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' REPLY BRIEF
IN SUPPORT OF THEIR MOTION FOR SUMMARY JUDGMENT

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules

Other Authorities

INTRODUCTION

Plaintiffs may prevail if—and only if—the Court adopts their "new test," Opposition Brief ("Br.") at 2, that their expert agrees "was not applied to the challenged districts in *Jamerson* [*v. Womack*]" or in *Wilkins v. West*. Ex. A, McDonald Rebuttal at 6. If, by contrast, the Court agrees with Defendant-Intervenors that Plaintiffs' new "predominance" test is foreclosed, then it must reject Plaintiffs' claims. Without that test, Plaintiffs "simply have nothing that they could prove to convince the finder of fact that any triable issue remains about whether" the House of Delegates Challenged Districts are compact. *Jackson v. Middleton*, 90 Va. Cir. 279, 281 (Norfolk Cir. 2015). Thus, the parties agree that "there is indeed a material dispute about how to interpret Virginia law and its application to this case." Br. at 15. That is a classic *legal* dispute that is ripe for adjudication now, and because the Virginia Supreme Court chose the governing test decades ago, Plaintiffs' attempt to change it in Circuit Court must be rejected.

ARGUMENT

Jamerson v. Womack, 244 Va. 506, 517 (1992), and *Wilkins v. West*, 264 Va. 447, 460 (2002), directly address and establish what Plaintiffs call

"the standard for assessing constitutional compactness." Br. at 2. They hold that courts "must give proper deference to the wide discretion accorded the General Assembly in its value judgment of the relative degree of compactness required when reconciling the multiple concerns of apportionment." *Jamerson*, 244 Va. at 517. These cases do *not* differentiate one standard for assessing "constitutional compactness" and another for "reviewing legislative determinations of fact." Br. at 2. Rather, whether a district is compact is *itself* a "legislative determination[] of fact" that is "binding upon" the courts unless proven to be "clearly erroneous, arbitrary, or wholly unwarranted." *Wilkins*, 264 Va. at 481. There is no second step. Br. at 2.[1]

Thus, if the General Assembly declares that a district is compact, then it satisfies the constitutional requirement of compactness, unless the Plaintiffs can provide compelling evidence that the General Assembly's position is unreasonable. *Jamerson*, 244 Va. at 509. In that event, the General Assembly may respond with evidence of reasonableness and will prevail if the issue is "fairly debatable." *See id.* (citing *Barrick v. Bd. of*

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[1] *Brown v. Saunders*, 159 Va. 28, 35–36 (1932), does not, contrary to Plaintiffs' representation (Br. at 2) say anything about a bifurcated approach.

Sup'rs of Mathews Cnty., 239 Va. 628, 630 (1990)). That test applies here and Plaintiffs cannot meet it at trial. Plaintiffs' untested substitute for the controlling standard is not the law. And their predictable fallback to procedural sniping is unpersuasive and, besides, moot.

A. *Wilkins* and *Jamerson* Apply Here and Require Dismissal

Prior plaintiffs have twice tried to invalidate districts for alleged non-compactness and have twice failed, including in *Wilkins* where the Virginia Supreme Court unanimously rejected as clearly erroneous all trial-court findings of non-compactness. 264 Va. at 464–66. If "the facts in the case at bar are not distinguishable from the facts in" those cases, "the doctrine of stare decisis applies and is controlling." *Spicer v. Hartford Fire Ins. Co. of Hartford, Conn.*, 171 Va. 428, 437 (1938); *see also Selected Risks Ins. Co. v. Dean*, 233 Va. 260, 265 (1987).

The material facts are the same here and were identified with specificity in Defendant-Intervenors' opening brief. First, the compactness scores of the Challenged House Districts are all at or better than the compactness scores of the districts found to be compact in *Wilkins* and *Jamerson*. Summary Judgment Brief ("SJ Br.") at 15. Second, the actual boundaries of the districts are not in dispute, and the Court can review them in comparison to the districts found to be compact in *Wilkins* and

Jamerson. *Id.* And, third, there are no other facts amounting to "probative evidence of unreasonableness," *Barrick*, 239 Va. at 630, that might distinguish this case from *Wilkins* and *Jamerson*. All three assertions are now confirmed. Plaintiffs have since stipulated to (A) the compactness scores in this case and those in *Jamerson* and *Wilkins*, and (B) the boundaries of the Challenged Districts, and those stipulations, including maps of the Challenged Districts, are attached to this reply as Exhibit B. And Plaintiffs' brief does not identify any probative evidence of unreasonableness other than their expert's predominance analysis. There is therefore no triable issue of fact.

