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' REPLY IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

I. INTRODUCTION

Plaintiffs' Response to County Defendants' Motion for Summary Judgment neither rebuts the undisputed material facts recited by County Defendants nor overcomes the well-established law in this Circuit. The Response simply makes clear that the Illustrative Plan was drawn primarily based on race, and thus, fails to meet the requirements of *Nipper*. Plaintiffs, however, persist in their steadfast refusal to recognize the controlling authority of *Nipper*, and its limitations on a plaintiff's ability to meet the first prong of *Gingles*. Because those limitations make clear that Plaintiffs do not have a Section 2 claim, Plaintiffs try to convince the Court to look away from precedent in this Circuit and focus instead on whether

Plaintiffs' Illustrative Plan reaches some magical threshold of compliance with some traditional redistricting principles.

In addition to the lack of any legal authority for their alternative theory, even using it shows the folly of Plaintiffs' argument. While every redistricting plan will depart from traditional principles in some way, those departures are typically explainable by compliance with the constitutional principle of one-person, one-vote, local geographic features, or other legal principles. If the Illustrative Plan is not a racial gerrymander, Plaintiffs would be able to explain easily their consistent failure to follow traditional redistricting principles in drawing the plan. In short, it is the *lack* of explanation for the departures from traditional redistricting principles that reinforces Plaintiffs' failure to meet the first prong of *Gingles*.

Plaintiffs' argument that the minority population in Fayette County is "geographically compact" also misses the mark. While an extended discussion of compactness scores may be interesting, "compactness" cannot be determined by a number or in a vacuum. In addition, relying on the *district's* alleged compactness to show the *minority community's* compactness does not meet Plaintiffs' burden.

II. ARGUMENT AND CITATION OF AUTHORITIES

County Defendants' Motion focuses on the failure of Plaintiffs as a matter of law to carry their burden to meet the first prong of the test in *Thornburg v. Gingles*,

478 U.S. 30, 106 S.Ct. 2752, 92 L.Ed.2d 25 (1986) and explained by the Eleventh Circuit in *Nipper v. Smith*, 39 F.3d 1494 (11th Cir. 1994). Plaintiffs fail to carry their burden because (1) they have failed to show that the Illustrative Plan is not a racial gerrymander and (2) they have not presented any evidence that the minority community in Fayette County is geographically compact. [Doc. 108-2]. Plaintiffs' failure to meet the first prong ends this Court's analysis and requires summary judgment be granted to County Defendants.[1]

A. Plaintiffs Cannot Explain the Boundaries of the Illustrative Plan on Any Grounds Other than Race.

The boundaries of the Illustrative Plan were drawn based primarily on race. Both the facts and the law that Plaintiffs cite in hopes of overcoming that fatal flaw work against them. Plaintiffs begin by arguing that their expert, William Cooper, did in fact "consider" some traditional redistricting principles, [Doc. 141, p. 8], but then confuse the notion of "considering" those principles with actually following

[1] Because Plaintiffs do not even meet the first prong of *Gingles*, County Defendants did not include a discussion of the totality of the circumstances in their opening brief. However, Plaintiffs chose to raise that issue in their Response, even though the totality of the circumstances does not support their claims [Doc. 140, pp. 21-53]. Plaintiffs' allegations that County Defendants have conceded a number of points, including the totality of the circumstances, is simply untrue. *See* County Defendants' Response in Opposition to Plaintiffs' Motion for Summary Judgment ("Response") [Doc. 141, pp. 5-6]. As this Court is aware, County Defendants oppose Plaintiffs' Motion in part because Plaintiffs have not met the standard for totality of the circumstances [Doc. 140, pp. 21-53] and undeniably dispute that the at-large method of voting in Fayette County is discriminatory [Doc. 140, p. 23-24].

them.[2] County Defendants have never disputed that Cooper may have *considered* some traditional redistricting principles in his plan drafting, [Doc. 108-2, pp. 12-15], but in order to demonstrate that their plan is not a racial gerrymander, Plaintiffs must show how those "considerations" *explain* the boundaries of the Illustrative Plan. *See* [Doc. 108-2, pp. 12-15]; *Shaw v. Reno*, 509 U.S. 630, 647, 113 S.Ct. 2816, 2827, 125 L.Ed.2d 511 (1993). Plaintiffs do not argue that traditional redistricting criteria explain the twists and turns of District 5 nor could they make that argument, in light of Cooper's acknowledgment that the district's boundaries were *not* explained by traditional principles.[3] [Doc. 108-2, pp. 3-7].

