IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

TATI ABU KING and TONI HEATH JOHNSON,

Plaintiffs,

v.

JOHN O'BANNON, in his official capacity as Chairman of the State Board of Elections for the Commonwealth of Virginia; ROSALYN R. DANCE, in her official capacity as Vice Chair of the State Board of Elections for the Commonwealth of Virginia; GEORGIA ALVIS-LONG, in her official capacity as Secretary of the State Board of Elections for the Commonwealth of Virginia; DONALD W. MERRICKS, in his official capacity as a member of the State Board of Elections for the Commonwealth of Virginia; MATTHEW WEINSTEIN, in his official capacity as a member of the State Board of Elections for the Commonwealth of Virginia; SUSAN BEALS, in her official capacity as Commissioner of the Department of Elections for the Commonwealth of Virginia; ERIC SPICER, in his official capacity as the General Registrar of Fairfax County, Virginia; and SANDY C. ELSWICK, in her official capacity as the General Registrar of Smyth County, Virginia,

Defendants.

Case No. 3:23-cv-00408

PLAINTIFFS' OPPOSITION TO MOTION TO STAY

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INTRODUCTION

After delaying this case for 14 months pending Defendants' appeal of the denial of their motion to dismiss on immunity grounds, Defendants now seek a further delay while they petition the Supreme Court for review. Such delay will only further deprive Plaintiffs and numerous other disenfranchised Virginians of their right to vote for what Defendants admit may be at least five more months. And Defendants seek that stay without even attempting to demonstrate that the Supreme Court will grant their petition. In such circumstances, the factors guiding the Court's discretion weigh strongly against staying this case. Plaintiffs respectfully request that this Court deny Defendants' Motion.

BACKGROUND

Mr. Tati Abu King and Ms. Toni Heath Johnson filed this lawsuit nearly two years ago, on June 26, 2023. Dkt. 1. Their Second Amended Complaint (Dkt. 96), filed as a class action, seeks declaratory and injunctive relief to prevent Defendants from continuing to unlawfully and permanently disenfranchise Virginians convicted of crimes that were not felonies at common law in 1870—as prohibited by the plain text of the Virginia Readmission Act.

Defendants first moved to stay this case when they moved this Court to dismiss the complaint on immunity grounds. *See* Dkt. Nos. 75, 89. After this Court denied the motion to dismiss in part, Dkt. 88, Defendants filed their second motion to stay, pending their appeal of the Court's partial denial to the U.S. Court of Appeals for the Fourth Circuit. Dkt. Nos. 91-92. On appeal, the Fourth Circuit granted Plaintiffs' motion to expedite Defendants' appeal. *Order Granting Motion to Expedite*, King v. Youngkin, No. 24-1265, Dkt. 25 (4th Cir. July 31, 2024). The parties stipulated to a stay in the district court on April 19, 2024, Dkt. 98, which lasted for approximately eight months until a panel of the Fourth Circuit partially affirmed this Court's decision and remanded the case to proceed against all but two defendants. Dkt. 99.

Since the Fourth Circuit issued its mandate on December 27, *see* Dkt. 101, Defendants filed their answer on January 10, 2025, Dkt. 103, Plaintiffs served discovery requests, the parties held two productive conferences regarding discovery and the case schedule, and the Court set a scheduling conference for February 12, Dkt. 106.

Five days before that scheduling conference, Defendants filed their third motion to stay, this time asserting that they *intend* to file by March 5 a petition for a writ of certiorari for review of the Fourth Circuit's immunity decision. Dkt. 110 ("Mot.") at 5. Based on the speculative assumption that "the Supreme Court would rule on Defendants' petition" before it concludes its current term on June 26, *id.* at 5, Defendants assert that staying this case pending resolution of their intended petition for a writ of certiorari will "result[] in a maximum delay of only about five months." *Id.* At the scheduling conference, the Court requested a written opposition to the motion to address whether to grant a stay and the degree of its discretion. Dkt. 115. The Court also issued an initial pretrial order and scheduled trial for August 14, 2025. Dkt. 116.

