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

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| Latasha Holloway, et al.,<br><br>*Plaintiffs,*<br><br>v.<br><br>City of Virginia Beach, et al.,<br><br>*Defendants.* | Case No. 2:18-cv-0069 |

**DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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## SUMMARY OF THE CASE

1. This Voting Rights Act case comes before the Court after trial on a single Section 2 claim asserted by Plaintiffs Latasha Holloway and Georgia Allen ("Plaintiffs") against the City of Virginia Beach (sometimes, the "City"), its City Council and Council members in their official capacities, the City Manager in his official capacity, and the City's Registrar of Elections in her official capacity (collectively, "Defendants"). Both Plaintiffs identify as African American or Black and contend that the at-large City Council election method dilutes the votes of an alleged coalition of Black, Hispanic, and Asian voters (which they label "Minority" or "HBA").

2. The claim fails on the law and the facts. The Supreme Court has repeatedly condemned 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). But Plaintiffs ask the Court to assume that members of three *different* racial groups think alike and share the same political interests and preferences, simply because Plaintiffs assign them the label "Minority." This position unwittingly lends credence to the contentions of many federal judges that Section 2 does not countenance coalitional claims, and Plaintiffs failed at trial to meet the standards that would apply if it did. The Court is obliged to reject the claim.

## [PROPOSED] FINDINGS OF FACT

### I. Virginia Beach and the Challenged Method of Electing City Council Members

3. Virginia Beach, a cosmopolitan municipality and popular vacation destination on Virginia's southeastern coast, is the Commonwealth's most populous independent city. Joint Stipulations ¶ 6. As of the 2010 census, its total population was 437,994. *Id.* ¶ 8. White residents then composed 64.49% of the total population (and 67.38% of the voting-age population ("VAP")), Black residents 19.00% (18.10%), Hispanic residents 6.62% (5.64%), and Asian residents 6.01% (6.30%). PTX75 at 8–9. It is unknowable what the 2020 census will show of the City's demographics or the geographic dispersion of these disparate groups.

4. The City enjoys a substantial military presence, and a large portion of its populace with military ties does not have historic roots in the City, Virginia, or the American South. The Naval presence has also contributed to a vibrant Filipino community. Tr. 955:10–15 (Kidd).

5. Like the American South generally, and much of the American North, Virginia saw decades of *de jure* racial discrimination and prejudice against Black residents. *See, e.g.*, Joint Stipulations ¶¶ 36–41. Virginia Beach regrets these injustices. Nevertheless, there is no evidence that prior discrimination has impacted current electoral participation of Black voters in Virginia Beach, and Asians and Hispanics do not share this painful history. DTX83-26–27; Tr. 952:8–14, 951:24–952:2, 954:25–956:16 (Kidd).

6. The City attained its current form in 1963 through the consolidation of Princess Anne County with "the old city of Virginia Beach." *Davis v. Dusch*, 205 Va. 676, 677 (1964). The county then faced an unwanted annexation threat from Norfolk and preferred wedlock with Virginia Beach, which was then a small resort strip along the coast largely surrounded by Princess Anne County. *Id.* at 677–78; Tr. 957:18–958:14 (Kidd). Into the new City went the urban boroughs of the old city and the rural boroughs of the old county. *Dusch v. Davis*, 387 U.S. 112, 113 (1967).

7. Yet, "in order for consolidation to win approval," its proponents "would have 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*, 205 Va. at 679. They proposed a seven-borough city-council plan, demarcating the old city as one borough with five council seats and dividing the old county into six boroughs with one seat each. *Id.*; Tr. 957:11–18. The plan prevailed but was invalidated in 1965 under the recently announced one-person, one-vote principle. *See Dusch*, 387 U.S. at 114.

8. The General Assembly responded with an at-large system. Joint Stipulations ¶ 23. The Council has eleven members including the City's Mayor. Four are elected at-large without regard to residence, and seven are elected at-large but must reside, respectively, one in each of

seven residency districts. *Dusch*, 387 U.S. at 114; Joint Stipulations ¶ 24. This system, too, faced a constitutional challenge, but that challenge failed. The system, the Supreme Court held, "makes no distinction on the basis of race, creed, or economic status or 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. The system has no invidious purpose.[1]

9. The at-large system still serves this détente. Beginning in 1990, the City conducted a "comprehensive review of the then existing system of electing City Council members," seeking "views from every conceivable interested party as to the best manner to provide representation for the citizens of the City." *Lincoln v. City of Virginia Beach*, 2:97-cv-756, at 2 (E.D. Va. Dec. 29, 1997). No better option emerged. The 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." *Id.* at 3. This Court also rejected these racial gerrymanders and the Voting Rights Act lawsuit that sought to impose them. *Id.* at 11.

## II. The 2011 Redistricting of Residency Districts

10. The system *Dusch* upheld is, in essence, the system Plaintiffs challenge. But the City redraws the residency districts after each census to maintain them at substantially equal population. For assistance, the City has retained since 1990 Kimball William Brace, a redistricting consultant who has prepared "tens of thousands of redistricting plans," provided redistricting services in "more than half the nation," and given expert testimony in "over 75, 80 different court cases around the country." Tr. 542:3–8, 543:2–4, 564:3–21. When Mr. Brace is retained for partisan matters, his clients ordinarily have Democratic Party affiliations. Tr. 566:3–7, 588:20–23.

[1] Plaintiffs' expert, Dr. Allen Lichtman, cited the at-large system itself as evidence of discrimination. PTX78 at 12. *Dusch* rejected that assertion.

11. The City redistricted again in 2011. Tr. 585:3–15. In the process, it obtained input from leaders of many racial and ethnic groups, who (like all residents) had recourse to Mr. Brace's assistance in preparing proposals. Tr. 587:20–586:19. One proposal, from Andrew Jackson, a Black community leader, achieved a majority-Black residency district, but it was contorted, a block wide in places and connected only at a single point in others. *See* DTX107-013, -087 (Ex. K); Tr. 590:6–12. Mr. Jackson's "focus" was his racial, majority-minority goal. Tr. 590:7 (Brace).[2] Proposals from the NAACP bore similar flaws. Tr. 591:24–595:18.

12. In 2011, Mr. Brace determined that statistical estimation methods do not shed light on Asian and Hispanic voting patterns, since these groups are small and dispersed throughout the City. Tr. 566:8–25. Input from community leaders revealed "an actual non-connection between those communities," since "the Asian community[] tends to support Republicans, while the African-American community…, tend to vote for Democratic candidates." Tr. 611:15–612:1.[3]

## III. Geographic Residency Patterns in Virginia Beach and Potential for Combined Black, Hispanic, and Asian Electoral Opportunity in Single-Member Districts

13. Plaintiffs focus on three census categories, Black, Hispanic, and Asian, which they call together "HBA." These groups are not segregated in discrete areas but are integrated throughout the City. DTX156 at 36:14–20 (Dyer); Tr. 715:5–7 (Loyola); Tr. 905:11–14 (Kidd); Tr. 942:11–18 (Kidd). In particular, "the Asian population is widely distributed around the City.

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[2] Mr. Brace prepared the map on Mr. Jackson's behalf and at his direction. Tr. 589:5–13. Yet Mr. Jackson claimed not to remember this, or Mr. Brace's service to the NAACP, and he called Mr. Brace adversarial. Tr. 509:7–510:1. But Mr. Brace credibly denied these assertions, testifying that Mr. Jackson directed him in all particulars of "that plan." Tr. 587:20–589:10, 591:4–23; *see also* Tr. 594:7–21. Mr. Jackson's map itself displays the seal of Mr. Brace's redistricting software and was part of the City's preclearance submission to the Department of Justice. *See* DTX011-285.

[3] The City's ultimate choice to create one residency district of close to a non-white majority did not depend on a finding of Voting Rights Act factors. *See Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) (holding that states may voluntarily create majority-minority districts without a showing of compactness, cohesion, and white bloc voting). By contrast, "federal courts may not order the creation of majority-minority districts unless necessary to remedy a violation of federal law." *Id.* The City's policy choice does not absolve Plaintiffs of their Section 2 burden.

It's not concentrated in any one particular place." Tr. 575:17–19 (Brace); *see also* Tr. 614:15–22. The City's comparative integration, and lack of segregation, is a point of local pride.

14. Plaintiffs' mapping expert, Mr. Fairfax, presented illustrative districting plans of 10 single-member districts and some isolated majority-HBA districts. The Court cannot infer from these maps what options might exist as of the next election because the 2020 census is being conducted and no election is scheduled before its results are released. That aside, Mr. Fairfax was unable to draw an equally apportioned single-member district with a majority of any one minority group, Black, Hispanic, or Asian. Tr. 609:17–610:3 (Brace); DTX107-011. The districts in Mr. Fairfax's supplemental plans with the highest Black VAPs (or "BVAPs") are in the low 40% range and fall short even of a Black plurality. PTX84; PTX85; DTX107-012, -043, -057, -071.

15. The total population deviations of Mr. Fairfax's illustrative remedial plan—i.e., the percentage difference between the least- to most-populated districts—are between 7.36% (Plan 8) and 9.65% (Plan 5). *See* PTX432H, 432E (summarizing, *inter alia*, PTX80 at 17, 20 and PTX85 at 32, 34). No illustrative plan contains a total-population deviation of 1% or less.

16. Each illustrative map contains one or more alleged majority-HBA districts. But the HBA citizen voting-age populations ("CVAPs") of many are but a smidgen above 50%. *See, e.g.*, PTX75 at 20 (Plan 1); PTX85 at 17 (Plan 2); PTX80 at 3 (Plan 3); PTX80 at 10 (Plan 4); PTX85 at 18 (Plan 6). Because Mr. Fairfax utilized survey data from the American Community Survey ("ACS"), which are "estimates," Tr. 143:25–145:12 (Fairfax), and less accurate than enumerated census results, Tr. 596:1–14 (Brace), these percentages may fall, in reality, below 50%.

17. Further, the plans in Mr. Fairfax's rebuttal reports contain highly irregular districts that do not appear to be compact on visual inspection and are not shown to be under reliable compactness measures. Mr. Fairfax's "alternative 1" trades compactness in two alleged remedial districts for a slight increase in estimated HBACVAP to 51.50% and 51.64%, respectively. PTX79 at 5–6. The districts are visibly irregular. From there, Mr. Fairfax's successive remedial attempts

exhibit precipitous drops in compactness: districts snake across the city, split subdivisions, and disregard sound districting principles. *See* PTX79 at 7–10. The appendices to Mr. Fairfax's rebuttal report show low compactness scores and numerous split precincts. PTX80 at 5–7, 12–14, 19–21, 26–27, 32–33. Alleged majority-HBA districts are systematically less compact than majority-white districts. *See* PTX80 at 5, 12, 19, 26, 32. Each attempt produced higher racial percentages and lower compactness scores. Hitting a 50% racial target was his predominant purpose.

18. Yet another defect of Mr. Fairfax's original and rebuttal maps is that they place Plaintiff Georgia Allen in majority-white districts, not in majority-minority districts. Mr. Fairfax filed yet another report with yet more plans to remedy this error. PTX84 at 2. His modest changes did not meaningfully improve compactness, resolve irregularities, or align the districts with traditional redistricting principles. Nor were they meant to. Their purpose was to (1) carve Plaintiff Allen's address into a majority-HBA district, (2) add territory from the north because it had high HBA population, and (3) remove geography from the south. Tr. 190:12–191:4.

