IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Norfolk Division

JOAN HALL, RICHARD PRUITT, THOMASINA PRUITT, VIVIAN CURRY, ELIJAH SHARPE, EUNICE MCMILLAN, JAMES SPELLER, ROBBIE GARNES and LESLIE SPEIGHT,

Plaintiffs,

v. **Civil Action No. 2:03-CV-151**

COMMONWEALTH OF VIRGINIA, and JEAN JENSEN, SECRETARY, STATE BOARD OF ELECTIONS, in her official capacity.

Defendants.

BRIEF IN SUPPORT OF MOTION TO DISMISS

The Commonwealth of Virginia and Jean Jensen, Secretary of the State Board of Elections, by their counsel, submit the following argument in support of their Motion to Dismiss:

STATEMENT OF THE CASE

Plaintiffs filed their Complaint February 21, 2003.[1] They seek a declaration that the Commonwealth's 2001 congressional redistricting plan violates § 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, and seek preliminary and permanent injunctive relief prohibiting elections under the plan. (Compl., Prayer for Relief, ¶¶ 2-4.) Defendants move to dismiss the suit under Fed. R. Civ. P. 12(b)(1) and 12(b)(6).

[1] Plaintiffs filed an essentially identical lawsuit in April 2002 in the Circuit Court of the City of Petersburg, Virginia. They suffered nonsuit of that action on November 5, 2002.

QUESTIONS PRESENTED

I. WHETHER PLAINTIFFS HAVE STATED A CLAIM UNDER § 2 OF THE VOTING RIGHTS ACT.

II. WHETHER PLAINTIFFS HAVE STANDING.

STANDARDS OF LAW

When subject matter jurisdiction is challenged under Fed. R. Civ. P. 12(b)(1), the plaintiff bears the burden of demonstrating that jurisdiction exists, *see Lovern v. Edwards*, 190 F.3d 648, 654 (1999); *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982), and the court is not bound to accept the allegations in the complaint as true. "Indeed, the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case." *See Williams v. United States*, 50 F.3d 299, 304 (4th Cir. 1995) (internal quotation marks and citation omitted); *see also Vick v. Foote, Inc.*, 898 F. Supp. 330, 331 (E.D. Va. 1995), *aff'd*, 82 F.3d 411 (4th Cir. 1996).

Conversely, when considering a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the court must accept the plaintiffs' well-pleaded factual allegations as true and in the light most favorable to the plaintiff. The court should not dismiss the complaint unless it is clear the facts alleged do not entitle the plaintiff to relief. *GE Inv. Private Placement Partners II v. Parker*, 247 F.2d 543, 548 (4th Cir. 2001). However, legal conclusions merely couched as factual allegations need not be taken as true. *Assa'Ad-Faltas v. Commonwealth*, 738 F. Supp. 982, 985 (E.D. Va. 1989) (citing *Papasan v. Allain*, 478 U.S. 265, 286 (1986)). Where a plaintiff's claim is based on such conclusory allegations, dismissal is appropriate. *See, e.g.*, *Alley v. Angelone,* 962 F. Supp. 827, 838 (E.D. Va. 1997).

STATEMENT OF FACTS

On July 10, 2001, the General Assembly enacted a congressional redistricting plan based on the 2000 decennial census. Former Governor James S. Gilmore, III, signed the bill into law on July 19, 2001. (Compl. ¶ 1.) The plan is codified at Va. Code § 24.2-302.1.

Because the Commonwealth is subject to § 5 of the Voting Rights Act of 1965, the newly enacted law was submitted to the United States Department of Justice for "preclearance." To obtain preclearance under § 5, a covered jurisdiction must establish that its proposed redistricting plan "does not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." 42 U.S.C. § 1973(c). On October 16, 2001, finding that the Commonwealth had established that its congressional redistricting plan had neither the purpose nor the effect of denying or abridging the right to vote because of race, the Department of Justice precleared the redistricting plan. (Compl. ¶ 37.)

The instant proceeding challenges the composition of the existing Fourth Congressional District under § 2 of the Voting Rights Act. (*See, e.g.*, Compl. ¶ 39.) African Americans currently comprise 33.6% of the district's population, whereas, in the district as previously drawn, African Americans comprised 39.4% of the population. (Compl. ¶ 17.) Plaintiffs contend that this 5.8% reduction violates § 2 because it impermissibly dilutes the ability of African American voters to "influence" elections in the Fourth Congressional District. (*See, e.g.*, Compl. ¶ 4.)

