APPEAL NO. 14-11202-FF

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

Plaintiffs–Appellees

v.

FAYETTE COUNTY BOARD OF COMMISSIONERS, *et al.*,

Defendants–Appellants

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

BRIEF OF PLAINTIFFS-APPELLEES GEORGIA STATE CONFERENCE OF THE NAACP, ET AL. v. FAYETTE COUNTY BOARD OF COMMISSIONERS, ET AL.

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1-1, Plaintiffs certify that the following is a complete, alphabetical list of all persons and entities known to have an interest in the outcome of this appeal:

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

15. Fayette County Branch of the NAACP – Plaintiff/Appellee

16. Georgia State Conference of the NAACP – Plaintiff/Appellee

17. Harben, Hartley & Hawkins, LLP – Attorneys for BOE Defendants/Appellants in the District Court

18. Hartley, Phillip L. – Attorney for BOE Defendants/Appellants in the District Court

19. Haygood, Ryan P. – Attorney for Plaintiffs/Appellees

20. Ifill, Sherrilyn – Attorney for Plaintiffs/Appellees

21. Jones, Alice – Plaintiff/Appellee

22. Jones, John E. – Plaintiff/Appellee

23. Kendall, Wayne B. – Former Attorney for Plaintiffs/Appellees

24. Key, Marion – BOE Defendant/Appellant

25. Korgaonkar, Natasha M. – Attorney for Plaintiffs/Appellees

26. Lewis, Anne Ware – Attorney for BOC and Elections Defendants/Appellants

27. Lowry, Dan – Plaintiff/Appellee

28. Maguire, J. Matthew, Jr. – Attorney for BOE Defendants/Appellants

29. Marchman, Allen – BOE Defendant/Appellant

30. McCarty, Allen – BOC Defendant/Appellant

31. NAACP Legal Defense & Educational Fund, Inc. – Attorney for Plaintiffs/Appellees

32. Oddo, Charles – BOE Defendant/Appellant

33. Ognio, Randy – BOE Defendant/Appellant

34. Parks, Chesin & Walbert, P.C. – Attorney for BOE Defendants/Appellants

35. Presberg, Leonard – BOE Defendant/Appellant

36. Richardson, Lelia – Plaintiff/Appellee

37. Sawyer, Tom –Elections Defendant/Appellant

38. Strickland, Frank B. – Attorney for BOC and Elections Defendants/Appellants

39. Todd, Bob – BOE Defendant/Appellant

40. Tyson, Bryan P. – Attorney for BOC and Elections Defendants/Appellants

41. Walbert, David. F. – Attorney for BOE Defendants/Appellants

42. Williams, Elverta – Plaintiff/Appellee

43. Wright, Bonnie Lee – Plaintiff/Appellee

Dated: June 26, 2014

Respectfully submitted,

s/ *Leah C. Aden*
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STATEMENT REGARDING ORAL ARGUMENT

Plaintiffs, Georgia State Conference of the NAACP, *et al.*, who are Appellees in this case, respectfully request oral argument. This appeal involves complicated legal and statutory issues related to Section 2 of the Voting Rights Act, as well as the validity of the permanent injunction and remedial order issued by the District Court in implementing Section 2's objective. Appellants agree that oral argument of the issues and the applicable precedent would benefit the Court.

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This is an appeal from a final judgment of the United States District Court for the Northern District of Georgia in a civil case. This Court has jurisdiction pursuant to 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the District Court applied the proper framework for determining the geographical compactness of the Black community in the Plaintiffs' Illustrative Plan used to satisfy the first prong of *Thornburg v. Gingles*, 478 U.S. 30 (1986);
2. Whether the District Court properly rejected the Board of Commissioners' theory that Plaintiffs' Illustrative Plan, which by definition was required to use racial data to satisfy the first prong of *Gingles*, is an unconstitutional racial gerrymander;
3. Whether the District Court properly held that a single-member district comprised of 50 percent plus one Black voting-age population is sufficiently numerous under *Gingles*; and
4. Whether the District Court properly held that, under the totality of the circumstances, Plaintiffs established a Section 2 violation where the Board of Commissioners *concedes* that elections are characterized by racially polarized voting such that no Black candidate has ever been elected to that body or the Board of Education and where *five* Senate Factors weighed in Plaintiffs' favor.

STATEMENT OF THE CASE

STATEMENT OF FACTS & PROCEDURAL BACKGROUND

After nearly 20 years, Black voters in Fayette County, including Plaintiffs, had exhausted nearly every possible non-judicial avenue to change the at-large method of election for the Board of Commissioners ("BOC") and Board of Education ("BOE").[1] Following these nearly two decades of the BOC and BOE repeatedly ignoring Plaintiffs' entreaties for the adoption of a racially fair electoral method, Plaintiffs-Appellees—Georgia State Conference of the NAACP, Fayette County Branch of the NAACP, and ten individual Black voters[2]—filed suit under Section 2 of the Voting Rights Act ("Section 2" and the "VRA").[3]

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[1] Vol. III, 152, at 14 (The District Court recognizing that "[s]ince 1993, various Fayette County citizens," including Plaintiffs "have publicly advocated for district voting" for the BOC and BOE).

References to the BOC's Appellant-Appendix are cited as "Vol. I,_, at_" to "Vol. III,_, at_." References to documents filed with the District Court are cited as "Doc._, at_." References to the BOC's Brief are cited as "BOC Br.'s, at _."

[2] These individuals are Henry Adams, Terence Clark, Alice Jones, John E. Jones, Dan Lowry, Ali Abdur-Rahman, Aisha Abdur-Rahman, Lelia Richardson, Elverta Williams, and Bonnie Lee Wright.

[3] 42 U.S.C. §1973.

In addition to the BOC and its individual members in their official capacities, and the BOE and its individual members in their official capacities, Plaintiffs also sued Tom Sawyer in his official capacity as the department head of the County Board of Elections and Voter Registration ("Board of Elections") and Board of Elections.

A. Attempted Settlements

Shortly after this lawsuit commenced, the BOE sought to settle Plaintiffs' Section 2 claim by consent decree, adopting a single-member districting plan with five districts, one of which had a 46.2 percent Any-Part[4] Black voting-age population ("VAP") and would provide an opportunity for Plaintiffs to elect candidates of their choice. Though it first accepted this original consent decree, the District Court later vacated it after the other Defendants objected.[5]

Subsequent to that vacatur, Plaintiffs and the BOE entered into an amended consent decree, relying on the same single-member district, but which added that the BOE "admit[ed] that the . . . at-large method of electing members to the [BOE] violates Section 2 . . . and that *Plaintiffs have established the factual and legal basis for [the BOE's] violation of Section 2*.[6]

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[4] Doc. 54-2, at 7, n.1 (Plaintiffs' expert, Bill Cooper, explaining that as of the 2000 Census, the "Any Part" Black category includes people who identify as single-race Black or Black plus one or more other races, including people who identify as Black and Hispanic).

[5] Doc. 50 (order vacating the District Court's approval of the original consent decree and final judgment against the BOE based on its failure to consider the impact of administering the original consent decree on the Board of Elections, represented by the same counsel as for the BOC); Doc. 35 (order adopting original consent decree between Plaintiffs and the BOE).

[6] Doc. 54, at ¶ 7 (emphasis added); Doc. 54-1, at 9-10, 12; Doc. 43, at 3-4, 6; Doc. 68, at 1-2.

At a May 30, 2012 hearing, the District Court's rejected the amended consent decree,[7] holding that existing case law would not permit a settlement which was less than 50 percent Any-Part Black VAP.[8] Thereafter, the BOE took a mostly inactive role in the litigation.

B. Discovery & Summary Judgment

After discovery between Plaintiffs and the BOC,[9] those parties cross-moved for summary judgment.[10] Plaintiffs were required to establish each of the *Thornburg v. Gingles* prongs for a Section 2 claim,[11] and demonstrate that, under the totality of the circumstances, Black voters in Fayette have less opportunity than other members of the electorate to elect their candidates of choice.[12]

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7 Vol. III, 152, at 8-10; Doc. 54-8, at 2 & ¶¶ 16-18.

8 Vol. III, 179, at 10, n.9.

9 The BOE, because they believed that they would be able to settle this case, did not sign onto the Joint Preliminary Report and Discovery Plan, Doc. 21, that the District Court approved (and later extended) between Plaintiffs and the BOC. Docs. 44 & 90. After Plaintiffs and the BOE's settlements were unsuccessful, the District Court rejected Plaintiffs and the BOE's request for a separate discovery plan. Doc. 126; Vol. III, 152, at 10.

10 Docs. 108, 110. In its summary judgment order, the District Court recognized that "[t]he [BOE], having conceded the existence of a Section 2 violation, did not participate in discovery or the current [summary judgment] motions." Vol. III, 152, at 10.

11 478 U.S. 30, 50-51, 106 S. Ct. 2752, 2766-77 (1986); *Johnson v. De Grandy*, 512 U.S. 997, 1011, 114 S. Ct. 2647, 2657 (1994).

12 42 U.S.C. § 1973(b); *Abrams v. Johnson*, 521 U.S. 74, 91, 117 S. Ct. 1925, 1936 (1997).

As to the first prong of *Gingles*, Plaintiffs' expert demographer, William Cooper ("Cooper"), who has testified in 34 voting rights cases,[13] created a geographically compact single-member districting plan, referred to herein as the *Illustrative Plan*. Under Plaintiffs' Illustrative Plan, the Any-Part Black VAP in District 5, the remedial district, was 50.22 percent. District 5 is located in the northern part of Fayette County, where Black residents are geographically concentrated[14] in Fayetteville and Tyrone, cities that are separated by just 3.5 miles[15] and contain the highest concentrations of Black residents in Fayette.[16]

In their summary judgment submission, Plaintiffs demonstrated that their Illustrative Plan compared favorably to existing districting plans for the BOC ("Commissioners' Plan")[17] and BOE ("February 2012 BOE Plan"),[18] as well as

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[13] Vol. III, 152, at 14 n.7 (the District Court noting that "[s]ince the release of the 2010 census, [Cooper] has developed several statewide legislative plans, including plans for Georgia, and has developed sixty local redistricting plans, primarily for groups working to protect minority voting rights").

[14] *Id.* at 10-11.

[15] *Id*. at 35.

[16] *Id*. at 10-11.

[17] In March 2012, the BOC was involved in other redistricting litigation to correct the then existing malapportionment in the BOC at-large district. *Lindsey v. Fayette Cnty. Bd. of Comm'rs*, No. 3:12-cv-40-TCB (N.D. Ga. 2012); Vol. III, 152, at 11-12. The District Court entered a consent decree that retained at-large voting with five residence districts , one of which contained an Any-Part Black VAP of 44.75 percent.

