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

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' RENEWED MOTION TO BIFURCATE TRIAL

Having failed in several attempts to break this case apart and litigate it piecemeal—including an initial motion to bifurcate and a request to pursue an interlocutory appeal—Defendants now ask the Court to set aside scarce judicial resources for *two* bench trials in the midst of a global pandemic. Plaintiffs Latasha Holloway and Georgia Allen respectfully ask the Court to reject this needless duplication of effort.

I. BACKGROUND

Defendants have filed their *fourth* request to deviate from standard civil procedure, all directed to avoiding or postponing full adjudication of Plaintiffs' claim under Section 2 of the Voting Rights Act ("VRA Section 2"). None of Defendants' previous efforts to achieve this goal has succeeded.

First, on May 15, 2019—nearly two months after the Rule 16 planning conference—Defendants moved for a protective order. ECF No. 75. Defendants sought to limit initial discovery to evidence relevant to the three preconditions for VRA Section 2 liability under *Thornburg v.*

Gingles, 478 U.S. 30 (1986), [1] then conduct an initial round of summary judgment briefing focused solely on those preconditions. *See* Defs. Mem. in Support of Mot. for Protective Order, ECF No. 76 at 1, 6. Under this proposed plan, if Defendants lost their initial motion for summary judgment, a new round of discovery, dispositive motions, and trial would follow.

Second, on May 31, 2019—before Plaintiffs had even responded to Defendants' motion for a protective order—Defendants moved to bifurcate discovery and trial, seeking to adjudicate the *Gingles* preconditions before assessment of the totality of the circumstances. ECF No. 79. After the filings were fully briefed, the Court denied both motions, but granted Defendants leave to renew their motion to bifurcate after the Court ruled on dispositive motions. ECF No. 93.

Third, on March 19, 2020, after the Court denied Defendants' motion for summary judgment, ECF No. 126, Defendants then moved to certify an interlocutory appeal of the question whether tri-minority coalition claims, or coalition claims generally, are cognizable under Section 2 of the VRA. ECF No. 127. The Court denied that motion, too, noting that "the *full factual record* developed at trial will greatly enhance any appellate review of whether coalition claims are legally cognizable under Section 2." ECF No. 134 at 3 (emphasis added).

Fourth, on April 13, 2020, while their motion for a certificate of appealability was pending, Defendants filed this Renewed Motion to Bifurcate Trial, ECF No. 132 (the "Motion"). Defendants thus sought an interlocutory appeal *and* two separate trials, all in the midst of the COVID-19 pandemic. In light of the Court's order denying an interlocutory appeal, only the request for a bifurcated trial is now at issue.

[1] *See infra* Section II.A.

II. LEGAL STANDARD

A. Standard for VRA Section 2 Liability

In *Thornburg v. Gingles*, the Supreme Court established three "preconditions" for liability in cases challenging the use of multimember districts or at-large systems under VRA Section 2:

> First, the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district . . . .
>
> Second, the minority group must be able to show that it is politically cohesive . . . .
>
> Third, the minority must be able to demonstrate that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate.

Id.

"If these three preconditions are satisfied, then the trier of fact must determine whether, based on the totality of the circumstances, there has been a violation of Section 2." *United States v. Charleston Cty.*, 365 F.3d 341, 345 (4th Cir. 2004). "According to Congress and the [Supreme] Court, 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.'" *Id.* (quoting *Gingles*, 478 U.S. at 48-49).

B. Standard for Bifurcation of Trial

Bifurcated trials are "not to be routinely ordered," except in special circumstances where experience shows that bifurcation is worthwhile. Fed. R. Civ. P. 42(b) advisory committee's note to 1966 amendment; *see also Gioso v. Thoroughgood's Transport, LLC*, No. ADC-16-3841, 2018 WL 5281903, at *4 (D. Md. Oct. 24, 2018) ("[B]ifurcation is the exception rather than the rule in civil cases.") (citation omitted). Even in areas where separate trials are relatively common, such

as patent litigation, courts regularly deny bifurcation, "especially where there is danger of delay or duplication of efforts, where the issues [sought to be bifurcated] . . . are intertwined, or where the evidence [for the proposed second trial] is not extensive or complex." *Am. Science and Engineering, Inc. v. Autoclear, LLC*, No. 2:07cv415, 2008 WL 11379925, at *2 (E.D. Va. Sept. 22, 2008) (Jackson, J.); *see also Seneca Specialty Ins. Co. v. Dockside Dolls, Inc.*, No. 3:12cv19–REP–DJN, 2012 WL 3579879, at *5 (E.D. Va. June 22, 2012) (denying bifurcation where "two separate trials would delay the proceedings and further tax the resources of the parties and this Court."); *Westvaco Corp. v. International Paper Co.*, No. 3:90CV00601, 1991 WL 398677, at *21-*22 (E.D. Va. May 7, 1991) (declining to bifurcate trial on liability and damages, where certain evidence was relevant to both issues).

