

**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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## **I. Background**

1. Plaintiffs Latasha Holloway and Georgia Allen filed an amended complaint on November 13, 2018. Joint Stipulated Fact 1.

2. Plaintiffs' amended complaint alleged that the current electoral system for the City of Virginia Beach Council (the "City Council") violates section 2 of the Voting Rights Act of 1965 by denying them and the entire Hispanic/Latino, African-American/Black, and Asian community ("the Minority Community"), an opportunity to elect their preferred candidates of choice to the Council. ECF No. 62; 52 U.S.C. § 10301.

### **A. Parties**

3. Plaintiff Latasha Holloway is a United States citizen; an eligible and registered voter; and an African-American resident of Virginia Beach. Joint Stipulated Fact 2.

4. Plaintiff Holloway's address is 826 Tuition Court, Virginia Beach, Virginia, 23462. P-0084 at 3; Joint Stipulated Fact 3.

5. Plaintiff Holloway resides 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 also the Voting Age Population ("VAP").<sup>1</sup> P-0084 at 5-12. Plaintiff Holloway also lives in an area of Virginia Beach that could constitute a single-member district in which African-American and Hispanic/Latino voters are, together, a majority of the CVAP. P-0079 at 10; P-0084 at 5.

6. Plaintiff Georgia Allen is a United States citizen; an eligible and registered voter; and an African-American resident of Virginia Beach. Joint Stipulated Fact 4.

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<sup>1</sup> The CVAP is calculated using both ACS 5-Year Estimates for 2013-2017 and 2014-2018, while the VAP is calculated using the 2010 decennial census data.

7. Plaintiff Allen's address is 4649 Merrimac Lane, Virginia Beach, Virginia, 23455. P-0084 at 3; Joint Stipulated Fact 5.

8. Plaintiff Allen resides in an area of Virginia Beach that could constitute a single-member district in which the Minority Community is a majority of the CVAP and also the VAP. P-0084 at 5-12.

9. Defendant City of Virginia Beach ("the City") is the largest city in Virginia (by population). Joint Stipulated Fact 6.

10. The City is located in southeastern Virginia. Joint Stipulated Fact 7.

11. Defendant City Council is the governing body of Virginia Beach. Joint Stipulated Fact 9.

12. Its legislation impacts the public spending, health, well-being and livelihood of Virginia Beach residents.

13. Defendant Robert Dyer, a white male, is currently the Mayor of Virginia Beach. Joint Stipulated Fact 10.

14. Defendant James Wood, a white male, currently serves as the Vice Mayor and the Councilmember representing the Lynnhaven District. Joint Stipulated Fact 11.

15. Defendant Jessica Abbott, a white female, currently serves as the Councilmember representing the Kempsville District. Joint Stipulated Fact 12.

16. Defendant Michael Berlucchi, a white male, currently serves as the Councilmember representing the Rose Hall District. Joint Stipulated Fact 13.

17. Defendant Barbara Henley, a white female, currently serves as the Councilmember representing the Princess Anne District. Joint Stipulated Fact 14.

18. Defendant Louis Jones, a white male, currently serves as the Councilmember representing the Bayside District. Joint Stipulated Fact 15.

19. Defendant John Moss, a white male, currently serves as a Councilmember who was elected At-Large. Joint Stipulated Fact 16.

20. Defendant Aaron Rouse, a Black male, currently serves as a Councilmember who was elected At-Large. Joint Stipulated Fact 17.

21. Defendant Guy Tower, a white male, currently serves as the Councilmember representing the Beach District. Joint Stipulated Fact 18.

22. Defendant Rosemary Wilson, a white male, currently serves as a Councilmember who was elected At-Large. Joint Stipulated Fact 19.

23. Defendant Sabrina Wooten, a Black female, currently serves as the Councilmember representing the Centerville District. Joint Stipulated Fact 20.

24. Defendant Donna Patterson, a Black female, currently serves as the Director of Elections/General Registrar for the City. Joint Stipulated Fact 21.

25. Defendant Patrick Duhaney, a Black male, was appointed City Manager by the City Council in June 2020, effective July 20, 2020. Stipulated Fact 22.

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

26. In 1966, the Virginia General Assembly adopted at-large elections for electing 11 Virginia Beach City Council members. Joint Stipulated Fact 23.

27. The Mayor of the City is a member of the City Council and is also elected at-large.

28. Under Virginia Beach's at-large system, all candidates are required to compete for the votes of all voters across the 249 square mile City. P-0078 at 12.

29. Under the current at-large system, seven of these members are elected from designated or numbered posts, where they run from residential districts with a single seat at stake but all voters in the city vote on the councilmember from each district. Joint Stipulated Fact 24.

30. Since 1966, only five Black candidates (Aaron Rouse, Sabrina Wooten, Dr. Amelia Ross-Hammond, Louisa M. Strayhorn, and John L. Perry) and one Asian-American candidate (Ron A. Villanueva) have been elected to the City Council. Joint Stipulated Fact 25.

31. None of the Black candidates has ever been re-elected to office. P-0078 at 45.

32. Since 1966 no Latino candidates have been elected to the City Council. P-0078 at 45.

33. The City Council appointed Prescott Sherrod, a Black male, to an open seat on the City Council in July 2011 in a 9-1 vote. Joint Stipulated Fact 26.

34. Prescott Sherrod was not re-elected to this seat. P-0078 at 45.

35. In the past five elections for the City Council (2010-2018), 16 out of 74 City Council candidates were Black. P-0396 at 4-5; Joint Stipulated Facts 27.

36. In the past five elections for the City Council (2010-2018), only three of the 22 winners were Black. P-0396 at 4-5.

37. The Minority Community's preferred candidates would not routinely lose if the City Council instead were elected using 10 single-member voting districts, each of which elects its own representative, and one at-large mayoral race. P-0077 at 32-33.

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

38. Since at least 2001, members of the Minority Community have repeatedly tried to change the City's method of elections to remedy the dilution of their votes. *Expected testimony of Georgia Allen, Andrew Jackson, Shewling Moy, and Kelly Fowler.*



39. In 2001, representatives from the Minority Community, as the Community Coalition for a Better Virginia Beach (“Coalition”), appealed to the City Council to change the method of elections to single member districts. The Coalition was “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. During the October 2, 2001 City Council meeting, the Coalition urged the City to switch to single-member districts. P-0145 at 10-24; *Expected testimony of Georgia Allen*. Nony Abrajano, a Filipino-American who appeared before the Council as a member of the Coalition and a representative of the Filipino-American Association in Hampton Roads, asked the Council to adopt single-member districts to help ensure “equal representation.” P-0145 at 12-13.

40. Ron Villanueva, a Filipino-American and former Council member, also appeared before the City Council as the President of the Filipino-American Community of Tidewater and Chairman of the Filipino-American Community Action Group. He advocated “creating Districts that are . . . reflective of the City’s changing demographics.” P-0145 at 15-16.

41. Shewling Moy, a Chinese-American woman, advocated for the City to adopt single-member districts. P-0145 at 10-11.

42. Plaintiff Allen also urged the City Council to adopt districts. P-0145 at 11-12.

43. In 2001, the City Council rejected the Minority Community’s request and instead limited the discussion to two other plans. DTX067 at 18.

44. In 2011, the Minority Community again appeared before the City Council seeking a fairer method of electing City Council members. *Expected testimony of Andrew Jackson*.

45. Andrew Jackson, Chair of the Virginia Beach African American Leadership Forum, presented a ten-district plan to the City Council with one district where the Minority

Community was a majority of the VAP. Defendant's expert Kimball Brace, whom the City had hired to create a redistricting plan, helped draw the plan and provided the demographic data tables for it. DTX011 at 285, Appendix Figure 14; Brace Dep. 128:3-5.

46. Separately, the NAACP and the Virginia Beach Concerned Citizens Coalition ("CCC") met with Mr. Brace to draw redistricting proposals. DTX010 at 7 ¶ 11. Andrew Jackson and the NAACP/CCC both submitted their own proposed maps. DTX010 at 34.

47. Current Council member Moss urged support of the NAACP/CCC 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.

48. On April 12, 2011, Andrew Jackson submitted a report to the City Council titled "Truth: The First Casualty of Racial Disenfranchisement," to "promote an honest, fair, inclusive, and understandable election system." P-0210 at 2. The report described the City's method of electing Councilmembers as, "in the view of most minorities, the worst of the worst" because it "impedes equal representation." P-0210 at 2-3; *Expected testimony of Andrew Jackson, Georgia Allen*.

49. The City Council rejected both Mr. Jackson's and the NAACP/CCC's proposed district maps. P-0139; DTX011 at 222-226.

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

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

50. The most recent decennial census, completed in 2010 (the "2010 Census"), reported that the City had a total population of 437,994. Joint Stipulated Fact 8; Joint Stipulated Fact 29.

51. The Minority Community was 31.62% of the City’s total population, with a Hispanic population of 6.6%, a Non-Hispanic Black population of 19.0%, and a Non-Hispanic Asian population of 6.0%. Appendix Table 1.

52. In addition to the decennial census, the Census Bureau publishes one- and five-year estimates of population demographics based on the American Community Survey (“ACS”). The ACS is a rolling sample survey of over 3.5 million households annually. The City’s Budget and Management Services has used demographic information from the ACS in performing its duties. P-0396 at 6.

53. According to the most recent ACS 5-Year Estimates (2014-2018), the City’s population is 450,135. The Minority Community constitutes 33% of that total population, with a Hispanic population of 8.0%, a Non-Hispanic Black population of 18.5%, and a Non-Hispanic Asian population of 6.0%. Appendix Table 2. The ACS 2013-2017 5-Year Estimates appear in Appendix Table 3.

**i. The Minority Community Has Grown Significantly in Virginia Beach, While the White Population Has Decreased**

***a. Total Population***

54. According to the decennial censuses of 1990 and 2010, the City’s total population increased 11.42% from 1990 to 2010. P-0075 at 7; P-0076 at 14-16.

55. From 1990 to 2017, the Minority Community grew from 20.80% to 33% of the City’s total population. 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; P-0082 at 52-53; P-0378 at 46; Appendix Table 4.

***b. Voting Age Population and Citizen Voting Age Population***

56. In order to determine the potential voting strength of a community, experts often consider the Voting Age Population (“VAP”) or the Citizen Voting Age Population (“CVAP”) of a jurisdiction (if there is a difference in the rate of citizenship between demographic groups). Plaintiffs here use both VAP and CVAP. P-0075 at 8-12; P-0076 at 42-43; P-0080 at 3, 10, 17, 24, 30; P-0085 at 17-18, 24-25, 31-32; *Expected testimony of Anthony Fairfax*.

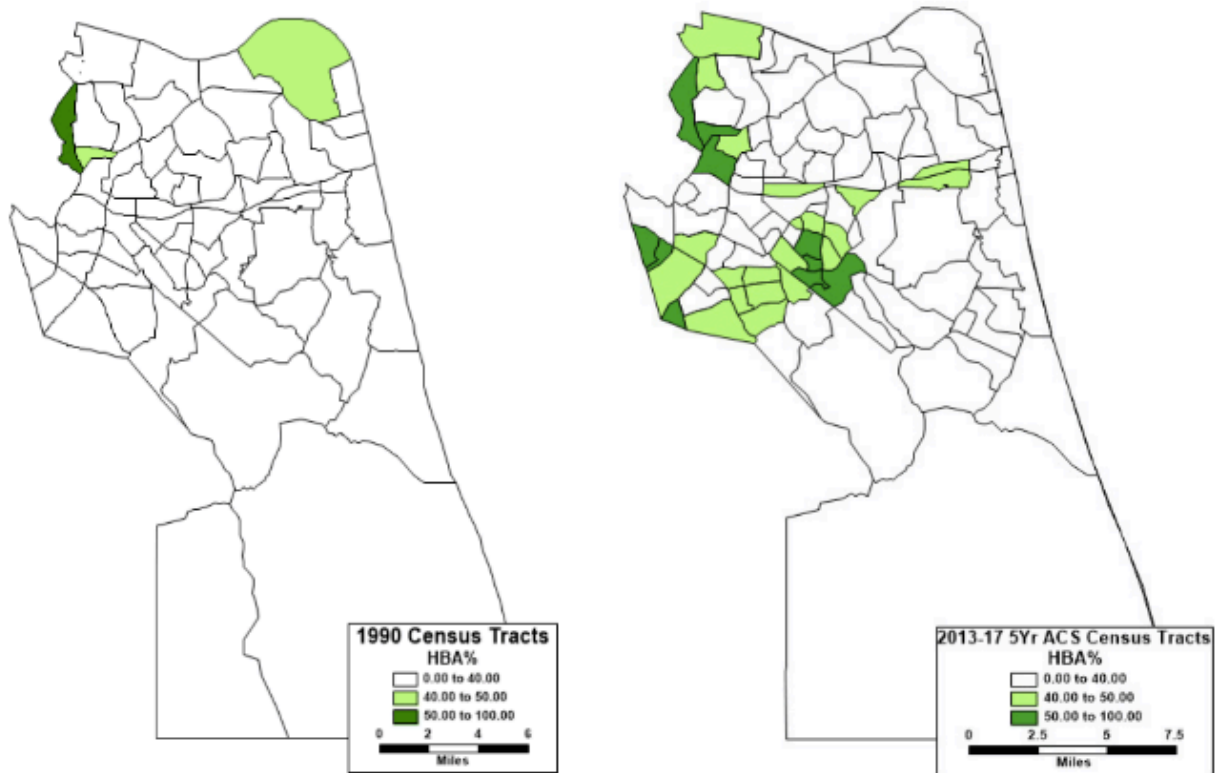
57. The City’s VAP and CVAP reflect trends similar to those of the total population, with the decennial census (the source of VAP data) showing a significant increase in the total minority population between 1990 and 2010, and the ACS (the source of CVAP data) showing a similar trend from 2010 to 2017. Each of the constituent groups of the Minority Community increased during these periods, while the white population declined. P-0075 at 10, 12; Appendix Tables 5-6.

**ii. Distribution of Census Tracts that are Majority Minority**

58. In 1990, there was only one census tract in the City where the Minority Community was a majority of the total population. According to 2013-2017 ACS data, there are now 10 such census tracts. P-0075 at 13. Census tracts are a conglomeration of census block groups, generally with populations between 1,200 and 8,000.

59. According to 2013-2017 ACS 5-Year Estimates, the census tracts with a Minority Community over 50% are located near the western center of Virginia Beach and toward the west and northwest Norfolk and Chesapeake boundary areas of the city. P-0075 at 13.

60. The following figure shows the Majority Minority census tracts from 1990 compared to the 2013-2017 ACS 5-Year Estimates data:



**Figure 3 – Virginia Beach, VA Maj. HBA (Total Race) Census Tracts  
(1990 Decennial Census & 2013-2017 5Yr ACS)**

Note: Race categories are Alone (Single Race) Not Hispanic categories

Source: U.S. Census Bureau PL94-171 data for 1990; 2013 - 2017 5-Year ACS data

61. The distribution of the Hispanic, Non-Hispanic Black, and Non-Hispanic Asian populations are set out in Appendix Figures 1, 2, and 3.
62. Thirty-one of the 100 census tracts in Virginia Beach contain 54.90% of the City's Minority Community. Those same 31 census 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.
63. Even in non-Majority Minority census tracts, the Minority Community tends to reside in clusters. P-0079 at 23; Appendix Table 7.

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

64. 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 over the last 28 years, and three decennial redistricting cycles, he has developed nearly 1,000 redistricting plans. Mr. Fairfax has drawn plans for jurisdictions of all sizes, from states to small municipalities. P-0075 at 2.

65. To meet the requirement of *Gingles* Prong One, Mr. Fairfax drew 10 illustrative plans, eight with 10 single-member districts and two with a single illustrative district. Each of these 10 illustrative plans has at least one district in which the Minority Community constitutes a majority of the CVAP. ECF No. 62, Appendix A at 17; P-0075; P-0076; P-0079; P-0080; P-0084; P-0085. Each also has at least one district in which the Minority Community constitutes a majority of the district's VAP. P-0080 at 27, 34, 41, 54; P-0085 at 29, 30, 36, 37, 43, 44.

66. Eight of the 10 illustrative plans contain *two* single-member districts in which the Minority Community constitutes a majority of the district's CVAP. ECF No. 62, Appendix A; P-0075; P-0076; P-0079; P-0080; P-0084; P-0085.

67. One of the illustrative plans contains a district in which the Hispanic and Non-Hispanic Black populations together constitute a majority of the district's CVAP. P-0079 at 10; P-0080 at 30.

68. 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 290; DTX011 at 285.

### **A. Mr. Fairfax's Data and Methods**

69. Mr. Fairfax used a common software package called Maptitude for Redistricting to draw the illustrative plans. Many local and state governing bodies across the country use Maptitude for redistricting and other demographic analyses. P-0075 at 3; P-0079 at 11; P-0080 at 42-49; Morrison Dep. at 111:15-18.

#### **i. Data Sources**

70. In drawing Plaintiffs' illustrative plans, Mr. Fairfax relied upon population and geographic data from the 1990 to 2010 decennial censuses, including the city-level PL 94-171 data for 1990, 2000, and 2010. P-0075 at 3; P-0076; P-0079; P-0080; P-0084; P-0085; *Expected testimony of Anthony Fairfax*.

71. Mr. Fairfax also downloaded subdivision shapefiles from the City's Geographic Information System ("GIS") website in order to obtain Virginia Beach's current city council plan. These shapefiles allowed him to compare his illustrative plans with the current city council plan, and also to approximate neighborhood subdivision locations for the city. P-0075 at 4.

72. PL 94-171 files, published by the Census Bureau, contain race and ethnicity data on the total population and VAP found in units of Census geography from the state level down to census blocks that can be used for redistricting. A census block is the smallest geographic tabulation area from the decennial census. P-0075 at 3-4; DTX110 at 6; DTX011 at 52.

73. In drawing Plaintiffs' illustrative plans, Mr. Fairfax also relied upon demographic and population data from the 2008-2012 ACS 5-Year estimates, the 2013-2017 ACS 5-Year estimates, the 2014-2018 ACS 5-Year estimates, and the 2017 ACS 1-Year estimates. ECF No. 62, Appendix A; P-0075 at 3-4; P-0076; P-0079; P-0080; P-0084; P-0085; *Expected testimony of Anthony Fairfax*.

74. ACS 5-Year estimates contain citizenship data, as well as the most recent race/ethnicity data after the decennial census. Unlike the PL 94-171 data, the ACS 5-Year Estimates report at the census block group level, not the census block level. P-0075 at 4.

**ii. Disaggregation and Reaggregation of CVAP Data**

75. Because the boundaries of the current and illustrative districts do not necessarily correspond to the census block groups in the ACS 5-Year estimates, those estimates must be disaggregated from the census block group level to the census block level to assess the CVAP populations for a district. P-0075 at 4; P-0079 at 11. Disaggregation apportions a population from a higher geographic area to a lower geographic area using a percentage of a matching population field at both geographic levels. P-0075 at 4, n. 4; P-0079 at 11.

76. Aggregation is the process of summing up the lower level results (here census blocks) to all other higher geographic levels that will be used in drawing or evaluating districts. In other words, aggregation allows review of CVAP data at the district level. P-0075 at 4, n.4; *Expected testimony of Anthony Fairfax*.

77. Mr. Fairfax utilized the disaggregation/aggregation process in Maptitude for Redistricting, an accepted, reliable way to evaluate citizenship or other data not provided at the census block level. P-0075 at 4; P-0079 at 11; *Expected testimony of Anthony Fairfax*.

78. Single race alone CVAP estimates provide a more conservative estimate of the Hispanic, Black, and Asian populations in a district, but exclude individuals who identify as more than one race. P-0075 at 5; DTX110 at 9. A more accurate estimation of the Minority Community in a district includes single-race Asian, Hispanic/Latino, and both single-race Black individuals and individuals who identify as both Black and white. In all of his reports and appendices, Mr. Fairfax includes CVAP estimates for single race alone populations, as well as population numbers including individuals who identify as both Black and white. In Plaintiffs'



Proposed Findings of Fact, a district is called “Majority Minority” if the Hispanic, Black, and Asian populations combined are greater than 50% for the relevant population base. P-0075; P-0076; P-0079; P-0080; P-0085; *Expected testimony of Anthony Fairfax*.

**iii. Building Blocks for Illustrative Plans**

79. Mr. Fairfax used Voter Tabulation Districts (“VTDs”) as the dominant building block when drawing the districts in the illustrative plans, a well-accepted technique. He used VTDs because they follow precinct boundaries in most cases, and where they do not it is because the precinct boundaries split census blocks. P-0075 at 5-9; P-0079; P-0084; *Brace Dep.* at 45:6-48:11, *Expected testimony of Anthony Fairfax*.

80. Precinct boundaries are not immutable. Cities can increase or decrease the number of precincts and need not include an equal number of registered voters in each. VA Code § 24.2-307; P-0075 at 7, n.16. Precincts also can be changed by court order. VA Code § 24.2-309.2; P-0075 at 7.

