VIRGINIA:

IN THE CIRCUIT COURT FOR THE CITY OF RICHMOND

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

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANT-INTERVENORS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, by and through the undersigned counsel, submit this Memorandum in Opposition to the Motion to for Summary Judgment filed by the Defendant-Intervenors, Virginia House of Delegates and Virginia House of Delegates Speaker William J. Howell ("Defendant-Intervenors"), and state as follows:

INTRODUCTION

Defendant-Intervenors bring a motion for summary judgment based largely on allegations in Plaintiffs' Complaint and on inappropriately attached Affidavits. They cite to the opinion of Plaintiffs' expert witness but do not attach his report or any part of it, and they fail to include a section detailing that there are no material facts genuinely in dispute. As this is not a demurrer,

repeated citations to the Complaint - particularly ones which distort the allegations[1] - are not helpful. There is currently no evidence before the Court, nor any undisputed facts on which to rely. As such, summary judgment cannot be granted.

Nonetheless, Plaintiffs will address the summary judgment brief because it rests on an improper premise. Plaintiffs are not arguing that districts be "ideal." They are arguing that the legislature was required to follow the Constitution and they failed in that respect. While Plaintiffs are proposing a new test or method and a standard for assessing constitutional compactness - they are not asking the Court to apply a different legal standard of review for the actions of the General Assembly. Just as there exists a test or method and standard for assessing whether equal population has been met or racial gerrymandering has occurred, Plaintiffs ask the Court to adopt their test or method and standard for assessing whether compactness has been met as required under the Virginia Constitution.

The legal standard for reviewing legislative determinations of fact still applies as set forth in the seminal cases of *Jamerson v. Womack*, 244 Va. 506, 423 S.E.2d 180 (1992)("*Jamerson*"), and *Wilkins v. West,* 264 Va. 447, 571 S.E.2d 100 (2002) ("*Wilkins*"). However, once the facts are determined, the issue moves to whether the "apportionment bill...conform[s] to constitutional provisions prescribed for enacting any other law, and whether such requirements

---

[1] Although irrelevant since this is a summary judgment motion, the following are Paragraphs 23 and 24 of the Complaint which were repeatedly cited in a misleading fashion in the Memorandum in Support:

> 23. Article II, §6 of the Virginia Constitution dictates three and only three requirements that the legislature must follow when drawing legislative districts after each decennial census. Districts must be 1) contiguous; 2) compact; and 3) as nearly equal in population as is practical.
>
> 24. These three requirements--in addition to the federal "one person, one vote" and Voting Rights Act (VRA) requirements--must occupy a special status with unique authority over the legislature. While the legislature may consider other rational public policy considerations, the mandates of the United States and Virginia Constitutions can never be subordinated to those considerations. Yet that is precisely what occurred. Both Constitutions are the supreme law of the land over which they govern and must be treated as such throughout the redistricting process.

have been fulfilled is a question to be determined by the court when properly raised. ... The legal question involved is whether or not the act of the legislature is in conflict with the mandate of the Constitution." *Brown v. Saunders,* 159 Va. 28, 35-36, 166 S.E. 105, 107 (1932) (citations omitted). Plaintiffs' argue and believe the evidence will show - at trial - that the "act of the legislature is in conflict with the mandate of the Constitution." *Id.*

As will be discussed below, the parties disagree on the interpretation of the language in *Jamerson* and *Wilkins*, but not on the application of their standard of review.

I. Summary Judgment Standard

The truncated section on the summary judgment standard of review in Defendant-Intervenors' Memorandum in Support (p. 8) provides further confirmation as to why summary judgment is wholly inappropriate in this case. Rule 3:20 states that summary judgment may be granted if "it appears from the pleadings, the orders, if any, made at a pretrial conference, the admissions, if any, in the proceedings... that no material facts are genuinely in dispute." As noted in Plaintiffs' contemporaneously filed Motion to Strike, which is incorporated herein, the use of affidavits is not permitted. A motion for summary judgment is not a substitute for trial where an issue of fact actually exists. *Klaiber v. Freemason Assocs. Inc.*, 266 Va. 478, 484, 587 S.E.2d 555, 558 (2003).

Accordingly, a trial court considering a motion for summary judgment must "'accept[] as true those inferences from the facts that are most favorable to the nonmoving party, unless the inferences are forced, strained, or contrary to reason.'" *Id.* (quoting *Dudas v. Glenwood Golf Club, Inc.*, 261 Va. 133, 136, 540 S.E.2d 129, 130-31 (2001)). Here, Defendant-Intervenors do not even attempt to list a statement of undisputed material facts. Only a vacuum exists where allegations of what the undisputed material facts should be, so Plaintiffs are left to posit what

might fill that vacuum, if anything. As there is no proper evidence before the Court and Defendant-Intervenors have proffered no material facts they contend *are not* in dispute, summary judgment cannot be granted in this case.

Virginia law regarding motions for summary judgment is clear - they should be granted sparingly. "The decision to grant a motion for summary judgment is a drastic remedy which is available only where there are no material facts genuinely in dispute." *Slone v. General Motors Corp.*, 249 Va. 520, 522, 457 S.E.2d 51, 52 (1995) (*citing Turner v. Lotts*, 244 Va. 554, 556, 422 S.E.2d 765, 766 (1992)). The policy behind this standard is sound. Virginia courts "disapprove the grant of motions which 'short circuit' the legal process thereby depriving a litigant of his day in court and depriving [the Supreme Court] of an opportunity to review a thoroughly developed record." *Seyfarth, Shaw, Fairweather & Geraldson v. Lake Fairfax Seven Limited Partnership, et al.*, 253 Va. 93, 95, 480 S.E.2d 471, 472 (1997) (citations omitted).

