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' Opposition to Motion for Indefinite Abeyance and Cross-Motion To Advance Briefing and Expedite Argument and Decision

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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 Jessica Abbott, 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

Plaintiffs ask not to delay this appeal but functionally to deny it. The Defendants are the City of Virginia Beach, its City Council and various City officials, named in their official capacities. Plaintiffs are two Black voters alleging that the City's at-large system of electing City Council members dilutes the votes of a coalition of Black, Hispanic, and Asian voters. The circuits are split on whether such a claim is even viable under Section 2 of the Voting Rights Act. And, in any event, the Virginia General Assembly has repealed the challenged at-large scheme, mooting this case.

Undeterred by its jurisdictional limits and the Act's plain text, the district court enjoined further use of the at-large system. That injunction triggered Defendants' appeal as of right under 28 U.S.C. § 1292(a)(1). Now, Plaintiffs have moved to hold the appeal in "abeyance" pending final judgment. But that would have exactly the same effect as dismissing this appeal, which this Court lacks discretion to do. Besides, Plaintiffs' basis for this unprecedented request—that they want another bite at the apple in proving liability—is a patently unsound basis for an indefinite stay. Appellate procedural doctrines are meant to discourage, not encourage, this type of transparent, practically admitted gamesmanship.

Further, this appeal should be expedited, not slowed down. As discussed below, the City needs a ruling this year, before a constitutional deadline of December 31, on whether the district court is the right body to redistrict the City or whether Virginia's legislative actors have that responsibility. Far from a

"waste of time," this appeal will serve the invaluable function of deciding that question. The Court should do so promptly.

Defendants filed their appeal brief early, on June 11, 2021. The Court should, first, amend the briefing schedule to concomitantly advance Plaintiffs' due date to July 12. It should, second, expedite argument and decision, ordering the clerk of court to calendar the next available argument date. As explained below, time is of the essence. Procrastination is election-administration poison. The Court should not heed the baseless calls to throw the City's elections into tumult; it should grant Defendants' motion and deny Plaintiffs'.[1]

ARGUMENT

A. Plaintiffs' Motion Must Be Denied

Congress provided that this Court "*shall* have jurisdiction of appeals from: (1) Interlocutory orders of the district courts…granting,…injunctions…." 28 U.S.C. § 1292(a)(1) (emphasis added). There is no dispute that this statute applies here. The district court's order provides "that any further use of the at-large system of election for the Virginia Beach City Council is hereby **ENJOINED**." Dist.Ct.Dkt.242 at 133. Plaintiffs do not, because they cannot, contend that Defendants lack an immediate right of appeal.

"[A] federal court's 'obligation' to hear and decide a case is 'virtually unflagging.'" *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013) (citation

[1] Plaintiffs oppose Defendants' motion to advance briefing and expedite argument and decision.

omitted). It is that principle which Plaintiffs dispute in the instant motion. They seek an order holding "this appeal in abeyance until the district court…enters final judgment." Mot. 1. But on entry of final judgment, the aggrieved party has an independent right to appeal under 28 U.S.C. § 1291. *See Clark v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 924 F.2d 550, 553 (4th Cir. 1991). Under the statutory scheme, the significance of pausing a Section 1292(a)(1) appeal pending final judgment is to deny Section 1292(a)(1) any effect at all. There is no difference between Plaintiffs' request for "abeyance," Mot. 1, and a request for outright dismissal. That Plaintiffs have no colorable basis to request the latter should tell the Court all it needs to know about their request for the former.

This Court has no discretionary authority to dispose of Defendants' absolute right of appeal in favor of Plaintiffs' freewheeling ideas of best case-management. "The circuits that have specifically considered the" argument that injunction appeals are "discretionary" have "unanimously rejected it." *United States v. Bayshore Assocs., Inc.*, 934 F.2d 1391, 1396 (6th Cir. 1991). This Court should too. And, even if there were discretionary to deny Defendants their right to appeal, Plaintiffs cite no good reason for the Court to exercise any such discretion in favor of denying Defendants their right of appellate review.

