IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

Governor Mark R. Warner by substitution for Governor James S. Gilmore, III, Lt. Governor and President of the Senate John H. Hager, Acting Attorney General Randolph A. Beales, Speaker of the House of Delegates S. Vance Wilkins, Jr., Senate Majority Leader Walter A. Stosch, House Majority Leader H. Morgan Griffith, Senator Kevin G. Miler, Delegate John H. Rust, Jr., Delegate S. Chris Jones, State Board of Elections Secretary Cameron P. Quinn, all in their official capacities,

Defendants and also Appellants except for Gov. Mark R. Warner, Former Lt. Gov. John H. Hager, and former Acting Atty. Gen. Beales.

v.

Douglas MacArthur West, Albert Simpson, Nanalou Sauder, Ruby Tucker, Shirley N. Tyler, Shanta Reid, John Mumford, Sam Werbel, Collins Howlett, Ira. J. Coleman, Maryann Coleman, Carl Waterford, Regina Harris, Herman L. Carter, Jr., Grindly Johnson, Rosa Byrd, Harold A. Brooks, Elijah Sharp, III, Herbert Coulton, Delores L. McQuinn, Richard Railey, Jr., Vincent Carpenter, Leslie Byrne, L. Louise Lucas, Yvonne Miller, Henry Marsh, Henry Maxwell, Mary Margaret Whipple, Bill Barlow, Bob Brink, C. Richard Cranwell, Viola Baskerville, Flora Crittenden, Mary T. Christian, L. Karen Darner, Jay W. DeBoer, R. Creigh Deeds, Franklin P. Hall, Robert D. Hull, Thomas M. Jackson, Jr., Jerrauld C. Jones, Kenneth R. Melvin, William P. Robinson, Jr., Marian Van Landingham, Mitchell Van Yahres, Clifton A. Woodrum,

Plaintiff-Appellees.

RECORD NO. 021003

ON APPEAL FROM THE CIRCUIT COURT FOR THE CITY OF SALEM

BRIEF OF *AMICI CURIAE*
THE DKT LIBERTY PROJECT, THE CENTER FOR VOTING AND DEMOCRACY, AND CAMERON BARRON
IN SUPPORT OF PLAINTIFF-APPELLEES

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The DKT Liberty Project ("Liberty Project"), the Center for Voting and Democracy ("Center"), and Cameron Barron (collectively, *"Amici"*) respectfully submit this brief as *amici curiae* in support of the Plaintiff-Appellees in accordance with Virginia Supreme Court Rule 5:30(a)(2). As indicated in the letters accompanying this brief, all parties have consented in writing to its filing.

INTEREST OF *AMICI CURIAE*

As Thomas Jefferson warned, "the natural progress of things is for liberty to yield and government to gain ground." Mindful of this trend, the Liberty Project was founded in 1997 to promote individual liberty against encroachment by all levels of government. The Liberty Project is a not-for-profit organization that advocates vigilance over regulation of all kinds, especially restrictions of individual civil liberties such as the right to vote because such restrictions threaten the reservation of power to the citizenry that underlies our constitutional system. To help preserve these essential rights, the Liberty Project advocates for the rights of individual Americans to choose the officials who will represent them. Increasing electoral fairness and providing voters with meaningful options to select public officials — rather than granting advantages to the re-election of incumbent officeholders — is a paramount goal of the Liberty Project and at the heart of its mission.

The Center is a non-partisan, non-profit corporation incorporated for educational purposes. The Center researches and distributes information on electoral systems that promote full voter participation and fair representation, particularly alternatives that will enable more voters to elect candidates of their choice than in traditional elections. The Center's mission is founded on the belief that implementing such voting systems would: restore vitality to our democracy; ensure fairer representation of our society's diversity in elected bodies; and assist

local, state, and national governments in solving the complex problems facing our nation. The Center has been active in encouraging government officials, judges and the public to explore systematic alternatives to the use of territorial districting.

Cameron Barron, an Organizer of the Tenants and Workers Support Committee in Alexandria, Va., is an African-American who resides and votes in Alexandria City. He is a member of Senate District 30 and House District 49, the latter of which is at issue in this case.

This case directly and fundamentally implicates the ability of Virginia citizens to participate in fair elections and have meaningful electoral choices. Because Mr. Barron is a Virginia citizen whose ability to vote will be directly affected by the outcome of this case, and because both the Liberty Project and the Center have strong interests in protecting such rights and opportunities for all citizens, *Amici* are well-situated to provide this Court with additional insight into the issues presented.

INTRODUCTION

Amici submit this brief in support of Plaintiff-Appellees and the decision of the Circuit Court below. *Amici* support Plaintiff-Appellees' arguments with respect to the Defendant-Appellants' contention that the Circuit Court erroneously applied strict scrutiny to their racial gerrymandering claims. *See* Def.-App. Br. at 32-39. *Amici* write separately, however, to address and counter Defendant-Appellants' second argument alleging error in the Circuit Court's finding of racial gerrymandering – specifically, their contention that the General Assembly's plan survives strict scrutiny because avoiding retrogression in order to obtain preclearance under Section 5 of the Voting Rights Act of 1965 is a compelling state interest. *Id.* at 39-44.

Defendant-Appellants' contention that the avoidance of retrogression is a compelling state interest is beyond dispute. In order to survive strict scrutiny, however, a defendant must show *both* that avoidance of retrogression is a compelling interest *and* that the plan adopted by

the legislature is narrowly tailored to achieve that interest. *Shaw v. Reno*, 509 U.S. 630 (1993). Here, the General Assembly's attempt to avoid retrogression through racial gerrymandering was not narrowly tailored because it unnecessarily violated virtually every other statutory and constitutional principle of redistricting, such as contiguity and compactness. Instead, the General Assembly – like other legislatures around the country – could have implemented alternative voting mechanisms in multimember districts to achieve the same goal in a firmly constitutional manner. As demonstrated below, the use of alternative voting mechanisms – *e.g.*, limited voting, cumulative voting and/or preference voting – in multimember districts completely avoids retrogression in minority voting strength because *all* communities of interest have enhanced opportunities to elect candidates of choice under such plans. With the use of such mechanisms, moreover, traditional districting criteria such as the contiguity and compactness required by the Virginia Constitution easily can be preserved. Contrary to the contentions of Defendant-Appellants, the General Assembly thus can fully adhere to such requirements while at the same time steering clear of potential equal protection or Voting Rights Act deficiencies. The Circuit Court's determination that the failure to do so here required entry of an injunction enjoining implementation of the General Assembly's redistricting plan therefore must be affirmed.

