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.

Civil Action No. 2:18-cv-0069

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

Twenty months after Plaintiffs Latasha Holloway and Georgia Allen filed their amended complaint, Defendants, for the seventh time, have filed a motion seeking to avoid adjudicating the merits of Plaintiffs' claim under Section 2 of the Voting Rights Act ("Section 2" of the "VRA"). This motion fares no better than the prior six, which all failed. It is deficient in both law and logic. Further, it dresses up factual arguments as *faux* jurisdictional claims, which cannot conceal Defendants' extreme delay in advancing this latest futile assault.

Defendants wrongly claim that this Court lacks jurisdiction to decide whether Plaintiffs are suffering unlawful vote dilution now, because the 2020 Census will produce new population data sometime next year. This fundamentally misstates the role of population data in this case. The imminent release of new decennial census data can sometimes raise mootness issues in litigation challenging redistricting maps *currently in force*, where a new census typically renders old maps unenforceable. But Plaintiffs here are not simply challenging an existing redistricting plan. Just the opposite: Plaintiffs challenge the longstanding, permanent at-large system of electing Virginia Beach City Council members *without* voting districts. To show that this at-large electoral system

violates Section 2, Plaintiffs must prove certain facts about the population of Virginia Beach by a preponderance of evidence. *See Thornburg v. Gingles*, 478 U.S. 30, 49-51 (1986). The decennial census is just one source of relevant evidence, among others—including other, more detailed annual data and local electoral data—about the local population. No jurisdictional doctrine requires the Court to withhold adjudication of Plaintiffs' vote-dilution claim until the Census Bureau provides updated population data about Virginia Beach's population by releasing 2020 Census data. Indeed, "[t]he [Supreme] Court has never hinted that plaintiffs claiming present Voting Rights Act violations should be required to wait until the next census before they can receive any remedy." *Garza v. County of Los Angeles*, 918 F.2d 763, 772-73 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028 (1991).

Second, Defendants argue that because Plaintiffs are Black, they lack standing to challenge the dilution of political opportunity for a cohesive community of color that includes Hispanic, Black, and Asian (together "HBA") members. But if the HBA community in Virginia Beach is cohesive, as Plaintiffs claim, then any member of that community—Hispanic, Black, or Asian—can properly assert harm from that dilution. Defendants thus assume the conclusion, that the combined HBA community in Virginia Beach is *not* politically cohesive. This Court has already refused to indulge that dubious assumption. When Plaintiffs prove at trial that the HBA community is cohesive, they will necessarily show that they personally are injured by Virginia Beach's adherence to a voting scheme that systematically submerges the HBA community's preferences.

The Court should therefore find that it has subject-matter jurisdiction over this case, and accordingly deny this motion, like the six meritless motions that preceded it.

I. Background

A. Virginia Beach's At-Large System for Electing City Council Members

This case is about the Virginia Beach City Council's electoral system and its dilutive impact on political opportunity for the HBA community. All eleven members of the City Council are elected at-large, although seven of them must live in a specific residency district. Amended Complaint ("Am. Compl."), ECF No. 62 at ¶ 21.[1]

Virginia Beach has maintained this at-large voting system for City Council since 1966. ECF No. 118-1 (Initial Report of Dr. Allan J. Lichtman) at 12. Over the decades, members of the HBA community have frequently advocated for a change to a district-based voting system. *See* ECF No. 150-1 (Opinion and Order, *Lincoln v. City of Virginia Beach*, No. 2:97-cv-756 (E.D. Va. 1997)) at 1-3; ECF No. 118-22 (Declaration of Georgia Allen) at ¶ 4. The City considered this proposal in the 1990s but rejected it, even as other Virginia jurisdictions moved away from at-large voting. ECF No. 118-1 at 13; ECF No. 118-7 (John Moss Dep.) at 46:13-49:13, 56:1-57:13, 58:6-59:15.

Virginia Beach's HBA community has grown substantially in recent years. As of the 1990 Census, Hispanic and non-white residents made up 21.2 percent of the City's population. Ex. 1 (Selected Historical Census Bureau Data) at 2. By the 2010 Census, Hispanic, Black alone, and Asian alone residents made up 31.6 percent of the population of Virginia Beach. Ex. 2 (Selected 2010 Census Data). Since then, the HBA community has continued to grow as proportion of the City's population. *See* Ex. 3 (Selected 2016 ACS 5-Year Estimates) (showing that Hispanic, Black

[1] Under the "extremely unusual" current election system for city council in Virginia Beach, ECF No. 118-7 at 152:19-21, it is possible for candidates to lose their own "residency district," yet still win election to the Council, because the city votes at-large for candidates. *See, e.g., id*. at 156:3-21.

alone, and Asian alone residents together made up 32.6 percent of the City's population); Ex. 4 (Selected 2017 ACS 5-Year Estimates) (32.7 percent); Ex. 5 (Selected 2018 ACS 5-Year Estimates) (33 percent).

However, as Plaintiffs will prove at trial, the at-large voting system has prevented the HBA community from achieving political representation commensurate with its population growth. Only six minority candidates have ever been elected to the City Council. No Black candidate has ever been re-elected. Am. Compl. ¶ 4. More broadly, City Council elections follow a clear pattern with few exceptions: the HBA community votes together for particular candidates of choice; the white majority votes as a bloc against those candidates; and the HBA candidates of choice therefore lose. Am. Compl. ¶¶ 7-8. Defendants could end this systematic subordination of the HBA community's political voice by adopting a district-based system where two districts (or at least one) have a majority-HBA electorate. *Id.* ¶ 8; Ex. 6 (Supplemental Report of Anthony Fairfax). They have not done so.

B. Census Bureau Data Products, Redistricting, and Section 2 of the VRA

The U.S. Census Bureau produces numerous types of data about the population in Virginia Beach and throughout the United States. The best-known, but by no means the only survey, is the decennial census, which the Census Bureau conducts as required by the Constitution. U.S. Const. art. I § 2, cl. 3. For the decennial census, the Bureau attempts to collect information about every person living in the U.S. as of April 1 in each year ending in zero. 13 U.S.C. § 141(a). The Bureau uses this information to produce numerous data products. Of particular note, the decennial census provides the raw data for the once-a-decade Public Law 94-171 redistricting data file, which

contains tabulations of population data for geographic units throughout the nation, down to the granular level of census blocks.[2]

The Census Bureau is currently collecting data for the 2020 Census. The next release of P.L. 94-171 data—reflecting the population as of April 1, 2020—is expected in 2021. Under current law, these decennial census data are due to be published by April 1, 2021. *See* 13 U.S.C. § 141(c). However, the 2020 Census has experienced significant delays due to the COVID-19 pandemic, and the Bureau is now operating under the assumption that Congress will extend the data-delivery deadline to July 31, 2021.[3] The Bureau does not even plan to *start* releasing P.L. 94-171 data until at least the week of June 17, 2021.[4]

The surveys the Census Bureau conducts in addition to the decennial census include the American Community Survey ("ACS"), which collects detailed information from a sample of U.S. households on a rolling basis throughout the decade.[5] The Bureau publishes updated statistics from the ACS every year, including new tabulations for small geographic subunits within cities like Virginia Beach.[6] Unlike the P.L. 94-171 file, data releases from the ACS include information on the U.S. citizen voting-age population ("CVAP"), broken down by race and Hispanic origin.[7]

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[2] *See* U.S. CENSUS BUREAU, 2010 CENSUS NATIONAL SUMMARY FILE OF REDISTRICTING DATA 1-2 (2011), https://www2.census.gov/programs-surveys/decennial/2010/technical-documentation/complete-tech-docs/summary-file/nsfrd.pdf.