Plaintiffs focus their brief entirely on three genres of argument against a direct application of *Wilkins* and *Jamerson*, claiming: (1) *Wilkins* and *Jamerson* are consistent with a novel predominance test, (2) those cases are distinguishable because they applied a unique standard to majority-minority districts, and (3) first principles of constitutional preeminence and judicial review require a "predominance." All three are meritless.

1. *Wilkins* and *Jamerson* Preclude a Predominance Test

Plaintiffs' suggestion (at 6–7) that *Wilkins* and *Jamerson* can coexist with their "new" predominance test is specious. Those cases *upheld* districts that Plaintiffs' test would certainly condemn. Take, for example,

Wilkins's treatment of HD74. 264 Va. at 465. The 2001 version of that district was less compact than the Challenged House Districts, Ex. B, Stipulations, Ex. J11 & J12, because of "discretionary criteria":

- "the new District 74 contained 98.3% of the 1991 district" (core retention is "discretionary"),
- "[t]he change from the 1991 district was the reunification of a previously split precinct in Charles City County, the City of Hopewell precincts, and two precincts in Henrico County" (preservation of subdivisions and communities of interest is "discretionary"),
- "the incumbent member of the House of Delegates from House District 62 was a Republican. Removing the 'highly Democratic' Hopewell precincts from District 62 made that district a 'safer' Republican district" (partisanship considerations are "discretionary"),[2]
- "Maintaining an existing district in this case and removing the Hopewell precincts from the adjoining district in which the incumbent is Republican reflects the traditional redistricting considerations of incumbency" (which is "discretionary").

264 Va. at 465–66. *Wilkins* then expressly endorsed legislators' weighing of discretionary criteria against compactness: "This record reflects a balancing by the General Assembly of population equality, incumbency [discretionary], maintaining communities of interest [discretionary], and avoiding retrogression in designing District 74." 264 Va. at 466.

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[2] Plaintiffs quote a deposition transcript to suggest that the parties *might* dispute that partisan considerations were part of the 2011 redistricting, Br. at 5–6, but, if that were in dispute, it would not be material because that would not be a basis to distinguish *Wilkins* and *Jamerson*.

Plaintiffs' assertions that *Wilkins* simply could not mean what it says, Br. at 11, miscomprehend the law in this area (and how legal requirements operate generally, *see infra* at A.3). Even a requirement as clear-cut as the equal-protection rule that voting districts be "as nearly of equal population as is practicable," *Reynolds v. Sims*, 377 U.S. 533, 577 (1964), allows leeway for states to balance "rational state policy" against mathematical equality, *Voinovich v. Quilter*, 507 U.S. 146, 161 (1993). That is the holding in *Brown v. Saunders*, 159 Va. 28, 36 (1932), which recognized that the "*custom* to refrain from dividing any county or city into separate districts" may justify deviations from the equal-population *requirement*, that only "a grave, palpable and unreasonable deviation from" equality "would justify or warrant an application to a court for redress," and that "*[n]o exact dividing line can be drawn*" (emphasis added). *See also Wilkins v. Davis*, 205 Va. 803, 806 (1965) (same).[3] This leeway is built in to the requirement *itself*

[3] These cases also emphasize that redistricting "is, in a sense, political, and necessarily wide discretion is given to the legislative body." *Brown*, 159 Va. at 36, *see also Jamerson*, 244 Va. at 510; *Chapman v. Meier*, 420 U.S. 1, 27 (1975); *Karcher v. Daggett*, 462 U.S. 725, 753 (1983) (Stevens, J., concurring); *White v. Weiser*, 412 U.S. 783, 795–96 (1973); *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973); *Growe v. Emison*, 507 U.S. 25, 33 (1993). The judiciary should proceed in this area only with "extraordinary caution," *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

and therefore the requirement is not violated by the balancing and weighing that the requirement *itself* allows. These cases refute both Plaintiffs' "predominance" test and their 50% dividing line. Br. at 12–13.