STATEMENT OF THE CASE

A. Background

Plaintiff-Appellees initiated this action on June 26, 2001 against then-Governor James S. Gilmore, III, Lieutenant Governor John H. Hager, Acting Attorney General Randolph A. Beales, Secretary of State Board of Elections Cameron P. Quinn, and six members of the General Assembly. The Complaint alleges, *inter alia*, that the General Assembly's 2001 state redistricting plan constitutes racial gerrymandering in violation of the Virginia Constitution because certain House and Senate districts do not consist of "contiguous and compact" territories

or follow traditional districting principles. On March 11, 2002, Salem Circuit Court Judge Richard C. Pattisall agreed, finding that that the plan violates constitutional requirements for compactness, contiguity, and racial equity.[1] Accordingly, the court ordered new districting plans to be devised for a special 2002 election for the House of Delegates and a 2003 election for the Senate. On April 26, 2002, Attorney General Jerry W. Kilgore filed a petition for appeal with this Court. On May 28, 2002, the petition was granted and the Circuit Court's order stayed pending the outcome of this appeal.

B. Applicable State and Federal Law

1. State Constitutional Requirements

The Virginia Constitution requires legislative districts for the election of representatives to the state House and Senate to consist of "contiguous and compact territory." Va. Const. Art. II, § 6. Contiguity and Compactness are not only state constitutional requirements, but they are chief among the traditional districting principles to which all state legislatures must adhere in order to avoid a claim of racial gerrymandering under the U.S. Constitution. A. 2795.

In addition, the Virginia Constitution, like the U.S. Constitution, expressly prohibits a legislature from drawing district lines based predominantly on race. *See* Va. Const. Art. I, § 1 ("all men are by nature equally free and independent and have certain inherent rights, of which, when they enter into a state of society, they cannot, by any compact, deprive or divest their posterity; namely, the enjoyment of life and liberty, with the means of acquiring and possessing property, and pursuing and obtaining happiness and safety") and Va. Const. Art. I, § 11 ("the

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[1] Six senate districts were invalidated on the ground that they were drawn along racial lines and packed as many minority voters as possible into only a few districts in order to dilute their political influence. A. 2817. In addition, several house districts drawn along racial lines were invalidated because they packed more minorities into districts than necessary to give them a reasonable opportunity to elect a candidate of their choice. A. 2828-37.

right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged"). These equal protection provisions of the Virginia Constitution are commensurate with the Equal Protection Clause of the U.S. Constitution. *See Archer v. Mayes*, 194 S.E.2d 707, 711(Va. 1973); *Schilling v. Bedford County Mem. Hosp., Inc.*, 303 S.E.2d 905, 907 n. 2 (Va. 1983) (citing *Archer*) (noting that analysis is the same under Va. Const., Art. I, § 11 and Equal Protection Clause of Fourteenth Amendment).[2]

2. Federal Constitutional Limitations

Two federal constitutional principles animate the design and operation of the Voting Rights Act. Both emanate from the Equal Protection Clause of the Fourteenth Amendment of the U.S. Constitution, which provides that "[n]o state shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const., Amend. 14 § 1; *see also* Va. Const. Art. I, §§ 1, 11. The first of these constitutional principle is "population equality," also known as the "one person, one vote" requirement, which requires "equal representation for equal numbers of people." *Karcher v. Daggett,* 462 U.S. 725, 730 (1983). The "one person, one vote" principle is not in dispute in this case.[3]

In the 1993 landmark case *Shaw v. Reno*, the U.S. Supreme Court recognized a second constitutional voting rights cause of action for "racial gerrymandering." 509 U.S. at 657-58. There the Court held that, except in extraordinary circumstances, excessive use of race in

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[2] The court below therefore correctly found that Virginia's equal protection provision "can be no less than the protection of the 14th Amendment [of the U.S. Constitution]; thus, it is one and the same." A. 2819-20 (citing *Archer*, 194 S.E.2d at 711).

[3] Even if it were, alternative voting systems easily can be implemented in multimember districts to comply with this requirement. *See Chapman v. Meier*, 420 U.S. 1, 15 (1975) (reaffirming prior holding that States may devise apportionment plans in multimember districts to comply with one person, one vote principle); *McCoy v. Chicago Heights*, 6 F. Supp. 2d 973,

redistricting – even in an attempt to remedy minority vote dilution – is prohibited by the Fourteenth Amendment's Equal Protection Clause. *Id.* The use of race in redistricting thus is unconstitutional if race is the "predominant factor" motivating the configuration of a district. *Miller v. Johnson*, 515 U.S. 900, 915-16 (1995). Race is a "predominant factor" if a districting plan subordinates "traditional race-neutral districting principles" such as "compactness, contiguity, respect for political subdivisions, or communities defined by actual shared interests" to racial considerations. *Id*. at 916. *Shaw* and its progeny severely limit a State's ability to remedy minority vote dilution by creating single-member districts for the primary purpose of increasing a minority group's voting strength.

3. Federal Statutory Limitations

The Voting Rights Act is the principle mechanism for evaluating the legality of redistricting schemes under federal law. Section 5 of the Act places limitations on the redistricting processes of "covered jurisdictions" by requiring that these jurisdictions obtain federal "preclearance" prior to the implementation of any new redistricting plan; Section 2 advances the right to vote guaranteed by the Fifteenth Amendment of the U.S. Constitution by prohibiting the drawing of district lines that "dilute" the voting strength of minority populations.

a. The Section 5 Preclearance Requirement

Section 5 applies to nine entire States and parts of seven others. Except for Fairfax City, Frederick County and Shenandoah County, the Commonwealth of Virginia is a "covered jurisdiction" under Section 5. "Covered jurisdictions" must obtain preclearance from either the Attorney General of the United States ("DOJ") or the United States District Court for the District

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984 (N.D. Ill. 1998) ("By allowing each voter the same number of votes, cumulative voting

of Columbia before implementing any changes to voting practices or electoral districts. *Beer v. United States*, 425 U.S. 130, 133 (1976). To obtain preclearance, a State must show that a new redistricting plan does not have the purpose, and will not have the effect, of abridging a minority group's right to vote. *See* 42 U.S.C. § 1973c. Both the "purpose prong" and the "effects prong" of the Section 5 test require a showing that a redistricting plan will not have a "retrogressive" impact on the voting strength of members of a minority group. *Id.; see also Beer*, 425 U.S. at 141 (reviewing requirements of same).