[18] Although the District Court rejected the February 2012 BOE Plan as part of the settlements between the BOE and Plaintiffs, the BOE ultimately adopted that Plan, though

other districts throughout Georgia.[19] Cooper also submitted a Hypothetical Plan, drawn primarily on race to demonstrate to the District Court that District 5 could contain an Any-Part Black VAP that was higher at 53.58 percent.[20]

The chart below compares the redistricting principle measures, including geographical compactness, precinct splits, and population deviation, as well as compliance with Section 2 between the principal plans in this case. Plaintiffs' expert, Cooper, and the BOC's expert, John Morgan, ("Morgan") each used the Reock test as one measure of geographical compactness.[21]

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maintaining at-large voting under the new districting scheme. Vol. III, 179, at 5-6; Doc. 174, at 2 n.2.

[19] Doc. 110-1, at 9-14.

[20] *Id*. at 19.

[21] The "Reock test," one compactness indicator, is an area-based measure that compares each district to a circle. It is measured on a scale of 0 to1, with 1 being the most compact. *See*, Doc. 110-1, at 15 n.8.

	Plaintiffs' Illustrative Plan	**Commissioners' Plan**	**February 2012 BOE Plan**	**Hypothetical Plan**
Any-Part Black VAP in District 5	50.22%	44.75%	46.2%	53.58%
Mean Reock Score For Plan	.42	.45	.49	.40
Reock Score for District 5	.31	.45	.43	.27
Population Deviation for Plan	5.69%	4.03%	5.90%	9.96%
Population Deviation in District 5	-3.46%	.43%	-2.10%	-7.57%
Total Split Precincts	11	7	4	17
Total Split Precincts in District 5	8	2	1	13

In their summary judgment submission, the BOC *conceded* the existence of racially polarized voting ("RPV") in Fayette, relevant to *Gingles* two and three.[22] Plaintiffs' expert, Dr. Richard Engstrom ("Dr. Engstrom"), a leading political scientist, determined that the County's election are characterized by stark levels of RPV. The District Court accepted Dr. Engstrom as "an expert on the relationship between election systems and the ability of minority voters to participate fully in

[22] Vol. III, 152, at 43-44.

the political process and to elect representatives of their choice."[23] The BOC did not offer contrary evidence on RPV.

The BOC never disputed the fact that not one of the seven Black candidates that had run for BOC seats had been elected, despite those candidates being the preferred candidates of choice of Black voters in those countywide elections.[24] For example, in one BOC election, three Republican candidates ran for a vacant seat on the BOC, including two Black candidates and one white candidate. One of the Black candidates was an attorney and vice-chairman of the County Republican party, and the other Black candidate was a certified public accountant.[25] The white candidate was a newly registered voter and mechanic. Two other Black Democratic candidates also ran in that election. In the end, the white candidate defeated all four Black candidates without a runoff.

Plaintiffs also offered evidence in support of the totality of the circumstances standard, including that: (1) no Black candidate has ever been elected to the BOC or BOE, despite consistent support from Black voters; (2) BOC and BOE elections are characterized by RPV; (3) Georgia has an indisputable history of *de jure* racial

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23 *Id.* at 43.

24 *Id.* at 12-13.

25 Doc. 110-1, at 5 n.4.

discrimination; (4) multiple election practices, such as numbered posts, residency requirements, staggered terms, and a majority vote requirement, enhance the at-large system's discriminatory effects for BOC and BOE elections; and (5) the BOC's appointment process limits Black residents' political participation in Fayette.[26] The BOC did not offer contrary evidence on the totality of circumstances standard.

On May 21, 2013, the District Court, in an 81-page opinion, entered summary judgment for Plaintiffs (and denied it to the BOC), determining that at-large voting for the BOC and BOE elections violates Section 2.[27] Specifically, the District Court held that Fayette's at-large voting scheme violates Section 2 because it gives Black voters "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice" for the BOC and BOE.[28] More than 30 pages of that opinion were dedicated to the District Court's consideration and ultimate holding that "under the totality of the circumstances, [African-Americans in Fayette are] denied meaningful access to the political process on account of race or color."[29]

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26 Vol. III, 152, at 46-59, 64-69, 75-78.

27 *Id*. at 79-80.

28 *Id*. at 79.

29 *Id*. at 79-80; *id*. at 44-80.

The District Court denied the BOC's motion to amend the summary judgment order to include certification of an interlocutory appeal and stay the case pending appeal, based on the BOC's failure "to identify any issues within the Court's order on which there is substantial ground for difference of opinion," and acknowledgment that the BOC's purported controlling questions of law were "*manufactured, wholly inaccurate recitations of the Court's ruling, and/or have no relation to the Court's Order*.[30]

C. Remedial Phase

In its summary judgment order, the District Court directed the parties to submit proposed remedial plans by June 25, 2013. Plaintiffs submitted their Illustrative Plan with five single-member districts, one of which includes a 50.22 percent Any-Part Black VAP district, as a proposed remedy for the Section 2 violation.[31] The BOC offered a plan applicable for BOC elections only, which also included five single-member districts, one of which contained a 50.23 percent Any-Part Black VAP majority ("Commissioners' Proposed Remedial Plan").[32]

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30 Vol. III, 161, at 5, 19 (emphasis added). In denying the BOC's motion for reconsideration, the District Court expressly rejected all of the arguments that the BOC makes in this Court.

31 Vol. III, 179, at 5-6.

32 *Id*. at 5-6, 8.

The BOE did not offer a proposed remedial plan,[33] and instead referenced the February 2012 BOE Plan that they relied upon in their request for the District Court to approve their two settlements with Plaintiffs. The BOE also suggested guidelines for the Court to follow in developing a remedial plan.[34]

After briefing on the parties' proposed remedies, the District Court engaged an independent technical, expert advisor to develop, at its direction, an appropriate remedy for the Section 2 violation.[35] No party objected to the District Court engaging the expert advisor, who works for the state's Legislative and Congressional Reapportionment Office of the Georgia General Assembly.[36]

On January 24, 2014, the parties received the District Court's proposed remedial plan ("Court-Drawn Remedial Plan") developed in consultation with the expert advisor. In the District Court's Remedial Plan, the Any-Part Black VAP constitutes 50.13 percent in a single-member district located in the northern part of Fayette, where Black residents are largely concentrated.

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33 *Id.* at 5-6.

34 *Id.*

35 *Id.* at 6-7.

36 *Id.*; *see also* Doc. 167, at 4 (The BOC acknowledging that advisor's "expertise regarding redistricting is widely known throughout . . . Georgia, and [that the advisor] has served as a technical advisor for a number of local jurisdictions, as well as for courts creating local plans").

The following chart provides a comparison of the key redistricting measures between Plaintiffs' Illustrative Plan, the Commissioners' Proposed Remedial Plan, the February 2012 BOE Plan, and the Court-Drawn Remedial Plan, with the primary differences being that the District Court's remedial plan has the lowest majority-Any-Part Black VAP, splits the fewest precincts, and has the lowest population deviation.[37]

[37] Vol. III, 179, at 8-9; Doc. 163, at 2-6.

	Court-Drawn Remedial Plan	**Plaintiffs' Illustrative Plan/Remedial Plan**	**Commissioners' Proposed Remedial Plan**	**February 2012 BOE Proposed Plan**
Any-Part Black VAP in District 5	50.13%	50.22%	50.23%	46.2%
Mean Reock Score for Plan	.44	.42	.40	.49
Reock Score in District 5	.30	.31	.30	.43
Overall Population Deviation in Plan	4.80%	5.69%	7.35%	5.90%
Population Deviation in District 5	-2.65	-3.46	-3.16	-2.10%
Total Split Precincts in Plan	9	11	12	4
Total Split Precincts in District 5	7	8	9	1

The District Court also set a hearing on its remedial plan, and, in advance of it, requested that the parties submit any written objections.[38] No party objected to the District Court's proposed remedial plan.[39] That hearing on the Court's

[38] Vol. III, 179, at 9.

[39] *Id.*; *see also id.* at 29-30 (The BOC acknowledging that the Court's Remedial Plan "appears to defer to the BOC and BOE [county] policy decisions to some degree."); Doc. 175, at 7-9 (The BOC acknowledging that the court-drawn plan considers race and appears to comply

proposed remedy to the Section 2 violation was held on February 18, 2014, wherein the BOC provided the District Court with a time table of how Defendants could feasibly implement district voting for the 2014 elections in May and November.[40] Shortly after that hearing, the District Court entered a detailed 37-page order: (1) enjoining candidate qualification and the conduct of elections under at-large voting, and (2) adopting the Court-Drawn Remedial Plan for both the BOC and BOE.[41]

In the remedial order, the District Court set forth the standards that guided the redistricting expert, at the direction of the federal court, in the redistricting, which included: (1) "fashion[ing] the relief so that it completely remedies" the Section 2 violation by creating a single-member plan with an Any-Part Black VAP district that is more than 50 percent; (2) narrowly tailoring that relief so as to be compliant with the one person, one vote guarantee of the Equal Protection Clause of the Fourteenth Amendment ("Equal Protection Clause") by creating a plan with a small population deviation of less than ten percent; (3) complying with the VRA,

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with traditional redistricting principles and constitutional and statutory requirements for remedial redistricting); *see also id*. at 9 ("Although the BOC disagrees, this Court has determined that such racial focus is appropriate and necessary to comply with Section 2.")

[40] Vol. III, 179, at 9; *see also id.* at 15 n.11 (acknowledging the BOC's request to issue a remedial order within a week of the remedial hearing to have sufficient time to conduct elections in accord with state law).

[41] *Id*. at 32.

specifically Sections 2 and 5; (4) following traditional redistricting principles—maintaining communities of interest, traditional boundaries, geographical compactness, contiguity, minimizing splits of political subdivisions, and, to a lesser extent, protecting incumbents[42]—recognizing that the requirements of the Constitution and VRA have more precedence; and (5) avoiding race as the predominate factor.[43]

D. Final Judgment & Elections Under District Voting

On March 13, 2014, the District Court entered final judgment, ordering Defendants to "implement the remedial plan promptly and consistently with the Constitution and laws of the United States and the Constitution and laws of the State of Georgia."[44]

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[42] Vol. III, 179, at 13.

In its remedial order, the District Court acknowledged that in its role in redistricting it "'should be guided by the legislative policies underlying' a prior plan—including an unenforceable one—'to the extent those policies do not lead to violations of the Constitution or the [VRA].'" *Id.*, at 2 (quoting *Abrams*, 521 U.S. at 79, 117 S. Ct. at 1940 (internal quotation marks omitted); *id.*, at 14.

[43] *Id.*, at 3-4, 6-8, 10-11, 14.

The District Court explained that "race was *a* factor in creating the remedial plan, specifically the majority-minority district" because "whenever a majority-minority district is intentionally created . . . there is a race-related goal: achieving a minority [VAP] for that district of more than 50 percent." *Id.*, at 17. The District Court further clarified that "a plan drawn with an awareness of race or a race-related goal is not per se unconstitutional. This is because 'a [plan-creator] may be conscious of the voters' races without using race as a basis for assigning voters to districts." *id.* (citing *Shaw v. Hunt* (*Shaw II*), 517 U.S. 899, 905, 116 S. Ct. 1894, 1900 (1996)).

