IN THE SUPREME COURT OF VIRGINIA

RECORD NO. 170697

RIMA FORD VESILIND, *et al.*,

Appellants,

v.

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

Appellees.

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

Rachel Elsby
VSB No. 81389
G. Michael Parsons, Jr.
(Admitted *Pro Hac Vice*)
Corey W. Roush
(Admitted *Pro Hac Vice*)
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Ave., NW
Washington, D.C. 20036-1564
TEL: 202.887.4000
FAX: 202.887.4288
EMAIL: relsby@akingump.com

Counsel for Amici Curiae

December 14, 2017

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

Rules

Constitutional Provisions

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 Appellants, Rima Ford Vesilind; Arelia Langhorne; Sharon Simkin; Sandra D. Bowen; Robert S. Ukrop; Vivian Dale Swanson; H.D. Fiedler; Jessica Bennett; Eric E.

[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).

Amateis; Gregory Harrison; Michael Zaner; Linda Cushing; Sean Sullivan Kumar; and Dianne Blais (collectively, "Plaintiffs")[2] in their Opening Brief.

Amici contend that the trial court misunderstood and misapplied the "fairly debatable" standard when it credited legally flawed defenses by Appellees, Virginia State Board of Elections; Virginia Department of Elections; James B. Alcorn; Clara Belle Wheeler; Singleton B. McAllister; and Edgardo Cortes, and Appellee-Intervenors, 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

[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 Opening Brief.

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 . . .

[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 Defendants seem to believe.

The Virginia Constitution requires that legislators make a *bona fide* effort to prioritize mandatory constitutional criteria based on contemporaneous, objective facts. Legislators may also seek to advance consistently applied, nondiscriminatory, and legitimate discretionary redistricting policies, but the implementation of such discretionary statutory policies cannot subordinate mandatory constitutional commands.

Because the undisputed factual record below shows that the legislature misunderstood and violated this constitutional requirement by using compactness scores as a "floor," the Court should clarify that mandatory criteria cannot be subordinated to discretionary policies; hold that each of the challenged districts fail to comply with Article II, Section 6 of the Virginia Constitution; reverse the decision below; and remand the case with a direction to enter judgment for Plaintiffs and require that new districts be enacted no later than January 31, 2019.

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*, 264 Va. at 463-64, 571 S.E.2d at 109 (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 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). 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 challenged district will fail constitutional scrutiny—regardless of any deviation calculation or *post hoc* legislative 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

[4] The fact that a mandatory criterion must be prioritized—and cannot be "subordinated" or "emasculated"—does not render the inquiry "intent-based." *See* Def.-Interv's' Br. in Opp'n & Assignments of Cross-Error 19-20 (June 14, 2017) [hereinafter House Opp. Br.]. The inquiry is based on an objective review of the facts. *See infra* at note 7.

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.

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* Exhibit A, 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. *See 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 and making delicate *factual* judgments 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" that mandatory criteria must be given priority, and the legislature is prohibited from according mandatory and discretionary criteria equal priority. That is especially so when the legislature cannot point to a neutral, legitimate, and consistently-applied 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 (June 14, 2017) [hereinafter Att'y Gen. Opp. Br.]. This is precisely the opposite of the *bona fide* effort that the

[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 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))).

Virginia Constitution demands, and this misinterpretation grates against the law as articulated by this Court and numerous other state supreme courts.[6]

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

---

[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] 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.").

the Constitution]" means that the adopted redistricting plan does not reflect "the exercise of discretion[,] but a reckless disregard of that discretion." *Id.* This Court's "fair-minded men" standard assumes that the parties are debating over *how* compactness should be prioritized in the face of competing mandatory criteria, not *whether* compactness should be prioritized over discretionary criteria. The Virginia Constitution answers the latter question, and it is not up for debate by legislators, fair-minded or otherwise.

Thus, the fact that some degree of deviation from compactness may be justified (and owed due deference) when the legislature attempts to prioritize compactness while simultaneously honoring other criteria does not mean that the same degree of deviation is forevermore constitutional *per se* and without 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, contemporaneous facts as part of the legislature's *bona fide* effort to honor and prioritize constitutional criteria.[7]

---

[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 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.").

This case presents a unique and important opportunity for the Court to reaffirm this fundamental constitutional requirement because Defendants entered *no objective evidence whatsoever* to 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 no 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* from that which it advances here. In *Jamerson*, 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 district's compactness score *can* go *lower* than the score in a prior plan if that is necessary and justified by the facts, but the district's score *must* go *higher* than the score from a prior plan whenever possible.

No deviation from mandatory criteria gets a free pass. Deviations must be justified based on the legislature's considered judgment of the

[8] *See* Exhibit A, 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.").

facts, and—even then—deviations based on statutory policies cannot subordinate the constitution's requirements. Driving compactness levels down to a "compactness score floor" as the legislature did here—without regard to the facts and without even attempting to prioritize compactness—constitutes "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. Although the court below rightfully identified that this was an erroneous reading of *Jamerson* and *Wilkins*, the court then turned around and deferred to the legislature's legal error, thereby failing 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. Criticizing a measurement that shows compactness was de-prioritized is not the same as introducing affirmative evidence that compactness was prioritized. Plaintiffs have provided objective, admissible evidence that compactness was subordinated in the challenged districts, and Defendants have offered *no evidence whatsoever* to demonstrate that *any* attempt to maximize compactness was made. The "fairly debatable" standard has no application in such a situation.

To start, 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. Using an alternative map as a baseline to test for constitutional violations is commonplace in the redistricting context. Not

only have courts held that alternative maps have evidentiary value in the equal population context,[9] state courts have held that alternative maps have evidentiary value in the very same context found here: judging compliance with constitutional compactness provisions, *see In re 1983*, 469 A.2d at 831 (describing the challengers' evidentiary burden in a compactness challenge); *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

[9] In equal-population challenges to congressional districts, plaintiffs "bear the burden of proving the existence of population differences that 'could practicably be avoided.'" *Tennant v. Jefferson Cty. Comm'n*, 133 S. Ct. 3, 5 (2012) (quoting *Karcher v. Daggett*, 462 U.S. 725, 734 (1983)). Then, "the burden shifts to the State to 'show with some specificity' that the population differences 'were necessary to achieve some legitimate state objective.'" *Id.* (quoting *Karcher*, 462 U.S. at 741). The burden at this step is "flexible" and depends on "the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely." *Id.* This approach retains room for legislative discretion in redistricting while simultaneously confining the scope of that discretion as the constitution requires.

accounts for all 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; *see* P29-0010-14 (comparing compactness scores of enacted plan with Alternative Plan 1, which substantially improved compactness while complying with equal population, contiguity, and Voting Rights Act requirements).

Moreover, Plaintiffs even introduced evidence that compactness could be improved while still advancing neutral, legitimate, and consistently-applied discretionary criteria in addition to honoring mandatory criteria. *See* P29-0014-15 (describing Alternative Plan 2, which improved compactness while "splitting the same number or fewer political subdivisions (counties/cities) and voting precincts compared to the current plan" and "refrain[ing] from pairing incumbents in the same district to the same degree as the current plan"). Such a showing demonstrates that "no bona fide effort was made to [comply with the compactness requirement] as near as practicable," as this Court requires. *Saunders*, 159 Va. at 46, 166 S.E. at 111; *see also supra*, note 6 (collecting cases requiring legislatures provide for territorial compactness "as nearly as practicable").

