

**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

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**PLAINTIFFS' PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW**

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## INTRODUCTION

From the outset, the system of electing the City Council of Virginia Beach has discriminated against minorities. The City carved out seven individual geographic “residency” districts, but requires *all* candidates to compete City-wide, diluting the votes of minority residents. As a result, although the population of Virginia Beach is one-third minority, only six minority candidates since 1966 have ever won election to the Council.

In establishing that this system violates Section 2 of the Voting Rights Act of 1965 (“VRA”), Plaintiffs must show that it is possible to draw a compact majority-minority district in Virginia Beach. *Thornburg v. Gingles*, 478 U.S. 30 (1986). Plaintiffs far exceeded that threshold, drawing 18 such districts in 10 different illustrative plans. They also showed that the Minority Community—Hispanics, Blacks, and Asians—bound together by the shared experience of discrimination, is politically cohesive and that whites usually vote as bloc to defeat the Minority Community’s candidates of choice, satisfying prongs two and three of *Gingles*. And Plaintiffs demonstrated that the totality of the circumstances shows a violation of Section 2. Indeed, “totality” aptly describes the history of discrimination in Virginia Beach, which has permeated every aspect of life for minority residents, with effects that will continue for years to come. From disparities in City contracting and educational achievement to income inequality and the City’s shameful failure to meet basic housing needs in the historically Black community of Burton Station, the legacy of discrimination and lack of responsiveness to the Minority Community has heightened the discriminatory impact of Virginia Beach’s electoral system. In short, Plaintiffs have proven a violation of Section 2.

## **PROPOSED FINDINGS OF FACT**

### **I. Background**

1. Plaintiffs Latasha Holloway and Georgia Allen filed their amended complaint on November 13, 2018, alleging that the electoral system for the Virginia Beach City Council violates Section 2 of the Voting Rights Act by denying the Hispanic, Black, and Asian and community (collectively “the Minority Community”), an opportunity to elect their preferred candidates of choice to the Council. Joint Stipulated Fact 1 (“JSF”); ECF No. 62; 52 U.S.C. § 10301.

#### **A. Parties**

2. Plaintiffs Latasha Holloway and Georgia Allen are U.S. citizens, and eligible, registered Black voters in Virginia Beach, the State’s most populous city. JSF 2, 4.

3. Plaintiffs Holloway and Allen reside in an area of Virginia Beach that could be a single-member district in which the Minority Community is a majority of the Citizen Voting Age Population (“CVAP”) and the Voting Age Population (“VAP”).<sup>1</sup> P-0084 at 5-12. The area in which Plaintiff Holloway lives also could constitute a single-member district where Black and Hispanic/Latino voters are, together, a majority of the CVAP. P-0079 at 10; P-0084 at 5.

4. Defendant City Council is the governing body of Virginia Beach and includes Defendants Robert Dyer, Mayor; Councilmembers at-large John Moss, Aaron Rouse, and Rosemary Wilson; and Vice Mayor James Wood, Jessica Abbott, Michael Berlucchi, Barbara Henley, Louis Jones, Guy Tower, and Sabrina Wooten, Councilmembers representing individual geographic districts. JSF 9, 10-20.

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<sup>1</sup> Both statistics are from data compiled by the U.S. Census Bureau. The CVAP is based on the Bureau’s American Community Survey (“ACS”) 5-Year Estimates for 2013-2017 and 2014-2018. VAP data are based on the 2010 decennial census. Transcript D1, ECF No. 218, 119:23-120:18 (“Tr.”).

5. Defendant Donna Patterson is the Director of Elections/General Registrar for the City and Defendant Patrick Duhaney was appointed City Manager by the City Council in June 2020, effective July 20, 2020. JSF 21-22.

**B. Virginia Beach's Electoral System**

6. In 1966, the Virginia General Assembly adopted at-large elections for electing 11 Virginia Beach City Councilmembers, including the Mayor. JSF 23. *See* <https://www.vbgov.com/government/departments/city-clerk/city-council/Pages/default.aspx>.

7. Under this at-large system, all candidates compete for the votes of all voters across the 249 square mile city. P-0078 at 12. Seven of the Councilmembers are elected from designated or numbered posts—residential districts with a single seat at stake--but all City voters choose the councilmember for each district. JSF 24.

8. Since 1966, the City has elected only five Black Councilmembers (Aaron Rouse, Sabrina Wooten, Amelia Ross-Hammond, Louisa Strayhorn, and John Perry), and one Asian-American (Ron Villanueva). JSF 25. Defendants claimed a Latina (Rita Bellitto) was elected, but offered no evidence of her ethnicity. DTX175 49:16-20. The Council appointed one Black member, Prescott Sherrod, to a vacancy in 2011, JSF 26, but he was not re-elected. P-0078 at 45.

9. As of trial, no Black Councilmember had ever been re-elected. P-0078 at 45. Ms. Bellitto did not seek re-election. DTX023 at 9-10.

10. In the five City Council elections prior to trial (2010-2018), 16 out of 74 candidates were Black. JSF 27. Of the 22 winners, only three were Black. P-0396 at 4-5.

11. The Minority Community's preferred candidates usually lose because white residents vote as a bloc against them. If the City used 10 single-member districts, each electing its own representative, with the Mayor elected at-large, the Minority Community could elect candidates of their choice. P-0077 at 32-33. This plan would not guarantee electoral success for

the Minority Community's candidates of choice, but would give them a "fighting chance." Tr. D2 327:23-328:7.

**C. For 20 Years, the City Council Has Thwarted Efforts by the Minority Community to Change the Electoral System.**

12. Since at least 2001, members from each of the three constituent groups of the Minority Community have cooperated in repeated attempts to change the City's method of elections and remedy the dilution of their votes under the at-large scheme.

13. In 2001, "a broad-base[d] coalition of Asians, Hispanics, African-Americans, Indians, people of all backgrounds that are wishing to seek a more equitable system of representation," P-0145 at 15, urged the City to adopt single-member districts. P-0145 at 10-11; Supp. JSF 1-2, ECF No. 211. Among the witnesses before the Council urging this change was Ron Villanueva, a Filipino-American and former Council member who testified as the President of the Filipino-American Community of Tidewater and Chairman of the Filipino-American Community Action Group. P-0145 at 15-16. Defense witness Nonato Abrajano, a former leader of the City's Filipino-American community, admitted to testifying in 2001 as part of the coalition and on behalf of the National Federation of Filipino-American Associations (NaFFAA), where he urged the Council to adopt single-member districts to help ensure "equal representation." Tr. D4 761:25-762:24; P-0145 at 12-13. Mr. Abrajano also admitted that as long as there has been an active chapter of NaFFAA in Hampton Roads, it never changed its support for district elections. Tr. D4 762:15-24. These admissions contradicted Mr. Abrajano's testimony on direct that he opposed single-member districts and that his community had not cooperated with the Black and Hispanic communities since 1997.



14. In 2011, the Minority Community formed a new organization, the Virginia Beach Concerned Citizens Coalition (“VBCCC”), to urge the Council to adopt a fairer method of electing City Council members. Tr. D3 489:6-490:9.

15. Andrew Jackson, Chair of the Virginia Beach African American Leadership Forum in 2011, told the City that its method of electing Councilmembers “impedes equal representation.” Tr. D3 490:18-491:4; P-0210 at 2-3. Mr. Jackson also presented at least three 10-district plans to the City Council in 2011, including one where the Minority Community was a majority of the VAP in at least one district. Tr. D3 493:9-494:1. DTX011 at 285, 289, 294. The NAACP and the VBCCC also proposed maps. DTX010 at 34 ¶ 32b, g, l. Defendants’ expert witness, Kimball Brace, whom the City hired for redistricting in 2011, helped draw these maps. Tr. D3 563:3-8.

16. Current Councilmember Moss urged support of the NAACP/VBCCC map and “a district (or ward) system for local elections because the current system is flawed” and “the at-large voting system dilutes the voting strength of voters.” DTX011 at 158. Nonetheless, the City Council rejected all these proposals. DTX011 at 222-226.<sup>2</sup>

## **II. Demographics of Virginia Beach**

17. Mr. Anthony E. Fairfax is a demographic and mapping consultant, the CEO/Principal Consultant of CensusChannel LLC, and an expert in demography and drawing redistricting plans. P-0075 at 2. As a consultant on redistricting issues for 28 years and three decennial redistricting cycles, he has developed nearly 1,000 redistricting plans for jurisdictions ranging from states to small municipalities. P-0075 at 2. The Court qualified him as a demographic

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<sup>2</sup> In July 2020, the City Council voted against a resolution that would have placed a referendum on the ballot changing the City’s method of elections to single-member districts. Although Councilmembers Rouse and Wooten voted for the resolution, six of the white councilmembers voted against it.

and mapping expert. Tr. D1 118:1-16. As discussed below, he prepared multiple examples of 10-district plans with majority-minority districts that comply with traditional redistricting criteria.

**A. Current Population Statistics in Virginia Beach**

18. The most recent decennial census, completed in 2010, reported that the City had a total population of 437,994. JSF 8, 29. In addition to the decennial census, the Census Bureau publishes estimates of population demographics based on the American Community Survey (“ACS”), including race and ethnicity data that is reliable for use in redistricting. Tr. D1 119:4-22.

19. According to the most recent ACS 5-Year Estimates (2014-2018), the City’s population is 450,135. The Minority Community constitutes 33% of the total population (8% Hispanic, 18.5% Black, and 6.5% Asian). DTX132 at 4.

**B. The Minority Community Is Concentrated in Certain Areas and Has Grown Significantly in Virginia Beach, While the White Population Has Decreased**

20. The Minority Community is concentrated in certain areas of the City, with 54.90% living in 31 of the 100 census tracts in Virginia Beach.<sup>3</sup> P-0075 at 13, 17; Tr. D1 177:7-21.

21. Mr. Fairfax testified that according to the decennial censuses of 1990 and 2010, the Minority Community grew from “almost 21 percent to 33 percent” of the City’s total population (and VAP and CVAP). P-0075 at 8, Tr. D1 121:15-25; 122:4-11; 124:3-10. P-0075 at 8-11. Each of the constituent groups—Hispanic, Black, and Asian—increased during that period while the white population fell. P-0075 at 4, 7-8; P-0076 at 14-17.

**III. The Minority Community is Sufficiently Large and Geographically Compact to Constitute a Majority in at least one Single-Member District**

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<sup>3</sup> These figures reflect 2013-2017 ACS data. The tracts contain 45.50% of the Hispanic population, 59.02% of the Black population, and 52.20% of the Asian population. P-0075 at 13, 17; Tr. D1. 177:7-21.

