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

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

DEFENDANTS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

Pursuant to the Court's scheduling order of May 15, 2020, Defendants submit the following proposed findings of fact and conclusions of law in advance of the trial in the above-captioned case set to begin October 6, 2020.

SUMMARY OF THE CASE

1. This case comes before the Court after trial on a single cause of action under Section 2 of the Voting Rights Act brought by Plaintiffs Latasha Holloway and Georgia Allen ("Plaintiffs") against the City of Virginia Beach (sometimes, the "City"), its City Council, the members of the City Council 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 City's method of electing members to its City Council through at-large elections dilutes the votes of a coalition identified by Plaintiffs as consisting of Black, Hispanic or Latino, and Asian voters in Virginia Beach. Despite the coalitional nature of this claim, no Hispanic or Asian voters have joined this case as plaintiffs.

2. The claim is deficient for many reasons and must be rejected. 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 the error of racial stereotyping plagues the claim asserted here, and to a degree far greater and more pernicious than the error *Reno* condemned: 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." But there is no evidence that members of these three groups—and the various subgroups they comprise—have a common racial identity within each racial group, let alone between each group. And Plaintiffs' effort to show that they share common political aims does no more than submerge Asian and Hispanic voters into a vast amalgamation titled "All Minority," with no attempt to determine whether these groups in fact share political preferences and interests within this artificial category.

3. The weight of the evidence indicates that there is no political cohesion among these disparate groups. Plaintiffs' own statistical estimates affirmatively show that there is not, and the anecdotal evidence indicates that there may even be significant levels of polarized voting among members of these allegedly cohesive groups. Meanwhile, Plaintiffs' projections of future "minority" performance in single-member remedial districts depend on estimated *white* crossover voting to assist Black voters in electing their preferred candidates, at the expense of those voters with different political preferences. The intentional submergence of Asian and Hispanic voters into districts where they will be outvoted in this manner would work a violation of Section 2, not its vindication.

4. Plaintiffs' claim gives substantial credence to the reasoning of many federal judges who have contended that "coalitional" claims do not fall within the scope of Section 2. The Fifth Circuit has cautioned that members of one group in a purported coalition may attempt to "increase their opportunity to participate in the political process at the expense of members of the other minority group." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 986 F.2d 728, 786 n.43 (5th Cir. 1993). That risk has materialized here. Plaintiffs assert that they do not seek to vindicate or protect the interests of Asian and Hispanic voters, but simply intend to *use* these voters to advance Plaintiffs' own personal political interests, which—Plaintiffs insist—are the only interests advanced here. The Court is not empowered by the Act to upend the entire system of voting in a City of about 438,000 people to favor the personal interests of two Plaintiffs, or even an entire racial group that cannot constitute a majority of the voting-age population in a single-member district.

5. In any event, Plaintiffs have failed to satisfy any of the elements that would apply if Section 2 authorized coalitional claims. Plaintiffs cannot prove that a "minority" population can constitute a majority in a single-member district because they failed to show that such districts may be fashioned in compliance with the one-person, one-vote principle even under current data, must less under the data that must be used in a future election. Likewise, Plaintiffs fail to establish cohesion for many reasons, most notably that their evidence does not establish that members of each of the three groups posited as an alleged coalition tend to prefer the same candidates. Plaintiffs cannot even make the fundamental *Shaw* showing that Asians in Virginia Beach "think alike, share the same political interests, and will prefer the same candidates at the polls," nor can they do so for Hispanic voters. 509 U.S. at 647. Nor can Plaintiffs establish that white bloc voting causes the defeat of candidates preferred by these three groups (assuming any

even are preferred by all three): the candidates Plaintiffs themselves identify as minority preferred have usually been successful in elections in the past decade.

6. Taken together, the circumstances, in their totality, confirm that the at-large method works no vote dilution on anyone. To the contrary, the at-large system *empowers* minority voters. In sharp contrast to a system that buries a geographically compact minority group into a hostile white voting bloc that drowns it out in election after election—which is the essence of vote dilution—the at-large system amplifies the voices of Black residents, who are able "to pull, haul, and trade to find common political ground," *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994), with other voters—including white voters—in the political system without court intervention. Two of ten current City Council members are Black, and the entire Council is and must be responsive to the Black community, which wields meaningful clout in City politics. Meanwhile, the Supreme Court held that the at-large system serves the City's "compelling need" to achieve balanced representation. *Dusch v. Davis*, 387 U.S. 112, 114 (1967). That need is as compelling today as it was in 1967.

7. Plaintiffs focus on the shameful history of discrimination against Black residents in Virginia and Virginia Beach, but this focus on history relating to one racial group presents a mismatch for their *coalitional* claim. There is no evidence that this history is shared by members of the Asian and Hispanic groups, who have their own history, experience, and right to vote. Plaintiffs fail to prove that the at-large method "interacts with social and historical conditions to cause an inequality in the opportunities" shared by the *entire* coalition. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (plurality opinion).[1]

[1] The *Gingles* plurality opinion of Justice Brennan is cited in this document unless otherwise indicated.

8. Ultimately, Plaintiffs ask the Court to bend (or ignore) the law governing every element of a vote-dilution claim simply because (in their view) it *must* be possible for Black voters in Virginia Beach to be grouped into majority-minority districts. But the demographic reality is that these districts cannot be drawn in a compact way that honors communities of interest and traditional districting principles. Virginia Beach is an integrated city. The Supreme Court has, many times, rejected the entirely circular argument that a VRA claim must succeed simply because it must. And that warning rings all the louder here where the proposed coalitional districts amount to terrible pubic policy: the use of some racial and ethnic groups merely for an instrumental purpose that does not consider their own interests. This claim lacks sound underpinnings in law, fact, or policy, and it fails on many independent grounds.

[PROPOSED] FINDINGS OF FACT

I. History of the At-Large Method of Electing City Council Members

9. Virginia Beach is an independent city located on the southeastern coast of the Commonwealth of Virginia. It is a resort city with miles of beaches and hundreds of hotels, motels, and restaurants along its oceanfront.

10. The City's origins are in Princess Anne County, which was formed in 1691, when Lower Norfolk County was split to form it and Norfolk County. Princess Anne County remained rural and agricultural, but in the late Nineteenth Century, after the 1883 arrival of railway service to the region, a resort town sprang up along the County's coast.

11. Over time, the town grew, and it gained status in 1952 as an independent city, the City of Virginia Beach, breaking off a region on the coast from Princess Anne County. The County remained a separate political subdivision.

12. In 1963, Princess Anne County and "the old city of Virginia Beach" were consolidated pursuant to referendums passed in both jurisdictions and approved by the General

Assembly. *Davis v. Dusch*, 205 Va. 676, 677 (Va. 1964). The apparent motivation for the consolidation was that Princess Anne County faced the threat of annexation into the City of Norfolk, and most residents of Princess Anne County felt a stronger community of interest with Virginia Beach, which was looking to expand because of consistent growth. *Id.* at 677–78. The consolidated of the new City of Virginia Beach consisted of urban boroughs in the old City of Virginia Beach and rural boroughs in the old Princess Anne County. *Dusch v. Davis*, 387 U.S. 112, 113 (1967).

13. The proponents of the new City of Virginia Beach, before the consolidation was approved by voters, faced a problem: "in order for consolidation to win approval, it 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, 139 S.E.2d at 27. The plan they proposed divided the new City into seven boroughs; the old city would constitute one borough and be afforded five members on the City Council, elected at large from that borough; the old county was divided into six districts with one representative afforded for each. *Id.* This plan gained support and was enacted into law in the new City's charter. *Id.*

14. But the system was short-lived. It was invalidated by this Court in 1965 under the recently announced one-person, one-vote principle. *See Dusch*, 387 U.S. at 114.

15. In response, the Virginia General Assembly amended the City's charter to institute a system of at-large voting. The Council is composed of 11 members, including the City's Mayor. Four (including the Mayor) are elected at-large without regard to residence, and seven are also elected at-large but must reside, respectively, one in each of seven residency

districts. *Dusch*, 387 U.S. at 114. These districts are called Bayside, Beach, Centerville, Kempsville, Lynnhaven, Princess Anne, and Rose Hall.

16. This system was also challenged under the Equal Protection Clause, but the Supreme Court upheld the system, finding that it "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." *Id.* at 115–17.

17. The at-large scheme has continued to serve this détente. As this Court recounted in 1997, the City spent five years beginning in 1990 on 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). The City declined to adopt 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, too, declined to impose such districts and dismissed with prejudice a plaintiff's Voting Rights Act claim, observing that, *inter alia*, the proposals were racial gerrymanders. *Id.* at 11 (citing and quoting *Shaw v. Reno*, 509 U.S. 630 (1993) and *Miller v. Johnson*, 515 U.S. 900 (1995)). Having successfully avoided the temptation to engage in racial gerrymandering, and seeing no policy basis for a change, the City continued to utilize the at-large scheme that has been approved by the Supreme Court and this Court.

18. There is no evidence that the at-large system was established for the purpose of impeding the electoral opportunity or success of any voter or group of voters on the basis of race, color, or language-minority status. Plaintiffs have made no claim to that effect here.

II. The 2011 Redistricting of Residency Districts

19. The at-large system the Supreme Court upheld in *Dusch* is, in its fundamental aspects, the system the City utilizes today. But the City has redrawn its residency districts each decade to maintain them at substantially equal population after the release of the decennial census results.

20. For assistance in this process, the City has retained since the 1990 redistricting cycle Kimball William Brace, a redistricting consultant and president of Election Data Services, Inc., a consulting firm based in Manassas, Virginia that specializes in reapportionment, redistricting, election administration, and the census. Mr. Brace has performed these types of services across the United States. When retained for redistricting matters that have a partisan element, Mr. Brace ordinarily is hired by clients with Democratic Party affiliations or interests.

21. The decennial process of redrawing the seven-seat residency district plans has involved extensive public outreach and solicitation and consideration of public input and comments. The process has involved public hearings, competing proposals, expert analysis from Mr. Brace, and deliberation by the City Council.

22. Through the 2011 redistricting, the process also involved a review by the United States Department of Justice under the preclearance mechanism of Section 5 of the Voting Rights Act. After a new residency plan was adopted, the City was required to submit the plan to the Department's Voting Rights Section along with evidence sufficient to establish that the plan did not have "the purpose…[or] effect of diminishing the ability of any citizens of the United States on account of race or color." 52 U.S.C. § 10304(b).

23. This process was undertaken in 2011 and produced the current seven-member residency districting plan. In that process, input was received from representatives of many minority racial and ethnic groups in Virginia Beach.

24. One proposal, from Andrew Jackson, a Black community leader in the City, achieved a majority-Black residency district, but it was highly contorted, stretching across the City with tentacles nabbing pockets of Black population dispersed relatively evenly through the City, and it did not comport with traditional redistricting principles. *See* Declaration and Expert Report of Kimball W. Brace ("Brace Rpt.") at 13 & Ex. K, Ex. DTX107. In many instances, Mr. Jackson's district was only a block wide or came together at a single point. Brace Rpt. 13 & Ex. K.

25. Mr. Brace considered conducting racial bloc voting analyses of individual minority groups in Virginia Beach in 2011 but determined that the concentrations of different minority groups—other than Black residents—were individually not large enough to obtain reliable estimates. Mr. Brace concluded in 2011 that it was not possible to tell how Asian and Hispanic voters voted in Virginia Beach through a method of statistical estimation such as regression.

26. The City ultimately settled on a seven single-member districting plan with one seat (District 1: Centerville) containing a non-white population of somewhere between 45% and 52%, depending on the measure of non-white population. Brace Rpt. 12. Plaintiffs' mapping expert, Mr. Anthony Fairfax, reports the percentage of combined Black, Hispanic, and Asian, or "HBA," population (the demographic Plaintiffs assert is relevant in this case) at 47.97%, and the HBA voting-age population at 47.28%. Expert Report of Anthony E. Fairfax ("Fairfax Rpt.") at 69, Ex. DTX123.

27. The City adopted the current seven-member residency plan in 2011 after consultation with persons and groups of various races and ethnicities, including Blacks, Hispanics, and Asians.

28. The United States Department of Justice, overseen by Attorney General Eric Holder, precleared the 2011 seven-member residency plan.

29. No evidence was presented to the City Council during the 2011 redistricting to indicate that members of the Black, Hispanic, and Asian groups are politically cohesive.

30. Based on this thorough review of the evidence, including data and testimony, over a two-decade period, Mr. Brace understood that the Asian group, which includes a significant contingency of Filipino voters, generally leans right-of-center on political issues and, to the extent a voting pattern is discernible for this group, it is in favor of the Republican Party in partisan elections. Mr. Brace understood, based on this thorough review of the evidence, including data and testimony, over a two-decade period, that Black voters consistently lean left-of-center on political issues and favor Democratic Party candidates in partisan elections. Mr. Brace also understood the Hispanic community to be composed of diverse viewpoints and not amenable to easy characterization politically or to assumptions of ethnic political cohesion—especially in non-partisan elections.

31. Lay witness trial testimony comports with Mr. Brace's understanding of the diverse political perspectives represented in these dissimilar groups.

III. Virginia Beach Today

32. Virginia Beach is the largest independent city in Virginia by population. As of the 2010 census, its total population was 437,994.

33. As of the 2010 census, white residents composed 64.49% of the total population, Black residents composed 19.00% of the total population, Hispanic residents composed 6.62% of the total population, and Asian residents composed 6.01% of the total population. Fairfax Rpt. 8.

34. As of the 2010 census, white residents composed 67.38% of the voting-age population, Black residents composed 18.10% of the voting-age population, Hispanic residents composed 5.64% of the voting-age population, and Asian residents composed 6.30% of the voting-age population. Fairfax Rpt. 8.

35. The 2020 census is now being conducted, and neither the parties nor the Court can speculate on what it will show concerning the population of Virginia Beach or the proportions various racial and ethnic groups constitute in the City. Because the ideal district size for purposes of the one-person, one-vote rule is derived by dividing the total population of a jurisdiction by the number of districts into which the jurisdiction is proposed to be divided, the Court cannot know what the ideal district population is for a single-member district that can lawfully be used in an election after the 2020 census results are released.

36. Virginia Beach is a diverse, vibrant, cosmopolitan city blessed with natural resources and an industrious community.

37. As when the City assumed its current form through consolidation, Virginia Beach today contains broad swaths of farmland and sparsely populated rural areas, alongside a vibrant city center and populated suburbs. Few other cities in the United States have this character.

38. Virginia Beach enjoys a substantial military presence, mostly Navy servicemembers and employees from the nearby Norfolk Naval Base and Virginia Beach's Oceana Master Jet Base. Because of this presence, a substantial portion of the Virginia Beach populace does not have historic roots in Virginia Beach, Virginia, or the American South.

39. The Naval presence has also contributed, in part, to a vibrant Filipino community, since many persons of Filipino ancestry have come to the United States through ties to the U.S. Navy. Virginia Beach has more than four times the number of Filipinos as does Norfolk, the city with the next highest Filipino population in Virginia.[2] Filipinos typically identify as "Asian" in filling out census forms, and a significant portion of the "Asian" census category of Virginia Beach residents—but by no means the entirety of that community—is Filipino.

40. Like virtually the entire American South, and much of the American North, Virginia Beach experienced decades of racial prejudice and *de jure* discrimination against Black residents on the basis of race. Virginia Beach regrets these injustices.

41. However, Asians do not have the same experience in Virginia Beach. As of 1900, there were only 253 persons of Asian or Pacific Island descent in Virginia Beach. Expert Report of Dr. Quentin Kidd ("Kidd Rpt.") at 26, Ex. DTX083. The experience of Hispanics also differs from that of Blacks. Kidd Rpt. at 26–27.

42. There is no evidence that prior discrimination has impacted current electoral participation of Black voters in Virginia Beach. Voter turnout numbers suggest the opposite. Kidd Rpt. 27–30.

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

A. Demographic Trends in Virginia Beach

43. Plaintiffs' case focuses on three census categories: Black, Hispanic, and Asian.[3]

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[2] *See* Old Dominion University, Filipino Americans in the United States and Hampton Roads Area, https://www.odu.edu/life/support/fac/facts (last visited Sept. 27, 2020).

[3] Although these findings at times utilize the terminology Plaintiffs have employed for the sake of argument or clarity, they do not endorse these terms or the concepts they purport to represent. To the contrary, Plaintiffs' terminology is misleading and assumes the very points of fact Plaintiffs are bound to prove, such as cohesion within and among these highly disparate groups,

44. The report of Plaintiffs' expert, Mr. Anthony Fairfax, shows that there has been a trend of decline of Black total population in Virginia Beach: in 2010, about 19% of the total population was Black; by 2015 the Black total-population percentage was about 18.51%; and it was about 18.24% in 2017. Fairfax Rpt. 8, Table 1. The Black voting-age population ("BVAP") went from 18.10% in 2010, down to 17.98% in 2015, and up to 19.22% in 2017. Fairfax Rpt. 9, Table 2.

45. The Asian population and voting-age population saw a small increase of 6.01% (2010) to 6.52% (2015) to 6.60% (2017) on the total-population scale and 6.30% (2010) to 6.52% (2015) to 7.57% (2017) on the voting-age population scale. Fairfax Rpt. 8–9, Tables 1–2.

46. The Hispanic population saw a somewhat larger increase of 6.62% (2010) to 7.83% (2015) to 8.15% (2017) on the total-population scale and 5.64% (2010) to 5.74% (2015) to 7.52% (2017) on the voting-age population scale.

47. The citizen voting-age population ("CVAP") scale shows a smaller Hispanic population increase, running from 5.05% (2012) to 6.06% (2015) to 6.29% (2017). Fairfax Rpt. 11, Table 3. The CVAP metric is critical to understanding Hispanic potential voting power, since the Hispanics population tends have a higher non-citizen rate than that of the Black and whites populations. The franchise under Virginia law may be exercised only by United States citizens.

48. The 2020 census is currently being taken. Neither the parties nor the Court are able to speculate about what its results will show. Plaintiffs ask the Court to assume that the combined percentages of Black, Hispanic, and Asian persons, voting-age persons, and citizen

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which are really conglomerations of subgroups and individuals within them. The term "Asian," for example, includes persons who are of Filipino, Japanese, Chinese, Vietnamese, and Korean descent (and so forth), and those groups have significantly different histories and identities and have frequently through history been in open conflict with each other.

voting-age persons will likely increase under those new results. This is entirely speculative and has not been shown by a preponderance of the evidence. The Court is unable to say what the results will show and *where* any potential population growth will lie. Furthermore, the City's percentage of Black total population has declined in in recent years, so there is no basis to speculate that it will be shown to have increased once the 2020 census results are released.

49. Unlike many cities in the southern United States, Virginia Beach is not characterized by marked racial segregation. Virginia Beach is a highly integrated city.

50. Mr. Fairfax's report indicates that Hispanic, Black, and Asian residents are dispersed throughout the City. Fairfax Rpt. 16, Fig. 5.

51. Mr. Fairfax attempts to show that there is a "concentration" of Hispanic, Black, and Asian residents in "31 of Virginia Beach's 100 census tracts," Fairfax Rpt. 13, but 31 census tracts is a large segment of the City, and even then, these tracts contain only 54.9% of the combined Hispanic, Asian, and Black residents, Fairfax Rpt. 13, meaning that nearly half of these residents—and more than half of the Hispanic residents—do not live in these census tracts. These datapoints suggest a high degree of racial integration in Virginia Beach.

52. Mr. Fairfax does not provide information on concentration levels of minority groups in any other cities to offer a point of comparison.

53. Due to that integration, Mr. Fairfax is unable to draw an equally apportioned single-member district in a ten-district City Council plan containing a majority Black voting-age population anywhere in Virginia Beach, even though Black voting-age persons constitute over 19% of the total voting-age population of the city.

54. Mr. Fairfax is likewise unable to draw an equally apportioned single-member district in a ten-district City Council plan containing a majority Hispanic or Latino voting-age population anywhere in Virginia Beach.

55. Mr. Fairfax is also unable to draw an equally apportioned single-member district in a ten-district City Council plan containing a majority Asian voting-age population anywhere in Virginia Beach.

