IN THE

# Supreme Court of Virginia

RECORD NO. _____

RIMA FORD VESILIND, *et al.*,

*Petitioners,*

v.

VIRGINIA STATE BOARD OF ELECTIONS, *et al.*,

*Respondents.*

## PETITION FOR APPEAL

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2. Assuming the trial court shifted the burden, it erroneously found without analysis that the evidence produced by Defendants and Defendant-Intervenors sufficed to make the redistricting decision fairly debatable for the Challenged Districts. [Error Preserved at: 3/13/17 Trial Transcript at 12-18, 285-300; 3/15/17 Trial Transcript at 738-775, 802-806; Memorandum in Opposition to Motion for Summary Judgment at 2, 8-11; 2/28/17 Hearing Transcript at 24-34].

## III. NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

This case addresses what may be the most sinister threat to representative democracy in the modern era--the creation of artfully crafted legislative districts that allow legislators to pick their voters instead of the other way around. Plaintiffs are residents of eleven such districts that are challenged in this case. On September 14, 2015, Plaintiffs filed their Complaint against the Virginia State Board of Elections ("VSBE"), James B. Alcorn in his official capacity as Chairman of VSBE, Clara Belle Wheeler in her official capacity as Vice-Chair of VSBE, Singleton B. McAllister in her official capacity as Secretary of VSBE, the Virginia Department of Elections ("VDE"), and Edgardo Cortes in his official capacity as Commissioner of VDE ("Original Defendants") for declaratory judgment and other equitable relief, seeking a judgment that the State House of Delegates and Senate

districting plans, and specifically House of Delegates Districts 13, 22, 48, 72, and 88, and Senate Districts 19, 21, 28, 29, 30, and 37 (the "Challenged Districts") violate the Constitution of the Commonwealth of Virginia.

The lawsuit was filed under Article II, § 6 of the Virginia Constitution alleging that when the General Assembly drew the 2011 House and Senate district plans, it did not make a good-faith effort to draw compact districts and instead subordinated the constitutional requirement of compactness to other non-constitutional political and policy concerns. Article II, § 6 dictates three and only three requirements the Legislature must follow when drawing legislative districts. Districts must be 1) contiguous; 2) compact; and 3) as nearly equal in population as is practical. These three requirements--in addition to the federal "one person, one vote" and Voting Rights Act ("VRA")--occupy a special status with unique authority over the Legislature. While the Legislature may consider--"balance"--other rational public policy considerations, the mandates of the United States and Virginia Constitutions can never be subordinated to those considerations.

The Virginia House of Delegates and its Speaker Delegate William J. Howell (hereinafter the "House") intervened. The Attorney General's office represented the Original Defendants, but defense counsel decided that the Attorney General's office would defend the Senate plan and the House's counsel would defend the House plan. As such, actions taken on behalf of the Attorney General

will be referred to as the "Senate" below. When discussed collectively, the House and the Senate will be referred to as "Defendants".

A discovery dispute regarding the scope of the legislative privilege was decided by this Court on September 15, 2016. *See Edwards v. Vesilind*, 292 Va. 510, 790 S.E.2d 469 (2016). The House filed a Motion for Summary Judgment that was fully briefed. Plaintiffs also filed a Motion to Strike the House's supporting Affidavits. On February 28, 2017, a hearing was held on these Motions. Ruling from the bench, Judge Marchant denied the Motion for Summary Judgment, granted the Motion to Strike, and issued an order on March 2, 2017.

The Senate filed a Motion *in Limine* to exclude certain testimony of Plaintiffs' expert witness, Dr. Michael McDonald, to which the House joined by filing a brief in support. Plaintiffs filed a Memorandum in Opposition. On March 2, 2017, a hearing was held. Judge Marchant took the Motion *in Limine* under advisement and issued an order that same day setting forth the ruling.

A trial was held on March 13, 14, and 15, 2017. While the Senate adopted the House's evidence, nothing either side produced was relevant to the other's redistricting plan. At the close of Plaintiffs' case, Defendants made a Motion to Strike which was denied. 3/13/17 Trial Transcript (hereinafter "TT") at 278-301. That Motion was renewed at the close of all evidence and again denied, because Plaintiffs had met their burden of presenting a *prima facie* case. 3/15/17 TT at 724,

806-807. The Motion *in Limine* was likewise denied after the close of all evidence. *Id.* at 729-730. On March 31, 2017, the trial court issued its final "Opinion and Order" finding in favor of the Defendants (hereinafter cited as "Op.").

Pursuant to Rule 5:9 of this Court, Plaintiffs timely filed their Notice of Appeal on April 26, 2017.

## IV. STATEMENT OF FACTS

The parties stipulated to the following facts (P1): On February 3, 2011, the U.S. Census Bureau released decennial census data showing that Virginia's House of Delegates and Senate Districts needed to be redistricted. In 2011, Virginia was a covered jurisdiction under § 5 of the VRA. On March 25, 2011, the Senate and House Committees on Privileges and Elections approved their versions of Committee Resolution No. 1 containing "District Criteria" which allegedly governed their respective redistricting process (hereinafter referred to jointly as "Resolutions" and individually as "House Resolution" or "Senate Resolution"). Exhibits J24 (Senate), J25 (House) (in Exhibit P1).

On April 11, 2011, the General Assembly passed HB 5001 setting forth redistricting plans for the House and Senate, which then-Virginia Governor Robert McDonnell vetoed. Exhibits J26-27. On April 28, 2011, the General Assembly passed HB 5005, which set forth redistricting plans for the House and Senate, and became law when signed by the Governor (the "Enacted Plans"). Exhibits J28-29.

Virginia submitted the Enacted Plans to the U.S. Department of Justice ("DOJ") for preclearance. The Reock, Polsby-Popper, and Schwartzberg measures of compactness appeared in the submission to the DOJ. Exhibits J32-33.