1. The Court Lacks Authority To Order an Appellant To Utilize Section 1291 Rather Than Section 1292

a. Plaintiffs' invocation of "the basic federal policy against piecemeal appeals," Mot. 2 (citation omitted), ignores that Section 1292(a)(1) "creates an exception from the long-established policy against piecemeal appeals...."

Gardner v. Westinghouse Broad. Co., 437 U.S. 478, 480 (1978). To cite the very policy Congress excepted as a basis to deny a Section 1292(a)(1) appeal is another way of saying Congress got Section 1292(a)(1) wrong. Federal courts are "not authorized to approve or declare judicial modification" of Section 1292(a)(1). *Baltimore Contractors v. Bodinger*, 348 U.S. 176, 181 (1955). "The Congress is in a position to weigh the competing interests of the dockets of the trial and appellate courts, to consider the practicability of savings in time and expense, and to give proper weight to the effect on litigants."[2] *Id.*

For these reasons, appellate policy is irrelevant as "to orders that explicitly grant, continue, modify, refuse or dissolve injunctions and thereby meet the plain terms of the statute." *CFTC v. Walsh*, 618 F.3d 218, 224 (2d Cir. 2010). It is only where an explicit right to appeal does not exist that such policy considerations may obtain. *Id.* The policy against piecemeal appeals, for example, counsels against exercise of appellate courts' extraordinary-writ power, which was all this Court held with respect to that policy in *United States v. Georgia Pac. Corp.*, 562 F.2d 294 (4th Cir. 1977), the sole case Plaintiffs cite (at 3) for their "piecemeal" policy argument. Further, courts have applied the policy to reject enlarged interpretations of Section 1292(a). *See, e.g.*, *Gardner*,

[2] The specific holding of *Baltimore Contractors* was that an order refusing to stay a district-court action is appealable under Section 1292(a)(1). 348 U.S. at 184. Even though the doctrinal basis for this holding was overturned in *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 280-88 (1988), the proposition that Congress, not the courts, decide the scope of the federal policy against piecemeal appeals remains indisputable. *See Gardner*, 437 U.S. at 480.

437 U.S. at 481-82. But to appeal from an order plainly within the scope of Section 1292(a)(1), a litigant need not make any type of policy showing. Charles A. Wright, et al., Fed. Prac. & Proc., Juris. § 3924 note 3 and surrounding text (3d ed.).

A doctrine permitting an Article III court, in its discretion, to deny review of a case brought as a matter of right is called an *abstention* doctrine, and a motions panel of this Court lacks authority to craft a new one incompatible with the statutory scheme. Denying recourse to Section 1292 solely because Section 1291 is available and is arguably more expedient is not equitable "gap-filling," but rather "legislation-overriding." *See Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 680-81 (2014). Because Congress already gave the *appellant* the choice of when to appeal, ordering the appellant to make a different choice is not a discretionary option. Plaintiffs' motion is the mirror image of this Court's *Clark* decision, which found "utterly without merit" the contention that an appellant waived a challenge to an interlocutory injunction by awaiting final judgment to appeal. 924 F.2d at 553. It is equally without merit for Plaintiffs to demand that Defendants be forced to waive the challenge to the interlocutory injunction and await final judgment.

And the results of this doctrine would be staggering. Appellate courts, for example, entertain innumerable preliminary-injunction appeals every year, and adopting Plaintiffs' position would invite, in every one, a motion to stay pending final judgment. After all, one might reasonably contest the expediency of letting a preliminary-injunction loser seek appellate review on the *likelihood* of success

while the same case proceeds in the district court towards adjudicating *actual* success. Given the incredible advantage appellees would reap in obtaining effective dismissals, a colorable motion for abeyance could and would be tendered in every case. What standards would apply? What would ensure that different motions panels, who often do not explain their rulings, issue consistent decisions across cases? What recourse would disappointed appellants, whose Section 1292(a)(1) appeals were effectively dismissed under a novel abstention doctrine, have to further review?

