IN THE

SUPREME COURT OF VIRGINIA

Record No. 021004

Governor Mark R. Warner, et al.,
Defendants,

and

S. Vance Wilkins, Jr., Speaker of the House of Delegates, et al.,
Defendants-Appellants,

v.

Douglas MacArthur West, et al.,
Plaintiffs-Appellees.

On appeal from the Circuit Court for the City of Salem

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION AND AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA IN SUPPORT OF APPELLEE

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INTEREST OF AMICI CURIAE

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with nearly 300,000 members that is dedicated to defending the principles of liberty and equality embodied in the Constitution and this nation's civil rights laws. As part of that commitment, the ACLU has been active as amicus in defending the equal right of racial and other minorities to participate in the electoral process. The ACLU has participated, or provided representation to plaintiffs, in numerous voting cases involving the electoral processes throughout the country. See, e.g., Hunt v. Cromartie, 532 U.S. 234 (2001) (participation as amicus); Abrams v. Johnson, 521 U.S. 74 (1997); Miller v. Johnson, 515 U.S. 900 (1995); Busbee v. Smith, 549 F. Supp. 494 (D.D.C. 1982).

The American Civil Liberties Union of Virginia, an affiliate of the ACLU, has been involved in numerous cases involving voting rights in the Commonwealth of Virginia. See e.g., Moon v. Meadows, 952 F.Supp. 1141 (E.D.Va. 1997); Simpson v. City of Hampton, 919 F.Supp. 212 (E.D.Va. 1996), Smith v. Brunswick County Bd. of Supervisors, 984 F.2d 1393 (4th Cir. 1993); Irby v. Virginia State Bd. of Elections, 889 F.2d 1352 (4th Cir. 1989); McDaniels v. Mehfoud, 702 F.Supp. 588 (E.D. Va. 1988); Neal v. Coleburn, 689 F.Supp. 1426 (E.D.Va. 1988); Henderson v. Bd. of Supervisors of Richmond County, 1988 WL 86680 (E.D.Va. 1988); and

Neal v. Harris,837 F.2d 632 (4th Cir. 1987). It is hoped that the above experience will assist the Court in resolution of some of the issues before it.

ISSUES PRESENTED

This brief is limited to two issues. It addresses that part of the trial court ruling which construed the concept of "contiguity" in the redistricting process in a way that may create barriers to the drawing of districts that fairly represent minority voters. Second, this brief addresses those parts of the trial court's opinion that made assumptions about race and polarized voting as a basis for the reduction or dismantling of majority-minority districts.

ARGUMENT

I. THE COURT SHOULD NOT ADOPT THE TRIAL COURT'S STANDARDS OF "CONTIGUITY."

The concept of contiguity for legislative districts has a long history and is generally accepted as a traditional redistricting criterion in the United States. Shaw v. Reno, 509 U.S. 630, 639 (1993). Indeed, the infamous district attributed to Massachusetts Governor Elbridge Gerry that gave rise to the term "gerrymander" may have been oddly shaped for its time, but it was at least contiguous. Contiguity has never been considered to be mandated by the U.S. Constitution, Shaw v. Reno, 509 U.S. at 647; Gaffney v. Cummings, 412 U.S. 735, 752, n. 18 (1973); White v. Weiser, 412 U.S. 783 (1973), but it is now

embraced as a state constitutional custom or requirement in Virginia. Va. Const. Art. II, 6; Jamerson v. Womack, 244 Va. 506, 517, 423 S.E.2d 180 (1992) (describing "compactness" in the constitution's language of "[e]very electoral district shall be composed of contiguous and compact territory" as a "constitutional requirement"). The dispute is this case is over an interpretation of that requirement, not whether it is a valid concept that should be applied in redistricting.

To date the Commonwealth of Virginia has used a pragmatic application of contiguity in redistricting. In consideration of the tidewater area's geographic uniqueness, water contiguity -- by which sections of legislative and congressional districts have been considered contiguous only because they are connected by bodies of water -- has been used for decades.

The ACLU supports the requirement of election districts being contiguous. But the court's interpretation of the contiguity requirement may unnecessarily hinder the ability to draw districts that otherwise meet the requirements of the state and federal constitutions and the Voting Rights Act. In essence, the court held that unless one can reach all parts of a district without having to travel into another district, the district is not contiguous. When districts can be drawn that meet the standards of equal population, avoiding minority vote dilution, are compact and contiguous, etc., there should be no additional

absolute barrier based on the happenstance of where bridges are placed or how highways curve. Convenience of travel within a district is properly taken into account, but a traffic detour should not trump voting rights and other state and federal interests in drawing districts. This is especially true in light of the geographic reality of Virginia's tidewater area.

A. The trial court's definition of "contiguity" to include ease of travel is not capable of uniform application to all districts and unduly restricts the ability to draw constitutional districts.