Furthermore, while Plaintiffs argue that the BOE Plan's boundaries are explained by traditional redistricting principles, they miss a key factual point. Cooper's design of District 5 on the Illustrative Plan was *not* based on the BOE Plan but was based on a draft he created before he knew where incumbents lived, which he then fit into what became the Illustrative Plan. Cooper Dep. 153:4-154:8.

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[2] As one of many examples, Plaintiffs claim that County Defendants argued that Cooper did not consider school attendance lines. [Doc. 141, p. 8]. County Defendants did not make that argument but rather pointed to Cooper's admission that the boundaries of District 5 do not match school attendance zones. [Doc. 108-2, p. 7].

[3] Cooper admits that even a racial gerrymander will follow precinct and road boundaries in at least some places, so following such boundaries in some places does not absolve District 5's boundaries of their racial predominance. Deposition of William Cooper [Doc. 107] ("Cooper Dep.") 177:1-178:21, 178:22-179:9.

The law is not on Plaintiffs' side, even given the facts Plaintiffs deem favorable to their position. First, Plaintiffs' inability to explain the boundaries of District 5 by traditional redistricting principles matches what is recognized as evidence of racial predominance, including 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.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).[4]

Second, Plaintiffs' reliance on *Askew v. City of Rome*, 127 F.3d 1355 (11th Cir. 1997) actually undermines their argument. In that case, the Eleventh Circuit adopted a district court holding that found the strange shape of the district boundaries of a proposed plan was due to the neutral principle of adhering to city boundaries. *Askew*, 127 F.3d at 1367 n.6. Plaintiffs make no such argument to explain District 5's boundaries, and the metric that a certain amount of the

[4] Plaintiffs' focus on a district being bizarre on its face to be a racial gerrymander ignores the Supreme Court's decision in *Hunt*, 526 U.S. at 547-548. In addition, Plaintiffs' reliance on "aesthetic appeal" of the districts of three counties Cooper attached to his second declaration makes no sense because Cooper disavowed any knowledge of whether those plans were currently in force, were drawn by a court or legislature, followed precinct boundaries, were properly apportioned, had any protected districts under Section 5, or whether any other local considerations drove the shapes of the districts involved. Cooper Dep. 200:15-209:18.

perimeter of District 5 follows "existing political lines" is unhelpful because Plaintiffs do not provide a comparison—such as the amount which other districts follow such "political lines."

County Defendants do not argue that Plaintiffs must present a perfect plan. However, Plaintiffs' failure to explain the boundaries of District 5 by any non-racial standard in the face of the facts raised by County Defendants leads to the inescapable conclusion that the district was drawn primarily based on race.

1. The Split Precincts in District 5 Are the Product of Racial Gerrymandering.

Plaintiffs next discuss the large number of precinct splits, arguing that they are not unusual. While County Defendants do not dispute that precincts are often split in the drafting of redistricting plans, again the issue is *why* the precincts were split in a particular plan.[5]

[5] The extended citation of Morgan's various splits of precincts does not support Plaintiffs' argument because the mere fact that a split exists says nothing. The key is *why* the split exists, something Plaintiffs do not explain. Even if the splits in plans drawn by Morgan are somehow relevant, Plaintiffs ignore the fact that Morgan did not split any precincts in the Atlantic Freeholders plan and split only one town when it was too large to include in a single district (Deposition of John Bennett Morgan [Doc. 119] ("Morgan Dep.") 73:11-74:8, 95:12-96:1); Morgan split fewer than 10 precincts on an entire statewide plan for New Jersey, despite drawing the plan at zero population deviation and always tries to split as few precincts as possible (95:2-8). Morgan drew initial drafts of plans for Virginia that were later negotiated without his involvement and did not draw the final statewide

Of the 11 precincts in District 5, Cooper included only three whole precincts in that district. [Doc. 141, p. 14]. Cooper split eight precincts, and every single split was racial in nature. Supp. Morgan Report [Doc. 108-8], ¶ 20. Plaintiffs do not dispute that Cooper drew District 5 with racial percentages visible by block. Despite Plaintiffs' claims, Cooper did not identify any precinct in District 5 besides one—Hopeful—that he split to protect an incumbent.[6] Cooper Dep. 144:20-145:16. Plaintiffs claim Sandy Creek was split for population purposes but ignore the differences in the splits of that precinct in the Illustrative Plan and BOE Plan—the split of the precinct in the Illustrative Plan is racial. Cooper Report [Doc. 108-4], Ex. E-1 [Doc. 107-1, p. 55]; Supp. Morgan Report, ¶ 20.