None of this has been a problem to date because courts "normally assume[], without extensive discussion, that appeals from preliminary injunctions are appeals as of right pursuant to section 1292(a)(1)." *Bayshore Assocs.*, 934 F.2d at 1395. That is all the more true here, where the injunction is final, and the district court will say nothing more of the merits. Section 1292(a), and its forerunners, have long been recognized to give appellate courts "the power of examining the merits of the case, and, upon deciding them in favor of the defendant, of dismissing the bill, and thus saving to both parties the needless expense of a further prosecution of the suit." *Smith v. Vulcan Iron Works*, 165 U.S. 518, 524 (1897). That choice of Congress may not be disregarded.

b. Plaintiffs cite no case where an appeals court stayed an appeal from an injunction simply to await final judgment in the same case. Plaintiffs' cases on discretion "to hold cases in abeyance," Mot. 2, have nothing to do with their enigmatic position. *Landis v. N. Am. Co.*, 299 U.S. 248 (1936), considered the rare class of cases where "a litigant in one cause [may] be compelled to stand

aside while a litigant in another settles the rule of law that will define the rights of both." *Id.* at 255. Here, Plaintiffs are not asking this Court to stay the case to await disposition of a thorny legal issue about to be decided in another controlling case. Plaintiffs' other authority, *Maryland v. Universal Elections, Inc.*, 729 F.3d 370 (4th Cir. 2013), held merely that a district court did not abuse its discretion in declining "to stay the proceedings pending resolution of partially parallel criminal proceedings." *Id.* at 379. Those cases provide studies in contrast, since holding cases in abeyance in those circumstances does not categorically eliminate a statutory right.

Meanwhile, Plaintiffs' discussion (at 3-4) of *Wright v. Sumter County Board of Elections & Registration*, 979 F.3d 1282 (11th Cir. 2020), provides a study in misdirection. It is misleading for Plaintiffs to say "the Eleventh Circuit declined to reach the County Board's merits appeal of liability until after the district court had completed its remedial proceedings." Mot. 3. The Eleventh Circuit in *Wright* did not stay the Georgia county's appeal from an injunction merely to await final judgment. The *opposite* happened: the district court stayed remedial proceedings pending the interlocutory appeal.[3] 979 F.3d at 1298. Subsequently, because of imminent elections, and because it was unclear how to proceed due to the district court's injunction against the election scheme to be used in those

[3] The district court's reason for doing so, that it "concluded it was without power to draw a new map" due to the notice of appeal, 979 F.3d at 1298, was for factual reasons that no party contends are applicable here. To the contrary, Plaintiffs are actively pressing the remedial phase forward below, and Defendants do not contend there is a jurisdictional problem with their doing so.

elections, the Eleventh Circuit issued successive limited-purpose remands to permit the district court to issue orders addressing those elections, which included remedial orders. *Id.* at 1298-99.

That train of events and rulings in no way supports Plaintiffs' position that "[c]ombining the merits and the remedy issues into a single appeal makes particular sense," Mot. 3—or shows why Plaintiffs' freewheeling notions of "sense" trump the governing acts of Congress. *Wright* did not hold a Section 1292(a) appeal can be combined with a future Section 1291 out of case-management discretion. It relied on duly promulgated rules that Plaintiffs do not invoke. Nor could they, when the election issues that drove the *Wright* motions rulings do not exist now. Plaintiffs are the first to tell the Court that "[t]he next election for the Virginia Beach City Council is not until November 2022." Mot. 1.

c. Plaintiffs fare no better in contending that "proceeding in this piecemeal liability appeal now will prejudice Appellees' ability to complete the record…." Mot. 4. If Plaintiffs had evidence supporting liability, they should have presented it at trial. Their failure to do so is not this Court's problem and provides no basis to deprive Defendants of their right of appeal.

Endorsing this logic would blow open the floodgates of motions to thwart Section 1292(a)(1) appeals, as any litigant can assert some tactical advantage to an indefinite stay, such as a desire at a second bite at the apple of presenting evidence or even the desire simply to frustrate the other side. Any permissible policy considerations cut decisively against that doctrine, as litigants obviously

should be incentivized to present their case completely the first time and not to request case-management orders on the basis of admitted gamesmanship.

