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' MOTION TO SUSPEND BRIEFING AND HOLD CASE IN ABEYANCE PENDING REMEDIAL PROCEEDINGS IN DISTRICT COURT

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INTRODUCTION

To avoid piecemeal litigation of this suit under Section 2 of the Voting Rights Act, Appellees respectfully request that the Court suspend briefing and hold this appeal in abeyance until the district court completes the ongoing remedial proceeding, issues a remedial plan, and enters final judgment.

Appellants ("the City") appeal the district court's interlocutory decision concluding that the City of Virginia Beach's at-large method of city council elections violates Section 2 of the Voting Rights Act by diluting the votes of Black, Latino, and Asian American voters and enjoining further use of that system. Opinion, Doc. 242. The district court has ordered the parties to submit proposed remedial plans and suggestions for an independent court-appointed expert to review those proposed remedial plans by July 1, 2021, after which the district court will issue a remedial plan and final judgment. *See* Order, Doc. 252.

The next election for the Virginia Beach City Council is not until November 2022, with a candidate filing deadline of June 14, 2022. The briefing schedule for this appeal is currently set with Appellants' opening brief due June 22, 2021 and Appellees' response brief due July 22, 2021—simultaneous with the remedial proceeding in the district court, and over a year before the next election. This schedule will potentially result in piecemeal appeals on the issue of liability and remedy, contrary to the interests of judicial economy and case law related to

adjudicating Section 2 appeals. Because there is ample time for a single appeal on both liability and remedy to proceed prior to the November 2022 city council elections, it is appropriate for this Court to suspend briefing and hold this case in abeyance pending issuance of a remedial plan and entry of final judgment by the district court. Counsel for Appellants have indicated that they oppose this motion.

ARGUMENT

This Court has well-established discretion to hold cases in abeyance. *See Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). That discretion derives from "the power to stay proceedings [that] is incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Id.* at 254; *see also Maryland v. Universal Elections, Inc.*, 729 F.3d 370, 379 (4th Cir. 2013) (same). Whether to do so "calls for the exercise of judgment, which must weigh competing interests and maintain an even balance." *Landis*, 299 U.S. at 254-55. That discretion is particularly broad where, as here, the parties in the proceeding that is sought to be stayed are the same as those in the parallel proceeding, and thus a decision to hold the first matter in abeyance will not require one party to "stand aside" as another litigates the issues that will decide its case. *Id.* at 255. A decision to hold an appeal in abeyance is particularly sensible where, as here, it furthers "the basic federal policy against

piecemeal appeals." *United States v. Ga. Pac. Corp.*, 562 F.2d 294, 296 (4th Cir. 1977).

I. This Appeal Should Be Held in Abeyance Because the Liability and Remedial Phases of Section 2 Litigation Are Intertwined and Create a Single Record on Appeal.

Combining the merits and the remedy issues into a single appeal makes particular sense in a Section 2 case—indeed it is the most appropriate approach. In *Wright v. Sumter County Board of Elections & Registration*, the Eleventh Circuit declined to reach the County Board's merits appeal of liability until after the district court had completed its remedial proceedings—which involved the appointment of a special master—as the district court intends to do here. 979 F.3d 1282, 1287, 1298-1300 (11th Cir. 2020). In doing so, the court explained that the appropriate appellate record was "the entire record," both from the trial on the merits and "the subsequent remedial proceeding." *Id.* at 1302. "[W]e have often explained that our 'inquiries into remedy and liability cannot be separated'" in Section 2 cases. *Id.* (quoting *Burton v. City of Belle Glade*, 178 F.3d 1175, 1199 (11th Cir. 1999)). Because the existence of an available remedy is relevant to the merits review, but an actual remedy need not be proposed until later, "a district court's remedial proceedings bear directly on and are inextricably bound up in its liability findings." *Id.* at 1302-03; *see also, e.g.*, *E. Jefferson Coal. for Leadership & Dev. v. Parish of Jefferson*, 926 F.2d 487, 492 (5th Cir. 1991) (holding that evidence from remedial phase could

support liability finding because "the 'liability' phase and the 'remedy' phase of Voting Rights Act cases frequently merge"); *United States v. Brown*, 561 F.3d 420 (5th Cir. 2009) (considering liability and remedy in single appeal in Section 2 case).

