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**

REPLY MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION FOR CERTIFICATION OF APPEALABILITY

COME NOW the Defendants, by counsel, and in reply to Plaintiffs' opposition to Defendants' motion for the Court to certify an appeal on a controlling question of law pursuant to 28 U.S.C. § 1292(b)—either by entry of a new Order or by amending its prior Order to include a certification as prescribed by 28 U.S.C. § 1292(b)—state as follows:

Reply Argument

The present motion to certify an appeal pursuant to 28 U.S.C. § 1292(b) should be granted because the controlling question of law presented here undoubtedly satisfies all three elements set forth in § 1292(b) and can be decided "quickly and cleanly" by the Fourth Circuit. Understanding that a motion for appealability is not automatically or freely granted in instances such as this, Defendants reassert their request that the Court exercise its discretion to certify this Court's March 11, 2020 Order denying summary judgment and permitting the Plaintiffs' coalition claim under Section 2 to advance to trial for appeal because the facts of this case are the sort of exceptional circumstance that are proper for immediate appellate adjudication.

Defendants will not rehash in this Reply the arguments set forth in their prior memorandum. (ECF No. 128.) Instead, Defendants' intend only to respond to the instances where Plaintiffs' have raised specious arguments, selectively quoted applicable case law, and otherwise mischaracterized the true nature of the Defendants' arguments in support of their Motion for Certification of Appealability.

I. The material-advancement element of 28 U.S.C. § 1292(b).

a. A Fourth Circuit opinion concluding that coalition claims are not cognizable under Section 2 of the Voting Rights Act would terminate this litigation.

For a court to approve an interlocutory appeal of an order not otherwise appealable, the moving party must establish, along with other elements, that "an immediate appeal from the order may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). If the Defendants' are correct in their stated position that coalition claims are not cognizable under Section 2, this proposed interlocutory appeal would obviate entirely the need for and expense of trial, and along with it, the numerous costly and time-consuming pretrial disclosures that immediately precede a bench trial in federal court.

Plaintiffs have reluctantly recognized in their brief that "there is a possibility that Defendants' proposed interlocutory appeal, if successful, could render trial unnecessary." (ECF No. 129, Pls. Brief in Opp. at 4.) While Plaintiffs suggest that this possibility is remote by pointing to their view of the merits of the proposed appeal, Plaintiffs cannot dispute that, if successful, Defendants' proposed appeal makes a trial in this matter unnecessary. This is consistent with Plaintiffs' own footnote that states "an interlocutory appeal that certainly '*would* serve to avoid a trial,'…satisfies the material-advancement prong; one that merely could avoid trial does not." *Id.* at n. 1. Plaintiffs' effort to draw a distinction between "could" and "would" is dubious in this case. If the Fourth Circuit were to hold that coalition claims are not permitted under Section 2 of the

Voting Rights Act, the alleged factual basis of Plaintiffs' coalition claim would evaporate, Plaintiffs would have no basis to proceed any further, and this matter would necessarily be resolved in Defendants' favor.

b. The Court has inherent authority to control the adjudication of matters on its own docket to address Plaintiffs' concerns regarding judicial economy, timing of an appeal and the COVID-19 pandemic in order to achieve a just result.

Plaintiffs express concern about how much time would actually be saved by proceeding with an interlocutory appeal on this issue. (ECF No. 129, pp. 2-5.) Plaintiffs fail to acknowledge that any ruling from the Fourth Circuit in Defendants' favor prior to trial would save both parties from incurring significant litigation costs associated with what is shaping up to be a multiple day, if not weeks long, bench trial. Any decision from the Fourth Circuit in Defendants' favor as to the discrete, dispositive issue of the cognizability of coalition claims prior to trial—even if only a month before trial—would save significant expense and prevent an unnecessary trial.

Plaintiffs also express concern about the uncertainty of the timing of a potential interlocutory appeal in the Fourth Circuit in view of the COVID-19 pandemic. (ECF No. 129, pp. 5.) [1] The specter of COVID-19 creates uncertainty at all levels of the judiciary. Any potential impact on the speed with which appeals are be adjudicated in the Fourth Circuit because of the pandemic is equally applicable to the district courts in their ability to adjudicate cases on the merits.[2]

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[1] In support of their argument, Plaintiffs refer to cancellation of oral argument in the Fourth Circuit for March and April of 2020. Plaintiffs, however, did not reference the Standing Order temporarily suspending the oral argument requirement for published opinions during this same time frame. *See* Standing Order 20-01, Temporary Suspension of Argument Requirement for Published Opinions, United States Court of Appeals for the Fourth Circuit (March 23, 2020), https://www.ca4.uscourts.gov/docs/pdfs/noticestandingorder20-01.pdf?sfvrsn=8.

