Virginia:

In the Circuit Court of the City of Richmond, John Marshall Courts Building

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| **RIMA FORD VESILIND, *et al.*,** | ) | |
| | ) | |
| **Plaintiffs,** | ) | |
| | ) | |
| **v.** | ) | |
| | ) | |
| **VIRGINIA STATE BOARD OF ELECTIONS, *et al.*,** | ) | |
| | ) | |
| **Defendants,** | ) | **Case No.: CL15-3886** |
| | ) | |
| **and** | ) | |
| | ) | |
| **VIRGINIA HOUSE OF DELEGATES, *et al.*,** | ) | |
| | ) | |
| **Defendant-Intervenors.** | ) | |
| | ) | |

## OPINION AND ORDER

### *I. Introduction*

This case involves a challenge to the constitutionality of the 2011 Virginia General Assembly redistricting plan. Article II, Section 6 of the Constitution of Virginia provides in relevant part that "[e]very 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." Va. Const. art. II, § 6. The issue before the Court is whether the Virginia Legislature gave priority to the constitutionally required criterion of compactness over discretionary criteria in the 2011 redistricting with respect to eleven challenged districts (House of Delegates districts 13, 22, 48, 72, and 88, and Senate districts 19, 21, 28, 29, 30, and 37).

Plaintiffs Rima Ford Vesilind, Arelia Langhorne, Sharon Simkin, Sandra D. Bowen, Robert S. Ukrop, Vivian Dale Swanson, H.D. Fiedler, Eric E. Amateis, Jessica Bennett, Gregory Harrison, Michael Zaner, Patrick M. Condray, Sean Sullivan Kumar, and Dianne Blais (collectively "Plaintiffs") are residents and registered voters representing each of the challenged districts. Defendants are the Virginia State Board of Elections, its Chairman James B. Alcorn, Vice-Chair Clara Belle Wheeler, and Secretary Singleton B. McAllister; and the State Department of Elections, and its Commissioner Edgardo Cortés (collectively "Defendants"). Defendant-Intervenors are the Virginia House of Delegates and Virginia House of Delegates Speaker William J. Howell (collectively "Defendant-Intervenors").

Plaintiffs filed their Complaint against Defendants on September 14, 2015. By a Consent Order dated October 21, 2015, the Virginia House of Delegates and Virginia House of Delegates Speaker William J. Howell were permitted to intervene as defendants. Defendants and Defendant-Intervenors filed a Joint Motion to Stay the Proceedings in light of a concurrent federal challenge to the 2011 Virginia legislative redistricting plan in *Bethune-Hill, et al. v. Virginia State Board of Elections, et al.*, 3:14-cv-852 (E.D. Va.). Additionally, Defendant-Intervenors and several non-party legislative respondents filed motions to quash subpoena duces tecum requests by the Plaintiffs under the doctrine of legislative privilege. For the reasons and to the extent provided in the Letter Opinion of January 29, 2016, the Court denied the Joint Motion to Stay and the motions to quash the subpoenas duces tecum by Order dated February 16, 2016. Several Virginia Senators and the Division of Legislative Services ("DLS") refused to comply with the Court's February 16 Order to produce documents. At the request of the Senators and DLS, the Court held Virginia Senators John S. Edwards, Ralph K. Smith, Richard L. Saslaw, Charles J. Colgan, David W. Marsden, George L. Barker, and DLS in contempt. This discovery

dispute lead to an interlocutory appeal to the Supreme Court of Virginia, and the case was remanded to this Court for further proceedings by Order dated October 15, 2016. *See Edwards v. Vesilind*, 292 Va. 510 (2016).

Upon remand, the parties came before the Court on February 28, 2017 for a hearing on Defendant-Intervenors' Motion for Summary Judgment and Plaintiffs' Motion to Strike the Affidavits filed in Support of the Motion for Summary Judgment. By Order dated March 2, 2017, the Court denied Defendant-Intervenors' Motion for Summary Judgment and granted Plaintiffs' Motion to Strike the Affidavits.

