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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.

REPLY 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*

The statement of interest for *amici curiae* is set forth in the December 14, 2017 opening brief in support of appellants.[1]

II. SUMMARY OF THE ARGUMENT

The fundamental question before this Court is whether the General Assembly's actions are constitutional with respect to the requirement of Article II, § 6 of the Constitution of Virginia that Legislative districts be compact. During trial, the Challengers presented, and the circuit court accepted, evidence demonstrating that the General Assembly failed to give priority to compactness. Appendix ("App.") at 560-64. In response, the Original Defendants[2] and Original Defendant-Intervenors[3] failed to provide any explanation of how the General Assembly gave priority to compactness. Instead, they provided alternating and contradictory defenses to avoid answering a fundamental question: did the General

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[1] Referred to hereinafter as "Challengers." The Court has granted *amici curiae*'s motion to submit a brief in support of appellants.

[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."

Assembly do anything to give priority to the constitutional requirement of compactness?

The General Assembly has wide discretion in how it may give priority to compactness. However, that discretion does not include giving priority to nondiscretionary factors over the constitutionally-mandated compactness requirement.[4] The General Assembly must do *something* (*i.e.*, articulate and abide by a standard) to meet the compactness requirement in Article II, § 6. Only when the General Assembly articulates and abides by a standard can members of the public and, if necessary courts, hold the General Assembly accountable and determine if the lines drawn were constitutional. Without such a standard, the public and court are left simply to accept the General Assembly's unsupported assurances that it complied with constitutional requirements. Relying on such assurances would effectively eliminate the legislature's accountability and would place the legislature's actions beyond judicial review. This would disregard the constitutional mandates set forth in Article II, § 6 and the Court's precedents. The Court must affirm its role in reviewing the legislature's actions for compliance with

[4] The Original Defendants argue that the lack of extensive debate on compactness indicates that compactness was a non-controversial part of the process. Original Defendants Br. at 5. The lack of debate regarding compactness also could indicate that the General Assembly did not take compactness into consideration during the redistricting process.

constitutional obligations by requiring the General Assembly to articulate and abide by the standard by which it gave priority to compactness.

III. ARGUMENT

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

The requirement that priority be given to compactness derives directly from the text of Article II, § 6, which mandates that districts be compact.[5] It is also supported by this Court's decision in *Wilkins v. Davis*. In *Wilkins v. Davis*, the Court recognized that considerations such as community of interest are important factors in the redistricting process, but, unlike equal population, they are not "spelled out in the Constitution." *Wilkins v. Davis*, 205 Va. 803, 811-12, 139 S.E.2d 849, 854-55 (1965). The Court found that "[w]hatever the means of accomplishment, the *overriding objective* must be substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen" and that "neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from

[5] The House takes issue with use of the term "compact*ness*." House Br. at 1-2. However, the circuit court, legislature, and its experts repeatedly use this term to refer to the requirement under Article II, § 6 that districts be compact. *See* App. at 550-564; Original Defendants Br. at 1-18; House Br. at 4-7.

population-based representation." *Wilkins v. Davis*, 205 Va. at 812-13, 139 S.E.2d at 855 (quoting and citing *Reynolds v. Sims*, 377 U.S. 533, 579-80 (1964)) (emphasis added). Similarly, compactness must also be an overriding objective and be given priority over discretionary criteria.

The constitutional requirement that priority be given to compactness has been acknowledged by the General Assembly itself. That body adopted resolutions in 2011 stating that compliance with constitutional requirements (*e.g.*, 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, the question before this Court is whether the General Assembly complied with the requirement to give priority to compactness.

B. The Circuit Court Incorrectly Applied the Fairly Debatable Standard By Not Requiring the Legislature To Demonstrate How It Gave Priority to Compactness

Whether the General Assembly gave priority to compactness is subject to the fairly debatable standard of review. *See Wilkins v. West*, 264 Va. 447, 462, 571 S.E.2d 100, 108 (2002); *Jamerson v. Womack*, 244 Va. 506, 510, 423 S.E.2d 180, 182 (1992). Under that standard, legislative action is afforded a presumption of validity. *Id.* However, when the

challenging party presents evidence to overcome that presumption, the burden shifts to the legislature to present relevant and material evidence that its actions were constitutional. *See Vienna Council v. Kohler*, 218 Va. 966, 977, 244 S.E.2d 542, 548 (1978).

In this case, the Challengers presented the predominance test, demonstrating that the General Assembly did not give priority to compactness. The circuit court heard testimony from both sides before admitting the Challengers' test into evidence and finding "some degree of persuasiveness to both the test and Dr. McDonald's conclusions." App. at 562. The circuit court should then have shifted the burden to the Legislature to present relevant and material evidence that the General Assembly gave priority to compactness. Instead, the circuit court simply cited general testimony regarding the redistricting process and found the issue to be "fairly debatable." App. at 562-64. None of the evidence provided by the Legislature was relevant or material to the issue of how (or even whether) the General Assembly gave priority to compactness.

