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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.*

## REPLY BRIEF OF APPELLANTS

Wyatt B. Durrette, Jr. (VSB #04719)
Christine A. Williams (VSB #47074)
Durrette, Arkema & Gill PC
1111 East Main Street, 16th Floor
Richmond, Virginia 23219
Telephone: (804) 775-6900
Facsimile: (804) 775-6911
wdurrette@daglawrva.com
cwilliams@daglawrva.com

*Counsel for Appellants/Challengers*

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

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## II. SUMMARY OF ARGUMENT

The Legislature assiduously avoids the issue actually posed by the trial court: was priority given to compactness over Discretionary Criteria? By doing so, neither the House nor the Senate actually address the arguments made and the evidence presented by Challengers. Therefore, they ignore the necessary factual determination that invokes the fairly debatable standard. Instead, by trying to fit this case within prior decisions, they unwittingly highlight how it differs from *Jamerson v. Womack,* 244 Va. 506, 423 S.E.2d 180 (1992), and *Wilkins v. West,* 264 Va. 447, 571 S.E.2d 100 (2002). In neither case was this Court asked to determine if the Legislature afforded the constitutional requirement of compactness priority over Discretionary Criteria. Challengers are not requesting or suggesting the elimination of legislative discretion. That is a smoke screen. Challengers are merely seeking a meaningful restraint on that discretion--as none was applied in the Challenged Districts--so that Article II, §6 is not deemed worthless.

Although stated in the Opening Brief, it bears repeating--if the Legislature merely needed to (i) "consider" compactness-however negligible that consideration was; or (2) ensure that each district was within the "tolerable range" of the basement level compactness scores in *Jamerson* and *Wilkins*, then this case never needed to be tried. But surely (surely!) our laws demand that our Legislature act in good faith and afford **all** constitutional requirements the respect they deserve.

As to the cross-error, the House decided not to pursue their cross-assignment of errors (House Br. at 50 fn13). Thus, only the Senate's assignment of cross-error remains. The Senate's objections were heard previously through a Motion *in Limine* and oral argument - both before and at trial. JA at 102-374, 461-533, 538, 613-659, 935-958, 1374-1380. The trial court thoroughly considered Dr. McDonald's testimony and other evidence and properly found it to be admissible.

## III. AUTHORITIES AND ARGUMENT

### I. Challengers Established a Basis for Reversal

This Court has an obligation to determine if the General Assembly's actions are constitutional**.** The Legislature claims it has untethered discretion and even argues it merely needed to "consider" compactness to satisfy the Virginia Constitution. Senate Br. at 4-5; House Br. at 35-37. The House argues that there is no basis for giving priority to a constitutional mandate but this position ignores common sense, the text and history of Article II, §6, and the prior case law set forth in Challengers' Opening Brief, especially *Brown v. Saunders*, 159 Va. 28, 166 S.E. 105 (1932). The Middle District of North Carolina very recently stated:

> Legislative Defendants are correct that none of these empirical analyses appear in the Constitution. But Plaintiffs need not show that a particular empirical analysis or statistical measure appears in the Constitution to establish that **a judicially manageable standard exists to resolve their constitutional claims**…. The Supreme Court long has relied on statistical and social science analyses as *evidence* that a defendant violated a standard set forth in the Constitution or federal law.

*Common Cause v. Rucho*, No. 16-CV-1026, 2018 U.S. Dist. LEXIS 5191, *86-87 (M.D.N.C. Jan. 9, 2018) (italics in original). That is precisely what occurred in this case. Rather than address it head-on, the Legislature continues its mantra that the compactness scores of different districts during different redistricting cycles and based on different trial records should govern here. That is nonsensical.

This Court does not need to adopt the predominance test exclusively in order to find that the test shifted the burden to the Legislature to show what standard they used to give, or how they actually gave, priority to compactness in each of the Challenged Districts. The Legislature did not provide any evidence of the standard it used to give priority to compactness or any evidence on priority at all other than when the *Jamerson* or *Wilkins* scores were implicated. Moreover, this case does not deal with a single Voting Rights Act ("VRA") district. Dr. McDonald was only asked to address the Challenged Districts. Thus, the Legislature's repeated chorus about the predominance standard not applying to VRA districts is truly a red herring and not an issue before this Court.[1]

The federal court in *Rucho* went on to state:

> the framework must distinguish partisan gerrymandering from the results of legitimate districting objectives, including those objectives that take into account political data or permissible partisan considerations. Put differently, "[a] determination that

[1] It is also wrong. Priority for all constitutional mandates applies. The uncertainty is how to determine whether it has been followed for compactness and because VRA districts were uninvolved in this case, no time was devoted to this issue.

