



April 2, 2012

VIA ELECTRONIC AND FIRST CLASS MAIL

Mayor James Ireton
Council President Terry Cohen and Members of the City Council
City of Salisbury
125 North Division Street
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Dear Mayor Ireton, President Cohen, and Members of the City Council:

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We write on behalf of the American Civil Liberties Union of Maryland and the Wicomico County Branch of the NAACP, in follow up to our March 14 correspondence, your criss-crossing (and sometimes contradictory) communications of the past two weeks, and to formally submit our legal analysis and sample redistricting proposals for Salisbury City Council elections.¹

As we previously informed you, and as explained at greater length below, the ACLU and NAACP believe that in light of the increasing racial diversity of the Salisbury community, the City must change the structure of its election system as it undertakes redistricting this year in order to comply with the requirements of the Voting Rights Act. Moreover, any structural change to the City's election system must receive federal court approval, as the City remains bound by the 1987 Consent Decree in the case of *Billy Gene Jackson, et al. v. City of Salisbury, Md.*, Civil Action No. Y-86-587 (D. Md. 1987), which establishes the City's current election structure. Accordingly, we have indicated our intentions to re-open the *Jackson* litigation, in order to facilitate reform of the election system consistent with the aims of racial fairness guaranteed under the U.S. Constitution and Voting Rights Act.

Salisbury Demographics and the Voting Rights Act

According to the 2010 Census, adjusted pursuant to Maryland's No Representation Without Population Act, the general demographic makeup of the City of Salisbury is as follows:

Black:	34.4 %
White:	52.8 %
Asian:	3.2 %
Hispanic:	7.0 %
Other and Mixed Race:	3.6 %
Total Minority:	48.2 %

¹ In preparing these proposals, we worked with independent demographer William S. Cooper, lending enormous expertise to our efforts. Mr. Cooper has over 25 years of experience working with civil rights activists and government officials on preparation and analysis of redistricting maps.

To achieve racial fairness, the redistricting plan adopted by the City should – to the greatest extent possible – be one that reflects the general diversity of the City’s populace, and gives residents opportunities to elect their chosen candidates roughly proportionate to their numbers in the population.

Section 2 of the Voting Rights Act prohibits the use of voting practices that are purposefully discriminatory, as well as those that "result" in discrimination.² *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986). According to the Act’s legislative history and its interpretation by the Supreme Court, the key question in analyzing a vote dilution claim under Section 2 is whether, based on the totality of circumstances, the plan at issue provides minority residents with “less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.”³ 42 U.S.C. § 1973(b) (2006).

² The legislative history of Section 2 indicates that "a variety of factors, depending upon the kind of rule, practice, or procedure called into question," are relevant in determining if a plan "results" in discrimination. S. Rep. No. 417, 97th Cong., 2d Sess. 28-9 (1982). These factors (the "Senate factors") include:

1. The extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. The extent to which voting in the elections of the state or political subdivision is racially polarized;
3. The extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. If there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. The extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. Whether political campaigns have been characterized by overt or subtle racial appeals;
7. The extent to which members of the minority group have been elected to public office in the jurisdiction.

Id.

³ In *Gingles*, 478 U.S. at 50-1, the Supreme Court held that to establish a violation of the "results" standard of Section 2, plaintiffs had to show that: (1) the minority group is sufficiently large and geographically compact to constitute a majority in one or more single member districts; (2) the minority is politically cohesive, *i.e.*, tends to vote as a bloc; and, (3) the majority also votes as a bloc "usually to defeat the minority's preferred candidate." The other Senate factors "are supportive of, but not essential to, a minority voter's claim." *Id.* at 48 n.15. In *Johnson v. De Grandy*, 512 U.S. 997, 1018 (1994), the Court confirmed the *Gingles* analysis and held that the ultimate determination of a Section 2 violation is to "be assessed 'based on the totality of circumstances.'" The analysis under *Gingles* and *Johnson* has been adopted and consistently applied in the

As you know, Salisbury's existing election system establishes District 1 as a single-member, majority African-American district electing one council member, and District 2 as a majority-white, multi-member district electing four council members. The system thus offers minority voters a fair opportunity to elect candidates of their choice just 20 percent of the time, far lower than is justified by the City's current minority population. Exacerbating matters, the City's staggering of its elections, with District 1 elections synchronized with the Mayoral election, means that people who live in the minority district only vote in City elections once every four years, whereas those who live in the majority white district vote every two years, thus further limiting minority electoral opportunities. Given the City's current demographics, this system indisputably affords minority voters "less opportunity than other members of the electorate, to participate in the political process and to elect representatives of their choice." As such, it violates the Voting Rights Act, and thus the structure of the system needs to change as part of the current redistricting process.

