No. 21-1533

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Latasha Holloway, et al.,

Plaintiffs-Appellees,

v.

City of Virginia Beach, et al.,

Defendants-Appellants.

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

Appellants' Emergency Motion for a Stay of Injunction Pending Appeal

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Mark D. Stiles
Virginia Beach City Attorney
Christopher S. Boynton
Deputy City Attorney
Gerald L. Harris
Senior City Attorney
Joseph M. Kurt
Assistant City Attorney
OFFICE OF THE CITY ATTORNEY
Municipal Center, Building One,
Room 260
2401 Courthouse Drive
Virginia Beach, Virginia 23456

Erika Dackin Prouty
BAKER & HOSTETLER LLP
200 Civic Center Drive
Suite 1200
Columbus, OH 43215

Katherine L. McKnight
Richard B. Raile
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.,
Suite 1100
Washington, D.C. 20036
T: (202) 861-1618
F: (202) 861-1783
kmcknight@bakerlaw.com

Patrick T. Lewis
BAKER & HOSTETLER LLP
Key Tower, 127 Public Square
Suite 2000
Cleveland, OH 44114

Counsel for Defendants-Appellants

CORPORATE DISCLOSURE STATEMENT

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

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

STATEMENT

The Defendants-Appellants, the City of Virginia Beach, the Virginia Beach City Council, and various City officials sued in their official capacities (collectively the "City"), respectfully move for a partial stay of the injunction below pending appeal. That injunction forbids the City from utilizing its at-large method of electing members to the City Council. A member of the City Council has resigned, and state law requires an election occur in November 2021 to fill the vacancy. The injunction below forbids that election, creating irreparable harm to the City and its residents by forbidding an election and the exercise of the franchise. The injunction also, absent a stay, would render the seat unfilled (or filled by an appointed, not elected, member) indeterminately. The Court should grant a partial stay of the injunction and permit that special election to proceed.

The Plaintiffs-Appellees told this Court previously that they "do not oppose the motion for a limited stay to permit a November 2021 special election." CA4.Dkt.28 at 1. After they induced this Court to grant them relief based on that assertion, they abandoned it. Plaintiffs' counsel now informs counsel for the City that "Plaintiffs oppose the motion and will file a response." Further, the district court denied the City's motion. For reasons explained below, this Court should intervene, stay the injunction, and do so immediately. It should require an expedited response from Plaintiffs—who have waived all arguments by their prior representations—by **Friday July 23, 2021**. **Time is of**

the essence, given the City's need for permission to conduct the election in time to meet legal and practical deadlines.

Additionally, this Court should vacate the abeyance it has imposed on this appeal, which was predicated on Plaintiffs' false assertion that they did not oppose a stay and on the implication that it would be granted. Plaintiffs' assertions in requesting that abeyance have proven inaccurate. The Court should revisit that order and vacate it.

BACKGROUND

A. Virginia Beach is Virginia's most populous city. It has used an at-large method of electing members to its City Council since 1966, which the Supreme Court approved in *Dusch v. Davis*, 387 U.S. 112 (1967). This case was filed in November 2017, and an amended complaint, filed in November 2018, alleges that the at-large method dilutes the votes of a coalition of Black, Hispanic, and Asian voters in violation of Section 2 of the Voting Rights Act. Plaintiffs are two Black voters; no Hispanic or Asian voters joined the suit. The district court conducted a bench trial and, on March 31, 2021, issued an order finding in Plaintiffs' favor and permanently enjoining the City from future use of the at-large system. Dist.Ct.Dkt.242. The City timely appealed and, on June 11, filed its opening appeal brief. CA4.Dkt.20.

B. Meanwhile, Plaintiffs moved this Court for an order holding the appeal in abeyance pending final judgment after remedial proceedings. CA4.Dkt.11. Plaintiffs contended that the City would not be harmed by this relief because "[t]he next election for the Virginia Beach City Council is not until

November 2022, with a candidate filing deadline of June 14, 2022." *Id.* at 1; *see also id.* at 9. The City opposed the motion, contending, *inter alia*, that this Court lacks discretion to completely deny an appellant recourse to 28 U.S.C. § 1292(a)—which is the effect of Plaintiffs' request for abeyance pending final judgment—and that indefinite abeyance would compromise this Court's ability to render meaningful review before the November 2022 election cycle and before the City's deadline to redistrict under state law. CA4.Dkt.22. That motion went unresolved for more than a month.

C. On July 2, 2021, Virginia Beach Councilmember Jessica Abbott announced her resignation from the Council, effective immediately, due to health concerns. Virginia law requires the City Council to appoint an interim, temporary successor to fill the vacancy, the Kempsville residency district.[1] 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 district court's injunction forbids this special election.

D. The City promptly filed a letter in this Court to inform it that the City is being irreparably harmed by the injunction, which defeats a core premise of Plaintiffs' abeyance motion, and that the City would move to stay the injunction pending appeal. CA4.Dkt.27. Plaintiffs filed a response criticizing the

[1] Although elections to the Council are at-large, some seats on the Council are subject to a "residency" requirement, meaning the representative must reside within a single-member district. *See* CA4.Dkt.20 at 4.

City for not consulting with Plaintiffs' counsel before filing that letter: "Had the City waited…it would have learned that Plaintiffs do not oppose the motion for a limited stay to permit a November 2021 special election." CA4.Dkt.28 at 1. On July 12, this Court granted Plaintiffs' motion and ordered the appeal held in abeyance with no explanation and no end date identified. CA4.Dkt.29.

E. On July 19, the district court denied the stay motion. Ex.A. The City hereby renews the motion in this Court and also requests that the abeyance be lifted, as the fundamental assertions undergirding it have failed. Plaintiffs now oppose this motion.

ARGUMENT

I. The Court Should Stay the Injunction Pending Appeal

This case presents as compelling a stay motion as this Court will ever see. Plaintiffs below did not oppose it; they boldly proclaimed that non-opposition to this Court, implying that it would be granted as a matter of course; the City will plainly be irreparably harmed without a stay; Plaintiffs will almost certainly not be harmed; and the voting public will be harmed by being deprived of the right to vote in November for a representative to fill the vacancy, and concomitant representation, for more than a year. Moreover, the merits of this case involve a question of first impression in this Court that has split its sister circuits and will ultimately be resolved by the Supreme Court. What the Supreme Court has stated on the topic indicates that the City is likely to succeed. Besides, Plaintiffs have waived any arguments by failing to preserve them and by abandoning them in a letter to this Court.

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). 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).

A. The City Is Likely To Succeed on the Merits

The City has a substantial likelihood of success on appeal. It already has filed its opening brief, which raises numerous issues, success on any of which will be sufficient for reversal. CA4.Dkt.20. This motion focuses on two issues.

1. Plaintiffs' sole cause of action alleges a "coalition" claim under Section 2 of the Voting Rights Act. In the typical Section 2 vote-dilution claim, members of a single minority group assert that their group—which must be sufficiently large and geographically compact to constitute a majority in a single-

member district—is denied an equal opportunity to elect its preferred candidates by an at-large or multi-member system. *See Thornburg v. Gingles*, 478 U.S. 30 (1986). In this case, by contrast, Plaintiffs allege that members of three minority groups, Blacks, Asians, and Hispanics, have together suffered a dilutive injury.[2] But "[e]ven the most cursory examination reveals that § 2 of the Voting Rights Act does not mention minority coalitions, either expressly or conceptually." *Nixon v. Kent County*, 76 F.3d 1381, 1386 (6th Cir. 1996) (en banc). The Sixth Circuit in *Nixon* rejected the entire coalition theory, meaning that Plaintiffs would have no claim in Michigan, Ohio, Kentucky, or Tennessee. Further, the court of appeals that has most clearly endorsed coalitional claims, the Fifth Circuit, has done so over the opposition of multiple judges. *See, e.g.*, *Campos v. City of Baytown, Tex.*, 849 F.2d 943, 945 (5th Cir. 1988) (Higginbotham, J., dissenting from denial of rehearing en banc); *LULAC, Council No. 4434 v. Clements*, 999 F.2d 831, 894 (5th Cir. 1993) (Jones, J., concurring). The Court need only review these opinions to see "that plausible arguments exist for reversing the decision below." *California v. Am. Stores Co.*, 492 U.S. 1301, 1306 (1989) (O'Connor, J., in chambers) (granting stay where circuit split suggested likelihood of success); *see also* CA4.Dkt.20 at 26–34 (fulsome articulation of the problems with coalition claims).

