No. 21-1533

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Latasha Holloway, et al.,

Plaintiffs-Appellees,

v.

City of Virginia Beach, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Virginia
Case No. 2:18-cv-00069
The Honorable Raymond A. Jackson

Appellants' Opening Brief

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CORPORATE DISCLOSURE STATEMENT

Defendants-Appellants are the City of Virginia Beach; the Virginia Beach City Council; Donna Patterson, in her official capacity as General Registrar of the City of Virginia Beach; Robert Dyer, in his official capacity as the Mayor of Virginia Beach; James Wood, in his official capacity as Vice Mayor of Virginia Beach; Patrick Duhaney, in his official capacity as City Manager of Virginia Beach; and Jessica Abbott, Michael Berlucchi, Barbara Henley, Louis Jones, John Moss, Aaron Rouse, Guy Tower, Rosemary Wilson, and Sabrina Wooten, in their official capacities as members of the Virginia Beach City Council.

None of the Defendants-Appellants are a publicly held corporation or other publicly held entity, and no publicly owned parent corporation owns any stock in any of the Defendants–Appellants. There is no publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation. Defendants-Appellants are not trade associations. This case does not arise out of a bankruptcy proceeding.

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PRELIMINARY STATEMENT

This case under Section 2 of the Voting Rights Act was brought by two Black voters ("Plaintiffs") asserting that the at-large method of electing Virginia Beach City Council members dilutes the votes of Black, Hispanic or Latino, and Asian voters, whom they label, together, "HBA" or "Minority" voters. Not one person of Hispanic or Asian descent joined the lawsuit. Neither this Court nor the Supreme Court has approved Plaintiffs' coalitional theory, and the Sixth Circuit rejected it 25 years ago as incompatible with the Act's plain text, structure, and purpose. *See Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (en banc). Meanwhile, those courts endorsing coalitional claims have set a high bar for establishing coalitional "cohesion," demanding proof that majorities of each alleged constituency share candidate preferences with members of their own constituency and the others. The Supreme Court has confirmed that, if coalitional claims are even cognizable, a "higher-than-usual" need for this showing "obviously" applies. *Growe v. Emison*, 507 U.S. 25, 40-41 (1993).

Yet Plaintiffs failed to present a single estimate of Asian or Hispanic cohesion. In fact, the unrebutted testimony below established that members of the Filipino community, the City's largest Asian group, tend to be conservative Republicans and often vote against Black-preferred candidates. Undeterred by the Supreme Court's condemnation of the assumption "that members of the same racial group…think alike, share the same political interests, and will prefer the same candidates at the polls," *Shaw v. Reno*, 509 U.S. 630, 647 (1993), Plaintiffs insisted that members of *different* groups share these attributes simply

because they are not white. And they persisted in demanding an injunction against the at-large system even after the Virginia General Assembly effectively repealed it, ensuring that it will never govern another election.

The district court's ruling in Plaintiffs' favor was erroneous. The court lacked jurisdiction to advise that a repealed system violates the Act. It erroneously concluded that two Black voters may press a coalitional claim predicated on an alleged injury to tens of thousands of non-party "Minority" voters without establishing the elements of third-party standing. It misread Section 2's guarantee of racial equality to protect the supposed political coalition of persons sharing no racial or ethnic common denominator. It applied a relaxed cohesion standard where the Supreme Court commanded a strict standard. And, ultimately, it gave its imprimatur to a misguided and affirmatively harmful effort to utilize persons of Hispanic and Asian descent instrumentally to advance the cause of a group that cannot on its own meet the Section 2 criteria (an undisputed point the district court still, somehow, got wrong). Coalitional claims are "fraught with risks." *LULAC, Council No. 4434 v. Clements*, 986 F.2d 728, 785 n.43 (5th Cir. 1993) ("*LULAC*"). They should not be allowed. And, certainty, *this* one should not be allowed. The Court should reverse.

STATEMENT OF JURISDICTION

Jurisdiction in the district court was proper under 28 U.S.C. §§ 1331 and 1342(a). The district court issued an injunction on March 31, 2021, and Defendants timely appealed on April 29, 2021. JA1278. This Court has jurisdiction under 28 U.S.C. § 1292(a)(1), including to review the merits of the liability ruling, *see Davidson v. City of Cranston, R.I.*, 837 F.3d 135, 141 (1st Cir. 2016).

STATEMENT OF ISSUES

1. Did the district court have jurisdiction?

2. Do two Black Plaintiffs have standing to assert alleged interests of members of the Asian and Hispanic communities?

3. Does Section 2 protect "coalitions" of different groups, and, if so, what legal standards apply to such a claim?

4. Did the district court commit legal or clear error in its Section 2 analysis?

5. Does an injunction ordering Virginia Beach to comply with Section 2 satisfy Federal Rule of Civil Procedure 65(d)(1)(C)?

STATEMENT OF THE CASE

A. Factual Background

1. Virginia Beach is Virginia's most populous city. JA1153. It assumed its current form in 1963 when the City "consolidated with adjoining Princess Anne County, which was both rural and urban." *Dusch v. Davis*, 387 U.S. 112, 113 (1967); JA1153. The Virginia General Assembly—which regulates the City's elections—attempted "to produce a plan which would be acceptable to the voters in the half of the county which was rural and to those in the half which was urban and which would, at the same time, win the support of the voters in the old city." *Davis v. Dusch*, 205 Va. 676, 677 (1964); JA1154-55. But its original effort, allocating members to the City Council through a borough system, "was invalidated in 1965 under the one-person, one-vote principle." JA1155; *Dusch*, 387 U.S. at 114.

In response, the General Assembly instituted a system of at-large voting. JA1155. The Council comprises eleven members. Four, including the mayor, are elected at large without regard to residence, and seven are elected at-large but must reside, respectively, one in each of seven residency districts.[1] *Dusch*, 387 U.S. at 114; JA1151. This system also faced an equal-protection challenge, but the Supreme Court rejected it, finding the system "makes no distinction on the basis of race, creed, or economic status or location," bore no hint of

[1] Because Plaintiffs do not contend the mayor should be elected from a single-member district, this brief refers to the residency scheme as having three at-large positions.

"invidious discrimination," and served the City's "compelling need" to create "a detente between urban and rural communities that may be important in resolving the complex problems of the modern megalopolis in relation to the city, the suburbia, and the rural countryside." *Dusch*, 387 U.S. at 115-17.[2]

The at-large system was used through the November 2020 councilmanic elections and is the system challenged in this case. The City, however, has periodically examined whether to recommend a change to the General Assembly. For example, "[i]n 1990, the City conducted a 'comprehensive review…,' seeking 'views from every conceivable interested party as to the best manner to provide representation for the citizens of the City.'" JA1157 (citation omitted). As the district court recounted, "[t]he City declined proposals for race-based single-member districts that 'stretched nearly all the way across the City, and in many instances' were 'only a block wide or came together at a single point.'" JA1157 (citation omitted). The Eastern District of Virginia "also rejected these racial gerrymanders and the Voting Rights Act lawsuit that sought to impose them." JA1157.

The City also has redrawn its residency districts after the release of each decennial census to maintain them at substantially equal population. In 2011, the City adopted a new residency plan, including one residency district drawn

[2] The district court's assertion that "Defendants' [sic] have not proffered a reasonable explanation for designing such system," JA1277, is therefore perplexing. *See* Dist.Ct.Dkt.237 at 1-3.

with a near majority racial and ethnic minority populations. JA1276. The U.S. Department of Justice precleared the plan under Section 5 of the Act. JA2184.

2. As of the 2010 Census, white residents composed 64.49% of the City's population (and 67.38% of the voting-age population), Black residents 19.00% (18.10%), Hispanic residents 6.62% (5.64%), and Asian residents 6.01% (6.30%). JA1159. Members of these disparate minority groups are not significantly concentrated in any portion of the City, JA2187-90; JA0675-78, as proven by the fact that no compact majority-Black district was presented in this case, despite that Black residents are nearly 20% of the population.

Through the Civil Rights Era, Virginia Beach, like most southern jurisdictions, imposed *de jure* and *de facto* discrimination against Black residents. The City regrets these injustices. However, the Asian and Hispanic communities are relatively new to the City and do not share that history. JA2277; JA1057-59; JA1001-02. The largest of the Asian communities is the "vibrant Filipino community," which has grown in the City largely by consequence of the Naval presence there. JA1160; JA1057. Multiple trial witnesses—including the City's redistricting consultant, leaders of the Filipino community, and an expert in local politics—testified that the Filipino community is conservative, leans Republican, is largely Roman Catholic and pro-life, and supports a strong military. JA0858-60; JA0334; JA0359; JA0717; JA0722-23; JA1003; JA2269-70; JA2293-94. They testified that the Filipino community does not regularly support candidates preferred by the Black community, who are typically Democratic and lean progressive. JA0860. This testimony went unrebutted.

Portions of Virginia Beach are represented in the Virginia House of Delegates by Delegate Kelly Fowler, a Hispanic and Filipina, whose district is majority white. JA0319-20. The current Virginia Beach circuit clerk of court, an at-large elected official, is also Filipina. JA1168. A Filipino, Ron Villanueva, was previously elected to the City Council, JA1151, as was a Hispanic, Rita Bellitto, JA1262.[3] Plaintiffs presented no evidence that anyone of Asian or Hispanic descent has ever lost a Virginia Beach election to a white candidate.[4]

The district court's findings show that members of the Asian communities generally enjoy a socio-economic status comparable with, if not better than, that of whites. Among other things, "the City had overutilized Asian-American owned business" in public contracting. JA1268. "Asian students perform at the same, or higher, rate compared to white students," and Asian high-school graduation rates are comparable with white rates. JA1249. More Asian than white graduates go on to college. JA1250. Asian household income exceeds white household income. JA1251. White and Asian home-ownership rates are almost identical. JA1252.

B. Procedural History

1. In November 2017, one Black Plaintiff, Latasha Holloway, filed a *pro se* complaint in the Richmond Division of the Eastern District of Virginia

[3] The district court's assertion that Defendants "offered no evidence of her ethnicity," JA1262, is clearly erroneous. *See* JA2638.

[4] One Filipina candidate, Kelly Fowler, defeated a Filipino, Ron Villanueva, in a 2017 House of Delegates contest.

against Virginia Beach, the City Council, its members, and other officials ("Defendants") under Section 2 of the Act. The complaint made no mention of a multi-racial coalition. JA0037. On February 12, 2018, the case was transferred to the Norfolk Division. JA0045. The case underwent a lengthy period of delay through a series of miscellaneous motions and an improper interlocutory appeal. *See* JA0001-0036.

