
In The
Supreme Court of Virginia

RECORD NO. 210770

**TREY ADKINS, DAVID EATON, CRAIG STILTNER, ROBERT
MAJORS, MARGARET ANN ASBURY, CHARLES STACY,
AND SENATOR THURMAN TRAVIS HACKWORTH,**
Petitioners,

v.

VIRGINIA REDISTRICTING COMMISSION, et al,
Respondents.

**AMICI CURIE, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF
VIRGINIA, THE LEAGUE OF WOMEN VOTERS OF VIRGINIA, AND THE
NATIONAL BLACK NONPARTISAN REDISTRICTING ORGANIZATION TO
VERIFIED PETITION FOR WRIT OF MANDAMUS
IN SUPPORT OF THE RESPONDENTS**

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STATEMENT OF AMICI

The American Civil Liberties Union Foundation of Virginia (ACLU of Virginia) is a statewide, nonprofit, nonpartisan organization with approximately 28,000 members. The ACLU of Virginia appears frequently before the state and federal courts of this Commonwealth, both as counsel and as amicus curiae. The issues presented in this case are of particular importance to the ACLU of Virginia given our advocacy around explicitly guaranteeing the right to vote in the Virginia Constitution, including to incarcerated persons, and thereby bringing an end to felony disenfranchisement. Like felony disenfranchisement, prison gerrymandering has a profound impact on the electoral strength of communities of color and particularly Black communities, as racial disparities in incarceration rates combine with the concentration of prisons in overwhelmingly white parts of the state to transfer political power away from Black communities—an effect that is compounded by the disenfranchisement of 1 in 7 Black Virginians who are unable to have a say in local electoral politics of either their prison districts or the communities from which they hail. Further, the elected representatives from prison districts are beholden not to incarcerated people or their families—who cannot vote for them and generally live elsewhere in the Commonwealth—but to the correctional officials and employees whose livelihood depends on the continued existence of the prisons and the disenfranchised prisoner populations who expand their political

power. Ending prison gerrymandering helps correct that distortion, increases political accountability, and removes an incentive for rural areas to build large prisons to gain political power. Because this case addresses an important question related to prison gerrymandering, its proper resolution is a matter of concern for the ACLU of Virginia and its members and supporters.

The League of Women Voters of Virginia (LWV-VA) is a nonpartisan, nonprofit membership organization that works on voting rights and redistricting issues in Virginia, has advocated for passage of the 2020 House Bill 1255 to end prison-based gerrymandering, and has testified before the Virginia Redistricting Commission in support of fair maps that lift up the voices of diverse communities and put power back into the hands of voters. LWV-VA provides its members and the public with information about voting laws and practices, fosters civic engagement, and works to ensure that all Virginia citizens over the age of eighteen, particularly those from traditionally underrepresented or underserved communities, and including those who are incarcerated, have the right to vote as well as the opportunity and information they need to exercise that right. LWV-VA has been active in efforts to bring about a nonpartisan process for drawing legislative lines, and the organization participates in coalition with other organizations and individuals to help educate and inform voters about the importance of redistricting. LWV-VA has a demonstrated interest in voting rights and redistricting in Virginia.

Because this case addresses an important question related to redistricting, voting rights, and prison-based gerrymandering in Virginia, its proper resolution is a matter of concern for the League of Women Voters of Virginia and its members and supporters.

The National Black Nonpartisan Redistricting Organization (NBNRO) was established to ensure that Black and minority communities have a voice in the redistricting process occurring nationwide, including in Virginia. The NBNRO believes that redistricting represents the third prong in the overall protection of voting rights, alongside voter registration and the right to vote. The NBNRO educates Black and minority communities on redistricting and works with these communities to ensure they participate in their federal, state, and local redistricting processes. The NBNRO conducts research to assist Black and minority community members in developing plans and maps for redistricting efforts in their states and their communities and to provide information on redistricting efforts in their states. Because this case addresses an important question related to the power of Black communities in redistricting, its proper resolution is a matter of concern to NBNRO and its members and supporters.

No party's counsel authored this brief in whole or in part, and no party, party's counsel, or person other than amici, their members, or their counsel, contributed money intended to fund the brief's preparation or submission. Pursuant to Virginia

Supreme Court Rule 5:30(b)(2), amici has sought and received consent from all parties to the case to file this amicus brief.

INTRODUCTION

The writ of mandamus “is an extraordinary remedy” and the “promotion of substantial justice has served as a prerequisite to the issuance of a writ of mandamus in this Commonwealth for almost 200 years.” *In re Commonwealth of Va.*, 278 Va. 1, 15 (2009). Rather than promote substantial justice, Petitioners debase this concept by attempting to preserve a practice—prison gerrymandering—that has deprived Virginia’s Black communities of proportional representation for far too long. The Court should reject their petition.

