist.Ct.Dkt.283 at 2. On December 22, 2021, the district court entered an order adopting the remedial plan, as revised,<sup>5</sup> and making supplemental findings in an effort to bolster its liability ruling. SJA359-64. It entered final judgment, SJA364, and the City timely appealed, SJA365.

### SUMMARY OF THE ARGUMENT

I. The district court erred in entertaining this case.

First, the case is moot. The at-large system will never govern another election, as HB2198 automatically shifts the City from at-large to single-member seats. The district court misread that enactment, believing the City may voluntarily readopt at-large seats, but it cannot: the City lacks independent legislative authority to amend its charter, which would have to be accomplished to eliminate the residency requirements that HB2198 transforms into single-member districts. And any challenge to the new system must be adjudicated on its own merits, not on the merits of Plaintiffs' evidence and arguments regarding the at-large system.

Second, Plaintiffs, two Black voters, lack standing to assert a coalitional claim dependent on the rights of Hispanic and Asian voters. The district court erroneously thought they need not assert those third-party rights, but prevailing on a *coalitional* claim depends on the rights and interests of all constituencies of the *coalition*. Members of the Black community could not hope to win a

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<sup>5</sup> Dr. Grofman issued a revised plan in response to criticisms the City lodged against his initial proposal, which are not relevant to this appeal. SJA342.

coalitional claim independent of the rights of other groups and therefore have no choice but to assert those rights, which Plaintiffs lack standing to do.

II. The decision below is also erroneous on the merits. Plaintiffs failed to prove that “a bloc voting majority [is] *usually*...able to defeat candidates supported by a politically cohesive, geographically insular minority group.” *Thornburg v. Gingles*, 478 U.S. 30, 49 (1986). They did not plead or prove that the City’s Black community is sufficiently large, compact, and insular to constitute the majority of a single-member district, and the district court’s inexplicable finding that they met this standard cannot stand.

The claim Plaintiffs did plead and attempt to prove, a coalitional claim on behalf of the Black, Hispanic, and Asian communities lumped together, is not a legally proper invocation of Section 2. The statute forbids inequality “on account of race or color,” 52 U.S.C. § 10301(a), but constituencies in a coalition share, at best, political interests. And the statute’s conceptual dichotomy between “members of a class”—singular—and “other members of the electorate”—white and non-white—undermines the dichotomy of a coalition, which places white voters in one category and “All Minority” in another. The Act’s structure and purpose, guaranteeing the right of members of a protected class to “elect [their preferred] candidate based on their own votes and without assistance from others,” *Bartlett v. Strickland*, 556 U.S. 1, 14 (2009), further undercuts any claim to coalitional relief.

Plaintiffs also failed to establish coalitional cohesion, another threshold element of a Section 2 claim. They presented no evidence—quantitative or

qualitative—of Hispanic and Asian voting patterns alone. Instead, Plaintiffs and the district court relied solely on “All Minority” aggregate estimates, even though the smaller Asian and Hispanic communities can easily be buried in the far larger Black group and even though estimates showing Black preferences consistently exceeded the “All Minority” preferences estimated for the same candidates. This impermissibly attributed Black voting preferences to Asians and Hispanics. And the district court adhered to this approach even after its special master concluded it is “mathematically impossible” to estimate the “voting behavior of each individual group.” SJA285. Moreover, the qualitative evidence, without rebuttal, established that the City’s largest Asian community prefers conservative candidates and does not vote in line with the Black community. The district court erred in applying a relaxed cohesion standard, where a stringent standard “quite obviously” applies. *Grove*, 507 U.S. at 40-41.

The district court erred further in concluding that white bloc voting “usually” defeats the minority-preferred candidate. Its own factfinding showed a 50-50% split, with minority-preferred candidates successful half the time. The court erroneously discounted races where the minority-preferred candidate was white, in contravention of this Court’s precedent, and it erroneously discounted the success of Black candidates after this case was filed, without identifying an impact of this then-unknown lawsuit on those contests.

III. The district court’s injunction is an impermissibly vague obey-the-law injunction and does not “describe in reasonable detail...the act or acts restrained or required.” Fed. R. Civ. P. 65(d)(1)(C). The injunction



impermissibly threatens with contempt a broad array of actions the City might take, even unknowingly, and even actions the City merely implements at the command of the General Assembly.

### STANDARD OF REVIEW

“Whether the district court had subject matter jurisdiction is a question of law that [this Court] review[s] *de novo*,” *Anita’s New Mexico Style Mexican Food, Inc. v. Anita’s Mexican Foods Corp.*, 201 F.3d 314, 316 (4th Cir. 2000), as is the question whether Plaintiffs have (or need) third-party standing, *see Corr v. Metro. Washington Airports Auth.*, 740 F.3d 295, 300 (4th Cir. 2014). The Court reviews “judgments resulting from a bench trial under a mixed standard of review: factual findings may be reversed only if clearly erroneous, while conclusions of law are examined *de novo*.” *Raleigh Wake Citizens Ass’n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333, 340 (4th Cir. 2016) (citation omitted). “Of course, if the trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard.” *Id.* (citation omitted). The Court reviews “the scope of a district court’s injunction for abuse of discretion.” *Roe v. Dep’t of Defense*, 947 F.3d 207, 231 (4th Cir. 2020), *as amended* (Jan. 14, 2020). “A district court abuses its discretion when it misapprehends or misapplies the applicable law.” *League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 235 (4th Cir. 2014).

## ARGUMENT

### I. The District Court Erred in Reaching the Merits

#### A. The Case Is Moot

This case became moot when HB2198 was enacted, because it ended the at-large system Plaintiffs challenged. JA1140; JA1146-47. “[S]tatutory changes that discontinue a challenged practice are ‘usually enough to render a case moot.’” *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 116 (4th Cir. 2000) (citation omitted). This includes amendments that replace the challenged act with “a significantly amended statutory scheme.” *Esposito v. S.C. Coastal Council*, 939 F.2d 165, 171 (4th Cir. 1991).

Here, HB2198 transformed the challenged at-large system to a new system dominated by seven single-member districts (i.e., the seven residency districts), which were precleared under Section 5, and containing only three at-large districts. Because Plaintiffs challenged an “election method, in which *all* councilmembers are elected at-large in citywide elections,” JA0048 (emphasis added), the legislative shift away from that system to one where each voter votes in a single-member district was not “minor and insignificant.” *Valero*, 211 F.3d at 116. It repealed the system challenged in this lawsuit. The district court erroneously issued an advisory opinion in enjoining a system that will never be used again. *See 11126 Baltimore Blvd. v. Prince George’s Cnty.*, 924 F.2d 557, 557 (4th Cir. 1991) (per curiam); *Checker Cab Operators, Inc. v. Miami-Dade Cnty.*, 899 F.3d 908, 916 (11th Cir. 2018); *Int’l Women’s Day Planning Comm. v. City of San Antonio*, 619 F.3d 346, 357 (5th Cir. 2010). Further, even the existing residency

districts may not be used in future elections because the 2020 census results renders them malapportioned and obsolete, and any new redistricting will be subject to preclearance under the Virginia Voting Rights Act to ensure that the plan affords minority communities an equal opportunity to elect their preferred candidates, Va. Code § 24.2-129.

The district court's reasons for retaining jurisdiction lack merit. JA1147. First, the court invoked the voluntary-cessation doctrine, opining that "the law allows Defendants to eliminate the district residency requirements for the seven seats on the City Council and allows them to retain the at-large system of election for those positions." Not so. Virginia Beach's residency districts are set forth in the City's charter. Eliminating the residency requirement would require an amendment to that charter. But Virginia is a Dillon's Rule jurisdiction, and "[o]nly the Virginia General Assembly can amend the city charter." *Simpson v. City of Hampton*, 166 F.R.D. 16, 17 (E.D. Va. 1996); Va. Code § 15.2-200; JA1151-52. "The 'voluntary cessation' exception to mootness has no play in this case" because the elimination of the at-large system "was not voluntary" by the City, but was imposed by the General Assembly, which transformed the residency requirements (which only it can repeal) into single-member district through HB2198 (which only it can repeal). *Am. Bar Ass'n v. FTC*, 636 F.3d 641, 648 (D.C. Cir. 2011). Nor does the General Assembly's theoretical ability to repeal the newly enacted HB2198, or amend the City's charter, breathe life into this dead case. *See Valero*, 211 F.3d at 116.

