

IN THE
SUPREME COURT OF VIRGINIA

Record No. 210770

TREY ADKINS, et al.,
Petitioners,

v.

VIRGINIA REDISTRICTING COMMISSION, et al.,
Respondents.

CORRECTED BRIEF ON BEHALF OF THE VIRGINIA STATE
CONFERENCE OF THE NAACP, RISE FOR YOUTH, AND THE
VIRGINIA INTERFAITH CENTER FOR PUBLIC POLICY AS *AMICI*
CURIAE IN SUPPORT OF RESPONDENTS

Of Counsel

JON GREENBAUM
(PRO HAC VICE MOTION PENDING)
RYAN SNOW
(PRO HAC VICE MOTION PENDING)
LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW
1500 K Street, NW, Suite 900
Washington, D.C. 20005
(202) 662-8600
(202) 783-0857 (fax)
jgreenbaum@lawyerscommittee.org
rsnow@lawyerscommittee.org

N. THOMAS CONNALLY III
(VSB No. 36318)
HOGAN LOVELLS US LLP
8350 Broad Street, 17th Floor
Tysons, VA 22102
(703) 610-6100
(703) 610-6200 (fax)
tom.connally@hoganlovells.com

JESSICA L. ELLSWORTH
(VSB No. 46832)
HOGAN LOVELLS US LLP
555 13th St NW
Washington, D.C. 20004
(202) 637-5600
(202) 637-5910 (fax)
jessica.ellsworth@hoganlovells.com

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES.....	ii
INTEREST OF AMICI	1
ARGUMENT.....	1
A. Mass Incarceration in Virginia	3
B. Prison Gerrymandering in Virginia	4
C. Fair Distribution of Prison Populations	7
D. “Cracking” and “Packing” Standards	8
CONCLUSION	10
CERTIFICATE	

TABLE OF AUTHORITIES

Cases:

<i>Cooper v. Harris</i> , 137 S. Ct. 1455 (2017).....	9
<i>Ketchum v. Byrne</i> , 740 F.2d 1398 (7th Cir. 1984).....	9
<i>Perez v. Abbott</i> , 253 F. Supp. 3d 864 (W.D. Tex. 2017).....	9

Constitution and Statutes:

Va. Const. Art. I, Sec. 11.....	8
Va. Const. Art. II Sec. 1.....	4
Va. Const. Art. II Sec. 6.....	8
Va. Code § 24.2-304.04.....	1, 2, 6, 8, 9

Other Authorities:

Christina Rivers, <i>A Brief History of Felon Disenfranchisement and Prison Gerrymanders</i> , <i>The American Historian</i> (Nov. 2017).....	8
Dale Ho, <i>Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle</i> , <i>Stanford Law and Policy Review</i> , at 363-364 (June 5, 2011).....	7
Erika L. Wood, <i>Implementing Reform: How Maryland & New York Ended Prison Gerrymandering</i> , <i>Demos</i> 3 (Aug. 2014).....	7
The Vera Institute of Justice, <i>Incarceration Trends in Virginia</i> , at 1 (December 2019).....	3, 4
U.S. Census Bureau, Population Division, <i>Annual Estimates of the Population by Sex, Race, and Hispanic Origin for Virginia: April 1, 2010 to July 1, 2019</i> (June 2020).....	3

Virginia Dep't of Corrections, *State Responsible Offender Population Trends; FY2015-FY2019*, at 7 (Jan. 2020) 4, 5

Virginia Public Access Project, *End of "Prison Gerrymandering" Saps Rural Virginia*, (April 14, 2021)..... 5

Virginia Public Access Project, *Prison Policy Shifts Population from Rural to Urban*, (Aug. 28, 2021) 5

INTEREST OF AMICI

The Virginia State Conference of the NAACP, RISE for Youth, and the Virginia Interfaith Center for Public Policy submit this amicus brief in support of Respondents. Amici are organizations that represent and serve communities of color across Virginia. They are committed to ensuring political equality for all citizens. As such they have a strong interest in defending Virginia Code Section 24.2-304.04, which provides protections for racial minority communities in the redistricting process and ends prison gerrymandering in Virginia.

