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

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

PLAINTIFFS' MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION AND PRELIMINARY STATEMENT

This case raises fundamental legal questions about the integrity of Fayette County's democratic processes generally, and their discriminatory impact on its racial minority citizens particularly. Plaintiffs[1] contend that, in combination with racially polarized voting ("RPV"), the at-large electoral method maintained by County Defendants[2] results in improper race-based vote dilution in violation of Section 2 of the Voting Rights Act ("VRA"), 42 U.S.C. 1973 ("Section 2").

Plaintiffs have established—and County Defendants have not disputed—that the at-large electoral method for the Board of Commissioners dilutes the voting strength of Fayette County's Black citizens in violation of Section 2 of the VRA. Therefore, summary judgment is appropriate. *See* Fed. R. Civ. P. 56(a).

First, there is no genuine dispute that the three *Gingles* preconditions for demonstrating a vote dilution claim have been met: (1) Fayette County's Black population is sufficiently large and geographically compact to constitute a majority of the voting-age population ("VAP") in a properly apportioned single-member district (*Gingles* 1); (2) Black residents' voting patterns are politically cohesive in

[1] Plaintiffs are the Georgia State Conference of the NAACP, Fayette County Branch NAACP, and Black Fayette County residents 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.

[2] County Defendants are the Fayette County Board of Commissioners, individual board members in their official capacities, Herb Frady, Robert Horgan, Lee Hearn, Steve Brown, and Allen McCarty, as well as the director, in his individual capacity, Tom Sawyer, of the Fayette County Board of Elections and Voter Registration.

elections involving candidates to the Board of Commissioners (*Gingles* 2); 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 that Board* (*Gingles* 3).

Second, Plaintiffs' uncontradicted evidence shows that, under the totality of the circumstances, Fayette County's Black residents have less of an opportunity than white residents to elect their preferred candidate of choice. County Defendants' current at-large method of electing its members, in combination with RPV, guarantees that Fayette County's racial minorities cannot participate on equal terms in the County's political process. Section 2 of the VRA was enacted to proscribe precisely this discriminatory result. [3]

For these reasons, and those set forth below, this Court should grant Plaintiffs' Motion for Summary Judgment.

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[3] Congress enacted the VRA for the broad remedial purpose of "rid[ding] the county of racial discrimination in voting." *South Carolina v. Katzenbach*, 383 U.S. 301, 315 (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 (1969). Section 2 prohibits County Defendants from applying or imposing any "voting qualification or prerequisite to voting or standard, practice, or procedure" that "results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973(a). In particular, Section 2 prohibits vote dilution, which is the use of an electoral scheme—such as County Defendants' at-large method of election—that weakens the voting strength of minority voters and, consequently, denies those voters an opportunity to elect a candidate of their choice. 42 U.S.C. § 1973(b). The Supreme Court has explained that "[t]he essence of a [Section] 2 claim is that a certain electoral law, practice or structure interacts with social and historical conditions to cause an inequality" in the voting of various racial minority groups. *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986).

SUMMARY JUDGMENT STANDARD

In a motion for summary judgment, it is the moving party's burden to demonstrate "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "[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." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). Material facts are those "that might affect the outcome of the suit under the governing law." *Id.* at 248. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *see* Fed. R. Civ. P. 56(c).

Since there is no genuine dispute on the facts material to Plaintiffs' claims under Section 2, summary judgment is appropriate in this case.

ARGUMENT

PLAINTIFFS HAVE ESTABLISHED A VIOLATION OF SECTION 2 BY SHOWING THAT, BASED ON THE TOTALITY OF CIRCUMSTANCES, COUNTY DEFENDANTS' AT-LARGE ELECTORAL METHOD RESULTS IN RACIAL DISCRIMINATION

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 is "sufficiently large and geographically compact to constitute a majority in a single-member district," (2) the majority group is "politically cohesive," and (3) the "majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."). *Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986); *see* 42 U.S.C. § 1973(b). *Second*, Plaintiffs must, under the totality of circumstances, "demonstrat[e] that a challenged election practice has resulted in the denial or abridgment of the right to vote based on color or race." *Chisom v. Roemer*, 501 U.S. 380, 394 (1991). Plaintiffs satisfy both of these components of a successful Section 2 claim with undisputed facts.

I. There Is No Genuine Dispute of Material Fact That Plaintiffs Have Satisfied the Three *Gingles* Preconditions

A. County Defendants Concede That Fayette County's Black Population Is Politically Cohesive and That Its Elections Are Characterized By Racially Polarized Voting (*Gingles* 2 and 3)

Plaintiffs satisfy the second and third *Gingles* preconditions, as there is no dispute that "[a]lthough Black voters are politically cohesive, bloc voting by other

members of the electorate consistently defeats Black-preferred candidates. Indeed, non-Black members of the electorate have consistently voted as a bloc so as to defeat *every* Black-preferred candidate for the Board of Commissioners [and] Board of Education." Doc. 1, Compl. ¶ 43. The uncontroverted opinion of Plaintiffs' expert, Dr. Richard L. Engstrom, demonstrates that Fayette County's elections are characterized by stark patterns of RPV, with Black voters preferring Black candidates, and non-Black voters preferring non-Black candidates.[4] Ex. 8, Engstrom Decl. ¶¶ 17, 19-22, 29. The result is that Black candidates are

[4] For example, in 2006, the County held a special election to the Board of Commissioners to fill a vacancy. Ex. 1, County Defs.' Admission 8. Three Republican candidates ran for this seat, including two Black candidates (Emory Wilkerson, an attorney and then vice-chairman of the County's Republican Party, and Malcolm Hughes, a certified public accountant), and one white candidate, Robert Horgan, a mechanic and political novice. *See, e.g.*, Ex. 2, Dunn Dep. Tr. 38:4-39:10 (testifying with regard to Horgan's political experience prior to running in 2006 that "[h]e had none"); Ex. 3, Frady Dep. Tr. 46:9-10 (acknowledging that Wilkerson, finished a distant second in the election, even though prominent Republicans endorsed him); *see also* Ex. 3, Frady Dep. Tr. 50:11-13, 51:1-7; Ex. 4, Hearn Dep. Tr. 65:2-7.

Two Black Democratic candidates also ran in this 2006 special election: ((1) Wendi Felton, a small business owner, and (2) Charles Rousseau, Assistant Director of Design and Planning for Fulton County Parks and Recreation). Ex. 1, County Defs.' Admission 8.

Mr. Horgan won 51.70 percent of the total vote in the at-large election, defeating all four Black candidates—without a runoff election—even though he was objectively not as qualified as his Black opponents. *See, e.g.*, Ex. 5, McCarty Dep. Tr. 55:17-56:16 (testifying that Wilkerson should have won because he was "better qualified ... As far as his knowledge and willingness to represent the people," than Horgan); Ex. 5, Dunn Dep. Tr. 39:13-17 (testifying that Horgan was not "as qualified as [Wilkerson]").

Mr. Horgan was not the preferred candidate of choice among Black voters. *See* Ex. 1, County Defs.' Admissions 8 & 13; *see also* Ex. 6, Horgan Dep. Tr. 72:9-11 (admitting that he has never voted for a Black person for any public office position). Fayette residents became even more weary of Mr. Horgan's leadership after he was arrested and convicted of misdemeanor marijuana possession while serving on the Board. Ex. 6, Horgan Dep. Tr. 107, 116; Ex. 7, Brown Dep. Tr. 122:15-23, 123:1.

consistently defeated in each election, notwithstanding strong support from Black voters.[5] *Id.*

County Defendants have conceded that Plaintiffs satisfy *Gingles* prongs two and three, categorically stating: "[h]aving reviewed the Declaration and Supplemental Declarations of Richard Engstrom, Docs. 54-6, 54-7, County Defendants *do not dispute* that Plaintiffs are likely able to establish the second and third preconditions of *Gingles*." Doc. 67, County Defs.' Resp. to Ct. Orders & Pls.' May 2 Br., at 10 (emphasis added).

B. There Is No Genuine Dispute of Material Fact That Fayette County's Black Population Is Sufficiently Large and Geographically Compact to Allow For the Creation of A Properly Apportioned Single-Member District for Electing Members of the Board of Commissioners (*Gingles* 1)

Plaintiffs have satisfied the first *Gingles* precondition, having demonstrated 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 Board of Commissioners . . . in which Black voters would constitute a majority of both the total population and the [VAP]." Doc. 1, Compl. ¶ 42. Plaintiffs' expert, William S. Cooper, explains that (a) Fayette County's Black population is approximately 20 percent, Ex. 9, Cooper Decl. ¶ 15;

[5] Other Black candidates who have run for the Board of Commissioners have met the same unsuccessful fate in preceding election cycles, including: Republican Frank Oakley in 2000, and Republican David Simmons in 2004. Ex. 1, County Defs.' Admission 13.

(b) is concentrated in the northern portion of the County, *id*. at ¶ 20; and (c) is "sufficiently numerous and geographically compact to constitute a majority of the [VAP] in a single-member district under a five district plan," *id*. at ¶ 44. Mr. Cooper demonstrates through an *Illustrative Plan* that a properly apportioned single-member district plan for electing members to the Board of Commissioners can be drawn in which Black voters constitute a majority of both the total population and the VAP (50.22 percent) in one compact single-member district (District 5). *See* Ex. 9, Cooper Decl. ¶¶ 35-42; *see also* Ex. 10, Cooper Suppl. Decl. ¶ 7; Ex. 11, Cooper Second Suppl. Decl. ¶ 42.

