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 EDUCATION, et. al.,

Defendants/Appellants.

Appeal from the United States District Court
For the Northern District of Georgia - Newnan Division
3:11-cv-00123-TCB

REPLY BRIEF OF APPELLANTS

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CERTIFICAT OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

In compliance with FRAP 26.1 and 28(a), and 11th Cir. R. 26.1-1, 26.1-2, and 26.1-3, counsel for Defendants/Appellants hereby certify that the following persons and entities, listed in alphabetical order, have an interest in the outcome of this appeal:

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

17. Fayette County School District
18. Georgia State Conference of the NAACP – Appellee
19. Harben, Hartley & Hawkins, LLP – Attorneys for Defendants/Appellants in the District Court
20. Hartley, Phillip L. – Attorney for Defendants/Appellants in the District Court
21. Haygood, Ryan P. – Attorney for Appellees
22. Jones, Alice – Appellee
23. Jones, John E. – Appellee
24. Kendall, Wayne – Former Attorney for Plaintiffs
25. Key, Marion – Appellant
26. Korgaonkar, Natasha – Attorney for Appellees
27. Lewis, Anne Ware – Attorney for County Defendants
28. Lowry, Dan – Appellee
29. Maguire, J. Matthew, Jr. – Attorney for Appellants
30. Marchman, Barry – Appellant
31. McCarty, Allen – County Defendant
32. NAACP Legal Defense and Education Fund, Inc. – Attorneys for Appellees
33. Oddo, Charles – County Defendant
34. Ognio, Randy – County Defendant
35. Parks, Chesin & Walbert, P.C. – Attorneys for Appellants
36. Presberg, Leonard – Appellant
37. Richardson, Lelia – Appellee

38. Sawyer, Tom – County Defendant
39. Strickland, Frank B. – Attorney for County Defendants
40. Todd, Bob – Appellant
41. Tyson, Bryan P. – Attorney for County Defendants
42. Walbert, David F. – Attorney for Appellants
43. Williams, Elverta – Appellee
44. Wright, Bonnie Lee – Appellee

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RESPONSE TO APPELLEES' "STATEMENT OF FACTS & PROCEDURAL BACKGROUND"

Plaintiffs' rendition of the facts is seriously inaccurate and incomplete. That is especially troubling since this case is on appeal from a summary judgment order, and this Court must "view all of the evidence in the light most favorable to the non-moving party and draw all reasonable inferences in [Appellants'] favor." *FindWhat Investor Corp. v. FindWhat.com*, 658 F.3d 1282, 1307 (11th Cir. 2011).

Plaintiffs' distortions are evident from the opening lines of their brief, where they claim to have been engaged in a 20-year struggle for a "nondiscriminatory method of election" borne out of a history of oppression in Fayette County. Completely missing from that distorted picture is even lip service to the actual demographics and racial facts of Fayette County, which until recently had only a very small black population (*e.g.*, 5.4% in 1990). The recent increase in black population is a direct result of blacks choosing to move to the County from other areas of Georgia and the United States. Unique among vote dilution cases is the complete absence here of any link between a past history of racial discrimination in Fayette County and present-day politics. Also unique in this case is the absence of any socioeconomic disadvantage of black voters that might be tied to past discrimination. To the contrary, the median income of black families is *higher* than

that of white families in Fayette County[1] – a fact that does not appear in any other case where vote dilution was alleged. Also missing from Plaintiffs' statements are any recognition of the paucity of black candidates who have sought election to the Board of Education ("BOE"), much less done so since the percentage of black residents in the County increased in recent years. Nor is there any mention of the fact that no African-American even ran for election in the new single-member BOE district, District 5, that was created by the district court in 2014 as a remedy in this case.

Plaintiffs' mischaracterization of the facts reveals much about their misapprehension of the law of vote dilution. It is apparent throughout their arguments, both in this Court and below, that Plaintiffs' counsel operate under the premise that a voting system is *per se* illegal – at least in the South where there was *de jure* discrimination 50 years ago – if fewer than a desired or proportional number of blacks have been elected to office. That, of course, is not the law nor was it ever the law. Vote dilution claims have always required an "intensely local appraisal of the design and impact of the [election system] … in light of past and present reality, political and otherwise." *White v. Regester*, 412 U.S. 755, 769-70

[1] The median household income for African-American households is $86,865, compared to $79,550 for Caucasian Households. http://fairplan.u31.infinology.net/ACS/3yr_ACS_Counties_Places/African-American/13_Fayette%20County,%20Georgia_ACS_Black_3YR.pdf , p. 33.

(1983); *Thornburg v. Gingles*, 478 U.S. 30, 78 (1986).

Since the BOE has previously provided a statement of facts in accordance with the applicable legal standard, and the Court has the record before it, Appellants will not here correct every misstatement Plaintiffs have made. There are, however, a few statements to which a response must be made. Initially, at page 10 of their Brief, Plaintiffs assert that "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.'" This quotation from the district court's order is a very incomplete and misleading characterization of what actually transpired. What is not stated is decidedly adverse to Plaintiffs.

THE ADMISSION OF SECTION 2 LIABILITY FOR SETTLEMENT PURPOSES.

