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,

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

RECORD NO. 021003

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

REPLY BRIEF OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

STATE STATUTES, CONSTITUTIONAL PROVISIONS, AND JUDICIAL CANONS

REPLY TO COUNTERSTATEMENT OF FACTS

Defendants submit the following corrections and clarifications to plaintiffs' recitation of the facts. Plaintiffs claim that the legislative committees tasked with preparing legal criteria for the 2001 Virginia redistricting plans "specifically stated that such traditional districting considerations as equipopulation, [and] compactness and contiguity . . . were to be subordinated whenever necessary" to race-based concerns. (Br. Appellees at 5.) This is patently false. The resolutions adopted by these committees demonstrate that population equality, compliance with federal and state constitutional requirements, and compliance with the federal Voting Rights Act were all to be taken into account. (A. at 2610, 2648.) None of these was prioritized over the others. (Id.) Obviously, where noncompliance with a factor would have rendered the plan illegal (i.e., non-retrogression or "one person, one vote"), the criteria recognize that the law had to be followed.

Plaintiffs also assert that most of the precincts in challenged districts are "heavy black," (Br. Appellees at 5), and imply that minorities were included in these districts in an attempt to "'resegregat[e]'" the Commonwealth. (Id. at 14.) This hyperbole has no factual support in the record. Plaintiffs admit that Virginia is more integrated now than in 1990 (id. at 4), and it is undisputed that in most instances, while the percentage of African-Americans in the state's population grew over the last decade, the African-American population in the challenged districts nevertheless declined. (A. at 1281.) The evidence presented below showed that relatively few precincts in these regions were racially homogenous, and almost none of the precincts at the boundaries of these districts were "heavy black." This is depicted graphically in plaintiffs' maps, which were not

contested, and in the testimony of Dr. David Peterson, who correlated data regarding these border precincts and found that the ultimate inclusion of precincts in challenged districts was as explainable on the basis of politics as it was on race. (A. at 1344-45.) The Supreme Court of the United States, based on similar compelling testimony from Dr. Peterson, held in Hunt v. Cromartie, 532 U.S. 234 (2001), that 1991 congressional redistricting plans in North Carolina were constitutional because the evidence presented did not establish that race predominated in the drawing of district lines, reversing a contrary finding by the district court.

ARGUMENT

I. The Trial Court Lacked Jurisdiction Because Plaintiffs Failed to Prove Standing.

Plaintiffs do not challenge the doctrine of standing as it is set forth in the Opening Brief of Appellants. Instead, they contend that standing was proven below through a bare "stipulation . . . establishing the address of each and every plaintiff and the . . . district in which each resided." (Br. Appellees at 17.) In their view, "[n]othing more was needed." (Id.) This conclusion is demonstrably wrong and misstates the basic law of standing in Virginia that requires the dismissal of their claims.

Despite having waived all federal claims, plaintiffs seek to avoid the controlling state law rules by selectively relying upon United States v. Hays, 515 U.S. 737 (1995). But in Hays itself, it was recognized that a plaintiff must prove that "he or she, personally, has been injured by that kind of racial classification . . . ." Id. at 744. The plaintiffs in Hays failed to satisfy this test, and thus failed to meet their burden of proof to show standing. Id. at 745. The Court reasoned that the legislative act of placing all individuals in one district or another did not mean that

> every Louisiana voter has standing to challenge [the redistricting act] as a racial classification. Only those citizens able to allege injury 'as a direct result of having personally been denied equal treatment' may bring such a challenge . . . .

Hays, 515 U.S. at 746 (emphasis in original) (internal citation omitted).

Ignoring this, as well as similar language in Hays suggesting that a particularized analysis of harm or injury is necessary to prove standing,[1] plaintiffs contend that an "individualized harm is established '[w]here a plaintiff resides in a racially gerrymandered district' . . . ." (Br. Appellees at 18) (emphasis deleted) (quoting Hays, 515 U.S. at 745). However, this syllogism is flawed. In the very next sentence of its opinion, the Court in Hays observed that "[v]oters in such districts may suffer the special representational harms racial classifications can cause in the voting context." 515 U.S. at 745 (emphasis added). Thus, it is apparent under Hays that more than mere residence in a challenged district is required to achieve standing to maintain a racial gerrymandering claim.[2] See also id. at 750-51 (Stevens, J., concurring) (questioning whether plaintiffs were registered voters in the first place).