The Court does not need to make Plaintiffs' "degradation test" constitutionally dispositive or adopt any specific degradation threshold to hold that the test (or even the underlying "Alternative Plan 1" upon which that test is based) has evidentiary value. Indeed, one of Defendants' own experts—Dr. M.V. Hood III—acknowledged that the test offered by Plaintiffs provided at least one way to shed light on the relative priority given to compactness in the redistricting process. *See* Trial Tr. 392:9-12. In short, the trial court was well within its bounds to admit Plaintiffs' evidence,[10] and that evidence is precisely the kind of proof demanded by state courts in other compactness challenges.

In the face of this evidence and of the constitutional requirement that "[e]very" electoral district be compact, Defendants offered mere conjecture and legally erroneous arguments about the plan as a whole. Specifically, Defendants argued that "*maybe* [the legislators] 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

[10] Although this Court reviews the lower court's interpretation of the Virginia Constitution *de novo*, *see supra* at 4, it reviews the lower court's decision to admit expert opinion for abuse of discretion, *see Holiday Motor Corp. v. Walters*, 292 Va. 461, 483, 790 S.E.2d 447, 458 (2016) (quoting *Hyundai Motor Corp. v. Duncan*, 289 Va. 147, 155, 766 S.E.2d 893, 897 (2015)).

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 a fact-specific defense of the districts challenged by Plaintiffs, not *post hoc* hypotheticals. *See* Att'y Gen. Opp. Br. 5-7; House Opp. Br. 2; Trial Tr. 785:8-16.

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 constitution's compactness requirement 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.

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 is not the duty of Virginians to undertake the labors anew. Rather, it is this Court's duty 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, this Court should clarify that mandatory criteria cannot be subordinated to discretionary policies; hold that each of the challenged districts fail to comply with Article II, Section 6 of the Virginia Constitution; reverse the decision below; and remand the case with a direction to enter judgment for Plaintiffs and to require that new districts be enacted no later than January 31, 2019.

Respectfully submitted,

KEN CUCCINELLI
MARY SUE TERRY
STEPHEN ROSENTHAL

/s/ Rachel Elsby

Rachel Elsby
VSB No. 81389
G. Michael Parsons, Jr.
(Admitted *Pro Hac Vice*)
Corey W. Roush
(Admitted *Pro Hac Vice*)
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Ave., NW
Washington, D.C. 20036-1564
TEL: 202.887.4000
FAX: 202.887.4288
EMAIL: relsby@akingump.com

Counsel for Amici Curiae

December 14, 2017

CERTIFICATE OF SERVICE

I hereby certify that on December 14, 2017, Rule 5:26(e) was complied with and also the required copies of this brief were filed with this Court, and copies were emailed to the following counsel of record:

Wyatt B. Durrette, Jr.
Christine A. Williams
DURRETTECRUMP PLC
1111 East Main Street, 16th Floor
Richmond, VA 23219
wdurrette@durrettecrump.com
cwilliams@durrettecrump.com

Counsel for Appellants

E. Mark Braden
Katherine L. McKnight
Richard B. Raile
BAKER HOSTETLER LLP
1050 Connecticut Ave NW, Suite 1100
Washington, DC 20036
mbraden@bakerlaw.com
kmcknight@bakerlaw.com
rraile@bakerlaw.com

Counsel for Appellee-Intervenors

Joshua D. Heslinga
Anna T. Birkenheier
OFFICE OF ATTORNEY GENERAL
202 North Ninth Street
Richmond, VA 23219
jheslinga@oag.state.va.us
abirkenheier@oag.state.va.us

Counsel for Appellees

I further certify that this brief is not longer than 50 pages and otherwise complies with the Rules of the Supreme Court of Virginia.

/s/ Rachel Elsby
Rachel Elsby
VSB No. 81389
Akin Gump Strauss Hauer & Feld LLP
1333 New Hampshire Ave., NW
Washington, D.C. 20036-1564
TEL: 202.887.4000
FAX: 202.887.4288
EMAIL: relsby@akingump.com

EXHIBIT A

241UA526

IN THE SUPREME COURT OF VIRGINIA

Record No. 920460

W. E. JAMERSON, et al.,

Appellants,

v.

PAMELA WOMACK, et al.,

Appellees.

BRIEF OF APPELLEES

MARY SUE TERRY
Attorney General of Virginia

STEPHEN D. ROSENTHAL
Chief Deputy Attorney General

GAIL STARLING MARSHALL
Deputy Attorney General

GREGORY E. LUCYK
Senior Assistant Attorney General

Office of the Attorney General
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-2071
Counsel for Appellees

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Other Authorities

IN THE SUPREME COURT OF VIRGINIA

Record No. 920460

W. E. JAMERSON, et al.,

Appellants,

v.

PAMELA WOMACK, et al.,

Appellees.

BRIEF OF APPELLEES

STATEMENT OF THE CASE

Appellants, the plaintiffs below, appeal a decision of the Circuit Court of the City of Richmond, the Honorable Lewis Hall Griffith, Retired Judge, presiding by designation, which upheld Virginia's 1991 Senate Redistricting Plan against a claim that two of the forty districts established by the plan violated the Virginia Constitution's requirement that legislative districts be composed of "compact territory." Va. Const. Art. II, § 6.

The 1991 Senate Redistricting Plan, enacted by Ch. 18, 1991 Va. Acts (Special Session) (hereafter "Adopted Plan"), was passed by the General Assembly on May 21, 1991, signed by the Governor on May 23, 1991, and approved by the United States Department of Justice under § 5 of the Voting Rights Act, 42 U.S.C. § 1973 et seq., on July 16, 1991. The Adopted Plan creates five majority black districts -- a significant increase over the 1981 redistricting plan for the Virginia Senate, which provided for only

two majority black districts. The three new majority black districts are located in Newport News, in the Richmond/Charles City area, and in Southside Virginia.

This suit for a Declaratory Judgment originally was filed in the Circuit Court of Halifax County on June 24, 1991. Judge Griffith was assigned to the case when the judges of the 10th Judicial Circuit recused themselves. By consent of the parties, venue was transferred to the Circuit Court of the City of Richmond on August 6, 1991. Leave was granted to add additional parties, and a Second Amended Petition for Declaratory Judgment was filed on September 25, 1991, naming as defendants Pamela M. Womack, Secretary of the Commonwealth, L. Douglas Wilder, Governor of the Commonwealth of Virginia, and the three members of the State Board of Elections (hereafter "defendants").

The thirty-four plaintiffs/appellants in this case (hereafter "plaintiffs") are residents of Senate District 18, the new Southside majority black district created in the Adopted Plan, and Senate District 15, which is adjacent to District 18. They complain that their new districts are narrow and elongated instead of square and "compact," that they combine urban and rural areas with "competing interests," cut across local jurisdictional lines, and fail to recognize communities of interest they believe to be significant. They contend that the General Assembly <u>could</u> have adopted an alternative plan introduced before the legislature, known as the Privileges and Elections Committee Substitute for SB 1510 (hereafter "P&E Plan"). This plan provided for a different

configuration of districts in the Northern Virginia and Northern Neck areas, and moved the Southside majority black district east into the P&E Plan District 15. The plaintiffs argue that more compact Southside districts could have been created if the General Assembly had enacted the P&E Plan.

