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, Norfolk Division

APPELLEES' REPLY IN SUPPORT OF MOTION TO SUSPEND BRIEFING AND HOLD CASE IN ABEYANCE PENDING REMEDIAL PROCEEDINGS IN DISTRICT COURT

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INTRODUCTION

In two weeks, the parties will submit remedial proposals and special master suggestions to the district court. After the district court enters its remedial order, the record in this case will be complete. The Court should hold this appeal in abeyance until that time. This approach would consolidate all issues in a single appeal, ensure a complete appellate record, and allow substantial time for a decision prior to the November 2022 election.

This is precisely the approach that other circuits have endorsed, acknowledging that Section 2 lawsuits are unique among federal litigation in two respects: (1) they generally involve bifurcated liability and remedy determinations, yet (2) the nature of Section 2 claims makes the evidence and analysis from both proceedings relevant to the question of liability, and the appropriate appellate record is the complete record of both proceedings. *See, e.g.*, *Wright v. Sumter Cty. Bd. of Elections & Registration*, 979 F.3d 1282, 1302-03 (11th Cir. 2020) (holding that proper Section 2 appellate record is the "entire record" because "our inquiries into remedy and liability cannot be separated" and are "inextricably bound up" (internal quotation marks omitted)); *E. Jefferson Coal. for Leadership & Dev. v. Parish of Jefferson*, 926 F.2d 487, 492 (5th Cir. 1991) (holding that evidence from remedial phase may support liability finding because "the 'liability' phase and the 'remedy' phase of Voting Rights Act cases frequently merge").

Defendants respond to this reasonable request—grounded in precedent, common sense, and this Court's sound discretion—with hyperbole. Defendants accuse Plaintiffs of inviting "poison" and "tumult" to an election seventeen months in the future. Opp. 2, 11. They label Plaintiffs' proposal "freewheeling," *id.* at 3, and "enigmatic," *id.* at 6, and say a consolidated appeal would yield "staggering" results, *id.* at 5, which will "blow open the floodgates," *id.* at 8, disrupting the course of "every" future appeal, *id*. They accuse Plaintiffs of proffering "a study in misdirection," *id.* at 7, and advancing "admitted gamesmanship," *id.* at 9, whereby "Plaintiffs' conscious object *is* to harm Defendants," *id.* at 15 (emphasis in original). Alternatively, they contend Plaintiffs are "ignorant," *id.* at 15, and "brazenly ask[] this Court to threaten electoral risk to the very communities they purport to benefit from their advocacy." *Id.* at 12. These dangers are "difficult to overstate," *id*. at 12, Defendants say.

The Court should disregard this hyperbole, follow the precedent of the Fifth and Eleventh Circuits, and permit the district court to complete its work so that a consolidated appeal with a complete appellate record can proceed—well in advance of the November 2022 election.

ARGUMENT

I. This Court Has Authority To Hold this Appeal in Abeyance.

This Court has authority to hold this appeal in abeyance and consolidate all appeals. This authority derives from the Court's inherent power "to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936); *see also Am. Life Ins. Co. v. Stewart*, 300 U.S. 203, 215 (1937) ("A court has control over its own docket. In the exercise of a sound discretion it may hold one lawsuit in abeyance to abide the outcome of another, especially where the parties and the issues are the same.") (internal citation omitted). Defendants' contrary arguments are meritless.

First, Defendants contend that this Court lacks that authority because 28 U.S.C. § 1292(a)(1) authorized them to file this appeal. Opp. 2-6. This argument is a *non sequitur*. With few exceptions, *all* appeals are lodged pursuant to a statute authorizing appellate jurisdiction. Defendants cite no authority—nor does any exist—excepting § 1292(a)(1) appeals from this Court's inherent power to control its docket with abeyances and consolidations. Defendants contend that *Landis*'s ruling was limited to "the rare class of cases" where one litigant is ordered to stand aside while another litigates the issue. Opp. 6-7. But this inverts *Landis*'s holding. Indeed, the Supreme Court subsequently cited *Landis* to explain that courts' inherent power to control their dockets applies "*especially* where the parties and the issues

are the same." *Stewart*, 300 U.S. at 215 (emphasis added). Here, the parties are identical, and the issues—liability and remedy—are "inextricably bound up" and "cannot be separated." *Wright*, 979 F.3d at 1302-03.

