

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
NORFOLK DIVISION**

Latasha Holloway, et al.,

*Plaintiffs,*

v.

Case No. 2:18-cv-0069

City of Virginia Beach, et al.,

*Defendants.*

**DEFENDANTS’ NOTICE OF FILING PETITION TO REQUEST AN ORDER OF  
SPECIAL ELECTION**

Defendants respectfully give notice to the Court and parties that on this date, the City of Virginia Beach filed a *Petition to Request an Order of Writ of Special Election* (the “**Petition**”) in the Circuit Court of the City of Virginia Beach regarding the vacancy in the Office of Councilmember, Kempsville District, following the July 2, 2021 resignation of Councilmember Jessica Abbott. The Petition, along with its enclosure letter and exhibits, is attached as **Exhibit A**.

The City of Virginia Beach filed its *Emergency Motion for Stay of Injunction* on July 7, 2021 (ECF No. 262) seeking a stay or modification of the Court’s permanent injunction of March 31, 2021 to permit a special election to occur to fill the vacancy referenced above. The City has caused the Petition to be filed today to comply with a time-sensitive Virginia law requirement to, “within 15 days of the occurrence of the vacancy petition the circuit court to issue a writ of election to fill the vacancy.” Va. Code Ann. § 24.2-226. That special election, in this instance, will be the November 2, 2021 General Election—*i.e.*, the “next general election in November” after the vacancy occurred. *Id.* § 24.2-226(A). The Petition notifies the state circuit court of this Court’s order and of the City’s pending Emergency Motion for Stay of Injunction. No proposed Order has

been submitted to the circuit court pending this Court's ruling on the Emergency Motion to Stay Injunction.

This Petition is a pre-requisite to holding the special election, should the Court's permanent injunction be stayed or modified to permit the special election to be held.

DATE: July 16, 2021

Respectfully submitted,

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*Counsel for Defendants*

**CERTIFICATE OF SERVICE**

I hereby certify that on July 16, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of the filing to all parties of record.

*/s/ Patrick T. Lewis*  
\_\_\_\_\_  
*Counsel for Defendants*

118906.000001 4837-4188-7986



MARK D. STILES  
CITY ATTORNEY

EXHIBIT "A"

City of Virginia Beach

[VBgov.com](http://VBgov.com)

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In Reply Refer to Our File No.: CA15009

July 16, 2021

**VIA HAND DELIVERY**

Tina E. Sinnen, Clerk of Court  
City of Virginia Beach Circuit Court  
CIVIL DIVISION  
2425 Nimmo Parkway  
Virginia Beach, VA 23456-9002

Re: Petition to Request an Order of Writ of Special Election – Kempsville District

Dear Ms. Sinnen:

Enclosed please find a Petition to Request an Order of Writ of Special Election regarding the vacancy in the Office of Councilmember, Kempsville District. Please file the Petition on behalf of the City Council and direct this matter to the Chief Judge's attention. **Please note that this Petition is subject to an injunction in the U.S. District Court of the Eastern District of Virginia. A proposed order is not included at this time because the City is seeking a stay of the injunction in District Court to allow for the special election to proceed.**

Should you have any further questions concerning this matter, please feel free to contact me at (757) 385-4215. Thank you for your attention in this matter.

Sincerely,

Christopher S. Boynton  
Deputy City Attorney

CSB/lcl  
Enclosures

**VIRGINIA: IN THE CIRCUIT COURT OF THE CITY OF VIRGINIA BEACH**

IN THE MATTER OF:	:	
SPECIAL ELECTION TO FILL	:	
VACANCY IN THE OFFICE OF	:	CL21-
COUNCILMEMBER KEMPSVILLE	:	
DISTRICT FOR A TERM	:	
ENDING DECEMBER 31, 2024	:	

**PETITION TO REQUEST  
AN ORDER OF WRIT OF SPECIAL ELECTION**

COMES NOW the Petitioner, the City Council of the City of Virginia Beach, by counsel, and for its Petition to Request an Order of Writ of Special Election, states to the Court as follows:

1. The Councilmember for the Kempsville District, elected for a term ending December 31, 2024, resigned her office effective July 2, 2021.

2. Code of Virginia § 24.2-226 provides that the governing body shall “within 15 days of the occurrence of the vacancy petition the circuit court to issue a writ of election to fill the vacancy” for such vacancy to be filled by special election on November 2, 2021.

3. On March 31, 2021, the U.S. District Court for the Eastern District of Virginia, Norfolk Division (“District Court”), enjoined “any further use of the at-large system of election for the Virginia Beach City Council” (see page 135 of the excerpt of March 31, 2021 Opinion and Order attached hereto as Exhibit #1).

4. On July 6, 2021, the City Council of the City of Virginia Beach adopted a resolution (the “Resolution”) to request that the Court order a special election for the purpose of filling the vacancy in the Office of Councilmember for the Kempsville District (attached hereto as Exhibit #2).

5. On July 7, 2021, the City Council filed in the District Court a motion to stay the injunction of the City's election system to allow for the special election to occur (Motion for Stay is attached hereto as Exhibit #3). The Resolution provides that if the stay is not forthcoming, the City Attorney is directed to seek such other relief to allow the City to fulfill its statutory obligations to fill the vacancy.


6. As of the filing date of this Petition, the Motion for Stay is fully briefed and before the District Court for decision but has not been acted upon by the District Court.

7. The City Council seeks to abide by its obligations under Code of Virginia § 24.2-226 and under the injunction issued by District Court.

