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. Miller, Delegate John H. Rust, Jr., Delegate S. Chris Jones, State Board of Elections Secretary Cameron P. Quinn, all in their official capacities,	)	**RECORD NO. 021003**
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,	)	
Plaintiffs/Appellees.		

ON APPEAL FROM THE CIRCUIT COURT FOR THE CITY OF SALEM

OPENING BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

FEDERAL STATUTES & REGULATIONS

STATE STATUTES, LEGISLATION, CONSTITUTIONAL PROVISIONS, JUDICIAL CANONS, AND RULES OF COURT

MISCELLANEOUS

ASSIGNMENTS OF ERROR

I. The trial court erred in not dismissing the case when plaintiffs failed to prove standing.

II. The trial court erred in not dismissing plaintiffs' claims based upon lack of compactness and contiguity.

III The trial court erred in not dismissing plaintiffs' claims based upon racial gerrymandering.

IV. If this Court does not reverse and enter final judgment on the preceding assignments of error, it should reverse and remand for transfer to the proper venue because the trial court erred in finding that venue was proper in the City of Salem.

V. If this Court does not reverse and enter final judgment on the first three assignments of error, it should reverse and remand for trial by a different judge because the trial judge erred in not recusing himself.

VI. If this Court does not reverse and enter final judgment on the first three assignments of error, it should reverse and remand for a new trial based upon the following additional errors:

(a) the trial court erred in concluding that contiguity by water requires that there be a bridge, tunnel, or ferry in the district and/or that ease of transportation is either a factor or a controlling factor in determining whether a voting district satisfies the contiguity requirements of the Constitution of Virginia;

(b) the trial court erred by ruling that House District 74 is unconstitutional not only based upon its novel rule respecting contiguity by water, but also because of its nondeferential review of the General Assembly's decision to use dimensions for the

district which on their face are more compact than those of districts upheld by this Court in Jamerson v. Womack, 244 Va. 506, 423 S.E.2d 180 (1992);

(c) the trial court erred in finding that racial considerations predominated in the drawing of certain districts so as to trigger strict scrutiny review;

(d) the trial court erred in its definition of packing and in employing that definition to find that the compelling state interest of satisfying the non-retrogression command of the Voting Rights Act, 42 U.S.C. §§ 1971, et seq., was not made out on this record;

(e) when the trial judge found that a single race minority voting age population cannot constitutionally exceed a certain percentage in the challenged districts, he erred as a matter of state constitutional law by failing to accord the deference due the legislative branch in choosing a number within a permissible range;

(f) the trial court erred in using the Constitution of Virginia to engage in strict scrutiny of the federal Voting Rights Act's non-retrogression requirements because the policy of non-retrogression is preemptive of state law;

(g) the trial court erred in using its definition of the proper number of minority voters to prevent retrogression because the trial court's analysis is different from, and conflicts with, the rule established by federal law and is, therefore, preempted;

(h) the trial court erred in employing § 2 of the Voting Rights Act as interpreted by the Supreme Court of the United States to limit the discretion of the General Assembly in preserving majority-minority districts both because plaintiffs expressly waived reliance on federal constitutional and statutory law and because § 2 of the Voting Rights Act was irrelevant to the issues before the court as pled. It was also

error to rely upon definitions of reasonable opportunity and non-retrogression that were erroneous as a matter of statutory construction and that were based improperly upon expert opinion;

(i) the trial court erred in employing as an independent expert a law professor publicly identified with the party opposing the redistricting plan, particularly where it then permitted *ex parte* communications with the court without notice of the contents of those communications or opportunity to respond as required by Canon 3B(7)(b) of Virginia's Canons of Judicial Conduct, and in violation of the guarantees of due process of the Constitutions of the United States and of Virginia. This error was compounded by the fact that the requirements of the Canon had been made known to the trial court, which had assured the parties that communications would be public and subject to comment. It was also error to deny a motion to vacate based upon this error; and

(j) the trial court erred when it permitted Allan Lichtman to testify concerning racial gerrymandering when it was admitted that he had not considered other possible reasons for the lines being drawn as they were.

VII. The trial court erred in issuing the mandatory injunction decree entered below because:

(a) the decree violates the Separation of Powers doctrine and thereby exceeds the jurisdiction of the trial court;

(b) the decree exceeds the jurisdiction of the trial court in that it violates the Voting Rights Act because its terms are not conditioned on preclearance even though it purports to change voting/election procedures in the Commonwealth of Virginia;

(c) the decree exceeds the equitable powers of the trial court;

(d) the trial court lacks jurisdiction to strike down districts for which there is no plaintiff with standing, and/or which were not challenged in the First Amended Bill of Complaint, and/or on which no evidence was offered, and/or for which no constitutional defect has been found;

(e) the decree violates the constitutional provision establishing set terms for legislators;

(f) the decree violates the constitutional requirement for elections to be conducted on a date certain;

(g) the trial court erred in granting sweeping equitable relief after dismissing the claim for permanent injunctive relief on a motion to strike, and further erred by doing so without performing any analysis concerning the balance of the equities with respect to the scope of the relief being given, and by then granting relief that is contrary to the balance of the equities;

(h) the trial court erred by enjoining defendants to perform acts which are beyond their official powers, thereby converting this suit in substance into one against the Commonwealth itself in contravention of the doctrine of sovereign immunity;

(i) the trial court erred in not dismissing, but instead enjoining, defendants who were immune from suit; and

(j) the court erred in not requiring the bond prescribed in Va. Code Ann. § 8.01-631.

QUESTIONS PRESENTED

(1) Did plaintiffs prove standing? (Assignment I)

(2) Do the redistricting acts, Va. Code Ann. §§ 24.2-303.1 & 24.2-304.01, violate the compactness and contiguity requirements of the Constitution of Virginia with respect to any districts? (Assignments II, VI(a)-(b))

(3) Do the redistricting acts violate the Constitution of Virginia as alleged in plaintiffs' claims of racial gerrymandering? (Assignments III, VI(c)-(h), (j))

(4) Was venue proper in the City of Salem? (Assignment IV)

(5) Did the trial court err by (i) failing to recuse himself; (ii) by retaining the outside expert assistance it obtained; (iii) by engaging in *ex parte* communications with that expert witness without providing the parties notice of the substance of, and the right to comment on, those communications; or (iv) in failing to grant the motion to vacate after it was determined that such communications had occurred? (Assignments V, VI(i))

(6) Should the injunctive remedy decree be vacated in whole or in part? (Assignment VII)

STATEMENT OF THE CASE

I. Nature of the Case

This case involves a multi-count complaint attacking the 2001 Virginia Senate and House of Delegates redistricting plans. Immediately, the trial court confronted significant procedural and administration of justice issues, regarding proper venue, recusal of the trial judge, and apparent forum and judge shopping by the plaintiffs. The court refused to order proper remedies to those troubling issues and, instead, proceeded to hear the case.

The plaintiffs, who even failed to establish standing to bring the suit, conceded that they had no viable federal law claims and thus set about attempting to fit the square peg of federal voting rights law into the round hole of the Constitution of Virginia. Plaintiffs are led by Democrat legislators whose party was responsible for drawing the 1991 districting lines upon which the 2001 plans were based. Through the case now before this Court, plaintiffs seek to invalidate the 2001 plans, even though the challenged "new" districts, when compared to the 1991 plans, are in almost all cases more compact, less irregularly shaped, more nearly equipopulous, and comprised of smaller concentrations of minority population. Moreover, these across-the-board improvements were achieved while retaining the core of the very districts drawn by the Democrat majority in 1991.

Despite a failure of proof at trial by the plaintiffs and overwhelming evidence and law supporting the plans as drawn by the legislature – enactments carrying a powerful presumption of constitutionality – a single circuit court judge has substituted his individual preferences for the collective judgment of the General Assembly, the governor who signed the legislation, and the United States Department of Justice which precleared the redistricting plans. Indeed, the court below went so far as to strike down some districts which had not been challenged by the plaintiffs and about which the plaintiffs presented no evidence. Ultimately, the trial court ruled the House and Senate plans invalid in their entirety based on untenable interpretations of the established law applicable to claims of racial gerrymandering and lack of compactness and contiguity.

This appeal presents issues of enormous concern, both as matters of law and as matters of public interest and policy. Accordingly, this case now comes before this Court to receive the thorough and authoritative review necessary for matters of such significance.

II. Material Proceedings Below

In June 2001, plaintiffs filed suit against the then-Governor James S. Gilmore, III, Lieutenant Governor John H. Hager, Acting Attorney General Randolph A. Beales, Secretary of the State Board of Elections Cameron P. Quinn, and six members of the General Assembly, attacking the constitutionality of Va. Code Ann. § 24.2-304.01 (establishing the boundaries of the 100 House of Delegates districts) and Va. Code Ann. § 24.2-303.1 (establishing the boundaries of the 40 state senatorial districts), and seeking a judgment from the trial court enjoining elections from occurring under these redistricting statutes and preventing the certification of the results of any such elections.

In August 2001, plaintiffs filed a First Amended Bill of Complaint. In Count I of the First Amended Bill of Complaint, plaintiffs alleged that House Districts 49, 63, 69, 70, 71, 74, 75, 77, 80, 83, 89, 90, 92, and 95, and Senate Districts 2, 5, 9, 13, 16, and 18 "were each designed with the avowed, race-based goal of maximizing the number of minority voters" in violation of Article I, §§ 1 and 11 of the Constitution of Virginia. (Appendix [hereinafter "A"] at 383.) In Count II, plaintiffs alleged gender discrimination. (A. at 384.) In Count III, plaintiffs alleged political gerrymandering. (A. at 384-85.) In Count IV, plaintiffs alleged that House Districts 49, 62, 64, 69, 70, 71, 74, 75, 77, 79, 80, 83, 89, 90, 91, 92, 95, and 100, and Senate Districts 1, 2, 3, 4, 5, 9, 13, 16, and 18 "are either non-compact or non-contiguous or both . . . [and] disregard such traditional districting criteria as precinct, city and county lines and communities of interest" in violation of Article II, § 6 of the Constitution of Virginia. (A. at 385-86.) In Count V, plaintiffs challenged the General Assembly's failure to use statistically adjusted population figures. (A. at 386-87.)

