IN THE SUPREME COURT OF VIRGINIA

RECORD NO. 170697

RIMA FORD VESILIND, *et al.*,

Petitioners,

v.

VA. STATE BD. OF ELECTIONS, *et al.*,

Respondents.

BRIEF OF *AMICI CURIAE* FORMER VIRGINIA ATTORNEYS GENERAL KEN CUCCINELLI, MARY SUE TERRY, AND STEPHEN ROSENTHAL IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*

Amici in this case are a bipartisan group of former Virginia Attorneys General. Ken Cuccinelli is a Republican who served as Attorney General for the Commonwealth from 2010-2014. Mary Sue Terry and Stephen Rosenthal are Democrats who served in the role of Attorney General from 1986-1993 and 1993-1994, respectively.

The Attorney General for the Commonwealth serves a vital and unique role in the Commonwealth, with both constitutional and statutorily-prescribed duties. To fulfill these duties, the Attorney General needs to be able to provide clear legal guidance on compliance with and enforcement of the Virginia Constitution. The present case demonstrates the need for this Court to clarify the law as articulated in *Jamerson v. Womack*, 244 Va. 506, 423 S.E.2d 180 (1992), and *Wilkins v. West*, 264 Va. 447, 571 S.E.2d 100 (2002), as all *amici* agree that the present case is distinguishable from *Jamerson* and *Wilkins*.

The instant case presents a critical question of first impression: What limitation does the Virginia Constitution place on the legislature's ability to sacrifice mandatory constitutional redistricting criteria to discretionary policy goals? The answer to this question is of great importance to the Office of the Attorney General and its ability to provide legal advice and

representation to the Commonwealth. *Amici* believe this case offers the Court an important opportunity to clarify its case law and reaffirm that the state's reconciliation of redistricting criteria must prioritize mandatory criteria and cannot subordinate constitutional requirements to discretionary state policies.

Amici note that they respect the need for legislative discretion and judicial deference and have defended the legislature's exercise of such discretion in the past.[1] In this case, however, that deference was misunderstood and misapplied.

STATEMENT OF THE CASE AND ASSIGNMENT OF ERROR

Amici accede to the Assignment of Error, Nature of the Case, and Material Proceedings Below submitted by citizen Petitioners, Rima Ford Vesilind; Arelia Langhorne; Sharon Simkin; Sandra D. Bowen; Robert S. Ukrop; Vivian Dale Swanson; H.D. Fiedler; Jessica Bennett; Eric E. Amateis; Gregory Harrison; Michael Zaner; Linda Cushing; Sean Sullivan

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[1] In *Jamerson*, two *amici* defended the legislature's reconciliation of the mandatory population criterion, the mandatory compactness criterion, and the mandatory antidiscrimination requirements imposed by federal law. See Br. of Appellees, Record No. 920460, at 6-8, 27-32 (filed Aug. 6, 1992) (attached hereto as Exhibit A).

Kumar; and Dianne Blais (collectively, "Plaintiffs")[2] in their Petition for Appeal.

Amici contend that the trial court misunderstood and misapplied the "fairly debatable" standard when it credited legally flawed defenses by Respondents, Virginia State Board of Elections; Virginia Department of Elections; James B. Alcorn; Clara Belle Wheeler; Singleton B. McAllister; and Edgardo Cortes, and Intervenor-Respondents, Virginia House of Delegates and the Honorable Speaker William J. Howell (collectively, "Defendants") and relieved them of their burden of producing objective evidence showing that the legislature made a *bona fide* effort to prioritize the constitutionally required criterion of compactness over discretionary factors.

Amici further contend that the trial court erroneously concluded "that the constitutional validity of the Virginia Legislature's 2011 redistricting plan is 'fairly debatable' and must be upheld," Slip Op. at 15, where (1) the Va. Const. art. II, § 6 requires compactness for "[e]very electoral district" and (2) the trial court defined the "issue before the Court [a]s whether the

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[2] Due to the multiplicity of entities and parties defending the challenged districts, *amici* believe that descriptive terms may not serve the ends of clarity encouraged by Rule 5:26(f). Instead, *amici* have adopted "the designations used in the lower court." Rule 5:26(f).

Virginia Legislature gave priority to the constitutionally required criterion of compactness over discretionary criteria in the 2011 redistricting with respect to eleven challenged districts (House of Delegates districts 13, 22, 48, 72, and 88, and Senate districts 19, 21, 28, 29, 30, and 37)," *id.* at 1.

STATEMENT OF FACTS

Amici accede to the Statement of Facts submitted by Plaintiffs in their Petition for Appeal.

