APPEAL NO. 14-11202-FF

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

v.

FAYETTE COUNTY BOARD OF COMMISSIONERS, *et al.*

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

REPLY BRIEF OF APPELLANTS/COUNTY DEFENDANTS

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, counsel for Defendants/Appellants Fayette County Board of Commissioners; Steve Brown, David Barlow, Allen McCarty, Charles Oddo, and Randy Ognio, in their official capacities; Fayette County Board of Elections and Voter Registration; and Tom Sawyer, in his official capacity ("County Defendants"), hereby certifies that, except as provided below, the individuals named in the briefs of County Defendants/Appellants and Plaintiffs/Appellees is a complete list of the trial judge(s), attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case or appeal, including subsidiaries, conglomerates, affiliates and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party.

The following individuals are misidentified in Plaintiffs' Certificate:

Oddo, Charles – BOC Defendant/Appellant

Ognio, Randy – BOC Defendant/Appellant

In addition, the following attorney for Plaintiffs was omitted from Plaintiffs' certificate:

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Date: July 11, 2014.

Respectfully submitted,

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INTRODUCTION

The District Court erred in concluding that Section 2 of the Voting Rights Act requires Fayette County to abandon at-large voting. The NAACP's response brief—while parroting the decision—does not support its affirmance. The fact remains that there are not enough African-Americans who live in a geographically compact area of Fayette County to require the creation of a majority-minority district. Therefore, the first prong of *Gingles* is not met.

The NAACP utilized a mapdrawing technique that unlawfully used race as the predominate factor and a method of counting that combined minority voters of different races even though there was no evidence of political cohesion. Even with the unlawful use of race and the improper counting, the resulting district is still only 35 people over a majority.

Even if this Court concludes that the use of racial predominance and the grouping of voters who have not been shown to be politically cohesive will suffice to meet the first prong of *Gingles*, the District Court still erred in granting summary judgment to the NAACP and denying it to County Defendants because the evidence did not demonstrate that the racial bias of Fayette County dilutes African-American voting strength.

The evidence showed that County Defendants were entitled to summary judgment on the NAACP's Section 2 claim. For that reason, the District

Court's decision should be reversed and judgment entered for County Defendants. At the very least, as the NAACP concedes, there is a material fact in dispute, and so the decision should be reversed and remanded for trial.

REPLY TO STATEMENT OF THE CASE

I. Reply to Statement of Facts.

As an initial matter, the NAACP's contention that County Defendants "did not offer any contrary evidence on the totality of the circumstances standard"[1] is completely incorrect. In response to the NAACP's summary judgment motion, County Defendants produced and relied upon a significant amount of evidence showing that the totality of the circumstances test weighed in their favor .[2]

In its Statement of Facts, the NAACP also continues to tell only part of the story about electoral success by African-Americans in the county.[3] African-Americans constituted only approximately 5% of the total population of Fayette County at both the 1980 and 1990 Censuses.[4] Even after steady growth to 11% in 2000, the 2010 African-American population was still just 19.8% of

[1] Brief of Plaintiffs-Appellees ("NAACP Brief") at 10.

[2] [140, pp. 21-53].

[3] NAACP Brief, pp. 9-10.

[4] [Vol. I, 110-12, p. 6].

the total population of Fayette County.[5] Despite its relatively low minority population, Fayette County has elected an African-American judge countywide, and the City of Fayetteville elected an African-American to its city council in 2011, as the District Court recounted.[6]

In describing a 2006 special election in which a white candidate succeeded, the NAACP omits significant information from the record.[7] There was extremely low turnout for the election.[8] Furthermore, the evidence showed reasons for the defeat of the African-American candidates that were unrelated to their race. Emory Wilkerson, one of the African-American candidates who was the then-vice chair of the local Republican Party, had previously run for office from as a Democratic and Republican candidate.[9] Two of the other African-American candidates, Malcolm Hughes and Charles Rousseau, did not campaign or show up for events.[10]

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[5] *Id.*

[6] [Vol. III, 152, p. 14].

[7] NAACP Brief, p. 9.

[8] Fayette County Election Summary Report, p. 1 *at* http://www.fayettecountyga.gov/elections/pdf/POST1_GEMS_SUMMARY_REPORT.pdf (March 22, 2006) (8.37% turnout).

[9] [Vol. II, 140-6, pp. 52:12-23, 53:17-21]

[10] [Vol. II, 140-6, pp. 53:22-54:2, 76:6-10].

The evidence also showed that Robert Horgan, the winner of the election whom the NAACP dismisses as "a newly registered voter and mechanic," owned his own small business in Fayetteville, was endorsed by the then-Sheriff (a popular elected official), and was more qualified than the other candidates.[11] However, the NAACP and the District Court ignore or discount evidence that Horgan's success was due to nonracial reasons. In its response brief, the NAACP also fails to mention that no African-American candidate has run for the Board of Commissioners following that 2006 special election[12] or that Horgan was later defeated in an at-large election.[13]

In their Statement of Facts, the NAACP offer charts purporting to compare various plans, but the incompleteness of the charts make them of little or no assistance to this Court. The first chart[14] provides only limited information about each plan that was in the expert reports. In addition, the

[11] [121, p. 66:7-17]; [115, p. 49:9-16]; [120, pp. 24:6-25:6].