At hearings conducted on July 20 and 27, 2001, defendants objected to the appointment of Professor A.E. "Dick" Howard on the ground that he is affiliated with the political party challenging the redistricting plan, and asked that any communication from Professor Howard comply with Canon 3B(7)(b) of Virginia's Canons of Judicial Conduct by being in writing and subject to comment by defendants. The court stated: "The Court had every intention of doing that and I think that the Court set that forth in the notice that it gave in open court here last Friday, if I am not mistaken." (A. at 127.)

On or about July 25, 2001, defendants filed an objection to venue and motion to transfer, a demurrer and motion to dismiss unnecessary and misjoined parties, and a motion for bill of particulars and motion craving oyer. These motions, which were opposed by plaintiffs, were heard by the Circuit Court for the City of Salem on July 27, 2001. On or about July 31, 2001, plaintiffs filed their bill of particulars and response to defendants' motion craving oyer. On or about August 23, 2001, the Circuit Court for the City of Salem granted defendants' motion for bill of particulars and motion craving oyer, and denied defendants' objection to venue and motion to transfer. The Circuit Court granted defendants' motion to dismiss unnecessary and misjoined parties as to the Acting Attorney General, but denied it with respect to other defendants. The Circuit Court also granted a motion to quash service of process and for protective order for the members of the General Assembly named as defendants who had been served. Former Lieutenant Governor Hager was never served.

On or about August 15, 2001, plaintiffs filed a motion for temporary injunction. The motion was heard by the Circuit Court for the City of Salem – sitting in Hilton Head, South Carolina – on September 10, 2001. At the conclusion of all the evidence, the Circuit Court denied the motion.

On or about August 27, 2001, defendants filed a demurrer and plea to the jurisdiction of the court, and a motion to recuse Judge Richard C. Pattisall. The trial court heard these motions on September 10, 2001, and on or about September 18, 2001, the Circuit Court granted defendants' demurrer with respect to Count V of the First Amended Bill of Complaint, denied the demurrer and plea to the jurisdiction of the court as to Counts I and IV, and took defendants' motions under advisement as to Counts II and III.

A three-day trial in this matter was held before Judge Pattisall in the Circuit Court for the City of Salem beginning on September 20, 2001. At the conclusion of plaintiffs' evidence, the Circuit Court granted defendants' motion to strike with respect to Counts II and III of the First Amended Bill of Complaint. The order granting the motion was entered on or about December 5, 2001. At the conclusion of all the evidence, the Circuit Court granted defendants' motion to strike plaintiffs' claim for a permanent injunction. (A. at 1791-92, 2786.) The Circuit Court took defendants' motion to strike Counts I and IV of the First Amended Bill of Complaint under advisement. The resulting order was entered on December 5, 2001.

On or about March 11, 2002, the Circuit Court for the City of Salem issued its opinion. An amended opinion was issued March 13, 2002. In the amended opinion, the Circuit Court held: (1) House Districts 49, 63, 64, and 75 comply with Article I, §§ 1 and 11 of the Constitution of Virginia; (2) House Districts 62, 69, 70, 71, 74, 77, 80, 83, 89, 90, 91, 92, and 95, and Senate Districts 2, 5, 9, 13, 16, and 18 violate Article I, §§ 1 and 11 of the Constitution of Virginia; (3) House Districts 49, 62, 64, 69, 70, 71, 75, 77, 80, 89, 90, 92, and 95, and Senate Districts 5, 9, 13, 16, and 18 comply with Article II, § 6 of the Constitution of Virginia; and (4) House Districts 74, 91, and 100, and Senate Districts 1, 2, and 6 violate

Article II, § 6 of the Constitution of Virginia. The Circuit Court made no finding or ruling as to House District 83 and Senate Districts 3 and 4. The Circuit Court's amended opinion provided that a formal decree would follow, stating that Va. Code Ann. §§ 24.2-304.01 and 24.2-303.1 "be and are from this day of no further force and effect on the grounds that they violate Article I § 1, Article I, § 11, and Article II, § 6 of the Constitution of Virginia"; enjoining defendants from conducting any state legislative elections "until the General Assembly of Virginia enacts and the Governor signs new redistricting statutes for the House of Delegates and the Senate Districts that abide by all of the requirements of the Constitution of the United States and Constitution of Virginia, specifically adhering to Article 1, § 1, Article 1, § 11, and Article II, § 6, and the other laws of the Commonwealth"; and further ordering that state legislative elections "be conducted in 2002, as provided by law, to take office . . . upon convening of the 2003 session of the General Assembly of Virginia." (A. at 2839-40.) The trial court by letter directed counsel to prepare a formal decree reflecting its opinion and incorporating that opinion by reference.

The related decree and final judgment was entered April 3, 2002 over the objections of all defendants except Governor Gilmore, Lieutenant Governor Hager and Attorney General Beales – all of whom had left office, one of whom had never been served, and one of whom had been dismissed.

After entry of judgment but within twenty-one days, these defendants filed motions to stay and for a statement pursuant to Rule 5:11(c) of Professor Howard's *ex parte* contacts with the trial court, if any. The latter motion was based upon a press report that Professor Howard had participated in the preparation of the trial court's opinion.

Governor Mark R. Warner filed a consent motion to be substituted for former Governor Gilmore pursuant to Rule 2:16 of the Rules of this Court on April 4, 2002 that was granted on April 12, 2002.

On April 12, 2002, the trial court denied the motion for stay. On April 15, 2002, the trial court entered an order stating that Professor Howard had been consulted on an *ex parte* basis, quashing his deposition subpoena, and denying a hearing.

On or about April 17, 2002, these defendants moved to vacate the amended opinion and decree to permit comment on Professor Howard's *ex parte* communications. That motion was denied on April 24, 2002. This timely appeal followed and this Court has stayed the decree pending appeal.

STATEMENT OF FACTS

Although Senate Districts 15 and 18 – one majority black and one majority white – were challenged in 1991 as violating the Constitution of Virginia's requirement that districts be composed of compact and contiguous territory, that challenge was rejected by this Court in Jamerson v. Womack, 244 Va. 506, 423 S.E.2d 180 (1992), and no other attack was made on the House and Senate plans throughout the 1990s relevant to the subject of this appeal. The 1991 districts – which were precleared under the Voting Rights Act – thus became the starting point for the 2001 decennial redistricting.

Virginia received census data at the voting precinct level for use in redistricting on March 8, 2001. The General Assembly also conducted public hearings, seeking public input into the redistricting process. On April 2, 2001, before any plans were publicly introduced as legislative bills, the House Privileges and Elections Committee reviewed and discussed a draft resolution proposing redistricting criteria. On April 3, the Committee formally adopted

the criteria, which included complying with federal constitutional requirements such as the "one-person, one-vote" mandate, observing the Constitution of Virginia's compactness and contiguity requirements, and complying with the Voting Rights Act's § 5 mandate to avoid retrogression in the position of minority voters. The criteria also listed as goals preserving jurisdictional lines and promoting communities of interest.

The 2001 House plan had a population deviation within the plus/minus two percent deviation called for in the redistricting criteria. As a result of population changes, the House plan moved one district in Western Virginia, and two districts from urban Tidewater to Northern Virginia. Statewide, fifteen incumbents were combined into seven districts; no minority delegate was paired. In the Senate plan, population shifts forced one district from Southwest Virginia to Northern Virginia, and another Northern Virginia district inside the Beltway was shifted to the faster-growing suburbs outside the Beltway. These shifts resulted in four incumbents being paired; none of whom was African-American.

Because all of the majority-minority districts drawn in 1991 were below the ideal population for a district by 2000 – some by as much as 30% – new population was added; however, the cores of these preexisting majority-minority districts were maintained. In most of the minority districts, the percentage of minority-age population was reduced from what it had been in 1991.[1] (A. at 1281.) The districts drawn in 2001 were generally more compact than they had been in 1991, and none were less compact, as defined by the perimeter compactness (or Polsby-Popper) measure, than the two Senate districts unsuccessfully

[1]This was not the case in each and every district, as one majority-minority Senate district and two majority-minority House districts saw their percentages of African-Americans rise slightly in the current plan. This lack of an absolute pattern is consistent with evidence at trial showing that race was not the predominant factor in the creation of these districts.

challenged under the old plan. (A. at 1226-27, 1298-99.) With respect to the contiguity of the districts, as has been the case for over one hundred years, the legislature continued to draw districts that span the Chesapeake Bay, Hampton Roads, and rivers throughout the Commonwealth.

Plaintiffs' Case

Plaintiffs made numerous claims (all brought solely under the Constitution of Virginia) concerning the contiguity and compactness of the districts, the race and gender of the incumbents, the partisan effects of the redistricting plans, and the use of unadjusted census data. The only claims that survived trial were the compactness and contiguity claim and the racial gerrymandering claim. Plaintiffs' case-in-chief can be summarized as expert testimony on the compactness of the districts, expert testimony on the presence of racial polarized bloc voting in Virginia, lay testimony from a partisan campaign worker concerning her experience with communities of interest in Virginia, and maps depicting the population of the challenged districts arrayed in racial percentages.

On the issue of compactness, plaintiffs provided the testimony of a professor of government, Dr. David Lublin, who simply ranked the districts in order of their scores on two of the many compactness measurements that scholars have identified. Dr. Lublin provided no standard of comparison for judging whether the scores indicated that the districts were compact or non-compact. Though he admitted that there were nearly limitless measures of compactness, Dr. Lublin chose to evaluate the compactness of Virginia's legislative districts using measures developed for congressional districts. Dr. Lublin admitted that none of the challenged districts fell below the level of compactness called for by the published proponents of the measures he relied upon. Because the court had not yet enunciated its

transportation theory of contiguity, there was no evidence from any of plaintiffs' witnesses on the question of bridges, ferries, or regularly used or scheduled modes of transportation. Based upon the lack of evidence produced at trial, Count IV should not have survived defendants' motion to strike.

