IN THE SUPREME COURT OF VIRGINIA

Record No. 170697

RIMA FORD VESILIND*, et al.*,

Petitioners,

v.

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

Respondents.

BRIEF *AMICUS CURIAE* ON BEHALF OF PROFESSORS A.E. DICK HOWARD, MARK E. RUSH, REBECCA GREEN, AND CARL W. TOBIAS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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I. STATEMENT OF INTEREST OF *AMICI CURIAE*

Pursuant to Rule 5:30 of the Rules of the Court of Appeals of Virginia, *amicus curiae*, Professors A.E. Dick Howard, Mark E. Rush, Rebecca Green, and Carl W. Tobias, respectfully submit this brief in support of petitioners.

Professor A.E. Dick Howard is the White Burkett Miller Professor of Law and Public Affairs at the University of Virginia School of Law. Professor Howard served as the Executive Director of Virginia's Commission on Constitutional Revision. In that capacity, Professor Howard was the principal drafter of the current Virginia Constitution. He was counsel to the General Assembly at the sessions when that body approved the current Constitution, and he directed the successful referendum campaign for its ratification. Professor Howard is also the author of Commentaries on the Constitution of Virginia (Univ. Press of Va. 1974).

Professor Mark E. Rush is the Waxberg Professor of Politics and Law at the Washington and Lee University. Professor Rush has written extensively on constitutional and election-law issues.

Professor Rebecca Green is a Professor of the Practice of Law and Co-Director of the Election Law Program at the William and Mary Law

School. Professor Green educates judges about election law and has conducted research projects for the Presidential Commission on Election Administration.

Professor Carl W. Tobias is the Williams Chair in Law at the University of Richmond School of Law. Professor Tobias has written extensively on several areas of law, including constitutional law.

Amicus curiae support petitioners' arguments and submit this brief to assist the Court in interpreting the compactness requirement of Article II, § 6 of the Virginia Constitution. Article II, § 6 requires the General Assembly to give priority to compactness over discretionary criteria. When determining if the General Assembly complied with this constitutional mandate, a court must require the General Assembly first to identify the relevant, constitutionally sound standard by which the General Assembly gave priority to compactness. This first step is necessary in order to identify the issue in dispute and properly assess the parties' evidence and arguments under the fairly debatable standard. *Amicus curiae* request that the Court grant the petition for review and require the General Assembly to abide by an articulated and constitutionally sound standard for giving priority to compactness over discretionary criteria. As legal scholars and residents of Virginia, *amicus curiae* have an interest in the enforcement of

the Virginia Constitution's compactness requirement and in the proper application of the fairly debatable standard in redistricting cases.

II. ASSIGNMENTS OF ERROR

- *Amicus curiae* adopt the Assignments of Error set forth in the Petition for Appeal ("Petition").
- *Amicus curiae* submit that the circuit court's failure first to require the General Assembly to identify a constitutionally sound standard for giving priority to compactness resulted in an improper application of the fairly debatable standard of review.
- Moreover, if the General Assembly failed to apply any constitutionally sound standard for giving priority to compactness over discretionary criteria, the failure to do so violates Article II, § 6 of the Virginia Constitution.

III. STATEMENT OF THE CASE AND FACTS

Amicus curiae adopt the statement of the facts as set forth in the Petition. Pet. at 4-16.

IV. SUMMARY OF THE ARGUMENT

This is a case of first impression. This Court has never reviewed the constitutional mandate that the General Assembly give priority to compactness over discretionary criteria.

Article II, § 6 of the Virginia Constitution directs the General Assembly to establish electoral districts that are (i) compact, (ii) contiguous, and (iii) as nearly as practicable, equal in population. These are mandatory constitutional commands. As such, the General Assembly must give them priority over discretionary criteria. Giving priority to compactness,

contiguity, and population equivalence preserves the twin pillars of democracy – the right to vote and the right to representation. These constitutional criteria were added to constrain the legislature's capacity to undermine the rights to vote and fair representation. Accordingly, the legislature must abide by these limitations when drawing voting districts

In this case, the General Assembly failed to identify any constitutionally sound standard it used to give compactness priority over discretionary criteria. Moreover, the circuit court did not require the General Assembly to identify any such standard before declaring the issue to be "fairly debatable." The circuit court's failure to do so permits the General Assembly to *claim* that it satisfied the constitutional requirements without having to *demonstrate* that it actually did so. The Court must correct this error by requiring the General Assembly to identify the standard by which it gave compactness priority over discretionary criteria before the Court applies the fairly debatable standard.

This Court's seminal 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) – do not address the question presented here. Under Article II, §6 of the Virginia Constitution, the General Assembly must give compactness priority over discretionary criteria. Further, it must balance

compactness against other constitutional requirements. These are separate obligations, which may require different standards. In *Jamerson* and *Wilkins v. West*, this Court defined the General Assembly's obligations to abide by the compactness requirement within the context of the Voting Rights Act and other constitutional requirements. It did not provide a standard with respect to the General Assembly's obligation to give priority to compactness. In this case, other constitutionally mandated constraints such as the Voting Rights Act obligations are not applicable. Because the nature of the compactness obligation at issue may be different from case to case (and even district to district), a one-size-fits-all approach for determining compliance with state constitutional obligations is not suitable.