The only time the BOE "conceded" anything about a Section 2 violation was in its effort to obtain court approval of a settlement that was premised upon using District 5 lines that avoided the extreme, race-based approach that Plaintiffs advocated and the district court ultimately accepted. Settlements are about compromise, and in seeking the district court's approval of the settlement, the BOE was explicit in its motivation – it had very limited resources, largely as a result of the economic crisis of 2009, and it was seeking to avoid costly litigation.

Nor was a concession about a Section 2 violation something the BOE

wanted to do as part of the settlement. The initial Consent Decree submitted by Plaintiffs and the BOE contained no such language. [Doc. 33-1 at ¶ 21]. It was only after the Board of Commissioners ("BOC") objected [Doc. 38-1, p. 3], that Plaintiffs and the BOE submitted an Amended Consent Decree that referenced a Section 2 violation, still in the hope of settling the case on acceptable terms.

That effort also met with objections from the BOC that the BOE did not have the authority to simply "admit" to a Section 2 violation; that in order to override state law, a Section 2 violation had to be shown; and that the remedy on which the settlement was based was impermissible under *Bartlett v. Strickland*, 556 U.S. 1 (2009) and *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994). [Doc. 67, pp. 4, 10, 13-15, 18]. The district court agreed with the BOC and refused to approve the revised Consent Decree. [Doc. 70; Doc. 125]. In denying Plaintiffs and the BOE the relief they sought, the district court did provide those parties a glimmer of hope regarding settlement. Judge Batten indicated that the court would sign a certificate of immediate review and give Plaintiffs the opportunity to appeal the adverse ruling. [Doc. 85, p. 35, lines 7-14].

Through this time period, the BOE most definitely made statements for the specific purpose of effecting a settlement of the case *based upon the agreed-upon remedy*. But it is difficult to fathom how statements made for that ***specific*** purpose could possibly be construed as an "admission" for all purposes in the case when

the effort to settle was unsuccessful. Plaintiffs cannot point to a single statement outside of the settlement context that can be construed as an admission of Section 2 liability. The BOE's Answer, for example, continued to deny liability, as it does to this day.

THE BOE'S DISCOVERY EFFORTS.

On June 8, 2012, Plaintiffs filed a motion seeking a certificate of immediate review of the district court's order rejecting the proposed Amended Consent Decree, reminding the court of its previously stated willingness to sign a certificate. [Doc. 84, p. 2].

It is unquestionably true that, during the period wherein Plaintiffs and the BOE were endeavoring to settle the case, including the period wherein Plaintiffs were seeking a certificate of immediate review from the district court, the BOE did not take discovery from Plaintiffs. It would have been a poor use of the BOE's limited funds to actively engage in discovery at the same time the parties were attempting to avoid the expense of litigation *and* while the BOC was doing its own discovery that the BOE could later use if that became necessary. At the same time, it is important to note that neither did the Plaintiffs serve any discovery requests on the BOE, nor did they seek to depose any BOE witnesses. No motions to compel discovery or motions for sanctions were filed against BOE, nor was there any complaint by Plaintiffs regarding the BOE's conduct regarding discovery.

On July 9, 2012, shortly after the district court denied the motion to approve the proposed Amended Consent Decree, Plaintiffs and the BOE filed a Joint Scheduling and Discovery Plan for the district court's approval. [Doc. 92]. In that submission, Plaintiffs and the BOE acknowledged that, until then, the two parties had "directed their efforts at obtaining this Court's approval of their settlement and the [BOE] Defendants have sought to conserve the resources of the Fayette County School District." *Id*. at 2. They further noted that the issue of certification "is presently pending before this Court," and that "a resolution of the issue that Plaintiffs seek to appeal to the Eleventh Circuit may resolve whether this Court can approve Plaintiffs and the [BOE's] proposed settlement." *Id*. at 3. For these reasons, Plaintiffs and the BOE proposed that the two parties have "six months to engage in discovery following the resolution of the issue raised in Plaintiffs' request for an interlocutory appeal;" that each side would thereafter have "thirty (30) days to file motions for summary judgment;" and that "a Pre-trial Order shall be filed thirty (30) days after the conclusion of the discovery period unless any party files a motion for summary judgment, in which case the Pre-trial Order shall be filed within thirty (30) days after entry of an order ruling on that motion." *Id*. at 3.

In light of these joint statements and positions, neither Plaintiffs nor the district court could have fairly believed that any "admission" concerning Section 2

liability extended beyond the specific and limited context in which it was made – namely, the effort at settlement. Plaintiffs explicitly recognized that any effort to impose liability ***on the BOE*** in any other context would require the filing of a motion for summary judgment ***against the BOE*** or a trial on the merits.

On September 18, 2012, four days after Plaintiffs filed their motion for summary judgment against the BOC and on the same day it denied the motion to certify the case for interlocutory appeal, the district court entered an order deeming Plaintiffs' and the BOE's Joint Scheduling and Discovery Plan a "request for an extension of discovery" and then denied the proposed Plan. [Doc. 126]. As a result of that order, no additional discovery could be undertaken between Plaintiffs and the BOE.

