IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA NORFOLK DIVISION

Latasha Holloway, *et al*.,

Plaintiffs,

v.

City of Virginia Beach, *et al*.,

Defendants.

Civil Action No. 2:18-cv-0069

PLAINTIFFS' REPLY IN SUPPORT OF MOTION TO MODIFY THE REMEDIAL BRIEFING SCHEDULE TO PERMIT STAGGERED BRIEFING

Defendants' request that remedial briefing be extended until December 21—nine months after this Court's liability determination—should be rejected. In support of their request, Defendants make representations to this Court that contradict what they told the public, what they said in their Fourth Circuit filings, and what the Census Bureau stated regarding its timeline for releasing redistricting data. The Court should require submission of a remedial proposal, based upon ACS data, by Defendants on July 1, a response by Plaintiffs on July 15, and a reply by Defendants on July 30. This schedule will provide the Court (and any special master appointed by this Court) the opportunity to review the parties' proposals before Census redistricting data are released on August 16, 2021. The release of those data will reveal what, if any, technical adjustments are needed to balance population among the districts. After the Census data release, Plaintiffs suggest an opportunity for supplemental briefing in mid-September (if the Court or the parties find it necessary). If this Court were to set a remedial hearing at any point during this period, Plaintiffs would welcome the opportunity to participate in it. But based upon Defendants' own public statements, their suggestion here that this process be extended through Christmas, with

subsequent special master review and a remedial decision not likely until 2022, is unwarranted and should be denied.

BACKGROUND

Until recently, the parties were working toward a joint remedial proposal and a final resolution to this litigation. Defendants abruptly withdrew from that process. But before they did, the deputy city attorney Mr. Boynton—counsel in this case—gave an extensive public presentation in a public May 11 City Council meeting. Contrary to Defendants' position here, Mr. Boynton explained to the 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 the census data." Ex. A (May 11, 2021 Mt'g Tr.) at 24.

The Census Bureau has announced that "legacy" redistricting data will be released on August 16, 2021. As the Bureau has explained, "the term 'legacy' refers to our long time practice of providing the full P.L. 94-171 Redistricting Data for each State as a group of text files with the geography file and data segments as separate files in that group."[1] For the first time ever, the Census Bureau is providing redistricting data in an *additional* format that will have a more user-friendly interface helpful for those not using commercial redistricting software or who are interested in viewing the data without linking it to mapping geography. The Bureau will not release that version until September 30, 2021. But the "legacy" data are *the same data*, in the *same format*, that the Census Bureau has released in every previous redistricting cycle; it is the only data Virginia Beach has ever used to redraw its residency districts.

[1] U.S. Census Bureau, *Redistricting Data Program Management* (Mar. 16, 2021), https://www.census.gov/programs-surveys/decennial-census/about/rdo/program-management.html#P3 (last visited June 17, 2021)

Indeed, one of the most common redistricting vendors used by jurisdictions—Maptitude—has explained that "[t]he legacy format data being provided by Census by August 16, 2021 is the format we have always had to work with. They are moving to a more user-friendly format for the final PL data release for users that are looking at tabular data specifically. Since we attach the PL data to the geography and you never use the data alone, legacy v. user-friendly is moot."[2] Maptitude says its software will be updated with the legacy data within 5 business days of the release by the Census Bureau on August 16. *Id.*[3]

Consistent with statements by the Census Bureau and Maptitude, Patrick Lewis—Baker Hostetler partner and counsel of record for Defendants—published an article on March 19 advising his clients that "the Bureau [will] now release a so-called legacy format summary redistricting data file in 'mid to late August.' What the Bureau will release by Sept. 30 will only differ by (a) the addition of some summary tabulations and (b) a user-friendly front end. In essence, the Bureau is promising to publish, in August, the redistricting data in a format that is the same as or similar to the format in which it published the data in 2011."[4]

On July 3, Plaintiffs filed a motion with the Fourth Circuit to place Defendants' appeal in abeyance pending the resolution of this Court's remedial proceedings and entry of final judgment. In urging the Fourth Circuit to avoid piecemeal litigation, *see generally* Ex. B (Plaintiffs'

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[2] Maptitude, *When Will I Receive My 2020 Redistricting Data?* (June 15, 2021), https://www.caliper.com/learning-redistricting/index.php/articles/when-will-i-receive-my-2020-redistricting-data/.