81. The Virginia Division of Legislative Services published a document entitled “Guide to Local Redistricting for 2011,” and a copy of this document is found in composite exhibit DTX011 beginning at p. 37 thereof. Joint Stipulated Fact 35. It states, “When a locality redraws local election district lines, it necessarily will be adjusting some precinct lines.” DTX011 at 48.

**iv. Principles for Drawing Illustrative Plans**

82. In drawing the illustrative plans, Mr. Fairfax followed five commonly used redistricting criteria: equal population, contiguity, compactness, minimizing political subdivision splits, and preservation of communities of interest. Mr. Fairfax also considered race and ethnicity data in order to draw districts compliant with Section 2. P-0075 at 6-7.

***a. Equal population***

83. Districts for local government must have equal populations within a specific deviation declared as a safe-harbor for the “one person, one vote” mandate under the Fourteenth Amendment. *See, e.g., Baker v. Carr*, 369 U.S. 186 (1962); *Gray v. Sanders*, 372 U.S. 368 (1963); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964).

84. State law also requires equal population for election districts, VA Code § 24.2-304.1; P-0075 at 6, and Virginia Beach requires that its seven residence districts be “of approximately equal population.” Code of the City of Virginia Beach § 3.01 (Acts 1966, Ch.39; Acts 1987, Ch. 227, § 1; Acts 1995, Ch. 697, § 1).

85. The ideal population for a district is calculated by dividing the jurisdiction’s total population by the number of districts. The ideal district size for Plaintiffs’ illustrative plans using the 2010 census total population data is thus 43,799 (437,994/10). P-0075 at 18. At the local level, districts should not deviate more than 10% from the ideal population size in order to fall into the safe-harbor established by the Supreme Court. *See, e.g., Brown v. Thomson*, 462 U.S. 835 (1983); Brace Dep. at 41:11-42:20. The Current Residency District Plan in Virginia Beach (“the Current Residency Plan”) has an overall population deviation of 7.29% (calculated by adding the largest + and – deviations: 4.20% and -3.09%). P-0076 at 43; DTX107; DTX112.

***b. Contiguity***

86. State law requires that districts be contiguous, meaning that no parts of a district can be separated from the district itself. Contiguity can be measured using Maptitude for Redistricting, as well as other redistricting software. P-0075 at 6; VA Code § 24.2-304.1.

***c. Compactness***

87. Compactness refers to how irregularly shaped or dispersed a district is compared to an ideal compact area. Virginia law requires consideration of compactness in redistricting. VA Code § 24.2-304.1; P-0075 at 6.

88. There are a number of measures of compactness. The three most widely-used—the Reock, Polsby-Popper, and Convex Hull tests—rate compactness on a scale between 0 and 1. The closer the value is to 1, the more compact the district. P-0075 at 6; *Expected testimony of Anthony Fairfax*.

89. The Reock test “computes the ratio of the area of the district to the area of the minimum enclosing circle for the district.” P-0075 at 6, n.13 (quoting Maptitude for Redistricting documentation). The Polsby-Popper test “computes the ratio of the district area to the area of a circle with the same perimeter.” P-0075 at 6, n. 13 (quoting Maptitude for Redistricting documentation). The Convex Hull measure “computes only a ratio of the area of the district to the area of the convex hull of the district, without regard to population within the areas.” P-0075 at 6 (quoting Maptitude for Redistricting documentation).

90. Mr. Fairfax used all three tests to measure the compactness of districts in his illustrative plans with 10 districts. P-0075 at 6; *Expected testimony of Anthony Fairfax*; Appendix Tables 13, 21, 26, 29, 34, 39, 44.

***d. Minimizing political subdivision splits***

91. Minimizing political subdivision splits is a traditional redistricting criterion that aims to keep political entities such as cities, counties, VTDs, or precincts, intact. P-0075 at 7.

92. The most VTD splits in any of Plaintiffs’ illustrative plans is 25. By comparison, the Current Residency Plan splits 28 VTDs total; 26 among two districts, at least one VTD

among three districts, and at least one VTD among four districts. P-0076 at 52; P-0075 at 7;

*Expected testimony of Anthony Fairfax.*

***e. Preservation of communities of interest***

93. A good redistricting plan seeks to preserve communities of interest. Thus, where a specific population group shares one or more common interests (*e.g.*, economic, social, cultural, or ethnic interests), this criterion would leave the group intact within a defined geographic area. P-0075 at 7. Neighborhoods can be communities of interest. P-0075 at 7; Brace Dep. at 36:5-17.

94. Minimizing splits of communities of interest allows voters in those communities to band together to vote for a representative who can best serve their particular interests. P-0075 at 7.

95. In drawing his illustrative plans, Mr. Fairfax sought to ensure that subdivisions were wholly contained within the districts in order to respect communities of interest. P-0075 at 7; *Expected testimony of Anthony Fairfax.*

96. Mr. Fairfax also analyzed socioeconomic characteristics of majority-Hispanic, Black, and Asian census tracts for potential communities of interest so that he could keep those communities together in the illustrative districts that he drew. P-0075 at 7.

97. After the completion of each illustrative plan, Mr. Fairfax generated reports summarizing the plan's performance. These reports show his plans' favorable performance in terms of compactness, contiguity, VTD splits, preservation of communities of interest, equal population, and demographics. P-0075 at 7; *Expected testimony of Anthony Fairfax.*

**B. It Is Possible to Draw Two Districts Out of Ten Total Districts Where the Minority Community Constitutes a Majority**

98. The Minority Community in Virginia Beach is sufficiently large (over 30% by VAP and CVAP) and geographically compact (concentrated in 31 census tracts) to be the majority in two single member districts. P-0075; P-0079; P-0084.

**i. Appendix A, Plaintiffs' Amended Complaint (Plan 1)**

99. The map attached to Plaintiffs' Amended Complaint at Appendix A ("Plan 1") contains two districts where the Minority Community constitutes a majority of CVAP based on the 2008-2012 5-Year ACS estimates. These districts include District C2, which has a 50.13% Minority Community CVAP and District D, which includes a 50.21% Minority Community CVAP. The first illustrative redistricting plan drawn by Mr. Fairfax for Virginia Beach ("Map 1") is depicted in Appendix Figure 4. ECF No. 62, Appendix A, *Expected testimony of Anthony Fairfax*.

100. Both Plaintiff Latasha Holloway and Plaintiff Georgia Allen reside in district C2 of Plan 1. ECF No. 62, Appendix A; *Expected testimony of Anthony Fairfax*.

**v. Plaintiffs' Illustrative Plan (Plan 2)**

101. Plaintiffs' Illustrative Plan ("Plan 2") contains two Majority Minority districts by CVAP using the 2013-2017 ACS 5-Year or 2014-2018 ACS 5-Year estimates. The map reflecting this plan is Figure 5 in the Appendix. P-0085 at 17.

102. Both District 1 and District 2 in Plan 2 are Majority Minority by CVAP using single race alone or including the Black and white category. Appendix Tables 9-12.

103. District 1 in Plan 2 is Majority Minority by VAP. Appendix Tables 9-12, 77.

104. Defendants' expert Peter Morrison produced CVAP point estimates of essentially 50.0% for Districts 1 and 2 of Plaintiffs' Illustrative Plan. DTX076 at 6-7; P-0079 at 4.

105. The former and current residences of Plaintiff Latasha Holloway are in District 2 of Plan 2. P-0084 at 5.

106. Plan 2 has an overall population deviation of 7.45% (calculated by adding the largest + and – deviations: 2.68% and -4.77%), which falls within the 10% tolerance acknowledged by Defendants’ Expert Brace. P-0075 at 18.

107. The districts in Plan 2 are contiguous with no separate land masses or areas. P-0075 at 21; P-0076 at 45.

108. The compactness scores of Districts 1 and 2 of Plan 2 are comparable to the Current Residency Plan. Appendix Tables 13-14.

109. District 1 of Plan 2 splits 6 VTDs and District 2 of Plan 2 splits 5 VTDs. Overall, Plan 2 contains only 12 VTD splits, significantly fewer than the Current Residency Plan, which splits 28 VTDs. Any splits in VTDs in Plan 2 are only between two districts. None of Plaintiffs’ illustrative plans split any VTDs among four districts. By comparison the Current Residency Plan splits one VTD into three districts and one into four districts. P-0076 at 49-53; P-0080 at 6, 13, 20, 27, 33; P-0085 at 20, 27, 34; Appendix Table 15.

110. Plan 2 sought to preserve neighborhood subdivisions as communities of interest. Most neighborhoods were not split, but where a neighborhood split did occur in the Illustrative Plan, it was to follow the outline of a VTD that already split a subdivision or to include or exclude an irregularly shaped census block. P-0075 at 23, P-0076 at 54-56; *Expected testimony of Anthony Fairfax*.

111. According to the 2013-2017 5-Year ACS, there are four census tracts in District 1, and five in District 2, in which the Minority Community is a majority. P-0075 at 24. These tracts possess similar socioeconomic characteristics and thus are communities of interest that

differ from the overall citywide characteristics of most census tracts. By keeping these tracts together in the two districts, Plan 2 respects these socioeconomic communities of interest. P-0075 at 24; *Expected testimony of Anthony Fairfax*; Appendix Table 16.

**vi. Plaintiffs' Illustrative Alternative 1 Plan (Plan 3)**

112. Plaintiffs' Illustrative Alternative 1 Plan ("Plan 3") contains two majority Minority Community districts by CVAP using the 2013-2017 ACS 5-Year or 2014-2018 ACS 5-Year estimates. The map reflecting this plan is Figure 6 in the Appendix. P-0085 at 24.

113. Both District 1 and District 2 in Plan 3 are Majority Minority by CVAP using single race alone or including the Black and white category. P-0079 at 5; P-0080 at 27; P-0085 at 36. Appendix Tables 17-20.

114. Both District 1 and District 2 in Plan 3 have a majority Minority Community VAP. P-0080 at 3.

115. The former and current residence of Plaintiff Latasha Holloway is in District 2 of Plan 3. P-0084 at 5.

116. Plan 3's overall population deviation of 9.0% (calculated by adding the largest + and – deviations: 4.23% and -4.77%), falls within the 10% tolerance acknowledged by Defendants' Expert Brace. P-0080 at 3.

117. Plan 3's districts are contiguous with no separate land masses or areas. P-0080 at 4.

118. The compactness of Districts 1 and 2 of Plan 3 is comparable to the Current Residency Plan. Appendix Table 21.

119. District 1 of Plan 3 splits 10 VTDs and District 2 splits 7 VTDs, compared to the 13 splits in districts 2 and 3 in the Current Residency Plan. P-0080 at 6-7; P-0075 at 23. Overall, Plan 3 splits 22 VTDs compared to 28 under the Current Residency District Plan. P-0080 at 6.

120. Plan 3 sought to preserve neighborhood subdivisions as communities of interest. Most neighborhoods were not split, but where a neighborhood split did occur in Plan 3, it was to follow the outline of a VTD that split a subdivision or to include or exclude an irregularly shaped census block. P-0080 at 8; *Expected testimony of Anthony Fairfax*.

**vii. Plaintiffs' Illustrative Alternative 2 Plan (Plan 4)**

121. Plaintiffs' Illustrative Alternative 2 Plan ("Plan 4"), depicted in Figure 7, contains two Majority Minority districts—Districts 1 and 2—using the 2013-2017 ACS 5-Year or 2014-2018 ACS 5-Year estimates of CVAP. P-0085 at 31; Appendix Table 22; P-0079 at 6; P-0080 at 3; Appendix Tables 23-25.

122. Both District 1 and District 2 in Plan 4 are Majority Minority by CVAP using single race alone or including the Black and white category. Appendix Tables 22-25.

123. Both District 1 and District 2 in Plan 4 are Majority Minority Districts by VAP. Appendix Table 77.

124. Plan 4 split no Census Block Groups and so the ACS CVAP data did not need to be disaggregated to the block level (and then reaggregated to the plan level). P-0079 at 6, P-0084 at 6, n.3; *Expected testimony of Anthony Fairfax*.

125. The former and current residence of Plaintiff Latasha Holloway is in District 2 of the Plan 4. P-0084 at 5.

126. Plan 4's overall population deviation of 7.57% (calculated by adding the largest + and – deviations: 2.73% and -4.84%) falls within the 10% tolerance acknowledged by Defendants' Expert Brace. P-0080 at 10.

127. The compactness of Districts 1 and 2 of Plan 4 is comparable to that of the Current Residency Plan. Appendix Table 26.



128. Plan 4's districts are contiguous with no separate land masses or areas. P-0080 at 11.

129. Overall, Plan 4 splits 25 VTDs, which is less than the 28 splits under the Current Residency District Plan. P-0075 at 23; P-0080 at 13. District 1 of Plan 4 splits 9 VTDs and District 2 of Plan 4 splits 11 VTDs. P-0080 at 13-14.

130. Plan 4 sought to preserve neighborhood subdivisions as communities of interest. Most neighborhoods were not split, but where a neighborhood split did occur in Plan 3, it was to follow the outline of a VTD that split a subdivision or to include or exclude an irregularly shaped census block. P-0080 at 15; *Expected testimony of Anthony Fairfax*.

**viii. Plaintiffs' Illustrative Alternative 3 Plan (Plan 5)**

131. Plaintiffs' Illustrative Alternative 3 Plan ("Plan 5") contains two Majority Minority districts according to the 2013-2017 ACS 5-Year CVAP estimates. The map reflecting this plan is Figure 8 in the Appendix. P-0079 at 7; P-0080 at 17; Appendix Tables 27-28.

132. Both District 1 and District 2 in Plan 5 are Majority Minority by CVAP using single race alone or including the Black and white category. Appendix Tables 27-28.

133. Plan 5 contains two Majority Minority districts by VAP. Appendix Table 77; *Expected testimony of Anthony Fairfax*.

134. Plan 5 encompasses different geographic areas than Plan 2. P-0079 at 7.

135. The former and current residence of Plaintiff Latasha Holloway is in District 2 of Plan 5. P-0084 at 5.

136. Plan 5 has an overall population deviation of 9.65% (calculated by adding the largest + and – deviations: 4.77% and -4.88%), which falls within the 10% tolerance acknowledged by Defendants' Expert Brace. P-0080 at 17.

137. Plan 5's districts are contiguous with no separate land masses or areas. P-0080 at 18.

138. The compactness of Districts 1 and 2 of Plan 5 is comparable to that of the Current Residency Plan. Appendix Table 29.

139. Overall, Plan 5 splits 21 VTDS, fewer than the 28 VTDS split by the Current Residency Plan. P-0080 at 20, P-0075 at 23. District 1 of Plan 5 splits 11 VTDS, and District 2 of Plan 5 splits 10 VTDS. P-0080 at 44-45.

140. Plan 5 only splits VTDS among two districts. P-0080 at 20.

141. Plan 5 sought to preserve neighborhood subdivisions as communities of interest. Most neighborhoods were not split, but where a neighborhood split did occur in Plan 3, it was to follow the outline of a VTD that split a subdivision or to include or exclude an irregularly shaped census block. P-0080 at 22; *Expected testimony of Anthony Fairfax*.

**ix. Plaintiffs' Modified Illustrative Plan (Plan 6)**

142. Plaintiffs' Modified Illustrative Plan ("Plan 6"), depicted in Figure 9, contains two Majority Minority districts by CVAP using the 2013-2017 ACS 5-Year or 2014-2018 ACS 5-Year estimates. The map reflecting this plan is Figure 9 in the Appendix. P-0084 at 6-7; P-0085 at 18; Appendix Tables 30-33.

143. Plan 6 was created to include the residence of Plaintiff Georgia Allen in a Majority Minority district, as well as to follow the criteria of equal population, compactness, contiguity, and minimizing subdivision splits. P-0084 at 6-7, 12; P-0085; *Expected testimony of Anthony Fairfax*.

144. District 1 in Plan 6 is the same as District 1 in Plan 2. P-0084 at 6.

145. Both District 1 and District 2 in Plan 6 are Majority Minority by CVAP using single race alone or including the Black and white category. Appendix Tables 30-33.

146. District 1 of Plan 6 is Majority Minority by VAP. P-0085 at 18.

147. The former and current residence of Plaintiff Latasha Holloway and the residence of Plaintiff George Allen are contained in District 2 of Plan 6. P-0084 at 5-6, 9.

148. Plan 6 has an overall population deviation of 7.49% (calculated by adding the largest + and – deviations: 2.68% and -4.81%), which falls within the 10% tolerance acknowledged by Defendants’ Expert Brace. P-0085 at 18.

149. Plan 6’s districts are contiguous with no separate land masses or areas. *Expected testimony of Anthony Fairfax.*

150. The compactness of Districts 1 and 2 of Plan 6 is comparable to that of the Current Residency Plan. Appendix Table 34.

151. Overall, Plan 6 splits 15 VTDS total, which is fewer than the 28 VTDS split by the Current Residency District Plan. P-0085 at 20, P-0075 at 23.

152. District 1 of Plan 6 splits 6 VTDs and District 2 of Plan 6 splits 7 VTDs. P-0085 at 20-21.

**x. Plaintiffs’ Modified Illustrative Alternative 1 Plan (Plan 7)**

153. Plaintiffs’ Modified Illustrative Alternative 1 Plan (“Plan 7”) contains two Majority Minority districts by CVAP using the 2013-2017 ACS 5-Year or 2014-2018 ACS 5-Year estimates. The map reflecting this plan is Figure 10 in the Appendix. P-0084 at 6-7; P-0085 at 25. Appendix Tables 35-38.

154. Plan 7 was created to include the residence of Plaintiff Georgia Allen in one a Majority Minority district, as well as to follow the criteria of equal population, compactness, contiguity, and minimal subdivision splits. P-0084 at 6-7, 12; P-0085; *Expected testimony of Anthony Fairfax.*

155. District 1 in Plan 7 is the same as District 1 in Plan 3. P-0084 at 6.

156. Both District 1 and District 2 of Plan 7 are Majority Minority by CVAP using single race alone or including the Black and white category. P-0084 at 6-7; P-0085 at 37.

Appendix Tables 37-38.

157. District 1 of Plan 7 is also a Majority Minority district by VAP. P-0085 at 25. Table 77.

158. The former and current residences of Plaintiff Latasha Holloway and the residence of Georgia Allen is contained in District 2 of Plan 7. P-0084 at 5-6, 10.

159. Plan 7 has an overall population deviation of 9.21% (calculated by adding the largest + and – deviations: 4.44% and -4.77%), which falls within the 10% tolerance acknowledged by Defendants’ Expert Brace. P-0085 at 25.

160. Plan 7’s districts are contiguous with no separate land masses or areas. *Expected testimony of Anthony Fairfax.*

161. The compactness of Districts 1 and 2 of Plan 7 is comparable to the Current Residency Plan. Appendix Table 39.

162. Overall, Plan 7 splits 23 VTDs, which is fewer than the 28 VTDS split by the Current Residency Plan. P-0085 at 27, P-0075 at 23.

163. District 1 of Plan 7 splits 10 VTDs, and District 2 of Plan 7 splits 8 VTDs. P-0085 at 39-40.

**xi. Plaintiffs’ Modified Illustrative Alternative 2 Plan (Plan 8)**

164. Plaintiffs’ Modified Illustrative Alternative 2 Plan (“Plan 8”) contains two Majority Minority districts by CVAP using the 2013-2017 ACS 5-Year or 2014-2018 ACS 5-Year estimates. The map reflecting this plan is Figure 11 in the Appendix. P-0085 at 32; Appendix Tables 40-43.

165. Plan 8 was created to include the residence of Plaintiff Georgia Allen in a Majority Minority district, as well as to follow the criteria of equal population, compactness, contiguity, and subdivision splits. P-0084 at 6-7, 12; P-0085; *Expected testimony of Anthony Fairfax*.

166. District 1 in Plan 8 is the same as District 1 in Plan 4. P-0084 at 6.

167. Plan 8 does not split Census Block Groups and therefore ACS CVAP data did not need to be disaggregated to the block level and reaggregated to Plan 8. P-0084 at 6, n.3.

168. Both District 1 and District 2 in Plan 8 are Majority Minority by CVAP using single race alone or including the Black and white category. P-0084 at 6-7; P-0085 at 32; Appendix Tables 40-43.

169. District 1 of Plan 8 is also a Majority Minority district by VAP. P-0085 at 32; Appendix Table 77.

170. The former and current residence of Plaintiff Latasha Holloway, along with the residence of Georgia Allen, is in District 2 of the Plan 8. P-0084 at 5, 11.

171. Plan 8 has an overall population deviation of 7.36% (calculated by adding the largest + and – deviations: 2.52% and -4.84%), which falls within the 10% tolerance acknowledged by Defendants' Expert Brace. P-0085 at 32.

