IN THE
Supreme Court of Virginia

RECORD NO. 170697

RIMA FORD VESILIND, *et al*.,

Appellants,

v.

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

Appellees.

OPENING BRIEF OF APPELLANTS

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1. After Challengers presented a *prima facie* case, the trial court erroneously failed to shift to the House and Senate the burden to produce evidence sufficient to show reasonableness.[Error Preserved: Joint Appendix ("JA") at 669-675, 942-957; 1388-1425, 1452-1456; 401; 407-410].

2. Assuming the trial court shifted the burden, it erroneously found without analysis that the evidence produced by the House and Senate sufficed to make the redistricting decision fairly debatable for each Challenged District. [Error Preserved: JA at 669-675, 942-957; 1388-1425, 1452-1456; 401; 407-410; 593-603].

III. NATURE OF THE CASE AND MATERIAL PROCEEDINGS BELOW

Enforcing the constitutional mandate of compactness is the heart of this proceeding. In the 2011 redistricting, the Legislature flouted this requirement in the eleven Challenged House and Senate Districts. Most believe the Legislature did so in order to artfully craft districts that allowed legislators to pick their voters and thereby create favorable circumstances for their reelection.

However, the reason for this constitutional transgression does not matter, nor is this a politically driven case. This lawsuit challenges both districts drawn by the Republican-controlled House of Delegates and the Democrat-controlled Senate. The evidence before the trial court established that the Legislature subordinated the required criterion of compactness to discretionary criteria in violation of the Virginia Constitution. Without correction, the trial court's erroneous decision allows the Legislature to continue undermining representative democracy and the Virginia Constitution.

Appellants ("Challengers") are residents of the eleven districts challenged in this case in which compactness was not afforded priority over discretionary criteria. They filed a Complaint 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 ("Original Defendants") for declaratory judgment and other equitable relief, seeking a judgment that House Districts 13, 22, 48, 72, and 88, and Senate Districts 19, 21, 28, 29, 30, and 37 (the "Challenged Districts") violate the Virginia Constitution. JA at 1-41.

The lawsuit was filed under Article II, § 6 of the Virginia Constitution alleging that when the General Assembly undertook the 2011 redistricting, it did not make a good-faith effort to draw compact districts and instead subordinated the constitutional requirement of compactness to other non-constitutional political and policy concerns. *Id.* Article II, § 6 dictates three and only three requirements that the Legislature must follow when drawing legislative districts. Each district must be 1) contiguous; 2) compact; and 3) as nearly equal in population as is practical. These requirements--in addition to the federal "one person, one vote" and Voting Rights Act ("VRA")--occupy a special status with unique authority over the Legislature. While the Legislature may consider--"balance"--other rational public

policy considerations, the mandates of federal law and the U.S. and Virginia Constitutions can never be subordinated to those considerations.

The Virginia House of Delegates and its Speaker Delegate William J. Howell (the "House") intervened. JA at 57. The Attorney General's ("AG") office represents the Original Defendants and defends all Challenged Districts, but defense counsel decided that, at trial, the AG's office would defend the Senate plan and the House's counsel would defend the House plan. As such, actions taken on behalf of the AG will be referred to as the "Senate" below. When discussed collectively, the House and the Senate will be referred to as the "Legislature".

A discovery dispute regarding the scope of the legislative privilege was decided by this Court on September 15, 2016. *See Edwards v. Vesilind*, 292 Va. 510, 790 S.E.2d 469 (2016). The House filed a Motion for Summary Judgment that was fully briefed, JA at 75-101; 400-460, and argued on February 28, 2017. *Id*. at 570-612. Ruling from the bench, the trial judge denied the Motion for Summary Judgment and issued an order on March 2, 2017. *Id*. at 534.

The Senate filed a Motion *in Limine* to exclude the testimony of Challengers' expert witness, Dr. Michael McDonald, to which the House joined and Challengers opposed. JA at 102-399; 461-533. On March 2, 2017, a hearing was held. *Id.* at 613-659. The trial court took that Motion under advisement and issued an order that same day. *Id.* at 538.

A trial was held on March 13, 14, and 15, 2017. JA at 660-1466. Even though the Senate formerly adopted the House's evidence, nothing either side produced was relevant to the other's redistricting plan. At the close of Challengers' case, the Legislature made a Motion to Strike which was denied. *Id*. at 935-958. That Motion was renewed at the close of all evidence and again denied, because Challengers met their burden of presenting a *prima facie* case. *Id.* at 1374, 1456-1457. The Motion *in Limine* was also denied after the close of all evidence. *Id.* at 1379-1380. On March 31, 2017, the trial court issued its final "Opinion and Order" in favor of the Legislature. *Id.* at 550-564.

Pursuant to Rule 5:9, Challengers timely filed their Notice of Appeal on April 26, 2017. JA at 565-567. An appeal was granted on October 24, 2017.

IV. STATEMENT OF FACTS

The parties stipulated to the following facts (JA at 1468-1740): On February 3, 2011, the U.S. Census Bureau released decennial census data showing that Virginia's House and Senate Districts needed to be redistricted. In 2011, Virginia was a covered jurisdiction under § 5 of the VRA. On March 25, 2011, the Senate and House Committees on Privileges and Elections approved their versions of Committee Resolution No. 1 containing "District Criteria" which allegedly governed their respective redistricting processes ("Resolutions"; "House Resolution" or "Senate Resolution"). JA at 1685-86 (Senate), 1688-89 (House).

On April 11, 2011, the General Assembly passed HB 5001 setting forth redistricting plans for the House and Senate, which then-Virginia Governor Robert McDonnell vetoed. *Id.* at 1691-96. On April 28, 2011, the General Assembly passed HB 5005, which set forth redistricting plans for the House and Senate, and became law when signed by the Governor (the "Enacted Plans"). *Id.* at 1698-1704.

Virginia submitted the Enacted Plans to the U.S. Department of Justice ("DOJ") for preclearance. The Reock, Polsby-Popper, and Schwartzberg measures of compactness were utilized in the DOJ submission. *Id.* at 1710-1740.

On September 14, 2015, the Complaint in this case was filed. *Id.* at 1. The parties identified Drs. McDonald (Challengers), Thomas Hofeller (House), and M.V. "Trey" Hood III (Senate) as expert witnesses and stipulated that each was qualified as an expert in the field of redistricting. *Id.* at 1485.

The parties also stipulated to the Reock, Polsby-Popper, and unadjusted Schwartzberg (before conversion to a 0 to 1 scale like Reock and Polsby-Popper) compactness scores[1] for the (1) 2001 plans; (2) 2011 Enacted Plans; and (3) Challengers' Alternative Plans 1 & 2, as generated in the Maptitude for Redistricting[2] software's standard compactness report. JA at 1490-1516. They further stipulated that Exhibit J10 is a true and accurate copy of tables and figures

[1] The lower the number on the scale from 0 to 1 the less compact the district is.
[2] This is the redistricting mapping software used by the Legislature in 2011 and by all the experts in this case.

submitted into evidence in *Wilkins v. West* and that Exhibit J11 summarizes the Reock and Polsby-Popper scores from Exhibit J10 for the districts at issue in *Jamerson v. Womack*, 244 Va. 506, 423 S.E.2d 180 (1992) ("*Jamerson*"), and *Wilkins v. West*, 264 Va. 447, 571 S.E.2d 100 (2002) ("*Wilkins*"). *Id.* at 1517-1547

The parties stipulated to additional materials. *Id*. at 1468-1740.

A. Challengers' Evidence at Trial

Nick Mueller, who assisted Dr. McDonald's work, including the creation of the maps for the Alternative Plans, testified first on behalf of Challengers. He was called to authenticate certain materials. JA at 700-739, 1761-1779, 1781-1783, 1861-1882. Dr. McDonald then testified about his methodology for measuring constitutional compactness and his conclusions, which were the subject of the Motion *in Limine*. *Id.* at 800-865, 929-34.