Second, Defendants contend that an abeyance would serve as an "outright dismissal" of their appeal. Opp. 3. Not so. An abeyance would merely postpone this Court's consideration of Defendants' liability appeal on an incomplete record. *See Wright*, 979 F.3d at 1302; *infra* at 5-6. Defendants' characterization of an abeyance as a "novel abstention doctrine," Opp. 6, is therefore mistaken. There is nothing "novel" about this Court's authority to control its docket. *See Landis*, 299 U.S. at 254.

Third, Defendants contend that an abeyance will result in a parade of horribles—causing "every" appellee in "every" future appeal from a preliminary injunction to seek an abeyance pending final judgment. Opp. 5-6. But this is not an appeal from a preliminary injunction, nor does this case bear any resemblance to one. Instead, as the Fifth and Eleventh Circuits have explained, this Section 2 appeal has characteristics uncommon in most litigation—bifurcated liability and remedy proceedings that are nevertheless "merge[d]," *Parish of Jefferson*, 926 F.2d at 492, with "remedial proceedings [that] bear directly on and are inextricably bound up with [the district court's] liability findings" such that this Court's "inquiries into remedy and liability cannot be separated," *Wright*, 979 F.3d at 1302-03 (internal

quotation marks omitted). Defendants' contention that an abeyance here will have "staggering" results, Opp. 5, misses the mark.

II. This Court Should Reject Defendants' Invitation to Depart from the Approach of the Fifth and Eleventh Circuits.

The Court should reject Defendants' invitation to depart from the approach of its sister circuits. Defendants object to how the Eleventh Circuit handled the *Wright* appeal, characterizing it as "a model in how *not* to manage an election-related appeal." Opp. 13 (emphasis in original). They are mistaken.

First, Defendants contend that *Wright* "in no way supports" Plaintiffs' motion for an abeyance because the Eleventh Circuit twice remanded the case to permit the district court to fashion a remedy. Opp. 7-8. But a remand for remedial proceedings is entirely consistent with Appellee's motion to hold this appeal in abeyance. Moreover, the Eleventh Circuit did not rely solely on the procedural posture of the case in holding that the appropriate appellate record should include both liability and remedy proceedings. Rather, the court of appeals reasoned that "inquiries into remedy and liability cannot be separated." *Wright*, 979 F.3d at 1302 (internal quotation marks omitted). "Thus, a district court's remedial proceedings bear directly on and are inextricably bound up in its liability findings." *Id.* at 1302-03.

The Eleventh Circuit's holding in this regard is not limited to the procedural posture of the case; it is premised on the nature of every Section 2 claim.[1]

Second, Defendants contend that *Wright*'s holding would disrupt "any case" involving a preliminary injunction. Opp. 9. As noted earlier, this is not an appeal from a preliminary injunction. And, in any event, bifurcated Section 2 decisions, with their inseparable liability and remedy phases, are not the same as run-of-the-mill preliminary injunctions. The evidence adduced in the remedial phase will necessarily bear on the *Gingles* preconditions—issues on which Defendants premise this appeal—and this Court should not "cover[] one of [its] eyes from the entire record." *Wright*. 979 F.3d at 1303.

Third, Defendants suggest that the Eleventh Circuit's approach was "implicitly reject[ed]." Opp. 9, by *Abbott v. Perez*, 138 S. Ct. 2305 (2018). But this is plainly not the case. In *Abbott*, the plaintiffs' expert had admitted in the liability phase that a second functioning Section 2 district could not be drawn as a remedy. *Id.* at 2332-33. With a remedy admittedly impossible, the Court held that there was no Section 2 liability, making remedial proceedings unnecessary. *Id.* In sharp

[1] Defendants also incorrectly contend that the Eleventh Circuit was unconcerned with having a complete appellate record when it remanded *Wright*. The court expressly ordered the district court to "return the record" of the remedial proceedings to the Eleventh Circuit. *See* Order at 2, *Wright*, No. 18-11510 (11th Cir. Aug. 9, 2018).