22. Mr. Fairfax testified that the Minority Community in Virginia Beach is sufficiently large and geographically compact to constitute the majority in at least one of 10 single-member districts. Tr. D1 177:22-2. He proved this by drawing 10 illustrative plans, eight with 10 single-member districts and two with a single illustrative district. Plaintiffs labeled these Plans 1 through 10. Each illustrative plan has *one or two* districts where ACS data show the Minority Community is a majority of the CVAP, and eight plans have *one or two* districts where the 2010 Decennial Census data show the Minority Community is a majority of the VAP. *See infra* ¶ 27.

#### **A. Principles for Drawing Illustrative Plans**

23. In drawing the illustrative plans, Mr. Fairfax followed five common redistricting criteria: equal population, contiguity, compactness, minimizing political subdivision splits of Voter Tabulation Districts (“VTDs”), and preservation of communities of interest. P-0075 at 6-7; Tr. D1 128:12-135:1. Mr. Fairfax balanced these criteria while also considering race and ethnicity data in order to draw districts compliant with Section 2. P-0075 at 6-7; Tr. D1 135:2-7.

24. Mr. Fairfax analyzed how Plans 2 through 8 complied with his designated criteria, and also compared them to the current City Council Seven District Residency Plan (“the Current Plan”).<sup>4</sup> As to compactness Mr. Fairfax explained that “[t]he shape of the jurisdiction..., can affect the compactness scores” and so you have to look at the compactness of districts in the context of the shape of the jurisdiction and the number of districts being drawn. Tr. D1 142:1-6. Mr. Fairfax testified that each of this Plans’ compactness scores were “within the acceptable range for this type of geography.” Tr. D1 142:21-24 (Plan 2); 146:1-5 (Plan 3); 148:23-149:2 (Plan 4); 151:2-6 (Plan 5); 153:21-25 (Plan 6); 156:14-18 (Plan 7); 159:16-20 (Plan 8).

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<sup>4</sup> The Current Plan and Plans 2 through 8 contain districts that are contiguous; therefore, that criterion is not included in Table 1. Tr. D1 153:25-154:2. A district is contiguous if you can travel from any point in the district to any other point in the district without crossing the district’s boundary.

25. Mr. Fairfax’s conclusions as to the total population deviation, compactness, and VTD splits for Plans 2 through 8 are set out below:<sup>5</sup>

Table 1: Compliance with Traditional Redistricting Criteria in Current and Demonstrative Plans

Plan	Total Pop. Deviation	VTD splits
Plan 2	7.45%	12
Plan 3	9.0%	22
Plan 4	7.57%	25
Plan 5	9.65%	21
Plan 6	7.49%	15
Plan 7	9.21%	23
Plan 8	7.36%	23
Current Plan	7.29%	28

**B. Demographics for Mr. Fairfax’s Demonstrative Plans**

26. Mr. Fairfax used CVAP in assessing whether a district is majority-minority for the purposes of prong 1 of the *Gingles* test for two reasons: First, it “is the closest data to those that have the ability to vote. Voting age population includes non-citizens and, of course, total population includes people who can’t vote.” Second, “you get a more current indication of the what the population is” because you are using recent ACS data. Tr. D1 135:8-19.

27. The demographics for the majority-minority districts in Dr. Fairfax’s Demonstrative Plans is set out in Table 2.

Table 2: CVAP and VAP Data for Majority-Minority Districts in Demonstrative Plans

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<sup>5</sup> The sources of data in this table are: Plan 2 (P-0075 at 18, P-0076 at 47, 49-53, P-0085 at 17; Tr. D1 137:23-138:21, 142:20-23), Plan 3 (P-0080 at 3, 5-6; Tr. D1 145:10-13, 145:25-146:4), Plan 4 (P-0080 at 10, 12-13; Tr. D1 148:11-14.148:22-149:1), Plan 5 (P-0080 at 17, 19-20; Tr. D1 150:7-9, 150:14-15, 151:1-5), Plan 6 (P-0085 at 18-20; Tr. D1 153:9-12, 153:20-24), Plan 7 (P-0085 at 25-27; Tr. D1 155:24-156:3, 156:13-17), Plan 8 (P-0085 at 32-34; Tr. D1 158:24-159:2, 159:15-19), Current Plan (P-0076 at 43, Tr. D1 150:10-13.).

Plan	District	Percent HBA CVAP using ACS 2014-2018 <sup>6</sup>		Percent HBA VAP using 2010 Census
		(using single race Black) <sup>7</sup>	(using single race Black plus Black/White)	
Plan 1	C2	50.13%	Not available	Not available
	D	50.21%	Not available	
Plan 2	1	51.77%	52.91%	51.03%
	2	50.75%	51.88%	
Plan 3	1	53.07%	54.31%	51.07%
	2	52.16%	53.23%	50.08%
Plan 4	1	52.72%	53.94%	51.02%
	2	52.11%	53.25%	50.03%
Plan 5	2013-2017 ACS data only:			
	1	54.47%	55.72%	54.05%
	2	51.92%	52.75%	51.32%
Plan 6	1	51.77%	52.91%	51.03%
	2	50.93%	52.02%	
Plan 7	1	53.07%	54.31%	51.07%
	2	51.37%	52.47%	
Plan 8	1	52.72%	53.94%	51.02%
	2	51.38%	52.45%	
Plan 9	2013-2017 ACS data, % Hispanic and Black only:			
	1	50.58%	51.46%	
Plan 10	2013-2017 ACS data, % Hispanic and Black only:			% Hispanic and Black only:
	1	51.04%	52.17%	56.54%

<sup>6</sup> The sources for the VAP and CVAP data in this table are: Plan 1 (ECF No. 62, App. A; Tr. D1 136:8-20), Plan 2 (P-0085 at 17; P-0084 at 7; Tr. D1 136:24-137:4 and 137:14-22; 138:22-139:2), Plan 3 (P-0085 at 24; Tr. D1 143:19-7, 145:1-9; 145:14-24), Plan 4 (P-0080 at 31; Tr. D1 146:6-147:1; 147:9-23, 148:15-21), Plan 5 (P-0080 at 17; Tr. D1 149:3-14, 149:24-150:6, 150:16-25), Plan 6 (P-0085 at 18; Tr. D1 151:9-152:1, 152:18-153:8, 153:13-16), Plan 7 (P-0085 at 25; Tr. D1 154:4-16, 155:8-23, 156:4-6), Plan 8 (P-0085 at 32; Tr. D1 at 156:19-157:16, 158:8-23, 159:9-11), Plan 9 (P-0080 at 24; Tr. D1 159:21-160:15), Plan 10 (P-0080 at 30; Tr. D1 161:5-24, 162:2-5).

<sup>7</sup> These categories were defined in testimony by Mr. Fairfax at Tr. D1 139:8-140:23, namely that “single race Black” only includes individuals who select only Black as their race, not Black and another category (e.g. white, Asian, etc.). While “Black + White” includes anyone who selects both Black and white as their race.

28. The illustrative plans drawn by Mr. Fairfax are not the only possible configurations of majority Hispanic, Black, and Asian districts in Virginia Beach. P-0075 at 25; DTX011 at 285.<sup>8</sup>

**IV. Elections in Virginia Beach Demonstrate Significant Levels of Racially Polarized Voting Between Voters from the Minority Community and White Voters**

29. Plaintiffs' expert Dr. Douglas Spencer is a Professor of Law and Public Policy at the University of Connecticut with a joint appointment in the School of Law and the Department of Public Policy. He earned a Ph.D. in Jurisprudence and Social Policy and a J.D from the University of California, Berkeley. Dr. Spencer is an expert in empirical analysis of public law, with an emphasis on voting rights and campaign finance. He publishes academic articles that use social science methods to assess election laws, including two reflecting his nationwide surveys of polarized attitudes (racial and political) in U.S. elections. P-0077 at 43-45. The Court qualified Dr. Spencer as an expert in political science and quantitative statistical analysis. Tr. D2 266:4-6; P-0077 at 35, 43-44.

**A. Three Tests are Typically Used to Identify Racially Polarized Voting**

30. Because voting is private, political scientists use three statistical methods to infer voting behavior of demographic subgroups: (1) homogenous precinct analysis ("HP"), (2) ecological regression ("ER"), and (3) ecological inference ("EI"). P-0077 at 4. Tr. D2 268:12-273:4; *Thornburg v. Gingles*, 478 U.S. 30 (1986).

31. Generally, HP analysis examines precincts with high concentrations of a demographic group, and uses the voter preferences there as a proxy for the preferences of members of that race or ethnicity throughout the larger jurisdiction. ER uses linear regression to determine

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<sup>8</sup> It is also possible to draw a seven-district plan with at least one majority-minority district. In 2011, the City Council considered, and rejected, at least one such plan. *See, e.g.*, DTX010 at 8, 34; DTX011 at 290, 220-226.

the relationship between the voting patterns of particular groups in the jurisdiction in each precinct for each relevant election. EI also uses regression analysis, but relies on information known with certainty to narrow the bounds of possible support from demographic groups and draw inferences from the data. The strongest case for racially polarized voting exists when HP, ER, and EI all generate similar estimates and point in the same direction. Tr. D2 359:3-360:16; P-0077 at 7.

**B. Quantitative Evidence of Cohesion Among the Minority Communities**

32. Generating individual estimates for each constituent group's support for various candidates is not the only way to establish that the City's Minority Community votes cohesively.

33. The size and dispersion of the Asian and Hispanic communities in Virginia Beach make it difficult to individually ascertain their preferred candidates using election returns by precinct. P-0081 at 6. However, that determination is possible for the Black community and the Minority Community as a whole. Thus, Dr. Spencer explained that the goal for his racially polarized voting analyses using HP, ER, and EI was to "identify trends. Do these three models tell a story that there's a pattern of racially polarized voting in Virginia Beach?" Tr. D2 295:7-9.

34. Defendants' expert, Dr. Kidd, did not conduct HP, ER, or EI analyses; he merely appropriated Dr. Spencer's analyses and sought to draw different conclusions. Tr. D5 882:7-21. In fact, Dr. Kidd has never conducted a racially polarized voting analysis in any jurisdiction. Tr. D5 882:3-6.

