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VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

VESILIND, *et al.*, Plaintiffs, v. VIRGINIA STATE BOARD OF ELECTIONS, *et al.*, Defendants.	Case No. CL15003886-00

DEFENDANT-INTERVENORS' MOTION FOR SUMMARY JUDGMENT

Pursuant to Virginia Supreme Court Rule 3:20, Virginia House of Delegates and Virginia House of Delegates Speaker William J. Howell ("Defendant-Intervenors"), by counsel, move for summary judgment against Plaintiffs, and in support thereof, state that:

1. Plaintiffs' "predominance" claim has no basis in Virginia law and fails to apply Virginia Supreme Court binding caselaw, *West v. Gilmore*; *sub nom. Wilkins v. West*, 571 S.E. 2d 100 (Va. 2002) and *Jamerson v. Womack*, 423 S.E. 2d 180 (Va. 1992), to the facts.

2. Plaintiffs fail to apply the appropriate "fairly debatable" standard to the General Assembly's drawing of the House of Delegates districts, as required by *Jamerson v. Womack*, 423 S.E. 2d 180 (Va. 1992).

3. Plaintiffs fail to raise probative evidence of unreasonableness or make any material allegations that the drawing of the House of Delegates districts is not a fairly debatable legislative judgment.

WHEREFORE, for the reasons stated above, which will be further detailed in a Brief in Support of this Motion for Summary Judgment that will be submitted in accordance with the briefing schedule set by this Court, the Defendant-Intervenors respectfully request that this Honorable Court grant them summary judgment, and dismiss this case.

Counsel for Virginia House of Delegates and Virginia House of Delegates Speaker William J. Howell has conferred in good faith with other affected parties in an attempt to resolve the subject of the Motion for Summary Judgment without court action, pursuant to Rule 4:15(b) of the Rules of the Supreme Court of Virginia. Counsel for Plaintiffs did not consent.

Dated: January 26, 2017

Respectfully submitted,

VIRGINIA HOUSE OF DELEGATES AND VIRGINIA HOUSE OF DELEGATES SPEAKER WILLIAM J. HOWELL

By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 2017, a copy of the foregoing Defendant-Intervenors' Motion for Summary Judgment was served on the following counsel of record by electronic mail and U.S. first-class mail postage-prepaid:

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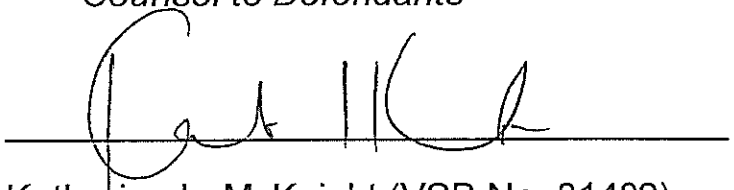

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[PROPOSED] ORDER

THIS MATTER having come before the Court upon Defendant-Intervenors' Motion for Summary Judgment; and the Court having reviewed the submissions, and heard the argument of the parties: It is hereby **ORDERED** and **ADJUDGED** that the Defendant-Intervenors' Motion for Summary Judgment is **GRANTED**.

Entered this ___ day of _____, 2017

_____

Judge, Circuit Court for the City of Richmond

WE ASK FOR THIS:

VIRGINIA HOUSE OF DELEGATES AND SPEAKER WILLIAM J. HOWELL

By: _____

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MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT-INTERVENORS' MOTION FOR SUMMARY JUDGMENT

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Introduction

This case seeks to overturn two decades of binding Virginia Supreme Court precedent. In 2011, the General Assembly fulfilled its constitutional duty to redistrict the Senate and House voting districts in accord with a myriad of constitutional, statutory, and customary criteria. Three election cycles later—at the prompting of an organization that argues the General Assembly should have *no* role in redistricting—the Plaintiffs suddenly discovered that five House districts where they, respectively, reside are (they claim) irregularly shaped. They filed this case alleging that these districts violate Article II, § 6, of the Virginia Constitution which requires that districts be composed of "compact" territory.[1] Plaintiffs posit that this provision prohibits "discretionary" redistricting criteria from "predominating" over "considerations" of compactness.

That theory is foreclosed. The Virginia Supreme Court held over 24 years ago that compactness challenges are governed by the familiar "fairly debatable" standard, not by a "predominance" standard, and that these challenges turn on the "spatial" characteristics of a district, not the General Assembly's subjective priorities. Moreover, the General Assembly has

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[1] They also challenge several Senate districts, but the Virginia House and Speaker Howell intervened only to defend the House districts and have no position on the validity of the challenged Senate districts.

"wide discretion" as to the "value judgment" of how compact a district must be, and what that even means, and there is no requirement that districts be "ideal." There are neither material allegations nor evidence directed at the *correct* legal standard, and this case therefore should be dismissed.

Facts

The Virginia Constitution vests the "legislative power of the Commonwealth" in the General Assembly, which is comprised of a Senate and House of Delegates. Va. Const. art. IV, §1. The Virginia House consists of 100 Delegates, representing 100 single-member "electoral districts," which are "established by the General Assembly." Va. Const. art. II, § 6. Districts are reapportioned every 10 years after the release of federal census data. *Id.* Each district must be drawn to give "as nearly as is practicable" equal representation to Virginia citizens. *Id.* Districts also must be "composed of contiguous and compact territory." *Id.* The Virginia Constitution does not define the term "compact," nor does it specify a metric for distinguishing "compact" from non-compact districts. The General Assembly also has long recognized multiple redistricting customs and policies, including "minimizing the splitting of counties and cities and of

recognizing existing communities of interest." *Jamerson v. Womack*, 244 Va. 506, 514 (1992).

Additionally, all state legislatures are bound by "two overarching conditions" that supersede state law and custom: (1) the equal representation standard under federal law and (2) "mandates of the Federal Voting Rights Act." *Id.* at 511. In 2011, Virginia was a covered jurisdiction under the Federal Voting Rights Act ("VRA") and so was required to submit changes in voting laws, including legislative redistricting plans, to the Department of Justice ("DOJ") for preclearance or to file a declaratory judgment action in D.C. federal court. *See* 52 U.S.C. § 10303. Under either option, Section 5 would have the effect of "freezing [a state's] election procedures" unless its new redistricting plan could "be shown to be nondiscriminatory." *Beer v. United States*, 425 U.S. 130, 140 (1976).

The House districts were required to be redrawn in 2011. Va. Const. art. II, §6. The process begins with the release of Public Law 94-171 data by the U.S. Census Bureau after the decennial census. Virginia conducts elections in odd-numbered years, and therefore the time frame for assimilating the census data, drawing, obtaining support for, and passing a redistricting law, and obtaining preclearance is short. Jones Aff. ¶ 7.

The House Privileges and Elections Committee (the "Committee") is responsible for managing the redistricting process and proposing and evaluating redistricting plans. *Id.* ¶ 5. The Committee conducted two rounds of hearings statewide to solicit comments from citizens and local officials and also collected comments via email. *Id.* ¶ 9.

On February 3, 2011, the federal government released Virginia census data. *Id.* ¶ 6. There was further delay, however, because portions of that data were erroneous, and two weeks were required for corrections. *Id.* As anticipated, Virginia House districts were badly malapportioned. *Id.* ¶ 8. The deviation ranged from 19% below to 138% above the ideal. *Id.*

On March 25, 2011, the Committee passed a list of criteria to guide the redistricting effort. *Id.* ¶ 11. The first criterion required compliance with a "one-person-one-vote" deviation of plus-or-minus one percent from the ideal population. *See id.* Ex. A. The second criterion required compliance with the Voting Rights Act. *Id.* The third criterion concerned "contiguity and compactness" and stated: "Districts shall be contiguous and compact in accordance with the Constitution of Virginia as interpreted by the Virginia Supreme Court in the cases of *Jamerson v. Womack*, 244 Va. 506 (1992) and *Wilkins v. West*, 264 Va. 447 (2002)." *Id.* The fourth criterion required

that all districts be single-member districts. *Id.* And the fifth criterion, called "communities of interest," provided that "Districts shall be based on legislative consideration of the varied factors that can create or contribute to communities of interest," and set forth an illustrative list of traditional districting considerations. *Id.*

Delegate S. Chris Jones created the redistricting plan challenged in this case. Jones Aff. ¶ 12. He was assisted by consultants John Morgan and Chris Marston, who used Maptitude software to draw the plan. *Id.* ¶ 13. Delegate Jones devoted hundreds of hours to the process, including dozens of meetings with Delegates from both political parties, who made numerous suggestions and played an active role in drawing lines. *Id.* ¶ 10.