56. Mr. Fairfax's suggestion that the Black, Hispanic, and Asian groups are geographically concentrated in segregated areas of Virginia Beach does not merit credit.

B. Possibility of Single-Member Districts Achieving a Combined Black, Hispanic, and Asian Majority Under a Reliable Method

57. Mr. Fairfax's initial report presents an illustrative remedial City Council districting plan composed of 10 single-member districts. Mr. Fairfax's report then evaluates these districts under various demographic metrics.

58. The Court is unable to conclude anything from Mr. Fairfax's redistricting plans about what electoral possibilities may exist under a single-member districting plan beginning in 2022. Any redistricting plan governing the 2022 elections and those beyond 2022 will be governed by districts drawn under the 2020 census results. Because the Court cannot speculate about what those results will show, it cannot speculate about what types of redistricting plans may be drawn to govern elections beginning in 2022 and those beyond 2022.

59. Mr. Fairfax's report uses 2010 census data and data reported in the Census Bureau's American Community Survey ("ACS") to evaluate his plans. Although this information is unhelpful for resolving issues in this case, given that the information is not relevant to any election a judgment of this Court may impact, the following recounts the record evidence adduced on this matter.

60. Under the 2010 census results, the total population deviation of Mr. Fairfax's illustrative remedial plan—i.e., the deviation from the lowest-population to the highest-population district—is 3,264 persons or 7.45%, with the lowest population deviation at -2,090 (-4.77%) and the highest at 1174 (2.68%). Fairfax Rpt. 18.

61. The illustrative remedial plan of Mr. Fairfax's initial report contains two districts that Mr. Fairfax represents are remedial districts containing sufficiently high levels of Black, Hispanic, and Asian persons to perform as "minority" opportunity districts. These districts are labeled District 1 and District 2.

62. The body of Mr. Fairfax's report identifies racial and ethnic percentage measures for these two districts under two metrics. The first is total population of Black, Hispanic, and Asian persons (which Mr. Fairfax labels "HBA total population") as measured by the 2010 census results. Mr. Fairfax's report shows that, under the HBA total-population metric, the two remedial districts are at 52.42% and 52.52%, respectively. Fairfax Rpt. 19.

63. This total-population measure, however, is not a probative figure. It includes persons under the age of 18 who are not eligible to vote and thus gives little meaningful sense of potential voting strength of Asian, Black, or Hispanic eligible voters. The Court cannot make any conclusion about voting-strength potential from the HBA total-population metric.

64. The other metric Mr. Fairfax employs is CVAP as measured by the ACS. Taking the CVAP of Mr. Fairfax's HBA category, his report represents that the two remedial districts have HBACVAPs of 50.03% and 50.04%, respectively. Fairfax Rpt. 20.

65. CVAP data is more probative than total population but does not provide the entire picture. The ACS, which is the sole source of CVAP data, is less reliable than census results because the ACS is a sample survey, whereas the census is a home-by-home enumeration of the

population. The error margin of the ACS is more significant than the error margin in the census, and further information from the 2010 Census is needed to assess the true voting potential contained in the illustrative districts.

66. The critical number from the 2010 Census is voting-age population. Under this metric, which Mr. Fairfax only reports in an appendix to his initial report (Appendix D), one of the two remedial districts, District 2, has a 49.24% HBAVAP. Fairfax Rpt. 68. This alone renders the Court unable to conclude that District 2 achieves a 50% majority HBA voting-age population.

67. A further problem plagues the remedial districts in Mr. Fairfax's initial report. The CVAP measure Mr. Fairfax uses is not reported at the census-block level, which is the level of census geography at which City Council and other electoral districts are drawn. The CVAP value is reported with the ACS at the "block group" level of census geography. Expert Report of Peter Morrison ("Morrison Rpt.") at 3, Ex. DTX076. Block groups are the next level above census blocks are a combination of census blocks.[4] To determine the HBACVAP of a district drawn at the census-block level, an expert must make an estimate of the CVAP value taken from the block-group level and attribute it, by approximation, to census blocks. Morrison Rpt. 3. Mr. Fairfax did not use a sound method for making this estimate. At best, Mr. Fairfax's estimates contain sizeable margins of error.

68. Dr. Peter Morrison evaluated the illustrative plan presented in Mr. Fairfax's initial report. Dr. Morrison is an applied demographer retired from the RAND Corporation, a non-profit, non-partisan research organization, where he served as Senior Demographer and the

[4] *See, e.g.*, https://www2.census.gov/geo/pdfs/reference/GARM/Ch11GARM.pdf (last visited Sept. 29, 2020).

founding director of RAND's Population Research Center. Morrison Rpt. 1. Dr. Morrison also served on the U.S. Census Bureau Advisory Committee on Population Statistics from 1989 until 1995, and as an invited participant on the Census Bureau's Working Group on 2010 Race and Ethnicity. Morrison Rpt. 1. Dr. Morrison is a knowledgeable and credible expert witness on issues pertaining to the census and demography.

69. As Dr. Morrison's report explains, there are erroneous ways to estimate CVAP values at the block level, and "[a] common hallmark of" an unsound method "is the appearance of alarming logical inconsistencies among the values for individual census blocks." Morrison Rpt. 3. Dr. Morrison reviewed Mr. Fairfax's work and found that this "hallmark" pervades it. Morrison Rpt. 4–5. Mr. Fairfax's method reports that many census blocks composing his illustrative districts have more citizen voting-age persons than *total* persons—meaning more eligible voters than people. Morrison Rpt. 4–5. This is a logical and factual impossibility and demonstrates an erroneous method of estimating the CVAP of census blocks.

70. Dr. Morrison opined that an industry-standard method of estimating CVAP at the block level that the Census Bureau itself uses is called "raking" and would not produce these erroneous estimates. Morrison Rpt. 4. Mr. Fairfax did not use raking, and the method he used is self-evidently erroneous.

71. Further, Dr. Morrison observed that Mr. Fairfax's estimates are point estimates that fall within a range of statistical uncertainty, a common feature of statistical estimates. Morrison Rpt. 6. It is the *range* of statistically probable outcomes, not the point estimate itself, that is most probative in interpreting statistical estimates, and the true value being estimated could be as low as the bottom of the range. Morrison Rpt. 6. Mr. Fairfax's estimates show HBACVAP just a hair above 50% and include a range of potential true values that fall below

50%, meaning that the Court cannot conclude that the true value falls above 50%; it is eminently possible that the true value falls below 50%.

72. Moreover, Dr. Morrison "replicated Mr. Fairfax's aggregation of block-level data in forming his two proposed districts," using "his own GIS shape files to allocate his own defective block-level data among districts." Morrison Rpt. 6. Dr. Morrison concluded Mr. Fairfax should have arrived at CVAP shares below those that he reported; in both Districts 1 and 2, the HBACVAP share falls below 50%. Morrison Rpt. 6–7.

73. Mr. Fairfax attempted to mitigate these errors in a rebuttal report, which presented five new illustrative plans (which Mr. Fairfax labeled "alternative" plans) that were not presented in his initial report.

74. These five new plans do not amount to legitimate material to include in a rebuttal report.

75. The five new plans do not make up for the deficiencies that plagued Mr. Fairfax's initial report and his initial illustrative plan. Each of the new plans contains highly irregular districts that do not appear to be compact on visual inspection and are not shown to be compact under any reliable methodology. Some of the remedial districts also are not sufficiently above a 50% HBACVAP estimate to make up for the errors that undermined Mr. Fairfax's first attempt at a remedy. These errors only confirm that a compact 50% HBACVAP district is not likely able to be drawn in the City of Virginia Beach in a 10-seat single-member district City Council plan.

76. Mr. Fairfax's "alternative 1" sacrifices compactness in the two remedial districts for a slight increase in estimated HBACVAP to 51.50% and 51.64%, respectively. Expert Report of Anthony E. Fairfax Response to Peter Morrison's Report ("Fairfax Rebuttal Rpt.") at 5–6, Ex. DTX124. The districts are visibly irregular.

77. The Court is therefore unable to conclude that the illustrative districts in alternative 1 are compact and otherwise meet the City's traditional districting principles. Further, the slight increase in HBACVAP is not sufficient to overcome the methodological problems Mr. Morrison identified in Mr. Fairfax's method.

78. From there, Mr. Fairfax's districts exhibit, on visual inspection, continuous and precipitous drop in compactness, Fairfax Rebuttal Rpt. 7–10. The proposed districts snake across the city, split subdivisions, and reflect no care for traditional redistricting principles. They are not compact, they are barely contiguous with very narrow passageways, and they were self-evidently drawn with the singular racial purpose of ratcheting up a combined minority percentage without regard to communities, geography, geometry—or anything other than race. The fact that each attempt on Mr. Fairfax's part produces a higher racial percentage and lower compactness scores only proves the predominant racial motive behind these districts.

79. Notably, Mr. Fairfax did not include in the body of his report a compactness analysis like he included in his initial report to establish that his first attempt at a remedy fit within the compactness range of the City's current residency districts. Mr. Fairfax also did not include the other analyses regarding traditional districting principles that accompanied the proposals in his initial report.

80. The appendices to Mr. Fairfax's rebuttal report show low compactness scores and a high number of voting-district splits. Fairfax Rebuttal 29–31, 36–38, 43–45, 50–51, 56–58. The compactness scores of the districts Mr. Fairfax identifies as majority HBACVAP are systematically lower than the compactness scores of the districts Mr. Fairfax does not identify as majority HBACVAP. *See* Fairfax Rebuttal 29, 36, 43, 50, 56. Mr. Fairfax systematically

sacrificed traditional districting principles in these districts to achieve the racial goal of maximizing these districts' HBACVAPs.

81. Yet another defect in the remedial districts Mr. Fairfax presented in both his original and rebuttal reports is that Plaintiff Georgia Allen does not reside in any of them.

82. To overcome this deficiency, Mr. Fairfax filed yet another expert report with further illustrative plans, demonstrating that in three configurations, Ms. Allen's residence can be included in an HBACVAP-majority district. Supplemental Expert Report of Anthony E. Fairfax ("Fairfax Suppl. Rpt.") at 2, DTX128.

83. This effort is likewise unavailing. All of the illustrative districts show estimates of HBACVAP in the proposed illustrative maps that are just slightly above 50%, indicating that it is unknown whether the true value lies above or below 50%, especially given the errors that have plagued Mr. Fairfax's method. Fairfax Suppl. Rpt. 6. The modest changes to Mr. Fairfax's first illustrative districts did not overcome the errors identified in Mr. Morrison's report, and the modest alterations to the subsequent illustrative districts did not meaningfully improve compactness, or resolve narrow passageways, or otherwise align the districts with traditional districting principles. There was no traditional-districting purpose to the changes, just the purpose to include a single person in one of the two purported majority HBACVPA districts, and race remains the predominant motive for their creation.

84. Indeed, Kimball Brace, a redistricting expert with extensive map-drawing experience, analyzed Mr. Fairfax's adjusted supplemental illustrative proposals and concluded that it must have been "quite difficult to achieve the racial targets the mapdrawers ostensibly had in mind." Brace Rpt. 13. Among other defects, the districts represented as containing an

HBACVAP majority are underpopulated, apparently on purpose to achieve racial goals, and they do not honor incumbent residences, a traditional districting principle. Brace Rpt. 13–14.

C. Possibility of Effective Functional Coalition District

85. The mere existence of illustrative districts exceeding a 50% HBACVAP—even assuming they were shown to be plausibly drawn at any point in time in Virginia Beach under a 10-seat single-member plan—would not establish a meaningfully increased opportunity of a group called "HBA" to elect its preferred candidates, assuming that the HBA group cohesively supports the same candidates.

86. As an initial matter, the question itself assumes that HBA persons constitute a cohesive political group, and this assumption is not borne out by the evidence for reasons discussed below (Findings of Fact § V).

87. In any event, the effort of Plaintiffs' experts to establish a meaningful improvement of electoral opportunity for the diverse body of HBA voters, who do not appear to prefer similar candidates, proves unpersuasive on the facts.

88. For this showing, Plaintiffs rely on Dr. Douglas M. Spencer, who conducted a reconstituted election analysis, superimposing election results from City-Council races onto the illustrative districts. This effort does not show a meaningful improvement of electoral opportunity.

89. Dr. Spencer leaves out crucial information from his report and expert disclosure which render his analysis incapable of being replicated and his conclusions incapable of being confirmed. As the report of Mr. Brace explains, a reconstituted election analysis takes information from two different paradigms and merges it, and this requires assumptions and aggregation of data. Brace Rpt. 14. Election returns are reported by precincts established by state and local governments, and districts are drawn with census blocks, which are established by the

United States Census Bureau. Mr. Fairfax's illustrative plans split precincts, so the illustrative-district lines do not match evenly with the precincts. Dr. Spencer needed some reliable method to identify how election results reported at the precinct level can be attributed to geography in illustrative districts that are a mismatch for those precincts, and Dr. Spencer did not provide sufficient information concerning his methodology (or lack thereof). Brace Rpt. 14–15. Mr. Brace found it "impossible" to check Dr. Spencer's results without this crucial disclosure. Brace Rpt. 15.

90. The Court is unable to draw any conclusions about a performance analysis that could not be vetted through the adversarial process. The Court cannot simply trust Dr. Spencer's analysis without verification from Defendants' expert that it was conducted using a reliable method.

91. Further, Dr. Spencer makes clear that significant crossover support from *white* voters is responsible for the supposed improved performance of candidates supposedly preferred by the HBA coalition. *See See* Expert Report of Douglas Spencer ("Spencer Rpt.") at 32, Ex. DTX135 (opining that HBA-preferred candidates are "likely to benefit from cross-over support from white voters"). Dr. Spencer opined from his analysis 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 a single exception. Spencer Rpt. 33. Even if the purported successful outcomes for given candidates is accurate, this does not establish that these illustrative districts will afford opportunity for a cohesive coalition of HBA voters (which is not proven to exist). Rather such evidence merely establishes that these districts may perform as crossover districts to empower a cohort of white voters and Black voters to elect their shared preferred candidates. Because there is a legally significant difference between a

crossover district (which is not protected by Section 2) and a cohesive coalitional district (which has not been definitively held to be protected by Section 2), *see infra* Conclusions of Law § I.B.1, this distinction of fact is essential.

92. Additionally, Dr. Spencer's report does not establish meaningful differences in electoral outcomes. Under Dr. Spencer's analysis, the same candidate who won at-large in 2014 (Kane) would have won both purported remedial districts contained in Mr. Fairfax's initial report, the same candidate who won one at-large seat in 2010 (Bellito) would have won both purported remedial districts presented in that report, and the other candidate who won an at-large seat in 2010 (DeSteph) would have won one purported remedial district (District 1) presented in that report. Spencer Rpt. 34.

93. The result is similar under the modified illustrative plans. Dr. Spencer's analysis of the modified illustrative plans identifies significant white crossover votes as the cause of a purported improvement of electoral opportunity for the coalition of Black, Hispanic, and Asian voters. And, as the report of Mr. Brace shows, four of the seven contests listed under District 1 would have resulted in the same outcomes as existed at the time of the election under the at-large method, and the only contests where the result would have been different occurred before 2011. Brace Rpt. 15. These are the oldest and least probative races. Under District 2, two of the three most recent elections would not have seen changed outcomes.

V. Alleged Cohesion of Black, Hispanic, and Asian Voters in Virginia Beach

94. Plaintiffs make a series of allegations regarding racial and ethnic trends in voting patterns in Virginia Beach.

95. To establish proof of their various contentions on racial and ethnic voting patterns within Virginia Beach, Plaintiffs rely on Dr. Spencer, who performed a racially polarized voting

analysis of the City. He utilized homogeneous precinct analysis, ecological regression, and ecological inference techniques for this analysis.

96. Defendants' expert on racial and ethnic voting patterns within Virginia Beach is Quentin Kidd, Ph.D., a full Professor of Political Science and Dean of the College of Social Sciences at Christopher Newport University in Newport News, VA. Newport News is located within the same media market as Virginia Beach.

97. Dr. Kidd received his Ph.D. from Texas Tech University in 1998 and has been on the faculty of Christopher Newport University since 1997. 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.

98. In that capacity, Dr. Kidd has published a book and peer-reviewed articles on race and politics with a focus on the American South.

A. Plaintiffs' Erroneous Aggregation of "All Minority Voters" Into an Indistinguishable Group

99. Dr. Spencer used each of the three statistical techniques identified above to "infer the voting behavior of demographic subgroups" by leveraging "information about individual voting precincts." Spencer Rpt. 4. Dr. Spencer utilized these methods of estimation because it is unknown what candidates members of various racial and ethnic groups supported in voting under the secret-ballot process. Stated at a high level of generality, these various methods of estimation involve a comparison of the racial and ethnic composition of precincts—with data transferred from census blocks through a method of disaggregation and reaggregation—to the results of elections reported at the precinct levels.

100. From the outset, Dr. Spencer's cohesion analysis was fundamentally flawed. Dr. Spencer considered as probative only those elections for which he identified a minority-preferred

candidate. While for prong 3 analysis this approach is also suspect, it is an egregious error for prong 2 cohesion analysis. To measure the degree of cohesiveness that *generally* exists amongst minority voters by looking only at races where one claims such cohesion exists is akin to measuring the prevalence of gun ownership by surveying only gun owners. Such a myopic, self-reinforcing approach cannot provide a basis for the Court's inquiry regarding cohesion. Indeed, the Fourth Circuit has admonished against such an approach. *Levy v. Lexington County*, 589 F.3d 708, 720, (4th Cir. 2009).

101. Furthermore, statistical estimation in this manner is not the only way to make estimates of racial and ethnic patterns in voting behavior. An expert could also conduct a survey, much as news organizations do through exit polls. Neither Dr. Spencer nor any expert retained by Plaintiff utilized a survey method.

102. Using these techniques, Dr. Spencer performed an analysis of a series of endogenous elections (i.e., Virginia Beach City Council elections) and select exogenous elections (i.e., elections that are not Virginia Beach City Council elections, such as federal elections) from 2008 to 2018. For each election, he generated voting support estimates for white voters alone, Black voters alone, and for "All Minority Voters" (i.e., the a category that combines Black, Hispanic, Asian, and all other non-white voters). Spencer Rpt. 8–10.

103. Dr. Spencer did not generate individual estimates of the support levels of Asian voters or Hispanic voters for candidates in the contests he evaluated, let alone for Asian or Hispanic voters of specific nationalities (e.g., Filipino-Americans, Sino-Americans, Mexican-Americans, and Cuban-Americans) because he concluded those populations were too small and insufficiently concentrated in precincts in the City to produce reliable estimates. Spencer Oct. 1,

2019 Dep. 68–71. This means there is no statistical evidence before the Court of the voting preferences of Hispanic residents or of Asian residents of the City.

104. The only way to make an informed estimate of the support levels in the Hispanic and Asian groups and their various subgroups would be through a survey method. As noted, Plaintiffs' experts did not utilize any survey method in this case.

105. As Dr. Kidd explains, lumping together persons of multiple races into an "All Minority Voters" aggregate category does not allow the Court to assess whether each of the three groups in Plaintiffs' tri-partite coalition are cohesive with each other and with members of the other groups in Plaintiffs' tri-partite coalition. Because of the relatively low population sizes of the Asian and Hispanic communities in the City, high cohesion within the much larger Black community can mask a lack of cohesion within the much smaller Asian and Hispanic groups and among all three of these groups. Voter preferences shared among members of the Black group can therefore be attributed to members of the Asian and Hispanic communities who do not, in fact, share those voting preferences.

106. Furthermore, the use of aggregate "All Minority" datapoints can also mask a lack of cohesion *within* one or more of the groups comprising the so-called coalition.

