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' MOTION TO MODIFY REMEDIAL BRIEFING SCHEDULE TO PERMIT STAGGERED BRIEFING

Defendants are prepared to comply with the Court's May 11, 2021 Order (Dkt. 252) (the "Remedial Order"). There are several areas of agreement between Defendants and Plaintiffs as detailed herein, e.g., Defendants are afforded both priority and deference in proposing any remedial plan. Plaintiffs likely also will agree that no one—not even a special master—can create a legally acceptable final remedial plan for the City Council's next elections *before* the release of the 2020 census data, due to the strictures of the one-person one-vote requirement under *Reynolds v. Sims* and its progeny. 377 U.S. 533 (1964). The release of census data usable for redistricting currently is slated for September 2021. In other words, while preliminary proposals may be made in July 2021 using other data, these preliminary proposals could not be made final until after the plans are adjusted using 2020 census data. There also is briefing that may be helpful to the Court prior to September 2021 as proposed herein.

1. The Parties agree that the City is afforded first opportunity and deference.

Beginning with a point of agreement between the Parties: Defendants agree that the City of Virginia Beach—which is "the appropriate legislative body" here[1]—should be "given [. . .] the first opportunity to devise an acceptable remedial plan." *McGhee v. Granville Cty., N.C.*, 860 F.2d 110, 115 (4th Cir. 1988). In addition to giving the City the first opportunity to prepare a remedial plan, this Court also "should defer to state policy in fashioning relief." *White v. Weiser*, 412 U.S. 783, 797 (1973). Only if the City fails "to respond or responds with a legally unacceptable remedy," does "'the responsibility fall[] on the District Court,' to exercise its discretion in fashioning a 'near optimal' plan." *McGhee*, 860 F.2d at 115 (citing *Chapman v. Meier*, 420 U.S. 1, 27 (1975); *Seastrunk v. Burns*, 772 F.2d 143, 151 (5th Cir. 1985)).

The Court must provide the City an "adequate opportunity" to adopt a substitute plan "in a timely fashion" that does not violate "federal constitutional requisites." *White v. Weiser*, 412 U.S. 783, 79495 (1973) (quoting *Reynolds v. Sims*, 377 U.S. 533, 586 (1964)). *See also*, *Page v. Virginia State Bd. of Elections*, No. 3:13CV678, 2015 WL 3604029, at *18 (E.D. Va. June 5, 2015 (quoting *Wise v. Lipscomb*, 437.U.S. 535, 539 (1978)) (The Court must provide the state map drawer a "reasonable opportunity" to adopt a substitute plan that "meet[s] constitutional requirements."); *Bethune-Hill v. Virginia State Bd. of Elections*, 326 F. Supp. 3d 128, 181 (E.D. Va. 2018) (same).

2. No Party or Special Master can propose a legally acceptable final remedy until after 2020 census data is released.

A legally acceptable final remedial plan cannot be crafted until after the 2020 census data is released. Any plan adopted to govern the City's council elections for the 2022 elections

[1] Charter, City of Virginia Beach, § 3.01(B); Va. Const. art. 7, § 5; Va. Code Ann. § 24.2-304.1 (C).

forward must be drawn using the 2020 census data to ensure that the council districts contain equal population required to comply with the one-person, one-vote command of *Reynolds v. Sims*, 377 U.S. 533 (1964). As the Supreme Court has observed, "[w]hen the decennial census numbers are released, States must redistrict to account for any changes or shifts in population." *Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003), abrogated by statute on other grounds, *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254 (2015). Upon the publication of a "new enumeration, no districting plan is likely to be legally enforceable if challenged" due to population changes. *Id.*

Virginia law requires that electoral districts in the Commonwealth by redistricted after the publication of each new decennial census. Va. Code Ann. § 24.2-304.1(C); Va. Const. art. VII, § 5. Virginia law also requires political subdivisions to "use the most recent decennial population figures for such county, city, or town from the United States Bureau of the Census, which figures are identical to those from the actual enumeration conducted by the United States Bureau of the Census…." Va. Code Ann. § 24.2-304.1(C).

The Census Bureau presently estimates releasing redistricting data to all states by September 30, 2021.[2] *See* U.S. Census Bureau, Press Release No. CB21-RTQ.09 (Mar. 15, 2021), at https://www.census.gov/newsroom/press-releases/2021/statement-legacy-format-redistricting.html. Once those data are published, the Virginia Division of Legislative Services must, within 30 days of receipt, reallocate the residence of persons incarcerated in correctional facilities to their last home address and publish those adjusted numbers to redistricting

[2] Some summary data will be provided in "mid-to-late August 2021," but this will not be sufficient for redistricting. U.S. Census Bureau, Press Release No. CB21-RTQ.09 (Mar. 15, 2021), at https://www.census.gov/newsroom/press-releases/2021/statement-legacy-format-redistricting.html.

authorities across the Commonwealth. Va. Code Ann. § 24.2-314. Only then can the City begin the process of decennial redistricting.

