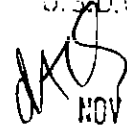


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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF GEORGIA  
ATLANTA DIVISION

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By:   
Deputy Clerk

SARA LARIOS, et al.,	)	
	)	
Plaintiffs,	)	CIVIL ACTION
	)	NO. 1:03-CV-693-CAP
v.	)	(Three-Judge Court)
	)	
CATHY COX, in her official	)	
capacities as Secretary of State and	)	
Chair of the State Election Board,	)	
	)	
Defendant.	)	

**DEFENDANT'S BRIEF IN OPPOSITION TO  
PLAINTIFFS' JOINT MOTION FOR SUMMARY JUDGMENT**

**I. INTRODUCTION**

Despite previously declaring a litany of alleged constitutional breaches, Plaintiffs now seek summary judgment on only one set of claims: their one person, one vote challenges to the current State Senate, State House, and Congressional redistricting plans.

Plaintiffs' motion is a conundrum to say the least, typified by their brief's "introduction," which serves as a substitute for a movant's more typical statement of facts. Plaintiffs initially recognize that there is no evidence to substantiate their allegation that the population deviations in the redistricting plans are caused due to an unconstitutional political gerrymander (and fail to even mention their prior

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claim of a racial gerrymander). Nevertheless, ignoring legal precedent placing the burden squarely on their shoulders to establish the unconstitutionality of the plans, Plaintiffs contend that “the numbers themselves” make invalid the population deviations present in the plans. Moreover, without any factual or legal basis, these Republican Plaintiffs assert that the plans must be set aside due to the failure of the legislature to draw plans which complied with “traditional redistricting principles,” notwithstanding the undisputed facts that there are no such principles grounded in Georgia law and, during the prior redistricting process, the Georgia Republican Party led the chorus in drawing congressional and legislative lines that followed no discernable pattern except to enhance Republican election opportunities.

Plaintiffs have concocted a scenario (also not based upon actual fact) in which Democrats got together and agreed to discriminate against Republicans by over populating “Republican districts” and under populating “Democratic districts,” resulting in further discrimination against “fast-growing areas,” “suburban areas,” and “Northern Georgia.” Nothing in this scenario equates to a violation of one person, one vote principles under any accepted legal theory. Indeed, Plaintiffs fail to articulate a single unconstitutional or illegal state policy which was the sole source of the *de minimus* deviations in the legislative plans, which is their burden to show under Supreme Court precedent. In addition,

Plaintiffs have presented no evidence to rebut Defendant's showing that the seventy-two person total deviation in the Congressional Plan was the result of a good faith effort to achieve mathematical equality and justified to avoid incursions into neighborhoods and subdivisions. The legal and factual arguments underlying Plaintiffs' motion are without merit, and their motion should be denied.

## **II. ARGUMENT AND CITATION OF AUTHORITY**

### **A. Plaintiffs Have Failed to Set Forth Any Legal Basis for Invalidating the State House and State Senate Plans.**

#### **1. Plaintiffs Ignore Their Burden of Proof for Challenging the Deviations to the State House and State Senate Plans.**

At the outset, it should be noted that Plaintiffs' one person, one vote analysis of the State House and State Senate plans incorrectly implies that Defendant must carry the burden of justification even if the total deviation is less than 10%. See Pls.' Joint Mem. In Supp. of Mot. for Summ. J. ("Pls.' Joint Mem.") at 8-9. Indeed, Plaintiffs' entire analysis is predicated on Defendant shouldering the burden of proof and Plaintiffs simply arguing that Defendant cannot carry that burden based on any "traditional and rational state policies." See id. at 8-10.

It is Plaintiffs, though, who shoulder the burden of proving an independent constitutional infringement as the reason for the deviations. See Larios v. Perdue, No. 1:03-CV-693-CAP, slip op. at 26 (N.D. Ga. Aug. 29, 2003) (three-judge court)

("[I]f the maximum deviation is less than 10%, a *prima facie* — that is rebuttable — presumption that the reapportionment plan in question is constitutional has been established. The onus lies with plaintiffs to establish the unconstitutionality of the plan." (Emphasis in original.)); see also Daly v. Hunt, 93 F.3d 1212, 1220-21 (4th Cir. 1996) ("[A]n apportionment plan that satisfies the 10% *de minimis* threshold could nevertheless be challenged under *another* theory, such as a violation of the Voting Rights Act or as an unconstitutional racial gerrymander . . . ." (Emphasis added.)); Cecere v. County of Nassau, 274 F. Supp. 2d 308, 314-15 (E.D.N.Y. 2003); Montiel v. Davis, 215 F. Supp. 2d 1279, 1286 (S.D. Ala. 2002) (three-judge court); Marylanders for Free Representation v. Schaefer, 849 F. Supp. 1022, 1032 (D. Md. 1994) (three-judge court) (citing Karcher v. Daggett, 462 U.S. 725, 740-44 (1983)).

Only a plan with larger disparities in population than 10% must be justified by the State as the product of a rational and legitimate state policy:

[W]e have held that "minor deviations from mathematical equality among state legislative districts are insufficient to make out a *prima facie* case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." [Gaffney v. Cummings, 412 U.S. 735, 745 (1973)] Our decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. See, e.g., Connor v. Finch, 431 U.S. 407, 418 (1977); White v. Regester, 412 U.S. 755, 764 (1973). A plan with larger disparities in population, however, creates a *prima facie* case of

discrimination and therefore must be justified by the State. See Swann v. Adams, 385 U.S. 440, 444 (1967) (“*De minimis* deviations are unavoidable, but variations of 30% among senate districts and 40% among house districts can hardly be deemed *de minimis* and none of our cases suggests that differences of this magnitude will be approved without a satisfactory explanation grounded on acceptable state policy.”).

Brown v. Thompson, 462 U.S. 835, 842 (1983); see also White, 412 U.S. at 764 (“[We have not held] that *any* deviations from absolute equality, however small, must be justified to the satisfaction of the judiciary to avoid invalidation under the Equal Protection Clause.” (Emphasis in original.)); Daly, 93 F.3d at 1218-22. Because the deviations in this case are less than 10%, Defendant is not required to justify the plans’ deviations. See, e.g., Marylanders, 849 F. Supp. at 1033 (stating that, for a 9.84% deviation, “the State need not justify the plan’s minor deviation”).