A two day trial was held October 21 and 22, 1991. Eighteen witnesses testified, producing over five hundred pages of transcribed testimony. Some sixty-six maps, charts, and other exhibits were introduced into evidence. On December 11, 1991, Judge Griffith issued his four page letter opinion upholding the Adopted Plan and denying the Petition for Declaratory Judgment. He found that the General Assembly (1) properly considered compactness in its redistricting deliberations, and (2) accorded compactness appropriate weight among the hierarchy of redistricting criteria, reflected in resolutions adopted by the legislature to guide the redistricting process, including the mandates of equal population and effective minority representation under the Voting Rights Act, 42 U.S.C. § 1973 et seq. He found from the evidence that the challenged districts were not lacking in compactness under mathematical and geometric measures adduced in the evidence, and that population shifts and demographic changes meant that larger rural districts were inevitable under any redistricting configuration. Finally, he rejected the plaintiffs' proposal that compactness should be evaluated by socio-economic ties or historical jurisdictional boundaries, a so-called "compactness of content" approach, as this concept incorporates separate, distinct

and non-constitutional policy considerations appropriately left for the judgment of the legislature.

On January 8, 1992, the Circuit Court entered its order incorporating the reasoning and rulings contained in Judge Griffith's letter opinion. This Appeal followed.

QUESTIONS PRESENTED

1. Whether Senate Districts 15 and 18 as constituted by the General Assembly and signed by the Governor comport with the Virginia Constitutional requirement of being composed of contiguous and compact territory.

2. If not, whether any deviations from compactness are rationally related to achieving compliance with federal and state mandated standards of equal population and the Voting Rights Act.

STATEMENT OF THE FACTS

The standard of review on appeal from the grant or denial of a declaratory judgment is abuse of discretion, and the trial court's findings are entitled to a presumption of correctness. Cupp v. Bd. of Supervisors of Fairfax County, 227 Va. 580, 318 S.E.2d 407 (1984).

The defendants do not dispute the legislative history of the adopted plan set forth by plaintiffs in their Statement of the Facts. However, plaintiffs' statement must be supplemented and amplified as there are other facts stipulated by the parties and undisputed facts adduced in the evidence at the trial of this matter which clearly demonstrate that the trial court's judgment upholding the constitutionality of the Adopted Plan was correct.

At the trial of this matter, plaintiffs offered expert testimony from Thomas M. Guterbock, Ph.D, from the Department of Sociology of the University of Virginia ("Guterbock"). The defendants' expert was Kimball W. Brace, President of Election Data Services, Inc., of Washington, D.C. ("Brace").

At the outset, it should be noted that Guterbock testified he had never conducted a compactness analysis of legislative districts until this case. (Guterbock testimony, Joint Appendix, p. 171) (hereafter "JA __"). He admitted that "'compactness of content' is [his] own term. It is not in the literature," (JA 250), and he acknowledged that pre-eminent compactness scholars (e.g., Richard G. Niemi, Distinguished Professor, University of Rochester) specifically have rejected a socio-economic interests based approach to evaluating compactness. (JA 251).

The evidence is undisputed that between the 1980 and 1990 censuses, Virginia's total population increased from 5,346,818 to 6,187,358, roughly a 15 percent increase (Defendants' Ex. 7, JA 469). Most of this increase occurred in the Northern Virginia Area. The ideal Senate district size likewise increased from 133,670 persons to 154,683 persons (Stipulation, JA 60). At the same time, the population actually decreased in most of the Southside Virginia localities included in the Senatorial districts involved in this litigation. (JA 469). The result of increased ideal district size coupled with decreased locality population in the Southside area was a significant expansion of the territory needed to create legislative districts meeting the equal population

criterion -- and thus much larger legislative districts in the Southside (JA 347-48).

Guterbock and Brace both agreed that in the hierarchy of redistricting criteria, equal population and effective minority representation "without question take precedence" over compactness. (Guterbock, JA 259; Brace, JA 326). Their testimony corroborated the hierarchy of redistricting criteria adopted by the General Assembly in P&E Committee Resolution No. 1 to guide the redistricting process. The full text of the Resolution and its preliminary Discussion Draft are set forth at JA 74 and JA 478-83. The applicable legal "Criteria" listed according to the hierarchy reflected in P&E Committee Resolution No. 1 were as follows: (1) equal representation; (2) minority representation; (3) compactness; (4) contiguity; and (5) political fairness. The subordinate "Policy Considerations" listed were: (1) political subdivisions, (2) communities of interests, (3) precincts, and (4) existing districts and incumbency, which the Resolution stated were merely "permissible to consider."

Guterbock and Brace also agreed that the overall compactness of legislative districts has <u>decreased</u> during the past two decades with increased enforcement of the equal population and Voting Rights requirements. This trend is demonstrated in a comparison of the overall compactness of Virginia's Senate redistricting plans from 1970, 1981, and 1991 (JA 299-300, 354, 508). Both experts also agreed that majority black districts created pursuant to the Voting Rights Act tend to be less compact than non-minority

districts (JA 248, 349), and result in more split jurisdictions (JA 246), because of the need to knit together widely scattered pockets of black population (JA 247, 349-50).

In comparing the Adopted Plan with the P&E Plan in terms of compliance with equal population, compactness, and effective minority representation requirements, the evidence is uncontroverted that the Adopted Plan fares better than the P&E Plan in all categories.

First, as to equal population, the Adopted Plan scores better, with a lower total deviation (8.53% vs. 9.35%), lower average deviation (2.00% vs. 2.31%) and lower median deviation (1.69% vs. 2.46%) from ideal population than the P&E Plan. (JA 328; Defendants' Exs. 1(c), 4(c), at JA 136, 466).

Second, the compactness of the legislative districts created in the Adopted Plan and the P&E Plan was analyzed both by Guterbock and Brace using the mathematical and geometrical formulas generally referred to by courts and commentators. Their results showed that the Adopted Plan performed better, i.e., was more compact than the P&E plan, on every measure. The largest district among all the plans in terms of sheer mass (area) was the P&E Plan District 18, at 4,335 square miles. (JA 121). In contrast, the largest district in the Adopted Plan was District 15, at 3,763 square miles. (JA 122). The longest district among all the plans was P&E Plan District 28, stretching over 204 miles from the western tip of Culpeper County all the way to the shores of the Chesapeake Bay in Lancaster County. (JA 96, 121, 275). By comparison, the longest

district in the Adopted Plan is District 18, at 165 miles. (JA 122, 275). In the "perimeter measures" used by Guterbock, the P&E Plan contained two districts (2 and 12) that were less compact than the challenged District 18 in the Adopted Plan (JA 97, 98, 275-76), while his "dispersion measures" showed P&E District 28 was the least compact district of all the districts in all of the plans. (JA 99, 100, 277-78).

Third, in looking at effective minority representation, it is undisputed that District 18 in the Adopted Plan is "a more effective minority district than the P&E Plan District 15." (JA 335). This conclusion is based upon an examination of white voter turnout (higher white voter turnout works against minority candidates); black voter turnout (higher black voter turnout helps minority candidates); and "incumbency advantage" -- that is, the likelihood that a sitting white incumbent, who retains some or most of the territory from her former district in a newly redrawn district, can defeat a minority challenger. The unrebutted evidence at trial showed that P&E District 15 had a higher white turnout and lower black turnout, and thus less opportunity to elect a minority candidate, than did the Adopted Plan District 18. (JA 335-36). Moreover, the evidence also established that the incumbency advantage Senator Richard Holland would have enjoyed in P&E 15 was nearly double that of Senator Howard Anderson in the Adopted Plan's District 18 (43% vs. 22.5%) (JA 331-32). If Senator Holland were to run again in District 15 of the P&E Plan, given the high white voter turnout, low black voter turnout, and his strong

incumbency advantage, it is highly likely he would have been re-elected, despite the fact that he would have run in one of the P&E Plan's new minority districts. (JA 332). Senator Anderson had no such incumbency advantage in the Adopted Plan's District 18, and would have had to run in a minority district with less favorable black/white voter turnout ratios. After the adopted plan was approved by the Justice Department, Senator Anderson chose not to run for re-election and retired from the Virginia Senate. This Court may take notice that Senate District 18 is now represented by a black woman, Senator L. Louise Lucas.