1. The Circuit Court Did Not Abuse Its Discretion in Admitting the Predominance Test

The circuit court did not abuse its discretion in admitting the Challengers' test into evidence. This Court reviews a trial court's decision to admit expert opinion for abuse of discretion. *Holiday Motor Corp. v.*

Walters, 292 Va. 461, 483 (2016). When scientific evidence is offered, "the court must make a threshold finding of fact with respect to the reliability of the scientific method offered, unless it is of a kind so familiar and accepted as to require no foundation to establish the fundamental reliability of the system, such as fingerprint analysis." *Spencer v. Commonwealth*, 240 Va. 78, 97 (1990). In making this threshold finding of fact, a court "must usually rely on expert testimony"; if there is a conflict, "and the trial court's finding is supported by credible evidence, it will not be disturbed on appeal" even if the issue of scientific reliability is in dispute. *Id.* at 97-98.

The Legislature's arguments regarding the predominance test are attempts to re-litigate its reliability. They do not demonstrate that the circuit court abused its discretion in permitting the test to be introduced into evidence at trial. *See id.* Accordingly, there is no basis for overturning the circuit court's decision to consider the Challengers' predominance test.

2. The Circuit Court Properly Relied on the Predominance Test

The Legislature argues that adoption of the predominance test would effectively eliminate legislative discretion. Original Defendants Br. at 29-31; House Br. at 2. However, the circuit court did not *adopt* the predominance test; likewise, this Court need not adopt it in order to find that the burden shifted to the Legislature to show how the General Assembly gave priority

to compactness. The predominance test served as evidence under the fairly debatable standard to rebut the presumption of validity. Once that showing was made, the burden shifted to the Legislature to demonstrate that the General Assembly's actions were constitutional. *See Norton v. City of Danville*, 268 Va. 402, 409, 602 S.E.2d 126, 130 (2004).

The House claims that the burden does not shift to the Legislature because the circuit court found that the Challengers failed to meet their *prima facie* burden. House Br. at 41. The circuit court made no such finding. Instead, the circuit court stated that it weighed the evidence on all sides before determining the issue was "fairly debatable." App. at 562-64. If the Challengers had failed to satisfy their *prima facie* burden, the circuit court would not have had to consider evidence presented by the Legislature to reach its decision.

The House also argues that the predominance test "would forbid drawing districts to reflect communities of interest." House Br. at 34; Original Defendants Br. at 29-31. But the House mischaracterizes the predominance test; that is, the predominance test would limit, but not "forbid," drawing districts to account for discretionary criteria. As noted by the circuit court, the predominance test creates "ideal districts" which can be used to determine the degree to which discretionary criteria affect

compactness. App. at 554-55. The General Assembly has discretion to deviate from an ideal, but it must explain why it is doing so in order for the Court to determine if such actions are reasonable (*i.e.*, articulate and abide by its own standard). Opening Br. at 20-21; *see Brown v. Saunders*, 159 Va. 28, 43-44, 166 S.E. 105, 110-11 (1932); *see also Cosner v. Dalton*, 522 F. Supp. 350, 356 (E.D. Va. 1981) ("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)). Moreover, the General Assembly need not adopt the predominance test; it *must*, however, adopt and abide by *some* standard to demonstrate how it exercised its discretion. The Legislature has provided no such standard for the Court's review.

3. The General Assembly Failed To Demonstrate How It Gave Priority to Compactness

Instead of addressing how the General Assembly gave priority to compactness, the Legislature repeatedly points to the compactness scores in *Jamerson v. Womack* and *Wilkins v. West* as evidence that the challenged districts are constitutional. House Br. at 38-41; Original Defendants Br. at 8-12. At the same time, the Legislature argues that its position has never been that these cases represent a floor for satisfying the compactness requirement. Original Defendants Br. at 29. By relying on

Jamerson and *Wilkins* as evidence that they satisfy the compactness requirement, the Legislature is effectively arguing that these cases *do* represent a floor. As recognized by the circuit court, that argument does not address how the General Assembly gave priority to compactness. *See* App. at 562-63 (finding that *Jamerson* and *Wilkins* did not establish a standard "for measuring the priority given to compactness in drawing legislative districts"). Moreover, the Challengers and *amici curiae* do not challenge the Court's findings in those cases. Those cases are inapposite here because they applied to Voting Rights Act districts. They do not address whether the General Assembly gave priority to compactness.

C. The General Assembly's Exercise of Discretion Is Subject to Judicial Review

The General Assembly has wide -- but not unlimited -- discretion in how it gives priority to compactness. At a minimum, the General Assembly must articulate a standard within which it exercises its discretion. Otherwise, "[d]iscretion without standards is, essentially, arbitrary and capricious government." Opening Br. at 31. In this case, the Legislature did not provide any evidence of the standard it used to give priority to compactness -- it simply states that the General Assembly "considered" compactness. *See* Original Defendants Br. at 4-5. If that is enough to satisfy the constitutional requirement, legal challenges to

violations of the compactness requirement are effectively foreclosed and the constitutional command is rendered pointless. The legislature may do more than the constitution requires, but it cannot do less. *See Brown*, 159 Va. at 35-36, 166 S.E. at 107 (finding that whether the legislature exceeds constitutional limitations is a judicial question).

