IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division

TATI ABU KING, et al., Plaintiffs, v. JOHN O'BANNON, in his official capacity as Chairman of the State Board of Elections for the Commonwealth of Virginia, et al., Defendants.	)	Civil Action No. 3:23-cv-408-JAG

DEFENDANTS' MOTION TO STAY PENDING RESOLUTION OF THEIR PETITION FOR WRIT OF CERTIORARI

Defendants respectfully move this Court to stay this case pending resolution of Defendants' forthcoming petition for writ of certiorari seeking review of the Fourth Circuit's decision in this case. The Court possesses inherent authority to manage its docket in an efficient manner. A stay would promote judicial efficiency by avoiding burdensome litigation in this Court that may be wholly unnecessary if the Supreme Court grants Defendants' petition and agrees with their legal position that the remaining Defendants are entitled to sovereign immunity.

BACKGROUND

In June 2023, Plaintiffs filed this lawsuit challenging the enforcement of Article II, Section 1 of the Virginia Constitution, which prohibits convicted felons from voting absent the restoration of their civil rights by the Governor. See Compl. (ECF No. 1). Plaintiffs brought two counts, one under 42 U.S.C. § 1983 and another based on *Ex parte Young*, 209 U.S. 123 (1908), alleging that enforcement of this constitutional provision violated the Virginia Readmission Act. Compl. ¶¶ 89–117. Specifically, they contended that the Virginia Readmission Act permits the Commonwealth

to disenfranchise individuals convicted of only felonies at common law, while Article II, Section 1 currently disenfranchises individuals convicted of any felony. See *id.* ¶ 7.

Defendants moved to dismiss the initial complaint on several grounds. See, *e.g.*, Defs.' Memo. in Support of Mot. to Dismiss Compl. (ECF No. 54). In relevant part, they argued that sovereign immunity deprived the Court of jurisdiction entirely, or at the very least deprived the Court of jurisdiction over the Governor and the Secretary because they do not enforce the challenged constitutional provision. *Id.* at 8–12. Defendants also argued that Plaintiffs' claims fail on the merits because Article II, Section 1 does not violate the Virginia Readmission Act, and the canon of constitutional avoidance foreclosed Plaintiffs' reading of the Act. *Id.* at 18–30. Soon thereafter, Plaintiffs amended their complaint. See First Amend. Compl. (ECF No. 58). Defendants again moved to dismiss the complaint. See Defs.' Memo. in Support of Mot. to Dismiss First Amend. Compl. (ECF No. 77).

On March 18, 2024, the Court dismissed three of Plaintiffs' four counts. See Opinion on Mot. to Dismiss (ECF No. 88).[1] Specifically, the Court dismissed Count I because the Virginia Readmission Act does not create a private right enforceable under § 1983 and dismissed Counts III and IV because felon disenfranchisement is not a punishment under the Eighth Amendment. *Id.* at 2. The Court denied Defendants' motion to dismiss Count II, however, because it held that Plaintiffs could pursue their relief under *Ex parte Young*'s exception to sovereign immunity. *Ibid.* In doing so, the Court rejected Defendants' sovereign-immunity arguments. Among other things, the Court held that Plaintiffs could bring a claim under *Ex parte Young* even though they lacked a cause of action under § 1983. *Id.* at 15–18. The Court held that the Governor and Secretary are

[1] The Court also dismissed Bridging the Gap, Inc. for lack of standing. Op. at 1–2.

proper defendants under *Ex parte Young* because they "may enforce the permanent disenfranchisement of certain individuals." *Id.* at 10.

The following week, Defendants filed a notice of appeal with respect to the Court's denial of their assertion of sovereign immunity. Notice of Appeal (ECF No. 91). They simultaneously moved to stay proceedings in this Court while the Fourth Circuit resolved the appeal. Defs.' Mot to Stay (ECF No. 92). Plaintiffs later agreed to stipulate to a stay pending resolution of the interlocutory appeal. See Stip. and [Proposed] Order Regarding Litig. Schedule Pending Appeal (ECF No. 97). The Court entered the stipulation and stayed the case pending resolution of Defendants' sovereign-immunity appeal. Stay Order (ECF No. 98).

On December 5, 2024, the Fourth Circuit issued its opinion affirming in part and reversing in part. Opinion of Fourth Circuit (ECF No. 99). In reversing, the Fourth Circuit held that the Governor and the Secretary were not proper defendants under *Ex parte Young* and thus were entitled to sovereign immunity. *Id.* at 14–17. In affirming, the Fourth Circuit held that Plaintiffs could bring a claim under *Ex parte Young* even though they lacked a cause of action under § 1983, *id.* at 6–8, and that Plaintiffs could seek equitable relief under the Virginia Readmission Act, *id.* at 11–14.

Pursuant to the Court's stay order, Defendants filed their answer within two weeks after issuance of the Fourth Circuit's mandate. Defs.' Answer (ECF No. 103). The Court has scheduled an initial pretrial conference for February 12, 2025. Initial Sched. Order (ECF No. 106). Following internal consultations, Defendants intend to file a petition for writ of certiorari seeking review of the Fourth Circuit's decision and thus file this motion to stay.