35. Though he did no analysis himself, Dr. Kidd opined that where the ER and EI estimates for a particular candidate were higher for "Black support" than "All minority support," Asian and Hispanic voters must support that candidate at a lower rate than Black voters. DTX083 at 17. Dr. Spencer explained that in fact, it was more likely that all three minority communities usually supported the same candidate. Tr. D2 295:10-15. Where the ER and EI estimates differed for Black support and "All minority" support, it was likely caused by the non-linear distribution

of the data. Tr. D2 281:13-22. Moreover, Dr. Spencer bolstered that conclusion with two additional statistical analyses: 1) HP analyses confirming the ER and EI results (see e.g. Tr. D2 302:7-13 (Rouse 2018 election); Tr. D2 305:18-306:12 (Ross-Hammond 2016 election); Tr. D2 307:8-15 (Sherrod 2011 election); and 2) non-linear “LOESS” curves showing that the most accurate line through the distributed precinct data for the “All minority” community was nonlinear. Tr. D2 287:4-289:2, 289:21-290:19. P-0087 at 6; P-0077 at 33.

36. Based on the results from the HP, ER, and EI analyses, and the underlying data in a number of scatter plots in his reports, Dr. Spencer concluded that the term “All minority” in his reports and testimony “capture[d] the preferences of the Hispanic, Black, and Asian voters in Virginia Beach as a cohesive community.” Tr. D2 295:10-15; P-0087 at 6; P-0077 at 33. The court finds that Dr. Spencer’s expert analysis is trustworthy and credible. The court rejects Dr. Kidd’s opinion that Asian and Hispanic voters support candidates at a lower rate than Black voters, because he did not independently analyze that issue, and Dr. Spencer’s data rebut that conclusion.

**C. Local and Federal Elections in Virginia Beach Also Show High Levels of Racially Polarized Voting**

**i. Voting in Virginia Beach City Council Elections is Highly Racially Polarized**

37. Dr. Spencer determined whether racially polarized voting is present in City Council elections by looking at probative races, i.e., all recent elections for City Council where a candidate of color was running because they “provide[] some salience to this decision, this idea that voters might be taking race into account.” Tr. D2 296:24-25.

38. There were 36 City Council elections between 2008 and 2018. Tr. D2 370:11-12. Of those, six were uncontested and not useable for racially polarized voting analysis, and 13 included only white candidates, leaving 17 of the 36 City Council elections between 2008 and 2018 with a candidate from the Minority Community. Dr. Spencer considered these 17 elections



probative in analyzing patterns of racially polarized voting between whites and the Minority Community. *Id.*; P-0077 at 11-29. Dr. Spencer also analyzed four less probative, but still informative, elections: non-City Council elections with a candidate of color. Tr. D2 300:13-14.

39. Table 3 shows the findings of Dr. Spencer's analysis of the 17 probative elections. He concluded that in either eight (47%) or nine (53%) of the 17 races, the Minority Community's candidate of choice lost due to white bloc voting, while the white community's candidates were successful in either 15 (88%) or 16 (94%) of the 17 races.

Table 3 - Summary of Electoral Success of Candidates of Choice of Minority Community in Probative Virginia Beach City Council Elections 2008-2018

Year	Election	Candidates of Choice (COC) of the Minority Community	Wins by COC of Minority Community	COC of the white community	Wins for COC of the white community
2018	At-large (2)	1. Rouse, 2. White	1	1. Moss, 2. Oliver or Rouse	1 (or 2)
	Centerville	Wooten	1	Wooten	1
2016	At-large (M)	Sessoms	1	Sessoms	1
	Kempsville	Ross- Hammond	0	Abbott	1
2014	At-large (2)	1. Davenport, 2. Moss or Martin	1 (or 2)	1. Davenport, 2. Moss	2
	Princess Anne	Henley	1	Henley	1
	Rose Hall	Cabiness	0	Kane	1
2012	Kempsville	Ross- Hammond	1	Dale	0
2011	At-large	Sherrod	0	Moss	1
2010	At-large (2)	1. Jackson, 2. Bellitto	1	1. Bellitto, 2. DeSteph	2
	Bayside	Jones	1	Jones	1
	Princess Anne	Bullock	0	Henley	1
2008	At-large	Allen	0	Wilson	1
	Kempsville	Jackson or Flores	0	Diezel	1
	<b>Total</b>	<b>17</b>	<b>8 (or 9)</b>	<b>17</b>	<b>15 (or 16)</b>

Tr. D2 301:16-311:21; P-0077 at 11-29.

**ii. Voting in Federal Elections in Virginia Beach is Also Highly Racially Polarized**

40. Voting in federal elections in Virginia Beach is racially polarized. For example, about 90% of voters from the Minority Community strongly preferred Barack Obama over both John McCain (2008) and Mitt Romney (2012), while 65% of white voters strongly preferred McCain and Romney (65% support) over Obama (35%). Tr. D2 312:1-15; P-0077 at 30. Minority Community voters also strongly supported Black candidate Shaun Brown for the Second Congressional District in 2016, while white voters strongly supported white candidate Scott Taylor. Tr. D2 313:7-13; P-0077 at 31. In all three elections, the candidate of choice of the Minority Community got less than 50% of the vote in Virginia Beach due to bloc voting by whites. Tr. D2 312:16-20, 313:11-13.

41. Virginia's primary elections are open to all voters, and therefore returns from those elections are not necessarily restricted to Democratic voters. This allows for an examination into whether the racial polarization in the 2008 and 2012 elections in Virginia Beach was entirely driven by the partisan preferences of white and non-white voters, or whether the race of the candidate was a driving factor.

42. Dr. Spencer's ER plot for the 2008 Presidential primary election shows that support for Obama (over Clinton) was much stronger among non-white voters than white voters, and therefore even controlling for party label, there is evidence of racial polarization in voting between non-white voters and white voters in Virginia Beach. P-0077 at 30.

**D. Qualitative Evidence Also Demonstrates the Political Cohesiveness of the Minority Community**

43. The City itself frequently treats the Minority Community as a cohesive group. For example, in 2011 the City Council sought to create a Majority-Minority "district" in its at-large system. DTX162 (Jones Dep.) at 57:6-58:22 (admitting that in 2011 they put "[a]ll the minorities

together” to try to make a majority-minority district in Centerville). Mayor Dyer explained that his and the Council’s motivation behind the creation of this district was “to see equal representation,” DTX156 (Dyer Dep.) at 39:2-16, but all council members were still elected at-large.

44. Additionally, the City-created Minority Business Council (“MBC”), supports “minority business owners” without limiting that support to any particular racial or ethnic group. DTX157 (Rouse Dep.) at 107:2-9 (describing the purpose of the MBC). Former councilmember Louisa Strayhorn testified that she was involved in creating the MBC and that it reflected the minorities’ shared experience of discrimination. It served “[t]he Hispanics, the Asians, the African-Americans [because they] all had inequities. They all had very, very low percentages of the kinds of contracts that could be gotten.” Tr. D3 451:19-452:11.

45. Councilmembers also discuss the Minority Community as a cohesive community. For example, Councilmembers Aaron Rouse and Rosemary Wilson speak about minorities in the City collectively with group-specific needs and priorities. *See, e.g.*, DTX157 (Rouse Dep.) at 48:13-19 (Councilmember Rouse discussing a need to increase minority participation in City contracts); DTX163 (Abbott Dep.) at 74:12-18 (Councilmember Abbott discussing hiring of minority police officers).

46. There is substantial evidence that the Minority Community in the City has common interests. For example, Councilmember Rouse testified that minority representation on the Council is important because “what may particularly have been an issue for the minority population may be overlooked by the majority.” DTX157 (Rouse Dep.) at 79:18–20. Councilmember Abbott identified the two issues she discussed most frequently with Minority Community members were (1) district voting and (2) a desire for a disparity study. DTX163 (Abbott Dep.) at 136:15-137:12. Multiple witnesses identified the Minority Community’s shared interest in a disparity study by the

City. Tr. D1 57:24-59:1 (Allen testimony); Tr. D2 223:23-224:14 (Fowler testimony); Tr. D3 452:23-453:18 (Strayhorn testimony). Based on her long history working with the NAACP and the Hispanic, Black, and Asian communities, Plaintiff Allen identified housing and transportation as common interests of the Minority Community. Tr. D1 47:12-48:6. Similarly Ms. Strayhorn testified that the Minority Community jointly supported light rail while whites opposed it. Tr. D3 454:10-455:1.

47. Even Defendants' witnesses confirmed that transportation, and in particular light rail, is a political issue of common concern among the Minority Community. Dr. Ross-Hammond testified that her support for light rail "played a major part" in her re-election loss in 2016. Tr. D4 728:5-16. Dr. Ross-Hammond's opponent, Jessica Abbott, opposed light rail. DTX163 (Abbott Dep.) at 162:1-3. Dr. Kidd acknowledged that his own polling had shown that support for light rail was split along lines similar to the split for the Presidential election in 2016, Tr. D5 998:20-25, which Dr. Spencer showed was highly polarized by race. Tr. D2 312:10-20.

48. The record shows that the Minority Community has acted as a unified coalition in the City. The coalition that convened in 2001 to advocate for single-member districts was discussed above. PFOF ¶ 12-13; Tr. D1 40:2-44:1. In 2003, the Minority Community united twice to protest the City Treasurer's racially derogatory remarks about the Minority Community. Plaintiff Allen testified that a diverse group joined those protests because "whether we were targeted directly by the comment or not, it was offensive to one, so offensive to all." Tr. D1 50:11-23; 53:6-9; 57:8-13.<sup>9</sup> Del. Fowler described the Minority Community's recent collaboration to seek removal of Confederate monuments and to march against racial injustice. Tr. D2 225:2-16.

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<sup>9</sup> Defendants' witness Mr. Abrajano participated in those protests, notwithstanding his testimony that his community had not cooperated with other minorities since 1997. Tr. D4 762:25-763:24.

Mr. Abrajano also agreed that “ensuring an accurate Census is particularly important to the minority communities” in relation to the Census 2020 count that was ongoing at the time of trial. Tr. D4 763:25-764:5. Former Councilmember and Defendants’ witness Dr. Amelia Ross-Hammond testified that she encountered interests that were common amongst the Minority Community. Tr. D4 738:2-16.

**E. Plaintiffs’ Illustrative Majority-Minority Districts Offer the Minority Community a Greater Opportunity to Participate in the Political Process and Elect Candidates of Their Choice**

49. In order to determine whether the Minority Community can elect their preferred candidates under Mr. Fairfax’s illustrative maps, Dr. Spencer recompiled the results from seven elections in which a Black candidate who was unquestionably the choice of the Minority Community lost due to white bloc voting. These elections include: the 2008 at-large (one seat), 2010 Princess Anne and at-large (two seats), 2011 at-large (one seat), 2014 Rose Hall, and 2016 Kempsville elections (the “Performance Analysis Elections”). Tr. D2 316:1-10; P-0077 at 34.