[2] The district court made a cursory alternative holding that Black voters, standing as a single group, could prevail on a Section 2 claim, but Plaintiffs did not plead that claim, they did not argue it below, they presented no evidence on it, all evidence undermined it, and to this day they have not defended the district court's inexplicable assertion. CA4.Dkt.20 at 25-26.

Supreme Court precedent also supports the City's appellate position. In *Bartlett v. Strickland*, 556 U.S. 1 (2009), the Court rejected crossover claims—i.e., claims asserting the right of a minority group to districts in which its members join with whites to elect their shared preferred candidates. *Bartlett* read the Act to reach "African-Americans standing alone," i.e., guaranteeing members of a single minority group the right to "elect [their preferred] candidate based on their own votes and without assistance from others." *Id.* at 14. The same reasoning defeats coalition claims. Indeed, *Bartlett* found this Court's decision in *Hall v. Virginia*, 385 F.3d 421 (4th Cir. 2004), persuasive for the proposition that "the Act does not grant minority voters 'a right to preserve their strength for the purposes of forging an advantageous political alliance.'" 556 U.S. at 14-15. "Permitting such political coalitions the advantage of Voting Rights Act protection…risks wrenching the Act from its ideological and constitutional foundations[.]" *Nixon*, 76 F.3d at 1392.[3]

2. The City is also likely to prevail on the cohesion element under Section 2, known as the second *Gingles* precondition, which requires proof that members of the relevant minority group "constitute a politically cohesive unit." *Gingles*, 478 U.S. at 56. The Supreme Court has cautioned that, if coalition claims are cognizable, there is "quite obviously a higher-than-usual need for the

[3] Members of this Court have also emphasized that "this Court resolves disputes based on legal principles, not political preferences." *See Middleton v. Andino*, 990 F.3d 768, 771 (4th Cir. 2020) (Wynn, J., concurring).

second of the *Gingles* showings." *Growe v. Emison*, 507 U.S. 25, 41 (1993). The Fifth Circuit has stated the standard for coalitional cohesion as follows:

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

Brewer v. Ham, 876 F.2d 448, 453 (5th Cir. 1989). But the district court did not apply that standard. Its opinion fails to identify a single estimate of Asian or Hispanic support for any candidate in any election. Instead, the district court adopted polarized voting estimates, presented by Plaintiffs, that aggregated all three minority groups—Black, Hispanic, and Asian—into a *single* "All Minority" category, and then reported the Black group separately—but not the Asian and Hispanic groups separately. *See* Dist.Ct.Dkt.242 at 74-77; CA4.Dkt.20 at 37-39. The district court admitted that "high Black support for a given candidate *could* mask far lower support—or even opposition—from Asian and Hispanic voters." Dist.Ct.Dkt.242 at 83 (emphasis in original). It nevertheless permitted Plaintiffs to attribute Black support for given candidates to Asian and Hispanic voters, which merely assumed the cohesion conclusion. *See* CA4.Dkt.20 at 40-45. But "Section 2 'does not assume the existence of racial bloc voting; plaintiffs must prove it.'" *Growe*, 507 U.S. at 42 (citation omitted).

In short, for this Court to affirm the injunction below, it would have to split not only with the Sixth Circuit (on the viability of coalitional claims) but

also with the Fifth (on the standard for cohesion). And it would have to disregard the Supreme Court's warning in *Growe* that a "higher-than-usual" standard applies, where the district court applied a relaxed standard. That outcome is not likely.

3. None of this has been rebutted at this stay stage. Plaintiffs asserted below merely that "Defendants do not meet the first prong of the stay standard," Dist.Ct.Dkt.263 at 2 n.2—even as they informed this Court that they "do not oppose the motion for a limited stay," CA4.Dkt.28 at 1—but Plaintiffs provided no argumentation whatsoever. "[T]his perfunctory and undeveloped claim" is "waived." *Russell v. Absolute Collection Servs., Inc.*, 763 F.3d 385, 396 n.* (4th Cir. 2014).

For its part, the district court concluded that it "need not consider whether Defendants' [sic] will likely succeed on appeal." Ex.A. at 8. The court reasoned that "the Fourth Circuit stayed Defendants' appeal because the Court has not issued final judgment as it still must fashion remedies," *id.*, which the court apparently viewed as a ruling that this appeal is improper or even jurisdictionally defective. *See id.* (citing cases on the final-judgment rule). This is wrong. As the district court also seemed to admit, *id.* at 8 n.4, jurisdiction in this Court is proper under 28 U.S.C. § 1292(a), because the district court enjoined the City's at-large system. *See Abbott v. Perez*, 138 S. Ct. 2305, 2319 (2018). Indeed, Plaintiffs told this Court that dismissal of the City's appeal is *not* what an abeyance would accomplish, instead assuring the Court that "[a]n abeyance would merely *postpone* this Court's consideration of Defendants' liability appeal on an

incomplete record." CA4 Dkt.25-1 at 4 (emphasis added). This Court's abeyance ruling did not reject the City's position on the merits, and the district court was not excused from determining "whether the stay applicant has made a strong showing that he is likely to succeed on the merits." *Nken*, 556 U.S. at 426. As shown above, numerous Article III judges have agreed with the City, and its likelihood of success is established.

B. The City Will Suffer Irreparable Harm Without a Stay

The district court's injunction imposes paradigmatic irreparable harm. "[I]njunctions barring the State from conducting this year's elections pursuant to a statute enacted by the Legislature…would seriously and irreparably harm the State." *Abbott*, 138 S. Ct. at 2324 (footnote omitted); *see also id.* at 2324 n.17 ("[T]he inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State."). The district court's injunction would forbid the City from conducting any election at all, in contravention to its obligations under state law and the voting rights of its hundreds of thousands of citizens. "The decision to enjoin an impending election is so serious that the Supreme Court has allowed elections to go forward even in the face of an undisputed constitutional violation." *Sw. Voter Registration Educ. Project v. Shelley*, 344 F.3d 914, 918 (9th Cir. 2003). "For this reason our law recognizes that election cases are different from ordinary injunction cases. Interference with impending elections is extraordinary…." *Id.* (citing *Reynolds v. Sims*, 377 U.S. 533, 585 (1964)).

The district court's treatment of this element was erroneous. First, it made several assertions about the appropriateness of injunctions and remedial plans

in redistricting cases. Ex.A at 10-12. But it bypassed the relevant point: the injunction imposes irreparable harm to the City and its citizens by forbidding an election. Even if a remedial order may ultimately be appropriate, it does not follow at *this* stage that the injunction forbidding the City from conducting an election does not irreparably harm the City.

The district court also attempted to justify the injunction itself, asserting that "the injunction is designed to prevent the City Council from using an unconstitutional electoral system to elect other city council members and further harm the minority community." Ex.A at 13. That noble intent, however, does not negate the *harm* to the City. The equities must, of course, be balanced at a later stage of the inquiry, but that balancing cannot be accurate where a recognized harm to a governmental body and its citizens is treated as non-existent. (And, as shown below, the injunction—as applied in *this* instance—would serve no benefit to the City's residents or even the minority communities, so the balance of equities, too, favors a stay.)

Next, the district court offered flimsy distinctions between this case and some (not all) of the numerous cases staying election-related injunctions. Ex.A at 12 & n.5. For example, the district court distinguished *Abbott* by referencing differences it perceived between this case and that one on the merits, Ex.A at 12, but this missed *Abbott*'s treatment of irreparable harm. The impact of the injunctions in these cases is identical for that purpose. *See* 138 S. Ct. at 2324 & n.17. Many of the district court's statements, moreover, were inaccurate. *Gill v. Whitford*, 137 S. Ct. 2289 (2017), for instance, stayed an injunction pending

appeal; it did not, as the district court believed, stay proceedings "while the State legislature developed a remedial plan," Ex.A at 12 n.5, which never occurred, *see Gill v. Whitford*, 138 S. Ct. 1916, 1926 (2018) (stay halted remedial phase, and liability ruling was vacated). Likewise, *Rucho v. Common Cause*, 138 S. Ct. 923 (2018), is not distinguishable on the ground that it involved "state-wide redistricting maps." Ex.A at 12 n.5. The right to vote in a city is the same as in a statewide election. *See, e.g.*, *Chisom v. Roemer*, 853 F.2d 1186, 1189 (5th Cir. 1988) (vacating injunction against locality-wide election); *cf. Oden v. Brittain*, 396 U.S. 1210, 1211 (1969) (Black, J., in chambers) (stating, in the context of a city-council election, that "[i]ntervention by the federal courts in state elections has always been a serious business."). In short, the district court's treatment of this venerable line of cases, beginning with *Reynolds*, 377 U.S. at 585, displayed a callous indifference to the harms of judicial interference with elections. *See Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006).