WHEREFORE, for the foregoing reasons, this Petition respectfully requests the Court to receive this request for a writ of special election; to hold such Petition in abeyance until such time as the City is able to obtain a stay of the injunction of its election system or receive other relief from a federal court; and, upon the City's having obtained such stay or other relief, grant a writ of special election to fill the vacancy in the Office of Councilmember for the Kempsville District seat on November 2, 2021.

Respectfully submitted,

CITY COUNCIL OF CITY OF VIRGINIA BEACH

By:  \_\_\_\_\_  
Of Counsel

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**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Norfolk Division**

***MEMORANDUM OPINION AND ORDER***  
***In***

**LATASHA HOLLOWAY et. al.,  
Plaintiff,**

**v.**

**CIVIL ACTION NO. 2:18-cv-69**

**CITY OF VIRGINIA BEACH, et. al.,  
Defendant.**





**Holloway et. al. v. City of Virginia Beach  
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of the nine seats on City Council are designated. In response, Defendants' have not proffered a reasonable explanation for designing such system.

## **VII. CONCLUSION**

By a preponderance of the evidence, the Plaintiffs have demonstrated that the at-large system of elections for the Virginia Beach City Council denies Hispanics, African Americans, and Asians equal access to the electoral and political process, in contravention of Section 2 of the Voting Rights Act. Accordingly, it is hereby **DECLARED** that Virginia Beach's at-large method of election is illegal and cannot be enforced in future elections. It is, therefore,

**ORDERED**, that any further use of the at-large system of election for the Virginia Beach City Council is hereby **ENJOINED**.

**ORDERED**, that the City of Virginia Beach shall not adopt any system of election for members of its City Council that does not comply with Section 2 of the Voting Rights act.

**ORDERED**, that the City of Virginia Beach shall not implement or utilize any practice, policy, procedure or other action that results in the dilution of minority participation in the electoral process.

Pursuant to 42U.S.C. 1988(b) and Title 52 U.S.C. 10310(e), the Court **GRANTS** Plaintiffs' request for attorneys' fees, costs, and litigation expenses. Plaintiffs shall file their request for attorneys' fees, costs, and litigation expenses within thirty (30) days of the date of this Order.

The Court will contact counsel as necessary regarding the scheduling of argument regarding remedies.

The Clerk is **DIRECTED** to electronically provide this Order to all parties.

**IT IS SO ORDERED**

Norfolk, Virginia  
March 31, 2021

  
UNITED STATES DISTRICT JUDGE

1 A RESOLUTION TO DIRECT THE CITY ATTORNEY TO  
2 FILE A PETITION FOR A WRIT OF SPECIAL ELECTION  
3 FOR THE OFFICE OF COUNCILMEMBER, KEMPSVILLE  
4 DISTRICT  
5

6 WHEREAS, Councilmember Jessica Abbott, Kempsville District, was elected for  
7 a term that ends December 31, 2024;  
8

9 WHEREAS, Councilmember Abbott has tendered her resignation effective July 2,  
10 2021;  
11

12 WHEREAS, Code of Virginia § 24.2-226 requires the governing body to petition  
13 its circuit court for a Writ of Special Election to fill the remaining portion of the term of  
14 office for a member of the City Council when that member's term of office ends in a year  
15 other than the year for which a general election to fill the vacancy occurs; and  
16

17 WHEREAS, the next election available is November 2, 2021.  
18

19 NOW, THEREFORE, BE IT RESOLVED BY THE COUNCIL OF THE CITY OF  
20 VIRGINIA BEACH, VIRGINIA:  
21

22 That the City Council directs the City Attorney to file a Petition for a Writ of  
23 Special Election in the Circuit Court for the purpose of filling the vacancy in the Office of  
24 Councilmember, Kempsville District, for a term ending December 31, 2024, and  
25 requests such special election to be held on November 2, 2021.  
26

27 BE IT FURTHER RESOLVED:  
28

29 That the City Attorney is directed to seek a stay of the federal injunction of the  
30 City's election system to allow the special election to occur, and should such a stay not  
31 be forthcoming, the City Attorney is directed to seek such other relief from the federal  
32 courts to allow the City to fulfill its statutory obligations to fill the vacancy in the Office of  
33 Councilmember, Kempsville District.

Adopted by the City Council of the City of Virginia Beach, Virginia, this 6th day  
of July, 2021.

APPROVED AS TO LEGAL SUFFICIENCY:

  
City Attorney's Office

CA15009  
R-2  
July 2, 2021



CERTIFIED TO BE A TRUE COPY OF A CERTIFICATE OF  
RESOLUTION ADOPTED BY THE CITY COUNCIL OF THE CITY OF  
VIRGINIA BEACH, VIRGINIA, ON JULY 6, 2021.

  
Amanda Barnes, MMC  
City Clerk

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
NORFOLK DIVISION**

Latasha Holloway, et al.,

*Plaintiffs,*

v.

Case No. 2:18-cv-0069

City of Virginia Beach, et al.,

*Defendants.*

**DEFENDANTS' EMERGENCY MOTION FOR STAY OF INJUNCTION**

On July 2, 2021, Virginia Beach Councilmember Jessica Abbott announced her resignation from the Virginia Beach City Council, effective immediately, due to health concerns.<sup>1</sup> The City Council must now appoint an interim, temporary successor to fill the seat Ms. Abbott vacated, the Kempsville residency district. Va. Code Ann. § 24.2-228(A). The City must then hold a special election “on the date of the next general election in November,” November 2, 2021, to fill the remainder of Ms. Abbott’s unexpired term of office. *Id.* § 24.2-226(A). The temporary successor, by law, cannot remain in office past that date. *Id.* § 24.2-226.

