

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION**

Latasha Holloway, et al.,

Plaintiffs,

v.

City of Virginia Beach, et al.,

Defendants.

Case No. 2:18-cv-0069

DEFENDANTS' EMERGENCY MOTION FOR STAY OF INJUNCTION

On July 2, 2021, Virginia Beach Councilmember Jessica Abbott announced her resignation from the Virginia Beach City Council, effective immediately, due to health concerns.¹ The City Council must now appoint an interim, temporary successor to fill the seat Ms. Abbott vacated, the Kempsville residency district. Va. Code Ann. § 24.2-228(A). The City must then hold a special election “on the date of the next general election in November,” November 2, 2021, to fill the remainder of Ms. Abbott’s unexpired term of office. *Id.* § 24.2-226(A). The temporary successor, by law, cannot remain in office past that date. *Id.* § 24.2-226.

This vacancy was unforeseen when this Court entered its injunction and, indeed, even as of a week ago. But this vacancy now requires the City to hold an election. However, the Court’s permanent injunction of March 31, 2021 forbids the City from conducting elections under the at-large system, even a special election to fill an unexpired term. This injunction, if it remains in effect and prohibits a special election, will impose irreparable harm on the City by depriving it of the ability to have a fully staffed City Council beyond November 2, 2021 to manage the largest

¹ See, e.g., *Virginia Beach City Councilwoman Jessica Abbott resigns due to health concerns*, THE VIRGINIAN-PILOT, (July 2, 2021), <https://www.pilotonline.com/government/local/vp-nw-virginia-beach-councilwoman-resigns-20210702-6kcl6hteqfe25hiytdkfvrlm-story.html>.

city in the Commonwealth. And for a host of reasons more fully set forth below, there is insufficient time for the Court to impose a remedial plan and to conduct the special election under that new plan's boundaries.

For these reasons, and those articulated below, Defendants respectfully move pursuant to Fed. R. Civ. P. 62 for a partial stay or modification of the Court's injunction pending appeal to permit the coming special election in November 2021 to go forward. Importantly, Plaintiffs will not oppose the relief here requested, albeit on a qualified basis. Their counsel represented to counsel for Defendants as follows:

Plaintiffs do not oppose a limited stay of the district court's injunction to permit a special election for the Kempsville residency district seat on the City Council to fill the vacancy caused by Ms. Abbott's resignation. However, without further court order, the person elected in such a special election will hold office through 2024. Plaintiffs therefore reserve the right to seek an order from this Court, in the exercise of its remedial authority, to require a new special election in November 2022 in the event that the candidate elected in the November 2021 special election resides in one of the Section 2 remedial districts ordered by the Court. Plaintiffs intend to file a short response to Defendants' motion for a stay to further explain their position.

To be clear, Defendants intend to oppose future requests to alter term lengths of any members. But for *present* purposes, this motion is functionally unopposed.

Additionally, all of the stay factors are satisfied, establishing that the motion has merit independent of the parties' consent.

First, Defendants have shown a likelihood of success on the merits of their appeal. Defendants press compelling arguments on appeal of matters that have split the circuits and raise, at a minimum, difficult and close questions going to Article III standing and the meaning of Section 2 of the Voting Rights Act. The Court need not agree with Defendants' position on the merits—and Defendants recognize the Court does not do so—to find in Defendants' favor on this issue.

Second, the City and its approximately 450,000 residents would be irreparably harmed absent issuance of a stay. A remedial plan cannot be put into effect in sufficient time to conduct a special election to fill the remainder of Ms. Abbott’s unexpired term. Absent a stay of the Court’s injunction, by operation of Virginia law, her seat would sit vacant after the November 2, 2021 election, depriving the City of a fully staffed City Council for up to a year.

Third, Plaintiffs would not be harmed by a stay. In none of the proposed remedial plans before the Court is Ms. Abbott designated as either Plaintiff’s Council representative, and it is unlikely that they would be permitted to vote for her replacement under a remedial plan comprising single-member districts. And Plaintiffs would not benefit from her former seat remaining vacant and City Council shorthanded.

Finally, the balance of equities and public interest tilt decidedly in favor of a stay. A shorthanded City Council harms *all* the City’s residents by depriving them of a fully constituted body to conduct the people’s business. And the public interest is further served by allowing the Fourth Circuit and, if necessary, the U.S. Supreme Court to address the important legal questions presented by this case and Defendants’ appeal.

In further support, the City respectfully represents as follows:

FACTUAL BACKGROUND

As set forth above, due to the resignation of Ms. Abbott, under the City of Virginia Beach charter the Council must appoint an interim successor to represent the Kempsville residency district until a special election can be called to fill the remainder of her unexpired term in office. Va. Code Ann. § 24.2-228(A). That special election, in this instance, will be the November 2, 2021 General Election—*i.e.*, the “next general election in November” after the vacancy occurred. *Id.* § 24.2-226(A).

The following deadlines govern the special election:

Deadline	Event
Monday, July 19, 2021 <i>15 days after resignation</i>	City Council must petition the circuit court to issue a writ of election to fill the vacancy. Source: Va. Code Ann. § 24.2-226
Some date after July 6, 2021 <i>City Council meets on this date to vote on resolution to seek writ from Circuit Court</i>	Candidates for special elections may not circulate petitions for signatures to accompany ballot access documents until after the writ or order calling the election is issued. (125 signatures needed - Va. Code Ann. § 24.2-506(A)(5)) Source: Virginia Department of Elections, the Handbook, Chapter 16 Candidate Processing at p. 4 (available at https://www.elections.virginia.gov/media/grebhandbook/2020-individual-chapters/16_Candidate_Processing_(2020).pdf)
Wednesday, August 4, 2021 <i>90 days before election</i>	Special elections for vacancies occurring after this date cannot be ordered to occur at the November 2021 general election and will have to occur in the November 2022 general election. Source: Va. Code Ann. § 24.2-226
Friday, August 13, 2021 <i>81 days before election</i>	Independent, political party, and 3rd party candidates must file ballot access documents by 5pm. Source: Va. Code Ann. § 24.2-503, 24.2-507, 24.2-506, 24.2-521, and SBE Policy 2010-003
Saturday, August 14, 2021 <i>80 days before election</i>	General Registrar to confirm 1) all special election candidate filings have been submitted, reviewed, are complete and accurate, and have been processed, and 2) all candidate records in VERIS have been set up and are complete and accurate. Reminder: § 24.2-613 was amended in 2018 to change the meaning of “time of filing”. This must be taken into account when entering “time of filing” in VERIS. Note: Ensuring VERIS is completely up to date satisfies the reporting requirements in § 24.2-505 & 24.2-612 (Candidate lists to ELECT). Source: Va. Code Ann. § 24.2-505 & 24.2-612

