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' OPPOSITION TO MOTION FOR ENTRY OF A PROTECTIVE ORDER

For the reasons set forth below, Plaintiffs' respectfully submit this Opposition to Defendants' Motion for a Protective Order.

BACKGROUND

At the outset, Plaintiffs note the context in which Defendants have filed their motion. On March 5, 2019, the Court issued a Rule 26(f) Pretrial Order in this matter instructing the parties to meet, confer, and appear at a scheduling and planning conference on March 20, 2019.[1] Doc. 71. In the same document, the Court required completion of discovery in this matter on or before August 28, 2019 and a trial date before January 28, 2020. The parties conferred on discovery and scheduling matters and, at the March 20, 2019 planning conference, agreed upon the schedule entered by this Court on April 2, 2019. Doc. 72. That schedule provides for expert disclosures staggered throughout the summer, a discovery completion date of August 19, 2019, followed by summary judgment briefing in September, and a January 14, 2020 trial date. *Id.* At the planning

[1] This Court entered the scheduling order after Defendants' filed their answer on January 24, 2019. Doc. 67. In filing an answer, Defendants chose not to file a motion to dismiss pursuant to Rule 12(b)(6).

conference, Defendants never raised the possibility of litigating this case in two stages or bifurcating discovery. Nothing in the schedule reflects the possibility of two stages of discovery. To the contrary, Plaintiffs have only four and a half months to conduct all of their discovery. *Id.* Plaintiffs are also required to disclose all experts—including those that will address "totality of circumstances"—by June 14 and produce their reports by July 15. *Id.*

On May 1, Plaintiffs served Plaintiffs' First Requests for Production. Doc. 76-1. On May 10, counsel for the parties met and conferred regarding Plaintiffs' discovery requests. During that call, Defendants' counsel asked Plaintiffs' counsel for the first time if they could agree to limiting discovery to the three preconditions set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986).[2] Given the unprecedented nature of such a request—as Plaintiffs' counsel are aware of no court that has ever done so in a Section 2 case—its unfeasibility with the current schedule and relief for 2020, and the reasons set forth in detail below, Plaintiffs' counsel did not agree to bifurcation. Defendants' counsel did *not* make any other suggestions regarding narrowing the scope of Plaintiffs' First Requests for Production. For example, Defendants' counsel did not request limitations as to the time period covered by the requests nor did they ask for any other narrowing constructions.[3] *See* Ex. 1 (Defendants' summary email of meet and confer). After Plaintiffs' counsel rejected a complete bifurcation of discovery based on the three *Gingles* factors, Defendants' counsel informed Plaintiffs' counsel that they would file a motion for protective order. On May 15, Defendants filed the instant protective order motion demanding bifurcation of

[2] *See id.* at 50-51 ("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.").

[3] Plaintiffs' counsel would be happy to meet and confer about any such narrowing requests short of depriving Plaintiffs' of all relevant discovery outside the three *Gingles* factors.

discovery. Docs. 75, 76. Defendants' motion does not provide any suggested schedule for this bifurcation or explain how bifurcation could occur within the trial schedule agreed to by Defendants and ordered by this Court. *Id.*

As explained below, a request to limit discovery to the three *Gingles* factors is not only unsupported by case law, it would be inconsistent with the overall purpose and plain language of Section 2 itself, which calls for an examination "of the totality of circumstances." 52 U.S.C. § 10301(b). As the Supreme Court explained, "the ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts." *Johnson v. De Grandy*, 512 U.S. 997, 1011 (1994) (quoting *Gingles* 478 U.S. at 46 (O'Connor, J., concurring)).

ARGUMENT

I. The Defendants failed to ask for bifurcation of discovery in a timely fashion and bifurcation would disrupt the agreed upon schedule.