This vacancy was unforeseen when this Court entered its injunction and, indeed, even as of a week ago. But this vacancy now requires the City to hold an election. However, the Court’s permanent injunction of March 31, 2021 forbids the City from conducting elections under the at-large system, even a special election to fill an unexpired term. This injunction, if it remains in effect and prohibits a special election, will impose irreparable harm on the City by depriving it of the ability to have a fully staffed City Council beyond November 2, 2021 to manage the largest

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<sup>1</sup> See, e.g., *Virginia Beach City Councilwoman Jessica Abbott resigns due to health concerns*, THE VIRGINIAN-PILOT, (July 2, 2021), <https://www.pilotonline.com/government/local/vp-nw-virginia-beach-councilwoman-resigns-20210702-6kcl6hteqfe25hiytdkfvrlm-story.html>.



city in the Commonwealth. And for a host of reasons more fully set forth below, there is insufficient time for the Court to impose a remedial plan and to conduct the special election under that new plan's boundaries.

For these reasons, and those articulated below, Defendants respectfully move pursuant to Fed. R. Civ. P. 62 for a partial stay or modification of the Court's injunction pending appeal to permit the coming special election in November 2021 to go forward. Importantly, Plaintiffs will not oppose the relief here requested, albeit on a qualified basis. Their counsel represented to counsel for Defendants as follows:

Plaintiffs do not oppose a limited stay of the district court's injunction to permit a special election for the Kempsville residency district seat on the City Council to fill the vacancy caused by Ms. Abbott's resignation. However, without further court order, the person elected in such a special election will hold office through 2024. Plaintiffs therefore reserve the right to seek an order from this Court, in the exercise of its remedial authority, to require a new special election in November 2022 in the event that the candidate elected in the November 2021 special election resides in one of the Section 2 remedial districts ordered by the Court. Plaintiffs intend to file a short response to Defendants' motion for a stay to further explain their position.

To be clear, Defendants intend to oppose future requests to alter term lengths of any members. But for *present* purposes, this motion is functionally unopposed.

Additionally, all of the stay factors are satisfied, establishing that the motion has merit independent of the parties' consent.

*First*, Defendants have shown a likelihood of success on the merits of their appeal. Defendants press compelling arguments on appeal of matters that have split the circuits and raise, at a minimum, difficult and close questions going to Article III standing and the meaning of Section 2 of the Voting Rights Act. The Court need not agree with Defendants' position on the merits—and Defendants recognize the Court does not do so—to find in Defendants' favor on this issue.

*Second*, the City and its approximately 450,000 residents would be irreparably harmed absent issuance of a stay. A remedial plan cannot be put into effect in sufficient time to conduct a special election to fill the remainder of Ms. Abbott's unexpired term. Absent a stay of the Court's injunction, by operation of Virginia law, her seat would sit vacant after the November 2, 2021 election, depriving the City of a fully staffed City Council for up to a year.

*Third*, Plaintiffs would not be harmed by a stay. In none of the proposed remedial plans before the Court is Ms. Abbott designated as either Plaintiff's Council representative, and it is unlikely that they would be permitted to vote for her replacement under a remedial plan comprising single-member districts. And Plaintiffs would not benefit from her former seat remaining vacant and City Council shorthanded.

*Finally*, the balance of equities and public interest tilt decidedly in favor of a stay. A shorthanded City Council harms *all* the City's residents by depriving them of a fully constituted body to conduct the people's business. And the public interest is further served by allowing the Fourth Circuit and, if necessary, the U.S. Supreme Court to address the important legal questions presented by this case and Defendants' appeal.

In further support, the City respectfully represents as follows:

#### **FACTUAL BACKGROUND**

As set forth above, due to the resignation of Ms. Abbott, under the City of Virginia Beach charter the Council must appoint an interim successor to represent the Kempsville residency district until a special election can be called to fill the remainder of her unexpired term in office. Va. Code Ann. § 24.2-228(A). That special election, in this instance, will be the November 2, 2021 General Election—*i.e.*, the “next general election in November” after the vacancy occurred. *Id.* § 24.2-226(A).



The following deadlines govern the special election:

<b>Deadline</b>	<b>Event</b>
Monday, July 19, 2021  <i>15 days after resignation</i>	City Council must petition the circuit court to issue a writ of election to fill the vacancy.  Source: Va. Code Ann. § 24.2-226
Some date after July 6, 2021  <i>City Council meets on this date to vote on resolution to seek writ from Circuit Court</i>	Candidates for special elections may not circulate petitions for signatures to accompany ballot access documents until after the writ or order calling the election is issued. (125 signatures needed - Va. Code Ann. § 24.2-506(A)(5))  Source: Virginia Department of Elections, the Handbook, Chapter 16 Candidate Processing at p. 4 (available at <a href="https://www.elections.virginia.gov/media/grebhandbook/2020-individual-chapters/16_Candidate_Processing_(2020).pdf">https://www.elections.virginia.gov/media/grebhandbook/2020-individual-chapters/16_Candidate_Processing_(2020).pdf</a> )
Wednesday, August 4, 2021  <i>90 days before election</i>	Special elections for vacancies occurring after this date cannot be ordered to occur at the November 2021 general election and will have to occur in the November 2022 general election.  Source: Va. Code Ann. § 24.2-226
Friday, August 13, 2021  <i>81 days before election</i>	Independent, political party, and 3rd party candidates must file ballot access documents by 5pm.  Source: Va. Code Ann. § 24.2-503, 24.2-507, 24.2-506, 24.2-521, and SBE Policy 2010-003
Saturday, August 14, 2021  <i>80 days before election</i>	General Registrar to confirm 1) all special election candidate filings have been submitted, reviewed, are complete and accurate, and have been processed, and 2) all candidate records in VERIS have been set up and are complete and accurate. Reminder: § 24.2-613 was amended in 2018 to change the meaning of “time of filing”. This must be taken into account when entering “time of filing” in VERIS. Note: Ensuring VERIS is completely up to date satisfies the reporting requirements in § 24.2-505 & 24.2-612 (Candidate lists to ELECT).  Source: Va. Code Ann. § 24.2-505 & 24.2-612

