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 OPPOSITION TO COUNTY DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

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SUMMARY OF THE ARGUMENT

County Defendants in this case concede that Plaintiffs[1] have established that: (1) Black voters in Fayette County are sufficiently large to constitute a majority of the voting-age population in a properly apportioned single-member district ("District 5"); (2) Fayette County's Black residents' voting patterns are politically cohesive in elections involving candidates to the Board of Commissioners (and Board of Education); and (3) bloc voting by Fayette County's White majority electorate consistently defeats Black preferred candidates, such that *no Black candidate has ever been elected* to the Board of Commissioners (or Board of Education). In addition, County Defendants do not dispute that the current at-large method of electing its members, in combination with racially polarized voting, guarantees that Fayette County's racial minorities cannot participate on equal terms in Fayette County's political process. Moreover, County Defendants do not contest that Plaintiffs have established that, under the totality of circumstances, Fayette County's Black residents have less opportunity than White residents to elect their preferred candidate of choice.

[1] Plaintiffs are the Georgia State Conference of the NAACP, Fayette County Branch of the NAACP, Henry Adams, Terence Clark, Alice Jones, John E. Jones, Dan Lowry, Aisha Abdur-Rahman, Ali Abdur-Rahman, Lelia Richardson, Elverta Williams, and Bonnie Lee Wright.

References to exhibits attached to the Declaration of Ryan P. Haygood in Support of Plaintiffs' Motion for Summary Judgment, Doc. 110-3, are cited herein as "Ex. _".

Given these significant concessions, the only remaining matter before this Court is to find that, as a matter of law, Section 2 of the Voting Rights Act ("VRA") proscribes this discriminatory result.

County Defendants' defense is limited to two arguments: that, as a matter of law, (1) although a compact single-member district can be created in Fayette County in which Black voters are the majority of the voting-age population, it cannot be done without racial gerrymandering; and (2) Black residents of Fayette County, though sufficiently numerous to be a majority in a compact district, are a geographically disparate community, rather than a compact one. As discussed more fully below, neither of these arguments are meritorious.

First, Plaintiffs' *Illustrative Plan* is not the product of racial gerrymandering. Plaintiffs have established that Plaintiffs' expert, William Cooper ("Mr. Cooper") developed District 5 with considerations of traditional redistricting principles and of remedying minority vote dilution in Fayette County.

Second, County Defendants have conceded the existence of racially polarized voting—the element most critical in a Section 2 analysis. *See Thornburg v. Gingles*, 478 U.S. 30, 46, 48-49 (1986) (emphasizing racial bloc voting as the essence of a successful vote dilution claim). Under a Section 2 analysis, politically cohesive minorities, which can be drawn into a compact district, are not "disparate" groups, as County Defendants contend. Rather, they are a politically

cohesive community protected by the Voting Rights Act. Therefore, since County Defendants recognize that Black voters in Fayette County share a common political interest, among other things, in the candidates that they collectively support, their second argument fails.

For these reasons, and those discussed below, Plaintiffs respectfully request that this Court deny County Defendants' Motion for Summary Judgment, Doc. 108, and grant summary judgment in favor of Plaintiffs, *see* Doc. 110.

ARGUMENT

I. 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.

County Defendants first contend that race was the dominant factor in creating Plaintiffs' *Illustrative Plan*, and, therefore, it does not comply with *Shaw v. Hunt*, 517 U.S. 899 (1996). Doc. 108-2, County Defs.' Br. at 12-13 ("all of [the] circumstantial evidence of racial predominance is present in this case and without the contrary political evidence that prevented the grant of summary judgment in [*Shaw*]."); *see Shaw*, 517 U.S. at 905, 908-11 (holding 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") (citation and internal quotation marks

omitted). In fact, however, Plaintiffs' *Illustrative Plan* complies with *Shaw* for two reasons.