On March 2, 2017, the parties appeared before the Court to argue Defendants' Motion *in Limine* to exclude Plaintiffs' expert witness, Dr. Michael McDonald, from anticipated testimony and evidence regarding Dr. McDonald's "new compactness test." The Court took the Defendants' Motion *in Limine* under advisement for later consideration at the time of trial. At that hearing, the Court also heard argument on Defendant-Intervenors' Motion to Stay the Proceedings in light of the United States Supreme Court decision in *Bethune-Hill, et al. v. Virginia State Board of Elections, et al.*, 137 S. Ct. 788 (2017). After considering briefs that were subsequently filed on the issue of staying the proceedings, the Court denied Defendant-Intervenors' Motion to Stay by Order dated March 7, 2017.

A three-day bench trial commenced on March 13, 2017. The parties, by agreement, introduced numerous exhibits into evidence, some of which were not specifically referred to by any witness, by counsel in argument, or otherwise. While the Court questioned then, and questions now, the efficacy of that trial procedure, it was the parties' chosen approach.

Post-trial, on March 29, 2017, the parties appeared before the Court on Plaintiffs' Motion to Grant Objection to Defendant-Intervenors' Exhibit 11, regarding the inclusion of

Dr. Gerald R. Webster's Expert Report prepared in 2001 for the trial of *Wilkins v. West*, 264 Va. 447 (2002). For the reasons stated on the record, the Court hereby **SUSTAINS** the Plaintiffs' objection to that portion of Defendant-Intervenors' Exhibit 11 (TX-11-203 to TX-11-257). Dr. Webster's Expert Report will remain in Defendant-Intervenors' Exhibit Binder, but it is marked offered and refused. Additionally, the parties agreed to a Complete List of Exhibits listing the numbers of all exhibits (both admitted and refused), providing a description of each exhibit, and identifying the location of each exhibit in their respective books. All the exhibits listed in the Complete List of Exhibits are admitted, with the exception of Defendants' Exhibit 8 (*see infra* p. 8), Defendant-Intervenors' Exhibit 11 from TX-11-001 to TX-11-028 (the body of Dr. Hofeller's Expert Report), and Defendant-Intervenors' Exhibit 11 from TX-11-203 to TX-11-257 (Dr. Webster's Expert Report from *Wilkins*), which were offered, objected to, and the Court sustained the objections.

## *II. Principles of Agreement*

At the outset, the Court takes note of several significant matters about which there is no dispute. There is no dispute that compactness is one of the "constitutionally required criteria" that must be considered in any Virginia legislative redistricting. Other constitutionally required criteria include compliance with the Voting Rights Act ("VRA"), population equality, and contiguity.

There is also no dispute that other non-constitutionally required criteria, also referred to as "discretionary criteria," are customarily and historically considered in redistricting. This fact is not only supported by history, but also by the very House and Senate Committees on Privileges and Elections resolutions upon which the 2011 legislative redistricting was authorized and based. Such things as communities of interest, pairing of incumbents, geography, and

splitting districts are all examples of discretionary criteria that are regularly considered by the Legislature in redistricting.

It is also not disputed that compactness, as a constitutionally required criterion, is to be given priority over discretionary criteria in the event of a conflict between criteria in the redistricting process. Reconciling these conflicts is part of the legislative process of redistricting.

## *III. Evidence*

### *a. Plaintiffs*

Plaintiffs allege that in the 2011 legislative redistricting process, the constitutionally required criterion of compactness was subordinated to the consideration of various discretionary criteria and as such was constitutionally flawed. Plaintiffs' position is based upon the testimony of Nicholas Mueller and Dr. Michael McDonald, and the accompanying exhibits and documentary evidence associated therewith. Dr. McDonald testified to a new compactness test that measured the degradation of compactness in the challenged districts. Dr. McDonald's test was intended to illustrate that the compactness of the challenged districts had not been given priority in the legislative reconciliation of competing criteria. The test essentially re-created the challenged districts in the most compact form Dr. McDonald could devise, but using only constitutionally required criteria (VRA requirements, population equality, contiguity, and compactness) and without any discretionary criteria. These re-created districts were referred to as "ideal" districts in "Alternative Plan 1."

