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' RESPONSE TO PLAINTIFFS' BRIEF REGARDING REPORT OF THE SPECIAL MASTER

Plaintiffs' brief addressing the Special Master's report is "an exercise in 'looking over a crowd and picking out your friends.'" *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005) (citation omitted). Plaintiffs selectively quote portions of the Special Master's report that *sound* supportive of the Court's liability ruling, but they ignore both the Special Master's acknowledged caveats to those select statements and the Special Master's express finding that it is "mathematically impossible" for Plaintiffs to meet the standard articulated in *Brewer v. Ham*, 876 F.2d 448 (5th Cir. 1989). Plaintiffs' discussion of the City's expert's analysis is likewise internally contradictory and legally and factually incorrect. Besides, it is effectively moot now that the Special Master has provided a reasonable resolution to the parties' longstanding dispute about how much can be inferred regarding Asian and Hispanic voting patterns from estimates that do not show Asian and Hispanic voting patterns. This Court's obligation is to make a reasoned evaluation of the expanded record and "dissolve its injunction" if that record undermines the liability ruling. *Wright v. Sumter Cty. Bd. of Elections & Registration*, 979 F.3d 1282, 1303 (11th Cir. 2020). No reasonable analysis can yield the "express factual findings" regarding Asian and Hispanic voting patterns that Plaintiffs ask this Court to make—especially Plaintiffs' claim that the Special Master's Report provided "additional robust evidence" of cohesion. ECF No. 282 at 1, 8.

I. The Court Should Not Issue Factual Findings That Are "Mathematically Impossible"

Plaintiffs' request for "express factual findings that this evidence further supports the Court's previous findings regarding the cohesion of Hispanic, Black, and Asian American ("HBA") voters and the presence of white bloc voting," ECF No. 282 at 1, improperly posits that the Court's role at the remedial phase is to make every effort to stand by its liability ruling and bolster it. But, as the City's opening brief explained, ECF No. 283 at 2–3, the *Wright* decision that Plaintiffs invoke holds the opposite. Under *Wright*, because Plaintiffs persuaded the Fourth Circuit to hold the City's appeal from the liability decision in abeyance pending final judgment, the

remedial record can—and, indeed, must—be considered, even if the record on remand develops *against* the liability ruling. *Wright*, 979 F.3d at 1302–03 (declining to "resolve the merits of this appeal, covering one of our eyes from the entire record now properly before us"). Here, Plaintiffs assumed the litigation risk that the remedial record would not develop as they anticipated, and there is no fairness in permitting them to take the risk *Wright* described and claim a "heads I win, tails you lose" victory with findings of fact that are untenable on the record now before the Court.

A. The Special Master's Report Expressly Rejects the Finding Plaintiffs Request

As the City's opening brief recounted, ECF No. 283 at 4–5, Dr. Grofman's report clearly explains that he cannot "regard any inferences about how the three minority groups voted as individual groups, whether made by an expert for Plaintiffs or an expert for Defendants, to be sufficiently well supported for me to make any use of them in my own analyses." ECF No. 282-1 at 62 (emphasis in original). Dr. Grofman repeatedly asserted this, *see id.* at 13 n.15, and devoted an entire appendix of his report to this issue, *see id.* at 62–63. Because there is no basis for Dr. Grofman to rely on any such inferences in *his* work, the City respectfully submits that there is no basis for this Court to rely on such inferences in *its* final opinion and judgment.

Plaintiffs' opening brief says nothing of the Special Master's finding on this topic. *See* ECF No. 282 at 8–11. Instead, Plaintiffs quote the Special Master's finding that when viewed "as a group" the minority community is "unquestionably politically cohesive in its support of minority candidates . . . ." *Id.* at 9 (quoting ECF No. 282-1 at 17) (emphasis omitted). But this glosses over the limited scope of that opinion. The Special Master could not have been clearer that his conclusion follows only "**when we look at the combined minority community**." ECF No. 281-1 at 18 (emphasis in original). The Special Master disclaimed any opinion on cohesion concerning "**each minority group separately**." *Id.* at 19 (emphasis in original). At the risk of belaboring this point, the City provides the Special Master's full explanation without alteration or omission:

> **Given the limits on election analyses placed by the demographic and geographic facts in this case, to further require that a finding of minority political cohesion must be supported by evidence of voting patterns for each minority group <u>separately</u> is simply, in my view, to ask the mathematically impossible (see Appendix B.).**

Id. (emphasis and underlining in original). And it is equally clear that Dr. Grofman looked at the combined minority community and provided his analysis with respect to that combined community, in part because "it is the voting group whose voting behavior Judge Jackson asked [him] to examine in the context of determining an appropriate remedy . . . ." *Id.* at 13 n.5. Stated differently, Dr. Grofman's opinions about minority group cohesion incorporate the Court's premise, as directed, that all three minority groups should be considered together for the purpose of evaluating *the cohesiveness of the combined minority group*.[1] But regarding the threshold question of whether each of those groups support the same candidates, Dr. Grofman expressly stated that the data was insufficient to reach a conclusion.

There is then no genuine avenue by which the Court could make "express factual findings" in Plaintiffs' favor. ECF No. 282 at 1. The City has consistently maintained that the correct coalitional cohesion analysis (assuming coalitional claims are even cognizable) requires exactly what the Special Master calls impossible: "**evidence of voting patterns for each minority group <u>separately</u>**." *Id.* (emphasis in original). As the Fifth Circuit has held, "the determinative question" in analyzing coalitional cohesion

> 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 . . . area.

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[1] To reformulate a proposition consistent with the Defendants' prior arguments, Dr. Grofman's opinions on minority cohesiveness are analogous to a doctor who opines that students at a given high school generally are tall, while acknowledging that she did not have data to state whether freshman were similar in height to seniors — the latter constituting a threshold inquiry here.

Brewer v. Ham, 876 F.2d 448, 453 (5th Cir. 1989). The Court cannot make the express factual finding that this standard is met when the Special Master has concluded that this is "**to ask the mathematically impossible**."[2] ECF No. 281-1 at 19 (emphasis in original).

At most, the Court could only make the express *legal* finding by rejecting the standard of *Brewer*. But that would be erroneous. As Dr. Grofman explained in his academic work, "by failing to disaggregate, we might wrongly infer that [no] group" in the alleged coalition "is supporting the white candidate(s) when in fact one group may be giving most of its support to the white candidate(s)." Bernard Grofman, *Voting Rights in a Multi-Ethnic World*, 13 Chicano-Latino L. Rev. 15, 24 (1993); ECF No. 283-2 at 3. As he explained:

> For example, if blacks and Hispanics are present among the electorate in equal numbers, and if 90% of the blacks but only 30% of the Hispanics support a given black candidate in a contest against a white opponent, that candidate will still be receiving 60% support from the combined group, even though 70% of the Hispanic voters voted for the white candidate.

Id. Dr. Handley made the same point in nearly the same terms. *See* ECF No. 260-2 at 6–7 n.4. To permit Plaintiffs to establish coalitional cohesion without presenting evidence of each alleged group of the coalition separately would merely assume cohesion without requiring that it be proven. But "Section 2 'does not assume the existence of racial bloc voting; plaintiffs must prove it.'" *Growe v. Emison*, 507 U.S. 25, 42 (1993) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 42 (1986)). No amount of quoting the Special Master's opinions concerning the *combined* amalgamation of the three minority groups can show how they vote *separately*, as the law requires.

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[2] Even the Special Master's conclusion of "minority" cohesion on a combined basis is erroneous, for reasons the City outlined in its opening brief. ECF No. 283 at 9–10. Plaintiffs' arguments about the third *Gingles* precondition err as well, ECF No. 282 at 9–11, for reasons the City explained in its opening brief, ECF No. 283 at 9–10.

B. The Remedial Submissions Do Not, and Cannot, Do the Mathematically Impossible

Perhaps recognizing that the Special Master's report undercuts their position, Plaintiffs direct this Court first and foremost to *Dr. Handley's analysis*, asserting the claim "that Defendants' expert Dr. Handley's own analysis in the remedial phase . . . support[s] the Court's conclusion of cohesive voting." ECF No. 282 at 5. This assertion, and supporting arguments, lack merit.

To begin, the Special Master's report deemed experts for *both* sides equally incapable of estimating voting patterns of the Asian and Hispanic communities separately: "I do not regard any inferences about how the three minority groups voted . . . whether made by an expert for Plaintiffs or an expert for Defendants, to be sufficiently well supported . . . ." ECF No. 281-1 at 63 (bolding omitted). Even assuming for argument sake that an expert for the City had offered an opinion that supports Plaintiffs' position, the remedial record now clearly rejects such a position.