Deadline	Event
Wednesday, September 8, 2021 <i>5-10 days before absentee voting begins</i>	Virginia Beach provides an electronic version of the ballot to absent uniformed service members and overseas citizens five to ten days prior to the opening of absentee balloting in order to ensure compliance with ensure compliance with the Uniform and Overseas Citizens Absentee Voting Act (“UOCAVA”), and its Virginia equivalent. Source: Declaration of Donna Patterson, attached as Ex. 1 (“Patterson Decl.”), ¶ 15.
Saturday, September 18, 2021 <i>45 days before election</i>	Absentee voting begins for the November election. Source: Va. Code Ann. § 24.2-612
Tuesday, November 2, 2021	Election Day

STANDARD

Defendants move under Fed. R. Civ. P. 62 for a stay pending appeal. The stay factors are: “(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.” *Nken v. Holder*, 556 U.S. 418, 426 (2009) (internal quotations and citations omitted). Given the impact of injunctions on elections, a stay pending appeal is a common remedy in election and redistricting matters. *See, e.g., Gill v. Whitford*, 137 S. Ct. 2289 (2017); *Rucho v. Common Cause*, 138 S. Ct. 923 (2018); Order, *Benisek v. Lamon*, No. 1:13-cv-3233 (D. Md. Nov. 16, 2018), ECF No. 230; *Common Cause v. Rucho*, 2018 WL 4214334, at *1 (M.D.N.C. Sept. 4, 2018); Order, *Common Cause v. Rucho*, 1:16-cv-1026 (M.D.N.C. Sept. 12, 2018), ECF No. 155; *North Carolina v. Covington*, 138 S. Ct. 974 (2018); *Abbott v. Perez*, 138 S. Ct. 49 (2017); *North Carolina v. Covington*, 137 S. Ct. 808 (2017); *Perry v. Perez*, 565 U.S. 1090 (2011); *Miller v.*

Johnson, 512 U.S. 1283 (1994); *Karcher v. Daggett*, 455 U.S. 1303 (1982) (Brennan, J., in chambers).

ARGUMENT

I. Defendants Are Likely To Succeed on the Merits

Defendants have a substantial likelihood of success on appeal. They have already filed their opening appellant brief in the Fourth Circuit which raises numerous issues. (*See* Appellants’ Br., *Holloway et al., v. City of Virginia Beach, et al.*, No. 21-1533, Dkt. 20 (4th Cir. filed June 11, 2021).) Success on any issue is sufficient for Defendants to obtain vacatur or reversal of the injunction. This motion focuses on four.²

First, the Court’s alternative holding that the Black community, standing alone, can constitute a majority in a single-member district, (ECF No. 242 at 65), cannot withstand appellate scrutiny. No plan presented at the liability stage met this goal, (*see id.* at 53), and Plaintiffs’ remedial proposal, filed just days ago, also falls far short of this goal, with the highest Black Citizen Voting Age Population in any remedial district being 35.61%. (ECF No. 261-1 at 12.) Plaintiffs did not argue at trial that the Black community standing alone can meet this test.

Second, the claim Plaintiffs *did* plead and attempt to prove, a coalitional claim, is not a cognizable invocation of Section 2, for reasons Defendants have set forth previously. (*See* ECF No. 237 at 27–29.) Although the Court concluded otherwise, the question is the subject of a circuit split, which underscores that Defendants are presenting a compelling case on appeal. *See, e.g., California v. Am. Stores Co.*, 492 U.S. 1301, 1305 (1989) (O’Connor, J., in chambers) (staying

² Defendants acknowledge that the Court ruled on these matters in finding liability, but Defendants have the obligation of presenting these arguments in support of their stay motion to this Court in the first instance. *See* Fed. R. App. P. 8(a)(1). It is “fairly contemplated” in this Rule that “tribunals may properly stay their own orders when they have ruled on an admittedly difficult legal question and when the equities of the case suggest that the status quo should be maintained.” *Washington Metro. Area Transit Comm’n v. Holiday Tours, Inc.*, 559 F.2d 841, 844–45 (D.C. Cir. 1977).

judgment where circuits split on the question presented). The statutory text of Section 2 does not contemplate coalitional claims, and the Supreme Court's decision in *Bartlett v. Strickland*, 556 U.S. 1 (2009), undermines such claims by construing Section 2 to protect only the right of members of a group to "elect [its preferred] candidate based on their own votes and without assistance from others." *Id.* at 14.

Third, Defendants are also likely to prevail on the cohesion element. Plaintiffs failed to provide a single estimate of Asian or Hispanic support for any candidate in any race. This left the Court unable to identify such an estimate in its opinion. This is a legal failing on Plaintiffs' part because a coalitional claim can only be valid if majorities of *each* constituency in the coalition support the same candidates as members of their own constituencies and the others. *Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989). If it is otherwise, then the coalition is internally polarized, not cohesive, and grouping such persons together would dilute votes of some members, rather than vindicate anyone's right to vote. As explained previously, the trial testimony indicates that this will be the result of a remedial plan in this case. (ECF No. 237 at 36.)

Fourth, Plaintiffs' coalitional claim is undermined further by the fact that no Asian or Hispanics have joined as plaintiffs, even though there are tens of thousands of such persons in the City. The result is a scenario where two Plaintiffs are asserting alleged dilution of the votes of persons of other racial backgrounds for the instrumental purpose. This is a paradigmatic third-party standing problem that has a substantial chance of resulting in reversal on appeal.

Although the Court took a different view on these and other issues, the question is not whether Defendants are certain to succeed, or even whether the Court agrees with these positions. This case presents a multitude of difficult issues, Defendants have a likelihood of success, and that satisfies the first stay factor.