In preparing the maps under the direction of Delegate Jones, Messrs. Morgan and Marston took care to adhere to the Committee's criteria, including the requirement that districts be compact as interpreted in Virginia case law. *Id.* ¶¶ 14,15. They took account of the two mathematical compactness measures referenced in Virginia case law and using these scores, as well as "eyeballing" the districts, they ensured there were no outliers from the other districts and that all districts were within or above the range of scores of districts previously upheld. *Id.* ¶¶ 14–16.

On March 29, 2011, Delegate Jones introduced his plan to the General Assembly as HB5001. *Id.* ¶ 17. Multiple floor debates were conducted. *Id.* ¶ 19. The two other plans that were introduced did not comport to the Committee's criteria. *Id.* ¶ 18.

The House overwhelming voted in support of HB5001, with unanimous support from Republican Members and supermajority support from Democratic Members. *Id.* ¶ 20. This bi-partisan success was a remarkable feat. *See, e.g.*, *Baldus v. Members of Wis. Gov't Accountability Bd.*, 849 F. Supp. 2d 840, 843 (E.D. Wis. 2012) (describing how, notwithstanding Wisconsin's "courtesy and its tradition of good government," the state has not been "exempted . . . from the contentious side of the redistricting process," and "the last time the Wisconsin legislature successfully passed a redistricting plan was in 1972"). But HB5001 also included the Senate plan, and Governor Robert McDonnell vetoed HB5001, citing "significant issues with the Senate reapportionment plan," while "applaud[ing] the House for its bipartisan approach." Jones Aff. Ex. B. A new Senate plan was proposed and was joined to a substantially identical House plan as HB5005, and the House, again with overwhelming bipartisan support, adopted this plan. Jones Aff. ¶ 23. The Governor signed

it on April 29, 2011. *Id.* The Department of Justice precleared the plan on June 17, 2011. *Id.* ¶ 25.

Four years and three election cycles later, the Plaintiffs filed this case, alleging that five House districts—HD13, HD22, HD48, HD72, and HD88—are not compact within the meaning of Virginia Constitution, Art. II, § 6. Compl. ¶ 17. Their lawsuit is funded by OneVirginia2021,[2] an organization whose stated mission is "to advocate for the adoption of an amendment to the Virginia Constitution that will establish an independent, impartial commission" to draw voting districts.[3] Yet that effort has failed to date, and this lawsuit seeks to use the judiciary to advance this goal.

The premise of the Complaint is that the requirement of compactness "must occupy a special status with unique authority over the legislature" and "can never be subordinated to" other considerations. Compl. ¶ 24. The Complaint alleges, and Plaintiffs' expert designation asserts, that the General Assembly subordinated compactness to other criteria in the Challenged Districts. Compl. ¶ 25; Pls.' Designation of Expert Witness at 33.

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[2] Compactness Lawsuit – OneVirginia21, http://onevirginia2021.org/about/compact/ (last visited Jan. 25, 2017).
[3] About Us – OneVirginia21, http://onevirginia2021.org/about/ (last visited Jan. 25, 2017).

Summary Judgment Standard

The Court must grant summary judgment if "it appears from the pleadings, the orders, if any, made at a pretrial conference, the admissions, if any, in the proceedings, or, upon sustaining a motion to strike the evidence, that the moving party is entitled to judgment." Va. S. Ct. R. 3:20.

Argument

I. Plaintiffs' Case Depends on Overturning the Governing Standard

The Supreme Court has twice addressed challenges under Article II, § 6, and the governing standard is well established. *See Jamerson v. Womack*, 244 Va. 506 (1992); *Wilkins v. West*, 264 Va. 447 (2002). The General Assembly's ratification of voting districts is a legislative determination of fact and "bind[s] the courts unless clearly erroneous, arbitrary, or wholly unwarranted." *Jamerson*, 244 Va. at 509. Accordingly, the "fairly debatable" standard applies to this case. *Id.* at 509. Under that standard, an initial burden falls on the plaintiff to present "probative evidence of unreasonableness." *Bd. of Sup'rs of Fairfax Cnty. v. Jackson*, 221 Va. 328, 333 (1980) (cited in *Jamerson*, 244 Va. at 509–10). If that burden is met, the question becomes whether the matter is "fairly debatable," a standard lower than the preponderance-of-the-evidence

standard, which is met where "the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions." *Id.*; *see also Wilkins*, 264 Va. at 462.

Thus, the question before this Court is *not* whether the Challenged Districts are compact, but whether there is "probative evidence" that the General Assembly's determination that they are compact is unreasonable, and, if so, whether the General Assembly's counter-evidence is sufficient to show that the issue is "fairly debatable." This standard is sufficiently robust that the Supreme Court unanimously reversed all lower-court findings that the General Assembly violated Article II, § 6, in crafting the 2001 legislative plans. *See Wilkins*, 264 Va. at 461–66. That was not an unusual result under the fairly debatable standard. *See, e.g.*, *Bd. of Sup'rs of Rockingham Cnty. v. Stickley*, 263 Va. 1, 12 (2002); *County of Lancaster v. Cowardin*, 239 Va. 522, 527 (1990). For the same reason, summary judgment is warranted under the fairly debatable standard where either the plaintiff fails to make a threshold showing of unreasonableness, *Schefer v. City Council of City of Falls Church*, 279 Va. 588, 595 (2010), or where evidence renders the question fairly debatable, *Newberry Station Homeowners Ass'n, Inc. v. Bd. of Sup'rs of Fairfax Cnty.*, 285 Va. 604, 626 (2013).

Plaintiffs do not even attempt to meet this arduous standard, but rather seek to subvert it. In its place, they (and their expert) would have the Court substitute a "predominance" test to jettison voting districts on a judicial finding that the General Assembly "subordinated" compactness to other considerations. Compl. ¶ 24. They claim the case turns on whether "Discretionary Criteria predominated over the constitutional requirement that districts be composed of compact territory." Pls.' Designation of Expert Witness at 3.

Yet the Supreme Court has already determined that the fairly debatable test applies, and that leaves no room for a "predominance" test. Unlike the proposed predominance test, the fairly debatable test allows the General Assembly to exercise a "value judgment of the relative degree of compactness required when reconciling the multiple concerns of apportionment." *Jamerson*, 244 Va. at 517. Criteria that may permissibly be balanced over and against compactness include what Plaintiffs call "discretionary" criteria, including the "preservation of existing districts, incumbency, voting behavior, and communities of interest." *Wilkins*, 264 Va. at 463–64. A district's partisan performance also may permissibly be weighed against compactness. *See id.* at 465 (approving HD74, which was

adjusted by the removal of "the 'highly Democratic' Hopewell precincts from District 62" making "that district a 'safer' Republican district").

In fact, the Plaintiffs know that their test is not the law, and their allegations reflect this: their Complaint *criticizes* the General Assembly for relying on the Supreme Court's *Wilkins* and *Jamerson* decisions, Compl. ¶ 42, it submits that Illinois law should apply instead, ¶ 29, and it laments—echoing the *Jamerson* dissent—that "the compactness standard can only restrain gerrymandering if the courts establish and enforce constitutional restraints on the legislative discretion," ¶ 29. Similarly, Plaintiffs' expert announced via Twitter on December 13, 2016, that, in concocting the "predominance" test, he had devised a "new legal theory" of Virginia Constitutional law. Harris Aff. ¶ 2, Ex. A. All parties therefore agree that this case is about changing the law, not applying it. But reversing two decades of precedent is not this Court's prerogative. *See, e.g.*, *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983).

Moreover, even if this were a matter of first impression (it is not), a predominance test would open a Pandora's box for judicial inquiry into legislative motive—a box that Plaintiffs *conceded* should remain closed. Before the Supreme Court in this very case, their counsel admitted:

> We do not contend that we are entitled to go into the motive, and that the motive of the legislator makes a difference as to whether or not the district is constitutional or not. And so we can take that off the table. That is not something that we contend.