Under no set of circumstances is summary judgment proper in this case.

II. This is Not a Demurrer and there is No Evidence Properly before This Court

Treating their motion for summary judgment like a demurrer, Defendant-Intervenors repeatedly cite to the Complaint in this case and then claim Plaintiffs have not put forth any probative evidence. They then cite to cases dismissed on a demurrer. Defendant-Intervenors' Memorandum in Support, pp. 17-18 (citing *Dean v. Dearing*, 263 Va. 485, 561 S.E.2d 686 (2002); *Friends of the Rappahannock v. Caroline County Bd. of Supervisors*, 286 Va. 38, 743 S.E.2d 132 (2013)). This is quizzical. Defendant-Intervenors missed the boat on a demurrer challenge. No evidence is properly before the Court nor will there be until the trial of this matter.

A. Affidavits

Plaintiffs were never contacted about agreeing to the substance of the Affidavits. However, under no circumstances is there a basis for consideration of Delegate Jones's Affidavit and as a factual matter it is incomplete and misleading. For example, Chris Marston, identified on p. 5 of Defendant-Intervenors' Memorandum in Support as one of the consultants assisting Delegate Jones in drawing the map, testified under oath that the following testimony he gave in the *Bethune-Hill* matter regarding Governor McDonald's Independent Commission "was an honest statement based on [his] then existing recollection":

> There wasn't a particular consideration individually of each Commission recommendation; they were **all rejected because they didn't accomplish the political objectives of the Caucus, which was to elect more Republicans.**

See Exhibit A (pp.45-46 of Transcript discussing Exhibit 4) (emphasis added). Further questioning elicited the following exchange:

> Q Specifically with regard to the testimony on Page 125, and your answer to the question regarding a general recollection as to this shift, you stated, "Generally it was our goal to make Republican districts as strong as possible, so I'm assuming that he felt that making that move would strengthen all the districts involved." QUESTION: When you say strengthen the districts, what do you mean? ANSWER: Make them such that the population had a majority of Republicans that would re-elect a Republican delegate."
>
> Q When you gave that testimony, you were being truthful. Correct?
>
> A Yes.
>
> Q And if I ask you those questions today, you would give me the same testimony. Correct?
>
> A Yes.

Id. (pp. 76 of Transcript).

Under Dr. McDonald's expert opinion and methodology as described below, why the General Assembly drew the maps as they did is not a relevant consideration, though Mr. Marston's testimony and the tortured shape of the districts suggest why. However, their motives and actions would clearly be in dispute if Defendant-Intervenors claim those do matter. This would merely establish a material fact in dispute should any Defendant make such an argument.

ARGUMENT

In essence, the Defendant-Intervenors are arguing that the Supreme Court of Virginia cases, *Jamerson* and *Wilkins,* hold the following: (1) as long as a challenged district meets the lowest numerical compactness score on the measures used in those cases and deemed acceptable for those unique districts based on that trial record, the challenged district is constitutionally compact irrespective of context; and (2) the constitutionally-mandated criterion of compactness is entitled to no greater weight than traditional or customary criteria and can, therefore, be subordinated to same. Stated differently, Defendant-Intervenors argue for a standard that eviscerates a constitutional mandate by suggesting that somehow it can be balanced away by mysterious applications of considerations not mandated by federal or state law and applied in ways known only to the members who drew and/or voted for the legislation. For the reasons set forth below, this is a seriously flawed analysis.

I. *Jamerson* and *Wilkins*

At the outset and discussed in further detail below, it is important to note the critical differences between these two cases and the one at bar. In both prior cases, at least one of the districts challenged on compactness grounds was a majority-minority district drawn to comply with the Voting Rights Act (VRA). It is well-accepted that voting rights districts can have lower compactness scores as a result of balancing an additional mandatory criterion, compliance with

the VRA. Much like the pieces of a puzzle, this necessarily impacts the compactness of directly adjacent districts as well. None of the challenged districts in this case is a voting rights district or are adjacent to a voting rights district, except for a shared border between challenged House District 72 and voting rights District 74, a border that's necessity is not disputed by Plaintiffs. No one claims that this border is a material factor influencing the bizarre shape of House District 72.

Thus, in *Jamerson* and *Wilkins* the legislature had to balance ***constitutional or statutory*** criteria ***against each other*** and then consider other legitimate objectives when drawing those challenged districts. Because constitutional and statutory criteria take precedence and must be adhered to, the balancing amongst those requirements is much more difficult. In this case, however, we have assumed all statutory and constitutional criteria were met except for compactness. Therefore, the legislature had to meet the constitutional criterion of compactness first before balancing the other legitimate considerations - such as preservation of existing districts, incumbency, etc. - not mandated by federal or state law. These "other legitimate considerations" are not on equal footing with the statutory and constitutional requirements. That cannot be under our law. As we have been recently reminded, the applicable Constitutional mandates bridle even our Chief Executive and they can never be subordinated to non-constitutional policy preferences. "It is emphatically the province and duty of the judicial department to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

It is like baking a cake. You must start with the necessary ingredients: (1) cake mix / equal population; (2) oil / VRA; (3) eggs / contiguity; and (4) water / compactness. Once those are in, you can add whatever you like - chocolate chips (maintaining communities of interest), sprinkles (minimizing precinct splits), food coloring (protecting incumbents); frosting (core retention), etc. - as long as it does not ruin the cake. In the districts challenged in this case, the

legislature ruined the cake. Instead of using the required amount of water - a necessary ingredient - they used too much of the added items!