After surveying a variety of sources for the meaning of contiguity, the trial court adopted two standards for assessing whether the legislative plan violated the contiguity requirement of the state constitution. First, it ruled that "a district is considered contiguous if every part of the district is accessible to all other parts of the district without having to travel into a second district." Amended Opinion (AM), at 16. Stated otherwise, a perfectly square district is not "contiguous" if the happenstance of roads requires one to travel outside the edge of the district to get to a part of the district. Second, it rejected "water contiguity" as sufficient to meet the contiguity requirement of Article II, sec. 6. Instead, it fashioned a test of whether there exists "reasonable opportunity for travel within the district," as a constitutional criterion. AM at 16.[1] In

[1] The trial court described this criterion of "a reasonable opportunity for travel within the district" as a "critical

applying the latter, however, the trial court imposed an impossibly strict standard that would vitiate almost all legislative districts.

The reach of these holdings is illustrated in the trial court's rejection of Senate District 2. The court invalidated this district holding that "reasonable access to all parts of the district" was absent because motor vehicle access between parts of the district required a four to five mile trip across a beltway. AM 18. In contrast, Jamerson rejected compactness challenges to districts that were 145 and 165 miles in length. The holding that a five mile trip "creates an unreasonable burden on the access of [] citizens to their senator," AM at 18, is an overly rigid and essentially standardless criterion. Because rural districts are unavoidably more spread out than urban districts, rural residents are subjected to far heavier "burdens" of travel than Senate District 2. A five mile trek cannot rationally be deemed an "unreasonable burden" when compared to much longer travel required to campaign elsewhere in Virginia.

Reasonable access to travel within a district is a legitimate and worthy goal, but it should not be elevated to a constitutional requirement, at least not in the manner applied by

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element of contiguity that Jamerson affirmed..." AM at 16. Though Jamerson did discuss some of the evidence regarding a candidate's ability to communicate at the far end of a district, there is nothing in Jamerson that even suggests that such issue was before the Court.

the trial court.

B. The happenstance of the location of roads should not be used as a barrier to uniting minority communities into legislative districts.

Representation of communities and the ability to provide racially fair representation should not always depend upon the vagaries of transportation. Though a valid criterion, the inability to drive through a district should not be used to block the creation of a district that otherwise meets redistricting criteria including compliance with the Voting Rights Act.

In the view of the trial court, unifying a community into a district is improper if, generously put, there is a minimal burden in traveling within the district.

The unfortunate reality is that freeways, rail lines and other traffic barriers have often been located in poor and minority communities because they have typically contained the most affordable land. Though freeways often connect disparate communities, they also frequently divide existing communities. It would be a painful irony to hold that a minority community, split by a multi-lane freeway with no local exits or underpasses, could not be united in a legislative district because of the existence of that traffic barrier. This Court should reject such a rule.

Structures designed to facilitate commerce or to connect larger communities were often built at the expense of the

communities through which they were constructed. Designed to facilitate travel for some, they often made travel within communities more difficult. Rural or suburban freeways with no exits or underpasses for miles are common. And this country has an unfortunate history in urban areas of using such barriers to foster racial segregation, or create buffer zones to slow down integration. Freeways effectively divide communities geographically. But that does not mean the people on both sides of the barriers cease to share common interests that are legitimate concerns for legislative representation.

Over time, of course, such barriers can play a role in altering communities and bring about a real difference on either side of the divide. At least since the 1961 publication of Jane Jacobs' The Death and Life of Great American Cities, city planners have been aware that the placement of freeway exits, the blocking off of streets, the construction of streets that are not pedestrian friendly, etc., not only affect communication within communities but can destroy neighborhoods and whole communities. These structures, designed for travel, affect commercial and residential development in ways intended and unintended.

The ability to travel within a district, to reach constituents and vice versa, is a legitimate concern. But in urban areas, it has almost no weight. The most difficult urban terrain involves less travel than any rural district. Amici urge

the Court to reject the trial court's holding that contiguity is only present if a resident can travel the whole district without leaving the district. Amici further urge the Court evaluate the findings of the trial court regarding "unreasonable burdens" in the districts under challenge, and either reverse or vacate and remand for further findings.

II. THE TRIAL COURT'S CONCLUSION THAT CERTAIN DISTRICTS ARE TOO HIGH IN MINORITY PERCENTAGES IS BASED ON IMPROPER ASSUMPTIONS CONTRARY TO THE PRECEDENTS OF THE UNITED STATES SUPREME COURT, AND MAY RESULT IN THE DIVISION OF NATURALLY EXISTING MINORITY COMMUNITIES.

Where, as here, challenges alleging packing of minority voters depends on evidence of voter behavior, reliable evidence of voter behavior must be provided. The trial court repeatedly reached conclusions based on race, without reciting evidence to support those conclusions. This lack of fact finding is more accurately described as making assumptions based on race.