Choice of an Election System Structure

Before any decision can be made about what specific plan to adopt, officials must first make a determination about what election structure best satisfies legal requirements and serves the interests of City residents. Should the City maintain a five-member council, or expand the size of City Council to seven members? Will single member or multi-member districts be used, or should the City seek to reintroduce at-large seats? In making these determinations, the City obviously cannot operate as if it is writing on a blank slate. Rather, it must carefully evaluate the legal consequences of any structural changes it implements, given the City's current demographics and the backdrop of the federal court's consent order finding that Salisbury's past use of at-large elections resulted in minority vote dilution.

Discussion about redistricting possibilities in Salisbury over the last few months has included discussion of several options, including 1) changing to a system of single member districts; 2) creating a "hybrid" system that combines single-member districts with use of at-large seats; and 3) maintenance of the current system with one single-member and one multi-member district. Variations on these themes have also been suggested.

The ACLU and NAACP take the position that single-member districts are the superior approach for Salisbury, in order to ensure racial fairness and meet the requirements of the Voting Rights Act.

Single Member vs. Multi-Member Districts or At-Large Seats

It is well established that at-large election systems and multi-member districts⁴ "tend to minimize the voting strength of minority groups by permitting the political majority to

Fourth Circuit. See, e.g., *United States v. Charleston County*, 365 F.3d 341 (4th Cir. 2004).

⁴Multi-member districts in which the white majority submerges the racial minority can dilute voting rights in the same way as at-large systems. Thus, the Supreme Court has historically treated these two structures the same for purposes of legal analysis.

elect *all* representatives of the district[.]” *Rogers v. Lodge*, 458 U.S. 613, 616 (1982) (emphasis in original), raising legal concerns under the Voting Rights Act. As the Supreme Court opined in the quintessential voting rights case of *Thornburg v. Gingles*:

The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives. This Court has long recognized that multimember districts and at-large voting schemes may “operate to minimize or cancel out the voting strength of racial [minorities in] the voting population.’ ”

478 U.S. 30, 47-48 (1986) (citations and footnotes omitted). See also *United States v. Charleston County*, 465 F.3d 341 (4th Cir. 2004); *Cane v. Worcester County*, 840 F. Supp. 1081 (D.Md. 1994), *aff’d* 35 F.3d (4th Cir. 1994), *cert. denied*, 513 U.S. 1148 (1995).⁵

Courts have generally held that concerns about minority vote dilution resulting from an at-large structure are best remedied by a system of single member districts (SMDs). See, e.g., *Mahan v. Howell*, 410 U.S. 315, 333 (1973) (“in fashioning reapportionment remedies, the use of single member districts is preferred.”); *Rogers, supra*, 458 U.S. at 627-28. Single member districts effectively remedy minority vote dilution because they enable a sufficiently large concentration of minority voters to coalesce in the district in such way that “the illegal discriminatory effects of racially polarized voting can be overcome, and members of that minority group may enjoy a meaningful opportunity to participate in the governmental process and to elect a candidate of their choice.” *Dillard v. Town of Louisville*, 730 F.Supp. 1546, 1548 (M.D.Ala. 1990).

Likely for these reasons, single member districts have traditionally been used by Maryland counties and municipalities to remedy the problem of minority vote dilution. Indeed, SMDs have been implemented by municipalities across the Lower Shore, successfully resolving voting rights litigation and resulting in historic change by affording African American voters fair opportunities to participate in the political process and to elect candidates of their choice. Absent exceptional circumstances, courts have held that single member districts should be used exclusively, rather than in combination with multi-member districts or at-large seats, so as to eliminate the chances for minority vote dilution as completely as possible.

Proposals that at-large elections be reinstituted in Salisbury for certain council seats are troubling, given the established tendency of that election structure to dilute minority voting rights. Notably, the City of Salisbury conceded this point in the *Jackson* litigation, expressly agreeing that “*the totality of the factual circumstances in Salisbury demonstrate . . . that the effect of the at-large method of nominating and electing City Council members is violative of §2 of the Voting Rights Act, 42 U.S.C. §1973, inasmuch as the existing at-large system tends to afford blacks unequal access to the electoral process.*” Consent Decree, at ¶ 3D (emphasis added.)

⁵In the protracted *Cane* litigation handled by the ACLU, both the U.S. District Court for the District of Maryland and the U.S. Court of Appeals for the Fourth Circuit found nearby Worcester County’s at-large election system for County Council members to interact with social and historical conditions to dilute minority electoral opportunities, in violation of Section 2 of the Voting Rights Act.

This principle holds true whether the proposal would be to add new at-large seats to the City Council, revert to an all at-large system, or reinstitute at-large elections for one or more of the existing Council seats. For example, Mayor Ireton has introduced a proposal for expansion of the City Council size to seven, with five members elected from single member districts and creation of two new at-large seats, a so-called “hybrid” system of single-member and at-large seats. This proposal is legally flawed, however, as it would unfairly discriminate against minority voters with respect to the two new Council seats.

