

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

**Emergency Motion for Expedited Briefing, Argument, and Decision
and Related Case-Management Relief**

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INTRODUCTION

On July 12, 2021, the Court ordered that this appeal be held “in abeyance pending the district court’s issuance of a remedial order and final judgment.” ECF No. 29. On December 22, 2021, the district court entered a remedial order and final judgment and thereby triggered the right of appeal of the appellants (who are the City of Virginia Beach, its City Council, and various City officials, named in their official capacities (collectively, “the City”). Accordingly, on December 27, this Court issued an order “resum[ing] the briefing schedule” and mandating that the appellee brief of the plaintiffs (“Plaintiffs”) be due on January 26, 2022, with the City’s reply brief due 21 days thereafter.

While the Court has correctly concluded that this appeal is ripe to proceed, several administrative items should be addressed at this time to facilitate prosecution and resolution of this appeal. The most important among them is that, unless this Court expedites the appeal, there will be insufficient time for this Court to issue relief impacting the 2022 election, and a ruling from this Court in the City’s favor risks electoral confusion and disorder as the City would have no lawful redistricting plan in place by which to administer that election. Any ruling after **early February 2022** will create a severe risk of this election-administration quagmire. The Court therefore should expedite briefing, argument, and decision with a goal of reaching a final decision by February 1, 2022.

The City warned the Court about this likelihood last June when it opposed Plaintiffs' motion to hold the appeal in abeyance. Plaintiffs, however, assured the Court that "[t]here is ample time" for an abeyance and full appellate review before the 2022 election cycle. ECF No. 25-1 at 8. Plaintiffs should be held to that assurance and ordered to litigate this appeal within a temporal framework that guarantees that the City will obtain the full benefits of a decision in its favor, should the Court issue such a ruling. But, when the City sought Plaintiffs' position on this motion to expedite—as well as their input into proposing an appropriate schedule for expedition—Plaintiffs responded simply that they oppose expedition, full stop. *See* Exhibit A (correspondence of counsel). The Court should recognize this bait-and-switch for what it is and grant the City's motion to expedite briefing, argument, and decision.

Further, the City respectfully asks the Court to undertake the various administrative action items outlined below, including affording the City an opportunity to file a revised appellant brief and consolidating this appeal with the new case docket created by the City's notice of appeal from the final judgment. Finally, given the time-sensitive nature of this appeal, the City also asks the Court to order expedited briefing on this motion, ordering Plaintiffs' response to be filed by **Thursday, December 30, at 5:00pm**, and the City's reply to be filed by **Friday, December 31**.

ARGUMENT

A. This Appeal Should Be Expedited

1. The City has taken the consistent position that this appeal should be resolved as soon as possible to ensure that the 2022 elections can and will be administered in an effective manner in compliance with all applicable laws, state and federal. The City accordingly filed its appeal brief before the due date last June, *see* ECF No. 20, and cross-moved to expedite this appeal in response to Plaintiffs' motion to hold the appeal in abeyance, *see* ECF No. 22 at 19–20. As the City explained then, the Virginia Constitution requires that the voting districts governing city elections be promulgated by the end of the first odd-numbered year of each decade beginning in 1971, meaning redistricting in the City must by law be accomplished by December 31, 2021—a deadline that is now impossible to meet. Va. Const. art. VII, § 5; Va. Code § 24.2-304.1. Moreover, any new redistricting plan must undergo a new preclearance review under the Virginia Voting Rights Act, which may take up to 60 days, *see* Va. Code § 24.2-129; and must comply with new single-member district requirements governing Virginia Beach City elections, Va. Code § 24.2-222 (effective January 1, 2022).

As a result, if the City prevails in this appeal, it will be placed into violation of Virginia law because it does not have a lawful redistricting plan to govern its elections. As the City has explained, ECF No. 22 at 15–16, it is not permitted to resort to the at-large system challenged in this case, since intervening changes in Virginia law have forbidden the use of that system (and also mooted Plaintiffs'

challenge). The City also would not be permitted to use the remedial plan imposed by the district court at the remedial phase in this case because it does not comply with Virginia law, which requires the City to utilize seven single-member districts and three at-large districts. Va. Code § 24.2-222 (effective January 1, 2022). The district court's remedial plan utilizes ten single-member districts. *See* Dist. Ct. Dkt. 290. As a result, if the City prevails in this appeal it will find itself with an election to administer and no lawful redistricting plan to utilize.