Oral Argument at 37:10, *Edwards v. Vesilind*, 292 Va. 469 (2016), http://www.courts.state.va.us/courts/scv/oral_arguments/2016/jul/160643.MP3. But this binding judicial admission, *see General Motors Corp. v. Lupica*, 237 Va. 516, 520 (Va. 1989), only begs the question: what exactly is the concern of the predominance inquiry, other than motive? After all, the "predominance" test is unsubtly lifted from the U.S. Supreme Court's racial-gerrymandering cases, which employ a "predominance" test to identify improper "legislative *purpose*."[4] *Miller v. Johnson*, 515 U.S. 900, 916 (1995) (emphasis added). Not surprisingly, in purporting to state a predominance claim, the Complaint is permeated with allegations of motive, including that the General Assembly "subordinated the constitutional requirement of compactness to other political and policy concerns," ¶ 25, that it failed to give "more than *pro forma* consideration to the issue of compactness,"

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[4] As to the issues surrounding inquiries into legislative purpose under the federal Equal Protection clause, *see generally Washington v. Davis*, 426 U.S. 229 (1976), and *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977). Needless to say, this case was not filed under the federal Equal Protection Clause.

¶ 40, that "political criteria were given far greater consideration than the Constitution's compactness mandate," ¶ 41, and that the General Assembly "display[ed] an indifference to the elevated constitutional status of compactness," ¶ 42. Yet a reading of Article II, § 6 that requires a set of subjective priorities contradicts the holding in *Jamerson* that the compactness inquiry concerns only "spatial restrictions in the composition of districts," 244 Va. at 514, raises a host of concerns under the Speech or Debate Clause, *Gravel v. United States*, 408 U.S. 606, 621 (1972) (observing that judicial inquiry into legislative "motives or purposes" is prohibited); *accord Edwards v. Vesilind*, 292 Va. 510, 525–31 (2016), and, besides, has been expressly abandoned by Plaintiffs.

Indeed, the federal experience with a predominance standard does not recommend its use here. Over 24 years after the Supreme Court's first foray into racial gerrymandering, *see Shaw v. Reno*, 509 U.S. 630 (1993), federal courts are still struggling to understand this test, *see Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505 (E.D. Va. 2015), appeal pending, No. 15-680 (filed Nov. 20, 2015), in part because the "[Supreme] Court's 'predominant factor' standard has no direct antecedents in either constitutional law or, perhaps more relevantly, in the common law of

causation." Samuel Issacharoff, *The Constitutional Contours of Race and Politics*, 1995 Sup. Ct. Rev. 45, 57 (1995). And the standard is even less suitable here. Whereas the racial-gerrymandering predominance test seeks to smoke out the impermissible use of a single factor (race) from *all* other factors (politics, compactness, incumbency protection, etc.), *Shaw v. Hunt*, 517 U.S. 899, 906-07 (1996), the Plaintiffs identify several mandatory factors that *can* predominate over compactness, compactness itself, several "discretionary criteria" that *must* be subordinated but *may* be considered, and apparently several factors, like partisan performance, that they appear to argue must be excluded entirely. Compl. ¶¶ 40-44, 60; Pls' Designation of Expert Witness at 10-11. This hierarchy—aside from being invented wholesale—is far more complex than a racial inquiry and is not amenable to an analogous approach.

II. This Case Cannot Survive Under the Fairly Debatable Standard

The Plaintiffs' plea for a concededly novel "predominance" standard should come as no surprise because their claim fails under current law.

There is no "probative evidence of unreasonableness." *See Bd. of Sup'rs of Fairfax Cnty.*, 221 Va. at 333. Under the Reock and Polsby-Popper methods of compactness measurement, which were used by the

Supreme Court in *Wilkins*, 265 Va. at 464 n.6, the Challenged Districts are all at or above the compactness levels of the districts challenged and found satisfactory in the 2001 and 1991 Virginia plans. Hofeller Aff. Ex. A. In fact, *every* one of these scores is at or above the scores of formerly approved districts, except for the Polsby-Popper score of HD72, which is a smidgen below the Polsby-Popper scores of HD74 in the 2001 map, upheld in *Wilkins*, and SD15 and SD18, upheld in *Jamerson*, but the Reock score of HD72 is substantially higher than the Reock scores of districts approved in past plans. *Id.*; Jones Aff. ¶ 16. Likewise, an "eyeball" comparison of the Challenged Districts with those from prior plans reveals no substantial differences from previous districts. *See* Exhibit 1.

Because the Challenged Districts are not outliers as a "spatial" matter, *Jamerson*, 244 Va. at 514, Plaintiffs predictably fail to articulate any act of the General Assembly that is objectively unreasonable. Their expert opines that "Discretionary Criteria have Predominated Over Compactness," Pls.' Designation of Expert Witness at 10, but, as discussed above, that is not the test. Their expert also represents that four plus years later a compact plan can be drawn, *id.* at 16–34, but this shows, at most, that the districts are not "ideal in terms of compactness," which also is not the

standard. *Jamerson*, 244 Va. at 517. In that and other respects, the Plaintiffs' quarrel is not with the House, but with the Virginia Constitution's Art. II, § 6 requirement that districts be "established by the General Assembly," rather than by professors.

Plaintiffs' Complaint adds nothing material. It asserts that the compactness requirement "is meant to preclude at least the more obvious forms of gerrymandering," Compl. ¶ 28 (quotation marks omitted), but does not explain how a plan approved by supermajorities of *both parties* could be an "obvious" form of gerrymandering. It alleges that other maps, including SB5002 and HB5003, have more compact districts. Compl. ¶¶ 30-35. These were not seriously considered because they were unlawful and politically impossible to enact, Jones Aff. ¶ 18., and there is no requirement that the General Assembly draw the most compact districts possible or consider all (or any) alternatives. Jamerson, 244 Va. at 514. For the same reason, it is of no import that the General Assembly allegedly "adopted no measure by which to test the compactness of individual districts," Compl. ¶ 40, gave "political criteria...far greater consideration than the Constitution's compactness mandate," *id.* ¶ 41, or followed the guidance in *Jamerson* and *Wilkins*, *id.* ¶ 42.

The Complaint also alleges that the districts by their appearance are "an affront to the very idea of compactness," but this allegation is, by itself, conclusory and depends on the Complaint's characterizations of the districts. *See id.* ¶¶ 47–52. These allegations add nothing substantive to the *actual* districts, the boundaries of which are not in dispute, and therefore cannot create a material dispute of fact. Moreover, the allegations merely state that the districts are "visually noncompact" without explaining how they are meaningfully *worse* than districts upheld in the past, that they score "poorly" on compactness metrics without stating what a poor score is compared to past plans, and that better configurations were available, notwithstanding that this is irrelevant. None of these allegations provides a triable issue. *Id.*

Finally, the Complaint concludes with series of allegations purporting to state a cause of action, including allegations that the districts "resulted from a process that was clearly erroneous, arbitrary and wholly unwarranted," *id.* ¶ 61, and that "objective and reasonable persons could not reach any conclusion but that the Challenged Districts do not meet the Virginia Constitution's compactness requirement," *id.* ¶ 62. This is the only reference in the Complaint to the correct standard, and without supporting

factual content, they are conclusory and insufficient to avoid dismissal. *See, e.g.*, *Friends of the Rappahannock v. Caroline Cty. Bd. of Sup'rs*, 286 Va. 38, 49 (2013); *Dean v. Dearing*, 263 Va. 485, 490 (2002).

Even if the Plaintiffs had identified probative evidence of objective unreasonableness, the Virginia House's countervailing evidence of reasonableness is more than sufficient to make the question "fairly debatable" as to each Challenged District.

