IN THE SUPREME COURT OF VIRGINIA
AT RICHMOND

Governor Mark R. Warner by substitution for Governor James S. Gilmore, III, Lt. Governor and President of the Senate John H. Hager, Acting Attorney General Randolph A. Beales, Speaker of the House of Delegates S. Vance Wilkins, Jr., Senate Majority Leader Walter A. Stosch, House Majority Leader H. Morgan Griffith, Senator Kevin G. Miller, Delegate John H. Rust, Jr., Delegate S. Chris Jones, State Board of Elections Secretary Cameron P. Quinn, all in their official capacities,	)	**RECORD NO. 021003**

Defendants and also Appellants except for Governor Mark R. Warner, former Lt. Governor Hager, and former Acting Attorney General Beales.

v.

Douglas MacArthur West, Albert Simpson, Nanalou Sauder, Ruby Tucker, Shirley N. Tyler, Shanta Reid, John Mumford, Sam Werbel, Collins Howlett, Ira J. Coleman, Maryann Coleman, Carl Waterford, Regina Harris, Herman L. Carter, Jr., Grindley Johnson, Rosa Byrd, Harold L. 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, Bob 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 AMICUS CURIAE OF GOVERNOR MARK R. WARNER IN SUPPORT OF APPELLEES

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INTEREST OF AMICUS CURIAE

Amicus Mark R. Warner is the Governor of the Commonwealth of Virginia. In addition to his general constitutional responsibility to take care that the laws be faithfully executed, Va. Const., art. V, § 7, the Governor will have the specific duty, should this Court uphold the Circuit Court's judgment, of deciding whether to sign or veto legislation creating new districting plans that comply with the Constitution and federal law. See Va. Const., art. V, § 6. The Governor believes that the 2001 redistricting plans violate specific provisions of Article II, § 6, of the Virginia Constitution, and thus undermine the right to vote recognized as fundamental under Article I, § 11 of the Virginia Constitution. See *Etheridge v. Medical Center Hospitals*, 237 Va. 87, 98, 376 S.E.2d 525, 530 (1989).

Governor Warner's predecessor in office, Governor James S. Gilmore, III, was the original lead defendant in this action. While Governor Warner believes that the Circuit Court was correct in holding that the 2001 Virginia Senate and House of Delegates redistricting plans violate the Constitution of Virginia, he determined that a decision of this magnitude should be reviewed by this Court, rather than being resolved finally by a single judge. Accordingly, he concluded that the Attorney General should prosecute an appeal on behalf of other named defendants,[1] and is appearing here as amicus in support of the plaintiff-appellees. Rather than responding to the bulk of the Attorney General's brief that involves a partisan attack on the good faith of the Circuit Court, this brief focuses on the substantive issue before this Court: whether the redistricting plans violate the Commonwealth's Constitution.

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[1] Not all of the original named defendants were properly served with process. Governor Warner takes no position on the question of which of the originally named defendant-appellants are proper parties here.

Counsel for the parties have consented to the filing of this brief.

STATEMENT OF THE CASE

Governor Warner adopts the appellees' statement of the case.

STATEMENT OF THE FACTS

Governor Warner adopts the appellees' statement of the facts.

SUMMARY OF ARGUMENT

This Court should reject the Attorney General's position that redistricting is a matter of essentially unreviewable legislative prerogative, and that the federal law governing redistricting Constitution. The specific provisions of the Virginia Constitution are designed to serve important values in the democratic process. Sixty years before the U.S. Constitution was construed to require substantial equality of populations among districts, the Virginia Constitution embodied such a commitment; that commitment was extended to state legislative districts by Article II, § 6. Just as the requirement that districts contain substantially equal numbers of people is meant to further "fair and effective representation of all citizens," *Gaffney v. Cummings*, 412 U.S. 735, 748 (1973), so, too, the requirements of contiguity and compactness embodied in Article II, § 6 are intended to serve a functional purpose, and not merely to express an esthetic preference for "Mondrian [rather than] Pollock." *Prosser v. Elections Board*, 793 F. Supp. 859, 863 (W.D. Wis. 1992) (three-judge court). Article II, § 6's requirement that districts be constructed from "contiguous and compact territory" is an attempt to give concrete form to the

Commonwealth's longstanding commitment to respecting communities of interest. *Wilkins v. Davis*, 205 Va. 803, 139 S.E.2d 849 (1965).

This Court's only decision interpreting Article II, § 6, *Jamerson v. Womack*, 244 Va. 506, 423 S.E.2d 180 (1992), offered a functional approach to deciding whether challenged districts comply with Article II, § 6. In *Jamerson*, this Court looked beyond the cartographic outlines of the challenged district to ask whether its residents would have a real opportunity for fair and effective representation.

The same functional approach this Court took to compactness in *Jamerson* also explains why the General Assembly exceeded its constitutional power in taking the categorical position that "contiguity by water is sufficient" under all circumstances to satisfy Article II, § 6. Under a functional view of Article II, § 6, contiguity by water is sufficient only when the communities that are combined into a district are in fact *linked by* water – that is, share some commonality beyond their fortuitous placement in a single district – or when "contiguity by water" is the nearest approximation that can be achieved to the kind of "contiguous . . . territory" contemplated by Article II, § 6, given the need to satisfy other constitutional criteria as well. Thus, "contiguity by water" complies with Article II, § 6 only when it serves either some other constitutional or federal statutory command or where it adheres to the constitutional "common law" of redistricting. It cannot supplant the traditional form of contiguity in which geographically adjacent populations with shared concerns and interests are joined together in a district.

While *Jamerson* is certainly the starting point for analyzing Article II, § 6, it should be read in light of subsequent U.S. Supreme Court decisions that substantially recast the way in

which state legislatures can rely on race in the redistricting process. *Jamerson* took the command of the federal Voting Rights Act to create majority-black districts to essentially preempt any need for analyzing the question of compactness under Article II, § 6. But one year later, in *Shaw v. Reno*, 509 U.S. 630 (1993), the U.S. Supreme Court identified a new, "analytically distinct," id. at 652, cause of action: an apportionment plan that "rationally can be viewed only as an effort to segregate the races for purposes of voting, without regard for traditional districting principles and without sufficiently compelling justification" violates the equal protection clause of the Fourteenth Amendment. Id. at 642.

The Voting Rights Act was intended to give minority voters an equal opportunity to elect the candidates of their choice, not to provide a smokescreen to the General Assembly under which it could ignore Article II, § 6. After *Shaw*, courts must begin their inquiry by asking, without regard to race or the commands of the Voting Rights Act, whether a district is compact. Thus, this Court should not reason backwards from the fact that federal law may on occasion demand relaxing particular aspects of Article II, § 6, to conclude that any district that complies with federal law thereby achieves compactness retroactively, as it were.

Shaw also makes clear that "in reconciling the different demands upon it," *Jamerson*, 244 Va. at 517, 423 S.E.2d at 186, a state legislature cannot ignore the state constitutional requirement of compactness. "The judiciary retains an independent obligation . . . to ensure that the State's actions are narrowly tailored to achieve a compelling interest." *Shaw v. Hunt*, 517 U.S. 899, 915 (1996). Although *Shaw* was decided under the equal protection clause, this Court should employ the same analysis in assessing claims under the "anti-discrimination clause" of Article I, § 11.

Applying these legal principles to the record in this case shows that the Circuit Court correctly held that the 2001 Senate and House Plans violated Article II, § 6, and Article I, § 11, of the Virginia Constitution.

With respect to the issue of contiguity, the Circuit Court properly held that the General Assembly violated Article II, § 6 by using "contiguity by water" excessively or unnecessarily. The Circuit Court found no justification for the General Assembly's resort to contiguity by water with respect to several Senate and House districts. Moreover, even with respect to districts where *some* "contiguity by water" was necessary, the Circuit Court correctly held that the General Assembly exceeded its authority by patching bits and pieces of several localities together, rather than crossing the water only once, and in a logical direction to secure sufficient population.

Not only did the Commonwealth provide no justification for its resort to "contiguity by water," but the configurations of the challenged districts posed substantial obstacles to fair and effective representation for the districts' various residents. Thus, these oddly-shaped, elongated districts violated the compactness prong of Article II, § 6 as well. Unlike the district upheld by this Court in *Jamerson*, the challenged districts knit together such widely dispersed and divergent populations that effective participation and representation was unfairly impeded.

The General Assembly's retreat from the application of traditional race-neutral redistricting principles explains also why the 2001 Senate and House plans violated Article I, §11's anti-discrimination clause. Analysis of a racial gerrymandering claim proceeds essentially in three steps. First, a reviewing court must ask whether race played a predominant role in the redistricting process. Second, if the answer to this question is "yes," it must ask whether either

section 2 or section 5 of the Voting Rights Act required the state to take race into account in order to avoid the dilution or degradation of minority voting strength. Finally, assuming that the state was justified in relaxing its compliance with traditional districting principles, the reviewing court must ask whether the challenged districts were narrowly tailored.