[3] *See 2020 Census Operational Adjustments Due to COVID-19*, U.S. Census Bureau, https://2020census.gov/en/news-events/operational-adjustments-covid-19.html (last visited June 28, 2020).

[4] Hansi Lo Wang (@hansilowang), TWITTER (July 13, 2020, 11:59 PM), https://twitter.com/hansilowang/status/1282887389006966789.

[5] *See* U.S. CENSUS BUREAU, UNDERSTANDING AND USING AMERICAN COMMUNITY SURVEY DATA: WHAT ALL DATA USERS NEED TO KNOW, 1 (2018), https://www.census.gov/content/dam/Census/library/publications/2018/acs/acs_general_handbook_2018.pdf.

[6] *See id.* at 6.

[7] *See Citizen Voting Age Population (CVAP) Special Tabulation From the 2014-2018 5-Year American Community Survey (ACS)*, U.S. CENSUS BUREAU (2020),

One function of Census Bureau data is to measure compliance with the Constitution's "one-person, one-vote" requirement. This constitutional doctrine requires district-based voting schemes to have approximately equal populations in each district. *Evenwel v. Abbott*, 136 S. Ct. 1120, 1124, 1124 n.1 (2016). When courts are applying the one-person, one-vote doctrine, the decennial census is the dominant measure of district population equality. Each time new decennial census figures are released, existing voting-district maps must be reevaluated and, if necessary, adjusted to ensure that the districts have sufficiently equal population. *Georgia v. Ashcroft*, 539 U.S. 461, 488 n.2 (2003). ACS statistics released between decennial censuses do not trigger this population-equalization requirement. *See id.*

Another legal application for population data is to provide evidence of vote dilution under Section 2 of the VRA. Unlike the "one person, one vote" doctrine, Section 2 does not single out a particular Census Bureau data product as the source of population information. Courts in Section 2 cases routinely consider multiple sources of population evidence, including ACS data as well as decennial figures. *See, e.g.*, *Benavidez v. City of Irving*, 638 F. Supp. 2d 709, 729-30 (N.D. Tex. 2009) ("ACS data *is* Census data" and may properly be used as population evidence to establish Section 2 liability); *Terrebonne Parish Branch NAACP v. Edwards*, 399 F. Supp. 3d 608, 614 (M.D. La. 2017) ("CVAP [from the ACS] is commonly used in remedial redistricting to assess effectiveness."), *vacated on other grounds*, *Fusilier v. Landry*, No. 19-30665, 2020 WL 3496856 (5th Cir. June 29, 2020).

C. Procedural History

Ms. Holloway filed the initial complaint in this case *pro se* in November 2017. ECF No. 5. Ms. Holloway and Ms. Allen subsequently retained counsel and filed an Amended Complaint in

https://www2.census.gov/programs-surveys/decennial/rdo/technical-documentation/special-tabulation/CVAP_2014-2018_ACS_documentation.pdf?#.

November 2018. ECF No. 62. As the Amended Complaint alleges, both Plaintiffs are Black voters in Virginia Beach. Am. Compl. ¶¶ 14-15. They seek to replace the at-large electoral scheme with a system in which Black, Hispanic or Latino, and Asian American voters are together able to elect their candidates of choice to the City Council. Am. Compl. ¶ 1.

Defendants chose not to move to dismiss the Amended Complaint, instead filing an answer in January 2019. ECF No. 67; *see also* Fed. R. Civ. P. 12(b) ("A motion asserting any of [the Rule 12(b)] defenses must be made before pleading if a responsive pleading is allowed."). Since then, however, Defendants have bombarded this Court with motions to avoid or delay a full trial on the merits. Two motions sought to bifurcate the trial into separate phases on the *Gingles* preconditions and the totality of circumstances. ECF Nos. 79, 132. Two more motions tried to postpone any discovery on the totality of circumstances. ECF Nos. 75, 90. In addition, Defendants moved for summary judgment, urging the Court to resolve, without trial, disagreement among the expert witnesses regarding inter-minority political cohesion and white bloc voting. ECF No. 114. After losing on summary judgment, Defendants moved for certification of appealability, to pursue an interlocutory appeal on their twice-rejected argument that the VRA does not protect cohesive, multiracial communities of color. ECF No. 127. The Court denied every one of these motions. ECF Nos. 93, 95, 126, 134, 145. As the Court explained in rejecting an interlocutory appeal in April 2020, "this case has been on the Court's docket for over two years and involves claims that should be fully litigated given the genuine dispute as to material facts." ECF No. 134 at 3.

Accordingly, on May 15, the Court scheduled trial to begin on October 6, 2020. ECF No. 142. No party objected to this trial date, although the Court gave all parties an opportunity to do so. *See* ECF No. 129-1 (email from Courtroom Deputy Patrice Thompson to counsel for all parties regarding potential trial dates).

After the Court set the trial date, new counsel also appeared on behalf of Defendants. ECF Nos. 144, 146. Then, on June 30, 2020—over a year and a half after answering the current complaint—Defendants filed the instant Motion to Dismiss. ECF No. 149 (the "Motion").

II. Legal Standard

A motion to dismiss for lack of subject-matter jurisdiction "must be made before pleading if a responsive pleading is allowed." Fed. R. Civ. P. 12(b). "An untimely motion under Rule 12(b)(1) may be treated as a suggestion that the court lacks jurisdiction." *Jones v. United States*, 1989 WL 409417, at *2 (D.S.C. Nov. 16, 1989). However, calling a motion jurisdictional does not make it so. A Rule 12(b)(6) motion by another name still falls under Rule 12(b)(6), and still had to be filed back in 2018. Although Defendants' arguments in fact do not go to the subject matter jurisdiction of the Court, they are deficient under any rubric. Plaintiffs therefore will treat this motion as if it legitimately fell under Rule 12(b)(1).