The City will therefore be required to redistrict, which will take time, and then to obtain approval of the redistricting plan from state authorities, which will take additional time. The filing deadline is 7:00 pm on June 21, 2022, Va. Code § 24.2-507(1), but candidates need time prior to that date to collect signatures to secure a place on the ballot, *see* Va. Code § 24.2-506(A)(5). The City understands that candidates are already collecting signatures. To create sufficient time for the collection of signatures, district lines must be in place by early April (as Plaintiffs have themselves conceded, ECF No. 11-1 at 8). Redistricting, however, is forbidden until this Court issues a ruling in the City's favor. Accordingly, to permit the City time to redistrict and obtain necessary approval that, in turn, will allow for timely and effective election administration will require a final ruling from this Court by early February.

2. The City has been consistent in raising these practical needs with the Court and urging the Court to resolve this case quickly so as to ensure that the 2022 elections are administered in a competent and effective manner in

compliance with all governing laws and with this Court's ultimate decision in this case. On this basis, the City opposed Plaintiffs' motion to hold the City's appeal in abeyance pending final judgment. The City cautioned the Court in June that holding this appeal in indefinite abeyance would likely result in a delay in the appeal of five months or more, *see* ECF No. 22 at 15, and an emergency situation risking harm to the City's elections and residents, *see id.* at 17–18. And, as the City warned, those bearing the brunt of that harm are most likely to be the City's minority communities and voters, who were found by the district court to have less resources at their disposal to navigate last-minute changes to the City's election system. *Id.* at 12. The City's prediction of the length of a remedial phase, the timing of a final judgment, and the election exigencies created as a result have all proven accurate.

Plaintiffs, however, represented to this Court that the City's concerns were overblown and that a delay of the appeal pending final judgment would “not harm” the City. ECF No. 11-1 at 8. Plaintiffs contended that “[t]here is ample time” for the remedial phase to conclude in time for this Court to issue an effective ruling in this case. ECF No. 25-1 at 8. They also explicitly assured the Court that their requested abeyance “will permit an [sic] consolidated appellate process to conclude well in advance of the November 2022 election.” *Id.* at 11–12. In short, Plaintiffs sought and obtained an order holding the City's appeal in abeyance on clear representations that such an order would permit the City to (1) prosecute the appeal to finality and (2) obtain the

benefits of a favorable ruling (3) in time to administer the 2022 election in conformity with Virginia law under a new redistricting plan.

Given those representations, and the fact that this Court relied on them in granting their requested relief, one might have thought Plaintiffs would cooperate in expedited resolution of this appeal. But, when the City reached out to Plaintiffs' counsel in contemplation of this motion, representing the City's intention to secure a ruling from this Court by early February 2022, Plaintiffs announced their opposition to any expedition, full stop, and without explanation. Plaintiffs did not explain how their own representations could go fulfilled without expedition; Plaintiffs did not propose an alternative schedule for expedition; Plaintiffs simply stated that they oppose expeditious resolution of this appeal.

All of this lends credence to the City's concern, which it expressed last June, that the motion to hold the City's appeal in abeyance reflected either ignorance of the needs of election administration or else a purposeful attempt to frustrate this Court's ability to grant the City meaningful relief in advance of the 2022 election. It is difficult to see how opposition to the City's request for expedition—and their failure to provide any alternative view on an appropriately expedited schedule—is consistent with Plaintiff's assurances that their request for a stay of the appeal would not harm the City. In all events, the Court should hold Plaintiffs to that promise, and the only way to do so is to expedite this appeal. The City has proposed a schedule below illustrating how this appeal may be briefed, argued, and decided in time to afford the City relief.

As noted, the City solicited Plaintiffs' position as to a proposed schedule, and Plaintiffs declined to provide any input.