STANDARD OF REVIEW

Errors regarding questions of law are reviewed *de novo*. *Edmonds v. Edmonds*, 290 Va. 10, 18, 772 S.E.2d 898, 902 (2015).

ARGUMENT

I. The Virginia Constitution requires the legislature to give priority to contiguity, compactness, and equal population over discretionary state redistricting policies and criteria.

The Virginia Constitution requires the legislature to give priority to mandatory constitutional criteria over discretionary policy criteria in redistricting. The plain language of Va. Const. art. II, § 6 is unambiguous: "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." The import of this provision is equally clear: constitutionally mandated criteria explicitly

limit legislative discretion in the redistricting process. *Brown v. Saunders*, 159 Va. 28, 36, 166 S.E. 105, 107 (1932) (noting that the provision "places limitations on the discretion of the legislature").

Several states have enshrined mandatory redistricting criteria in their governing documents because "[n]othing can more deeply concern the freedom, stability, the harmony and success of a representative republican government, nothing more directly affect[s] the political and civil rights of all its members and subjects, than the manner in which the popular branch of its legislative department is constituted." *Att'y Gen. v. Suffolk Cty. Apportionment Comm'rs*, 224 Mass. 598, 601, 113 N.E. 581, 584 (1916) (quoting *Op. of Justices*, 76 Mass. 613, 615 (1858)).

Among these mandatory criteria, compactness is required because it enhances voters' ability to organize and hold legislators accountable, helps prevent gerrymandering,[3] and aids in effective representation. *See Karcher v. Daggett*, 462 U.S. 725, 756, 103 S. Ct. 2653, 2673 (1983) (Stevens, J., concurring) (noting that "geographical compactness . . .

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[3] Defendants contend that partisan gerrymandering is not at issue in this case. *See* Trial Tr. 26:20. *Amici* do not take a position on whether assigning partisan advantage to one party in one house and another party in another house constitutes partisan gerrymandering or a legitimate, nondiscriminatory state policy permitting deviation from constitutional mandates. Nor does this case require the Court to decide that issue.

facilitates political organization, electoral campaigning, and constituent representation"); *In re Legis. Districting of State*, 299 Md. 658, 675, 475 A.2d 428, 436 (1982) (collecting cases that hold state constitutional compactness provisions "are intended to prevent political gerrymandering"); 1 A.E. Dick Howard, Commentaries on the Constitution of Virginia 415 (1974) (noting that Virginia's compactness requirement "is meant to preclude at least the more obvious forms of gerrymandering").

The court below recognized—and none of the parties below disputed—that the constitutionally compelled criteria of contiguity, compactness, and equal population must take priority over discretionary criteria in the event of a conflict. *See* Slip Op. at 4-5. The problem according to Defendants is that "there's no clarity about what a conflict between criteria is." *See* Trial Tr. 787:1-2. But the duty imposed by the constitution is far less complex than they seem to believe. This Court should seize the unique opportunity presented by this case, grant the Petition for Appeal, and clarify the limitations that the constitutional criteria place upon legislative discretion in the redistricting process.

A. Mandatory criteria do not compel perfection and do not foreclose the consistent application of a nondiscriminatory and legitimate discretionary state policy.

The requirement to prioritize mandatory criteria clearly does not bind the legislature strictly to the map with the absolute least possible deviation. First, the co-existence of multiple mandatory criteria makes such an "ideal" map impossible. *See Saunders*, 159 Va. at 37, 166 S.E. at 107 (noting that "[i]t is inevitable that there must be in the several districts some variation" from perfect population equality); *In re 1983 Legislative Apportionment*, 469 A.2d 819, 827 (Me. 1983) ("[F]ull compliance with all of the standards imposed by the state constitution as well as the federal . . . is a practical impossibility."); *Schrage v. State Bd. of Elections*, 88 Ill. 2d 87, 96, 430 N.E.2d 482, 486 (1981) ("[This] court has refused to require perfect compactness."); *In re Livingston*, 96 Misc. 341, 349, 160 N.Y.S. 462, 468 (Sup. Ct. 1916) ("[I]t is . . . apparent that in every case all the provisions of the Constitution cannot be complied with . . . .").