contrast, *Defendants* here admit that three remedial districts can be drawn. *See infra* Part III.[2]

Fourth, Defendants contend that *Wright* is inapposite because they say the district court lacked jurisdiction in this case because the 2020 Census data has not yet been released. Opp. 10. Defendants offer no explanation or authority for how this affects Article III jurisdiction, or why the official census data and population estimates relied upon below somehow stripped the district court of jurisdiction. Indeed, Defendants' counsel publicly advised the City Council that "our expert has agreed with us that you can draw final maps off of the ACS latest series of data and only have to do technical population and precinct boundary adjustments once you have census data." Ex. A (May 11, 2021 Council Mtg. Tr.) at 24.

Fifth, Defendants contend that this Court should split from the Eleventh Circuit's precedent because the *Wright* appeal was lengthy. Opp. 13-14. But that timeline was a result of the election schedule and the necessity for Rule 12.1 indicative rulings in that case. Those concerns are not present here. The district court's remedial proceeding begins in *two weeks*, and the next election is not until November 2022. Yet Defendants contend that "Plaintiffs' invocation of *Wright* renders them incapable of credibly representing to this Court that any different

[2] Defendants note that the Supreme Court "has repeatedly entertained" separate merits and remedy appeals, Opp. 9 n.4, but cite only racial gerrymandering cases, which do not involve the same intertwined liability/remedy issue as Section 2 cases.

timeline would result here." Opp. 14. The district court's remedial timeline in this case speaks for itself. There is ample time for a complete record to be developed for this Court's consideration.

Finally, Defendants contend that Plaintiffs have "pulled . . . out of a hat" their belief that this Court could resolve a consolidated appeal in time for the November 2022 election. Opp. 14. Defendants' argument is curious, given their request pages later that this Court hurriedly decide the case within four months of (expedited) oral argument. Opp. 20.

III. Defendants' Announced Intent to Abandon Their Electoral System also Justifies an Abeyance.

Defendants have publicly announced that they intend, regardless of the outcome of this appeal, to abandon their existing electoral system to comply with new state-law obligations protective of minority voting rights. In particular, the new Virginia Voting Rights Act ("VVRA"), which the Governor approved *after* the district court entered its injunction in this case, now governs redistricting in Virginia and imposes important obligations beyond those included in Section 2 of the federal Voting Rights Act. How the City seeks to meet those obligations will undoubtedly inform this Court's disposition of this appeal, and an abeyance—already warranted for the reasons discussed above—is further justified.

Defendants have publicly acknowledged that the VVRA will independently require them to adopt a new map that is *more* protective of minorities than Section

2. The deputy city attorney has advised the City Council that the VVRA has a "more relaxed standard for liability," does not require proof of "the first *Gingles* precondition," Ex. A at 40, protects the "ability [of a minority group] to influence the outcome of an election," *id.* at 14, and thus Virginia Beach minorities "will need not to rely on a coalition of minorities to satisfy the [VVRA's] requirements," *id.* at 40. The VVRA, the deputy city attorney advised, "takes away a number of the defenses we have asserted in the federal court action." *Id.* at 15. Moreover, the VVRA requires Defendants to submit the new map they adopt for preclearance review by the Virginia Attorney General, *see* Va. Code § 24.2-129; *id.* § 24.2-130(A); *id.* § 24.2-130(B). The map must be adopted this year. *See* Va. Const. art. VII, § 5.

Indeed, Defendants have publicly contemplated that submitting the district court's Section 2 remedial plan to the Virginia Attorney General will earn them preclearance, on the view that the federal court's determination that its remedy complies with Section 2 will persuade the Virginia Attorney General that it likewise complies with the broader VVRA. *See, e.g.*, Ex. A at 64 (explaining that a Section 2 remedy approved by the federal court "would be defensible at the State level").[3]

[3] This was before Defendants abruptly withdrew from the parties' effort to settle the case, but the point remains that Defendants must adopt and submit to the Virginia Attorney General for preclearance a map compliant with the VVRA.