To be sure, at some point, a district would be sufficiently non-compact that the requirement would not be satisfied, but that was not the case as to HD74 because the district "*is within acceptable objective measures of compactness*." 264 Va. at 466 (emphasis added). All of the Challenged House Districts are compact as well because the scores are indistinguishable or better than those of HD74 (and the other districts upheld in the past), and, under the principle of *stare decisis*, the legislature's determination of compactness is reasonable.[4]

2. The Compactness Standard of *Wilkins* and *Jamerson* Is Race-Neutral

Plaintiffs' only attempt to distinguish *Wilkins* and *Jamerson* factually is founded on *Plaintiffs'* decision to challenge majority-white and not majority-black districts, but the argument that Virginians may be subject to different

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[4] Plaintiffs suggest that their expert will testify that the districts are *not* within acceptable measures of compactness, Br. at 10, but, even if he does, his word does not create *stare decisis*. *See, e.g.*, *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014) ("[A] district court cannot declare a statute unconstitutional just because he thinks (with or without the support of a political scientist) that the dissent was right [in binding precedent] and the majority wrong'").

redistricting standards on the basis of race was rejected by the U.S. Supreme Court as "bear[ing] an uncomfortable resemblance to political apartheid." *Shaw v. Reno*, 509 U.S. 630, 647 (1993). Plaintiffs erroneously assert that "[i]t is well accepted that voting rights districts can have lower compactness scores" than other districts, Br. at 6, but if that were true, they would have authority, and they cite none. In fact, the U.S. Supreme Court conditioned the creation of majority-minority districts under the Voting Rights Act (VRA) on a demonstration that the resulting district would be "geographically compact," *Thornburg v. Gingles*, 478 U.S. 30, 50 (1986), and has found that a non-compact district does *not* satisfy the majority-minority requirement, *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 430–31 (2006).

Perhaps more importantly, Plaintiffs' *ipse dixit* rule violates the U.S. Supreme Court's holding that subordination of traditional redistricting principles like "*compactness*" to racial considerations renders a district presumptively unconstitutional because differing compactness (and other) standards for different racial groups is "offensive and demeaning." *Miller v. Johnson*, 515 U.S. 900, 912 (1995) (emphasis added); *see also Shaw v. Reno*, 509 U.S. at 647. The way for states to avoid strict scrutiny while drawing VRA districts is "by respecting *their own* traditional districting

principles," including compactness, *e.g.*, *Bush v. Vera*, 517 U.S. 952, 978 (1996) (emphasis added), so the view that compactness standards are *different* based on race is not "accepted," (Br. at 6); it has been anathematized.[5]

These governing principles disprove Plaintiffs' assertion (Br. at 9–10) that the districts in *Wilkins v. West* were upheld because they were majority-minority districts, rather than because they satisfied Article II, § 6 of the Virginia Constitution. To the contrary, *Wilkins* found that race did not predominate in these districts (in a parallel racial-gerrymandering analysis), *see Wilkins*, 264 Va. at 470–79, meaning that traditional criteria, not racial criteria, governed their respective configurations and borders. *Bush*, 517 U.S. at 978. The section on compactness does *not* suggest that different standards apply based on the race of a district's residents or that the standard would not apply to other districts in the future. *Wilkins* at 465.

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[5] Moreover, a non-compact district can rarely be narrowly tailored under the VRA to survive strict scrutiny because of the compactness requirement under Section 2, *see, e.g.*, *Shaw v. Hunt*, 517 U.S. 899, 916 (1996), and because the Department of Justice is not inclined to preclear districts under Section 5 that "ignore[] other relevant factors such as compactness and contiguity." Guidance Concerning Redistricting Under Section 5 of the Voting Rights Act, 76 Fed. Reg. 7470, 7472 (Feb. 9, 2011).

Moreover, Plaintiffs' theory does not explain SD15 in *Jamerson*, which was not drawn as a VRA district, yet satisfied the compactness standard. *See* Br. at 8. Plaintiffs claim that its boundaries were controlled by a neighboring VRA district, but it only shared *one* border with that district and it had substantial open geography to utilize on the other boundary to the North. *See* SJ Br. Ex. 1. *Jamerson* did not even hint that the compactness standard would have been different had the neighboring district been majority white.

3. Constitutional and Statutory Requirements Need Merely Be "Satisfied"; "Predominance" Is Not Required

Plaintiffs focus the remainder of their opposition on the law and ask the Court to adopt a "new" predominance test, which they find self-evident in *Marbury v. Madison*'s dictum that "[i]t is emphatically the province and duty of the judicial department to say what the law is." 5 U.S. 137, 177 (1803); *see* Br. at 7. But neither Plaintiffs, nor their counsel, nor their expert are the "judiciary"; that distinction belongs to the Virginia Supreme Court and it already said "what the law is" in *Wilkins* and *Jamerson*.