Dr. McDonald testified that he was asked to determine if priority was given to the constitutional requirement of compactness in the Challenged Districts or whether other discretionary criteria not mandated by federal or state law--typically called traditional or customary redistricting criteria--predominated over compactness. *Id.* at 824-832. "Required Criteria" means those criteria required by the Federal or Virginia Constitutions or the VRA. "Discretionary Criteria" refers to all other criteria that the Legislature could conceivably have considered. These criteria are defined in the Resolutions as "communities of interests" to "include,

among others, economic factors, social factors, cultural factors, geographic features, governmental jurisdictions and service delivery areas, political beliefs, voting trends, and incumbency considerations." JA at 1685-89.

To answer the question posed, Dr. McDonald compared the Enacted Plans to alternative House and Senate maps which follow the Enacted Plans exactly as to the VRA, equal population, and contiguity requirements, and which sought to maximize compactness across all of the districts in the state.[3] *Id.* at 816, 824-827, 830-832. These maps (one each for the House and Senate) are referred to as "Alternative Plan 1." JA at 1561-1569. Alternative Plan 1 retains the majority-minority districts drawn to comply with the VRA in the exact configuration as the Enacted Plan, abides by the contiguity requirement, and meets the equal population standards set by the respective Resolutions. In order to maximize compactness, it pays no heed to the application of Discretionary Criteria.

By using these alternate plans that only seek to comply with Required Criteria--including compactness--Dr. McDonald testified that he isolated the cause of degradation of compactness from these ideally compact plans to the Enacted Plans. JA at 832. Therefore, any decrease in compactness cannot be attributed to other Required Criteria but only to Discretionary Criteria. In comparing the

[3] Both Mr. Mueller and Dr. McDonald stated that it may be possible that slightly more compact districts could be drawn but none were offered by the Legislature. If the districts in these alternative maps were more compact that would have favored Challengers, which is likely why the Legislature did not offer any alternatives.

Challenged Districts in the Enacted Plans to their counterparts[4] in Alternative Plan 1, Dr. McDonald looked at the composite compactness scores across all three measures apparently used by the Legislature and contained in the DOJ submission (Reock, Polsby-Popper, Schwartzberg). *Id*. at 822-823. He then compared them to the composite scores for the corresponding districts in Alternative Plan 1. He subtracted the composite compactness scores of the Challenged Districts from the composite compactness scores of the alternative districts and divided the result by the alternative districts' scores. *Id*. at 833-847, 863-864; 1761-69, 1777-83.

The result is the percentage by which compactness was degraded (or decreased) from the approximation of the ideal in order to meet the Legislature's desired application of Discretionary Criteria. If the degradation of compactness is greater than 50%, Dr. McDonald concluded that Discretionary Criteria predominated over compactness. *Id*. Obviously then, compactness could not have been given the required priority. *Id.* The calculations show that for <u>each</u> Challenged District the degradation of compactness is greater than 50%. *Id.* at 833-850. There was testimony that only Reock and Polsby-Popper were used by the House. As such, Dr. McDonald also did his analysis using only these two scores. Eliminating Schwartzberg resulted in an even greater compactness degradation-favoring the Challengers. *Id*. at 832-833, 1780.

[4] Districts were matched based on the most common population shared. *Id.* at 713.

As a result, Dr. McDonald opined that when the Legislature balanced the various Discretionary Criteria against the Required Criterion of compactness, they allowed those Discretionary Criteria to predominate over (or be given greater weight than) the constitutional compactness requirement in each of the eleven Challenged Districts. *Id.*

Dr. McDonald further testified that his method provides the Legislature with wide discretion and flexibility to achieve many of the Discretionary Criteria that the General Assembly and courts have identified as traditional and legitimate goals--such as not splitting political subdivisions or precincts and not pairing incumbents--without those goals predominating over compactness or the other Required Criteria. JA at 828-832, 842-843, 867-868. To demonstrate this, Dr. McDonald compared each Challenged District to their counterpart in a second alternative plan ("Alternative Plan 2"). *Id.* at 833-50, 1570-78, 1763-64, 1770-79. Alternative Plan 2 equally follows the other Required Criteria precisely as Alternative Plan 1 does. However, Alternative Plan 2 also meets a number of Discretionary Criteria stated in the Resolutions by (i) splitting the same or fewer political subdivisions (counties/cities) and voting precincts; and (ii) refraining from pairing incumbents to the same degree as the Enacted Plans. *Id.* at 1775-1776. Finally, the Alternative Plan 2 districts are on average and individually much more

compact than the Enacted Plans, allowing the Legislature substantial discretion to adjust boundaries even more before any degradation approaches 50%. *Id.*

Alternate Plan 2 demonstrates how the Legislature's discretionary redistricting considerations can be achieved without predominating over compactness, or even coming close to doing so. *Id.* at 843. Thus, the predominance standard for compactness does not unduly hinder the Legislature's pursuit of other legitimate Discretionary Criteria. The Legislature can "balance" them as they see fit and decide what importance to accord each. What they cannot do is give these Discretionary Criteria greater priority than the compactness requirement set down by the Virginia Constitution. *Id.* No one argues the Legislature could allow Discretionary Criteria to predominate over any other constitutional mandate such as equal population or contiguity. Compactness is no different.

B. Senate's Evidence at Trial

The Senate introduced a number of exhibits and then played three videos from the April 7, 2011 floor debate concerning HB 5001. JA at 962-999. While not objected to, these videos have no probative value as they did not pertain to the legislation actually enacted into law (HB 5005). *Id.* at 970-984. Even if somehow

relevant,[5] they provide no support to the Senate's case as they merely include one conclusory statement that HB 5001 met all constitutional requirements without further specificity beyond listing the criteria. The Senate next played two videos from the April 28, 2011 floor debate concerning HB 5005 which actually became the Enacted Plan. *Id.* at 987-994. Neither of these videos even mentions compactness. The documents and videos presented by the Senate convincingly establish the importance the Senate placed upon Discretionary Criteria, particularly incumbency protection. *Id.* Other than Senator Howell mentioning compactness as a constitutional criterion, no other Senator mentioned it during the remainder of the floor debate and the remarks focused almost entirely on the characteristics of the districts related to election results.

The Senate then called their expert witness, Dr. Hood. JA at 1000. As indicated by the trial court, Dr. Hood's testimony actually supports Challengers' case in important particulars. Dr. Hood conceded that the compactness scores for the 2011 redistricting plan as a whole and for the six Challenged Senate Districts in particular declined from 2001 to 2011. *Id.* at 1013-14, 1019-20. He acknowledged that the Challenged Senate Districts are "at the lower end of the [compactness]

[5] If the Senate argues that it was only required to merely consider compactness, the videos would be relevant to show that one Senator mentioned compactness as among the criteria they considered, though nothing was said about how it was considered. Of course, the Resolutions also mention compactness so if that is all that is required, then the Legislature met this exceedingly low and virtually nonexistent bar.

scale for the Virginia Senate plan." *Id.* at 1020. Dr. Hood had very few criticisms of Dr. McDonald's approach and even admitted that Dr. McDonald's analysis was one way to test compactness. *Id.* at 1044. Dr. Hood agreed with Dr. McDonald that a decline in compactness from Alternative Plan 1 to the existing districts was due to the application of Discretionary Criteria. *Id.* at 1078.