On September 14, 2015, Plaintiffs filed their Complaint alleging that the Challenged Districts violate the compactness clause of the Virginia Constitution. The parties identified Drs. Michael McDonald (Plaintiffs), Thomas Hofeller (House), and M.V. "Trey" Hood III (Senate) as expert witnesses. The parties stipulated that each was qualified as an expert in the field of redistricting. Exh. P1.

The parties also stipulated to the Reock, Polsby-Popper, and unadjusted Schwartzberg (before conversion to a 0 to 1 scale like Reock and Polsby-Popper) compactness scores[1] for the (1) 2001 ("Benchmark") plans; (2) 2011 Enacted Plans; and (3) Plaintiffs' Alternative Plans 1 & 2, as generated in the Maptitude for Redistricting software's standard compactness report. Exhibits J2-9. They further stipulated that Exhibit J10 is a true and accurate copy of tables and figures submitted into evidence in *Wilkins v. West* and that Exhibit J11 summarizes the Reock and Polsby-Popper scores from Exhibit J10 for the districts at issue in *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*").

The parties stipulated to additional materials found in Trial Exhibit P1.

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[1] The lower the number on the scale from 0 to 1 the less compact the district is.

## A. Plaintiffs' Evidence at Trial

Plaintiffs' case consisted of two witnesses, Nick Mueller and Dr. McDonald, and exhibits. Mr. Mueller assisted Dr. McDonald's work, including the creation of the maps for the Alternative Plans, and was therefore called to authenticate certain materials. 3/13/17 TT at 43-82, P33-44, P47, P56-P66. Dr. McDonald testified about his methodology for measuring constitutional compactness and his conclusions, which were the subject of the Motion *in Limine*. *Id.* at 143-208.

Dr. McDonald testified that he was asked to determine if priority was 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 - predominated over compactness. *Id.* at 167-175. "Required Criteria" means those criteria required by the Federal or Virginia Constitutions or the federal VRA. "Discretionary Criteria" refers to all other criteria that the Legislature could conceivably have considered. These criteria are defined in the Resolutions as "communities of interests" to "include, among others, economic factors, social factors, cultural factors, geographic features, governmental jurisdictions and service delivery areas, political beliefs, voting trends, and incumbency considerations." J24, J25.

To answer the question posed, Dr. McDonald compared the Enacted Plans to alternative House and Senate maps which follow the Enacted Plans exactly as to

the VRA, equal population, and contiguity requirements, and which approximate the maximization of compactness across all of the districts in the state. *Id.* at 159, 167-170, 173-175. These maps (one each for the House and Senate) are referred to as "Alternative Plan 1." J14. Alternative Plan 1 retains the majority-minority districts drawn to comply with the VRA in the exact configuration as the Enacted Plan, abides by the contiguity requirement, and meets the equal population standards set by the respective Resolutions. In order to maximize compactness, it pays no heed to the application of Discretionary Criteria.

By using these alternate plans that only seek to comply with Required Criteria--including maximizing compactness--Dr. McDonald testified that he isolated the cause of degradation of compactness from these ideally compact plans to the Enacted Plans. 3/13/17 TT at 175. Therefore, any decrease in compactness cannot be attributed to other Required Criteria but only to Discretionary Criteria. In comparing the Challenged Districts in the Enacted Plans to their alternative counterparts[2] in Alternative Plan 1, Dr. McDonald looked at the composite compactness scores across all three measures[3] apparently used by the Legislature and contained in the DOJ submission (Reock, Polsby-Popper, Schwartzberg). *Id.* at

[2] Districts were matched based on the most common population shared. *Id.* at 56,
[3] There was testimony that only Reock and Polsby-Popper were used by the House. As such, Dr. McDonald also did his analysis using only these two scores and the compactness degradation gets worse-favoring the Plaintiffs-when Schwartzberg is eliminated. *Id.* at 175-176, P46.

165-166. He then compared them to the composite scores for the corresponding districts in Alternative Plan 1. He subtracted the composite compactness scores of the Challenged Districts from the composite compactness scores of the alternative districts and divided the result by the alternative districts' scores. *Id.* at 176-180, 185, 190, 206-207; P33-34, P37-38, P43-44, P46-47.

The result is the percentage by which compactness was degraded (or decreased) from the approximation of the ideal to meet the Legislature's desired application of Discretionary Criteria. If the degradation of compactness is greater than 50%, Dr. McDonald concluded that Discretionary Criteria predominated over compactness, so compactness obviously could not have been given priority. *Id.* The calculations show that for each Challenged District the degradation of compactness is greater than 50%. *Id.* at 176-193. As a result, Dr. McDonald opined that when the Legislature balanced the various Discretionary Criteria against the Required Criterion of compactness, they allowed those Discretionary Criteria to predominate over (or be given greater weight than) the constitutional compactness requirement in each of the eleven Challenged Districts. *Id.*

Dr. McDonald further testified that his method provides the Legislature with wide discretion and flexibility to achieve many of the Discretionary Criteria 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 and the other Required Criteria have also been met. *Id.* at 171-175, 186, 210-211.

