Nos. 21-1533, 21-2431

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Latasha Holloway, et al.,

Plaintiffs-Appellees,

v.

City of Virginia Beach, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
For the Eastern District of Virginia
Case No. 2:18-cv-00069
The Honorable Raymond A. Jackson

Reply in Support of Emergency Motion for Expedited Briefing, Argument, and Decision and Related Case-Management Relief

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INTRODUCTION

This case stands in an emergency posture because Plaintiffs sought and obtained an order last summer holding the City's appeal in abeyance indefinitely. Plaintiffs argued at the time that such a delay would "not harm" the City because there would be "ample time for a single appeal on liability and remedy to occur" so that the 2022 election process could be governed by this Court's ruling. ECF No. 11-1 at 8. The City warned the Court at the time that Plaintiffs' request may have been motivated by the goal to run the clock out on the City's appeal and game the system to ensure that the 2022 councilmanic elections will occur under a court-ordered redistricting plan regardless of whether the City prevails in this appeal. Plaintiffs' arguments in opposition to the City's motion to expedite prove that the City was right.

There is now no dispute that Plaintiffs' purpose in seeking a stay of this appeal was to harm the City. In their opposition to the City's motion to expedite, they do not deny this, even though the City raised the point expressly (ECF No. 43-1 at 6). In fact, Plaintiffs do not even *mention* their prior motion to hold this appeal in abeyance. They simply argue that the City must be content to comply with the district court's injunction because it is too late for appellate review and "[t]hat is how the judicial process works." Opp. 1. But this case has not followed ordinary process. When a district court issues an injunction, the aggrieved party has an appeal as of right. *See* 28 U.S.C. § 1292(a)(1). The City exercised that right last May—eight months ago—and prosecuted its appeal diligently, when there was ample time for it to be processed and decided on a comfortable

schedule. By statute, it was entitled to challenge the district court's liability ruling and, if successful, obtain effective appellate relief.

Plaintiffs did not want orderly process then, and they do not want it now. They want to prevail in this case, at least as to the November 2022 election, without appellate review. But there is no rule of "judicial process" in the federal system that insulates district court decisions from this Court's scrutiny. That proposition is one Plaintiffs want to manufacture for this case only. This Court should see Plaintiffs' position for what it is, reject it, and grant the City's motion.

ARGUMENT

1. As the City's motion explains (at 5–6), the City appealed the district court's permanent injunction in May 2021, and filed its opening brief on June 11, 2021, but its appeal was held in abeyance from June 2021 until December 2021. *See* ECF Nos. 1, 23, 29. Had this lengthy abeyance not occurred, the City's appeal would likely have been resolved by now on an ordinary or modestly expedited schedule. That is "orderly judicial process," Opp. 1, and the City diligently pursued that process last May and defended it in June. *See* ECF No. 24 at 3–10 (arguing that 28 U.S.C. § 1292(a)(1) entitles the City to prosecute an appeal from an injunction before final judgment).

Plaintiffs objected to orderly judicial process at that time and asked the Court to halt the City's appeal until after remedial proceedings were conducted in the district court. Recognizing that this request was untenable without assurances that such a delay would not prejudice the City, Plaintiffs' briefing exuded such assurances, representing that their request would "not harm" the

City, that "[t]here is ample time" for the remedial phase to conclude in time for effective appellate review, and that their requested abeyance "will permit an [sic] consolidated appellate process to conclude well in advance of the November 2022 election." ECF No. 25-1 at 8, 11–12.

How do Plaintiffs explain those representations now? They don't. They ignore them. Instead, they contend that "the City is bound by the district court's order: it is effective immediately and governs the 2022 elections." Opp. 2. But that is exactly the state of affairs Plaintiffs told the Court an indefinite abeyance would *not* facilitate. They assured the Court that it could suspend this appeal for months without prejudicing the City's right to appellate review—and, as appropriate, appellate relief—before the 2022 elections. For Plaintiffs to contend now that this case is effectively over (as far as 2022 is concerned) because the *district court* ruled and it is too late for an appeal only exposes their prior assertions as disingenuous. The City is entitled to the effective appellate review it sought in May 2021.

