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 MOTION FOR ENTRY OF A PROTECTIVE ORDER

COME NOW the Defendants, by counsel, and for their Reply to Plaintiffs' Opposition to Motion for Entry of a Protective Order, state as follows:

INTRODUCTION

In support of their Motion for a Protective Order, Defendants filed a memorandum of law explaining their reasons for asking this Court to enter a Protective Order limiting discovery at this time to matters related to the preconditions set forth in *Gingles v. Thornburg*. In Plaintiffs' Opposition to Motion for Entry of a Protective Order ("Plaintiffs' Memo"), Plaintiffs give various reasons for their opposition to Defendants' motion, but do not address substantively the core arguments Defendants advance in support of their Motion for entry of a Protective Order.

I. Defendants have timely requested a protective order, and their Motion to Bifurcate Trial addresses the implications for the trial schedule.

Plaintiffs contend in their memorandum in opposition that Defendants' Motion for Entry of a Protective Order was untimely, as the concerns giving rise to this motion were foreseeable at the Rule 26 and Rule 16 conferences attended by both parties. While Defendants certainly knew that the two phases of Section 2 cases (the *Gingles* preconditions

and the 'totality-of-the-circumstances' inquiry) were well established in case law, Defendants did not know how sweeping would be the Plaintiffs' discovery requests—most of which cover two decades or more and implicate the communications, during those multi-decade time spans, of each employee of a city that employs nearly 7,500 persons at any given time. Additionally, as this complex litigation develops, it is entirely reasonable for Defendants' assessment of the litigation "terrain" to evolve—especially during early stages of litigation. For this reason, Defendants promptly sought to confer with Plaintiffs, by counsel, to minimize the burden and expense associated with these Requests and, being unable to reach an agreeable resolution, filed the present Motion forthwith.

Plaintiffs also express concern that the Court's entry of a Protective Order would adversely impact the Scheduling Order currently in place. This concern may be addressed by the Defendants' filing of their Motion to Bifurcate Trial (ECF No. 79), which, if granted, will allow for the parties to proceed on the *Gingles* preconditions stage of the trial according to the Scheduling Order currently in place. The 'totality' inquiry would take place—if not rendered moot by judgment in Defendants' favor—subsequent to that first trial phase. In the alternative, the Court retains the discretion to alter the Rule 16(b) Scheduling Order according to the needs of the case and as justice requires. (ECF No. 72, p. 1.)

II. Defendants have shown good cause for their request for a Protective Order.

As Plaintiffs aver, a party seeking a protective order has the burden establishing 'good cause' by demonstrating a "specific prejudice or harm will result" in the absence of such relief. Although protective orders sometimes are related to privacy concerns, the relief afforded by protective orders is by no means limited to this arena, as Plaintiffs seem to suggest.

The Defendants have articulated the specific prejudice and harm they will incur in the absence of the requested relief, which is created by two features of this case. First, the 'totality' phase of this case—likely to create a substantial burden of production in any case—is made especially onerous because of the sweeping scope of Plaintiffs' requests. The far-reaching nature of these requests is immediately evident upon examination.[1] Plaintiffs requests cover a wide range of topics (often only tangentially related to this claim), contain the broad instruction to produce all items "related to" each such topic, encompass a span of decades, and implicate multiple searches of millions of employee/agent communications and other city documents. While Defendants have stated their objections to these requests, they cannot accurately predict what will be the ultimate scope of the required search after negotiations with opposing counsel or after any discovery-related orders this Court may issue. They reasonably believe, however, that the task of responding to 'totality'-related discovery will remain onerous.

Second, the considerable time and expense spent answering discovery requests pertaining to the totality inquiry will be *for naught* should the Defendants obtain judgment in their favor based upon Plaintiffs' failure to satisfy the *Gingles* preconditions. As discussed, *infra*, Plaintiffs' Memo elides the two-phased nature of Section 2 cases, relying upon the fact that two of the *Gingles* preconditions may have bearing on the totality inquiry. What Plaintiffs do not challenge—and what case law makes unmistakably clear—is that if Plaintiffs fail to satisfy the *Gingles* preconditions, the totality inquiry is entirely moot. It is not Defendants, but the courts, that have named the so-called "*Gingles* preconditions." Further, the unprecedented nature of Plaintiffs' tripartite coalition claim—Plaintiffs cite no case where such a strategy has been

[1] See Plaintiffs' First Requests for Production, attached as Exhibit 1 to Defendants' Motion for Protective Order.

successful—militates in favor of protecting Defendants from incurring a heavy burden that may be wholly unnecessary for them to carry at the taxpayers' expense.

The Plaintiffs correctly assert that "[t]here is no taxpayer expense exception to the ordinary rules of discovery." Defendants do not suggest the opposite is true. Rather, they assert that the enormous time and costs at stake are proper considerations for this Court. Given the enormity of the potential burden of using City staff to assist the search of decades' worth of documents, and the distinct possibility that judgment in Defendants' favor will obviate the need to undertake the totality inquiry, there is good cause to grant Defendants' request for relief.

III. Section 2 Voting Rights cases are feasibly adjudicated in two phases and often are.

Given the case law, Plaintiffs' contention that discovery in Section 2 cases "does not lend itself neatly to bifurcation" is confounding. The case law makes it unmistakably clear that there are two distinct phases to Section 2 cases. Most important, the United States Supreme Court was explicit in its *Gingles* opinion, stating that the three conditions set forth therein "are necessary preconditions for multimember districts to operate to impair minority voters' ability to elect representatives of their choice . . ." 478 U.S. 30, 50 (1986) (emphasis added). Consistent with the Gingles holding, the United States Court of Appeals explained in *Hall v. Virginia* that "[t]he ultimate determination of vote dilution under the Voting Rights Act still must be made on the basis of the 'totality of the circumstances.' On the other hand, the failure of a minority group to satisfy all of the *Gingles* preconditions means that it cannot sustain a claim under Section 2." 385 F.3d 421, 426 (4th Cir. 2004) (quotation omitted). There was no need for the Court of Appeals to conduct a 'totality' inquiry in *Hall* "[b]ecause the plaintiffs [could] not establish that black voters in the Fourth District can form a majority in a single-member district as required by *Gingles*, the complaint fail[ed] to state a vote dilution claim under Section 2." *Id.* at 432.