In this case, there is a consensus that the Voting Rights Act required the Commonwealth to take race into account in its redistricting process and to draw a substantial number of majority-black legislative districts. Thus, the real questions are whether race played a predominant role in the redistricting process and whether the districts the General Assembly drew went beyond what was necessary in order to comply with the Voting Rights Act.

The Circuit Court correctly held that the answer to both those questions was "Yes." It pointed to extensive evidence of a disregard for keeping regions and localities intact, the creation of noncompact and noncontiguous majority-minority districts, and an inordinate use of split precincts in creating majority-minority districts. And it identified two ways in which a number of the majority-minority districts were not narrowly tailored. First, in several areas of the Commonwealth, it would have been possible to draw majority-black districts without violating traditional principles of compactness and contiguity, but the General Assembly drew unjustifiably irregular districts instead. Second, given existing political realities and voting patterns, the General Assembly assigned more black voters to majority-black districts than was necessary to provide black voters with a full and fair opportunity to elect the candidates of their choice. Thus, neither section 2 nor section 5 of the Voting Rights Act provided a justification for the General Assembly's overreliance on race.

ARGUMENT

I. The Virginia and U.S. Constitutions Significantly Constrain the General Assembly's Discretion in Drawing Senate and Delegate Districts

The Attorney General's brief rests on the implicit premise that redistricting is a matter of legislative prerogative, constrained only by federal law, and thus that this Court should be suspicious of voters who turn to state constitutional law and state courts to vindicate their interest in fair and effective representation. He argues that this Court should ignore the Constitution of Virginia, because he thinks the Commonwealth's Constitution imposes no real limits on the General Assembly's inventiveness in drawing districts. See, e.g., Opening Brief of Appellants at 6, 20.

The Attorney General has gotten it exactly backwards. First, the United States Supreme Court has repeatedly emphasized that the federal Constitution "leaves with the States primary responsibility for apportionment of their . . . state legislative districts." *Growe v. Emison*, 507 U.S. 25, 34 (1993). While the equal protection clause of the Fourteenth Amendment and the Voting Rights Act of 1965, 42 U.S.C. § 1973 et seq. (1994), impose several significant limits on a state's choice among plans, most states (including Virginia), impose additional constraints on legislative carte blanche. See, e.g., Bernard Grofman, Criteria for Districting: A Social Science Perspective, 33 U.C.L.A. L. Rev. 77, 177-83 (1985) (presenting a table describing different constraints imposed by various states, including contiguity, compactness, for political jurisdictions, natural boundaries, and communities of interest, and political fairness); Lashley G. Harvey, Reapportionments of State Legislatures – Legal Requirements, 17 Law & Contemp. Probs. 364, 368 (1952) (also describing different states' constitutional constraints); Ralph

Eisenberg, Legislative Reapportionment and Congressional Redistricting in Virginia, 23 Wash. & Lee L. Rev. 295 299-301 (1966) (discussing the history of Virginia constitutional provisions governing redistricting).

Second, long before federal courts began to police Virginia's redistricting process, this Court recognized that the courts of the Commonwealth play an essential role in safeguarding voters. In *Brown v. Saunders*, 159 Va. 28, 166 S.E. 105 (1932), it declared that when a constitutional provision limits "the legislative power of apportionment . . ., then whether those limitations have been exceeded is . . . a question for judicial determination." Id. at 36, 166 S.E. at 107. See also *Wilkins v. Davis*, 205 Va. 803, 139 S.E.2d 849 (1965). Thus, it is entirely appropriate that this Court resolve the question whether the current state legislative apportionment complies with the Virginia Constitution. Indeed, as the United States Supreme Court made clear in *Scott v. Germano*, 381 U.S. 407 (1965), and reiterated unanimously in *Growe v. Emison*, 507 U.S. at 34, "[t]he power of the judiciary of a State to require valid reapportionment . . . has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." *Germano*, 381 U.S. at 409 (citing state court cases).

A. Individual Constraints on the Configuration of Districts Should Be Read in Light of the Central Purpose of Apportionment: To Provide Fair and Effective Representation for all Citizens

The Constitutions of Virginia and the United States are more than an obstacle course for willful legislators to navigate on the way to drawing a plan that serves their interests. Instead, they lay out practical rules that are designed to safeguard important values in the democratic

process. "Achieving 'fair and effective representation of all citizens is . . . the basic aim of legislative apportionment.'" *Board of Estimate v. Morris*, 489 U.S. 688, 694 (1989) (ellipses in the original) (quoting *Reynolds v. Sims*, 377 U.S. 533, 565-66 (1964). It is "for that reason" that the equal protection clause requires on substantial equality of populations among districts. See *Morris*, 489 U.S. at 694 (quoting *Gaffney v. Cummings*, 412 U.S. 735, 748 (1973)).[2] While many constitutional constraints are *expressed* in formal terms – for example, "one-person, one-vote" or a requirement that districts be composed of "contiguous . . . territory" – they should be *interpreted* in light of their functional purpose.

Moreover, individual constitutional constraints do not operate in isolation. Blindly maximizing adherence to a particular criterion can do serious violence to other constitutional goals. For example, suppose that the total population of Northampton and Accomack Counties were 70,000 (rather than the 51,400 it actually is, App. 2809). It would be absurd, and would defeat principles of fair and effective representation, if, to achieve absolute population equality, the General Assembly were to reach down to the southern end of Virginia Beach and pluck 785 people from there to add to a Northampton-Accomack district. The Virginia Beach residents would be so separated by distance and interest from the overwhelming majority of their district that they would be deprived of having any real representation. Even with respect to equality of

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[2] This Court in *Jamerson v. Womack*, 244 Va. 506, 511, 423 S.E.2d 180, 182 (1992), and the Circuit Court in this case, App. 2794, located the federal strand of this requirement in Article I, § 2 of the U.S. Constitution rather than in the equal protection clause of the Fourteenth Amendment. Article I, § 2, however, governs the equality of population requirement only for congressional districts; the equal protection clause governs the equality of population requirement for state and local districts. See *Mahan v. Howell*, 410 U.S. 315, 320-22 (1973) (noting, in the context of reviewing Virginia's 1971 legislative redistricting, that the equal protection clause permits "more flexibility" with respect to equality in population for state legislative districts than Article I permits with respect to congressional districts).

population – the most quantifiable of the various criteria governing districting – there must be some play in the joints if other important interests are to be realized. That is why the U.S. Supreme Court upheld Virginia's 1971 redistricting, which had a maximum deviation of slightly over sixteen percent. It found that deviation justifiable in light of the Commonwealth's reasons, related to tradition and the General Assembly's involvement in local legislation, for not fragmenting political subdivisions. See *Mahan v. Howell*, 410 U.S. 315, 323-29 (1973).

This Court also has consistently treated constitutional criteria as interrelated. For example, in *Brown v. Saunders*, this Court read the equal population requirement in section 55 of the 1902 Constitution flexibly:

> Mathematical exactness, either in compactness of territory or in equality of population, cannot be attained, nor was it contemplated in the provisions of section 55. The discretion to be exercised should be an honest and fair discretion, the result revealing an attempt, in good faith, to be governed by the limitations enumerated in the fundamental law of the land. No small or trivial deviation from equality of population would justify or warrant an application to a court for redress.

159 Va. at 43-44, 166 S.E. at 110. Thus, section 55 permitted those deviations in population necessary to avoid dividing counties or cities among districts. Id. at 37, 166 S.E. at 107-08. Similarly, in *Wilkins v. Davis*, this Court explained the General Assembly's obligations under § 55 in these terms:

> It is the duty of the General Assembly of Virginia to reapportion the congressional districts of Virginia so that each district shall be composed of contiguous and compact territory, containing as nearly as practicable an equal number of inhabitants, and, so far as can be done without impairing the essential requirement of substantial equality in the number of inhabitants among the districts, give effect to the community of interest within the districts.

205 Va. at 813, 139 S.E.2d at 856. The creation of districts reflecting common interests thus permitted some deviation from absolute equality, but the commitment to numerical equality

placed a limit on how far the General Assembly could go in pursuing more qualitative measures of representation. Thus, while the General Assembly has substantial latitude in "reconciling the different demands upon it," *Jamerson v. Womack*, 244 Va. 506, 517, 423 S.E.2d 180, 186 (1992), it cannot arbitrarily or unjustifiably disregard or subordinate one criterion in pursuit of another. Achieving a degree of mathematical population equality beyond that demanded by the Constitution, for example, could not justify diluting minority voting strength in violation of the Voting Rights Act. Conversely, the need to comply with the Voting Rights Act does not give the General Assembly a blank check to ignore Article II's compactness and contiguity requirements: if the General Assembly can comply both with federal and state requirements, it cannot sacrifice the former to the latter.[3]

B. The "Contiguous and Compact" Requirement of Article II, § 6 Imposes a Functional, and Not Merely a Formal, Constraint on the General Assembly

Over time, an increasing number of states have required that electoral districts be contiguous and compact. Compare, e.g., Harvey, supra, at 368 (in 1952, 26 state constitutions, not including Virginia's, required contiguity and 9, not including Virginia's, required compactness) with Grofman, supra at 177-83 (by 1985, roughly two thirds of the states had constitutional requirements of contiguity and roughly half required compactness), and Richard H.