While Dr. Hood testified that he did not believe this Court drew a bright line[6] for compactness scores in *Jamerson* and *Wilkins*, he still proceeded to make those comparisons and look for "compactness scores for districts that were challenged that were previously upheld by the Virginia Supreme Court and comparing those to the challenged districts from the present case to see if they're in the same general area in terms of scores." JA at 1029-30. Absent a bright-line approach or something close to it, that comparison seems futile. Dr. Hood's only testimony about compactness in the Challenged Senate Districts was to state that as a whole (he did not address them individually) their scores on the compactness measures are similar to the scores of the different districts upheld during different redistricting cycles in *Jamerson* and *Wilkins.* *Id.* He provided no explanation as to why the compactness scores in the districts in those cases, located in different parts of the state and operating under different geographical and population constraints, provided any value when compared to the Challenged Districts. *Id*.

[6] In the context of this case, the "bright line" would be a compactness score that would meet the constitutional requirement without further analysis.

Dr. Hood testified about several Discretionary Criteria including incumbency protection and communities of interest. JA at 1011, 1037-41. He agreed that "while maintaining communities of interest is an important principle in drawing legislative district boundaries, this consideration does not override the constitutional requirement of compactness in Virginia." *Id.* at 1075. Yet, he presented no testimony on how the Senate afforded priority to compactness in any of the Challenged Senate Districts. Finally, while he did state that the average degradation in compactness in the entire 2011 Senate plan versus Senate Alternative Plan 1 was less than 50%, he was made aware on cross-examination that all VRA districts were in Alternative Plan 1 at 0% (since they remained identical to the Enacted Plan), thereby seriously skewing that calculation. *Id*. at 1053, 1061-63. Nonetheless, overall plan scores are irrelevant to any single Challenged District because each district--not merely the plan--must meet every constitutional requirement. For example, the average for a plan could meet the allowed equal population deviation but that would not save an individual district that was significantly over or under-populated.

The Senate also called Senator Jeremy McPike from the 29th Senate District. Senator McPike was not in office in 2011 and had no part in the 2011 redistricting. JA at 1088-94. Thus, his testimony-while not objected to-had no relevance. To the

extent that it was considered, it only applied to Senate District 29 and had no bearing on the other five Challenged Senate Districts.

C. House's Evidence at Trial

The House first presented the testimony of Delegate Chris Jones, who was the chief sponsor of the 2011 House redistricting plan. Del. Jones testified about the House Resolution setting forth the criteria used for the 2011 plan. JA at 1108, 1118. Del. Jones said he utilized consultants and legal counsel to assist and provide guidance as to constitutional requirements. *Id.* at 1117, 1149-50. He repeatedly indicated that the 2011 plan complied with the House Resolution as well as *Jamerson* and *Wilkins,* although he gave no specifics on how it did so. *Id*. at 1148-64. Indeed, Del. Jones spent significant time talking about districts not at issue in this case, especially House District 74. *Id*. at 1129-36. Even in his conclusory discussion of the Challenged House Districts, Del. Jones defaults to the importance of Discretionary Criteria. *Id.* at 1136-43.

Del. Jones said "my assumption is that when we ran the plans, that if a score was better than that that was affirmed by the Supreme Court, then we would probably--we should be in a good state." JA at 1160-61. This exchange followed shortly thereafter on cross-examination:

> Q …when you say you met the standard of that court case, are you able to articulate that standard for me and tell me what it is that you followed?

> A No, sir. I think as I told you in deposition, that's what I had attorneys for and other assistants.….
> ***
> THE COURT:….Is there some score that you relied on?
> THE WITNESS: I cannot tell you what the score is, Your Honor. There was -- I assume there was a test that was run on that like all the districts.
> THE COURT: A numerical score?
> THE WITNESS: That would have been in the Reock and with the -- I can never say the other one.
> THE COURT: So you're assuming there was some numerical score from those compactness tests, and you just relied on counsel to tell you that you were meeting them?
> THE WITNESS: Correct…. But I could not tell you what the score was. And assume it was assigned a score, and I relied on other individuals to help me in that regard.

JA at 1161-64.

Del. Jones testified about Discretionary Criteria and the importance of incumbency protection. JA at 1126-28, 1141-43, 1146. He conceded upon cross-examination that the compactness scores as measured by both Reock and Polsby-Popper declined in House Districts 13, 22, 48, and 88 (only one declined for 72) from the 2001 plan to the 2011 plan. *Id*. at 1148-64. Nonetheless, he inexplicably maintained that those Districts were more compact in 2011. *Id.* Despite being the patron of both the 2001 and 2011 redistricting plans, Del. Jones was not able to remember the name of one of the compactness measures on which he and his counsel supposedly relied nor was he familiar with the scores for each Challenged House District. *Id.* His

testimony as to when there might be a conflict amongst criteria stayed within the *Jamerson* and *Wilkins* defense:

> Q …when you were making decisions to shape a district, whether it's moving a metro stop or picking up Senator Kogan's (sic) home or one of the communities of interest that you've talked about, how did you determine whether or not the requirement for compactness was subordinated to your decision with respect to discretionary criteria?
> A It was never subordinated to my -- to that -- top three criteria always were met within the range established by Wilkins v. West.

Id. at 1159.

John Morgan testified next for the House as the demographer primarily responsible for drawing the 2011 redistricting maps. JA at 1168. Like all House witnesses, Mr. Morgan testified in a conclusory fashion that the House Resolution had been adhered to. *Id*. at 1193-94. He stated that compactness scores were run periodically using Reock and Polsby-Popper to determine if they were within the "acceptable" or "tolerable" range based on the scores in *Jamerson* and *Wilkins* and then given to Del. Jones and/or legal counsel. *Id.* at 1199-1214.

He deferred repeatedly to Del. Jones and legal counsel and had virtually no information about specific Challenged House Districts. *See, e.g.,* JA at

1218-21. Mr. Morgan's understanding of when a conflict[7] might arise amongst criteria was also in line with *Jamerson* and *Wilkins*:

> Q You've testified that -- that the constitutional requirements, whether state or federal, were given priority, that if there was a conflict with communities of interest, the constitutional requirements were favored, were given preference, and I'm trying to determine how you did that. And what I think I've heard is that you -- not that you determined it, but you were told by counsel, maybe by Delegate Jones, that there was a score for Reock and for Polsby-Popper that you had to meet and that you couldn't go below that and as long as you did that, you felt you were honoring this criteria. Is that accurate?
> A …as long as the districts were within the allowable range, I didn't see that there was a conflict. And if they were outside the allowable range, I certainly would have brought it to the attention of Delegate Jones and to legal counsel.

JA at 1214 (emphasis added). *See also Id.* at 1209.

The House then had their expert, Dr. Hofeller, testify. JA at 1227. He described the redistricting process as a "three-legged stool," with the legs being law, politics, and technical input. *Id*. at 1232. Dr. Hofeller spoke about the political leg and how important Discretionary Criteria are, including incumbency protection and other criteria falling under the broad and undefined--at least by him--term "communities of interest." *Id*. at 1241-42, 1263-65.

Dr. Hofeller testified that the compactness scores of the districts challenged in *Jamerson* and *Wilkins* were a bright line established by the Supreme Court of

[7] The questioning sometimes focused on a "conflict" because the Resolutions required priority to be given to the constitutional and federal criteria when such a conflict occurred.

Virginia as the "floor" beneath which future scores could not go and more importantly, that scores above that floor met the constitutional compactness mandate. JA at 1271-72. His testimony was that "the legislature, when it was looking in 2011 in its criteria, was looking towards these court cases to say how low would be too low to get us out of the range of compactness scores that were used in Jamerson and Wilkins." *Id*. He used the term "floor" fifteen times in his testimony. JA at 1227-1373.