Subject-matter jurisdiction in federal courts requires an actual case or controversy. *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016), *as revised* (Feb. 9, 2016). "The Supreme Court has developed a number of constitutional justiciability doctrines" to implement this case-or-controversy requirement, "including the prohibition against advisory opinions, the political question doctrine, and the doctrines of standing, ripeness, and mootness." *United States v. McClure*, 241 F. App'x 105, 107 (4th Cir. 2007).

In deciding a motion to dismiss for lack of subject-matter jurisdiction, the Court must view all factual allegations "in the light most favorable to" Plaintiffs. *Wilson v. Johnson*, 535 F.3d 262, 264 (4th Cir. 2008).

III. Argument

A. The 2020 Census Does Not Deprive the Court of Jurisdiction.

1. The Census Does Not Moot Plaintiffs' Challenge to the At-Large System.

"A case becomes moot—and therefore no longer a 'Case' or 'Controversy' for purposes of Article III—when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (citation omitted). Defendants claim there is no live dispute because Plaintiffs must wait for updated Census data that will *further* prove their case. This is incorrect. The parties are engaged in a live controversy over whether Virginia Beach's at-large system dilutes the voting strength of the City's HBA community, given the current facts about the City's population. In arguing that the anticipated release of 2020 Census data next year moots this case, Defendants misconceive the nature of Plaintiffs' claim and the role of population data in this context, and seek to transmute an issue of proof into one of jurisdiction.

The at-large voting scheme for Virginia Beach's City Council long predates the 2010 Census and will survive the release of 2020 Census data, absent relief from this Court. Plaintiffs contend that this system deprives the City's HBA population of equal opportunity to elect its candidates of choice, in violation of Section 2. Am. Compl. ¶ 1. As preconditions for liability in this case, Plaintiffs must "(1) 'demonstrate that [the HBA population] is sufficiently large and compact to constitute a majority in a single member district,' (2) 'show that it is politically cohesive,' and (3) 'demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.'" *Hall v. Virginia*, 385 F.3d 421, 426 (4th Cir. 2004) (quoting *Gingles*, 478 U.S. at 50-51). Relatedly, Plaintiffs must show that it is possible to draw one or more remedial districts that would likely "perform[]"—that is, "enhance the ability of

minority voters to elect the candidates of their choice." *Abbott v. Perez*, 138 S. Ct. 2305, 2332 (2018).[8] Each of these factual propositions must be proven by a preponderance of the evidence. *Mo. State Conf. of the NAACP v. Ferguson-Florissant Sch. Dist.*, 894 F.3d 924, 930 (8th Cir. 2018) (preponderance-of-evidence standard for *Gingles* preconditions); *Rodriguez v. Bexar Cty.*, 385 F.3d 853, 859-60 (5th Cir. 2004) (same); *see also CIGNA Corp. v. Amara*, 563 U.S. 421, 444 (2011) (preponderance-of-evidence standard is "the default rule for civil cases").

Defendants argue that "the question whether these things can be proven under 2010 census data (or ACS data from the 2010 decade) is moot." Defs. Mem. in Support of Mot. to Dismiss ("Defs. Mem."), ECF No. 150 at 8. But Section 2 claims are not brought "under" a set of data. Instead, Section 2 litigants use multiple population datasets—including decennial census data and ACS statistics—as *evidence* to help the Court answer factual questions about the geographic distribution and racial makeup of a real-world community. As with any other factual issue, the Court may consider *any* source of relevant evidence that the law does not specifically exclude. *See Johnson v. DeSoto Cty. Bd. of Comm'rs*, 204 F.3d 1335, 1342 (11th Cir. 2000) ("Like most evidence presented by expert testimony, we think [the] admissibility [of non-census population evidence] has to be determined on a case-by-case basis by the district court."); Fed. R. Evid. 402. Indeed, courts in Section 2 cases routinely weigh multiple sets of population data from the Census

[8] Absent unusual circumstances, a showing that all three *Gingles* preconditions are satisfied suffices to demonstrate that a performing remedial district is possible. *See Harding v. County of Dallas*, 948 F.3d 302, 308 (5th Cir. 2020) ("[I]t is hard to see how the *Gingles* factors could be 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." (internal quotation marks and citation omitted)). After all, the *Gingles* preconditions exist to ensure that Section 2 liability does not attach if the minority group in question cannot actually benefit from a change to single-member districts. *Gingles*, 478 U.S. at 49-51, 50 n.17. In any event, Plaintiffs here are prepared to prove affirmatively that Virginia Beach could draw single-member districts that would perform for the HBA community by permitting the minority community to elect candidates of their choice.

Bureau and other sources. *See, e.g., Johnson*, 204 F.3d at 1341-42 (approving district court's consideration of voter-registration data as evidence of population change since the last decennial census, and noting that "statistical evidence derived from a sampling method, using reliable statistical techniques, is admissible on the question of determining the relevant population"); *Garza*, 918 F.2d at 772-73; *Benavidez*, 638 F. Supp. 2d at 729-30; *Terrebonne Parish Branch NAACP*, 399 F. Supp. 3d at 614.

In this case, Plaintiffs' trial evidence will make clear that their claim is not dependent upon, or brought "under," any single source of population data. To show that at least one majority-HBA can be created, Plaintiffs plan to offer the reports and live testimony of their expert Anthony Fairfax, who has drawn illustrative district maps and calculated population metrics for those maps using multiple sets of ACS data, including 2014-2018 ACS 5-year estimates, as well as 2010 Census data. *See* Ex. 6 (Supplemental Report of Anthony Fairfax). Notably, in seeking dismissal of this case, Defendants raise no direct objection to Plaintiffs' long-disclosed intention to offer evidence derived from both the ACS and the decennial census. Nor could they, given the wealth of precedent making clear that courts in Section 2 cases may consider population evidence other than data from the latest decennial census.[9]

Because the decennial census is just one source of admissible population evidence among others,[10] the Court may make findings about Virginia Beach's population on the record available

[9] Of course, Plaintiffs also intend to offer evidence at trial regarding electoral data in Virginia Beach that will demonstrate the political cohesiveness of the HBA community.

[10] This is not to minimize the importance of decennial census data as evidence in Section 2 litigation. Courts regard the decennial data as "presumptively accurate until proven otherwise." *Benavidez*, 638 F. Supp. 2d at 729. But this presumption is rebuttable. *See id*. And the presumption of an accurate decennial census in no way prevents courts from crediting other datasets that complement the decennial figures by providing additional detail, such as CVAP statistics from the ACS.

as of October 2020, without worrying that a subsequent release of new decennial data will somehow render those factual findings legally invalid. The anticipated release of 2020 Census data in 2021 will simply produce more evidence about the City's population.

