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' NOTICE OF NEW AUTHORITY

This case is not moot. Plaintiffs brought this suit because Defendants had violated their rights under Section 2. Defendants are still violating those rights. The new statute Defendants cite does not change that. It is not yet in effect, will not by itself remedy Plaintiffs' Section 2 injury even if Virginia Beach adopts the new system its lawyers unilaterally deem adequate, and will not prevent Defendants from continuing to violate Plaintiffs' Section 2 rights. This controversy meets none of the tests for mootness.

A case is moot "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013)). That occurs "only when it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Id.* (quoting *Knox v. Serv. Emps. Int'l Union, Local 1000*, 567 U.S. 298, 307 (2012)). Moreover, the new statute does not compel compliance with Section 2, and "a defendant's voluntary cessation of a challenged practice"—even if it had occurred—"does not deprive a federal court of its power to determine the legality of the practice." *Porter v. Clarke*, 852 F.3d 358, 363 (4th Cir. 2017) (quoting *City of Mesquite v. Aladdin's Castle, Inc.*, 455 U.S. 283, 289 (1982)). Rather, "a defendant claiming that its voluntary

compliance moots a case bears the formidable burden of showing that it is absolutely clear the alleged behavior could not reasonably be expected to recur." *Id.* at 364 (quoting *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 190 (2000). A defendant fails that burden where it "retains the authority and capacity to repeat an alleged harm." *Id*. (quotation marks omitted).

Under these legal standards, this case is not moot for several reasons.

First, the electoral system challenged by Plaintiffs is still in effect, and the violation of Section 2 continues. *See Super Tire Eng'g Co. v. McCorkle*, 416 U.S. 115, 123-24 (1974). The new law does not go into effect until 2022. *See* Acts of Assembly 225, ECF 240-1 at 2:65. The City has not repealed its current system of election, and the sitting City Council is constituted under the plan Plaintiffs are challenging. Plaintiffs' voting rights are injured by the unlawful election of the sitting Council members.[1] So long as the existing system remains operative, it presents a live controversy.

Second, the new statute does not remedy Virginia Beach's violation of Section 2. It merely requires that, *if* the city maintains its district-based residency requirements for Council members, those Members be elected from the districts in which they reside. It does not prescribe how Defendants draw these districts, and Defendants could draw them in ways that discriminate against minority voters. The remedy Plaintiffs seek is "the implementation of an election system for the City Council that complies with Section 2 of the Voting Rights Act" and "that all future elections

[1] It is no response that any remedy this Court might impose also would be ineffective until 2022. First, the argument is irrelevant. The dispositive fact is that the violation continues. Second, this Court has authority to order special elections for new city council members before the 2022 elections. *See North Carolina v. Covington*, 137 S. Ct. 1624, 1625-26 (2017) (remanding to district court to weigh equitable considerations in determining whether to require immediate special elections to remedy unlawful racial gerrymandering of existing districts).

for the City of Virginia Beach comply with Section 2 of the Voting Rights Act." Pls.' Am. Compl., ECF 62 at 16. Nothing in Defendants' Notice suggests that they intend to switch to a district-based system that will remedy Plaintiffs' Section 2 claim by including districts in which the Hispanic, Black, and Asian communities can elect their candidates of choice. *See U.S. v. City of Cambridge, Md.*, 799 F.2d 137 (4th Cir. 1986) (even though defendants had changed from the at-large system of election challenged under Section 2 of the VRA to a district-based system, triable issues remained because defendants' change had not provided every element of remedy sought by plaintiffs). In short, Defendants' counsel cannot imperiously proclaim that the city will adopt a new system in the future extinguishing Plaintiffs' Section 2 claim.

Further, a declaration that Plaintiffs' have satisfied the *Gingles* test and demonstrated a right to elect their candidates of choice is essential to "effectual relief," *Chafin*, 568 U.S. at 172, because it will require the City to fashion a new system that respects Plaintiffs' Section 2 rights. Thus, Plaintiffs retain far more than a "small" interest in their suit, and a full and effective remedy for their alleged Section 2 violation is far from "impossible." *Id*. This controversy is live.