Even assuming both of Plaintiffs' alleged explanations for the split precincts are valid, they provide some explanation for only *two* of the eight split precincts in District 5. This complete lack of justification for most of the precinct splits is stunning in light of the undisputed (and unrebutted) testimony from Morgan that every precinct split by Cooper specifically *includes* areas with concentrations of African-American population while systematically *excluding* areas with higher white population. Supp. Morgan Report, ¶ 20. The Supreme Court found this type

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plan. Morgan Dep. 156:5-25. Morgan also did not draw the adopted version of the plan for Connecticut. Morgan Dep. 102:13-19.

[6] The Dogwood precinct is not located in District 5 on the Illustrative Plan. Cooper Report, Ex. E-1 [Doc. 107-1, p. 55].

of "boundary segment analysis" persuasive of racial predominance, and Plaintiffs have done precious little to rebut the same conclusion here. *Hunt*, 526 U.S. at 548. Cooper's systematic exclusion of the white population that lives between the African-American population centers in the County is strong support for the conclusion that race predominated in the drawing of the Illustrative Plan. Morgan Report [Doc. 108-5], ¶ 49.

2. The Illustrative Plan's Population Deviations Point to Racial Predominance.

While Plaintiffs claim that County Defendants do not dispute that the Illustrative Plan complies with one-person, one-vote, that is simply not the case. As detailed in County Defendants' Response, Plaintiffs improperly rely on a ten percent threshold for deviation. [Doc. 140, pp. 10-11]. As with other features of the Illustrative Plan, Cooper was unable to explain the reason for the population deviations from the ideal size, as required by *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).

3. Plaintiffs' "Community of Interest" Argument Does Not Explain the Shape of District 5.

Plaintiffs' claim that Cooper accounted for communities of interest in the development of the Illustrative Plan is directly contrary to Cooper's own statements. Cooper admitted in his deposition that (1) he was unaware of the

location or attendance patterns for any churches or civic organizations (other than the NAACP) when he drew the Illustrative Plan (Cooper Dep. 284:23-285:7; 285:20-24); (2) the Illustrative Plan did not follow 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 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.

As detailed in County Defendants' Response, the sweeping claims of similarity among African-American residents of District 5 are not supported by any testimony. [Doc. 140, pp. 13-16]. Even if those claims were supported by some testimony, Plaintiffs have not explained how the boundaries of District 5 take in people who are part of these "communities" or represent these "communities."

Plaintiffs' various efforts to undermine Morgan's testimony about Fayette County are not supported by the facts.[7] Cooper admitted that Morgan is an expert in redistricting and demographics. Cooper Dep. 57:14-17. As Morgan explained,

[7] Indeed, Plaintiffs' charge that Morgan did not take the Voting Rights Act into account when reviewing plans is without any basis in fact whatsoever. Morgan testified that he did take compliance with the Voting Rights Act into account as one of the "understood" elements of redistricting and required by federal law. Morgan Dep. 150:9-24. Morgan obviously distinguished it from the non-statutory traditional redistricting principles, such as compactness, preserving political subdivisions, and contiguity. Morgan Dep. 151:20-152:2.

he did not base his analysis of the separateness of the three areas of minority population based on his drive through the County but instead on his analysis of its demographics and population. Morgan Dep. 143:1-145:10. At least two Plaintiffs agreed that African-Americans in Fayette County do not all live in the same area. *See* [Doc. 140, p. 17]. Plaintiffs have not shown how the boundaries of District 5 are explained by an attempt to unite an identifiable community of interest.

4. Cooper Never Used Election Data in the Creation of District 5.

Plaintiffs' claim that Cooper used election data as a shield against racial predominance is not supported by Cooper's testimony. Cooper is absolutely clear that he never relied on any election returns while developing his plans:

> Q. Did you rely in any way on the 2006 and 2008 election data [the Public Mapping Project file referenced by Plaintiffs] in drawing your plans?
> A. No. I really -- I downloaded it just to see what it was exactly, and I didn't really use it for anything specific.