Second, the district court's assertion that HB2198 "does not specifically address Plaintiffs' Section 2 claims of voter dilution" misses the *effect* of HB2198, which eliminates the "election method, in which all councilmembers are elected at-large in citywide elections." JA0048. Plaintiffs sought relief from "Virginia Beach's at-large method," *id.*, not a system with seven single-member districts subject to state-law preclearance. Any challenge to the single-member-district system must be brought through a new action or amended complaint. *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (directing that allegations that revised statute exhibited features of challenged statute be raised in a new action); *Md. Highways Contractors Ass'n, Inc. v. Maryland*, 933 F.2d 1246, 1249-50 (4th Cir. 1991) (similar). And it must be brought *after* the City redraws the existing residency districts, and after preclearance review, because only when that occurs may the effects of the new plan be evaluated. At a minimum, it was Plaintiffs' burden to "adduce[] evidence" that the challenged features of the at-large system have "not been substantially altered" in HB2198. *Nextel Partners Inc. v. Kingston Township*, 286 F.3d 687, 693 (3d Cir. 2002). They presented no such evidence, *see* Dist.Ct.Dkt.241, and could not have, given how different the new system is from the one they challenge and given that the new system has yet to take form.

Third, the court doubly erred in announcing it could give "effectual relief" in the form of an injunction mandating "the implementation of an election system for the City Council that complies with Section 2 of the Voting Rights Act" and that "Virginia Beach comply with Section 2 of the Voting Rights Act"

in “all future elections.” JA1147 (citations omitted). For one thing, without proof that the seven-member system is unlawful, “there neither has been a wrong *nor can be a remedy.*” *Grove*, 507 U.S. at 41 (emphasis added). For another thing, vague directives to comply with the law in the future are not available relief. *See* Section III, *infra*. The possibility of ordering a defendant to comply with law that applies regardless would, if deemed an exception to mootness, apply in every case.

**B. Plaintiffs Lack Third-Party Standing To Assert the Rights of All Virginia Beach “Minority” Residents**

The district court also erred in permitting Plaintiffs to bring a Section 2 “coalition” claim on behalf of all “Minority” residents of Virginia Beach, including members of the Asian and Hispanic communities. The court ultimately concluded that “[t]wo or more politically cohesive minority groups can bring a claim as a coalition under Section 2.” JA1181. But two or more minority groups did not bring this claim; two Black voters did.

Standing principles incorporate a “general prohibition on a litigant’s raising another person’s legal rights.” *Lexmark Int’l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (citation omitted). Unless an exception applies, a plaintiff “must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.” *U.S. Dep’t of Labor v. Triplett*, 494 U.S. 715, 720 (1990) (citations omitted). The district court erred in permitting Plaintiffs to bring a coalitional claim predicated on the rights of non-party Asian and Hispanic voters, who were not even asked to join,

and who are “the best proponents of their own rights.” *Singleton v. Wulff*, 428 U.S. 106, 114 (1976).

The district court erroneously found no third-party standing problem at all, positing that “Plaintiffs’ personal legal interests have been injured” and that Hispanic and Asian communities were relevant only insofar as Plaintiffs put on “statistical evidence that the votes of their community, and minority voters generally, have been diluted.”<sup>6</sup> JA0100. That is legally incorrect. Plaintiffs’ assertions concerning the Asian and Hispanic communities are not mere circumstantial evidence of harm to Plaintiffs, but the coalitional claim itself. *See Nordgren v. Hafter*, 789 F.2d 334, 338 (5th Cir. 1986) (holding that “a white Jewish female...cannot successfully assert standing on behalf of aggrieved black applicants to the Mississippi bar. She is not their representative.”).

The rights of third parties are necessarily asserted in cases where a “litigant appears in court and seeks to challenge the validity of a statute or other governmental action,” and the challenge will fail “[i]f validity were to be measured solely in light of the litigant’s interests.” Charles A. Wright et al., *Fed. Prac. & Proc., Juris.* § 3531.9 (3d ed.). Here, members of the Black community can prevail only by showing that Black voters “make up more than 50 percent of the voting-age population in the relevant geographic area.” *Bartlett*, 556 U.S. at 18. Plaintiffs did not plead this, they put on no evidence of it, and none could

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<sup>6</sup> Indeed, Plaintiffs failed to put on statistical evidence about Asian and Hispanic voting preferences. *See* Section II.B.1, *infra*.

have been adduced. *See* Section II.A.1, *infra*. Only by also asserting the alleged rights of members of the Asian and Hispanic communities could a coalitional claim succeed. *See Nordgren*, 789 F.2d at 338. Moreover, Plaintiffs would have no entitlement to “at least two single-member City Council districts” comprising a majority of “minority population,” JA0055, without asserting the rights of members of the Asian and Hispanic communities. *See I.N.S. v. Delgado*, 466 U.S. 210, 217 n.4 (1984).

Although there are exceptions to the bar on asserting third parties’ rights, *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004), Plaintiffs below asserted that they “are not alleging third-party standing,” Dist.Ct.Dkt.156 at 27, and the district court agreed, JA0100. Any such invocation is therefore waived.

## **II. Plaintiffs’ Section 2 Claim Fails on the Merits**

A Section 2 plaintiff must establish each of three preconditions set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986), known as the “*Gingles* preconditions”: (1) “the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district,” (2) “the minority group must be able to show that it is politically cohesive,” and (3) “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.” *Id.* at 50-51. “If these preconditions are met, the court must then determine under the ‘totality of circumstances’ whether there has been a violation of Section 2.” *Lewis v. Alamance Cnty.*, 99 F.3d 600, 604 (4th Cir. 1996) (citation omitted). The district court erred at each step.



**A. The District Court Erred on the First *Gingles* Precondition**

A Section 2 plaintiff must establish at least that the relevant minority group constitutes “more than 50 percent of the voting-age population in the relevant geographic area,” *Bartlett*, 556 U.S. at 18, and that the group is “geographically compact,” *Gingles*, 478 U.S. at 50.

**1. Plaintiffs Did Not Plead or Prove a Single-Race Claim**

The district court clearly erred in its alternative conclusion that “Plaintiffs established that the African American community in Virginia Beach is sufficiently large and geographically compact” to satisfy the first *Gingles* precondition. JA1209. Not only did Plaintiffs present no evidence of this, but they did not even plead it, JA0060. The adjudication of an un-pleaded, untried claim contravened Federal Rule of Civil Procedure 15(b)(2), *see Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 783 F.3d 976, 983 (4th Cir. 2015), and “the principle of party presentation,” *see United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).

The finding also is clearly erroneous. The district court cited no evidence that Black voters alone can constitute a majority in even one single-member district. Its sole citation was to Table 1 of its opinion, JA1209, which did not include a single entry reflecting that Black voters, without Hispanic and Asian voters, can constitute a majority of a compact, single-member district, JA1197. Plaintiffs advanced a coalitional claim for a reason. “The impetus for two minority groups seeking to proceed as a coalition under Section 2 is apparently



their inability, as separate groups, to overcome the first *Gingles* threshold factor.” *LULAC*, 986 F.2d at 785 n.43.

The remedial phase confirmed that a single-race claim is unavailable. Dr. Grofman concluded that only a combination of minority groups can satisfy the 50% minority voting-age population threshold, SJA235, and no proposed remedial plans achieved a majority-Black district, SJA158-259 (special master failing to achieve any Black district above 35% BVAP); *see also* SJA134 (similar failing on Plaintiffs’ part). The district court failed to address this issue, SJA359, despite receiving notice of the error, Dist.Ct.Dkt.283 at 9.

## **2. Plaintiffs’ Coalitional Claim Is Not Cognizable**

The claim Plaintiffs did plead, a coalitional claim, is not a cognizable invocation of Section 2. “Even the most cursory examination reveals that § 2 of the Voting Rights Act does not mention minority coalitions, either expressly or conceptually.” *Nixon*, 76 F.3d at 1386.

a. Section 2 forbids the “denial or abridgement of the right of any citizen of the United States to vote on account of race or color.” 52 U.S.C. § 10301(a). But “[a] group tied by overlapping political agendas but not tied by the same statutory disability is no more than a political alliance or coalition.” *Campos v. City of Baytown*, 849 F.2d 943, 945 (5th Cir. 1988) (Higginbotham, J., dissenting from denial of rehearing en banc). The Act’s “purpose was to eliminate *racial* discrimination—not to foster particular *political* coalitions.” *LULAC*, 986 F.2d at 785 n.43 (citation omitted).