Wilkins and *Jamerson* were rightly decided, and Plaintiffs are tilting at windmills in asking the Court to hold that "legitimate legislative considerations can never predominate over constitutional and statutory

factors that the General Assembly is required to satisfy." Br. at 7 (quotations and alterations omitted). This is neither a tenable reading of Article II, § 6, nor is it correct in any other context.

Virginia's constitutional compactness requirement differs from most legal requirements because it "depend[s]" upon "determinations of fact." *Jamerson*, 244 Va. at 509. Assessing compliance with, for instance, the Recess Appointments Clause is, as a factual matter, as easy as identifying whether an appointee was approved by the Senate, and the difficulty arises from the *legal* question of when approval is *required*. *See Nat'l Labor Rel. Bd. v. Noel Canning*, 134 S. Ct. 2550, 2557 (2014). By contrast, a requirement, say, that pillows used in state-run hospitals must be "soft" or that state-run museums must conform to "traditional architectural norms" is inherently fact-laden and may be a matter of context-specific expertise. Virginia courts interpret such provisions by reference to the "fairly debatable" standard of deference, and the finding of the requisite government actor "bind[s] the courts" in the ordinary case. *Jamerson*, 244 Va. at 182.

That deference is "what the law is" in Virginia, and judicial deference to other branches is neither unusual nor a threat to the principle of judicial review. *See, e.g., City of Arlington, Tex. v. Fed. Comm. Comm'n*, 133 S. Ct.

1863, 1871 (2013). In fact, "[s]ometimes[...] the law is that the judicial department has no business entertaining the claim of unlawfulness—because the question is entrusted to one of the political branches or involves no judicially enforceable rights."[6] *Vieth v. Jubelirer*, 541 U.S. 267, 277 (2004).

To be sure, *Jamerson* and *Wilkins* do not "hold[] that the legislature has boundless discretion" in deciding whether or not a district is compact. (Br. at 17). They defer *unless* the decision is unreasonable: a pillow is not even arguably "soft" if it is filled with marbles, a museum does not arguably adhere to "traditional architectural norms" if it is built with toothpicks, and a voting district is not arguably "compact" if it is only as wide as a freeway and extends across the state. *See Shaw v. Reno*, 509 U.S. at 635–36. The difference between Defendant-Intervenors and Plaintiffs, then, is that Plaintiffs see in fact-bound words like "compact" a license for judicial

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[6] If this were a case of first impression, the compactness requirement would be a strong candidate for non-justiciability, *see Vieth*, 541 U.S. at 277–78, because of the textual commitment of redistricting to the General Assembly, the inherent policy choice in assessing what level of compactness is appropriate, the lack of clear standards for assessing compactness, and the embarrassment of judicial intrusion into the process. The "fairly debatable" standard is therefore a *compromise* for what could as easily be a complete bar to the courthouse for these Plaintiffs.

usurpation of *the entire redistricting process*, including by implementing their regime set forth on pages 18 through 21 of their brief. *See also* Ex. A, Rebuttal at 2. In contrast, Defendant-Intervenors see the inherent ambiguity as creating legislative discretion on an inherently political matter that is not subject to review unless something has plainly gone awry.

Jamerson and *Wilkins* side with Defendant-Intervenors. Under their holdings, the General Assembly has discretion, not only in identifying which districts are and are not compact, but also in identifying, "in its value judgment," "the relative degree of" adherence "required," *Jamerson*, 244 Va. at 517—*i.e.*, in answering the question "how soft is 'soft' enough?" "how traditional is 'traditional' enough?" or, in redistricting, "how compact is 'compact' enough?" Under that standard, the *Wilkins* plaintiffs were soundly defeated by a unanimous vote with every last factual finding in their favor being overturned as clearly erroneous.[7] What material *fact* makes this case different? Plaintiffs cite none.

Moreover, even if the compactness requirement did not "depend" upon "determination[s] of fact," *Jamerson*, 244 Va. at 509, it would not

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[7] This defeats Plaintiffs' claim that *Wilkins* was a "fact-specific" ruling with no other application. Br. at 16. In "fact-specific" cases, trial courts' findings are affirmed, rather than being unanimously reversed.

imply a "predominance" test because the satisfaction of a legal requirement is a binary on/off switch and is judged by what it requires or prohibits, not by gradation comparison with other "factors" or "ingredients" or "considerations." If the mandate is satisfied, it is of no import whether it is "the most frequent or common" consideration, whether it has "superior strength," whether it "hold[s] advantage in numbers of quantity," Ex. A at 1 (quoting *Merriam-Webster Dictionary*), or whether it is the legislature's "overriding desire." *Miller*, 515 U.S. at 917 (defining "predominance").