172. Plan 8's districts are contiguous with no separate land masses or areas. *Expected testimony of Anthony Fairfax*.

173. The compactness of Districts 1 and 2 of Plan 8 is comparable to the Current Residency Plan. Appendix Table 44.

174. Overall, Plan 8 splits 23 VTDS, which is fewer than the 28 VTDS split in the Current Residency Plan. P-0085 at 34; P-0075 at 23.

175. District 1 of Plan 8 splits 9 VTDS, and District 2 of Plan 8 splits 10 VTDS. P-0085 at 34-35.

**C. It Is Possible to Draw One District Out of Ten Total Districts That Is Majority Minority**

176. The Minority Community in Virginia Beach is sufficiently large and geographically compact to be the majority in one single member district. P-0075; P-0079 at 3; P-0084.

177. Given that it is possible to draw multiple illustrative plans with two districts out of 10 total that are Majority Minority by CVAP or VAP, it is also possible to draw a plan—in fact, a number of plans—with a single Majority Minority district. P-0079 at 8-9; DTX011 at 285.

178. Plaintiffs' expert drew two illustrative plans that contain one district out of ten total districts that are Majority Minority by CVAP and one illustrative plan that contains one district that is Majority Minority by VAP. P-0079 at 8-10; P-0080 at 24, 30.

**i. Plaintiffs' Illustrative Alternative 4 Plan (Plan 9)**

179. Illustrative Alternative 4 Plan ("Plan 9") contains one Majority Minority district by CVAP according to the 2013-2017 5-Year ACS CVAP estimates. The map reflecting this plan is Figure 12 in the Appendix. P-0079 at 9; P-0080 at 24; Appendix Table 45.

180. District 1 of Plan 9 is Majority Minority by CVAP using single race alone or including the Black and white category. P-0079 at 9; P-0080 at 24.

181. The former and current residence of Plaintiff Latasha Holloway is contained in District 1 of Plan 9. P-0084 at 5.

182. Plan 9's District 1 has a population deviation of 991 persons. P-0080 at 24.

183. Plan 9's district is contiguous with no separate land masses or areas. P-0080 at 25.

184. District 1 of Plan 9 has compactness values of 0.19 for Reock, 0.11 for Polsby-Popper, and 0.47 for Convex Hull. P-0080 at 26.

185. Plan 9 splits zero VTDs, compared to the 28 VTDs split by the current residency district plan. P-0080 at 27; P-0075 at 23.

186. Plan 9 was developed with the goal of preserving neighborhood subdivisions as communities of interest. Most neighborhoods were not split, but where a neighborhood split did occur in Plan 5, it was to follow the outline of a VTD that split a subdivision or to include or exclude an irregularly shaped census block. P-0080 at 28; *Expected testimony of Anthony Fairfax*.

**ii. Plaintiffs' Illustrative Alternative 5 Plan (Plan 10)**

187. Plaintiffs' Illustrative Alternative 5 Plan ("Plan 10") contains one district that is Majority Minority by CVAP according to 2013-2-17 ACS 5-Year estimates. The map reflecting this plan is Figure 13 in the Appendix. P-0080 at 30; Appendix Table 46.

188. According to 2013-2017 ACS 5-Year estimates, District 1 of Plan 10 is a Majority Minority district by CVAP whether using single race alone or including the Black and white category. P-0080 at 30; Appendix Tables 46-47.

189. District 1 of Plan 10 is a Majority Minority district by VAP. P-0085 at 30; Appendix Table 77.

190. The former and current residence of Latasha Holloway is included in District 1 of Plan 10. P-0084 at 5.

191. Plan 10's District 1 has a population deviation of 1,967 persons. P-0080 at 30.

192. Plan 10's district is contiguous with no separate land masses or areas. P-0080 at 31.

193. District 1 of Plan 10 has compactness values of 0.11 for Reock, 0.09 for Polsby-Popper, and 0.42 for Convex Hull. P-0080 at 32.

194. District 1 of Plan 10 splits 16 VTDs, which is few than the 28 VTDs split by the Current Residency District Plan. P-0075 at 23; P-0080 at 33.

195. Plan 10 only splits VTDs among two districts. P-0080 at 33.

196. Plan 10 was developed with the goal of preserving neighborhood subdivisions as communities of interest. Most neighborhoods were not split, but where a neighborhood split did occur in Plan 5, it was to follow the outline of a VTD that split a subdivision or to include or exclude an irregularly shaped census block. P-0080 at 34; *Expected testimony of Anthony Fairfax*.

**iii. Andrew Jackson's Ten District Plan dated August 15, 2011**

197. In 2011, Virginia Beach resident Andrew Jackson drew and presented to the City Council a plan with one district out of 10 total districts where the Minority Community was a majority of VAP. DTX011 at 283, 285; DTX110 at 13; Brace Dep. at 128:3-5. The map reflecting this plan is Figure 14 in the Appendix.

198. According to Defendants' expert, Kimball Brace, there are three ways to calculate the racial breakdowns for the 2000 and the 2010 census. The one recommended by the Federal Office of Management and Budget ("OMB") for federal agencies counted as a minority any respondent to the Census who marked themselves as both white and a member of a minority group. Under the OMB approach, District 1 of Mr. Jackson's ten district plan contained 47.87% Non-Hispanic Black and white VAP, 8.11% Hispanic VAP, and 5.70% Non-Hispanic Asian and white VAP. DTX011 at 285; DTX010 at 22. Combined, the Minority Community is 61.68% of the VAP in District 1 of Mr. Jackson's plan. Non-whites (that is, all people who identify



themselves as having one or more races that are not white) constitute 63.69% of the VAP in District 1, and 50.22% of the VAP in District 8. DTX011 at 285; DTX010 at 22.

199. The overall population deviation for Mr. Jackson's plan is 7.47% (calculated by adding the largest + and – deviations: 3.93% and -3.54%), which falls within the traditional 10% tolerance used for redistricting plans. DTX011 at 285; DTX010 at 22.

200. Mr. Brace did not publicly release and Defendants did not produce any compactness scores or political subdivision split numbers that Brace calculated for Mr. Jackson's 10 district plan. DTX010; DTX011.

**D. It Is Possible to Draw One District Out of Ten Total Districts That Is Majority Hispanic and Black**

201. The Hispanic and Black population in Virginia Beach, without the Asian population, is sufficiently large and geographically compact to be the majority in one single member district. P-0079 at 10; P-0080 at 30; DTX011 at 285.

202. A number of illustrative maps for the City Council can be drawn that include one district out of 10 total that is majority Hispanic and Black by CVAP or VAP. P-0079 at 10-11; P-0080 at 30; DTX011 at 285; Appendix Figures 13-14.

203. Plaintiffs' expert drew one illustrative plan that contains one district out of 10 total districts that is majority Hispanic and Black by CVAP. P-0079 at 10; P-0080 at 30; Figure 13.

204. Plan 10 contains one district in which the Hispanic and Black population are a majority of the district's CVAP according to 2013-2017 ACS 5-Year estimates. P-0079 at 10; P-0080 at 30; Appendix Table 47.

205. According to 2013-2017 ACS 5-Year Estimates, whether using CVAP estimates of single race alone or persons that identify as both Black and white, District 1 in Plan 10 is majority Hispanic and Black CVAP. P-0085 at 30.

206. Andrew Jackson's 10 district plan also includes one district out of 10 total districts that is majority Hispanic and Black by VAP. DTX011 at 285; DTX010 at 22.

**E. It Is Possible to Draw One District Out of Ten Total Districts That Is Majority Black**

207. The Black population in Virginia Beach is sufficiently large and geographically compact to be the majority in one single member district. DTX011 at 285; DTX010 at 21-22.

208. Andrew Jackson, with help from Mr. Brace, drew an illustrative plan that contains one district out of ten total districts that is majority Black by total population. DTX110 at 13; Brace Dep. at 44:2-12; DTX011 at 285; DTX110 at 13; DTX010 at 21.

209. Defendants expert, Mr. Brace, admitted that it is possible to draw one district that is majority Black. Brace Dep. at 42:2-12.

210. District 1 of Andrew Jackson's ten district plan had a Black total population of 21,758 persons, or 51.50% using the OMB method utilized by Mr. Brace. DTX010 at 21.

211. District 1 of Andrew Jackson's ten district plan had a Non-Hispanic Black VAP of 14,684 persons or 47.87% according to the OMB method of calculation. DTX011 at 285; DTX010 at 22.

**F. It Is Possible to Draw One District Out of Seven Total Districts That Is Majority Minority**

212. At least one illustrative map for the City Council can be drawn that includes one district out of seven total that is Majority Minority by VAP. DTX011 at 290; DTX011 at 266, 268.

213. In 2011, the council considered, and rejected, at least one proposed plan containing one district out of seven total that was Majority Minority using VAP. DTX010 at 8, 34; DTX011 at 290, 22-226.

214. The final residency district plan passed by the City Council did not have a residency district that was Majority Minority by VAP. DTX110 at 35-40; DTX011 at 222-226, 315, P-0139.

215. In 2011, Mr. Brace and the City Council created a seven-district plan titled “Council Liaison Alt 3 Amended.” The demographic statistics for that plan are set out in Appendix Figure 15. DTX011 at 290; DTX011 at 128.

216. The Council Liaison Alt 3 Amended Plan included one Majority Minority district by VAP. DTX011 at 290.

217. District 3 of Council Liaison Alt 3 Amended Plan contained a Non-Hispanic Black VAP of 29.51%, a Non-Hispanic Asian VAP of 12.65%, and a Hispanic VAP of 7.92%, making it a Majority Minority district with a VAP of 50.08%. DTX011 at 290.

218. The Council Liaison Alt 3 Amended Plan had an overall population deviation of 6.15% (calculated by adding the largest + and -: 2.82% and -3.33%), which is well within the 10% tolerance and lower than the Current Residency District Plan’s population deviation. DTX011 at 290.

219. Mr. Brace did not publish and Defendants did not produce compactness scores for the Council Liaison Alt 3 Amended Plan. DTX010; DTX011.

220. Mr. Brace did not publish and Defendants did not produce political subdivision split numbers for the Council Liaison Alt 3 Amended Plan. DTX010; DTX011.

221. The Council did not adopt the Council Liaison Alt 3 Amended Plan. DTX011 at 222-226.

222. In 2011, the Virginia Beach NAACP proposed two seven district plans, each of which had one majority non-white district. DTX110 at 12; DTX010 at 20; DTX011 at 289; DTX011 at 294.

223. The first plan from the Virginia Beach NAACP was called the “NAACP Initial Proposal Created 5/27/11.” DTX011 at 129; DTX010 at 34. The map and statistics for that plan are set out in Appendix Figure 16.

224. District 3 (Rose Hall District) of the NAACP Initial Proposal contained a nonwhite VAP of 51.61%, with a Non-Hispanic Black VAP of 29.10%, a Non-Hispanic Asian VAP of 12.96%, and a Hispanic VAP of 7.67%. DTX011 at 129; DTX011 at 294; DTX110 at 12.

225. District 3 of the NAACP Initial Proposal’s Non-Hispanic Black, Non-Hispanic Asian, and Hispanic VAP numbers sum to a total Hispanic, Black, and Asian VAP of 49.73%. DTX011 at 294.

226. The NAACP Initial Proposal had an overall population deviation of 6.34% (calculated by adding the largest + and -: 3.14% and -3.20%), which is well within the 10% tolerance and below the population deviation of the Current Residency District Plan. DTX011 at 294.

227. Mr. Brace did not publish and Defendants did not produce compactness scores for the NAACP Initial Proposal. DTX010; DTX011.

228. Mr. Brace did not publish and Defendants did not produce political subdivision split numbers for the NAACP Initial Proposal. DTX010; DTX011.

229. The City Council did not adopt the NAACP Initial Proposal. DTX011 at 222-226.

230. The Virginia Beach NAACP proposed a second plan with the Virginia Beach Concerned Citizens Coalition, called the “NAACP/The VA BCH Concerned Citizens Coalition Proposal Created 7/15/2011.” The map and district statistics for the NAACP and Virginia Beach Concerned Citizens Coalition Proposal are set out in Figure 17. DTX011 at 289; DTX010 at 34; Appendix Figure 17.

231. District 3 of the NAACP and Virginia Beach Concerned Citizens Coalition Proposal contained a nonwhite VAP of 51.47%, including a Non-Hispanic Black VAP of 29.10%, a Non-Hispanic Asian VAP of 12.96%, and a Hispanic VAP of 7.67%, making the Minority Community 49.55% of the district by VAP. DTX011 at 289; DTX010 at 20.

232. The NAACP and Virginia Beach Concerned Citizens Coalition Proposal had a population deviation of 9.23% (calculated by adding the largest + and -: 4.83% and -4.40%), which falls within the 10% tolerance. DTX011 at 289.

233. Mr. Brace did not publish and Defendants did not produce compactness scores for the NAACP and Virginia Beach Concerned Citizens Coalition Proposal. DTX010; DTX011.

234. Mr. Brace did not publish and Defendants did not produce political subdivision split numbers for the NAACP and Virginia Beach Concerned Citizens Coalition Proposal. DTX010; DTX011.

235. The City Council did not adopt the NAACP and Virginia Beach Concerned Citizens Coalition Proposal. DTX011 at 222-226.

236. The City’s Current Residency District Plan has one residency district (of seven total) that has a non-white VAP over 50%, but that district is elected at-large. DTX011 at 315; DTX110 at 30, 34, 36, 40; P-0139; Brace Dep. at 43:18-44:1.

**G. Majority-Minority Districts with Lower Compactness Scores Than Any of the Districts in Plaintiffs' Illustrative Plans are Routinely Upheld by Courts.**

237. Defendants' expert Kimball Brace drew the Illinois Fourth congressional district following the 1990 Census, intending to comply with Section 2 of the Voting Rights Act. Brace Dep. at 129:5-130:20; *See Comm. for a Fair & Balanced Map v. Illinois State Bd. of Elections*, 835 F. Supp. 2d 563, 568 (N.D. Ill. 2011). The district "combin[ed] the Puerto Rican northern part of the city [of Chicago] together with the Mexican-American southern part of the city." Brace Dep. at 129:11-14. A court approved the district. Notably, it had a compactness rating under the Polsby-Popper test of 0.02, *far* less compact than any of Plaintiffs' illustrative districts, which have a minimum Polsby-Popper score of 0.09.

238. Following the 2000 Census, Defendants expert drew the Illinois Fourth congressional district again, keeping "substantially the same shape as the [1990] District 4." *See Comm. for a Fair & Balanced Map*, 835 F. Supp. 2d at 569. The district retained similar boundaries following the 2010 Census, when Mr. Brace again tweaked the district. Today, its compactness score under the Polsby-Popper test is 0.05. *Id.* at 570.

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

**A. Prof. Spencer is An Expert in Identifying Racially Polarized Voting**

239. Prof. 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. Prof. Spencer is expert in the empirical analysis of public law, with an emphasis on campaign finance and voting rights. He regularly publishes academic articles that use social science methods to assess election laws, including two papers reflecting nationwide

surveys he conducted of polarized attitudes (racial and political) in American elections. P-0077 at 35, 43-44.

240. Because voting is private, it is impossible to know for certain how individuals cast their ballots. Therefore, analysts must use statistical methods to determine the voting behavior of demographic subgroups. P-0077 at 4.

241. Political scientists typically use three methods of analysis to infer the voting behavior of demographic subgroups: (1) homogenous precinct analysis (“HP”) also called “extreme case analysis”, (2) ecological regression (“ER”), and (3) King’s ecological inference (“EI”). P-0077 at 4.

242. Homogenous precinct analysis requires the examination of observed “marginal distributions” of data, such as how many white people live in a precinct or how many votes a particular candidate received, to estimate unobserved “joint distributions,” such as how many white people voted for a particular candidate. P-0077 at 4; *Expected testimony of Douglas Spencer*.

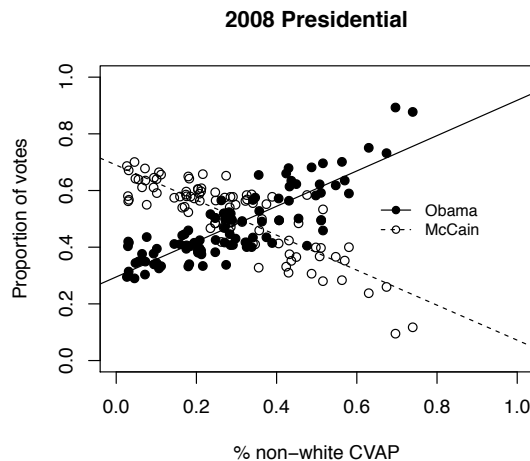
243. That HP only looks at precincts with very small or very large concentrations of a demographic group necessarily means that the analysis relies on only a small subset of the precinct data that is available (*i.e.*, it does not use all the precincts with a demographic profile of a white population between 40% and 60%). P-0077 at 4.

244. Ecological regression allows a political scientist to determine the correlation of race and candidate preference across *every* voting precinct (not just the outlier precincts that are used in HP). P-0077 at 5.

245. An ER analysis starts by identifying the demographic profile and election outcomes of each voting precinct for each relevant election. These outcomes are put on a graph,

or scatter plot, and subjected to a regression analysis that seeks to determine the relationship between the votes for a candidate (on the y-axis) and the demographic profile of the precincts (on the x-axis). A line of “best fit” can be drawn through the scatter plot in order to determine how strong the correlation is between the demographic profile of a precinct and its level of support for a particular candidate in a race. This allows for an intuitive graphical representation of the relationship between race/ethnicity and voting preference. P-0077 at 5.

246. The following chart uses the demographic profile of the precincts in Virginia Beach from 2008 (from 0% nonwhite to 100% nonwhite along the x-axis) and plots the support in each precinct for then-presidential candidate Barack Obama (solid dots) and presidential candidate John McCain (open dots). The solid line shows the line of best fit for the Obama data, and the dotted line shows the line of best fit for the McCain data. The angles of those lines suggest that as the non-white population of precincts in Virginia Beach increases, the percentage vote for Obama also increases (and conversely that as the non-white population of precincts increased, the percentage vote for McCain decreased). This indicates that, on the whole, white voters preferred McCain and non-white voters preferred Obama in the 2008 Presidential race. This markedly split preference for candidates by race is called “racially polarized voting.” P-0077 at 30.





247. In *Thornburg v. Gingles*, 478 U.S. 30 (1986), the Supreme Court cited HP and ER as methods for analyzing racially polarized voting analysis. *See id.* at 52-53 (“Dr. Grofman subjected the data to two complementary methods of analysis—extreme case analysis and bivariate ecological regression analysis—in order to determine whether blacks and whites in these districts differed in their voting behavior. These analytic techniques yielded data concerning the voting patterns of the two races, including estimates of the percentages of members of each race who voted for black candidates.”)

248. One limitation of ER is that it presumes a *linear* relationship between election returns and the racial composition of voting precincts, but that may not always hold true. In 1997, Gary King at Harvard developed a refinement of ER, called EI. P-0077 at 6.

249. Rather than relying on a *supposed* linear relationship between election returns and the racial composition of a precinct, EI uses the axiom that there *will always be* a linear relationship between the preferences of white and non-white voters—that is white support for a candidate can be inferred by subtracting the non-white vote from the total of possible votes. P-0077 at 6.

250. When there are more possible votes than nonwhite votes (or vice versa), the estimated white support will fall into a range. That range will be particular to each precinct. For example, if 90% of voters supported Candidate A and 80% of all voters were white, then white support for Candidate A must fall somewhere between the bounds of 70% (all nonwhite voters supported Candidate A) and 80% (if no non-white voters supported Candidate A). EI uses regression analysis to narrow those bounds based on the bounds in similar precincts. When there are many demographically similar precincts, the EI estimates become quite precise, meaning that the confidence interval for each estimate is small. P-0077 at 6-7.

251. EI has become the gold standard for assessing racially polarized voting in vote dilution cases under Section 2 of the VRA. *See e.g. 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.”) The Court cited Dr. Katz, an expert in the case, with approval: “ecological regression ‘was great technology in 1950’ when it was developed, but ‘[t]he world has come a long way in those intervening six decades.’”). *Id.* at 559 n.37. The strongest case for racially polarized voting exists when HP, ER, and EI all generate similar estimates and point in the same direction. P-0077 at 7.

252. In order to determine whether the Minority Community voted cohesively, Prof. Spencer estimated the joint preference of non-white voters together. This combined estimate provides a reliable measure of cohesion among the Minority Community in Virginia Beach. This was necessary because Asian and Hispanic precinct-level populations are simply too small to draw reliable conclusions about independently. *Expected testimony of Douglas Spencer.*

**i. Prof. Spencer’s Data Sources**

253. Prof. Spencer’s analysis used election results downloaded from the City’s website. No errors have been identified in those datasets. P-0097 (“election data PDFs”).

254. Prof. Spencer’s analysis used demographic information from the ACS 2013-2017 5-Year and 2014-2018 ACS 5-Year CVAP data. P-0077 at 38; P-0097 (“census\_cvap”).