In support of their racial gerrymandering claims, plaintiffs relied on the testimony of Dr. Allan Lichtman, an historian whose analysis consisted of examining the precincts along the borders of the challenged districts to determine their racial composition. Finding certain instances in which the population within the minority district included a higher percentage of African-Americans than nearby precincts not included in the district, he opined that the districts were drawn based predominately on race.

His opinion, however, was a complete tautology because Dr. Lichtman also stated that he did not consider whether any other factor, such as incumbency, previous district lines, political factors, or equal population could credibly explain the boundaries on a non-racial basis. (A. at 901-03.) Dr. Lichtman candidly admitted that what he was doing was not social science and that anyone could do it. (A. at 918.) Counsel for plaintiffs confirmed that what Dr. Lichtman was doing was not social science and told the Judge, "[Y]ou could do it yourself, but nobody has the time for that." (A. at 871.) The balance of Dr. Lichtman's report and testimony addressed what he felt to be the minimum percentage of African-American voting age population necessary to establish a tip point at which a candidate of choice of the minority community would have an equal chance of winning. By analyzing elections involving many minority incumbents, he concluded that the minority only needed 49% to 51% and defined minority concentrations above that as packing. (A. at 972-73, 976.) It was Dr. Lichtman who first introduced the term "packing" into the proceedings. Perhaps

realizing that he was stating legal conclusions forbidden to an expert under Va. Code Ann. § 8.01-401.3(B), Dr. Lichtman back-stepped, claiming, "I mean nothing pejorative with the term 'packing' except concentration." (A. at 926.)

The final witness offered was a lay witness, Julie Copeland, who had served as a campaign organizer for former Lieutenant Governor Don Beyer. Ms. Copeland testified about her experiences with the various communities of interest throughout Virginia. Ms. Copeland's testimony does not seem to have been relied upon by the court in its amended opinion.

In the end, plaintiffs failed to make out a *prima facie* case of racial gerrymandering because all they proved was (a) some district boundary lines correlate with race; and (b) the legislature preserved the same number of African-American majority-minority districts as had previously existed. Because the use of race in redistricting is not unconstitutional unless it predominates, and is even required under the Voting Rights Act for a covered jurisdiction like Virginia, this was not enough.

Defendants' Case

Plaintiffs' circumstantial case would be insufficient to carry their burden to show that race was the predominant factor unless they could also show that it is not reasonably debatable – the traditional standard employed in Virginia – that the General Assembly had considered and weighed traditional redistricting principles in addition to race in drawing the challenged districts. Defendants produced undisputed evidence of the legislature's stated intent to consider and weigh such traditional factors when they introduced into evidence the redistricting criteria adopted by the Privileges and Elections Committees of the two houses of the General Assembly. Defendants also produced ample evidence that these and other

permissible criteria were used in practice. The districts were more equal in population than they had been in 1991. (A. at 2457-59.) Districts were made more compact. (A. at 1226-27, 1282, 1298-99.) Political factors were obviously employed in pairing certain incumbents while protecting others. (A. at 2643-46.) The cores of existing districts were largely preserved. (A. at 1238, 1240-41.) Fewer jurisdictions were split. (A. at 2642-43.) All of these are permissible and traditional redistricting factors. Because these factors were clearly in play, it could never be said under the fairly debatable standard that race predominated. Hence, no strict scrutiny review was triggered under the Constitution of Virginia.

Defendants also adduced evidence that no majority-minority district had a minority voting age population in excess of 57%, and that that percentage was a reasonable percentage to use to ensure against retrogression. (A. at 1431-39.) The testimony of Dr. James W. Loewen, an expert on racial polarization and racial bloc voting, was selectively used by the trial court to bolster its conclusion that the 54% to 56% minority percentages selected by the General Assembly were higher than necessary because they have produced landslide victories in certain elections. In so doing, the trial court disregarded Dr. Loewen's testimony that the higher percentages chosen by the legislature were justified to make the district majority-minority when the effects of incumbency are factored in. (A. at 1040-41, 1045-46.) In other words, although incumbent minority candidates had been elected in these districts, if an incumbent did not seek reelection and a district became an open seat, absent the advantage of incumbency, a minority candidate of choice could lose – and the legislature was justified in taking this into account. (A. at 2667-68.) While the trial court correctly noted that it was not required to accept any particular expert testimony, under the fairly debatable/rational basis test if the legislature might have rationally believed that the higher number was

necessary to prevent retrogression – and Dr. Loewen's testimony clearly established that such a belief would have been at least rational – then the trial court's belief that a lower number was the right one is constitutionally irrelevant.

In addressing the compactness and contiguousness requirement of the Constitution of Virginia, defendants called Dr. Gerald R. Webster, an expert in geographic compactness. Unlike plaintiffs' expert, Dr. Webster provided a basis for comparing the compactness score of the challenged districts based upon the relevant social science literature. This comparison demonstrated that the challenged districts were indeed compact. When the trial court rejected the basis of comparison offered by Dr. Webster because it was developed for evaluating the compactness of congressional districts (A. at 2797 n.3), it was then left without any objective basis for finding districts non-compact which were on their face more compact than the ones upheld in Jamerson.[2]

Dr. Webster also analyzed the contiguity of the districts. Recognizing that every portion of the Commonwealth, including the waters of the Chesapeake Bay and the various rivers, are within a given city or county, Dr. Webster concluded that every district was composed of territory that was contiguous. (A. at 1244.)

Although plaintiffs' case failed to examine the various traditional districting principles and their effect on the districting plans, defendants offered credible and complete testimony through Dr. David Peterson, an expert in statistical modeling with an emphasis on racial discrimination and redistricting, that traditional districting principles were respected by

[2]In the end, the trial court's factual analysis in striking districts under Article II, § 6 was limited to its "water contiguity" analysis, except for House District 74 where both "water contiguity" and the shape and dimensions of the district were employed to strike it down. (A. at 2810-12.)

the legislature. Dr. Peterson concluded that partisan considerations cannot be definitively distinguished from potential racial considerations as explanations for the boundaries of the districts, so that neither one can fairly be said to dominate the other. (A. at 1345.) Dr. Peterson reviewed the maps depicting the circa-1991 districts and compared them to the 2001 districts. Dr. Peterson concluded that the cores of the old districts continued to form the bulk of the new districts; fully 73% of the new districts maintained half of their old districts within them. (A. at 1299-1305, 1318-19.) Likewise, Dr. Peterson examined the degree to which partisan political concerns shaped the boundaries of districts, and found that in many instances the shapes of the House and Senate districts were the result of partisan efforts.[3] (A. at 1295-96, 1345.) In fact, Dr. Peterson testified that in most of the challenged cases, the boundaries were just as correlated to partisan voting as to race. (A. at 1306-17, 1345.)

Defendants also called a fact witness, Dr. Jack Austin, a longtime staff member of the General Assembly with four decades of experience in redistricting. Dr. Austin testified about the Division of Legislative Services' computer system that was available to legislators during the redistricting process and regarding the degree to which it displayed data, including partisan political data, for legislators as they drew the plans that were considered by the General Assembly. Dr. Austin testified from personal knowledge that legislators relied on such data. (A. at 1198.) Dr. Austin also explained why large precincts at the periphery of a district might be split to meet equal population requirements.

Thus, defendants provided ample evidence at trial that the lines that were drawn were supposed to reflect the adopted criteria and that the districts that were drawn do reflect

[3]It was comparable testimony from the same expert witness in Hunt v. Cromartie, 532 U.S. 234 (2001), that led a majority of the Supreme Court of the United States to conclude that plaintiffs there could not make out a circumstantial case on similar facts.

consideration of such nonracial criteria as equal population (A. at 2457-59), protecting incumbents (A. at 2643-46), preserving the cores of existing districts (A. at 1238, 1240-41), respect for jurisdictional lines (A. at 2642-43), non-retrogression, promoting communities of interest (Id.), and partisan political considerations. (A. at 1198.) This was more than sufficient to rebut the flimsy circumstantial evidence of racial consciousness that plaintiffs had attempted to parlay into proof of racial predominance. Defendants also established that the districts were composed of compact and contiguous territory, and plaintiffs offered no credible evidence that would warrant any finding to the contrary.

SUMMARY OF ARGUMENT

In 1991 the General Assembly crafted a redistricting plan that included seventeen majority-minority districts. In 2001 the General Assembly, now controlled by a different political party, drew a redistricting plan that preserved the cores of those districts, while lowering the population deviation between districts, making the districts generally more compact than their 1991 counterparts, and decreasing the minority percentage for most of them while preserving political incumbents in those and other districts. Despite these indisputable facts – which clearly demonstrate that race did not impermissibly dominate the redistricting process – plaintiffs, who are publicly affiliated with the political party that first drew the majority-minority districts, filed suit claiming that these districts are racially gerrymandered. The irony here is that these plaintiffs are essentially challenging improved versions of districts that they themselves created and benefited from. This case is not really about race, but about politics being played out in the courts.

A recognized subset of districting cases is denominated a Shaw claim. Named after the 1993 case that first recognized the elements of this type of violation of the Equal

Protection Clause, Shaw v. Reno, 509 U.S. 630 (1993), a valid Shaw claim involves a redistricting plan in which racial considerations have predominated over traditional redistricting principles. A Shaw claim is distinct from a § 2 claim (brought under § 2 of the Voting Rights Act, 42 U.S.C. § 1973). A § 2 claim is typically brought where districts have been drawn under conditions of racial bloc voting that fail to give minorities a reasonable opportunity of electing candidates of choice. Another distinct violation of the Voting Rights Act is a § 5 claim brought under 42 U.S.C. § 1973c, arising from the failure of a covered jurisdiction such as Virginia to preclear changes in laws with respect to voting. Changes will not be precleared under § 5 if they result in a retrogression of minority electoral opportunities.