The compactness of each ideal district in Alternative Plan 1 was measured by three different measurements: Reock, Polsby-Popper, and Schwartzberg.[1] Similarly, the compactness of the actual House and Senate districts in question was measured by the same three measurements. Dr. McDonald opined that the compactness scores of each existing challenged district were over fifty percent less compact than the compactness scores of the ideal districts in Alternative Plan 1. Dr. McDonald attributed this decline in compactness to the fact that the actual challenged districts considered discretionary criteria, and it was the addition of the discretionary criteria that degraded the compactness scores by more than fifty percent. This, he further opined, proves that discretionary criteria predominated over constitutionally required criteria, and therefore the redistricting violated the constitutional requirement of giving priority to compactness. Dr. McDonald referred to this test as the "predominance test."

Dr. McDonald further created "Alternative Plan 2" as part of his new compactness test, wherein the discretionary criteria of not splitting political subdivisions and not pairing incumbents were added to the ideal districts of Alternative Plan 1. The same three measurements were used to measure the compactness scores of Alternative Plan 2 districts. The Alternative Plan 2 districts also showed a degradation of compactness from Alternative Plan 1, but not as significantly as the actual existing districts degraded from Alternative Plan 1. This Alternative Plan 2 was created to demonstrate how discretionary criteria could be added back into the ideal Alternative Plan 1 districts without failing the predominance test, if compactness was prioritized.

[1] The evidence was not in conflict about the fact that there is no unanimity of opinion as to the "best" measurement standard of compactness. The parties' experts all seemed to agree that there are fifty or more measurement standards, but that Reock and Polsby-Popper are probably the most commonly used, and while Schwartzberg is used less so, it is a recognized measurement test.

After the Plaintiffs rested, Defendants and Defendant-Intervenors moved to strike the Plaintiffs' evidence, and the Court denied the motions. Accordingly, it is hereby **ORDERED** that Defendants' and Defendant-Intervenors' Motions to Strike the Plaintiffs' Evidence are **DENIED.**

*b. Defendants*

The Defendants presented the video testimony of Senator Barker, Senator Saslaw, Senator Norment, and Speaker Howell from the 2011 Senate floor debates. The Senators' testimony primarily justified the 2011 redistricting plan based on population changes, the use of population deviations, consideration of communities of interest, efforts to not split jurisdictional boundaries, overwhelming bipartisan approval, adjustments to meet the concerns of the Governor, accommodation of VRA requirements, and even some references to meeting "all constitutional requirements," *presumably* including compactness.

Defendants also presented expert testimony from Dr. M.V. (Trey) Hood III, a professor at the University of Georgia with a Ph.D. in Political Science and an expert on redistricting. Dr. Hood testified that the redistricting process usually starts with a benchmark plan, often the prior approved and implemented plan, and adjustments are made from there. Dr. Hood acknowledged that all of the challenged districts declined in compactness from their 2001 measures to their 2011 measures; however he also testified that a difference of .02 or .03 between compactness scores is not meaningful, and that some of the declines in the challenged districts' scores were that small. Dr. Hood did not agree that the Supreme Court of Virginia drew a bright-line test in *Wilkins v. West*, 264 Va. 447 (2002), or *Jamerson v. Womack*, 244 Va. 506 (1992), but agreed that the compactness scores of the existing challenged House and Senate districts herein were very similar to the compactness scores of districts challenged and approved

in *Wilkins* and *Jamerson*. *See* Pls.' Ex. 1 at J11. Dr. Hood conceded that there is a line where the compactness level would be so low as to not pass constitutional muster, but he opined that other criteria had to be considered as well, and mentioned population changes, consideration of communities of interest, efforts to not split jurisdictions or pair incumbents, core retention, and accommodation of VRA requirements. Dr. Hood conceded that Dr. McDonald's new compactness test is one approach to testing compactness, but Dr. Hood opined that Dr. McDonald's test would not sufficiently consider legislative balancing of competing criteria. Dr. Hood testified that the average degradation in compactness in the *entire* 2011 plan, not just the challenged districts, was less than fifty percent (43.14%) compared to the Alternative Plan 1 of Dr. McDonald's test. However, Dr. Hood admitted that Dr. McDonald's test would be "a measure" of a good faith effort to not degrade compactness by more than fifty percent, and that the decline in compactness from Alternative Plan 1 to the existing districts was due to the application of discretionary criteria. Dr. Hood's criticisms of Dr. McDonald's test included the failure of the test to make comparisons of the *entire plan* instead of just the challenged districts, and Dr. McDonald's use of averaging the various compactness measures.