Dr. Hofeller criticized Dr. McDonald's test on three grounds: (1) it needs more exposure and research (JA at 1287) (a criticism made for the first time at trial and not in his report) (at 1326); (2) it is not a proper way to measure constitutional compliance with compactness because "the floor that was established in Jamerson and Wilkins" is the standard (at 1286); and (3) the overlap of Alternative Plan 1 districts with the Challenged Districts is too low and therefore improper for comparison (at 1287) (despite that Dr. McDonald used the best match of population and Dr. Hofeller was unable to provide a better method (at 1367-69)). His views were challenged on cross. *Id*. at 1314-69.

V. Summary of Argument

The trial court properly defined the issue as "whether the Virginia Legislature gave priority to the constitutionally required criterion of compactness over discretionary criteria in the 2011 redistricting with respect to the eleven

challenged districts....” JA at 550. This is not challenged on appeal. As such, the findings of facts to which the fairly debatable test applies is whether that priority was actually given in each Challenged District. The evidence in this case must be reviewed through that lens.

If the Legislature merely needs to state that it considered compactness to comply with Article II, § 6 of the Virginia Constitution, then the trial of this case was unnecessary. Likewise, if the scores in *Jamerson* and *Wilkins* are the standard and the Legislature simply needs to asses “how low would be too low”, then, again, this case never needed to be tried. However, if the Legislature has to show that it “gave priority to the constitutionally required criterion of compactness over discretionary criteria” then the trial showed conclusively that the Legislature failed its evidentiary burden and this Court must reverse the judgment.

Dr. McDonald’s testimony and test clearly addressed that issue and was evidence that the Legislature failed to give such priority in any of the Challenged Districts. In fact, his testimony proves that the Legislature subordinated compactness to Discretionary Criteria--the ultimate failure to accord it any priority.

Due to their interpretation of *Jamerson* and *Wilkins*, the Legislature produced no evidence as to priority other than conclusory statements that were belied by actual testimony. There was not a single witness or any exhibit which showed how they actually accorded priority to compactness over Discretionary

Criteria in any (let alone each) Challenged District. Indeed, the Legislature did not believe it had to afford priority to Article II, § 6, unless a district's compactness scores was outside the allowable range purportedly established in those cases.

However, the trial court rejected the Legislature's view of those cases and limited them, as this Court surely intended, to the facts in those records and the peculiar characteristics and legal requirements that shaped those districts, including being VRA districts or having boundaries substantially affected by a VRA district. No party assigned error to that ruling and it is now the law of the case.[8] Yet, even after positing the right issue and rejecting the prime defense in the case, the trial court still found for the Legislature. The trial court did not and could not identify a single piece of evidence by either the House or the Senate which showed that priority was given to compactness in any Challenged District. Indeed, the trial court failed to assess each Challenged District individually.

A cardinal principle of jurisprudence is that constitutional standards must be followed and may not be subordinated to the policy or political preferences of the Executive or Legislative branches. Our Constitution mandates that "**every**" district be compact "to preclude at least the more obvious forms of gerrymandering,"[9] but prior decisions of this Court have been interpreted by the Legislature to provide

[8] *Board of Supervisors v. Stickley*, 263 Va. 1, 6, 556 S.E.2d 748, 751 (2002). Challengers agree with the trial court's interpretation and do not seek any alteration of that ruling.

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

near-boundless discretion and essentially rob this clause of any meaningful restraint. This Court now has the chance to fulfill its role as the final arbiter of the Virginia Constitution and rein in a practice that mocks the basic tenets of democracy and the unambiguous mandate that "every" district be compact.

VI. AUTHORITIES AND ARGUMENT

A. After Challengers Presented a *Prima Facie* Case, the Trial Court Erroneously Failed to Shift to the Legislature the Burden to Produce Evidence Sufficient to Show Reasonableness as to Priority.

1. Standard of Review

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

2. Argument

The trial court correctly defined the issue but failed to evaluate the evidence measured by the standard it identified: "whether the Virginia Legislature gave priority to the constitutionally required criterion of compactness over discretionary criteria in the 2011 redistricting with respect to the eleven challenged districts...." JA at 550. The trial court discussed the law regarding the fairly debatable standard, but the ruling itself and the reasoning underlying it shows that the trial court did not correctly apply it. "In Virginia, 'we presume [trial] judges know the law and correctly apply it.' An appellant can rebut the presumption by showing, either by

the ruling itself or the reasoning underlying it, the trial judge misunderstood the governing legal principles." *Ay Hwa White v. White*, 56 Va. App. 214, 217-218, 692 S.E.2d 289, 290-291 (2010) (citation omitted).

A plaintiff always has an initial burden, so the only question to define is what is that burden when legislative action is challenged. As this Court stated in *Board of Supervisors v. Jackson,* 221 Va. 328, 333, 269 S.E.2d 381, 385 (1980):

> We have established the following test for determining whether the presumption of reasonableness should stand or fall. If the presumptive reasonableness of zoning action is challenged by probative evidence of unreasonableness, the challenge must be met by evidence of reasonableness. If such evidence of reasonableness is sufficient to make the issue fairly debatable, the legislative action must be sustained; if not, the presumption is defeated by the evidence of unreasonableness and the legislative act cannot be sustained

Id. (cited with approval by *Jamerson*). *See also Board of Supervisors v. Snell Constr. Corp.,* 214 Va. 655, 659, 202 S.E.2d 889, 893 (1974). Here, Challengers presented "probative evidence of unreasonableness." *Id.*

As the trial court correctly observed, Dr. McDonald's testimony and his methodology established that the "adding of discretionary criteria to the legislative redistricting process increased the degradation of the districts' compactness." JA at 562. Indeed, Dr. McDonald's calculations showed that for each Challenged District the degradation of compactness was greater than 50%. This led to his opinion that when the Legislature balanced the various conflicting criteria, they allowed

Discretionary Criteria to predominate over the constitutionally Required Criterion of compactness in each Challenged District. *Id.* at 832-50.

This evidence showed that the Legislature violated Article II, § 6 by subordinating compactness to criteria not mandated by federal or state law; i.e. - Discretionary Criteria, such as communities of interest. *See Wilkins v. Davis,* 205 Va. 803, 811, 139 S.E.2d 849, 853-854 (1965) ("But community of interest is not the only requirement, or even one of the requirements spelled out in the Constitution."). When "a legislative act is undertaken in violation of an existing [constitutional mandate], the [Legislature]'s 'action [i]s arbitrary and capricious, and not fairly debatable, thereby rendering the [legislative act] void and of no effect.'" *Newberry Station Homeowners Ass'n v. Bd. of Supervisors*, 285 Va. 604, 621, 740 S.E.2d 548, 557 (2013) (quoting *Renkey v. County Bd. of Arlington County*, 272 Va. 369, 376, 634 S.E.2d 352, 356 (2006)).

Challengers met their burden, as evidenced by the denial of a Motion to Strike on two separate occasions. JA at 935-958, 1374, 1456-1457. "This evidence was sufficient to neutralize the presumption of reasonableness which attached to the [Legislature's approval] of the [redistricting plan] and to shift to the [Legislature] the burden of producing evidence to establish the reasonableness of its [legislative] action." *Bd. of Supervisors v. Williams*, 216 Va. 49, 59, 216 S.E.2d 33, 40 (1975) (*citing City of Richmond v. Randall*, 215 Va. 506, 511, 211 S.E.2d

56, 60 (1975)). The Legislature needed "to produce sufficient evidence of reasonableness to render this issue fairly debatable." *Barrick v. Board of Supervisors,* 239 Va. 628, 630, 391 S.E.2d 318, 319 (1990) (cited by *Jamerson). See also Ames v. Painter*, 239 Va. 343, 347-348, 389 S.E.2d 702, 704 (1990).