Measured by the relief afforded, this was predominately a Shaw case. However, it was not a *normal* Shaw case. It is rare for a Shaw claim to be brought in state court. It appears to be unprecedented for Shaw litigants to expressly waive all federal constitutional and statutory claims. To ensure that a specific trial judge would hear this case and that it could not be removed to federal court, plaintiffs brought their case solely under the Constitution of Virginia and affirmatively pled away all of their federal constitutional and statutory claims.

The forum shopping that undergirded plaintiffs' decision to forgo the well-developed federal law in favor of the completely undeveloped Virginia law on this subject, immediately presented a venue problem which the trial court erroneously resolved when it ruled that venue was proper in the City of Salem. Misconstruing the venue statute, Va. Code Ann. § 8.01-261, the trial court determined that under subsection (15)(c), a redistricting statute could be enjoined by any circuit court because the thing to be enjoined – a statewide election

– would occur in every jurisdiction. This erroneous ruling ignored the provisions of Va. Code Ann. § 8.01-261(2), which provides that a suit against an officer of the Commonwealth in an official capacity is to be brought where that person "has his official office." In this case, the only non-immune official was the Secretary of the State Board of Elections, whose office is in the City of Richmond. Furthermore, even under § 8.01-261(15)(c), the thing to be done – conducting a statewide election – is done by the State Board of Elections in Richmond, not by the local Electoral Boards which are under the supervision and direction of the State Board.

The case was also infected with early error when the trial court refused to recognize an appearance of impropriety warranting recusal. Recusal was necessary because obvious forum shopping through the stratagem of waiving core claims in order to obtain a judge with a partisan background in a highly politicized case gave rise to an appearance of impropriety. That error was compounded when, over defendants' objection, the trial court appointed as an ostensibly neutral expert someone who on the record appeared to have partisan leanings. After assuring the defendants that the trial court would comply with the Canon 3B(7)(b) of Virginia's Canons of Judicial Ethics by providing the parties with the substance of the expert's views and an opportunity to respond to them, the trial court was later compelled to acknowledge post-judgment that it had had *ex parte* communications with that expert without the required safeguards. Then, having already violated these defendants' due process rights to notice and hearing through *ex parte* contacts, the trial court denied a motion to vacate to permit belated notice and comment.

The fact that this case is tainted with these and other errors as set out in the Assignments of Error does not simply require reversal. The defendants are entitled to

reversal and final judgment. As a threshold jurisdictional matter, plaintiffs utterly failed to prove standing so as to confer jurisdiction on the trial court. No plaintiff testified at trial concerning any claimed grievance. The only evidence on standing was that provided by a stipulation of the mailing addresses of plaintiffs, together with a statement of the legislative districts in which some of those addresses fell. There was no proof at all of voter registration or the exercise of the franchise. Hence, counsel for plaintiffs took the position that mere residence proved standing under Virginia law.

Although the Supreme Court of the United States has held that a failure to reside in a district defeats standing, federal and Virginia standing law both require proof of individualized harm not based upon a generalized grievance, or a desire to represent someone else or to enforce the law generally. Here, in the absence of any testimony, it is unknown whether any particular plaintiff would have testified to being aggrieved solely on account of the gender, partisan gerrymandering, or census claims that were stricken at trial. Had any particular plaintiff testified, it may have developed that the grievance claimed was derivative and not personal, and therefore insufficient as a matter of law. While the successful articulation of standing may not be particularly challenging in a districting case, plaintiffs do have to show up to prove standing.

In addition to the Shaw claim, the trial court also entertained challenges based on compactness and contiguity, striking down House Districts 74, 91, and 100, and Senate Districts 1, 2, and 6. The trial court struck down these districts in whole, or in part in the case of House District 74, on the extra-constitutional ground that contiguity across a body of water requires sufficient or convenient transportation links within the district. Furthermore, the trial court's ruling cannot be reconciled with this Court's decision in Jamerson v.

Womack, 244 Va. 506, 423 S.E.2d 180 (1992), inasmuch as the stricken districts, including House District 74, were more compact on their face than the districts upheld in Jamerson. As in Jamerson, it is at least fairly debatable that the General Assembly considered compactness and contiguity among the mix of factors used to draw the districts, the legal standard established in Jamerson. In fact, the evidence was far stronger than that inasmuch as the evidence showed: (1) that the General Assembly formally adopted compactness and contiguity as redistricting criteria, and (2) then proceeded to draw districts which in general were more compact than those drawn in the last cycle. In light of this evidence, these defendants are entitled to reversal and final judgment on the compactness and contiguity claims.

The trial court struck down House Districts 62, 69, 70, 71, 74, 77, 80, 83, 89, 90, 91, 92, and 95, and Senate Districts 2, 5, 9, 13, 16, and 18 as violative of Article I, §§ 1 & 11 of the Constitution of Virginia based upon the racial gerrymandering claim. To reach this conclusion, the trial court committed a number of errors. Prominent among those errors was the conclusion that plaintiffs had made out a *prima facie* case, under the deferential rational basis/fairly debatable standard, to the effect that the General Assembly had allowed race to predominate so as to trigger strict scrutiny. Under Shaw analysis, if it is fairly debatable that any traditional districting principle was at least as important as racial considerations, then the General Assembly's decisions are to be upheld as a proper exercise of its legislative discretion. In this case, the evidence established that the legislature stated its intention to consider traditional factors when it adopted redistricting criteria, and that traditional districting considerations such as equality of population, compactness, preserving the cores

of existing districts, and preserving some incumbents while pairing others, *etc.* affected the districts that were drawn.

Plaintiffs' only expert on racial gerrymandering, Dr. Lichtman, did testify that race was the predominant factor in his opinion. However, Dr. Lichtman admitted that he did not even consider whether past district boundaries, partisanship, incumbency, jurisdictional boundaries, or any other permissible factor could conceivably help explain the shapes of the districts. When an expert does not even consider important factors relevant to his opinion, the opinion is not even admissible, much less persuasive.

Defendants, by contrast, demonstrated that the General Assembly formally enacted redistricting criteria that included compliance with federal constitutional requirements such as the "one-person, one-vote" mandate, that observed the Constitution of Virginia's compactness and contiguity requirements, that required compliance with the Voting Rights Act's § 5 mandate to avoid retrogression, that called for the preservation of jurisdictional lines, and that considered communities of interest. They also proved that the districts that were enacted actually do reflect the interplay of some or all of these criteria. Certainly it is fairly debatable that they do so. For example, the districts in the new plans were more equal in population than they had been, were generally more compact, overwhelmingly preserved the core portions of the former districts, and protected certain incumbents. The newly passed redistricting plans also lowered the percentage of minority population in almost every majority-minority district, yet sufficiently guarded against retrogression so that the United States Department of Justice precleared the plans.

Under the standards established by the Supreme Court of the United States in Hunt v. Cromartie, 532 U.S. 234 (2001), if such a traditional factors were in play, then no Shaw

violation has occurred and strict scrutiny is not triggered. Indeed, under Cromartie, when it became evident – using similar evidence from the same expert called by these defendants below – that the permissible factor of partisan voting patterns was highly correlated with race, a majority of the Supreme Court concluded that the Shaw claim failed as a matter of law. This was so despite proof that the challenged district in Cromartie was bizarrely shaped with a high African-American voting age population. The lesson of Cromartie is that a circumstantial case under Shaw fails whenever it appears that traditional factors may have influenced the drawing of the district. In this case, then, there was ample evidence that it was at least fairly debatable that the General Assembly respected traditional districting principles, so that strict scrutiny was never triggered. Race is a permissible factor if it does not predominate and, in fact, a covered jurisdiction like Virginia must consider race to avoid retrogression under § 5 of the Voting Rights Act.

In a Shaw case arising under the federal constitution, even if race is found to predominate so as to trigger the strict scrutiny standard of constitutional review, the districts to be scrutinized are legal if they are narrowly tailored to the compelling state interest of preventing retrogression. With respect to non-retrogression, plaintiffs' expert testified that an equal chance standard should apply, deeming anything above that as "packing." He opined that an equal chance required minority districts be composed with "the low side . . . [being] something below 50, 49 point something, 51 point something." (A. at 976.) However, Dr. Lichtman's analysis failed to take into account that had his lower target been in effect in the 1990s, some incumbent minority members would have lost either in the primaries or in the general election, and that in the future when a district became an open seat due to retirement, the minority candidate of choice would likely lose. These were all factors

that the General Assembly was entitled to consider when it decided how much or whether to lower the percentages of minorities in these districts while not sacrificing the compelling state interest of non-retrogression.

Despite frequent warnings from defendants that experts are prohibited by statute from giving opinions on questions of law, the trial court fashioned a formula for retrogression solely from expert testimony. In so doing, the trial court adopted a legal definition of retrogression more restrictive than that provided for under federal law, an act barred by federal preemption. Plaintiffs' novel tactic of renouncing all federal claims again becomes significant in this area of the case. While the federal constitution does limit the sweep of the § 5 command respecting non-retrogression, the Constitution of Virginia cannot be so employed because of federal preemption. It is doctrinally incoherent to claim that compliance with the nonretrogression policy of § 5 can be strictly scrutinized under a state constitution.

This case is unusual for an additional reason: the decree in this case represents an unprecedented assault on Virginia's doctrine of the separation of powers. The trial court, having found twenty-two districts unconstitutional, proceeded to strike down all 140 legislative districts. No plaintiff even lived in 125 of these districts. Further, there was no evidence available to the trial court that it was necessary to invalidate every district to cure the defects the trial court found in a few districts. The trial court's order purports to enjoin absolutely immune legislative defendants in a mandatory, rather than a merely prohibitory, fashion to enact a new redistricting scheme, and to do so in time to conduct House of Delegate elections in all of the new districts this year. The mandatory injunction shortens

legislative terms and alters election dates contrary to clearly stated provisions of the Constitution of Virginia.