[12] [Vol. III, 152, p. 13].

[13] Fayette County Election Summary Report Official and Complete, p. 4, CC P1-R *at* http://www.fayettecountyga.gov/elections/archives/070312ELECTION-SUMMARY-REPORT.pdf (August 3, 2012).

[14] NAACP Brief, p. 8.

first chart includes the Hypothetical Plan, which all parties agreed was not a valid remedy and thus provides no useful information.[15]

The second chart[16] offers no insight about the various remedial plans. Instead, the chart only reinforces the point made by County Defendants: there simply is not more than one way to draw a majority-minority district because there is not enough of a concentrated community of African-Americans in Fayette County. The statistics are similar because the plans have to be similar in order to include a "district" that is over 50% minority *population* using "Any Part" Black.

The NAACP's statement that no party objected to the remedial plan is also incorrect. County Defendants objected to the District Court's remedial plan for the very reasons outlined in this appeal.[17] Further, the accommodation of County policy referenced in County Defendants' remedial pleadings was simply preservation of incumbents. Contrary to the NAACP's unsupported assertions, County Defendants have *never* said it is possible to draw a plan that

[15] Brief of Appellants/County Defendants ("County Brief"), pp. 41-42

[16] NAACP Brief, p. 14.

[17] [175, p. 2].

is explained by traditional redistricting principles while also creating a majority-minority district.[18]

The NAACP also appears to place great weight on the standards that it believes guided the District Court's technical advisor, but neither the NAACP nor County Defendants can say what for certain guided that advisor. The District Court insulated the advisor from discovery and cross-examination.[19] Further, County Defendants' expert confirmed that the boundary segment analysis of the court-drawn plan matched the Illustrative Plan: whenever a precinct is split, both plans always *include* blocks with more African-American population and always *exclude* blocks with more white population.[20]

ARGUMENT AND CITATIONS OF AUTHORITY

In their response brief, the NAACP mostly parrots the District Court's decision, rarely refuting County Defendants' arguments explaining why that decision should be reversed. Like the District Court, the NAACP completely ignores the boundary segment analysis which shows that, without exception, every single precinct split on the Illustrative Plan was based on racial considerations. The NAACP never attempts to respond to County Defendants'

[18] [175, p. 9].

[19] [Vol. III, 170, p. 2].

[20] [175, pp. 5-7].

arguments about a case the District Court considered critically important: *Davis v. Chiles*.[21] The NAACP never explains how this Court should handle the fact that the evidence of racial predominance before the District Court was almost identical to the evidence before the Supreme Court in *Hunt*.

This Court must conduct a *de novo* review of the findings of fact and conclusions of law made by the District Court and determine if the lower court correctly granted summary judgment to the NAACP and correctly denied summary judgment to County Defendants.[22] The NAACP offers little or no counterargument to the issues raised by County Defendants to assist this Court in that process.

Apparently unable to rebut County Defendants' legal arguments, the NAACP resorts to unnecessarily inflammatory language. For example, the NAACP's opening comment that Fayette County relies "on at-large voting to maintain a racially segregated BOC and BOE,"[23] is completely incorrect. The

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[21] 139 F.3d 1414 (11th Cir. 1998).

[22] The NAACP agrees with this standard of review. NAACP Brief, p. 17. While some cases indicate that findings of vote dilution are accorded more deference on appeal, those cases all involved such findings made after a trial. *See Solomon v. Liberty County Commissioners*, 221 F.3d 1218, 1226-1228 (11th Cir. 2000) (en banc); *Negron v. City of Miami Beach, Florida*, 113 F.3d 1563, 1566 (11th Cir. 1997); *Meek v. Metro. Dade Cnty.*, 908 F.2d 1540, 1544 (11th Cir. 1990). This appeal of the grant of summary judgment requires *de novo* review.

[23] NAACP Brief, p. 18.

District Court specifically found that the policy reasons behind the County's use of at-large voting—none of which were racial—were genuine and not tenuous.[24] Similarly, despite the fact that at-large systems are not *per se* discriminatory or unconstitutional,[25] the NAACP makes the claims that, over time, Fayette County failed to adopt a "racially fair electoral method."[26]

Section 2 precedent makes clear that the law is designed to prohibit vote dilution, not to achieve minority vote maximization. As the Supreme Court noted,

> The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives.[27]

However, under the District Court's interpretation of Section 2, the statute no longer concerns structures that interact with historical conditions to cause inequality—true vote dilution. Instead, Section 2 must be read to mandate that every possible minority voter be put together to achieve a "district" of over 50% minority population and thereby force the creation of a district-based

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[24] [Vol. III, 152, pp. 74-75].

[25] *U.S. v. Dallas County Commission, Dallas County, Ala.*, 850 F.2d 1433, 1438 (11th Cir. 1988).

[26] NAACP Brief, p. 3.

[27] *Thornburg v. Gingles*, 478 U.S. 30, 47, 106 S. Ct. 2752, 2764 (1986).

system, even when the jurisdiction has a reasonable, non-discriminatory basis for continuing its at-large system.

The District Court's decision mandates a dramatic return to a Section 2 interpretation that requires the drawing of every mathematically possible majority-minority district—even districts with just one person more than 50%. The NAACP does not back away from or even attempt to modify the District Court's return to that Section 2 interpretation and NAACP offers no alternative this return of "max black" districting.

