IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA NEWNAN DIVISION

GEORGIA STATE CONFERENCE OF THE NAACP, *et al.*, Plaintiffs, v. FAYETTE COUNTY BOARD OF COMMISSIONERS, *et al.*, Defendants.	CIVIL ACTION NO. 3:11-CV-00123-TCB

COUNTY DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs face two insurmountable obstacles to establishing the first prong for a successful claim under Section 2 of the Voting Rights Act, as prescribed by the United States Supreme Court in *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986): (1) they cannot create a district with 50% African-American population without racially gerrymandering and (2) they have no evidence proving that the African-American community in Fayette County is geographically compact. With regard to the first obstacle, because this Court cannot order a racial gerrymander as a remedy for an alleged Section 2 violation,

the district proposed cannot be used to meet the first prong Plaintiffs must prove to succeed. Even if Plaintiffs did not face that obstacle, Plaintiffs have not and cannot show another critical requirement of the first *Gingles* prong: that the African-American community in Fayette County is geographically compact. Because Plaintiffs cannot establish the necessary requirements of the first prong of *Gingles* and there is no dispute of a material fact, County Defendants are entitled to judgment as a matter of law.

II. STATEMENT OF FACTS

In order to show a Section 2 violation, Plaintiffs bear the burden of proving the first *Gingles* prong: that the minority community in Fayette County is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50-51. To meet this prong, Plaintiffs rely on the expert testimony of William Cooper, who drew a five-member Illustrative Plan for Fayette County which contained a district with a population that was more than 50% African-American ("the majority-minority district"). Declaration of William S. Cooper, attached as Ex. B ("Cooper Report"), ¶¶ 7, 35.

Although Plaintiffs and Mr. Cooper contend that, on its face, this plan illustrates that the first prong of *Gingles* is met, a closer look at the Illustrative Plan and other plans drawn by Cooper demonstrates otherwise. As discussed below, the

only way to create a majority-minority district in Fayette County is to use race as the predominant factor in the creation of the plans. The design of the majority-minority district in the Illustrative Plan and other plans drawn by Cooper is unexplainable on grounds other than race, because the techniques Cooper used prove that race was the most important consideration in his mapdrawing.

Several factual considerations related specifically to the majority-minority district in the Illustrative Plan are relevant to this Court's consideration.[1] First, the shape of the majority-minority district is unusual, but especially so when viewed against the racial composition of Fayette County. Declaration of John B. Morgan, attached as Ex. C ("Morgan Report"), Second Supplemental Declaration of William Cooper, attached as Ex. E ("Second Supp. Cooper Report"). The racial densities on the map attached to the Morgan Report show that the district ***specifically includes*** areas with concentrations of African-American population while ***systematically excluding*** white population. Morgan Report, ¶30. The district is designed to combine three disparate concentrations of African-Americans in the county and exclude the intervening white population because that is the only way to create a majority-minority district. Morgan Report, ¶¶24, 30-31.

[1] These points are also included in the Statement of Undisputed Material Facts filed with this brief. While focused primarily on the Illustrative Plan offered by Plaintiffs, many of the same points apply to the More Compact Plan and Low Deviation Plan offered by Cooper and discussed below.

The district also splits a large number of precincts without any explanation other than race. Supplemental Declaration of John B. Morgan, attached as Ex. D ("Supp. Morgan Report"), ¶¶19-20. Cooper originally tried to draw a majority-minority district using whole precincts but was unable to do so. Deposition of William Sexton Cooper [Doc. 107] ("Cooper Dep.") 191:14-25. He then disregarded precinct boundaries, instead using only Census blocks, the smallest level of geography. Cooper Dep. 163:19-164:1; 183:1-5. He decided which Census blocks to include in the district while using the display feature showing the African-American percentage of each block. Cooper Dep. 107:2-15. An analysis of each split precinct confirms that racial information was critical to Cooper's drafting of the plan, because every time he split a precinct, he *always* placed a higher percentage of African-American individuals into the majority-minority district while *always* removing a higher percentage of white individuals from the district. Supp. Morgan Report, ¶ 20.