The trial court has also enjoined the Secretary of the State Board of Elections to effect these changes even though she lacks the power to comply with the mandatory injunction. The command to change the law of the Commonwealth transformed the suit into one against the Commonwealth itself in violation of the doctrine of sovereign immunity. Even the prohibitory part of the injunction, forbidding elections until the mandated changes are made, is illegal. The Voting Rights Act forbids changing any state law, even by state court judicial decree, unless precleared. The decree is invalid because it purports to order an immediate, unconditional, and unprecleared change in state law.

Not only is the decree beyond the power of the trial court, it is also erroneous. First, the trial court by written order granted defendants' motion to strike plaintiffs' claim for a permanent injunction for failure to prove where the balance of equities lay. Then, months later, the court imposed its remedy without conducting a remedy hearing as is usual in a successful Shaw case. Instead, it imposed its remedy *sua sponte* without conducting an analysis of any balance of equities. The injunction, moreover, is clearly contrary to any proper balance of equities because, for example, plaintiffs have no legal interest in at least 125 districts wherein the rights of voters have been invaded. In a final error, the court disregarded the bond requirements of Va. Code Ann. § 8.01-631.

The trial court's errors are legion and any one of them would be sufficient to warrant reversal and remand. However, because plaintiffs failed to make out a *prima facie* case of standing, unconstitutional lack of compactness and contiguity, or racial gerrymandering, these defendants are entitled to reversal and final judgment.

ARGUMENT

I. Plaintiffs Failed to Prove Standing.

The trial court below found that "Senate Districts 1, 2, and 6 are unconstitutionally noncontiguous and/or non-compact."[4] (A. at 2808.) The trial court found House Districts 74, 91, and 100 unconstitutional on the same ground.[5] (Id.) The trial court struck down Senate Districts 2, 5, 9, 13, 16, and 18, and House Districts 62, 69, 70, 71, 77, 80, 83, 89, 90, 91, 92, and 95 on racial gerrymandering grounds.[6]

No plaintiff testified at trial, and when plaintiffs rested, there consequently had been a complete failure of proof of the standing of any plaintiff to prosecute this suit. Plaintiffs moved to reopen the evidence to publish a stipulation showing the mailing addresses of all plaintiffs and the districts wherein certain plaintiffs resided. (A. at 2414-16.) This motion was granted over the objection of defendants, who then moved to strike plaintiffs' evidence on the ground that standing cannot simply be inferred from residence alone.[7]

It is a fundamental principle of standing that "[a]n individual or entity does not acquire standing to sue in a representative capacity by asserting the rights of another, unless authorized by statute to do so." W.S. Carnes, Inc. v. Board of Supervisors, 252 Va. 377, 383, 478 S.E.2d 295, 300 (1996). A plaintiff must have "'a personal stake in the outcome of the controversy . . . .'" Cupp v. Board of Supervisors, 227 Va. 580, 589, 318 S.E.2d 407, 411 (1984) (emphasis deleted) (quoting Duke Power Co. v. Carolina Envtl. Study Group, Inc.,

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[4]Count IV of plaintiffs' First Amended Bill of Complaint did not even challenge Senate District 6, and no plaintiff resided in that district (or in Senate District 1).

[5]No plaintiff resided in House Districts 91 or 100.

[6]No plaintiff resided in Senate District 13, or in House Districts 62 or 83.

[7]The trial court's finding that "[e]ach of the Plaintiffs resides, votes, and alleges injuries in his or her respective . . . district" dramatically overstates the scope of the evidence. The stipulation did not provide any evidence of voting registration or practice.

438 U.S. 59, 72 (1978)). To have standing, a litigant must have an injury that is "different from that suffered by the public generally." Virginia Beach Beautification Comm'n v. Board of Zoning Appeals, 231 Va. 415, 420, 344 S.E.2d 899, 903 (1986). If the plaintiff seeks merely "to advance some perceived public right or to redress some anticipated public injury," there is no standing. 231 Va. at 419, 344 S.E.2d at 902.

In a redistricting lawsuit, plaintiffs living outside of a challenged district lack standing. Sinkfield v. Kelley, 531 U.S. 28, 30 (2000) (per curiam) (citation omitted). The converse is not necessarily true. Here, had any plaintiff taken the stand and been subjected to cross-examination, it might have developed that that person was aggrieved solely on account of the claims of political or gender gerrymandering, which were dismissed at trial, or that the compactness and contiguity claim or racial gerrymandering claim were not personal and immediate, but were instead based upon a concern that others were being inconvenienced or classified according to race. Derivative claims would have been particularly likely for non-voters. Had any plaintiff testified to a concern about only "some perceived public right," that party's standing claim would have failed.

Standing to assert racial gerrymandering claims cannot be inferred from mere residence for another reason. Where a case goes to trial, the plaintiff must not only allege, but also prove standing, which in racial gerrymandering cases requires proof that the plaintiff was personally categorized by race. United States v. Hays, 515 U.S. 737, 743-44 (1995). "Demonstrating the individualized harm [that the] standing doctrine requires may not be easy in the racial gerrymandering context, as it will frequently be difficult to discern why a particular citizen was put in one district or another." Id. at 744. However, where no plaintiff proves his or her race, or even comes to trial to testify to a personal objection to such

classification, there is no standing. The threshold for proving standing in a redistricting case may be low, but nothing in the case law excuses a plaintiff from having to at least show up and affirm that his grievance is personal.

Having found eight senatorial districts – three without plaintiffs – and fourteen house districts – four without plaintiffs – unconstitutional, the trial court purported to require defendants to redraw all 100 house districts and all 40 senatorial districts in time for a 2002 election and enjoined defendants from conducting elections in any of the 140 existing districts. Since plaintiffs failed to prove standing even for those districts where they live, they *ipso facto* lack standing to challenge the remaining districts. And if the trial court lacks jurisdiction for want of standing to declare districts unconstitutional that do not have plaintiffs with standing, then its equitable power cannot extend to casually striking them down as a matter of remedy, particularly as there was no evidence whatsoever that the stricken districts could not be redrawn without changing every other district.

II. The Trial Court Erred by Striking Down Districts on the Basis of Compactness and Contiguity.

The trial court's ruling that Senate Districts 1, 2, and 6, and House Districts 74, 91, and 100 are unconstitutionally non-compact and noncontiguous cannot be reconciled with this Court's ruling in Jamerson. There, one 145-mile-long district – eight miles wide at its narrowest point, crossing twelve counties (only six of which were wholly in the district) and also cutting through three independent cities – and another district – 165-miles-long and only five miles wide in some places, crossing six counties (only two of which were entirely in the district) and six independent cities (only one of which was wholly included within the district) – were upheld under Article II, § 6 of the Constitution of Virginia because "evidence was introduced from which the chancellor could have concluded that the General Assembly

had considered the constitutional requirement of compactness in reconciling the different demands upon it in reapportioning . . . ." Jamerson, 244 Va. at 517, 423 S.E.2d at 186.

Here, the evidence clearly demonstrated that the legislature had considered compactness and contiguity in redistricting. Not only were those factors listed among the criteria to be considered, the evidence was uncontradicted that there are districts which were made more compact in this redistricting cycle, thereby demonstrating that those factors were actively considered in redistricting. (A. at 1345, 2640-42.) Plaintiffs offered no expert opinion that the districts were not compact. Instead, their expert merely assigned standard compactness numbers to the districts without providing any basis of comparison. Not only was there no affirmative evidence that any district was non-compact by any objective measure, the trial court's standard for striking districts that are contiguous by water was legally erroneous. The court only found water contiguity to be acceptable where it could judicially notice that there are convenient bridges, tunnels, or ferries within the district, as though candidates and voters require passports and visas to cross water outside of their districts. The trial court stated that it had discovered this constitutional requirement from the fact that convenience of travel had been a factor employed by the legislature whose districting had been upheld in Jamerson. (A. at 2803-04.) There is nothing in the text or mode of analysis of Jamerson to suggest that a voluntary criterion – which went wholly unremarked upon in that opinion – was being elevated to a constitutional imperative. This is particularly so when it is remembered that the two districts being challenged in Jamerson did not even implicate the water contiguity issue inasmuch as they were landlocked Southside districts.

When the evidence in this record is evaluated under the appropriate deferential standard of review, it is clear that the General Assembly did not go beyond the "fairly debatable" in reconciling compactness and contiguity with the other redistricting factors it was required or permitted to consider.

III. The Trial Court Erred by Striking Down Districts Based Upon a Finding of Racial Gerrymandering.

The trial court determined that the Commonwealth's 2001 redistricting plan violated the due process guarantees established in Article I, §§ 1 and 11 of the Constitution of Virginia by discriminating against voters on the basis of race. To reach this conclusion, the court stated that Article I, § 11 of the Constitution of Virginia is "one and the same" as the Equal Protection Clause of the Constitution of the United States. (A. at 2819) (citing Archer v. Mayes, 213 Va. 633 (1973)). In Archer, this Court held that Article I, § 11 "is no broader than the equal protection clause of the Fourteenth Amendment to the Constitution of the United States." Archer, 213 Va. at 638, 194 S.E.2d at 711. Assuming that federal case law concerning unconstitutional racial gerrymandering can be imported wholesale into Virginia constitutional law, it is clear that the question of whether race predominated so as to trigger strict scrutiny is subject to Virginia's version of the rational basis test – the Jamerson "fairly debatable" standard.

In Jamerson, this Court reiterated the standards of review to be applied in assessing the legality of statutes under the state constitution. Noting the "'strong presumption of validity' attached to every statute and the requirement that it 'clearly' violate some constitutional provision before courts will invalidate it," (citation omitted), this Court went on to recognize that "reapportionment 'is, in a sense, political, and necessarily wide discretion is given to the legislative body.' An abuse of that discretion is shown only by a

'grave, palpable and unreasonable deviation from the principles fixed by the Constitution.'" Jamerson, 244 Va. at 510, 423 S.E.2d at 182 (quoting Brown v. Saunders, 159 Va. 28, 36, 44, 166 S.E. 105, 107, 110-11 (1932)). Notably, in Jamerson, this Court applied the rational basis test to determine the constitutionality of the Commonwealth's Senate districting plan, upholding the districts because it was at least reasonably debatable that the legislature had considered the requirements of compactness and contiguity. 244 Va. at 517, 423 S.E.2d at 186. This was in full accord with established Virginia constitutional law.