To provide an example of this, Dr. McDonald compared each of the Challenged Districts to their counterparts in a second alternative plan for each Chamber ("Alternative Plan 2"). *Id.* at 176-193, J15, P35-36, P39-44. Alternative Plan 2 equally follows the other Required Criteria precisely as Alternative Plan 1 does. However, these plans also meets a number of traditional redistricting objectives referenced in the Resolutions by splitting the same number or fewer political subdivisions (counties/cities) and voting precincts compared to the Enacted Plans. They also refrain from pairing incumbents in the same district to the same degree as the Enacted Plans. *Id.*, P41-42. Finally, the districts in Alternative Plan 2 are on average and individually much more compact than the Enacted Plans, allowing the Legislature substantial discretion to adjust boundaries even more before any degradation approaches 50%. *Id.*

Alternate Plan 2 demonstrates how certain redistricting considerations can be achieved without predominating over compactness, or even coming close to doing so. *Id.* at 186. Thus, it is clear the predominance standard for compactness does not unduly hinder the Legislature's pursuit of other legitimate Discretionary Criteria. The Legislature can "balance" them as they see fit and decide what priority to accord each. What they cannot do is employ them so that they

subordinate a constitutional requirement by predominating over it and failing to accord it the mandated priority. *Id.* No one argues the Legislature could allow Discretionary Criteria to predominate over any other constitutional mandate such as equal population. Compactness is no different.

**B. Senate's Evidence at Trial**

The Senate introduced a number of exhibits and then played three videos from the April 7, 2011 floor debate concerning HB 5001. 3/14/17 TT at 307-347. These videos were irrelevant as they did not pertain to the legislation actually enacted into law (HB 5005). DX44-46. Even if somehow relevant, they provided no support to Senate's case as they merely included one conclusory statement that HB 5001 met all constitutional requirements without further specificity beyond listing the criteria. The Senate next played two videos from the April 28, 2011 floor debate concerning HB 5005 which actually became the Enacted Plan for the Senate. DX58-59. Neither of these videos even mentions compactness. The documents and videos presented by the Senate convincingly establish the importance the Senate placed upon Discretionary Criteria in 2011, particularly incumbency protection. *Id.* Other than Senator Howell mentioning compactness as a constitutional criterion, no other Senator mentioned it and the remarks focused almost entirely on the characteristics of the districts related to election results.

The Senate then called their expert witness, Dr. Hood. 3/14/17 TT at 348. As outlined in the trial court's Opinion and Order, Dr. Hood's testimony actually supported Plaintiffs' case in important particulars. Dr. Hood conceded that the compactness scores for the 2011 redistricting plan as a whole and for the six Challenged Senate Districts declined from 2001 to 2011. *Id.* at 361-362, 367-368. He acknowledged that the Challenged Senate Districts are "at the lower end of the [compactness] scale for the Virginia Senate plan." *Id.* at 368. Dr. Hood had very few criticisms of Dr. McDonald's approach and even admitted that Dr. McDonald's analysis was one way to test compactness. *Id.* at 392. Dr. Hood agreed with Dr. McDonald that a decline in compactness from Alternative Plan 1 to the existing districts was due to the application of Discretionary Criteria. *Id.* at 426.

While Dr. Hood testified that he did not believe this Court drew a bright line for compactness scores in *Jamerson* and *Wilkins*, he still proceeded to make those comparisons and look for "compactness scores for districts that were challenged that were previously upheld by the Virginia Supreme Court and comparing those to the challenged districts from the present case to see if they're in the same general area in terms of scores." *Id.* at 377-378. Absent a bright-line approach or something close to it, that comparison seems futile. Dr. Hood's only testimony about the Challenged Senate Districts' compactness was to state that as a whole (since he did not address them individually) their scores on the compactness

measures are similar to the scores of the different districts upheld during different redistricting cycles in *Jamerson* and *Wilkins*. *Id.*

Dr. Hood testified about a number of Discretionary Criteria including incumbency protection and communities of interest. *Id.* at 359, 385-389. However, he agreed that "while maintaining communities of interest is an important principle in drawing legislative district boundaries, this consideration does not override the constitutional requirement of compactness in Virginia." *Id.* at 423. Yet, he presented no testimony on how the Senate afforded priority to compactness in each of the Challenged Senate Districts. Finally, while he did state that the average degradation in compactness in the entire 2011 Senate plan versus Senate Alternative Plan 1 was less than 50%, he was made aware on cross-examination that all majority-minority districts were in Senate Alternative Plan 1 at 0% (since they were frozen in place), thereby seriously skewing that calculation. *Id.* at 401, 409-411. Nonetheless, overall plan scores are irrelevant to any single district that was challenged, because each district must meet every constitutional requirement.

For their only other witness, the Senate called Senator Jeremy McPike from the 29th Senate District. Senator McPike was not in office in 2011 and had no part in the 2011 redistricting. *Id.* at 436-442. Thus, his testimony had no relevance.

### C. House's Evidence at Trial

The House first presented the testimony of Delegate Chris Jones, who was the chief architect of the 2011 House redistricting plan. Delegate Jones testified about the House Resolution setting forth the criteria used for the 2011 plan. 3/14/15 TT at 456, 466. Delegate Jones said he utilized consultants and legal counsel to assist and provide guidance as to constitutional requirements. *Id.* at 465, 497-498. He repeatedly indicated that the 2011 plan complied with the House Resolution as well as *Jamerson* and *Wilkins,* although he gave no specifics on how it did so. *Id.* at 496-512. Indeed, Delegate Jones spent significant time talking about districts not at issue in this case, especially House District 74. *Id.* at 477-484. Even in his conclusory discussion of the Challenged House Districts, Delegate Jones defaults to the importance of Discretionary Criteria. *Id.* at 484-491.

Delegate Jones said "my assumption is that when we ran the plans, that if a score was better than that that was affirmed by the Supreme Court, then we would probably--we should be in a good state." *Id.* at 508-509. This exchange followed shortly thereafter on cross-examination:

> Q Are you able to -- when you say you met the standard of that court case, are you able to articulate that standard for me and tell me what it is that you followed?
> A No, sir. I think as I told you in deposition, that's what I had attorneys for and other assistants.....
> ***

> THE COURT:....Is there some score that you relied on?
> THE WITNESS: I cannot tell you what the score is, Your Honor. There was -- I assume there was a test that was run on that like all the districts.
> THE COURT: A numerical score?
> THE WITNESS: That would have been in the Reock and with the -- I can never say the other one.
> THE COURT: So you're assuming there was some numerical score from those compactness tests, and you just relied on counsel to tell you that you were meeting them?
> THE WITNESS: Correct.... But I could not tell you what the score was. And assume it was assigned a score, and I relied on other individuals to help me in that regard.