ARGUMENT

The Court has "broad discretion" to deny "a motion to stay." *Thornock v. JES Found. Repair*, No. 7:23-CV-00638, 2024 WL 1739755, at *11 (W.D. Va. Apr. 23, 2024), *reconsideration denied*, 2024 WL 1828745 (W.D. Va. Apr. 26, 2024) (denying motion to stay pending petition for certiorari, citing *Gibbs v. Plain Green, LLC*, 331 F. Supp. 3d 518, 529 (E.D. Va. 2018)). The Court's discretion to deny is at its peak when "potential prejudice to Plaintiffs is high and weighs heavily against granting a stay." *Gibbs*, 331 F. Supp. 3d at 529. Where, as here, "there is even a fair *possibility* that the stay" will "work damage to" another, staying a case is *only* appropriate where the movant "make[s] out a clear case of hardship or inequity in being required to go forward." *Williford v. Armstrong World Indus., Inc.*, 715 F.2d 124, 127 (4th Cir. 1983) (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)) (emphases added). In considering whether the

movant has carried that heavy burden, this Court considers four factors, the first two of which are the "most important":

> (1) whether the stay applicant has made a strong showing that [s]he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Southworth v. Jones, No. 3:20-CV-55, 2021 WL 12155016, at *1 (E.D. Va. Apr. 28, 2021) (quoting *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)); *see also Nken v. Holder*, 556 U.S. 418, 434 (2009); *Patterson v. Mahwah Bergen Retail Grp., Inc.*, No. 3:21CV167, 2021 WL 2653732, at *4 (E.D. Va. June 28, 2021) (explaining the first two factors are the "most important" (citation omitted)). The Court should deny Defendants' Motion because Defendants have not demonstrated that any factors warrant a stay.

I. DEFENDANTS HAVE NOT DEMONSTRATED LIKELIHOOD OF SUCCESS

Defendants have not made the necessary "strong showing" that their still-unfiled petition for a writ of certiorari will be granted and that they will succeed in the Supreme Court. *See Southworth*, 2021 WL 12155016, at *1. Indeed, they have made no showing at all.

"[A] stay pending a petition for certiorari is not justified where there is not a reasonable probability that the Supreme Court would grant the petition and the applicant would ultimately prevail on the merits." *United States v. Evans*, No. 1:02CR00136, 2006 WL 2872723, at *1 (W.D. Va. Oct. 9, 2006); *see also Dumas v. Clarke*, 324 F. Supp. 3d 716, 717 (E.D. Va. 2018). "[S]imply explain[ing]" the grounds for the petition is not enough, *JTH Tax, LLC v. Shahabuddin*, No. 2:20CV217, 2021 WL 8445889, at *4 (E.D. Va. Oct. 8, 2021); the movant must "produce[] … new evidence which would support a likelihood of success," *O'Brien v. Appomattox Cnty., Virginia*, No. CIV.A.6:02 CV 00043, 2002 WL 31663226, at *1 (W.D. Va. Nov. 15, 2002). For these reasons, courts in this circuit regularly deny requests to stay proceedings pending a petition

for Supreme Court review where no showing of likelihood of success is made. *See, e.g.*, *Dumas*, 324 F. Supp. 3d at 717; *Gadsden v. United States*, 294 F. Supp. 3d 516, 519 (E.D. Va. 2018); *Thornock*, 2024 WL 1739755, at *11 ("Thornock has not shown by clear and convincing evidence that a stay is warranted….").

