

**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' RESPONSE IN OPPOSITION
TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

I. INTRODUCTION

This Court should deny Plaintiffs' Motion for Summary Judgment and grant County Defendants' Motion for Summary Judgment. Plaintiffs refuse to recognize the controlling authority of *Nipper* and its requirement that a proposed plan must be capable of being ordered as a remedy. The reason for Plaintiffs' stubborn refusal is clear: under the clear authority of *Nipper*, the Illustrative Plan proposed by Plaintiffs cannot be ordered as a remedy by this Court because that plan is a racial gerrymander.

Even if *Nipper* did not make it impossible for Plaintiffs to meet this *first* precondition of a successful Section 2 claim, they still must also show that the totality of the circumstances supports their claim. Because Plaintiffs cannot meet that test either, they present this Court with a mirage—something that looks real at a distance but cannot stand up to the facts. At root, Plaintiffs base their arguments with respect to the totality of the circumstances analysis not on facts but on how they perceive the world to exist and their feelings about that perceived world. [Doc. 110-1, p. 50]. In short, Plaintiffs’ view of the world can be summed up as Plaintiff John E. Jones, president of the Fayette County NAACP expressed: those who do not support district voting for Fayette County hold “white supremacist views” and the word “conservative” in political campaigns is a coded racial appeal. Deposition of John E. Jones [Doc. 134] (“J. Jones Dep.”) 57:25-58:2; 82:17-25.

While County Defendants do not discount the passion with which Plaintiffs are pursuing their *political* goal of district voting, in that effort Plaintiffs have manufactured a Fayette County world that simply does not match the facts which are relevant to an examination of the totality of the circumstances. Plaintiffs have been unable to identify any racial discrimination by Fayette County, any racial appeal by a Fayette candidate, or any particularized need of the African-American community that white citizens of Fayette County do not have. They have not

identified any need of the northern Fayette area that remains “unmet” at this point beyond a desire for increased government spending on Kenwood Park during an economic downturn, even at the expense of critical services like fire and police. In fact, the only “unmet” desire of Plaintiffs is their fervent political wish for district voting.

In the end, Plaintiffs do not and cannot provide this Court with the necessary ingredients for a finding in their favor: undisputed facts and legal authority which requires judgment in their favor. On the other hand, County Defendants have provided both. Therefore, Plaintiffs’ Motion for Summary Judgment should be denied and County Defendants’ Motion granted.

II. ARGUMENT AND CITATION OF AUTHORITIES

Plaintiffs correctly state what they must show in order to establish a Section 2 claim under *Thornburg v. Gingles*, 478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986). As detailed in County Defendants’ brief in support of their motion for summary judgment [Doc. 108-2], Plaintiffs cannot meet the first *Gingles* precondition. Even if Plaintiffs could meet that standard, they cannot demonstrate that the totality of the circumstances supports their theory that at-large voting has abridged their right to vote on account of their race. Instead, the undisputed

testimony of Plaintiffs themselves shows the totality of the circumstances weighs against their claims, and therefore Plaintiffs' motion must be denied.

A. County Defendants Do Not Contest Plaintiffs' Ability to Establish Prongs Two and Three of *Gingles*.

Although it is unclear whether the evidence of racial polarization in the Fayette County is due to race or politics, County Defendants do not dispute Plaintiffs' ability to establish the second and third *Gingles* preconditions.¹ Plaintiffs recognize the absence of any dispute on those two prongs but, in arguing the points anyway, add a footnote that County Defendants must address. In that footnote, Plaintiffs cast the 2006 special election to the Board of Commissioners as a situation in which an "objectively not as qualified" white candidate defeated a number of qualified black candidates. [Doc. 110-1, p. 11 n.4]. Plaintiffs do not provide any basis for how they determined that Commissioner Horgan was "objectively not as qualified," and conveniently ignore the testimony of other commissioners (past and present) that Commissioner Horgan *was* qualified and

¹ County Defendants have not contested these points even though it is unclear whether the evidence of racial polarization in the county is due to race or politics. As Plaintiffs testified, most African-American voters in Fayette County vote for Democratic candidates in a largely Republican county. Deposition of Henry Adams [Doc. 130] ("Adams Dep.") 39:16-24; Deposition of Terence Clark [Doc. 131] ("Clark Dep.") 47:12-16; 30(b)(6) Deposition of Ga. State Conf. of the NAACP by and through Edward DuBose [Doc. 132] ("DuBose Dep.") 52:25-53:4; J. Jones Dep. 125:6-16; Deposition of Bonnie Lee Wright [Doc. 138] ("Wright Dep.") 25:4-7.

was supported in his election by the very-popular incumbent sheriff, providing a reasonable non-racial explanation for his success during a low-turnout special election. Deposition of Jack Smith [Doc. 121] (“Smith Dep.”) 66:7-17 (qualified); Deposition of Herbert Eugene Frady [Doc. 115] (“Frady Dep.”) 49:9-16 (more qualified than others); Deposition of Peter Pfeifer [Doc. 120] (“Pfeifer Dep.”) 24:6-25:6 (supported by sheriff). Plaintiffs’ subjective beliefs that Commissioner Horgan was not qualified do not prove that racial discrimination exists in Fayette County’s electoral system .

B. Plaintiffs’ Illustrative Plan Does Not Comply with Prong One of *Gingles* Because It is a Racial Gerrymander.

Inexplicably, Plaintiffs still refuse to acknowledge the existence of *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994). There is not a single reference to that case in Plaintiffs’ brief on summary judgment, even after this Court explained to Plaintiffs’ counsel that *Nipper* controlled in the Eleventh Circuit. [Doc. 85, pp. 24:25-26:10]. Although County Defendants have fully briefed the failure of the Illustrative Plan to comply with the first *Gingles* prong [Doc. 108-2], a full response to Plaintiffs’ brief requires specific rebuttal of several of the points raised by Plaintiffs.

1. *The Illustrative Plan Does Not Comply with Traditional Redistricting Principles.*

Plaintiffs launch immediately into a discussion of whether the Illustrative Plan meets “traditional redistricting principles.” [Doc. 110-1, p. 14]. Plaintiffs, however, do not appear to understand *why* a proposed plan must meet those principles. As this Court has made clear, a plan submitted for compliance with prong one must be a plan that the Court can order as a remedy. [Doc. 85, pp. 24:25-26:10]; [Doc. 125, p. 2 n. 2]. Analysis of such a plan necessarily includes a review of whether it would be necessary to subordinate “traditional redistricting policies and allowing race to predominate,” but the purpose of the review is to ensure that the plan complies with prong one. *Abrams v. Johnson*, 521 U.S. 74, 91, 117 S.Ct. 1925 (1997); *see also Nipper*, 39 F.3d at 1530-31; *Burton v. City of Belle Glade*, 178 F.3d 1175, 1199 (11th Cir.1999); *Bush v. Vera*, 517 U.S. 952, 1016-1017, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996). Plaintiffs must show that race did not predominate in the drawing of their remedial plan; if they fail to make that showing, they cannot satisfy the first prong of *Gingles*. *Nipper*, 39 F.3d at 1530-31.

This is not a new requirement. In a decision related to Georgia 1990s redistricting that was later upheld by the Supreme Court, the district court determined that Section 2 did not require the addition of a second majority-minority district; in making that determination, the district court looked

specifically at the geographic dispersion of the minority community and the inability to draw a majority-minority district without race predominating. *Johnson v. Miller*, 922 F.Supp. 1556, 1566 (S.D. Ga. 1995) *aff'd sub nom. Abrams v. Johnson*, 521 U.S. 74, 117 S. Ct. 1925, 138 L. Ed. 2d 285 (1997).

a. Compactness.

There is no objective compactness standard; instead, compactness is measured relative to other shapes² and districts. Deposition of William Cooper [Doc. 107] (“Cooper Dep.”) 216:5-217:6; Deposition of John Bennett Morgan [Doc. 119] (“Morgan Dep.”) 67:16-68:1. Both Plaintiffs’ and County Defendants’ experts agree that using more than one compactness measure is helpful because the two main measures of compactness (Polsby-Popper and Reock) “reward” different things.³ Declaration of John B. Morgan [Docs. 108-5, 108-6, 108-7] (“Morgan Report”) ¶ 32; Cooper Dep. 225:16-226:3.

Despite that admission by their expert, as well as his statement that the Illustrative Plan is “not going to win a blue ribbon for compactness,” Cooper Dep.

² The shape of the district is created by the boundaries of the population the mapdrawer chose to include in the district.

³ For example, the Reock score looks at how well a district fills an enclosing circle, while the Polsby-Popper score takes the boundaries of a district and expands them to a circle to measure the area. Reock generates higher scores for districts that fill an area, while Polsby-Popper generates higher scores for districts that use less perimeter. Morgan Dep. 111:3-113:3.

135:9-10, Plaintiffs urge the use of only one compactness score in an attempt to illustrate the Illustrative Plan is somehow compact. [Doc. 110-1, pp. 17-20].

