**IN THE SUPREME COURT OF VIRGINIA**

**Record No. 170697**

**RIMA FORD VESILIND*, et al.*,**
**Appellants,**

**v.**

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

**VIRGINIA HOUSE OF DELEGATES, *et al.*,**
**Appellees.**

# BRIEF OF *AMICI CURIAE* OF PROFESSORS A.E. DICK HOWARD, MARK E. RUSH, REBECCA GREEN, AND CARL W. TOBIAS AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS

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## I. STATEMENT OF INTEREST OF *AMICI CURIAE*

Pursuant to Rule 5:30 of the Rules of the Court of Appeals of Virginia, *amici curiae*, Professors A.E. Dick Howard, Mark E. Rush, Rebecca Green, and Carl W. Tobias, respectfully submit this brief in support of Appellants.[1]

Professor A.E. Dick Howard is the Warner-Booker Distinguished Professor of Law at the University of Virginia School of Law. Professor Howard served as the Executive Director of Virginia's Commission on Constitutional Revision. In that capacity, Professor Howard was the principal drafter of the current Virginia Constitution. He was counsel to the General Assembly at the sessions when that body approved the current Constitution, and he directed the successful referendum campaign for its ratification. Professor Howard is also the author of Commentaries on the Constitution of Virginia (Univ. Press of Va. 1974).

Professor Mark E. Rush is the Waxberg Professor of Politics and Law at the Washington and Lee University. Professor Rush has written extensively on constitutional and election-law issues.

Professor Rebecca Green is a Professor of the Practice of Law and Co-Director of the Election Law Program at the William and Mary Law School. Professor Green has taught Election Law since 2009 and co-

[1] Appellants are referred to collectively as "Challengers."

directs the Election Law Program which educates judges on election law topics.

Professor Carl W. Tobias is the Williams Chair in Law at the University of Richmond School of Law. Professor Tobias has written extensively on several areas of law, including constitutional law.

*Amici curiae* support Challengers' arguments and submit this brief to assist the Court in interpreting the compactness requirement of Article II, § 6 of the Virginia Constitution. Article II, § 6 requires the General Assembly to give priority to compactness over discretionary criteria. When determining if the General Assembly complied with this constitutional mandate, a court must require the General Assembly first to identify the relevant, constitutionally sound standard by which the General Assembly gave priority to compactness. This first step is necessary in order for the Court properly to assess the parties' evidence and arguments and determine if the General Assembly's actions complied with Article II, § 6 under the fairly debatable standard.

As legal scholars and residents of Virginia, *amici curiae* have an interest in the enforcement of the Virginia Constitution's compactness requirement and in the proper application of the fairly debatable standard in redistricting cases.

## II. ASSIGNMENTS OF ERROR

*Amici curiae* adopt the Assignments of Error set forth in Challengers' Opening Brief.

## III. STATEMENT OF THE CASE

*Amici curiae* adopt the statement of the case and facts as set forth in Challengers' Opening Brief.

## IV. STANDARD OF REVIEW

This Court reviews errors regarding questions of law under a *de novo* standard of review. *Edmonds v. Edmonds*, 290 Va. 10, 18, 772 S.E.2d 898, 902 (2015). Whether a lower trial court applied the proper legal standard is a question of law. *Id.*

## V. SUMMARY OF THE ARGUMENT

This Court must require that the General Assembly give priority to compactness and the legislative record should reflect that priority was given to the constitutional requirement. Article II, § 6 of the Virginia Constitution directs the General Assembly to establish electoral districts that are (i) compact, (ii) contiguous, and (iii) as nearly as practicable, equal in population. These are mandatory constitutional commands. As such, the General Assembly must give them priority over discretionary criteria. Giving priority to compactness, contiguity, and population equivalence preserves the twin pillars of democracy – the right to vote and the right to

representation. These constitutional criteria were added to constrain the legislature's capacity to undermine the rights to vote and fair representation. Accordingly, the legislature must abide by these limitations when drawing voting districts.

In this case, the Original Defendants[2] and Original Defendant-Intervenors[3] failed to give compactness priority over discretionary criteria. Moreover, the circuit court did not require the Legislature to identify any standard guiding line-drawing decisions to ensure compliance with the constitutional compactness command before declaring the issue to be "fairly debatable." The circuit court's failure to do so permits the Legislature to *claim* that it satisfied the constitutional requirements without having to *demonstrate* that it made any *bona fide* attempt to do so. The Court must correct this error by requiring the Legislature to identify the standard by which the General Assembly gave compactness priority over discretionary criteria before the Court applies the fairly debatable standard.

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[2] The original Complaint was filed against (i) the Virginia State Board of Elections ("VSBE"); (ii) the following officers of VSBE in their official capacity: James B. Alcorn, Chairman; Clara Belle Wheeler, Vice-Chair; and Singleton B. McAllister, Secretary; (iii) the Virginia Department of Elections ("VDE"); and (iv) Edgardo Cortes in his official capacity as Commissioner of VDE (hereinafter the "Original Defendants").

[3] The Virginia House of Delegates and its Speaker Delegate William J. Howell (hereinafter the "House") intervened. When discussed collectively, the House and Original Defendants will be referred to as the "Legislature".

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), this Court defined the General Assembly's obligations to abide by the compactness requirement within the context of the Voting Rights Act and other constitutional requirements. It did not provide a standard with respect to the General Assembly's obligation to give priority to compactness when Voting Rights Act concerns were not present. Other statutorily mandated federal constraints such as the Voting Rights Act obligations are not applicable in this case. Because the nature of the compactness obligation at issue may be different from case to case (and even district to district), a one-size-fits-all approach for determining compliance with state constitutional obligations is not suitable.