More than a year after the General Assembly passed a bill that prohibited prison gerrymandering—the practice of counting incarcerated people at the location of carceral facilities where they are housed rather than in their home communities—and added other factors that promote racial justice in districting, Petitioners seek to block these laws. They contend without any support that some of these new Statutory Criteria, including the Anti-Prison Gerrymandering Provision, Va. Code Ann. § 24.2-304.04(9), conflict with the standards approved by Virginia voters when they amended the Virginia Constitution in 2020 (the “2020 Amendment”). The 2020

Amendment created a Redistricting Commission and provided basic standards for the drawing of congressional and state legislative districts. But Petitioners ignore that this very amendment requires that the Commission look outside of the Constitution for additional redistricting criteria, including to “federal and *state statutes* that address racial and ethnic fairness.” Va. Const. art. II, § 6 (emphasis added). The Anti-Prison Gerrymandering Provision is exactly such a statute.

The Anti-Prison Gerrymandering Provision ends for purposes of reapportionment and redistricting the practice of counting incarcerated persons as residents of the prisons where they are involuntarily confined. This practice is known as “prison gerrymandering” because it transfers political power from areas without prisons to areas with them, and from the mostly urban and suburban communities from which Virginia’s incarcerated population disproportionately hails—and to which they are more closely connected—to the rural communities in Virginia where they are disproportionately imprisoned.¹ In prohibiting this practice, Virginia has

¹ For additional information, see *Calvin v. Jefferson Cnty. Bd. of Commissioners*, 172 F. Supp. 3d 1292, 1312 (N.D. Fla. 2016) (explaining that “including a relatively large, geographically compact group of [incarcerated individuals] in a district [where their carceral facility happens to be located] impermissibly dilutes the voting *and* representational strength of people in *other* districts.”). See generally Dale E. Ho, *Captive Constituents: Prison-Based Gerrymandering and the Current Redistricting Cycle*, 22 Stan. L. & Pol’y Rev. 355 (2011).

joined a growing list of states that have ended the practice, which now number around a dozen, as compared to only three in the 2010 redistricting cycle.²

Engaging in prison gerrymandering and allocating incarcerated individuals to a geographical location to which they have no “element of allegiance or enduring tie,” *Franklin v. Massachusetts*, 505 U.S. 788, 804 (1992), harms the principle of representational equality and is tantamount to racial vote dilution. Black Virginians make up less than 21 percent of Virginia’s population, but comprise approximately 56 percent of Virginia’s incarcerated population. Prison gerrymandering also compounds the racially disproportionate effect of Virginia’s felony disenfranchisement policy. It does so not only by denying the majority-Black incarcerated population the right to vote, but also by increasing the power of districts represented by elected officials who, like several of the Petitioners, benefit politically from their continued incarceration. Virginia’s prisons are disproportionately located in predominantly white, rural communities. By allocating

² Compare Nat’l Conf. of State Legislatures, *Reallocating Inmate Data for Redistricting* (Aug. 20, 2021), <https://www.ncsl.org/research/redistricting/reallocating-incarcerated-persons-for-redistricting.aspx> (citing laws in California, Colorado, Connecticut, Delaware, Illinois, Maryland, Nevada, New Jersey, New York, Virginia, and Washington), and Madeleine Carlisle & Sanya Mansoor, ‘*We Are Standing up for Equal Treatment Before the Law.*’ *Pennsylvania Abolishes Prison Gerrymandering*, Time, Aug. 24, 2021, <https://time.com/6092470/prison-gerrymandering-pennsylvania-abolished/>, with Ho, *supra* note 1 (citing only Maryland, Delaware, and New York as not using a prison-gerrymandered population base in the 2010 redistricting cycle).

incarcerated Virginians to the home communities to which they almost always return after serving their sentence³ rather than to their carceral locations, where they live for an average of only 2.6 years,⁴ Virginia follows the path of a nearly a dozen other states in remedying the unjust and racially dilutive effect of prison gerrymandering.

Even if the Court declines to find that the Anti-Prison Gerrymandering Provision is a state statute that promotes racial fairness, neither it nor the other factors in Va. Code Ann. § 24.2-304.04 (the “Statutory Factors”) conflict with the Virginia Constitution. Because the Provision affects the population base for districting rather than the process of drawing lines, it does not implicate the 2020 Amendment. Moreover, the only two other Statutory Factors that Petitioners claim conflict with the 2020 Amendment merely incorporate standards recognized under Section 2 of the Voting Rights Act of 1965—a statute explicitly incorporated into the 2020 Amendment as a districting factor.

Nor should the Court seriously entertain Petitioners’ argument that the Anti-Prison Gerrymandering Provision violates any other federal or Virginia constitutional principle, including one-person, one-vote. Every court to address this

³ *You’ve Heard about Prison Gerrymandering. What Happens When It Involves Prisons?* N.Y. Times (Apr. 11, 2021), <https://www.nytimes.com/2021/04/11/opinion/prison-gerrymandering-census.html>.

⁴ Danielle Kaebler, *Time Served in State Prisons, 2016*, U.S. Dep’t of Justice, at 1 (Nov. 2018), <https://bjs.ojp.gov/content/pub/pdf/tssp16.pdf>.

argument—including one case summarily affirmed by the U.S. Supreme Court—has rejected such a claim, finding that re-allocating incarcerated individuals to their home communities provides the type of rational, consistent, and nonarbitrary adjustment permitted by both the U.S. and state constitutions. *See, e.g., Fletcher v. Lamone*, 831 F. Supp. 2d 887 (D. Md. 2011) (three-judge court), *aff'd*, 567 U.S. 930 (2012); *In re Initiative Petition No. 426, State Question No. 810*, 465 P.3d 1244, 1255 (Okla. 2020). Indeed, a federal court even found that one county’s *failure* to eliminate prison gerrymandering violated the U.S. Constitution and principles of representational equality. *See Calvin v. Jefferson Cnty. Bd. of Comm’rs*, 172 F. Supp. 3d 1292, 1326 (N.D. Fla. 2016).