Additionally, the district court attempted to discount harms to the City Council, opining that the absence of a representative (due to the vacancy) "may procedurally complicate matters for the Council members themselves, and increase their individual workload, [but] the Court is not persuaded that the Council cannot carry out the people's business with only ten elected officials." Ex.A at 14. But, even if the City were required to show "that the Council can *only* effectively function with eleven-members or that there is constant gridlock requiring a tie-breaking vote"—which is not the standard—the district court completely missed the representational harm to the populace. *Id.* (emphasis in

original). The "hardship" of an injunction "falls not only upon the putative defendant, the [City], but on all the citizens of [the City], because this case concerns a [citywide] election." *Sw. Voter Registration Educ. Project*, 344 F.3d at 919. Most obviously, the Court has ordered the Kempsville residency district to go without an elected representative for more than a year and a half. *See, e.g., Craig v. Simon*, 980 F.3d 614, 618 (8th Cir. 2020) (affirming irreparable harm where district "would be left without representation in the House of Representatives between the end of the incumbent's term in January 2021 and the seating of a new Representative after a special election in February 2021"); *Covington v. North Carolina,* 316 F.R.D. 117, 177–78 (M.D.N.C. 2016), *aff'd* 137 S.Ct. 2211 (2017) (declining to order the postponement of 2016 elections under a plan invalidated as a racial gerrymander, finding such postponement would "cause significant and undue disruption to North Carolina's election process and create considerable confusion, inconvenience, and uncertainty among voters..."); *see also Smith v. Beasley,* 946 F. Supp. 1174, 1212 (D.S.C. 1996) (declining to enjoin elections to allow more time to create new districts). That harm accrues to all City voters, who have the right to vote in a special election for that seat and who will be deprived of an elected council representative for an indefinite period of time. A further harm follows from the possibility that the open seat may be held indefinitely by an individual appointed by the City

Council—who is therefore not elected.[4] The irreparable harm at issue is therefore indisputable, and Plaintiffs below did not dispute it.[5]

C. Plaintiffs Will Not Be Harmed by a Stay

It is also eminently clear that Plaintiffs are unlikely to be harmed by a partial stay, and any arguments to the contrary are waived. The injunction, as applied in *this* circumstance, is highly unlikely to benefit Plaintiffs. Plaintiffs would be unlikely to be eligible to vote in a special election for the vacant seat in a single-member district and therefore cannot complain (and did not complain below) that a citywide election—in which Plaintiffs *would* be entitled to vote—harms them.

1. Recall that the contemplated November 2021 special election would not be a plenary election for all seats, or even many. It would only be to fill the vacancy of Ms. Abbott's seat. Thus, the question whether Plaintiffs will be harmed by a partial stay does *not* turn on whether the at-large scheme is generally

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[4] The City, in its urgency to seek relief in district court, represented that the appointment of a member to fill the vacancy would necessarily expire in November 2021, when a special election was required to be called. Dist.Ct.Dkt.262 at 3. A closer examination of the governing statute in this unprecedented situation suggests that, if the special election in November is enjoined, the appointee may continue in office until an election is held at an unspecified point in the future. *See* Va. Code § 24.2-228(A) ("[T]he person so appointed shall hold office only until the qualified voters fill the vacancy by special election pursuant to § 24.2-682.").

[5] The district court agreed that it would be "irresponsible and inappropriate" to "rush" a remedial plan into existence and conduct a November 2021 election under such a plan. Ex. A at 15; *see also* Ex.B. (declaration of City Registrar explaining why that is so).

dilutive, or even whether it is dilutive in ordinary elections. The district court's extensive recitation of trial evidence, Ex.A at 17-19, is therefore beside the point. The question is whether filling Ms. Abbott's seat through a special election conducted at-large will harm Plaintiffs by depriving them of a likely opportunity to fill *that seat* in an alternative election in a single-member district contest. Two factors establish that this opportunity would likely never materialize.

First, in the three remedial plans presented to the district court (from both parties and comprising single-member-district seats), Ms. Abbott is not assigned as Plaintiffs' representative. Ex.C at ¶5. This is powerful evidence that, even if the vacancy were to be filled in November 2022 in an election conducted in a remedial single-member scheme, Plaintiffs would not be entitled to vote in that contest. Because "a person's right to vote is 'individual and personal in nature,'" *Gill*, 138 S. Ct. at 1929 (citation omitted), Plaintiffs would not be personally harmed by an at-large special election to fill a vacant seat that they would, under a likely remedial scheme, have no personal opportunity to help fill. This principle applies in full force in Section 2 cases. *See Shaw v. Hunt*, 517 U.S. 899, 917 (1996) ("The vote-dilution injuries suffered by these persons [in contravention of Section 2] are not remedied by creating a safe majority-black district somewhere else in the State."). Indeed, any claim that Plaintiffs would be harmed by an at-large election—in which they *would* be entitled to vote—by the foreclosure of the opportunity for a future single-member-district election—in which they would *not* be entitled to vote—is irrational.

Second, it is also unlikely that Ms. Abbott's seat would, under a remedial plan, constitute a majority-minority seat. In two of the three plans now before the district court, Ms. Abbott is designated as the incumbent of a majority-white district. Ex.C at ¶6. Importantly, that is so in *Plaintiffs' proposed remedy*. To be sure, in one of the City's proposed remedies, Ms. Abbott is designated the incumbent of a district that falls right on the edge of majority-minority status: the district is only a majority-minority district under one method of calculation, but not under a different method, under which it is majority-white. Dist.Ct.Dkt.262 at 16-17. However, Plaintiffs asserted below that they object to this plan, Dist.Ct.Dkt.263 at 2 n.3, rendering it an unlikely candidate for remedial purposes. The confluence of this evidence establishes, with no serious rebuttal, that Ms. Abbott would likely be deemed the representative of a majority-white district in a remedial scheme. In turn, the election to fill her vacancy would be in a majority-white district.

For that reason, there would be no harm, even to the "minority" community as understood in the district court's liability ruling and Plaintiffs' (erroneous) coalition theory, from an at-large special election. Ms. Abbott's seat could be filled in November 2021 in a majority-white jurisdiction (the City at large), or her seat could be filled in November 2022 in a majority-white jurisdiction (the likely single-member seat where she would have been designated the incumbent). Section 2 of the Voting Rights Act is not concerned in a contest between which of two majority-white jurisdictions should be utilized.

2. The district court concluded that Plaintiffs would be harmed—rejecting *Plaintiffs' own contrary assertions*—through an erroneous analysis that focused on the wrong factor. The district court looked to evidence concerning "minority cohesive voting" and concluded that, because in prior Kempsville races the minority community was (it believed) cohesive, the Kempsville district "is a district that contributes to violating the minority community's right to vote." Ex.A at 17-18. But that has nothing to do with whether Plaintiffs would be harmed by an at-large election. As explained, the right question is whether the vacancy caused by Ms. Abbott's resignation is tied to a district that is likely to be a majority-minority district (and one where Plaintiffs personally reside) in a remedial plan for use in the near future.

In contrast, the district court's analysis erroneously assumes that voting patterns in a Kempsville residency race under the at-large system sheds light on the voting behavior or political geography of the Kempsville area. It does not. The Kempsville residency district races, like all prior City Council races, occurred *at-large*, so the cohesion the district court cited reflected the *entire City's* "minority" electorate. As explained (*supra* note 1), the residency requirement applies to *candidates* in City elections, not *voters*. That voting may have been polarized as to given candidates who resided in Kempsville does not mean that territory of Kempsville is likely to be incorporated into a remedial majority-minority district. In fact, Plaintiffs informed the district court that "[t]he majority of the Kempsville residency district covers areas with low minority

populations," Dist.Ct.Dkt.263 at 3, making it an unlikely candidate for inclusion in a remedial district.

D. The Public Interest Favors a Partial 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, as does the balance of equities. As explained above, Plaintiffs and the minority community are unlikely to be harmed by an at-large election in November 2021, and the entire public would be harmed by being denied the right to vote for a year. Plaintiffs did not argue otherwise below, any arguments they might now raise are waived, and the district court's contrary view was founded on its errors in evaluating other elements.

II. The Court Should Vacate the Abeyance Order

These recent developments also call out for this Court to revisit and vacate its order holding this appeal in abeyance. Plaintiffs' representations supporting this decision have fallen flat.

First, and most importantly, Plaintiffs' representation that the City will not be harmed by indefinitely declining to address their appeal has proven false. That would be especially obvious if the Court denies this stay motion—as Plaintiffs now urge. But even granting the stay request would acknowledge that this is an exceptional case warranting prompt review, given the City's likelihood of success and the exigencies of City elections. Where a stay is warranted in a court of appeals, expedition typically is as well. Stopping an appeal in its tracks

where exceptional relief is warranted is as untenable as doing so where irreparable harm is flowing.