II. Defendants Will Suffer Irreparable Harm Without a Stay

Defendants will be irreparably harmed absent a stay. The injunction, if left unchanged, would forbid the City from filling a vacancy on the Council, meaning that after the November 2, 2021 election, the City would only have a 10-member Council. Such an injunction would inflict irreparable harm on the City and the public.

A. The Court's injunction frustrates application of a state law governing elections in the City.

“[T]he [State’s] inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State.” *Abbott v. Perez*, 138 S. Ct. 2305, 2324 n.17 (2018) (citing *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers)); *see also Miller v. Johnson*, 515 U.S. 900, 915 (1995) (“Federal court review of districting legislation represents a serious intrusion on the most vital of local functions.”). Accordingly, the Supreme Court’s “ordinary practice is to suspend...injunctions from taking effect pending appellate review” “[w]hen courts declare state laws unconstitutional and enjoin state officials from enforcing them.” *Strange v. Searcy*, 135 S. Ct. 940, 940 (2015) (Thomas, J., dissenting) (citing *Herbert v. Kitchen*, 134 S. Ct. 893 (2014), and *San Diegans for Mt. Soledad Nat. War Mem’l v. Paulson*, 548 U.S. 1301 (2006) (Kennedy, J., in chambers)).

That problem is compounded here in that the City Council will, under the current injunction, become short one member as of November 2021. The Council, however, operates continuously to do the people’s work, and the loss of a member curtails its ability to do that. The Council schedules two formal session meetings per month,³ various special sessions, and at least

³ *City Council Formal Session Meeting Schedule*, City of Virginia Beach, <https://www.vbgov.com/government/departments/city-clerk/city-council/Pages/default.aspx> (last visited Jul. 7, 2021).

80 regularly scheduled public meetings, some monthly and others quarterly.⁴ The vacancy makes one less representative of voters to consider, deliberate on, and vote on the myriad issues before the Council. It also creates a governing body with an even number of representatives, without a tie-breaking vote. In addition, the shortage removes a member who is expected to shoulder part of the load of doing the Council's work. The agenda for a recent meeting on July 6, 2021, illustrates the variety and importance of issues facing the Council: a proposed ordinance to end the Declaration of a Local Emergency re COVID-19 Pandemic, recommendations for the Citizens Review Panel Task Force, amendments to City Bylaws, appointments to 25 different committees and commissions, and conditional use permits from businesses and individuals seeking relief from City ordinances in this bustling vacation economy.⁵ The "bookmarked" version of this particular agenda, including all materials necessary for review for the meeting, spans nearly 900 pages.⁶ Simply put, the workload on each Council member is substantial and the Council cannot afford to lose a member and risk deadlock.

B. A remedial plan cannot be adopted and administered prior to the November 2, 2021 election.

Absent a stay of this Court's injunction to permit a special election to occur under the present at-large plan, the only way under present law for the City to avoid losing a member of the City Council would be for the Court to rush out a remedial plan and to attempt to conduct the

⁴ *City Council Public Meetings*, City of Virginia Beach, <https://www.vbgov.com/government/departments/city-clerk/city-council/Pages/public-meetings.aspx> (last visited Jul. 7, 2021).

⁵ *City Council Brief Agenda*, City of Virginia Beach, (Jul. 6, 2021), available at <https://www.vbgov.com/government/departments/city-clerk/city-council/Documents/CurrentBriefAgenda.pdf>.

⁶ *City Council Bookmarked Agenda*, City of Virginia Beach, (Jul. 6, 2021), available at <https://www.vbgov.com/government/departments/city-clerk/city-council/Documents/BookmarkedAgenda.pdf>.

special election in November 2021 under that new plan. But such a strategy is untenable and would impose its own form of irreparable harm on the City.

First, there is no serious prospect of fashioning and implementing a remedial plan utilizing the 2020 census results after those results are released (likely in September 2021) in time for the November 2021 election. As a result, the Court would apparently only implement a remedy using 2010 census results and ACS data up to 2019. Districts drawn to equality under that standard will, however, by November 2021 be malapportioned under the Equal Protection Clause. Although the Court might justify that impingement on equal-protection rights under the theory that even unconstitutional plans may be utilized when election exigencies so require, *see Reynolds v. Sims*, 377 U.S. 533, 585 (1964), that same theory equally supports using the at-large system, since even plans that violate Section 2 may be utilized when election exigencies require under the same logic, *see infra*. A statutory impingement does not trump a constitutional impingement.⁷

Second, the exercise itself would create an election-administration quagmire. “[C]onsiderations specific to election cases” guide the equitable balancing in cases like this. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). “[I]ntervention by the federal courts in state elections” is a “serious business.” *Chisom v. Roemer*, 853 F.2d 1186, 1189 (5th Cir. 1988) (quoting *Oden v. Brittain*, 396 U.S. 1210 (1969) (Black, J., opinion in chambers)). Accordingly, an injunction requires a weighing of equities, “even after an adjudication on the merits that a legislative apportionment plan violate[s] the Constitution.” *Id.*; *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003) (“The decision to enjoin an impending election is so

⁷ An at-large election does not dilute votes for purposes of the one-person, one-vote principle. *See Baten v. McMaster*, 967 F.3d 345, 356 (4th Cir. 2020), as amended (July 27, 2020).

serious that the Supreme Court has allowed elections to go forward even in the face of an undisputed constitutional violation.”).

To begin, it is now July 7, and remedial proceedings have just begun. The Court has not hired a special master. The parties will be briefing the initial remedial proposals through the end of this month. (ECF No. 259) (Order directing briefing through July 30, 2021). It is unclear whether any given proposal will withstand scrutiny, and the Court has already announced that it will “have all proposed plans reviewed by an independent court-appointed expert” and that the Court expects to “draft[] a remedial plan.” (ECF No. 259.) For that to occur beginning in August could take months. For example, Special Master Bernard Grofman took three months in a recent case out of Sumter County, Georgia, which had approximately 30,000 people. *Compare* Order, *Wright v. Sumter County Board of Elections and Registration*, No. 1:14-cv-00042-WLS (M.D. Ga.), ECF No. 261 (Aug. 14, 2019) (identifying special master) *with id.*, ECF No. 272 (Nov. 11, 2019) (initial report of the special master). Virginia Beach, by comparison, is the largest city in Virginia, fifteen times the size of Sumter County, with a total population of around 450,000. (*See, e.g.*, ECF No. 261-1 at 12.) A special master’s plan would have to undergo scrutiny and vetting by the parties, and approval by the Court before use. In *Wright*, that process took two-and-a-half months. *See* Order, *Wright v. Sumter County Board of Elections and Registration*, No. 1:14-cv-00042-WLS (M.D. Ga.), ECF No. 277 (Jan. 29, 2020) (issuing remedy). It is difficult to see this entire process beginning and concluding in less than four months, before Election Day in November 2021.

