

**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.

Civil Action No. 2:18-cv-0069

**DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF
SUPPLEMENTAL MOTION FOR ENTRY OF A PROTECTIVE ORDER**

COME NOW the Defendants, City of Virginia Beach, Virginia Beach City Council, Louis Jones, James Wood, Jessica Abbott, Aaron Rouse, Robert Dyer, Barbara Henley, Shannon Kane, John Moss, David Nygaard, Sabrina Wooten, Rosemary Wilson, in their official capacity as members of the Virginia Beach City Council, David L. Hansen, in his official capacity as City Manager, and Donna Patterson, in her official capacity as Director of Elections/General Registrar for the City of Virginia Beach (collectively "Defendants"), by counsel, and in support of their Supplemental Motion for Entry of a Protective Order,¹ pursuant to Rules 26(c)(1) and 26(b)(1)(C)(iii) of the Federal Rules of Civil Procedure, limiting discovery and subpoenas issued pursuant to Rule 45 at this time to only those matters relating to the three preconditions promulgated in *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) state as follows:

¹ See Defendants' Motion for Entry of a Protective Order and Memoranda of Law in Support of Motion for Entry of a Protective Order (ECF Nos. 75, 76 and 78). Defendants incorporate by reference the arguments as fully set forth in the original Motion for Entry of a Protective Order and Memoranda in lieu of restating them in full again in this Memorandum.

BACKGROUND

Plaintiffs Latasha Holloway and Georgia Allen bring this suit against Defendants, contending that the City of Virginia Beach's ("City") at-large system of electing councilmembers violates Section 2 of the Voting Rights Act of 1965 by diluting the voting power of the City's Minority Voters. Up to this point, Plaintiffs and Defendants have engaged in several efforts to meet and confer regarding the permissible scope and appropriate methods of discovery in this matter. These discussions have remained amicable and agreeable to the greatest extent possible; however, there remains a dispute between counsel as to the appropriateness of Plaintiffs' First Requests for Production, which is comprised of thirty-two (32) requests for documents, communications, and things regarding a wide variety of matters, the time period for many of which extends for the entirety of the past two decades or more and repeatedly employed the construction "[p]rovide any and all documents, communications and things related to...from January 1, 2000 to present."²

The majority of the requests also have no bearing whatsoever on the Court's inquiry into the *Gingles* preconditions (and some have only limited relevance even to the 'totality of the circumstances' inquiry). That being the case, Defendants also filed a Motion to Bifurcate to lessen the burden of these thirty-two (32) requests and other future litigation expense by having this Court consider the threshold *Gingles* inquiry before moving on to the "totality" inquiry, assuming Plaintiffs can even carry their burden regarding the first stage of litigation.³ Defendants continue to assert the Motion to Bifurcate should be granted.

² A copy of Plaintiffs' First Request for Production of Documents was previously attached as Exhibit 1 to Defendants' Memorandum of Law in Support of Motion for Entry of a Protective Order. *See* ECF No. 76, Exhibit. 1.

³ *See* ECF No. 79 (Motion to Bifurcate), ECF Nos. 80 and 82 (Memoranda in Support of Motion to Bifurcate).

Plaintiffs and Defendants also disagree regarding the scope of the Defendants' counsels' representation of the named Defendants. Given that the Defendants are named in their "official-capacity" only, Defendants' counsel objected to efforts by Plaintiffs to seek discovery of the Defendants in their "personal capacity"—and, therefore, as non-parties. Plaintiffs disagree with Defendants' stated position but—without waiving their arguments and subject to their objections—agreed to issue subpoenas pursuant to Rule 45 to the named Defendants in their individual capacity in lieu of litigating the issue. The Defendants counsel agreed to accept service of Rule 45 subpoenas for the following individuals to help facilitate this process and avoid unnecessary expense to Plaintiffs: (1) Robert M. "Bobby" Dyer, (2) James Wood, (3) Jessica Abbott, (4) Barbara Henley, (5) Louis Jones, (6) John Moss, (7) Aaron Rouse, (8) Rosemary Wilson and (9) Sabrina Wooten.

Defendants accepted service of these nine (9) subpoenas by electronic mail on June 21, 2019, by agreement amongst counsel. These subpoena requests appear to identical to the documents requested in the Plaintiffs' First Request for Production.⁴ Given the obvious similarity in the nature and scope of these requests, Defendants seek to supplement their prior Motion for Entry of a Protective Order to include these Rule 45 subpoenas issued by Plaintiffs, which amount to a copy and paste of the requests that form the basis of Defendants' Motion for Entry of a Protective Order.

ARGUMENT

I. Plaintiffs' Rule 45 subpoenas seek production of the same documents that form the basis of Defendants' Motion for Entry of a Protective Order (ECF No. 75).

⁴ For illustrative purposes, the Rule 45 subpoena issued to Mr. Robert M. "Bobby" Dyer is attached hereto as Exhibit 1. With the exception of the name of the intended recipient being changed, the other eight Rule 45 subpoenas appear identical to Exhibit 1.