Second, there is now no credible possibility that "that all appellate issues can be consolidated in a single appeal." CA4.Dkt.28 at 1. As case events are proving, again and again, the only result of this Court's continued deferral on the merits is more motions practice in this Court (and the court below) on issues that could easily be resolved if this Court took this case for expedited consideration. Here, even when the parties *agreed below on the right course of conduct*, an emergency motion in this Court has proven necessary. The way to stop "piecemeal" litigation is to decide this appeal.

Third, Plaintiffs' principal contention is that remedial evidence and findings will shed light on the appeal issues has proven false. Plaintiffs have not identified any remedial-phase evidence that supports their liability case as to the issues raised in the City's appeal brief, instead preferring to—time and again—make that assertion without explanation. This case predominantly concerns the viability of coalitional claims and the standard of cohesion.

Finally, Plaintiffs' counsel's reliability on these issues has fallen short of the mark. This Court granted Plaintiffs' abeyance motion shortly after they announced that, "[h]ad the City waited…it would have learned that Plaintiffs do not oppose the motion for a limited stay to permit a November 2021 special election." CA4.Dkt.28. Now Plaintiffs oppose that relief. Not only have Plaintiffs' predictions proven false, but Plaintiffs have proven all too ready to abandon their own representations as soon as they have obtained what they

wanted from this Court. None of their other representations—including that the remedial phase will conclude in time to secure adequate review in this Court—can be viewed as reliable.

CONCLUSION

The Court should stay the injunction pending appeal, permit the City to conduct an at-large election in November 2021 to fill Ms. Abbott's seat, vacate its abeyance ruling, and expedite this appeal.

Date: July 20, 2021

Respectfully submitted,

/s/ Katherine L. McKnight
Katherine L. McKnight
Richard B. Raile
BAKER & HOSTETLER LLP
1050 Connecticut Ave., N.W.,
Suite 1100
Washington, D.C. 20036
T: (202) 861-1618
F: (202) 861-1783
kmcknight@bakerlaw.com

Patrick T. Lewis
BAKER & HOSTETLER LLP
Key Tower, 127 Public Square
Suite 2000
Cleveland, OH 44114

Counsel for Defendants-Appellants

Mark D. Stiles
Virginia Beach City Attorney
Christopher S. Boynton
Deputy City Attorney
Gerald L. Harris
Senior City Attorney
Joseph M. Kurt
Assistant City Attorney
OFFICE OF THE CITY ATTORNEY
Municipal Center, Building One,
Room 260
2401 Courthouse Drive
Virginia Beach, Virginia 23456

Erika Dackin Prouty
BAKER & HOSTETLER LLP
200 Civic Center Drive
Suite 1200
Columbus, OH 43215

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(g)(1), I hereby certify that the foregoing motion complies with the type-volume limitation in FRAP 27(d)(2). According to Microsoft Word, the brief contains 5,197 words and has been prepared in a proportionally spaced typeface using Calisto MT in 14-point size.

DATE: July 20, 2021

/s/ Katherine L. McKnight
Katherine L. McKnight

Counsel for Defendants–Appellants

CERTIFICATE OF SERVICE

I certify that on July 20, 2021, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

DATE: July 20, 2021

/s/ Katherine L. McKnight
Katherine L. McKnight

Counsel for Defendants–Appellants

No. 21-1533

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Latasha Holloway, et al.,

Plaintiffs-Appellees,

v.

City of Virginia Beach, et al.,

Defendants-Appellants.

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

Exhibit A – July 19, 2021 Memorandum Opinion and Order (Dist.Ct.Dkt.269)

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

LATASHA HOLLOWAY et. al.,
Plaintiff,

v. **CIVIL ACTION NO. 2:18-cv-69**

CITY OF VIRGINIA BEACH, et. al.,

Defendant.

MEMORANDUM OPINION AND ORDER

Before the Court is Defendants' Emergency Motion to Stay Injunction, pursuant to Fed. R. Civ. P. 62, filed on July 7, 2021. ECF No. 262. On July 8, 2021, Plaintiffs responded without opposition and Defendants replied. ECF Nos. 263, 264. Having reviewed the motion and filings, this Court finds that a hearing is not necessary to address this motion. For the reasons set forth below, Defendants' Motion is **DENIED.**

I. FACTUAL AND PROCEDURAL HISTORY

On March 31, 2021, the Court entered a judgment declaring the City of Virginia Beach's at-large method of election illegal. ECF No. 242. Pursuant to Section 2 of the Voting Rights Act, the Court further enjoined use of the at-large system of election, ordered that the City shall not adopt any system of election for members of its City Council that does not comply with § 2 of the Voting Rights Act, and ordered that the City of Virginia Beach shall not implement or utilize any practice, policy, procedure or other action that results in the dilution of minority participation in the electoral process. *See id.*

On April 29, 2021, Defendants filed an appeal (No. 21-1533) to the United States Court of Appeals for the Fourth Circuit ("Fourth Circuit"). ECF Nos. 247, 249, 250. On May 12, 2021, the Court ordered the parties to submit proposed remedial plans by July 1, 2021 to redress the at-large

system of election for the City of Virginia Beach. ECF No. 252. On June 3, 2021, Plaintiffs filed a motion to Modify the Remedial Briefing Schedule and Defendants responded. ECF Nos. 256, 257, 258. On July 1, 2021, the Court denied Plaintiffs' motion to modify the remedial briefing schedule and ordered the parties to file their proposed remedial proposed plans, responses, and replies, all due by July 30, 2021. ECF No. 259.

Meanwhile, on June 3, 2021, Plaintiffs (Appellees) filed a Motion with the Fourth Circuit to Suspend Briefing and Hold the Case in Abeyance pending remedial proceedings in the district court. *See* No. 21-1533 Dkt. No 11. In response, on June 15, 2021, Defendants (Appellants) filed a motion in opposition to abeyance pending remedial proceedings in the district court and a cross-motion to advance the briefing and expedite the appeal on the District Court's memorandum and opinion, ECF No. 242, which found the City in violation of the Voting Rights Act. *Id.* at Dkt. No. 24.

Then, on July 2, 2021, Virginia Beach Councilmember Jessica Abbott announced her resignation from the Virginia Beach City Council, effective immediately, for health concerns. Ms. Abbott represented the Kempsville residency district. *See* ECF No. 262. Accordingly, on July 7, 2021, Defendants (Appellants) filed a letter informing the Fourth Circuit about Ms. Abbott's resignation and arguing that the Plaintiffs (Appellees) Motion to hold the case in abeyance be denied because it would irreparably harm the City and the Motion "no longer has any conceivable merit (if it ever did…)." *See* ECF No. 263 at Exhibit 1; *see also,* No. 21-1533 Dkt. No. 27. At the same time, on July 7, 2021, Defendants' also filed the instant motion before the Court. On July 12, 2021, the Fourth Circuit granted Plaintiffs' (Appellees) motion for abeyance, Dkt. No. 11, as well as denied Defendants' (Appellants) motion to expediate review of the district court's

memorandum and opinion and order, Dkt. No. 24. *Id.* at Dkt. No. 29. Accordingly, the Defendants request that the Court lift the permanent injunction.

II. LEGAL STANDARD

A district court is authorized to suspend or grant equitable relief during the pendency of an appeal by Rule 62(c), F.R.Civ.P.:

> When an appeal is taken from an interlocutory or final judgment granting, dissolving, or denying an injunction, the court in its discretion may suspend, modify, restore, or grant an injunction during the pendency of the appeal upon such terms as to bond or otherwise as it considers proper for the security of the rights of the adverse party.

The moving party effectively asks the court to delay the implementation of its decision until the court of appeals has had an opportunity to consider the validity of that ruling. Since such an action interrupts the ordinary process of judicial review and postpones relief for the prevailing party at trial, the stay of an equitable order is an extraordinary device which should be sparingly granted. "The factors regulating the issuance of a stay are generally the same: (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." *Hilton v. Braunskill*, 481 U.S. 770, at 776 (1987); *see also,* Fed.Rules Civ.Proc.Rule 62(c), 28 U.S.C.A.