PLAINTIFFS' SUMMARY JUDGMENT MOTION AGAINST THE BOC.

The district court's (and now, on appeal, the Plaintiffs') reliance upon the fact that the BOE "did not participate in . . . the current [summary judgment] motions" (Appellees' Brief at 10) as a basis for finding an admission of Section 2 liability and then entering summary judgment against the BOE on account of that supposed admission, is impossible to reconcile with what actually happened, much less with established procedure that governs summary judgment motions. As the BOE demonstrated in its main brief, Plaintiffs' summary judgment motion was directed solely against the BOC. Plaintiffs specifically stated that the motion was

not directed against the BOE, and the reason for excluding the BOE had nothing to do with any supposed "admission" of Section 2 liability by the BOE.[2] In short, what the district court (and now Appellees) rely upon to claim that the BOE "admitted" Section 2 liability for purposes of the summary judgment proceedings is affirmatively contradicted by the record.

At p. 19 of their Brief, Plaintiffs also write: "On appeal, the BOE raises a number of issues that it never litigated in the District Court." While that statement might be technically true as to some points, it is disingenuous. The time for the BOE to raise the issues about which Appellees complain would have been either in opposition to a motion for summary judgment ***directed at the BOE*** or by way of a defense at trial. Neither of those events occurred here because of the abnormal way the case proceeded to judgment. The BOE certainly had no occasion to argue that ***its*** election system was not illegal in response to a motion that made no claim against the BOE. The district court's after-the-fact inclusion of the BOE as a subject of the summary judgment order pretermitted the proper opportunity of the BOE to raise defense issues below.

In their "Statement of Facts & Procedural Background," Appellees also find it noteworthy that "[n]o party objected to the District Court engaging [an] advisor"

[2] As Plaintiffs' explained their decision, they were "await[ing] this Court's certification of an appeal … of the denial of their Amended Consent Decree." [Doc. 110, p. 2, n. 1]

to assist it in developing a remedial plan based on its liability determination and that "[n]o party objected to the Court-Drawn Remedial Plan." Appellees' Brief at 13, 15. Again, this contention is spurious. The absence of an objection to a court-appointed expert has no bearing on anything in this appeal. By the time the court directed the parties to "show cause" why a court-appointed expert should not be appointed, the court had already rendered its decision on Section 2 liability as to both the BOC and the BOE and sought an advisor to assist in developing "an appropriate remedial plan." [Doc. 164, p. 1]. While expressing no objection to the appointment itself, the BOE defendants made clear they were doing so "without waiving any legal position or rights available to them." [Doc. 168, p. 1].

Appellees also try to bootstrap the BOE's response to the remedial plan proposed by the district court into an "admission" by the BOE of Section 2 liability. Appellees' Brief at 15-16. Appellees appear to argue that the BOE not only "admitted" liability, but had no issue with the remedy imposed by the district court. Any such argument is again inconsistent with what actually transpired.

The summary judgment order directed all of the parties to submit proposed remedial plans "in accordance with this Order on or before June 25, 2013." [Doc. 152, p. 80]. To comply with that order, the BOE submitted a brief that recited what it understood to be the conceptual requirements being imposed by the Court; cited the map to which Plaintiffs and the BOE had agreed in connection with the

proposed Consent Decrees; and then requested that the district court adhere to that map as much as it could consistent with "[t]he terms of the Court's [summary judgment] Order." [Doc. 157, p. 2].

In no way was this mandatory compliance with a court order an expression of "acquiescence" in the summary judgment order or the remedial map that had yet to be drawn. To the contrary, the BOE made it quite clear that it "submits this plan in order to comply with the directions of the Court as noted above and without waiving any rights or positions it may have on appeal or in other potential proceedings relevant to this case." [Doc. 157, p. 4].

Thereafter, the court e-mailed its proposed remedial map to the parties and directed them to file any briefs in opposition to the map by February 5, 2014. [Doc. 172]. The BOE filed its brief on that date. [Doc. 174]. It is very difficult to understand how Plaintiffs could credibly contend that this brief did not constitute an objection to the court's proposed plan. In addition to making clear that the BOE "does not waive its position on appeal that the proposed Amended Consent Decree was constitutional and in compliance with Section 2 in all respects" [Doc. 174, p. 4], the BOE stated as follows regarding the specific plan put forward by the district court:

> [H]aving reviewed the plans offered by the Court, the Plaintiffs, and the County Defendants that attempt to create five voting districts with one bare majority-minority district, the [BOE] has renewed concern that such a

> district can only be produced without sufficient regard to "traditional districting principles." In particular, the plans divide numerous voting precincts, as well as community of interests such as the "island" in the far eastern section of District 1 surrounded by District 5. Of course, this is part of the constitutional concern the County Defendants raise. It may suggest one of two things. Either, as the County Defendants argue, the Defendants' current electoral schemes do not violate Section 2 of the Voting Rights Act at all. Or, the Board of Education's proposed plan is an appropriate means of addressing the violation because its plan, as reflected in the Consent Decree, clearly avoids those problems and, therefore, comports with constitutional principles.