I. County Defendants' Appropriate Concession of *Gingles* Prongs Two and Three is Not Fatal to County Defendants' Case.

As its first argument, the NAACP raises a puzzling and legally incorrect argument that it did not present to the District Court. In the District Court, County Defendants appropriately conceded the existence of the second and third *Gingles* prongs, arguing only that the first prong had not been met and that the totality of the circumstances test did not weigh in the NAACP's favor. In its response brief to this Court, the NAACP argues that the County Defendants concession that the second and third prongs are met is fatal to their defense of this case.[28] As a matter of law, the NAACP is wrong.

[28] NAACP Brief, p. 23.

To support its new contention, the NAACP cites a single case, *U.S. v. Marengo County Commission.*[29] In that 1984 case, this Court considered a Section 2 vote dilution case *prior* to the Supreme Court's 1986 decision in *Gingles*, which explained the three prongs. Therefore, in *Marengo County*, this Court looked exclusively at the Senate factors but did not have the benefit of the *Gingles* preconditions.[30] The NAACP attempts to transform language from *Marengo County's* discussion about racial polarization in the totality of the circumstances analysis into a new "keystone" position as part of the three *Gingles* prongs, something for which *Marengo County*—decided before *Gingles*—does not and cannot possibly stand.

As *Gingles* clearly recognizes, the first prong is crucial to a plaintiffs' case. As is the case in Fayette County, if minority voters are not a sufficiently large and geographically compact enough community to constitute a majority, "the [at-large] form of the district cannot be responsible for minority voters' inability to elect its candidates."[31] The Supreme Court further explained in a footnote:

> Thus, if the minority group is spread evenly throughout a multimember district . . . these minority voters cannot maintain that they would have

[29] 731 F.2d 1546 (11th Cir. 1984).

[30] *Id.* at 1565-1566.

[31] *Gingles*, 478 U.S. at 50.

> been able to elect representatives of their choice in the absence of the multimember electoral structure.[32]

Furthermore, as the Supreme Court recognized in *Bartlett* and *LULAC,*[33] conceding the second and third prongs of *Gingles* is not fatal to County Defendants' defense. Instead, "the failure to establish the first *Gingles* factor—the availability of a remedy—*is fatal to a plaintiff's section 2 claim*."[34] In fact, this Court often ends its analysis of a Section 2 claim after plaintiffs fail to demonstrate the first prong of *Gingles*, even when the second and third prongs are found to exist.[35]

If the underlying minority community were geographically compact and sufficiently numerous to comprise a majority-minority district and could be explained by traditional redistricting principles in addition to race, County Defendants would not object to a district voting scheme.[36] However, the NAACP refuses to accept the difference between using race as *one* of many

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[32] *Id.* at 50 n.17.

[33] *Bartlett v. Strickland*, 556 U.S. 1, 12, 129 S.Ct. 1231 (2009); *LULAC v. Perry*, 548 U.S. 399, 427, 126 S.Ct. 2594 (2006).

[34] *Burton v. City of Belle Glade*, 178 F.3d 1175, 1199 (11th Cir. 1999) (emphasis added).

[35] *See, e.g., Johnson v. DeSoto Cnty. Bd. of Comm'rs*, 204 F.3d 1335, 1343 (11th Cir. 2000); *Burton*, 178 F.3d at 1199; *Brooks v. Miller*, 158 F.3d 1230, 1240 (11th Cir. 1998); *Negron*, 113 F.3d at 1567.

[36] County Brief, pp. 17, 43-44.

factors considered in drawing a district and using race as *the* only explanation for the boundaries. The former is legally allowable. The latter either shows the underlying community is not geographically compact for Section 2 purposes or violates the Equal Protection clause.[37]

In essence, the NAACP proposes to manufacture a community through race-based redistricting, with the only commonality being the color of the voters' skin. The issue here is whether the NAACP's manufactured "community" can support the first prong. Contrary to the NAACP's claim, a concession that the second and third *Gingles* prongs are met does not eliminate the need to establish that the first prong is also met and has no bearing on whether the District Court should be reversed.

II. The Minority Community in Fayette County is Not Sufficiently Numerous.

The NAACP next claims that 35 people over a majority is "sufficiently numerous" for purposes of *Gingles*. Other than making that claim, the NAACP does not respond effectively to any of County Defendants' arguments on this topic.

As County Defendants explained in their initial brief, *Bartlett* had nothing to do with how much over 50% minority population was required in a

[37] *Id.*, pp. 43 *et seq*.

Section 2 case because all the *Bartlett* parties agreed that even 50% was not met with a single race.[38] In response to County Defendants pointing that all the cases cited by the District Court as adopting a "bright line 50% standard" did nothing of the sort, the NAACP simply cites the same cases without explaining how those cases refute County Defendants' position.[39] Furthermore, the NAACP continues to cite a case for the proposition that it adopts a 50% bright line rule, despite County Defendants pointing out that the case found exactly the opposite, *i.e.*, that a 50.3% district was *not* enough to be an effective voting majority.[40]

The NAACP's claims that County Defendants conceded various points regarding the 50% number are both inaccurate and misleading. Regarding the claim that County Defendants conceded that "Black voters in District 5" are above 50%,[41] the sentence is taken completely out of context. It actually refers to the "Any Part" Black voting age *population* numbers, not "voters" as the NAACP claims.[42] Additionally, in the District Court, as before this Court,

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[38] *Id.*, p. 60; *Bartlett*, 556 U.S. at 12.

