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. 021004**
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

BRIEF OF APPELLEES

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

FEDERAL STATUTES AND REGULATIONS

STATE CONSTITUTIONAL AND STATUTORY PROVISIONS

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

QUESTIONS PRESENTED

1. May a plaintiff in a redistricting case establish standing by virtue of the fact that he or she lives in a district being challenged?

2. Was the trial court's finding that the redistricting acts, Va. Code Ann. §§ 24.2-303.1 and Va. Code Ann. §§ 24.2-304.1, include districts that violate the antidiscrimination provisions of the Virginia Constitution clearly erroneous?

3. Was the trial court's finding that the redistricting acts include districts that violate the contiguity and compactness requirements of the Virginia Constitution clearly erroneous?

4. Did the court abuse its discretion in holding that venue was proper in the City of Salem?

5. Did the trial judge abuse his discretion in declining to recuse himself on the uncontested ground that he was unbiased and could dispense justice impartially?

6. Did the court's order invalidating the redistricting acts exceed its equitable authority?

STATEMENT OF THE CASE

The heart of this case is the question whether the Virginia Constitution imposes any meaningful constraints on the electoral districting process. If the Constitution imposes any genuine limitation on racial discrimination in the drawing of electoral districts, the 2001 plans plainly violate that limitation. If the Constitution imposes any genuine limitation on the shape and contiguity of districts, the 2001 plans plainly violate that limitation. To uphold these plans is to say that the Virginia Constitution lacks any meaningful limitation on the districting process. And to reach that conclusion is to contradict the Constitution's terms, purpose and history.

In tacit recognition of the weakness of his legal and factual attack on the judgment below, the Attorney General's brief on appeal instead attacks plaintiffs and their litigation strategy. First, the Attorney General complains that Virginia residents filed a challenge under the Virginia Constitution to a Virginia electoral scheme in the courts of Virginia. The Attorney General evidently would rather see such cases litigated in federal court, under the

federal Voting Rights Act. Yet nowhere does the Attorney General explain why Virginia is better served when *federal* judges review and invalidate *state-created* electoral districts, as in *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va. 1997) (three-judge court), *aff'd*, 521 U.S. 1113 (1997), or why the courts of the Commonwealth lack the competence to resolve questions arising under its own Constitution. The simple truth is that the existence of federal voting laws has exactly nothing to do with whether the Virginia Constitution imposes its own independent constraints on the districting process. Nor is there support for the Attorney General's apparent view that federal courts should have exclusive authority for handling redistricting litigation. And it is especially ironic that the chief legal officer of the Commonwealth would criticize plaintiffs for invoking the legal system of the Commonwealth to vindicate their rights; one can easily imagine the Attorney General complaining — with some justification — of the sensitive federalism issues raised had this case been brought in federal court, under federal law.

Second, the Attorney General also complains at length that some of the many Virginia residents bringing this challenge are Democratic legislators and leaders, some of whom played a role in enactment of the 1991 districting plans. The point of this attack is even less clear than the first. If the Attorney General means to suggest by his attacks that plaintiffs believed that the 1991 plans were valid *at that time*, that does nothing to undermine their challenge to the 2001 plans *now*. Among other things, the courts have imposed substantial new constraints on districting since the prior plans were enacted, and the demographics of the state's population have changed significantly. Moreover, the Attorney General's implicit suggestion that districting constraints in the Virginia Constitution should be interpreted on the basis of the political affiliations of the plaintiffs bringing the challenge offends every principle on which the Constitution is based. The political affiliations of the

plaintiffs are as irrelevant to the appropriate adjudication of the current plan, under current law, as is the political affiliation of the Attorney General.

Plaintiffs understand full well that districting is a political process. But the fact that redistricting is political cannot shield the outcome of the process from the mandate of the Virginia Constitution. The legislature should be accorded substantial latitude in this political process, but that latitude is not infinite, and, as the *Moon* court found with regard to the 1991 districting plan, it can run afoul of legal limitations. That is precisely what happened here.

STATEMENT OF FACTS[1]

In open defiance of the settled rule that trial evidence must be viewed in the light most favorable to the prevailing party, *see, e.g.*, *Tashman v. Gibbs*, 263 Va. 65, 68, 556 S.E. 2d 772, 774 (2002), the Attorney General's brief presents an explicitly argumentative and strikingly one-sided recitation of the facts, omitting material facts favorable to the judgment, and flatly misstating many others. The reality is that the material record facts supporting the trial court's judgment are *wholly undisputed*, which is doubtless why the Attorney General ignores or changes them as necessary to support his position.

A. General Background

On April 1, 2000, the United States Census Bureau conducted the twenty-second decennial count of the United States' population. The count showed that Virginia's population had increased 14.4 percent since 1990, to 7,078,515 people. Since World War II, the number of African Americans had steadily declined in Virginia. But in the 1990s, that trend reversed itself: Virginia's African American population grew by 19.5 percent in the 1990s, and grew from 18.8 percent to 19.6 percent of the total population.

[1] The Attorney General's statement of proceedings below is substantially correct.

Although large concentrations of African Americans still lived in Richmond and the Tidewater areas, many had moved out of the inner city areas of Richmond, Hampton, and Norfolk, as more educational and professional doors swung open to members of the African American community. As compared to 1990, the African American population was less concentrated in the urban cores. As a result, African Americans were gaining a political voice in certain new communities for the first time. Their influence was felt outside of city centers, and their numbers in certain legislative districts were growing.

The 2001 districting process began on March 8, when Virginia received the 2000 census data. The legislature promised an open process, but what happened was a farce. Citizens were asked to come to public hearings to comment on plans that did not exist. Once the plans were adopted, the public had one day to respond to them and attend a hastily-convened public hearing to provide "input." Assembly leaders rammed through their proposals, cutting off debate when Sen. Emily Couric began aggressive questioning about compactness and contiguity problems in the plans. Several speakers, including members of the Legislative Black Caucus, also rose to put the Legislature on notice that the districting plans were improperly dividing voters by race, and unnecessarily packing African Americans into as few districts as possible. They were ignored.

B. Trial Evidence Relating to Racial Gerrymandering

1. At trial, the proof of racial gerrymandering in the 2001 plan was largely made through undisputed, direct evidence, and it was illustrated in vivid color detail by maps of the challenged districts. The Attorney General's own brief on appeal accurately states that there "was no dispute" below that the Legislature consciously drew the lines of 17 districts — 12 in the House and 5 in the Senate — to ensure that "minority voters would have an equal opportunity to elect candidates of choice." AG Br. 40. Unfortunately, the legislature did not

stop there. In each of the districts invalidated by the trial judge, the Black voting age population ("BVAP") was between 55 and 60%. (A. 1905, 1938.) The asserted motive for drawing such districts was to comply with the Voting Rights Act. (A. 2256, 2269.) The Committee responsible for establishing districting criteria specifically stated that such traditional districting considerations as equipopulation, compactness and contiguity, and integrity of jurisdictional boundaries, were to be subordinated whenever necessary to that goal. (A. 2610, 2648.)

2. The maps introduced into evidence — the accuracy of which was not contested by the Attorney General — plainly reveal the extent to which the legislature went to segregate voters into racially demarcated districts. (A. 1837-1873.) The district lines frequently jump rivers and other bodies of water, they split county and city lines, and they split precincts, yet they neatly ensure that *almost every black precinct ends up on one side of the line, while almost every white precinct ends up on the other*. Though the maps speak for themselves, they were supplemented by the testimony of two witnesses. Julie Copeland testified from personal knowledge as to many of the deviations from geographical and political boundaries. (A. 796-859.) Not one factual detail of her testimony was challenged by the defendants. American University professor and widely recognized voting rights expert Dr. Allan Lichtman analyzed the precincts along the borders of the challenged districts (using the same methodology employed by defendants' expert) and showed how precincts with heavy black populations were consistently included within the challenged districts, while those with heavy white populations were consistently excluded from the districts. (A.

888-1056, 1901-1964, 1984-2019, 2101-2110.) Again, the facts in respect to the border precincts were not challenged by the defendants.[2]

Consistent with the stated intent of the districting criteria, the maps and supplementary testimony and evidence showed a clear and consistent pattern of subordinating traditional districting principles such as contiguity, compactness, and respect for political boundaries, to racial considerations. As Dr. Jack Austin, an official with the Legislative Services Division of the General Assembly, testified, the legislators responsible for designing the plan had access to more detailed racial data than was ever before available to the General Assembly. (A. 1171.) The results speak for themselves.

3. Full trial evidence descriptions of the bizarre, race-based turns of the district lines can be found in the Appendix at pages 809-28, 837-53, 1927-37, and 1904-15; what follows is merely a capsule summary of what that evidence showed.

a. In the House plan, Richmond-based HD 69 is a bizarrely shaped district, with several odd protrusions that jut out across the city line and over the James River; in one case, the district boundary actually divides a precinct along racial lines. (A. 1846.) The maps and unrefuted testimony establish that the district makes these moves to grab heavily black precincts, leaving adjoining suburban districts almost entirely white. HD 70, in parts of Richmond and Henrico County, is a star-shaped district with arms jutting in every direction to pull in together disparate Black populations. (A. 1848.) And again, the district lines bob

[2] The defendants' own "border precinct" expert witness, Dr. David Peterson, tried to make two points: (1) that the districts looked much like the 1991 districts, and (2) that although the district lines correlate neatly with race, they also correlate with political performance, suggesting that politics was also a potential explanation for the line-drawing decisions. The first is of no legal consequence, *see infra* at 26. The second is also irrelevant, given the legislature's admission that it was driven primarily by the race-based goal of creating heavily Black districts, *see infra* at 23-24, as well as the utter lack of any evidence that the legislature was actually motivated by politics and not race. In any event, plaintiffs

and weave as necessary to avoid the admission of black voters to the suburban white-majority District 62. Nearby HD 74 is both the least compact district in the entire House plan, (A. 1978), and the most heavily black. (A. 1905.) It is the "meat cleaver" district, with a "blade" comprising Charles City County, and a long "handle" running northwest into Henrico County and Richmond. (A. 1852, 1850.) The district is at least 45 miles long, but only a half-mile wide at some points. The district also crosses the James River at one of its widest points (where there is no bridge), and juts into the City of Hopewell to absorb its two heavily African-American precincts, splitting the city into two distinct parts — one black and one white. As the undisputed record evidence establishes, similar patterns of racial line-drawing repeat themselves in the other districts invalidated by the trial court, HD 77 (A. 1853), HD 80 (A. 1856), and HD 92 (A. 1858.)

b. The Senate districts invalidated by the trial court share the same characteristics. SD 2, for example, spans the Chesapeake Bay to pull in African-American voters from four different cities (Chesapeake, Hampton, Suffolk, and Newport News) on two distinct landmasses. (A. 1860.) The northern half of the district includes precincts on the Peninsula, and the lines trace racial divisions with surgical precision, collecting heavily black precincts in Hampton and Newport News and keeping blacks out of majority-white SD 1. The pattern is the same in Tidewater, where the black precincts are divided between SD 2 and SD 18 (also majority black), leaving white precincts to SD 13. (A. 1861, 1872.) SD 5 claims heavily African-American areas in two different political subdivisions, Chesapeake and Norfolk, on two sides of the Elizabeth River. (A. 1862.) The borders of SD 5 are rife with mini-peninsulas, where the lines cross geographical and political boundaries to pick heavily African-American precincts out of white areas. SD 9, which includes a third of

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demonstrated conclusively that race is a statistically *better* explanation for the district lines

Richmond, half of Henrico, and all of Charles City County, has a northwestern most tip of the district that reaches just as far as necessary into Henrico to pick up almost all of the heavily African-American precincts in that county, stopping right where the Henrico precincts begin to become heavily white. (A. 1864, 1867.) Henrico is thus split along lines that reflect no geographic or jurisdictional boundaries — other than leaving one half predominantly white and one half largely African-American. The district also cuts a swath through the middle of Richmond that picks up all the majority and heavily African-American precincts that are left out of SD 16 (another majority African-American district), ensuring that not one majority African-American precinct in Richmond is included in either SD 10 or SD 12, which consist of the remaining, heavily white precincts in the city. (A. 1868.)