It is beyond serious dispute that Blacks, Asians, and Hispanics in Virginia Beach do not share a common identity of “race or color.” The district court found that there are “important differences between and within the Minority Community.” JA1211. Those differences are important precisely because they go to the lack of a common racial heritage and shared American experience. As the district court found, Filipinos—the largest among Virginia Beach’s Asian communities—have congregated in Virginia Beach over the decades in large part due to the City’s “Naval presence.” JA1160. By and large, the Black and Hispanic communities arrived and have grown in the region for different reasons and at different times. These dynamics are typical of coalitional claims. *See* JA1185 (quoting precedent allowing a coalitional claim even though “Blacks and Mexican-Americans are racially and culturally distinct” (citation omitted)).

The court dismissed these conceded differences, concluding that “differences in race, color, or language” can be overcome if these persons are “*politically* cohesive.” JA1191 (emphasis added). But this reasoning only demonstrates the political, not racial, nature of the claim. In fact, the court—relying on generic dictionary definitions—extended Section 2 protections to any “*group* sharing the same economic or social status,” JA1191 (footnote omitted), opining that “[m]utual political interests are present *in any group seeking to elect a particular candidate*,” JA1194 (emphasis added). This interpretation strayed far from the statutory North Star “of race or color.” 52 U.S.C. § 10301(a).

b. Other textual indicia in the Act foreclose coalitional claims. To begin, the statute “consistently speaks of a ‘class,’ in the singular,” *Nixon*,

76 F.3d at 1386, and offers protection to “members of a class,” not classes. 52 U.S.C. § 10301(a). “Had Congress chosen explicitly to protect minority coalitions it could have done so by defining the ‘results’ test in terms of protected classes of citizens. It did not.” *LULAC, Council No. 4434 v. Clements*, 999 F.2d 831, 894 (5th Cir. 1993) (“*Clements*”) (Jones, J., concurring). The district court missed this point in focusing on the plural statutory term “members.” JA1191. But those “members” must be “of *a* class”—singular; the statute reinforces this by clarifying that “*its* members”—members of the singular class—enjoy protection. 52 U.S.C. § 10301(b) (emphasis added); *Nixon*, 76 F.3d at 1386.

Moreover, the district court overlooked Section 2’s comparative test, which hinges on a showing that “members of a class” under “subsection (a)” have “less opportunity *than other members of the electorate* to participate in the political process....” 52 U.S.C. § 10301(b) (emphasis added). This contrast between “members of a class” and “other members of the electorate” places all persons not “of” the singular “class” in the basket of “other members of the electorate.” The statute therefore contrasts Plaintiffs’ class of Black voters with Asian and Hispanic voters, who are just as much “other members of the electorate” as are white voters.

The statutory definitions confirm this. Section 2 was amended in 1975 to include “language minorities,” 52 U.S.C. § 10303(f), a term Congress defined to mean “persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage,” 52 U.S.C. § 10310(c)(3); *see* Act of Aug. 6, 1975, Pub. L. 94-73, §§ 203, 207, 89 Stat. 401-402. “That each of these groups was

separately identified indicates that Congress considered members of each group and the group itself to possess homogeneous characteristics.” *Clements*, 999 F.2d at 894 (Jones, J., concurring).

c. That statutory meaning flows from constitutional limits on congressional power. “[T]he Voting Rights Act is premised upon congressional ‘findings’ that each of the protected minorities is, or has been, the subject of pervasive discrimination and exclusion from the electoral process.” *Nixon*, 76 F.3d at 1390. The scope of congressional findings limits the permissible scope of the Act because these findings are necessary to Congress’s enforcement of the Fifteenth Amendment. *See, e.g., Johnson v. Governor of State of Fla.*, 405 F.3d 1214, 1231 (11th Cir. 2005); *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001). Congress made findings to support enacting Section 2 protections for Black voters, *see Jones v. City of Lubbock*, 727 F.2d 364, 374-75 (5th Cir. 1984) (collecting findings), and for extending those protections to language minorities, 52 U.S.C. § 10303(f)(1). But a “coalition of protected minorities is a group of citizens about which Congress has not made a specific finding of discrimination.” *Nixon*, 76 F.3d at 1391. “To assume...that a group composed of both minorities,” or several, “is itself a protected minority is an unwarranted extension of congressional intent,” *Campos*, 849 F.2d at 945 (Higginbotham, J., dissenting from denial of rehearing en banc), and congressional authority, *see City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

d. Coalitional claims also conflict with the statutory scheme and purpose. For one thing, “a coalition theory could just as easily be advanced as a

defense in Voting Rights Act cases, a position that courts would be logically bound to accept if plaintiff coalitions were allowed, yet a position at odds with congressional purpose.” *Nixon*, 76 F.3d at 1391. The theory would empower jurisdictions to create dilutive coalitional districts to defend itself from a claim for majority-minority districts. *See Campos*, 849 F.2d at 944-46 (Higginbotham, J., dissenting from denial of rehearing en banc). And coalition claims are “fraught with risks,” as members of one group may bring them to “increase their opportunity to participate in the political process at the expense of members of the other minority group.” *LULAC*, 986 F.2d at 785 n.43. Moreover, allowing some groups (not all) “to further their mutual political goals” hijacks Section 2 for partisan ends. *Nixon*, 76 F.3d at 1392. A major political party that enjoys substantial support from certain racial groups can claim a Section 2 right to a districting scheme that favors that party’s interests, coopting these groups’ minority status for partisan advantage. If allowed, this would empower partisan interests to politicize the Act in ways that will ultimately undermine, rather than further, congressional purpose and the integrity of the Act.

e. Coalition claims are untenable for the same reasons the Supreme Court rejected crossover claims—i.e., claims asserting the right of a minority group to districts in which its members join with whites to elect their shared preferred candidates. *Bartlett*, 556 U.S. at 13-25. *Bartlett* read the Act to reach “African-Americans standing alone,” i.e., to “elect [their preferred] candidate based on their own votes and without assistance from others.” *Id.* at 14. The Court explained: “Nothing in § 2 grants special protection to a minority group’s

right to form political coalitions.” *Id.* at 15; *see also id.* at 20 (“The statute does not protect any possible opportunity or mechanism through which minority voters could work with other constituencies to elect their candidate of choice.”). So too here. The Court also explained that Section 2 case law “does not impose on those who draw election districts a duty to give minority voters the most potential, or the best potential, to elect a candidate by attracting crossover voters.” *Id.* Section 2 protects a racial group’s opportunity to make its “own choice,” and “[t]here is a difference between a racial minority group’s ‘own choice’ and the choice made by a [crossover] coalition” of white and Black voters. *Id.* The coalitional problem is no different.

This Court’s decision in *Hall* anticipated *Bartlett*’s holding and reasoning, including the view that members of a minority group must “have the potential to elect a candidate *on the strength of their own ballots*” before claiming Section 2 protection. *Hall v. Virginia*, 385 F.3d 421, 429 (4th Cir. 2004). Indeed, *Bartlett* quoted *Hall* for the proposition that the Act does not “grant minority voters ‘a right to preserve their strength for the purposes of forging an advantageous political alliance.’” 556 U.S. at 14-15 (quoting 385 F.3d at 431). That reasoning equally precludes coalitional claims.

So too does *Bartlett*’s concern “for workable standards and sound judicial and legislative administration.” *Id.* at 17. “Determining whether a § 2 claim would lie—*i.e.*, determining whether potential districts could function as crossover districts—would place courts in the untenable position of predicting many political variables and tying them to race-based assumptions.” *Id.*

Coalitional claims fare even worse, requiring (in the district court's words) courts to make findings on "the complex intersectional ways in which citizens identify as minorities." JA1192. That amorphous concept cannot be reduced into cognizable, and consistently applied, legal judgments. And it is impossible to leave even white voters out of the calculus: here, Plaintiffs' proposed alternative districts were projected to perform only because of anticipated "cross-over support *from white voters*." JA1581 (emphasis added).

Hence, *Bartlett*'s concern that reading crossover claims into Section 2 would likely render it unconstitutional applies with equal force here. 556 U.S. at 21. *Bartlett* observed that a Section 2 crossover-district requirement would greatly increase the use of racial classifications and "unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *Id.* (citation omitted). If that is so with two races (white and Black) it is all the more so with several. In this case, there are three "Minority" groups; in the next, there could be five or seven. The redistricting authorities forced to consider the innumerable possible coalitions that might exist in their jurisdictions would be overwhelmed with racial considerations.