[39] *Compare* NAACP Brief, p. 26 n.71 *with* County Brief, pp. 60-61.

[40] NAACP Brief, p. 26 n.71; *Cousin v. Sundquist*, 145 F.3d 818, 829 (6th Cir. 1998); County Brief, p. 60.

[41] NAACP Brief, p. 27.

[42] [67, p. 14].

County Defendants have consistently disputed the concept of using "Any Part" Black as the sole measurement for 50%, noting the inclusion of Hispanic and Black individuals and the lack of any evidence that African-American voters can elect their candidate of choice without assistance.[43]

The NAACP's second claimed concession by County Defendants—that District 5 met the "threshold" of 50%—is even stranger, especially as the NAACP cites its *own* summary judgment brief for the proposition.[44] That brief, in turn, cites County Defendants' expert, who notes the "Any Part" Black number is, in fact, 50.22%.[45]

County Defendants do not deny that District 5 on the Illustrative Plan contains 35 people more than a bare majority when using only the most generous measurement of voting age population.[46] County Defendants disagree that the measurement of African-American voting age population used by the District Court, *i.e.*, 50.22% "Any Part" Black, is correct, as the evidence does not establish that the number truly represents the "effective

[43] [67, pp. 13-15].

[44] NAACP Brief, p. 28; [110-1, p. 8].

[45] [110-1, p. 8].

[46] County Brief, p. 57.

voting majority"[47] required by the Supreme Court,[48] especially when the African-American voting age population of District 5 is only 48.74% when individuals who report being Black and another race are excluded. [49] The NAACP's claim that all the plans in this case "used the more informative Any-Part Black category"[50] is simply wrong, as every plan submitted by the NAACP's expert included single-race, Non-Hispanic, and "Any Part."[51]

The Supreme Court cases that interpret *Gingles*' requirement of "a majority in a single-member district" have each added some modifier in front of the word "majority."[52] This is an important point: when trying to locate and remedy vote dilution, stretching to create a district that does not contain 50% of a single race means a plaintiff fails to make his or her threshold showing.[53]

County Defendants do not advocate that some turnout model, as the Supreme Court properly rejected in *Bartlett*, is necessary to show an effective, working majority. But when the majority in a proposed district is so razor-thin

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[47] *Johnson v. De Grandy*, 512 U.S. 997, 1014, 114 S. Ct. 2647 (1994).

[48] County Brief, p. 56 *et seq*.

[49] [Vol. II, 110-14, p. 6].

[50] NAACP Brief, p. 28.

[51] [Vol. II, 110-14, p. 6].

[52] County Brief, at 59-60.

[53] *Gingles*, 478 U.S. at 50 n.17.

that *any* potential ineligibility means that the district will drop below the required *Gingles* threshold, a turnout model or other evidence might show that the exercise of drawing the district is not an academic one. Drawing a 50.22% all-inclusive majority-minority district, standing alone, provides no confidence that the district contains the "numerical, working majority" the Supreme Court required in *Bartlett*.[54] That is not an offensive statement. It is the law regarding what the NAACP must prove to prevail on the first prong.

Courts consistently use voting age population as opposed to total population in Section 2 cases because the minority group in the district must actually be "able to elect their candidate of choice."[55] As the Supreme Court similarly explained in *LULAC*, "only eligible voters affect a group's opportunity to elect candidates."[56] The *Bartlett* plaintiffs' claim failed precisely because the evidence showed that the minority group (which was only 39.36% of the voting age population) could not "elect that candidate [of choice] based on their own votes and without assistance from others."[57] As the undisputed evidence demonstrates here, African-American voters in Fayette County will

[54] *Bartlett*, 556 U.S. at 13.

[55] *Id.* at 13.

[56] *LULAC*, 548 U.S. at 429.

[57] 556 U.S. at 14.

require assistance from others in order to elect their candidate of choice when the margin is as razor-thin as that on the Illustrative Plan.[58]

The NAACP is thus left making the assertion that *Bartlett* forever foreclosed any challenges to numerosity, so long as the number is a single person above 50%, even if 10% of that population are not citizens or otherwise ineligible to vote.[59] *Bartlett* cannot bear that weight, because it still requires the minority group to be able to elect its candidate of choice *without assistance* from others.[60] Moreover, requiring that result would seem to say that *Bartlett* overruled *Negron*, because this Court specifically considered voter eligibility even when minority voting age population in that case was well in excess of 50%.[61]

The NAACP wrongly claims that the County did not submit any evidence that "Any Part" Black VAP should not be used. The NAACP apparently overlooked the discussion and citation in County Defendants' brief

[58] County Brief, p. 63.

[59] NAACP Brief, pp. 29-30.

[60] *Bartlett*, 556 U.S. at 14; *cf. Texas v. U.S.*, 831 F.Supp.2d 244, 263 n.22 (D. D.C. 2011) (noting use of 60 or 65% in Section 2 cases).

