No. 21-1533

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, Norfolk Division

APPELLEES' RESPONSE TO APPELLANTS' EMERGENCY MOTION FOR A STAY OF INJUNCTION PENDING APPEAL

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INTRODUCTION

This is not an emergency. There is a vacancy on Virginia Beach's 11-member City Council. The City Council is about to fill that vacancy by appointment, as required by Virginia law.[1] Below, Appellants ("the City") told Plaintiffs and the district court—incorrectly, as they now admit—that the appointee "cannot remain in office past" November 2, 2021, and thus a special election was the only way to ensure that the Council would not be short-staffed as of November. Dist.Ct.Doc.262 at 1. Being short one member, with tied votes possible, was the *only* purported harm that the City identified in its motion for a stay below. *Id.* at 8-9.

The City's concern—with which Plaintiffs sympathized—induced Plaintiffs' conditional non-opposition to a *modification* of the injunction in the district court, despite Plaintiffs' apprehension about the harm a modification could cause. *See* Dist.Ct.Doc.263 at 2 (acknowledging the importance of "a full complement of Council members," arguing that a stay was inappropriate because the standard was unsatisfied, but not objecting to a modification conditioned upon the district court's ability to truncate the end of the term of office from 2024 to 2022).

But as the City now acknowledges in a footnote, *see* Mot. at 14 n.4, it flatly misrepresented Virginia law to Plaintiffs and the district court. The appointee's term

[1] Applications are due August 2, and the City Council will make the appointment on August 10. *See* https://www.vbgov.com/government/departments/communications-office/hot-topics/Pages/City-Council-Vacancy.aspx.

will not expire on November 2, 2021, so the City Council will not be short-staffed and tie votes are not a real possibility. Instead, Virginia law provides that the appointee will remain in office until a successor is elected, regardless of when that election occurs. Va. Code § 24.2-228(A). The only harm the City cited below in justifying a stay—a vacant seat come November—will not occur. The district court's decision to complete its work fashioning a remedial plan before permitting any further elections is thus reasonable because it will permit the district court to craft remedial districts for minority voters without a newly elected councilmember in any of the new minority opportunity districts.

Indeed, the exact type of election the City asks this Court to urgently order to occur in November will be *illegal* in Virginia come January. Earlier this year, the General Assembly enacted HB2198, effective January 1, 2022, which prohibits election systems in which a candidate must reside in a district but be elected city-wide rather than by that district's voters. The public interest is hardly served by rushing an election for a non-vacant seat, under a system that the district court concluded violates Section 2 of the Voting Rights Act and that the General Assembly outlawed.

The entire premise of the City's motion was wrong, and this Court should reject the City's attempt to project its error onto Plaintiffs and the district court.[2] It should be no surprise that Plaintiffs have reconsidered their position now that the fundamental premise of the City's motion has proven false.[3] It is now evident that the City will suffer no harm whatsoever absent a stay. This alone defeats the City's motion. *See Ruckelshaus v. Monsanto Co.*, 463 U.S. 1315, 1317 (1983) ("An applicant's likelihood of success on the merits need not be considered [] if the applicant fails to show irreparable injury from the denial of the stay."). But the City meets none of the other stay factors either.

Moreover, there is no merit to the City's request that this Court vacate its order, entered last week, to hold the City's appeal in abeyance. That issue has nothing to do with the City's request for a stay to permit a special election. The

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[2] The City should have informed Plaintiffs and the district court of its misrepresentation sooner. At the July 13 City Council meeting, the Mayor explained that "there is a possibility that the person we would choose to fill the temporary vacancy may be on longer depending on what the court may say." June 13, 2021 Informal Session at 1:44:15, https://www.vbgov.com/media/Pages/default.aspx; *id.* at 1:54:35 (Council member Moss stating that there is a "very high probability" that the appointee will serve beyond November). Yet that *same day*, the City's counsel emailed the district court urging it to hurry its decision on the stay motion, omitting that the entire premise of the motion had proven false. *See* Ex. 1.

[3] Because the City filed its letter to this Court about its stay motion *before* filing or serving its motion below, Plaintiffs used the phrase "limited stay" as shorthand. After reading the City's motion, it became clear that the stay standard was unmet and instead a conditional modification was the appropriate vehicle for relief (a view itself premised on the City's misrepresentation of Virginia law).

motion to hold the appeal in abeyance rested upon precedent supporting a combined appeal of liability and remedy in Section 2 cases, and the City's obligation to independently submit a new districting plan compliant with the more stringent Virginia Voting Rights Act for preclearance review—an event that will bear on this Court's disposition of the City's appeal. Delaying the appeal is appropriate whether the Court grants or denies a partial stay or modification of the injunction regarding the Kempsville special election, and the City's attempt to conflate the issues and relitigate the abeyance motion *one week* after this Court decided it is a vexatious multiplication of the proceedings. The City's motion should be denied.