In *Bartlett v. Strickland*, 556 U.S. 1 (2009), the Supreme Court held that the first prong of *Gingles* 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?" *Id.* at 18, 19-20.[6] This Court has recognized that the first *Gingles* prong requires only a bare statistical majority. *See, e.g.*, Ex. 12, May 30 Hearing Tr. at 3:12-13 (referring to the *Illustrative Plan*, "I think 50.000001 would be a majority, and the majority is a majority is a majority.").

[6] This requirement of a simple numerical majority is consistent with other jurisdictions' understanding of the first *Gingles* precondition. *See, e.g.*, *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."); *Pope v. Cnty. of Albany*, 687 F.3d 565, 574 (2d Cir. 2012) ("identify[ing] legal error in the district court's demand for plaintiffs to show more than a simple majority of the relevant minority group at the first step of *Gingles* analysis").

County Defendants concede that Black voters in District 5 of the *Illustrative Plan* "meet[] th[e] threshold" of being above 50 percent of the VAP. Doc. 67, Doc. 67, County Defs.' Resp. to Ct. Orders & Pls.' May 2 Br., at 14.[7] County Defendants' expert, John Morgan, also concedes that the *Illustrative Plan* surpasses the 50 percent numerical threshold at 50.22 percent. Ex. 13, Morgan Decl. ¶ 28; Ex. 14, Morgan Suppl. Decl. ¶ 24; Ex. 15, Morgan Dep. Tr. 159:13-24, 167:1.

Therefore, it is undisputed that Black voters in District 5 of the *Illustrative Plan* satisfy the numerical majority-minority threshold.

1. Plaintiffs' *Illustrative Plan* Is Sufficiently Compact And Complies With Traditional Redistricting Principles

Not only is the Black VAP in District 5 of Plaintiffs' *Illustrative Plan* sufficiently numerous, but also it complies with traditional redistricting principles. Ex. 9, Cooper Decl. ¶¶ 35-42; Ex. 10, Cooper Suppl. Decl. ¶ 7; *see Larios v. Cox*, 314 F. Supp. 2d 1357, 1362 (N.D. Ga. 2004) (recognizing that traditional districting principles are "compactness, contiguity, minimizing the splits of counties, municipalities, and precincts, recognizing communities of interest, and avoiding multi-member districts"), *aff'd sub nom. Cox v. Larios*, 542 U.S. 947

[7] *See also Gingles*, 478 U.S. at 50, n.17 (the purpose of the numerosity and compactness requirement is to ensure that minority voters have "the *potential* to elect representatives in the absence of the challenged structure or practice") (emphasis in original); *Johnson v. Hamrick*, 155 F. Supp. 2d 1355, 1367 (N.D. Ga. 2001), *aff'd*, 296 F.3d 1065 (11th Cir. 2002).

(2004); *see also Larios*, 300 F. Supp. 2d at 1331, 1349-1353. There is no genuine dispute of material fact that the *Illustrative Plan* satisfies these criteria.

Compactness

First, as Mr. Cooper concluded, Plaintiffs' *Illustrative Plan* is geographically compact. Using the Reock test, Mr. Cooper determined that the compactness of the *Illustrative Plan* compares favorably with County Defendants' *Commissioners' Plan*. The mean Reock score for the five districts in the *Illustrative Plan* is .42 and District 5 has a Reock score of .31.[8] Ex. 11, Cooper Second Suppl. Decl. ¶¶ 8-9. By comparison, the mean Reock score for County Defendants' *Commissioners' Plan*, adopted by this Court in *Lindsey v. Fayette Cnty. Bd. of Comm'rs*, No. 3:12-cv-00040-TCB (N.D. Ga. Mar. 27, 2012), is .45, and District 5 under that Plan also is .45. Ex. 13, Morgan Decl. ¶ 38.[9]

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[8] 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, e.g.*, Ex. 16, Cooper Dep. Tr. 225:8-12; Ex. 15, Morgan Dep. Tr. 111:6-18.

[9] The Reock score is .49 for the *Board of Education Plan* (*BOE Plan*) that this Court rejected. According to Mr. Morgan, the *BOE Plan* complies with traditional redistricting principles *See* Ex. 13, Morgan Decl. ¶ 39 ("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"); *see also* Ex. 14, Morgan Suppl. Decl. ¶ 13; Ex. 15, Morgan Dep. Tr. 178:5-12.

As Mr. Morgan accepts that the *BOE Plan* complies with traditional redistricting principles, it is notable that Mr. Cooper based the *Illustrative Plan* on the *BOE Plan* in that the *Illustrative Plan* follows similar county, precinct, and municipal lines. Ex. 16, Cooper Dep. Tr. 134:1-6 ("[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); *see also* Ex. 16, Cooper Dep. Tr. 136-38, 144 (discussing, for example, how "the *Illustrative Plan* splits Sandy Creek precinct as the [*BOE Plan*] does").

Mr. Cooper further determined that, under the Reock test, Plaintiffs' *Illustrative Plan* is well within the norm for districts across a number of recently-adopted state and local redistricting plans. Ex. 11, Cooper Second Suppl. Decl. ¶¶ 5-6, 22; Ex. 16, Cooper Dep. Tr. 49:1-4 (explaining that Plaintiffs' *Illustrative Plan* "is more compact using the Reock standard than 25 percent of [Georgia's] legislative districts"). Moreover, based on the Reock test, Plaintiffs' District 5 under the *Illustrative Plan* is as compact or more compact than 23 county school board and county commission districting plans from a sample of 25 Georgia counties with a total of 125 districts. Ex. 11, Cooper Second Suppl. Decl. ¶¶ 13-14. And, based on the Reock test, District 5 under the Plaintiffs' *Illustrative Plan* is as compact or more compact than 87 (out of 294) lower house legislative districts drawn by Mr. Morgan in three states (New Mexico, South Carolina and Virginia). *Id.* at ¶¶ 8-10. Thus, there is no dispute of fact that Plaintiffs' *Illustrative Plan* adheres more closely to the compactness principle than a significant number of Georgia's legislative, county commission and school board districts, and districts across the country drawn by County Defendants' expert. *Id.* at ¶ 42.

Mr. Morgan contends that Plaintiffs' *Illustrative Plan*, as a matter of law, is not compact, based on his use of a combination of various compactness tests, including the "Polsby-Popper" and perimeter tests, arguing that the

Commissioners' Plan is more compact than the *Illustrative Plan*.[10] Ex. 13, Morgan Decl. ¶¶ 32-34; *see also* Ex. 11, Cooper Second Suppl. Decl. ¶ 4.

Compactness Score Comparisons

	Illustrative Plan		***Commissioners' Plan***		***BOE Plan***	
	Reock	*Polsby-Popper*	*Reock*	*Polsby-Popper*	*Reock*	*Polsby-Popper*
Mean	.42	.23	.45	.35	.49	.34
District 5	.31	.16	.45	.51	.43	.40
District 4	.31	.17	.27	.27	.45	.30
District 3	.33	.24	.51	.34	.33	.24
District 2	.63	.39	.55	.35	.63	.39
District 1	.51	.19	.47	.25	.63	.36

Mr. Morgan's testimony, however, does not create a genuine issue of fact for several reasons. *First*, as the chart above makes plain, Plaintiffs' *Illustrative Plan* fares well even under the Polsby-Popper test favored by Mr. Morgan, with the mean score for the five districts in the *Illustrative Plan* at .23 and District 5 scoring at .16. By comparison, the mean Polsby-Popper score for the *Commissioners' Plan* is .35, and the score for District 5 under that Plan is .51. Significantly, at

[10] The Polsby-Popper test, another compactness indicator, 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. *See, e.g.*, Ex. 16, Cooper Dep. Tr. 225:16-18; Ex. 15, Morgan Dep. Tr. 111:9-25, 112:1-4.

As explained below, *infra* n.12, the perimeter test computes the sum of the perimeters of all the districts. The test computes one number for the whole plan. When comparing several plans, the plan with the smallest total perimeter is the most compact. Ex. 13, Morgan Decl. ¶ 43; Ex. 15, Morgan Dep. Tr. 112:6-14; 116:1-6 (describing the perimeter test as "more of a low-tech measure of compactness because you're just adding up the sum of perimeters, and you're not comparing it to, say, an idealized district"); *see also* Ex. 16, Cooper Dep. Tr. 247:1-9; Ex. 11, Cooper Second Suppl. Decl. at 4, n.2 (noting that Mr. Cooper "does not report perimeter measures because that method does not yield meaningful results for comparisons of plans *across* states and localities").

least one of the *Illustrative Plan's* districts (District 2) is more compact (at .39) than the same district in the *Commissioners' Plan* (at .35) and as equally compact as that district under the *BOE Plan* (at .39), which Mr. Morgan admits is compact.[11] While four of the five *Illustrative Plan* districts are less compact using the Polsby-Popper measure than the remaining districts in the *Commissioners' Plan*, Ex. 13, Morgan Decl. ¶ 41, the differences are not appreciable.