[61] *Negron*, 113 F.3d at 1569.

that the Department of Justice uses the "Any Part" Black numbers *only* if required and *only* after reviewing single-race and other combinations first.[62]

Finally, far from supporting the NAACP's position, *Georgia v. Ashcroft*[63] supports County Defendants' use of only single-race Black or Non-Hispanic Black numbers in this case. In *Ashcroft*, the Supreme Court found that using only single-race numbers (the numbers proposed by the United States) would be relevant in a Section 2 case, when a comparison of different minority groups is required.[64]

The District Court's finding that African-Americans were sufficiently numerous to constitute a majority in District 5 should be reversed. County Defendants have established the error in that finding, and the NAACP has not offered any support for affirming that finding.

III. The Minority Community in Fayette County is Not Geographically Compact.

To assess the first *Gingles* prong, this Court must also determine whether the minority community in Fayette County is geographically compact.[65] If the boundaries of District 5 are explained by traditional redistricting principles, it

[62] County Brief, p. 58.

[63] 539 U.S. 461, 123 S.Ct. 2498 (2003).

[64] *Ashcroft*, 539 U.S. at 473 n.1 (citing cases evaluating Section 2 claims).

[65] *LULAC*, 548 U.S. at 433.

is likely that the community inside the district is geographically compact. If those principles cannot explain the boundaries, then the community is not geographically compact.

In short, the determination is not made by deciding a "beauty contest" but rather by determining whether the boundaries are explained by traditional districting principles.[66] Despite that precedent, the NAACP proposes a beauty contest, consistently comparing the Illustrative Plan to other plans, claiming that supposed similarities support its position.

A. Statistical Measures of Compactness.

The NAACP first takes on the statistical measures of compactness, claiming that because the numbers on a single score were within some range, which it calls "generally-accepted standards for compactness," District 5 is compact. This argument is incorrect for several reasons. First, the NAACP did not submit any evidence that the scores fell within some generally-accepted standard. Cooper admitted that he could not say District 5 was "more compact" than any number of legislative or county commission plans because he never compared the total scores.[67] In spite of his incomplete analysis, Cooper could still concede that District 5 had a compactness score on the

[66] *Bush v. Vera*, 517 U.S. 952, 977, 116 S.Ct. 1941 (1996).

[67] [Vol. II, 142-2, pp. 231:20-232:15; 236:17-237:2; 245:8-13; 246:5-15].

various statistical tests that put it at least in the bottom 10% of all districts he analyzed, if not lower.[68] Cooper could not explain any of the other considerations that might have driven lower compactness scores in the plans to which he compared the Illustrative Plan.[69]

Second, statistical compactness scores provide only a mathematical representation of the outlines of the district.[70] District 5's low score compared with other districts, combined with a lack of explanation for that score, demonstrates that compactness was not Cooper's goal in crafting District 5.[71]

Third, the NAACP's citation of *Comm. for a Fair & Balanced Map v. Illinois State Bd. of Elections*,[72] is not relevant. In that case, the court found that the district still failed the "eyeball test" for compactness despite its scores.[73] But the court turned away a challenge to the district's strange shape because its shape was explained by politics,[74] something the NAACP has never claimed accounts for the bizarre shape of District 5.

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[68] [Vol. II, 142-2, pp. 236:17-237:2].

[69] [Vol. II, 142-2, pp. 231:20-232:15; 236:17-237:2; 245:8-13; 246:5-15].

[70] [Vol. I, 108-5, pp. 16-17].

[71] County Brief, pp. 19-23.

[72] 835 F. Supp. 2d 563, 590 (N.D. Ill. 2011).

[73] *Id.*

[74] *Id.*

The NAACP offers no nonracial, objective explanation for the low compactness scores of District 5 because it cannot. The only explanation is the racial makeup of the district.

B. Shape and Distance of Communities.

In discussing the shape of the district, the NAACP makes no response to nor support for the District Court's startling determination that the county is *itself* a community of interest. The NAACP also does not respond to the evidence in the record that there was intervening white population between the pockets of African-American population.[75]

Intervening white population was exactly what caused the strange district shape in *Sensley v. Albritton*,[76] which the NAACP cites. In that case, the Fifth Circuit rejected the plaintiffs' Section 2 case when the unusual shape of a third majority-minority district resulted "specifically from excluding non-blacks while simultaneously adding 'excess' blacks from other communities."[77] That same scheme is exactly what County Defendants demonstrated the NAACP did in this case to create the Illustrative Plan.

[75] County Brief, p. 24.

[76] 385 F.3d 591, 597 (5th Cir. 2004).

[77] *Id.*

C. Communities of Interest.

In discussing communities of interest, the NAACP claims County Defendants offered no evidence that African-American voters did not comprise a community of interest, continuing to ignore the key point that none of the purported communities the NAACP puts forward can explain the boundaries of the district. While some plaintiffs testified about various alleged communities, none of those were part of Cooper's considerations in the creation of the plan because he testified he was not aware of them.[78]

None of the four supposed communities submitted by the NAACP can explain the boundaries. The affluent "socioeconomic status" is shared by whites and African-Americans in the county, not exclusively the minority community.[79] As for a community of people who supported district voting, the NAACP never conducted a survey to establish that District 5 contained such a community, and even if there had been such a survey, Cooper did not consider it. The remaining two proposed communities—political cohesion and ethnicity—are based solely on the "color of the skin"[80] of those within its

[78] [Vol. I, 108-3, 284:23-285:7; 285:20-24].

