IN THE

# Supreme Court of Virginia

**RECORD NO. 170697**

RIMA FORD VESILIND, *et al.*,

*Appellants,*

v.

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

*Appellees.*

**BRIEF OF APPELLEES**
**AND ASSIGNMENT OF CROSS-ERROR**

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Funk & Wagnalls, New Comprehensive International Dictionary of the English Language, Encyclopedic Edition (1978) ..... 18

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## Cross-Assignment of Error

The Circuit Court erred to the extent—if at all—that it adopted Plaintiffs' intent-based "predominance" test.[1]

## Nature of the Case

All parties to this appeal agree that Virginia legislative districts "must be…compact." Appellants' Brief ("Br.") at 1 (emphasis in original). But this does not answer—indeed, does not even shed light on—the critical follow-up questions: what does "compact" mean? And how compact is compact enough?

The Appellants ("Challengers") claim to have discovered a silver-bullet answer, but their sole argument is unrelated to the Constitution's plain language: "Every electoral district shall be composed of contiguous and compact territory." Va. Const. Art. II. § 6. In their reading, the Constitution requires that the abstract concept of "compact*ness*" must "predominate" in legislative priorities over "customary criteria" Br. at 6. But adding words to legal texts is amendment, not interpretation. Predictably, this fundamental misunderstanding has steered the Challengers so far off target that their opening brief fails even to allege once simply that the Challenged Districts "are not *compact*." In replacing a simple adjective with an abstract noun and a standard for spatial content and district functionality with a standard of subjective prioritization, the Challengers snatch

[1] Preserved: JA87–93; JA947–48.

complexity from the jaws of simplicity and substitute bunk social science for constitutional text.

They also argue directly against precedent. This Court has *twice* interpreted Article II, § 6 and *twice* upheld districts that are as compact as those challenged here. *Jamerson v. Womack*, 244 Va. 506, 517 (1992); *Wilkins v. West*, 264 Va. 447, 466 (2002). The legal rule the Court laid down in those cases was *not* that "compact*ness*" must "predominate." Instead, it disclaimed judicial competence to establish in the first instance a standard for distinguishing what is and is not "compact." Try as they might to render their "predominance" test compatible with that approach, the two frameworks (theirs and this Court's) are at war. Their test requires the Court to adopt a rigid formula to smother the General Assembly's discretion in what is inherently a political process. In stark contrast, *Jamerson* and *Wilkins* restrict judicial review to an arbitrary-and-capricious analysis reserving intervention for extreme cases. The Challengers' micro-management approach makes redistricting the province of the judiciary; the Court's accords the General Assembly its proper role under the Constitution's plain language.

Finally, as if common sense, basic principles of textual construction, and binding law were not sufficiently formidable adversaries, the Challengers also contend with the lower court's findings of fact. In particular, the Circuit Court's finding that the testimony of their expert was not, on its own, sufficient to cover

their burden is subject to review only for abuse of discretion, and the Circuit Court's decision was sound. The Challengers' expert offered a non-peer-reviewed, never-before-tried approach that was invented only after this case was filed and is riddled with errors. There is no clear error in the Circuit Court's finding that this testimony did not *per se* satisfy the Challengers' demanding burden.

The Court should affirm the decision below.

## STATEMENT OF FACTS

### A. The House Redistricting

Virginia's Constitution requires that legislative districts be "established by the General Assembly" each decade. Va. Const. Art. II, § 6. It also requires that districts be "composed of contiguous and compact territory." *Id.* After the 1991 redistricting, two Senate districts were challenged under this requirement, and this Court rejected that challenge. *Jamerson v. Womack*, 244 Va. 506 (1992). After the 2001 redistricting, 17 House districts were challenged under this requirement, and the challenge also failed as to each district. *West v. Gilmore*, 2002 Va. Cir. LEXIS 37 (Va. Cir. Ct. 2002); *Wilkins v. West*, 264 Va. 447 (2002).

In 2011, the Virginia House conducted the redistricting process in the same manner it conducted it in 2001. After the release of Census data, the House Privileges and Elections Committee adopted criteria that were nearly identical to the 2001 criteria and required that districts be "compact" as interpreted in this

Court's decisions in *Wilkins* and *Jamerson*. JA1114; JA2499–2500. Delegate S. Chris Jones was the chief House patron for the 2001 and 2011 redistricting bills, JA1108–09, and John Morgan, a redistricting consultant, was instrumental in drafting both the 2001 and 2011 House plans. JA1180–81, JA1191. The House used the same software in both cycles, faced similar population shifts, and similar Voting Rights Act challenges. JA1114, JA1123-24.

It is undisputed that the House districts challenged here (the "House Challenged Districts") are as or more compact than the districts upheld in *Wilkins* and *Jamerson* according to social-science metrics known as "compactness scores." JA1412–16, JA1444, JA1544–47. The two compactness scores referenced in the *Wilkins* litigation, which are by far the most common scores used in social science and court decisions, are the "Reock" and "Polsby-Popper" scores. *See Wilkins*, 264 Va. at 464 n.6. The Reock score calculates the percentage by which a shape (in this case, a district) takes up the space of the smallest possible circle circumscribing it. That is, a Reock score of .15 means that the district takes up 15% of the smallest possible circle drawn around it. High scores are considered more compact because they signify shapes closer to a perfect circle, which the Reock metric posits as the most compact shape. The Polsby-Popper score is perimeter metric that scores a district by measuring the length of the district's perimeter as divided by the area of the district, and the higher the number, the more compact the shape. The Reock

score penalizes shapes that are long, and the Polsby-Popper score penalizes shapes that have jagged edges and indentations. *See* JA2412–15; JA1529.

The parties stipulated that the compactness scores of the House Challenged Districts are as follows (JA1472-73; JA1545):

| District | Reock | Polsby-Popper |
|---|---|---|
| HD13 | .16 | .13 |
| HD22 | .20 | .11 |
| HD48 | .18 | .16 |
| HD72 | .26 | .08 |
| HD88 | .28 | .13 |

The parties stipulated that the compactness scores of the districts upheld in the *Jamerson* litigation are as follows (JA1472-73; JA1525):

| District | Reock | Polsby-Popper |
|---|---|---|
| Senate 15 | .23 | .10 |
| Senate 18 | .12 | .10 |

The parties stipulated that the compactness scores of the districts upheld in the *Wilkins* litigation include the following (JA1472-73; JA1545–46)[2]:

[2] All *Wilkins* scores are listed in the Joint Appendix at JA1545–46.

| District | Reock | Polsby-Popper |
|---|---|---|
| HD49 | .25 | .18 |
| HD62 | .34 | .15 |
| HD71 | .24 | .19 |
| HD74 | .16 | .10 |
| HD92 | .25 | .14 |
| SD3 | .28 | .18 |
| SD5 | .35 | .15 |
| SD9 | .24 | .16 |
| SD16 | .16 | .17 |
| SD18 | .22 | .12 |

The Challengers agreed that there is no material difference between the scores of districts upheld in *Wilkins* and *Jamerson* and those challenged here. JA1033. That did not occur by accident. The unrebutted trial testimony was that the House took care to adhere to all criteria and that "if there was an actual conflict between compactness and," for instance, "communities of interest," then compactness "prevailed." JA1134-35. Indeed, this was an explicit requirement of the criteria. JA2499-2500. Mr. Morgan ran compactness reports, provided by the House's redistricting software, at frequent intervals during the map-drawing

process to calculate Reock and Polsby-Popper compactness scores, which "were the scores that were used in the court cases." JA1203-04. The scores were analyzed to assess compliance with those cases. JA1206. Additionally, Mr. Morgan, a veteran redistricting consultant, JA1176-79, analyzed each move to assess the effect of changes on each district's compactness level, JA1200. Mr. Morgan applied the same method in 2001 and applies it in other states where he assists in redistricting. JA1206. In both 2001 and 2011, majority-minority districts were not "treated differently" on the basis of race, JA1125, and the same standard was applied to all districts, JA1125.