Accordingly, past courts have seen no mootness problem with adjudicating challenges to electoral systems late in a decennial census cycle. For example, in 1989, a district court ordered changes to the preexisting electoral system for the Council of Jefferson Parish, Louisiana—a partially at-large scheme which the court had previously found to violate Section 2. *E. Jefferson Coal. for Leadership and Dev. v. Parish of Jefferson*, 706 F. Supp. 470, 471-72, 471 n.1 (E.D. La. 1989). By the time of that order, Jefferson Parish was not scheduled to elect councilmembers again until 1991—*after* the scheduled release of 1990 Census data. *Id*. at 472. The district court "realize[d] that the decennial census of 1990 could have some effect on the district lines" and clarified that the remedial district lines should be adjusted as necessary to account for the 1990 Census. *Id*. After an appeal and remand, but still before the release of 1990 Census data, the district court made a new factual finding that "the minority [group] is sufficiently large & geographically compact to constitute a majority w/in a single-member district." Minute Entry, *E. Jefferson Coal. for Leadership and Dev. v. Parish of Jefferson*, No. 2:86-cv-03668-PB-RF, ECF No. 140 (E.D. La. May 17, 1990). Then, the district court—still without 1990 Census data—approved a new remedial plan. Minute Entry, *Parish of Jefferson*, No. 2:86-cv-03668-PB-RF, ECF No. 142 (E.D. La. June 5, 1990). The Fifth Circuit affirmed that order. *E. Jefferson Coal. for Leadership and Dev. v. Parish of Jefferson*, 926 F.2d 487, 494 (5th Cir. 1991). If the district court and the Fifth Circuit thought the forthcoming 1990 Census data mooted the case, they would have said so. *See Mine Reclamation Corp. v. FERC*, 30 F.3d 1519, 1522 (D.C. Cir. 1994) (court is "obliged to

address [mootness] sua sponte because mootness goes to the jurisdiction of [the] court"). Instead, they exercised jurisdiction and granted relief.

Similarly, in *Reno v. Bossier Parish Sch. Bd.*, the Supreme Court held that a school board's claim for preclearance of its 1992 redistricting plan under Section 5 of the VRA was not moot, even though the Board was scheduled to redistrict with 2000 Census data before holding its next election. 528 U.S. 320, 327-28 (2000). The Court explained the 1992 plan would "serve as the baseline against which appellee's next voting plan will be evaluated for the purposes of preclearance." *Id*. at 328. Thus, the 1992 plan remained the subject of a live case and controversy—even though it was, by its terms, *less* permanent than Virginia Beach's at-large electoral scheme.[11] [12]

Defendants fail to cite *any* authority directly supporting their mootness-by-forthcoming-census theory. Instead, they rely on inapposite malapportionment case law for the uncontroversial proposition that existing redistricting plans typically must be redrawn after new decennial census data are released. *See* Defs. Mem. 3 (citing *Georgia v. Ashcroft*, 539 U.S. 461 (2003)); *id.* at 8

[11] Yet another VRA case demonstrating the continued justiciability of Plaintiffs' claim is *United States v. Blaine Cty.*, 157 F. Supp. 2d 1145 (D. Mont. 2001). As late as July 2001—*after* the release of 2000 Census data—the parties had submitted only pre-2000 population data. *Id.* at 1147, 1147 n.1. Yet, the district court expressed no doubt as to its jurisdiction in denying the defendant's motion for summary judgment. *Id.* at 1152. Clearly, the court in *Blaine County* did not regard the case as limited to the issue of whether the minority vote was diluted "under" 1990 Census data, and thus did not think the case became moot once 2000 Census data were available.

[12] Similarly, Virginia Beach's current residency district plan (developed using 2010 Census data), whether replaced by this litigation or in its original form, will also serve as a baseline for the creation of the City's new residency district plan (even though the city does not currently need to seek preclearance). For example, Kimball Brace, the consultant hired to draw the City's residency plan following the 2010 Census, clearly used 2000 Census data as a baseline when drawing the city's residency districts in 2011. Ex. 7 (Brace Chart). Thus, even the City's own historical practice shows that 2010 Census data does not become irrelevant to map drawing following the next decennial census.

(same). At most, this principle suggests that litigation challenging a specific redistricting plan may become moot at the end of the decade, *if* the record shows that the plan and its effects will terminate with the release of new census data. *But see Reno*, 528 U.S. at 327-28 (no mootness where the redistricting plan at issue would soon expire but its effects would continue). A challenge to an electoral system that will, unless enjoined, survive the release of census data does not become moot. Virginia Beach's at-large system is precisely the type of electoral scheme that can live forever, unaffected by decennial census results.

Defendants seek to avoid this conclusion by focusing their mootness argument on the timing of the remedy in this case. According to Defendants, a remedy would necessarily come after the release of 2020 Census data, and therefore the Court's post-trial findings of fact would amount to an "advisory opinion" on the moot questions of "whether districts created under census data from the 2010 decade would perform" and whether Virginia Beach could have drawn a majority-HBA district for its elections during the 2010 decade. Defs. Mem. 9-10, 13. This argument fails because it is wrong on the mootness doctrine, wrong on the VRA, and wrong on the facts of this case.

First, a case does not become moot simply because information that may affect the remedy is expected to emerge after the adjudication of liability. That is why the district court in *Parish of Jefferson* saw no defect in its jurisdiction, even as it explicitly recognized that 1990 Census data were forthcoming and might require adjustment of the court's remedy before it was implemented. 706 F. Supp. at 472. Looking outside the VRA context does not help Defendants' position, either. Indeed, a non-election hypothetical highlights the fallacy of Defendant's position. Imagine that an employee sues her employer under the Americans with Disabilities Act, seeking an injunction to require the employer to provide reasonable accommodation for her physical disability. *See* 42

U.S.C. § 12112(b)(5)(A). The employee goes to her healthcare provider for an annual physical exam every April; the case goes to trial in March. Under these circumstances, the employee's post-trial physical predictably may reveal new information that would be relevant to the determination of what reasonable accommodation (if any) the employer could make for the employee's disability. But no one, presumably, would call this hypothetical case "moot" on the theory that the plaintiff cannot obtain relief "under" her existing medical records.

Second, Defendants' argument rests on a misunderstanding of the role of illustrative remedial districts in VRA litigation. Plaintiffs' experts in VRA cases generally draw one or more hypothetical districts to demonstrate "*the possibility* of creating more than the existing number of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice," as *Gingles* requires. *Johnson v. De Grandy*, 512 U.S. 997, 1008 (1994) (emphasis added). Defendants suggest the Court's post-trial opinion would be "advisory" because any conclusions the Court reaches about the demographics and performance metrics of the illustrative districts drawn by Plaintiffs' expert would later need to be reevaluated with 2020 Census data before the Court could implement any remedies. Defs. Mem. 9-10, 12-13. But the point of illustrative districts is not to dictate exactly how the court must craft its remedy. The point is, as the Court made clear in *De Grandy*, to show that it is possible to craft *some* redistricting plan that includes one or more performing majority-minority districts. *See Terrebonne Parish Branch NAACP*, 399 F. Supp. at 611 ("The Court found that the 'Illustrative Plan', offered by the Plaintiffs as part of their proof in the liability phase, demonstrated that 'the black population is sufficiently numerous and geographically compact . . . to comprise a majority of the voting age population in one single member district in a five-district plan.'").

