IN THE SUPREME COURT OF VIRGINIA

RECORD NO. 170697

RIMA FORD VESILIND, *et al.*,

Appellants,

v.

VA. STATE BD. OF ELECTIONS, *et al.*,

Appellees.

REPLY BRIEF OF *AMICI CURIAE* FORMER VIRGINIA ATTORNEYS GENERAL KEN CUCCINELLI, MARY SUE TERRY, AND STEPHEN ROSENTHAL IN SUPPORT OF APPELLANTS

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TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

ARGUMENT 1

I. Requiring The Legislature to Make a *Bona Fide* Effort to Prioritize Compactness is Consistent With The Plain Language Of The Constitution and This Court's Precedent 3

II. Requiring a *Bona Fide* Effort is Administrable, Appropriate, and Ensures Each Branch Plays Its Proper Role 5

III. Plaintiffs Offered Unrebutted Evidence That Compactness Was Not Prioritized 10

IV. The Legislature Failed to Make Any *Bona Fide* Effort to Prioritize Compactness 11

CONCLUSION 14

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases

Brown v. Saunders,
159 Va. 28, 166 S.E 105 (1932). 3, 4, 8, 9

Cole-Randazzo v. Ryan,
198 Ill. 2d 233, 762 N.E.2d 485 (2001) 8, 10

In re 1983 Leg. Apportionment of House, Senate, & Congressional Dist.,
469 A. 819 (Me. 1983) 8, 10

Jamerson v. Womack,
244 Va. 506, 423 S.E.2d 180 (1992) 4

Mahan v. Howell,
410 U.S. 315, 93 S. Ct. 979 (1973) 8

Op. to the Governor,
101 R.I. 203, 221 A.2d 799 (1966) 6

Roman v. Sincock,
377 U.S. 695, 84 S. Ct. 1449 (1964) 6

Tennant v. Jefferson Cty. Comm'n,
133 S. Ct. 3 (2012) 7

Wilkins v. West,
264 Va. 447, 571 S.E.2d 100 (2002) 4

Rules, Statutes & Constitutional Provisions

Va. Const. of 1851, art. IV, § 14 1

Va. Const., art. II, § 6 ..... 1, 3, 11, 14

Va. S. Ct. Rule 5:26(f) 1

Va. S. Ct. Rule 5A:23(b) 2

Miscellaneous

G. Michael Parsons, *The Institutional Case for Partisan Gerrymandering Claims*, 2017 Cardozo L. Rev 155. 7

ARGUMENT

In 1851, the citizens of the Commonwealth first decided to put limits on the legislature's then-boundless discretion in redistricting. Undertaking the arduous process of amending the state's governing charter, voters decided to define the scope of permissible redistricting in simple and reasonable ways. Among them was a requirement that congressional districts be compact. *See* Art. IV, § 14 of the Constitution of 1851.

In 1971, the people of Virginia—once again seeking to reign in redistricting abuses and cabin legislative discretion—extended the compactness requirement to state legislative districts. *See* Va. Const., art. II, § 6. Article II, Section 6 reads: "Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district." Its purpose could not be clearer: to require the legislature to prioritize some basic criteria—equal population, compactness, and contiguity—above all others.

The plainness of this language makes Defendants'[1] attempts to cast off these restrictions stunning. Among other things, Defendants argue that

[1] For clarity, *amici* have adopted "the designations used in the lower court," Rule 5:26(f), and for readability *amici* refer to all entities defending the challenged districts as "Defendants."

they have ***no*** obligation to make ***any*** *bona fide* effort at prioritizing compactness, *see* Br. of Def.-Appellees 34 (Jan. 8, 2018) [hereinafter AG Br.], and that, perhaps, the provision may not be justiciable at all, *see* Br. of Appellees & Assignment of Cross-Error 36 (Jan. 8, 2018) [hereinafter House Br.] (suggesting that "the telltale signs of a non-justiciable political question are present"). Far from asking this Court to engage in "redistricting policymaking," AG Br. at 35, Plaintiffs seek to preserve and enforce the fundamental safeguards that the Constitution provides to ensure representative legislative districts. Instead, it is Defendants who ask this Court to erase the provision that Virginians fought so hard to write into our Constitution and to remove all meaningful limits imposed by it.