[Doc. 174, p. 5]. One cannot honestly label these explicit assertions of substantive concerns as an "endorsement" of the district court's remedial map.[3]

ARGUMENT AND CITATION OF AUTHORITIES

I. PLAINTIFFS' CONTENTION THAT THE BOE'S "APPEAL MUST FAIL" BECAUSE IT "FAILED TO LITIGATE THIS CASE AFTER UNSUCCESSFULLY SETTLING WITH PLAINTIFFS" IS BASELESS.

Plaintiffs argue that because the BOE made an "admission of Section 2 liability" in the context of the unsuccessful effort to effect a settlement on the basis of a non-gerrymandered District 5, BOE's "appeal must fail." Appellees' Brief at 20, 25. Not surprisingly, Plaintiffs cite no authority in support of this proposition.

[3] Nor can it fairly be claimed that the BOC Defendants did not object to the remedial map. In addition to asserting that no Section 2 violation existed so as to authorize a remedial map, the BOC made clear that the "County Defendants object to any plan that contains a district drawn primarily based on race, as is the case with the parties' proposed plans and appears to be the case with the Court-Drawn Plan as well." [Doc. 175, p. 2]. It was only with these objections expressly "preserved" that the BOC did not "otherwise object" to the district court's plan. *Id*.

There are two fundamental problems with Plaintiffs' argument – the facts and the law. As set forth above and in BOE's main brief, the history of the case in the district court makes it clear that Plaintiffs fully understood that an admission of Section 2 liability made for purposes of effecting a settlement was not an admission for purposes of trial. Otherwise, Plaintiffs would not have jointly filed with the BOE the proposed Joint Scheduling and Discovery Plan. Nor would they have filed a motion for summary judgment which expressly excluded the BOE for the reason that they were awaiting a ruling from the district court on the motion for a certificate of immediate review. Plaintiffs were no doubt as surprised by the district court's unsolicited inclusion of the BOE in its summary judgment order as was the BOE.

Moreover, as set forth in BOE's main brief, whatever the BOE may have said in connection with the parties' mutual effort to settle the case does not trump the procedural requirements of Fed. R. Civ. P. 56, much less the judicially-established principle that a state law cannot be invalidated by a federal court simply upon the admission of a defendant. Brief of Appellants at 45-47. It is telling that, for all of its discussion of what took place in the context of the failed settlement, Plaintiffs make no effort to address any of the legal infirmities with the district court imposing summary judgment against the BOE when it was expressly excluded from the motion's reach.

Because the district court provided no explanation of a legal basis for entering summary judgment against the BOE, and Plaintiffs are equally silent in this appeal, the BOE is left to surmise a legal theory that could justify what transpired. The only legal principles that Plaintiffs (or the district court) could even remotely invoke to justify the district court's action against the BOE would be judicial estoppel – *i.e.*, that the BOE admitted Section 2 liability in the settlement phase of the case and could not thereafter take a different position – or judicial admission. Neither principle has any application here.

The purpose of judicial estoppel is to protect the integrity of the judicial process. *New Hampshire v. Maine*, 532 U.S. 742, 749 (2001). Accordingly, the Supreme Court has identified certain factors to consider when deciding the applicability of judicial estoppel: (1) whether a party's later position is "clearly inconsistent" with its earlier position; (2) whether the party succeeded in persuading the court to accept its earlier position (so that acceptance of the inconsistent position in a later proceeding creates the perception that the court was misled); and (3) whether the party asserting the inconsistent position derived on unfair advantage. *Id*. *See also*, *Zedner v. United States*, 547 U.S. 489, 504 (2006) ("[J]udicial estoppel, 'generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase,'" quoting *Pegram v. Herdich*, 530 U.S. 211, 227, n.8 (2000));

Warfield v. Stewart, 434 Fed.Appx.777, 783-84 (11th Cir. 2011).

Even assuming *arguendo* that conceding Section 2 liability for the sole purpose of effecting a settlement premised on establishing a 46% "any part black" District 5 could be considered "inconsistent" with a denial of liability outside of that settlement context, the other two factors are plainly not present here. The district court expressly denied the joint motion for approval of the proposed Amended Consent Decree. [Doc. 70].

Nor can it legitimately be claimed that a judicial admission was made by the BOE. There are at least three reasons for this. First, an admission of Section 2 liability for the purpose of attempting to effectuate a settlement is qualitatively different than admissions for other purposes. *Reed Elsevier, Inc. v. Muchnick*, 559 U.S. 154, 170 (2010). Second, judicial admissions must not only be deliberate, express and unequivocal, but are "limited to questions of fact." *United States v. Ins. Co. of North America*, 83 F.3d 1507, 1510 n. 6 (D.C. Cir. 1996); *McCaskill v. SCI Management Corp.*, 298 F.3d 677, 682 (7th Cir. 2002); *MacDonald v. General Motors Corp.*, 110 F.3d 337, 341 (6th Cir. 1997) ("Determinations of negligence and proximate causation require the application of rules of law to complex factual patterns. Judicial admissions, in contrast, typically concern only matters of fact."). The admission of Section 2 liability for purposes of settlement was hardly an admission of fact. Third, there is considerable authority that "[b]ecause of their

binding consequences, judicial admissions generally arise only from deliberate voluntary waivers that *expressly concede for the purposes of trial the truth of an alleged fact*." *U.S. v. Belculfine*, 527 F.2d 941, 944 (1st Cir. 1975) (emphasis added); *Long v. Fairbank Farms, Inc.*, 2011 WL 2516378, 9 (D. Me. 2011); *Dorocon, Inc. v. Burke*, 2005 WL 3454338, 5 (D.D.C. 2005) (citing IX Wigmore on Evidence § 2588 (Chadbourn ed.1981); *In re Jones*, 197 B.R. 949, 957 (Brptcy M.D. Ga. 1996). Here, the admission of Section 2 liability was made only as part of an unsuccessful effort at settlement, not for trial.