ARGUMENT

I. The City's Request for a Partial Stay of the Injunction Pending Appeal Should Be Denied.

The City's request for a partial stay should be denied. Four factors determine whether a stay is appropriate: (1) whether the applicant "has made a strong showing that [it] is likely to succeed on the merits," (2) whether the applicant will be irreparably injured absent a stay, (3) whether a stay will injure Plaintiffs, and (4) how the public interest is affected. *Nken v. Holder*, 556 U.S. 418, 426 (2009). This Court can begin and end its consideration with the second factor, because the City has admitted that its proffered harm—being left with an indefinitely vacant Council seat come November—will not occur. With no irreparable harm (indeed, no harm), the City cannot obtain the partial stay it seeks. *See Ruckelshaus*, 463 U.S. at 1317;

Doe #1 v. Trump, 957 F.3d 1050, 1061-62 (9th Cir. 2020) ("[I]f the petition has not made a certain threshold showing regarding irreparable harm . . . then a stay may not issue, regardless of the petitioner's proof regarding the other stay factors." (internal quotation marks omitted)). Thus, the Court need not reach the remaining factors, but if it does, the City fails those too.

A. The City Will Not Suffer Irreparable Harm Absent a Stay.

The City will not suffer irreparable harm absent a stay, because Virginia law requires the City Council to appoint a new Council member who will remain in office until a successor is elected, whenever that occurs. *See* Mot. at 14, n.4; Va. Code § 24.2-228(A). There will be no vacancy, and so, no harm to the City.

The City proffered *one* purported harm in its district court briefing: "The injunction, if left unchanged, would forbid the City from filling a vacancy on the Council, meaning that after the November 2, 2021 election, the City would only have a 10-member Council. Such an injunction would inflict irreparable harm on the City and the public." Dist.Ct.Doc.262 at 8. The City explained that "the workload on each Council member is substantial and the Council cannot afford to lose a member and risk deadlock." *id.* at 9. The City explained in its district court brief that, unless the district court modified or partially stayed its injunction, "the only way under present law for the City to avoid losing a member of the City Council" would be a rushed remedial process completed in time for a November election. *Id.* at 9-10; *see id. at*

1 (noting that the appointed "temporary successor, by law, cannot remain in office past [November 2, 2021]").

None of this was true. As the City now acknowledges, Virginia law provides that the appointee will serve in office until a successor is elected—a term that will continue whether that election is hurriedly held this November, November 2022, or any other time. Once the appointment is made, there will be no vacancy, no increased workload, and no risk of deadlock. Not a single purported harm the City identified in its district court briefing will occur, because the critical premise of the City's motion misrepresented Virginia law.

The City buries this admission in a footnote, *see* Mot. at 14 n.4, and instead contends that "the district court completely missed the representational harm to the populace" because "the open seat may be held indefinitely by an individual appointed by the City Council—who is therefore not elected." Mot. at 12-14. After blaming the district court for "completely miss[ing]" this, the City contends that it is "indisputable, and Plaintiffs below did not dispute it." *Id.* at 14.

It should not surprise the City that the district court missed this purported harm, and that Plaintiffs did not engage with it, *because the City failed to mention it below*. In fact, it argued the precise inverse. In any event, the "representational" harm the City newly proffers is not irreparable harm to *the City*. Rather, it is relevant to the public interest factor. *See Sw. Voter Registration Educ. Project v. Shelley*, 344

F.3d 914, 919 (9th Cir. 2003) (en banc) (per curiam) (explaining that effect on voters is public interest consideration, not irreparable harm consideration). As Plaintiffs explain below, *see infra* Part I.D, this "representational" argument is meritless. The City has abandoned the only purported harm it proffered in urging a stay in the district court, and offers nothing in its place. The absence of irreparable harm alone suffices for this Court to deny the City's motion. *See Williams v. Zbaraz*, 442 U.S. 1309, 1312 (1979) (noting that "the District Court's injunction should be observed . . . [u]nless the applicants will suffer irreparable injury")

Moreover, it appears the City also may have misunderstood Virginia's laws regarding the timeline for special elections. Virginia Code § 24.2-226 provides that the special election should occur "on the date of the next general election in November or in May if the vacant office is regularly scheduled by law to be filled in May." But the general election for *city council elections* is regularly scheduled in even numbered years, so the "next general election in November" for the city council is November 2022, not November 2021. Virginia law specifically authorized localities to adopt even-numbered election cycles for city council elections, Va. Code § 24.2-222.1, and Virginia Beach's City Charter does so, *see* Va. Beach City Charter § 3.02:1.