Even if the process of issuing a final remedial plan using a special master could be accomplished by November 2, 2021, that would be much too late. Drawing the plan is only the beginning. Next, the plan must be administered.

The City's Registrar, Donna Patterson, does not yet have a complete understanding of what that even would take, in part because there is not yet a remedial plan and in part because the City has used a single-member system since it assumed its current form. Just an overview of the challenge before the Registrar and her staff of 13 full-time employees underscores the difficulties. A new single-member districting scheme would have to be uploaded into the City's geographic information system (GIS) computers and then transferred to the Virginia State Department of Elections' VERIS system. (*See* Patterson Decl. ¶ 6.) The Department of Elections would then assign voters to the new City Council districts (*i.e.*, determine what voters are eligible to vote in what districts under the new scheme) and send a report to the General Registrar. (*Id.*)

The City would also have to create new ballot types for voters based on those assignments.

As Ms. Patterson explains:

Because voters in the City of Virginia Beach may be assigned to different electoral districts (*e.g.*, United States Representative, Virginia House of Delegates, Virginia Senate, City Council), it is necessary for the City to have different versions of its ballot for different voters. All ballots will have statewide and citywide offices listed, but other offices will only be listed on ballots distributed to voters who reside in the districts represented by those offices and who are therefore eligible to vote for those offices. If a local office is not elected by at-large voting, then a unique ballot will be printed for the sub-group of voters in the City who are permitted to vote for that office.

(*Id.* at ¶ 7.) Once the new boundaries for the new single-member Council districts are identified, the General Registrar and her staff will have to overlay the council districts atop the other districts up for election and create new ballot types (on top of the eight ballot types the City already has created for this year's election) to ensure each Virginia Beach voter receives a ballot that contains all the elections that voter is entitled to vote in—but not more. (*Id.* at ¶¶ 8-9.)

In administering mail-in voting, the Registrar then would have to manually match voters with the correct ballots—which also display numerous other races and candidates—and fill

envelopes with the correct ballots. (*Id.* at ¶¶ 10-11.)⁸ In the 2020 General Election, Virginia Beach had 130,244 voters vote absentee, so the burden associated with this task is not a light one. (*Id.* at ¶ 20.) These steps must all be done well in advance of Election Day (Nov. 2), because absentee ballots must be transmitted to voters at least 45 days before Election Day. (*Id.* at ¶ 15.) And indeed, in Virginia Beach, absent uniformed service members and oversea citizens are typically emailed ballots 5-10 days *before* the start of absentee balloting to ensure the City’s compliance with the federal UOCAVA statute, 52 U.S.C. § 20302(a)(8)(A), and its state-law analogue, Va. Code Ann. § 24.2-460(A).

That, in turn, means the process has to be complete substantially in advance of that date so that the ballots and envelopes are *ready* to go to voters by that date. The City’s ballot-printing vendor has asked for finalized ballot types by August 16 to allow the vendor sufficient time to obtain Virginia Department of Elections approval of the ballots, and to have adequate lead time to print the ballots and deliver them to the General Registrar’s office in time to allow ballots to be stuffed and mailed. (*See* Patterson Decl. ¶ 17) (explaining that her office’s general practice is to have all ballots “finalized and printed by Labor Day Weekend”). This year, the City projects printing 150,000 ballots, making this not a small task. (*Id.* at ¶ 16.)

And there is more. The deadline for candidate qualification for an election held November 2, 2021 is August 13, 2021 and to qualify, candidates must themselves reside in the district and, under a new single-member system, must obtain 125 petition signatures from voters eligible to vote in the district in question. (*Id.* at ¶¶ 23-24.) Thus, potential candidates would need to know the district lines well in advance of that date to know whether they are even qualified to run and to

⁸ This process is made especially laborious and difficult to the extent a remedial plan adopted by the Court does not follow existing City voting-precinct boundaries. (Patterson Decl. ¶ 11.)

identify potential supporters for purposes of qualification. Additionally, the Registrar needs the information (fully uploaded in the State's computer system) for a hand check of eligibility of each signatory, person by person. (*Id.* at ¶ 24.) The harms to candidates and the voting public from rushing this process speak for themselves.

And that leads to yet another challenge: public education. The City's current at-large system has been in place since the 1960s, and the single-member-district system potentially at issue does not even exist yet. A fraction of the public would be entitled to vote in a November special election under a single-member scheme, but most would not. Both the Registrar and the Council would be required to engage in a full-court-press education effort. The failure of such an effort would be enormous confusion within the electorate and, ultimately, disenfranchisement. In Ms. Patterson's experience and view, there is insufficient time for a sufficient voter education effort to take place before November to minimize the risk of voter confusion. (Patterson Decl. ¶¶ 26-28.)

Everything written so far assumes perfect execution. And the risk of error increases as public servants are compelled to do their work under strict and unusual time pressures. This Court is no stranger to this type of error. *See Lecky v. Virginia State Bd. of Elections*, 285 F. Supp. 3d 908, 912 (E.D. Va. 2018) (recounting allegations of voters who asserted they were given the wrong ballots at polling place).

Finally, there is the compounding factor that all of that is for just *one* election. The City would have to administer a different plan in November 2022, given the intervening redistricting under the 2020 census results. The change upon change exacerbates all of the above-described problems.

