APPEAL NO. 14-11204-FF

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GEORGIA STATE CONFERENCE OF THE NAACP, *et al.*,

Plaintiffs–Appellees

v.

FAYETTE COUNTY BOARD OF COMMISSIONERS, *et al.*,

Defendants–Appellants

Appeal from the United States District Court
For the Northern District of Georgia

BRIEF OF PLAINTIFFS-APPELLEES GEORGIA STATE CONFERENCE OF THE NAACP, ET AL. v. FAYETTE COUNTY BOARD OF COMMISSIONERS, ET AL.

NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
Sherrilyn Ifill
Director-Counsel
Ryan P. Haygood
Natasha M. Korgaonkar
Leah C. Aden
40 Rector St., 5th Fl.
New York, NY 10006
(212) 965-2200
rhaygood@naacpldf.org
laden@naacpldf.org

Neil Bradley
Georgia Bar No. 075125
3276 Wynn Dr.
Avondale Estates, GA 30002-1647
(404) 298-5052
neil.bradley.ga@gmail.com

Attorneys for Plaintiffs–Appellees

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v. FAYETTE COUNTY BOARD OF COMMISSIONERS, *et al.*

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, Plaintiffs certify that the following is a complete, alphabetical list of all persons and entities known to have an interest in the outcome of this appeal:

1. Abdur-Rahman, Ali – Plaintiff/Appellee
2. Abdur-Rahman, Aisha – Plaintiff/Appellee
3. Adams, Henry – Plaintiff/Appellee
4. Aden, Leah C. – Attorney for Plaintiffs/Appellees
5. Barlo, David – BOE Defendant/Appellant
6. Batten, Sr., Timothy C. – District Court Judge
7. Bradley, Neil T. – Attorney for Plaintiffs/Appellees
8. Brown, Steve – BOC Defendant/Appellant
9. Chesin, Larry H. – Attorney for BOE Defendants/Appellants
10. Clark, Terence – Plaintiff/Appellee
11. Colwell, Daniel J. – BOE Defendant/Appellant
12. Fayette County Board of Commissioners – Defendant/Appellant
13. Fayette County Board of Education – Defendant/Appellant
14. Fayette County Board of Elections and Voter Registration – Defendant/Appellant

15. Fayette County Branch of the NAACP – Plaintiff/Appellee

16. Georgia State Conference of the NAACP – Plaintiff/Appellee

17. Harben, Hartley & Hawkins, LLP – Attorneys for BOE Defendants/Appellants in the District Court

18. Hartley, Phillip L. – Attorney for BOE Defendants/Appellants in the District Court

19. Haygood, Ryan P. – Attorney for Plaintiffs/Appellees

20. Ifill, Sherrilyn – Attorney for Plaintiffs/Appellees

21. Jones, Alice – Plaintiff/Appellee

22. Jones, John E. – Plaintiff/Appellee

23. Kendall, Wayne B. – Former Attorney for Plaintiffs/Appellees

24. Key, Marion – BOE Defendant/Appellant

25. Korgaonkar, Natasha M. – Attorney for Plaintiffs/Appellees

26. Lewis, Anne Ware – Attorney for BOC and Elections Defendants/Appellants

27. Lowry, Dan – Plaintiff/Appellee

28. Maguire, J. Matthew, Jr. – Attorney for BOE Defendants/Appellants

29. Marchman, Allen – BOE Defendant/Appellant

30. McCarty, Allen – BOC Defendant/Appellant

31. NAACP Legal Defense & Educational Fund, Inc. – Attorney for Plaintiffs/Appellees

32. Oddo, Charles – BOE Defendant/Appellant

33. Ognio, Randy – BOE Defendant/Appellant

34. Parks, Chesin & Walbert, P.C. – Attorney for BOE Defendants/Appellants

35. Presberg, Leonard – BOE Defendant/Appellant

36. Richardson, Lelia – Plaintiff/Appellee

37. Sawyer, Tom –Elections Defendant/Appellant

38. Strickland, Frank B. – Attorney for BOC and Elections Defendants/Appellants

39. Todd, Bob – BOE Defendant/Appellant

40. Tyson, Bryan P. – Attorney for BOC and Elections Defendants/Appellants

41. Walbert, David. F. – Attorney for BOE Defendants/Appellants

42. Williams, Elverta – Plaintiff/Appellee

43. Wright, Bonnie Lee – Plaintiff/Appellee

Counsel is unaware of any other persons with an interest in this brief.

Dated: June 26, 2014

Respectfully submitted,

s/ *Leah C. Aden*
Ryan P. Haygood
Natasha M. Korgaonkar
Leah C. Aden
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
40 Rector St., 5th Floor
New York, NY 10006
Telephone: (212) 965-2200
Facsimile: (212) 229-7592
laden@naacpldf.org

Neil Bradley
Georgia Bar No. 075125
3276 Wynn Drive
Avondale Estates, GA 30002-1647
Telephone: (404) 298-5052
neil.bradley.ga@gmail.com

Attorneys for Plaintiffs-Appellees

STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs, Georgia State Conference of the NAACP, *et al.*, who are Appellees in this case, respectfully request oral argument. This appeal involves complicated legal and statutory issues related to Section 2 of the Voting Rights Act, as well as the validity of the permanent injunction and remedial order issued by the District Court in implementing Section 2's objective. Appellants agree that oral discussion of the issues and the applicable precedent would benefit this Court.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is an appeal from a final judgment of the United States District Court for the Northern District of Georgia in a civil case. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the District Court properly held that the Black community in Fayette County is geographically compact and Plaintiffs' expert properly considered non-racial traditional redistricting principles and race to develop a majority-minority district in compliance with Section 2;
2. Whether the District Court properly held that Plaintiffs' Illustrative Plan used to establish liability under Section 2 and the Court-Drawn Remedial Plan is an acceptable remedy for the existing Section 2 violation; and
3. Whether the District Court properly granted summary judgment to Plaintiffs against the Board of Education.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS & PROCEDURAL BACKGROUND

A. Background

After nearly 20 years, Black voters[1] in Fayette County, Georgia, including Plaintiffs, had exhausted nearly every possible non-judicial avenue to change the at-large method of election for the Board of Commissioners ("BOC") and Board of Education ("BOE").[2] Following nearly two decades of the BOC and BOE repeatedly ignoring Plaintiffs' entreaties for the adoption of a nondiscriminatory method of election, Plaintiffs-Appellees—Georgia State Conference of the NAACP, Fayette County Branch of the NAACP, and ten individual Black voters[3]—filed suit under Section 2 of the Voting Rights Act ("Section 2" and "VRA").[4] As a remedy for the dilution of their voting strength, Plaintiffs sought—

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[1] Plaintiffs prefer to use the term "Black" to refer to people who identify as Black only or Black in combination with other racial groups. "African-American," as used by the District Court, and "Black" are used interchangeably herein.

[2] Vol. I, 152, at 14 (The District Court recognizing that "[s]ince 1993, various Fayette County citizens," including Plaintiffs "have publicly advocated for district voting" for the BOC and BOE).

References to the BOE's Appellant-Appendix are cited as "Vol. I,_, at_" to "Vol. II,_, at_." References to documents filed with the District Court are cited as "Doc._, at_." References to the BOE's Brief are cited as "BOE Br., at _."

[3] These individuals are Henry Adams, Terence Clark, Alice Jones, John E. Jones, Dan Lowry, Ali Abdur-Rahman, Aisha Abdur-Rahman, Lelia Richardson, Elverta Williams, and Bonnie Lee Wright.

[4] 42 U.S.C. § 1973.

In addition to the BOC and its individual members in their official capacities, and the BOE and its individual members in their official capacities, Plaintiffs sued Tom Sawyer in his

and ultimately won—a ruling that Fayette's at-large electoral method for both boards violated Section 2.[5]

B. Attempted Settlements

Shortly after this lawsuit commenced, the BOE made clear that they did not wish to litigate this matter. Thus, the BOE promptly attempted to settle Plaintiffs' Section 2 claim by consent decree, adopting a single-member districting plan with five districts, one of which had a 46.2 percent "Any-Part" Black[6] voting-age population ("VAP") and would provide an opportunity, for the first time in history, for Plaintiffs to elect candidates of their choice for the BOE.[7] Though it first accepted this original consent decree, the District Court later vacated it after the other Defendants objected.[8]

In opposing the original consent decree, the BOC argued, among other things, that the parties' district-based plan was impermissible because the District

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official capacity as the department head of the Fayette County Board of Elections and Voter Registration ("Board of Elections") and the Board of Elections.

[5] Vol. I, 152, at 79-80.

[6] Doc. 54-2, at 7 n.1 (Plaintiffs' expert, Bill Cooper, explaining that as of the 2000 Census, the "Any-Part" Black category includes people who identify as single-race Black or Black plus one or more other races, including people who identify as Black and Hispanic).

[7] Docs. 33, 33-1.

[8] Doc. 50 (order vacating the District Court's approval of original consent decree and final judgment against the BOE based on failure to consider the impact of administering the original consent decree on the Board of Elections); Doc. 35 (order adopting original consent decree between Plaintiffs and the BOE).

Court had not found, and the BOE had not admitted to, a Section 2 violation, and the remedial district contained less than a 50 percent "Any-Part" Black VAP.[9] The District Court ordered additional briefing and an evidentiary hearing on the District Court's authority to enter the original consent decree.[10]

Subsequent to that vacatur and prior to the evidentiary hearing, Plaintiffs and the BOE entered into an amended consent decree,[11] relying on the same single-member district, but which added that the BOE admitted to a Section 2 violation.[12]

After briefing by the parties on the legality of the amended consent decree,[13] at a May 30, 2012 evidentiary hearing, the District Court rejected it,[14] holding that case law would not permit a settlement that was less than 50 percent "Any-Part" Black VAP.[15] Thereafter, the BOE took an inactive role in the litigation.

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9 *See, e.g.*, Doc. 50, at 6; Docs. 38-1 – 40-1, 48, 174, at 2 n.1.

10 Doc. 50, at 12.

11 Doc. 54-8.

12 Doc. 54, at ¶ 7 (The BOE "admit[ing] that the . . . at-large method of electing members to the [BOE] violates Section 2 . . . and that Plaintiffs have established the factual and legal basis for [the BOE's] violation of Section 2."); Doc. 54-1, at 9-10, 12; Doc. 43, at 3-4, 6; Doc. 68, at 1-2.

13 *See, e.g.*, Docs. 55, 67, 67-2, 67-5, 68-69.

14 Vol. I, 152, at 8-10.

15 Vol. I, 179, at 10 n.9.

C. Discovery & Summary Judgment

Following the unsuccessful settlement attempts, Plaintiffs and the BOC engaged in discovery. The BOE elected not to attend any of the depositions, despite receiving notice of them.[16] The BOE did not sign onto the Joint Preliminary Report and Discovery Plan that the District Court approved (and later extended) between Plaintiffs and the BOC.[17] After Plaintiffs and the BOE's two attempted settlements were unsuccessful, the District Court rejected Plaintiffs and the BOE's request for a separate discovery plan.[18]

After discovery between Plaintiffs and the BOC, both parties cross-moved for summary judgment.[19] Plaintiffs explained to the District Court that they moved for summary judgment as against the BOC *only* since Plaintiffs and the BOE were awaiting the District Court's certification of Plaintiffs' appeal to this Court of the District Court's denial of their amended consent decree with the BOE.[20] After the District Court declined to certify Plaintiffs' request for an appeal, the BOE nevertheless failed to engage in any summary judgment briefing.[21]

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16 *See, e.g.*, Docs. 59-63, 78. The BOE also were served with discovery requests and responses. *See, e.g*. Docs. 29, 64.