19. Mr. Fairfax conceded that many of his illustrative majority-HBA districts "hug[ged]" the City's border, Tr. 188:6, in order to collect two pockets of "HBA communities," "one at the northern end and one at the southern end," Tr. 187:17–189:2. Mr. Fairfax asked the Court to make the "assumption" that he honored traditional districting principles even though he testified that "the change to the northern end was used to allow for the District 2 to ensure that it was a majority Hispanic, Black, and Asian combined district that was comfortably above 50 percent." Tr. 193:25–194:16. Mr. Fairfax asserted that his proposals are not "actual plans that would be passed" and that he would make different choices "[u]nder normal circumstances." Tr. 207:20–208:2; *see also* Tr. 207:4–9. It is unknown whether districts drawn for actual use in accord with traditional principles can also attain, without racial predominance, HBA majorities.

20. Mr. Brace analyzed Mr. Fairfax's adjusted supplemental illustrative proposals and concluded it must have been "quite difficult to achieve the racial targets the mapdrawers ostensibly

had in mind," DTX107-013, without a "single-minded consideration" of race in disregard of traditional districting principles, Tr. 629:19–630:1, 628:25–629:9 (Brace). The majority-minority districts are underpopulated, apparently on purpose to achieve racial goals, and they do not avoid pairing incumbents, as redistricting authorities traditionally attempt to do. DTX107-013–14.

21. Further, the mere attainment of a mechanical 50%+ HBACVAP target does not equate to increased functional opportunity at the polls for the would-be coalition. In an effort to show the latter, another of Plaintiffs' experts, Dr. Douglas Spencer, presented a reconstituted election analysis, superimposing election results from City Council races onto some of Mr. Fairfax's illustrative districts. Tr. 314:16–315:4. But this effort failed to show improvement.

22. The analysis was, firstly, flawed or at least incomplete. The remedial districts split precincts, but precincts report election results; Dr. Spencer therefore needed a reliable method for disaggregating data from precincts down to census blocks and up to his illustrative districts, but he erroneously disaggregated the data down to voter-tabulation districts, using outdated information. Tr. 633:2–12 (Brace). Dr. Spencer's report also omitted information necessary to replicate his work, rendering his conclusions incapable of confirmation. DTX107-014–15.

23. The analysis, secondly, failed to establish improved coalitional opportunity. Dr. Spencer opined that *white* crossover support is responsible for the supposed improved HBA opportunity. *See* PTX77 at 32 (opining that HBA-preferred candidates are "more likely to benefit from cross-over support from white voters"). He opined that "the election preferences of white and minority voters is statistically indistinguishable or not substantively significant for all…hypothetical elections in both proposed districts," with one exception. PTX77 at 33. This does not show improved HBA opportunity, only (at best) the possibility of functional crossover districts.

24. The analysis, thirdly, did not even show improved outcomes. The candidate who won at-large in 2014 (Kane) would have won both purported remedial districts in Mr. Fairfax's initial report, one candidate who won at-large in 2010 (Bellito) would also have won both, and the

other who won at-large in 2010 (DeSteph) would have won one (District 1). PTX77 at 34. As to the supplemental plans, four of the seven contests under District 1 would have seen the same outcomes as under the at-large method, and the contests showing different outcomes occurred before 2011 and are the least probative. DTX107-015; Tr. 634:12–25 (Brace). And the outcomes in two of the three most recent contests under District 2 would have also been the same. Further, no plan shows more than two minority-preferred wins out of ten. This is no better than the current system, where two of ten seats in 2018 went to candidates Plaintiffs allege are HBA-preferred.

## IV. Alleged Voting Patterns and Preferences in Virginia Beach

25. Plaintiffs contend that HBA persons are cohesive and that white bloc voting consistently results in the defeat of HBA-preferred candidates. For these assertions, Plaintiffs rely on Dr. Spencer, who lacks degrees in either statistics or political science, Tr. 263:25–264:4, and has no teaching experience in or about Virginia or even the South. *See* PTX77 at 43.

26. Defendants' expert on voting patterns is Dr. Quentin Kidd, Professor of Political Science and Dean of the College of Social Sciences at Christopher Newport University ("CNU"), which is 20 miles from Virginia Beach. Tr. 871:16–20, 872:1–9. Dr. Kidd earned his Ph.D. from Texas Tech University in 1998 and has been on the faculty of CNU since 1997. Tr. 871:7–15, 871:23–25. Dr. Kidd has taught and researched American Politics, Citizenship/Civic Participation, Virginia Politics, Methods of Social Science Research, Quantitative Analysis, and Political Campaigns and Elections. Tr. 872:10–873:2. Dr. Kidd published a book and peer-reviewed articles on race and politics, focusing on the American South. Tr. 874:25–877:5, 873:3–9.

### A. Dr. Spencer's Erroneous Aggregation Method

27. Because the secret ballot prevents direct analysis of whether members of various racial groups tend to prefer the same or different candidates, Tr. 267:1–5, Dr. Spencer used three statistical estimation methods—homogeneous precinct analysis, ecological regression, and ecological inference—to "infer the voting behavior of demographic subgroups" by leveraging

"information about individual voting precincts." PTX77 at 4; Tr. 329:1–3, 332:17–333:23. The analysis was flawed, root and branch.

28. To begin, Dr. Spencer considered only those elections involving a minority candidate. Tr. 295:16–296:23. This error excludes 13 of the 30 contested Council elections from 2008 to 2018. Tr. 891:3–22 (Kidd). It is possible to "have cohesive voting blocs among White voters and non-White voters, regardless of whether a candidate is minority or not." Tr. 891:25–892:2. The analytic "focus ought to be on voters, not on candidates," Tr. 891:21–22, and the omission of 13 elections is material and undermines the analysis.

29. Furthermore, Dr. Spencer generated voting support estimates for white voters alone, Black voters alone, and for "All Minority Voters" (i.e., a category that combines all non-white voters), but not for Asians and Hispanics. PTX77 at 8–10; Tr. 330:3–15 (Spencer). According to the 2013–17 ACS, Black voters constitute 19.3% of the City's population, Asian voters 6.6%, and Hispanic voters 6.1%. Tr. 910:3–9 (Kidd); PTX078 at 14, Tbl. 1. Hence, Black voters make up 60.3% of the "All Minority" category; Asian, Hispanic, and other minority voters together make up 39.7%. *Id.* Dr. Spencer did not generate individual estimates of Asian or Hispanic support because these groups are too small and insufficiently concentrated to produce reliable estimates. Tr. 336:7–337:9 (Spencer). Another way to estimate the voting behavior of these groups would be through a survey. Tr. 899:5–16 (Kidd); 613:9–15 (Brace); 133:11–15 (Fairfax). Plaintiffs, however, did not survey these groups.

30. Plaintiffs failed to provide statistical evidence of Asian or Hispanic voting preferences. As Plaintiffs' expert Dr. Allan Lichtman testified, "we don't have information one way or the other on the individual behavior of Asians. *Beyond that, we can't go*." PTX430 at 120:2–13 (emphasis added). The same is true of Hispanic voters. PTX430 at 120:13–15, 225:17–21. Dr. Lichtman also testified that "political cohesiveness" is "not usually a term we [political scientists use to] describe across groups." PTX430 at 119:16–17.

31. Dr. Spencer's aggregation of three racial groups into an "All Minority Voters" category does not allow the Court to assess whether each group is internally cohesive and all three groups are together cohesive. Tr. 906:22–907:11 (Kidd). Because the Asian and Hispanic communities are much smaller than the Black community, high Black support for a given candidate can mask far lower support—or even opposition—from Asian and Hispanic voters. Tr. 910:14–24, 911:11–912:2. Subsuming Asian voters "under this larger category of 'all-minority' essentially threatens to just disappear their own independent political identity...." Tr. 912:13–18.

32. Dr. Spencer's report indicates that this misleading attribution is occurring. It is his consistent finding that Black-only voting support levels for given candidates are higher than the "All Minority Voters" support levels. For example, in the 2016 Kempsville election, Dr. Spencer calculated ecological inference (EI) support estimates for Amelia Ross-Hammond:

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| Black support (%) | 76.8 |
| All minority support (%) | 59.9 |
| White support (%) | 30.3 |

PTX77 at Fig. 4.

33. In this instance, and many others, Dr. Spencer's own results show the absence of cohesion. Because "Black support" is included within "All Minority support," the fact that "All Minority support" is far lower than "Black support" means that the support level of one or both of the other minority groups within the "All Minority support" umbrella must be significantly lower than the "All Minority support" figure. Tr. 912:6–15 (Kidd).

34. Using simple algebra, Dr. Kidd demonstrated that cohesion almost certainly does not exist across these groups. Because Dr. Spencer estimated Black support levels for candidates, and because Black voters constitute 60.3% of the "All Minority" group, Dr. Kidd could algebraically estimate the Asian and Hispanic combined support for a given candidate. Tr. 921:10–922:18. This method, for example, shows that, given the 76.8% estimated Black support for Amelia Ross-Hammond, and the 59.9% "All Minority" estimated support, the *combined* Asian and Hispanic support was only 34.4%. Tr. 922:19–924:12; DTX83-20–21; DDX2. Dr. Kidd

showed that four other candidates Dr. Spencer identified as minority-preferred, Allen (2008), White (2018), Sherrod (2011), and Jackson (2010), almost certainly received less than 50% of the Hispanic and Asian vote (and, possibly, significantly less from at least one of those groups). DTX83 at Tbl. 9 (with addition of candidate White in 2018). Tr. 928:4–22. It is, more importantly, unknowable whether both the Asian and Hispanic communities supported *any* Black-preferred candidate at meaningfully high rates.

B. Dr. Spencer's Flawed Efforts To Explain Away Mathematical Laws

35. Dr. Spencer twice attempted, and twice failed, to overcome this fatal flaw.

1. "The Logic of Equivalency Testing"

36. During discovery, Dr. Spencer produced a rebuttal report attempting to estimate Hispanic and Asian support levels. PTX81. He provided those values for one contest, but not the 12 others analyzed in his initial report. *Id.* at 8. At Defendants' request, Dr. Spencer then produced a data set on September 5, 2019, reflecting estimates for all 13 races. Tr. 367:25–368:13; PTX101. Dr. Spencer conceded that the estimates he produced were not reliable. Tr. 369:10–16.

37. Dr. Spencer created a table (Table 1) based upon those individual estimates for Asian and Hispanic support using "the logic of equivalence testing." PTX81 at 8. But Dr. Spencer did not offer trial testimony concerning equivalency testing or its results, and Plaintiffs have abandoned it.[4] *See* Pls' SJ Opp., ECF No. 118, at 37 (clarifying that Dr. Spencer's equivalency testing was intended only "to show that the individual estimates alone are not reliable measures of candidate preference" and that Plaintiffs do not rely on the method to establish voting behaviors).

38. Yet it remains noteworthy that for 10 of the 13 races, Dr. Spencer's estimate for the support levels of one or both of the Hispanic or Asian groups for the Black-preferred candidate fell below 50%. These estimates suggest markedly different candidate preferences on the part of

[4] Dr. Lichtman testified that equivalence testing was necessary to glean anything about the preferences of Asian and Hispanic voters. PTX430 at 58:12–20, 68:5–9. Dr. Spencer's abandonment of that method means Dr. Lichtman's testimony supports Defendants' position.

these three dissimilar groups. Even if these estimates cannot be proven to reflect the true support values, they cannot be *disproven* to reflect them.