Louise Lucas was one of several witnesses who testified at trial for the defendants. Ms. Lucas described the time she spent on her grandparents' farm in Bartnett County, North Carolina, working in the tobacco and cotton fields and "killing hogs." (JA 441-42). She recounted her travels throughout the 18th Senatorial District and her numerous meetings with local government officials, farmers, and other business people (JA 434-38). She found no "vast differences in philosophy" between rural and urban Virginians (JA 444), and expressed her belief that there was no likelihood of conflict so long as a representative was "committed to serving fairly" and did <u>not</u> "serve the whims of special interest groups." (JA 443).

Seymour A. Banks, a black resident of South Boston, testified that it would pose no problem for him if his new Senator lived in Portsmouth because "the place is not as important as attitude and accessibility." (JA 445). He pointed out that although they lived

only five miles apart, he had never met Senator Anderson. "There are social distances," Mr. Banks stated, "which may have as much impact on relationships . . . The social distance may be more important than the linear distance." (JA 445-46). Mr. Banks views were echoed in testimony by Ernest L. Morice, a black businessman from Mecklenburg County.

Dr. James C. Baker, an agronomist and soil science expert from Virginia Tech, testified at length regarding plaintiffs' contention that there were "competing" forms of agriculture in the new 18th Senatorial District. He pointed out that 75% of the agriculture in the entire district, consisting primarily of wheat, corn, and soybeans, is identical, and that the remainder, tobacco and peanuts, is regulated entirely by the Federal Farm Bill. (JA 450, 454). He made clear that there was no likelihood for conflict or competition within the district in legislative matters relating to water resources, soil conservation, or agricultural marketing. (JA 451-54). Testimony also was offered by Mary S. Mosenburg, Clinical Health Supervisor at the Southside Community Services Board in Halifax, Virginia, and Mark Kilduff, Director of Trade and Industrial Development for the Virginia Department of Economic Development. Their evidence confirmed the obvious -- that issues relating to health care, economic development, and the like are statewide concerns not limited to any particular constituency or geographic region of the state.

SUMMARY OF ARGUMENT

Plaintiffs are thirty-four individuals from Southside Virginia who brought a declaratory judgment action challenging the redistricting plan for the Virginia Senate enacted by Chapter 18, 1991 Acts of Assembly (Special Session). Contrary to the essential thrust of their Opening Brief, the Circuit Court did not decline to consider the merits of their challenge based on the availability of other forms of relief. Rather, the Circuit Court rejected -- following a two-day trial -- plaintiffs' claim that new Senate Districts 15 and 18 violate the Virginia Constitution's requirement of compactness. Both the voluminous record and the law fully support the Circuit Court's decision. The Court below found that the General Assembly acted well within its legislative discretion in enacting the Adopted Plan rather than the P&E Plan favored by plaintiffs. The case law clearly establishes that drawing legislative districts is a matter involving "necessarily wide legislative discretion" and that state constitutional compactness requirements rarely provide a basis for judicial intervention. In Virginia, such challengers face a particularly heavy burden of overcoming a strong presumption of validity and proving that the General Assembly's action was "grave, palpable and unreasonable," and without any legitimate or rational basis.

Plaintiffs made no such showing here. Indeed, the expert testimony presented by both parties shows that there are a number of mathematical measures of compactness, and that the P&E Plan favored by plaintiffs scored worse on these measures than the plan

adopted by the General Assembly. The evidence also showed that the Adopted Plan created a more effective minority district, and thus was more likely to pass muster under the Voting Rights Act, than did the P&E Plan. It was for the General Assembly to choose the plan it believed best satisfied the competing legal criteria and policy considerations involved in redistricting. The Circuit Court correctly concluded that plaintiffs wholly failed to show any objective basis for judicial intervention, much less the strong proof required to overturn the duly adopted plan of the General Assembly.

Plaintiffs' central argument -- about the availability of mandamus -- ignores the record and the Circuit Court's rejection of petitioners' compactness claim on the merits. Plaintiffs' legal arguments -- about communities of interest and the Voting Rights Act -- ignore settled precedent. Moreover, as argued by the defendants below, plaintiffs failed to show any justiciable interest or controversy or indeed any harm whatsoever from the legislative action challenged.

In any event, these plaintiffs had not one but two full trial days in court and they lost on the facts. The Circuit Court's carefully considered, fact-based judgment should, therefore, be affirmed.

ARGUMENT

A. In Order to Prevail, Plaintiffs Must Establish A "Grave, Palpable and Unreasonable" Violation of the Constitution.

The Adopted Plan for redistricting the Virginia Senate, as an

enactment of the General Assembly, "carries a strong presumption of validity." Caldwell v. Seaboard System Railroad, 238 Va. 148, 152, 380 S.E.2d 910, 912 (1989). The plaintiffs bear a heavy burden to prove that the statute "clearly violates" some constitutional provision, and any reasonable doubt must be resolved in favor of the statute's validity. See City of Charlottesville v. DeHaan, 228 Va. 578, 323 S.E.2d 131 (1984). In DeHaan, this Court, in reversing a trial court's ruling of unconstitutionality of a bond ordinance, stated as follows:

> In opinion after opinion, we have emphasized the very narrow confines in which the courts must operate when considering the constitutionality of legislative activities . . . Every presumption is made in favor of the constitutionality of an act of the legislature. A reasonable doubt as to its constitutionality must be resolved in favor of the validity of the law, and the Courts have nothing to do with the question whether or not the legislation is wise and proper, as the legislature has plenary power, except where the Constitution of the State or of the United States forbids, and it is only in cases where the statute in question is plainly repugnant to some provision of the Constitution that the courts can declare it to be null and void. (emphasis added).

Id. at 583-84, quoting Harrison v. Day, 200 Va. 750, 754, 107 S.E.2d 585 (1959).

This Court also has made clear that the presumption of validity applies with even greater force in the context of redistricting legislation because "redistricting is, in a sense, political, and necessarily wide discretion is given to the legislative body." Brown v. Saunders, 159 Va. 28, 36, 166 S.E. 105, 107 (1932). It is for this reason that in order to prevail in a challenge to a redistricting statute, a plaintiff must show "a

grave, palpable and unreasonable deviation from the principles fixed by the Constitution." Brown v. Saunders, 159 Va. at 44, 166 S.E. at 110.

Other state and federal courts across the country have adopted this strict standard:

> Our review of the compactness requirement, however, is limited. The framers of the Constitution "clearly intended to leave the legislature with a wide discretion as to the territorial structuring of electoral districts." . . . The court reviews to ensure that the legislature did not act "without a rational or legitimate basis."

Holmes v. Farmer, 475 A.2d 976, 986 (R.I. 1984), quoting Opinion to the Governor, 221 A.2d 799, 803 (1966). See also, In re Legislative Districting, 299 Md. 658, 688, 475 A.2d 428, 443 (Md. 1984) ("Essentially, the districting process is a political exercise for determination by the legislature and not the judiciary; the function of the courts is limited to assessing whether the principles underlying the compactness and other constitutional requirements have been fairly considered and applied in view of all relevant considerations."). Logan v. O'Neill, 448 A.2d 1306, 1310 (Conn. 1982) (The burden on a party challenging the validity of a redistricting statute is "to establish that it is unconstitutional beyond a reasonable doubt").