SD 16 is centered in Dinwiddie, but has attached to its northeast corner an elongated sickle-shaped appendage that extends all the way into Richmond. (A. 1868.) At its northernmost end, the district picks up every single predominantly African-American precinct in Richmond south of the James River, save one (which is assigned to SD 9, another majority African-American district). SD 16 also hops over the James River, picking up six more heavily African-American districts in Richmond. (A. 1866.) Though SD 10 also divides Richmond, every Richmond precinct assigned to SD 10 is predominantly populated by white voters. Richmond is thus divided among three separate districts, which racial lines — not geographic or jurisdictional — being the obvious basis for demarcation. (A. 1866.) After helping to carve up Richmond, SD 16 moves south through Chesterfield, minimizing the capture of voters in this mostly white area by narrowing to a thin corridor often only a single precinct wide. (A. 1866.) The district then splits Prince St. Georges county and picks up the two precincts with significant African-American populations. The district veers east

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than is politics. (A. 2010-2019, 2103-2110.)

to avoid heavily white Colonial Heights, but extends a "finger" to the northeast into the city of Hopewell, picking up just the precincts with sizeable African-American populations. (A. 1865.) SD 16 then turns west to snare all of Petersburg, with all of its heavily African-American precincts. (A. 1865.) The pattern is similar for SD 18. (A. 1870, 1872.)

c. Not only did the challenged House and Senate districts divide political subdivisions along racial lines as just described, they also split individual precincts along racial lines, as the trial court found. (A. 2835-36; *see also* A. 953-61, 2011, 2013-14, 2104, 2107.) Like most legislatures, the Virginia Assembly had no political data at the sub-precinct level, only racial data. (A. 00171.) For that reason, courts have considered evidence that precincts were split along racial lines to be "'substantial evidence that it was race that led to the neglect of traditional districting criteria.'" *Moon*, 952 F. Supp. at 1147 n.6 (quoting *Bush v. Vera*, 517 U.S. 952, 963 (1996) (plurality op.)); *see Bush*, 517 U.S. at 971 (splitting of precincts on racial lines "suggests that racial criteria predominated over other districting criteria in determining the district's boundaries"); *Miller v. Johnson*, 515 U.S. 900, 918 (1995) (finding racial gerrymander in part because "[t]o the extent that precincts in the Eleventh Congressional District are split, a substantial reason for their being split was the objective of increasing the black population of the district") (internal quotations omitted). And what this especially important evidence showed here is that when the legislature chose to split a precinct, it most often did so by dividing the heavily black portion from the heavily white portion.

In sum, all of the districts invalidated by the trial court as racial gerrymanders share three things in common: first, they were all explicitly designed to include a majority Black population; second, rather than stopping there, they are all created to be overwhelmingly Black; and third, they all subordinated traditional redistricting principles to place Black

voters into these overwhelmingly Black districts — with the necessary effect of reducing the presence of Black voters (and of diminishing their political influence) in adjacent, predominantly white districts. While the Commonwealth of Virginia became more integrated over the past decade, the legislature effectively undid the political effects of that integration by grouping voters by race into largely segregated electoral districts.

4. Given the overwhelming, undisputed evidence of racial predominance in district line-drawing, the only remaining question at trial was whether the Commonwealth had carried its burden of proving both a compelling interest in the predominant use of race, and that the use of race was narrowly tailored to the service of that interest. *See infra* at 28-29 (setting forth legal standards). As noted above, the Commonwealth asserted at trial that the legislature's goal was to create these districts to satisfy its obligations under § 5 of the federal Voting Rights Act. As elaborated in the legal discussion below, both parties agreed that complying with § 5 is a compelling interest, and that to comply with § 5 the Commonwealth was required to create 12 House districts and 5 Senate districts in which African Americans had an equal chance to elect a candidate of their choice. At the outset of the trial, then, the dispute was framed as a disagreement over whether the legislature had subordinated traditional districting principles to race more than necessary to maintain compliance with the Voting Rights Act.

When the parties submitted their evidence, however, it turned out there was very little disagreement between the parties with regard to the facts. Analyzing data reflecting the patterns of racial voting in scores of past elections, plaintiffs' expert Dr. Allan Lichtman – one of the nation's leading scholars and experts in this field — testified that to ensure African Americans living in the challenged districts a reasonable opportunity to elect a candidate of their choice, the legislature was essentially required to establish districts with a minimum

BVAP of approximately 50%. (A. 974.) In other words, no district needed to be in excess of 50% BVAP to ensure black voters in that district at least a "toss up" chance of electing the candidate they favor in any given election. (A. 974.) Not only did defendants' expert Dr. Loewen fail to rebut any aspect of that testimony using the same "ecological regression" methodology — pioneered by Dr. Lichtman and now standard in expert voting rights analysis — he actually reached essentially *the same conclusion*. (A. 1566 ("[E]very single one of my estimates came out right around 51 percent"); A. 1569 (minimum BVAP for toss-up election is 50.3%)).[3] Thus the expert testimony — *by both parties' experts* — fully supported the trial court's conclusion "that minority districts do not need 54% to 56% BVAP to have a *reasonable* opportunity to elect candidates of its choice, and certainly do not need a higher BVAP [as in the invalidated districts]." (A. 2834.) In other words, the legislature had stretched, twisted, and contorted district lines to fill them with Black voters far more than was necessary to ensure that the districts complied with the Voting Rights Act.

C. Trial Evidence Relating to Compactness/Contiguity Claim

The principal evidence relating to plaintiffs' claims under the compactness and contiguity requirements of the Virginia Constitution were the maps and supplementary testimony, already summarized above in respect to the districts also challenged as racial

[3] Dr. Loewen did testify that a range of as high as 60 percent could be necessary in some instances to ensure electoral success, but that testimony was based on the theory that black voters feel a "chilling" effect when their relative numbers are reduced. Plaintiffs proved below why "chilling" has no relevance in the districts at issue. First, Dr. Loewen was forced to concede that such chilling occurs only when percentages are reduced well below 50% — to the point that many minority voters simply see no point in turning out. (A. 1563.) Second, Dr. Loewen was also forced to concede that his chilling conclusion was based largely on black voter behavior in areas where blacks were much less than 30% of the population, and usually below 10%, and that such behavior could not be translated to districts where they constitute a slight or near majority. (A. 1563.) Dr. Loewen ultimately conceded that his chilling analysis was based on a "contradiction" (A. 1567), and that in fact any chilling effect here would be "modest." (A. 1589; *see also* A. 1004-05.)

gerrymanders. Dr. David Lublin also testified as to the relative compactness of the districts. (A. 765.)

The district maps revealed significant undisputed evidence of contiguity and compactness problems with the districts. SD 1 is composed of two non-contiguous landmasses — the City of Poquoson and Newport News on one side of the water, and the City of Hampton on the other. These two landmasses are "separated by water with no ingress or egress by motor vehicle within the district from the Hampton part of the district." (A. 2805.) One must travel through SD 2 to get from Hampton to Poquoson or Newport News. *Id.* SD 2 similarly straddles a body of water with no easy crossing point. Newport News and Hampton are on the north side of the bay, while a single precinct of Suffolk and a single precinct in Portsmouth are on the south side of the bay. SD 6 contains all of Accomack County, all of Northampton County, all of Mathews County, part of the City of Norfolk, and part of the City of Virginia Beach, but neither Accomack County nor Northhampton County are contiguous with Mathews County, and none of those three counties is contiguous with Norfolk or Virginia Beach. The three disparate landmasses are "twenty or thirty miles apart from one another across barren stretches of water," and "there is no evidence of any access by the usual regularly used or scheduled modes of transportation . . . from Mathews to Accomack or Northhampton or vice-versa or from Mathews to Norfolk or Virginia beach within the district itself." (A. 2807.)

Similar problems plague HDs 74, 91, and 100. HD 74 runs 45 miles long and is only a half mile wide at certain points. The district is the single least compact district in both plans according to both accepted statistical compactness measures. (A. 1978.) In addition, the district artificially joins non-contiguous landmasses, Charles City County and Hopewell, crossing the James River to snatch two precincts in the City of Hopewell, even though "there

are no bridges, tunnels, or other motor vehicle ingress and egress connecting Hopewell to any other part of the district." (A. 2812.) HD 91 is similar in its configuration to Senate Districts 1 and 2. *Id.* "Residents of the Hampton portion of the district are separated by water, with no access within the district, from residents of Poquoson and York County." *Id.* Moreover, Newport News residents are separated from Hampton and must travel through HD 92 to reach Hampton. House District 100 is comprised of three distinct landmasses — Northampton and Accomack County on the Delmarva peninsula on one; Hampton on another; and Norfolk on a third. Hampton's Buckroe precinct is separated by 17 miles of water from the peninsula, and from the Norfolk portion across Hampton Roads. (A. 2809.)[4]

SUMMARY OF ARGUMENT

I. Plaintiffs have standing. As a general matter, Virginia courts apply the same standing principles as are applied in federal court, and in *United States v. Hays*, 515 U.S. 737 (1995), the Supreme Court "set forth a bright-line standing rule for a particular class of cases alleging illegal racial gerrymandering with respect to voting districts: if the plaintiff lives in the racially gerrymandered district, she has standing." *Dillard v. Baldwin County Commissioners*, 225 F.3d 1271, 1279 (11th Cir. 2000). It is undisputed that each plaintiff lives in a challenged district; thus, each has standing to argue that he or she has been individually harmed by being subjected to a racial classification. The Attorney General cites no case in support of his proposed requirement that a plaintiff must individually testify as to

[4] The state's expert, Dr. Gerald Webster, opined that the districts were compact by comparing them to a suggested compactness cut-off proposed as a legal standard in a law review article. Dr. Webster admitted that the cut-off was devised solely for congressional districts, and was not intended to apply to much smaller state legislative districts. (A. 1257-1258). Dr. Webster's testimony also established that the legislature could have easily drawn *more* compact districts by not engaging in some of the bizarre line-drawing that separated black and white precincts. (A. 1264.) Finally, Dr. Webster admitted that he had done no analysis of contiguity by water (A. 1265), but agreed that the lack of transportation across water could affect the quality of voter representation. (A. 1267.)

his or her psychic reaction to being subject to a racial classification in this context. The rule is no different for contiguity and compactness challenges; if anything, the nature of the injury in such cases should allow plaintiffs to challenge even districts in which they do *not* reside.

II. The trial court's findings that 8 of the House districts and 5 of the Senate districts are unlawful racial gerrymanders are not clearly erroneous. They are clearly correct. The evidence supporting the findings is mostly undisputed. The district maps, which reflect the districts' racial demographics, literally illustrates just how much race predominated the legislature's work: the district lines bob and weave, twist and turn, and jump water and other boundaries, all to divide African Americans from their white neighbors. What the record ultimately reveals is the effective political "re-segregation" of Virginia. After years of seeping residential integration, Blacks had finally begun to become a genuine political presence in new, more integrated communities; the 2001 plans forces them into fewer, overwhelmingly Black communities, effectively diminishing overall Black political influence in the Commonwealth.