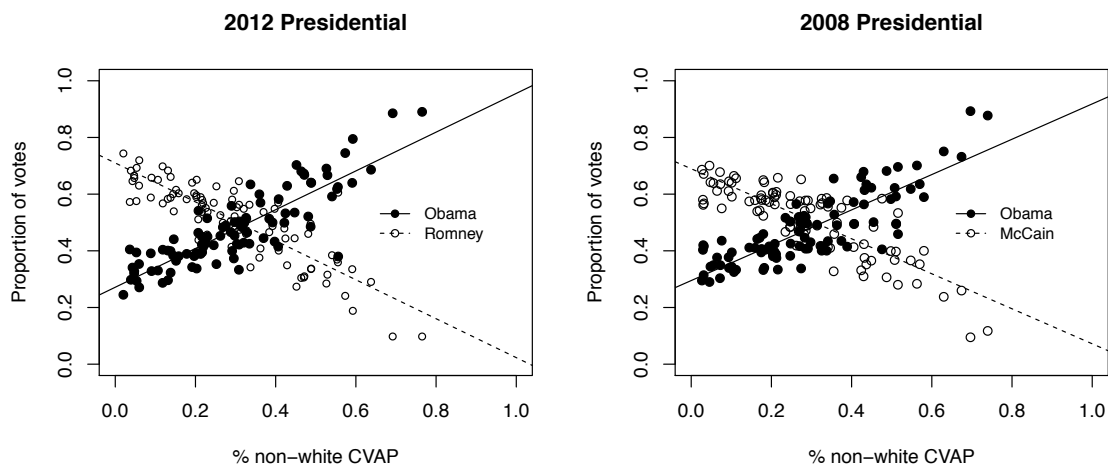
255. Prof. Spencer applied the 2010 Virginia Beach VTD file and the 2018 Virginia Beach precinct file to the relevant elections. P-0081 at 14; P-0097 (“vabeach\_vtd.R,” “vb\_2014.csv,” and “cvap2018.csv”).

## B. Federal and State Elections in Virginia Beach Show High Levels of Racially Polarized Voting

256. Voting in federal elections in Virginia Beach is racially polarized. For example, an estimated 90% of non-white voters strongly preferred Barack Obama over both John McCain (2008) and Mitt Romney (2012). White voters strongly preferred McCain and Romney (65% support) over Obama (35%). P-0077 at 30.

257. HP, ER, and EI analysis for the 2008, and 2012 Presidential elections, as well as the 2016 Congressional election all demonstrate that white and non-white voters in the City had divergent candidate preferences.

258. The ER plots for racially polarized voting in the 2012 and 2008 Presidential elections using Virginia Beach election results show a direct correlation between the percentage of the voting age population in a voting precinct that is non-white and the level of support for Obama. The plots suggest racially polarized voting in the 2008 and 2012 Presidential elections in Virginia Beach:

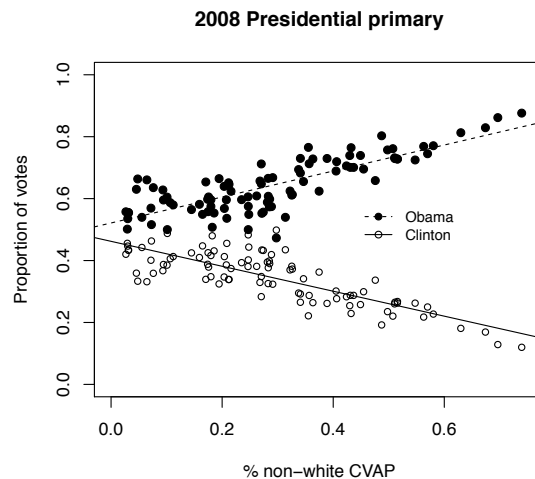


P-0077 at 30.

259. 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

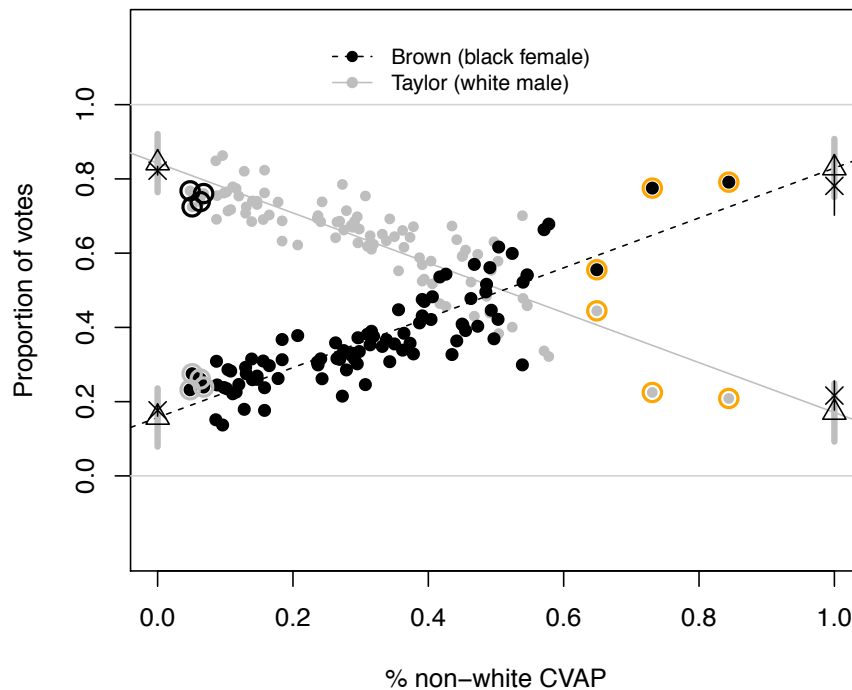
investigation into whether the racial polarization in the 2008 and 2012 elections in Virginia Beach was entirely driven by the partisan preferences of white and non-white voters, or whether the race of the candidate was a driving factor.

260. The ER plot for racially polarized voting in the 2008 Presidential primary election using Virginia Beach election results 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.

261. The ER plots for racially polarized voting in the 2016 congressional election for Virginia's second district, using Virginia Beach election results, suggest that non-white voters strongly preferred Shaun Brown (a Black female) over Scott Taylor (a white male), and white voters strongly preferred Taylor over Brown. Despite being the candidate of choice of non-white voters in Virginia Beach, Brown earned just 36.6% of the city's overall votes compared to 63.3% for Taylor:



P-0077 at 31.

### C. Probative City Council Elections for Racially Polarized Voting Analysis

262. There were 36 elections to the City Council between 2008 and 2018, where an “election” is defined as a race that results in one person winning a seat on the Council (where two people are elected at-large that is referred to as two elections for the purpose of this analysis). P-0097 (“Election Data PDFs,”); *Expected testimony of Douglas Spencer*.

263. Seven races were uncontested and not useable for RPV analysis. P-0097 (“Election Data PDFs,”); *Expected testimony of Douglas Spencer*.

264. Seventeen of the 36 elections for City Council between 2008 and 2018 included a candidate from the Minority Community and are presumptively probative in analyzing the patterns of racially polarized voting between the Black and white communities, and between the Minority Community and white community. P-0077 at 11-29; *Expected testimony of Douglas*

*Spencer*. Of those 17, two did not produce useable data, P-0077 at 3, 19, 39-41, leaving 15 that Prof. Spencer analyzed to determine the patterns of racially polarized voting. *Expected testimony of Douglas Spencer*.

**i. Racially Polarized Voting in the 2008 City Council Elections**

265. In 2008, five candidates including the incumbent Wilson, Allen, Strausbaugh, Shuler, and Teator ran for election to one at-large seat. Wilson, who is white, won. P-0077 at 29. Allen, who is Black, was the top-choice candidate and received the highest estimated level of support among non-white voters in the 2008 at-large election. Wilson was the top-choice candidate and received the highest estimated level of support among white voters. P-0077 at 29; Appendix Table 48.

266. In 2008, three candidates ran for the Kempsville seat including the incumbent Diezel, Jackson, and Flores. Diezel, who is white, won. P-0077 at 29. Jackson, who is Black, was the top-choice candidate and received the highest estimated level of support among non-white voters in the 2008 Kempsville election. Diezel was the top-choice candidate and received the highest estimated level of support among white voters in the 2008 Kempsville election. P-0077 at 29; Appendix Table 49; *Expected testimony of Douglas Spencer*.

**ii. Racially Polarized Voting in the 2010 City Council Elections**

267. In 2010, two candidates ran for the Princess Anne seat including incumbent Henley and Bullock. Henley, who is white, won. Bullock, who is Black, was the candidate of choice and received the highest estimated level of support among non-white voters. Henley, who is white, was the top-choice candidate and received the highest estimated support of white voters. P-0077 at 27; Appendix Table 50.

268. In 2010, seven candidates ran for two at-large seats including Bellitto, incumbent DeSteph, Moss, Erb, Redmond, Jackson, and Cabiness. Bellitto, who is white, and DeSteph who

is white, won. Jackson, who is Black, was the top-choice candidate and received the highest estimated level of support among non-white voters in the 2010 at-large election. Bellitto was the second-choice candidate and received the second highest estimated support among non-white voters. DeSteph was the top-choice candidate and received the highest estimated support of white voters in the 2010 at-large election. Bellitto also received the highest and second highest estimated level of support among white voters in the 2010 at-large election. P-0077 at 27; Appendix Table 51.

### **iii. Racially Polarized Voting in the 2011 City Council Election**

269. In 2011, three candidates ran in the special election for the at-large seat including Sherrod (incumbent by appointment only), Moss, and Free. Moss, who is white, won. Sherrod, who is Black, was the top-choice candidate and received the highest estimate level of support among non-white voters. Moss received the highest estimated level of support among white voters in the 2011 special at-large election. P-0077 at 23; Appendix Table 52.

### **iii. Racially Polarized Voting in the 2012 City Council Election**

270. In 2012, four candidates ran for the Kempsville seat including Ross-Hammond, Dale, Weeks, and Smith. Ross-Hammond, who is Black, won. Ross-Hammond was the top-choice candidate and received the highest estimate level of support among non-white voters. It is unclear whether Dale, who is white, or Weeks, who is white, was the first-choice candidate of white Voters, because the support for Dale and Weeks by white voters was statistically indistinguishable. Special circumstances allowed Ms. Ross-Hammond to get elected to the City Council in 2012 despite being the least preferred candidate of white voters; white voters split their vote fairly evenly between Dale, Weeks, and Smith, while non-white voters heavily supported her election. P-0077 at 21; Appendix Table 53.

### **iv. Racially Polarized Voting in the 2014 City Council Elections**

271. In 2014, two candidates ran for the Princess Anne seat including incumbent Henley and Burton. Henley, who is white, won. Henley was the top-choice candidate and received the highest estimated level of support among non-white voters. Henley was also the top-choice candidate and received the highest estimated level of support among white voters. P-0077 at 19; Appendix Table 54.

272. In 2014, four candidates ran for the Rose Hall special election including Kane, Johnston, Browder, and Cabiness. Kane, who is white, won. Cabiness, who is Black, was the top choice candidate and received the highest estimated level of support among non-white voters. Kane was the top choice candidate and received the highest estimated level of support among white voters. P-0077 at 19; Appendix Table 55.

273. In 2014, four people ran for two at-large seats including incumbent Moss, Davenport, Martin, and Furman. Moss, who is white, and Davenport, who is white, won. Davenport was the top-choice candidate and received the highest estimated level of support among non-white voters. Moss was the top-choice candidate and received the highest estimated level of support by white voters in the 2014 at-large election. P-0077 at 19; Appendix Table 56.

**vi. Racially Polarized Voting in the 2016 City Council Elections**

274. In 2016, two candidates ran for the Kempsville seat including incumbent Ross-Hammond and Abbott. Abbott, who is white, won. Ross-Hammond, who is Black, was the top-choice candidate and received the highest estimated level of support among non-white voters. Abbott was the top-choice candidate and received the highest estimated level of support among white voters. P-0077 at 16; Appendix Table 57.

275. In 2016, four candidates ran for Mayor of Virginia Beach including incumbent Sessoms, Kowalewitch, Weeks, and Furman. Sessoms, who is white, won. Sessoms was the top-choice candidate and received the highest estimated level of support among non-white voters. He



was also the top-choice candidate and received the highest estimated level of support among white voters. P-0077 at 16; Appendix Table 58.

**vii. Racially Polarized Voting in the 2018 City Council Elections**

276. In 2018, three candidates ran for the Centerville seat including Wooten, Wray, and Schesventer. Wooten, who is Black, won. Wooten was the top-choice candidate and received the highest estimate level of support among non-white voters. She also was the top-choice candidate and received the highest estimated level of support among white voters. P-0077 at 14; Appendix Table 59.

277. In 2018, six candidates ran for two at-large seats including incumbent Moss, Rouse, Oliver, White, Bright, and Hubbard. Rouse, who is Black, and Moss, who is white, won. Rouse was the top-choice candidate and received the highest estimate level of support among non-white voters. White, who is white, was the second-choice candidate and received the second highest estimated level of support among non-white voters. Moss was the top-choice candidate and received the highest estimated level of support among white voters. There was no clear second-choice candidate for white voters because the support for Oliver, who is white, and Rouse, was statistically indistinguishable. P-0077 at 14; Appendix Table 60.

278. Special circumstances existed for the election of councilmembers Rouse and Wooten, because they both were elected after the filing of this case, *Holloway v. City of Virginia Beach*, 2:18-cv-69.

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

279. The City frequently treats the Minority Community as one cohesive group. For example, in 2011 the City Council touted its attempt to create a Majority Minority district. P-0427 (Jones Dep.) 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 specifically explained that his and the Council’s motivation behind the creation of a district was “to see equal representation.” P-0424 (Dyer Dep.) 39:2-16. Additionally, the City’s Minority Business Council (“MBC”) works to support “minority business owners” without limiting that support to any particular group. P-0421 (Rouse Dep.) at 107:2-9 (describing the purpose of the MBC); *Expected testimony of Georgia Allen, Alicia Bobulinski, Kelly Fowler, Andrew Jackson, Louisa Strayhorn, and Shewling Moy.*

280. The City Council members discuss the Minority Community as a cohesive community. For example, City Council members Aaron Rouse and Rosemary Wilson speak about minorities in Virginia Beach as a group with group-specific needs and priorities. *See, e.g.*, P-0421 (Rouse Dep.) at 48:13-19 (Council member Rouse discussing his platform goal about increasing minority participation to level the playing field economically); P-0428 (Wilson Dep.) at 170:4 (Council member Wilson discussing the hiring of minority police officers and saying “we really love having minorities”).

281. There is substantial evidence that the Minority Community has shared interests in the City. For example, Council member Rouse specifically identified the shared interests of the Minority Community in Virginia Beach in speaking about why there was a lack of minority representation on City Council and why that matters. Rouse testified that “what may particularly have been an issue for the minority population may be overlooked by the majority.” P-0421 (Rouse Dep.) at 89:18–20. Councilwoman Abbott identified what some of those minority-specific issues were when she testified that the two issues she had spoken about with Minority Community members most frequently were (1) district voting and (2) the minority community’s desire for a disparity study. P-0423 (Abbott Dep.) at 136:15-137:12; *Expected testimony of*

*Georgia Allen, Alicia Bobulinski, Kelly Fowler Latasha Holloway, Andrew Jackson, Shewling Moy.*

282. There is evidence that the Minority Community has acted as a unified coalition in the City. In 2001 the Minority Community united under a single name, “Community Coalition for a Better Virginia Beach,” to advocate for single-member districts. In 2003 the Minority Community united to protest the Virginia Beach city treasurer on two separate occasions after he made derogatory remarks to the African-American and Asian-American communities. Recently, the Minority Community has worked together to push for a disparity study, seek the removal of confederate monuments, and to march against racial injustice. *Expected testimony of Georgia Allen, Alicia Bobulinski, Kelly Fowler Latasha Holloway, Andrew Jackson, Shewling Moy.*

**V. Bloc Voting by the White Majority Usually Defeats the Preferred Candidate of Choice of the Minority Community**

283. Out of the 15 probative elections in Virginia Beach from 2008 to 2018, the Minority Community’s preferred candidate of choice was a person of color 10 times, but only three of those candidates won election, due to opposition by a cohesive bloc of white voters. P-0077 at 3; *Expected testimony of Douglas Spencer.*

284. Of the three candidates of color elected to the Council between 2008 and 2018, two, Mr. Rouse and Ms. Wooten, won in 2018 after the filing of this suit. P-0077 at 3; *Expected testimony of Douglas Spencer.*

285. White candidates who were the candidates of choice of the Minority Community won election seven times out of 15 probative elections (47%). In the other eight races, opposition by a cohesive bloc of white voters prevented the candidate of choice of the Minority Community from winning the election. P-0077 at 3; *Expected testimony of Douglas Spencer.*

286. Because it is not clear whether white voters preferred Rouse, who was elected, or Oliver, who was not, as their second-choice candidate in the 2018 at-large race, white voters either had their preferred candidate of choice elected to the council 14 times out of 15 probative elections (93%) or 13 times out of 15 probative elections (87%). *Expected testimony of Douglas Spencer.*

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

287. One way to test the effectiveness of an illustrative plan is to check how the proposed districts would have performed in past election contests when the results are recompiled to the new district configurations. DTX107 at 14; *Expected testimony of Douglas Spencer.*

288. Prof. Spencer recompiled the results from seven elections (the seven elections in which a Black candidate who was unquestionably the choice of the Minority Community lost due to white bloc voting) in order to analyze the likely performance of Districts 1 and 2 in Plan 2 drawn by Mr. Fairfax. These elections include: the 2008 at-large (one seat), 2010 Princess Anne, 2010 at-large (two seats), 2011 at-large (one seat), 2014 Rose Hall, and 2016 Kempsville elections (the "Performance Analysis Elections"). P-0077 at 34.

289. In order to determine the demographic data of the voting precincts for each election for the City of Virginia Beach for the Performance Analysis Elections, Prof. Spencer performed a "spatial join" that aggregated data from census blocks in proportion to the area of each block within the district, utilizing a technique identified in a peer reviewed publication: Brian Amos et al., *When Boundaries Collide: Constructing a National Database of Demographic Voting Statistics*, 81 Pub. Opinion Q. 385 (2017).

290. In these Performance Analysis Elections, under the Current Residency Plan, the Minority Community were only able to elect a candidate of choice in one of the seven (14%) elections in Plan 2. P-0077 at 34; Appendix Table 61.

291. District 1 in Plan 2 drawn by Mr. Fairfax would have increased the support for the candidate of choice of the Minority Community in six of the seven Performance Analysis Elections. In four of the seven (57%), the candidate of choice of the Minority Community would have won the reconstituted election. P-0077 at 34; Appendix Table 61.

292. District 2 in Plan 2 drawn by Mr. Fairfax would have increased the support for the candidate of choice of the Minority Community in all seven of the Performance Analysis Elections. Indeed, in six of seven (86%), the candidate of choice of the Minority Community would have won the reconstituted election. P-0077 at 34; Appendix Table 61.

293. When analyzing Plans 6, 7 and 8 drawn by Mr. Fairfax, Prof. Spencer added two additional elections (the two at-large seats elected in 2018) to the analysis to determine whether Districts 1 and 2 in Plans 6, 7, and 8 would perform for the Minority Community (the “Performance Elections Plus 2018”). P-0087 at 4-5.

294. In order to determine the demographic data for the voting precincts for each election in the City of Virginia Beach for the Performance Elections Plus 2018, Prof. Spencer disaggregated the VTDs or precincts, weighted by population, into census blocks and then aggregated them into the illustrative districts of Plans 6, 7 and 8, utilizing a technique identified in Brian Amos et al., *When Boundaries Collide: Constructing a National Database of Demographic Voting Statistics*, 81 Pub. Opinion Q. 385 (2017).

295. Using the Performance Elections Plus 2018, under the Current Residency Plan, the Minority Community were only able to elect two candidates in the nine elections (22%). P-0087 at 4.

296. District 1 in each of Plans 6, 7 and 8 drawn by Mr. Fairfax would have increased support for the candidate of choice of the Minority Community in all nine Performance Elections Plus 2018. In five of the nine (56%), the candidates of choice of Minority Community would have won the reconstituted election. P-0087 at 4; Appendix Table 62.

297. District 2 in each of Plans 6, 7, and 8 drawn by Mr. Fairfax would have increased support for the candidate of choice of the Minority Community in all nine Performance Elections Plus 2018. In seven of the nine (78%), the candidates of choice of the Minority Community would have won the reconstituted election. P-0087 at 4; Appendix Table 63.

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

298. The totality of circumstances inquiry under Section 2 of the Voting Rights Act (“VRA”) evaluates the “Senate factors” detailed in a report accompanying the 1982 renewal of the VRA by the Senate Committee on the Judiciary. *Thornburg v. Gingles*, 478 U.S. 30, 36-37 (1986) (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 76.