While Cooper claims that some precinct splits were designed to avoid pairing incumbents, he was only able to identify one split that actually was the result of protecting an incumbent. Cooper Dep. 151:16-152:17. He was unable to explain the purpose of the other splits. Cooper Dep. 152:3-17.

The majority-minority district on the Illustrative Plan scores very low on a variety of compactness measures compared to other plans for Fayette County. Morgan Report, ¶¶ 41-43. Because there is no objective standard for measuring the compactness of a proposed district, the only way to measure compactness is in relation to something else. Cooper Dep. 216:5-217:6. Morgan used several methods of calculating compactness that each "reward" different things in measuring compactness. Morgan Report, ¶ 32; Cooper Dep. 225:16-226:3.

In an attempt to explain the lower compactness scores of the Illustrative Plan, particularly the majority-minority district, Cooper performed an analysis that purported to show the district was "in the norm" of compactness with other districts. Second Supp. Cooper Report, ¶¶ 8, 13. Cooper utilized districts in the legislative district plans of seven states, along with county commission and board of education plans in 25 counties in Georgia, and compared them with the compactness scores of the majority-minority district on the Illustrative Plan. Second Supp. Cooper Report, ¶ 8, 13.

On cross-examination about his own analysis, however, Cooper conceded that the number of state legislative districts that scored the same or lower than the compactness of the majority-minority district was no more than 86 out of 908 districts (approximately 9%) and could have been far less. Cooper Dep. 231:20-

232:15. Cooper agreed that states (including Georgia) that have to comply with Section 5 of the Voting Rights Act ("VRA") would likely have lower compactness scores, Cooper Dep. 235:13-17, and if those states were removed from his analysis, only eight districts out of 384 (approximately 2%) had compactness scores as low as the majority-minority district in the Illustrative Plan. Cooper Dep. 236:17-237:2.

Similar patterns emerged when reviewing Cooper's comparisons to county commission and board of education plans. Cooper admitted that only nine of the 125 districts (approximately 7%) he analyzed had compactness scores the same or lower than the majority-minority district on the Illustrative Plan and, again, that number could be far lower. Cooper Dep. 245:8-13. The largest number of counties containing districts with compactness scores the same or lower than the majority-minority district in the Illustrative Plan was three out of 25 and could be less than that. Cooper Dep. 246:5-15. Cooper was unable to identify which of any of the counties he analyzed have a majority-minority district that had to be protected under Section 5 of the VRA, which he had already admitted could lead to lower compactness scores. Cooper Dep. 243:21-244:6.

Thus, using Cooper's own analysis of other districts in the state and country, the majority-minority district in his Illustrative Plan is far less compact than most districts in the country and most county commission and school board districts in

Georgia. While a lack of compactness may sometimes be explained by other factors, such as compliance with Section 5 of the VRA or other traditional redistricting principles, the lack of compactness of the majority-minority district on Cooper's plans cannot be explained by any geographic features in the county. Supp. Morgan Report, ¶ 24. Instead, the only explanation for the lack of compactness is the necessity of cobbling together African-Americans in order to create a majority-minority district. Morgan Report, ¶ 35. Even Cooper acknowledged that the Illustrative Plan is "not going to win a blue ribbon for compactness." Cooper Dep. 135:9-10.

In the process of drawing the majority-minority district, Cooper did not use any recognizable communities of interest except for race. Cooper Dep. 184:13-185:6, 186:19-25. He testified he was unaware of the location or attendance patterns for any churches or civic organizations besides the NAACP (Cooper Dep. 284:23-285:7; 285:20-24), ignored municipal boundaries (Cooper Dep. 284:4-20), and did not follow school attendance zones. (Cooper Dep. 286:16-24). As discussed above, Cooper did not make an effort to maintain precinct boundaries. Morgan Report, ¶¶19-20.