This Court should reject Petitioners’ late-hour effort to undermine legitimate, pro-democracy and pro-racial fairness reforms properly enacted by the General Assembly and specifically contemplated by the 2020 Amendment.

ARGUMENT

I. The Anti-Prison Gerrymandering Provision Promotes the Constitution’s “Racial Fairness” and Equal-Opportunity Commands by Stopping Racial Vote Dilution.

Article II, Section 6 of the Virginia Constitution requires that the Redistricting Commission must look, at a minimum, to “federal and *state laws* that address racial and ethnic fairness,” and the judicial decisions interpreting them. Va. Const. art. II, § 6 (emphasis added). One such state law is the statutory requirement to count

incarcerated persons in their home districts for purposes of apportionment and redistricting. Va. Code Ann. § 24.2-304.04(9). Therefore, even accepting Petitioners’ dubious and unsupported premise that the General Assembly may not pass legislation to refine the criteria guiding the Commission’s work, Pet. Br. 15–16, 19, the Anti-Prison Gerrymandering Provision constitutes one of those extrinsic legal sources that the Commission must follow under Section 6. Accepting Petitioners’ argument would strip the General Assembly of any power to enact laws that promote racial and ethnic fairness in districting, despite the 2020 Amendment’s explicit call for compliance with such state laws.

The provision affirmatively promotes racial fairness in redistricting by remedying disparate harm to communities of color—particularly Black communities in Virginia, whose community members are incarcerated at staggeringly disproportionate rates and housed primarily in facilities in predominantly white, rural parts of the state, as detailed below. It does so by allocating the majority-Black group of incarcerated individuals back to their home communities for districting purposes, thereby creating more equal representation for those communities. Va. Const. art. II, § 6.

The Constitution also provides that districts “shall provide, where practicable, opportunities for racial and ethnic communities to elect candidates of their choice”—language that echoes Section 2 of the Voting Rights Act of 1965 (“VRA”), which

prohibits racial vote dilution in districting. *See, e.g., League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 425–26 (2006). Indeed, the U.S. Supreme Court has recognized that the principle of representational equality seeks to prevent “debasement of voting power and diminution of access to elected representatives.” *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969). Allocating incarcerated individuals—who are disproportionately Black Virginians—to their home communities rather than to the sites of their incarceration helps to prevent severe racial disparities in districting that dilutes the voting strength of Black communities.

A. Prison gerrymandering distorts political power in a manner that disproportionately harms Black Virginians.

Across the country, prison gerrymandering has led to significant and sometimes extreme distortions in political power, often along racial lines, as well as the systematic transfer of representational power from urban to rural areas. For example, in the 2002 election cycle, the small city of Anamosa, Iowa was split into four city council wards of approximately 1,370 residents each. But one of those wards contained more than 1,300 incarcerated “residents” of a state prison and only 58 non-incarcerated residents—each of whom had approximately 25 times as much representational power as those in the other wards—allowing for the election of a councilperson with just two total votes.⁵

⁵ *See* Ho, *supra* note 1, at 362–63.

In Virginia, the failure to attribute imprisoned Virginians to their home districts for the districting population base has also produced extreme electoral skews. Analysis conducted by the Prison Policy Initiative for the League of Women Voters of Virginia and introduced in support of a 2015 anti-prison gerrymandering bill found that prison populations accounted for 51 percent of the total population of a Board of Supervisors district in Southampton County, 45 percent of the total population of a district in Buckingham County, 42 percent of the total population of a district in Nottoway County, and 36 percent of the total population of a district in Bland County, among many others.⁶

The extreme population distortions caused by prison gerrymandering produce profound impacts on the electoral strength of communities of color and particularly Black communities, as racial disparities in incarceration rates combined with the geographical concentration of the incarcerated population in overwhelmingly white parts of the state transfer political power away from Black communities. Virginians identifying in whole or part as Black constitute less than 21 percent of Virginia's population,⁷ but make up more than 55 percent of the population of Virginians

⁶ League of Women Voters of Va., *League of Women Voters of Virginia Supports HB 1465 To Count Prisoners in Their Home Districts for Redistricting Purposes*, <https://static.prisonersofthecensus.org/testimony/LWV-HB1465-written.pdf>.