First, race was not the "dominant and controlling consideration" in creating the *Illustrative Plan*. Indeed, the record reflects that, in addition to seeking to remedy the existing Section 2 violation, Mr. Cooper developed the *Illustrative Plan* with careful attention to non-racial factors.[2] In particular, Mr. Cooper considered traditional redistricting principles, including precinct and municipal boundaries, incumbency, school attendance zones,[3] respecting the one-person, one-vote principle, and compactness. *See, e.g.*, Ex. 9, Cooper Decl. ¶¶ 35-42; Ex. 10, Cooper Suppl. Decl. ¶¶ 3, 7, 11-12; Ex. 11, Cooper Second Suppl. Decl. ¶¶ 36-42; Doc. 107, Cooper Dep. Tr. 131:16-132:22, 136:24-137:23, 163:3:11, 157:22-24, 184:6-187:6. The Supreme Court has recognized that adherence to such traditional redistricting principles "may serve to defeat a claim that a district has been gerrymandered on racial lines." *Shaw v. Reno*, 509 U.S. 630, 647 (1993); *see also Shaw*, 517 U.S. at 907 ("strict scrutiny applies when . . . the legislature *subordinate*[*s*] traditional race neutral districting principles . . . to racial

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[2] Had Plaintiffs sought to *maximize* Black voting strength in a single district and focus solely on race, Mr. Cooper could have drawn a remedial district at 53.58 percent Black voting-age population ("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.

[3] Contrary to County Defendants' incorrect assertion, the record reflects that Mr. Cooper considered school attendance lines in creating Plaintiffs' *Illustrative Plan*. Doc. 108-2, County Defs.' Br. at 4; *see*, Doc. 107, Cooper Dep. Tr. at 134:1-4, 137:7-14, 163:3-11, 189:1-9, 286-16:24-287:1-3; Ex. 9, Cooper Decl. ¶¶ 36-38, Ex. 10, Cooper Suppl. Decl. ¶¶ 11-12, Ex. 11, Cooper Second Suppl. Decl. ¶¶ 37-38.

considerations") (citation and internal quotation marks omitted; emphasis added; alteration in original).

Plaintiffs' *Illustrative Plan* 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 "been dubbed the least geographically compact district in the Nation." 517 U.S. at 905-06 (citations and internal quotation marks omitted). Here, County Defendants concede that the *Illustrative Plan* is not facially "bizarre on its face" under *Shaw*. Doc. 108-2, County Defs.' Br. at 13. Indeed, in light of the shape and aesthetic appeal of districts in Georgia counties—such as Baldwin, Bulloch and Newton counties—District 5 compares favorably. *See* Ex. 10, Cooper Suppl. Decl., at ¶ 18.

Moreover, the shape of the *Illustrative Plan*, far from resembling a district created predominately based on race, has boundaries that compare favorably with those of the *Board of Education Plan* ("*BOE Plan*"), which County Defendants' expert, John Morgan ("Mr. Morgan"), concedes comports with traditional redistricting principles. Ex. 9, Cooper Decl. ¶ 35-42; Ex. 10, Cooper Suppl. Decl. ¶¶ 11, 14; *see also* 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); Ex. 14, Morgan Suppl. Decl. ¶ 13; Doc. 119, Morgan Dep. Tr. 178:5-12.

Mr. Morgan's concession is not surprising, since Mr. Cooper based the shape of the *Illustrative Plan* on the *BOE Plan*—the *Illustrative Plan* follows similar county, precinct, and municipal lines as the *BOE Plan*. Doc. 107, 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 id*. at 136:24-38, 144:13-14 (discussing how the "*Illustrative Plan* splits Sandy Creek precinct as the [*BOE Plan*] does").

Moreover, two-thirds of the perimeter for District 5 follows already existing political lines in Fayette County. Ex. 9, Cooper Decl. ¶¶ 36-38; Ex. 10, Cooper Suppl. Decl. ¶¶ 3, 11-12; Ex. 11, Cooper Second Suppl. Decl. ¶¶ 18-19, 23-25, 36; Doc. 107, Cooper Dep. Tr. 70:11-13, 106:17-18, 134:1-6, 136-38, 144:13-145:23, 157:22-24, 190:4-11, 258:12-15, 273:8-14; Ex. 13, Morgan Decl. ¶ 39; Ex. 14, Morgan Suppl. Decl. ¶ 13; Doc. 119, Morgan Dep. Tr. 178:5-12. Specifically, the "northeast and northern tier of District 5 follows the Clayton and Fulton County lines," and that "[m]uch of the remaining perimeter of [District 5] follows the [*BOE Plan*] boundaries, precinct lines, or parts of the city limits of Fayetteville and

Tyrone." Ex. 9, Cooper Decl. ¶ 37. 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.[4]