*Id.* at 509-512.

Delegate Jones testified about Discretionary Criteria and the importance of incumbency protection. *Id.* at 474-476, 489-491, 494. He conceded upon cross-examination that the compactness scores as measured by both Reock and Polsby-Popper declined in House Districts 13, 22, 48, and 88 (only one declined for 72) from the 2001 plan to the 2011 plan. *Id.* at 496-512. Nonetheless, he inexplicably maintained that those Districts were more compact in 2011. *Id.* Despite being the patron of both the 2001 and 2011 redistricting plans, Delegate Jones could not even remember the name of one of the compactness measures nor was he familiar with the scores for

each Challenged House District. *Id.* His penultimate admission occurred in the exchange with Judge Marchant set forth above.

John Morgan testified next for the House as a demographer who was primarily responsible for drawing the maps for the 2011 redistricting. *Id.* at 516. Like all witnesses for the House, Mr. Morgan testified in a conclusory fashion that the House Resolution had been complied with. *Id.* at 539-540. He testified that compactness scores were run periodically using Reock and Polsby-Popper and given to Delegate Jones and/or legal counsel. *Id.* at 547-562. The scores were run to determine if they were within the "acceptable" or "tolerable" range based on the scores in *Jamerson* and *Wilkins. Id.* He deferred repeatedly to Delegate Jones and legal counsel and had virtually no information about specific Challenged House Districts. *See, e.g., Id.* at 566-569. Mr. Morgan testified that while he was aware that the goal of the Republican caucus was to elect Republican delegates, he somewhat incredulously maintained that he did not attempt to make the districts Republican! *Id.* at 560.

The House then had their expert, Dr. Hofeller, testify. 3/15/17 TT at 577. He described the redistricting process as a "three-legged stool," with the three legs being law, politics, and technical input. *Id.* at 582. Dr. Hofeller spoke about the political leg and how important Discretionary Criteria are, including

incumbency protection and other criteria falling under the broad and undefined--at least by him-- term "communities of interest." *Id.* at 591-592, 613-615.

Dr. Hofeller testified that the compactness scores of the districts challenged in *Jamerson* and *Wilkins* were a bright line established by the Supreme Court of Virginia as the "floor" beneath which compactness scores could not go and more importantly, that scores above that floor met the constitutional compactness mandate. *Id.* at 621-622. His testimony was that "the legislature, when it was looking in 2011 in its criteria, was looking towards these court cases to say how low would be too low to get us out of the range of compactness scores that were used in Jamerson and Wilkins." *Id.* at 621. He used the term "floor" fifteen times in his testimony.

Dr. Hofeller then criticized Dr. McDonald's test on three grounds: (1) it needs more exposure and research (at 637) (a criticism made for the first time at trial and not in his report) (at 676); (2) it is not a proper way to measure constitutional compliance with compactness because "the floor that was established in Jamerson and Wilkins" is the standard (at 636); and (3) the overlap of Alternative Plan 1 districts with the existing Challenged Districts is too low and therefore improper for comparison (at 637) (despite that Dr. McDonald used the best match of population and Dr. Hofeller was unable to provide a better method (at 717-719)). His views were challenged on cross. *Id.* at 664-719.

## V. Summary of Argument

Plaintiffs brought this action solely to enforce the restraint on the practice of gerrymandering by politicians to serve their own interests rather than those of the people they represent by giving teeth to the compactness provision in the Virginia Constitution. This mandate is in the Constitution "to preclude at least the more obvious forms of gerrymandering",[4] but prior precedent of this Court has been interpreted by the Legislature to allow its discretion to run amok and essentially rob this provision of any meaningful restraint on their abusive discretion. It is now time for this Court to fulfill its role as the final arbiter of the Constitution and rein in a practice that mocks the basic tenets of democracy.

The trial court properly defined the issue as "whether the Virginia Legislature gave priority to the constitutionally required criterion of compactness over discretionary criteria in the 2011 redistricting with respect to the eleven challenged districts...." Op. 1. As such, the finding of fact to which the fairly debatable test applies is whether that priority was actually given. Dr. McDonald's testimony and test clearly went to that issue and was evidence that the Legislature failed to give priority to the constitutionally Required Criterion of compactness in the eleven Challenged Districts. In fact, his testimony proves that the Legislature subordinated compactness to Discretionary Criteria--the polar opposite of

[4] A.E. Dick Howard, Commentaries on the Constitution, 415 (1974).

according priority. Under the fairly debatable standard, this was "probative evidence of unreasonableness" which shifted the burden to Defendants to produce sufficient evidence of reasonableness to make the question fairly debatable.[5]

Yet, because of their interpretation of *Jamerson* and *Wilkins*, Defendants produced no evidence as to priority. The trial court did not identify a single piece of evidence by either Defendant which showed that any priority was given to compactness in any Challenged District. Neither expert for Defendants opined on that factual determination nor testified - in any capacity - that the Legislature gave priority to compactness. Instead, they deferred to *Jamerson* and *Wilkins,* despite the fact that those cases dealt with different districts during different redistricting cycles with different attributes and markedly contrasting trial records. The rest of their experts' testimony went solely to criticizing Dr. McDonald.

There is no evidence from the Senate that even requires analysis. Each witness for the House said that the only thought given to compactness was to ensure that the scores did not stray too far from those in *Jamerson* and *Wilkins*. Thus, contrary to providing some proof of reasonableness, i.e., that they gave priority to compactness--Defendants actually established that they merely paid compactness lip service and subordinated it to Discretionary Criteria. It is clear that every change made to a district that reduced compactness in favor of a

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[5] *Board of Supervisors v. Snell Constr. Corp.*, 214 Va. 655, 659, 202 S.E.2d 889, 893 (1974).