Deadline	Event
Wednesday, September 8, 2021  <i>5-10 days before absentee voting begins</i>	Virginia Beach provides an electronic version of the ballot to absent uniformed service members and overseas citizens five to ten days prior to the opening of absentee balloting in order to ensure compliance with ensure compliance with the Uniform and Overseas Citizens Absentee Voting Act (“UOCAVA”), and its Virginia equivalent.  Source: Declaration of Donna Patterson, attached as Ex. 1 (“Patterson Decl.”), ¶ 15.
Saturday, September 18, 2021  <i>45 days before election</i>	Absentee voting begins for the November election.  Source: Va. Code Ann. § 24.2-612
Tuesday, November 2, 2021	Election Day

### **STANDARD**

Defendants move under Fed. R. Civ. P. 62 for a stay pending appeal. The stay factors are: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 426 (2009) (internal quotations and citations omitted). Given the impact of injunctions on elections, a stay pending appeal is a common remedy in election and redistricting matters. *See, e.g., Gill v. Whitford*, 137 S. Ct. 2289 (2017); *Rucho v. Common Cause*, 138 S. Ct. 923 (2018); Order, *Benisek v. Lamon*, No. 1:13-cv-3233 (D. Md. Nov. 16, 2018), ECF No. 230; *Common Cause v. Rucho*, 2018 WL 4214334, at \*1 (M.D.N.C. Sept. 4, 2018); Order, *Common Cause v. Rucho*, 1:16-cv-1026 (M.D.N.C. Sept. 12, 2018), ECF No. 155; *North Carolina v. Covington*, 138 S. Ct. 974 (2018); *Abbott v. Perez*, 138 S. Ct. 49 (2017); *North Carolina v. Covington*, 137 S. Ct. 808 (2017); *Perry v. Perez*, 565 U.S. 1090 (2011); *Miller v.*



*Johnson*, 512 U.S. 1283 (1994); *Karcher v. Daggett*, 455 U.S. 1303 (1982) (Brennan, J., in chambers).

## **ARGUMENT**

### **I. Defendants Are Likely To Succeed on the Merits**

Defendants have a substantial likelihood of success on appeal. They have already filed their opening appellant brief in the Fourth Circuit which raises numerous issues. (*See* Appellants' Br., *Holloway et al., v. City of Virginia Beach, et al.*, No. 21-1533, Dkt. 20 (4th Cir. filed June 11, 2021).) Success on any issue is sufficient for Defendants to obtain vacatur or reversal of the injunction. This motion focuses on four.<sup>2</sup>

First, the Court's alternative holding that the Black community, standing alone, can constitute a majority in a single-member district, (ECF No. 242 at 65), cannot withstand appellate scrutiny. No plan presented at the liability stage met this goal, (*see id.* at 53), and Plaintiffs' remedial proposal, filed just days ago, also falls far short of this goal, with the highest Black Citizen Voting Age Population in any remedial district being 35.61%. (ECF No. 261-1 at 12.) Plaintiffs did not argue at trial that the Black community standing alone can meet this test.

Second, the claim Plaintiffs *did* plead and attempt to prove, a coalitional claim, is not a cognizable invocation of Section 2, for reasons Defendants have set forth previously. (*See* ECF No. 237 at 27–29.) Although the Court concluded otherwise, the question is the subject of a circuit split, which underscores that Defendants are presenting a compelling case on appeal. *See, e.g., California v. Am. Stores Co.*, 492 U.S. 1301, 1305 (1989) (O'Connor, J., in chambers) (staying

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<sup>2</sup> Defendants acknowledge that the Court ruled on these matters in finding liability, but Defendants have the obligation of presenting these arguments in support of their stay motion to this Court in the first instance. *See* Fed. R. App. P. 8(a)(1). It is "fairly contemplated" in this Rule that "tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained." *Washington Metro. Area Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 844–45 (D.C. Cir. 1977).

judgment where circuits split on the question presented). The statutory text of Section 2 does not contemplate coalitional claims, and the Supreme Court's decision in *Bartlett v. Strickland*, 556 U.S. 1 (2009), undermines such claims by construing Section 2 to protect only the right of members of a group to "elect [its preferred] candidate based on their own votes and without assistance from others." *Id.* at 14.

Third, Defendants are also likely to prevail on the cohesion element. Plaintiffs failed to provide a single estimate of Asian or Hispanic support for any candidate in any race. This left the Court unable to identify such an estimate in its opinion. This is a legal failing on Plaintiffs' part because a coalitional claim can only be valid if majorities of *each* constituency in the coalition support the same candidates as members of their own constituencies and the others. *Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989). If it is otherwise, then the coalition is internally polarized, not cohesive, and grouping such persons together would dilute votes of some members, rather than vindicate anyone's right to vote. As explained previously, the trial testimony indicates that this will be the result of a remedial plan in this case. (ECF No. 237 at 36.)