Second, this Court—like the United States Supreme Court and other state courts—has recognized that some minor deviations from mandatory criteria are permitted to advance a consistently applied, nondiscriminatory, rational state policy. *See Wilkins v. West*, 264 Va. 447, 463-64, 571 S.E.2d 100, 109 (2002) (noting that while "the General Assembly must balance a

number of competing constitutional and statutory factors," there were also other "legitimate legislative considerations" that the legislature could advance "[i]n addition" to mandatory criteria); *Saunders*, 159 Va. at 37, 166 S.E. at 108-09 (noting that inevitable population deviations "will necessarily be augmented where, as in Virginia, it has been the unbroken custom to refrain from dividing any county or city into separate districts"). Indeed, the Supreme Court expressly made this view clear when considering a deviation from the federal equal-population principle. *Mahan v. Howell*, 410 U.S. 315, 325, 93 S. Ct. 979, 985 (1973) ("[S]o long as the divergences . . . are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible . . . ." (quoting *Reynolds v. Sims*, 377 U.S. 533, 579, 84 S. Ct. 1362, 1391 (1964))). *See also Op. to the Governor*, 101 R.I. 203, 209-10, 221 A.2d 799, 803 (1966) ("[I]f the objective of compactness is to be attained the deviations must be explainable by rational and legitimate considerations; they must be in good faith; and they must be justifiable upon grounds which . . . 'are free from any taint of arbitrariness or discrimination.'" (quoting *Roman v. Sincock*, 377 U.S. 695, 710, 84 S. Ct. 1449, 1458 (1964))).

That said, this limited leeway does not upend the fixed constitutional pecking order. The fact that some divergence from constitutional principles is permitted to advance legitimate redistricting policies does not make the legislature's discretion boundless.

B. Even a consistently applied, nondiscriminatory, and legitimate state policy cannot emasculate a constitutional command.

State policy cannot override a constitutional command. This remains true even in the absence of clear "bright lines" for gauging the "conflict between criteria."

In *Mahan v. Howell*, the Supreme Court examined whether Virginia's long-standing policy of maintaining city and county boundaries could survive the one-person, one-vote doctrine. 410 U.S. at 318-31, 93 S. Ct. at 982-88. The Court first inquired "whether it can be reasonably said that the state policy urged by Virginia to justify divergences . . . is, indeed, furthered by the plan adopted." *Id.* at 326, 93 S. Ct. at 986. The Court held that the plan did, in fact, "advance the rational state policy of respecting political subdivisions." *Id.* at 328, 93 S. Ct. at 987.

But then the Court went on. "The *remaining* inquiry is whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits;" for a state policy, "however rational, cannot constitutionally be permitted to emasculate the goal of

substantial equality." *Id.* at 328, 326, 93 S. Ct. at 987, 986 (emphasis added). The Court upheld the plan under this inquiry as well (despite its "16-odd percent" population deviation), noting that "[w]hile this percentage may well approach tolerable limits, we do not believe . . . Virginia has . . . sacrificed substantial equality to justifiable deviations." *Id.* at 329, 93 S. Ct. at 987.

The case reflects a simple axiom: Although "[n]either courts nor legislatures are furnished any specialized calipers that . . . establish[] what range of . . . deviations [from constitutional requirements] is permissible," a legislative preference cannot subordinate a constitutional command. *Id.* And even though the Supreme Court has adopted a *burden-shifting* standard for deviations smaller than 10% under the federal constitution, the Supreme Court still eschews bright lines on the ultimate question of constitutionality. *See Harris v. Ariz. Indep. Redistricting Comm'n*, 136 S. Ct. 1301, 1306-07 (2016). Indeed, deviations above 10% may survive and deviations below 10% may fail based on the facts of the case. *See Mahan*, 410 U.S. at 329, 93 S. Ct. 987 (upholding a 16.4% population deviation); *Cox v. Larios*, 542 U.S. 947, 124 S. Ct. 2806 (2004) (rejecting a 9.98% population deviation as unconstitutional).

C. The legislature must make a *bona fide* effort to prioritize mandatory criteria based on the facts presented in each redistricting session.

This Court articulated the duty placed upon the legislature by our state constitution in *Brown v. Saunders*. In *Saunders*, this Court acknowledged that "[m]athematical exactness, *either in compactness of territory or in equality of population*, cannot be attained" and that "[n]o exact dividing line can be drawn." 159 Va. at 43-44, 166 S.E. at 110-11 (emphasis added). Nonetheless, the legislature's work must reveal "an attempt, in good faith, to be governed by the limitations enumerated in the fundamental law of the land." *Id.* at 44, 166 S.E. at 110. This duty to observe constitutionally mandated criteria means the legislature must make a "*bona fide* effort" to prioritize mandatory criteria. *Id.* at 47, 166 S.E. at 111. A *bona fide* effort follows the guiding principle set out by Daniel Webster and adopted by this Court:

> That which cannot be done perfectly must be done in a manner as near perfection as can be. If exactness cannot, from the nature of things, be attained, then the nearest practicable approach to exactness ought to be made. [The legislature] is not absolved from all rule, merely because the rule of perfect justice cannot be applied. . . . The nearest approximation to exact truth or exact right, when that exact truth or exact right cannot be reached, prevails in other cases, not as a matter of discretion, but as an intelligible and definite rule, dictated by justice, and conforming to the common sense of

> mankind—a rule of no less binding force in cases to which it is applicable, and no more to be departed from than any other rule.