Nor is the Attorney General helped by claiming that the legislature drew district lines on the basis of race in order to comply with the Voting Rights Act. Compliance with federal voting rights laws is a compelling reason to draw districts with an eye to minority voting opportunities, but the U.S. Supreme Court has repeatedly warned that those laws do not give a legislature *carte blanche* to draw whatever lines it wishes, especially when those lines essentially pack minorities into as few districts as possible, thereby *reducing* black political influence statewide. That is precisely the harm that constitutional equal protection principles are intended to protect against. And yet that is exactly what the record evidence shows happened here: *both sides'* experts established that the legislature drew lines that filled the challenged districts with many more minority voters than was necessary to ensure that they

had an equal opportunity to elect candidates of choice. Federal voting laws thus provide the legislature no refuge from the consequences of drawing race-based electoral districts with no legal, constitutional, or moral justification — lines that had the effect of reducing black political influence, rather than truly advancing black voter electoral opportunities.

III. The trial court's findings that several of the House and Senate districts are not contiguous, and that a subset of those districts also are not compact, are not clearly erroneous. As to contiguity, the trial court correctly held that a district divided by water may be considered contiguous, but only where there are adequate, reasonable modes of transport across the water to ensure easy accessibility within the district. The court's factual finding that the invalidated districts do not provide such access is not disputed. And the legal requirement of intradistrict accessibility is a sensible, functional application of the contiguity requirement to districts divided by water. By contrast, the Assembly's view that *any* connection by water is *always* sufficient to satisfy the contiguity requirement would render the requirement a virtual nullity in a state like Virginia, with its large coastline and many rivers. As to compactness, the record fully supports the court's conclusions that several of the districts are far too geographically dispersed to facilitate adequate representation.

Nothing in *Jamerson v. Womack*, 244 U.S. 506, 423 S.E.2d 180 (1992), compels a contrary result. *Jamerson* does not apply to contiguity claims at all, nor does it hold (as the Attorney General suggests) that mere "consideration" of compactness concerns by the legislature suffices to satisfy the constitutional requirement of compactness. That provision is a substantive, mandatory requirement that constrains the objective shape of districts, not the process of their design.

IV. The trial court did not abuse its discretion in finding venue proper in Salem. First, venue is proper in an injunction action wherever the act to be enjoined is to be done;

here, the act to be enjoined was the conduct of an election, which takes place everywhere in Virginia. Second, venue is proper in an action against a state officer anywhere that officer has an "official office." Plaintiffs filed this action against Delegate Morgan Griffith and others in Salem on the belief that key elements of the unlawful distorting plans were devised in Delegate Griffith's official district office in Salem. The fact that Delegate Griffith and others elected to assert immunity was neither predictable — legislative defendants in many other districting cases have chosen to stand up and explain their actions — nor did it undo venue predicated on Delegate Griffith's role in this case. Finally, time was of the utmost essence in this case, and ordering transfer would have wasted valuable time. This Court has held that even an erroneous venue determination will not subject the judgment to reversal when time is of the essence. Here, the court's determination was not erroneous, and any doubts should be resolved in favor of finality given the parties' need to reach an expeditious resolution in the unique circumstances of this case.

V. The Attorney General's argument that the judgment should be reversed because of an "appearance of impropriety" caused by the judge's decision not to recuse himself is meritless. It is perfectly well settled in Virginia that a refusal to recuse will not justify reversal absent a showing of *actual* bias or unfairness. The trial judge declined to recuse himself here because he believed he would be fair and impartial. The trial record bears him out: on many of the critical issues in the case, the court ruled for defendants, not plaintiffs. More to the point, the Attorney General does not even argue on appeal that the judge was anything less than honest, fair, and unbiased. That ends the matter under Virginia law. And the Attorney General's asserted "appearance" grounds for recusal — that the judge was active in local Democratic politics *over thirty years ago*, that he retained the services of

a respected law professor to act essentially as a temporary law clerk, and that the plaintiffs chose not to bring federal claims — border on the frivolous.

VI. The Attorney General's argument that the injunctive relief in this case is overbroad is demonstrably incorrect. The court's order invalidating the entire districting laws because of the constitutional flaws in the design of numerous districts is consistent with the practice of this Court and others. It is also the only solution respectful of the legislative process: precisely because the trial court cannot predict what changes the legislature and Governor would pursue in reenacting the plans, the proper course is to allow them to exercise the full range of their discretion, rather than cabining it by ordering precise changes. Nor does the court's order reflect a mandatory injunction impermissibly directed at the legislature. Consistent with precedents of this Court, the trial court simply invalidated the existing plans and enjoined the conduct of future elections until lawful plans are enacted. Finally, nothing in § 5 of the Voting Rights Act requires that a state court obtain "preclearance" of an order invalidating a districting plan *before the order is issued*. Section 5 requires only that new districting laws be precleared *before they are enforced*. Thus, what must be precleared is not the court's declaration that the existing plans are unlawful, but whatever plans the legislature and Governor devise in response to that declaration.

ARGUMENT

I. PROOF OF RESIDENCE IN A DISTRICT ESTABLISHES STANDING

The Attorney General argues that the trial court lacked jurisdiction over this case because the voters failed to prove standing. That is incorrect. The plaintiffs introduced a stipulation of the parties establishing the address of each and every plaintiff and the challenged district in which each resided. Nothing more was needed.

The Attorney General recognizes that Virginia's standing rules mirror the federal standing rules in this context as in others. AG Br. 28-30 (relying on federal authorities); *see also W.S. Carnes, Inc. v. Board of Supervisors*, 252 Va. 377, 383, 478 S.E.2d 295, 300 (1996) (applying federal precedents); *Cupp v. Bd. of Supervisors*, 227 Va. 580, 589, 318 S.E.2d 407, 411 (1984) (same). A line of cases starting with *United States v. Hays*, 515 U.S. 737 (1995), makes perfectly clear that a plaintiff need only prove residence in the district to establish standing to challenge the district as a racial gerrymander. *See id.* at 744-45 ("Where a plaintiff resides in a racially gerrymandered district . . . the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria, and therefore has standing to challenge the legislature's action."); *accord Shaw v. Hunt*, 517 U.S. 899, 904 (1996) ("*Shaw II*") (recognizing that "a plaintiff who resides in a district which is the subject of a racial gerrymander claim has standing to challenge the legislation which created that district"); *Miller v. Johnson*, 515 U.S. 900, 909 (1995) ("As residents of the challenged Eleventh District, all appellees had standing"). As the Eleventh Circuit has put the point, "*Hays* set forth a bright-line standing rule for a particular class of cases alleging illegal racial gerrymandering with respect to voting districts: if the plaintiff lives in the racially gerrymandered district, she has standing." *Dillard v. Baldwin County Comm'rs*, 225 F.3d 1271, 1279 (11th Cir. 2000). There is no reason why the settled federal standing rule should be rejected here.

The Attorney General simply ignores the standing holdings of all these cases, and tries to make something of the uncontroversial proposition that standing requires proof of some individualized harm. AG Br. 28. But the exact same question was at issue in *Hays*, *see* 515 U.S. at 743-44, and the U.S. Supreme Court there concluded that individualized harm *is* established "[w]here a plaintiff resides in a racially gerrymandered district," because in that

situation "the plaintiff has been denied equal treatment because of the legislature's reliance on racial criteria [in the districting process]," *id.* at 745. Thus, the Attorney General's insistence that plaintiffs must personally testify as to the individualized grievance they feel at having been subjected to a racial classification — for which he cites not one case — is demonstrably incorrect. Proof of residence in a racially gerrymandered district is fully sufficient to establish the relevant injury.

Nor is there any reason to require anything beyond proof of residency to establish standing for a compactness and contiguity challenge under Article II, § 6 of the Virginia Constitution. Just as a plaintiff suffers the harm of racial classification simply by residing in a district drawn impermissibly along racial lines, so too does a plaintiff necessarily suffer harm — in the form of isolation from one's fellow residents and representatives — solely by living in a district that fails to comply with the constitutional requirements of compactness and contiguity. Indeed, there is good reason for this Court to hold that a plaintiff making a compactness or contiguity challenge need *not even* reside in the particular district being challenged. Because the compactness and contiguity clauses are designed to curb legislative discretion and prevent egregious forms of political gerrymandering, *see infra* at 34-35, a violation of those clauses in a redistricting plan creates a threat of *systematic* legislative abuse[5] that would harm citizens *across* district lines.[6] In any event, given that plaintiffs

[5] *Cf. Erfer v. Commonwealth*, 794 A.2d 325, 330 (Pa. 2002) (distinguishing *Hays* and holding that a political gerrymandering challenge cannot be "logically confine[d]" to the drawing of the district in which the plaintiff resides because "[a] reapportionment plan acts as an interlocking jigsaw puzzle, each piece reliant upon its neighbors to establish a picture of the whole"); *Vieth v. Pennsylvania*, 188 F. Supp. 2d 532, 540 (M.D. Pa. 2002) (noting that the "very nature of a claim of partisan gerrymandering contemplates a harm which extends beyond that inflicted upon a particular voter," and therefore that plaintiff asserting such a claim need not prove residency in a gerrymandered district).

[6] For this reason the court did not err in invalidating on contiguity/compactness grounds four districts in which no plaintiff resided (HDs 62, 83, 91 and 100). What is more, since plaintiffs unquestionably have standing to challenge the vast majority of the districts

established their residence in virtually every district at issue here, there is no standing barrier to this action.

II. THE TRIAL COURT'S RACIAL GERRYMANDERING FINDINGS ARE NOT CLEARLY ERRONEOUS

The Attorney General's brief badly misapprehends the principles governing challenges to race-based government action in Virginia generally, as well as those governing racial gerrymandering challenges specifically. It also flatly ignores key evidence supporting that challenge here, and seriously misstates the extensive expert evidence underlying the claim. Having heard and evaluated all of that evidence, the trial court reached the only possible result: invalidation of many districts that subordinated traditional districting principles to racial considerations much more than could be justified by the federal voting rights laws or any other compelling state interest.

As we elaborate below, a successful racial gerrymandering claim must satisfy a two-part inquiry. First, plaintiffs must prove "racial predominance" — *i.e.*, that in drawing a given district's borders, the legislature was more concerned with the racial makeup of the district than with such traditional considerations as compactness, contiguity, and integrity of government jurisdictions. The plaintiffs easily made that showing here. Second, where the plaintiffs have proved that race-consciousness predominated over other considerations, "strict scrutiny" is triggered and the burden shifts to the state to prove — not just that it had a compelling purpose for drawing a race-based district — but that it employed race no more than required to satisfy its compelling purpose. It is the latter "narrow tailoring" inquiry that the Commonwealth fails here.

A. Race Predominated In The Drawing Of The Challenged Districts

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that the trial court invalidated, the lack of residence in these four additional districts is inconsequential: as a practical matter, invalidation of the districts in which plaintiffs reside will require that a new statewide map be drawn in any event.