⁷ See U.S. Census Bureau, *Race and Ethnicity in the United States: 2010 Census and 2020 Census* (Aug. 12, 2021), <https://www.census.gov/library/visualizations/interactive/race-and-ethnicity-in-the-united-state-2010-and-2020-census.html>.

sentenced to a year or more of incarceration (otherwise known as “state-responsible”).⁸ That population is disproportionately incarcerated in rural, whiter areas, artificially inflating rural populations and thus their representation at the expense of the suburban and urban areas—and particularly Black communities—from which the state prison population disproportionately hails. According to the Virginia Public Access Project, 19 of the 20 State House districts with major prison facilities, and 12 of the 13 State Senate districts with major prison facilities, are majority white,⁹ and nearly 75 percent of the state-responsible incarcerated population is incarcerated in majority-white counties, and more than 25 percent of the state-responsible incarcerated population is located within counties that are at least 85 percent white.¹⁰

⁸ See Va. Dep’t of Corrections, State Responsible Offender Population Trends at 7, Jan. 2020, <https://vadoc.virginia.gov/media/1473/vadoc-offender-population-trend-report-2015-2019.pdf>.

⁹ The Va. Public Access Project, *End of “Prison Gerrymandering” Saps Rural Virginia* (Apr. 14, 2021), <https://www.vpap.org/visuals/visual/transfer-clout-rural-to-urban> (last visited August 31, 2021).

¹⁰ Compare Va. Dep’t of Corrections, Monthly Population Summary at 4 (June 2021), <https://vadoc.virginia.gov/media/1702/popsummaryjune2021.pdf> (listing 5,506 of 21,347 incarcerated individuals in state facilities in Augusta, Bland, Buchanan, Grayson, Smyth, Tazewell, and Wise Counties and 15,784 in those counties plus Buckingham, Culpeper, Fluvanna, Goochland, Lunenburg, Mecklenberg, Nottaway, Pittsylvania, Richmond, and Southampton Counties and Chesapeake City), with U.S. Census Bureau, *supra* note 7 (listing the former group of counties as having a 2020 population of more than 85% white only, and the latter having a population of 55% of more white only).

The degree to which Black people are used to inflate the political power of rural white communities is particularly evident in the state legislative districts where Petitioners themselves reside and serve as elected representatives. For example, State Senate District 38, where every one of the Petitioners reside and which is represented by Petitioner Senator Hackworth, is nearly 95 percent white, 4 percent Black,¹¹ and has a prison population of roughly 4,126 individuals (meaning 2.0 percent of the total population of the district is in state custody).¹² Assuming the prisoner population tracks the demographic breakdown of the state-responsible prisoner population, we can estimate that *27.4 percent of the senate district's Black population is in state custody*.¹³ The rate is even more astonishing in House District

¹¹ See Ballotpedia, “Virginia State Senate District 38,” https://ballotpedia.org/Virginia_State_Senate_District_38 (last visited Aug. 28, 2021).

¹² See Va. Dep’t of Corrections, Monthly Population Summary, June 2021, <https://vadoc.virginia.gov/media/1702/popsummaryjune2021.pdf> (last visited Aug. 31, 2021) (providing most recently-reported prison population and demographic estimates). Wallens Ridge State Prison, Bland Correctional Center, Keen Mountain Correctional Center, Pocahontas State Correctional Center, and Red Onion State Prison are in State Senate district 38, according to district maps. *Compare* State Senate District 38, The Virginia Public Access Project, <https://www.vpap.org/offices/state-senate-38/district-map/> (last visited Aug. 31, 2021) *with* Va. Dep’t of Corrections, Facilities and Offices, <https://vadoc.virginia.gov/facilities-and-offices/> (last visited Aug. 31, 2021).

¹³ *Compare* notes 11-12 and accompanying text *with* Va. Dep’t of Corrections, State Responsible Offender Population Trends at 7, Jan. 2020, <https://vadoc.virginia.gov/media/1473/vadoc-offender-population-trend-report-2015-2019.pdf> (providing most recent statewide demographic breakdown of state-responsible confined population in Virginia) This estimate does not take into account persons incarcerated

3, where all but one of the Petitioners reside, and where 2,411 persons, or 3.0 percent of the district's total population, are in custody.¹⁴ We estimate that in House District 3, *more than half (55 percent) of the Black population is likely in state custody.*¹⁵

B. Prison gerrymandering worsens the discriminatory impact of Virginia's felony disenfranchisement provision.

The democracy-distorting effect of prison gerrymandering also exacerbates the racially disparate effects of Virginia's felony disenfranchisement policy because incarcerated persons are unable to hold accountable elected officials in either their

in local jails, which might mean an even greater percentage of the district's black population is behind bars.

¹⁴ See Va. Dep't of Corrections, Monthly Population Summary, June 2021, <https://vadoc.virginia.gov/media/1702/popsummaryjune2021.pdf> (last visited Aug. 31, 2021) (providing most recently-reported prison population and demographic estimates). Bland Correctional Center, Keen Mountain Correctional Center, and Pocahontas State Correctional Center are in House of Delegates District 3, according to district maps. *Compare* House of Delegates: District 3, The Virginia Public Access Project, <https://www.vpap.org/offices/house-of-delegates-3/district-map/> (last visited August 31, 2021) *with* Va. Dep't of Corrections, Facilities and Offices, <https://vadoc.virginia.gov/facilities-and-offices/> (last visited Aug. 31, 2021).