A. *Jamerson*

Jamerson involved two Senate districts located in Southside Virginia. One of the districts was a majority-minority district drawn in order to comply with the VRA (District 18) with which the other district shared a significant border (District 15). Due to this factor and the location of these Districts (District 18 ran along Virginia's southern border), both experts in *Jamerson* "recognized that the mandatory constitutional requirements of equal representation and minority representation meant that rural districts, such as those in Southside Virginia, would compare unfavorably in compactness with urban districts, and with other rural districts that did not have large minority group populations." *Id.* at 515, 423 S.E.2d at 185. Those factors are not present in this case—not even close and no Defendants' expert contends otherwise—which makes comparisons of these districts unhelpful. Moreover and of critical importance, the Supreme Court's decision in *Jamerson* derived from and relied on that trial record, including the trial judge's judgment as to the credibility of the experts. *Id.* at 515, 423 S.E.2d at 185.

The Supreme Court in *Jamerson* quoted with approval that "legislative conclusions based on findings of fact are not immune from judicial review where they are arbitrary and unwarranted." *Id.*, 244 Va. at 509, 423 S.E.2d at 182 (*quoting Bristol Redevelopment & Hous. Auth. v. Denton,* 198 Va. 171, 176-177, 93 S.E.2d 288, 292 (1956)). "As a corollary, it is also settled that if the validity of such a determination is fairly debatable, the legislative determination will be upheld by the courts." *Id.* "Further, we also note the 'strong presumption of validity' attached to every statute and the requirement that it 'clearly' violate some constitutional provision before courts will invalidate it." *Id.* at 510, 423 S.E.2d at 182.

Without question, subordinating a constitutional requirement to other criteria that are not mandated by state or federal law is "arbitrary and unwarranted" and such an action clearly violates a "constitutional provision." *Id.* Thus, the only thing debatable is whether Plaintiffs will factually show - at trial - predominance, because that is what arose from the balancing process. Defendant-Intervenors have not presented any countervailing evidence (admissible or otherwise) to impair Dr. McDonald's conclusions. And even if they had it would only place material facts in dispute and bar summary judgment. There are suggestions from Defendants' experts that Dr. McDonald could have done some things differently but the weighing of that evidence requires a trial and the application of the tests Defendant-Intervenors advance.

"Nevertheless, when a legislative act is undertaken in violation of an existing ordinance, the board's 'action [i]s arbitrary and capricious, and not fairly debatable, thereby rendering the [legislative act] void and of no effect.'" *Newberry Station Homeowners Ass'n v. Bd. of Supervisors,* 285 Va. 604, 621. 740 S.E.2d 548, 557 (2013) (*quoting Renkey v. County Bd. of Arlington County*, 272 Va. 369, 376, 634 S.E.2d 352, 356 (2006)). Thus, should the Court find after the trial of this matter that the legislature's actions were "undertaken in violation of" the Constitution, the legislature's "action [i]s arbitrary and capricious, and not fairly debatable, thereby rendering the [legislative act] void and of no effect." *Id.*

B. *Wilkins*

Wilkins was a case where compactness was one of many violations alleged but where only three of the claims were actually submitted to the trial court for determination (others were racial gerrymandering and contiguity). The case involved various challenges to several districts on multiple grounds. The Supreme Court only directly addressed a compactness challenge as to one House district. Like one of the districts in *Jamerson,* the district challenged in *Wilkins* on

compactness grounds was a majority-minority district required by the VRA and was also being challenged on racial gerrymandering grounds. Again, this is not a factor present in the case at bar. As this Court knows, the only issue before it is compactness - undiluted by the other issues involved in prior cases. For that reason, making a district to district comparison is also not helpful here. This is especially true where the trial record prompted the Supreme Court to observe that "[t]he trial court did note, however, that 'there was no testimony that any particular district was unacceptably non-compact according to either of the measures applied by the experts." *Id.*, 264 Va. at 464, 571 S.E.2d at 108. The trial record here will be markedly different.

Defendant-Intervenors incorrectly cite *Wilkins* for the following statement "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.'" Defendant-Intervenors Memorandum in Support, p. 10 (citing *Wilkins*, 264 Va. at 463-64, 571 S.E.2d at 108 (emphasis added)). Nowhere does *Wilkins* (or *Jamerson* for that matter) support the notion that a constitutional requirement may be subordinated to other traditional redistricting criteria, or even "balanced" in some way "over" them. To the contrary, the Supreme Court of Virginia in *Wilkins* held as follows:

> We also note, as we did in *Jamerson*, that Article II, § 6 speaks in **mandatory terms**, stating that electoral districts "shall be" compact and contiguous. This directive, however, does not override all other elements pertinent to designing electoral districts. In making reapportionment decisions, the General Assembly is **required to satisfy a number of state and federal constitutional and statutory provisions in addition to designing districts that are compact and contiguous.** To do this requires the General Assembly to exercise its discretion in reconciling these often competing criteria.
>
> Finally, any purpose that may underlie the design of an electoral district, while relevant to challenges under other portions of the Constitution of Virginia as discussed below, is not determinative in a challenge based on Article II, § 6. Determinations of contiguity and compactness, as we said

> in *Jamerson*, are limited to consideration of the district from a spatial perspective, *id. at* 514, 423 S.E.2d at 184, taking into consideration the other factors which a legislative body **must** balance in designing a district.
>
> In summary, if the validity of the legislature's reconciliation of various criteria is fairly debatable and not clearly erroneous, arbitrary, or wholly unwarranted, neither the court below nor this Court can conclude that the resulting electoral district fails to comply with the compactness and contiguous requirements of Article II, § 6.

Id., 264 Va. at 462-463, 571 S.E.2d at 108 (emphasis added). The clarity of this passage is unassailable. The Supreme Court is addressing the obvious "require[ment]" that constitutional and VRA mandates must be balanced. Nowhere is anything else introduced as a permissible part of this equation. Then the language cited by Defendant-Intervenors follows this passage:

> As indicated above, the General Assembly **must** balance a number of competing constitutional and statutory factors when designing electoral districts. **In addition**, traditional redistricting elements not contained in the statute, such as preservation of existing districts, incumbency, voting behavior, and communities of interest, are **also** legitimate legislative **considerations**.

Id., 264 Va. at 463-464, 571 S.E.2d at 109 (emphasis added).[2] Thus, it is clear that the General Assembly *must* adhere to federal and state mandated requirements and may "in addition ... also" consider other criteria once those are met. Nothing in these cases suggests—nor could they—that the legislature can subject a constitutional mandate to second tier status because of the legislature's non-constitutional/non-VRA choices no matter what they are. It is a bit surprising that such an argument would even be made. "[L]egitimate legislative *considerations*" can never predominate over "constitutional and statutory factors" that "the General Assembly *is required* to satisfy." *Id.* (emphasis added).

[2] It seems clear that the omission of the words "or constitution" after "statute" in the second sentence is merely an oversight and does not dilute the guidance of this paragraph.

II. Other Cases

A. *Saunders* and *Davis*

Before *Jamerson* and *Wilkins*, there were two other cases that shed light on this analysis. While compactness is not their focus, these cases are the starting points for the opinions in *Jamerson* and *Wilkins*. In *Brown v. Saunders,* 159 Va. 28, 166 S.E. 105 (1932) the legislature's reapportionment and redistricting of the State into congressional districts was challenged. There the Supreme Court of Virginia held as follows:

> When a State legislature passes an apportionment bill, it must conform to constitutional provisions prescribed for enacting any other law, and whether such requirements have been fulfilled is a question to be determined by the court when properly raised.... The legal question involved is whether or not the act of the legislature is in conflict with the mandate of the Constitution.
>
> The duty of dividing the State into districts corresponding in number to the number of representatives to which Virginia is entitled by the reapportionment act of 1929 is, in a sense, political, and necessarily wide discretion is given to the legislative body. Section 55 of **the Constitution of Virginia places limitations on the discretion of the legislature**, and whether or not the act in question exceeds those limitations becomes a judicial question when raised by the proper parties in a proper proceeding.

Id. at 36, 166 S.E. at 107 (citations omitted) (emphasis added). The constitutional requirement that "every" district be compact places a limitation on the discretion of the legislature in this case. After the Court hears the evidence at trial, "whether or not the act in question exceeds those limitations becomes a judicial question." *Id.* While this is truly an unremarkable proposition, the Defendant-Intervenors seem not to accept it.

The Supreme Court of Virginia also held:

> 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. It must be a grave, palpable and unreasonable deviation from the principles fixed by the Constitution. No exact dividing line can be drawn.

Id. at 44, 166 S.E. at 110-111 (emphasis added). That is the test here too. Plaintiffs believe the evidence at trial will show that by subordinating a "limitation[] enumerated in the fundamental law of the land" the legislature's "deviation from the principles fixed by the Constitution" were "grave, palpable and unreasonable." *Id.*

The legislature's apportionment of congressional districts was also challenged in *Wilkins v. Davis,* 205 Va. 803, 139 S.E.2d 849 (1965). In *Davis*, the Supreme Court of Virginia directly addressed the "communities of interest" conundrum:

> These are some of the problems of redistricting. There is no denying that these and other problems exist and from the standpoint of community of interest alone this record would show little reason for disturbing the boundaries of the present districts.
>
> **But community of interest is not the only requirement, or even one of the requirements spelled out in the Constitution**. There must be, as nearly as practicable, an equal number of inhabitants in the districts.... Nor does the record show that the boundaries of these two districts, or of other districts, cannot be so arranged as to make districts that are contiguous and compact and at the same time contain as nearly as practicable an equal number of inhabitants. Such is the command of § 55 of the Virginia Constitution and since the Apportionment Act of 1952 does not now meet that requirement, it is invalid.

Id. at 811, 139 S.E.2d at 853-54 (emphasis added). The Supreme Court went on to hold:

> 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.