[44] Vol. III, 183, at 5.

STANDARD OF REVIEW

This Court reviews *de novo* findings of fact and conclusions of law following the District Court's grant of summary judgment for Plaintiffs.[45] This Court views the record and draws reasonable inferences in the light most favorable to the non-moving party.[46]

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45 *Meek v. Metro. Dade Cnty*., 908 F.2d 1540, 1544 (11th Cir. 1990).

46 *Id*.; *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1217 (11th Cir. 2005) (en banc).

SUMMARY OF THE ARGUMENT

Plaintiffs challenged Fayette's nearly two century old reliance on at-large voting to maintain a racially segregated BOC and BOE. The District Court held that the at-large electoral method used by Defendants results in improper vote dilution in violation of Section 2. The District Court recognized that, though Black[47] voters comprise twenty (20) percent of the VAP, are geographically compact in the northern part of the County, and are politically cohesive, Fayette's at-large electoral method, in combination with RPV, denies them the opportunity to participate equally in the political process and elect responsive elected officials.[48] As the District Court recognized, *no* Black candidate has *ever* been elected to the BOC or BOE.[49]

The District Court properly held that there is no genuine dispute of material fact that: (1) Plaintiffs satisfied the three *Gingles* preconditions for demonstrating a vote dilution claim; and (2) under the totality of the circumstances, the County's

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[47] Plaintiffs prefer to use the term "Black" to refer to people who identify as Black only or Black in combination with other racial groups. "African-American," which the District Court uses, and "Black" are used interchangeably herein.

[48] *See, e.g.*, Vol. III, 152, at 79 (The District Court holding that Black voters in Fayette County "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice . . . .") (internal citation omitted)); *id.* at 10 (recognizing that as of the 2010 Census, the Any-Part Black VAP is 19.5 percent in Fayette).

[49] *Id.*

Black residents have less of an opportunity than white residents to elect their preferred candidates of choice.

First, as the District Court held, there is no genuine dispute of material fact that: (1) Fayette's Black population is sufficiently large and geographically compact to constitute a majority of the VAP in a properly apportioned single-member district (*Gingles* one); (2) Black residents' voting patterns are politically cohesive in elections involving candidates to the BOC and BOE (*Gingles* two); and (3) bloc voting by other members of the electorate consistently defeats Black-preferred candidates, such that *no Black candidate has ever been elected to either board* (*Gingles* three).[50] The BOC conceded that Plaintiffs have established *Gingles* two and three, *i.e.*, the existence of RPV in Fayette.

Second, the District Court held that Plaintiffs' evidence shows that the BOC's at-large method of electing its members, in combination with RPV, provides "less opportunity to minorities than other members of the electorate" to elect their candidates of choice, in violation of Section 2.[51] To remedy the VRA violation, the District Court granted summary judgment for Plaintiffs, enjoined at-

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50 *Id*. at 42, 44.

51 *Id*. at 79-80; 42 U.S.C. § 1973(b).

large voting, and ordered the implementation of a Court-Dawn Remedial Plan that provides district voting for elections in Fayette.

The BOC does not seriously dispute that Fayette's at-large electoral method provides less of an opportunity—indeed, as the record here clearly demonstrates, *no opportunity*—for Black voters to elect their candidates of choice to the BOC and BOE. Instead, on appeal, the BOC urges this Court to look past the demonstrated Section 2 violation in this case, and find that the *remedy* for the existing racial discrimination is *itself unconstitutional, racial discrimination.*

Having made the significant concession that Plaintiffs satisfied *Gingles* two and three, the BOC, *first*, argues that the District Court erred in accepting that the minority community in the majority-Black district in Plaintiffs' Illustrative Plan, and later, the Court-ordered remedial plan, is geographically compact under *Gingles* one. *Second*, the BOC argues that both the Plaintiffs *and the District Court* created racially gerrymandered redistricting plans in violation of the Equal Protection Clause. *Finally*, the BOC argues that the District Court gave "improper weight to the 'totality of the circumstances' test" that it held weighed in Plaintiffs' favor.[52]

[52] BOC. Br., at 27.

As the District Court recognized in denying the BOC's request to certify an interlocutory appeal and stay the case pending an appeal, the BOC's appeal must fail.

ARGUMENT AND CITATIONS OF AUTHORITY

A successful Section 2 claim has two components. *First*, Plaintiffs must satisfy the three *Gingles* preconditions for alleging a vote dilution claim, specifically: (1) that the minority group is "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) the minority group is "politically cohesive," and (3) the "majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."[53] *Second*, Plaintiffs must, under the totality of circumstances standard, "demonstrat[e] that a challenged election practice has resulted in the denial or abridgment of the right to vote based on color or race."[54]

After determining that Plaintiffs made both of these showings, the District Court held that Defendants' at-large electoral method violated Section 2, and granted summary judgment in Plaintiffs' favor.[55]

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[53] *Gingles*, 478 U.S. at 50-51, 106 S. Ct. at 2766-77; 42 U.S.C. § 1973(b); Fed. R. Civ. P. 56(a).

[54] *Chisom v. Roemer*, 501 U.S. 380, 394, 111 S. Ct. 2354, 2363 (1991).

[55] Vol. III, 152, at 80. To survive summary judgment under Section 2, Plaintiffs showed that the undisputed *material* facts demonstrate that *Gingles* was met and the totality of the circumstances weighed in their favor. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322, 106 S. Ct. 2548, 2552 (1986); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48, 106 S. Ct. 2505, 2509-10 (1986) ("[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact.") (emphasis in original).

To remedy the VRA violation, the District Court ordered the implementation of a single-member districting plan in which Black voters in District 5, one of the five districts for each board, comprise the majority of the VAP.[56]

I. The BOC Concedes That Plaintiffs Met *Gingles* Two and Three, Which Are Recognized As the "Keystone of A Dilution Case."

The BOC concedes that Plaintiffs established *Gingles* two and three, *i.e.*, the existence of RPV, in Fayette.[57] The District Court credited the uncontested findings of Plaintiffs' RPV expert, Dr. Engstrom,[58] determining that "it is undisputed that Fayette County's African-American population is politically cohesive and that its elections are characterized by racially polarized bloc voting,"[59] which is "ordinarily . . . the keystone of a dilution case." [60]

The BOC's concession is fatal to its chosen defense: that race data was improperly used by Plaintiffs and the District Court in fashioning an illustrative

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[56] BOC's Br., at 14 (acknowledging that once plaintiffs have met their burden under Section 2, "the court may then implement a . . . remedy that ends the dilution of minority voting strength").

[57] Vol. III, 152, at 43.

[58] *Id*.

[59] *Id*.

[60] *Id*., at 52; *United States v. Marengo Cnty. Comm'n.*, 731 F.2d 1546, 1566 (11th Cir. 1984), *cert. denied*, 469 U.S. 976, 105 S. Ct. 375 (1984) (the existence of RPV is the keystone of a vote dilution case).

and remedial district. Because elections in Fayette are characterized by RPV, as the BOC concedes, *any* redistricting *has to* take race into account, in addition to the other traditional redistricting principles, both to establish the Section 2 violation and develop a remedy in light of it.[61] As the District Court held, and the BOC does not dispute, it is because the BOC's at-large electoral method interacts with RPV that Plaintiffs have never been able to elect a candidate of their choice to the BOC or BOE.[62] Section 2 was enacted to proscribe precisely this result.

II. The District Court Properly Held that Plaintiffs Satisfied *Gingles One*—Sufficiently Numerous And Geographically Compact.

Plaintiffs also satisfied *Gingles* one, having shown that the "County's Black population is sufficiently numerous and geographically compact to . . . creat[e] a properly apportioned single-member district for electing members [to the] . . . [BOC] in which Black voters would constitute a majority of both the total population and the [VAP]."[63] The purpose of this requirement is to demonstrate that the inability of Black voters in Fayette to elect their preferred candidates

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61 *See, e.g., Davis v. Chiles*, 139 F.3d 1414, 1423 n.19 (11th Cir. 1998) (explaining "[a]ny remedy designed to alleviate [RPV] is by definition intended to help minority voters elect their candidates of choice.")

62 Vol. III, 152, at 79-80.

63 Doc. 110-1, at 1-2.

results from illegal vote dilution not the "natural" dispersion of Black voters across Fayette where white voters are a majority.[64]

Plaintiffs' expert, Cooper, demonstrated through Plaintiffs' Illustrative Plan that a properly apportioned single-member district plan for electing members to the BOC and BOE could be drawn in which Black voters constitute a majority of both the total population and the Any-Part Black VAP (50.22 percent) in one geographically compact district (District 5).[65]

A. District 5 in Plaintiffs' Illustrative Plan Is Sufficiently Numerous at 50.22 Percent Any-Part Black VAP.

The District Court held that the Black VAP in District 5 is sufficiently numerous at 50.22 percent.[66] The purpose of the numerosity requirement, together with the compactness requirement discussed below, is to ensure that voters of color have "the *potential* to elect representatives in the absence of the challenged structure or practice" (emphasis in original).[67]

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64 *Gingles*, 478 U.S. at 50-51, 106 S. Ct. at 2766-67.

65 *Id.*

66 As the District Court properly recognized, the Eleventh Circuit, like other circuits, uses VAP, rather than overall population, numbers to determine if a minority community is sufficiently large. Vol. III, 152, at 20 (citing a special concurrence in *Solomon v. Liberty Cnty., Fla.*, 899 F.2d 1012, 1018 (11th Cir. 1990)); *id.* at 21.

67 *See Gingles*, 478 U.S. at 50 n.17, 106 S. Ct. at 2766 n.17 (emphasis in original).

The District Court based its determination that, in District 5 of Plaintiffs Illustrative Plan, the Any-Part Black VAP of "50.22 [percent] is sufficient to show that the minority [VAP] population is sufficiently large," on *Bartlett*.[68] In that case, the Supreme Court held that *Gingles* one is a strict "majority-minority rule [that] relies on an objective, numerical test: Do minorities make up more than 50 percent of the [VAP] in the relevant geographic area?"[69] In articulating a bright-line, 50 percent plus one standard, *Bartlett* reasoned that "[t]hat rule provides straightforward guidance to courts and to those officials charged with drawing district lines to comply with [Section] 2."[70] As the District Court recognized, other courts have held that *Gingles* one requires this simple numerical majority.[71]

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[68] Vol. III, 152, at 20-21 (citing *Bartlett v. Strickland*, 556 U.S. 1, 18-20, 129 S. Ct. 1231, 1245-46 (2009) ("a party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent")).

[69] *Bartlett*, 556 U.S. at 3-4, 129 S. Ct. at 1236-38.

[70] *Id*. at 18, 129 S. Ct. at 1245.

