IN THE SUPREME COURT OF VIRGINIA

Record No. 210770

TREY ADKINS, et al.,

Petitioners,

v.

VIRGINIA REDISTRICTING COMMISSION, et al.,

Respondents.

REPLY IN SUPPORT OF VERIFIED PETITION FOR WRIT OF MANDAMUS

M. Brett Hall, Esq.
Virginia Bar No: 92267
Hall Law Firm, PLLC
148 W. Jackson St.
Gate City, VA 24251

Jason Torchinsky (VSB #47481)
Jonathan P. Lienhard (VSB #41648)
Philip M. Gordon (VSB #95621)
Holtzman Vogel Baran
Torchinsky & Josefiak PLLC
15405 John Marshall Highway
Haymarket, VA 20169

September 10, 2021

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

REPLY IN SUPPORT OF PETITION

Respondents argue Petitioners lack standing and have not met the standard for mandamus relief.[1] Petitioners present this Reply to address those arguments.

I. All Petitioners Have Standing to Challenge the Statutory Criteria.

Petitioners' right to vote is harmed by the enforcement of Statutory Criteria that dilute their votes and reduce their political power. Pet. at 6-7. Respondents claim Petitioners have failed to establish an injury in fact sufficient for standing in this matter, arguing they have stated "little more than a generalized interest in the proper implementation of the referendum for which they voted." Response Br. at 15. But Petitioners clearly argue that the Statutory Criteria have "dilute[d their] voting power and diminish[ed] the effectiveness of [their] representation" by artificially reducing the populations of the districts where they reside in Southwest Virginia. *Jamerson v. Womack*, 26 Va. Cir. 145, 146 (1991), *aff'd*, 244 Va. 506 (1992).

All Petitioners have a right to vote that is protected by the Virginia Constitution. *See* Va. Const. Art. I, § 6; *Howell v. McAuliffe*, 292 Va. 320, 335 (2016). Although the Statutory Criteria[2] will not prevent Petitioners from casting ballots in future elections, they directly impact Petitioners' voting strength and reduce

---

[1] The Commission and its Members take no position on the underlying legal questions but ask the Court to resolve this action quickly. *See generally* Response Br. Because Petitioners agree with this goal, this Reply only presents arguments in response to the Respondent Board of Elections and Department of Elections.

[2] Each of the Statutory Criteria, which seek to illicitly amend the Virginia Constitution, dilute Petitioners' voting rights insofar as they seek to apply extraconstitutional or unconstitutional criteria to their electoral districts.

their representation by reallocating nonvoting populations housed in correctional facilities—concentrated in Southwest and Southside Virginia—to their former addresses in other parts of the Commonwealth. As the U.S. Supreme Court has recognized, "[t]he right to vote can be affected by a dilution of voting power as well as by an absolute prohibition on casting a ballot." *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969); *Howell*, 292 Va. at 333 n.5, 335 n.7. Simply because the highly individualized right to vote is held by many does not make that right any less valid. Response Br. at 17. Although Petitioners do not yet know the exact contours of their new districts, they can be certain that Southwest Virginia will be adversely affected on a regional basis if maps are drawn using the Statutory Criteria due to the prevalence of nonvoting prison populations that reside in the region. Hence, the grievance they assert is not "speculative" or "generalized," but clear on the face of the Statutory Criteria and specific to voters in this part of the Commonwealth.

Additionally, Petitioner Sen. Hackworth has his own independent source of standing as an elected official and future candidate who will compete for reelection in a district redrawn using the Statutory Criteria. Respondents assert that Sen. Hackworth's role as a state senator would only matter if the Statutory Criteria imposed "financial costs" for ballot access or affected "the candidate-in-question's competitive chances in the election," Response Br. at 21, but the D.C. Circuit has acknowledged the possibility of broader standing for candidates. In *LaRoque v. Holder*, the court explained that "candidates may have standing to challenge illegally structured campaign environments even if the multiplicity of factors bearing on

elections prevents them from establishing with any certainty that the challenged rules will disadvantage their … campaigns." 650 F.3d 777, 787 (D.C. Cir. 2011) (quotations omitted). Sen. Hackworth cannot be certain that the Statutory Criteria will impact his chances of winning reelection in a redrawn district, so he has not claimed it will. What he *can* be certain of, even before maps are drawn, is the same injury asserted by Petitioners: That Section 24.2-304.04(9) will *inevitably* reduce the relative political representation of Southwest Virginia in both the federal and state legislatures and dilute the voting power of Petitioners and others who live there.