Fourth, Plaintiffs' coalitional claim is undermined further by the fact that no Asian or Hispanics have joined as plaintiffs, even though there are tens of thousands of such persons in the City. The result is a scenario where two Plaintiffs are asserting alleged dilution of the votes of persons of other racial backgrounds for the instrumental purpose. This is a paradigmatic third-party standing problem that has a substantial chance of resulting in reversal on appeal.

Although the Court took a different view on these and other issues, the question is not whether Defendants are certain to succeed, or even whether the Court agrees with these positions. This case presents a multitude of difficult issues, Defendants have a likelihood of success, and that satisfies the first stay factor.

## **II. Defendants Will Suffer Irreparable Harm Without a Stay**

Defendants will be irreparably harmed absent a stay. The injunction, if left unchanged, would forbid the City from filling a vacancy on the Council, meaning that after the November 2, 2021 election, the City would only have a 10-member Council. Such an injunction would inflict irreparable harm on the City and the public.

### **A. The Court's injunction frustrates application of a state law governing elections in the City.**

"[T]he [State's] inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State." *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018) (citing *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers)); *see also Miller v. Johnson*, 515 U.S. 900, 915 (1995) ("Federal court review of districting legislation represents a serious intrusion on the most vital of local functions."). Accordingly, the Supreme Court's "ordinary practice is to suspend...injunctions from taking effect pending appellate review" "[w]hen courts declare state laws unconstitutional and enjoin state officials from enforcing them." *Strange v. Searcy*, 135 S. Ct. 940, 940 (2015) (Thomas, J., dissenting) (citing *Herbert v. Kitchen*, 134 S. Ct. 893 (2014), and *San Diegans for Mt. Soledad Nat. War Mem'l v. Paulson*, 548 U.S. 1301 (2006) (Kennedy, J., in chambers)).

That problem is compounded here in that the City Council will, under the current injunction, become short one member as of November 2021. The Council, however, operates continuously to do the people's work, and the loss of a member curtails its ability to do that. The Council schedules two formal session meetings per month,<sup>3</sup> various special sessions, and at least

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<sup>3</sup> *City Council Formal Session Meeting Schedule*, City of Virginia Beach, <https://www.vbgov.com/government/departments/city-clerk/city-council/Pages/default.aspx> (last visited Jul. 7, 2021).

80 regularly scheduled public meetings, some monthly and others quarterly.<sup>4</sup> The vacancy makes one less representative of voters to consider, deliberate on, and vote on the myriad issues before the Council. It also creates a governing body with an even number of representatives, without a tie-breaking vote. In addition, the shortage removes a member who is expected to shoulder part of the load of doing the Council's work. The agenda for a recent meeting on July 6, 2021, illustrates the variety and importance of issues facing the Council: a proposed ordinance to end the Declaration of a Local Emergency re COVID-19 Pandemic, recommendations for the Citizens Review Panel Task Force, amendments to City Bylaws, appointments to 25 different committees and commissions, and conditional use permits from businesses and individuals seeking relief from City ordinances in this bustling vacation economy.<sup>5</sup> The "bookmarked" version of this particular agenda, including all materials necessary for review for the meeting, spans nearly 900 pages.<sup>6</sup> Simply put, the workload on each Council member is substantial and the Council cannot afford to lose a member and risk deadlock.

**B. A remedial plan cannot be adopted and administered prior to the November 2, 2021 election.**

Absent a stay of this Court's injunction to permit a special election to occur under the present at-large plan, the only way under present law for the City to avoid losing a member of the City Council would be for the Court to rush out a remedial plan and to attempt to conduct the

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<sup>4</sup> *City Council Public Meetings*, City of Virginia Beach, <https://www.vbgov.com/government/departments/city-clerk/city-council/Pages/public-meetings.aspx> (last visited Jul. 7, 2021).

<sup>5</sup> *City Council Brief Agenda*, City of Virginia Beach, (Jul. 6, 2021), available at <https://www.vbgov.com/government/departments/city-clerk/city-council/Documents/CurrentBriefAgenda.pdf>.

<sup>6</sup> *City Council Bookmarked Agenda*, City of Virginia Beach, (Jul. 6, 2021), available at <https://www.vbgov.com/government/departments/city-clerk/city-council/Documents/BookmarkedAgenda.pdf>.

special election in November 2021 under that new plan. But such a strategy is untenable and would impose its own form of irreparable harm on the City.

First, there is no serious prospect of fashioning and implementing a remedial plan utilizing the 2020 census results after those results are released (likely in September 2021) in time for the November 2021 election. As a result, the Court would apparently only implement a remedy using 2010 census results and ACS data up to 2019. Districts drawn to equality under that standard will, however, by November 2021 be malapportioned under the Equal Protection Clause. Although the Court might justify that impingement on equal-protection rights under the theory that even unconstitutional plans may be utilized when election exigencies so require, *see Reynolds v. Sims*, 377 U.S. 533, 585 (1964), that same theory equally supports using the at-large system, since even plans that violate Section 2 may be utilized when election exigencies require under the same logic, *see infra*. A statutory impingement does not trump a constitutional impingement.<sup>7</sup>

Second, the exercise itself would create an election-administration quagmire. “[C]onsiderations specific to election cases” guide the equitable balancing in cases like this. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). “[I]ntervention by the federal courts in state elections” is a “‘serious business.’” *Chisom v. Roemer*, 853 F.2d 1186, 1189 (5th Cir. 1988) (quoting *Oden v. Brittain*, 396 U.S. 1210 (1969) (Black, J., opinion in chambers)). Accordingly, an injunction requires a weighing of equities, “even after an adjudication on the merits that a legislative apportionment plan violate[s] the Constitution.” *Id.*; *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (“The decision to enjoin an impending election is so

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<sup>7</sup> An at-large election does not dilute votes for purposes of the one-person, one-vote principle. *See Baten v. McMaster*, 967 F.3d 345, 356 (4th Cir. 2020), as amended (July 27, 2020).

serious that the Supreme Court has allowed elections to go forward even in the face of an undisputed constitutional violation.”).