A. The district court made improper assumptions about racially polarized voting.

Courts should not engage in assumptions based on race, and more specifically, the United States Supreme Court has warned against assuming the existence of racially polarized voting, insisting on evidence of such voting behavior. Thornburg v. Gingles, 478 U.S. 30, 46 (1986). The trial court invalidated districts by simply reciting that districts that were more than 54 to 56% African American in voting age and repeatedly elected minority supported candidates by more than 60% were

unconstitutionally packed with minority voters. AM at 36, 45.[2] Such conclusions, if supported by underlying evidence of racially polarized voting, could be sustainable. But the opinion does not discuss or otherwise rely on facts that would support findings of racially polarized voting.

Amici have not plumbed the record for the presence of underlying facts. That role is properly left to the parties. The end result of the opinion below may very well be defensible. But on its face the opinion holds that if candidates from districts in which African American are the majority are winning by big margins, there must be too many African Americans in the district. This is simply applying a mandate that majority African American districts should be invalidated if they are "too black." That kind of racial assumption violates the fourteenth amendment and would allow the division of cohesive African American communities that occur naturally on the geographic landscape. The Supreme Court has made clear that "the Constitution does not place an affirmative obligation upon the legislature to avoid creating districts that turn out to be heavily, even majority, minority." Hunt v. Cromartie, 532 U.S. 234, 249 (2001)(emphasis in original).

[2]Exceptions were House Districts 63 and 75 both of which had BVAPs higher than 56%, but which elected white Democrats. The court assumed the incumbents were candidates of choice of the majority-minority voters but rejected the challenge for lack of evidence. AM 38.

Without proof of the existence or absence of racially polarized voting, merely reciting the racial makeup of a district and the margin of victory of the winning candidate tells us little or nothing about whether the district is "packed" with minority voters. Nonetheless, the trial court repeatedly relied on these two pieces of information to invalidate districts. In only one instance, in discussing Senate District 2, AM at 30, does the court mention evidence of racially polarized voting.[3] Evidence about how voters vote differently correlated with race may provide a basis for concluding that a legislature may have packed a high percentage of minority voters into a district in

[3]It found the presence of racially polarized voting in Senate District 2 to be sufficient "to usually prevent a minority candidate of choice from being elected." AM at 30. Inconsistently, the trial court found that no minority preferred candidate lost in the district in the last decade and that "the minority candidates of choice in Senate District 2 received 64.1% of the vote in 1992 and 80.1% of the vote in 1999 with a BVAP in the district of 54%." AM at 35. The trial court invalidated the district on other grounds, AM at 49, but in the only effort to assess whether racially polarized voting proved or disproved the justification for the size of the African American population in a district, the court made irreconcilable findings.

order to dilute their voting strength elsewhere. Such evidence is not reflected in the opinion of the trial court.

B. The trial court improperly assumed that the degree of racially polarized voting is uniform throughout all majority-minority districts.

Drawing on evidence from expert witnesses, the trial court embraced a rule of thumb that if minority-supported candidates won 60% of the vote, a presumption of packing was justified. AM at 35, 37, 45. Laying aside the problematic terminology of "presumption" rather than "inference," what the court did in reality was make an assumption about voter behavior in multiple districts. Challenges to election districts are required to be dealt with individually. It is incorrect to assume that the degree of racially polarized voting is the same in separate districts; and it is impermissible to average voter behavior among districts and draw a conclusion that certain districts are invalid based on that average. Thornburg v. Gingles, 478 U.S. at 59, n. 28. The trial court's methodology ignores the reality of differences in racially polarized voting among districts. It was error for the court to assume that racially polarized voting was uniform throughout the Commonwealth based on margins of victory.

C. The trial court improperly assumed that all winners in majority-minority districts are the "candidates of choice" of the minority community.

The trial court repeatedly refers to election winners in

majority-minority districts as "candidate[s] of choice of the minority community." E.g., AM at 44. But the trial court's opinion does not contain any analysis of vote returns or lay testimony to establish who African American voters actually supported. If there is such evidence in the record, the trial court gives no indication of relying on it, merely reciting the racial makeup of the district and the margin of victory as establishing that the winner was supported by African Americans voting along racial lines. This is insufficient fact finding.

CONCLUSION

For the foregoing reasons, amici respectfully urge the Court to vacate the opinion below and remand for further findings of fact.

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CERTIFICATE OF COMPLIANCE WITH Rule 5:26

Pursuant to Rule 5:26, the undersigned counsel for amici curiae hereby certifies that on this 1st day of July, 2002, twenty copies of the foregoing brief were filed by hand with the Clerk of the Supreme Court of Virginia, and three copies were sent by U.S. mail, postage pre-paid to the following counsel of record:

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