[3] Maptitude further explains that "[a]side from the format, we have been told by Census that the content of the [September 30] PL data will be the same [as the August 16 legacy data]," and will confirm that fact after its release. *Id.*

[4] Patrick T. Lewis & Clark H. Benson, BakerHostetler, *Even with Reprieve, Census Delays Add Stress to 2021 Redistricting* (Mar. 19, 2021), https://www.bakerlaw.com/alerts/even-with-reprieve-census-delays-add-stress-to-2021-redistricting (last visited June 18, 2021).

Abeyance Motion), Plaintiffs explained that this Court is soon moving to the remedial phase, an abeyance is appropriate to permit this Court to complete the record in this case, and a remedial decision is likely in time for a consolidated appeal to conclude before the candidate filing deadline in June 2022. Both the Fifth and Eleventh Circuits have explained that, in Section 2 cases, the liability and remedy phases are inseparable, and evidence and analysis adduced during the remedy phase is relevant to any appellate consideration of the *Gingles* liability considerations. *See Wright v. Sumter Cty. Bd. of Elections & Registration*, 979 F.3d 1282, 1302-03 (11th Cir. 2020) (holding that appropriate appellate record in Section 2 case is "the entire record" of liability and remedial phase, because "our inquiries into remedy and liability cannot be separated" and "a district court's remedial proceedings bear directly on and are inextricably bound up in its liability findings" (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 supports liability determination because "the 'liability' phase and the 'remedy' phase of Voting Rights Act cases frequently merge").

Moreover, as Plaintiffs explained to the Fourth Circuit, Defendants have publicly announced their intent to abandon their current at-large electoral system, regardless of the outcome of their appeal, in light of new Virginia statutes. In particular, the new Virginia Voting Rights Act, approved by the Governor *after* this Court's liability decision and injunction, independently requires the City to protect minority voting rights by a more rigorous standard than does Section 2 of the federal Voting Rights Act. At the May 11 City Council meeting, Mr. Boynton 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 obviates any need by Virginia Beach minorities "to

rely on a coalition of minorities to satisfy the [VVRA's] requirements," *id.* at 40. The VVRA, Mr. Boynton 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.

Before withdrawing from settlement discussions, Defendants publicly contemplated adopting this Court's remedial order as their preclearance submission, on the belief that this Court's approval of it as a Section 2 remedy might also satisfy the broader VVRA standard. Ex. A at 64. As Plaintiffs explained to the Fourth Circuit, Defendants' response to this Court's remedial order and their independent VVRA obligations will bear on the Fourth Circuit's disposition of Defendants' appeal, further justifying an abeyance. *See* Ex. B; Ex D (Plaintiffs' Abeyance Reply). Now, for the first time, Defendants seek to delay this Court's remedial order until sometime in 2022—after their preclearance state law deadline.

Defendants opposed Plaintiffs' motion for an abeyance in the Fourth Circuit, contending that this Court's remedial phase, despite commencing on July 1, may actually take many months and an abeyance would jeopardize their ability to have an appellate decision in time for the November 2022 election. Ex. C at 11-15 (Defendants' Abeyance Opposition). In contrast to their position here that there is plenty of time for the Court to act before the election, Defendants warned the Fourth Circuit that the next election's deadlines were soon approaching, *compare id.* at 15 (requesting appellate decision this year because of election deadlines) *with* Opp. at 7 ("[T]he next election is some 17 months away"), and filed a cross-motion in the Fourth Circuit asking the Court to *advance* briefing on their appeal and expedite argument. Defendants did not raise with the Fourth Circuit any of the Census-related arguments they now assert for the first time as a basis for

asking this Court to delay its remedial proceeding. Indeed, their only basis for assuming a lengthy remedial process was the length of the remedial process in the Eleventh Circuit's *Wright* case. Ex. C at 13-14.

On June 15, the Fourth Circuit granted Plaintiffs' motion to suspend briefing pending the Court's consideration of their abeyance motion.

ARGUMENT

I. The Court Should Maintain its July Remedial Deadline with Staggered Briefing.

The Court should maintain its July remedial deadline, with staggered briefing. Plaintiffs proposed staggered briefing because it accords with Defendants' obligation to be the first to propose a remedy, *see McGhee v. Granville Cty., N.C.*, 860 F.2d 110, 115 (4th Cir. 1988), and would afford Plaintiffs the opportunity to assess Defendants' proposal for its effectiveness in remedying the Section 2 violation found by this Court. Plaintiffs propose a July 15 deadline to submit a responsive brief and (if warranted) alternative proposed plan(s), and a July 30 reply deadline for Defendants. The parties also should propose special masters by July 1. This schedule would provide any special master designated by the Court an opportunity to review the parties' submissions, and be prepared to assess them in light of the August 16, 2021 Census data release to determine what, if any, technical modifications are needed to balance population among the districts.