> a gerrymander violates the law must rest . . . on a conclusion that [political] classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective." *Id.* at 307. …we conclude that Plaintiffs' proposed legal frameworks and supporting evidence do just that.

*Id.* at *84-85 (*quoting Vieth v. Jubelirer*, 541 U.S. 267, 307 (2004)). Applying that principle here, when Discretionary Criteria subordinate compactness scores by more than 50%, those considerations - "though generally permissible, were applied in an invidious manner" which violates the Virginia Constitution. *Id.*

The Senate claims that "the former AGs want the judiciary to supplant the General Assembly's role in redistricting." Senate Br. at 34. The Senate also argues that a "*bona fide* effort" would be a burden on the Legislature. *Id.* Basically, the Senate is arguing that the Legislature's discretion is essentially unfettered, even though its actions are not *bona fide* and would not meet constitutional mandates. That is not the law. The Legislature's "wide discretion" must have some meaningful boundaries. Subordination is that boundary and subordinating compactness by more than 50% is egregious, arbitrary and capricious. Neither the former AGs nor the Challengers are asking the judiciary to take over redistricting, but instead to assure that the Legislature's redistricting is constitutionally sound.

As noted by the House's expert, Dr. Hofeller, and his colleagues: "If compactness is to be more than an empty concept, some precise definition in the law would be useful." Richard G. Niemi; Bernard Grofman; Carl Carlucci; Thomas

Hofeller, *Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering*, 52 J. of Politics 1155, 1177, fn18 (1990). Dr. McDonald has now provided a standard to judge constitutionality, if not a precise definition. This is the uniqueness of his work. Note also that despite the House's repeated discussion of Challengers' alleged improper use of "compact*ness*" - that is precisely what *their* expert is discussing above.

In *United States v. Dicristina*, 886 F. Supp. 2d 164 (S.D.N.Y. August 21, 2012) *rev'd on other grounds*, 726 F.3d 92 (2d Cir. 2013), Judge Weinstein authored an opinion defining "Texas Hold'em" poker as a game predominantly of "skill," not "chance." He set aside the verdict and said this about predominance:

> That chance plays some role in the outcome of the game does not imply that poker is predominately a game of chance rather than predominately a game of skill. …
> The fundamental question is not whether some chance or skill is involved in poker, but what element predominates. **To predominate, skill must account for a greater percentage of the outcome than chance—i.e., more than fifty percent.**

*Dicristina*, 886 F.Supp.2d at 231 (emphasis added). Here, to "predominate, [Discretionary Criteria] must account for a greater percentage of the outcome than [compactness]-i.e., more than fifty percent." *Id.* Dr. McDonald opines that, in each Challenged District, Discretionary Criteria predominated over the Required Criterion of compactness because the percentage by which compactness has been degraded from the approximation of the ideal is "more than fifty percent." *Id.*

The Legislature asserts--in another example of their "strawman" arguments--that the predominance test "would forbid drawing districts to reflect communities of interest." House Br. at 34; Senate Br. at 29-31. This grossly mischaracterizes the predominance test and ignores Alternative Plans 2 which show the extensive discretion available to the Legislature, up to 50%. JA at 828-68, 1570-78, 1763-64, 1770-79. The Professors' amicus brief states that deviations from the ideal are permissible so long as they are reasonable and made pursuant to a rational state policy. Professors Br. at 20-21. They argue that the Legislature has discretion to deviate from the ideal but must simply explain why it is doing so (*i.e.*, articulate and abide by its own standard).

Alternative Plans 2 were provided as **an example** where the districts in Alternative Plans 1 are rendered less compact by reducing the number of jurisdictional and voting precinct divisions and avoiding pairing of incumbents. JA at 833-850. Alternative Plans 2 merely demonstrate how certain Discretionary Criteria can be achieved without predominating over compactness.[2] **No one challenges the use of legislative discretion**. In fact, Alternative Plans 2 embrace

[2] The districts in Alternate Plans 2 meet some of the Discretionary Criteria and yet are much more compact than the Enacted Plans. This leaves substantial room to apply even more Discretionary Criteria before any degradation approaches 50%. JA at 1775-76. Thus, broad discretion remains before the Plans become unconstitutional.

it. The Colorado Supreme Court elucidated the inverse standard for compactness when it was required to be subordinated in that state:

> The remaining criteria, compactness and preservation of communities of interest, are subordinate to compliance with section 47(2) [of the Constitution]. **Other nonconstitutional considerations**, such as the competitiveness of a district, are not per se illegal or improper; however, such factors **may be considered only after all constitutional criteria have been met**.

