

## MEMORANDUM

TO: The Virginia Redistricting Commission

FROM: H. Christopher Bartolomucci and Bryan P. Tyson

RE: Guidance on Political Favoritism

DATE: October 18, 2021

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This memorandum offers guidance on the Commission’s legal duty to avoid political favoritism. Virginia law provides: “A map of districts shall not, when considered on a statewide basis, unduly favor or disfavor any political party.” VA. CODE ANN. § 24.2-304.04(8). Because this statute was enacted only last year, it has never been construed or applied by a Virginia court.

### I.

We start with the U.S. Supreme Court’s 2019 decision in *Rucho v. Common Cause*, 139 S. Ct. 2484. The Court held in *Rucho* that partisan gerrymandering claims—i.e., “claims of excessive partisanship in districting,” *id.* at 2491—are not “justiciable” in federal court. In other words, partisan gerrymandering claims are not “properly suited for resolution by the federal courts.” *Id.* Thus, federal courts will not entertain such claims.

The *Rucho* Court began its analysis by rejecting statewide “proportional representation” as an appropriate test to apply to congressional district maps. *Id.* at 2499. The Court observed that “[p]artisan gerrymandering claims

invariably sound in a desire for proportional representation.” *Id.* But the Court rejected the notion that mapdrawers must “draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be.” *Id.*

After rejecting proportional representation, the Court considered whether federal courts can or should assess the fairness of district maps to a political party. “Unable to claim that the Constitution requires proportional representation outright, plaintiffs inevitably ask the courts to make their own political judgment about how much representation particular political parties *deserve*—based on the votes of their supporters.” *Id.* (emphasis in original). The Court concluded, however, that “[t]he Constitution supplies no objective measure for assessing whether a districting map treats a political party fairly.” *Id.* at 2501.

In sum, after *Rucho*, the federal courts are no longer in the business of deciding whether district maps are illegal partisan gerrymanders.

## II.

The fact that partisan gerrymandering claims are not justiciable in federal court does not mean, however, that such claims are not justiciable in state court. Indeed, the *Rucho* Court explained that state courts may decide, and already have been deciding, partisan fairness cases based on state statutes. *See id.* at 2507–08.

A minority of states have adopted statutes somewhat similar to Virginia Code Ann. § 24.2-304.04(8). The exact wording of each statute varies. Hawaii law, like Virginia law, uses undue favoritism language. “No district shall be drawn so as to unduly favor a person or political party.” HAW. REV. STAT. ANN. § 25-2(b)(1). *See also* DEL. CODE ANN. TIT. 29, § 804 (“Each district shall, insofar as is possible: ... (4) Not be created so as to unduly favor any person or political party.”). Ohio law provides that “No general assembly district plan shall be drawn primarily to favor or disfavor a political party.” OHIO CONST. art. XI, § 6(A). Florida law focuses on the district drawer’s intent: “No apportionment plan or individual district shall be drawn with the intent to favor or disfavor a political party or an incumbent.” FLA. CONST. art. III, § 20(a).

### III.

In our opinion, draft map C1, if adopted by the Commission, would not violate Virginia Code Ann. § 24.2-304.04(8), which, again, provides that “[a] map of districts shall not, when considered on a statewide basis, unduly favor or disfavor any political party.” Four considerations inform our opinion.

First, a bipartisan mapdrawing process was used to create map C1. The Commission instructed the mapdrawers to start by taking Districts 3 and 4 as they are now and making only the minimal changes needed to achieve population equality. Districts 3 and 4 were previously drawn by a Special

Master and upheld by a federal court as compliant with the federal Voting Rights Act. The Commission then instructed Mr. Morgan to draw the three heavily Republican districts in Southwest Virginia and instructed Mr. Strasma to draw the three heavily Democratic districts in Northern Virginia. Both mapdrawers drew their own versions of the remaining three districts, and the three districts that each drew turned out to be similar.

Second, the mapdrawers drew map C1 based on traditional districting criteria, including contiguity and compactness, maintaining political subdivisions, and preserving communities of interest. The mapdrawers also kept the two Voting Rights Act districts, Districts 3 and 4, essentially as is.