Because the General Assembly has wide discretion in how it may satisfy its constitutional obligations, this Court need not itself establish a standard. However, the Court must require that the General Assembly *identify and abide by* a standard. Whether the General Assembly's actions are sufficient to meet constitutional requirements is then for the Court to decide under the fairly debatable standard of review.

A constitutionally sound standard for giving compactness priority over discretionary criteria ensures that the General Assembly does not exceed its authority during the redistricting process. It also allows citizens to raise

legal challenges when that standard has been disregarded. Finally, it guarantees that the courts can properly apply the fairly debatable standard of review to evaluate the General Assembly's actions. Thus, the Court must accept the Petition in order to establish, for the first time, that the General Assembly must abide by a constitutionally sound standard for giving compactness priority over discretionary criteria.

V. ARGUMENT

A. The General Assembly Must Give Priority to Compactness over Discretionary Criteria

The compactness requirement emanates from the plain language of Article II, § 6 itself, which provides that legislative districts "shall" be compact. The compactness requirement protects citizens' fundamental rights, *i.e.*, the right to vote and the right to representation. Although the General Assembly may consider other factors when drawing legislative districts, the constitutional requirements – compactness, contiguity, and population equivalence – must be given priority over discretionary criteria. *See Wilkins v. Davis*, 205 Va. 803, 811-12, 139 S.E.2d 849, 854-55 (1965).

1. The Virginia Constitution was Revised in 1971 to Restore and Protect Fundamental Rights

In 1968, Governor Mills E. Godwin, Jr., appointed the Commission on Constitutional Revision. Report of the Commission on Constitutional Revision, at 1 (January 1, 1969) (hereinafter "Report of the Commission").

The Commission was composed of some of Virginia's most distinguished citizens, including two former governors, a future Justice of the Supreme Court of the United States, a future justice of the International Court of Justice, and Virginia's leading civil rights lawyer.[1] *See* Report of the Commission at i.

A central purpose of the Commission was to reject the discredited legacy of Virginia's 1902 Constitution. *See* Report of the Commission at 7-8. A dominant goal of the convention that wrote the 1902 document was disenfranchisement, especially of black voters. *See* I A.E. Dick Howard, Commentaries on the Constitution of Virginia 16-17 (1974) (hereinafter "Commentaries"). To that end, the 1902 Constitution relied upon a range of devices, including the poll tax, complicated registration requirements, and taking the vote from those convicted even of minor offenses such as petit larceny. Report of the Commission at 104 (eliminating provisions such as poll tax and property requirements, which disenfranchised minority voters);

[1] The Chairman of the Commission was former governor Albertis S. Harrison Jr. Other members of the Commission included Colgate W. Darden, Jr. (former governor); Lewis F. Powell, Jr. (future U.S. Supreme Court Justice), Hardy Cross Dillard (future justice of the World Court at the Hague); Oliver Hill (leading civil rights lawyer); Albert V. Bryan, Jr. (future federal district judge), George M. Cochran (future Virginia Supreme Court Justice), Ted Dalton (federal district court judge), and Alexander M. Harman, Jr. (future Virginia Supreme Court Justice). The executive director was A. E. Dick Howard.

Commentaries I at 17 (implementation of the poll tax and the "rigors of registration" reduced the franchise), 330-31 (noting the effect of strict registration requirements and the inclusion of petit larceny to reduce the franchise). The results were devastating to representative government. In 1900, there had been 147 votes cast for every 1,000 Virginians; in 1904, the figure fell to 67. Commentaries I at 331.

Aspiring to guarantee a more enlightened future, the Commission drafted the proposed Constitution's Franchise article with the premise that the right to vote is "a basic and precious right in a democratic society, a right underlying and bolstering many other individual rights." Report of the Commission at 102. Driving that point home, the Commission declared, "Hence it follows that needless obstacles ought not to be placed in the path of Virginians seeking to have a voice in the government of their Commonwealth." *Id.*

The Commission saw the link between the right to vote and the "closely related" matter of representation. *Id.* It affirmed that, in addition to defining who should have the ballot, the Constitution should lay down "clear guidelines" for deciding how legislative districts would be drawn. *Id.* The Commission advised, in other words, that the drawing of legislative districts should not be left to whim or discretion but should be controlled by the

Constitution itself. *See id.* at 102, 118. Drawing on the previous Constitution's requirement that congressional districts be contiguous and compact, the Commission proposed that the same constitutional requirement control the drawing of legislative districts. *See id.* at 117 ("There is no reason to make any distinction between General Assembly and congressional apportionment.").

