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' MOTION TO DISMISS

Defendants are wrong to contend that this case is moot because for one day—November 8, 2022—they will temporarily employ a lawful election system before reverting to one that violates the Voting Rights Act ("VRA"). A claim by Plaintiffs in an amended complaint that the 7-3 system of election is unlawful—presently set to govern the 2024 and all subsequent Virginia Beach City Council elections—is neither speculative nor contingent on any future actions. It is the law today that the 7-3 system will take effect. That Plaintiffs sought a stay of litigation in the interest of judicial economy, and to give the Virginia Beach City Council and the Legislature the opportunity to permanently adopt a 10-district system compliant with the VRA without simultaneously engaging in litigation, does not make Plaintiffs' claim unripe.

STANDARD

"A case is fit for adjudication 'when the action in controversy is final and not dependent on future uncertainties. Stated alternatively, '[a] claim is not ripe if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Scoggins v. Lee's*

Crossing Homeowners Ass'n, 718 F.3d 262, 270 (4th Cir. 2013) (quoting *Miller v. Brown*, 462 F.2d 312, 319 (4th Cir. 2006)). In deciding a motion to dismiss for lack of subject-matter jurisdiction, the Court must view all factual allegations "in the light most favorable to" Plaintiffs. *Wilson v. Johnson*, 553 F.3d 262, 264 (4th Cir. 2008).

ARGUMENT

Plaintiffs' right to seek a judgment ensuring that future elections for Virginia Beach City Council comply with the VRA cannot be extinguished by Defendants' mere assertion that Plaintiffs have nothing to fear "until further notice." Br. at 2, ECF No. 308. While it is uncertain whether the Virginia Beach City Council will request that the Legislature amend the City Charter to comply with the VRA, what *is* certain is that Plaintiffs have a ripe claim that the system *presently set* to govern the 2024 and all future elections for Virginia Beach City Council violates the VRA. Defendants cannot speculate that they may, or may not, abandon the current, unlawful system and contend that their bald conjecture makes this case unripe. Were that the law, *no lawsuit* could ever proceed—every law is subject to potential change in the future. The ripeness doctrine focuses on whether the challenged conduct is currently in effect, not whether it might cease being in effect in the future. *See, e.g.*, *Jordahl v. Democratic Party of Virginia*, 122 F.3d 192, 198 (4th Cir. 1997) (recognizing that a claim is unripe when it challenges violative conduct that arose only from "a statute which is no longer in effect").

As Plaintiffs explained in their Reply to Defendants' Response to Plaintiffs' Motion for a Stay of Proceedings, ECF No. 311, the 7-3 system is the law of the land unless the Legislature adopts a Charter amendment or this Court enjoins that system. Defendants misapprehend the ripeness doctrine; a challenge to a law is not subject to future uncertainties and thus unripe if that law is actually in effect now—as is the case here. The fact that the Legislature may in the future

change that law does not make its *current* existence and injury to Plaintiffs uncertain.[1] A challenge to the 7-3 system would only be unripe if it were *not* the law and Plaintiffs were merely speculating that it might become the law. Here, unless the Legislature changes it or this Court enjoins it, the 7-3 system is set by the City's Charter. And, as has already been shown in this case, that 7-3 system violates the VRA. As Special Master Dr. Bernard Grofman explained, "[t]he seven single member district and three at-large district plan submitted by the City of Virginia Beach can be rejected on multiple grounds," including because it "creates at most two *minority opportunity districts* whereas . . . the creation of three *minority opportunity districts* appears to be mandated." ECF No. 281-1 at 25.

This is all in line with the Fourth Circuit's instructions that "[o]n remand, the plaintiffs *may raise* any claims they have against the City's system going forward." *Holloway v. City of Virginia Beach*, 42 F.4th 266, 277 (2022) (emphasis added). The cases cited by the Fourth Circuit, as well as those cited by Defendants in their Motion, ECF No. 308 at 4-5, support the argument that Plaintiffs have a ripe claim. The circumstances in this case are akin to the circumstances in both *New York State Rifle & Pistol Ass'n, Inc. v. City of New York* and *Lewis v. Continental Bank Corp.* "where the mootness is attributable to a change in the legal framework governing the case, and where the plaintiff may have some residual claim under the new framework that was understandably not asserted previously." *N.Y. State Rifle & Pistol Ass'n, Inc.*, 140 S. Ct. 1525, 1526 (2020) (per curiam) (quoting *Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 482-83 (1990)). The

[1] Plaintiffs are hopeful that the newly constituted City Council will request a Charter amendment from the Legislature to adopt a 10-district system and will subsequently adopt the VRA-compliant map imposed by this Court without the need to litigate further and waste more taxpayer dollars. But those hopes do not alter the status quo, which violates the VRA. Indeed, that the currently constituted City Council (or its counsel) is fighting Plaintiffs' good faith and sensible suggestion for a stay of proceedings to permit that opportunity for legislative correction of the vote dilution in the 7-3 system is certainly not a good sign.