The Court should review the briefing filed last June: it will not find any statement by Plaintiffs to the effect that the point of the abeyance was to ensure that the City would be "bound by the district court's judgment" for the 2022 elections regardless of how this Court rules on appeal because "[t]hat is how the judicial process works." Opp. 1–2. Instead, the Court will see the City's warning that "Plaintiffs ask not to delay this appeal but functionally to deny it," ECF No. 24 at 1, and Plaintiffs' response that the City's position was "hyperbole," ECF

No. 25-1 at 2. Plaintiffs do not deny that they knew then, and know now, that every assertion the City made in June was true.

2. Plaintiffs' opposition is an effort to confuse rather than persuade. The relevant premises of the City's motion are that (1) the City could have prosecuted its May 2021 appeal to a final adjudication in time to obtain relief for the 2022 elections, (2) Plaintiffs stifled that statutory right of appeal through their motion for an indefinite abeyance, (3) Plaintiffs secured that abeyance only upon assuring the Court it would not harm the City, and (4) it is only fair to require Plaintiffs to now litigate an expedited appeal in light of their assurances. Plaintiffs do not challenge any of those premises, and what they do say is unpersuasive.

To begin, Plaintiffs complain that expedition "would prejudice Appellees' ability to respond to the City's arguments." Opp. 3. If so, Plaintiffs should have recognized that in June, when there was plenty of time for generous briefing deadlines governing this appeal. Instead, they assured the Court that there was "ample time" for both an abeyance and appellate review in this Court. ECF No. 25-1 at 8. The City warned that this request would have consequences, but Plaintiffs were unmoved. *See* ECF No. 24 at 17–18 (comparing Plaintiffs' requested abeyance to unnecessary emergencies from procrastination in other contexts). Because Plaintiffs' assertion of fact was a core premise of this Court's order granting Plaintiffs' motion, Plaintiffs are estopped from claiming that the City's request will harm them. *See, e.g.*, *New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001) (discussing doctrine of judicial estoppel). Besides, Plaintiffs have

had a version of the City's appellant brief in possession for more than six months, ECF No. 20, and if Plaintiffs were confident in their defense of the district court's judgment, they would have no qualms about defending it on short notice.

Next, Plaintiffs deny that the City needs expedition to prosecute this appeal in time for the 2022 elections. Opp. 3–4. But the City meticulously set forth the election timelines in its motion (at 3–4) showing why a ruling by early February is necessary. Plaintiffs do not contest those deadlines. They simply offer the assertion that, because there are "five-and-a-half months before the candidate filing deadline," expedition is unnecessary. Opp. 5. But elections do not just happen; they must be administered. And administration requires lead time between an order from this Court vacating the district court's injunction and the candidate filing deadline, for reasons the City's motion set forth. Plaintiffs fail to explain how the City can comply with the myriad of election requirements—including the requirement to enact new districts—without a ruling well before then.[1]

Instead, Plaintiffs deflect, arguing that the City does not need appellate review because (in Plaintiffs' view) the City will lose this appeal. *See* Opp. 3–4. But it is *this Court's* role to decide the appeal. Plaintiffs cannot simply declare themselves the victors and use that as a basis to prevent the City from obtaining

[1] Plaintiffs also cite a 1995 case involving Maryland elections, Opp. 5 n.2, but fail to account for the election strictures applicable to Virginia Beach, *see* Mot. 3–4.

timely appellate review from *this Court*—especially when Plaintiffs assured this Court that *it* would have the opportunity to review this case after final judgment and before the 2022 elections. Again, these arguments directly conflict with Plaintiffs' representations to the Court last June that there was ample time *both* to stay this appeal pending final judgment *and* for the City to obtain effective appellate review.

Plaintiffs neglect to mention that the City's appeal raises questions of first impression that are subject to a circuit split and are ultimately destined for Supreme Court review. *See* ECF No. 20-1 at 26–34; ECF No. 30-1 at 5–9. This is far from a "quintessential Voting Rights Act" case. Opp. 2. In many courts, it would have been dismissed on the pleadings. *See Nixon v. Kent County*, 76 F.3d 1381 (6th Cir. 1996) (en banc) (holding that the type of claim asserted in this case is legally unavailable). Further, while Plaintiffs contend that the remedial record is "robust," Opp. 2, that record supports the City. The district court's special master confirmed that it is "mathematically impossible" for Plaintiffs to meet the standard the City contends applies to Plaintiffs' claims (if those claims are even cognizable). *See* Dist. Ct. Dkt. 283 at 3–7; Dist. Ct. Dkt. 286 at 1–8. These are important issues that impact the voting rights of hundreds of thousands of Virginia Beach residents, and they merit this Court's timely review. If Plaintiffs are confident that the City is wrong on merits, why are they so afraid of appellate review?