To begin, it is now July 7, and remedial proceedings have just begun. The Court has not hired a special master. The parties will be briefing the initial remedial proposals through the end of this month. (ECF No. 259) (Order directing briefing through July 30, 2021). It is unclear whether any given proposal will withstand scrutiny, and the Court has already announced that it will “have all proposed plans reviewed by an independent court-appointed expert” and that the Court expects to “draft[] a remedial plan.” (ECF No. 259.) For that to occur beginning in August could take months. For example, Special Master Bernard Grofman took three months in a recent case out of Sumter County, Georgia, which had approximately 30,000 people. *Compare* Order, *Wright v. Sumter County Board of Elections and Registration*, No. 1:14-cv-00042-WLS (M.D. Ga.), ECF No. 261 (Aug. 14, 2019) (identifying special master) *with id.*, ECF No. 272 (Nov. 11, 2019) (initial report of the special master). Virginia Beach, by comparison, is the largest city in Virginia, fifteen times the size of Sumter County, with a total population of around 450,000. (*See, e.g.*, ECF No. 261-1 at 12.) A special master’s plan would have to undergo scrutiny and vetting by the parties, and approval by the Court before use. In *Wright*, that process took two-and-a-half months. *See* Order, *Wright v. Sumter County Board of Elections and Registration*, No. 1:14-cv-00042-WLS (M.D. Ga.), ECF No. 277 (Jan. 29, 2020) (issuing remedy). It is difficult to see this entire process beginning and concluding in less than four months, before Election Day in November 2021.

Even if the process of issuing a final remedial plan using a special master could be accomplished by November 2, 2021, that would be much too late. Drawing the plan is only the beginning. Next, the plan must be administered.



The City's Registrar, Donna Patterson, does not yet have a complete understanding of what that even would take, in part because there is not yet a remedial plan and in part because the City has used a single-member system since it assumed its current form. Just an overview of the challenge before the Registrar and her staff of 13 full-time employees underscores the difficulties. A new single-member districting scheme would have to be uploaded into the City's geographic information system (GIS) computers and then transferred to the Virginia State Department of Elections' VERIS system. (*See* Patterson Decl. ¶ 6.) The Department of Elections would then assign voters to the new City Council districts (*i.e.*, determine what voters are eligible to vote in what districts under the new scheme) and send a report to the General Registrar. (*Id.*)

The City would also have to create new ballot types for voters based on those assignments.

As Ms. Patterson explains:

Because voters in the City of Virginia Beach may be assigned to different electoral districts (*e.g.*, United States Representative, Virginia House of Delegates, Virginia Senate, City Council), it is necessary for the City to have different versions of its ballot for different voters. All ballots will have statewide and citywide offices listed, but other offices will only be listed on ballots distributed to voters who reside in the districts represented by those offices and who are therefore eligible to vote for those offices. If a local office is not elected by at-large voting, then a unique ballot will be printed for the sub-group of voters in the City who are permitted to vote for that office.

(*Id.* at ¶ 7.) Once the new boundaries for the new single-member Council districts are identified, the General Registrar and her staff will have to overlay the council districts atop the other districts up for election and create new ballot types (on top of the eight ballot types the City already has created for this year's election) to ensure each Virginia Beach voter receives a ballot that contains all the elections that voter is entitled to vote in—but not more. (*Id.* at ¶¶ 8-9.)

In administering mail-in voting, the Registrar then would have to manually match voters with the correct ballots—which also display numerous other races and candidates—and fill

envelopes with the correct ballots. (*Id.* at ¶¶ 10-11.)<sup>8</sup> In the 2020 General Election, Virginia Beach had 130,244 voters vote absentee, so the burden associated with this task is not a light one. (*Id.* at ¶ 20.) These steps must all be done well in advance of Election Day (Nov. 2), because absentee ballots must be transmitted to voters at least 45 days before Election Day. (*Id.* at ¶ 15.) And indeed, in Virginia Beach, absent uniformed service members and overseas citizens are typically emailed ballots 5-10 days *before* the start of absentee balloting to ensure the City's compliance with the federal UOCAVA statute, 52 U.S.C. § 20302(a)(8)(A), and its state-law analogue, Va. Code Ann. § 24.2-460(A).

That, in turn, means the process has to be complete substantially in advance of that date so that the ballots and envelopes are *ready* to go to voters by that date. The City's ballot-printing vendor has asked for finalized ballot types by August 16 to allow the vendor sufficient time to obtain Virginia Department of Elections approval of the ballots, and to have adequate lead time to print the ballots and deliver them to the General Registrar's office in time to allow ballots to be stuffed and mailed. (*See* Patterson Decl. ¶ 17) (explaining that her office's general practice is to have all ballots "finalized and printed by Labor Day Weekend"). This year, the City projects printing 150,000 ballots, making this not a small task. (*Id.* at ¶ 16.)

And there is more. The deadline for candidate qualification for an election held November 2, 2021 is August 13, 2021 and to qualify, candidates must themselves reside in the district and, under a new single-member system, must obtain 125 petition signatures from voters eligible to vote in the district in question. (*Id.* at ¶¶ 23-24.) Thus, potential candidates would need to know the district lines well in advance of that date to know whether they are even qualified to run and to

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<sup>8</sup> This process is made especially laborious and difficult to the extent a remedial plan adopted by the Court does not follow existing City voting-precinct boundaries. (Patterson Decl. ¶ 11.)



identify potential supporters for purposes of qualification. Additionally, the Registrar needs the information (fully uploaded in the State's computer system) for a hand check of eligibility of each signatory, person by person. (*Id.* at ¶ 24.) The harms to candidates and the voting public from rushing this process speak for themselves.