¹⁵ *Compare* note 14 *and* Ballotpedia, "Virginia House of Delegates District 3," https://ballotpedia.org/Virginia_House_of_Delegates_District_3 (last visited Aug. 31, 2021) (providing district demographics) *and* Va. Dep't of Corrections, Monthly Population Summary, June 2021, <https://vadoc.virginia.gov/media/1702/popsummaryjune2021.pdf> (last visited Aug. 31, 2021) (providing most recently-reported prison population estimates) *with* Va. Dep't of Corrections, State Responsible Offender Population Trends at 7, Jan. 2020, <https://vadoc.virginia.gov/media/1473/vadoc-offender-population-trend-report-2015-2019.pdf> (providing most recent statewide demographic breakdown of state-responsible confined population in Virginia).

prison districts or the communities from which they hail. Virginia is one of seven states in the country where more than one in seven Black individuals is disenfranchised—more than twice the national average.¹⁶ As the U.S. Supreme Court has noted, “[t]o the extent that a citizen’s right to vote is debased, he is that much less a citizen.” *Reynolds*, 377 U.S. at 567. Prison gerrymandering compounds the harm inflicted by felony disenfranchisement on Black communities in Virginia. Voters living in districts that opted to build prisons benefit from the increased voting strength that comes from having additional, disenfranchised persons—who lack any connection to the community and whose interests are often antithetical to their own—counted as “residents” of their districts. But rather than just punishing the person convicted of a felony, prison gerrymandering harms the communities from which these individuals come by diluting their votes. For every Black Virginian locked up and allocated for representation purposes in predominantly white communities like Pound, Grayson County, or Chatham, Black communities in places

¹⁶ See Chris Uggen, et al., *Locked Out 2020: Estimates of People Denied Voting Rights Due to a Felony Conviction*, The Sentencing Project, Oct. 30, 2020, <https://www.sentencingproject.org/publications/locked-out-2020-estimates-of-people-denied-voting-rights-due-to-a-felony-conviction/>.

like Richmond, Portsmouth, and Hampton lose influence in local and state government.¹⁷

Further, the elected representatives from prison districts are beholden not to incarcerated people or their families—who cannot vote for them and generally live elsewhere in the Commonwealth—but to the correctional officials and employees whose livelihood depends on the continued existence of the prisons and the disenfranchised prisoner populations who inflate their political strength. Indeed, this is the very basis of Petitioners’ claims—counting individuals in their home communities rather than at the carceral facilities in their districts will “depriv[e] them and the Southwest region of political power. . . .” Pet. Br. 7. Because people incarcerated for a felony conviction remain disenfranchised in Virginia, the practice distorts “the basic principle of representative government [that] the weight of a citizen’s vote cannot be made to depend on where he lives.” *Reynolds v. Sims*, 377 U.S. 533, 567 (1964). But seeking to maintain unfounded power on the backs of individuals who have no voice in their election relies on a false foundation. As the U.S. Supreme Court has explained, determining the “usual residence” of an individual for purposes of allocating political power has historically called for considering “more than mere physical presence, and has been used broadly enough

¹⁷ See Va. Public Access Project, *End of “Prison Gerrymandering” Saps Rural Virginia* (Apr. 14, 2021), <https://www.vpap.org/visuals/visual/transfer-clout-rural-to-urban/>.

to include some element of allegiance or enduring tie to a place.” *Franklin*, 505 U.S. at 804.

If Virginians convicted of felonies maintained their right to vote, prison gerrymandering would still harm Black communities by depriving those areas of political power by counting their disproportionately high percentage of incarcerated residents elsewhere. But those incarcerated individuals would at least have the ability to have a say in who represents them in that region of the state, and therefore, the elected representatives of prison districts would have a measure of accountability towards them. But due to Virginia’s felony disenfranchisement rule, persons incarcerated for a felony lack any “representational nexus” to their representatives. *Calvin*, 172 F. Supp. 3d at 1310. Meanwhile, voters living in districts that opted to build prisons benefit from the increased voting strength that comes from having additional, disenfranchised persons—who lack any connection to the community and whose interests are often antithetical to their own—counted as “residents” of their districts. As one federal court held in striking down prison gerrymandering in a Florida county

If the representative can’t make decisions that meaningfully affect *me*; if the representative can’t act as *my* ombudsperson because the governing body to which she belongs can’t do anything for *me*; if *I’m* not receiving services from the governing body—under these circumstances, there’s no representational nexus [*i.e.* meaningful representation] between the representative and me.

Id.

Therefore, not only are Black communities deprived of representational equality through prison gerrymandering, but a disproportionate number of incarcerated Black Virginians are deprived of any real representation by the confluence of felony disenfranchisement and prison gerrymandering.

C. Counting incarcerated people in their home communities promotes racial fairness by helping counteract the discriminatory impact of prison gerrymandering and preventing racial vote dilution.

The Anti-Prison Gerrymandering Provision provides a new source of state law that promotes racial and ethnic fairness in districting, just as the 2020 Amendment contemplated. *See* Va. Const. art. II, § 6 (requiring districts “be drawn in accordance with the requirements of federal and *state laws* that address racial and ethnic fairness”) (emphasis added). By properly allocating incarcerated individuals to their home communities—places where they lived, worked, and had neighbors, family, and associates who are more likely to represent their interests—rather than to the communities in which they happen to be imprisoned and to which they have no ties, the State protects Black communities’ right to fair representation rather than ceding their political power to communities across the state.