In addition, another Virginia law—cross-referenced in § 24.2-226—provides the City Council with discretion on when to schedule a special election. Section 24.2-682 provides that

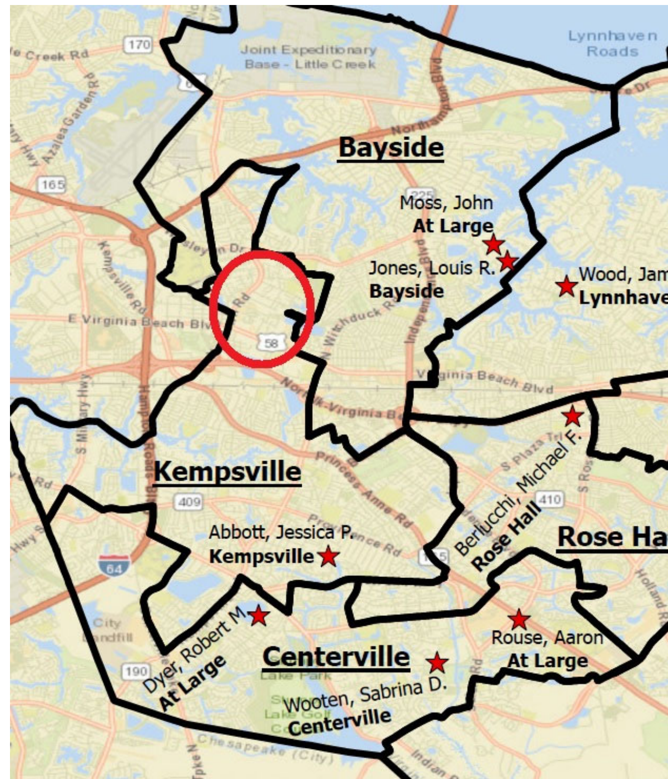
> [n]otwithstanding any charter or special act to the contrary, the following provisions govern the times for holding special elections. Every special election shall be held on a Tuesday. No special election shall be held within 55 days prior to a general or primary election. No special election shall be held on the same day as a primary election. A special election *may* be held the same day as a general election.

Va. Code § 24.2-682(A) (emphasis added). That Virginia law requires a special election this November is far from obvious.

Regardless, as the City suffers no harm at all, let alone irreparable harm, its stay motion fails, and this Court can end its inquiry here.

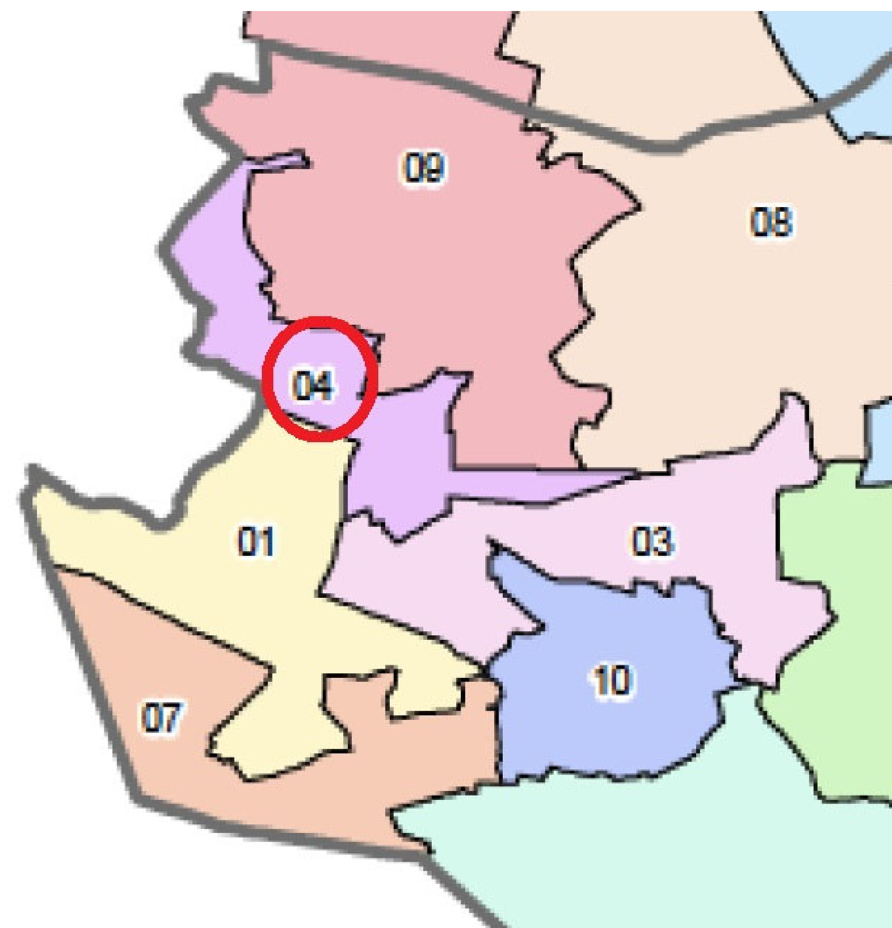
B. A Stay May Harm Plaintiffs.