1. *Applicable Law.* The plaintiffs' racial gerrymandering claim rests on Article I §§ 1, 11 of the Virginia Constitution, which together prohibit the state from discriminating on the basis of race. The antidiscrimination protections embedded in those provisions are coterminous with the equal protection rights guaranteed by the Fourteenth Amendment to the United States Constitution. *See Archer v. Mayes*, 213 Va. 633, 638, 194 S.E.2d 707, 711 (1973); *Leftwich v. Bevilacqua*, 635 F. Supp. 238, 242 (W.D. Va. 1986).[7]

In an important line of cases starting with *Shaw v. Reno*, 509 U.S. 630 (1993) ("*Shaw I*"), the U.S. Supreme Court has held that the right to be free from race discrimination includes constraints on the extent to which states may use race as a criterion in the drawing of electoral districts. Specifically, the U.S. Supreme Court has held that "strict scrutiny" is triggered whenever a state draws electoral district lines that "subordinate[] traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests, to racial considerations." *Miller*, 515 U.S. at 916 (1995); *see Moon v. Meadows*, 952 F. Supp. 1141,

[7] The Attorney General seems to suggest that the Virginia Constitution allows more racial discrimination by the Commonwealth than does the U.S. Constitution. Whereas state actions motivated by race are permissible under the U.S. Constitution only if they withstand "strict scrutiny," the Attorney General insists that under the Virginia Constitution the action is permissible so long as it appears "rational" or the predominance of race is "fairly debatable." AG Br. 32. That is patently incorrect. All of the "rational basis" cases on which the Attorney General relies involve challenges to statutes that did *not* involve the use of a suspect criterion such as race. This Court has repeatedly recognized that although such statutes are "presumed to be constitutional" and will be invalidated only "when it clearly is repugnant to some provision of either the state or federal constitution," when "a statute affects a fundamental right or a suspect classification, its constitutionality will be judged by the 'strict scrutiny' test." *Hess v. Snyder Hunt Corp.*, 240 Va. 49, 52-53, 392 S.E.2d 817, 820 (1990); *see Mahan v. NCPAC*, 227 Va. 330, 336, 315 S.E.2d 829, 832 (1984) (where a statute "creates a suspect classification . . . or affects a fundamental right, the presumption of constitutionality fades, and the 'strict scrutiny' test, rather than the more relaxed 'reasonable relationship' test, applies."). Because this Court's cases thus uniformly confirm that the same judicial scrutiny applies under both the federal and the state constitutions, they provide no basis for refusing to apply strict scrutiny where, as here, the direct and circumstantial evidence points overwhelmingly to the use of race.

1145 (E.D. Va. 1997) *aff'd*, 521 U.S. 1113 (1997) (invalidating Virginia congressional district under *Shaw*). Though *Shaw I* itself focused on the "bizarre" shape of the district at issue, *id.* at 642, 644, the U.S. Supreme Court subsequently made clear that "bizarreness" is *not* a threshold showing. *See Miller*, 515 U.S. at 912-13. A plaintiff may show either that the district is bizarrely shaped, or that the district in some other way subordinates traditional districting principles in favor of racial considerations in the positioning of its borders. *See id.* at 916; *id.* at 928-29 (O'Connor, J., concurring).

2. *Record Evidence Of Racial Predominance.* a. Undisputed evidence at trial easily established the predominance of race over other factors in the drawing of the challenged district lines.[8] Plaintiffs introduced geographic and demographic maps establishing the tortured shapes and close racial tracking of the district lines, as well as testimony describing and analyzing them — though in point of fact, the maps very much spoke for themselves.[9] The Attorney General argues that maps and demographic evidence are "insufficient" as a matter of law to prove a racial gerrymandering claim, AG Br. 38-39, but the law is to the exact contrary: plaintiffs may prove racial predominance through "circumstantial evidence of a district's shape and demographics" alone, *Miller*, 515 U.S. at

[8] The Attorney General's claim that plaintiffs relied exclusively on the testimony of an expert for a legal conclusion about racial predominance, AG Br. 34, is sheer nonsense. Plaintiffs' expert Dr. Lichtman simply compared the racial population of precincts immediately inside district borders with those immediately outside the borders to show that the district lines consistently divide white from Black voters — a fact that is evident from the maps themselves, and which the Attorney General has never disputed. Dr. Lichtman further demonstrated why the lines do not correlate equally well with politics. (A. 2010-19, 2103-10.) Dr. Lichtman's statistical analysis is no different from expert statistical evidence about hiring practices used to support an inference of discrimination in an employment discrimination case.

[9] The Attorney General's claim that "no competent testimony" accompanied the maps, AG Br. 35, is baffling. A witness with personal knowledge described without contradiction the physical and political geography reflected in the maps, and an expert statistical witness set forth an undisputed description of the racial makeup of the precincts on the inside and outside of the district borders.

916, and indeed district shape and demographics "may be *persuasive* circumstantial evidence that race for its own sake, and not other districting principles, was the legislature's dominant and controlling rationale in drawing its district lines," *id.* at 913 (emphasis added).

Beyond erroneously denying its legal relevance, the Attorney General does not — and could not — deny what the geographic and demographic evidence shows. As explained in detail in the Statement of the Facts above — and therefore not repeated in detail here — the evidence adduced at trial showed that the district lines at issue here take various "twists" and "turns" and "leaps," splitting up counties and cities, fording rivers, and dividing traditional communities of interest while combining others with no shared interests, all in order to "grab" heavily African-American precincts while typically bypassing — sometimes even threading the needle to avoid — neighboring "white" precincts. *See supra* at 6-9. Time and again, heavily Black precincts were plucked from a political jurisdiction and placed in a heavily Black legislative district — making the resulting adjacent district almost entirely white. (A. 1927-37, 1987-98.) Sometimes the legislature even split precincts themselves, and when it did so it most often split them along racial lines, including the most heavily African-American portions inside the majority African-American districts, and leaving heavily white portions in predominantly white districts. (A. 953-61, 2011, 2013-14, 2104, 2106-07.) No explanation for this segregative pattern other than race is plausible: the legislature had only racial data — not political data — available at the subprecinct level. (A. 1171.) For that reason, courts have repeatedly recognized that such race-based precinct-splitting is especially strong evidence that race, and not politics, drove the line drawing. *See supra* at 9 (citing cases).

b. The obvious conclusion from the maps and supporting analysis — *i.e.*, that the legislature was engaged in race-conscious districting — is buttressed by the Attorney

General's description of the legislature's intent in drawing such districts: "[T]he General Assembly knew that, when drawing new districts it . . . was required to maintain the same number of districts . . . that would provide minority voters equal opportunities to elect candidates of choice in the 2001 plan as there were in the 1991 plan." AG Br. 40. As the Attorney General observes, there "was no dispute" below that the lines were intentionally drawn to maintain the same number of districts in which blacks constitute an effective majority. *Id.* It is well-established that an acknowledged intent to draw districts to improve or maintain the voting success of a racial minority, though it may ultimately pass constitutional muster, nonetheless triggers strict scrutiny, because it is evidence that race predominated over other considerations in the drawing of the districts.[10] *See Hunt v. Cromartie*, 532 U.S. 234, 254 (2001) (proof that state "set out to create a majority-minority district" is "significant" and "direct evidence" of racial predominance); *Bush v. Vera*, 517 U.S. 952, 958, 962 (996) (plurality op.); *Shaw II*, 517 U.S. at 906; *Miller*, 515 U.S. at 916.[11] Thus, while the Assembly's avowed effort to create 17 minority opportunity districts was by no means improper — and indeed, something we agree was compelled by the Voting Rights Act — it does nonetheless trigger scrutiny of the *extent* to which race was used in that process; in a litigation context, it means that the burden shifts to the state to prove that race was used no more than necessary to achieve this compelling state objective. *See infra* at 28-29.

c. In view of the overwhelming, undisputed evidence of racial predominance, the trial court's finding that the evidence revealed a "subordination of the traditional districting

[10] The conclusion of racial "predominance" is further supported by the legislature's statement, in its districting criteria, that compliance with the Voting Rights Act was to be given "priority" over traditional districting principles. (A. 2610.)

principles to race" in the challenged districts, (A. 2839), was not just supported by the record — it was compelled by it. The Attorney General's brief on appeal only confirms the point. The Attorney General does not actually suggest — or point to any evidence showing — that any motive other than race was *in fact* the legislature's true, predominant motive. Instead, the Attorney General only relies on evidence showing that a number of other considerations were also involved in redistricting. AG Br. 17-18. The Attorney General's entire theory on appeal is premised on the proposition that plaintiffs must adduce "proof — by a process of elimination — that other factors [beside race] were *not* involved." AG Br. 35 (emphasis added); *see id.* ("defendants' proof that other factors were considered stands unrebutted"). As the Attorney General understands the law, "a circumstantial case under *Shaw* fails whenever it appears that traditional factors may have influenced the drawing of the district." AG Br. 25; *see id.* at 38 ("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.").

That view of the law is demonstrably incorrect. The question in a racial gerrymandering case is not whether race was the *only* motive; it is whether that motive *predominated* over other, traditional motives. *See, e.g.*, *Bush*, 517 U.S. at 959 (upholding racial predominance finding where evidence showed that *one* of the state's goals "was to produce majority-minority districts," and that "other goals, particularly incumbency protection . . . also played a role in the drawing of the district lines"). Thus, the existence of other considerations — which plaintiffs have never denied — simply does nothing to call into question the finding that race *predominated* over those other considerations, which the record so clearly establishes. The point is not that the Assembly had *no* other motives; it is that as between the state's several motives there is "ample bases on which to conclude that racially motivated gerrymandering

[11] The *Moon* court relied heavily on Virginia's argument that the district was drawn to satisfy § 5 to support the conclusion that race predominated in the design of the district. *See* 952 F. Supp. at 1146.

had a qualitatively greater influence [than other motives] on the drawing of the district lines." *Bush*, 517 U.S. at 969.[12]

d. Finally, the Attorney General makes much out of circumstantial evidence that the 2001 districts were in many respects similar to districts originally drawn in 1991, as if this evidence showed that race was not the predominant rationale for the 2001 districts. This argument is unavailing for several reasons.

First, we have no way of knowing if the 1991 legislative districting scheme would have survived scrutiny if challenged as a racial gerrymander, because no such challenge was

[12] In this respect the Attorney General and one supportive amicus also badly misread the Supreme Court's recent decision in *Hunt v. Cromartie*, 532 U.S. 234 (2001), as excusing any kind of racial gerrymander whenever race and politics happen to correlate. AG Br. 34; *see also* Lawyers for Rep. Br. 40-46. In *Cromartie*, the state of North Carolina had introduced direct evidence showing that what *appeared* to be a racial gerrymander was *actually* a district motivated *entirely by political objectives* — in that case, a desire to draw a Democratic district in Piedmont Carolina – and *not by race*. *See* 532 U.S. at 251-52, 257. The district only *looked* like a racial gerrymander because so many of the voting Democrats in that rural region were African Americans centered in largely urban communities connected by the narrow district. *Id.* at 243. In other words, the apparent correlation of the district lines with race was mere coincidence. Under *those* circumstances, the Court held, a plaintiff cannot rest on district appearances alone, but must do more to rebut the evidence showing that politics and not race actually motivated the legislature. *Id.* at 258.

Here, by contrast, the Attorney General adduced no direct evidence — none — tending to prove that the legislature was *actually* motivated by politics and *not race*. Even more to the point, the legislature here adopted *explicit criteria* stating that it was putting the goal of creating majority-minority districts ahead of all traditional considerations. Indeed, *Cromartie* itself acknowledges that proof of an intent to create a majority-minority district is both "significant" and "direct" evidence that race predominated over other considerations when the district lines depart from districting principles. *See id*. at 254. It follows that where, as here, a state admits a racial motive in the drawing of challenged districts and offers no proof of any "legitimate political objectives" in the drawing of those districts, *id.* at 257, the state cannot rely on the post hoc coincidence of race and politics to claim that political objectives must have predominated. Nor can a legislature defend a racial gerrymander on the ground that it was acting on the assumption that racial divisions would correlate with political differences. *See Bush*, 517 U.S. at 998 (Kennedy, J., concurring) (proof that a legislature "shifted blocs of African-American voters to districts of incumbent Democrats in order to promote partisan interests" is merely "the illicit use of race as a proxy"); *id.* at 969 (finding *Shaw* violation where "political gerrymandering was accomplished in large part by the use of race as a proxy"); *id.* at 968 ("to the extent that race is used as a proxy for political characteristics, a racial stereotype requiring strict scrutiny is in operation").

brought. And, of course, had it been brought at that time, the law under which it would have been considered would have been different, as the 1991 plan was enacted two years before *Shaw* was decided. We do know that the 1991 congressional districting scheme fell to a post-*Shaw* challenge in *Moon v. Meadows.* The simple fact is that if a district designed in 1991, 1981, or 1951, improperly divided voters along racial lines, it is no defense to rely on the same racial divisions again in 2001. Moreover, population and residential patterns have shifted in Virginia since 1991: the percentage of Blacks in the state increased, as did the progress of integration, resulting in the prospect of increased Black political influence in many areas. And yet, the 2001 legislative districting plan reaches out and grabs Black voters living near white voters — sometimes, even when they reside in the same precinct as white voters — and packs them into heavily Black districts. The fact that the legislature attempted to apply a map from a decade before to a state that had changed much in the intervening 10 years does not belie a race-conscious motivation; to the contrary, it may be further evidence of it.