Delegate Jones, in addition to relying on Mr. Morgan's expertise for formal mathematical compactness standards, evaluated compactness from a pragmatic perspective: "the ease of going back and forth" across the districts. JA1137. For example, HD13 became more compact from the benchmark district, notwithstanding reduced Reock and Polsby-Popper scores, because it occupies "a much smaller geographic area." *Id.*; *see* JA1549 (illustrating change in HD13).

The House plan passed by an overwhelming majority, including supermajority support from the minority party and the Black Caucus. JA1146. It was ratified by the Governor and precleared by the U.S. Department of Justice under the Voting Rights Act. There is no evidence on the record that, as of 2011, anyone believed the House districts were not compact.

### B. Challengers' Novel Motive-Based Theory

Over four years and three election cycles passed. In September 2015, the Challengers filed this case, alleging that five House districts—HD13, HD22, HD48, HD72, and HD88—violate Article II, § 6. The suit is funded by OneVirginia2021, which advocates for the elimination of the General Assembly's role in redistricting. JA784–85. At filing, the Challengers' "thought process" had not "unfolded" as to why the Challenged Districts are not compact; their theory was that "whatever the legislature had in mind when it designated those districts, it must have been more important to the legislature than honoring a constitutional standard of compactness." JA667.

The Challengers sought broad discovery on legislative intent through subpoenas to legislators and the Division of Legislative Services, resulting in an interlocutory appeal to this Court. *Edwards v. Vesilind*, 292 Va. 510 (2016). At oral argument, however, the Challengers' counsel abandoned the view that "whatever the legislature had in mind" is relevant:

> We do not contend that we are entitled to go into the motive, and that the motive of the legislator makes a difference as to whether or not the district is constitutional or not. And so we can take that off the table. That is not something that we contend.

Oral Arg. 37:10, *Edwards v. Vesilind*, 292 Va. 510 (2016).

But, on remand, Challengers attempted to develop a method "to figure out is there a way that we can show that the legislature did not…value compactness," which is "how [they] developed the model and the testimony that" is the sole basis of their claim. JA671. They asked their expert, Dr. Michael McDonald, to address a single question: whether "'priority has been given to the constitutional requirement of compactness.'" JA903. Dr. McDonald "came up with the idea that, well, if" so-called discretionary "choices result[] in a diminishment or degradation of the compactness score [of a district] by more than 50 percent, than [sic] that means that collectively those discretionary criteria, whatever they are, predominated over the constitutional requirement of compactness." JA673-74. He identified the number 50 percent from reading "dictionary definitions" and "my own common sense of what the word predominant means." JA878.

### C. Challengers' Mystery Algorithm and Discriminatory Map

Nicholas Mueller, a then-third-year associate at the Challengers' law firm, JA705, developed "Alternative Plan 1": a purportedly "ideal map that makes the district as compact as possible," JA673, under the view that a "circle" is "ideal," JA830–31. But because the Challengers believe that majority-minority districts are subject to a different compactness requirement from majority-white districts, JA927, and because Dr. McDonald has not "contemplated how to approach [his] test" for majority-minority districts, JA881, Mr. Mueller first imported the current

House and Senate majority-minority districts into Alternative Plan 1, without change, JA711. Mr. Mueller then imported another map from "some kind of computer algorithm," *id*., he found on a website called "BDistricting," JA786–87, that Mr. Mueller did not know or understand, JA743–44, or have any informed basis for choosing over any other of the numerous redistricting algorithms that exist in cyberspace, JA787–88. Mr. Mueller adjusted boundaries as he felt it appropriate to make "the most compact" possible districts. JA791.

Then, Dr. McDonald measured purported "degradation" according to an average of Reock, Polsby-Popper, and Schwartzberg[3] compactness scores, comparing districts in Alternative Plan 1 with the adopted House and Senate Challenged Districts bearing the same district number. JA842. Dr. McDonald concluded that each Challenged District was degraded by more than 50 percent. *E.g.*, JA836. His opinions "are purely based upon the comparison of Alternative Plan 1 to the current plan and the degradation score that results from that comparison." JA867.

### D. Challengers' Evidence

After the Challengers disclosed Dr. McDonald's expert opinion as part of its pre-trial disclosure obligations, the House moved for summary judgment, contending that the Challengers' case depends entirely on Dr. McDonald's new

[3] Schwartzberg is another compactness calculation that, like Polsby-Popper, assesses the perimeter of shapes.

"predominance" test, which conflicts with *Wilkins* and *Jamerson*. The Circuit Court denied the motion because of Complaint allegations that, for example, "during the drafting process…the degree of compactness was rarely, if ever, determined for individual districts," that the General Assembly "adopted no measure by which to test the compactness of the individual districts," and that "significant effort was expended to ensure that the districts were drawn to favor partisan interests." JA588–90; *see also* JA610.

The case proceeded to a three-day bench trial beginning on March 13, 2017. Counsel for the Challengers opened by observing that "the issues in the case go well beyond the parties to this litigation, and it has potentially far-reaching and significant effect." JA664. He argued that "[c]ompactness is supposed to be…a restraint," "[b]ut it was clear to us from reading the two Virginia Supreme Court cases that it wasn't serving as much, very much of a restraint." JA668-69. Accordingly, "[w]e believe that we have come up with a way to measure, to set a standard, to create a line…to determine whether or not a constitutional criteria has been subordinated to discretionary, nonconstitutional criteria," and thus "the effect of this case will be to provide the ingredient…that has eluded us in finding a way to measure [compactness] until this case." JA675. Challengers' counsel acknowledged the method's novelty, but "[i]t's got to be tried somewhere," JA1407, and this is a "creative way," JA1425, "to determine not compactness in

the social science sense, but in the constitutional sense," JA1399. He also conceded the House relied on *Wilkins* and *Jamerson*, but opined that "it doesn't matter" because "courts are, all the time, finding that the legislature made a mistake." JA1452.

The Challengers offered no evidence that the General Assembly "adopted no measure" of compactness, and their counsel conceded that there is no evidence of "partisan interests": "we are not going…to get into trying to make judgments about what discretionary criteria the legislature utilized because in reality, we don't know." JA674.

The Challengers' only witnesses were Mr. Mueller and Dr. McDonald. Mr. Mueller testified to authenticate exhibits and disclaimed personal knowledge of the 2011 redistricting. Dr. McDonald opined only that discretionary criteria "predominated" in each Challenged District. On cross, he clarified that "there is no widespread agreement on" the point at which "a district is compact or not compact," and that his testimony was restricted to "whether or not discretionary criteria have dominated over compactness." JA870.

Dr. McDonald also admitted that he has not used a predominance test in his academic work on compactness, is aware of no other expert who has, and knows of no court opinion that has used or approved it. JA875. Neither Dr. McDonald nor any other scholar has ever published on it. JA875–76. Dr. McDonald conceded it is

"a novel legal theory" that was "created for this case by [Dr. McDonald] and [the Challengers'] attorneys" and that predominance of compactness is "not a question that I've ever seen in any legal or scholarly writings that are out there." JA876. No state uses a predominance test in redistricting. JA901. Dr. McDonald conceded that the 2001 Virginia plan may have been unconstitutional under the test, JA910, and that SD15, which *Jamerson* upheld, may also have been unconstitutional. JA852–53. Dr. McDonald neither advised the General Assembly in 2011 to use a predominance test nor expressed concern with the 2011 districts at the time of redistricting (despite his involvement with the Virginia Governor's advisory redistricting commission at the time). JA912–16. Dr. McDonald maintained that his test is the only standard, and the General Assembly "should not look to *Jamerson* and *Wilkins* as a guide" for "determining what's compact under the Virginia constitution[.]" JA885–86.

After Dr. McDonald's testimony, Challengers rested. JA277.

**E. The House's Evidence**

The House called Delegate Jones and Mr. Morgan, who testified to the facts stated in Section A, above.