Second, the *Illustrative Plan* satisfies *Shaw* because there is a strong basis in evidence that remedial District 5 is necessary for Section 2 compliance. Plaintiffs' *Illustrative Plan* seeks to remedy County Defendants' dilutive electoral scheme 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"). Mr. Cooper created the *Illustrative Plan* "within the context of a Section 2 lawsuit," and used race as "one consideration of many," but not as the "dominant and controlling

[4] The race consciousness of plaintiffs' demographer, Mr. Cooper, in a vote dilution claim is a recognized consideration, given that plaintiffs seek a remedy that has a majority-minority district. *See Bush v. Vera*, 517 U.S. 952, 958 (1996) (O'Connor, J., principal opinion) ("Strict scrutiny does not apply merely because redistricting is performed with consciousness of race"). Thus, County Defendants' strategy of proving Mr. Cooper's racial motive, *see generally,* Doc. 108-1, County Defs.' Statement of Facts, is unpersuasive, as it is only when a demographer uniformly gives short shrift to other traditional redistricting criteria that race is considered predominant at an impermissible level. *Shaw*, 517 U.S. at 907. In addition, remedial plans, such as District 5 here, are not required to be completely cabined by traditional redistricting criteria, *i.e.*, splitting some precinct lines does not establish that race predominated nor does protecting some, but not all incumbents, prove that race predominated. *See Askew v. City of Rome*, 127 F.3d 1355, 1376-77(reaffirming that a "Section 2 district that is reasonably compact and regular, taking into account traditional districting principles such as maintaining communities of interest and traditional boundaries, may pass strict scrutiny without having to defeat rival compact districts designed by plaintiffs' experts in endless beauty contests."), *reh'g denied*, 136 F.3d 1333 (11th Cir. 1998). In this case, there is ample support that race did not predominate over all other considerations.

consideration," to "remedy racial discrimination." Ex. 10, Cooper Suppl. Decl. ¶¶ 4, 11; Ex. 11, Cooper Second Suppl. Decl. ¶ 36; *see also* Doc. 107, Cooper Dep. Tr. 148:10-13.

Shaw protects this "'compelling' interest in engaging in race-based redistricting to give effect to minority voting strength" if there is a "'strong basis in evidence' for concluding that such action is 'necessary' to prevent [an] electoral districting scheme from violating the [VRA]." *Johnson v. Miller*, 864 F. Supp. 1354, 1381 (S.D. Ga. 1994) (quoting *Shaw v. Hunt*, 861 F. Supp. 408 (E.D.N.C. 1994)), *aff'd*, 515 U.S. 900 (1995).

Thus, County Defendants' reliance on the *Shaw* defense that race predominated in the creation of Plaintiffs' *Illustrative Plan* should be rejected as a matter of law. *See, e.g.*, *Easley v. Cromartie*, 532 U.S. 234 (2001) (finding clearly erroneous a district court's determination that race rather than politics predominated—as evidenced by the district's shape, its split towns and counties, and high Black voting-age population—in statewide congressional plan); *Davis v. Chiles*, 139 F.3d 1414 (11th Cir. 1998) (reasoning that a district court holding that a judicial elections plan involved unconstitutional racial gerrymandering was clearly erroneous); *Prejean v. Foster*, 83 F. App'x 5 (5th Cir. 2003) (affirming district court's determination that state legislature's redistricting motivation was incumbency, a traditional and legitimate districting concern rather than race); *Chen*

v. City of Houston, 206 F.3d 502 (5th Cir. 2000) (affirming district court's dismissal on summary judgment of claim that race predominated in city's redistricting plan that was based, in part, on racial and ethnic data at the precinct level, contained maximum population deviation, and had four districts that were not compact).

Significantly, County Defendants' expert, Mr. Morgan, failed to consider compliance with the VRA when reviewing Plaintiffs' *Illustrative Plan*. Doc. 119, Morgan Dep. Tr. 149-151 (admitting that he failed to include compliance with Section 2 in his "exhaustive list of traditional redistricting criteria"); *see also Bush*, 517 U.S. at 952, 990-91 (assuming without deciding that a state has a compelling interest in complying with Section 2 of the Voting Rights Act) (O'Connor, J., concurring); *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 [VRA], and the redistricting principles traditionally recognized by Georgia," and the former two take precedence over the latter). Thus, while Mr. Cooper balanced traditional redistricting principles and compliance with the VRA in developing Plaintiffs' *Illustrative Plan*, Mr. Morgan neglected to consider VRA compliance at all, even though it is at the center of this case. Doc. 107, 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 within it, do not run afoul of *Shaw*.