1. The General Assembly Must Show a Good-Faith Effort To Give Priority to Compactness

The Court has explained that "[t]he discretion to be exercised [by the legislature] 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." *Brown*, 159 Va. at 44, 166 S.E. at 110 (emphasis added). Thus, the discretion exercised by the General Assembly must reveal the good-faith attempt it made to meet the constitutional compactness requirement.

The Legislature has presented no relevant or material evidence demonstrating that it made a good-faith effort to give priority to compactness. Instead, the Legislature argues that the predominance test is not the standard by which to determine whether priority was given to compactness. House Br. at 16; Original Defendants Br. at 38. The Legislature's arguments against the predominance test begs the question –

what standard did the General Assembly use? The Legislature has yet to answer that question.

2. The Court Has a Duty To Review the General Assembly's Actions for Constitutionality

Even though legislative actions are afforded a strong presumption of validity, those actions (or inactions) are 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 afforded 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 Original Defendants argue that this issue is beyond the Court's review by claiming that this issue is one of "redistricting policymaking," which should be left to the legislative and executive branches. Original Defendants Br. at 35-37. They cite to the recent election results as evidence that redistricting reform "may be closer to reality than at any time in modern Virginia history." *Id.* Although the executive and legislative branches may pursue redistricting reform, that is a separate issue from the

Court's obligation to determine whether the General Assembly abided by its constitutional requirement to give priority to compactness.

The House also argues that one of the purposes of compactness -- to preclude obvious forms of gerrymandering -- "does not translate into any particular judicially manageable compactness standard." House Br. at 2 and 33-34. While the purpose for the compactness requirement may be informative, the Court must examine the legislature's actions to determine if they are constitutional. Here, the General Assembly has failed to explain how it exercised its discretion, that is, demonstrated that it made a good-faith effort to comply with the Constitution.

It may well be difficult to develop a standard to give priority to compactness, but that difficulty does not excuse the Legislature from complying with this constitutional obligation. The fairly debatable standard presumes that there is a *standard* that can be *debated*. The standard is amorphous only to the extent that the General Assembly fails to take any action to give priority to compactness.

The difficult nature of the compactness issue does not excuse the Court from its duty to review the General Assembly's actions for compliance with its obligations under the Constitution. *See Wilkins v. Davis*, 205 Va. at 811, 139 S.E.2d at 854 ("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.") (quoting *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964)).

D. The General Assembly Must Identify a Constitutionally Sound Standard for Giving Priority to Compactness

In order for the Court to determine whether the General Assembly complied with the Constitution's requirement, that is to give priority to compactness, the General Assembly must be required to articulate its compliance for the Court's review. The Original Defendants claim that requiring the General Assembly to "identify and abide by an articulated standard that gives compactness priority over discretionary criteria" constitutes a "significant change in the law governing redistricting challenges." Original Defendants Br. at 31-35. In fact, such a requirement is consistent with this Court's prior rulings.

In *Brown v. Saunders*, the Court reviewed the legislature's compliance with 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. This Court has also stated that "it is not the duty of the court to substitute its judgment for that of the legislature but simply declare what the law is, and to state whether or not the act is in conflict with the constitutional requirement." *Wilkins v. Davis*, 205 Va. at 813, 139 S.E.2d at 855. The Court cannot satisfy this duty if the legislature refuses to explain its actions for the Court to review.

The House argues that the General Assembly, and not the courts, should determine what is sufficiently compact to satisfy the constitutional requirement. House Br. at 35-37. That is not the law. It is this Court's duty "to state whether or not [a legislative] act is in conflict with the constitutional requirement." *Brown*, 159 Va. at 35, 166 S.E. at 107. The House also argues that the Court's role is to review legislative determinations of fact to ensure that they are not clearly erroneous, arbitrary, or wholly unwarranted. House Br. at 36. But the Court can only fulfill this role if the General Assembly articulates what actions it took; otherwise, the Court has no means to determine if those actions were constitutional.

Requiring the General Assembly to articulate and abide by a standard by which it gives priority to compactness does not threaten legislative discretion or the presumption of validity. Such a requirement allows the General Assembly to exercise its discretion in a manner that then allows

the Court to review those actions to ensure constitutionality. In this case, the Legislature failed to provide any relevant or material evidence that the General Assembly gave priority to compactness for the Court to review.

IV. CONCLUSION

For the foregoing reasons and the reasons stated in our Opening Brief, 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 22nd
day of January, 2018.

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Certificate of Service

I, Lucius B. Lau, certify that I complied with Rule 5:26(e), and on January 22, 2018, a true and accurate copy of the foregoing Reply 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 15 pages.

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