Rule 26(f)(3)(B) explicitly requires the parties to confer *prio*r to the scheduling conference on "the subjects on which discovery may be needed, when discovery should be completed, and **whether discovery should be conducted in phases or be limited to or focused on particular issues**." (Emphasis added). Despite this, Defendants did not raise their bifurcation of discovery demand during the parties' Rule 26 meet and confer or during the Rule 16 conference with the Court. Defendants have failed to identify any reason they failed to follow Rule 26. Discovery pursuant to the *Gingles* preconditions and "totality of the circumstances" was foreseeable and Defendants do not have any good cause for raising this matter nearly two months after the Rule 16 planning conference, particularly given the speed of this Court's docket and the scheduling order in this case.

Defendants' motion for protective order would require a dramatic shift to the current scheduling order. Defendants' theory for their motion rests on the premise that they should conduct discovery on the three *Gingles* factors now and then they will file a motion for summary judgment on the basis of those factors. Doc. 76 at 7. Defendants concede that if that motion is not successful, they would then need to "respond in good-faith to discovery requests related to the 'totality of circumstances' inquiry." *Id.* Even if the Court granted this belated motion today, that would leave only two and a half months for the parties to: conduct this first phase of *Gingles* discovery, fully brief a summary judgment motion, receive a ruling from this Court on that motion, and then—if the motion is denied—conduct the remaining discovery. This is plainly untenable. Defendants do not identify when they plan to file said motion for summary judgment—dispositive motions are not due until after close of discovery—but presumably they will not do so until their expert witness reports are produced on July 29. This timeline ensures that the summary judgment briefing on the *Gingles* preconditions would not be complete until after close of discovery.

Defendants' motion ignores the implications of their request on the schedule of this case. Defendants propose no alternative timelines to accommodate their novel approach to discovery in Section 2 cases. Local Civil Rule 16 provides that "[t]he parties and their counsel are bound by the dates specified in any such orders and no extensions or continuances thereof shall be granted in the absence of good cause." While not styled as such, Defendants' motion would require substantial extensions and modifications to the schedule in this case. Defendants have not and cannot show good cause for those extensions and the motion should be denied for those reasons alone.

II. Defendants have not and cannot show good cause for the sweeping protective order they seek.

Federal Rule 26(c) states that "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense." In order to prevail on a motion for protective order, "[t]he party seeking a protective order has the burden of establishing 'good cause' by demonstrating that 'specific prejudice or harm will result if no protective order is granted.'" *United States ex rel. Davis v. Prince,* 753 F.Supp. 2d 561, 565 (E.D. Va. 2010) (quoting *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1210-11 (9th Cir. 2002)). Courts have found that "good cause cases usually involve a litigant's concern that private information obtained in discovery will become public." *Rofail v. United States*, 227 F.R.D. 53, 56 (E.D.N.Y. 2005).

Defendants cannot meet this standard. In essence, Defendants ask this Court to limit discovery to the matters most important to their anticipated defenses and allow them to develop the record for their motion for summary judgment while staying discovery into other matters relevant to Plaintiffs' case. This is not how discovery works. Generally, the scope of discovery is broad and it allows all parties to obtain "discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed.R.Civ.P. 26(b)(1)*; see also Virginia Dep't of Corr. v. Jordan*, 921 F.3d 180, 188 (4th Cir. 2019) ("Relevance is not, on its own, a high bar" and the proportionality requirement "relieves parties from the burden of taking unreasonable steps to ferret out every relevant document.").

Defendants have not identified any "specific prejudice" that will result absent a protective order. The only harm Defendants identify is a vague allegation that "the enormity of the task and taxpayer expense" would impose an undue burden on them. Doc. 76 at 8. This is precisely the type of vague assertion of harm that is insufficient under Rule 26(c). To the extent Defendants believe

it is, as a general matter, unduly burdensome to obtain relevant information from its employees and agencies, this does not constitute good cause for a protective order. There is no taxpayer expense exception to the ordinary rules of discovery. "Broad allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy Rule 26(c)." *Springs v. Ally Fin. Inc.*, 684 F. App'x 336, 338 (4th Cir. 2017) (internal quotation omitted).