The Defendants next offered the testimony of Senator Jeremy McPike from the 29th Senate District, who essentially testified about the ease of travel around his district and that communication with his constituents was mainly through social media.

The Defendants offered as evidence their Exhibit 8, the trial testimony of Dr. Gerald R. Webster in the 2001 redistricting challenge of *Wilkins v. West*, 264 Va. 447 (2002). This was objected to by the Plaintiffs. The Court sustained the objection for all the reasons stated on the record.

*c. Defendant-Intervenors*

The Defendant-Intervenors presented the testimony of Delegate Chris Jones, who was the chief patron of the 2011 redistricting for the House, and sponsor of the 2001 redistricting plan. Delegate Jones was also a Defendant in *Wilkins v. West*, 264 Va. 447 (2002), in which seventeen House districts of the 2001 redistricting plan were challenged for not being sufficiently compact. Delegate Jones testified that the criteria used for the 2011 plan was almost identical to that used for the 2001 plan (except for population deviation, which changed from ±2% in 2001 to ±1% in 2011) and that the 2001 plan was upheld in *Wilkins*. He testified that the Legislature used the same software, Maptitude, to create both plans, and utilized consultants and legal counsel to assist and provide guidance as to constitutional requirements. Delegate Jones repeatedly indicated that the 2011 plan complied with the 2011 House Privileges and Elections Committee resolution authorizing the plan, as well as the requirements of *Wilkins* and *Jamerson v. Womack*, 244 Va. 506 (1992). Delegate Jones conceded upon cross-examination that the compactness scores as measured by both Reock and Polsby-Popper declined or degraded in House districts 13, 22, 48, and 88 (but not 72) from the 2001 plan to the 2011 plan.[2] He maintained, however, that there was compliance with the constitutional requirement of prioritizing constitutionally required criteria over discretionary criteria. Delegate Jones testified that he believed the challenged districts were not less compact in 2011 than in 2001, despite the measurement scores indicating otherwise. He based this conclusion on his consideration of all the plan's districts and their effect upon each other, as well as his visual assessment of the plan, the ease of traversing the districts,

[2] Also the parties' Joint Exhibit J11 (contained in Plaintiffs' Exhibit 1) indicates that the average compactness scores of the challenged districts herein (2011) were less compact than the average compactness scores of the challenged districts in 2001 (*Wilkins v. West*), and the average compactness scores of the challenged districts in 1991 (*Jamerson v. Womack*).

compliance with the VRA and population equality requirements, and his 20 years of experience in the Virginia Legislature. Delegate Jones testified that compactness was not subordinated to discretionary criteria in the 2011 redistricting, and that he relied upon legal advice that the 2011 plan complied with *Wilkins* and *Jamerson*.

John Morgan testified as a demographer who draws maps for redistricting around the country, and he assisted with the House redistricting in Virginia in 2001 and 2011. He testified that he worked with Delegate Jones in 2011 and that criteria #1, 2, and 3 of the authorizing House resolution (Defendant-Intervenors' Exhibit 10) had all been complied with. He testified that during the process compactness scores were measured periodically using Reock and Polsby-Popper, and were all determined to be within acceptable ranges based on *Wilkins* and *Jamerson*. Morgan testified that while he was aware that the goal of the Republican caucus was to elect Republican delegates, he did not attempt to make the districts Republican.