HD13, located in Manassas City, was the most over-populated district in the entire benchmark plan and had enough population for two districts, which explains why the new district covers a substantially smaller geographic space. Jones Aff. ¶ 26. It is drawn to accord with county lines to the west and east and road and river lines, to keep the Signal Hill community whole, and to preserve the urban, suburban, and rural interests. It is more compact than the districts upheld in the past by both measures used in *Wilkins*. *Id.*

HD22, located in Campbell and Bedford Counties and Lynchburg City, was drawn, to move westward with the general flow of population, to protect two veteran incumbents in the region to comport to river lines. *Id.*

¶ 27. The district is more compact than the districts upheld in the past by both measures used in *Wilkins*. *Id.*

HD48, located in Arlington and Fairfax Counties, was expanded to pick up population because Arlington County could no longer support three districts by itself, to comport to a river line and precinct and county lines, and to recognize the community of interest between North Arlington County and McLean. *Id.* ¶ 28. The district is more compact than the districts upheld in the past by it is more compact than the districts upheld in the past by both measures used in *Wilkins*. *Id.*

HD72, located in Henrico County, was severely underpopulated and surrounded by under-populated districts. *Id.* ¶ 29. It surrendered precincts in its former core to a Richmond-based district to resolve that district's population and Voting Rights Act issues and picked up precincts in what the General Assembly determined to be a nearby community with similar interests. *Id.* All of this was accomplished without crossing county lines, which the Assembly viewed as important for the region, and the district is far more compact on the Reock measure than districts upheld in the past. *Id.* The district is a mere .02 below the Polsby-Popper score of three

districts previously upheld, and this discrepancy is a difference of angels dancing on the head of a pin.

HD88, located in Prince William and Fauquier Counties, was substantially overpopulated. *Id.* ¶ 30.The district preserved most of its core, follows County and river lines, and is far more compact than districts upheld previously by both measures used in *Wilkins*. *Id.*

Whatever purported problems or hypothetical improvements the Plaintiffs may cite, all of these decisions and priorities are well within the zone of discretion recognized in binding case law. *See Wilkins*, 264 Va. at 463–66 (upholding districts where the "record reflects a balancing by the General Assembly" of the factors balanced here); *Jamerson*, 244 Va. at 514–17 (same). Moreover, to the extent it matters, the General Assembly *did* subjectively consider compactness, having consultants run compactness scores to ensure compliance with the *Wilkins* and *Jamerson* standards. Jones Aff. ¶¶ 12-14. So without a change in law, it is fairly debatable, at minimum, that the districts are "compact."

Conclusion

For these reasons, summary judgment should be granted and the case dismissed.

Dated: January 26, 2017

Respectfully submitted,

VIRGINIA HOUSE OF DELEGATES AND VIRGINIA HOUSE OF DELEGATES SPEAKER WILLIAM J. HOWELL

By Counsel

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CERTIFICATE OF SERVICE

I hereby certify that on this 26th day of January, 2017, a copy of the foregoing Memorandum of Law in Support of Defendant-Intervenors' Motion for Summary Judgment was served on the following counsel of record by electronic mail and U.S. first-class mail postage-prepaid:

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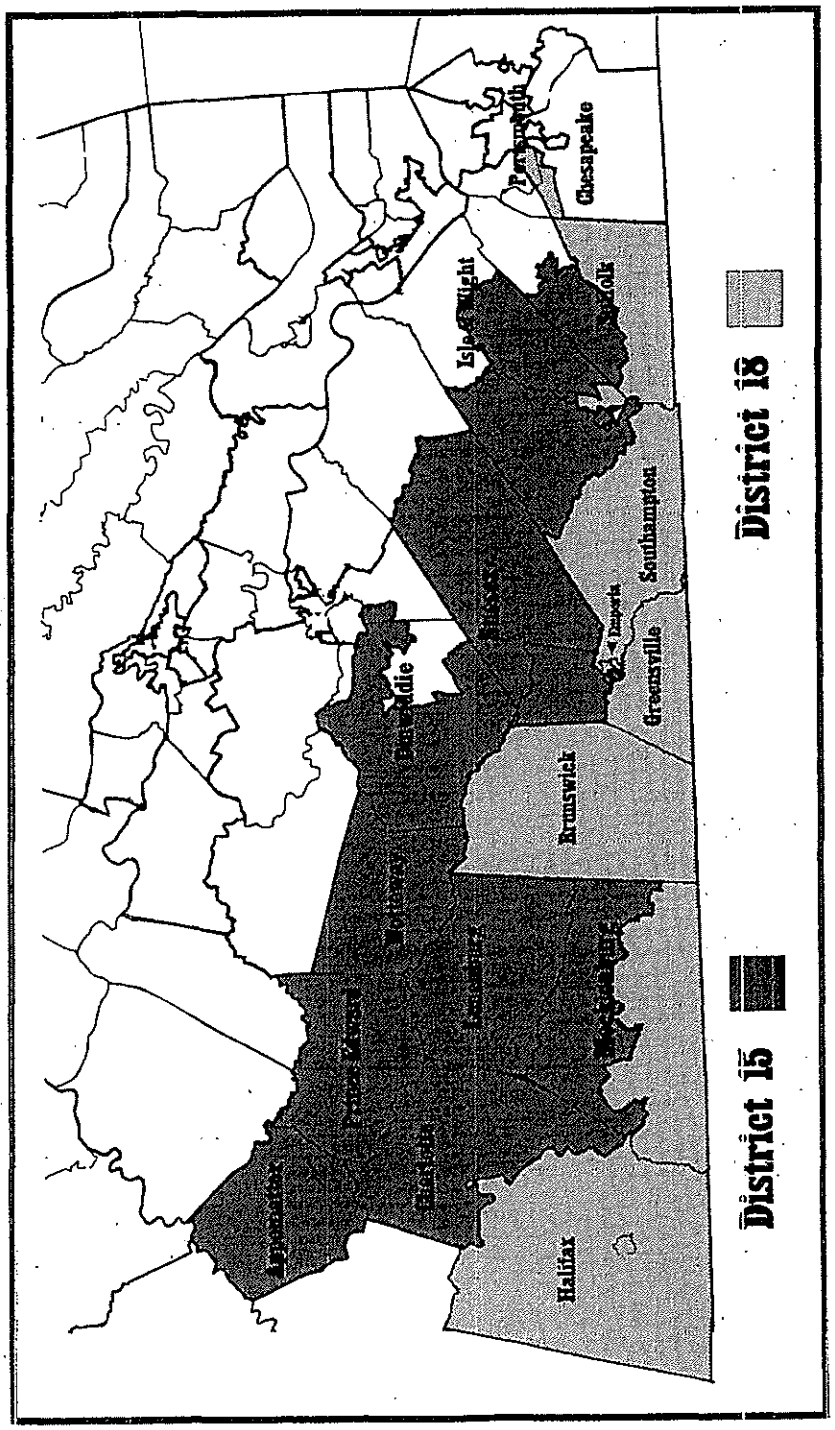
EXHIBIT