Defendants now contend, for the first time, that it is impossible for them to draw proposed remedial plans until November 30, 2021. Opp. at 10. This is so, they say, because ACS data should not be used as the basis for "[a] legally acceptable final remedial plan," *id.* at 2, the August 16 legacy data "will not be sufficient for redistricting," *id.* at 3 n.2, Virginia will release prison-

residency adjustments to the data by October 30, *id.* at 3-4, and Defendants wish to have another month after that to submit their proposal.

This is exactly the opposite of what Defendants have publicly asserted. At the May 11 meeting, Mr. Boynton told the Council that the City's expert (Mr. Brace) "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 the census data." Ex. A (May 11, 2021 Mt'g Tr.) at 24. Defendants' contention that the August 16 Census "legacy" data "will not be sufficient for redistricting," Opp. at 3, is simply false. They are the only data the City—and its mapdrawing expert—has ever used to redistrict. The data arriving on September 30 is a new format helpful for those looking only at the information in data-format, and those not utilizing mapping software. But this new data form has never been released before, and Defendants' representation to the Court that they cannot use the same data that they have always used to redistrict is untrue. In fact, Mr. Lewis—counsel of record for Defendants—has publicly advised his clients that the same data Defendants tell this Court "will not be sufficient for redistricting," Opp. at 3, in fact "will only differ" from the September 30 release in ways that do not matter to redistricting, and will be released in "the same [] or similar [] format in which [the Census Bureau] published the data in 2011." *See supra* note 4.

II. The Court Should Permit Supplemental Briefing and/or Holding a Remedial Hearing After the Census Data Are Released.

Plaintiffs propose that the Court permit supplemental briefing after the Census data are released. Plaintiffs agree that the Court should not rely upon ACS data alone to issue its final remedial plan, but it is unnecessary for the parties to wait until November 30 to *begin* submitting proposed plans. A schedule that has the parties submit remedial proposals using ACS data in July—not simply "[r]ough-draft concept maps . . . drawn with whole precincts," Opp. at 9—would

permit the Court and/or its special master time to review those proposals before the Census data are released. Indeed, the Census data will likely be released *while* the special master is reviewing the proposals. As Defendants have publicly stated, these data will likely necessitate "technical population and precinct boundary adjustments," Ex. A at 24, but need not paralyze the remedial process until the winter.

Plaintiffs propose that the parties be afforded an opportunity to file supplemental briefs in mid-September, following release of the August 16 Census data, in the event that the data warrant any population adjustments. The Court could also thereafter hold a remedial hearing, and a final remedial order could be entered by early November. This timeline will afford the parties and the Court multiple opportunities to ensure the ultimate remedial plan is "legally acceptable," Opp. at 2, in light of the delayed Census release, would give the special master ample time to review the parties' proposals (or prepare his or her own plan), would allow the Court an opportunity to assess the materials, would provide Defendants with a remedial plan they can assess for potential preclearance submission pursuant to their independent VVRA obligations, and would leave ample time for Defendants to pursue a consolidated appeal with a complete record to proceed in the Fourth Circuit well in advance of the November 2022 election.[5]

In a footnote, Defendants acknowledge this approach would work, explaining that as an alternative to their November/December proposal, "[t]his Court also could order staggered briefing prior to the release of 2020 census data useable for redistricting, with the understanding that

[5] An early November decision would also permit the Court to receive the prison-population adjusted data from the Virginia Division of Legislative Services, which will be available by October 30 at the latest. These data may or may not warrant technical adjustments for population equalization.

additional briefing will be necessary following that release." Opp. at 10 n.5. The Court should accept that alternative proposal.

CONCLUSION

There is no reason to delay remedial proceedings into 2022. The parties currently have the tools they need to submit proposed remedial plans in July to afford the Court and the special master an opportunity to begin work in time for the August 16 Census data release. It will take time for the special master to assess the proposals, and supplemental briefing can readily address any technical modifications the parties find advisable in light of the Census data.

For these reasons, Plaintiffs' motion for staggered briefing should be granted, as modified herein.

Dated: June 18, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 18, 2021, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing to the following:

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