b. The Section 2 Prohibition on Minority Vote Dilution

Unlike Section 5, Section 2 of the Voting Rights Act applies nationwide. It prohibits States from adopting any electoral practice or procedure that dilutes the voting strength of a racial or language minority group. 42 U.S.C. § 1973. Such dilution need not be intentional. It is sufficient to demonstrate that, in operation, a redistricting scheme has the effect of diluting the minority vote. *Thornburg v. Gingles*, 478 U.S. 30, 43-44 (1986) (*citing* Senate Report accompanying 1982 amendments to Section 2, S. Rep. No. 97-417, at 2, 15-16, 27 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205). This can occur either by "packing" a minority group into a small number of districts (depriving it of a majority in other districts), or by fragmenting the minority group so that it does not constitute a majority in any district ("fracturing" or "cracking"). *See McGhee v. Granville County, North Carolina*, 860 F.2d 110, 116 n.7 (4th Cir. 1988) (noting that "packing" or "fracturing" dilutes minority voting power).

The remedy for minority vote dilution typically has been the creation of new single-member "majority-minority" districts in which a majority of residents are members of a protected minority group. *See*, *e.g.*, *Gingles*, 478 U.S. at 42 (affirming single-member districting

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subscribes to the one-person, one-vote requirement with numeric exactness.").

remedy in Voting Rights Act challenge to multimember state legislative districts). Although single-member districts typically have been the preferred remedy for curing minority vote dilution, they are by no means the exclusive remedy. Many States instead have remedied potential Voting Rights Act violations by utilizing multimember districting plans that employ what are known as alternative voting mechanisms. *See, e.g., McCoy,* 6 F. Supp. 2d at 985 (ordering cumulative voting as remedy for Section 2 violation); *Dillard v. Town of Cuba*, 708 F. Supp. 1244, 1247 (M.D. Ala. 1988) (approving settlement involving limited voting as remedy for Section 2 violation); *Dillard v. Chilton County Bd. of Educ.*, 699 F. Supp. 870, 876 (M.D. Ala. 1988) (approving settlement involving cumulative voting as remedy for Section 2 violation), *aff'd*, 868 F.2d 1274 (11th Cir. 1989).

C. Alternative Voting Mechanisms

The Supreme Court consistently has held that multimember districts are not per se unconstitutional. Rather, it is the traditional "winner-take-all" approach that often leads to minority vote dilution in the context of multimember districts. *See, e.g., Rogers v. Lodge,* 459 U.S. 613, 616-17 (1982) (noting same); *Whitcomb v. Chavis*, 403 U.S. 124, 158-159 (1971) (same). The traditional "winner-take-all" form of at-large elections in multimember districts allows each voter to cast only one vote for each candidate, up to the number of available seats in the district. But a number of alternative voting mechanisms exist for use in multimember districts that do not employ a winner-take-all approach and thus avoid this constitutional pitfall. Three alternative voting mechanisms in particular have been employed most often by States and have received the most attention from the courts: cumulative voting, limited voting, and preference (or choice) voting.

1. Cumulative Voting

In a cumulative voting system, voters in a multimember district are given a certain number of votes that they can distribute among a group of candidates in any proportion they choose. Typically, voters receive as many votes as there are seats to fill. Voters may give all of their votes to one candidate ("plumping"), give one vote to each of several candidates, or distribute their votes in any other combination they choose. For example, in the case of an at-large district in which three seats are available, voters would be assigned three votes. They may cast three votes for a single candidate, cast one vote for each of the three candidates, or make intermediate distributions with some candidates receiving multiple votes and some candidates receiving single votes. Cumulative voting gives minority groups that vote as a bloc the option of concentrating their votes on a few candidates and ensuring their election.

In *Dillard v. Chilton County*, the court approved a settlement imposing cumulative voting as a remedy for a vote dilution claim in a multimember district. 699 F. Supp. at 876. The court focused its analysis specifically on whether the minority voters in the county would have the potential to elect the representatives of their choice, even in the face of the "worst case scenario" − the most racially polarized voting pattern. Under that scenario, it is assumed that the majority group sponsors only as many candidates as there are seats to fill and spreads its votes evenly among its candidates, with no "cross-over voting" for the minority preferred candidate. *Id.* at 874. The court found that a minority group could elect its preferred candidate in a cumulative voting system − even under the most unfavorable conditions − as long as it had a population meeting or exceeding the "threshold of exclusion."[4] If the minority population exceeds or

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[4] As an empirical matter, the threshold of exclusion is "the percentage of the vote that will guarantee the winning of a seat even under the most unfavorable circumstances," typically expressed as "1 / 1+ # of seats." *Dillard*, 699 F. Supp. at 874. An analysis of the threshold of

approaches the threshold of exclusion, cumulative voting has virtually the same effect as the creation of single-member, majority-minority districts. Because this number typically is similar to the number necessary for the creation of a single-member, majority-minority district, the two remedies generally have virtually the same effect. Accordingly, the *Dillard* court found that cumulative voting was an appropriate, alternative remedy for curing the alleged Section 2 violation. *Id.* at 875.

Cumulative voting has been used in a number of States, including Alabama, Texas, New Mexico and Illinois. *See, e.g., McCoy*, 6 F. Supp. 2d at 974 (adopting cumulative voting system for election of city aldermen and park board members in Chicago Heights, Illinois); *Dillard*, 699 F. Supp. at 876 n.7 (approving cumulative voting as proposed remedy for violation of the Voting Rights Act and noting that cumulative voting "is becoming rather common in Alabama"); Robert R. Brischetto & Richard L. Engstrom, *Cumulative Voting and Latino Representation: Exit Surveys in Fifteen Different Texas Communities*, 78 Soc. Sci. Q. 973, 974 (1997) ("By mid-1997, at least fifty-seven local governments in five states had adopted cumulative voting to elect their legislative bodies."); Richard L. Engstrom, *Modified Multi-Seat Election Systems as Remedies for Minority Vote Dilution*, 21 Stetson L. Rev. 743, 757 (1992) (describing the use of cumulative voting in Peoria, Ill.); Richard L. Engstrom, et al., *Limited and Cumulative Voting in Alabama: An Assessment After Two Rounds of Elections*, 6 Nat'l Pol. Sci. Rev. 180, 185-189 (1997) (describing the use of cumulative and limited voting by localities in Alabama since 1988); Pamela S. Karlan, *Maps and Misreadings: The Role of Geographic Compactness in Racial Vote*

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exclusion can be undertaken with respect to any alternative voting mechanism and the details of the chosen voting mechanism (such as the number of counties and thus the number of seats at stake) can be tailored to fit the actual characteristics of the district in question.