Plaintiffs' contention that their improvised abstention doctrine should apply "in a Section 2 case" because "'inquiries into remedy and liability cannot be separated' in Section 2 cases," Mot. 3 (citation omitted), is not materially different from any argument that would be available in any case. Any preliminary-injunction appellee, for instance, could as easily contend that evidence at the merits stage will shed light on (if not obviate) the preliminary-injunction issues, which overlap. What Plaintiffs miss, however, is that it was their burden at trial to establish that a viable remedy can be fashioned, *Hall v. Virginia*, 385 F.3d 421, 428-29 (4th Cir. 2004), just as the burdens at the preliminary-inunction stage must be met at *that* time, not at some later time. That is the holding of *Abbott v. Perez*, 138 S. Ct. 2305 (2018), which found that Section 2 plaintiffs had failed to establish an adequate Section 2 remedy *at the liability phase* and had no problem reversing an injunction without permitting those plaintiffs to attempt to supplement their case at a remedial phase (which became unnecessary). *See id.* at 2331–34. *Abbott* implicitly rejects the notion that Section 2 plaintiffs are entitled to two shots at proving their case.[4]

[4] The Court has repeatedly entertained appeals from injunctions in redistricting cases, even as remedial phases progressed. *See Va. House of Delegates v. Bethune-Hill*, 139 S. Ct. 1945, 1950 & n.1 (2019) (describing how remedial phase advanced as the Supreme Court entertained an appeal from injunction); *North Carolina v. Covington*, 137 S. Ct. 2211 (2017) (adjudication of liability on appeal from injunction); *North Carolina v. Covington*, 137 S. Ct. 1624 (2017)

There is, in short, no prejudice to Plaintiffs in not being given a mulligan. Again, the *Wright* decision does not provide otherwise. Although it ultimately found evidence and findings at the remedial phase relevant to the predicate liability questions, *Wright* was a "peculiar" and "unusual" case. 979 F.3d at 1302-03. The court there held that it would not "shut [its] eyes" to evidence and findings adduced at the remedial phase during the limited-purpose remands issued for reasons *other* than revisiting liability. *Id.* at 1303. This is similar to the doctrine that, if the merits of a case *happen* to outpace the preliminary-injunction appeal, those subsequent events will overtake the preliminary-injunction appeal. It is completely different to hold that, in every Section 2 case (or every preliminary-injunction case), an appellee is entitled to short-circuit the interlocutory-injunction appeal by forcing the appellant to await further record developments *en route* to final judgment.

Another point of distinction between this case and *Wright* is that Plaintiffs' failing under Section 2 is of an altogether different species compared with the alleged failing in *Wright*. In this case, Plaintiffs were unable even to raise the valid issue of a future remedy because the census results necessary to do so did not exist at trial and will not be issued until August or September 2021. *See* Appellants' Br. 11, 21-22. Because Plaintiffs were required to establish Article III jurisdiction "in the same way as any other matter on which the plaintiff bears

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(adjudication of remedial phase, which proceeded after liability determination); *North Carolina v. Covington*, 138 S. Ct. 2548 (2018) (same).

the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation," *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992), they cannot credibly contend that a failing at trial could be made up later.

2. Any Discretion This Court May Have Cannot Be Exercised To Stay This Case

Even if the Court were inclined to fashion a new abstention doctrine, this would be the wrong case in which to apply it. This appeal should be sped up, not slowed down. This appeal involves "[c]ourt orders affecting elections," which "can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). The sensitivity surrounding elections is so pronounced 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) (citing multiple examples); *see also Reynolds v. Sims*, 377 U.S. 533, 585 (1964).

Plaintiffs' advice to procrastinate in deciding liability is backwards. The Court should resolve this appeal promptly, well in advance of the election cycle, since a ruling too late could throw Virginia Beach elections into tumult. As shown below, Plaintiffs' request for a stay is virtually certain to achieve that result, whether they know it or not.