[2] *See* General Orders 2020-01 through 2020-10, United States District Court for the Eastern District of Virginia, http://www.vaed.uscourts.gov/ (last visited: April 6, 2020).

Nevertheless, to accommodate for any putative delays and to address the Plaintiffs' concerns, this Court is well within its discretionary authority to select alternative trial dates from those already proposed or stay the proceedings *sua sponte*. While the Defendants are not specifically asking for a stay of the proceedings, the Defendants recognize the inherent power of this Court to control its own docket to accommodate the interests of justice or to otherwise alleviate the concerns brought forth by the Plaintiffs. *See Landis v. North American Co.*, 299 U.S. 248, 254-55, 57 S. Ct. 163, 166 (1936) ("[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of causes on its docket . . . . How this can best be done calls for the exercise of judgment, which must weigh competing interests and maintain an even balance.").

II. The cognizability of coalition claims is a controlling question of law.

The legal question presented regarding the viability of coalition claims, such as Plaintiffs' alleged tri-partite coalition in this case, is the quintessential "controlling question of law" contemplated by 28 U.S.C. § 1292(b). Plaintiffs seek to obscure this clear fact by alleging that Defendants have conflated or confused coalition claims generally (i.e. any Section 2 claim involving more than one group) with the Plaintiffs' own *tri*-partite coalition of Black, Latino or Hispanic, and Asian voters in Virginia Beach; thereby creating two potentially distinct appellate issues. Plaintiffs' argument about this "distinction" is a red herring. To the extent there is any confusion or ambiguity regarding whether the appeal at issue presents two legal questions, as Plaintiffs suggest, Defendants assert definitively that they are seeking to appeal a single, controlling question of law: whether a vote-dilution claim predicated upon an allegedly cohesive multiracial coalition (of any size), as Plaintiffs have sought to do in this case, is cognizable under Section 2 of the Voting Rights Act. As to that question, the Plaintiffs and Defendants are in

agreement that is it a controlling issue of law. (ECF 129, p. 12 ("Only the [broader issue of whether *any* coalition claims…is cognizable under Section 2] is controlling in this case.")).

Defendants are unable to find any instance where a court from any circuit weighing in on the validity of multiracial coalition claims under Section 2 has suggested that there is—or might be—a distinction between claims involving two racial or ethnic groups and more than two such groups. The meaningful distinction is between those claims explicitly permitted by Section 2—involving one group—and those claims based upon two or more allegedly cohesive groups. Every rationale courts and parties have offered both in favor of and in opposition to coalition claims—including those arguments and case cites offered by the Plaintiffs—applies equally to Section 2 claims involving two racial or ethnic groups or multiple racial or ethnic groups.[3]

Furthermore, to the extent Plaintiffs now offer the possibility of a new legal theory that seeks relief based on a *bi*-minority coalition of Blacks and Hispanics only—without Asians—this is almost certainly nothing more than an insinuation offered for sake of argument and not an effort Plaintiffs seriously intend to undertake. None of their other expert reports, pleadings, or written discovery responses suggest at all that Plaintiffs intend to advance this theory, even in the alternative. Plaintiffs' citation to their own expert on the issue omits these crucial facts: that his offering of a "possible" bi-minority district of Blacks and Hispanics came only in a rebuttal report; the bi-minority district was the last of his seven proposed districts and the only one of its kind; no such district was offered in his original report; and their expert himself cast serious doubt on whether the compactness of the proposed district could withstand legal scrutiny. *See* Defs. Memo

[3] It certainly is the case, that as a plaintiff adds on more minority groups to its Section 2 claim, its evidentiary burden increases exponentially (and the odds become ever slimmer that the requisite conditions in fact exist)—which is likely why there has never been a successful vote dilution claim involving more than two minority groups.

in Support of Summary Judgment, ECF No. 115, Ex. 2 at 4, 11, 54-59 (Rebuttal Report of Anthony Fairfax), Ex. 3 at 237-38 (Deposition Transcript of Anthony Fairfax).

All this being considered, notwithstanding Plaintiffs' obfuscations, there should not be any doubt that the issue presented in the proposed appeal is a single, controlling question of law in this case.