Dilution Litigation, 24 Harv. C.R.-C.L. L. Rev. 173, 233 (1989) (describing the use of cumulative voting in city council elections in Alomogordo, New Mexico).

Illinois has more experience than any other State with cumulative voting. In 1870, the Illinois Constitutional Convention adopted cumulative voting for elections of representatives to the Illinois General Assembly. Illinois Assembly on Political Representation and Alternative Electoral Systems, Executive Summary, at 15 (Spring 2001) ("Illinois Assembly Executive Summary"). Cumulative voting remained in effect in Illinois Assembly elections until 1982. *Id.* at 17. During the two decades of using single member districts that have followed, Illinois voters have had fewer electoral choices, voter turnout has declined and it is likely that minority representation has not been as strong as it would have been if cumulative voting had been maintained. *Id.* at 18-22.

2. Limited Voting

Limited voting operates in a manner similar to cumulative voting. In a limited voting system, each voter casts one vote per candidate to fill a number of seats, but the total number of votes that each voter may cast is fewer than the total number of seats to be filled. In a three-seat district, for example, each voter may receive one vote. This limitation prevents a majority voting as a bloc from filling every available seat with its chosen candidates, thus affording minority groups the opportunity to fill the void. Because the number of votes allotted to each voter in a limited voting scheme is malleable, such schemes can be tailored to satisfy the unique circumstances of a particular district so that if a minority group votes as a bloc it will have the ability to elect its candidate of choice.

Limited voting has been court-approved for use and implemented for local elections in North Carolina, Alabama, Connecticut and Pennsylvania. *See, e.g., Moore v. Beaufort*, 936 F.2d

159, 164 (4th Cir. 1991) (approving settlement that included a multimember district with limited voting to elect Beaufort County, North Carolina Board of County Commissioners); *Orloski v. Davis*, 564 F. Supp. 526, 536 (M.D. Pa. 1983) (rejecting equal protection, State Constitution and Voting Rights Act challenges to limited voting scheme for judicial elections in Pennsylvania); *LoFrisco v. Schaffer*, 341 F. Supp. 743, 751 (D. Conn. 1972) (upholding statute calling for limited voting scheme for Boards of Education elections in Connecticut); *Kaelin v. Warden*, 334 F. Supp. 602, 609 (E.D. Pa. 1971) (upholding limited voting scheme to elect County Commissioners in Bucks County, Pennsylvania). *See also* Richard H. Pildes and Kristen A. Donoghue, *Cumulative Voting in the United States*, 1995 U. Chi. Legal F. 241, 266 (1995) ("Between twenty and twenty-three jurisdictions in Alabama use limited voting[.]"); Karlan, 24 Harv. C.R.-C.L. L. Rev. at 225 (noting that New York Court of Appeals upheld limited voting for New York City elections).

3. Preference (or Choice) Voting

Preference voting – also known as choice voting – requires voters to rank candidates in their order of preference by placing numbers on the ballot next to each candidate's name. Votes are then tallied in a series of rounds. In the first round, candidates receiving a specified percentage of first-choice votes win a seat. That percentage is the fewest number of votes that a candidate must receive to win a seat.[5] After the first round, the winning candidates' excess votes (the number received above the minimum needed to win a seat) are reassigned based on the second choice preferences of all the voters who ranked the winning candidates as their first choice. Following this reassignment, the second round of counting is undertaken and any candidate receiving more than the minimum in that round is awarded a seat. If no candidate

[5] This number is the same as the threshold of exclusion.

reaches the minimum, the lowest vote-getter in the election is disqualified and that candidate's votes are reassigned based on the second choices selected by the voters. This process of seating and disqualifying candidates in rounds of counting continues until every seat is filled.

Preference voting has been employed successfully in elections in Cambridge, Massachusetts, New York City, and at least two dozen other jurisdictions expressly for the purpose of increasing minority representation in those jurisdictions. *See* Steven J. Mulroy, *Alternative Ways Out: A Remedial Road Map for the Use of Alternative Electoral Systems as Voting Rights Act Remedies*, 77 N.C. L. Rev. 1867, 1879 (June 1999). These efforts have met with marked success. When New York City began using preference voting in 1970, for example, the number of successful African-American and Hispanic candidates increased such that the number of representatives from these minority groups nearly matched the percentages of those groups in the overall population. *Id*. at 1893. Representation for these groups also proportionally increased in elections following 1970 as their percentages of the population increased. *Id*.

SUMMARY OF THE ARGUMENT

The court below correctly found the challenged majority-minority districts created by Va. Code §§ 24.2-303.1 and 304.01 represent unconstitutional racially gerrymanders because the General Assembly "subordinated traditional redistricting principles to race in drawing district lines" but wholly failed to show that these districts were narrowly tailored to achieve a compelling state interest. A. 2838; *see also* A. 2826-36. While the goal of avoiding retrogression in minority voting strength is unquestionably a compelling interest, it is not an unfettered license to violate basic principles of equal protection. *See Bush v. Vera*, 517 U.S. 952, 983 (1996). In this case the General Assembly went too far because its chosen remedy – subordinating all traditional districting principles to race in order to create bizarrely-shaped

single-member majority-minority districts – was not necessary to further that interest and thus by definition was not narrowly tailored.[6] *See Shaw v. Reno,* 509 U.S. at 655 ("A reapportionment plan would not be narrowly tailored to the goal of avoiding retrogression if the State went beyond what was reasonably necessary to avoid retrogression.").

Instead, the General Assembly, like other state legislatures around the country, could have implemented alternative voting mechanisms in multimember districts, which are equally effective safeguards against retrogression while at the same time faithfully adherent to traditional districting principles such as compactness and contiguity. The use of such mechanisms has been proven effective in enhancing minority electoral opportunities. Indeed, several U.S. Supreme Court Justices have suggested that alternative voting mechanisms are "more efficient and straightforward mechanisms for achieving what has already become our tacit objective: roughly proportional allocation of power according to race."[7] *Holder v. Hall*, 512 U.S. 874, 912 (1994) (Thomas, J., concurring, joined by Scalia, J.). Unlike the establishment of single-member majority-minority districts, however, alternative voting mechanisms enhance minority voting strength in a wholly *race-neutral* manner, thus avoiding equal protection concerns caused when districts are drawn using race as the predominant factor.