In circumstances where a stay is requested before the district issues final judgment[1], and thus, appeal is not pending, "[t]he District Court has broad discretion to stay proceedings as an incident to its power to control its own docket." *Clinton v. Jones*, 520 U.S. 681, 706 (1997). In exercising that discretion, a district court is instructed to "weigh competing interests and maintain an even balance." *Landis v. North American Co.*, 299 U.S. 248, 254 (1936) (explaining that "the power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket."); *see also, Dominion Energy, Inc. v. City of Warren Police & Fire Ret. Sys.*, 928 F.3d 325, 335 (4th Cir. 2019). "Proper use of this authority calls for the exercise of judgment which must weigh competing interests and maintain an even balance." *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983) (citation and internal quotation marks omitted). To determine whether to grant a stay before final judgment, a district court should consider "(1) the length of the requested stay; (2) the hardship or inequity that the movant would face in going forward with the litigation; (3) the injury that a stay would inflict upon the non-movant; and (4) whether a stay would simplify issues and promote judicial economy." *Rajput v. Synchrony*, 221 F. Supp. 3d 607, 609-10 (M.D. Pa. 2016).

Above all, the exercise of this power is especially important "in cases of extraordinary public moment" where a party "may be required to submit to delay not immoderate in extent and not oppressive in its consequences if the public welfare or convenience will thereby be promoted." *Clinton v. Jones*, 520 U.S. 681, at 707 (1997) (*quoting Landis*, 299 U.S. at 256).

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[1] 28 U.S.C.A. § 1291 provides that "the courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States. "Final judgment" rule serves several salutary purposes, such as preventing piecemeal appeals that might otherwise undermine independence of district judge, avoiding obstruction to just claims, and promoting efficient judicial administration. *Cunningham v. Hamilton Cty., Ohio*, 527 U.S. 198 (1999). In accord with this historical understanding, the Supreme Court has repeatedly interpreted § 1291 to mean that an appeal ordinarily will not lie until after final judgment has been entered in a case. See, *e.g.*, *Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 712 (1996); *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994); *Richardson–Merrell Inc. v. Koller*, 472 U.S. 424, 430 (1985).

Nevertheless, the burden of showing the necessity for a stay rests with the moving party and is heightened when a stay will "work damage" to another party. *Landis*, 299 U.S. at 255. "The party seeking a stay must justify it *by clear and convincing circumstances* outweighing potential harm to the party against whom it is operative." *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983) (emphasis added).

III. DISCUSSION

Defendants' argue that the Court should stay its injunction prohibiting the City of Virginia Beach from employing the at-large system of election so that the City may conduct a special election in November 2021. In support of this argument, Defendants first contend that they have a substantial likelihood of success on appeal and they set forth their grounds for appeal. *See* ECF No. 262 at 6-7. Second, Defendants argue that the injunction will be irreparably harmed absent a stay because the City Council will become short one member as of November 2021 and a remedial plan "cannot be adopted and administered prior..." to the November election. *Id.* at 8-15. Third, Defendants' argue that Plaintiffs would not be harmed by lifting the injunction. *Id.* at 15-17. Finally, Defendants contend that a stay would benefit the public both in the Kempsville District and across the City. *Id.* at 17-20.

In response, Plaintiffs do not oppose modifying the Court's injunction to allow the special election for the Kempsville residency district. ECF No. 263. Notably, the Plaintiffs assert that the results of a special election for the Kempsville district is unlikely "…to harm Plaintiffs' remedial rights." *Id.* at 2. However, Plaintiffs contend that if the elected candidate in the November 2021 Kempsville special election resides in the area of the district that contains a majority of the Minority population, then "... it *is* likely that this Court's remedial plan will be affected by the

special election." *Id.* at 4 (emphasis in original).[2] Moreover, Plaintiffs state that they reserve the right to "seek an order from this Court truncating the term of the candidate elected in the November 2021 special election in the event that the winning candidate resides in one of the Section 2 remedial districts ordered by the Court." *Id.* at 4.

While F.R.C.P. Rule 62(c) authorizes the Court to grant the Defendants relief by lifting the injunction, the decision is one within the Court's discretion. Moreover, since a stay interrupts the court's proceedings, including devising equitable remedies to issue final judgment, a stay postpones relief for the prevailing party. Therefore, "the stay of an equitable order is an extraordinary device which should be granted sparingly." *See United States v. State of La.*, 815 F. Supp. 947, 948 (E.D. La. 1993); *see also, Atlantic Richfield Co. v. Federal Trade Commission*, 398 F.Supp. 1, 17 (S.D.Tex.1975), *aff'd.* 546 F.2d 646 (5th Cir. 1976); *see also, F.M.C. v. New York Terminal Conference*, 373 F.2d 424, 426 (2nd Cir. 1967).

When an injunction serves as an equitable remedy, albeit temporarily, for constitutional violations, the clear and compelling duty of the Court is to institute meaningful relief to eliminate the effects of past illegality and assure future compliance with the laws of the land. *Louisiana v. United States, 380 U.S. 145*, at 154 ("We bear in mind that the court has not merely the power but the duty to render a decree which will so far as possible eliminate the discriminatory effects of the past as well as bar like discrimination in the future."); *See e.g., Green v. County School Board*, 391 U.S. 430, at 438, n.4 (1968); *United States v. Crescent Amusement Co.*, 323 U.S. 173; *Standard Oil Co. v. United States*, 221 U.S. 1; *Griffin v. County School Board of Prince Edward County*, 377 U.S. 218, at 232—234; *Green v. Cty. Sch. Bd. of New Kent Cty., Va.*, 391 U.S. 430, at 438 (1968).

[2] Plaintiffs note that a portion of the Kempsville district contains 18,000 people, with a citizen voting age population ("CVAP") that is 45.8% Black, 9.3% Hispanic, 5.9% Asian, and 37.1% white. Accordingly, this portion of the district is included in the remedial districts proposed by both parties. *See* ECF No. 262 at 4; *see also*, ECF Nos. 260, 261 (Remedial proposals by Defendants and Plaintiffs).

These general precepts governing requests for interlocutory stays are underscored when relief has been ordered to remedy constitutional violations, as it pertains to fundamentals rights such as voting. Constitutional rights are warrants for the here and now, to be promptly fulfilled in the absence of "an overwhelming compelling reason". *Watson v. Memphis,* 373 U.S. 526, at 533 (1963). Accordingly, with these principles in mind, the Court will examine the Defendants' merits for lifting the equitable injunction currently in place.

A. Likelihood of Success on the Merits

First, the Court has already determined that Defendants are not likely to succeed on the merits of the underlying case. Although Defendants claim that they will likely succeed on appeal, *see* ECF No. 262, Defendants' legal analysis is misguided. That is, the question before the Court is not whether Defendants will succeed on appeal. Rather, the question is whether Defendants will succeed on the merits of the underlying case to justify lifting the temporary injunction.

Critically, the Court found that the at-large election system used by the City of Virginia Beach is unconstitutional because it dilutes the votes of Minority voters, and, thus, violates § 2(a) of the Voting Rights Act of 1965 ("VRA") and the Fifteenth Amendment. *See* ECF No. 242. Specifically, the Court found that Plaintiffs satisfied the *Gingles* preconditions and determined that "based on the totality of the circumstances, there [was] a violation of Section 2." *United States v. Charleston Cty.*, S.C., 365 F.3d at 345 (4th Cir. 2004); *see also,* ECF No. 242 at 38-132; *Thornburg v. Gingles,* 478 U.S. 30, at 44-45 (1986). Moreover, in conducting the totality of the circumstance's inquiry, the Court found substantial evidence in support of each of the nine Senate factors, and ultimately found that "Plaintiffs [] satisfied their burden of showing that the Minority Community has less opportunity than other members of the electorate to participate in the political process and elect their preferred candidates." *See id.* at 94.