It is important to recall that the Commission was working closely in the wake of important federal commands that addressed voting and representation, notably the Supreme Court's one person, one vote decisions and Congress' enactment of the Voting Rights Act of 1965. Commentaries I at 333-35 (noting the impact of the Voting Rights Act) and 406 (detailing the Supreme Court's one person, one vote decisions). Putting muscle into their recommendation on franchise and redistricting, the Commission said that it had "proceeded on the assumption that the people of Virginia want to shape their own destiny, that they do not want to abdicate decisions to others, such as to the Federal Government, and that therefore they want a constitution which makes possible a healthy, viable, responsible state government." Report of the Commission at 11.

The Commission reported to the Governor and General Assembly on January 1, l969. *Id.* at vii. The General Assembly met in special session to

review and adjust the Commission's recommendations. Commentaries I at 23. The General Assembly then approved the revised Constitution at its 1970 session and placed the Constitution on the ballot for a referendum in November 1970. *Id.* at 23-24. The people of Virginia overwhelmingly approved the Constitution, with 72% of those voting saying "yes." *Id.* at 24. The revised Constitution then became effective in 1971. *See* Va. Const., Foreword, at III (1971).

2. Compactness is Constitutionally Mandatory and Protects Fundamental Rights

The legislative history of the 1971 constitutional revisions demonstrates that protecting the right to representation and the right to vote were guiding principles for lawmakers and voters. Those principles also apply to the requirements in Article II, § 6, which provides that legislative districts shall be (i) compact, (ii) contiguous, and (iii) as nearly equal in population as practicable. Although many factors shape the redistricting process,[2] only these three criteria are constitutionally

[2] In 2011, both the House and Senate Committees on Privileges and Elections adopted resolutions identifying criteria for consideration during the redistricting process. Discretionary criteria included economic factors, social factors, cultural factors, and communities of interest. *See* H.D. Comm. on Privileges and Elections Res. 1, 2011 Special Sess. I (Va. Mar. 25, 2011); S. Comm. on Privileges and Elections Res. 1, 2011 Special Sess. I (Va. Mar. 25, 2011). Virginia House Committee on Privileges and Elections, Committee Resolution No. 1 (approved March 25, 2011); Virginia

mandated. *See Brown v. Saunders*, 159 Va. 28, 37, 166 S.E. 105, 107 (1932) ("The only limitation made upon the discretion of the legislature is that each district 'shall be composed of contiguous and compact territory, containing as near as practicable an equal number of inhabitants.'"). In *Brown*, this Court addressed congressional districts and the General Assembly's compliance with § 55 of the 1902 Constitution. *See id.* at 35-36, 166 S.E. at 107. The same constitutionally mandated criteria of compactness, contiguity, and population equivalence for congressional districts considered in *Brown* now apply to state legislative districts as a result of the 1971 revisions to the Constitution. *See* Report of the Commission at 117. As explained by the Court, the Virginia Constitution's compactness requirement is not aspirational – it is mandatory. *See Wilkins v. West*, 264 Va. at 462, 571 S.E.2d at 108 ("Article II, § 6 speaks in mandatory terms, stating that electoral districts 'shall be' compact and contiguous.").

Compactness has been required by the Virginia Constitution for over one hundred and fifty years. The first Virginia Constitution was adopted in

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Senate Committee on Privileges and Elections, Committee Resolution No. 1 (approved March 25, 2011).

1776 and has only undergone five complete revisions since then.[3] The constitutional requirement that congressional districts be compact first appeared in 1851.[4] The compactness requirement was then carried over into the 1870 and 1902 Constitutions.[5] *See* Art. V, § 13 of the Constitution of 1870; § 55 of the Constitution of 1902.

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[3] Complete revisions occurred in 1830, 1851, 1870, 1902, and 1971. This does not include (i) the Constitution of 1864, which was drafted during the Civil War and had uncertain legal status or (ii) the revisions of 1928, which changed fewer than half the sections of the 1902 Constitution. *See* Va. Const., Foreword, at III (1971).

[4] Article IV, § 14 of the Constitution of 1851:

> In the apportionment, the state shall be divided into districts, corresponding in number with the representatives to which it may be entitled in the House of Representatives of the Congress of the United States, which shall be formed respectively of contiguous counties, cities and towns, be compact, and include, as nearly as may be, an equal number of the population, upon which is based representation in the House of Representatives of the United States.

[5] Article V, § 13 of the Constitution of 1870:

> In the apportionment the state shall be divided into districts, corresponding in number with the representatives to which it may be entitled in the house of representatives of the congress of the United States, which shall be formed, respectively, of contiguous counties, cities and towns, be compact, and include, as nearly as may be, an equal number of population.

Section 55 of the Constitution of 1902:

> The General Assembly shall by law apportion the State into districts, corresponding with the number of representatives to which it may he entitled in the House of Representatives of the Congress of the United States; which districts shall be composed of contiguous and compact territory containing, as nearly as practicable, an equal number of inhabitants."