Discretionary Criterion accorded priority to that criterion. Mr. Morgan confirmed this when he testified that "as long as the districts were within the allowable range [established by *Jamerson* and *Wilkins*], I didn't see that there was a conflict." 3/14/17 TT at 562. This was supported by Dr. Hofeller: "the legislature…was looking towards these court cases to say **how low would be too low** to get us out of the range…." 3/15/17 TT at 621 (emphasis added). This is the rationale that allowed the creation of districts with such bizarre and outlandish configurations.

According to Defendants, all the Legislature needs to do is merely state that they considered compactness (irrespective of whether *that* even occurred) to meet the constitutional requirement set forth in Article II, § 6. For example, in their Answer to Interrogatory #3, the Original Defendants stated:

> claims that the [11] Challenged Districts are not compact either should be non-justiciable or must fail as long **as evidence is introduced from which a court could conclude that the General Assembly considered** compactness.

P52 (emphasis added). As for the purported bright line test in *Jamerson* and *Wilkins*, the trial court correctly interpreted those cases by finding that neither established such a test. The trial court limited those cases as this Court surely intended: to the facts in those records and the peculiar characteristics and legal requirements of those districts, particularly their characteristic as a VRA district or having boundaries substantially affected by a VRA district. The interpretation advanced by Defendants robs the restraint placed upon the Legislature in the

Virginia Constitution to "preclude at least the more obvious forms of gerrymandering" from serving as any meaningful barrier towards that end.

## VI. AUTHORITIES AND ARGUMENT

### A. After Plaintiffs presented a *prima facie* case, the trial court erroneously failed to shift to Defendants the burden to produce evidence sufficient to show reasonableness.

#### 1. Standard of Review

Whether the trial court correctly applied the legal standard in this case is a question of law which this Court reviews *de novo*. *Edmonds v. Edmonds*, 290 Va. 10, 18, 772 S.E.2d 898, 902 (2015).

#### 2. Argument

The trial court correctly defined the issue as "whether the Virginia Legislature gave priority to the constitutionally required criterion of compactness over discretionary criteria in the 2011 redistricting with respect to the eleven challenged districts...." Op. at 1. This is the legal framework in which the evidence must be considered. The trial court discussed the applicable law regarding the fairly debatable standard of review but never set forth the language pertaining to the burdens. As this Court stated in *Board of Supervisors v. Snell Constr. Corp.*, 214 Va. 655, 659, 202 S.E.2d 889, 893 (1974):

> Where presumptive reasonableness is challenged by probative evidence of unreasonableness, the challenge must be met by some evidence of reasonableness. If evidence of reasonableness is sufficient to make the question fairly debatable, the ordinance

> "must be sustained". If not, the evidence of unreasonableness defeats the presumption of reasonableness and the ordinance cannot be sustained.

*Id.* (citation omitted). *See also Ames v. Painter*, 239 Va. 343, 347, 389 S.E.2d 702, 704 (1990) (presumption of reasonableness stands "until surmounted by evidence of unreasonableness."). Here, Plaintiffs presented "probative evidence of unreasonableness." *Id.*

Dr. McDonald's testimony and his methodology established that the "adding of discretionary criteria to the legislative redistricting process increased the degradation of the districts' compactness." Op. at 13. Indeed, Dr. McDonald's calculations showed that for each Challenged District the degradation of compactness was greater than 50%. This lead to his opinion that when the Legislature balanced the various Discretionary Criteria against the Required Criterion of compactness, they allowed those Discretionary Criteria to predominate over the constitutional compactness requirement in each Challenged District. This evidence showed that the Legislature violated Article II, § 6 by subordinating compactness to criteria not mandated by federal or state law; i.e. - Discretionary Criteria. *See Wilkins v. Davis,* 205 Va. 803, 811, 139 S.E.2d 849, 853-854 (1965) ("But community of interest is not the only requirement, or even one of the requirements spelled out in the Constitution."). When "a legislative act is undertaken in violation of an existing [constitutional mandate], the [Legislature]'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)).

Plaintiffs met their burden. "This evidence was sufficient to neutralize the presumption of reasonableness which attached to the [Legislature's approval] of the [redistricting plan] and to shift to the [Legislature] the burden of producing evidence to establish the reasonableness of its [legislative] action." *Bd. of Supervisors v. Williams*, 216 Va. 49, 59, 216 S.E.2d 33, 40 (1975) (*citing City of Richmond v. Randall*, 215 Va. 506, 511, 211 S.E.2d 56, 60 (1975)). Once Plaintiffs produced "such probative evidence, the legislative act cannot be sustained unless the governing body... meets the challenge with some evidence of reasonableness." *Ames v. Painter*, 239 Va. at 347-348, 389 S.E.2d at 704. The trial court never shifted the burden to Defendants to do so.

Defendants should have been required to "produce some evidence that its actions were reasonable thereby rendering the issue fairly debatable." *Norton v. City of Danville,* 268 Va. 402, 409, 602 S.E.2d 126, 130 (2004). *See also Board of Supervisors v. McDonald's Corp.*, 261 Va. 583, 590, 544 S.E.2d 334, 339 (2001). In this case, that means evidence that in fact the Legislature--House and Senate based on the evidence relied upon by each--accorded the constitutional mandate of

compactness priority over Discretionary Criteria. The trial court erred when it never evaluated the Defendants' evidence under this standard.