In any event, there is simply no requirement that Plaintiffs' proposed *Illustrative Plan* be *more compact* than the existing *Commissioners' Plan*. Plaintiffs are not required to present the most compact plan possible, only one that satisfies generally-accepted standards for compactness, as Mr. Cooper has done. Both Mr. Cooper and Mr. Morgan agreed that there is no objective ideal for compactness, but rather that compactness can only be measured by comparing one district to another. *See, e.g.*, Ex. 16, Cooper Dep. Tr. 216:10-18 (explaining "you can compare compactness scores. You probably should go beyond that, but as a first cut, you can compare compactness scores"); *id.* at 48:14-20 (explaining that to satisfy *Gingles* one, "it needs to be a district that is potentially functional that would not confuse voters and is not terribly dissimilar from other districts that are out there"); *see id*. 166:1-6, 194:5-17; *see also* Ex. 15, Morgan Dep. Tr. 67:3-10,

[11] Not only is District 2 under Plaintiffs' *Illustrative Plan* equally compact to District 2 under the *BOE's Plan*, which Mr. Morgan admits is compact, but District 3 under both of those plans also is equally compact. *See supra* n.9.

68:7-12, 91:6-8, 113:16-18, 179:4-9 (explaining "you can look at districts and compare them to other districts and particular other districts in that region"). Here, Plaintiffs' *Illustrative Plan* and the remedial District 5 within it compare favorably with many other redistricting plans and districts throughout Georgia, and thus Plaintiffs have satisfied the threshold for compactness under *Gingles* one.

Second, as discussed above, even though Plaintiffs' *Illustrative Plan* is compact under any measure (*i.e.*, Reock or Polsby-Popper), courts are not required to rely on any particular method for measuring compactness. In fact, courts have used *various* methods to calculate the compactness of a district, and have considered compactness in the context of numerous other redistricting principles—including adherence to the VRA—without holding that any particular metric is required. In *Larios*, 314 F. Supp. 2d at 1369 n.19, for example, this Court, in gauging the compactness of the districts at issue, considered metrics such as the smallest-circle or perimeter-to-area compactness measures, but did not ultimately favor any particular method for measuring compactness over another.[12] Moreover, the district court in *Johnson v. Miller* recognized the difficulty in assessing any one compactness test's superiority over another, stating that "[u]nfortunately, there is no litmus test for compactness; it has been described as such a hazy and ill-defined

[12] The *Larios* court explained that "[t]he 'smallest-circle' measure compares a district's area to that of the smallest circle that could encompass the entire district; the 'perimeter-to-area' measure is the ratio of the district's area to the area of a circle with the same perimeter. Under both measures, the figure for the 'perfect' district would be 1.00." *Id.* at 1369 n.19.

concept that it seems impossible to apply it in any rigorous sense in matters of law." 864 F. Supp. 1354, 1388 (S.D. Ga. 1994) (citation and internal quotation marks omitted), *aff'd*, 515 U.S. 900 (1995).[13] *See* Ex. 16, Cooper Dep. Tr. 134:9-10 (recognizing "there are lots of flaws and issues with compactness measures").

Thus, as *Larios* and *Johnson* demonstrate, the Reock test relied on by Mr. Cooper, is a sufficient method, *by itself*, for measuring compactness. *Larios*, 314 F. Supp. 2d at 1369 n.19; *Johnson*, 864 F. Supp. at 1388. Mr. Morgan concedes this point. Ex. 15, Morgan Dep. Tr. 110:23-111: 4, 113:25-114:1-4, 115:3-10 ("I don't think there's a requirement that you would use both" Reock *and* Polsby-Popper to measure a district's compactness). Indeed, Mr. Morgan testified that he did not know if "there is an acceptable range of compactness," but that he simply compares "compactness scores in relation to other plans," just as Mr. Cooper has done here, and that he does this compactness comparison *only* when asked by clients to do so. Ex. 11, Cooper Second Suppl. Decl. ¶ 4; *see also* Ex. 15, Morgan Dep. Tr. 74:14-19; 69:7-17, 87:14-19.

In sum, there is no dispute of fact that Plaintiffs' *Illustrative Plan* is sufficiently compact to satisfy *Gingles* one.

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[13] The *Johnson* court, nonetheless, identified common methods used for measuring compactness, including "measuring the ratio of the district's area to the square of the district's perimeter; measuring the ratio of the district's population to the population of the area that would fall inside a rubber band stretched around the district; and measuring the ratio of the district's area to the area of the minimum circle that could circumscribe the district." 864 F. Supp. at 1388.

Population Balance

There also is no genuine dispute of fact that Plaintiffs' *Illustrative Plan* has an acceptable overall population deviation from the ideal district size of 5.69 percent. Ex. 9, Cooper Decl. ¶ 37; Ex. 11, Cooper Second Suppl. Decl. ¶ 26. By comparison, the *Illustrative Plan's* deviation of 5.69 percent is *lower* than the 5.9 percent total deviation of the *BOE Plan*.[14] The *Commissioners' Plan* has a lower overall deviation of 4.03 percent, but that is not an appreciable difference from the *Illustrative Plan*. Ex. 13, Morgan, Decl. ¶¶ 37, 45.

In providing the standard for the maximum acceptable population for state legislative districts, the Supreme Court, in *White v. Regester*, 412 U.S. 755 (1973), determined 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. Consistent with *White*, Mr. Cooper recognized that the general rule among redistricting practitioners is that election district populations should fall within an overall deviation range of about 10 percent of the ideal size. Ex. 9, Cooper Decl. ¶ 32. Mr. Morgan also concedes that deviation ranges vary and there is no bright line rule for what is an acceptable deviation, though "the goal is to have them as close

[14] Again, it is instructive to note that according to Mr. Morgan, the *BOE Plan*, follows traditional redistricting principles even though it has an overall population range greater than the *Illustrative Plan* District 5 and a higher relative mean deviation that the *Illustrative Plan* District 5. *See, e.g.,* Ex. 15, Morgan Dep. Tr. 178:5-12.

to zero as practicable." Ex. 15, Morgan Dep. Tr. 73:6-10 ("Again, I drew the plans that I was asked to draw," but "generally, I would try to draw them close to the ideal"); *see also id.* at 70:25-71:1:25, 75:18. Mr. Morgan also testified that an acceptable deviation "really depends on the jurisdiction and what the instructions or the accepted practices are in those jurisdictions." *id.* at 75:14-18.

In sum, there is simply no genuine dispute of fact that Plaintiffs' *Illustrative Plan*, under *White* and when compared to the *BOE Plan* and *Commissioners' Plan*, falls within an acceptable overall deviation range.[15]

Precincts

It is also indisputable that Plaintiffs' *Illustrative Plan* properly splits precincts to balance other redistricting principles, namely protecting incumbents. The *Illustrative Plan* splits eleven precincts, and the *Commissioners' Plan* splits seven precincts. Ex. 10, Cooper Suppl. Decl. ¶ 17; Ex. 11, Cooper Second Suppl. Decl. ¶ 24*; see also* Ex. 14, Morgan Suppl. Decl., ¶ 19; Ex. 16, Cooper Dep. Tr.

[15] For its part, County Defendants assert that District 5 in the *Illustrative Plan* is "substantially" underpopulated in order to achieve a majority-minority district. Ex. 14, Morgan Suppl. Decl. ¶¶ 4, 7; Ex. 15, Morgan Dep. Tr. 169:17-21. Though Mr. Cooper contends that District 5 is "substantially" underpopulated, he provides a legitimate, non-racial rationale for the minor under-population of the district in the *Illustrative Plan*. As detailed in Mr. Cooper's March 2012 Declaration, between 2000 and 2010, the county-wide Black population more than doubled—from 10,383 to 21,117 persons, while the white population fell by 2,618 persons—from 74,820 in 2000 to 72,202 in 2010. *See* Ex. 9, Cooper Decl. ¶¶ 11-19; Ex. 11, Cooper Second Suppl. Decl. ¶¶ 30, 32. Given that this trend is likely to continue, Mr. Cooper underpopulated District 5 in the *Illustrative Plan* because he determined that it would be substantially *overpopulated* by the 2020 Census. Ex. 11, Cooper Second Suppl. Decl. ¶ 32.

146:15-21 (explaining that he split Tyrone and Fayetteville to comply with the one-person, one-vote principle and to create a majority-minority district).

Mr. Cooper explains that "[s]everal precincts were split to create District 5 under *the Illustrative Plan*," but "[p]recinct lines are not, however, sacrosanct, especially when [VRA] violations are at issue" and "precinct lines are routinely split to protect incumbents" and precincts were split in the *BOE Plan*, and *Commissioners' Plan*, and the *Illustrative Plan* to protect incumbents. Ex. 11, Cooper Second Suppl. Decl. at ¶ 23; *Cf. United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 439 (S.D.N.Y. 2010) ("[E]lection precincts are not such important political boundaries that they should negate a districting proposal, particularly where, as here, other key districting principles are obeyed.").[16] Indeed, Mr. Morgan concedes that it often is necessary to split precincts, explaining that it is "really [not] possible to re-district without splitting some towns." Ex. 15, Morgan Dep. Tr. 74:5-6.

