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' OPPOSITION TO DEFENDANTS' MOTION TO BIFURCATE TRIAL

COME NOW the Defendants, by counsel, and in reply to Plaintiffs' Opposition to Defendants' Motion to Bifurcate Trial, state the following:

INTRODUCTION

In Defendants' Memorandum of Law in Support of Motion to Bifurcate ("Supporting Memo"), Defendants set forth in a straightforward manner the good cause that exists to support their motion. Defendants described therein the factors that they believe warrant the bifurcation of the trial in this case: (1) the existence of two distinct phases of all Section 2 cases, the first of which is a threshold inquiry; (2) the novel and unprecedented character of Plaintiffs' tri-partite coalition strategy to satisfy the threshold inquiry; and (3) the enormity of burden that each phase of this case places on the parties and the Court. Plaintiffs' memorandum in opposition ("Opposition Memo") does not substantively respond to any of the weighty considerations that Defendants advance in their Supporting Memo. Instead, Plaintiffs obfuscate the case law regarding Section 2 cases, protest the timing of Defendants' motion and mischaracterize Defendants' arguments.

ARGUMENT

Defendants pointed out in their Supporting Memo that claims brought pursuant to Section 2 of the Voting Rights Act are conceptually divided into two distinct phases: the *Gingles* inquiry and the 'totality-of-the-circumstances' inquiry. Further, courts have referred to the three *Gingles* prongs as preconditions and, consistently treating them as such, have dismissed cases wherein Plaintiffs were unable to satisfy all three *Gingles* prongs—obviating the need in such cases for courts to conduct a 'totality' inquiry.

Plaintiffs do not challenge the unambiguous holdings of the cases Defendants have cited in the previous memoranda.[1] Plaintiffs do, however, offer collateral attacks that merely elide the clarity of that case law. For example, Plaintiffs assert that bifurcation of the case would contradict the text of Section 2, which "compels courts to examine 'the totality of the circumstances.'" (ECF No. 84, pps. 1-2.) This is a red herring. Defendants do not challenge what the case law makes abundantly clear: that the 'totality' inquiry is the ultimate metric for determining whether an election system violates Section 2. Plaintiffs seem reluctant, however, to similarly acknowledge what a plethora of cases make equally clear: that if the *Gingles* preconditions are not satisfied, the totality inquiry is moot. Bifurcating this trial would in no way alter the fact that—should Plaintiffs satisfy the *Gingles* preconditions—the totality inquiry is the ultimate test for a Section 2 claim.

Plaintiffs also misrepresent Defendants' purpose in citing cases that have, in one way or another, analyzed separately—and as a preliminary matter—the *Gingles* preconditions. Plaintiffs

[1] Understanding that the Court has had the opportunity to review Plaintiffs' Memorandum of Law in Support of Motion to Bifurcate Trial (ECF No. 80) as well as two memoranda (ECF Nos. 76 and 81) with regard to Defendants' Motion for Protective Order (ECF No. 75)—which the Plaintiffs correctly note contain arguments that substantially overlap with those advanced regarding the present motion—Defendants do not restate herein the case law and citations regarding the two phases of Section 2 claims, which Plaintiffs have not disputed.

assert, for example, that "*Rios-Andino v. Orange County*, 51 F. Supp. 3d 1215 (M.D. Fla. 2014), hardly stands for the proposition that courts routinely bifurcate Section 2 cases." (ECF No. 84, p. 5). It bears mention that nowhere in their Supporting Memo do Defendants make this contention. The *Rios-Andino* court, in the second footnote to its opinion, stated, "The Court bifurcated the trial so that both parties presented their cases on the *Gingles* preconditions before either party offered evidence on the totality of the circumstances. Because the Court concluded that Plaintiffs failed to satisfy their burden of proof as to the preconditions, the Court is able to enter judgment on partial findings." 51 F. Supp. 3d at n. 2. Plaintiffs' arguments about how, as a procedural matter, the *Rios-Andino* court came to bifurcate the trial notwithstanding, (ECF. No. 84, p. 5-6), Defendants believe that this case proves the proposition for which it is offered: bifurcation of Section 2 cases is entirely feasible—and most easily along the lines Defendants offer. In their prior memoranda (ECF Nos. 76, 80, and 81), Defendants have cited numerous cases that, though not formally bifurcated, further demonstrate that two-phased structure of Section 2 cases—the existence of a set of preconditions to be satisfied before the totality inquiry—makes bifurcation a practicable option. To wit, the United States Court of Appeals for the Fourth Circuit has held that "if [the *Gingles*] preconditions are met, the court must then determine under the 'totality of the circumstances' whether there has been a violation of Section 2." *Levy v. Lexington County*, 589 F. 3d 708, 713 (4th Cir. 2009) (emphasis added) (quoting *Lewis v. Alamance County, N.C.*, 99 F.3d 600, 604 (4th Cir. 1996) (citing *Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994)). That the two phases of Section 2 claims are conceptually distinct and separable is beyond doubt.