17 Docs. 21, 44, & 90.

18 Doc. 126; Vol. I, 152, at 10.

19 Docs. 108, 110.

20 Doc. 110, at 2 n.1.

In their summary judgment brief against the BOC, Plaintiffs asserted that they established each of the *Thornburg v. Gingles* preconditions for a Section 2 claim, and they demonstrated that, under the totality of the circumstances, Black voters have less opportunity than other members of the electorate to elect their candidates of choice.[22]

As to *Gingles* one, Plaintiffs' expert demographer, William Cooper ("Cooper"), who has testified in 34 voting rights cases,[23] created a geographically compact single-member districting plan, referred to herein as the Illustrative Plan. Under Plaintiffs' Illustrative Plan, "Any-Part" Black voters in District 5, the remedial district, comprise 50.22 percent of the VAP.[24] District 5 is located in the northern part of Fayette, where Black residents are geographically concentrated[25] in Fayetteville and Tyrone, cities that are separated by just 3.5 miles[26] and contain the highest concentrations of Black residents in Fayette.[27]

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21 Vol. I, 152, at 10.

22 478 U.S. 30, 50-51, 106 S. Ct. 2752, 2766-67 (1986); *see, e.g.*, Doc. 110-1, at 8-9.

23 Vol. I, 152, at 14 n.7 (also noting that "[s]ince the release of the 2010 census, [Cooper] has developed several statewide legislative plans, including plans for Georgia, and has developed sixty local redistricting plans, primarily for groups working to protect minority voting rights).

24 Doc. 110-14.

25 Vol. I, 152, at 10-11.

26 *Id*. at 35.

27 *Id*. at 10-11.

In their summary judgment submission, Plaintiffs argued that their Illustrative Plan compared favorably to existing plans for the BOC ("Commissioners' Plan")[28] and BOE ("BOE Plan"),[29] as well as other local and statewide districts in Georgia. Cooper also submitted a Hypothetical Plan, drawn primarily based on race to demonstrate to the District Court that District 5 could contain an "Any-Part" Black VAP at 53.58 percent that was higher than that contained in the Illustrative Plan.

The chart below compares the redistricting principle measures, including geographical compactness, precinct splits, and population deviation, as well as compliance with Section 2, between these above-mentioned plans. Cooper and the BOC's expert, John Morgan, ("Morgan") each used the Reock test as one measure of geographical compactness.[30]

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[28] Around when Plaintiffs and the BOE engaged in settlement, the BOC was involved in other redistricting litigation in March 2012 to correct the then existing malapportionment in the BOC residence districts. *Lindsey v. Fayette Cnty. Bd. of Comm'rs*, No. 3:12-cv-40-TCB (N.D. Ga. 2012); Vol. I, 152, at 12. The District Court entered a consent decree preserving at-large voting, but creating residence districts for the BOC that were equally populated. That Commissioners' Plan contained a single-member district, still elected at-large, that had a 44.57 percent Any-Part BVAP.

[29] Although the District Court rejected the BOE Plan as part of the settlement between the BOE and Plaintiffs, the BOE adopted that Plan, though maintaining at-large voting under its new redistricting scheme. The Department of Justice subsequently approved that Plan under Section 5 of the VRA. Vol. I, 179, at 5-6; Doc. 174, at 2 n.2.

[30] The "Reock test," one compactness indicator, is an area-based measure that compares each district to a circle. It is measured on a scale of 0 to1, with 1 being the most compact. *See*, Doc. 110-1, at 15 n.8.

	Plaintiffs' Illustrative Plan	Commissioners' Plan	BOE's Plan	Hypothetical Plan
Any-Part Black VAP in District 5	50.22%	44.75%	46.2%	53.58%
Mean Reock Score For Plan	.42	.45	.49	.40
Reock Score for District 5	.31	.45	.43	.27
Population Deviation for Plan	5.69%	4.03%	5.90%	9.96%
Population Deviation of District 5	-3.46%	.43%	-2.10%	-7.57%
Total Split Precincts in Plan	11	7	4	17
Total Split Precincts in District 5	8	2	1	13

In their summary judgment submission, the BOC conceded the existence of racially polarized voting ("RPV") in Fayette, relevant to *Gingles* two and three.[31] Plaintiffs' RPV analysis was conducted by Dr. Richard Engstrom ("Dr. Engstrom"), a leading political scientist. The District Court accepted him as an expert on the relationship between election systems and the ability of minority

[31] Vol. I, 152, at 42-43; Doc. 108-2.

voters to participate fully in the political process.[32] Defendants did not offer contrary evidence on RPV.

Moreover, Plaintiffs' demonstrated that under the totality of the circumstances: (1) no Black candidate has ever been elected to the BOE or BOC, despite consistent support from Black voters; (2) BOE and BOC elections are characterized by RPV; (3) Georgia's indisputable history of *de jure* racial discrimination; and (4) multiple election practices, such as numbered posts, residency requirements, staggered terms, and a majority vote requirement, enhance the at-large system's discriminatory effects for elections for the BOE and BOC.[33] BOE did not offer any proof contrary to this totality evidence.

On May 21, 2013, the District Court, in an 81-page opinion, entered summary judgment for Plaintiffs (and denied it to the BOC), determining that at-large voting for the BOC and BOE violates Section 2.[34] In its order, the District Court recognized that "[t]he [BOE], having conceded the existence of a Section 2 violation, did not participate in discovery or the current [summary judgment] motions."[35]

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32 Vol. I, 152, at 43.

33 *Id*. at 46-59, 64-69, 75-78.

34 *Id*. at 79-80.

35 *Id*. at 10.

Specifically, the District Court held that Plaintiffs satisfied each of the *Gingles* preconditions. The District Court held that the Black community in District 5 of Plaintiffs' Illustrative Plan is sufficiently large and geographically compact pursuant to *Gingles* one;[36] Plaintiffs' Illustrative Plan respects traditional redistricting principles, including achieving a low population deviation, with 5.69 percent being "comfortably within the accepted 10% for state or local legislature districting purposes;"[37] the Illustrative Plan keeps communities of interest whole;[38] and, that Plan permissibly splits precincts.[39]

The District Court also held that Fayette's at-large voting scheme violates Section 2 because it gives Black voters "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" to these boards.[40] The District Court denied the BOC's motion to amend the summary judgment order to include certification of an interlocutory appeal and stay the case pending appeal, which the BOE did not seek, based on the BOC's failure "to identify any issue within the Court's order on which there is

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36 *Id*. at 21, 32-34.

37 *Id*. at 40.

38 *Id*. at 36-40.

39 *Id*. at 41-42.

40 *Id*. at 79.

substantial ground for difference of opinion," and acknowledgment that the BOC's purported controlling questions of law were "*manufactured, wholly inaccurate recitations of the Court's ruling, and/or have no relation to the Court's order*."[41]

D. Remedial Phase

In its summary judgment order, the District Court directed the parties to submit proposed remedial plans by June 25, 2013. Plaintiffs submitted their Illustrative Plan with five single-member districts, including the "Any-Part" Black VAP district (at 50.22 percent).[42] The BOC offered a plan applicable to BOC elections only, which also provided for five single-member districts, including an "Any-Part" Black VAP district (at 50.23 percent) ("Commissioners' Proposed Remedial Plan").[43] The BOE did not offer a proposed remedial plan,[44] and instead referenced the BOE Plan that they relied upon in their request for the District Court to approve their two attempted settlements with Plaintiffs.[45] The BOE also

41 Doc. 161, at 5, 19 (emphasis added).

42 Vol. I, 179, at 5-6; Doc. 163.

43 *Id*. at 5-6, 8.

44 *Id*. at 5-6.

45 *Id*.

suggested guidelines for the District Court to follow in devising a remedial plan.[46] The BOE made clear that:

> [T]he parties should review the Illustrative Plan and map submitted by the Plaintiffs as part of their motion for summary judgment to determine if the District 5 as drawn on that map can be made more contiguous and compact and incumbents can be placed in separate districts. With those two *starting points* and the [redistricting] criteria set forth above, the parties would hopefully be able to agree upon one map that could be made applicable to both boards.[47]

After briefing on the parties' proposed remedies, the District Court engaged an independent technical advisor to develop an appropriate remedy for the Section 2 violation it found.[48] No party objected to the District Court engaging the advisor, who works for the state's Legislative and Congressional Reapportionment Office of the Georgia General Assembly.[49] On January 24, 2014, the parties received the District Court's proposed remedial plan developed in consultation with the advisor. In the remedial plan, the "Any-Part" Black VAP constitutes 50.13 of a single-

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46 *Id*. These guidelines included: a "District 5 in the northeastern portion of the County composed of at least 50% plus 1 African American voting age residents" and "[f]ive districts that are within a 10% deviation in population size so as to comply with Constitutional standards." Doc. 157, at 2.

47 *Id*. at 3 (emphasis added).

48 Doc. 170.

49 Vol. I, 179, at 6-7; *see also* Doc. 167, at 4 (The BOC acknowledging that "Ms. Wright's expertise regarding redistricting is widely known throughout . . . Georgia, and she has served as a technical advisor for a number of local jurisdictions, as well as for courts creating local plans.").

member remedial district located in the northern part of Fayette, where Black residents are largely concentrated.

The following chart illustrates a comparison of the key redistricting measures between the Court-Drawn Remedial Plan, Plaintiffs' Illustrative Plan, the Commissioners' Proposed Remedial Plan, and the BOE Plan, with the primary differences being that the Court-Drawn Remedial Plan has the lowest "Any-Part" Black VAP, splits the fewest precincts, and has the lowest population deviation.[50]

	Court-Drawn Remedial Plan	**Plaintiffs' Illustrative Plan/ Remedial Plan**	**Commissioners' Proposed Remedial Plan**	**BOE Proposed Remedial Plan**
Any-Part Black VAP in District 5	50.13%	50.22%	50.23%	46.2%
Mean Reock Score for Plan	.44	.42	.40	.49
Reock Score in District 5	.30	.31	.30	.43
Overall Population Deviation in Plan	4.80%	5.69%	7.35%	5.90%
Population Deviation in District 5	-2.65	-3.46	-3.16	-2.10%
Total Split Precincts in Plan	9	11	12	4
Total Split Precincts in District 5	7	8	9	1

[50] Vol. I, 179, at 8-9.

The District Court set a hearing on its proposed remedial plan, and, in advance of it, requested that the parties submit written objections.[51] No party objected to the Court-Drawn Remedial Plan.[52] Though the BOE conceded that the District Court "made every effort to design a plan with appropriate weight given to traditional redistricting principles,"[53] the BOE questioned whether a majority-minority district can be drawn in Fayette "with[] sufficient regard" to the same."[54] Defendants did not object to the use of "Any-Part" Black VAP to develop the majority-minority district in the Court-Drawn Remedial Plan.