50. Under the Current Plan, the Minority Community elected a candidate of choice in only one of the seven (14%) elections. Tr. D2 316:21-317:1; P-0077 at 34.

51. In District 1 of Mr. Fairfax’s Plan 2, support for the candidate of choice of the Minority Community would be higher than under the Current Plan in six of the seven Performance Analysis Elections. In four of the seven (56%), the candidate of choice of the Minority Community would have won the reconstituted election. Tr. D2 317:16-22; P-0077 at 34.

52. In District 2 of Plan 2 drawn by Mr. Fairfax, there would be greater support for the Minority Community’s candidate of choice in all seven of the Performance Analysis Elections. In six of seven (86%), the Minority Community’s candidate of choice would have won the reconstituted election. Tr. D2 317:25-318:5; P-0077 at 34.

53. When analyzing Plans 6, 7, and 8 drawn by Mr. Fairfax, Dr. Spencer included two additional elections, the two at-large seats elected in 2018. Tr. D2 318:10-319:4; P-0087 at 4-5. Including the 2018 elections, under the Current Plan, the Minority Community was only able to elect two preferred candidates in the nine elections (22%). Tr. D2 319:5-10; P-0087 at 4.

54. Under Plans 6, 7, and 8 drawn by Mr. Fairfax, District 1 would have greater support compared to the current system for the Minority Community's candidate of choice in all nine of the elections analyzed. In five of the nine (56%), the candidates of choice of the Minority Community would win the reconstituted election. Tr. D2 319:14-320:10; P-0087 at 4. In District 2, the Minority Community's candidates of choice perform better than the Current Plan in all nine elections. In seven of the nine (78%), the Minority Community's candidates of choice would win the reconstituted election. Tr. D2 321:4-322:21; P-0087 at 4.

**V. Under the Totality of the Circumstances, the Political Process is Not Equally Open to Minority Voters**

55. The totality of circumstances inquiry under Section 2 evaluates the "Senate factors" detailed in a Senate Judiciary Committee report accompanying the 1982 renewal of the VRA ("Senate Report"). *Thornburg v. Gingles*, 478 U.S. at 36-37 (quoting S. Rep. No. 97-417, at 28-29 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 206-07) (internal quotation marks omitted). P-0078 at 2. All nine Senate Factors are present in Virginia Beach. P-0078 at 69.

56. Plaintiffs' expert Professor Allan Lichtman is an expert in statistical methods and qualitative research in American voting rights and elections. He is a Distinguished Professor of History at American University in Washington, D.C, and has authored numerous scholarly works on quantitative methodology in social science. He has worked as a consultant or expert witness for both plaintiffs and defendants in more than 90 voting and civil rights cases, and the U. S. Supreme Court has authoritatively cited his expert work. *LULAC v. Perry*, 548 U.S. 399, 427 (2006).

**A. Senate Factor One: A History of Official Discrimination in the State and City Has Affected Minority Groups' Ability to Register, Vote, or Otherwise Participate in the Democratic Process**

57. Virginia and the City have long, dismal histories of racial discrimination that have affected the Minority Community. See P-0078 at 4-13. Defendant Wooten acknowledged that “Virginia Beach has a long history of racial tension,” and that “many minority communities are still suffering some of the downstream effects of discrimination.” Tr. D2 392:22-24, 393:19-21.

58. In addition to direct restrictions on voting and voter registration, other forms of discrimination have burdened racial minorities, contributed to their isolation, and limited opportunities to improve their socio-economic status. This discrimination continues to impede the Minority Community’s full and effective participation in the City’s political process. P-0078 at 5.

59. In 2015, a federal court in this District held in *Page v. Virginia St. Bd. of Elections* No. 3:13CV678, 2015 WL 3604029, at \*15 (E.D. Va. June 5, 2015) that Virginia’s post-2010 congressional redistricting was unconstitutional because it needlessly packed Black voters into a single district, diminishing their political influence elsewhere in the State. In 2018, a federal district court also found “overwhelming evidence” that Virginia engaged in an unlawful racial gerrymander by sorting “voters into districts based on the color of their skin.” P-0078 at 10-11.

60. Uncontroverted testimony also showed that Latinos face adverse treatment compared to white people in seeking rental housing, partly due to hostility towards immigrants, generalized to all Latinos regardless of immigration status. P-0078 at 11.

61. The Virginia General Assembly has inflamed tensions around immigration, with the anti-sanctuary Senate Bill in 2019 barring any “locality [from adopting] any ordinance, procedure, or policy intended to restrict the enforcement of federal immigration laws.” All but one legislator representing Virginia Beach voted for the bill. The same year, the Virginia General Assembly passed House Bill 2270 which required correctional facility officials to notify the U.S.

Immigration Customs and Enforcement when immigrants were being released from custody. The Governor vetoed the bill. P-0078 at 11.

62. Like the State, the City has a history of discrimination from its founding in the 1960s through recent times. P-0078 at 12.

63. Dr. Lichtman in his testimony cited a study finding that the distribution of voting machines in both Richmond and Virginia Beach for the 2004 and 2008 elections was biased against voters in precincts with high proportions of Black individuals. P-0078 at 17. In 2004, higher ratios of registered voters per machine were associated with lower levels of voter participation in Norfolk, Richmond, and Virginia Beach, indicating that the disparate treatment likely deterred people from voting. The magnitude of the decline in voter participation in Virginia Beach was substantial: from high to low, on the order of 5 to 10 percent. P-0078 at 17. The City did not contest this evidence.

**B. Senate Factor Two: Voting in the City Council Elections Is Racially Polarized**

64. As discussed in PFOF ¶¶ 29-42, *supra*, voting in Virginia Beach elections is racially polarized.

**C. Senate Factor Three: The City Has Used Voting Practices and Procedures That Enhance the Opportunity for Discrimination Against Minorities**

65. Seven of the City Council's 11 seats are designated posts, a device the Senate Report recognized as one that often exacerbates the discriminatory effect of at-large elections. P-0082 at 10, 15. Single-shot voting for a preferred candidate in multi-winner elections allows minority voters to vote for only one candidate, increasing the vote total for a preferred candidate without increasing it for other candidates. The City's designated posts combined with at-large voting precludes single-shot voting by requiring voters to split their votes among seven residency district seats, enhancing the dilutive effect of at-large elections. P-0078 at 4, 21; P-0082 at 10.



66. The use of staggered elections for three non-designated posts further intensifies the dilutive impact of at-large elections. Under this staggered system, candidates compete for only one position in one election year and two positions in the next. This system renders single-shot voting impossible in a single-seat election and ineffective in a two-seat election. P-0082 at 10, 21.

67. The City's hybrid system is unique in the region and possibly the country. P-0082 at 10-12; DTX160 (Moss Dep.) at 152:19-21 (stating that the City's system is "extremely unusual").

68. Virginia Beach is unique among 13 cities of comparable size in Virginia in requiring all City Council candidates to run citywide. At 249 square miles, the City is essentially tied for second among those cities in the size of the area candidates must traverse to win a city council position. With a population of 450,000, the City has the largest electorate for which each candidate must compete. P-0078 at 22-24; P-0082 at 13, 15, 51; DTX163 (Abbott Dep.) at 51:19-52:3 (agreeing that it is unusual for a city the size of Virginia Beach to use an at-large system). Under Plaintiffs' proposed Plan 2, the mean district sizes would be 24.9 square miles, reducing the area for electoral competition by 90 percent. P-0082 at 51; DTX083 at 31.

**D. Senate Factor Four: Members of the Minority Community are Excluded from the Candidate Slating Process**

69. There is evidence of informal candidate slating in City Council elections. One way this occurs is by candidates uniting to fund each other's campaigns, and this type of combined support in Virginia Beach is largely confined to white candidates. P-0078 at 25.

70. Dr. Lichtman studied united funding in City Council elections from 2008-2018 and found that while 17 white candidates received \$250 or more from two or more other candidates, that was true for only two Black candidates (out of 20 from 2008-2018). P-0078 at 25.

71. When intra-election candidates (those who ran in City Council elections from 2008-2018 but not in the same year as the recipient of the contribution) are included in the analysis, seven white but no Black candidates received two or more intra-election donations (\$250 or more). In fact, the only Black candidates to garner *any* intra-election candidate contributions (one each) were Ross-Hammond (2016), Rouse (2018), and Wooten (2018). P-0078 at 25-27.

72. Another method of informal slating in City Council elections is through sample ballots. In 2018, Friends of the Elephant, a Political Action Committee, handed out sample ballots at one or more polling places with recommended candidates for office. These sample ballots were color coded, with one color for Black voters and another color for white voters. Aaron Rouse, a Black candidate for City Council, was included on sample ballots handed to Black voters, but not on the ones handed to white voters. DTX175 (Wood Dep.) at 76:10-77:13.

**E. Senate Factor Five: Minority Group Members Bear the Effects of Discrimination**

**i. Past discrimination continues to affect the socio-economic status of minorities in Virginia Beach**

73. The Minority Community in Virginia Beach continues to suffer the effects of past official discrimination and lacks certain rights afforded to whites. P-0078 at 28-36; DTX163 (Abbott Dep.) at 151:10 (agreeing that the City has a history of racial discrimination and that people in the Minority Community still endure downstream effects of long-term discrimination); DTX157 (Rouse Dep.) at 121:2-11 (same); Tr. D2 393:19-21 (Councilmember Wooten agreeing that minority communities in the City still suffer downstream effects of racial discrimination).

74. The deficient socio-economic position of minorities in Virginia Beach shows the lingering effects of past discrimination. Disparities between Black and white, Hispanic and white, and Asian and white communities exist with regard to per capita income, the poverty rate for

individuals, the percentage with SNAP assistance, median home values, and the percentage of 18-64 year-olds with no health insurance. P-0078 at 28-36.

**ii. Past discrimination continues to negatively impact the Minority Community compared to white residents of Virginia Beach with regard to Education**

75. The white community graduates from high school at the rate of 95.0%, while the Minority Community lags behind, with rates of just 89.4% for Black individuals, 88.7% for Hispanic individuals, and 91.8% for Asian individuals. P-0078 at 33. The Black and Hispanic communities, in particular, lag behind the white community in their passage rate in basic skills. For example, the English writing passage rate for white persons is 89% but just 68% for Black persons and 81% for Hispanic persons, with similar trends for reading, math, and science passage rates. P-0078 at 33.