[71] Vol. III, 152, at 21 (citing to *Pope v. County of Albany*, 687 F.3d 565, 575-77 (2d Cir. 2012) ("[T]he first *Gingles* factor can be satisfied by showing that an identified minority group forms a simple majority of the relevant population of a proposed district."); *Bone Shirt v. Hazeltine*, 461 F.3d 1011, 1019 (8th Cir. 2006) (acknowledging that "the Supreme Court . . . requires only a simple majority of eligible voters in the single-member district."); *Valdespino v. Alamo Heights Indep. Sch. Dist.*, 168 F.3d 848, 852-83 (5th Cir. 1999) (50 percent bright line rule); *Cousin v. Sundquist*, 145 F.3d 818, 828-29 (6th Cir. 1998) (same); and *Parker v. Ohio*, 263 F.Supp. 2d 1100, 1104-05 (S.D. Ohio 2003) (same), *aff'd mem.*, 540 U.S. 1013, 124 S. Ct. 574 (2003)).

The BOC has conceded that Black voters in District 5 of Plaintiffs' Illustrative Plan "meet[] th[e] threshold" of being above 50 percent of the [VAP].[72] The BOC, however, attempts to complicate this simple requirement by raising three issues with the District Court's holding. Each of these should be rejected.

First, the BOC challenges the use of the "Any-Part" Black VAP category. The BOC contends: (a) Plaintiffs have to establish that there are sufficient people of "a *single race*" in Fayette to form an "effective voting majority"[73]; (b) the Any-Part Black category, which provides for multi-race reporting by individuals is the wrong category to use; and (c) the District Court should have considered the numbers reflecting Black only (not in combination with any other race) *or* Black with other combinations (except Hispanic), because those numbers are less than 50 percent in Fayette *before* looking at Black in all combinations (e.g., Black + white and Black + Hispanic).[74]

This argument cites *no* authority that the District Court was required to use the "Black only" single race category.[75] Beginning with the 2000 Census, the Any-Part Black category includes people who identify as single-race Black or

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72 *See, e.g.*, Doc. 67, at 14.

73 BOC's Br., at 56.

74 *Id.*, at 57-58.

75 *Id.*, at 56.

Black plus one or more other races, including people who identify as Black and Hispanic.[76] In this case, *every one* of the plans in the record, namely the February 2012 BOE Plan, the Commissioners' Plan, Plaintiffs' Illustrative Plan, *and* the Court-Drawn Remedial Plan, have used the more informative Any-Part Black category.[77]

Second, building on their "Any Part" Black theory, the BOC challenges the District Court's determination that 50 percent plus a single person meets the "sufficiently" large test under *Gingles*.[78] In fact, the record reflects that the BOC conceded that the Any-Part Black VAP in District 5 of the Illustrative Plan "meets th[e] threshold" of being above 50 percent.[79]

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[76] The use of "Any-Part" Black category has been endorsed by the Supreme Court in a case arising out of Georgia, and other circuit courts, where, like here, the voting rights of one minority group—Black residents of Fayette—are at issue. In *Georgia v. Ashcroft*, the Supreme Court accepted Georgia's figures which included "those people who self-identify as both black and a member of another minority group, such as Hispanic." 539 U.S. 461, 474 n.1, 123 S. Ct. 2498, 2508 n.1 (2003) (O'Connor, J.). Justice O'Connor, writing for the Court, stated that in voting rights cases in which African Americans are the only minority group whose exercise of the franchise is at issue, "we believe it is proper to look at *all* individuals who identify themselves as black." (emphasis in the original). *See also Pope*, 687 F.3d at 577 n.11 (where a single minority group's voting effectiveness is at issue, it is appropriate to count all individuals who consider themselves Black, so long as the same measure is used consistently by the plaintiff).

Following that lead, the Georgia General Assembly in 2011 used this expansive category to produce reports for legislative redistricting. Doc. 54-2, at 13, n. 4.

[77] Doc. 54-2 (Cooper comparing the "Any Part" Black populations in the February 2012 BOE's Plan, Commissioners' Plan, and Plaintiffs' Illustrative Plan).

[78] BOC's Br., at 58-59; Vol. III, 152, at 23.

[79] Doc. 110-1, at 8.

Third, the BOC takes issue with Plaintiffs' meeting that threshold by approximately 35 voters.[80] The BOC argues that .22 percent over 50 percent does not satisfy *Gingles* one's numerosity requirement.[81] Though the BOC concedes that *Bartlett* requires only a "numerical, working majority,"[82] they nevertheless assert that the Eleventh Circuit requires an "effective voting majority."[83] This meritless proposition is unsupported by the law.

As the District Court recognized, Black voters in District 5 are a "numerical, working majority," without considering the number of registered voters, whether Black voters are politically cohesive in Fayette, which they are, or that District 5

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80 BOC's Br., at 58-59.

81 *Id*.
The BOC also makes the unsupported and offensive assumption that District 5 might lose its Any-Part Black VAP numerical majority if 35 Black individuals, but not any white individuals, become ineligible voters in that District due to their becoming "mentally incompetent or convicted felons who have not completed their sentence." *Id*. at 62.

82 BOC's Br., at 59 (citing *Bartlett*, 556 U.S. at 13, 129 S. Ct. at 1242).

83 *Id*., at 59-60.
The BOC's reliance on Negron *v. City of Miami Beach*, for example, is inapposite to this case on this point about an "effective majority." There this Court, in determining whether plaintiffs satisfied *Gingles* one in a Section 2 challenge to a jurisdiction's electoral scheme, was concerned with the citizenship VAP of the Hispanic community because of evidence that there was (1) a disparity in Black (minority) and white (majority) citizenship rates and, (2) a substantial number of immigrants in the challenged jurisdiction, unlike in Fayette. 113 F.3d. 1563, 1568 (11th Cir. 1997).

has the exact ideal population size, all considerations that the BOC concedes that *Gingles* one does not require.[84]

In underscoring the purpose of the bright-line rule, *Bartlett* expressly *rejected* a standard that would require courts to ask, "What are the historical turnout rates among white and minority voters and will they stay the same?"[85] The Supreme Court in *Bartlett* made clear that the 50 percent bright-line rule provides "straightforward guidance to courts" charged with complying with Section 2, explaining:

> Where an election district could be drawn in which minority voters form a majority but such a district is not drawn, or where a majority-minority district is cracked by assigning some voters elsewhere, then—assuming the other *Gingles* factors are also satisfied—denial of the opportunity to elect a

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[84] BOC's Br., at 61-63.

Notably, in opposing Plaintiffs' amended consent decree with the BOE, the BOC cautioned the District Court against doing exactly what it is asking this Court to do here: consider more than the VAP calculus in determining whether Plaintiffs established liability and, thus, a potential remedy in this action. *See* Doc. 67, at 25 (The BOC indicating to the District Court that "[t]he Supreme Court cautioned against courts analyzing turnout and political performance numbers as part of a liability determination under Section 2") (citing *Bartlett*, 556 U.S. at 17-18, 129 S. Ct. at 1244-45)); *id*. (The BOC further indicating to the District Court that "[t]he same cautions should govern this Court's analysis of potential remedies, especially in light of the Eleventh Circuit's requirements related to remedies in Section 2 cases.") (citing *Nipper*, 39 F.3d at 1530-31).

[85] *See Bartlett*, 556 U.S. at 17; *see also Solomon v. Liberty, Cnty., Fla.*, 865 F.2d 1566, 1574 (11th Cir. 1998) (Tjoflat, J.,), *vacated and reh'g en banc granted*, 873 F.2d 248 (11th Cir. 1989) ("Minority voter registration figures are inherently unreliable measures in vote dilution cases because the very lack of minority political power responsible for the bringing of the [S]ection 2 action also may act to depress voter registration."); Doc. 125, at 7 n. 2.

> candidate of choice is a present and discernible wrong…*The special significance, in the democratic process, of a majority means it is a special wrong when a minority group has 50 percent or more of the voting population and could constitute a compact voting majority but, despite racially polarized bloc voting, that group is not put into a district*.[86]

Thus, the Supreme Court has foreclosed the BOC's argument that Plaintiffs must prove that on Election Day Black voters will be a majority in District 5. The Supreme Court has made clear that Section 2 protects the *potential* to elect,[87] but it "does not guarantee minority voters an electoral advantage."[88] Black voters, like all others, are subject to the necessity to "pull, haul and trade" for votes.[89] Because both District 5 in Plaintiffs' Illustrative Plan (and the Court-Drawn Remedial district) are above 50 percent in Any-Part Black VAP, they clearly satisfy *Gingles* one.

Finally, the BOC relies on the pre-*Bartlett* decision, *Thompson v. Glades County Board of Commissioners*, in which the proposed Any-Part Black VAP district was 50.23 percent, to urge this Court to find, as the district court did in

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86 *Bartlett*, 556 U.S. at 18-19, 129 S. Ct. at 1245-46 (emphasis added).

87 *Gingles*, 478 U.S. at 50 n.17, 106 S. Ct. at 2766 n.17 (emphasis in original).

88 *Bartlett*, 556 U.S. at 20, 129 S. Ct. at 1246.

89 *De Grandy*, 512 U.S. at 1020, 114 S. Ct. at 2661.

Glades, that District 5 is an influence district.[90] This Court, however, should reject the BOC's misplaced reliance on this pre-*Bartlett* decision.

B. District 5 Contains A Geographically Compact Any-Part Black Community

The District Court also held that it contains a "reasonably compact" minority community.[91] Cooper developed the Illustrative Plan and District 5 within it having followed each of the traditional districting principles, including: (1) geographical compactness, (2) geographical shape, (3) maintaining a community of interest, (4) achieving a low population deviation, (5) minimizing split precincts, and (6) compliance with Section 2.[92]

Therefore, there is no genuine dispute of material fact that the remedial districts in Plaintiffs' Illustrative Plan (and the Court-Drawn Remedial Plan) are geographically compact. Against this reality, the BOC is left only to contest the degree of that compactness. But the undisputed evidence clearly demonstrates that both the Plaintiffs' Illustrative Plan (and the Court-Drawn Remedial Plan) compare favorably with plans that both the BOC and BOE drew for their respective at-large residency districts. The charts included *supra* illustrate these comparisons.

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90 No. 2:00-CV-212-FTM-29DNF, 2004 WL 5616892 (M.D. Fla. Aug. 27, 2004), *aff'd on reh'g en banc*, 532 F.3d 1179 (11th Cir. 2008) (equal division); BOC's Br., at 63-64.

91 Vol. III, 152, at 32.

92 *Id.*, at 32-42.

1. Geographical Compactness

First, Plaintiffs' expert, Cooper, measured District 5's compactness using the Reock test.[93] Using this test, Cooper compared District 5's compactness to the Commissioners' Plan, the February 2012 BOE Plan, and plans in other Georgia jurisdictions.[94]

Cooper determined that: (1) the mean score for the five districts in Plaintiffs' Illustrative Plan is .42, with District 5 having a score of .31; (2) the Reock scores compared favorably with those of the Commissioners' Plan;[95] (3) those Reock scores were within the norm for districts across many state and local redistricting plans in Georgia, and is as compact or more compact than 23 school board and county commission districting plans from a sample of 25 Georgia counties; and (4) District 5 is more compact than 25 percent of Georgia state legislative districts.[96]

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93 Doc. 110-1, at 9 n.8.