Because the legislature's authority to establish electoral districts is subject to a duty to prioritize compactness and because Defendants persist in misreading this Court's precedents and ignoring the plain mandates of the Constitution, *amici* are compelled to file this reply brief.[2]

[2] *See* Va. S. Ct. Rule 5A:23(b) (permitting *amici* to file a reply brief when "an opening brief amicus curiae has been filed.").

I. REQUIRING THE LEGISLATURE TO MAKE A *BONA FIDE* EFFORT TO PRIORITIZE COMPACTNESS IS CONSISTENT WITH THE PLAIN LANGUAGE OF THE CONSTITUTION AND THIS COURT'S PRECEDENT

The Virginia Constitution plainly states that "[e]very electoral district shall be composed of contiguous and compact territory," Va. Const., art. II, § 6, and Defendants concede that "Virginia legislative districts '<u>must</u> be . . . compact,'" House Br. at 1. Defendants contend, however, that they are under *no obligation* to give more weight to *constitutionally required* redistricting criteria than any other criteria they might desire. *See* AG Br. at 34. This Court should not permit such a flippant response to prevail, for "it is [this Court's] duty, as it is the duty of all others, to obey the mandate of the fundamental law; and in obedience to the sovereign will of the people, speaking through the Constitution[.]" *Brown v. Saunders*, 159 Va. 28, 48; 166 S.E. 105, 111 (1932).

The Constitution's mandatory redistricting criteria necessarily (and purposefully) "place[] limitations on the discretion of the legislature." *Id.* at 36, 166 S.E. at 107. In *Brown v. Saunders*, this Court explicitly stated that, while "[m]athematical exactnesss, *either in compactness of territory* or in equality of population, cannot be attained," the legislature must make a "*bona fide* effort" to prioritize such mandatory criteria holding that "that

which cannot be done perfectly must be done in a manner as near perfection as can be." *Id*. at 43-44, 47, 38-39.[3]

Nothing in this Court's subsequent redistricting decisions—*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)—suggest that this duty does not remain binding on the legislature or that the Court's decision in *Saunders* was overturned *sub silentio*. The fact that perfection is not attainable and that there may be many "fairly debatable" ways to prioritize compactness in good faith does not mean that a good faith effort is not required. *See Saunders,* 159 Va, at 38-39, 166 S.E. at 108 ("[The legislature] is not absolved from all rule, merely because the rule of perfect justice cannot be applied[.]"). Defendants wholly fail to account for the guiding principle—and duty—stated by this Court in *Saunders* of making a bona fide effort. To say as Defendants seem to do that no effort at honoring compactness is required is to say that the provision requires nothing. This is clearly wrong—there would be no provision if it had no meaning.

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[3] Defendants attempt to cast *Saunders* as only applicable to equal-population cases. *See* AG Br. at 33-34 n.28; House Br. at 29. The fact that this Court *explicitly* discussed how the principle it was establishing applied to the equal-population *and compactness* requirements belies this reading.

Indeed, not only do Defendants fail to account for this Court's plainly stated rule of making a good faith effort—*neither* of Defendants' briefs even attempts to grapple with ***more than one hundred years of cases*** from state supreme courts across the country ***consistently*** interpreting compactness provisions to require a *bona fide* effort in the same manner as this Court. *See* Br. of *Amici Curiae* Former Virginia Attorneys General at 18 n.6, 20 n.7 (Dec. 14, 2017) (collecting cases). State courts have not hesitated to give these provisions full effect and, where necessary, to strike down districts when it was clear that no *bona fide* effort was made.