A. There Is No Dispute of Material Fact That The Split Precincts in Plaintiffs' *Illustrative Plan* Are Not the Product of Racial Gerrymandering

While conceding that the shape of District 5, by itself, is not problematic on its face, County Defendants assert that reviewing the shape of the District *in conjunction with* the underlying makeup of the population and precinct splits "tell[s] a story of racial gerrymandering." Doc. 108-2, County Defs.' Br. at 13. This argument, too, is without merit. As Mr. Morgan himself explains, it is "really [not] possible to re-district without splitting some towns." Doc. 119, Morgan Dep. Tr. 74:5-6; *see also id*. at 95:2-8 (acknowledging that he split 10 precinct in a majority-minority congressional district in New Jersey); *id*. at 104:10-11 (acknowledging that he split a precinct in his redistricting work in Connecticut); *id*. at 108:14-15, 156:16-17 (acknowledging that "there were split precincts all over Virginia in the House-redistricting plan" which he drafted portions of). Given this reality, Plaintiffs' *Illustrative Plan* splits eleven precincts,[5] and the *Commissioners' Plan*, which this Court approved in *Lindsey v. Fayette Cnty. Bd. of Comm'rs*, No. 3:12-cv-00040-TCB (N.D. Ga. Mar. 27, 2012), splits seven

[5] Mr. Cooper also used whole precincts, including Blackrock, Kenwood and Europe, in developing District 5. *See* Ex. 9, Cooper Decl. at Ex. E-1. Further, even after splitting precincts, Mr. Cooper commonly followed precinct boundaries. *Id*. at ¶ 37; Ex. 11, Cooper Second Suppl. Decl. at ¶ 19; Doc. 107, Cooper Dep. Tr. 134:1-6.

precincts.[6] Ex. 10, Cooper Suppl. Decl. ¶ 17; Ex. 11, Cooper Second Suppl. Decl. ¶ 24; Ex. 14, Morgan Suppl. Decl. ¶ 19; Doc. 107, Cooper Dep. Tr. 146:15-21.

Mr. Cooper provides legitimate, non-racial and unrefuted bases for splitting precincts—protecting incumbents and aligning the *Illustrative Plan* with the *BOE Plan*.[7] Ex. 9, Cooper Decl. ¶¶ 35, 37; Ex. 10, Cooper Suppl. Decl. ¶¶ 3, 11; Ex. 11, Cooper Second Suppl. Decl. ¶ 23; Doc. 107, Cooper Dep. Tr. 148:10-13, 157:22-24. As Mr. Cooper explained, precinct lines are "not, sacrosanct, especially when Voting Rights Act violations are at issue" and "are routinely split to protect incumbents;" in this case, precincts were split in the *BOE Plan*, the *Commissioners' Plan*, approved by this Court, *and* the *Illustrative Plan*, to protect incumbents. Ex. 11, Cooper Second Suppl. Decl. at ¶ 23; Doc. 107, Cooper Dep.

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[6] There are 36 precincts in Fayette County. Fayette County, Georgia, Community Services: Elections & Voter Registration, Voting Precincts, *available* at http://www.fayettecountyga.gov/elections/voting_precincts.htm (last visited Oct. 4, 2012).

[7] County Defendants' Brief contains numerous mischaracterizations of Mr. Cooper's testimony and other aspects of the record. For example, the record reflects that in developing plans for this case and considering split precincts, Mr. Cooper, at various points, reviewed the Census block labels for the total population *and* the Black percentages within each block. Doc. 107, Cooper Dep. Tr. 107:9-15. It is not the case that the only Census block data that Mr. Cooper reviewed was racial. Doc. 108-2, County Defs.' Br. at 14; *Cf Bush*, 517 U.S. at 974 (1996) (abandonment of precincts, a traditional districting unit, which caused substantial administrative problems, and reliance by the state on racial data on the block level drove inference that district was motivated by race).

In addition, Mr. Cooper testified that he split at least two precincts to protect incumbents, including Hopeful and Dogwood, despite the contention by County Defendants that he could only identify one precinct that he split in defense of incumbency. Doc. 107, Cooper Dep. Tr. 144:17-24, 145:15-16, 145:19-23, 151:16-20, 152:1-2; *see also* Doc. 108-2, County Defs.' Br. at 4.