94 *Id.*, at 12-13 (Cooper and Morgan agreeing that there is no objective ideal for compactness, but rather that compactness can only be measured by comparing one district to another).

95 *See, e.g.*, Doc. 163-1, at 3 (Cooper declaring that rather than starting out with a majority Black area and then applying redistricting principles working backwards that instead "Plaintiffs' *Illustrative Plan* builds upon existing boundaries for Fayette County, and the redistricting principles that underscore them, including the [*Commissioners' Plan*]").

96 Vol. III, 152, at 32-33; Doc. 110-1, at 15-16.

Plaintiffs also showed that their Illustrative Plan's compactness scores compared favorably with the February 2012 BOE Plan's .49 Reock score.[97] Importantly, Morgan conceded that the February 2012 BOE Plan complies with traditional redistricting principles,[98] a significant admission given that Cooper based Plaintiffs' Illustrative Plan on the February 2012 BOE Plan and followed similar county, precinct, and municipal lines.[99] Moreover, two-thirds of the perimeter for District 5 in Plaintiffs' Illustrative Plan followed already existing political lines in Fayette County.[100]

The BOC, even as they concede that Plaintiffs are not required to "reach[] some particular number on the statistical compactness scores,"[101] argue that Plaintiffs' Illustrative Plan is not compact. In support of their contention, the BOC

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97 Doc. 110-1, at 8-9, & n.9.

98 *Id.* (Morgan explaining that "traditional redistricting principles were followed in drafting the [*BOE*] *Plan*, in that the district boundaries follow precinct and major road boundaries, the districts are compact and the population of the districts are close to ideal") (internal citation omitted).

99 *Id.* (Cooper explaining: "[I]t was easy for me to look at the district as drawn in the *Illustrative Plan* and say, yes, that can be a functional district. It follows county lines, precinct lines, municipal boundaries, you know, what I really thought was the school boundaries to a large extent) (internal citation omitted); *see also id.* (Cooper discussing, for example, how "the *Illustrative Plan* splits Sandy Creek precinct as the [*BOE Plan*] does") (internal citation omitted)).

100 Doc. 69-1, at 7, ¶¶ 18-19 ("two-thirds of the perimeter for District 5 follows already existing political lines")); Doc. 110-1, at 15-21.

101 BOC's Br., at 22.

explains that "they have been unable to locate another Section 2 case in which a district court declared a proposed district 'geographically compact' based on a *single* statistical compactness measurement."[102] (emphasis added in original).

But "[The BOC] cite[s] no authority that Plaintiffs bear the burden of designating a district that is compact under multiple tests or is more compact than a majority of other districts, i.e., that the district need be blue-ribbon worthy."[103] Plaintiffs were not required to present the most compact plan possible, only one that satisfies generally-accepted standards for compactness. The District Court accepted that Plaintiffs' expert, Cooper, has done exactly that.

Even though not required, Cooper also measured the Illustrative Plan's compactness under the Polsby-Popper test, determining that it fared well under that measure too.[104] And, the District Court explained that in the one case where a court used the Reock and Polsby-Popper together, as the BOC sought, the scores

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102 *Id.*, at 21-22.

103 Vol. III, 152, at 33-34. In their appeal, the BOC again fail to provide authority for using multiple tests. *See* BOC's Br., at 19-23.

104 The Polsby-Popper test computes the ratio of the district area to the area of a circle with the same perimeter. It is measured on a scale of 0 to 1, with 1 being the most compact. Doc. 110-1, at 11-12 & n.11.

for District 5 reflected *greater compactness* than the districts at issue in that case.[105]

2. Geographical Shape

The District Court also assessed the shape of District 5, recognizing that "the geographical shape of any proposed district necessarily directly relates to the *geographical compactness and population dispersal of the minority community in question*" and "is a significant factor that courts can and must consider in a *Gingles* compactness inquiry.[106]

Applying these considerations, the District Court determined that unlike the non-compact district in *Sensley v. Albritton*, which was the result of "two areas of highly-concentrated African-American population, which [were] roughly 15 miles apart from one another, [being] linked together by a narrow corridor of land," the Black population in Plaintiffs' District 5 under the Illustrative Plan in this case "is dispersed throughout the northern half of the county, the cities of Fayetteville and

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[105] Vol. III, 152, at 34 n.14 (citing *Committee for a Fair & Balanced Map v. Illinois State Board of Elections*, 835 F. Supp. 2d. 563, 570 (N.D. Ill. 2011)).

[106] *Id.*, at 34 (citing *Sensley v. Albritton*, 385 F.3d 591, 596 (5th Cir. 2004) (emphasis added)).

Tyrone are separated only by 3.5 miles . . . and are linked together by much more than a . . . corridor of land."[107]

Moreover, the District Court explained that the Black populations in Tyrone and Fayetteville are geographically close to the area in which the Black population is generally concentrated.[108]

3. Maintaining A Community of Interest

The District Court also determined that, "importantly, Plaintiffs' evidence demonstrates that District 5 includes a community of interest," another traditional redistricting principle.[109] The BOC offered "no evidence" that Black voters in District 5 do not comprise a community of interest.[110]

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[107] *Id.*, at 35 (citing *Sensley*, 385 F.3d at 596); *see also id.* at 10-11 (recognizing that "the [Black] population is largely concentrated in the northern half of the county," "[t]he city of Fayetteville, which is in the northeast portion of the country, is one-fourth [Black]," and "Tyrone, located on the northwest border of the county, is one-third [Black]").

[108] *Id.*, at 35-36 (referencing *Benavidez v. City of Irving*, 638 F. Supp. 2d 709, 722 (N.D. Tex. 2009), in which even though the illustrative district "'reach[ed] out to grab' pockets of Hispanic population" it was compact because "the heavily Hispanic Census blocks [were], in fact, geographically very close [to] the nucleus of Hispanic concentration in south Irving")).

[109] Vol. III, 152, at 36.

[110] *Id.*, at 40 ("In essence, none of the [BOC's] arguments show[] that the residents of District 5 have 'disparate needs and interests,' *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 435, 126 S. Ct. 2594, 2619 (2006), or that the plan 'includes in one district individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin,' *Shaw[v. Reno*, 509 U.S. 630, 647. 113 S. Ct. 2816, 2827 (1993)]")

As the District Court recognized, "manifestations of [a] community of interest" include: "shared broadcast and print media, public transport infrastructure, and institutions such as schools and churches,"[111] as well as common socioeconomic and political concerns.[112]

The District Court noted that Cooper accounted for the "perceived unity of the African-American community in the cities of Fayetteville and Tyrone and the Kenwood, Europe areas," in District 5.[113] As part of that "unity," various Plaintiffs testified that residents in District 5 share schools, places of worship and recreation, as well as membership in a community association and civil rights organizations like the NAACP, and fraternities and sororities.[114] Moreover, the District Court

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111 Vol. III, 152, at 36 (citing *Bush v. Vera*, 517 U.S. 952, 964, 116 S. Ct. 1941, 1954 (1996)).

112 *Id*., at 36-37 (citing *Cane v. Worcester Cnty*., Md. 35, F.3d 921, 927 n.6 (4th Cir. 1994) (compact district that included citizens who shared common socioeconomic and political concerns followed traditional redistricting principle of drawing districts consistent with common interests).

113 Vol. III, 152, at 36; *see also id*. at 38-39 (accepting Cooper's testimony that he was aware of common interests between Black residents of Tyrone and Fayetteville in northern Fayette when developing Plaintiffs' Illustrative Plan); *see also* Doc. 110-1, at 21.

114 *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 899 (D. Md. 2011) (plaintiffs must offer more than bare assertions that the minority community in the contested district share the same characteristics, needs, and interests)*; see also* Vol. III, 152, at 36, n.16 (crediting Plaintiff Lowry's deposition testimony that Fayetteville and Tyrone have shared schools, Tyrone residents go to churches in North Fayette, and people from Tyrone are members of the NAACP and North Fayette Community Association); *id*. (crediting Plaintiff Alice Jones' deposition testimony that residents in North Fayette share schools and attend NAACP meetings); *id*. (crediting Plaintiffs Ali and Aisha Abdur-Rahman's deposition testimony that citizens of Tyrone and Fayetteville attend a mosque in Fayetteville); Doc. 110-1, at 27-28.

accepted evidence that the Black community in District 5 of Plaintiffs' Illustrative Plan has (1) shared socioeconomic status,[115] which the BOC has recognized,[116] (2) a desire for district voting,[117] (3) are politically cohesive (*Gingles* two),[118] which the BOC also does not dispute, and (5) share a common ethnicity.[119]

Finally, the District Court determined that Black residents in Fayetteville and Tyrone, where the highest percentages of Black people in northern Fayette live in "close geographical proximity to each other," as evidence that they are a community of interest, in contrast to the two Hispanic communities in *LULAC* that were separated by an "enormous geographical distance" of 300 miles."[120]

The District Court explained that the BOC "misconstrue[d]" Plaintiffs' expert's testimony, which it continues to do on appeal, by asserting that (1) by

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115 Vol. III, 152, at 36-37 (citing Cane, 35, F.3d at 927, n.6).

116 BOC's Br., at 13 (The BOC conceding that Fayette "is a place . . . where African-Americans and whites enjoy relatively similar socio-economic and education status"); *id*. at 67.

117 Doc. 110-1, at 29.

118 As the District Court recognized, unlike in *League of United Latin American Citizens v. Perry* (*LULAC*), 548 U.S. 399, 433, 126 S. Ct. 2594, 2618 (2006), here the undisputed evidence of RPV in Fayette conclusively proves that Black voters in the County are politically cohesive. Vol. III, 152, at 38 & n.18; *see also* Doc. 14,1 at 19 n.9 (The record reflects that Cooper was aware of Dr. Engstrom's RPV analysis while working on this case) (internal citation omitted).

119 Vol. III, 152, at 38 & n.19 (the District Court recognizing as a common interest Black people's shared ethnicity) (referencing Justice Ginsburg's dissenting opinion in *Miller v. Johnson*, 515 U.S. 900, 919-20, 944, 115 S. Ct. 2475, 2489-90 (1995)).

120 Vol. III, 152, at 37-38 & n.19; Doc. 110-1, at 29.

splitting the two municipalities of Fayetteville and Tyrone, District 5 includes diverse interests that "are so significant that plaintiffs' proposed district could not be effectively represented,"[121] even though the Commissioners' own Plan *also split those municipalities*, (2) excluding school attendance zones in north Fayette from District 5, because they often change, rendered District 5 non-compact, despite the fact that school attendance zones were considered and the Commissioners' Plan *also failed to follow them*,[122] and (3) arguing that Black residents in Tyrone and Fayetteville are two separate concentrations of the Black population.[123]

As the District Court noted, the BOC failed to show that residents of District 5 have "disparate needs and interests," or that Plaintiffs' Illustrative Plan "includes in one district individuals who belong to the same race, but who are otherwise

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[121] Vol. III, 152, at 38-39 (referencing *Clark v. Calhoun Cnty., Miss.*, 21 F.3d 92, 96 (5th Cir. 1994); *id.* (also citing *Cane*, 35 F.3d at 927 n.6, for proposition that "simply because district lines may be drawn to maintain the integrity of political subdivisions does not mean that a proposed majority-minority district that would divide *municipalities fails to comply with* traditional redistricting principles").