In the end, it does not matter whether the 1991 plan was or was not constitutional when enacted in 1991. It might well have survived a racial gerrymandering challenge, because the law was different then, and because population patterns (and voting behavior) at that time may have required the districts to be drawn as they were to avoid a Voting Rights Act violation. The 1991 plan is not before this Court; the 2001 plan's relationship to that earlier enactment does not insulate it from review under today's laws, applied to today's facts.

B. The District Lines Are Not Narrowly-Tailored To Accomplishing The Legitimate Goal Of Complying with the Voting Rights Act, and Preserving Minority Political Opportunity

1. *Applicable Law.* Once the plaintiffs prove that the state has subordinated traditional districting principles to the goal of creating heavily minority districts, "strict scrutiny" is triggered, and the burden shifts to the state to prove that it had a compelling reason for drawing such districts, and that the district lines are narrowly-tailored to that justification. *See Miller,* 515 U.S. at 920; *Moon,* 952 F. Supp. at 1149. The justification asserted here for creating the challenged districts is compliance with § 5 of the Voting Rights Act. Section 5 requires states to avoid "retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Beer v. United States*, 425 U.S. 130, 141 (1976). What § 5 means in effect is that if, as here, a state previously had 12 minority opportunity state house districts and 5 minority opportunity state senate districts, its new districting schemes must include at least the same number of such districts in each plan.

Plaintiffs fully favor government efforts to ensure that minority voting communities realize their rights to full and equal representation; we therefore agree that states have a compelling interest in drawing districts that satisfy § 5's nonretrogression mandate. We also fully agree that the Assembly had an obligation to create 17 districts where African Americans would have the opportunity to elect their candidates of choice. The need for 17 such districts, and the permissibility of some degree of race-conscious districting to create them, is not the issue here.

But the U.S. Supreme Court has repeatedly held that § 5 does *not* give states "*carte blanche* to engage in racial gerry-mandering in the name of nonretrogression." *Shaw I,* 509 U.S. at 654; *see Bush,* 517 U.S. at 983 (O'Connor, J., concurring) (§ 5 is not a "license for the State to do whatever it deems necessary" to comply). Compliance with § 5 is a lawful

end, in other words, but a state "is constrained in how it may pursue that end: the *means* chosen to accomplish the State's asserted purpose must be *specifically and narrowly framed to accomplish that purpose*." *Shaw II*, 517 U.S. at 908 (emphasis added) (internal quotations omitted). Thus, where a state seeks to justify a racial gerrymander by reference to § 5, the district lines must be "narrowly tailored to the goal of avoiding retrogression," *Shaw I*, 509 U.S. at 655, and § 5 offers no refuge "if the State went beyond what was reasonably necessary to avoid retrogression," *id.* Moreover, "the legislature must have had a *strong basis in evidence* to support that justification before it implements the classification." *Shaw II*, 517 U.S. at 908 n.4.

In sum, § 5 compliance can justify race-conscious districting, but only if the state affirmatively proves that the legislature *actually* had before it a "strong basis in evidence" that the particular district lines drawn departed from traditional districting principles *no more than was reasonably necessary* to comply with § 5. If the state could have created the same number of minority opportunity districts in other, less-racially gerrymandered ways, then the plan is not narrowly tailored, and violates equal protection principles. *See Bush*, 517 U.S. at 982-83 (racially gerrymandered district not narrowly tailored to § 5 compliance); *Shaw II*, 517 U.S. at 912-13 (same); *Miller*, 515 U.S. at 922-27 (same).

2. *Record Evidence.* The Attorney General did not come close to proving at trial that the legislature had a strong basis in evidence for believing that *these district lines* were reasonably necessary to satisfy § 5. Indeed, the Attorney General adduced no facts revealing any basis in evidence — strong or otherwise — that the legislature had for believing that it had to draw lines filling the districts with African Americans *as much as they did* to comply with § 5. That omission alone defeats the state's § 5 defense. *See Shaw II*, 517 U.S. at 908 n.4.

Indeed, the post hoc statistical evidence only confirms the absence of a viable § 5 justification for the district lines at issue here. The evidence submitted by *both sides* shows that the legislature packed Blacks into the challenged districts in consistently much greater numbers than was reasonably necessary to ensure compliance with § 5.

Both parties agree that to satisfy § 5, the legislature was required to draw at least 17 districts in which minority voters have a "reasonable opportunity to elect candidates of their choice." But the expert evidence was essentially undisputed that *every one* of the challenged districts included *many* more Blacks than necessary to accomplish that end. The plaintiffs' expert Dr. Lichtman testified that no more than roughly 50% BVAP was needed to ensure that black voters have an equal chance of electing their preferred candidate in a given election. *See supra* at 10-11. The defendants' expert Dr. Loewen identified essentially the same number. *Id.* As the trial court recognized, even allowing for some leeway in the tailoring of the districts — *i.e.*, even giving the legislature some room to go beyond that bare minimum number — it is clear that in stretching district lines over waters and into other jurisdictions to capture potential Black voters and cabin them into Black districts, the legislature consistently exceeded by *wide margins* the population both experts found necessary to ensure the *opportunity* for African Americans to elect candidates of choice. (A. 974; A. 1566, 1569.)[13]

There are an infinite number of alternative maps that the General Assembly could have drawn to comply with its § 5 obligation to ensure that Virginia maintains the same number of minority opportunity districts — without increasing the minority populations of the districts so significantly, and without subordinating traditional districting criteria so

[13] Any review of the expert testimony adduced by plaintiffs demonstrates the inaccuracy of the ACLU's suggestion that the trial court's findings might not be supported by sufficient expert analysis of racial voting patterns. *Cf.* ACLU Br. 8-11.

severely. Indeed, the trial court identified specific changes that could have been made to reduce the subordination of traditional districting principles to race without risk to the professed goal of § 5 compliance. (A. 2820, 2829-30, 2833.) The Attorney General takes no issue with those findings. What is clear is that the districting plan the Assembly did adopt — with all its meat cleavers, star-fishes, bug-splats, and the like — was far from *necessary* to comply with the Voting Rights Act.[14] As in *Moon v. Meadows*, the "bizarre and tortured shape of the district[s] contradicts Defendants' assertion that the district[s] [are] narrowly tailored." 952 F. Supp. at 1150.[15]

Thus, it appears that while professing the intent to comply with § 5, the legislature may have had a less benign interest as well: the combination of excessive packing of minorities into the districts, and the odd shapes of so many borders, suggests that the legislature drew districts with lines that bobbed and weaved throughout the state to "pick off" heavily minority precincts, so as to keep them out of neighboring "white" districts and thereby diminish minority influence in those districts.

In the end, however, the subjective intentions of the plan's drafters are irrelevant. Even if motivated by nothing more than a genuine and single-minded intent to comply with

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[14] Contrary to the Attorney General's understanding, AG Br. 42; *see also* Lawyers for Rep. Br. 37, the record evidence regarding the excessive concentration of minorities in the challenged districts was not offered to prove a "packing claim" *as that term is used in § 2 of the Voting Rights Act*. Plaintiffs brought no such § 2 claim; instead the evidence was introduced simply to show that blacks were concentrated in greater numbers than necessary to comply with § 5. As a result, proof of actual dilutive effect in other districts, though required under § 2, is unnecessary for plaintiffs' case, which is not based on (and does not seek the remedies provided by) § 2 of the Voting Rights Act.

[15] It is of course true that "narrow tailoring" does not demand a mathematically perfect fit between the African-American population of a district and the exact minimum percentage necessary to ensure African Americans in the district a reasonable opportunity to elect a candidate of choice. AG Br. 41. But it is equally true that "narrow tailoring" means *narrow* tailoring. As the precedents have instructed, it is a requirement that must be taken seriously. Acceptance of the Attorney General's view that the requirement is satisfied by

§ 5, the record makes clear that the legislature subordinated traditional districting considerations *much more than was necessary* to meet that compelling state interest. Thus, no matter what the legislature believed it was doing — or what spirit motivated its action — it excessively and impermissibly divided voters based on race.

Indeed, in tacit recognition that the facts refute the claim of "narrow tailoring" under § 5, the Attorney General instead chooses to fight the § 5 standard. The districts' overly high percentages of minority voters are permissible, the Attorney General says, because § 5 actually requires that covered jurisdictions grant minorities a consistent electoral *advantage* over other races, not just an *equal* chance at success. AG Br. 41-42. The Attorney General cites no precedent for that proposition, because there is none. Plaintiffs recognize that the persistent effects of racial discrimination on minority voting performance sometimes requires districts to be something more than 50% minority to ensure a truly fair and equal electoral footing. But the burden was on the state to establish that the districts here were required to be as much as 55%, 58% and even 60% minority voting age population to ensure electoral equality. As the trial record reveals, the Attorney General failed to carrying that burden.

The Attorney General also argues that in a *state*-law case such as this, the narrow-tailoring requirement simply does not apply, because § 5 completely preempts any state equal protection requirement that limits the use of race in districting. AG Br. 39. This is quite wrong. As we have seen, § 5 requires only that a state *avoid retrogression* — it does not affirmatively authorize unbounded racial gerrymandering in the service of that requirement. In other words, where it is possible to both comply with § 5 by avoiding retrogression, and to comply with a state antidiscrimination requirement at the same time, then § 5 does not authorize breaching that state antidiscrimination rule. Thus, while § 5 *does* preclude a state

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bizarrely-shaped districts that range up to 60% minority population would instead make a

from applying its laws to cause retrogression, it does *not* preempt the enforcement of a state law that constrains districting, so long as the state can still avoid retrogression consistent with those constraints. *Cf*. *Stephenson v. Bartlett*, 562 S.E.2d 377 (N.C. 2002) (concluding that § 5 of the Voting Rights Act does not preempt state constitutional districting requirement where § 5 does not compel the districts that violate the requirement). Because the record clearly establishes that the legislature could have complied with the equal protection commands of the Virginia Constitution without compromising its § 5 obligations, these state constitutional provisions are not nullified by federal law. [16]

The evidence thus establishes that, ostensibly for the purpose of drawing districts to comply with the Voting Rights Act's requirements for minority voter opportunities, the legislature went out of its way to draw lines that essentially placed as many Black voters as possible into those few districts. The effect was to cabin Black voters into "Black districts," leaving adjacent districts "whiter" and less influenced by African Americans than they would have been had traditional districting principles predominated over race, rather than vice versa. Whether actually motivated by a benign intent to comply with the Voting Rights Act or by a far less benign purpose, the Assembly engaged in segregation by districting, plain and simple.

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mockery of it.