Here, Mr. Cooper balanced splitting precincts with another key redistricting principle: protecting incumbency. Mr. Cooper sought to "avoid[] the placement of two or more County Commissioner incumbents in the same district." Ex. 9, Cooper Decl., at ¶¶ 35, 37; *see* Ex. 10, Cooper Suppl. Decl. ¶ 3; Ex. 16, Cooper

[16] *See* Ex. 1, Cooper Second Suppl. Decl. ¶ 23; Ex. 16, Cooper Dep. Tr. 148:10-13 (explaining that "[a] lot of the precinct splits really are because [Plaintiffs are] trying to protect incumbents"); *see also id.* at 152:1-25, 188:11-13, 257:1-21 (discussing that precincts are routinely split at the local and state levels).

Dep. Tr. 157:22-24. Significantly, Mr. Morgan agreed, testifying that protecting incumbency is so important that Reock (and Polsby-Popper) compact measures "can give way to an incumbent's interest to protect their district or to re-draw their district along the lines that's favorable to them." Ex. 15, Morgan Dep. Tr. 131:9-17.

2. Plaintiffs' *Illustrative Plan* Complies with *Shaw* Because It Does Not Subordinate Traditional Redistricting Principles to Racial Considerations and Creates A Remedial District That Provides Black Voters With An Opportunity to Elect a Candidate of Their Choice

In *Shaw v. Hunt*, 517 U.S. 899 (1996), the Supreme Court held that a redistricting plan in which race is the "dominant and controlling consideration" is unconstitutional unless there is a "strong basis in evidence" that the plan represents an effort "to comply with the Voting Rights Act." *Id.* at 905, 910-11 (citations and internal quotation marks omitted).

Plaintiffs' *Illustrative Plan* complies with *Shaw* for two reasons. *First*, race was not the "dominant and controlling consideration" in fashioning the *Illustrative Plan*. *See id.* at 905 (citation and internal quotation marks omitted). Under *Shaw*, "strict scrutiny applies when . . . the legislature *subordinate[s]* traditional race-neutral districting principles . . . to racial considerations." *Id.* at 907 (citation and internal quotation marks omitted; emphasis added; alteration in original). Unlike in *Shaw*, the *Illustrative Plan* follows "traditional redistricting principles, including

keeping communities of interest together, contiguity, and compactness." *See* Ex. 9, Cooper Decl. ¶¶ 35-42; Ex. 10, Cooper Suppl. Decl. ¶¶ 7, 11. Indeed, District 5 under the *Illustrative Plan*, as discussed above, is compact. Ex. 9, Cooper Decl. at Ex. C-1. This stands in stark contrast to the district at issue in *Shaw*, where it was an "obvious fact that the district's shape [wa]s highly irregular and geographically non-compact by any objective standard that can be conceived," such that the district in question had "been dubbed the least geographically compact district in the Nation." 517 U.S. at 905-06 (citations and internal quotation marks omitted). In fact, in light of the shape and aesthetic appeal of districts in neighboring counties, such as Baldwin, Bulloch and Newton counties, District 5 compares favorably. *See* Ex. 10, Cooper Suppl. Decl. ¶ 18.

Consequently, *Shaw* is inapplicable here, as Plaintiffs have not proposed a remedial district in which "[r]ace was the criterion that, in the [jurisdiction's] view, could not be compromised." 517 U.S at 907. Had Plaintiffs sought to *maximize* Black voting strength in a single district, Plaintiffs' expert, Mr. Cooper, could have drawn a remedial district at 53.58 percent Black VAP, rather than at 50.22 percent Black VAP in the *Illustrative Plan*. *See* Ex. 10, Cooper Suppl. Decl. ¶ 8; Ex. 9, Cooper Decl. ¶ 31. Traditional redistricting principles were not subordinated to racial considerations, and, accordingly, *Shaw* has no application here.

Second, even if race had been the "dominant and controlling consideration," which is was not, remedial District 5 satisfies *Shaw* because there is a strong basis in evidence that the remedy proposed is necessary for Section 2 compliance. Plaintiffs' *Illustrative Plan* seeks to remedy that violation by creating a district (District 5) that will "provide African Americans with an opportunity to elect their preferred candidates." Ex. 9, Cooper Decl. ¶ 31 (explaining that District 5 "will provide African American voters with a reasonable opportunity to elect a candidate of their choice in the district"). Accordingly, the *Illustrative Plan* comports with *Shaw*.

Mr. Cooper created the *Illustrative Plan* "within the context of a Section 2 lawsuit," using race as "but one consideration of many," and not as a "dominant and controlling consideration," to "remedy racial discrimination." Ex. 10, Cooper Suppl. Decl. ¶¶ 4, 11; Ex. 11, Cooper Second Suppl. Decl. ¶ 36. Mr. Morgan, on the other hand, did not even consider compliance with the VRA when reviewing Plaintiffs' *Illustrative Plan*. Ex. 15, Morgan Dep. Tr. 149-151 (admitting that he failed to include compliance with Section 2 in his "exhaustive list of traditional re-districting criteria"); *see also Larios*, 314 F. Supp. 2d at 1359-1360 (noting guidelines in redistricting include "reconciling the demands of the Constitution, the [VRA], and the redistricting principles traditionally recognized by [Georgia]," and the former two take precedence over the latter). While Mr. Cooper was compelled

to (and did) balance traditional redistricting principles and compliance with the VRA in developing the *Illustrative Plan*, Mr. Morgan did not even *consider* VRA compliance in his work with County Defendants. Ex. 16, Cooper Dep. Tr. 273:9-14 (recognizing "all of these [traditional redistricting] factors have to be balanced").

Accordingly, the *Illustrative Plan*, and remedial District 5, are appropriately designed to remedy a Section 2 violation and do not run afoul of *Shaw*.

Community of Interest

There is no genuine dispute of fact that Mr. Cooper accounted for communities of interest in developing the *Illustrative Plan*. Mr. Cooper drew District 5, comprising a majority of the VAP, to contain neighborhoods in Fayetteville and Tyrone in which Black residents attend the same public schools, share places of worship and recreation, are patients of the same doctors, belong to the same civic, political and homeowners organizations, participate in fraternity and sorority events, shop together, and are, importantly, bound together by a nearly two-decade struggle for district voting in the County. Ex. 11, Cooper Second Suppl. Decl. ¶ 36; Ex. 16, Cooper Dep. Tr. 136:25, 137:1-6 (testifying that he took "into account the perceived unity of the African-American community in the [c]ities of Fayetteville and Tyrone and the Kenwood, Europe areas").

Plaintiffs' unequivocal testimony demonstrates that a community of interest exists between residents, and Black residents in particular, of Fayetteville and Tyrone, encompassed in District 5. *See, e.g.*, Ex. 17, Lowry Dep. Tr. 33:7-35:19, 54:5-13 (referring to shared schools, that Tyrone residents go to churches in north Fayette, and that "[p]eople [from Tyrone] are members of the NAACP" and the North Fayette Community Association); Ex. 18, Wright Dep. Tr. 29:19-30:1 (referring to a meet-up group that she attends, as a North Fayette resident, in Tyrone, and that she visits her primary care physician in Tyrone); Ex. 19, John Jones Dep. Tr. 84:1-3, 85:13-86:9, 87:4-11 (testifying to common interests between Fayetteville and Tyrone, including "low crime, better education, maintenance of street, recreation and emergency services," and that people from both areas attend Olivet Baptist Church together and participate in NAACP and fraternities together); Ex. 20, Alice Jones Dep. Tr. 92:11-93:17 (discussing shared schools, park, attendance at NAACP meetings, and frustration with at-large electoral system); Ex. 21, Richardson Dep. Tr. 6:18-19, 20-21 (testifying that she lives in Tyrone and, like other Black residents in her community, her vote is stymied by at-large voting).[17] There is no testimony to the contrary from County Defendants.

[17] *See also* Ex. 22, Ali Abdur-Rahman Dep. Tr. 21:18-23:19, 41:14-15 (referring to shared schools, churches and mosques, senior citizens center, Kenwood Park, civic organizations like the Democratic Women's Association and the NAACP); Ex. 23, Adams Dep. Tr. 50:17-51:13

More fundamentally, District 5 under the *Illustrative Plan* geographically encompasses the northern portion of Fayette County, including parts of Tyrone and Fayetteville, where the highest percentages of Black people in the County reside. Ex. 13, Morgan Decl. ¶¶ 20-21, 37. This undisputed fact is substantiated by County Defendants and Plaintiffs' testimony about where the Black community in the County is concentrated. *See, e.g.*, Ex. 27, Pfeifer Dep. Tr. 39:12-18 (admitting the majority of Black residents live in the "north end of the county"); Ex. 2, Dunn Dep. Tr. 55:22-56:6, 69:18-70:12 (referring to the "black community up there" and admitting the largest concentration of Black residents in the County live "on the north side … that's where the majority of the black population has been," "Above 54", "North of Fayetteville");[18] Ex. 24, Clark Dep. Tr. 30:8-15, 31:15-20 ("certain parts of north Fayette is overwhelmingly black"); Ex. 26, Aisha Abdur-Rahman

(referring to shared schools, particularly Sandy Creek High School, membership in fraternal, sorority and civic organizations and North Fayette Homeowners Association); Ex. 24, Clark Dep. Tr. 68:5-69:7 (referring to district voting as a shared interest); Ex. 25, DuBose Dep. Tr. 60:12-62:23 (referring to shared worship houses, political needs, access to better education, grocery shops, civic organizations and sororities and fraternities); Ex. 26, Aisha Abdur-Rahman Dep. Tr. 59 (discussing share civic organizations).