Over the course of three decades, courts evaluating hybrid single-member/at large systems have consistently held that *unless the use of at-large seats leaves the number of minority opportunity districts unaffected*, hybrid systems conflict with the Voting Rights Act.⁶ See, e.g. *Citizens for Good Government v. City of Quitman*, 148 F.3d 472 (5th Cir. 1998) (Change from at-large system for electing five-member council to system with four SMDs and one at-large post was inadequate to remedy minority vote dilution absent showing of “singular combination of unique factors” justifying continued use of one at-large council seat); *United States v. Dallas County Commission*, 850 F.2d 1433 (11th Cir. 1988), *cert. denied*, 490 U.S. 1030 (1989) (election plan for county school board providing for four SMDs – two majority black, two majority white – plus one at-large seat violated the Voting Rights Act); *Jamison v. Tupelo, Mississippi*, 471 F.Supp. 706 (N.D. Miss. 2007) (hybrid City Council system combining five SMDs with two at large seats violated the Voting Rights Act.)

In Salisbury, minority electoral opportunity would be adversely affected by the use of the Mayor’s proposed hybrid five SMD/two at-large election scheme. That is, when analyzed under the Supreme Court’s *Gingles* test, introduction of two new council seats elected at large would diminish minority electoral opportunity over what is possible in a five member council, as well as if a complete system of single-member districts were to be used to elect a seven-member council. To prove this point, sample plans created by the ACLU illustrate ways that two minority opportunity districts can be created in five-member plan, or three such districts on a seven-member plan, whereas the Mayor’s hybrid plan offers just two minority opportunities on a seven-member council. (See ACLU Sample Plans, discussed below.)

Continued minority vote dilution from at-large elections in Salisbury also is strongly suggested in the record of elections that have occurred in District 2 since the City’s implementation of the *Jackson* Consent Decree in 1990. As noted, District 2 is a

⁶Not surprisingly, it has been pointed out by some City officials that Wicomico County has a hybrid system of the type proposed by Mayor Ireton, and that that system withstood a court challenge by the U.S. Justice Department. Wicomico’s present system was in fact put into place during the course of DOJ’s Voting Rights Act challenge to Wicomico’s at-large election system, in an effort by the County to resolve that challenge. The system includes one majority black single-member district of five single member districts, and two at-large seats. To our knowledge, since implementation of this hybrid system, no African-American has ever been elected to an at-large position on the Wicomico Council. Rather, African American County Council members have only been elected from the majority black single-member district. As such, Wicomico’s hybrid system hardly seems a model of racial fairness, and may well bear re-evaluation to determine whether, given changing demographics and evidence of minority vote dilution since implementation of the hybrid system, it is vulnerable to a new Voting Rights Act challenge.

majority-white, multi-member district electing four council members, with elections staggered every two years. As a multi-member district that is majority white, District 2 operates like an at-large system, and thus it is helpful to look to election results in that district to determine whether minority voters are able to fully participate in elections there despite the multi-member structure. Unfortunately, the record of elections in Salisbury's District 2 has shown extremely little participation or success by minority candidates. Over the course of a dozen election cycles since the *Jackson* Consent Decree was implemented (each including primary and general elections), at least two dozen members of the City Council have been elected from District 2. Of those roughly 24 elected officials, our best information⁷ is that only *one* was a minority candidate elected from this majority-white multimember district, Rachel Polk.⁸ Likewise, we understand that no minority candidate ever has been elected Mayor of Salisbury under the at-large system. As far as we can determine, the *only* minority candidates apart from Ms. Polk who have *ever* been elected to Salisbury government have been elected to the City Council in District 1, the remedial district created as a result of the *Jackson* litigation.

Case law generated by Voting Rights Act challenges and the record of minority vote dilution in the City strongly counsel in favor of a restructuring of Salisbury's election system through a single member district plan, and against any re-introduction of at-large seats, in order to ensure the system's racial fairness and the City's ongoing compliance federal civil rights laws.