Third, the mapdrawers were expressly instructed not to favor or disfavor any political party. The Commission's guidance to the mapdrawers included this command: "Maps shall not favor or disfavor any political party." 2021 Redistricting Guidelines and Criteria ¶ 4(b).

Fourth, map C1 appears to be politically balanced. It includes what appears to be five safe Democratic districts, five safe Republican districts, and one district that is either Republican-leaning or a swing district.

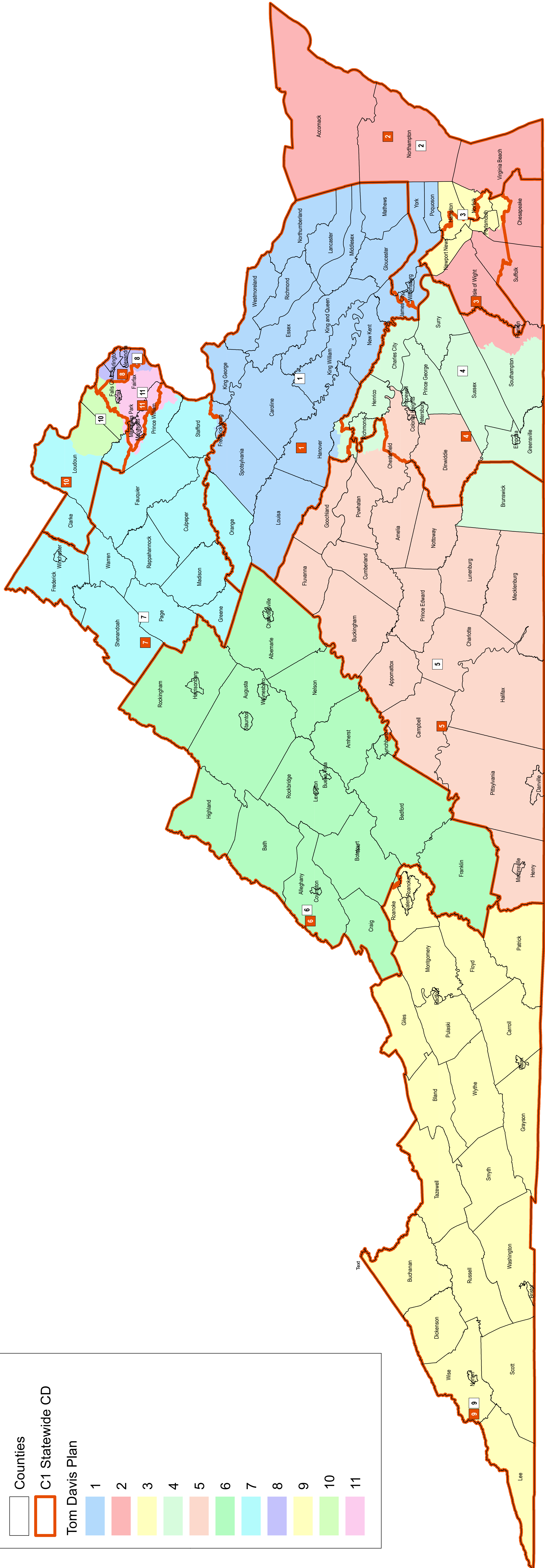
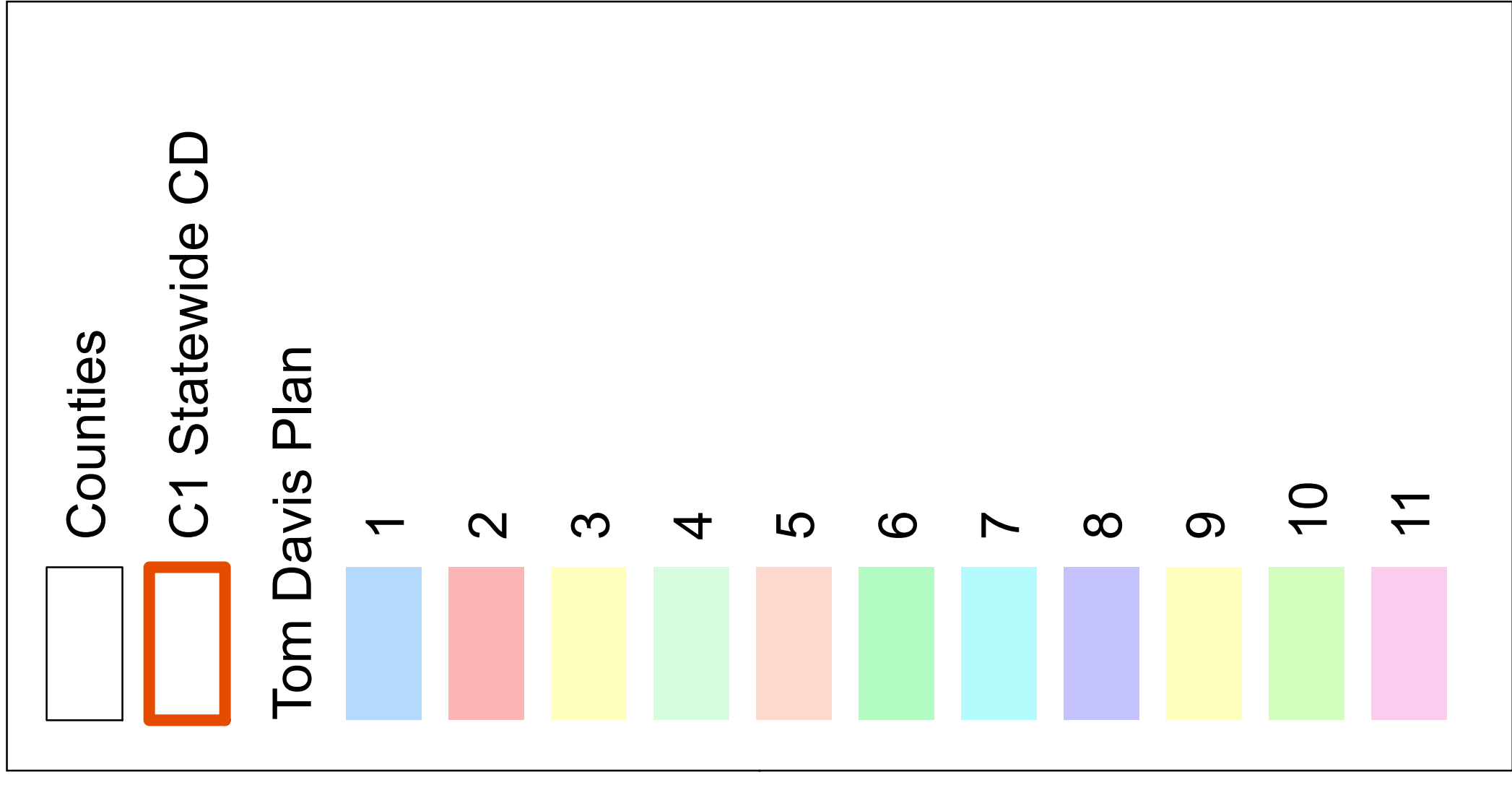
To be sure, map C1 may not achieve "proportional representation." That is, it may not award to the two major political parties a number of congressional districts proportional to their share of the vote in statewide elections. But Virginia Code § 24.2-304.04(8) does not expressly demand