Because the General Assembly has wide discretion in how it may satisfy its constitutional obligations, this Court need not itself establish a standard for how compact districts must satisfy Virginia's constitutional requirement. However, the Court must require that the General Assembly *identify and abide by* an articulated standard that gives compactness priority over discretionary criteria. Whether the General Assembly's actions are sufficient to meet constitutional requirements is then for the Court to decide under the fairly debatable standard of review.

A constitutionally sound standard for giving compactness priority over discretionary criteria ensures that the General Assembly does not exceed its authority during the redistricting process. Such a standard would provide an objective measure of the efforts the General Assembly undertook to give compactness priority over discretionary criteria such as incumbent protection. It would also allow citizens to hold legislators accountable, enabling citizens to raise legal challenges when the legislature disregards its stated standard. Finally, it guarantees that the courts can properly apply the fairly debatable standard of review to evaluate the General Assembly's actions.

In this case, the circuit court erred by not requiring the Legislature to identify the constitutionally sound standard by which it gave compactness priority over discretionary criteria. The Legislature failed to show that the General Assembly made any *bona fide* attempt to give compactness priority over discretionary criteria. The General Assembly's failure to form and apply a constitutionally sound standard to give compactness priority over discretionary criteria violates Article II, § 6 of the Virginia Constitution.

Thus, *amici curiae* request that this Court make clear that mandatory criteria cannot be subordinated to discretionary policies; hold that each of the challenged districts fails 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 the Challengers and to require that new districts be enacted no later than January 31, 2019.

## VI. ARGUMENT

### A. Under Article II, § 6 of the Virginia Constitution, the General Assembly Must Give Priority to Compactness over Discretionary Criteria

The compactness requirement is found in the plain language of Article II, § 6 itself, which provides that legislative districts *shall* be compact. Although the General Assembly may consider other factors when drawing legislative districts, the constitutional requirements – compactness, contiguity, and population equivalence – must be given priority over discretionary criteria. *See Wilkins v. Davis*, 205 Va. 803, 811-12, 139 S.E.2d 849, 854-55 (1965). The requirement to give compactness priority over discretionary criteria is supported by the plain language of Article II, § 6 and the legislative history, which demonstrates that the compactness requirement was enacted to protect citizens' fundamental rights, *i.e.*, the right to vote and the right to representation.

#### 1. The Virginia Constitution was Revised in 1971 To Restore and Protect Fundamental Rights

In 1968, Governor Mills E. Godwin, Jr., appointed the Commission on Constitutional Revision. Report of the Commission on Constitutional

Revision, at 1 (January 1, 1969) (hereinafter "Report of the Commission"). The Commission was composed of some of Virginia's most distinguished citizens, including two former governors, a future Justice of the Supreme Court of the United States, a future justice of the International Court of Justice, and Virginia's leading civil rights lawyer.[4] *See* Report of the Commission at i.

A central purpose of the Commission was to reject the discredited legacy of Virginia's 1902 Constitution. *See* Report of the Commission at 7-8. A dominant goal of the convention that wrote the 1902 document was disenfranchisement, especially of black voters. *See* A.E. Dick Howard, Commentaries on the Constitution of Virginia 16-17 (1974) (hereinafter "Commentaries"). To that end, the 1902 Constitution relied upon a range of devices, including the poll tax, complicated registration requirements, and taking the vote from those convicted even of minor offenses such as petit larceny. Report of the Commission at 104 (eliminating provisions such as

[4] The Chairman of the Commission was former governor Albertis S. Harrison, Jr. Other members of the Commission included Colgate W. Darden, Jr. (former governor); Lewis F. Powell, Jr. (future U.S. Supreme Court Justice), Hardy Cross Dillard (future justice of the World Court at the Hague); Oliver Hill (leading civil rights lawyer); Albert V. Bryan, Jr. (future federal district judge), George M. Cochran (future Virginia Supreme Court Justice), Ted Dalton (federal district court judge), and Alexander M. Harman, Jr. (future Virginia Supreme Court Justice). The executive director was A. E. Dick Howard.

poll tax and property requirements, which disenfranchised minority voters); Commentaries at 17 (implementation of the poll tax and the "rigors of registration" reduced the franchise), 330-31 (noting the effect of strict registration requirements and the inclusion of petit larceny to reduce the franchise). The results were devastating to representative government. In 1900, there were 147 votes cast for every 1,000 Virginians; in 1904, the figure fell to 67. Commentaries at 331.

Aspiring to guarantee a more enlightened future, the Commission drafted the proposed Constitution's Franchise article with the premise that the right to vote is "a basic and precious right in a democratic society, a right underlying and bolstering many other individual rights." Report of the Commission at 102. Driving that point home, the Commission declared, "Hence it follows that needless obstacles ought not to be placed in the path of Virginians seeking to have a voice in the government of their Commonwealth." *Id.*

The Commission saw the link between the right to vote and the "closely related" matter of representation. *Id.* It affirmed that, in addition to defining who should have the ballot, the Constitution should lay down "clear guidelines" for deciding how legislative districts would be drawn. *Id.* The Commission advised, in other words, that the drawing of legislative districts

should not be left to whim or discretion but should be controlled by the Constitution itself. *See id.* at 102, 118. Drawing on the previous Constitution's requirement that congressional districts be contiguous and compact, the Commission proposed that the same constitutional requirement control the drawing of legislative districts. *See id.* at 117 ("There is no reason to make any distinction between General Assembly and congressional apportionment.").