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[6] For example, several senate districts are drawn to span large bodies of water, the result of which is the dispersal of African-American communities and combination of communities that have no meaningful means of transportation between them. A. 2805, 2819, 2820. Similarly, several house districts are drawn such that communities of interest and governmental subdivisions are ignored and that access from one area of the district to another may require traveling distances of up to 20 miles through a different district. A. 2828.

[7] The Supreme Court consistently has held that multimember districts are not per se unconstitutional, but that it is only the traditional "winner-take-all" approach to at-large electoral schemes that tends to dilute minority voting strength in multimember districts. *Rogers,* 459 U.S. at 616-17; *Whitcomb*, 403 U.S. at 158-159.

Because the use of alternative voting mechanisms in multimember districts adheres to the districting requirements of the Virginia Constitution but avoids retrogression, the General Assembly's use of racial gerrymanders and its failure to adhere to traditional districting criteria as mandated by the Virginia Constitution was wholly unnecessary and therefore patently unlawful.

ARGUMENT

I. USE OF MULTIMEMBER DISTRICTS WITH ALTERNATIVE VOTING MECHANISMS IS WHOLLY PERMISSIBLE UNDER BOTH SECTION 2 OF THE VOTING RIGHTS ACT AND *SHAW v. RENO*

Without question, Defendant-Appellants are correct that the General Assembly was required to comply with Section 2 and Section 5 of the Voting Rights Act when enacting its redistricting plan. *See* Def.-App. Br. at 40. While the attempt to avoid retrogression is indeed compelling, it "is not a license for the State to do whatever it deems necessary to continue electoral success; it merely mandates that the minority's opportunity to elect representatives of its choice not be diminished, directly or indirectly by the State's actions." *Vera*, 517 U.S. at 983 (cited in opinion below, *see* A. 2821). Here, the General Assembly far exceeded the mandate of the Voting Rights Act because it enacted a plan that was not necessary to furthering the goal of non-retrogression. On the contrary, the use of alternative voting mechanisms in multimember districts constitutes a means toward exactly the same end and, furthermore, avoids the equal protection violations that Defendant-Appellants now maintain were necessary in order to obtain preclearance.

A. Alternative Voting Mechanisms Comply With Section 2 Of The Voting Rights Act.

1. The *Gingles* Test

Section 2 of the Voting Rights Act prohibits any voting procedure that "results in a denial or abridgement of any citizen of the United States to vote on account of race or color." 42 U.S.C. § 1973. The essence of a Section 2 claim is a charge that an electoral law, practice, or structure will "interact[ ] with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Gingles*, 478 U.S. at 47. Proof of a discriminatory motive is unnecessary. Rather, a violation of

Section 2 is established by showing that, "based on the totality of the circumstances," members of a protected minority group "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b).[8]

Gingles thus establishes a "results oriented" test for evaluating when and how a State must draw district lines to enhance the voting power of a minority group. At the heart of *Gingles* is the admonition that politically cohesive minority groups may not have their voting power impermissibly "diluted" by multimember districting or at-large electoral processes that "submerge" the minority group in a constituency in which a "bloc voting majority" usually is able to defeat candidates of the minority group's choice. *Gingles*, 478 U.S. at 47-49. Minority vote dilution typically occurs in a single-member districting context when a plan fragments large concentrations of minority populations and disperses them into separate electoral districts ("fracturing" or "cracking") or, conversely, concentrates minorities into districts so that they constitute an excessive "super-majority" and thus deprives the group of voting power in multiple districts ("packing"). *See id.* at 46 n.11.

Under *Gingles,* a Section 2 prima facie case requires proof of three "preconditions:"

> (1) The minority group is large enough and located in a sufficiently geographically compact area to make up a majority in a single member district;
>
> (2) The minority group is politically cohesive; and

[8] The Senate Judiciary Report accompanying this provision (as amended in 1982) listed a number of factors that may be used to prove a Voting Rights Act violation, including the history of voting-related discrimination in the state or political subdivision; the extent to which voting is racially polarized; and the extent to which members of the minority group have been elected to public office in that jurisdiction. S. Rep. No. 97-417, at 28-29 (1982), *reprinted in* 1982 U.S.C.C.A.N. 177, 205. These factors are neither comprehensive nor exclusive. *See Gingles*, at 45.

(3) There is bloc voting by the white majority such that the minority's preferred candidate usually is defeated.

478 U.S. at 50-51. The first and second *Gingles* factors together establish that a minority group has sufficient potential to elect its representative of choice in a single-member district; the second and third factors together establish that the challenged district(s) thwarts a distinctive minority vote by cracking or packing the minority voting group, or by submerging it in a larger white voting population. *Growe v. Emison*, 507 U.S. 25, 40-41 (1993) (citing *Gingles*). If all of these preconditions are not satisfied, there has been no wrong, and Section 2 thus requires no remedy.[9] *Id.*

Where the *Gingles* preconditions are satisfied, the remedy typically has been the creation of single-member districts in which a majority of residents are members of the minority group on whose behalf the Section 2 challenge was asserted. The use of single member districts to remedy minority vote dilution, however, can create significant practical and constitutional problems. As a practical matter, minority populations often are dispersed geographically, making it difficult to create majority-minority districts in the first instance. To overcome this problem, majority-minority districts run the risk of being drawn with unsightly and uneven district boundaries that are subject to equal protection challenges, as is the case here. *See infra* at II.B (discussing *Shaw* and its progeny). Although single-member majority-minority districts have been the more common remedy for redressing minority vote dilution, by no means have they been the exclusive

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[9] Even where all three preconditions are satisfied, a finding that Section 2 has been violated is not automatic. *Johnson v. DeGrandy*, 512 U.S. 997, 1011 (1994) (finding no violation of Section 2, despite proof of preconditions, based on the "totality of the circumstances").

remedy. To the contrary, several jurisdictions have implemented alternative voting mechanisms in multimember districts to remedy alleged voting rights violations.[10]

2. Alternative Voting Mechanisms Are Fully Permissible Under *Gingles* Because They Enable Cohesive Minority Groups To Elect Their Candidates of Choice.