Within the narrow confines afforded the courts to scrutinize a redistricting plan, there must be clear and convincing evidence, if not evidence beyond a reasonable doubt, that the legislature so grossly abused its discretion that it may be said not to have exercised it at all. It is not sufficient that a court views the

plan as unwise, or that the court or the plaintiffs, given the opportunity to do so, would have enacted a different plan. Rather, the court must find that the redistricting plan is totally devoid of any rational basis. In this case, as the Circuit Court found below, the evidence to support such a finding is completely lacking in the record. The simple answer to plaintiffs' appeal in this case is that they have failed to meet their burden of proof, and the decision below should be affirmed.

B. The Circuit Court Correctly Found That The Challenged Districts Meet The Requirement of Compactness Set Forth In Article II, § 6.

1. Compactness Is A Flexible Concept Which Allows Considerable Legislative Discretion To Balance Competing Interests.

The concept of compactness first appeared in the Virginia Constitution in 1851, requiring Congressional districts to be composed of "contiguous and compact territory containing as nearly as practicable an equal number of inhabitants." Va. Const. 1851, Art. IV, § 14. This provision was carried over into § 55 of the 1902 Constitution, and became applicable to state legislative districting when the provisions governing congressional and state legislative reapportionment in §§ 43 and 55 of the 1902 Constitution were combined in Article II, § 6 of the 1971 Constitution. See Proceedings and Debates of the Senate of Virginia 661 (1969) (remarks of Governor Godwin advocating common set of criteria for legislative and congressional apportionment); Proceedings and Debates of the Virginia House of Delegates 10 (1969) (same).

Consistent with the timing of its first appearance in the Virginia Constitution, compactness as a criterion for legislative redistricting developed in the mid-nineteenth century as a response to limited mobility, a lack of transportation systems, and the general absence of comprehensive systems of communications between elected representatives and constituents. (Commonwealth's Ex. 34, JA 488); See Smith v. Board of Supervisors, 148 N.Y. 187, 192-93, 42 N.E. 592 (1896); B. Cain, The Reapportionment Puzzle 33 (1984) (compactness is "the legacy of earlier periods in history when communication and transportation were more difficult").

Today, the telephone, the mails, and other contemporary methods of travel and communication have significantly reduced the importance of geographic considerations in the balance state legislators must strike between the applicable redistricting criteria. See, e.g., Reynolds v. Sims, 377 U.S. 533, 580 (1964) ("Modern developments and improvements in transportation and communication make rather hollow, in the mid-1960's, most claims that deviations from population-based representation can validly be based on geographical considerations"). As a result, many courts now take the view that compactness requirements "are intended to prevent political gerrymandering." In re Legislative Redistricting, 475 A.2d at 436. (Compactness "is an anti-gerrymandering safeguard to provide the electorate with effective representation, rather than . . . to establish an orderly and symmetrical pattern of electoral districts"). See also Holmes v. Farmer, 475 A.2d at 986 (A complete abandonment of compactness may

demonstrate that "a reapportionment plan creates districts solely for political considerations"); Karcher v. Daggett, 462 U.S. 725, 758 (1983) (Stevens, J., concurring) ("[I]t seems fair to conclude that drastic departures from compactness are a signal that something may be amiss").

Courts specifically have "eschewed adopting a standard dictionary definition of the word 'compact,'" and instead have held that "the requirement was a 'practical' one, without a precise meaning." In Re Legislative Redistricting, 475 A.2d at 437-38, quoting Schneider v. Rockefeller, 31 N.Y.2d 420, 340 N.Y.S.2d 889, 896, 293 N.E.2d 67, 72 (1972). This more flexible concept of territorial compactness has been embraced by this Court. In County of Norfolk v. Portsmouth, 186 Va. 1032, 45 S.E.2d 136 (1947), the Court interpreted a statute requiring annexation lines to be drawn so as to encompass "a reasonably compact body of land."

> What constitutes such a "reasonably compact body" necessarily must depend upon the circumstances and conditions of each case.
>
> * * *
>
> [T]he statute prescribes no standard or yardstick for determining compactness . . . . The statute does not forbid the annexation of a desirable urban area merely because it is not compact in form anymore than it permits the annexation of a substantial body of rural or agricultural lands in order to render an adjacent urban area compact. The shape of the area, the symmetry, regularity or irregularity of its contours was clearly intended . . . to be subordinate to the necessity or expediency of its annexation, having in view the interests of the county as well as the city, and of the residents and freeholders of both.

186 Va. 1047-49, 45 S.E.2d 143-44 (emphasis added).

This Court likewise recognized a flexible concept of territorial compactness in the context of congressional redistricting under § 55 of the 1902 Constitution. See Brown v. Saunders, 159 Va. at 43-44, 166 S.E. at 110-11 ("Mathematical exactness . . . in compactness of territory . . . cannot be attained, nor was it contemplated in the provisions of section 55"). Accord, Wilkins v. Davis, 205 Va. 803, 806, 139 S.E.2d 849, 851 (1965). Other state courts applying state constitutional provisions similar to Article II, § 6 have adopted Virginia's approach. In Opinion to the Governor, 221 A.2d 799, 802 (R.I. 1966), for example, the Rhode Island Supreme Court, citing the Virginia Supreme Court's decision in County of Norfolk, concluded:

> 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.

See also Rybicki v. State Board of Elections, 574 F.Supp. 1082, 1097 (N.D. Ill. 1982), on reconsideration, 574 F.Supp. 1147, later opinion, 574 F.Supp. 1161 (N.D. Ill. 1983) ("We clearly recognize the importance of the compactness standard . . . . Nevertheless, we are aware of the various difficulties involved in drawing legislative districts and the constraints imposed by the one-person, one-vote standard, the imperatives of census track data, the desire to follow natural, ecological and political boundaries, and the competing demands of incumbents, voters and the courts"); Preisler v. Kirkpatrick, 528 S.W.2d 426 (Mo. 1975) ("It must be recognized that there will be unavoidable noncompactness in any apportionment of this state into 34 senatorial districts").

As the foregoing cases illustrate, it is for the legislature to balance the competing legal criteria and policy considerations involved in the essentially political task of redistricting. The courts' function is to intervene only where district configurations are so tortured, uncouth, or bizarre that some inquiry into the process which created the districts is warranted, Karcher v. Daggett, 462 U.S. at 762-63 (1983) (Stevens, J., concurring). When such an inquiry is appropriate courts should grant relief only where the line drawers are unable to advance any rational reason which might justify a radical departure from compactness requirements, Schrage v. State Bd. of Elections, 88 Ill.2d 87, 98, 430 N.E.2d 483, 487 (1981).

In this case, the plaintiffs wholly failed to establish the "drastic departure" from, or "complete abandonment" of, the requirements of compactness as would justify judicial inquiry into the process itself. Indeed, as the Circuit Court below found, the evidence in the record "overwhelmingly showed that the legislature . . . adopt[ed] a valid and permissibly compact configuration for redistricting," and "that the challenged districts are within acceptable standards of compactness." (Letter Opinion, JA 27-28). Moreover, even if the plaintiffs had succeeded in showing that the challenged districts lacked compactness, the undisputed evidence proved that the General Assembly's effort to comply with the federal mandate of effective minority representation under the Voting Rights Act, and to obtain prompt pre-clearance of the plan by the Justice Department in order to hold timely elections in

November, 1991, were reasonable, rational and legitimate objectives as would justify any variance from the standards of compactness.