[16] Contrary to the Attorney General's submission, the Justice Department's preclearance of the plans as avoiding retrogression is totally irrelevant to the question whether less race-conscious districts could also have avoided retrogression. *See Miller*, 515 U.S. at 922 ("Where a State relies on the Department's determination that race-based districting is necessary to comply with the Voting Rights Act, the judiciary retains an independent obligation in adjudicating consequent equal protection challenges to ensure that the State's actions are narrowly tailored to achieve a compelling interest."); *Shaw II*, 517 U.S. at 908 n.4 ("[In *Miller*] the Court rejected the contention that complying with the Justice Department's preclearance objection could be a compelling interest."); *Shaw I*, 509 U.S. U.S. at 654 ("the Voting Rights Act and our case law make clear that a reapportionment plan that satisfies § 5 still may be enjoined as unconstitutional").

III. THE TRIAL COURT'S CONTIGUITY AND COMPACTNESS FINDINGS ARE NOT CLEARLY ERRONEOUS

In addition to prohibiting the subordination of traditional districting principles to race more than necessary to serve a compelling state interest, the Virginia Constitution also affirmatively requires that "[e]very electoral district shall be composed of contiguous and compact territory." VA. CONST. art. II, § 6. The trial court found that SDs 1, 2 and 6, and HDs 74, 91, and 100, violate the contiguity requirement. The court found that SDs 2 and 6, and HD 74, violate the compactness requirement as well. Those findings are amply supported by the record.

A. Text, Structure and Purpose Of Contiguity and Compactness Clause

The text of the Constitution imposes an unambiguous substantive obligation on the Assembly: every electoral district "*shall be*" compact and contiguous. That limitation is deeply rooted in the history and traditions of the Commonwealth. Since 1851, the Constitution of Virginia has imposed such limitations on the shape of congressional districts. VA. CONST. art. IV, § 14 (1851). Those limitations were extended to the shape of state legislative districts in 1971. VA. CONST. art. II, § 6 (1971).[17]

The fundamental purposes of compactness and contiguity requirements are widely recognized. First, they provide a neutral bulwark against the more egregious forms of political and racial gerrymandering. *See Schrage v. State Bd. Of Elections,* 430 N.E.2d 483, 486 (Ill. 1981) ("compactness is almost universally recognized as an appropriate anti-

[17] Even prior to 1971, informal apportionment principles barring the division of political subdivisions effectively ensured that state legislative districts ordinarily adhered to compactness and contiguity principles. *See* Robert Jackson Austin, The Redistricting Process After One-Man One-Vote: The Case of Virginia 77-79 (1976) (unpublished Ph.D. dissertation, Univ. of Virginia) (on file with the Library of Virginia, Richmond).

gerrymandering standard") (internal quotation marks and citations omitted).[18] Second, they facilitate democratic governance by ensuring that citizens have access to each other and to their representatives. *See id.* at 489 ("The creation of a representative district which is extremely elongated and not 'closely united' significantly impedes vital constituent-representative communication, thus preventing the achievement of a legislative process which is, in fact, representative"); *Preisler v. Doherty*, 284 S.W.2d 427, 434 (Mo. 1955).[19]

For the foregoing reasons, numerous other states have seen fit to adopt constitutional provisions much like Virginia's. *See* Bernard Grofman, *Criteria for Districting: A Social Science Perspective*, 33 UCLA L. Rev. 77, 111 (Table 3) (1985). The courts of those states have not been reluctant to enforce their substantive commands — as evidenced just last month in Maryland. *See In re Legislative Districting of State*, __ A.2d __, 2002 WL 1277816 (Md. June 11, 2002) (holding that "significant portions" of plan were inconsistent with

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[18] *See also Opinion to the Governor*, 221 A.2d 799, 801 (R.I. 1966) ("political gerrymander was an evil which [the] constitutional requirement of compactness was designed and intended to eradicate"); *Preisler v. Doherty*, 284 S.W.2d 434, 435 (Mo. 1955) (similar); Polsby & Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & Pol Rev. 301, 332 (1991) ("where compactness is a constraint, a gerrymanderer's job is noticeably harder"); Stern, *Political Gerrymandering: A Statutory Compactness Standard as an Antidote for Judicial Impotence*, 41 U. Chi. L. Rev. 398, 412-14 (1973-74); Morrill, Political Redistricting and Geographic Theory 21 (1981) ("it is quite difficult to gerrymander compactly"); *People ex rel. Woodyatt v. Thompson*, 40 N.E. 307, 315 (Ill. 1895) (origin of "compact and contiguous" requirement in Illinois Constitution is to forestall rampant gerrymandering); *People ex rel. Smith v. Bd. of Supervisors*, 36 N.Y.S. 40, 42-44 (N.Y. Gen Term 1895) *rev'd on other grounds*, 42 N.E. 592 (1896) (adoption of contiguity and compactness requirement in New York Constitution was intended to prevent gerrymandering); *cf. Karcher v. Daggett*, 462 U.S. 725, 755 (1983) (Stevens, J., concurring) ("drastic departures from compactness are a signal that something may be amiss"); *Reynolds v. Sims*, 377 U.S. 533, 578-79 (1964) ("Indiscriminate districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering").

[19] *See also* Morrill, *A Geographer's Perspective*, in Political Gerrymandering and the Courts 212, 214 (Grofman, ed., 1990) ("Compactness is inherently preferable to irregularity, simply because compact territories tend to have easier communication and greater internal cohesion, because most human settlement is clustered, and because there is a relation between the cost of creating a sense of common identity and irregularity of territory").

compactness requirement of Maryland Constitution).[20] And whereas the compactness clauses in many other state constitutions explicitly make compactness only a guidepost,[21] the command of the Virginia Constitution to design compact and contiguous districts is specific and mandatory.

Rather than address the text and purpose of the Constitution's compactness and contiguity requirements, the Attorney General draws the governing legal principle entirely from this Court's opinion in *Jamerson*. The Attorney General reads *Jamerson* as holding that an Article II, § 6 challenge necessarily fails when it is "at least fairly debatable that the General Assembly *considered* compactness and contiguity among the mix of factors used to draw the districts." AG Br. 23 (emphasis added). The Attorney General suggests that what matters under *Jamerson* is not the objective shape of the districts, but merely whether the legislators *think about* compactness and contiguity during the redistricting process.

That argument contradicts both the text and purpose of Article II, § 6, as well as *Jamerson* itself. As discussed above, the contiguity and compactness requirements are mandatory substantive requirements applicable to the ultimate shape of each district, not a guidepost for the legislature to include in its deliberations. The constraints on district shape

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[20] *See also Schrage*, 430 N.E.2d at 485-89 (compactness clause requires districts to be "closely united" and "reasonably compact," rejecting argument that limitation could be ignored simply because compactness may be hard to measure, and invaliding a District that "reveal[ed] a tortured, extremely elongated form which is not compact in any sense"); *In re Legislative Districting of Gen. Assembly*, 193 N.W.2d 784, 791 (Iowa 1972) (inadequately justified "strange shapes" in redistricting plan rendered plan invalid under state constitutional compactness requirement); *Acker v. Love*, 496 P.2d 75, 76 (Colo. 1972) (same); *Preisler v. Doherty*, 284 S.W.2d 429 (Mo. 1955) (same); *In re Livingston*, 160 N.Y.S. 462 (N.Y. Sup. Ct. 1916); *In re Sherill*, 81 N.E. 124, 132 (N.Y. 1907).

[21] *See, e.g.*, COLO. CONST. art V, § 47 (each district must be "as compact as possible"); MO. CONST. art III, § 5 (state senate districts must be "of contiguous territory, as compact and nearly equal in population as may be"); HI. CONST. art. III, § 4, ¶ 13 (districts must be "as compact as practicable"); N.Y. CONST. art. III, § 5 (assembly districts must be drawn "in as compact form as practicable"). R.I. CONST. arts. XIII and XIX (districts must be "as compact in territory as possible").

— and hence on legislative use of the districting process for illegitimate ends — would be utterly ineffective if a legislature need only purport to "consider" compactness and contiguity when drawing districts. *Jamerson* does not say otherwise. To the contrary, this Court explicitly made clear that Article II, § 6 defines the "spatial restrictions in the composition of electoral districts." *Jamerson*, 244 Va. at 514, 423 S.E.2d at 184. And, this Court further held, the judiciary has an *obligation* to overturn a "legislative determination" regarding those spatial restrictions that are "plainly repugnant" to the Constitution's substantive requirements. *Id.* at 509-10, 423 S.E.2d at 182. The "fairly debatable" principle simply holds that a legislative "determination" will be upheld if "the *validity* of such a determination is fairly debatable." *Jamerson*, 244 Va. at 509, 423 S.E.2d at 182 (emphasis added). This principle is one that commands *substantive* review — deferential, but not toothless, and certainly not one that approves any result so long as the Assembly *fairly debated* the issue.[22]

B. The Court's Contiguity and Compactness Findings Were Correct

1. *Contiguity.* Applying the proper substantive standards for a review of legislative determinations under Article II, § 6, the trial court found that SDs 1, 2 and 6, and HDs 74, 91, and 100, violated Article II, § 6's contiguity clause. That finding is unassailable.

Each of the districts invalidated on contiguity grounds is contiguous only by water. Though an extreme version of a contiguity requirement might command the physical

[22] To be sure, *Jamerson* at one point notes that evidence had been 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 the Senatorial Districts," *id.* at 516, 423 S.E.2d at 186. But this statement, while arguably a relevant factor in the analysis, cannot sensibly be elevated to *Jamerson*'s "legal standard," as the Attorney General proposes. AG Br. 23. Any such conclusion would render *Jamerson*'s analysis of the actual shape of the challenged districts wholly irrelevant. It would also effectively eviscerate the substantive content of the constitutional requirements. Whatever the continued validity of this statement in light of subsequent developments in federal law, *see supra* at 21, it cannot establish the rule that mere *consideration* of compactness and contiguity is sufficient.

touching of every landmass in the district, the trial court properly recognized that, given Virginia's geography, such an extreme rule could not be applied to every district that is divided by water. (A. 2809.) Instead the trial court held that while contiguity by water was permissible in some instances, a district could only be considered contiguous, notwithstanding its division by water, where there was a reasonable opportunity to travel across that body of water without leaving the district. (A. 2813.) In other words, "contiguity by water" is constitutionally *im*permissible where citizens are practically compelled, by virtue of an intervening body of water lacking adequate, realistic means of transport across it, to leave the district in order to gain access to another part of the district. (A. 2813.) Applying that rule here, the trial court found that intervening bodies of water in six of the challenged districts precluded any reasonable opportunity for residents to travel across the district without leaving it entirely and crossing into another. (A. 2805-2813.)

The Attorney General does not even attempt to challenge the trial court's *factual* conclusions in respect to intra-district accessibility. Instead the Attorney General limits his attack to the *legal* standard the trial court adopted for assessing the permissibility of water contiguity in a given instance. Contrary to the Attorney General's submission, the trial court's functional analysis of the limits of water contiguity is fully supported by logic and precedent.[23]

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[23] The ACLU objects to the trial court's contiguity standard on the ground that it would interfere with the state's ability to draw race-based districts to comply with federal voting rights laws. ACLU Br. 3. That is incorrect: as explained above, *supra* at 32-33, to the extent (but only to the extent) that application of a state constitutional provision prevents a state from complying with a federal voting rights law, the federal law preempts application of the state provision. The trial court in this case specifically found that the districts could be made more contiguous and compact *without* compromising minority voter opportunity or violating federal law. (A. 2820, 2829-30, 2833.) Thus, while the ACLU's concerns might properly apply in some *other* case, they do not apply here.