proportional representation. The Code states that “A map of districts shall not, when considered on a statewide basis, unduly favor or disfavor any political party.” *Id.* (emphasis added). The Code does not use the term “proportional representation.”

As previously noted, the U.S. Supreme Court in *Rucho* rejected the “claim that the Constitution requires proportional representation outright.” 139 S. Ct. at 2499. The Court observed that “[t]he Founders certainly did not think proportional representation was required.” *Id.* In light of *Rucho* and this history, it seems to us that if the General Assembly meant to require proportional representation, it would have used language more direct than “unduly favor or disfavor any political party.”

Accordingly, based on the foregoing considerations, we conclude that the Commission would not violate Virginia Code § 24.2-304.04(8) if it were to adopt map C1.

# C1 Statewide CD overlaid onto Tom Davis Plan







| Plan Name                                    | VRA consideration |      |         |         | Elections - 2012 to 2018 |          |          |            | Splits         |                |       |      | Compactness Polsby-Popper |       |      |          | Compactness Schwartzberg |      |          |       | Compactness Reock |          |  |  |
|--|-------------------|------|---------|---------|--------------------------|----------|----------|------------|----------------|----------------|-------|------|---------------------------|-------|------|----------|--------------------------|------|----------|-------|-------------------|----------|--|--|
|  | Coalition         | Opp+ | Any Dem | Any GOP | Strong Dem               | Lean Dem | Lean GOP | Strong GOP | Whole Counties | Split Counties | Worst | Best | Avg                       | Worst | Best | Avg      | Worst                    | Best | Avg      | Worst | Best              | Avg      |  |  |
| va_cd_364_c1_statewide                       | 3                 | 2    | 6       | 5       | 5                        | 1        | 0        | 5          | 119            | 14             | 0.21  | 0.38 | 0.281818                  | 0.46  | 0.62 | 0.529091 | 0.22                     | 0.51 | 0.403636 | 0.22  | 0.51              | 0.403636 |  |  |
| va_cd_haystaq_3                              | 3                 | 2    | 6       | 5       | 5                        | 1        | 0        | 5          | 121            | 12             | 0.22  | 0.38 | 0.283636                  | 0.47  | 0.62 | 0.530909 | 0.22                     | 0.51 | 0.406364 | 0.22  | 0.51              | 0.406364 |  |  |
| va_cd_haystaq_4                              | 3                 | 2    | 6       | 5       | 5                        | 1        | 0        | 5          | 121            | 12             | 0.22  | 0.38 | 0.283636                  | 0.47  | 0.62 | 0.530909 | 0.22                     | 0.51 | 0.406364 | 0.22  | 0.51              | 0.406364 |  |  |
| va_cd_haystaq_1                              | 3                 | 2    | 7       | 4       | 5                        | 2        | 0        | 4          | 120            | 13             | 0.16  | 0.28 | 0.232727                  | 0.41  | 0.53 | 0.482727 | 0.22                     | 0.5  | 0.366364 | 0.22  | 0.5               | 0.366364 |  |  |
| haystaq_cd_combined_2                        | 3                 | 2    | 6       | 5       | 5                        | 1        | 0        | 5          | 120            | 13             | 0.21  | 0.38 | 0.281818                  | 0.46  | 0.62 | 0.53     | 0.22                     | 0.51 | 0.403636 | 0.22  | 0.51              | 0.403636 |  |  |
| va_cd_haystaq_2                              | 3                 | 2    | 7       | 4       | 5                        | 2        | 0        | 4          | 120            | 13             | 0.17  | 0.38 | 0.273636                  | 0.42  | 0.62 | 0.520909 | 0.22                     | 0.5  | 0.391818 | 0.22  | 0.5               | 0.391818 |  |  |
| va_cd_b4                                     | 3                 | 2    | 6       | 5       | 5                        | 1        | 0        | 5          | 121            | 12             | 0.22  | 0.38 | 0.283636                  | 0.47  | 0.62 | 0.530909 | 0.22                     | 0.51 | 0.406364 | 0.22  | 0.51              | 0.406364 |  |  |
| va_cd_haystaq_congressional_6_lc             | 3                 | 2    | 6       | 5       | 5                        | 1        | 1        | 4          | 119            | 14             | 0.11  | 0.27 | 0.209091                  | 0.33  | 0.52 | 0.453636 | 0.22                     | 0.5  | 0.34     | 0.22  | 0.5               | 0.34     |  |  |