A government actor's respective mandatory and discretionary acts are therefore not "like baking a cake" with a careful mix of "ingredients" under which courts forbid "too much" attention to discretionary ones. Br. at 7. The only recipe from Plaintiffs is one for absurd results when applied to *reality.* After all, a government actor's so-called "discretionary" functions are frequently its top priority—which is why the government actor has *discretion* in carrying it out in the first place. For example, the Food and Drug Administration has authority to investigate and punish violations of food and drug law, which is among its most important tasks. *See* 21 U.S.C. § 372. But this authority is *discretionary*, not *mandatory*. *See Heckler v. Chaney*, 470 U.S. 821, 835 (1985). Thus, under Plaintiffs' view, a *mandatory* requirement under, *e.g.*, the Paperwork Reduction Act, *see* 44 U.S.C.

§ 3507, would have to be the FDA's "overriding desire" and "most frequent or common" consideration as compared to its efforts in enforcing food and drug law. That regime would, of course, be backwards, and not within the judiciary's preview to enforce, and certainly not through a percentage test governing allocation of its resources. Plaintiffs may find "beauty" in such rank judicial activism, Br. at 20, but it has no precedent in American law.,

The proposed "predominance" rule is therefore "both dubious and severely unmanageable." *Vieth*, 541 U.S. at 286 (rejecting proposed "predominance" to adjudicate allegedly partisan redistricting). Plaintiffs cite *no* cases in defending it.[8] In adjudicating whether a "mandatory" requirement is satisfied, the courts' role instead is to identify whether that requirement is satisfied, as adjudicated on a case-by-case basis, with factually similar cases receiving equivalent treatment. *Spicer*, 171 Va. at 437. The relevant standards for this case have been developed in two binding cases, and that resolves the matter.

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[8] The use of a predominance test in racial-gerrymandering claims is an anomaly, SJ Br. at 13–14, and these cases are only relevant here insofar as they refute Plaintiffs' advocacy for race-based districting, *see supra* A.2.

B. There Is No Procedural Barrier To Summary Judgment

Having no facts or law to pound, Plaintiffs pound the table. They claim that this motion is procedurally improper because of Defendant-Intervenors' submission of affidavits, purported failure to file a separate statement of undisputed facts, and citation of Complaint paragraphs. Br. at 3–6. As discussed below, Defendant-Intervenors' motion is procedurally proper, but these issues are largely moot because Plaintiffs have since agreed to stipulations on the compactness scores and maps of the Challenged Districts and the districts upheld in *Wilkins* and *Jamerson*, and these are attached as Exhibit B. The compactness requirement dictates only "spatial restrictions in the composition of electoral districts," *Jamerson*, 244 Va. at 514, and the compactness scores of the Challenged House Districts are the same as or better than those of previously upheld districts.

Moreover, Plaintiffs' brief does not even attempt to identify probative evidence of unreasonableness (other than evidence tied to their "predominance" test), which is their burden. *Bd. of Sup'rs of Fairfax Cnty. v. Jackson*, 221 Va. 328, 333 (1980). Therefore, the affidavit of Delegate Jones, which pertains to the second step of the fairly debatable test, SJ Br. 18–20, and the affidavit of Dr. Hofeller, which authenticates compactness scores, are now largely superfluous.

To the extent these issues are not moot, consideration of affidavits is proper on summary judgment and is routine in Virginia Supreme Court cases. *See American Safety Casualty Insurance Co. v. C.G. Mitchell Construction, Inc.*, 268 Va. 340, 346 (2004); *Nationwide Mut. Ins. Co. v. Smelser*, 264 Va. 109, 112 (2002); *Stone v. Alley*, 240 Va. 162, 163(1990); *Va. Capital Bank v. Aetna Cas. & Sur. Co.*, 231 Va. 283, 284 (1986); *Bloodworth v. Ellis*, 221 Va. 18, 20(1980); *see also West v. Chandler*, 14 Va. Cir. 433, 433 (Henrico Cnty. Cir. 1976). The consideration of affidavits follows from the canon of construction *expresio unius exclusion alterius*: Virginia Supreme Court Rule 3:20 specifically mentions the prohibition against "discovery depositions" but does not explicitly prohibit affidavits. *Tri-Port Terminals, Inc. v. Hitch S. Branch*, 87 Va. Cir. 314, 318 (Chesapeake Cir. 2013); Middleditch & Sinclair, Va. Civil Procedure 11.7 (1992). These principles also resolve Plaintiffs' motion to strike, which should be denied.[9]