Moreover, Mr. Cooper split Sandy Creek precinct to avoid overpopulation in District 5. Doc. 107, Cooper Dep. Tr. 119:8-10, 152:12-17, 257:7-12; *see also* Doc. 108-2, County Defs.' Br. at 4.

Tr. 152:1-25, 188:11:13, 257:1-21. *Cf. United States v. Vill. 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."). Finally, Mr. Cooper testified that he split precincts because he could not include the entire white population in Fayetteville and Tyrone in District 5 without ignoring the one-person, one-vote principle *and* the objective of developing a majority-minority district.[8] Doc. 107, Cooper Dep. Tr. 159:15-160:1-2.

Hence, contrary to County Defendants' assertion, the shape of Plaintiffs' *Illustrative Plan*, when viewed alongside the splitting of precincts to protect incumbency and align with the *BOE Plan*, demonstrates that Mr. Cooper did not subordinate traditional redistricting principles to race to create Plaintiffs' *Illustrative Plan.*

[8] County Defendants do not dispute that Plaintiffs' *Illustrative Plan* complies with the one-person, one-vote principle and, therefore, has an acceptable overall population deviation from the ideal district size of 5.69 percent because their Brief is silent on this redistricting principle. Ex. 9, Cooper Decl. ¶ 37; Ex. 11, Cooper Second Suppl. Decl. ¶ 26; *see generally*, Doc. 108-2, County Defs.' Br.

B. There Is No Dispute of Material Fact That Black Residents in District 5 of Plaintiffs' *Illustrative Plan* Constitute a Community of Interest

There is no genuine dispute of fact that Mr. Cooper accounted for communities of interest in developing the *Illustrative Plan*. Plaintiffs' unequivocal testimony demonstrates that a community of interest exists between Black residents of Fayetteville and Tyrone, encompassed in District 5. In particular, Black residents of District 5: (1) share a similar socio-economic status, Doc. 107, Cooper Dep. Tr. 137:17-138:22 (explaining that Cooper "looked at the socioeconomic data for the county and for . . . Tyrone and Fayetteville" and finding that both have "very similar socioeconomic profiles"); (2) attend the same public schools; (3) share places of worship and recreation; (4) are patients of the same doctors; (5) belong to the same civic, political and homeowners organizations; (6) participate in fraternity and sorority events; (7) shop together; and (8) advocate for district voting in Fayette County. Doc. 135, Lowry Dep. Tr. 33:5-35:19, 54:5-13; Doc. 138, Wright Dep. Tr. 29:19-30:1; Doc. 134, John Jones Dep. Tr. 84:1-3, 85:13-86:9, 87:4-11; Doc. 133, Alice Jones Dep. Tr. 92:11-93:17; Doc. 136, Richardson Dep. Tr. 20:11-21:23; Doc. 129, Ali Abdur-Rahman Dep. Tr. 21:18-23:19, 41:14-15; Doc. 130, Adams Dep. Tr. 50:17-51:13; Doc. 131, Clark Dep. Tr. 68:5-69:7; Doc. 132, DuBose Dep. Tr. 60:12-62:23; Doc. 128,

Aisha Abdur-Rahman Dep. Tr. 59. There is no testimony to the contrary from County Defendants.

Significantly, County Defendants concede that the residents of District 5 are politically cohesive—the calculus that is most critical in a Section 2 analysis. Mr. Cooper drew District 5 to contain neighborhoods in Fayetteville and Tyrone in which Black residents share a common political interest in the candidates that they collectively vote for, despite facing strict bloc voting against their preferred candidates by the County's majority voters. Furthermore, while County Defendants' expert, Mr. Morgan, asserts that the Black community in Fayette County constitutes three separate communities of Black individuals, Ex. 13, Morgan Decl. ¶¶ 14-17, 21-22, 48, his assertions cannot be given considerable weight by this Court, considering the method by which he reached this conclusion. Mr. Morgan, who does not reside in Fayette County, simply drove "around some of the neighborhoods in Fayette County," and did not talk to any people in the "neighborhoods … [and] houses" that he saw. Doc. 119, 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]"). Furthermore, 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. Hence, Mr.