Here, based upon the stipulation that plaintiffs presented as their sole evidence of standing, the trial court held that plaintiffs could proceed with their racial gerrymandering claim because "[e]ach . . . resides, votes, and alleges injuries in his or her respective

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[1] See, e.g., Hays, 515 U.S. at 743-44 ("[I]f a governmental actor is discriminating on the basis of race, the resulting injury 'accords a basis for standing only to "those persons who are personally denied equal treatment" by the challenged discriminatory conduct.'") (emphasis added) (citations omitted).

[2] Plaintiffs' contention that Hays established "'a bright-line standing rule'" based on mere residence is mistaken. (Br. Appellees at 18) (citing Dillard v. Baldwin County Comm'rs, 225 F.3d 1271, 1279 (11th Cir. 2000)). No state court, and no federal court outside the Eleventh Circuit, has recognized this "bright-line . . . rule" as such, and the Court ruled soon after Hays that "the complexity of the redistricting process" is "such that bright-line rules are not available." Bush v. Vera, 517 U.S. 952, 984 (1996).

House of Delegates or Senate District . . . ." (A. at 2790.) There is no rational basis for this conclusion given the scant content of the stipulation, which listed only district numbers and addresses, and made no references to voting eligibility, registration or practice, or to any particularized harm that any plaintiffs allegedly suffered.[3] (A. at 2414-16.) No evidence was submitted to negate the strong possibility that any given plaintiff may have felt aggrieved on account of some claim that was ultimately dismissed (e.g., partisan gerrymandering or gender discrimination), or wished to vindicate someone else's rights, or the law in general. No plaintiffs even lived in three of the districts that were struck by the trial court on racial gerrymandering grounds. (Opening Br. Appellants at 28 n.6.) Because no plaintiff's race was stated in the stipulation, it is not established which plaintiffs were racially classified, the *sine qua non* of a racial gerrymandering case.

II. No Racial Gerrymandering Occurred in the 2001 Redistricting Plans.

Plaintiffs' lack of standing requires this Court to reverse the trial court's decision and enter final judgment for defendants. Nonetheless, even if it is assumed that plaintiffs had standing, this Court need look no further than Jamerson v. Womack, 244 Va. 506, 423 S.E.2d 180 (1992), which upheld the validity of Virginia's 1991 redistricting plans and describes the standard of review for this appeal, to dispose of plaintiffs' claims. Under Jamerson, if the General Assembly's finding of the "fact upon which the constitutionality of a statute may depend" is "fairly debatable," judicial inquiry ends and

[3]Even in their First Amended Complaint, plaintiffs did not describe themselves as voters or persons who had been at all injured, but simply stated that they were "citizens of the Commonwealth of Virginia, who live in legislative districts affected by the Republican redistricting plans." (A. at 370.)

the legislature's decision is valid. 244 Va. at 509, 423 S.E.2d at 182. See Industrial Dev. Auth. v. La France Cleaners and Laundry Corp., 216 Va. 277, 282, 217 S.E.2d 879, 883 (1975) (noting that "a legislative body is presumed to have been cognizant at the time it acted of all existing facts and circumstances bearing upon the public policies and private rights relating to their action") (citations omitted).

Accordingly, this Court does not defer to the trial court's determination on the threshold question of whether race predominated. The evidence on that issue was essentially undisputed, and this Court should apply the law to that record employing the well-established "fairly debatable" rational basis test. Jamerson is not to the contrary to the extent that it deferred to contested evidence, such as which expert to credit. Here, plaintiffs' expert on the predominance question did not raise an issue of contested fact, but instead expressed a legal opinion that race predominated, an opinion that violated Va. Code Ann. § 8.01-401.3B.

Had the trial court correctly applied the "fairly debatable" standard announced in Jamerson, it would have necessarily upheld the validity of the redistricting plans because of the overwhelming evidence that the General Assembly considered and balanced numerous competing redistricting factors. The evidence showed that race was but one of the many factors considered, that partisanship was at least as significant an explanation of new district boundaries as race, that districts were made more compact, and that minorities generally saw their percentages decline without any lessening of their opportunity to elect their candidates of choice.