Plaintiffs' First Requests for Production are comprised of thirty-two (32) requests for documents, communications, and things regarding a wide variety of matters, the time period for many of which extends for the entirety of the past two decades or more. These sweeping requests were the subject of Defendants' Motion for Entry of a Protective Order. (ECF No. 75). At the time of the filing of that Motion, Plaintiffs had not served any other discovery requests on Defendants. As of June 21, 2019, Plaintiffs have issued and served nine (9) subpoenas pursuant to Rule 45. Defendants assert that, if the Court is to grant the Motion for Entry of a Protective Order, the Court should grant the same protection from these nine (9) subpoenas.

"Ordinarily, a party does not have standing to challenge a subpoena issued to a nonparty unless the party claims some personal right or privilege in the information sought by the subpoena." *United States v. Idema*, 118 F. App'x. 740, 744 (4th Cir. 2005); *see also Green v. Sauder Mouldings, Inc.*, 223 F.R.D. 304, 306 (E.D. Va. 2004). However, where a party has made a motion for a protective order under Rule 26, a defendant has standing to challenge a subpoena under Rule 26 standards, "regardless of whether [it has] standing to bring a motion to quash under Rule 45." *Singletary v. Sterling Transp. Co.*, 289 F.R.D. 237, 240 at n.2 (E.D. Va. 2012). Under Rule 26(c), "a party may move for a protective order to protect itself from 'annoyance, embarrassment, oppression, or undue burden or expense,' regardless of whether the moving party is seeking to prevent disclosure of information by a nonparty, as long as the moving party can tie the protected information to an interest listed in the rule" *See In re C. R. Bard, Inc.*, 2014 U.S. Dist. LEXIS 57890, *2788 (S.D. W. Va., April 22, 2014) (citing *Firetrace USA, LLC v. Jesclard*, No. cv-07- 2001, 2008 U.S. Dist. LEXIS 101838, 2008 WL 5146691, at *2 (D. Ariz. Dec. 8, 2008)); *see also Singletary*, 289

F.R.D. 237 (E.D. Va. 2012) (granting plaintiff's motion to quash pursuant to Rule 45(d) while simultaneously granting a protective order pursuant to Rule 26(c)).

Here, it is clear that, based on the virtually identical nature of the requests issued to the Defendants in their "official capacity" pursuant to Rule 34 and in their "personal capacity" pursuant to Rule 45, any finding of undue burden or expense sufficient to satisfy the requirements of Rule 26(c) by the Court as to the pending Motion for Entry of a Protective Order will apply equally to the subpoenas issued pursuant to Rule 45. Therefore, assuming the Court grants the Defendants Motion for Entry of a Protective Order pursuant to Rule 26(c), the Court should grant that same protection to the subpoenas issued on June 21, 2019 and any subsequent subpoena issued pursuant to Rule 45 until further order from the Court.

II. Plaintiffs should have taken reasonable steps to avoid undue burden and expense as required by Rule 45(d)(1).

The Court should also consider that Plaintiffs' subpoenas are overbroad and not tailored to a particular purpose in accordance with the requirements of Rule 45. It appears that Plaintiffs have done nothing more than copy and paste the same requests that were issued to the named Defendants in their "official capacity" to the same individuals in their "personal capacity"—without any regard for whether the request has any bearing on the person to whom the subpoenas is being issued. For all the reasons fully set forth in the Motion for Entry of a Protective Order and associated memoranda, many of these requests are overbroad and unduly burdensome. For Plaintiffs to cast the same wide net without some reasonable effort to particularize these subpoenas to the individual to whom it is addressed, Plaintiffs run afoul of the requirement of Rule 45(d)(1) that states: "A party or attorney

responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena.”

At this stage of litigation, Defendants have not sought legal protection from to requests for non-privileged materials related to the three *Gingles* preconditions. Discovery on that issue is ongoing, and, should Plaintiffs satisfy this threshold matter, there would be a requirement at that time to respond in good-faith to any discovery requests related to the “totality” inquiry and to subpoenas issued pursuant to Rule 45 to individuals on that same issue. While the Defendants do expect that the individuals who received a subpoena pursuant to Rule 45 will comply with those subpoenas at the proper time and as required by the Court, Defendants respectfully restate their request that this Court limit discovery at this time only to matters related to the *Gingles* preconditions and supplement that request now to include limiting discovery in such a way that incorporates any and all subpoenas issued pursuant to Rule 45 by the Plaintiffs.

CONCLUSION

WHEREFORE, for all the reasons set forth above, the Defendants hereby respectfully request entry of a protective order limiting the scope of discovery and subpoenas issued pursuant to Rule 45 at this time to requests related to the *Thornburg v. Gingles* preconditions, and for other relief as the Court deems appropriate.

Respectfully submitted,

CITY OF VIRGINIA BEACH, VIRGINIA BEACH CITY COUNCIL, LOUIS JONES, JAMES WOOD, JESSICA ABBOTT, AARON ROUSE, ROBERT DYER, DAVID NYGAARD, BARBARA HENLEY, SHANNON KANE, JOHN MOSS, SABRINA WOOTEN, and ROSEMARY WILSON, in their official capacity as members of the Virginia Beach City Council, DAVID L. HANSEN, in his official capacity as City Manager, and DONNA PATTERSON, in her official capacity

as Director of Elections/General Registrar for the
City of Virginia Beach,

By: _____/s/_____
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