Although Defendants allege the requests are "sweeping," they do not allege that the requests are irrelevant to Plaintiffs' claims. Indeed, Defendants concede that they would ultimately have to "respond in good-faith" to all of Plaintiffs' requests if the Court were to bifurcate the proceedings and Plaintiffs satisfied the three *Gingles* preconditions. Doc. 76 at 3, 7. In their motion, Defendants raise concerns about the breadth of certain requests for production. For example, Defendants complain about the breadth of the requests for documents related to Beach Week and the time period associated with some requests. *Id.* at 3. These individualized concerns may be ripe for a meet and confer, but they do not warrant staying *all* discovery outside of the three *Gingles* preconditions. Plaintiffs' counsel stand ready and willing to engage with Defendants' counsel on these areas of concern.

III. Discovery in cases brought to enforce Section 2 of the Voting Rights Act is not typically bifurcated and does not lend itself neatly to bifurcation.

The Supreme Court established the three *Gingles* preconditions for Section 2 cases over thirty years ago. Since then, there have been hundreds if not thousands of Section 2 challenges to congressional, state, and local district maps, as well as challenges to at-large election systems such as the one in Virginia Beach. Yet, Defendants fail to cite a single instance where a court bifurcated discovery based on the *Gingles* factors. Plaintiffs are not aware of any court that has bifurcated discovery in the manner Defendants propose. If this were a proper or sensible way to conduct

discovery in Section 2 cases, presumably some defendants would have sought it and some courts would have adopted it. The lack of precedent for this type of bifurcation speaks for itself.

Gingles provides "some structure to [Section 2]'s 'totality of the circumstances' test in a case challenging multimember legislative districts." *De Grandy*, 512 U.S. at 1010. The *Gingles* Court noted that the Senate Report which accompanied the 1982 amendments to Section 2 lists a number of factors that are relevant in assessing the totality of circumstances in Section 2 cases:

> the history of voting-related discrimination in the State or political subdivision; **the extent to which voting in the elections of the State or political subdivision is racially polarized**; the extent to which the State or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority vote requirements, and prohibitions against bullet voting; the exclusion of members of the minority group from candidate slating processes; the extent to which minority group members bear the effects of past discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; the use of overt or subtle racial appeals in political campaigns; and the extent to which members of the minority group have been elected to public office in the jurisdiction.

Gingles, 478 U. S. at 44-45 (emphasis added).

As the Court notes, two of the three *Gingles* preconditions are listed among the factors in the Senate Report's listing of the totality of circumstances. Neither Congress nor the Supreme Court has stated that a court's examination of relevant circumstances under Section 2 should be circumscribed to the three *Gingles* factors in isolation. As the Supreme Court has explained:

> [B]loc voting [is] a matter of degree, with a variable legal significance depending on other facts, [and] the ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts. Lack of electoral success is evidence of vote dilution, but courts must also examine other evidence in the totality of circumstances, including the extent of the opportunities minority voters enjoy to participate in the political processes.

De Grandy, 512 U.S. at 1011.

Defendants' motion to limit discovery in this Section 2 case to just three factors also runs counter to the "textual command of § 2, that the presence or absence of a violation be assessed 'based on the totality of circumstances.'" *De Grandy*, 512 U.S. at 1018. As the Supreme Court has explained,

> [t]he need for such "totality" review springs from the demonstrated ingenuity of state and local governments in hobbling minority voting power, a point recognized by Congress when it amended the statute in 1982. Since the adoption of the Voting Rights Act, some jurisdictions have substantially moved from direct, overt impediments to the right to vote to more sophisticated devices that dilute minority voting strength. In modifying § 2, Congress thus endorsed our view . . . that whether the political processes are equally open depends upon a searching practical evaluation of the past and present reality.