*In re Reapportionment of the Colorado General Assembly*, 332 P.3d 108, 111 (Colo. 2011) (emphasis added).

The Senate argues that their position has never been that *Jamerson* and *Wilkins* created a compactness score floor. Senate Br. at 29. However, they continue to cite to the scores in those cases as evidence that they satisfied the compactness requirement. They cannot have it both ways.[3] The Legislature also takes issue with the cases cited by Challengers regarding the fairly debatable standard. Without question, *Jamerson* and *Wilkins* are critical precedent. But those two cases rely on the fairly debatable standard whose origin arose and was defined in earlier cases, which directly address the standard at issue in this appeal.

[3] Whether these scores establish a "floor" is beside the point. The Senate--as does the House--seeks to avoid producing evidence that priority was given to compactness by arguing that they met their constitutional obligations by drawing districts with scores close to those in *Jamerson* or *Wilkins*. Whether this means there is a floor established by those scores matters not one bit.

Without a citation to the record, the House argues that the trial court found the Challengers failed to meet their *prima facie* burden. House Br. at 41-42. The trial court did not make any such finding, which accounts for the House's failure to include a citation to this phantom ruling. The trial court stated that it weighed the evidence on all sides before determining the issue was "fairly debatable." If the Challengers failed to satisfy their *prima facie* burden, the trial court would have ended the case and not required evidence from the Legislature or it would have granted the motion to strike at the conclusion of all evidence. Yet, it did neither. Nonetheless, the trial court's lack of clarity dictated the Challengers' first assignment of error and the House's argument only serves to support that position.

Interestingly, despite stating that "there is no consensus about how to measure and define" compactness, Senate Br. at 5-6, the Senate still believes the scores in *Jamerson* and *Wilkins* govern and should govern forever. Yet when Dr. McDonald utilizes those same scores in a slightly different way, they are "junk science" and not reliable. Senate Br. at 41. The two positions cannot be reconciled.

The Legislature failed to present evidence sufficient to make its redistricting decision fairly debatable for each Challenged District. The trial court erred and should be reversed.

## II. The Assignment of Cross-Error is Without a Basis in Law or Fact

### A. Standard of Review

Contrary to the Senate's position (Senate Br. at 38), this Court reviews a "circuit court's decision to admit expert opinion using an abuse of discretion standard and, therefore, will reverse the circuit court's decision 'only upon a finding of abuse of that discretion.'" *Holiday Motor Corp. v. Walters*, 292 Va. 461, 483, 790 S.E.2d 447, 458 (2016) *quoting Hyundai Motor Co. v. Duncan*, 289 Va. 147, 155, 766 S.E.2d 893, 897 (2015).

**B. The Trial Court Did Not Abuse its Discretion**

The trial court properly admitted Dr. McDonald's testimony. The Senate's argument that weighing the evidence was "clear error" is merely another way of saying it is not reliable and should not be admitted. Senate Br. at 41. Obviously, if reliable and admissible--as Dr. McDonald's opinion is--any evidence then is given "weight" in varying degrees by the trier of fact. Dr. McDonald's opinions were based on undisputed facts. All parties agree on the compactness scores for the Challenged Districts. In his Alternative Plans, Dr. McDonald (i) maintained the VRA districts in the exact configuration as the current maps; (ii) abided by the contiguity requirement; and (iii) met the equal population standards set by the respective House and Senate Committee Resolutions. He utilized the same mapping software and compactness measures used by the General Assembly. There are no grounds upon which to find that the trial court abused its discretion.

**1. General Standard**

"Determining whether an adequate foundation has been laid for the admission of an expert opinion is an exercise of the trial court's discretion, to be made in light of all the testimony produced." *Smith v. Commonwealth*, 265 Va. 250, 254, 576 S.E.2d 465, 468 (2003) (citation omitted). *See also Payne v. Commonwealth*, 277 Va. 531, 542, 674 S.E.2d 835, 841 (2009).

**2. An Adequate Foundation was Established in this Case for the Admission of Dr. McDonald's Opinions and Test**

In *O'Dell v. Commonwealth*, 234 Va. 672, 696-697, 364 S.E.2d 491, 504 (1988), this Court affirmed the admission of expert testimony because challenges to the "reliability of the method" and "the manner in which [the expert] did the tests" went to "the weight of the evidence rather than its admissibility." The same is true here. As further elucidated in *Spencer v. Commonwealth*, 240 Va. 78, 97-98, 393 S.E.2d 609, 621 (1990):

> the court must make a threshold finding of fact with respect to the reliability of the scientific method offered …. In making the threshold finding of fact, the 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 where the issue of scientific reliability is disputed, if the court determines that there is a sufficient foundation to warrant admission of the evidence, the court may, in its discretion, admit the evidence ….