Plaintiffs’ attempt to place the burden on Defendant to prove that a deviation in legislative plans under 10% was in furtherance of so-called “legitimate state policies” would effectively reverse established Supreme Court precedent, which mandates that a plaintiff can rebut the presumption of constitutionality only by proving the existence of an independent constitutional or statutory violation which caused the deviation. Plaintiffs have not provided evidence of a single constitutional or statutory infringement as the reason for the deviations. Indeed, by not seeking summary judgment on their racial and political gerrymandering claims

(see Pls.' Joint Mem. at 1-2), Plaintiffs admit that no independent constitutional violation underlying the deviations can be established as a matter of law.

Accordingly, summary judgment cannot be entered for Plaintiffs on the state legislative plans.

2. *Plaintiffs' Argument Regarding Average Deviation Conflicts with Longstanding Precedent.*

The frivolity of Plaintiffs' summary judgment motion on the one person, one vote state legislative claims is shown by their attempt to posit a new theory based on "average deviation" rather than accepted precedent which examines total deviation. Plaintiffs assert that the plans have "more than double the acceptable average deviation recognized by the Supreme Court in White [v. Regester, 412 U.S., 755, 764 (1973)]." Pls.' Joint Mem. at 15 (emphasis in original). The Supreme Court, however, has never said that, when the total deviation is under 10%, average deviation in excess of 1.82% nevertheless requires justification by the State. Indeed, the "warning" Plaintiffs say the Supreme Court gave for "plans with larger deviations" was not in regards to *average* deviation, as Plaintiffs represent to this Court,<sup>1</sup> but rather in regards to *total* deviation in excess of 10%:

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<sup>1</sup> See Pls.' Joint Mem. at 8 ("Although the Supreme Court upheld a legislative plan with an average deviation of 1.82% in White v. Regester, the Court warned that plans with larger deviations 'are very likely . . . not [ ] tolerable without justification based on legitimate considerations incident to the effectuation of a rational state policy.'").

For the reasons set out in Gaffney v. Cummings[, 412 U.S. at 735] we do not consider relatively minor population deviations among state legislative districts to substantially dilute the weight of individual votes in the larger districts so as to deprive individuals in these districts of fair and effective representation. Those reasons are as applicable to Texas as they are to Connecticut; and *we cannot glean an equal protection violation from the single fact that two legislative districts in Texas differ from one another by as much as 9.9%, when compared to the ideal district. Very likely, larger differences between districts would not be tolerable without justification "based on legitimate considerations incident to the effectuation of a rational state policy,"* but here we are confident that appellees failed to carry their burden of proof insofar as they sought to establish a violation of the Equal Protection Clause from population variations alone.

White, 412 U.S. at 764 (emphasis added and citations omitted).

Moreover, contrary to the impression Plaintiffs seek to create, federal courts routinely have allowed average deviations in excess of 1.82% without requiring a justification for the deviation. See, e.g., Gaffney, 412 U.S. at 737 (upholding plan with 1.9% average deviation and 7.83% total deviation); African Am. Voting Rights Legal Def. Fund v. Villa, 54 F.3d 1345, 1357 (8th Cir. 1995) (“[C]ontrary to the assertions of the plaintiffs, the twenty-eight wards were drawn remarkably evenhandedly. They had an average deviation of 2.8% and a range of 8.3%, *neither of which is significant.*” (Emphasis added.)); Perry v. City of Opelousas, 515 F.2d 639, 641 (5th Cir. 1975) (concluding that average deviation of 2.1%

“certainly meets the population variance requirements”).<sup>2</sup> In fact, most courts in reviewing population deviation in legislative plans have not considered average deviation at all and instead have analyzed the plans according to total deviation alone. See, e.g., Daly, 93 F.3d at 1228 (8.33% total deviation is “*de minimis* because the maximum deviation is less than 10%”); Cecere, 274 F. Supp. 2d at 311 (8.94% total deviation upheld on motion to dismiss and no reference to average deviation); Montiel, 215 F. Supp. 2d at 1282 (9.78% and 9.93% total deviations upheld on summary judgment, and no reference to average deviation), aff’d, No. 02-12803, 2003 U.S. App. LEXIS 9051 (11th Cir. Feb. 21, 2003); Marylanders, 849 F. Supp. at 1033 (9.84% total deviation acceptable absent unconstitutional or irrational state purpose); Holloway v. Hechler, 817 F. Supp. 617, 623 (S.D. W. Va. 1992) (three-judge court) (9.97% total deviation upheld on motion to dismiss, and no reference to average deviation), aff’d, 507 U.S. 956 (1993).

Plaintiffs also assert that, for legislative redistricting plans, “every deviation from population equality must advance a rational state policy.” See Pls.’ Joint Mem. at 7. There is no legal basis for such a pronouncement. Plaintiffs’ contention would mean that, even where population deviations fall below 10% and

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<sup>2</sup> In Bonner v. City of Prichard, 661 F.2d 1206, 1207 (11th Cir. 1981) (en banc), the United States Court of Appeals for the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit rendered prior to the close of business on September 30, 1981.

are not otherwise a product of unconstitutional discrimination, a federal court could require the state to justify each deviation under some sort of “neutral” redistricting guideline. This would effectively reverse existing precedent which provides that, unless a plaintiff can prove a *de minimus* deviation was caused by an independent constitutional or statutory violation, the deviation complies with the Equal Protection Clause. See Cecere, 274 F. Supp. 2d at 318.

3. *The Deviations in the House and Senate Plans Did Not Arise Out of Any “Misunderstanding” of the Law or To Further Any Numeric “Goal.”*

Plaintiffs next claim that since Democratic legislators “misunderstood” that legislative plans with a deviation of  $\pm 5\%$  would be “immune from Constitutional attack,” they aimed to draw districts at the outer edges of the 10% deviation range rather than trying to get as close to zero as possible. However, while the General Assembly as a whole was certainly aware that there was a maximum range of deviation that, if exceeded, would likely be subject to legal challenge, there is no evidence that the drafters of the plans considered the 10% deviation to be a “safe harbor” that resulted in the present deviations being created through any unconstitutional or unlawful actions.