[79] [Vol. II, 142-2, p. 138:4-8] [Vol. II, 140-6, pp. 67:22-68:5].

[80] *See Shaw v. Reno*, 509 U.S. 630, 647, 113 S.Ct. 2816 (1993).

boundaries; race forms the basis of the political cohesion cited by the NAACP and the ethnicity at issue is the racial status of the residents.

The NAACP again repeats claims about municipal boundaries and school attendance zones but never responds to County Defendants' arguments on those points.[81] County Defendants' plan split school and municipal boundaries because, unlike the NAACP, the County relied on other traditional principles to explain why the boundaries were placed where they were.[82]

The NAACP also seems to highlight a dispute of fact in the record. In one footnote, it claims the District Court rejected testimony by County Defendants' expert regarding whether the various municipalities in Fayette County are separate communities,[83] while a few pages earlier, it noted the District Court accepted Cooper's testimony on exactly the same point.[84] At the very least, the record presents a dispute of fact on this point, which is essential to the NAACP prevailing in this case.

[81] County Brief, p. 28.

[82] County Brief pp. 28-29.

[83] NAACP Brief, p. 40 n.123.

[84] *Id.*, p. 38, n.113.

D. Deviation.

The NAACP next seizes on what it believes is yet another purported concession by County Defendants, this one regarding deviation. The County has never conceded that the NAACP only had to present a plan within 10% total deviation, and the citation by the NAACP does not support that contention.[85] County Defendants, in fact argue exactly the opposite.[86]

Not surprisingly, the NAACP continues to ignore precedent in this Circuit that a plan presented to show liability under the first *Gingles* prong must be a remedy the court can order.[87] The NAACP cannot simply waive that requirement by citing *Reed v. Town of Babylon*,[88] because the decision from the Eastern District of New York is not binding, and, more importantly, the decision is in conflict with the law of this Circuit on that point, which is *Nipper* and *Burton*.[89]

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[85] *Id.*, p. 42 n.128.

[86] County Brief, p. 32.

[87] *Nipper v. Smith*, 39 F.3d 1494, 1530-31 (11th Cir. 1994); *Burton*, 178 F.3d at 1199.

[88] 914 F.Supp. 843 (E.D. N.Y. 1996).

[89] *Nipper*, 39 F.3d at 1530-31; *Burton*, 178 F.3d at 1199.

The NAACP also appears content to rely on the deviation in a court-ordered plan drawn long before the advent of computer redistricting[90] instead of the standard for court-drawn plans of recent vintage.[91] But even in *Lodge v. Buxton*, the majority-minority districts were not all consistently underpopulated[92] as District 5 is here. Deviation matters in this case because the NAACP (and the District Court) cannot draw a majority-minority district without underpopulating it,[93] strongly suggesting that the minority community is not sufficiently numerous and geographically compact.

E. Split Precincts.

In responding on the issue of split precincts, the NAACP completely ignores the clear evidence that every split precinct was split for racial purposes. The NAACP even goes beyond the District Court, claiming that "each of Cooper's precinct splits adhered to traditional redistricting principles"[94] when there is no evidence for that statement in the record.

[90] NAACP Brief, p. 43, n.133, citing one 1982 case.

[91] County Brief, p. 31 n.112, collecting recent cases.

[92] 639 F.2d 1358, 1361 n.4 (5th Cir. Unit B 1981).

[93] [Vol. I, 108-5, p. 48].

[94] NAACP Brief, p. 44.

The NAACP also creates an important question by citing Sandy Creek as a precinct its expert claims he split for population purposes.[95] If Cooper in fact split Sandy Creek solely to avoid *over*population, why was District 5 the most *under*populated and why did the split line up *exactly* with the racial composition of that precinct?[96] The NAACP cannot and does not provide an answer because the answer is clear: race drove the plan.

F. Compliance with Section 2.

Compliance with Section 2 is a valid redistricting principle for a legislatively-drawn plan because the drafter must determine whether there has been a failure to create a required district.[97] But Cooper's consideration of Section 2 was limited to establishing the existence of a majority-minority district.[98] Because that consideration was based primarily on race—instead of merely race as one of the factors—consideration of compliance with Section 2 does not show that District 5 was explained by traditional redistricting principles.[99]

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[95] *Id.*, p. 44 n.137.

[96] County Brief, p. 39.

[97] *Davis*, 139 F.3d at 1425 n.23; *Vera*, 517 U.S. at 976-978 (collecting cases).

[98] [Vol. I, 108-3, 195:17-196:12].

[99] County Brief, pp. 34-43.

G. Evidence of Racial Predominance.

Although County Defendants cited significant evidence in the record showing that race-based decisions drove the creation of the Illustrative Plan,[100] the NAACP offers no response. County Defendants do not seek to "severely limit" Section 2. Instead, County Defendants urge that this Court reverse the dramatic expansion of Section 2 by the District Court.

The NAACP fails to recognize that the first prong of *Gingles* already places a significant limitation on plaintiffs seeking to impose single-member districts. If the minority community is dispersed throughout the jurisdiction, no claim will lie for vote dilution.[101] In spite of the NAACP's use of inflammatory terms like "segregated areas," this is a limitation on cases the Supreme Court recognized and enforced, especially in the 1990s era of "max black" plans.[102] The NAACP apparently wishes to return to that time and rewrite Section 2 to require any mathematically possible district, even though the Constitution does not permit this outcome.[103]

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[100] *Id.*

[101] *Gingles*, 478 U.S. at 50 n.17.