Amicus Senator Rerras labors at length to show that the 1991 plans included many districts divided by water. Rerras Br. 2. As we note above, contiguity by water is not per se

The trial court's functional approach to contiguity directly serves the underlying purposes of Article II, § 6, which "was designed to place certain spatial restrictions on the composition of electoral districts to insure that they are not drawn to include geographical areas that are separated by significant distances and barriers and have no access to each other without traveling through one or more other districts." (A. 2813.) The court's "travel opportunities" principle is derived from the most widely-cited understanding of "contiguity" in the redistricting context — one the Attorney General nowhere contests — *viz.*, 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." (A. 2804); *see Hickel v. Southeast Conference*, 846 P.2d 38, 45 (Alaska 1992) ("[A] district may be defined as contiguous if every part of the district is reachable from every other part without crossing the district boundary (*i.e.*, the district is not divided into two or more discrete pieces.")) (quoting Grofman, *supra* at 35; *Commonwealth ex rel. Specter v. Levin*, 293 A.2d 15, 23 (Pa. 1972)). It is the same functional standard that has been employed in Virginia. (A. 2804) (quoting the 1991 criteria as providing that "contiguity by water is acceptable to link territory within a district . . . provided there is a reasonable opportunity for travel within the district").[24]

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impermissible; thus, the fact that some districts were divided by water in the 1991 plan proves nothing. Indeed, the legislature in 1991 purported to use the same functional approach to contiguity by water that the trial court applied here. Whether the 1991 plan actually did or did not meet that test at the time is unknowable now, because the 1991 plan was never subjected to a challenge on that basis. Invocation of the 1991 plan thus provides no defense for the 2001 plan's excessive use of contiguity by water.

[24] It is also the approach taken by legislatures in other states. *See Smith v. Beasley*, 946 F. Supp. 1174, 1179 (D.S.C. 1996) (1991 South Carolina redistricting guidelines provide "[c]ontiguity by water is acceptable to link territory within a district provided that there is a reasonable opportunity to travel within the district"); *DeWitt v. Wilson*, 856 F. Supp. 1409, 1414 (E.D. Cal. 1994) (quoting 1991 California districting principles: "The constitutional requirement of 'contiguity' is not an abstract or geometric technical phrase. . . . The territory included within a district should be contiguous and compact, taking into account the availability of transportation and communication.").

The only alternative to the trial court's functional standard is the standard followed by the Assembly in 2001, *viz.*, that contiguity by water is *always* sufficient. But the "principle" that water contiguity *always* suffices, regardless of the circumstances, is no principle at all — it is simply a warrant for evading the contiguity requirement altogether. *See Hickel*, 846 P.2d at 45 (although contiguous district may contain some amount of open sea, given geography of Alaska, "potential to include open sea in an election district is not without limits"; if it were, "then any part of coastal Alaska could be considered contiguous with any other part of the Pacific Rim."); Polsby & Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301, 329 & n. 142 (1991) (noting displays of "ingenuity, even audacity" in legislative abuses of "contiguity by water" as a concept). As the trial court correctly noted, unless the principle of water contiguity is "limited by traditional construction," such as the requirement of reasonable intradistrict accessibility (A. 2814), the geography of Virginia — with its long coastline, including the deep intrusion of the Chesapeake Bay, and its many rivers — would justify unfathomably absurd districts, connecting disparate parts of the state with little true accessibility between district residents, *id.* A district running along the James River, or the length of the coast, would be permissible. Knowing that geography, the drafters of the Virginia Constitution's contiguity requirement could not have intended for it to be satisfied any time legislators can find a body of water to connect two parts of an otherwise disperse district. By contrast, the functional approach adopted by the trial court authorizes districts contiguous by water when they are necessary and shaped to ensure reasonable access across the district. Six districts fail *that* test, and the Attorney General does not argue otherwise.

2. *Compactness*. In addition to, and distinct from, the court's *contiguity* findings, the trial court also invalidated three districts on *compactness* grounds — SDs 2 and

6, and HD 74. Those findings were also supported by abundant record evidence, including expert testimony, from which the trial court could have concluded that the challenged districts were non-compact under any fair reading of Article II, § 6's compactness requirement. For example, with respect to HD 74, which the court likened in appearance to an axe, the court "considere[ed] all of the evidence related to the compactness of House District 74," and concluded that the "district is non-compact because it stretches over a large area of land with a twenty mile long intervening land mass of another district separating the Henrico section from Hopewell." (A. 2812; *see also* A. 2811) ("According to both statistical measures of compactness, this bizarre looking district is the least compact House district in the state.").

The court's compactness findings were correct. Indeed, the Attorney General does not take serious issue with the underlying compactness factual findings.[25] Instead the Attorney General argues little more than that because the invalidated districts were "more compact" than those upheld in *Jamerson*, they are necessarily lawful. AG Br. 23. That argument lacks merit.

First, it is important to see that even on its own terms the Attorney General's *compactness* argument does not apply to the trial court's wholly independent *contiguity* ground for invalidating the districts. That is, each of the districts invalidated on compactness grounds were also invalidated on contiguity grounds, and even the Attorney General

[25] The Attorney General does assert, incorrectly, that plaintiffs "offered no expert opinion that the districts were not compact." AG Br. 30. Dr. Lublin testified as to the relative compactness of the districts in both plans. More important, to the extent compactness is a question of fact, direct evidence establishing the size, shape and geographic diffusion of the district is more probative of compactness than an expert opinion based on arithmetic calculations applicable solely to a different kind of districts. (A. 2799) ("The Court must examine each district in context of its geographical form and structure in relation to other portions of the district in order to determine whether they are closely and compactly

concedes that *Jamerson* did not involve the contiguity portion of Article II, § 6 at all. AG Br. 31. Thus, *Jamerson*'s holding, whatever its effect on the trial court's compactness analysis, cannot possibly affect the validity of the court's ruling on contiguity, which was an independent basis for invalidating these districts.

Second, as to the compactness findings alone, the Attorney General again fundamentally misconstrues *Jamerson*. This Court in *Jamerson* did not announce a conclusive constitutional benchmark of compactness against which all future plans could be judged. To the contrary, this Court deferred there to the factfinding of the trial court, which had determined as a matter of fact that the districts in the case were compact. Thus, this Court declared that it was "bound by the [lower court's] resolution of disputed facts, if supported by credible evidence," and that it must "consider the evidence and all reasonable inferences that can be drawn therefrom in the light most favorable to the parties who prevailed before [the lower court]." *Jamerson*, 244 Va. at 510, 423 S.E.2d at 182; *see also id.* at 515, 423 S.E.32d at 185 (chancellor's resolution of the facts was binding upon the Court). The trial court's resolution of the contested facts below is entitled to the same respect afforded to the lower court in *Jamerson*.

Third, *Jamerson* turned not only on appellate deference to trial court factfinding, but also on a key legal conclusion that has since been called into doubt. In describing the rule of deference to legislative districting judgments, the *Jamerson* Court strongly emphasized the importance of deferring to the Assembly's asserted need to *use race* in the design of the 1991 plans. *See id.* at 513, 423 S.E.2d at 184 (detailing legislature's desire to create additional majority-minority districts, including District 18); *id.* at 515, 423 S.E.2d at 185 (describing expert testimony regarding effect of legislative goal of "minority representation" on

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packed together. Though the opinions of experts may assist the court in reaching its ultimate

compactness). *Jamerson* thus gave "deference to the wide discretion accorded the General Assembly in its value judgment of the relative degree of compactness required when reconciling the multiple concerns of apportionment [including the need for minority representation]." *Id.* at 517, 423 S.E.2d at 186. The problem, of course, is that in the intervening years, *Shaw* (decided in 1993) and its progeny have limited the use of race as a basis for drawing noncompact districts. In other words, one of the key justifications that allowed the *Jamerson* Court to uphold two noncompact districts in 1991 is no longer of the same force in 2002.[26]

The point is neither that *Jamerson* was incorrectly decided at the time nor that it necessarily should be overruled; the point is that the reasoning of *Jamerson* does not support reversal of the trial court's compactness findings *in this case*.[27] Unless this Court is willing to hold that the contiguity and compactness requirements of the Virginia Constitution are of no substantive force at all, the trial court's findings must be affirmed.

IV. THE TRIAL COURT DID NOT ABUSE ITS DISCRETION IN HOLDING THAT VENUE IN SALEM WAS PROPER

Under Virginia law, "[b]oth the decision of the court transferring or refusing to transfer an action . . . shall be within the sound discretion of the trial judge." Va. Code

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determination, the Court is not bound by their testimony.").

[26] Given *Jamerson*'s reliance on minority representation as a justification for bizarre districts, the Attorney General's reliance on *Jamerson* to support a majority *white* district — HD 64 — is inexplicable.

[27] Plaintiffs do not seek, as we might, a remand to the trial court to determine whether *even more* districts should have been invalidated under Art. II, §6's compactness requirement as properly understood. Given that the other infirmities with the 2001 Plan require Legislative action to redraw substantial portions of the House and Senate districts, we see no benefit (and much harm), in conducting additional trial proceedings before the inevitable legislative redistricting occurs. Clear guidance from this Court as to the content and requirements of Art. II, §6 should suffice to provide the legislature with the direction that it needs to ensure that the product of its next effort to draw House and Senate districts comports with those requirements. And if that effort fails as well, a subsequent legal challenge will be available to test such non-compliance.

§ 8.01-267. Absent a finding that the trial court "abuse[d] its discretion," this Court may not reverse a ruling that venue was proper. *See Faison v. Hudson*, 243 Va. 413, 418, 417 S.E.2d 302, 304 (1992). The trial judge did not abuse his discretion here. A "presumption of correctness . . . attaches to the plaintiffs' choice of venue." *City of Danville v. Virginia State Water Control Bd.*, 18 Va. App. 594, 599, 446 S.E.2d 466, 469 (1994); *see Norfolk and W. Ry. Co. v. Williams*, 239 Va. 390, 394, 389 S.E.2d 714, 717 (1990). In addition to this "presumption of correctness," venue was proper in Salem for three independent reasons.

First, an injunction action is proper wherever "the act" to be enjoined "is to be done." Va. Code § 8.01-261(15)(c). In this case, the "act[s]" the plaintiffs sought to enjoin included the taking of any steps to hold an election for the state House and Senate in any locality in Virginia. (A. 378.) By the Attorney General's own admission, Secretary Quinn "ultimately governs [general registrars and local officers of election] in the performance of their official duties." AG Br. 45. Thus, venue was proper anywhere local registrars would carry out Secretary Quinn's duty to conduct an election — the "act to be done" — which included Salem.

Second, venue was proper because defendant Delegate Griffith maintains an official office in Salem. (A. 378.)[28] Section 8.01-261(2) of the Virginia Code provides: "[W]here the action is against one or more officers of the Commonwealth in an official capacity, [the preferred venue is] the county or city where any such person has his official office." This action was filed in Salem against Delegate Griffith and other legislators in part because

[28] The Attorney General's claim that Delegate Griffith does not have an "official office" in Salem is absurd. Each member of the Assembly receives an allowance of $1,750 per month to maintain an official district. In official legislative directories, Delegate Griffith lists his district office with a Salem PO Box, and a Salem phone number. A legislative aide, paid for by the Commonwealth, works in his district office. From that office Delegate Griffith reviews constituent mail, hosts official meetings, and conducts other legislative

plaintiffs believed, and sought to prove, that it was in Delegate Griffith's Salem district office in which key elements of the unlawful districting plans were devised. (A. 378-79.) To that end plaintiffs unsuccessfully sought depositions from Griffith and other legislators to find out what happened in Salem to illuminate the court's inquiry into legislative motive in this case. Legislative immunity is not automatic; it is a waivable defense. *See*, *e.g.*, *Consumers Union v. ABA*, 470 F. Supp. 1055, 1072 (E.D. Va. 1979), *vacated on other grounds*, 446 U.S. 719 (1980). In numerous other *Shaw*-type cases — including the *Shaw* litigation itself — legislators responsible for districting have come forward to give evidence disclosing to the public the bases for their districting decisions. The fact that Delegate Griffith and others chose to keep their secrets locked away may have rendered futile the Attorney General's efforts to identify any legislative motive other than what the district maps plainly reveal, but it did not compel the court to reject venue in Salem, especially once the case was underway and time and effort to litigate had been invested by all concerned. *See* Va. Code §8.01-264(B).