Here, Defendants do no more than make the bare assertion that they "intend to seek Supreme Court review" to challenge the Fourth Circuit's decision that Plaintiffs "can proceed under *Ex parte Young*." Mot. 4. That assertion, devoid of any detail or showing as to the purported strength of their petition, is not enough to address—let alone make a "strong showing" of—the likelihood of Defendants' success on the merits. To the contrary, the Supreme Court "rarely" reviews an alleged "misapplication of a properly stated rule of law," and typically steps in only when (i) appellate courts disagree "on the same important matter," (ii) a court "has so far departed from the accepted and usual course of judicial proceedings, … as to call for an exercise of th[e Supreme] Court's supervisory power," or (iii) a court "has decided an important question of federal law that has not been, but should be, settled by" or conflicts with the decisions of the Supreme Court. U.S. Sup. Ct. R. 10. This case presents no such reason for review. The panel opinion is straightforward and unanimous; it includes no dissent or concurrence. *King v. Youngkin*, 122 F.4th 539, 542 (4th Cir. 2024). Nor does it create a circuit split. *See id.* at 543-49. Indeed, the Fourth Circuit's opinion is a simple application of well-established Supreme Court precedent, and no amici participated in Defendants' interlocutory appeal to the Fourth Circuit. *See id.* at 541. Furthermore, Defendants intend to seek Supreme Court review from an interlocutory appeal under the collateral order doctrine, *id.* at 543, which is contrary to the Supreme Court's "policy against piecemeal interlocutory review other than as provided for by statutorily authorized appeals," *Pac.*

Union Conf. of Seventh-Day Adventists v. Marshall, 434 U.S. 1305, 1309 (1977) (Rehnquist, J., in chambers).[1]

II. DEFENDANTS HAVE NOT DEMONSTRATED IRREPARABLE INJURY

Defendants' assertion that compliance with the minimal burden of discovery would cause them irreparable harm has no merit. *See* Mot. 5.

For their claimed injury to justify a stay, Defendants must show "clear and convincing circumstances outweighing potential harm to the party against whom it is operative." *Williford*, 715 F.2d at 127, *quoted in Redding v. Mayorkas*, No. 1:23-CV-1325, 2024 WL 663038, at *3 (E.D. Va. Feb. 5, 2024). But Defendants cite to no authority for the notion that compliance with ordinary civil discovery *after* an appellate court has denied immunity poses any risk of injury, let alone one that is irreparable and would clearly outweigh the harms described below. At most, Defendants have "show[n] *some* possibility of irreparable injury," which is insufficient. *Nken*, 556 U.S. at 434-435 (citation omitted) (emphasis added). And any injury caused by incurring discovery has already been mitigated because Defendants "had the benefit of a stay pending [their] appeal to the Fourth Circuit." *Dumas*, 324 F. Supp. 3d at 718.

In any event, contrary to their characterization, Plaintiffs' discovery requests (attached as Exhibits A through C) are modest and principally directed to the numerosity of the putative class on behalf of which the complaint is brought: Plaintiffs seek information and admissions about the number of Virginians disenfranchised and the historical records available to the Commonwealth.

[1] Ignoring the likelihood of success, Defendants invoke a three-factor test which they assert concerns only the relative hardship or prejudice to the parties and "the interests of judicial economy." Mot. 4 (quoting *Redding v. Mayorkas*, No. 1:23-CV-1325, 2024 WL 663038, at *3 (E.D. Va. Feb. 5, 2024)). But likelihood of success is critical even under that articulation of the test; in fact, Defendants' cited case rejected a stay request in large part because the movant's "likelihood of success on the merits of [her] petition [we]re de minimis." *Redding*, 2024 WL 663038, at *5. And, as discussed in Part IV below, prejudice and judicial economy both counsel against a stay here.

Discovery is proceeding only after two courts have thoroughly considered (and rejected) Defendants' claims of immunity in light of well-established Supreme Court precedent. Defendants make no showing that the alleged burden they will incur from Plaintiffs' tailored discovery requests justifies further forestalling this case for at least five more months (*assuming* the Supreme Court assesses the petition before recessing for the summer).[2]

III. DEFENDANTS HAVE NOT JUSTIFIED THE HARM A STAY WOULD CAUSE PLAINTIFFS AND CLASS MEMBERS

Where, as here, a matter has been pending for several years "and was stayed awaiting a decision by the court of appeals," the "prejudice to the non-moving parties [of a further stay] is plain." *Tarlton v. Sealey*, No. 5:15-CV-451, 2019 WL 4861164, at *1 (E.D.N.C. Oct. 1, 2019). That is particularly so given a stay would further extend the deprivation of Plaintiffs' right to vote—and "limiting the right to vote" is an "irreparable harm" to which Defendants' successive stay motions have already subjected Plaintiffs for 14 months. *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552, 560 (E.D. Va. 2016). The Fourth Circuit implicitly recognized those concerns when it expedited Defendants' interlocutory appeal (on Plaintiffs' request), and this Court should exercise its broad discretion to reject additional delay and avoid further prolonging the deprivation of Plaintiffs' fundamental rights. None of the cases cited by Defendants in which a stay was granted pending certiorari risked injury to non-movants comparable in any way to