Next, Dr. Handley did not offer any opinion or analysis that supports Plaintiffs. The Court need only look to what Dr. Handley wrote to ascertain her relevant opinion, which is: "I cannot draw any conclusions about Asian or Hispanic voting preferences in Virginia Beach." ECF No. 260-2 at 6–7 n.4. That should sound familiar, because it mirrors the Special Master's opinion. *See* ECF No. 281-1 at 13 n.5, 62–63. The Court can safely end the analysis at this stage because *no one* can do the mathematically impossible. It is beyond implausible that Dr. Handley somehow achieved that feat both without knowing it and while expressly disclaiming having done so.

A closer look at Plaintiffs' argument discloses it as nothing but a combination of legal error and factual contradiction. It is meant to confuse, not persuade. Plaintiffs begin with Dr. Handley's "percent needed to win" analysis and contend that Dr. Handley erred "because 50% is not the winning threshold for city council elections." ECF No. 282 at 6. The problem with this opening salvo is that percent needed to win a multi-candidate race is not the same as the standard of

cohesion. Even if a candidate need not obtain 50% of the vote to prevail, the cohesion question is whether candidates supported by each constituency "receive a *majority*" of support by each other constituency. *Brewer*, 876 F.2d at 453 (emphasis added). Evidence that a candidate failed to achieve "50 percent of the minority vote" would "demonstrate a *lack* of political cohesiveness." *Levy v. Lexington County, S.C.*, 589 F.3d 708, 720 n.18 (4th Cir. 2009) (addressing jurisdiction with multi-candidate races) (emphasis added). *See also, e.g.*, *Kumar v. Frisco Independent Sch. Dist.*, 476 F. Supp. 3d 439, 509 (E.D. Tex. 2020) (finding lack of cohesion where, in "five three-way races, each minority group consistently fractured its vote into roughly thirds," meaning that "it cannot be inferred that minority voters are uniting together behind particular candidates").

Plaintiffs' contrary effort to replace a majority-support cohesion standard with the percent-needed-to-win standard suffers from two conceptual flaws. First, Plaintiffs' standard would virtually always show cohesion because *some* candidate virtually always wins a plurality of the minority vote in a multi-candidate race (a rare perfect tie is the sole exception). Second, Plaintiffs' standard permits the minority community to be found cohesive around a given candidate when more members of that group *oppose* the candidate than *support* that candidate. That result makes no sense; a fractured vote is evidence against cohesion. *See Monroe v. City of Woodville, Miss.*, 881 F.2d 1327, 1331 (5th Cir. 1989), *as corrected*, 897 F.2d 763 (5th Cir. 1990). Thus, Dr. Handley's analysis correctly chose a 50% mark as relevant for purposes of cohesion, which is how the standard was actually used.[3]

Plaintiffs then take their analysis in an even more illogical direction by immediately

[3] In evaluating performance, Dr. Handley permitted the possibility of a "plurality win," ECF No. 260-2 at 8, which is the basis of much of Plaintiffs' argumentation. Even under that standard, there were plenty of losses for Black-preferred candidates in her analysis in remedial districts with high percentages of combined Black, Asian, and Hispanic voting-age persons. *See id.*

assuming a 50% standard *back into* an analysis that rejected a 50% standard. They argue "that Dr. Handley's" reconstituted election shows Asian and Hispanic cohesion around Black-preferred candidates because the "analysis suggests" that certain candidates listed as losing would "actually in fact . . . win" in multi-candidate races. ECF No. 282 at 6 (emphasis omitted); ECF No. 273-1 ¶ 31 (Spencer Decl.). Plaintiffs' reason that "the fact that minority candidates of choice . . . win the majority of these elections . . . in the face of white opposition, but with only 32-36% Black CVAP, strongly suggests that Hispanic and Asian voters vote cohesively with Black voters." ECF No. 282 at 6 (quoting ECF No. 273-1 ¶ 33). But that is a *non-sequitur*. It assumes the winning candidate needs significantly more than 32 to 36% of the vote to prevail—i.e., something at or near 50%.