[18] *See also*, Ex. 6, Horgan Dep. Tr. 69:24-70:10 (referring to his purported equal representation of "people in north Fayetteville" with "those in Peachtree City"); Ex. 7, Brown Dep. Tr. 44:19-24 (recognizing that Black residents predominantly live in the northern part of the County), 64:19-67:15 (referring to the voting tendencies of the Black community in the "north Fayette area"); Ex. 28, Smith Dep. Tr. 53:9-25 (testifying that the largest concentration of Black residents live in the northeast part of the County)

Dep. Tr. 58 (defining the "northern part of Fayette County" as "straight north from [Highway] 85 up to where I live").[19]

In sum, there is no genuine dispute of fact that Plaintiffs satisfy *Gingles* one because they can show that a majority-minority (District 5) "*could be drawn*." *Houston v. Lafayette Cnty.*, 56 F.3d 606, 611 (5th Cir. 1995) (emphasis in original). Further, there is no dispute of fact that, as the *Illustrative Plan* demonstrates, creating a majority-minority district in Fayette County is a "simple" matter because Black voters in Fayette County are sufficiently numerous and geographically compact. Ex. 9, Cooper Decl. ¶¶ 43-44; Ex. 16, Cooper Dep. Tr. 136:1-5.

[19] Notwithstanding this unequivocal testimony, County Defendants' expert, Mr. Morgan, asserts that the *Illustrative Plan* "lasso[s] African Americans from different population centers," *see* Ex. 13, Morgan Decl. ¶¶ 14, 22, 48, and argues that the minority community in the County constitutes three separate communities of Black individuals. *id.* at ¶¶ 14-17, 21. However, Mr. Morgan's testimony in this regard has no basis in fact for several reasons.

First, Mr. Morgan, who does not reside in the County, testified that he based his conclusion about the separateness of these three communities 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. Ex. 15, Morgan Dep. Tr. 26:8-25, 27:1-25, 28:1-8; 148:5-13 ("It never would occur to me to stop someone on the street and ask [residents of Tyrone, Fayetteville and Kenwood if they are a community of interest]"). *Second*, Mr. Morgan conceded that he did not "have enough information" to determine whether Kenwood, Blackrock, Fayetteville, and Tyrone were a single community. *id.* at 27:11-25. *Third*, Mr. Morgan's unsubstantiated opinion is wholly insufficient to rebut the experiences actually lived by the Plaintiffs and other Black residents in Fayette County. *id.* at 145-148.

II. There Is No Genuine Dispute of Fact That, Under The Totality of the Circumstances, Black Residents of Fayette County Have Less Opportunity Than Other Members of the Electorate to Participate in the Political Process and Elect Representatives of Their Choice

Having satisfied each of the three *Gingles*' preconditions, a Section 2's "totality of the circumstances" analysis is required to examine whether Black residents of Fayette County "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *See* 42 U.S.C. §1973(b). The Senate Report accompanying the 1982 amendments to the VRA identified "typical factors" ("Senate Factors") that are relevant in analyzing whether Section 2 has been violated.[20] Congress did not intend this list to be comprehensive or exclusive, nor did Congress intend that "any particular number of factors be proved, or that a majority of them point one way or

[20] These factors are: (1) "the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;" (2) "the extent to which voting in the elections of the state or political subdivision is racially polarized;" (3) "the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;" (4) "if there is a candidate slating process, whether the members of the minority group have been denied access to that process;" (5) "the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;" (6) "whether political campaigns have been characterized by overt or subtle racial appeals;" and (7) "the extent to which members of the minority group have been elected to public office in the jurisdiction." *Gingles*, 478 U.S. at 36-37, (quoting S. Rep. No. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 206-07) (internal quotation marks omitted). Additional factors include: (1) "whether there is a significant lack of responsiveness on the part of elected officials to the particularized needs of the members of the minority group;" and (2) "whether the policy underlying the state or political subdivision's use of such voting qualification, prerequisite to voting, or standard, practice or procedure is tenuous." *Id.* (internal quotation marks omitted).

the other." *Gingles*, 478 U.S. at 29. Rather, in examining the totality of the circumstances to determine whether a challenged voting practice results in vote denial or vote dilution on account of race, courts must consider how the challenged practice "interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Id.* at 47.

The flexible totality of circumstances test allows the Senate Factors to be considered factor by factor, applying only those factors relevant to a particular case. *See Mississippi State Chapter, Operation Push v. Allain*, 674 F. Supp. 1245 (N.D. Miss. 1987) (holding that Mississippi's dual registration requirement constituted vote denial in violation of Section 2 after discarding as irrelevant five Senate Factors and finding that plaintiffs' evidence about the remaining four Senate Factors weighed in plaintiffs' favor under the totality of circumstances).

Here, the totality of the circumstances demonstrates that Fayette County's Black electorate has less opportunity than the white electorate to participate in the political process and elect representatives of their choice. Senate Factors 1, 2, 3, 6, 7, 8, and 9 are most relevant here, and each weigh in Plaintiffs' favor.

A. There Is No Dispute of Fact About Georgia's History of State-Sponsored Discrimination (*Senate Factor 1*)

Georgia has a long, notorious and undisputed history of official discrimination aimed at preventing voters of color from electing their preferred

candidates. *See generally*, Laughlin McDonald et al., *Georgia*, in *Quiet Revolution in the South: The Impact of the Voting Rights Act 1965-1990*, 67-102 (Chandler Davidson & Bernard Grofman eds., 1994). Hundreds of jurisdictions used at-large methods of election to minimize the voting strength of voters of color, and ensured that voters of color could not elect their preferred candidates of choice. *Id.* at 77-78, 81-82. As a result of these and other documented discriminatory practices, Georgia is subject to Section 5 of the VRA, requiring it to receive preclearance for *every* voting change it seeks to implement from the U.S. Department of Justice or a three-judge federal district court. Doc. 4, *Lindsey*, No. 3:12-cv-00040-TCB, at 9-10 (recognizing Section 5 preclearance requirements). Georgia's history of discrimination made it fertile ground for nearly one hundred successful Section 2 litigations that ultimately struck discriminatory at-large methods of elections, like the one at issue here. Laughlin McDonald et al., *Georgia*, in *Quiet Revolution in the South* at 82-84.

Given this undisputed history, Board of Education Defendants admitted that the at-large method of electing members to that Board dilutes the voting strength of the County's Black voters in violation of Section 2, and determined that it would implement a non-discriminatory method of election. Doc. No. 54-8, Am. Consent Decree at 2 & ¶¶ 16-18; *see also* Doc. 43, Bd. of Educ. Defs.' Resp. to Mot. to Vacate J., at 6. County Defendants, however, have resisted mightily the

opportunity to implement a non-discriminatory method of election and remain one of the few counties in Georgia in which no Black person has ever been elected to its body. *See, e.g.*, Ex. 3, Frady Dep. Tr. 67:19-68:1 (agreeing that "[m]ost Georgia counties have at least some district commissioners, according to the Association of County Commissioners of Georgia); Ex. 7, Brown Dep. Tr. 59:15-24 (recalling that a majority of county commissions in Georgia do not use at-large elections); Ex. 6, Horgan Dep. Tr. 71[21]

B. There is No Dispute of Fact That Racially Polarized Voting (RPV) Exists in Fayette County (*Senate Factor 2*)

There is no dispute of fact that elections in Fayette County are characterized by racially polarized voting. Dr. Engstrom's RPV analysis, discussed *supra*, establishes that, in each election involving a Black candidate for the Board of Commissioners, bloc voting by other members of the electorate consistently defeats Black-preferred candidates. County Defendants concede that elections in Fayette County are characterized by RPV. Doc. 67, Doc. 67, County Defs.' Resp. to Ct. Orders & Pls.' May 2 Br., at 10.

RPV also exists in Fayette County in the context of other elections, including elections for the Board of Education, as conceded. Doc. 54-8, Am.

[21] Similarly, Board of Education Defendants have admitted that a vast majority of education elections in the state, specifically, "106 out of 180 school districts in the state have single member district elections" and noted that "many of the remaining school districts have a mix of single member district elections and at-large elections and that only 20 have completely at-large elections for all board members." Doc. 43, Bd. of Educ. Defs.' Resp. to Mot. to Vacate J., at 6.