76. Though the Virginia Beach Public School District temporarily showed progress toward integration after a 1969 court desegregation order, segregation in the District has increased since 1990. The District's Dissimilarity Index score, a commonly used measure of segregation, was 45.0 in 1968, 27.0 in 1990, 32.7 by 2000, and back up to 38.9 by 2011. P-0078 at 18.

77. The City lags in employing minority teachers relative to minority public school enrollment. In 2011, the City had one white teacher for every nine white students, but only one minority teacher for every 43 minority students. Virginia Beach's minority teacher employment levels in 2011 lagged behind Virginia overall. In Virginia, 43 percent of students and 17 percent of teachers were minorities; while in the City over 50 percent of students and just 15 percent of teachers were minorities. P-0078 at 20.

**iii. The legacy of discrimination affects the ability of the Minority Community to participate in the political process at the same level as white citizens**

78. The ongoing socioeconomic effects of past discrimination hinder the ability of minority voters in Virginia Beach to participate in the political process. P-0078 at 4-5.

79. Minority voter registration in Virginia trails white voter registration. On average, from 2008-2018, white registration as a percentage of CVAP was 74%, while it was only 66.1% for Black persons, 55.2% for Hispanic persons, and 64.2% for Asian persons. P-0082 at 23-24.

80. For all Virginia elections from 2008-2018, the average white voter turnout of 59.6% was higher than the 54.5% rate for Black voters, 44.4% for Hispanic voters, and 47.4% for Asian voters. Overall, the 56.4% voter turnout in Virginia Beach is significantly lower than the 71.5% statewide, even though the jurisdictions have very similar demographics. P-0082 at 18.

**F. Senate Factor Six: Overt and Subtle Racial Appeals in Political Campaigns**

81. Recent Virginia political campaigns and politics generally, including in Virginia Beach, have seen overt racial appeals, including racial slurs by a candidate for the U.S. Senate, a Governor's Confederate History Proclamation that did not mention slavery, racist depictions of President Obama, controversies about the Confederate flag and statutes, demonstrations by white supremacists in Charlottesville, and the distribution of color-coded sample ballots based on race. P-0078 at 39-44; P-0082 at 32-33; DTX175 (Wood Dep.) at 73:4-77:13.

82. There are also several documented instances of racial appeals in political campaigns in Virginia Beach. P-0078 at 40-41; P-0082 at 33-35; P-0419. In 1998, Louisa Strayhorn faced racial harassment in her unsuccessful reelection bid for the City Council after becoming only the second Black member ever elected four years prior. P-0078 at 42; Tr. D3 447:5-10.

83. In 2008, a flyer distributed in Black neighborhoods in the City showed white Republican Virginia Beach mayoral candidate Will Sessoms with a smiling Barack Obama, without the legally required attribution (*e.g.*, "paid for by ..."). P-0082 at 33, 34.

84. A second flyer circulated in the 2008 mayoral race, also without the legally required attribution, purported to represent "African Americans for Change." It claimed that Will Sessoms "will do more in his first term as mayor to contract with African Americans than the current mayor

has done in twenty years.” P-0082 at 33, 35. Both of these flyers in the 2008 mayoral race were racial appeals, trying to associate Sessoms with Obama and the purported group “African Americans for Change.” P-0082 at 33; Tr. D5 994:20-995:4; Tr. D3 448:9-17, 449:5-16.

85. In 2017, an ad for Del. Rocky Holcomb (R-85 Virginia Beach) claimed that his Democratic opponent wanted to reinstate parole in Virginia “and let rapists out of jail early.” The ad shows a dark hand over the mouth of a little girl who appears to be white. P-0078 at 44.

86. In 2019, Shannon Kane, a white Virginia Beach City Councilmember from 2014-2019, challenged Del. Kelly Fowler, who is of both Mexican and Filipino descent. Kane’s campaign sent a flyer with a photoshopped image of Fowler next to MS-13 gang members. The flyer stated: “Kelly Fowler. Good for illegal immigrants. Bad for us.” P-0419. Kane did not apologize to Fowler. Tr. D2 234:23-235:23; 257:24-258:1.

**G. Senate Factor Seven: The Extent to Which Members of the Minority Community Have Been Elected to Public Office in the Jurisdiction**

87. As previously discussed, Virginia Beach has a poor record in electing candidates of color to City positions, despite being one-third Hispanic, Black, and Asian by CVAP. P-0078 at 45, 69; PFOF ¶ 8.

88. In the City’s history, only one member of the Minority Community—Tina E. Sinnen, the current Filipina Circuit Court Clerk—has ever been elected to *any* of the City’s five constitutional offices. P-0078 at 45.

89. Only one of 11 members of the elected School Board, a Black woman named Sharon R. Felton, is a minority. A second Black woman, Jessica L. Owens, was appointed to the School Board in 2019, while this lawsuit was pending. P-0078 at 45.

**i. Representatives Aaron Rouse and Sabrina Wooten Were Elected Under Special Circumstances**

90. The unprecedented election of two Black candidates, Aaron Rouse and Sabrina Wooten, to the City Council in 2018, after the filing of this suit, reflects special circumstances. Both Rouse and Wooten received unusual white support as compared to all other Black City Council candidates since 2008. DTX155 (Hansen Dep) at 60:13-17 (admitting that Aaron Rouse received the most votes for City Council that he had ever seen). White voters' support for Rouse's candidacy was 15.4 percentage points (179%), higher than their average support for the five other Black candidates who ran for at-large seats since 2008. Wooten was the only Black candidate for City Council in Virginia Beach since 2008 to win a majority of the white vote. P-0078 at 45-49.

91. No Black candidates other than Rouse and Wooten have garnered substantial contributions from white donors. All five major white donors in City Council elections donated to *both* Rouse and Wooten and all in the amount of \$1,000 or more. No other candidate garnered contributions from all five major donors in 2018. Prior to 2018, none of Rouse's or Wooten's top white donors had ever contributed to a non-incumbent Black candidate. P-0082 at 39, 55.

**H. Senate Factor Eight: Elected Officials' Failure to Respond to the Particularized Needs of the Minority Community**

**i. The Rocky Path to Commissioning a Disparity Study**

92. The City Council's years of rejecting or ignoring the Minority Community's persistent calls for a disparity study of city contracts illustrates the City's lack of responsiveness to minority residents. Tr. D1 57:25-59:11 (Allen testimony); Tr. D3 452:23-453:6 (Strayhorn testimony); Tr. D3 498:10-20 (Jackson testimony).

93. In 2008, the City set an aspirational goal of 10 percent for minority participation in city contracts overall. Since then, the City has failed to reach this goal even though the City is about one-third minority. P-0277 at 4, 22; P-0429; Tr. D5 833:11-16 (Questioning from the Court);

845:9-846:21 (Adams testimony for 2008 to 2016 data); 855:2-14 (Adams testimony for 2017-2018 data); 857:6-14 (Adams testimony for 2019 data).

94. The Minority Community lobbied for over nine years to obtain a disparity study of city contracts. Mr. Jackson testified that he was aware that the Minority Community made efforts to get a disparity study from at least 2008. Tr. D3 498:10-16. The Minority Business Council also began advocating for a disparity study in 2011. Tr. D3 452:12-453:6 (Strayhorn testimony). In 2016, Black former-NFL player and Virginia Beach resident Bruce Smith, who claimed that the City had turned him down for multiple projects at least in part because of his race, began to publicly call for a disparity study, and offered to cover half its cost. P-0078 at 61; Tr. D2 384:5-385:11. The Minority Business Council voted in 2017 to reaffirm its 2011 request that the City Council conduct a disparity study. Tr. D2 399:6-25. In 2017, leaders of the Minority Community organized the Faith, Freedom and Justice March to call for a disparity study. Tr. D2. 385:16-20; Tr. D2 224:15-225:1; Tr. D1 58:1-59:1.

95. In 2017, the Virginia Beach City Council finally authorized a disparity study of city contracts (“the Disparity Study”), JSF 43, but only after years of requests and pressure, and after accepting Bruce Smith’s offer to pay half the costs of the study. Even after the Disparity Study was approved, disputes continued about the timeline for the study and the City’s failure to communicate with Mr. Smith about the process. P-0344; P-0345.

#### **ii. The Disappointing Results of the Disparity Study**

96. The City released the results of the Study in January 2019. The study computed a “Disparity Index” measuring the difference between the availability of minority-owned businesses for contracts and their actual participation. A disparity index level of 80 or below “indicates a substantial disparity.” P-0078 at 61; P-0298. As shown below, the results showed a substantial

disparity in the participation of minority-owned businesses in contracts that the City awarded during the study period. P-0298 at 13, 18.

97. Among minority-owned businesses, firms with Black owners were the minority group available for the largest share of city contracts at 8.1 percent, but received only 4.5 percent, a disparity index of 56, well below the threshold of 80. P-0078 at 61; P-0298.

98. Hispanic-owned business had the second highest eligibility among minority-owned businesses at 2.7 percent, but received only 0.5 percent of city contracts, a disparity index of 20. P-0078 at 61; P-0298.

99. Asian-American owned businesses had an eligibility percentage of just 0.8 percent, and received 5.6 percent of city contracts, for a disparity index of 700. P-0078 at 61; P-0298. Asian-American owned businesses accounted for just seven percent of eligible business owned by members of the three minority groups, but accounted for 53 percent of the contracts that awarded to minority businesses. However, these contracts were not spread among the community; 86 percent of the total dollars went to a *single* Asian-American owned business. P-0298 at 74; Tr. D5 833:24-834:15 (Adams testimony).

100. The Disparity Study identified numerous deficiencies in City policies that, if rectified, could help achieve greater participation for minority-owned businesses. P-0078 at 61. The Disparity Study recommended that Virginia Beach create an office dedicated to implementing the City's Small, Women, and Minority owned businesses (SWaM) program. P-0298 at 97-98; Tr. D2 389:15-22. The City has refused repeated requests by Council member Wooten for changes to reduce disparities in the City. Tr. D2 389:19-390:1 (stating that she requested that the City increase the funding for a staff member for the implementation of the Disparity Study but that was initially not approved).



**iii. Disparities in Hiring Practices of the Virginia Beach Police Department**

101. City hiring lags behind demographic changes. In 2006, for example, a consent decree between the U.S. Justice Department and the City and its police force, noted: “the City has pursued policies and practices that discriminate against and deprive or tend to deprive African Americans and Hispanics of employment opportunities because of their race and national origin.” P-0078 at 59-60.