Adopted Senate Plans Districts 15 & 18

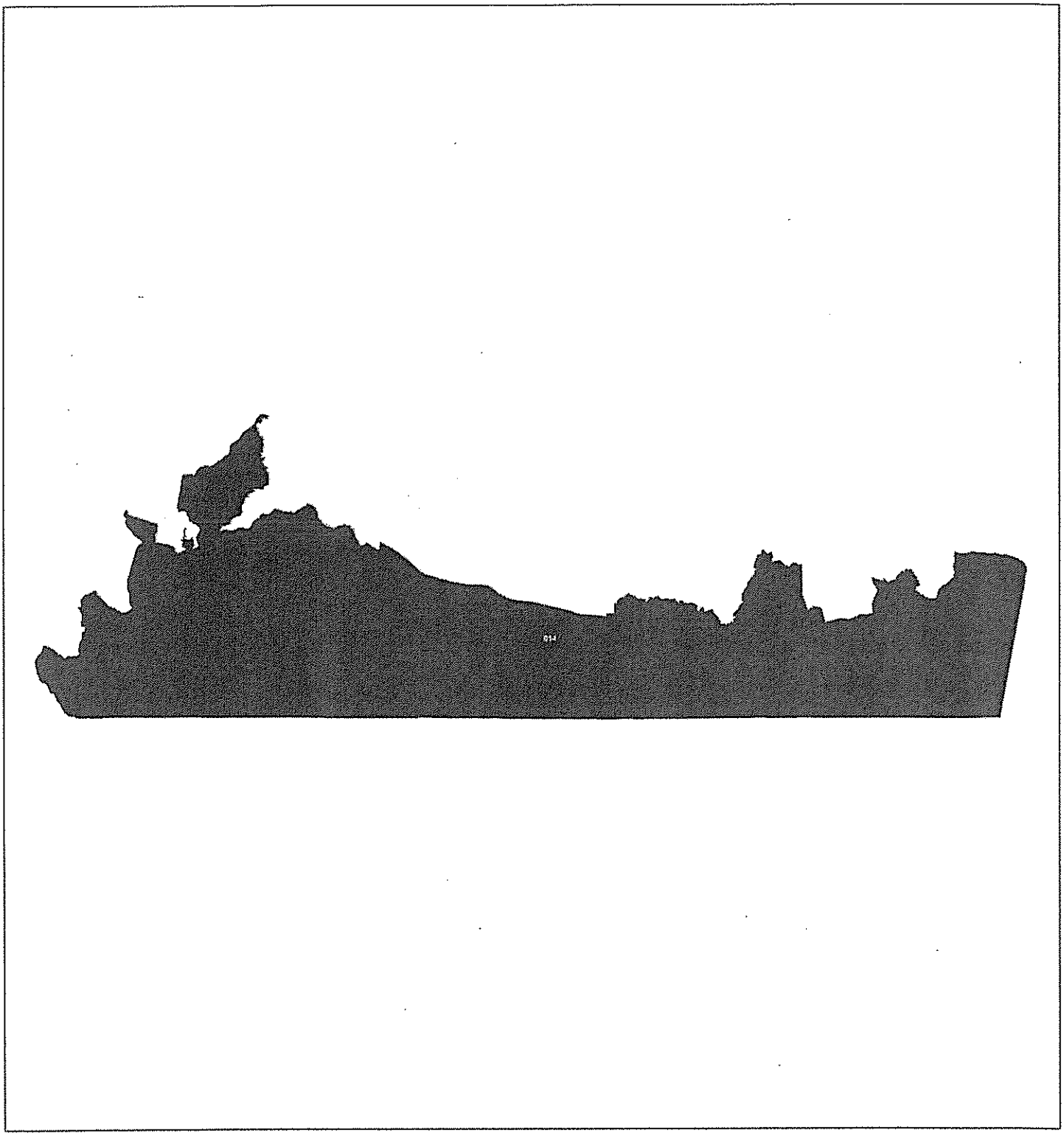


*Jamerson v. Womack, 244 Va. 506, 517, 423 S.E.2d 180, 187 (1992)

EXHIBIT 1

House 14; 2001 Enacted Plan

Reock 0.18; Polsby-Popper 0.18



vaLD_2001-014_silhouette_qa25a

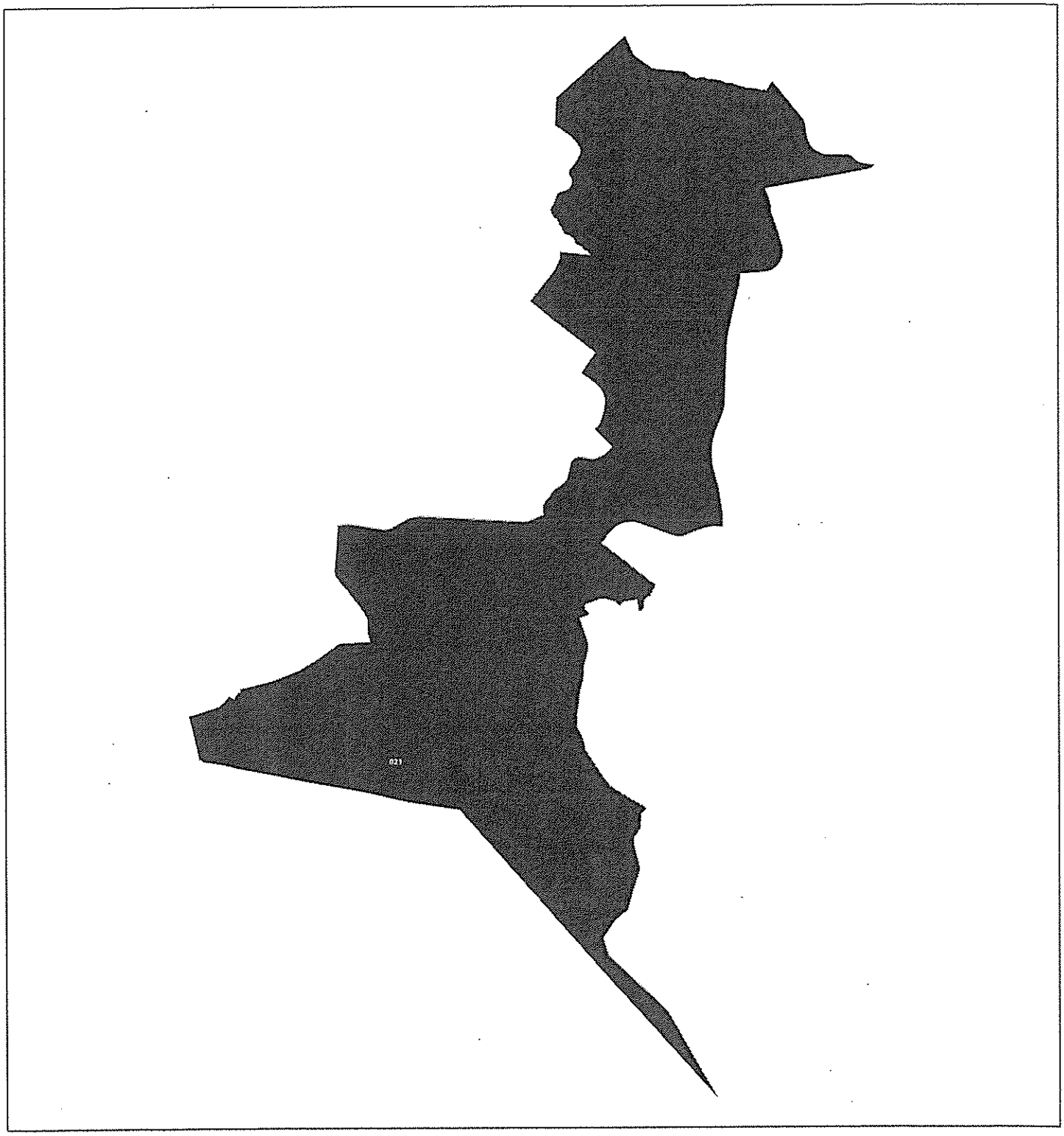
*Map prepared by Clark Bensen, designated Expert Witness, to illustrate district from the 2001 Redistricting plan