As discussed, an analysis by the Virginia Public Access Project shows that the Anti-Prison Gerrymandering Provision results in roughly 20,000 people being

reallocated from rural parts of the state to urban or suburban parts of the state.¹⁸ For example, over 750 individuals will be allocated to their home communities within the majority-Black City of Petersburg, and away from the predominantly white, rural areas of the state where they are incarcerated.¹⁹ This makes up more than 2% of the city’s population and may make up an even greater percentage of certain districts in the city.²⁰ This allocation will help provide more equal representation to the residents of Petersburg and thus promotes the goal of racial or ethnic fairness. It does so by ending the distortive practice of depriving “urban communities of color, whose members are disproportionately represented in the incarcerated population,”²¹ of power by recognizing that incarcerated individuals maintain their ties to home and cannot be fairly represented by the counties in which they are incarcerated.²²

While the Anti-Prison Gerrymandering Provision does not explicitly mention “racial or ethnic fairness,” this fact should carry little weight in light of the evidence.

¹⁸ See Va. Public Access Project, *End of “Prison Gerrymandering” Saps Rural Virginia*, (Apr. 14, 2021), <https://www.vpap.org/visuals/visual/transfer-clout-rural-to-urban/>.

¹⁹ *Id.*

²⁰ See *supra* note 7.

²¹ Ho, *supra* note 1, at 356.

²² See, e.g., Julie A. Ebinstein, *The Geography of Mass Incarceration: Prison Gerrymandering and the Dilution of Prisoners’ Political Representation*, 45 Fordham Urb. L.J. 323, 369–70 (2018) (“Prisons allow for only a limited connection between people incarcerated and the residents of the community surrounding the prison and few opportunities to politically engage.”).

Of course, neither the Twenty-Fourth Amendment of the U.S. Constitution that outlawed the poll tax, nor even the Equal Protection Clause of the Fourteenth Amendment explicitly mentions racial fairness or even race, yet few would doubt that these provisions were enacted to address ongoing racial discrimination.

The data does not lie. Prison gerrymandering has exacted an unfair representational toll on Black communities in Virginia, compounded by felony disenfranchisement. The Anti-Prison Gerrymandering Provision provides a source of state law that promotes racial fairness by seeking to remedy that representational gap. Rather than conflicting with the Virginia Constitution, it promotes the goals of the 2020 Amendment.

II. The Anti-Prison Gerrymandering Provision and Other Statutory Criteria Do Not Conflict with the Constitution's Redistricting Criteria Regardless of the Racial & Ethnic Fairness Command.

Even if this Court declines to find that the Anti-Prison Gerrymandering Provision affirmatively promotes racial and ethnic fairness, it should nonetheless decline to strike it and the remaining Statutory Factors down as unconstitutional. This Court has long held that “the General Assembly has the authority to enact any statute which is not prohibited by the Constitution; that the presumption is in favor of the validity of the statute; and that the burden of showing that it contravenes the Constitution is upon those who aver that it does.” *Blake v. Marshall*, 152 Va. 616, 625 (1929). In considering whether a statute conflicts with the Constitution,

“courts have a duty when construing a statute to avoid any conflict.” *Commonwealth v. Doe*, 278 Va. 223, 229 (2009). Reading the Anti-Prison Gerrymandering Provision and the other Statutory Factors to conflict with the Constitutional Criteria would require an implausible construction that would not track with ordinary statutory interpretation principles.

The Anti-Prison Gerrymandering Provision concerns where to *allocate the population base* for districting, not how to *divide* the state into districts. In other words, the rule concerns how to determine the “usual residence” of Virginians, a concept that “can mean more than mere physical presence” and often means having an “enduring tie to a place.” *Franklin*, 505 U.S. at 804. As such, the provision affects the data the Commission receives from the Census Bureau. By contrast, and as Petitioners admit, the 2020 Constitutional Amendment created the Commission “for the purpose of establishing districts,” Va. Const. art. II, § 6-A(a), and provided criteria for how to draw the districts. Va. Const. art. II, § 6. Because the Anti-Prison Gerrymandering Provision does not concern who draws the districts or how they are drawn, even if the Court did not find it promotes racial fairness, it should read the provision not to conflict with the Constitution. *See Doe*, 278 Va. at 229.

Beyond the Anti-Prison Gerrymandering Provision, the other Statutory Criteria clarify rather than conflict with the Constitutional Criteria. Petitioners admit that most of the Statutory Criteria merely “duplicate” the criteria. Pet. Br. 5–6. Other than the Anti-Prison Gerrymandering Provision, the only provisions they contend conflict with the Constitutional criteria are that districts not harm a “racial or language minority group” through denying or abridging the right “to participate in the political process and to elect representatives of their choice,” and that they be drawn “to give racial and language minorities an equal opportunity to participate in the political process and shall not dilute or diminish their ability to elect candidates of choice.” *Id.* at 24 (citing Va. Code Ann. §§ 24.2-304.04(3), (4)). But these provisions refer to principles set out in Section 2 of the federal Voting Rights Act of 1965, 52 U.S.C. § 10301—a law that the Virginia Constitution expressly calls for the Commission to follow in drawing districts. *See* Va. Const. art. II, § 6.