There is no question that the General Assembly was given legal guidance that deviations between  $\pm 5\%$  would generally be acceptable, guidance that was

consistent with both existing law and the deviations developed by the legislature in drawing legislative plans since the 1980's (see DSMF Exhs. 4-6). But this guidance was not accepted by just one political party. Even House Minority Leader Lynn Westmoreland candidly admitted that this had been the accepted standard among both Republicans and Democrats in the General Assembly with respect to legislative plans:

Q. With regard to – you heard from various legislators on any number of occasions during the course of reapportionment about their perceived belief that as long as you were in a plus or minus five percent, that satisfied the deviation requirement, didn't you?

A. Yes.

Q. You never heard any legislator express the view that they understood anything else about deviation requirements, did you?

A. What do you mean by – I mean –

Q. You never heard any legislator ever say that the law requires anything tighter than a plus or minus five percent?

A. No, except on the Congressional map.

Q. I apologize. All those questions I asked, really, in my mind and in your mind, we were talking about the state House and Senate, weren't we?

A. That's correct.

Westmoreland Depo. at 81-82. And, contrary to Plaintiffs' belief that the goal should have been zero deviation, even Plaintiff Johnson instructed his map drawer,

Morgan Perry, to construct districts with a deviation between  $\pm 2\frac{1}{2}\%$ , which Perry cited as the “principles I would draw by,” Perry Depo. at 37, principles that are found nowhere in the law.

Contrary to Plaintiffs’ argument, it was never a “goal” to draw the maps with a particular deviation, as long as the deviation did not exceed the outside limitation of  $\pm 5\%$ .<sup>3</sup> Senator Robert Brown, who was the principal architect of the Senate Plan,<sup>4</sup> testified that he perceived no “safe harbor” and did not have a particular deviation “goal” in mind:

Q. Did you understand that if you were within the plus or minus five percent, it was a safe harbor?

A. Safe harbor?

Q. Did you understand that as long as you were within the plus or minus five percent, you would be okay?

A. I understood that as long as we were within a plus or minus five percent, that there would be no legal violations, as far as I understood it. Now whether that’s a safe harbor, what that means, I don’t know.

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<sup>3</sup> The “goal of keeping deviations *within* the  $\pm 5\%$  standard,” Def.’s. Resp. to Pls.’ First Ints. ¶¶ 8-10 (emphasis added), does not equate to a “goal” of *attaining* a  $\pm 5\%$  deviation.

<sup>4</sup> Plaintiffs’ allegation that John Kirincich, then Executive Director of the Georgia Democratic Party, and Doug Moore, then Communications Director of the Democratic Party, were two of the principal drafters of the Senate Plan is incorrect. Moore Depo. at 36 (“The Senate plan was Robert Brown’s plan. . . I know the plan did not come from John Kirincich.”). While Kirincich lobbied for the adoption of certain plans (Kirincich Depo. at 71), none of the maps that passed the General Assembly were “Democratic Party maps,” and the party’s concepts were frequently rejected by the Democratic leadership. Kirincich Depo. at 231-234; Moore Depo. at 23-24; Brown Aff. ¶¶ 50-51; Brown Depo. at 25-26.

- Q. When you were drawing the state legislative districts, was it your understanding you could go to the plus or minus five percent for the sole purpose of increased political performance, if you wanted to?
- A. When I was drawing state districts, frankly, the plus or minus five percent was not something that was the first thing on my mind as to whether, you know – in many instances, I have drawn districts and that was the last data that was entered in as to what the percentages were. When you took into consideration a wide range of other things, individual senators preferred that the voting rights requirements and a lot of those other kinds of considerations. And when you plug that in and – deviations sometimes will end up kicking it – that particular configuration out. Sometimes you could leave it in as a result of that. So deviations was not something that I used as a benchmark for any kind of construction of a district.
- Q. Okay. So it is your testimony that when you were drawing districts that deviation was the last thing you considered?
- A. Not in all considerations – not in all instances, but it certainly was not a – in other words, I don't sit down and look at a District and say, "Okay, this district should be a plus or minus five percent, or this district should be a plus four percent or that district," and then start drawing the district. You sit down and you look at the other objectives that you may want to accomplish, including making sure of – for sure making sure that you are not violating the Voting Rights Act and all those other kinds of considerations that you may want to have, as far as that district is concerned, and then you make some decision about deviations. But your objective here is not to see what kind of deviations you can have. So, therefore, it would not be among the first things that I personally would look at.

Brown Depo. at 18-20. Brown's testimony is consistent with others' testimony that there were never any conversations which indicated any type of strategy to draw districts with certain deviations depending upon political party status.

Westmoreland Depo. at 75; Johnson Depo. at 65-67; Tyson Depo. at 113-114; Perry Depo. at 54. The two principal drafters of the House and Senate Plans, Linda Meggers and Robert Brown, are unequivocal in their statements that they never discussed manipulating any deviations so as to increase Democratic strength. Meggers Aff. ¶ 40; Brown Decl. ¶ 39.

In fact, the deviations which occurred in the House Plan were a result of the population divide between rural south Georgia (loss of population) and urban North Georgia (increase in population), incumbency, the personal preferences of individual House members, and maintaining the voting strength of majority-minority districts. Meggers Aff. ¶¶ 47-48. The same considerations affected the deviations in the Senate Plan. Brown Decl. ¶¶ 31-38. Even the Republican incumbents who lost population resisted taking on additional population in areas above which were not legally required. Perry Depo. at 24, 37-39. The fact that everyone was aware of the  $\pm 5\%$  deviation standard did not mean it was a goal; rather, it was an outside limitation the members of the General Assembly knew they could not exceed. The House and Senate districts were drawn to satisfy a variety of political, regional, incumbency, and Voting Rights Act concerns, none of which rise to a constitutional violation that requires the plans to be set aside by this Court.

4. *The Deviations in the House and Senate Plans Are Not Arbitrary or Discriminatory.*
  - a. *The Bensen and Gaddie Opinions Fail to Support Any Constitutional Violation.*

In support of their assertion that the deviations in the House and Senate Plans are “arbitrary” and “discriminatory,” Plaintiffs rely in great measure upon the reports of their experts, Clark Bensen and Keith Gaddie. Both the Bensen and Gaddie reports were fully discussed in the Brief in Support of Defendant’s Motion for Summary Judgment at 35-46, and that critique will not be repeated here. Aside from the mechanical calculations of the population deviations in each district – which are a matter of undisputed fact – the reports add nothing relevant or material to this case but merely provide the authors’ personal views of redistricting.