2. In November 2018, two Black candidates, Sabrina Wooten and Aaron Rouse, prevailed in contested councilmanic races. Neither then knew of this lawsuit, JA0506; JA2429, and there is no evidence that it impacted the election.

A week after the election, an amended complaint was filed, this time by counsel from the Campaign Legal Center on behalf of two Black voters, Ms. Holloway and Georgia Allen. JA0049. The amended complaint alleged a new theory, that the "current at-large scheme impermissibly denies Black, Hispanic or Latino, and Asian-American voters ("Minority Voters") an equal opportunity to participate in the political process and to elect representatives of their choice[.]" JA0047. It alleged that the combined "Minority" population "is sufficiently numerous and geographically compact to form a majority of the total population and citizen voting age population in at least two single-member City Council districts in a demonstrative 10-district plan." JA0055. No members of the Asian or Hispanic communities joined the case, and Plaintiffs testified that they made no effort to obtain such participation. JA0524; JA0171.

The court (the Honorable Raymond A. Jackson, presiding) conducted a six-day bench trial in October 2020. At trial, Plaintiffs presented multiple alternative districting plans purporting to show that voting-age persons labeled "Minority" can constitute majorities in one or more single-member districts. JA1195-97. Those plans were constructed under the 2010 Census results and Census Bureau survey data, known as the "American Community Survey" or "ACS," from 2013 to 2018. JA1197. Additionally, Plaintiffs' statistical expert, Dr. Spencer, overlaid the illustrative districts with past councilmanic election results and concluded the districts would improve electoral prospects of Black-preferred candidates because, in his view, they would "likely…benefit from cross-over support from white voters." JA1581.

Dr. Spencer also provided statistical estimates of racial and ethnic voting patterns, but did not estimate patterns of the Asian and Hispanic communities. Rather, Dr. Spencer lumped Asian and Hispanic voters into an "All Minority" category, *see, e.g.*, JA1578, that also included Black voters (who constitute by far the largest of the three groups) and other racial minorities (such as Native Americans), JA443. Dr. Spencer testified that the Asian and Hispanic groups are too small and dispersed for purposes of estimating their voting preferences by standard means. JA0439-40. As discussed above, unrebutted qualitative evidence at trial showed divergent political preferences among Black, Asian, and Hispanic groups.

3. In November 2020, Ms. Wooten was reelected to her councilmanic seat. (Mr. Rouse did not stand for election, due to the City's staggered terms.)

No further elections are scheduled to occur until November 2022, after the release of the next decennial census results. As a result, the illustrative maps presented at trial do not show what type of districts can be used in any future election.

On March 18, 2021, the Virginia General Assembly changed Virginia Beach's electoral system, enacting Assembly House Bill 2198 (HB2198). The legislation provided that, "in a city or town that imposes district-based or ward-based residency requirements for members of the city or town council, the member elected from each district or ward shall be elected by the qualified voters of that district or ward and not by the locality at large." JA1139. Because seven of Virginia Beach's districts are subject to a "residency requirement," JA1150-51; JA1154, they will become single-member districts as of January 1, 2022, HB2198's effective date. No elections are planned before November 2022. On March 22, 2021, Defendants filed a notice of HB2198, asserting that the case was moot. JA1134.

4. On March 31, the district court released a 133-page opinion and order finding that Virginia Beach's at-large system violates Section 2, permanently enjoining the City from future use of the at-large system, and forbidding it from otherwise violating Section 2. JA1277. In a footnote, the court found that HB2198 does not moot the case. JA1147. The district court also concluded, *inter alia*, that coalitional claims are cognizable under Section 2, JA1189, that members of each constituency in an alleged coalition need not be joined as plaintiffs, JA1227, and that Plaintiffs did not need to provide estimates

of voting preferences of members of each constituency to prove their claim, JA1230-31.

SUMMARY OF THE ARGUMENT

I. The district court erred in entertaining this case, because it is moot, unripe, and Plaintiffs lack standing.

First, the case is moot. The at-large system will never govern another election, as HB2198 automatically shifts the City from at-large to single-member seats. The district court misread that enactment, believing the City may voluntarily readopt at-large seats, but it cannot: the City lacks independent legislative authority to amend its charter, which would have to be accomplished to eliminate the residency requirements that HB2198 transforms into single-member districts. And any challenge to the new system must be adjudicated on its own merits, not on the merits of Plaintiffs' evidence and arguments regarding the at-large system.

Second, the 2020 census results will be released before the next councilmanic election, markedly altering the landscape of what alternative schemes may be used in future contests. This independently renders the case moot and unripe and deprives Plaintiffs of standing, because Plaintiffs were required to show harm and redressability through an alternative scheme that might be used in real-life elections. Plaintiffs' proffered alternatives were drawn to achieve equality of population under conditions that will not exist once the 2020 census results are released. Whether dilution will exist and be capable of

remedy in any future election presents a question of speculation, which the district court lacked jurisdiction to resolve.

Third, Plaintiffs, two Black voters, lack standing to assert a coalitional claim predicated on the rights of members of the Hispanic and Asian communities. The district court erroneously thought they need not assert those third-party rights, but prevailing on a *coalitional* claim depends on the rights and interests of all constituencies of the *coalition*. Members of the Black community could not hope to win a coalitional claim independent of the rights of other groups and therefore have no choice but to assert those rights, which Plaintiffs lack standing to do.

II. The decision below is also erroneous on the merits. Plaintiffs failed to prove that "a bloc voting majority [is] *usually*…able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Thornburg v. Gingles*, 478 U.S. 30, 49 (1986). They did not plead or prove that the City's Black community is sufficiently large, compact, and insular to constitute the majority of a single-member district, and the district court's inexplicable finding that they met this standard amounted to an abuse of discretion and clear error.

The claim Plaintiffs did plead and attempt to prove, a coalitional claim on behalf of the Black, Hispanic, and Asian communities lumped together, is not a legally proper invocation of Section 2. The statute forbids inequality "on account of race or color," 52 U.S.C. § 10301(a), but constituencies in a coalition share, at best, political interests. And the statute's conceptual dichotomy between

"members of a class"—singular—and "other members of the electorate"—white and non-white—undermines the dichotomy of a coalition, which places white voters in one category and "All Minority" in another. The Act's structure and purpose, guaranteeing the right of members of a protected class to "elect [their preferred] candidate based on their own votes and without assistance from others," *Bartlett v. Strickland*, 556 U.S. 1, 14 (2009), further undercuts any claim to coalitional relief.

Plaintiffs also failed to establish coalitional cohesion, another threshold element of a Section 2 claim. They presented no evidence—quantitative or qualitative—of Hispanic and Asian voting patterns alone. Instead, Plaintiffs and the district court relied solely on "All Minority" aggregate estimates, even though the smaller Asian and Hispanic communities can easily be buried in the far larger Black group. This impermissibly attributed Black voting preferences to Asians and Hispanics.

In fact, Plaintiffs' own analysis *disproved* cohesion, showing that either the Hispanic or Asian groups (or both) consistently vote against Black-preferred candidates, dragging the "All Minority" average down from the much higher Black support for identified candidates. Moreover, the qualitative evidence, without rebuttal, established that the City's largest Asian community prefers conservative candidates and does not vote in line with the Black community. The district court erred in applying a relaxed cohesion standard, where a stringent standard "quite obviously" applies. *Growe*, 507 U.S. at 40-41.

The district court erred further in concluding that white bloc voting "usually" defeats the minority-preferred candidate. Its own factfinding showed a 50-50% split, with minority-preferred candidates successful half the time. The court erroneously discounted races where the minority-preferred candidate was white, in contravention of this Court's precedent, and it erroneously discounted the success of Black candidates after this case was filed, without identifying an impact of this then-unknown lawsuit on those contests.

III. The district court's injunction is an impermissibly vague obey-the-law injunction and does not "describe in reasonable detail…the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1)(C). The injunction impermissibly threatens with contempt a broad array of actions the City might take, even unknowingly, and even actions the City merely implements at the command of the General Assembly.

STANDARD OF REVIEW

"Whether the district court had subject matter jurisdiction is a question of law that [this Court] review[s] *de novo*," *Anita's New Mexico Style Mexican Food, Inc. v. Anita's Mexican Foods Corp.*, 201 F.3d 314, 316 (4th Cir. 2000), as is the question whether Plaintiffs have (or need) third-party standing, *see Corr v. Metro. Washington Airports Auth.*, 740 F.3d 295, 300 (4th Cir. 2014). The Court reviews "judgments resulting from a bench trial under a mixed standard of review: factual findings may be reversed only if clearly erroneous, while conclusions of law are examined de novo." *Raleigh Wake Citizens Ass'n v. Wake Cty. Bd. of Elections*, 827 F.3d 333, 340 (4th Cir. 2016) (citation omitted). "Of course, if the

trial court bases its findings upon a mistaken impression of applicable legal principles, the reviewing court is not bound by the clearly erroneous standard." *Id.* (citation omitted). The Court reviews "the scope of a district court's injunction for abuse of discretion." *Roe v. Dep't of Defense*, 947 F.3d 207, 231 (4th Cir. 2020), *as amended* (Jan. 14, 2020). "A district court abuses its discretion when it misapprehends or misapplies the applicable law." *League of Women Voters of N. Carolina v. North Carolina*, 769 F.3d 224, 235 (4th Cir. 2014).

ARGUMENT

I. Multiple Justiciability Defects Barred Resolution on the Merits

A. The General Assembly's Effective Repeal of the Challenged At-Large System Mooted the Case

This case became moot, at the latest, when HB2198 was enacted, because it ended the at-large system Plaintiffs challenged. JA1140; JA1146-47. "[S]tatutory changes that discontinue a challenged practice are 'usually enough to render a case moot.'" *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112, 116 (4th Cir. 2000) (citation omitted). This includes amendments that replace the challenged act with "a significantly amended statutory scheme." *Esposito v. S.C. Coastal Council*, 939 F.2d 165, 171 (4th Cir. 1991).