Indeed, proceeding in this piecemeal liability appeal now will prejudice Appellees' ability to complete the record where, as the Fifth and Eleventh Circuits have explained, the liability and remedial phases of Section 2 cases "merge," *Parish of Jefferson*, 926 F.2d at 492, and are "intertwined," *Wright*, 979 F.3d at 1302, for purposes of their appellate record. It is wasteful to proceed with this appeal now when a phase integral to this Court's consideration—and to the record on appeal—is incomplete.

II. This Appeal Should Be Held in Abeyance to Promote Judicial Economy and Avoid Piecemeal Appeals.

The interests of judicial economy for this Court, for counsel, and for the parties would be best served by suspending briefing and holding this case in abeyance pending the district court's resolution of its ongoing remedial proceeding. The district court has ordered the parties to submit proposed remedial plans and suggestions for an independent, court-appointed expert to analyze those plans by July 1, 2021. Order, Doc. 252.[1] Under this Court's May 13, 2021 briefing order, the

[1] Appellees are today filing a motion requesting that the district court modify this schedule to provide for staggered briefing, with a July 15, 2021 deadline for Appellees' submission, so that the City can first provide its proposed remedy and

City's opening brief is due June 22, 2021, Appellees' response brief is due July 22, 2021, and the City's reply is due 21 days later.[2] The remedial proceeding in the district court is thus currently scheduled to occur simultaneously with briefing of this interlocutory appeal.

Appellees anticipate that the district court, which has diligently focused its attention on this case from the beginning, will move forward with the remedial proceeding and enter final judgment with due consideration and speed. Given the interlocutory posture of this appeal, and the fact that the district court is proceeding with dispatch to fashion a remedy and enter final judgment, it makes little sense for this appeal to proceed on its current briefing schedule. The current schedule invites the type of "piecemeal appeal" that is disfavored, *see Ga. Pac. Corp.*, 562 F.2d at 296, draining the resources of both this Court and the parties. In particular, Appellees face hardship under the current schedule of overlapping deadlines between their response brief in this Court and their remedial submission in the district court—hardship that is both logistical in terms of their workload, but also substantive in terms of the completion of the appellate record. *See supra* Part I. A decision to hold

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Plaintiffs can respond with their concerns, if any, with the City's proposal. *See McGhee v. Granville Cty., N.C.*, 860 F.2d 110, 115 (4th Cir. 1988).

[2] Appellees would have filed this motion immediately after this Court issued its May 13 briefing order, but until recently it was the parties' intent to file a joint request that the appeal be stayed while the parties submit a remedial proposal for the Court's consideration. The City made a recent and abrupt about-face, abandoning that plan and necessitating Appellees' present motion.

this appeal in abeyance until the district court issues its remedy and enters final judgment would permit all issues—liability and remedy—to be efficiently heard in a single appeal, limiting the burden on this Court, and would likewise structure the schedule to minimize the burdens on counsel and the parties and ensure that the parties and this Court have a complete appellate record. *See, e.g.*, *First Penn-Pac. Life Ins. Co. v. Evans*, No. 05-1336, 2006 WL 2008912, at *2 (4th Cir. July 14, 2006) ("Should an appeal become necessary, these issues may be best considered in tandem rather that in piecemeal fashion."); *Williams v. First Gov't Mortg. & Invs. Corp.*, 176 F.3d 497, 500 (D.C. Cir. 1999) ("Given . . . our desire to avoid deciding this case piecemeal, we also hold in abeyance William's appeal . . . .").

III. This Appeal Should Be Held in Abeyance Because the City Has Announced its Intent to Abandon its Electoral System Regardless of the Outcome of this Case.