Plaintiffs cite to the Bensen report for the statement that the “vote of an elector in an overpopulated district carries significantly less weight than the vote of an elector in an under populated district.” Pls.’ Joint Mem. at 19. As Mr. Bensen admitted in his deposition, however, his evaluation of purported “overweighting” or “underweighting” was based *not* on population deviations – in accord with the Supreme Court’s precedents – but instead on (1) the number of registered voters and (2) the number of votes cast in particular elections. Bensen Depo. at 74-76. Mr. Bensen further admitted that this approach of comparing supposed vote

“weights” in different districts was a personal approach of his own, and did not reflect the actual practice in a single state or local jurisdiction in the United States for at least the past quarter century. Bensen Depo. at 68-74, 88-91.

The actual differences in population weightings between what Plaintiffs describe as Republican-leaning and Democratic-leaning districts – to the extent there are any such differences – necessarily must take into account the fact that no district is politically monolithic. That is not a matter of expert opinion, but a simple fact that flows necessarily and inevitably from Supreme Court rulings that make *actual population* the hallmark of one person, one vote jurisprudence. Burns v. Richardson, 384 U.S. 73, 91 (1966); see also id. at 92-93 (rejecting claim that state was required to redistrict based on registered voters); Chen v. City of Houston, 206 F.3d 502, 523 (5th Cir. 2000), cert. denied, 532 U.S. 1046 (2001) (rejecting claim that city was required to use voting age population instead of total population); Daly, 93 F.3d at 1227-28 (district court should respect state’s use of total population base for redistricting rather than imposing use of voting age population). Applying that straight-forward analysis to the applicable legal principles, any actual vote weight differences between voters in Democratic and Republican districts is, in fact, next to nothing. Epstein Rpt. at 9-13. Furthermore, what differences may have existed between voters in Republican and Democratic

leaning districts as of the 2001-02 redistrictings has diminished even further in light of the current political trends, admitted in this case by the Republican leadership. Westmoreland Depo. at 45.

Based on their expert reports, Plaintiffs also complain that “North Georgia” districts, which they allege to be faster growing, are unconstitutional where they have positive deviations. Pls.’ Joint Mem. at 20-21. Again, Plaintiffs’ entire thesis asks the Court to ignore the census population figures, and to criticize the State’s redistricting based on other much more speculative considerations. Any use of data other than census figures must be convincingly established as more accurate, and speculative future population trends cannot serve as a basis for redistricting. Burns, 384 U.S. at 91-92. Consequently, a state cannot be held to act unconstitutionally because it does not act on the basis of such speculation.<sup>5</sup>

Finally, Plaintiffs refer to the statement in the Gaddie report that the existing redistricting maps are “worse” with regard to several “traditional redistricting principles.” Pls.’ Joint Mem. at 28. However, what Professor Gaddie describes as “traditional redistricting principles” are in no way grounded in Georgia law. Those

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<sup>5</sup> Defendant would note that there is no demographic basis in either report that substantiates the *assumption* that North Georgia growth will exceed – by an unspecified amount – South Georgia population growth. While that has been the pattern of past decades, Plaintiffs simply assume that pattern will continue in an unquantified matter. Their approach provides no rational basis for redistricting. Rather, they would open the process to arbitrary projections of future population growth, which is precisely what the Supreme Court has not permitted.

“principles” are taken instead from cases that have required the judiciary to establish redistricting plans without considering the vast range of political and other considerations that legislatures are permitted under the Constitution to consider. At his deposition, Dr. Gaddie unequivocally acknowledged that his “traditional redistricting principles” were solely ones that he had found “articulated by courts when courts are doing redistricting plans.” Gaddie Depo. at 96. He further acknowledged that, while a few states may have adopted considerations like some of his “traditional redistricting principles,” no such principles have been adopted in Georgia. *Id.* at 91-93.

Putting aside the fact that Dr. Gaddie’s criticisms are both irrelevant and immaterial to the issues before this Court, even his opinions are problematic for the Plaintiffs’ theory. Dr. Gaddie opines that more county lines were crossed by Georgia’s districts in 2001-02 than before, but nothing in that statement could possibly make the present districts unconstitutional. The number of split counties for the Georgia House of Representatives increased from 72 to 80, for example. Gaddie Rpt. at 18. For Plaintiffs to suggest that that increase might conceivably raise a constitutional claim is to advance an argument devoid of any substance.

While the number of county splits in the congressional map increased substantially, unlike the House Plan, the present *legislative-drawn* congressional

plan is succeeding a *court-drawn* plan. The fact that the court-drawn plan used county boundaries as a redistricting guide cannot conceivably mean that, as a matter of constitutional law, the State of Georgia is forevermore required to emulate the court's plan. Yet that is the essence of Plaintiffs' and Dr. Gaddie's criticism. County splits increased in the Senate Plan less than in the Congressional Plan, but more than in the House Plan. As a matter of constitutional law, that is again irrelevant. Plaintiffs' argument to the contrary would mean that the Constitution stipulated the permissible number of counties that could be split. It is difficult to conceive of a more arbitrary argument, particularly in a state like Georgia where there is no restriction on the State's prerogatives to redistrict across county lines.

b. *No State Policy Exists That Prevents the Splitting of Political Subdivisions.*

Plaintiffs' position that a redistricting plan should be thrown out because it splits counties — and, therefore, purportedly violates traditional redistricting principles — ignores the very Georgia history Plaintiffs and their Republican predecessors created. As discussed more fully in the Brief in Support of Defendant's Motion for Summary Judgment, at 6-10 & 25, in the 1991-92 reapportionment cycle, Republican and African American legislators (with the aid of the Department of Justice) joined forces to draw districts with high black

population percentages and, in doing so, disregarded county lines whenever they conflicted with their racial motives.