Id. at 813, 139 S.E.2d at 856. The same is true here. The legislature has discretion to include its customary or traditional redistricting criteria "so far as can be done without impairing the essential requirement" of compactness as mandated by the Virginia Constitution. *Id.*

B. Fairly Debatable Cases

As set forth in Defendant-Intervenors' Memorandum in Support (p. 9), the vast majority of cases addressing the "fairly debatable" standard arise from challenges to zoning ordinances. By the time these cases reach the Supreme Court for review, it is typical that a full evidentiary hearing occurred before the zoning board or the trial court. *See, e.g., Board of Supervisors v. Jackson,* 221 Va. 328, 269 S.E.2d 381 (1980); *County of Lancaster v. Cowardin*, 239 Va. 522; 391 S.E.2d 267 (1990); *Board of Supervisors v. Stickley,* 263 Va. 1, 556 S.E.2d 748 (2002). Thus in those cases - unlike this one - there is evidence before the Court from which to make a final ruling (summary judgment or otherwise). That is not the situation here.

III. Required Criteria that Must be Met during a Redistricting in Virginia

It is not contested that when drafting a redistricting plan legislators balance several different considerations and criteria. It is further not contested that equal population; compliance with the VRA; and compliance with the state constitutional requirement of contiguity are to be given priority over other criteria. What appears to be contested here is whether compliance with the state constitutional requirement of compactness should also be given the same priority over non-constitutional/non-VRA criteria (such as "communities of interest"). Why compactness would be treated any differently than the other state and federally mandated requirements is a mystery but that appears to be what Defendant-Intervenors suggest. On page 10 of their Memorandum in Support, Defendant-Intervenors state that "[c]riteria 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.'" (*citing Wilkins*, 264 Va. at 463-64, 571 S.E.2d at 108) (emphasis added). Given this astonishing (mis)treatment of a constitutional mandate, there is indeed a material dispute about how to interpret Virginia law and its application in this case.

While what constitutes a non-compact district in violation of the Constitution has heretofore lacked clear expression, that is not a sufficient basis for subordinating compactness to criteria not required by our state's highest law. As noted by Defendant-Intervenors' expert, Dr. Hofeller, and his colleagues: "The fact that compactness is a relative measure does not render it meaningless." Richard G. Niemi; Bernard Grofman; Carl Carlucci; Thomas Hofeller, *Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering*, 52 J. of Politics 1155, 1176 (1990). While Defendant-Intervenors might protest, the position they advocate comes dangerously close to rendering compactness meaningless and perhaps actually does so.

Article II, Section 6 of the Constitution of Virginia provides that "**Every** electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district." (Emphasis added). In the authoritative treatise on Virginia's current constitution, renowned professor A.E. Dick Howard wrote that the compactness requirement "is meant to preclude at least the more obvious forms of gerrymandering." 1 A.E. Dick Howard, Commentaries on the Constitution, 415 (1974). This is supported by Defendant-Intervenors' expert, Dr. Hofeller, and his colleagues: "On the other hand, compactness is supported by a number of scholars (e.g., Morrill 1981; Baker 1986, 1990) and by many in the general public (e.g., Horn et al. n.d.) as a prime defense against

gerrymandering." Richard Niemi, et al., *Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering*, 52 J. of Politics at 1156.

Thus, the constitutionally-mandated criterion of compactness serves a vital purpose - perhaps now more than ever in the increasingly partisan environment we live in and the computer-aided implementation of that partisanship into an effective dilution of the voting rights of large numbers of our citizens. Based on an overly simplistic reading of *Jamerson* and *Wilkins*, which were fact-specific rulings mostly regarding districts mandated by the VRA, Defendant-Intervenors argue here that Plaintiffs are not even entitled to a trial because the legislature rubber-stamped a numerical compactness requirement and that was all they were obligated to do. That is not and cannot be the law if the Constitution is to mean anything. Compactness must be given the same weight and priority as each of the other state constitutional requirements (equal population and contiguity). No more, but no less.

No one would seriously argue--including Defendant-Intervenors--that if a district is not contiguous or does not meet the equal population or VRA requirements, it is still constitutional because of the balancing of non-constitutional/non-VRA considerations lumped by Senate and House Resolutions under "communities of interest." Indeed, the Resolutions addressing redistricting criteria approved by both the House and Senate Committees on Privileges and Elections[3] specifically state that "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." Thus, Defendants seem to agree with Plaintiffs' position.

---

[3] Publicly available via the Division of Legislative Services website at:
http://redistricting.dls.virginia.gov/2010/Data/Ref/Criteria/Approved_House_criteria_3-25-11.pdf
http://redistricting.dls.virginia.gov/2010/Data/Ref/Criteria/Approved_Senate_criteria_3-25-11.pdf

Despite this, Defendant-Intervenors claim here that *Jamerson* and *Wilkins* allow them to subordinate compactness to traditional or customary redistricting criteria. By adding the word "compact" to the Constitution the framers obviously had something in mind. Any reading of *Jamerson* and *Wilkins* which holds that the legislature has boundless discretion to define "compact" is to say that the branch intended to be contained by that limitation has full authority to define its own constraints. Under that interpretation, the word "compact" is meaningless. That is clearly not what was intended by the Supreme Court of Virginia. In *Wise v. Bigger*, 79 Va. 269, 273-274 (1884). the Supreme Court of Virginia held:

> That the court must take notice of compliance, or non-compliance, with the constitution, in the mode and manner of enacting laws, as well as in the objects and provisions of the proposed laws, is a settled question. In *Wolfe et als. v. McCaull, Clerk, &c.*, 76 Va. 876, Judge Christian, in delivering the opinion of this court, says: "To enact laws or to declare what the law shall be, is legislative power; to interpret law--to declare what law is or has been--is judicial power. The power to declare what is the law of the state, is delegated to the courts. The power to declare what the law is, of necessity involves the power to declare what acts of the legislature are, and what acts of the legislature are not laws.