Of the nine Plaintiffs[2], only two reside in the Fourth Congressional District. The remaining seven reside in either the Third or Fifth Congressional District, or their residence is unknown. (Compl. ¶¶ 7-14.)[3]

SUMMARY OF ARGUMENT

The arguments raised by the Commonwealth and Secretary Jensen herein address threshold issues. First, Plaintiffs have failed to state a claim against the Secretary under § 2 of the Voting Rights Act because they cannot prove the necessary preconditions to such a claim set forth in *Thornburg v. Gingles*, 478 U.S. 30 (1986), and *Growe v. Emison*, 507 U.S. 25 (1993). Second, only two Plaintiffs have standing to prosecute this suit, and the remaining seven must be dismissed.

ARGUMENT

I. PLAINTIFFS HAVE FAILED TO STATE A CLAIM UNDER § 2 OF THE VOTING RIGHTS ACT OF 1965.

A. Section 2 of the Voting Rights Act

Section 2 of the Voting Rights Act provides as follows:

> (a) No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or in contravention of the guarantees set forth in section 1973b(f)(2) of this title, as provided in subsection (b) of this section.

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[2] Elijah Sharpe, alleged to be a resident of the Third Congressional District, has requested that his name be removed as a Plaintiff. *See* Attachment A. If he is removed there will be eight plaintiffs.

[3] Although the Complaint includes information about most of the parties under a separate heading in the Complaint, there are no allegations about Plaintiffs Richard Pruitt and Thomasina Pruitt.

> (b) A violation of subsection (a) of this section is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) of this section in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice. The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.

42 U.S.C. § 1973. Congress enacted § 2 to effectuate the Fifteenth Amendment's guarantee that no citizen's right to vote may be denied or abridged because of their race. *Voinovich v. Quilter*, 507 U.S. 146, 152 (1993).

In its present form, § 2 is the legislative embodiment of the "vote dilution" concept. *McGhee v. Granville County*, 860 F.2d 110, 116 (4th Cir. 1988). Stated broadly, this concept means that the voting power of a minority may not be diluted by districting processes that "'submerge' the minority voting group in a voting constituency in which the voting power of a racially 'bloc-voting' white majority always insures defeat for the candidates of the minority group's choice. As so stated, the concept is logically unbounded." *Id.* at 116.

Expressing concern that the vote dilution concept "is logically unbounded," courts have imposed special requirements on § 2 claims. *See McGhee*, 860 F.2d at 116 (citing *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 944-45 (7th Cir. 1988)). Moreover, this same concern animated congressional deliberations that lead to the amendment of § 2 in 1982. *McGhee*, 860 F.2d at 116-17. "The judicial and legislative process of putting principled bounds upon the vote dilution concept . . . culminated in the Supreme Court's exhaustive analysis of the concept" in *Thornburg v. Gingles*. *McGhee*, 860 F.2d at 117.

B. The Gingles Preconditions

In *Gingles*, the Supreme Court read § 2 to impose "necessary preconditions" on the prosecution of vote dilution claims and held that, to establish such claims, plaintiffs must prove three threshold conditions. First, the minority group must demonstrate that its population is sufficiently large and geographically compact to constitute a majority in a single-member district. Second, the minority group must be able to show that it is politically cohesive. And third, the minority group must be able to establish that the white majority usually votes sufficiently as a bloc to enable it to defeat the minority's preferred candidate. *Gingles*, 478 U.S. at 50-51 (citations omitted).

If plaintiffs can prove each of these three preconditions, they may then present evidence that, under the "totality of the circumstances" test identified in 42 U.S.C. § 1973(b), there has been impermissible vote dilution. However, "*[u]nless these points are established*, *there neither has been a wrong nor can be a remedy*." *Growe v. Emison*, 507 U.S. at 40-41 (1993) (emphasis added). The *Gingles* preconditions thus establish a bright line test for determining whether there has been a § 2 violation. *See, e.g.*, *Valdespino v. Alamo Heights Indep. School Dist.*, 168 F.3d 848, 852 (5th Cir. 1999). If plaintiffs cannot establish the preconditions, they cannot establish a § 2 claim. *Uno v. City of Holyoke*, 72 F.3d 973, 988 (1st Cir. 1995) ("In any claim brought under . . . § 2, the *Gingles* preconditions are central to the plaintiffs' success.").