107. Indeed, Dr. Spencer's report indicates that this misleading attribution is occurring. It is a consistent finding across Dr. Spencer's analysis that Black-only voting support levels for given candidates are higher than those for the "All Minority Voters" category. In the 2010 At-Large City Council election, for example, Dr. Spencer calculated King's ecological inference ("EI") estimates for support for Black candidate Andrew Jackson as follows:

Black support (%)	85.6
All minority support (%)	58.2
White support (%)	7.7

Spencer Rpt. Fig. 9. Since "Black support" is included within "All Minority support," the fact that "All Minority support" is 27.4 percentage points lower than "Black support" means, as a matter of arithmetic, that the support level of one or both of the other minority groups within the "All Minority support" umbrella must be significantly less than the 58.2% resultant "All Minority support" level of support. In other words, the level of Hispanic and/or Asian support for Mr. Jackson must have been substantially less than the level of Black support for him.

108. Likewise, in the 2016 Kempsville election, Dr. Spencer calculated EI estimates for support for Black candidate Amelia Ross-Hammond as follows:

Black support (%)	76.7
All minority support (%)	59.9
White support (%)	30.3

Spencer Rpt. Fig. 4. Because the "All Minority" support level of 59.9% is 16.8% lower than the "Black support" of 76.7%, this indicates that the level of Hispanic and/or Asian support for Ms. Ross-Hammond must have been substantially less than the level of Black support.

109. Further, although in this and other similar instances it is possible (though by no means proven) that either Asians or Hispanics also supported the Black-preferred candidate at high levels, the application of basic arithmetic would then require that the other group supported that candidate and dramatically lower levels. Stated differently, the pattern of higher support for candidates among Blacks than among All Minority Voters leads to the inference that, in all likelihood, either Hispanic or Asian voters—or both—tend to support *different* candidates from those Black voters support.

110. In sum, the All Minority Voters datapoints adduced by Dr. Spencer provide the Court no basis whatsoever to conclude that Asian and Hispanic voters share candidate preferences with Black voters in Virginia Beach.

111. In a rebuttal to Dr. Kidd's report, Dr. Spencer attempted to create estimates for the levels of support for specific candidates within the Hispanic community and within the Asian community. Response Report of Douglas Spencer to Report by Dr. Quentin Kidd ("Spencer Rebuttal Rpt.") at 7–8 and Table 1, Ex. DTX136. His rebuttal report only provided those specific values for Aaron Rouse, but not the other 12 candidates shown on Table 1. At Defendants' request, Dr. Spencer then produced a data set on September 5, 2019, reflecting his estimates as to all 13 candidates.

112. Dr. Spencer created a table (Table 1) based upon those individual estimates for Asian and Hispanic support using "the logic of equivalence testing." However, Dr. Spencer conceded that he did not "think the estimates that are used in this table [Table 1] actually mean much" and that he was "not confident in their findings at all." Spencer Sept. 1, 2019 Dep. at 125. He further described the confidence intervals as "so ridiculous, ridiculously big." *Id.* at 146.

113. Dr. Spencer's "logic of equivalence testing" approach is not a reliable methodology, and its results are not reliable either—as even Dr. Spencer concedes. As such, and because Dr. Spencer has disowned any confidence in what these results purport to show, they do not merit any weight. Nevertheless, it is noteworthy that for 10 of 13 of the candidacies listed in the September 5, 2019 data set (e.g., White and Rouse in 2018, Ross-Hammond in 2016 and 2012, Cabiness in 2014, Sherrod in 2011, Jackson and Belitto in 2010, and Allen and Flores in 2008), Dr. Spencer's estimate for the support levels of one or both of the Hispanic or Asian groups for the candidate in question fell below 50%. Nevertheless, Dr. Spencer concludes that each of these candidates are preferred by all three minority groups in question. These conclusions defy common sense.

114. Dr. Spencer's estimate for Rouse in 2018, for example, was that he had 83% support in the Black community, 33.3% support in the Hispanic community, and 53% support in the Asian community. Ross-Hammond in 2016 was estimated to have 81.2% support in the Black community, 49% in the Hispanic community, and 26.2% support in the Asian community. And Cabiness in 2014 was estimated to have 70.2% support in the Black community, 13% in the Hispanic community, and 9.4% in the Asian community.

115. This wide gap between Black and Hispanic and/or Asian voting patterns is also seen in Dr. Spencer's data for Bellitto in 2010. Dr. Spencer estimated 8.4% support for Bellitto that year among Black voters, along with 45.2% of Hispanic voters and 47.2% of Asian voters. These estimates suggest markedly different candidate preferences on the part of these three dissimilar groups.

116. These numbers do not support a conclusion that Black, Hispanic, and Asian voters in the City generally support the same candidates in City Council elections. Dr. Spencer's estimates demonstrate that the support levels of these other racial groups can fall substantially below the support levels exhibited by the Black community or, in certain cases (e.g., Bellitto in the 2010 At-Large election, and Abbott in the 2016 Kempsville), support levels from the other groups exceed the support levels exhibited by the Black community. These basic principles of arithmetic signal that this much lower (or sometimes higher) degree of support from the Asian and Hispanic groups is certainly the reality in many or most contests and that Dr. Spencer has no way to demonstrate that this is not happening—and his sole attempt at addressing this question only confirms that it can happen and is happening—establishes beyond serious doubt that these three groups are not cohesive.

117. Dr. Spencer himself opines that these estimates are wholly unreliable. Dr. Spencer also is unable to, in turn, offer a reliable counter to his own data. Even if the Court views the September 5, 2019 data set as no more than one possible scenario, it illustrates why Dr. Spencer's conclusions based upon All Minority Voters datapoints are fundamentally unsound.

118. Plaintiffs' allegations of cohesion among these dissimilar groups is further undercut by lay-witness testimony.

119. The City relies on qualitative evidence from three lay witnesses, Nony Abrajano (Asian), Ben Loyola (Hispanic), and Delceno Miles (Black), who are credible witnesses to testify on the issue of commonalities and cohesion amongst Black, Hispanic, and Asian residents of the City. Each of these witnesses is a leader in the witness's respective minority community. Each provided lay testimony supporting a finding that the Black, Hispanic and Asians in the City are not monolithic in their beliefs or of a single mind on issues of importance to their respective communities. Each witness confirmed that Black, Hispanic and Asians in the City have different experiences, do not share the same candidate preferences, and do not often, if ever, collaborate on issues of community concern.

120. Plaintiffs Allen, a past president of NAACP, and Holloway were unable to identify any leaders of the Asian or Hispanic Community.

121. Plaintiffs Allen, a past president of NAACP, and Holloway were unable to identify any historical instances where they collaborated with an Asian or Hispanic group on an issue of importance to them.

122. The anecdotal evidence indicates with particular clarity that Filipino-Americans constitute their own distinct community of interest and have voting preferences distinct from members of the Black community. In partisan races, there is evidence that Filipinos vote far

more frequently for Republican candidates than Black voters. And in non-partisan races, like those for the City Council, there is evidence that Filipino-American groups have endorsed candidates opposed to those whom Dr. Spencer identified as being preferred by the Black community. An example is found in the 2014 City Council race in Rose Hall between Shannon Kane and James Cabiness (whom Dr. Spencer characterized as the "clear choice of black and other minority voters", Spencer Rpt. 17), in which Kane received the endorsement of the Filipino American Community Action Group. Kidd Rpt. 19 and Appx. A.

B. The Court Finds Low Levels of Cohesion and the Absence of Legally Significant White Bloc Voting, Even Assuming the Validity of Plaintiffs' Erroneous Method

123. Dr. Kidd further analyzed Dr. Spencer's "All Minority" vote data in the seventeen endogenous elections Dr. Spencer studied. However, the City had at least 30 elections from 2008 to 2018 that were contested: 2018 Mayor (special election), At-Large (2 seats), Bayside, Beach, Lynnhaven, Centerville (special), Princess Anne; 2016 Mayor, At-Large, Kempsville, and Rose Hall; 2014 At-Large (2 seats), Princess Anne, and Rose Hall (special); 2012 Mayor, At-Large, Kempsville, and Rose Hall; 2011 At-Large (special); 2010 At-Large (two), Bayside, Lynnhaven, and Princess Anne; and 2008 Mayor, At-Large, Kempsville, and Rose Hall. The failure to consider all 30 elections is a material omission of data and compromises the reliability of Dr. Spencer's analysis.

124. Of the seventeen elections he analyzed, Dr. Spencer found that in at least three instances (Cabiness 2010, Flores 2008, Jackson 2008), Dr. Spencer's claimed minority-preferred candidate was estimated to have received less than 50% of the Black or "All Minority" vote. Kidd Rpt. 23.

125. In addition, Dr. Kidd estimated that the Asian and Hispanic populations in the City, combined, accounted for 39.7% of the citizen voting-age population represented in the "All

Minority" metrics Dr. Spencer reports, with Black voters constituting 60.3%. Dr. Kidd noted that this estimate was conservative, because Asian and Hispanic voters often have lower turnout rates than Black voters, meaning that Asian and Hispanic voters may actually make up less than 39.7% of the total population reflected in the "All Minority" numbers Dr. Spencer is calculating. Kidd Rpt. 19–20.

126. Dr. Kidd then reviewed the Black support and "All Minority" support metrics reported by Dr. Spencer for four other minority candidates Dr. Spencer identified as minority-preferred, Allen (2008), Ross-Hammond (2016), Sherrod (2011), and Jackson (2010). Using his estimate that 39.7% of the "All Minority" population is Hispanic or Asian, Dr. Kidd found that each of these candidates almost certainly received less than 50% of the Hispanic and Asian vote (and, possibly, received even much less than that from at least one of those groups). He found Allen received, at best, 46.6%, Ross-Hammond 34.3% in 2016, Sherrod 31%, and Jackson 16.6% in 2010. Kidd Rpt. 21, Table 9.

127. Finally, Dr. Kidd then observed that of the ten remaining candidates, at least seven won election (Rouse 2018, Wooten 2018, Ross-Hammond 2012, Sessoms 2016, Davenport 2014, Henley 2014, and Jones 2010). This means that of the seventeen candidates that Dr. Spencer claimed to be minority-preferred, at least fifteen of them were (i) election victors or (ii) failed to obtain even a plausible majority of the "All Minority" category under even Plaintiffs' methodologically unsound theory. Kidd Rpt. 23, Table 10.

128. In addition, of the four elections from 2012 to 2018 where Dr. Spencer claims cohesion from a 50% average support from the "All Minority" category—a category that masks potential differences in voter preferences—the purported "minority-preferred" candidate prevailed in three of four elections. Kidd Rpt. 9, Table 3.

129. In fact, the evidence shows that Black voters more often than not do not prefer the same candidates. Dr. Kidd identified a total of 19 Black candidates who ran during 2008 to 2018 and, only nine (Wooten 2018 and Rouse 2018, Ross-Hammond 2016, Cabiness 2014, Ross-Hammond 2012, Sherrod 2011, Jackson 2010, Bullock 2010, and Allen 2008) had Black support above 50%. Of those nine, three prevailed. And, for candidates running in elections between 2012 and 2018, which are the most recent and the most probative, as they were conducted under the 2011 plan under challenge, three of five candidates (Rouse, Wooten, and Ross-Hammond in 2012) prevailed. Kidd Rpt. 7, Table 1.

130. Further, candidates preferred by Black voters and allegedly preferred by "All Minority" voters have been successful at high rates in endogenous elections.

131. Looking solely at candidates identified by Dr. Spencer as being Black preferred candidates of choice between 2008 and 2018, Dr. Kidd identified that among them, six lost (Ross-Hammond 2016, Cabiness 2014, Sherrod 2011, Jackson and Bullock 2010, and Allen 2008) and three prevailed (Wooten and Rouse 2018, Ross-Hammond 2012). Kidd Rpt. 10, Tbl 4. However, in the most recent elections, those occurring since 2012, which are the most probative, three of five candidates whom Dr. Spencer identified as Black-preferred prevailed.

132. Thus, in the most probative elections, Black-preferred candidates prevailed more often than they were defeated.

133. Dr. Kidd examined the Black candidates whom Dr. Spencer (erroneously) identified as being "All Minority Voter"-preferred candidates of choice between 2012 and 2018 the most probative elections, he found that three out of four Black candidates prevailed (Wooten and Rouse 2018, Ross-Hammond 2012). When elections from 2008 through 2011 were also

considered, three won and five lost (Ross-Hammond 2016, Sherrod 2011, Jackson and Bullock 2010, Allen 2008). Kidd Rpt. 11, Table 5.

134. When Dr. Kidd examined not just Black candidates whom Dr. Spencer considered "All Minority" voter-preferred candidates of choice, but candidates of all races who were "All Minority"-preferred, the number of successful candidates increased. From 2008 to 2018, seven of seventeen "All Minority"-preferred candidates of choice prevailed. Kidd Rpt. 15, Table 7.

135. Ultimately, when Dr. Kidd combines his analysis of the second and third *Gingles* preconditions, he concludes, in Table 6 of his report, at least 7 out of 9 elections that Dr. Spencer studied from 2012 to 2018 (the most probative election) affirmatively refute Dr. Spencer's ultimate conclusion that a white voting bloc consistently outvotes a cohesive group combined of Black, Hispanic, and Asian voters, even assuming that estimates of "All Minority" voter preferences can be made using Dr. Spencer's flawed aggregation method. And Dr. Kidd concludes that the endogenous elections from 2008 to 2011 affirmatively refute Dr. Spencer's ultimate conclusion that a white voting bloc consistently outvotes a cohesive group combined of Black, Hispanic, and Asian voters, even assuming that estimates of "All Minority" voter preferences can be made using Dr. Spencer's flawed aggregation method.

VI. Plaintiffs' Various Contentions Regarding Minority Disadvantage

A. Minority Opportunity in Virginia Beach

136. Plaintiffs' expert, Dr. Allan Lichtman, a Maryland resident, provides a lengthy narration of racial discrimination and segregation in Virginia. *See* Expert Report of Dr. Allan Lichtman ("Lichtman Rpt.") 5–10, Ex. DTX143. There is no dispute that beginning in the late nineteenth century, the Virginia legislature began to adopt measures intended to eliminate Black voting and office-holding in Virginia, such as poll taxes and literacy testing, and by the early

twentieth century, had enacted laws requiring racial segregation of Blacks and whites in schools, public transportation, and public facilities. Joint Stip. of Fact ¶¶ 36–42.

137. This evidence, however, relates predominately to Black residents. Evidence of past official racial discrimination against Asians or Hispanic residents touching on their rights to participate in the democratic process is minimal. The Asian community itself only very recently grew to a population level approaching its current size, well after *de jure* discrimination against Blacks ended. Kidd Rpt. 26.

138. For example, at the time some discriminatory measures discussed by Dr. Lichtman were adopted in the early 1900s, there were very few Asians living in present-day Virginia Beach, and it is unclear how many Hispanics were among that population. Kidd Rpt. 26. The 1960 Census reported less than 5,00 residents of Asian and Pacific Island descent in Virginia Beach, and the 1970 census reported 2,292 Hispanic or Latino residents, equivalent to 1.3% of the population. Kidd Rpt. 26.

139. Plaintiffs' more recent evidence of discrimination is, even as to Blacks residents, much weaker.

140. Dr. Lichtman cites to *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* Lichtman Rpt. 10. But that case did not even *allege* invidious intent, only that the General Assembly misinterpreted the Voting Rights Act in a good-faith effort to *protect* majority-minority districts. As the plaintiffs' brief in that case explained, "Plaintiffs do not contend, and will not seek to prove, that Delegate Jones," the principal legislator who prepared and sponsored the redistricting plan challenged in that case, "acted with racial animosity and such a showing is decidedly irrelevant and unnecessary for Plaintiffs to succeed. Even when

acting in good faith and with the best of intentions, covered jurisdictions do not have *carte blanche* to engage in racial gerrymandering in the name of nonretrogression," under Section 5 of the Voting Rights Act. 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). Ironically, the error alleged in *Bethune-Hill* is precisely the error Plaintiffs make in this case: presenting race-based districts for the misguided and erroneous—albeit genuine—purpose of remedying a potential Voting Rights Act violation. Evidence of genuine but mistaken efforts to comply with the Voting Rights Act is not evidence of racial discrimination, and the Court cannot conclude anything relevant to this case from the *Bethune-Hill* litigation.

141. Moreover, the *Bethune-Hill* litigation ended up inconclusive on the merits of the claim because the Supreme Court concluded that the Virginia House of Delegates lacked standing to appeal. *See Virginia House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1956 (2019). It is unknown and unknowable whether the Supreme Court would have affirmed the decision finding improper racial gerrymandering had the case been properly appealed.[5]

142. Plaintiffs next cite a study regarding rental housing discrimination, but it included, besides Virginia Beach, "the City of Fairfax, the City of Richmond, Henrico County, Loudoun County, Prince William County and Manassas, Roanoke County, Northwest Virginia." Lichtman Rpt. 11. Plaintiffs offer no findings from this study specific to Virginia Beach.

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[5] The litigation over Virginia's congressional districts, including *Page v. Virginia State Bd. of Elections*, No. 3:13CV678, 2015 WL 3604029, at *1 (E.D. Va. June 5, 2015), involved similar allegations of misguided efforts to comply with the Voting Rights Act and followed a similar course of procedure as the *Bethune-Hill* litigation. *See Wittman v. Personhuballah*, 136 S. Ct. 1732, 1737 (2016) (dismissing appeal for lack of standing). This litigation is no more probative of racial discrimination than is the *Bethune-Hill* litigation.

143. Dr. Lichtman also alleges that the city's historical use of the at-large system as evidence of past discrimination. Lichtman Rpt. 12–14. But whether Virginia Beach's at-large system impedes minority voting opportunities in the very issue to be decided in this case.

144. Plaintiffs contend that Virginia Beach is "behind its neighbors" in minority representation on the city council. *See* Lichtman Rpt. 17. Their own evidence flatly refutes this: minority-preferred candidates routinely win. Kidd Rpt. 14–16, Table 7.

145. Plaintiffs accept that white candidates can be the preferred candidates of choice for minority voters, and when considering these white candidates, the number of minority-preferred candidates who won the 17 races identified by Plaintiff's expert Dr. Spencer is 7 of 17, including 6 of 7 since 2012. Kidd Rpt. 5, 14–16, Table 7. Indeed, for a jurisdiction of less than 30 percent combined minority population, the combined minority population punches well above its weight, even under the erroneous assumption of cohesion, by successfully electing candidates Dr. Spencer asserts are preferred by the combined minority community.

146. Plaintiffs also cite a handful of more recent episodes they contend establish racial discrimination, but these isolated incidents are not indicative of widespread racism and do not reflect any degree of racism within City government.

147. The evidence overwhelmingly shows that city services are offered on an equal-opportunity basis. The City is an equal-opportunity employer. City resources are allocated under objective, race-neutral criteria.

148. The City Council places an emphasis on diversity in its appointment of men and women to the various Boards and Commissions of the City.

149. The City Council's speaker policy provides citizens with meaningful opportunity to address City Council directly. The City Council maintains a single email address

(citycouncil@vbgov.com) that provides a single address to contact all council members simultaneously.

150. The City emphasizes recruitment, hiring, and retention of racial, ethnic, and other minorities.

151. The City has established a formal EEO policy, complaint procedure and investigative process through its Human Resources Department.

152. The City has established and enhanced programs that seek to increase opportunities for contracting with minority and women-owned small businesses.

153. The City's engagement of minority and women-owned small business has grown steadily in the last five years.

154. The City has numerous initiatives aimed at increasing awareness and responsiveness to the needs of minority communities.

155. The Office of the Voter Registrar is accessible to the public, seeks to limit barriers to voting for everyone, and ensures the mechanics of voting are administered in a professional and race-neutral manner.

156. Plaintiffs' allegations of non-responsiveness likewise fail. Lichtman Rpt. 59.

157. Plaintiff Georgia Allen and others were appointed by City Council to the "Envision Virginia Beach 2040" Committee to prepare a comprehensive report detailing the City's visioning initiatives.

158. City Council appointed Plaintiff Georgia Allen and others to the "Vision to Action Community Coalition" to continue public outreach and monitor the City's progress toward achieving the vision established by the comprehensive report of the Envision Virginia Beach 2040 Committee.

159. The City Council created a Minority Business Council in 1995 and has continued to appoint a diverse membership on the MBC ever since, to address the needs and concerns of minority owned businesses.

160. The Minority Business Council has been active in assisting the City in developing opportunities to recruit minority, women owned and small business to bid upon and be awarded City contracts and otherwise advance minority business in the City.