[2] Defendants' cited cases (Mot. 5) are not to the contrary; neither *Russell* nor *Allen* involved a motion to stay *after* a Court of Appeals had already determined that immunity did not apply. And in both cases, the court determined that the district court had erred regarding the threshold question of immunity. The first case ordered a district court to quash third-party subpoenas issued to judicial officers whom the appellate court had *already* found were entitled to immunity as part of a separate lawsuit. *See Russell v. Jones*, 49 F.4th 507, 514-515 (5th Cir. 2022). The second ordered dismissal after a district court proceeded to discovery without even "resolv[ing] whether the individual officers were entitled to legislative immunity." *Allen v. Cooper*, 895 F.3d 337, 357 (4th Cir. 2018), *aff'd*, 589 U.S. 248(2020).

disenfranchisement, which violates "a fundamental political right, because" voting "is preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *see* Mot. 5-6.[3]

IV. DEFENDANTS HAVE NOT DEMONSTRATED A STAY IS IN THE PUBLIC INTEREST OR WOULD SERVE JUDICIAL ECONOMY

Nowhere do Defendants suggest that the stay they seek would serve the public interest. That is not surprising: further delaying this case would inhibit the timely vindication of the franchise for all Virginians in advance of future elections. By contrast, timely prosecution of this case ensures Plaintiffs' public rights are vindicated "as expeditiously as possible." *Mowbray v. Kozlowski*, 725 F. Supp. 888, 891 (W.D. Va. 1989).[4]

The only argument Defendants do present—that proceeding will waste judicial resources if it turns out they were "entirely immune from suit from the very beginning"—has no merit. Mot. 4. Now that the Court has set a schedule, discovery will advance between the parties while Defendants file and await resolution of their petition, which they admit may be resolved before the date set for trial in this matter. The burden to the Court is minimal, and it should exercise its

[3] In *Carlton & Harris Chiropractic, Inc. v. PDR Network, LLC*, for example, the only purported prejudice was the inability to take discovery regarding "the receipt of one fax message." No. CV 3:15-14887, 2018 WL 11412001, at *3 (S.D.W. Va. Apr. 30, 2018). In another cited case, the motion to stay was unopposed because the non-movant benefitted from the status quo. *See B.P.J. v. W. Virginia State Bd. of Educ.*, No. 2:21-CV-00316, 2024 WL 2885348, at *1 (S.D.W. Va. June 7, 2024). And in *Guthrie v. PHH Mortgage Corp.*, the non-movant did not "demonstrate *any* prejudice." No. 7:20-CV-43, 2024 WL 314982, at *1 (E.D.N.C. Jan. 26, 2024) (emphasis added). *See also Upstate Forever v. Kinder Morgan Energy Partners, L.P.*, No. CV 8:16-4003, 2018 WL 7458267, at *2 (D.S.C. July 13, 2018) (granting stay where the damaged pipeline at issue had already been repaired and the site was undergoing remediation); *Philipp v. Fed. Republic of Germany*, 436 F. Supp. 3d 61, 69 (D.D.C. 2020) (granting stay where alleged prejudice to the non-movants was "unrelated to the filing of the petition for certiorari").

[4] This case also has little to do with Defendants' cited decisions involving stays pending the outcome of distinct, related lawsuits. Mot. 6. There are no related lawsuits to wait for, *Hickey v. Baxter*, 833 F.2d 1005, at *1 (4th Cir. 1987) (table) (per curiam), and no risk that parties are evading a parallel judicial forum, *Amdur v. Lizars*, 372 F.2d 103, 106, 107 (4th Cir. 1967).

discretion to deny Defendants' Motion consistent with the above analysis of the four stay factors. *See Thornock*, 2024 WL 1739755, at *11.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that the Court deny Defendants' Motion to Stay.

Dated: February 21, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on February 21, 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.

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