The Court may, in its discretion, order separate trials on distinct issues "[f]or convenience, to avoid prejudice, or to expedite and economize." Fed. R. Civ. P. 42(b); *see also Hopeman Bros., Inc. v. Cont'l Cas. Co.*, No: 4:16–cv–187, 2017 WL 4399552, at *3 (E.D. Va. Oct. 2, 2017) ("In the Fourth Circuit, it is well-established that the decision whether to bifurcate pursuant to Rule 42(b) 'is within the sound discretion of the trial judge.'" (quoting *Bowie v. Sorrell*, 209 F.2d 49, 51 (4th Cir. 1953)). "[T]he party seeking bifurcation bears the burden of establishing that bifurcation is warranted." *Am. Science and Engineering*, 2008 WL 11379925, at *1. None of those circumstances is present here.

III. ARGUMENT

A. VRA Section 2 trials should, and almost always do, cover all issues in dispute.

1. The plain language of Rule 42 suggests that VRA Section 2 trials should not be bifurcated.

As Plaintiffs have previously explained, bifurcation is inappropriate for this case. *See* Pls. Opp. to Defs. Mot. to Bifurcate Trial, ECF No. 84. Fed. R. Civ. P. Rule 42(b) authorizes separate

trials only "[f]or convenience, to avoid prejudice, or to expedite and economize." Bifurcating VRA Section 2 trials in the manner Defendants seek would serve none of these purposes, but rather lead to duplicative proceedings involving overlapping witnesses and evidence.

Defendants concede that the evidence and witnesses in the two trials they propose would overlap. Defendants' expert, Dr. Quentin Kidd, submitted a report responding to Plaintiffs' initial expert reports submitted by Dr. Douglas Spencer and Dr. Allan Lichtman. *See* ECF No. 118 Ex. 8. Dr. Spencer's report focused on the racially polarized voting analysis required under the *Gingles* preconditions. *See* ECF No. 115 Ex. 4. Dr. Lichtman's report examined the totality of circumstances, including an analysis of racially polarized voting in Virginia Beach. *See* ECF No. 118 Ex. 1. Dr. Kidd's report first critiques Dr. Spencer's analysis. Dr. Kidd then turned to Dr. Lichtman's report and when scrutinizing Dr. Lichtman's analysis of racially polarized voting, Dr. Kidd concluded that because "Lichtman largely follows Spencer's lead on this factor, the rebuttal can be found in the section of the report focused on" Spencer's analysis of the *Gingles* preconditions. ECF No. 118 Ex. 8 at 32. That is, in responding to Plaintiffs' experts, Defendants' experts used the same arguments and evidence in both phases of the VRA Section 2 inquiry. Thus, to the extent Defendants plan to challenge Plaintiffs' evidence of racially polarized voting, they would likely need Dr. Kidd's testimony and evidence in the preconditions phase as well as the totality of the circumstances phase.

More generally, the legal framework for VRA Section 2 claims makes it impossible to mark any neat separation between the evidence concerning the *Gingles* preconditions and the evidence showing the totality of circumstances. In particular, racially polarized voting is *both* the subject of the second and third *Gingles* preconditions *and* a central consideration in the totality-of-circumstances inquiry. *See Gingles*, 478 U.S. at 50-51; *Charleston Cty.*, 365 F.3d at 345. The

point of a "totality of the circumstances" analysis is that it is comprehensive. Accordingly, district courts rely on the same evidence in both the preconditions and the totality of the circumstances in reaching their conclusions. *See, e.g.*, *Missouri State Conference of the Nat'l Ass'n for the Advancement of Colored People v. Ferguson-Florissant Sch. Dist*., 201 F. Supp. 3d 1006 (E.D. Mo. 2016), aff'd, 894 F.3d 924 (8th Cir. 2018) (finding racially polarized voting in the totality of the circumstances analysis based on evidence previously analyzed in the preconditions determination); *Pope v. Cty. of Albany*, 94 F. Supp. 3d 302 (N.D.N.Y. 2015) (declining to discuss racially polarized voting in the totality of the circumstances analysis because the court's findings on racially polarized voting was discussed in the preconditions inquiry). Although the parties could simply rely on the overlapping evidence previously submitted in the preconditions phase, this limits Defendants' alleged savings of judicial resources from bifurcation.