II. REQUIRING A *BONA FIDE* EFFORT IS ADMINISTRABLE, APPROPRIATE, AND ENSURES EACH BRANCH PLAYS ITS PROPER ROLE

Defendants claim that enforcing the Constitution's compactness provision would "gut" legislative discretion and that requiring a *bona fide* effort on the part of the legislature would be too confusing or difficult. *See* AG Br. at 30, 34. That is hardly true. Just as the legislature is permitted to deviate from "perfect equality" to some extent in the pursuit of a discretionary policy (such as honoring county lines), so too is the legislature permitted to deviate from "perfect compactness" in the pursuit of such a discretionary policy.

Requiring the legislature to make a *bona fide* effort ensures that the Court can police plain violations of constitutional requirements without substituting its own judgment for any reasonable, consistent, and nondiscriminatory judgment of the legislature. The *legislature's* role is to (1) pick which policies to pursue and (2) choose a map among a broad range of reasonable alternatives. The *courts'* role is to ensure (1) that the legislature's chosen policies are "legitimate, nondiscriminatory, and consistently applied" and (2) that the legislature does not exceed the bounds of the constitution by selecting an *unreasonable* alternative. *See Op. to the Governor*, 101 R.I. 203, 209-10, 221 A.2d 799, 803 (1966) ("[I]f the objective of compactness is to be attained the deviations must be explainable by rational and legitimate considerations; they must be in good faith; and they must be justifiable upon grounds which . . . 'are free from any taint of arbitrariness or discrimination.'" (quoting *Roman v. Sincock*, 377 U.S. 695, 710, 84 S. Ct. 1449, 1458 (1964))).

To the first point, if the legislature wants to honor county lines or avoid pairing incumbents together in the same district, it can do so as long as these policies are *consistently applied*. If the legislature follows a county line for a bit, inexplicably veers through the middle of a neighborhood in a neighboring county, then cuts back into the original county to slice out

some sections of a city, then the legislature has deviated from compactness without honoring a *consistently applied* state policy. Similarly, if the legislature pairs five sets of incumbent Republicans and zero sets of incumbent Democrats (or *vice versa*), then it has not applied its purported policy of "avoiding incumbent pairing" in a consistent or neutral way.[4] In short, the legislature is free to decide which legitimate, discretionary policies it would like to advance, but these policies must be implemented with reasonable consistency—otherwise the process devolves into a free-for-all at the expense of constitutional mandates.[5]

To the second point, the final map cannot go so far in pursuit of discretionary policies that it effectively emasculates a constitutional

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[4] Although "avoiding the pairing of incumbents" is generally understood to be a legitimate redistricting policy, *see, e.g., Tennant v. Jefferson Cty. Comm'n*, 133 S. Ct. 3, 8 (2012), *amici* do not suggest that "incumbency advantage" is a "legitimate" policy. *See, e.g.*, G. Michael Parsons, *The Institutional Case for Partisan Gerrymandering Claims*, 2017 Cardozo L. Rev. de novo 155, 174 n.134 (collecting cases distinguishing between an accepted state interest in "incumbency-pairing prevention" and a purported state interest in "incumbency advantage").

[5] This is why Defendants' argument that compactness undermines communities of interest rings hollow. *See* House Br. at 49. The Constitution does not require the legislature to sacrifice communities of interest in order to make districts abstractly compact; the Constitution requires that the legislature be *clear and consistent* in how it *defines* communities of interest, thereby demonstrating a *bona fide* effort to keep districts compact.

command—such a map is not among the broad universe of "reasonable" alternatives constitutionally available to the legislature. *See Mahan v. Howell*, 410 U.S. 315, 326 (1973) (noting that a state policy, "however rational, cannot constitutionally be permitted to emasculate [a constitutional requirement]").

For example, in *Brown v. Saunders*, this Court struck down an electoral map where "a slight change in district lines" could "have applied the provision of practical equality" without sacrificing other redistricting policies, thereby demonstrating "that no *bona fide* effort was made to divide [the population equally between districts] as near as practicable." 159 Va. at 44, 47, 166 S.E. at 110, 111. Other courts have applied a similar approach in gauging compliance with constitutional requirements such as compactness. *See In re 1983 Leg. Apportionment*, 469 A.2d 819, 831 (Me. 1983) (holding that "a challenger . . . must show that [the district] could be substantially improved without creating constitutional violations elsewhere in the state"); *Cole-Randazzo v. Ryan*, 198 Ill. 2d 233, 238, 762 N.E.2d 485, 488 (2001) (evaluating whether an alternative plan would improve compactness without running afoul of other mandatory requirements).