While there is an appeal pending regarding the Court's aforementioned findings set out in its memorandum and opinion, *see* ECF Nos. 247, 250, the Fourth Circuit stayed Defendants' appeal because the Court has not issued final judgment as it still must fashion remedies. *See* ECF No. 266; *see also, Van Cauwenberghe v. Biard,* 486 U.S. 517, at 521–522 (1988) (holding that a decision is not final unless it "'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'") (quoting *Catlin v. United States,* 324 U.S. 229, 233 (1945)); *Swint v. Chambers County Comm'n,* 514 U.S. 35, 42, (1995) (A "final decisio[n]" is typically one "by which a district court disassociates itself from a case."); *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (holding the same).[3]

Accordingly, the Fourth Circuit appropriately denied Defendants' motion to expedite appeal proceedings because the Court has not yet concluded the remedies on this matter, and, thus proceedings are ongoing. Therefore, the Court need not consider whether Defendants' will likely succeed on appeal. *See also, e.g., Virginia Petroleum Jobbers Assn. v. FPC,* 104 U.S. App.D.C. 106, at 110 (1958); *Washington Metropolitan Area Comm'n v. Holiday Tours, Inc.,* 182 U.S. App. D.C. 220, at 221–222 (1977).[4]

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[3] Although, once an appeal is filed district courts are divested from jurisdiction there are situations where the district court's are given jurisdiction to promote judicial efficiency and facilitate the division of labor between trial and appellate courts. *See, Doe v. Pub. Citizen*, 749 F.3d 246, 258-59 (4th Cir. 2014) (explaining that, after the filing of a notice of appeal, a federal district court is divested of jurisdiction to rule on matters related to the appeal unless such rulings "aid[ ] the appellate process"); *but see, e.g., Lytle v. Griffith,* 240 F.3d 404, 407 n. 2 (4th Cir.2001) (concluding that the district court's limited modification of an injunction appropriately "aided in th[e] appeal by relieving [the court] from considering the substance of an issue begotten merely from imprecise wording in the injunction"); *Fobian v. Storage Tech. Corp.,* 164 F.3d 887, 890 (4th Cir.1999) (holding that a district court is authorized, under the in aid of appeal exception, to entertain a Rule 60(b) motion after a party appeals the district court's judgment); *Grand Jury Proceedings Under Seal,* 947 F.2d at 1190 (holding that the district court retained jurisdiction to memorialize its oral opinions soon after a decision was rendered).

[4] However, the Court notes the Judiciary Act of 1789, 1 Stat. 73, "established the general principle that only final decisions of the federal district courts would be reviewable on appeal." *Carson v. American Brands, Inc.,* 450 U.S. 79, at 83 (1981) (emphasis deleted). Notably, § 1292(a)(1) gives the courts of appeals jurisdiction over "[i]nterlocutory orders of the district courts" "granting, continuing, modifying, refusing or dissolving injunctions," "except where a direct review may be had in the Supreme Court." *Abbott v. Perez*, 138 S. Ct. 2305, at 2319 (2018).

Therefore, the Defendants' have failed to show that they will succeed on the merits. Without a substantial case on the merits, Defendants' burden to demonstrate that the circumstances of this case warrant a stay is practically impossible. This is because, in order to carry their burden, the Defendants must provide sufficient proof to show that "the injury and harm, which would inure to their detriment as a result of the implementation of court-ordered relief, would be so overwhelming as to call into question the logic of the remedial plan itself." *United States v. State of La.*, 815 F. Supp. 947, 953 (E.D. La. 1993).

B. Irreparable Injury to the Moving Party

Second, the Court finds that the Defendants will not suffer irreparable injury if the Court keeps the temporary injunction until it can establish a remedial and constitutional electoral system.

First, the injunction itself is an appropriate temporary measure in this case to prevent further injury to the public. As noted above, case law instructs that remediation of the § 2 violation is part of the judgment. Congress and federal courts have recognized that the appropriate remedy for a §2 violation in a single-member at-large districting scheme is to redraw district lines to create one or more additional districts in which minority voters can exercise electoral control. *See Bush v. Vera*, 517 U.S. 952, 977 (1996); *Shaw v. Hunt,* 517 U.S. 899, 914–15 (1996) (*Shaw II*); *De Grandy*, 512 U.S. at 1008. As Justice O'Connor stated in her concurring opinion in *Vera*,

> [W]here voting is racially polarized, § 2 prohibits States from adopting districting schemes that would have the effect that minority voters "have less opportunity than other members of the electorate to ... elect representatives of their choice." § 2(b). That principle may require a State to create a majority-minority district where the three *Gingles* factors are present....

Vera, 517 U.S. at 993 (first alteration in original). In this case, the litigation has not ended with respect to the merits of a remedy and, thus, the Court, at this stage does not have a judgment to execute. *Van Cauwenberghe v. Biard,* 486 U.S. 517, 521–522 (1988) (quoting *Catlin v. United*

States, 324 U.S. 229, 233 (1945)). A "final decisio[n]" is typically one "by which a district court disassociates itself from a case." *Swint v. Chambers County Comm'n,* 514 U.S. 35, 42, (1995). In the instant case, pursuant to Fed. R. Civ. P. 65, the Court specified that "any further use of the at-large system of election for the Virginia Beach City Council is hereby enjoined." *See* ECF No. 242 at 132. Subsequently, on May 12, 2021, the Court further elaborated by ordering the parties to submit proposed remedial plans by July 1, 2021 to redress the at-large system of election for the City of Virginia Beach. ECF No. 252. *See Abbott v. Perez*, 138 S. Ct. 2305, at 2321 (2018) (noting that the district court's "orders are unequivocal that the current legislative plans 'violate § 2 and the Fourteenth Amendment' and that these violations 'must be remedied.' Thus, the district Court's language had the practical effect of enjoining further use of the invalid legislative districts and, the court properly provided the state an opportunity to remedy.). On July 1, 2021, the Court denied Plaintiffs' motion to modify the remedial briefing schedule and ordered the parties to file their proposed remedial proposed plans, responses, and replies, all due by July 30, 2021. ECF No. 259. Subsequently, the parties filed their respective proposed remedies on July 1, 2021. ECF Nos. 260, 261.

Absent unusual circumstances, "such as where an impending election is imminent and a State's election machinery is already in progress," an injunction is the appropriate temporary remedy " to insure (*sic*) that no further elections are conducted under the invalid plan." *Reynolds v. Sims,* 377 U.S. 533, at 585 (1964). In such circumstances, the "a court is entitled to and should consider the proximity of a forthcoming election and the mechanics and complexities of state election laws, and should act and rely upon general equitable principles. With respect to the timing of relief, a court can reasonably endeavor to avoid a disruption of the election process which might result from requiring precipitat[ing] changes that could make unreasonable or embarrassing

demands on a State in adjusting to the requirements of the court's decree." *Id.* The Court notes that there were no special circumstances at the time the Court enjoined Defendants from using the invalid at-large district system.

However, the Court recognizes special circumstances may arise during the remedial proceedings. At the case at bar, while both parties have been participating in remedial proceedings, there has been an unexpected resignation on the City Council which presents such circumstances. Specifically, on July 2, 2021, Virginia Beach Councilmember Jessica Abbott announced her resignation from the Virginia Beach City Council, effective immediately, for health concerns. Ms. Abbott represented the Kempsville residency district. *See* ECF No. 262. Pursuant to Virginia Law, the City Council must now appoint an interim, temporary successor to fill the vacant seat. Next, the City is required to 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. Va. Code Ann. § 24.2-228(A). The temporary successor, by law, cannot remain in office past that date. *Id.* at § 24.2-226. Moreover, pursuant to state law, the City must follow certain procedures and deadlines to fill the vacancy in November 2021. *See* ECF No. 262 at 4-5 (outlining the timeline that the City must follow starting on July 19, 2021 by filing a petition to the circuit court to issue a writ of election to fill the vacancy.).

Accordingly, Defendants argue that the injunction "would inflict irreparable harm on the City and the public" primarily because it frustrates the City's application of state law governing

elections, creates a council without a tie-breaking vote, and no alternative remedial plan would be in place by November 2021. ECF No. 262 at 8-15.[5]

The Court disagrees with Defendants' position and their legal analysis is, again, misguided. First, Defendants reliance on *Abbott v. Perez,* to argue that the Court's injunction frustrates application of a state law governing elections in the City, is inapplicable. In *Abbott v. Perez,* the Supreme Court overturned a three-judge court in the Western District of Texas which directed the State of Texas not to conduct its election using districting plans the district court previously developed for the 2012 elections, pursuant to a previous VRA case. *See Abbott v. Perez,* 138 S. Ct. at 2313 (2018); *see also, Perry v. Perez,* 565 U.S. 388, (2012). The three-judge panel repealed the State-approved 2011 plans and found that "they were tainted by discriminatory intent and that the 2013 Legislature had not 'cured' that 'taint.'" *Abbott v. Perez,* at 2313. The Supreme Court overturned the three-judge panel's repeal of the 2011 plans because the panel committed a "fundamental legal error" of shifting the burden onto the State to show that the 2013 Legislature did not act with discriminatory intent when it enacted the 2011 plans, and used them in the 2012, 2014, and 2016 elections, which the district court previously approved. *Id.* Therefore, the Supreme

[5] Defendants also cite to numerous cases for the proposition that "[c]ourts 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." However, Defendants legal analysis is, again, inapplicable because the cases they cite to are unalike to the facts, proceedings, and case at bar. *See* ECF No. 262 at 15. For example, in *Chisom v. Roemer*, 853 F.2d 1186, 1192 (5th Cir. 1988), the Fifth Circuit vacated a *preliminary injunction* that the district court imposed, after a panel rehearing, to enjoin the electoral system in an upcoming election *before* making any factual or legal conclusions. Defendants also cite to various orders where the Supreme Court vacated a lower court's injunction. However, these cases are also unalike to the circumstances at bar. For example, in *Gill v. Whitford*, 137 S. Ct. 2289, 198 L. Ed. 2d 697 (2017), the Supreme Court stayed the District Court's injunction of a districting plan created by the State legislature pending an appeal while the State legislature developed a remedial plan. *See also, Rucho v. Common Cause*, 138 S. Ct. 923, 199 L. Ed. 2d 619 (2018) (lifting a temporary injunction pending appeal in a case where the district court had placed knowing that the 2018 general election was months away in a case involving state-wide redistricting maps.); *North Carolina v. Covington*, 138 S. Ct. 974, 200 L. Ed. 2d 216 (2018) (similar procedural background involving state redistricting maps where an injunction by the district court was lifted pending appeal).