The District Court held an evidentiary hearing on its proposed remedy on February 18, 2014, wherein the BOC provided the District Court with a timetable of how Defendants could feasibly implement district voting for the 2014 elections in May and November.[55] The BOE participated in the remedial hearing *only in so far as* to request that the District Court account for the BOE's state constitutional

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51 *Id*., at 9.

52 *Id*. at 9, 28-29.

53 Doc. 174, at 5.

54 Vol. I, 179, at 16-17; Doc. 174, at 4-5 (at the remedial posture of the case, the BOE also continuing to contend that the amended consent decree complies with the constitution and Section 2); Doc. 176, at 2 (The BOC acknowledging in their filing on the court proposed remedial plan that "BOE Defendants *for the first time* raise concerns about mandating a majority-minority district in the County's districting plan") (emphasis added).

55 Vol. I, 179, 15 n.11.

redistricting requirements after each decennial census in its final remedial order.[56] The District Court orally granted the BOE's request in that regard after Plaintiffs did not object to it.[57]

Following that hearing, the District Court entered a detailed 37-page order,[58] setting forth the standards that guided the independent advisor in the redistricting.[59]

E. Final Judgment

On March 13, 2014, the District Court entered final judgment, ordering Defendants to "implement the remedial plan promptly and consistently with the Constitution and laws of the United States and the Constitution and laws of the State of Georgia."[60]

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56 Feb. 18, 2014, Tr., at 3:14-22.

57 *Id.* at 4:4-10 (District Court indicating that it would not put that in the order "but the record should reflect that that request for relief is granted," and the BOE "can get a transcript of [the] hearing and it will be so indicated").

58 Vol. I, 179, at 32.

59 *Id.* at 3-4, 6-8, 10-11, 14.

60 *Id.*, at 32; Vol. II, 183, at 5.

STANDARD OF REVIEW

This Court reviews the District Court's grant of summary judgment for Plaintiffs *de novo*, applying the same legal standards as those that bound the District Court.[61] This Court views the factual record and draws reasonable inferences in the light most favorable to the non-moving party.[62]

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61 *Meek v. Metro. Dade Cnty.*, 908 F.2d 1540, 1544 (11th Cir. 1990).

62 *Id.*; *Johnson v. Gov. of Fla.*, 405 F.3d 1214, 1217 (11th Cir. 2005) (en banc).

SUMMARY OF THE ARGUMENT

During settlement attempts with Plaintiffs, the BOE conceded that its current electoral method violated Section 2, and that: (1) Fayette's Black population is sufficiently large and geographically compact to constitute a majority of the VAP in a properly apportioned single-member district (*Gingles* one); (2) Black residents' voting patterns are politically cohesive in elections involving candidates to the BOC and BOE (*Gingles* two); and (3) bloc voting by other members of the electorate consistently defeats Black-preferred candidates, such that *no Black candidate has ever been elected to either Boards* (*Gingles* three). Significantly, the BOE *conceded* that Plaintiffs established *Gingles* two and three, *i.e.*, the existence of RPV in Fayette, which is the essence of a Section 2 claim. The BOE also *conceded* that, under the totality of the circumstances, Fayette's at-large method of election, in combination with RPV, denies Black voters in Fayette of the opportunity to participate equally in the political process and elect responsive elected officials in violation of Section 2.

Settlement with Plaintiffs was unsuccessful, however, after which the BOE sat idle and did not litigate any aspect of this case. Independent of and consistent with the BOE's concessions, Plaintiffs developed a record that led the District Court to hold that the racially discriminatory at-large electoral method maintained by the BOE and BOC results in vote dilution in violation of Section 2. To remedy

the VRA violation, the District Court granted summary judgment for Plaintiffs, enjoined at-large voting, and ordered the implementation of a Court-Drawn Remedial Plan that now provides for district voting in Fayette.

On appeal, the BOE raises a number of issues that it never litigated in the District Court. However, like the BOC, the BOE cannot seriously dispute that Fayette's at-large electoral method is racially discriminatory in that it provides less of an opportunity—indeed, as the record here clearly demonstrates *no opportunity*—for Black voters to elect their candidates of choice to the BOC and BOE. Instead, the BOE urges this Court to look past the demonstrated Section 2 violation in this case, and instead find that the *remedy* for racial discrimination is *itself unconstitutional racial discrimination.*

The BOE *relies entirely on the BOC's arguments*, to assert that: (1) the District Court's determination of vote dilution and that Plaintiffs' Illustrative Plan and the Court-Drawn Remedial Plan are geographically compact under *Gingles* one was in error; (2) the Plaintiffs *and* the District Court created racially gerrymandered redistricting plans in violation of the Equal Protection Clause of the Fourteenth Amendment ("Equal Protection Clause"); (3) the District Court's use of "Any-Part" Black VAP in creating the remedial district at issue was improper; and (4) the District Court's summary judgment ruling in support of Plaintiffs does not apply to them.

As discussed more fully below, the BOE's failure to litigate any aspect of this case after the settlement attempts with Plaintiffs were unsuccessful is fatal to its appeal. Moreover, the judgment against the BOE also should be affirmed because the BOE's appeal is not supported by controlling legal standards, and seeks a result is at odds with Section 2 jurisprudence and the VRA's remedial purpose.

ARGUMENT AND CITATIONS OF AUTHORITY

I. Because It Failed to Litigate this Case After Unsuccessfully Settling with Plaintiffs, the BOE's Appeal Must Fail.

From the beginning of this lawsuit, the BOE expressed its strong desire not to litigate this case, and promptly agreed to Plaintiffs' demand for district voting. Indeed, the BOE hoped to settle this case before their answer to Plaintiffs' complaint was due.[63] Accordingly, six months after this litigation commenced, Plaintiffs and the BOE attempted their first of two attempted settlements of Plaintiffs' Section 2 claim against the BOE by jointly moving the District Court for approval of their original consent decree and seeking final judgment as to the BOE.[64] Based on the BOE's: (1) admission that "[n]o African American has ever

[63] Doc. 12 (Plaintiffs and the BOE jointly moving in October 2011 for extension of time for the BOE to answer Complaint because "[t]he parties are exploring the possibility of alternative resolutions and would prefer to devote resources to that end."); Doc. 18 (those parties moving for another extension in November 2011). The BOE ultimately filed an answer on December 9, 2011, denying Plaintiffs' allegations including that there is "a single-member district containing a majority Black [VAP] and whose voting strength is diluted by the Section 2 violations." Vol. I, 26, at ¶ 8.

been elected to the [BOC at least since Reconstruction] despite comprising nearly 20 [percent] of the [VAP],"[65] (2) admission that "there is a concentrated group of black electors residing in the northern part of Fayette County,"[66] (3) "the potential cost of litigation,"[67] (4) its authority pursuant to a local constitutional amendment to redistrict following a Census,[68] *and* (5) an "interest in avoiding a judicial finding of liability under Section 2,"[69] the BOE consented to the BOE Plan, a single-member redistricting plan that included a remedial district, District 5, in which the "Any-Part" Black VAP was 46.2 percent.[70] The BOE defended this plan as reasonable, fair, and compliant with Section 2 and the Constitution,[71] and also

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64 Docs. 33, 33-1.

65 Doc. 33, at ¶¶ 3-4.

66 Doc. 43, at 3.

67 Doc. 33, at ¶¶ 5, 8; Doc. 43, at 4, 7, 11; Doc. 68, at 2.

68 Doc. 33, at ¶ 6 (referencing the BOE's authority under local constitutional amendment found in 1970 Georgia Laws 1979 to redraw BOE districts following the release of Census data); *id*. at ¶ 18.

69 Doc. 33-1 at ¶ 21; *see also* Doc. 43, at 2 (in defending the original attempted settlement, the BOE expressed their "desire . . . to avoid the substantial costs of litigating this matter—particularly in light of the fact that many of the relevant allegations in Plaintiffs' Complaint are undisputed"); *id*. (BOE describing the first settlement with Plaintiffs as an "agreement on a precise, equitable Consent Decree that both parties feel is in the public's best interest"); *id*. at 10-11.

70 Doc. 33 at ¶ 6; Doc. 33-1 at ¶ 16.

71 Doc. 43, at 11.

maintained that the Plan respected traditional redistricting principles, including keeping communities of interest together, and being contiguous and compact.[72]

In reading from a prepared statement before his BOE colleagues approved the settlement of this case with Plaintiffs, then BOE Chairman Leonard Presberg said:

> *The fact is that the* [*then current*] *at-large voting method used for our elections is most likely against the law.* Not only would it be a huge waste of money for our cash strapped system to fight this lawsuit, but it is one that I do not believe we would win. But the fact that we cannot win only underscores the point: settling this lawsuit and moving to a district voting system is the right thing to do. For too long too many of our citizens have felt disenfranchised.[73]

Although District 5 did not contain a numerical majority-minority district in the BOE Plan, Plaintiffs and the BOE considered District 5 in that Plan, in which the "Any-Part" BVAP (at 46.20 percent) is a plurality (to the white VAP at 42.67 percent), to be an opportunity to elect district.[74]

Moreover, Plaintiffs and the BOE relied on the BOE Plan to develop Plaintiffs' Illustrative Plan to establish liability under *Gingles* one. Plaintiffs' Illustrative Plan, developed by their expert, Cooper, included District 5 in which

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[72] Doc. 33-1 at ¶ 16; Doc. 43, at 4.

[73] Doc. 42, at 12 (emphasis added).

[74] Doc. 33-1; *see also* Doc. 42, at 4 n.5 ("The Settling Parties . . . agreed upon the remedy of a single-member District 5 in which Black voters are less than a majority of the [VAP], but will nevertheless have an opportunity to elect their preferred candidate to the [BOE]").

the "Any-Part" Black VAP was 50.22 percent.[75] In reaching the original settlement, the BOE agreed that "Plaintiffs have stated 'a plausible and fairly contestable legal' claim."[76]

Following this original attempted settlement and prior to the evidentiary hearing that the District Court scheduled on that settlement, Plaintiffs and the BOE entered into an amended consent decree and moved the District Court to enter it as the final order and judgment as to Plaintiffs' Section 2 claim against the BOE.[77] Under the amended consent decree, the BOE:

> admit[ed] that the . . . at-large method of electing members to the [BOE] violates Section 2 . . . and that *Plaintiffs have established the factual and legal basis for [the BOE's] violation of Section 2*.[78]
>
> . . . .
>
> In so admitting, [the BOE] concede[d] that Plaintiffs have satisfied the three *Gingles* preconditions for alleging a vote dilution claim and demonstrated that, under the totality of the circumstances, Black residents of [Fayette] have less of an opportunity than other members of the [VAP] in that County to participate in the election of members of the [BOE] and to elect their preferred candidate[s] of choice.[79]

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75 Doc. 42 n.5; Doc. 54-1, at 18 n.10.