2. Dr. Spencer's Improvised Opinions on Linearity

39. At trial, Dr. Spencer tried to rebut Dr. Kidd's criticisms of his "All Minority" metric by claiming for the first time—offering opinions absent from his three reports—that the ecological regression point estimates in his own report may be wrong. *See, e.g.*, Tr. 278:4–280:15. Dr. Spencer testified that ecological regression "requires you to draw a straight line through the data" and opined that "it could be the case that the actual support" levels *might* involve a "deviation from linearness." Tr. 278:21–279:8. Inferring an actual deviation from its mere *possibility*, and citing "eyeball tests" of the homogenous precinct analysis as *ad hoc* support for this theory, Tr. 281:14–15, Dr. Spencer offered the mystifying opinion that his own reported numbers of "All Minority" support are wrong and the possibility exists "that Asian and Hispanic support actually is closer to Black support than" his report showed. Tr. 286:4–8. This improvised analysis, supported only by charts Dr. Spencer scribbled on paper at trial, PTX500, is devoid of credibility and reliability.

40. One problem is that the ecological regression method is bound by the assumption of linearity, as Dr. Spencer admitted. Tr. 278:21–23. Abandoning that assumption calls *all* of *Dr. Spencer's* estimates into question—including those of Black cohesion. Tr. 938:8–9 (Kidd testifying that Dr. Spencer "was essentially…undermining his own analysis."); *see also* Tr. 285:12–13 (Dr. Spencer testifying that "ecological regression is just an estimator that has limitations"). Employing one's preferred methodology and then disavowing the results—but only where they do not support one's preferred conclusion—is unsound, to say the least.

41. Another problem is that Dr. Spencer's opinion—i.e., that All Minority Support estimates approach or exceed Black Support estimates—is totally speculative. Dr. Spencer admitted that Dr. Kidd's contrary opinion (that Asian and/or Hispanic support falls well below Black support) is "one possible explanation." Tr. 275:13–14. Dr. Spencer has not proven, to any

degree of reliability under any method, that Dr. Kidd is wrong and he is right. Indeed, Dr. Spencer admitted that a departure of linearity could *undermine* his own conclusions because some departures from linearity would show an even further divorce between Black and All Minority Support estimates. Tr. 280:3–5 ("[T]his voting support could be even much less than 70 percent."); Tr. 936:20–938:21 (Kidd agreeing). Dr. Spencer did not produce a single new estimate to accompany his *ad hoc* analysis at trial. The side bearing the burden—Plaintiffs—loses this dispute.

42. Yet another problem is that Dr. Spencer's attack on his own estimates applies only to ecological regression, which is bound by an assumption of linearity. Tr. 278:21–23. Dr. Spencer conveniently forgets that Dr. King's ecological inference (EI) method resolves the very problem Dr. Spencer purports to invent. *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." (emphasis 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., Tex.*, 964 F. Supp. 2d 686, 759 (S.D. Tex. 2013) (same). Dr. Spencer's EI analysis (which Dr. Kidd analyzed in turn) accounted for possible departures from linearity, considering "all possible lines," including curved lines. Tr. 937:17–18 (Kidd). Dr. Spencer's EI analysis, which he called "the gold standard for evaluating racially polarized voting," PTX77 at 5, shows the same pervasive divorce between Black Support and All Minority support.

43. A final problem is that Dr. Spencer's opinion retreats to his homogenous-precinct analysis, which is his least reliable method because it utilizes only the small segment of precincts that involve the extreme case of racial homogeneity. EI is "largely regarded as an improvement upon" the older estimate methods, including ecological regression and homogeneous precinct analysis. *Hall v. Louisiana*, 108 F. Supp. 3d 419, 433 n.15 (M.D. La. 2015); *Bone Shirt v.*

*Hazeltine*, 336 F. Supp. 2d 976, 1003 (D.S.D. 2004) ("Courts recently have recognized EI as a reliable improvement on ecological regression analysis."). And homogenous-precinct analysis is generally viewed as the weakest method. *See, e.g.*, *City of Eastpointe*, 378 F. Supp. 3d at 597. Further, Dr. Spencer conceded that the homogeneous precinct analysis requires precincts containing at least an 85–90% concentration of the relevant minority, Tr. 338:6–12, and he identified no precincts above 80% Black—much less Hispanic or Asian—voting-age population. Tr. 338:13–23; Tr. 942:19–943:6 (Kidd); DTX83-017. EI is the best method and defeats Plaintiffs' contentions of cohesion.

C. Qualitative Evidence Concerning Cohesion

44. Qualitative evidence further disproved tripartite cohesion. Qualitative evidence, such as public surveys, and "on-the-ground" interviews of community leaders, activists, and members, can be useful for understanding voting behavior. Tr. 899:5–21 (Kidd).

45. Based on his expertise studying Virginia politics for over 20 years, Dr. Kidd offered a qualitative assessment of Asiana and Hispanic voting patterns in Virginia Beach. Tr. 900:8–904:21. He testified that the large Filipino community "has historically been more conservative/Republican in its orientation." Tr. 900:12–17. "[T]he Fil-Am CAG, the large community organization in Virginia Beach that supports the larger Filipino community's voice in civic and political issues, for years endorsed candidates and nearly always endorsed Republicans," and "many of the community leaders in the Filipino community in Virginia Beach are vocally Republicans." Tr. 900:18–23. Dr. Kidd's report detailed examples of Filipino community endorsements for Republican candidates. DTX83-018–19, -042–43. None of Plaintiffs' experts conducted a competing qualitative analysis. Tr. 899:24–900:7.

46. Nonato "Nony" Abrajano, a leader of Virginia Beach's Filipino community, the largest of its "Asian" communities, Tr. 754:8–755:3, testified from decades of experience that Filipinos lean towards Republican and conservative candidates because of the community's

customs and traditions, shared religion (Catholicism), pro-life views, and support for the military. Tr. 755:4–10, 756:6–15, 757:10–758:12. Mr. Abrajano testified that the Filipino community does not regularly support the same candidates who receive support from the Black community. Tr. 758:14–19. Plaintiffs' witnesses agreed that Mr. Abrajano is among the "elders" of the Filipino community and receives "respect" in that role. Tr. 232:10–21, 257:1–10 (Fowler); *see also* Tr. 445:25–446:5, 450:11–19 (Strayhorn). Mr. Abrajano was the most credible witness on Filipino political voting habits, and record evidence confirms his testimony. *See, e.g.*, Tr. 611:15–612:1.

47. Benito Loyola, who identifies as Hispanic and was born in Cuba, campaigned as a Republican for congressional and state legislative offices in Virginia Beach. Tr. 708:13–709:8. He encountered numerous Hispanics and Asians who are Republicans, Tr. 714:5–8, 714:22–25, and himself received endorsements from Filipino community groups and leaders, Tr. 712:5–22.

48. Plaintiffs provided no competent lay testimony supporting their assertions of cohesion. Plaintiff Allen conceded that, in her campaign for City Council, she received no endorsement from any Asian or Hispanic community groups. Tr. 85:23–86:1, 86:8–10. The most she could say on cohesion was that "there are times when" Black residents share interests with Hispanic and Asian residents. Tr. 68:10–14, 68:18–21. She did not, however, testify that members of these groups regular support the same *candidates*. And although Ms. Allen has previously spoken out to ensure that African Americans are represented by City Council, she made no such statements regarding the Asian or Hispanic communities.[5]

49. Louisa Strayhorn testified that she believes Black, Asian and Hispanic residents have common interests because "all of them have experienced some kind of inequities in the

[5] Ms. Allen testified that she, with the Virginia Beach Concerned Citizens Coalition, advocated a change the City's election process in 2011, Tr. 45:23–46:3, yet her comments at a public hearing in July 2011 were summarized as representing her desire "to make sure that the *African American* community is represented," DTX011-159 (emphasis added). Members of the Black community, but not the Asian or Hispanic communities, advocated single-member districts and a majority-Black district in 2011. DTX162 at 61:14–62:10 (Jones); DTX160 at 128:9–129:19 (Moss).

system of government." Tr. 463:1–11. But she did not testify about how Asians or Hispanics vote. Andrew R. Jackson testified that he was able to speak some Mandarin Chinese and so connected with members of the Asian community in Virginia Beach—even though Filipinos do not speak Mandarin and are not Chinese—but said nothing about interests or candidates shared among the Black, Asian, or Hispanic communities. Tr. 526:13–527:3, 486:21–487:3.

50. The testimony of Delegate Kelly Fowler cut against Plaintiffs' allegations. She is Hispanic and Filipino and represents a portion of Virginia Beach in the Virginia House. Tr. 217:24–218:3. A Democrat, she "felt strongly" that Filipino voters "needed to" know she was Filipino, Tr. 221:5–11, since Filipinos support Republicans and only "crossover" to vote for a Democrat who is also Filipino, Tr. 220:10–17, 221:5–11. She believed this "crossover" voting was evidence that "the Filipino community voted for their candidate." Tr. 220:20–21. This means, at most, that Filipinos may occasionally join with Black voters to elect a Filipino, not that Filipinos *ordinarily* support the Democratic candidates (hence, the term "crossover"). Moreover, Delegate Fowler appears not to have obtained strong Filipino support. She characterized the Centerville voting precinct as heavily Filipino and as one of the "top crossover precincts." Tr. 243:18–244:2. But Delegate Fowler lost the Centerville voting precinct both times she ran. Tr. 619:4–620:8 (Brace). The precinct is decidedly Republican. Tr. 615:20–25, 618:1–613:3; DDX1.

D. The Absence of Significant White Bloc Voting

51. Plaintiffs also failed to establish that white bloc voting consistently results in the defeat of minority-preferred candidates. Of the 17 elections Dr. Spencer studied, he identified 13 with "minority-preferred" candidates. Seven of those 13 candidates won, and six lost. Tr. 920:13–19 (Kidd). Of the six candidates who lost, Dr. Kidd was able to demonstrate that five, as set forth above, failed to obtain even a plausible majority of the "All Minority" category. DTX83-23, Tbl. 10; Tr. 930:13–931:6. Hence, at best, Dr. Spencer's analysis identified that only one out of 17 elections he studied featured a candidate (Bullock 2010) who (1) drew majority support from each of the Black, Hispanic, and Asian communities and (2) was defeated by white-bloc voting.

DTX83-23. Moreover, of the four elections from 2012 to 2018 where Dr. Spencer claims cohesion from a 50% average support from the "All Minority" category, the purported minority-preferred candidate prevailed 75% of the time. DTX83-9, Tbl. 3.

52. Dr. Spencer's own rebuttal is not materially to the contrary: it identifies eight minority-preferred candidates from 2010 through 2018 and concedes that four prevailed, a 50% success rate by his own (flawed) account. PTX81 at 8.

## V. Plaintiffs' Various Contentions Regarding Minority Disadvantage

### A. The Muted Present Electoral Impact of Past Discrimination

53. Dr. Allan Lichtman, a Maryland resident, provided a lengthy narration of Virginia's history of discrimination against Black residents, *see* PTX78 at 5–10, which is not disputed, Joint Stipulations ¶¶ 36–42. But the Asian and Hispanic communities are relatively new to Virginia Beach and do not share that experience. Tr. 954:25–956:5, 898:20–899:4 (Kidd); DTX083-26.