161. The City emphasizes recruitment and contracting with minority owned businesses and over the last five year has made it easier for the City to award contracts under $100,000.00 to minority and women-owned business.

162. The City has maintained as aspirational goal of 10% for minority contracting in the City since 2007 and recently increased that aspirational goal to 12% in response to the Disparity Study.

163. The City's percentage of contract awards to minority owned businesses and expenditures on assistance for minority owned businesses exceeds that of the surrounding cities as well as the Commonwealth of Virginia.

164. On July 11, 2017 the City Council authorized and spent almost $500,000 to conduct a Disparity Study to identify any existing disparities in public contracting and recommend process improvements or enhancements.

165. The City has taken steps to implement certain recommendations of the completed Disparity Study along with enhancement of existing efforts to recruit minority businesses and contractors, including increasing its aspirational goal for minority contracting to 12%.

166. In response to the issues surrounding the 1989 Labor Day Weekend at the Virginia Beach Oceanfront, the City Council created a Labor Day Review Commission, which

evolved into a Labor Day Community Coordinating Committee, and in 1991, became the Virginia Beach Human Rights Commission. The City Council has continued to appoint a diverse membership to the HRC ever since.

167. The Human Rights Commission's purpose is to institute, conduct and engage in educational and informational programs for the promotion of mutual understanding and respect among citizens, and the fulfillment of human rights; to serve as a forum for the discussion of human rights issues, and to conduct studies and propose solutions for the improvement of human relations in the City; and to provide assistance to persons who believes their rights have been violated by identifying the appropriate federal, state or local agency to address the complaint and referring such persons to that agency.

168. After College Beach Weekend, also known as Week 17, experienced issues over a few years in the 2010s, the City sought and sponsored the Something in the Water festival, created by Pharrell Williams, a Virginia Beach native, in 2019 and 2020, as a way to provide structured events and activities for that annual weekend.

169. The City contributed $250,000 to the 2019 Something in the Water festival, as well as significant City staff time and resources to support the festival. The City was poised to increase its contribution to the 2020 festival when it was canceled due to the COVID-19 pandemic.

170. The 2019 Something in the Water festival attracted a diverse group of entertainers, and drew a diverse group of attendees, including people of all minority groups and ages.

171. On May 31, 2019, the City suffered a mass shooting in and around Building 2 at its Municipal Center. A City-employed public utilities engineer killed 12 people and injured 5 others, including one police officer.

172. The City hired an independent consultant, Hillard Heintz, to review the tragic events of May 31, 2019 and make recommendations for how to improve workplace safety and security.

173. The City responded to the Hillard Heintz report and implemented certain changes recommended by the report.

174. The City received and considered the Virginia Beach African American Leadership's proposed "5 Point Plan" to reform policing in the City of Virginia Beach, and has taken certain steps in furtherance of the goals of that plan.

175. The City authorized and funded purchase and implementation of police body cameras in its FY 2016-17 budget by vote taken May 10, 2016.

176. On October 20, 2015, the City donated 4.8+/- acres of land assessed at $1,671,100 to create an African American Cultural Center in the Kempsville section of the City.

177. The City has also supported the creation of the African American Cultural Center by donating staff time to assist in the Center's capital campaign.

178. The City provides wraparound services to under-privileged citizens, regardless of race or ethnicity, who may be suffering from food insecurity, homelessness, lack of proper medical care or is otherwise in need of services. Plaintiff Latasha Holloway has personally benefitted from these programs.

179. Plaintiffs emphasize various other forms of disadvantage experience by Black residents, but they fail to distinguish between racial and non-racial causes. *See* Lichtman Rpt. 18.

Plaintiffs make no effort to explain how these experiences compare to those of Hispanic and Asian residents, likely because their own evidence shows they differ. For example, Plaintiffs highlight the suspension rates for Black students as evidence of ongoing discrimination, but Dr. Lichtman's report contrasts Black students' experiences with those of white *and* Hispanic students, who are suspended at much lower rates than Black students. Lichtman Rpt. 18.

180. Moreover, Plaintiffs fail to explain how these examples correlate to infringement of these residents' ability to participate in the democratic process. To the contrary, recent turnout rates among Black, Asian, and Hispanic voters do not indicate these groups' political participation has been impeded by past racial discrimination. Kidd Rpt. 26–27.

181. Specifically, the turnout rates of Black and white voters were nearly identical in 2008 and 2012, and the differences in 2016 and 2018 were statistically negligible. Kidd Rpt. 26–28, Fig. 1. Dr. Lichtman's own analysis of turnout rates confirms this. Rebuttal Report of Dr. Allan Lichtman ("Lichtman Rebuttal Rpt.") 19, Table R6, Ex. DTX144. Hispanic levels matched white turnout levels in 2012 and came close in 2016. Kidd Rpt. 26–30, Fig. 3. Dr. Lichtman also confirms that Asian voter turnout exceeded white turnout in 2016 and that Hispanic voter turnout was within less than one percent of white turnout in 2016. Lichtman Rebuttal Rpt. 19, Table R6.

B. The Absence of a Candidate Slating Process

182. Plaintiffs concede that there is no formal slating process for candidate hopefuls to City Council seats, much less a slating process that limits access to seats on the basis of race or ethnicity. Lichtman Rpt. 25. There is also no informal slating process; Plaintiffs have adduced no evidence that an organization of any kind vets candidates and provides an essential gateway to the ballot or office.

183. Plaintiffs contend that contributions from some candidates for City Council seats to other candidates for City Council seats are disproportionately in favor of white candidates. Lichtman Rpt. 25. But, even if that were true, there is no shown significance to this contention. There is no evidence before the Court that candidates to City Council seats need funding from other candidates to have a legitimate chance to prevail. All kinds of factors can contribute to the ability of candidates to raise money from the general public, there is no reason for the Court to conclude that funding from other candidates is a prerequisite to office or the functional equivalent of a slating process, and the many factors relevant to fundraising prevent the Court from making any determination of the cause of contribution or to conclude there is a racial motive for these choices.

184. In any event, Plaintiffs' method of measurement is overinclusive. Kidd Rpt. 32.

185. In his analysis of contributions to city council candidates made by other candidates from 2008 to 2018 candidates, Plaintiffs' expert, Dr. Lichtman, crosses elections and considers contributions by candidates running in different years, not just candidates appearing on the ballot at the same time. Kidd Rpt. 32. Intra-election contributions are better indicators of support by candidates for one another, and have been infrequent over the last 10 years, though Black candidates have received several such contributions. Kidd Rpt. 32–33, Table 11. The single largest intra-election donation was made in 2016 to a Black candidate by a white candidate. Lichtman Rebuttal Rpt. 16, Table R5.

186. Furthermore, most of the contributions Dr. Lichtman cited were for comparatively small dollar amounts. In 2018, for example, the 22 candidates running that year raised a total of $1,681,967, Kidd. Rpt. at 33, but the largest total dollar amount Dr. Lichtman identifies being given to a single candidate was $12,000 to Henley, and that $12,000 figure was aggregated over

the 2010, 2014, and 2018 cycles. Lichtman Rebuttal Rpt. 19, Table. R5. Even if it had all be given in 2018, however, such a donation would amount to only 0.7% of the total campaign spending that year. Spencer Rebuttal Rpt. 16, Table R5.

187. In addition, Dr. Lichtman's method is arbitrary and lacking in a sound methodology. Dr. Lichtman arbitrarily selected $250 as the threshold amount of contributions to be analyzed, ignoring contributions below this amount. Dr. Lichtman also decided to only analyze contributions made by two or more candidates, discounting candidates who received contributions from one other candidate.

188. Plaintiffs erroneously contend that "the state House of Delegates districts that encompass at least parts of Virginia Beach have no elected African Americans or Asians representatives," Lichtman Rpt. 43, ignoring their own witness, Delegate Kelly K. Convirs-Fowler of the 21st House of Delegates District, elected in 2017 and re-elected in 2019 and who is of Filipino and Hispanic descent.

C. Minority Candidate Success in the Most Recent City Council Election

189. Two Black candidates were elected to the city council in 2018. Lichtman Rpt. 43.

190. Sabrina Wooten currently serves as the Councilmember representing the Centerville District. Joint Stip. of Fact ¶ 20. Ms. Wooten prevailed in the 2018 election over C. Conrad Schesventer II, a white male, and Eric V. Wray, a Black male. *See* Records from the Virginia Beach Office of Voter Registration and Elections, Official Election Results from 11/2018 General and Special Elections (Multiple Races), Ex. DTX037-100.

191. Aaron Rouse currently serves as a Councilmember who was elected At-Large. Joint Stip. of Fact ¶ 17. Mr. Rouse prevailed in the 2018 election over five other candidates, all but one of whom (Linda M. Bright) are white. *See* DTX037-38, 39.

192. These Black candidates were the minority-preferred candidates, Spencer Rpt. 14, and their success is probative evidence of equal opportunity in Virginia Beach city council races.

193. Plaintiffs contend that the 2018 election involved "special circumstances," Lichtman Rpt. 43, but cannot deliver any evidence that the election was affected by this litigation or that any other highly unusual circumstance negates the obvious import of this election. Kidd Rpt. 38–39.

194. Plaintiffs have no evidence of an "overt conspiracy" to elect Mr. Rouse and Ms. Wooten after this lawsuit was filed, as was present in *Collins v. City of Norfolk, Virginia*. *See* Lichtman Rpt. 44. Plaintiffs have no evidence that the existence of this lawsuit had any impact on the 2018 election. Nor would that seem likely: this case had achieved no public notoriety before the 2018 election, and the coalitional claim that now presents the *sole* basis of alleged relief was not even part of the case before the 2018 election. There is no connection at all between the 2018 election and this lawsuit.

195. Dr. Lichtman contends Mr. Rouse and Ms. Wooten received "unusual white support" in the 2018 election. Lichtman Rpt. 44. This "unusual white support" was not widespread amongst the other Black candidates, however—only Ms. Wooten received a majority of the white vote. Kidd Rpt. 38. Plaintiffs' speculation that this support is due to strategic voting by white voters to undermine this lawsuit is without any foundation and—in an insult to each candidate—discounts the fact that voters appeared to view Ms. Wooten and Mr. Rouse as the best qualified candidates with the most popular policy positions.

196. The evidence regarding campaign contributions and funding confirm special circumstances did not exist in 2018. To the contrary, Sabrina Wooten was not the "monied" interest in her contested race and Aaron Rouse was widely supported by donors from varying

backgrounds and demographic makeups. Kidd Rpt. 38–39. For example, Rouse's largest donor was Bruce Smith, a Black businessman who contributed $16,000. Lichtman Rpt. 55.

D. Economic Disadvantage

197. Plaintiffs also point to economic and social disadvantages suffered by the Black and Hispanic communities. Lichtman Rpt. 28. But by Plaintiffs' own measures, Asians are more closely situated to whites than Hispanics or Blacks. Lichtman Rpt. 28–36. Asians score better than, or comparable with, whites on over half of the 15 measures Dr. Lichtman analyzes and are more like whites than Hispanics or Blacks on several others. Kidd Rpt. 34.

198. For example, Asians in Virginia Beach have a slightly greater median household income than whites ($72,001 compared with $71,948) and have lower unemployment rates (4.6% compared with 5%). Lichtman Rpt. 29, Table 7. Whites and Asians have almost identical home ownership rates (69.5% compared with 69.4%). Lichtman Rpt. 36, Table 9.

199. Asians hold Bachelor's degrees at higher rates whites (41.6% versus 36.4%), and Asian students perform better than white students on writing, science, and mathematics. Lichtman Rpt. 33, Table 8. White and Asian students have identical success on reading (91%). Lichtman Rpt. 33, Table 8.

200. On other metrics where whites and Asians do not have comparable scores, Asians are still more similar to whites than Hispanics or Blacks on metrics relating to poverty rates, food stamps, and health insurance. Lichtman Rpt. 29, Table 7.

201. Plaintiffs have also not shown that economic disadvantage translates into disproportionate political participation. Kidd Rpt. 34–35. Under Plaintiffs' logic, the most disadvantaged group according to Dr. Lichtman's measures—Black residents—should be the least politically active, but turnout rates from the last six federal elections show that Black voters in Virginia participate at greater rates than Hispanics. Kidd Rpt. 34–35. Dr. Lichtman's data

confirms that Black voters turned out at higher rates than Hispanic voters in every election from 2008 to 2018. Lichtman Rebuttal Rpt. 19, Table R6.

E. Racial Appeals

202. Plaintiffs try to drum up evidence of racial appeals in campaigns, Lichtman Rpt. 37, but their evidence is weak. Most of the incidents did not occur in Virginia Beach. Kidd. Rpt. 36.

203. The few incidents specific to Virginia Beach are not persuasive. The comments directed at Louisa Strayhorn in 1998, Lichtman Rpt. 40, are to be condemned, but there is no evidence these taunts were part of her opponents' campaigns or anything more than the racist beliefs of isolated individuals.

204. The one example of an overt racial appeal occurring in a 2017 House of Delegates race was rejected by the community, as the candidate responsible for the appeal lost his bid for re-election. Kidd Rpt. 36–37. This is not probative evidence of racism in the community, only of a bad candidate.

205. The only recent incident specific to city council races that Plaintiffs identify, Lichtman Rebuttal Rpt. 33, simply lacks the negative connotation present in most examples of racial appeals. The flier circulated during the 2008 campaign depicted the mayoral candidate next to then-candidate Barack Obama as a signal of the candidate's support for the Black community and Obama.

[PROPOSED] CONCLUSIONS OF LAW

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

A. The Legal Standard

206. This case is brought under the "effects" element of Section 2 of the Voting Rights Act. Section 2 prohibits any "standard, practice, or procedure" that "results in a 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). A violation of this provision "is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of [protected] citizens…in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id.* § 10301(b). Section 2, however, does not establish "a right to have members of a protected class elected in numbers equal to their proportion in the population." *Id.*

207. The Supreme Court held in *Thornburg v. Gingles*, 478 U.S. 30 (1986), that a plaintiff challenging a redistricting scheme under Section 2 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." *Id.* at 50–51. *See also Levy v. Lexington Cty., S.C.*, 589 F.3d 708, 713 (4th Cir. 2009).

208. "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*, 589 F.3d at 713.

209. Plaintiffs challenge the City's at-large election method of electing members to the City Council, and at-large methods are frequent targets of Section 2 challenges. At-large methods *can* be dilutive of the minority vote, and, where this is shown, at-large methods are an injustice that should be corrected. *United States v. Charleston Cty., S.C.*, 365 F.3d 341, 348 (4th Cir. 2004). But "at-large elections[] may not be considered *per se* violative of § 2." *Gingles*, 478 U.S. at 46. Because at-large schemes can serve a "compelling need," *Dusch v. Davis*, 387 U.S. 112, 114 (1967), Section 2 plaintiffs must establish vote dilution by a preponderance of the evidence.

210. In this case, Plaintiffs' claim is deficient under each of the *Gingles* preconditions, and a review of the totality of the circumstances confirms that the at-large system challenged in this case is not dilutive.

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

211. Under the first precondition, a Section 2 plaintiff must show that the relevant minority group "is sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50. The 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).

212. Plaintiffs have established none of these elements.

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

213. Plaintiffs have not proven 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" to the at-large system, *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. Plaintiffs concede that they have no such evidence. It is, in fact, not possible to make this showing. Brace Rpt. 11–12.

214. Instead, Plaintiffs have alleged and tried to prove a "coalitional" claim, contending that multiple groups (which they identify as "Black," "Hispanic or Latino," and "Asian") should be combined *together* to achieve a 50% plus one voting-age majority of (what they call) "minority" voters. *See League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 986 F.2d 728, 786 n.43 (5th Cir. 1993) ("The impetus for two [or more] minority groups seeking to proceed as a coalition under Section 2 is apparently their inability, as separate groups, to overcome the first *Gingles* threshold factor.").[6]

215. But so-called "coalitional" claims are not cognizable under Section 2 of the Voting Rights Act.

216. "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 Cty.*, 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 or colors are prevented from electing candidates of their choice is a *political* claim, not a racial claim, and "[t]he Voting Rights Act's purpose was to

[6] On reh'g, 999 F.2d 831 (5th Cir. 1993)

eliminate *racial* discrimination—not to foster particular *political* coalitions." *Clements*, 986 F.2d 786 n.43 (quotation marks omitted) (emphasis in original).

217. The only point of commonality among the groups joined in a coalition is political preference—i.e., the contention and attempted proof that members of the various groups favor many of the same political candidates. There is no common racial identity. It is, in this case, beyond serious dispute that Blacks and Hispanics or Latinos and persons of Asian descent (in various, disparate forms) do not all share a common racial identity. Plaintiffs' contention that members of various groups prefer the same candidates in certain election contests, presented as evidence here, could at most establish only a shared political preference—if that evidence were taken as valid.

218. Evidence that a coalition cannot elect its candidates of choice is not evidence of discrimination "on account of race or color." "A group tied by overlapping political agendas but not tied by the same statutory disability is no more than a political alliance or coalition." *Campos v. City of Baytown, Tex.*, 849 F.2d 943, 945 (5th Cir. 1988) (Higginbotham, J., dissenting from denial of rehearing en banc), *reh'g denied*, 849 F.2d 943 (5th Cir.1988), *cert. denied*, 492 U.S. 905 (1989).. A coalition does not fall within the statutory definition and enjoys no protection under Section 2. "The crucial problem inherent in the minority coalition theory…is that it transforms the Voting Rights Act from a statute that levels the playing field for all races to one that forcibly advances contrived interest-group coalitions of racial or ethnic minorities." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 894 (5th Cir. 1993) (en banc) (Jones, J., concurring).

219. Further, the statute "consistently speaks of a 'class, in the singular," affording protection to any "citizen" on "account of" that citizen's race or color or membership in a

protected language minority. *Nixon*, 76 F.3d at 1386; 52 U.S.C. § 10301(a). This use of singular categories precludes treating groups of classes has receiving Section 2 protection *as* classes. *Nixon*, 76 F.3d at 1386–87. "Had Congress chosen explicitly to protect minority coalitions it could have done so by defining the 'results' test in terms of protected classes of citizens. It did not." *Clements*, 999 F.2d at 894 (Jones, J., concurring).

220. In addition, the statutory definitions preclude reading it to authorize coalition claims. Section 2 was amended in 1975 to include "language minorities," 52 U.S.C. § 10303(f); An act to amend the Voting Rights Act of 1965, Pub. L. 94-73, 89 Stat. 400, § 203 (Aug. 6, 1975), 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); Pub. L. 94-73, 89 Stat. 400, § 207. "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.*

221. Indeed, 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) (recounting findings and collecting legislative history), and for extending those protections to language minorities, 52 U.S.C. § 10303(f)(1). "[T]he Voting Rights Act is premised upon congressional 'findings' that each of the protected minorities is, or has been, the subject of pervasive discrimination and exclusion from the electoral process." *Nixon*, 76 F.3d at 1390. But "[a] coalition of protected minorities is a group of citizens about which Congress has not made a specific finding of discrimination." *Id.* The scope of congressional findings limits the permissible scope of the Act, because these findings are necessary to Congress's enforcement of the

Fifteenth Amendment. *See, e.g., Johnson v. Governor of State of Fla.*, 405 F.3d 1214, 1231 (11th Cir. 2005) ("For Congress to enact proper enforcement legislation" under the Fourteenth and Fifteenth Amendments "there must be a record of constitutional violations."); *Bd. of Trustees of Univ. of Alabama v. Garrett*, 531 U.S. 356, 368 (2001) ("The legislative record of the ADA, however, simply fails to show that Congress did in fact identify a pattern of irrational state discrimination in employment against the disabled."). "To assume…that a group composed of both minorities," or several minority contingencies, "is itself a protected minority is an unwarranted extension of congressional intent." *Campos*, 849 F.2d at 945 (Higginbotham, J., dissenting from the denial or rehearing en banc). Plaintiffs' reading of the statute would extend it beyond its remedial purpose, rendering it unconstitutional as applied. *See City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

222. Coalitional claims conflict with the statutory scheme and purpose. For one thing, the coalitional theory of Section 2 may *justify* discriminatory voting systems. "[A] coalition theory could just as easily be advanced as a defense in Voting Rights Act cases, a position that courts would be logically bound to accept if plaintiff coalitions were allowed, yet a position at odds with congressional purpose." *Nixon*, 76 F.3d at 1391. The coalitional theory, if adopted, would empower a jurisdiction to create dilutive coalition districts and defend itself from a claim for majority-minority districts on this basis. *Campos*, 849 F.2d at 944 (Higginbotham, J., dissenting from denial of rehearing en banc).