Third, the trial court properly concluded that transferring the case would delay the case and could jeopardize plaintiffs' claim for relief. Plaintiffs' principal prayer for relief was an injunction against conducting the 2001 elections under the illegal districting scheme; defendant Quinn submitted an affidavit stating that the trial court had little or no time before the 2001 elections to fashion the remedy sought by the plaintiffs. Meanwhile, defendants were using every possible tactic of delay to avoid resolving matters quickly. The trial court was rightly concerned that transferring the case — after a month in Salem — might jeopardize any prospect of reaching a timely resolution: "[W]e are on a tight time table. The Court feels that the time element and the irreparable harm that could occur if the Plaintiffs

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business, all of which is necessary given that the legislature meets in Richmond for only one

are successful outweighs the convenience of the parties . . . and that given the posture of this case in respect to the time constraints and the need to move the case forward, to get the case heard and get it to a decision, that the motion for Change of Venue is denied." (A. 189-90.) In *Faison v. Hudson,* 243 Va. 413, 418, 417 S.E.2d 302, 304 (1992), this Court held that a trial court had "good cause" to retain a case because of an advancing trial date. *See id.* Here too, the trial court concluded that the need to resolve the case justified retaining the case where it had been filed — a conclusion that is within the "discretion of the trial court." *Id.*

V. THE "APPEARANCE OF IMPROPRIETY" ARGUMENT IS MERITLESS

The Attorney General urges reversal on the ground that the "judgment below is tainted with an appearance of impropriety," AG Br. 46, principally because the trial judge declined to recuse himself on the ground that he was active in the local Democratic Party *over thirty years ago*. The argument is without merit.

The dispositive point is that the Attorney General does not contend that the trial judge should have recused himself for *actual* bias against the Commonwealth. Nor could he, given the trial court's consistently fair treatment of both parties.[29] Instead, he makes only an "appearance"-based suggestion of recusal. But in Virginia, "whether a trial judge should recuse himself or herself is measured by whether he or she harbors such bias or prejudice as would deny the defendant a fair trial, and is a matter left to the reasonable discretion of the trial court." *Welsh v. Commonwealth,* 14 Va. App. 300, 315, 416 S.E.2d 451, 459-60 (1992) (internal quotations omitted); *see Davis v. Commonwealth,* 21 Va. App. 587, 592, 466 S.E.2d

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or two months each year.

[29] Any allegation of bias in plaintiffs' favor is belied by the course of proceedings, during which the trial court ruled against plaintiffs *in toto* on three of the five counts in the complaint; rejected plaintiffs' request for a preliminary injunction against the 2001 election — the relief plaintiffs' principally wanted — and struck the request for a permanent injunction against conducting the 2001 election under the newly-enacted districts. In

741, 743 (1996) ("the trial judge must exercise discretion in determining whether he or she harbors bias or prejudice that might impair the judge's ability to give the defendant a fair trial"); *Stamper v. Commonwealth*, 228 Va. 707, 714, 324 S.E.2d 682, 686 (1985) ("trial judge must exercise reasonable discretion to determine whether he possesses such bias or prejudice as would deny a party a fair trial"); *Justus v. Commonwealth*, 222 Va. 667, 673, 283 S.E.2d 905, 908 (1981); *Scott v. Rutherford*, 30 Va. App. 176, 189-90, 516 S.E.2d 225, 232 (1999). Thus, if a trial judge fairly determines that he or she does not harbor actual bias, there is no basis in law for reversal. *See also* Va. Code §8.01-678(2) ("When it plainly appears from the record and the evidence given at the trial that the parties have had a fair trial on the merits and substantial justice has been reached, no judgment shall be arrested or reversed . . . [f]or any other defect, imperfection, or omission in the record, or for any error committed on the trial."). The judge in this case eloquently and thoroughly explained his views on this matter (A. 510-522), concluding, "To put this to rest, if I had any doubt, not reasonable doubt, not a preponderance of evidence, not clear and convincing evidence …[but] if I had any doubt that I couldn't hear this case and be fair, I would have gotten out a long time ago. I'm convinced that I can be fair and impartial." (A. 521.) As noted, the Attorney General does not even suggest that the judge was anything less than honest and fair. That ends the matter under Virginia law.[30]

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addition, even in ruling on behalf of plaintiffs' claims as to a number of the individual districts, the trial court also rejected plaintiffs' claims against several other districts.

[30] The grounds for recusal asserted by the Attorney General are meritless in any event. A rule disqualifying all judges who previously were active in politics from presiding in voting rights or other political cases obviously would disqualify many if not most judges from all such cases. In Virginia, as in the federal system, political activity is an important and perfectly acceptable route to a judgeship. Past political service has not been, and should not be, regarded as a stain on a judge's record.

Nor did the trial judge's communications with Professor Howard, whom the Court retained as a sort of temporary law clerk, create any appearance of impropriety. The court "unequivocally" stated that it "made its findings and rulings expressed in its opinion from its

VI. THE TRIAL COURT'S ORDER DID NOT EXCEED THE COURT'S EQUITABLE AUTHORITY

Upon finding that over twenty districts in the districting plans failed constitutional scrutiny, the trial court necessarily invalidated the laws that included those districts. (A. 2839-40.) The Attorney General offers essentially three arguments why that order was flawed. All lack merit.

First, the Attorney General complains that the order was overbroad because it invalidated the entirety of the districting laws, not just those districts specifically addressed in the opinion. But this Court has previously affirmed the invalidation of an entire districting law on the basis of just *one* malapportioned district. *See Brown v. Saunders*, 159 Va. 28, 46–48, 166 S.E.2d 105, 111 (1932).[31] And though the Attorney General also complains that the trial court made no findings as to the "ripple" effects statewide of redrawing only a subset of

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own independent analysis of the evidence and law applicable to the case [and] not on the imagined 'advice and/or opinion" of Professor Howard. (A. 2896.) And even if the Court's communications with Professor Howard raise an issue under the applicable Judicial Canons, that issue would not provide a basis for reversal; what matters on appeal under Virginia law is whether the defendants received a "fair trial on the merits and substantial justice," Va. Code § 8.01-678, which the Attorney General does not deny having received here.

The Attorney General also claims that although the judge's planned retirement was part of his basis for rejecting any appearance problems, the judge later did seek reappointment. The Attorney General cites not a shred of record proof for this claim. And if innuendo is to be the basis for judgment here, plaintiffs are compelled to observe that the accepted rumor is that Judge Pattisall sought reappointment solely so that he could complete his opinion in this case. That is an indisputably honorable act, not one that should subject him to the Attorney General's public condemnation.

The Attorney General's most ludicrous argument is that the judge should have recused himself *simply because the plaintiffs asserted state-law claims and not federal Voting Rights Act claims.* AG Br. 46. Why *the plaintiffs'* choice to litigate this matter under Virginia law in Virginia courts — rather than in the courts and under the laws of another sovereign — would make *the trial court* appear biased is simply mystifying.

[31] Other courts — including most recently those of Virginia's own neighbors — have also invalidated entire redistricting plans because of flaws in a subset of districts. *See, e.g., See In re Legislative Districting of State*, _ A.2d _, 2002 WL 1277816 (Md. June 11, 2002); *Stephenson v. Bartlett*, 355 N.C. 354, 562 S.E.2d 377 (N.C. 2002); *see also Smith v. Beasley*, 946 F. Supp. 1174, 1212 (D.S.C. 1996) ("[a]ny interim remedy would have to apply to all

the districts, that is very much the point: precisely *because* the court was in no position to decide for itself how much the districting laws should be rewritten to resolve their constitutional flaws, the only practical solution for the court was to invalidate the entire plan, *leaving to the General Assembly and the Governor* the task of drawing new plans. That is exactly what the court's order does.

Second, the Attorney General complains that the trial court improperly issued a "mandatory injunction" against members of the legislature to issue a new redistricting law. AG Br. at 48. Not so. The court simply declared the law unconstitutional and barred the Secretary of Elections from conducting an election until a new, lawful plan is enacted. *Cf*. *Reynolds v. Sims*, 377 U.S. 533, 585 (1964) ("[O]nce a State's legislative apportionment scheme has been found to be unconstitutional, it would be the unusual case in which a court would be justified in not taking appropriate action to insure that no further elections are conducted under the invalid plan."). Action by the legislature is not directly compelled; instead the order merely describes what is required — a lawful plan — before the Secretary may conduct another election. That the legislature would enact new plans (rather than forgo an election) is *assumed*, not required. In this respect the order tracks the order in *Wilkins v. Davis*, which merely operated against the Secretary and members of the Board, prohibiting them from conducting elections under a districting scheme "until the General Assembly of Virginia shall enact a constitutionally valid reapportionment act." 205 Va. 803, 814, 139 S.E.2d 849, 856 (1965). The order here is to the same effect.[32]

[the districts] . . . because the court could not accurately predict how repairing the unconstitutional districts would alter the boundary lines of the surrounding districts").

[32] It is true that the trial court *also* went further and ordered a new election for the fall — which is exactly what the Attorney General had earlier urged the court to do if it found a violation, *see* Def. Mem. Op. Pl. Mot. Temp. Inj. at 7 — but that remedy has been effectively mooted by this Court's stay.

Finally, the Attorney General argues that the injunction is improper because the court did not obtain § 5 preclearance from the Department of Justice before issuing it. That argument is frivolous. It is true that "[c]hanges in state law occasioned by a state court decree are subject to preclearance requirements," AG Br. 50, but a court is no more required to obtain preclearance before it issues an order than a legislature is required to obtain preclearance before it votes on a new plan. *See* 28 C.F.R. § 51.21 ("Changes affecting voting should be submitted as soon as possible *after* they become final." (emphasis added)). Even where a court writes its own redistricting plan as a remedy, the court need not obtain preclearance before issuing the order; the state simply has to submit the judicially-ordered change, *once it is final under state law,* to the Department of Justice for preclearance. *Id.* §§ 51.21, 51.22, 51.23, 51.27. The court here did not order its own plan, but instead simply invalidated the existing plans, leaving to the legislature the responsibility for devising new plans for the future elections. Hence *it is only the plan the legislature and Governor ultimately devise in response to the court's order that must be precleared*. *See McDaniel v. Sanchez*, 452 U.S. 130, 150 n.30 (1981) ("in the normal case, the legislature will enact an apportionment plan to replace that invalidated by the court; such a plan clearly must be precleared under § 5"); *Hathorn v. Lovorn*, 457 U.S. 255, 270 n.24 (1982).

CONCLUSION

For the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 5:28 of the Rules of the Supreme Court of Virginia, I hereby certify that Rules 5:26(d) has been complied with, that twenty copies of this brief were filed by hand delivery this 22nd day of July, 2002, in the Office of the Clerk of the Supreme Court of Virginia, and that three copies of this brief were mailed by certified first-class mail, postage prepaid, this 22nd day of July, 2002, to the following counsel:

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