[122] Vol. III, 152, at 39 & n.20.

[123] The District Court rejected Morgan's unsubstantiated opinion based on the record. Vol. III, 152, at 40; *see also* Doc. 110-1, at 24 n.19 (explaining that the BOC's expert's, Morgan's, who does not reside in the County, opinion about the separateness of these three communities is based on two experiences: one occasion in which he traveled through Fayette in route to another location; and, another occasion, in which he drove "around some of the neighborhoods in Fayette County," but did not talk to any people in the "neighborhoods … [and] houses" that he saw); *id.* (Morgan conceding that he did not "have enough information" to determine whether Kenwood, Blackrock, Fayetteville, and Tyrone were a single community).

widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin."[124]

4. Population Deviation

The District Court next determined that "in drawing the Illustrative Plan [with a total population deviation at 5.69 percent,] [Cooper,] ensured that the population deviation was within the 10% norm for redistricting."[125] Although the population deviation in Plaintiffs' Illustrative Plan is higher than the Commissioners' Plan, which is 4.03 percent, the District Court determined that it is "still comfortably with[in] the accepted 10% for state or local redistricting

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[124] Vol. III, 152, at 40 (internal citation omitted).

[125] *Id*., at 40-41 (citing *Brown v. Thomson*, 462 U.S. 835, 842-43, 103 S. Ct. 2690, 2695-96 (1983) (in statewide redistricting action, recognizing that a maximum population deviation under 10 percent is insufficient to make out a prima facie case of a constitutional deviation); *White v. Regester*, 412 U.S. 755, 764, 93 S. Ct. 2332, 2338 (1973) (in statewide and local redistricting action, recognizing that the combined deviation of the most populous district and least populous district from the ideal district population could not exceed 10 percent, and all other district populations are required to fall within that range); *see also id*. at 41 (citing *U.S. v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 421 (S.D.N.Y. 2010), a Section 2 case, court accepted plan with 5.71 percent population deviation, and *Reed v. Town of Babylon*, 914 F. Supp. 843, 869 (E.D.N.Y. 1996) a Section 2 case in which court held that plaintiffs must only establish a population deviation within 10 percent); *cf. Abate v. Mundt*, 403 U.S. 182, 185, 90 S. Ct. 1904, 1907 (1971) (affirming remedial plan for county legislature with 11.9 percent deviation because "the particular circumstances and needs of a local community as a whole may sometimes justify departures from strict equality").

purposes."[126] Notably, Plaintiffs' Illustrative Plan's overall deviation at 5.69 percent is less than the February 2012 BOE Plan, which was 5.91 percent.[127]

The BOC concedes that Plaintiffs need only show a deviation of less than 10 percent, but nevertheless argue that Plaintiffs should have identified redistricting principles that "drove the deviation from the ideal size in District 5."[128] In reality, Plaintiffs are not required to "bear a greater burden than simply presenting a plan with a population deviation under 10%."[129] Plaintiffs have clearly done that here.

While it is true that "court-drawn plans are held to tighter standards of population deviation than plans created by legislatures,"[130] this "general adhere[nce] is irrelevant when assessing population deviation for the purpose of establishing *liability*.[131] For liability, Plaintiffs generally need only present a plan with a population deviation under 10 percent, which they have done here.

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126 Vol. III, 152, at 40.

127 Doc. 110-1, at 15.

128 BOC's Br., at 30.

129 Vol. III, 152, at 41.

130 BOC's Br., at 30-31 (citing to *Connor v. Finch*, 431 U.S. 407, 414, 97 S. Ct. 1828, 1833 (1977) for the proposition that "courts are held to little more than a de minimis variation")).

131 *Reed*, 914 F. Supp. at 870 (reasoning that "[p]laintiffs should not, however, be required to present to the Court a plan that contemplates [a court-ordered plan] to satisfy the first *Gingles* precondition").

Not only does the Court-Drawn Remedial Plan respect the standard set forth by the Supreme Court for such plans,[132] the population deviation of the Court-Drawn Remedial Plan (at 4.80 percent) also falls comfortably within the norm established by other court-drawn remedial plans. Indeed, in *Rogers v. Lodge*, which followed *Connors v. Finch*, the Supreme Court affirmed a district court's remedial order that selected a single-member districting plan for county commissioners with a 4 percent deviation.[133] Given that the District Court possesses the expertise to fashion appropriate remedies for Section 2 violations, its court-drawn plan, with just an 0.8 percent difference from *Rogers*, achieves the goal of remedying the Section 2 violation at issue here with "little more than *de minimis*" population deviation.[134]

5. Minimizing Split Precincts

The BOC concedes that Plaintiffs are not required to present a plan that splits zero precincts, but then criticizes Cooper for not providing a variety of reasons for the precinct splits in District 5.[135] As the District Court recognized,

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[132] Vol. III, 179, at 25 n.13 (citing *Connor*, 431 U.S. at 414 and *Chapman v. Meier*, 420 U.S. 1, 27, 95 S. Ct. 751, 766 (1975).

[133] Vol. III, 179, at 23; *Lodge v. Buxton*, 639 F.2d 1358, 1362, 1381 (5th Cir. Unit B 1981), *aff'd sub. Nom. Rogers v. Lodge*, 458 U.S. 613, 627-28, 102 S. Ct. 3272, 3280-81 (1982).

[134] *Chapman*, 420 U.S. at 26–27, 95 S. Ct. at 765-66.

[135] BOC's Br., at 32, 34.

split precincts in District 5 are appropriate for several reasons. *First*, Cooper split precincts to protect incumbents, which is a redistricting principle.[136] *Second*, Cooper, balanced the splitting of precincts with achieving low population deviation.[137]

Moreover, Plaintiffs' Illustrative Plan splits only four more precincts than the Commissioners' Plan.[138] And importantly, "election precincts are not such important political boundaries that they should negate a districting proposal, particularly where, as here, other key districting principles were obeyed."[139] In sum, as the District Court recognized, each of Cooper's precinct splits adhered to traditional redistricting principles.[140]

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136 Vol. III, 152, at 41; Doc. 110-1, at 22-24 (Cooper, explaining that he split at least two precincts to protect incumbents, including Hopeful and Dogwood) (internal citation omitted); *id.* (Cooper explaining that "[a] lot of the precinct splits really are because [Plaintiffs are] trying to protect incumbents") (internal citation omitted); Doc. 141, at 15 n.7.

137 Vol. III, 152, at 41; Doc. 110-1, at 22-24 (Cooper explaining that he split Tyrone and Fayetteville to comply with the one-person, one-vote principle and to create a majority-minority district) (internal citation omitted); *id.* (Cooper explaining that he split Sandy Creek precinct to avoid overpopulation in District 5) (internal citation omitted).

138 Vol. III, 152, at 41-42.

139 *Id.* (citing *Vill. of Port Chester*, 704 F. Supp. 2d at 439).

140 *Id.*, at 41.

6. Compliance with Section 2 of the VRA

Cooper also considered compliance with the VRA, another traditional redistricting principle, in developing Plaintiffs' Illustrative Plan.[141] Plaintiffs' Illustrative Plan thus appropriately and necessarily reflects racial as well as many other non-racial demographic factors, to comply with *Gingles* one.[142]

In stark contrast, Morgan did not include compliance with the VRA in his purportedly "exhaustive list of traditional redistricting criteria."[143]

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In sum, as the District Court recognized, Plaintiffs demonstrated that although Cooper took race into consideration when developing Plaintiffs' Illustrative Plan to comply with Section 2, he did not do so at the expense of any other redistricting principles.[144] Cooper testified that had he relied predominantly

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141 *See Larios v. Cox*, 314 F. Supp. 2d 1357, 1359-60 (N.D. Ga. 2004) (noting guidelines in redistricting include "reconciling the demands of the Constitution, the Voting Rights Act, and the redistricting principles traditional recognized by [Georgia]," and the former two take precedence over the latter).

142 Doc. 110-1, at 26-27 (Plaintiffs' expert, Cooper, recognizing "all of these [traditional redistricting, including compliance with the VRA] factors have to be balanced") (internal citations omitted).

143 Doc. 110-1, at 26 (Morgan admitting that he failed to include compliance with Section 2 in his purportedly "exhaustive list of traditional redistricting criteria") (internal citations omitted).

144 Vol. III, 152, at 42.

on race, he could have drawn a district with a 53.58 percent Black VAP.[145] "However, taking other redistricting principles into account, including achieving a low population deviation, joining a community of interest, geographical compactness, and protecting incumbents, he was able to achieve a district that has a voting-age African-American population of 50.22%,"[146] in northern Fayette County.

The BOC seeks to have this Court severely limit Section 2's reach to "the creation of only naturally-occurring majority-minority districts,"[147] in short, where such a district will result even if drawn without race data. The BOC's approach, however, would mean that majority-minority districts are only acceptable in the most segregated areas of a challenged jurisdiction; a result antithetical to Section 2's broad remedial purpose of combating racial discrimination.[148]

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145 *Id.*

146 *Id.*

147 BOC's Br., at 9, 49.

148 Congress enacted the VRA for the broad remedial purpose of "rid[ding] the country of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 315, 86 S. Ct. 803, 812 (1966). Thus, the VRA should be interpreted in a manner that provides "the broadest possible scope" in combating racial discrimination. *Allen v. State Bd. of Elections*, 393 U.S. 544, 567, 89 S. Ct. 817, 832 (1969).

III. The BOC Incorrectly Attempts to Import the Equal Protection Clause's Compactness Analysis into this Section 2 Context.

Notwithstanding the District Court's straightforward determination that Plaintiffs have demonstrated that the Black community in District 5 of their Illustrative Plan is geographically compact under Section 2, the BOC nevertheless attempts to import the standard for compactness from the Equal Protection context, an entirely distinct inquiry, into this Section 2 case.[149] In particular, and though they cite no Section 2 case in support of this interpretation, the BOC views compactness under *Gingles* one through an Equal Protection Clause lens, seeking to have the District Court look at whether, for instance, the *boundaries of a plan/district* (as opposed to concentration of a community of color in a district) was *explained predominantly by race* or adherence to traditional redistricting principles.[150]

As the District Court correctly recognized, compactness under Section 2 '"refers to the compactness of the minority population [in Fayette], not to the compactness of the contested district' [District 5 as under Equal Protection

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149 Vol. III, 152, at 30; Vol. III, 179, at 10 n.10.