De Grandy, 512 U.S. at 1018 (internal citations and quotations omitted).

Moreover, Defendants' cited authority is inapposite. Defendants cite *Lincoln v. City of Virginia Beach*, 97-cv-756, Doc. 35,[4] for the proposition that "a vote dilution challenge to an at-large system cannot proceed unless the plaintiff first establishes three preconditions." Doc. 76 at 5. Defendants' place emphasis on "cannot proceed" presumably to suggest that Section 2 cases are usually conducted in phases, addressing the three *Gingles* preconditions first. But a glance at *Lincoln* makes clear that is not the implication. In *Lincoln,* the district court was only considering whether the Section 2 complaint—which Plaintiff moved to dismiss after her counsel failed to prosecute the case—should be dismissed with or without prejudice. In dismissing the case with prejudice, the district court relied on the Plaintiff's failure to prosecute but also noted that there was no record evidence of the ability to draw a majority-minority district.

Thus, *Lincoln* sheds no light on the question before this Court of whether to bifurcate discovery. Indeed, the scheduling order indicates that the court did not plan on bifurcated discovery

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[4] This cited authority was also filed as an attachment to Defendants' Memorandum in Support of their Motion to Dismiss. Doc. 14-1.

prior to the dismissal motion. Doc. 26. And, in this case—unlike *Lincoln*—Plaintiffs have provided demonstrative maps with two majority-minority districts. Doc. 62 at 18. *Lincoln* merely stands for the proposition that the *Gingles* preconditions are a necessary part of a Plaintiff's totality of circumstances burden. That proposition is uncontroversial and Plaintiffs have pled—with demonstrative maps—all three *Gingles* preconditions. *Lincoln* does not, however, stand for the unusual stance that Defendants can limit discovery to the elements of the case that they think will lead to their success on the merits.[5]

Finally, the three *Gingles* preconditions cannot be as easily separated from the "totality of the circumstances" analysis as Defendants suggest. Disputes over what data is reliable, which candidates represent candidates of choice, the relevance of incumbency to the racially polarized voting analysis, the relevance of post-litigation elections, and other "special circumstances" can require district court to engage in fact-intensive inquiries to conduct a thorough *Gingles* analysis. *See, e.g.*, *Lewis v. Alamance Cty.*, 99 F.3d 600, 614 (4th Cir. 1996) (discussing preferred candidate analysis for minority voters in multi-seat elections), *Collins v. City of Norfolk*, 883 F.2d 1232, 1243 (4th Cir. 1989) (finding incumbency "was a significant factor in black electoral success"), *Collins v. City of Norfolk*, 816 F.2d 932, 938 (4th Cir. 1987) ("The factfinder must use great care in assessing what counts as a 'minority electoral success.' [A trial court must investigate] beyond the surface outcome of an election when evaluating minority success."); *see also* Ellen Katz, Documenting Discrimination in Voting: Judicial Findings Under Section 2 of the Voting Rights Act Since 1982, 39 U. Mich. J. Law Reform 643, 660-674 (2006), https://repository.law.umich.edu/cgi/viewcontent.cgi?article=1057&context=other.

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[5] *Levy v. Lexington County*, 589 F.3d 708 (4th Cir. 2009), is no more helpful to Defendants' cause. In *Levy*, the Fourth Circuit vacated and remanded a district court order that concluded a school board election process violated the VRA. While the Fourth Circuit vacated and remanded on the merits of one of the three *Gingles* preconditions, discovery was not bifurcated in *Levy* and the Fourth Circuit did not suggest it should have been.