Id. at 38-39, 166 S.E. at 108 (quoting Joseph Story, Commentaries on the Constitution of the United States 484-96 (Thomas Cooley ed., 4th ed. 1874)).

Under the Virginia Constitution, there is no population deviation above "X" percentage or compactness level below "Y" score that always fails, just as there is no population deviation below "X" percentage or compactness level above "Y" score that always survives. As in *Mahan*, a large deviation—such as a 16% population spread—may be permissible in one decade when the legislature demonstrates that it is necessary to advance a consistent, neutral, and legitimate state policy. *See* 410 U.S. at 329, 93 S. Ct. at 987. But that does not give the legislature free license to push future deviations as close as possible to 16% in all successive decades based on inconsistent or illegitimate whims and wants. Such an approach would recklessly disregard the legislature's constitutional duty to

prioritize population equality, and a court would be remiss not to strike down such an egregious violation of a constitutional mandate.[4]

If evidence reflects that the legislature did not make a *bona fide* effort to prioritize the constitutional requirement of compactness, then the map fails constitutional scrutiny—regardless of any deviation calculation or *post hoc* justification. Even a simple "eyeball test" can be sufficient if it plainly reveals that the legislature did not make a genuine effort to comply with its duty to prioritize compactness. *Schrage*, 88 Ill. 2d at 98, 430 N.E.2d at 487 (relying on a "visual examination" to determine that compactness was not observed).

II. The legislature only fulfills its constitutional duty when it makes a *bona fide* effort to prioritize mandatory criteria such that deviations are objectively justified by contemporaneous facts.

Redistricting is a fact-intensive exercise with few shortcuts. This has implications for both the judiciary and the legislature. A deviation from a mandatory criterion that is justified by the facts in one decade may not be justified by the facts in another. Each new redistricting cycle brings a new set of facts and a host of delicate balancing duties and challenges.

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[4] The fact that a mandatory criterion must be prioritized—and cannot be subordinated—does not render the inquiry "intent-based." *See* Def.-Interv's' Br. in Opp'n & Assignment of Cross-Error 19-20 [hereinafter House Opp. Br.]. The inquiry is based on an objective review of the facts. *See infra* at note 7.

As Defendants point out, there is no one "most" compact map, and the alternative maps relied upon by Plaintiffs below to run their degradation model are not the only way of reconciling compactness with other mandatory and discretionary criteria. *See* House Opp. Br. 11 (noting that "you literally could have created hundreds of different districts against which to measure the plan"). This reflects the broad room available for legislative discretion in reconciling mandatory districting criteria and explains the proper deference the judiciary owes when the legislature shows a *bona fide* effort to prioritize and harmonize mandatory criteria while taking into account other neutral, consistent, and rational state redistricting policies. *See Wilkins*, 264 Va. at 463, 571 S.E.2d at 108 (noting that if the legislature's reconciliation is "fairly debatable," the courts will uphold the plan).

Amici respect the need for legislative discretion and judicial deference in such circumstances and have defended the legislature's exercise of such discretion in the past. Indeed, in *Jamerson*, two *amici* defended the legislature's reconciliation of the mandatory population criterion, the mandatory compactness criterion, and the mandatory antidiscrimination requirements imposed by federal law. *See* Br. Of Appellees, Record No. 920460, at 6-8, 27-32. There, the legislature could not improve

compactness without degrading minority voters' ability to elect the candidate of their choice, and the Commonwealth supported this conclusion with robust factual findings. *Id.* at 8-10. In fact, the parties' experts in *Jamerson* agreed that "the mandatory constitutional requirements of equal representation and minority representation meant that rural districts . . . would compare unfavorably in compactness with urban districts, and with other rural districts that did not have large minority group populations." 244 Va. 506, 515, 423 S.E.2d at 185 (1992).

As this Court recognized in articulating and applying the law in *Jamerson*, the reconciliation of these mandatory criteria reflects a sensitive exercise deserving of generous deference. *Id.* at 510-11, 423 S.E.2d at 182 (acknowledging the deference due to "legislative determinations of fact" and the lower court's "resolution of disputed facts, if supported by credible evidence").