102. The consent decree did not end the disparity. As of the 2010 Census, the Minority Community made up 32.6% of the adult population in Virginia Beach, but, as of 2015, only 15.5% of the City’s police force. Specifically, the force was only 9.4% Black (compared to 18.9% of the adult population), 3.3% of Hispanic (compared to 5.6% of the adult population), and 2.2% Asian (compared to 7.2% of the adult population). P-0078 at 65-67.

**iv. Neglect of Burton Station Community**

103. Defendants’ witness Taylor Adams testified that the Burton Station community “is an historically strong African-American community in Virginia Beach, who have been somewhat vocal regarding their lack of – their feelings on a lack of resources in the past that have been provided by the City.” Tr. D5 867:19-23. Mr. Adams also explained that it was only in the last five years that the City worked on the sewer and water project for Burton Station. Tr. D5 867:1-8. Defendants offered no evidence that there were white areas or neighborhoods in the City that were neglected in terms of basic needs such as adequate water supply and sewer services.

**I. Senate Factor Nine: The Continued Use of At-large Elections Is Unjustified**

104. There is no justification for the City Council’s current election system other than complacent acceptance of a system that, since 1966, has reliably elected white candidates to office and blocked the Minority Community’s candidates of choice.

105. Six of 12 other large cities in Virginia use either a district system or a mixed at-large/district system for their city elections, with the majority elected from districts. P-0078 at 68.

106. Even among other large cities using an at-large system, none shares Virginia Beach's problematic combination of at-large elections, designated posts for most positions, and staggered terms. P-0078 at 68.

## **CONCLUSIONS OF LAW**

After consideration of the evidence before this Court and the applicable law, the Court concludes that, for the reasons provided below, the City of Virginia Beach's method for electing City Council members deprives its Hispanic, Black, and Asian-American residents of an equal opportunity to elect candidates of their choice, in violation of Section 2 of the Voting Rights Act.

### **I. Jurisdiction**

1. This Court has federal jurisdiction pursuant to 28 U.S.C. § 1343(a). This Court has jurisdiction to grant relief pursuant to 28 U.S.C. §§ 2201 and 2202.

### **II. Section 2 of the Voting Rights Act**

2. Section 2 of the VRA prohibits the "impos[ition] or appli[cation]" of any electoral practice that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 52 U.S.C. § 10301(a). The Supreme Court has held that "the Act should be interpreted in a manner that provides 'the broadest possible scope' in combating racial discrimination." *Chisom v. Roemer*, 501 U.S. 380, 403 (1991) (quoting *Allen v. State Bd. of Elections*, 393 U.S. 544, 567 (1969)).

3. A Section 2 vote dilution claim has two components. *First*, Plaintiffs must satisfy the three preconditions set forth in *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). *Second*, Plaintiffs must demonstrate that, based on the totality of circumstances, "a challenged election

practice has resulted in the denial or abridgement of the right to vote based on color or race.” *Chisom*, 501 U.S. at 394.

4. Vote dilution claims are “‘peculiarly dependent upon the facts of each case’ . . . and require[] ‘an intensely local appraisal of the design and impact’ of the contested electoral mechanisms.” *Lewis v. Alamance Cty., N.C.*, 99 F.3d 600, 625 n.5 (4th Cir. 1996). Thus, the Court must assess how at-large elections operate in Virginia Beach and determine whether the Minority Community has actual, not hypothetical, equal access to the political process.

5. Two or more politically cohesive minority groups can bring a claim as a coalition under Section 2. The Supreme Court has declined to reach this issue, *see Bartlett v. Strickland*, 556 U.S. 1, 13–14 (2009), but previously assumed without deciding that a minority voter coalition could satisfy Section 2. *Grove v. Emison*, 507 U.S. 25, 41 (1993). The Fourth Circuit also has not addressed the question,<sup>10</sup> but most courts, including the Second, Fifth, and Eleventh Circuits, have recognized coalition claims under Section 2. *See Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 276–77 (2d Cir. 1994), *vacated on other grounds*, 512 U.S. 1283 (1994); *Concerned Citizens of Hardee Cty. v. Hardee Cty. Bd. of Comm’rs*, 906 F.2d 524, 526 (11th Cir. 1990); *Campos v. City of Baytown, Tex.*, 840 F.2d 1240, 1244 (5th Cir. 1988). The Ninth Circuit has implicitly agreed, stating that “[p]laintiffs must be able to show that minorities have in the past voted cohesively for minorities and have the potential to elect minority representatives.” *Badillo v. City of Stockton, Cal.*, 956 F.2d 884, 891 (9th Cir. 1992). The Sixth Circuit is the lone outlier. *See Nixon v. Kent Cty.*, 76 F.3d 1381 (6th Cir. 1996) (*en banc*).

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<sup>10</sup> Defendants’ reliance on *Hall v. Virginia*, 385 F.3d 421 (4th Cir. 2004) on this question, is misplaced. That case concerns “crossover” districts (*i.e.*, whether whites cross over and vote with minorities), not coalition claims. *See Bartlett*, 556 U.S. at 13 (distinguishing between crossover claims and coalition claims and explaining why crossover claims are analytically distinct and cannot be conflated with coalition claims).

6. This Court follows the prevailing rule allowing coalition claims under Section 2. The inclusive language of Section 2, protecting “any citizen” against denial or abridgement of voting rights on account of race, color, or membership in a language minority, 52 U.S.C. § 10301(a), recognizes that discrimination in voting does not target any one race. When § 10301(b) refers to “participation by members of *a class* of citizens protected by subsection (a),” *Nixon*, 76 F.3d at 1386-87 (quoting 52 U.S.C. § 10301(b)) (emphasis in original), it means the class of people whose rights were denied or abridged in violation of subsection (a). The class is defined by exclusion from the political process on account of race, not by the particular race or color of the people excluded. Nothing in the statutory text requires every member of this “class” to be of the same race.

### **III. Standing**

7. Plaintiffs Latasha Holloway and Georgia Allen have standing because they are registered voters, members of the Minority Community, and live in areas that could comprise a single-member district in which the Minority Community, or alternatively Black and Hispanic members, are a majority of the population using either Citizen Voting Age Population (“CVAP”) or Voting Age Population (“VAP”).<sup>11</sup> PFOF ¶¶ 2-3, 11, 26-28.

### **IV. Plaintiffs Have Established the Three *Gingles* Preconditions**

#### **A. *Gingles* I: Plaintiffs Have Demonstrated that the Minority Community is Sufficiently Large and Geographically Compact to Constitute a Majority in a Single-Member District.**

##### **i. Legal Standard**

8. To satisfy the requirements of *Gingles* I, Plaintiffs must show that the Minority Community is “sufficiently large and geographically compact to constitute a majority in a single-

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<sup>11</sup> Defendants previously argued that Plaintiffs did not have standing but this Court rejected that argument, *See* ECF Nos. 150, 168, and does so again.

member district.” *Gingles*, 478 U.S. at 50. To make this showing, plaintiffs must create an illustrative plan with a single-member district in which the Minority Community constitutes a majority of the voting age population. See *Bartlett*, 556 U.S. at 18 (2009) (stating that *Gingles I* asks a simple threshold question: whether the protected group of voters can make up “more than 50 percent of the voting-age population in the relevant geographic area?”).

**ii. Plaintiffs Have Satisfied the Requirements of *Gingles I***

9. Plaintiffs have more than satisfied this requirement. Their expert, Anthony Fairfax, drew multiple illustrative plans that meet the *Gingles* requirements. He drew eight illustrative plans with 10 single-member districts and two plans with a single illustrative district. PFOF ¶¶ 22-28.<sup>12</sup> Each plan has at least one majority-minority district using CVAP, and eight of the 10 plans have *two* single member majority-minority districts by CVAP. Further, eight of the plans have at least one majority-minority district by VAP (of those, three have two majority-minority districts by VAP). *Id.* Additionally, Mr. Fairfax drew one plan where the Hispanic and Non-Hispanic Black populations together constitute a majority of one single member district’s CVAP. *Id.* Every one of these illustrative plans shows that it is possible to draw majority-minority districts compliant with traditional redistricting principles, as *Gingles I* requires.<sup>13</sup>

**B. *Gingles II* and *III*: Plaintiffs have Demonstrated that the City Has Racially Polarized Voting and that Minority-Preferred Candidates Usually Lose Their Elections Due to White Bloc Voting**

**i. Legal Standard**

10. Together, prongs II and III of *Gingles* ask first, whether minority and white voters tend to “vote *differently*,” *i.e.*, whether there is racially-polarized voting, *Gingles*, 478 U.S. at 53

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<sup>12</sup> Mr. Fairfax is a recognized expert demographer and creator of legally compliant redistricting plans in the context of Section 2 analysis. PFOF ¶ 17.

<sup>13</sup> Contrary to Defendants’ meritless arguments, Mr. Fairfax testified that race did not predominate in the drawing of any of the illustrative districts. Tr. D1 135:3-8.

n.21 (emphasis added); and second, whether the minority’s preferred candidates “usually” lose to candidates preferred by white voters, *id.* at 50-51.

11. *Gingles* II is satisfied where a minority group or coalition is politically cohesive. *See id.* at 51, 56. One example of cohesiveness is where “a significant number of minority group members usually vote for the same candidates,” *Levy v. Lexington Cty., S.C.*, 589 F.3d 708, 719-20 (4th Cir. 2009) (citation omitted). Plaintiffs can establish cohesiveness by showing that voting is racially polarized, *i.e.*, there is “a consistent relationship between [the] race of the voter and the way in which the voter votes, or to put it differently, where black voters and white voters vote differently,” *Gingles*, 478 U.S. at 53 n.21 (alteration in original) (citations and internal quotation marks omitted). This “consistent relationship” does not preclude overlap in racial preferences, as “the *Gingles* standard presupposes the existence of crossover voting.” *Jenkins v. Red Clay Consol. Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1123 (3d Cir. 1993).

12. Plaintiffs can satisfy *Gingles* III by demonstrating that the white majority votes sufficiently as a bloc to enable it, absent special circumstances, usually to defeat the minority’s preferred candidates. *See Gingles*, 478 U.S. at 50-51. For racially polarized voting to be “legally significant” in Section 2 cases, “minority voters must ‘usually’ vote for the same candidates, and white bloc voting must ‘normally’ or ‘generally’ lead to the defeat of minority-preferred candidates.” *United States v. Charleston Cty., S.C.*, 365 F.3d 341, 348 (4th Cir. 2004).