(Emphasis added; citation omitted). Here, there was a "sufficient foundation to warrant the admission" of Dr. McDonald's testimony and tests.[4] *Id.* Indeed, the trial court specifically held that "this field of redistricting is such that I think Dr. McDonald's (sic) had adequate foundation for his opinions and his tests." JA 1380. The "trial court's finding [wa]s supported by credible evidence" and should "not be disturbed on appeal." *Spencer*, 240 Va. at 97-98, 393 S.E.2d at 621.

In *Spencer*, this Court continued:

> if scientific unanimity of opinion were necessary, very little scientific evidence, old or new, could be used. **Wide discretion must be vested in the trial court** to determine, when unfamiliar scientific evidence is offered, whether the evidence is so inherently unreliable that a lay jury must be shielded from it, or whether it is of such character that the jury may safely be left to determine credibility for itself.

*Id.* at 97-98, 393 S.E.2d at 621 (emphasis added). Here, the only thing "unfamiliar" is the 50% subordination line Dr. McDonald drew to help the trial court assess the Legislature's compliance or non-compliance with the Constitution's compactness requirement. The methods by which he made his calculations are not new nor are they unreliable. Contrary to the assertion that his work lacks foundation in social sciences or legal precedent, Dr. McDonald relied on nothing beyond what has been used for decades in the compactness literature and case law. He simply applied it to the question in this case - was priority given to compactness?

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[4] Furthermore, this case was tried to the court and not a jury, thereby decreasing the likelihood of any improper application.

There was no error from the trial court's self-evident comment that redistricting is "an inexact science" so the foundation necessary for admission is not like one with an "accepted and experienced body of science." JA at 1379. The issue is whether a proper foundation was established for Dr. McDonald's opinion to meet the reliability threshold so that the trial court did not abuse its discretion by admitting it. Here that standard is easily met. The trial court found that the "predominance test and resulting conclusions appear to be relevant, logical, and founded on generally acceptable compactness measurements." JA at 562.

The Senate cites to *Billips v. Commonwealth,* 274 Va. 805, 652 S.E.2d 99 (2007), which involved the admission of plethysmograph testing without any attendant expert testimony. *Billips* evinces no resemblance to the case at bar. In that case, this Court held:

> As with any evidence requiring a preliminary foundation, the burden of making a prima facie showing of that foundation rests upon the proponent of the evidence, subject to the opponent's opportunity for cross-examination and refutation. Here, the Court of Appeals erred in reversing that burden, requiring Billips to introduce evidence of unreliability instead of requiring that the Commonwealth first make out a prima facie case of "the reliability of the scientific method offered."

*Id.* at 810, 652 S.E.2d at 102. Challengers met their "burden of making a prima facie showing of that foundation." *Id.* It was subject to the Legislature's "opportunity for cross-examination and refutation." *Id.* The Legislature put on two qualified redistricting experts, but the trial court found their criticisms of Dr.

McDonald's approach insufficient to preclude admissibility. JA at 550-564. Dr. Hood even admitted that Dr. McDonald's analysis was one way to test compactness and he 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. JA at 1044, 1078. With this admission, the Senate's expert bolsters Dr. McDonald's opinion that priority could not have been given to the requirement of Article II, §6. The trial court considered all the evidence and made a sound ruling that a sufficient foundation had been laid for the admissibility of Dr. McDonald's testimony and the predominance test.

In *John v. Im*, 263 Va. 315, 320-321, 559 S.E.2d 694, 697 (2002), another case cited by the Senate, the expert could not "identify the person who actually performed the QEEG test. Without this information, the testing conditions and procedures could not be ascertained." *Id.* There were other notable deficiencies that do not exist here. Dr. McDonald performed the test. Mr. Mueller merely assisted with the underlying data using a software program "of a type normally relied upon by others in the particular field of expertise." Rule 2:703(a). JA at 700-739.