C. Courts have repeatedly permitted elections to proceed in similar circumstances.

These problems are not new. Courts are well acquainted with them, and they have repeatedly held that a remedy can be worse than the alleged disease. Courts have, many times, found administration problems to weigh in favor of permitting an election to proceed under a challenged scheme, or even one held unlawful:

- July 7 was held too late to enjoin October 1 election. *Chisom*, 853 F.2d at 1190 (vacating *Chisom v. Edwards*, 690 F. Supp. 1524 (E.D. La. July 7, 1988)).
- May 19 was too late to interfere with November election. *Klahr v. Williams*, 313 F. Supp. 148, 152 (D. Ariz. May 19, 1970), *aff'd sub nom. Ely v. Klahr*, 403 U.S. 108 (1971).
- February 25 too late to interfere with June primary. *Cardona v. Oakland Unified Sch. Dist., Cal.*, 785 F. Supp. 837, 843 (N.D. Cal. 1992).
- March 23 too late to interfere with May 18 primary. *In re Pennsylvania Cong. Districts in Reapportionment Cases*, 535 F. Supp. 191, 195 (M.D. Pa. 1982).
- July 17 too late to interfere with November election. *Diaz v. Silver*, 932 F. Supp. 462, 469 (E.D.N.Y. 1996).
- May 28 too late to interfere with November elections. *Dillard v. Crenshaw County*, 640 F. Supp. 1347, 1362 (M.D. Ala.1986).
- August 9 too late to interfere with November elections. *Watkins v. Mabus*, 771 F. Supp. 789, 805 (S.D. Miss. 1991).
- June 8 too late to enjoin September primary or November elections. *Ashe v. Bd. of Elections in City of New York*, 1988 WL 68721, at *1 (E.D.N.Y. June 8, 1988).

In short, the harms inflicted on the City from mandating the use of a single-member system for use in November 2021 are severe. And they are irreparable precisely because, once the election occurs, the Court cannot go back in time and redo it under optimal conditions. This factor cuts decisively in favor of a stay.

III. Plaintiffs Would Incur No Harm from a Stay

A stay of the injunction would not harm Plaintiffs, because the injunction—as applied to the contemplated November 2021 special election—does not benefit Plaintiffs. Importantly, as noted

above, Plaintiffs will not oppose the relief requested in this motion and thus do not intend to argue that a stay would harm them. The record evidence further bears this point out.

First, Plaintiffs would not benefit from being served by a shorthanded Council. As explained, the Council is designed to have eleven members, is accustomed to having eleven members, and is not fully effective without eleven members. Nor could Plaintiffs colorably claim an injury tied to the size of the Council; Section 2 protections do not govern the size of an electoral body. *Holder v. Hall*, 512 U.S. 874, 881 (1994).

Second, Plaintiffs would be highly unlikely to benefit from a special election under a purported remedial plan. As of this time, there are three plans before the Court, representing good faith efforts by both sides to address the Court's liability ruling. But under *none* of these plans would Plaintiffs vote in a special election to replace Ms. Abbott. In all three plans, Ms. Abbott is designated as an incumbent in a district where no Plaintiff resides. (*Declaration of Kimball W. Brace*, attached as Exhibit 2 ("Brace Decl."), at ¶ 5.) The right to vote is personal, *Gill v. Whitford*, 138 S. Ct. 1916, 1921 (2018), so Plaintiffs would not be harmed by the conduct of an at-large special election where the alternative would be a special election in a district where they have no right to vote.

For another thing, it is unlikely that the special election would occur in a majority-minority district. In two of the three plans now before the Court, Ms. Abbott is designated as the incumbent of a majority-white district. (ECF No. 260 at 5, 7, 11, 12; *Brace Decl.* ¶ 6.) In one, Ms. Abbott is designated the incumbent of a district that falls right on the edge of majority-minority status. District 2 in Defendants' 10-1 Concept Plan, where Ms. Abbott is the incumbent, is only a majority-minority district under one method of calculation (total population using ACS), but not under a different method, under which it is majority-white using citizen voting age population.

(ECF No. 260 at 5, 7, 11, 12.) Defendants' expert, Dr. Lisa Handley, casts doubt on whether it would perform as a minority district. (ECF No. 260-2 at ¶¶16-19, 24-25); *see also Abbott v. Perez*, 138 S. Ct. 2305, 2332 (2018); *Harding v. County of Dallas, Tex.*, 948 F.3d 302, 309 (5th Cir. 2020).

Third, these are not problems that could be resolved through a special-master drawn plan. As explained, even accomplishing that appears unlikely, if not impossible. But even if it could be done, a special master is not legally entitled to attempt to fix these precise problems. A court-drawn plan must adhere to the policies of the state, *Perry v. Perez*, 565 U.S. 388, 393 (2012), and it is not among the policies of Virginia Beach to make an effort to include two specific individuals in a district that just happens to be set for a special election at a given point in time. There is, then, no basis to assume that, under some *other* plan *not* now before the Court, that Plaintiffs would be entitled to participate in November 2021 in a special election in a majority-minority district. That contingency is highly unlikely to occur, and it could not occur on purpose.

IV. The Public Interest Weighs in Favor of a Stay

A stay would benefit the general public; maintaining the injunction would harm the public. Accordingly, this final stay factor also cuts decisively in favor of a stay.

First, all the harm to the City would accrue equally to the public because the public constitutes the City. The public's interest lies in favor of an eleven-member Council, not a ten-member Council. The public's interest also lies in favor of being permitted to vote in an election for the vacant seat, not in being denied the opportunity to vote. And the public interest lies in favor of election order, not election chaos. All the harms identified above, Section II, *supra*, apply in full force here. The deadline for candidates to file ballot access documents is on August 13, 2021, Va. Code Ann. §§ 24.2-503 & 24.2-507, just two weeks after initial briefing is set to conclude in the remedial phase of this matter. This Court will not have an opportunity to receive meaningful

input from any special master and issue a final remedial plan until after this deadline passes. Potential candidates—even if they are able to decide to run for election and gather all necessary signatures once any remedial plan issues—will be robbed of their opportunity to engage in the level of campaigning necessary to reach the 31,000 voters in their new district, and some may be confused or otherwise disincentivized even from running. (*See, e.g.*, ECF No. 261-1 at 13) (showing citizen voting age population in least populated proposed district using ACS 2019 data). And the public would be robbed, too. It would lose promising candidates to the prohibitively punishing campaign schedule and would miss out on valuable opportunities to learn about their candidate before Election Day.