Cooper's primary goal in drafting the plan was to create a majority-minority district. Cooper Dep. 131:16-24. He could only identify race as a community of

interest in the majority-minority district and would have subordinated every traditional redistricting principle to race if he felt it was necessary to achieve his goal of a majority-minority district. Cooper Dep. 187:8-191:4. Cooper also based his drawing on the belief that the African-American voters in Fayette County want to be in the same district and that white voters would not want to be in such a district. Cooper Dep. 195:17-195:12.

Cooper did not consider any election data in creating his plan, instead focusing on the racial makeup of the district. Cooper Dep. 109:24-110:3. He never performed any sort of political analysis of his plans. Cooper Dep. 109:24-110:3. Even if Cooper had attempted to perform a political or voter registration analysis, the number of split precincts in his plans introduces significant error, as he recognized. Cooper Dep. 111:13-23.

Cooper conceded the challenges faced in trying to achieve a majority-minority district in Fayette County. When he attempted to make a district that was more compact, the population deviations rose and the black percentages dropped. Cooper Dep. 241:9-242:14. When he attempted to draw a district that had deviations closer to zero, the black percentages and compactness suffered. Cooper Dep. 269:23-270:4; Second Supp. Cooper Report, Ex. E. As Morgan testified, it is

simply not possible to draw such a district without focusing primarily on race as the predominant factor over every other consideration. Morgan Report, ¶ 49.

Although Cooper is the sole expert witness offered by Plaintiffs to establish the first *Gingles* prong, Cooper Report, ¶ 7, Cooper never even reviewed whether the African-American community in Fayette County was geographically compact. Cooper Dep. 166:25-167:9. Instead, he says he determined the compactness of the community by looking at the land area, his "eyeball test" of how a district looks based on his experience in redistricting, his analysis of the demographics of the county, and maps he drew. Cooper Dep. 170:15-24; 172:2-15.

Cooper apparently developed his "analysis" of geographic compactness on the spot during his deposition, fixing it primarily on his ability to draw a majority-minority district. Cooper Dep. 170:15-24; 172:2-15. None of the elements he mentioned was included in any of his expert reports and Cooper cited nothing to support his analysis. Cooper Dep. 166:14-20. In contrast, Morgan's analysis of geographic compactness demonstrates that when there is significant white population between a concentration of minority population, the minority community is not geographically compact; it is geographically dispersed. Morgan Report, ¶¶21-23.

III. ARGUMENT AND CITATION OF AUTHORITIES

Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56. The moving party bears the initial burden but is not required to negate the opposing party's claims. Instead, the moving party may point out the absence of evidence to support the non-moving party's case. *Marion v. DeKalb County, Ga*. 821 F.Supp. 685, 687 (N.D. Ga. 1993).

The evidence before the Court demonstrates that Plaintiffs cannot establish the first prong required to show a Section 2 violation under *Gingles*, *i.e.*, that the minority community in the jurisdiction is "sufficiently large and geographically compact to constitute a majority in a single-member district." *Gingles*, 478 U.S. at 50-51. As discussed below, (1) the only way to create a majority-minority district in the county is through a racial gerrymander, (2) a racial gerrymander cannot be the method of meeting the first prong of *Gingles* because the Eleventh Circuit requires that the plan used to meet the first prong be a possible remedy and (3) Plaintiffs have put forward no evidence of the geographic compactness of the minority community in Fayette County.

Plaintiffs and their expert have argued that meeting the first prong of *Gingles* is as simple as drawing a district with 50% plus one African-American

population in any shape, size, or configuration, but the Supreme Court disagrees. As discussed below, Plaintiffs must offer a district which can be ordered as a remedy (meaning it cannot be a racial gerrymander) and must produce evidence that the minority *community* – not just a proposed district – is geographically compact. They have not done and cannot do either in this case.