Plaintiffs' argument that there is no "requirement" to use both tests ignores the testimony of both their own expert and Morgan that using both tests is useful in determining the relative compactness scores of various districts and plans.⁴

Morgan Dep. 110:25-112:21 ("Well, I don't think there's a requirement that you would use both. But the reason I like to use them, and the reason that I think they make sense is they complement each other."); Cooper Dep. 225:16-226:20 ("Well, it helps to look at different scores. Right.").

It is undisputed that, when using the two compactness measures, the majority-minority district (District 5 on the Illustrative Plan drawn by Cooper) is the *least* compact district of any district drawn for Fayette County. Morgan Report, ¶ 35. Furthermore, by Plaintiffs' expert's admission, the district is less compact

⁴ Plaintiffs incorrectly claim that Morgan contended the Illustrative Plan is "not compact." Morgan never made such a claim, but instead he repeatedly explained the lack of an objective "compact/not compact" standard to Plaintiffs' counsel during his deposition. For example in response to a repeated theme in his deposition, whether a district was "compact enough" to meet his standards, Morgan responded, "I wouldn't characterize it as saying that a district is compact or is not compact, and I take issue with the way that that is phrased. I have tried to say several times that you can characterize a district as being more or less compact in comparison to another district." Morgan Dep. 127:2-8; *see also* Morgan Dep. 113:4-24 ("I wouldn't make a general statement that a district is compact").

than nearly all of the districts to which he compared it for state and county commission boundaries. Cooper Dep. 231:20-232:15; 236:17-237:2; 245:8-13; 246:5-15.

After recognizing that a district has a relatively low or lower compactness score when compared with other districts, the next question is *why* that is the case. For example, Cooper noted that a lower compactness score sometimes can be explained by factors such as efforts to comply with Section 5 of the VRA (which is not an issue in Fayette County because it currently lacks a protected district). Cooper Dep. 235:13-17. However, Cooper was unable to explain the lack of compactness of District 5 of the Illustrative Plan by any geographic features of the county or maintaining political subdivisions, lending support to the conclusion that the plan was drawn primarily based on race.

Of course, Plaintiffs do not have to present the most compact plan possible. But they do bear the burden of demonstrating that the relative *lack* of compactness in the Illustrative Plan is not the result of race-conscious redistricting, something they cannot do. *Miller v. Johnson*, 515 U.S. 900, 917, 115 S.Ct. 2475, 2489, 132 L.Ed.2d 762 (1995); *Hunt v. Cromartie*, 526 U.S. 541, 547-548, 119 S.Ct. 1545, 143 L.Ed.2d 731 (1999).

b. Population Equality.

Plaintiffs next argue that their plan falls within an acceptable population deviation from the ideal district size, *i.e.*, ten percent. [Doc. 110-1, p. 21]. Plaintiffs cite *Larios v. Cox*, 300 F.Supp.2d 1320 (N.D. Ga. 2004) *aff'd*, 542 U.S. 947, 124 S. Ct. 2806, 159 L. Ed. 2d 831 (2004), for that proposition. The *Larios* court, however, determined that there is *no* ten percent “safe harbor” for population equality. *Larios*, 300 F. Supp.2d at 1340-1341. Furthermore, when a court orders a plan as a remedy (the standard for review of the Illustrative Plan), population equality is the “overriding objective.” *Larios v. Cox*, 314 F. Supp. 2d 1357, 1360 (N.D. Ga. 2004). Simply coming within ten percent is not the standard, particularly after *Larios*.

Still, the question is not whether the Illustrative Plan has an objectively “low enough” population deviation. The question is whether deviations from the ideal population size are justified by some state interest, such as maintaining precincts or other traditional principles of redistricting. *Larios*, 300 F.Supp.2d 1341-1342. Cooper was unable to identify *any* traditional principles of redistricting that drove the deviation from the ideal district size in District 5: not avoiding precinct splits (Cooper Dep. 191:14-25), not compactness (Cooper Dep. 236:17-237:2; 245:8-13),

and not maintaining communities of interest (Cooper Dep. 284:4-20; 284:23-285:7; 285:20-24; 286:16-24).⁵

Plaintiffs do not have to present a zero deviation redistricting plan. They do, however, bear the burden of demonstrating that the reasons for deviations from the ideal district size are not the result of race-conscious redistricting, something they cannot do with the Illustrative Plan. *Miller*, 515 U.S. at 917; *Hunt*, 526 U.S. at 547-548.

c. Precinct Splits.

As discussed at length in County Defendants' Brief, Cooper was unable to draw a majority-minority district using only precincts. Cooper Dep. 191:14-25. Instead, he used the smallest level of geography (where the only things that can be known are race and population) and he had the African-American percentage of each block displayed on his computer as he drew District 5. Cooper Dep. 107:2-15.

⁵ Plaintiffs' argument in a footnote that Cooper underpopulated District 5 based on growth patterns in Fayette County after the Census does not square with Cooper's own testimony. There are no population estimates available below the county level, making it impossible for Cooper to know where in the county any growth is taking place. Cooper Dep. 278:10-19. Those county-level estimates did not appear in Cooper's redistricting software, were not released until May 2012 (long after Cooper drew District 5), and Cooper performed no analysis of voter registration growth below the precinct level. Cooper Dep. 278:22-25, 279:23-280:3. Courts have also recognized that relying on growth trends as a reason for deviating from the ideal district size is not appropriate. *Larios*, 300 F.Supp.2d at 1345.

Plaintiffs are correct that the location of incumbents' residences can be one of the factors that drives a lower compactness score or leads to more split precincts, but that factor does not explain all of the precinct splits here. Cooper claims the 11 split precincts on his plan were designed to protect incumbents, but he could only identify *one* such split and was unable to explain the purpose for any of the other 10 splits. Cooper Dep. 151:16-152:17.

But Cooper's mapdrawing and testimony establishes that, without question, race was the reason for the precinct splits on the Illustrative Plan. In each split on District 5, Cooper *always* placed a higher percentage of African-American individuals into the district and *always* removed a higher percentage of white individuals. Supplemental Declaration of John B. Morgan [Doc. 108-8] ("Supp. Morgan Report") ¶ 20. This is exactly the type of boundary segment analysis that demonstrates racial predominance. *Hunt*, 526 U.S. at 548.

Plaintiffs are not required to present a plan to this Court without any precinct splits, but they do have to present a plan that is not drawn primarily based on race. *Miller*, 515 U.S. at 917; *Hunt*, 526 U.S. at 547-548. The precinct splits in District 5 demonstrate racial predominance in the drawing of the Illustrative Plan and cannot be explained on any other grounds.

d. Communities of Interest.

Although somewhat out of place, Plaintiffs argue in their discussion of *Shaw* that Cooper “accounted for communities of interest in developing the *Illustrative Plan*.” [Doc. 110-1, p. 27]. This is a curious and completely unsupported assertion, in light of Cooper’s admissions that (1) he was unaware of the location or attendance patterns for any churches or civic organizations besides the NAACP when he drew the Illustrative Plan (Cooper Dep. 284:23-285:7; 285:20-24), (2) the Illustrative Plan ignored municipal boundaries (Cooper Dep. 284:4-20), and (3) the Illustrative Plan did not follow school attendance zones (Cooper Dep. 286:16-24). The only community of interest to which Cooper apparently paid any attention was a racial one, relying on his perception of the unity of the black population in the county. Cooper Dep. 184:13-185:6; 186:19-25; 136:25-137:6. Assuming that a population group is a community based solely on their race is not appropriate. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433, 126 S. Ct. 2594, 2618, 165 L. Ed. 2d 609 (2006).

To the extent Plaintiffs are arguing that Cooper accidentally included non-racial communities of interest in District 5, that argument is refuted by a comparison of the Plaintiffs’ testimony and the Illustrative Plan. Plaintiffs’ testimony indicates that there is a regional community in the northern portion of

Fayette County with shared interests in the North Fayette Community Association, lower crime and better education, and using the same recreation areas. [Doc. 110-1, p. 28].

That asserted community of interest, however, does not exist on the Illustrative Plan. Instead of being included or possibly explaining the shape of the district and its deviations from traditional redistricting principles, most of these regional communities of interest are in fact *excluded* from District 5 on the Illustrative Plan. The predictor of whether a particular area will be included in District 5 is not its *regional* character but rather its *racial* character. *See* Supp. Morgan Report, ¶ 20. School attendance zones in north Fayette are excluded from the district. Cooper Dep. 288:14-290:19. Municipal boundaries of cities in Fayette (like Tyrone) are divided by the district. Cooper Dep. 146:15-21. In spite of Cooper's reliance on things he had been told by Plaintiffs' counsel about church attendance and common interests (Cooper Dep. 52:9-23; 284:23-285:19), not one of the Plaintiffs could identify a single individual who attends church in a different part of the county than the part where they live. Adams Dep. 52:10-14; Clark Dep. 74:7-14; DuBose Dep. 61:4-10; Deposition of Alice Matthews Jones [Doc. 133] ("A. Jones Dep.") 61:10-13; J. Jones Dep. 85:9-86:20; Deposition of Daniel L. Lowry [Doc. 135] ("Lowry Dep.") 33:5-34:8. The only apparent common worship

area in the county is the one mosque located in Fayetteville.⁶ Deposition of Aisha Abdur-Rahman [Doc. 128] (“Aisha Abdur-Rahman Dep.”) 80:6-10; Deposition of Ali Abdur-Rahman [Doc. 129] (“Ali Abdur-Rahman Dep.”) 41:10-12, 41:22-42:1. Not all Plaintiffs are members of the North Fayette Community Association. Wright Dep. 44:22-24.