Third, Defendants have not satisfied their "formidable burden of showing that it is absolutely clear the alleged behavior could not reasonably be expected to recur." *Porter*, 852 F.3d at 364 (quoting *Laidlaw*, 528 U.S. at 190). For one, there has not even been a voluntary cessation—the challenged scheme remains in effect and continues to injure Plaintiffs. But that aside, the new law does not make "absolutely clear" that the Section 2 violation will abate. While the new law does not allow Defendants to conduct at-large elections *with* residency requirements, it does allow Defendants to eliminate the district residency requirements for the seven relevant positions on the Council and retain the at-large system of election for those positions. *See* Acts of Assembly 225, ECF 240-1 at 1:44-46 ("[I]n a city…that imposes district-based or ward-based residency

requirements for members of the city . . . council, the member elected from each district or ward shall be elected by the qualified voters of that district or ward and not by the locality at large."). If the City does elect to switch to a district system, the statute does not tell the City how to draw the Districts, and, if past is prologue, their map will continue to violate Section 2. As the Fourth Circuit has explained, even where a defendant *has* voluntarily ceased the challenged conduct, the case remains a live controversy if the defendant "retains the authority and capacity to repeat an alleged harm." *Porter*, 852 F.3d at 364 (quotation marks omitted). Defendants retain that authority and capacity even under the new law.

Defendants' barebones one-and-a-half page "Notice" does not carry their formidable burden to prove the case is moot. *See Laidlaw*, 528 U.S. at 189 ("The heavy burden of persuading the court that the challenged conduct cannot reasonably be expected to start up again lies with the party asserting mootness."). Defendants claim that "without further action of the Virginia Beach City Council or the Virginia General Assembly," the City "will instead have a seven-district ward system with only the voters who reside in each ward eligible to vote for the ward representative." Notice at 2. Defendants do not contend, then, that the Virginia Beach City Council will adopt a district-based system, nor do they foreswear any action to institute a different system. The full council has held almost no public discussions regarding their response to the law. In a March 23, 2021 City Council Workshop, Councilmember Barbara Henley requested such a public legal briefing regarding "the bills, the implications, what our steps are going to have to be." City Council Workshop (March 23, 2021) at 2:24:04-12.[2] She went on to say that the Council needed "to start determining policies for implementing this total change." Id. at 2:26:38-45. Until the City Council

[2] *Available at* https://www.vbgov.com/media/Pages/default.aspx#playlistid=PL31A7A8D73F3976B9.

takes such action—and until it is "absolutely clear" that the action taken actually resolves Plaintiffs' Section 2 injuries and prevents those injuries from recurring—this case is not moot.[3]

CONCLUSION

The electoral system challenged by Plaintiffs remains in effect. The councilors elected under that unlawful system remain in office. The new statute—effective in 2022—retains for the city the power to maintain an all, or partially, at-large electoral system. The city's legal counsel have indicated a partially at-large system is likely to remain, and the city has not abandoned its position that Plaintiffs have *no* Section 2 injuries and no rights to be accounted for or protected when the city draws the seven districts its lawyers claim it will decide to adopt. Plaintiffs' interest in remedying their Section 2 injury remains as vital as it was the day this suit was filed, and relief for Plaintiffs' claim is far from "impossible." *Chafin*, 568 U.S. at 172. Indeed, given Defendants' litigating posture, an order declaring that the Plaintiff's Section 2 rights have been violated and ordering a remedy is the only way to ensure Plaintiffs' rights are protected as the City Council considers how to respond to the new statute enacted by the legislature. Defendants have fallen far short of their burden to prove the case is moot.

The Court should reject Defendants' mootness argument, enter declaratory judgment in Plaintiffs' favor on their Section 2 claim, and commence remedial proceedings to correct root and branch the ongoing violation of Section 2.

[3] Moreover, claims related to elections are frequently considered "capable of repetition, yet evading review." *See, e.g., Action NC v. Strach*, 216 F. Supp. 3d 597, 612 (M.D.N.C. 2016) ("This exception is especially germane to cases involving election-related issues, as they 'frequently present issues that will persist in future elections, and resolving these disputes can simplify future challenges.'") (quoting *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1343 (11th Cir. 2014)); *Lopez v. City of Houston*, 617 F.3d 336, 342 (5th Cir. 2010). The opportunity to repeat the harm is present, and the Council has not sworn off new violations of the Voting Rights Act.

Dated: March 26, 2021

Respectfully submitted,

/s/ J. Gerald Hebert

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