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

REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

Plaintiffs respond to the City's motion to dismiss with a single argument. They say they have a live Section 2 Voting Rights Act claim against a "7-3 system," which they call "the law today" and the "law of the land." ECF No. 312 at 1, 5. But the only redistricting plan that meets this undefined term is last decade's residency redistricting plan, which is malapportioned and accordingly is unconstitutional. Even if the City redistricts under a 7-3 framework in the future—which may never occur—there is no live controversy today over how it may configure the lines. Until that future redistricting, the City will use the plan fashioned in this litigation, which Plaintiffs do not challenge. No ripe claim exists, and dismissal is mandatory.

1. The parties largely agree on the premises of the City's motion. Plaintiffs do not deny that they have no Section 2 claim against the 10-1 plan to be used for the 2022 councilmanic elections. *Compare* ECF No. 310 at 2 *with* ECF No. 312 at 1. Plaintiffs do not deny that a Section 2 challenge to a redistricting plan to be configured in the future is unripe. *Compare* ECF No. 310 at 3–4 *with* ECF No. 312 at 3. Plaintiffs do not deny that the Virginia Voting Rights Act provides a threshold procedure that any plan the City may adopt must satisfy before a federal claim is proper. *Compare* ECF No. 310 at 3 *with* ECF No. 312. And Plaintiffs do not deny that a ripeness deficiency

cannot be overcome by holding a case in abeyance to await future injury that may never arise. *Compare* ECF No. 310 at 4 *with* ECF No. 312. The only disputed question is whether a live Section 2 controversy exists, presently, concerning a "7-3 system" that Plaintiffs reference but do not define. ECF No. 312 at 1. The answer is no.

2. The only districting plan following a "7-3 system" that arguably qualifies as "the law today," ECF No. 312 at 1, will never and can never be used in an election. That plan is the prior decade's residency district plan, which contained three at-large seats and seven former "residency" districts (seats whose members were elected at-large but were required to reside within the given district). Va. Code § 24.2-222(A); *see Holloway v. City of Virginia Beach*, 42 F.4th 266, 271–72 (4th Cir. 2022) (describing the system). HB 2198 transformed those residency districts into single-member districts in which only "the qualified voters of that district" may vote for that district's member. Va. Code § 24.2-222(A); *see Holloway*, 42 F.4th at 271. Due to HB 2198, this would now qualify as a "7-3 system" with seven single-member districts (last decade's residency districts) and three at-large districts. But the last time the City revised these residency districts was 2011, based on 2010 census results, and the 2020 census revealed the residency-district populations to be malapportioned. The percentage deviation between the largest and smallest districts exceeds the 10% total-population deviation the Supreme Court has identified as the threshold at which a plan becomes presumptively unconstitutional. *See Harris v. Ariz. Indep. Redistricting Comm'n*, 578 U.S. 253, 259 (2016); Ex. A, Declaration of Kim Brace ¶ 4. Because the City has no policy basis to justify a deviation that resulted solely from the absence of redistricting this decade, the plan is unconstitutional.[1] *See Georgia v. Ashcroft*, 539 U.S. 461, 488

[1] To be sure, this omission is for good reason. By the 2020 census results were released, this Court had enjoined City's election system, leaving no reason to redistrict. However, that explanation would not justify a presumptively unconstitutional plan. By the time the Fourth Circuit vacated

n.2 (2003) ("When the decennial census numbers are released, States must redistrict to account for any changes or shifts in population.").

3. There is no ripe controversy over whether the 2011 plan also violates the VRA. Adjudicating the Section 2 implications of an unconstitutional plan "would have no 'practical effect on the outcome of the matter,'" *Holloway*, 42 F.4th at 275 (citation omitted), given that the constitutional deficiency standing alone prohibits the plan's use. This mootness deficiency is identical to that in *Holloway*, where Plaintiffs' challenge to the City's all-at-large system became moot because the City became legally barred from using it. *Id.* at 273–75. The City is equally barred from using the 2011 plan, this time by force of the Fourteenth Amendment. *See Lopez v. City of Houston*, 617 F.3d 336, 339–41 (5th Cir. 2010) (finding moot VRA challenge to districts that upcoming census would render obsolete). Plaintiffs agree that a challenge to a plan is not available if that plan "were *not* the law" and may not "become the law," ECF No. 312 at 3, but they fail to see that last decade's plan is not the law and will never be: "[a]n unconstitutional law is void, and is as no law." *Ex parte Siebold*, 100 U.S. 371, 376 (1879); *Montgomery v. Louisiana*, 577 U.S. 190, 204 (2016), *as revised* (Jan. 27, 2016) (same). Plaintiffs' many references to the City's "reverting" to, ECF No. 312 at 1, or planning to use the 2011 plan for "the 2024 and all future elections," *id.* at 2, and its status as "law of the land," *id.* at 5, are simply incorrect.

4. Plaintiffs also seek to confuse the Court with references to the Special Master's rejection of a *different* 7-3 plan the City proposed to this Court at the remedy phase, prior to the Fourth Circuit's ruling. ECF No. 281-1 at 25 (quoted at ECF No. 312 at 3). Plaintiffs vaguely

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the injunction, it was too late for the City to redistrict before the 2020 elections, so it elected to use the plan this Court had imposed through its injunction, even though the injunction was vacated. ECF No. 310 at 1–2. Plaintiffs reference this choice as applicable for only "one day," ECF No. 312 at 1, but that day is election day, when any vote dilution would occur.

mention this proposed remedial plan, which the City later withdrew, *see* ECF No. 283 at 11 n.8, but do not explain its relevance. ECF No. 312 at 3–4. It has none. First, it was a litigation proposal having no legal force and is "*not* the law." *Id.* at 3. Second, it too is malapportioned and hence unusable. The Court directed the parties to propose remedies before the 2020 census results were released, and both parties' proposals became outdated mid-process when that occurred, as the Special Master found. *See* ECF No. 281-1 at 34. Plaintiffs cannot plausibly amend their complaint to challenge what amounts to an obsolete data file on a consultant's computer.