Unlike the City, Plaintiffs face a risk of harm from a stay. As Plaintiffs explained in the district court, a portion of the existing Kempsville residency district overlaps with minority neighborhoods that both the City and Plaintiffs have located in their proposed Section 2 remedial districts. The map below shows the current Kempsville residency district, and the red circle illustrates the region with concentrated minority populations that both parties have located in their proposed majority-minority districts:

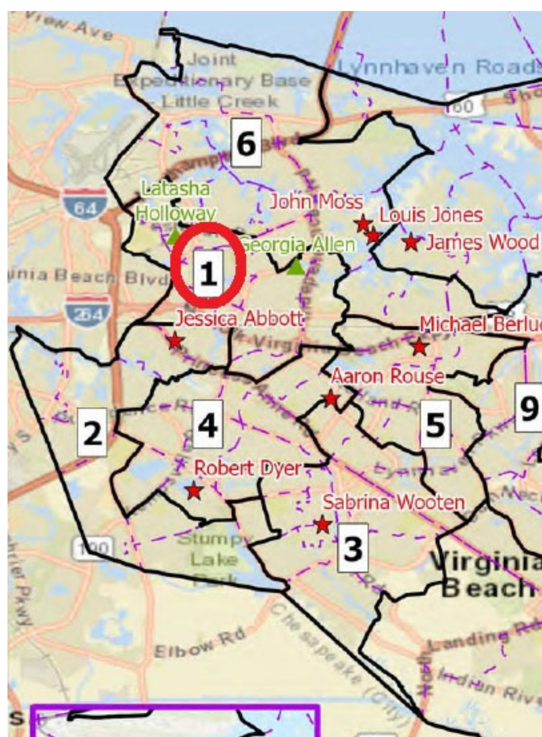


The area shown in the red circle contains nearly 18,000 people, with a citizen voting age population ("CVAP") that is 45.8% Black, 9.3% Hispanic, 5.9% Asian, and 37.1% white. One Plaintiff resides in this area. As illustrated below, the area shown in the red circle appears in both Plaintiffs' and the City's proposed majority-minority remedial districts:

<u>Plaintiffs' Proposal</u>
(Districts 4, 7, and 10 are proposed minority opportunity districts)



Defendants' Proposal[4]
(Districts 1, 3, and 5 are proposed minority opportunity districts)



It is thus possible that the candidate who wins a November 2021 special election will reside in the portion of the Kempsville district included in a district intended to remedy the Section 2 violation. Without further court order, the winner would remain in office until 2024. Plaintiffs thus face the risk that the candidate who wins a special election this November will be adverse to their interests, and will hold until

[4] The City proposed two other maps, both of which include the same area shown in the red circle in proposed minority opportunity districts.

2024 in a remedial district that is intended to offer minority voters an opportunity to elect their preferred candidate.

Because Plaintiffs believed the City's representation that without a special election the Council would be short-staffed and vulnerable to tie votes, they proposed that their risk of harm could be lessened by a court order shortening the term of office of the winning candidate if that person's residence interfered with the remedial plan adopted by the district court. The City objected to that proposal, and the district court's denial of the motion made resolution of the issue unnecessary.

The City contends that Plaintiffs face no risk of harm because Ms. Abbott does not reside in the minority opportunity districts proposed by the parties. *See* Mot. at 15-16. But Ms. Abbott's residency is irrelevant; she has resigned. A new representative elected in a special election could live *anywhere* in the Kempsville district, including in the area shown in the red circle above. It is that risk—coupled with the fact that, without court order, the term of Ms. Abbott's successor, elected under an illegal system, will continue until 2024—that harms Plaintiffs.