Morgan's unsubstantiated opinion is insufficient to rebut the experiences testified to by Plaintiffs and also lived by other Black residents in Fayette County. *id.* at 145-48. In sum, there is no genuine dispute of fact that Black residents in District 5 of Plaintiffs' *Illustrative Plan* constitute a community of interest. Finally, there is no dispute of fact that Mr. Cooper, in addition to seeking to remedy the existing Section 2 violation at issue in this case, accounted for non-racial commonalities, including political cohesion,[9] when developing the *Illustrative Plan*. Ex. 11, Cooper Second Suppl. Decl. ¶ 36, Doc. 107, Cooper Dep. Tr. 136:24-137:1-6 (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").

II. PLAINTIFFS' IRREFUTABLE EVIDENCE ESTABLISHES THAT FAYETTE COUNTY'S BLACK COMMUNITY IS GEOGRAPHICALLY COMPACT

County Defendants further contend that, even if this Court finds that Plaintiffs' *Illustrative Plan* is not the product of a racial gerrymandering, "Plaintiffs have presented no evidence that the African-American community in

[9] Mr. Cooper also (1) considered block-level vote estimates from the Public Mapping Project file, (2) considered voter registration disaggregated by race at the precinct level, and (3) developed block level estimates, which he reviewed at all times while developing plans, contrary to County Defendants' contention. Ex. 9, Cooper Decl. ¶ 27, Doc. 107 Dep. Tr. 108:5-110, 139:11-140:7, 279-280:3, 282:1-3, 4-17; *see also* Doc. 108-2, County Defs.' Br. at 8.

Mr. Cooper also was aware of Plaintiffs' expert, Dr. Engstrom, racially polarized voting analysis while working on this case. *See, e.g.*, Doc. 107, Cooper Dep. Tr. 122:11-17, 142:14-19.

Fayette County is geographically compact." Doc. 108-2, County Defs.' Br. at 20. In support of its false assertion, County Defendants cite *League of United Latin American Citizens* ("*LULAC*") *v. Perry*, providing that "the first *Gingles* condition refers to the compactness of the minority population, not the compactness of the contested district." 548 U.S. 399, 433 (2006) (quoting *Bush*, 517 U.S. at 997). County Defendants' reliance on *LULAC* fails because both Plaintiffs' *Illustrative Plan*, and District 5 in particular, are geographically compact.

1. The Minority Population in District 5 is Compact

LULAC is simply no bar to this Court finding that, as a matter of law, Plaintiffs' *Illustrative Plan*, and the minority population in District 5, are geographically compact. *LULAC* concerned a challenge to a Texas legislative redistricting plan that shifted substantial portions of a cohesive majority-Latino population out of a district in favor of white voters to protect an incumbent from losing his seat. *Id.* at 423-24, 428. The state then sought to place these Latino voters into a new district in which 300 miles separated the Latino communities and the characteristics and "needs and interests" of these communities—differences in socio-economic status, education, employment, and health—were distinct. *Id.* at 424, 432, 434. On these facts, the Supreme Court concluded that Latino communities in this new district were not compact, finding that the district at issue contained "two distant, disparate communities [in which] one or both groups will

be unable to achieve their political goals." *Id*. at 434; *see also id*. at 402 (emphasizing "the enormous geographical distance separating" the Latino communities in the new district "coupled with the disparate needs and interests of these populations – not either factor alone – that renders [the new district] noncompact for §2 purposes").[10]

Unlike the Latino populations in the district at issue in *LULAC*, Black voters *in* District 5 are reasonably compact, separated only by 3.5 miles, and significantly, are joined by cohesive voting patterns such that they have the potential to achieve their political goals, and various other connections and interests. The uncontested record here demonstrates that: (1) Black residents' voting patterns in District 5 are politically cohesive in elections involving candidates to the Board of Commissioners (and Board of Education); (2) bloc voting by other members of the electorate consistently defeats Black preferred candidates, such that *no Black candidate has ever been elected* to the Board of Commissioners (or Board of

[10] Neither the *Illustrative Plan* nor District 5 within "reaches out to grab small and … isolated minority communities" which is evidence that a district is not reasonably compact. *Bush*, 517 U.S. at 979 (plurality opinion); *see also Miller*, 864 F. Supp. at 1389-90 (rejecting a proposed congressional district that, unlike in the instant case, combined minority groups "centered around four discrete, widely spaced urban centers [Atlanta, Augusta, Savannah, and Columbus] that have absolutely nothing to do with each other" in terms of economic conditions, educational backgrounds, media concentrations, commuting habits, and other aspects of life and "stretch the district hundreds of miles across rural counties and narrow swamp corridors"); *Johnson v. Mortham*, 926 F. Supp. 1460, 1472-73 (N.D. Fla. 1996) (rejecting congressional district encompassing, unlike here, four non-adjacent black populations in Jacksonville, Orlando, Daytona Beach, and Gainesville, some that were separated by 100 miles and "linked together only by narrow land bridges of white rural and small town populations" presenting administration difficulties).

