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' REPLY TO PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS' RENEWED MOTION TO BIFURCATE

COME NOW the Defendants, by counsel, and in reply to Plaintiffs' Memorandum in Opposition to Defendants' Renewed Motion to Bifurcate ("Opposition Memo"), state as follows:

Reply Argument

Defendants welcome Plaintiffs' candor in acknowledging in their Opposition Memo that vote dilution claims under Section 2 of the Voting Rights Act consist of two distinct analytical phases and that the totality-of-the-circumstances phase is relevant only if plaintiffs first satisfy their burden regarding the *Gingles* preconditions. [ECF No. 136 at 3, 7.] While Plaintiffs do not support the bifurcation of the trial of this matter, they do not dispute that bifurcation is feasible. [ECF No. 136 at 6-8.] In other respects, however, Plaintiffs' Opposition Memo is less forthright—especially as it miscasts what a putative 'totality' phase of trial would look like. In any event, Plaintiffs have not rebutted Defendants' fundamental assertion that bifurcation of this trial would create the distinct possibility that the efforts and expenditures of both parties—as well as significant judicial resources—will be dramatically reduced and that resolution of this

matter will be significantly expedited in the event the totality-of-the-circumstances phase becomes moot.

I. The Rios-Andino *case is a clear example of bifurcation of a Section 2 claim.*

As a primary matter, Plaintiffs' peculiar assertion that Defendants have not cited precedential caselaw for bifurcation of a Section 2 claim cannot go unanswered. Plaintiffs cite a Notification issued by the trial judge in the *Rios-Andino* case—cited by Defendants—as evidence that the *Rios-Andino* court did not "plan[] to hold two distinct trials." (ECF No. 136 at 7.) It is unclear what Plaintiffs hope to gain by parsing the language of this Notification, which does not detail exactly in what manner the trial judge planned to proceed after first hearing evidence only on the *Gingles* preconditions. The following facts, however, are undisputable: (1) the *Rios-Andino* opinion notes that "[t]he Court bifurcated the trial"; (2) consistent with the Notification, during the first phase of the trial the parties presented evidence only on the *Gingles* preconditions; (3) after this initial trial phase, the Court issued an opinion finding that plaintiffs had not met their burden regarding the preconditions; and (4) because plaintiffs did not satisfy the *Gingles* preconditions, the Court ruled it need not proceed with the totality phase of the trial. 51 F. Supp. 3d 1215, 1218 n. 2 (M.D. Fla. 2014). Courts may bifurcate trials in various manners, but *Rios-Andino* unambiguously stands for the proposition that bifurcation is a feasible option in Section 2 cases—and one that is not without precedent.

II. Plaintiffs greatly overstate the amount of overlap that exists in the presentation of evidence in a bifurcated trial of this matter.

As for the contours of a putatively severed trial, Plaintiffs repeatedly suggest that the evidence in the two phases of trial largely would overlap. That assertion simply is not correct. In support of their position, Plaintiffs cite *United States v. Charleston County* for the proposition that the "most important factors in the inquiry into the totality of the circumstances are the

'extent to which minority group members have been elected to public office in the jurisdiction' and 'the extent to which voting in the elections of the state or political subdivision is racially polarized." 365 F.3d 341, 345 (4th Cir. 2004) (quoting *Thornburg v. Gingles*, 478 U.S. 30, 48-49 (1986)). And indeed, those two factors do overlap somewhat with the *Gingles* preconditions. Plaintiffs' argument in this vein, however, conflates which totality factors are to be given the *most weight* and which factors will necessitate the *most exhaustive presentation of evidence* during the totality phase. To wit, the inquiry regarding the extent to which minority group members have been elected in Virginia Beach may indeed be afforded particular weight, but it would require little, if any, presentation of new evidence in a hypothetical scenario where Plaintiffs already would have met their burden regarding each of the three *Gingles* preconditions—particularly Plaintiffs' burden to prove that white voters in Virginia Beach vote sufficiently as a bloc usually to defeat the minority groups' preferred candidates.

The totality phase of a putatively bifurcated trial would be of an entirely different character than a first phase focused on the *Gingles* preconditions. The *Charleston County* opinion cited by Plaintiffs characterizes the totality inquiry as a "searching practical evaluation of the past and present reality which demands a comprehensive, not limited, canvassing of relevant facts." *Id.* at 348 (quotations omitted). Plaintiffs' exhaustive discovery requests and responses demonstrate that they are vigorously preparing—consistent with the dictates of caselaw—to conduct this canvassing of Virginia Beach's and indeed all of Virginia's history in a most comprehensive manner.[1] The already wide-ranging totality inquiry is only made more

[1] Plaintiffs propounded dozens of interrogatories and requests for production involving a wide range of issues and spanning several decades—and bearing no relationship to the *Gingles* preconditions. In response, Defendants produced hundreds of thousands of pages of discovery. Plaintiffs have also provided close to two hundred articles (or links to articles) that they indicate may be used at trial—all of which could only have relevance for the totality inquiry. It appears

enormous in scope by the fact that the requisite exploration of Virginia Beach's historical and political landscape in this case involves not just one minority group, but three. Plaintiffs play coy, then, by failing to mention in their Opposition Memo any of the other (non-exhaustive) totality factors enumerated in *Gingles*, which will guide both parties in their respective production of copious evidence.[2]

III. Bifurcation of this trial would leave open the possibility of substantial conservation of resources and an expedited resolution to this case without impairing Plaintiffs' ability to litigate their claim.