13. *Gingles* II and *Gingles* III require this Court to “first identify those individuals who constitute minority-preferred candidates of choice, and then analyze whether those candidates are usually defeated by majority White bloc voting.” *Levy*, 589 F.3d at 716.

**ii. Relevant Elections for Evaluating *Gingles* II and *Gingles* III**

14. Not all elections are equally probative for *Gingles* II and *Gingles* III. *First*, uncontested elections, for example, have no probative value. *Gingles*, 478 U.S. at 57; *Harvell v. Blytheville Sch. Dist. No. 5*, 71 F.3d 1382, 1389 (8th Cir. 1995). *Second*, absent special circumstances, more recent elections are generally more probative. *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1020-21 (8th Cir. 2006). *Third*, although “endogenous” elections (those within the jurisdiction at issue) are more probative than “exogenous” ones (elections for offices not at stake in the litigation), the latter can still be probative in determining the extent of racial polarization in voting. *See, e.g., Cane v. Worcester Cty., Md.*, 840 F. Supp. 1081, 1088 (D. Md. 1994) (“plaintiffs may rely on factors beyond endogenous election data that prove political cohesion,” including exogenous elections). *Fourth*, elections where “the minority’s only choice is to vote for a white candidate or not vote at all . . . are, in general, less probative on the issue of racial polarization than elections involving both black and white candidates.” *Lewis*, 99 F.3d at 623; *see also United States v. Charleston Cty., S.C.*, 365 F.3d at 350 (“elections involving minority candidates may be more probative ‘on the question of whether racial polarization exists’”) (*citing Lewis*, 99 F.3d at 610 n. 8). *Fifth*, elections marked by special circumstances have less probative value. *See Gingles*, 478 U.S. at 75-76; *see also Ruiz v. City of Santa Maria*, 160 F.3d 543 at 557-58 (elections “not representative of the typical way in which the electoral process functions” have less probative value).

**iii. Identifying Minority-Preferred and White-Preferred Candidates**

15. To analyze whether Plaintiffs have met *Gingles* II and III, the Court has performed “an intensely local appraisal” of whether the Minority Community has candidates of choice and, if so, identify them. *Gingles*, 478 U.S. at 78 (citation omitted). Answering the *Gingles* II and III

threshold questions “typically requires a statistical and non-statistical evaluation” of the voting behavior and election results. *Bone Shirt*, 461 F.3d at 1020.

16. Political scientists use statistical methods to determine the voting behavior of the Minority Community. PFOF ¶ 30. Courts have recognized ecological inference as the “gold standard,” *Wright v. Sumter Cty. Bd. of Elections & Registration*, 301 F. Supp. 3d 1297, 1305 (M.D. Ga. 2018), *aff’d*, No. 18-11510, 2020 WL 6277718 (11th Cir. Oct. 27, 2020), for determining whether voting is racially polarized. *See also Bethune-Hill v. Virginia State Bd. of Elections*, 141 F. Supp. 3d 505, 559 (E.D. Va. 2015), *aff’d in part, vacated in part*, 137 S. Ct. 788 (2017) (rejecting racially polarized voting analysis because it *only* included “ecological regression” rather than “ecological inference.”)

#### **iv. Dr. Spencer’s Statistical Analysis**

17. For the reasons below, this Court concludes that Plaintiffs’ evidence meets the requirements of *Gingles* II and III. Plaintiffs’ expert, Dr. Douglas Spencer analyzed City Council elections from 2008 to 2018 using three different methods: Homogenous Precincts (HP), Ecological Regression (ER), and Ecological Inference (EI). PFOF ¶¶ 30, 37-39. Dr. Spencer identified 17 probative City Council elections between 2008 and 2018. PFOF ¶ 39. In order to reliably measure cohesion in voting within the Minority Community in those elections, Dr. Spencer estimated the joint preference of non-white voters overall, as well as the individual preferences of Black voters and white voters. PFOF ¶¶ 32-36. Determining the aggregate preference for non-white voters was necessary because the City’s Asian and Hispanic populations make it difficult to individually ascertain their preferred candidates using election returns by precinct. PFOF ¶ 33. Dr. Spencer analyzed each of the probative elections using HP, ER, and EI,



relying most heavily on EI to determine the candidate of choice of the minority and non-minority communities.

18. This Court credits Dr. Spencer 's analyses and testimony, which found clear racial polarization in voting in each of the probative elections. PFOF ¶¶ 37-39. Dr. Spencer buttressed this finding with evidence of racially polarized voting in four federal elections. PFOF ¶¶ 40-42.

19. Special circumstances existed in three of the analyzed City Council elections. First, in 2012 when Ms. Amelia Ross-Hammond was elected, she won as the candidate of choice of the Minority Community with approximately 32.2 percent of the vote because white voters split their support among three white candidates. P-0077 at 21. The Supreme Court and this Court have recognized that when a minority group elects their candidate of choice only because white voters split their votes, that is a special circumstance under Section 2. *City of Rome v. United States*, 446 U.S. 156, 183-84 (1980); *Neal v. Coleburn*, 689 F. Supp. 1426, 1436 (E.D. Va. 1988).

20. Prior to 2018, only three Black candidates had ever been elected to the City Council, PFOF ¶ 8, and prior to 2020 none won re-election. In March 2018, Plaintiffs filed their Amended Complaint in this action. After that, for the first time, two Black candidates, Aaron Rouse and Sabrina Wooten, won seats on the City Council in the same election, with record white support. PFOF ¶¶ 90-91. The Fourth Circuit has recognized the existence of special circumstances where candidates of color won election after commencement of a Section 2 suit. *Collins v. City of Norfolk, Va.*, 883 F.2d 1232, 1241-2 (4th Cir. 1989) ("*Collins II*") (noting that white support for a Black candidate had "never...remotely approached 26.6%" and that the mayor, while a defendant,

had publicly stated, while supporting a black candidate for the City Council for the first time “after the election, the issue of black representation may become a moot point.”).<sup>14</sup>

21. Dr. Spencer’s finding that only 47% or 53% of the Minority Community’s preferred candidates were successful in their elections, while either 93% or 87%<sup>15</sup> of the white community’s preferred candidates were successful, establishes that white bloc voting regularly defeats the Minority Community’s preferred candidate and dilutes their votes. PFOF ¶ 39.

**a) Performance of Mr. Fairfax’s Illustrative Districts**

22. This Court concludes that the Minority Community would increase their opportunity to elect candidates of their choice under the various illustrative plans. To test the effectiveness of Mr. Fairfax’s plans, Dr. Spencer analyzed how the majority-minority districts in Plans 2, 6, 7, and 8 would have performed using past election contests. PFOF ¶ 49-54. An illustrative plan need not result in the Minority Community’s preferred candidates winning every election. It simply requires that the Minority Community have a greater *opportunity* to participate in the political process and to elect candidates of their choice. In *all* of the 18 illustrative districts analyzed, Dr. Spencer found that the Minority Community would increase their opportunity to elect candidates of their choice compared to the status quo. *Id.* The success rate went from 14% under the current system to, for example, 57% for District 1 and 86% for District 2 in Plan 2. PFOF ¶ 49-54. If the two at-large elected seats in 2018 are included in the analysis of Plans 6, 7 and 8,

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<sup>14</sup> Aaron Rouse is also an ex-pro football player, a fact which courts have before found established special circumstances in combination with the pendency of litigation. *See, e.g., Gunn v. Chickasaw Cty.*, 1997 WL 33426761, \*4 (N.D. Miss. Oct. 28, 1997).

<sup>15</sup> The white community’s second choice candidate in the 2018 at-large election was not clear from the statistical analysis. White voters clearly preferred Mr. Moss as their top choice, but their support split fairly evenly between Ms. Oliver and Mr. Rouse. If Mr. Rouse is included as a candidate of choice of the white community, then their candidate of choice won in 14 out of 15 elections. If Ms. Oliver is included as their candidate of choice, then white voters’ candidate of choice has won in 13 out of 15 elections.

Prof Spencer found that the electoral success rate goes from 22% under the status quo to 56% in District 1 and 78% in District 2. PFOF ¶ 54

**v. Dr. Kidd’s Approach for Identifying Minority-Preferred Candidates Among Minority Voters Is Unreliable**

23. Defendants’ expert, Dr. Kidd opined on whether voting in the City is racially polarized, but did not conduct his own analysis of racially polarized voting. Tr. D5 882:3-23. First, Dr. Kidd’s experience in this area is limited, and his opinions suffer from methodological defects. Tr. D5 883:20-25. Second, his critique of Dr. Spencer’s combined estimate at least in part relied on different levels of turnout for Black, Hispanic, and Asian voters. Courts have repeatedly discounted efforts to disprove a Section 2 claim by positing differential turnout rates. *See, e.g., Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1405 (E.D. Wash. 2014) (“[T]he Ninth Circuit has prohibited district courts from discounting statistics about a minority group’s candidate preferences on the basis of low voter turnout.”). Third, Dr. Kidd’s opinion that a candidate of choice must receive 50%+1 or more support in *every* election makes no sense in the many multi-candidate races in Virginia Beach. Minority preferred candidates *have won* with less than 50% of the vote, which is a fair measure of success. *See Lewis*, 99 F.3d at 613 n. 10 (holding that candidates are not required to “achieve a threshold of 50% in a multi-candidate election” to be considered a minority-preferred candidate). This Court therefore rejects Dr. Kidd’s testimony as unreliable and unsupported by any independent analysis.

**vi. There Is Voluminous Qualitative Evidence of Cohesion Amongst the Minority Community**

24. In addition to the quantitative evidence, Plaintiffs have also demonstrated cohesiveness through qualitative evidence. “The experiences and observations of individuals involved in the political process are clearly relevant to the question of whether the minority group

is politically cohesive.” *Sanchez v. Bond*, 875 F.2d 1488, 1494 (10th Cir. 1989). In *Bridgeport Coal. for Fair Representation*, for example, the statistical evidence was strong for one of the groups in the coalition and lacking for the other, but the court found sufficient evidence of cohesiveness by considering qualitative evidence from the community. 26 F.3d at 276. Even absent any statistical evidence, a court could still find that qualitative evidence established political cohesiveness. See *Arbor Hill Concerned Citizens Neighborhood Ass’n v. Cty. of Albany*, 2003 WL 21524820 at \*8-9 (N.D.N.Y. 2003).