This evidence established that it was at least "fairly debatable" (and in fact much more) that multiple legitimate redistricting factors were in play in the creation of these

districts. This was all that was needed under Jamerson. Similarly, under federal precedent, when such factors have been made out, a circumstantial Shaw challenge must fail. Cromartie, 532 U.S. at 257-58. See also DeWitt v. Wilson, 856 F. Supp. 1409, 1413-15 (E.D. Cal. 1994), aff'd in part, appeal dismissed in part, 515 U.S. 1170 (1995) (upholding redistricting legislation balancing traditional redistricting principles, as well as compliance with requirements of the Voting Rights Act). The trial court's failure here to acknowledge the interplay of these factors, and thereby to afford the General Assembly the deference its findings were due under Jamerson, is reversible error.

A. Plaintiffs' Syllogism Respecting Racial Predominance, if Accepted, Would Destroy Legislative Redistricting in Every Jurisdiction Covered by § 5 of the Voting Rights Act.

In their brief, plaintiffs contend that any time a covered jurisdiction takes steps to comply with the non-retrogression standard of § 5 of the Voting Rights Act, that attempt is necessarily a race-conscious decision that triggers strict scrutiny. (Br. Appellees at 24.) In Bush v. Vera, 517 U.S. 952, 958 (1996), the Supreme Court of the United States rejected the position plaintiffs advance here by holding that "[s]trict scrutiny does not apply merely because redistricting is performed with consciousness of race. Nor does it apply to all cases of intentional creation of majority-minority districts." (citation omitted). Consciousness of race and consideration of race are completely legal if race does not predominate. Therefore, consideration of race in an attempt to avoid non-retrogression is *ipso facto* not enough to prove racial predominance.[4]

[4]Plaintiffs do concede that the legislature was "compelled" by federal law to draw at least seventeen districts in which minorities would have a reasonable opportunity to elect candidates of choice. (Br. Appellees at 24.)

In their brief, plaintiffs attempt to shift their burden of proof, asserting that defendants did "not actually suggest . . . that any motive other than race was in fact the legislature's true, predominant motive." (Br. Appellees at 25) (emphasis deleted). But once plaintiffs accepted the heavy burden of making out a case of racial predominance through circumstantial evidence under the "fairly debatable" rational basis test, the burden was on them to negate the influence of nonracial factors in the 2001 redistricting plans, a burden they manifestly failed to sustain.

B. Plaintiffs' Evidence was Insufficient to Trigger Strict Scrutiny.

In their brief, plaintiffs gloss over the overwhelming amount of record evidence that the General Assembly validly considered numerous traditional redistricting factors such as population equality, communities of interest, current district boundaries, compactness and contiguity, and compliance with § 5 of the Voting Rights Act when crafting the plans that were ultimately adopted.

One of the traditional districting principles that the legislature used involved maintaining the cores of preexisting districts. In order to avoid retrogression, the central cores of the minority districts drawn in 1991 were maintained, even as the districts had lost population. To be sure, the General Assembly made nearly all of these districts more compact, and in most cases the percentages of racial minorities was reduced. Nevertheless, plaintiffs contend that the maintenance of these districts may be further evidence of "race-conscious motivation." (Br. Appellees at 27.) Putting aside the fact that a consciousness of race by itself is insufficient to trigger strict scrutiny, Shaw v. Reno, 509 U.S. 630, 646 (1993) ("the legislature always is aware of race when it draws district lines") (emphasis in original), there is no fact in the record that would support an

inference that maintaining the essential configuration of previous districts is anything other than a valid traditional districting principle. Shaw v. Reno, 517 U.S. 899, 912-13 (1996). Furthermore, the previous districting plan provides the legal benchmark for complying with the § 5 non-retrogression principle.

Having erroneously disregarded the overwhelming record evidence that race was not predominant, the trial court held that race had predominated and then went on to consider the parties' evidence of compelling state interest and narrow tailoring. In doing so, the trial court applied a legally erroneous definition of retrogression and made findings that are unsupported by the record.

C. The Trial Court Erred in Ruling that the Requirement of Non-Retrogression Would Not Have Justified the Redistricting Plans Even Had Race Predominated.