Perhaps an even more glaring omission in Plaintiffs' Opposition Memo is the absence of any argument regarding the core of Defendants' argument for bifurcation: that severing this trial into two phases creates the distinct possibility that the need to conduct the totality inquiry will be obviated entirely. And in that event, the interests of expediency and economization of resources

certain that both parties will produce copious amounts of evidence at the totality phase of the trial that has no overlap whatsoever with the *Gingles* preconditions inquiries.

[2] Defendants listed the non-exhaustive totality-of-the-circumstances inquiry factors in their Memorandum of Law in Support of Defendants' Renewed Motion to Bifurcate Trial. Those factors enumerated in *Gingles* but not addressed by Plaintiffs are as follows: (1) the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process; (3) the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group; (4) if there is a candidate slating process, whether the members of the minority group have been denied access to that process; (5) the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process; [and] (6) whether political campaigns have been characterized by overt or subtle racial appeals…Additional factors that in some cases have had probative value as part of Plaintiffs' evidence to establish a violation are: whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group, whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous. *Thornburg v. Gingles*, 478 U.S. 30, 37 (1986) (citation omitted).

invoked by Federal Rule of Procedure 42 undeniably will be well-served. Plaintiffs tellingly have not challenged that this distinct possibility exists.

Plaintiffs justifiably ask the Court not to prejudge this case in exercising its discretion regarding whether to bifurcate the trial for this matter. Defendants trust fully that the Court will faithfully exercise its duty to hear the merits of this matter at trial with an open mind and to rule accordingly. Defendants believe it is appropriate, however, for the Court to be cognizant of the following undisputed facts as it considers whether bifurcation is warranted in order to preserve the possibility that substantial resources and time may be saved by so doing: (1) any Section 2 claim predicated upon the alleged cohesion of three minority groups presents a substantial evidentiary burden for the plaintiffs; (2) no such tri-partite coalition claim has ever succeeded; and (3) Plaintiffs and their expert readily acknowledge that they cannot produce to the Court reliable independent estimates of Hispanic and Asian vote totals in elections taking place in Virginia Beach. Bifurcation of this trial—requiring Plaintiffs to demonstrate that they can satisfy their heavy burden regarding the *Gingles* pre-conditions before moving on the totality phase—would not in the slightest degree deprive Plaintiffs the opportunity to make their case and have their evidence considered without bias or prejudice.

Plaintiffs also do not challenge Defendants' important assertion that any potential relief in this case could not occur before the November 2022 councilmanic elections—and that bifurcation of this trial would not alter that timeline.

Finally, both parties acknowledge that the determination to bifurcate this trial is within the sound discretion of the Court. Defendants therefore place this matter in the Court's hands, trusting that they have provided the Court an honest and thorough appraisal of the significance of the *Rios-Andino* case, the general contours of the two phases of a severed trial, and the likely

benefits of bifurcation—most importantly that the second phase of the bifurcated trial may be mooted entirely. Defendants assert that these considerations, as described above, militate heavily in favor of bifurcating this trial.

Conclusion

WHEREFORE, for all the reasons set forth above and those previously set forth in their Memorandum of Law in Support of Defendants' Renewed Motion to Bifurcate Trial, the Defendants hereby respectfully renew their request that this Court bifurcate the trial of this claim, separating the adjudication of the threshold *Thornburg v. Gingles* preconditions from the totality-of-the-circumstances inquiry and for such other relief as the Court deems appropriate.

Respectfully submitted,

CITY OF VIRGINIA BEACH, et al.,

By: _____/s/_____
Of Counsel

Mark D. Stiles (VSB No. 30683)
City Attorney
Christopher S. Boynton (VSB No. 38501)
Deputy City Attorney
Gerald L. Harris (VSB No. 80446)
Associate City Attorney
Joseph M. Kurt (VSB No. 90854)
Assistant City Attorney
Attorneys for the City of Virginia Beach
Office of the City Attorney
Municipal Center, Building One
2401 Courthouse Drive
Virginia Beach, Virginia 23456
(757) 385-4531 (Office)
(757) 385-5687 (Facsimile)
mstiles@vbgov.com
cboynton@vbgov.com
glharris@vbgov.com
jkurt@vbgov.com

CERTIFICATE OF SERVICE

I hereby certify that on the 4th day of May, 2020, I will electronically file the foregoing with the Clerk of the Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

Joseph Gerald Hebert
Danielle Marie Lang
Paul March Smith
Christopher Lamar
Annabelle Harless
Ruth Merewyn Greenwood
Campaign Legal Center
1101 14th Street, NW,
Washington, DC 20005
(202) 736-2200 (telephone)
(202) 736-2222 (facsimile)
ghebert@campaignlegal.org
dlang@campaignlegal.org
psmith@campaignlegal.org
clamar@campaignlegal.org
aharless@campaignlegal.org
rgreenwood@campainlegal.org
Attorneys for Plaintiffs

/s/
Joseph M. Kurt

Mark D. Stiles (VSB No. 30683)
City Attorney
Christopher S. Boynton (VSB No. 38501)
Deputy City Attorney
Gerald L. Harris (VSB No. 80446)
Associate City Attorney
Joseph M. Kurt
Assistant City Attorney (VSB No. 90854)
Attorneys for the City of Virginia Beach
Office of the City Attorney
Municipal Center, Building One, Room 260
2401 Courthouse Drive
Virginia Beach, Virginia 23456
(757) 385-8803 (Office)
(757) 385-5687 (Facsimile)
mstiles@vbgov.com
cboynton@vbgov.com
glharris@vbgov.com
jkurt@vbgov.com