Additionally, the House's expert, Dr. Thomas Hofeller, identified multiple defects with Dr. McDonald's methodology, including that the "computer generated" plan, even with "human assist[ance]," made the location of Alternative

Plan 1 districts a "matter of chance," and thus "you literally could have created hundreds of different districts" against which to measure the plan. JA1288. Moreover, the districts in Alternative Plan 1 do not occupy the same geography as the districts being compared, so "you're kind of comparing apples to oranges here." JA1288. In addition, Dr. McDonald's method of averaging both "perimeter" and "dispersion" compactness scores exaggerated the differences in scores, JA1294, as did his method of dividing percentages, JA1295. According to Dr. Hofeller, Dr. McDonald's method "snatched complexity out of the jaws of simplicity," given that the General Assembly's method was workable, JA1286, and amounts to "an incomplete research project" that "would add a whole new layer of complexity," leaving little idea how Dr. McDonald's method would work without its prior "use…in conjunction with a real redistricting." JA1290. Besides, "it's six years later," and the method "wasn't there when [the General Assembly was] drawing the map. How can they be held to a standard that wasn't even thought of at that time?" JA1288–89.

## Summary of Argument

For the third redistricting cycle in a row, this Court is presented with a meritless claim under Virginia Constitution, Article II, § 6. The spatial composition of the Challenged Districts here is not different from that of those

upheld in the past, and no material fact distinguishes the facts here from those in *Wilkins* and *Jamerson*.

Undeterred, the Challengers argue that an abstract concept of "compactness" was bound to "predominate" over "discretionary" criteria and that their expert has created a method that, on its own, shows when this occurs. This position is wrong.

First, their predominance argument does not account for the one word that matters in this case: "compact." The term admits of degrees, and this Court has twice held that, except in egregious cases, the judiciary will not second-guess the General Assembly's choice of what is sufficiently compact under the Constitution.

Second, the Circuit was well within its discretion to conclude that the Challengers' expert did not, on his own, prove that the districts are unquestionably non-compact. The evidence was in conflict as to the value of his testimony, and the Circuit Court did not commit clear error in according it only partial weight.

## ARGUMENT

### I. The Circuit Court Applied the Correct Legal Standard (Assignments 1 and 2 and Intervenor-Appellees' Cross-Assignment)

#### A. Standard of Review

Whether the Circuit Court interpreted the governing legal standard correctly is a question of law to be reviewed *de novo*. *Buhrman v. Commonwealth*, 275 Va. 501, 505, (2008).

### B. The Circuit Court Correctly Identified the "Fairly-Debatable" Standard, Not a "Predominance" Standard, as Providing the Governing Framework

The Circuit Court applied the correct standard. First, it cited and quoted *Jamerson* and *Wilkins* for the proposition that whether or not the Challenged Districts are "compact" "depends on facts," requiring deference to the General Assembly in most cases. JA561. The Circuit Court then reviewed the evidence to ascertain whether the General Assembly's decision was arbitrary and capricious and found the evidence "would lead reasonable and objective persons to reach different conclusions" as to whether the Challenged Districts are sufficiently compact. JA563. That conclusion required deference to the legislature, so the Circuit Court concluded it "must" uphold the districts. JA563–64.

The Challengers' attack to this simple holding is circuitous. They offer no basis by which to conclude that the districts are, beyond dispute, not *compact*. In fact, they neglect even to contend that the districts are not compact in their opening brief. Rather, they argue that their evidence is *per se* sufficient to show that "compact*ness*" did not "predominate" in legislative priorities.

That is not the standard, nor should it be. The Challengers have no textual, contextual, or historical support for what is nothing but a circular line of reasoning about the priority of legal requirements. Moreover, the argument runs headlong into binding precedent holding that the General Assembly, not the courts, is

primarily responsible for interpreting the all-important, but vague, word: "compact." The Challengers offer no explanation as to why this case belongs among the outlier cases identified in *Wilkins* and *Jamerson* as meriting judicial intervention, and that is because it does not meet that test.

### 1. A "Predominance" Test Does Not Apply

The Challengers contend that a showing of "predominance" of "discretionary" criteria over "compactness," resulting in a 50% degradation in average compactness scores from the proposed "ideal," establishes a *per se* violation of Article II, § 6. The argument comes from left field and has no support in any authority or cognizable judicial method.

#### a. Interpretive Canons Do Not Support the Challengers

The Challengers do not even pretend that their test has any foundation in the text or structure of Article II, § 6. None of these ordinary principles of constitutional interpretation are so much as cited in their brief, and the Court could not turn to any of them to discern a 50% degradation standard because their test is, they admit, "novel." JA876; *see also* JA904.

Virginia Constitution Article II, § 6, provides that legislative districts "shall be composed of contiguous and compact territory." Legal provisions ordinarily apply by their plain language. *See, e.g.*, *Meeks v. Commonwealth*, 274 Va. 798, 802 (2007). The plain language of "compact" does not remotely suggest that, once

a shape departs by more than 50% under some social-science metric from an ideally circular shape, then the shape passes from "compact" to "non-compact." Rather, dictionaries offer such definitions as "firmly united," "pressed together," "solid," and "dense." *E.g.*, Funk & Wagnalls, New Comprehensive International Dictionary of the English Language, Encyclopedic Edition 265 (1978). And these definitions all admit *degrees*: a shape can be more "dense" and less "dense," more "firmly united" and less "firmly united," but there is no definition inherent in this language suggesting the Challengers' bright-line approach.[4]

The context in which the word "compact" is used, *see, e.g.*, *Sansom v. Board of Supervisors*, 257 Va. 589, 594–95 (1999), further detracts from the Challengers' position. As this Court observed in *Jamerson*, the adjectives "contiguous and compact" are "joint modifiers of the word 'territory,'" 244 Va. at 514, and, ultimately, this "territory" forms an "electoral district," Art. II, § 6. The requirement that districts be "compact," then, does not serve some abstract "compact*ness*" purpose of giving aesthetic pleasure to those who view their silhouette forms. *But see* Br. at 46 (asking the Court to judge a district by its

[4] The amicus brief of Former Attorneys' General (at 22–23) suggests that the General Assembly cannot benefit from the ambiguity in the word "compact" when an ambiguous definition would prevent the General Assembly from proving that a district *is* compact. That is, however, only a problem for the Challengers because the General Assembly does not bear the burden to prove that the districts are compact. If there is a debatable question about whether a district is compact, the Challengers lose.

silhouette). It serves the purpose of creating a *district* in which elections can feasibly be conducted and which will ultimately be represented as a community by a single representative.

This Court was therefore right in *Jamerson* and *Wilkins* in declining to cabin the General Assembly into cookie-cutter abstract standards, but rather to assess whether "communication between the residents of the district and their elected representative has been adversely impacted…because of the design of the district." *Wilkins*, 264 Va. at 466. This tracks the reasoning of federal courts in their assessment of whether a proposed district is "compact" under the Voting Rights Act, which "does not require that a proposed district must meet, or attempt to achieve, some aesthetic absolute, such as symmetry or attractiveness." *E.g.*, *Dillard v. Baldwin Cty. Bd. of Educ.*, 686 F. Supp. 1459, 1465 (M.D. Ala. 1988). This context suggests that a district is sufficiently "compact" if it is "solid" enough to comprise a cognizable "territory." Thus, for example, the configurations of Croatia, Chile, Norway, Vietnam, Laos, Myanmar, Austria, and Maryland would be "compact," even though they are not aesthetically pleasing or circular. They are solid enough to be geographic territories, identifiable on a map as coherent units.[5]

[5] The nation-building efforts in the Middle East and Balkans following World War I illustrate how ill-informed and disastrous efforts to create geographic territories according to Platonic, geometric compactness standards can be. Communities of interest, after all, rarely exist in circles.

While the Challengers claim that the House advocates too lenient a standard, examples of districts that would fail it abound. One set of districts in Texas, for example, was sufficiently bizarre that the configurations "caused a severe disruption of traditional forms of political activity"; "Campaigners seeking to visit their constituents had to carry a map to identify the district lines, because so often the borders would move from block to block; voters did not know the candidates running for office because they did not know which district they lived in." *Bush v. Vera*, 517 U.S. 952, 974 (1996) (internal citations omitted). One district in North Carolina was "approximately 160 miles long and, for much of its length, no wider than the I–85 corridor," and "if you drove down the interstate with both car doors open, you'd kill most of the people in the district." *Shaw v. Reno*, 509 U.S. 630, 635–36 (1993) (quotation marks omitted). It did not take years and a complex "degradation" test to conclude that those districts were non-compact; the question was not, in those cases, "fairly debatable." This case is markedly different.