The trial court never shifted the burden to the Legislature to do so. The Legislature should have been required to "produce some evidence that its actions were reasonable thereby rendering the issue fairly debatable." *Norton v. City of Danville,* 268 Va. 402, 409, 602 S.E.2d 126, 130 (2004). *See also Board of Supervisors v. McDonald's Corp.*, 261 Va. 583, 590, 544 S.E.2d 334, 339 (2001). In this case, that is proof that in fact the House and Senate--based on the evidence relied upon by each--accorded the constitutional mandate of compactness priority over Discretionary Criteria in <u>each</u> <u>Challenged</u> <u>District</u>. The trial court erred when it never evaluated either Chamber's evidence under this standard.

The trial court explained that Challengers faced a problem "in sustaining their burden"[10] because binding precedent "requires that if the evidence offered by both sides of the case would lead reasonable and objective persons to reach different conclusions, then the legislative determination is 'fairly debatable' and

[10] It is unclear what "burden" the trial court is referencing here as the Challengers met their burden to show unreasonableness. This further establishes the trial court's misapplication of the standard. To the extent it is meant as a general statement--regarding the difficulty of overcoming the fairly debatable standard--that is uncontested but does not foreclosure a finding in the appropriate case, such as this one, that the Legislature failed to meet its burden.

must be upheld." JA at 563. However, no such analysis exists in the trial court's opinion regarding the Legislature's burden in relation to their evidence. As shown below, no such evidence exists.

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

B. Assuming the Trial Court Shifted the Burden, It Erroneously Found that the Legislature's Evidence on Priority Sufficed to Make their Redistricting Decision Fairly Debatable for Each Challenged District.

1. Standard of Review

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

2. Argument

Challengers agree with the summary of the evidence enumerated by the trial court. However, because the Legislature relied on *Jamerson* and *Wilkins* to measure whether priority was given, there were no factual findings specified from their evidence regarding prioritization of compactness. There was no evidence identified by the trial court or in the record on that point, thereby relieving this Court of any obligation to defer to the trial court. A *de novo* review of the application of law to the facts in this case mandates reversal.

Challengers do not assign error because the trial court did not detail or analyze the evidence supporting its decision but rather because there was no evidence to support the decision on the issue the trial court identified, nor any in the record. There was no "evidence of reasonableness" establishing that either the House or the Senate gave priority to compactness over Discretionary Criteria in each Challenged District, let alone "sufficient evidence." *See McDonald's Corp*., 261 Va. at 590-91, 544 S.E.2d at 338-339 (finding that if defendants' "evidence of reasonableness is insufficient," the legislative action cannot be sustained).

An issue is fairly debatable "when, measured by both quantitative and qualitative tests, the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions." *Jamerson*, 244 Va. at 510, 423 S.E.2d at 182 (citation omitted). By framing the issue as "fairly

debatable" the Court found that Challengers met their burden and that is not contested on appeal, if Dr. McDonald's testimony is admitted. However, there was no "evidence offered in support of the opposing view" because the Legislature made a strategic decision not to engage on the question of priority. The conclusory statements that compactness was given priority--without more--are insufficient. Further, these statements were contradicted by the same witnesses testifying that a "conflict" between compactness and Discretionary Criteria would only occur if the scores were outside the purported *Jamerson/Wilkins* range. JA at 1209, 1214.

In *GEICO v. USAA,* 281 Va. 647, 708 S.E.2d 877 (2011), a case cited by the Senate below, the trial court heard extensive testimony during a bench trial and then entered judgment that a driver in an accident was entitled to coverage under certain insurance policies. Thus, the appeal went to this Court in the same posture as the case at bar. This Court reversed the trial court, finding that there was:

> no evidence in the record supporting the circuit court's judgment that Steven's use of the car **at the time of the collision** was within the scope of the permission he may reasonably have believed he had. Likewise, such a conclusion is not a reasonable inference from the direct evidence in the face of the contradictory testimony.

Id. at 657, 708 S.E.2d at 883 (emphasis added). Although there were many witnesses who testified that Steven had permission to use the vehicle in other scenarios, this Court focused on the main issue: "whether his particular use — the angry escapade that culminated in the collision — was within the scope of that

permission." *Id.* On that point, the evidence did not support the verdict. The same is true here. While there is evidence in the record that the Legislature *considered* compactness, there is "no evidence in the record supporting the circuit court's judgment…" that a reasonable and objective person could conclude that the Legislature afforded *priority* to compactness in each Challenged District. *Id.* The Legislature's evidence was insufficient to make that question fairly debatable.

As such, the trial court erred and should be reversed.

a. The Trial Court Analyzed Challengers' Evidence on the Issue It Identified: Prioritization

The Challengers met their burden to prove that priority was not given to compactness over Discretionary Criteria and, unless rebutted, the Enacted Plans were unconstitutional. The trial court found that "[c]ertainly it appears that the adding of discretionary criteria to the legislative redistricting process increased the degradation of the districts' compactness." JA at 562. It also found Dr. McDonald's test and his conclusions "appear to be relevant, logical, and founded on generally acceptable compactness measurements." *Id.* Finally, the trial court found (i) "some degree of persuasiveness to both the test and Dr. McDonald's conclusions"; (ii) that both defense experts "acknowledged…that Dr. McDonald's test was at least one method of scoring compactness in the redistricting process" and that Dr. Hood admitted it "would be 'a measure' of a good faith effort to not degrade compactness by more than fifty percent"; and (iii) "that the decline in

compactness from Alternative Plan 1 to the existing districts was due to the application of discretionary criteria." *Id.* at 557, 562.

In addition, the trial court rejected the Legislature's efforts to undermine Dr. McDonald's test and conclusions, finding that the Legislature's "criticism was not so eviscerating as to leave no room for the Court's consideration of the predominance test and Dr. McDonald's conclusions." *Id.* at 562. The trial court noted that Dr. McDonald's test would not preclude consideration of Discretionary Criteria and, in fact, accounts for them. *Id.* at 554-55. Furthermore, to the extent the test places limitations on Discretionary Criteria, the trial court recognized that it is to ensure that compactness is prioritized over competing Discretionary Criteria. *See Id*. (explaining that the test creates an "ideal district" which can be used to determine the degree to which Discretionary Criteria affect compactness).

b. The Trial Court Recounted the Legislature's Evidence Without Any Linkage to Prioritization

After a thoughtful analysis of Challengers' evidence and how it showed that compactness was subordinated to Discretionary Criteria, the trial court set forth the Legislature's evidence without any focus on priority. The trial court did not identify any evidence offered by either Chamber that met the Challengers' burden for "probative evidence of unreasonableness" regarding the question at issue - prioritization of compactness for <u>each</u> of the Challenged Districts. As no such evidence exists, the trial court erred in finding for the Legislature.

The trial court explained that "[w]eighing the test, opinions, and conclusions of [Challengers' witnesses] on one side, against the testimony of [some of the Legislature's witnesses] on the other side, would in the opinion of the Court, lead reasonable and objective people to differ." JA at 563. The trial court addressed two categories of the Legislature's evidence: (1) that which attempted to discredit Dr. McDonald's test and conclusions; and (2) proof of Discretionary Criteria being utilized. *Id*. at 556-60, 562-63. However, the trial court undermined its own ruling as neither is related to prioritization. The trial court erred by not focusing on the ultimate issue that it identified: did the Legislature produce sufficient evidence that they prioritized compactness over Discretionary Criteria to make the question fairly debatable in <u>each</u> individually Challenged District?