2. Plaintiffs Failed to Prove That The Adopted Plan Violated Any Accepted Standard of Compactness.

Plaintiffs relied exclusively on the testimony of their expert, Dr. Thomas Guterbock, in an effort to prove that the challenged districts lacked compactness. Guterbock quite candidly admitted, however, that he had never conducted a compactness analysis of legislative districts until this case. (JA 171). Guterbock offered two approaches to measuring compactness. He first looked at "compactness of form," and used certain mathematical measures to analyze the shape, length, and width of districts. As will be shown, Guterbock's analysis actually proved that the Adopted Plan was more compact than the P&E Plan touted by plaintiffs as a "better" alternative. The second approach offered by Guterbock, which he acknowledged "is [his] own term. It is not in the literature" (JA 250), is "compactness of content." This approach looks at social, political, economic, and demographic characteristics to determine whether a district shares a community of interests. As will be shown, Guterbock's "compactness of content" theory has been rejected by legitimate compactness scholars because it involves pure policy determinations appropriately left for legislative judgment, and has no relevance to the legal standard of territorial compactness as a matter of law.

i. The Adopted Plan Is Compact Under Accepted Mathematical Measures.

As set forth in the written report and emphasized in the testimony of defendants' expert, Kimball W. Brace, a nationally renowned reapportionment expert and President of Election Data Services, Inc., of Washington, D.C.,[1] in actual redistricting practice, compactness refers solely to the geometric shape of districts and nothing else. (JA 338, 489). In terms of ideal district shape, the circle is the most compact shape or form known in nature, but obviously, no state can be divided into equally populated legislative districts which are circular. The size and shape of legislative districts will be affected by myriad factors, including local political boundaries, geographic and natural boundaries and population settlement patterns. (JA 491-92). Moreover, as both experts testified below, the enhanced legal requirements during the last three decades of population equality and minority representation have greatly decreased the compactness of legislative districts. (JA 299-300, 354).

As a result, mathematical 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. Instead, scores must be

---

[1]Mr. Brace's professional experiences include direct participation in drawing redistricting plans for fourteen state and local jurisdictions, as well as participation in 20 court cases. See Resume accompanying Evaluation of the Use of Compactness Tests to Judge the Constitutionality of Certain Virginia State Senate Districts, dated Sept. 16, 1991 ("Brace Report," Defendants' Exhibit 34, JA 484-513).

analyzed on a comparative basis. (JA 344, 493-94). And while there are several sources for comparison which are appropriate, there are two which clearly are not appropriate. One is using compactness scores from other states. This is so because the initial shapes and underlying features of different states, such as rivers, coasts and other natural boundaries, will result in differing degrees of compactness. (JA 494-95). The other inappropriate comparison is to use a state's past redistricting plans. (JA 498). This is precisely the error that Guterbock committed in his compactness analysis. There is no question that the 1981 plan will compare more favorably in terms of compactness than the Adopted Plan, because the 1981 plan had a higher population deviation (10.65% vs. 8.53%), and only two minority districts compared to five in the Adopted Plan. (JA 497).[2] Thus, Guterbock's conclusion that Districts 15 and 18 in the Adopted Plan

---

[2]Compactness of Senatorial districts in Virginia as a whole has decreased over time, as evidenced by the average scores for each of the plans on each of the mathematical measures used in the Brace report:

	1970	1981	1991
Dis7	.3710	.3538	.3395
Dis10	.3778	.3634	.3539
Per2	.3237	.2853	.2396
Pop1	.7366	.7184	.6707
Pop2	.4040	.3874	.3655
P/A	.4484	.4519	.5178

[Note: Except for P/A, the lower the compactness measure, the less compact the districts]. (JA 508).

are less compact than the districts in the 1981 Plan is meaningless. Indeed, as the evidence at trial proved, the same result obtained when the P&E Plan was compared with the 1981 Plan. In fact, this comparison demonstrated that the P&E Plan was far less compact than the Adopted Plan. (JA 96-100).

As detailed in Brace's report, the Adopted Plan scored better on nearly every measure than did the P&E Plan, which plaintiffs offer as a "better alternative" than the Adopted Plan. Specifically, the comparative analysis showed that:

- the Adopted Plan as a whole scored better than the P&E Plan on nearly all measures;
- black majority District 18 as adopted scored better than 10 districts in the P&E Plan on Pop1;
- black majority District 18 as adopted scored better than two districts in the P&E Plan on Per2;
- the largest district in the P&E Plan (District 18) is almost 800 square miles larger than the largest district in the adopted plan (District 15); and
- the longest district in the P&E Plan (District 28) is 204 miles long, whereas the longest district in the Adopted Plan (District 18) is only 165 miles long (JA 120-21, 494).

Significantly, Brace's analysis also shows that District 18 in the Adopted Plan compares favorably with other districts in Adopted Plan. For instance, the analysis discloses that District 18:

- ranks fifth in area (after Districts 15, 4, 3, and 22);
- has the second-greatest perimeter (after District 15);
- ranks last in the two dispersion measures (Dis7 and Dis10), yet just ahead of District 22;
- ranks second-to-last in the perimeter measure (Per2) -- behind Districts 2 and 16;

- ranks 31st (tenth-to-last) in one population measure (Pop1);
- ranks next-to-last in the other (Pop2) -- behind District 15.

(JA 493).

Brace's report further demonstrates that Districts 15 and 18 score better on certain compactness measures than the plaintiffs' own local supervisors' districts in Mecklenburg and Lunenburg Counties (JA 494). These analyses all clearly prove that Districts 15 and 18 in the Adopted Plan do not score uniformly "worse" than other contemporary Virginia districts. The undisputed evidence in the record thus proves that the Adopted Plan, and specifically Districts 15 and 18 in that Plan, are compact under accepted mathematical measures, and do not violate Article II, § 6 of the Virginia Constitution. Accordingly, plaintiffs failed to meet their burden of proving a grave, palpable and unreasonable violation of the Constitution. The Circuit Court's denial of a declaratory judgment was not an abuse of discretion, and the decision below should be affirmed.

ii. Plaintiffs' Reliance on Community of Interests As A Measure Of Compactness Is Clearly Wrong.

Plaintiffs argue at length that compactness "can be said to embrace the idea of communities of interest." (Opening Brief of Appellants, p. 36). However, plaintiffs' "sociological" concept of compactness has no basis in redistricting practice or Virginia law. Indeed, in a case on appeal from the State Corporation Commission, this Court specifically rejected an attempt to expand the plain meaning of the identical terms contained in Article II, § 6 of the

Constitution to include other concepts. See First Virginia Bank v. Commonwealth, 212 Va. 655, 187 S.E.2d 187 (1972) ("The State Corporation Commission held that 'contiguous' . . . means economically contiguous or compact, not geographically contiguous . . . . We can find no warrant for the unique meaning ascribed by the Commission") (emphasis in original). This Court also has held that preserving communities of interest is not a requirement of constitutional dimension. See Wilkins v. Davis, 205 Va. 810, 139 S.E.2d 853 (1965).[3]

Moreover, as Guterbock acknowledged, the question whether legislative districts should be homogeneous (shared community of interests) or heterogeneous (a diversity of interests) is ultimately a question of policy about which academics and politicians continue to debate and disagree. (JA 310). During cross-examination, Guterbock conceded that the principal academic upon whom he relied, Richard G. Neimi, had rejected his theory of "compactness of content":

> "Q: But let me at least turn to what Mr. Neimi says about the notion of compactness of content.