54. Plaintiffs' more recent evidence is, even as to Blacks residents, much weaker. Dr. Lichtman cited *Bethune-Hill v. Virginia State Bd. of Elections*, 326 F. Supp. 3d 128 (E.D. Va. 2018), a case alleging racial gerrymandering of Virginia's state legislative districts. *See* PTX78 at 10. But that case did not even allege invidious intent, only that the General Assembly misinterpreted the Voting Rights Act in good faith. The plaintiffs in that case did "not contend, and will not seek to prove, that" legislators "acted with racial animosity and such a showing is decidedly irrelevant and unnecessary for Plaintiffs to succeed." Pls' Pre-Trial Brief, *Bethune-Hill v. Va. State Bd. of Election*, 3:14-cv-00852-REP-GBL-BMK (E.D. Va.) Dkt. No. 74 at 18 (filed June 19, 2015). Moreover, the result was inconclusive; the case was resolved on standing grounds. *See Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1956 (2019).

55. Dr. Lichtman cited a study of rental housing discrimination against Hispanics in Virginia, PTX78 at 11, but admits there were no findings as to Virginia Beach. PTX430 at 73:8–15, 80:7–15. Likewise, Dr. Lichtman admitted that an expert report, reflecting the views of a paid

expert in adversarial litigation, studying polling places in Virginia Beach, PTX78 at 17, analyzed only the effect on Blacks, whom he referred to as the "predominant minority group," to the exclusion of Asians and Hispanics. PTX430 at 88:15–16, 90:15–91:3. The expert report is not probative here. Meanwhile, Dr. Lichtman claimed that Blacks and Hispanics share the lingering effects of discrimination, but he could not say the same of Asians. PTX430 at 69:1–5.

56. Other studies purporting to evidence ongoing discrimination are not probative of shared experiences amongst Asians, Hispanics, and Blacks. PTX78 at 18–20. The studies of suspension rates Dr. Lichtman cited did not address Asians, PTX430 at 95:19–96:2, and Dr. Lichtman could not opine on whether Asian and white suspension rates differ, PTX430 at 98:1–8. Hispanic and white suspension rates were "fairly comparable." PTX430 at 97:17–22. Dr. Lichtman dismissed "whatever is going on with Asians and Hispanics" because his focus was on "what's happening to the predominant minority," the Black community. PTX430 at 98:9–11. Dr. Lichtman could not opine whether the claimed racial "imbalance" between teachers and students in Virginia Beach had any impact on Asian and Hispanic students. PTX430 at 99:22–100:6.

57. Regardless, past discrimination does not harm political participation today. Tr. 952:8–14 (Kidd); *see also* Tr. 951:24–952:2. Black and white turnout in presidential races is often the same or within the margins of error. Tr. 952:15–24, 953:19–23; DTX83-026–28. The same pattern exists between white and Asian and Hispanic voters, respectively. Tr. 953:1–10, 953:24–954:24; DTX83-29–30. Asian turnout exceeded white turnout in 2016. Tr. 954:6–14. Historical discrimination does not burden voting participation. Tr. 953:11–15.

B. The Non-Discriminatory Method of Elections

58. Dr. Lichtman cited in conclusory fashion the size and population of the at-large system as a "discriminatory feature[]," but at-large systems are not unusual, and they have benefits. Tr. 956:25–957:17; DTX83-031. While some cities have adopted single-member districts, others, like Newport News, have considered at-large races to incentivize council members to consider the

common good of the city. Tr. 959:1–7. Members of the community support the at-large system because it makes members accountable to the entire city. Tr. 758:20–759:14 (Abrajano); Tr. 699:15–19, 700:24 (Miles); *see also* Tr. 715:13–15 (Loyola) (expressing satisfaction with method of elections). Current and former members have echoed the value of representing residents from all over the City. Tr. 727:9–23 (Ross-Hammond); DTX164 at 96:14–97:7 (Wilson); DTX175 at 46:6–11 (Wood); DTX157 at 55:22–56:14 (Rouse) (explaining that he ran for at-large seat instead of district-based seat because he wanted to represent the entire city).

C. The Absence of a Candidate Slating Process

59. There is no formal candidate slating process in Virginia Beach City Council races. PTX430 at 124:20–125:4; DTX83-032. A slating process involves an organization identifying candidates and producing a "slate" or example ballot for members to take to the polls. Tr. 959:20–960:1 (Kidd); PTX430 at 126:6–10. None is present here.

60. Dr. Lichtman contended that campaign contributions among council candidates are an "informal slating process." PTX430 at 125:7–9. Yet Dr. Lichtman never before used such an analysis and could identify no uses by others. PTX430 at 125:10–126:3. Campaign contributions are not viewed as a slating process in the field of political science. Tr. 961:17–25 (Kidd).

61. Dr. Lichtman arbitrarily selected $250 as the threshold amount of contributions to be analyzed and only analyzed candidates who received two or more. *See* PTX430 at 126:17–127:9, 127:11–16. These arbitrary thresholds excluded from Dr. Lichtman's analysis several contributions to Black candidates. PTX430 at 128:3–129:19.

62. Further, contributions between candidates were an insignificant subset of the total sums raised in the relevant election cycles; it is "ineffective, at best, if it is attempting to be an informal slate[.]" Tr. 960:2–9 (Kidd); *cf.* PTX430 at 130:13–18 (Dr. Lichtman admitting he did not analyze the relative size of candidate-to-candidate contributions). In any event, Black

candidates have received these types of contributions. Tr. 960:10–961:1 (Kidd); DTX83-032–33.[6] No evidence suggests that minorities are excluded from any informal candidate slating process that might exist. Tr. 962:1–5 (Kidd). The evidence shows that Black candidates have received support from white candidates and incumbent members. *See* DTX164 at 52:15–21, 73:14–74:21, 60:13–20, 64:17–18, 66:16–67:9, 68:18–69:21 (Ms. Wilson contributed to and campaigned with Dr. Ross-Hammond in 2016, and contributed to and supported Ms. Wooten's campaign in 2018); DTX156 at 50:12–14, 51:14–19, 49:8–21 (Mayor Dyer supported Ms. Wooten's campaign in 2018); DTX163 at 26:13–19, 28:2–29:18, 31:2–11 (Ms. Abbott endorsed Mr. Rouse in 2018).

D. The Absence of Asian Socioeconomic Disadvantage

63. Dr. Lichtman compared Blacks, Asians, and Hispanics using 15 economic and educational measures. PTX78 at 28–38. But Asians score better than or comparable to whites on most. PTX430 at 133:13–19, 139:14–19, 64:11–18; Tr. 964:16–24 (Kidd). Asians exceed whites in household income and employment, and have almost identical homeownership rates. PTX430 at 133:20–134:3, 135:16–136:1; PTX78 at 29, 36. Asian students score better than or comparable to white students on five of six education measures. PTX430 at 138:11–139:1, 63:11–17; PTX78 at 33. Asians are more like whites than Hispanics or Blacks on metrics relating to poverty, food stamps, and health insurance. PTX78 at 29. There is no evidence that Hispanic, Asian, or Black voters are less able than white voters to participate in the political process. Tr. 973:8–23.

E. The Rarity and Insignificance of Racial Appeals

64. Dr. Lichtman contends political campaigns in Virginia, including Virginia Beach, have been marked by overt racial appeals. PTX78 at 39. This is overblown. The two examples involving Virginia Beach City Council elections that he referenced were isolated instances that do not prove that Council races are marked by racial appeals.

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[6] While Dr. Lichtman contended that Dr. Kidd's analysis omitted some contributions, they were insignificant relative to the millions raised in the analyzed elections. Tr. 961:6–16 (Kidd).

65. The first, involving Louisa Strayhorn, occurred over twenty years ago. Tr. 966:24–967:12 (Kidd).

66. The second, involving Will Sessoms' 2008 mayoral campaign, is not a racial appeal but an effort to utilize a photo with President Obama to *help* a candidate. Tr. 968:17–969:22 (Kidd). Racial appeals involve an attempt to "convey all the worst stereotypes of a character, of whoever the character – the focus of the appeal is and trying to convey all of those negative connotations onto the candidate that you're opposing in that racial appeal…a racial appeal is a negative thing." Tr. 966:6–18; *see also* PTX430 at 158:3–7. This was not a racial appeal. Tr. 969:8–22; Tr. 995:24–996:2; PTX430 at 157:3–9 (conceding Black support for Mayor Sessoms).

67. Other examples, while they should be condemned, were not City Council elections, and were not successful and were rejected by the community. *See* Tr. 967:13–969:16 (Rocky Holcomb campaign). They are not probative of local election dynamics. One contended example identified by Delegate Fowler during trial met a familiar fate; the appeal sparked outrage, it was broadly condemned, and the candidate who issued the appeal lost. Tr. 250:25–251:10, 252:7–10.

F. Minority Candidate Success

68. The City Council now has two Black members.[7] This is probative evidence that the at-large scheme is not dilutive. But Dr. Lichtman contends they were elected under "special circumstances." PTX78 at 45; PTX430 at 174:17–175:7. Not so.

69. Plaintiffs filed the amended complaint governing this suit a week *after* the 2018 election, and there is zero evidence that this lawsuit, initially filed *pro se*, impacted the races. Tr. 971:17–22 (Kidd). Neither Rouse nor Wooten was aware of the suit when they ran. Tr. 403:25–404:11 (Wooten); DTX157 at 11:2–4 (Rouse). Dr. Lichtman has no evidence of any "overt conspiracy" to elect Mr. Rouse and Ms. Wooten after the filing of this action. PTX430 at 190:1–

[7] Further, a Hispanic, Rita Belitto, previously sat on the Council. DTX175 at 49:16–22 (Wood). Plaintiffs' assertion that no Hispanic has ever prevailed in a Council race is therefore incorrect.

7. No one from City Council asked Wooten or Rouse to run for City Council. Tr. 402:23–24 (Wooten); DTX157 at 37:9-11 (Rouse). Dr. Lichtman contends that Mr. Rouse and Ms. Wooten received "unusual" support from white voters and donors. PTX430 at 163:2–12; PTX78 at 46–49. This is evidence that voting is not polarized, not of a conspiracy.

70. Dr. Kidd, who visited Virginia Beach for work once or twice a week before the pandemic and is well-informed and engaged in local politics, had not heard of this lawsuit before he was contacted to serve as an expert. Tr. 971:7–16, 1006:8–13. This lawsuit was not a significant issue in Virginia Beach during the 2018 election. Tr. 972:4–973:7.

71. Dr. Lichtman claimed the financial contributions Mr. Rouse and Ms. Wooten received from white donors was "unusual." But Mr. Rouse's largest donor was Bruce Smith, a Black businessman, NFL Hall of Famer, and fellow Virginia Tech alumnus. PTX430 at 175:8–176:14; PTX78 at 57–58. And Dr. Lichtman did not inquire as to any other possible explanations for contributions. PTX430 at 178:22–180:10. Dr. Lichtman did not look at the facts, generally, but rather looked only at race. PTX430 at 180:7–10, 184:1–7. Dr. Lichtman did not see any public statements by donors that referenced this lawsuit, and had no evidence donors were aware of this lawsuit. PTX430 at 169:5–9, 186:8–17, 184:1–7. And the white donors who gave to Mr. Rouse and Ms. Wooten were not the same donors. PTX430 at 185:21–22. It is demeaning to these candidates to suggest that their success is the result of anything but their effort and merit.