299. 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 1: There Is a History of Official Discrimination in the State and City that Has Affected Minority Groups’ Ability to Register, Vote, or Otherwise Participate in the Democratic Process**

300. The State of Virginia and the City of Virginia Beach have long and well-recognized histories of racial discrimination. Official discrimination in Virginia has affected all people of color. It persists to this day, and directly affects the opportunity of minority residents to participate fully in the political process as well as elect candidates of their choice in Virginia and Virginia Beach. P-0078 at 4-5.

301. In addition to direct restrictions on voting and voter registration, other forms of discrimination have burdened racial minorities, contributed to racial isolation, and limited opportunities for advancing their socio-economic status. These forms of discrimination also have restricted and continue to restrict the ability of minorities to participate fully and effectively in the political process in Virginia Beach. P-0078 at 5.

**i. Historical discrimination in Virginia**

302. During the Reconstruction period that followed the era of slavery and the end of the Civil War, African Americans in Virginia participated in the politics of the Commonwealth as voters and office-holders. P-0078 at 5; Joint Stipulated Fact 36.

303. By the 1880s, the Virginia state legislature began to adopt measures aimed at eliminating black voting and office-holding in Virginia. Joint Stipulated Fact 37.

304. In 1884, the state passed the Walton Act—a secret ballot law—to disenfranchise illiterate individuals, most of whom were Black. P-0078 at 5.

305. During the Virginia’s Constitutional Convention of 1901-1902, the Commonwealth adopted literacy testing and poll tax requirements for voting. Joint Stipulated Fact 38.

306. These policies effectively snuffed out Black voting and office-holding. Convention delegate Carter Glass, later a U.S. Senator from Virginia, said, “Discrimination! Why, that is precisely what we propose; that, exactly is what this Convention was elected for—to discriminate to the very extremity of permissible action under the limitations of the Federal Constitution, with a view to the elimination of every negro voter who can be gotten rid of, legally, without Discrimination!” P-0078 at 5. The effort succeeded. By 1905, only 10,500 of 147,000 eligible African Americans in Virginia (7 percent) remained on the registration lists. P-0078 at 6.

307. At the 1964 passage of the Twenty-Fourth Amendment, Virginia was one of only five states that still used poll taxes.

308. Virginia still enforced a poll tax law in January of 1964, when the Twenty-Fourth Amendment abolished the use of the poll tax in federal elections. Joint Stipulated Fact. 39.

309. Anticipating this result, the General Assembly enacted other legislation designed to disenfranchise minority voters, which a federal district court struck down in May 1964. P-0078 at 8.

310. Virginia continued to require poll taxes in state elections until it was struck down in *Harper v. Virginia Board of Elections* in 1966. Joint Stipulated Fact 40.

311. The Court found that “the Virginia poll tax was born of a desire to disenfranchise the Negro.” 383 U.S. 663, 666 n.3 (1966).



312. By the early twentieth century, Virginia had established the comprehensive system of racial subjugation known as Jim Crow. This included legal segregation in schools, transportation, and public facilities, and de facto segregation in housing and public accommodations. Participation in the legal system—including service as judges, prosecutors, police officers and jurors—was largely limited to whites. P-0078 at 6; Kidd Dep. at 37:3-9.

313. Virginia was also part of the eugenics movement. In the 1920's, Virginia passed a law known as the Racial Integrity Act, which authorized thousands of forced sterilizations, and included a miscegenation law recognized as the most draconian in American history. In 1926, the state enacted a law requiring racial segregation in places of public accommodation. Only Virginia among all the states adopted such extreme laws. P-0078 at 6.

314. These laws, moreover, applied to all non-whites, including Asians. P-0078 at 6-7, n.7. Legal segregation in public accommodations, for example, applied to Chinese and Japanese students at the University of Richmond. P-0078 at 6.

315. In 1955, the Virginia Supreme Court rejected a challenge to its ban on interracial marriage brought by an Asian man married to a white woman. As late as 1962, the state Supreme Court ruled that a bi-racial Asian and white couple married in New Jersey did not have a legal marriage in Virginia and could not get a divorce in the state. In 1967, in *Loving v. Virginia*, the U.S. Supreme Court struck down the prohibitions on interracial marriage in Virginia and fifteen other states. P-0078 at 7.

316. Virginia resisted integration. After *Brown v. Board of Education*, 347 U.S. 483 (1954), Virginia joined the white South's "massive resistance." Every member of Virginia's congressional delegation signed the "Declaration of Constitutional Principles"—known as the "Southern Manifesto"—pledging resistance to school desegregation. P-0078 at 6-7.

317. In 1956, a special session of the Virginia General Assembly vested pupil placement authority with the state to prevent assignment of Black pupils to white schools, authorized the governor to close schools that courts had ordered integrated—which was quickly struck down as unconstitutional—and required the NAACP to disclose its membership. Through the late 1950's, counties continued to resist integration by closing public schools and opening white-only private schools. The pace of integration in Virginia did not pick up until the late 1960s. P-0078 at 7.

318. Federal intervention in the 1960s began dismantling Jim Crow and expanding opportunities for non-whites in Virginia to participate in the political process.

319. In 1964, Congress enacted the Civil Rights Act that banned racial discrimination in both public facilities and public accommodations. It prohibited employment discrimination based on race or sex and racial discrimination in programs and activities receiving federal financial assistance, and applied to institutions such as federally-funded schools and colleges. P-0078 at 7. Joint Stipulated Fact 42.

320. In 1965, Congress enacted the Voting Rights Act (“VRA”) over the opposition of all but one member of the Virginia congressional delegation. Only two members of Virginia’s twelve-member congressional delegation subsequently supported extensions of the Voting Rights Act in 1970, 1975, and 1982. P-0078 at 8.

321. Sections 4 and 5 of the Voting Rights Act required certain “covered” jurisdictions with demonstrated histories of discrimination and low rates of voter registration or turnout, to submit proposed election changes for “preclearance” to ensure they did not discriminate against minority voters. P-0078 at 8-9.

322. Virginia was one of only six southern states covered in their entirety by the preclearance requirement from passage of the Act until 2013, when the U.S. Supreme Court in *Shelby County v. Holder*, 570 U.S. 529 (2013) invalidated the coverage formula of the Act. P-0078 at 9.

323. In the decades since adoption of the VRA, the Justice Department and federal courts objected to many proposed laws relating to voting in Virginia. In 1973, Virginia sought to invoke the “bail out” provision of the Act, because, it claimed, the State had rectified the low registration and turnout of African Americans that was the basis for its original coverage under Section 4. A federal district court rejected this effort, in part because Virginia still maintained inferior schools for Black children. P-0078 at 9.

324. At the time of redistricting in the 1980s, Virginia’s record of four Black representatives in the hundred-member lower house and one in the forty-member upper house was the lowest level of Black representation in the South. The state legislative redistricting process following the 1980s census was protracted and contentious, encompassing some 14 legislative sessions, six redistricting plans, a three-judge federal court finding of unconstitutional population disparities, a gubernatorial veto, and Justice Department Section 5 objections to plans for both houses. Under pressure, the legislature allowed civil rights groups to participate in the map drawing process. As a result of the redistricting, the House of Delegates transitioned to 100 single-member districts, of which nine (9 percent) had Black majorities. P-0078 at 9.

325. In the elections following redistricting in the 1980s, Black representation in the State Senate increased from one to three members (7.5 percent) in a State that was 19 percent Black. P-0078 at 9.

326. In 1991, the Department of Justice objected to Virginia’s redistricting plan for the State House of Delegates, arguing that it violated Section 5 by submerging Black voters in some majority white districts. P-0078 at 9.

**ii. Recent discrimination against the Minority Community in Virginia**

327. Discrimination against minorities in Virginia has continued well into the 21st century. In 2014, a three-judge federal court for the Eastern District of Virginia held in *Page v. Virginia State Board of Elections*, 15 F. Supp. 3d 657 (E.D. Va. 2014) that Virginia’s post-2010 congressional redistricting was unconstitutional because it needlessly packed African American voters into a single district, diminishing their political influence elsewhere in the state. In June 2018, after a remand from the U.S. Supreme Court, a three-judge federal district court held in *Bethune-Hill v. Virginia State Bd. of Elections* that Virginia had engaged in an unlawful racial gerrymander of state legislative districts. The Court found “overwhelming evidence” that “the state has sorted voters into districts based on the color of their skin . . . . This predominant use of race and disregard of narrow tailoring principles plainly are at odds with the guarantees of the Equal Protection Clause.” P-0078 at 10-11.

328. Latinos also face adverse treatment as compared to white people in seeking rental housing, in part because of local hostility towards immigrants, irrespective of their immigration status. P-0078 at 11.

329. 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 of the legislators representing part of Virginia Beach voted for the bill. The same year, the Virginia General Assembly passed House Bill 2270 requiring “the sheriff, jail superintendent, or other official in charge of a local correctional facility or a regional jail in which an alien is

incarcerated [to] notify U.S. Immigration and Customs Enforcement of the release or discharge of the alien forthwith as soon as the release date is known.” The Governor, who vetoed two similar bills the year before, vetoed both these bills. P-0078 at 11.

**iii. Virginia Beach also has a long history of discrimination**

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

331. A study of the allocation of polling place resources in the City in 2004 and 2008 found that the distribution of machines in both Richmond and Virginia Beach for the 2004 and 2008 elections was biased against voters in precincts with high proportions of African-Americans. In both Richmond and Virginia Beach, the higher the proportion of African Americans in the voting age population, the higher the mean number of registered voters per voting machine. 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 the peak value to the lowest, the decrease was on the order of 5 to 10 percent. P-0078 at 17.

**B. Senate Factor 2: Voting in the City Council Elections Is Racially Polarized**

332. As discussed in Proposed Findings of Fact 239-294, elections in Virginia Beach are racially polarized.

**C. Senate Factor 3: The City Has Used Voting Practices or Procedures That Tend to Enhance the Opportunity for Discrimination Against the Minority Group, Such as Unusually Large Election Districts, Majority-Vote Requirements, and Prohibitions Against Bullet Voting**

**i. Use of at-large elections, numbered posts, anti-single shot voting, and staggered elections all enhance the opportunity for discrimination in elections in Virginia Beach**

333. Virginia Beach maintains designated posts for the election of the majority of City Council members, a device the Senate Report explicitly recognized as one that often exacerbates the discriminatory nature of an at-large election system. P-0082 at 10, 15.

334. Seven positions in Virginia Beach have designated posts, but are elected at-large. The at-large election of seven designated seats of 11 on the City Council prevents minority voters from single-shot voting for a preferred candidate or concentrating their votes on a small number of candidates. P-0082 at 10; P-0078 at 4, 21.

335. Single-shot voting for a preferred candidate in multi-winner elections gives minority voters an increased opportunity to elect a candidate of choice. This is because although voters could vote for multiple candidates, they have the option to instead vote for only one candidate, increasing the vote total for the preferred candidate without increasing the vote total for any other candidates. Designated posts voted on at large remove that ability by requiring voters to split their votes among seven residency district seats. P-0078 at 4, 21; P-0082 at 10.

336. 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 one position in one election year and two positions in the next election year. This system renders single-shot or concentrated voting impossible in a single-seat election and ineffective in a two-seat election. P-0082 at 10, 21.

337. Virginia Beach's unusual hybrid system is unique in the region and possibly the country. P-0082 at 10-12.

**ii. Candidates must compete across a huge population and geographic area in order to get elected**

338. Virginia Beach is unique among 13 cities of comparable size in the State of Virginia in requiring all City Council candidates to run citywide. The City is essentially tied for second among those cities in the size of the land mass that candidates must traverse to win a city council position, and first in the size of the electorate for which each candidate must compete. P-0078 at 22-24; P-0082 at 13, 15, 51; P-0423 (Abbott Dep.) 51:19-52:3 (agreeing that it's unusual for a city the size of Virginia Beach to use an at-large system); P-0422 (Moss Dep.) 152:19-21 (stating that the City's election system is "extremely unusual").

339. Minority candidates running at-large for City Council in Virginia Beach must compete across a city of some 250 square miles and more than 450,000 persons. P-0078 at 4, 21. This is far higher than the average square miles candidates must cover to win a city council seat in Virginia cities with populations over 50,000. P-0078 at 22; Appendix Tables 64-66. If Virginia Beach were to adopt 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, Appendix Figure 5.

**D. Senate Factor 4: Members of the Minority Community are Excluded from the Candidate Slating Process**

340. Formal candidate slating occurs when candidates list themselves as running together for office, in the hope that voters will vote for the entire slate of candidates. Functionally, slating (formal or informal) tends to be used by party officials and private associations to deny minority candidates meaningful access to the ballot. 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.

341. Prof. Lichtman studied united funding in City Council elections from 2008-2018 and found that while 17 white candidates had received \$250 or more from two or more other candidates, only two Black candidates (of 20 total candidacies by Black persons from 2008-2018) had done the same. P-0078 at 25.

342. When intra-election candidates (people who ran in City Council elections between 2008 and 2018 but not in the same year as the recipient of the contribution) are included in the analysis, seven white candidates receive two or more intra-election candidate donations (of \$250 or more), while no Black candidates received two or more intra-election candidate donations. 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.

343. Another method of informal slating in City Council elections is through sample ballots. In 2018, Friends of the Elephant, a Political Action Committee ("PAC") associated with the Republican Party, handed out sample ballots at one or more polling places with their 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 sample ballots handed to white voters. P-0034 at 15-16; P-0426 (Wood Dep.) at 73:4-77:13.

344. The color-coded ballots handed out by the Friends of the Elephant likely sought to ensure that candidates preferred by Friends of the Elephant received support from Black voters due to the association with Rouse, but prevented Rouse from receiving the support of white voters by not associating him with the Friends of the Elephant's preferred candidates. *Expected*



*testimony Allan Lichtman*; P-0421 (Rouse Dep.) 63:19-64:7 (explaining that he did not campaign with other candidates in 2018, and did not support a slate of candidates for that election); Abbott Dep: 178:7-14 (admitting that it would be of concern if Friends of the Elephant handed out two different slates, one that included Aaron Rouse and one that did not, with the one with Aaron Rouse only being given to African American constituents).

**E. Senate Factor 5: Minority Group Members Bear the Effects of Discrimination in Areas Such as Education, Employment, and Health, Hindering Their Ability to Participate Effectively in the Political Process**

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

345. The Minority Community of Virginia Beach continues to suffer the effects of past official discrimination, and lack certain privileges or rights that are afforded to the white community. P-0078 at 28-36; P-0423 (Abbott Dep.) at 151:10 (agreeing that the City has a history of racial discrimination and that people in the Minority Community still suffer from downstream effects of long-term discrimination); P-0421 (Rouse Dep.) at 121:2-11 (admitting that Virginia Beach has a history of racial discrimination and that minority communities are still suffering the downstream effects of that discrimination); Wooten Dep. at 128:7-13 (agreeing that many minority communities in the City are still suffering some of the downstream effects of racial discrimination).

346. 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 median income, 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; Appendix Table 70-71.

347. For example, the per capita income of white persons in Virginia Beach is \$37,433, but only \$22, 773 (61%) for Black individuals, \$20,784 (56%) for Hispanic individuals, and \$26,512 (71%) for Asian individuals. Similarly, the poverty rate for white persons is only 5.8% yet it is 14.4% for Black individuals, 14.2% for Hispanic individuals, and 7.4% for Asian individuals. The rate of 18-64 year-olds with no health insurance follows a similar pattern, with only 11.6% of white persons in the age range having no health insurance compared to 17.1% of Black individuals, 24.5% of Hispanic individuals, and 15.7% of Asian individuals. Only 4.1% of white individuals received SNAP assistance, compared to 15.9% of Black individuals, 10.9% of Hispanic individuals, and 5.5% of Asian individuals. White individuals in Virginia Beach have a median home value of \$273,700, while the median home value is \$218,100 for Black individuals, \$231,400 for Hispanic individuals, and \$253,400 for Asian individuals. P-0078 at 28-36; Appendix Table 70-71.

**ii. Past discrimination continues to affect how the education system serves the Minority Community compared to white residents of Virginia Beach**

348. The white community graduates from high school at the rate of 95.0%, while the Minority Community lags behind, with high school graduation rates of just 89.4% for Black individuals, 88.7% for Hispanic individuals, and 91.8% for Asian individuals. P-0078 at 33; Appendix Table 67. The Black and Hispanic communities, in particular, lag behind the white community in their passage rate of 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; Appendix Table 68.

349. Though the Virginia Beach Public School District temporarily showed progress toward integration after a court desegregation order in 1969, since 1990 segregation in the District has increased in each subsequent decade. This can be measured by the Dissimilarity

Index, which was 45.0 in 1968, dropped to 27.0 in 1990, rose to 32.7 by 2000, and as of 2011 was back up to 38.9. P-0078 at 18.

350. Black students, in particular, in Virginia Beach's public schools suffer disproportionately from suspensions and expulsions. For the 2015-16 school year, 8.92% of Black students were punished with short-term suspensions while just 2.41% of white students were suspended. P-0078 at 18-19; Appendix Figure 21.

351. Virginia Beach lags in the employment of minority teachers relative to minority public school enrollment. In 2011, Virginia Beach had one white classroom 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 Virginia Beach over 50 percent of students and just 15 percent of teachers were minorities. Thus, challenges in recruiting minority teachers, present across the state, do not explain the great racial imbalance in teacher/student ratios in Virginia Beach as compared to other Virginia communities. 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**

352. 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.

353. Minority voter registration in Virginia trails white voter registration. On average from 2008 to 2018, white registration as a percentage of CVAP was 74%, while the rate in the Minority Community was only 66.1% for Black individuals, 55.2% for Hispanic individuals, and 64.2% for Asian individuals. P-0082 at 23-24; Appendix Figure 22.

354. For all Virginia elections from 2008 to 2018, the average white voter turnout of 59.6% was higher than turnout for the Minority Community, which was 54.5% 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 turnout, even though Virginia Beach and the Commonwealth have virtually identical demographic profiles. P-0082 at 18.

355. Prof. Lichtman used ecological regression, described supra at 244-247, to estimate the difference in turnout between white and Black voters in Virginia Beach. P-0082 at 26; Appendix Table 73. He finds a stark difference in turnout in Virginia Beach between Black and white voters, with Black turnout 32% lower than white turnout in 2018, and 36% lower in 2016. P-0082 at 31; Appendix Table 69.

356. Hispanic voters often face additional obstacles to effective participation in the political system, including a language barrier. This occurs because 34 percent of Hispanics in Virginia speak English “less than ‘very well,’” and campaigns are less likely to contact Hispanic voters than Black voters. P-0082 at 21-23; Appendix Table 74.

357. Candidates from the Minority Community are also at a disadvantage because white candidates have access to structured campaign resources and funds that minority candidates generally lack. Prof. Lichtman studied the contribution patterns of the five largest donors in City Council elections and found that the vast majority of their donations go to white candidates. P-0078 at 52; Appendix Table 75.

#### **F. Senate Factor 6: Overt and Subtle Racial Appeals Are Used in Political Campaigns**

358. Even defendants’ expert, Prof. Kidd, admits that overt and subtle racial appeals do not have to result in the election of a candidate to office in order to be relevant to the

consideration of the totality of the circumstances in Voting Rights Act cases. P-0082 at 37; Kidd Dep. at 138:12-139:3, 140:6-22.

359. Recent Virginia political campaigns and politics generally, including in Virginia Beach, have seen overt racial appeals, from the use of racial slurs by a candidate for the U.S. Senate, to a Governor's issuance of a Confederate History Proclamation that did not mention slavery, racist depictions of President Obama, controversies about the Confederate flag and statutes, and demonstrations by white supremacists in Charlottesville, among other examples. P-0078 at 39-44; P-0082 at 32-33.

360. There are also several documented instances of racial appeals during political campaigns in Virginia Beach. P-0078 at 40-41; P-0082 at 33-35; P-0384.

361. In 1998, Louisa Strayhorn faced racial harassment in her unsuccessful reelection bid for Virginia Beach City Council after becoming only the second African American elected to the City Council four years prior. These racist incidents included phone calls threatening, "We're going to make sure that n\*\*\*er doesn't get elected," and in-person confrontations following the election, where people said "See, n\*\*\*er we said we'd get you." Ms. Strayhorn's campaign workers also received racist threats. P-0078 at 40; *Expected testimony of Louisa Strayhorn*.

362. 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, bearing no attribution or authorization of any kind, (e.g., "paid for by ..."), which is required by law. P-0082 at 33, 34; Appendix Figure 19.

363. A second flyer circulated in the 2008 mayoral race, also without the legally required attribution/authorization, 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; Appendix Figure 20.

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; Kidd Dep. at 142:18-143:3, 145:8-12; *Expected testimony of Allan Lichtman*.

