

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.*

Case No. 2:18-cv-0069

**DEFENDANTS’ REPLY IN SUPPORT OF  
MOTION TO DISMISS OR, IN THE  
ALTERNATIVE, TO CERTIFY AN  
INTERLOCUTORY APPEAL OR HOLD  
THE CASE IN ABEYANCE**

Plaintiffs’ opposition, ECF No. 350 (“Opp’n”), to the City’s Motion to Dismiss or, in the Alternative, to Certify an Interlocutory Appeal or Hold the Case in Abeyance, ECF Nos. 341 & 342 (“Mot.”), only confirms the deficiencies in the Second Amended Complaint. Plaintiffs attempt to hide behind the “factual matter” they have pleaded. Opp’n at 1. But no amount of factual matter can overcome the fact that the only two courts of appeals to have meaningfully addressed their coalition theory have—in en banc rulings—rejected it. And no allegations can override the fact that there is no particular 7-3-1 system for Plaintiffs to challenge, only the 7-3-1 *framework* established in the City Charter and HB2198. The Fourth Circuit held *in this case* that Plaintiffs have no right to relief in the abstract, but must challenge a concrete set of election districts that they might plausibly allege have injured them. Meanwhile, Plaintiffs’ effort to wield the Virginia Voting Rights Act (“VAVRA”) against the abstract 7-3-1 framework depends on the startling theory that acts of the Virginia General Assembly—the City Charter and HB2198—can be struck down in federal court because of another act of the Virginia General Assembly—VAVRA. That concept poses profound constitutional questions—for *the Commonwealth of Virginia*, not for the *federal* system. Plaintiffs do not acknowledge this reality, much less explain how a federal court can be justified in rewriting state constitutional order by addressing novel questions that should be

raised in state court. It would be an abuse of discretion to maintain the state claim and contravene the Fourth Circuit’s mandate to entertain the federal claim. The motion to dismiss should be granted.

### ARGUMENT

#### **I. The Court Should Dismiss Plaintiffs’ Section 2 Claim Because Section 2 Does Not Recognize Coalition Claims**

Plaintiffs acknowledge that their racial coalition theory was rejected by two courts of appeals in en banc rulings, including the Fifth Circuit’s recent decision in *Petteway v. Galveston County*, 111 F.4th 596, 603 (5th Cir. 2024) (en banc). Opp’n at 2. Plaintiffs could not bring this case in Michigan, Ohio, Kentucky, Tennessee, Mississippi, Louisiana, or Texas. Yet Plaintiffs insist those en banc decisions adopted “an outlier interpretation of Section 2.” *Id.* That is plainly incorrect. No holding of two circuits can be fairly called an outlier—especially when those holdings come with the enhanced precedential weight of en banc decisions. *See, e.g., Kyocera Corp. v. Prudential-Bache Trade Servs., Inc.*, 341 F.3d 987, 995 (9th Cir. 2003) (en banc) (describing the primacy of en banc rulings over panel rulings); *Etheridge v. Norfolk & Western Ry. Co.*, 9 F.3d 1087, 1090 (4th Cir. 1993) (recognizing the en banc court can overrule panel decisions); *Moody v. Albemarle Paper Co.*, 417 U.S. 622, 626 (1974) (describing en banc review as “normally reserved for questions of exceptional importance, or to secure or maintain uniformity of decision within the circuit”).

By comparison, no court of appeals that has meaningfully examined the question has ratified coalition claims. *See Petteway*, 111 F.4th at 603. Plaintiffs fail to cite any case law showing otherwise. The district court decision Plaintiffs cite from within the First Circuit opined that the circuit “has yet to address coalition claims.” *Huot v. City of Lowell*, 280 F. Supp. 3d 228, 235 (D. Mass. 2017); *see Latino Political Action Committee, Inc. v. City of Boston*, 784 F.2d 409

(1st Cir. 1986) (not addressing the question). The Second and Ninth Circuit decisions Plaintiffs cite merely “assumed, arguendo, that minority coalitions are allowed under Section 2.” *Huot*, 280 F. Supp. 3d at 235 (discussing *Badillo v. City of Stockton*, 956 F.2d 884 (9th Cir. 1992), and *Bridgeport Coalition for Fair Representation v. City of Bridgeport*, 26 F.3d 271 (2d Cir. 1994), *vacated and remanded*, 512 U.S. 1283 (1994)). In another case Plaintiffs cite, the Eleventh Circuit cited the Fifth Circuit’s now overruled decisions before rejecting the Section 2 claim before it. *See Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm’rs*, 906 F.2d 524, 526 (11th Cir. 1990). In a district court case Plaintiffs cite, *NAACP, Spring Valley Branch v. E. Ramapo Cent. Sch. Dist.*, 462 F. Supp. 3d 368 (S.D.N.Y. 2020), the “Defendant concede[d] that combining minority groups is permissible,” *id.* at 379–80, and that court mentioned the coalition question in a cursory footnote that cited the *Bridgeport Coalition* case, *id.* at n.11. It is Plaintiffs’ position that is the outlier.