Under the above authority, as well as that cited in the BOE's main brief, the district court had no lawful basis for cherry-picking an "admission of Section 2 liability" from the settlement phase of the case while discarding the remainder, and then entering summary judgment against the BOE on the basis of such an "admission." The court likewise had no basis for entering summary judgment against the BOE when no motion for summary judgment was ever filed against it and where no notice was provided that the BOE could be subject to summary judgment. There is no basis for Plaintiffs' claim that there was a "failure to litigate" this case, after the settlement failed, that made the requirements of Fed.R.Civ.P. 56 (a) and (f) disappear.

II. A GEOGRAPHICALLY COMPACT MAJORITY AFRICAN-AMERICAN DISTRICT CANNOT BE DRAWN IN FAYETTE COUNTY.

Plaintiffs claim that there is "no genuine dispute of material fact" that both Plaintiffs' Illustrative Plan and the court-adopted Wright Plan "contain a geographically compact minority community" and that these plans "compared favorably with the plans that both sets of Defendants drew for their at-large residency districts." Appellees' Brief at 26.

These contentions are unsupportable on a number of levels. It is decidedly unclear from Appellees' Brief what definition of "geographically compact," if any, they might propose to justify their assertions. However, if the concept requires that race not predominate over other factors and further requires adherence to traditional districting principles, as the Supreme Court and this Court have repeatedly held, *see, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 919 (1995); *Clark v. Putnam County*, 293 F.3d 1261, 1266-67 (11th Cir. 2002), then Plaintiffs' pronouncement must fail. Testimony provided in the Declarations of John Morgan establish that District 5, both in the Illustrative Plan and the Wright Plan, was: (1) pieced together by stringing together African-American populations from three separate locations in Fayette County; (2) formed by the intentional exclusion of whites and inclusion of black areas, "block by block;" and (3) underpopulated relative to ideal district population because it would have been impossible to craft

even a bare majority "any part" black VAP district any other way. [Doc. 108-5, pp. 8-13; Doc. 175-2, pp. 5-7]. These facts are both unrefuted and irrefutable.

There is no way multiple features of District 5 can be explained except by acknowledging that separating voters by race was the predominant consideration in the district's design. How can one possibly explain the neck extending into District 4 and disemboweling the center of that district except by acknowledging that its purpose was to avoid white voters on the way in and then grab black voters in Fayetteville? How can one possibly explain the extreme narrowing of District 5 as it moves to the west and the subsequent inclusion of an ill-shaped pocket in Tyrone, except by acknowledging that the design was race-based? How can one explain the innumerable jagged edges throughout the entire district except by a singular focus on race?

These were precisely the practices that were held unconstitutional in *Miller*, *supra*. Plaintiffs attempt to avoid the holding of *Miller* and other cases previously cited by the BOE by claiming that these cases addressed "large" geographic distances between African-American communities, placing particular reliance on *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006) *("LULAC")*. However, there is a vast difference between holding that stringing together two highly dissimilar Latino communities separated by "enormous geographic differences" is non-compact (*id*. at 435) and holding that such

characteristics are a *sine qua non* of a non-compactness determination. The fact that a county is relatively small does not exempt a Section 2 plaintiff from meeting its burden of proving all *Gingles* preconditions, including geographic compactness.[4] Nor is the equal protection clause somehow inapplicable to smaller counties or districts.

Miller was based on numerous factors, including that the plan reached out to various locations, which, when viewed in conjunction with racial concentrations in the affected areas, made it clear that a primary objective was to exclude white population from the district while roping in black population. District 5 suffers from the identical infirmities.

An even starker example where racial gerrymandering and non-compactness (in the Section 2 sense) were found by the district court and upheld by the Supreme Court despite an absence of "enormous geographic distances" between African-American populations is *Abrams v. Johnson*, 521 U.S. 74 (1997). The congressional district at issue there was found unconstitutional because race was

[4] Fayette County is approximately 199 square miles in area, roughly equivalent to a 14 by 14 mile square. The State of Georgia, by contrast, is approximately 59,441 square miles, approximately 300 times larger. The cartographic gymnastics that permeate District 5 are, *proportionately*, very similar to the congressional district that was held to be an unconstitutional racial gerrymander in *Miller*. What binds *Miller* to the present case more than the bizarre shape of the two districts is the reality that, in both cases, the reason behind the strange meanderings was a desire to include blacks in one district, while excluding whites who were in the way.

the predominant motivating factor in drawing the district lines. As here, this was evidenced by the use of "land bridges to connect parts of the district," with a "number of irregular appendages" at the edge of the otherwise block-like district that split cities, counties and municipalities. The district court found that race was the "predominant reason for these irregular lines" and therefore held the district unconstitutional. *Johnson v. Miller,* 922 F.Supp. 1552, 1554 (S.D. Ga.1995),[5] *affirmed*, *Abrams v. Johnson*, *supra*.