76 Doc. 43, at 10-11.

77 Docs. 54, 54-1.

78 Doc. 54, at 4 ¶ 7 (emphasis added); Doc. 54-1, at 9-10, 12; Doc. 43, at 3-4, 6; Doc. 68, at 1-2.

79 Doc. 54-1, at 12; Doc. 174, at 2-3.

The basis for the BOE's concession that Plaintiffs satisfied *Gingles* one (*i.e.*, that the "Any-Part" Black VAP community is sufficiently numerous and geographically compact in Fayette) was Plaintiffs' Illustrative Plan. In Plaintiffs and the BOE's jointly filed brief in support of the amended consent decree, the BOE acknowledged that:

> Cooper demonstrated that a properly apportioned single-member district plan for electing members to the [BOE] can be drawn in which ["Any-Part"] Black voters constitute a majority of both the total population and the [VAP] in one compact single-member district. This plan is legally sound in all respects because it follows traditional redistricting principles, including keeping communities of interest together, contiguity and compactness. [The BOE] concede[s] that Plaintiffs satisfy [*Gingles* one].[80]

The BOE further conceded that Plaintiffs satisfied *Gingles* two and three based on analyses conducted by Plaintiffs' other expert, Dr. Engstrom, which:

> reveal[ed] that [BOE] elections are characterized by stark patterns of [RPV], with Black voters preferring Black candidates, and non-Black voters preferring non-Black candidates. The result, as Dr. Engstrom details [and the BOE acknowledged], is that Black candidates are consistently defeated in each election, notwithstanding strong support from Black voters.[81]

The BOE did not dispute that not one of the five African-American candidates that have run for BOE seats in the elections which Dr. Engstrom studied were elected, despite those candidates being the preferred candidates of Black

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[80] Doc. 54-1, at 7 (internal citations omitted); *id*. at 11 n.8; Doc. 174, at 4 (at the remedial posture of the case, BOE continuing to assert that the amended consent decree is legal).

[81] Doc. 54-1, at 8 (internal citations omitted).

In addition to admitting that BOE elections are characterized by RPV, the BOE also admitted that racial bloc voting in BOC elections has resulted in the defeat of every Black candidate to that body. *Id*. at n.9.

voters in Fayette. For example, the BOE acknowledged that a Black candidate lost a BOE election after receiving 99 percent of support from Black voters, but securing only 15 percent of the votes from white voters.[82] The BOE never offered their own expert to conduct these RPV analyses; instead, they relied upon Dr. Engstrom. The BOE also never sought to offer evidence that partisanship rather than race or the purported "new[ness]" of Black people to Fayette explained the defeat of Black-preferred candidates.[83] The BOE ultimately conceded that "the totality of the circumstances make clear that the current at-large method of electing members to the [BOE], in combination with [RPV] patterns, . . . violates Section 2."[84]

Notwithstanding its early admission of Section 2 liability, the BOE now challenges the District Court's grant of summary judgment to Plaintiffs. Having failed to brief or otherwise litigate this case after attempts to settle with Plaintiffs were unsuccessful, the BOE's appeal relies upon the BOC's purportedly "abundant evidence," though the BOE amassed no evidence whatsoever at any point in this litigation.[85] Independent of and consistent with these concessions, Plaintiffs

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82 *Id*., at 8-9.

83 BOE Br., at 11-12.

84 Doc. 54-1, at 9.

85 *See, e.g.*, BOE Br., at 6 (citing to the BOC's briefing in Docs. 140-3 and 140-24 in opposition to Plaintiffs motions for summary judgment, but not their own); *see also id.*, at 13

developed a record in this case that led the District Court to hold that the racially discriminatory at-large electoral method maintained by the BOE and BOC results in vote dilution in violation of Section 2.

II. Plaintiffs Demonstrated that the Black Community in Fayette is Geographically Compact and Sufficiently Numerous Under *Gingles* One, and Plaintiffs' Expert Reasonably Considered Non-Racial Traditional Redistricting Principles and Race to Develop a Remedial District.

There is no genuine dispute of material fact that District 5, within Plaintiffs' Illustrative Plan, and the remedial district in the Court-Drawn Plan, contain a geographically compact minority community.[86] These plans compared favorably with plans that both sets of Defendants drew for their at-large residency districts.

A. District 5 Contains a Geographically Compact Any-Part Black Community.

As the District Court correctly recognized, compactness under Section 2 "refers to the compactness of the minority population [in Fayette], not [like under an Equal Protection Clause analysis] the compactness of the contested district [District 5]."[87] The purpose of this Gingles *one* requirement is to determine

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(citing to BOC arguments and the opinions of BOC's expert, but not their own); *id*. at 14 (same); *id*. at 17 (same).

86 Vol. I, 152, at 32, 42.

87 *Id*. at 30 (citing *League of United American Citizens v. Perry*, 548 U.S. 399, 435, 126 S. Ct. 2594, 2619 (2006) ("*LULAC*") (quoting *Bush v. Vera*, 517 U.S. 952, 997, 116 S. Ct. 1941, 1971 (1996) (Kennedy, J., concurring)).

Unlike the BOC in the companion appeal, 14-11202-FF, the BOE accepts that compactness under a Section 2 vote dilution analysis is a distinct concept from compactness

whether a sizeable minority group, with interests in common, live in close proximity to each other, such that it is reasonable to redistrict them into a single-member district to provide them with an opportunity to exercise their voting power, as an alternative to the dilutive effects of at-large voting.[88]

The District Court further properly recognized that "while no precise rule has emerged governing [how to evaluate Section] 2 compactness, the 'inquiry should take into account 'traditional districting principles such as maintaining community of interest and traditional boundaries.'"'[89] Following the Supreme Court's ruling in *LULAC*, this Circuit has required that a Section 2 compactness inquiry look to whether a plan has been designed "*consistent with* traditional districting principles."[90]

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under an equal protection analysis. BOE Br., at 25-27 ("The lack of sufficient compactness for purposes of the *Gingles* prerequisite is not the same as the more restrictive inquiry under the constitutional gerrymander cases.")

[88] *See Thornburg v. Gingles*, 478 U.S. 30, 50 n.17, 106 S. Ct. 2752, 2766 n.17 (1986) (the purpose of the numerosity and compactness requirement is to ensure that minority voters have "the *potential* to elect representatives in the absence of the challenged structure or practice") (emphasis in original); *Johnson v. Hamrick*, 155 F. Supp. 2d 1355, 1367 (N.D. Ga. 2001), *aff'd*, 296 F.3d 1065 (11th Cir. 2002).

[89] Vol. I, 152, at 31 (citing *LULAC*, 548 U.S. at 433, 126 S. Ct. at 2618) (emphasis added); *see also* Doc. 161, at 7 (same).

[90] Vol. I, 152, at 31 (citing *Davis v. Chiles*, 139 F.3d 1414, 1425 (11th Cir. 1998) (a Section 2 case in which this Circuit held that a plan is compact where it is designed "consistent with traditional districting principles); Doc. 161, at 7.

Applying the Section 2 framework for analyzing the geographic compactness of the Black community in District 5, the District Court considered *each* of the non-racial traditional redistricting principles that Plaintiffs' expert, Cooper followed, along with his consideration of race, and determined that the Illustrative Plan, and District 5 within it, contains a geographically compact Black community.[91] Each redistricting principle that Cooper considered and the District Court evaluated, including geographical compactness, geographical shape, maintaining a community of interest, achieving a low population deviation, minimizing split precincts, and compliance with Section 2, are discussed in turn below. Contrary to the BOE's contention on appeal, the Illustrative Plan is compact under *Gingles one*.[92]

1. Geographical Compactness

The District Court concluded that the Black community in District 5 is reasonably compact based on several factors.[93] *First*, Cooper's application of the Reock test to Plaintiffs' Illustrative Plan demonstrated District 5's compactness, as compared to other "principal plans," such as the Commissioners' Plan and the BOE Plan, as well as plans in other state and local Georgia jurisdictions.[94]

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91 Vol. I, 152, at 32-42.

92 BOE Br., at 27.

93 Vol. I, 152, at 32; *id*. at 32-42.

The District Court acknowledged that Plaintiffs are not required to achieve a particular number on the statistical compactness scores, *or* that they bear the burden of designating a district that is compact under multiple tests,[95] or is more compact than a majority of other districts.[96] Plaintiffs were not required to present the most compact plan possible, only one that satisfies generally-accepted standards for compactness.

Accordingly, the District Court credited Cooper's determination that: (1) the mean Reock score for the five districts in Plaintiffs' Illustrative Plan is .42, with District 5 having a score of .31; (2) those Reock scores compared favorably with those of the Commissioners' Plan; (3) those Reock scores were within the norm for districts across many state and local redistricting plans in Georgia, and is as compact or more compact than 23 school board and county commission districting

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94 Doc. 110-1, at 14-20; *id*. at 18 (Cooper and the BOC's expert, Morgan, agreeing that there is no objective ideal for compactness, but rather that compactness can only be measured by comparing one district to another).

95 The District Court determined that Plaintiffs were not required to use a combination of statistical measures (e.g., the Reock test *and* another test referred to as the Polsby-Popper test) to determine geographical compactness. Vol. I, 152, at 33-34; Doc. 110-1, at 19-20. The Polsby-Popper test computes the ratio of the district area to the area of a circle with the same perimeter. It is measured on a scale of 0 to 1, with 1 being the most compact. *See, e.g.*, Doc. 110-1, at 11-12 & n.10. Cooper used the Polsby-Popper test and the Illustrative Plan's scores compared favorably.

96 Vol. I, 152, at 33-34; BOE Br., at 27.

plans from a sample of 25 Georgia counties; and (4) District 5 is more compact than 25 percent of Georgia state legislative districts.[97]

In their summary judgment submission, Plaintiffs also showed that their Illustrative Plan's compactness scores compared favorably with the BOE Plan in which the Reock score is .49.[98] BOC's expert admitted that the BOE Plan complies with traditional redistricting principles,[99] an important concession given that Cooper based the Illustrative Plan on the BOE Plan, and follows similar county, precinct, and municipal lines.[100] In addition, the record reflects that two-thirds of the perimeter for District 5 in the Illustrative Plan followed already existing political lines in Fayette.[101]

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97 Vol. I, 152, at 32-33.

98 Doc. 110-1, at 8-9, & n.9; *see also id*. at n.11 (explaining that Districts 2 and 3 under Plaintiffs' Illustrative Plan were equally compact to Districts 2 and 3 under the BOE Plan, which the BOC's expert, Morgan, admits is compact).

99 *Id.* (Morgan opining that "traditional redistricting principles were followed in drafting the [*BOE*] *Plan*, in that the district boundaries follow precinct and major road boundaries, the districts are compact and the population of the districts are close to ideal") (internal citation omitted).

100 *Id*. (Cooper declaring that "[i]t was easy for [him] to look at the district as drawn in the *Illustrative Plan* and say, yes, that can be a functional district. It follows county lines, precinct lines, municipal boundaries, you know, what I really thought was the school boundaries to a large extent) (internal citations omitted); *see also id*. (Cooper discussing, for example, how "the *Illustrative Plan* splits Sandy Creek precinct as the [*BOE Plan*] does") (internal citations omitted).