Unlike the deficiencies in *John*--which could have had a profound effect on the results of the test--it does not matter who draws the Alternative Plans and particularly Alternative Plans 1. Dr. McDonald testified that different maps could be drawn that epitomize an ideally compact map but he opined that the change

from one ideal to another would be minimal and you would still have a 50% degradation for the Challenged Districts.[5]

In *Online Resources Corp. v. Lawlor*, 285 Va. 40, 60, 736 S.E.2d 886, 897 (2013), the expert "did not take general knowledge and apply it to specific unknowns in this case. Instead, [the expert] took reliable stock valuations that he did not calculate and used those valuations to create the specific calculation that he was well-qualified to compute. Accordingly, the trial court did not abuse its discretion when it admitted [the expert's] expert opinion testimony." Similarly here, Dr. McDonald took reliable maps generated on the software program utilized by the General Assembly, and used those maps "to create the specific calculation that he was well-qualified to compute." *Id.* As such, "the trial court did not abuse its discretion when it admitted [Dr. McDonald's] expert opinion testimony." *Id.*

### 3. The Whole Point of Dr. McDonald's Test was to Ignore One Set of Variables in Alternative Plans 1 - Discretionary Criteria

The Legislature seems unable to accept that the whole point of Dr. McDonald's method was to ignore Discretionary Criteria in Alternative Plans 1 to test whether the Legislature gave priority to the constitutional mandate of compactness. Thus, their argument that the test lacks reliability "because it ignores

[5] In fact, Dr. McDonald testified that if a map could be drawn that was more "ideal" with districts having higher compactness scores than those on his map, the degradation would actually be more severe. JA at 891-92.

relevant variables" (Senate Br. at 42) is without merit The trial court dispensed with this criticism at the hearing on the Motion *in Limine*:

> THE COURT:….the criticism of…those districts not having all the criteria, I don't really follow that one because the whole point seems to me of creating those districts with only the three primary considerations of population, (sic) equality, Voting Rights Act, and compactness is to show the difference between districts without the other discretionary criteria and districts with the discretionary criteria, trying to show how one differs from the other, thereby implicating that the additional criteria made the difference. I mean, if you didn't do that, this whole comparison study wouldn't work, would it? Isn't that the point?
> …
> MR. HESLINGA: That's certainly what Professor McDonald has attempted to do.

JA at 636-37. Thus, this is not a valid objection.

Dr. McDonald merely provided a standard to measure whether the constitutional criterion of compactness had been subordinated to Discretionary Criteria and therefore was not accorded the priority to which it was entitled. *Id.* It is self-evident that Dr. McDonald's test allows for appreciable legislative discretion to employ Discretionary Criteria--as Alternative Plans 2 show--within constitutional limitations. There is no error.

## IV. CONCLUSION

In addition to the relief sought in their Opening Brief, Challengers respectfully ask this Court to deny the cross-error and to hold that the testimony of Dr. McDonald was properly admitted.

Respectfully submitted, RIMA FORD VESILIND, et al,
By Counsel

/s/ Wyatt B. Durrette, Jr.
/s/ Christine A. Williams

Wyatt B. Durrette, Jr., Esquire (VSB #04719)
Christine A. Williams, Esquire (VSB #47074)
Durrette, Arkema & Gill PC
1111 East Main Street, 16th Floor
Richmond, Virginia 23219
Telephone: (804) 775-6900
Facsimile: (804) 775-6911
wdurrette@daglawrva.com
cwilliams@daglawrva.com
*Counsel for Appellants/Challengers*

## CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of January, 2018 a true and accurate copy of this Reply Brief of Appellants was delivered via email to the following counsel of record:

Heather Hays Lockerman (Va. Bar 65535) HLockerman@oag.state.va.us
Joshua D. Heslinga (Va. Bar 73036) JHeslinga@oag.state.va.us
Anna T. Birkenheier (Va. Bar 86035) ABirkenheier@oag.state.va.us
Matthew R. McGuire (Va. Bar 84194) MMcguire@oag.state.va.us
Office of the Attorney General
202 North Ninth Street
Richmond, VA 23219
Telephone: (804) 786-3847
Facsimile: (804)-692-1647
*Counsel for Appellees/Defendants*

E. Mark Braden (admitted pro hac vice) mbraden@bakerlaw.com
Katherine L. McKnight (Va. Bar 81482) kmcknight@bakerlaw.com
Richard B. Raile (Va. Bar 84340) rraile@bakerlaw.com
Baker Hostetler LLP
1050 Connecticut Ave. NW Suite 1100
Washington, D.C. 20036
Telephone: (202)-861-1618
Facsimile: (202) 861-1783
*Counsel for Appellees/Defendant-Intervenors*

I further certify that this Reply Brief is in compliance with Rule 5:26.

/s/ Christine A. Williams

Christine A. Williams (Va. Bar 47074)
Durrette, Arkema & Gill PC
1111 East Main Street 16th Floor
Richmond, VA 23219
Telephone: (804) 775-6838
Facsimile: (804) 775-6911
cwilliams@daglawrva.com