In Virginia, "the party assailing the legislation has the burden of proving that it is unconstitutional, and if a reasonable doubt exists as to a statute's constitutionality, the doubt must be resolved in favor of its validity." Etheridge v. Medical Ctr. Hosps., 237 Va. 87, 94, 376 S.E.2d 525, 528 (1989) (internal citation omitted). "The presumption is that the classification is reasonable and appropriate and that the act is constitutional unless illegality appears on its face." Caldwell v. Seaboard Sys. R.R., Inc., 238 Va. 148, 152, 380 S.E.2d 910, 912 (1989), cert. denied sub nom. CSX Transp., Inc. v. Caldwell, 493 U.S. 1095 (1990) (citation omitted). In redistricting, the reasonably debatable test is satisfied if the "result[s] reveal[] an attempt, in good faith, to be governed by the limitations enumerated in the fundamental law of the land." Saunders, 159 Va. at 44, 166 S.E. at 110.

It is not surprising that plaintiffs failed to sustain their burden. The Supreme Court of the United States has made it extremely difficult to prove claims of racial gerrymandering based on circumstantial evidence.

> [G]iven the fact that the party attacking the legislature's decision bears the burden of proving that racial considerations are 'dominant and controlling,' given the 'demanding' nature of that burden of proof, and given the sensitivity, the 'extraordinary caution,' that district courts must show to avoid treading upon legislative prerogatives, the attacking party has not successfully shown that race, rather than politics, predominantly accounts for the result.

Cromartie, 532 U.S. at 257 (internal citations omitted). Cromartie is the most recent Shaw claim to come before the Supreme Court of the United States. There, the district court sitting as the finder of fact was reversed in its finding that race predominated. Because a plaintiff in a Shaw case "must show that a facially neutral law" "is 'unexplainable on grounds other than race,'" Cromartie, 532 U.S. at 241 (citations omitted), the evidence in Cromartie that the district had a "'bizarre shape,'" id. at 263 (Thomas, J., Rehnquist, C.J., Scalia, J., and Kennedy, J., dissenting), split towns and counties, and had a "high African-American voting population" was inadequate "*as a matter of law*" where "racial identification is highly correlated with political affiliation . . . ." Id. at 243 (emphasis added).

Plaintiffs in the case at bar likewise failed to meet their demanding burden. They adduced no direct evidence at trial of the legislature's intent in creating the challenged districts. One of plaintiffs' expert witnesses, Dr. Lichtman, purported to offer evidence that the *effects* of the legislature's redistricting plan evidenced an *intention* to segregate voters on the basis of race. However, during *voir dire*, Dr. Lichtman fatally admitted that he did not consider whether other factors such as communities of interest or incumbency are reflected in the redistricting lines. (A. at 901-03.) An expert opinion that assumes that race predominated through a reasoning process that does not even consider other relevant factors that may have been involved is not even properly admissible, John v. Im, 263 Va. 315, 320, 559 S.E.2d 694, 696-97 (2002) (citations omitted), much less sufficient to prove beyond reasonable debate that race was "'*the predominant* factor motivating the legislature's [redistricting] decision.'" Bush v. Vera, 517 U.S. 952, 959 (1996) (plurality opinion) (emphasis in original) (quoting Miller v. Johnson, 515 U.S. 900, 916 (1995)).

Plaintiffs' only other proffer of evidence that the challenged districts were drawn predominately along racial lines was maps entered in evidence that show the racial composition of precincts in and around the challenged districts. This represents an absolute failure of proof by the party challenging the constitutionality of the redistricting statutes.

Further, the introduction into evidence of maps – with no competent testimony accompanying them – that allegedly show a simple correlation between some legislative district boundaries and race cannot by themselves be sufficient to carry plaintiffs' heavy burden. The Supreme Court of the United States, in enunciating the model of a racial gerrymandering claim, described the hallmark of a racial gerrymander as: "redistricting legislation that is so extremely irregular on its face that it rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles . . . ." Shaw, 509 U.S. at 642. This requires proof – by a process of elimination – that other factors were not involved. Because plaintiffs made no effort to address the other factors that may be reflected in the boundary lines, defendants' proof that other factors were considered stands unrebutted.

Furthermore, in Virginia, in the 2000 cycle, unlike most of the challenged congressional districts of the 1990s, districts were drawn using precinct level data. (A. at 2643.) All of the cases referred to by the trial court in its amended opinion dealt with districts which were drawn at the census block level – the smallest piece of geography for which the census reported racial data. See, e.g., Shaw, 509 U.S. at 636 (challenged district no wider than the interstate); Vera, 517 U.S. at 970-71 (precincts divided racially along census block lines). Accord Hays v. Louisiana, 839 F. Supp. 1188, 1200-01 (W.D. La. 1993) (three-judge panel), appeal dismissed, 18 F.3d 1319 (5th Cir.), vacated and remanded on

other grounds, 512 U.S. 1230 (1994). The distinction is meaningful because the outlandishly-shaped districts that gave rise to Shaw and its progeny were crafted by state legislators in North Carolina, Louisiana, and Texas who shattered precincts in search of racially-homogenous census blocks to create the bizarrely-shaped and highly race-correlative districts that the Supreme Court of the United States struck down in the last decade.

In contrast, Virginia's legislative districts are created almost exclusively using whole precincts. This practice produces more racially integrated districts and, importantly, boundaries shaped like the underlying precincts that are the building blocks of these districts. See Abrams v. Johnson, 521 U.S. 74, 99-100 (1997). The trial court's lack of perspective is highlighted where its amended opinion compares Virginia's 2001 legislative districts to the contorted block-by-block boundaries adopted in Texas' 1992 congressional plan. The Supreme Court of the United States observed when it struck down that plan that "[t]hese districts are so finely 'crafted' that one *cannot* visualize their exact boundaries without looking at a map at least three feet square." Vera, 517 U.S. at 973 (emphasis in original) (citation omitted). No such district is found in Virginia's 2001 redistricting plans.

As a consequence, plaintiffs failed to adduce any evidence that would establish that the 2001 districts were "unexplainable on grounds other than race." In fact, plaintiffs' expert witness, Dr. Lublin, testified that he performed certain perimeter and dispersion measures to determine the relative compactness of the Virginia legislative districts and admitted that based on compactness measures published in the early 1990s known as the Polsby-Popper and the Reock measurements, none of the Virginia districts fell below the authors' "bright line" test for non-compactness. (A. at 785-87.) Even the trial court alluded to the failure of

plaintiffs' evidence here where it noted that both plaintiffs' and defendants' experts reached the same conclusions – *i.e.*, that the districts were reasonably compact. (A. at 2796-97.)

Finally, in its most recent term, the Supreme Court of the United States articulated a particular nuance of plaintiffs' burden where, as here, race and political identification correlate strongly.

> In a case such as this one where majority-minority districts (or the approximate equivalent) are at issue and where racial identification correlates highly with political affiliation, the party attacking the legislatively drawn boundaries must show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles. That party must also show that those districting alternatives would have brought about significantly greater racial balance.

Cromartie, 532 U.S. at 258.

Because both of their expert witnesses made clear that they did not evaluate the past construction of Virginia's legislative districts[8] or conduct any analysis concerning other traditional districting principles (A. at 777-78, 901-03), plaintiffs also failed to address this burden. Accordingly, the evidence adduced by plaintiffs was utterly inadequate to make out a *prima facie* case of racial gerrymandering, and the court below should have granted defendants' motion to strike Count I of plaintiffs' suit.

In contrast, defendants provided clear, uncontroverted evidence of the General Assembly's stated motivations by introducing redistricting criteria adopted by the Privileges and Elections Committees of the two houses prior to their consideration of competing redistricting plans. These criteria included the equal population requirements of the federal and state constitutions; the contiguous and compact territory requirements of Article II, § 6 of

the Constitution of Virginia; adherence to §§ 2 and 5 of the Voting Rights Act, 42 U.S.C. §§ 1973 & 1973c; preservation of communities of interest; incumbency interests; and preservation of jurisdictional boundaries. (A. at 2609-10, 2647-48.) Because redistricting is inherently political, Jamerson, 244 Va. at 510, 423 S.E.2d at 182, partisan advantage is also a permissible factor. Saunders, 159 Va. at 36, 166 S.E. at 107 (recognizing that "[t]he duty of dividing the State into districts . . . is, in a sense, political, and necessarily wide discretion is given to the legislative body"). Even race is a proper factor as long as it does not predominate. Indeed, under the Voting Rights Act, consideration of race is mandatory.

As long as it is fairly debatable that the legislative branch considered these factors in a way that did not cause race to predominate, whatever balance the legislature struck is dispositive. "Legislative determinations of fact upon which the constitutionality of a statute may depend bind the courts unless clearly erroneous, arbitrary, or wholly unwarranted." Jamerson, 244 Va. at 509, 423 S.E.2d at 182 (citing Bristol Redevelopment and Hous. Auth. v. Denton, 198 Va. 171, 176, 93 S.E.2d 288, 292 (1956)). In Jamerson, this Court further added the following corollary:

> [I]t is also settled that if the validity of such a determination is fairly debatable, the legislative determination will be upheld by the courts. In this context, an issue is 'fairly debatable' if, 'when, measured by both quantitative and qualitative tests, the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions.'

Jamerson, 244 Va. at 509-10, 423 S.E.2d at 182 (internal citations omitted).