While the *Gingles* Court construed § 2 in the context of a challenge to a multi-member district, 478 U.S. at 50, it is nevertheless clear that the preconditions apply with equal force to challenges to single-member districts, such as the Fourth Congressional District. *Growe*, 507 U.S. at 40. Indeed, as the Court stated in *Growe v. Emison*:

> It would be peculiar to conclude that a vote dilution challenge to the (more dangerous) multimember district requires a higher threshold showing than a vote

> fragmentation challenge to a single-member district. Certainly the reasons for the three *Gingles* prerequisites continue to apply: *the "geographically compact majority" and "minority political cohesion" showings are needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district*. And the "minority political cohesion" and "majority bloc voting" showings are needed to establish that the challenged districting thwarts a distinctive minority vote by submerging it in a larger white voting population. *Unless these points are established, there neither has been a wrong nor can be a remedy*.

Growe, 507 U.S. at 40-41 (citations omitted) (emphasis added).

Of particular importance in the instant case is the first *Gingles* precondition; that is, the requirement that the minority group must demonstrate that its population is sufficiently large and geographically compact to constitute a majority in a single-member district. The reason for this requirement is clear: "Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by that structure or practice." *Gingles*, 478 U.S. at 50 n.17 (emphasis in original); *see also Growe*, 507 U.S. at 40 (The first precondition is "needed to establish that the minority has the potential to elect a representative of its own choice in some single-member district.").

The Supreme Court has explained the gist of this first precondition as follows: "When applied to a claim that single-member districts dilute minority votes, the first *Gingles* condition requires the possibility of creating *more than the existing number* of reasonably compact districts with a sufficiently large minority population to elect candidates of its choice." *Johnson v. DeGrandy*, 512 U.S. 997, 1007 (1994) (emphasis added). Thus, a § 2 plaintiff must demonstrate that it is possible to create additional geographically compact majority-minority districts. *See Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 479 (1997) (". . . a § 2 plaintiff must postulate a reasonable alternative voting practice to serve as the benchmark 'undiluted' voting practice.") Plaintiffs here cannot state a § 2 claim because they have not alleged that the minority population

at issue is sufficiently large and geographically compact to constitute a majority in more that the existing number of majority-minority districts.

To explain, in the 1991 round of redistricting, the General Assembly created the Commonwealth's first and only majority-minority congressional district, the Third Congressional District. *See Moon v. Meadows*, 952 F. Supp. 1141, 1144 (E.D. Va. 1997). In order to state a claim that the Commonwealth's 2001 redistricting plan violates § 2 by impermissibly diluting the voting strength of African Americans, Plaintiffs would have to establish that African American voters could constitute a geographically compact majority in a hypothetical single-member district *in addition to the Third Congressional District*. This they cannot do.

In the Complaint, Plaintiffs refer to three redistricting plans rejected by the General Assembly during the 2001 round of redistricting. None of the rejected plans created a majority-minority district in addition to the Third Congressional District. The first two plans, Congressional Plan 188 and the Deeds Plan, would have increased the African American population in the Fourth Congressional District from 39.4% to 40.4%[4] and 40.3%, respectively. However, neither plan would have created an additional majority-minority district. Thus, Plaintiffs cannot use Congressional Plan 188 or the Deeds Plan to satisfy the first *Gingles* precondition.

The third plan, the Maxwell-Crittenden, Plan would have increased the African American population to 52.8%. To create a majority-minority Fourth Congressional District, the Maxwell-

[4] In ¶ 33 of the Complaint, Plaintiffs assert that "Congressional Plan 188 would have increased the African-American *voting population* in the Fourth Congressional District to 40.4%." (Emphasis added.) The African American *Voting Age Population* is actually 38.3%. See Virginia Div. of legislative Services website at http://dlsgis.state.va.us/congress/SB6/VAP.xls. the African American *Population* that is 40.4%. See http://dlsgis.state.va.us/congress/SB6/POP.xls.