101 Doc. 69-1, at 8, ¶¶ 18-19.

2. Geographical Shape

The District Court also assessed the shape of District 5, recognizing that "the geographical shape of any proposed district necessarily directly relates to the *geographical compactness and population dispersal of the minority community in question*" and "is a significant factor that courts can and must consider in a *Gingles* compactness inquiry."[102]

The District Court determined that unlike the non-compact district in *Sensley v. Albritton*, which was the result of "two areas of highly-concentrated African-American population, which [were] roughly 15 miles apart from one another, [being] linked together by a narrow corridor of land," the Black population in Plaintiffs' District 5 in the Illustrative Plan "is dispersed throughout the northern half of the county, the cities of Fayetteville and Tyrone are separated only by 3.5 miles . . . and are linked together by much more than a corridor of land."[103]

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[102] Vol. I, 152, at 34-35 (citing *Sensley v. Albritton*, 385 F.3d 591, 596 (5th Cir. 2004)) (emphasis added).

[103] Vol. I, 152, at 35 (citing *Sensley*, 385 F.3d at 596); *see also id.* at 10-11 (recognizing that "the [Black] population is largely concentrated in the northern half of the county," "[t]he city of Fayetteville, which is in the northeast portion of the country, is one-fourth [Black]," and "Tyrone, located on the northwest border of the county, is one-third [Black]").

Moreover, the District Court determined that the Black populations in Tyrone and Fayetteville are geographically close to the area in which the Black population is generally concentrated.[104]

3. Maintaining a Community of Interest

The District Court also determined that, "importantly, Plaintiffs' evidence demonstrates that District 5 includes a community of interest," another traditional redistricting principle relevant to a Section 2 compactness determination.[105] Though the BOE disagrees with the District Court, they have offered no evidence demonstrating that Black voters in District 5 are not a community of interest.[106]

As the District Court recognized, "manifestations of [a] community of interest" include: "shared broadcast and print media, public transport infrastructure, and institutions such as schools and churches,"[107] as well as common socioeconomic and political concerns.[108]

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[104] Vol. I, 152, at 35-36 (citing *Benavidez v. City of Irving*, 638 F. Supp. 2d 709, 722 (N.D. Tex. 2009), in which an illustrative district that "'reach[ed] out to grab' pockets of Hispanic population" was compact because "the heavily Hispanic Census blocks [were], in fact, geographically very close [to] the nucleus of Hispanic concentration in south Irving").

[105] Vol. I, 152, at 36.

[106] *Id*., at 40 (Defendants have failed to set forth any "arguments [that] show[] that the residents of District 5 have 'disparate needs and interests,'" (citing *LULAC*, 548 U.S. at 435, 126 S. Ct. at 2619), or that the plan "includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin" (citing *Shaw v. Hunt (Shaw I)*, 509 U.S. 630, 647, 113 S. Ct. 2816, 2827 (1993))

[107] Vol. I, 152, at 36 (citing *Bush v. Vera*, 517 U.S. at 964, 116 S. Ct. at 1954).

The District Court noted that in developing Plaintiffs' Illustrative Plan, Cooper accounted for the "perceived unity of the African-American community in the cities of Fayetteville and Tyrone and the Kenwood, Europe areas," in District 5.[109] Moreover, various Plaintiffs testified that residents in District 5 share schools, places of worship and recreation, and membership in fraternities and sororities, and a community association and civil rights organizations like the NAACP.[110] Moreover, the District Court accepted the substantial evidence that the Black community in District 5 of Plaintiffs' Illustrative Plan has (1) shared socioeconomic status,[111] a fact that the BOE also has recognized,[112] (2) a desire for

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[108] Vol. I, 152, at 36-37 (citing *Cane v. Worcester Cnty., Md.* 35 F.3d 921, 927 n.6 (4th Cir. 1994) (compact district that included citizens who shared common socioeconomic and political concerns followed traditional redistricting principle of drawing districts consistent with common interests).

[109] Vol. I, 152, at 36; *see also id*. at 38-39 (The District Court accepting Cooper's testimony that he was aware of common interests between Black residents of Tyrone and Fayetteville in northern Fayette when developing Plaintiffs' Illustrative Plan); Doc. 110-1, at 27.

[110] *Fletcher v. Lamone*, 831 F. Supp. 2d. 887, 899 (D. Md. 2011) (plaintiffs must offer more than bare assertions that the minority community in the contested district share the same characteristics, needs, and interests).

Vol. I, 152, at 36 n.16 (crediting Plaintiff Lowry's deposition testimony that Fayetteville and Tyrone have shared schools, Tyrone residents go to churches in North Fayette, and people from Tyrone are members of the NAACP and North Fayette Community Association); *id*. (crediting Plaintiff Alice Jones' deposition testimony that residents in North Fayette share schools and attend NAACP meetings); *id*. (crediting Plaintiffs Ali and Aisha Abdur-Rahman's deposition testimony that citizens of Tyrone and Fayetteville attend a mosque in Fayetteville); *id*. at 37; Doc. 110-1, at 27-28.

[111] Vol. I, 152, at 36-37 (citing *Cane*. 35 F.3d at 927 n.6).

[112] BOE Br., at 10-11.

district voting,[113] (3) are politically cohesive (also relevant under *Gingles* two)[114] and another fact that the BOE does not dispute, and (4) share a common racial and ethnic identity.[115]

Finally, the District Court recognized that Black residents in Fayetteville and Tyrone, where the highest percentages of Black people reside in northern Fayette, live in "close geographical proximity to each other," living roughly only 3.5 miles apart as evidence that they are a community of interest, in contrast to the two Hispanic communities in *LULAC* that were separated by an "enormous geographical distance" of 300 miles.[116]

For its part, the District Court determined that the BOC, in its summary judgment submission, "misconstrue[d]" Cooper's testimony, which the BOE attempts also to do here on appeal[117] in the following three ways. *First*, the

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[113] Doc. 110-1, at 29.

[114] As the District Court recognized, unlike in *LULAC*, 548 U.S. at 433, 126 S. Ct. at 2618, here the undisputed evidence of RPV in Fayette conclusively proves that Black voters are politically cohesive. Vol. I, 152, at 38 & n.18; *see also* Doc. 141, at 19 n.9 (The record reflects that Cooper was aware of Dr. Engstrom's RPV analysis while working on this case (internal citation omitted)).

[115] Vol. I, 152, at 38 & n.19 (the District Court recognizing as a common interest Black people's shared ethnicity) (referencing Justice Ginsburg's dissenting opinion in *Miller v. Johnson*, 515 U.S. 900, 919-20, 944, 115 S. Ct. 2475, 2489-90, 2504 (1994)).

[116] Vol. I, 152, at 37-38 & n.19; Doc. 110-1, at 29.

[117] *See, e.g.,* BOE Br., at 28-29 (The BOE referencing the BOC's expert's unsubstantiated opinions that the Black community in Kenwood, Tyrone, and Fayetteville, represent three separate communities); *id*. at 53-54.

District Court rejected the contention that by splitting the two municipalities of Fayetteville and Tyrone, District 5 includes diverse interests that "are so significant that plaintiffs' proposed district could not be effectively represented," since BOC's own plan *also split those municipalities*.[118] *Second*, the District Court rejected the contention that District 5 is not compact because it excludes school attendance zones in north Fayette, since the BOC's Plan *also failed to follow school zones*.[119] *Third*, the District Court rejected the contention that Black residents in Tyrone and Fayetteville are two separate concentrations of the Black population, based on the BOC's expert's, Morgan's, opinion, particularly since Morgan did not indicate that they were two distinct communities with different interests or political beliefs.[120]

As the District Court recognized, none of the BOC's arguments, upon which the BOE now relies entirely on in this appeal, show that the residents of District 5 have "disparate needs and interests," or that the plan "includes in one district

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[118] Vol. I, 152, at 38-39 (referencing *Clark v. Calhoun Cnty. Miss*., 21 F.3d 92, 96 (5th Cir. 1994); *id*. (also citing *Cane*, 35 F.3d at 927 n.6, for proposition that "simply because district lines may be drawn to maintain the integrity of political subdivisions does not mean that a proposed majority[-]minority district that would divide municipalities fails to comply with traditional redistricting principles")) (internal quotations and citation omitted).

[119] Vol. I, 152, at 39 & n.20.

[120] The District Court rejected Morgan's unsubstantiated opinion based on the record. Vol. I, 152, at 40; *see also* Doc. 110-1, at 30 n.19 (explaining that Morgan's, who does not reside in Fayette, testimony about the separateness of these three communities is based on two experiences: one occasion in which he traveled through Fayette in route to another location; and, another occasion, in which he drove "around some of the neighborhoods in Fayette County," but did not talk to any people in the "neighborhoods … [and] houses" that he saw); *id*. (Morgan conceding that he did not "have enough information" to determine whether Kenwood, Blackrock, Fayetteville, and Tyrone were a single community).

individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin."[121]

4. Population Deviation

The District Court next determined that "in drawing the Illustrative Plan [with a population deviation at 5.69 percent,] Cooper ensured that the population deviation was within the 10% norm for redistricting."[122] Although it recognized that Plaintiffs' Illustrative Plan's deviation from exact population equality is higher than the Commissioners' Plan, which is 4.03 percent, the District Court determined that it is "still comfortably within the accepted 10% for state or local redistricting purposes."[123] Notably, Plaintiffs' Illustrative Plan's overall deviation at 5.69 percent is less than the BOE Plan, which was 5.91 percent.[124] Despite that, the

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121 Vol. I, 152, at 40 (internal citations and quotations omitted).

122 *Id*., at 40-41 (citing *Brown v. Thomson*, 462 U.S. 835, 842-43, 103 S. Ct. 2690, 2696 (1983) (in statewide redistricting action, recognizing that a maximum population deviation under 10 percent is insufficient to make out a prima facie case of a constitutional deviation); *White v. Regester*, 412 U.S. 755, 764, 93 S. Ct. 2332, 2338 (1973) (in action involving statewide and local redistricting, recognizing that the combined deviation of the most populous district and least populous district from the ideal district population could not exceed 10 percent, and all other district populations are required to fall within that range, and approving a plan with a 9.9 percent deviation).

123 Vol. I, 152, at 40.

124 Doc. 110-1, at 15.

BOE now argues that Plaintiffs' Illustrative Plan would not have been a legal remedy.

The BOE acknowledges that generally Plaintiffs do not "bear a greater burden than simply presenting a plan with a population deviation under 10%."[125] The BOE nevertheless asks this Court to rely on equal protection jurisprudence, in which that presumptive 10 percent norm is rebuttable where population deviation between the districts is the result of invidious racial purpose, which they contend is the case here.[126] Relying upon the BOC's expert's opinion (which was available during the District Court proceedings), the BOE claims that District 5 of Plaintiffs' Illustrative Plan is intentionally under populated to achieve a majority-minority district.[127]

The District Court rejected a similar argument made by the BOC, recognizing that "a plan with a population deviation that is under 10% is 'presumptively constitutional, and the burden [*in a one person, one vote challenge*]

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[125] Vol. I, 152, at 41; BOE Br., at 40. In its proposed remedial guidelines to the District Court, the BOE expressed a need for: "[f]ive districts that are within a 10% deviation in population size so as to comply with Constitutional standards." Doc. 157, at 2.

[126] BOE Br., at 40-41 (citing, for example, *Gaffney v. Cummings*, 412 U.S. 735, 93 S. Ct. 2321 (1973), an equal protection challenge in which the Supreme Court approved a state legislative redistricting plan that produced a 7.83 percent deviation); *see also Larios v. Cox*, 300 F. Supp. 2d 1320,1340-41 (N.D. Ga. 2004) *aff'd*, 542 U.S. 947, 124 S. Ct. 2086 (2004) (acknowledging in the context of a one person, one vote challenge that the presumptive constitutionality of a plan with a 10 percent population deviation can be rebutted).