150 *See, e.g.*, BOC's Br., at 16-17 (citing language only from equal protection cases like *Shaw*, 509 U.S. at 643, 113 S. Ct. at 2825, *Miller*, 515 U.S. at 917, 115 S. Ct. at 2488, *Vera*, 517 U.S. at 952, 116 S. Ct. at 1941, *Abrams*, 521 U.S. at 91, 117 S. Ct. at 1936, and *Hunt v. Cromartie*, 526 U.S. 541, 548, 119 S. Ct. 1545, 1549 (1999)).

jurisprudence]."[151] In the Equal Protection context, "compactness focuses on the contours of district lines to determine whether race was the predominant factor in drawing those lines."[152] In other words, as the District Court recognized, "the inquiries into compactness for Section 2 and equal-protection purposes are distinct."[153]

The BOC, rather than citing Section 2 cases, relies on several Equal Protection cases, including *Miller*, *Shaw*, *Larios v. Cox*, and *Clark v. Putnam County*.[154] Reliance on these cases, however, is misplaced, as "[t]he deficiencies in the [the BOC's] arguments are highlighted by the fact that they fail to point to a single [Section] 2 case applying the framework that they proffer" or "point to any precedent showing[] why this Court's application of *LULAC* is erroneous."[155] As

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[151] Vol. III, 152, at 30 (citing *LULAC*, 548 U.S. at 435, 126 S. Ct. at 2619 (quoting *Vera*, 517 U.S. at 997, 116 S. Ct. at 1971 (Kennedy, J., concurring)).

[152] *Id.* (citing *LULAC*, 548 U.S. at 433, 126 S. Ct. at 2618, and *Miller*, 515 U.S. at 916-17, 115 S. Ct. 2488-89)).

[153] Vol. III, 152, at 30-31; Vol. III, 161, at 5-7.

Even BOE appellants recognize that "[t]he lack of sufficient compactness for purposes of [*Gingles* one] is not the same as the more restrictive inquiry under the constitutional gerrymander cases." BOE Br., at 25-26 in the companion appeal No. 14-11204-FF.

[154] *See, e.g.*, BOC Br., at 17-18 (citing *Larios v. Cox*, 400 F. Supp. 2d 1320) (N.D. Ga. 2004) (three-judge court), and acknowledging that that case was an Equal Protection challenge to Georgia's legislative and Congressional districts), *aff'd*, 542 U.S. 947, 124 S. Ct. 2806 (2004)); *id.* (citing *Clark v. Putnam*, 293 F.3d 1261, 1269-70 (11th Cir. 2002), and acknowledging that that case was an Equal Protection challenge to a county commission district in Georgia)).

[155] Vol. III, 161, at 9.

the District Court recognized, the problem with the BOC's argument is "their continued failure to acknowledge that this is a [Section] 2 case–not an action brought under the Equal Protection Clause."[156]

As the District Court properly recognized, the Supreme Court demands a different Section 2 analysis from an Equal Protection analysis.[157] And "'"while no precise rule has emerged governing [Section] 2 compactness, the 'inquiry should *take into account* 'traditional districting principles such as maintaining community of interest and traditional boundaries."'"'"[158] Following *LULAC*, this Circuit has required that a Section 2 compactness inquiry look to whether a plan has been designed "*consistent with* traditional districting principles."[159] Other courts, as the District Court recognized, also require that in a Section 2 compactness inquiry, that the focus be on whether the mapdrawer *followed* traditional districting principles.[160]

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156 *Id.*, at 5-6.

157 Vol. III, 152, at 28-29.

158 Vol. III, 152, at 31 (citing *LULAC*, 548 U.S. at 433, 126 S. Ct. at 2618) (emphasis added); *see also* Vol. III, 161, at 7 (same).

159 Vol. III, 152, at 31 (citing *Davis*, 139 F.3d at 1425 (a Section 2 case in which this Circuit held that a plan is compact where it is designed "consistent with traditional districting principles) (emphasis added); Vol. III, 161, at 7 (same).

160 Vol. III, 152, at 31-32 (citing *Vill. of Port Chester*, 704 F. Supp. at 420 (a Section 2 case in which the district court held that for plaintiffs to satisfy *Gingles* one, they are required to

Thus, applying the appropriate Section 2 framework for determining whether Plaintiffs' Illustrative Plan and District 5 within it adhered to traditional districting principles or subordinated them to race, the District Court properly held that Cooper developed the Illustrative Plan consistent with and having followed traditional districting principles.[161]

IV. Plaintiffs Met the Legal Standards for a Section 2 Case by Demonstrating at the Liability Stage that their Illustrative District is a Permissible Remedy to Fayette's Discriminatory At-Large Electoral Method.

The BOC urges this Court to look past the demonstrated Section 2 violation in this case, and find that Plaintiffs' Illustrative Plan, which established Section 2 *liability and* created a *remedy* for the existing racial discrimination, is *itself unconstitutional racial discrimination.* Relying on this Court's precedent, the District Court rejected the BOC's argument that Plaintiffs' Illustrative Plan is a racial gerrymander.[162] Practically, the BOC's argument would make it impossible for plaintiffs to prove a Section 2 violation, *i.e.*, draw a majority-Black district. Of

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"draw [an] illustrative single-member districts following traditional districting principles to show that the [minority] population is sufficiently large and compact . . . .")).

[161] Vol. III, 152, at 42; *id*. at 32-42; Vol. III, 161, at 7.

[162] Vol. III, 152, at 28; Vol. III, 161, at 10.

necessity, as the District Court recognized, Plaintiffs must use racial data to do so.[163]

Although it held that "race was not Cooper's predominant consideration in designing the plan,"[164] the District Court noted that *even if Plaintiffs relied predominantly on race*, "it is possible that a district created to comply with [Section] 2 that uses race as the predominant factor in drawing district lines may survive strict scrutiny."[165] As the District Court noted, "at least one court has found a district drawn predominantly on racial lines was nevertheless constitutional" where it remedied an anticipated Section 2 violation by preserving the Latino community's voting strength through vote consolidation.[166]

The BOC would have this Court create new law and require district courts, if they found that race predominated, to determine whether a compelling interest

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163 *See, e.g.*, Vol. III, 152, at 27-28; *Davis v. Chiles*, 139 F.3d 1414, 1423, n.19 (11th Cir. 1998) (explaining "[a]ny remedy designed to alleviate [RPV] is by definition intended to help minority voters elect their candidates of choice.")

164 Vol. III, 161, at 8; Vol. III, 152, at 42 n.21.

165 Vol. III, 152, at 24 (citing *Reed*, 914 F. Supp. at 871); *id*. at 42 n.21.

166 *Id*. at 25 (citing *King v. State Bd. of Elections*, 979 F. Supp. 619, 626 (N.D., Ill. 1997, *summarily aff'd*, 522 U.S. 1087, 118 S. Ct. 877 (1998) (in an equal protection case, on remand, following a determination that plaintiffs established a racial gerrymander claim, the district at issue survived strict scrutiny because it "remedied the anticipated [Section] 2 violation by preserving the Latino community's voting strength through vote consolidation")).

exists "*before* it finds a Section 2 violation."[167] The BOC also contends that remedying a Section 2 violation does not constitute a compelling interest.[168] Neither of these propositions are supported by case law.

Indeed, the District Court recognized that the BOC's proffered framework here would penalize "[Plaintiffs] . . . for attempting to make the very showing that *Gingles*, *Nipper*, and *SCLC* demand [and] would make it impossible, as a matter of law, for any plaintiff to bring a successful Section Two action.'"[169] Instead, the appropriate strict scrutiny framework, as the District Court described, is as follows: upon a finding that a plan "subordinate[s] traditional race-neutral redistricting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations . . . the district is not simply rejected as a racial gerrymander."[170]

The court, instead, applies strict scrutiny to determine if the plan pursues a compelling state interest and is narrowly tailored to achieve that interest. The District Court noted that the Supreme Court in *Shaw* and *Vera* "assumed that compliance with [Section] 2 can constitute a compelling state interest," though a

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167 BOC's Br., at 52, 54.

168 BOC's Br., at 55-56.

169 Vol. III, 152, at 27-28.

170 *Id.*, at 23 (citing *Miller*, 515 U.S. at 916, 115 S. Ct. at 2488).

district drawn to satisfy Section 2 must not "subordinate traditional redistricting principles to race substantially more than is 'reasonably necessary' to avoid Section 2 liability."[171] Thus, a determination of whether race was the predominant factor in designing the proposed districts is "only the beginning, not the totality, and an equal-protection inquiry."[172]

Thus, the District Court determined that *even if* Plaintiffs' Illustrative Plan *was* drawn predominantly on race, to determine whether it passes strict scrutiny, the District Court must know whether the district is necessary to avoid Section 2 liability or remedy a Section 2 violation.[173] The District Court "assumed without deciding that the need to [establish or] remedy a [Section] 2 violation is a compelling state interest," an approach consistent with the Supreme Court and this Circuit's command to decide statutory issues first and avoid constitutional issues

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171 *Id.*, at 24 (citing plurality opinion in *Vera*, 517 U.S. at 958, 116 S. Ct. at 1951); *see also id.*, at 23 n.10 (citing *DeWitt v. Wilson*, 856 F. Supp. 1409, 1415 (E.D. Cal. 1994), *summarily aff'd*, 515 U.S. 1170, 115 S. Ct. 2637 (1995) (state redistricting plan, developed by court-appointed special masters, was not a racial gerrymander, "but rather a thoughtful and fair example of applying traditional redistricting principles while being conscious of race"; thus strict scrutiny did not apply); *id.* (citing *Robertson v. Bartels*, 148 F. Supp. 2d 443, 455-58 (D.N.J. 2001) (record demonstrated that "redistricting plan carefully was drawn [by redistricting commission] utilizing traditional redistricting principles while seeking to comply with the [VRA] by giving minority candidates the opportunity to be elected to political office," and "[w]hile the Commission certainly considered race . . its use . . .was not the predominant factor").

172 Vol. III, 152, at 25-26.

173 *Id.*, at 25 (citing *King*, 979 F. Supp. at 626).

where possible.[174] The BOC's challenge to Plaintiffs' Illustrative Plan as a racial gerrymander must therefore fail.

V. The District Court Properly Held that, under the Totality of the Circumstances and Based on a Preponderance of the Evidence, Plaintiffs Demonstrated Vote Dilution in Fayette in Violation of Section 2.

Having determined that the Plaintiffs satisfied *Gingles*, the District Court next held that Plaintiffs' evidence demonstrates, under the "totality of the circumstances" and based on a preponderance of evidence, vote dilution in Fayette in violation of Section 2. The District Court recognized that "it will be only the very unusual case in which the plaintiffs can establish the existence of the three *Gingles* factors but still have failed to establish a violation of Section 2 under the

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[174] Vol. III, 152, at 24, 42, n.21; Vol. III, 179, at 20-21 (referencing *Shaw*, 517 U.S. at 915, 116 S. Ct. at 1905 ("We assume, *arguendo*, for purpose of resolving this suit, that compliance with [Section] 2 could be a compelling interest . . . ."); *Vera*, 517 U.S. at 977, 116 S. Ct. at 1960 (assuming without deciding that "compliance with the results test [of Section 2], as interpreted by our precedents, . . . can be a compelling state interest") (internal citation omitted); *Clark*, 293 F.3d at 1273 (recognizing that "there is a 'significant state interest in eradicating the effects of past discrimination'") (internal citation omitted); *Davis*, 139 F.3d at 1425 n.23 ("[A] majority of the Supreme Court has assumed that the need to remedy a Section [2] violation itself constitutes a compelling interest.").