III. Substantial ground for difference of opinion under 28 U.S.C. § 1292(b).

Plaintiffs argue that Defendants fail to carry the burden of showing a substantial ground for difference of opinion on whether Section 2 categorically forbids multiracial minority communities from obtaining relief as a single class. In support of their position, Plaintiffs' cite to *U.S. ex rel. A1 Procurement, LLC v. Thermcor, Inc.*, 173 F. Supp. 3d 320, 323 (E.D. Va. 2016). (ECF No. 129, p 6.) However, the *Thermcor* opinion, considered fully, actually serves the Defendants' argument. In the sentences immediately preceding Plaintiffs' conveniently edited quotation, the court provides a fuller context. The full text of the rule statement in *Thermcor* for when a "substantial ground for disagreement" may exist states:

> A substantial ground for difference of opinion arises only if the disagreement on controlling law exists between courts, not merely parties. *Cooke-Bates v. Bayer Corp.*, No. 3:10cv261, 2010 U.S. Dist. LEXIS 121255, 2010 WL 4789838, at *2 (E.D. Va. Nov. 16, 2010). Furthermore, 'just any simple disagreement between courts will not merit certification.' *Id.* A substantial ground for disagreement may arise if there is a 'novel and difficult issue of first impression,' or if there is a circuit split and the controlling circuit has not commented on the conflicting issue. *Id.* However, the mere fact that an issue is one of first impression or that there is a lack of unanimity is not enough to meet this prong. *Wyeth v. Sandoz, Inc.*, 703 F. Supp. 2d 508, 527 (E.D.N.C. 2010).

Thermcor, 173 F. 3d at 323. Plaintiffs failure to include these two examples where the court held that substantial ground for disagreement exists is meaningful because in this case there is both a "novel and difficult issue of first impression" as well as a circuit split on the issue upon which the

Fourth Circuit has not commented—according to the Plaintiffs themselves.[4] Plaintiffs' insistence that *Hall* is inapposite to the case at bar only helps to make the point that this case presents the quintessential example of a substantial ground for disagreement offered in *Thermcor*: there is a circuit split and the controlling circuit has not commented (Plaintiffs allege) in a meaningful way on the conflicting issue. In other words, the facts of this case match perfectly the examples provided in *Thermcor* and which Plaintiffs omit from their quotation.

Finally, Plaintiffs' claim that the Sixth Circuit's opinion in *Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996), does not offer any principled legal argument is absurd. The Sixth Circuit explained that the plain language of the statute "does not mention minority coalitions, either expressly or conceptually," that Section 2 "consistently speaks of a 'class' in the singular," and that if Congress "had intended to sanction coalition suits," the statute would have read "participation by members of the classes of citizens protected by subsection (a)." *Id.* at 1386. The court in *Nixon* also outlined four policy considerations to support its conclusion that minority coalitions were not cognizable under Section 2. *Id.* at 1390-93. Plaintiffs' disagreement with the rationale of *Nixon* does not mean there are no principled legal arguments that give rise to substantial ground for a difference of opinion on the cognizability of coalition claims under Section 2 of the Voting Rights Act.

[4] Defendants maintain that the district court and the Fourth Circuit have cast serious doubt on the cognizability of coalition claims under Section 2. *See Hall v. Virginia*, 385 F.3d 421, 431 (4th Cir. 2004) ("[A]ny construction of Section 2 that authorizes the vote dilution claims of multiracial coalitions would transform the Voting Rights Act from a law that removes disadvantages based on race, into one that creates advantages for political coalitions that are not so defined."); *see also Hall v. Virginia*, 276 F. Supp. 2d 528, 536 (E.D.Va 2003) ("The question [] is whether the disfavor that has befallen vote dilution claims in influence districts likewise precludes such claims with respect to coalition districts. The Court FINDS that it does.")

IV. Conclusion

All three elements set forth in § 1292(b) are established in this case. The question of law presented by Plaintiffs' tri-partite coalition claim under Section 2 of the Voting Rights Act is the quintessential type of dispositive question of law over which there is substantial ground for difference of opinion that is proper for certification for appeal to the Fourth Circuit. For the reasons set forth in the Memorandum of Law in Support of the Motion and those included here, Defendants respectfully request that the Court certify this matter for an appeal pursuant to 28 U.S.C. § 1292(b)—either by entry of a new Order or by amending its March 11, 2020 Order to include a certification as prescribed by 28 U.S.C. § 1292(b).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 6th day of April, 2020, I have electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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