Because that is not required, Plaintiffs' argument is exposed as a semantic play on the word "win," which they hope the Court will instinctively read to mean 50% even though they just told the Court it does *not* mean 50%. ECF No. 282 at 6. Dr. Handley's analysis, in fact, shows that in districts with a high plurality of Black CVAP, only a percentage of votes marginally higher than the Black CVAP is obtained by the Black-preferred candidate. *See* ECF No. 260-2 at 8–9. For purposes of cohesion, that is the relevant fact; wins and losses are irrelevant. The fact that the Black-preferred candidate may sometimes be the reconstituted winner of the *plurality* election in a hypothetical district with a *plurality* Black CVAP does not mean that large numbers of Asian and Hispanic voters support the Black-preferred candidate. In this regard, it is important to recall that, even if white bloc voting exists—and even if it exists at legally significant levels—not all white voters vote against Black-preferred candidates. *See, e.g.*, ECF No. 242 at 74 (finding 33% white crossover vote for the Black-preferred candidate in relevant contest); ECF No. 260-2 at 6 (reporting white crossover vote of up to 32.9% for Black-preferred candidates). The difference

between Black CVAP and the plurality vote share shown in Dr. Handley's charts could easily be white crossover vote, it could easily be an amalgamation of non-cohesive members of various races, and it could easily be only support of *one* of the two other groups—Hispanic *or* Asian rather than "Hispanic *and* Asian." ECF No. 282 at 6 (emphasis added) (citation omitted). Plaintiffs have no way to show *which* of these possibilities is *actually* occurring, as Dr. Grofman's analysis shows.

Undeterred, Plaintiffs go on to contend that Dr. Handley's analysis somehow "still *supports* the Court's finding that HB voters are politically cohesive," this time reasoning that the difference between the percentage of All Minority CVAP needed to win and Black CVAP needed to win is, in Plaintiffs' view, "quite similar." ECF No. 282 at 6 (quoting ECF No. 273 ¶ 36). But they fail to state what that difference is, and it is *not* "quite similar." The average difference across nine elections is more than 6% and runs up to more than 9%. ECF No. 260-2 at 6 n.4. And this number does *not* refer to cohesion rates (as in a 6% difference in support levels) but the percentage All Minority CVAP needed in the district to win versus the Black CVAP needed to win. The difference between, e.g., a 53.9% minority CVAP district and one with 47.6% minority CVAP is not only significant but legally significant, since the latter is not even a majority-minority district.

In short, the Special Master had good reason to call the inferences Plaintiffs continue to ask this Court to draw "mathematically impossible." And it was precisely this neutral and well-reasoned opinion that this Court hired the Special Master to offer. The Special Master's opinion defeats liability, and the Court should follow *Wright*, vacate its liability order, and dissolve its injunction. At a minimum, if the Court preserves its liability ruling, it should clarify that it does so based on a legal disagreement with *Brewer*, not based on mathematically impossible inferences.

II. The Court Should Not Disregard the One-Person, One-Vote Principle

The City's opening brief addressed other respects in which the remedial-phase record

undermines the liability determination, including that the record defeats the Court's finding that the first *Gingles* precondition can be satisfied. ECF No. 283 at 7–9. For the most part, Plaintiffs' brief does not address these issues, and, because this brief only "respond[s] to the response[]" of Plaintiffs, ECF No. 284, the City will not repeat these arguments. However, Plaintiffs make one relevant cursory assertion that "the Special Master's Illustrative Map currently falls within the allowable constitutional threshold for population deviations" and cite *Brown v. Thompson*, 462 U.S. 835 (1983), for this proposition.

But, as the City's brief explained, ECF No. 283 at 7–8, "[c]ourt ordered apportionment plans must meet more stringent standards of population equality" than plans drawn by state redistricting authorities. *Daly v. Hunt*, 93 F.3d 1212, 1218 n.7 (4th Cir. 1996). Plaintiffs' reliance on *Brown* is misplaced because *Brown* addressed the population-equality standard applicable "to Wyoming's 1981 statute reapportioning its House of Representatives." 462 U.S. at 838. That statute was not subject to the "stringent standards of population equality" that bind this Court's remedial authority. *Daly*, 93 F.3d at 1218 n.7. And *Brown* is a particularly inapposite case because it said very little about the correct standard of population equality. The plaintiffs there "deliberately . . . limited their challenge to" a single county thereby omitting review of the statewide population deviations usually adjudicated in one-person one-vote cases. 462 U.S. at 846.