Consent Decree, at 2 & ¶¶ 16-18; *see also* Doc. 43, Bd. of Educ. Defs.' Resp. to Mot. to Vacate J., at 6. For example, in the 2010 Board of Education general election, in which the incumbent did not run for re-election, Laura Burgess, a Black college professor, "the clear choice of the African American voters," received about 99 percent (near unanimous) support from Black voters. Ex. 8, Engstrom Decl. ¶¶ 19-20; *see also* Ex. 29, Engstrom Suppl. Decl. at ¶¶ 7, 12. Burgess, however, "was not the choice of the non-African American voters," receiving between 14.3 and 15.6 percent of support from white voters. Ex. 8, Engstrom Decl. ¶¶ 19-20; *see also* Ex. 29, Engstrom Suppl. Decl. at ¶ 7. Burgess ultimately lost the election to Sam Tolbert, a white candidate, who received 68.4 percent of the overall vote. Ex. 8, Engstrom Decl. ¶¶ 19-20; *see also* Ex. 29, Engstrom Suppl. Decl. ¶ 7.[22]

Moreover, a 2010 race for U.S. Senate involving Michael Thurmond, a Black candidate, and Johnny Isakson, a white candidate, was characterized by RPV. Ex. 29, Engstrom Suppl. Decl.¶ 12. In that race, which Mr. Thurmond lost, Black voters overwhelmingly supported Mr. Thurmond (he received 99.1 percent

[22] Other Black candidates also have run unsuccessfully for Board of Education seats: (1) Paul Snowden (Democrat) in 1994; (3) Carolyn Fludd (Democrat) in 1998; Faith Hardnett (Republican) in 2006; Frank Oakley (Republican) in 2006. Ex. 8, Engstrom Decl. ¶ 26; Ex. 20, Alice Jones Dep. Tr. at 68:5-6.

of Black electoral support) and non-Black voters overwhelmingly did not prefer Mr. Thurmond (he received only 11.4 percent of white electoral support). *Id*.[23]

In sum, Dr. Engstrom has demonstrated, and both the County Defendants and Board of Education Defendants have conceded, that:

> [E]ach of the general elections and the special election for seats on Fayette County's Board of Commissioners *and* the Board of Education reveal [RPV]. The preference of African American voters to be represented by *the* African American candidate or *an* African American candidate is clear in each of these elections. This preference was not shared by the non-African American voters in *any* of these elections . . . As a result, a white candidate preferred by the non-African American voters was elected in every instance.

Ex. 8, Engstrom Decl. ¶ 29.[24]

C. There Is No Dispute of Fact That The Majority Vote Requirement and Other Voting Practices or Procedures Enhance Discrimination Against Fayette County's Black Community (*Senate Factor 3*)

In conjunction with its discriminatory at-large voting scheme, Fayette County also employs voting practices and procedures that further impair Black

[23] Significantly, Dr. Engstrom further shows that at 46.2 percent of the voting age population—the BVAP in the remedial district under the *BOE Plan* that this Court rejected—Black voters in District 5 could have elected their preferred candidates, Ms. Burgess and Mr. Thurmond, on the strength of their votes alone, and without any support from white voters. Ex. 29, Engstrom Suppl. Decl.¶¶ 10-13.

[24] The experiences of Black candidates losing elections in the County is exhaustive. In addition to the loses candidates have endured to the Board of Commissioners, Board of Education and U.S. Senate, a Black candidate also lost a Republican primary in 2008. African American candidate, Dave Simmons, ran against three white candidates, Barry Babb, Wayne Hannah and Thomas Mindar, for a sheriff's position. Simmons received the least amount of votes at 14.0 percent. Hannah won with 50.4 percent. Ex. 8, Engstrom Decl.¶ 27.

electoral success in the County, including: (1) numbered posts,[25] (2) residency requirements, (3) staggered terms, and a (4) majority vote requirement. Ex. 1, County Defs.' Admission 7.[26]

Courts have generally found that numbered posts dilute minority voting strength when combined with other dilutive voting devices, such as, here, at-large electoral schemes and/or staggered terms. *See, e.g.*, *United States v. Dallas Cnty. Comm'n*, 739 F.2d 1529, 1537 (11th Cir. 1984) (holding that "the district court erred in finding that the combination of a majority requirement in the primary, the significance of the Democratic primary, and the use of numbered posts did not operate to cancel voting strength of minorities"); *see also United States v. City of Euclid*, 580 F. Supp. 2d 584 (N.D. Ohio 2008); *Dillard v. Crenshaw Cnty.*, 640 F. Supp. 1347, 1353 (M.D. Ala. 1986).[27] Courts, in sum, have discerned the

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[25] A numbered post system "requires a candidate to declare for a particular seat on a governmental body. The candidate then runs only against other candidates who have declared for that position. The voters then only have one vote for that seat. The system prevents the use of bullet, or single shot, voting." *Bradford Cnty. NAACP v. City of Starke*, 712 F. Supp. 1523, 1537 (M.D. Fla. 1989).

[26] In fact, until March 2012, the Board of Commissioners used numbered posts in combination with residency requirements for election to that Board. *Lindsey*, No. 3:12-cv-00040-TCB, Doc. 4, Consent Decree. Until March 2012, the Board of Commissioners also had not redrawn its district boundaries since it began using militia districts in the 1800s; as a result, existing boundaries for three posts were unequal. *See, e.g.*, Ex. 7, Brown Dep. Tr. 133:8-134:7.

Former Commissioner Pfeifer admitted that he opposed reapportioning districts in 2007 during his tenure on the Board because he believed that doing so would open Fayette county to a challenge to its at-large method. Ex. 27, Pfeifer Dep. Tr. 64:21-65:8.

[27] Courts have also been specific about the ills of numbered posts on their own. *See, e.g.*, *Lodge v. Buxton*, 639 F.2d 1358, 1380 (5th Cir. 1981) (emphasizing the lower court's finding that "though there is no anti-single shot provision, the requirement that candidates run for numbered posts has potential effects that are equally adverse," and that the lower court's

discriminatory nature of numbered posts when accompanied by: (1) racially polarized voting, (2) at-large electoral schemes, and/or (3) anti-single shot voting laws. *See, e.g., Dillard v. Town of Louisville*, 730 F. Supp. 1546, 1548 (M.D. Ala. 1990) ("When the community suffers from racial polarization in voting -- and especially when the system is supplemented by mechanisms such as majority vote requirement laws, anti-single shot voting laws, and numbered place laws -- at-large systems can be potent tools for those seeking to deny minorities participation the in community's political operation.")

Like numbered posts, courts have found that staggered terms, when employed in conjunction with other factors, like the at-large electoral scheme, violate the VRA. *See, e.g., Jackson v. Edgefield Cnty., S. C. Sch. Dist.*, 650 F. Supp. 1176, 1202 (D.S.C. 1986); *City of Lockhart v. United States*, 460 U.S. 125, 135 (1983).

It is undisputed then that Fayette County, having never elected a Black person to either the Board of Commissioners or Board of Education under its at-large method of election, employs numbered posts, residency requirements, staggered terms, and a majority vote requirement, which together enhance the discriminatory nature of its at-large election scheme.

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conclusion "is sound and well supported" that "the presence of these factors enhanced the likelihood that the electoral system could be used for discriminatory purposes"), *aff'd sub. nom. Rogers v. Lodge*, 458 U.S. 613 (1982).

D. Campaigns In Fayette County Are Characterized By Overt Or Subtle Racial Appeals[28] (*Senate Factor 6*)

As discussed above, in 2006, four Black candidates ran in a special election with one white candidate, Robert Horgan, who won without a runoff. During his campaign, Mr. Horgan said that he ran for the seat on the Fayette County Board of Commissioners to "maintain and preserve the heritage we have in our county." *See* Ex. 1, County Defs.' Admissions 8-10. Plaintiffs understood this campaign theme to be consistent with County Defendants' objective "to keep Fayette County the way that it has always been," which is "the old boy way of operation." *See, e.g.*, Ex. 20, Alice Jones Dep. Tr. 51:17-18, 52:3-13, 91:15-21; Ex. 21, Richardson Dep. Tr. 40:17-41:19, 41:20-42:11. Following up on his offensive heritage remark, Mr. Horgan recently further exposed himself when he referred to certain members of his constituency, namely Black children, as "colored kids." Ex. 6, Horgan Depo. Tr: 49: 22-24.

In addition, single member redistricting has been a racially charged issue in Fayette County campaigns. White candidates who oppose district voting receive significant support from the white community and prevail in elections. *See*, *e.g.*, Ex. 3, Frady Dep. Tr. 52:14-17 (concerning Mr. Horgan's 2006 special election campaign, acknowledging a publication quoting Mr. Horgan as saying "I came out

[28] *See generally Johnson*, 155 F. Supp.2d 1535; *Cofield v. City of LaGrange, Ga.*, 969 F. Supp. 749 (N.D. Ga. 1997); *Brooks v. State Bd. of Elections*, 848 F. Supp. 1548 (S.D. Ga. 1994); *Jordan v. Winter*, 604 F. Supp. 807 (N.D. Miss. 1984).

of the gate before anybody, being the one who said he wasn't for district voting"). Further, Plaintiffs have understood references to not wanting to be like Clayton, Riverdale, Fulton and Dekalb counties, which have district voting, Black representatives, and significant, if not majority, Black populations, as racially charged. *See, e.g.*, Ex. 23, Adams Dep. Tr. 45:15-46:1; Ex. 20, Alice Jones Dep. Tr. 51:18-21, 53:2-15.

E. Fayette County Has Never Elected A Black Candidate to the Board of Commissioners or Board of Education (*Senate Factor 7*)

As a result of the discriminatory at-large election scheme discussed above, no Black candidate, whether he or she ran as a Republican or Democrat, has ever been elected to the County Board of Commissioners *or* Board of Education. Ex. 1, County Defs.' Admission 12 (admitting no Black elected within last 40 years);[29] Ex. 26, Aisha Abdur-Rahman Dep. Tr. 78 (explaining the common denominator is race when "there have been African-Americans who are Republicans who have run for office," and that "[t]hey have not been elected," and "[t]here have been African-Americans who were Democrats who have run for office," and "[t]hey have not been elected," and, "[s]o the common factor between those two people is that they're black.").