As discussed above, the central purpose of the *Gingles* test is to evaluate whether a minority community that is unable to elect its preferred candidate(s) under a challenged districting scheme would be able to seat its candidate(s) of choice under an alternative districting scheme. Use of an alternative voting system in a multimember district has the same effect as the creation of a single-member majority-minority district – it allows for the election of the minority group's preferred candidate(s) if the group is sufficiently large and politically cohesive. All three alternative voting mechanisms discussed above – cumulative, limited and preference voting – enable minority groups to secure the election of their preferred candidates, even in the face of racially polarized voting. They do this by effectively fragmenting the voting power of electoral *majorities* – irrespective of race, ethnicity or any characteristic other than pure political preference. For racial minorities, the effect is the same as it would be through the creation of a single-member majority-minority district.

Cumulative voting accomplishes this result by giving all groups the opportunity to concentrate their votes on a few candidates and secure their election. *See Dillard*, 699 F. Supp. at 875 (cumulative voting "provides black voters [] with a realistic opportunity to elect

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[10] *See, e.g.*, *Moore*, 936 F.2d at 164 (approving settlement that included a multimember district with limited voting in North Carolina); *McCoy*, 6 F. Supp. 2d at 985 (adopting cumulative voting as complete and adequate remedy to Section 2 violation); *Dillard*, 699 F. Supp. at 876 (approving cumulative voting scheme as Section 2 remedy in Chilton County, Alabama); *Orloski*, 564 F. Supp. at 536 (rejecting Voting Rights Act challenges to limited voting scheme in Pennsylvania); *LoFrisco*, 341 F. Supp. at 751 (upholding statute calling for limited

candidates of their choice, even in the presence of substantial racially polarized voting"). If five seats are open in a district, for example, voters would have five votes each to distribute as they choose. Because the same majority cannot concentrate its votes on all five seats, they cannot dominate the election. Instead, voters in a sufficiently large minority group – more than one-sixth of the electorate in a five-seat race – can assure their candidate's election regardless of how other voters, including a majority, cast their ballots. *See* Pildes & Donoghue, 1995 U. Chi. Legal F. at 254.

Limited voting operates similarly, except that voters have fewer votes to cast than the number of seats to fill. By limiting each voter to, for example, one or two votes in a five-seat election, the same majority group cannot dominate every seat. As under a cumulative voting system, cohesive minority groups that are sufficiently large are empowered to control the outcome of at least one seat. *Id.* Under a preference voting system, the vote-transferring process increases the proportion of voters who vote for a winning candidate. It does this by transferring "wasted" votes – votes that are cast for a candidate who would win without them or who could not win with them – onto the next ranked candidates of a voter's ballot. Preference voting thus enables electoral minorities to control some seats in a multimember race even in the face of extreme majority opposition. In a race for five seats, for example, a candidate with just over one-sixth of the total vote will win a seat. A minority voting bloc of that size is thus sufficient to ensure election of at least one representative of its choice.[11] *Id.*

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voting scheme in Connecticut); *Kaelin*, 334 F. Supp. at 609 (upholding limited voting scheme in Pennsylvania).

[11] Indeed, analyses done by the Center suggest that the implementation of alternative voting systems in Virginia could increase the number of representatives of choice for African-American voters in the Virginia House of Delegates to 40% and, likewise, bring in the first Latino and Asian representatives ever if the respective minority communities are sufficiently politically cohesive.

Evidence from several multimember jurisdictions that have employed such alternative voting mechanisms demonstrates that these systems are in fact useful in enhancing minority representation. In Alabama, for example, nine counties began using limited voting in response to Section 2 challenges to districting plans in the late 1980s. In the first elections following implementation, an African-American candidate won in thirteen of the fourteen municipalities in which an African-American candidate ran for office. Mulroy, 77 N.C. L. Rev. at 1891. The only unsuccessful African-American candidate lost by a single vote. *Id*. In ten of the thirteen Alabama municipalities that employed alternative voting systems, the minority candidates were the first African-Americans ever elected to office in those jurisdictions. *Id*.

The results of elections in Chilton County, Alabama following the settlement achieved in *Dillard* demonstrate the effectiveness of a cumulative voting system. In the first election following the settlement, Chilton County elected its first African-American representative to the County Commission since Reconstruction. *See* Pildes & Donoghue, 1995 U. Chi. Legal F. at 272. In fact, that candidate was the leading vote-getter in the election despite the fact that he received support from only 1.5 percent of white voters. *Id*. This was because he received votes from virtually every African-American voter in the county, many of whom cast multiple votes for him. *Id*. An African-American candidate also was elected to the Board of Education in Chilton County in the first two elections held with cumulative voting in place. *Id*.

Alternative voting systems also can remedy minority vote dilution in situations where a single-member districting scheme might fail, such as where a single member districting plan would leave some members of the minority group outside the remedial minority district. *See*, *e.g., Dillard,* 699 F. Supp. at 876 (noting the usefulness of alternative voting systems where minority populations are dispersed). Moreover, because alternative voting mechanisms can be

tailored to the size of the minority population within a county (or counties) such that minority groups will be able to elect as many or more candidates of choice as they can under single-member majority-minority districts, such mechanisms in many circumstances can do a *better* job of meeting Voting Rights Act goals.

A few examples based on evidence before the Circuit Court in this case make clear that minority voting strength can be preserved through the implementation of alternative electoral systems without departing from traditional districting principles such as the preservation of governmental subdivisions and communities of interest. For example, the population of Newport News and Hampton, which combined have approximately 326,000 people including 137,000 African-Americans, together is nearly enough to support 2 Senate seats. A. 2820. If Newport News and Hampton were combined into a single two-seat district in which voters had one vote each – a form of limited voting – the result would be exactly the same as in a majority-minority district because the African-American population would comprise more than 40% of the district – comfortably more than the 33% threshold of exclusion – and thus have the opportunity to elect a candidate of choice.[12] Similarly, the evidence before the Circuit Court showed that Hampton and Newport News each could justify two House Districts. A. 2817. If these cities were combined into a four seat multimember district, then the African-American population of the combined district would be more than 40%. By implementing a limited voting system in which every voter had a single vote, the threshold of exclusion would be 20%, and the district would have the ability to elect two minority representatives.

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[12] Alternatively, these two cities could be combined with other communities of interest in the area based on governmental or other race-neutral boundaries to create a larger district capable of electing additional minority representatives.