---

[3]In contrast to Virginia, some states do make community of interest a constitutional requirement. See, e.g., Carpenter v. Hammond, 667 P.2d 1204, 1213-14 (Alaska 1983), appeal dismissed, 464 U.S. 801 (1983) (state constitution required districts "formed of contiguous and compact territory containing as nearly as practicable a relatively integrated socio-economic area").

Unlike Virginia, some state constitutions also impose specific definitions of compactness. See In re Reapportionment of Colorado General Assembly, 647 P.2d 209, 210-11 (Colo. 1982) (state constitution required districts to be as compact as possible and the aggregate linear distance of all boundaries as short as possible).

> Neimi says, and this is in the article you referred to, "whether districts should be homogeneous or combine different types of areas, whether urban and rural, rich and poor, is another matter entirely and should not be determined as a side effect of the compactness measure."
>
> Do you recognize that as Neimi's position?
>
> A: Yes."

(JA 251). See also Pamela S. Karlan, Maps and Misreadings: The Role of Geographic Compactness in Racial Vote Dilution Litigation, 24 HARV. CIV. RTS. LAW REV. 173, 182 (1989) (Homogeneous districts "promote simple logrolling and special interest bargaining," and "impair the development of representatives concerned with the welfare of the entire community").

In any event, there is no question that this issue was debated extensively in the General Assembly's 1991 Redistricting Session. It remains a policy determination properly left for the legislature, and to hold otherwise would usurp the legislative function and violate the separation of powers command of Article I, § 5, and Article III, § 1 of the Virginia Constitution.

The record also belies plaintiffs' related contention that splitting local political subdivisions causes voter confusion and "prevents effective service from legislators to constituents," (Opening Brief of Appellees, p. 37). There was absolutely no evidence of voter confusion or ineffective constituent service adduced at the trial of this matter. Moreover, plaintiffs' own expert agreed that "significant geographic boundaries" such as rivers or major highways can form effective boundary lines for legislative districts (JA 282-86). The evidence shows that the

General Assembly in fact used the Nottoway River as a geographic boundary dividing Southampton County between the 15th and 18th Districts in the Adopted Plan, and the Meherrin River as the geographic boundary dividing Greensville County between those two districts. (See Commonwealth's Ex. 11, JA 472). The boundaries thus are clearly defined, voters and representatives can easily ascertain the districts in which they reside, and there is no threat of voter confusion or denial of effective representation. Both experts also testified that majority black districts created pursuant to the Voting Rights Act tend to result in more split jurisdictions because of the need to knit together widely scattered pockets of black population. (JA 246-47, 349-50). This can be seen in the P&E Plan's District 15, a minority district which splits six of ten local political subdivisions. (JA 101).

In sum, the court below correctly held that territorial compactness is not measured by whether a district combines urban and rural areas, or cuts across local jurisdictional lines, or brings together differing "communities of interest." These are "policy considerations," not constitutional requirements, and properly are left exclusively for determination by the legislature.

3. The Challenged Districts Reflect A Proper Balance Of Competing State And Federal Interests.

Even if plaintiffs had succeeded in showing that the challenged districts were lacking in compactness, the evidence in the record before the Circuit Court demonstrates that the General Assembly gave due regard to all of the competing state and federal interests at issue during the 1991 redistricting process. The

policy choices made by the legislature in its effort to comply with the federal mandate of effective minority representation, and to obtain prompt pre-clearance of the plan, were reasonable, rational, and legitimate objectives, and clearly justify any variance from the standards of compactness.

First, plaintiffs obviously cannot show that the General Assembly disregarded the compactness criterion of Va. Const. Art. II, § 6. That criterion was included in the P&E Committee Resolution Number 1, (JA 72), adopted at the outset to guide the legislative process and, indeed, was the subject of debate when the General Assembly, on April 30, 1991, adopted the configuration of Senate Districts 15 and 18 that is the subject of this litigation.[4] The House Privileges and Elections Committee also adopted a similar resolution. The comments to the Committee Discussion Draft Resolution explained this hierarchy as follows:

> The criteria set out below are derived from the legal standards generally applicable to state legislative redistricting plans. Following the criteria should lead to valid redistricting plans. Prompt action is needed to meet the state constitutional requirements for redistricting in 1991, an election year for the Senate and House, to allow time for pre-clearance of plans under the Voting Rights Act, and to nominate and elect candidates from new districts by November 1991. The proposed criteria and policy considerations place primary emphasis on meeting

---

[4]The applicable legal "Criteria" listed according to the hierarchy reflected in Senate P&E Committee Resolution No. 1 were as follows: (1) equal representation; (2) minority representation; (3) compactness; (4) contiguity; and (5) political fairness. The subordinate "Policy Considerations" listed were: (1) political subdivisions, (2) communities of interests, (3) precincts, and (4) existing districts and incumbency, which the Resolution stated were merely "permissible to consider." (JA 72-73).

> the two main legal tests applicable to redistricting -- one person-one vote and fair representation for minorities. (Emphasis added) (JA 478).

Courts have recognized that full compliance with state constitutional standards of contiguous and compact territory, as well as federal law principles of equal population and minority rights, "is a practical impossibility." In re 1983 Legislative Apportionment, 469 A.2d 819, 827 (Me. 1983). The difficult task of making the compromises necessary to best effectuate state standards within the limitations imposed by federal law must be left with the legislature. Id.

In this case, the evidence before the Circuit Court was undisputed that the Adopted Plan's District 18 was a "more effective" minority district than District 15 in the P&E Plan. It was more effective because (1) the ratio of black to white voter turnout was more favorable to minority candidates, (JA 335-36), and (2) the incumbent Senator in District 18 had less of an "incumbency advantage," and thus it was more likely that a minority candidate could win election against the sitting white incumbent. (JA 331-32). These factors plainly supported the Southside minority district configuration in the Adopted Plan, and militated against the configuration of the P&E Plan, not only to meet the fair representation criteria of the Voting Rights Act, but also to secure prompt pre-clearance of the plan by the Justice Department. See 28 C.F.R. § 51.58(4) ("election participation of minority voters" will be examined by the Attorney General in reviewing redistricting plans for Section 5 pre-clearance). Given that none

of the competing redistricting plans could offer perfect compactness among all their districts, the legislature reasonably could conclude that the creation of a viable minority district under the Voting Rights Act was entitled to greater weight in the balance. In this instance, the legislature did not "disregard" the compactness requirement. It simply exercised its judgment to defer to the requirements of federal law in choosing among the competing plans.

The true source of plaintiffs' dissatisfaction lies in the contention that the General Assembly should have given this state constitutional criterion greater weight than the requirement of effective minority rights under the federal Voting Rights Act. According to plaintiffs, there is no authority for the proposition that the federal statute outweighs the constitutional requirement of compactness.