Plaintiffs declare that the state Senate and House of Delegates districts struck down need to be only approximately 50% African-American to ensure that minority voters are guaranteed a reasonable opportunity to elect their candidates of choice. (Br. Appellees at 30.) This statement is based upon the testimony of their expert, Dr. Alan Lichtman, who spoke to a "49 point something" to "51 point something" percent range at which minority voters' rights would be protected. (A. at 976.) Supposedly, any deviation above or below that range would assure either retrogression or "packing." (A. at 926.)

Although plaintiffs make the representation that defendants' expert, Dr. Loewen, "identified essentially the same number," (Br. Appellees at 30), this is not so. In fact, Dr. Loewen disagreed strongly with Dr. Lichtman's conclusion. (A. at 1408) ("I think those numbers are far too low."). Dr. Loewen then proceeded to identify House Districts 69,

70, and 75, in which the African American candidates of choice were either defeated or barely won over the past decade. (A. at 1408-20.) This evidence was essentially ignored by the trial court and now, in a futile attempt to bolster Dr. Lichtman's conclusions, plaintiffs erroneously state that the experts reached the same conclusions. But Dr. Loewen testified that the ranges of minority population present in the 2001 plans were necessary to avoid retrogression, and Dr. Lichtman's analysis of the effects of incumbency was non-existent.

In determining whether a districting plan is retrogressive, it is necessary to determine an appropriate benchmark. See Reno v. Bossier Parish Sch. Bd., 520 U.S. 471, 478 (1998) (plurality opinion). In this case, the proper benchmark for beginning the § 5 retrogression analysis is the last enacted plan. Despite plaintiffs' efforts to disparage the validity of Virginia's 1991 plans (Br. Appellees at 27), it is apparent that these plans were not successfully challenged in the 1990s, and that they therefore necessarily stand as benchmarks for determining the relative position of minorities prior to the current plan. There is no dispute that the General Assembly utilized the basic cores of former districts as the foundation for designing most of the challenged districts. This is a permissible and reasonable determination by the legislature to maintain minority opportunities as required by federal law. It is also one of Virginia's traditional districting methods inasmuch as it protects incumbents and preserves communities of interests which arise when people are in the same political districts over at least a ten-year period. Jamerson, 244 Va. at 512, 423 S.E.2d at 183.

Although plaintiffs have hewn to the trial court's unique and selective definitions of "opportunity," the legally operative test is one of "advantage." (See Opening Br.

Appellants at 41-42.) Dr. Lichtman and Dr. Loewen both agreed that the practical effect of the 1991 redistricting plans in certain districts was to give African-American candidates an advantage. To reduce minority strength in those districts to the level of a "toss-up" as plaintiffs now demand constitutes retrogression by the legal meaning of that word.

When testing whether retrogression had occurred, the trial court used the analysis in Thornburg v. Gingles, 478 U.S. 30, 50-51 (1986) – normally reserved for § 2 cases – to determine whether challenged districts were narrowly-tailored to meet the requirements of § 5. Although plaintiffs never brought any § 2 claim (Br. Appellees at 31 n.14), they advance the *ipse dixit* claim that the Gingles analysis was used to evaluate the degree of "packing" of minorities. Because the Gingles three-prong test demonstrates only whether there are sufficient minorities in a compact area to constitute a functioning majority in the face of significant racially-polarized bloc voting, it is an inappropriate test to gauge whether there has been retrogression under § 5. See Voinovich v. Quilter, 507 U.S. 146, 153-54 (1993).

Since the trial court's eccentric tests for retrogression are contrary to federal law, they were preempted by that law. Because the trial court employed a legally incorrect standard, it *per se* abused its discretion in making its retrogression analysis.

III. The Trial Court Struck Legislative Districts that were Contiguous and Compact.

Plaintiffs' suggestion that the trial court's findings on compactness and contiguity are not "clearly erroneous," and their insistence that the logic in Jamerson "does not support reversal of the trial court's compactness findings in this case," have no credible

legal basis. (Br. Appellees at 34, 43) (emphasis deleted). Instead, Jamerson defeats all of plaintiffs' state law claims under Article II, § 6 of the Constitution of Virginia.