The same was true in *Wilkins*. There, this Court analyzed the compactness of Senate District 2 and House District 74, both of which needed to satisfy a competing mandatory criterion—the Voting Rights Act. *See* 264 Va. at 461, 470-72, 476-77, 571 S.E.2d at 108, 113-14, 116-17. This Court held that the compactness directive "does not override all other elements pertinent to designing electoral districts" because "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." *Id.* at 462, 571 S.E.2d at 108 (emphasis added). "[T]his *requires* the General Assembly to exercise its discretion in reconciling these often competing criteria." *Id.* (emphasis added). This Court also noted that while "the General Assembly *must* balance a number of competing constitutional and statutory factors," there were also other "legitimate legislative considerations" that the legislature could advance "*[i]n addition*" to the mandatory criteria. *Id.* at 463-64, 571 S.E.2d at 109 (emphasis added).

III. This Court should fulfill its constitutional duty to correct the legal error below, clarify the law, and remedy the violation that occurs when the legislature adopts a legally erroneous view of its authority and makes no *bona fide* effort to prioritize mandatory redistricting criteria.

The deference extended when weighing mandatory criteria against each other does not grant the legislature the boundless discretion to make a "value judgment" about "the relative degree of compactness required." Trial Tr. 779:16-21.[5] The *Virginia Constitution* makes the "value judgment"

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[5] *See, e.g.*, *In re Livingston*, 96 Misc. at 350, 354, 160 N.Y.S. at 471 (noting that "the courts must interfere" when deviations from compactness "stand wholly unexplained and unjustified," pointing—for example—to the fact that the creation of a district "within the limits of a city 'would seem to

that mandatory criteria must be given priority, and the legislature is not permitted to accord mandatory and discretionary criteria equal priority. That is especially so when the legislature cannot point to a consistent, neutral, legitimate state policy advanced by the deviations from mandatory criteria. The legislature is not free to "weigh" the constitutional limits upon its power against its desire to avoid those limits.

Where the legislature went wrong here is its assumption that just because it need not draw the *most* compact districts, it also need not try to draw *more* compact districts where possible. *See, e.g.*, Defs.' Br. in Opp'n & Assignment of Cross-Error 18 [hereinafter Att'y Gen. Opp. Br.]. This is precisely the opposite of the *bona fide* effort that the Virginia Constitution demands, and this misinterpretation grates against the law as articulated by this Court and numerous other state supreme courts.[6]

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exclude all possibility' of [an irregularly shaped] district being created" (quoting *Sherrill v. O'Brien*, 188 N.Y. 185, 211, 81 N.E. 124, 132 (1907))).

[6] *Cf. Saunders*, 159 Va. at 44, 47, 166 S.E. at 110, 111 (discussing the mandatory criteria of compactness and equal population and holding that "no *bona fide* effort was made to divide [the population equally between districts] as near as practicable"). *See also Schrage*, 88 Ill. at 96, 430 N.E. 2d at 486 ("Although the court has refused to require perfect compactness, it has also refused to allow the constitutional requirement of compactness to be ignored. . . . Although this court has not heretofore invalidated any legislative or representative district on the basis that it violates the constitutional compactness requirement, other States [have held that]

Indeed, when the legislature aims for the *lowest* compactness score it can and makes no *bona fide* effort to prioritize compactness, it exits the realm of due deference and, "under the assumption of an exercise of discretion[,] does a thing which is a mere assumption of arbitrary power." *Preisler v. Doherty*, 365 Mo. 460, 465-66, 284 S.W.2d 427, 431 (1955) (quoting *Sherrill*, 188 N.Y. 185, 198, 81 N.E. 124, 128 (1907)). This "disregard of . . . the purpose for which express limitations are included [in the Constitution]" means that the adopted redistricting plan does not reflect "the exercise of discretion[,] but a reckless disregard of that discretion." *Id.*

Moreover, the fact that a deviation from compactness may be justified (and owed due deference) when the legislature attempts to maximize compactness while simultaneously honoring other criteria does not mean that the same deviation is forevermore constitutional *per se* and without

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newly drawn districts failed to meet the constitutional mandate that each district be as compact in area as possible."); *In re Legislative Districting of Gen. Assembly*, 193 N.W.2d 784, 790-91 (Iowa 1972) (holding that "the requirement of compactness must be construed to mean as compact as practicable" and that "[t]he goal . . . must be to provide for equality of population and territorial compactness as nearly as practicable"); *In re Livingston*, 96 Misc. at 349, 160 N.Y.S. at 468 ("While it is . . . apparent that in every case all the provisions of the Constitution cannot be complied with[,] the language of the Constitution plainly requires that its provisions shall be complied with wherever it is practicable[, and] apportionments must comply with the constitutional mandate wherever possible.").