Here, Plaintiffs' trial exhibits and expert testimony, including their numerous illustrative maps and reconstituted election analyses, will provide strong evidence that the current population of Virginia Beach—the very population being measured by the 2020 Census—lends itself easily to drawing two performing majority-HBA districts (or at least one). *See* Ex. 6 (Supplemental Report of Anthony Fairfax); Ex. 8 (Supplemental Report of Dr. Douglas M. Spencer). The Court has jurisdiction to make a factual finding to this effect. And that finding will not later be rendered "advisory" if the Court, after examining 2020 Census data, adopts a remedy that does not precisely track Plaintiffs' illustrative districts. *See, e.g.*, *Terrebonne Parish Branch NAACP*, 399 F. Supp. 3d at 612, 617 (adopting remedial plan developed by special master, rather than illustrative plan offered by plaintiffs); *Parish of Jefferson*, 926 F.2d at 490-91 (noting that district court adopted remedial plan first offered during post-trial proceedings); *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 745, 771 (N.D. Oh. 2009) (adopting "limited voting" system rather than redistricting as remedy, and relying on ACS data that was not available at the liability stage). Insofar as Defendants assert that it will be impossible to draw valid remedial districts because the 2020 census will expose demographic shifts that will dramatically counter the most recent ACS datasets, *see* Defs. Mem. 13, that assertion is easily dismissible on three grounds: (1) Defendants offer no evidence to support it; (2) even if they did, their argument would go to the weight of Plaintiffs' evidence, not the Court's jurisdiction to decide the pertinent fact questions; and (3) it is contrary to uncontested population data showing the continued growth of the minority population in Virginia Beach over the past few decades.

Third, contrary to Defendants' suggestion, *see* Defs. Mem. 13, Plaintiffs can benefit from a victory in this case sooner than the first City Council election held under a redistricting plan drawn with 2020 Census data. Recently, Virginia Beach has held multiple special elections to fill

unscheduled vacancies on the City Council.[13] This could easily happen again. If the Court rules for Plaintiffs on liability, and a City Council vacancy subsequently opens before the 2020 Census data arrive, Plaintiffs would benefit from the ability to seek an emergency remedy for the special election without needing to prove liability from scratch. Such a remedy need not even involve redistricting. The Court could order the City to adopt an interim system of electing councilmembers through citywide ranked-choice voting, which would provide increased opportunity for minority political viewpoints. *See Holder v. Hall*, 512 U.S. 874, 910 n.16 (1994) (Thomas, J., concurring).[14]

Perhaps more important, a favorable ruling at trial would change the political dynamics of Virginia Beach in ways that would benefit Plaintiffs immediately, regardless of when and how the next election is conducted. By declaring that the current at-large system violates Section 2, *see* Am. Compl. at 16 (requesting declaratory relief), the Court would put councilmembers on notice that the Council will soon include one or more majority-HBA districts. This would create an incentive for responsiveness to the HBA community among politicians who see themselves as possible future candidates for election in a majority-HBA district.

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[13] *See* Alissa Skelton & Stacy Parker, *Guy Tower prevails in Beach District; Michael Berlucchi wins Rose Hall council seat in Virginia Beach*, VIRGINIAN-PILOT (Nov. 5, 2019), https://www.pilotonline.com/government/elections/vp-nw-elx19-vb-council-1106-20191106-jply66r7hbhnpbuskqxu5azefa-story.html.

[14] The Court could potentially order an interim ranked-choice-voting remedy that takes effect as soon as the November 2020 election. This remedy could be fashioned without using any census data, as it does not involve drawing districts. While Plaintiffs take no position at this time on whether the Court should order interim relief for the November 2020 election, Plaintiffs note that the Court would have jurisdiction to do so. Even in cases where courts find that it is too close to an election to order relief, they do so in an exercise of discretion, not because the impending election presents a jurisdictional problem. *See Benisek v. Lamone*, 138 S. Ct. 1942, 1944-45 (2018) (interest in avoiding disruption of impending election "supported the District Court's discretionary decision to deny a preliminary injunction and to stay the proceedings").

The Court should thus reject Defendants' meritless argument that the forthcoming publication of 2020 Census data renders this case moot.

2. The Anticipated Release of Census Data Next Year Does Not Render This Case Unripe.

"The ripeness doctrine derives from Article III limitations on judicial review, and ensures that judicial intervention in a controversy is timed appropriately." *NAACP v. Bureau of the Census*, 945 F.3d 183, 192 (4th Cir. 2019). Courts determine whether claims are ripe based on "(1) the fitness of the issues presented for judicial review; and (2) the hardship that the parties would endure by delayed adjudication." *Id.* (citing *Deal v. Mercer Cty. Bd. of Educ.*, 911 F.3d 183, 191 (4th Cir. 2018)). Both prongs of this test point to the conclusion that Plaintiffs' claim is ripe for adjudication, contrary to Defendants' argument that the Court must wait for 2020 Census data.

Plaintiffs' claim is that the at-large system deprives the HBA community of equal opportunity to elect candidates of choice *right now*. As discussed,[15] this claim is not brought "under" any single dataset. Rather, Plaintiffs draw on multiple sources of evidence to fully support their claim, including evidence that the current population of Virginia Beach lends itself to drawing majority-HBA districts that would perform for the HBA community. *See* Ex. 6 (Fairfax Supp. Report) at 12 ("at least one majority-HBACVAP district can be easily drawn that contains both Plaintiffs' residences, and in fact all three modified Plans continue to include two majority-HBACVAP districts for the City of Virginia Beach"); Ex. 8 (Spencer Supp. Report) at 2 ("minority candidates of choice are usually *not* likely to be defeated due to white bloc voting in each set of majority-minority districts contained in the plans"). Courts have found vote dilution claims ripe on records far less robust than this, for example, where there was no reliable statistical evidence

[15] *Supra* Section III.A.I.

to predict voting behavior, *see Cane v. Worcester Cty.*, 35 F.3d 921, 925-26 (4th Cir. 1994) ("the two statistical methods … failed to produce reliable statistical evidence because of the lack of available data and a truncated analysis…"), and where any majority-minority district would run contrary to traditional districting principles, *see id*. at 925 ("…the construction of a majority African–American district would necessarily entail the running of commissioner district lines across election districts and through at least two municipalities…"), or create logistical difficulties for election administration, *see United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 422 (S.D.N.Y. 2010) ("…the district plans would create a system where the population of certain election precincts would be divided among one or more Trustee districts … rais[ing] administrative and logistical concerns…").