In fact, the Court in *Vera* avoided the constitutional issue which the BOC seeks to reach in this case because the issues in *Vera* could be decided without reaching the constitutional decision. *See also Ashwander v. Tennessee Valley Authority*, 297 U.S. 288, 347, 56 S. Ct. 466, 483 (1936).

totality of the circumstances."[175] This, as the District Court held, is not that rare case.

The totality of the circumstances analysis is a consideration of whether "minorities have been denied an 'equal opportunity' to 'participate' in the political process and to elect representatives of their choice.'"[176] The totality of the circumstances analysis involves a "searching practical evaluation of the 'past and present reality,'"[177] based on an examination of the Senate Factors.[178] The Senate Factors, which are not exhaustive, do not require Plaintiffs to prove a majority of those factors or even any particular number of them.[179] As the District Court recognized, however, "the most important" Senate Factors at issue here "are 'the extent to which minority group members have been elected to public office in the jurisdiction' and 'the extent to which voting in the elections of the state or political subdivision is racially polarized."[180]

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175 Vol. III, 152, at 44-45 (internal citation omitted); *see De Grandy*, 512 U.S. at 1009-12, 114 S. Ct. at 2656-58; *Nipper*, 39 F.3d at 1513-1514.

176 *Abrams*, 521 U.S. at 91, 117 S. Ct. at 1936 (quoting 42 U.S.C. § 1973(b)).

177 *Gingles*, 478 U.S. at 45, 106 S. Ct. at 2764 (internal citation omitted).

178 *Id*. at 44-45, 106 S. Ct. at 2763-64.

179 Vol. III., 152, at 6-7 (citing *Gingles*, 478 U.S. at 44-45, 106 S. Ct. at 2763-64.).

180 *Gingles*, 478 at 51 n.15, 106 S. Ct. at 2767 n.15 (internal citation omitted); Vol. III, 152, at 78-79.

It is undisputed that no Black person has ever been elected to the BOC or BOE, and that voting in Fayette for both of these bodies is racially polarized. Based on the "heavy weight of those two factors," along with the other factors that weigh in Plaintiffs' favor discussed in turn below, "and having conducted a 'searching practical evaluation of the past and present reality'" of Fayette's challenged at-large electoral method, the District Court determined that Black voters "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[181] Thus, the District Court was "satisfied that 'under the totality of the circumstances, [African-Americans in Fayette are] denied meaningful access to the political process on account of race or color."[182]

A. The District Court Determined that Five Senate Factors (1, 2, 3, 7, and an Additional Factor) Weighed in Plaintiffs' Favor, Including Two Key Senate Factors (2 and 7).

1. RPV (Senate Factor 2) and Election of African-Americans (Senate Factor 7)

As discussed above, the BOC *concedes* that the two most critical Senate Factors, 2 and 7, weigh in Plaintiffs' favor, as "no African-American has ever been

181 Vol. III, 152, at 79.

182 *Id.*, at 80.

elected to the BOC or BOE and that voting in Fayette County is racially polarized in BOC and BOE elections."[183]

The BOC's concession is fatal to its defense of Fayette's at-large electoral method. As the District Court held, it is precisely because the BOC's at-large electoral method interacts with RPV that Plaintiffs have *never* been able to elect a candidate of their choice to the BOC or BOE.[184]

The District Court also recognized that it was obliged to consider how, if at all, partisanship may explain RPV in Fayette if such evidence is exists.[185] However, because the BOC failed to proffer *any* evidence that partisanship explained the uncontested RPV results, the District Court properly determined that existence of that factor weighed in Plaintiffs' favor.[186]

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[183] Vol. III, 152, at 79; *see id*., at 69 (nonexistence of election of African Americans "weighs strongly in favor of vote dilution"); *id.* at 53-54 (existence of RPV "weighs in favor of Plaintiffs"); *see also* Vol. III, 161, at 16-17; *Gingles*, 478 U.S. at 51 n.15, 106 S. Ct. at 2767 ("[t]he extent to which minority group members have been elected to public office in the jurisdiction" is one of the most important Senate factors); *Nipper*, 39 F.3d at 1533 (RPV is the essence of a vote dilution claim).

[184] Vol. III, 152, at 79-80.

[185] Vol. III, 161, at 16 ("a vote dilution claim must fail '[w]hen the record indisputably proves that partisan affiliation, not race, best explains the divergent voting patterns among minority and white citizens'") (citing *League of United Latin American Citizens v. Clements*, 999 F.2d 831, 850 (5th Cir. 1993)).

[186] Vol. III, 161, at 16-17 ("because [the BOC did] not offer any evidence, or even analysis, in support of their contention that racial bloc voting could potentially be related to politics rather than race, the Court finds that this factor weighs in favor of Plaintiffs"); *id.* at Vol. III, 152, at 53-54, 66-67.

Based on Plaintiffs' demonstration of these two factors alone,[187] the District Court appropriately could have held that "under the totality of the circumstances, [African-Americans in Fayette] are denied meaningful access to the political process on account of race or color."[188]

The District Court, however, evaluated eight other Senate Factors over more than 30 pages in its summary judgment order, and expressly held that three additional Senate Factors, which are discussed below in turn, weighed in Plaintiffs' favor.[189]

2. Past Discrimination and Its Lingering Effects (Senate Factor 1)

In addition to Senate Factors 2 and 7, the District Court also held that Senate factor 1 weighs in Plaintiffs' favor based on Georgia's undisputable history of *de jure* racial discrimination, including its use of at-large methods of election in hundreds of jurisdictions, to minimize the voting strength of voters of color, and ensure that voters of color could not elect their preferred candidates of choice.[190]

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187 Vol. III, 152, at 64, 78-79.

188 Vol. III, 152, at 79-80 (internal citation omitted). In fact, the District Court properly acknowledged that in the Eleventh Circuit, the "most important Senate Factor is the extent to which blacks have been elected to public office." *Id*. at 79 (citing *S. Christian Leadership Conference*, 56 F.3d 1281, 1315 n.4 (11th Cir. 1995)).

189 Vol. II, 161, at 16-17; Vol. III., 152, at 44-80.

190 Vol. III, 152, at 52.

The BOC argues that for this factor to weigh in their favor, Plaintiffs were required to show discrimination *specific to Fayette County*.[191] In rejecting this argument, the District Court recognized that Plaintiffs were not required to proffer such evidence,[192] and ultimately concluded that this factor, though "not heavily[,] supports" a Section 2 finding.[193]

3. Election Practices that Enhance Discrimination (Senate Factor 3)

In addition to Senate Factors 1, 2, and 7, the District Court also determined that Senate Factor 3, involving the extent to which Fayette uses multiple election practices—(1) numbered posts, (2) residency requirements, (3) staggered terms, *and* (4) a majority-vote requirement—that enhance the discriminatory nature of Fayette's at-large voting scheme, *weigh heavily* for Plaintiffs.[194]

In particular, the District Court determined that the BOC used staggered terms, numbered posts, residency requirements, and a majority-vote requirement in

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191 BOC's Br., at 66.

192 Vol. III, 152, at 50 (citing *Dillard v. Crenshaw Cnty*., 649 F. Supp. 289, 294 (M.D. Ala. 1986); *Sierra v. El Paso Indep. Sch. Dist*., 591 F. Supp. 802, 807 (W.D. Tex. 1984); *see also Davis*, 139 F.3d at 1419 n.10 (in a Section 2 challenge to electoral systems for a circuit and county courts, district court finding *Florida's* history of racially discriminatory factors continue to hinder Black voters).

193 Vol. III, 152, at 52.

194 *Id*., at 54, 59; Vol. II, 161, at 17.

its elections.[195] The District Court recognized that "[b]y virtue of dividing the election of commissioners into individual elections, these devices increase vote dilution."[196]

4. Board Appointments (Additional Factor)

Finally, in addition to Senate Factors 1, 2, 3, and 7, the District Court also held that an additional factor favored Plaintiffs: "the BOC's method of appointing board and commission positions has the potential to affect African-Americans' participation in the political process . . . ."[197] In particular, the record before the District Court demonstrated that the Board's informal process and nepotism "discourages Black individuals from applying for appointments," despite their interest in such appointments.[198]

* * *

In sum, the District Court held that five factors, including the two most critical factors in a vote dilution case, weighed in Plaintiffs' favor *after* having

195 Vol. III, 152, at 57.

196 *Id.*

197 Vol. III, 152, at 78; Vol. II, 161, at 17.

198 Doc., 110-1 at 41.

conducted its thorough review of totality of the circumstances.[199] That analysis pointed the District Court to find that Black voters are denied an opportunity to equally participate in the electoral process because of Fayette's at-large method of election, in combination with the undisputed existence of RPV, in violation of Section 2.[200]

CONCLUSION

For the foregoing reasons, Plaintiffs–Appellees respectfully request that this Court affirm the District Court's judgment.

Respectfully submitted,

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[199] The District Court also determined that Senate Factors 4 (candidate slating process), 5 (effects of past discrimination), and 8 (responsiveness to particularized needs), added limited weigh to Plaintiffs' claim, are nonexistent in Fayette, or did not weigh in any party's favor. Moreover, the District Court determined that Senate Factors 6 (racial campaign appeals) and 9 (tenuousness of the at-large electoral method) did not weigh in Plaintiffs' favor.

[200] Vol. III, 152, at 79-80.

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APPEAL NO. 14-11202-FF
GEORGIA STATE CONFERENCE OF THE NAACP, *et al.*,
v. FAYETTE COUNTY BOARD OF COMMISSIONERS, *et al.*

CERTIFICATE OF COMPLIANCE

Pursuant to FRAP 32(a)(7)(B), the undersigned counsel certifies that this brief complies with the type-volume limitations because it contains 13,943 words, excluding the parts of the brief exempted by FRAP 32(a)(7)(B)(iii). This brief also complies with the typeface and style format requirements of FRAP 32(a)(5) and 32(a)(6) because it has been prepared in a proportionally spaced typeface using Word 2003 and is typed in 14 point Times New Roman Font.

This 26th day of June, 2014.

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

GEORGIA STATE CONFERENCE OF THE NAACP, *et al*.,	)	
PLAINTIFFS–APPELLEES,	)	APPEAL No. 14-11202-FF
v.	)	
FAYETTE COUNTY BOARD OF COMMISSIONERS, *et al*.,	)	
DEFENDANTS–APPELLANTS.	)	

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **BRIEF OF PLAINTIFFS-APPELEES' GEORGIA STATE CONFERENCE OF THE NAACP, ET AL. v. FAYETTE COUNTY BOARD OF COMMISSIONERS, ET AL.**, with the Clerk of the Court using the CM/ECF system which will automatically send e-mail notification to all counsel of record, including:

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