It is important to recall that the Commission was working closely in the wake of important federal commands that addressed voting and representation, notably the Supreme Court's one person, one vote decisions and Congress' enactment of the Voting Rights Act of 1965. Commentaries at 333-35 (noting the impact of the Voting Rights Act) and 406 (detailing the Supreme Court's one person, one vote decisions). Putting muscle into their recommendation on franchise and redistricting, the Commission said that it had "proceeded on the assumption that the people of Virginia want to shape their own destiny, that they do not want to abdicate decisions to others, such as to the Federal Government, and that therefore they want a constitution which makes possible a healthy, viable, responsible state government." Report of the Commission at 11.

The Commission reported to the Governor and General Assembly on January 1, 1969. *Id.* at vii. The General Assembly met in special session to review and adjust the Commission's recommendations. Commentaries at 23. The General Assembly then approved the revised Constitution at its 1970 session and placed the Constitution on the ballot for a referendum in November 1970. *Id.* at 23-24. The people of Virginia overwhelmingly approved the Constitution, with 72% of those voting saying "yes." *Id.* at 24. The revised Constitution then became effective in 1971. *See* Va. Const., Foreword, at III (1971).

**2. Legislative History and Judicial Interpretation Demonstrate that Compactness Is Constitutionally Mandatory and Protects Fundamental Rights**

The legislative history of the 1971 constitutional revisions demonstrates that protecting the right to representation and the right to vote were guiding principles for lawmakers and voters. Those principles also apply to the requirements in Article II, § 6, which provides that legislative districts shall be (i) compact, (ii) contiguous, and (iii) as nearly equal in population as practicable. Although many factors shape the redistricting process, only these three criteria are constitutionally mandated. *See Brown v. Saunders*, 159 Va. 28, 37, 166 S.E. 105, 107 (1932) ("The only limitation made upon the discretion of the legislature is that each

district 'shall be composed of contiguous and compact territory, containing as near as practicable an equal number of inhabitants.'"). In *Brown*, this Court addressed congressional districts and the General Assembly's compliance with § 55 of the 1902 Constitution. *See id.* at 35-36, 166 S.E. at 107. As a result of the 1971 revisions to the Constitution, the same constitutionally mandated criteria of compactness, contiguity, and population equivalence for congressional districts considered in *Brown* now apply to state legislative districts. *See* Report of the Commission at 117. The Virginia Constitution's compactness requirement is not aspirational; it is mandatory. *See Wilkins v. West*, 264 Va. at 462, 571 S.E.2d at 108 ("Article II, § 6 speaks in mandatory terms, stating that electoral districts 'shall be' compact and contiguous.").

Compactness has been required by the Virginia Constitution for over one hundred and fifty years. The first Virginia Constitution was adopted in 1776 and has undergone only five complete revisions since then. The constitutional requirement that congressional districts be compact first appeared in 1851. The compactness requirement was carried over into the 1870 and 1902 Constitutions. *See* Art. IV, § 14 of the Constitution of 1851; Art. V, § 13 of the Constitution of 1870; § 55 of the Constitution of 1902.

In 1971, the Virginia Constitution was revised to extend the

mandatory redistricting requirement to the drawing of state legislative districts. *See* Report of the Commission at 117; *see also* Proceedings and Debates of the Virginia House of Delegates, Extra Sess. 1969 and Regular Sess. 1970, at 10 (Va. 1969); Proceedings and Debates of the Senate of Virginia, Extra Sess. 1969 and Regular Sess. 1970 at 661 (Va. 1969) (Governor Mills E. Godwin Jr. endorsing common criteria for state legislative and congressional apportionment). Article II, § 6 states:

> Members of the House of Representatives of the United States and members of the Senate and of the House of Delegates of the General Assembly shall be elected from electoral districts established by the General Assembly. *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 General Assembly shall reapportion the Commonwealth into electoral districts in accordance with this section in the year 2011 and every ten years thereafter.

Va. Const., Art. II, § 6 (emphasis added).

Recognizing that the passage of time would present unforeseen challenges, the Virginia Constitution was drafted to "preserve the best of Virginia's constitutional heritage while responding to new problems." Report of the Commission at 9; *see also id.* at 11 (explaining that "to avoid rigidity and early obsolescence," the Constitution should, "while protecting the rights of the people, create a government which can deal with unforeseen problems of the future as they arise"). In particular, the

Constitution "embodies *fundamental law*" and "should protect *basic individual rights*." *Id.* at 9-10 (emphasis added). To do so, the Constitution and its revisions "create the frame of government, allocate powers and duties among the branches of government, and *put essential limits on the exercise of such power*." *Id.* (emphasis added).

With respect to Article II, § 6, the revisions were made "so as to apply a common set of *principles to representation* (districts to be compact, contiguous, and proportionate to population) . . . ." Report of the Commission at 103 (emphasis added). Thus, constitutional requirements such as compactness were designed to protect fundamental rights by limiting the legislature's discretion, regardless of technological or political changes over time. *See id.* at 9-11 (explaining that Constitutional revisions were "designed to make the present Constitution more responsive to contemporary pressures and probable future needs").

### 3. In Order To Protect Fundamental Rights, Violations of the Article II, § 6 Compactness Requirement are Justiciable

Violations of the General Assembly's mandate to give compactness priority over discretionary criteria are justiciable. *See Jamerson v. Womack*, 26 Va. Cir. 145, 146 (1991) (finding that plaintiffs have a "justiciable interest" to bring suit alleging violation of compactness requirement); *Wilkins v. West*, 264 Va. at 460, 571 S.E.2d at 107 (explaining that residents of a district that fails to comply with the constitutional compactness and contiguous requirements "are directly affected").