And that leads to yet another challenge: public education. The City's current at-large system has been in place since the 1960s, and the single-member-district system potentially at issue does not even exist yet. A fraction of the public would be entitled to vote in a November special election under a single-member scheme, but most would not. Both the Registrar and the Council would be required to engage in a full-court-press education effort. The failure of such an effort would be enormous confusion within the electorate and, ultimately, disenfranchisement. In Ms. Patterson's experience and view, there is insufficient time for a sufficient voter education effort to take place before November to minimize the risk of voter confusion. (Patterson Decl. ¶¶ 26-28.)

Everything written so far assumes perfect execution. And the risk of error increases as public servants are compelled to do their work under strict and unusual time pressures. This Court is no stranger to this type of error. *See Lecky v. Virginia State Bd. of Elections*, 285 F. Supp. 3d 908, 912 (E.D. Va. 2018) (recounting allegations of voters who asserted they were given the wrong ballots at polling place).

Finally, there is the compounding factor that all of that is for just *one* election. The City would have to administer a different plan in November 2022, given the intervening redistricting under the 2020 census results. The change upon change exacerbates all of the above-described problems.

**C. Courts have repeatedly permitted elections to proceed in similar circumstances.**

These problems are not new. Courts are well acquainted with them, and they have repeatedly held that a remedy can be worse than the alleged disease. Courts have, many times, found administration problems to weigh in favor of permitting an election to proceed under a challenged scheme, or even one held unlawful:

- July 7 was held too late to enjoin October 1 election. *Chisom*, 853 F.2d at 1190 (vacating *Chisom v. Edwards*, 690 F. Supp. 1524 (E.D. La. July 7, 1988)).
- May 19 was too late to interfere with November election. *Klahr v. Williams*, 313 F. Supp. 148, 152 (D. Ariz. May 19, 1970), *aff'd sub nom. Ely v. Klahr*, 403 U.S. 108 (1971).
- February 25 too late to interfere with June primary. *Cardona v. Oakland Unified Sch. Dist., Cal.*, 785 F. Supp. 837, 843 (N.D. Cal. 1992).
- March 23 too late to interfere with May 18 primary. *In re Pennsylvania Cong. Districts in Reapportionment Cases*, 535 F. Supp. 191, 195 (M.D. Pa. 1982).
- July 17 too late to interfere with November election. *Diaz v. Silver*, 932 F. Supp. 462, 469 (E.D.N.Y. 1996).
- May 28 too late to interfere with November elections. *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1362 (M.D. Ala. 1986).
- August 9 too late to interfere with November elections. *Watkins v. Mabus*, 771 F. Supp. 789, 805 (S.D. Miss. 1991).
- June 8 too late to enjoin September primary or November elections. *Ashe v. Bd. of Elections in City of New York*, 1988 WL 68721, at \*1 (E.D.N.Y. June 8, 1988).

In short, the harms inflicted on the City from mandating the use of a single-member system for use in November 2021 are severe. And they are irreparable precisely because, once the election occurs, the Court cannot go back in time and redo it under optimal conditions. This factor cuts decisively in favor of a stay.

**III. Plaintiffs Would Incur No Harm from a Stay**

A stay of the injunction would not harm Plaintiffs, because the injunction—as applied to the contemplated November 2021 special election—does not benefit Plaintiffs. Importantly, as noted

above, Plaintiffs will not oppose the relief requested in this motion and thus do not intend to argue that a stay would harm them. The record evidence further bears this point out.

First, Plaintiffs would not benefit from being served by a shorthanded Council. As explained, the Council is designed to have eleven members, is accustomed to having eleven members, and is not fully effective without eleven members. Nor could Plaintiffs colorably claim an injury tied to the size of the Council; Section 2 protections do not govern the size of an electoral body. *Holder v. Hall*, 512 U.S. 874, 881 (1994).

Second, Plaintiffs would be highly unlikely to benefit from a special election under a purported remedial plan. As of this time, there are three plans before the Court, representing good faith efforts by both sides to address the Court's liability ruling. But under *none* of these plans would Plaintiffs vote in a special election to replace Ms. Abbott. In all three plans, Ms. Abbott is designated as an incumbent in a district where no Plaintiff resides. (*Declaration of Kimball W. Brace*, attached as Exhibit 2 ("Brace Decl."), at ¶ 5.) The right to vote is personal, *Gill v. Whitford*, 138 S. Ct. 1916, 1921 (2018), so Plaintiffs would not be harmed by the conduct of an at-large special election where the alternative would be a special election in a district where they have no right to vote.

For another thing, it is unlikely that the special election would occur in a majority-minority district. In two of the three plans now before the Court, Ms. Abbott is designated as the incumbent of a majority-white district. (ECF No. 260 at 5, 7, 11, 12; Brace Decl. ¶ 6.) In one, Ms. Abbott is designated the incumbent of a district that falls right on the edge of majority-minority status. District 2 in Defendants' 10-1 Concept Plan, where Ms. Abbott is the incumbent, is only a majority-minority district under one method of calculation (total population using ACS), but not under a different method, under which it is majority-white using citizen voting age population.