Despite the fact that the scant evidence offered by the plaintiffs in an attempt to establish that the legislature was motivated predominately by race was insufficient as a

[8]Dr. Lichtman first averred that he did review past district boundaries, but when confronted with his prior sworn statement at deposition, admitted that he had not looked at the previous House and Senate districts. (A. at 902-04.)

matter of law under Cromartie because of the high correlation between race and voting patterns, and was insufficient to overcome the presumptions afforded the General Assembly by this Court, the trial court determined that plaintiffs' maps, newspaper articles, and expert testimony concerning the irregularity of district shapes were sufficient to establish plaintiffs' *prima facie* case that the General Assembly intentionally segregated voters on the basis of race in enacting the current redistricting plan. Whereupon, the trial court applied strict scrutiny to reject defendants' argument that the districts serve the compelling state interest of non-retrogression.

The idea that the state constitution can be used to restrict the scope of the non-retrogression duty imposed by federal law is constitutionally illogical. Under ordinary principles of conflict preemption, the policy of non-retrogression cannot be restricted by state law. Hines v. Davidowitz, 312 U.S. 52, 67 (1941) (preemption found where state law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress"). Nor can plaintiffs argue that the non-retrogression duty imposed by the Voting Rights Act should be narrowly tailored to avoid Shaw problems under the federal constitution because plaintiffs expressly waived all federal law claims to prevent removal of this case to federal court.

Even putting aside the erroneous finding triggering strict scrutiny, and the doctrinal incoherence of state law strict scrutiny of a federal command, defendants are due to prevail because they made the requisite showing even under the strict scrutiny standard. The General Assembly's intentions in enacting the current House of Delegates and Senate districts were manifested in the redistricting criteria adopted by the two Privileges and Elections Committees. In setting the criteria, the General Assembly included this language:

> All of the foregoing criteria shall be considered in the districting process, but population equality among districts and compliance with federal and state constitutional requirements and the Voting Rights Act of 1965 shall be given priority in the event of conflict among the criteria. Where the application of any of the foregoing criteria may cause a violation of applicable federal or state law, there may be such deviation from the criteria as is necessary, but no more than is necessary, to avoid such violation.

H. & Sen. Privileges and Elections Comms. Res. Nos. 1 (Va. 2001).

The General Assembly was required under the Voting Rights Act to comply with §§ 2 and 5 of that Act, including the non-retrogression standard contained in § 5. This non-retrogression principle, first discussed by the Supreme Court of the United States in Beer v. United States, 425 U.S. 130 (1976), states that "the purpose of § 5 has always been to insure that no voting-procedure changes 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 Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 478 (1997) (plurality opinion) ("the jurisdiction's existing plan is the benchmark against which the 'effect' of voting changes is measured") (citation omitted). Thus, the General Assembly knew that, when drawing new legislative districts, it must not enact a plan that would lead to a retrogression in the ability of minorities to elect candidates of choice as compared to the 1991 plan then in effect. This meant that the General Assembly was required to maintain the same number of districts (12 House and 5 Senate) that would provide minority voters equal opportunities to elect candidates of choice in the 2001 plan as there were in the 1991 plan.

There was no dispute among the parties that the General Assembly properly intended to maintain the same number of districts in which minority voters would have an equal opportunity to elect candidates of choice. Plaintiffs' counsel admitted that the General Assembly "can't adopt a new plan that reduces effective minority political opportunities."

(A. at 1768.) This compelling state interest to avoid retrogression was specifically acknowledged by the Supreme Court of the United States in Vera, where "a majority of justices support the position that compliance with the [Voting Rights Act] is a compelling state interest." Diaz v. Silver, 978 F. Supp. 96, 128 (E.D.N.Y.) (per curiam) (three-judge panel), aff'd without opinion, 522 U.S. 801 (1997) (citing Vera, 517 U.S. at 994 (O'Connor, J., concurring), 1035 (Stevens, J., Ginsburg, J., and Breyer, J., dissenting), 1065 (Souter, J., Ginsburg, J., and Breyer, J., dissenting)).

It thus being established that the General Assembly's stated purpose of avoiding retrogression is compelling, the percentage of minority voting age population in majority-minority districts would survive strict scrutiny if those percentages are narrowly tailored to achieving non-retrogression. In holding that the districts were not narrowly tailored to that purpose, the trial court used an erroneous definition of retrogression that is preempted by contrary federal law. 28 C.F.R. pt. 51, subpt. F. The trial court then failed to give any deference to the legislature's assessment of what minority percentage voting age population might reasonably be thought necessary to avoid retrogression.

In determining what the legal standard "reasonable opportunity" meant, the trial court eliminated any percentage that would give minority voters "a 'safe seat,' a 'lock' on an election, or 'guaranteed' electoral success . . . ."[9] (A. at 2821-22.) The court below then selected certain terms, such as "chance," "reasonable," and "toss up," looking up their meaning in the dictionary. (A. at 2822.) Unfortunately, the trial court failed to look up the operative word "opportunity." The American Heritage Dictionary at page 872 (4th ed.

[9]To support this legal conclusion, the trial court relied on the expert testimony of Dr. Lichtman. This is clearly improper and was foreseen by defendants in their objection to Dr. Lichtman's proffered testimony concerning the legal test for narrow tailoring. (A. at 867.)

2001), defines opportunity as: "1. a favorable or advantageous combination of circumstances . . . and 2. a chance for progress or advancement." This definition certainly describes a different set of circumstances than the trial court considered in its opinion – advantage versus chance. Having wrongly decided that reasonable opportunity means no more than a chance or a toss-up – or at least having adopted a state test that is in conflict with the less restrictive federal regulations so as to trigger federal preemption principles – the court then compounded its analytical legal error by concluding that "'[p]acking' defeats chance." (A. at 2822.) In the first place, "packing" is a legal term of art recognized by the Supreme Court of the United States as shorthand for a violation of § 2 of the Voting Rights Act. Plaintiffs, of course, have expressly waived any reliance on that Act. Furthermore, the trial court defined "packing" by reference to expert opinion. (Id.) Experts are expressly forbidden to opine on legal questions in Virginia, Va. Code Ann. § 8.01-401.3(B), a point repeatedly brought home to the trial court. (A. at 863-65, 867-68, 883-85.)

Another startling error of legal analysis appeared when the trial court stated that "in order to assure non-retrogression . . . [a district] must be drawn in accord with the three conditions set forth in Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986)." (A. at 2818.) It is well settled that the so-called Gingles preconditions are evidence necessary to make out a violation of § 2 of the Voting Rights Act, which has nothing to do with a § 5 retrogression claim. See, e.g., Bossier Parish Sch. Bd., 520 U.S. at 479-80 (noting that a plaintiff claiming vote dilution under § 2 must initially establish the existence of the three Gingles preconditions); McDaniels v. Mehfoud, 702 F. Supp. 588, 591 (E.D. Va. 1988) (mem.) ("In Gingles the Court reiterated . . . the 'essence of a § 2 claim . . . .'"). When a trial court misapplies the law to the evidence on a material issue before it, it commits reversible error.

Hence, at a minimum, reversal would be required of the trial court's finding on the issue of compelling state interest.

However, because the trial court also failed to defer to the General Assembly's findings of legislative facts upon which constitutionality depends, Bristol Redevelopment and Hous. Auth., 198 Va. at 176, 93 S.E.2d at 292, defendants are entitled to reversal and final judgment on their compelling state interest defense as well. See also Turner Broad. Sys., Inc. v. Federal Communications Comm'n, 512 U.S. 622, 665 (1994) ("courts must accord substantial deference to the predictive judgments of Congress" even where strict scrutiny applies). In boiling down hundreds of calculations using the two-tailed ecological regression analysis first accepted by the Supreme Court of the United States in Gingles, the trial court reduced the experts' analysis to a narrow range of acceptable black voting age population concentrations: between 51.5% and 54%. Even plaintiffs' counsel never demanded that specificity, stating that "nobody could argue that the state has to figure out and peg to a certainty, the exact number that any one district has to have and then keep the district at that number. That would be crazy and unfair." (A. at 1770.)

Furthermore, the trial court's findings include glaring errors. According to the amended opinion, "Senate District 18 with a [black voting age population] of 56% gave the minority candidate of choice [State Senator Louise Lucas] 51.9% of the votes in 1991 . . . ." (A. at 2824.) This range of population exceeded the levels that the court found to be necessary – and thus was declared to be "packed." The evidence at trial makes clear that reducing the black voting age population of District 18 would have led to the defeat of the minority candidate of choice in 1991. (A. at 2600.) That can hardly be viewed as giving

minorities a "reasonable opportunity" as required by § 5 of the Voting Rights Act; it is more like the "chance" or "toss up" that the trial court found sufficient.

There is nothing in § 5 of the Voting Rights Act or in its implementing retrogression regulations that support such logical contortions as went on below. There is nothing in Virginia's approach to constitutional law, even under strict scrutiny review, to permit a court to say that less than 54% is correct while 54% to 56% is not. Of course, either number is essentially a prediction of what the Department of Justice would be willing to preclear. The only independent evidence bearing on the correctness of the General Assembly's prediction supports the position of these defendants. The General Assembly's plans – unlike the trial court's opinion – have actually been precleared by the Department of Justice.

IV. Venue did not Lie in the City of Salem.

Defendants correctly objected to venue in Salem because the preferred venue for suits against officers of the Commonwealth lie in the county or city where any such person has his official office. Cameron Quinn was the only defendant empowered to supervise the conduct of an election, and she was the only defendant who was not subject to a plea of absolute privilege. Her office is in the City of Richmond and venue was only proper in that jurisdiction.