C. The City Is Not Likely to Succeed on the Merits.

The City is unlikely to succeed on the merits of its appeal. The City raises two arguments on the merits. First, the City contends that Section 2 of the Voting Rights Act *permits discrimination* when racial minority groups must join together in a coalition to constitute a majority of a single-member district. Second, the City

contends that the district court clearly erred in concluding that Black, Hispanic, and Asian American voters in Virginia Beach are politically cohesive and thus satisfy the second prong of the *Gingles* test for Section 2 claims. Both arguments are wrong. The City has not satisfied its burden to make "a strong showing that [it] is likely to succeed on the merits." *Nken*, 56 U.S. at 426, on either issue.

1. The City Has Not Made a Strong Showing that Section 2 of the Voting Rights Act Authorizes the City to Discriminate Against a Coalition of Black, Hispanic, and Asian American Voters.

The City has not made a strong showing that Section 2 of the Voting Rights Act authorizes the City to discriminate against a coalition of Black, Hispanic, and Asian American voters. A coalition of two or more politically cohesive minority groups can bring a claim together under Section 2. While the Supreme Court and this Circuit have not expressly addressed the question,[5] the Second, Fifth, and Eleventh Circuits have each ruled that coalition claims are cognizable under Section 2. *See Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 276–77 (2nd Cir. 1994), *vacated on other grounds*, 512 U.S. 1283 (1994); *Concerned Citizens of Hardee Cty. v. Hardee Cty. Bd. of Comm'rs*, 906 F.2d 524, 526 (11th Cir. 1990); *Campos v. City of Baytown, Tex.*, 840 F.2d 1240, 1244 (5th

[5] The Supreme Court has expressly declined to reach this issue. *See Bartlett v. Strickland*, 556 U.S. 1,13–14 (2009). But when the issue has arisen, the Supreme Court assumed without deciding that coalition districts would be permissible. *Growe v. Emison*, 507 U.S. 25, 41 (1993).

Cir. 1988). The Ninth Circuit has implicitly agreed, explaining, in a coalitional Section 2 case, that "[p]laintiffs must be able to show that minorities have in the past voted cohesively for minorities and have the potential to elect minority representatives." *Badillo v. City of Stockton, Cal.*, 956 F.2d 884, 891 (9th Cir. 1992).

The prevailing rule allowing coalition claims under Section 2 is correct. Section 2 protects "any citizen" against denial or abridgement of voting rights on account of race, color, or membership in a language minority. 52 U.S.C. § 10301(a). With this inclusive language, Congress recognized that discrimination in voting is not a problem limited to any one race, but a legacy of white supremacy that can affect and has affected all people of color. It would be anomalous to conclude that when those voters' common experience of discrimination leads to inter-minority collective action, Congress's chosen safeguard would be powerless to protect those coalitions against voting discrimination.

The Fifth Circuit's decision in *LULAC Council No. 4386 v. Midland Independent School District* illustrates the commonsense logic of Section 2 coalition claims. *See* 812 F.2d 1494, 1495 (5th Cir. 1987), *vacated on other grounds*, 829 F.2d 546 (5th Cir. 1987) (en banc).[6] In that case, a coalition of Black and Hispanic voters

[6] The en banc Fifth Circuit later vacated the panel decision on other grounds. *See LULAC Council No. 4386*, 829 F.2d at 547–48. The Fifth Circuit has since adhered to the panel's ruling that Section 2 allows coalition claims. *See, e.g.*, *Brewer v. Ham*, 876 F.2d 448, 453 (5th Cir. 1989); *Campos*, 840 F.2d at 1244.

challenged the at-large structure of their local school board. The record showed a history of discrimination against both groups; resulting socioeconomic disparities; and consistent defeat of both groups' preferred candidates by white bloc voting. *Id.* at 1496–99. These circumstances led Black and Hispanic voters to the "realization that, at least in Midland, Texas, they have common social, economic, and political interests which converge and make them a cohesive political group." *Id.* at 1501. Consequently, the court affirmed the district court's remedial order imposing single-member districts. *Id.* at 1503.

The City nevertheless urges this Court to follow the lone exception to the prevailing view, *Nixon v. Kent County*, in which the Sixth Circuit ruled that Section 2 does not permit coalition-based claims of discriminatory results. 76 F.3d 1381, 1393 (6th Cir. 1996) (en banc). But *Nixon* misinterprets the plain text of the statute. It suggests that Section 2 excludes coalition claims because subsection (b) refers to "participation by members of *a class* of citizens protected by subsection (a)." *Id.* at 1386-87 (quoting 52 U.S.C. § 10301(b)). But nothing in the statute requires every member of such a "class" to share the same race, as opposed to sharing the same experience of being politically excluded on account of race. "[A] class of citizens protected by subsection (a)" means just that—a class of individuals who are protected by subsection (a) against denial or abridgement of their individual right to vote. In this case, the minority coalition consists of three groups whose

members are each protected by the VRA. Together, the coalition members here, each wielding the right conferred by subsection (a), are the "class of citizens" that subsection (b) protects. A contrary conclusion violates both the plain text and broad remedial purpose of Section 2. Congress did not create the discrimination loophole the City advocates.