[127] BOE Br., at 20 (relying on BOC's expert's, opinions); *id*. at 42-43 (same).

lies on the plaintiffs to rebut that presumption.'"[128] The District Court appropriately determined that in this case, Plaintiffs' burden is to simply present a plan with a population deviation under 10 percent, which they have done here.[129] In particular, the District Court held that Plaintiffs' expert achieved an acceptable population deviation in Plaintiffs' Illustrative Plan and in District 5 based on his consideration of the record evidence, respect for the traditional districting principles of maintaining political subdivisions and a community of interest, and keeping districts compact.[130]

Further, not only does the Court-Drawn Remedial Plan respect the standards set forth by the Supreme Court for such plans, the population deviation of the Court-Drawn Remedial Plan (at 4.80 percent) also falls comfortably within the norm for other court-drawn remedial plans. Indeed, in *Rogers v. Lodge*, the Supreme Court affirmed a district court's remedial order that selected a single-member districting plan for county commissioners with a 4 percent deviation.[131]

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128 Vol. I, 152, at 41 (citing *Larios*, 300 F. Supp. 2d at 1341).

129 *Id*. (citing *U.S. v. Vill. of Port Chester*, 704 F. Supp. 2d 411,421 (S.D.N.Y. 2010) a Section 2 case, court accepted plan with 5.71 percent population deviation, and *Reed v. Town of Babylon*, 914 F. Supp. 843, 869 (E.D.N.Y. 1996), a Section 2 case in which court held that plaintiffs must only establish a population deviation within 10 percent); *cf. Abate v. Mundt*, 403 U.S. 182, 185, 91 S. Ct. 1904, 1907 (1971) (affirming remedial plan for county legislature with 11.9 percent deviation because "the particular circumstances and needs of a local community as a whole may sometimes justify departures from strict equality").

130 Vol. I, 152, at 40-42.

Given that the District Court possesses the expertise to fashion appropriate remedies for Section 2 violations, its court-drawn plan, with just an 0.8 percent difference from *Rogers*, achieves the goal of remedying the Section 2 violation at issue here with "little more than *de minimis*" population deviation.[132]

5. Minimizing Split Precincts

While redistricting plans are not required to split zero precincts,[133] Plaintiffs' expert provided a variety of non-racial reasons for precinct splits in District 5 of Plaintiffs' Illustrative Plan, each of which was credited by the District Court. Cooper testified that precincts were split to protect incumbents, a redistricting principle.[134] *Second*, Cooper balanced the splitting of precincts with achieving low population deviation.[135]

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131 Vol. I, 179, at 23; *Lodge v. Buxton*, 639 F.2d 1358, 1362, 1381 (5th Cir. Unit B 1981), *aff'd sub. Nom. Rogers v. Lodge*, 458 U.S. 613, 627-28, 102 S. Ct. 3272, 3280-81 (1982).

132 *Chapman v. Meier*, 420 U.S. 1, 26-27, 95 S. Ct. 751, 766-67 (1975).

133 Vol. I, 152, at 41-42.

134 *Id*. at 41; *id.* at 110-1, at 22-24 (Cooper explaining that he split at least two precincts to protect incumbents, including Hopeful and Dogwood) (internal citations omitted)); *id*. (explaining that "[a] lot of the precinct splits really are because [Plaintiffs are] trying to protect incumbents")); Doc. 141, at 15 n.7.

135 Vol. I, 152, at 41; *id.* at 110-1, at 22-24 (Cooper explaining that he split Tyrone and Fayetteville to comply with the one-person, one-vote principle and to create a majority-minority district) (internal citations omitted); *id.* (Cooper explaining that he split Sandy Creek precinct to avoid overpopulation in District 5).

Moreover, Plaintiffs' Illustrative Plan splits only four more precincts than the Commissioners' Plan.[136] And importantly, "election precincts are not such important political boundaries that they should negate a districting proposal, particularly where, as here, other key districting principles were obeyed."[137] Accordingly, as the District Court recognized, each of Plaintiffs' expert's precinct splits reflected his respect for and adherence to traditional redistricting principles.[138]

6. Compliance with Section 2 of the VRA

In addition to each of the redistricting principles discussed *supra*, Cooper also considered compliance with the VRA, another traditional redistricting principle.[139] As a result, Cooper developed Plaintiffs' Illustrative Plan, which appropriately and considers race among many other demographic factors to comply with *Gingles* one.[140] In contrast, the BOC's expert, Morgan, did not

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136 Vol. I, 152, at 41-42.

137 *Id*. at 41-42 (citing *Vill. of Port Chester*, 704 F. Supp. 2d at 439).

138 *Id*. at 41.

139 Congress enacted the VRA for the broad remedial purpose of "rid[ding] the county of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 315, 86 S. Ct. 803, 812 (1966). Thus, the VRA should be interpreted in a manner that provides "the broadest possible scope" in combating racial discrimination. *Allen v. State Bd. of Elections*, 393 U.S. 544, 567, 89 S. Ct. 817 (1969).

140 Doc. 110-1, at 26-27 (Plaintiffs' expert, Cooper, recognizing "all of these [traditional redistricting, including compliance with the VRA] factors have to be balanced") (internal citations omitted).

include compliance with the VRA in his purportedly "exhaustive list of traditional redistricting criteria."[141]

* * *

In sum, as the District Court recognized, Plaintiffs demonstrated that although their expert took race into consideration when creating Plaintiffs' Illustrative Plan to comply with Section 2, he did not do so at the expense of any other redistricting principles.[142] Cooper testified that had he relied predominantly on race, he could have drawn a district with a 53.58 percent "Any-Part" Black VAP.[143] "However, taking other redistricting principles into account, including achieving a low population deviation, joining a community of interest, geographical compactness, and protecting incumbents, he was able to achieve a district that has a voting-age African-American population of 50.22%,"[144] in northern Fayette.

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141 *Id*. at 26 (internal citation omitted) (Morgan admitting that he failed to include compliance with Section 2 in his purportedly "exhaustive list of traditional redistricting criteria").

142 Vol. I, 152, at 42.

143 *Id*.

144 *Id*.

Rather than serving as "damning proof" that Plaintiffs' Illustrative Plan subordinated redistricting principles to race,[145] as the BOE contends, the District Court recognized that the Hypothetical Plan, drawn primarily on race, demonstrates that Plaintiffs' Illustrative Plan appropriately balances non-racial traditional redistricting principles and compliance with Section 2.

B. The District Court Also Properly Held that the Black Community is Sufficiently Large to Satisfy *Gingles* One.

The District Court also properly determined that the "Any-Part" Black VAP in District 5 also is sufficiently numerous at 50.22 percent.[146] *Gingles'* numerosity requirement, together with its compactness requirement, ensures that voters of color have "the *potential* to elect representatives in the absence of the challenged structure or practice").[147]

Unable to credibly counter the District Court's ruling on this point, the BOE challenges Plaintiffs' and the District Court's use of the "Any-Part" Black category in developing the remedial district in those plans, arguing that both "strain[] mightily to reach the 50% minority voter threshold."[148]

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145 BOE Br., at 32; *id*. at 31-33.

146 As the District Court properly recognized, the Eleventh Circuit, like other circuits, uses VAP, rather than overall population, numbers to determine if a minority community is sufficiently large. Vol. I, 152, at 20 (citing a special concurrence in *Solomon v. Liberty Cnty*., 899 F.2d 1012, 1018 (11th Cir. 1990)); *id*. at 21.

147 *Gingles*, 478 U.S. at 50 n.17, 106 S. Ct. at 2766 n.17 (emphasis in original).

But, in the District Court, the BOE *themselves* used "Any-Part" Black VAP in their BOE Plan. On appeal, the BOE claims that the "Any-Part" Black category is a "problem."[149] In an already rejected argument, the BOE urges this Court to reject the "Any-Part" Black category because it includes persons who identify as Black-Hispanic, which must "inevitabl[y]" include non-citizens, which may require Plaintiffs to prove their citizenship.[150] This argument is wholly without merit.

Beginning with the 2000 Census, the "Any-Part" Black category includes people who identify as single-race Black or Black plus one or more other races, including people who identify as Black and Hispanic. Since then, the use of the "Any-Part" Black category has been endorsed by the Supreme Court in a case arising out of Georgia, and other circuit courts, where, like here, the voting rights of one minority group—Black residents of Fayette—are at issue.[151] Following that

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148 BOE Br., at 27. When the BOE proposed remedial guidelines to the Court, it expressed a need for: a "District 5 in the northeastern portion of the County composed of *at least 50% plus 1* African American voting age residents." (Emphasis added); Doc. 157, at 2.

149 BOE Br., at 21 (relying on the BOC's expert's opinion); *id*. at 36-40.

150 *Id*. at 21-22; 38-39.

151 In *Georgia v. Ashcroft*, the Supreme Court accepted Georgia's figures which included "those people who self-identify as both black and a member of another minority group, such as Hispanic." 539 U.S. 461, 474 n.1, 123 S. Ct. 2498, 2508 n.1 (2003) (O'Connor, J.). Justice O'Connor, writing for the Court, stated that in voting rights cases in which African Americans are the only minority group whose exercise of the franchise is at issue, "we believe it is proper to look at *all* individuals who identify themselves as black." (Emphasis in the original). *See also Pope v. Cnty. of Albany*, 687 F.3d 565, 577 n.11 (2d Cir. 2012) (where a single minority group's

lead, the Georgia General Assembly in 2011 used this more informative category to produce reports for legislative redistricting.[152] The Department of Justice also uses the "Any-Part" Black category.[153] And in this case, every one of the "principal plans at issue," as identified by the BOE, namely the BOE Plan, the Commissioners' Plan, Plaintiffs' Illustrative Plan, *and* the Court-Drawn Remedial plan, have used the more informative "Any-Part" Black category.[154]

Moreover, Plaintiffs' Illustrative Plan does not contain a coalition of aggregated groups of color for purposes of forming a district in which Black voters in District 5 comprise the majority of the VAP. On this point, the BOE's reliance on *Pope*,[155] *Badillo v. City of Stockton*[156] and *Broward Citizens for Fair Districts v.*

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voting effectiveness is at issue, it is appropriate to count all individuals who consider themselves Black, so long as the same measure is used consistently by the plaintiff).

Given this precedent, the BOE's reliance on *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 642 n.21 (D.S.C. 2002) is misplaced. In *Colleton*, the district court used the "black only" single race category in applying *Gingles*, noting that, unlike in the instant case, the parties differed in their use of categories of analyzing the Black population, and that the categories ultimately had an "insignificant impact on the analysis before the court."

[152] Doc. 54-2, at 13 n.4.

[153] *Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act; Notice 76*, Dep't of Justice, 7472 (Feb. 9, 2011), http://www.justice.gov/crt/about/vot/sec_5/sec5guidance2011.pdf.

[154] BOE Br., at 13.

[155] 687 F.3d. at 572 n.5 (plaintiffs bear the burden of establishing political cohesiveness of minority groups aggregated in coalition district for purposes of establishing *Gingles* one).