The trial court explained that Plaintiffs faced a problem "in sustaining their burden" because binding precedent "requires that if the evidence offered by both sides of the case would lead reasonable and objective persons to reach different conclusions, then the legislative determination is 'fairly debatable' and must be upheld." Op. at 14. This is a summary statement and not how the standard is employed. The trial court erred in its misapplication. It is a two-step analysis where Plaintiffs first had to produce evidence sufficient to establish unreasonableness. The trial court's analysis showed that Plaintiffs (more than) met that burden. However, no such analysis exists in the trial court's opinion regarding Defendants' burden to produce sufficient evidence of reasonableness to make the question of what got priority fairly debatable. As shown below, no such evidence exists.

"Unless the [trial court] makes appropriate findings, supported by the record, or states appropriate conclusions supported by the record, or unless the record itself, taken as a whole, suffices to render the issue fairly debatable, probative evidence of unreasonableness adduced by a litigant attacking the [Legislature's] action will be deemed unrefuted." *Painter*, 239 Va. at 350, 389 S.E.2d at 706. The trial court failed to shift the burden to Defendants, made no findings and none can be found in the record. Therefore, the trial court erred and should be reversed.

## B. Assuming the trial court shifted the burden, it erroneously found without analysis that the evidence produced by each Defendant sufficed to make their redistricting decision fairly debatable for the eleven Challenged Districts

### 1. Standard of Review

Application of the requirements of the Virginia Constitution is a mixed question of fact and law. *Smyth County Comm. Hosp. v. Town of Marion*, 259 Va. 328, 336, 527 S.E.2d 401, 405 (2000); *Lawlor v. Commonwealth,* 285 Va. 187, 240, 738 S.E.2d 847, 877 (2013). As such, deference is given to the circuit court's factual findings but this Court reviews *de novo* its application of law to those facts. *William H. Gordon Assocs., Inc. v. Heritage Fellowship, United Church of Christ*, 291 Va. 122, 146, 784 S.E.2d 265, 276 (2016).

Because Defendants relied on *Jamerson* and *Wilkins* to measure whether priority was given, there were no factual findings on the Defendants' evidence regarding prioritization of compactness. There was no evidence identified by the trial court or in the record on that point, thereby relieving this Court of any obligation to defer to the trial court. A *de novo* review of the application of law to the facts in this case mandates reversal.

### 2. Argument

There was no "evidence of reasonableness" by the Defendants, let alone "sufficient evidence." *See McDonald's Corp.*, 261 Va. at 590-91, 544 S.E.2d at 338-339 (finding that if defendants' "evidence of reasonableness is insufficient,"

the legislative action cannot be sustained). Reasonableness here required probative evidence that "the Virginia Legislature gave priority to the constitutionally required criterion of compactness over discretionary criteria in the 2011 redistricting with respect to the eleven challenged districts ...." Op. at 1. An issue is fairly debatable "when, measured by both quantitative and qualitative tests, the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions." *Jamerson*, 244 Va. at 510, 423 S.E.2d at 182 (citation omitted).

The trial court analyzed Plaintiffs' evidence and found that Plaintiffs met their burden to show that priority was not given to compactness and, unless rebutted, the Legislature's Enacted Plans were unconstitutional. For instance, the trial court found that "[c]ertainly it appears that the adding of discretionary criteria to the legislative redistricting process increased the degradation of the districts' compactness." Op. at 13. It also found Dr. McDonald's test and his conclusions "appear to be relevant, logical, and founded on generally acceptable compactness measurements." *Id.* Finally, the trial court found "some degree of persuasiveness to both the test and Dr. McDonald's conclusions." *Id.* Quite importantly, the trial court noted that the Senate's expert witness conceded that Dr. McDonald's test is "one approach to testing compactness" and that it "would be 'a measure' of a good faith effort to not degrade compactness by more than fifty percent, and that the

decline in compactness from Alternative Plan 1 to the existing districts was due to the application of discretionary criteria." *Id.* at 8.

In addition, the trial court rejected Defendants' efforts to undermine Dr. McDonald's test and conclusions. The trial court found that Defendants' "criticism was not so eviscerating as to leave no room for the Court's consideration of the predominance test and Dr. McDonald's conclusions." *Id.* at 13. The trial court noted that Dr. McDonald's test would not preclude consideration of Discretionary Criteria and, in fact, incorporates them. *Id.* at 5-6. Furthermore, to the extent the test places limitations on Discretionary Criteria, the trial court recognized that is to ensure that compactness is prioritized over competing Discretionary Criteria. *See Id.* (explaining that the test creates an "ideal district" which can be used to determine the degree to which Discretionary Criteria affect compactness).

After a thoughtful analysis of Plaintiffs' evidence, the trial court should have then examined Defendants' evidence for reasonableness. But it failed to do so. Although the trial court summarized each Defendant's evidence, it did not identify any evidence for either Chamber that met the Plaintiffs' "probative evidence of unreasonableness" regarding the question at issue - prioritization of compactness.

The trial court explained that "[w]eighing the test, opinions, and conclusions of [Plaintiffs' witnesses] on one side, against the testimony of [some of Defendants' witnesses] on the other side, would in the opinion of the Court, lead

reasonable and objective people to differ." Op. at 14. The trial court identified and discussed two categories of evidence presented by Defendants: (1) that which attempted to discredit Dr. McDonald's test and conclusions; and (2) proof of Discretionary Criteria being utilized but unrelated to demonstrating how compactness was prioritized. Op. at 7-11, 13-14. However, the trial court erred by not focusing on the ultimate issue it identified: did Defendants produce evidence that they prioritized compactness over Discretionary Criteria? *Id.* at 9-11, 13-14.