This Court has not articulated the specific nature of the fundamental rights protected by the compactness requirement. However, in *Brown*, this Court recognized that violations of Article II, § 6 injure a citizen's right to vote and right to representation. 159 Va. at 38, 166 S.E. at 108 ("'Any plan of districting which is not based upon approximate equality of inhabitants will work inequality in right of suffrage and of power in elections of the representatives in Congress.'") (quoting *Moran v. Bowley*, 179 N.E. 526, 532 (1932)).

Compactness has been recognized to protect the right to vote and the right to representation by limiting the impact of gerrymandering. *See,*

*e.g.*, *Karcher v. Daggett*, 462 U.S. 725, 758 (1983) (Stevens, J., concurring) (noting that geographic compactness may serve independent values such as constituent representation); *see also Pearson v. Koster*, 359 S.W.3d 35, 39 (Mo.), *aff'd*, 367 S.W.3d 36 (2012) (en banc) (explaining that the requirements for contiguous and compact territory are "to guard, as far as practicable, under the system of representation adopted, against a legislative evil, commonly known as 'gerrymander'") (citation omitted); *In re Legislative Redistricting*, 475 A.2d 428, 438 (Md. 1982) (noting that compactness requirement has been described as "an anti-gerrymandering safeguard to provide the electorate with effective representation") (citing *Opinion to the Governor*, 221 A.2d 799, 802 (1996)).[5] Virginia's Commission was guided by the same concerns in approving Article II, § 6. *See* Commentaries at 415 (explaining that the constitutional requirements for districts to be "contiguous and compact" are "meant to preclude at least the more obvious forms of gerrymandering").

By protecting the right to vote and the right to representation, the compactness requirement ensures that voters have the means to hold legislators accountable at the polls. *See Reynolds v. Sims*, 377 U.S. 533,

[5] Missouri's state constitution similarly requires districts to be composed of "contiguous territory as compact and as nearly equal in population as may be." Mo. Const., Art. III, § 45.

561-62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights."); *In re Legislative Redistricting*, 475 A.2d at 438 (noting the compactness requirement as a safeguard to protect effective representation) (citing *Opinion to the Governor*, 221 A.2d at 802); *see also* Commentaries at 402 (explaining that "Who shall have the vote – suffrage – and how votes shall be apportioned – representation – are the twin talisman of the locus of formal political power in a state.") (citations omitted). Thus, the compactness requirement helps to ensure that voting districts are drawn in a manner to keep the interests of voters, and not the interests of legislators, in mind.

Compactness is not an end in itself and may have to give way to other competing constitutional interests, such as equal representation, in order to protect fundamental rights. *See Jamerson*, 244 Va. at 511, 423 S.E.2d at 182-83; *Wilkins v. West*, 264 Va. at 466-70, 482, 571 S.E.2d at 110-113, 120. But, this Court has made clear that the General Assembly must give constitutional requirements priority over discretionary criteria, however attractive they may seem. *See Wilkins v. Davis*, 205 Va. at 810-11, 139 S.E.2d at 854. The Court has also made clear that the General

Assembly's efforts (or lack of effort) to comply with Article II, § 6 are subject to judicial review. *See Brown*, 159 Va. at 47, 166 S.E. at 111.

#### 4. The General Assembly Must Make a *Bona Fide* Effort To Give Priority to Compactness over Non-Constitutional Criteria

Like the population equivalence requirement, the General Assembly must give compactness priority over discretionary criteria. *See Wilkins v. Davis*, 205 Va. at 810-11, 139 S.E.2d at 854 (finding that the constitutional equal population requirement must be given priority over discretionary criteria such as communities of interest). Similarly, the General Assembly has a constitutional obligation to make a *bona fid*e effort to give compactness priority over discretionary factors. *See Brown*, 159 Va. at 47, 166 S.E. at 111 (legislature's failure to make a "*bona fide* effort" to satisfy equal population requirement was unconstitutional).

In 2011, the General Assembly acknowledged this obligation by adopting resolutions stating that compactness "shall be given priority in the event of conflict among the criteria." *See* H.D. Comm. on Privileges and Elections Res. 1, 2011 Special Sess. I (Va. Mar. 25, 2011); S. Comm. on Privileges and Elections Res. 1, 2011 Special Sess. I (Va. Mar. 25, 2011).

Thus, it is undisputed that compactness must, *in principle*, be given priority over discretionary criteria in order to protect fundamental rights. But

the General Assembly did not satisfy its constitutional obligation to make a *bona fide* attempt to give compactness priority over discretionary criteria.

### B. The Court Must Require the General Assembly To Identify a Constitutionally Sound Standard for Giving Compactness Priority over Discretionary Criteria before Applying the Fairly Debatable Standard of Review

This Court must require the General Assembly to identify the standard it used to give compactness priority over discretionary criteria.