Here, HB2198 transformed the challenged at-large system to a new system dominated by seven single-member districts (i.e., the seven residency districts), which were precleared under Section 5, and containing only three at-large districts. Because Plaintiffs challenged an "election method, in which *all* councilmembers are elected at-large in citywide elections," JA0048 (emphasis

added), the legislative shift away from that system to one where each voter votes in a single-member district was not "minor and insignificant." *Valero*, 211 F.3d at 116. It repealed the system challenged in this lawsuit. The district court erroneously issued an advisory opinion in enjoining a system that will never be used again. *See 11126 Baltimore Blvd. v. Prince George's County, Md.*, 924 F.2d 557, 557 (4th Cir. 1991) (per curiam); *Checker Cab Operators, Inc. v. Miami-Dade County*, 899 F.3d 908, 916 (11th Cir. 2018); *Int'l Women's Day Planning Comm. v. City of San Antonio*, 619 F.3d 346, 357 (5th Cir. 2010).

The district court's reasons for retaining jurisdiction lack merit. JA1147. First, the court invoked the voluntary-cessation doctrine, opining that "the law allows Defendants to eliminate the district residency requirements for the seven seats on the City Council and allows them to retain the at-large system of election for those positions." Not so. Virginia Beach's residency districts are set forth in the City's charter. Eliminating the residency requirement would require an amendment to that charter. But Virginia is a Dillon's Rule jurisdiction, and "[o]nly the Virginia General Assembly can amend the city charter." *Simpson v. City of Hampton, Va.*, 166 F.R.D. 16, 17 (E.D. Va. 1996); Va. Code § 15.2-200; JA1151-52. "The 'voluntary cessation' exception to mootness has no play in this case" because the elimination of the at-large system "was not voluntary" by the City, but was imposed by the General Assembly, which transformed the residency requirements (which only it can repeal) into single-member district through HB2198 (which only it can repeal). *Am. Bar Ass'n v. FTC*, 636 F.3d 641, 648 (D.C. Cir. 2011). Nor does the General Assembly's theoretical ability to

repeal the newly enacted HB2198, or amend the City's charter, breathe life into this dead case. *See Valero*, 211 F.3d at 116.

Second, the district court's assertion that HB2198 "does not specifically address Plaintiffs' Section 2 claims of voter dilution" misses the *effect* of HB2198, which eliminates the "election method, in which all councilmembers are elected at-large in citywide elections." JA0048. Plaintiffs sought relief from "Virginia Beach's at-large method," *id.*, not a system with seven single-member districts. Any challenge to the single-member-district system must be brought through a new action or amended complaint. *N.Y. State Rifle & Pistol Ass'n, Inc. v. City of New York*, 140 S. Ct. 1525, 1526 (2020) (directing that allegations that revised statute exhibited features of challenged statute be raised in a new action); *Md. Highways Contractors Ass'n, Inc. v. Maryland*, 933 F.2d 1246, 1249-50 (4th Cir. 1991) (similar). At a minimum, it was Plaintiffs' burden to "adduce[] evidence" that the challenged features of the at-large system have "not been substantially altered" in HB2198. *Nextel Partners Inc. v. Kingston Township*, 286 F.3d 687, 693 (3d Cir. 2002). They presented no such evidence, *see* Dist.Ct.Dkt.241, and could not have, given how different the new system is from the one they challenge.

Third, the court doubly erred in announcing it could give "effectual relief" in the form of an injunction mandating "the implementation of an election system for the City Council that complies with Section 2 of the Voting Rights Act" and that "Virginia Beach comply with Section 2 of the Voting Rights Act" in "all future elections." JA1147 (citations omitted). For one thing, without

proof that the seven-member system is unlawful, "there neither has been a wrong *nor can be a remedy*." *Growe v. Emison*, 507 U.S. 25, 41 (1993) (emphasis added). For another thing, vague directives to comply with the law in the future are not available relief. *See* Section III, *infra*. The possibility of ordering a defendant to comply with law that applies regardless would, if deemed an exception to mootness, apply in every case.

Fourth, it does not matter (as Plaintiffs argued below) that the seven-member-system does not take effect until January 2022, because no elections are scheduled to occur before November 2022. Plaintiffs "will suffer no hardship" before that time. *See Lopez v. City of Houston*, 617 F.3d 336, 342 (5th Cir. 2010) (finding election challenge moot after final election before the next redistricting).

B. Plaintiffs Failed To Establish a Live Controversy Over the At-Large System

HB2198 aside, Plaintiffs failed to establish standing or a live controversy. To establish a redressable injury-in-fact, Plaintiffs were required to show that non-dilutive districts governing future elections can be fashioned consistent with the one-person, one-vote framework. Plaintiffs established, at best, only that such districts could be constructed in the past. Because it remains speculative whether their injury can be redressed in the future, Plaintiffs failed to establish jurisdiction.

1. The elements of standing are (1) injury-in-fact, (2) causation, and (3) redressability. *Dreher v. Experian Info. Sols., Inc.*, 856 F.3d 337, 343 (4th Cir. 2017). The most obvious defect here goes to redressability, the required showing

that it is "likely, as opposed to merely speculative, that [an] injury will be redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (citation omitted). Because the right to vote is "individual and personal in nature," vote-dilution plaintiffs must present—at the threshold standing stage—"facts showing disadvantage to themselves as individuals" and that their votes would have more weight in an alternative system. *Gill v. Whitford*, 138 S. Ct. 1916, 1930 (2018) (citations omitted). For example, in *Gill*, a vote-dilution plaintiff was held not to establish standing where "even plaintiffs' own demonstration map resulted in a virtually identical district for him." *Id.* at 1933. Similarly, *Shaw v. Hunt*, 517 U.S. 899 (1996) held that racial vote dilution alleged to exist in one part of a jurisdiction is "not remedied by creating a safe majority-[minority] district somewhere else in the" jurisdiction. *Id.* at 917.

In this case, Plaintiffs attempted to establish dilution through a series of illustrative, alternative redistricting plans purporting to show that Virginia Beach can be divided into ten equi-populous single-member districts, some with "All Minority" majorities. *See* JA1195-99. Plaintiffs' expert constructed these districts with 2010 census results and data from subsequent ACS surveys conducted between 2014 and 2018. The district court credited these maps. JA1195-99.

The Achilles Heel of this analysis is that by the time the case was tried, it was the end of the decade, and the data had become stale, incapable of showing what single-member districts might be utilized in November 2022 and beyond. "When the decennial census numbers are released" later this year, "States must redistrict to account for any changes or shifts in population." *Georgia v. Ashcroft*,

539 U.S. 461, 488 n.2 (2003). Although they may safely "operate under the legal fiction that even 10 years later, the plans are constitutionally apportioned," the census ends the basis for that reliance: "After the new enumeration, *no districting plan is likely to be legally enforceable* if challenged, given the shifts and changes in a population over 10 years." *Id.* (emphasis added). That same principle applies to Plaintiffs' illustrative plans. *Cane v. Worcester County, Md.*, 35 F.3d 921, 927 (4th Cir. 1994) ("A proposed plan is a legally unacceptable remedy if it violates constitutional or statutory voting rights—that is, if it fails to meet the same standards applicable to an original challenge of an electoral scheme." (citation and edit marks omitted)). Hence, Plaintiffs' illustrative plans established only what was possible in the past, not what remedies might exist on a prospective basis that could redress their claimed vote-dilution injuries.

2. Similar defects overcome the other elements of standing, as well as Plaintiffs' duty to establish a live controversy. *See Warth v. Seldin*, 422 U.S. 490, 499 n.10 (1975) ("The standing question thus bears close affinity to questions of ripeness…and of mootness."). The source of the problem on these elements is the Section 2 requirement "that the minority group [be proven] sufficiently large and geographically compact to constitute a majority in a single-member district." *Collins v. City of Norfolk, Va.*, 883 F.2d 1232, 1236 (4th Cir. 1989). This showing is not a formality. "Any claim that the voting strength of a minority group has been 'diluted' must be measured against some reasonable benchmark of 'undiluted' minority voting strength." *Hall v. Virginia*, 385 F.3d 421, 428 (4th Cir. 2004); *Thornburg v. Gingles*, 478 U.S. 30, 50 n.17 (1986). Otherwise, any

"[t]alk of 'debasement' or 'dilution' is circular talk. One cannot speak of 'debasement' or 'dilution' of the value of a vote until there is first defined a standard of reference as to what a vote should be worth." *Hall*, 385 F.3d at 428 (citations omitted). Stated differently, the alternative-plan requirement serves to show not only redressability but the very existence of injury-in-fact and causation.

As explained, Plaintiffs' attempt to establish this through illustrative redistricting plans established, at best, a past injury, not a present injury. Plaintiffs' challenge therefore became moot and unripe, at least as of the November 2020 election. *See Lopez*, 617 F.3d at 342. It became unripe because whether effective remedial plans might be constructed under the confines of the 2020 census results "rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all." *Scoggins v. Lee's Crossing Homeowners Ass'n*, 718 F.3d 262, 270 (4th Cir. 2013) (citation omitted). It might be possible to construct performing single-member districts with effective and functional "All Minority" majorities; but it might not. The claim became moot insofar as it asserted vote dilution in the 2012 through 2020 elections, which was "no longer [a] 'live'" issue, and the parties "lack a legally cognizable interest in the outcome." *United States v. Hardy*, 545 F.3d 280, 283 (4th Cir. 2008) (citation omitted).

3. The district court's reasoning only confirmed its lack of jurisdiction. It opined that "a ruling in favor of Plaintiffs will caution Defendants in using an at-large election method that violates Section 2 of the VRA and encourage

Defendants to come up with a remedy that complies with Section 2 of the VRA." JA0094. There could hardly be a more apt description of an advisory opinion. *See 11126 Baltimore Boulevard*, 924 F.2d at 557-58 (rejecting as advisory an opinion that would inform a county council whether an ordinance was unconstitutional so that the council could legislate accordingly). The court's suggestion that the possibility of declaratory relief overcame mootness was equally erroneous. *Int'l Coal. for Religious Freedom v. Maryland*, 3 F. Appx 46, 49-50 (4th Cir. 2001); *LaFaut v. Smith*, 834 F.2d 389, 395 (4th Cir. 1987). Further, the court's conclusion that "the results of the 2010 Census are still in effect," JA0091, missed that "new census figures will be available *prior to the next election*," *Lopez*, 617 F.3d at 342 (emphasis added), which is the next juncture where Plaintiffs' votes could possibly be diluted. And the district court's opinion that the claim is ripe because "Plaintiffs are not seeking to use the results from the 2020 Census," JA0093, merely describes the problem. Because a remedy usable in any real-life election *must* use the 2020 census results (or post-2020 ACS survey data), Plaintiffs' failure to use them dooms their claim. It is no answer that they are not even trying to prove what they must prove to prevail.