Plaintiffs cite this Court's order denying the City's prior motion for a partial stay of the district court's injunction pending appeal, Opp. 3, but that

order is beside the point. The City need not win a stay of the injunction to obtain expedition based on election exigencies Plaintiffs both created and assured the Court would not occur. *See Craig v. Simon*, 978 F.3d 1043, 1051 (8th Cir. 2020) (denying motion to stay pending appeal but granting motion to expedite because of election exigencies).

Moreover, Plaintiffs misrepresent the record. The stay motion the City filed last summer did not seek a stay of the judgment or the injunction, in full, pending appeal. Rather, when a vacancy occurred on the City Council, the City sought a partial stay from the injunction to conduct a special election for *that* seat. ECF No. 30-1. Plaintiffs opposed, and their *lead argument* was not that Plaintiffs are likely to succeed in this appeal, but rather that the City suffered no irreparable harm because "the City Council [was] to appoint a new Council member who will remain in office until a successor is elected." ECF No. 32-1 at 5. Now, Plaintiffs ask the Court to believe that the stay ruling was based on a finding that the City was not "likely to succeed on the merits on appeal." Opp. 1. The Court's order made no such finding. ECF No. 34.

Plaintiffs make a confusing and wholly erroneous argument "that the plan the district court ordered to remedy the federal Section 2 VRA violation *would now be required under Virginia law anyway*." Opp. 4 (underlining added; italicization in original). The underlined portion of this statement renders the statement absolutely false, and it is hard to see how Plaintiffs do not know this. Virginia law does not require the City to use "the plan the district court ordered." As the City's motion explained, Virginia law requires the City to use something

other than the *plan challenged*. Mot. 3–4. As the City has explained on several prior occasions, if it prevails in this appeal it will be *free from* the district court's injunction but *not* free to return to the challenged system. *See* ECF No. 24 at 15–17; ECF No. 20-1 at 15–18. Stated differently, it will have both the right and the obligation to adopt a plan that is (1) different from what the district court imposed, (2) different from what is challenged in this case, and (3) compliant with new Virginia laws. That is precisely what the representations Plaintiffs' cite and quote say. *See* Opp. 4.

Plaintiffs attempt to trick the Court with the false dichotomy that there are only two plans that could ever govern Virginia Beach: the challenged plan and the district court's plan. On this view, they argue that the City will be bound to the district court's plan even if the City prevails because the City cannot return to the challenged plan. But neither option is available. The City is obligated to do something different from both. In fact, a near infinite number of districting plans can be devised that are compliant with Virginia law, and—if the City prevails on this appeal—Virginia's legislative actors, not a federal court, will have the right and obligation to choose the new scheme. The point of this appeal is to return authority over that process to the bodies entitled and obligated to redistrict under state law. Plaintiffs' suggestion that the City would be obligated to adhere to the district court's plan regardless of the outcome is baseless and is hard to see as anything but completely disingenuous.

3. The City's motion asks for several forms of relief, including expedition and an order addressing several case-management issues created by

Plaintiffs' request that this appeal depart from "orderly judicial process." Opp. 1; *see* Mot. 7–10. Plaintiffs' opposition brief addresses only expedition. That being so, the Court should view the City's other requests as unopposed and grant them as part of its order expediting this appeal.[2]

CONCLUSION

The Court should order this appeal to be expedited and grant the other relief requested in the City's motion.

[2] The City's request for consolidation has already been granted. ECF No. 45.

Dated: December 31, 2021

Respectfully submitted,

/s/ Katherine L. McKnight

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g)(1), I hereby certify that the foregoing motion complies with the type-volume limitation in Fed. R. App. P. 27(d)(2). According to Microsoft Word, the brief contains 2,362 words and has been prepared in a proportionally spaced typeface using Calisto MT in 14-point size.

Dated: December 31, 2021

/s/ Katherine L. McKnight
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Counsel for Defendants-Appellants

CERTIFICATE OF SERVICE

I hereby certify that on December 31, 2021, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to all parties or their counsel of record through the CM/ECF system.

Dated: December 31, 2021

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