| va_cd_haystaq_congressional_5_cd6            | 3                 | 2    | 7       | 4       | 5                        | 2        | 0        | 4          | 121            | 12             | 0.2   | 0.38 | 0.277273                  | 0.45  | 0.62 | 0.524545 | 0.22                     | 0.5  | 0.391818 | 0.22  | 0.5               | 0.391818 |  |  |
| va_cd_jm_5_dist                              | 2                 | 0    | 2       | 3       | 2                        | 0        | 0        | 3          | 82             | 6              | 0.21  | 0.36 | 0.264                     | 0.46  | 0.6  | 0.512    | 0.22                     | 0.49 | 0.396    | 0.22  | 0.49              | 0.396    |  |  |
| jm_cd_combined_1                             | 3                 | 2    | 6       | 5       | 5                        | 1        | 0        | 5          | 119            | 14             | 0.21  | 0.38 | 0.281818                  | 0.46  | 0.62 | 0.529091 | 0.22                     | 0.51 | 0.403636 | 0.22  | 0.51              | 0.403636 |  |  |
| va_cd_a4                                     | 3                 | 2    | 5       | 6       | 5                        | 0        | 1        | 5          | 120            | 13             | 0.21  | 0.38 | 0.285455                  | 0.46  | 0.62 | 0.532727 | 0.22                     | 0.56 | 0.415455 | 0.22  | 0.56              | 0.415455 |  |  |
| va_cd_mcdougale_1                            | 2                 | 0    | 2       | 0       | 2                        | 0        | 0        | 0          | 18             | 0              | 0.2   | 0.33 | 0.265                     | 0.45  | 0.57 | 0.51     | 0.37                     | 0.46 | 0.415    | 0.37  | 0.46              | 0.415    |  |  |
| va_cd_323_davis                              | 3                 | 2    | 5       | 6       | 5                        | 0        | 1        | 5          | 123            | 10             | 0.2   | 0.57 | 0.32                      | 0.45  | 0.75 | 0.559091 | 0.22                     | 0.64 | 0.419091 | 0.22  | 0.64              | 0.419091 |  |  |
| va_cd_164_zimmermann                         | 2                 | 4    | 7       | 4       | 6                        | 1        | 0        | 4          | 109            | 24             | 0.16  | 0.57 | 0.320909                  | 0.4   | 0.75 | 0.557273 | 0.2                      | 0.59 | 0.451818 | 0.2   | 0.59              | 0.451818 |  |  |
| va_cd_153_crossing_the_bay_2_jordan          | 4                 | 1    | 6       | 5       | 4                        | 2        | 1        | 4          | 131            | 2              | 0.19  | 0.39 | 0.278182                  | 0.44  | 0.62 | 0.525455 | 0.21                     | 0.57 | 0.403636 | 0.21  | 0.57              | 0.403636 |  |  |
| va_cd_148_rework_jordan                      | 4                 | 2    | 6       | 5       | 5                        | 1        | 1        | 4          | 131            | 2              | 0.19  | 0.37 | 0.281818                  | 0.44  | 0.61 | 0.530909 | 0.21                     | 0.57 | 0.418182 | 0.21  | 0.57              | 0.418182 |  |  |
| va_cd_121_nakhle                             | 4                 | 2    | 6       | 5       | 6                        | 0        | 1        | 4          | 124            | 9              | 0.18  | 0.31 | 0.25                      | 0.43  | 0.56 | 0.5      | 0.22                     | 0.56 | 0.392727 | 0.22  | 0.56              | 0.392727 |  |  |
| va_cd_7_competative_west                     | 1                 | 4    | 5       | 6       | 3                        | 2        | 5        | 1          | 118            | 15             | 0.11  | 0.31 | 0.187273                  | 0.34  | 0.55 | 0.424545 | 0.15                     | 0.58 | 0.303636 | 0.15  | 0.58              | 0.303636 |  |  |
| va_cd_97_wright                              | 2                 | 3    | 7       | 4       | 5                        | 2        | 0        | 4          | 127            | 6              | 0.21  | 0.39 | 0.31                      | 0.46  | 0.62 | 0.554545 | 0.24                     | 0.58 | 0.403636 | 0.24  | 0.58              | 0.403636 |  |  |
| va_cd_73_bueche                              | 2                 | 4    | 8       | 3       | 4                        | 4        | 1        | 2          | 127            | 6              | 0.12  | 0.53 | 0.286364                  | 0.35  | 0.73 | 0.525455 | 0.16                     | 0.59 | 0.410909 | 0.16  | 0.59              | 0.410909 |  |  |