364. During the 2017 House of Delegates elections, Delegate Rocky Holcomb (R-85 in Virginia Beach) claimed in an advertisement that his Democratic opponent Cheryl Turpin 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. Under the picture is the caption, “Police: Convicted rapist out on parole attacked 7-year old girl.” P-0078 at 40; Appendix Figure 21. Turpin responded with an ad that attempted to link Holcomb to white hate groups and Scott Pressler, the person depicted in the ad next to Holcomb, sued Turpin for defamation, claiming that he was not a racist or a hate group leader. P-0078 at 41; P-0198.

365. In 2019, Shannon Kane, a Virginia Beach City Council member from 2014-2019, sought to unseat Delegate Kelly Fowler who is of both Mexican and Filipino descent. Kane’s campaign sent out a campaign flyer showing a photoshopped image of Fowler next to MS-13 gang members. The flyer included the phrases “Extremist Kelly Fowler. Weak on illegal immigration. Supporting sanctuary cities. Putting our safety at risk,” and “Kelly Fowler. Good for illegal immigrants. Bad for us.” P-0384; P-0202; P-0419. Kane admitted that the image on the flyer was harmful, saying that “it’s hurting people, hurting someone, it’s not something I ever want to do, and for that I truly regret the image used on the flyer.” Kane, however, did not apologize for the verbal portions of the flyer, saying that she “approved the content of the flyer but [] didn’t approve the creative direction....” P-0384.

**G. Senate Factor 7: The extent to which members of the minority group have been elected to public office in the jurisdiction.**

**i. Virginia Beach has a poor record of electing minority candidates to City offices**

366. For a city that is 19.3 percent African American in citizen voting age population and has a citizen voting age population that is one-third non-white, Virginia Beach has a poor record in electing minority candidates to city positions. P-0078 at 43, 67. The sparse history of electing candidates from the Minority Community to the City Council is set out in detail *supra* at PFOF 30-36.

367. Additionally, in the history of Virginia Beach, only one member of the Minority Community—Tina E. Sinnen, the current Latina Circuit Court Clerk—has ever been elected to *any* of the city’s five constitutional offices. P-0078 at 43.

368. Currently, four of the five officials elected citywide in Virginia Beach are white, including the Treasurer, Sheriff, Commissioner of Revenue, and Commonwealth’s Attorney. Only one of 11 members of the elected School Board—African American Sharon R. Felton—is a minority. A second African American woman, Jessica L. Owens, was appointed to the School Board in 2019, while this lawsuit was pending. P-0078 at 43.

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

369. The unprecedented election of two African Americans, 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. Hansen Dep: 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 the average white support for the five other Black candidates that ran for at-large City Council seats since 2008. Wooten was the only Black

candidate for City Council in Virginia Beach since at least 2008 to win a majority of the white vote. P-0078 at 44-48.

370. No Black candidates other than Rouse and Wooten have garnered substantial contributions from white donors. All of the five major white donors in City Council elections donated to *both* Rouse and Wooten and all in the amount of \$1,000 or more. Notably, no other candidate garnered contributions from all these five major donors in the 2018 election. 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.

371. Additionally, Mr. Rouse was endorsed by Governor Northam and Senator Warner. These endorsements from statewide office holders are "very unusual" for City Council members. P-0421 (Rouse Dep.) 41:10-17, 45:2-4.

#### **H. Senate Factor 8: Elected Officials Are Failing to Respond to the Particularized Needs of the Minority Community**

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

372. 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 the particularized needs of minority residents. *Expected testimony of Allan Lichtman, Andrew Jackson, and Louisa Strayhorn.*

373. In 2008, Virginia Beach set an aspirational goal of 10 percent for minority participation in city contracts overall. At no point from FY09 to FY19 did Virginia Beach reach this goal. P-0275; P-0336 at 5; P-0277 at 4; P-0429.

374. The Minority Community lobbied for over six years to obtain a disparity study of city contracts. In 2011, the predominantly Black community group the Hampton Roads Committee of 200+ Men, Inc. passed a resolution calling for such a study. P-0244. At that time,



the Virginia Beach Minority Business Council also began advocating for a disparity study of city contracts. P-0244, P-0040, P-0245. 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 the cost of the study. P-078 at 59; P-0038; P-294; P-303. The Minority Business Council voted in 2017 to reaffirm its 2011 request that the City Council conduct a disparity study. P-0008; P-0245. In 2017, the Virginia Beach Human Rights Commission also voted to support a disparity study in Virginia Beach, citing among other things Bruce Smith's offer to pay half the expense of the study as an additional incentive to conduct it now. P-0303. In 2017, leaders of the Minority Community organized the Faith, Freedom and Justice March to call for a disparity study. P-0175; P-0317; P-0338.

375. Over this period, City officials consistently pushed back internally and externally against the concept of conducting a disparity study. P-0010; P-0347; P-0400. Prior to authorizing a disparity study, City officials pitched a truncated disparity study to be conducted in phases, indicating that they believed they would not have to complete all three phases. P-0009; P-0248; P-0363; P-0402; P-0407; P-0422 (Moss Dep.) 181:2-5 (admitting that he supported only doing certain phases of the disparity study before continuing on to the rest). Members of the Minority Community objected to this multiple-phase approach. P-0066; P-0401; P-0407.

376. In 2017, the Virginia Beach City Council finally authorized a disparity study of city contracts ("the Disparity Study"). Joint Stipulated Fact 43.

377. The Council authorized the Disparity Study in response to years of requests and increasing pressure, but only after accepting Bruce Smith's offer to pay for half of the study. P-0147. Once the Disparity Study was approved, there were still internal disputes about the

timeline for the study and a failure to communicate about the process with Bruce Smith. P-0344; P-0345.

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

378. The results of the Disparity Study were released in January 2019. As part of the study, the researchers computed a “Disparity Index” that measured differences between the availability for contracts among minority-owned businesses and the actual participation of such businesses in city contracts. They noted that in their display of the index “the line down the center of the graph shows a disparity index level of 100, which indicates parity between participation and availability. A line is also drawn at a disparity index level of 80, because some courts use 80 as the threshold for what indicates a substantial disparity.” A disparity index of 80 means that a business category received \$0.80 “for every dollar that they might be expected to receive based on their availability for the relevant prime contracts and subcontracts that the City awarded during the study period.” P-078 at 59; P-0298.

379. Once the disparity study was actually conducted, following years of requests by the Minority Community, the results showed that the City had 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.

380. 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 59; P-0298.

381. 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-078 at 59; P-0298.

382. Asian-American owned businesses had a minimal eligibility percentage of just 0.8 percent, and received 5.6 percent of city contracts, for a disparity index of some 700. P-0078 at 59; 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 Asian community; 86 percent of the total dollars went to a *single* Asian-American owned business. P-0298 at 74.

383. The Disparity Study identified numerous deficiencies in City policies that, if rectified, could help achieve greater participation for minority-owned businesses. P-078 at 59. 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; Wooten Dep. at 100:20-101:2. The City has refused repeated requests by Council member Wooten for changes to reduce disparities in the City. P-0026; Wooten Dep. at 100:5-102:9 (stating that she requested that the City increase the funding for a staff member for the implementation of the Disparity Study but that was not approved); Wooten Dep. 83:8-85:20 (stating that she had requested the Color Guard to participate in the Disparity Study Forum but that did not occur); Wooten Dep. 98:3-19 (stating that she requested adding \$84,000 to the Summer Youth Employment Program and that was not approved in the budget).

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

384. Virginia Beach's hiring practices have not kept pace with the City's demographic changes. For example, the City has lagged in the hiring of members of the Minority Community to the police force. P-078 at 59.

385. In 2006, the City reached a consent decree with the U.S. Department of Justice noting: "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.” In particular, “the City’s use of a mathematics test as a pass/fail screening device in the selection process for the entry-level position of police officer has had a statistically significant disparate impact against African- American and Hispanic applicants” and “has not been shown to be job related for the position in question and consistent with business necessity.” P-078 at 59-60.

386. 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 Virginia Beach police force, including only 9.4% Black individuals (versus 18.9% of the adult population), 3.3% of Hispanic individuals (versus 5.6% of the adult population), and 2.2% of Asian individuals (versus 7.2% of the adult population). P-0078 at 61-62, 65.

**I. Senate Factor 9: The City Council Has No Valid Justification for the Challenged Election System**

387. 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 and white candidates of choice to office.

388. Six of 12 other large independent cities in Virginia use either a straight district system or a mixed at-large district system for their city council elections, with the majority elected from districts. P-0078 at 66.

389. 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 66; *see* PFOF 333-336 (discussion of how staggered terms and designated posts can facilitate discrimination).

## 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 at-large method for electing City Council members deprives its Hispanic/Latino, 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. The Court’s conclusions of law are set forth below.

### I. Jurisdiction and Venue

This Court has federal jurisdiction pursuant to 28 U.S.C. § 1343(a), because this action seeks to redress the deprivation, under color of state law, of rights, privileges, and immunities secured by the Voting Rights Act; and 28 U.S.C. § 1331, because this action arises under the laws of the United States. This Court has jurisdiction to grant both declaratory and injunctive relief pursuant to 28 U.S.C. §§ 2201 and 2202. Venue is proper in this District pursuant to 28 U.S.C. § 1391(b)(2).

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

Section 2 of the Voting Rights Act (“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)). To prove a Section 2 violation, a showing of discriminatory intent is not required, as “Congress [has] made clear that a violation of § 2 c[an] be established by proof of discriminatory results alone.” *Chisom*, 501 U.S. at 404. The standard for proving prohibited “discriminatory results” is set out in 52 U.S.C. § 10301(b), which provides:

A violation of [Section 2] is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a [protected class] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.

A Section 2 vote dilution claim has two components. *First*, Plaintiffs must satisfy the three “*Gingles* preconditions,” specifically: (1) the minority group must be “sufficiently large and geographically compact to constitute a majority in a single-member district” (“*Gingles* I”); (2) the minority group must be “politically cohesive” (“*Gingles* II”); and (3) the majority must vote “sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate” (“*Gingles* III”). *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.

As the statutory language suggests, Section 2 requires a functional analysis of unlawful vote dilution. “[T]he question whether the political processes are equally open depends upon a *searching practical evaluation* of the *past and present reality*, and on a *functional view* of the political process.” *Gingles*, 478 U.S. at 45 (emphasis added; internal quotation marks and citation omitted). At-large elections are not a *per se* violation of Section 2. *Id.* at 46. Vote dilution claims are “‘peculiarly dependent upon the facts of each case’ . . . and requires ‘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).

To determine whether a jurisdiction has violated Section 2 of the VRA, the Court must make a practical assessment of how at-large elections operate in the City of Virginia Beach (“the

City”) and determine whether Hispanic/Latino, Black, and Asian voters (the “Minority Community”) have actual, not hypothetical, equal access to the political process.

A coalition of two or more politically cohesive minority groups can bring a claim together under Section 2. While the Supreme Court and the Fourth Circuit have not expressly addressed the question,<sup>2</sup> the Second, Fifth, and Eleventh Circuits have each ruled that coalition claims are cognizable under Section 2. *See Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 276–77 (2nd 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, explaining, in a coalitional Section 2 case, 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).<sup>3</sup> The Sixth Circuit is the lone exception. *See Nixon v. Kent County*, 76 F.3d 1381, 1393 (6th Cir. 1996) (en banc) (ruling that Section 2 does not permit coalition-based claims of discriminatory results).

This Court adopts the prevailing rule allowing coalition claims under Section 2 of the VRA. Section 2 protects “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). With this inclusive language, Congress recognized that discrimination in voting is not a problem limited to any one race, but a

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<sup>2</sup> The Supreme Court has expressly declined to reach this issue. *See Bartlett v. Strickland*, 556 U.S. 1, 13–14 (2009). But when the issue has arisen, the Supreme Court assumed without deciding that coalition districts would be permissible. *Grove v. Emison*, 507 U.S. 25, 41 (1993).

<sup>3</sup> A district court in the First Circuit, adjudicating the claims of a Hispanic and Asian coalition of voters, recently adopted the prevailing view. *See Huot v. City of Lowell*, 280 F. Supp. 3d 228, 231 (D. Mass. 2017). The plaintiffs and defendants later settled via consent decree. *See* Consent Decree, *Huot v. City of Lowell*, No. 1:17-cv-10895, ECF No. 109 (D. Mass. Oct. 9, 2019).

legacy of white supremacy. It is a hallmark of white supremacy that it demeans and excludes all people of color. It would be anomalous to conclude that when those voters' common experience of discrimination leads them to respond collectively, when the disadvantages of the "non-whiteness" they have in common lead them to seek increased influence through cooperation, Congress's chosen safeguard would leave their coalitions without protection from voting discrimination.

Although §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)), nothing in the statute requires every member of such a "class" to share the same race, as opposed to sharing the same experience of being politically excluded on account of race. "[A] class of citizens protected by subsection (a)" means just that—a class of individuals who are protected by subsection (a) against denial or abridgement of their individual right to vote. In this case, the Minority coalition consists of three groups whose members are each protected by the VRA. Together, the coalition members here, each wielding the right conferred by subsection (a), are the "class of citizens" that subsection (b) protects.

The City's particular history of racial discrimination and the practical ways in which this history lives on in the persistent racial disparities experienced by its residents, therefore guide the Court's assessment of Minority Community voters' access to the political process in the City.

As discussed below, white voters and the Minority Community diverge in their preferences as to who should be elected to City Council. PFOF ¶¶ 239-97. White voters vote as a bloc and usually defeat candidates of choice of the Minority Community. This fact, combined with racial disparities, historical prejudices, and additional circumstances in the City, denies the Minority Community a fair opportunity to elect the candidates of their choice. PFOF ¶¶ 298-388.



### III. Standing

Plaintiffs Latasha Holloway and Georgia Allen have standing because they are members of the Minority Community, registered voters, and live in areas of the City that could comprise a single-member district in which Black and Latino persons or the Minority Community could constitute a majority (a “Majority Minority” district) using either the citizen voting age population (“CVAP”) or voting age population (“VAP”).<sup>4</sup> PFOF ¶¶ 3-8.

### IV. Elections in the City of Virginia Beach

In 1966, the City adopted at-large elections for electing 10 city councilmembers and the Mayor, which required all candidates to compete for positions across the 249 square mile city. The City established that seven of the members would be selected from residential districts with a single seat at stake, but that all voters in the city would vote on the councilmember from each district.<sup>5</sup> PFOF ¶¶ 26-29.

### V. Plaintiffs Have Established the 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

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-member district.” *Gingles*, 478 U.S. at 50. This straightforward threshold requirement is satisfied by the

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<sup>4</sup> Previously, Defendants argued that Plaintiffs, who are two African-American women, do not have standing to bring a Section 2 claim alleging that the City’s method of elections for City Council dilutes the voting power of the entire Minority Community. Dkt. 150. This Court previously rejected those arguments, dkt. 168, and does so again. Plaintiffs have established both constitutional and prudential standing. *See* dkt. 168 at 9-15.

<sup>5</sup> The seven residential districts are: Centerville, Kempsville, Rose Hall, Bayside, Lynnhaven, Beach, and Princess Anne.

creation of an illustrative plan containing a single-member district in which the Minority Community constitutes a bare majority of the citizen 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?”); *see also id.* at 16 (describing “the *Gingles* threshold inquiry” as “the baseline of our § 2 jurisprudence”). “[T]he Supreme Court [at this stage] requires only a simple majority of eligible voters in the single-member district. The court may consider, at the *remedial* stage, what type of remedy is possible . . . . But this difficulty should not impede the judge at the liability stage of the proceedings.” *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1019 (8th Cir. 2006) (“*Bone Shirt II*”) (alteration in original) (quoting *Dickinson v. Ind. State Election Bd.*, 933 F.2d 497, 503 (7th Cir. 1991)); *see also Pope v. Cty. of Albany*, 687 F.3d 565, 576 (2d Cir. 2012) (“[T]he first *Gingles* question is straightforward and statistical: does the identified minority group form at least a simple majority of the relevant population in the proposed district?”).

The illustrative plan must comply with both federal and state legal requirements. *Voinovich v. Quilter*, 507 U.S. 146, 156 (1993) (in area of voting and apportionment, “federal courts are bound to respect the States’ . . . choices unless those choices contravene federal requirements”). Legal redistricting plans in Virginia Beach must:

(1) satisfy the one person, one vote constitutional requirements, *i.e.*, approximate population equality across all districts in the plan, VA Code § 24.2-304, Code of the City of Virginia Beach § 3.01 (Acts 1966, Ch.39; Acts 1987, Ch. 227, § 1; Acts 1995, Ch. 697, § 1), *see also Abrams v. Johnson*, 521 U.S. 74, 98 (1997);

(2) be composed of contiguous districts, VA Code § 24.2-304.1,

(3) be composed of geographically compact districts, VA Code § 24.2-304.1 and

(4) comply with traditional redistricting principles, including: minimizing the splits of counties, municipalities, and precincts; recognizing communities of interest; and avoiding multimember districts, *see Abrams*, 521 U.S. at 92 (“[Section] 2 compactness inquiry should take into account ‘traditional districting principles such as maintaining communities of interest and traditional boundaries.’” (citation omitted)).

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

Plaintiffs established that the Minority population is “sufficiently large and geographically compact to constitute a majority in a single-member district.” *Gingles*, 478 U.S. at 50. Plaintiffs’ expert Anthony Fairfax has offered ten illustrative plans, eight with ten single-member districts and two each with a single illustrative district. PFOF ¶¶ 64-196, 201-236; Appendix Tables 9-47; Appendix Figures 4-13.<sup>6</sup> In each of his plans, there is at least one district in which the Minority Community constitutes a majority of the CVAP. *Id.* In eight of the plans at least one district contains a majority of the Minority Community by VAP (of those, three contain two districts where the Minority Community is a majority by VAP). *Id.*, Appendix Table 77. Eight of the ten plans drawn by Mr. Fairfax have *two* single member districts where Minority Community voters constitute a majority of the district’s CVAP. *Id.* Additionally, one plan drawn by Mr. Fairfax contains a district in which the Hispanic and Non-Hispanic Black populations together constitute a majority of the district’s CVAP. *Id.* Each plan seeks to achieve slightly different goals. For example, Plan 2 prioritizes minimizing Voter Tabulation Districts (“VTD”) splits,<sup>7</sup> while Plans 4 and 8 prioritize not splitting any Census Block Groups. Plaintiffs have shown in every plan that illustrative districts can be drawn that are Majority Minority while complying with traditional

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<sup>6</sup> Mr. Fairfax is a recognized expert demographer and creator of legally compliant redistricting plans in the context of Section 2 analysis. PFOF ¶ 64.

<sup>7</sup> All of Mr. Fairfax’s plans split less VTDs than the Current Residency District Plan.

redistricting principles. Plaintiffs thus satisfy the requirements of *Gingles* I. Plaintiffs have demonstrated that the Minority Community is sufficiently numerous and geographically compact in Virginia Beach to constitute a majority in one or more districts.

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

**i. Legal Standard**

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

*Gingles* II is satisfied where a Minority Community, is politically cohesive. *See Gingles*, 478 U.S. at 51, 56. Cohesiveness exists 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), and can be established by demonstrating the existence of racially polarized voting, *i.e.*, “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 require completely divergent 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); *see Sanchez v. Colorado*, 97 F.3d 1303, 1319 (10th Cir. 1996) (same).

*Gingles* III, meanwhile, is satisfied where the white majority votes sufficiently as a bloc to enable it, in the absence of special circumstances, usually to defeat the minority’s preferred candidate. *See Gingles*, 478 U.S. at 50-51. There is no requirement that white voters have “an

unbending or unalterable hostility” to minority-preferred candidates such that those candidates always lose. *Jenkins*, 4 F.3d at 1123. Rather, *Gingles* III is met where, “as a practical matter, the *usual* result of the bloc voting that exists is the defeat of the minority-preferred candidate.” *Id.* (emphasis added); *see also Blytheville*, 71 F.3d at 1389 (marginal minority electoral success “fit[s] precisely in the *Gingles* test as to whether the white majority does indeed vote sufficiently as a bloc to enable it . . . usually to defeat the minority’s preferred candidate” (alteration in original; citation and internal quotation marks omitted)). For racially polarized voting to be “legally significant” in the context of Section 2, “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).

As the Supreme Court observed, “no simple doctrinal test” applies to the third *Gingles* factor because racial bloc voting can “vary according to a variety of factual circumstances.” *Gingles*, 478 U.S. at 57-58. *Gingles* II and *Gingles* III requires 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**

Not all elections are probative in assessing *Gingles* II and *Gingles* III. For example, only contested elections have probative value in evaluating the *Gingles* preconditions because only if elections are held can the outcomes provide relevant information about the ability of the Minority Community to elect candidates of their choice. *Gingles*, 478 U.S. at 57; *Blytheville*, 71 F.3d at 1389.