C. Plaintiffs Lack Third-Party Standing To Assert the Rights of All Virginia Beach "Minority" Residents

The district court also erred in permitting Plaintiffs to bring a Section 2 "coalition" claim on behalf of all "Minority" residents of Virginia Beach, including members of the Asian and Hispanic communities. The court ultimately concluded that "[t]wo or more politically cohesive minority groups

can bring a claim as a coalition under Section 2." JA1181. But two or more minority groups did not bring this claim; two Black voters did.

Standing principles incorporate a "general prohibition on a litigant's raising another person's legal rights." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014) (citation omitted). Unless an exception applies, a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 720 (1990) (citations omitted). The district court erred in permitting Plaintiffs to bring a coalitional claim predicated on the rights of Asian and Hispanic voters who did not join the case, who were not even asked to join, and who are "the best proponents of their own rights." *Singleton v. Wulff*, 428 U.S. 106, 114 (1976).

The district court erroneously found no third-party standing problem at all, positing that "Plaintiffs' personal legal interests have been injured" and that Hispanic and Asian communities were relevant only insofar as Plaintiffs put on "statistical evidence that the votes of their community, and minority voters generally, have been diluted."[5] JA0100. That is legally incorrect. Plaintiffs' assertions concerning the Asian and Hispanic communities are not mere circumstantial evidence of harm to Plaintiffs, but the coalitional claim itself. *See Nordgren v. Hafter*, 789 F.2d 334, 337 (5th Cir. 1986) (holding that "a white

[5] Indeed, Plaintiffs failed to put on statistical evidence about Asian and Hispanic voting preferences. *See* Section II.B.1, *infra*.

Jewish female…cannot successfully assert standing on behalf of aggrieved black applicants to the Mississippi bar. She is not their representative.").

The rights of third parties are necessarily asserted in cases where a "litigant appears in court and seeks to challenge the validity of a statute or other governmental action," and the challenge will fail "[i]f validity were to be measured solely in light of the litigant's interests." Charles A. Wright et al., Fed. Prac. & Proc., Juris. § 3531.9 (3d ed.). Here, members of the Black community can prevail only by showing that Black voters "make up more than 50 percent of the voting-age population in the relevant geographic area." *Bartlett v. Strickland*, 556 U.S. 1, 18 (2009). Plaintiffs did not plead this, they put on no evidence of it, and none could have been adduced. *See* Section II.A.1, *infra*. Only by also asserting the alleged rights of members of the Asian and Hispanic communities could a coalitional claim succeed. *See Nordgren*, 789 F.2d at 338. Moreover, Plaintiffs would have no entitlement to "at least two single-member City Council districts" comprising a majority of "minority population," JA0055, without asserting the rights of members of the Asian and Hispanic communities. *See I.N.S. v. Delgado*, 466 U.S. 210, 217 n.4 (1984).

Although there are exceptions to the bar on asserting third parties' rights, *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004), Plaintiffs below asserted that they "are not alleging third-party standing," Dist.Ct.Dkt.156 at 27, and the district court agreed, JA0100. Any such invocation is therefore waived.

II. Plaintiffs' Section 2 Claim Fails on the Merits

A Section 2 plaintiff must establish each of three preconditions set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986), known as the "*Gingles* preconditions": (1) "the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district," (2) "the minority group must be able to show that it is politically cohesive," and (3) "the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it...usually to defeat the minority's preferred candidate." *Id.* at 50-51. "If these preconditions are met, the court must then determine under the 'totality of circumstances' whether there has been a violation of Section 2." *Lewis v. Alamance County, N.C.*, 99 F.3d 600, 604 (4th Cir. 1996) (citation omitted). The district court erred at each step.

A. The District Court Erred on the First *Gingles* Precondition

A Section 2 plaintiff must establish at least that the relevant minority group constitutes "more than 50 percent of the voting-age population in the relevant geographic area," *Bartlett*, 556 U.S. at 18, and that the group is "geographically compact," *Gingles*, 478 U.S. at 50.

1. Plaintiffs Did Not Plead or Prove a Single-Race Claim

As an initial matter, the district court clearly erred in its alternative conclusion that "Plaintiffs established that the African American community in Virginia Beach is sufficiently large and geographically compact" to satisfy the first *Gingles* precondition. JA1209. Not only did Plaintiffs present no evidence of this, Dist.Ct.Dkt.238 at 33, but they did not even plead it. JA0060. The district

court's adjudication of an un-pleaded, untried claim contravened Federal Rule of Civil Procedure 15(b)(2), *see Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 783 F.3d 976, 983 (4th Cir. 2015), and "the principle of party presentation," *see United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020).

The finding also is clearly erroneous. The district court cited no evidence that Black voters alone can constitute a majority in even one single-member district. Its sole citation was to Table 1 of its opinion, JA1209, which did not include a single entry reflecting that Black voters, without Hispanic and Asian voters, can constitute a majority of a compact, single-member district, JA1197. Plaintiffs advanced a coalitional claim for a reason. "The impetus for two minority groups seeking to proceed as a coalition under Section 2 is apparently their inability, as separate groups, to overcome the first *Gingles* threshold factor." *LULAC*, 986 F.2d at 785 n.43. Plaintiffs spent two years developing evidence for a coalitional claim because a single-race claim would fail this precondition. The unrebutted evidence below bore this out. JA0711-12. The district court's contrary finding cannot stand.

2. Plaintiffs' Coalitional Claim Is Not Cognizable

The claim Plaintiffs did plead, a coalitional claim, is not a cognizable invocation of Section 2. "Even the most cursory examination reveals that § 2 of the Voting Rights Act does not mention minority coalitions, either expressly or conceptually." *Nixon*, 76 F.3d at 1386.

a. Section 2 forbids the "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). But "[a] group tied by overlapping political agendas but not tied by the same statutory disability is no more than a political alliance or coalition." *Campos v. City of Baytown, Tex.*, 849 F.2d 943, 945 (5th Cir. 1988) (Higginbotham, J., dissenting from denial of rehearing en banc). The Act's "purpose was to eliminate *racial* discrimination—not to foster particular *political* coalitions." *LULAC*, 986 F.2d at 785 n.43 (citation omitted).

It is, in this case, beyond serious dispute that Blacks, Asians, and Hispanics in Virginia Beach do not share a common identity of "race or color." The district court found that there are "important differences between and within the Minority Community." JA1211. Those differences are important precisely because they go to the lack of a common racial heritage and shared American experience. As the district court found, Filipinos—the largest among Virginia Beach's Asian communities—have congregated in Virginia Beach over the decades in large part due to the City's "Naval presence." JA1160. By and large, the Black and Hispanic communities arrived and have grown in the region for different reasons and at different times. These dynamics are typical of coalitional claims. *See* JA1185 (quoting precedent allowing a coalitional claim even though "Blacks and Mexican-Americans are racially and culturally distinct" (citation omitted)).

The court dismissed these conceded differences, concluding that "differences in race, color, or language" can be overcome if these persons are "*politically* cohesive[.]" JA1191 (emphasis added). But this reasoning only demonstrates the political, not racial, nature of the claim. In fact, the court—

relying on generic dictionary definitions—extended Section 2 protections to any "*group* sharing the same economic or social status," JA1191 (footnote omitted), opining that "[m]utual political interests are present *in any group seeking to elect a particular candidate*," JA1194 (emphasis added). This interpretation strayed far from the statutory North Star "of race or color." 52 U.S.C. § 10301(a).

b. Other textual indicia in the Act foreclose coalitional claims. To begin, the statute "consistently speaks of a 'class,' in the singular," *Nixon*, 76 F.3d at 1386, and offers protection to "members of a class," not classes. 52 U.S.C. § 10301(a). "Had Congress chosen explicitly to protect minority coalitions it could have done so by defining the 'results' test in terms of protected classes of citizens. It did not." *LULAC, Council No. 4434 v. Clements*, 999 F.2d 831, 894 (5th Cir. 1993) ("*Clements*") (Jones, J., concurring). The district court missed this point in focusing on the plural statutory term "members." JA1191. But those "members" must be "of *a* class"—singular; the statute reinforces this by clarifying that "*its* members"—members of the singular class—enjoy protection. 52 U.S.C. § 10301(b) (emphasis added); *Nixon*, 76 F.3d at 1386.

Moreover, the district court overlooked Section 2's comparative test, which hinges on a showing that "members of a class" under "subsection (a)" have "less opportunity *than other members of the electorate* to participate in the political process…." 52 U.S.C. § 10301(b) (emphasis added). This contrast between "members of a class" and "other members of the electorate" places all persons not "of" the singular "class" in the basket of "other members of the electorate." The statute therefore contrasts Plaintiffs' class of Black voters with

Asian and Hispanic voters, who are just as much "other members of the electorate" as are white voters.

The statutory definitions confirm this. Section 2 was amended in 1975 to include "language minorities," 52 U.S.C. § 10303(f), a term Congress defined to mean "persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage," 52 U.S.C. § 10310(c)(3); *see* Act of Aug. 6, 1975, Pub. L. 94-73, §§ 203, 207, 89 Stat. 401-402. "That each of these groups was separately identified indicates that Congress considered members of each group and the group itself to possess homogeneous characteristics." *Clements*, 999 F.2d at 894 (Jones, J., concurring).

c. That statutory meaning flows from constitutional limits on congressional power. "[T]he Voting Rights Act is premised upon congressional 'findings' that each of the protected minorities is, or has been, the subject of pervasive discrimination and exclusion from the electoral process." *Nixon*, 76 F.3d at 1390. The scope of congressional findings limits the permissible scope of the Act because these findings are necessary to Congress's enforcement of the Fifteenth Amendment. *See, e.g.*, *Johnson v. Governor of State of Fla.*, 405 F.3d 1214, 1231 (11th Cir. 2005); *Bd. of Trustees of Univ. of Ala. v. Garrett*, 531 U.S. 356, 368 (2001). Congress made findings to support enacting Section 2 protections for Black voters, *see Jones v. City of Lubbock*, 727 F.2d 364, 374-75 (5th Cir. 1984) (collecting findings), and for extending those protections to language minorities, 52 U.S.C. § 10303(f)(1). But a "coalition of protected minorities is a group of citizens about which Congress has not made a specific finding of

discrimination." *Nixon,* 76 F.3d at 1391. "To assume…that a group composed of both minorities," or several, "is itself a protected minority is an unwarranted extension of congressional intent," *Campos*, 849 F.2d at 945 (Higginbotham, J., dissenting from denial of rehearing en banc), and congressional authority, *see City of Boerne v. Flores*, 521 U.S. 507, 519 (1997).