Petitioners criticize only two parts of these provisions as extending beyond the VRA, but neither criticism has merit.

First, Petitioners criticize language that refers to a minority group having the “ability to elect candidates of choice either alone *or in coalition with others.*” Pet. Br. 24 (citing Va. Code Ann. § 24.2-304.04(4)). The U.S. Supreme Court, however,

has never rejected minority “coalition district” claims under the VRA, and some federal courts have explicitly endorsed such claims. *See, e.g., Bridgeport Coal. for Fair Representation v. City of Bridgeport*, 26 F.3d 280, 281 (2d Cir. 1994); *Concerned Citizens of Hardee Cnty. v. Hardee Cnty. Bd. of Comm’rs*, 906 F.2d 524, 526 (11th Cir. 1990).

Second, Petitioners argue that the vote-dilution standard differs from the VRA in that it refers to members of a minority group being “dispersed into districts in which they constitute an ineffective minority of voters or are concentrated into districts where they constitute an excessive majority.” Pet. Br. 24. Although the VRA itself does not contain this precise language, this text refers to the practices of “cracking” minority voters across districts and “packing” them into districts—processes that the U.S. Supreme Court has recognized are relevant in evaluating vote-dilution claims. *See, e.g., Voinovich v. Quilter*, 507 U.S. 146, 153 (1993) (explaining that “the usual device for diluting minority voting power is the manipulation of district lines” which can include “[d]ividing the minority group among various districts so that it is a majority in none may prevent the group from electing its candidate of choice” and/or “concentrat[ing] [] minority voters within a district”).

Neither the Anti-Prison Gerrymandering Provision nor the other Statutory Criteria conflict with Article 2, Section 6 of the Virginia Constitution. Reading them to do so would defy both common sense and statutory interpretation principles.

III. Allocating Virginia's Incarcerated Population to their Home Residences Rather Than Prisons Accords with Constitutional Principles Including One-Person, One-Vote.

In contending that the Anti-Prison Gerrymandering Statute violates Article II, Section 6's equal population mandates and the U.S. Constitution's "one-person, one-vote principle," Petitioners turn these principles on their heads. In doing so, they also ignore the multiple courts that have rejected this very argument, the U.S. Census Bureau's own allowance of allocating incarcerated individuals to their home addresses, and the Commonwealth's own history.²³

Neither the Virginia Constitution nor the U.S. Constitution's One-Person, One-Vote principle concerns whether a state makes alterations to Census data as the starting point for its population base. Rather, these provisions involve the concept of

²³ The Court should also summarily reject Petitioners' argument that the Anti-Prison Gerrymandering Provision violates Article I, Section 11 of the Virginia Constitution. Petitioners admit Section 11 is "no broader" than that of the U.S. Constitution's equal protection requirement, Pet. Br. at 21, and the U.S. Supreme Court has held a racial discrimination claim brought under this principle requires proof of discriminatory intent. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977) ("Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause."). Because Petitioners do not even allege, let alone provide any evidence, that the provision or any of the Statutory Criteria were enacted with a discriminatory purpose, their claim cannot stand.

representational equality—the idea of “[e]qual representation for equal numbers of people . . . a principle designed to prevent debasement of voting power and diminution of access to elected representatives.” *Kirkpatrick*, 394 U.S. at 531. In other words, once the population base is determined, districts should be drawn to reflect roughly equal population numbers in each district. Petitioners have not alleged, however, that the Redistricting Commission intends to draw districts of substantially unequal size. Rather, their disagreement lies with the policy choice of the Virginia General Assembly to allocate incarcerated Virginians to their home communities rather than their prison location. Their issue is not one of equal population per districts but how to allocate the population base jurisdictions must equalize. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016) (recognizing the distinction between “the permissibility of deviating from perfect population equality” and “the population base jurisdictions must equalize”). Courts have consistently rejected that this argument gives rise to a one-person, one-vote violation, and rightfully so.

States are required to use the best data available to them in drawing districts of roughly equal population, but this does not mean they must “use only the unadjusted census figures.” *City of Detroit v. Franklin*, 4 F.3d 1367, 1374 (6th Cir. 1993); *see also Senate of State of Cal. v. Mosbacher*, 968 F.2d 974, 979 (9th Cir. 1992) (“If the State knows that the census data is underrepresentative, it can, and

should, utilize noncensus data in addition to the official count in its redistricting process.”). Rather, courts have repeatedly permitted states to adjust census figures in the redistricting population base if they do so in a principled, rational, nondiscriminatory manner. This includes adjustments to account for the home location of incarcerated residents. Indeed, the Census Bureau has created a process to assist states “in their goals of reallocating their own prisoner population counts.” Final 2020 Census Residence Criteria and Residence Situations, 83 FR 5525, 5528 (Feb. 8, 2018).