a. Plaintiffs' suggestion that this Court can sit on its hands until the last minute is plain bad advice. Such a ruling would be precisely the type of ruling the Supreme Court warned against in *Purcell*. The resulting confusion

would be difficult to overstate. Plaintiffs, for instance, insist that "federal courts are empowered to alter the candidate filing deadline," Mot. 8 n.4, but this assertion conveniently assumes Plaintiffs will prevail on appeal. They neglect to inform the Court that if Defendants win, the federal judiciary would have no hook to justify *any* involvement in Virginia Beach elections. That being so, the injunction would dissolve, and the City would revert by operation of law to the default state-promulgated election scheme—imposed by the Virginia General Assembly—including all deadlines, which the City could not then alter. But the current districts would be malapportioned, and the City would be thrown into a requirement to redistrict its Council's districts.[5] Plaintiffs' suggestion that the Court wait until the last possible moment means these events would occur as campaigning is commencing. That chaos, of course, would benefit well-funded campaigns equipped to respond, including of incumbents and members of the white majority, which Plaintiffs contend enjoys socioeconomic advantages over the minority communities. Plaintiffs are, in other words, brazenly asking this Court to threaten electoral risk to the very communities they purport to benefit from their advocacy.

b. Plaintiffs also neglect to inform the Court that these problems infected the *Wright* appeal, which they offer as a model of appellate case

[5] Va. Const. art. VII, § 5; Charter, City of Va. Beach, §3.01(B); Va. Code § 24.2-304.1(C).

management. *Wright* is a model in how *not* to manage an election-related appeal. Plaintiffs' reliance on it cuts decisively against their motion.

In *Wright*, as described above, various motions panels—consisting of different judges each time, not attuned to the nuances of the case—issued limited-purpose remands out of, no doubt, the best intentions to manage election issues. But that process delayed the appeal *by years*. The notice of appeal from the injunction was filed in March 2018, and the appeal was not argued until September 2020. *See Wright v. Sumter Cty. Bd. of Elections & Registration*, No. 18-11510 (11th Cir.), docket entries dated 04/12/2018 & 09/23/2020. This was so even though, after the limited-purpose remands ended, the Court granted the appellant's motion to expedite argument and decision. *See id.* at docket entry dated 4/30/2020. In the process, one election was completely prevented from occurring, denying the minority community any right to vote in the name of vindicating that very right.

And the September 2020 argument occurred less than two months before another election. As a result, questions from the judges—who were not on the motions panels—focused on how a ruling would impact the upcoming elections and what practical result would occur. *See* Oral Argument at 19:00-21:12, *Wright*, No. 18-11510.[6] By that time, ballots had already gone out, and the course

[6]https://www.ca11.uscourts.gov/oral-argument-recordings?title=18-11510&field_oar_case_name_value=&field_oral_argument_date_value%5Bvalue%5D%5Byear%5D=&field_oral_argument_date_value%5Bvalue%5D%5Bmonth%5D=.

of argument indicated that a ruling in the county's favor would have likely triggered a complex and burdensome special-elections process under Georgia law. *Id.* at 20:00-21:00 (appellant's counsel); *id.* at 58:00-59:05 (appellee's counsel). It is no wonder, then, that the merits panel opined that the motions panels "could have denied [the plaintiff's] motion to remand for remedial proceedings and instead decided this case on the limited record before us at that time." 979 F.3d at 1302. This would have been by far the wiser course of action.

Plaintiffs' bald assertion that a stay "would not harm Appellants," Mot. 8, is therefore undermined by *Wright*. Notably, the final limited-purpose remand in *Wright* occurred on a more generous timeline compared to what Plaintiffs request here, as the order to remand was issued on May 16, 2019, and the next election was in November 2020. *Wright*, No. 18-11510, docket entry of 05/16/2019. The remedial phase lasted until February 2020, and it took the Eleventh Circuit until September 2020 to hold argument *in an expedited appeal*. Aligned with this case, that experience establishes that an order indefinitely staying this case in June 2021 could easily result in the case not being argued until October or November 2022—even after the next election.

Plaintiffs' invocation of *Wright* renders them incapable of credibly representing to this Court that any different timeline would result here. Their assertion that, with an indefinite stay, this case will be resolved "ten-and-a-half months from now" comes with no citation or explanation. Mot. 8. They appear to have pulled that estimated decision date out of a hat, and it makes no sense when the case Plaintiffs proffer as a model did not progress on that timeframe.

Indeed, a recent study shows that the median length of an appeal in this Circuit exceeds six months.[7] Even assuming this case would otherwise fall at the median, and not on the high end, holding it in abeyance for an unknown period of months—even four of five months—would easily push the final decision past Plaintiffs' unsupported ten-month estimate.