For these reasons, no one has the data necessary to draw remedial districts *now*. The only data available to inform the drawing of districts now are (1) 2010 census data, which is now stale, and (2) survey data like the "American Community Survey" (ACS), which is insufficiently precise. The 2010 census data is stale—it is a decade old and no longer enjoys even a legal fiction of accuracy. *See Georgia*, 539 U.S. at 488 n.2. Data from the ACS is no substitute for enumerated census results. Once the 2020 census results are released, a plan not meeting the one-person, one-vote standard as informed by the 2020 census will not be defensible on the ground that *older* ACS results showed it to be properly apportioned. Further, ACS data is the product of a survey, and is not an "enumeration" as required by state law. *See State of New York v. United States Dep't of Commerce*, 315 F. Supp. 3d 766, 778 (S.D.N.Y. 2018) (distinguishing ACS, which surveys "roughly one in every thirty-eight households in the country," from the decennial census, which reports the results of the Census Bureau's effort to count every U.S. resident); Va. Code § 24.2-304.1(C) (requiring use of "enumeration" data). In particular, data from the ACS lacks the accuracy needed to perform redistricting and is not suitable for that task. *See, e.g.*, *Pope v. County of Albany*, No. 1:11-cv-0736, 2014 WL 316703, *13 n.22 (N.D.N.Y. Jan. 28, 2014) ("The Census Bureau acknowledged that its American Community Survey, a collection of survey estimates on statistics such as CVAP, is less reliable than Census data and not intended to be used for redistricting"); *State of New York v. United States Dep't of Commerce*, 315 F. Supp. 3d 766, 778 (S.D.N.Y. 2018) ("Unlike the decennial census, the ACS is conducted annually and is not used to obtain an 'actual Enumeration' of the population for purposes of apportionment' but is instead only given to about 3.5 million households). *See also Benavidez v. Irving*

Independent Sch. Dist., 690 F. Supp. 2d 451, 461 (N.D. Tex. 2010) (finding that ACS data was less reliable than traditional census data); *United States v. Osceola County, Fla.*, 474 F. Supp. 2d 1254, 1255 (M.D. Fla. 2006) (court concluded that "2000 Census data should be used for remedial purposes"). Indeed, dozens of voting-rights groups, including the League of Women Voters, the National Association for the Advancement of Colored People (NAACP), Advancing Justice, the Mexican American Legal Defense and Education Fund (MALDEF), and Common Cause recently issued a statement to "unequivocally affirm the basic principle that it is not appropriate to implement electoral district lines based primarily on American Community Survey (ACS) data" and to declare that "line drawers should wait until decennial Census data is available to draw actual maps to be implemented in elections." League of Women Voters, *League Joins Statement on Appropriate Data For Redistricting*, Apr. 30, 2021, at https://www.lwv.org/census/league-joins-statement-appropriate-data-redistricting (visited June 15, 2021).

Simply stated, the degree of data precision needed to redistrict in compliance with *Reynolds'* one-person, one-vote principle does not permit use of stale or imprecise data. State and local districts must generally be drawn within 10% of ideal population size—when drawn by legislatures. *See, e.g., Connor v. Finch*, 431 U.S. 407, 418 (1977) (citing cases); *Voinovich v. Quilter*, 507 U.S. 146, 161–62 (1993); *See, e.g., Regensburger v. City of Bowling Green*, 278 F.3d 588, 595 (6th Cir. 2002); *Bodker v. Taylor*, No. Civ.A.1:02-cv-999, 2002 WL 32587312, *7 (N.D. Ga. June 5, 2002); *United States v. City of Euclid*, 523 F. Supp. 2d 641, 646 (N.D. Ohio 2007). Equal population is also required for city council districts by the City's charter. Va. Beach Charter § 3.01(B) (the "boundaries shall be adjusted periodically as may be necessary to ensure that the populations of the districts remain approximately equal").