[102] County Brief, pp. 10-12.

[103] *Shaw*, 509 U.S. at 655-656; *see also Miller v. Johnson*, 515 U.S. 900, 920-921, 115 S.Ct. 2475 (1995).

IV. Both Equal Protection and Section 2 Jurisprudence are Keys to This Case.

The NAACP refuses to address the arguments of County Defendants regarding Equal Protection jurisprudence. The NAACP first attempts to dismiss cases cited as solely Equal Protection cases and not Section 2 cases, although many of the cases reviewed the proper standard under Section 2 and found that even when a mathematically possible district was drawn, Section 2 did not require the district when it was drawn primarily based on race.[104] Ironically, the NAACP later quotes one of these "not Section 2 cases" for the proper standard under Section 2's totality of the circumstances test.[105]

Faced with the racial predominance of the Illustrative Plan, this Court can reach one of two conclusions. Either (1) the plan's racial predominance is part of the geographic compactness analysis and shows that the minority community is not geographically compact for purposes of Section 2 or (2) the plan's racial predominance means the plan cannot be a proper remedy under the first prong of *Gingles* and *Nipper* because such racial predominance violates

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[104] *See*, *e.g.*, *Abrams v. Johnson*, 521 U.S. 74, 91, 117 S.Ct. 1925 (1997); *Shaw v. Hunt*, 517 U.S. 899, 916, 116 S.Ct. 1894 (1996); *Vera*, 517 U.S. at 979.

[105] *Compare* NAACP Brief, p. 55 n.176, citing *Abrams with* NAACP Brief, p. 47 n.150, including *Abrams* in list of cases not about Section 2.

the Equal Protection Clause unless justified by a compelling government interest.

A. Geographic Compactness and Section 2.

As County Defendants previously discussed, the term "compactness" in the Equal Protection context and the Section 2 context refers to different tests.[106] The two are related, however, and courts have sometimes used them interchangeably. Compactness in the Equal Protection context looks at the boundaries of the district, while compactness in the Section 2 context looks at the underlying minority population.[107]

The challenge is that districts are the method primarily used by a court reviewing the compactness of the underlying community. In *LULAC*, the Supreme Court reversed a determination that a Section 2 district was reasonably compact, because the district court considered only the racial makeup of the district and not the underlying community.[108] Similarly, in this case, the evidence of racial predominance necessary to create the district indicates that no other consideration regarding the cohesiveness of members of

[106] *LULAC*, 548 U.S. at 433.

[107] *Id.*

[108] *Id.* at 435.

the minority community in Fayette County existed apart from the color of their skin.

This concept is consistent with this Court's determinations regarding Section 2 compactness, which requires plan design "consistent with traditional redistricting principles"[109]—something the NAACP cannot show in this case because District 5 was not designed consistently with any principle except race. The use of precedent referencing Equal Protection jurisprudence helps illustrate what is involved in making this determination, in addition to showing what the Supreme Court views as necessary for Section 2 compliance, as County Defendants explained.[110]

The NAACP pays lip service to this concept, using terms like "consistent with" and "followed,"[111] but it does not show how District 5 was designed consistently with any of those principles. Because there were no traditional districting principles that could unite the underlying community and no traditional boundaries support the unification of the community in District 5,

[109] *Davis*, 139 F.3d at 1425.

[110] County Brief, pp. 34-43.

[111] NAACP Brief, p. 49.

the minority community in Fayette County is not geographically compact for purposes of Section 2.[112]

B. Compactness under the Equal Protection Clause.

But that is not the end of the story. Even if the minority *community* were geographically compact for purposes of Section 2, the *district* cannot be ordered as a remedy because it was designed primarily based on race. This Circuit requires plans submitted for purposes of prong one of *Gingles* to be something a court can order.[113] As discussed in County Defendants' opening brief,[114] the NAACP's continuing desire to separate liability and remedy is simply not supported by the cases in this Circuit.

C. Waiting to Decide Compelling Interest Means a Resurrection of the "Max Black" Scheme.

As County Defendants point out,[115] the NAACP's proposed test—allowing a district court to implement plans drawn primarily based on race that are "justified" by the compelling interest of complying with Section 2—is exactly what was found unconstitutional in the *Shaw* line of cases.[116] Instead of

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[112] *LULAC*, 548 U.S. at 433.

[113] County Brief, pp. 43-54.

[114] *Id.*

[115] *Id.*, p. 50.

[116] *Shaw*, 509 U.S. at 655-656; *Vera*, 517 U.S. at 976; *Abrams*, 521 U.S. at 91.

responding to that point, the NAACP repeats the District Court's ruling on the topic, without addressing the arguments of County Defendants.

The District Court and the NAACP propose a dramatic expansion of Section 2. A lawyer advising a government client under this theory must instruct that client to create every mathematically possible majority-minority district in order to avoid Section 2 liability, because every amount of racial predominance can be cured by the attempt to comply with Section 2. This interpretation of Section 2, which helped Republicans dramatically consolidate power in the South in the 1990s, was unconstitutional.[117]

The NAACP's sole response is that constitutional issues should be avoided, apparently believing County Defendants seek some type of constitutional ruling.[118] But as explained above, the whole point of this case is that the NAACP is expanding Section 2 beyond its statutory limits and violating constitutional principles in the process. A decision enforcing the existing statutory limits of Section 2 is all that is required to resolve this case.