Moreover, for purposes of analyzing the *Gingles* preconditions, not all contested elections have equal probative value. *First*, more recent elections, absent special circumstances, are generally more probative. *Bone Shirt II*, 461 F.3d at 1020-21. *Second*, although “endogenous”

elections—*i.e.*, those elections for the offices at issue, here, the City of Virginia Beach City Council elections—are more probative than the results of “exogenous” elections—*i.e.*, contests for other offices, such as Congress or President, *id.*, they can still be a useful indicator for the Court as to the extent of racial polarization in voting. *See, e.g., Cane v. Worcester Cty.*, Md., 840 F. Supp. 1081, 1088 (D. Md. 1994) (explaining that “plaintiffs may rely on factors beyond endogenous election data that prove political cohesion,” including exogenous elections) (quoting *Gingles*, 478 U.S. at 57, n.25; *Hall v. Holder*, 955 F.2d 1563, 1571 (11th Cir. 1992)), *aff’d in part, rev’d in part on other grounds*), *see also Jenkins v. Red Clay Consolidated Sch. Dist. Bd. of Educ.*, 4 F.3d 1103, 1134-35 (3rd Cir. 1993) (holding that exogenous elections could be considered in racially polarized voting analysis); *Citizens for a Better Gretna v. City of Gretna, La.*, 834 F.2d 496, 502 (5th Cir. 1987) (“[T]he district court properly considered [exogenous elections] as additional evidence of bloc voting—particularly in light of the sparsity of available data.”). *Third*, “when the minority’s only choice is to vote for a white candidate or not vote at all, such elections are, in general, less probative on the issue of racial polarization than elections involving both black and white candidates.” *United States v. Charleston Cty., S.C.*, 365 F.3d 341, 350 (4th Cir. 2004), *citing Lewis v. Alamance County*, 99 F.3d at 610 n. 8 (“elections involving minority candidates may be more probative ‘on the question of whether racial polarization exists’”).<sup>8</sup> *Fourth*, there is less

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<sup>8</sup> Indeed, the *Gingles* Court relied exclusively on interracial legislative contests. *See* 478 U.S. at 80-82. The Fifth, Ninth, and Eleventh Circuits have followed suit in holding that interracial elections are most probative of racially polarized voting. *See Citizens for a Better Gretna*, 834 F.2d at 503-04 (“[I]mplicit in the *Gingles* holding is the notion that black preference is determined from elections which offer the choice of a black candidate.”); *Ruiz v. City of Santa Maria*, 160 F.3d 543, 552-53 (9th Cir. 1998) (“[A] minority vs. non-minority election is more probative of racially polarized voting than a non-minority vs. non-minority election.”); *Nipper v. Smith*, 39 F.3d 1494, 1540 (11th Cir. 1994) (“[Monoracial] elections . . . may reveal little about the issue to be determined: the capacity for white bloc voting usually to defeat black candidates of choice. Particularly where voting is extremely polarized by race in elections in which black candidates

probative value in any election that is marked by special circumstances. *See Gingles*, 478 U.S. at 75-76 (holding that district court “could appropriately take account of the circumstances surrounding recent black electoral success in deciding its significance to [plaintiffs’] claim.”); *see also Ruiz*, 160 F.3d at 557-58 (there is less probative value in elections that are “not representative of the typical way in which the electoral process functions.”).

### iii. Methods for Identifying Minority-Preferred and White-Preferred Candidates

To analyze whether Plaintiffs have met *Gingles* II and *Gingles* III, the Court must necessarily determine whether the Minority Community has candidates of choice and, if so, identify those candidates. The Supreme Court has explained that, in Section 2 cases, courts must perform “an intensely local appraisal” that accurately reflects voters’ preferences. *Gingles*, 478 U.S. at 78 (citation omitted).

Identifying the candidates of choice of the Minority Community is not a mechanical task. Rather, a court must employ a contextual case-by-case approach that, as required by the Fourth Circuit, establishes, that “[e]ach such situation must be reviewed individually to determine whether the elected candidates can be fairly considered as representatives of the minority community.” *Collins v. City of Norfolk, Va.*, 816 F.2d 932, 937 (4th Cir. 1987) (“*Collins I*”). Answering the *Gingles* II and III threshold questions “typically requires a statistical and non-statistical evaluation” of the voting behavior and election results in the relevant elections. *Bone Shirt II*, 461 F.3d at 1020.

Because voting is private, it is impossible to know for certain how individuals cast their ballots. PFOF ¶ 240. Therefore, analysts must use statistical methods to determine the voting behavior of subgroups. PFOF ¶ 240. Ecological inference (“EI”) has become the “gold standard,”

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participate, white-on-white elections in which a small majority (or a plurality) of black voters prefer the winning candidate seem comparatively less important.”).

*Wright v. Sumter Cty. Bd. of Elections & Registration*, 301 F. Supp. 3d 1297, 1305 (M.D. Ga. 2018), for determining whether voting in a jurisdiction 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

Plaintiffs’ expert Dr. Douglas Spencer analyzed City Council elections from 2008 to 2018 using three different methods: Homogenous Precincts, Ecological Regression, and Ecological Inference.<sup>9</sup> PFOF ¶¶ 241-278.

Dr. Spencer determined that there were 15 probative City Council elections between 2008 and 2018.<sup>10</sup> PFOF ¶¶ 262-264. In order to determine whether the Minority Community voted cohesively, Dr. Spencer estimated the joint preference of non-white voters together. This combined estimate provides a reliable measure of cohesion among the Minority Community in Virginia Beach. PFOF ¶ 252. This was necessary because Asian and Hispanic “precinct-level populations are simply too small to draw reliable conclusions about . . . independently.” PFOF ¶ 252. Dr. Spencer analyzed each of the 15 probative elections using HP, ER, and EI, and relied most heavily

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<sup>9</sup> Dr. Spencer is a Professor of Law and Public Policy at the University of Connecticut. PFOF ¶ 239. Dr. Spencer regularly publishes academic articles that use social science methods to assess the impact of election laws, including two papers reflecting nationwide surveys he conducted of polarized attitudes (racial and political) in American elections. *Id.* Dr. Spencer is an expert in the empirical analysis of public law, with an emphasis on campaign finance and voting rights. *Id.* Homogenous Precinct analysis and Ecological Regression were approved by the Supreme Court in *Gingles* but those methods were refined in 1997 with the introduction of King’s EI. King’s EI is now the accepted pre-eminent method of determining whether racially polarized voting exists in a jurisdiction.

<sup>10</sup> Dr. Spencer excluded the remaining elections for a variety of reasons: some were uncontested, some involved results where the candidate of choice of the minority or non-minority community could not be definitively determined and some involved only white candidates running for election



on the latter to determine who was the candidate of choice of the minority and non-minority communities in each probative election.

Dr. Spencer found that racial polarization in voting was clear in each of the 15 probative elections. PFOF ¶¶ 265-278. Dr. Spencer's analysis of recent federal elections corroborated this finding, with clear evidence of racially polarized voting in both presidential and congressional elections. PFOF ¶¶ 256-261.

Special circumstances existed in three of the elections identified as probative.<sup>11</sup> First, in 2012 when Ms. Amelia Ross-Hammond was elected, she was only able to win as the candidate of choice of the Minority Community because white voters split their support fairly evenly between three white candidates. PFOF ¶ 270. The Supreme Court and the Eastern District of Virginia have recognized that when a minority group elects their candidate of choice only because white voters split their votes, that is a special circumstance relevant to an inquiry 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).

Prior to 2018, only three Black candidates had ever been elected to City Council, PFOF ¶¶ 265-275, and none won re-election. Thus, special circumstances also existed in 2018, when for the first time in the City's history two Black candidates were elected to the City Council in the same election. Both Mr. Aaron Rouse and Ms. Sabrina Wooten were elected to office after the filing of this case and while it was still pending. PFOF ¶¶ 276-278. The Fourth Circuit has recognized that the election of candidates of color after the filing of a Section 2 suit can constitute special

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<sup>11</sup> "While the *Gingles* Court did not provide more specific metrics to inform what types of situations may constitute special circumstances, the Sixth Circuit has suggested a special circumstance must be a dynamic that plays an 'unusually important role in the election at issue.' *Clarke v. City of Cincinnati*, 40 F.3d 807, 813 (6th Cir. 1994) (discussing incumbency as a special circumstance)." *United States v. City of Eastpointe*, 387 F.Supp.3d 589, 606 (E.D. Mich 2019).

circumstances. *Collins v. City of Norfolk, Va.*, 883 F.2d 1232, 1241 (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.”)

Dr. Spencer found that white bloc voting regularly defeats the Minority Community’s preferred candidates of choice. PFOF ¶¶ 283-286. Only 7 out of 15 (47%) of the Minority Community’s preferred candidates were successful in their elections, while either 14 or 13 out of 15 (93% or 87%)<sup>12</sup> of the white community’s preferred candidate were successful in their elections. This dramatically different success rate is evidence that white bloc voting is diluting the votes of the Minority Community and that this pattern will likely persist so long as the City continues to use its current method of electing councilmembers. *Id.*

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

To test the effectiveness of Mr. Fairfax’s plans, Dr. Spencer also analyzed how the Majority Minority districts in Mr. Fairfax’s Plans 2, 6, 7, and 8 would have performed in past election contests. PFOF ¶ 287-297. When assessing Plan 2, Dr. Spencer focused on the seven contests where there was a Black candidate who was unquestionably the candidate of choice of the Minority

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<sup>12</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 candidate, but their support went fairly evenly to both Ms. Oliver and Mr. Rouse. If Mr. Rouse is included as a candidate of choice of the white community, then they have had their candidate of choice elected in 14 out of 15 elections. But if Ms. Oliver is included as their candidate of choice, then white voters have had their candidate of choice elected in 13 out of 15 elections.

Community but had lost the election due to white bloc voting.<sup>13</sup> *Id.* When assessing Plans 6, 7, and 8, Dr. Spencer added the 2018 races to his analysis and so focused on nine total contests. *Id.*

Dr. Spencer concluded that in all of the illustrative districts analyzed, the Minority Community would increase their ability to elect candidates of their choice compared to the status quo of the current at-large system. *Id.* For Plan 2, the status quo resulted in the Minority Community only electing their candidate of choice in one out of seven elections (14%), but District 1 in Plan 2 would change that level of success to four out of seven elections (57%), and District 2 in Plan 2 would result in success in six out of seven elections (86%). PFOF ¶¶ 290-292. When analyzing Plans 6, 7 and 8 drawn by Mr. Fairfax, Prof. Spencer added two additional elections (the two at-large seats elected in 2018) to the analysis to determine whether Districts 1 and 2 in Plans 6, 7, and 8 would perform for the Minority Community (the “Performance Elections Plus 2018”). PFOF ¶ 293. The status quo resulted in the Minority Community only electing their candidate of choice in two out of nine elections (22%), but District 1 in Plans 6, 7, and 8 would change that level of success to five out of nine elections (56%), and District 2 in Plans 6, 7, and 8 would change that level of success to seven out of nine elections (78%). PFOF ¶¶ 294-297. An illustrative plan need not result in Minority Community 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 representatives of their choice. Dr. Spencer’s analysis shows that the districts in Mr. Fairfax’s illustrative plans 2, 6, 7, and 8 achieve that goal.

**v. Dr. Kidd’s Approach for Identifying Minority-Preferred Candidates Among Minority Voters Is Not Reliable.**

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<sup>13</sup> These contests include the 2008 at-large (one seat), 2010 Princess Anne, 2010 at-large (two seats), 2011 at-large (one seat), 2014 Rose Hall, and 2016 Kempsville races.

Defendants' expert, Dr. Kidd has offered opinions on whether voting in the City is racially polarized, without conducting his own racially polarized voting analysis. Dr. Kidd's experience in this area is limited, and his opinions suffer from several methodological defects. First, Dr. Kidd does not calculate his own homogenous precinct, ER, or EI estimates. Secondly, one of Dr. Kidd's critiques of Dr. Spencer relies on there being different levels of turnout between the Minority Community voters. For example, Dr. Kidd critiques Dr. Spencer's combined estimate analysis by relying on different levels of voter turnout for Black, Hispanic, and Asian voters. However, courts have repeatedly discounted analysis that rely on turnout rates to disprove a Section 2 claim. *See, e.g., Montes v. City of Yakima*, 40 F. Supp. 3d 1377, 1405 (E.D. Wash. 2014), 1405 ("[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 incorrectly applies a 50% threshold for Minority-preferred candidates in *every* election, a standard which is improper given the high number of multi-candidate races in Virginia Beach. Candidates with less than 50 percent of the vote can win, and have won, in multi-candidate races.

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

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 cohesive." *Sanchez v. Bond*, 875 F.2d 1488, 1494 (10th Cir. 1989); *see also Cuthair v. Montezuma-Cortez, Colorado Sch. Dist. No. RE-1*, 7 F. Supp. 2d 1152, 1168 (D. Col. 1998) (finding competent lay testimony to be "strongly persuasive and highly probative of minority vote dilution."). In *Bridgeport Coal. for Fair Representation v. City of Bridgeport*, for example, the statistical evidence was stronger for one of the groups in the coalition but lacking for the other, but the court

found sufficient evidence of cohesiveness by supplementing the statistical evidence with qualitative evidence from the community. 26 F.3d 271, 276 (2d Cir. 1994), *vacated on other grounds*, *City of Bridgeport, Conn. v. Bridgeport Coal. for Fair Representation*, 512 U.S. 1283 (1994). Even in the absence of *any* statistical evidence, a court could still find that cohesiveness has been sufficiently demonstrated by qualitative evidence of 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).

Plaintiffs present four types of qualitative evidence: 1) Evidence of the City treating the Minority Community as one group; 2) Evidence of elected officials treating the Minority Community as one group; 3) Evidence of shared interests of the Minority Community; and 4) Evidence of the Minority Community working together as a unified coalition. *See* PFOF ¶¶ 279-282.

**vii. Plaintiffs Have Met the Requirements of Gingles II and III.**

Plaintiffs' quantitative and qualitative evidence demonstrate cohesive preferences in the Minority Community that differ from the preferences of white voters; that is, there is evidence of racial polarization in voting. Additionally, white bloc voting usually defeats the preferred candidates of the Minority Community.

Dr. Spencer's proffered opinions rest on substantial expertise. They are credible, reliable and not diminished by the attempted attacks by Defendants' expert, Dr. Kidd, who lacks both the same level of expertise or credibility. Based on Dr. Spencer's methodology, the Court finds that out of the 15 probative City Council elections in Virginia Beach from 2008 to 2018, the Minority-preferred candidate was a Black person 10 times but only three of those candidates won their election due to the opposition by a cohesive bloc of white voters. PFOF ¶¶ 283-286. Of the three

Black candidates elected, two of them—Rouse and Wooten—were elected in 2018 after the filing of this lawsuit, and hence their election does not suggest that the problem has been resolved. *Id.*

Additionally, when Dr. Spencer assessed elections where both white and Black candidates were the choice of the Minority Community, he found that the Minority Community is still usually unable to elect its candidates of choice to office. Namely candidates preferred by the Minority Community were successful only 7 times out of 15 (47%), while either 14 or 13 out of 15 (93% or 87%)<sup>14</sup> of the white community's preferred candidate were successful in their elections.

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

“Proof of the *Gingles* preconditions is not alone sufficient to establish a claim of vote dilution under Section 2.” *Hall v. Virginia*, 385 F.3d 421, 426 (4th Cir. 2004). “If these three 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 341, 345 (4th Cir. 2004). The Fourth Circuit has noted that other circuits “have acknowledged that where a plaintiff 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). Nonetheless, Plaintiffs still must prove that, based on an evaluation of the totality of circumstances, the Minority Community has less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. Plaintiffs have more than met their burden.

“[T]he question whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality, and on a functional view of the political

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<sup>14</sup> See *supra* note 11.

process.” *Gingles*, 478 U.S. at 45 (internal quotation marks omitted) (citing S. Rep. No. 97-417, at 30 & n.120 (1982)). In undertaking this practical evaluation, courts look to the following non-exhaustive “typical factors” identified in the Senate Report accompanying the 1982 amendments to the VRA (“Senate Factors”), *see* S. Rep. No. 97-417, at 28-29: (1) the prior history of voting-related discrimination; (2) the degree of racially polarized voting; (3) the presence of voting practices or procedures that tend to subjugate the minority group’s voting preferences; (4) the exclusion of minority group members from the candidate slating process; (5) the extent to which the minority group bears the effects of past discrimination in areas that tend to hinder its members’ ability to participate effectively in the political process; (6) the use of subtle or overt racial campaign appeals; and (7) the extent to which members of the minority group have succeeded in being elected to public office. *Gingles*, 478 U.S. at 44-45. A court may also consider two additional factors: (1) the extent to which elected officials have been responsive to the particularized needs of the minority group (“Senate Factor 8”); and (2) the tenuousness of the policy underlying the challenged voting practice or procedures (“Senate Factor 9”). *Id.* at 45. Plaintiffs need not prove “any particular number of factors . . . or that a majority of them point one way or the other.” *Id.*<sup>15</sup>

Applying this practical evaluation of the past and present realities in the City, this Court concludes that, under the totality of the circumstances, Minority Community residents of the City have less opportunity than other members of the electorate to participate in the political process and elect candidates of their choice.

**A. Senate Factor One: There Is a History of Official Discrimination in the State and City that Has Affected Minority Groups’ Ability To Register, Vote, or Otherwise Participate in the Democratic Process.**

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<sup>15</sup> More recently, at least one Circuit has found Senate Factors one and seven to be the “predominate” factors. *See Bone Shirt II*, 461 F.3d at 1022.

Senate Factor One weighs in favor of Plaintiffs, as the State of Virginia and the City have a long history of official discrimination that has affected all people of color, and which persists to this day and directly affects the opportunity of the Minority Community to fully participate in the political process. PFOF ¶ 300.

“The Commonwealth of Virginia and its political subdivisions bear a history of official racial discrimination.” *Virg Neal v. Coleburn*, 689 F. Supp. 1426, 1428 (E.D. Va. 1988). The history of public racial discrimination has affected all people of color and includes requiring proof of literacy tests until 1974, a poll tax that was unconstitutionally maintained until 1966, and racial segregation until 1963. *Id.*; see also PFOF ¶¶ 300-26. Virginia was also part of the eugenics movement. PFOF ¶ 313. In the 1920’s, Virginia passed a law known as the Racial Integrity Act, which authorized thousands of forced sterilizations, and included a miscegenation law recognized as the most draconian in American history. *Id.* In 1926, the state enacted a law requiring racial segregation in places of public accommodation. Only Virginia among all the states adopted such extreme laws. PFOF ¶ 314. These laws, moreover, applied to all non-whites, including Asians. *Id.* Legal segregation in public accommodations, for example, applied to Chinese and Japanese students at the University of Richmond. *Id.*

In 1955, the Virginia Supreme Court rejected a challenge to its ban on interracial marriage brought by an Asian man married to a white woman. PFOF ¶¶ 315. As late as 1962, the state Supreme Court ruled that a bi-racial Asian and white couple married in New Jersey did not have a legal marriage in Virginia and could not get a divorce in the state. *Id.* In 1967, in *Loving v. Virginia*, the U.S. Supreme Court struck down the prohibitions on interracial marriage in Virginia and fifteen other states. 388 U.S. 1 (1967); *id.*



Discrimination against minorities in Virginia has continued well into the 21st century. PFOF ¶ 327. In 2014, a three-judge federal court for the Eastern District of Virginia held in *Page v. Virginia State Board of Elections*, 15 F. Supp. 3d. 657 (E.D. Va. 2014), 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 June 2018, after a remand from the U.S. Supreme Court, a three-judge federal district court held in *Bethune-Hill v. Virginia State Board of Elections* that Virginia had engaged in an unlawful racial gerrymander of state legislative districts. The Court found “overwhelming evidence” that “the state has sorted voters into districts based on the color of their skin . . . . This predominant use of race and disregard of narrow tailoring principles plainly are at odds with the guarantees of the Equal Protection Clause.” PFOF ¶ 327.

Latinos also face adverse treatment as compared to white people in seeking rental housing, in part because of local hostility towards immigrants irrespective of the immigration status of the renters. PFOF ¶¶ 328-29. The Virginia General Assembly has inflamed tensions around immigration, with an 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 of the legislators representing part of Virginia Beach voted for the bill. *Id.* The same year, the Virginia General Assembly passed House Bill 2270 requiring “the sheriff, jail superintendent, or other official in charge of a local correctional facility or a regional jail in which an alien is incarcerated [to] notify U.S. Immigration and Customs Enforcement of the release or discharge of the alien forthwith as soon as the release date is known.” *Id.* The Governor, who vetoed two similar bills the year before, vetoed both these bills as well. *Id.*

Virginia Beach also has a long history of discrimination. PFOF ¶¶ 330-31. A study of the allocation of polling place resources in both Richmond and Virginia Beach for the 2004 and 2008 elections showed a bias against voters in precincts with high proportions of African-Americans. In both Richmond and Virginia Beach, the higher the proportion of African Americans in the voting age population, the higher the mean number of registered voters per voting machine. *Id.* 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 the peak value to the lowest the decrease in was on the order of 5 to 10 percent. *Id.*

Defendants' expert Dr. Kidd does not rebut Plaintiffs' expert Dr. Lichtman's conclusions, but instead states that Hispanics and Asians have not suffered from a long history of discrimination because Hispanics and Asians have voting turnout rates similar to non-Hispanic whites. However, Dr. Kidd only uses statewide turnout data rather than Virginia Beach specific turnout data. As will be discussed further below, Dr. Lichtman, on the other hand, reviewed Virginia Beach turnout data and found that the Minority Community's voting turnout percentage was lower than that of non-Hispanic whites.<sup>16</sup>

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

As discussed in detail above, *see supra* at 90-92, elections in Virginia Beach suffer from stark racial polarization. PFOF ¶¶ 239-294, 332.