In this case, the circuit court erred by not requiring the Legislature to identify the constitutionally sound standard by which the General Assembly gave compactness priority over discretionary criteria. *See Brown*, 159 Va. at 47, 166 S.E. at 111. Instead of requiring the Legislature to demonstrate the *bona fide* efforts the General Assembly made to satisfy the compactness requirement, the circuit court found the issue to be fairly debatable based on conclusory statements that the compactness requirement was not violated. *See* Appendix ("App.") at 556-564 (relying on testimony from Delegate Chris Jones regarding the "overall process" and statements that the districts met "all constitutional requirements," which "presumably" included compactness). The Legislature cannot satisfy the constitutional requirement to give compactness priority by relying on misinterpretations of the law or merely claiming, without support, that it did not violate the requirement. This is not and cannot be the standard for

satisfying the constitutional compactness requirement. *See Brown*, 159 Va. at 47, 166 S.E. at 111.

### 1. The General Assembly Must Articulate a Standard for Complying with Article II, § 6 of the Virginia Constitution

The General Assembly has an obligation to make a "bona fide" effort to satisfy the compactness requirement in Article II, § 6. *See Brown*, 159 Va. at 47, 166 S.E. at 111. In making this effort, the General Assembly must articulate a standard by which it gave compactness priority in order for the Court to evaluate whether the General Assembly's actions are constitutional. In *Brown*, this Court considered the equal-population requirement as it relates to discretionary criteria and explained that the legislature must abide by certain principles to comply with that requirement. *See Brown*, 159 Va. at 47-48, 166 S.E. at 111. *See also Wilkins v. Davis*, 205 Va. at 811-12, 139 S.E. at 854-55 (discussing standards governing obligation to comply with equal-population requirement).

With respect to the equal-population requirement, the Court has explained that, although mathematical exactness is not required, deviations must not be unreasonable. *See Brown*, 159 Va. at 43-44, 166 S.E. at 110-11 ("Mathematical exactness, either in compactness of territory or in equality of population, cannot be attained, nor was it contemplated in the

provisions of section 55 . . ."); *see also Cosner v. Dalton*, 522 F. Supp. 350, 356 (E.D. Va. 1981) (explaining that "deviations from the ideal are permissible if they are 'are based on legitimate considerations incident to the effectuation of a rational state policy'") (quoting *Reynolds*, 377 U.S. at 579)). The Court has also explained that "small or trivial deviation from equality of population" would not suffice to demonstrate a violation, and that plaintiffs must demonstrate that the deviation is "a grave, palpable and unreasonable deviation from the principles fixed by the Constitution." *Brown*, 159 Va. at 44, 166 S.E. at 110-11. This Court's decisions established a standard under which parties could present evidence demonstrating compliance (or non-compliance) with the constitutional requirement.

The Court's decisions demonstrate that *identifying the relevant standard* is a first and necessary step in determining whether the General Assembly's actions (or inaction) exceeded the constitutional limitations on its discretion. *See id.* at 45, 166 S.E. at 111; *Wilkins v. Davis*, 205 Va. 811-13, 139 S.E.2d 854-55. In particular, the Legislature must present "*relevant and material* evidence of reasonableness sufficient to make the question fairly debatable." *Vienna Council v. Kohler*, 218 Va. 966, 977, 244 S.E.2d 542, 548 (1978) (upholding trial judge's finding that city council's actions

were "arbitrary, capricious, unreasonable and illegal" because they were not related to the purported justifications) (emphasis added). Without first establishing the relevant standard used by the General Assembly to give compactness priority, the Court cannot properly apply the fairly debatable standard to evaluate the parties' evidence and determine if the General Assembly complied with its constitutional obligations.

Requiring the General Assembly to establish its own relevant standard is a reasonable request and would not require the Court to interfere in legislative affairs. Such a requirement would simply require the General Assembly to articulate the standard it presumably employed to give priority to compactness so that the public and Court can evaluate it. If the General Assembly did not act pursuant to any standard, then it failed to comply with the constitutional obligation to make a *bona fide* effort to give priority to compactness.

### 2. *Jamerson* and *Wilkins v. West* Did Not Establish Standards for Giving Compactness Priority over Discretionary Criteria

The Defendants' and Defendant-Intervenors' reliance on *Jamerson* and *Wilkins v. West* is misplaced in this case of first impression because these cases did not constitute a constitutionally sound standard for giving priority to compactness. In *Jamerson*, the Court noted "two overarching

considerations that bind state legislatures in reapportioning electoral districts." 244 Va. at 511, 423 S.E.2d at 182-83. The first is "equal representation for equal numbers of people" imposed by Article 1, § 2 of the U.S. Constitution. *Id.* The second is compliance with the Voting Rights Act. *Id.* Similarly, in *Wilkins v. West*, the Court found that the compactness requirement under Article II, § 6 had to be considered along with the equally mandatory requirements of the Voting Rights Act and Article I §§ 1 and 11 of the Virginia Constitution. 264 Va. at 466-70, 482, 571 S.E.2d at 110-113, 120.

The General Assembly must abide by *Jamerson* and *Wilkins v. West* in order to comply with the Voting Rights Act and Article I §§ 1 and 11 of the Virginia Constitution. *See Jamerson*, 244 Va. at 511, 423 S.E.2d at 182-83; *Wilkins v. West*, 264 Va. at 466-70, 571 S.E.2d at 110-113. However, it *must also comply* with its obligation to give priority to compactness over discretionary criteria. *Jamerson* and *Wilkins v. West* do not address this separate, mandatory, constitutional obligation. *Jamerson* and *Wilkins v. West* addressed the General Assembly's obligation to comply with the compactness requirement when balanced against Voting Rights Act requirements. The requirements of that Act are not at issue in this case; the Legislature cannot hide behind the *Jamerson* and *Wilkins'*

logic to evaluate whether it satisfied Virginia's constitutional requirement of compactness.