d. Coalitional claims also conflict with the statutory scheme and purpose. For one thing, "a coalition theory could just as easily be advanced as a defense in Voting Rights Act cases, a position that courts would be logically bound to accept if plaintiff coalitions were allowed, yet a position at odds with congressional purpose." *Nixon*, 76 F.3d at 1391. The theory would empower jurisdictions to create dilutive coalitional districts to defend itself from a claim for majority-minority districts. *See Campos*, 849 F.2d at 944-46 (Higginbotham, J., dissenting from denial of rehearing en banc). And coalition claims are "fraught with risks," as members of one group may bring them to "increase their opportunity to participate in the political process at the expense of members of the other minority group." *LULAC*, 986 F.2d at 785 n.43. Moreover, allowing some groups (not all) "to further their mutual political goals" hijacks Section 2 for partisan ends. *Nixon*, 76 F.3d at 1392. A major political party that enjoys substantial support from certain racial groups can claim a Section 2 right to a districting scheme that favors that party's interests, coopting these groups' minority status for partisan advantage. If allowed, this would empower partisan interests to politicize the Act in ways that will ultimately undermine, rather than further, congressional purpose and the integrity of the Act.

e. Coalition claims are untenable for the same reasons the Supreme Court rejected crossover claims—i.e., claims asserting the right of a minority group to districts in which its members join with whites to elect their shared preferred candidates. *Bartlett*, 556 U.S. at 13-25. *Bartlett* read the Act to reach "African-Americans standing alone," i.e., to "elect [their preferred] candidate based on their own votes and without assistance from others." *Id.* at 14. The Court explained: "Nothing in § 2 grants special protection to a minority group's right to form political coalitions." *Id.* at 15; *see also id.* at 20 ("The statute does not protect any possible opportunity or mechanism through which minority voters could work with other constituencies to elect their candidate of choice."). So too here. The Court also explained that Section 2 case law "does not impose on those who draw election districts a duty to give minority voters the most potential, or the best potential, to elect a candidate by attracting crossover voters." *Id.* Section 2 protects a racial group's opportunity to make its "own choice," and "[t]here is a difference between a racial minority group's 'own choice' and the choice made by a [crossover] coalition" of white and Black voters. *Id.* The coalitional problem is no different.

This Court's decision in *Hall* anticipated *Bartlett*'s holding and reasoning, including the view that members of a minority group must "have the potential to elect a candidate *on the strength of their own ballots*" before claiming Section 2 protection. 385 F.3d at 429. Indeed, *Bartlett* quoted *Hall* for the proposition that the Act does not "grant minority voters 'a right to preserve their strength for the

purposes of forging an advantageous political alliance.'" 556 U.S. at 14-15 (quoting 385 F.3d at 431). That reasoning equally precludes coalitional claims.

So too does *Bartlett*'s concern for "for workable standards and sound judicial and legislative administration." *Id.* at 17. "Determining whether a § 2 claim would lie—i.e., determining whether potential districts could function as [crossover] districts—would place courts in the untenable position of predicting many political variables and tying them to race-based assumptions." *Id.* Coalitional claims fare even worse, requiring (in the district court's words) courts to make findings on "the complex intersectional ways in which citizens identify as minorities[.]" JA1192. That amorphous concept cannot be reduced into cognizable, and consistently applied, legal judgments. And it is impossible to leave even white voters out of the calculus: here, Plaintiffs' proposed alternative districts were projected to perform only because of anticipated "cross-over support *from white voters*." JA1581 (emphasis added).

Hence, *Bartlett*'s concern that reading crossover claims into Section 2 would likely render it unconstitutional applies with equal force here. 556 U.S. at 21. *Bartlett* observed that a Section 2 crossover-district requirement would greatly increase the use of racial classifications and "unnecessarily infuse race into virtually every redistricting, raising serious constitutional questions." *Id.* (citation omitted). If that is so with two races (white and Black) it is all the more so with several. In this case, there are three "Minority" groups; in the next, there could be five or seven. The redistricting authorities forced to consider the

innumerable possible coalitions that might exist in their jurisdictions would be overwhelmed with racial considerations.

"That interpretation would result in a substantial increase in the number of mandatory districts drawn with race as 'the predominant factor motivating the legislature's decision.'" *Id.* at 21-22 (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). The flawed assumption "that members of the same racial group…think alike, share the same political interests, and will prefer the same candidates at the polls," *Shaw v. Reno*, 509 U.S. 630, 647 (1993), fares worse when applied generically across "Minority" groups, simply because they are not white.

f. The decisions recognizing coalitional claims are not sound and do not merit the Court's adherence. They provide precious little analysis, frequently bypassing the predicate statutory question in favor of case-specific analysis. *See, e.g.*, *Bridgeport Coal. For Fair Representation v. City of Bridgeport*, 26 F.3d 271, 275-76 (2d Cir.), *vacated sub nom. City of Bridgeport, Conn. v. Bridgeport Coal. For Fair Representation*, 512 U.S. 1283 (1994); *LULAC, Council No. 4386 v. Midland Indep. Sch. Dist.*, 812 F.2d 1494, 1498-1502 (5th Cir.), *vacated*, 829 F.2d 546 (5th Cir. 1987). One leading case found coalitional claims viable simply because the Act does not expressly prohibit them, *see Campos v. City of Baytown, Tex.*, 840 F.2d 1240, 1244 (5th Cir. 1988), an approach that has drawn cogent criticism, *Clements*, 999 F.2d at 895 (Jones, J., concurring) ("The proper question is whether Congress *intended to protect* coalitions."). Other decisions assumed that coalitional claims are authorized under the Act but rejected them on the merits,

without discussing the anterior legal question. *See Concerned Citizens of Hardee Cty. v. Hardee Cty. Bd. of Comm'rs*, 906 F.2d 524, 526-27 (11th Cir. 1990); *Badillo v. City of Stockton, Cal.*, 956 F.2d 884, 890 (9th Cir. 1992), *as amended* (Apr. 27, 1992). Another court simply chose to "remain faithful to the reasoning of the majority of the circuit and district courts which have considered the issue," *Huot v. City of Lowell*, 280 F. Supp. 3d 228, 236 (D. Mass. 2017), notwithstanding that the "majority" of courts have offered little "reasoning" for their rulings.

3. Plaintiffs' Coalitional Claim, Taken at Face Value, Fails the First *Gingles* Precondition

Even taking Plaintiffs' coalitional claim at face value, it fails the first precondition. As explained, Section I.B, *supra*, Plaintiffs' illustrative districts show only what can be used in the past, not in real-life future elections. Even if that failure does not defeat jurisdiction, it defeats Plaintiffs' claim on the first *Gingles* precondition.

B. The District Court Erred on the Second *Gingles* Precondition

The second *Gingles* precondition requires proof that members of the relevant minority group "constitute a politically cohesive unit." *Gingles*, 478 U.S. at 56. "If the minority group is not politically cohesive, it cannot be said that the selection of [an at-large] electoral structure thwarts distinctive minority group interests." *Id.* at 51. Accordingly, "minority-group political cohesion never can be assumed, but specifically must be proved in each case in order to establish that a redistricting plan dilutes minority voting strength in violation of § 2." *Shaw*, 509 U.S. at 653 (citing *Growe*, 507 U.S. at 40-41).

Even if a coalitional claim is cognizable under Section 2, the standard of cohesion is strict. In *Growe*, the Court declined to decide whether coalitional claims are cognizable, but held that, if they are, "there [is] quite obviously a higher-than-usual need for the second of the *Gingles* showings." 507 U.S. at 41. The Court held that, "when dilution of the power of such an agglomerated political bloc is the basis for an alleged violation, proof of minority political cohesion is all the more essential." *Id.*

1. Plaintiffs Made No Showing of Hispanic and Asian Voting Patterns

Courts that have permitted coalitional claims have applied the following cohesion standard:

> [T]he determinative question is whether black-supported candidates receive a majority of the Hispanic and Asian vote; whether Hispanic-supported candidates receive a majority of the black and Asian vote; and whether Asian-supported candidates receive a majority of the black and Hispanic vote in most instances in the [relevant] area.

Brewer v. Ham, 876 F.2d 448, 453 (5th Cir. 1989). This is the only plausible formulation of the cohesion test. Any other approach would undermine the coalitional theory that members of *each* group in the coalition suffer dilution of *their own* votes. To aggregate groups is to attribute preferences of one to the others, thereby assuming the cohesion conclusion that must be proven. Other precedents hold, implicitly or explicitly, that cohesion must be established for each group in an alleged coalition. *See, e.g.*, *Concerned Citizens of Hardee Cty.*, 906 F.2d at 526-527 (rejecting coalitional claim where plaintiffs failed to prove

cohesion between Black and Hispanic groups in the coalition); *Campos*, 840 F.2d at 1245 ("[I]f one part of the group cannot be expected to vote with the other part, the combination is not cohesive."); *Badillo*, 956 F.2d at 891 (district court "found that plaintiffs' testimony…failed to prove that blacks and Hispanics were politically cohesive, either when combined or when considered separately"); *Huot*, 280 F. Supp. 3d at 235-36 (requiring plaintiffs to show cohesive coalition among the member groups in the coalition).

It is undisputed that Plaintiffs failed under this test. Their expert did not separately estimate candidate-preference levels for each constituent group, but instead only separately estimated the voting preferences of Black voters. Plaintiffs' analysis of the coalition, then, relied on a statistical analysis that lumped all groups into an "All Minority" category and reported estimates of voting behavior attributed to that entire aggregate group. These aggregate datapoints prove nothing about the preferences of the three constituent groups, leaving Plaintiffs unable to show, and the district court unable to find, that a majority of Asian and Hispanic voters prefer the same candidates, and that those are the same candidates preferred by Black voters.

2. Plaintiffs' Presentation Evidenced Polarization Among the Tripartite Constituencies

Plaintiffs' analysis, in fact, affirmatively *disproves* cohesion. Plaintiffs' expert, Dr. Spencer, estimated Black voting preferences that were consistently higher (i.e., more cohesive) than the "All Minority" numbers. Consider the 2016 Kempsville race, where Dr. Spencer estimated Black support for candidate Ross-

Hammond at 76.8% and "All Minority" support at 59.9%. JA0457-58; JA1565. Using basic algebra and knowledge of the relative sizes of Virginia Beach's Black, Hispanic, and Asian communities, Defendants' expert estimated only 34.3% of the Asian and Hispanic component of the "All Minority" number supported Ross-Hammond. JA2271. Dr. Spencer did not dispute this calculation, JA0467, and conceded it was possible this meant the coalition was not cohesive. JA0468. And, whether or not that estimate is probative, it remains a mathematical fact that voting choices of either Asians or Hispanics (or both) dragged the average down.