Defendants do not argue—as Plaintiffs seem to suggest—that the two phases of Section 2 claims *cannot* be tried simultaneously or that presentation of the evidence is always (or usually) bifurcated and performed sequentially. Defendants merely point out that such bifurcation—of discovery and/or the trial itself—is entirely feasible. In fact, in *Rios-Andino v. Orange County*, the United States District Court for Florida's Middle District bifurcated *the trial* of a Section 2 claim—along the very lines Defendants ask to bifurcate discovery in the instant case (as well as the trial, as requested in Defendants Motion to Bifurcate Trial (ECF No. 79)). 51 F. Supp. 1215, 1218 n. 2 (M.D.Fla. 2014). Other courts have also analyzed separately the *Gingles* preconditions and dismissed plaintiffs' claims where those threshold conditions are not satisfied. This Court's ruling in *Lincoln v. City of Virginia Beach*, 97-cv-756, is just such an example. Plaintiffs correctly note that the Court analyzed the *Gingles* factors to determine whether the case should be dismissed with or without prejudice. The Court's determination that the *Lincoln* plaintiffs could not satisfy the *Gingles* preconditions was fatal to their claim—leaving no need for the Court to evaluate the totality of the circumstances. Plaintiffs are correct in stating that this Courts admonition in *Lincoln* that a Section 2 claim "cannot proceed unless the plaintiff first establish three [*Gingles*] preconditions" does not *necessarily* mean that discovery or trial need be conducted in separate stages. *Id.* at 7. But the Court's analysis does adhere to the well-established idea that there are two conceptual stages to this claim, that *Gingles* is first among them, and that a plaintiff's failure to satisfy the *Gingles* preconditions renders the totality inquiry moot.

Plaintiffs' assertion that because "the *Gingles* preconditions are a necessary part of the Plaintiff's totality of the circumstances burden" is a red herring that does not logically lead to the conclusion that the relief Defendants request is improper. (ECF No. 78, p. 9.) Defendants request

that discovery is limited to the *Gingles* preconditions. If any discovery request, then, is relevant to both the *Gingles* and the totality inquiry, the Protective Order Defendants seek would not absolve them of the duty to answer any such a request in good faith, so far as it is reasonably related to the *Gingles* phase. Regarding any implications for the subsequent totality phase, the logic that follows is simple: if any *Gingles*-related discovery is *also* pertinent to any subsequent totality inquiry, that evidence will still be equally as available to the Court as it would be without the issuance of the requested Protective Order. In fact, the Court's putative totality inquiry may be expedited by the likely fact of its having made findings of fact on the three *Gingles* inquiries.

Plaintiffs also suggest that Defendants request for relief is designed unfairly to limit discovery to the "elements of the case that they think will lead to their success on the merits." (ECF No. 78, p. 9.) This contention plainly ignores that it is the *Plaintiffs' burden* of proving the *Gingles* threshold circumstances. Asking that Plaintiffs be required to make a showing on this threshold inquiry—which in itself creates a substantial burden regarding discovery—before Defendants are required to take on a second, considerable burden cannot reasonably be characterized as an attempt to unfairly 'tilt the playing field.' Plaintiffs' burden will remain the same regardless of this Court's determination on the Motion to Bifurcate. If this Motion is granted, the only difference would be that discovery will occur in two phases rather than in one. Defendants' request for entry of a Protective Order does not impair Plaintiffs' ability to present their case.

IV. The Court need not adoption Defendants' assessment of the merits of the Plaintiffs' claim to recognized the sound rationale for limiting discovery to the *Gingles* preconditions.

Plaintiffs misapprehend Defendants' purpose in setting forth in their memorandum the significant obstacles Plaintiffs face in prevailing on the *Gingles* phase of this case. Defendants do

not ask this Court to adopt their assessment of the merits of this case; rather, they merely ask this Court to recognize that the impediments that Plaintiffs face in meeting the *Gingles* preconditions are substantial, unprecedented, and complex. Notably, Plaintiffs have not offered any case that challenges Defendants' belief that there is no precedent in case law wherein a plaintiff has prevailed on a Section 2 claim by alleging cohesion among three minority groups. Nor do Plaintiffs deny that the Gingles preconditions analysis involving three groups is far more complex than a 'garden-variety' one-minority claim.

Given the obstacles these weighty considerations present, a more deliberate, one-step-at-a-time approach to this litigation is prudent and sound—and may save both parties from needlessly conducting discovery on the secondary, totality phase of litigation.

CONCLUSION

WHEREFORE, for all the reasons set forth above, the Defendants hereby respectfully restate their request that this Court enter a Protective Order limiting discovery for this matter to requests related to the *Thornburg v. Gingles* preconditions 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/_____
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 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:

Joseph Gerald Hebert
Danielle Marie Lang
Paul March Smith
Annabelle Harless
Ruth Merewyn Greenwood
Campaign Legal Center
1411 K Street, NW
Suite 1400
Washington, DC 20005
(202) 736-2200 (telephone)
(202) 736-2222 (facsimile)
ghebert@campaignlegal.org
dlang@campaignlegal.org
psmith@campaignlegal.org
aharless@campaignlegal.org
rgreenwood@campainlegal.org

/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