Plaintiffs are unpersuasive in seeking support in *Hall v. Virginia*, 385 F.3d 421 (4th Cir. 2004). It found that “[a] redistricting plan that does not adversely affect a minority group’s potential to form a majority in a district, but rather diminishes its ability to form a political coalition with other racial or ethnic groups, does not result in vote dilution ‘on account of race’ in violation of Section 2.” *Id.* at 431. And it did so after finding that “any 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.” *Id.* While *Hall* does not directly foreclose coalition claims, its reasoning strongly suggests they are not cognizable.

Notably, Plaintiffs cite no authority—except dissenting opinions—to support their text-based arguments on the merits, *see* Opp’n at 3–4, and each assertion they tender is anticipated and

refuted in *Petteway*. Plaintiffs first argue that Section 2 defines the “class of citizens” it protects not as one sharing race, color, or language minority status, but instead as any group of individuals who “share the same experience of being politically excluded ‘on account of race’ or membership in a language minority group.” *Id.* at 3. This argument draws upon the definition of “class” governing class action suits in Federal Rule of Civil Procedure 23. *Id.* *Petteway* persuasively found this rationale inapplicable to Section 2; while Rule 23 defines “class” for a procedural purpose based on shared injury, that definition does not translate to Section 2, which creates substantive (not procedural) rights, because “the *object* of Section 2(b) is to determine whether a ‘protected class’ has suffered injury.” *Petteway*, 111 F.4th at 606. “Defining the class in terms of injury begs the question whether the class is ‘protected by subsection (a)’ in the first place,” a question that is ultimately “determined by the individual characteristic of race, color, or language minority status, *not by injury.*” *Id.* (emphasis added). It is for the same reason circular for Plaintiffs to claim “racial discrimination” in this case. *See* Opp’n at 6. They do not (and could not) allege intent to discriminate, and no discriminatory effect arises where Congress did not define it to exist.

Plaintiffs also cite the last antecedent canon in contending that the phrase “protected by subsection (a)” in subsection (b) of Section 2 modifies the noun “citizens,” rather than “class.” *See* Opp’n at 3. That is wrong in the first instance because “citizens” is the object of a prepositional phrase “class of citizens,” not the last in a string of antecedent nouns. *See* 52 U.S.C. § 10301(b); *see Lockhart v. United States*, 577 U.S. 347, 351 (2016) (explaining that the last antecedent canon applies to “a list of terms or phrases followed by a limiting clause”). Moreover, *Petteway* rejected this argument because the last-antecedent canon can be overcome by “other indicia of meaning.” 111 F.4th at 605 (quoting *Barnhart v. Thomas*, 540 U.S. 20, 26 (2003)); *see also Lockhart*, 577 U.S. at 352. The Fifth Circuit explained that “Section 2 provides other indicia of meaning by using

‘protected class’ as shorthand for ‘a class of citizens protected by subsection (a).’” *Id.* In that context, “‘protected’ plainly modifies ‘class,’ not ‘citizens.’”<sup>1</sup> *Id.*

Plaintiffs are mistaken in arguing that, without coalition claims, Section 2 relief would be unavailable to citizens who are members of multiple racial groups. Opp’n at 4. As *Pettaway* put it, “[t]his is not a credible concern” where the Supreme Court has permitted voting-rights plaintiffs to count anyone belonging in part to a protected class as part of that class, even if they belong to a different class as well. *Pettaway*, 111 F.4th at 605 n.3 (citing *Georgia v. Ashcroft*, 539 U.S. 461, 473 n.1 (2003), and *Robinson v. Ardoin*, 37 F.4th 208, 217 (5th Cir. 2022)). It further bears noting that factual records in these cases are built on the self-reporting of the decennial census, so properly cognizable Section 2 claims depend on residents’ own racial self-identification, not on “some sort of racial purity test.” Opp’n at 4 (citation omitted).

## **II. If the Court Concludes That Section 2 Recognizes Coalition Claims, It Should Certify the Question for Interlocutory Appeal**

If the Court continues to view coalition claims as cognizable following *Pettaway*, it should certify an interlocutory appeal for resolution of this pivotal legal question. Plaintiffs concede the first two elements of certification are satisfied, i.e., that (1) “the order involves a controlling question of law” and (2) “there is substantial ground for difference of opinion” as to that question.<sup>2</sup> Opp’n at 6–7. Plaintiffs resist certification solely on the third element, denying that “an immediate appeal from the order may materially advance the ultimate termination of the litigation.” *Id.* But their argument misses the legal meaning of that element.