[156] 956 F.2d 884, 887, 890-91 (9th Cir. 1992) (in a Section 2 case, *prior to the 2000 Census changes providing for Any-Part Black category*, relying on 1980 Census data for the percentage of Black and Hispanic VAPs in proposed redistricting plan, to find that plaintiffs failed to

Broward County[157] is misplaced, as those cases involved districts in which two distinct groups of color combined to create a majority-minority district to satisfy *Gingles* one.

Here, Plaintiffs' Illustrative Plan includes Black voters (*i.e.*, all voters who identify Black, including Black-Hispanic voters) in Plaintiffs' District 5, whose political cohesion Plaintiffs have demonstrated under *Gingles* two and is uncontested by Defendants.[158] In other words, District 5 does not require the addition of the separate category of Hispanic *only* voters, who may or may not be politically cohesive with the "Any-Part" Black VAP, to reach the 50 percent threshold required by *Gingles* one. For that reason, Plaintiffs' District 5 is an *opportunity district*, not, as in the inapposite cases on which the BOE relies, a *coalition district*.

In any event, the "Any-Part" Black population in District 5 in Plaintiffs' Illustrative Plan and the Court-Drawn Remedial Plan satisfy *Gingles* one under the Supreme Court's straightforward guidance in *Bartlett v. Strickland*, which requires

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establish that Black and Hispanic voters were politically cohesive when combined or considered separately).

[157] No. 12-60317-CV, 2012 WL 1110053, at **4-6 (S.D. Fla. 2012) (with respect to a Section 2 claim, *following the 2000 Census changes providing for Any-Part Black category*, questioning whether plaintiffs can establish *Gingles* one without alleging a coalition district between two minority groups, African American and Hispanic voters and, if so, requiring that plaintiffs demonstrate political cohesion between the two groups).

[158] Vol. I, 152, at 43-44; BOE Br., at 37, 39.

a "numerical, working majority,"[159] which at 50.22 percent and 50.13 "Any-Part" Black, Plaintiffs' Illustrative Plan and the Court-Drawn Remedial Plan, respectively, satisfy. In underscoring the purpose behind the bright-line rule, *Bartlett* expressly rejected a standard that would require courts to ask, "What are the historical turnout rates among white and minority voters and will they stay the same?"[160]

By this language, the Supreme Court has foreclosed the BOE's argument that Plaintiffs must prove that on election day "eligible" Black voters will be a majority.[161] The BOE's argument also is antithetical to other holdings of the Supreme Court that provide that Section 2 protects the *potential* to elect,[162] and does not require a proof that Black voters will win, and that Black voters like all others are subject to the necessity to "pull, haul and trade" for votes.[163]

Because District 5 in Plaintiffs' Illustrative (and the district in the Court-Drawn Remedial district) are above 50 percent in "Any-Part" Black VAP, they meet the Section 2 standard.

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159 556 U.S. 1 12, 129 S. Ct. 1231, 1242 (2009).

160 *Id*. at 17; Doc. 125, at 7 n.2.

161 BOE Br., at 35-39.

162 *See Gingles*, 478 U.S. at 50 n.17, 106 S. Ct. at 2766 (emphasis in original).

163 *De Grandy*, 512 U.S. 997, 1020; 114 S. Ct. 2647, 2662 (1994).

C. The Court-Drawn Plan Also is a Legally Acceptable Remedy.

Following the February 18, 2014 hearing, the District Court entered a detailed 37-page order that clearly set forth the standards that guided its independent advisor in the remedial redistricting, which included: (1) "fashion[ing] the relief so that it completely remedies" the Section 2 violation by creating a single-member plan with a majority-minority district comprised of an "Any-Part" Black (Black alone or in combination) VAP that is more than 50 percent; (2) narrowly tailoring that relief so as to be compliant with the one person, one vote guarantee of the Equal Protection Clause by creating a plan with a small population deviation of less than ten percent; (3) complying with the VRA, specifically Sections 2 and 5; (4) following traditional redistricting principles—maintaining communities of interest, traditional boundaries, geographical compactness, contiguity, minimizing splits of political subdivisions,[164] and, to a lesser extent, protecting incumbents[165]—recognizing that the requirements of the Constitution

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[164] In its remedial order, the District Court acknowledged that in its role in redistricting it "'should be guided by the legislative policies underlying a prior plan—including an unenforceable one—'to the extent those policies do not lead to violations of the Constitution or the [VRA].'" Vol. I, 179, at 2 (citing *Abrams v. Johnson*, 521 U.S. 74, 79, 117 S. Ct. 1925, 1930 (1997) (internal quotation marks omitted); *id*. at 14.

[165] Vol. I, 179, at 13 (recognizing that Georgia courts routinely treat incumbent protection as a "distinctly subordinate consideration" to the other traditional redistricting principles).

and VRA have more precedence; and (5) avoiding race as the predominate factor.[166]

While the BOE claims that the Court-Drawn Remedial Plan contains some "confusing parameters,"[167] the BOC conceded that it "appears to defer to the BOC and BOE [County] 'policy decisions' to some degree,'"[168] and while it considers race, it also appears to comply with traditional redistricting principles and constitutional and statutory requirements for remedial redistricting,[169] with the District Court having "determined that such racial focus is appropriate and necessary to comply with Section 2."[170]

In light of the nature of the violation, and the record established by Plaintiffs, the District Court's remedy was appropriate.

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166 *Id*. at 3-4, 6-8, 10-11, 14.

The District Court explained that "race was a factor in creating the remedial plan, specifically the majority-minority district" because "whenever a majority-minority district is intentionally created . . . there is a race-related goal: achieving a minority voting-age population for that district of more than 50 percent." Vol. I, 179, at 17. The District Court further clarified that "a plan drawn with an awareness of race or a race-related goal is not per se unconstitutional. This is because '"a [plan-creator] may be conscious of the voters' races without using race as a basis for assigning voters to districts."' *id.* (citing *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899, 905, 116 S. Ct. 1894, 1900 (1996).

167 BOE Br., at 34.

168 Vol. I, 179, at 9; *id*. at 29-30.

169 Doc. 175, at 7-9.

170 *Id*. at 9.

III. The District Court Properly Granted Summary Judgment Against the BOE.

The District Court properly granted summary judgment against the BOE for several reasons. *First,* in accord with Fed. R. Civ. P. 56(a), Plaintiffs properly moved for summary judgment on their one and only claim in this case: that Fayette's use of at-large voting violated Section 2.[171] Plaintiffs did not move for summary judgment specifically against the BOE because, as they noted in their briefing, they were awaiting the District Court's certification of their appeal to this Court concerning the District Court's denial of their attempts to settle with Plaintiffs following the BOE's admission of Section 2 liability. The District Court ultimately denied that certification and, simultaneously, those parties' request for extended discovery. Unable to settle, the BOE became inactive, failing to move for summary judgment against Plaintiffs, or even join in on the BOC's summary judgment motion. If the BOE wished to mount a defense, it took no action to do so.

Second, Fed. R. Civ. P. 54(f) does not require the District Court to provide formal notice to the BOE that it was considering granting summary judgment against them. The instant case is analogous to other decisions in this Circuit that have determined that summary judgment is appropriate, without formal notice

[171] The BOE's recitation of Fed. R. Civ. P. 56(a) contains an error. BOE Br., at 45 (reciting that "a party moving for summary judgment must do so by 'identifying each claim or defense—or the part [*sic*] [rather than party] of each claim or defense—on which summary judgment is sought.'").

where, as here, a legal issue has been fully developed, and the evidentiary record, is complete.[172] Indeed, Plaintiffs and the BOC engaged in many rounds of briefing on the legality of Plaintiffs' Illustrative Plan as appropriate for establishing *Gingles* one and as a potential remedy under *Nipper v. Smith*.[173]

The BOE argues that the District Court used the BOE's concession of liability in the rejected amended consent decree to override the notice provision of Fed. R. Civ. P. 56(f).[174] Contrary to the BOE's position, the District Court's order did not adopt parts of the amended consent decree (*i.e.*, the admission of liability) and discard the remainder (*i.e.*, the BOE Plan); it rejected the decree in its entirety.[175] The holdings of the District Court on Plaintiffs' proof of a Section 2

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172 *See, e.g., Artistic Entmt't, Inc. v. City of Warner Robins*, 331 F.3d 1196, 1201-02 (11th Cir. 2003) (per curiam) (summary judgment was proper without formal notice to party because district court "had all the information necessary to rule on the legal issues" and appellate court was "convinced that the outcome would not have been different" if district court had formally noticed the party); *Jones v. Fulton Cnty., Ga.*, 446 F. App'x 187, 189-90 (11th Cir. 2011) (affirming district court's grant of summary judgment without formal notice in favor of moving party based on a reason that that party did not argue in their summary judgment motion and where non-moving party failed to identify different or relevant evidence to undermine district court's summary judgment determination); *Restigouche, Inc. v. Town of Jupiter*, 59 F.3d 1208, 1213 (11th Cir. 1995) (finding on appeal that even if district court provided insufficient notice that it was taking summary judgment under advisement, *de novo* review of appellant's supplemental materials did not change outcome of summary judgment, where appellant had "ample opportunity to marshal facts and arguments, and does not assert on appeal that there exists additional evidence, beyond the record and the proffered supplemental material, which would create material issues of fact").

173 39 F.3d 1494, 1511 (11th Cir. 1994).

174 Vol. I, 152, at 10; BOE Br., at 46-50.

175 BOE Br., at 48. Thus, the BOE's reliance on *U.S. v. Brennan*, 650 F.3d 65, 118 (2d Cir. 2011), *U.S. v. City of Hialeah*, 140 F.3d 968, 984 (11th Cir. 1998), and *U.S. v. City of Miami*,

violation stand on their own. And the holdings of the District Court were fully applicable to the BOE and did not depend on the BOE's position when it attempted to settle with Plaintiffs.

For their part, the BOE cites cases that are inapposite here concerning the District Court's obligation to give formal notice under Fed. R. Civ. P. 56(f) prior to granting summary judgment: (1) for a nonmonvant; *or* (2) on a ground not raised by a party; *or* (3) after identifying for the parties undisputed material facts. In one of those cases, *Byars v. Coca-Cola Co.*, an appellant challenged the district court's grant of summary judgment against her on a ground not raised by *any* of the parties in cross-moving for summary judgment and without providing the parties notice that it intended to address this claim not briefed on summary judgment.[176] Of course, this case, like the others on which the BOE relies, are clearly distinguishable from the facts at issue in this case. Here, the District Court granted summary judgment on the very ground, *i.e.*, the Section 2 claim, raised by both parties in cross-moving.

Fla., 664 F.2d 435, 440 (5th Cir. 1981), for the proposition that district courts may not give effect to parts of a proposed consent decree that diminish the legal rights of an objecting party, has no application in this case.

[176] 517 F.3d 1256, 1264 (11th Cir. 2008).

For similar reasons as in *Byars*, *Imaging Bus. Machs., LLC. v. BancTec, Inc.*, is distinguishable from this case. 459 F.3d 1186, 1191 (11th Cir. 2006). There the district court granted summary judgment *sua sponte* to claims not raised, and therefore not briefed, by the parties, unlike the well-briefed and only Section 2 claim at issue in this case at hand.