This Court may determine on summary judgment that a plan is a racial gerrymander when there is "uncontroverted evidence and the reasonable inferences" support such a finding. *Hunt v. Cromartie*, 526 U.S. 541, 553, 119 S.Ct. 1545, 1553, 143 L.Ed.2d 731 (1999). While a party challenging a plan as a racial gerrymander is usually attempting to overturn a legislatively-enacted plan entitled to deference, in this case the Court must address a plan proposed by Plaintiffs as evidence of a Section 2 claim. *Easley v. Cromartie*, 532 U.S. 234, 242, 21 S.Ct. 1452, 1458 (2001). Such a proposed plan is entitled to less deference than is a legislatively-enacted plan because a legislature must have discretion to exercise the "political judgment necessary to balance competing interests." *Easley*, 532 U.S. at 242. Here, Plaintiffs seek a change in a legislatively-enacted electoral system and offer the various plans drawn by Cooper as support for that claim.

A. Plaintiffs' Section 2 Claim Fails Because the Illustrative Plan and Other Plans Offered by Plaintiffs' Expert Do Not Achieve a Majority-Minority District Without Making Race the Most Important Consideration in the Plans.

Districting legislation is race neutral on its face, so in order to demonstrate a particular redistricting plan is a racial gerrymander, a party must show using direct or circumstantial evidence that race was the "predominant factor" motivating the districting decision. *Hunt*, 526 U.S. at 547. Circumstantial evidence of racial predominance includes maps showing the district is bizarrely-shaped in relation to the racial and population densities, low scores on traditional measures of compactness, ignoring traditional redistricting criteria, and dividing political subdivisions and communities of interest. *Miller v. Johnson*, 515 U.S. 900, 917, 115 S.C.t 2475, 2489, 132 L.Ed.2d 762 (1995); *Hunt*, 526 U.S. at 547-548. Evidence that minority voters were included in a district while white voters were excluded when political subdivisions were split also can demonstrate racial predominance. *Hunt*, 526 U.S. at 548 (boundary segment analysis). Even without direct evidence of intent on the part of the mapdrawer, these items support an inference that the mapdrawer drew with "an impermissible racial motive." *Hunt*, 526 U.S. at 548-549.

All of that circumstantial evidence of racial predominance is present in this case and without the contrary political evidence that prevented the grant of

summary judgment in *Hunt*. 526 U.S. at 551. In addition, Cooper testified directly regarding his race-based goals in his map-drawing process.

As demonstrated by the maps attached to the Morgan Report, the majority-minority district created by Cooper on the Illustrative Plan takes in nearly every Census block in the county with a significant minority population. While a map may not initially appear bizarre on its face, review of the shape in conjunction with the underlying racial makeup of the population may tell a story of racial gerrymandering, as it does here. *Miller*, 515 U.S. at 917. The maps attached to the Morgan Report showing the underlying racial population demonstrate that the boundary lines follow the racial population nearly exactly.

The story of racial gerrymandering becomes clearer when precinct splits are added to the picture. Although avoiding split precincts is a traditional principle of redistricting in Georgia, *Larios v. Cox*, 300 F.Supp.2d 1320, 1349 (N.D. Ga. 2004), Cooper testified it was impossible to draw a majority-minority district using only precinct boundaries. Cooper Dep. 191:14-25.

In order to achieve the goal of drawing a majority-minority district in Fayette County, Cooper then began drawing with only Census blocks. Cooper Dep. 191:14-25. The *only* data available at this level is racial data. *Bush v. Vera*, 517 U.S. 952, 1016-1017, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996). Cooper conceded

that while he was drawing, he had labels on each Census block indicating the African-American percentage of every block. Cooper Dep. 107:2-15.

In each precinct Cooper split to achieve a majority-minority district, he *always included* areas with a higher percentage of African-American population in the district while *always excluding* areas with higher percentages of white population. Supp. Morgan Report, ¶ 20. As a result, with eight split precincts, it is no accident that the exclusion of white population took place every time—it was part of the specific process necessary to achieve a majority-minority district. Supp. Morgan Report, ¶ 20. This type of boundary segment analysis further demonstrates the racial focus taken by Cooper. *Hunt*, 526 U.S. at 548.