25. The Court finds that the Plaintiffs have met the requirements of *Gingles* II and III and established political cohesiveness with qualitative evidence showing that: 1) the City itself treats the Minority Community as one group; 2) elected officials’ treat the Minority Community as one group; 3) the Minority Community has shared interests; and 4) the Minority Community works together as a unified coalition. See PFOF ¶¶ 43-48.<sup>16</sup> In sum, this evidence shows cohesiveness as well as racial polarization in voting in Virginia Beach, accompanied by white bloc voting that usually defeats the Minority Community’s preferred candidates.

**V. Under the Totality of the Circumstances, It is Clear that the Political Process is not Open to Members of the Minority Community**

26. If the three *Gingles* preconditions are satisfied, “then the trier of fact must determine whether, based on the totality of the circumstances, there has been a violation of Section 2.” *United States v. Charleston Cty., S.C.*, 365 F.3d at 345. The Fourth Circuit has recognized that, where “a plaintiff [has] established the *Gingles* prerequisites, that plaintiff is likely to succeed under the totality of the circumstances.” *Baten v. McMaster*, 967 F.3d 345, 379 (4th Cir. 2020), as amended (July 27, 2020). The Court concludes that Plaintiffs have more than met their burden.

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<sup>16</sup> Defendants’ lay witnesses also testified that there was cohesion among the minority groups. PFOF ¶ 48.

27. In the “totality of circumstances” evaluation, courts look to nine factors. *See* S. Rep. No. 97-417, at 28-29; *see also Gingles*, 478 U.S. at 44-45. Applying these Senate Factors, the Court concludes that the Minority Community has less opportunity than other members of the electorate to participate in the political process and elect candidates of their choice.<sup>17</sup>

**A. Senate Factor One: History of Official Discrimination**

28. Senate Factor One weighs in favor of Plaintiffs. A long history of official discrimination in the City and Commonwealth has affected all people of color, and persists to this day. PFOF ¶¶ 57-63. *Neal v. Coleburn*, 689 F. Supp. at 1428 (“Virginia and its political subdivisions bear a history of official racial discrimination.”). The history of public racial discrimination includes: (1) literacy tests until 1974; (2) an unconstitutional poll tax that existed until 1966; (3) racial segregation until 1963; (4) upholding its interracial marriage ban in 1955; and (5) maintaining this ban until the Supreme Court struck it down in 1967.<sup>18</sup>

**B. Senate Factor Two: Voting in City Council Elections is Racially Polarized**

29. Elections in the City suffer from stark racial polarization. PFOF ¶ 29-42.

**C. Senate Factor Three: Discriminatory Voting Practices or Procedures**

30. The City uses several voting practices or procedures that increase discrimination against the Minority Community in City elections, including at-large elections, numbered posts, anti-single shot voting, and staggered elections. PFOF ¶¶ 65-68.

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<sup>17</sup> Plaintiffs need not prove “any particular number of factors . . . or that a majority of them point one way or the other.” *Montes*, 40 F. Supp. 3d 1377.

<sup>18</sup> Dr. Kidd does not try to rebut Plaintiffs’ evidence regarding discrimination, but instead concludes that Hispanics and Asians have not suffered from a long history of discrimination because their voting turnout rates are similar to those for non-Hispanic whites. However, Dr. Kidd only uses statewide, not Virginia Beach, turnout data. As discussed *infra*, Dr. Lichtman, Plaintiffs’ expert in statistical methods and qualitative research in American voting rights and elections, found that the Minority Community’s voter turnout percentage in Virginia Beach was lower than that of non-Hispanic whites. P-0082 at 17-20.

31. The Supreme Court has found that at-large voting schemes can “minimize or cancel out the voting strength of racial [minorities in] the voting population.” *Gingles*, 478 U.S. at 47 (alteration in original) (citation omitted); *Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994); *Collins II*, 883 F.2d at 1236 (at-large system and staggered terms can dilute minority votes). At-large voting, on top of socioeconomic disparities by race in the City, disadvantages Minority candidates who “are likely to have less access to the necessary resources for travel and advertising” outside the immediate area surrounding the candidates’ homes. *Ward v. Columbus Cty., N.C.*, 782 F. Supp. 1097, 1104 (E.D.N.C. 1991). This is especially so in the unusually large 249 square mile Virginia Beach. PFOF ¶ 68.

32. The City’s use of staggered terms “promote the dilution of minority voting strength because they limit the number of seats, [and] create more head-to-head contests between white and minority candidates, which highlight the racial element and minimize the influence of single-shot voting.” *Buckanaga v. Sisseton Indep. Sch. Dist. No. 54-5, S.D.*, 804 F.2d 469, 475 (8th Cir. 1986). Staggered terms, as well as numbered posts, prevent the Minority Community from concentrating their votes on a single candidate and increasing the chances that that candidate gets elected. PFOF ¶¶ 65-68.<sup>19</sup>

#### **D. Senate Factor Four: Exclusionary Slating Processes**

33. Senate Factor 4 also weighs in favor of Plaintiffs. Under this factor, “if there is a candidate slating process,” this Court must consider “whether members of the minority group have been denied access to that process.” *Gingles*, 478 U.S. at 37. As shown by the evidence, slating occurs in Virginia Beach in two ways. First, white candidates help fund each other’s campaigns,

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<sup>19</sup> Defendants’ expert Dr. Kidd opined that the City does not have an “unusual” method of electing City Councilmembers, but he failed to identify a single jurisdiction that has all of the elements present in Virginia Beach. Thus, this factor weighs in favor of Plaintiffs.

but largely exclude minority candidates from this validation. PFOF ¶¶ 69-71. Second, Defendants have acknowledged another method of informal slating in City Council elections: sample ballots. At least once, color-coded ballots were differentially distributed based on the race of the voter and the candidate. PFOF ¶ 71.

**E. Senate Factor Five: Minorities Bear the Effects of Discrimination**

34. The evidence as a whole demonstrates that the shameful history of racism and discrimination in Virginia Beach has caused continuing disparities between Black and white, Hispanic and white, and Asian and white communities with regard to median and per capita income, poverty rate for individuals, percentage with SNAP assistance, median home values, graduation rates, and the lack of health insurance. PFOF ¶¶ 73-80. This, in turn, also undermines and inhibits participation by the Minority Community in the political process. *Id.*

**F. Senate Factor Six: Overt and Subtle Racial Appeals in Political Campaigns**

35. The sixth Senate Factor likewise supports Plaintiffs' claim. PFOF ¶ 81-86. Racial appeals can take a variety of forms, including use of racially charged campaign tactics and highlighting of racially charged campaign issues. The PFOFs detail uncontroverted instances of overt racial attacks on minority candidates, and racial appeals used against them. PFOF ¶ 81-86.

**G. Senate Factor Seven: The Number of Elected Minorities**

36. This factor also weighs in favor of Plaintiffs. In a city that is one-third minority, only five Black candidates, one Asian-American candidate, and no Latino candidates have ever been elected to the City Council.<sup>20</sup> PFOF ¶¶ 87-89. Of the five Black candidates, three, as noted, reflect special circumstances. PFOF ¶¶ 90-91. Ms. Wooten's re-election in the 2020 November

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<sup>20</sup> As set out in PFOF ¶ 8, Defendants assert that Ms. Bellitto identifies as Puerto Rican but provided no proof for this assertion. Thus, Plaintiffs maintain that no Latino candidates have ever been elected to the City Council in Virginia Beach.

election is also a special circumstance; she is the only Black candidate to ever be re-elected, which also occurred during the pendency of and after trial in this litigation.

**H. Senate Factor Eight: Unresponsive Elected City Officials<sup>21</sup>**

37. Although the Senate report provides that “[u]nresponsiveness is not an essential part of plaintiff’s case,” S. Rep. No. 97-417, at 29 n.116, Plaintiffs have presented ample evidence demonstrating this factor.

38. The City Council’s years of rejecting and ignoring the Minority Community’s persistent calls for a disparity study of City contracts illustrate the City’s lack of responsiveness to the needs of minority residents. PFOF ¶¶ 92-100. Beginning in 2011, there were letters, marches, and Council testimony, but it *still* took over nine years for the City to agree to conduct the study. Given this delay, and given that it took an offer from a minority contractor to pay half the costs of the study to precipitate action, the City can hardly congratulate itself regarding this review.

39. The results of the disparity study, released in January 2019, demonstrate the persistence of discrimination. Defendants claim they have met their aspirational goal of awarding 10% of the City’s contracts to minority-owned businesses.<sup>22</sup> However, their own witness conceded that—when using the metrics outlined in the City’s own resolution—the City continues to allocate significantly less than 10% of city contracts to minority businesses. Tr. D5 843:24-844:13. In fact, the City has *never* met its 10% goal, and Defendants’ claim to the contrary is troubling, to say the least. Tr. D5 at 844:16-846:23, 854:10-859:24; P-0277 at 4; P-0429 at 17. In other areas, Plaintiffs’ evidence also showed examples of persistent unresponsiveness to the needs of the Minority

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<sup>21</sup> Defendants’ expert Dr. Kidd did not opine on this Senate Factor.

<sup>22</sup> As explained in ¶ 39, this claim is incorrect, and the City awards much less than 10% of City contracts to the Minority Community per fiscal year. However, even if accurate, it would mean that 90% of City contracts go to white businesses, despite the fact that the City’s Hispanic, Black, and Asian population is around one-third of the City.



Community, including discriminatory hiring practices with respect to the City’ police force and the neglect of historically Black Burton Station. *See* PFOF ¶¶ 101-103.

**I. Senate Factor Nine: Unjustified Method of Elections**

40. The last factor—whether the justifications for the City’s discriminatory voting practices are “tenuous,” *see Gingles*, 478 U.S. at 45—also weighs heavily in favor of Plaintiffs. Here, the justifications are not merely tenuous; they do not exist. The continuation of the City’s current election system reflects, at best, complacent inertia: satisfaction with a system that, since 1966, has reliably elected white candidates and white candidates of choice. Virginia Beach stands alone in the State with its troublesome combination of voting procedures that harm minority voters.

**VI. CONCLUSION**

41. For all of the above reasons, this Court concludes that the City’s at-large method for electing City Council members deprives its Minority Community—Hispanic/Latino, Black, and Asian—of an equal opportunity to elect representatives of their choice in violation of Section 2 of the Voting Rights Act. Accordingly, the Court in a separate order will enjoin the Defendants from conducting any further elections for the City Council under the current electoral system. The Court will also set a briefing schedule on remedies forthwith.

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**CERTIFICATE OF SERVICE**

I hereby certify that on December 1, 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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