72. Dr. Lichtman contended no Black candidate has won reelection, PTX78 at 45, but Ms. Wooten was reelected in the November 3, 2020, general election.[8] And two Black candidates for City Council who were unsuccessful in their campaigns testified that they did not believe they lost their election or reelection because of their race. Tr. 684:3–11 (Miles); Tr. 729:24–730:1

[8] The Court may take judicial notice of the November 3, 2020, election results, including that Sabrina Wooten was re-elected. *See, e.g.*, *Schaffer v. Clinton*, 240 F.3d 878, 885 n.8 (10th Cir. 2001); *Libertarian Party v. D.C. Bd. of Elections & Ethics*, 768 F. Supp. 2d 174, 177 n.3 (D.D.C. 2011).

(Ross-Hammond). Dr. Lichtman further contended the House of Delegates districts encompassing part of Virginia Beach have never elected Asian representatives, PTX78 at 45, ignoring Plaintiffs' own witness, Delegate Fowler, and Ron Villanueva, a Filipino-American who won the same House district multiple times, Tr. 245:4–14 (Fowler), and was also elected and re-elected to the Virginia Beach City Council before his election to the House. *See* Joint Stipulations ¶ 25; PTX78 at 17.

G. The Council's Responsiveness

73. The overwhelming evidence shows that the City Council is responsive to Black, Hispanic, and Asian residents. The City Council unanimously supported the African American Cultural Center, at the request of the Black community, Tr. 95:6–10 (Allen); 733:21–736:10 (Ross-Hammond), and donated land valued at $1.7 million, Tr. 94:25–95:1 (Allen); 736:11–22 (Ross-Hammond). The City Council unanimously granted the land tax-exempt status. Tr. 736:23–737:9. The City continues to support the center in various ways, including through a public-private partnership. Tr. 735:3–4, 737:10–738:11. The City Council established the Minority Business Council in 1995 to improve minority participation in contracting. Tr. 398:12–23 (Wooten); Tr. 464:16–465:3 (Strayhorn); Tr. 689:5–15 (Miles). The Minority Business Council provides tools and information to small, women, and minority-owned ("SWaM") businesses to be competitive in pursing contracts with the City. Tr. 686:16–689:4. The City provides support staff to the Minority Business Council, utilizes the database of SWaM firms to recruit minority businesses to bid on city contract opportunities, and holds contractors accountable under a SWaM utilization requirement. Tr. 690:21–693:14, 694:24–695:19. The City Council also approved and funded a Disparity Study in July 2017,[9] Tr. 400:1–9 (Wooten), costing $475,000, Tr. 405:24–406:3. The

[9] Through the Disparity Study, the City learned that it had achieved its 10% minority contracting goal over a 5-year period, Tr. 813:16–814:4, 815:8–17 (Adams), that it had overutilized Asian-American owned businesses, but underutilized other minority owned businesses, Tr. 814:12–815:1, 816:8–16, 834:19–835:15, and that the appropriate aggregate minority owned business contacting goal is 12%, Tr. 814:3–17. The Voting Rights Act does not guarantee minority opportunity or success in public contracting.

first council member to advocate for the disparity study was Jessica Abbott, a white councilmember who defeated Dr. Ross-Hammond in 2016. DTX163 at 111:6–9 (Abbott). Ms. Abbott supported a disparity study during her 2016 campaign, DTX163 at 91:17–92:6, and spoke in favor of the study at marches in 2017 and 2018, DTX163 at 108:22–110:12.

74. In 2019, the City Council approved a $30,000 budget item to monitor progress in minority contracting. Tr. 407:5–8 (Wooten). Ms. Wooten proposed increasing the City's minority contracting goal from 10% to 12%, and this was unanimously approved. Tr. 408:3–13. Also approved was Ms. Wooten's request to implement the Disparity Study's recommendation to hire an additional staff member to work in the SWaM office. Tr. 389:15–390:17. The City Council unanimously adopted a race-conscious remedial program called "Project Goals" in June 2020 to address the concerns and recommendations of the Disparity Study. Tr. 408:14–409:12. The City Council unanimously adopted a Sheltered Bidding Program in June 2020 to enhance opportunities for minority contractors. Tr. 409:13–410:12. The City Council unanimously adopted an Enhanced Subcontracting Program in June 2020. Tr. 410:13–412:1. The City debarred two contractors who failed to satisfy minority contracting obligations. Tr. 826:14–23 (Adams). Ms. Wooten is satisfied that the Council has adopted the Disparity Study's most significant recommendations and that City staff members are moving in the right direction to implement the Council's goals. Tr. 407:25–408:2, Tr. 412:2–13; *see also* DTX157 at 106:1–4 (explaining there were no actions Mr. Rouse had proposed related to the disparity study that had not yet been acted on by Council). The City is a leader in this area, and its minority participation rate is ahead of Virginia's. Tr. 843:11–844:4 (Adams); *see also* Tr. 693:23–694:12 (Ms. Miles is unaware of any other city in the region with a minority business council or with programs in place to provide meaningful assistance to minority businesses).

75. Council members' phone numbers are posted to the City's website and regularly given out by City Clerk's office. Tr. 778:18–779:7 (Barnes). Agendas are made publicly available

through distribution lists and on the City's website. Tr. 780:7–784:7. The City appoints personnel to handle citizen concerns. Tr. 784:10–21. Anyone may speak at many council meetings, Tr. 785:8–12, without regard to race or ethnicity, Tr. 787:12–788:8. Members hold townhall meetings throughout the City to engage and inform residents of City business. DTX156 at 20:10–21:16 (Dyer). The Minority Business Council gives the Council annual briefings and communicates to it through a liaison member. Tr. 788:9–15, Tr. 788:23–789:8 (Barnes). The Human Rights Commission appears at Council meetings and also communicates through a liaison member. Tr. 789:9–21. The African American Roundtable appears at Council meetings, Tr. 789:22–790:5, as does the Interdenominational Ministers Conference, Tr. 790:6–16. The City supported Dr. Ross-Hammond's efforts with resources and staff to start up an annual workshop for SWaM businesses, and to secure $50,000 from the City for a partnership with Hampton University to benefit these businesses. Tr. 730:21–732:6, 732:12–19, 733:3–6 (Ross-Hammond). The Something in the Water Festival, first held in April 2019, was created by Pharrell Williams and supported by the City Council—including through a $250,000 sponsorship—and the City Manager to provide programming for Virginia Beach visitors—many of whom are Black—during College Beach Weekend. Tr. 459:14–461:24, Tr. 473:11–474:24 (Strayhorn); *see also* DTX157 at 112:10–17.

76. Mr. Abrajano finds the Council very responsive to Filipino concerns. Tr. 759:15–24. Mr. Loyola is satisfied with the service the City has provided and finds Council responsive. Tr. 715:1–4, 719:4–6. Ms. Strayhorn was appointed to a City task force in regard to College Beach Weekend and observed positive interactions between Virginia Beach Police and visitors, stating "I was happy police were respectful to the students." Tr. 472:2–473:10. Delceno Miles, a Black leader who has supported the NAACP, Tr. 106:6–107:13 (Allen), and served on the Minority Business Council for nearly a decade, Tr. 685:21-22, 686:12–15 (Miles), has benefited from the City's utilization requirements as a SWaM-certified business, Tr. 693:15–22, Tr. 692:16–24. Ms. Miles does not believe the contracts she earned were of inferior quality. Tr. 696:14–16.

77. Plaintiffs and some of their witnesses assert that the Council could have done better in achieving goals favored by some Black residents, but this misses the forest for the trees. The Council is highly responsive. There is no right, legal or otherwise, for a group to obtain everything it requests or desires from a representative body.

78. Dr. Lichtman ignored that evidence. He did not examine the City's boards and commissions (their racial makeup or otherwise). PTX430 at 196:1–9. Dr. Lichtman criticized the racial composition of the Police Department but admitted ignorance of the City's effort to recruit minorities. Lichtman 199:6–16. Dr. Lichtman did not examine the Minority Business Council, PTX430 at 200:14–20, the Vision 2040 Committee, PTX430 at 200:22–201:4, or the Virginia Beach Human Rights Commission, PTX430 at 203:5–8. Dr. Lichtman relied on the disparity study as evidence of non-responsiveness, but the Study is evidence of responsiveness, and he was, besides, ignorant of the City's aspirational goals. PTX430 at 205:12–18.

## [PROPOSED] CONCLUSIONS OF LAW

### I. Plaintiffs' Voting Rights Act Claim Fails on Every Element

A. The Legal Standard

79. A Section 2 plaintiff must establish three 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." *Thornburg v. Gingles*, 478 U.S. 30, 51–51 (1986). "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 County, N.C.*, 99 F.3d 600, 604 (4th Cir. 1996). "In this analysis, courts should consider the factors set forth in the Senate Judiciary Committee Majority Report…accompanying the 1982 amendment to Section 2 to determine whether, under the totality

of the circumstances, Section 2 has been violated." *Levy v. Lexington Cnty., S.C.*, 589 F.3d 708, 713 (4th Cir. 2009). "[A]t-large elections[] may not be considered *per se* violative of § 2." *Gingles*, 478 U.S. at 46.

B. The Claim Fails Under the First *Gingles* Precondition

80. A Section 2 plaintiff must establish that "minorities make up more than 50 percent of the voting-age population in the relevant geographic area," *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009), that the group is "geographically compact," *Gingles*, 478 U.S. at 50, and that an "alternative to the districting decision at issue would…enhance the ability of minority voters to elect the candidates of their choice," *Abbott v. Perez*, 138 S. Ct. 2305, 2332 (2018).

1. Plaintiffs' Coalitional Claim Is Not Cognizable Under Section 2

81. Plaintiffs failed to prove that "a class of citizens protected by" the Voting Rights Act, 52 U.S.C. § 10301(a), constitutes at least a 50% plus one majority in a single-member district. Plaintiffs identify as Black or African American, and they have presented no "reasonable alternative," *Holder v. Hall*, 512 U.S. 874, 880 (1994), demonstrating that Black voting-age persons can constitute a majority in even *one* single-member district. DTX107-011–12. Instead, Plaintiffs have alleged a "coalitional" claim, contending that multiple groups should be combined together to achieve a 50% plus one voting-age majority. *See League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 986 F.2d 728, 786 n.43 (5th Cir. 1993).

82. But so-called "coalitional" claims are not cognizable under 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 v. Kent Cnty.*, 76 F.3d 1381, 1386 (6th Cir. 1996). 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) (emphasis added). A claim that persons of many races are prevented from electing their preferred candidates is a political claim, not a racial claim. *Clements*, 986 F.2d at 786 n.43; *Campos v. Cty. of Baytown, Tex.*, 849 F.2d 943, 945

(5th Cir. 1988) (Higginbotham, J., dissenting from denial of rehearing en banc). *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 894 (5th Cir. 1993) (en banc) (Jones, J., concurring). Further, the statute "consistently speaks of a 'class,' in the singular," affording protection to any "citizen" on "account of" that citizen's race, color, or language-minority status. *Nixon*, 76 F.3d at 1386–87; 52 U.S.C. § 10301(a); *Clements*, 999 F.2d at 894 (Jones, J., concurring). It does not speak of coalitions.