Program Used: Maptitude. Date Created: January 23, 2017

EXHIBIT 1

House 21; 2001 Enacted Plan

Reock 0.21; Polsby-Popper 0.17



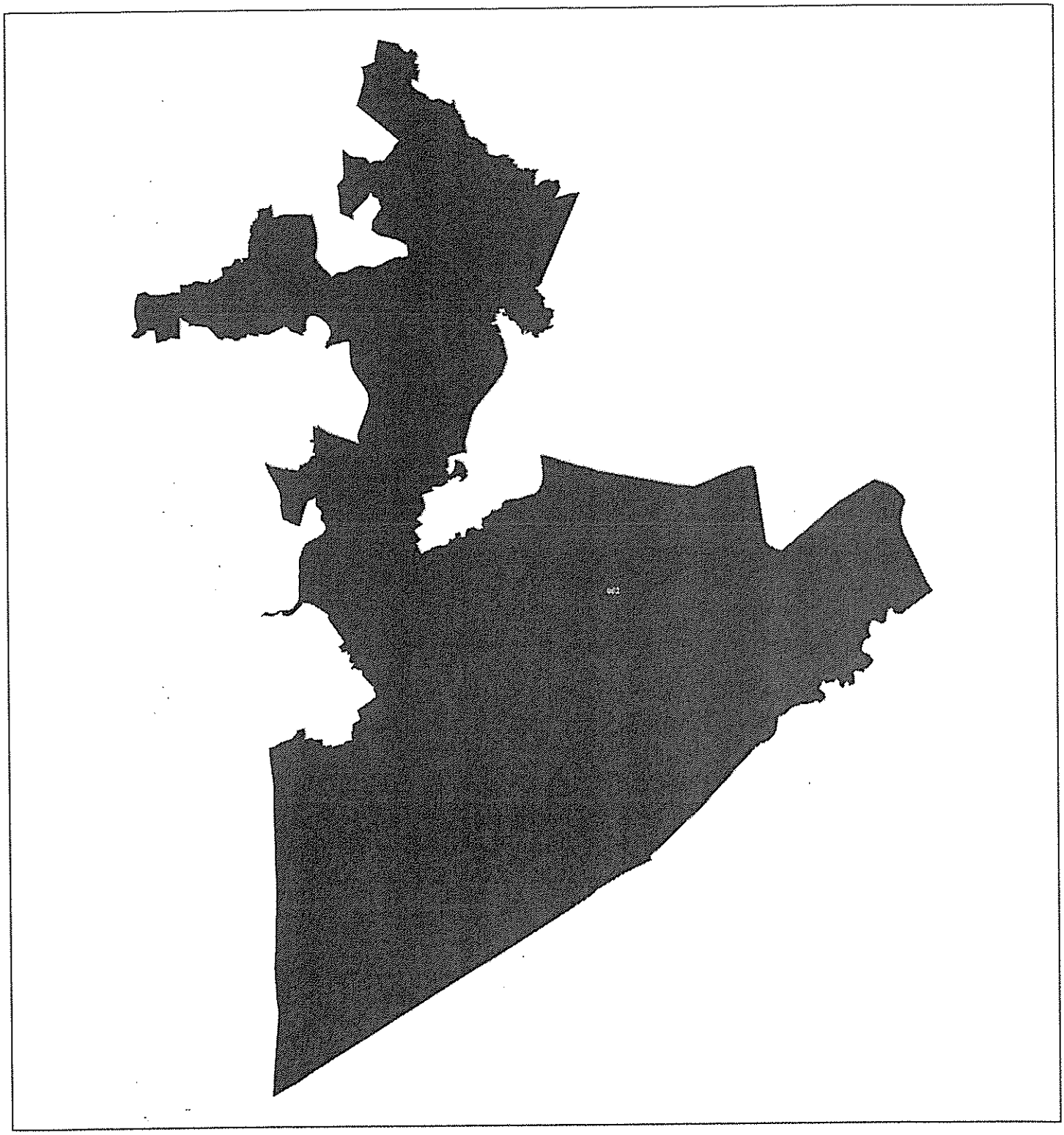
vaLD_2001-021_silhouette_qa25a

*Map prepared by Clark Bensen, designated Expert Witness, to illustrate district from the 2001 Redistricting plan

EXHIBIT 1

House 62; 2001 Enacted Plan

Reock 0.34; Polsby-Popper 0.15



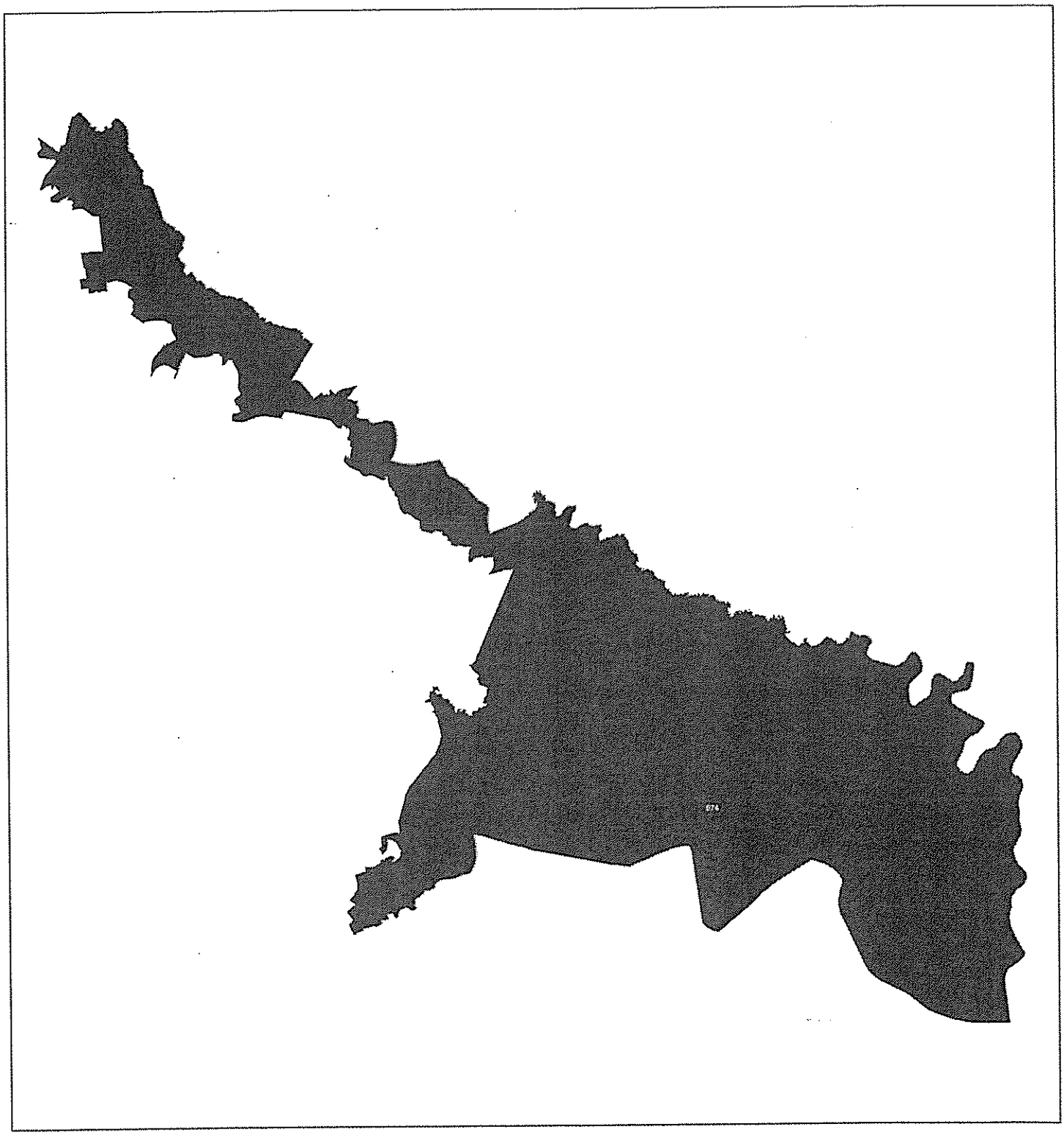
vaLD_2001-062_silhouette_qa25a

*Map prepared by Clark Bensen, designated Expert Witness, to illustrate district from the 2001 Redistricting plan
Program Used: Maptitude. Date Created: January 23, 2017.

EXHIBIT 1

House 74; 2001 Enacted Plan

Reock 0.16; Polsby-Popper 0.10



vaLD_2001-074_silhouette_qa25a

*Map prepared by Clark Bensen, designated Expert Witness, to illustrate district from the 2001 Redistricting plan

Program Used: Maptitude Date Created: January 23, 2017

EXHIBIT 1

House 96; 2001 Enacted Plan

Reock 0.23; Polsby-Popper 0.15

vaLD_2001-096_silhouette_qa25a

***Map prepared by Clark Bensen, designated Expert Witness, to illustrate district from the 2001 Redistricting plan**

Program Used: Maptitude. Date Created: January 23, 2017

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

VESILIND, *et al.*, Plaintiffs, v. VIRGINIA STATE BOARD OF ELECTIONS, *et al.*, Defendants.	Case No. CL15003886-00

AFFIDAVIT OF DELEGATE S. CHRIS JONES

I, Delegate S. Chris Jones, declare as follows based upon personal knowledge:

1. I, Delegate S. Chris Jones, am above the age of 18 and am otherwise competent to testify.

2. I was first elected to the Virginia House of Delegates in 1997.

3. I currently represent Virginia's 76th House District that comprises a portion of the City of Chesapeake and a portion of the City of Suffolk.

4. During the 2011 redistricting of the Commonwealth's House of Delegates Districts, I led the drafting of the House of Delegates plan.

5. The House Privileges and Elections Committee is a standing committee responsible for managing the redistricting process and proposing and evaluating redistricting plans.

6. On or about February 3, 2011, the federal government released census data, but two additional weeks were spent correcting erroneous data.

7. Because Virginia conducts odd-year elections, there is a very tight time frame for the General Assembly to prepare, debate, and pass redistricting plans.

8. The Virginia House Districts were badly malapportioned. The deviation ranged from approximately 19% below the ideal in the least-populated district to approximately 138% over the ideal in the most-populated district.