Defendant-Intervenors then presented Dr. Thomas B. Hofeller, an expert in state legislative redistricting who has a Ph.D. in Government and Political Science. Dr. Hofeller has extensive experience in the field since the 1970's, and estimated he had been involved in more than 100 legislative redistricting plans. He testified that the constitutionally required criterion of compactness has always been important, and that he co-authored a book on it in the 1980's. Dr. Hofeller testified that the redistricting process is like a "three-legged stool," with the three legs being law, politics, and technical input. He acknowledged the use of Maptitude as standard practice. He testified that population changes have to be accounted for with any redistricting, and that in order to do so, existing districts have to either be stretched out to reach more growth area (or presumably moved inward to reduce), or districts are actually picked up and moved from one area of the state to another. He indicated that factors like irregular shapes of geographic

boundaries, like rivers and jagged jurisdictional boundaries, make compactness more difficult to achieve. Dr. Hofeller referred to the measurement scores of the districts challenged in *Wilkins* and *Jamerson* as the "floor" beneath which compactness scores could not go. He considered this floor to be a bright line established by the Supreme Court of Virginia. Dr. Hofeller testified that it was that simple, and that Dr. McDonald had essentially "snatched complexity out of the jaws of simplicity." He also criticized Dr. McDonald's test as an "incomplete analysis" that needs more exposure and research to prove it. He testified that Dr. McDonald's predominance test and its Alternative Plan 1 and Alternative Plan 2 are not a proper way to measure constitutional compliance regarding compactness. Dr. Hofeller also criticized the predominance test because in his opinion the overlap of the Alternative Plan 1 districts with the existing challenged districts is very low and it is therefore inappropriate to compare compactness scores.

The parties then rested their cases and presented no further evidence. The Defendants renewed their Motion *in Limine* to exclude the expert testimony of Dr. McDonald, to which the Court denied the motion for all the reasons stated on the record. The Defendants and Defendant-Intervenors then both renewed their Motions to Strike the Plaintiffs' Evidence, to which the Court denied the motions for the reasons stated on the record. Accordingly, it is hereby **ORDERED** that Defendants' Motion *in Limine* to exclude Dr. McDonald's testimony is **DENIED**, and the Defendants' and Defendant-Intervenors' renewed Motions to Strike the Plaintiffs' Evidence are **DENIED**.

*IV. Relevant Law*

Legislation is entitled to a "strong presumption of validity" and will be invalidated by the Court only if it clearly violates a constitutional provision. *Wilkins v. West*, 264 Va. 447, 462 (2002); *Jamerson v. Womack*, 244 Va. 506, 510 (1992).

The Supreme Court of Virginia has previously noted that Article II, Section 6 of the Constitution of Virginia speaks in mandatory terms, stating that districts "shall be" compact and contiguous. *Wilkins*, 264 Va. at 462. However, this directive does not override all other elements pertinent to redistricting, as the General Assembly is required to satisfy a number of additional state and federal constitutional and statutory provisions. *Id.*; *Jamerson*, 244 Va. at 511. The General Assembly must exercise its discretion in reconciling these often competing criteria. *Wilkins*, 264 Va. at 462.

When a statute's constitutionality depends on facts, the legislature's factual determination will be set aside if it is clearly erroneous, arbitrary, or wholly unwarranted. *Id.* If the evidence offered in support of those facts would lead reasonable, objective persons to reach different conclusions, then the legislative determination is fairly debatable and must be upheld. *Id.*; *Jamerson*, 244 Va. at 509-10.

In applying this standard, Courts "have nothing to do with the question whether or not legislation is wise and proper," and will declare a statute null and void only where it is "plainly repugnant" to a constitutional provision. *Jamerson,* 244 Va. at 510 (quoting *City of Charlottesville v. DeHaan*, 228 Va. 578, 583-84 (1984)). Even where districts are not ideal in terms of compactness, the Court "must give proper deference to the wide discretion accorded [to] the General Assembly in its value judgment of the relative degree of compactness when reconciling the multiple concerns of apportionment." *Id.* at 517.