B. The Court Should Undertake Additional Administrative Action To Facilitate Orderly and Effective Resolution of This Appeal

Several other housekeeping matters have arisen as a result of the unusual posture of this appeal, and the City respectfully asks the Court to address these at this time.

1. *Revised Appellant Brief.* The City should be permitted to file a revised appellant brief. The City filed its brief early, on June 11, 2021, but this was before the Court granted Plaintiffs' request to hold the appeal in abeyance pending final judgment. Plaintiffs represented that the purpose of awaiting final judgment was to permit further development of the record at the remedial phase, which Plaintiffs contend bears on liability issues. *See* ECF No. 11-1 at 3–4; ECF No. 25-1 at 5–8. Although the City disagreed with this position, the Court implicitly endorsed Plaintiffs' view that the remedial phase can relate to liability issues by granting Plaintiffs' motion. The City therefore should be permitted to revise its opening brief to address the remedial record and otherwise make changes given the new case posture.¹ The City will show how the remedial record actually confirmed that the liability ruling was erroneous. It would be unfair for the City to be required to stand on its current brief, when Plaintiffs will be permitted to draw on the remedial record in their appellee brief.

¹ Among other things, the City may need to revise prior arguments to leave space for additional argument regarding the remedial record within applicable word limits.

2. *Consolidation.* The Court should also consolidate this appeal with the new appeal created by the City's notice of appeal from final judgment. The City's notice of appeal creating the present appeal listed the district court's liability order, which issued an injunction, as the basis of the appeal. Dist. Ct. Dkt. 247. This appeal, however, does not arise from a final judgment, and the City has filed a second notice of appeal listing the final judgment so as to avoid any contention on Plaintiffs' part that this Court lacks jurisdiction to review the final judgment.² Dist. Ct. Dkt. 292.

The result of the new notice of appeal, as a matter of the Court's administrative practices, will be for a new case docket to be created. But the sole purpose of the notice of appeal was to ensure that the final judgment is properly brought into *this* case. There is no need for a new case docket or new case-initiation processes. The Court therefore should order this case to be

² Some courts of appeals strictly require a new notice of appeal before exercising review of a different order from the one from which an appeal was originally taken. *See, e.g., Jordan v. Ector Cty.*, 516 F.3d 290, 294 (5th Cir. 2008) ("Where a notice of appeal lists 'particular orders only (and not the final judgment), we are without jurisdiction to hear challenges to other rulings or orders not specified in the notice of appeal.'"); *Graco Children's Prod., Inc. v. Century Prod. Co.*, 99 F.3d 1159 (Fed. Cir. 1996) (holding that if a party "intends to appeal matters not related to the injunction order, it must also file a new appeal after final judgment."). This Court's precedent appears more flexible in this respect. *See, e.g., Kannapel v. Hudson*, 12 F.3d 205 (4th Cir. 1993) (holding that failure to identify the summary judgment order as the order being appeal from was not fatal because "an error designating the judgment or part thereof will not result in a loss of appeal if 'the intent to appeal a specific judgment can be fairly inferred and the appellee is not prejudiced by the mistake.'"). However, the City was not willing to test that precedent and filed a new notice of appeal out of an abundance of caution.

consolidated with the newly created case (which has not yet been assigned a number). It should also order that case filings otherwise required in the new matter—such as a transcript order form, civil appeal statement, and opening brief—be dispensed with and covered by filings in this case.

3. *Appendices.* The Court should also permit the parties to file supplemental appendices with their respective briefs. The City prepared and filed a six-volume joint appendix with its opening brief after consulting with counsel for Plaintiffs. *See* ECF No. 21. However, as explained, the parties will also be relying on a remedial record that developed after that date, including additional affidavits and reports by the parties, a report of the district court's special master, new remedial rulings, and so forth. These materials should be brought before this Court to the extent relied upon by the parties on appeal.

The City respectfully submits that the optimal way to accomplish this would be to permit the parties to file supplemental appendices with their respective briefs containing materials properly part of the record on appeal, as they deem appropriate. The time-sensitive needs of this case counsel against requiring service of designations and other negotiations among counsel, which can be time-intensive and cumbersome processes. The parties are capable of presenting the Court with appropriate appendices providing the materials they deem relevant, and otherwise relying on the already-filed joint appendix.