9. On or about August 2010 through March 2011, the House Privileges and Elections Committee collected emails and conducted two

rounds of hearings around the state in order to receive comments from citizens and local officials about the redistricting of the House of Delegates.

10. I held dozens of meetings with Delegates from both political parties. I also met with the House Black Caucus. Delegates offered numerous suggestions and played an active role in the creation of the House plan.

11. On or about March 25, 2011, the House Committee on Privileges and Elections passed Committee Resolution No. 1. A true and correct copy is attached as Exhibit A.

12. I created a House redistricting plan with the assistance of consultants John Morgan and Chris Marston.

13. Messrs. Morgan and Marston used Maptitude software to prepare the redistricting plan and various drafts in the process.

14. In preparing the redistricting plan, they took account of Maptitude software reported scores for compactness, and eyeballed the shape of the districts.

15. In preparing the redistricting plan for the Republican Caucus, Mr. Morgan, Mr. Marston, and I were aware of and considered the Virginia

Supreme Court opinions addressing compactness, specifically, *Jamerson v. Womack*, 244 Va. 506 and *Wilkins v. West*, 264 Va. 447 (2002).

16. None of the districts in my plan were outliers as to compactness as compared with the other districts approved by the Virginia Supreme Court in the past two redistricting cycles.

17. On or about March 29, 2011, I presented HB5001 to the General Assembly, and the bill was referred to the House Privileges and Elections Committee.

18. Besides HB5001, the only other plans introduced were HB5002 and HB5003. These plans did not comport with Committee Resolution No. 1's criteria.

19. House debates were conducted on the merits of HB5001. I attended those debates and answered questions posed by other Members.

20. The House of Delegates passed HB5001, with unanimous support from Republican Members and supermajority support from Democratic Members.

21. On or about April 15, 2011, Governor Robert McDonnell vetoed the Senate plan. A true and correct copy of the Governor's veto statement is attached as Exhibit B.

22. On or about April 18, 2011, I presented HB5005 with a substantially identical House plan as HB5001 to the General Assembly.

23. HB5005 was passed by the House of Delegates on or about April 28, 2011 with a vote of 63 to 7 and passed by the Senate on or about April 28, 2011. On or about April 29, 2011, Governor Robert McDonnell signed HB5005.

24. All Republican Caucus members voted for the plan. A supermajority of Democratic Caucus members voted for the plan.

25. On or about June 17, 2011, the Department of Justice precleared HB5005 under Section 5 of the Voting Rights Act.

26. HD13, located in Manassas County, was the most over-populated district in the entire benchmark plan and had enough population for two districts. In order to comply with the one-person, one-vote principle, the new district covers a substantially smaller geographic space. The redrawn district accords with county lines to the west and east and road

and river lines, to keep the Signal Hill community whole, and to preserve the urban, suburban, and rural interests.

27. HD22, located in Campbell and Bedford Counties and Lynchburg City, was drawn in part to move westward with the general flow of population, to protect two veteran incumbents in the region, and to comport with river lines.

28. HD48, located in Arlington and Fairfax Counties, was drawn to pick up population because Arlington County could no longer support three districts by itself; to comport to a river line and precinct and county lines, and to recognize the community of interest between North Arlington County and McLean.

29. HD72, located in Henrico County, was severely underpopulated and surrounded by under-populated districts. The redrawn district surrendered precincts in its former core to a Richmond-based district to resolve that district's population problem, address Voting Rights Act issues and picked up precincts in what the General Assembly determined to be a nearby community with similar interests. All of this was accomplished without crossing county lines, which was important for the region.

30. HD88, located in Prince William and Fauquier Counties, was substantially overpopulated. The redrawn district preserved most of its core and follows county and river lines.

Under penalty of perjury, I affirm that the above is true and accurate to the best of my knowledge.

Further the affiant sayeth not.

(signatures on next page)

Dated: January 25, 2017

Delegate S. Chris Jones
Virginia House of Delegates, 76th District

STATE OF VIRGINIA)
) SS:
COUNTY OF Suffolk)

The above affiant did appear before on this 25th day of January, 2017 and declare the foregoing is true based upon personal knowledge.

Witness my hand and seal.

My Commission Expires:

December 31, 2020

Reg. # 323771

Susan C. Clark
Signature of Notary Public

SUSAN C. CLARK
Name of Notary Public

EXHIBIT A TO DEL. JONES AFFIDAVIT

Approved 3/25/11

HOUSE COMMITTEE ON PRIVILEGES AND ELECTIONS

COMMITTEE RESOLUTION NO. 1 -- House of Delegates District Criteria

(Proposed by Delegate S. Chris Jones)

RESOLVED, That after consideration of legal requirements and public policy objectives, informed by public comment, the House Committee on Privileges and Elections adopts the following criteria for the redrawing of Virginia's House of Delegates districts:

I. Population Equality

The population of legislative districts shall be determined solely according to the enumeration established by the 2010 federal census. The population of each district shall be as nearly equal to the population of every other district as practicable. Population deviations in House of Delegates districts should be within plus-or-minus one percent.

II. Voting Rights Act

Districts shall be drawn in accordance with the laws of the United States and the Commonwealth of Virginia including compliance with protections against the unwarranted retrogression or dilution of racial or ethnic minority voting strength. Nothing in these guidelines shall be construed to require or permit any districting policy or action that is contrary to the United States Constitution or the Voting Rights Act of 1965.

III. Contiguity and Compactness

Districts shall be comprised of contiguous territory including adjoining insular territory. Contiguity by water is sufficient. Districts shall be contiguous and compact in accordance with the Constitution of Virginia as interpreted by the Virginia Supreme Court in the cases of *Jamerson v. Womack*, 244 Va. 506 (1992) and *Wilkins v. West*, 264 Va. 447 (2002).

IV. Single-Member Districts

All districts shall be single-member districts.

V. Communities of Interest

Districts shall be based on legislative consideration of the varied factors that can create or contribute to communities of interest. These factors may include, among others, economic factors, social factors, cultural factors, geographic features, governmental

jurisdictions and service delivery areas, political beliefs, voting trends, and incumbency considerations. Public comment has been invited, has been and continues to be received, and will be considered. It is inevitable that some interests will be advanced more than others by the choice of particular district configurations. The discernment, weighing, and balancing of the varied factors that contribute to communities of interest is an intensely political process best carried out by elected representatives of the people. Local government jurisdiction and precinct lines may reflect communities of interest to be balanced, but they are entitled to no greater weight as a matter of state policy than other identifiable communities of interest.

VI. Priority

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

DLS/mrs
3/25/11

EXHIBIT B TO DEL. JONES AFFIDAVIT

COMMONWEALTH of VIRGINIA

Office of the Governor

Robett F. McDonnell
Governor

GOVERNOR'S VETO

APRIL 15, 2011

TO THE HOUSE OF DELEGATES:

HOUSE BILL NO. 5001

House Bill 5001 includes decennial redistricting plans for the House of Delegates and Senate of Virginia, as required by Article II, Section 6 of the Constitution of Virginia. Upon reviewing the plans and relevant state and federal law, I have several legal and other concerns with this legislation. Specifically, there are significant issues with the Senate reapportionment plan ("Senate plan") that prevent me from signing the bill in its current form. While I applaud the House for its bipartisan approach, I encourage the House to pursue opportunities that will strengthen its plan.

First, it is apparent that districts proposed in the Senate plan are not compact, as required in the Constitution of Virginia, and do not properly preserve locality lines and communities of interest. These issues were noted in the Independent Bipartisan Advisory Commission on Redistricting ("Bipartisan Commission") report as the most significant concerns of the citizens of Virginia. The Constitution of Virginia requires that electoral districts be composed of "compact territory." This requirement is also contained in the resolution adopted by the Senate Privileges and Elections Committee on March 25, 2011. Using the most commonly recognized tools of compactness scoring, the Reock and Polsby-Popper methods, the plan adopted by the Senate has less compact districts than the existing House or Senate districts or other plans that have been proposed. The Senate Committee resolution also requires that communities of interest be respected, including local jurisdiction lines. While the House plan keeps the number of split localities relatively static, the Senate plan significantly increases the number of times localities are split as compared to either other proposed plans or the current redistricting law (from 190 to 198 in the House plan (4% change), contrasted with an increase of 108 to 135 in the Senate plan (25% change)). A plain visual examination of the districts in the Senate plan also places into serious doubt that the compactness and communities of interest requirements have been met. As Justice Stevens said in the 1983 U.S. Supreme Court case of *Karcher v. Daggett*, "Drastic departures from compactness are a signal that something may be amiss."