Requiring the exact same testimony and evidence for two different trials wastes judicial resources and results in duplicative proceedings. This very likely outcome counsels against bifurcation. Indeed, courts in this circuit have repeatedly denied motions to bifurcate where overlapping evidence and witnesses would lead to duplicative proceedings. *See, e.g.*, *Am. Science Engineering*, 2008 WL 11379925, at *2; *Seneca Specialty Ins. Co.*, 2012 WL 3579879; *CSX Transp., Inc. v. Gilkison*, No. 5:05CV202, 2012 WL 3283411, at *5 (N.D. W. Va. Aug. 10, 2012) (denying bifurcation motion after finding the motion "would substantially increase costs by requiring the parties to re-try issues and re-present facts."); *Smith v. Wyeth Labs*., No. 84-2002, 1986 WL 727820, at *1 (S.D. W. Va. Aug. 21, 1986) ("In reaching its decision [denying a motion to bifurcate], the court relies on the possibility, indeed the likelihood, that separate trials would necessitate duplicitous evidence and require witnesses to present testimony at two different stages in the proceeding.").

Bifurcating trial in this case would lead to duplicative efforts not only at the trial level, but also at the appellate level. As this Court has already noted, "the *full* factual record developed at trial will greatly enhance any appellate review." ECF No. 134 at 3 (emphasis added). Thus, even if this Court sides with Defendants at the *Gingles* preconditions phase and declines to hear evidence regarding the totality of the circumstances, appellate review would be hampered because that Court will not have the full record before it. The purpose of Rule 42 is to increase efficiency. Granting Defendants' request would impede any potential appellate review and result in duplication and waste judicial resources.

2. *Defendants have failed to cite a case that bifurcates VRA Section 2 cases in the manner they seek.*

After multiple filings to this Court supporting their bifurcation requests, Defendants have still not identified a single case that bifurcates trial in the manner that they seek. Although courts agree that a VRA Section 2 analysis has two phases, it does not follow—and it *has not* followed—that it requires two trials. [2]

Defendants claim that the court in *Rios-Andino v. Orange County*, 51 F. Supp. 3d 1215 (M.D. Fl. 2014), "bifurcated the *Gingles* preconditions from the 'totality of the circumstances' inquiry.'" Defs. Mem. in Support of Renewed Mot. to Bifurcate, ECF No. 133 at 8 ("Defs. Mem."). But the *Rios-Andino* court did not do what Defendants are requesting—order two separate trials. Although a footnote in *Rios-Andino* states that the court "bifurcated the trial," 51 F. Supp. 3d at 1218 n.2, it does not appear that the court ever planned to hold two distinct trials. A notice regarding the trial schedule in *Rios-Andino* indicates that the court merely "intend[ed] to *hear* both parties' evidence on the preconditions . . . before hearing either party's evidence on the totality of

[2] Defendants cite Section 2 cases in this circuit for the uncontroversial proposition that there are two *analytical* phases to a Section 2 claim. *See* Defs. Mem at 4-6. But in none of the cases Defendants cite did the court order separate trials.

the circumstances." *Rios-Andino*, No. 6:12–cv–1188–ORL–22KRS, (M.D. Fl. May, 2, 2014) ECF No. 127 (emphasis added). In other words, the court was merely addressing the order of proof, and intended by this sequencing to "clearly highlight the disputed issues and . . . assist the parties in arranging travel for their expert witnesses." *Id.*

Even if the *Rios-Andino* court had planned to bifurcate the case in the manner that Defendants propose, this lone example is meager authority for the proposition that VRA Section 2 cases have bifurcated trials. That *Rios-Andino* is the only case Defendants could find provides a strong argument for *not* bifurcating the trial here, especially given the hundreds of Section 2 cases that have been decided over the years.

B. Defendants' cases do not support their request for two bench trials on substantially overlapping issues.

Defendants seek to ground their Motion in a series of precedents in areas other than voting rights where courts granted motions to bifurcate. *See* Defs. Mem. at 6-8. However, none of Defendants' cases involve bifurcation of trial in circumstances remotely similar to this case.