All of this shows either that Plaintiffs are ignorant of the pressures on appeal timelines and elections, or else that Plaintiffs' conscious object *is* to harm Defendants. The Court need not answer that question to see that Plaintiffs' motion has no merit.

c. And there are additional pressures here that were not present in *Wright*. As Plaintiffs concede, the legal terrain has changed in Virginia, due to recent new statutes that have already ended the at-large scheme Plaintiffs challenge in this case. This means that the City has much work to do before the next election, calling for a decision from this Court before December 31, 2021. Once again, Plaintiffs' discussion of this topic (at 6-8) reflects either ignorance or gamesmanship.

As an initial matter, the fact that the General Assembly has repealed the challenged at-large system renders this case moot, meaning the district court lacks jurisdiction to issue a remedy. Appellants' Br. 11, 15-18. This Court would

[7] U.S. Courts of Appeals—Median Time Intervals in Months for Cases Terminated on the Merits, U.S. Courts, https://www.uscourts.gov/sites/default/files/data_tables/jb_b4_0930.2020.pdf.

be justified in ending the case now and ordering the district court to dismiss the case, rather than extend it.

In any event, the City's obligation to change its redistricting scheme only underscores that Plaintiffs' timeline for a ruling from this Court is wrong. April 2022 is not the date by which a ruling is needed; a ruling is needed by December 2021.[8] Plaintiffs tender the bizarre argument that, because state law compels the City to "abandon the existing at-large system" and create a new one, "proceeding with this piecemeal appeal would be particularly wasteful of the Court's and the parties' time and resources." Mot. 6-8. This is, again, exactly backwards. If Defendants are right on any of the issues raised in this appeal, the redistricting must occur through Virginia's legislative channels. If Plaintiffs prevail on appeal, however, a federal-court-overseen process will override, or at least supervise, the state legislative channels. It is not a "waste of time" for the litigants—and the general public—to learn which channel is the right one. Quite the opposite, it would be a waste of time for a *judicial* redistricting to occur only to find out in a ruling from this Court that a *legislative* redistricting should have occurred instead.

It also would be incredibly problematic for the City to learn too late that a legislative redistricting is essential. As described, for the City to prevail on appeal would automatically end federal-court intrusion and retrigger all state-law requirements without qualification. Those include provisions of the Virginia

[8] Va. Const. art. VII, § 5 (requiring redistricting in the year 2021).

Constitution and the Virginia Code requiring redistricting of localities to occur before January 1, 2022. *See* Va. Const. art. VII, § 5; Va. Code § 24.2-304.1. If the Court were to issue a ruling in the City's favor by April 15, 2022, as Plaintiffs advise, the City would automatically be in violation of the Commonwealth's Constitution, leading to an unknown quagmire and likely more litigation.

d. Equally meritless is Plaintiffs' remarkable contention that, because the City has not moved for a *stay* of the injunction pending appeal, it has effectively conceded that no harm would occur from an *abeyance*. That is a *non-sequitur*.

To begin, the argument is but a slight variation on the repeatedly rejected argument that, to prosecute a Section 1292(a)(1) appeal explicitly concerning an injunction, a litigant must show irreparable harm, or something similar. *See Paige v. State of California*, 102 F.3d 1035, 1038 (9th Cir. 1996); *FDIC v. Bell*, 106 F.3d 258, 261-262 (8th Cir. 1997); *Cross Medical Products, Inc. v. Medtronic Sofamor Danek, Inc.*, 424 F.3d 1293, 1300-1301 (Fed. Cir. 2005); *Westar Energy, Inc. v. Lake*, 552 F.3d 1215, 1223 (10th Cir. 2009); *CFTC v. Walsh*, 618 F.3d 218, 223-225 (2d Cir. 2010); *Morgenstern v. Wilson*, 29 F.3d 1291, 1294-1295 (8th Cir. 1994).