Court held that the three-judge panel's injunction of the 2011-districting plans was without merit. *Id.*[6]

Here, the Court has not committed a fundamental legal error of shifting the burden of proof. Rather, after a six-day bench trial, the Court meticulously examined the Plaintiffs and Defendants evidence, proposed finds of fact and law, and found that the Plaintiffs did satisfy their burden of proof and demonstrated that the City of Virginia's at-large district system is unconstitutional. Moreover, unlike *Abbott v. Perez,* to-date there have not been any court- or state-approved redistricting plans to remedy the City's unconstitutional at-large district. Critically, as noted above, the Court commenced remedial proceedings on July 1, 2021, and has provided both parties with the opportunity to remedy the constitutional violation. Therefore, the Court is not frustrating implementing of any court- and state-approved districting plans.

The Defendants further argue that it will have "…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." *See* ECF No. 262 at 9. Here, the Court considers *who* is allegedly being injured by maintaining the injunction and, most importantly, who is not. Notably, the injunction is designed to prevent the City Council from using an unconstitutional electoral system to elect other city council members and further harm the minority community. That is, the injunction is designed to thwart the Defendants' (i.e. the City Council and its governing members) unconstitutional electoral policies, procedures, and system to protect the public, particularly the minority community. The distinction is critical and one that Defendants failed to acknowledge.

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[6] Moreover, the Court notes that the Defendants' argument that it is ordinary practice to suspend an injunction pending appeal of a district court enjoining state officials from enforcing state laws deemed unconstitutional, is irrelevant for the reasons stated in Section III.A. *See* ECF No. 262 at 8 (citing *Strange v. Searcy*, 135 S. Ct. 940, 940 (2015) (Thomas, J., dissenting).

While the Court recognizes that the City Council may find itself in special circumstances because of Ms. Abbott's sudden resignation, for reasons articulated below, the equities still do not weigh in favor of the Defendants to justify lifting the temporary injunction. Still, though the Court recognizes that being short one-representative may procedurally complicate matters for the Council members themselves, and increase their individual workload, the Court is not persuaded that the Council cannot carry out the people's business with only ten elected officials. Notably, the Defendants did not provide evidence showing that the Council can *only* effectively function with eleven-members or that there is constant gridlock requiring a tie-breaking vote. Moreover, pursuant to the City Charter "a majority of the council shall constitute a quorum for the transaction of business." CODE OF ORDINANCES, City of Virginia Beach, Ch. 3, §§ 3.06; 1973, Ch. 52, §1. Thus, the City can still vote, pass measures, and carry out their business. While the City Charter does not set out specific provisions for how the council can proceed with a ten-member council, the Court has not doubt that the Council has previously operated in the absence of city council members.

Even if the Court accepted the Defendants' claim that there would be an adverse effect upon the councils ability to conduct business in the absence of one-council member, the Court has to balance this claim of injury with the injury that would be inflicted upon the public if the Court did not provide a remedy to address to the constitutional violations it has found. The Court will balance these claims below in Section III.D.

Finally, Defendants argue that it would be injured because the remedial plan has not been developed yet and, thus, argues that "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 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." *See* ECF No. 262 at 9-10. The Court disagrees with Defendants argument for three reasons. First, while it is true that the Court is currently in the process of developing a remedial plan, the Court will not "rush out a remedial plan" as Defendants allege because that would be an irresponsible and inappropriate manner to redress the City's longstanding violations of the minority community's constitutional rights, deeply steeped in a history of racial discrimination—namely the right to vote. As the Court recognized in its memorandum and opinion, ECF No. 242, though the City's at-large district has been in place since 1966, the City has elected *only five* Black Councilmembers and *one* Asian-American. ECF No. 190 at ¶ 25. Moreover, the Court found that the City's policies and procedures dilute the votes of the minority community. Additionally, the Court notes that no Black Councilmember had ever been re-elected. Second, the argument that the City is harmed by the Court's methodical remedial procedure dismisses, or at least obscures, the harm the city's electoral system has inflicted on the minority community. Accordingly, if the Court were to allow a special election to occur under the current invalid and unconstitutional system, the Court could further harm the City's minority community. Finally, as examined in Senate Factor Eight in the Court's memorandum and opinion, there is substantial evidence showing that, under the currently electoral system, the City has been consistently unresponsive to the economic and social needs of the Minority Community (e.g. Burton Station, the Disparity). *See* ECF No. 242 at 122- 131. This finding severely undercuts the Defendants' present argument that a ten-member city council is harmful to the residents of Virginia Beach because on balance a special election could further be harmful to the minority community.

Overall, in carefully weighing the City Councils' challenges in temporarily having a ten-member board with the historic, and possibly ongoing, harms the council has inflicted on the

minority community via the unconstitutional electoral system, the Court finds that any injury to the Council is not irreparable. Still, the Court recognizes that a ten-member board is not ideal and will move as expeditiously as possible to craft a remedial plan. Critically, however, the Defendants have not provided evidence that a stay is justified "…by clear and convincing circumstances [and that a stay] outweigh[s] potential harm to the party against whom it is operative." *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983); *see also, Int'l Refugee Assistance Project v. Trump*, 323 F. Supp. 3d 726, 731 (D. Md. 2018). The Court further notes that the parties may revisit any injury inflicted by a temporary ten-member Council should evidence arise.

C. Substantial Injury to Non-Movant

The Court does not agree with Plaintiffs' acceptance of the modification. As noted in the Court's memorandum and opinion, the Plaintiffs' brought a suit on behalf of the minority community of Virginia Beach alleging that the City's at-large electoral system dilutes the votes of the minority community in violation of § 2 of the VRA. The Court found substantial evidence supporting factual and legal findings demonstrating constitutional violations. Thus, the Court is puzzled on Plaintiff's counsel position in response to the Defendants motion. First, while Plaintiffs accept that a modification of the injunction is appropriate, their reasoning is based on speculating the outcome of the Kempsville November 2021 special election and recognition that a special election might be contrary to the minority community's interests. That is, Plaintiffs write that:

> If the candidate elected in the November 2021 Kempsville special election resides in the area shown in the red circle (or potentially nearby), then it *is* likely that this Court's remedial plan will be affected by the special election. This is so because Ms. Abbott's term was set to expire in 2024, and therefore it is possible a special election will yield a new incumbent, potentially one disfavored by the minority community who resides in one of the Section 2 remedial districts ordered by the Court and who would remain in office through 2024.

ECF No. 263 at 4 (emphasis in original). However, Plaintiffs then acknowledge that since the "bulk of the Kempsville district is outside the geography likely to be included in the Court's remedial plan…it is likelier than not that the prevailing candidate will reside in the portion of the district outside…" where the majority of the minority community resides. *Id.* Plaintiffs also previously note that a proposed remedial plan includes a portion of the Kempsville district which "contains nearly 18,000 people, with a citizen voting age populations ("CVAP") that is 45.8% Black, 9.3% Hispanic, 5.9% Asian, and 37.1% white." *Id.* Accordingly, Plaintiffs' lack of opposition is based on two flaws. First, Plaintiffs speculate that it is "likelier" that the elected candidate of the Kempsville special election would not be from the minority community, and, thus, this reasoning is speculative. Second, Plaintiffs' reasoning reinforces the logic behind the unconstitutional electoral system. That is, since the Kempsville district is drawn in a way that dilutes the votes of minorities, they are significantly less likely to elect a minority preferred candidate of their choice. As the Court noted in its memorandum and opinion, based on evidence that Plaintiffs presented, there is strong evidence of minority cohesive voting in the 2012 and 2016 voting with some evidence of white bloc voting. *See* ECF No. 242 at 75-76.