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www.governor.virginia.gov

Second, I am concerned that the Senate plan may violate the one person-one vote ideal embodied in the United States and Virginia Constitutions. The Fourteenth Amendment of the United States Constitution provides for equal protection of the laws. This has been interpreted to require that state legislative districts have as close to equal representation as practicable, taking into consideration other important and legitimate redistricting factors. Additionally, Article II, Section 6 of the Constitution of Virginia requires that districts be drawn in a manner to "give, as nearly as is practicable, representation in proportion to the population of the district." The House plan has a deviation of only ±1 percent. However, in reviewing the districts proposed in the Senate plan, they appear to deviate from the one person-one vote standard without any apparent legitimate justification. While the deviation from the ideal district is smaller than in past decennial redistricting cycles, deviations must be justified with achieving some recognized principle of redistricting such as preserving local jurisdictional lines, creating compact districts, or maintaining communities of interest. Additionally, as the Bipartisan Commission noted, "the tradition in the Commonwealth has been to require a stricter population standard than allowed by the federal courts." After close review of the Senate plan, I cannot identify any apparent justification for the deviations proposed. In fact, the Senate plan systematically underpopulates districts in slow-growth regions of the state (urban and rural) while overpopulating districts in high-growth areas of the Commonwealth (suburban).

Lastly, I am concerned that the Senate plan is the kind of partisan gerrymandering that Virginians have asked that we leave in the past. The House of Delegates passed its plan on an overwhelming 86-8 vote, with twenty-eight affirmative votes from members of the minority party. Similarly, in 2001, both the House and Senate plans passed with bipartisan support. In stark contrast, the Senate plan failed to garner any votes in the Senate from the minority party. Certainly, the Senate can create a plan that will be supported by a bipartisan majority of Senators, especially with the Senate's overwhelming support for a bipartisan redistricting process as expressed in previous legislation.

In conclusion, after a careful review of the Senate plan, I have serious concerns that such a plan may violate state and federal law and could potentially subject Virginia to costly and unnecessary litigation. Time is of the essence to ensure that we maintain control over a process that drastically impacts Virginians for years to come. I encourage you to reevaluate this legislation in light of these expressed concerns and begin work immediately to develop a plan that is clearly lawful and can ensure bipartisan support. It is imperative that your work commence and be completed promptly to permit the appropriate preclearance process to occur so that the election can proceed as currently scheduled.

Accordingly, pursuant to Article V, Section 6, of the Constitution of Virginia, I veto this bill.

Sincerely,

Robert F. McDonnell

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

VESILIND, *et al.*, Plaintiffs, v. VIRGINIA STATE BOARD OF ELECTIONS, *et al.*, Defendants.	Case No. CL15003886-00

AFFIDAVIT OF THOMAS BROOKS HOFELLER, Ph.D.

I, Thomas Brooks Hofeller, Ph.D., declare as follows based upon personal knowledge:

1. I, Thomas Brooks Hofeller, Ph.D., am above the age of 18 and am otherwise competent to testify.

2. I am a Partner in Geographic Strategies, LLC, located in Columbia, South Carolina, and I provide redistricting services including database construction, strategic political and legal planning in preparation for actual line drawing, support services and training on the use of geographic information systems (GIS) used in redistricting, analysis of plan drafts, and actual line-drawing when requested.

3. I attest that the compactness scores from the expert report of Gerald R. Webster Ph.D. for the districts challenged *West v. Gilmore*; *sub nom. Wilkins v. West*, 571 S.E. 2d 100 (Va. 2002) and *Jamerson v. Womack*, 423 S.E. 2d 180 (Va. 1992) are accurately reflected in the attached Exhibit A.

4. I calculated the compactness scores for the House of Delegates districts challenged in the above-captioned matter, and I attest that those compactness scores attached in Exhibit B are true and accurate.

Under penalty of perjury, I affirm that the above is true and accurate to the best of my knowledge.

Further the affiant sayeth not.

(signatures on following page)

Dated: January 25, 2017

Thomas Brooks Hofeller, Ph.D.

STATE OF North Carolina)
) SS:
COUNTY OF Wake)

The above affiant did appear before on this 25th day of January, 2017 and declare the foregoing is true based upon personal knowledge.

Witness my hand and seal.

RHINNA IGLESIAS
Notary Public
Wake Co., North Carolina
My Commission Expires June 9, 2021

My Commission Expires:
6/9/2021

Signature of Notary Public

Rhinna Iglesias

Name of Notary Public

EXHIBIT A TO HOFELLER AFFIDAVIT

Compactness Scores for Districts Challenged in *West v. Gilmore; sub nom. Wilkins v. West,* 571 S.E. 2d 100 (Va. 2002) from Expert Report of Gerald R. Webster, Ph.D.		
Districts Drawn in 2001	**Reock (Dispersion Compactness)**	**Polsby-Popper (Perimeter Compactness)**
House District 49	0.25	0.18
House District 62	0.34	0.15
House District 64	0.42	0.19
House District 69	0.37	0.20
House District 70	0.47	0.14
House District 71	0.24	0.19
House District 74	0.16	0.10
House District 77	0.25	0.24
House District 79	0.37	0.24
House District 80	0.39	0.26
House District 83	0.31	0.38
House District 89	0.58	0.31
House District 90	0.35	0.22
House District 91	0.57	0.40
House District 92	0.25	0.14
House District 95	0.43	0.29
House District 100	0.27	0.35
Senate District 1	0.42	0.23
Senate District 2	0.45	0.29
Senate District 3	0.28	0.18

EXHIBIT A TO HOFELLER AFFIDAVIT (continued)

Senate District 4	0.31	0.25
Senate District 5	0.35	0.15
Senate District 9	0.24	0.16
Senate District 13	0.42	0.20
Senate District 16	0.36	0.17
Senate District 18	0.22	0.12

Compactness Scores for Districts Challenged in *Jamerson v. Womack*, 423 S.E. 2d 180 (Va. 1992) from Expert Report of Gerald R. Webster, Ph.D.		
Districts Drawn in 1991	**Reock (Dispersion Compactness)**	**Polsby-Popper (Perimeter Compactness)**
Senate 15	0.23	0.10
Senate 18	0.12	0.10

EXHIBIT B TO HOFELLER AFFIDAVIT

Compactness Scores for Districts Challenged in *Vesilind v. Virginia State Board of Elections*		
Districts Drawn in 2011	**Reock (Dispersion Compactness)**	**Polsby-Popper (Perimeter Compactness)**
House District 13	0.16	0.13
House District 22	0.20	0.11
House District 48	0.18	0.16
House District 72	0.26	0.08
House District 88	0.28	0.13

VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

VESILIND, *et al.*, Plaintiffs, v. VIRGINIA STATE BOARD OF ELECTIONS, *et al.*, Defendants.	Case No. CL15003886-00

AFFIDAVIT OF AMELIA TOLBERT HARRIS

I, Amelia Tolbert Harris, declare as follows based upon personal knowledge:

1. I, Amelia Tolbert Harris, am above the age of 18 and am otherwise competent to testify.

2. I am a Paralegal at Baker Hostetler LLP.

3. I attest that Exhibit A to this Affidavit accurately reflects a "screenshot" capturing the user profile and the tweet posted on December 13, 2016 at 7:30 AM to the Twitter account of Michael McDonald of @ElectProject.

Further the affiant sayeth not. (signatures on following page)

Dated: January 25, 2017

Amelia Tolbert Harris

DISTRICT
~~STATE~~ OF COLUMBIA)
) SS:
~~COUNTY OF~~ _____)

The above affiant did appear before on this 25th day of January, 2017 and declare the foregoing is true based upon personal knowledge.

Witness my hand and seal.

My Commission Expires:

5/14/17

Signature of Notary Public

SHARON ANN OWENS
Name of Notary Public

SHARON ANN OWENS NOTARY PUBLIC EXP. 5-14-2017 DISTRICT OF COLUMBIA

EXHIBIT A TO TOLBERT HARRIS AFFIDAVIT