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[3] Put concretely, although nothing in federal law requires that territorial districts be used for state legislatures, Article II, § 6's requirements that the House of Delegates be elected "from electoral *districts* . . . . composed of contiguous and compact *territory*" (emphasis added) suggests that the General Assembly could not decide to comply with the Voting Rights Act by using statewide cumulative or limited voting instead of drawing a plan with geographic districts that provide minority voters with an equal opportunity to participate and elect candidates of their choice.

Pildes & Richard G. Niemi, Expressive Harms, "Bizarre Districts," and Voting Rights: Evaluating Election-District Appearances After Shaw v. Reno, 92 Mich. L. Rev. 483, 529 (1993) (reporting that half of all states currently require compactness). These criteria are included in state constitutions not because, as one court trenchantly observed, the drafters "prefer Mondrian to Pollock," but because contiguity and compactness have long been considered to promote better representation. *Prosser v. Elections Board*, 793 F. Supp. 859, 863 (W.D. Wis. 1992) (three-judge court). They do this in three ways. First, people who live in geographical proximity to one another are more likely to share common needs and interests and thus to elect representatives responsive to their distinctive concerns. Id. Cf. Eisenberg, supra, at 300 (describing the history of apportionment in Virginia and noting that the Constitution of 1830 explicitly acknowledged the importance of "sectional differences in the State" in its decision about how to allocate seats in the legislature). Second, contiguity and compactness serve the relationship between representatives and their constituents: they "reduce travel time and costs, and therefore make it easier for candidates for the legislature to campaign for office and once elected to maintain close and continuing contact with the people they represent. Viewing legislators as agents and the electorate as their principal, we can see that compactness and contiguity reduce the 'agency costs' of representative democracy." *Prosser*, 793 F. Supp. at 863. Similarly, voters who work in the same area, read the same newspapers and watch the same local television news, and are involved with the same schools and civic organizations are far better able to communicate more effectively with one another and participate in the political process. Finally, contiguity and compactness provide at least a modest limit on the degree of political gerrymandering. Harvey, supra, at 368; Daniel D. Polsby & Robert D. Popper, The Third Criterion: Compactness as a

Procedural Safeguard Against Partisan Gerrymandering, 9 Yale L. & Pol'y Rev. (1991); 1 A.E. Dick Howard, Commentaries on the Constitution of Virginia 415 (1974).

This Court has been called on to interpret Article II, § 6's "contiguous and compact" requirement only once, in *Jamerson v. Womack*, 244 Va. 506, 423 S.E.2d 180 (1992). That case concerned a challenge to two senatorial districts in the Commonwealth's 1991 redistricting. The Attorney General and the *amici* supporting him confuse the narrow result in *Jamerson* – that this Court rejected a compactness challenge to Senate Districts 15 and 18 in light of the then-existing federal legal landscape – with its analysis. *Jamerson* did not read the "contiguous and compact" requirement out of the Constitution. Rather, it employed a functional approach to deciding whether challenged districts comply with Article II, § 6.

1. *Jamerson's* Functional Treatment of Compactness Demands That Reviewing Courts Look at Whether the Configuration of a District Adequately Protects the Residents' Opportunity for Effective Representation

While *Jamerson* clearly holds that the contiguity and compactness requirements of Article II, § 6 refer to "spatial restrictions in the composition of electoral districts," rather than the distribution of population within a district, 244 Va. at 514, 423 S.E.2d at 184,[4] this Court just as clearly looked beyond the configuration of the challenged district to ask whether its residents would have a real opportunity for fair and effective representation. The plaintiffs in *Jamerson* had alleged that Senate District 18 failed to reflect any community of interest among its residents.

[4] So, for example, a district composed of two adjacent whole counties would satisfy the requirements of compactness and contiguity, even if the western county's population were concentrated on its western border and the eastern county's population were concentrated on its eastern frontier.

See id. at 515, 423 S.E.2d at 185. To evaluate that claim, this Court reviewed the evidence on which the Circuit Court had relied regarding the opportunity for fair and effective representation. In particular, it pointed to testimony concerning "whether the agricultural and other interests of persons living in the western and eastern parts of District 18 were significantly divergent" and testimony from the elected representative regarding her campaign practices and her plans to be accessible to residents throughout the district. Id. It assumed that the Circuit Court had resolved these issues in favor of the defendants, and thus that the challenged district gave appropriate weight to communities of interest. Id.

The Court's discussion of this evidence would have been unnecessary had the Court thought examination of the maps alone sufficient to determine whether a district is compact as a matter of constitutional law. In fact, beyond reprinting a map of the challenged districts, see id. at 518, 423 S.E.d2d at 187, the Court devoted relatively little of its opinion to discussing the districts' perimeters.

Jamerson thus follows this Court's earlier decisions in *Brown v. Saunders* and *Wilkins v. Davis* in taking a context-sensitive approach to constitutional districting criteria. In *Wilkins*, for example, this Court explained "the duty of the General Assembly" as requiring "so far as can be done without impairing the essential requirement of substantial equality in the number of inhabitants among the districts, giv[ing] effect to the community of interest within the districts." 205 Va. at 813, 139 S.E.2d at 856. This suggests, as the U.S. Supreme Court was later expressly to hold in *Mahan v. Howell*, 410 U.S. 315 (1973), that there might be some deviations from absolute numerical equality among districts that would be permissible if, *but only if*, they gave

effect to communities of interest. In short, at the margins, the degree of numerical equality required depends on the presence of other important state and federal interests.

So too with compactness. This Court's discussion of the evidence produced at trial in *Jamerson* shows that here, too, evidence regarding the presence or absence of a "community of interest within the districts," *Wilkins*, 205 Va. at 813, 139 S.E.2d at 856, is relevant in interpreting the meaning of compactness. While *Wilkins* "said that the policy of recognizing communities of interest was not one spelled out in the Constitution," it "recognized that it was one of several factors to be considered in reapportionment cases." *Jamerson*, 244 Va. at 514, 423 S.E.2d at 184.[5] Had the chancellor in *Jamerson* found as a matter of fact that the challenged districts strung together dramatically disparate communities with significantly divergent interests, that they had been configured in a way that substantially burdened effective campaigning or other participation in the political process, and that their layout significantly impeded their representatives' ability or incentive to communicate with their constituents, he could have been justified in striking them down as failing the compactness requirement of Article II, § 6. Put more generally, the degree of cartographic irregularity permitted by Article II, § 6 may depend on the justifications for drawing irregularly shaped districts and its impact on the ability of voters to achieve fair and effective representation.

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[5] The Court's use of the phrase "reapportionment *cases*" shows that there is a role for reviewing courts in deciding whether the General Assembly properly considered community of interest in drawing districts.

2. Nothing in this Court's Opinion in *Jamerson* Immunizes the 2001 Plan From Review

The Attorney General's argument rests implicitly on the following syllogism: the 2001 plans are based on the 1991 districts; this Court upheld the 1991 districts in *Jamerson*; therefore, the 2001 districts are constitutional. That syllogism is flawed and represents a significant overreading of *Jamerson*.

First, *Jamerson* involved a limited challenge to only two of the 140 districts drawn as part of the 1991 redistricting: Senate Districts 15 and 18. None of the other Senate or House districts in the 1991 plan was at issue in *Jamerson* (or indeed, in any other lawsuit). There is no warrant for assuming that this Court's opinion determined that any other districts in the 1991 plan satisfied Article II, § 6.[6] Indeed, the Attorney General's position that individuals living outside a district lack standing to challenge it, see Opening Brief for Appellants at 29 (citing *Sinkfield v. Kelley*, 531 U.S. 28, 30 (2000) (per curiam)), means that there was not even a party before this Court in *Jamerson* who could have raised a challenge to the constitutionality of the other districts.