This phenomenon existed across the board. These are the races involving a Black candidate that the district court relied on (JA1218-21) and Dr. Spencer's estimated support for the Black candidate:

Contest/Measured Candidate	All Minority (combined Black, Asian, Hispanic and other races) Support for Candidate (using Ecological Inference)	Black Support for Candidate (using Ecological Inference)	Asian Support (?)	Hispanic Support (?)

2008 At-Large/Allen	70.5%	86.3%		
2010 Princess Anne/Bullock	79.9%	89.9%		
2010 At-Large/Jackson	58.2%	85.6%		
2011 Rose Hall/Sherrod	64.8%	87.0%		
2012 Kempsville/Ross-Hammond	65.7%	86.9%		
2014 Rose Hall / Cabiness	37.0%	51.7%		
2016 Kempsville / Ross-Hammond	59.9%	76.8%		
2018 Centerville / Wooten	85.5%	95.6%		
2018 At-Large / Rouse	31.8%	36.6%		

The district court credited each contest as showing "minority cohesive voting," JA1221, yet in each, Black support substantially exceeded "All Minority" support—by more than 10% in eight and more than 20% in three.[6] Because the

[6] The court's treating the 2014 Rose Hall and 2018 At-Large races as evidence of cohesion only underscored its erroneous view of cohesion.

estimated "All Minority" support includes estimated Black support, the true support of the Asian or Hispanic communities—or both—must fall below the "All Minority" figure reported. And, because the Black community is much larger than the Asian and Hispanic Asian communities, the true Asian and Hispanic support must be *far* below the All Minority average, because the Black contingency so heavily outweighs the others. Any other conclusion defies the laws of averages and algebra.

Further, there is no way to know from this analysis whether the Asian and Hispanic groups even are *internally* cohesive. The above-stated estimates are consistent with the Asian or Hispanic communities, or both, having no consistent pattern of voting for or against the same candidates. There is also no way to assess cohesion between members of the Hispanic and Asian contingencies. For instance, in the 2011 Rose Hall Race, Black support for Cabiness was estimated at 87% and All Minority support at 64.8%. Because Black voters significantly outnumber Asian and Hispanic voters, a wide range of outcomes is consistent with these datapoints. It could be that Hispanic support for Cabiness mirrored strong Black support but that Asian support was near zero. The opposite is also possible—along with an infinite number of scenarios in between.

3. The District Court Erroneously Applied a Relaxed Cohesion Standard

The district court erred in applying a relaxed standard of cohesion. The district court admitted that "high Black support for a given candidate *could* mask

far lower support—or even opposition—from Asian and Hispanic voters." JA1227. Dr. Spencer, too, admitted that this scenario is "one possible explanation" for his estimates. JA0377. Plaintiffs' expert Dr. Allan Lichtman likewise conceded that "we don't have information…on the individual behavior of" the Asian and Hispanic groups, and "[b]eyond that, we can't go." JA1910. This case should have ended with these admissions. "Section 2 'does not assume the existence of racial bloc voting; plaintiffs must prove it.'" *Growe*, 507 U.S. at 42 (citation omitted). The district court erred in excusing Plaintiffs from doing so.

a. The district court "twisted the burden of proof beyond recognition," *Abbott v. Perez*, 138 S. Ct. 2305, 2333 (2018), opining that Defendants' expert was not properly qualified to opine on "quantitative statistical methods." JA1228. Thus, it concluded that Defendants' expert "cannot *disprove* that Hispanics, Asians, and Blacks vote cohesively." JA1229 (emphasis added). But "plaintiffs must prove" cohesion. *Growe*, 507 U.S. at 42 (citation omitted). As shown, Plaintiffs' quantitative statistical method failed as a matter of law.

b. The district court also rewrote the standard of cohesion, concluding that less than majority support from minority voters can prove cohesion. JA1230. As an initial matter, that is beside the point, because Plaintiffs proved nothing about Hispanic and Asian support levels. Whether 50% support was required, or something lower would suffice, is an academic question.

And the district court was legally wrong. This Court explained in *Levy v. Lexington County, S.C.*, 589 F.3d 708 (4th Cir. 2009), that the failure of an alleged

minority-preferred candidate to achieve "50 percent of the minority vote" would "demonstrate a lack of political cohesiveness." *Id.* at 720 n.18. That stands to reason: if *more* members of a group *oppose* the candidate than *support* that candidate, then the group cannot plausibly be called cohesive around that candidate. *See Levy v. Lexington Cty., S.C., Sch. Dist. Three Bd. of Trustees*, 2012 WL 1229511, at *3 (D.S.C. Apr. 12, 2012), *as amended* (Apr. 18, 2012). And, because even bare-majority support is hardly probative of cohesion, courts usually apply a 60% standard. *Rodriguez v. Pataki*, 308 F. Supp. 2d 346, 388-90 (S.D.N.Y. 2004); *Smith v. Board of Supervisors*, 801 F. Supp. 1513, 1522 n.11 (E.D. Va. 1992).

The district court founded its contrary view on *Lewis v. Alamance County, N.C.*, 99 F.3d 600, 613 n.10 (4th Cir. 1996), but the relevant portion of that decision addressed the third *Gingles* precondition, "whether minority-preferred candidates are 'usually' defeated" by white bloc voting (often called "polarization"). *Id.* at 608. As *Levy* explains, a candidate may receive less than 50% of the minority vote in a multi-candidate race to be the "candidate of choice" under the third precondition, 589 F.3d at 716-18, but less than 50% support cuts against cohesion under the second precondition, *id.* at 720 n.18. Cohesion (*Gingles* two) and polarization (*Gingles* three) are distinct. *See id.* at 720 (faulting a district court for failing to "recognize[] this distinction"). "For example, the black population of a district may vote in a racially polarized manner [for purposes of *Gingles* three] so as to overwhelmingly favor black candidates, but the group may lack political cohesion [for purposes of *Gingles*

two] if it splits its vote among several different black candidates for the same office." *Monroe v. City of Woodville, Miss.*, 881 F.2d 1327, 1331 (5th Cir. 1989), *as corrected*, 897 F.2d 763 (5th Cir. 1990). Nothing less than 50%, if not 60%, proven support would be evidence of cohesion; anything less would be evidence against cohesion.

c. The district court tried to transform Plaintiffs' legal failing into a fact issue by crediting Plaintiffs' expert's effort "to address his own limitations." JA1230. The district court "recognize[d] that Plaintiffs' methodology for estimating voter cohesion among Minority Community is limited" but did "not find that the methodology is flawed." JA1231. But, flawed or not, the methodology's *limits* are dispositive.

Put simply, those limits left the court unable to identify a single estimate of Asian or Hispanic preference for any candidate in any race, anywhere, ever. Because Plaintiffs had to prove, as a predicate to showing coalitional cohesion, *Brewer*, 876 F.2d at 453, that each constituency is internally cohesive standing alone, no amount of explaining away arithmetic, even if creditable, could overcome the absence of necessary estimates. That problem is especially glaring when *two* parts of the purported tripartite coalition are total unknowns. What is certain where Black support exceeds All Minority support is that levels of either Asian or Hispanic (or both) *must be* lower than the All Minority support estimate. But even assuming All Minority support were shown to match Black support, this would not show cohesion of the Asian or Hispanic communities: Asian support could be vanishingly small if Hispanic support is strong (or vice

versa). This failing is all the more glaring given that this Court has expressed skepticism of statistical estimation methods used by Dr. Spencer even for single-race claims, *see Lewis*, 99 F.3d at 604 n.3, and given that Dr. Spencer grouped all non-white persons into his "All Minority" category, including Native Americans and others not alleged to belong to the tripartite coalition and whose impact on the analysis is unknown.

Dr. Spencer's effort to "address his own limitations" did not overcome them. The district court credited a bizarre improvisational courtroom session where, on an easel, Dr. Spencer scrawled a new expert report consisting of scribbled straight and curved lines. JA2307. This last-ditch attempt to overcome basic algebra only further undermined his case.

Dr. Spencer performed his original statistical analysis using three methods—Ecological Regression (ER), Ecological Inference (EI), and Homogeneous Precinct Analysis (HP). At trial, he challenged for the first time the assumption of linearity underlying *his own* ER datapoints, testifying that ER "requires you to draw a straight line through the data" but that "it could be the case that the actual support" levels might involve a "deviation from linearness." JA0380-81. Dr. Spencer described through the scribbled charts three possibilities—one preserving the linearity assumption and two that challenged the assumption underlying his analysis. JA2307. For two of those possibilities, Dr. Spencer conceded that where "All Minority" support levels were lower than Black-only support levels, it meant Asian and Hispanic voters supported candidates at lower rates than Black voters. JA0380 (first); JA0382 (third). In

the final possibility, Dr. Spencer posited that his own estimated "All Minority" support levels *might* be understated and, in fact, "All Minority" support could be higher than Black support. JA0381. Stated differently, Dr. Spencer testified that his ER datapoints might be wrong and then made the assumption that that error worked in Plaintiffs' favor.

The problems here are obvious. First, Dr. Spencer still could not proffer an estimate of Asian or Hispanic voting preferences for even a single election. That failing alone renders the episode, whatever its academic value, irrelevant here.

Moreover, crediting this totally untested and vague methodology was clear error. As shown, Dr. Spencer's improvised abandonment of linearity would yield three possible outcomes, and *two* cut *against* "Minority" cohesion. Dr. Spencer's choice to prefer the third was arbitrary—he based it on his own "eyeball test[]" and a position that his Ecological Regression estimates might be understated because the data did not fit his straight-line model but rather featured a "scooping," curvilinear shape. JA0381; JA0383; JA390; JA392. But, because the ER method is bound by the assumption of linearity, as Dr. Spencer admitted, JA0380, abandoning that assumption calls *all* of his estimates into question—including the estimate of Black cohesion. JA1040.