In 1971, the Virginia Constitution was revised to extend the mandatory redistricting requirement to the drawing of state legislative districts. *See* Report of the Commission at 117; *see also* Proceedings and Debates of the Virginia House of Delegates, Extra Sess. 1969 and Regular Sess. 1970, at 10 (Va. 1969); Proceedings and Debates of the Senate of Virginia, Extra Sess. 1969 and Regular Sess. 1970 at 661 (Va. 1969) (Governor Mills E. Godwin Jr. endorsing common criteria for state legislative and congressional apportionment). Article II, § 6 states:

> Members of the House of Representatives of the United States and members of the Senate and of the House of Delegates of the General Assembly shall be elected from electoral districts established by the General Assembly. *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*. The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with this section in the year 2011 and every ten years thereafter.

Va. Const., Art. II, § 6 (emphasis added)

Recognizing that the passage of time would present unforeseen challenges, the Virginia Constitution was drafted to "preserve the best of Virginia's constitutional heritage while responding to new problems." Report of the Commission at 9; *see also id.* at 11 (explaining that "to avoid rigidity and early obsolescence," the Constitution should, "while protecting the rights of the people, create a government which can deal with

unforeseen problems of the future as they arise."). In particular, the Constitution "embodies *fundamental law*" and "should protect *basic individual rights*." *Id.* at 9-10 (emphasis added). To do so, the Constitution and its revisions "create the frame of government, allocate powers and duties among the branches of government, and *put essential limits on the exercise of such power*." *Id.* (emphasis added).

With respect to Article II, § 6, the revisions were made "so as to apply a common set of *principles to representation* (districts to be compact, contiguous, and proportionate to population)… ." Report of the Commission at 103 (emphasis added). Thus, constitutional requirements such as compactness were designed to protect fundamental rights by limiting the legislature's discretion, regardless of technological or political changes over time. *See id.* at 9-11 (explaining that Constitutional revisions were "designed to make the present Constitution more responsive to contemporary pressures and probable future needs.").

3. In Order to Protect Fundamental Rights, Violations of Constitutional Compactness Requirement are Justiciable

The Virginia Constitution protects fundamental rights by requiring the General Assembly to give compactness priority over discretionary criteria. Violations of that mandate are justiciable. *See Jamerson v. Womack*, 26

Va. Cir. 145, 146 (1991) (finding that plaintiffs have a "justiciable interest" to bring suit alleging violation of compactness requirement); *Wilkins v. West*, 264 Va. at 460, 571 S.E.2d at 107 (explaining that residents of a district that fails to comply with the constitutional compactness and contiguous requirements "are directly affected").

This Court has not articulated the specific nature of the fundamental rights protected by the compactness requirement. However in *Brown*, this Court recognized that violations of Article II, § 6 of the Virginia Constitution injure a citizen's right to vote and right to representation. *See Brown*, 159 Va. at 38, 166 S.E. at 108 ("'[a]ny plan of districting which is not based upon approximate equality of inhabitants will work inequality in right of suffrage and of power in elections of the representatives in Congress.'") (quoting *Moran v. Bowley*, 179 N.E. 526, 532 (1932)).

Compactness has been widely recognized to protect the right to vote and the right to representation by limiting the impact of gerrymandering. *See, e.g.*, *Karcher v. Daggett*, 462 U.S. 725, 758 (1983) (Stevens, J., concurring) (noting that geographic compactness may serve independent values such as constituent representation); *see also Pearson v. Koster*, 359 S.W.3d 35, 39 (Mo.), *aff'd*, 367 S.W.3d 36 (2012) (en banc) (explaining that the requirements for contiguous and compact territory are "to guard, as

far as practicable, under the system of representation adopted, against a legislative evil, commonly known as 'gerrymander'") (citation omitted) [6]; *In re Legislative Redistricting*, 475 A.2d 428, 438 (Md. 1982) (noting that compactness requirement has been described as "an anti-gerrymandering safeguard to provide the electorate with effective representation") (citing *Opinion to the Governor*, 221 A.2d 799, 802 (1996)). Virginia's Commission was guided by the same concerns in approving Article II, § 6. *See* Commentaries I at 415 (explaining that the constitutional requirements for districts to be "contiguous and compact" are "meant to preclude at least the more obvious forms of gerrymandering").

By protecting the right to vote and the right to representation, the compactness requirement ensures that voters have the means to hold legislators accountable at the polls. *See Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights."); *In re Legislative Redistricting*, 475 A.2d at 438 (noting compactness requirement as a safeguard to protect effective

[6] Missouri's state constitution similarly requires districts to be composed of "contiguous territory as compact and as nearly equal in population as may be." Mo. Const., art. III, § 45.

representation) (citing *Opinion to the Governor*, 221 A.2d at 802); *see also* Commentaries I at 402 (explaining that "[w]ho shall have the vote – suffrage – and how votes shall be apportioned – representation – are the twin talisman of the locus of formal political power in a state.") (citations omitted). Thus, the compactness requirement helps to ensure that voting districts are drawn in a manner to keep the interests of voters, and not the interests of legislators, in mind.