However Defendants proceed, it will bear on this Court's consideration and disposition of this appeal, a fact that warrants careful deliberation by this Court, not haste.[4]

Defendants' VVRA obligations also defeat their contention that this Court must hurry to issue a decision on appeal before the end of December. Opp. 16. Defendants contend that "if Defendants are right on any of the issues raised in this appeal, the redistricting must occur through Virginia's legislative channels," and not via the district court's remedial plan. *Id.*[5] As a result, Defendants say this Court must issue a decision by December of this year, lest the City violate its obligation to adopt new districts in 2021. *Id.*; *see* Va. Const. art. VII, § 5. But as Defendants have publicly acknowledged, the VVRA obligates them to adopt and submit for preclearance a new map this year independent of this case. *See, e.g.*, Ex. A at 15 & 64. So, unless Defendants now intend to violate their independent VVRA obligations, the "unknown quagmire" about which they worry—being caught unaware mid-2021 with no map, Opp. 17—cannot arise.

Finally, Defendants' contention that a different state law, HB 2198, mooted Plaintiffs' case is wrong. That law merely converted seven of the City's ten at-large

[4] Defendants' response elided the VVRA entirely. Opp. 15-16.

[5] This is inaccurate; Defendants raise several issues on appeal that, even if successful, would at most narrow the remedy.

seats to ward-based seats. It did not alter *how* the lines were drawn, nor did it alter the remaining at-large seats. None of the existing residency districts are majority-minority, and so converting any of them to single-member election districts does not remedy—or moot—Plaintiffs' Section 2 claim.

Defendants have publicly admitted as much. The deputy city attorney said about HB 2198: "The seven that you already have as residence districts are now ward districts, and then it's done; it's accomplished its purpose and there's no further impact." *See* June 1, 2021 Informal Council Mt'g at 43:22-43:41, https://www.vbgov.com/media/Pages/default.aspx. Likewise, Defendants acknowledge that a Section 2 remedy would require three majority-minority districts, a change HB 2198 did not effect. *Id.* at 21:37-23:24; *see also* City of Virginia Beach, https://www.vbgov.com/government/departments/communications-office/hot-topics/Pages/Holloway-vs-VaBeach.aspx (last visited June 16, 2021).

* * *

Precedent and common sense justify this Court exercising its discretion to hold this case in abeyance pending resolution of the remedial proceeding in the district court. Doing so will prevent, rather than cause, confusion,[6] and will permit

[6] Defendants' invocation of the *Purcell* principle seventeen months before an election, Opp. 11, rings hollow.

an consolidated appellate process to conclude well in advance of the November 2022 election.

CONCLUSION

For the foregoing reasons, Plaintiffs' motion for an abeyance should be granted.[7]

June 17, 2021

Respectfully submitted,

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[7] Defendants' contention that Plaintiffs "delayed serving their joint-appendix designations," Opp. 19, is peculiar. As Defendants agreed, Plaintiffs served their designations on their due date, June 9. *See* Fed. R. App. P. 30(b)(1).

CERTIFICATE OF COMPLIANCE

In accordance with Rules 27(d)(2)(C) of the Federal Rules of Appellate Procedure, the undersigned counsel for Appellees certifies that the foregoing is printed in 14 point typeface, in Times New Roman font, and, including footnotes, contains no more than 2,600 words. According to Microsoft Word, this reply contains 2,597 words.

/s/ Mark P. Gaber
Mark P. Gaber

Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2021, I electronically filed the foregoing motion with the Clerk of Court using the CM/ECF system, which will send notice of such filing to all counsel of record.

/s/ Mark P. Gaber
Mark P. Gaber

Counsel for Appellees

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EXHIBIT A

Excerpted Transcript of May 11, 2021 Virginia Beach City Council Workshop

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Transcription of

Virginia Beach City Council Workshop

May 11, 2021

seven seats. And this law is equally applicable to school boards.

The other massive change in Richmond at the General Assembly this last year was the Virginia Voting Rights Act. There are a number of significant changes that occur to election processes in the state of Virginia.

But particularly for our purposes today that law, in part, says that an at-large method of election including one that combines at-large elections with district- or ward-based elections shall not be imposed or applied in a manner that impairs the ability of members of a protected class to elect candidates of its choice or its ability to influence the outcome of an election.