Fourth Circuit held that Plaintiffs' current complaint, which it found was aimed at the existence of the City's prior all at-large system, became moot upon the passage of HB 2198 in the time between trial and the issuance of this Court's Order and Judgment. That "newly enacted legislation," *Diffenderfer v. Cent. Baptist Church of Miami, Fla., Inc.*, 404 U.S. 412, 415 (1972), has had the force of imposing on Virginia Beach a system of election going forward which is still violative of Plaintiffs' rights under Section 2 of the VRA.

Thus, this is no mere "abstract disagreement[]" that could favor the Court declining to maintain jurisdiction, *Scoggins*, 718 F.3d at 270 (citation omitted); it is a concrete dispute supported by the fact that the parties' mutually proposed Special Master concluded that the 7-3 system drawn under current law will perpetuate the vote dilution injury already proven here. In keeping with the Fourth Circuit's instructions and controlling precedent, Plaintiffs must be afforded an opportunity to raise the claims they have against the 7-3 system so that this Court "can decide whether plaintiffs should be permitted to amend their complaint or otherwise develop the record to pursue those claims here." *Holloway*, 42 F.4th at 277-78.

Defendants seem to prefer that Plaintiffs raise such a claim in a "new proceeding," even if their ripeness argument fails (which it must). Br. at 5, ECF No. 308. Indeed, Defendants contend that starting over in a new lawsuit before a different Court, unfamiliar with the facts and issues already presented here, is "the only avenue that makes sense" and this Court should exercise its "discretionary" power to dismiss this lawsuit so that Plaintiffs can file a new one with a new Court. *Id.* at 6. Defendants offer no explanation for why *that* would "make[] sense," *id.*, because no such legitimate reasons exist. Instead, the ripeness considerations of the "fitness of the issues before the court, as well as the hardship that the parties will experience if the court withholds consideration"

favors rejecting Defendants' ripeness assertions. *Scoggins*, 718 F.3d at 270.[2] This Court has spent considerable time with the facts and evidence in this case and is best suited to adjudicate a claim about whether the 7-3 system also violates the VRA. That is especially true given this Court's familiarity with the record.

Indeed, the Fourth Circuit recognized as much, explaining that for Plaintiffs' claims on remand "the parties and the district court will likely have done much—though not all—of the work necessary to analyze those claims." *Holloway*, 42 F.4th at 277. That is correct, and is again highlighted by Special Master Grofman's report, which explains that the 7-3 map that the City proffers fails to remedy the VRA violation because the 7-district system can only produce two minority opportunity districts, while having three minority opportunity districts in a 10-district system "appears to be mandated" to correct the vote dilution injury here. ECF No. 281-1 at 25. The record and evidence developed already in this case is integral to ensuring an efficient resolution of this case. Defendants get it exactly backwards, seeking to dismiss this case and requiring Plaintiffs to start over in a new suit before a new Court, a course of action that Defendants fail to justify.

CONCLUSION

Plaintiffs have ripe claims against the 7-3 system of election that is the law of the land for Virginia Beach City Council elections beginning in 2024 and in subsequent elections. That

[2] Underscoring the ripeness here is the reality that if Plaintiffs are forced to wait and file a new lawsuit before a new Court in a time closer to the 2024 election, Defendants will most likely then argue that Plaintiffs' claims are barred from seeking relief too near an election under the doctrine attributed to *Purcell v. Gonzalez*, 549 U.S. 1 (2006). Defendants' ripeness arguments that set up a goldilocks problem where plaintiffs in election cases must seek relief at a precise yet unknown "right" time—not too close but not too far from the operative election—should be rejected. *See, e.g.*, *DNC v. Bostelmann*, 466 F. Supp. 3d 957, 963 (W.D. Wis. 2020) (recognizing paradox between *Purcell* and ripeness, and rejecting arguments); *Fitzgerald v. Alcorn*, 285 F. Supp. 3d 922, 942 (W.D. Va. 2018) (same).

Defendants are using this Court's 10-district plan for a single election because the Fourth Circuit's ruling reversing the imposition of that plan was issued "too late for the City to adopt and implement a new redistricting plan for the 2022 elections" does nothing to remedy the harm that the 7-3 system is set to inflict on Virginia Beach's minority voters in future elections. Plaintiffs respectfully request that this Court accordingly deny Defendants' Motion to Dismiss.

Dated November 1, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 1, 2022, the foregoing document was filed electronically with the Clerk of the Court using CM/ECF system, and that the following counsel of record were served by CM/ECF:

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