(ECF No. 260 at 5, 7, 11, 12.) Defendants' expert, Dr. Lisa Handley, casts doubt on whether it would perform as a minority district. (ECF No. 260-2 at ¶¶16-19, 24-25); *see also Abbott v. Perez*, 138 S. Ct. 2305, 2332 (2018); *Harding v. County of Dallas, Tex.*, 948 F.3d 302, 309 (5th Cir. 2020).

Third, these are not problems that could be resolved through a special-master drawn plan. As explained, even accomplishing that appears unlikely, if not impossible. But even if it could be done, a special master is not legally entitled to attempt to fix these precise problems. A court-drawn plan must adhere to the policies of the state, *Perry v. Perez*, 565 U.S. 388, 393 (2012), and it is not among the policies of Virginia Beach to make an effort to include two specific individuals in a district that just happens to be set for a special election at a given point in time. There is, then, no basis to assume that, under some *other* plan *not* now before the Court, that Plaintiffs would be entitled to participate in November 2021 in a special election in a majority-minority district. That contingency is highly unlikely to occur, and it could not occur on purpose.

#### **IV. The Public Interest Weighs in Favor of a Stay**

A stay would benefit the general public; maintaining the injunction would harm the public. Accordingly, this final stay factor also cuts decisively in favor of a stay.

First, all the harm to the City would accrue equally to the public because the public constitutes the City. The public's interest lies in favor of an eleven-member Council, not a ten-member Council. The public's interest also lies in favor of being permitted to vote in an election for the vacant seat, not in being denied the opportunity to vote. And the public interest lies in favor of election order, not election chaos. All the harms identified above, Section II, *supra*, apply in full force here. The deadline for candidates to file ballot access documents is on August 13, 2021, Va. Code Ann. §§ 24.2-503 & 24.2-507, just two weeks after initial briefing is set to conclude in the remedial phase of this matter. This Court will not have an opportunity to receive meaningful

input from any special master and issue a final remedial plan until after this deadline passes. Potential candidates—even if they are able to decide to run for election and gather all necessary signatures once any remedial plan issues—will be robbed of their opportunity to engage in the level of campaigning necessary to reach the 31,000 voters in their new district, and some may be confused or otherwise disincentivized even from running. (*See, e.g.*, ECF No. 261-1 at 13) (showing citizen voting age population in least populated proposed district using ACS 2019 data). And the public would be robbed, too. It would lose promising candidates to the prohibitively punishing campaign schedule and would miss out on valuable opportunities to learn about their candidate before Election Day.

Second, the public interest would not be served by hastening an election under a plan known to violate core constitutional principles, such as the one-person, one-vote rule, which is founded in the Equal Protection Clause itself.

Third, the public interest risks substantial damage in a special election until the core legal question in this case are resolved. The remedial plans before the Court were, naturally, drawn with the purpose of remedying a Section 2 violation, which, in turn, requires a concerted effort to make sure there are sufficient districts achieving a large quantity of persons of specific races or ethnicities. (ECF No. 261 at 3) (“a complete remedy requires the creation of no fewer than three districts with majority-minority populations.”); (ECF No. 260-1 at 2.) Plaintiffs’ proposed remedial plan has three majority-minority districts with remarkably high minority percentages: District 4 has 60.30% minority population; District 7 have 58.83%; and, District 10 has 60.46%. (Brace Decl. Ex. A.) Drawing majority-minority remedial districts with even *less* minority population—as Defendants proposed—required the map drawer’s “principal purpose” and “predominant goal” to be achievement of this racial goal. (ECF No. 260-1 at ¶ 6; ECF No. 260 at

11-12.) Although this is essential for Section 2 compliance, the Supreme Court has repeatedly held that this approach to redistricting is *suspect* under the Equal Protection Clause. *Abbott*, 138 S. Ct. at 2334 (explaining how redistricting authorities are “pulled in opposite directions” by Section 2 and the Equal Protection Clause); *Miller v. Johnson*, 515 U.S. 900, 912 (1995). The choice of a majority-minority district over a non-majority-minority district itself triggers that scrutiny. *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 799 (2017) (“[I]f race for its own sake is the overriding reason for choosing one map over others, race still may predominate.”); *Cooper v. Harris*, 137 S. Ct. 1455, 1469 (2017) (applying this rule to subject to strict scrutiny, and ultimately invalidate, a district implemented with the purpose of complying with Section 2).

To be sure, race-based redistricting can be justified if a state has a substantial basis in evidence to conclude that there is a Section 2 violation, “[b]ut if not, then not.” *Id.* at 1460. The problem here is that the strong-basis-in-evidence question turns on whether coalitional claims are cognizable and, also, whether they can be proven without evidence of cohesion as to each constituency of the alleged cohesion. Only if the liability opinion is affirmed on appeal is there a strong basis in evidence for these race-based districts. If not, then a special election will violate the Equal Protection rights of Virginia Beach citizens. The risk of that harm is not worth the potential reward here, where Defendants have made out a likelihood of success on the merits.

Third, any interest in conducting an election in an equal-opportunity district is mitigated by the substantial doubt that the interest would or could be vindicated here. As shown, Ms. Abbott is not designated the incumbent in a majority-minority district (with one *arguable* exception), and it remains unknown whether any district can perform as Section 2 districts. Indeed, that cannot be known until after the remedial phase closes. Under that circumstance there is substantial doubt that there is any interest in conducting any election in a Section 2 district, and the public is better off



waiting until finality on that question is achieved, before race-based districts are used in any election.

### **CONCLUSION**

The Court should stay its injunction, or modify it, and permit the City to conduct the November 2021 special election under the at-large system.

DATE: July 7, 2021

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on July 7, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of the filing to all parties of record.

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