Moreover, for the City to doubt that it can *currently* prove irreparable harm from the district court's injunction is not remotely to concede that "the City will not face any hardship by this Court holding the appeal on liability issues in *abeyance*…." Mot. 10 (emphasis added). Harm from the injunction and harm from indefinite abeyance are completely different animals. Just because a

student need not pull an all-night study session for an exam three weeks away does not remotely mean it is a good idea for her to procrastinate—and hold studying in abeyance—so that she *will* have to pull an all-nighter once the exam date arrives.

So too here: just because an election is not, today, breathing down the City's neck does not even arguably suggest the City would not be harmed by indefinitely delaying this case so that the appeal *will* be conducted in circumstances like *Wright*—Plaintiffs' model redistricting case—where irreparable harm would have resulted had the appeal proven meritorious. Yet again, Plaintiffs' own arguments only prove that this Court should move promptly to resolve the appeal *before* irreparable harm to anyone ensues and not wait until *after* it ensues and someone is entitled to a stay.

Indeed, the only thing the Court can glean from Plaintiffs' lengthy recitation of the City's beliefs and legal strategy is that the City is being careful not to burden this Court with motions without first ensuring that they are compelling and worthy of this Court's time and careful consideration. Plaintiffs, unfortunately, have a different notion of appellate practice. To rule in Plaintiffs' favor would punish the City for not bringing a low-odds stay motion and reward Plaintiffs with a new abstention doctrine incentivizing every last Section 1292(a) appellee to make an identical motion. Plaintiffs' motion should be denied.

B. The Court Should Advance the Briefing Schedule and Expedite Argument and Decision

The Court should also advance the briefing schedule and expedite argument and the decision. Defendants and their counsel have worked diligently to prosecute this appeal and, on Friday, June 11, 2021, filed their opening appellant brief eleven days before the due date. Defendants were, in fact, prepared to file earlier, but Plaintiffs' counsel delayed serving their joint-appendix designations, representing to counsel for Defendants that Plaintiffs' legal team was busy with an unrelated lawsuit in Washington state preventing more prompt cooperation. In fact, soon after making that very representation, Plaintiffs filed the motion now burdening this Court's (and the attorneys') time. Go figure.

The briefing order governing this appeal addresses a case like this, providing: "If a brief is filed in advance of its due date, the filer may request a corresponding advancement of the due date for the next brief by filing a motion to amend the briefing schedule." ECF No. 8 at 1. Defendants hereby invoke this provision. As described above, it is in the parties' and public interest to achieve a prompt resolution of this appeal. As Defendants' appellant brief shows, there are both jurisdictional and merits defects plaguing the district court's liability ruling and permanent injunctions. The case is moot, because the at-large system has been repealed, and it remains unknown whether Plaintiffs' coalitional theory under Section 2 of the Voting Rights Act is even a permissible use of that statute. The circuits are split on that question. *See* Appellants' Br. at 1, 33-34. Defendants

therefore have compelling legal positions. And, as described above, the needs of this case overwhelmingly cut in favor of prompt resolution of case issues, to ensure a final ruling by the end of 2021. The Court need look no further than *Wright* to see why this is so.

In fairness and to achieve the ends of justice, the Court should amend the briefing schedule to make Plaintiffs' brief due on or before July 12, 2021, an appropriately adjusted deadline tailored to the amount of time that Defendants filed their briefing early. Additionally, the Court should, for the same reasons, expedite argument and decision. The briefing can be complete as of early August, and the parties should have no difficulty presenting argument as soon thereafter as is practicable for the Court. Utilizing that time frame will allow the merits panel to fully examine the issues and render a decision before the end of 2021. As discussed, the ruling will decide whether a judicial redistricting is authorized under the Voting Rights Act or, rather, whether Virginia's legislative bodies will be responsible to redistrict. The City and its 400,000+ residents need to know the answer as soon as possible.

CONCLUSION

Plaintiffs' motion should be denied. Defendants' motion should be granted.

Date: June 14, 2021

Respectfully submitted,

/s/ Katherine L. McKnight

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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 5,196 words and has been prepared in a proportionally spaced typeface using Calisto MT in 14-point size.

DATE: June 14, 2021

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CERTIFICATE OF SERVICE

I certify that on June 14, 2021, the foregoing document was served on all parties or their counsel of record through the CM/ECF system.

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