With respect to the first category, the trial court found the Legislature's criticisms were insufficient to discredit Dr. McDonald's predominance test. JA at 562. None of this evidence was probative of whether the Legislature gave priority to compactness over Discretionary Criteria, so it completely failed the fairly debatable test's quantitative analysis and there was no quality to examine. To rebut probative evidence of unreasonableness, the Legislature needed to introduce at least some "relevant and material evidence of reasonableness sufficient to make the question fairly debatable." *Vienna Council v. Kohler*, 218 Va. 966, 977, 244 S.E.2d 542, 548 (1978) (finding that city council's actions were not related to the

purported justifications). Both the House and the Senate failed to produce any probative evidence on the central issue in the case as defined by the trial court.

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

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

JA at 1439-40 (emphasis added).[11]

This evidence cannot constitute proof of reasonableness because it supports rather than counters Challengers' evidence of unreasonableness. The Legislature provided neither a quantitative nor a qualitative analysis demonstrating that priority was given to compactness. Therefore, the trial court's opinion is inherently

[11] All House witnesses admitted exactly the same process. *Supra*.

inconsistent and without evidence in the record to support the outcome. Such circumstances are precisely when this Court has previously overturned trial court decisions upholding laws under the fairly debatable standard.

In finding that the governing body failed to present sufficient evidence to make the question fairly debatable, this Court in *Board of Supervisors v. Allman*, 215 Va. 434, 443, 211 S.E.2d 48, 53-54 (1975). stated:

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

Similarly here, the Legislature's evidence that they gave priority to compactness by merely ensuring that the compactness scores were close to the low scores in *Jamerson* and *Wilkins* "was countered" by the trial court's express rejection of that interpretation of those cases[12] and was "negated by" the Legislature's own evidence showing the emphasis placed on Discretionary Criteria over compactness. *Id.* This Court held in *Allman* as the trial court should have held here: "The reasonableness of the Board's action is not fairly debatable, and it will not be sustained." *Id.* at 445, 211 S.E.2d at 55.

[12] The trial court opined that it "does not agree that the Supreme Court of Virginia has ever established a constitutionally required minimum compactness score for measuring the priority given to compactness in drawing legislative districts." JA at 562-63. This ruling was not challenged on appeal and is now the law of the case. *Board of Supervisors v. Stickley*, 263 Va. 1, 6, 556 S.E.2d 748, 751 (2002).

In *Norton v. City of Danville,* 268 Va. 402, 602 S.E.2d 126, the trial court also concluded the issue was fairly debatable despite a lack of evidence by the governing body. There the trial court affirmed the decision of an architectural commission's refusal to grant a certificate because a homeowner modified the front door to his historic home by installing glass panes to aid in preventing burglaries. The homeowner provided evidence that many other houses in the historic preservation district had glass doors including a house of similar style directly across the street. This Court found:

> To meet Norton's evidence of unreasonableness, the city council was obligated to put forth some evidence of reasonableness for its decision in order to carry its burden to render the matter fairly debatable. Despite this low threshold, the city council failed to present evidence demonstrating that its decision was reasonable. This is due, in large part, to the fact that the city council presented no witnesses and offered no exhibits to demonstrate there was a wooden door before 1992 …. Similarly, the city council offered no explanation why its mandate … was reasonable….

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

The result here must be the same. The Legislature "failed to present evidence demonstrating that its decision was reasonable. This is due, in large part,

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

c. The Legislature's Entire Case Rested on Their Improper Interpretation of *Jamerson* and *Wilkins*

The Legislature will likely argue that this appeal is improvident because to prevail the Challengers must seek modification or reversal of *Jamerson* and *Wilkins*. The Legislature is wrong. Challengers agree with the trial court's interpretation of these two cases. Here the Legislature relied exclusively on the purported "bright line" in the *Jamerson* and *Wilkins* cases - i.e., if the Challenged Districts had a similar compactness score to the districts in those cases, they pass constitutional muster. This resulted in a complete lack of evidence showing priority because the House and the Senate each directed all their evidence to their erroneous interpretation of those cases. JA at 560, 1159, 1209, 1214.

Accordingly, as compactness was degraded in favor of Discretionary Criteria, each change of a district boundary gave priority to whichever discretionary choice drove that decision. There was no evidence that compactness was ever given even a nod towards priority, so long as the compactness scores were within the purported "allowable range" of *Jamerson* and *Wilkins*. The Legislature treated these cases as a safe harbor, because under their theory they were relieved from the obligation to provide evidence they simply did not have: evidence on the factual issue of priority. This conveniently allowed the Legislature to substitute meeting the numerical scores of those cases for their Constitutional obligation as established by the trial court.

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

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

Likewise, in "attempting to carry [their] burden, [the Legislature] relied exclusively upon the" *Jamerson* and *Wilkins* scores. *Id.* But this reliance failed upon the trial court's holding that it "does not agree that the Supreme Court of Virginia has ever established a constitutionally required minimum compactness

score for measuring the priority given to compactness in drawing legislative districts." JA at 562-63. Neither the House nor the Senate assigned cross-error to this ruling. When "a party fails to assign error to a particular holding by the circuit court, that holding becomes the law of the case and is binding on appeal." *Egan v. Butler*, 290 Va. 62, 79, 772 S.E.2d 765, 775 (2015) (citation omitted).

The trial court correctly rejected the Legislature's prime defense that they met the Constitution's compactness requirement via their interpretation of *Jamerson* and *Wilkins*. Neither the House nor the Senate produced any other evidence on priority. To the extent the trial court considered the "district scores in *Wilkins* and *Jamerson*" as "a factor", there must be some evidence in the record of how those scores served as probative evidence of reasonableness--which in this case means compactness having received priority over Discretionary Criteria. JA at 563. The trial court offered no explanation as to how it employed those scores and none appears in the record.

It is clear from the Petition stage briefs that the Legislature plans to continue hiding behind these cases despite the trial court's ruling. As such, Challengers address and distinguish these cases below. Two observations from the Petition briefing seem obvious: (1) the Legislature improperly expanded the trial court's opinion that "the analogy drawn to the district scores in *Wilkins* and *Jamerson* is a factor to be considered" into a bright-line test for constitutional compliance for any

district regardless of the circumstances; and (2) even though the trial court held that those cases did not create a floor "for measuring the priority given to compactness in drawing legislative districts," the Legislature's entire case rested on the advice of counsel that these cases did just that. This cannot be reconciled.

d. This Case is Not Identical to *Jamerson* or *Wilkins*

Jamerson involved 1991 Senate Districts 15 and 18 located in Southside Virginia. District 18 was a VRA district with which District 15 shared a significant border. Due to this factor and the location of these Districts (District 18 ran along Virginia's southern border), both experts in *Jamerson* "recognized that the mandatory constitutional requirements of equal representation and minority representation meant that rural districts, such as those in Southside Virginia, would compare unfavorably in compactness with urban districts, and with other rural districts that did not have large minority group populations." *Id.* at 515, 423 S.E.2d at 185 (emphasis added). Those factors are not present in this case--and neither of the Legislature's current experts contend otherwise--which makes comparisons of these districts to any of the Challenged Districts unhelpful. This Court's decision in *Jamerson*--as in any case--derived from and relied on that trial record.

In *Wilkins*, several 2001 districts were challenged on multiple grounds. However, this Court only directly addressed a compactness challenge for one House district which was a VRA district also being challenged as a racial

gerrymander. Again, these are not factors present in the case at bar. As this Court knows, the only issue before it is constitutional compactness--undiluted by the other issues involved in prior cases. For that reason, comparing different districts during different redistricting cycles is not helpful and certainly not dispositive.