No traditional redistricting principles can explain these unusual features of Cooper's plans. The majority-minority districts he drew consistently score low on various compactness tests, even under comparisons performed by Cooper. Cooper Dep. 236:17-237:2; 245:8-13. While Cooper claimed the district was well within "the norm" of compactness scores of other districts in the U.S. and in Georgia, his comparison was based solely on districts that shared only one compactness score with his majority-minority district. Cooper Dep. 231:20-232:15. His proposed district, however, scored low on two compactness measures, and only a vanishingly small number of districts scored low on *both* measures. Cooper Dep.

236:17-237:2; 245:8-13. In addition, Cooper was unable to explain what local issues may drive the lower compactness scores on his comparison plans, such as compliance with the preclearance requirements of Section 5 of the Voting Rights Act, geographic features, or incumbents at issue. Cooper Dep. 243:21-244:6. By his own testimony or lack thereof, the district drawn by Cooper is far below the "norm" of compactness scores for other districts drawn in the U.S. and in Georgia.

No communities of interest or other interests beyond race explain the low compactness scores. Cooper was unaware of any communities in Fayette and could not name any church, civic or other connections in his proposed district (beyond common membership in the NAACP). Cooper Dep. 284:4-20; 284:23-285:7; 285:20-24; 286:16-24. Tellingly, Cooper also based his drawing on his supposition that the African-American community in Fayette County "wants" to be in the same district and that white voters would not want to be in such a district. Cooper Dep. 195:17-196:12.

While Cooper attached several other plans to his various declarations, all are infected with his undue focus on race. When attempting to correct one of the traditional redistricting principles lacking under the Illustrative Plan, Cooper was never able to fix all of the issues. Instead, when he drew the More Compact Plan that was "more compact" than the Illustrative Plan, the African-American

percentage dropped and the population deviations fell. Cooper Dep. 241:9-242:14. When he drew the Low Deviation Plan closer to zero population deviations, the compactness and African-American percentage decreased, further illustrating the impossibility of correcting the problems that infect all of these plans. Cooper Dep. 269:23-270:4; Second Supp. Cooper Report, Ex. E.

The African-American voting age population is so close to 50% (only 35 people over a majority in the Illustrative Plan) that every single change has a dramatic effect on the racial makeup of the district. Morgan Report, ¶ 28; Supp. Morgan Report, ¶ 23. As set forth above, in order to achieve a majority-minority district in Fayette County, Cooper was forced to subjugate every traditional redistricting principle to race in order to achieve a majority district. Even doing that, the district is still only 35 people over a majority.

All of the same evidence before the *Hunt* Court is present in this case regarding the majority-minority districts in the plans drawn by Cooper: they follow the racial composition of the county, split precincts, score low on compactness measures, and always exclude areas of higher white population while always including areas of higher African-American population. *Hunt*, 526 U.S. at 547-548. Cooper was unaware of any communities of interest while drawing the plans, and thus the shapes and splits of precincts have nothing to do with anything except

race. Cooper Dep. 184:13-185:6, 186:19-25. That race predominated is even clearer when considering that Cooper drew his map with only one piece of demographic information visible on his plan: the percentage of African-American population in each Census block. Cooper Dep. 107:2-15.

That admitted focus on race, in addition to the circumstantial evidence found relevant by the Supreme Court in *Hunt*, supports the inference here that the mapdrawer drew with "an impermissible racial motive." *Hunt*, 526 U.S. at 548-549. Unlike *Hunt*, there is no possible alternative explanation that would preclude summary judgment: Cooper never reviewed the political makeup of the district while drawing the district despite having those data available and freely admitted that his focus was drawing a majority-minority district. Cooper Dep. 109:24-110:3; 131:16-24. Cooper's plans are not entitled to any deference as legislatively-enacted plans, especially because they are offered as support to overturn an existing legislatively-enacted system for electing officials in Fayette County. *Easley*, 532 U.S. at 242

Because of the lack of any alternative explanation for the evidence of racial gerrymandering, this Court may properly make a determination that the Illustrative Plan, the More Compact Plan, and the Low Deviation Plans are racial gerrymanders on summary judgment. *Hunt*, 526 U.S. at 553.

B. A Racially-Gerrymandered Plan Cannot be Used to Show a Violation of Section 2 Because it Cannot be Ordered as a Remedy.