Abeyance of this appeal makes additional sense because the City has admitted publicly that it is planning to abandon the existing at-large system that the district court enjoined. This is so for two reasons independent of this case. First, a new state law functionally limits Virginia Beach, beginning in 2022, to having at most three council members elected at large (in addition to the mayor). *See* Va. H.B. 2198, https://lis.virginia.gov/cgi-bin/legp604.exe?212+sum+HB2198; *see also* Ex. 1 (May 11, 2021 City Council Meeting Tr.) at 15 (deputy city attorney citing new state law and noting that "even without the *Holloway* case having ever been filed, our current

system is changing for 2022 and would be changing"). Second, the deputy city attorney advised the city council that although H.B. 2198 permits three at-large seats, maintaining those three at-large seats would likely separately violate the new Virginia Voting Rights Act, which he advised is broader in its reach than Section 2 of the federal Voting Rights Act and which requires the state Attorney General to preclear the City's redistricting plan. *See* Ex. 1 at 37 ("[E]ven if the City were to prevail on appeal in this federal case, . . . it would be less likely that the city could successfully defend an at-large system on the Voting Rights Act of the State of Virginia."). Indeed, the deputy city attorney essentially admitted that maintaining three at-large seats, given Virginia Beach's racially polarized voting, would in fact violate the Virginia Voting Rights Act. *See* Ex. 1 at 37 (deputy city attorney advising Council Member Moss 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" because its "broader" standard than federal Voting Rights Act) (emphasis added).[3]

[3] The City argued below in a supplemental post-trial brief that H.B. 2198, which was enacted after trial was completed, rendered Plaintiffs' claim moot. The district court correctly rejected that argument. Opinion at 3 n.1, Doc. 242. The new law is not effective until 2022, and as the deputy city attorney has admitted publicly, it would permit the maintenance of at-large seats. Moreover, H.B. 2198 does not speak to whether any districts or at-large seats must be drawn to comply with Section 2, and so cannot moot Plaintiffs' claim. *See, e.g.*, *Erie v. Pap's A.M.*, 529 U.S. 277, 287 (2000). But the City's publicly-stated intention, announced *after* the district court's issuance of its liability decision, to independently abandon its election system warrants holding the present appeal in abeyance.

Given the City's announced intent to abandon its current system regardless of the outcome of this litigation, proceeding with this piecemeal appeal would be particularly wasteful of the Court's and the parties' time and resources.

IV. The City Will Not Be Harmed by an Abeyance and the Opportunity to Present a Single Appeal on all Issues.

A decision holding this appeal in abeyance pending the resolution of the district court's remedial proceeding would not harm Appellants. The next city council election is not until November 2022. On May 11, 2021, the deputy city attorney explained in a public city council meeting that the candidate filing deadline for the November 2022 election is in June 2022. *See* Ex. 1 at 18. Specifically, the deadline will be 7 PM on June 14, 2022. *See* Va. Code § 24.2-507(1). The candidates would need some period of time prior to the June 2022 filing deadline to gather the requisite 125 signatures of registered voters to secure ballot placement. *See* Va. Code § 24.2-506(A)(5). A final decision from this Court on liability and remedy by April 15, 2022 (ten-and-a-half months from now) would thus provide two months' time for final maps to be in place and candidates to obtain 125 signatures. Two months is more than sufficient for candidates to gather 125 signatures, and likewise provides ample time for a single appeal on liability and remedy to occur.[4]

[4] Moreover, federal courts are empowered to alter the candidate filing deadline should it be necessary to accommodate the Court's need to adjudicate the case in a single, orderly appeal. *See, e.g.*, *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1, 15 (1971) ("[O]nce a right and a violation have been shown, the scope of a

