

**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' RESPONSE TO DEFENDANTS' EMERGENCY MOTION FOR STAY
OF INJUNCTION**

Plaintiffs do not oppose a modification of this Court's injunction to permit a special election for the Kempsville residency district seat as a result of Ms. Abbott's resignation from the Council. Plaintiffs disagree with much of Defendants' motion, including Defendants' contention that they are likely to prevail on appeal. They are not. Likewise, a dissenting Supreme Court opinion does not establish that a stay of an election-related injunction is "ordinar[il]y" appropriate. *See* Mot. at 8. The motion and supporting documents contain other errors as well, many of which will be addressed as the remedial proceeding continues.¹

¹ Defendants did not provide Plaintiffs notice of the vacancy, or their intention to file the stay motion, until 11:20 AM yesterday. Despite knowing of the vacancy for six days, Defendants requested Plaintiffs provide their position on the motion—which, at 20+ pages with multiple exhibits, was clearly well underway—within 3.5 hours' time. Then, a mere fifteen minutes after notifying Plaintiffs, and before notifying *this Court* or filing their stay motion, Defendants filed the attached letter with the Fourth Circuit seeking to use the vacancy and this Court's remedial proceeding to justify an accelerated appeal and as a justification to defeat Plaintiffs' pending motion for an abeyance. *See* Ex 1 (Defendants' Fourth Circuit Letter); Ex. 2 (Plaintiffs' Fourth Circuit Response).

But a modification² of the injunction is appropriate because it is likely—though not guaranteed—that the results of a special election for the Kempsville district seat will not affect the Court’s imposition of a remedy for the Section 2 violation, and thus the City’s concerns regarding election administration, timing, and ensuring a full complement of Council members can be addressed in a manner that is unlikely to harm Plaintiffs’ remedial rights. And, as Plaintiffs explain further below, in the unlikely event that a special election for the Kempsville district seat *does* impede the effectiveness of the final remedial map, the Court can exercise its remedial authority to truncate the term of the candidate elected to that seat to prevent that harm from occurring.

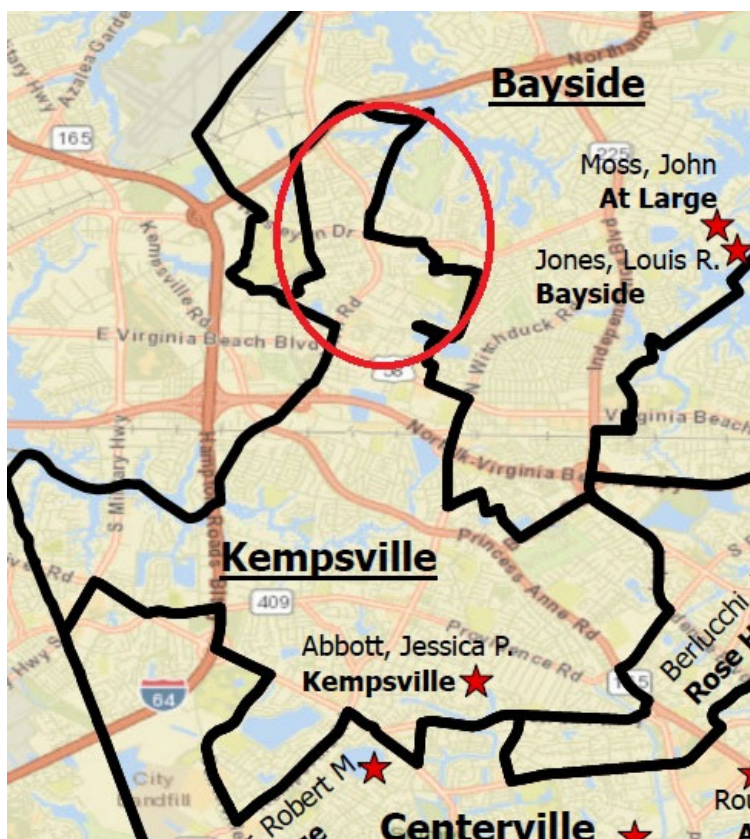
Defendants nevertheless contend Plaintiffs would suffer no harm from a stay because Ms. Abbott does not reside in any proposed remedial district in which a plaintiff resides, Mot. at 16-17, but this misses the point.³ The issue is not where Ms. Abbott resides—she has resigned and is

² Because Defendants do not meet the first prong of the stay standard—likelihood of success on the merits on appeal—the most appropriate course is for this Court to modify its injunction, which Rule 62(d) authorizes, to permit the special election to occur for the Kempsville residency district under the existing system. *See* Fed. R. Civ. P. 62(d) (“While an appeal is pending from an interlocutory order [granting an injunction], . . . the court may suspend, modify, restore, or grant an injunction”); *Grand Jury Proceedings Under Seal v. United States*, 947 F.2d 1188, 1190 (4th Cir. 1991) (noting that district court retains jurisdiction to make modifications that aid an appeal and “avoid the confusion and waste of time” from issue proceeding before two courts); *NRDC v. Sw. Marine, Inc.*, 242 F.3d 1163, 1166 (9th Cir. 2001) (noting that Rule 62(d) permits district court to modify injunction while appeal is pending “to preserve the status quo during the pendency of the appeal”). Defendants seek a modification in the alternative to their request for a stay, and that is the more appropriate approach to address this issue.