## *V. Analysis and Ruling*

Plaintiffs' case is entirely dependent upon Dr. McDonald and his new compactness test, which applies the principle of "predominance" to the issue of compactness. While that test is novel and untested in this context, the Court does find that Dr. McDonald's testimony and accompanying conclusions do merit serious consideration. Certainly it appears that the adding of discretionary criteria to the legislative redistricting process increased the degradation of the districts' compactness. The predominance test and resulting conclusions appear to be relevant, logical, and founded on generally acceptable compactness measurements. While there certainly was criticism by the Defendants' and Defendant-Intervenors' experts, the Court finds that criticism was not so eviscerating as to leave no room for the Court's consideration of the predominance test and Dr. McDonald's conclusions. In fact, the Court finds some degree of persuasiveness to both the test and Dr. McDonald's conclusions.

The Defendants and Defendant-Intervenors case is primarily supported by their experts, Dr. Hood and Dr. Hofeller, as well as Delegate Chris Jones. Both Dr. Hood and Dr. Hofeller acknowledged in their own separate ways that Dr. McDonald's test was at least one method of scoring compactness in the redistricting process. However, both experts found flaws with the use of the predominance test as a touchstone for scoring compactness. They seemed to agree in their criticisms, citing among other things the test's failure to properly account for discretionary criteria.

Additionally, Dr. Hofeller opined that the numerical compactness scores of the challenged and approved districts in *Wilkins v. West*, 264 Va. 447 (2002), and *Jamerson v. Womack*, 244 Va. 506 (1992), created a "floor," and that any constitutional challenge to compactness should simply be measured against that floor. As such, Dr. Hofeller testified that

Dr. McDonald's predominance test overly complicates the analysis. However, this Court does not agree that the Supreme Court of Virginia has ever established a constitutionally required minimum compactness score for measuring the priority given to compactness in drawing legislative districts. Rather, 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. That notwithstanding, the analogy drawn to the district scores in *Wilkins* and *Jamerson* is a factor to be considered.

The testimony of Delegate Chris Jones was informative on the overall process, and provided explanation for how the 2011 legislative redistricting plan was ultimately approved and considered constitutionally sound.

The problem the Plaintiffs face in sustaining their burden is the standard by which this Court must judge the legislative actions in question. Unlike the preponderance of the evidence standard, which only requires the Court to find the greater weight of the evidence, the standard set by the Supreme Court of Virginia in *Wilkins v. West* and *Jamerson v. Womack* requires that if the evidence offered by both sides of the case would lead reasonable and objective persons to reach different conclusions, then the legislative determination is "fairly debatable" and must be upheld. *Wilkins,* 264 Va. 447, 462 (2002)*; Jamerson*, 244 Va. 506, 509-10 (1992).

This Court "must give proper deference to the wide discretion accorded [to] the General Assembly in its value judgment of the relative degree of compactness when reconciling the multiple concerns of apportionment." *Jamerson*, 244 Va. at 517. Weighing the test, opinions, and conclusions of Dr. McDonald and Mr. Mueller on one side, against the testimony of Dr. Hood, Delegate Chris Jones, and Dr. Hofeller on the other side, would in the opinion of the Court, lead reasonable and objective people to differ. As such, the Court must find that the constitutional

validity of the Virginia Legislature's 2011 redistricting plan is "fairly debatable" and must be upheld.

Therefore, based on the law and the evidence as set out above, the Court hereby **FINDS** in favor of the Defendants and Defendant-Intervenors, and it is hereby **ORDERED** that Plaintiffs' Complaint seeking a declaration of the unconstitutionality of the adopted legislative plans is **DENIED**; Plaintiffs' request that the Court declare the challenged House and Senate districts to be in violation of the Virginia Constitution and of no effect is **DENIED**; Plaintiffs' request for a permanent injunction enjoining Defendants from giving effect to the boundaries of the challenged districts is **DENIED**; and Plaintiffs' request for an award of attorneys' fees and costs is **DENIED**.

Pursuant to Rule 1:13 of the Supreme Court of Virginia, the Court dispenses with the parties' endorsement of this Order.

The Clerk is directed to forward a certified copy of this Order to the parties.

It is so **ORDERED**.

ENTER: 3/31/17

W. Reilly Marchant, Judge