"That interpretation would result in a substantial increase in the number of mandatory districts drawn with race as 'the predominant factor motivating the legislature's decision.'" *Id.* at 21-22 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). The flawed assumption "that members of the same racial group...think alike, share the same political interests, and will prefer the same candidates at the polls," *Shaw v. Reno*, 509 U.S. 630, 647 (1993), fares worse



when applied generically across “Minority” groups, simply because they are not white.

f. The decisions recognizing coalitional claims are not sound and do not merit the Court’s adherence. They provide precious little analysis, frequently bypassing the predicate statutory question in favor of case-specific analysis. *See, e.g., Bridgeport Coal. For Fair Representation v. City of Bridgeport*, 26 F.3d 271, 275-76 (2d Cir.), *vacated sub nom. City of Bridgeport, Conn. v. Bridgeport Coal. For Fair Representation*, 512 U.S. 1283 (1994); *LULAC, Council No. 4386 v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1498-1502 (5th Cir.), *vacated*, 829 F.2d 546 (5th Cir. 1987). One leading case found coalitional claims viable simply because the Act does not expressly prohibit them, *see Campos v. City of Baytown*, 840 F.2d 1240, 1244 (5th Cir. 1988), an approach that has drawn cogent criticism, *Clements*, 999 F.2d at 895 (Jones, J., concurring) (“The proper question is whether Congress *intended to protect* coalitions.”). Other decisions assumed that coalitional claims are authorized under the Act but rejected them on the merits, without discussing the anterior legal question. *See Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm’rs*, 906 F.2d 524, 526-27 (11th Cir. 1990); *Badillo v. City of Stockton*, 956 F.2d 884, 890 (9th Cir. 1992), *as amended* (Apr. 27, 1992). Another court simply chose to “remain faithful to the reasoning of the majority of the circuit and district courts which have considered the issue,” *Huot v. City of Lowell*, 280 F. Supp. 3d 228, 236 (D. Mass. 2017), notwithstanding that the “majority” of courts have offered little “reasoning” for their rulings.



## **B. The District Court Erred on the Second *Gingles* Precondition**

The second *Gingles* precondition requires proof that members of the relevant minority group “constitute a politically cohesive unit.” *Gingles*, 478 U.S. at 56. “If the minority group is not politically cohesive, it cannot be said that the selection of [an at-large] electoral structure thwarts distinctive minority group interests.” *Id.* at 51. Accordingly, “minority-group political cohesion never can be assumed, but specifically must be proved in each case in order to establish that a redistricting plan dilutes minority voting strength in violation of § 2.” *Shaw*, 509 U.S. at 653 (citing *Grove*, 507 U.S. at 40-41).

### **1. The District Court Erroneously Applied a Relaxed Cohesion Standard**

The district court applied an untenable cohesion standard. Even if coalitional claims are viable, the standard of cohesion must be strict. In *Grove*, the Supreme Court declined to decide whether coalitional claims are cognizable, but held that, if they are, “there [is] quite obviously a higher-than-usual need for the second of the *Gingles* showings.” 507 U.S. at 41. The Court held that, “when dilution of the power of such an agglomerated political bloc is the basis for an alleged violation, proof of minority political cohesion is all the more essential.” *Id.*

Courts that have recognized coalitional claims have required a showing that each group in the coalition is internally cohesive *and* that each group is cohesive with the others. As the Fifth Circuit explained:

[T]he determinative question is whether black-supported candidates receive a majority of the Hispanic

and Asian vote; whether Hispanic-supported candidates receive a majority of the black and Asian vote; and whether Asian-supported candidates receive a majority of the black and Hispanic vote in most instances in the [relevant] area.

*Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989). This is the only plausible standard. Any other approach would undermine the coalitional theory that members of *each* group in the coalition suffer dilution of *their own* votes. To aggregate groups is to attribute preferences of one to the others, thereby assuming the cohesion conclusion that must be proven. Aggregation also creates an unacceptable risk, even a likelihood, that the coalition is *not* a coalition at all, but rather a large amalgamation of different, dissimilar groups the preferences of whose larger elements are improperly attributed to the smaller elements. *See* Bernard Grofman, *Voting Rights in a Multi-Ethnic World*, 13 Chicano-Latino L. Rev. 15, 23 (1993). Only by requiring proof that each alleged group of the putative coalition satisfies the Section 2 standard independently, as well as with the other alleged groups, can a court justify a finding that a coalition even exists.

Other precedents hold that cohesion must be established for each group in an alleged coalition. *See, e.g., Concerned Citizens of Hardee Cnty.*, 906 F.2d at 526-527 (rejecting coalitional claim where plaintiffs failed to prove cohesion between Black and Hispanic groups in the coalition); *Campos*, 840 F.2d at 1245 (“[I]f one part of the group cannot be expected to vote with the other part, the combination is not cohesive.”); *Badillo*, 956 F.2d at 891 (district court “found that plaintiffs’ testimony...failed to prove that blacks and Hispanics were politically cohesive, either when combined or when considered separately”); *Huot*, 280 F. Supp. 3d

at 235-36 (requiring plaintiffs to show cohesive coalition among the member groups in the coalition).

It is undisputed that Plaintiffs failed under this test. Their expert did not separately estimate candidate-preference levels for each constituent group. Plaintiffs' expert lumped all groups into an "All Minority" category and reported estimates of voting behavior attributed to that entire aggregate group. These aggregate datapoints prove nothing about the preferences of the three constituent groups, leaving Plaintiffs unable to show that a majority of Asian and Hispanic voters prefer the same candidates, and that those are the same candidates preferred by Black voters.

The district court found a Section 2 violation only by applying a relaxed standard at the liability phase and effectively rejected *Brewer's* standard in its final order.

**a. Plaintiffs' Liability-Stage Failure**

A central evidentiary problem is that, due to the small size and geographic dispersion of the City's Hispanic and Asian communities, the statistical techniques employed in this case cannot estimate the Hispanic and Asian communities' respective voting patterns. *See, e.g.*, JA0439 (Dr. Spencer); SJA284 (Dr. Grofman). Plaintiffs' expert, Dr. Spencer, attempted to bypass this problem by creating an aggregate "All Minority" estimate and performed his statistical analysis on that aggregate number, along with the Black community alone (which is large enough to individually estimate). Where Dr. Spencer saw high

levels of this aggregate group support the same candidate, he viewed this as evidence of cohesion.

The problem with lumping the three distinct minority groups together is revealed by Dr. Spencer's own analysis, which improperly attributes Black voting preferences to Asians and Hispanics. His estimates of Black voting preferences were consistently higher (i.e., more cohesive) than the "All Minority" numbers. Consider the 2016 Kempsville race, where Dr. Spencer estimated Black support for candidate Ross-Hammond at 76.8% and "All Minority" support at 59.9%. JA0457-58; JA1565. Using algebra and the relative sizes of Virginia Beach's Black, Hispanic, and Asian communities, Defendants' expert estimated only 34.3% of the Asian and Hispanic component of the "All Minority" number supported Ross-Hammond. JA2271. Dr. Spencer did not dispute this calculation, JA0467, and conceded it was possible this meant the coalition is not cohesive. JA0468. And, whether or not that estimate is probative, it is indisputable that voting choices of Asians or Hispanics (or both) dragged the average down.

This phenomenon existed across the board. These are the races involving a Black candidate that the district court relied on (JA1218-21) and Dr. Spencer's estimated support for the Black candidate:

| Contest/<br>Measured Candidate      | All Minority <sup>7</sup><br>Support for<br>Candidate <sup>8</sup> | Black<br>Support for<br>Candidate <sup>9</sup> | Asian<br>Support<br>(?) | Hispanic<br>Support<br>(?) |
|-------------------------------------|--|--|-------------------------|----------------------------|
| 2008 At-Large/Allen                 | 70.5%  | 86.3%  |                         |                            |
| 2010 Princess Anne/<br>Bullock      | 79.9%  | 89.9%  |                         |                            |
| 2010 At-<br>Large/Jackson           | 58.2%  | 85.6%  |                         |                            |
| 2011 Rose Hall/<br>Sherrod          | 64.8%  | 87.0%  |                         |                            |
| 2012<br>Kempsville/Ross-<br>Hammond | 65.7%  | 86.9%  |                         |                            |
| 2014 Rose Hall/<br>Cabiness         | 37.0%  | 51.7%  |                         |                            |
| 2016<br>Kempsville/Ross-<br>Hammond | 59.9%  | 76.8%  |                         |                            |
| 2018 Centerville/<br>Wooten         | 85.5%  | 95.6%  |                         |                            |
| 2018 At-Large/<br>Rouse             | 31.8%  | 36.6%  |                         |                            |

The district court credited each contest as showing “minority cohesive voting,” JA1221, yet in each, Black support substantially exceeded “All Minority” support—by more than 10% in eight and more than 20% in three.<sup>10</sup> Because the estimated “All Minority” support includes estimated Black support, the true support of the Asian or Hispanic communities—or both—must fall below the

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<sup>7</sup> Combined Black, Asian, Hispanic and other races.