Thus, it is certainly *not* the case, as Defendants claim, that only Plaintiffs' first three requests for production relate to the *Gingles* preconditions. Doc. 76 at 4. For example, the fourth request—which pertains to Virginia Beach's reliance on American Community Survey (ACS) data in its ordinary business—is relevant to Plaintiffs' reliance ACS data in its data analysis. Doc. 76-1 at 6. The fifth through seventh requests all relate to documents addressing proposals to change the at-large electoral system. *Id.* at 7. Those requests could certainly lead to the discovery of documents revealing internal views on how the at-large election system benefits the majority-white community or how a change would impact the majority-white community. Such documents certainly would be relevant to this Court's analysis of whether the current system allows white voters to "usually defeat" candidates supported by the minority community in Virginia Beach. *Gingles,* 478 U.S. at 49. Likewise, the eighth and ninth requests—seeking documents addressing "lack of minority representation on the Virginia Beach City Council" and "difficulties for the minority community to elect candidates of choice to the Virginia Beach City Council," Doc. 76-1 at 7—go squarely to the question of whether minority candidates of choice are "usually defeat[ed]." *Gingles*, 478 U.S. at 49. The list goes on. In sum, the clean division of evidence between the *Gingles* preconditions and the totality of the circumstances that Defendants posit is illusory.

IV. Defendants' merits arguments are misplaced and unsupported.

Despite the foregoing, Defendants argue that this Court should take the unprecedented step of bifurcating discovery in this Section 2 case because "Defendants expect that . . . this Court will be convinced—given Plaintiffs' inability to satisfy the three required *Gingles* preconditions—summary judgment is appropriate." Doc. 76 at 6. In two paragraphs of briefing, Defendants assert this is so because (1) *Hall v. Virginia,* 276 F. Supp. 2d 528, 536 (2003), bars multi-racial coalition

districts in the Fourth Circuit, and (2) Defendants "do not believe" Plaintiffs will be able to make the necessary evidentiary showings to succeed on the merits. Doc. 76 at 6.

These arguments are neither appropriate for a protective order motion nor convincing. With respect to the Defendants' "beliefs" regarding Plaintiffs' likely evidentiary showing, an opposing party's convictions regarding the merits of a party's case are not a reason to withhold discovery. If they were, discovery would be written out of existence. Defendants provide no basis for these beliefs and Plaintiffs are confident in their ability to meet their evidentiary burden at the appropriate time.

With respect to Defendant's cursory argument that coalition districts are legally foreclosed under Section 2 of the Voting Rights Act based on *Hall v. Virginia,* that argument could have been raised in a motion to dismiss for failure to state a claim. As Defendants note, Plaintiffs' reliance on a district comprised of more than one minority group is plain from their Complaint. Defendants chose not to file a motion to dismiss on those grounds, however, and for good reason.

Hall is a case about *crossover* districts—districts that rely upon a set of white voters from the majority group crossing over and supporting a minority candidate of choice—not Section 2 districts that rely on a coalition of minority group voters. The Supreme Court has since agreed with *Hall* in foreclosing Section 2 claims for *crossover* districts. *See Bartlett v. Strickland*, 556 U.S. 1 (2009). However, the clear weight of authority is in favor of allowing Section 2 suits based on minority coalition districts. *See, e.g.*, *Campos v. City of Baytown*, 840 F.2d 1240 (5th Cir. 1988); *Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 271, 275 (2d Cir. 1994), cert. granted and judgment vacated on different grounds, 512 U.S. 1283 (1994); *Badillo v. City of Stockton*, 956 F.2d 884, 891 (9th Cir. 1992); *Concerned Citizens of Hardee Cty. v. Hardee Cty. Bd. Of Comm'rs*, 906 F.2d 524, 526 (11th Cir. 1990); *see also Huot v. City of Lowell*, 280

F.Supp.3d 228, 230 (D. Mass. 2017) (allowing a coalition of Asian-American and Hispanic/Latino voters for §2 VRA purposes). Thus, Plaintiffs' reliance on a coalition district is neither "extraordinary" nor "unprecedented." Doc. 76 at 6.