In Jamerson, two Senate districts in the General Assembly's 1991 redistricting plan were challenged as being violative of Article II, § 6. 244 Va. at 508, 423 S.E.2d at 181. Before deciding the merits of plaintiffs' claims (which were ultimately dismissed), this Court articulated the following "well-settled principles" that would govern its review. Id. at 509, 423 S.E.2d at 182. Legislative determinations of fact bind this Court. The legislature's conclusion must be given deference if it is fairly debatable because wide discretion is given the legislature. And, the legislature's enactments come before this Court with a presumption of validity that is overcome only if the law is plainly repugnant to the Constitution. Id. at 509-10, 423 S.E.2d at 182.

Applied here, these principles lead to but one inexorable conclusion – that which is the exact opposite of the one reached by the trial court below. Under Jamerson, if it is "fairly debatable" that a redistricting plan created legislative districts that were compact and contiguous, judicial inquiry ends and the districts must be upheld as constitutional.

In their brief, plaintiffs go to great lengths – citing three law review articles, one Ph.D. dissertation, eleven out-of-state court decisions, five non-applicable constitutional provisions, two books, and four inapposite federal court decisions – to distance themselves from Jamerson, the one authority from this Court that is controlling and dispositive of their compactness and contiguity claim under Virginia law. Specifically, they make three principal arguments: (1) that "Jamerson does not apply to contiguity claims at all," (2) that the deference due legislative findings as to compactness and contiguity are trumped by deference due the trial court's findings, and (3) that Jamerson

has been substantively "limited" by Shaw v. Reno, 509 U.S. 630 (1993), and its progeny. All of these arguments are unavailing.

First, although the Jamerson plaintiffs only challenged the compactness of Senate Districts 15 and 18, it is axiomatic that the same "well-settled principles" that guided this Court's compactness analysis would have also governed any holding on contiguity. 244 Va. at 509-10, 423 S.E.2d at 182. Like compactness, contiguity entails a "legislative determination" and this Court was fully justified in parsing both modifiers in the phrase "contiguous and compact territory" in the context of a compactness challenge. Id. at 514, 423 S.E.2d at 184. Even the trial court referred repeatedly to Jamerson when it purported to "[d]efin[e] 'Contiguous' in its Constitutional Context." (A. at 2798-2805.) Plaintiffs' attempt to distinguish Jamerson by characterizing compactness and contiguity as "wholly independent . . . ground[s] for invalidating the districts" (Br. Appellees at 41) is further refuted by the fact that they brought their compactness and contiguity challenge below as a single claim. (A. at 385-86.)

Second, plaintiffs' proposition that the trial court's findings on compactness and contiguity should trump the General Assembly's legislative findings is contrary to law. City Council of the City of Salem v. Wendy's of W. Va., Inc., 252 Va. 12, 471 S.E.2d 469 (1996) (after giving "full credit to the presumption of validity of the challenged legislative action," this Court reversed trial court's finding because the contrary conclusion was "fairly debatable"). Furthermore, here there was no direct evidence at all before the trial court to indicate that the challenged districts were not compact. (A. at 2796-97) ("[T]here was no testimony that any particular district was unacceptably non-compact according to either of the measures applied by the experts.") (internal footnote

omitted). The trial court simply applied its unwarranted contiguity by water analysis to unchallenged maps. This exercise is entitled to no deference under established law.

As this Court held in Jamerson, contiguity is a spatial concept. 244 Va. at 514, 423 S.E.2d at 184. Every piece of land in the Commonwealth, whether it be covered by water or the open sky, is part of a Senate and House district. Plaintiffs' own maps, presented as evidence below, show that when two districts adjoin a body of water, they extend out into the water and meet somewhere in the middle.[5] The principle of contiguity is not violated when travel within a particular district becomes inconvenient.[6]

Finally, Shaw and subsequent federal Voting Rights Act decisions have not at all compromised the integrity and viability of Jamerson. Shaw cases have nothing to do with the standard of review adopted in Jamerson. While they somewhat limit non-retrogression as a basis for justifying racial predominance when such retrogression can be proved, they do not do so in this case because of plaintiffs' tactical decision to expressly waive all federal constitutional claims. The doctrinal impossibility of strictly scrutinizing federal law under the state constitution was described in the opening brief (Opening Br. Appellants at 39) and remains unanswered by plaintiffs.