With respect to the first category, the trial court found Defendants' criticisms were insufficient to discredit Dr. McDonald's predominance test and that Plaintiffs' side of the fairly debatable test was met. Op. at 13. This evidence only addressed alleged shortcomings in Dr. McDonald's methodology. None of it was probative of whether Defendants gave priority to compactness over Discretionary Criteria, so it completely failed the quantitative analysis and there was no quality to examine. To rebut probative evidence of unreasonableness, Defendants needed to introduce at least some "relevant and material evidence of reasonableness sufficient to make the question fairly debatable." *Vienna Council v. Kohler*, 218 Va. 966, 977, 244 S.E.2d 542, 548 (1978) (upholding trial judge's finding that city council's actions were "arbitrary, capricious, unreasonable and illegal" because they were not related to the purported justifications). Defendants failed to do so.

With respect to the second category of Defendants' evidence, the trial court recounted Defendants' evidence regarding Discretionary Criteria. Rather than showing how the Legislature prioritized compactness, this evidence actually supported Plaintiffs and established that the Defendants subordinated compactness to Discretionary Criteria, so long as the districts met the exceedingly low *Jamerson* and *Wilkins* scores. The trial court acknowledged this during closing arguments:

> THE COURT: ...So the defense, your clients, the senators, their position is that the Senate districts were sufficiently compact but have you offered into evidence any standard by which to judge that other than just saying we complied with Jamerson and Wilkins. Is that it? I mean, I just want to be sure I didn't miss something. Is that it? That's the standard given by the Senate?
> MR. HESLINGA: I think that's what -- when they talk about compactness -- there are a couple ways they talk about it -- that's the prime one is they talk about complying with those cases for purposes of compactness.
> THE COURT: ...**That's the only standard that was given from the defense side.**

3/15/17 TT at 789-790 (emphasis added).[6]

However, this evidence cannot constitute evidence of reasonableness because it supports rather than counters Plaintiffs' evidence of unreasonableness. In finding that the governing body failed to present sufficient evidence to make the question fairly debatable, this Court in *Board of Supervisors v. Allman*, 215 Va. 434, 443, 211 S.E.2d 48, 53-54 (1975) stated:

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[6] Delegate Jones, Mr. Morgan, and Dr. Hofeller for the House admitted exactly the same process. *Infra.*

> The evidence introduced, and the argument advanced by the Board, that the County's public facilities would be unduly impacted by the Allman rezoning was countered, not only by testimony of witnesses, but negated by a showing of the Board's other rezonings which had the same, or even greater, impact than would have resulted from the Allman development.

Similarly here, Defendants' evidence that they gave priority to compactness by merely ensuring that the compactness scores were close to the low scores in *Jamerson* and *Wilkins* "was countered" by the trial court's express rejection of that interpretation of these cases[7] and was "negated by" Defendants' own evidence showing the emphasis placed on Discretionary Criteria over compactness. *Id.* This Court held in Allman as the trial court should have held here: "The reasonableness of the Board's action is not fairly debatable, and it will not be sustained." *Id.* at 445, 211 S.E.2d at 55.

The *Norton v. City of Danville,* 268 Va. 402, 602 S.E.2d 126, case is similar to this case in that the trial court likewise concluded that the issue was fairly debatable despite a lack of evidence by the governing body. In *Norton,* the trial court affirmed the decision of the city council affirming a local architectural commission's refusal to grant the certificate of appropriateness because a homeowner modified the front door to his historic home by installing glass panes

[7] As will be discussed later, the trial court opined that it "does not agree that the Supreme Court of Virginia has ever established a constitutionally required minimum compactness score for measuring the priority given to compactness in drawing legislative districts." Op. at 13-14.

to aid in preventing burglaries. The homeowner provided evidence that many other houses in the historic preservation district had glass doors including a house of similar style directly across the street. This Court found:

> To meet Norton's evidence of unreasonableness, the city council was obligated to put forth some evidence of reasonableness for its decision in order to carry its burden to render the matter fairly debatable. Despite this low threshold, the city council failed to present evidence demonstrating that its decision was reasonable. This is due, in large part, to the fact that the city council presented no witnesses and offered no exhibits to demonstrate there was a wooden door before 1992 .... Although Norton was ordered to restore the door to its deemed original condition, the commission and the city council admitted in their proceedings that they did not know what type of door was on the house when it was originally constructed. Similarly, the city council offered no explanation why its mandate that Norton's house have a wooden front door was reasonable, when other glass-paned doors on the house are clearly viewable by the public.

*Id.* at 410-411, 602 S.E.2d at 131. This Court held that the "trial court thus erred in concluding the issue was fairly debatable because the city council failed to meet its burden of proof. As a matter of law, the trial court could not conclude the issue was fairly debatable because the city council adduced no evidence of reasonableness." *Id.* at 411, 602 S.E.2d at 131.

The result here must be the same. Defendants "failed to present evidence demonstrating that its decision was reasonable. This is due, in large part, to the fact that [Defendants] presented no witnesses and offered no exhibits to demonstrate" how they prioritized compactness in each of the eleven Challenged Districts. *Id.*

The "trial court thus erred in concluding the issue was fairly debatable because [Defendants] failed to meet [their] burden of proof. As a matter of law, the trial court could not conclude the issue was fairly debatable because [Defendants] adduced no evidence of reasonableness." *Id. See also Estes Funeral Home v. Adkins*, 266 Va. 297, 306-07, 586 S.E.2d 162 , 167 (2003) (also reversing a trial court's finding that the issue was fairly debatable after concluding that defendants failed to present sufficient evidence of reasonableness).

Here Defendants relied exclusively on the purported "bright line" in the *Jamerson* and *Wilkins* cases - i.e., if the districts in the 2011 plan had a similar compactness score to the districts in those cases, they pass constitutional muster. This resulted in a complete lack of evidence showing priority because Defendants directed all their evidence to their erroneous interpretation of *Jamerson* and *Wilkins.* As Mr. Morgan testified, "as long as the districts were within the allowable range [established by *Jamerson* and *Wilkins*], I didn't see that there was a conflict." 3/14/17 TT at 562. *See also Id.* at 557 ("the conflict would occur if the compactness [scores] of the districts were outside the allowable range."). Dr. Hofeller testified that the Supreme Court of Virginia established this floor to be a "bright line" and that a compactness analysis requires nothing more. Op. at 11.