Yet another problem is that Dr. Spencer's attack on his own estimates applied only to ER. JA0380. But (as noted) Dr. Spencer also used EI, which resolves the very problem Dr. Spencer purports to cure, because it *is not bound by an assumption of linearity* and thus accounted for non-linear possibilities. *See, e.g.*,

United States v. City of Eastpointe, 378 F. Supp. 3d 589, 597 (E.D. Mich. 2019) ("But unlike ecological regression, ecological inference does not rely on an assumption of linearity and instead incorporates 'maximum likelihood statistics' and the 'bounds method' to produce estimates of voting patterns by race." (underlining added)); *Cisneros v. Pasadena Indep. Sch. Dist.*, 2014 WL 1668500, at *10 (S.D. Tex. Apr. 25, 2014) (same); *Alabama NAACP v. Alabama*, 2020 WL 583803, at *30 (M.D. Ala. Feb. 5, 2020) (same); *Rodriguez v. Harris County, Tex.*, 964 F. Supp. 2d 686, 759 (S.D. Tex. 2013) (same). All of the estimates shown in the table above are EI estimates; all show All Minority support lagging behind Black support; and none is even touched by the district court's statement on "non-linear 'LOES' curves.'" JA1230.

4. Qualitative Evidence Disproved Cohesion

Tellingly, the district court expressed little confidence in the expert estimates of voting behavior and instead commenced its discussion of cohesion with "qualitative evidence." JA1211. This discussion, too, was legally and factually erroneous.

The district court cited not one item of qualitative evidence suggesting that large numbers of Asian, Hispanic, and Black voters "prefer certain candidates whom they could elect in a single-member, [HBA] majority district." *Gingles*, 478 U.S. at 68. In fact, the evidence overtly undercut any such finding. All qualitative testimony on voting patterns, lay and expert, was to the effect that the large Filipino community "has historically been more conservative/Republican in its orientation." JA1003; JA2269-70; JA2293-94.

Ignoring this, the court below cited only evidence of "shared political advocacy," such as that—twenty years ago—"a coalition of African Americans, Hispanics, Asians, and Indians advocated for the City to adopt single-member districts," JA1211 (citation omitted), and that, "in 2003, the Minority Community organized two protests," JA1213. But that advocacy, even if it exists, has no logical relation to *vote* dilution in an at-large system, which turns on lack of "ability to elect representatives of their choice." *Gingles*, 478 U.S. at 51. None of the evidence the court cited establishes that "a significant number of minority group members usually vote for the same candidates." *Levy*, 589 F.3d at 719-20. Just as "courts should not hastily assume that cooperation among minority groups in filing a Section 2 complaint will inevitably lead to a finding of political cohesion in their actual electoral practices," *Brewer*, 876 F.2d at 454, they should not assume that groups that do *not* cooperate to file a Section 2 complaint, but may arguably engage in some common political activism, vote for the same candidates—especially when direct testimony is to the contrary. The question remains whether the groups "*vote together*," and evidence of that must be shown "*by some sort of reliable*" means. *Id.* (citation omitted). Because that was not proven, the claim should have been rejected.

C. The District Court Erred on the Third *Gingles* Precondition

The third *Gingles* precondition requires a Section 2 plaintiff to prove that the "bloc voting majority must *usually* be able to defeat candidates supported by a politically cohesive, geographically insular minority group." *Gingles*, 478 U.S. at 49. The district court's findings reveal this standard to be unmet. It concluded:

"50% of the minority-preferred candidates have lost City Council elections between 2008-2018 due to white bloc voting." JA1232. A 50-50 split does not show that white bloc voting "usually" defeats the minority-preferred candidate, as this Court opined in *Lewis v. Alamance County, N.C.* 99 F.3d at 616 (stating that "a court would ineluctably find" failure on this element in "circumstances" where "minority-preferred candidates were successful fifty percent of the time"); *see also Cottier v. City of Martin*, 604 F.3d 553, 560 (8th Cir. 2010) (en banc); *Clay v. Bd. of Educ. of City of St. Louis*, 90 F.3d 1357, 1362 (8th Cir. 1996).

The district court erred in concluding otherwise. First, it discounted races where white candidates were found to be minority preferred, JA1232, but this Court rejected that precise argument in *Lewis*, 99 F.3d at 607 ("[T]he minority-preferred candidate may be either a minority or a non-minority…."). This error was particularly pronounced, and prejudicial, because the court considered the same races in finding cohesion, JA1222, thereby considering successful white candidates where it helped Plaintiffs' case and ignoring them where it harmed that case. *See, e.g.*, *John Allan Co. v. Craig Allen Co. L.L.C.*, 540 F.3d 1133, 1139 (10th Cir. 2008) ("[I]nternally inconsistent findings constitute clear error.")

Second, the district court discounted the two 2018 races where Black candidates prevailed, positing that these reflected "special circumstances because" they occurred "***after*** the instant lawsuit was filed." JA1232. But there is no rule that post-filing elections are irrelevant. Rather, this Court has held that a "court should probe further to determine whether" post-filing success "resulted from unusual circumstances." *Collins v. City of Norfolk, Va.*, 816 F.2d 932, 938

(4th Cir. 1987). In *Collins*, for instance, the Court opined that it *might* have been relevant that the mayor, who had never before supported a Black candidate, supported a Black candidate in a post-filing contest and stated publicly: "After the election, the issue of black representation may become a moot point." *Id.* Even then, the statement was "not dispositive"; rather a "proper inquiry must examine the result of the mayor's conduct and statement." *Id.*

Here, nothing connects the pendency of this lawsuit to the 2018 success of the two Black candidates, and the district court identified no such connection. There was, at that time, no coalitional claim, the case had been floundering in the wrong court and was beleaguered by aimless motions practice, and there is no evidence that it attracted any meaningful amount of attention in the City. The district court, however, concluded that "abnormally large support from white voters" for the 2018 Black candidates constituted a special circumstance. JA1232. But there is nothing suspicious about white voters supporting Black candidates. Absent a showing that the lawsuit caused this crossover voting, white support for Black candidates cuts against Plaintiffs on the third precondition and cannot alone establish a special circumstance.

D. Plaintiffs' Claim Fails Under the Totality of the Circumstances

"The ultimate determination of vote dilution under the Voting Rights Act…must be made on the basis of the 'totality of the circumstances.'" *Lewis*, 99 F.3d at 604 (edit marks omitted). To make this assessment, courts consider various factors, including the so-called Senate factors and those the Supreme

Court has added. *Cane*, 35 F.3d at 925. The district court's analysis at this stage was erroneous.

1. The district court's analysis of what it called "the deferential *DeGrandy* fourth factor," JA1236, repeated its errors on the third *Gingles* preconditions. *Johnson v. De Grandy*, 512 U.S. 997 (1994), held that the existence of majority-minority districts roughly proportional to the minority group's overall percentage in a jurisdiction cuts heavily against a claim for more majority-minority districts. *Id.* at 1009-24. In challenges to at-large systems, courts have applied this rule by assessing whether minority-preferred candidates have held seats in rough proportion to the minority group's percentage of the population. *See, e.g.*, *Solomon v. Liberty Cty. Comm'rs*, 166 F.3d 1135, 1143 (11th Cir. 1999); *United States v. Euclid City Sch. Bd.*, 632 F. Supp. 2d 740, 753 (N.D. Ohio 2009). Here, the district court's findings established that proportionality, establishing that two of ten seats are held by minority-preferred candidates and that numerous minority-preferred candidates have, in the past, prevailed. The district court concluded otherwise only because it had already discounted those results in evaluating the third *Gingles* precondition. JA1236-37. Because that discounting was erroneous, so too was the Court's *De Grandy* analysis.

2. The district court erred in failing to analyze each of the totality factors as to each of the coalitional constituencies. Just as proof of cohesion is "all the more essential" when "dilution of the power of…an agglomerated political bloc is the basis for an alleged violation," *Growe*, 507 U.S. at 41, a unique totality inquiry, analyzing each constituency on each factor, is essential.

But here, the district court relied overwhelmingly on facts concerning the Black community and attributed those facts to all "Minority" residents of the City. This injected "impermissible racial stereotypes" into the analysis, *Shaw*, 509 U.S. at 647, as the district court, in effect, assumed any disadvantage suffered by any racial minority group amounted to disadvantage suffered by anyone who is not white. Only "a searching practical evaluation of the 'past and present reality,'" *Gingles*, 478 U.S. at 75, concerning *each* disparate group could yield the conclusion that a *coalition* suffers a shared disadvantage.

The correct analysis would have changed the outcome. The district court concluded that Plaintiffs "provided sufficient evidence to show that each factor is met," JA1238, but only because it found facts concerning the Black community under each rubric. It did not find facts as to the Asian community under each factor, nor could it have. For example, in considering "consequences of official past and ongoing discrimination," the court identified many ways in which Asians are roughly at or above the socioeconomic status of whites, including that "Asian students perform at the same, or higher, rate compared to white students," that Asian high-school graduation rates are comparable to white rates, JA1249, that more Asian students graduate college than white students, JA1250, that Asian household income exceeds white household income, JA1251, and that white and Asian home-ownership rates are almost identical. JA1252. In considering minority-candidate success, another senate factor, the court identified one Asian-American elected to the City Council and did not identify a single Asian-American who lost any Virginia Beach race.

JA1262. In considering responsiveness of elected officials, the court found that "the City had *overutilized* Asian-American owned business." JA1268 (emphasis added). And, even on the question of past discrimination, the Court cited no evidence of discrimination against Asians of any stripe, only "racial segregation of whites and Blacks." JA1238-43.

The Court need not conduct its own totality-of-the-circumstances analysis to see that, had the district court applied the correct legal standard, it could not possibly have found that each factor is met. JA1238. Few, if any, were. This error of law infected the analysis, which cannot stand under the correct inquiry.

III. The District Court's Obey-the-Law Injunction Is Improper and Unenforceable

The district court erred in issuing vague injunctions that the City "comply with Section 2 of the Voting Rights [A]ct" and abstain from "any practice, policy, procedure or other action that results in the dilution of minority participation in the electoral process." JA1277. An injunction must "describe in reasonable detail…the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1)(C). This is because "[t]he judicial contempt power is a potent weapon. When it is founded upon a decree too vague to be understood, it can be a deadly one." *Int'l Longshoremen's Ass'n, Loc. 1291 v. Philadelphia Marine Trade Ass'n*, 389 U.S. 64, 76 (1967). Courts therefore have "held repeatedly that 'obey the law' injunctions are unenforceable." *Fla. Ass'n of Rehab. Facilities, Inc. v. State of Fla. Dep't of Health & Rehab. Servs.*, 225 F.3d 1208, 1222 (11th Cir. 2000) (citation omitted); *see also Burton v. City of Belle Glade*, 178 F.3d 1175, 1200 (11th

Cir.1999) (rejecting injunction which prohibited municipality from discriminating on the basis of race in its annexation decisions).