Plaintiffs attempt to avoid the inevitable result of how severely race-based are the lines of District 5 in the Illustrative Plan and the Wright Plan by asserting that: (1) BOC's expert, Mr. Morgan, "admitted" that the BOE Plan complies with traditional districting principles; and (2) this was an "important concession" because Plaintiffs' expert, Mr. Cooper, based his Illustrative Plan "on the BOE Plan and follows similar county, precinct and municipal lines." Appellees' Brief at 30. This argument is baseless. Even the most cursory comparison of the BOE Plan with the Illustrative Plan and the Wright Plan demonstrates beyond a shadow of a doubt that the BOE Plan bears no resemblance to the other plans beyond the fact that District 5 of the BOE Plan is located in the northern part of the county and

[5] "A comparison of maps depicting the Second District's twelve split counties with maps showing the concentration of black residents in the same counties proves that the drawing of Georgia's Second Congressional District was motivated predominately by racial considerations. Put differently, the line was drawn to put black voters in the Second District and to keep white voters out." *Id*. at 1555.

most of District 5 in the other two plans is also located there. *See* Brief of Appellants at 15. Far from assisting Plaintiffs, the BOE Plan serves to highlight just how drastically the other two plans depart from traditional districting principles in order to eke out a 50 plus one "any part black" VAP district.[6]

Finally, both Plaintiffs and the district court attempted to justify the Illustrative and Wright Plans on the ground that Plaintiffs' expert, Mr. Cooper, was able to create another plan, which he called the "Hypothetical Plan," with an "any-part black" VAP of 53.58%, approximately 3.5% higher than the Wright Plan. In his Supplemental Declaration, Cooper admitted that the Hypothetical Plan is "the direct result of combining contiguous census blocks to achieve the highest possible aggregate percentage of African-Americans in that district." [Doc. 110-15, p. 4].

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[6] As Plaintiffs concede, the "compactness" inquiry under the first *Gingles* precondition focuses on the dispersal of the minority population. *See, e.g., Abrams v. Johnson, supra* at 74, 91–92; ("[Section] 2 does not require the state to create, on predominantly racial lines, a district that is not reasonably compact."); *Bush v. Vera*, 517 U.S. 952, 979 ("If, because of the dispersion of the minority population, a reasonably compact majority-minority district cannot be created, § 2 does not require a majority-minority district ...."); *Sensley v. Albritton*, 385 F.3d 591, 596 (5th Cir. 2004) ("As the geographical shape of any proposed district necessarily directly relates to the geographical compactness and population dispersal of the minority community in question, it is clear that shape is a significant factor that courts can and must consider in a *Gingles* compactness inquiry.") A comparison of the BOE Plan with the Illustrative and Wright Plans shows in dramatic fashion how the latter two – for the sole purpose of including black population and excluding white population – extend tentacles into the northwest part of the county and the middle part of the county to grab black population, thereby hollowing out the centers of Districts 1 and 4, giving these districts an unnatural and otherwise inexplicable shape.

As the district court put it, "Cooper testified that had he relied solely on race, he could have drawn a district [*i.e.*, the Hypothetical Plan] with a 53.58% African-American voting-age population." [Doc. 152, p. 42].

Cooper's statement does not in any way insulate the Illustrative or Wright Plans; it is an indictment of them. It shows that, at full throttle, an "any part black" maximization plan could only produce a slight increase in the minority percentage. And as was explained in Appellants' principal brief, pp. 32-33, the ***percentage*** of minority residents was artificially inflated in the Hypothetical Plan by taking out additional whites around the periphery of District 5, thereby making the district even more underpopulated than in the Illustrative Plan. The actual ***number*** of black residents is at the virtual maximum in the Illustrative Plan, just as in the Hypothetical Plan, according to Cooper's own testimony. The fact that a "slightly worse" plan exists is no answer to the fact that the Illustrative and Wright Plans are the product of illegal racial gerrymandering.[7]

[7] Appellants have also shown that District 5 in both plans falls below the required 50% majority of minority eligible voters because it reached that number by improperly cobbling together a variety of racial groups. *See* Appellants' Brief at 35-39. Appellees sole response to this fatal flaw is to contend, with neither factual nor legal authority, that the various racial and ethnic subgroups can arbitrarily be deemed to be one political group because persons in the Any-Part Black census category have at least some black racial ancestry, no matter how slight. Appellees' Brief at 42-43. But the *assumption* that different racial and ethnic groups are politically fungible is exactly what the Supreme Court and other courts have repeatedly held is impermissible. *See* Appellants' Brief at 35-39.