ARGUMENT

In 2020, Virginia took an important step towards creating a more equitable redistricting process. For years, Virginia had utilized tools in redistricting that disadvantaged communities of color throughout the Commonwealth. Specifically, the General Assembly adopted a practice when drawing district lines of including individuals temporarily confined to correctional facilities within the total population counts of the mostly rural and largely White communities where those facilities were located. This practice ignored the fact that a significant proportion of the people confined in those facilities were Black Virginians transferred hundreds of miles from their home communities. This practice ignored the fact that those Black

Virginians overwhelmingly had little to no connection to the communities hosting their temporary carceral quarters, and that those Black Virginians were entirely disenfranchised while in prison. Instead, in a throwback to the era of the infamous “Three-Fifths Clause” in the original United States Constitution, redistricting in Virginia involved giving extra representational weight to rural White voters by padding their population statistics with Black people deprived of any voice in the political process. In 2020, the General Assembly finally put an end to this nefarious practice. See Va. Code § 24.2-304.04(9).

This same statute also provides additional protections for Virginia’s communities of color. These include standards prohibiting both “cracking” racial minority voters into multiple districts and “packing” them into a single district in a broader effort to dilute their political power. Va. Code § 24.2-304.04(3). Such redistricting techniques have been used by map-drawers in Virginia for decades to reduce the representation of communities of color. But the General Assembly sought expressly to end those practices and ensure that the 2020 redistricting process in Virginia would be fairer than it had ever been before.

Petitioners in this action seek to reinstate prison gerrymandering, and thereby move Virginia backwards in its efforts to end the dilution of racial

minority voting strength. Their goal is to enhance their own political power. See Pet'rs Br. at 23. But they seek to enhance their power at the expense of the fair representation of Black communities and other communities of color across the Commonwealth.

A. Mass Incarceration in Virginia

Incarceration in Virginia has exploded over the last several decades. Since 1983, the prison population of Virginia has more than doubled, with well over 30,000 individuals confined in State correctional facilities by 2018.¹ Similarly, between 1970 and 2015, the population of individuals incarcerated in jails in Virginia increased eightfold, to nearly 30,000 individuals statewide.²

The impact of this rapid increase in incarceration has not fallen evenly across communities in Virginia. Black Virginians have long made up a disproportionate share of the Commonwealth's incarcerated population. For example, in 2019, while 20% of Virginia's total population was Black,³

¹ The Vera Institute of Justice, *Incarceration Trends in Virginia*, at 1 (December 2019) <https://www.vera.org/downloads/pdfdownloads/state-incarceration-trends-virginia.pdf>.

² *Id.*

³ U.S. Census Bureau, Population Division, *Annual Estimates of the Population by Sex, Race, and Hispanic Origin for Virginia: April 1, 2010 to July 1, 2019* (June 2020).

Black Virginians made up over 50% of the confined inmate population.⁴ Similarly, in 2015, 43% of individuals held in Virginia's jails were Black.⁵ These glaring racial disparities in incarceration have existed in Virginia for years, and have resulted in a range of significant economic and political disadvantages in Black communities across the Commonwealth. Notably, because Virginia disenfranchises voters convicted of felony offenses, by 2020 the right to vote had been revoked for an estimated one in six Black Virginians, compared to just one in twenty Virginians overall.⁶

B. Prison Gerrymandering in Virginia

Mass incarceration has also disempowered Black communities through redistricting in Virginia by artificially inflating the total population numbers of communities where correctional facilities are located, while simultaneously deflating the population of the communities where the majority of incarcerated individuals are from.

Correctional facilities tend to be located in rural areas of the Commonwealth. An analysis from earlier this year found that over 38,000 individuals, making up approximately 72% of Virginia's total incarcerated

⁴ Virginia Dep't of Corrections, *State Responsible Offender Population Trends; FY2015-FY2019*, at 7 (Jan. 2020) <https://vadoc.virginia.gov/media/1473/vadoc-offender-population-trend-report-2015-2019.pdf>.

⁵ The Vera Institute of Justice, *Incarceration Trends in Virginia*, at 1.