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<sup>16</sup> Dr. Allan Lichtman is an expert in statistical methods and qualitative research in American voting rights and elections.

**C. Senate Factor Three: The City Has Used Voting Practices or Procedures that Tend to Enhance the Opportunity for Discrimination Against the Minority Group, Such as Unusually Large Election Districts, Majority-Vote Requirements, and Prohibitions Against Bullet Voting.**

The City uses four voting practices or procedures that tend to enhance the opportunity for discrimination against the Minority Community: (1) the use of at-large elections, (2) numbered posts, (3) anti-single shot voting, and (4) staggered elections all enhance the opportunity for discrimination in elections in Virginia Beach. PFOF ¶¶ 333-39.

As the Supreme Court has long recognized, 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); *see also Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994); *Collins II*, 883 F.2d at 1236 (at-large system and staggered terms susceptible of diluting minority votes). Plaintiffs’ expert Dr. Allan Lichtman has proffered opinions demonstrating how at-large voting works in conjunction with socioeconomic racial disparities in the City to disadvantage 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).<sup>17</sup> PFOF ¶¶ 333-39.

Staggered terms also enhance the opportunity to dilute the voting power of minorities because it is combined with at-large voting. PFOF ¶¶ 333-36. 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

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<sup>17</sup> Additionally, because the City Council elections are at-large, Minority candidates have to cover an unusually large—both in area (249 square miles) and in population (450,055)—municipality in order to get elected. PFOF ¶¶ 338-39. Although two cities with more square miles than Virginia Beach—Roanoke and Chesapeake—use at-large elections, the remaining 10 cities with a population above 50,000 do not and thus candidates do not have to traverse the entire city in order to get elected. PFOF ¶¶ 333-39.

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). Thus, this procedure prevents the Minority Community from concentrating their votes on a small number of candidates, or single shot voting. Single-shot voting for a preferred candidate in multi-winner elections gives minority voters an increased opportunity to elect a candidate of choice. PFOF ¶ 335. This is because although voters could vote for multiple candidates, they have the option to instead vote for only one candidate, increasing the vote total for the preferred candidate without increasing the vote total for any other candidates. *Id.* Designated posts voted on at large remove that ability by requiring voters to split their votes among seven residency district seats. PFOF ¶ 334. Virginia Beach also maintains designated posts for the election of the majority of City Council members, a device explicitly recognized in the Senate Report’s description of factors as one that often exacerbates the discriminatory nature of an at-large election system. PFOF ¶ 333.

Defendants’ expert Dr. Kidd opined that Virginia Beach does not have an “unusual” method of electing city councilmembers. Although Dr. Kidd discusses jurisdictions that have components of the City’s method of elections, he does not discuss a single jurisdiction that simultaneously has all of them. Additionally, he does not rebut Dr. Lichtman’s opinion that the City’s use of designated or numbered posts to elect 7 out of 11 at-large seats prevents the Minority Community from single shot voting and potentially electing a candidate of their choice. Thus, this factor weighs in favor of Plaintiffs.

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

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. While there may not be a “consensus in

federal law or political science texts on a definitive meaning of the phrase ‘slating group[,]’ . . . there is no support in the law for [a] restrictive definition.” *Collins I*, 816 F.2d at 938. In fact, the Supreme Court has “viewed ‘slating’ as essentially involving the endorsing of candidates,” *see id.* at 938-39 (citing *White v. Regester*, 412 U.S. 755, 766-67 (1973); *Whitcomb v. Chavis*, 403 U.S. 124, 150-51 & n.30 (1971)). And access to a slating process is about more than being allowed to apply for endorsement. As the Eleventh Circuit has noted, “[i]n jurisdictions where there is an influential official or unofficial slating organization, the ability of minorities to participate in that slating organization *and to receive its endorsement may be of paramount importance.*” *United States v. Marengo Cty. Comm’n*, 731 F.2d 1546, 1569 (11th Cir. 1984) (emphasis added).

Formal candidate slating occurs when candidates list themselves as running together for office, in the hope that voters will vote for the entire slate of candidates. PFOF ¶¶ 340. Functionally, slating (formal or informal) tends to be used by party officials and private associations to deny minority candidates meaningful access to the ballot. *Id.* There is evidence of informal candidate slating in City Council elections. *Id.* 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. *Id.*

Dr. Lichtman studied united funding in City Council elections from 2008-2018 as a form of informal slating, and found that while 17 white candidates had received \$250 or more from two or more other candidates, only two Black candidates had done the same. PFOF ¶¶ 340-342. When intra-election candidates (people who ran in City Council elections between 2008 and 2018 but not in the same year as the recipient of the contribution) are included in the analysis, seven white candidates receive two or more intra-election candidate donations (of \$250 or more), while no Black candidates received two or more intra-election candidate donations. In fact, the only Black

candidates to garner *any* intra-election candidate contributions (one each) were Ross-Hammond (2016), Rouse (2018), and Wooten (2018). PFOF ¶ 342.

Defendants have also acknowledged that another method of informal slating in City Council elections is through sample ballots. PFOF ¶ 343. In 2018, Friends of the Elephant, a Political Action Committee associated with the Republican Party, handed out sample ballots at least one polling place with their recommended candidates for office. PFOF ¶¶ 343-44. Councilmember Wood testified that these sample ballots were color coded, one color for Black voters and to the other for white voters. *Id.* Aaron Rouse, a Black candidate for City Council, was included on sample ballots handed to Black voters, but not on the sample ballots handed to white voters. *Id.* The color-coded ballots used by Friend of the Elephant likely sought to ensure that the association with Rouse benefitted candidates preferred by Friends of the Elephant, but the group denied Rouse the opportunity to gain credibility with white voters by the association with the Friends of the Elephant's preferred candidates. *Id.*

**E. Senate Factor 5: Minority Group Members Bear the Effects of Discrimination in Areas Such as Education, Employment, and Health, Hindering Their Ability to Participate Effectively in the Political Process.**

Beyond the shameful history of racism and discrimination, the evidence as a whole demonstrates that the Minority Community in Virginia Beach “bear[s] the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process” (Senate Factor 5). *Gingles*, 478 U.S. at 37. The Senate Report explains the rationale and nature of the inquiry into this factor:

disproportionate educational employment, income level and living conditions arising from past discrimination tend to depress minority political participation. Where these conditions are shown, and where the level of black participation in politics is depressed plaintiffs need not prove any further causal nexus between their disparate socio-economic status and the depressed level of political participation.

S. Rep. No. 97-417, at 29 n.114.

Here, Minority residents still suffer the effects of past official discrimination. PFOF ¶ 345. The deficient socio-economic position of minorities in Virginia Beach shows the lingering effects of past discrimination. PFOF ¶ 346. Disparities between Black and white, Hispanic and white, and Asian and white communities exist with regard to median income, 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. PFOF ¶ 347.

For example, the per capita income of white persons in Virginia Beach is \$37,433, but only \$22, 773 (61%) for Black individuals, \$20,784 (56%) for Hispanic individuals, and \$26,512 (71%) for Asian individuals. *Id.* Similarly, the poverty rate for white persons is only 5.8% yet it is 14.4% for Black individuals, 14.2% for Hispanic individuals, and 7.4% for Asian individuals. *Id.* The rate of 18-64 year-olds with no health insurance follows a similar pattern, with only 11.6% of white persons in the age range having no health insurance compared to 17.1% of Black individuals, 24.5% of Hispanic individuals, and 15.7% of Asian individuals. *Id.* Only 4.1% of white individuals received SNAP assistance, compared to 15.9% of Black individuals, 10.9% of Hispanic individuals, and 5.5% of Asian individuals. *Id.* White individuals in Virginia Beach have a median home value of \$273,700, while the median home value is \$218,100 for Black individuals, \$231,400 for Hispanic individuals, and \$253,400 for Asian individuals. *Id.*

Past discrimination also continues to have an effect on how the education system serves the Minority Community compared to white residents of Virginia Beach. PFOF ¶ 348. The white community graduates from high school at the rate of 95.0%, while the Minority Community lags behind, with high school graduation rates of just 89.4% for Black individuals, 88.7% for Hispanic individuals, and 91.8% for Asian individuals. *Id.* The Black and Hispanic communities, in

particular, lag behind the white community in their passage rate of basic skills. *Id.* 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. *Id.*

Though the Virginia Beach Public School District temporarily showed progress toward integration after a court desegregation order in 1969, since 1990 segregation in the District has increased in each subsequent decade. PFOF ¶ 349. This can be measured by the Dissimilarity Index, which was 45.0 in 1968, dropped to 27.0 in 1990, rose to 32.7 by 2000, and as of 2011 was back up to 38.9. *Id.*

Black students, in particular, in Virginia Beach's public schools suffer disproportionately from suspensions and expulsions. PFOF ¶ 350. For the 2015-16 school year, 8.92% of Black students were punished with short-term suspensions while just 2.41% of white students were suspended.

The legacy of discrimination has also affected the ability of the Minority Community to participate in the political process at the same level as whites. PFOF ¶ 352. On average from 2008 to 2018, white registration as a percentage of CVAP was 74%, while the rate in the Minority Community was only 66.1% for Black individuals, 55.2% for Hispanic individuals, and 64.2% for Asian individuals. PFOF ¶ 353. For all Virginia elections from 2008 to 2018, the average white voter turnout of 59.6% was higher than turnout for the Minority Community, which was 54.5% 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 turnout, even though Virginia Beach and the Commonwealth have virtually identical demographic profiles. PFOF ¶ 354. Dr. Lichtman also used ER, described *supra*, to estimate the difference between white and Black voters in Virginia Beach. PFOF ¶ 355. He finds a stark difference in turnout in Virginia



Beach between Black and white voters, with Black turnout 32% lower than white turnout in 2018, and 36% lower in 2016. *Id.*<sup>18</sup> Hispanic voters often face additional obstacles to effective participation in the political system, including a language barrier. This occurs because 34 percent of Hispanics in Virginia speak English “less than ‘very well,’” and campaigns are less likely to contact Hispanic voters than Black voters. PFOF ¶ 356.

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

The sixth Senate Factor, *i.e.*, “the use of overt or subtle racial appeals in political campaigns,” *Gingles*, 478 U.S. at 44-45, likewise supports Plaintiffs’ claim. PFOF ¶¶ 358-65. Racial appeals can take a variety of forms, including the use of racially charged campaign tactics and the highlighting of racially charged campaign issues “that prey[] on racial anxiety,” *United States v. City of Euclid*, 580 F. Supp. 2d 584, 610 (N.D. Ohio 2008); *see id.* at 613, such as campaign literature that “appealed to the fears of Town residents that black students . . . would be bused to schools in the Town,” *Goosby v. Town Bd. of Hempstead*, 956 F. Supp. 326, 342 (E.D.N.Y. 1997); *see also, e.g., Bone Shirt v. Hazeltine*, 336 F. Supp. 2d 976, 1041 (D.S.D. 2004) (“*Bone Shirt I*”) (evidence of racial appeals included accusations that Native Americans were “trying to take land back and put it in trust”); *Williams v. City of Dallas*, 734 F. Supp. 1317, 1348 (N.D. Tex. 1990) (campaigns employed racial appeals where platforms included opposition to busing for school desegregation).

There are several documented instances of racial appeals during political campaigns in Virginia Beach. PFOF ¶¶ 358-65. In 1998, Louisa Strayhorn faced racial appeals in her losing reelection bid for Virginia Beach City Council after becoming only the second African American

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<sup>18</sup> Dr. Kidd’s approach of analyzing statewide voter turnout is less probative for this Senate Factor. Particularly where City-wide turnout rates are available.

elected to the city council four years prior. *Id.* These racist incidents included phone calls threatening, “We’re going to make sure that n\*\*\*er doesn’t get elected,” and in-person confrontations following the election, where people said “See, n\*\*\*er we said we’d get you.” *Id.* Ms. Strayhorn’s campaign workers also received racist threats. *Id.* In 2019, Shannon Kane, a former Virginia Beach City Council member was running to unseat Delegate Kelly Fowler, who is of both Mexican and Filipino descent. *Id.* Kane’s campaign sent out a campaign flyer showing a photoshopped image of Fowler next to MS-13 gang members. *Id.* The flyer included the phrases “Extremist Kelly Fowler. Weak on illegal immigration. Supporting sanctuary cities. Putting our safety at risk,” and “Kelly Fowler. Good for illegal immigrants. Bad for us.” *Id.* Kane admitted that the image on the flyer was harmful, saying that “it’s hurting people, hurting someone, it’s not something I ever want to do, and for that I truly regret the image used on the flyer.” *Id.* Kane, however, did not apologize for the verbal portions of the flyer, saying that she “approved the content of the flyer but [] didn’t approve the creative direction....” *Id.*

**G. Senate Factor Seven: The extent to which members of the minority group have been elected to public office in the jurisdiction.**

This factor considers “the extent to which members of the minority group have been elected to public office in the jurisdiction,” *Gingles*, 478 U.S. at 45, also weighs in favor of Plaintiffs. This factor looks at the electoral success of Minority representatives and does not require the total absence of minority electoral success. *See id.* at 75 (“[T]he language of § 2 and its legislative history plainly demonstrate that proof that some minority candidates have been elected does not foreclose a § 2 claim.”).

For a city that is 19.3 percent Black in citizen voting age population and has a citizen voting age population that is one-third non-white, Virginia Beach has a poor record of electing Minority candidates into City offices. PFOF ¶¶ 366-68. In the history of Virginia Beach, only five Black

candidates (Aaron Rouse, Sabrina Wooten, Dr. Amelia Ross-Hammond, Louisa M. Strayhorn, and John L. Perry), one Asian-American candidate (Ron A. Villanueva), and no Latino candidates have been elected to the City Council. *Id.*; PFOF ¶¶ 30-36. None of the Black candidates have ever been re-elected to office. PFOF ¶¶ 30-36. Prescott Sherrod, an African-America businessman in Virginia Beach, was appointed to the City Council in 2011 and was not re-elected to this seat. *Id.* Additionally, in the history of Virginia Beach, only one member of the Minority Community—Tina E. Sinnen, the current Latina Circuit Court Clerk—has ever been elected to any of the city’s five constitutional offices. Currently, four of the five officials elected citywide in Virginia Beach are white, including Treasurer, Sheriff, Commissioner of Revenue, and Commonwealth’s Attorney. PFOF ¶¶ 366-68. Only one of 11 members of the elected School Board—African American Sharon R. Felton—is a minority. *Id.* A second African American woman, Jessica L. Owens, was appointed to the School Board in 2019, during the pendency of this lawsuit. *Id.*

The unprecedented election of two African Americans, Aaron Rouse and Sabrina Wooten, to the City Council in 2018, after the filing of this suit, reflects special circumstances. PFOF ¶ 369-71. Both Rouse and Wooten received unusual white support as compared to all other Black City Council candidates since 2008. *Id.*

#### **H. Senate Factor Eight: Elected Officials Are Failing to Respond to the Particularized Needs of the Minority Community**

Plaintiffs have presented “evidence demonstrating that elected [Board members] are unresponsive to the particularized needs of the members of the minority group” (Senate Factor 8). *Gingles*, 478 U.S. at 45. If officials are unresponsive, “it is evidence that minorities have insufficient political influence to ensure that their desires are considered by those in power.” *Marengo Cty. Comm’n*, 731 F.2d at 1572. The Senate report provides, however, that

“[u]nresponsiveness is not an essential part of plaintiff’s case.” S. Rep. No. 97-417, at 29 n.116. Accordingly, the Court concludes that this factor thus weighs in favor of Plaintiffs.

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 the particularized needs of minority residents. PFOF ¶ 372.

In 2008, Virginia Beach set an aspirational goal of 10 percent for minority participation in city contracts overall. PFOF ¶ 373. At no point from fiscal year 2009 to fiscal year 2019 did Virginia Beach reach this goal. *Id.*

Minority groups lobbied for more than six years to obtain a disparity study of city contracts. PFOF ¶ 374. In 2011, the predominant Black community group the Hampton Roads Committee of 200+ Men, Inc. issued a resolution calling for such a study. *Id.* At that time, the Virginia Beach Minority Business Council also began advocating a disparity study of city contracts. *Id.* In 2016, Black former NFL player Bruce Smith, who claimed that the City had turned him down for multiple projects, began to publicly call for a disparity study, and offered to cover half the cost of the study. *Id.* The Minority Business Council voted in 2017 to reaffirm its 2011 request that the City Council conduct a disparity study. In 2017, Minority leaders organized the Faith, Freedom and Justice March to call for a disparity study. Over this period, City officials consistently pushed back internally and externally against the concept of conducting a disparity study. PFOF ¶ 375.

In 2017, the Virginia Beach City Council finally authorized a disparity study of city contracts (“the Disparity Study”) in response to the increased pressure, accepting Bruce Smith’s offer to pay for half of the study. PFOF ¶ 376. Once the Disparity Study was approved, there were still internal disputes about the timeline for the study and a failure to communicate about the process with Bruce Smith. PFOF.

The results of the Disparity Study were released in January 2019. As part of the study, the researchers computed a “Disparity Index” that measured differences between the availability for contracts among minority-owned businesses and the actual participation of such businesses in city contracts. PFOF ¶ 378. They noted that in their display of the index “the line down the center of the graph shows a disparity index level of 100, which indicates parity between participation and availability. *Id.* A line is also drawn at a disparity index level of 80, because some courts use 80 as the threshold for what indicates a substantial disparity.” *Id.* A disparity index of 80 means that a business category received \$0.80 “for every dollar that they might be expected to receive based on their availability for the relevant prime contracts and subcontracts that the City awarded during the study period.” *Id.*

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. PFOF ¶ 380. 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. Asian-American owned businesses had a minimal eligibility percentage of just 0.8 percent, and received 5.6 percent of city contracts, for a disparity index of some 700. 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 Asian community; 86 percent of the total dollars went to a *single* Asian-American owned business. *Id.*

The study identified numerous deficiencies in City policies that, if rectified, could help achieve greater participation for Minority-owned businesses. PFOF ¶ 383. The study

recommended that Virginia Beach create an office dedicated to implementing the City’s Small, Women, and Minority owned businesses (SWaM) program. Despite repeated calls by Councilmember Sabrina Wooten to hire a full-time employee dedicated to implementing the recommendations of the study, the City has never hired such an employee. *Id.* In other words, the Minority Community advocated for a disparity study for approximately six years before the City agreed and since the release of the study, the City has not implemented a key component of the recommendations.<sup>19</sup>

**I. Senate Factor Nine: The City Has No Justification for the Challenged Election System.**

The last factor, which considers whether the policies underlying the City’s use of this discriminatory voting practices are “tenuous,” *see Gingles*, 478 U.S. at 45, also weighs in favor of Plaintiffs. The justifications are not merely tenuous; they are nonexistent. The continuation of the City Council’s current election system reflects nothing more the complacent satisfaction with a system in place since 1966 that has reliably elected white candidates and white candidates of choice to office. Six of 12 other large independent cities in Virginia use either a straight district system or a mixed at-large district system, with the majority of members elected from districts, for their city council elections. PFOF ¶ 388. Even among other large cities using an at-large system, none share Virginia Beach’s problematic combination of at-large elections, designated or numbered post for the majority of positions, and staggered terms. PFOF ¶ 389.<sup>20</sup>

**VII. CONCLUSION**

For these 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

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<sup>19</sup> Dr. Kidd did not opine on this Senate Factor.

<sup>20</sup> Dr. Kidd did not opine on this Senate Factor.

equal opportunity to elect representatives of their choice in violation of Section 2 of the Voting Rights Act. The Minority Community has suffered and continues to suffer from the effects of discrimination that have long plagued the State and the City and hindered their ability to participate equally in the political process. Against this backdrop of inequality, a host of other factors hinder the Minority Community's electoral success, such as staggered elections, designated posts, racial campaign appeals, and the City's indifference to the Minority Community's concerns. These factors coupled with the unwillingness of white voters to support Minority-preferred candidates has effectively diluted the votes of minorities and blocked the Minority Community from exercising effective political power in the City.

Accordingly, the Court enjoins Defendants from conducting any elections for the City's Council under the current electoral system. The Court will set a briefing schedule on remedies forthwith.

Dated: September 29, 2020

Respectfully submitted,

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### **CERTIFICATE OF SERVICE**

I hereby certify that on the September 29, 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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