Moreover, as the Attorney General must concede, "*Jamerson* did not even implicate the water contiguity issue" involved in this case. Opening Brief of Appellants at 31. The plaintiffs

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[6] The Attorney General's observation that "no other attack was made on the House and Senate plans," Opening Brief of Appellants at 11, is essentially beside the point. Of course, aspects of the 1991 plan – in particular, its creation of a substantial number of majority-black districts – are relevant to the question whether section 5 of the Voting Rights Act permitted the 2001 General Assembly to rely on race in otherwise constitutionally suspect ways. But the fact that the 1991 districts were not challenged under Article II, § 6 cannot immunize the 2001 districts from a constitutional challenge any more than the lack of challenge to inequalities in Virginia's 1910 congressional redistricting, see *Brown v. Saunders*, 159 Va. at 43 n.1, 166 S.E. at 110 n.1 (setting out the populations of the 1910 districts), could have immunized inequalities in the 1932 redistricting from challenge in *Brown v. Saunders*.

in *Jamerson* challenged Senate Districts 15 and 18 only for their alleged lack of compactness. See 244 Va. at 508, 423 S.E.2d at 181. While *Jamerson* does shed some light on what contiguity means – an issue addressed in the next section of this brief – it most certainly does not establish Senate District 18 as a benchmark of constitutionally satisfactory contiguity across the Commonwealth.[7] Thus, contrary to the approach advanced by the Attorney General, see Opening Brief of Appellants at 22-23, Senate District 18 does not provide a definitive last word regarding the constitutionality of districts across the Commonwealth.

3. Article II, § 6 Permits "Contiguity by Water" Only in Limited Circumstances

In 2001, the General Assembly took the categorical position that "[c]ontiguity by water is sufficient" under all circumstances to satisfy the Constitution. See App. 2609 (House P&E Resolution); 2647 (Senate P&E Resolution).

The Circuit Court persuasively explained why that cannot be true:

> The Court cannot realistically fathom Article II, § 6 permitting contiguity by the waters of the James River of an electoral district composed of the Town of Buchannan in Botetourt County in the Appalachian Mountains, and part of the City of Richmond in the Piedmont and Jamestown in Tidewater, or a district consisting of the City of Poquoson and the City of Fredericksburg, linked together by the Chesapeake Bay and Rappahannock River.

App. 2813. For the same reasons that compactness is treated functionally, rather than formalistically, contiguity should be treated functionally as well. While contiguity by water may sometimes be necessary, it is not invariably sufficient.

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[7] These facts significantly undercut the argument presented in the Brief Amicus Curiae of Senator D. Nick Rerras.

When does contiguity by water satisfy the Constitution? Under a functional view of Article II,[8] contiguity by water can be sufficient when it reflects communities that in fact are *linked by* water. For example, neighborhoods on opposite sides of a body of water that are connected by ferry service and whose residents share common interests and characteristics might properly be treated as contiguous. The lack of a bridge within the district need not always be fatal. More generally, contiguity by water can be sufficient as a *compromise* in satisfying other constitutional commands. Sometimes, the constitutional commitment to contiguity must be relaxed – most obviously in order to comply with the federal and state constitutional commitments to one-person, one-vote. Indeed, this was the eminently reasonable position taken by the General Assembly in 1991. As the Circuit Court explained, the 1991 redistricting resolutions provided that "[c]ontiguity by water is acceptable to link territory within a district *in order to meet the other criteria stated herein* and provided that there is reasonable opportunity for travel within the district." App. 2804 (emphasis added). See also App. 2809 (noting that one-person, one-vote means that the Eastern Shore cannot form a district by itself and that it must be included in some district, but that placing the Eastern Shore in a "truly 'contiguous' district [is] an impossibility"). Under such circumstances, contiguity by water may be the nearest approximation that can be achieved to the kind of "contiguous . . . territory" contemplated by Article II, § 6. Otherwise, "contiguity by water" is at bottom a linguistic trick, much like the "point contiguity"condemned in several recent cases as a deviation from traditional districting principles. See, e.g., *Smith v. Beasley*, 946 F. Supp. 1174, 1196 (D.S.C. 1996) (three-judge

[8] Because contiguity and compactness should be assessed as functional constraints on apportionment, rather than esthetic or formalistic criteria, the Circuit Court correctly declined to rest its decision solely on expert testimony or mathematical formulae in assessing the compliance of individual districts.

court); *Johnson v. Miller*, 864 F. Supp. 1364, 1375 (S.D. Ga. 1994) (three-judge court), aff'd, 515 U.S. 900 (1995).

Put somewhat differently, contiguity by water is permissible when it is narrowly tailored either to serve some other constitutional or federal statutory command or where it adheres to the constitutional "common law" of redistricting. But it cannot supplant the traditional form of contiguity in which geographically adjacent populations with shared concerns and interests are joined together in a district. When the pieces of a challenged district are contiguous only by water, a reviewing court should make sure that the voters within the district will have an opportunity for adequate representation.

C. "Compactness" Has a Different Constitutional Significance Today Than It Did When This Court Decided *Jamerson*

This Court decided *Jamerson* in 1992. One year later, in *Shaw v. Reno*, 509 U.S. 630, 652 (1993), the U.S. Supreme Court identified a new, "analytically distinct,"cause of action under the equal protection clause that casts the question of compactness in a dramatically different light. Ironically for all his invocations of *Shaw*, the Attorney General fails completely to understand its message for how to interpret the compactness requirement of Article II, § 6.

This Court's opinion in *Jamerson* took a federally imposed duty to create majority-black districts as the starting point for analyzing the question of compactness. See *Jamerson*, 244 Va. at 511, 423 S.E.2d at 183. *Shaw* establishes, however, that the analysis should proceed in precisely the opposite direction. Courts should begin their inquiry by asking, without regard to race or the commands of the Voting Rights Act, whether a district is compact. Only if the reviewing court determines that the district violates traditional districting principles of

compactness, contiguity, or respect for natural and political subdivision boundaries or communities of interest does it then ask whether the Voting Rights Act justifies creating what would otherwise be considered irregular.

The post-1990 round of redistricting took place against a backdrop in which states faced substantial pressure under the Voting Rights Act to create majority-minority districts and no apparent federal constraint on the shape of those districts. That round of redistricting was characterized, across the nation, by the creation of irregularly shaped districts, including many irregularly shaped majority-minority districts. Many state legislatures – including, perhaps, Virginia's, see *Moon v. Meadows*, 952 F. Supp. 1141 (E.D. Va.) (three-judge court) (striking down Virginia's Third Congressional District), aff'd, 521 U.S. 1113 (1997) – acted under the assumption that they could draw oddly shaped, "bizarr[e]," or "noncompac[t]" majority-minority districts in order "to achieve the State's compelling interest in compliance with § 2 while simultaneously achieving other legitimate redistricting goals, such as incumbency protection" or partisan advantage. *Bush v. Vera*, 517 U.S. 952, 979 (1996) (opinion of O'Connor J.) (internal quotation marks and citations omitted).

Shaw v. Reno, 509 U.S. 630 (1993), and its progeny, however, squarely rejected this assumption. While states may take race into account in the redistricting process, see *Hunt v. Cromartie*, 532 U.S. 234 (2001), a state's use of race is subject to strict scrutiny when racial considerations "subordinat[e] traditional race-neutral districting principles, including but not limited to compactness, contiguity, respect for political subdivisions or communities defined by actual shared interests." *Miller v. Johnson*, 515 U.S. 900, 916 (1995). And the narrow tailoring requirement means that even when the Voting Rights Act does require a state to take race into

account and to create a majority-minority district, the state cannot unnecessarily disregard traditional redistricting principles. See *Bush v. Vera*, 517 U.S. at 979 (opinion of O'Connor, J.) ("if a reasonably compact district can be created, nothing in § 2 requires" – or, indeed, justifies – "the race-based creation of a district that is far from compact").

Jamerson recognized that Senate District 18 was drawn for the explicit purpose of creating a majority-black district in Southside Virginia. (Indeed, the Governor had vetoed a previous apportionment precisely because it did not create a sufficient number of majority-black districts.) See 244 Va. at 513, 423 S.E.2d at 184. And it found that "[t]he territories of Districts 15 and 18 are *not ideal* in terms of compactness." Id. at 517, 423 S.E.2d at 186 (emphasis added); see also id. at 515, 423 S.E.2d at 185 (noting that the plaintiffs' and defendants' experts agreed that the "mandatory constitutional requiremen[t]" of "minority representation" meant that districts like Senate District 18 "would compare unfavorably in compactness with urban districts, and with other rural districts that did not have large minority group populations"). But this Court saw itself bound to cede authority to the General Assembly to determine "the relative degree of compactness required when reconciling the multiple concerns of apportionment." Id. at 517, 423 S.E.2d at 186. In short, because the Court quite correctly understood compliance with the federal Voting Rights Act as one of the "overarching conditions" governing redistricting, id. at 511, 423 S.E.2d at 182, it thought its inquiry was at an end. It never asked whether, under the equal protection clause of the Fourteenth Amendment and Article I, § 11 of the Constitution of 1971, race had played too great a role in the construction of Senate District 18 or whether a more narrowly tailored district could have met the demands both of the Voting Rights Act and of Article II, § 6.