III. THE WRIGHT "REMEDIAL" PLAN AND PLAINTIFFS' "ILLUSTRATIVE PLAN" VIOLATE THE EQUAL PROTECTION CLAUSE BECAUSE THEY DELIBERATELY UNDER-POPULATE DISTRICT 5 AND DELIBERATELY OVER-POPULATE OTHER DISTRICTS IN ORDER TO CONSTRUCT A MAJORITY "ANY PART BLACK" VAP DISTRICT.

In finding Section 2 liability and entering the Wright Plan as a remedy for the supposed Section 2 violation, the district court was laboring under the belief that a plan with a population deviation of 10% or less was effectively entitled to a "free pass" as far as the requirement of population equality between districts was concerned. [Doc. 152, p. 41; Doc. 179, p. 24].[8] Thus, at no time did the district court address the dominant role that race played in the deliberate under-population of District 5 and over-population of other districts. Appellants attempt to duck this issue by asserting "that the BOE acknowledges that generally Plaintiffs 'do not bear a greater burden than simply presenting a plan with a population deviation under 10%.'" Appellees' Brief at 37. However, Appellees do not quote there anything the BOE said. Rather, they quote from the district court's summary judgment order.

In fact, Appellants seriously overstate what the BOE acknowledges and they misstate what the law is. Both the Illustrative Plan and the Wright Plan suffer from

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[8] For example, the court wrote that "state or local districting plans with a population deviation less than 10 percent belong to the category of minor deviations that are consistent with the constitutional requirements." [Doc. 179, p. 24].

the fact that District 5 was *deliberately* under-populated on the basis of race in order to create a district that had more than 50 percent "any part black" VAP, and other districts were *deliberately* over-populated on the basis of race for that same reason. Simply because the deviation is under 10% does not create a safe harbor under these circumstances.

Deviations of less than 10% do not create a *prima facie* showing of unconstitutional variation for legislative plans, though they may still be challenged if the deviations are the product of invidious discrimination. *See* Appellants' Brief at 40-42. Although the Supreme Court has not set out a similar numerical limit for state or local plans that are court-drawn, the permissible deviations are unquestionably much less for court-ordered plans. *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975)("a court-ordered reapportionment plan of a state legislature [or local government] ... must ordinarily achieve the goal of population equality with little more than *de minimis* variation."); *Connor v. Finch*, 431 U.S. 407, 409-10 (1977).

The decisional law on this issue is comprehensively summarized in *Essex v. Kobach*, 874 F.Supp.2d 1069, 1082 (D. Kan. 2012):

> . . . As the Court explained in *Chapman*, "[w]ith a court plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features [of the state]." 420 U.S. at 26, n. 19.
>
> Other courts have interpreted this language to indicate that low level deviations are constitutional. At the high end, the Fifth Circuit has held that

> a total deviation of 4.11 percent qualifies as "sufficiently de minimis," *Wyche v. Madison Parish Police Jury,* 635 F.2d 1151, 1159 (5th Cir.1981). The Eighth Circuit approved a plan with a 1.13 percent total deviation, but did not consider whether that marked the high end of the acceptable range. *Fletcher v. Golder,* 959 F.2d 106, 109 (8th Cir.1992).
>
> District courts . . . have approved maps ranging up to two percent total deviation. . . .
>
> Lacking more precise guidance from the Supreme Court, this court can only deduce that 5.95 percent is probably too high in terms of population deviation, and that lower is better. We agree with *Burton v. Sheheen,* 793 F.Supp. 1329, 1344-45 (D.S.C.1992), *judgment vacated on other grounds,* 508 U.S. 968 (1993), and we repeat that opinion's conclusion: We conclude, without quantifying the *de minimis* standard, that the standard lies somewhere between the 10 percent presumption of *Brown* [*v. Thomson,* 462 U.S. 835 (1983)] and the mathematical preciseness required for congressional redistricting under *Wesberry v. Sanders,* 376 U.S. 1 (1964), and in the opinion of this court, it lies closer to [the equal population standard for congressional districts.]

Id. at 1082-1083.

Much more troubling in this case than the deviation itself is the reason for it. The evidence is unrefuted that District 5 is under-populated to make it possible to get to what the district court considered the "magic number" – anything over a 50% "any part black" VAP threshold. Had District 5 been populated at the ideal, the district could not meet that threshold. Stated otherwise, there are, intentionally and purposefully, fewer persons in District 5 in order to enable it to be a 50% "any part black" VAP district. The population deviation is, beyond any dispute, based on race. That is the definition of invidious discrimination, and that renders the deviations here – even though less than 10% – unconstitutional under any

interpretation of equal protection. *See, e.g.*, *Putnam County*, *supra* at 1276-77 ("Although we have concluded that the 1992 plan is a "court-ordered" one, our analysis of why the deviation it produced is constitutionally infirm depends not on its size, but rather on the *reason* for that size—intentional racial gerrymandering."); *Larios v. Cox*, 305 F.Supp. 1335, 1338 (N.D. Ga.)(three-judge court), *affirmed*, 542 U.S. 947 (2004)("where population deviations are not supported by such legitimate interests but, rather, are tainted by arbitrariness or discrimination, they cannot withstand constitutional scrutiny.").

IV. The District Court Could Not Properly Enter Summary Judgment In Plaintiffs' Favor Given The Numerous Disputed Questions Of Fact.