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<sup>1</sup> To say that Congress’s “omitting the letters ‘-es’ in Section 2” has no meaning, Opp’n at 6, is like saying the words “fat” and “fit” are equivalent because they are just one letter off from each other.

<sup>2</sup> Plaintiffs hedge the second concession with the qualifier “arguably.” Opp’n at 7. Where two thorough en banc appellate rulings have rejected Plaintiffs’ position, there is more than an *arguable* ground to disagree with that position.

Plaintiffs largely concede away the third element because it “is closely tied to the requirement that the order involve a controlling question of law,” 16 Charles A. Wright et al., *Federal Practice and Procedure Jurisdiction* § 3930 (3d ed.), which Plaintiffs concede is satisfied here, Opp’n at 7; *see also In re Willis Towers Watson Plc Proxy Litig.*, No. 1:17-cv-1338, 2020 WL 923331, \*2 (E.D. Va. Feb. 26, 2020) (“courts have recognized that whether an issue implicates a controlling question of law is closely-tied to whether an interlocutory appeal would materially advance the termination of the litigation”). The third element, too, is satisfied because, if a “panel of [the Fourth Circuit] were to find the complaint fails to state” a Section 2 claim, “litigation would end.”<sup>3</sup> *In re Trump*, 874 F.3d 948, 952 (6th Cir. 2017); *see also* Mot. at 15 (citing, *inter alia*, *Zinski v. Liberty Univ., Inc.*, No. 6:24-cv-41, 2025 WL 1001163, \*5 (W.D. Va. Apr. 3, 2025)). Plaintiffs complain that an appeal may compromise their ability “to obtain relief” immediately and contend that “the parties are poised for expedited discovery and a limited trial for rapid resolution of this matter.” Opp’n at 7. This puts the proverbial cart before the horse. If coalition claims are not cognizable—as two en banc courts have held—Plaintiffs will not be entitled to relief, and expedited discovery and trial would be wasteful. Indeed, “[w]hile an appeal inevitably delays trial, an immediate appeal would allow the Parties to define the contours of the litigation,” which would materially advance the ultimate termination of this case. *Hutchens v. Capital One Servs., LLC*, No. 3:19-cv-546, 2020 WL 6121950, \*6 (E.D. Va. Oct. 16, 2020).

Plaintiffs’ cited authority is not to the contrary. They cite one case where the proposed question for review would “not end the litigation,” *Difelice v. U.S. Airways, Inc.*, 404 F. Supp. 2d 907, 909 (E.D. Va. 2005), which is not the case here. Plaintiffs also note that this Court denied a

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<sup>3</sup> The same is true even if an appeal could eliminate some, but not all, claims. *See Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011).

prior certification motion in this case at a time when discovery was already “nearly complete” and a trial time was projected. *Holloway v. City of Virginia Beach*, No. 2:18-CV-69, 2020 WL 1891863, at \*1 (E.D. Va. Apr. 16, 2020). By contrast, discovery related to the Second Amended Complaint has yet to commence. Moreover, the fact that *two* courts of appeals sitting en banc have now rejected coalition claims proves this case to have the “extraordinary” quality Plaintiffs deem lacking. *See* Opp’n at 7 (citation omitted); *see Holloway*, 2020 WL 1891863, at \*2 (finding no “exceptional circumstances” four years before *Petteway* was decided). The en banc ruling is by definition “exceptional,” *Moody*, 417 U.S. at 626, and a split from two en banc rulings would be exceptional as well.

In addition, Plaintiffs are incorrect that the case can be decided on evidence “already . . . considered by this Court.” Opp’n at 7. Years have passed since discovery closed in September 2019, and material facts have changed. The City has voted in three federal elections (2020, 2022, and 2024), two legislative elections (2021, 2023), and two City Council elections (2022, 2024) using single-member districts, and officials elected under the 10-1 system have governed the City for nearly four years. “[R]ecent elections are the most probative in determining vote dilution.” *United States v. Charleston County*, 365 F.3d 341, 350 (4th Cir. 2004); *see also Uno v. City of Holyoke*, 72 F.3d 973, 990 (1st Cir. 1995) (“Though past elections may be probative of racially polarized voting, they become less so as environmental change occurs.”). And facts coming into existence after the 2020 trial will be far more probative here than what was then available. Plaintiffs disregard the substantial burden and expense that expedited discovery and trial would impose on the litigants, attorneys, expert witnesses, and the Court, which would be wasteful if the Fourth Circuit later reverses on a dispositive legal question. *See, e.g., In re Va. Elec. & Power Co.*, 539 F.2d 357, 364 (4th Cir. 1976) (finding interlocutory appeal would advance the termination

of the litigation because decision would prevent waste of “much time, expense and effort”); *Hutchens*, 2020 WL 6121950, at \*6; *Est. of Giron Alvarez v. Johns Hopkins Univ.*, No. 15-cv-0950, 2019 WL 1779339, at \*2 (D. Md. Apr. 23, 2019) (finding material-advancement prong satisfied in part because “expert discovery is ongoing, discovery issues remain, and discovery motions remain to be resolved”); *Feinberg v. T. Rowe Price Grp., Inc.*, No. 17-cv-0427, 2021 WL 2784614, at \*4 (D. Md. July 2, 2021) (finding material advancement “is more likely to occur at earlier stages in the litigation, when resolving a question on interlocutory appeal can obviate the need for a lengthy or costly discovery process”).