But *Shaw* makes clear that "in reconciling the different demands upon it," *Jamerson*, 244 Va. at 517, 423 S.E.2d at 186, a state legislature cannot abandon compactness in the creation of majority-minority districts. "The judiciary retains an independent obligation . . . to ensure that the State's actions [in abandoning its traditional level of compactness] are narrowly tailored to achieve a compelling interest." *Shaw v. Hunt*, 517 U.S. 899, 915 (1996) (quoting *Miller v. Johnson*, 500 U.S. at 922)). For all his invocations of the *Shaw* cases and *Jamerson*, the Attorney General misses this fundamental point about how they interact.

Today, the explicit race consciousness of the decision to draw Senate District 18 would trigger strict scrutiny unless the district were found to be compact *without regard to the dictates of the Voting Rights Act*. At the very least, the decision to create Senate District 18 would raise several important questions that *Jamerson* did not address.

First, is there sufficient evidence, either direct or circumstantial, that "race was the 'predominant factor' motivating the legislature's districting decision," *Hunt v. Cromartie*, 526 U.S. at 547? Did the creation of Senate District 18 subordinate traditional districting principles to the decision to create a majority-black district?

Second, assuming that race played a predominant role, did the Commonwealth nonetheless have a compelling interest in considering race in order to comply with the Voting Rights Act? The answer to this question turns on three factors identified in *Thornburg v. Gingles*, 478 U.S. 30, 48-51 (1986): whether the minority *population* is sufficiently large and "geographically compact" (that is, concentrated) to form a majority in a fairly drawn district, whether the minority community is politically cohesive, and whether white voters usually vote sufficiently as a bloc so as to defeat the minority's candidates of choice. If these conditions are

not satisfied, then section 2 does not demand the creation of *any* majority-minority district, let alone one that fails to comply with state constitutional requirements of compactness.

Third, even assuming that section 2 required the creation of *some* majority-minority district, was Senate District 18 narrowly tailored? Was it drawn in an area where a plausible section 2 claim existed? For example, in *Shaw v. Hunt*, 517 U.S. 899, 917 (1996), the U.S. Supreme Court held that North Carolina's decision to place the challenged majority-black congressional district in the Piedmont could not be justified by the existence of a colorable section 2 claim in the southeastern part of the state. Did it place more minority group members in the district than was necessary to provide an equal opportunity to elect or to avoid retrogression under section 5 of the Voting Rights Act, 42 U.S.C. § 1973c? For example, in *Bush v. Vera*, 517 U.S. 952, 982-83 (1996), the U.S. Supreme Court held that a plan that not only maintained, but actually increased, the minority concentration within a district was not narrowly tailored. Did it unnecessarily sacrifice other state interests, such as a state constitutional requirement of compactness?

It is quite understandable that this Court did not explicitly address these questions in *Jamerson*; no then-existing precedent suggested the need to do so. But *Shaw* means that this Court should no longer reason backwards from the fact that, in limited circumstances, federal law may require the creation of majority-minority districts to decide that federal law immunizes any majority-minority districts the General Assembly draws from state constitutional review.

An example regarding one-person, one-vote may illustrate this point. It is certainly the case that one-person, one-vote will require drawing less compact districts in thinly populated rural areas – like, for example, Southside or Southwest Virginia – than are drawn in more

densely populated parts of the Commonwealth. But the fact that the General Assembly must stretch from Lee County into parts of Grayson County to pick up sufficient population to comply with the equal protection clause (as Senate District 40 now does) would not disable this Court from concluding that a district stretching from Arlington to Richmond violated Article II, § 6. Such a district would be unnecessary to achieve compliance with one-person, one-vote and would defy other traditional districting principles.[9]

Similarly, the Voting Rights Act quite clearly requires drawing majority-black districts in some areas of the Commonwealth.[10] But it does not provide the General Assembly with a

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[9] Nor can the General Assembly redefine the mandate of substantial population equality and use its newly announced definition as an excuse for drawing noncontiguous or noncompact districts.

Just as the General Assembly redefined contiguity, so too, it redefined population equality. As a matter of federal equal protection law, unless the maximum deviation reaches at least ten percent, there cannot be even a prima facie case of malapportionment. See *Voinovich v. Quilter*, 506 U.S. 146, 160 (1993); *Brown v. Thompson*, 462 U.S. 835, 842-43 (1983). See also *Brown v. Saunders*, 159 Va. at 43-44, 166 S.E. at 110 (taking a similarly flexible view with respect to § 55 of the 1902 Constitution). This time around, the General Assembly adopted a far more stringent equality criterion of a total deviation "within plus-or-minus two percent." App. 2609 (House P&E Resolution); 2647 (Senate P&E Resolution). (This is more stringent even than a total deviation of four percent, since that might be obtained by having, for example, districts that are three percent under the ideal population figure balanced off against other districts that are one percent over the ideal.)

Compliance with the "plus-or-minus two percent" *policy* adopted by the General Assembly *cannot* justify disregarding the other requirements of Article II, § 6. Nor could it justify picking a configuration for a majority-minority district that would otherwise run afoul of the principle of *Shaw v. Reno*, 509 U.S. 630 (1993). That is, if the General Assembly could have drawn compact and contiguous majority-minority districts that provided black voters with an equal opportunity to elect their preferred candidates, it cannot justify drawing irregular districts that violate traditional districting principles by pointing to its newly announced desire to achieve population equality beyond what the Constitution requires.

[10] Indeed, the black community in Southside presents such a case. Cf. App. 2805 (holding that majority-black Senate District 18 under the 2001 plan "reasonably adhere[s] to the contiguous and compact requirements").

blanket license to ignore compactness and contiguity, either in drawing districts generally or in drawing majority-black districts. If the General Assembly were to construct a majority-black district that began with precincts in Richmond, ran down the middle of the James River into Hampton Roads, and added precincts from Newport News, that district would be unconstitutional under Article II, § 6. And that noncontiguous district could not be salvaged by invoking the Voting Rights Act, since it is entirely possible to create compact and contiguous majority-black districts instead. In short, federal law does not disable this Court from treating contiguity and compactness as important, functional limitations on the General Assembly's choice among plans. Thus, contrary to the Attorney General's repeated invocations of *Jamerson*, this Court's decision there to uphold a landlocked, contiguous, heavily black district in sparsely populated Southside Virginia against a limited constitutional challenge brought prior to *Shaw v. Reno* does not answer the question presented by this case.

II. The Circuit Court Correctly Held That the 2001 Senate and House Plans Violated Article II, § 6

The plaintiffs in this case alleged that nine state senatorial districts and sixteen state House districts failed to comply with the "contiguous and compact" requirement of Article II, § 6. After a full trial and upon an extensive record, the Circuit Court struck down three Senate districts and three House districts on Article II grounds.

The Attorney General devotes very little space in his brief to this issue. See Opening Brief of Appellants at 13-14, 17, 22-23, 30-32. His reticence is understandable: the Circuit Court applied the correct legal standard to the issue before it and made factual findings sufficient to justify its ultimate conclusions. As *Jamerson* explains, this Court is "bound by a chancellor's

resolution of disputed facts, if supported by credible evidence." And 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 chancellor." 244 Va. at 510, 423 S.E.2d at 182.

A. The Circuit Court Took an Appropriately Functional View of Article II, § 6

The Attorney General's contention that the Circuit Court's ruling was inconsistent with *Jamerson*, see Opening Brief of Appellants at 30, rests on an odd formalism. He writes as if the U.S. Supreme Court had been speaking *literally* when it described the process of judicial review as "lay[ing] the article of the Constitution which is involved beside the statute which is challenged . . . to decide whether the latter squares with the former." *United States v. Butler*, 297 U.S. 1, 62 (1936). But the question whether districts in the 2001 plan comply with Article II cannot be answered simply by superimposing the bare outlines of their perimeters on the outline of Senate District 18.[11]

Unlike the Attorney General, the Circuit Court rested its analysis on a properly functional approach to contiguity and compactness:

> The framers of the Virginia Constitution recognized the wisdom of relatively small, compact areas of territory in contiguity composing electoral districts because such units would share a certain history, culture, economic interests, political beliefs, geographical features, social factors and the many other elements that make up communities of interest. Undoubtedly, they understood that the most efficient, representative, and functional electoral district should be drawn as such. Article II, § 6 was designed to place certain spatial restrictions on the composition

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[11] Even under the Attorney General's cramped interpretation, the districts challenged in this case would fare poorly, since, unlike Senate Districts 15 and 18, several of them are noncontiguous as well as being noncompact, and, again unlike Senate Districts 15 and 18, several of them were drawn in densely populated areas where one-person, one-vote provided no justification for deviating from principles of contiguity and compactness.

> 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.

App. 2813. The Circuit Court's approach was entirely consistent with this Court's approach in *Wilkins v. Davis* and *Jamerson*.