[29] Magistrate Judge Charles Floyd is the only Black person to have been elected countywide in the history of the County as an incumbent *after* he was appointed to the bench in 2002. Ex. 1, County Defs.' Admission 11. Since his death in 2010, the County has not elected any other Black person to a county-wide position.

Ed Johnson, a Black man, currently holds a position on the Fayetteville City Council. However, this is not a county-wide elected position.

Moreover, though Board of Commissioners have the authority to appoint members to various boards, committees and commissions, it has exercised that authority to appoint precious few Black individuals. *See, e.g.*, Ex. 7, Brown Dep. Tr. 146-152. The Board otherwise discourages Black individuals from applying for appointments by failing to regularly publicize these positions and instead basing appointments on personal relationships and nepotism. *See, e.g.*, Ex. 5, McCarty Dep. Tr. 128-129 (testifying there is no process of publicly advertising vacant committee positions), *id.* at 134-136; Ex. 3, Frady Dep. Tr. 178-180 (testifying that appointments involve "the board just picking some people it knows" and reappointing incumbents); Ex. 6, Horgan Dep. Tr. 46:22-53:22; Ex. 7, Brown Dep. Tr. 156:18-25.

Neither is it the case that Black Fayette County residents are not interested in such appointments. For example, Plaintiff Alice Jones, given her sustained leadership as part of the North Fayette Homeowners Association in the creation of Kenwood Park, as well as advocate for youth and senior centers, asked, applied for and was not appointed to any commission seat. Ex. 20, Alice Jones Dep. Tr. 37:10-39:14.

In sum, there is no dispute that the County has failed to elect a Black person to the Board of Commissioners or Board of Education, and that few Black people

have been appointed by County Defendants to serve on various boards, committees and commissions.

F. County Defendants Are Nonresponsive to Plaintiffs' Particularized Needs (*Senate Factor 8*)

At least since 1993, during Commissioner Frady's first of five (5), four-year terms (having been elected initially in 1992), County residents have appeared at County Commission meetings and passionately advocated for the County Defendants' consideration and resolution adopting district voting.[30] Ex. 3, Frady Dep. Tr. 149:8-12 (acknowledging that his "legacy will be that as the longest serving county commissioner in [the] County's history, almost two decades, [he] will never have had an African-American colleague on the county commission"); *see also id.* at 73-82, 112-114, 181-185. For example, on March 11, 1993 meeting minutes reflect that residents requested that the County Commission consider adopting district voting. On March, 25, 1993 meeting minutes reflect that various residents: (1) presented a resolution to the Board of Commissioners calling for single-district voting, (2) expressed that Coweta, Clayton, Douglas, Dekalb, Fulton, and Spalding counties have single district voting, and (3) stated that "at-

[30] County residents likely advocated for district voting even before 1993. During discovery, Plaintiffs requested commission meeting minutes (and other documents) from January 1980 to present. However, County Defendants only produced a sampling of commission meeting minutes from 1991-1993 and 2001-2003, and a complete set of meeting minutes from 2004 to March 16, 2012, the date of production. County Defendants claim that Georgia Secretary of State's recommended document destruction policy, which generally recommends destruction of most documents older than seven (7) years, prevents them from locating documents from the complete period that Plaintiffs requested.

large voting discriminated against minorities and violated the 1965 [VRA]"); *see* Ex. 1, County Defs.' Admission 19 (admitting that "as early as 1995, some black citizens of [the] County, as well as some white citizens of [the] County, publicly advocated for district method of voting and that, at various times in the 17 years since, black and white citizens have repeated that advocacy"); *see also* Ex. 4, Hearn Dep. Tr. 79-80 (acknowledging that between 1996-2007, when he regularly attended commission meetings, residents requested district voting).

Among many examples, Plaintiff Dan Lowry in 1996 urged the Board of Commissioners to consider district voting because it would "increase the chances of minority representation." Ex. 17, Lowry Dep. Tr. 48:17-49:8. In 2005, Black Fayette County residents urged the Board of Commissioners to adopt single-member districts. *See, e.g.*, Ex. 3, Frady Dep. Tr. 100-104; Ex. 2, Dunn Dep. Tr. 105-108. In 2005, Plaintiff John Jones also wrote an op-ed explaining that the Black community's support for single-member districts "was not about race, but about ensuring a system that provided fair representation for all citizens in [the] County," and likening his request for district voting in Fayette with the 1960s pursuit of justice. Ex. 19, John Jones Dep. Tr. 20:3-10.

On at least two occasions, residents, including Plaintiff Alice Jones, submitted proposed resolutions to the Board of Commissioners requesting that the County Defendants' adopt district voting. *See, e.g.*, Ex. 3, Frady Dep. Tr. 122-129.

Specifically, on August 24, 2007, Plaintiff Jones introduced at a commission meeting a proposed resolution that requested the implementation of a district-based voting plan. Ex. 1, County Defs.' Admission 18.[31]

Thereafter, throughout 2008 and 2009, residents continuously requested that the County Defendants consider district voting. *See, e.g.*, Ex. 3, Frady Dep. Tr. 140-145, 156-57 (acknowledging (1) at least nine individuals who commented in favor of district voting during a February 28, 2008 commissioner meeting, (2) that Plaintiff John Jones, on behalf of the Fayette NAACP, sent a letter to the County Commissioners on June 16, 2008 seeking the Board's consideration of district voting, (3) acknowledging that John Jones publicly advocated for district voting during a June 11, 2009 commission meeting); *see also* Ex. 6, Horgan Dep. Tr. 121-123. And as recently as February 14, 2012, Black County residents urged the

[31] That proposed resolution (1) highlighted the fundamental unfairness and lack of accountability of Fayette County's at-large system and (2) described how the County neglected her majority Black neighborhood in northern Fayette for road and street improvements, green space acquisition, recreational space, and other critical services. In her accompanying testimony, Plaintiff Jones cited the Board of Commissioners' failure to expend necessary resources to properly maintain Kenwood Park, located in northern Fayette – an action that she repeatedly urged the Board of Commissioners to take over the course of multiple commission meetings – as one example of the Board of Commissioners' nonresponsiveness to the Black community in Fayette, underscoring the need for district-based voting to ensure adequate representation of this community. Ex. 20, Alice Jones Dep. Tr. 85:18-25; Ex. 2, Dunn Dep. Tr. 69:18-70:12 (confirming to the "years and years and years of not having any [recreation facilities] up on the north side").

In fact, the Board of Commissioners has voted to reduce the Capital Improvements Project budget for Kenwood Park since 2007. Ex. 1, County Defs.' Admission 20. The County has not improved Kenwood Park after completing only Phase I of III of the Park, years after its initial opening in 2008. *See, e.g.*, Ex. 23, Adams Dep. Tr. 21:18-22:12; Ex. 2, Alice Jones Dep. Tr. 32:8-33:10.

County Defendants' to adopt a single-member district plan; instead, during a Special Called Board Meeting, County Defendants voted in favor of a five-district plan with at-large voting that this Court approved. Ex. 1, County Defs.' Admissions 21-23.[32]

Yet County Defendants—over nearly two decades—have ignored *each and every* one of these public demands for them to consider, much less pass a resolution adopting, district voting for County Commission elections. In opposing this advocacy, the County Defendants never once conducted a survey or commission a study to ever meaningfully consider the merits of district voting. *See, e.g.*, Ex. 3, Frady Dep. Tr. 89-91 (testifying that he "did not recall" ever surveying the frequency of district voting in Georgia or whether it was favored among County residents), Tr. 185 (testifying that there was not *any* scenario in

[32] Attempts also were made to pursue district voting in Fayette County through the legislative process. For example, in 2005, State Representative Virgil Fludd sponsored a bill in the state legislature to divide the County into five single-member districts, with one commissioner to be elected from each district. Ex. 1, County Defs.' Admission 14. County Defendants responded by holding a special meeting and formally adopting a resolution condemning Rep. Fludd's resolution. Ex. 1, County Defs.' Admission 15. Then former Chairman of the Board of Commissioners, Gregg Dunn, stated that the Board heard no great support for a change from the current at-large system to district voting and criticized proponents of the legislation as "trying to achieve through Legislation what they could not achieve at the ballot box." *See e.g.*, Ex. 2, Dunn Dep. Tr. 110-111.

The Georgia State Assembly rejected (82-63) Rep. Fludd's introduction of a district voting bill in the 2005 Session. Ex. 1, County Defs.' Admission 16. The late Rep. Dan Lakly (R-Peachtree City) argued that the bill reflected an "attempt by the Democratic Party to infiltrate [the] County and make [it] like Clayton County and Fulton County." *See, e.g.*, Ex. 3, Frady Dep. Tr. 65-66. For the second time, in February 2006, the Board of Commissioner adopted a resolution opposing Rep. Fludd's legislation. *See, e.g.*, Ex. 2, Dunn Dep. Tr. 18-19, 57-59, 121. Following Rep. Fludd's urging, the House reconsidered the bill, but the House ultimately rejected it a second time.

which he would consider district voting); Ex. 2, Dunn Dep. Tr. 64:14-65:11 ("I don't recall any formal survey," about how the community thought about district voting); *see also* Ex. 6, Horgan Dep. Tr. 122:1-12; Ex. 4, Hearn Dep. Tr. 52:10-21, 55:13-56:22 (acknowledging that he does not know if a majority of County residents want at-large voting); Ex. 7, Brown Dep. Tr. 117:20-118:20; Ex. 27, Pfeifer Dep. Tr. 91:23-92:2.