Compactness is not an end in itself and may have to give way to other competing constitutional interests such as equal representation in order to protect fundamental rights. *See Jamerson*, 244 Va. at 511, 423 S.E.2d at 182-83; *Wilkins v. West*, 264 Va. at 466-70, 482, 571 S.E.2d at 110-113, 120. However, this Court has made clear that constitutional requirements must be given priority over discretionary criteria, however attractive they may seem. *See Wilkins v. Davis*, 205 Va. at 810-11, 139 S.E.2d at 854.

4. The General Assembly Must Give Priority to Compactness over Non-Constitutional Criteria

Like the population equivalence requirement, compactness protects fundamental rights, and the General Assembly must give it priority over discretionary criteria. *See id.* (finding constitutional equal population requirement must be given priority over discretionary criteria such as

communities of interest). The General Assembly must give priority to constitutional requirements such as compactness over discretionary criteria, no matter how inviting those other criteria may seem. *See id*.

In 2011, the General Assembly acknowledged this obligation by adopting resolutions stating that compactness "shall be given priority in the event of conflict among the criteria." *See* H.D. Comm. on Privileges and Elections Res. 1, 2011 Special Sess. I (Va. Mar. 25, 2011); S. Comm. on Privileges and Elections Res. 1, 2011 Special Sess. I (Va. Mar. 25, 2011). In fact, it is undisputed that compactness must, *in principle*, be given priority over discretionary criteria in order to protect fundamental rights.

B. The Court Must Require the General Assembly to Identify a Constitutionally Sound Standard for Giving Compactness Priority over Discretionary Criteria before Applying the Fairly Debatable Standard of Review

In this case, the General Assembly did not apply a constitutionally sound standard to satisfy its obligation to give compactness priority over discretionary criteria. Pet. at 10-16. Instead, the circuit court found the issue to be fairly debatable based on conclusory statements from members of the General Assembly that they did not violate the compactness requirement. *See* Op. at 7-15 (relying on testimony from Delegate Chris Jones that compactness was not subordinated to discretionary criteria

because he relied on legal advice that the redistricting plan complied with *Wilkins v. West* and *Jamerson*).

Jamerson and *Wilkins v. West* are sound precedent, but only with respect to the compactness requirement as it relates to other constitutional obligations under the Voting Rights Act. *See Jamerson*, 244 Va. at 511, 423 S.E.2d at 182-83; *Wilkins v. West*, 264 Va. at 466-70, 482, 571 S.E.2d at 110-113, 120. The circuit court recognized that these cases do not represent a standard by which to determine whether the General Assembly gave priority to compactness over discretionary criteria. Op. at 14. The circuit court also found petitioners' evidence demonstrating that the General Assembly failed to give priority to compactness "merit serious consideration." Op. at 13. The circuit court seemed to acknowledge that petitioners demonstrated that the General Assembly failed to give priority to compactness over discretionary criteria. Op. at 13-15. Nonetheless, the circuit court never shifted the burden to the respondents or respondent-intervenors to identify what constitutionally sound standard, if any, the General Assembly applied to give priority to compactness.

By excusing the General Assembly from demonstrating compliance with its constitutional obligations, the circuit court's decision permits the General Assembly to avoid judicial review. This Court should not allow the

General Assembly to evade judicial scrutiny by hiding behind inapposite case law, irrelevant facts, and an appeal to legislative discretion. The General Assembly can exercise wide discretion, but that discretion is not unlimited. *See Brown*, 159 Va. at 43-44, 166 S.E. at 110-11 (The General Assembly's "discretion to be exercised should be an honest and fair discretion, the result revealing an attempt, in good faith, to be governed by the limitations enumerated in the fundamental law of the land"). The Court must require the General Assembly to articulate the standard by which it gave priority to compactness so that the Court can determine if the General Assembly's actions were constitutional. *See id.* at 46, 166 S.E. at 111 (finding that it is the duty of the Court to determine whether a legislative act is in conflict with constitutional requirements). A legislature's failure to take any action to satisfy its constitutional obligations is unconstitutional. *See id.* at 47, 166 S.E. at 111 (finding the legislature's failure to make any *bona fide* effort to comply with the population equivalency requirement to be unconstitutional).

1. The Fairly Debatable Standard Requires the Court to Determine if the General Assembly Gave Priority to Compactness

Legislative action in redistricting cases is subject to the fairly debatable standard of review. *See Wilkins v. West*, 264 Va. at 462, 571

S.E.2d at 108; *Jamerson*, 244 Va. at 510, 423 S.E.2d at 182. Although legislative action is afforded a strong presumption of validity under that standard, those actions (or inactions) are still subject to judicial review. *See Jamerson*, 244 Va. at 510, 423 S.E.2d at 182; *Wilkins v. West*, 264 Va. at 462, 571 S.E. at 108; *Brown*, 159 Va. at 35, 166 S.E. at 107 (finding that discretion should be accorded to the General Assembly but emphasizing that the duty of the court is "to state whether or not [a legislative] act is in conflict with the constitutional requirement."); *Wilkins v. Davis*, 205 Va. at 813, 139 S.E.2d at 855 (reiterating that the Court's duty is to declare whether or not a legislative act conflicts with a constitutional requirement (citing *Brown*, 159 Va. at 46, 166 S.E. at 111).