Although some Plaintiffs claimed that there is an interest in shared recreation areas, one Plaintiff testified that recreation areas in fact are not primary communities of interest. Adams Dep. 54:23-55:3. Another Plaintiff testified that those who live in Tyrone go to parks in Tyrone, not to Kenwood Park in Fayetteville. Richardson Dep. 43:18-44:16; 46:3-9. According to two Plaintiffs, Kenwood Park is often used by individuals from outside Fayette County, further undermining Plaintiffs’ reliance on common recreation areas as proof of a community of interest of Fayette County residents. A. Jones Dep. 63:21-24; Adams Dep. 53:22-54:1.

⁶ Most of Plaintiffs attend worship locations that are located outside of Fayette County, further undermining Plaintiffs’ reliance on common church attendance as a community of interest sufficient to support District 5’s configuration. Adams Dep. 52:4-9; Clark Dep. 74:21-23; A. Jones Dep. 36:19-37:2; J. Jones Dep. 86:21-87:3; Lowry Dep. 33:21-24; Deposition of Leila Darlene Richardson [Doc. 136] (“Richardson Dep.”) 15:7-17; Deposition of Elverta Jean Williams [Doc. 137] (“Williams Dep.”) 35:16-25.

In the end, Plaintiffs are left with three possible communities of interest to support the creation of District 5 on the Illustrative Plan: (1) membership in the NAACP; (2) frustration with the at-large electoral system; and (3) race. Plaintiffs have submitted no evidence that the boundaries of District 5 are driven by the locations of members of the NAACP. To the contrary, Cooper had no idea which civic organizations existed in the county or where individuals lived when drawing the plan. Cooper Dep. 284:23-285:7; 285:20-24. To the extent a common belief can even constitute a community of interest,⁷ Plaintiffs have offered no evidence of unanimous or even any support of district voting by individuals who are located in the proposed District 5, so this possible community of interest is not the reason behind its creation. Plaintiffs are left with the one community of interest in District 5: race, which is an inappropriate consideration for this Court as part of a remedial plan.

Plaintiffs' attempt to discredit Morgan's finding that there are three separate population centers of African-Americans in the county is foiled by the testimony of

⁷ Plaintiffs cite no authority for the proposition that agreement on a single issue creates a community of interest for purposes of redistricting. Other "communities of interest" identified by Plaintiffs include senior citizens, card players, the Democratic Party, and people who have the same concerns and positions on regulations. Williams Dep. 36:16-37:2; A. Jones Dep. 64:8-14. Other Plaintiffs had no idea what a community of interest was. Clark Dep. 76:19-77:13; J. Jones Dep. 88:17-19; Lowry Dep. 36:20-37:4; Aisha Abdur-Rahman Dep. 62:13-19; Ali Abdur-Rahman Dep. 44:9-11.

Plaintiffs' expert and Plaintiffs themselves. Cooper admitted that Morgan is an expert in redistricting and demographics. Cooper Dep. 57:14-17. As Morgan explained, he did not base his analysis of the separateness of these three areas based on his drive through Fayette County but instead on his analysis of the demographics and population. Morgan Dep. 143:1-145:10. The intervening white population between the African-American population centers was the key to determining the geographic dispersion of the minority community. Morgan Dep. 144:19-145:10. In addition, at least two Plaintiffs agree that African-American individuals in Fayette County do not all live in the same area. Williams Dep. 41:7-14; DuBose Dep. 60:12-61:3. Courts should look specifically at the geographic dispersion of the minority community as part of a Section 2 analysis, and Plaintiffs have offered no evidence to counter Morgan's conclusion. *See Johnson*, 922 F.Supp. at 1566; Morgan Report ¶¶ 24, 30-31.

Plaintiffs do not have to present a plan that perfectly represents all communities of interest, however defined, but the communities of interest Plaintiffs allege are the basis for the drawing of District 5 do not and cannot explain its shape. Plaintiffs' inability to explain the shape of District 5 on any grounds other than race yet again supports the finding of racial predominance in its creation.

2. *Plaintiffs Misstate the Standard for Determining a Racial Gerrymander.*

Instead of considering the standard for *determining* a racial gerrymander, Plaintiffs base their entire analysis of the Illustrative Plan *not being* a racial gerrymander on *Shaw v. Hunt*, 517 U.S. 899, 116 S.Ct. 1894 (1996). Plaintiffs misstate the standard for determining a racial gerrymander: it is not limited merely to whether the mapdrawer intended to maximize the minority population or testifies that race did not predominate.⁸

Although Plaintiffs argue that the use of “traditional redistricting principles” rescues the Illustrative Plan from a *Shaw* violation, it does not. As Plaintiffs’ expert conceded, even a plan that adheres to some traditional redistricting principles can be a racial gerrymander. The plan referenced by Plaintiffs drawn at 53.58% African-American VAP was drawn by Cooper to be a racial gerrymander. Cooper Dep. 176:2-16. That plan keeps precincts whole (Cooper Dep. 177:1-178:21), falls within a ten percent population threshold (Cooper Dep. 178:22-179:9), and

⁸ Plaintiffs’ reliance on comparing District 5 with the shapes of “Baldwin, Bulloch, and Newton” county districts [Doc. 110-1, p. 25] is inexplicable. Besides the fact that none of those counties neighbor Fayette County, Plaintiffs’ expert disavowed any knowledge of whether those plans that were attached to his report were currently in force, were drawn by a court or the General Assembly, followed precinct boundaries, were properly apportioned, had any protected districts under Section 5, or had any other local considerations that drove the shapes of the districts involved. Cooper Dep. 200:15-209:18.

otherwise follows some traditional redistricting principles (Cooper Dep. 178:12-21). Thus, Plaintiffs' argument that, simply because the Illustrative Plan may follow *some* traditional redistricting principles it is not a racial gerrymander, does not even meet the standard enunciated by their own expert.

The method for determining a racial gerrymander focuses on whether race was the predominant factor in drafting the plan, and reviewing the Illustrative Plan in light of Supreme Court precedent leads to the inescapable conclusion that race was the predominant factor in drawing that plan. *See* [Doc. 108-2, pp. 12-17]. The low compactness scores, racial character of split precincts, and lack of any coherent community of interest beyond race (which, as discussed above is not appropriately a community of interest) makes the majority-minority district on the Illustrative Plan unexplainable on grounds other than race. [Doc. 108-2, pp. 12-17]; *Hunt*, 526 U.S. at 547-548.

3. *Plaintiffs' Cannot Save Their Racial Gerrymander by Claiming it is Necessary for Section 2 Compliance.*

Undoubtedly recognizing their plan to be a racial gerrymander, Plaintiffs next propose that the Illustrative Plan can meet strict scrutiny because it is "necessary for Section 2 compliance." [Doc. 110-1, p. 26]. Plaintiffs, however, cite no precedent to support the idea that Section 2 *requires* the creation of a racially-gerrymandered majority-minority district, much less that creation of such a

district in an effort to comply with Section 2 is a compelling state interest. Indeed, the Supreme Court has consistently found that jurisdictions that use racial gerrymanders to comply with Section 2 were not interpreting Section 2 correctly. *See, e.g., Shaw*, 517 U.S. at 911; *Miller*, 515 U.S. at 921.

Such a theory also flies in the face of the clear rule in this Circuit that the prong one plan must be a remedy that can be ordered by the Court. *Nipper*, 39 F.3d at 1530-31. Courts cannot order racial gerrymanders as remedial plans. [Doc. 108-2, pp. 18-19]; *Abrams*, 521 U.S. at 90; *Wright v. City of Albany*, 306 F.Supp.2d 1228, 1235 (M.D. Ga. 2003). Plaintiffs' Illustrative Plan is a racial gerrymander and thus cannot be used to meet the first prong of *Gingles*. *Nipper*, 39 F.3d at 1530-31.

4. *Plaintiffs Are Not Entitled to Summary Judgment on Prong One of Gingles.*

Plaintiffs have failed to carry their burden to provide this Court with an appropriate remedy to meet prong one of *Gingles*. Instead, Plaintiffs have conceded the exact opposite point: their sole reliance on a racial gerrymander requires summary judgment in favor of County Defendants.