regard to the facts. *See Wilkins*, 264 Va. at 462, 571 S.E.2d at 108 ("*If the evidence offered in support of the facts at issue* would lead objective and reasonable persons to reach different conclusions, the legislative determination is considered fairly debatable . . . .") (emphasis added). The compactness deviations permitted in *Jamerson* and *Wilkins* are no more binding outside of their specific factual contexts than the 16% population deviation permitted in *Mahan* is binding outside its own. *See Mahan*, 410 U.S. at 328-30, 93 S. Ct. 987-88. For well over a hundred years, state courts have held—with remarkable consistency—that deviations from constitutional redistricting requirements must be justified by objective facts as part of the legislature's *bona fide* effort to honor and prioritize constitutional criteria.[7]

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[7] *Saunders*, 159 Va. at 46, 166 S.E. at 111 (striking down a map where "a slight change in district lines" could "have applied the provision of practical equality required" without sacrificing other redistricting policies demonstrated "that no *bona fide* effort was made"); *Pearson v. Koster*, 359 S.W.3d 35, 40 (Mo. 2012) (holding that "the duty to draw the district lines of a contiguous territory as compact and as nearly equal in population as may be [drawn] is one that is mandatory and objective"); *Schrage*, 88 Ill. 2d at 98, 430 N.E.2d at 487 ("A visual examination of [the district] reveals a tortured, extremely elongated form which is not compact in any sense. Nor were the plaintiffs able to advance any reason which might possibly justify such a radical departure from the constitutional requirement of compactness in this case."); *In re Legislative Districting of Gen. Assembly*, 193 N.W.2d at 791 (finding that "[n]othing appears to indicate the strange shapes are necessitated by considerations of population equality or result

The Court's duty is to ensure that its interpretations of the Virginia Constitution provide clear guidance to the legislature tasked with following the law and lower courts entrusted with applying it. Thus, if the trial court's standards are not clearly understood or appropriately applied, this Court should step in to correct course. This Court is thus uniquely positioned to interpret the Virginia Constitution and provide a coherent legal framework to ensure priority is given to constitutionally-required redistricting criteria. With the Court's assistance, future Attorneys General and legislators alike will be better equipped to give meaningful effect to the Virginia Constitution's compactness mandate.

This case presents a unique and important opportunity to discharge that duty because Defendants entered *no objective evidence whatsoever* to

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from unfeasibility" and, therefore, "[t]he legislature failed to comply with the constitutional mandate to devise districts consisting of compact territory"); *Preisler*, 365 Mo. at 467, 284 S.W.2d at 432 (noting that the challenged districts' "lack of compactness is not due to physical features of the area or works of man in the area[;] [i]n fact, such features and works that might be reasonable natural boundaries are disregarded"); *Att'y Gen. v. Suffolk Cty. Apportionment Comm'rs*, 224 Mass. at 609, 113 N.E. at 587 (examining other hypothetical arrangements and holding that "[e]ven a cursory examination of the report would show that a far more equal apportionment might have been made by following the plain mandate of the Constitution"); *Sherrill*, 188 N.Y. at 208, 81 N.E. at 131 ("The absurdity of joining Richmond county with some of the interior counties . . . is apparent upon a mere suggestion of such possibility.").

support the legislature's deviations from compactness. Instead, Defendants offered several misinterpretations of law as "defenses."

First, Defendants claim that because compactness was listed in the formal criteria adopted and because a handful of legislators mentioned compactness on the floor, compactness was "considered" sufficiently for constitutional purposes. *See* Att'y Gen. Opp. Br. 5-7; House Opp. Br. 2; Trial Tr. 785:8-16. This is not—and cannot be—the proper standard. Defendants could not save a 70% population deviation from an equal-protection challenge merely by pointing to the words "equal population" in a floor colloquy or upon a list of criteria. That same defense fails here.

Second, Defendants note that the legislature relied upon counsel's advice and therefore proceeded in good faith. *Amici* do not doubt that the legislature "truly believed that they were complying with the constitution when they simply met those two scores at the bottom of the scale . . . ." Trial Tr. 740:19-21. But constitutional violations do not vanish just because the government retains a legal opinion. If the constitution imposes a duty to shoot at the ceiling, that duty does not disappear because a lawyer said to shoot at the floor. "Good intentions . . . cannot make valid [an apportionment that is] on its face obnoxious to the requirements of the Constitution. The [apportionment] must be judged by what appears on its

face in the light of facts of which the court can take notice." *Donovan v. Suffolk Cty. Apportionment Comm'rs*, 225 Mass. 55, 58, 113 N.E. 740, 742 (1916).