B. Alternative Voting Systems Also Satisfy State And Federal Equal Protection Requirements And Thus Present Clear Advantages For Districting Efforts In The Wake Of *Shaw v. Reno.*

As demonstrated above, the use of alternative voting mechanisms in multimember districts enhances the ability of cohesive minority groups to elect their preferred candidates at the polls. In this regard, they are at least as effective as the creation of single-member majority-minority districts in avoiding retrogression. Because alternative voting mechanisms accomplish this objective in a race-neutral fashion, however, they also offer clear advantages in terms of compliance with equal protection constraints on the redistricting process. In this case, they offer the General Assembly a way out of the conundrum that Defendant-Appellants claim necessitated racial gerrymandering by enabling them to adhere to the compactness and contiguity requirements of the Virginia Constitution without dividing voters on racial lines.

In *Shaw*, the U.S. Supreme Court held that the deliberate segregation of voters into districts on the basis of race properly states claim for "racial gerrymandering" under the Equal Protection Clause of the Fourteenth Amendment.[13] 509 U.S. 630. Two provisions of the Virginia Constitution also secure the right to equal protection of the laws and provide a basis for a racial gerrymandering claim: Article I, section 1, which states that "all men are by nature equally free and independent," and Article I, section 11, which provides that "the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin shall not be abridged." Va. Const. Art. I, §§ 1, 11. These provisions create the same protection afforded to all citizens under the Fourteenth Amendment to the United States Constitution. *Archer*, 194 S.E.2d at 711; *Schilling*, 303 S.E.2d at 907 n. 2 (Court's analysis is

[13] The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o state shall ... deny to any person with in its jurisdiction the equal protection of the laws." U.S. Const., Amend. 14, § 1. Its central purpose is to prevent the States from intentionally discriminating against individuals on the basis of race. *Washington v. Davis*, 426 U.S. 229, 239 (1976).

the same under Va. Const., Art. I, § 11 and Equal Protection Clause of Fourteenth Amendment).

A claim of racial gerrymandering, like all laws that classify citizens on the basis of race, is constitutionally suspect and subject to strict judicial scrutiny. *Shaw*, 509 U.S. at 657. To prevail, a plaintiff must demonstrate that race is the "predominant" consideration in drawing district lines such that "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations." *Miller*, 515 U.S. at 916. Once a plaintiff proves that race predominates, the burden shifts to the defendant to show that its use of race in districting was "narrowly tailored to achieve [a] compelling state interest;" if this burden cannot be satisfied, the plan cannot be upheld. *Id.* at 920.

Since 1993, courts have invoked *Shaw* to invalidate majority-minority districting plans in a number of States on the grounds that race was the predominant factor motivating the shape and size of the district. *See, e.g., id.*, 515 U.S. at 915-917 (invalidating Georgia legislative district because race was predominant factor motivating boundary lines); *Shaw v. Hunt*, 517 U.S. 899, 906 (1996) (invalidating North Carolina districting plan because race was predominant factor used to draw majority-minority district); *Vera*, 517 U.S. at 955-57 (invalidating Texas legislative redistricting plan that demonstrated "substantial disregard for traditional districting principles" in favor of establishing majority-minority districts based on race). *Shaw* and its progeny thus severely restrict a State's ability to draw districts that enhance minority representation because, if race is too central to a district's boundary determination and there is no compelling justification for using race as a proxy, then the district violates the equal protection requirement.

Factors such as those the Circuit Court found here – including unusually-shaped or unnatural district boundaries that "pack" minority populations into a small number of districts and the use of narrow land bridges to "grab" otherwise separate minority populations – influence the determination of whether race impermissibly was the predominant factor in a districting scheme. *Miller*, 525 U.S. at 917; A. 2827. Unlike single-member majority-minority districts, multimember districts that are drawn in a race-neutral manner in accordance with traditional districting principles by definition do not implicate *Shaw*. Similarly, if the primary rationale underlying the creation of district boundary determinations is conformance with a state constitutional requirement that districts be comprised of "contiguous and compact territory," *see* Va. Const. Art. II, § 6, then the districting scheme, by its very nature, is not using race as the predominant factor.

Alternative electoral systems, moreover, avoid the pernicious assumption that the *Shaw* line of cases rejects as "odious to a free people whose institutions are founded upon the doctrine of equality," 509 U.S. at 643 (citing *Hirabayashi v. United States*, 320 U.S. 81, 100 (1943)) – that voting behavior can be predicted based solely on skin color. At the heart of the Court's objection in *Shaw* was the notion that members of the same racial group – regardless of their age, education, status, or community – think alike, share the same political views, and will prefer the same candidates at the polls. *Shaw*, 509 U.S. at 647; *see also Gingles*, 478 U.S. at 46 (a court may not presume bloc voting within a minority group). *Cf. Holland v. Illinois*, 493 U.S. 474, 484 n. 2 (1990) (finding assumption that black juror will be partial to black defendant based on skin color to be unconstitutional racial stereotype). Alternative voting systems do not assume voting behavior for any group, minority or otherwise. Instead, they simply provide a mechanism for groups voting as a bloc – *i.e.*, groups that demonstrate electorally that they *do share* the same

political views and prefer the same candidates at the polls – to ensure the election of their preferred candidates.[14]

By the same token, alternative voting systems avoid the "representational" harm caused when a district is created solely to effectuate the perceived common interests of one racial group. *See* Steven J. Mulroy, *The Way Out: A Legal Standard for Imposing Alternative Electoral Systems as Voting Rights Remedies*, 33 Harv. C.R.-C.L. L. Rev. 333, 352 (1998). Because alternative voting mechanisms treat voters of all races alike, they do not "stigmatize individuals by reason of their [race]," and because they do not create "safe" districts for minorities, incumbents are discouraged from believing that "their primary obligation is to represent only the members of [a racial] group, rather than their constituency as a whole." *United States v. Hays*, 515 U.S. 737, 744 (1995) (*citing Shaw*, 509 U.S. at 643). *See also* Mulroy, 33 Harv. C.R.-C.L. L. Rev. at 352.

Because alternative voting systems do not employ racial classifications in any manner, districting plans that use them are not subject to strict scrutiny under *Shaw* and its progeny. This conclusion applies with equal force even if alternative voting mechanisms are employed for the purpose of facilitating minority representation. It is the classification of individuals on the basis of race, not the mere motivation to facilitate equal opportunity for representatives of all races, that requires heightened scrutiny. *See Shaw,* 509 U.S. at 653; *see also Vera*, 517 U.S. at 993 (Section 2 "must be reconciled with the complementary commitment of our Fourteenth

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[14] *See also* Brischetto & Engstrom*,* 78 Soc. Sci. Q. at 989 ("Cumulative voting can provide minority electoral opportunities while avoiding what the Supreme Court views as objectionable features of some single-member districting schemes – the 'segregation' of voters into racially identifiable election units . . . .Dilution can be combated, therefore, while retaining an incentive for coalition building across a jurisdiction based on interests that are not necessarily defined by race . . . .").