**b. Original Understanding and Historical Practice Do Not Support the Challengers**

There is, furthermore, no indication of an original understanding that "compact" meant a 50% degradation or less from a perfect circle. The fact that the social-science metrics Challengers use to make that calculation did not exist for well over 100 years after the provision was first adopted refutes any suggestion that their reading is even in the ballpark of what was contemplated.

The Challengers and their *amici* suggest the purpose was "to preclude at least the more obvious forms of gerrymandering." Brief for Professor A.E. Dick Howard, et al. as Amici Curiae Supporting Appellants ("Howard Br.") (Dec. 14, 2017) at 15 (quotations omitted). But that purpose does not translate into any particular judicially manageable compactness standard. *See generally Vieth v. Jubelirer*, 541 U.S. 267, 286 (2004) (addressing the inherent problems of determining whether political motive in redistricting is excessive).

Besides, the view neither finds support in any contemporaneous historical materials, nor does it appear to have occurred to anyone for well over 100 years after the word "compact" was codified as Virginia's supreme law in 1851. Howard Br. at 11–12. In fact, for five of the intervening decades, the "Byrd Organization" retained a stranglehold on Virginia politics through ingenious gerrymanders requiring "the support of only 5 to 7 percent of the voting-age population" for the election of Byrd operatives.[6] None of these gerrymanders was invalidated as being unconstitutionally non-compact, and not a single challenge to the Byrd gerrymanders appears to have been filed under this provision.

Quite the opposite, when the provision was enacted, challenges to redistricting were non-justiciable. *See, e.g.*, Ethan Weiss, *Partisan Gerrymandering and the Elusive Standard*, 53 SANTA CLARA L. REV. 693, 698

[6] Brent Tarter, *Byrd Organization*, *in* ENCYCLOPEDIA VIRGINIA (November 27, 2017), *available at* https://www.encyclopediavirginia.org/Byrd_Organization.

(2013). That doctrine, in turn, was inherited from English common law, under which "it was settled…that Parliament was the ultimate and sole authority in determining the methods in which its members were elected." Troy McCurry, *Leeway for Judicial Usurpation: Ignoring the Default of the Elections Clause in the Texas Redistricting Cases*, 25 QUINNIPIAC L. REV. 631, 637 (2007). That was because "the whole law of and custom of parliament has its original from this one maxim, that whatever matter arises concerning either house of parliament, ought to be examined, discussed, and adjudged in that house to which it relates, and not elsewhere." William Blackstone, 1 COMMENTARIES ON THE LAWS OF ENGLAND 163 (1753) (internal quotation omitted). Thus, the notion of a court case to "[e]nforc[e] the constitutional mandate of compactness," Br. at 1, is anachronistic to the framework in existence when the provision was adopted.[7]

#### c. Principles of Constitutional Supremacy Do Not Support the Challengers

The Challengers cite first principles in purporting to divine a "predominance" test in the truism that legal requirements are mandatory and policy

[7] The *amicus* brief of various law professors outlines the ambitions of Virginia's 1971 constitutional revisions, but those concerns were generic and pertained principally to burying Virginia's odious legacy of racial discrimination and to adopting the one-person, one-vote principle. Setting forth a compactness standard appears not to have been a priority—or even addressed. *See* Howard Br. at 8–12. Moreover, the requirement for "compact" districts remained virtually unchanged from the version in existence beginning in 1851. *Id.* at 12.

considerations are optional. But this argument is entirely circular. That a mandatory requirement is non-negotiable sheds no light whatsoever on what the requirement *means*. Just because tying one's shoes is a condition precedent to taking a jog does not mean that shoe-tying must "predominate" over jogging. The jogger can focus virtually all his energy and attention on jogging and virtually none on tying his shoes and yet satisfy the condition.

Similarly, that districts must be "compact" does not implicate a standard so high as to occupy more of the map-drawers' attention, effort, or resources than "discretionary" criteria. The standard could be high, it could be low, it could be somewhere in between. But whether it is mandatory has no bearing on its content. To identify content, the courts must look to standard judicial interpretive tools, not to *non-sequiturs* about "priority" of mandatory over discretionary criteria.

It should come as no surprise, then, that the Challengers fail to cite a single case where a court discerned a "predominance" standard from the virtue of a legal requirement's being "mandatory." That omission is not from a lack of opportunity: *all* legal requirements are *mandatory*, so, if the Challengers are right, a "predominance" standard should apply in *every* case—from challenges under the Free Exercise Clause, Va. Const. Article I, § 16, to those under the Paperwork Reduction Act, 44 U.S.C. § 3501 *et seq.* Yet it has apparently occurred to zero courts that assessing whether "religion-ness" predominated over "secular-ness" or

"paperwork reduction-ness" predominated over "paperwork proliferation-ness" would be a useful exercise. There is, similarly, no "predominance" theory of statutory interpretation—as the Challengers construe it—in Southerland, no "predominance" theory of constitutional interpretation on Story, and no "predominance" theory of common law in Holmes. The entire line of reasoning is unheard of because it is nonsense.

**d. Precedent Does Not Support the Challengers**

The Challengers offer a revisionist view of *Wilkins* and *Jamerson* in suggesting that the discretion those cases reference is limited to discretion among competing *legal* criteria and does not cover "discretionary" criteria. To the contrary, *Jamerson* indicated that the "concerns" of apportionment the General Assembly may balance include "constitutional, statutory, and *policy considerations*." *Jamerson*, 244 Va. at 515 (emphasis added). *Jamerson* also credited expert testimony opining that factors stated in a General Assembly resolution ("Resolution No. 1")—which included such considerations as "Political Subdivisions," "Communities of Interest," "Precincts," "Existing Districts," and "Incumbency"—"militate against compactness" and that the "General Assembly had to reconcile these considerations that compete with the constitutional requirement of compactness." *Id.* at 511–512; 515–16.

Likewise, *Wilkins*, 264 Va. at 466, reversed as clearly erroneous the lower court's findings that legislative districts were not compact, observing that "the record reflects a balancing by the General Assembly of" such policy concerns as "incumbency" protection and "maintaining communities of interest." For example, *Wilkins* upheld the 2001 version of HD74, which was less compact than the districts challenged in this case because of "discretionary criteria":

- "the new District 74 contained 98.3% of the 1991 district" [core retention is "discretionary"],
- "[t]he change from the 1991 district was the reunification of a previously split precinct in Charles City County, the City of Hopewell precincts, and two precincts in Henrico County" [preservation of subdivisions and communities of interest is "discretionary"],
- "the incumbent member of the House of Delegates from House District 62 was a Republican. Removing the 'highly Democratic' Hopewell precincts from District 62 made that district a 'safer' Republican district" [partisanship considerations are "discretionary"],
- "Maintaining an existing district in this case and removing the Hopewell precincts from the adjoining district in which the incumbent is Republican reflects the traditional redistricting considerations of incumbency" [which is "discretionary"].

264 Va. at 465–66. *Wilkins* upheld the district because: "[t]his record reflects a balancing by the General Assembly of population equality, incumbency [discretionary], maintaining communities of interest [discretionary], and avoiding retrogression in designing District 74." 264 Va. at 466.

The Challengers' incredulity as to why *Jamerson* and *Wilkins* could allow districts to be less compact than they would otherwise be because of "discretionary," rather than "mandatory," criteria is a product of their circular reasoning. *Jamerson* and *Wilkins* simply did not buy the notion that "compact" means "ideal" or "circle." Nor did they accept that the legislature's priorities in redistricting presented a relevant (or justiciable) question. Instead, they conducted a functional assessment of whether the districts were devoid of coherent form such that it would not be "fairly debatable" that they are "compact."