Cooper Dep. 109:24-110:3.

While every citation to Cooper's testimony from Plaintiffs on this point refers to him reviewing *voter registration information*,[Doc. 141, p. 19 n.9], Cooper never even relied on that voter registration data. Cooper Dep. 282:4-12, 111:13-23, 113:24-114:10. Thus, political interests do not explain the boundaries of District 5, and only election information that explained the boundaries of the district precluded the grant of summary judgment in *Hunt*, 526 U.S. at 551.

B. Plaintiffs' Racial Gerrymander Cannot Be Saved as Necessary for Compliance with a Compelling State Interest.

Undoubtedly recognizing their plan as a racial gerrymander, Plaintiffs argue that District 5 is a remedial district "necessary for Section 2 compliance." [Doc. 141, p. 11]. While claiming the Illustrative Plan remedies a "dilutive electoral scheme," Plaintiffs refuse to recognize that they must first show the plan can be ordered as a remedy to show the current at-large system is dilutive.[8] *Nipper*, 39 F.3d at 1530-31. Plaintiffs' theory that a racial gerrymander can be used both to *show* a Section 2 violation and to *remedy* that violation places the Court in an impossible "which came first" problem: if a violation can only be shown by a valid remedy, but the remedy is only made valid by the existence of a violation, then the Court never has a place to start.[9] This conundrum is precisely why *Nipper* requires a valid remedy first, something Plaintiffs cannot show here. 39 F.3d at 1530-31.

In arguing their point, Plaintiffs misrepresent the language quoted from *Johnson v. Miller*, 864 F.Supp. 1354, 1981 (S.D. Ga. 1994). In reality, it is a quote from a district court case that was *reversed* by the U.S. Supreme Court, not

[8] Plaintiffs never address or even attempt to distinguish *Nipper* in their brief, let alone the Eleventh Circuit's consistent interpretation of the first prong of *Gingles*. *See, e.g.*, *Burton v. City of Belle Glade*, 178 F.3d 1175, 1199 (11th Cir.1999).

[9] Or, as Luna Lovegood stated in response to the question, "Which came first, the phoenix or the flame?" "I think the answer is that a circle has no beginning." J. K. ROWLING, HARRY POTTER AND THE DEATHLY HALLOWS 587 (Scholastic 2007).

affirmed. *Shaw v. Hunt*, 861 F. Supp. 408, 437 (E.D.N.C. 1994) *rev'd*, 517 U.S. 899, 116 S.Ct. 1894, 135 L.Ed.2d 207 (1996). In its reversal, the Supreme Court did not find that compliance with the VRA justified racial gerrymandering (even when the state believed it was vulnerable to a Section 2 lawsuit if it failed to create the new district) because the minority community was not compact enough to support a Section 2 claim. 517 U.S. at 911, 914-918. The other cases cited by Plaintiffs have no bearing on the propriety of the Illustrative Plan in this case.[10]

Plaintiffs have not shown that a belief that their Illustrative Plan complies with Section 2 rescues it from its constitutional infirmity and never cite any

[10] The other cases either are not relevant or reinforce County Defendants' point that if Plaintiffs could explain the boundaries of District 5 using neutral criteria (which they cannot and do not), they could demonstrate their plan is a possible remedy. *Easley v. Cromartie*, 532 U.S. 234, 242, 121 S.Ct. 1452, 1458, 149 L.Ed.2d 430 (U.S.N.C. 2001) (reversing racial gerrymandering determination based on evidence that politics, not race, was the primary explanation for the boundaries of a district; no mention of Voting Rights Act); *Davis v. Chiles*, 139 F.3d 1414, 1424-25 (11th Cir. 1998) (dismissing § 2 case based on *Nipper*; dismissing racial gerrymandering claim by finding proposed districts complied with *every* traditional redistricting principle and mapdrawer did not "begin in the majority black area and work out"); *Prejean v. Foster*, 83 F. App'x 5, 11 (5th Cir. 2003) (constitutional challenge denied when "boundaries were drawn with traditional political concerns rather than race predominating"); *Chen v. City of Houston*, 206 F.3d 502, 505, 507-513 (5th Cir. 2000) (in "extremely close and difficult" case, plaintiffs failed to meet evidentiary burden under *Shaw* when city explained reasons behind unusual boundaries with traditional redistricting principles). The Supreme Court has recognized that compliance with § 5 of the VRA is not a defense to a constitutional claim. *Shaw*, 509 U.S. at 654-55 (covered jurisdiction do not have "*carte blanche* to engage in racial gerrymandering in the name of nonretrogression.").

authority for the proposition that a racial gerrymander meets strict scrutiny solely because it is designed to comply with Section 2. The failure to explain the creation of the district on anything but racial grounds defeats Plaintiffs' ability to meet the first prong of *Gingles*.