Nowhere does *Wilkins* or *Jamerson* support the notion that a constitutional requirement may be subordinated to other traditional redistricting criteria, or even "balanced" in some way over them. To the contrary, this Court in *Wilkins* held:

> We also note, as we did in *Jamerson*, that Article II, § 6 speaks in **mandatory terms**, stating that electoral districts "shall be" compact and contiguous. This directive, however, does not override all other elements pertinent to designing electoral districts. In making reapportionment decisions, **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.** To do this requires the General Assembly to exercise its discretion in reconciling **these** often competing criteria.
>
> Finally, any purpose that may underlie the design of an electoral district, while relevant to challenges under other portions of the Constitution of Virginia as discussed below, is not determinative in a challenge based on Article II, § 6. Determinations of contiguity and compactness, as we said in *Jamerson*, are limited to consideration of the district from a spatial perspective, id. at 514, 423 S.E.2d at 184, taking into consideration the other factors which a legislative body **must**[13] balance in designing a district. In summary, if the validity of the legislature's reconciliation of various criteria is fairly debatable and not clearly erroneous, arbitrary, or wholly unwarranted, neither the court below nor this Court can conclude that the resulting electoral district fails to comply with the compactness and contiguous requirements of Article II, § 6.

[13] Only constitutional and statutory factors **must** be balanced.

Id., 264 Va. at 462-463, 571 S.E.2d at 108 (emphasis and footnote added). The clarity of this passage is unassailable. This Court is addressing the obvious "require[ment]" that constitutional and VRA mandates must be balanced. Nowhere are any discretionary considerations introduced as a permissible part of this balancing equation. Only then does this Court state:

> …the General Assembly **must balance** a number of **competing constitutional and statutory** factors when designing electoral districts. **In addition**, traditional redistricting elements not contained in the statute, such as preservation of existing districts, incumbency, voting behavior, and communities of interest, are **also** legitimate legislative **considerations**.

Id., 264 Va. at 463-464, 571 S.E.2d at 109 (emphasis added). The General Assembly must adhere to federal and state mandated requirements and may "in addition … also" consider other criteria once those are met. Nothing in these cases suggests--nor could they--that the legislature can subject a constitutional mandate to second tier status because of the legislature's non-constitutional/non-VRA choices no matter what they are. The Legislature's argument that *Jamerson* and *Wilkins* are dispositive of whether constitutional compactness was given priority in each of the Challenged Districts contradicts the opinions of those cases and the interpretation of them by the trial court, which is now the law of the case.

At the Petition stage, the Legislature argued that the trial court should be affirmed "because the record here mirrors *Jamerson* and *Wilkins* in all material respects." House Response at 14. It does not. First, and most importantly, the

issue of whether compactness was subordinated to Discretionary Criteria or given the mandated priority in the context of those particular districts was not before this Court in either case. It comes now for the first time.

Second, in both prior cases, every one of the districts challenged on compactness grounds was a majority-minority district drawn to comply with the VRA or had substantial portions of their shape affected by a shared border with such a district. None of the Challenged Districts is a VRA district or is adjacent to a VRA district, except for Challenged House District 72 which shares a relatively small portion of its border with VRA District 74, a border whose necessity is not disputed by Challengers. No one claims that this border is a material factor influencing the bizarre shape[14] of Challenged House District 72.

Thus, in *Jamerson* and *Wilkins,* the legislature had to balance constitutional or federal statutory criteria against each other. Because constitutional and statutory criteria take precedence and must be adhered to, the balancing in those districts presents different issues than are before the Court. In this case, it was established and not contested that all statutory and constitutional criteria were met in Dr. McDonald's maps. That was the entire purpose of his test - to isolate the cause of

[14] The shape of each Challenged District can be observed at JA at 1861-1882.

degradation of compactness in the eleven Challenged Districts.[15] Discretionary considerations are not on equal footing with the federal statutory and constitutional requirements at play in those cases.

e. *Brown* and *Davis* also Support Challengers' Position

There are two earlier cases that are relevant to this analysis. While compactness is not their focus, these cases are the starting points for the opinions in *Jamerson* and *Wilkins*. In *Brown v. Saunders,* 159 Va. 28, 166 S.E. 105 (1932) ("*Brown*"), the legislature's reapportionment and redistricting of the State into congressional districts was challenged. There this Court held as follows:

> When a State legislature passes an apportionment bill, it must conform to constitutional provisions prescribed for enacting any other law, and whether such requirements have been fulfilled is a question to be determined by the court when properly raised.… The legal question involved is whether or not the act of the legislature is in conflict with the mandate of the Constitution. The duty of dividing the State into districts … is, in a sense, political, and necessarily wide discretion is given to the legislative body. Section 55 of **the Constitution of Virginia places limitations on the discretion of the legislature**, and whether or not the act in question exceeds those limitations becomes a judicial question when raised by the proper parties in a proper proceeding.

[15] The Legislature claims that Dr. McDonald believes the VRA districts are subject to a different compactness standard. He does not. This is a red herring and an issue not before the Court. Dr. McDonald was not tasked with evaluating the compactness of any district other than the eleven Challenged Districts.

Id. at 36, 166 S.E. at 107 (citations omitted) (emphasis added). The constitutional requirement that "every" district be compact places a limitation on the discretion of the Legislature. The trial court's opinion necessarily strips that limitation of any bridling effect in direct contrast to the reason why it exists at all.

This Court also held in *Brown*:

> 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. The 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**. No small or trivial deviation from equality of population would justify or warrant an application to a court for redress. It must be a grave, palpable and unreasonable deviation from the principles fixed by the Constitution.

Id. at 44, 166 S.E. at 110-111 (emphasis added). That is the test here too. The evidence at trial showed that by subordinating a "limitation[] enumerated in the fundamental law of the land" the Legislature's "deviation from the principles fixed by the Constitution" were not "small or trivial" but so substantial that the criterion of compactness was swallowed by policy and political preferences found nowhere in the Constitution. This is clearly "a grave, palpable and unreasonable deviation from the principles fixed by the Constitution." *Id.*

The Legislature's apportionment of congressional districts was also challenged in *Wilkins v. Davis,* 205 Va. 803, 139 S.E.2d 849 (1965) ("*Davis*"). In *Davis*, this Court directly addressed the "communities of interest" conundrum:

> …from the standpoint of community of interest alone this record would show little reason for disturbing the boundaries of the present districts. **But community of interest is not the only requirement, or even one of the requirements spelled out in the Constitution**. There must be, as nearly as practicable, an equal number of inhabitants in the districts…. Nor does the record show that the boundaries of these two districts, or of other districts, cannot be so arranged as to make districts that are contiguous and compact and at the same time contain as nearly as practicable an equal number of inhabitants. Such is the command of § 55 of the Virginia Constitution and since the Apportionment Act of 1952 does not now meet that requirement, it is invalid.

Id. at 811, 139 S.E.2d at 853-54 (emphasis added). This Court went on to hold:

> It is the duty of the General Assembly of Virginia to reapportion … so that each district shall be composed of contiguous and compact territory, containing as nearly as practicable an equal number of inhabitants, and, so far as can be done without impairing the essential requirement of substantial equality in the number of inhabitants among the districts, give effect to the community of interest within the districts.

Id. at 813, 139 S.E.2d at 856. The same is true here. The Legislature has discretion to use its Discretionary Criteria "so far as can be done without impairing the essential requirement" of compactness mandated by the Virginia Constitution. *Id.*

In *Jamerson*, this Court reflected on these two cases (*Brown* and *Davis*):

> the evidence showed significant and obvious disparities in the populations of the various congressional districts in violation of the federal and state constitutional requirements of equal representation. Although some effort was made to justify the disparities on the grounds of communities of interest, we held that the evidence failed to show that the General Assembly could not have adjusted the boundaries of those districts to achieve a more reasonable equality in population.