Plaintiffs concede that a bright line test to measure whether a district is sufficiently compact to meet constitutional requirements has not existed up to this case. That is largely because such an evaluation is context specific and requires flexibility and in large measure explains the expert testimony in prior cases. Plaintiffs also concede that their expert, Dr. Michael McDonald, has developed a test to assess compactness which provides the necessary flexibility. As noted by Defendant-Intervenors' expert, Dr. Hofeller, and his colleagues: "If compactness is to be more than an empty concept, some precise definition in the law would be useful." Richard Niemi, et al., *Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering*, 52 J. of Politics at 1177, fn18. Dr. McDonald has now provided one.

However, this test does not "replace" any legal standard of factual review which ultimately governs this case, as alleged by Defendant-Intervenors. Dr. McDonald merely provides the "precise definition" Defendant-Intervenors' expert sought 27 years ago, and raises a constitutional question after the legal standard for factual review is applied to decide the facts. The same software utilized by the General Assembly is used to draw his maps, the same measures to obtain compactness scores are employed, and some of the same so-called "traditional" redistricting criteria are applied in his Alternate Plan 2. He merely takes what has been around for years and brilliantly uses it to fill a void and provide the courts with a standard to require the legislature to adhere to the constitutional mandate of compactness.

IV. The Predominance Test

Dr. McDonald was asked to determine if priority had been given to the constitutional requirement of compactness or whether other criteria not mandated by federal or state law - typically called traditional or customary redistricting criteria - had predominated over compactness. Dr. McDonald uses the term "Required Criteria" to mean those criteria required by the Federal or Virginia Constitutions or the federal Voting Rights Act. Dr. McDonald uses the term "Discretionary Criteria" to refer to all criteria other than the Required Criteria that the legislature could conceivably have considered without any reference or regard to whether such criteria are considered by the law to be legitimate governmental interests in redistricting. These include such items identified by Defendant-Intervenors as preservation of existing districts, incumbency, voting behavior and communities of interest.

To answer the question posed Dr. McDonald compared the current House and Senate district maps to alternative House and Senate maps which equally follow the VRA, equal population requirements, the contiguity requirement, and which approximate the maximization

of compactness across all of the districts in the state. These maps (one for the House and one for the Senate) will be referred to as "Alternative Plan 1." Alternative Plan 1 retains the majority-minority districts drawn to comply with the VRA in the exact configuration as the current maps, abides by the contiguity requirement, and meets the equal population standards set by the respective committee Resolutions. While this plan creates single-member districts as required by the Resolutions, it pays no heed to the application of Discretionary Criteria that the Resolutions refer to as "communities of interest."

By using this alternate plan that only seeks to comply with the Required Criteria--including maximizing compactness--Dr. McDonald isolated the cause of the degradation of compactness from this ideally compact plan to the current plan. Therefore, any decrease in compactness cannot be attributed to other Required Criteria but only to the Discretionary Criteria. In comparing the challenged districts in the current plan to their alternative counterparts in Alternative Plan 1, Dr. McDonald looked at the composite compactness scores across all three measures used by the legislature and which appeared in the submission to the U.S. Department of Justice seeking preclearance of Virginia's 2011 redistricting plans (Reock, Polsby-Popper, Schwartzberg). He then compared them to the composite scores for the corresponding districts in Alternative Plan 1. He subtracted the composite compactness scores of the current challenged districts from the composite compactness scores of the alternative districts and divided the result by the alternative districts' scores.

The result is the percentage by which compactness has been degraded from the approximation of the ideal in order to meet the legislature's desired application of Discretionary Criteria. If the degradation of compactness is greater than 50%, Dr. McDonald concludes that Discretionary Criteria predominated over compactness. The calculations show that for each

challenged district the degradation of compactness is greater than 50%. As a result, Dr. McDonald opines that when the legislature balanced the various Discretionary Criteria against the Required Criterion of compactness, they allowed those Discretionary Criteria to predominate over the compactness requirement. Of course, Defendant-Intervenors essentially concede that point on page 10 of their Memorandum in Support ("[c]riteria 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.'" (*citing Wilkins*, 264, Va. at 463-64, 571 S.E.2d at 108) (Emphasis added)).

The beauty of Dr. McDonald's method is twofold: (1) it eliminates the need to inquire into any motive of the legislature, which is already mired by privilege issues; and (2) it provides the legislature with wide discretion and flexibility to achieve many of the Discretionary Criteria[4] that the General Assembly and courts have identified as traditional and legitimate goals--such as not splitting political subdivisions or precincts, as well as not pairing incumbents--as long as those goals do not predominate over compactness (again, this is assuming all other Required Criteria have also been met as was the case here).

