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' SUBMISSION IN RESPONSE TO COURT'S JULY 1, 2021, ORDER

COME NOW the Defendants, by counsel, and, in response to the Court's July 1, 2021 Order (Dkt. 259) (the "Remedial Briefing Order"), and hereby offer the following submission.

Defendants are continuing to prosecute their appeal consistent with their legal rights. *See* 28 U.S.C. § 1292(a)(1). As expressed in their appeal papers, Defendants respectfully disagree with the Court's liability ruling. (Dkt. 242) (the "Opinion"). However, for purposes of the remedial phase only—and without waiving any rights, including the right to challenge the liability ruling on appeal before and after final judgment—Defendants respond to Plaintiffs' plans proposed on July 1, 2021, at Dkt.261.

1. **This brief assumes the correctness of the Opinion but notes all proposed plans evidence a lack of cohesion among the Black, Asian and Hispanic communities.**

As noted in Defendants' proposal, Dkt. 260 at 7-12, Dr. Lisa Handley found that there were "consistently lower levels of cohesion among all minority voters compared to Black voters," and that these differences raise a question about whether Black voters and other minority voters are actually supporting the same candidates. *Id.* at 8-9.

This makes drawing remedial plans more difficult as a lack of cohesion will impact how many "performing" districts can be drawn within Virginia Beach. The remedial proposals by Plaintiffs and Defendants evidence this lack of cohesion.

Comparing Plaintiffs' 10-1 proposal to Defendants', in races in the proposed majority minority districts over the past 10 years, only one district reliably performs[1] in each party's proposal: Plaintiffs' remedial district 4 (Dkt. 261-2 at 6), and Defendants' remedial district 1 (Dkt. 260 at 10-11). The following table shows the performance of candidates of choice who lost their election but who would win a reconstituted election in Plaintiffs' proposed remedial districts:

Candidate of Choice Performance in Plaintiffs' Proposed Remedial Districts			
Election	**District 4**	**District 7**	**District 10**
2018 AL	Wins	Loses	Loses
2016 KE	Wins	Loses	Loses
2014 RH	Loses	Loses	Loses
2011 AL	Wins	Wins	Wins

Dkt. 261-2 at 6 (Spencer's reconstituted election analysis). Plaintiffs' reconstituted election analysis dates back thirteen years and includes as a victory a 2010 election in Princess Anne but the percent of white votes for the minority preferred candidate of choice in that election was substantial (over 30%). *Compare* Dkt. 261-2 at 6 (Spencer's reconstituted election analysis) with Dkt. 260-2 at ¶16 (indicating 32.9 percent white vote for minority-preferred candidate using

[1] Reliable "performance" in the context of the claims at issue in this case means a district that is likely to provide voters from a minority community with an opportunity to elect their candidates of choice within the meaning of this Court's liability ruling and assuming its validity for the sake of argument.

EI estimates from Spencer Report) and ¶9 (noting that where "many white voters (30 to 40 percent) support the minority-preferred candidates, a district […] may easily and consistently elect minority-preferred candidates to office."). In other words, Plaintiffs cannot tell this Court that this "victory" in Spencer's reconstituted election analysis is due to coalitional minority voting strength and not white crossover voting.

The following table shows the demographic data for Plaintiffs' proposed remedial plans using ACS data from 2019. Declaration of Kimball W. Brace, attached as Exhibit A ("Brace Decl.") at ¶3. The three majority-minority districts are highlighted in grey.

Plaintiffs' Proposed District	Racial Demographics as Percent of Total Population (ACS 2019)				
	White NH	Black NH	Asian NH	Hispanic	Minority
1	63.94%	16.21%	9.64%	5.14%	36.06%
2	72.57%	12.09%	5.76%	5.17%	27.43%
3	60.93%	18.91%	5.61%	9.98%	39.07%
4	39.70%	35.60%	6.15%	14.35%	60.30%
5	74.94%	8.90%	3.65%	7.82%	25.06%
6	70.81%	15.76%	2.01%	6.15%	29.19%
7	41.17%	29.93%	12.11%	10.39%	58.83%
8	81.85%	5.80%	3.46%	4.75%	18.15%
9	72.32%	10.47%	5.30%	7.26%	27.68%
10	39.54%	30.15%	11.87%	10.65%	60.46%