Second, the public interest would not be served by hastening an election under a plan known to violate core constitutional principles, such as the one-person, one-vote rule, which is founded in the Equal Protection Clause itself.

Third, the public interest risks substantial damage in a special election until the core legal question in this case are resolved. The remedial plans before the Court were, naturally, drawn with the purpose of remedying a Section 2 violation, which, in turn, requires a concerted effort to make sure there are sufficient districts achieving a large quantity of persons of specific races or ethnicities. (ECF No. 261 at 3) (“a complete remedy requires the creation of no fewer than three districts with majority-minority populations.”); (ECF No. 260-1 at 2.) Plaintiffs’ proposed remedial plan has three majority-minority districts with remarkably high minority percentages: District 4 has 60.30% minority population; District 7 have 58.83%; and, District 10 has 60.46%. (Brace Decl. Ex. A.) Drawing majority-minority remedial districts with even *less* minority population—as Defendants proposed—required the map drawer’s “principal purpose” and “predominant goal” to be achievement of this racial goal. (ECF No. 260-1 at ¶ 6; ECF No. 260 at

11-12.) Although this is essential for Section 2 compliance, the Supreme Court has repeatedly held that this approach to redistricting is *suspect* under the Equal Protection Clause. *Abbott*, 138 S. Ct. at 2334 (explaining how redistricting authorities are “pulled in opposite directions” by Section 2 and the Equal Protection Clause); *Miller v. Johnson*, 515 U.S. 900, 912 (1995). The choice of a majority-minority district over a non-majority-minority district itself triggers that scrutiny. *Bethune-Hill v. Virginia State Bd. of Elections*, 137 S. Ct. 788, 799 (2017) (“[I]f race for its own sake is the overriding reason for choosing one map over others, race still may predominate.”); *Cooper v. Harris*, 137 S. Ct. 1455, 1469 (2017) (applying this rule to subject to strict scrutiny, and ultimately invalidate, a district implemented with the purpose of complying with Section 2).

To be sure, race-based redistricting can be justified if a state has a substantial basis in evidence to conclude that there is a Section 2 violation, “[b]ut if not, then not.” *Id.* at 1460. The problem here is that the strong-basis-in-evidence question turns on whether coalitional claims are cognizable and, also, whether they can be proven without evidence of cohesion as to each constituency of the alleged cohesion. Only if the liability opinion is affirmed on appeal is there a strong basis in evidence for these race-based districts. If not, then a special election will violate the Equal Protection rights of Virginia Beach citizens. The risk of that harm is not worth the potential reward here, where Defendants have made out a likelihood of success on the merits.

Third, any interest in conducting an election in an equal-opportunity district is mitigated by the substantial doubt that the interest would or could be vindicated here. As shown, Ms. Abbott is not designated the incumbent in a majority-minority district (with one *arguable* exception), and it remains unknown whether any district can perform as Section 2 districts. Indeed, that cannot be known until after the remedial phase closes. Under that circumstance there is substantial doubt that there is any interest in conducting any election in a Section 2 district, and the public is better off

waiting until finality on that question is achieved, before race-based districts are used in any election.

CONCLUSION

The Court should stay its injunction, or modify it, and permit the City to conduct the November 2021 special election under the at-large system.

DATE: July 7, 2021

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of the filing to all parties of record.

/s/ Katherine L. McKnight

Katherine L. McKnight (VSB No. 81482)
Counsel for Defendants

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION**

Latasha Holloway, et al.,

Plaintiffs,

v.

City of Virginia Beach, et al.,

Defendants.

Case No. 2:18-cv-0069

PROPOSED ORDER

UPON CONSIDERATION of Defendants' Emergency Motion for Stay of Injunction, and any response thereto, it is hereby

ORDERED that Defendants' Emergency Motion for Stay of Injunction is granted; and it is further

ORDERED that this Court's permanent injunction issued on March 31, 2021, at ECF No. 242, is stayed only to the extent necessary to allow a special election for the Kempsville District seat in the Virginia Beach City Council to occur on November 2, 2021. All other aspects of the March 31, 2021, permanent injunction remain in place.

Honorable District Judge Raymond A. Jackson

Exhibit 1

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION**

Latasha Holloway, et al.,

Plaintiffs,

v.

City of Virginia Beach, et al.,

Defendants.

Case No. 2:18-cv-0069

DECLARATION OF DONNA PATTERSON

I, Donna Patterson, declare and state pursuant to 28 U.S.C. § 1746 as follows:

1. I serve as the Director of Elections and the General Registrar for the City of Virginia Beach, Virginia. I have served in this role since April 2012. From May 2003 until April 2012, I served as a Deputy Registrar for Arlington County, Virginia. As such, I have over 18 years of experience administering elections in Virginia.

2. As part of my obligation as General Registrar of the City, I took and signed the oath of office indicated in Article II, Section 7 of the Constitution of Virginia. Va. Code Ann. § 24.2-120. This oath includes a solemn affirmation that I will faithfully and impartially discharge all the duties incumbent on me as General Registrar, according to the best of my ability. Va. Const. Art. II, § 7.

3. This declaration is given in support of the City's Motion to Stay this Court's injunction dated March 31, 2021.

4. As detailed herein, my office already has begun work to administer the General Election currently scheduled for the November 2, 2021 (the "General Election"). This Declaration is intended to identify the requirements and challenges imposed on my office to

administer a special election as part of the General Election for a newly created Virginia Beach City Council district.

THE CITY WILL NEED TO ASSIGN VOTERS TO THE NEWLY CREATED DISTRICT TO ENSURE THOSE VOTERS CAN VOTE IN THE SPECIAL ELECTION AND ADD TO THE (8) DIFFERENT BALLOT STYLES THE CITY HAS ALREADY

5. If the current Kempsville residency City Council seat—from which Councilwoman Abbott recently resigned—is replaced with a single-member district with different boundaries, and a special election is to be conducted this November for that district, the City’s voters will have to be assigned into the new districts and the City’s official ballot type(s) amended appropriately for that special election in time. These tasks take time and must be executed accurately in order for me to fulfill my responsibility to ensure that each voter entitled to vote in the new district receives the correct ballot and can in fact vote. *See* Va. Code Ann. § 24.2-706.