Plaintiffs have made a fatal concession by arguing that while "contiguity by water is not *per se* impermissible," its "excessive use" in the 2001 redistricting plans is objectionable. (Br. Appellees at 38-39 n.23.) Of course, all questions of degree are

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[5](See, e.g., A. at 1850) (map of House District 74 showing that its boundary with House District 64 is underwater).

[6]Although, this is what the trial court held. (A. at 2804) ("The Court accepts that it is a general rule of thumb that a district is considered contiguous if every part of the district is accessible to all other parts of the district without having to travel into a second district.") But there is no evidence that the legislature or this Court have ever construed the Constitution of Virginia in this way.

uniquely for the legislature and not the judiciary under the rational basis test unless the act is so extreme that it is not fairly debatable that it is unreasonable. Here, the trial court adopted an incorrect legal standard and then struck down districts whose contiguity was at least fairly debatable. That was error.

IV. Venue Could Lie Only in the City of Richmond.

Plaintiffs have advanced no argument in support of venue lying in the City of Salem that requires any elaboration of what defendants demonstrated in their opening brief, although it should perhaps be noted that Faison v. Hudson, 243 Va. 413, 417 S.E.2d 302 (1992), is in substance a waiver case. When, as here, there is no unreasonable delay in raising the venue issue, permitting a lawsuit in an improper forum that had "at best only a technical formal connection" to the claims constitutes reversible error. Norfolk and W. Ry. Co. v. Williams, 239 Va. 390, 395, 389 S.E.2d 714, 717 (1990) (cited in Br. Appellees at 44).

V. Reversal is Warranted Because the Trial Court Erred in not Recusing Itself and in Permitting *Ex Parte* Expert Opinion without Affording Defendants a Right of Response.

Under Virginia law, it is imperative to the integrity of the court that "a judge . . . diligently avoid not only impropriety but a reasonable appearance of impropriety as well." Davis v. Commonwealth, 21 Va. App. 587, 591, 466 S.E.2d 741, 743 (1996). This is confirmed by Canon 3E(1), which aptly cautions that "[a] judge shall disqualify himself or herself in a proceeding in which the judge's impartiality might reasonably be questioned . . . ." "Judges are presumed to be aware of the provisions of Canon 3 . . . ." Davis, *supra*. When a motion to recuse is presented, a "judge must be guided not only by the true state of his impartiality, but also by the public perception of his fairness, in order

that public confidence in the integrity of the judiciary may be maintained." Stamper v. Commonwealth, 228 Va. 707, 714, 324 S.E.2d 682, 686 (1985).

Whether or not the trial judge should have recused himself under this standard when it became apparent that grotesque judge-shopping was afoot in a case of high political significance – and he should have – it is beyond reasonable debate that his *ex parte* receipt of expert advice without affording defendants a right of response violated Canon 3B(7)(b) and was reversible error.

VI. The Trial Court Grossly Exceeded its Equitable Authority.

Plaintiffs attempt to address the fact that the trial court exceeded its equitable powers by simply denying that it did so. Plaintiffs' claim that the trial court merely enjoined the Secretary of the State Board of Elections from holding any further elections. (Br. Appellees at 49.) But their claim that legislative action is "assumed, not required," (id.) (emphasis deleted), is exactly contradictory of the trial court's decree. (A. at 2839-40.) Legislative action is required, not assumed. While it is true that any plan which might be adopted in response to the decree would have to be precleared, all parts of the decree that are immediately effective violate the Voting Rights Act unless and until they are themselves precleared. These excessive acts are stayed by this Court's order, but not mooted, as they remain part of the trial court's final decree and are merely suspended, not revoked.

CONCLUSION

Wherefore, the judgment below should be reversed and final judgment entered for defendants. In the alternative, a new trial should be granted in the proper venue before an impartial judge.

Respectfully Submitted,

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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 brief were filed by hand this _____ day of August, 2002 in the Office of the Clerk of the Supreme Court of Virginia, and that three copies of this brief were mailed by first-class mail, postage prepaid, this _____ day of August, 2002, to the following opposing counsel:

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