| virginia_cd_57_killey                        | 3                 | 3    | 7       | 4       | 4                        | 3        | 1        | 3          | 120            | 13             | 0.2   | 0.28 | 0.241818                  | 0.44  | 0.53 | 0.490909 | 0.21                     | 0.57 | 0.377273 | 0.21  | 0.57              | 0.377273 |  |  |
| va_cd_49_samanta                             | 3                 | 2    | 6       | 5       | 5                        | 1        | 1        | 4          | 121            | 12             | 0.11  | 0.37 | 0.225455                  | 0.34  | 0.61 | 0.469091 | 0.22                     | 0.6  | 0.384545 | 0.22  | 0.6               | 0.384545 |  |  |
| va_cd_244_most_proportionally_rep_bristow    | 2                 | 3    | 7       | 4       | 5                        | 2        | 0        | 4          | 119            | 14             | 0.21  | 0.38 | 0.282727                  | 0.46  | 0.62 | 0.529091 | 0.21                     | 0.6  | 0.379091 | 0.21  | 0.6               | 0.379091 |  |  |
| va_cd_315_joels_compact_vra_galloway         | 3                 | 2    | 7       | 4       | 5                        | 2        | 0        | 4          | 123            | 10             | 0.23  | 0.35 | 0.289091                  | 0.48  | 0.59 | 0.536364 | 0.22                     | 0.65 | 0.433636 | 0.22  | 0.65              | 0.433636 |  |  |
| va_cd_312_compact_districts_harrison         | 2                 | 4    | 6       | 5       | 5                        | 1        | 1        | 4          | 123            | 10             | 0.12  | 0.39 | 0.265455                  | 0.35  | 0.63 | 0.508182 | 0.19                     | 0.61 | 0.336364 | 0.19  | 0.61              | 0.336364 |  |  |
| va_cd_310_fair_congressional_vishwanath      | 2                 | 3    | 7       | 4       | 5                        | 2        | 0        | 4          | 121            | 12             | 0.2   | 0.39 | 0.292727                  | 0.45  | 0.62 | 0.536364 | 0.24                     | 0.51 | 0.407273 | 0.24  | 0.51              | 0.407273 |  |  |
| va_cd_current                                | 3                 | 2    | 6       | 5       | 4                        | 2        | 2        | 3          | 119            | 14             | 0.09  | 0.26 | 0.186364                  | 0.31  | 0.51 | 0.429091 | 0.2                      | 0.48 | 0.318182 | 0.2   | 0.48              | 0.318182 |  |  |
| va_cd_39_bueche                              | 2                 | 5    | 8       | 3       | 5                        | 3        | 0        | 3          | 124            | 9              | 0.16  | 0.34 | 0.242727                  | 0.4   | 0.58 | 0.489091 | 0.22                     | 0.61 | 0.393636 | 0.22  | 0.61              | 0.393636 |  |  |
| va_cd_351_szymanski                          | 4                 | 1    | 5       | 6       | 5                        | 0        | 2        | 4          | 121            | 12             | 0.14  | 0.35 | 0.210909                  | 0.38  | 0.59 | 0.457273 | 0.22                     | 0.53 | 0.364545 | 0.22  | 0.53              | 0.364545 |  |  |
| va_cd_277_portanova                          | 3                 | 2    | 5       | 6       | 5                        | 0        | 1        | 5          | 121            | 12             | 0.17  | 0.43 | 0.267273                  | 0.41  | 0.65 | 0.509091 | 0.22                     | 0.6  | 0.37     | 0.22  | 0.6               | 0.37     |  |  |
| va_cd_253_compact_southside_districts_bristo | 2                 | 4    | 7       | 4       | 5                        | 2        | 0        | 4          | 122            | 11             | 0.16  | 0.39 | 0.295455                  | 0.4   | 0.62 | 0.538182 | 0.17                     | 0.6  | 0.409091 | 0.17  | 0.6               | 0.409091 |  |  |
| va_cd_361_harrison_existing_districts        | 4                 | 1    | 6       | 5       | 5                        | 1        | 2        | 3          | 120            | 13             | 0.18  | 0.37 | 0.287273                  | 0.43  | 0.61 | 0.535455 | 0.22                     | 0.65 | 0.378182 | 0.22  | 0.65              | 0.378182 |  |  |
| va_cd_362_harrison_from_scratch              | 3                 | 2    | 6       | 5       | 5                        | 1        | 1        | 4          | 123            | 10             | 0.21  | 0.45 | 0.31                      | 0.46  | 0.67 | 0.551818 | 0.24                     | 0.52 | 0.385455 | 0.24  | 0.52              | 0.385455 |  |  |