The circuit court rejected the Legislature's interpretation of these cases and found that *Jamerson* and *Wilkins v. West* did not establish a standard "for measuring the priority given to compactness in drawing legislative districts." App. at 562-63. Such a one-size-fits-all approach to complying with constitutional obligations has been consistently rejected by the Supreme Court. *See, e.g., Bethune-Hill v. Va. State Bd. Of Elections*, 137 S. Ct. 788, 802 (2017) (explaining that reliance on black voting-age population percentage target may be appropriate in some instances to comply with the Voting Rights Act, but that the relevant percentage may differ depending on the district at issue); *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1273-74 (2015) (rejecting a "mechanically numerical" approach to satisfying complex constitutional requirements that may differ by district).

Notably, Defendants and Defendant-Intervenors did raise the circuit court's finding that *Jamerson* and *Wilkins v. West* do not represent a standard for measuring the priority given to compactness as a cross error. Thus, it appears that Defendants and Defendant-Intervenors agree with the

circuit court that *Jamerson* and *Wilkins v. West* are not relevant to the priority accorded to compactness over discretionary criteria.

### 3. The Circuit Court Did Not Identify Any *Bona Fide* Attempt by the General Assembly To Give Compactness Priority Over Discretionary Criteria

Despite finding that *Jamerson* and *Wilkins v. West* were irrelevant with respect to giving priority to compactness, the circuit court did not identify what standard the General Assembly applied to give compactness priority over discretionary criteria. App. at 562-63. The evidence presented by the Legislature and cited by the circuit court was inapposite or non-existent with respect to the issue of the standard the General Assembly followed in giving priority to compactness. *Id.* at 556-560 (*e.g.*, relying on testimony of delegate Chris Jones that compactness was not subordinated based on reliance that the 2011 plan complied with *Jamerson* and *Wilkins v. West*).

To demonstrate compliance, the Original Defendants simply presented conclusory statements that the General Assembly satisfied "'all constitutional requirements,' *presumably* including compactness." *See* App. at 556 (emphasis original). Despite the lack of evidence demonstrating that the General Assembly actually gave priority to compactness, the circuit court found the evidence to be fairly debatable.

*Id.* at 562-64. The circuit court's decision suggests that all the General Assembly need do to demonstrate that it complied with its constitutionally mandated obligations is simply to assert that it did so. However, compliance with Article II, § 6 demands more. *See Brown*, 159 Va. at 47, 166 S.E. at 111.

In its decision, the circuit court seemed to acknowledge that the General Assembly failed to give priority to compactness over discretionary criteria. App. at 562-64. After reviewing the evidence and testimony, the circuit court denied the Legislature's motion *in limine* to exclude Challengers' expert testimony. *Id.* at 560. This Court reviews a trial 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)); *see also Smith v. Commonwealth*, 265 Va. 250, 254, 576 S.E.2d 465, 468 (2003) ("Determining whether an adequate foundation has been laid for the admission of an expert opinion is an exercise of the trial court's discretion, to be made in light of all the testimony produced." (citation omitted). The circuit court evaluated and found Challengers' evidence to "merit serious consideration." App. at 560-62.

The Legislature's criticisms of Challengers' expert evidence relate to the weight and not the admissibility of the evidence. *See O'Dell v. Commonwealth,* 234 Va. 672, 696-697, 364 S.E.2d 491, 504, *cert. denied,* 488 U.S. 871 (1988) (factual questions regarding the reliability of the method at issue involve the weight of the evidence and not its admissibility) (citations omitted). Notably, one of Original Defendants' own expert witnesses, Dr. M.V. Hood, III, conceded that the compactness test presented by Challengers' expert is "one approach to testing compactness" and a "'a measure' of a good faith effort" of whether compactness was given priority. App. at 557. Although the Legislature criticized the Challengers' compactness test, those criticisms pertain to the weight of the test, which is a factual question properly resolved by the circuit court. *See O'Dell*, 234 Va. at 696-697, 364 S.E.2d at 504 (finding that factual issues going to the weight of expert testimony were properly resolved by the jury) (citations omitted); *Tarmac Mid-Atlantic v. Smiley Block Co.*, 250 Va. 161, 167, 458 S.E.2d 462, 466 (1995) (finding that expert's conclusions were open to challenge but any "weaknesses in his testimony were not grounds for its exclusion but were matters properly to be considered by [the factfinder] in determining the weight to be given the evidence") (citations omitted).

It is not necessary for this Court to determine whether the Challengers' compactness test is constitutionally dispositive in order to shift the burden to the Legislature to demonstrate that the General Assembly's actions were constitutional. *See Tennant v. Jefferson Cty Comm'n*, 567 U.S. 758, 760 (2012) (finding that in equal population challenges to congressional districts, plaintiffs "bear the burden of proving the existence of population differences that 'could practicably be avoided.'") (quoting *Karcher*, 462 U.S. at 734). With respect to challenges to the equal population requirement, once plaintiffs make a showing that the districts at issue could have avoided population differences, "the burden shifts to the State to 'show with some specificity' that the population differences were necessary to achieve some legitimate state objective." *Id.* Similarly, the Challengers' compactness test relied on alternative maps and commonly accepted compactness scores to demonstrate that the General Assembly failed to meet its obligation to give priority to compactness. App. at 554-55. Once the Challengers' made such a showing, the burden should have shifted to the Legislature to demonstrate that the General Assembly's actions were reasonable, making the issue "fairly debatable." *See Norton v. City of Danville*, 268 Va. 402, 409, 602 S.E.2d 126, 130 (2004) (finding that once plaintiffs present sufficient evidence, the burden shifts to

defendants to "produce some evidence that its actions were reasonable, thereby rendering the issue fairly debatable)."