To provide an example of this, Dr. McDonald also compared each of the challenged districts to their counterparts in a second alternative plan ("Alternative Plan 2"). Alternative Plan 2 equally follows the other Required Criteria by retaining the majority-minority districts drawn to comply with the VRA in the exact configuration as the adopted maps, abiding by the contiguity requirement, and meeting the equal population standards set by the respective legislative committee Resolutions. This plan also meets a number of traditional redistricting

[4] Plaintiffs should note that by not raising an issue at this stage as to whether all of the Discretionary Criteria employed by the General Assembly will survive constitutional challenge, Plaintiffs do not waive raising that issue at the appropriate time.

objectives referenced in the House of Delegates and Senate criteria Resolutions by splitting the same number or fewer political subdivisions (counties/cities) and voting precincts compared to the adopted plan. Alternative Plan 2 also refrains from pairing incumbents in the same district to the same degree as the current plan did when it was enacted. Finally, the districts in Alternative Plan 2 are on average much more compact than in the current plan, allowing the legislature substantial discretion to adjust boundaries even more before any degradation approaches 50%. Alternate Plan 2 demonstrates how certain redistricting considerations can be achieved without predominating over compactness. Thus, it is clear the predominance standard for compactness does not unduly hinder the legislature's pursuit of other legitimate discretionary redistricting criteria. The legislature can "balance" them as they see fit and decide what priority to accord each of them. What they cannot do is employ them so that they subordinate a constitutional requirement by predominating over it.

CONCLUSION

In prior litigation in Virginia and elsewhere and in scholarly publications, Plaintiffs believe there will be general agreement from the experts for all parties that no consensus exists for a specific **numerical** score from any measure below which a district would universally be deemed not compact. This has lead to the ironic result that the constitutional provision primarily there to prevent gerrymandering has been unable to erect a barrier to prevent it. Plaintiffs believe Dr. McDonald has developed the bright line that provides the constitutional standard to give life to this provision and follows the Supreme Court's rulings in *Jamerson* and *Wilkins.*

Plaintiffs reiterate that Defendant-Intervenors have not established a basis by which they are entitled to summary judgment nor a posture in which it is appropriate in this case. Wherefore, Plaintiffs respectfully request that the Court deny the Motion for Summary Judgment.

Dated February 20, 2017

Respectfully submitted,

RIMA FORD VESILIND, et al,
By Counsel

Wyatt B. Durrette, Jr., Esquire (VSB #04719)
Debbie G. Seidel, Esquire (VSB #23124)
Christine A. Williams, Esquire (VSB #47074)
J. Buckley Warden IV, Esquire (VSB #79183)
DurretteCrump PLC
1111 East Main Street, 16th Floor
Richmond, Virginia 23219
Telephone: (804) 775-6900
Facsimile: (804) 775-6911
wdurrette@durrettecrump.com
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of February, 2017, a copy of the foregoing was filed and served on the following counsel of record by mail with a courtesy copy sent by email:

Mark Herring Cynthia E. Hudson John W. Daniel II Heather H. Lockerman (VSB # 65535) Joshua D. Heslinga (VSB # 73036) Anna T. Birkenheier (VSB # 86035) Office of the Attorney General 202 North 9th Street Richmond, Virginia 23219 hlockerman@oag.state.va.us jheslinga@oag.state.va.us abirkenheier@oag.state.va.us *Counsel for Defendants*	Katherine L. McKnight (VSB # 81482) E. Mark Braden BAKER & HOSTETLER LLP 1050 Connecticut Avenue, N.W., Suite 1100 Washington, D.C. 20036 mbraden@bakerlaw.com kmcknight@bakerlaw.com *Counsel for Defendant-Intervenors*

Christine A. Williams, Esquire

EXHIBIT A

In The Matter Of:

Rima Ford Vesilind, et al v.
Virginia State Board of Elections, et al

Christopher Michael Marston
November 14, 2016

ZAHN
COURT REPORTING

208 E. Plume Street, Suite 214
Norfolk, Virginia 23510
tel: 757 627 6554 *fax:* 757 625 7077
email: info@zahncourtreporting.com

Original File Marston_Christopher 111416 ASCII.txt
Min-U-Script® with Word Index

sure what a decision would constitute or ...

Q Okay. Do you agree that there wasn't a particular consideration individually of each commission recommendation, they were all rejected because they didn't accomplish the political objectives of the caucus, which was to elect more Republicans?

A No.

Q You do not?

A There's a lot packed in there, and I can't say that I agree with all of it.

Q Okay.

A Did I say it? Two years is a long time.

MR. DURRETTE: Marston Exhibit 4.

(Marston Deposition Exhibit 4 marked for identification and is attached to the transcript.)

MR. MUELLER: Josh, for your reference, what's just been distributed is not Bates-numbered. It's Pages 135 and 136 from Christopher Marston's deposition conducted in the Bethune-Hill trial in 2015.

Q What I read was -- begins on Line 18, on Page 135.

A Uh-huh.

MR. RAILE: And I object to Lines 20

through 22 being brought in, on legislative privilege grounds.

Q You were under oath when you gave that testimony. Correct, Mr. Marston?

A Yes.

Q Are you now rejecting it?

A It certainly reflected my recollection in 2015. I don't have a specific recollection today of whether there was a particular consideration individually of each commission recommendation.

Q So when you gave that testimony in 2015, it was an honest statement based on your then existing recollection. Fair?

A Yes.

Q Okay.

A Given the context of the statement, I'm unsure if I was referring simply to options related to majority/minority districts and their number or all of the options ever contemplated by the commission.