223. Along the same lines, 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. Here, no Asian or Hispanic plaintiff has even joined the case, and these groups are ostensibly

being used for a mere instrumental purpose to reach a "minority" citizen-voting age population threshold of 50%, notwithstanding the complete absence of evidence that coalitional districts advance the interests of Hispanics or Asians. This amounts to discrimination *against* these minority groups that are being purposefully submerged in districts where they stand no chance to prevail in electing their preferred candidates.

224. Moreover, allowing some groups (but not all) "to further their mutual political goals" (if that is even occurring) hijacks Section 2 for partisan ends, which no one can seriously defend as within congressional purpose or power. *Nixon*, 76 F.3d at 1392. There appears to be no limiting principle to this theory. A political party that enjoys substantial support from certain racial groups can claim a Section 2 right to a districting scheme that favors that party's interests, coopting these groups' minority status for its instrumental and partisan ends. If this is allowed, it will empower partisan interests to politicize the Act in ways that will ultimately undermine, rather than further, congressional purpose and the integrity of the Act.

225. Coalition claims must be rejected for the same reasons the Supreme Court rejected crossover claims as inconsistent with the Act's text, purpose, and constitutional underpinnings. *Bartlett*, 556 U.S. at 13–25. *Bartlett* read the Act's coverage to reach "Blacks standing alone," reading it to protect only that group's opportunity to "elect that candidate based on their own votes and without assistance from others." *Id.* at 14. The Court explained: "Nothing in § 2 grants special protection to a minority group's right to form political coalitions." *Id.* at 15; *see also id.* at 20 ("The statute does not protect any possible opportunity or mechanism through which minority voters could work with other constituencies to elect their candidate of choice."). So too here.

226. The Court explained that Section 2 case law "does not impose on those who draw election districts a duty to give minority voters the most potential, or the best potential, to elect a candidate by attracting crossover voters." *Id.* Section 2 protects a racial group's opportunity to make its "own choice," and "[t]here is a difference between a racial minority group's 'own choice' and the choice made by a coalition." *Id.* The Court also explained that crossover claims would require the Court "to revise and reformulate the *Gingles* threshold inquiry that has been the baseline of our § 2 jurisprudence." *Id.* at 16. The same would be true of a coalitional claim.

227. *Bartlett*'s concern for "for workable standards and sound judicial and legislative administration" cuts equally against coalition claims. *Id.* at 17. "Determining whether a § 2 claim would lie—i.e., determining whether potential districts could function as [coalition] districts—would place courts in the untenable position of predicting many political variables and tying them to race-based assumptions." *Id.* This litigation presents a case in point: as discussed below, Plaintiffs' expert, Dr. Spencer, purports to show that illustrative districts will perform effectively, but he admits that *white crossover voting* is as likely (if not more likely) the cause of this as is *coalitional* voting. An attempt to allow coalitions to vote together against white blocs could (and will) easily devolve into empowering white voters to join with *one* minority coalition against *other* minority voters to *dilute* the votes of those latter minority votes. Courts have found that this *violates* Section 2; it certainly does not *vindicate* the policies of Section 2. *See Meek v. Metro. Dade Cty.*, 908 F.2d 1540, 1545–46 (11th Cir. 1990) (finding "that a coalition of Hispanics and [] Whites could form the relevant majority voting bloc" that frustrates the Black vote).

228. *Bartlett*'s concern for constitutional doubt also applies with equal force here. 556 U.S. at 21. The Court explained that a Section 2 crossover-district requirement would greatly

increase the use of racial classifications in redistricting and "unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *Id.* (quotation marks omitted). Injecting a coalitional theory into Section 2 would demand an even *more* race-conscious approach to redistricting, requiring *multiple* racial classification and single-minded consideration of race in redistricting. "That interpretation would result in a substantial increase in the number of mandatory districts drawn with race as 'the predominant factor motivating the legislature's decision.'" *Id.* at 21–22 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). To interpret Section 2 in this way places the statute in constitutional doubt, and the avoidance canon strictly militates against these readings.

229. All of these factors, and others, that drove the Supreme Court's rejection of crossover districts in *Bartlett* equally cut against coalitional claims. The Fourth Circuit's decision in *Hall v. Virginia*, 385 F.3d 421 (4th Cir. 2004), anticipated *Bartlett*'s holding and much of its reasoning, including the view that members of a minority group must "have the potential to elect a candidate *on the strength of their own ballots*" before claiming Section 2 protection. *Id.* at 429 (emphasis in original). *Hall* provides yet more authority that cuts against Plaintiff's coalition theory, which is not consistent with the Act.

230. Plaintiffs' position, in essence, is that it would be fundamentally unjust for Blacks in Virginia Beach to vote without majority-minority districts. But "[t]he objective of Section 2 is not to ensure that a candidate supported by minority voters can be elected in a district. Rather, it is to guarantee that a minority group will not be denied, on account of race, color, or language minority status, the ability to elect its candidate of choice on an equal basis with other voters." *Hall*, 385 F.3d at 430 (quotation marks omitted). Unless a racial group can constitute a majority in a single-member district, the discussion of dilution is "circular talk." *Hall*, 385 F.3d at 428;

Gingles, 478 U.S. at 51 n.17. There is simply no dilution within the meaning of Section 2 to remedy. "Permitting Section 2 claims by opportunistic minority coalitions, however, artificially escapes [the majority-minority] hurdle." *Clements*, 999 F.2d at 896 (Jones, J., concurring). As a result, the remedy afforded to the coalition may easily cross the line "from protecting minorities against racial discrimination to the prohibited, and possibly unconstitutional, goal of mandating proportional representation." *Id.*

231. For all these reasons, the decisions of some courts recognizing coalitional claims are not sound and do not merit the Court's adherence. The decisions provide precious little analysis on the viability *vel non* of coalitional claims, frequently skipping to an analysis of the facts before determining the predicate legal question of whether the claim itself falls within the scope of the Act. *See, e.g.*, *Bridgeport Coal. For Fair Representation v. City of Bridgeport*, 26 F.3d 271, 275–76 (2d Cir.), *vacated sub nom. City of Bridgeport, Conn. v. Bridgeport Coal. For Fair Representation*, 512 U.S. 1283 (1994); *League of United Latin Am. Citizens, Council No. 4386 v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1498–1502 (5th Cir.), *vacated*, 829 F.2d 546 (5th Cir. 1987). One leading case found coalitional claims viable simply because the Act does not expressly prohibit them, *see Campos*, 840 F.2d at 1244, and this approach has drawn rightful criticism, *Clements*, 999 F.2d at 895 (Jones, J., concurring) ("The proper question is whether Congress *intended to protect* coalitions." (emphasis in original)). Other decisions assumed that coalitional claims are authorized under the Act but rejected them on the merits, without discussing the anterior legal question. *See Concerned Citizens of Hardee Cty. v. Hardee Cty. Bd. of Comm'rs*, 906 F.2d 524, 526–27 (11th Cir. 1990); *Badillo v. City of Stockton, Cal.*, 956 F.2d 884, 890 (9th Cir. 1992), *as amended* (Apr. 27, 1992). Another court simply chose to "remain faithful to the reasoning of the majority of the circuit and district courts which have considered

the issue," *Huot v. City of Lowell*, 280 F. Supp. 3d 228, 236 (D. Mass. 2017), notwithstanding that the "majority" of courts have provided very little "reasoning" for their rulings.

232. The substantial criticisms of coalitional claims lodged by numerous Article III jurists in numerous thoughtful, well-reasoned opinions have not been met in kind by proponents of coalitional claims, and the better reading of the Act is that a group attempting to meet the first *Gingles* precondition must show that the group itself is sufficiently large to "elect [its preferred] candidate based on their own votes and without assistance from others." *Bartlett*, 556 U.S. at 14. Plaintiffs here have not shown that and effectively concede that they cannot. Their claim fails on this basis alone.

2. Plaintiffs Do Not Establish the First *Gingles* Precondition, Even Under a Coalition Theory

233. Even if their coalitional claim is taken at face value, Plaintiffs fail to establish that minority districts of at least 50% plus one minority VAP can be created to govern Virginia Beach City Council elections. The minority groups are relatively dispersed throughout Virginia Beach, which is not characterized by marked racial segregation. *See* Fairfax Rpt. 14. This racial integration, a point of pride in Virginia Beach, explains why the Black community, which constitutes about 20% of the City's population, cannot be drawn into even *one* majority-Black district.

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

234. Plaintiffs attempt to establish the first *Gingles* precondition through illustrative remedial districting plans of 10 single-member districts. But all these various plans establish is what could have been drawn in the past, not what plans can be implemented for use in future elections. They therefore do not establish the first *Gingles* precondition.

235. As discussed, the first *Gingles* precondition requires plaintiffs to prove that "the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district." *Collins v. City of Norfolk, Va.*, 883 F.2d 1232, 1236 (4th Cir. 1989). This showing is not a formality. "Any claim that the voting strength of a minority group has been 'diluted' must be measured against some reasonable benchmark of 'undiluted' minority voting strength." *Hall v. Virginia*, 385 F.3d 421, 428 (4th Cir. 2004); *Thornburg v. Gingles*, 478 U.S. 30, 51 n.17 (1986) ("Unless minority voters possess the potential to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice."). Section 2 plaintiffs must show "that their votes have been diluted by discriminatory elements of the election process, and not simply that their votes are dilute." *Gause v. Brunswick Cty., N.C.*, 92 F.3d 1178 (4th Cir. 1996) (unpublished table decision) (emphasis in original). Otherwise, any "[t]alk of 'debasement' or 'dilution' is circular talk. One cannot speak of 'debasement' or 'dilution' of the value of a vote until there is first defined a standard of reference as to what a vote should be worth." *Hall*, 385 F.3d at 428 (quotation marks and citation omitted).

236. For these reasons, Supreme Court and Fourth Circuit precedent "focus[] up front on whether there is an effective remedy for the claimed injury." *Hines v. Mayor & Town Council of Ahoskie*, 998 F.2d 1266, 1273 (4th Cir. 1993) (citation omitted). No remedy means no injury.

237. But Plaintiffs cannot show what a vote should be worth in any future election—and can show no injury at all—because the data that will be used to construct any future single-member election districts do not yet exist.

238. There is no serious question that this Court cannot adjudicate liability and issue a remedy before the last election of the decade, scheduled for November 3, 2020. It would violate

numerous Supreme Court precedents to interfere with that election at this late hour, after a trial that did not begin until October 6. *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020); *Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006); *Reynolds v. Sims*, 377 U.S. 533, 542–43, 586–87 (1964).

239. All scheduled elections after November 3, 2020, will occur after the 2020 census results are released in 2021.

240. All of Plaintiffs' remedial plans are drawn to equalize district populations under results of either the 2010 census or the American Community Survey (ACS) results from the 2010 decade.

241. Even assuming that Plaintiffs can establish dilution under data from the 2010 decade, there is no reason to anticipate that their illustrative districts could be drawn in substantially the same form, and with substantially the same racial demographics, under 2020 census results. The remedial districts, like anything a legislature might enact, 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). Needless to say, a plan that does not comply with the equal-protection clause cannot constitute an acceptable Section 2 remedy. *Cane v. Worcester Cty., Md.*, 35 F.3d 921, 927 (4th Cir. 1994) ("A proposed plan is a legally unacceptable remedy if it violates constitutional or statutory voting rights—that is, if it fails to meet the same standards applicable to an original challenge of an electoral scheme." (quotation and edit marks omitted)).

242. Plaintiffs are required to establish the *Gingles* factors by a preponderance of the evidence. *Bartlett*, 556 U.S. at 19–20.

243. Plaintiffs do not establish by a preponderance of the evidence what single-member district may be drawn under the 2020 census results *before those results are released*. It would be pure guesswork for the Court to assume that alternative plans produced to comply with the one-person, one-vote principle under 2010-decade census data can be drawn in materially identical ways to equalize population under the new census results.

244. Plaintiffs assert that their maps show what might be drawn, but that is speculation. And there is no basis for it. Plaintiffs' expert reports do not opine that the illustrative districts will be usable after the 2021 census results are released. Plaintiffs' experts are bound by the statements in their reports and may not testify at trial beyond those statements. Plaintiffs' expert reports do not contain any reliable analysis that projects the results of the 2021 census or what districting possibilities may exist under those results.

245. There is therefore no competent evidence before the Court establishing that the first *Gingles* precondition can be met in an *actual* election in Virginia Beach. This is an independent reason why Plaintiffs' claim fails under the first *Gingles* precondition.

(b) Plaintiffs' Illustrative Districts Are Legally Deficient Under the One-Person, One-Vote Standard

246. Plaintiffs' illustrative districts fail to establish the first *Gingles* precondition for the additional reason that they do not show that a properly apportioned, court-imposed plan can be drawn at 50% plus one coalitional citizen voting-age population.

247. Plaintiffs' illustrative districts utilize the full 10% total deviation normally allowed to state legislatures and redistricting authorities. *See Harris v. Arizona Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1309 (2016). In fact, remedial districts in Mr. Fairfax's supplemental report appear to be purposefully underpopulated to achieve racial targets. Brace Rpt. 13.

248. But court-imposed maps are subject to a stricter "de minimis" 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 8%. *See* Fairfax Rpt. 68; *Connor*, 431 U.S. at 418 ("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."). The Court therefore would lack the ability to impose these illustrative plans on the City of Virginia Beach and they therefore do not establish that a "*remedy*" can be fashioned "for the claimed injury." *Hines*, 998 F.2d at 1273 (emphasis added).

249. 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 8% deviation. *See Reed v. Town of Babylon*, 914 F. Supp. 843, 869 (E.D.N.Y. 1996). But this is not a reason to allow Plaintiffs an 8% total deviation; Plaintiffs came to court, not the legislature. And, if the legislature declines to issue a remedy, the Court would be helpless to act, since it would not be empowered to implement a district with an 8% total deviation. 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 a plan having an overall population deviation the court itself is powerless to impose on Virginia Beach.[7]

(c) Plaintiffs' Illustrative Plans Do Not Establish That the So-Called "Minority" Population Can Constitute a Voting-Age Population Majority in a Compact Single-Member District

250. 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

[7] For this reason, the *Reed v. Town of Babylon* district-court decision is unpersuasive.

percent of the voting-age population in the relevant geographic area?" *Bartlett*, 556 U.S. at 18. There are multiple failings on this front.

251. 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 citizen-voting age population majority, *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 429 (2006); *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.[8]

252. Second, the illustrative districts in Mr. Fairfax's initial report do not cross the 50% mark even under the ACS citizen-voting-age population metric. Plaintiffs' expert, Mr. Fairfax, drew districts at a bare 50% HBA majority. Fairfax Rpt. 20. But he disaggregated the ACS data to the census blocks that compose the illustrative districts through an unreliable means, as discussed in the findings of fact. ACS data is not reported at the census-block level of census geography, and therefore it is necessary for experts to disaggregate the ACS data through a reliable method of estimation. Morrison Rpt. 3. As Dr. Morrison credibly shows, the illustrative

[8] Indeed, because a citizen-voting age population could never be higher, only lower, than the minority group's respective voting-age population, the fact that the districts fall short of 50% under the 2010 results calls into substantial doubt the assertion that they exceed the 50% mark under the ACS citizen-voting-age-population metric.

districts fall short of a majority. Morrison Rpt. 7. Mr. Fairfax's disaggregation method results in inconsistencies that render the method unreliable and not worthy of credit.

253. Third, the HBACVAP percentages in Mr. Fairfax's various proposed remedial districts are sufficiently low, and the method of disaggregating ACS data down to the census-block level is sufficiently uncertain, that there is a real possibility that these proposed remedial districts do not cross the 50% mark. The statistical "noise" created in this process generates large confidence intervals, which in turn signal that the true value of HBACVAP may fall below 50%. Plaintiffs suggest that districts drawn below a majority are sufficient 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 below that line. *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).

254. Fourth, Mr. Fairfax attempted to correct his errors through various alternative plans presented in a rebuttal report and a supplemental report. Most of the HBACVAP levels in these districts are not sufficiently high to overcome the above-described problems. And, in any event, Mr. Fairfax could only ratchet up the minority percentages in his proposed illustrative districts at the detriment of district compactness and traditional districting principles.

255. To satisfy the first *Gingles* precondition, a remedial district must be "geographically compact." *Gingles*, 478 U.S. at 50. Mr. Fairfax's alternative districts, and their modified forms configured to include the residence of Plaintiff Georgia Allen, are highly irregular and are visibly non-compact. The take in "disparate and distant communities" across the city for the self-evidence purpose of ratcheting up population the map-drawer identified as "minority." *League of United Latin Am. Citizens*, 548 U.S. at 430. This is particularly true of the

districts that achieve higher minority CVAP percentages (i.e., the districts that arguably overcome the flaws Dr. Morrison identified in Mr. Fairfax's initial proposals).

256. 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, and they do not appear intended comply with them. The districts snake across the city in bizarre ways, split voting districts and communities, draw incumbents into contests with one another, and gobble up pockets of population the map-drawer identified as "minority" for no other ostensible purpose than their race and ethnicity. That is hardly even contested: Mr. Fairfax concedes that he was attempting to achieve the maximal racial percentages, *see Cooper v. Harris*, 137 S. Ct. 1455, 1475 (2017), and that in the modified alternative maps he was simply trying to draw a single person, Georgia Allen, into the alternative districts, which is not a traditional districting principle. To the extent other factors came into consideration (if at all), they were subordinate to race.

257. "The Equal Protection Clause forbids 'racial gerrymandering,' that is, intentionally assigning citizens to a district on the basis of race without sufficient justification." *Abbott*, 138 S. Ct. at 2314. Mr. Fairfax's remedial proposals, particularly his alternative proposals, are racial gerrymanders that cannot establish the baseline of the first *Gingles* precondition.

258. 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, or justify race-based districting, through districts that are not compact and do not honor traditional redistricting principles. *See Shaw v. Hunt*, 517 U.S. 899, 916 (1996) (finding that race-based district was not justified under Section 2 because "[n]o one looking at [it] could reasonably suggest that the district contains a 'geographically compact' population of any race"); *League of United Latin Am. Citizens*, 548 U.S. at 430 (holding that a "noncompact district cannot…remedy a violation" of Section 2).

259. In short, none of Plaintiffs' illustrative remedies establish the first *Gingles* precondition. It is not established by a preponderance of the evidence that any of them can be used in a real-life election, that any can be implemented by a federal court as a "remedy," or that any of them provides a compact district that is shown under the preponderance of the evidence to contain a 50% HBACVAP majority. This element is not satisfied.

3. Plaintiffs Fail To Establish That Their Proposed Remedial Districts Constitute Functional and Effective Coalitional Districts

260. Plaintiffs also fail to establish that their illustrative districts would perform as effective coalitional districts.

261. It is not sufficient for a Plaintiff to establish that a 50% majority may be reached in a single-member district; the first *Gingles* element "focus[es] up front on whether there is an *effective* remedy for the claimed injury." *Hines*, 998 F.2d at 1273 (quoted source omitted; emphasis added). To meet this test, a Section 2 plaintiff must establish that an alternative map establishes "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 v.*

Perez, 138 S. Ct. 2305, 2332 (2018). Failure to meet this standard "precludes…a finding of liability." *Nipper v. Smith*, 39 F.3d 1494, 1533 (11th Cir. 1994); *Holder v. Hall*, 512 U.S. 874, 880 (1994); *see also id.* at 887 (O'Connor, J., concurring).