Defendants rely on patent, insurance, and *Monell* civil rights[3] cases, because those are among the few areas of litigation where bifurcation under Rule 42(b) is not rare. *See Am. Science and Engineering*, 2008 WL 11379925, at *2 (noting that "separate trials are frequently ordered in patent cases"); *Audio MPEG, Inc. v. Dell Inc.*, 254 F. Supp. 3d 798, 804 (E.D. Va. 2017) (antitrust counterclaims in patent cases are frequently set for separate trial); *Hoskins v. Allstate Prop. & Cas. Ins. Co.*, No. 6:06-389-DCR, 2006 WL 3193435, at *2 n.2 (E.D. Ky. Nov. 2, 2006) (collecting authority for separate trial on issue of insurer's bad faith); *Jones v. Chapman*, No. ELH-14-2627, 2016 WL 4944978, at *5 (D. Md. Sept. 15, 2016) (noting that it is "particularly common" for

[3] *See Monell v. Dep't of Social Servs. of City of New York*, 436 U.S. 658, 690-91 (1978) (holding that municipal defendants may be sued under 42 U.S.C. § 1983 for policies and customs that violate civil rights).

courts to separate civil rights claims against individual defendants from pattern-or-practice claims against "supervisors and municipal employers"). As Defendants' cases illustrate, those types of cases often present good reasons for bifurcation, which do not apply in this case.

To begin with, these patent, insurance, and *Monell* cases involve *jury* trials, where there may be a serious risk of prejudice or confusion if the jury considers all issues together. *See, e.g.*, *Audio MPEG*, 254 F. Supp. 3d at 807 (separate trials on patent infringement and antitrust claims would promote juror comprehension and avoid biasing the jury against the alleged monopolist's patent claim); *Novopharm Ltd. v. Torpharm, Inc.*, 181 F.R.D. 308, 311-12 (E.D.N.C. 1998) (by holding separate patent infringement and damages trials, and treating defendant's willfulness as a damages issue, court avoids prejudicing the jury against the defendant on infringement); *Saint John's African Methodist Episcopal Church v. GuideOne Specialty Mut. Ins. Co.*, 902 F. Supp. 2d 783, 787 (E.D. Va. 2012) (including evidence of bad faith "would serve only to prejudice the jury" in trial over insurer's alleged breach of contract); *Hoskins*, 2006 WL 3193435, at *2, *2 n.2 (precedent supports bifurcating bad faith claim to avoid prejudice in insurance breach-of-contract trial); *Jones*, 2016 WL 4944978, at *6 (in police misconduct case, bifurcating claim against municipal supervisor avoids tainting individual defendants' trial with prejudicial evidence of city's general practice or policy). Of course, there is no corresponding risk of jury confusion or prejudice in this case, where the Court will be the sole factfinder on all issues.

Similarly, Defendants' cases involve special situations where experience has shown that bifurcation is efficient because the second trial will consist overwhelmingly, if not entirely, of new evidence irrelevant to the first trial. For example, in *Novopharm*, the court found that it would be economical to try liability and damages issues separately, because the damages stage would involve "complex" and "voluminous" evidence that would not be needed for the liability trial,

including evidence about the amount of lost profits, the but-for cause of those losses, and "the nature and scope of a license that would have been granted to a hypothetical licensee" of the patent. 181 F.R.D. at 311. Because this evidence was irrelevant to liability, bifurcating trial created a possibility that "the production and synthesis of these materials [might] ultimately become unnecessary." *Id.*; *see also Jones*, 2016 WL 4944978, at *6 (second trial would consist of pattern-or-practice evidence that would probably be inadmissible in the first trial)[4]; *Audio MPEG*, 254 F.Supp. 3d at 805 (judicial economy favored separate trial on antitrust counterclaims that were "much greater in scope than Plaintiffs' patent infringement claims" and would require "require substantial new and additional evidence"); *Zenith Ins. Co. v. Old Republic Ins. Co.*, No. 5:16-cv-07219-EJD, 2017 WL 2861130, at *2 (N.D. Cal. Jul 5, 2017) (bifurcated issue was "legally and factually distinct from" the main issue to be tried); *Hoskins*, 2006 WL 3193435, at *2, *2 n.3 (separating contract dispute over insurance coverage of fire from tort and statutory claims involving insurer's conduct *after* the fire). In contrast to these cases, the second trial Defendants propose for this case would overlap substantially with the first trial, requiring at least one witness to appear twice, and the Court to consider a significant portion of evidence again. Even if the parties simply relied on the overlapping evidence from the previous trial, this would limit Defendants' claim that bifurcation would conserve judicial resources. As discussed above, racially polarized voting is one of the two most important factual questions in the totality-of-circumstances analysis, as well as the centerpiece of the parties' dispute over the *Gingles* preconditions in this case.[5] If the trial were bifurcated, the Court would likely have to hear from at least one of Plaintiffs' witnesses twice because Plaintiffs may want Dr. Spencer and Dr. Lichtman to testify about racially

[4] Another practical benefit of bifurcation in *Jones* was that that the two trials would involve separate defendants. If the individual officer defendants won the first trial, the municipal defendant would not have to go to trial at all. 2016 WL 4944978, at *5-*6. In this case, by contrast, the trial (or trials) will involve all parties.
[5] *See supra*, Section II.A.

polarized voting in both phases of a VRA Section 2 case. Thus, there would be inefficiencies in terms of traveling expenses and time allocated.