Defendants attempt to discount the parallels between mandatory criteria such as the equal-population requirement and the compactness

requirement by arguing that "the amorphous nature of compactness differentiates compactness cases from equal population cases." *See* AG Br. at 33 n.28. Not only does this turn a blind eye to cases in which compactness provisions have been enforced, it does not hold as a matter of plain logic. The constitutional question is not what "perfect" equality means (the *exact* same number of persons in every district), just as the constitutional question is not what "perfect" compactness means (a circle). These are both mathematically precise answers that—in almost all cases—are not possible or realistic. The *relevant* constitutional question is *how far from perfection* the Constitution allows the legislature to stray.

This is *exactly* what *Saunders* recognized when it discussed population *and* compactness in adopting the *bona fide* effort rule. The fact that the exact population deviation number or precise compactness measure may vary from redistricting cycle to redistricting cycle based on the particular facts, population dynamics, and legislative balancing involved, does *not* mean that no limits exist or that courts cannot intervene when it is obvious that no good faith effort was in fact made.

Ironically, it is Defendants' approach that provides no guidance on when and how this Court should execute its constitutional duty. Defendants offer no suggestion on how to identify a "non-compact" district

or what evidence a plaintiff must provide in order to prove that a district violates the Constitution.[6] Such an approach is not administrable and strips the Constitution's compactness provision of all meaning.

III. PLAINTIFFS OFFERED UNREBUTTED EVIDENCE THAT COMPACTNESS WAS NOT PRIORITIZED

Consistent with the "alternative plans" approach found in *In re 1983*, 469 A.2d at 831, and *Cole-Randazzo*, 198 Ill. 2d at 238, 762 N.E.2d at 488, Plaintiffs have met their burden of proof by introducing alternative maps that *vastly* improve compactness while still satisfying all other mandatory criteria and even advancing the legislature's legitimate discretionary policies with more consistency and neutrality than the enacted plan. *See* P29-0010-15.

Defendants contend that the mere existence of "reasonable alternatives" should not undermine a map's constitutionality. AG Br. at 22. That much is true. But when compactness can be drastically improved

[6] Defendants seem to suggest that because the word "compact" is vague or admits of degrees, there will always be a "debatable question about whether a district is compact," and therefore plaintiffs must always lose. *See* House Br. at 18 n.4. To the extent Defendants mean to imply that such challenges are non-justiciable, that interpretation is foreclosed by this Court's unbroken precedent and would render meaningless the efforts of those citizens who explicitly reformed the Constitution in order to cabin the legislature's redistricting discretion. That is obviously not what the drafters intended, and to interpret the provision in such a manner would violate all sound principles of constitutional interpretation.

without sacrificing any other mandatory criteria or undermining other legitimate, nondiscriminatory, and consistently applied discretionary criteria, the challenged plan itself is shown not to be a "reasonable alternative" constitutionally available to the legislature. In other words, even if this Court were to *reject* Plaintiffs' "degradation test," Plaintiffs' alternative maps would *still* provide evidence demonstrating that the legislature did not make a good faith effort at prioritizing compactness.[7]

IV. THE LEGISLATURE FAILED TO MAKE ANY *BONA FIDE* EFFORT TO PRIORITIZE COMPACTNESS

Defendants have made clear their belief that the legislature bears no duty to prioritize compactness over discretionary preferences. It should therefore come as no surprise that the legislature, in fact, failed to make any *bona fide* effort to prioritize compactness.

First, Defendants contend once again that the compactness requirement has been satisfied because the adopted redistricting criteria

[7] In fact, Defendants' critique of Plaintiffs' degradation/predominance test fatally undercuts their own argument that enforcing the compactness provision will "gut" legislative discretion in districting. Defendants argue that Plaintiffs' alternative maps cannot provide a baseline for the degradation computations because there are numerous ways to draw reasonably compact maps and Plaintiffs' chosen alternatives should not be entitled to any special weight. If there are so many reasonable alternative maps, however, then it follows that there are abundant opportunities for the legislature to exercise discretion within the textual bounds of Art. II, § 6.