Possible Plans Using Single Member Districts

There exist numerous ways that plans can be drawn for Salisbury elections using single member districts that we believe would meet the requirements of the Constitution and the Voting Rights Act. Once the City makes a determination as to whether it wants to maintain a five-member council or expand the council to seven (or another number), the focus could then shift to how best to draw the lines in accordance with legal requirements and traditional redistricting principles. The ACLU is providing the City with three sample plans illustrating ways that single-member districts can be drawn for Salisbury, consistent with all legal requirements – two plans with five SMDs (ACLU Sample Plans 1a and 1b), and one plan with seven (ACLU Sample Plan 2). These maps are attached, with corresponding charts showing population breakdowns for the plans.⁹ ***We emphasize, however, that these are just examples, and realignment of the districts in different ways is fully possible, so long as the realignments maintain minority opportunity districts proportionate to the community's general diversity, as legally required.***

Under the Voting Rights Act, we believe that a five member-council must include at least two districts affording minority voters an effective electoral opportunity, given the City's current demographic makeup and the trajectory for continued growth in diversity over the

⁷ This is based upon information known to us as of this time, based upon the recollections of those we have interviewed. Please advise us if our information is incorrect in any way.

⁸ Ms. Polk was elected in 2000 from District 2, and served from 2000 until 2003, when she was defeated in her reelection bid.

⁹ By electronic mail of this date, we are also providing the City Planner with shape files for the ACLU submissions.

next decade. If the Council is expanded to seven members, we think the VRA requires that there be three election districts where minority residents comprise a majority. In addition to meeting VRA requirements, redistricting proposals generally should be attentive to traditional redistricting principles. Under the Constitution's one-person, one-vote requirement, plans must ensure population equality among the districts. Each district should be as contiguous and compact as is reasonable, given Salisbury's extreme irregularity and non-compactness. Where possible, the plans should also respect "communities of interest," and endeavor not to place more than one incumbent council member in a single district.

In Salisbury, this last pair of interests – respect for incumbency and communities of interest – conflict to some extent. This is because three of the five incumbent legislators reside close together, in an area that might otherwise itself be considered a community of interest. This conflict means compromise is necessary when it comes to which redistricting principles will be prioritized, as mappers may be required either to divide a community between districts, or to place more than one incumbent in a single district. Mayor Ireton has proposed a plan that does the latter – placing three incumbents in one district in his proposed plan of five SMDs. While this is acceptable legally, the City might alternately choose to prioritize incumbency protection more highly, sacrificing complete respect for communities of interest, in order to place incumbent legislators in different districts. To show ways this alternate approach might be accomplished, the ACLU has prepared two sample plans that place every current incumbent in a different district; each of these proposals might require, however, that the neighborhood these three incumbents live in be divided between districts, at least slightly.

Election Staggering

As noted, since entry of the *Jackson* Consent Decree, elections have been staggered in Salisbury, with some Council members from District 2 elected every two years, while the District 1 representative and Mayor are elected every four years. This is simply not fair, as by its terms, it permits voters in the minority district to participate in elections only half as often as those in the majority white district.

Furthermore, we believe the staggering of elections in District 2 exacerbates the dilutive effect of the at-large system. See *City of Rome v. United States*, 446 U.S. 156, 183-85 (1980) (recognizing staggered terms as one of many dilutive devices in at-large elections). This is because election staggering in a multi-member district minimizes the effectiveness of single-shot voting,¹⁰ a factor identified in the legislative history of the

¹⁰“Single-shot voting enables a minority group to win some at-large seats if it concentrates its vote behind a limited number of candidates and if the vote of the majority is divided among a number of candidates.” U. S. Commission on Civil Rights, *The Voting Rights Act: Ten Years After*, pp. 206–207 (1975). For example, in a multi-member district electing four council members, where each voter has the option of voting for four candidates, minority voters could empower a minority candidate by casting just one of their four votes for the minority candidate, thus depriving his competitors of extra votes. If white voters meanwhile use all of their votes, split among the candidates, single shot voting can give the minority candidate the advantage. Where terms are staggered in a multi-member district, however, the effectiveness of single-shot voting is lessened, because there are fewer candidates running for fewer positions in any one election.

VRA as significant to evaluation of the dilutive effect of a particular election scheme.
See n. 2, supra.

On top of all this, staggering of elections depresses turnout by limiting the number of contests at issue, and costs the City more money, as elections must be conducted more often. For these reasons, the ACLU and NAACP urge the City to do away with staggered terms as part of its election reform package, and to conduct elections once every four years for all positions in City government.

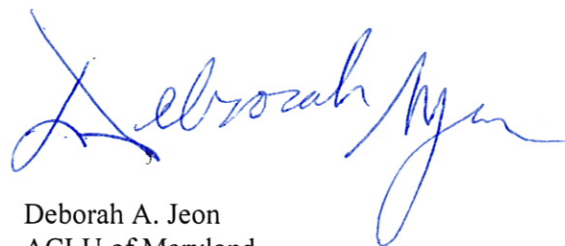
Conclusion

The ACLU and NAACP look forward to working with the City of Salisbury on redistricting and reform of its election system as we seek Court approval for a modification of the *Jackson* Consent Decree. We hope our analysis and proposals are helpful to the City. Please let us know if you have any questions, or need additional information about this submission.

Sincerely,



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