The fairly debatable standard of review arose from zoning cases. This Court first applied the standard to redistricting cases in *Jamerson*. 244 Va. at 509-10, 423 S.E.2d at 181-82 (citing *Barrick v. Bd. of Supervisors*, 239 Va. 628, 630, 391 S.E.2d 318, 319 (1990), and *Bd. of Supervisors v. Jackson*, 221 Va. 328, 333, 269 S.E.2d 381, 384-85 (1980)). The fairly debatable standard is based on the principle of the separation of powers, that is, that the court's role is not to second-guess the wisdom of the legislature's actions. *Town of Leesburg v. Giordano*, 280 Va. 597, 609, 701 S.E.2d 783, 790 (2010) (Russell, J., dissenting). The rationale

underlying this standard is that voters who might be displeased by legislative actions "have a ready remedy at the next election." *Id.* at 609-10, 701 S.E.2d at 790-91. However, this rationale is undermined when the legislative act in question weakens or destroys the voters' ability to hold their legislative representatives accountable. *See id.* (finding that when legislative acts affect "persons and territory outside the jurisdiction in which the legislative body has the authority to govern, the rationale supporting the 'fairly debatable' standard is non-existent.").

Thus, the Court must ensure that the fairly debatable standard is properly applied, especially in cases where legislative actions at issue are challenged as undermining the right to representation and the right to vote. *See Reynolds*, 377 U.S. at 561-62 (stating that "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized"); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (finding that the right to vote is "a fundamental political right"). The General Assembly's failure to act pursuant to *any* standard to ensure priority is given to compactness over discretionary criteria does not survive judicial scrutiny, even under the fairly debatable standard.

2. *Jamerson* and *Wilkins v. West* Did Not Establish Standards for Giving Compactness Priority over Discretionary Criteria

The respondents' and respondent-intervenors' reliance on *Jamerson* and *Wilkins v. West* is misplaced in this case of first impression. In *Jamerson*, the Court noted "two overarching considerations that bind state legislatures in reapportioning electoral districts." 244 Va. at 511, 423 S.E.2d at 182-83. The first is "equal representation for equal numbers of people" imposed by Article 1, § 2 of the U.S. Constitution. *Id.* The second is compliance with the Voting Rights Act. *Id.* Similarly, in *Wilkins v. West*, the Court found that the compactness requirement under Article II, § 6 of the Virginia Constitution had to be considered along with the equally mandatory requirements of the Voting Rights Act and Article I §§ 1 and 11 of the Virginia Constitution. 264 Va. at 466-70, 482, 571 S.E.2d at 110-113, 120.

The General Assembly must abide by *Jamerson* and *Wilkins v. West* in order to comply with the Voting Rights Act and Article I §§ 1 and 11 of the Virginia Constitution. *See Jamerson*, 244 Va. at 511, 423 S.E.2d at 182-83; *Wilkins v. West*, 264 Va. at 466-70, 571 S.E.2d at 110-113. However, it *must also comply* with its obligation to give priority to compactness over discretionary criteria. *Jamerson* and *Wilkins v. West* do

not address this separate, mandatory, constitutional obligation. *Jamerson* and *Wilkins v. West* addressed the General Assembly's obligation to comply with the compactness requirement as it relates to the Voting Rights Act, which is not at issue in this case.

The General Assembly's reliance on *Jamerson* and *Wilkins v. West* was a misguided attempt to adopt a one-size-fits all approach to satisfy the compactness requirement. *See* Pet. at 13-16. However, the circuit court rejected the General Assembly's interpretation of those cases and found that *Jamerson* and *Wilkins v. West* did not establish a standard "for measuring the priority given to compactness in drawing legislative districts." Op. at 13-14. Such a one-size-fits-all approach to complying with constitutional obligations has been consistently rejected by the Supreme Court. *See Bethune-Hill v. Va. State Bd. Of Elections*, 137 S.Ct. 788, 802 (2017) (explaining that reliance on black voting-age population percentage target may be appropriate in some instances to comply with the Voting Rights Act but that the relevant percentage may differ depending on the district at issue); *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1273-74 (2015) (rejecting a "mechanically numerical" approach to satisfying complex constitutional requirements that may differ by district).

Notably, respondents and respondent-intervenors did not dispute the circuit court's finding that *Jamerson* and *Wilkins v. West* do not represent a standard for measuring the priority given to compactness. Respondents' Br. at 2; Respondent-Intervenors' Br. at 1. Thus, it appears that respondents and respondent-intervenors agree with the circuit court that *Jamerson* and *Wilkins v. West* are not relevant to the priority accorded to compactness over discretionary criteria. It remains unclear then, what standard, if any, the General Assembly applied to ensure that it gave priority to compactness over discretionary criteria.