Defendants, after trying in vain to convince this Court to discount Plaintiffs' evidence at the summary judgment stage, now argue that the claim is unfit for review because it rests on "contingent future events that may not occur as anticipated, or indeed may not occur at all"—namely, the Census Bureau's publication of 2020 Census figures that support Plaintiffs' factual contentions about Virginia Beach's population. Defs. Mem. 12-14. That is false. Plaintiffs do not allege that their votes *will be* diluted based on future, unknown circumstances. Rather, they allege their votes are being diluted *now*, based on the population that currently exists and is being counted in the 2020 Census. The mere fact that a future event might (or might not) yield more information and might (or might not) alter the exact remedy in a case, does not make that case unripe. *See, e.g.*, *Colleton Cty. Council v. McConnell*, 201 F. Supp. 2d 618, 627 (D.S.C. 2002), opinion clarified (Apr. 18, 2002) (implementing a remedial districting plan despite the possibility that a new plan would be adopted before the next relevant election two years later).

Courts have flatly rejected the proposition that nearing the end of a decennial census cycle renders Section 2 cases unsuitable for adjudication. In *United States v. Town of Lake Park*, for example, the defendants argued to no avail "that the action should be dismissed or stayed until after the 2010 U.S. Census data is released because the suit [was] based on the 2000 Census data," which the defendants said were "not as relevant as the 2010 Census data [would] be." No. 09-80507-CIV, 2009 WL 3667071, at *2 (S.D. Fla. Oct. 23, 2009). As the court recognized, any factual issues about the reliability of the available population evidence should be resolved at trial: "The appropriate method to challenge the rebuttable presumption of the evidentiary validity of the 2000 Census data is through a presentation of competent evidence to the contrary, either at the summary judgment or trial stage of the litigation." *Id.* at *4 (internal citation omitted); *accord Vill. of Port Chester*, 704 F. Supp. 2d at 424-25 (relying on 2000 Census data to adjudicate Section 2 liability, where Defendants tried unsuccessfully to prove at trial that those data were inaccurate and outdated).

Similarly, in *Parish of Jefferson*, the district court not only ruled that it was possible to design an appropriate remedy, but actually adopted one—even as the 1990 Census data were scheduled to be released before the next affected election. 706 F. Supp. at 472. Neither the district court nor the Fifth Circuit raised any ripeness issue with adjudicating liability and remedies based on the best evidence available at the time. *See Parish of Jefferson*, 926 F.2d at 494 (affirming the district court's judgment).

Defendants offer no persuasive reason for the Court to depart from these precedents. In fact, absurd results would follow if the Court were to adopt Defendants' flawed logic and hold this case unripe because additional relevant evidence is expected to emerge in the next year. Given the ACS data release schedule, Virginia Beach, like many subdivisions in the United States, is *never*

more than a year away from receiving new data from the Census Bureau.[16] Thus, it cannot be that a Section 2 claim is unripe simply because more evidence is on the horizon.

Defendants make much of the fact that any redistricting plan drawn to remedy the Section 2 violation in this case may eventually need to be reevaluated, and perhaps adjusted, to make sure the districts have sufficiently equal population as measured by the 2020 Census. *See* Defs. Mem. 12-13. But contrary to Defendants' suggestion, the Court does not need the 2020 Census results to decide by a preponderance of the evidence whether the City's current population lends itself to drawing at least one performing majority-HBA district. Defendants make no showing that waiting for the 2020 Census data would affect the outcome of this case. Nor could they. The record shows that the minority population in Virginia Beach has been growing for decades. While Hispanic and non-white residents made up just 21.2 percent of the City's population in 1990, the minority population climbed substantially by the 2010 Census, when Hispanic, Black alone, and Asian alone residents made up 31.6 percent of the population. Exs. 1, 2. This growth has continued, as shown by the three most recent releases of ACS 5-year estimates. *See* Exs. 3-5. Plaintiffs' unrebutted evidence, using the latest ACS and decennial census data, shows that it is now possible to draw *two* majority-HBA districts. *See, e.g.*, Ex. 6. (Fairfax Supp. Report).

Given the pattern of population growth, the 2020 Census is very likely to show that, if anything, it is now *even easier* to draw one or more performing majority HBA districts. And even if the 2020 Census surprisingly were to show that the HBA population somehow shrank, it is vanishingly unlikely that it could have shrunk so drastically as to make it impossible to draw even

[16] *American Community Survey Information Guide* 12, U.S. Census Bureau, *available at* https://www.census.gov/content/dam/Census/programs-surveys/acs/about/ACS_Information_Guide.pdf (describing how ACS data is released every year for all areas with populations of 20,000+).

one remedial district.[17] Defendants seek to surmount this common sense conclusion by improperly asking this Court to view the facts in the light *least* favorable to Plaintiffs—the inverse of the correct standard on a motion to dismiss. By speculating that Plaintiffs cannot win because the 2020 Census theoretically *could* later contradict their evidence, Defendants are effectively asking for a beyond-a-shadow-of-doubt standard of proof. Absent the unprecedented adoption of such a standard under these circumstances, Defendants cannot prevail. Defendants' suppositions and speculations roam far afield from subject matter jurisdiction.

To the extent Defendants suggest that the ripeness inquiry generally favors waiting for the 2020 Census data because decennial data are "better" than the ACS, that argument falls flat. "The appropriate method to challenge" Plaintiffs' population evidence "is through a presentation of competent evidence to the contrary" at trial, not in a motion to dismiss, and certainly not in a motion to dismiss for lack of subject matter jurisdiction. *Town of Lake Park*, 2009 WL 3667071, at *4. In any event, the decennial census does not contain every type of data that is found in ACS tables. For one thing, the ACS—unlike the P.L. 94-171 decennial census data—includes citizen voting age population (CVAP) data. Plaintiffs will use CVAP data at trial for good reason—to help demonstrate how their illustrative districts would perform. *See* Ex. 8 (Spencer Supp. Report) at 6.

Finally, a delay in adjudicating liability would create unacceptable hardship for Plaintiffs. While this case may not be decided in time to impact the November 2020 election, the failure to adjudicate liability now may nonetheless lead to another City Council election in which Plaintiffs have their votes diluted, and in any event, will prolong the disproportionately diminished electoral

[17] Plaintiffs have also provided evidence that it is possible to draw at least *one* district based on Hispanic and African-American residents. *See* ECF No. 115, Exhibit 2 at 10.

effectiveness of the minority community in Virginia Beach political life. The COVID-19 pandemic has disrupted 2020 Census operations and census data will be delayed until June or July 2021. If the Court delays adjudication of this case to await release of the 2020 Census, it is not difficult to envision a scenario in which Defendants seek yet again to delay or avoid a trial. This all would push up against the June 14, 2022 candidate filing deadline for the next scheduled Virginia Beach City Council general election. And that is all assuming that there will be no special election for Council in the interim—not a wise assumption given that Virginia Beach held special elections to fill Council seats in two of the last three years.[18]

A delay in adjudication would be especially unfair because Plaintiffs have acted diligently to move this case forward since Plaintiffs filed their current complaint over twenty months ago. Defendants, on the other hand, have now filed seven motions seeking patently unwarranted relief. For Defendants to argue that this case has become unripe in the time it took to rule on their motions, resolve discovery disputes, and schedule depositions of Defendants' witnesses, would validate their strategy of improper delay.