The City's reliance on *Bartlett v. Strickland*, 556 U.S. 1 (2009) and *Hall v. Virginia*, 385 F.3d 421 (4th Cir. 2004), is misplaced. These cases concerned "crossover" claims, where Black voters sought to rely upon support from crossover members of the white majority to support their Section 2 claims. *Bartlett* itself cautioned that crossover and coalition claims were distinct. 556 U.S. at 13. Because members of the white majority do not suffer discrimination in voting on account of race, they are not part of the class protected by Section 2(a). The same cannot be said of Black, Hispanic, and Asian American voters, all of whom are part of the class protected by Section 2(a).

The plain text of the statute rebuts the City's claim that Section 2 permits it to discriminate against Virginia Beach's Black, Hispanic, and Asian American voters, as every circuit to consider the question but one has concluded. A single out-of-Circuit decision does not show likelihood of success on the merits; rather, it shows the City is likely to lose.

2. The City Has Not Made a Strong Showing that the District Court Clearly Erred in Finding Political Cohesion.

The City has not made a strong showing that the district court clearly erred in its factual finding that Black, Hispanic, and Asian voters are politically cohesive, and thus satisfy *Gingles* prong two. This Court must defer to the City's factual findings, subjecting them only to clear error review. *See* Fed. R. Civ. P. 52(a)(6). "Under that standard, [this Court] may not reverse just because [it] 'would have decided the matter differently.'" *Cooper v. Harris*, 137 S. Ct. 1455, 1465 (2017) (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 573 (1985)). "A finding that is 'plausible' in light of the full record—even if another is equally or more so—must govern." *Id.* "[C]lear error occurs when a district court's factual findings are against the clear weight of the evidence considered as a whole." *United States v. Martinez-Melgar*, 591 F.3d 733, 738 (4th Cir. 2010) (internal quotation marks omitted). The City's task in a stay motion is even more onerous—not only must it show clear error, but it must make a "strong showing" of clear error, in order to disrupt the ordinary judicial process and obtain a stay. *Nken*, 556 U.S. at 426.

The City has not met its heavy burden. The district court devoted twenty-one pages of analysis to the question of political cohesion among Black, Hispanic, and Asian American voters, concluding that both the qualitative and quantitative evidence proves that the coalition was political cohesive. Dist.Ct.Doc.242 at 66-87. The court cited years of cohesive efforts among the three groups in seeking to protect

their rights and interests, including in seeking to end voting discrimination, economic disparities, housing discrimination, and other issues. *Id.* at 66-71. The City does not even mention the district court's cohesion finding based upon the qualitative evidence, let alone show how it was clearly erroneous.

Nor has the City made a strong showing that the district court's cohesion finding based upon its review of the quantitative evidence was clearly erroneous. The district court laboriously examined prior city council elections, and determined that there was "strong evidence of minority voter cohesion" in eleven different probative elections in which candidates were vying for fourteen spots. *Id.* at 80. The court likewise cited federal elections as further evidence of cohesive voting among minorities. *Id.* at 81. Notably, the district court rejected the argument the City advances on appeal—that there was insufficient evidence of Asian and Hispanic voter preferences—and concluded that the City's expert's "analysis, methodology, and findings are neither credible nor sufficient to rebut [Plaintiffs' expert's] findings." *Id.* at 85. The City does not challenge that determination, let alone show how it was clearly erroneous. *See United States v. Shea*, 989 F.3d 271, 278 (4th Cir. 2021) ("Because the assessment of the weight to give an expert opinion is a discretionary determination committed to the factfinder, courts of appeals defer to that determination, reviewing only for abuse of discretion.").

The district court credited Plaintiffs' expert's response to the City's criticisms, which relied upon additional statistical analysis, including homogenous precinct analysis and non-linear LOESS curves to demonstrate cohesion among minority voters. Dist.Ct.Doc.242 at 86-87. These "robust statistical methods," the district court concluded, "minimize[d] [any] methodological limitations" caused by the relatively small Hispanic and Asian American populations. *Id.* at 87.[7] The City offers no argument for how the district court clearly erred in its conclusion.