Education); and (3) Black voters in District 5 could elect their preferred candidate of choice on the strength of their votes *alone*, and without any support from white voters. Doc. 110-1, Pls.' Br. in Support of Mtn. for SJ at 4-6, 28-30; *see also* Ex. 8, Engstrom Decl. at ¶¶ 17, 19-30, ; Ex. 29, Engstrom Suppl. Decl. at ¶¶ 5-13.

In addition, the record demonstrates that: (1) District 5 encompasses parts of Tyrone and Fayetteville, the two municipalities in Fayette with the highest percentages of Black residents, Ex. 9, Cooper Decl. ¶ 37, Morgan Decl. ¶¶ 15-17; (2) these two municipalities are only 3.5 miles apart from city limits to city limits, or jogging distance from one another, Ex. 11, Cooper Second Suppl. Decl. ¶ 36; (3) District 5 covers a land area of 31.2 square miles; (4) the Black population, as County Defendants' concede, is concentrated in the northern portion of Fayette County, including parts of Tyrone and Fayetteville, encompassing District 5, Ex. 9, Cooper Decl. ¶¶ 20-21; Ex. 13, Morgan Decl. ¶¶ 20-21, 37; Doc. 120, Pfeifer Dep. Tr. 39:12-18; Doc. 114, Dunn Dep. Tr. 55:22-56:6, 69:18-70:12; Doc. 117, Horgan Dep. Tr. 69:24-70:10; Doc. 112, Brown Dep. Tr. 44:19-24, 64:19-67:15; Doc. 121, Smith Dep. Tr. 53:9-25; Doc. 131, Clark Dep. Tr. 30:8-15, 31:15-20; Doc. 128, Aisha Abdur-Rahman Dep. Tr. 58:5-17; and (5) Black residents in Fayetteville and Tyrone are a community of interest for the reason discussed *supra* (I)(B).

Thus, applying the principles of *LULAC* to the facts of this case leads to the conclusion that the minority community in District 5 is compact.

2. *The Illustrative Plan is Compact*

Plaintiffs' *Illustrative Plan*, as a matter of law, is compact under any measure (*i.e.*, Reock or Polsby-Popper). Courts are not required to rely on any particular method for measuring compactness. *See, e.g.*, *Karcher v. Daggett*, 462 U.S. 725, 756 (1983) (stating that compactness requirements have been of limited use because of vague definitions and imprecise application); B. Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. Rev. 85 (1985) (reviewing measures of compactness and stating that none are accepted as definitive). To be sure, 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.

This Court, in gauging the compactness of the districts at issue in *Larios*, 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. 314 F. Supp. 2d at 1369 n.19. Moreover, the district court in *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 concept that it seems impossible to apply it in any rigorous sense in matters of law." 864 F. Supp.

at 1388 (citation and internal quotation marks omitted); *see also* Doc. 107, Cooper Dep. Tr. 134:8-10 (recognizing "there are lots of flaws and issues with compactness measures").

Thus, as *Larios* and *Johnson* demonstrate, the Reock test[11] relied on by Mr. Cooper, is a sufficient method, *by itself*, for measuring compactness. *Larios*, 314 F. Supp. 2d at 1369 n.19; *Miller*, 864 F. Supp. at 1388. Mr. Morgan concedes this point. Doc. 119, Morgan Dep. Tr. 110:23-111:6, 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,[12] and that he conducts this compactness comparison *only* when asked by clients to do so. Ex. 11, Cooper Second Suppl. Decl. ¶ 4; Doc. 119, Morgan Dep. Tr. 74:14-19; 69:7-17, 87:14-19.

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[11] 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. Doc. 107, Cooper Dep. Tr. 225:8-12; Doc. 119, Morgan Dep. Tr. 111:6-18.