Indeed, the Challengers' legal theory runs contrary to the fundamental proposition in *Jamerson* and *Wilkins* that judicial intervention is reserved for exceptional cases. The difference between the Challengers and these precedents is that the Challengers see in fact-bound words like "compact" a license for judicial usurpation of *the redistricting process*, as described at length by Challengers' expert at trial. Dr. McDonald opined that, under his new standard, the legislature would be required to draw multiple maps, including one with perfectly compact districts, and begin from that starting point before implementing "discretionary" criteria. *E.g.*, JA631–32; JA892. John Morgan, by contrast, testified that in 2001 and 2011 the General Assembly began with the *existing* districts in order to maximize the status quo and made changes from that starting point. JA1185. John Morgan also testified that the other states where he has worked follow the same

procedure. JA1187. Yet, according to the Challengers, the single word "compact" means that this standard order of operations is unlawful. That is far removed from the limited role *Jamerson* and *Wilkins* envision.

**e. The Voting Rights Act Does Not Support the Challengers**

The Challengers contend that different treatment is appropriate for the Challenged Districts in this case from that accorded the districts upheld in precedent because the *Wilkins* and *Jamerson* districts were majority black and therefore protected by the Voting Rights Act, and the districts here are not. The argument is both wrong and would place Article II, § 6 in constitutional doubt.

It is wrong because neither *Wilkins* nor *Jamerson* admit this interpretation. Although they mention the Voting Rights Act, they do not suggest it was responsible for the relative compactness levels of the challenged districts; they rather attribute deviations from the "ideal" to such discretionary factors as incumbency protection, partisan composition, and political subdivisions. *Wilkins*, 264 Va. at 465–66. In fact, as described above, the standard for assessing whether a district is "compact" under the Voting Rights Act is highly similar, if not identical, to the standard applied in *Wilkins* and *Jamerson*, so the notion that complying with that standard made the districts *less* compact is untenable.

Moreover, the Challengers' theory does not explain SD15 in *Jamerson*, which was not a VRA district, yet was found to be compact. The Challengers claim

that its boundaries were controlled by a neighboring VRA district, but it only shared one border with that district and it had substantial open geography to utilize on the other boundary to the North. *See Jamerson*, 244 Va. at 518.

The argument places Article II, § 6 in constitutional doubt because applying different compactness standards on the basis of the race of a districts' residents would violate the Equal Protection Clause. The United States Supreme Court has forbidden race-based redistricting, and differing standards for different racial groups would be "offensive and demeaning." *Miller v. Johnson*, 515 U.S. 900, 912 (1995) (emphasis added). The way for states to avoid strict scrutiny while drawing VRA districts is "by respecting their own traditional districting principles," including their ordinary standard of compactness. *E.g.*, *Bush*, 517 U.S. at 978 (emphasis added). Moreover, a non-compact district can rarely be narrowly tailored under the VRA to survive strict scrutiny because, again, the Voting Rights Act requires that districts be compact. *See, e.g.*, *Shaw v. Hunt*, 517 U.S. 899, 916 (1996) (striking down non-compact district as a violation of the Fourteenth Amendment). Thus, the Challengers' suggestion that Virginia may draw majority-black districts that are systematically less compact than majority-white districts is a constitutional anathema and injects a federal issue where none is necessary. Besides, the fact that their redistricting test cannot be applied to majority-minority districts is further evidence of how far afield it is from a workable standard.

#### f. The Equal-Population Framework Does Not Support the Challengers

The Challengers rely on cases interpreting the equal-population principle in redistricting, such as *Brown v. Saunders*, 159 Va. 28, 36 (1932), and *Wilkins v. Davis*, 205 Va. 803, 806 (1965), but their reliance is self-defeating. Br. at 41–43. These redistricting cases do not impose a "predominance" test, but rather evaluate mal-apportioned districts in two steps. First, courts assess whether deviations from perfect equality in district populations is sufficiently severe as to require the state to present evidence justifying the deviations. *See Voinovich v. Quilter*, 507 U.S. 146, 161 (1993). If the burden shifts, the second step involves assessment of whether a "rational state policy" justifies the deviations. *Mahan v. Howell*, 410 U.S. 315, 325 (1973). Contrary to the Challengers' suggestion that only "mandatory" requirements can justify deviations from the ideal, courts have treated discretionary policies—such as "maintaining the integrity of political subdivision lines," incumbency protection, and keeping communities of interest whole—as rational state policies justifying deviations from equality beyond what is presumptively valid. *See id.* at 328–29 (approving Virginia House of Delegates scheme with deviations over 16 percent from the ideal). Thus, *Brown* recognized that the "*custom* to refrain from dividing any county or city into separate districts" may justify deviations from the equal-population *requirement*, that only "a grave, palpable and unreasonable deviation from" equality "would justify or warrant an

application to a court for redress," and that "*[n]o exact dividing line can be drawn.*" 159 Va. at 37 (emphasis added); *see also Wilkins*, 205 Va. at 806 (same).[8]

This Court has not expressly endorsed the equal-population framework for adjudicating claims under the Virginia Constitution's compactness requirement, but, regardless, that law refutes any notion that discretionary criteria may not result in departures from perfect compliance with mandatory criteria. If the Court were to apply such an analysis, the first question would be whether the districts are unacceptably non-compact. Only after that threshold finding was made would the burden shift. Notably, *Jamerson* and *Wilkins* did not shift the burden to the defendant at the compactness levels of districts in those cases, so those precedents show the districts were not sufficiently non-compact as to require affirmative justification by the state.

In fact, the prevailing brief filed in *Jamerson* made this precise point. *See* Exhibit A to Brief for Former Virginia Attorneys General, et al. as Amici Curiae Supporting Appellants (Dec. 14, 2017). The brief made two alternative arguments (1) that the districts did not violate "any accepted standard of compactness," *id.* at 20, and (2) that "[e]ven if Challengers had succeeded in showing that the

[8] These cases also emphasize that redistricting "is, in a sense, political, and necessarily wide discretion is given to the legislative body." *Brown*, 159 Va. at 36, *see also Jamerson*, 244 Va. at 510; *Chapman v. Meier*, 420 U.S. 1, 27 (1975); *Karcher v. Daggett*, 462 U.S. 725, 753 (1983) (Stevens, J., concurring); *White v. Weiser*, 412 U.S. 783, 795–96 (1973); *Gaffney v. Cummings*, 412 U.S. 735, 751 (1973); *Growe v. Emison*, 507 U.S. 25, 33 (1993).

challenged districts were lacking in compactness," that the deviations were justified, *id.* at 27. *Jamerson* did not reach the second argument, so, to the extent that the case is viewed as adopting that framework, it must be construed as adopting the first: that the districts were acceptably compact. So too are the Challenged Districts here.

#### g. Doctrine on Judicial Review of Legislative Motive Does Not Support the Challengers

The Challengers find a basis for their predominance theory in the principle that the General Assembly must "value" compactness above other considerations. JA671. But that contention is barred by their judicial admission that "[w]e do not contend that we are entitled to go into the motive, and that the motive of the legislator makes a difference as to whether or not the district is constitutional or not." Oral Argument at 37:10, *Edwards v. Vesilind*, 292 Va. 510 (2016). Counsel's representation that "we can take that off the table," *id.*, was "distinct" and "formal" and thus is "binding" on Challengers. *Ambiance Assocs., Inc. v. Kilby*, 230 Va. 60, 62–63 (1985). Nevertheless, Challengers staked their entire case on a "predominance" theory that is an admitted effort to show that "the legislature did not…value compactness." JA671. To be sure, Challengers have sought to make this showing through circumstantial rather than direct evidence, but the underlying legal requirement they contend applies remains intent-based and was unequivocally disclaimed before this Court.

Besides, motive is, in fact, irrelevant: the Constitution governs only the "spatial content" of the districts, *Jamerson*, 244 Va. at 514, meaning the "priority" due is, as with any requirement, that it be honored in the event of conflict with any competing criteria if *both cannot be satisfied*.[9] Only a violation of a legal requirement merits judicial intervention; the subjective understanding of priorities is of no concern. *See Fletcher v. Peck*, 10 U.S. [6 Cranch] 87, 130 (1810) ("a court…cannot sustain a suit brought by one individual against another founded on the allegation that the act is a nullity, in consequence of the impure motives which influenced certain members of the legislature which passed the law").