3. The General Assembly Must Articulate a Standard for Complying with Article II, § 6 of the Virginia Constitution

The General Assembly must give priority to compactness over discretionary criteria. *See Brown*, 159 Va. at 43-44, 166 S.E. at 110-11; *Wilkins v. Davis*, 205 Va. at 809-10, 139 S.E. at 853-54. In *Brown*, this Court considered the equal-population requirement as it relates to discretionary criteria and explained that the legislature must abide by certain principles to comply with that requirement. *Brown*, 159 Va. at 47-48, 166 S.E. at 111. *See also Wilkins v. Davis*, 205 Va. at 811-12, 139 S.E. at 854-55 (discussing standards governing obligation to comply with equal-population requirement).

With respect to the equal-population requirement, the Court has explained that, although mathematical exactness is not required, deviations must not be unreasonable. *See Brown*, 159 Va. at 43-44, 166 S.E. at 110-11 ("Mathematical exactness, either in compactness of territory or in equality of population, cannot be attained, nor was it contemplated in the provisions of section 55"); *see also Cosner v. Dalton*, 522 F. Supp. 350, 356 (E.D. Va. 1981) (explaining that "deviations from the ideal are permissible if they are 'are based on legitimate considerations incident to the effectuation of a rational state policy'") (quoting *Reynolds*, 377 U.S. at 579)). The Court has also explained that "small or trivial deviation from equality of population" would not suffice to demonstrate a violation and that plaintiffs must demonstrate that the deviation is "a grave, palpable and unreasonable deviation from the principles fixed by the Constitution." *Brown*, 159 Va. at 44, 166 S.E. at 110-11. The Court's decisions established a standard under which the General Assembly and plaintiffs could present evidence demonstrating compliance (or non-compliance) with the constitutional requirement.

The Court's decisions demonstrate that *identifying the relevant standard* is a first and necessary step in determining whether the General Assembly's actions (or inaction) exceeded the constitutional limitations on

its discretion. *See id.* at 45, 166 S.E. at 111; *Wilkins v. Davis*, 205 Va. 811-13, 139 S.E.2d 854-55. In particular, the General Assembly must present "*relevant and material* evidence of reasonableness sufficient to make the question fairly debatable." *See Vienna Council v. Kohler*, 218 Va. 966, 977, 244 S.E.2d 542, 548 (1978) (upholding trial judge's finding that city council's actions were "arbitrary, capricious, unreasonable and illegal" because they were not related to the purported justifications) (emphasis added). Without first establishing the relevant standard, the Court cannot properly apply the fairly debatable standard to evaluate the parties' evidence.

4. This Court Must Identify a Constitutionally Sound Standard for Giving Priority to Compactness over Discretionary Criteria before Applying the Fairly Debatable Standard of Review

The circuit court's decision demonstrates that the failure first to identify the relevant standard makes it impossible to apply properly the fairly debatable standard. *See* Op. at 12-15. In evaluating respondents' evidence, the circuit court did not discuss *how* the General Assembly demonstrated that it had given priority to compactness over discretionary criteria. Op. at 13-15.

To demonstrate compliance, respondents simply presented conclusory statements that the General Assembly satisfied "'all

constitutional requirements,' *presumably* including compactness." *See id.* at 7. Nonetheless, the circuit court found the evidence to be "fairly debatable" and, therefore, ruled in favor of respondents. *Id.* at 13-15. The circuit court's decision suggests that all the General Assembly must do to demonstrate that it complied with its constitutionally mandated obligations is for it to simply assert that it did so. *See* Pet. at 13-15 (Delegate Chris Jones claimed that priority had been given to compactness but failed to explain how). The Virginia Constitution requires more. *See Brown*, 159 Va. at 47, 166 S.E. at 105 (legislature's failure to make a "*bona fide* effort" to satisfy equal population requirement was unconstitutional). As with the equal population requirement, the General Assembly must apply constitutionally sound standards to demonstrate that it gave priority to compactness over discretionary criteria. *See Brown*, 159 Va. at 47, 166 S.E. at 111.

The Constitution does not define "compact" or offer guidance as to how compactness is to be given priority. However, the absence of specific guidance in the Constitution does not mean the General Assembly lacks any obligation to satisfy this requirement. *See id*. The General Assembly is afforded wide discretion in determining the standards it applies to give priority to compactness. The Court must then determine whether the

standards are constitutionally sound. *See id.* at 36, 166 S.E. at 107 (citations omitted) (finding that whether the legislature's actions exceed constitutional limitations is a question for the courts). *See also Cosner v. Robb*, 541 F. Supp. 613, 619 (E.D. Va. 1982) (stating that authoritative construction of the "contiguous and compact" clause is to be made by the Supreme Court of Virginia).