C. Plaintiffs' Have Not Shown the Totality of the Circumstances Supports Their Claims.

If the Court determines that Plaintiffs cannot carry their burden on the first prong of *Gingles*, the analysis of their Section 2 claim ends. “In a § 2 case, only when a party has established the *Gingles* requirements does a court proceed to analyze whether a violation has occurred based on the totality of the circumstances.” *Bartlett v. Strickland*, 556 U.S. 1, 11-12, 129 S. Ct. 1231, 1241, 173 L. Ed. 2d 173 (2009).

However, meeting the *Gingles* test alone does not entitle Plaintiffs to summary judgment. This Court must still consider the totality of the circumstances, and a plaintiff may still fail to show a violation of Section 2 under the totality of the circumstances even after showing all three *Gingles* prongs. *Johnson v. De Grandy*, 512 U.S. 997, 1009-1012, 114 S.Ct. 2647, 129 L.Ed.2d 775 (1994); *Nipper*, 39 F.3d at 1513-1514. Plaintiffs must show that the voting practice at issue—at-large voting—denies them access to the political process “on account of their race.” *Nipper*, 39 F.3d at 1523. Merely showing electoral defeat or even a tendency of racial groups in the county to support differing candidates is not enough; to support a Section 2 claim, those instances must be explained by “the interaction of racial bias in the community with the challenged voting scheme.”

Nipper, 39 F.3d at 1524. This heavy burden is not one that Plaintiffs can carry in Fayette County.

Plaintiffs correctly state the standard for the totality of the circumstances analysis. [Doc. 110-1, pp. 31-32]. However, this Court should review *all* of the Senate Factors, not just the ones chosen by Plaintiffs, in order to determine whether the “social and historical conditions” in the county cause an inequality of opportunity. *Gingles*, 478 U.S. at 47.

1. *Senate Factor 1: the extent of any history of official discrimination.*

The first Senate factor reviews the “the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process.” *Gingles*, 478 U.S. at 36-37. While the regrettable past discrimination in Georgia as a whole is not in doubt, Plaintiffs do not point to any specific examples of discrimination in the political subdivision at issue in this litigation: Fayette County.

The earliest any Plaintiff moved to Fayette County was 1989. Most Plaintiffs retired to Fayette County after concluding all or most of their working life. Adams Dep. 7:19-21 (moved to Fayette in 1990); Clark Dep. 7:7-9 (moved to Fayette in 1993 from New York); A. Jones Dep. 7:13-8:6 (moved to Fayette in 1997; born in

Pennsylvania); J. Jones Dep. 7:13-15 (moved to Fayette in 1997); Lowry Dep. 6:18-25 (moved to Fayette in 1989 from Washington, D.C.); Ali Abdur-Rahman Dep. 6:24-7:1 (moved to Fayette in 2005); Aisha Abdur-Rahman Dep. 7:17-20 (moved to Fayette in late 2004); Richardson Dep. 6:23-7:7 (moved to Fayette in 2003 from Buckhead area); Williams Dep. 6:17-22 (moved to Fayette in 1998 from Minnesota); Wright Dep. 6:23-25 (moved to Fayette in 2002).

No Plaintiff has ever been denied the right to vote or prohibited from registering to vote or participating in the political process in Fayette County based on his or her race. Aisha Abdur-Rahman Dep. 40:24-41:13; Ali Abdur-Rahman Dep. 29:6-13; Adams Dep. 34:21-35:3; Clark Dep. 43:20-44:1; A. Jones Dep. 37:3-11; J. Jones Dep. 33:25-34:6; Lowry Dep. 21:16-22; Richardson Dep. 34:14-19; Williams Dep. 27:2-11; Wright Dep. 22:19-23:4; DuBose Dep. 48:4-18.

While Plaintiffs wish to make much of the “admissions” of the Board of Education Defendants, counsel for the Board of Education indicated to this Court that he worked hard to “conserve the resources of the school district.” [Doc. 85, p. 42:22-25]. Settling on terms proposed by Plaintiffs was obviously part of that process, but this Court properly denied a settlement on those terms. [Doc. 70].

Furthermore, Plaintiffs’ own numbers, to the extent they mean anything, demonstrate that more than 10% of school districts in Georgia still use at-large

voting. [Doc. 110-1, p. 34 n.21]. Although repeatedly referred to as a “discriminatory method of election” by Plaintiffs, at-large voting schemes are neither *per se* discriminatory nor unconstitutional. *U.S. v. Dallas County Commission, Dallas County, Ala.*, 850 F.2d 1433, 1438 (11th Cir. 1988). In short, Fayette County is far from the only county using an at-large voting system, and the mere use of the system does not meet the standard required of Plaintiffs under Section 2.

While voting discrimination is a fact of Georgia’s history, that is not the case today. There has been no showing by Plaintiffs that the at-large system was adopted in Fayette County as part of that history; that Fayette County has ever taken any steps to discriminate against voters based on race; or that any member of a minority group in Fayette County has ever had their rights to register, vote, or participate in the political process affected by the county. The first Senate factor, therefore, weighs against Plaintiffs.

2. *Senate Factor 2: racial polarization in voting.*

The second factor reviews “the extent to which voting in the elections of the state or political subdivision is racially polarized.” *Gingles*, 478 U.S. at 37. This factor is largely a restatement of the second prong of *Gingles*, something Plaintiffs must prove to reach consideration of the Senate factors. As noted above in Section

A, County Defendants do not dispute that Dr. Richard Engstrom's analysis appears to show racial polarization in voting but leaves unanswered the question of whether the appearance of polarization is due to politics or race.

As the Eleventh Circuit recognizes, bloc voting is only one factor, and if a defendant can show "under the totality of the circumstances, that racial bias does not play a major role in the political community," Plaintiffs cannot win even having proven bloc voting. *Nipper*, 39 F.3d at 1525 n.60. In addition, when partisan affiliation best explains divergent voting patterns, there is no racial bias that shows a Section 2 claim. *Nipper*, 39 F.3d at 1525.

3. *Senate Factor 3: use of other discriminatory voting practices.*

The third factor reviews "the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group." *Gingles*, 478 U.S. at 37.

First, and most importantly, not a single Plaintiff could identify *any* discriminatory voting practice used by Fayette County government other than the at-large system, which Plaintiffs erroneously believe is discriminatory. Adams

Dep. 41:18-21; Clark Dep.⁹ 57:20-58:3; A. Jones Dep. 46:4-15; J. Jones Dep. 36:12-18; Lowry Dep. 21:11-22:7; Ali Abdur-Rahman Dep. 51:6-11; Aisha Abdur-Rahman Dep. 46:18-25; Richardson Dep. 34:14-19; Williams Dep. 27:2-11; Wright Dep. 22:17-23:4; DuBose Dep. 48:14-49:24.

Furthermore, Plaintiffs' complaint that the Board of Commissioners districts were problematic because they were unusually large before being redrawn by this Court in 2012 is contrary to the efforts of five of these Plaintiffs to return the County to the malapportioned militia districts based on their affidavits filed in *Lindsey v. Fayette County Board of Commissioners*, Case No. 3:12-CV-0040-TCB [Docs.16-1, ¶¶ 17-18; 16-2, ¶¶ 17-18; 16-3, ¶¶ 13-14; 16-4, ¶¶15-16; 16-5, ¶¶17-18].

Finally, there is no support for Plaintiffs' position that the four listed practices are *always* discriminatory. This Senate factor requires instead that a court review the electoral structure of the jurisdiction as a whole. *U.S. v. Dallas County Commission*, 739 F.2d 1529, 1536-37 (11th Cir. 1984). For example, the *lack* of a residency requirement in one case cited by Plaintiffs was shown to favor a finding

⁹ Mr. Clark believed that the county had a police presence at polling stations that could possibly be discriminatory, but could not remember any instance or election where this took place. Clark Dep. 59:16-21.

of discrimination when combined with numbered posts. *Lodge v. Buxton*, 639 F.2d 1358, 1380 (5th Cir. Unit B 1981).¹⁰

The first two items on Plaintiffs' list, when combined, are not discriminatory based on Eleventh Circuit precedent. A residency requirement does *not* "provide probative evidence on the question of dilution" when it is used with a mechanism like numbered posts. *Dallas County Commission*, 739 F.2d at 1537. While numbered posts have "potential effects" that might be discriminatory, *Dallas County Commission*, 739 F.2d at 1536, Plaintiffs have not explained how such is the case in Fayette County.