Plaintiffs are wrong. One need look no further than Article VI of the U.S. Constitution to know that a law enacted by Congress pursuant to its power to enforce the Civil War Amendments "shall be the supreme law of the land." Courts and commentators have recognized that in light of the 1982 amendments to the federal Voting Rights Act, which were first authoritatively interpreted by the U.S. Supreme Court in the 1986 case of Thornburg v. Gingles, 478 U.S. 30 (1986), concerns relating to the size and shape of districts must give way to the federal Voting Rights Act requirement of creating districts that will provide minorities a viable opportunity to elect candidates of their choice. See, e.g.,

Neal v. Coleburn, 689 F.Supp. 1426, 1437 (E.D. Va. 1988) ("Even though the [proposed] districts are not symmetrical, they are nonetheless relatively compact and are in line with the configurations of electoral districts that have been approved in other cases . . . while these proposed districts are not idally compact, they are reasonably so," citing, Rybicki v. State Bd. of Elections, 574 F.Supp. 1147, 1161, 1166-67 (N.D.Ill. 1983); Garza v. County of Los Angeles, 918 F.2d 763, 776 (9th Cir. 1990) ("The deliberate construction of minority controlled voting districts is exactly what the Voting Rights Act authorizes").[5]

East Jefferson Coalition v. Jefferson Parish, 691 F.Supp. 991 (E.D. La. 1988), is cited by plaintiffs because the district court purportedly refused to order the creation of a minority councilmanic district which had 35 sides and twice spanned the Mississippi River. Plaintiffs, however, failed to explain the subsequent history of the case. See East Jefferson Coalition v. Parish of Jefferson, 926 F.2d 487 (5th Cir. 1991), which notes that the case was remanded to the district court following an objection by the Justice Department to the Court's refusal to implement the

---

[5]See also Jeffers v. Clinton, 730 F.Supp. 196, 207 (E.D. Ark. 1989), aff'd mem., 111 S.Ct. 662 (1991) (strange shape did not defeat proposed minority districts); Dillard v. Baldwin County Bd. of Education, 686 F.Supp. 1459 (M.D. Ala. 1988) (rejecting attack on black plaintiffs' proposed districts as "too elongated and curvaceous"); Oregon v. Mitchell, 400 U.S. 112, 129 (1970) (Civil War Amendments enhance Congress' power to remedy racial discrimination); Katzenbach v. Morgan, 384 U.S. 641, 647 (1966) (by force of Supremacy Clause, Voting Rights Act legislation enacted by Congress under Civil War Amendments takes priority over state constitutional requirement); J. Quinn, et al., Congressional Redistricting in the 1990s: The Impact of the 1982 Amendments to the Voting Rights Act, 1 G.M.U. Civ. Rts. L.J. 207, 213 (1990).

proposed minority district. On remand, the district court amended its findings, holding that the minority group was "sufficiently large and geographically compact," 926 F.2d at 492, and ordered the creation of the "oddly shaped district." See Gelfand, Voting Rights Developments: Academic Reflections and Practical Projections, 21 STETSON L. REV. 707, 711 n.19 (Summer, 1992).

In sum, the evidence in the record is clear and undisputed. It establishes that District 18 of the Adopted Plan was a more effective minority district than that created by District 15 of the P&E Plan. Simply stated, it was more likely that Adopted District 18 would be upheld against a minority vote dilution claim under § 2 of the Voting Rights Act, and more likely that District 18 would be promptly pre-cleared under § 5 of the Voting Rights Act. The final proof of the wisdom of the legislature's choice is that the Adopted Plan was promptly approved by the Justice Department, and a new black Senator was elected last November in Senate District 18.

The General Assembly and Governor of Virginia acted well within the bounds of their legislative discretion in adopting the 1991 Redistricting Plan. Their policy choices were reasonable, rational, and legitimate, and were clearly justified under the circumstances of this case. Plaintiffs have shown no grounds for intervention by the courts, and the Circuit Court's decision should be affirmed.

C. The Circuit Court's Observation That Plaintiffs Could Have Proceeded By Mandamus Did Not Affect The Result In This Case.

As a final matter, although the issue was not raised by the parties or briefed in any of the proceedings below, Judge Griffith noted on the last page of his letter opinion that "the Court would exercise its discretion to deny declaratory judgment because the Petitioners have an alternative mode of proceeding which can provide equivalent relief from unconstitutional state redistricting." (JA 29). Plaintiffs argue that the Circuit Court committed error in declining to grant declaratory relief when a remedy by mandamus was available to challenge the allegedly unconstitutional redistricting. Plaintiffs' contention appears to be that mandamus was not really available to them, and that the court therefore should have decided their case on the merits. The problem with plaintiffs' argument, however, is that the Circuit Court did in fact reach the merits and held, after a two day trial, that they were not entitled to relief because the Adopted Plan, on the merits, was not unconstitutional. The Court's opinion is replete with findings and conclusions premised upon an assessment of the evidence in light of the applicable law. See, e.g., the following:

> The evidence showed that the legislature properly considered compactness, contiguity, and community of interest in the redistricting process.
>
> * * *
>
> On the contrary, the evidence overwhelmingly showed that the legislature gave appropriate consideration and weight to the requisite factors

> in adopting a valid and permissibly compact configuration for redistricting.
>
> * * *
>
> In configuring the new districts, the legislature properly gave great weight to achieving equal representation and effective minority representation.
>
> * * *
>
> Furthermore, the evidence convinced the Court that the challenged districts are within acceptable standards of compactness and contiguity so that the redistricting should not adversely affect the quality of representation or diminish the individual votes of the Petitioners in this case.
>
> * * *
>
> Even without the aid of this presumption, however, the Court would find that districts 15 and 18 are within acceptable bounds of compactness and contiguity in terms of size, terrain, and existing local political subdivisions . . .

JA 27-28. Even if the Circuit Court's observation as to mandamus were in error, it was unnecessary for the decision below and did not affect the result in this case. The reference to the availability of mandamus is at best dictum, as mandamus was neither relied on nor argued in this case by either side. Regardless of whether mandamus would or would not have been an appropriate alternative, the Circuit Court heard and decided plaintiffs' action for declaratory and injunctive relief on the merits, and there is no need to disturb the lower Court's findings or holdings on appeal.

CONCLUSION

For all the above reasons, there was no error in the judgment complained of, and the decision below should be affirmed.

Respectfully submitted,

PAMELA M. WOMACK, et al.

By 
Counsel

MARY SUE TERRY
Attorney General of Virginia

STEPHEN D. ROSENTHAL
Chief Deputy Attorney General

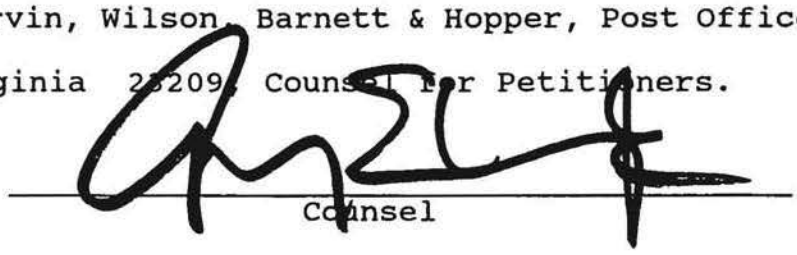
GAIL STARLING MARSHALL
Deputy Attorney General

GREGORY E. LUCYK
Senior Assistant Attorney General

Office of the Attorney General
101 North Eighth Street
Richmond, Virginia 23219
(804) 786-2071

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copies of the foregoing BRIEF OF APPELLEES were mailed, first class, postage prepaid, this 6th day of August, 1992, to Frank M. Slayton, Esquire, Vaughan & Slayton, Post Office Box 446, South Boston, Virginia 24592; J. William Watson, Esquire, Edmunds & Watson, Courthouse Square, Halifax, Virginia 24558; and to James W. Hopper, Esquire, Parvin, Wilson, Barnett & Hopper, Post Office Box 1201, Richmond, Virginia 23209, Counsel for Petitioners.


Counsel

Jamer2/DBD/301