In addition to ignoring the issue of district voting, County Defendants responded slowly to Black residents' requests for other services, including community centers for youth and elderly populations. *See. e.g.*, Ex. 7, Brown Dep. Tr. 181, 182:1-11. In addition, Plaintiff Alice Jones testified to the disparity of treatment of residents in the north of the County, including with regard to street improvements, maintenance and care for potholes, drain fields and lawn mowing, lack of recreation facilities, and the underdevelopment of Kenwood Park. Ex. 20, Alice Jones Dep. Tr. 20:19-21:1, 21:22-23:24, 69:11-21, 71:3, 71:11-73:8. Plaintiff Dan Lowry expressed that Black residents' interests in Fayette County are not different than white residents but that those interests "just are not served equitably." Ex. 17, Lowry Dep. Tr. 28:6-31:15. [33]

[33] *See also* Ex. 23, Adams Dep. Tr. 21:18-22:12; 23:9-24:8 (testifying that County Defendants were not timely in paving the roads for the residents of his subdivision in the north end of the County, even while other parts of the County were getting their roads paved); Ex. 25, Dubose Dep. Tr. 56:17-22 ("I don't think [white and black residents in Fayette County] needs are different. I think it's how we are represented to access those needs [that is different].").

Further, Plaintiff Aisha Abdur-Rahman testified that County Defendants had been slow to address road and sewer system improvements in her neighborhood, and expressed concerns about the need for more police presence in "her end of the county." Ex. 26, Aisha Abdur-Rahman Dep. Tr. 17-18, 20-22, 30-31, 33. Plaintiff John Jones, on behalf of the Fayette NAACP, testified to County Defendants' slow response to sewer and road repair issues in the northern part of the County where he lives. Ex. 19, John Jones Dep. Tr. 70:18-73:1, 73:14-25. Plaintiff Terrence Clark testified to the difficulties in the development of Kenwood Park, that the Park has insufficient amenities, that there was a sinkhole—for over year—on a two-way street in a subdivision in north Fayette, and generally that north Fayette residents "are paying [their] fair share of taxes, but [are] not getting [their] fair share of benefits." Ex. 24, Clark Dep. Tr. 27:12-25, 28:15, 29:13-22, 36:8-12, 42:17-22.[34]

Notably, the Board of Commissioners has not ignored the annual request to approve a proclamation for confederate history and heritage month, notwithstanding how deeply offensive such a recognition is to Plaintiffs and other Black people. *See, e.g.*, Ex. 2, Dunn Dep. Tr. 134-136 (former Commissioner

[34] *See also* Plaintiff Ali Abdur-Rahman testified that County Defendants took at least three years to get a storm siren in his neighborhood in north Fayette, even in the face of persisting inclement weather that required a warning. Ex. 22, Ali Abdur-Rahman Dep. Tr. 21:2-16. Plaintiff Bonnie Lee Wright testified to requesting – to no avail – that County Defendants increase safety in her dark neighborhood by installing more street lights. Ex. 18, Wright Dep. Tr. 35:22-36:4.

Dunn acknowledging that the Board approved this proclamation and he attended two gatherings at confederate monuments). The Board of County Commissioners has not, however, introduced or approved on its own accord a Black history and heritage month, for example, recognizing Dr. Martin Luther King, Jr.'s birthday. *See, e.g.*, Ex. 5, McCarty Dep. Tr. 143:8-11; Ex. 7, Brown Dep. Tr. 185:20-186:1; Ex. 19, John Jones Dep. Tr. 49:5-8, 49:15-19.

In sum, notwithstanding the unrelenting advocacy for district voting by Black and other residents of Fayette County since at least 1993, there is no dispute of fact that County Defendants did not, at a minimum, pass a resolution seeking to adopt it. *See, e.g.*, Ex. 3, Frady Dep. Tr. 187:25-188:6 (acknowledging as a first step that the Board could have adopted a resolution implementing district voting to be submitted to the Georgia General Assembly). Rather, the Board of Commissioners approved two resolutions opposing district voting. *See, e.g.*, Ex. 3, Frady Dep. Tr. 115-117; Ex. 2, Dunn Dep. Tr. 110-112; 120-121; Ex. 6, Horgan Dep. Tr. 122; Ex. 7, Brown Dep. Tr. 90-94. As a result, Black residents in north Fayette are unable to elect responsive representatives but are "governed" by non-responsive County Commissioners.

G. The Rationale Underlying the Maintenance Of The At-Large Scheme In Fayette County Is Tenuous (*Senate Factor 9*)

County Defendants' underlying rationale for maintaining its at-large scheme—that it ensures a broad, county-wide constituency, prevents "fiefdoms"

across the County, and that the County has had it "all along"—is tenuous when weighed against (1) the reality that no Black person has ever been elected under this scheme, and (2) such a scheme enables the countywide majority to control many issues (including district voting or other particularized needs, *see supra* F), to the detriment of the minority community. *See* Ex. 30, County Defendants' Objections and Responses to Plaintiffs' First Set of Interrogatories and Defendants Fayette County Board of Commissioners and Fayette County Board of Elections and Voter Registration, Interrogatory No. 17; *see also*, Ex. 3, Frady Dep. Tr. 57 (testifying to his opposition to district because "all the citizens need to elect all the people that are spending their money"); Ex. 5, McCarty Dep. Tr. 40-41 (testifying that district voting "will engender … commissioners fighting over money[]" because "a representative from a particular district is going to look out for the benefits of that specific district"); Ex. 4, Hearn Dep. Tr. 50:4-19, 53:1-54:18 (testifying that district voting is about "[t]oo much guarding your kingdom, not look[ing] at needs"), 55:13-56:22, 56:23-57:20, 83:5-84:3; Ex. 6, Horgan Dep. Tr. 122:1-12; Ex. 7, Brown Dep. Tr. 101:14-102:9, 103:11-106:1; Ex. 27, Pfeifer Dep. Tr. 13:20-14.9; Ex. 28, Smith Dep. Tr. 83:13-20; Ex. 2, Dunn Dep. Tr. 19:3-20:17, 99:4-100:8.

As a practical matter, County Defendants' rejection of district voting over a nearly 20 year period, based on a tenuous rationale, has led Fayette County's Black

community to believe that their votes do not count equally since they can not elect their preferred candidate to the County Commission. *See, e.g.*, Ex. 20, Alice Jones Dep. Tr. 89:17-24 (discussing her embarrassment at attending commission meetings because "I don't feel represented. I don't feel that our interest is being respected – our concerns are being respected. When you go to the commissioner meetings and you make appeal after appeal after appeal, you're not – you're not considered. As a tax-paying citizen of the county, you're not even given consideration, so it's a waste of my time"); Ex. 17, Lowry Dep. Tr. 27:5-20 ("I'm sure that there are some African-Americans who feel ... their vote isn't going to count for their particular candidate of choice ... some people feel that, hey, why should I vote ... my candidate is not going to win anyway"); Ex. 26, Aisha Abdur-Rahman Dep. Tr. 17, 33-34 ("I really think I'm entitled as a … citizen to be able to elect a candidate of my choice who will represent my interests").

Moreover, County Defendants' opposition to district voting, based on a tenuous rationale, also has discouraged minority candidates from seeking election to countywide positions. *See, e.g.*, Ex. 19, John Jones Dep. Tr. 115:25-116:1, 116:19-20 (testifying that he chose to forego running for a county commission position in the 2012 election cycle because of "the polarization of the voting population"); Ex. 23, Adams Dep. Tr. 66:18-67:11 (testifying that after inquiring if people would run for the school board, people responded that "they weren't going

to waste their time and energy to run now under the present system"); Ex. 26, Aisha Abdur-Rahman Dep. Tr. 76-77; *see also* Ex. 4, Hearn Dep. Tr. 43 (discussing how *no* minority county commission candidates have run since the 2006 special election).

Thus, considering that County Defendants (or Defendant Board of Education) have never had a single representative from the Black community and the countywide majority controls on many issues to the detriment of the minority community, ensuring a county-wide electoral system for all elections, like all of the purported rationales for maintaining the at-large electoral scheme, in fact has not ensured broad representation for all Fayette citizens.

In sum, the totality of the circumstances demonstrates that Fayette County's Black electorate has less opportunity than the white electorate to participate in the political process and elect representatives of their choice. In particular, Plaintiffs have demonstrated that Senate Factors 1, 2, 3, 6, 7, 8, and 9 each weigh in their favor.

CONCLUSION

For the reasons set forth above, Plaintiffs respectfully request that this Court grant Plaintiffs' Motion for Summary Judgment.

Dated: September 13, 2012

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

1. The following statement is made in accordance with Civil Local Rules 5.1(B) and 7.1(D).

2. This brief was prepared in the processing system Microsoft Word 97-2003, with Times New Roman typeface, 14 point font (12 point footnotes).

Dated: September 13, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on September 13, 2012, I electronically filed *Plaintiffs' Memorandum of Law in Support of Motion for Summary Judgment* and accompanying evidence with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to all attorneys of record registered with the ECF system as required by this Court's Rules. I further certify that I mailed the foregoing document by first-class mail to counsel of record who are not CM/ECF participants as indicated in the notice of electronic filing.

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