Plaintiffs next complain about the use of staggered terms. It seems odd for Plaintiffs to complain that this practice is discriminatory when Plaintiffs agreed to a settlement containing staggered terms earlier in this litigation. [Doc. 54-8, p. 11]. In addition, the only Section 2 case Plaintiffs cite with respect to staggered terms discusses the use of that practice as a way to defeat "single-shot voting," something which is not an option in Fayette County. *See Jackson v. Edgefield County*, 650 F.Supp. 1176, 1202-1203 (D. S.C. 1986). The only other case cited by Plaintiffs on this topic is not a Section 2 case but a preclearance case in which the U.S. Supreme Court found that the lack of the ability to use single-shot voting

¹⁰ Decisions by Unit B of the Fifth Circuit are binding authority on the Eleventh Circuit. *Stein v. Reynolds Sec., Inc.*, 667 F.2d 33, 34 (11th Cir. 1982).

made staggered terms *not* discriminatory under Section 5. *City of Lockhart v. U.S.*, 460 U.S. 125, 135, 103 S.Ct. 998, 74 L.E.2d 863 (1983). Thus, under the authority Plaintiffs rely upon, the staggered terms in the County are not discriminatory because they are not in place in order to defeat single-shot voting. If Fayette County were to eliminate its use of staggered terms, then county commission elections would be held only once every four years. In addition, two Plaintiffs who were asked about the topic did not believe that eliminating staggered terms would help an African-American candidate. A. Jones Dep. 74:1-13; Adams Dep. 62:18-20.

Plaintiffs cite no cases in support of their argument that a majority vote requirement is a discriminatory practice and do not explain how its use is discriminatory in Fayette County. More importantly, most of the individual Plaintiffs do not believe a majority vote requirement is actually discriminatory. Aisha Abdur-Rahman Dep. 46:1-14 (majority vote not discriminatory if used in districts); Ali Abdur-Rahman Dep. 32:15-21 (majority vote not discriminatory); Adams Dep. 40:25-41:12 (no opinion on whether majority vote is good or bad); Clark Dep. 49:8-15 (majority vote hinders minorities in at-large but not in district system); A. Jones Dep. 75:6-11 (not requiring majority vote not good public policy); Lowry Dep. 26:1-11 (candidates should get majority of the vote).

Other cases cited by Plaintiffs are irrelevant, not in accordance with Eleventh Circuit precedent, or simply not helpful in evaluating this factor. *Dillard v. Town of Louisville*, 730 F.Supp. 1546, 1549 (M.D. Ala. 1990) (approval of Section 2 settlement with city that included a majority-minority district that was non-contiguous); *Dillard v. Crenshaw County*, 640 F.Supp. 1347 (M.D. Ala. 1986) (ruling on preliminary injunction and res judicata on constitutional claims related to discriminatory intent); *U.S. v. City of Euclid*, 580 F.Supp.2d 584, 607 (N.D. Ohio 2008) (finding numbered posts *without* residency requirements enhanced the discriminatory effect by concentrating elected officials in one area).

Plaintiffs have not shown that any of the four stated practices are in fact discriminatory or that any other voting practice or procedure affects the minority community in Fayette County in any negative way. The third Senate factor weighs against Plaintiffs.

4. *Senate Factor 4: candidate slating process.*

The fourth factor reviews “if there is a candidate slating process, whether the members of the minority group have been denied access to that process.” *Gingles*, 478 U.S. at 37. There is no candidate slating process and Plaintiffs do not argue there is any candidate slating process in Fayette County elections (*see, e.g.*, Wright Dep. 25:22-26:2), so this factor does not weigh in their favor.

5. *Senate Factor 5: bearing effects of past discrimination.*

The fifth factor reviews “the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process.” *Gingles*, 478 U.S. at 37. Plaintiffs conveniently ignore this factor, perhaps because, as their expert recognized, “Both African-Americans and the non-Hispanic white population in the two cities and really in the whole county are very well off. I mean, this is not a desperately poor county. People are very prosperous.” Cooper Dep. 138:4-8; *see also* Deposition of Steve Brown [Docs. 112, 113] (“Brown Dep.”) 67:22-68:5 (“African-Americans in Fayette County are not that distinctively different from their white counterparts”).

Plaintiffs have not alleged that any member of a minority group in Fayette County bears any effects of discrimination in the areas of education, employment, or health. As Plaintiffs themselves stated (many of whom retired to Fayette County by choice), there are no effects of discrimination in the county that negatively affect the ability of the minority community to participate in the political process. Aisha Abdur-Rahman Dep. 50:25-51:8; Ali Abdur-Rahman Dep. 33:20-34:12; Adams Dep. 43:25-44:6; Clark Dep. 62:5-62:11; A. Jones Dep. 49:17-50:11; J. Jones Dep. 51:16-52:1; 56:15-18; Lowry Dep. 27:1-20; Richardson Dep. 39:11-

40:8; Wright Dep. 26:7-21; DuBose Dep. 54:5-22. Thus, Plaintiffs freely admit that past discrimination does not reduce participation or influence in political affairs in the county. *See U.S. v. Marengo County Commission*, 731 F.2d 1546, 1567 (11th Cir. 1984) (purpose of past discrimination factor is that, where it occurs, it can “reduce participation and influence in political affairs”).

In fact, Plaintiffs went beyond just agreeing that no members of the minority group bear such effects—several Plaintiffs identified the education system of Fayette as having a good academic reputation and as a reason people move to the county. Clark Dep. 61:8-14; A. Jones Dep. 49:17-50:11; J. Jones Dep. 43:23-44:6; Lowry Dep. 26:12-17; Wright Dep. 26:7-21. While one Plaintiff made generalized allegations about isolated incidents involving students in schools that *might* have racial overtones, he also agreed that the incidents did not affect the ability of African-Americans to participate in politics.¹¹ J. Jones Dep. 45:18-52:1.

Indeed, Plaintiffs are not limited in their ability to pursue the political process. As they explain, they attempted to work directly through the Georgia

¹¹ The generalized claims of racial problems made by Mr. Jones (who is also president of the local branch of the NAACP) involved private entities, a single anonymous letter, or generalized allegations for which he could not provide any specific information about the incidents. *See generally*, J. Jones Dep. 45:18-56:14. Mr. Jones further identified the word “conservative” in political campaigns as a coded racial appeal, along with alleging that those who do not favor district voting hold “white supremacist views.” J. Jones Dep. 57:25-58:2; 82:17-25.

General Assembly to achieve their political end of district voting but ultimately were not successful. [Doc. 110-1, p. 45 n.32].

Plaintiffs undoubtedly wish to avoid the Court's review of this Senate factor because it heavily favors County Defendants. As Plaintiffs and their expert recognize, the affluence of the county extends across racial boundaries and African-Americans are not held back from full participation in the county's political processes. Simply stated, there are no hindrances to Plaintiffs' participation in the political process in Fayette County that are the effect of discrimination.

6. *Senate Factor 6: racial appeals in campaigns.*

The sixth factor reviews "whether political campaigns have been characterized by overt or subtle racial appeals." *Gingles*, 478 U.S. at 37. The cases cited by Plaintiffs (in a footnote) do not provide any direction or standard for this Court regarding campaigns characterized by racial appeals.¹²

¹² *Johnson v. Hamrick*, 155 F.Supp.2d 1355, 1377 (N.D. Ga. 2001) (plaintiffs failed to show third prong of *Gingles*; cursory review of totality of circumstances showed no evidence of overt or subtle racial appeals); *Cofield v. City of LaGrange*, 969 F.Supp. 749, 777 (N.D. Ga. 1997) (evidence that debate about consolidation of local schools was marked by racial appeals; no specific standard cited); *Brooks v. State Bd. of Elections*, 848 F. Supp. 1548, 1561 (S.D. Ga. 1994) *appeal dismissed and remanded sub nom. Brooks v. Georgia State Bd. of Elections*, 59 F.3d 1114 (11th Cir. 1995) (noting that stipulation between parties did not address racial appeal issue); *Jordan v. Winter*, 604 F.Supp. 807, 813 (N.D. Miss. 1984)

The word “characterized” in this factor is significant in light of the fact that most of Plaintiffs said either that they had never seen a racial appeal in Fayette County elections or, if they had, could not identify any election where that took place. Aisha Abdur-Rahman Dep. 53:12-22 (no racial appeals in elections); Ali Abdur-Rahman Dep. 34:18-35:18 (referenced 2010 midterm elections but could not recall candidates or appeal); Adams Dep. 44:14-45:14 (described a picture of candidate on signs as a racial appeal he could think of but could not recall any elections in Fayette using the same); Clark Dep. 63:2-7 (no racial appeals in elections); DuBose Dep. 54:23-55:11 (no racial appeals except possibly in 2006 special election); Lowry Dep. 37:17-38:1 (no racial appeals); Williams Dep. 31:17-25 (racial appeals happen but could not recall any elections where this occurred in Fayette).

Plaintiffs reference three alleged racial appeals in the history of Fayette County: (1) the use of the word “heritage” by a candidate in a 2006 special election, (2) opposition to district voting in the same 2006 special election, and (3) references to not wanting to be like certain surrounding counties in unspecified elections. [Doc. 110-1, pp. 39-40]. Plaintiffs call these “racial” appeals based

(television ad featuring Confederate imagery and slogan “he’s one of us” was racial appeal).

solely on their “understanding” of what certain comments meant¹³ but, interestingly, did not argue that other “understandings” of Plaintiffs constituted racial appeals, such as Mr. Jones’ understanding that the word “conservative” is such an appeal. [Doc. 110-1, pp. 39-40]; J. Jones Dep. 57:2-13.