Amendment jurisprudence to eliminate unjustified use of racial stereotypes") (O'Connor, J., concurring).

For the foregoing reasons, a redistricting plan that does not abandon traditional districting principles but, instead, utilizes multimember districts with alternative voting not only avoids violating the Virginia constitutional requirement to create "contiguous and compact territories," but also comports with the Virginia and U.S. Constitution by affirmatively promoting fundamental principles of fairness and equal protection under the laws.

II. MULTIMEMBER DISTRICTS THAT EMPLOY ALTERNATIVE VOTING MECHANISMS EXPAND ELECTORAL OPPORTUNITY AND THUS QUALIFY FOR PRECLEARANCE UNDER SECTION 5

"Section 5 of the Voting Rights Act authorizes preclearance of a proposed change that 'does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color.'" *Reno v. Bossier Parish School Bd.*, 528 U.S. 320, 324 (2000) *("Bossier Parish II")* (*quoting* 42 U.S.C. § 1973c). The key question under Section 5 is "'whether the ability of minority groups to participate in the political process and to elect their choices to office is augmented, diminished, or not affected by the change affecting voting . . . .'" *Beer*, 425 U.S. at 141 (*quoting* H.R. Rep. No. 94-196, p. 60). "In other words the purpose of § 5 has always been to insure that no voting-procedure change would be made that would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer*, 425 U.S. at 141; *see also Bossier Parish II*, 528 U.S. at 329 (holding that retrogression is the focus of the analysis under both the "purpose" and "effect" components of the Section 5 inquiry).

The use of properly constructed alternative voting mechanisms in multimember districts satisfies the Section 5 non-retrogression requirement because, as discussed at length above, such mechanisms expand the "effective exercise of the electoral franchise" for all voters. Indeed,

although traditional at-large electoral schemes disable minority groups from electing candidates of their choice by submerging them in larger multimember districts, the use of alternative voting mechanisms cures any such vote dilution by enabling cohesive minority groups to elect the candidates of their choice. *See supra* at I.A.2. And, as the Supreme Court only recently reiterated, "'[i]t is [ ] apparent that a legislative reapportionment that enhances the position of racial minorities with respect to their effective exercise of the electoral franchise can hardly have the 'effect' of diluting or abridging the right to vote on account of race within the meaning of § 5.'" *Reno v. Bossier Parish School Board*, 520 U.S. 471, 478 (1997) ("*Bossier Parish I*") (*quoting Beer*, 425 U.S. at 141).

In addition, because the fundamental objective of the use of alternative voting mechanisms is to allow any sufficiently large and cohesive voting bloc to elect candidates of choice, the ability of such a group to elect candidates of choice should correspond closely to the relative voting strength of that group, if the alternative voting mechanisms are properly constructed. As the Supreme Court made clear in *City of Richmond v. United States*, 422 U.S. 358 (1975), voting changes such as this that will "'fairly reflect[] the strength of the [minority] community'" cannot be said to violate Section 5. *Bossier Parish II*, 528 U.S. at 330 (*quoting Richmond*, 422 U.S. at 371).[15]

DOJ's prior administrative preclearance efforts demonstrate that multimember districting plans that employ alternative voting mechanisms qualify for preclearance under Section 5.

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[15] *Richmond* "involved requested preclearance for a proposed annexation that would have reduced the black population of the City of Richmond, Virginia from 52% to 42%." *Bossier Parish II*, 528 U.S. at 330. The *Richmond* Court found that if the City's pre-existing multimember at-large voting scheme for the nine-person city council were replaced by a voting system that "fairly reflects the strength of the Negro community as it exists after the annexation," such an annexation cannot be found to be barred by Section 5. *Richmond*, 422 U.S. at 371.

Since 1985, for example, at least 52 jurisdictions have submitted electoral plans incorporating alternative voting mechanisms to DOJ for preclearance. Of these, 47 received final determinations from DOJ and, in all but one of these submissions, preclearance was granted. Steven J. Mulroy, *Limited Cumulative Evidence: Divining Justice Department Positions on Alternative Electoral Schemes*, 84 Nat'l Civic Rev. 66, 67 (1995). All 29 of the submissions that employed limited voting in at-large districts were precleared, including the voting plan adopted by several Alabama municipalities in a settlement of a vote dilution claim, and that settlement was upheld in *Dillard v. Baldwin County*, 686 F. Supp 1459 (M.D. Ala. 1988). *See* Mulroy, 84 Nat'l Civic Rev. at 67. In addition, cumulative voting plans were precleared in all but one of the 18 submissions that proposed their use in multimember districts.[16] *Id.* Significantly, several of the Section 5 submissions that utilized alternative voting mechanisms involved districts in which it would have been possible to draw single-member minority-majority districts to enhance minority electoral opportunities. *Id.* at 67. DOJ also has entered into consent decrees under which limited voting mechanisms were adopted. *See id.* at 69 (discussing litigation settlements to which DOJ consented involving multimember districts with limited voting systems for elections in North Carolina and Georgia).

There thus appears to be no question that multimember districting plans that employ properly constructed alternative voting mechanisms warrant preclearance under Section 5.

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[16] Even in the one cumulative voting submission to which DOJ initially objected, the Department ultimately did preclear a revised cumulative voting plan for the jurisdiction in question. *Id.* at 68. The initial objection was based on evidence that the city council had failed to investigate whether the minority community understood the cumulative voting system or would require bilingual education regarding the new system.

CONCLUSION

For the foregoing reasons, the Court should affirm the judgment of the Circuit Court for the City of Salem and require the General Assembly to seek Section 5 preclearance of a districting scheme that follows traditional districting principles and does not use race as a predominant factor in violation of the equal protection provisions of the Virginia and U.S. Constitutions.

Respectfully submitted, this 22nd day of July, 2002.

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CERTIFICATE OF SERVICE

Pursuant to Rule 5:28 of the Rules of Supreme Court of Virginia, I hereby certify that Rule 5:26(d) has been complied with, that twenty (20) copies of this Brief *Amici Curiae* of The DKT Liberty Project, The Center For Voting and Democracy, and Cameron Barron were filed with the Court, and that three (3) copies were was served by first class mail, postage prepaid, this 22nd day of July 2002, upon each of the following:

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