Finally, the public interest would best be served by the certainty that an interlocutory appeal may provide. While the City attempted to implement a 10-1 plan under its own authority, the *Branch* litigation has frustrated that effort. However, the City may yet continue with a 10-1 system. A federal judgment enjoining a 7-3-1 system that might be adopted in the future will, among other things, be disruptive to the City’s voters and create confusion. If that result is justified, it should be because the Fourth Circuit has elected to split with the Fifth and Sixth Circuits and recognize coalition claims—or the Supreme Court has elected to overrule their decisions. Unless that occurs, any injunction this Court issues may be vulnerable to stay or reversal.<sup>4</sup>

### **III. Plaintiffs’ Second Amended Complaint Should Be Dismissed For Failure to State a Plausible Claim for Relief Under Section 2 or VAVRA**

Plaintiffs are incorrect in insisting that they have adequately pled Section 2 and VAVRA claims. While they claim “factual allegations” of dilution satisfy their pleading requirement, *see, e.g.*, Opp’n at 14, they cannot overcome the fact that “there has been no adoption of a particular 7-

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<sup>4</sup> Insofar as election timing is Plaintiffs’ concern, the Fourth Circuit has the power to expedite an appeal. Should an interlocutory appeal occur, the City represents that it will not oppose a motion to expedite, which Plaintiffs are entitled to file, so long as Plaintiffs propose at least three weeks from the grant of such a motion for the filing of the City’s opening brief and at least 10 days from Plaintiffs’ brief for the City to file a reply brief.

3-1 configuration,” a point they are compelled to concede, *id.* at 15. And Plaintiffs are incorrect to assert that “the City *will* adopt a particular 7-3-1 configuration before the next election.” *Id.* at 16 n.8. The City has demonstrated, with no rebuttal, that this may never occur because the *Branch* court has not yet ordered it; that court may never order it; and, even if it does, the *Branch* court may ultimately find itself obliged to draw the new plan. *See* Mot. at 7–8 & n.4, 17–19 & n.6, 26–28 & n.9. This basic fact leaves Plaintiffs in a position where they challenge no districts that might dilute their votes. What they call a “7-3-1 system” is merely a general framework in which districts might at some point be configured. The Fourth Circuit has already held that no claim against an abstract framework exists under Section 2, and the same is true under VAVRA.

**A. A Section 2 Claim Cannot Be Made Against a 7-3-1 Framework in the Abstract**

Because a Section 2 claim lies against a “particular” election system, not an “abstract” framework, the Fourth Circuit remanded this case to permit Plaintiffs to challenge “whatever post-HB2198 electoral system the City adopts.” *Holloway v. City of Virginia Beach*, 42 F.4th 266, 275, 277 (4th Cir. 2022). And because the City has not adopted a plan consisting of seven single-member districts and three at-large districts, Plaintiffs have no viable claim (and, in fact, no ripe claim). To adjudicate a claim against an abstract 7-3-1 framework would violate the Fourth Circuit’s mandate. Mot. at 16–19.

Plaintiffs’ response to this clear point lacks coherence. They first rest on their “allegations” that a “7-3-1 system would necessarily dilute the votes” of a coalition and call that sufficient for present purposes. Opp’n at 8. But the *Holloway* ruling requires that Plaintiffs allege that a “particular” 7-3-1 system—rather than an “abstract” one—actually exists. *Holloway*, 42 F.4th at 275. Plaintiffs concede there is no such system. Opp’n at 15. No amount of allegations about what a 7-3-1 system “would” do, *id.* at 8, states a viable claim under the Fourth Circuit’s ruling.

Plaintiffs also engage in wordplay. The Fourth Circuit used the word “system” (rather than “plan”), the Second Amended Complaint uses the term “system” as well, so Plaintiffs theorize that they mean what the Fourth Circuit means, and their allegations concerning such a “system” suffice. Opp’n at 8–9. This contrived reading of the Fourth Circuit’s decision ignores that “the language of an opinion” should not be “parsed” like the “language of a statute,” *Reiter v. Sonotone Corp.*, 442 U.S. 330, 341 (1979), but must “be read in the light of the facts of the case under discussion,” *Armour & Co. v. Wantock*, 323 U.S. 126, 133 (1944); see also *Upper Skagit Indian Tribe v. Sauk-Suiattle Indian Tribe*, 66 F.4th 766, 770–71 (9th Cir. 2023). Plaintiffs take the Fourth Circuit’s use of the word “system” out of context. The type of “system” Plaintiffs challenge is *not* what the Fourth Circuit meant by that term.