However, in this case, the circuit court failed to shift the burden to the Legislature to identify what constitutionally sound standard, if any, the General Assembly applied to give priority to compactness. The circuit court failed to require the Legislature to articulate a constitutionally sound standard in order for the court to determine if the General Assembly's actions were constitutional. The General Assembly has an obligation to apply constitutionally sound standards to demonstrate that it gave priority to compactness over discretionary criteria. *See Brown*, 159 Va. at 47, 166 S.E. at 111 (the legislature has an obligation to make a "*bona fide* effort" to satisfy the equal population requirement).

Here, the General Assembly failed to articulate the compactness standard it applied when drawing the legislative districts. It is impossible to determine if a standard or interpretation is fairly debatable unless the standard is articulated in the first place. In this instance, the absence of a clearly stated standard of compactness not only undermines the applicability and use of the fairly debatable principle, but also renders the districting process arbitrary. It also undermines the possibility of testing the merit of any evidence (such as Challengers' expert analysis) because,

again, there is no legislatively articulated standard to which such evidence can be compared.

#### 4. The Court Must Determine if the General Assembly Gave Priority to Compactness Under the Fairly Debatable Standard

Whether the General Assembly gave priority to compactness is subject to the fairly debatable standard of review. *See Wilkins v. West*, 264 Va. at 462, 571 S.E.2d at 108; *Jamerson*, 244 Va. at 510, 423 S.E.2d at 182. Although legislative action is afforded a strong presumption of validity under that standard, those actions (or inactions) are still subject to judicial review. *See Jamerson*, 244 Va. at 510, 423 S.E.2d at 182; *Wilkins v. West*, 264 Va. at 462, 571 S.E. at 108; *Brown*, 159 Va. at 35, 166 S.E. at 107 (finding that discretion should be accorded to the General Assembly but emphasizing that the duty of the court is "to state whether or not [a legislative] act is in conflict with the constitutional requirement"); *Wilkins v. Davis*, 205 Va. at 813, 139 S.E.2d at 855 (reiterating that the Court's duty is to declare whether or not a legislative act conflicts with a constitutional requirement (citing *Brown*, 159 Va. at 46, 166 S.E. at 111)). The General Assembly can exercise wide discretion, but that discretion is not unlimited. *See Brown*, 159 Va. at 43-44, 166 S.E. at 110-11 (finding that the General Assembly's "discretion to be exercised should be an honest and fair

discretion, the result revealing an attempt, in good faith, to be governed by the limitations enumerated in the fundamental law of the land"). We do not challenge the use of legislative discretion. Instead, we note that in this case, it is impossible to assess whether that discretion was exercised unconstitutionally because the General Assembly has not articulated a clear standard to which its discretion is applied. Discretion without standards is, essentially, arbitrary and capricious government.

The fairly debatable standard of review arose from zoning cases and was first applied to redistricting cases in *Jamerson*. 244 Va. at 509-10, 423 S.E.2d at 181-82 (citing *Barrick v. Bd. of Supervisors*, 239 Va. 628, 630, 391 S.E.2d 318, 319 (1990), and *Bd. of Supervisors v. Jackson*, 221 Va. 328, 333, 269 S.E.2d 381, 384-85 (1980)). In a dissenting opinion in a zoning case, Senior Justice Russell, joined by Justice Mims, explained that the fairly debatable standard is based on the principle of the separation of powers, that is, that the court's role is not to second-guess the wisdom of the legislature's actions. *Town of Leesburg v. Giordano*, 280 Va. 597, 609, 701 S.E.2d 783, 790 (2010) (Russell, J., dissenting). The rationale underlying this standard is that voters who might be displeased by legislative actions "have a ready remedy at the next election." *Id.* at 609-10, 701 S.E.2d at 790-91. However, this rationale is undermined when the

legislative act in question weakens or destroys the voters' ability to hold their legislative representatives accountable. *See id.* (finding that when legislative acts affect "persons and territory outside the jurisdiction in which the legislative body has the authority to govern, the rationale supporting the 'fairly debatable' standard is non-existent.").

The Court must ensure that the fairly debatable standard is properly applied, especially in cases where legislative actions at issue are challenged as undermining the right to representation and the right to vote. *See Reynolds*, 377 U.S. at 561-62 (stating that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized"); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (finding that the right to vote is "a fundamental political right"). The General Assembly's failure to act pursuant to *any* standard to ensure priority is given to compactness over discretionary criteria does not survive judicial scrutiny, even under the fairly debatable standard. This Court should not allow the Legislature to evade judicial scrutiny by hiding behind inapposite case law, irrelevant facts, and an appeal to legislative discretion.

### 5. This Court Must Require the General Assembly To Articulate a Constitutionally Sound Standard Subject to Judicial Review

The General Assembly must articulate the standard by which it gave priority to compactness so that the Court can determine if its actions were constitutional. *See Brown*, 159 Va. at 46, 166 S.E. at 111 (finding that it is the duty of the Court to determine whether a legislative act is in conflict with constitutional requirements). The General Assembly's failure to articulate what measures it took to satisfy its constitutional obligations is in itself unconstitutional. *See id.* at 47, 166 S.E. at 111.