Plaintiffs first argue that Commissioner Horgan’s comment in the 2006 special election about “heritage” to be inflammatory but ignore the context of Commissioner Horgan’s explanation in the article quoted and never even asked Commissioner Horgan what he meant by that comment. The unrebutted testimony (beyond Plaintiffs’ imagination about what the comment might have meant) is that Commissioner Horgan was referring to “the rural, neighborly character of the county as opposed to being a metropolitan Atlanta county” and “related to the traditions of the county and had no racial component.” County Defendants’ Objections and Responses to Plaintiffs’ First Requests for Admission [Doc. 110-4],

¹³ This is not the first time Plaintiffs have applied a factually incorrect “understanding” to a statement of a Fayette official. For example, Mr. Jones reported that, in a meeting with then-Commissioner Greg Dunn, Mr. Dunn had said “that the blacks are getting agitated up there on the north side, that y’all need to know that – y’all – we just want you to pay your taxes and keep your grass cut.” J. Jones Dep. 63:20-24. But when Plaintiffs asked Mr. Dunn about this conversation, the actual comment was in response to a question of whether black people were welcome in Fayette County. Mr. Dunn’s response was that “yeah, if they pay their taxes and cut their grass, what do we care?” Mr. Dunn explained that by that statement he obviously was referring to “[b]eing a good citizen.” Dunn Dep. 140:24-141:5. Mr. Dunn strongly denied ever making a comment about the “blacks getting agitated.” Dunn Dep. 141:7-20.

No. 9; County Defendants' Objections and Responses to Plaintiffs' First Interrogatories [Doc. 110-35], No. 9.

The comment made by Commissioner Horgan in his deposition is not a racial appeal in the context of an election, and the attempt to paint Commissioner Horgan as a racist (claiming Commissioner Horgan "exposed himself") [Doc. 110-1, p. 39] flies in the face of the testimony in this case. Commissioner Horgan's response about children came in response to a series of questions by Plaintiffs' counsel about Commissioner Horgan's personal relationships with people of color. Commissioner Horgan was naming a number of individuals including neighbors, social relationships, having minority visitors in his home, and having minority children play baseball on the same team with his children. Deposition of Robert Horgan [Doc. 117] ("Horgan Dep.") 49:3-51:14. Commissioner Horgan has appointed several minority individuals to county commission boards. Horgan Dep. 40:7-43:5. Commissioner Horgan's comments were apparently not considered an issue at the time of his deposition, as Plaintiffs' counsel did not even follow up after the complained-of comment. Horgan Dep. 49:19-50:8.

The second racial appeal alleged is that, generally, "single member redistricting has been a racially charged issue." [Doc. 110-1, p. 39]. Plaintiffs provide no support for this statement or the idea that white voters only support

white candidates who oppose district voting. The testimony of at least one commissioner is that the NAACP and an African-American state representative turned the issue of district voting into a “politically racially-charged” issue in approximately 2006. Brown Dep. 32:4-33:13. There is no support for the idea that the debate in the county about whether to adopt single member districts shows that racial appeals characterize county elections, especially when current and former commissioners believe that most people in the county oppose district voting, *regardless of their race*. Brown Dep. 68:24-70:12; Frady Dep. 117:17-118:3; Deposition of Bennett Lee Hearn [Doc. 116] (“Hearn Dep.”) 55:13-56:2; Smith Dep. 58:7-19.

The final racial appeal alleged by Plaintiffs is that references to “not wanting to be like” surrounding counties, which have district voting, is a racial appeal. This is a curious assertion, especially when Plaintiffs themselves recognized the significant problems in governance in the surrounding counties, such as Clayton County, that were completely unrelated to race. Adams Dep. 46:15-47:12 (Clayton and Fulton); A. Jones Dep. 56:19-57:22 (agreeing Clayton county is “a mess”); Aisha Abdur-Rahman Dep. 21:4-5 (wanting to control “out-of-county traffic” at Kenwood Park). As Commissioner Brown explained, he believes many of the governance problems in counties like Clayton County and counties like Gwinnett

and Coweta (which are not majority-minority) can be traced back to district voting.

Brown Dep. 113:1-115:10.

Even assuming the comment at issue is somehow a racial appeal, Plaintiffs could not identify any *election* in which this kind of comment was made. Mr. Adams' only reference to such a statement was that a fellow citizen said it at a commission meeting, not that any elected official or county official ever said this, let alone in the context of a campaign. Adams Dep. 45:15-46:14. Similarly, Ms. Jones' only reference to such a comment was by a member of Congress, not a county official, in a commission meeting instead of a campaign. A. Jones Dep. 56:1-6.

The undisputed facts show that not one of the statements cited by Plaintiffs is actually a racial appeal in the context of elections. Even assuming the 2006 "heritage" comment could be construed as a racial appeal, Plaintiffs have identified one word out of the entire history of county commission elections, which have taken place every two years for decades. If one word in one election out of hundreds of years means that the electoral system in the county is "characterized" by racial appeals, "characterized" has lost all meaning. This Senate factor weighs heavily against Plaintiffs.

7. *Senate Factor 7: extent of election of members of the minority group.*

The seventh factor reviews “the extent to which members of the minority group have been elected to public office in the jurisdiction.” *Gingles*, 478 U.S. at 37. Plaintiffs are correct that Magistrate Judge Charles Floyd is the only African-American elected to a countywide office, although Ed Johnson, a former president of the local NAACP chapter, was elected to the Fayetteville City Council in 2011. County Defendants’ Objections and Responses to Plaintiffs’ First Requests for Admission [Doc. 110-4], No. 11.

While Plaintiffs are quick to state their belief that this lack of electoral success is “a result” of the at-large election system, they are apparently exercising the age-old logical fallacy *post hoc ergo propter hoc*.¹⁴ As the Eleventh Circuit recognized, “[e]ven consistent defeat at the polls by a racial minority does not, in and of itself, give rise to constitutional claims.” *Lodge*, 639 F.2d at 1362. This Court must determine whether the defeats were due to race or politics, and if the losses are attributable to partisan politics, Section 2 is not implicated. *Nipper*, 39 F.3d at 1525.

¹⁴ “After this, therefore because of this,” the fallacy of “assuming causality from temporal sequence.” BLACK’S LAW DICTIONARY, *post hoc* (9th ed. 2009).

Not surprisingly, the facts show that electoral defeats of African-American candidates in Fayette County have nothing to do with their race, despite Plaintiffs' beliefs to the contrary. For example, Emory Wilkerson has run from many political parties (Brown Dep. 52:12-23, 53:17-21), Dave Simmons trumpeted his experience in Detroit which was politically unpopular in the County (Brown Dep. 52:24-53:16), Malcolm Hughes did not campaign for office when he ran (Brown Dep. 53:22-54:2), and Charles Rousseau did not show up to events during his campaign (Horgan Dep. 76:6-10). When the 2006 special election was held, the African-American vote was split by four different candidates running, but black candidates received a total of 49% of the county's vote. Deposition of Gregory Martin Dunn [Doc. 114] ("Dunn Dep.") 40:22-41:19. Plaintiffs have not shown that the lack of electoral success is due to the race of the candidates who ran or even that white voters refuse to vote for black candidates—in fact, the undisputed testimony shows just the opposite.

In spite of this Senate factor's requirement of *electoral* success, Plaintiffs engage in a discussion about African-Americans *appointed* to boards and committees by the members of the Commission. [Doc. 110-1, p. 41]. This is not an appropriate inquiry for this Senate factor, which focuses on elections, but even if this Court considers appointments, Plaintiffs do not provide any specifics about the

number of appointments. While Commissioners may not have appointed as many African-American individuals to various county boards as Plaintiffs wish, this is in part due to the lack of interest by some qualified individuals. Horgan Dep. 50:9-51:9. That fact is borne out by testimony from some Plaintiffs. Clark Dep. 66:19-24 (not interested in serving); Lowry Dep. 32:8-25 (applied, but was unable to serve on two different committees due to job responsibilities). In addition, Plaintiffs have not identified how many openings have become available or which have been filled by white applicants as opposed to African-American applicants, so it is impossible to determine whether the Commission has actually appointed “precious few” individuals of color to Boards, as Plaintiffs allege.

Plaintiffs’ belief that the existing appointment process is designed to discourage African-American applicants is unsupported and is factually incorrect. Any individual can apply for an appointment position at the county offices. Brown Dep.151:9-152:14. Although Ms. Jones has made open-ended public requests to be on a board, she apparently has never met with individual commissioners to discuss the opportunities. Horgan Dep. 52:2-10. Obviously, individuals who want to be appointed should pursue that involvement, like they would pursue employment. Horgan Dep. 52:2-10. Other Plaintiffs have simply never applied or were unable to serve. Clark Dep. 66:19-24 (not interested in serving); Lowry Dep. 32:8-25

(applied, but was unable to serve on two different committees due to job responsibilities).