In *Shaw v. Hunt*, 517 U.S. 899, 116 S.Ct. 1894 (1996), the Supreme Court held that districts drawn using race as the "predominant factor" are unconstitutional. *Shaw*, 517 U.S. at 906. The jurisdiction's belief that it was complying with Section 2 did not serve as a compelling state interest sufficient to meet strict scrutiny. *Shaw*, 517 U.S. at 917-918.

The Eleventh Circuit prohibits the separation of the first prong of liability under *Gingles* and the potential remedy. *Nipper v. Smith*, 39 F.3d 1494, 1530-31 (11th Cir. 1994); *see also Burton v. City of Belle Glade*, 178 F.3d 1175, 1199 (11th Cir.1999) ("We have repeatedly construed the first *Gingles* factor as requiring a plaintiff to demonstrate the existence of a proper remedy."). Whatever plan is used to demonstrate the violation of the first prong of *Gingles* must also be a remedy that can be imposed by the Court. *Nipper*, 39 F.3d at 1530-31. In short, if a plaintiff cannot show that the plan used to demonstrate the first prong can also be a proper remedy, then the plaintiff has not shown compliance with the first prong of *Gingles*. *Nipper*, 39 F.3d at 1530-31.

This Court cannot order a racial gerrymander without running afoul of *Shaw*, because racial classifications are "antithetical to the Fourteenth Amendment." *Shaw*, 517 U.S. at 907; *see also Abrams v. Johnson*, 521 U.S. 74, 90, 117 S. Ct.

1925, 1935, 138 L. Ed. 2d 285 (1997) ("the trial court acted well within its discretion in deciding it could not draw two majority-black districts without itself engaging in racial gerrymandering"); *Wright v. City of Albany*, 306 F.Supp.2d 1228, 1235 (M.D. Ga. 2003) ("A Court ordered plan must be free from any discrimination").

The Illustrative Plan, More Compact Plan, and Low Deviation Plan offered by Plaintiffs to demonstrate the first prong of *Gingles* cannot fill that role because they are impermissible racial gerrymanders. This Court cannot order any of these plans as a remedy because racial considerations predominate over traditional redistricting principles to achieve a majority-minority district.

While Plaintiffs may believe that racial gerrymandering should be excused to comply with Section 2,[2] such an approach places this Court in an impossible chicken-and-egg situation. If a Section 2 violation can only be demonstrated by a racial gerrymander, then *compliance* with Section 2 cannot be the reason the racial gerrymander is appropriate. In fact, this circular argument provides additional

[2] No Supreme Court case has ever addressed whether compliance with the VRA is a defense to a racial gerrymandering claim, and in *Shaw*, the Supreme Court specifically did *not* address the issue of whether compliance with the VRA was a defense to a racial gerrymander. 517 U.S. at 911. The Court noted that that it had previously left the question open in *Miller v. Johnson*, 515 U.S. 900, 921, 115 S.Ct. 2475, 132 L.Ed2d 762 (1995) and stated that "once again we do not reach that question." *Shaw*, 517 U.S. at 911.

support for the Eleventh Circuit's requirement that the first prong of *Gingles* requires that a valid remedy be demonstrated—if the prong one proposal cannot be ordered as a remedy, then a court never has to reach the question of whether compliance with the VRA is an excuse for a racial gerrymander.

The determination that the plans offered by Plaintiffs are racial gerrymanders ends this case as a matter of law. Without a valid showing under the first prong of *Gingles*, Plaintiffs failed to carry the first part of their burden to show a violation of Section 2. Without showing each of the three prongs, Plaintiffs have no claim for a violation of Section 2. *Gingles*, 478 U.S. at 50-51.

C. Plaintiffs' Expert Never Considered the Question of Geographic Compactness of the Minority Community.

Even if this Court concludes that it cannot reach the question of whether the plans proposed by Plaintiffs are racial gerrymanders at this point, Plaintiffs have presented no evidence that the African-American community in Fayette County is geographically compact. This absence of evidence supports a grant of summary judgment to County Defendants. *Marion*, 821 F.Supp. at 687.