<sup>8</sup> Using Ecological Inference.

<sup>9</sup> Using Ecological Inference.

<sup>10</sup> The court’s treating the 2014 Rose Hall and 2018 At-Large races as evidence of cohesion only underscored its erroneous view of cohesion.

“All Minority” figure reported. And, because the Black community is much larger than the Asian and Hispanic Asian communities, the true Asian or Hispanic support (or both) must be *far* below the All Minority average.

Further, there is no way to know whether the Asian and Hispanic groups are *internally* cohesive. The above-stated estimates are consistent with the Asian or Hispanic communities, or both, having no consistent pattern of voting for or against the same candidates. There is also no way to assess cohesion between members of the Hispanic and Asian contingencies. Because Black voters significantly outnumber Asian and Hispanic voters, a wide range of outcomes is consistent with Dr. Spencer’s estimates.

**b. The District Court’s Liability Opinion Makes Mathematically Impossible Assumptions**

i. The district court’s liability opinion did not address *Brewer* and, instead, “twisted the burden of proof beyond recognition.” *Abbott v. Perez*, 138 S. Ct. 2305, 2333 (2018). It opined that Defendants’ expert was not properly qualified to opine on “quantitative statistical methods,” JA1228, and that he “cannot *disprove* that Hispanics, Asians, and Blacks vote cohesively.” JA1229 (emphasis added). But “plaintiffs must prove” cohesion. *Grove*, 507 U.S. at 42 (citation omitted). It was error to require Defendants to disprove it.

What matters is that cohesion was not *proven*. The district court acknowledged that relying on a single aggregate “All Minority” point estimate means that “high Black support for a given candidate *could* mask far lower support—or even opposition—from Asian and Hispanic voters.” JA1227. Dr.

Spencer, too, admitted that this scenario is “one possible explanation” for his estimates. JA0377. Plaintiffs’ expert Dr. Allan Lichtman likewise conceded that “we don’t have information...on the individual behavior of” the Asian and Hispanic groups, and “[b]eyond that, we can’t go.” JA1910. All of this admitted that Plaintiffs’ elaborate presentation fall short of proving cohesion, which is what the law requires. *Grove*, 507 U.S. at 42 (citation omitted).

ii. The district court also rewrote the standard of cohesion, concluding that less than majority support from minority voters can prove cohesion. JA1230. As an initial matter, that is beside the point, because Plaintiffs proved nothing about Hispanic and Asian support levels. Whether 50% support was required, or something lower would suffice, is an academic question.

And the district court was legally wrong. This Court explained in *Levy v. Lexington County*, 589 F.3d 708 (4th Cir. 2009), that the failure of an alleged minority-preferred candidate to achieve “50 percent of the minority vote” would “demonstrate a lack of political cohesiveness.” *Id.* at 720 n.18. That stands to reason: if *more* members of a group *oppose* the candidate than *support* that candidate, then the group cannot plausibly be called cohesive around that candidate. See *Levy v. Lexington Cnty., Sch. Dist. Three Bd. of Trustees*, 2012 WL 1229511, at \*3 (D.S.C. Apr. 12, 2012), *as amended* (Apr. 18, 2012). And, because even bare-majority support is hardly probative of cohesion, courts usually apply a 60% standard. *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 388-90 (S.D.N.Y. 2004); *Smith v. Bd. of Supervisors*, 801 F. Supp. 1513, 1522 n.11 (E.D. Va. 1992), *rev’d on other grounds*, *Smith v. Bd. of Supervisors*, 984 F.2d 1393 (4th Cir. 1993).



The district court founded its contrary view on *Lewis v. Alamance County*, 99 F.3d 600, 613 n.10 (4th Cir. 1996), but the relevant portion of that decision addressed the third *Gingles* precondition, “whether minority-preferred candidates are ‘usually’ defeated” by white bloc voting (often called “polarization”). *Id.* at 608. As *Levy* explains, a candidate may receive less than 50% of the minority vote in a multi-candidate race to be the “candidate of choice” under the third precondition, 589 F.3d at 716-18, but less than 50% support cuts against cohesion under the second precondition, *id.* at 720 n.18. Cohesion (*Gingles* two) and polarization (*Gingles* three) are distinct. *See id.* at 720 (faulting a district court for failing to “recognize[] this distinction”). “For example, the black population of a district may vote in a racially polarized manner [for purposes of *Gingles* three] so as to overwhelmingly favor black candidates, but the group may lack political cohesion [for purposes of *Gingles* two] if it splits its vote among several different black candidates for the same office.” *Monroe v. City of Woodville*, 881 F.2d 1327, 1331 (5th Cir. 1989), *as corrected*, 897 F.2d 763 (5th Cir. 1990). Nothing less than 50%, if not 60%, proven support would be evidence of cohesion; anything less would be evidence against cohesion.

iii. Next, the district court tried to transform Plaintiffs’ legal failing into a fact issue by crediting Plaintiffs’ expert’s effort “to address his own limitations.” JA1230. The district court “recognize[d] that Plaintiffs’ methodology for estimating voter cohesion among Minority Community is limited” but did “not find that the methodology is flawed.” JA1231. But, flawed



or not, the methodology's *limits* are dispositive because they leave the method unable to prove coalitional cohesion.

Put simply, those limits left the court unable to identify a single estimate of Asian or Hispanic preference for any candidate in any race. Because Plaintiffs had to prove that each constituency is internally cohesive standing alone, no amount of explaining away arithmetic, even if creditable, could overcome the absence of estimates. That problem is especially glaring when *two* parts of the purported tripartite coalition are total unknowns. Even assuming All Minority support were shown to match Black support, this would not show cohesion of the Asian or Hispanic communities: Asian support could be vanishingly small if Hispanic support is strong (or vice versa). This failing is all the more glaring given that this Court has expressed skepticism of statistical estimation methods used by Dr. Spencer even for single-race claims, *see Lewis*, 99 F.3d at 604 n.3, and given that Dr. Spencer grouped all non-white persons into his "All Minority" category, including Native Americans and others not alleged to belong to the tripartite coalition and whose impact on the analysis is unknown.

iv. Dr. Spencer's effort to "address his own limitations" did not overcome them. The district court credited a bizarre improvisational courtroom session where, on an easel, Dr. Spencer scrawled a new expert report consisting of scribbled lines. JA2307. This last-ditch attempt only further undermined his case.

Dr. Spencer performed his original statistical analysis using three methods—Ecological Regression (ER), Ecological Inference (EI), and

Homogeneous Precinct Analysis (HP). At trial, he challenged for the first time the assumption of linearity underlying *his own* ER datapoints, testifying that ER “requires you to draw a straight line through the data” but that “it could be the case that the actual support” levels might involve a “deviation from linearness.” JA0380-81. Dr. Spencer described through the scribbled charts three possibilities—one preserving the linearity assumption and two that challenged the assumption underlying his analysis. JA2307. For two of those possibilities, Dr. Spencer conceded that where “All Minority” support levels were lower than Black-only support levels, it meant Asian and Hispanic voters supported candidates at lower rates than Black voters. JA0380 (first); JA0382 (third). In the final possibility, Dr. Spencer posited that his own estimated “All Minority” support levels *might* be understated and, in fact, “All Minority” support could be higher than Black support. JA0381. Stated differently, Dr. Spencer testified that his ER datapoints might be wrong and then made the assumption that that error worked in Plaintiffs’ favor.

The problems here are obvious. First, Dr. Spencer still could not proffer an estimate of Asian or Hispanic voting preferences for even a single election. That failing alone renders the episode, whatever its academic value, irrelevant.