262. For example, in *Abbott*, the Supreme Court reversed a lower court's finding of Section 2 liability, even though districts with "simple Latino majorities" were proposed as illustrative remedies, because the plaintiffs failed to establish that Latinos "would have a real opportunity to elect the candidates of their choice" in those districts. 138 S. Ct. at 2332–33 & n.27. The Court rejected the plaintiffs' expert's speculation that opportunity could be enhanced, holding that "[c]ourts cannot find § 2 effects violations on the basis of *uncertainty*." *Id.* at 2333 (emphasis in original); *see also Harding*, 948 F.3d at 310 (discussing the legal standard *Abbott* imposes).

263. Plaintiffs fail to meet this standard. Plaintiffs rely on Dr. Spencer's reaggregated election analysis to demonstrate an improvement of opportunity for the so-called "minority" coalition. Spencer Rpt. 32–34; Supplemental Expert Report of Douglas ("Spencer Suppl. Rpt.") at 4–15, Ex. DTX142. The analysis is deficient in many respects and fails to satisfy Plaintiffs' burden.

264. First, as discussed above in the findings of fact, 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 was utilized. Brace Rpt. 14. The illustrative remedies split a number of City precincts, and the failure to disclose the method of resolving the mismatch of geography renders Dr. Spencer's analysis unrepeatable and unable to be verified. Brace Rpt. 14–15. As a result, the analysis

cannot and does not establish by a preponderance of the evidence *anything* it is proffered as showing.

265. Second, there is no meaningful showing of effectiveness. In illustrative district 1, four of the seven contests Dr. Spencer analyzed would have come out the same way under the illustrative plan as under the at-large system, and those where the result would have changed under the alternative scheme involved elections from 2011 or earlier—the least probative data. Brace Rpt. 15. In illustrative district 2, two of the three most recent elections would not have changed outcomes under the alternative scheme. *Id.* These results are similar to those of the recompiled election results the Supreme Court held insufficient in *Abbott*—reversing a trial court's findings on this element. 138 S. Ct. at 2332 (finding it insufficient where minority-preferred candidate prevailed "in only 7 out of 35 relevant elections"). The Plaintiffs' illustrative remedies show "only that lines could have been drawn elsewhere, nothing more." *Johnson v. De Grandy*, 512 U.S. 997, 1015 (1994).

266. 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." Spencer Rpt. 7. This is not a legally significant difference. Section 2 does not guarantee the right of voters to win or lose elections by purportedly ideal margins.

267. Third, the analysis does not establish that the illustrative remedial districts are effective as *coalitional* districts. Even if an improvement were shown (it is not), Dr. Spencer, rather, relies on *white crossover voting* as the basis of his claim that the district will improve the electoral opportunity of so-called "minority" voters. Spencer Rpt. 32. Dr. Spencer did not

analyze the extent to which the effectiveness his analysis purports to identify is the result of coalitional voting or, instead, cross-over voting from white voters.

268. This is a significant defect in the analysis because the Supreme Court in *Bartlett* rejected the theory that Section 2 requires the creation of crossover districts. 556 U.S. at 25. "Crossover districts are, by definition, the result of white voters joining forces with minority voters to elect their preferred candidate." *Id.* At best, that is all Plaintiffs' illustrative districts amount to: districts that *may* empower Black voters and a segment of white voters to elect their purportedly shared preferred candidates. Plaintiffs have failed to show by a preponderance of evidence that all *constituent groups of the coalition* will see an improved opportunity to elect their preferred candidates under an alternative electoral method.

269. As discussed below, there is no independent analysis of Hispanic and Asian voting preferences, and no basis to conclude that the illustrative districts are effective as coalitional districts. They appear to be crossover districts by another name.

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

270. 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. "If the minority group is not politically cohesive, it cannot be said that the selection of [an at-large] electoral structure thwarts distinctive minority group interests." *Id.* at 51. The most common method of proving such cohesion is "[a] showing that a significant number of minority group members usually vote for the same candidates" *Id.* 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 have failed to prove it here.

1. Plaintiffs Fail to Prove That Members of Each Group of Their Proposed Tripartite Coalition Typically Prefer the Same Candidates

271. As discussed, Plaintiffs have asserted that a coalition that they define as comprising Black, Hispanic or Latino, and Asians—a group they call "HBA" minorities—is politically cohesive. Even if a Section 2 claim of this nature is cognizable, the standard of cohesion 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. The Court held that, "when dilution of the power of such an agglomerated political bloc is the basis for an alleged violation, proof of minority political cohesion is all the more essential." *Id.*

272. This burden "quite obviously," *id.*, requires Section 2 plaintiffs claiming injury on behalf of a coalition of different racial and ethnic groups to 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. The Fifth Circuit, which has allowed coalitional claims, has explained the cohesion test as follows:

> [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).

273. There is no other plausible way to fashion the cohesion test for a coalitional claim. Any other approach would undermine the very theory underpinning the coalitional claim itself: the members of *each* group in the coalition suffer dilution of *their own* votes.

274. In this case, Plaintiffs rely only on datapoints that aggregate all three constituencies of the alleged coalition. They provide no evidence whatsoever that Asian voters

and Hispanic voters favor the same candidates that Black voters favor, that Black and Hispanic voters favor the same candidates the Asians favor, and that Black and Asian voters favor the same candidates that Hispanics favor, as is required by law and logic.

275. Instead, Plaintiffs' statistical analysis simply lumps all of these groups together (along with the subgroups constituting each group) into an "All Minority" category and report estimates of voting behavior attributed to *the entire group*. These aggregate datapoints quite literally prove nothing about the preferences of the three constituent groups. There is no way for the Court to tell whether members of each group are cohesive with the members of the other groups—or even with members of their *own* group. Plaintiffs ask the Court to "assume" cohesion, but they "must prove it." *Growe*, 507 U.S. at 42 (quotation marks omitted). Their failure to do so is dispositive.

276. Plaintiffs' aggregation method is particularly defective in this case because the Hispanic and Asian contingencies of their alleged coalition are quite small and are easily drowned out by the data reflecting voter preferences of the larger Black community. An aggregate number is not probative and is insufficient as a matter of law. The aggregate datapoints could easily mask polarization among these groups: the very small group of Asians may consistently be voting *against* the Black-preferred candidate and yet be counted as voting *for* the Black-preferred candidate because their numbers are too small to make a meaningful dent in the overall average. 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. Plaintiffs' method allows one or more groups (here, the Asian and Hispanic groups) to be completely ignored in the analysis.

277. Another blatant deficiency in this method is that it masks differences *within* each racial group. Plaintiffs, for example, have no evidence that the diverse category of "Asians" is itself cohesive. To assume this would be gross racial stereotyping. The term Asians includes such diverse groups as Japanese, Chinese, Koreans, Filipinos, and Vietnamese, and there is no basis for speculating that these groups share political interests or preferences. By way of perspective, Japan and China have fallen on opposite sides of some of the fiercest and ugliest international conflicts in history, including the Second Sino-Japanese War from 1937 to 1945, which became subsumed in World War II as a major sector known as the China Burma India Theater. To assume cohesion between Japanese and Chinese simply because persons of these ancestries are often confused by white Americans would be just plain silly. The same is true as to members of each of these distinct groups. Asians from different countries often not only do not share common histories or cultures, but also have entirely different languages and practice different religions. The assumption Plaintiffs ask this Court to make—that persons of Filipino descent share political interests with persons of Japanese descent (and so forth) based on the loose racial category "Asian"—is no better than assuming that persons from Quebec have the same political preferences as Venezuelans, simply because they are all from the Western Hemisphere.

278. All of these assumption are, in fact, *affirmatively undone* by *Plaintiffs'* own evidence. Plaintiffs' expert, Dr. Spencer, included estimates of support levels exhibited all minorities (including Blacks) combined and separate estimates of Black support, and the Black support is consistently higher—often much higher—than "All Minority" support. As a matter of basic math, the Asian and/or the Hispanic/Latino 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.

279. Plaintiffs' expert attempted to overcome the glaring deficiencies in his initial analysis by introducing in his rebuttal report a methodology loosely based on "equivalency testing." During his deposition, however, this expert candidly admitted that equivalence testing has no place in a Voting Right Act case, does not produce reliable results (e.g. that would establish cohesion), and was performed only to emphasize that it was not possible to produce reliable estimates of Asian and Hispanic voter support in Virginia—all points regarding which Defendants are in absolute agreement.

280. As discussed above, this method is not reliable and does not refute the fundamental mathematical certainty that, when one constituent group's voter support level is higher than the voter support level of several combined groups averaged together, at least one of the other constituent group's level of support must be below that 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 numbers must be below five feet tall. The principle here is no different. Convoluted methods that defy logic—and have been affirmatively *disclaimed by Plaintiffs' expert*—cannot suspend the basic laws of arithmetic and the operation of averages.

281. Plaintiffs' implied suggestion that the assumption of cohesion can be made because it simply must be and to fit their ideological ends is circular, unsupported by reason, and entirely at odds with the unambiguous admonition of the Supreme Court. *Growe*, 507 U.S. at 41 ("Section 2 does not assume the existence of racial bloc voting; plaintiffs must prove it." (quotation marks omitted)).

282. The anecdotal evidence further undermines Plaintiffs' assertion of cohesion. The best evidence from community leaders, who offer credible testimony, is that Asians are not

cohesive even among themselves and, to the extent there is *some* cohesion, it is adverse to Black voter preferences. Persons of Filipino descent compose a substantial part of Virginia Beach's "Asian" demographic category, and testimony of community leaders indicates that Filipinos think independently and, to the extent there is a discernible voting pattern, vote for Republican candidates in partisan races. Black voters, by contrast, consistently favor Democratic candidates. Although there may be limited occasions where Filipino voters "cross over" and vote for Democratic candidates (such as where the Democratic candidate is Filipino), this very anomaly proves the general rule that Filipinos lean right of center and have preferences independent and distinct from those of Black voters.

283. There is also ample evidence that Hispanic/Latino voters have distinct interests and preferences and are not cohesive with Black voters.

284. The Plaintiffs' failure to meet their burden to prove cohesion—and the grave consequences of that failure—are difficult to overstate. An error in finding cohesion where it does not truly exist imposes a severe and unacceptable injury on members of those racial groups who are wrongly believed to be cohesive with members of other groups. To purposefully submerge those persons (here, Filipinos) into a district 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.

285. This case fares even worse than a coalitional claim recently rejected in a federal district court for a failure to establish cohesion amongst various minority groups. *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 in the alleged coalition. *Id.* at *42–45. But the evidence showed "that the Black 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 were not consistently voting for the same candidates preferred by other groups. *Id.* at *45.

286. In this case, there is no evidence of which candidates members of the Asian and Hispanic communities support. Speculative answers are not sufficient, and Plaintiffs' claim therefore fails.

2. Plaintiffs Fail to Prove Cohesion Even Under Their Own (Severely Flawed) Terms

287. Because Plaintiffs have categorically failed to establish the cohesion of all groups and subgroups within the purported coalition they claim is injured by the at-large system, their claim must fail. The Court would be justified in ending the analysis—of the entire case—at this point. The failure to prove coalitional cohesion is clear and decisive and preclusive of Plaintiffs' claim in full.

288. But it bears noting that Plaintiffs' claim is so thoroughly deficient that it fails *even under their own terms*. Even under the indefensible assumption that the mere aggregation of voters into a single "All Minority" category can establish cohesion between and among groups, Plaintiffs' evidentiary showing falls well short of establishing cohesion, for several reasons.[9]

[9] 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. At all times, they have contested it. Defendants' showing that Plaintiffs' claim fails even on its own flawed terms only underscores the failure of the claim; it does not suggest inconsistency in Defendants' position in any way.

(a) Plaintiffs' Expert Did Not Analyze Enough Election Results

289. Plaintiffs' expert, Dr. Spencer, failed to analyze a sufficient number of elections, and all the right types of elections, to satisfy the cohesion burden, even under Plaintiffs' flawed understanding of that burden.

290. Dr. Spencer's report "define[s] elections as probative of racially polarized voting," including cohesion, "when they feature a minority candidate running." Spencer Rpt. 11; Spencer Rebuttal Rpt. 10. Dr. Spencer analyzed no elections that did not feature a minority candidate.

291. Under binding precedent, this failure defeats Plaintiffs' claim—independently of all their other failures. In *Lewis v. Alamance Cty., N.C.*, 99 F.3d 600 (4th Cir. 1996), the court held that "it is insufficient to consider selectively only those elections in which minority candidates were on the ballot, at least where such elections are not such a substantial majority of the total elections that a fair assessment can be made of whether the minority-preferred candidates are usually defeated by white bloc voting." *Id.* at 611. The court there rejected as legally insufficient a Section 2 claim where the plaintiffs' expert only analyzed elections with minority candidates (even though the defendant introduced no additional election results or analyses). *Id.* at 610–11.

292. Here, Plaintiffs concede that the elections they analyze are not a substantial majority of the total elections. Spencer Rebuttal Rpt. 10. The same error exposed in *Lewis* plagues this case and requires rejection of Plaintiffs' claim.

(b) Plaintiffs Fail To Show That "Minority-Preferred" Candidates (as They Erroneously Define Them) Receive Cohesive Support From "Minority" Voters (as They Erroneously Define Them)

293. Plaintiffs' own evidence shows that Black and so-called "Minority" voters—improperly aggregated in a nonsensical way—routinely *oppose* the candidates Plaintiffs assert are "minority preferred." This is yet another reason their claims fail.

294. In the 17 endogenous elections Dr. Spencer studied, the candidate Dr. Spencer identified as minority-preferred is estimated to have obtained less than 50% of either the amalgamated "minority" vote, or, based on Dr. Kidd's estimate of Asian and Hispanic support disaggregated from the "All Minority" score, in at least eight contests. That means that, even assuming the erroneous premise that amalgamating "All Minority" groups together is methodologically sound, there is no evidence that the candidate proffered as the "minority preferred" candidate received at least 50% of the votes of Black, Hispanic, and Asian voters in nearly half of the endogenous elections analyzed. Further, Dr. Kidd identified a total of 19 Black candidates who ran for City Council seats from 2008 to 2018 and, only nine received more than 50% of the Black vote share.

295. Binding Fourth Circuit precedent treats all of this as evidence *against* cohesion. The Fourth Circuit has held that, where "no candidate during that election achieved more than 50 percent of the minority vote," this result "demonstrate[s] a lack of political cohesiveness." *Levy v. Lexington Cty., S.C.*, 589 F.3d 708, 720 n.18 (4th Cir. 2009); *see also Levy v. Lexington County, S.C., Sch. Dist. Three Bd. of Trustees, CA*, No. 3:03-3093-MBS, 2012 WL 1229511, at *3 (D.S.C. Apr. 12, 2012), as amended (Apr. 18, 2012) ("The Fourth Circuit observed that the 2002 electoral results, wherein no candidate achieved more than fifty percent of the minority vote, should not have been disregarded, because 'the 2002 results presumably demonstrated a lack of political cohesion-the very factor the district court sought to establish under the second

Gingles factor.'"); *Rodriguez v. Pataki*, 308 F. Supp. 2d 346 (S.D.N.Y. 2004) (applying a 60% threshold to identify cohesion); *Smith v. Board of Supervisors*, 801 F. Supp. 1513, n. 11 (E.D.Va. 1992) ("This Court finds persuasive Dr. Lichtman's use of a 60 percent figure for a cohesion rate.").

296. The overwhelming evidence—even under Plaintiffs' flawed terms—is against cohesion, under binding Circuit precedent.

297. Dr. Spencer attempts to overcome this additional fatal deficiency with the argument—which is improper expert legal argument—that "Minority voters are cohesive when their most preferred candidate earns enough minority support to win an election" in a multi-candidate race. Spencer Reply 4. This is incorrect. As discussed, the Fourth Circuit in *Levy* treated evidence that no candidate obtained 50% of the minority vote as evidence against cohesion, not for it, and *Levy* involved multi-candidate races. *See* 589 F.3d at 716–20 & n.18. The Fourth Circuit's treatment of any candidate's obtaining, in a multi-candidate race, as "demonstrate[ing] a lack of cohesiveness," *id.* at 720 n.18, controls; Dr. Spencer's attempt to manufacture legal doctrine through expert testimony fails.

298. In standing by Dr. Spencer's assertion concerning multi-candidate races, Plaintiffs appear to be confusing the second and third *Gingles* preconditions. The Fourth Circuit, in the same *Levy* decision, clarified that a candidate may be "minority preferred" for purposes of prong 3 without 50% of the vote in a multi-candidate race, "so long as an individualized assessment of that candidate supports that conclusion." *Levy*, 589 F.3d at 718 (third *Gingles* prong); *see also Collins v. City of Norfolk, Va.*, 816 F.2d 932, 937 (4th Cir. 1987) (totality of the circumstances); *Collins v. City of Norfolk, Va.*, 883 F.2d 1232, 1238 (4th Cir. 1989) (third *Gingles* prong). But, as

to the second *Gingles* prong, *Levy* treated any candidate's failure to achieve a 50% majority of the vote as evidence against cohesion. 589 F.3d at 720 n.18

299. This distinction, grounded in Fourth Circuit precedent, makes sense. The second and third preconditions are conceptually distinct inquiries. The second precondition calls for an analysis into whether the minority group is cohesive, not into whether white candidate of choice prevail over minority candidates of choice. The proper cohesion inquiry is focused not on electoral results (which is the focus of the third *Gingles* precondition), but on whether the constituent groups at issue each consistently and decisively support the same candidates.

300. Needless to say, where more members of a given group vote against a candidate rather than for the candidate, the group cannot be said to coalesce around that candidate in a cohesive way. "Political cohesion implies that the group generally unites behind a single political 'platform' of common goals and common means by which to achieve them." *Levy*, 589 F.3d at 720 (quotation and edit marks omitted). Where a group's support is fractured among candidates, there is no cohesion. As the recent *Kumar* decision explained, this fracturing cuts *against* cohesion:

> 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).

301. That hypothetical describes this very case. Dr. Spencer's data set shows numerous examples where there was more opposition from "All Minority"—erroneously calculated by Plaintiffs' flawed aggregation method—to the so-called "minority preferred" candidate than support. And when Dr. Kidd used the voting-age population of Asians and Hispanics in the City

to disaggregate Asian and Hispanic voters from Black voters to understand how their differing preferences might cause the "All Minority" support level to diverge from the Black support level, he found four more examples where it appeared a majority of one, or both, of the Hispanic and Asian components of the "All Minority" metric opposed the purported minority-preferred candidate. This again defeats cohesion.

302. Finally, even if the *Levy* holding regarding the third *Gingles* precondition applied to the second *Gingles* precondition—which is impossible when *Levy* itself says the opposite—*Levy* only allowed a candidate receiving less than 50% of the vote to be treated as minority preferred if the Court finds this as fact from "an individual assessment of [the] candidate[s]" in each election analyzed. *Levy*, 589 F.3d at 718. Plaintiffs fail to provide such an individual assessment, the Court cannot conduct this analysis, and the claim fails for this reason.

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

303. 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. Because Plaintiffs fail on cohesion, the third *Gingles* precondition is a moot point. The Court cannot pass judgment on the electoral success of candidates supposedly preferred by a minority coalition that does not exist—and where it instead appears that the three minority groups in question routinely prefer different candidates. In any event, Plaintiffs fail to establish that a white voting bloc usually defeats the candidates Plaintiffs themselves identify—through their flawed methodology—as the minority-preferred candidate.

304. The candidate Plaintiffs' expert identifies as "minority preferred" candidate *prevails* in three of the most recent four races. Kidd Rpt. 11.

305. Plaintiffs only sidestep this by discounting multiple races for legally improper reasons. First, they apparently believe that the white candidates who achieved high levels of minority support are not minority-preferred candidates. The Fourth Circuit has definitively rejected that view. *Lewis*, 99 F.3d at 606.

306. Second, they contend that two victories by Black candidates in 2018 are not probative because they occurred after this lawsuit was filed in its first iteration. Spencer Rpt. 14. But there is no evidence that the 2018 election results were influenced in any way by this lawsuit. The amended complaint, asserting a coalitional claim for the first time, was not filed until after the 2018 election, the city council was not briefed on this lawsuit until 2019, and the case events that occurred before the 2018 election were conducted by one *pro se* litigant in a matter that was not, at the time, deemed a serious 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. The evidence shows that the lawsuit had no impact on the 2018 election, and Plaintiffs present no evidence to the contrary.