But court-ordered plans "are held to higher standards of population equality than legislative ones." *Abrams v. Johnson*, 521 U.S. 74, 98 (1997). A court-ordered plan should "ordinarily achieve the goal of population equality with little more than de minimis variation," *id.*, *quoting Chapman v. Meier*, 420 U.S. 1, 26–27 (1975), and only "slight deviations are allowed under certain circumstances." *Id.* (upholding remedial plan with overall population deviation of 0.35%). *See also Bodker*, 2002 WL 32587312, *7 (0.98% overall population deviation held acceptable). That degree of precision requires decennial census data and *not* the ACS—as courts have acknowledged as noted above. And that is especially true given that only the decennial census data, and not ACS data, gets adjusted to count incarcerated Virginians in their cities of residence rather than the city where their correctional facilities may be located.

The City recognizes that some courts have allowed use of survey data like ACS data, housing data, and related data sets to help craft, or evaluate the effectiveness of, remedial plans. But resort to such secondary data is not defensible here, where the gold-standard decennial census data will be released by September 2020, some 14 months before the next council elections scheduled for November 2022. Using ACS data to craft a remedial plan for the November 2022 elections creates a serious risk of the Court adopting a plan that is unconstitutionally malapportioned right out of the gate.

3. The Court cannot adopt a remedy until after Defendants have had an adequate opportunity to redistrict the City Council using 2020 census data.

Supreme Court precedent affords the City an "adequate opportunity" to redistrict in cases like this. While the City will be able to provide the Court with preliminary remedial plans by July 1, 2021, the City will not be able to provide the Court with a final legally acceptable remedy until after 2020 census data is released and ready for redistricting in the Commonwealth.

The Supreme Court "has repeatedly held that redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to pre-empt." *Wise*, 437 U.S. at 539–40 (citing *Connor v. Finch*, 431 U.S. 407, 414–415 (1977); *Chapman v. Meier*, 420 U.S. 1, 27 (1975); *Gaffney v. Cummings*, 412 U.S. 735, 749 (1973); *Burns v. Richardson*, 384 U.S. 73, 84–85 (1966)). Here, the City is able and willing to provide the Court with a proposed remedial plan once it has the data to do so, and the next election is some 17 months away (and 14 months after that 2020 census data is expected). The Supreme Court has been clear that "adequate opportunity" means adequate in light of the state actor's ability and willingness to perform as compared with the timeline of the next election. *Growe* explains that "[a]bsent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it." *Growe v. Emison*, 507 U.S. 25, 34 (1993); *see also Scott v. Germano*, 381 U.S. 407, 409 (1965) (vacating District Court order that issued remedial plan without affording state actor "reasonable time" to "validly redistrict," concluding that "[w]e believe that the District Court should have stayed its hand."). There is no evidence before the Court that the City will fail to timely redistrict. Further, the next election in November 2022 is not so imminent as to make City redistricting prior to that date impossible. Therefore, the City should be given an adequate opportunity to redistrict following the release of 2020 census data usable for redistricting.

Accordingly, Defendants respectfully propose, as detailed in section 4 below, that a better use of the July 1 briefing due date would be to address, and come to some understanding about, the guidelines for the remedial map drawing when it occurs later this year. To require adversarial staggered briefing in July over preliminary proposed remedial plans that everyone—

including the Supreme Court of the United States[3]—knows to be an inadequate remedy due to the unavailability of 2020 census data, would be a waste of resources and prejudicial to the City, which seeks to comply with this Court's orders and realize its rights of priority and deference under governing law.

4. Should the Court decide to proceed with the remedial phase of this litigation now, Defendants propose the following briefing schedule.

Defendants understand the Court wishes to proceed promptly with a remedial phase and are committed to complying with the Court's direction. The following proposed schedule assumes prompt release of census data that is usable for redistricting purposes, and adjusted by Virginia' Division of Legislative Services.[4] Should the release of such data be delayed, Defendants propose that the following schedule, from subsection (b) on, be adjusted commensurately (i.e., a delay of one week would add one week to the schedule). This proposal adopts Plaintiffs' proposal for staggered briefing after census data is released.

a. July 1 Concurrent Briefs

Defendants propose that the best use of the July 1 briefing schedule is to require both parties to file, concurrently, a brief that identifies:

i. Preliminary proposed remedial plan concepts

This is an opportunity for the Parties to use presently available ACS data and an understanding of this Court's liability opinion to propose concepts that would likely remedy the violations found by the Court and comply with governing law including traditional districting

[3] *Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003).
[4] *See* Section 2, *supra* (indicating that the Census Bureau presently estimates releasing redistricting data to all states by September 30, 2021; and the Virginia Division of Legislative Services must, within 30 days of receipt, reallocate the residence of persons incarcerated in correctional facilities and to publish those adjusted numbers to redistricting authorities across the Commonwealth).