Unable to find precedent for holding multiple trials in circumstances analogous to this case, Defendants resort to cases where courts did not order separate trials at all. Defendants rely in part on *Seneca Ins. Co. v. Shipping Boxes I, LLC*, 30 F. Supp. 3d 506 (E.D. Va. 2014). Defs. Mem. at 6-7. But *Shipping Boxes* undermines Defendants' position, because this Court *specifically declined* to order two trials in that case. 30 F. Supp. 3d at 513 ("[T]he Court notes that it will *not* hold a separate trial as to the matter of attorneys' fees, although both parties appear to assume that it will."). Instead, the Court clarified that the issue of whether the insurer's actions justified awarding attorneys' fees would not go to trial, but would be reserved "for the Court to determine following the resolution of the substantive claims," in keeping with the relevant fee-shifting statute. *Id.* (citing Va. Code § 38.2-209); *accord Saint John's*, 902 F. Supp. 2d at 787 ("[T]he Court will consider [the insured's] right to recover attorneys' fees and costs under § 38.2–209 and any additional evidence of bad faith following any jury verdict in [the insured's] favor" on breach of contract.). Similarly, as noted above, the court in *Rios-Andino* did not order separate trials on different aspects of the VRA Section 2 analysis, but simply directed the parties to present evidence on the *Gingles* preconditions at the outset of the sole scheduled trial.

Try as they might, Defendants cannot cite any authority that supports their request for multiple bench trials on factually intertwined issues. The Court should decline to grant such novel relief.

C. The Court should refuse Defendants' invitation to prejudge the merits in their favor.

Defendants base their argument for bifurcation in part on their unilateral, self-serving assessment that Plaintiffs face "an uphill battle" in satisfying the *Gingles* preconditions. Defs.

Mem. at 10. Having already declined to enter summary judgment for Defendants, ECF No. 126, the Court should reject this request to assume the conclusion of the *Gingles* inquiry for purposes of managing trial.

As the Court has found, "there exists a genuine dispute as to material facts" in this case, and "Defendants are not entitled to judgment as a matter of law." ECF No. 126; *see also* Defs. Mem. at 11 ("[T]here remains significant dispute regarding Plaintiffs' ability to persuade a trier of fact that the *Gingles* threshold preconditions have been satisfied."). The facts in dispute pertain to all three *Gingles* preconditions, as well as the totality of circumstances. *See* Defs. Mem. at 11 n.5; Pls. Br. Opp. S.J., ECF No. 118 at 3-5 (identifying disputed material facts relevant to all three *Gingles* preconditions); *id.* at 13-36 (presenting and discussing evidence that Plaintiffs satisfy the second and third *Gingles* preconditions). Nevertheless, Defendants rehash arguments from their failed Motion for Summary Judgment and argue that the appropriate attitude at this stage is one of "deep skepticism regarding the probability that [Plaintiffs] can meet each of [the] three threshold burdens in such a unique case." Defs. Mem. at 10-11.

While Defendants might earnestly wish for a tilted playing field, the appropriate posture for any court is not "deep skepticism" about one party's case, but rather an open mind toward both sides. As the Court has already recognized, Plaintiffs are entitled to an opportunity to prove their claims at trial. ECF No. 126. The evidence at trial will show that the combined Black, Hispanic, and Asian community in Virginia Beach is sufficiently large and geographically compact to form a majority in two single-member districts; that this community is politically cohesive; and that the white majority votes sufficiently as a bloc to defeat the minority community's candidate of choice in most City Council elections. Speculating that the Court *might* ultimately disagree is no reason to grant a pretrial procedural motion premised on Defendants' view of the merits. As detailed

above, the near-universal practice is to try all VRA Section 2 issues together, even in cases where the plaintiff eventually fails to satisfy the *Gingles* preconditions.[6]

IV. CONCLUSION

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

Dated: April 28, 2020

Respectfully submitted:

/s/ J. Gerald Hebert

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[6] *See supra*, Section III.A.

CERTIFICATE OF SERVICE

I hereby certify that on the 28th day of April 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 to the following:

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