6. In order to assign voters into the newly created districts, the new plan’s district boundaries would have to be uploaded into the City’s geographic information systems (GIS) computers and then transferred to the Virginia Department of Elections’ VERIS database. The Virginia Department of Elections, through the VERIS system, would then be responsible for assigning voters into the new districts and providing my office with a report identifying those voters. It is not clear to me how quickly the Virginia Department of Elections would need to receive those new boundaries to perform this task, or what lead times are required within the City, as single-member districts for City Council have never before existed. What is clear is that my office will need to receive the list of voters in the new district in sufficient time to ensure that suitable types and numbers of ballots are printed to administer a General Election on November 2 that also includes a special City Council election from a newly created single-member district.

7. Because voters in the City of Virginia Beach may be assigned to different electoral districts (*e.g.*, United States Representative, Virginia House of Delegates, Virginia Senate, City Council), it is necessary for the City to have different versions of its ballot for different voters. All ballots will have statewide and citywide offices listed, but other offices will only be listed on ballots distributed to voters who reside in the districts represented by those offices and who are therefore eligible to vote for those offices. If a local office is not elected by at-large voting, then a unique ballot will be printed for the sub-group of voters in the City who are permitted to vote for that office.

8. The conversion of the current Kempsville residency district into a single-member district with new boundaries will require the creation of one or more *additional* ballot types beyond the 8 ballot types the City of Virginia Beach presently has configured for the General Election. Until the new district is drawn, such that its boundaries can be laid over the boundaries of other electoral districts, it is unclear how many additional ballots will be needed.

9. This has several consequences for election administration. First, my office currently is managing 8 different ballot types for voters in the City for the General Election. This is a high number of ballot types which creates a greater risk of error—errors that could result in voters receiving the wrong ballot types and thereby potentially voting in the wrong election(s).

10. The risk of error is especially pronounced in absentee voting by mail. My staff and I are responsible for stuffing absentee ballot envelopes and ensuring they are mailed to the City's voters. While my office may rely on the Commonwealth's VERIS system to identify which voters should get which ballots, and even print mailing labels, I rely on trained staff to review the voter name and address and confirm that the correct ballot is placed in the mail to that

voter. This is a very time-consuming process but we believe it is necessary to do the job properly.

11. This process is further complicated if the new district boundaries do not comport with pre-existing City precinct boundaries. In that instance, certain voters within the same precinct may be in the new district, and others outside the district. This will require significant time on the part of my office to manually ensure these voters are assigned correctly.

12. Ensuring the correct ballots are mailed to voters is essential because if a voter receives the wrong ballot, the voter's right to vote could be harmed, never mind the complications that arise when a voter votes the wrong ballot.

13. I have 13 staff members, including myself, who work on the task of ensuring voters receive the correct ballots in the mail. All 13 staff members require training on each ballot type, and any temporary staff we employ require that same training plus careful oversight by full-time staff.

BALLOT PRINTING MUST BE COMPLETED SOON

14. A major time-constraint affecting election administration for the General Election is the printing of ballots. In Virginia, only a small number of vendors are certified to print ballots. The ballot printing vendor that we use already has ballot information for our November ballot in order to get a jump on what becomes a very tight timeframe toward the end of the summer.

15. Under Virginia law, absentee voting begins 45 days before the General Election, which is September 18, 2021. Further, to ensure compliance with the Uniform and Overseas Citizens Absentee Voting Act ("UOCAVA"), 52 U.S.C. § 20302(a)(8)(A), and its Virginia equivalent, Va. Code Ann. § 24.2-460(A), Virginia Beach provides an electronic version of the

ballot to absent uniformed service members and overseas citizens five to ten days prior to the opening of absentee balloting.

16. Our office is currently projecting needing to print 150,000 ballots for the General Election.

17. Practically speaking, our ballot-printing vendor requires significant lead-time in order to ensure that a sufficient number of ballots can be printed and delivered to our office in time to issue ballots by the deadline below. My office has asked by the vendor to get the vendor, by August 16, 2021, the ballot types for the General Election, so the vendor has sufficient time to secure approval of the ballot types from the Virginia Department of Elections and to then have adequate lead time to print ballots and deliver them to my office in time to get the ballots mailed by the start of the absentee voting period. In my past experience, the “cutoff” for finalizing ballots is often 60 days, or at most 55 days, before a General Election. My office’s usual practice is to have all the ballots finalized and printed by Labor Day Weekend. This affords our office sufficient time to stuff absentee envelopes and arrange for UOCAVA ballots to be emailed out in advance of the start of absentee voting.

18. If this process is delayed due to complications arising from trying to add a new district to the election, it will severely affect my office’s ability to obtain, print, finalize, and mail ballots by the commencement of absentee balloting.

THE CITY IS ALREADY RECEIVING REQUESTS TO VOTE EARLY OR ABSENTEE

19. Notably, the City is already receiving requests from voters to vote early or absentee – approximately 2,000 requests have been received thus far for the General Election.

20. Due to changes in law allowing for “no-excuse” absentee and early voting in Virginia, we have seen unprecedented demand for early voting in the past election. In the 2020

general election, for example, the City of Virginia Beach saw 130,244 absentee ballots cast in the Presidential election as reflected in our Official Results.

21. This election will be our first gubernatorial election conducted with “no-excuse” absentee and early voting, and in our experience, gubernatorial elections have high turnout.

22. While the City’s voters’ extensive use of absentee and early voting has made Election Day calmer and lines shorter, it has greatly increased the burden on my staff in the time leading up to Election Day. The work burden is greater on our office between now and the start of absentee voting. And, once the early and absentee voting period begins, it will take our entire 13-member team to help with absentee and early voting – including to get ballots organized and mailed, to train staff, and get the process underway.

CANDIDATE QUALIFYING CANNOT BEGIN UNTIL WE HAVE A MAP

23. Another part of my office’s work is ensuring that candidate for City election are properly qualified to the ballot. In Virginia Beach, candidates for City Council are required to obtain 125 valid signatures from registered City voters to be placed on the ballot. August 13, 2021 is the current deadline for candidates to submit their ballot-access documents, including petitions, for a special election to be conducted on the date of the General Election.