criteria. Rough-draft concept maps, i.e., maps that have been drawn with whole precincts but not reduced to the one-person one-vote standard, could be provided to the Court to illustrate these concepts with the understanding that these maps would not be legally acceptable remedies in this case. These maps could form the starting point of remedial plans drawn using 2020 census data after it becomes available.

ii. Data that should be used to assess political performance of proposed districts

The Parties can propose which elections should be used to assess whether any proposed plan affords minority voters, as defined in the Court's liability order, an equal opportunity to elect their preferred candidates. It is important that the Parties and Court are using the same "measuring stick" to determine whether any proposed remedial districts would provide the minority community in Virginia Beach an opportunity to elect candidates of choice. If there is any debate between the Parties about which data should be used to assess performance, it should be resolved before final map drawing begins.

iii. Propose special masters

The Parties can propose special masters to assist the Court in this remedial phase in their July 1 briefs; a deadline in the existing remedial order that Plaintiffs agree to abide by. Dkt. 256 at 1. The Parties should provide not only names for proposed special masters but also proposals for how and when during the remedial process the Court could make best use of such a special master. There are different ways that special masters are engaged in preparing remedial plans in Section 2 cases and the Parties' counsel could offer the Court options for doing so.

b. November 30 Defendants' Brief[5]

Assuming that data usable for redistricting purposes is released by September 30, 2021, and that the Virginia Division of Legislative Services is able to process the data within the statutory 30 days, Defendants propose to file their final remedial proposal, including proposed plans, by November 30, 2021. This will allow the City 30 days to draw, consider and debate its proposed plan after receiving census data usable for redistricting; i.e., this would allow the City the "adequate opportunity" to redistrict that it is afforded by Supreme Court precedent.

c. December 14 Plaintiffs' Responsive Brief

Following Plaintiffs' staggered briefing proposal allotting 14 days for their response brief, Plaintiffs could file their response brief by December 14, 2021.

d. December 21 Defendants' Reply Brief

Defendants could file a reply brief, if any, in further support of their remedial brief by December 21, 2021.

CONCLUSION

The Court should modify the remedial order in accordance with the proposal identified herein and detailed in the attached proposed order.

[5] This Court also could order staggered briefing prior to the release of 2020 census data usable for redistricting, with the understanding that additional briefing will be necessary following that release. Defendants propose here a briefing schedule that focuses and reduces the amount of briefing before the Court on the fastest timeline possible in light of the release of census data usable for redistricting.

DATE: June 17, 2021

Respectfully submitted,

/s/ Katherine L. McKnight

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CERTIFICATE OF SERVICE

I hereby certify that on June 17, 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
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Counsel for Defendants

IN THE UNITED STATES DISTRICT COURT
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[PROPOSED] ORDER

UPON CONSIDERATION of Plaintiffs' Motion to Modify the Remedial Briefing Schedule to Permit Staggered Briefing (Dkt. 256), and Defendants' response thereto, and any related argument, it is hereby

ORDERED that the Court's May 11, 2021 Order (Dkt. 252) ("Remedial Order") shall be modified in a manner detailed herein; it is further

ORDERED that on July 1, 2021, the parties shall file briefs providing the following:

a. Preliminary remedial plan proposals

Using presently available data the Parties shall propose preliminary remedial proposals they believe would remedy the violations found by the Court, and comply with governing law including traditional districting criteria.

b. Data that should be used to assess political performance of proposed districts

The Parties shall propose which election data should be used to assess whether any proposed plan affords minority voters, as defined in the Court's liability order, an equal opportunity to elect their preferred candidates.

c. Propose special masters

The Parties shall propose special masters to assist the Court in this remedial phase. The Parties should provide not only names for proposed special masters but also proposals for how and when during the remedial process the Court could make best use of such a special master.

It is further

ORDERED that on November 30, 2021, Defendants shall file a brief detailing their final remedial plan proposal; and, it is further

ORDERED that on December 14, 2021, Plaintiffs shall file a brief in response to Defendants' November 30 brief; and, it is further

ORDERED that on December 21, 2021, Defendants shall file a brief in reply to Plaintiffs' December 14 brief; and, it is further

ORDERED that should the release of 2020 census data usable for redistricting be delayed beyond October 30, 2021, Defendants' November 30 brief and all subsequent briefing shall be adjusted commensurately (i.e., a delay of one week would add one week to the schedule).

_____ _____

Date Honorable District Judge