307. Plaintiffs rely also on four federal elections, Spencer 30–31, but their reliance fails. First, Plaintiffs' expert again cherrypicked elections involving minority candidates from an array of elections that the expert ignored. *Lewis*, 99 F.3d 611 ("it is insufficient to consider selectively only those elections in which minority candidates were on the ballot"). Second, endogenous elections are more probative than exogenous elections. *Johnson v. Hamrick*, 196 F.3d 1216, 1222 (11th Cir. 1999); *Sanchez v. State of Colorado*, 97 F.3d 1303, 1325 (10th Cir. 1996); *Clark v. Calhoun County, Miss.*, 88 F.3d 1393, 1397 (5th Cir.1996). Plaintiffs' own evidence shows that minority-preferred candidates routinely win, and four cherrypicked

exogenous elections cannot undercut this. Third, the evidence shows high crossover voting: a majority of whites voted for Barack Obama in the 2008 presidential primary, and 35% supported Obama in the 2008 and 2012 general elections. Spencer Rpt. 30. Mr. Obama was defeated citywide by slim margins. *Id.*

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

308. 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.* Another is "running afoul of Congress' intent in amending Section 2," given that the purpose was "not to foster particular political coalitions." *Id.* (quotation marks omitted). The Fifth Circuit has held "that minority 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.*

309. These risks are actualized here. Plaintiffs are two Black voters who claim that Hispanics and Asian voters are injured, but they conspicuously have not convinced a single Hispanic or Asian to join this case.

310. Plaintiffs' expert analyses bury Hispanic and Asian voters in a much larger group of Black voters and ask the Court to ignore that Hispanic and Asian voters are self-evidently dragging the average minority support down—often substantially down.

311. 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 relies on white crossover voting for Black voters to elect their preferred candidates.

312. Meanwhile, Asian residents are situated more closely to white residents than Black residents along an array of measures. Plaintiffs present no credible evidence that Hispanic and Asian voters are similarly situated with Black voters in any relevant sense other than a supposed shared political preference (which itself is assumed, not proven).

313. Plaintiffs' litigation strategy is self-evident. The Virginia Beach Black community cannot constitute a majority in a single-member district, and the Supreme Court's *Bartlett* decision rejects the theory of crossover districts. Recognizing this, Plaintiffs responded by creating districts with as many Black voters as possible and made up for the deficit by adding the requisite "minority" voters to reach a mechanical 50% threshold. They simply use members of these other "minority" groups as packing peanuts to fill out the district in a manner to circumvent *Bartlett*'s holding, with no serious consideration of the needs, interests, and preferences of these voters.

314. And relying on white crossover voting to assist the Black pluralities in electing their candidates of choice, at the expense Asian (especially Filipinos) and Hispanics who have different candidate preferences, Plaintiff construct districts that may well *dilute* the votes of Asians and Hispanics.

315. This is a concerning instance where "members of one of the minority groups" are trying to "increase their opportunity to participate in the political process at the expense of members of the other minority group[s]." *Clements*, 986 F.2d at 786 n.43.

F. The Claim Fails Under the Totality of the Circumstances

316. "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). The question is whether the challenged system "interacts with social and

historical conditions to cause an inequality in the opportunities enjoyed by" members of a protected group "to elect their preferred representatives." *Gingles*, 478 U.S. at 47.

317. 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.

318. Plaintiffs' coalition claim lacks any persuasive force under the circumstances, viewed functionally and in their totality. 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 under the totality of the circumstances is essential for coalitional claims. The question is not whether any of the three groups at issue (or their subgroups) experience vote dilution under the totality of the circumstances, but whether *all* of these groups experience vote dilution and do so on a *shared* basis.

319. But Plaintiffs' presentation is far too mechanical to approach establishing this shared injury. They attempt to check various Senate-factor boxes with evidence pertaining to *one* group (typically, the Black community), but consistently fail to provide any link between that evidence and members of the other racial groups. The problem is not simply that some items of evidence, taken alone, pertain only to one constituency of their tripartite coalition, but rather that the *entire* presentation suffers from this defect.

320. This apparently is because there is no meaningful shared experience of either discrimination or political interests among the various groups joined cumbersomely in Plaintiffs'

alleged coalition. The Black community in Virginia Beach has suffered the familiar sordid history of slavery and Jim Crow-era *de jure* and *de facto* discrimination, but Virginia Beach residents of Asian and Hispanic descent do not share that history or experience. It would not be a service to members of any of these groups to pretend as though the tragic Black experience is shared in any meaningful respect by members of these other groups.

321. In particular, Virginia Beach residents of Asian descent have a markedly different history, variegated even among persons of different racial heritage within that category. The Filipino community, for example, largely comprises persons who became associated with the region through the United States Navy. These include Filipinos who served in the Navy, those who married Naval servicemembers, and their descendants. The meaningful presence of this group in Virginia Beach (and surrounding regions of Virginia) arises in far more recent history as compared to when Blacks first demonstrated a meaningful presence in the region—and in far different circumstances. Members of the Korean, Vietnamese, Japanese, and Chinese communities likewise have their own histories and experiences that do not resemble the history of Black persons in the City in any meaningful respect. The same can be said of the Hispanic community and its component parts.

322. There is no competent evidence that the at-large electoral method "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by" members of these various groups on a shared basis. *Gingles*, 478 U.S. at 47. A review of the Senate factors reveals that Plaintiffs cannot show that even one factor supports their coalitional claim. Many of the factors cut affirmatively against their claim, and, for those factors where Plaintiffs mount some evidence relevant to one racial group, they are unable to establish that the factor is relevant to *all three* in order to support their claim of shared injury. These factors, at best, are neutral.

1. Factors That Affirmatively Cut Against the Claim

323. Multiple factors affirmatively support the use of at-large elections in Virginia Beach.

(a) Compelling State Policy

324. 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*, 387 U.S. at 114 (emphasis added). The Virginia General Assembly adopted the at-large method in response to this Court's 1965 ruling that a prior districting scheme violated the newly announced one-person, one-vote principle. *See Dusch*, 387 U.S. at 114 (discussing this Court's ruling); *Davis v. Dusch*, 205 Va. 676, 679 (Va. 1964) (describing the scheme invalidated). The U.S. Supreme Court upheld the at-large scheme from a follow-on equal-protection challenge, finding that it "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.

325. This Court applauded the City in the 1990s for 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). The City declined to adopt 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, too, declined to impose such districts and dismissed with prejudice a plaintiff's Voting Rights Act claim, observing that, *inter alia*, the proposals were

racial gerrymanders. *Id.* at 11 (citing and quoting *Shaw v. Reno*, 509 U.S. 630 (1993) and *Miller v. Johnson*, 515 U.S. 900 (1995)).

326. The evidence shows that the needs the Supreme Court identified as "compelling" in *Dusch* are equally compelling today. As in 1966, the City remains geographically diverse, comprising urban, rural, and suburban territory and neighborhoods. All of "the complex problems of the modern megalopolis" continue to confront the City and its government, and the at-large system still serves to balance the competing interests that must be represented in the government.

327. Indeed, the at-large schemes work in service of a racially diverse City, whose residents are not conglomerated along racial lines in racially segregated enclaves. It would be difficult to redistrict the City into single-member districts without engaging in single-minded racial stereotyping of the type that pervades Mr. Fairfax's alternative maps and which this Court in *Lincoln* disparaged. The at-large scheme allows members of various groups (racial and otherwise) to "to pull, haul, and trade to find common political ground," *Johnson v. De Grandy*, 512 U.S. 997, 1020 (1994), without being stereotyped by the City government.

328. This factor weighs overwhelmingly in favor of the challenged system.

(b) Minority Electoral Success

329. 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.

330. Plaintiffs' attempt to discredit these races falls flat, for reasons stated above. The fact that the 2018 election occurred after this complaint was filed is irrelevant in the absence of evidence that anyone in the City knew of this suit. There is no evidence and no reason to believe

the suit had any impact whatsoever on the November 2018 election. The suit had then gained no press and was not even asserting the minority coalitional theory offered today.

331. These election results, entrusting two of 10 council seats to Black representatives, are powerful evidence that the at-large system is fair and does not dilute votes.

(c) Non-Existent Polarization

332. 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. The combined alleged support of the "All Minority" community tends to be split among candidates, and there is meaningful white crossover voting across contests. Further, white candidates often receive high levels of support from the "All Minority" combined category of voters (erroneously averaged), and black candidates have received meaningful support from white voters. This is a healthy electoral environment.

(d) Proportionality

333. 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." *League of United Latin Am. Citizens*, 548 U.S. at 426. Although there are no "districts," given at large voting, this factor as applied supports the defense because minority-preferred candidates prevail above the proportion of the minority percentage. *See, e.g.*, *Solomon v. Liberty County Com'rs*, 166 F.3d 1135, 1143 (11th Cir. 1999); *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 753 (N.D. Ohio 2009).

334. 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 a success rate of over 40%,

even by Plaintiffs' own terms. The total combined minority percentage of the total and voting-age population is less than 40%. Thus, there is proportionality between minority-preferred-candidate success and minority percentage of the population.

335. There is no right to a greater share of representation than a groups actual proportionality. *Johnson*, 512 U.S. at 1022.

(e) Responsiveness

336. 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.

337. Plaintiffs' various quarrels on this element are outweighed by this evidence and show only disputes concerning city management on the margins, not a "significant lack of responsiveness." In any governmental unit, there will be tension regarding any number of policies, and that is all that is shown in Plaintiffs' presentation.

338. City services are offered on an equal-opportunity basis. The City is an equal-opportunity employer. City resources are allocated under objective, race-neutral criteria. The City Council places an emphasis on diversity in its appointment of men and women to the various Boards and Commissions of the City. The City Council's speaker policy provides citizens with meaningful opportunity to address City Council directly. The City emphasizes recruitment, hiring, and retention of racial, ethnic, and other minorities. The City has established a formal EEO policy, complaint procedure and investigative process through its Human Resources Department. The City has established and enhanced programs that seek to increase opportunities for contracting with minority and women-owned small businesses. The City's engagement of minority and women-owned small business has grown steadily in the last five

years. The City has numerous initiatives aimed at increasing awareness and responsiveness to the needs of minority communities. The Office of the Voter Registrar is accessible to the public, seeks to limit barriers to voting for everyone, and ensures the mechanics of voting are administered in a professional and race-neutral manner.

339. Plaintiff Georgia Allen and others were appointed by City Council to the "Envision Virginia Beach 2040" Committee to prepare a comprehensive report detailing the City's visioning initiatives. City Council appointed Plaintiff Georgia Allen and others to the "Vision to Action Community Coalition" to continue public outreach and monitor the City's progress toward achieving the vision established by the comprehensive report of the Envision Virginia Beach 2040 Committee. The City Council created a Minority Business Council in 1995 and has continued to appoint a diverse membership on the MBC ever since, to address the needs and concerns of minority owned businesses. The Minority Business Council has been active in assisting the City in developing opportunities to recruit minority, women owned and small business to bid upon and be awarded City contracts and otherwise advance minority business in the City.

340. The City emphasizes recruitment and contracting with minority owned businesses and over the last five year has made it easier for the City to award contracts under $100,000.00 to minority and women-owned business. The City has maintained as aspirational goal of 10% for minority contracting in the City since 2007 and recently increased that aspirational goal to 12% in response to the Disparity Study. The City's percentage of contract awards to minority owned businesses and expenditures on assistance for minority owned businesses exceeds that of the surrounding cities as well as the Commonwealth of Virginia. On July 11, 2017 the City Council authorized and spent almost $500,000 to conduct a Disparity Study to identify any existing

disparities in public contracting and recommend process improvements or enhancements. The City has taken steps to implement certain recommendations of the completed Disparity Study along with enhancement of existing efforts to recruit minority businesses and contractors, including increasing its aspirational goal for minority contracting to 12%.

341. In response to the issues surrounding the 1989 Labor Day Weekend at the Virginia Beach Oceanfront, the City Council created a Labor Day Review Commission, which evolved into a Labor Day Community Coordinating Committee, and in 1991, became the Virginia Beach Human Rights Commission. The City Council has continued to appoint a diverse membership to the HRC ever since. The Human Rights Commission's purpose is to institute, conduct and engage in educational and informational programs for the promotion of mutual understanding and respect among citizens, and the fulfillment of human rights; to serve as a forum for the discussion of human rights issues, and to conduct studies and propose solutions for the improvement of human relations in the City; and to provide assistance to persons who believes their rights have been violated by identifying the appropriate federal, state or local agency to address the complaint and referring such persons to that agency.

342. The 2019 Something in the Water festival attracted a diverse group of entertainers, and drew a diverse group of attendees, including people of all minority groups and ages. On May 31, 2019, the City suffered a mass shooting in and around Building 2 at its Municipal Center. A City-employed public utilities engineer killed 12 people and injured 5 others, including one police officer. The City hired an independent consultant, Hillard Heintz, to review the tragic events of May 31, 2019 and make recommendations for how to improve workplace safety and security. The City responded to the Hillard Heintz report and implemented certain changes recommended by the report.

343. The City received and considered the Virginia Beach African American Leadership's "5 Point Plan" to reform policing in the City of Virginia Beach, and has taken certain steps in furtherance of the goals of that plan. The City authorized and funded purchase and implementation of police body cameras in its FY 2016-17 budget by vote taken May 10, 2016.

344. On October 20, 2015, the City donated 4.8+/- acres of land assessed at $1,671,100 to create an African American Cultural Center in the Kempsville section of the City. The City has also supported the creation of the African American Cultural Center by donating staff time to assist in the Center's capital campaign. The City emphasizes recruitment, hiring and retaining of minorities. The City provides wraparound services to under-privileged citizens, regardless of race or ethnicity, who may be suffering from food insecurity, homelessness, lack of proper medical care or is otherwise in need of services. Plaintiff Latasha Holloway has personally benefitted from these programs.

345. These and other facts, established at trial, demonstrate that the City Council exhibits a high level of responsiveness to the needs of all Virginia Beach citizens, including those who identify as members of various racial or ethnic minority groups.

2. Factors That Are Neutral

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

(a) Candidate Slating

347. A relevant factor is the "exclusion of minority group members from the candidate slating processes." *Cane*, 35 F.3d at 925.

348. There is no evidence of a candidate slating process.

349. One of Plaintiff's experts, Dr. Lichtman, contends that there is an informal slating process that takes the form of disparate campaign donations to white candidates. But this is not a campaign slating process, controlled by political parties or organizations. "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.'" *City of Euclid*, 580 F. Supp. 2d at 608 (quoting *Westwego Citizens for Better Gov't v. City 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 Cty. Comm'n*, 731 F.2d 1546, 1569 (11th Cir. 1984)).

350. Dr. Lichtman identifies the total conglomeration of campaign donations, but this conglomeration is not the work of "an organization" but of numerous private choices on the part of numerous private individuals. The campaign donations merely reflect disparate choices of citizens to fund candidates they support. Donations are quite different from a slating process.

351. In any event, Dr. Lichtman's contention is factually untenable. Properly analyzed, there are comparable donations to Black and white candidates. Kidd Rpt. 32–33, Table 11. And as set forth *supra*, Findings of Fact § VI.B, the total dollar amount in such campaign contributions is *de minimis* relative to the total aggregate campaign spend in the elections under review. Plaintiffs have adduced no evidence to support that these contributions amount to a slating practice that renders the election a "stamp of approval." *Euclid*, 580 F. Supp. 2d at 608.

(b) Impact of a History of Discrimination on Political Participation

352. 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.

353. In this case, there is evidence of historical discrimination against the Black community. The evidence, however, tying that historical discrimination to the *current* ability of Black voters to participate in the political process is undeveloped or non-existent. Kidd Rpt. 34–35.

354. Furthermore, the evidence of discrimination against persons of Hispanic and Asians descent is exceptionally thin. Both groups (and their subgroups) have only been present in meaningful numbers in Virginia Beach recently, and there is no competent evidence of pervasive discrimination against *any* racial or ethnic group in recent years.

355. Plaintiffs cite evidence of a few isolated racially charged incidents, but this falls far short of evidence of meaningful discrimination that could harm participation.

356. This factor is neutral and arguably cuts against Plaintiffs' claim.

(c) Racial Appeals

357. Another factor is "the use of racial appeals in political campaigns." *Cane*, 35 F.3d at 925. Plaintiffs' efforts to show that campaigns are marked by racial appeals are unpersuasive. Most of their evidence does not involve Virginia Beach, and very little evidence involves City Council races in Virginia Beach. Ultimately, they identify a few isolated incidents that fall short of establishing a true picture of reality in elections to the Virginia Beach City Council.

(d) History of Voting Discrimination

358. Another factor is whether there is "a history in the state or political subdivision of official voting-related discrimination against the minority group." *Cane*, 35 F.3d at 925.

359. Although this exists as to the Black community, at least until the 1960s, this history is not by itself sufficient to support a coalition claim. Asians were not measurably impacted by this historical discrimination, and Hispanics are not impacted to the degree Blacks were impacted. Kidd Rpt. 27. Further, the evidence of voting-related discrimination against Blacks is dated, and more recent evidence is not voting-related and not compelling.

3. Totality of the Circumstances

360. Taken together the totality of the circumstances undermines Plaintiffs' claim. The at-large system services a compelling state interest, recognized by the Supreme Court, and offers opportunity on an equal basis to all residents of Virginia Beach. The City Council has proven responsive and effective over time, and the disputes Plaintiffs raise concerning the performance of City employees on isolated occasions are of contested and dubious significance, and, in any event, they do not suggest the type of pervasive racial animosity that would rise to a legally significant level under the circumstances. Black candidates (asserted by Plaintiffs to be preferred by the Black community) have scored recent success in at-large elections, and this success is probative and powerful evidence of equal opportunity in proportion to the Black (and even "All Minority") percentage of the population.

361. Meanwhile, Plaintiffs' heavy emphasis on the historical discrimination against Black residents of the City, and current socioeconomic disadvantage, does not link that discrimination to current circumstances and, more importantly, does not provide any meaningful link between discrimination against Blacks and disadvantages they experience and any such experience of discrimination and disadvantage on the part of Asians or Hispanics.

362. In short, under the totality of the circumstances, it has not been established that members of all groups of the alleged coalition suffer vote dilution attributable to the at-large system.

II. Plaintiffs' Claim Is Non-Justiciable

363. Plaintiffs' claim also fails under various justiciability elements that independently render them non-viable. Plaintiffs lack standing to claim injury from an electoral system based on future contingencies that may not materialize, and they lack standing to assert the rights of members of racial and ethnic groups that have not joined this case and have no representation.

364. The Court's ruling on Defendants' motion to dismiss, *Holloway v. City of Virginia Beach, Virginia*, No. 2:18-CV-69, 2020 WL 4758362, at *1 (E.D. Va. Aug. 17, 2020), does not resolve these matters for purposes of trial. "Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element" of justiciability "must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). This case is before the Court for trial on the merits, and Plaintiffs are obligated to establish standing under a preponderance of the evidence, the burden at trial. The Court therefore must revisit these justiciability inquiries in light of the evidence adduced at trial.

365. Plaintiffs have failed to meet their burden.

A. Plaintiffs' Claim Is Both Unripe and Moot, and Plaintiffs Lack Standing

366. "[A] federal court has neither the power to render advisory opinions nor to decide questions that cannot affect the rights of litigants in the case before them." *Preiser v. Newkirk*, 422 U.S. 395, 401 (1975) (quotation marks omitted). The doctrines of ripeness, mootness, and standing "ensure that [courts] do not exceed the limits of Article III judicial power" and therefore "guard against [courts'] rendering of an opinion advising what the law would be upon a hypothetical state of facts." *Trustgard Ins. Co. v. Collins*, 942 F.3d 195, 200 (4th Cir. 2019) (quotation marks omitted).