Moreover, it should be emphasized that there is nothing inherently proper about redistricting being based on county boundaries or improper about not having such a basis for redistricting, especially considering Georgia's rapid and geographically uneven population growth in the last twenty years. See Reynolds v. Sims, 377 U.S. at 581 ("Carried too far, a scheme of giving at least one seat in one house to each political subdivision (for example, to each county) could easily result, in many States, in a total subversion of the equal-protection principle in that legislative body. This would be especially true in a State where the number of counties is large and many of them are sparsely populated, and the number of seats in the legislative body being apportioned does not significantly exceed the number of counties"); Connor v. Finch, 431 U.S. 407, 419 (1977) ("[The] policy against breaking county boundary lines is virtually impossible of accomplishment in a State where population is unevenly distributed among 82 counties, from which 52 Senators and 122 House members are to be elected"); see also Easley v. Cromartie, 532 U.S. 234, 240, 252-57 (2001) (approving redistricting plan because cities and counties were split on basis of politics, not race, and thus plan did not infringe on Constitution). In our modern age where Georgia counties are much more diverse

than before, it makes little sense to apportion people based simply on county boundaries and not take into account the numerous other relevant factors related to their mutual interests. See Meggers Aff. ¶¶ 34-36.

Finally, while Plaintiffs rely heavily on Hulme v. Madison County, 188 F. Supp. 2d 1041 (S.D. Ill. 2001), which criticized redistricting where municipal government boundaries were crossed “unnecessarily,” that case was based in large part on an Illinois law which required that such boundaries be respected. Id. at 1055. No such state law limitation exists in Georgia.

5. *Plaintiffs Have Failed to Establish Any Independent Constitutional Violation as the Reason for the Minor Deviations in the State House and State Senate Plans.*

As discussed in Section II.A.1 above, the total deviations in the State House and State Senate plans are less than 10% and, therefore, are entitled to a presumption of constitutionality. It is Plaintiffs’ burden to rebut that presumption with evidence of an independent constitutional violation that “is the actual reason for the alleged deviation.” Marylanders, 849 F. Supp. at 1032 (citing Karcher v. Daggett, 462 U.S. 725, 740-44 (1983)) (emphasis in original).

Plaintiffs admit they cannot sustain a Davis v. Bandemer claim on summary judgment, but still maintain that political considerations in general can invalidate legislative plans when deviations are at a *de minimus* level. Plaintiffs’ novel

theory of “political gerrymandering lite” is not the law and cannot serve as the basis for invalidating the challenged plans on one person, one vote grounds. As the Supreme Court has warned, to require anything less than “*unconstitutional discrimination*” in the one person, one vote context would “invite judicial interference in legislative districting whenever a political party suffers at the polls.” Davis, 478 U.S. at 132, 142 (emphasis added). From then on, whenever population deviation whatsoever existed in a plan, plaintiffs would simply convert their political gerrymandering claims into one person, one vote claims to take advantage of the more lenient standard.

Evidence of political motive must rise to a level of “invidious *discrimination*.” Daly, 93 F.3d at 1220. Mere desire to improve the electoral opportunities of a political party does not suffice, for “[p]olitics and political considerations are inseparable from districting and apportionment.” Davis, 478 U.S. at 128; Gaffney, 412 U.S. at 753; see Georgia v. Ashcroft, 123 S. Ct. 2498, 2513 (2002) (“The ability to exert more control over [the legislative] process is at the core of exercising political power.”). In fact, if the existence of political considerations were fatal in any plan without zero deviation, then no redistricting plan would ever stand.

If, as plaintiffs urge, state interest factors are relevant, not only if invoked by a state to justify a deviation rate over 10%, but also as

affirmative evidence of “bad faith” sufficient to invalidate a pure “one person, one vote” claim, the 10% rule would be rendered virtually meaningless. It would mean that any plan with a deviation rate would be subject to attack . . . . “It makes little sense to conclude [that such] variations among legislative districts [causes] any person’s vote [to be] substantially diluted.”

Cecere, 274 F. Supp. 2d at 318 (quoting Gaffney, 412 U.S. at 745-46) (brackets in original).

Plaintiffs’ reliance on Hulme v. Madison County is again misplaced. Hulme involved the unique situation of one elected official “accomplish[ing] his goals via insults, threatening and bullying other Board members.” Cecere, 274 F. Supp. 2d at 319. As was emphasized by the court in Cecere v. County of Nassau, the redistricting plans there and here are only alleged to be a work product that sought to benefit Democratic legislators, and “political motivation is constitutionally permissible in a redistricting context.” Id.

In short, Plaintiffs have alleged no facts supporting a claim that their constitutional rights have been violated by the State House and State Senate redistricting plans. They recognize that they cannot prove actual discriminatory effect as required by Davis v. Bandemer, 478 U.S. at 127. Consequently, Plaintiffs hope that the constant drum of “politics” as an alleged explanation for *de minimis* deviation will be enough to carry the day. Plaintiffs’ one person, one vote claims fail, though, when confronted with the realization that “[P]laintiff’s burden both as

to pleading and ultimate proof, is formidable when, like here, a pure 'one vote, one person' claim is advanced, devoid of any racial or other protected status claim, or of a Davis v. Bandemer political gerrymandering cause of action." Cecere, 274 F. Supp. 2d at 312.

B. The Minute Deviation in the Congressional Plan Is Justified by Legitimate State Interests.

Defendant's brief supporting her Motion for Summary Judgment, at 66-73, details the Georgia General Assembly's good-faith reliance on the Supreme Court's decisions in Abrams v. Johnson, 521 U.S. 74 (1997), and prior cases in drawing the 2001 Congressional Plan, as well as a justification for the seventy-two person deviation. Consequently, Plaintiffs cannot be entitled to summary judgment on this claim.

The degree of justification depends on the deviation, see Karcher, 462 U.S. at 741, and the total deviation in this case is a mere seventy-two persons, or 0.01%. In fact, deviations in eleven of the thirteen districts do not register to as much as a hundredth of one percent. The Affidavit of Linda Meggers shows what would have had to be done to draw the 2001 Congressional Plan from a deviation of seventy-two persons down to zero, while still maintaining a plan that had any realistic possibility of being enacted into law. In almost every district, major natural, geographical, or highway boundaries would have to be breached in order

to pick up or lose the additional people necessary to get to a perfect “zero” deviation. Moreover, even more precincts would have had to be split and small portions of many neighborhoods and subdivisions would have to be “carved out” to get to absolute equality, creating confusion among election boards and voters. Meggers Aff. ¶¶ 38-39 & Exh. A. It is irrelevant whether other congressional plans that had no hope of passage were drawn at lower deviations.

Furthermore, since Karcher the Supreme Court has set forth a number of other policies that are applicable in congressional redistricting cases. First, there is a strong policy of deference to state legislatures in devising redistricting plans. The Supreme Court has stated repeatedly that “redistricting and reapportioning legislative bodies is a legislative task which the federal courts should make every effort not to preempt.” Wise v. Lipscomb, 437 U.S. 535, 539 (1978).