5. Ultimately, the gist of Plaintiffs' position appears to be that they have generalized concerns that no future 7-3 plan will yield a sufficient number of minority-opportunity districts to satisfy Section 2, as they construe it. *See* ECF No. 312 at 3. But Plaintiffs are "merely speculating" about this. *Id.* The City has not attempted to draw a new councilmanic district plan with 2020 census data, and only after it does so and codifies such a plan into a law that, in turn, satisfies the Virginia Voting Rights Act would a dispute about whether the plan as a whole satisfies Section 2 become ripe. Even if the City conducts elections under a 7-3 framework in the future—which may or may not occur—it could not do so without redistricting within that framework first to satisfy the Constitution. It is not possible to adjudicate a Section 2 claim against a "7-3 system" in the abstract; a live claim requires "a particular electoral system" and a "sensitive analysis" to its discrete features. *Holloway*, 42 F.4th at 275–76.

6. Plaintiffs' arguments regarding this Court's discretion (assuming any exists) fall with their jurisdictional contentions, since these arguments too propose there is some value to adjudicating "whether the 7-3 system also violates the VRA." ECF No. 312 at 5. It would be wasteful and futile to adjudicate the validity of an electoral map that will never be used in an election. That is more than a "legitimate reason[]," ECF No. 312 at 4, for the Court to exercise any

available discretion by dismissing this case. Plaintiffs are incorrect to suggest that the Fourth Circuit "recognized" that future proceedings will occur in this action, simply by virtue of the prior record development. *Id.* at 5. In fact, the Fourth Circuit expressly recognized that any residual claim may be "better pursued in a new proceeding." *Holloway*, 42 F.4th at 278. That is the case here, where litigating the effect of a plan that will never again be used would serve no purpose, and it cannot be known now what effect a future plan may have. To be clear, this principle does not exempt whatever plan the City ultimately uses from Section 2 scrutiny; to the extent they believe a future plan violates Section 2, Plaintiffs will be free to file a lawsuit challenging it. But the time for the suit is after, not before, the plan is adopted.

For these reasons, the Court should dismiss this case for lack of a live case or controversy.

DATE: November 7, 2022

Respectfully submitted,

/s/ Katherine L. McKnight

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CERTIFICATE OF SERVICE

I hereby certify that on November 7, 2022, 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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Counsel for Defendants

Exhibit A

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

DECLARATION OF KIMBALL W. BRACE

I, Kimball W. Brace, declare and state pursuant to 28 U.S.C. § 1746 as follows:

1. I have over 43 years of experience drawing electoral districts during redistricting cycles and in remedial phases for litigation. This experience includes drawing electoral districts in the City of Virginia Beach for the past three decades. I was a fact witness and testifying expert during the liability phase of this matter, and I submitted an affidavit during the remedial phase of this matter. Dkt. 260-1. My curriculum vitae is familiar to this court and most recently submitted as Exhibit A to Dkt. 260-1.

2. This declaration is given in support of Defendants' November 7, 2022, reply brief in further support of motion to dismiss. I reviewed the City's 2011 residency district plan and the 2020 Census data in order to prepare this declaration.

3. I have at multiple times over the past three decades been retained by Virginia Beach to help the city review and analyze each decades' Census results, draw redistricting plans to meet the requirements of the US Constitution (one-person, one vote), the Voting Rights Act (fairly reflect various minority groups voting rights), and other state and local requirements, assist the public and members of the City Council to create plan alternatives, and present the results of that work before

public hearings and City Council meetings. I, and members of my staff, performed this work for the 2010, 2000 and 1990 redistricting cycles for the City, generally in the year ending in "1" each decade when the Census results were released. Because of this Case, there was no 2020 round of redistricting when the 2020 Census data was finally released. As a result, the 2011 residency districts were the last plan adopted by the City.

4. The final 2020 Census data for Virginia Beach recorded a total population of 459,470. Election Data Services, Inc. unpacked the database file and incorporated the information into our redistricting software. Incorporating 2020 Census data into the 2011 residency districts, I was able to determine that the 2011 residency district plan has an overall deviation of 10.2%.

Table 1
2011 Residency Districts using 2020 Census data

DISTRICT	TAPERSONS	*Target*	*Raw Dev.*	*% Dev.*
1	68,255	65,639	2,616	3.9854%
2	63,331	65,639	(2,308)	-3.5162%
3	70,044	65,639	4,405	6.7109%
4	65,266	65,639	(373)	-0.5683%
5	64,435	65,639	(1,204)	-1.8343%
6	64,373	65,639	(1,266)	-1.9287%
7	63,766	65,639	(1,873)	-2.8535%
STATE TOT	459,470			
Total Dev			6,713	10.2272%
Highest			4,405	6.7109%
Lowest			(2,308)	-3.5162%

I, Kimball Brace, am over the age of 18 and fully competent to make this declaration. I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct to the best of my knowledge.

Kimball W. Brace