4. *Case Schedule.* In light of the exigencies of this case, as well as the above-described case needs, the City proposes the following schedule for expedited briefing, argument, and decision:

- Revised brief of Appellants due seven days after the entry of the order resolving the present motion;
- Brief of Appellees due seven days after the filing and service of the Appellants' brief;
- Reply brief of Appellants due seven days after the filing and service of Appellees' brief;
- The parties may file supplemental appendices containing portions of the record on appeal with their briefs according to the foregoing deadlines;
- Any additional filings otherwise required in the case created as a result of the City's notice of appeal filed December 27, 2021—including appendices, transcript order forms, briefs, and civil appeal forms—are dispensed with;
- Oral argument to be conducted at the earliest possible time after filing and service of the reply brief, at the Court's convenience;
- Target decision date: February 1, 2022.

The Court should, in all events, craft a schedule permitting it to issue a final decision by early February.

5. *Expedited Briefing on This Motion.* Given the exigencies of this case, the Court should expedite briefing on this motion. It should order Plaintiffs' response to be filed by **Thursday, December 30, at 5:00pm**, and the City's reply to be filed by **Friday, December 31**.

CONCLUSION

Plaintiffs assured the Court that holding the City's appeal in abeyance pending the district court's remedial process would not harm the City. It is time for Plaintiffs to deliver on that promise. The Court should order this appeal to be expedited and grant the other relief requested in this motion.

Dated: December 27, 2021

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Respectfully submitted,

/s/ Katherine L. McKnight

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Counsel for Defendants-Appellants

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I hereby certify that the foregoing motion complies with the type-volume limitation in Fed. R. App. P. 27(d)(2). According to Microsoft Word, the brief contains 2,770 words and has been prepared in a proportionally spaced typeface using Calisto MT in 14-point size.

Dated: December 27, 2021

/s/ Katherine L. McKnight

Katherine L. McKnight

Counsel for Defendants-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on December 27, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to all parties or their counsel of record through the CM/ECF system.

Dated: December 27, 2021

/s/ Katherine L. McKnight

Katherine L. McKnight

Counsel for Defendants-Appellants

EXHIBIT A

From: McKnight, Katherine L. <kmcknight@bakerlaw.com>

Sent: Monday, December 27, 2021 4:51 PM

To: Christopher Lamar <CLamar@campaignlegalcenter.org>; Annabelle Harless <aharless@campaignlegalcenter.org>; Gerry Hebert <ghebert@campaignlegalcenter.org>; Rob Weiner <RWeiner@campaignlegalcenter.org>; Mark Gaber <MGaber@campaignlegalcenter.org>; Simone Leeper <SLeeper@campaignlegalcenter.org>; Grayson Rost <GRost@campaignlegalcenter.org>

Cc: Christopher S. Boynton <CBoynton@vbgov.com>; Gerald L. Harris <GLHarris@vbgov.com>; Joseph M. Kurt <jKurt@vbgov.com>; Raile, Richard <rRaile@bakerlaw.com>; Lewis, Patrick T. <plewis@bakerlaw.com>

Subject: RE: Holloway v. City of Virginia Beach - request for Plaintiffs' position on appeal schedule

Dear Counsel,

Thank you for your prompt response. You have our notice of appeal now that it has been filed. And, because the Fourth Circuit has sua sponte issued a scheduling order, we no longer see the need for a filing in that court notifying it of the final judgment, since the court clearly is aware.

We will proceed with the motion described below and will note your opposition.