This case is ripe for resolution and should proceed to trial as scheduled.

3. The 2020 Census Does Not Remove Plaintiffs' Standing.

Defendants argue that Plaintiffs have not established the redressability element of standing because Plaintiffs cannot prove that they "could or likely would reside" in remedial districts drawn using 2020 Census data. Defs. Mem. 15-16. This argument fails for the same reasons as Defendants' other census-related contentions. Redressability requires only that it be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Lujan v.*

[18] Election Information & Results, VBgov.com, https://www.vbgov.com/government/departments/voter-registrar/elections/Pages/default.aspx

Defs. of Wildlife, 504 U.S. 555, 561 (1992). Plaintiffs' allegations and evidence easily satisfy this standard.

Plaintiffs have provided multiple illustrative majority-HBA districts based on population data from the 2010 Census and several years' worth of the Census Bureau's ACS statistics. Ex. 6 (Fairfax Supp. Rep.). All of these illustrative districts include Plaintiffs' residences. *Id*. Defendants have no basis for asserting that, simply because additional Census data is forthcoming, Plaintiffs' evidence cannot demonstrate a likelihood of redressability. As previously discussed, Virginia Beach receives updated ACS data annually, so it is hard to see how any plaintiff could ever establish standing under Defendants' theory if Plaintiffs must perpetually wait for new data that is just beyond the horizon.

Defendants also cite *Gill v. Whitford* to support their argument for dismissal. But the plaintiff in *Gill conceded* that remedial districting would not affect his ability to vote for his candidates of choice. 138 S. Ct. 1916, 1924-25 (2018). Plaintiffs here allege the opposite, Am. Compl. ¶ 50, and they have provided expert evidence that they are likely to be included in remedial districts. Courts have repeatedly held that such allegations are sufficient to establish redressability for Section 2 claims. *See Pope v. Cty. of Albany*, No. 1:11-cv-0736 LEK/CFH, 2014 WL 316703, at *5 (N.D.N.Y. Jan. 28, 2014) ("[S]upported allegations that Plaintiffs reside in a reasonably compact area that could support additional MMDs sufficiently proves standing for a Section 2 claim for vote dilution"); *see also Thompson v. Kemp*, 309 F. Supp. 3d 1360, 1365 (N.D. Ga. 2018); *Barnett v. City of Chicago*, No. 92 C 1683, 1996 WL 34432, at *6 (N.D. Ill. Jan. 29, 1996). Thus, Plaintiffs have made more than a sufficient showing of standing to survive a motion to dismiss.

B. Plaintiffs Have Standing to Challenge Dilution of the Cohesive HBA Community's Voting Strength.

Plaintiffs have also sustained an injury in fact that gives them standing to bring this vote dilution claim. The injury-in-fact requirement for standing allows Plaintiffs to sue only for "an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (internal citations omitted). Here, Plaintiffs are personally injured by the dilution of the HBA community's political strength.

At the outset, Defendants deploy their tried and untrue tactic of disputing the merits of Plaintiffs' claims or assuming the contrary position is true, in a procedural setting where such factual arguments and assumptions are improper.[19] This Court must presume, for the purposes of ruling on Defendants' motion to dismiss, the truth of Plaintiffs' allegations. Plaintiffs claim that the HBA community votes cohesively for particular candidates of choice, but these shared political preferences are submerged by the at-large system. Am. Compl. ¶¶ 7-8. Plaintiffs are, as no one disputes, members of the HBA community. The complaint alleges that as members of the HBA community, Plaintiffs have suffered dilution of their votes. That should end the injury-in-fact analysis on a motion to dismiss.

Yet, Defendants argue—without any evidentiary basis—that Plaintiffs do not have a "close" relationship with Asian or Latino/Hispanic voters and question whether Plaintiffs' claims have any merit. Defs. Mem. at 20. Defendants' latest attempt to assume the outcome of this Court's cohesiveness inquiry, this time to assert that Plaintiffs lack standing, places "the merits cart before the standing horse." *Cooksey v. Futrell*, 721 F.3d 226, 239 (4th Cir. 2013) (quoting *Initiative and Referendum Inst. v. Walker*, 450 F.3d 1082, 1093 (10th Cir. 2006)). Courts have routinely rejected

[19] *See, e.g.*, ECF No. 118 at 20 (Plaintiffs noting that Defendants' "battle-of-the-experts" arguments at the summary judgment stage were inappropriate).

such attempts to assume the outcome of the argument on the merits to decide a standing question. *See Flast v. Cohen*, 392 U.S. 83, 106 (1968) ("While we express no view at all on the merits of appellants' claims in this case, their complaint contains sufficient allegations under the criteria we have outlined to give them standing to invoke a federal court's jurisdiction for an adjudication on the merits."); *City of Waukesha v. EPA*, 320 F.3d 228, 235 (D.C. Cir. 2003) ("[I]n reviewing the standing question, the court must be careful not to decide the questions on the merits for or against the plaintiff, and must therefore assume that on the merits the plaintiffs would be successful in their claims."). If Defendants would like to argue that the HBA community is not cohesive, they of course may do so—at trial.

This Court has repeatedly and properly declined Defendants' inappropriate requests to reach the merits of Plaintiffs' claims. For example, this Court denied Defendants' motion for summary judgment because there is a genuine factual dispute, ECF No. 126, including the cohesiveness of the HBA community. The Court then twice denied Defendants' motions to bifurcate the trial to consider the *Gingles* conditions, in particular cohesiveness, before proceeding to any other issue. The Court rightly refused to "assume the conclusion of the *Gingles* inquiry for purposes of managing trial." ECF No. 136. This Court should deny Defendants' newest inappropriate invitation to reach the merits.

Assuming, as the Court must, that the HBA community is cohesive, Plaintiffs have clearly suffered a concrete and particularized injury from Defendants' continued use of a method of election for city council seats that results in vote dilution in violation of Section 2.