The Fourth Circuit keyed its analysis to the concept of “a *particular* electoral system” in the sense of specific voting districts—often called a redistricting plan—such as a system that “required *all* candidates to run at-large and *most* candidates to do so from especially problematic designated districts.” *Holloway*, 42 F.4th at 276 (first emphasis added). The Fourth Circuit contrasted such a “particular” system with an “abstract” framework and clarified that no claim lies “in the abstract.” *Id.* at 275. The Fourth Circuit clearly understood HB2198 as such an *abstract* framework. It explained that the HB2198 framework would “allow” different systems and thereby enable the City to adopt a “new, HB2198-compliant system.” *Id.* at 275–76. The Fourth Circuit never referred to HB2198 as *itself* a system that Plaintiffs may challenge under Section 2. The Fourth Circuit described HB2198 as a law that would “affect” the existing “system,” and one with which a new “system” must be “compliant,” not as a system itself. *Id.* at 271, 273; see also *id.* at 276 (“HB 2198 will allow the City to maintain at-large elections for three of its City Council seats”), 277 (“the City cannot side-step HB 2198 and return to an entirely at-large system”).

Perhaps most importantly, the Fourth Circuit described an order of operations by which the City would “adopt[]” a “post-HB 2198 electoral system” and this Court would decide “whether the plaintiffs should be permitted to amend their complaint” to challenge that system here “or whether [the new claims] are better pursued in a new proceeding.” *Id.* at 277. If Plaintiffs could have challenged HB2198 directly, no remand would have been necessary.

Read “in light of the facts of the case under discussion,” *Armour*, 323 U.S. at 133, the Fourth Circuit plainly described what Plaintiffs call “a particular 7-3-1 configuration” as the type of election law that may be challenged under Section 2. Opp’n at 15. A semantic dispute about the meaning of “system” versus “plan” in the abstract cannot obscure the Fourth Circuit’s plain meaning. *Holloway* held that Section 2 claims do not arise “in the abstract” or “in a vacuum,” but rather arise from a “particular electoral system.” 42 F.4th at 275–76. No amount of wordplay can create that needed particularity. Under Virginia law, cities like Virginia Beach redistrict through a decennial redistricting measure (i.e., an ordinance). *See, e.g.*, Va. Code § 24.2-304.1(A) & (B); *id.* § 24.2-311(B); Va. Beach City Charter § 3.01(B). The City had not adopted an ordinance creating any 7-3-1 plan at the time *Holloway* was decided, and it has not adopted one now. Accordingly, this case stands where it did at the time of remand, and no claim exists now for the same reason no claim existed then.

**B. The Court Should Not Exercise Supplemental Jurisdiction Over Plaintiffs’ VAVRA Claims**

Plaintiffs have not shown that supplemental jurisdiction over their VAVRA claims is proper. The City demonstrated that dismissal of Plaintiffs’ VAVRA claims would be particularly improper if the Court dismisses Plaintiffs’ federal claim (as it should). Mot. at 20. That is because when a federal court dismisses all federal claims early in a case, it “ordinarily should[] kick the case to state court.” *Royal Canin U. S. A., Inc. v. Wullschleger*, 604 U.S. 22, 32 (2025); *see also*

*RWJ Management, Inc. v. BP Products N. Am., Inc.*, 672 F.3d 476, 478 (7th Cir. 2012) (recognizing that a “general presumption” applies when all federal claims are dropped from a suit “in favor of relinquishment [of jurisdiction] applies and is particularly strong where, as here, the state-law claims are complex and raise unsettled legal issues”).

