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' RESPONSE IN OPPOSITION TO MOTION TO EXPEDITE

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INTRODUCTION

This appeal is not an emergency. The City already sought a stay of the district court's injunction from this Court, contending that it was likely to succeed on the merits on appeal. This Court denied that request. The district court's injunction and remedial order is in full force and effect, and the City must take the necessary steps to implement it for the 2022 elections, regardless of its pending appeal. That is how the judicial process works. A losing party that fails to obtain a stay pending appeal must comply with the district court's judgment. Doing so does not risk the City having "no lawful redistricting plan in place" for the 2022 election, Mot. at 1, but rather ensures the City *will* have such a plan in place.

Apparently unhappy with the orderly judicial process, the City now demands that the entire appellate process—from the filing of its new appellants' brief to this Court's decision—occur in ***one month***—because it has to administer an election *eleven months from now.* The City's unprecedented request for a one-month appellate process should be denied. If this Court concludes that it should issue a decision prior to the November 2022 election, there is ample time for a reasonable appellate schedule pursuant to the Federal Rules of Appellate Procedure.

ARGUMENT

I. The City's Proposed One-Month Appellate Timeline Should Be Rejected.

The City's proposed one-month timeline for this appeal should be rejected. The district court ruled that Virginia Beach's system of at-large city council elections violates Section 2 of the Voting Rights Act by submerging the City's minority population—more than a third of the City's population—among the bloc-voting white majority. This is a quintessential Voting Rights Act violation. The district court remedied that violation with the quintessential relief for a Voting Rights Act violation: single-member districts with several that will afford the City's minority voters an equal opportunity to elect their candidates of choice.

The district court "ORDER[ED] the City of Virginia Beach to implement the plan immediately to cure its electoral deficiencies which are in violation of Section 2 of the Voting Rights Act." *See* Final Order. Having sought and failed to obtain a stay, the City is bound by the district court's order: it is effective immediately and governs the 2022 elections unless vacated or reversed. The City's warning of an "election-administration quagmire," Mot. at 1, is misplaced.

The remedial proceedings were robust. The Special Master—whom the City nominated—issued 84 pages of expert analysis across two reports. The district court has made additional factual findings based on the Special Masters' reports. The record in this case was already voluminous; it has grown more so in recent weeks

and months. The City has adopted a kitchen-sink approach to its appeal, which demands a full response from Appellees and full consideration by this Court.

Yet the City demands that the appellate proceedings be a sprint—with a faster schedule than matters of extreme national importance receive.[1] It wishes to file a new appellants' brief and proposes to provide Appellees just ***seven days*** to respond. It demands oral argument and a decision from this Court only weeks later. And it informs this Court it must issue its decision by February 1—***one month from start to finish***. There is no justification for this unreasonable, rushed process—one that would prejudice Appellees' ability to respond to the City's arguments, and would hamper this Court's ability to decide this appeal with care and attention.

The City contends that this sprint is necessary for it to determine how to proceed with the November 2022 election. Not so. The City has already filed—and lost—a motion for a stay in this Court in which it argued it was likely to prevail on the merits. It did not pursue that motion further in the Supreme Court. Like all other cases where a stay does not issue, the district court's injunction and remedial order are in effect now. The City has the answer it seeks: it must prepare to implement the November election pursuant to the district court's injunction and remedial order.

[1] This is notable, because the City made every effort to delay trial and adjudication of Plaintiffs' case when it was pending in the district court.

Moreover, the City contends that if it wins its appeal sometime after February but before the November election, it "will find itself with an election to administer and no lawful redistricting plan to utilize," because it says Virginia law (absent the district court's Section 2 liability finding) "requires the City to utilize seven single-member districts and three at-large districts." Mot. at 4. Not so. The City has publicly said *the opposite.* In City Council meetings, the City's attorney has explained that "an at-large system or an at-large component of an election system is prohibited under the state version of the Voting Rights Act." Doc. 11-2 at 23 (June 3, 2021). Moreover, the City's attorney advised that "the state version of the Voting Rights Act" (VVRA) is broader than Section 2: "[a] plaintiff need not prove what is referred to as the first *Gingles* precondition that [the] minority group at issue is sufficiently large and geographically compact to constitute a majority in a single-member district." Doc. 25-2 at 21. He continued, explaining "[t]his likely means the plaintiffs in a state action will need not to rely on a coalition of minorities to satisfy the State's Voting Rights Act requirements." *Id.* He advised that the VVRA "takes away a number of the defenses that we have asserted in the federal court action." Doc. 11-2 at 21.

In other words, the City has publicly acknowledged that the plan the district court ordered to remedy the federal Section 2 VRA violation *would now be required under Virginia law anyway.* Its contention that it would be left directionless with no

map should it prevail in this appeal—unless this Court jumps to warp and resolves this appeal in the next month—is contradicted by its own public statements.

Even if the Court determines that it is appropriate to resolve this appeal before the November 2022 election, it can do so without adopting the unreasonable schedule proposed by the City. The election is in eleven months, and the candidate filing deadline is June 21, 2022. There is no need for the briefing, argument, and decision to occur in one months' time, five-and-a-half months before the candidate filing deadline and ten months before the election. Nor would such a rushed process serve justice. The City's appeal presents issues of law and fact premised on a voluminous record, which deserves the parties' and the Court's full consideration.[2]

The City has repeatedly sought to rush this appeal, and has repeatedly been denied that request. This should be no different. This Court has set a deadline for Appellees' response brief of January 26, 2022. That is a reasonable—and necessary—amount of time for Appellees' to prepare their responsive brief. The City has now indicated it wishes to replace the appellant brief it already filed with a new one—though it has yet to do so. Appellees should be afforded the standard 30-day

[2] This appeal is already ahead of the schedule set in a prior case in which this Court was able to issue a decision prior to the November election. In *Cane v. Worcester Cty., Md.*, the district court issued its final judgment on a remedial plan in February 1995. 874 F. Supp. 695 (D. Md. 1995). The appellate briefing in this Court was mostly completed in May 1995 and this Court issued an opinion in June in time for a November 1995 election. *Cane v. Worcester Cty., Md.*, 59 F.3d 165 (4th Cir. 1995).

response period ordinarily allotted to analyze and respond to this new brief. *See* Fed. R. App. P. 31(a)(1). If the Court wishes to resolve the City's appeal prior to the November election, there is ample time for it to do so under the ordinary briefing calendar—even if the Court aims to issue its decision prior to the June 21, 2022 candidate filing deadline. But the City's effort to concoct an emergency warranting the Court to delay its other business and rush to judgment should be rejected.

CONCLUSION

The City offers no legitimate justification for the unreasonably expedited appeal it seeks. Given the voluminous record and important legal questions presented by the case, this Court should allow ample time to carefully consider the issues presented by the appeal. The City's motion should be denied.

December 30, 2021

Respectfully submitted,

/s/ Mark P. Gaber

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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 response contains 1,424 words.

/s/ Mark P. Gaber
Mark P. Gaber

Counsel for Appellees

CERTIFICATE OF SERVICE

I certify that the foregoing was served on all counsel of record via the Court's CM/ECF system.

/s/ Mark P. Gaber
Mark P. Gaber

Counsel for Appellees