Crittenden Plan "robbed Peter to pay Paul"; that is, to increase minority population in the Fourth Congressional District, such large numbers of minority individuals would be taken from the Third Congressional District that it would no longer have been a majority-minority district. Thus, Plaintiffs cannot use the Maxwell-Crittenden Plan to satisfy the *Gingles* test.

Plaintiffs tacitly acknowledge that they cannot prove a vote dilution claim under *Gingles*, and instead, prosecute a so-called "influence" dilution claim. They contend that *Gingles* does not apply to influence dilution claims. This is the same argument Plaintiffs made before the Petersburg circuit court, and it is based upon the misapplication of Supreme Court *dicta* and the incorrect construction of lower federal court decisions interpreting § 2.

First, there is no decision by the Supreme Court of the United States that establishes the viability of an influence dilution claim under § 2 or that permits courts to dispense with the first *Gingles* precondition under any circumstances. It is true that in two cases the Court has *assumed* without deciding that plaintiffs alleging influence dilution had satisfied the first precondition. *See Johnson v. DeGrandy*, 512 U.S. 997, 1008-09 (1994); *Voinovich*, 507 U.S. at 154.[5] In each case, the Court ultimately concluded that no § 2 violation had occurred. *DeGrandy*, 512 U.S. at 1024 (no claim under the totality of the circumstances test); *Voinovich*, 507 U.S. at 158 (plaintiffs failed to establish the third precondition). The most Plaintiffs can draw from this *dicta* is the proposition that the Court has failed to rule out affirmatively the concept of an influence dilution claim. However, this does not mean that "the Court will likely embrace this broad

[5]In *Gingles* and *Growe*, the Court simply did not reach the question whether, when plaintiffs allege that an electoral structure impairs the minority group's ability to influence, rather than alter, an election, "a showing of geographical compactness of a minority group not sufficiently large to constitute a majority will suffice." *Growe*, 507 U.S. at 41 n.5 (citing *Gingles*, 478 U.S. at 46-47 n.12.).

interpretation of § 2 without limitation in the future." *Hastert v. State Bd. of Elections*, 777 F. Supp. 634, 652 (N.D. Ill. 1991).

Second, the federal circuit and district court cases on which Plaintiffs relied in the Petersburg circuit court do not support their influence dilution argument. Plaintiffs cited two federal circuit court decisions – *Garza v. County of Los Angeles*, 918 F.2d 763, 769-71 (9th Cir. 1990), and *Uno v. City of Holyoke*, 72 F.3d at 991 (1st Cir. 1995) – and two federal district court decisions – *Armour v. Ohio*, 775 F. Supp. 1044, 1052 (N.D. Ohio 1991), and *West v. Clinton*, 786 F. Supp. 803, 807 (W.D. Ark. 1992) – in support of their claim. Careful reading of these cases reveals that only one – *Armour v. Ohio* – stands for the proposition advanced by Plaintiffs. Moreover, Plaintiffs can take no comfort in *Armour* because it has been overruled by the Supreme Court's holding in *Growe*, 507 U.S. at 40-41, and the Sixth Circuit Court of Appeals' holding in *Cousin v. Sundquist*, 145 F.3d 818, 828-29 (6th Cir. 1998).

For example, in *Garza v. County of Los Angeles*, the Ninth Circuit Court of Appeals held that plaintiffs need not satisfy the first *Gingles* precondition where they have proved "*intentional* dilution of minority voting strength." 918 F.2d at 769 (emphasis added). The *Garza* court never held that the first *Gingles* precondition could be disregarded when plaintiffs merely allege – as they do here – that an electoral structure has a discriminatory effect. Indeed, two years after *Garza* was handed down, a federal district court sitting in the Ninth Circuit specifically rejected the notion that § 2 permits an influence dilution claim. *DeBaca v. County of San Diego*, 794 F. Supp. 990, 997 (S.D. Cal. 1992).

