<u>This is in response to a letter received from the City of Virginia Beach.</u>

<u>Myth #1</u>, Virginia Beach argues that the **bill creates uncertainties** for localities with at-large voting systems.

Wrong because:

- HB1890/SB1395 actually streamlines a familiar legal standard.
- It does not require the three *Gingles* preconditions from the federal standard.
- HB1890/SB1395 also leaves flexibility for localities in how to implement district schemes, including at-large district schemes, in a compliant way.

Details:
This bill actually eliminates significant uncertainties that currently exist under federal law. This bill simplifies the complex federal standard and will actually make future litigation more predictable and less expensive for all parties, because it will be easier for courts and parties to quickly sort out the strong cases from those without merit.

Plaintiffs litigating similar claims under federal law must first prove the existence of three "preconditions," including racially-polarized voting, and then must satisfy a fact-extensive "totality of the circumstances" test in which courts can consider nine non-exhaustive factors. *See, e.g.*, *Thornburg v. Gingles*, 478 U.S. 30 (1986). Plaintiffs seeking to vindicate their rights under federal law must risk six- and seven-figure expenditures in legal costs and fees in order to pursue litigation, and these cases are similarly expensive for localities to defend. *See* NAACP LDF, *The Cost (in Time, Money, and Burden) of Section 2 of the Voting Rights Act Litigation* (Feb. 14, 2019), https://www.naacpldf.org/wp-content/uploads/Section-2-costs-02.14.19.pdf.

<u>Myth #2:</u> Virginia Beach argues that this new standard has the "likely outcome of **invalidating any at-large** election system anywhere in Virginia by simply establishing the existence of 'racially-polarized voting.'"

Wrong because:

- HB1890/SB1395 doesn't ban all at-large district schemes.
- Even at-large district schemes with racially polarized voting could remain at-large under HB1890/SB1395.
- What HB1890/SB1395 prohibits: at-large district schemes that dilute or abridge the political voice of a protected class.

Details:
This is not accurate. In jurisdictions where the voting population is too small to influence the outcome of the election under any new election structure, plaintiffs will lack standing to bring claims and the lawsuit will be dismissed.

It may also be worth noting that, in addition to demonstrating racially-polarized voting, in order to prevail plaintiffs would still have to show that racially-polarized voting *combines* with the method of election to *dilute* the voting strength of a protected class in a way that *actually impairs* their ability to elect candidates of choice or influence the outcome of an election.

While this is a lower bar than the federal standard, in jurisdictions where the voting population of the protected class is too small to elect candidates of choice or influence the outcome of the election under *any* method of election, plaintiffs would lack standing to bring suit because there is no effective remedy a court could order.

The language in the current version of the bill does not preclude the use of at-large systems in all jurisdictions with racially-polarized voting, because these jurisdictions can keep their at-large districting system while switching to an alternative voting system and avoid liability. This concern ignores the availability of alternative voting systems in at-large districting schemes, as well as the need for plaintiffs to establish that their ability to elect or influence is actually impaired in a way that the court can effectively remedy.

Myth #3, Virginia Beach argues against removing the requirement in federal law that plaintiffs must prove that minority communities are **geographically compact or concentrated**, because it is an "important voting rights concept".

Wrong because:

- Geographic concentration of protected classes is **not** an important voting rights concept. It's just one of the *Gingles* preconditions in federal case law.
- By streamlining the standard and eliminating a geographic concentration requirement, HB1890/SB1395 actually allows localities more flexibility for compliance. Single-member districts aren't the only solution under HB1890/SB1395. HB1890/SB1395 is ensuring that our voting methods and district schemes truly express the will of the people, including the protected classes defined in the bill.
- As noted in the details section below, other state-level VRAs like HB1890/SB1395 have already proven geographic concentration is unnecessary and not an "important voting rights concept."

Details:

This requirement has already been eliminated by state-level Voting Rights Acts in three states: California, Oregon, and Washington. The California Voting Rights Act—adopted in 2002—has proven remarkably successful in protecting minority voting rights over the last two decades and has demonstrated that this requirement imposed by federal law is unnecessary, prevents otherwise valid claims from proceeding, and only serves to increase the cost and complexity of litigation.

Geographic compactness is only even arguably an "important voting rights concept" if you assume, as the *Gingles* Court erroneously did, that single-member districting is the only available remedy for VRA Section 2 vote dilution violations. As laid out above, this is not the case. It is also worth noting that geographic compactness is *not* required by the VRA itself, only by case law stemming from this erroneous assumption by the *Gingles* Court (which even Justice Thomas has suggested is erroneous, see *Holder v. Hall*, 512 U.S. 874, 910 (1994) (Thomas, J., concurring) ("[N]othing in our present understanding of the Voting Rights Act places a principled limit on the authority of federal courts that would prevent them from instituting a system of cumulative voting as a remedy under § 2, or even from establishing a more elaborate mechanism for securing proportional representation based on transferable votes.").

- Numerous federal courts have recognized that "[e]vidence of racially polarized voting is the linchpin of a section 2 vote dilution claim." *See Westwego Citizens for Better Gov't v. City of Westwego*, 872 F.2d 1201, 1207 (5th Cir. 1989); *Cano v. Davis*, 211 F. Supp. 2d 1208, 1238 (C.D. Cal. 2002), *aff'd*, 537 U.S. 1100 (2003); *Harding v. Cty. of Dallas, Texas*, 336 F. Supp. 3d 677, 690 (N.D. Tex. 2018), *aff'd* 948 F.3d 302 (5th Cir. 2020); *see also McMillan v. Escambia County*, 748 F.2d 1037, 1043 (5th Cir. 1984) ("racially polarized voting will ordinarily be the keystone of a dilution case"). The Supreme Court itself acknowledged that the two most important considerations are the "extent to which voting in the elections of the state or political subdivision is racially polarized" and the "extent to which minority group members have been elected to public office in the jurisdiction." *Thornburg v. Gingles*, 478 U.S. 30, 48 n.15 (1986).

- Proving the existence of racially polarized voting provides a sufficient gatekeeping function. According to one analysis, out of 155 lawsuits brought under Section 2 that considered the extent of racially polarized voting, only 105 actually found that racially polarized voting existed. *Ellen Katz et. al.*, *Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982*, University of Michigan Law School, 39 U. Mich. J.L. Reform 643, 664 (2006); *cf.* Adam B. Cox & Thomas J. Miles, *Judging the Voting Rights Act*, 108 Colum. L. Rev. 1, 11–12 (2008) (finding that Section 2 litigation "resulted in liability . . . 34% of the time for challenges to at-large districts").

- Other states to adopt (or consider adopting) state-level VRAs retained racially polarized voting as the primary analysis but eliminated other requirements under federal law, such as the requirement that a protected class must be geographically compact or concentrated. *See California Voting Rights Act*, Cal. Elec. Code § 14028 (effective 2003); *Oregon Voting Rights Act*, Or. Rev. Stat. Ann. § 255.411 (effective 2019), *Washington Voting Rights Act*, Wash. Rev. Code Ann. § 29A.92.030 (effective 2019); *John L. Lewis Voting Rights Act of New York*, Senate Bill S1046, § 17-206.2(B)(I) (currently pending).