This obviously means that as compactness was degraded in favor of Discretionary Criteria each change of a boundary gave priority to whatever

discretionary choice drove that decision. There was no evidence that compactness was ever given even a nod of priority, so long as the compactness scores were within the purported "allowable range" of *Jamerson* and *Wilkins*. The Legislature erected a barrier from *Jamerson* and *Wilkins* protecting itself from producing evidence on the factual issue of priority by substituting meeting the numerical scores of those cases for the Constitutional obligation established by the trial court.

It is little wonder then that Dr. McDonald's methodology graphically and convincingly demonstrated the substantial degree to which the Legislature ignored this constitutional mandate to fashion the Challenged Districts as they chose.

In *Williams*, 216 Va. at 59, 216 S.E.2d at 40, this Court stated:

> In attempting to carry its burden, the Board relied exclusively upon the Middle Run policies of its...comprehensive plan, policies which were intended to "avoid" higher-density zoning in the Middle Run area until public facilities "shall be available or shall be programmed to be available in the reasonably near future." The factual underpinning of the Board's reliance failed, of course, with the trial court's finding, supported by the evidence, that "public facilities to serve [the land in question] are either presently available or will be available in the reasonably foreseeable future."

Likewise, in "attempting to carry [their] burden, [Defendants] relied exclusively upon the" *Jamerson* and *Wilkins* scores. *Id.* But this reliance failed upon the trial court's opinion that it "does not agree that the Supreme Court of Virginia has ever established a constitutionally required minimum compactness score for measuring the priority given to compactness in drawing legislative districts." Op. at 13-14.

The trial court correctly rejected the Defendants' prime defense that they met the Constitution's compactness requirement. Defendants produced no other evidence.

The trial court cited to Mr. Jones' testimony as evidence of "how the 2011 legislative redistricting plan was ultimately approved and considered constitutionally sound," but did not explain how that was evidence of prioritization necessary to rebut Plaintiffs' probative evidence of unreasonableness. Op. at 13-14. Nor did the trial court address Mr. Jones' testimony that he too erroneously relied upon the minimum scores in *Jamerson* and *Wilkins* as setting the constitutional standard. To the extent the trial court considered the "district scores in *Wilkins* and *Jamerson*" as "a factor", there must be in the record some evidence of how those scores served as probative evidence of compactness having received priority as the districts took shape. Op.at 14. The trial court offered no explanation as to how it employed those scores in reaching its conclusions and none appears in the record.

Finally, the trial court also cited to Dr. Hood's testimony but Dr. Hood never explained how the Defendants prioritized compactness over Discretionary Criteria. Op. at 7-8. Similarly, conclusory statements that the Legislature satisfied "all constitutional requirements," which "presumably" included compactness are not sufficient evidence of reasonableness. *Id.* It is of no moment that the legislators who drafted the plans and/or voted for them would tout them as constitutional. Indeed, what else would they say? It is precisely the prerogative of the courts to

render opinions on the constitutionality of legislation. If the legislators' opinions on constitutionality serve as sufficient evidence of reasonableness to make a factual determination "fairly debatable", the constitutional role of the judiciary in redistricting would be abandoned and the compactness clause would not act as a restraint in any way. With no evidence relevant to priority, the trial court's opinion is contrary to the "fairly debatable" standard and should be reversed.

The trial court is correct that legislative action is granted a strong presumption of validity. Op. at 12. However, that presumption can be overcome with probative evidence - as occurred here. Once overcome, the burden shifted to Defendants to produce "relevant and material evidence" demonstrating that the legislative actions were reasonable. *Vienna Council v. Kohler*, 218 Va. at 977, 244 S.E.2d at 548. Since Defendants failed to produce such evidence, the issue cannot be considered fairly debatable and Plaintiffs should have prevailed. "Where the courts are called upon to review the acts of [those] exercising delegated legislative powers, the inquiry must ordinarily be whether the official, agency, or board has acted arbitrarily or capriciously, or rather, whether it has acted in accordance with the policies and standards specified in the legislative delegation of power." *Ames v. Painter,* 239 Va. at 349, 389 S.E.2d at 705.

Here the "legislative delegation of power" derived from the Commonwealth's supreme law - the Constitution - requires that **every** district be

composed of compact territory. Rather than act "in accordance" with that mandate, the Legislature subordinated compactness to Discretionary Criteria in each Challenged District. Such action was arbitrary and capricious. While the Legislature does indeed have "wide discretion" during the redistricting process, that discretion is not unbounded. Article II, § 6 of the Virginia Constitution is meant as a restraint on that discretion. It must be enforced in order to keep the Commonwealth's checks and balances in place. The trial court should be reversed.

## VII. CONCLUSION

Plaintiffs respectfully ask this Court to grant their Petition for Appeal so that the decision of the trial court may ultimately be corrected in this manifestly important case.

Respectfully submitted,

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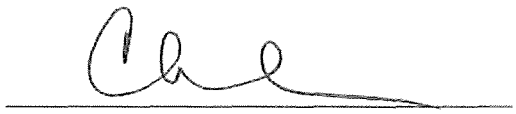
## 7. CERTIFICATE OF SERVICE

I hereby certify that on this, the 23rd day of May, 2017, a true and accurate copy of the foregoing Petition for Appeal was delivered via email and U.S. mail, postage prepaid, to all counsel of record.



Christine A. Williams

## 8. REQUEST FOR ORAL ARGUMENT

Counsel for Plaintiffs wish to state orally, in person, to a panel of this Court the reasons why this Petition for Appeal should be granted.