Id., 244 Va. at 516-517, 423 S.E.2d at 186. This is a resounding affirmation of what should be the result in this case. Here, "the evidence showed significant and obvious disparities in the" compactness of the Challenged Districts in violation of Article II, § 6's requirement that "every" district be compact. *Id.* The evidence also showed that the Legislature could have adjusted the boundaries of the Challenged Districts to achieve a more reasonable compactness level while still allowing for Discretionary Criteria. *See* Alternative Plans 2 (JA at 833-50, 1570-78, 1763-64, 1770-79). "Although some effort was made to justify the disparities on the grounds of communities of interest," this Court should hold that "the evidence failed to show that the General Assembly could not have adjusted the boundaries of those districts to achieve a" prioritization of compactness. *Id.* Dr. McDonald's testimony and Alternative Plans established beyond challenge that the Legislature failed miserably to meet the demand of *Brown* that "[t]he 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.** *Id.*, 159 Va. at 44, 166 S.E. at 110-111 (emphasis added).

f. A Redistricting Plan Cannot be Constitutional Simply Because the Legislature Says It Is

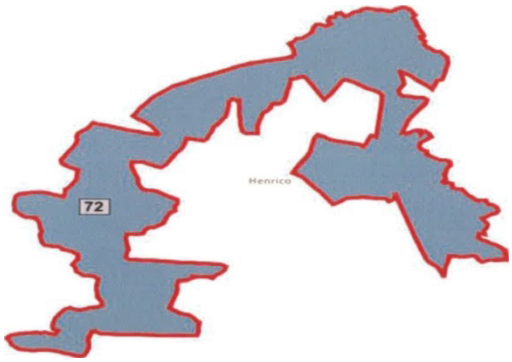
The trial court cited to Del. Jones' testimony as evidence of "how the 2011 legislative redistricting plan was ultimately approved and considered constitutionally sound," but did not explain how Del. Jones' conclusory, self-

serving statements were evidence of prioritization necessary to rebut Challengers' probative evidence of unreasonableness. JA at 562-63. Nor did the trial court address Del. Jones' testimony that he too erroneously relied upon the scores in *Jamerson* and *Wilkins* as setting the constitutional standard.

The trial court also cited generally to Dr. Hood's testimony but Dr. Hood never explained how the Senate prioritized compactness over Discretionary Criteria. JA at 556-57. Similarly, conclusory statements that the Legislature satisfied "all constitutional requirements," which "presumably" included compactness are insufficient evidence of reasonableness. *Id*. It is of no moment that the legislators who drafted and/or voted for the plans would tout them as constitutional. Indeed, what else would they say? It is precisely the prerogative of the courts to render opinions on the constitutionality of legislation. If the legislators' opinions on constitutionality serve as sufficient evidence of reasonableness to make a factual determination "fairly debatable," the constitutional role of the judiciary in redistricting would be abandoned and the compactness clause would not act as any meaningful restraint. With no evidence relevant to priority, the trial court's opinion is contrary to the "fairly debatable" standard and should be reversed.

g. The Resolutions Do Not Replace the Constitution

Similarly, the Legislature seems to argue that since their Resolutions state they only have to give priority to federal and state laws "in the event of a conflict among the criteria" they are somehow saved. JA at 1685-89. First, every change made to a district results from a "conflict among criteria." Thus, every change that reduced compactness in favor of a Discretionary Criterion accorded priority to that discretionary criterion and not to compactness. JA at 1214. This was supported by Dr. Hofeller: "the legislature…was looking towards these court cases to say **how low would be too low** to get us out of the range…." *Id.* at 1271 (emphasis added). This is the rationale that allowed the creation of districts with such bizarre and outlandish configurations, including Challenged House District 72 within Henrico County which looks like a ragged toilet bowl (JA 1867):



Second, just because their Resolutions make that statement does not make it correct. While the Legislature may consider other factors when drawing legislative districts, the constitutional requirements must be given priority over Discretionary

Criteria. According to the Legislature, all they need to do is merely state that they considered compactness (whether or not *that* even occurred or regardless of how it was considered) to meet the constitutional requirement set forth in Article II, § 6. In their Answer to Interrogatory #3, the Original Defendants stated:

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

JA at 1801-03 (emphasis added). The trial court's decision sanctions this position. Without this Court's intervention, the restraint placed upon the Legislature in the Virginia Constitution for the purpose of "preclud[ing] at least the more obvious forms of gerrymandering" will be eviscerated from serving as any meaningful barrier towards that end. A.E. Dick Howard, Commentaries on the Constitution, 415 (1974).

In *Wilkins*, 264 Va. at 464, 571 S.E.2d at 109, the trial court found that Senate District 2 failed the constitutional requirement of contiguity because the access between the two portions of the district was unreasonable. On appeal, this Court reversed the trial court and held:

> The trial court cites no record evidence supporting its position that the travel required was unreasonable and our review of the record shows none. Similarly, the trial court held that the four or five mile separation across water rendered the district non-compact without any further explanation or discussion of evidence supporting this conclusion.

Id. In this case, the "trial court cites no record evidence supporting its position" that the Legislature prioritized compactness over Discretionary Criteria with respect to each of the eleven Challenged Districts and a review of the record shows none. *Id.* In addition, "the trial court held that [the redistricting plan is 'fairly debatable'" and, therefore, the eleven Challenged Districts were constitutionally compact] without any further explanation or discussion of evidence supporting this conclusion." *Id.* Further, there was testimony - which the trial court found to have "some degree of persuasiveness" - that each of the eleven Challenged Districts was unacceptably non-compact in violation of the constitutional mandate because compactness was not given priority and was subordinated to Discretionary Criteria.

The evidence in this record is wholly insufficient to support the trial court's conclusion that the Legislature produced sufficient evidence to make the question of priority fairly debatable. The Legislature's bald assertions of compliance do not alter this. The trial court's judgment should be reversed.

VII. CONCLUSION

The trial court is correct that legislative action is granted a strong presumption of validity. JA at 561. However, that presumption can be overcome with probative evidence - as occurred here. "[L]legislative conclusions based on findings of fact are not immune from judicial review where they are arbitrary and unwarranted." *Jamerson,* 244 Va. at 509, 423 S.E.2d at 182 (citation omitted).

Since both the House and the Senate failed to produce any factual evidence on the central issue in the case, the legislative action cannot be considered fairly debatable and Challengers should have prevailed.

While the Legislature does indeed have "wide discretion" during the redistricting process, that discretion is not unbounded. Article II, § 6 of the Constitution is meant as a restraint on that discretion. It must be enforced in order to keep the Commonwealth's checks and balances in place.

No one would seriously argue--including the Legislature--that if a district is not contiguous or does not meet the equal population or VRA requirements, it is still constitutional because of the balancing of Discretionary Criteria. Compactness must be given the same weight and priority as each of the other state constitutional requirements of equal population and contiguity. No more, but no less.

VIII. RELIEF SOUGHT

Challengers respectfully ask this Court to reverse the decision of the trial court, render judgment in favor of them and to (1) hold that the eleven Challenged Districts are unconstitutional under Article II, Section 6 of the Constitution of Virginia; (2) clarify that Required Criteria cannot be subordinated to Discretionary Criteria; (3) require that new districts be enacted in compliance with the Court's order at or before the 2019 Session of the Virginia General Assembly, but in any event no later than January 31, 2019 such that the new districts will be used for the

2019 General Assembly elections; and (4) require the Legislature to establish an objective standard for these new districts that shows that in each district compactness was not subordinated to Discretionary Criteria.

Respectfully submitted,

RIMA FORD VESILIND, et al,
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CERTIFICATE OF SERVICE

I hereby certify that on the 14th day of December, 2017 a true and accurate copy of this Opening Brief of Appellants was delivered via email and U.S. mail, postage prepaid, to the following counsel of record:

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I further certify that this Opening Brief of Appellants is in compliance with Rule 5:26.

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