The City has not met its burden to show a strong likelihood of success on the merits.[8]

[7] The City cites the district court's observation that "high Black support for a given candidate *could* mask" lower support from Hispanic and Asian voters, Mot. at 8 (emphasis in original), but omits the district court's factual finding that this was not so in this case.

[8] The City's contention that Plaintiffs waived their merits argument by being too "perfunctory" in briefing the likelihood of success prong below, Mot. at 9, is absurd. Plaintiffs were presented with an emergency motion (six days after the "emergency" arose), and were given mere hours by the City to provide their position. Plaintiffs noted that the City was unlikely to succeed on appeal and thus a stay was inappropriate, but their position on the modification issue, relying upon the City's (admittedly false) representation about the vacancy, made further briefing unnecessary.

The City cites no case for the proposition that a party opposing a stay is limited to the points in its briefing in the district court. A motion for a stay in this Court is not an appeal from the district court's denial of a stay, but rather a separate, new proceeding. *See, e.g.*, *A. Philip Randolph Inst. v. Husted*, 907 F.3d 913, 917 (6th Cir. 2018). Plaintiffs are entitled to respond to the City's motion.

D. The Public Interest Weighs Against a Stay.

The public interest weighs in favor of denying the City's motion, especially with the risk of an indefinite vacancy eliminated. The public has an interest in being represented by candidates who are elected in accordance with the law. *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 560 (E.D. Va. 2016) *denial of stay affirmed Wittman v. Personhuballah*, 577 U.S. 1125 (2016). Here, Virginia Beach's at-large, "residency district" system of elections has been rendered invalid by at least two events: First, by the district court's Section 2 ruling, and second, by the Virginia legislature's passage HB2198, effective January 1, 2022, which bars the very type of election the City asks this Court to order.

The City's contention that voters will suffer a representational harm is meritless. The legislature outlawed this system of elections precisely *because* it undermines the representational interests of voters. Allowing *all* Virginia Beach citizens the opportunity to vote in a rushed special election to determine who will represent the Kempsville regions does little to safeguard the representational rights of the citizens of Kempsville—it actively injures their representational rights. *Georgia State Conf. of the NAACP v. Fayette Cty. Bd. of Comm'rs*, 118 F. Supp. 3d 1338, 1348–49 (N.D. Ga. 2015) (finding "the public interest is best served by ensuring not simply that more voters have a chance to vote but ensuring that all citizens [] have an equal opportunity to elect the representatives of their choice.").

This Court should defer to the General Assembly's determination of the public interest, and that determination is that the election the City asks this Court to order *contravenes* voters' representational rights.

Continuing to hold subsequent elections under this discriminatory system of elections not only multiplies the harm done to Plaintiffs, but to the public as well. *Larios v. Cox*, 305 F. Supp. 2d 1335, 1344 (N.D. Ga. 2004) (finding "the public interest will be disserved if we grant a stay, thereby requiring still another election under plans that are clearly unconstitutional."); *Personhuballah*, 155 F. Supp. 3d at 560. As the Supreme Court has affirmed, once an election scheme has been found invalid, "it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan." *Reynolds v. Sims*, 377 U.S. 533, 585 (1964). The public interest factor weighs heavily against a stay.

II. The City's Request that the Court Vacate the Abeyance it Ordered *Last Week* Should Be Denied.

The City's request that this Court vacate its order to hold the City's appeal in abeyance—issued *last week*—is not only meritless, but frivolous. The Court's decision to hold the City's appeal in abeyance is based on well-established precedent in the Fifth and Eleventh Circuits. The purpose of delaying the City's appeal is to give this Court the opportunity to consider a complete record, including all relevant information that would bear on an appeal, rather than rendering piecemeal judgments

based on an evolving factual record. Thus, the Court must have before it not only the record generated at the liability phase of this case, but also the record being created during the ongoing remedial phase. Likewise, the City's forthcoming preclearance submission pursuant to the Virginia Voting Rights Act will bear on this Court's disposition of this appeal.

Unsurprisingly, these parts of the record remain incomplete. In the one week that has transpired since this Court decided this issue, nothing has changed to affect the timeline of either the remedies phase or the preclearance process.[9] This will remain the case whether there is a special election to fill the Kempsville seat or not. The City's attempt to leverage this unforeseen vacancy to relitigate an unrelated matter is wrong, its vexatious effort to force this Court to rush its appellate review is improper and a waste of Plaintiffs' and this Court's time and resources, and its motion for this Court to vacate the order it issued *last week* to hold the City's appeal in abeyance should thus be denied.