Similarly, in *Uno v. City of Holyoke* the First Circuit Court of Appeals took "no view" of the question whether influence dilution claims were cognizable under § 2. 72 F.3d at 997 n.2. Moreover, while the *Uno* court "discuss[ed] the potential relevance of evidence from elections in

a particular 'influence district'" in the context of evaluating the plaintiffs' claim under the totality of the circumstances test, *id.* at 979 n.2; *see also id.* at 990-92, it repeatedly acknowledged the necessity of establishing each of the three *Gingles* preconditions in order to state a viable § 2 claim: "The platform required to launch a vote dilution claim *must* contain three interleaved planks," *id.* at 979 (emphasis added); "[t]he [*Gingles*] preconditions are *necessary* to prove an overall conclusion of vote dilution," *id.* at 985 (emphasis added); "[i]n *any* claim brought under . . . § 2, the *Gingles* preconditions are *central* to the plaintiffs' success," *id.* at 988 (emphasis added).

Lastly, *West v. Clinton* lends no support to Plaintiffs' argument here. In *West*, the court merely assumed the viability of an influence dilution claim, 786 F. Supp. at 806, and then, like the Supreme Court in *DeGrandy* and *Voinovich*, proceeded to dismiss the plaintiffs' § 2 claim, *id.* at 807.

Plaintiffs are thus left with the holding in *Armour v. Ohio*. There, the court held that influence dilution claims were viable under § 2 and that proof of the first *Gingles* precondition was not necessary to establish such claims. *Armour,* 775 F. Supp. at 1051-52. It is important to note that the *Armour* court premised its holding largely on the conclusion that the rationale underlying the *Gingles* preconditions had no application to challenges to single-member districts. *See id.* at 1051. This conclusion proved utterly erroneous, and the Supreme Court's holding in *Growe* that the *Gingles* preconditions apply to single-member districts has thus eviscerated the principle foundation for the holding in *Armour*. *See Growe*, 507 U.S. at 40.

Moreover, even if *Growe* did not sound the death knell of *Armour*, the Sixth Circuit Court of Appeals' holding in *Cousin*, 145 F.3d at 828-29, surely did. In *Cousin*, the federal appellate court whose precedent controls the *Armour* court, *see* 28 U.S.C. § 41, squarely rejected

the concept of an influence dilution claim on the ground that it was impermissible under § 2. 145 F.3d at 829. As the *Cousin* court stated:

> [T]he district court erred in assuming from the *Gingles* footnote [12] . . . that an influence claim is actionable under Section 2. The Supreme Court's reluctance in *Voinovich* to state that Section 2 authorizes such a claim, when the Court was so squarely presented with factual circumstances favorable to so holding, suggests that the existence of an influence cause of action should not be inferred . . . .

Id. at 828-29.

Indeed, the majority of federal courts apply the *Gingles* preconditions as a bright line test for the establishment of § 2 claims and thus reject the influence dilution concept outright. *See Metts v. Almond*, 217 F. Supp 2d. 252, 257 (D.R.I. Sept. 9, 2002); *O'lear v. Miller*, 222 F. Supp 2d. 850, 861 (E.D. Mich.) (Three-judge court), *aff'd* 123 S.Ct. 512 (2002) ("Because plaintiffs cannot satisfy the *Gingles* preconditions and because we do not recognize 'influence' claims, plaintiffs cannot state a claim under the Voting Rights Act."); *see also Valdespino*, 168 F.3d at 852 ("We have repeatedly disposed of vote dilution cases on the principle that 'failure to establish any one of [the *Gingles*'] threshold requirements is fatal.'"); *Cousin*, 145 F.3d at 829; *Romero v. City of Pomona*, 883 F.2d 1418, 1424, n.7 (9th Cir. 1989); *McNeil v. Springfield Park Dist.*, 851 F.2d 937, 947 (7th Cir. 1988), *cert. denied*, 490 U.S. 1031 (1989) ("If allowed, the 'ability to influence' claim would severely undermine whatever good purpose is served by the [*Gingles*] threshold factors."); *DeBaca*, 794 F. Supp. at 997; *Hastert*, 777 F. Supp. at 652-54; *Skorepa v. City of Chula Vista*, 723 F. Supp. 1384, 1392 (S.D. Cal. 1989).