83. In addition, the statutory definitions preclude coalition claims. Section 2 was amended in 1975 to include "language minorities," 52 U.S.C. § 10303(f), which the statute defines to mean "persons who are American Indian, Asian, Alaskan Natives or of Spanish heritage," 52 U.S.C. § 10310(c)(3). "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). "By negative inference, Congress did not envision that each defined group might overlap with any of the others or with blacks." *Id.*

84. Congress made findings to support enacting Section 2 protections for Black voters, *see Jones v. City of Lubbock*, 727 F.2d 364, 374 (5th Cir. 1984), and for extending those protections to language minorities, *see* 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. The scope of congressional findings limits the permissible scope of the Act, because these findings are necessary to Congress's enforcement of the Fourteenth and Fifteenth Amendments. *See, e.g., Johnson v. Governor of State of Fla.*, 405 F.3d 1214, 1231 (11th Cir. 2005); *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 368 (2001); *Campos*, 849 F.2d at 945 (Higginbotham, J., dissenting from the denial of rehearing en banc).

85. Coalitional claims conflict with the statutory scheme and purpose. For one thing, the coalitional theory of Section 2 may justify discriminatory voting systems. *Campos*, 849 F.2d at 944 (Higginbotham, J., dissenting from denial of rehearing en banc). And coalition claims can

easily be abusive, as members of one group can utilize the theory to attempt to "increase their opportunity to participate in the political process at the expense of members of the other minority group." *Clements*, 986 F.2d at 786 n.43. Moreover, allowing some groups (but not all) "to further their mutual political goals" (if such mutual goals even exist) hijacks Section 2 for partisan ends, which was neither Congress's purpose nor within its power. *Nixon*, 76 F.3d at 1392.

86. Coalition claims must be rejected for the reasons the Supreme Court rejected crossover claims. *Bartlett*, 556 U.S. at 13–25. *Bartlett* read the Act's coverage to reach "African-Americans standing alone," protecting only a minority group's opportunity to "elect that candidate based on their own votes and without assistance from others." *Id.* at 14; *see also id.* at 20; *Hall v. Virginia*, 385 F.3d 421 (4th Cir. 2004). So too here. And *Bartlett*'s concern for constitutional doubt applies with equal force here, where a coalition claim risks inundating every redistricting process with racial considerations and concerns. *Id.* at 21.

2. Plaintiffs' Coalitional Claim Fails Under the First *Gingles* Precondition

87. Even if coalitional claims were cognizable, Plaintiffs fail to establish that "All Minority" districts of at least 50% plus one HBACVAP can be created.

(a) Plaintiffs' Illustrative Districts Will Not Prove Workable in Any Future Election

88. Plaintiffs attempt to establish the first *Gingles* precondition through illustrative remedial districting plans of 10 single-member districts. But these plans establish, at most, what could have been drawn in the past, not what can be used in future elections. They therefore do not establish the first *Gingles* precondition. The remedial plans are drawn to equalize district populations under results of either the 2010 census or the ACS results from the 2010 decade. But the final elections of the decade have occurred, and no future elections are scheduled until 2022. The remedial districts are not "likely to be legally enforceable" after the new census, *Georgia v. Ashcroft*, 539 U.S. 461, 489 n.2 (2003), and a new plan must be configured under the 2020 census results, Va. Code § 24.2-304.1(C). A plan that does not comply with the equal-protection clause

cannot constitute an acceptable Section 2 remedy. *Cane v. Worcester Cnty., Md.*, 35 F.3d 921, 927 (4th Cir. 1994). Plaintiffs have therefore failed to establish the first *Gingles* factor by a preponderance of the evidence. *Bartlett*, 556 U.S. at 19–20. And, because this showing goes to injury-in-fact, causation, and redressability, Plaintiffs' failure defeats their standing.

(b) Plaintiffs' Alternatives Fail the One-Person, One-Vote Standard

89. Plaintiffs' illustrative districts fail the first *Gingles* precondition for the additional reason that they do not show that a properly apportioned, court-imposed plan can be drawn at a majority HBACVAP. Court-imposed maps are subject to a "de minimis" population-deviation standard. *Connor v. Finch*, 431 U.S. 407, 413 (1977). Plaintiffs' remedial proposals do not meet this "de minimis" standard; they have deviations of more than 7%. *See supra* ¶ 15; *Connor*, 431 U.S. at 418 n.17 ("The Court refused to assume in *Chapman v. Meier* that even a 5.95% deviation from the norm would necessarily satisfy the high standards required of court-ordered plans.").

90. To be sure, if the Virginia General Assembly fulfilled the task of remedying a proposed violation after a finding of liability, it could in theory implement a map with a total 7% deviation. But this is not a reason to allow Plaintiffs an 7% total deviation; Plaintiffs came to court, not the legislature. The Court is required to ensure itself that it can remedy a supposed violation, *Hall*, 385 F.3d at 428, and it cannot satisfy this requirement with Plaintiffs' illustrative plans.

(c) Plaintiffs' Alternatives Do Not Establish the First *Gingles* Precondition

91. Plaintiffs' various illustrative plans fail to afford, by a preponderance of the evidence, an affirmative answer to the relevant question: "Do minorities make up more than 50 percent of the voting-age population in the relevant geographic area?" *Bartlett*, 556 U.S. at 18.

92. First, Plaintiffs' illustrative districts do not establish that two districts can be drawn to cross the 50% threshold (measured even under the erroneous "minority" metric) under the 2010 Census results. Plaintiffs contend that two remedial proposals in some alternative possibilities cross that threshold under various subsequent releases of the ACS survey results, but the 2010

census controls the redistricting at present. Although it is necessary to use ACS data to establish a CVAP majority, *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 429 (2006) (hereinafter "*LULAC*"); *Perez v. Pasadena Indep. Sch. Dist.*, 165 F.3d 368, 372 (5th Cir. 1999), this is not sufficient. No court has allowed a purported 50% majority under the ACS to satisfy the first *Gingles* element when the district falls short under the most recent census results.

93. Second, the HBACVAP percentages in Mr. Fairfax's various proposed remedial districts are "estimates" only, *see, e.g.*, Tr. 143:25–145:12, and are sufficiently low that these proposed remedial districts cannot be proven to cross the 50% mark. Plaintiffs suggest that districts drawn below a majority are sufficiently close to the majority line to establish the first *Gingles* precondition, but the Supreme Court has established a bright-line rule, *Bartlett*, 556 U.S. at 18, and Plaintiffs' showing falls short. *See, e.g.*, *Negron v. City of Miami Beach, Fla.*, 113 F.3d 1563, 1567 (11th Cir. 1997) (finding plan with a 48.45% minority CVAP failed the first *Gingles* prong).

94. Third, Mr. Fairfax attempted to address this problem through various alternative plans presented in a rebuttal report and a supplemental report. But he could only ratchet up the minority percentages in his proposed illustrative districts at the detriment of compactness and traditional districting principles. A remedial district must be "geographically compact." *Gingles*, 478 U.S. at 50. Mr. Fairfax's alternative districts, and their modified forms, are highly irregular and are visibly non-compact. They gather in "disparate and distant communities" across the city for a racial purpose. *LULAC*, 548 U.S. at 430 (internal quotations omitted).

95. To be lawful under *Gingles*, proposed districts must comport with "traditional districting principles," including "compactness, contiguity, and respect for political subdivisions"; "avoiding contests between incumbent representatives"; "not disrupting preexisting electoral minority-opportunity districts"; and "maintaining communities of interest and traditional boundaries[.]" *Gonzalez v. Harris Cty., Tex.*, 601 F. App'x 255, 259 (5th Cir. 2015). Mr. Fairfax's districts, or at least his alternative districts, do not comply with these principles. Mr. Fairfax

concedes that he was attempting to achieve the maximal racial percentages. *See supra* ¶¶ 17–20; *see also Cooper v. Harris*, 137 S. Ct. 1455, 1475 (2017). Mr. Fairfax's remedial proposals, particularly his alternative proposals, are racial gerrymanders that cannot establish the baseline of the first *Gingles* precondition. *See Abbott*, 138 S. Ct. at 2314. Indeed, Mr. Fairfax admitted that they are unfinished and not fit for use in real-world elections. Tr. 207:20–208:2, 207:4–9.

96. Plaintiffs contend that race-based districting is justified because they are attempting to establish a Section 2 violation, but the argument is circular. They cannot establish a Section 2 violation with non-compact districts that do not honor traditional redistricting principles. *See Shaw v. Hunt*, 517 U.S. 899, 916 (1996); *LULAC*, 548 U.S. at 430.

(d) Plaintiffs Fail To Establish That Their Proposed Remedial Districts Constitute Functional and Effective Coalitional Districts

97. Plaintiffs also fail to establish that their illustrative districts would perform as effective coalitional districts. It is not sufficient for a Plaintiff to establish that a 50% majority may be reached in a single-member district; a Section 2 plaintiff must establish that an alternative map creates "an increased opportunity." *Harding v. County of Dallas, Tex.*, 948 F.3d 302, 309 (5th Cir. 2020). This standard is not met "if the alternative to the districting decision at issue would not enhance the ability of minority voters to elect the candidates of their choice." *Abbott*, 138 at 2332. Plaintiffs fail to meet this standard. Plaintiffs rely on Dr. Spencer's recompiled election analysis to demonstrate an improvement of opportunity for the so-called "minority" coalition. PTX87 at 4–15. But that analysis is deficient.

98. First, fundamental assumptions of the analysis are not disclosed. Dr. Spencer matches election return data, reported at the precinct level, with census blocks, established by the Census Bureau, and it is unclear what methodology he utilized.

99. Second, there is no meaningful showing of effectiveness. *See Abbott*, 138 S. Ct. at 2332. The analysis show "only that lines could have been drawn elsewhere, nothing more." *Johnson v. De Grandy*, 512 U.S. 997, 1015 (1994). Dr. Spencer relies on the contorted notion that

his illustrative remedies perform better than the challenged system because so-called "minority-preferred" candidates "would either increase their margin of victory" or "shrink their margin of defeat." PTX87 at 7. But Section 2 does not guarantee the right of voters to win or lose elections by purportedly ideal margins.

100. Third, the analysis does not establish that the illustrative remedial districts are effective as *coalition* districts. Dr. Spencer admits that his alleged improved electoral outcomes will occur because Black-preferred candidates are "more likely to benefit from cross-over support from white voters." PTX77 at 32. This alone is fatal because *Bartlett* rejected the theory that Section 2 requires the creation of crossover districts. 556 U.S. at 25. Stated differently, Section 2 does not afford a right to a district facilitating a cohesive group of Black and white voters to elect their candidates of choice. The illustrative districts are crossover districts by another name.

C. The Claim Fails Under the Second *Gingles* Precondition

101. Under the second *Gingles* precondition, a Section 2 plaintiff must show that members of the relevant minority group "constitute a politically cohesive unit." *Gingles*, 478 U.S. at 56. The Supreme Court has emphasized that "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 v. Reno*, 509 U.S. 630, 653 (1993) (citing *Growe v. Emison*, 507 U.S. 25, 40–41 (1993)). Plaintiffs here failed to prove that any of the individual groups is internally cohesive or that all three are together cohesive.

1. Plaintiffs Fail to Prove Coalitional Cohesion

102. If a coalition claim is even cognizable, the cohesion standard is strict. In *Growe*, the 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. "[W]hen 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.*

103. Plaintiffs pressing a coalitional claim must establish that members of each constituent group are cohesive with other members of their own group and with members of all other groups in the alleged coalition:

> [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). There is no other plausible way to fashion the cohesion test. Any other approach would undermine the very theory underpinning the coalitional claim itself: that most members of each group in the coalition suffer dilution, not simply that members of only one group, or some, in the coalition suffer dilution.