The Supreme Court requires that the size and geographic compactness portions of the first *Gingles* prong relate to the *community*, not to any potential district created by a plaintiff: "The first *Gingles* condition refers to the compactness of the minority population, *not to the compactness of the contested*

district." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433, 126 S. Ct. 2594, 2618, 165 L. Ed. 2d 609 (2006) *quoting Bush v. Vera*, 517 U.S. 952, 997, 116 S. Ct. 1941, 135 L. Ed. 2d 248 (1996) (emphasis added). In spite of this requirement, Cooper only analyzed the compactness of a *district* drawn around the minority community and never provided any analysis of the compactness of the community itself, aside from a conclusory declaration at the end that the standard is met. Cooper Report, ¶44. Cooper admitted he never reviewed the question of the geographic compactness of the minority community and on deposition, appeared to be attempting to create a test on the spot to determine geographic compactness. Cooper Dep. 166:25-167:9; 170:15-24; 172:2-15.

In contrast, County Defendants' expert specifically analyzed the minority *community* as required by the Supreme Court, analyzing the compactness of the group and determining that the three groups of minority population in Fayette County are geographically separated. Morgan Report, ¶¶21-23; *see also Perry*, 548 U.S. at 433 ("there is no basis to believe a district that combines two farflung segments of a racial group with disparate interests provides the opportunity that § 2 requires or that the first *Gingles* condition contemplates."). Morgan reviewed the steps necessary to connect the geographically-separated communities and concluded that the distance, combined with the necessity of creating a racial

gerrymander to unite the communities, leads to the inescapable conclusion that the minority communities are not sufficiently compact. Morgan Report, ¶¶ 21-23, 49-50. The Morgan Report demonstrates there are *three separate* communities of African-American individuals in Fayette County, which must be combined as one community to create a majority-minority district. Morgan Report, ¶¶ 14-17, 21. Furthermore, the only way to unite the three distinct communities in a majority-minority district is to eliminate the intervening white population between the three minority communities. Morgan Report, ¶ 24.

Plaintiffs have presented no evidence that the minority community in Fayette County is geographically compact. Cooper apparently never even considered that question, instead relying on the compactness of the district in question. Cooper Dep. 170:15-24; 172:2-15. The mere fact Cooper could draw a district around the three minority communities is not sufficient to make one community, as the Supreme Court has made clear. *Perry*, 548 U.S. at 433. In contrast, County Defendants have presented unrefuted and irrefutable evidence that the minority community in fact is not compact but is instead geographically disbursed. Morgan Report, at ¶¶ 21-23, 49-50.

In summary, even if the plans offered by Plaintiffs are not racial gerrymanders, the lack of evidence of an essential part of Plaintiffs' case—the

geographic compactness of the minority community in Fayette County—entitles County Defendants to a grant of summary judgment in their favor. *Marion,* 821 F.Supp. at 687.

IV. CONCLUSION

In this case, Plaintiffs seek to make dramatic changes to the system of government in Fayette County—moving from a system that has been in place for decades to a new, district-based system. They carry a heavy burden of demonstrating that judicial intervention in the political affairs of Fayette County is appropriate.

Plaintiffs cannot carry their burden. Even on the very first prong of *Gingles*, the most Plaintiffs can offer is a racially-gerrymandered map that this Court cannot order as a remedy and a few conclusory statements on the compactness of the minority community in Fayette County from their expert which have no evidentiary support. Based on the undisputed material facts, Plaintiffs have not carried and cannot carry their burden to meet the first prong of *Gingle*. Therefore County Defendants are entitled to judgment as a matter of law.

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing COUNTY DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT has been prepared in Times New Roman 14, a font and type selection approved by the Court in L.R. 5.1(B).

Respectfully submitted this 13th day of September, 2012.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day electronically filed the within and foregoing COUNTY DEFENDANTS' BRIEF IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT with the Clerk of Court using the CM/ECF system which will automatically send e-mail notification of such filing to the following attorneys of record:

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This 13th day of September, 2012.

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