**h. Straw-Man Arguments Do Not Support the Challengers**

The Challengers argue against a straw man in suggesting the Court cannot side with the House unless it interprets *Wilkins* and *Jamerson* to provide a "bright line" that districts with the same or higher Reock or Polsby-Popper scores are *per se* immunized from challenge under Article II, § 6. Yet the Challengers advance a bright-line rule that a 50% degradation from an ideally compact district is unconstitutional; the House has no analogous position.

The House does not contend that districts with Reock and Polsby-Popper scores at or above those of districts challenged in *Wilkins* and *Jamerson* are

[9] This was the standard of "priority" that the Circuit Court applied; it did not apply a "predominance" test. *See* JA554. The House, however, assigned error out of an abundance of caution in case the Court disagrees with this understanding of the decision below.

immune from challenge. Its position is that the *Challengers'* have an exceptionally high burden and clearly cannot meet it on the basis of compactness scores alone when materially indistinguishable compactness scores alone did not doom the *Wilkins* or *Jamerson* districts. Yet, here, the Challengers have only compactness scores and creative expert framing of compactness scores as their proof. That was not enough in *Wilkins* and *Jamerson*, so it is not enough here. Furthermore, as the Circuit Court found, the "analogy" to those scores is highly probative and cuts against the Challengers. With no record-based evidence indicating why districts as compact as those previously upheld are not, in fact, compact—or even *arguably* compact—they cannot win.

#### i. Anti-Gerrymandering Policy Does Not Support the Challengers

The Challengers have suggested at various stages that the basis of their position is the concern that the General Assembly crafted districts "to pick their voters and thereby create favorable circumstances for their reelection." Br. at 1. Yet this Court has already disclaimed using Article II, § 6 as a means to adjudicate "whether or not legislation is wise and proper." *Jamerson*, 244 Va. at 510.

Moreover, if gerrymandering were a legitimate concern in this case, a "predominance" test would be the worst standard imaginable, as the U.S. Supreme Court recognized in rejecting a predominance standard as providing the appropriate test for throwing out districts drawn with an impermissibly partisan

intent. *Vieth*, 541 U.S. at 286 (Scalia, J., plurality); *see also id.* at 541 U.S. at 306–17 (Kennedy, J., concurring). The Court observed that redistricting is "root-and-branch a matter of politics" and any effort to weed out permissible from impermissible political considerations based on a predominance standard "is both dubious and severely unmanageable." 541 U.S. at 285–86. Adopting a standard deemed unfit for federal courts is inadvisable.

Furthermore, Dr. McDonald's test is not actually an anti-gerrymandering test. The General Assembly would have little trouble drawing circular districts to maximize partisan advantage, as demonstrated by the Wisconsin legislative plan currently under review in the U.S. Supreme Court, which is composed of highly compact districts in the shapes of circles and squares. *See* Joint Appendix, Vol. II, at SA362–63, *Gill v. Whitford*, No. 16-1161.[10] Dr. McDonald's test, however, *would* forbid drawing districts to reflect communities of interest, which frequently do *not* exist in circles and squares. JA1141–43 (Delegate Jones testifying that HD48 was drawn to maintain communities of interest between homeowners and apartment dwellers); JA1219–20 (Mr. Morgan testifying that HD72 and neighboring districts were drawn to respect urban and suburban communities of interest); *see also* JA1126.

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[10] Available at http://www.scotusblog.com/wp-content/uploads/2017/08/16-1161-JA.pdf

### 2. *Jamerson* Afforded the General Assembly Primary Responsibility To Define What Is Sufficiently "Compact," and Courts Are Limited to Arbitrary-and-Capricious Review

Everything said so far demonstrates why *Jamerson* and *Wilkins* were correctly decided. The word "compact" does not admit of a bright-line approach, and the context of the word in providing a standard for real-life voting districts, not pictorial representations of voting districts, implies a functional standard concerning the needs of voters, communities, and representatives. *See supra* I.B.1. Applying a strict judicial test would frustrate that constitutional meaning by requiring circular districts whether or not a community of interest existed in that shape. Accordingly, *Wilkins* and *Jamerson* did not adopt such a reading, but held that courts must "give proper deference to the wide discretion accorded the General Assembly in its value judgment of the relative degree of compactness required when reconciling the multiple concerns of apportionment." *Jamerson*, 244 Va. at 517. Giving the General Assembly, rather than the judiciary, the first cut at answering that question places the decision of what voting district best serves local needs with the institution best informed to make that decision.

Furthermore, as discussed above, judicial forays into redistricting are relatively recent, and they invade the internal affairs of the General Assembly, thereby posing a separation-of-powers threat. And that intrusion for the purpose of imposing an inherently slippery concept like "compact"—or, worse,

"compact*ness*"—creates a substantial question of what judicially manageable standards are fit to that task. There is, in addition, a clear textual commitment of redistricting to the General Assembly, specifying that electoral districts be created "by the General Assembly," Art. II, § 6, raising the question of how much of a role may properly be exercised. In other words, many of the telltale signs of a non-justiciable political question are present. *See Vieth*, 541 U.S. at 277 (discussing *Baker v. Carr*, 369 U.S. 186, 217 (1962)).

Thus, although the Challengers complain that *Jamerson* and *Wilkins* go too easy on the General Assembly, they ignore that the alternative could be far more lenient: the case could be completely beyond judicial reach. Far from being too tolerant, this law represents a compromise between these competing possibilities—non-justiciability, on the one hand, and a judicially imposed standard of "compact," on the other. Although whether a voting district is "compact" is justiciable, *see Jamerson*, 244 Va. at 509–10, it is a question of "fact" triggering the "fairly debatable" standard. *Id.* Accordingly, *Jamerson* did not vest the judiciary with authority to establish a standard of compactness in the first instance; its role is to "review legislative determinations of fact" to ensure they are not "clearly erroneous, arbitrary, or wholly unwarranted." *Id.* at 509. In extreme cases, *Jamerson* reserved the prerogative for Virginia courts to intervene. But, in the ordinary case, courts "must give proper deference to the wide discretion accorded

the General Assembly in its value judgment of the relative degree of compactness required when reconciling the multiple concerns of apportionment." *Id.* at 517.

In seeking to unsettle this precedent, the Challengers risk pulling the rug from under their own feet because it is far from clear that a judicially manageable standard, grounded in the text of Art. II, § 6, could be identified. Although the Challengers contend that their expert has identified a test, the test has zero relation to the constitutional provision it purports to interpret. Moreover, the Challengers' view that "compact" means what their expert says it means—and only what their expert says it means—is a thinly veiled effort to transfer redistricting choices from the General Assembly and to professors, plaintiffs' lawyers, and judges. Virginia's constitutional framework, as it currently exists, does not contemplate that shift. This Court correctly avoided those questions in *Wilkins* and *Jamerson*, and it should decline the Challengers' request to revisit them here.

Finally, the Court should decline to revisit *Wilkins* and *Jamerson* for the simple reason that the Challengers did not identify these decisions in its Assignments of Error to be "modified," much less "overturned" or "reversed." Va. Sup. Ct. R. 5:17(c)(1). There is no basis to reassess them here.

## II. The Circuit Court Applied the Law Correctly and Made Sound Findings of Fact (Assignments 1 and 2)

### A. Standard of Review

The question of which party bears the burden of proof in this case is a question of law subject to review *de novo*. *Mulford v. Walnut Hill Farm Grp., LLC*, 282 Va. 98, 112 (2011). The question of whether the evidence was sufficient to meet the burden is a question of fact subject to reversal only on a showing that the Circuit Court's ruling was "plainly wrong or without evidence to support it." *Robinson-Huntley v. George Washington Carver Mut. Homes Ass'n, Inc.*, 287 Va. 425, 429 (2014); *Eure v. Norfolk Shipbuilding & Drydock Corp. Inc.*, 263 Va. 624, 631 (2002). The Circuit Court's decision about how much weight to afford the testimony of the Challengers' expert, Dr. McDonald, is subject to review only for abuse of discretion. *O'Rourke v. Vuturo*, 49 Va. App. 139, 150 (2006). The Court "must also give proper deference to those parts of the [Circuit Court's] decision that were based on conflicting evidence." *Jamerson*, 244 Va. at 517.