"reference" compactness and because compactness was "referenced" on the floor. AG Br. at 4-5. But merely "referencing" *population equality* in adopted criteria or on the floor of the General Assembly would not immunize from challenge a redistricting plan with a 70% population deviation. A plaintiff challenging such a map would quickly and easily prevail by introducing evidence of alternative maps that improve population equality without violating other constitutional mandates.

Next, Defendants argue that the term "compact" is "an inherently slippery concept" and that "compact*ness*" is even "worse" "creat[ing] a substantial question of what judicially manageable standards are fit to that task." House Br. at 35-36. Such linguistic wordplay is too clever by half and when taken at face value is an admission that the legislature did not apply a compactness standard here. That Defendants suggest they did not know how is no excuse. And it would seem that without this Court's clarification of the guiding standard, the legislature has no intention of honoring the duty imposed by the Constitution's compactness requirement. In order to achieve electoral districts that are compact, the legislature must make a good faith effort to preserve and prioritize compactness during the redistricting process. That is the duty imposed by the Constitution, by this

Court's interpretation thereof, and by every other state supreme court to consider this question.

Third, Defendants purport to lean on expert opinion, noting that "both [of their] experts agreed that all of the districts were sufficiently compact." *See* AG Br. at 9. But an expert cannot provide a conclusion that a district is "sufficiently" compact while simultaneously offering an opinion that there's no consensus on what "sufficiently" means. This is the same inescapable flaw that plagues Defendants' entire case: one cannot argue that no "bright-lines" exist and then urge this Court to provide safe harbor in the "bright lines" provided by prior maps' compactness scores. *See* House Br. at 7-8.

Finally, Defendants seem to suggest that the existence of social media obviates the need for compact districts because representatives can still communicate with their constituents. *See* AG Br. at 24. If lawmakers think compactness is an antiquated way to foster strong constituent relations, they are free to introduce an amendment to remove the compactness requirement from the Constitution. Until then, it is not for legislators to decide whether or not compact districts are required.

All of the arguments set forth by Defendants return to a similar theme: The Court must provide lawmakers as much discretion as possible. What Defendants have *not* provided is *evidence* that lawmakers sought to

prioritize—or even address—compactness during the redistricting process. Defendants' reliance on circular legal argumentation about why they should not be under any duty—rather than facts demonstrating how they fulfilled that duty—underscores the danger in providing the legislature the unbridled discretion requested here even though the Constitution was amended to foreclose it.

CONCLUSION

The people of the Commonwealth enacted constitutional limits upon the legislature's redistricting authority. The legislature may not want to make a good faith effort at fulfilling its constitutional duty—it may even wish this Court would free it of its constitutional obligations—but the past labors of Virginia's citizens cannot be ignored. Lawmakers are duty-bound to make a *bona fide* effort at prioritizing compactness in redistricting, and when the legislature violates that solemn obligation, this Court is duty-bound to uphold the supremacy of our governing charter and strike the offending enactment.

For the foregoing reasons, this Court should clarify that mandatory criteria cannot be subordinated to discretionary policies; hold that each of the challenged districts fail to comply with Article II, Section 6 of the Virginia Constitution; reverse the decision below; and remand the case with a

direction to enter judgment for Redistricting Challengers and to require that new districts be enacted no later than January 31, 2019.

Respectfully submitted,

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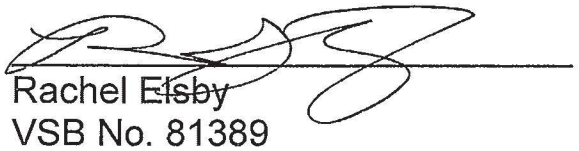

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I further certify that this brief is not longer than 15 pages and otherwise complies with the Rules of the Supreme Court of Virginia.

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