³ As Defendants acknowledge, Ms. Abbott *does* reside in one of their purported majority-minority (by total population) districts in their 10-district proposal—District 2. This plan—like Defendants’ 7-3 proposal—suffers from serious deficiencies. But given Defendants’ focus on Ms. Abbott’s residence, it is worth noting that Defendants’ proposed District 2 cracks the minority population in the College Park, Tallwood, and Colonial precincts and orphans them in a majority white-CVAP district that does not offer minority voters an equal opportunity to elect their candidate of choice. This unnatural districting decision—along with similar flaws in both of Defendants’ remedial proposals—has ripple effects throughout their proposals, including unnecessarily lowering the Black, Hispanic, and Asian CVAP percentages of all districts and decreasing the performance of the districts in reconstituted election result analyses, and thus renders their proposals inadequate and unworthy of any deference.

no longer a member of the Council—the issue is how the existing Kempsville residency district’s boundaries interact with Virginia Beach’s minority community and how that affects the remedy this Court ultimately imposes for the proven Section 2 violation.

The majority of the Kempsville residency district covers areas with low minority populations. But the northern portion of the Kempsville district includes a substantial minority population, including the residency of one of the plaintiffs in this case, as illustrated in the red oval below:



Source: Kimball Brace Expert Report at 83 (red oval added).⁴

⁴ Ms. Abbott’s residence, as shown in the map above, is no longer accurate, as reflected by the parties’ remedial proposals.

The bulk of the area shown in the red oval is included in remedial districts proposed by both parties. Indeed, the portion of the red oval included in both of Defendants' remedial proposals contains nearly 18,000 people, with a citizen voting age populations ("CVAP") that is 45.8% Black, 9.3% Hispanic, 5.9% Asian, and 37.1% white.

If the candidate elected in the November 2021 Kempsville special election resides in the area shown in the red circle (or potentially nearby), then it *is* likely that this Court's remedial plan will be affected by the special election. This is so because Ms. Abbott's term was set to expire in 2024, and therefore it is possible a special election will yield a new incumbent, potentially one disfavored by the minority community who resides in one of the Section 2 remedial districts ordered by the Court and who would remain in office through 2024.

Because the bulk of the Kempsville district is outside the geography likely to be included in the Court's remedial plan, Plaintiffs do not oppose a modification of the injunction to permit the special election to occur—it is likelier than not that the prevailing candidate will reside in the portion of the district outside the red oval illustrated above. Plaintiffs reserve the right, however, as part of the remedial proceeding, to seek an order from this Court truncating the term of the candidate elected in the November 2021 special election in the event that the winning candidate resides in one of the Section 2 remedial districts ordered by the Court. Such an order would be necessary to ensure that Plaintiffs' Section 2 rights are not violated anew through 2024, and to provide Plaintiffs with an opportunity to elect their candidate of choice at the November 2022 general election—when they would have had the opportunity to do so in the absence of Ms.

Abbott's resignation (given that her residence location did not interfere with drawing effective remedial districts).⁵ This issue may not arise—indeed, probably will not.⁶

Although Plaintiffs have concerns about any further elections being held under the illegal at-large system, in this instance practical election administration concerns coupled with the low likelihood of harm to the remedial districts ordered by the Court (and the Court's ability to alleviate any harm that could arise) lead Plaintiffs not to object to a modification, subject to the reservation of rights described above.

Dated: July 7, 2021

Respectfully submitted,

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⁵ Defendants contend that they will oppose such a request should it become necessary. The northernmost blocks of the Kempsville district are actually in the districts both parties propose to contain the residences of Council members Jones and Moss, whose terms expire in 2022. Query whether Defendants will be so quick to oppose a November 2022 special election if it is Council members Jones and Moss, rather than the minority community, who are negatively affected by a new Council member with a 2024 expiring term.

⁶ This issue may arise outside the context of the special election for Ms. Abbott's seat, however. Defendants' proposals place incumbents disfavored by minority voters, whose terms expire in 2024, in some of their proposed remedial districts. This is one of many deficiencies in their proposals.

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 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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