24. To the extent the Kempsville residency City Council district is converted into a single-member district with new boundaries, presumably, both the candidates for that new district and the candidacy petition-signers for that district would have to be residents of that district. As General Registrar, it is my responsibility to verify those persons’ residencies, which requires resort to the State’s VERIS database. And the candidates would need to understand those district boundaries as well to determine if they can be valid candidates and to determine which residents may validly sign their candidacy petitions.

25. In my opinion, that August 13 candidate-qualifying deadline is very important as it feeds into the City's process for creating and printing ballot types.

MY OFFICE NEEDS SUFFICIENT TIME TO EDUCATE VOTERS ABOUT THE NEW DISTRICT TO AVOID VOTER CONFUSION

26. Finally, my office requires sufficient time to undertake voter education efforts about any new districting plan for the City Council. Ever since the 1960s, Virginia Beach City Council elections have been at-large, including the residency districts like the Kempsville district recently vacated by Councilwoman Abbott.

27. In my experience, voters have grown accustomed to voting for City Council members at-large, and are likely to require significant amounts of publicity and education by our office and others in the community to understand the new single-member district process. This will also include the geographic boundaries of the new districts.

28. There are less than four months between the date of this Declaration and the General Election. There is not, in my opinion, sufficient time before the General Election for my office with its limited resources to undertake all the steps described above in my Declaration and to also provide sufficient voter education to minimize the risk of voter confusion about the proposed special election under a new single-member district plan.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 7th day of July, 2021, at Virginia Beach, Virginia.


Donna Patterson

Exhibit 2

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION**

Latasha Holloway, et al.,

Plaintiffs,

v.

City of Virginia Beach, et al.,

Defendants.

Case No. 2:18-cv-0069

DECLARATION OF KIMBALL W. BRACE

I, Kimball W. Brace, declare and state pursuant to 28 U.S.C. § 1746 as follows:

1. I have over 42 years of experience drawing electoral districts during redistricting cycles and in remedial phases for litigation. This experience includes drawing electoral districts in the City of Virginia Beach for the past three decades. I was a fact witness and testifying expert during the liability phase of this matter, and I have submitted an affidavit during the remedial phase of this matter. Dkt. 260-1. My curriculum vitae is familiar to this court and most recently submitted as Exhibit A to Dkt. 260-1.

2. This declaration is given in support of the City's Motion to Stay this Court's injunction dated March 31, 2021.

3. I have reviewed Plaintiffs' remedial proposal submitted to this Court at Dkt. 261. Attached as Exhibit A are demographic data about Plaintiffs' remedial proposal.

4. I understand that City Councilmember Jessica Abbott has tendered her resignation from the Council and a special election may be called to fill her seat.

5. I have reviewed all three remedial plans proposed to the Court, namely, the one proposed by Plaintiffs at Dkt. 261, and the two proposed concept plans by Defendants at Dkt. 260. I have

determined that in none of those plans would Plaintiffs vote in a special election to replace departing Councilmember Abbott because Ms. Abbott is not designated as an incumbent in any district where a Plaintiff resides.

6. In two of the three plans proposed to the Court, Ms. Abbott was designated as the incumbent of a majority-white district: in Plaintiffs' proposed plan and in Defendants' 7-3-1 Concept Plan.

I declare under penalty of perjury that the foregoing is true and correct. Respectfully executed and submitted this 7th day of July 2021.

_____  _____

Kimball W. Brace

Brace Decl.

Ex. A

DISTRICT	Total Population Tabulation (ACS 2019)				Racial Demographics as Percent of Total Population (ACS 2019)					ESRI 2020				Racial Demographics as Percent of Total Population (ESRI 2020)					
	All Persons	Target	Dev.	Difference	White NH	Black NH	Asian NH	Hispanic	Minority	Persons	Target	Dev.	Difference	White NH	Black NH	Asian NH	Hispanic	Minority	
1	44,662	45,020	-0.80%✓	-358	63.94%	16.21%	9.64%	5.14%	36.06%	43,813	45,328	-3.34%✓	-1,515	64.24%	15.40%	10.07%	6.31%	35.76%	
2	46,469	45,020	3.22%✓	1,449	72.57%	12.09%	5.76%	5.17%	27.43%	47,939	45,328	▼5.8%	2,611	68.23%	13.06%	8.03%	6.64%	31.77%	
3	45,474	45,020	1.01%✓	454	60.93%	18.91%	5.61%	9.98%	39.07%	45,232	45,328	-0.21%✓	-96	58.08%	19.90%	6.59%	10.17%	41.92%	
4	45,124	45,020	0.23%✓	104	39.70%	35.60%	6.15%	14.35%	60.30%	44,510	45,328	-1.80%✓	-818	40.35%	37.61%	5.81%	10.99%	59.65%	
5	42,603	45,020	5.4%▲	-2,417	74.94%	8.90%	3.65%	7.82%	25.06%	42,564	45,328	6.1%▲	-2,764	70.98%	10.90%	4.30%	9.05%	29.02%	
6	44,243	45,020	-1.73%✓	-777	70.81%	15.76%	2.01%	6.15%	29.19%	44,149	45,328	-2.60%✓	-1,179	68.29%	15.16%	2.49%	9.90%	31.71%	
7	45,197	45,020	0.39%✓	177	41.17%	29.93%	12.11%	10.39%	58.83%	44,517	45,328	-1.79%✓	-811	41.82%	28.55%	14.59%	9.45%	58.18%	
8	44,792	45,020	-0.51%✓	-228	81.85%	5.80%	3.46%	4.75%	18.15%	43,963	45,328	-3.01%✓	-1,365	83.30%	4.97%	3.55%	5.43%	16.70%	
9	46,262	45,020	2.76%✓	1,242	72.32%	10.47%	5.30%	7.26%	27.68%	47,449	45,328	4.68%✓	2,121	69.00%	12.17%	6.37%	8.15%	31.00%	
10	45,375	45,020	0.79%✓	355	39.54%	30.15%	11.87%	10.65%	60.46%	49,145	45,328	▼8.4%	3,817	38.52%	30.38%	12.72%	12.52%	61.48%	
Assigned	450201																		
Total Pop	450201																		
Unassigned	0																		