B. The Circuit Court Properly Held That the General Assembly Violated Article II, § 6 By Using "Contiguity By Water" Excessively or Unnecessarily

The constitutionality under Article II, § 6 of Senate Districts 1,2, and 6 and House Districts 74 and 100 turns on whether the aggressive brand of "contiguity by water" employed by the General Assembly passes constitutional muster.[12] There is no question that each of these districts is composed of tracts of land that do not touch one another. With respect to Senate District 1, while it would have been possible to draw a contiguous district containing Pakistan, parts of Newport News, and parts of Hampton – since these cities are adjacent to one another – the General Assembly chose instead to insert Senate District 2 between the Pakistan-Newport News and Hampton pieces of the district. Because "[one must travel through Senate District 2 to get from Hampton to Pakistan or Newport News," App. 2805, Senate District 1 does not comply with the traditional definition of "contiguous." As for Senate District 2, Hampton Roads separates the two parts of the district. App. 2806. Senate District 6 connects the two counties of the Eastern Shore – Northampton and Accomack – with Mathews County and pieces of the cities of Norfolk and Virginia Beach. Senate District 6 "crosses a large body of water in three different

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[12] This section addresses solely the question whether these districts comply with Article II, § 6. The question whether, even if a district fails the "contiguous and compact" requirement, it can nonetheless be justified as narrowly tailored under the Voting Rights Act is addressed in Part III.

directions to piece together a district made up of three disparate land areas, twenty to thirty miles apart from one another across barren stretches of water." App. 2807.

The three House Districts struck down as violative of Article II, § 6 also depended on an aggressive resort to contiguity by water. The relevant boundaries of House District 91, essentially followed those of Senate District 1, and thus required residents of one part of the district to travel through another district to reach the other part. See App. 2812-13. House District 100, like Senate District 6, took the Eastern Shore and attached it to part of Norfolk and a piece of a single precinct in Hampton. As the Circuit Court noted, "Hampton's Buckroe Precinct is separated by approximately 17 miles of water across Chesapeake Bay from the Northampton-Accomack part of the district, and from the Norfolk portion of the district by approximately three miles across Hampton Roads. Norfolk is similarly separated from Northampton-Accomack, and neither the Norfolk nor Hampton portions of the district are contiguous to any other landmass in the district. . . . [T]he district in question is merely connected by 'barren stretches of water.'" App. 2809 (quoting *Moon v. Meadows*, 952 F. Supp. 1141, 1147 (E.D. Va.) (three-judge court), summarily aff'd, 521 U.S. 1113 (1997), which actually referred to "barren stretches of river"). Finally, House District 74 lies entirely on the northern side of the James River, except for reaching across the river to grab two precincts from Hopewell. No intradistrict bridges or tunnels connect the Hopewell fragment to the rest of the district. App. 2812.

The Attorney General does not even attempt to argue that "contiguity by water" was necessary to the achievement of any identifiable, legitimate government interest.[13] Indeed, the

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[13] He fails to offer any argument, beyond complete deference to the General Assembly in defining the meaning of Article II, § 6, as to why "contiguity by water" should be acceptable. See Opening Brief of Appellants at 31.

Circuit Court found, as a matter of fact, that there was no "extraordinary necessity or other justification" for the General Assembly's resort to contiguity by water with respect to Senate Districts 1 and 2, App. 2806.[14] With respect to Senate District 6 and House District 100 (which each involve the Eastern Shore), the Circuit Court found that, although compliance with one-person, one-vote meant that the Eastern Shore had to be joined with some mainland jurisdiction, and thus that some degree of "contiguity by water" was necessary, the "the General Assembly abused its discretion by patching bits and pieces of localities across large bodies of water in order to create a district with Accomack and Northampton, rather than simply crossing the water once to secure enough population to create a district." App. 2810. And later in its opinion, the Circuit Court found that there was no legitimate justification for House District 74 to reach across the James River to grab the two Hopewell precincts. App. 2829.

Not only did the Circuit Court find that the Commonwealth had provided no justification for its resort to "contiguity by water," but it also found that the configurations of the challenged districts posed substantial obstacles to fair and effective representation for the districts' various residents. For example, with respect to House District 100 (and implicitly Senate District 6 as well), the Circuit Court found that the General Assembly had unjustifiably ignored the representational interests of the mainland residents by creating a district that required them to "travel through at least one other district and pay a toll to drive to Northampton-Accomack, and vice-versa, or . . . traverse the Chesapeake Bay, approximately 17 miles wide at their nearest points, by watercraft or aircraft," App. 2810, when it could have joined the Eastern Shore to the mainland more sensibly. Similarly, with respect to House District 74, the Circuit Court found

[14] This finding also logically applies to House District 91, since it follows essentially the same boundary line.

that the district – the most irregularly shaped district within the Commonwealth, App. 2811 – connected a "densely populated core" in Northern Henrico to a distant rural county by means of a "narrow strip of rural, sparsely populated land," App. 2828. As a result, "three distinct groups of African Americans have been 'packed' together over a large, dispersed area with prominent natural geographic barriers and no historical communities of interest for the sole purpose of creating a majority-minority district." Id. Here, too, the Attorney General's brief is entirely silent as to any legitimate interest served by such flagrant disregard of traditional district principles.

C. The Circuit Court Correctly Held That the General Assembly Created Districts That Were Not "Compact" Within the Meaning of Article II, § 6

As this brief explained earlier, compactness, like contiguity, is a functional, not a formalistic, concept. Thus, although compactness refers to the "territory," rather than the "contents" of a district, *Jamerson*, 244 Va. at 514, 423 S.E.2d at 184, in assessing whether an electoral district is compact, a court necessarily must keep in mind the end that compactness is meant to serve.

As one court explained, a district is not "compact if it [is] so spread out that there [is] no sense of community, that is, if its members and its representative could not effectively and efficiently stay in touch with each other; or if it [is] so convoluted that there [is] no sense of community, that is, if its members and its representative could not easily tell who actually lived within the district." *Dillard v. Baldwin County Board of Education*, 686 F. Supp. 1459,1466 (M.D. Ala. 1988). The Circuit Court, in analyzing the General Assembly's aggressive resort to

"contiguity by water" made findings, which the Attorney General never squarely addresses, that the territorial configurations of the districts impeded effective political participation by their citizens. In light of *Jamerson*'s functional approach to compactness, these findings explain why the districts fail the compactness prong of Article II, § 6 as well.

III. The Circuit Court Correctly Held That the 2001 Senate and House Plans Violated Article I, § 11

In this case, the Circuit Court held that the 2001 Senate and House plans violated Article I, § 11 of the Virginia Constitution because they involved an excessive reliance on race. Article I, § 11's "anti-discrimination clause," *Willis v. Mullett*, 263 Va. 653, 657, 561 S.E.2d 705, 708 (2002), provides that "the right to be free from any governmental discrimination upon the basis of . . . race . . . shall not be abridged."

A. With Respect to Claims of Racial Gerrymandering, Article I, § 11 Should Be Interpreted as Coextensive with the Equal Protection Clause of the Fourteenth Amendment

The Circuit Court assumed that the contents of Article I, § 11 and the equal protection clause of the Fourteenth Amendment "are one and the same." App. 2819 (citing *Archer v. Mayes*, 213 Va. 633, 194 S.E.2d 707 (1973)). Although this Court has never squarely held that the anti-discrimination clause of Article I, § 11 and the equal protection clause are identical in all circumstances, the Circuit Court's equation of the two clauses with respect to the question of racial gerrymandering makes sense. The anti-discrimination clause expressly bars governmental discrimination on the basis of race. And while the Supremacy Clause of the U.S. Constitution certainly means that the anti-discrimination clause cannot forbid uses of race that federal law

requires – for example, the Commonwealth's duty to avoid retrogression, even though that inevitably involves taking race into account – there is no reason why the anti-discrimination clause either permits reliance on race in the redistricting process that federal law would forbid or forbids reliance on race that federal law would allow, but not compel. Thus, the remainder of this part of the brief assumes that the analysis laid out by the U.S. Supreme Court in *Shaw v. Reno*, 509 U.S. 630 (1993), and its progeny applies with equal force to claims under Article I, § 11.[15]

B. The Circuit Court Properly Focused its Inquiry on the First and Third Prongs of the *Shaw* Test

As Section I.C. of this brief explained, a *Shaw* inquiry proceeds essentially in three steps: (1) did race predominate in the redistricting process?; (2) if race was a predominant factor, did either section 2 or section 5 of the Voting Rights Act require the state to take race into account in its redistricting process; (3) if the Voting Rights Act required race consciousness, are the challenged districts narrowly tailored?