Q Okay. Did you consider, if you recall, whether or not the districts, the House districts drawn by the commission, were more or less compact than the districts that were ultimately adopted by the House?

A I've reviewed it.

Q Specifically with regard to the testimony on Page 125, and your answer to the question regarding a general recollection as to this shift, you stated, "Generally it was our goal to make Republican districts as strong as possible, so I'm assuming that he felt that making that move would strengthen all the districts involved."

"QUESTION: When you say strengthen the districts, what do you mean?

"ANSWER: Make them such that the population had a majority of Republicans that would re-elect a Republican delegate."

When you gave that testimony, you were being truthful. Correct?

A Yes.

Q And if I ask you those questions today, you would give me the same testimony. Correct?

A Yes.

Q Okay. Let's go to House District 22, which should be the next one.

A So there's a bunch of 13. Twenty-two. There we go.

Q You have to get through 13, then you come to 22. And there should be three pages of 22. And

Q You produced it by more than half, using the nonconstitutional criteria.

Would you agree then that those nonconstitutional criteria predominated over compactness?

A I guess I have concerns about predominate. They certainly were relevant. But I can't say that compactness -- I mean, you've taken them all out of your base map.

Q Yes.

A So they can't predominate or not predominate, they don't exist?

Q Yes.

A When I add them back in, I don't know if they predominate over compactness or if they have a relevant weighting and they're about the same. Because compactness necessarily has to give way from that perfect example if you include the other factors. That doesn't mean the other factors predominate; it means that compactness wasn't the trump card.

Q Okay.

MR. DURRETTE: That's it.

A All right.

MR. DURRETTE: You have the ability, as

you undoubtedly know, to read and sign. Do you want to do that? The court reporter needs to know.

THE WITNESS: Yes, please.

COURT REPORTER: Mr. Raile, do you need a copy?

MR. RAILE: Yes, please.

COURT REPORTER: Mr. Heslinga, do you need a copy?

MR. HESLINGA: I am assuming that the others are ordering copies. And I will take a copy on the same turnaround as they are, yes.

MR. RAILE: Did you have any questions, Josh?

MR. DURRETTE: Oh, I'm sorry. I didn't give either one of you a chance to question.

MR. HESLINGA: That's all right. I don't want to ask any questions.

MR. RAILE: Same here. No questions.

(Off the record at 1:54 p.m.)

CERTIFICATE OF SHORTHAND REPORTER - NOTARY PUBLIC

I, Debra Ann Whitehead, the officer before whom the foregoing proceedings were taken, do hereby certify that the foregoing transcript is a true and correct record of the proceedings; that said proceedings were taken by me stenographically and thereafter reduced to typewriting under my supervision; and that I am neither counsel for, related to, nor employed by any of the parties to this case and have no interest, financial or otherwise, in its outcome.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed my notarial seal this 23rd day of November, 2016.

My commission expires:

September 14, 2018

NOTARY PUBLIC IN AND FOR THE

DISTRICT OF COLUMBIA

ACKNOWLEDGMENT OF DEPONENT

I, CHRISTOPHER MICHAEL MARSTON, do hereby acknowledge that I have read and examined the foregoing testimony, and the same is a true, correct and complete transcription of the testimony given by me and any corrections appear on the attached Errata sheet signed by me.

12/16/2016 _____

(DATE)

_____

(SIGNATURE)

ERRATA SHEET

Rima Ford Vesilind v. Virginia State Board of Elections

WITNESS: Christopher Michael Marston

Page	Line	Change	Reason
13	11	Change "conducted" to "contacted"	Transcription Error.
17	20-22	Change "constitutions" to "Constitution's".	Transcription Error.
74	25	Change "Rush" to "Rust"	Transcription Error.
86	17-19	Change "Spotsy" to "Spotsylvania".	Transcription Error.

Christopher Michael Marston

have created 13 African-American majority districts?

A Yes.

Q And did you recommend doing that?

A I'm sorry. I concluded that it was certainly possible to create 13 majority-minority districts, in the sense that there was at least a majority of Black voting population, which is 50 percent plus 1. This demonstrates you can do it with more than one. But my conclusion was, yes, you could draw 13 majority-minority districts.

Q And did you recommend doing that?

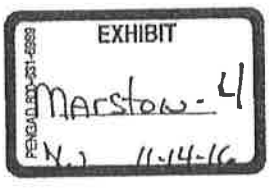
A I did not.

Q And this option, I take it, was ultimately rejected?

A All of the Commission's options were rejected.

Q Why was this option in particular rejected?

A There wasn't a particular consideration individually of each Commission recommendation; they were all rejected because they didn't accomplish the political objectives of the Caucus, which was to elect more Republicans.



Q Was there any consideration of whether the Voting Rights Act required the adoption of 13 majority-minority districts if feasible?

A Yes.

Q What was the conclusion in that regard?

A The Commission reached the same legal conclusion that we did, which is that it's not required under the non-retrogression standard.

Q You said the Commission reached that conclusion. What are you basing that on?

A The e-mail that you provided me where it says, although the non-retrogression standard of Section 5 does not bind the Commonwealth to create a 13th African-American majority district, the Commission determined that it would be informative to demonstrate how to create such a district.

Q Fair enough. It's right there in the text that they concluded with the proposed map, that that was their view.

I'm going to hand you what will be marked as Exhibit 21.