[12] 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.*, Doc. 107, 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* Doc. 119, Morgan Dep. Tr. 67:3-10, 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").

Using the Reock test, the compactness of the *Illustrative Plan* compares favorably with the *Commissioners' Plan* and the *BOE Plan*. The mean Reock score for the five districts in the *Illustrative Plan* is .42; in the *Commissioner's Plan* it is .45; and in the *BOE Plan*, which as discussed, *supra*, Mr. Morgan concedes is compact, is .49. Ex. 11, Cooper Second Suppl. Decl. ¶¶ 8-9; Ex. 13, Morgan Decl. ¶ 38. The Reock score for District 5 at .31 compares favorably with that of the *Commissioners' Plan* at .45 *and* the *BOE Plan* at .43. Ex. 11, Cooper Second Suppl. Decl. ¶ 8; Ex. 13, Morgan Decl. ¶¶ 38-39; Ex. 14, Morgan Suppl. Decl. ¶ 13; Doc. 119, Morgan Dep. Tr. 178:5-12.

The *Illustrative Plan* also compares favorably under the Reock test to a number of recently adopted state and local redistricting plans in Georgia. Ex. 11, Cooper Second Suppl. Decl. ¶¶ 5-6, 22; Doc. 107, Cooper Dep. Tr. 48:21-49:4 (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 districts 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 *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. There is, therefore, no dispute of fact that using the Reock compactness test, 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.

Moreover, the compactness of Plaintiffs' *Illustrative Plan* fares well under the Polsby-Popper test[13] favored by Mr. Morgan, with the mean score for the five districts in that *Plan* at .23 and District 5 scoring at .16.[14] By comparison, the mean Polsby-Popper score for the *Commissioner's Plan* is .35, and the score for District 5 under that Plan is .51. Significantly, using the Polsby-Popper test, at 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 is as equally compact as that district under the *BOE Plan* at .39, which Mr. Morgan admits is compact.[15]

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[13] 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.,* Doc. 107, Cooper Dep. Tr. 225:16-18; Doc. 119, Morgan Dep. Tr. 111:6-25, 112:1-4.

[14] Using the Polsby-Popper test, District 5's (at .16) compactness score also compares favorably to 21 (or 11.67%) of the 2011 adopted Georgia House districts that have scores equal to or less than .16. Ex. 11, Cooper Second Suppl. Decl. at ¶¶ 8, 11 and Tbl. 1. In addition, under the Polsby-Popper test, House District 63 in Fayette County, for example, is less compact than District 5 with a score of .12. *Id.* at ¶ 11.

[15] Using the Polsby-Popper test, not only is District 2 under the *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 is equally compact.

Thus, in consistently scoring favorably on various compactness tests with the C*ommissioners* and *BOE* plans, as well as other redistricting plans and districts throughout Georgia, the record is clear that Plaintiffs' *Illustrative Plan* is compact, complies with that traditional redistricting principle, and race was not the predominant consideration in its development. *See Dillard v. Baldwin Cnty. Bd. of Educ.*, 686 F. Supp. 1459, 1465-66 (M.D. Ala. 1988) ("By compactness, *Thornburg* does not mean that a proposed district must meet, or attempt to achieve, some aesthetic absolute, such as symmetry or attractiveness . . . [G]eographical symmetry or attractiveness is . . . a desirable consideration for districting, but only to the extent it facilitates the political process.").

Finally, County Defendants suggest that some of the districts that Mr. Cooper compared the *Illustrative Plan* to might have had unique reasons that they were less compact, such as that they were adopted to comply with the Voting Rights Act. *See, e.g.*, Doc. 108-1, Cnty. Defs.' Br. at ¶¶ 18, 21-22, 49. However, the reason(s) that similar covered jurisdictions did not adopt more compact plans is irrelevant to and in no way undercuts the compactness of Plaintiffs' *Illustrative Plan*. *See Askew*, 127 F.3d at 1376-77.

CONCLUSION

Based on the undisputed material facts, this Court should deny County Defendants' Motion for Summary Judgment, and grant Plaintiffs' Motion for Summary Judgment as a matter of law.

DATED: October 4, 2012

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

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

Dated: October 4, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on October 4, 2012, I electronically filed *Plaintiffs' Response in Opposition to County Defendants' Motion for Summary Judgment* 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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