Even though giving priority to compactness does not lend itself to easily identifiable standards, that difficulty does not excuse the General Assembly from complying with its obligation to identify such a standard or to respond to evidence indicating that it ignored any such standard. It also does not relieve the Court of its duty to review the General Assembly's actions for compliance with constitutional obligations. In *Wilkins v. Davis*, the Court noted the importance of adhering to the constitutional requirements even when it is difficult to do so. The Court explained

> While it may not be possible to draw congressional districts with mathematical precision, that is no excuse for ignoring our Constitution's plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives. That is the high standard of justice and common sense which the Founders set for us.

Wilkins v. Davis, 205 Va. at 811, 139 S.E.2d at 854 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964)). Thus, the difficulty of achieving perfectly equal representation or undisputed compactness is no excuse for ignoring

the Constitution's requirement that the General Assembly strive to achieve these objectives.

The Constitution "places limitations on the discretion of the legislature," and whether the legislature's act exceeds those limitations is a judicial question for the courts. *Brown*, 159 Va. at 36, 166 S.E. at 107 (citations omitted). *See also Gomillion v. Lightfoot*, 364 U.S. 339, 345 (1960) (rejecting argument that impairment of voting rights would be permissible if "cloaked in the garb of the realignment of political subdivisions."). The judiciary, as "a separate, co-equal, and apolitical branch of government, must not concern itself with the political implications" of a challenged redistricting plan. *See Wilkins v. West*, 264 Va. at 480-81, 571 S.E.2d at 119 (Hassell, J., concurring). Even if the General Assembly has wide discretion for much of its deliberations, it must still demonstrate to the Court that it complied with constitutional requirements. *See id.*; *Edwards v. Vesilind*, 292 Va. 510, 790 S.E.2d 469 (2016). Otherwise, the General Assembly's compliance (or noncompliance) with constitutional requirements would be beyond judicial review.

Identifying the appropriate standard for determining if compactness has been given priority over discretionary criteria is essential to the proper

application of the fairly debatable standard and for the protection of fundamental rights. It is impossible to apply the fairly debatable standard to the General Assembly's actions unless it articulates the compactness standard it used to give priority to compactness over discretionary criteria. The proper application of the fairly debatable standard is particularly important here because giving priority to discretionary criteria, such as incumbency over compactness, works to weaken voters' power at the polls. *See, e.g.*, *Town of Leesburg*, 280 Va. at 609-10, 701 S.E.2d at 789-90 (fairly debatable standard based on principle of voters' ability to hold legislators accountable) (Russell, J., dissenting); *see also Gomillion*, 364 U.S. at 347-48 (explaining that the state is not insulated from judicial review when it uses state power "as an instrument for circumventing a federally protected right").

Under the fairly debatable standard, the General Assembly must present evidence that it gave priority to compactness over discretionary criteria the failure to take any action would be unconstitutional. *See Brown*, 159 Va. at 47, 166 S.E. at 111. Such evidence must be relevant and material to demonstrating how the General Assembly gave priority to compactness. *See Vienna Council*, 218 Va. at 977, 244 S.E.2d at 548. If the General Assembly's evidence of reasonableness is insufficient, the

Court must find that its actions (or inactions) are unconstitutional. *See Bd. of Supervisors v. McDonald's Corp.*, 261 Va. 583, 590, 544 S.E.2d 334, 338-39 (2001) (finding that if defendants' "evidence of reasonableness is insufficient," the presumption of reasonableness is overcome).

Finally, proper application of the fairly debatable standard is necessary to ensure that the Court protects the fundamental rights embodied by the compactness requirement. *See, e.g.*, *Karcher*, 462 U.S. at 758 (Stevens, J., concurring) (compactness serves values such as constituent representation); *Pearson*, 359 S.W.3d at 39 (compactness requirement guards against "legislative evil" of gerrymandering); *In re Legislative Redistricting*, 475 A.2d at 438 (compactness serves as "an anti-gerrymandering safeguard" to protect effective representation). *See also* Commentaries I at 415 ("contiguous and compact" requirement meant to preclude "the more obvious forms of gerrymandering").

VI. CONCLUSION

For the foregoing reasons, *amicus curiae* request that the Court accept the petition for review and require the General Assembly to identify a constitutionally sound standard for giving priority to compactness over discretionary criteria and demonstrate that it abided by that standard. *Amicus curiae* also request that the Court clarify that the standard for

determining the prioritization of compactness must first be established before the Court applies the fairly debatable standard of review. Finally, the Court should declare that the General Assembly's failure to apply any standard for giving priority to compactness is unconstitutional.

Respectfully submitted this 30th

day of June, 2017.

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Certificate of Compliance with Rules 5.17, 5:26(e), and 5:30

Rule 5:17(i)(1)

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Rule 5:17(i)(3)

This brief complies with Rules 5:30(e) and 5:17(f) because the portion subject to that rule does not exceed 35 pages.

Rule 5:17(i)(5)

Amicus curiae do not request an oral hearing.

Certificate of Service

I, Lucius B. Lau, certify that I complied with Rule 5:26(e), and on June 30, 2017, a true and accurate copy of the foregoing Motion for Leave of Court to File a Brief *Amicus Curiae* in Support of the Petitioners was delivered via email to all counsel of record.

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