Third, Defendants admit that there are no "bright lines" separating "compact" from "non-compact" districts, but then claim that the legislature can seek safe harbor in specific scores from prior maps. *Compare* Trial Tr. 23:22-23 ("As the Supreme Court has held, there is no bright line test for compactness in Virginia.") *and* 794:9-10 ("It is not our position that *Jamerson* or *Wilkins* established a floor."), *with* 781:7-10, 791:13 ("[Y]ou look at the levels of compactness that have been approved before and ensure that you're essentially at or above that level. . . . It [is] about the numbers.") *and* 30:3-5 ("This court only needs to decide whether or not this plan is less compact than the prior plan . . . .").

This is a position at war with itself. Defendants cannot say that objective standards do not exist *and* that the districts meet objective standards. Dr. Hofeller attempted similar sleight of hand in another Virginia redistricting case to little avail. *See Bethune-Hill v. Va. State Bd. of Elections*, 141 F. Supp. 3d 505, 533 n.15 (E.D. Va. 2015), *affirmed in part and vacated and remanded in part on other grounds by* 137 S. Ct. 788 (2017) ("[Dr. Hofeller]. . . found 'no issues' with every last one of the

Challenged Districts despite testifying that there is no professional consensus on what is and is not compact.").

Indeed, the Commonwealth advanced precisely the opposite argument in *Jamerson*. There, the Commonwealth argued that any evaluation of compactness must be rooted in the facts justifying the deviations and that merely referring to a prior plan's compactness scores "is meaningless."[8] In other words, a compactness score can go *lower* than prior plans' scores if that is necessary and justified by the facts but must go *higher* than prior plans' scores whenever possible.

No deviation from mandatory criteria gets a free pass. Deviations must be justified based on the legislature's considered judgment of the facts, and—even then—deviations based on policies cannot subordinate a constitutional command. Driving compactness levels down to a "compactness score floor" as the legislature did here—without regard to the facts and without attempting to prioritize compactness—constitutes

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[8] *See* Br. Of Appellees, Record No. 920460, at 21-23 ("[M]athematical compactness is a *relative* rather than an *absolute* measure. There is no score for any one compactness measure or any other such 'bright line' that on its face indicates unsatisfactory compactness. . . . [However, one type of] inappropriate comparison is to use a state's *past redistricting plans*. . . . [The] conclusion that Districts 15 and 18 in the Adopted Plan are less compact than the districts in the 1981 Plan is meaningless.").

"reckless disregard" of the legislature's constitutional duty. *Sherrill*, 188 N.Y. at 198, 81 N.E. at 128. "Once the . . . lowest acceptable figures were fixed . . . all efforts to achieve [the criterion] ceased. Further efforts were aimed at different objectives; namely, rearrangement of voting blocks to achieve greater acceptability to the individual legislators. This approach . . . results in an unconstitutional apportionment plan." *In re Legislative Districting of General Assembly*, 193 N.W.2d at 788.

The court below rightfully acknowledged that *Jamerson* and *Wilkins* do not support Defendant's bright-line approach. Slip Op. at 14. And, towards the close of trial, the court seemed to recognize that Defendants' entire case rested upon this misinterpretation of law:

> Your expert . . . was reluctant to say the numbers, but he just kept saying [he] complied with *Jamerson* and *Wilkins*. I take it by that he means . . . they complied with these numbers . . . [from] *Jamerson* or *Wilkins* . . . . So – that's really all I heard, right? That's the only standard that was given from the defense side.

Trial Tr. 790:1-9. By holding this to be legal error, and then turning around and "deferring" to that legal error, the court below failed to properly apply the law.

Finally, Defendants contend that by critiquing Plaintiffs' degradation model, they have made the question of the legislature's compliance with

the constitution "fairly debatable." Not so. Plaintiffs' model provides concrete evidence that compactness was not prioritized in the redistricting process and that the plan's low compactness levels were not justified by the balancing of competing mandatory criteria or the consistent application of neutral and legitimate state policy.[9] *See In re 1983*, 469 A.2d at 831 (describing the challengers' evidentiary burden); *Cole-Randazzo v. Ryan*, 198 Ill. 2d 233, 238, 762 N.E.2d 485, 488 (2001) (same).

In re 1983 Legislative Apportionment is instructive because the challengers failed to show that an alternative plan would improve the aggregate equal population deviation without simultaneously running afoul of other constitutional requirements, namely the compact-and-contiguous and "whole district" rules. 469 A.2d at 830. Here, Plaintiffs' challenge accounts for all constitutionally required criteria and offers the precise evidence found lacking in that case: proof that compactness "could be substantially improved without creating constitutional violations elsewhere in the state." *Id.* at 831.