Respondents claim there is no meaningful difference between the constitution and the Statutory Criteria, but this is not true. If the Statutory Criteria are followed, nonvoting residents in Petitioners' districts will be reallocated to other parts of Virginia, thereby bolstering the representation of those areas and diluting Petitioners' votes by expanding the size of their districts. The state constitution does not compel this outcome because it has never been done before this cycle.

II. Petitioners Have Satisfied the Standard for Mandamus Relief.

Petitioners have demonstrated they have a clear right to compel Respondents to redistrict in accordance with the Virginia Constitution, and that Respondents have a ministerial duty—which they are currently shirking—to consider only the Constitutional Criteria in that process. Because the 2021 redistricting process has already commenced under the unconstitutional Statutory Criteria, time is of the essence in fashioning relief that prevents the adoption of unconstitutional maps.

A. Petitioners Have Established a Clear Right to Relief.

Respondents claim that Petitioners cannot establish a clear right to mandamus relief because "[n]othing in the Statutory Redistricting Criteria is contrary to the Virginia Constitution." Response Br. at 24-25. Their arguments in support of that conclusion, however, are constantly shifting. First, they claim the Statutory Criteria simply restate the requirements of the Voting Rights Act (which Respondents would have to obey with or without the Statutory Criteria); then argue that the Statutory Criteria implement obligations imposed by VRA caselaw (obedience to which is, again, already mandatory); and finally fall back on the defense that while the Statutory Criteria might differ in various ways from the Constitution, they are not *sufficiently* different as to raise any constitutional concerns. Even if Respondents picked one argument, it would not suffice to save the Statutory Criteria.

Respondents walk through the Statutory Criteria to demonstrate that they are "derive[d] from the Virginia Constitution" and federal law and, at most, "mirror[] and implement[]" those sources of law. Response Br. at 28-30. But if this were the case, then much of the Statutory Criteria would be superfluous. This Court should "resist a reading … that would render superfluous an entire provision passed in proximity" to the 2020 amendment. *Yates v. United States*, 574 U.S. 528, 543 (2015). It is implausible that the legislature, after voting twice for the Amendment, passed legislation duplicating redistricting criteria already contained in the amendment. Respondents correctly argue that "[s]tates have an independent obligation to follow federal law," but this only raises the question as to what purpose the Statutory

Criteria serve.[3] They would not have been enacted if they did not supply a separate meaning apart from existing federal and state constitutional commands.

Respondents agree that, in some instances, "the Statutory [] Criteria go further" than the state constitution, but disregard these inconsistencies by stating "they do so only to supplement or clarify the Constitutional Redistricting Criteria, not to contradict them." Response Br. at 27, 33 (conceding that Section 24.2-304.04(5) "is not … directly from the Virginia Constitution"). But they contradict themselves, acknowledging that Section 24.2-304.04(8) "supplements rather than implements the Constitutional Redistricting Criteria". *Id.* at 34. This logic has no limiting principle. If the legislature can "supplement[] rather than implement[]" the requirements of the state constitution when it fails to suit its preferences, then it will have created a backdoor by which it can amend the constitution by mere legislative act. Moreover, the legislative motivation underlying enactment, if discernible at all,[4] is irrelevant to an analysis of whether a conflict exists between the provisions. This Court has long held that "[a] statute must be construed as subordinate to … pertinent sections of the Constitution [that are] inconsistent therewith." *Va. Marine Red. Comm'n v. Chincoteague Inn*, 287 Va. 371, 379 (2014) (quotation omitted). The relevant inquiry

[3] After all, if the Statutory Criteria are genuinely duplicative with no independent significance, then a grant of the requested mandamus relief would not impede the progress of the 2021 redistricting process at all from Respondents' point of view.

[4] It is worth asking why nonvoting populations housed in Virginia correctional facilities were treated differently from similar populations, such as out-of-state students attending Virginia universities or military personnel. If the legislature "was well within its powers to conclude that most inmates will intend to return back home," Response Br. at 37, then the same logic applies elsewhere.

is whether any inconsistency exists between the two provisions; if it does, then the statute must yield before the contrary constitutional provision. The legislature cannot "supplement or clarify" constitutional provisions that were intended to strip them of their redistricting authority.