Unlike in *Byars*, where: (1) the amended complaint was ambiguous on the ground/claim the district court ultimately addressed *sua sponte*; (2) the summary judgment papers indicated that the parties were not seeking judgment on the ground/claim the district court ultimately addressed; and (3) supporting evidence demonstrated that the appellant did not know that she was litigating on those grounds.[177] Here, the BOE clearly understood the litigation at hand and the potential outcome of the District Court's consideration of Plaintiffs' and the BOC's cross-movement for summary judgment on Plaintiffs' Section 2 claim. Indeed, the BOE indicated early on its understanding of the potential impact on the BOC of Plaintiffs resolving the Section 2 claim against it, acknowledging that:

> [t]here is some irony to the [the BOC's] objection to the Consent Decree . . . as part of the reason the [BOE was] reluctant to stipulate to a Section 2 violation *was the potential effect on the [BOC's] position*.[178]

Similarly, *Karlson v. Red Door Homes, LLC,* another case on which the BOE relies, also is inapposite. In *Karlson*, without providing *any* notice to the parties, the district court granted summary judgment *sua sponte* in favor of the moving party on a claim that the moving party *had not raised on summary judgment.*[179] Here, however, the BOE was on more than aware of Section 2 claim being adjudicated by the District Court, as it was Plaintiffs only claim, and the

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177 517 F.3d at 1265.

178 Doc. 43, at 3 n.3 (emphasis added).

179 553 F. App'x 875, 877 (11th Cir. 2014).

nature of the proceedings made clear that the District Court could grant summary judgment against it *and* the BOC.

Consistent with its financial concerns that led the BOE to attempt settlement, the BOE intentionally did not participate in the discovery and summary judgment proceedings. To be sure, taking an inactive role has consequences for the BOE in this litigation. The BOE was certainly aware of all of the proceedings, and was also aware that given the parallels of the two challenged entities, both boards having five members elected at-large, the evidence about whether the election structures for each violated Section 2 would be largely the same. It would have been extraordinary if the District Court had ruled for one Defendant and against the other. In reality, the BOE should have expected that if the District Court ruled for Plaintiffs, the decision also would apply to the BOE. And, there is no doubt that if the BOC had won, the BOE would have sought to have that ruling apply to it as well.

Conversely, if the District Court had limited its ruling to just the BOC, it is very likely that the District Court would have looked favorably on Plaintiffs seeking to have the order extended to the BOE. As a practical matter, no court would be likely to grant summary judgment against a county commission and then want the board of education to proceed to trial when vote dilution in the identical electorate is the issue in the interest of saving judicial resources. The BOE

knowingly allowed the BOC to take the laboring oar, a conscious decision made with entirely foreseeable consequences. They took the risk and now seek to avoid the consequences. Their argument should be rejected.

IV. Under the "Totality of the Circumstances," Plaintiffs Demonstrated that the Defendants' At-Large Electoral Method Violated Section 2.

Having determined that the Plaintiffs met the three *Gingles* preconditions, the District Court turned next to whether Plaintiffs' evidence showed that the "totality of the circumstances" demonstrated vote dilution. The District Court recognized that "it will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of Section 2 under the totality of the circumstances."[180] This, as the District Court held, is not that rare case.

The totality of the circumstances analysis is a consideration of whether "minorities have been denied an 'equal opportunity' to 'participate' in the political process and to elect representatives of their choice.'"[181] The totality of the circumstances analysis involves a "searching practical evaluation of the 'past and present reality,'"[182] based on an examination of the Senate Factors.[183.] The Senate

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180 Vol. I, 152, at 44-45; *De Grandy*, 512 U.S. at 1009-12, 114 S. Ct. at 2656-57; *Nipper*, 39 F.3d at 1513-14.

181 *Abrams*, 521 U.S. at 91, 117 S. Ct. at 1936 (quoting 42 U.S.C. § 1973(b)).

182 *Gingles*, 478 U.S. at 45, 106 S. Ct. at 2763 (internal citation omitted).

Factors, which are not exhaustive, do not require Plaintiffs to prove a majority of those factors or even any particular number of them.[184] As the District Court recognized, however, "the most important" Senate Factors at issue in this vote dilution case "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.'"'[185]

The evidentiary record on the Senate Factors made summary judgment against the BOE and BOC appropriate. Here, it is undisputed that, no Black person has ever been elected to the BOE and BOC, and that RPV exists in elections for the BOE and BOC. Based on the "heavy weight of those two factors," along with the other factors that weigh in Plaintiffs' favor discussed in turn below, "and having conducted a 'searching practical evaluation of the past and present reality,'" of Fayette's challenged at-large electoral method, the District Court held that Black voters '"have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."'[186] Thus, the District Court concluded, "the Court is satisfied that 'under the totality of the

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183 *Id*. at 44-45.

184 Vol. I., 152, at 6-8 (citing *Gingles*, 478 U.S. at 44-45, 106 S. Ct. at 2763-64).

185 *Id*. at 78.

186 *Id*. at 79 (citing 42 U.S.C. § 1973(b))

circumstances, [African-Americans in Fayette are] denied meaningful access to the political process on account of race or color."'[187]

V. The District Court Held that Four Senate Factors (1, 2, 3, 7) Applicable to the BOE Weighed in Plaintiffs' Favor, Including Two Key Senate Factors (2 and 7).

1. RPV (Senate Factor 2) and Election of African-Americans (Senate Factor 7)

No party in this case has disputed that the two most critical Senate Factors, 2 and 7, weigh in Plaintiffs' favor, as "no African-American has ever been elected to the BOC or BOE and that voting in Fayette County is racially polarized in BOC and BOE elections."[188]

As the District Court held, it is precisely because Fayette's at-large electoral method interacts with RPV that Plaintiffs have *never* been able to elect a candidate of their choice to the BOE or BOC.[189] Based on Plaintiffs' demonstration of these two factors alone, the District Court appropriately could have held that "under the totality of the circumstances, [African-Americans in Fayette] are denied meaningful access to the political process on account of race or color."[190]

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187 *Id*. at 80 (citing *Nipper*, 39 F.3d at 1524).

188 *Id*. at 79; *Gingles*, 478 U.S. at 45, 106 S. Ct. at 2763 ("[t]he extent to which minority group members have been elected to public office in the jurisdiction" is one of the most important Senate Factors); *Nipper*, 39 F.3d at 1533 (RPV is the essence of a vote dilution claim).

189 Vol. I, 152, at 53-54, 66-67.

190 *Id*. at 79-80; *id*. at 64, 78-79 (District Court citing cases in which one of these factors alone, or together, were sufficient to satisfy totality of the circumstances analysis).

The District Court, however, evaluated multiple other Senate Factors over more than 30 pages in its summary judgment order, and expressly held that two additional Senate Factors, as applicable to the BOE and BOC, weighed in Plaintiffs' favor.[191]

2. Past Discrimination and Its Lingering Effects (Senate Factor 1)

In addition to Senate Factors 2 and 7, the District Court also held that Senate factor 1 weighs in Plaintiffs' favor based on Georgia's undisputable history of *de jure* racial discrimination, including its use of at-large electoral method in hundreds of jurisdictions to minimize the voting strength of voters of color, and ensure that these communities could not elect their preferred candidates of choice.[192]

The District Court recognized that Plaintiffs were not required to proffer evidence of discrimination specific to Fayette,[193] and ultimately concluded that this factor, though "not heavily[,] supports" a Section 2 finding.[194]

3. Election Practices that Enhance Discrimination (Senate Factor 3)

In addition to Senate Factors 1, 2, and 7, the District Court also held that Senate factor 3, involving the extent to which Fayette uses multiple election

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191 Doc. 161, at 16-17; Vol. I, 152, at 44-80.

192 Vol. I, 152, at 52.

193 *Id*. at 50 (citing *Dillard v. Crenshaw Cnty*., 649 F. Supp. 289, 294 (M.D. Ala. 1986); *Sierra v. El Paso Indep. Sch. Dist*., 591 F. Supp. 802, 807 (W.D. Tex. 1984)).

194 *Id*. at 52.

practices—(1) numbered posts, (2) residency requirements, (3) staggered terms, *and* (4) a majority-vote requirement—that enhance the discriminatory nature of the County's at-large voting scheme, *weigh heavily* for Plaintiffs.[195]

In particular, the District Court held that both Defendants use staggered terms, numbered posts, residency requirements, and a majority-vote requirement in its elections.[196] The District Court recognized that "[b]y virtue of dividing the election of commissioners into individual elections, these devices increase vote dilution."[197]

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In sum, the District Court held that four factors, including the two most critical factors, applicable to the BOE weighed in Plaintiffs' favor *after* having conducted its thorough review of the totality of the circumstances evidence.[198] That analysis properly pointed the District Court to find that Black voters in Fayette have less of an opportunity to participate equally in the political process.[199]

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195 *Id*. at 54, 59; Doc. 161, at 17.

196 Vol. I, 152, at 57.

197 *Id*.

198 *Id*. at 79-80.

199 *Id*.

CONCLUSION

For the foregoing reasons, Plaintiffs–Appellees respectfully request that this Court affirm the District Court's judgment.

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Respectfully submitted,

s/ *Leah C. Aden*
Ryan P. Haygood
Natasha M. Korgaonkar
Leah C. Aden
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
40 Rector St., 5th Floor
New York, NY 10006
Telephone: (212) 965-2200
Facsimile: (212) 229-7592
laden@naacpldf.org

Neil Bradley
Georgia Bar No. 075125
3276 Wynn Drive
Avondale Estates, GA 30002-1647
Telephone: (404) 298-5052
neil.bradley.ga@gmail.com

Attorneys for Plaintiffs-Appellees

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(B), the undersigned counsel certifies that this brief complies with the type-volume limitations because it contains 13,989 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii). This brief also complies with the typeface and style format requirements of FRAP 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2003 and is typed in 14 point Times New Roman Font.

This 26th day of June, 2014.

/s/ *Leah C. Aden*
Leah C. Aden
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
40 Rector St., 5th Floor
New York, NY 10006
Telephone: (212) 965-2200
Facsimile: (212) 229-7592
laden@naacpldf.org

Attorney for Plaintiffs/Appellee

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GEORGIA STATE CONFERENCE OF THE NAACP, *et al*.,	)	
PLAINTIFFS–APPELLEES,	)	APPEAL No. 14-11204-FF
v.	)	
FAYETTE COUNTY BOARD OF COMMISSIONERS, *et al*.,	)	
DEFENDANTS–APPELLANTS.	)	

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **BRIEF OF PLAINTIFFS-APPELEES' GEORGIA STATE CONFERENCE OF THE NAACP ET AL.**, with the Clerk of the Court using the CM/ECF system which will automatically send e-mail notification to all counsel of record, including:

David F. Walbert
Phillip Leroy Hartley
J. Matthew Maguire, Jr.

Counsel for BOE Defendants-Appellants

This 26th day of June, 2014.

/s/ *Leah C. Aden*
Leah C. Aden
NAACP LEGAL DEFENSE &
EDUCATIONAL FUND, INC.
40 Rector St., 5th Floor
New York, NY 10006

Telephone: (212) 965-2200
Facsimile: (212) 229-7592
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Attorney for Plaintiffs/Appellee