| va_cd_363_bristow_metro_based                | 3                 | 2    | 7       | 4       | 5                        | 2        | 0        | 4          | 118            | 15             | 0.17  | 0.37 | 0.295455                  | 0.41  | 0.61 | 0.540909 | 0.17                     | 0.54 | 0.385455 | 0.17  | 0.54              | 0.385455 |  |  |
| va_cd_252_most_minority_representation_brist | 3                 | 3    | 7       | 4       | 5                        | 2        | 1        | 3          | 119            | 14             | 0.14  | 0.4  | 0.261818                  | 0.37  | 0.63 | 0.503636 | 0.17                     | 0.56 | 0.34     | 0.17  | 0.56              | 0.34     |  |  |
| va_cd_249_most_competative_districts_bristow | 2                 | 2    | 8       | 3       | 4                        | 4        | 1        | 2          | 123            | 10             | 0.15  | 0.49 | 0.274545                  | 0.39  | 0.7  | 0.518182 | 0.18                     | 0.61 | 0.37     | 0.18  | 0.61              | 0.37     |  |  |
| va_cd_220_szymanski                          | 4                 | 2    | 6       | 5       | 5                        | 1        | 1        | 4          | 118            | 15             | 0.12  | 0.39 | 0.225455                  | 0.35  | 0.62 | 0.468182 | 0.21                     | 0.49 | 0.339091 | 0.21  | 0.49              | 0.339091 |  |  |
| va_cd_377_nakhle_revised                     | 1                 | 5    | 6       | 5       | 6                        | 0        | 2        | 3          | 126            | 7              | 0.18  | 0.32 | 0.259091                  | 0.43  | 0.56 | 0.508182 | 0.22                     | 0.58 | 0.394545 | 0.22  | 0.58              | 0.394545 |  |  |
| va_cd_375_trimmer                            | 3                 | 2    | 7       | 4       | 5                        | 2        | 2        | 2          | 123            | 10             | 0.18  | 0.38 | 0.287273                  | 0.42  | 0.62 | 0.535455 | 0.18                     | 0.57 | 0.344545 | 0.18  | 0.57              | 0.344545 |  |  |
| va_cd_374_wright                             | 3                 | 2    | 6       | 5       | 5                        | 1        | 2        | 3          | 117            | 16             | 0.15  | 0.38 | 0.250909                  | 0.39  | 0.62 | 0.497273 | 0.22                     | 0.64 | 0.39     | 0.22  | 0.64              | 0.39     |  |  |
| va_cd_365_rogers                             | 3                 | 2    | 6       | 5       | 5                        | 1        | 2        | 3          | 123            | 10             | 0.18  | 0.38 | 0.256364                  | 0.42  | 0.62 | 0.503636 | 0.22                     | 0.5  | 0.379091 | 0.22  | 0.5               | 0.379091 |  |  |
| va_cd_379_knoll                              | 3                 | 2    | 5       | 6       | 5                        | 0        | 2        | 4          | 120            | 13             | 0.18  | 0.35 | 0.253636                  | 0.42  | 0.59 | 0.498182 | 0.19                     | 0.52 | 0.370909 | 0.19  | 0.52              | 0.370909 |  |  |
| va_cd_380_bloechle                           | 1                 | 5    | 8       | 3       | 5                        | 3        | 1        | 2          | 125            | 8              | 0.1   | 0.26 | 0.180909                  | 0.32  | 0.51 | 0.420909 | 0.18                     | 0.51 | 0.31     | 0.18  | 0.51              | 0.31     |  |  |
| va_cd_386_bloechle                           | 3                 | 3    | 7       | 4       | 6                        | 1        | 1        | 3          | 112            | 21             | 0.14  | 0.39 | 0.245455                  | 0.37  | 0.62 | 0.486364 | 0.16                     | 0.62 | 0.363636 | 0.16  | 0.62              | 0.363636 |  |  |
| va_cd_389_seaman                             | 3                 | 2    | 6       | 5       | 5                        | 1        | 2        | 3          | 117            | 16             | 0.09  | 0.38 | 0.257273                  | 0.29  | 0.62 | 0.499091 | 0.19                     | 0.55 | 0.395455 | 0.19  | 0.55              | 0.395455 |  |  |
| va_cd_391_tuck                               | 3                 | 3    | 7       | 4       | 5                        | 2        | 1        | 3          | 124            | 9              | 0.19  | 0.38 | 0.287273                  | 0.43  | 0.62 | 0.531818 | 0.18                     | 0.62 | 0.359091 | 0.18  | 0.62              | 0.359091 |  |  |