In a footnote, Plaintiffs respond with the rule that a federal court retains discretion to entertain state claims after federal claims are dismissed. Opp’n at 11 n.5. But Plaintiffs supply no basis for the Court to exercise discretion in their preferred manner. Just because an issue “is left to the court’s discretion does not mean that no legal standard governs that discretion. A motion to a court’s discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.” *Nken v. Holder*, 556 U.S. 418, 434 (2009) (cleaned up). Here, the Supreme Court has directed that, when a federal court dismisses federal claims, it “ordinarily should[] kick the case to state court.” *Royal Canin*, 604 U.S. at 32 (citing *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726–727 (1966)). Such “dismissal is appropriate because district courts should avoid ‘[n]eedless decisions of state law . . . both as a matter of comity and to promote justice between the parties.’” *Judson v. Bd. of Supervisors of Mathews County*, 436 F. Supp. 3d 852, 869 (E.D. Va. 2020), *aff’d*, 828 F. App’x 180 (4th Cir. 2020) (citation omitted); *see also MediGrow, LLC v. Natalie M. LaPrade Medical Cannabis Comm’n*, 487 F. Supp. 3d 364, 376 (D. Md. 2020) (dismissing state-law claims, after dismissing federal claims, “because the state law claims concern the intricacies of a new state regulatory scheme” and “[p]rinciples of comity dictate that the Plaintiff’s novel state law claims should be reserved to the Maryland courts”). To justify departure from that rule, Plaintiffs should have identified some basis for doing so. Their reliance on an unreported decision that merely posed this question to the district court without answering

it, *see Shumate v. City of Lynchburg*, No. 24-1428, 2025 WL 2409059 (4th Cir. Aug. 20, 2025), is entirely unpersuasive.

Even if the Court retains Plaintiffs' federal claim, it should dismiss the VAVRA claim, which raises "novel" and "complex" questions of state law. 28 U.S.C. § 1367(c)(1); Mot. at 21. Plaintiffs do not dispute that their VAVRA claims present novel and complex issues of state law. *See* Opp'n at 10. They insist that this Court should plow ahead but cite no compelling reason to disregard the Fourth Circuit's directive that "important and potentially far-reaching issues of state law" should be "remitted to state courts." *Arrington v. City of Raleigh*, 369 F. Appx. 420, 424 (4th Cir. 2010). While Plaintiffs are correct that the court in *Lansdowne on the Potomac Homeowners Ass'n, Inc. v. OpenBand at Lansdowne LLC*, No. 1:11-cv-872, 2011 WL 5872885, \*11 (E.D. Va. Nov. 22, 2011), cited the discovery burden associated with state-law claims as *one* reason against supplemental jurisdiction, its principal reason was to avoid "embroil[ing] this Court in several complex and novel issues under Virginia law." *Id.*; *see also Richardson v. Clarke*, No. 3:18-cv-23, 2020 WL 4758361, at \*8 (E.D. Va. Aug. 17, 2020). Notably, Plaintiffs fail to cite any federal case, anywhere, retaining jurisdiction over state claims in analogous circumstances.<sup>5</sup>

### **C. The Second Amended Complaint Fails to State a VAVRA Claim**

On the merits, Plaintiffs have failed to state a plausible claim for relief under VAVRA's anti-dilution and anti-retrogression provisions, and their brief has failed to meaningfully address deficiencies in the Second Amended Complaint.

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<sup>5</sup> Indeed, VAVRA contains two venue provisions mandating that claims be brought in the state circuit court of the relevant locality. Va. Code §§ 24.2-129(C), 24.2-130(C). These provisions, which Plaintiffs do not claim to satisfy, demonstrate that the Virginia General Assembly expected VAVRA claims to be adjudicated in state court.

1. Plaintiffs Have Not Pled an Anti-Retrogression Claim.

The City demonstrated that Plaintiffs have no right of action to enforce VAVRA's retrogression provision. The twin express rights of action permit claims only "[d]uring [a] 30-day waiting period," Va. Code § 24.2-129(C), or "subsequent" to a certificate of no objection by the Virginia Attorney General, *id.* § 24.2-129(D). Plaintiffs concede that "there has been no . . . 30-day waiting period or certification of no objection." Opp'n at 15. Plaintiffs therefore have no right of action. *See Cherrie v. Va. Health Servs., Inc.*, 787 S.E.2d 855, 858–59 (Va. 2016). They insist that their claim should persist regardless in the name of "judicial economy and a streamlined adjudication," Opp'n at 15, and because they believe they have alleged retrogression, *id.* at 14–15. But that is not how rights of action work. Virginia courts "never infer a 'private right of action' based solely on a bare allegation of a statutory violation," and the question is whether "a statute expressly authorizes" the action, not whether it should have done so. *Cherrie*, 787 S.E.2d at 858 (citation omitted). Plaintiffs' invocation of supposed good policy does not create a right of action that does not otherwise exist.

Besides, Plaintiffs are wrong in their assertion that the Second Amended Complaint states a retrogression claim. There is plenty of reason to "doubt that there has been a change to the method of election of the Virginia Beach City Council," Opp'n at 14, where the *Branch* court has not ordered the City to utilize "a 7-3-1 system" of any kind and may never issue such an order. *See* Mot. at 7–8 & n.4, 17–19 & n.6, 26–28 & n.9. Moreover, there is good reason to doubt that a future judicially conducted redistricting by the *Branch* court would trigger VAVRA's retrogression provisions, as it is based on Section 5 of the federal Voting Rights Act, and that statute did not govern judicial redistricting. *See Connor v. Johnson*, 402 U.S. 690, 691 (1971). Plaintiffs' contrary contentions only confirm why the VAVRA claim belongs, if anywhere, in state court.