In this case, only the first and the third prongs of the Shaw inquiry are really at issue. The question is not whether the Voting Rights Act required Virginia to take race into account in its redistricting process and to draw a substantial number of majority-black legislative districts. Clearly, it did. The Commonwealth contains large, geographically compact and politically cohesive black communities. And while there has been substantial progress in building biracial

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[15] Even if the two clauses are not identical, this Court should nonetheless affirm the Circuit Court's judgment, since a correct reading of the equal protection clause shows that nothing in federal law authorized the General Assembly to engage in the wholesale repudiation of Article II described in Part II of this brief.

political coalitions, the persistence of racial bloc voting in some parts of the Commonwealth gave the General Assembly a "strong basis in evidence," *Shaw v. Hunt*, 517 U.S. at 908, for concluding that section 2 of the Voting Rights Act required the creation of some majority-minority districts. Moreover, the nonretrogression principle of section 5 also clearly required the Commonwealth to avoid causing retrogression to minority voting strength, particularly with respect to the majority-black districts created during the 1991 round of redistricting.

Rather, the real questions are whether, in drawing majority-black districts, the General Assembly subordinated traditional districting principles to racial concerns and whether the districts it drew rely on race more than was necessary in order to comply with the Voting Rights Act. The Circuit Court correctly answered both questions "Yes."

C. The Record Before the Circuit Court Supports Its Finding That Race Played a Predominant Role in the 2001 Redistricting Process

Based on its assessment of the testimony and examination of the record, the Circuit Court held that in drawing legislative districts "the General Assembly has subordinated traditional race-neutral principles, such as governmental jurisdictional lines, geographical features, and other social, economic, educational, and cultural factors that make up communities of interest to race in creating the Senate districts without a sufficiently compelling state interest or justification." App. 2825. See also App. 2836 (concluding, at the end of its discussion of the challenged House Districts that "evidence" of "a general disregard for keeping regions and localities intact, the abandonment of the constitutional requirement of contiguous and compact territory, the excessive number of split cities and counties, and the inordinate use of split precincts combine[s] to illustrate forcefully the subordination of the traditional redistricting principles to race").

The maps themselves provide powerful evidence that the General Assembly flouted traditional districting principles. Part II of this brief describes the districts that are noncontiguous and that stretch across wide swaths of barren water or unpopulated land to join together otherwise unconnected populations. There certainly was adequate evidence in the record to support the Circuit Court's conclusion that racial considerations explained the General Assembly's disregard of traditional principles of contiguity, compactness, respect for jurisdictional boundaries, and concern for communities of interest.[16]

For example, with respect to Senate District 2, the Circuit Court found that the district reached

> across a large body of water from Newport News-Hampton into two different governmental jurisdictions to remove one heavily black populated precinct each from Suffolk and Portsmouth, grabbing isolated minority communities, which are not part of a compact majority-minority with the Newport News-Hampton core of Senate District 2, and do[ing] so in order to make up for minority populations closer to the above mentioned core that it shed. This is the very act that the U.S. Supreme Court condemned in *Bush v. Vera* . . . .

App. 2818-19. Similarly, with respect to House District 74, the Circuit Court found that:

> Isolated groups of minority communities from two different political subdivisions which could not possibly be a part of the core of a compact majority-minority community [were] "grabbed" to replace a minority population that was packed into minority districts closer to the core, thus diminishing their overall influence

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[16] While the Circuit Court was not as explicit as one might wish in laying out district by district the evidence on which it relied, the plaintiffs presented extensive evidence with regard to each of the challenged districts in the form of expert testimony and reports, especially from Professor Allan Lichtman. Professor Lichtman testified both that the boundaries of the challenged districts tracked racial concentrations and that the Commonwealth's proffered nonracial reasons for drawing the challenged lines were less consistent with the evidence than a more racial explanation. See, e.g. App. 961 (summarizing his conclusions). Just as this Court assumed in *Jamerson* that the chancellor's decision rested on his conclusions regarding "which expert was the more credible, . . . because the chancellor saw and heard these witnesses," 244 Va. at 515, 423 S.E.2d at 185, so too, the Court should assume here that the Circuit Court found plaintiffs' expert testimony more persuasive than the Commonwealth's.

> and forcing the legislature to "'reach" to Charles City County and Hopewell to create a majority-minority district.

App. 2829. And with respect to House Districts 91, 92, and 95, the Circuit Court found not only that race was the predominant motive explaining the location of the district lines, but that the General Assembly split precincts along racial lines in drawing the districts. App.2831. See also App. 2833 (finding that "the community of Hampton has been needlessly divided and that its citizens have been parceled out into three electoral districts on the basis of the color of their skin. Rather than being represented by two delegates elected from a united community, Hampton has been separated against all traditional race-neutral principles, and race was the predominant factor for the separation and drawing of the boundaries for Districts 91, 92, and 95.")

The fact trumpeted by the Attorney General – that "Virginia's legislative districts are created almost exclusively using whole precincts," Opening Brief of Appellants at 36 – only highlights the constitutionally suspect behavior of the General Assembly in splitting precincts. As the Circuit Court explained:

> [I]nclusion of 77% of all the split precincts [in the entire Commonwealth] within the contested districts is not by coincidence or happenstance. Rather, this demonstrates a concerted effort or pattern to concentrate minority voters into heavily populated majority-minority districts on the basis of race in violation of Article I, § 1 and Article I, § 11 of the Virginia Constitution.

App. 2835-36. In short, given that this Court 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 chancellor," *Jamerson*, 244 Va. at 510, 423 S.E.2d at 182, there was ample evidence from which the Circuit Court could conclude that strict scrutiny was triggered.

Notably, the Attorney General provides virtually no argument regarding race-neutral explanations for the configurations of the challenged districts. Instead, he contents himself with

a long disquisition on the nature of the burden of proof in *Shaw* cases. See Opening Brief of Appellants at 32-34, 37. While *Hunt v. Cromartie*, 532 U.S. 234 (2001), reemphasizes the heavy burden plaintiffs face in showing that race played a predominant role, it does not create an irrebuttable presumption of legislative good faith.

The Attorney General's primary reference to evidence in the record supporting his assertion that race did not play a predominant role in the construction or configuration of the challenged districts concerns what he describes as the "clear, uncontroverted evidence of the General Assembly's *stated* motivations." Opening Brief of Appellants at 37 (emphasis added); see also id. at 15. The pages of the record he cites refer to the resolutions promulgated by the Privileges and Elections Committees of the two houses *before the redistricting took place*. Those resolutions are not even evidence of legislative good faith in adhering to traditional principles – as shown by their promulgation of an aggressive version of "contiguity by water." The other record citations in the Attorney General's brief describing what he claims were the General Assembly's actual motives are even less persuasive, since they consist entirely of conclusory and self-serving assertions made by the lawyers in the preclearance submission. See Opening Brief of Appellants at 15-16. In short, the Attorney General provides no citation to any evidence regarding the actual motivations of the legislators with regard to the plans actually enacted that can overcome "chancellor's resolution of disputed facts," when, as here, it is "supported by credible evidence," *Jamerson*, 244 Va. at 510, 423 S.E.2d at 182.

D. The Record Before the Circuit Court Supports Its Finding That the Challenged Districts Were Not Narrowly Tailored to Comply With the Voting Rights Act

The record before the Circuit Court reveals two ways in which challenged districts were not narrowly tailored. First, in several areas of the Commonwealth, it would have been possible to draw majority-black districts without violating traditional principles of compactness. Second, given existing political realities and voting patterns, the General Assembly assigned more black voters to majority-black districts than was necessary to provide black voters with a full and fair opportunity to elect the candidates of their choice.

1. The Circuit Court Was Justified in Concluding That It Would Have Been Possible to Draw Majority-Black Districts That Complied Far Better With Traditional Districting Principles of Compactness, Contiguity, and Respect for Communities of Interest

In order to satisfy the narrow tailoring requirement of *Shaw*, a "district drawn in order to satisfy § 2 must not subordinate traditional districting principles to race substantially more than is 'reasonably necessary' to avoid § 2 liability." *Bush v. Vera*, 517 U.S. at 979 (opinion of O'Connor, J.). In particular, a majority-minority district that "reaches out to grab small and apparently isolated minority communities . . . and does so in order to make up for minority populations closer to its core that it shed in a further suspect use of race" fails the narrowly tailoring requirement. Id.

As the Circuit Court recognized, the actions of the General Assembly in this case were on all fours with the actions of the Texas Legislature condemned in *Bush v. Vera.* For example, Senate District 2 reached "across a large body of water from Newport News-Hampton into two

different governmental jurisdictions to remove one heavily black populated precinct each from Suffolk and Portsmouth, grabbing isolated minority communities, which are not a part of a compact majority-minority with the Newport News-Hampton core of Senate District 2, and does so in order to make up for minority populations closer to the above mentioned core that it shed." App. 2819. The General Assembly could have created a compact and contiguous majority-black district instead. App. 2819-20. With respect to the analogous House seats, the Circuit Court found that the General Assembly could have drawn a compact, majority-black district centered on Newport News. App. 2831. Instead, it chose to divide Hampton into three fragments and to use one of those pieces to create a majority-black district including Newport News. Id.