Moreover, crediting this untested methodology was clear error. As shown, Dr. Spencer’s improvised abandonment of linearity would yield three possible outcomes, and *two* cut *against* “Minority” cohesion. Dr. Spencer’s choice to prefer the third was arbitrary—he based it on his own “eyeball test[]” and a position that his ER estimates might be understated because the data did not fit

his straight-line model but rather featured a “scooping,” curvilinear shape. JA0381; JA0383; JA0390; JA0392. But, because the ER method is bound by the assumption of linearity, as Dr. Spencer admitted, JA0380, abandoning that assumption calls *all* of his estimates into question—including the estimate of Black cohesion. JA1040.

Yet another problem is that Dr. Spencer’s attack on his own estimates applied only to ER. JA0380. But (as noted) Dr. Spencer also used EI, which resolves the very problem he sought to cure because it *is not bound by an assumption of linearity* and thus accounted for non-linear possibilities. *See, e.g., United States v. City of Eastpointe*, 378 F. Supp. 3d 589, 597 (E.D. Mich. 2019) (“But unlike ecological regression, ecological inference does not rely on an assumption of linearity and instead incorporates ‘maximum likelihood statistics’ and the ‘bounds method’ to produce estimates of voting patterns by race.” (underlining added)); *Cisneros v. Pasadena Indep. Sch. Dist.*, 2014 WL 1668500, at \*10 (S.D. Tex. Apr. 25, 2014) (same); *Alabama NAACP v. Alabama*, 2020 WL 583803, at \*30 (M.D. Ala. Feb. 5, 2020) (same); *Rodriguez v. Harris Cnty.*, 964 F. Supp. 2d 686, 759 (S.D. Tex. 2013) (same). All the estimates shown in the table above are EI estimates; all show All Minority support lagging behind Black support; and none is even touched by the district court’s statement on “non-linear ‘LOESS’ curves.” JA1230.

**c. The Remedial Record Undermines the Liability Ruling**

i. The remedial record confirmed Plaintiffs' failure to establish coalitional cohesion. Dr. Grofman's report determined that it is impossible to estimate voting patterns of the Asian and Hispanic communities in Virginia Beach. Dr. Grofman devoted Appendix B of his report to explaining why he regards "it as essentially mathematically impossible, given the data limitations in this case, to reliably estimate voting behavior for each [racial] group separately." SJA284-85. He concluded that he could not "regard any inferences about how the three minority groups voted as individual groups, whether made by an expert for Plaintiffs or an expert for Defendants, to be sufficiently well supported for me to make any use of them in my own analyses." *Id.* Dr. Spencer's ruminations about "linearity" were exposed yet again as bald speculation, were that not already obvious.

To be sure, Dr. Grofman opined that the "All Minority" group *combined* exhibits cohesion, but, as explained, that type of analysis is insufficient. Dr. Grofman used the "All Minority" number only because (1) he (mistakenly) thought that a combined Black-Asian-Hispanic coalition was the "voting rights group which brought this lawsuit," (2) it was the "voting group whose voting behavior [the court] asked" him to analyze, (3) it was the only "voting rights community" large and compact enough to meet the 50% CVAP test for a Section 2 claim, and (4) because he did "not believe that it is statistically possible to

determine the voting behavior of African-American, Asian-American, and Hispanic populations individually.” SJA235.

ii. The district court should have dissolved its injunction as any further reliance on mathematically impossible assumptions became untenable. That is the result contemplated by *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 979 F.3d 1282 (11th Cir. 2020)—which Plaintiffs cited as the justification for holding the City’s appeal in abeyance pending final judgment. *Wright* held that remedial-phase evidence bears upon the question of liability in a Section 2 case, since “the issue of remedy is part of the plaintiff’s prima facie case” and the court’s “inquiries into remedy and liability cannot be separated.” *Id.* at 1302-03 (citations omitted). This principle means that remedial proceedings may either *bolster* or *undermine* the liability ruling, depending on how the remedial record develops. *Id.* (discussing *Dillard v. Baldwin Cnty. Commr’s*, 376 F.3d 1260, 1266 (11th Cir. 2004), where a district court was “precluded from finding an ongoing section 2 violation” because the remedial record undermined its liability finding)). Because the remedial record revealed that the liability decision depended on “mathematically impossible” assumptions, the district court was duty bound to vacate it.

But the district court doubled down. The court effectively rejected the standard recognized in *Brewer* by expressly relieving Plaintiffs of the burden to prove cohesion as to each constituent group of the alleged coalition. SJA359-63. The court concluded that *Brewer* did not mean what it said when it set that requirement. *Id.* The district court pointed to language in *Brewer* reaffirming that,

in the Fifth Circuit, “minority groups may be aggregated” for Section 2 claims. *Id.* (quoting *Brewer*, 876 F.2d at 453). But this language in *Brewer* referred to the legal *viability* of coalitional claims, not to the standard of proof for cohesion. *See Brewer*, 876 F.2d at 453. *Brewer* made clear that the “determinative” cohesion question turns on evidence of each group separately and all groups together. *Id.* Despite that, the district court asserted that it conducted the “very inquiry” called for by *Brewer*. SJA362-63. Clearly, it did not.

The district court also credited Dr. Grofman’s conclusion that the aggregated “All Minority” group is cohesive, but Dr. Grofman offered that conclusion based on the court’s flawed legal premise that disaggregation is unnecessary. Dr. Grofman’s conclusion on “All Minority” cohesion “taken together,” SJA362, is no different from concluding that Republicans and Democrats are cohesive around Democratic candidates in Cleveland or Republican candidates in rural Alabama because *taken together* voters in these regions exhibit these preferences. That logic fails here for the same reason it fails there.

## **2. Qualitative Evidence Disproved Cohesion**

Tellingly, the district court expressed little confidence in the expert estimates of voting behavior and instead commenced its discussion of cohesion with “qualitative evidence.” JA1211. This discussion, too, was legally and factually erroneous.

The *only* evidence at trial of shared political advocacy related to a 20-year-old effort to support residency-based districts for City Council. The court

credited testimony by Ron Villanueva and Nonato Abrajano, both of Filipino descent, during a 2001 public hearing that they supported district-based elections, JA1275 (citing JA1290-96), but ignored contemporaneous testimony by the same witnesses clearly limiting that political cooperation, JA1292-93 (Villanueva and Abrajano stating that this was the “first time” the minority communities came together with a political proposal); JA0853-54 (Abrajano testifying that the Filipino-American Community Action Group did not support either of the Black candidates in the 2002 at-large City Council race). This testimony is consistent with Plaintiff Georgia Allen’s testimony that these moments of joint advocacy were fleeting, related to a “specific issue,” and then the groups would “disperse and go about our business.” JA0190-91.

All other examples of “cohesion” the court identified were testimony by members of the Black community about general efforts to support minority communities. An exchange between the court and Plaintiffs’ witness reveals the lack of anything suggesting voting cohesion:

THE COURT: During your 30 years, has there been a consistent interaction between African-Americans, Filipinos, and Asians with respect to matters of interest to the groups?

THE WITNESS: I only know about the economic one that is a consistent one, in terms of asking for more equity as far as contracts are concerned, because that’s what my business was.

JA0579.



The district court cited not one item of qualitative evidence suggesting that large numbers of Asian, Hispanic, and Black voters “prefer certain candidates whom they could elect in a single-member, [HBA] majority district.” *Gingles*, 478 U.S. at 68. In fact, the evidence overtly undercut any such finding. All qualitative testimony on voting patterns, lay and expert, was to the effect that the large Filipino community “has historically been more conservative/Republican in its orientation.” JA1003; JA2269-70; JA2293-94. All Asian and Hispanic witnesses at trial testified that members of the largest Asian population in Virginia Beach—the Filipino community—were decidedly conservative. JA0322 (Del. Fowler testifying that Filipino-Americans voted Republican and any vote for her—a Democrat—would be a “crossover” vote).

The court’s reference to “shared political advocacy,” even if it existed, has no logical relation to *vote* dilution in an at-large system, which turns on lack of “ability to elect representatives of...choice.” *Gingles*, 478 U.S. at 51. None of the evidence the court cited establishes that “a significant number of minority group members usually vote for the same candidates.” *Levy*, 589 F.3d at 719-20. Just as “courts should not hastily assume that cooperation among minority groups in filing a Section 2 complaint will inevitably lead to a finding of political cohesion in their actual electoral practices,” *Brewer*, 876 F.2d at 454, they should not assume that groups that do *not* cooperate to file a Section 2 complaint, but may arguably engage in some common political activism, vote for the same candidates—especially when direct testimony is to the contrary. The question remains whether the groups “*vote together*,” and evidence of that must be shown



“by some sort of reliable” means. *Id.* (citation omitted). Because that was not proven, the claim should have been rejected.