Appellants have publicly admitted that their appeal could be resolved well in advance of any remedy being applied for the November 2022 election. At a city council meeting on May 11, 2021, Council Member Moss read aloud to the public emails containing legal advice he had requested from the deputy city attorney. One of those questions concerned the unavailability of a stay of the district court's liability decision because of the ample time before the next election: "[Y]our narrative has been [that the chance of] securing a stay from the Fourth Circuit was low and the Supreme Court [was] even lower." Ex. 1. at 41-42. The deputy city attorney responded: "Again, outside counsel advises us that the Fourth Circuit is unlikely to find that we satisfy the standard [for a stay]. Most likely we would find it hard to satisfy Element 2 because the Fourth Circuit will likely find that the appeal could conclude before any remedy was applied due to the November [2022] election, . . . and, thus, that the City will not suffer irreparable harm in the absence of a stay." Ex. 1 at 42.[5] The deputy city attorney added that "[t]he Fourth Circuit may find we are weak on other points as well" and that "[t]he standard for a Supreme Court stay is even higher than for a Fourth Circuit stay." Ex. 1 at 42. Given this public

district court's equitable power to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.").

[5] The public reading of this email, and the response from the City's counsel, in a public forum waived any privilege protecting this information, as well as any other communications on the same subject. *See, e.g.*, *United States v. Jones*, 696 F.2d 1069, 1072 (4th Cir. 1982).

admission, it is clear that the City will not face any hardship by this Court holding the appeal on liability issues in abeyance while the district court completes its remedial proceeding. There is no reason for the parties, the district court, and this Court to take simultaneous action when a more orderly course is available that permits the district court to finish its work and a single appeal to proceed with a complete appellate record.

Moreover, an exchange between Council Member Tower and the deputy city attorney at the council's June 1, 2021 meeting underscores the wisdom of suspending briefing and holding this appeal in abeyance pending resolution of the remedial proceeding in the district court. Following a presentation on the case by the deputy city attorney, the following exchange ensued:[6]

> **Council Member Tower**: Could you explain . . . if we are not satisfied with the remedy . . . we are already obviously appealing the case in chief; if we are not satisfied with the remedy that the court imposes, . . . and choose to appeal it, how does that appeal get handled . . . relative to the case in chief.
>
> **Deputy City Attorney Boynton**: Sure, you would have every right to appeal the remedy just as you would to appeal the merits decision on liability. It would probably be a different timeline but it would be depending upon what the court does and what legal issues were presented at the time that would certainly be a viable additional appeal

[6] The video of the meeting, including this exchange, is available on the City's website. *See* Virginia Beach City Council Meeting – Informal Session at 31:44-32:35 (June 1, 2021), https://www.vbgov.com/media/Pages/default.aspx (emphasis added).

> *or alternative appeal* if you ended up not prevailing *or further pursuing the merits appeal*.
>
> **Council Member Tower:** Indeed, I mean, you would not need to appeal the case in the chief to appeal the remedy?
>
> **Deputy City Attorney Boynton:** That's correct.
>
> **Council Member Tower:** I just wanted to get that out for various interests, thanks.

This exchange highlights the fact that a second appeal of the remedy is possible, and illustrates the problem of proceeding under the current appellate schedule, which will yield piecemeal appeals in a case in which those matters are "intertwined," *Wright*, 979 F.3d at 1302, and should be considered together. An abeyance on the current appeal under these circumstances advances the interests of judicial economy.

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It makes little sense for this Court to rush to consider the City's interlocutory appeal now, without the benefit of the record from the district court's remedial proceeding, *see Wright*, 979 F.3d at 1302-03, and when the City has announced its intent to abandon its existing system regardless of the outcome of this case. The interests of judicial economy—for this Court, counsel, and the parties—would be best served by suspending briefing and holding this appeal in abeyance pending the district court's resolution of the remedial proceeding. This would permit a single appeal on all issues—furthering the basic policy against piecemeal appeals—and

would foster an orderly process. Moreover, this is the most appropriate approach in this Section 2 case, given the inextricably intertwined nature of liability and remedies, *see e.g.*, *Wright*, 979 F.3d at 1302-03; *Parish of Jefferson*, 926 F.2d at 492, and a contrary approach would prejudice Appellees.