Because Plaintiffs are unable to demonstrate that the lack of electoral success in Fayette is caused by the at-large voting system, this factor weighs against Plaintiffs' claims.

8. *Additional Factor: lack of responsiveness to needs.*

In addition to the seven Senate factors, the Supreme Court stated the Court may also consider two additional factors that are raised by Plaintiffs. The first of these additional factors is "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group." *Gingles*, 478 U.S. at 37. Plaintiffs identify a number of alleged unresponsiveness to "needs," none of which support their position under this factor.

First, as almost all Plaintiffs agreed, there are no particularized needs of the minority community in Fayette County that are any different than those of the white community. Aisha Abdur-Rahman Dep. 54:10-56:9 (only particularized need is district voting); Ali Abdur-Rahman Dep. 36:10-15 (all have the same needs); Adams Dep. 64:17-65:20 (only different need is need of self-worth); Clark Dep. 64:7-65:16 (needs are the same regardless of race); DuBose Dep. 56:17-22 (needs

are not different); A. Jones Dep. 58:20-59:1 (same needs and desires); J. Jones Dep. 69:1-15 (needs are generally the same); Lowry Dep. 30:5-31:5 (needs mostly based on region); Richardson Dep. 46:10-47:6 (needs are not different; interests are same regardless of race); Williams Dep. 32:7-13 (needs are about the same); Wright Dep. 28:14-29:3 (doesn't know of any different needs based on race). If there are no particularized needs, then there cannot be a lack of response to those needs.

Second, in order for the County to respond to any needs, there must be a request for a response. Most of the Plaintiffs have never contacted the county or contacted the county only once. Ali Abdur-Rahman Dep. 48:22-49:14 (never contacted commission about any issue); Adams Dep. 23:21-24:16, 30:7-20 (never contacted county about any issue besides district voting); Clark Dep. 34:15-18, 37:1-15. (never contacted anyone at the county regarding maintenance issues; only time ever contacted county was regarding an odor in the water but was unsure whether county ran the water system); Richardson Dep. 33:16-34:10 (never contacted commission about anything); Williams Dep. 34:17-35:9 (never requested anything from county; only contact was in support of neighbor's request for traffic light that was later installed); Wright Dep. 29:4-13 (never contacted county on any issue).

Third, Plaintiffs direct most of their fire at the Commission's failure to adopt a resolution in support of district voting. County Defendants readily acknowledge that individuals have been requesting district voting in the county for a long period of time by appearing at Commission meetings, writing op-eds, and taking other steps to make their political case.¹⁵ Plaintiffs apparently fail to comprehend that individual voters in Fayette County make hundreds of requests during public comment periods at Commission meetings. Deposition of Jesse Allen McCarty [Doc. 118] ("McCarty Dep.") 80:22-81:15. If Commissioners implemented everything requested by every voter, the county would go bankrupt because voters often request things like cutting all taxes in half. McCarty Dep. 92:1-22.

¹⁵ Plaintiffs' complaint that County Defendants did not provide enough meeting minutes in discovery is baffling. [Doc. 110-1, p. 42 n.30]. As County Defendants advised Plaintiffs, meeting minutes are retained permanently. Letter from A. Lewis to R. Haygood, April 25, 2012, attached as Ex. V. When Plaintiffs first requested meeting minutes for the twice-monthly meetings covering a 32-year period from 1980-2012, County Defendants produced all minutes that were readily available—from 2001 to 2012, covering 3,699 pages (Bates numbers FAYETTE000011-003372; FAYETTE003376-003710). County Defendants then conducted an additional search and located minutes from the 1990s that included references to district voting and provided those to Plaintiffs. When Plaintiffs renewed their request for minutes for the entire 32-year period, County Defendants investigated and told Plaintiffs that the older minutes were not easily accessible because they were stored in the archives and the county's IT department advised that fulfilling the request would fill more than 80 compact discs. In spite of these difficulties, County Defendants *still* offered to provide additional minutes if Plaintiffs would identify the specific dates which they desired. Ex. V. Plaintiffs did not respond and never filed a motion to compel production of those minutes.

Public officials obviously cannot meet every request by every voter, and Plaintiffs' reliance on the Commission's failure to adopt a resolution supporting their views does not demonstrate nonresponsiveness to the particularized needs of the minority community. Indeed, Plaintiffs have not shown that elimination of at-large voting is a need unique to African-American voters, that African-American voters unanimously support district voting, or even that a majority does so despite criticizing County Defendants for not conducting a countywide survey on the topic.¹⁶ It turns the analysis of the Senate factors on their head to have the question of responsiveness relate solely to the voting method at issue in the litigation. Plaintiffs have taken a political dispute to this Court, seeking to force a legislative victory they have been unable to obtain at the Commission, without any legal or factual basis for doing so.

Plaintiffs then turn to a litany of items that allegedly show the Commission responded "slowly" to the requests of African-American residents. Even if the County did not respond as quickly as Plaintiffs would have liked, Plaintiffs never claim that their requests have been gone unmet. Indeed, the delay in addressing

¹⁶ Contrary to Plaintiffs' assertions that County Defendants never studied the issue, former Commissioner Smith testified he spent time researching the issue. Smith Dep. 32:18-33:19, 37:12-39:7, 84:3-85:8. Commissioner Hearn had personal experience dealing with both district and at-large voting systems. Hearn Dep. 53:19-54:5. Commissioners considered Plaintiffs' positions and did not agree.

their requests may be in large part laid at the feet of Plaintiffs, most of whom never contacted the Commission or else contacted the wrong entity of county government. As former Commissioner Smith explained in his deposition about a Saturday meeting with the North Fayette Community Association, individuals present began to “pummel” him with statements such as “we don’t get any attention when we call,” “we get no response,” “nobody pays any attention to us when we contact the county commissioner office.” Smith Dep. 115:19-24. Commissioner Smith then said he had to know the specifics of what had been requested so he could address it in detail, because the broad statements were not helpful. Smith Dep. 116:1-6. He outlined the process that individuals should go through when they had a need from the county and asked for a letter outlining every request that had been made and promised personally to make sure it was addressed. Smith Dep. 116:7-118:2.

After a couple of weeks, he received a letter with seven or eight items on it. Smith Dep. 118:3-6. Commissioner Smith began to work personally with the county clerk to ensure every request was met. Smith Dep. 118:7-16. Several “unmet” requests were situations where members of the association were calling the wrong department of the county, such as calling Animal Control instead of Public Works about dead animals on the side of the road. Smith Dep. 118:18-

119:7. Similarly, complaints about not cutting the grass on medians of particular roads were not handled by the county because the roads were state roads, not county roads, and the county was prohibited by law from maintaining the medians. Smith Dep. 119:8-120:18.

No allegedly unmet need in that letter was the result of negligence by the county. Smith Dep. 120:19-23. As Commissioner Smith stated, “There was nothing in that list that had any implication that that group was being underserved for any reason other than they just didn’t know the right path to follow.” Smith Dep. 120:23-121:1. That remains true about the list of allegedly unmet needs in Plaintiffs’ brief. For example, some of the complaints directed at the Commission about roads are inapposite because the public works department (not the Commission) creates the priority list for paving and brings that to the Board for approval. Frady Dep. 29:15-30:16. In addition, the County is not responsible for paving or repairing every single road that exists within its boundaries. Hearn Dep. 54:19-55:12 (city and state roads; needs are addressed).

The complaints about Kenwood Park reflect a lack of understanding of the reality of the financial situation faced by the County after the 2008 economic collapse. Kenwood Park was the only park built by the County from the ground up. Brown Dep. 192:12-193:22. The park’s amenities rival the two other parks

operated by the County, as some Plaintiffs agree.¹⁷ Brown Dep. 195:3-196:4; Ali Abdur-Rahman Dep. 43:3-10 (used the park every morning). Original construction of the park required obtaining a state grant, which took some time and which Ms. Jones helped obtain. Brown Dep. 109:17-110:6. The first phase of the park was completed just before the economy collapsed in 2008. Brown Dep. 159:1-7. While there are county funds allocated to Kenwood Park waiting to be spent, spending has been frozen so the county can provide funds for its essential services like ambulances and the fire department. Brown Dep. 160:18-161:21. Despite this freeze, the County has still moved forward with some improvements at Kenwood Park. Brown Dep. 159:8-11.