Second, federal courts “should follow the policies and preferences of the State, as expressed in the statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to a state policy does not detract from the requirements of the Federal Constitution.” White v. Weiser, 412 U.S. 783, 795 (1973). Third, “[c]ourt-ordered districts are held to higher standards of population equality than legislative ones.” Abrams, 521 U.S. at 98. Because court-drawn remedial plans “are held to higher standards

of population equality than legislative ones,” it is significant that the Supreme Court in Abrams affirmed a court-drawn Georgia congressional plan with deviation *thirty times* greater than the 2001 Congressional Plan, calling the population differences in Abrams only “slight deviations.” Id. at 98-99.

### III. CONCLUSION


For the reasons set forth above, Defendant respectfully requests that the Court deny Plaintiffs’ Motion for Summary Judgment.

This 17th day of November, 2003.


Respectfully submitted,

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**Local Rule 7.1D Certification**

By signature below, counsel certifies that the foregoing document was prepared in Times New Roman, 14-point font in compliance with Local Rule 5.1B.

  
\_\_\_\_\_  
MARK H. COHEN

**CERTIFICATE OF SERVICE**

This is to certify that I have this day served or caused to be served a copy of the within and foregoing **DEFENDANT'S BRIEF IN OPPOSITION TO PLAINTIFF'S JOINT MOTION FOR SUMMARY JUDGMENT**, prior to filing the same, by email transmission and by first class mail, with adequate postage addressed thereon, properly addressed to:

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This 17th day of November, 2003.



Mark H. Cohen

FILED IN CLERK'S OFFICE  
U.S.D.C. Atlanta

*dtw*

NOV 17 2003

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

LUTHER D. THOMAS, Clerk  
By: *[Signature]*  
Deputy Clerk

SARA LARIOS, et al.,	)	
	)	
Plaintiffs,	)	CIVIL ACTION
	)	NO. 1:03-CV-693-CAP
v.	)	(Three-Judge Court)
	)	
CATHY COX, in her official	)	
capacities as Secretary of State and	)	
Chair of the State Election Board,	)	
	)	
Defendant.	)	

**DEFENDANT'S RESPONSE TO  
PLAINTIFFS' JOINT STATEMENT OF MATERIAL FACTS AS TO  
WHICH THERE IS NO GENUINE ISSUE TO BE TRIED**

COMES NOW Cathy Cox, by and through her counsel the Attorney General of Georgia, and pursuant to LR 56.1B(2), N.D.Ga., files this her Response to Plaintiffs' Joint Statement of Material Facts as to Which There is No Genuine Issue to be Tried:<sup>1</sup>

<sup>1</sup> Plaintiffs base many of their proposed undisputed Statement of Material Facts upon various proposed findings of fact and conclusions of law submitted by the State of Georgia in Georgia v. Ashcroft, No. 1:01-2111, United States District Court, District of Columbia. The proposed findings from Ashcroft were based on the record in that case and developed in light of the sole issue in that case – namely, the preservation of minority voting strength. Many of these proposed findings were not adopted as fact by the Ashcroft court. Defendant's response, therefore, is based upon the record in *this* case and any admissions made herein are supported by independent admissible evidence and not upon proposed findings made by any party in Ashcroft.

1.

Admitted.

2.

Admitted. See Defendant's Statement of Material Facts as to Which There is No Genuine Issue to be Tried ("DSMF") ¶ 27.

3.

Admitted. See DSMF ¶ 28.

4.

Admitted to the extent that the June 21, 2001 proclamation called the General Assembly into special session for the purposes of reapportioning the State Senate and House of Representatives. See DSMF ¶ 34; 2001 Ga. Laws Ex. Sess.

2. This proclamation did not mention reapportionment of the United States Congress, which was accomplished pursuant to a second proclamation. See DSMF ¶ 40; 2001 Ga. Laws Ex. Sess. 309.

5.

Admitted, with the proviso that a testimony at a number of the public hearings was orchestrated by both the Republican Party of Georgia in consultation with Plaintiffs' counsel. Johnson Depo. at 25-28; Westmoreland Depo. at 69.

6.

Admitted to the extent that the referenced dates refer to formal meetings of the committees. Various members of the House and Senate Reapportionment Committees, as well as other members of the General Assembly, frequently had informal meetings to discuss various proposed plans both prior and subsequent to formal meetings of the Committees.

7.

Admit that Plaintiffs' Exhibit 8 is a true and correct copy of the redistricting guidelines adopted by the House and Senate Committees on Congressional and Legislative Reapportionment and Redistricting. See also DSMF ¶ 31 & Exh. 4. Plaintiffs' characterization of the guidelines as procedural rather than substantive is denied; the guidelines speak for themselves.

8.

Admit that Plaintiffs' Exhibit 16 is a true and correct copy of the redistricting guidelines proposed by the House Republican Subcommittee on Congressional and Legislative Reapportionment and Redistricting, and supported by Republican legislators, and that such guidelines were not adopted by either the House or Senate Reapportionment Committees. Plaintiffs' characterization of the guidelines is denied; the guidelines speak for themselves.

9.

Admitted. See DSMF ¶ 35.

10.

Admitted to the extent that the referenced dates refer to formal meetings of the Senate Committee. Various members of the House and Senate Reapportionment Committees, as well as other members of the General Assembly, frequently had informal meetings to discuss various proposed plans both prior and subsequent to formal meetings of the Committees.

11.

Admitted to the extent that the referenced dates refer to formal meetings of the House Committee. Various members of the House and Senate Reapportionment Committees, as well as other members of the General Assembly, frequently had informal meetings to discuss various proposed plans both prior and subsequent to formal meetings of the Committees.

12.

Admitted. See DSMF ¶ 36.

13.

Admitted. See DSMF ¶ 38.

14.

Admitted.

15.

Admitted. See 2001 Ga. Laws Ex. Sess. 309.

16.

Admitted to the extent that the referenced dates refer to formal meetings of the Senate Committee. Various members of the House and Senate Reapportionment Committees, as well as other members of the General Assembly, frequently had informal meetings to discuss various proposed plans both prior and subsequent to formal meetings of the Committees.

17.