2. Plaintiffs' VAVRA Vote Dilution Claim Should Be Dismissed.

Plaintiffs address their VAVRA vote-dilution claim while ignoring the profound question it poses to Virginia's state constitutional order, *see* Opp'n at 12–14, even though the City's opening brief prominently addressed this problem, *see* Mot. at 25–26. Plaintiffs claim to challenge the electoral system “that the City Charter and HB2198 codified,” Opp'n at 12, but the City Charter and HB2198 are *state statutory law* created by the General Assembly. *See Holloway*, 42 F.4th at 277 (“only the General Assembly—not the City— . . . can amend that charter”). VAVRA is also a *statute* enacted by the Virginia General Assembly. Plaintiffs do not even attempt to say how a court—especially a federal court—can strike down one act of the General Assembly on the basis of another act of the General Assembly. And it would be especially inappropriate for this Court to do that here, when the City has been compelled by another court—a state court—to comply with HB2198 and the City Charter. Plaintiffs ask a federal court to hold that the City violated state law by complying with state law as construed by a state court. It is difficult to imagine a greater affront to state sovereignty. Plaintiffs' VAVRA claim presents a highly sensitive question of paramount constitutional importance that provides a compelling—indeed, mandatory—basis for dismissal (at least without prejudice) to permit state courts to address Plaintiffs' claim.

In all events, Plaintiffs misread VAVRA, which avoids this problem in the plainest of ways. The vote-dilution provision applies to actions of “the governing body of any locality,” not to acts of the General Assembly or of state courts. Va. Code § 24.2-130(a). Plaintiffs clumsily attempt to dance around that text. They claim that a 7-3-1 system “is set to be ‘applied’ *by the City* in future Virginia Beach City Council elections.” Opp'n at 12. That is not so—unless and until the City adopts an ordinance. In the absence of such ordinance, the City cannot be “set” to implement a 7-3-1 framework. The City has done literally nothing to apply a 7-3-1 system, and the Second Amended Complaint does not allege otherwise. It therefore does not matter that Plaintiffs claim to

challenge “the ‘method of election’ itself.” *Id.* at 12–13. Even if a state statute could be used to strike down a state statute—and directive of a state court implementing it—“the governing body of” Virginia Beach has taken no action to adopt or implement the 7-3-1 framework.

Finally, Plaintiffs’ discussion of the City’s arguments in state court “that any configuration of the 7-3-1 system of election creates liability under the VAVRA,” Opp’n at 13, fails for similar reasons. The City never said, even in defending the *Branch* case, that VAVRA would be violated *before* the City took any action of any kind. Whatever the City’s arguments may mean in some future case challenging a redistricting plan that has not been—and may never be—drawn, they have no legal relevance here.<sup>6</sup>

#### **IV. The *Purcell* Doctrine Supplies No Basis for Federal Intervention in Local Redistricting Absent a Cognizable Legal Claim**

Plaintiffs urge the Court to issue a series of orders if it maintains this action (despite lack of a cognizable claim) and holds it in abeyance pending future implementation of a 7-3-1 redistricting plan. Opp’n at 15–17. Specifically, they ask the Court to enter an order commanding the City to “provide a date certain” for when it would adopt a 7-3-1 plan following the November 2025 referendum vote and to set expedited discovery and trial deadlines. *Id.* at 16. Plaintiffs justify this novel concept under *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam), which they cite for the proposition “that timely adjudication of election-related cases is essential to preventing voter confusion and administrative disruption.” *Id.* Plaintiffs both misstate *Purcell* and ask the Court to intrude into the City’s redistricting process, and the pending *Branch* state-court litigation, contrary to teaching of *Grove v. Emison*, 507 U.S. 25 (1993).

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<sup>6</sup> Moreover, if Plaintiffs believe “Defendants’ admissions” about “VAVRA” are so compelling, Opp’n at 14, they should be willing to present those arguments in state court. The City never made “admissions” that a 7-3-1 system would violate federal law.