The Constitution does not define "compact" or offer guidance as to how compactness is to be given priority. However, the absence of specific guidance in the Constitution does not mean the General Assembly lacks any obligation to satisfy this requirement. *See id*. The General Assembly is afforded wide discretion in determining the standards it applies to give priority to compactness. The Court must then determine whether the standards applied by the General Assembly are constitutionally sound. *See id.* at 36, 166 S.E. at 107 (citations omitted) (finding that whether the legislature's actions exceed constitutional limitations is a question for the courts). *See also Cosner v. Robb*, 541 F. Supp. 613, 619 (E.D. Va. 1982)

(stating that authoritative construction of the "contiguous and compact" clause is to be made by the Supreme Court of Virginia).

Even though giving priority to compactness does not lend itself to easily identifiable standards, that difficulty does not excuse the Legislature from complying with its obligation to identify such a standard or to respond to evidence indicating that it ignored any such standard. It also does not relieve the Court of its duty to review the General Assembly's actions for compliance with constitutional obligations. In *Wilkins v. Davis*, the Court noted the importance of adhering to the constitutional requirements even when it is difficult to do so. The Court explained:

> While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us.

*Wilkins v. Davis*, 205 Va. at 811, 139 S.E.2d at 854 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964)). Thus, the difficulty of achieving perfectly equal representation or undisputed compactness is no excuse for ignoring the Constitution's requirement that the General Assembly strive to achieve these objectives.

The Constitution "places limitations on the discretion of the legislature," and whether the legislature's act exceeds those limitations is a

judicial question. *Brown*, 159 Va. at 36, 166 S.E. at 107 (citations omitted); *see also Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960) (rejecting argument that impairment of voting rights would be permissible if "cloaked in the garb of the realignment of political subdivisions"). The judiciary, as "a separate, co-equal, and apolitical branch of government, must not concern itself with the political implications" of a challenged redistricting plan. *See Wilkins v. West*, 264 Va. at 480-81, 571 S.E.2d at 119 (Hassell, J., concurring). Even if the General Assembly has wide discretion for much of its deliberations, it must still demonstrate to the Court that it complied with constitutional requirements. *See id.*; *Edwards v. Vesilind*, 292 Va. 510, 790 S.E.2d 469 (2016). Otherwise, the General Assembly's compliance (or noncompliance) with constitutional requirements would be beyond judicial review.

Identifying the appropriate standard for determining if compactness has been given priority over discretionary criteria is essential to the proper application of the fairly debatable standard and for the protection of fundamental rights. It is impossible to apply the fairly debatable standard to the General Assembly's actions unless the legislature articulates the compactness standard it used to give priority to compactness over discretionary criteria. The proper application of the fairly debatable

standard is particularly important here because giving priority to discretionary criteria, such as incumbency, works to weaken voters' power at the polls. *See Gomillion*, 364 U.S. at 347-48 (explaining that the state is not insulated from judicial review when it uses state power "as an instrument for circumventing a federally protected right"); *Baker v. Carr*, 369 U.S. 186, 229-230 (1962) (explaining the importance of striking down legislative actions that infringe the right to vote) (citations omitted); *Reynolds*, 377 U.S. at 553 (noting "consistent line of decisions by the Court" recognizing that "all qualified voters have a constitutionally protected right to vote" and "have their votes counted") (citations omitted).

Under the fairly debatable standard, the Legislature must present evidence that the General Assembly gave priority to compactness over discretionary criteria because the failure to take any action would be unconstitutional. *See Brown*, 159 Va. at 47, 166 S.E. at 111. Such evidence must be relevant and material to demonstrating how the General Assembly gave priority to compactness. *See Vienna Council*, 218 Va. at 977, 244 S.E.2d at 548. If the Legislature's evidence of reasonableness is insufficient, the Court must find that the General Assembly's actions (or inactions) are unconstitutional. *See Bd. of Supervisors v. McDonald's Corp.*, 261 Va. 583, 590, 544 S.E.2d 334, 338-39 (2001) (finding that if

defendants' "evidence of reasonableness is insufficient," the presumption of reasonableness is overcome).

Finally, proper application of the fairly debatable standard is necessary to ensure that the Court protects the fundamental rights embodied by the compactness requirement. *See, e.g.*, *Karcher*, 462 U.S. at 758 (Stevens, J., concurring) (compactness serves values such as constituent representation); *Pearson*, 359 S.W.3d at 39 (compactness requirement guards against "legislative evil" of gerrymandering); *In re Legislative Redistricting*, 475 A.2d at 438 (compactness serves as "an anti-gerrymandering safeguard" to protect effective representation); *see also* Commentaries at 415 ("contiguous and compact" requirement meant to preclude "the more obvious forms of gerrymandering"). In this case, the circuit court erred in its application of the fairly debatable standard by failing to require the Legislature to identify the standard by which the General Assembly gave compactness priority. Without such a standard, the circuit court was unable to determine if the General Assembly's actions represented a *bona fide* attempt to comply with the requirement to give compactness priority.

## VII. CONCLUSION

For the foregoing reasons, this Court should make clear that mandatory criteria cannot be subordinated to discretionary policies; hold that each of the challenged districts fails 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 Challengers and to require that new districts be enacted no later than January 31, 2019.

Respectfully submitted this 14th

day of December, 2017.

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## Certificate of Service

I, Lucius B. Lau, certify that I complied with Rule 5:26(e), and on December 14, 2017, a true and accurate copy of the foregoing Brief *Amici Curiae* in Support of the Appellants was delivered via email to the following counsel of record:

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**Rule 5:26 and 5:30(e)**

This brief complies with Rules 5:26 and 5:30(e) because the portion subject to these rules does not exceed 50 pages.

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