Admitted to the extent that the referenced dates refer to formal meetings of the House Committee. Various members of the House and Senate Reapportionment Committees, as well as other members of the General Assembly, frequently had informal meetings to discuss various proposed plans both prior and subsequent to formal meetings of the Committees.

18.

Admitted, with the exception of footnote 1, which is denied. See DSMF ¶ 42. The House plan passed by the General Assembly during the first special

session was vetoed by the Governor on September 26, 2001, so “HSEPLN2” (House Bill 14EX2) did not replace “CMTESUB” (house Bill 1EX1). See 2001 Ga. Laws Ex. Sess. 988.

19.

Admitted. See DSMF ¶ 44.

20.

Admitted in part and denied in part. Exhibit C to the First Amended Complaint appears to contain copies of maps which accurately depict Georgia’s current House districts. However, Exhibit C also includes a statistical summary of the individual districts which is not completely accurate, and contains a range of deviations in its summary sheet which is incorrect. A true and correct copy of the current House Plan with all correct deviations for each district and for the plan as a whole is attached as Exhibit 8 to DSMF.

21.

Admitted. See DSMF ¶ 46.

22.

Admitted. See DSMF Exh. 9.

23.

Admitted. See DSMF ¶ 49.

24.

Admitted. See DSMF ¶ 91.

25.

Admitted. See DSMF ¶ 93.

26.

Admitted. See DSMF ¶ 94.

27.

Admitted. See DSMF ¶¶ 51-53.

28.

Admitted. See DSMF Exh. 10.

29.

Admitted. See DSMF ¶ 94.

30.

Denied as stated, as the phrase “significant differences” is vague and undefined. There were both similarities and differences in the 2001-2002 redistricting process.

31.

Admitted to the extent that mapmaking has become more technologically sophisticated since the beginning of the redistricting process in the 1970's, with the most significant advancement in technology occurring prior to the redistricting process in 1991-1992. See Meggers Aff. ¶ 13.

32.

Admitted to the extent that such data became more available sophisticated beginning with the 1991-1992 reapportionment process. See Meggers Aff. ¶¶ 13-14, 16.

33.

Admitted.

34.

Denied. The State of Georgia evolved into a very competitive two-party state long before the 2001 redistricting process. See, e.g., Meggers Aff. ¶¶ 11-12, 17-21; DSMF, ¶¶ 65, 77, 89; Westmoreland Depo at 35.

35.

Denied. Reapportionment has always been an inherently partisan process, as shown by the redistricting process since the 1970's and in larger measure during the 1980's and 1990's. See, e.g., Meggers Aff. ¶¶ 9-13, 17-20. In 2001,

existing technology made it easier for both political parties to prepare redistricting plans which took into consideration political performance measures. Tyson Depo. at 52-53, 75, 87-88; Perry Depo. at 43-46.

36.

Admitted.

37.

Admitted.

38.

Denied as stated. Both political parties approached the redistricting process attempting to increase their membership in both the House and Senate. Johnson Depo. at 35, 46-47, 49-50; Perry Depo. at 17, 24, 37-39; Tyson Depo. at 52-53, 57-58.

39.

Denied as stated. The overall goal of the Democratic leadership was to maintain or increase the number of Democratic seats in the House and Senate and to comply with the Constitution and the Voting Rights Act. Declaration of Robert Brown, ¶¶ 25-26. The overall goal of the Republican leadership was to again, as they has done in the 1991-1992 process, join forces with African American

members to draw districts which would result in increases in the numbers of Republicans elected in both chambers. Johnson Depo. at 35, 46-47, 49-50.

40.

Admit that both Democrats and Republicans relied on political performance projections based upon the assessment of past election results. Tyson Depo. at 52-53, 57-58; Westmoreland Depo at 55-57; Johnson Depo. at 21-23.

41.

Admitted.

42.

Denied as stated. The guidelines of the House and Senate Reapportionment Committees in the 2001-2002 redistricting process, as the guidelines have been for the prior redistricting processes, provided that the population of legislative plans should not exceed an overall deviation of 10%, or a deviation of  $\pm 5\%$ . DSMF ¶¶ 31-32 & Exhs. 4-6. While it was not a “goal” of drawing the plans, it was understood that no plan could be drawn which did not fall within this allowable deviation. Defendant admits that the quoted portions are contained in the depositions of the person who they purport to represent, but are taken out of a larger context. Defendant admits that Doug Moore was the Communications Director of the Georgia Democratic Party but denies that he was “one of the

principal drafters of the plans.” See Moore Depo. at 24-25 (“I wasn’t the final crafter of the [Senate] map.”); id. at 36 (“The Senate plan was Robert Brown’s plan.”); id. at 42 (“I would say that two people really had their thumb print on it [the congressional plan] more than anyone – Robert Brown and Speaker Murphy and his lieutenants”).

43.

Denied. The legal basis for the admission is erroneous, since deviations under 10% are presumptively constitutional, and the burden is on the party challenging any such “minor” deviation to prove that the deviation was caused by an independent unconstitutional or illegal infirmity. In addition, Ms. Shelton is an employee of the Reapportionment Office who works under the direction of Linda Meggers, and Ms. Shelton’s “understanding” of the local redistricting process is irrelevant to the issues before the Court.

44.

Denied. There is no support for the statement that “drafters” of the legislative plans “freely” increased the deviations in order to improve Democratic political performance. The specific citation to Mr. Stanton’s deposition does not support that statement either.

45.

Admitted. See DSMF ¶ 73.

46.

Admitted, with the exception of the average deviation is 3.98%, not the “average deviation range.”

47.

Admitted.

48.

Admitted. See DMSF ¶ 84.

49.

Admitted.

50.

Denied as stated. Admit that 37 of the 56 districts in the Senate Plan (66%) and 74 of 147 districts in the House Plan (50%) have absolute deviations between 4.00% and 4.99%.

51.

Denied as stated. Voting age population (“VAP”) is not “used to measure deviation.” As a matter of fact, the VAP range from the lowest VAP to the highest VAP is (1) for the Senate Plan, 68.9% (District 27) to 83.7% (District 42), and (2)

for the House Plan 65.9% (District 50) to 87.8% (District 42). See DSMF Exhs. 8C & 10C. There is no “ideal” for VAP from which to calculate a purported “deviation.”

52.