Further, despite the constitutional requirement of compactness for "[e]very" electoral district, the trial court's holding that the validity of the

[9] The Court need not accept the "degradation" test as constitutionally dispositive to hold that it has evidentiary value.

legislature's 2011 redistricting plan is "fairly debatable" permits the legislature's general "consideration" of compactness for the 2011 redistricting plan to replace a fact-specific defense of the districts challenged by Plaintiffs.[10] *See* Att'y Gen. Opp. Br. 5-7; House Opp. Br. 2; Trial Tr. 785:8-16. Specifically, Defendants argued that "*maybe* they were all in agreement as to how they were going to consider [compactness] so they haven't talked about it as much as some of the other factors where th[ey] were in disagreement, but they mentioned it." Trial Tr. 785:9-13 (emphasis added). Similarly, the trial court found that justifications for the 2011 redistricting plan "*presumably* include[d] compactness." Slip Op. at 7. These are assumptions, not evidence. Defendants must present more than attorney argument and conjecture as to the reasons the legislature merely "mentioned" the constitutionally required criterion of compactness.

In short, Defendants have offered no evidence that compactness was given priority. Deriding a measurement that shows compactness was de-prioritized is not the same as introducing evidence that compactness was

[10] The issue before the trial court was "whether the Virginia Legislature gave priority to the constitutionally required criterion of compactness over discretionary criteria in the 2011 redistricting with respect to eleven challenged districts (House of Delegates districts 13, 22, 48, 72, and 88, and Senate districts 19, 21, 28, 29, 30, and 37)." Slip Op. at 1.

prioritized. Because Plaintiffs provided objective evidence that compactness was subordinated in the challenged districts and Defendants offered no such evidence, the trial court erred in holding the question to be "fairly debatable."

This Court's "fair-minded men" standard assumes the parties are debating over *how* compactness was prioritized, not *whether* compactness *should be* prioritized over discretionary criteria. *See Wilkins,* 264 Va. at 462, 571 S.E.2d at 108 ("*If the evidence offered in support of the facts at issue* would lead objective and reasonable persons to reach different conclusions, the legislative determination is considered fairly debatable . . . ." (emphasis added)). The Virginia Constitution provides the answer to the latter question, and it is not up for debate by legislators, fair-minded or not.

Without providing evidence that compactness was prioritized and that deviations were justified by the facts to rebut Plaintiffs' showing, Defendants cannot prevail. Compactness has no meaning as a raw score divorced from factual context. *Op. to the Governor*, 101 R.I. at 207, 221 A.2d at 802 (citing to *Cty. of Norfolk v. Portsmouth*, 186 Va. 1032, 166 S.E. 105 (1947)) ("The term 'compact' then, as it is used in the constitution, has reference to a principle, rather than to a definition, and has meaning only within an appropriate factual context."). If deviations from compactness do

not require factual justification, then the constitutional provision likewise has no meaning. If districts like those challenged here "can be upheld, when no other constitutional provision makes [their] shape necessary, then the provision as to compactness serves no purpose. But that provision . . . was enacted for a purpose, and the courts should require that it be respected." *In re Livingston*, 96 Misc. at 352, 160 N.Y.S. at 470.

In short, the legislature's duty is to engage the facts and make a *bona fide* attempt to prioritize compactness under the circumstances. Instead, the undisputed record shows that the constitution's mandate was an afterthought, with each district's compactness subordinated to the greatest extent the legislature thought possible. This is precisely the opposite of what the constitution—and all interpretive case law—requires.

The People of the Commonwealth—like the citizens of many sister states—already undertook the laborious work of amending the constitution to bridle legislative discretion and rein in the abuses at issue in this case. It should not be incumbent upon Virginians to undertake the labors anew. It is this Court's responsibility to give effect to the constitutional mandate already in place and to uphold the limits set out by the People in our governing charter.

CONCLUSION

For the foregoing reasons, the decision below reflects a clear legal error with respect to a vital constitutional question, and this Court should grant the Petition for Appeal to clarify the legal standard applicable to the case at bar and to ensure that the Virginia Constitution's redistricting requirements provide meaningful restraints upon legislative discretion.

Respectfully submitted,

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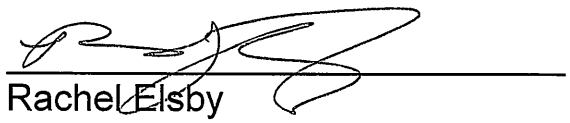

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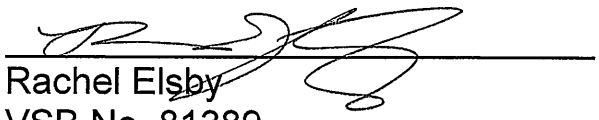

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EXHIBIT A