C. Plaintiffs Have Not Shown the Minority Community in Fayette County is Geographically Compact.

Plaintiffs cite eight references to the record in an attempt to support their idea that the African-American population in Fayette County is compact. None of them support the requirements that Plaintiffs must demonstrate in this case, because they all assume that the black community is cohesive simply because of race. *See Johnson v. Hamrick*, 196 F.3d 1216, 1222 n.6 (11th Cir. 1999).

First, Plaintiffs argue the cities of Fayetteville and Tyrone are separated by only 3.5 miles. While this is factually correct, the 3.5 mile distance between the cities is not included in District 5 on the Illustrative Plan. Cooper Dep. 284:4-22. Second, Plaintiffs cite cohesive voting patterns but do not explain these patterns in anything other than a racial context. Third, Plaintiffs argue that African-American voters could elect their preferred candidate in District 5 without support from white voters—again emphasizing the assumption that African-American voters are cohesive because of their race. Fourth, Plaintiffs point out the (obvious) fact that portions of Tyrone and Fayetteville are included in District 5, but they do not

explain how this is relevant or why including only parts of municipalities (as opposed to including entire cities, which the Illustrative Plan does not do) demonstrates geographic compactness of a community. Fifth, Plaintiffs cite the land area included in the proposed District 5 but never explain how that inclusion demonstrates geographic compactness. Sixth, Plaintiffs state incorrectly that the black population is "concentrated" in the northern portion of Fayette County. As County Defendants explained, there are three concentrations of African-American population in Fayette County. *See* Response to Plaintiffs' Statement of Undisputed Material Facts [Doc. 140-1] ¶ 38. Seventh, Plaintiffs fall back on the alleged "community of interest" in District 5. This issue is discussed above in Section A.3.

The final argument by Plaintiffs is that the Illustrative Plan is compact "as a matter of law." [Doc. 141, p. 23]. This claim is bizarre, especially when the rest of that paragraph states the correct rule: that no objective compactness standard exists. Both experts in this case recognize that compactness is measured *relative* to other shapes. Cooper Dep. 216:5-217:6; Morgan Dep. 67:16-68:1. District 5 scores lower on two compactness measures than most other districts. Cooper Dep. 231:20-232:15; 236:17-237:2; 245:8-13; 246:5-15. Plaintiffs' discussion of how District 5 ranks in comparison with other compactness scores is dealt with in County Defendants' Response [Doc. 140, pp. 7-9] and need not be repeated here.

Even assuming District 5 somehow meets the standard set forth by Plaintiffs, their burden is to show the minority *community* (not a district) in Fayette County is geographically compact. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433, 126 S. Ct. 2594, 2618, 165 L. Ed. 2d 609 (2006). The key problem in *Perry* was the mapdrawers' assumption that a group of individuals was a community solely because of their race, as Cooper did here. 548 U.S. at 433. Plaintiffs have put forward no evidence to counter Morgan's finding that there are three separate concentrations of African-American voters in Fayette County. The lengths Plaintiffs take to manufacture a geographically compact community after the fact show the lack of evidence in support of their position.

III. CONCLUSION

This case turns on a simple issue: have Plaintiffs carried their burden to show that the Illustrative Plan can be ordered as a remedy? Based on the undisputed evidence before this Court, they have not because the only explanation for the boundaries of District 5 is race. Because racial gerrymanders cannot be ordered as remedies, Plaintiffs' claims fail, and County Defendants are entitled to summary judgment.

Respectfully submitted this 18th day of October, 2012.

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CERTIFICATE OF COMPLIANCE

Pursuant to L.R. 7.1(D), the undersigned hereby certifies that the foregoing COUNTY DEFENDANTS' REPLY 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).

s/ Anne W. Lewis
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I have this day electronically filed the within and foregoing COUNTY DEFENDANTS' REPLY 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 18th day of October, 2012.

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