Plaintiffs, however, argued that venue will lie where an officer has an official office in the jurisdiction, and because Delegate Griffith's law office in Salem is also his district office, venue was appropriate in Salem. (A. at 77-78.) Although the trial court erroneously declined to dismiss the legislative defendants on the ground of legislative privilege, it was always apparent that those defendants were absolutely immune from suit. Va. Const. art. IV, § 9; Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 405 (1979);

Whitener v. McWatters, 112 F.3d 740, 745 (4th Cir. 1997); Schlitz v. Commonwealth, 854 F.2d 43, 46 (4th Cir. 1988), overruled in part on other grounds by Berkley v. Common Council, 63 F.3d 295, 303 (4th Cir. 1995). Predicating venue on claims against an absolutely immune party would have been nothing more than subterfuge. In any event, the trial court, on a record that contained no evidence that Delegate Griffith's Salem office is his official office instead of his office in the General Assembly Building in Richmond, understandably did not predicate venue on the basis of the location of Delegate Griffith's office. (A. at 148-49, 151.) Instead, the trial court found that venue would lie in Salem because a suit for injunction can be brought where "the act is to be done, or being done, or is apprehended to be done . . . ." Va. Code Ann. § 8.01-261(15)(c). The trial court believed that because a statewide election occurs in every jurisdiction, venue in a suit attempting to enjoin a statewide election will lie everywhere.[10] (A. at 165-66.)

This will not do. Local Electoral Boards may act only pursuant to the oversight of the State Board of Elections and the thing to be done – authorizing or conducting any election – is done in Richmond. Although general registrars and local officers of election are appointed by local electoral boards, Va. Code Ann. §§ 24.2-109 & -110, the State Board of Elections ultimately governs these persons in the performance of their official duties. Under Va. Code Ann. § 24.2-103, the State Board of Elections is required to supervise, train, and provide rules, regulations and instructions to electoral boards and registrars. The Board is also empowered to remove registrars who fail to discharge their duties. Id.; see also Va. Code Ann. § 24.2-114 (noting that registrars must *inter alia* follow recordkeeping and other

[10]Even though no responsive pleadings had yet been filed, the trial court also held that venue is merely permissive and therefore can somehow be influenced by the equitable consideration that time was of the essence. (A. at 188-89.)

policies set by the State Board of Elections); Va. Code Ann. § 24.2-404 (noting that the State Board of Elections must act through the local registrars to operate and maintain a statewide voter registration system). It is not true, as the trial court thought, that every circuit court in the Commonwealth is empowered to interfere with a pending general election on the theory that the local registrar, rather than the State Board of Election, controls "the act to be done."

V. The Judgment Below is Tainted with an Appearance of Impropriety.

It is beyond cavil that in our legal system justice must not only be done, but be seen to have been done, and that every judge is duty-bound to guard against even an appearance of impropriety. Canon 3E of Virginia's Canons of Judicial Conduct; Hurt v. Newcomb, 242 Va. 36, 38-40, 405 S.E.2d 843, 844-45 (1991). Here, defendants moved the trial judge to recuse himself not simply because he had been a local party chairman and candidate of the political party presently challenging the 2001 redistricting plan. The crux of the objection was that to keep their chosen forum, plaintiffs went to the extraordinary length of foreswearing all federal statutory and constitutional challenges, even though the principal legal theory at issue, racial gerrymandering, is well-developed in federal law and completely undeveloped in state law.[11] A judge who realizes that he already might be perceived as partisan should not be complicit in such gross forum and judge shopping.

The trial court rejected defendants' appearance of impropriety argument by supposing that plaintiffs might have sought out his court because they knew that he was completely independent because of his intent not to seek reappointment. (A. at 144-45.) This basis for

[11]Plaintiffs were also willing to go to extraordinary lengths to keep this particular judge. For example, when confronted with defendants' motion to transfer venue, plaintiffs expressed their willingness to transfer the case to Roanoke, where the Attorney General has a regional office, so that the same *judge* could preside over the case. (A. at 74-75.)

the trial court's ruling was not borne out by subsequent events, as it is a matter of indisputable public knowledge that the trial judge did indeed seek reappointment while this case was still under advisement.

Complicating matters further, the trial court appointed, over defendants' objections, an ostensibly neutral expert who could reasonably be viewed as a partisan of the political party that had opposed and challenged the redistricting plan. (A. at 124-26.) Then, contrary to clear assurances that notice of "the substance of the [expert's] advice" and a "reasonable opportunity to respond" would be given to the parties as required by Canon 3B(7)(b) of Virginia's Canons of Judicial Conduct (A. at 9, 126-27), the trial court admittedly engaged in *ex parte* communications with the expert without disclosing the substance of those contacts or allowing the parties an opportunity to respond to the expert's advice before reaching a decision in the case. This conduct violated not only Canon 3B(7)(b), but also defendants' state and federal constitutional right to due process. Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313-314 (1950) (due process requires notice and an opportunity to be heard); McManama v. Plunk, 250 Va. 27, 34, 458 S.E.2d 759, 763 (1995) (same). The trial court then denied a motion to vacate his decision to permit disclosure and comments.

This collective failure to guard against appearances of impropriety constitutes an abuse of discretion sufficient to warrant reversal. See, e.g., In re: Wisconsin Steel Co., 48 B.R. 753, 763-64 (N.D. Ill. 1985); Norton v. Ferrell, 981 S.W.2d 88, 90-91 (Ark. 1998); Bowlin v. State, 643 P.2d 1, 4-5 (Alaska Ct. App. 1982).

VI. The Trial Court's Injunctive Decree is Erroneous and Exceeds Its Power.

At trial, defendants moved to strike plaintiffs' prayer for permanent injunctive relief on the ground that the balance of equities did not favor such relief. (A. at 1741-46.) Even

though that motion was granted at trial (A. at 1791-92), the court below has now decreed that these defendants – none of whom have the power individually or collectively to pass laws – must redistrict all 140 House and Senate districts.

In decreeing injunctive relief, the trial court did not consider the balance of equities. This was clear error. See Wright v. Castles, 232 Va. 218, 224, 349 S.E.2d 125, 129 (1986). Had the trial court performed this analysis, it would have been immediately obvious that the equities attaching to plaintiffs could never overcome the equities of defendants and the public interest, especially in those districts where no plaintiff lives. This is particularly so as there is no basis in the record for concluding that the districts found to be unconstitutional could not be redrawn without redrawing every district, and no such finding was made by the trial court.

An even more fundamental objection to the decree arises from the fact that it is not a narrowly drawn prohibitory injunction, but is an expansive mandatory injunction directed against defendants (all but one of whom are absolutely immune from suit) and who lack authority to provide the relief decreed. The decree also orders unprecleared changes in state voting law in violation of the Voting Rights Act.

Where a suit nominally against state officials is in substance one against the Commonwealth, it is barred by the doctrine of sovereign immunity. Davis v. Marr, 200 Va. 479, 485, 106 S.E.2d 722, 727 (1959) (citation omitted). By waiving all federal claims in aid of their desire to avoid removal, plaintiffs gave up the legal fictions that permit federal constitutional and statutory claims to overcome sovereign immunity and the Eleventh Amendment. See Ex Parte Young, 209 U.S. 123 (1908).

Because it is settled law that the legislative defendants enjoy an absolute legislative privilege, Va. Const. art. IV, § 9; Lake Country Estates, Inc., 440 U.S. at 405; Whitener, 112

F.3d at 745; Schlitz, 854 F.2d at 46, Secretary Quinn is the only proper party as a matter of state law – and only with respect to specific districts – where plaintiffs enjoy standing, if any, and then only to the extent of a prohibitory injunction because she manifestly lacks the power to respond to the mandatory injunction to redistrict any of the 140 state legislative districts. Mandatory injunctions are limited to circumstances that would warrant the issuance of a writ of mandamus. Miguel v. McCarl, 291 U.S. 442, 452 (1934). Clearly, no writ of mandamus would lie against Secretary Quinn to redistrict the state.

This Court has never countenanced mandatory injunctive relief in a redistricting case. Indeed, the common law rule that the equity power does not extend to enjoining an election has not been overturned. Scott v. James, 114 Va. 297, 76 S.E. 283 (1912). When this Court has had occasion to strike down congressional districts, it has prohibited the use of the unconstitutional districts, deferentially leaving the timing and extent of redistricting to the legislature. Wilkins v. Davis, 205 Va. 803, 813-14, 139 S.E.2d 849, 856 (1965); Saunders, 159 Va. at 36, 166 S.E. at 107. As a matter of state constitutional law, a mandatory injunction directed against a legislative body also violates Article I, § 5 and Article III, § 1 of the Constitution of Virginia expressly establishing separation of powers. Tran v. Gwinn, 262 Va. 572, 584, 554 S.E.2d 63, 69 (2001); Board of Supervisors v. Farley, 216 Va. 816, 818-19, 223 S.E.2d 874, 876 (1976).[12]

Even had the trial court limited its decree to a prohibitory injunction against Secretary Quinn as the only proper party, the decree would still have exceeded the powers of the trial court. Under the Voting Rights Act of 1965, as given effect in Virginia through the Supremacy Clause of the federal constitution, the State Board of Elections may not

implement a change in any state law qualification or prerequisite to voting; or standard, practice, or procedure with respect to voting; unless those changes have been precleared by the Department of Justice or the United States District Court for the District of Columbia. Morse v. Republican Party of Va., 517 U.S. 186, 191 n.1, 193 (1996). The implementing regulations adopted by the Department of Justice exempt some changes occasioned by order of a federal court, but no such exemption exists for state court decrees. 28 C.F.R. § 51.18. Instead, changes in state law occasioned by state court decree are subject to the preclearance requirements of federal law. Hathorn v. Lovorn, 457 U.S. 255, 265 (1982). As a consequence, the trial court's sweeping decree is invalid under state law and is wholly unenforceable and without present effect as a matter of federal law.

CONCLUSION

Wherefore this Court should reverse and enter final judgment or in the alternative reverse and remand for further proceedings in the proper venue with a different judge untainted by any appearance of impropriety.

[12]The injunction also violated the bonding procedure required by Va. Code Ann. § 8.01-631.

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CERTIFICATE OF SERVICE

Pursuant to Rule 5:27 of the Rules of Supreme Court of Virginia, I hereby certify that Rule 5:26(d) has been complied with, that twenty copies of this Opening Brief of Appellants were filed by hand this ____ day of July, 2002 in the Office of the Clerk of the Supreme Court of Virginia, and that three copies of this Opening Brief of Appellants were mailed by first-class mail, postage prepaid, this ____ day of July, 2002 to the following opposing counsel:

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