The Fourth Circuit Court of Appeals is among this majority. Indeed, it has consistently applied all three *Gingles* preconditions to § 2 claims, *see, e.g.*, *Lewis v. Alamance County*, 99 F.3d 600, 604 (4th Cir. 1996); *Collins v. City of Norfolk*, 883 F.2d 1232, 1239 (4th Cir. 1989), and has recognized that the preconditions are "essential" to the proof of vote dilution claims, *see*

Collins v. City of Norfolk, 816 F.2d 932, 935 (4th Cir. 1987). It has, moreover, adopted the reasoning of the Seventh Circuit that establishment of the preconditions is "essential to 'pass the summary judgment threshold.'" *McGhee*, 860 F.2d at 117 (quoting *McNeil*, 851 F.2d at 942). As the Fourth Circuit has aptly stated, the *Gingles* preconditions are necessary to place "principled bounds" on the concept of vote dilution as codified in § 2. *See McGhee*, 860 F.2d at 117.

Moreover, to permit influence dilution claims would be inconsistent with the plain language of *Gingles* itself:

> Unless minority voters possess the *potential* to elect representatives in the absence of the challenged structure or practice, they cannot claim to have been injured by the structure or practice.

Gingles, 478 U.S. at 50 n.17 (emphasis in original). Absent a showing that the minority group would constitute a geographically compact majority in a single-member district, it cannot establish that it has "the potential to elect" the candidate of its choice. *Growe*, 507 U.S. at 40. This Court should decline Plaintiffs' invitation to endorse the concept of an "influence" dilution claim under § 2.

II. SEVEN OF NINE PLAINTIFFS LACK STANDING.

The Supreme Court of the United States has specifically rejected the notion that anyone who resides in a state has standing to challenge a district within that state on the ground that the district was racially gerrymandered. *United States v. Hays*, 515 U.S. 737, 744 (1995). Rather, in order to prosecute such a claim, plaintiffs must, at an "irreducible constitutional minimum," show that they have suffered an injury in fact; that is, the invasion of a legally protected interest

that is concrete and particularized, and actual or imminent, as opposed to merely conjectural or hypothetical. *Id.* at 742-43.

In this regard, the Supreme Court has held that when plaintiffs reside within a district, they have standing to challenge it because they may suffer the "special representational harms" racial classifications may cause in the voting rights context. Conversely, when plaintiffs do not reside within a district, they do not suffer those special harms, and therefore, absent specific evidence that they have been subjected to racial classification, they lack standing to pursue a voting rights claim. *Hays*, 515 U.S. at 545. Thus, the Court has repeatedly found that plaintiffs who reside outside a district lack standing to challenge that district on the voting rights grounds. *See Sinkfield v. Kelley*, 531 U.S. 28, 30-31 (2000); *Bush v. Vera*, 517 U.S. 952, 957 (1996); *Hays*, 515 U.S. at 747.

Of the nine Plaintiffs in this suit, it appears that only two, Joan Hall and Leslie Speight, reside in the Fourth Congressional District. Accordingly, only Plaintiffs Hall and Speight have standing to pursue this § 2 challenge, and the remaining Plaintiffs must be dismissed.

WHEREFORE, the Defendants respectfully request this Court to sustain their Motion to Dismiss and dismiss plaintiffs' claims in their entirety.

Respectfully submitted,

COMMONWEALTH OF VIRGINIA and JEAN JENSEN, Secretary of the State Board of Elections

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CERTIFICATE OF SERVICE

I hereby certify that on May 9, 2003, true and correct copies of the foregoing Brief in Support of Motion to Dismiss were sent by FedEx for delivery on May 12, 2003, to Anita Hodgkiss, Lawyers' Committee for Civil Rights Under Law, 1401 New York Avenue, N.W., Suite 400, Washington, DC 20005-0400; Donald L. Morgan, Esq., Cleary, Gottlieb, Steen & Hamilton, 2000 Pennsylvania Avenue, NW, Washington, DC 20006; J. Gerald Hebert, Esq., Law Office of J. Gerald Hebert, P.C., 5019 Waple Lane, Alexandria, VA 22304, counsel for Plaintiffs; and Michael A. Carvin, Esq., Louis K. Fisher, Esq., and Cody R. Smith, Esq., Jones Day, 51 Louisiana Avenue, NW, Washington, D.. 20001, counsel for Proposed Intervenor-Defendants Thompson, et al.

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