⁶ Va. Const. Art. II Sec. 1.

population, were confined in rural areas.⁷ Yet, for over 55% of the individuals confined in those rural correctional facilities, their most recent address was in an urban or suburban area of the Commonwealth.⁸ As a result, Virginia's carceral system massively inflated the population counts of rural communities at the expense of suburban and urban communities. Indeed, preliminary analysis of recently released Census data suggests that counting incarcerated individuals at correctional facilities artificially depressed the populations of Richmond City and Norfolk City, two urban areas with large Black populations, by nearly 2,000 people each.⁹

The communities hosting correctional facilities also have stark racial differences from the populations confined in those facilities. Senate District 38, where Petitioners in this action live, provides a particularly compelling example. This District hosts five correctional facilities, which, in 2019, held 4,170 individuals, of which approximately 1,850, or 44% of the total, were Black.¹⁰ But, according to the 2020 Census, only 4% of Senate District 38's

⁷ Virginia Public Access Project, *End of "Prison Gerrymandering" Saps Rural Virginia*, (April 14, 2021) <https://www.vpap.org/visuals/visual/transfer-clout-rural-to-urban/>.

⁸ *Id.*

⁹ Virginia Public Access Project, *Prison Policy Shifts Population from Rural to Urban*, (Aug. 28, 2021) https://www.vpap.org/visuals/visual/prisons_population_losers/.

¹⁰ Virginia Dep't of Corrections, *State Responsible Offender Population Trends; FY2015-FY2019*, at 99, 101, 103, 104, and 106.

population are Black, while over 90% are White. This also means that approximately 20% of the 7,478 Black residents in District 38 are incarcerated with no voice in the political process. It also means that, under Petitioners' position, a population that is more than 90% White would continue to maintain the political power that comes from "representing" 4,170 incarcerated individuals—44% of whom are Black, and none of whom can vote while incarcerated—while robbing this same representational weight and resulting political power from the communities these individuals are from.

Before 2020, Virginia legislators tasked with drawing district lines every ten years simply accepted the artificial population inflation and representational distortion caused by the carceral system. This fundamentally unjust practice—the routine transfer of power from communities of color in diverse urban areas to rural and overwhelmingly White communities—is what Petitioners seek to restore with this action.

Responding to the inequity inherent in this practice, the Virginia General Assembly enacted a law in 2020 that ensured individuals confined to correctional facilities would be counted at their last known address. Va. Code § 24.2-304.04(9).

C. Fair Distribution of Prison Populations

Prison gerrymandering is fundamentally unfair because voters in the districts where correctional facilities are located have no incentive or ability to adequately represent the interests of a disenfranchised incarcerated population.¹¹ To the contrary, these communities benefit economically from having correctional facilities located in their districts. The facilities provide jobs to local residents, and guaranteed consumption of local services, such as healthcare, paid for by the Commonwealth.¹² As a result, these communities have an undeniable incentive to maintain, and even expand, Virginia's carceral system and imprisoned population. This is an economic incentive to support mass incarceration.¹³ There should not also be a political incentive to support mass incarceration.

In contrast, the disenfranchised individuals who are merely temporarily confined in these rural communities have no interest in the continued maintenance or expansion of mass incarceration. Nor do the

¹¹ Dale Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, Stanford Law and Policy Review, at 363-364 (June 5, 2011).

¹² While Petitioners assert that they expend significant resources supporting local facilities, Petr's Brief at 23, they fail to note that they are compensated by the State for most services provided at State-run correctional facilities, and that they receive innumerable other economic and political benefits from their proximity to these facilities.

¹³ Erika L. Wood, *Implementing Reform: How Maryland & New York Ended Prison Gerrymandering*, Demos 3 (Aug. 2014).

vast majority of these individuals have any personal or familial connections to the communities in which they are confined such that their interests might be represented—or even understood—by the voters in their prison district. Rather, the only communities likely to represent and act and advocate on their behalf are those of their families and friends, where they are from and where they will almost certainly return upon serving their sentence.

Petitioners seek to reinstate a redistricting system that provides rural White communities with the representational weight of disenfranchised, mostly Black incarcerated individuals whom the officials elected from these districts have no incentive to actually represent. Indeed, representatives elected from districts where correctional facilities are located routinely express that they do not view incarcerated individuals as constituents.¹⁴

D. “Cracking” and “Packing” Standards

Petitioners claim that Code § 24.2-304.04(3) violates the equal protection and apportionment clauses of the Virginia Constitution (Art. I, Sec. 11, Art. II, Sec. 6), because it expressly prohibits “cracking” (“dispers[ing]” voters of color into districts in which they constituted an

¹⁴ Christina Rivers, *A Brief History of Felon Disenfranchisement and Prison Gerrymanders*, *The American Historian* (Nov. 2017) <https://www.oah.org/tah/issues/2017/november/a-brief-history-of-felon-disenfranchisement-and-prison-gerrymanders>.