367. Here, Plaintiffs have not established a live controversy by a preponderance of the evidence. A ruling on Plaintiffs' vote-dilution claim would be abstract and advisory. Section 2 requires Plaintiffs to prove at trial that a minority group can constitute a majority in at least one single-member district and that the proposed alternative districts actually would perform effectively as opportunity districts.

368. But Plaintiffs have not even raised a triable issue on these elements under 2020 census data, which is just now being gathered, and the question whether these things can be proven under 2010 census data (or ACS data from the 2010 decade) is moot. After the 2020 census "no districting plan is likely to be legally enforceable," *Georgia v. Ashcroft*, 539 U.S. 461, 489 n.2 (2003), and any new districting scheme must be prepared with the 2020 census results, Va. Code § 24.2-304.1(C).

369. This case has no apparent prospect of impacting actual elections in the City of Virginia Beach, and the Court lacks jurisdiction to entertain it. A ruling on these critical issues by reference to data from the 2010 decade would be an advisory opinion on a moot question; a ruling under 2020 data would an advisory opinion on an unripe question. And the Court can only speculate whether a ruling would benefit Plaintiffs personally. The Court lacks jurisdiction over this case.

1. A Ruling on the First *Gingles* Precondition Would Be Advisory

370. As described above (Conclusions of Law § I.B), a Section 2 plaintiff must meet the first *Gingles* precondition, proving "that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district." *Collins v. City of Norfolk, Va.*, 883 F.2d 1232, 1236 (4th Cir. 1989). A failure to meet this precondition renders any "[t]alk of 'debasement' or 'dilution'…circular…." *Hall*, 385 F.3d at 428 (quotation marks and citation omitted). For these reasons, Supreme Court and Fourth Circuit precedent "focus[] up

front on whether there is an effective remedy for the claimed injury." *Hines v. Mayor & Town Council of Ahoskie*, 998 F.2d 1266, 1273 (4th Cir. 1993) (citation omitted). No remedy means no injury.

371. But Plaintiffs cannot show what a vote should be worth in any future election—and can show no injury at all—because the data that will be used to construct any future single-member election districts do not yet exist. A ruling on whether districts created under census data from the 2010 decade would perform would be an advisory opinion on a moot question; a ruling that districts created under 2020 data might be able to perform would an advisory opinion on an unripe question. This case, then, is both moot and not ripe.

372. As discussed above, this Court is not able to afford any relief affecting the November 2018 election, the last of the decade.

373. It is too early to adjudicate whether a Section 2 claim is viable as of the November 2022 election and beyond.

(a) A Challenge That Might Impact the 2022 Election and Beyond Is Not Ripe

374. The Court cannot rule on whether a minority group would be sufficiently compact as to constitute a majority in single-member district under the 2020 census results without those results. "[A] claim is not ripe for adjudication if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Scoggins v. Lee's Crossing Homeowners Ass'n*, 718 F.3d 262, 270 (4th Cir. 2013) (quoting *Texas v. United States*, 523 U.S. 296, 300 (1998)).

375. That is the case here. Plaintiffs can only speculate that they might meet the first *Gingles* precondition in a plan that might actually be used in a real election. Even assuming that Plaintiffs can establish dilution under data from the 2010 decade, there is no reason to anticipate

that their illustrative districts could be drawn in substantially the same form, and with substantially the same racial demographics, under 2020 census data. The remedial districts, like anything a legislature might enact, are not "likely to be legally enforceable" after the new census, *Ashcroft*, 539 U.S. at 489 n.2, and a new plan must be configured under the 2020 census results, Va. Code § 24.2-304.1(C). Needless to say, a plan that does not comply with the equal-protection clause cannot constitute an acceptable Section 2 remedy. *Cane v. Worcester Cty., Md.*, 35 F.3d 921, 927 (4th Cir. 1994) ("A proposed plan is a legally unacceptable remedy if it violates constitutional or statutory voting rights—that is, if it fails to meet the same standards applicable to an original challenge of an electoral scheme." (quotation and edit marks omitted)).

376. Although the at-large scheme is not currently scheduled to be changed to a single-member scheme (and therefore may continue into the next decade), the at-large scheme is not dilutive merely by reference to itself. Without *Gingles* prong one, Plaintiffs' dilution talk is "circular talk." *Hall*, 385 F.3d at 428; *Gingles*, 478 U.S. at 51 n.17. In the strictest and plainest sense, it is entirely unknown at this point whether the at-large seats will be dilutive under the 2020 census data, and the Court lacks jurisdiction to guess on that issue.

377. The Court's motion-to-dismiss ruling opined that "Defendants cite no authority to support the proposition that the 2010 Census is no longer accurate" as of the time of trial. *Holloway*, 2020 WL 4758362, at *3. But the 2010 Census *will* be inaccurate as of the *next election* that may be impacted by the Court's ruling, and Plaintiffs were unable to establish at trial any likelihood that the relevant demographic numbers will remain materially identical. The trial evidence indicates that there is little to no likelihood of that outcome. Plaintiffs identified no election that can be impacted by a ruling in this case, and Section 2 guarantees "the right…to

vote." 52 U.S.C. § 10301(a). There being no election at issue in this case, there is no live controversy.

(b) A Judgment on Conditions Pertaining to the 2018 Election or Prior Elections Is Moot

378. Plaintiffs' contention that the at-large districts were dilutive during the 2010 decade is moot. "[A] case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *United States v. Hardy*, 545 F.3d 280, 283 (4th Cir. 2008) (quotation marks omitted). There is no live or cognizable interest in assessing whether dilutive conditions existed as of the elections occurring from 2010 through 2020, because a ruling cannot impact those elections. No future elections are scheduled to occur until after the 2020 census data are released. Thus, the sole purpose of rendering a liability decision on whether a minority group can constitute a majority in a single-member district would be to advise Virginia Beach that it adhered to a dilutive voting system for a decade that is now, for all intents and purposes, passed. The Court lacks jurisdiction to issue such an advisory opinion.

379. The same problem inheres under Plaintiffs' distinct, but related, burden to establish that remedial districts would "enhance the ability of minority voters to elect the candidates of their choice"—i.e., that "*performing*" districts can be fashioned as remedies. *Abbott v. Perez*, 138 S. Ct. 2305, 2332 (2018).

380. There was no live controversy established on this element at trial because the illustrative districts that might be created under 2020 data are unknown and as yet are unknowable. In this case, Plaintiffs offer an "analysis of reconstituted election results in [their] Illustrative Plan's majority-HBA districts"—which they call a "powerful test"—to establish, not only that districts with a simple minority majority can be drawn, but also that the districts would perform in a functional sense. ECF No. 118 at 20–21. But this elaborate analysis only

underscores how speculative their claims are concerning *future* elections. The reconstituted-elections analysis matches past vote totals to the lines of illustrative districts drawn data from the 2010 decade. Even if it shows that districts drawn with that data would guarantee equal minority opportunity, it holds no value in establishing that districts drawn with 2020 census data would likewise perform. Plaintiffs present no trial evidence on this all-important issue.

381. The issue is non-justiciable for the same reasons the *Gingles* one inquiry is non-justiciable. A ruling on whether districts created under 2010 data would perform would be an advisory opinion on a moot question; a ruling that districts created under 2020 data might be able to perform would an advisory opinion on an unripe question.

382. The Court's motion-to-dismiss ruling concluded that "Plaintiff will be able to use the 2010 Census as a data point to demonstrate that the minority group is sufficiently large and geographically compact to constitute a majority in a single-member district." *Holloway*, 2020 WL 4758362, at *3. But Plaintiffs did not identify at trial what purpose that would serve. The elections that could conceivably be governed by Plaintiffs' illustrative maps have passed or will pass before a ruling would impact this case. Plaintiffs have now presented their evidence; it is plainly for an abstract and advisory purpose.

2. Plaintiffs Lack Standing

383. The same problems defeat standing. The elements of standing are (1) injury-in-fact, (2) causation, and (3) redressability. *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 343 (4th Cir. 2017). Plaintiffs here cannot establish the first two elements for the same reasons that their claims are not ripe and moot. There is no injury-in-fact or causation because there is currently no available baseline to establish injury or to establish that the at-large seats are causing an injury. *See Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975) ("The standing question thus bears close affinity to questions of ripeness…and of mootness.").

384. And there is an additional, distinct standing defect under the redressability element, which requires a plaintiff to prove that it is "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 561 (quotation marks omitted). Here, Plaintiffs did not prove this because they did prove that any remedy this Court might issue will cure dilution of *their own* votes. In particular, Plaintiffs did not prove that, in a new plan of single-member districts, they personally could or likely would reside in a district drawn with sufficiently high minority voting-age population percentages to allow them "to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). For all anyone knows, a plan would draw them into districts overwhelmingly populated with white voters, who Plaintiffs contend vote as a bloc to defeat Plaintiffs' preferred candidates.

385. Without showing that their personal right to vote can be vindicated through a remedy, Plaintiffs' vote dilution claim becomes nothing but "the kind of undifferentiated, generalized grievance about the conduct of government that [the Supreme Court has] refused to countenance in the past." *Gill v. Whitford*, 138 S. Ct. 1916, 1931 (2018) (citation omitted). As the Supreme Court held in *Shaw v. Hunt*, 517 U.S. 899 (1996), vote dilution alleged to exist in one part of a jurisdiction is "not remedied by creating a safe majority-[minority] district somewhere else in the" jurisdiction. *Id.* at 917. "For example, if a geographically compact, cohesive minority population lives in south-central to southeastern North Carolina… [a district] that spans the Piedmont Crescent would not address that § 2 violation." *Id.* By the same token, a resident of one part of a jurisdiction where a majority-minority district cannot be drawn lacks standing to contend that a majority-minority district should be drawn elsewhere in the state, to benefit voters who are not present in the action. *See Gill*, 138 S. Ct. at 1924–25, 1932 (holding

that plaintiff Professor Whitford, who lived in a naturally "packed" districts in all events, had no standing to assert a vote-dilution injury to "his ability to vote" (quotation marks omitted)). Because "the remedy that is proper and sufficient lies in the revision of the boundaries of the individual's own district," *id.* at 1930, a plaintiff cannot claim redressability (or, for that matter, injury-in-fact or causation) by showing that a majority-minority district can be created elsewhere in the jurisdiction.[10]

386. Plaintiffs have effectively conceded this point by supplementing their expert reports after the close of discovery to propose alternative remedial districts that include Plaintiffs' residences. The initial report of Anthony Fairfax opined that the HBA citizen voting age population is sufficiently large and geographically compact to create two majority-HBA districts in Virginia Beach. But Mr. Fairfax subsequently conceded that his proposed remedial districts did not contain the residence of one of the Plaintiffs, Georgia Allen, was not located in any of the majority-HBA districts in any of his illustrative or proposed remedies. Mr. Fairfax thereafter filed a supplemental report (well after all applicable deadlines had passed) to establish that Ms. Allen's residence can be drawn into a proposed remedial district. Plaintiffs plainly appreciate (as they must) that Ms. Allen would not have standing without showing that her personal right to vote can be redressed in this action.

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[10] Although *Gill* concerned alleged vote-dilution on a partisan basis, not a racial basis, the injury-in-fact in both instances is materially identical: "cracking" and "packing" that dilutes voting strength. *Compare Gill*, 138 S. Ct. at 1930 (addressing the "injury from partisan gerrymandering, which works through 'packing' and 'cracking' voters of one party to disadvantage those voters") *with Voinovich v. Quilter*, 507 U.S. 146, 154 (1993) ("[D]ilution of racial minority group voting strength may be caused either by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an excessive majority." (quotation marks omitted)).

387. But these remedial districts are drawn to equalize population under data from the 2010 census period, not 2020 census data. Without that latter data, Plaintiffs are unable to show that this case can result in redress of any injury that might exist in future elections. Their belated efforts are unavailing, and the Court lacks jurisdiction for this additional and independent reason.

388. The conclusion of the Court's motion-to-dismiss ruling, which relied principally on what Plaintiffs alleged, *see Holloway*, 2020 WL 4758362, at *6, ultimately concluded that Plaintiffs' may show redressability "using the recent population data," *id.* Plaintiffs rely on that data at trial, but the data do not show what will be redressable as of the next election. The redressability element was not met under a preponderance of the evidence at trial.

B. Plaintiffs Lack Standing To Pursue Rights Belonging to Members of Other Racial Groups

389. This case must be dismissed for the additional reason that Plaintiffs lack standing to assert the rights of non-parties. Plaintiffs, who identify as Black, lack standing to bring Section 2 claims on behalf of a "coalition" consisting of Black, Hispanic/Latino, and Asian voters living in Virginia Beach. Even if Section 2 countenances a claim brought by a "class of citizens" consisting of three different groups acting in a coalition, Plaintiffs must still have standing to assert the claim. But Plaintiffs here are members of only one group they claim as part of their coalition; they do not have standing to bring claims on behalf of distinct minority communities of which they are not a member.

390. 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) (quotation marks omitted). Unless an exception applies, a plaintiff "must assert his own legal rights and interests and cannot rest his claim to relief on the legal rights of interests of third parties." *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990). Third-party standing

is disfavored because "courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not," and because "third parties themselves usually will be the best proponents of their own rights." *Singleton v. Wulff*, 428 U.S. 106, 113–114 (1976).

1. Third-Party Standing Requirements Are Triggered

391. As an initial matter, Plaintiffs have no choice but to proceed in this case by asserting the rights of third parties. The Court's motion-to-dismiss ruling opined that Plaintiffs need rely only on their "personal legal interests" and that the role of other "minority voters generally" is merely a point of "statistical evidence." *Holloway*, 2020 WL 4758362, at *7. At trial, however, it became clear that this understated the degree to which the rights of Asian and Hispanic voters simply must be asserted for Plaintiffs' claims to even be viable.

392. The rights of Hispanics and Asians are not mere evidence in this case; they are an essential component of the claim. Any other view undermines the entire concept of a coalitional claim, which is that members of each constituency of the coalition "join hands…to prevent their votes being diluted." *League of United Latin Am. Citizens, Council No. 4386 v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1495 (5th Cir.), *opinion vacated on reh'g*, 829 F.2d 546 (5th Cir. 1987). The implication of Plaintiffs' third-party standing workaround is that their claim treats the other constituencies of the coalition as mere tools to advance Plaintiffs' own political goals and interests, *not* the interests of all components of the coalition. If that is so, this is not a coalitional claim at all, but a claim of dilution harming Black residents of Virginia Beach, and *only* Black residents of Virginia Beach.

393. Stated otherwise, 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 from a common cause. That being so, the harm to other groups (here, the Asian and Hispanic communities) cannot be mere "statistical evidence" to prove harm to Black voters, 2020 WL 4758362, at *7, but constitutes an independent element of the claim. If the rights of all members of the coalition are not at issue, then there is no coalitional claim, but a claim of dilution to one racial group proven in part by evidence to harm to others.

394. As a leading treatise explains, 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.). That describes this case: if this case were viewed solely from the perspective of Black voters' interests, the claim would fail under the first *Gingles* precondition for lack of a showing of numerosity. It is only when "validity is measured in light of the distinctively different interests of others" that "the challenge may succeed." *Id.* That is precisely when third-party standing doctrine is implicated and its requirements must be met.

395. The controlling fact here is that Plaintiffs cannot prevail in establishing a coalitional right without direct reliance on, and assertion of, the rights of all constituencies in the coalition. Without asserting the right of these persons to vote, Plaintiffs have no claim.

396. It is equally controlling that the *remedy* Plaintiffs demand purports to vindicate the interests of these other groups—who have not asked for it and cannot be assumed to want it. Plaintiffs do not simply present "evidence" about these groups, they demand that these groups be purposefully grouped into single-member districts for the purpose of vindicate these groups' right to vote. It would be blind to reality to conclude that the rights of these persons are not even at issue in a case that touches and concerns those rights so directly and deeply.

397. Indeed, Plaintiffs' insistence that they do *not have these persons interests in mind* only underscores the deep moral and public-policy defects present in this case, as discussed above (Conclusions of Law § I.D.)

2. Third-Party Standing Requirements Are Not Satisfied

398. For a plaintiff to have standing to assert the rights of third parties, the plaintiff must make the following two additional showings: (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). *See also Freilich v. Upper Chesapeake Health*, 313 F.3d 205, 215 (4th Cir. 2002). These elements are not shown and cannot be shown.

399. First, Plaintiffs do not have a "close" relationship with Asian or Latino/Hispanic voters whose rights they assert. Plaintiffs identify as Black registered voters, and, whatever merit (if any) there may be to their contention that Section 2 recognizes coalition claims, it certainly cannot recognize coalition claims *without a coalition*—which existed in cases Plaintiff cite as supporting their position on coalition claims. *See, e.g.*, *Campos v. Baytown*, 840 F.2d 1240, 1242 (5th Cir. 1988) (class-action brought by a coalition of Blacks and Hispanics); *Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Commr's*, 906 F.2d 524, 525 (11th Cir. 1990); *Perez v. Perry*, No. SA-11-CV-360, 2017 WL 962686, *78 (W.D. Tex. Mar. 10, 2017).

400. Blacks, Asians, and Hispanics have different histories, origins on different continents—indeed, different hemispheres—and different racial and ethnic identities, and each of the groups within these categories in turn have sub-identities. Further, their histories and experiences in this nation, and in Virginia Beach, are markedly different. The mere fact of a claimed coalition, even evidence of shared candidate preferences, does not render these groups

sufficiently "close" so that a member of one group can be assumed to speak for the members of other groups.

401. Second, there is no evidence that any one of these communities where somehow hindered from joining his action. The failure to establish such a hindrance itself is a bar to a plaintiff being permitted to assert the claims of third parties. *See, e.g.*, *Freilich*, 313 F.3d at 215 (rejecting claim that a doctor had standing to assert claims of patients on dialysis, despite assertion that such patients were "disabled and chronically ill" and thus hindered in protecting their rights); *Judson v. Board of Supervisors of Mathew County, Va.*, No. 4:18cv121, 2019 WL 2558243, *10 (E.D. Va. June 20, 2019) (dismissing First Amendment claim brought by attendee at public meeting who was attempting to assert that the zoning commission suppressed the speech of third-parties at the meeting). In this case, there is no identifiable hindrance to a Section 2 suit by a resident of Hispanic or Asian descent. Nothing would have prevented their joining the case years ago when the case was filed or in November 2018 when the complaint was amended to add a second Black Plaintiff. Indeed, the fact that this did not occurs seems to suggest that a recruiting effort was made and came up dry. In any event, there is no lack of opportunity for Asians and Hispanics to assert their own rights under Section 2, and it is far too late in this case for new plaintiffs to be added.

402. Indeed, this case is no different from the numerous cases rejecting the efforts of plaintiffs to assert the rights of third parties, including of other races and ethnicities, in voting-rights litigation. *See, e.g.*, *Perry-Bey v. City of Norfolk, Va.*, 678 F. Supp. 2d 348, 363 (E.D. Va. 2009) (holding that plaintiff could not assert a vote-dilution claim based upon racial bloc voting relative to a city's city council district plan where the plaintiff was not "a member of a minority whose voting strength was diluted"); *Clay v. Garth*, No. 1:11cv85, 2012 WL 4470289, *2 (N.D.

Miss. Sept. 27, 2012) (rejecting standing of Black plaintiff to bring vote-dilution claims because he was "not a member of the voting group allegedly affected by Garth's actions and therefore does not have standing as an aggrieved voter"); *Greater Birmingham Ministries v. State*, 161 F. Supp. 3d 1104, 1115 (N.D. Ala. 2016) (holding that the NAACP and a ministry group failed to establish third-party standing to assert rights of Alabama voters without photo ID, finding both elements of *Kowalski* unsatisfied); *Fairley v. Patterson*, 493 F.2d 598, 604 (5th Cir. 1974) (finding that the "original plaintiffs cannot properly represent a sub-class of electors of which they may not be members" and finding a lack of standing since those plaintiffs were "not proper class representatives"). Plaintiffs have no better claim to assert the right of third parties than did the plaintiffs in those cases, and their claim here must be dismissed for the same reasons.

CONCLUSION

The Court should adopt the foregoing findings on the material issues of this case, or on those issues sufficient to reject Plaintiffs' claim.

DATE: September 29, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 29, 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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