The Defendants offered a second premise in their Supporting Memo that Plaintiffs also have not refuted: that the theory of Plaintiffs' case, based on tri-partite minority coalition, has never been successful. This is, then, a highly unusual Section 2 case. The Supporting Memo

additionally assert that this Court's opinion in *Hall v. Virginia*—and the United States Court of Appeals for the Fourth Circuit's decision affirming that holding—appear to cast doubt on the viability of coalition claims in this Circuit. 385 F.3d 421 (4th Cir. 2004); 276 F. Supp. 2d 528 (E.D. Va. 2003). The Defendants are not asking this Court to precisely handicap the Plaintiffs' chances of success, but rather to recognize that, given the novel character of Plaintiffs' claim, there is a distinct possibility that Defendants may win summary judgment based upon Plaintiffs' inability to satisfy the *Gingles* preconditions. And if that outcome comes to pass, any efforts expended, at the taxpayers' expense, on the (then moot) totality inquiry all would be for naught.

The enormity of the efforts required of both parties and the Court in order to litigate the two phases of this case constitutes the third pillar of Defendants' argument for bifurcation, and—like the first two pillars—is not challenged by Plaintiffs' Opposition Memo. The sweeping scope of Plaintiffs' First Request for Production[2] is a good indication of how burdensome will be the discovery in this case. Plaintiffs recently served Requests for Admissions, attached hereto as Exhibit 1, and containing ninety (90) such requests, are a further indication of the expansive scope of discovery that Plaintiffs seek in this case. Further, an examination of court opinions ruling on both the *Gingles* and totality inquiries suggests the magnitude and complexity of the legal inquiries involved in this case. *See, e.g.*, *Luna v. Cty. Of Kern*, 291 F. Supp. 3d 1088 (E.D. Cal. 2018); *Patino v. City of Pasadena*, 230 F. Supp. 3d 667 (S.D. Tex. 2017); *Rodriguez v. Harris County*, 964 F. Supp 2d 686 (S.D. Tex. 2013).

Perhaps because Plaintiffs recognize that the Defendants have accurately characterized the vastness and complexity of the legal issues involved in this case, they resort to criticizing Defendants' timing in requesting bifurcation of the case and a protective order limiting discovery

[2] Defendants have previously attached Plaintiffs' First Request for Production as Exhibit 1 to their Memorandum of Law in Support of Motion for Protective Order.

at this time to the *Gingles* inquiry. Defendants' motions, however, are requested in good faith, and based upon their having more information than they possessed when the Rule 16 Conference occurred. For instance, Defendants did not know at that time how sweeping in scope would be Plaintiffs' discovery requests—covering varied and broad topic areas, multiple decades, and the communications of thousands of City personnel.

Plaintiffs have not challenged the basic pillars of Defendants' argument in favor of bifurcation. Section 2 cases are comprised of two distinct conceptual phases that are separable; a plaintiff's failure to satisfy the first phase, the *Gingles* preconditions, renders moot the second phase, the totality inquiry. Further, Plaintiffs' tri-partite minority coalition theory—upon which they will rely to satisfy the *Gingles* prerequisites—is novel, highly complex, and without successful precedent. And finally, both of the two phases of his case implicate a host of inquiries that create massive burdens on the parties and the Court that is more effectively handled by dividing them. These unchallenged premises, considered together, support bifurcation of this trial into two phases.

Virginia Beach has successfully defended its at-large system of electing councilmembers on two prior occasions. It was successful both times—the more recent of which was a Section 2 claim alleging that the at-large system diluted the Black vote. Plaintiff Holloway's original complaint (ECF No. 5) challenged the at-large system on that same basis. After the City filed a Motion to Dismiss (ECF No. 13), the Plaintiffs filed an Amended Complaint (ECF No. 62) based upon a new, novel and heretofore unsuccessful tri-partite minority coalition strategy. Defendants are prepared once again to defend the legality of Virginia Beach's at-large system of elections. Defendants simply ask this Court to structure this litigation in a manner that may provide some

relief from the burdens of a lawsuit regarding which they expect to prevail on the first phase of a putatively bifurcated trial.

CONCLUSION

WHEREFORE, for all the reasons set forth above and in their Memorandum of Law in Support, the Defendants hereby restate their request that this Court bifurcate 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, VIRGINIA BEACH CITY COUNCIL, LOUIS JONES, JOHN UHRIN, BEN DAVENPORT, 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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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of June, 2019, 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:

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