104. Other precedents indicate that cohesion must be established for each group in an alleged coalition. *See, e.g.*, *Concerned Citizens of Hardee Cnty.* v. *Hardy Cnty. Bd of Commr's*, 906 F.2d 524, 526–527 (11th Cir. 1990) (rejecting coalitional claim where plaintiffs failed to prove cohesion between Black and Hispanic groups in the coalition); *Campos v. Cty. of Baytown, Texas*, 840 F.2d 1240, 1245 (5th Cir. 1988) ("if one part of the group cannot be expected to vote with the other part, the combination is not cohesive"); *Badillo v. City of Stockton*, 956 F.2d 884, 891 (9th Cir. 1992) (district court "found that plaintiffs' testimony...failed to prove that blacks and Hispanics were politically cohesive, either when combined or when considered separately"); *Huot v. Cty. of Lowell*, 280 F. Supp. 3d 228, 235–36 (D. Mass. 2017) (requiring plaintiffs to show cohesive coalition among the member groups in the coalition).

105. In this case, Plaintiffs provide no evidence that a majority of Asian and Hispanic voters favor the same candidates Black voters favor, that a majority of Black and Hispanic voters favor the same candidates the Asians favor, and that a majority of Black and Asian voters favor the same candidates that Hispanics favor. Instead, their statistical analysis lumps all of these groups together into an indiscriminate "All Minority" category and reports estimates of voting behavior

attributed to *the entire group*. These aggregate datapoints prove nothing about the preferences of the three constituent groups—and, in fact, could even be masking polarization among them.[10] For example, the (smaller) Asian community could consistently be voting against Black-preferred candidates, yet be counted as *supporting* the Black-preferred candidates because their numbers are too small to drag the "All Minority" average below 50%. By discounting the actual preferences of each group, an aggregation-based approach affirmatively undermines the entire premise of the coalitional theory—that members of each group suffer vote dilution.

106. These assumptions are, in fact, affirmatively undone by Plaintiffs' own evidence. Dr. Spencer included separate point estimates of support levels for all minorities (including Blacks) combined and, separately, for Black voters alone. Black support is consistently higher—often much higher—than "All Minority" support. As a matter of basic math, the Asian and/or Hispanic support must be dragging the combined average down. Stated differently, Plaintiffs' data proves some meaningful level of polarized voting among these minority groups—not cohesion.

107. Dr. Spencer attempted various workarounds to this fundamental flaw but, as discussed, he could not refute the mathematical certainty that, when one group's support level is higher than the combined average, at least one of the other groups' support level must fall below the combined average. If, by way of example, the average height of three persons is five feet tall, and one of them is known to be six feet tall, then one or both of the two other persons must be shorter than five feet tall. The principle here is no different.

108. And there is more. Antecedent to Plaintiffs' burden to prove cohesion among the three groups is their burden to demonstrate that each group is cohesive within itself. As the Supreme Court admonished in *Growe*, coalitional claims implicate a heavier burden than do

[10] Dr. Spencer's equivalency-testing estimates found support levels of one or both of the Hispanic or Asian groups for the Black-preferred candidate below 50%, signaling polarization, not cohesion. Although Dr. Spencer abandoned this method, he cannot prove that the estimates his own method produced are wrong. They are as likely correct as any other guess Plaintiffs proffer in this case.

single-race claims. Yet Plaintiffs utilize the "All Minority" approach to compensate for their failure to meet the minimum requirements of a single-race claim. For example, plaintiffs bringing a Section 2 claim on behalf of Asians alone would be obligated to prove that the Asian community is cohesive unto itself; to assume as much—that Chinese and Filipinos, Japanese and Koreans, share political preferences—would be racial stereotyping. Yet Plaintiffs sidestep that showing, assuming that their coalitional claim is exempt from ordinary Section 2 scrutiny. Binding precedent disagrees. And Defendants' evidence raised serious doubts about whether Filipinos are cohesive with other Asian voters, much less Black or Hispanic voters, and whether Cubans are cohesive with other Hispanic voters, much less Black and Asian voters.

109. The qualitative evidence further undermines Plaintiffs' assertion of cohesion. *See Sanchez v. Bond*, 875 F.2d 1488, 1494 (10th Cir. 1989) ("The experiences and observations of individuals involved in the political process are clearly relevant to the question of whether the minority group is politically cohesive."). Credible evidence from community leaders shows that Asians, Hispanics, and Blacks do not generally prefer the same candidates at the polls. This was the direct testimony of Mr. Abrajano, *supra* ¶ 46, Mr. Brace, *supra* ¶ 12, and Dr. Kidd, *supra* ¶ 45, and others, and Plaintiffs presented no testimony that credibly cuts against that testimony. Even Plaintiffs' sole witness on this issue, Delegate Fowler (D), repeatedly referred to what she perceived as Filipino support for her (which appears modest at best) as "crossover" voting, *supra* ¶ 50, an admission that Filipino voters in Virginia Beach ordinarily do not prefer Democratic or liberal candidates, as Black voters do. Plaintiffs sponsored no other witness who testified about Black, Asian, and Hispanic shared voting preferences.

110. Plaintiffs' failure to prove cohesion—and the deleterious consequences of that failure—are difficult to overstate. An error in finding cohesion where it does not exist imposes a severe and unjustifiable injury on members of those groups wrongly believed to be cohesive with other groups. To purposefully submerge those persons (here, Asians and possibly Hispanics) into

districts predominantly controlled by the dominant minority group (here, Blacks) perpetrates, rather than ameliorates, vote dilution and itself amounts to "a denial or abridgement of the right of…citizen[s] of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). For the Court to rule in Plaintiffs' favor would itself work a violation of the Act.

111. This case fares even worse than a coalitional claim recently rejected for a failure to establish cohesion. *Kumar v. Frisco Indep. Sch. Dist.*, -- F. Supp. 3d --, 2020 WL 4464502, at *45–48 (E.D. Tex. Aug. 4, 2020). The plaintiff's expert in *Kumar* did far more than Dr. Spencer, analyzing the estimated minority support of *each* racial group of the alleged coalition. *Id.* at *42–45. But the evidence showed "that the African American vote in those cases was practically split in thirds," establishing that this group was not even internally cohesive, and it further showed that Asian and Hispanic voters did not consistently vote for the same candidates preferred by other groups. *Id.* at *45. In this case, Plaintiffs provided no evidence that members of the Asian and Hispanic communities support candidates of choice of the Black community. Speculative answers are not sufficient, and Plaintiffs' claim fails on this inquiry.

2. Plaintiffs' Aggregated Analysis Does Not Prove Cohesion

112. Plaintiffs' claim fails even under the assumption that aggregating all minority groups into one indiscriminate lump can establish cohesion.[11] First, Plaintiffs' expert, Dr. Spencer, failed to analyze a sufficient number of elections. He "define[d] elections as probative of racially polarized voting," including cohesion, only "when they feature a minority candidate running," PTX77 at 11, and analyzed no elections lacking a minority candidate. This omitted 13 of the 30 contested elections from 2008 to 2018. Tr. 891:3–22 (Kidd). Under binding precedent, this failure alone is fatal. *Lewis*, 99 F.3d at 610–11.

[11] In challenging Plaintiffs' contentions under Plaintiffs' own erroneous logic as an alternative position, Defendants have not, at any point, conceded the validity of that flawed logic.

113. Second, Plaintiffs' evidence shows that Black and so-called "HBA" voters—improperly aggregated—often oppose the candidates Plaintiffs assert are "minority preferred." The candidate Dr. Spencer identified as minority preferred is estimated to have obtained less than 50% of either Dr. Spencer's amalgamated or Dr. Kidd's algebraically estimated "minority" vote in at least 8 of the 17 City Council election Dr. Spencer studied. There is no evidence that the candidate proffered as "minority preferred" received at least 50% support from Black, Hispanic, and Asian voters in nearly half of the endogenous elections analyzed. Further, Dr. Kidd identified 19 Black City Council candidates from 2008 to 2018, and only nine received more than 50% of even the Black vote share. DTX83-007, Tbl. 1. Fourth Circuit precedent treats this as evidence against cohesion. *Levy v. Lexington Cnty., S.C.*, 589 F.3d 708, 720 n.18 (4th Cir. 2009); *see also Levy v. Lexington Cnty., S.C., Sch. Dist. Three Bd. of Trustees, CA*, 2012 WL 1229511, at *3 (D.S.C.), *as amended* (Apr. 18, 2012); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 421–22 (S.D.N.Y. 2004); *Smith v. Board of Supervisors*, 801 F. Supp. 1513, n. 11 (E.D. Va. 1992).

114. Plaintiffs contend that cohesion exists when a candidate earns enough minority support to win an election in a multi-candidate race. PTX81 at 4. Binding precedent disagrees. *See Levy*, 589 F.3d at 716–20 & n.18. A group cannot be said to coalesce around a candidate when more of its members vote against, rather than for, that candidate. "Political cohesion…implies that the group generally unites behind a single political 'platform' of common goals and common means by which to achieve them." *Id.* at 720 (quotation and edit marks omitted). Plaintiffs' standard seems to find cohesion any time there is "a first-choice candidate of the minority community." *See* Tr. 301:25–302:1. Absent a tie, there will always be a first-choice candidate, and a test that "logically guarantee[s] a finding of cohesiveness" is erroneous.[12] *Levy*, 589 F.3d at 720. As the recent *Kumar* decision explained, this fracturing cuts against cohesion:

[12] A similar error underlies Dr. Spencer's dismissal of races involving candidate George Furman, a Black candidate who, Dr. Spencer concluded, failed to obtain substantial minority support. Mr. Furman's failure to attain substantial minority (or even Black) support is evidence against

> Imagine a town. In that town, White citizens only vote for candidates that are of type A. Minority citizens, on the other hand, split their support among candidates of types B, C, and D. In this hypothetical community, RPV [racially polarized voting] clearly exists, but there is no evidence of minority political cohesiveness. This is because minorities do not coalesce around one particular type of candidate—they are split, not cohesive.

2020 WL 4464502, at *40 (citation omitted). So too here. Plaintiffs, however, conflate the minority-preferred candidate standard of the third *Gingles* precondition, *see Levy*, 589 F.3d at 714–19, with cohesion under the second precondition, *see id.* at 720 & n.18; Tr. 300:22–301:3.

D. The Claim Fails Under the Third *Gingles* Precondition

115. Under the third *Gingles* precondition, a Section 2 plaintiff must establish 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. Plaintiffs failed to do so.

116. Dr. Spencer's rebuttal report identifies eight minority-preferred candidates from 2010 through 2018 and concedes that four prevailed. PTX81 at 8. Under this, the most favorable analysis to Plaintiffs, minority-preferred candidates prevailed as often as not. *See Johnson v. Hamrick*, 296 F.3d 1065, 1081 (11th Cir. 2002) (finding the third precondition unmet where "the African–Americans' candidates of choice have prevailed as frequently as they have lost, some 45.5 percent of the time"); *cf. Lewis*, 99 F.3d at 616 (surmising that a showing "that minority-preferred candidates were successful fifty percent of the time" would mean they are "not 'usually' defeated by white bloc voting").