So just by virtue of the passage of -- of that language, both sets of your at-large systems in -- in -- in terms of your -- your seven districts that have to become wards anyway and your three at-large non-mayor seats are subject to a future challenge where that at-large method of election can be said to impair the ability of members of a protected class to either elect candidates of its choice or even its ability to influence the outcome of an election.

So that is actually broader than the Federal

Voting Rights Act case and Federal Voting Rights Act legislation and takes away a number of the defenses that we have asserted in the federal court action.

It also, importantly, establishes a pre-clearance process with the state attorney general or an alternate path. But, essentially, there's an additional important step there that the -- the federal pre-clearance process is gone, but there's a new state pre-clearance process that has happened. And, again, this law is equally applicable to school boards.

So even without the Holloway case having ever been filed, our current system is changing for 2022 and would be changing. Seven residence districts become wards without further action from the General Assembly. Citizens will no longer be electing all 11 of their council members. And -- and that if -- if it's a 10 district ward system, for example, then you would be able to vote as a voter simply for your one ward member every four years and your mayor.

There are three at-large districts under our current system. Not residence at-large, but "at-large" at-large. And those are subject to a further challenge under the Voting Rights Act even if the City were to prevail in the case on appeal, even

bound by a 7-3-1 system using maps drawn using ACS data. I can tell you that ACS data is while -- while certainly not the same as the census, it is data that's relied upon by the federal government for, I think, 30 percent of its discretionary spending, hundreds of billions of dollars. And also our -- our finance department uses it for a number of -- of different purposes internally for -- for -- for budgeting and spending.

We like that the plaintiffs will be bound by a 7-3-1 map in July -- by July 15th because it helps solve the appellate timeline issue if this whole thing falls through.

The -- the plaintiffs have asserted and our expert has agreed with us that you can draw final maps off of the ACS latest series of data and only have to do technical population and precinct boundary adjustments once you have census data.

There is also the concept of how does -- how do our appellate rights fit into this settlement concept. What we would agree to do is that the City would stay its appeal through July 15th as the parties and the Court try to work through a settlement.

The stay of the appeal would be lifted on at least three events. One is if this body votes not to

Answer: If we were to prevail on appeal and either the Fourth Circuit or the Supreme Court, the plaintiffs or other similarly situated could file a new suit under the Voting Rights Act and could face an easier path to judgment because of the more relaxed standard for liability under the State act. Excuse me. A plaintiff need not prove what is referred to as the first Gingles precondition that minority group at issue is sufficiently large and geographically compact to constitute a majority in a single-member district. This likely means the plaintiffs in a state action will need not to rely on a coalition of minorities to satisfy the State's Voting Right Act requirements, unquote.

I go on to say it is not a -- this is my question to you: It is not a -- is it not a factual finding if the Supreme Court were to rule in favor by finding that for the purpose of finding a violation of Section 2 of the Voting Rights Act of 1965 as amended that the combination of minorities cannot be used to achieve minority status within the terms of the federal law, that the application of the State's Voting Rights Act would be constrained.

You answered: The State statute would not be directly constrained. A Virginia court may find a

impression from your comments that we don't really have any guarantee that -- that the State's not going to come in and change that. Is that correct?

MR. BOYNTON: Well, there are no guarantees in -- in the political world. But I would say that the pre-clearance issue at the AG's office ties into the at-large system.

And if you have, through the federal consent decree process, eliminated at-large districts and have only wards and super wards, that we -- we would think the system would -- would be defensible at the State level.

We're just saying that's another step that you have to go through under the -- the new law.

MR. JONES: But the State could come in or the State -- the legislature could still say, no, we want you to have 10 wards?

MR. BOYNTON: Well, the legislature could not override a federal consent decree, so I think you'd have some protection there.

The question is, mechanically, what does the pre-clearance process at the state level even look like, and I don't think they've thought that far ahead.

So we were just trying to identify that there's a

C E R T I F I C A T E

I, Robin L. Deal, Florida Professional Court Reporter and Transcriptionist, do hereby certify that I was authorized to and did listen to and transcribe the foregoing recorded proceedings and that the transcript is a true record to the best of my professional ability.

Dated this 26th day of May, 2021.

ROBIN L. DEAL