ARGUMENT

The Court should stay proceedings pending resolution of Defendants' petition for writ of certiorari. If the Supreme Court grants Defendants' petition and reverses, this case would need to

be dismissed entirely as barred by sovereign immunity. Any litigation conducted in the meantime would be a waste of resources for both the Court and the parties. The Court should grant Defendants' motion to stay pending resolution of their petition for writ of certiorari.

The Court's authority to stay proceedings is "incidental to the power inherent in every court to control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." *Landis v. North Am. Co.*, 299 U.S. 248, 254 (1936). This Court will typically consider three factors when exercising its inherent power to stay proceedings: "(1) the interests of judicial economy; (2) hardship and equity to the moving party if the action is not stayed; and (3) potential prejudice to the non-moving party." *Redding v. Mayorkas*, No. 1:23-cv-1325, 2024 WL 663038, at *3 (E.D. Va. Feb. 5, 2024) (brackets and internal quotation marks omitted). All three factors support a stay.

First, a stay will serve judicial economy by ensuring that the parties and this Court do not expend resources through discovery and summary judgment in a case where Defendants were entirely immune from suit from the very beginning. Defendants intend to seek Supreme Court review of the Fourth Circuit's holdings with respect to whether Plaintiffs' Virginia Readmission Act claim can proceed under *Ex parte Young*. If Defendants prevail, this case would need to be dismissed. Therefore, if this case continues in this Court—through discovery and summary-judgment briefing—while Defendants' petition for certiorari is pending, the parties (and the Court) will risk wasting an immense amount of resources if the Supreme Court ultimately agrees with Defendants' position.

Second, if the Court denies Defendants' motion, they will be forced to proceed through discovery and summary judgment in a case where they may later be deemed immune from suit by the Supreme Court. Plaintiffs have already made clear they intend to pursue wide-ranging

discovery—having served 21 Requests for Production (several with up to five sub-parts) and 37 Requests for Admission (in addition to interrogatories). Depriving Defendants of their sovereign immunity—an immunity so significant that it is enshrined in our Nation's Constitution—would constitute significant irreparable prejudice. See, *e.g.*, *Russell v. Jones*, 49 F.4th 507, 514 (5th Cir. 2022) ("[S]overeign immunity is an immunity from *suit* (including discovery), not just liability."). If Defendants are forced to proceed to discovery while their petition is pending, they will have lost the immunity the Eleventh Amendment guarantees. See, *e.g.*, *Allen v. Cooper*, 895 F.3d 337, 357 (4th Cir. 2018) (holding that even the "*deferral* in ruling" on an immunity defense "amounted to a *denial* of the immunity because the immunity protects officials not only from the consequences of litigation's results, but also from *the burden of defending* themselves in court" (emphasis in original; quotation marks omitted)).

Third, although Plaintiffs would experience some delay in litigating their sole remaining claim, a stay would also protect *them* from expending resources in a case that is barred by sovereign immunity. Moreover, Defendants' petition is due March 5, 2025. It is likely that the Supreme Court would rule on Defendants' petition by June 26, 2025, prior to the conclusion of the current Supreme Court term. And if the Court denies the petition, the parties can resume litigation soon thereafter, likely resulting in a maximum delay of only about five months.

District courts, including those in this Circuit, frequently stay proceedings pending resolution of a petition for certiorari. See, *e.g.*, *Guthrie v. PHH Mortg. Corp.*, No. 7:20-cv-43, 2024 WL 314982, at *1 (E.D.N.C. Jan. 26, 2024); *B.P.J. v. West Va. State Bd. of Educ.*, No. 2:21-cv-316, 2024 WL 2885348, at *1 (S.D. W. Va. June 7, 2024); *Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No. 8:16-cv-4003, 2018 WL 7458267, at *1 (D.S.C. July 13, 2018); *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, No. 3:15-cv-14887, 2018 WL 11412001, at *3

(S.D. W. Va. Apr. 30, 2018); *Philipp v. Federal Republic of Germany*, 436 F. Supp. 3d 61, 70 (D.D.C. 2020); *Peaceable Planet, Inc. v. Ty, Inc.*, No. 01 C 7350, 2004 WL 1574043, at *1 (N.D. Ill. July 13, 2004). Indeed, the Fourth Circuit has long recognized that a district court may issue a stay "pending the outcome" of a *different* yet "similar suit." *Amdur v. Lizars*, 372 F.2d 103, 106 (4th Cir. 1967); see also *Hickey v. Baxter*, 833 F.2d 1005 (4th Cir. 1987) (table) ("We find that the district court acted within its discretion in staying proceedings while awaiting guidance from the Supreme Court in a case that could decide relevant issues."). Given the risk of wasting an immense amount of judicial and party resources and given the fact that Defendants' petition for writ of certiorari will raise issues that would warrant dismissal of this action entirely, the Court should enter a brief stay until the Supreme Court acts on Defendants' forthcoming petition for writ of certiorari.

Defendants have consulted with Plaintiffs regarding this motion, and Plaintiffs have stated that they oppose the motion.

CONCLUSION

For these reasons, the Court should stay all proceedings pending resolution of Defendants' forthcoming petition for writ of certiorari.

Dated: February 7, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

THIS IS TO CERTIFY that on February 7, 2025, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to all parties of record.

/s/ Thomas J. Sanford
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