This divide between crossover and coalition districts makes doctrinal sense. "Congress itself recognized 'that voting discrimination against citizens of language minorities is pervasive and national in scope . . . and similar discrimination against Blacks is well documented." *Campos*, 840 F.2d at 1244. Whereas crossover districts require the inclusion of citizens to whom Section 2 is inapplicable—namely white voters from the majority racial group—each group involved in a coalition district is expressly a subject of Section 2's protection. Thus, collectively, they may "cross the *Gingles* threshold as potentially disadvantaged voters." *Id.* Discovery should not be withheld on the basis of Defendants' belief that they will ultimately convince this Court to buck the weight of authority across the country on this issue.

CONCLUSION

Defendants' failed to raise this issue at the scheduling conference, cannot establish good cause for their demands, cite no authority for bifurcation, and rely on specious assertions about the merits of Plaintiffs' case to support their sweeping request to avoid discovery. For the foregoing reasons, Defendants' motion for protective order should be denied.

Respectfully submitted,

/s/ J. Gerald Hebert___________
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CERTIFICATE OF SERVICE

I hereby certify that, on May 29, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to counsel of record, including:

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/s/ J. Gerald Hebert_____
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Holloway, et al. v. City of Virginia Beach, et al. - Telephone Conference

Exhibit 1

Gerald L. Harris <GLHarris@vbgov.com>

Fri 5/10/2019 3:06 PM

To: Danielle Lang <dlang@campaignlegalcenter.org>; Gerry Hebert <ghebert@campaignlegalcenter.org>;

Cc: Joseph M. Kurt <jKurt@vbgov.com>; Christopher S. Boynton <CBoynton@vbgov.com>; Dana R. Harmeyer <DHarmeye@vbgov.com>;

Danielle,

Thank you for your time today. This email is meant simply to memorialize our discussions during the telephone conference. Please feel free to correct me if you feel like I have misstated something or missed something altogether.

(1) The Defendants will not place BATES numbering on the documents identified in Number 25 (including all sub-parts) of the Defendants' Rule 26 Initial Disclosures as being publically available. Therefore, the Defendants will begin with BATES numbering for documents being produced in response to Plaintiffs' First Requests for Production will begin at DEF01994.

(2) The Defendants will provide a privilege log along with documents when the documents are produced. However, we've agreed that communication during the litigation that is wholly within our respective offices or is a direct attorney-client communication during litigation does not need to be included and routinely supplemented in the privilege logs. I understand you will do the same for your privilege log.

(3) You have agreed that the Defendants may serve discovery requests on the Plaintiffs jointly in a single document.

(4) We continue to disagree on the issue of the Defendants "official-capacity" versus "personal capacity." I advised you that the Defendants do not intend to produce documents or things we believe are outside of the Defendants possession, custody or control in their "official capacity." The Defendants maintain that it is improper for purposes of discovery pursuant to Rule 34 to seek things that are within their "personal capacity." Understanding you disagree with the Defendants' position, I understand you may elect to file a Motion to Compel to resolve our disagreement or, without conceding your position, simply issue Rule 45 subpoenas to those persons individually with the cooperation from my Office in order to save litigation expenses. I will wait to hear from you after you are able to discuss this matter with your colleagues and your clients. If you elect to issue subpoenas under Rule 45, please contact me so we may discuss the mechanics of that in more detail.

(5) The Defendants requested that discovery be limited only to matters concerning the three preconditions set forth in *Thornburg v. Gingles* until the Court has made a finding that these threshold criteria have been satisfied. You made clear that you and your clients could not agree to that request for a number of different reasons.

(6) You mentioned there were certain items in the Defendants' Rule 26 Initial Disclosures that you could not open on your computers and that you would send a separate email identifying those items. Our Office will cooperate in making sure you are able to access those documents or files when we receive your email identifying the items.

I appreciate your willingness to continue to work things out where we are able in order to limit court action where possible.

Enjoy your vacation!

Jerry

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