III. If this Court Grants Relief, it Should Modify the Injunction, Not Grant a Partial Stay.

The entire premise of the City's motion has proven false—no indefinite vacancy will upend the Council's ability to conduct its business. But if the Court is

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[9] The City objects that Plaintiffs have not explained what additional relevant evidence they will present in the remedial phase, but Plaintiffs' final remedial brief is not due until July 30. Mot. at 19.

inclined to grant the City relief, then the appropriate vehicle is not a partial stay with respect to a Kempsville special election, but rather a modification of the injunction pending appeal (relief the City sought below, but has not renewed in this Court). *See* Fed. R. App. P. 8(a)(1)(C) (authorizing appellate court to issue order modifying injunction pending appeal). The City meets none of the stay factors, and a "partial stay" with respect to a single residency district makes little doctrinal sense. If the Court does order the injunction modified, it should make clear that, in order to minimize the potential harm to Plaintiffs, the district court should shorten the term of the winning candidate if they live within the boundaries of a Section 2 remedial districts adopted by the court.

CONCLUSION

Particularly because Defendants risk no irreparable injury, but also because of the failure to satisfy the other criteria for a stay, the City's motion should be denied.

July 22, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In accordance with Rules 27(d)(2)(A) of the Federal Rules of Appellate Procedure, the undersigned counsel for Appellees certifies that the foregoing is printed in 14 point typeface, in Times New Roman font, and, including footnotes, contains no more than 5,200 words. According to Microsoft Word, this response contains 5,199 words.

/s/ Mark P. Gaber
Mark P. Gaber

Counsel for Appellees

CERTIFICATE OF SERVICE

I hereby certify that on July 22, 2021, I electronically filed the foregoing motion with the Clerk of Court using the CM/ECF system, which will send notice of such filing to all counsel of record.

/s/ Mark P. Gaber
Mark P. Gaber

Counsel for Appellees

EXHIBIT 1

Mark Gaber

From:	Patrice Thompson <Patrice_Thompson@vaed.uscourts.gov>
Sent:	Tuesday, July 13, 2021 3:33 PM
To:	McKnight, Katherine L.
Cc:	Christopher S. Boynton; Gerald L. Harris; plewis_bakerlaw.com; Prouty, Erika Dackin; Mark Gaber; Rob Weiner; Annabelle Harless; Christopher Lamar; Simone Leeper; Dana Paikowsky
Subject:	RE: Holloway v. City of Virginia Beach - Unopposed Emergency Motion for Stay - impending statutory deadline

Good afternoon Ms. McKnight,

The emergency motion is before the Court.

Thank you,
Patrice L. Thompson, Courtroom Deputy
to the Honorable Raymond A. Jackson
United States District Judge, EDVA
600 Granby Street
Norfolk, VA 23510
757-222-7218
757-222-7236 (Fax)
Patrice_Thompson@vaed.uscourts.gov

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From: McKnight, Katherine L. <kmcknight@bakerlaw.com>
Sent: Tuesday, July 13, 2021 2:30 PM
To: Patrice Thompson <Patrice_Thompson@vaed.uscourts.gov>
Cc: Christopher S. Boynton <CBoynton@vbgov.com>; Gerald L. Harris <GLHarris@vbgov.com>; plewis_bakerlaw.com <plewis@bakerlaw.com>; Prouty, Erika Dackin <eprouty@bakerlaw.com>; Mark Gaber <MGaber@campaignlegalcenter.org>; Rob Weiner <RWeiner@campaignlegalcenter.org>; Annabelle Harless <aharless@campaignlegalcenter.org>; Christopher Lamar <CLamar@campaignlegalcenter.org>; Simone Leeper <SLeeper@campaignlegalcenter.org>; Dana Paikowsky <DPaikowsky@campaignlegalcenter.org>
Subject: Holloway v. City of Virginia Beach - Unopposed Emergency Motion for Stay - impending statutory deadline

CAUTION - EXTERNAL:

Dear Ms. Thompson,

We hope you are well. We write regarding Defendant's unopposed Emergency Motion for Stay of Injunction filed on July 7, 2021 (Dkt. 262).

Defendants are growing concerned with upcoming deadlines detailed in that motion, including a statutory deadline set for this Saturday, July 17.

We wanted to make sure that the Motion had made its way to Judge Jackson's desk. We also wanted to offer a conference call with the parties about the modification suggested in that unopposed Motion, if that would be helpful to the Judge.

Thank you very much,

Kate

Katherine L. McKnight
Partner

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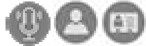

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