And the problem here is not merely that the district court's injunction duplicates the City's obligations under Section 2, but also that Section 2 is a notoriously convoluted statute, applicable to all the City's election mechanisms (including those imposed on it by the General Assembly), and requires no showing of discriminatory intent. The City has minimal advanced means of knowing when the injunction is violated, and when contempt might be triggered. *See E.E.O.C. v. AutoZone, Inc.*, 707 F.3d 824, 841-42 (7th Cir. 2013); *S.E.C. v. Goble*, 682 F.3d 934, 950 (11th Cir. 2012). Worse, the injunction is not limited to "the violation established in the litigation or similar conduct reasonably related to the violation." *AutoZone*, 707 F.3d at 841. If the City re-precincts, or enforces a state-imposed voter-identification law later found to violate Section 2, it could be subject to staggering contempt penalties. The injunction is unlawful and must be vacated.

CONCLUSION

The injunction should be vacated, and the case remanded with instructions that this case be dismissed or, alternatively, that judgment be entered for Defendants.

Date: June 11, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(g)(1), I hereby certify that the foregoing corrected motion complies with the type-volume limitation in FRAP 32(a)(7)(B). According to Microsoft Word, the brief contains 12,974 words and has been prepared in a proportionally spaced typeface using Calisto MT in 14-point size.

DATE: June 11, 2021

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CERTIFICATE OF SERVICE

I certify that on June 11, 2021, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

DATE: June 11, 2021

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No. 21-1533

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Latasha Holloway, et al.,

Plaintiffs-Appellees,

v.

City of Virginia Beach, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Eastern District of Virginia
Case No. 2:18-cv-00069
The Honorable Raymond A. Jackson

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52 U.S.C. § 10301

Denial or Abridgement of Right To Vote on Account of Race or Color Through Voting Qualifications or Prerequisites; Establishment of Violation

(a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 10303(f)(2) of this title, as provided in subsection (b).

(b) A violation of subsection (a) 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 class of citizens protected by subsection (a) 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. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: *Provided*, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

(Pub. L. 89–110, title I, §2, Aug. 6, 1965, 79 Stat. 437; renumbered title I, Pub. L. 91–285, §2, June 22, 1970, 84 Stat. 314 ; amended Pub. L. 94–73, title II, §206, Aug. 6, 1975, 89 Stat. 402 ; Pub. L. 97–205, §3, June 29, 1982, 96 Stat. 134 .)[1]

[1] Current as of June 9, 2021. United States Code, Office of the Law Revision Counsel, https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title52-section10301&num=0&edition=prelim (last visited June 10, 2021).

52 U.S.C. § 10303

Suspension of The Use of Tests or Devices in Determining Eligibility To Vote

52 U.S.C. §10303 provides in pertinent part:

***

(f) Congressional findings of voting discrimination against language minorities; prohibition of English-only elections; other remedial measures

(1) The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.

(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

(3) In addition to the meaning given the term under subsection (c), the term "test or device" shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority. With respect to subsection (b), the term "test or device", as defined in this subsection, shall be employed only in making the determinations under the third sentence of that subsection.

(4) Whenever any State or political subdivision subject to the prohibitions of the second sentence of subsection (a) provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, it shall provide them in the language of the applicable language minority group as well as in the English language: *Provided*, That where the language of the applicable minority group is oral or unwritten or in the case of Alaskan Natives and American Indians, if the predominate language is historically unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.

(Pub. L. 89–110, title I, §4, Aug. 6, 1965, 79 Stat. 438 ; renumbered title I and amended Pub. L. 91–285, §§2–4, June 22, 1970, 84 Stat. 314 , 315; Pub. L. 94–73, title I, §101, title II, §§201–203, 206, Aug. 6, 1975, 89 Stat. 400–402 ; Pub. L. 97–205, §2(a)–(c), June 29, 1982, 96 Stat. 131–133 ; Pub. L. 109–246, §§3(d)(2), (e)(1), 4, July 27, 2006, 120 Stat. 580 ; Pub. L. 110–258, §2, July 1, 2008, 122 Stat. 2428 .)[2]

[2] Current as of June 9, 2021. United States Code, Office of the Law Revision Counsel, https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title52-section10303&num=0&edition=prelim (last visited June 10, 2021).

52 U.S.C. § 10310

Enforcement Proceedings

(a) Criminal contempt

All cases of criminal contempt arising under the provisions of chapters 103 to 107 of this title shall be governed by section 1995 of title 42.

(b) Jurisdiction of courts for declaratory judgment, restraining orders, or temporary or permanent injunction

No court other than the District Court for the District of Columbia shall have jurisdiction to issue any declaratory judgment pursuant to section 10303 or 10304 of this title or any restraining order or temporary or permanent injunction against the execution or enforcement of any provision of chapters 103 to 107 of this title or any action of any Federal officer or employee pursuant hereto.

(c) Definitions

(1) The terms "vote" or "voting" shall include all action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this chapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

(2) The term "political subdivision" shall mean any county or parish, except that where registration for voting is not conducted under the supervision of a county or parish, the term shall include any other subdivision of a State which conducts registration for voting.

(3) The term "language minorities" or "language minority group" means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.

(d) Subpenas

In any action for a declaratory judgment brought pursuant to section 10303 or 10304 of this title, subpenas for witnesses who are required to attend the District Court for the District of Columbia may be served in any judicial

district of the United States: *Provided*, That no writ of subpena shall issue for witnesses without the District of Columbia at a greater distance than one hundred miles from the place of holding court without the permission of the District Court for the District of Columbia being first had upon proper application and cause shown.

(e) Attorney's fees

In any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee, reasonable expert fees, and other reasonable litigation expenses as part of the costs.

(Pub. L. 89–110, title I, §14, Aug. 6, 1965, 79 Stat. 445; renumbered title I, Pub. L. 91–285, §2, June 22, 1970, 84 Stat. 314; amended Pub. L. 94–73, title II, §207, title IV, §402, Aug. 6, 1975, 89 Stat. 402, 404; Pub. L. 109–246, §§3(e)(3), 6, July 27, 2006, 120 Stat. 580, 581.) [3]

[3] Current as of June 9, 2021. United States Code, Office of the Law Revision Counsel, https://uscode.house.gov/view.xhtml?req=granuleid:USC-prelim-title52-section10310&num=0&edition=prelim (last visited June 10, 2021).

Sections 203 and 207
of the
Act of Aug. 6, 1975, Pub. L. 94-73, 89 Stat. 401-402

SEC. 203. Section 4 of the Voting Rights Act of 1965 is amended by adding the following new subsection:

"(f)(1) The Congress finds that voting discrimination against citizens of language minorities is pervasive and national in scope. Such minority citizens are from environments in which the dominant language is other than English. In addition they have been denied equal educational opportunities by State and local governments, resulting in severe disabilities and continuing illiteracy in the English language. The Congress further finds that, where State and local officials conduct elections only in English, language minority citizens are excluded from participating in the electoral process. In many areas of the country, this exclusion is aggravated by acts of physical, economic, and political intimidation. The Congress declares that, in order to enforce the guarantees of the fourteenth and fifteenth amendments to the United States Constitution, it is necessary to eliminate such discrimination by prohibiting English-only elections, and by prescribing other remedial devices.

"(2) No voting qualification or prerequisite to voting, or standard, practice, or procedure shall be imposed or applied by any State or political subdivision to deny or abridge the right of any citizen of the United States to vote because he is a member of a language minority group.

"(3) In addition to the meaning given the term under section 4(c), the term 'test or device' shall also mean any practice or requirement by which any State or political subdivision provided any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the electoral process, including ballots, only in the English language, where the Director of the Census determines that more than five per centum of the citizens of voting age residing in such State or political subdivision are members of a single language minority. With respect to section 4(b), the term 'test or device', as defined in this subsection, shall be employed only in making the determinations under the third sentence of that subsection.

"(4) Whenever any State or political subdivision subject to the prohibitions of the second sentence of section 4(a) provides any registration or voting notices, forms, instructions, assistance, or other materials or information relating to the

electoral process, including ballots, it shall provide them in the language of the applicable language

minority group as well as in the English language: *Provided,* That where the language of the applicable minority group is oral or unwritten, the State or political subdivision is only required to furnish oral instructions, assistance, or other information relating to registration and voting.".

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SEC. 207. Section 14(c) is amended by adding at the end the following new paragraph:

"(3) The term 'language minorities' or 'language minority group' means persons who are American Indian, Asian American, Alaskan Natives or of Spanish heritage.".[4]

[4] Act of Aug. 6, 1975, Pub. L. 94-73, §§ 203, 207, 89 Stat. 401-402 (available at U.S. Gov't Publishing Office ("GPO"), https://www.govinfo.gov/app/details/STATUTE-89/STATUTE-89-Pg400/summary, or directly at https://www.govinfo.gov/content/pkg/STATUTE-89/pdf/STATUTE-89-Pg400.pdf (last visited June 10, 2021)).

Va. Code § 15.2-200

Required procedure for obtaining new charter or amendment

No charter shall be granted to a locality by the General Assembly and no charter of a locality shall be amended by the General Assembly except as provided in this chapter or in Chapter 34 (§ 15.2-3400 et seq.) of this title.

Code 1950, § 15-65.1; 1958, c. 329; 1962, c. 623, § 15.1-833; 1979, c. 297; 1985, c. 387; 1986, c. 312; 1997, c. 587.[5]

[5] Code of Virginia, Legislative Information System, https://law.lis.virginia.gov/vacodefull/title15.2/subtitleI/#:~:text=%C2%A7%2015.2%2D200.,15.2%2D3400%20et%20seq.) (last visited June 10, 2021).

Fed. R. Civ. P. 65

Injunctions and Restraining Orders

Federal Rule of Civil Procedure 65 provides in pertinent part:

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(d) CONTENTS AND SCOPE OF EVERY INJUNCTION AND RESTRAINING ORDER.

(1) *Contents*. Every order granting an injunction and every restraining order must:

(A) state the reasons why it issued;

(B) state its terms specifically; and

(C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required.

(2) *Persons Bound*. The order binds only the following who receive actual notice of it by personal service or otherwise:

(A) the parties;

(B) the parties' officers, agents, servants, employees, and attorneys; and

(C) other persons who are in active concert or participation with anyone described in Rule 65(d)(2)(A) or (B).

***[6]

[6] Legislative Information Institute, Cornell Law School, https://www.law.cornell.edu/rules/frcp/rule_65 (last visited June 10, 2021).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on June 11, 2021, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

DATE: June 11, 2021

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