To the extent Plaintiffs imply that Section 2 justifies a departure from the one-person, one-vote standard, their argument would be circular. If there is no viable remedy within the generally applicable legal confines, then "[a] Section 2 plaintiff cannot succeed." *Wright*, 979 F.3d at 1302; *see also Hall v. Virginia*, 385 F.3d 421, 428 (4th Cir. 2004). In that instance, there is no Section 2 violation, so Section 2 cannot be worked to justify a contravention of the one-person, one-vote rule. *See, e.g.*, *Holder v. Hall*, 512 U.S. 874, 881 (1994) (plurality opinion) (failure to show legally

viable alternative meant no Section 2 violation in the first instance); *Dillard v. Baldwin Cty. Comm'rs*, 376 F.3d 1260, 1266 (11th Cir. 2004) (same); *see also Wright*, 385 F.3d at 1303 (discussing *Dillard*). If the law were otherwise, the 50% majority-minority threshold could be met in every case: a plaintiff or court could simply under-populate a district as much as needed to ultimately arrive at a 50% minority voting-age population in that district, no matter how mal-apportioned. That is why the law requires that the remedy be otherwise within the confines of law.

III. The City Takes No Position on Plaintiffs' Suggested Alterations

To the extent the Court disagrees with its position on liability and the remedial record, the City stands by the position it took in its opening brief concerning the Special Master's remedial proposal, which should be adopted with the modifications and caveats the City identified. For their part, Plaintiffs also ask the Court to adopt the Special Master's plan with "two minor modifications." ECF No. 282 at 1. The City has no particular objection to these requests in the abstract, but it remains unclear what their implementation would mean in application. Plaintiffs opine that these changes would improve the remedial proposal on various metrics (e.g., population deviation) and would not sacrifice traditional districting criteria (e.g., compactness), and they point to their own remedial map as partial evidence. *See* ECF No. 281 at 2–4. However, Plaintiffs' remedial map is badly malapportioned and does not establish what is feasible at this stage, and no other mapping configurations were presented. The City therefore takes no position on the request.

CONCLUSION

The Court should vacate its liability ruling and dissolve its injunction. Alternatively, the Court should clarify the basis of its liability findings in light of the Special Master's rejection of core elements of its liability opinion, adopt the Special Master's remedy after correcting impermissible population deviation, and return jurisdiction to the Court of Appeals.

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Respectfully submitted,

/s/ Katherine L. McKnight

Katherine L. McKnight (VSB No. 81482)
Richard B. Raile (VSB No. 84340)
BAKER & HOSTETLER, LLP
1050 Connecticut Avenue, N.W.
Washington, D.C. 20036
Telephone: (202) 861-1500
Facsimile: (202) 861-1783
kmcknight@bakerlaw.com
rraile@bakerlaw.com

Patrick T. Lewis (*pro hac vice*)
BAKER & HOSTETLER, LLP
127 Public Square, Suite 2000
Cleveland, OH 44114
Telephone: (216) 621-0200
Facsimile: (216) 696-0740
plewis@bakerlaw.com

Erika Dackin Prouty (*pro hac vice*)
BAKER & HOSTETLER, LLP
200 Civic Centre Drive, Suite 1200
Columbus, OH 43215
(614) 462-4710
eprouty@bakerlaw.com

Mark D. Stiles (VSB No. 30683)
City Attorney
Christopher S. Boynton (VSB No. 38501)
Deputy City Attorney
Gerald L. Harris (VSB No. 80446)
Senior City Attorney
Joseph M. Kurt (VSB No. 90854) Assistant City Attorney
OFFICE OF THE CITY ATTORNEY
Municipal Center, Building One, Room 260
2401 Courthouse Drive
Virginia Beach, Virginia 23456 Telephone: (757) 385-4531
Facsimile: (757) 385-5687
mstiles@vbgov.com cboynton@vbgov.com
glharris@vbgov.com
jkurt@vbgov.com

Counsel for Defendants

CERTIFICATE OF SERVICE

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

/s/ Katherine L. McKnight
Katherine L. McKnight (VSB No. 81482)
Counsel for Defendants