At least two facts are notable from Plaintiffs' proposed plans. First, Plaintiffs had to pack their proposed majority-minority districts with minority population in the neighborhood of 60% in order to create putatively performing districts (and even then Districts 7 and 10 do not reliably perform). *Compare* Brace Aff. ¶3 with Dkt. 260-1 at 51 (indicating that Defendants' proposed majority minority districts were drawn at 55.34% for District 1, 52.55% for District 3, and 53.09% for District 5). Second, the two majority-minority districts drawn by Plaintiffs that do not reliably perform—Districts 7 and 10—are the two proposed districts drawn with the highest percentage Asian population. Brace Aff. ¶3 (indicating District 7 has 12.11% Asian population,

and District 10 has 11.87%). *See also*, Dkt. 261-1 at 14 (indicating District 7 and District 10 were the two highest Asian CVAP districts drawn).

2. Plaintiffs' preview of their response to Defendants' proposed plans splits hairs.

In their brief in response to Defendants' Motion to Stay, Plaintiffs claimed that one of Defendants' remedial plans "cracks the minority population in the College Park, Tallwood, and Colonial Precincts and orphans them in a majority white-CVAP district," that Defendants made "unnatural districting decisions" despite using existing whole precincts to draw their maps, and suffered "from serious deficiencies" that "decreas[ed] the performance of the districts in reconstituted election result analyses." Dkt. 263 n.3. But there are no findings or even evidence in this case concerning what an "unnatural" decision is as compared to a "natural" one. And Plaintiffs' proposed districts do not perform meaningfully different from or better than Defendants' proposed districts. *See supra* Section 1. Moreover, Plaintiffs' remedial districts are visibly non-compact—*see* District 4's jackknife-like appearance (Dkt. 261-2 at 4)—and fail to use whole precincts, in fact splitting several Voting Tabulation Districts ("VTDs"). Brace Aff. ¶4. Splitting VTDs in this manner creates an administrative burden on the County Registrar's office in trying to implement a plan as voters within each split precinct would need to be identified and assigned to the correct ballot style and/or two new precincts would need to be created instead of using the existing precinct. *Id.* Plaintiffs' position that Defendants' plans result in "unnatural districting decisions" and any material decrease in performance is inconsistent with their own proposed remedial plans in this matter. Further, Defendants have drawn the same number of majority minority districts in their 10-1 proposed plan as Plaintiffs have in theirs (three). An assertion of "cracking" is not legally cognizable where Plaintiffs' own plan has no more majority-minority districts than the supposedly "cracked" plan. *See Voinovich v. Quilter*, 507 U.S. 146, 153–54 (1993).

3. Defendants do not object to Plaintiffs' 10-1 plan.

Regardless of any minor differences between the proposed remedial plans, Defendants do not object to Plaintiffs' proposed 10-1 plan, *see*, Dkt. 261 (Plaintiffs' Proposed Remedial Plan), and note that all three plans proposed by the parties would be acceptable remedies within the parameters of the Court's liability ruling, assumed to be legally and factually correct.

4. Defendants are owed priority and deference.

The City of Virginia Beach is afforded both priority and deference in fashioning a remedial plan in this matter. *See*, Dkt. 257 at 2. 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 v. Granville Cty., N.C.*, 860 F.2d 110, 115 (4th Cir. 1988) (citing *Chapman v. Meier*, 420 U.S. 1, 27 (1975); *Seastrunk v. Burns*, 772 F.2d 143, 151 (5th Cir. 1985)).

Defendants respond to the Court that any of the three plans would be acceptable remedies, within the parameters of the Court's liability ruling, assumed to be legally and factually correct, but propose, for purposes of efficiency and avoiding unnecessary dispute, that the Court select Plaintiffs' remedial proposal, allow it to be adjusted using 2020 Census data when that is released in mid- to late-August, and issue a remedy promptly. *White v. Weiser*, 412 U.S. 783, 797 (1973) (holding that a court "should defer to state policy in fashioning relief.").

5. A special master can confirm that Plaintiffs' proposed plan remedies the Court-found violation.

The parties agree that the Court can select Plaintiffs' remedial plan and move forward with its remedial process. Defendants appreciate the Court's interest in soliciting the counsel of a special master to ensure that the final remedy cures the violation found by the Court in the

Opinion. The Court could rely on a special master here to confirm that Plaintiffs' remedial plan, as adjusted with 2020 Census data, remedies the violation identified in the Opinion.

DATE: July 20, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of the filing to all parties of record.

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