Even if compliance with Section 2 constitutes a compelling government interest when a government jurisdiction defends a plan that was drawn primarily based on race, it does not follow that the same standard applies when

[117] *Id.*

[118] NAACP Brief, p. 53.

a court forces the creation of a district. No resolution of that question is required, because this case does not involve a government-drawn plan—it involves the District Court forcing the County to accept a district-based scheme.

V. The Totality of the Circumstances Does Not Support a Finding of Vote Dilution in Fayette County.

As County Defendants outlined, the key to the totality of the circumstances analysis is how racial bias in the community of Fayette County interacts with the at-large system to dilute minority votes.[119] The NAACP never responds to this inquiry, instead repeating the limited findings of the District Court on the analysis.

The NAACP first agrees that the District Court found five of the Senate factors were nonexistent or did not weigh in their favor.[120] But the NAACP's discussion of the totality of the circumstances then takes a strange turn.

First, the NAACP claims County Defendants conceded that two factors weigh in the NAACP's favor, without any citation to County Defendants, but citing only to the District Court.[121] The NAACP then proclaims, yet again,

[119] County Brief, pp. 66-71.

[120] NAACP Brief, p. 61 n.199.

[121] *Id.*, pp. 56-57.

that this non-existent concession is "fatal" to County Defendants,[122] even though the Supreme Court insists on a review of all of the factors to determine the totality of the circumstances.[123] In addition, the lack of electoral success could be easily explained by the simple lack of African-American population in Fayette County until recently and that no African-American candidate has run for office since 2006.[124]

Second, the NAACP and the District Court are both incorrect in stating that County Defendants did not submit evidence of partisan explanations for racial polarization. County Defendants submitted evidence that most African-American voters supported Democrats in a county that otherwise votes Republican.[125]

In discussing the remaining Senate factors, the NAACP did not offer any responses to the arguments of County Defendants. Regarding past discrimination, the NAACP claims, but never explains how, the Fayette County "as a whole is driven by racial bias,"[126] as required by this Court.

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[122] *Id.*, p. 57.

[123] *De Grandy*, 512 U.S. at 1011.

[124] *Supra*, pp. 3-4.

[125] [140, p. 4 n.1].

[126] *Nipper*, 39 F.3d at 1534.

Regarding board appointments, the District Court ignored evidence in the record that African-Americans have been appointed to county boards. The NAACP perpetuates that error, citing only its own brief regarding the process and saying nothing about the evidence presented that African-Americans have been appointed.[127] The NAACP never submitted evidence regarding how many white individuals were appointed to boards versus minorities and ignored statements by Plaintiffs that they were not interested in board appointments or turned down opportunities to serve.[128]

The NAACP has not explained how totality of the circumstances supports a finding that Fayette County is "driven by racial bias" and that its existing at-large scheme "allows that [racial] bias to dilute the minority group's voting strength" as required by this Circuit.[129]

CONCLUSION

In granting summary judgment to the NAACP and denying that relief to County Defendants, the District Court made at least four errors. Any one of those errors is sufficient to reverse and grant summary judgment to County Defendants.

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[127] [Vol. II, 140-13, pp. 40:7-43:5].

[128] [Vol. II, 140-7, p. 66:19-24]; [Vol. II, 140-16, p. 32:8-25].

[129] *Nipper*, 39 F.3d at 1534.

First, the District Court improperly found that 35 people over a majority using a measurement that combines races is sufficient. Second, the District Court ignored evidence regarding racial predominance. Under its flawed interpretation, Section 2 now requires the creation of any mathematically possible majority-minority district and thus either (1) evidence of racial predominance can be ignored at the liability stage or (2) racial predominance is cured by the compelling government interest in complying with Section 2 before a violation is even found to exist. Finally, despite a lack of any evidence, the District Court found the totality of the circumstances supports a finding that the racial bias of Fayette County dilutes African-American voting strength.

The District Court erred in each instance, and the NAACP's brief does not provide any alternative path to victory under existing law. The NAACP instead urges this Court to make new law in each area.

The decision of the District Court should be reversed and summary judgment granted to County Defendants. In the alternative, the Court should reverse and remand for a trial to determine what traditional redistricting principles explain the Illustrative Plan.

Respectfully submitted this 11th day of July, 2014.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Fed.R.App.P. 32(a)(7)(B) because this brief contains 6,990 words, excluding the parts of the brief exempted by Fed.R.App.P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed.R.App.P. 32(a)(5) and the type style requirements of Fed.R.App.P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Professional Plus 2010 in 14-point Calisto MT.

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Dated: July 11, 2014.

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GEORGIA STATE CONF. OF THE NAACP, *et al.* Plaintiffs/Appellees, v. FAYETTE COUNTY BOARD OF COMMISSIONERS, *et al.*, Defendants/Appellants.	APPEAL NO. 14-11202-FF

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day electronically filed the within and foregoing **REPLY BRIEF OF APPELLANTS/COUNTY DEFENDANTS** with the Clerk of Court using the ECF system which will automatically send email notification of this filing and that I have further served a copy by U.S. mail with appropriate postage affixed thereto as follows:

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