General allegations about community centers are also unsupported by the facts. When Alice Jones requested a YMCA facility in Fayette County, the Commission undertook a detailed analysis and found the YMCA wanted the County to pay for construction costs of \$32 million in their entirety and then turn over control of the facility to the YMCA. Smith Dep. 126:7-128:15. The Commission then undertook to review whether the County could build and operate

¹⁷ Regarding the amenities, Mr. Clark testified that no one requested a track in Kenwood Park (Clark Dep. 27:17-25) while Mr. Abdur-Rahman testified about how useful the track was (Ali Abdur-Rahman Dep. 43:3-10). Plaintiffs again unwittingly demonstrate that local government is tasked with meeting the conflicting desires of its citizens, even among Plaintiffs.

the center at a profit, Smith Dep. 128:16-131:16, but just as that review was completed, the economy collapsed and county tax revenue dropped precipitously, leading to the abandonment of the idea. Smith Dep. 131:3-16.

Plaintiffs' view of "nonresponsiveness" is best summed up by Mr. Jones, president of the local NAACP:

Q. But the County did eventually respond to those requests to pave the road? A. Yes. **It just seems to take longer** when we make requests for something.

Q. Is that based on just kind of your feeling, or do you have specific instances where it's taken a shorter time when white residents make requests? A. **It's based on a feeling.** But, you know, I don't have any -- I can't say that they act any faster on the southern side but -- other areas.

J. Jones Dep. 73:22-74:7 (emphasis added). Plaintiffs do not allege their needs have not been addressed by the County and cannot even claim that the County responds more quickly to non-minority residents.¹⁸ Instead, they reflect a common

¹⁸ Other issues raised by Ms. Abdur-Rahman by Plaintiffs also do not support Plaintiffs' allegations, in part because of Ms. Abdur-Rahman's lack of contact with the County. *See* Aisha Abdur-Rahman Dep. 18:24-20:7 (contacted commission staff once three years ago, but she never followed up after that); 22:12-25 (contacted parks and rec department about maintenance of track at Kenwood Park; she never followed up with commission); 23:21-24:8 (contacted parks and rec department about out-of-county use of Kenwood Park; she agreed there was no solution to the problem); 27:17-30:17 (contacted county staffer about siren; only followed up once every six months and did not assist with obtaining grant funds that were required to install siren; county finally obtained grant funds and installed siren based on request); 33:2-12 (never contacted commission about police

desire by citizens that their government would act faster. That desire is not sufficient to rise to the level of nonresponsiveness by the jurisdiction for purposes of the totality of the circumstances for Section 2 purposes and especially has no bearing on whether such nonresponsiveness is due to race. As Mr. Jones admits, race has nothing to do with the response time, even if it is slow. J. Jones Dep. 73:22-74:7

The allegations about confederate history and heritage month have nothing to do with the responsiveness of the county government. Instead, they are an offensive attempt by Plaintiffs to paint the County as a racist entity that does not recognize the historic work of a fellow Georgian, Dr. Martin Luther King Jr., and instead celebrates the confederacy.

These allegations are directly contrary to the facts, which are known to Plaintiffs. First, any organization may present a proclamation to the Commission, and proclamations are routinely adopted. Brown Dep. 184:1-11. In fact, the Board adopts a number of proclamations presented by citizens on a regular basis. Brown Dep. 184:6-11; Smith Dep. 155:21-23 (“We made lots of proclamations”).

Contrary to Plaintiffs’ unsupported allegation, the Board did *not* generate the confederate history and heritage month proclamation—it was created by an outside presence issue); 67:16-25 (has not contacted commission in three years about roads in subdivision; said only problem was uneven surfaces on the roads).

group.¹⁹ Brown Dep. 184:12-14. No such proclamation has been presented since 2008, and at least one Commissioner testified he would oppose such a proclamation in the future. McCarty Dep. 140:20-141:3 (no proclamation since 2008); Brown Dep. 186:5-10 (no proclamation in two years he has been on Board); McCarty Dep. 142:1-4 (would oppose in future).

Second, the Commission *has* adopted proclamations celebrating Dr. King's birthday when they are presented. Hearn Dep. 111:2-21; Smith Dep. 156:6-19; Dunn Dep. 136:17-24. Dr. King's birthday is a county holiday. *See* http://www.fayettecountyga.gov/information/county_holidays.htm (last accessed, September 28, 2012). There is a parade in Fayetteville on Dr. King's birthday. Hearn Dep. 111:22-112:14. The county library system, which is funded by and reports directly to the Commission, sponsors a multicultural program on Dr. King's birthday and recognizes Black History Month. Brown Dep. 184:22-185:10. Members of the Commission attend and speak at the celebration for Dr. King's birthday held in Fayetteville. Brown Dep. 186:11-21; Smith Dep. 156:20-157:1; Dunn Dep. 136:25-137:14. The desperate attempt to argue that Fayette County

¹⁹ Georgia law recognizes Dr. King's birthday as a holiday but identifies Confederate History and Heritage Month as an element of Georgia history. *See* O.C.G.A. §§ 1-4-1, 1-4-20

and its Commission is racist as a basis for requiring a change in the voting system of the county is a low blow and flies in the face of the undisputed facts.

Plaintiffs have not shown that the Commission or the County is nonresponsive to the needs of its minority citizens. In fact, the undisputed facts show just the opposite—that the needs of all citizens of the county are represented and addressed by the Commission. This factor weighs against Plaintiffs.

9. *Additional Factor: policy for use of practice is tenuous.*

The final factor this Court can review and which Plaintiffs argue applies is “whether the policy underlying the state or political subdivision’s use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous.” Plaintiffs generally state that the rationale underlying the use of at-large voting is tenuous, relying on comparisons with the lack of electoral success of minority candidates.

Each Commissioner explained a different, but equally valid, rationale for their support of at-large voting. Commissioner Hearn walked through his history working in public works for county governments that had district voting versus Fayette County and saw the at-large system led to better governance. Hearn Dep. 53:19-54:10, 45:8-47:15. He also believes that getting to vote for all five commission seats helps address situations that arise under district voting when

citizens are prevented from voting out “four knuckleheads” because they are only able to elect one member. Hearn Dep. 46:12-20. Commissioner Brown originally supported district voting as a way to allow more local representation for municipalities before concluding that it would no longer be fair for the cities. Brown Dep. 35:1-36:5. Commissioner Frady believes that, if he’s spending the people’s money, those people should have the opportunity to vote for him. Frady Dep. 56:24-57:18. Commissioner Horgan sees at-large voting as a way of ensuring that everyone has a say in the issues addressed by the county, particularly in the road projects. Horgan Dep. 58:1-59:11.

None of the reasons espoused by the Commissioners is unreasonable, illegitimate, or tenuous. The reasons why the Commissioners continue to oppose a change in the voting structure of the county are all rooted in government spending, good government, and opportunities for citizens to influence the political process. In fact, Plaintiffs do not even argue that the Commissioners have some other, hidden reasons for their support of district voting and do not explain why they believe the reasons are tenuous beyond their disagreement with them.

Perhaps recognizing this fact, Plaintiffs again turn to their feelings and beliefs about district voting, rehashing earlier statements about what they believe is true about the voting process in the county. However, the discouragement allegedly

felt by Plaintiffs seems manufactured by their counsel. As Plaintiffs' expert recognizes, the county's African-American population continues to grow. Cooper Dep. 94:12-24. In spite of this fact, no minority candidate has even run for commission for the past six years, even though several commissioners believe that a qualified African-American candidate would stand a very good chance of being elected. Hearn Dep. 47:16-48:2; Smith Dep. 73:24-74:17. Plaintiffs cannot show that this factor weighs in their favor, in part because citizen discouragement with government knows no racial boundaries.

Although Plaintiffs try their best to show deep racial bias in Fayette County, their own statements and the undisputed evidence in this case make clear that no such bias exists, except possibly in the minds of Plaintiffs. Because County Defendants have demonstrated that racial bias does not play a major role in Fayette politics and that, in the aggregate, the Senate factors do not point to vote dilution. *Nipper*, 39 F.3d at 1525 n.60, 1526, County Defendants are entitled to summary judgment in their favor. At the very least, County Defendants have shown a dispute of fact regarding the totality of the circumstances that defeats Plaintiffs' claim for summary judgment.

IV. CONCLUSION

There are no disputes of fact on the issues that decide the outcome of this case. Plaintiffs improperly rely on a racial gerrymander to demonstrate compliance with the first precondition of *Gingles*. As there is no question that this Court is prohibited from ordering a racial gerrymander as a remedy, Plaintiffs' claims fail to meet the very first hurdle they must pass.

Even if Plaintiffs had shown the three *Gingles* preconditions were met, the undisputed facts demonstrate that there is no basis for concluding that race plays a role in the dilution of minority voting strength in the county. The totality of the circumstances favors County Defendants and operates to defeat Plaintiffs' claims.

This Court should deny Plaintiffs' Motion for Summary Judgment and grant summary judgment in favor of County Defendants.

CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing COUNTY DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' 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 4th day of October, 2012.

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**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

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day electronically filed the within and foregoing COUNTY DEFENDANTS' RESPONSE IN OPPOSITION TO PLAINTIFFS' 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 4th day of October, 2012.

s/ Anne W. Lewis

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