Specifically, the Court noted that in the 2012 election for the Kempsville District, Dr. Ross-Hammond (a Black woman), received about 65% (EI) of the all minority vote and 87% (EI) support from Black voters but less than 20% from white voters. *See* ECF No. 242 at 75 (citing P-0077 at 20-21). Thus, there was evidence of minority cohesive voting and Dr. Ross-Hammond became only the third Black member of the City Council in its fifty-five-year history. *Id.* However, in 2016, candidate Ross-Hammond lost re-election. Based on Dr. Spencer's analysis, Ross-Hammond was the preferred candidate of choice for all minority voters, with 59% (EI), and Black voters with 77% (EI) support. *Id.* (citing P-0077 at 16). However, Ross-Hammond received

low white voter support, with 33% (EI). P-0077 at 15-16. On the other hand, her opponent, Jessica Abbot (a white woman) received 69% (EI) of the white vote but less than 40% of the all minority vote and less than 38% of Black vote. *Id.*

Critically, as the Court noted in its analysis, Dr. Ross-Hammond credibly testified at trial that she lost the election in large part due to the split between white and minority voters on the issue of expanding the light rail. *See* Tr. 728:5-16 (Dr. Ross-Hammond supported the light rail and this issue "played a major part" in her re-election loss in 2016.); *see also,* DTX163 (Abbott Dep.) at 162:1-3 (Jessica Abbott, opposed light rail). Ultimately, the Court concluded that "[a]lthough [Dr. Ross-Hammond] had large support from the Minority Community in 2012 and 2016, she only won in 2012 because the white vote was split between three candidates and then lost in 2016 because the white vote consolidated to support her opponent and, thus, block her re-election." ECF No. 242 at 90.

Therefore, the record shows the Kempsville is a district with a history of minority cohesive voting and some evidence of white bloc voting. Accordingly, it is a district that contributes to violating the minority community's right to vote. Therefore, Plaintiffs lack of opposition to Defendants' motion, is incongruent with the evidence in the record. Most of all, if the Court abided by the Plaintiffs' acceptance of the special election, the Court risks further perpetuating the dilution of minority voters in the Kempsville district.

Ultimately, the Court finds that there would be substantial injury to the Plaintiffs', notably the minority community in the Kempsville district if the Court allowed the November 2021 election to occur by lifting the temporary injunction.

D. Public Interest

For the reasons articulated above, the Court finds that it would not be in the public interest to lift the temporary injunction and allow a special election for the Kempsville District in November 2021. Defendants argue that:

> [t]he 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.

ECF No. 262 at 17. Additionally, Defendants argue that the public interest would not be served by rushing out a remedial plan. *Id.* at 18. Further, Defendants contend that the public interest could be potentially harmed with the remedial districts because it is unclear, at this time, what their final composition will be. *Id.*

In order to exercise its discretion within the bounds of the law, a district court must "weigh competing interests and maintain an even balance." *Landis v. N. Am. Co.*, 299 U.S. 248, at 254 (1936). As detailed in the Court's memorandum and opinion, *see* ECF No. 242, the current electoral system has demonstrated evidence of harming the minority community of Virginia Beach because it dilutes their votes in violation of the Voting Rights Act. While the Court recognizes that it is currently in remedial proceedings, the Court found that the City Council has not been responsive to the needs of the minority community. Accordingly, on balance, the Court finds that while the city council may face challenges in operating a ten-member board, it is ultimately not in the public interest to hold a special election using an invalid system because it substantially risks further infringing the constitutional rights of the minority community.

E. Additional Factors

As noted above in section III.A, since the motion for a stay is situated before appeal and during ongoing remedial proceedings, the Court may also examine Defendants' request pursuant to other factors for granting a stay. *See, Ctr. for Int'l Envtl. Law v. Office of the U.S. Trade Representative*, 240 F. Supp. 2d 21, 22–23 (D.D.C. 2003) (considering, among other factors, that "this case presents an issue of first impression").

The Court notes that the following factors provide the Court with greater discretion for granting or denying a stay, and, so, it examines them in the alternative to the more rigid test articulated above. Typically, when a moving party requests the court to stay ongoing proceedings, sister courts have also considered "(1) the length of the requested stay; (2) the hardship or inequity that the movant would face in going forward with the litigation; (3) the injury that a stay would inflict upon the non-movant; and (4) whether a stay would simplify issues and promote judicial economy." *Rajput v. Synchrony*, 221 F. Supp. 3d 607, 609-10 (M.D. Pa. 2016); *CTF Hotel Holdings, Inc. v. Marriott Int'l, Inc.*, 381 F.3d 131, 135–36 (3d Cir. 2004); *see also, Int'l Refugee Assistance Project v. Trump*, 323 F. Supp. 3d 726, 731 (D. Md. 2018) (stating that "When considering a discretionary motion to stay, courts typically examine three factors: (1) the impact on the orderly course of justice, sometimes referred to as judicial economy, measured in terms of the simplifying or complicating of issues, proof, and questions of law which could be expected from a stay; (2) the hardship to the moving party if the case is not stayed; and (3) the potential damage or prejudice to the non-moving party if a stay is granted.") (citing *Lockyer v. Mirant Corp.*, 398 F.3d 1098, 1110 (9th Cir. 2005); *see also*, *Ortega Trujillo v. Conover & Co. Commc'ns, Inc.*, 221 F.3d 1262, 1265 (11th Cir. 2000) ("[T]he interests of judicial economy alone are insufficient to justify ... an indefinite stay"); *see also,*

In considering these additional factors, the Court has already discussed two at-length: 2) the hardship or inequity that the movant would face in going forward with the litigation and (3) the injury that a stay would inflict upon the non-movant. Thus, Court will examine the remaining additional factors.

First, regarding length of the stay, at first glance, Defendants only appear to request a stay until the November 2021 special election, which initially appears unproblematic. *See* ECF No. 262. However, upon further inspection, there is disagreement between the parties regarding how long the stay would apply to the Kempsville district after the special election. That is, Defendants and Plaintiffs disagree about how long the winning elected councilmember for the Kempsville district should be allowed to hold office. On the one hand, Plaintiffs state that it "reserves the right, [] as part of the remedial proceeding, to seek an order [] truncating the term of the candidate elected in the November 2021 special election in the event that the winning candidate resides in one of the Section 2 remedial districts ordered by the Court." ECF No. 263 at 4. On the other hand, Defendants "intend to oppose future requests to alter term lengths of any members." ECF No. 262 at 2. In all, the Court finds that Defendants are functionally asking the Court to stay the injunction until 2024 so that the winning candidate for the Kempsville district can serve a full term. While the Court is cautious to attribute any ulterior motivate behind Defendants request to keep the winning Kempsville candidate in office until 2024, the Court notes that it has factually determined that the City's electoral system, policies, and procedures have a long-history of racial discrimination and undermining the constitutional rights of the minority community. Critically, Defendants have signaled that, even if the Court allowed a stay, Defendants would oppose any equitable measures to limit the winning candidate's term to abide by any Court ordered remedial plan.

Second, the Court finds that a stay would not simplify issues and promote judicial economy. As previously noted, the Court has initiated remedial proceedings and has requested that both parties submit their briefings by July 30, 2021. While the Court will not rush remedial proceedings, the Court finds that a stay would negatively impact remedial proceedings as it will detract the from the Court and parties time from crafting a remedial plan. *See Chapman v. Meier*, 420 U.S. 1, 27, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975) (holding that if a state fails to enact "a constitutionally acceptable" remedial districting plan, "the responsibility falls on the District Court"); *Reynolds*, 377 U.S. at 586, 84 S.Ct. 1362 (holding that a district court "acted in a most proper and commendable manner" by imposing its own remedial districting plan, after the district court concluded that the remedial plan adopted by state legislature failed to remedy constitutional violation).

IV. CONCLUSION

Therefore, for the foregoing reasons, Defendants' Motion, ECF No. 262, is **DENIED.**

The Clerk is **DIRECTED** to electronically provide this Order to all parties.

IT IS SO ORDERED

Norfolk, Virginia
July 19, 2021

UNITED STATES DISTRICT JUDGE

No. 21-1533

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Latasha Holloway, et al.,

Plaintiffs-Appellees,

v.

City of Virginia Beach, et al.,

Defendants-Appellants.

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

Exhibit B – Declaration of Donna Patterson (Dist.Ct.Dkt.262-2)

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 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

No. 21-1533

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Latasha Holloway, et al.,

Plaintiffs-Appellees,

v.

City of Virginia Beach, et al.,

Defendants-Appellants.

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

Exhibit C – Declaration of Kimball W. Brace (Dist.Ct.Dkt.262-3)

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

Kimball W. Brace

Brace Decl. Ex. A

Overview

	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)				
DISTRICT	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																	