House District 74 fails narrow tailoring for a similar reason. With respect to the Richmond-Henrico-Chesterfield area, the Circuit Court found the existence of a "large, compact, and politically cohesive" black community. App. 2829. The General Assembly could have created "four compact, politically cohesive majority-minority districts . . . in the Richmond, Henrico, and Chesterfield area without stretching across vast geographical distances and prominent natural barriers and ignoring race-neutral criteria." Id. Rather than following this narrowly tailored solution to the need to comply with the Voting Rights Act, however, the General Assembly "reache[d] out to 'grab' small, isolated minority communities in Charles City County and the two precincts in the City of Hopewell in order to 'preserve' a majority-minority district with a population that shares no common traditional, economic, or community of interests with Henrico and serves as a suspect use of race as a proxy to further the neighboring incumbents interests." App. 2829-30.

In sum, the General Assembly could have complied with the Voting Rights Act by creating districts that were "contiguous and compact" within the meaning of Article II, § 6 and that genuinely respected the Commonwealth's longstanding quasi-constitutional commitment to "giv[ing] effect to the community of interest within the districts," *Wilkins*, 205 Va. at 813, 139 S.E.2d at 856. Instead, it drew districts that unnecessarily flouted the Commonwealth's traditional districting principles. Accordingly, the Circuit Court correctly held that the districts were not narrowly tailored.

2. The Circuit Court Was Justified in Concluding That The General Assembly Drew Districts With Unnecessarily High Concentrations of Black Voters

Section 2 of the Voting Rights Act of 1965 guarantees minority voters an equal opportunity "to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b) (1994). Section 5 of the Voting Rights Act, 42 U.S.C. § 1973c (1994), forbids covered jurisdictions – such as Virginia – from, among other things, adopting redistricting plans that cause a "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).

Sections 2 and 5 are preeminently *functional* statutes – they are concerned with the actual opportunity of minority citizens to participate fully and equally in the political system. Congress has made crystal clear that "the question whether the political processes are 'equally

open' depends upon a searching practical evaluation of the 'past and present reality'" within a particular jurisdiction. Senate Report No. 97-417, p. 30 (1982);[17] see also *Johnson v. DeGrandy*, 512 U.S. 997, 1018-19 (1994) (discussing the functional approach of section 2); *Thornburg v. Gingles*, 478 U.S. at 62-63 (same). Thus, unlike the rule of one-person, one-vote, which can be reduced to "sixth-grade arithmetic," *Avery v. Midland County*, 390 U.S. 474, 510 (1968) (Stewart, J., dissenting), the commands of the Voting Rights Act cannot be expressed in terms of bright-line mathematical formulae.

In deciding whether a particular electoral district provides minority voters with an equal opportunity to elect the candidate of their choice, there is no one-size-fits-all number to express what the racial composition of the district must be. See *Johnson v. DeGrandy*, 512 U.S. at 1017-18 n.14 (noting, in the context of a dispute between the parties over whether "the relevant figure is the minority group's share of the population, or of some subset of the population, such as those who are eligible to vote, in that they are United States citizens, over 18 years of age, and not registered at another address (as students and members of the military often are)" that the Court will refuse to "elevate this proportion to the status of a magic parameter"). In some jurisdictions, political mobilization among the minority community and sufficient crossover voting from white voters enables minority voters to elect their preferred candidates from districts where they constitute less than a majority of the electorate. See, e.g., *Page v. Bartels*, 144 F. Supp.2d 346, 362 (D.N.J. 2001) (three-judge court) (rejecting a § 2 challenge because it found that a reduction of the African-American population in a state legislative district from 53% to 27% would not impair the opportunity for African Americans to be elected, given partisan voting patterns and

[17] The U.S. Supreme Court has described this report as an "authoritative source for legislative intent" regarding § 2 . *Thornburg v. Gingles*, 478 U.S. at 44 n.7

the essential absence of racial bloc voting). In other jurisdictions, by contrast, the Voting Rights Act requires creating districts with substantial black majorities. See, e.g., *Martin v. Allain*, 658 F. Supp. 1183, 1188, 1204 (S.D. Miss. 1987) (holding that three state judicial districts that were over 60 percent black in total population and at least 54 percent black in voting age population violated § 2 because they did not provide black voters with an equal opportunity to elect candidates of their choice); *Georgia v. Ashcroft*, 195 F. Supp.2d 25, 61, 93-94 (2002) (three-judge court) (concluding, in light of registration and turnout levels, and the degree of racial bloc voting, that reducing the percentage of the black voting age population in a state senate district from 61 or 62 percent to between 50 and 51 percent would be retrogressive in violation of § 5). Neither the prohibition of dilution in section 2 nor the prohibition of retrogression in section 5 turns primarily on the percentage of minority group members within the relevant districts. Rather, each turns on the opportunity of those voters to elect the candidates they prefer. In short, retrogression looks to whether there has been a reduction in minority voters' electoral opportunities, not at whether there has been a reduction in minority voters' relative share of a district's electorate. Of course, those two factors may be related: a decrease in the share of minority voters within a district can diminish their effective voting strength. But the two are not invariably related. If minority-preferred candidates are already winning at landslide levels, reassigning some minority voters to adjacent districts can actually *enhance* the minority community's overall political effectiveness by allowing it greater influence in the selection of representatives in the adjacent districts.

In the context of this case, what these principles mean is that avoiding retrogression did not necessarily require preserving particular percentage figures within previously created

majority-black districts, especially when population shifts required substantial redrawing of district boundaries, cf. Opening Brief of Appellants at 12 (all of the majority-minority districts drawn in 1991 were below the ideal district population for 2001), and those districts were already electing the black community's preferred candidates with overwhelming support. What it did require was assuring that the black community continued to enjoy its pre-existing level of electoral opportunity. If the General Assembly scooped up additional black citizens and reassigned them to majority-black districts needlessly, that reassignment would not be narrowly tailored.

And that, the Circuit Court concluded, is precisely what happened. Based on testimony regarding district-by-district voting patterns, the Circuit Court found that "every minority candidate in every majority-minority Senate district over the last decade has won election from those Districts." App. 2823. Nonetheless, the General Assembly continued to draw districts with minority voting-age populations of over 60 percent. App. 2823 n.8. That degree of concentration was clearly excessive, particularly in light of the disregard of traditional districting principles of contiguity, compactness, respect for precinct boundaries, and concern for communities of interest that it entailed. For example, given that black candidates in the 1991 configuration of Senate District 2 were already receiving between 64 and 80 percent of the vote when the district had a black voting-age population of 54 percent, App. 2823, the Voting Rights Act provided no basis for increasing the black voting-age population to nearly 56 percent of the district and the overall minority voting-age population to over 60 percent.

Similarly, with respect to many of the majority-minority House seats, the Circuit Court found that the black community's preferred candidates had achieved consistent electoral success

throughout the 1990's. See App. 2832-35. Here, too, the Voting Rights Act did not compel disregard of traditional districting principles in order to artificially maintain an unnecessarily high concentration of minority voters within many of the districts.[18] The Voting Rights Act was intended to give minority voters an equal opportunity to elect the candidates of their choice, not to provide a smokescreen for "the retreat of the General Assembly from the application of traditional race-neutral redistricting principles." App. 2838. The General Assembly had no justification for creating heavily black districts by running a "land bridge," App. 2828, through essentially unpopulated territory, by fragmenting political subdivisions, or by drawing noncontiguous districts. More regularly shaped, less heavily concentrated districts would have provided black voters with the same opportunity to elect their preferred candidates that they had enjoyed under the 1991 plans.

[18] The Circuit Court refused to strike down majority-black House Districts 63 and 75, which contained black voting-age population percentages of 57.8 percent, and 56.2 percent, because their electoral history did not reveal minority-sponsored candidates winning by landslide proportions over the last decade. App. 2826. This shows that the Circuit Court properly did not apply a mathematical litmus test in assessing the constitutionality of individual districts.

CONCLUSION

This Court should affirm the judgment of the Circuit Court declaring that the 2001 redistricting plans for the Virginia Senate and General Assembly violate Article I, § 11 and Article II, § 6 of the Constitution of Virginia.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to Rule 5:27 of the Rules of the Supreme Court of Virginia, I hereby certify that Rules 5:26(d) and 5:27 have been complied with, that twenty copies of this brief *amicus curiae* were filed by hand delivery this ___ day of July, 2002, in the Office of the Clerk of the Supreme Court of Virginia, and that three copies were mailed by first-class mail, postage prepaid, this ___ day of July, 2002, to the following counsel:

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