### B. The Circuit Court Correctly Followed *Jamerson* and *Wilkins*

The Circuit Court followed both the letter and spirit of *Jamerson* and *Wilkins*, observing that "the Supreme Court of Virginia has generally discussed the legislative reconciliation of competing criteria and the need to allow wide discretion to the Legislature in doing so." JA563. The Circuit Court then addressed Challengers' burden and observed that their "case is entirely dependent upon Dr.

McDonald and his new compactness test, which applies the principle of 'predominance' to the issue of compactness." JA562. The Circuit Court admitted this evidence and found that the Defendants' "criticism was not so eviscerating as to leave no room for the Court's consideration" of it, but the Circuit Court, in weighing the evidence, found only "some degree of persuasiveness to both the test and Dr. McDonald's conclusions." JA562. On the other hand, the Circuit Court found the testimony of the Defendants' experts persuasive and took account of "the analogy drawn to the district scores in *Wilkins* and *Jamerson*." JA563. In light of this dispute, the Circuit Court found that the Challengers could not meet their demanding burden. JA563.

There is no plain error in this decision. The record here is no different from the records in *Wilkins* and *Jamerson*. It presented a conflict of views among experts, and the Circuit Court weighed the evidence and found that the Challengers' evidence was insufficient under the high burden *Wilkins* and *Jamerson* placed on them. JA563. Moreover, the *only* fact-witness testimony presented was from the House, so the Circuit Court did not clearly err in finding it persuasive. *See* JA563.

### 1. The Record Here Is Materially the Same as in *Wilkins* and *Jamerson*

The Circuit Court reached the only possible outcome because the record here mirrors *Jamerson* and *Wilkins* in all material respects. The evidence below was more than sufficient to establish the following:

(1) The compactness measures of the House Challenged Districts are the same as or better than the scores of the districts upheld in *Wilkins* and *Jamerson*. JA1412–16, JA1544–47. The Circuit Court accordingly found "the analogy drawn to the district scores in *Wilkins* and *Jamerson*" to be persuasive. JA563.

(2) As in *Wilkins*, "there is nothing in this record showing that…access is unreasonable, unduly burdensome, or adversely impacts the ability of residents to secure meaningful representation…or effective communication." 264 Va. at 465–66.

(3) As in *Wilkins*, no expert testified that the House Challenged Districts fall below "acceptable objective measures of compactness." *Id.* at 466. While Dr. McDonald testified that the House Challenged Districts did not satisfy his new test, he conceded he used a "different formulation of what we mean by compact or not compact" that does not enjoy any support in any academic field or court, JA870–71, and thus does not, on its own, amount to testimony that any district is "unacceptably non-compact"—words he did not use. Accordingly, the Circuit Court only found Dr. McDonald's testimony to hold "some degree of

persuasiveness," JA562, and there was no clear error in holding that this witness alone could not satisfy the Challengers' burden.

(4) "[E]vidence was introduced from which [the Circuit Court] could have concluded that the General Assembly had considered the constitutional requirement of compactness," *Jamerson*, 244 Va. at 517—in fact, *far more extensive evidence* than was present in *Wilkins* and *Jamerson*, neither of which involved *direct evidence* from a plan sponsor or architect. Here, John Morgan ran frequent compactness reports and kept close tabs on the effect of changes on the districts' compactness, and Delegate Jones monitored Mr. Morgan's work and "the ease of going back and forth" across the districts. JA1137. Both Jones and Morgan testified that their efforts did not differ materially from their efforts in 2001.

As in *Jamerson*, the Court must "give proper deference" to these findings, and this deference requires affirmance. 244 Va. at 517.

### 2. The Challengers Fail To Address the Circuit Court's Core Holding

The Challengers frame this appeal as raising legal questions concerning the Circuit Court's alleged failure to shift the burden *after* they met their *prima facie* burden. But they fail to address the Circuit Court's dispositive *threshold* finding that they failed to meet their *prima facie* burden. That threshold finding resulted in the adverse decision, so the Challengers' failure to assign error to it defeats their appeal. *See Ctr. for Pub. Integrity v. TitleMax of Virginia, Inc.*, No. 161108, 2017

WL 2871693, at *2 (Va. July 6, 2017) (rejecting appeal where no assignment of error was lodged against issue predicate to those raised on appeal).[11]

The only basis for the Challengers' assertion that the Circuit Court found their *prima facie* burden met is the Circuit Court's denial of the Defendants' and Intervenors' motions to strike evidence. Br. at 23. But, at that stage, the Challengers enjoyed "all reasonable inferences drawn from the evidence in the light most favorable to" them. *Izadpanah v. Boeing Joint Venture*, 243 Va. 81, 81, (1992). The Circuit Court emphasized this presumption in its denial of the motions to strike, thereby indicating that its holding was restricted to that procedural context. JA957. The presumption in Challengers' favor, however, does not carry beyond that procedural stage, and they bore the burden at trial with no benefit of the doubt. Thus, prevailing on the motions to strike did not mean the Challengers carried any burden relevant to the Circuit Court's decision *after trial* on the merits. *See Kiddell v. Labowitz*, 284 Va. 611, 621 n.3 (2012) (explaining that denial of motion to strike was *not* a finding that the non-moving party met its substantive burden). Were the rule otherwise, denial of a motion to strike would amount to a

[11] The holding that the Challengers failed at their *prima facie* burden is a "freestanding basis in support" of the decision because the Court need not address the burden-shifting assignments if the lower court was correct in that holding. *See Ferguson v. Stokes*, 287 Va. 446, 453 (2014) (quotation marks omitted).

finding in the *plaintiff's* favor on the merits in every case.[12] That is obviously not the law.

### 3. The Challengers' Burden-Shifting Arguments Are Meritless

Even if the Court interprets the Circuit Court's decision as holding that the Challengers did meet their *prima facie* burden, affirmance is warranted. The Challengers' contention that the Circuit Court should have shifted the burden assumes that (1) burden-shifting applies in this context (and they did not argue below that it does) and (2) that the Circuit Court did not apply the correct burden. Their contention that the evidence was insufficient under the fairly-debatable standard asks this Court to play factfinder when the evidence was more than sufficient under the highly lenient test.

As to the Challengers' first assignment of error, they conveniently ignore that *Wilkins* and *Jamerson* would both fail by their position because neither mentions burden shifting. In fact, the Challengers themselves did not mention burden shifting to the Court below, despite explaining at length how, in their view, the fairly-debatable standard works in this context. *See* JA952–54. The argument therefore was waived. Va. Sup. Ct. R. 5:25. Moreover, the Circuit Court cannot be

[12] The Challengers cite *City of Richmond v. Randall*, 215 Va. 506, 511 (1975), and *Bd. of Supervisors of Fairfax Cty. v. Williams*, 216 Va. 49, 59 (1975), but neither holds that denial of a motion to strike shifts the burden or even discusses motions to strike. Br. at 23–24.

assumed not to have applied the correct burden merely because (in the Challengers' view) "no such analysis exists" in its opinion. Br. at 25. Contrary to their assumption that painstaking detail was required, "[i]n Virginia, a trial court has no common law duty to explain in any detail the reasoning supporting its judgments. Absent a statutory requirement to do so, a trial court is not required to give findings of fact and conclusions of law." *Pilati v. Pilati*, 59 Va. App. 176, 180 (2011) (internal quotation omitted). Circuit Courts are well within their discretion to "conclude that…saying too much is as detrimental as saying too little." *Pilati*, 59 Va. App. at 181. The Court explained what evidence it found persuasive and held that the question before it was fairly debatable, JA563, which is the correct standard under *Wilkins* and *Jamerson*. 264 Va. at 462; 244 Va. at 509–10.

As to their second assignment of error, the Challengers concede they contest whether there was "sufficient evidence to support the decision," Br. at 26, which is subject to a highly deferential standard of review on appeal. *See supra*. Additionally, the standard applicable at trial is highly deferential to the government, even after a challenger meets his *prima facie* burden. The government need only present "some evidence of reasonableness," and the evidence need not establish the government's position by a "preponderance of the evidence"; it is enough if "the evidence offered in support of the opposing views would lead objective and reasonable persons to reach different conclusions." *Ames v. Town of*

*Painter*, 239 Va. 343, 348 (1990) (quotation marks omitted). Thus, like the challengers in *Jamerson*, the Challengers are arguing against multiple layers of deference. *See Jamerson*, 244 Va. at 516–17.