Plaintiffs' argument that Defendant-Intervenors should have filed a statement of undisputed facts attempts to smuggle local federal district

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[9] *Town of Ashland v. Ashland Inv. Co.*, 235 Va. 150, 154 (1988), does not hold that affidavits may not be considered; the Court *did* consider an affidavit, but rejected summary judgment because there was a material dispute of fact about the content attested to in that affidavit. Here, Plaintiffs have not contested any fact in any affidavit.

court rules into this Court, and they cite no rule requiring such a statement. Br. at 3. Suffice it to say, Defendant-Intervenors' burden of establishing the nonexistence of a genuine issue has been satisfied, *see Hair Studio 54 v. Customer Commercial Interiors, Inc.*, 79 Va. Cir. 143, 144 (Fairfax Cnty. Cir. 2009); *Farmers and Merchants Nat'l Bank of Hamilton v. Williams*, 30 Va. Cir. 167, 168 (Loudoun Cnty. Cir. 1993); *O'Brien v. Snow*, 215 Va. 403, 405 (1974), when the "spatial" configurations of all relevant districts have been stipulated and are the lynchpin of the analysis.

Finally, Plaintiffs quarrel with Defendant-Intervenors' references to their Complaint, but these references were made on the assumption that Plaintiffs would attempt to take advantage of Virginia's rule allowing references to the Complaint to create material issues of fact on summary judgment. *See* Va. S. Ct. R. 3:20; *Andrews v. Ring*, 266 Va. 311, 318 (1974). Plaintiffs have not cited their Complaint to create any material issues of fact, so Defendant-Intervenors' efforts to resolve potential concerns that the Complaint *might* create a material dispute were unnecessary.[10]

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[10] Plaintiffs complain that Defendant-Intervenors did not attach *Plaintiffs'* expert report, Br. at 1, but if they thought that report created a material

CONCLUSION

For these reasons, and those in their opening brief, Defendant-Intervenors respectfully request that summary judgment be entered in their favor.

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dispute of fact, *they* could have brought it to the Court's attention. For the sake of completeness, Defendant-Intervenors have attached Dr. McDonald's initial designation as Exhibit C to this Reply.

Dated: February 24, 2017

Respectfully submitted,

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

By Counsel

Richard B. Raile (VSB No. 84340)
Katherine L. McKnight (VSB No. 81482)
E. Mark Braden (*Pro Hac Vice*)
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, NW
Suite 1100
Washington, DC 20036
Telephone: 202.861.1500
Facsimile: 202.861.1783
rraile@bakerlaw.com
kmcknight@bakerlaw.com
mbraden@bakerlaw.com

Counsel to the Virginia House Of Delegates and Virginia House Of Delegates Speaker William J. Howell

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Defendant-Intervenors' Reply Brief in Support of Defendant-Intervenors' Motion for Summary Judgment was sent via e-mail and first class mail, postage prepaid, on the 23rd day of February, 2017 to the following:

Wyatt B. Durrette, Jr., Esq.
Debbie G. Seidel
Christine A. Williams, Esq.
J. Buckley Warden IV
DURRETTECRUMP PLC
1111 East Main Street, 16th Floor
Richmond, Virginia 23219
Telephone: (804) 775-6900
Facsimile: (804) 775-6911
wdurrette@durrettecrump.com
cwilliams@durrettecrump.com

Counsel to Plaintiffs

Mark Herring
Cynthia E. Hudson
John W. Daniel
Heather H. Lockerman
Joshua D. Heslinga
Anna T. Birkenheier
VIRGINIA ATTORNEY GENERAL'S OFFICE
202 NORTH 9TH STREET
Richmond, Virginia 23219
hlockerman@oag.state.va.us
jheslinga@oag.state.va.us
abirkenheier@oag.state.va.us

Counsel to Defendants

Richard B. Raile (VSB No. 84340)
Katherine L. McKnight (VSB No. 81482)
E. Mark Braden (*Pro Hac Vice*)
Richard B. Raile (VSB No. 84340)
BAKER & HOSTETLER LLP
1050 Connecticut Avenue, NW
Suite 1100
Washington, DC 20036
Telephone: 202.861.1500
Facsimile: 202.861.1783
rraile@bakerlaw.com
kmcknight@bakerlaw.com
mbraden@bakerlaw.com

Counsel to the Virginia House Of Delegates and Virginia House Of Delegates Speaker William J. Howell