CONCLUSION

For the foregoing reasons, Appellees' motion should be granted, the briefing schedule should be suspended, and the case should be held in abeyance pending the district court's issuance of a remedial order and final judgment.

June 3, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Rules 27(d)(2)(A) 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 5,200 words. According to Microsoft Word, this motion contains 3,062 words.

/s/ Mark P. Gaber
Mark P. Gaber

Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on June 3, 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 1

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

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

fact, politically cohesive in Virginia Beach. What that means is do these three groups, in fact, consistently support the same candidates and causes.

And then there are other legal issues such as standing, mootness, and ripeness that would be raised if the council elected to appeal.

Other appellate considerations, though, include that there is a high level of uncertainty at any level of appeal. No outcome can be reliably predicted. They are expensive and time consuming to reach the next -- or the final result, even if favorable.

And certainly that's particularly true in an elections case where your next City Council election is in November of 2022. The -- the deadline currently stated for candidates to file would be the second Tuesday in June of 2022. And candidates would need some period of time before June 2022 to circulate ballots -- or circulate petitions to get signatures to be on the ballot. So functionally you really need to know what your system is by early 2022.

In the remedial phase, which we believe the circuit court -- I'm sorry, the district court would pursue at the same time that we were pursuing an appeal is the -- the possible remedies are essentially to change the residence district system as well as the

homework is what we owe the public, is to do our due diligence.

So I asked him -- this is based on all the conversations that we have over time that now are in the -- in the public domain. Your narrative is that independent of this suit, meaning the Holloway case, that the state Voting Rights Act independent of the Fowler Act drives us toward voting.

And your response was, quote, an at-large system or an at-large component of an election system is prohibited under the state version of the Voting Rights Act. If there is evidence that there is racially polarized voting and in the locality and an at-large system dilutes the voting strength of a protected class, see Virginia Code Section 24.2-130, this is similar to, but broader than the test under the federal version of the Voting Rights Act. And, thus, even were the City to prevail on appeal in the federal case, it would most -- it would be less likely that the City could successfully defend an at-large system on the Voting Rights Act of the State of Virginia, unquote.

I went further on to add: Your narrative suggests that even if the Fowler Act which enabled us to preserve the true all at-large seats with seven

federal court's interpretation of the federal Voting Rights Act informative, but it would not be bound by those findings and interpreting state law. Further, there are differences between the current federal action and the contemplated state action because a state plant -- plaintiff would not need a coalition of different minority groups. A federal ruling on coalition -- coalition claims would be of limited relevance, unquote.

I went on to ask: Your narrative has shared the probability of winning on appeal at the Fourth District appellate court is highly dependent upon the luck of the draw of the judges in rotation that would hear our case and whether it was three judges or nine.

And your reply was: Our case would be heard by a three-judge panel, and the composition of that panel will be affected -- will affect the prospects of our success, unquote.

Your narrative has been getting a stay on Judge Jacksons on implementation of his remedy based on his ruling is nil. That's what we've heard.

And your answer was: I've been advised by our outside counsel that the likelihood of a stay is very low, and this is consistent with my view.

And then your narrative has been securing a stay

from the Fourth Circuit was low and the Supreme Court even lower.

And your answer was: Again, outside counsel advises us that the Fourth Circuit is unlikely to find that we satisfy the standard detailed in response to your next question. Most likely we would find it hard to satisfy Element 2 because the Fourth Circuit will likely find that the appeal could conclude before any remedy was applied due to the November 22nd election, in parentheses, and, thus, that the City will not suffer irreparable harm in the absence of a stay. The Fourth Circuit may find we are weak on other points as well. The standard for a Supreme Court stay is even higher than for a Fourth Circuit stay.

And the last question I had that I asked was: You have not yet shared and I now request you share at what point in the public briefing what is the standard our case would have to make to meet a stay.

The defendant has a strong or substantial likelihood of success on the merits. The defendant will suffer irreparable harm if the district court proceedings are not stayed. The staying district court proceedings will substantially injure other parties. And, lastly, where the public interest lies.

For a Supreme Court to stay, we would have to

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