As described above, the House countered the Challengers' case with a far more extensive evidentiary presentation than the Challengers offered, including first-hand testimony from the two individuals who crafted the House plan and an expert who challenged Dr. McDonald's views. The Circuit Court accepted all the evidence from both sides and, after weighing it, concluded that reasonable minds could disagree as to whether the districts are sufficiently compact. The Challengers' request that this Court act as a factfinder in the first instance ignores the governing standard of review, and the Court should reject this invitation.

#### 4. The Circuit Court Did Not Err in Concluding That Dr. McDonald's Test Does Not *Per Se* Establish the Challengers' Burden

The Challengers relied solely on the testimony of Dr. Michael McDonald to meet their burden under the fairly-debatable standard. The Circuit Court was well within its discretion not to afford his testimony dispositive weight. *See* JA562.

Dr. McDonald addressed his analysis and testimony solely to the question of whether "'priority has been given to the constitutional requirement of compactness.'" JA903. As discussed above, that is not the legal test, so even if his testimony is relevant, it is not *dispositive*. Dr. McDonald's test also was first

introduced to the world when discovery disclosures were due in this case, so it has not been peer reviewed. Lacking the input of professionals in the field, it is incomplete, does not even purport to apply in all districts in any plan, and—at best—has flaws to be corrected in the ordinary course of theoretical development.

Moreover, the Circuit Court was not bound to apply a 50% "degradation standard." Indeed, Dr. McDonald's comparison of the Challenged Districts with purportedly "ideal" districts was not a sufficient basis for his conclusion that "priority" was not afforded to "compactness"; his conclusion was based on applying a 50% standard. The Circuit Court heard testimony criticizing that bright-line benchmark, JA648–49, and had no obligation to adopt 50% as the be-all-end-all standard.

Dr. McDonald claims to have derived the percentage 50% by his reliance on the dictionary definition of the word "predominate," JA878, but there is nothing "scientific, technical, or…specialized," Va. Stat. § 8.01-401.3, about flipping the dictionary open to random words that do not pertain to an adopted legal test. If Dr. McDonald had chosen to begin with different terminology—such as "fairly debatable"—then he almost certainly would have arrived at a different number.

In fact, choosing to assign a *percentage* at all was dubious, given that the term defies a firm numerical definition. Examples of paradigmatic uses of the word in the Oxford English dictionary reference "Wills being already predominantly

inclined to follow God" and "criminal pleasures so fashionable and predominant in the age we live in," Oxford Dictionary of English (2d Ed. 1989), which hardly suggest a percentage definition. The Court, in any event, did not abuse its discretion in not codifying that test in Virginia constitutional law.

The Court also heard criticism of Dr. McDonald's comparison to a computer generated "ideal" plan, which could create "hundreds of different districts" in "different locations." JA1288. Identifying the proper district against which to make a comparison is "a matter of chance," and the overlap of territory can be minimal. *Id.* Thus, while the method purports to account for the unique geography in different areas, it does not do so in reality. The Circuit Court was not obligated to credit Dr. McDonald over Dr. Hofeller on this dispute.

Furthermore, the Court heard criticism of Dr. McDonald's choice to average compactness scores, which is problematic because compactness averages place different forms of measurement into one calculation. The Reock score is a "perimeter" measure, but the Polsby-Popper score is a "dispersion" score. They represent distinct concepts but are combined indiscriminately in Dr. McDonald's analysis. JA1294. Dr. McDonald, in fact, admitted that he does not recall ever having averaged scores in his work and that doing so could "mask differences in scores." JA876–77.

Dr. Hofeller also opined that Dr. McDonald's method "would add a whole new layer of complexity" to an already difficult redistricting process. JA1290. Dr. McDonald opined that, under his test, the General Assembly would be required to redistrict in several iterations, including by drawing perfectly compact districts, Voting Rights Act districts (under a different standard), and then "eventually, you're going to have to merge those two plans together" to create the actual districts, and then make necessary adjustments. JA861–62. He also acknowledged a separate, ongoing political process including the potential for political parties to circulate competing versions at *each* iteration—no doubt resulting in litigation over each. JA862. None of that complexity inheres in the simple word "compact."

Dr. Hofeller also criticized Dr. McDonald's method of dividing percentage, which exaggerated the respective differences between the purported ideal districts and the Challenged Districts. JA1295. The compactness scores forming the basis of Dr. McDonald's analysis are calculated as percentages: for instance, a Reock score of .15 means that a district "takes up 15% of the [smallest] circumscribing circle" that can be drawn around a district's shape. JA176; *see also* JA175 (discussing Polsby-Popper calculation), JA177 (discussing Schwartzberg calculation). In calculating the so-called degradation of an existing district against a purported ideal in Alternative Plan 1, Dr. McDonald took a percentage of those percentages, rather than subtracting what are already percentages. Accordingly, the difference in

Composite Scores of .64 and .52 is not, in his view .12 (i.e., 64 – .52=.12), or 12% (i.e., 64% – 52%=12%), but rather 18.75% [i.e., (.64 – .52) / .64 x 100%=18.57].

"That is a misuse of data" that can "mask . . . effectively identical" calculations. *Frank v. Walker*, 768 F.3d 744, 753 n.3 (7th Cir. 2014) (Easterbrook, J.). For instance, a drop from a score of .04 to .02 would be 50% degradation under Dr. McDonald's degradation test, but Dr. McDonald conceded that a difference of .02 is not material. "That's why we do not divide percentages." *Frank*, 768 F.3d at 753 n.3. Because a reduction from 50% to 40% is 10%, not 20%, the proper approach to identify the difference between a district that subsumes 50% of a circumscribing circle and one that subsumes 40% of a circumscribing circle is to subtract, not divide. And that makes a world of difference, at least under the 50% test: using subtraction rather than division, the difference between the composite scores of the Challenged Districts and the alleged benchmark analogues in Alternative Plan 1, are all at or less than 50%.

The Court was also entitled to find that Dr. McDonald's test is unrealistic. The "discretionary" criteria, not abstract shapes, are what distinguish quality electoral districts from those that do not adequately represent communities of interest, and the Constitution correctly places redistricting in the hands of the General Assembly. Dr. McDonald's test would be inimical to that delegation. Although Dr. McDonald purported to show in his Alternative Plan 2 that some

discretionary criteria can be applied, the plan does not achieve the General Assembly's redistricting goals: it does not maintain the same communities of interest, preserve the same political-jurisdiction boundaries, or protect the same incumbents. Dr. McDonald opined that Alternative Plan 2 preserved the same *number* of incumbents and jurisdictional lines, but these are *qualitative* goals based on the input of dozens of General Assembly members.

In fact, Dr. McDonald conceded that he would not advocate that the General Assembly should adopt Alternative Plan 2. JA269. The exercise therefore takes with the left hand what it gives with the right: the purpose of applying legitimate redistricting criteria is to create districts where at least some of Virginia's 8.4 million residents would want to reside. So proposing a plan that even Dr. McDonald would not adopt (Alternative Plan 1) and then comparing it with another plan that even Dr. McDonald would not adopt (Alternative Plan 2) does not prove that his "predominance" test works. The Circuit Court was under no obligation to conclude otherwise.[13]

## Conclusion

The Court should affirm the decision below.

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[13] The House preserved an assignment of error to the Circuit Court's admission of Dr. McDonald's testimony, but has determined not to press that position on appeal. The Circuit Court's finding that Dr. McDonald's testimony does not on its own satisfy the Challengers' burden supplies a sufficient basis for affirmance.

Dated: January 8, 2018

Respectfully submitted,

THE VIRGINIA HOUSE OF DELEGATES
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## CERTIFICATE OF SERVICE

I hereby certify compliance with Rule 5:26, and that on this 8th day of January 2018, copies of the foregoing brief were sent via mail and e-mail to the following counsel of record:

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