### **C. The District Court Erred on the Third *Gingles* Precondition**

The third *Gingles* precondition requires a Section 2 plaintiff to prove that the “bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group.” *Gingles*, 478 U.S. at 49. The district court’s findings reveal this standard to be unmet. It concluded: “50% of the minority-preferred candidates have lost City Council elections between 2008-2018 due to white bloc voting.” JA1232. A 50-50 split does not show that white bloc voting “usually” defeats the minority-preferred candidate, as this Court opined in *Lewis*, 99 F.3d at 616 (stating that “a court would ineluctably find” failure on this element in “circumstances” where “minority-preferred candidates were successful fifty percent of the time”); *see also Cottier v. City of Martin*, 604 F.3d 553, 560 (8th Cir. 2010) (en banc); *Clay v. Bd. of Educ.*, 90 F.3d 1357, 1362 (8th Cir. 1996).

The district court erred in concluding otherwise. First, it discounted races where white candidates were found to be minority preferred, JA1232,<sup>11</sup> but this Court rejected that precise argument in *Lewis*, 99 F.3d at 607 (“[T]he minority-preferred candidate may be either a minority or a non-minority....”). This error was particularly pronounced, and prejudicial, because the court considered the same races in finding cohesion, JA1222, thereby considering successful white

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<sup>11</sup> Dr. Grofman’s report makes the same legal error. SJA233-34.

candidates where it helped Plaintiffs' case and ignoring them where it harmed that case. *See, e.g., John Allan Co. v. Craig Allen Co. LLC*, 540 F.3d 1133, 1139 (10th Cir. 2008) (“[I]nternally inconsistent findings constitute clear error.”)

Second, the district court discounted the two 2018 races where Black candidates prevailed, positing that these reflected “special circumstances because” they occurred “*after* the instant lawsuit was filed.” JA1232. But there is no rule that post-filing elections are irrelevant. Rather, this Court has held that a “court should probe further to determine whether” post-filing success “resulted from unusual circumstances.” *Collins v. City of Norfolk*, 816 F.2d 932, 938 (4th Cir. 1987). In *Collins*, for instance, the Court opined that it *might* have been relevant that the mayor, who had never before supported a Black candidate, supported a Black candidate in a post-filing contest and stated publicly: “After the election, the issue of black representation may become a moot point.” *Id.* Even then, the statement was “not dispositive”; rather a “proper inquiry must examine the result of the mayor’s conduct and statement.” *Id.*

Here, nothing connects the pendency of this lawsuit to the 2018 success of the two Black candidates, and the district court identified no such connection. There was, at that time, no coalitional claim, the case had been floundering in the wrong court and was beleaguered by aimless motions practice, and there is no evidence that it attracted any meaningful amount of attention in the City. The district court, however, concluded that “abnormally large support from white voters” for the 2018 Black candidates constituted a special circumstance. JA1232. But there is nothing suspicious about white voters supporting Black

candidates. Absent a showing that the lawsuit caused this crossover voting, white support for Black candidates cuts against Plaintiffs on the third precondition and cannot alone establish a special circumstance.

**D. Plaintiffs' Claim Fails Under the Totality of the Circumstances**

“The ultimate determination of vote dilution under the Voting Rights Act...must be made on the basis of the ‘totality of the circumstances.’” *Lewis*, 99 F.3d at 604 (edit marks omitted). To make this assessment, courts consider various factors, including the so-called Senate factors and those the Supreme Court has added. *Cane v. Worcester Cnty.*, 35 F.3d 921, 925 (4th Cir. 1994). The district court’s analysis at this stage was erroneous.

1. The district court’s analysis of what it called “the deferential *DeGrandy* fourth factor,” JA1236, repeated its errors on the third *Gingles* preconditions. *Johnson v. De Grandy*, 512 U.S. 997 (1994), held that the existence of majority-minority districts roughly proportional to the minority group’s overall percentage in a jurisdiction cuts heavily against a claim for more majority-minority districts. *Id.* at 1009-24. In challenges to at-large systems, courts have applied this rule by assessing whether minority-preferred candidates have held seats in rough proportion to the minority group’s percentage of the population. *See, e.g., Solomon v. Liberty Cnty. Comm’rs*, 166 F.3d 1135, 1143 (11th Cir. 1999); *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 753 (N.D. Ohio 2009). Here, the district court’s findings established that proportionality, establishing that two of ten seats are held by minority-preferred candidates and that numerous minority-preferred candidates have, in the past, prevailed. The

district court concluded otherwise only because it had already discounted those results in evaluating the third *Gingles* precondition. JA1236-37. Because that discounting was erroneous, so too was the Court's *De Grandy* analysis.

2. The district court erred in failing to analyze each of the totality factors as to each of the coalitional constituencies. Just as proof of cohesion is "all the more essential" when "dilution of the power of...an agglomerated political bloc is the basis for an alleged violation," *Grove*, 507 U.S. at 41, a unique totality inquiry, analyzing each constituency on each factor, is essential. But here, the district court relied overwhelmingly on facts concerning the Black community and attributed those facts to all "Minority" residents of the City. This injected "impermissible racial stereotypes" into the analysis, *Shaw*, 509 U.S. at 647, as the district court, in effect, assumed any disadvantage suffered by any racial minority group amounted to disadvantage suffered by anyone who is not white. Only "a searching practical evaluation of the 'past and present reality,'" *Gingles*, 478 U.S. at 75, concerning *each* disparate group could yield the conclusion that a *coalition* suffers a shared disadvantage.

The correct analysis would have changed the outcome. The district court concluded that Plaintiffs "provided sufficient evidence to show that each factor is met," JA1238, but only because it found facts concerning the Black community under each rubric. It did not find facts as to the Asian community under each factor, nor could it have. For example, in considering "consequences of official past and ongoing discrimination," the court identified many ways in which Asians are roughly at or above the socioeconomic status of whites,

including that “Asian students perform at the same, or higher, rate compared to white students,” that Asian high-school graduation rates are comparable to white rates, JA1249, that more Asian students graduate college than white students, JA1250, that Asian household income exceeds white household income, JA1251, and that white and Asian home-ownership rates are almost identical. JA1252. In considering minority-candidate success, another senate factor, the court identified one Asian-American elected to the City Council and did not identify a single Asian-American who lost any Virginia Beach race. JA1262. In considering responsiveness of elected officials, the court found that “the City had *overutilized* Asian-American owned business.” JA1268 (emphasis added). And, even on the question of past discrimination, the Court cited no evidence of discrimination against Asians of any stripe, only “racial segregation of whites and Blacks.” JA1238-43.

The Court need not conduct its own totality-of-the-circumstances analysis to see that, had the district court applied the correct legal standard, it could not possibly have found that each factor is met. JA1238. Few, if any, were. This error of law infected the analysis, which cannot stand under the correct inquiry.

### **III. The District Court’s Obey-the-Law Injunction Is Improper and Unenforceable**

The district court erred in issuing vague injunctions that the City “comply with Section 2 of the Voting Rights [A]ct” and abstain from “any practice, policy, procedure or other action that results in the dilution of minority participation in the electoral process.” JA1277. An injunction must “describe in

reasonable detail...the act or acts restrained or required.” Fed. R. Civ. P. 65(d)(1)(C). This is because “[t]he judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one.” *Int’l Longshoremen’s Ass’n, Loc. 1291 v. Phila. Marine Trade Ass’n*, 389 U.S. 64, 76 (1967). Courts therefore have “held repeatedly that ‘obey the law’ injunctions are unenforceable.” *Fla. Ass’n of Rehab. Facilities, Inc. v. State of Fla. Dep’t of Health & Rehab. Servs.*, 225 F.3d 1208, 1222 (11th Cir. 2000) (citation omitted); *see also* *Burton v. City of Belle Glade*, 178 F.3d 1175, 1200 (11th Cir. 1999) (rejecting injunction which prohibited municipality from discriminating on the basis of race in its annexation decisions).

And the problem here is not merely that the district court’s injunction duplicates the City’s obligations under Section 2, but also that Section 2 is a notoriously convoluted statute, applicable to all the City’s election mechanisms (including those imposed on it by the General Assembly), and requires no showing of discriminatory intent. The City has minimal advanced means of knowing when the injunction is violated, and when contempt might be triggered. *See EEOC v. AutoZone, Inc.*, 707 F.3d 824, 841-42 (7th Cir. 2013); *SEC v. Goble*, 682 F.3d 934, 950 (11th Cir. 2012). Worse, the injunction is not limited to “the violation established in the litigation or similar conduct reasonably related to the violation.” *AutoZone*, 707 F.3d at 841. If the City re-precincts, or enforces a state-imposed voter-identification law later found to violate Section 2, it could be subject to staggering contempt penalties. The injunction is unlawful and must be vacated.