“ineffective minority”) and “packing” (“concentrat[ing] voters of color into districts where they constituted an “effective majority”). Incongruously, Petitioners argue that “in reality,” this prohibition will result in “diluting minority votes.” (Pet. At 25).

Petitioners’ argument makes no sense. First, and most important, Petitioners acknowledge—as they must—that the challenged section “works in conjunction” with Section 24.2-304.04(4), which mandates that racial and language minorities have equal opportunity to elect candidates of their choice. Thus, Petitioners’ speculation that decision-makers will hide behind the language of the section they challenge so as to dilute minority votes is necessarily based on the proposition that decision-makers would ignore the rest of the statute.

Second, while there is no requirement to plead or prove allegations of “cracking” and “packing” in a case brought under the federal Voting Rights Act (VRA), they are standard allegations in intentional vote dilution claims and in racial gerrymandering cases, where evidence of intent, i.e., that “racial considerations predominated,” is required, see *Cooper v. Harris*, 137 S. Ct. 1455, 1482 (2017); *Perez*, 253 F. Supp. 3d at 939, as well as in “results” claims under Section 2 of the VRA. See generally *Ketchum v. Byrne*, 740 F.2d 1398, 1407-1408 (7th Cir. 1984) (discussing how

manipulation of boundaries by cracking and packing are standard in Section 2 cases). The beneficial provisions of the Virginia law expressly prohibiting such manipulation will necessarily be applied by this Court to achieve the clear purpose of the statute: to protect racial and language minorities from being denied the opportunity to participate equally in the political process.

CONCLUSION

The Court should reject Petitioners' petition, which seeks to reinstate an inequitable and discriminatory redistricting process in Virginia. Rejecting the petition will allow Respondents to implement standards that ensure that 2020 will be the fairest redistricting cycle in the history of the Commonwealth.

DATE: September 1, 2021

Of Counsel

JON GREENBAUM
(PRO HAC VICE MOTION PENDING)
RYAN SNOW
(PRO HAC VICE MOTION PENDING)
LAWYERS' COMMITTEE FOR CIVIL
RIGHTS UNDER LAW
1500 K Street, NW, Suite 900
Washington, D.C. 20005
(202) 662-8600
(202) 783-0857 (fax)
jgreenbaum@lawyerscommittee.org
rsnow@lawyerscommittee.org

Respectfully submitted,

HOGAN LOVELLS US LLP

By: /s/ N. Thomas Connally

N. THOMAS CONNALLY III
(VSB No. 36318)
HOGAN LOVELLS US LLP
8350 Broad Street, 17th Floor
Tysons, VA 22102
(703) 610-6100
(703) 610-6200 (fax)
tom.connally@hoganlovells.com

JESSICA L. ELLSWORTH
(VSB No. 46832)
HOGAN LOVELLS US LLP
555 13th St NW
Washington, D.C. 20004
(202) 637-5600
(202) 637-5910 (fax)
jessica.ellsworth@hoganlovells.com

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of September, 2021, in compliance with Rule 5:1B(c) of this Court, I did serve via email a true and correct electronic version of this document upon counsel for all parties in this case, namely:

- M. Brett Hall, counsel for Petitioners, at Mbretthall.law@gmail.com
- H. Christopher Bartolomucci, counsel for Respondents, at cbartolomucci@schaerr-jaffe.com
- Gerry Hebert, counsel for Respondents, at hebert@voterlaw.com
- Michelle S. Kallen, counsel for Respondents, at MKallen@oag.state.va.us
- Heather Hays Lockerman, counsel for Respondents, at HLockerman@oag.state.va.us
- Brittany J. Record, counsel for Respondents, at BRecord@oag.state.va.us
- Carol L. Lewis, counsel for Respondents, at CLewis@oag.state.va.us

By: /s/ N. Thomas Connally

CERTIFICATE OF SERVICE

I hereby certify that on the 7th day of September, 2021, I did serve via email a true and correct electronic version of this Corrected Amicus Brief upon counsel for all parties in this case previously served on September 1, 2021.

By: /s/ N. Thomas Connally