Denied as stated. Voter registration is not “used to measure deviation.” As a matter of fact, the percentage of persons registered to vote lowest to the highest as a percentage of total population is (1) for the Senate Plan, 29.38% (District 5) to 62.76%% (District 32), and (2) for the House Plan 27.48% (District 66) to 63.96% (District 31). There is no “ideal” for persons registered to vote from which to calculate a purported “deviation.”

53.

Denied. What are “Republican-leaning” and “Democratic-leaning” districts are not specified, and those terms have variable meaning to different people and vary over time. The evidence establishes, for example, that what might have been a “Democratic-leaning” district in 2000 may well be a “Republican-leaning” district today.

54.

Denied. Brown Decl. ¶ 39; Meggers Aff. ¶ 40.

55.

Denied. Epstein Rpt., Exh. 3 to Defendant's Motion for Summary Judgment.

56.

Denied. Epstein Rpt., Exh. 3 to Defendant's Motion for Summary Judgment.

57.

Admit that a plan can be drawn as a matter of technology with less than a  $\pm 1\%$  deviation, but deny that any such plans were drawn, proposed, or introduced that had the support of a majority of legislators or that reasonably satisfied the goals of a majority of legislators. The specific plans referenced in ¶ 57 were introduced for future litigation purposes, rather than because of an expectation that they would secure a majority of the votes in the applicable chamber of the General Assembly.

58.

Admitted. See DSMF ¶ 62.

59.

Denied as stated. Many proposals were brought to the conference committee by various members of the General Assembly, but no formal introduction or vote was taken on the plan referenced by Plaintiffs.

60.

Admit that the 2001 Congressional Plan has a total population deviation of 72 persons. See DSMF ¶ 64 & Exh. 9C.

61.

Denied as stated. Defendant's response to the request for admission propounded by Plaintiff was as follows: "To the extent that a response is possible, the Defendant admits that the factors outlined above were certainly considered by some members of the General Assembly in considering reapportionment questions; and that complying with one person, one vote and the Voting Rights Act were substantial concerns of most or all members who voted for the plans at issue in 2001 and 2002." See Def's Resp. to Second Req. for Admissions ¶ 22. Furthermore, maintaining or increasing the Democratic majority was one of the purposes of some of the members of the General Assembly in voting for the House and Senate Plans, but it was not the only or principle objective. See Def's Resp. to Second Req. for Admissions ¶¶ 41, 42, 112.

62.

Denied. First, the citations to the depositions of Kirincich and Moore are not references to individuals who were the “drafters of the plans” which were enacted by the General Assembly. Moore Depo. at 23-24, 36, 42-43; Kirincich Depo. at 27, 61-62, 73, 230-231, 234; Brown Decl. ¶¶ 18, 51. Second, while race was not a predominant factor in the redistricting process, legislators were aware of the requirements of the Voting Rights Act and took care not to cause retrogression in the position of African Americans with respect to the effective exercise of their electoral franchise.

63.

Denied as stated. Defendant admits that other plans were drawn or could be drawn with both larger and smaller deviations that exist in the current plans. However, there is no evidence to conclude that any of these plans could have been enacted by the Georgia General Assembly during the 2001-2002 sessions on redistricting. Defendant denies that increasing the number of majority-minority districts is the sole determinant for measuring compliance with the Voting Rights Act. Further, the specific plans advocated by Plaintiffs and identified in ¶ 63 may well have violated the Voting Rights Act because of packing and vote dilutive aspects of those plans.

64.

Denied as stated. The determination of whether a district is “compact” is a subjective one that Plaintiffs have not defined, and the reference to all areas in all three plans is overly broad to the extent to which a subjective notion of “compactness” was a consideration varied among legislators. Overall, subjective compactness was not the dominant consideration.

65.

Denied. All districts were drawn to achieve at least point contiguity.

66.

Denied, as some political subdivisions were kept intact, while others were not. This was not a dominant goal to the exclusion of others, however.

67.

Denied as stated. The protection of incumbents was not a formal redistricting guideline. DSMF Exh. 4. However, certain districts were drawn in a manner so as to protect a particular incumbent, and there were what were generally perceived to be “safe” districts drawn to assist both Republicans and Democrats in their reelection efforts.

68.

Admitted.

69.

Denied as stated. Defendant is unable to check the accuracy of the statement, since it cannot be determined how Plaintiff is counting the combinations of representatives in multi-member districts.

70.

Denied. The term “cores of existing districts” is vague and undefined. Moreover, substantial portions of the populations of many districts were in fact continued on successor districts. That is apparent from the maps themselves and the testimony of Linda Meggers and Senator Robert Brown that the keep of incumbents’ existing areas was one of the factors that affected the drawing of the plans.

71.

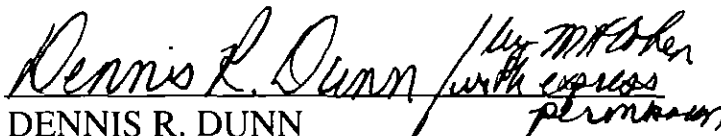
Denied as stated. The term “communities of interest” is vague and a characterization that Plaintiffs have failed to define. Defendant would note that Plaintiff Johnson’s line drawer could identify no such thing as a “community of interest,” other than using the phrase as a synonym for city or county boundaries. Perry Depo. at 32-35.

This 17th day of November, 2003.


Respectfully submitted,

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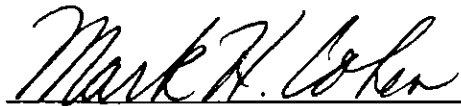
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Attorneys for Defendant

**Local Rule 7.1D Certification**

By signature below, counsel certifies that the foregoing document was prepared in Times New Roman, 14-point font in compliance with Local Rule 5.1B.

  
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Mark H. Cohen

**CERTIFICATE OF SERVICE**

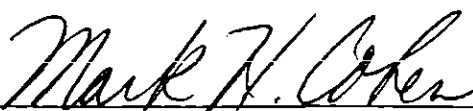
This is to certify that I have this day served or caused to be served a copy of the within and foregoing **DEFENDANT'S RESPONSE TO PLAINTIFFS' JOINT STATEMENT OF MATERIAL FACTS AS TO WHICH THERE IS NO GENUINE ISSUE TO BE TRIED**, prior to filing the same, by email transmission and first class mail, with adequate postage addressed thereon, properly addressed to:

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This 17th day of November, 2003.

  
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