## CONCLUSION

The injunction should be vacated, and the case remanded with instructions that this case be dismissed or, alternatively, that judgment be entered for Defendants.

## REQUEST FOR ORAL ARGUMENT

The City requests oral argument.

Dated: January 14, 2022

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**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitations of Fed. R. App. P (“Rule”) 32(a)(7)(B) because it contains 12,980 words, excluding the parts of the brief exempted by Rule 32(f). This brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Calisto MT typeface.

Dated: January 14, 2022

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**CERTIFICATE OF SERVICE**

I certify that on January 14, 2022, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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Nos. 21-1533, 21-2431

IN THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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Latasha Holloway, et al.,

*Plaintiffs-Appellees,*

v.

City of Virginia Beach, et al.,

*Defendants-Appellants.*

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On Appeal from the United States District Court  
for the Eastern District of Virginia  
Case No. 2:18-cv-00069  
The Honorable Raymond A. Jackson

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**Addendum: Legal Authorities**

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**52 U.S.C. § 10301****Denial or Abridgement of Right To Vote on Account of Race or Color Through Voting Qualifications or Prerequisites; Establishment of Violation**

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision 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, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(Pub. L. 89–110, title I, §2, Aug. 6, 1965, 79 Stat. 437; renumbered title I, Pub. L. 91–285, §2, June 22, 1970, 84 Stat. 314 ; amended Pub. L. 94–73, title II, §206, Aug. 6, 1975, 89 Stat. 402 ; Pub. L. 97–205, §3, June 29, 1982, 96 Stat. 134 .)<sup>1</sup>

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<sup>1</sup> Current as of June 9, 2021. United States Code, Office of the Law Revision Counsel, <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title52-section10301&num=0&edition=prelim> (last visited June 10, 2021).

**52 U.S.C. § 10303****Suspension of The Use of Tests or Devices in  
Determining Eligibility To Vote**

52 U.S.C. §10303 provides in pertinent part:

\*\*\*

**(f) Congressional findings of voting discrimination against language minorities; prohibition of English-only elections; other remedial measures**

(1) The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.

(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

(3) In addition to the meaning given the term under subsection (c), the term “test or device” shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority. With respect to subsection (b), the term “test or device”, as defined in this subsection, shall be employed only in making the determinations under the third sentence of that subsection.

(4) Whenever any State or political subdivision subject to the prohibitions of the second sentence of subsection (a) provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language: *Provided*, That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan Natives and American Indians, if the predominate language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

( Pub. L. 89–110, title I, §4, Aug. 6, 1965, 79 Stat. 438 ; renumbered title I and amended Pub. L. 91–285, §§2–4, June 22, 1970, 84 Stat. 314 , 315; Pub. L. 94–73, title I, §101, title II, §§201–203, 206, Aug. 6, 1975, 89 Stat. 400–402 ; Pub. L. 97–205, §2(a)–(c), June 29, 1982, 96 Stat. 131–133 ; Pub. L. 109–246, §§3(d)(2), (e)(1), 4, July 27, 2006, 120 Stat. 580 ; Pub. L. 110–258, §2, July 1, 2008, 122 Stat. 2428 .)<sup>2</sup>

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<sup>2</sup> Current as of June 9, 2021. United States Code, Office of the Law Revision Counsel, <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title52-section10303&num=0&edition=prelim> (last visited June 10, 2021).

## **52 U.S.C. § 10310**

### **Enforcement Proceedings**

#### **(a) Criminal contempt**

All cases of criminal contempt arising under the provisions of chapters 103 to 107 of this title shall be governed by section 1995 of title 42.

#### **(b) Jurisdiction of courts for declaratory judgment, restraining orders, or temporary or permanent injunction**

No court other than the District Court for the District of Columbia shall have jurisdiction to issue any declaratory judgment pursuant to section 10303 or 10304 of this title or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of chapters 103 to 107 of this title or any action of any Federal officer or employee pursuant hereto.

#### **(c) Definitions**

(1) The terms “vote” or “voting” shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this chapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

(2) The term “political subdivision” shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.

(3) The term “language minorities” or “language minority group” means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.

#### **(d) Subpenas**

In any action for a declaratory judgment brought pursuant to section 10303 or 10304 of this title, subpoenas for witnesses who are required to attend the District Court for the District of Columbia may be served in any judicial

district of the United States: *Provided*, That no writ of subpoena shall issue for witnesses without the District of Columbia at a greater distance than one hundred miles from the place of holding court without the permission of the District Court for the District of Columbia being first had upon proper application and cause shown.

**(e) Attorney's fees**

In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, reasonable expert fees, and other reasonable litigation expenses as part of the costs.

(Pub. L. 89–110, title I, §14, Aug. 6, 1965, 79 Stat. 445; renumbered title I, Pub. L. 91–285, §2, June 22, 1970, 84 Stat. 314; amended Pub. L. 94–73, title II, §207, title IV, §402, Aug. 6, 1975, 89 Stat. 402, 404; Pub. L. 109–246, §§3(e)(3), 6, July 27, 2006, 120 Stat. 580, 581.)<sup>3</sup>

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<sup>3</sup> Current as of June 9, 2021. United States Code, Office of the Law Revision Counsel, <https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title52-section10310&num=0&edition=prelim> (last visited June 10, 2021).



**Sections 203 and 207  
of the  
Act of Aug. 6, 1975, Pub. L. 94-73, 89 Stat. 401-402**

SEC. 203. Section 4 of the Voting Rights Act of 1965 is amended by adding the following new subsection:

“(f)(1) The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.

“(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

“(3) In addition to the meaning given the term under section 4(c), the term 'test or device' shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority. With respect to section 4(b), the term 'test or device', as defined in this subsection, shall be employed only in making the determinations under the third sentence of that subsection.

“(4) Whenever any State or political subdivision subject to the prohibitions of the second sentence of section 4(a) provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the

electoral process, including ballots, it shall provide them in the language of the applicable language

minority group as well as in the English language: *Provided*, That where the language of the applicable minority group is oral or unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.”.

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SEC. 207. Section 14(c) is amended by adding at the end the following new paragraph:

“(3) The term ‘language minorities’ or ‘language minority group’ means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.”.<sup>4</sup>

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<sup>4</sup> Act of Aug. 6, 1975, Pub. L. 94-73, §§ 203, 207, 89 Stat. 401-402 (available at U.S. Gov’t Publishing Office (“GPO”), <https://www.govinfo.gov/app/details/STATUTE-89/STATUTE-89-Pg400/summary>, or directly at <https://www.govinfo.gov/content/pkg/STATUTE-89/pdf/STATUTE-89-Pg400.pdf> (last visited June 10, 2021)).

**Va. Code § 15.2-200****Required procedure for obtaining new charter or amendment**

No charter shall be granted to a locality by the General Assembly and no charter of a locality shall be amended by the General Assembly except as provided in this chapter or in Chapter 34 (§ 15.2-3400 et seq.) of this title.

Code 1950, § 15-65.1; 1958, c. 329; 1962, c. 623, § 15.1-833; 1979, c. 297; 1985, c. 387; 1986, c. 312; 1997, c. 587.<sup>5</sup>

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<sup>5</sup> Code of Virginia, Legislative Information System, <https://law.lis.virginia.gov/vacodefull/title15.2/subtitleI/#:~:text=%C2%A7%2015.2%2D200.,15.2%2D3400%20et%20seq.> (last visited June 10, 2021).

**Fed. R. Civ. P. 65****Injunctions and Restraining Orders**

Federal Rule of Civil Procedure 65 provides in pertinent part:

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(d) CONTENTS AND SCOPE OF EVERY INJUNCTION AND RESTRAINING ORDER.

(1) *Contents*. Every order granting an injunction and every restraining order must:

(A) state the reasons why it issued;

(B) state its terms specifically; and

(C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.

(2) *Persons Bound*. The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys;  
and

(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

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<sup>6</sup> Legislative Information Institute, Cornell Law School, [https://www.law.cornell.edu/rules/frcp/rule\\_65](https://www.law.cornell.edu/rules/frcp/rule_65) (last visited June 10, 2021).

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