For example, in a decision summarily affirmed by the U.S. Supreme Court, a federal district court in Maryland rejected the precise argument made by Petitioners here—that the reallocation of the state’s incarcerated population for redistricting purposes violated the one-person, one-vote principle. *Fletcher*, 831 F. Supp. 2d 887. In doing so, it explained that “a State may choose to adjust the census data, so long as those adjustments are thoroughly documented and applied in a nonarbitrary fashion and they otherwise do not violate the Constitution.” *Id.* at 894–95. Similarly, the Oklahoma Supreme Court rejected the same argument against a citizen initiative petition seeking to eliminate prison gerrymandering because eliminating the practice was a “rational basis for correcting any representational equality issues” and the adjustment of census data would be conducted “in a systematic way.” *In re Initiative Petition No. 426*, 465 P.3d at 1255. A New York state court rejected the same

argument as well, explaining that the plaintiffs there did not establish how eliminating prison gerrymandering had “any impact on [the] mandate to create legislative districts which are ‘substantially equal in population.’” Decision and Order at 8, *Little v. N.Y. Legislative Task Force on Demographic Research & Reapportionment*, No. 2310-2011 (N.Y. Sup. Ct. Dec. 1, 2011).²⁴

Not only have courts consistently rejected the argument that anti-prison gerrymandering reforms violate equal population principles, but at least one has held that not remedying prison gerrymandering violates the U.S. Constitution. In *Calvin*, the Plaintiffs charged that the districts of a Florida county commission violated the one-person, one-vote principle where incarcerated individuals who were mostly from outside of the county made up a substantial amount of the population of one district. 172 F. Supp. 3d at 1292. The court agreed, holding that treating incarcerated individuals who mostly hail from outside the county the same as other county residents for the districting population base violated equal protection. *Id.* at 1326. It explained that the scheme “[made] no sense under any theory of one person, one vote, and indeed under any theory of representative democracy” *id.*, largely because the incarcerated individuals “are isolated from the surrounding community” and “lack a meaningful representational nexus” with the county’s representatives, *id.* at 1321.

²⁴ Available at https://www.prisonersofthecensus.org/little/Decision_and_Order.pdf.

The General Assembly has also long recognized the permissibility of reallocating prison populations even though it did not mandate doing so across the state until 2020. Beginning in 2002, Virginia allowed but not did not require jurisdictions to exclude prison populations if they exceeded 12 percent of the jurisdiction's total population, *see* Va. Code Ann. § 24.2-304.1(C) (2002), and beginning in 2013, it removed the 12 percent threshold, Va. Code Ann. § 24.2-304.1(C) (2013).

Finally, the Court should reject the offensive argument that Petitioners are “entitled to receive” political representation for “bear[ing] all of the responsibility to care for the people in their prisons.” Pet. Br. 23. For one, the Anti-Prison Gerrymandering Provision reallocates incarcerated people in the context of districting. It says nothing to indicate, nor do Petitioners contend, that it alters the population base for federal and state funding allocations. And while “incarcerated persons undoubtedly have an effect on some local services—for example, utilities like electricity and water—these sorts of financial considerations are accounted for in the cost of operating a prison” and “incarcerated persons cannot in fact utilize the same array of services as ordinary non-voting residents” like “parks, schools, libraries, and highways.”²⁵

²⁵ Ho, *supra* note 1, at 374–75.

Regardless, the implication that incarcerated Virginians are a drain on the communities in which they are imprisoned belies the reality that many of the rural communities in which they are located lobbied for them and for the funding and jobs that come with them.²⁶ In fact, some have referred to prison gerrymandering as a contemporary version of the Three-Fifths Compromise, whereby enslaved individuals in the South were not entitled to representation but were nonetheless used to increase political power of slaveholding regions. As one commentator observed, “rural counties all over the United States are again padding their census figures with disenfranchised African-Americans” because it “provides a political and financial incentive for rural communities to host prisons.”²⁷

Petitioners have failed to show how the Anti-Prison Gerrymandering Statute or any of the Statutory Criteria conflict with the Virginia Constitution, let alone establish a “‘clear right’ to the relief sought.” *Williams v. Matthews*, 248 Va. 277, 282 (1994).

²⁶ See, e.g., Susan Kinzie, *New Virginia Prison Sits Empty, at a Cost of More Than \$700,000 a Year*, Wash. Post, May 30, 2011, https://www.washingtonpost.com/local/new-virginia-prison-sits-empty-at-a-cost-of-more-than-700000-a-year/2011/05/25/AGXZqwEH_story.html (describing community support in Grayson County for building a new prison and the local state representative seeking funding to staff the prison).

²⁷ Andrew Marantz, *The Five-Fifths Clause: How We Count, and Use, Our Prisoners*, Slate, Nov. 6, 2006, <https://slate.com/news-and-politics/2006/11/how-we-count-and-use-our-prisoners.html>.

CONCLUSION

Petitioners raise no actionable claim, let alone demonstrate a clear right to relief that would promote substantial justice. The Court should reject their misguided and untimely petition.

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CERTIFICATE

Counsel for *Amici Curiae* American Civil Liberties Union Foundation of Virginia, The League of Women Voters of Virginia, and The National Black Nonpartisan Redistricting Organization hereby certifies compliance with Rule 5:30 of the Rules of the Supreme Court of Virginia. Counsel further certifies the *Amici Curiae* was filed electronically, via VACES, on this 1st of September, 2021. On this same day, the Brief was also served, via email, upon:

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