Defendants' contrary conclusion rests on inapposite cases. In *Perry-Bey v. City of Norfolk*, 678 F. Supp. 2d 348, 363 (E.D. Va. 2009), the plaintiff did not allege that she was a member of a minority group at all, and thus could not suffer a constitutional injury in fact. Here, Plaintiffs are

Black, and are thus members of a minority group that suffers injury in fact from having the votes of the HBA community diluted. In *Clay v. Garth*, No. 1:11-cv-00085, 2012 WL 4470289, at *2 (N.D. Miss. Sept. 27, 2012), the court found that a Black candidate did not have standing to allege that white votes were being diluted because Section 2 claims are limited to "'aggrieved persons,' and that category is confined to persons whose voting rights have been denied or impacted." (quoting *Roberts v. Wamser*, 883 F.2d 617, 621, 624 (8th Cir. 1989)). The court understandably held that the plaintiff was not a member of the class whose votes were being diluted. Here, taking Plaintiffs' complaint as true, it is beyond dispute that Plaintiffs have alleged they, along with other HBA voters in Virginia Beach as a cohesive group, have been injured. *See, e.g.*, Am. Compl. ¶ 8. In *Greater Birmingham Ministries v. Alabama*, 161 F. Supp. 3d 1104, 1114-15 (N.D. Ala. 2016), the plaintiffs failed to establish standing as organizational plaintiffs who represented affected "constituents." But that case is inapposite because Plaintiffs here do not allege that they possess organizational standing. Lastly, the plaintiffs in *Fairley v. Patterson*, 493 F.2d 598, 604 (5th Cir. 1974) lacked standing because they did not properly allege residence in one of the districts in which electors were underrepresented.[20]

Defendants' reliance on third-party standing doctrine is similarly misguided. Plaintiffs are not alleging third-party standing. Instead, Plaintiffs have standing *in their own right* as members of a cohesive HBA class that continues to have its political strength diluted because of Defendants' method of election. While the existence of vote dilution must always be analyzed with reference to groups, Section 2 case law makes clear that *individual* members of an injured class are

[20] This is even assuming that *Fairley* remains good law. Notably, the Fifth Circuit decided this case in 1974—and relied on standing elements that are no longer in use—long before the Supreme Court decided the seminal Section 2 case, *Thornburg v. Gingles*, 478 U.S. 30 (1986) and the seminal case on standing, *Lujan*, 504 U.S. at 555.

appropriate plaintiffs to bring a vote dilution claim. *See, e.g.*, *Kumar v. Frisco Independent School District*, No. 4:19-CV-00284, 2020 WL 1083770 (E.D. Tex. Mar. 6, 2020) (district court denying motion to dismiss where single Indian plaintiff brought Section 2 claim alleging the votes of HBA residents were being diluted); *see also* Minute Entry, *Kumar*, No. 4:19-CV-00284, ECF No. 107 (E.D. Tex. May 26, 2020) (minute entry indicating that the case proceeded to trial). Section 2(b) defines the class of citizens who can sue as a class in which the "members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. 10301(b). The text therefore demonstrates that the shared disadvantage based on "race or color" defines the protected class, not the racial or ethnic commonality of the group. Thus, Plaintiffs do not need to rely on third-party standing to protect the rights of others in their protected class. Instead, the fact that Plaintiffs are members of a class of voters whose votes Defendants continue to dilute is enough.[21] It makes no logical difference that the class victimized by Defendants' electoral scheme here is a multiracial community of color that includes members with different racial identities from Plaintiffs.

Defendants rely heavily on *Kumar*, 2020 WL 1083770, to argue that Plaintiffs' claims must be dismissed because they lack third-party standing. But this conclusion misreads *Kumar* and ignores its subsequent history. In *Kumar*, a single Indian voter brought a Section 2 claiming that

[21] Furthermore, Virginia Beach itself has treated the HBA community as cohesive. In 2011, for example, the city touted the City Council's attempt to create a majority-minority district (albeit one that only dictates the residence of the candidate, not the voters that may cast ballots in that district). ECF No. 118-9 (City Atty. Letter to Andrew Jackson). That district, the Centerville District, is comprised of Hispanic, Black, and Asian voters. ECF No. 118-10 (Virginian-Pilot article); ECF No. 118-11(Robert Dyer Dep.) at 39:2-16. In fact, the Centerville District is just shy of being a majority-minority district, with 45.91% HBA CVAP. ECF No. 115-1 at 69. But plainly, the city saw those minority groups as a cohesive group such that the creation of a district in which there was an HBA majority would satisfy those communities. *See, e.g.*, ECF No. 118-11 (Robert Dyer Dep.) at 39:2-16.

an at-large election system diluted the votes of the local HBA community. *Id*. In an order *denying* defendant's motion to dismiss, the court concluded that Kumar had constitutional standing but lacked prudential standing. The court reached this conclusion after wrestling with Kumar's "muddled" complaint. *Id.* at *7. From the court's view, it was not

> readily apparent, from a plain reading of Kumar's First Amended Complaint, whom Kumar [was] attempting to represent—i.e., whether Kumar [was] just representing himself or attempting to represent entire minority communities in [the School District]. Thus, the Court must determine whether Kumar [was]: (1) simply trying to put on evidence of a minority coalition under [*Gingles*] to demonstrate how his *personal* legal interests have been injured; or (2) attempting to represent the collective interests of all African Americans, Hispanics, Asians, and other minorities who live in [the School District].

Id. at *8 (emphasis in original). The court ultimately gave Kumar 14 days to amend his complaint. Kumar then filed a second amended complaint where he remained the *sole* plaintiff and continued to allege that the relevant at-large system prevented minority-preferred candidates from being elected. Second Amended Complaint, *Kumar,* No. 4:19-CV-00284, ECF No. 81 (E.D. Tex. Mar. 20, 2020). The case then went on to trial. Minute Entry, *Kumar,* No. 4:19-CV-00284, ECF No. 107 (E.D. Tex. May 26, 2020).

Defendants have read *Kumar* to mean that Plaintiffs' claims must be dismissed when, in fact, the case *further* supports Plaintiffs' position: that even *one* member of the aggrieved class can bring a Section 2 claim regardless of the plaintiff's race or the composition of the rest of the coalition and then take that case to trial. Unlike the initial complaint in *Kumar*, the complaint here makes clear that Plaintiffs are "simply trying to put on evidence of a minority coalition under [*Gingles*] to demonstrate how [their] *personal* legal interests have been injured." 2020 WL 1083770, at *8. Therefore, Plaintiffs have standing to bring this Section 2 claim.

CONCLUSION

This Court has jurisdiction to rule on Plaintiffs' challenge to the dilution of their political opportunity. The forthcoming release of 2020 Census data does not render Plaintiffs' claims moot or unripe, but will merely provide additional evidence that is likely to further support Plaintiffs' claims. Furthermore, because Plaintiffs are members of the aggrieved class of citizens, they are personally injured and have standing to bring this suit. Plaintiffs therefore respectfully request that this Court deny Defendants' Motion to Dismiss.

Dated: July 14, 2020

Respectfully submitted,

/s/ J. Gerald Hebert

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CERTIFICATE OF SERVICE

I hereby certify that on the July 14, 2020, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing to the following:

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