While the BOE believes the impossibility of creating a compact majority-minority district in Fayette County, the overriding role that race played in crafting the Illustrative Plan and the Wright Plan, and the subordination of traditional districting principles in the development of those plans to racial considerations doom Plaintiffs' Section 2 claim from the outset, it is unimaginable that liability in Plaintiffs' favor could be rendered as a matter of law based on this record. A plaintiff's burden under Section 2 is to establish the three *Gingles* preconditions and to prove that, under the totality of the circumstances, the challenged practice impairs the ability of minority voters to participate equally in the political process and to elect a representative of their choice. *LULAC*, 548 U.S at 425-26; *Johnson*

v. DeGrandy, 512 U.S. 997, 1011 (1994). "[T]he ultimate conclusions about equality or inequality of opportunity were intended by Congress to be judgments resting on comprehensive, not limited, canvassing of relevant facts." *Id*.

Abundant evidence was presented by the BOC that countered the evidence offered by Plaintiffs. Much of the evidence on which both Plaintiffs and the BOC relied for their summary judgment motions came from their respective experts, and their opinions and conclusions were largely at odds with one another. While the weight to be given these opinions and the other evidence is left to the trier of fact, it is not the role of a district court on a motion for summary judgment to engage in such an exercise. *FindWhat Investor Group*, *supra*.

In their principal brief at 52-58, Appellants pointed to 17 specific instances where the district court "found" facts that were either unsupported in the record or, at best, contradicted. Appellees make no effort to substantively address these flaws in the court's summary judgment order, nor could they do so on any legal basis. Instead, Appellees simply reiterate what the district court said, as if self-justification was a meaningful response. For example, Appellees repeat that the district court ruled that Georgia's majority vote requirement "weighed heavily for Plaintiffs," Appellees' Brief at 58, but Appellees continue to ignore the undisputed fact that Georgia's majority vote law has been found ***non***discriminatory. *See* Appellants Brief at 56 and cases cited.

Similarly, Appellees reiterate that the district court "weighed heavily" the fact that Georgia and Fayette County use "numbered posts," "residency requirements," and "staggered terms," "in addition" to its majority vote requirement. Appellees Brief at 58. But there is not a shred of evidence that any of these factors cause or contribute to vote dilution in Fayette County. Appellees do not even speculate as to some theoretical way in which that might be true. Majority vote elections necessarily have head-on-head elections for specific seats (*e.g.*, numbered posts) in which candidates win only when they receive a majority of the votes over their opponents, so "numbered posts" add nothing to Plaintiffs' case. Plaintiffs insist on residency districts, so they can hardly be heard to criticize that feature. And staggered terms – whereby some BOE members are elected in a given year and others are elected two years later, all for four-year terms – has not arguably caused discrimination in Fayette County.

Throughout its summary judgment order, the district court engaged in unabashed fact-finding and then drew inferences from the facts it "found." [*See, e.g.*, Doc. 152, pp. 37, 42, 52, 54, 58, 61, 63, 69, 74, 79, 80.][9] At the conclusion of its order, the court goes so far as to "find[] that the 'dots' of circumstantial

[9] Plaintiffs studiously avoid using the term "finding" to describe the district court's findings. Instead, they state that the court "concluded," "credited" certain statements, "determined," or "accepted substantial evidence." Appellants' Brief at 29-34, 88. These terms do not alter the reality of what the district court clearly did.

evidence form together to show that African-Americans 'have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.'" [Doc. 153 at 79].

In vote dilution cases courts must "consider all relevant evidence," conduct a "searching practical evaluation of the 'past and present reality'" of the challenged electoral system, and "gradually draw[] together a picture of the challenged electoral scheme and the political process in which it operates by accumulating pieces of circumstantial evidence." *Nipper, supra* at 1527. Summary judgment for plaintiffs in such a case is singularly inappropriate. *See, e.g., Mallory v. Eyrich*, 707 F.Supp. 947, 954 (S.D. Ohio 1989) (despite pertinent statistics not being in dispute, "[f]ull development of the record [at trial] is necessary in order to determine the appropriate interpretation of the pertinent facts and to resolve the disputed issues presented by the experts' analyses"); *Pope v. County of Albany*, 214 WL 316703, 14 (N.D.N.Y. 2014)(political cohesion issue required a "fact intensive consideration not appropriate for decision on summary judgment").

The district court committed clear error when it entered summary judgment in this case.

CONCLUSION

For the reasons set forth above and those previously set forth by the BOE, the district court erred in entering summary judgment against the BOE and

imposing the court-ordered remedial plan, and its judgment should be reversed.

RESPECTFULLY SUBMITTED:

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 32(a)(5) and 32(a)(7)(B) of the Rules of the United States Court of Appeals for the Eleventh Circuit, the undersigned counsel for Appellants hereby certifies that this brief complies with the typeface and style requirements because this brief has been prepared in a proportionally spaced typeface using Word 2010 and is typed in 14 point Times New Roman Font and further complies with the type-volume limitation of the Rule concerning the number of words (6478) in the brief.

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **REPLY BRIEF OF APPELLANTS** with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification constituting electronic service of such filing to the following attorneys of record:

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