Start with *Purcell*. That decision described circumstances where federal courts must “allow [an] election to proceed without an injunction” because of “the imminence of the election.” 549 U.S. at 5–6. It did not direct federal courts to rush to judgments, expedite proceedings, or upend procedural rules and norms to reach challengers’ desired outcomes in advance of election cycles. That much is plain from another case Plaintiffs cite, *Merrill v. Milligan*, 142 S. Ct. 879 (2022), where the Supreme Court stayed an injunction because a federal district court did exactly what Plaintiffs demand here—rushed to an injunction to beat election timelines. *See id.* at 879–81 (Kavanaugh, J., concurring); *see* Opp’n at 16 (citing this opinion). In that case, the redistricting plan was enacted too late for an injunction to issue—even though the plaintiffs challenged it at the earliest possible moment after the plan was adopted. *See Singleton v. Merrill*, 582 F. Supp. 3d 924, 939 (N.D. Ala. 2022) (decision stayed in *Milligan*, noting the claim was filed “[o]n the day that Alabama Governor Kay Ivey signed the Plan into law”). The Supreme Court nonetheless stayed the injunction for the 2022 elections—even though it would later affirm the very same injunction. *See Allen v. Milligan*, 599 U.S. 1 (2023). The Court issued another order staying an injunction against a plan adopted on a similar time frame the following year. *See Robinson v. Callais*, 144 S. Ct. 1171 (2024).

The Fourth Circuit has twice confirmed that *Purcell* applies to foreclose federal-court injunctions on the eve of an election, not to authorize courts to rush proceedings and issue injunctions because the challenged laws are deemed to have been promulgated too late. In *Wise v. Circosta*, 978 F.3d 93 (4th Cir. 2020), the en banc court denied an injunction pending appeal against a North Carolina state policy adopted just two months prior to an election, holding that “*Purcell* strongly counsels *against* issuing an injunction here.” *Id.* at 98 (opinion of Wynn, J., for the court). While some dissenting judges viewed the late hour of the state’s new policy to support

an injunction, the majority explained that “it is not federal court decisions, but state decisions, that establish the status quo” protected by *Purcell*. *Id.* Following suit, the Fourth Circuit found in *Pierce v. N.C. State Bd. of Elections*, 97 F.4th 194 (4th Cir. 2024), that *Purcell* foreclosed an injunction against a redistricting plan that the state adopted less than two months before the candidate filing period closed. *See id.* at 225–26. Plaintiffs flip *Purcell* on its head by claiming it commands “[e]xpeditious adjudication,” Opp’n at 16, when their apparent contention that it is too late for a redistricting case would in fact mean *Purcell* commands no adjudication or injunction.

To be clear, the City takes no position on how the *Purcell* doctrine may apply to future proceedings against a 7-3-1 plan because the City views the question as premature. It is sufficient for present purposes that *Purcell* does not “justify federal court intervention” that is otherwise unfounded. *Wise*, 978 F.3d at 99. Here, there is no basis for scheduling of any kind where Plaintiffs have failed to state a claim. Plaintiffs cite no basis of authority for their wish list of scheduling preferences. *See* Opp’n at 16–17.

Indeed, Plaintiffs’ request runs headlong into *another* federal election-law doctrine in which the Supreme Court “has required federal judges to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself.” *Growe*, 507 U.S. at 33. Plaintiffs ask the Court, among other things, to command the City “to provide a date certain by which they would adopt a 7-3-1 plan.” Opp’n at 16. Setting aside that it is passing strange for Plaintiffs to seek an order pushing the City to adopt a plan that Plaintiffs believe would violate their rights, Plaintiffs err in forgetting that such a plan would be promulgated—if ever—as part of a remedial proceeding in state court. The *Branch* court has assumed responsibility for (possibly) ushering a 7-3-1 system into usage—over the City’s

objection—so this is a case where an “issue in the federal action will be mooted or presented in a different posture following conclusion of the state-court case.” *Grove*, 507 U.S. at 32.

By consequence, the relevant question is not when the City may adopt a plan—and that in itself is an event the *Branch* court may regulate—but when the state court will have completed its work such that the plan may be used. That work may include a judicially conducted redistricting, if the City Council is unable to redistrict, *see id.* at 28–29 (judicial redistricting commenced after legislative redistricting failed), and it may include judicial review of the 7-3-1 plan’s compliance with legal dictates, including VAVRA, *see North Carolina v. Covington*, 585 U.S. 969 (2018) (describing judicial review of legislative remedial redistricting plan). During this entire process, precedent requires that a federal court “stay[] its hand.” *Grove*, 507 U.S. at 33 (quoting *Scott v. Germano*, 381 U.S. 407, 409 (1965) (per curiam)). There is no basis for the Court to effectively take over the *Branch* remedial proceeding here. No scheduling questions may ever arise, and the Court should take them up after Plaintiffs are able to state a viable claim, not before.

### **CONCLUSION**

For the foregoing reasons, the Court should dismiss the Second Amended Complaint. Alternatively, it should dismiss Count Two (the VAVRA claim) and certify an interlocutory appeal on Count One or permit Plaintiffs to replead Count One if and when they are able to present a cognizable claim against specific conduct by the City.

DATE: September 10, 2025

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**CERTIFICATE OF SERVICE**

I hereby certify that on September 10, 2025, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of the filing to all parties of record.

*/s/ Katherine L. McKnight*

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