Kind regards,

Kate

Katherine L. McKnight

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From: Christopher Lamar <CLamar@campaignlegalcenter.org>
Sent: Friday, December 24, 2021 4:33 PM
To: McKnight, Katherine L. <kmcknight@bakerlaw.com>; Annabelle Harless <aharless@campaignlegalcenter.org>; Gerry Hebert <ghebert@campaignlegalcenter.org>; Rob Weiner <RWeiner@campaignlegalcenter.org>; Mark Gaber <MGaber@campaignlegalcenter.org>; Simone Leeper <SLeeper@campaignlegalcenter.org>; Grayson Rost <GRost@campaignlegalcenter.org>
Cc: Christopher S. Boynton <CBoynton@vbgov.com>; Gerald L. Harris <GLHarris@vbgov.com>; Joseph M. Kurt <jKurt@vbgov.com>; Raile, Richard <rRaile@bakerlaw.com>; Lewis, Patrick T. <plewis@bakerlaw.com>
Subject: RE: Holloway v. City of Virginia Beach - request for Plaintiffs' position on appeal schedule

[External Email: Use caution when clicking on links or opening attachments.]

Hello Kate,

Thanks for the email. Please provide us with a draft of the status report to the Fourth Circuit as well as a draft of your notice of appeal from final judgment so we can determine whether we will be willing to join.

Regarding your motion for expedited briefing. We oppose and will respond accordingly. Thanks.

Warm regards,

Chris Lamar

Senior Legal Counsel

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From: [McKnight, Katherine L.](mailto:kmcknight@bakerlaw.com)
Sent: Thursday, December 23, 2021 1:04 PM
To: [Annabelle Harless](mailto:aharless@campaignlegalcenter.org); [Gerry Hebert](mailto:ghebert@campaignlegalcenter.org); [Rob Weiner](mailto:RWeiner@campaignlegalcenter.org); [Mark Gaber](mailto:MGaber@campaignlegalcenter.org); [Christopher Lamar](mailto:CLamar@campaignlegalcenter.org); [Simone Leeper](mailto:SLeeper@campaignlegalcenter.org); [Grayson Rost](mailto:GRost@campaignlegalcenter.org)
Cc: [Christopher S. Boynton](mailto:CBoynton@vbgov.com); [Gerald L. Harris](mailto:GLHarris@vbgov.com); [Joseph M. Kurt](mailto:jKurt@vbgov.com); [Raile, Richard](mailto:rRaile@bakerlaw.com); [Lewis, Patrick T.](mailto:plewis@bakerlaw.com)
Subject: Holloway v. City of Virginia Beach - request for Plaintiffs' position on appeal schedule

Dear Counsel,

As you know, Judge Jackson has issued final judgment in the above-captioned case, rendering the City's appeal ripe to proceed in the Fourth Circuit. We intend to file the requisite notice called for by the Fourth Circuit's abeyance order on Monday, December 27, and will provide a draft in due course to ascertain whether you will be willing to join.

We will also file a notice of appeal from final judgment to secure the Fourth Circuit's jurisdiction over the final judgment and a motion in the Fourth Circuit to consolidate that forthcoming case docket with the existing appeal and to dispense with any case initiation document filings (e.g. transcript and civil appeal forms). Please let us know your position on that motion.

In addition, we will file a motion on Monday, December 27, for expedited briefing, argument and decision. The predicates of this motion, including the December 31 deadline for Virginia localities to redistrict, have been represented in our prior briefing and will not be repeated here. We assume, based on your prior assertions that the abeyance will not compromise the Fourth Circuit's ability to grant meaningful relief before the 2022 election cycle, that you agree prompt resolution is both feasible and appropriate.

Our current plan is to propose the following briefing and argument schedule:

- Revised brief of appellants due seven days after entry of the order granting the motion to expedite
- Brief of appellees due seven days after the filing and service of the appellants' brief
- Reply brief of appellants due seven days after filing and service of appellees' brief
- Parties are free to file supplemental appendices containing portions of the record on appeal with their briefs according to the foregoing deadlines; any additional joint appendix obligations are dispensed with
- Oral argument to be conducted at the earliest possible time after filing and service of the reply brief
- Target decision date: February 1, 2022

Please let us know your position on this motion. If you have alternative proposals regarding briefing deadlines or accommodations in this regard, we are willing to consider altering our proposal consistent with the City's election administration needs and contingent on your joining or not opposing our motion to expedite.

As noted, we intend to file on December 27, so please provide your position as soon as possible.

Kind regards,

Kate

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