117. A more credible approach was offered by Dr. Kidd, who concluded that seven of 12 minority-preferred candidates, in races where cohesion was at least arguably established, prevailed. DTX83-15. Further, the most recent—and, hence, most probative—races show an even greater degree of minority success: the candidate Dr. Spencer identifies as "minority preferred"

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cohesion, but Dr. Spencer incorrectly treats his contests as "not probative of potential racially polarized voting." PTX81 at 10; *but see Levy*, 589 F.3d at 720 & n.18.

prevails in three of the most recent four races. DTX83-11; *Uno v. City of Holyoke*, 72 F.3d 973, 990 (1st Cir. 1995) ("[E]lections that provide insights into past history are less probative than those that mirror the current political reality."). At best, Dr. Spencer's analysis identified that only one out of 17 elections featuring a candidate who (1) drew majority support from each of the Black, Hispanic, and Asian communities and (2) was defeated by white-bloc voting. DTX83-23.

118. Plaintiffs, however, contend that two victories by minority-preferred Black candidates in 2018 are not probative because they occurred after this lawsuit was initially filed. But there is no evidence that the 2018 election results were influenced in any way by this lawsuit. This case is not remotely like *Collins v. City of Norfolk, Va.*, 816 F.2d 932 (4th Cir. 1987), where "the mayor supported a…Black candidate" after the lawsuit was filed, stating publicly "'[a]fter the election, the issue of Black representation may become a moot point.'" *Id.* at 938. These candidates' success was not "prompted by an attempt to forestall Voting Rights Act litigation," *id.*, but rather was the product of their merit and effort. Because Plaintiffs have no evidence to the contrary, their assertion of special circumstances cannot survive the "particularized investigation" *Collins* requires as the predicate to such a finding. *Id.*

E. <u>This Claim Bears Indicia of Risks Unique To Coalition Claims, Identifying It as an Abusive Claim Not Within the Scope of Section 2</u>

119. The courts that recognize coalition claims have appreciated that they are "fraught with risks." *Clements*, 986 F.2d at 786 n.43. One risk is "that members of one of the minority groups will increase their opportunity to participate in the political process at the expense of members of the other minority group." *Id.* "[M]inority groups should be allowed to proceed as a coalition under Section 2 only after the district court is satisfied that the risks we have discussed are not present in the community at issue." *Id.*

120. These risks are actualized here. Plaintiffs are two Black voters who claim that Hispanics and Asian voters are injured, but they conspicuously did not convince a single Hispanic or Asian to join this case (and provided only Del. Fowler, who undercut their case, as a witness

for these two groups). Plaintiffs' expert analyses bury Hispanic and Asian voters in a much larger group of Black voters (under the label "All Minority") and ask the Court to ignore that Hispanic and Asian voters are dragging the average minority support down—often substantially. Plaintiffs present zero evidence that Hispanic or Asian-preferred candidates will be elected under single-member districts of an HBA majority. In fact, Plaintiffs' reconstituted elections analysis explicitly relies on white crossover voting for Black voters to elect their preferred candidates.

121. Plaintiffs' litigation strategy is clear. The Black community cannot constitute a majority in a compact single-member district, and *Bartlett* held that Section 2 does not mandate white crossover districts. Plaintiffs responded by grouping as many Black voters as possible into districts and making up for the deficit with enough other "minority" voters to hit a 50% target. There has been no serious consideration of the needs, interests, and preferences of these non-white, non-Black voters and no obligation on Plaintiffs or their lawyers to represent persons not present in the case. Moreover, Plaintiffs rely on projected white crossover voting to assist the Black pluralities in electing their candidates of choice, *at the expense of* Asian (especially Filipinos) and Hispanics who have different candidate preferences. The proposed districts likely *dilute* the Asian and Hispanic vote. The fact that Plaintiffs' estimates group all non-white voters, including those not alleged to suffer vote dilution, into the "All Minority" category exposes the instrumental purpose for which Plaintiffs utilize the non-white, non-Black voters under the guise of affording to Asians and Hispanics help they do not seek. This claim has nothing to recommend it.

F. The Claim Fails Under the Totality of the Circumstances

122. "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 (quotation marks omitted). To make this assessment, courts consider various factors, including the "Senate factors" and those the Supreme Court has added. *Cane*, 35 F.3d at 925. "This determination is peculiarly dependent upon the facts of each case and requires an intensely local appraisal of the design and

impact of the contested electoral mechanisms." *Gingles*, 478 U.S. at 79 (citations and quotation marks omitted). Section 2 calls for "a 'functional' view of the political process." *Id.* at 51 n.15.

123. Plaintiffs' coalition claim lacks any persuasive force under the circumstances. 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," *Growe*, 507 U.S. at 41, a unique inquiry for each of the three minority groups under the totality of the circumstances is essential for coalitional claims. The question is not whether any one of the three groups (or their subgroups) experience vote dilution under the totality of the circumstances, but whether *all* groups experience vote dilution and on a *shared* basis.

124. But Plaintiffs' presentation is far too mechanical and conclusory to approach establishing this shared injury.

1. Factors That Affirmatively Cut Against the Claim

125. Multiple factors affirmatively support the use of at-large elections.

126. One critical factor is "whether the policies offered to justify the challenged voting practice are tenuous." *Cane*, 35 F.3d at 925. The policies are the opposite of tenuous; the Supreme Court held that the system serves a "compelling need." *Dusch v. Davis*, 387 U.S. 112, 114 (1967).

127. Another factor is "the extent to which minority group members have been elected to public office in the relevant jurisdiction." *Cane*, 35 F.3d at 925. Just two years ago, in 2018, two Black council members were elected under the at-large system, and they currently serve on the Council. One of them, Sabrina Wooten, was reelected on November 3, 2020.[13] Plaintiffs' attempt to discredit these races falls flat, for reasons stated above.

128. Another factor is "the extent of racial polarization in the elections of the state or political subdivision." *Cane*, 35 F.3d at 925. Here, even taking Plaintiffs' erroneous expert analyses at face value, the polarization rates are substantially muted.

[13] The other, Aaron Rouse, will not stand for reelection until November 2022.

129. Another factor is "whether the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population in the relevant area." *LULAC*, 548 U.S. at 426. Although there are no "districts," given at-large voting, this factor supports the defense because minority-preferred candidates prevail above the proportion of the minority percentage. *See, e.g.*, *United States v. Euclid Cty. Sch. Bd.*, 632 F. Supp. 2d 740, 753 (N.D. Ohio 2009). Even Dr. Spencer concedes that minority-preferred candidates—identified in an erroneous way, as described above—have prevailed in seven of 17 races in which Dr. Spencer purported to find cohesion of the "All Minority" voting share. This is success rate of over 40% exceeds proportionality.

130. Another factor is "whether elected officials exhibit a significant lack of responsiveness to the particularized needs of minority group members." *Cane*, 35 F.3d at 925. In this case, the evidence—including testimony of city employees, officials, and members of the community—demonstrates that the City Council is responsive to members of all races. This evidence outweighs Plaintiffs' various quarrels with the Council, which evidence only marginal disagreements concerning city management, not a "significant lack of responsiveness." There will inevitably be tension in any political community regarding any number of policies and dissatisfaction on the part of any number of interest groups. That this is so in Virginia Beach is neither surprising nor indicia of vote dilution.

2. Factors That Are Neutral

131. Other factors do not cut in either direction. Plaintiffs assert that they weigh in their favor, but their showing on these factors is substantially or totally neutralized.

132. A relevant factor is the "exclusion of minority group members from the candidate slating processes." *Cane*, 35 F.3d at 925. There is no evidence of a candidate slating process. "Slating is 'a process in which some influential non-governmental organization selects and endorses a group or 'slate' of candidates, rendering the election little more than a stamp of approval

for the candidates selected.'" *United States v. Cty. of Euclid*, 580 F. Supp. 2d 584, 608 (quoting *Westwego Citizens for Better Gov't v. Cty. of Westwego*, 946 F.2d 1109, 1116 n. 5 (5th Cir. 1991)). "The salient question for purposes of Senate Factor Four is, 'where there is an influential official or unofficial slating organization, [what is] the ability of minorities to participate in that slating organization and to receive its endorsement?'" *Id.* (quoting *United States v. Marengo Cnty. Comm'n*, 731 F.2d 1546, 1569 (11th Cir. 1984)). Dr. Lichtman's assertion that contributions among candidates is a slating process fails to identify a *slating* process. *See supra* ¶¶ 59–62.

133. Another relevant factor is "the extent to which past discrimination in areas such as education, employment, and health hinder the ability of members of the minority group to participate effectively in the political processes." *Cane*, 35 F.3d at 925. Here, the historical discrimination against the Black community is undisputed. But evidence that this discrimination hinders current Black political participation is undeveloped or non-existent. DTX83-034–35. Further, evidence of discrimination against persons of Hispanic and Asians descent is thin at best, as is evidence of these groups' alleged shared socioeconomic and educational experience.

134. Another factor is "the use of racial appeals in political campaigns." *Cane*, 35 F.3d at 925. Plaintiffs' efforts to show this are unpersuasive. Ultimately, they identify a few isolated incidents that fall far short of establishing that racial appeals are a recurring or impactful reality in elections to the Virginia Beach City Council.

135. Another factor is whether there is "a history in the state or political subdivision of official voting-related discrimination against the minority group." *Id.* at 925. Although this exists in Virginia as to the Black community, at least until the 1960s, this history is not sufficient to support a coalition claim. Asians were not measurably impacted by historical discrimination, and Hispanics were not impacted to the degree Blacks were impacted. DTX83-027. Further, the evidence of voting-related discrimination against Blacks is dated, and more recent evidence is not voting-related or compelling. Black and white turnout rates are comparable, Tr. 952:15–24,

953:19–23 (Kidd); DTX083-026–28, as are white and Asian, and white and Hispanic, turnout rates. Tr. 953:1–10, 953:24–954:24; DTX083 at 29–30. Asian turnout exceeded white turnout in 2016. Tr. 954:6–14. Historical discrimination has not depressed participation. Tr. 953:11–15.

## II. Plaintiffs Lack Third-Party Standing To Represent a Coalition

136. The claim fails for the additional reason that Plaintiffs, who identify as Black, lack third-party standing to assert the rights of a "coalition" including Hispanic and Asian voters. 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).

137. Plaintiffs have no choice but to proceed in this case by asserting the rights of third parties. The concept of a coalition is not that one group is harmed in ways that can be proven by harms to other groups, but that multiple groups suffer a common harm. The rights of third parties are 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., *Federal Practice and Procedure Juris.* § 3531.9 (3d ed.). Here, a Section 2 claim measured by the interests of Blacks alone would fail because Blacks alone cannot constitute a majority in a compact single-member district. Plaintiffs are, and must be, asserting the voting rights of Asians and Hispanics.

138. Plaintiffs presented no evidence at trial showing that (1) "the party asserting the right has a 'close' relationship with the person who possesses the right" and (2) "there is a 'hindrance' to the possessor's ability to protect his own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). The evidence undermined any such assertions. Tr. 67:15–68:21, Tr. 70:3–10 (Allen); Tr. 419:23–420:12, 421:5–21, 422:10–18 (Holloway). For this independent reason, Plaintiffs' claim fails.

## CONCLUSION

The Court should adopt the foregoing proposed findings of fact and conclusions of law.

DATE: December 1, 2020

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 1, 2020, 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:

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