One pertinent factor in the conflict analysis is whether a purpose to discontinue an existing practice or otherwise modify state law is "expressed, or at least indicated, by some appropriate language in the Constitution." *Blake v. Marshall*, 152 Va. 616, 625-26 (1929). Here, such a purpose is not just "indicated" by the text, it was the entire point of the amendment. The ballot question approved by Virginia voters in 2020 explained that "[t]he proposed amendment would shift the responsibility of drawing these election districts from the General Assembly … to a bipartisan commission."[5] If the only change effected by that amendment was that the Commission now draws district lines pursuant to detailed legislative criteria, then no "shift" of power has actually occurred; the legislature still drives the process and the Commission follows their orders. Under this reading, the "pertinent sections of the Constitution" would be rendered "subordinate" to the contrary dictates of statute[6] in a manner that inverts this Court's precedents. *Va. Marine*, 287 Va. at 379.

---

[5] Va. Dep't of Elections, *Proposed Amendments for 2020: Proposed Law*, available at: https://www.elections.virginia.gov/proposed-constitutional-amendment-2020/.

[6] As fully explained in the Petition, in addition to conflicting with Article II, Section 6 the Statutory Criteria also contradict Virginia's constitutional equal protection provisions by providing for explicitly race-based responses. *See* Pet. at 22-29.

If the Statutory Criteria only reiterate legal obligations already imposed by the state constitution and federal law, then they are entirely superfluous, and this Court should avoid reading an entire statute as superfluous if at all possible. *Yates*, 574 U.S. at 543. Here, there *is* a possible reading that does not render them superfluous: That they modify and add to the redistricting criteria contained in Article II, Section 6 of the constitution. If this latter reading is correct, then a conflict exists between the constitution and the statute, and only one set of criteria can prevail.

B. Respondents Must Comply with the State Constitution.

Respondents also contend that Petitioners "seek to command the State Elections Officials to violate state law." Response Br. at 42-43. To the contrary, Petitioners seek to compel Respondents to follow the one supreme source of state law in this situation: Article II, Sections 6 and A of the Virginia Constitution and the applicable federal law incorporated through those provisions.

Mandamus relief is appropriate "to compel public officers to execute their purely ministerial duties under the law," but is not to be granted in areas "where the public officer or board is vested with a discretion or judgment." *Richmond-Greyhound Lines, Inc. v. Davis*, 200 Va. 147, 152 (1958). Here, while the Commission has incontestable discretion to decide how best to ensure the maps they produce satisfy the requirements of applicable federal and state laws, they do *not* have discretion to pick and choose which laws they will take into account. The Virginia Constitution mandates that the Commission "establish[] districts … pursuant to Article II, Section 6," thereby making it clear which redistricting criteria the

Constitution commands the Commission to follow. Va. Const. Art. II, § A. Respondents' argument that this constitutional mandate speaks only to the manner by which the Commission is convened, *see* Response Br. at 27, is absurd. Article II, Section 6 says *nothing* about how to convene the Commission (a process which is covered in Section A) but provides extensive information concerning the criteria that the new districts should be constructed to satisfy. This is not one of several possible readings of the Constitution, but the *only* reading that makes sense in context.

Respondents repeatedly claim that Petitioners seek to force Respondents "to disregard state law," as if relief in this case would result in a redistricting process totally lacking in governing standards. Not so—if the Court grants the requested relief, then the Commission would still be obligated to redistrict in accordance with the Virginia Constitution and other applicable federal law.

C. Petitioners Have No Adequate Alternative Remedy at Law.

Finally, Respondents argue that the Petition should be dismissed because Petitioners have an adequate alternative remedy in the form of a lawsuit for injunctive or declaratory relief filed in circuit court. Response Br. at 43-44. Respondents incorrectly claim that Petitioners justify Supreme Court original jurisdiction by pointing to "the upcoming election," but that is not true. Petitioners clearly argued in their Petition that the impending event proving that time is of the essence is the Commission's ongoing drafting of new maps, which this year must be

submitted to the General Assembly for approval by September 26th and October 11th.[7] Pet. at 35-36. It is this ongoing redistricting process, rather than anything that may or may not occur in the November 2021 election, that justifies the relief sought.

As an initial matter, an action for injunctive relief "is not a legal remedy" but "an equitable remedy," and therefore the possibility of equitable relief is not a reason to deny mandamus relief. *Howell*, 292 Va. at 351 n.17. While a declaratory judgment *would* be a remedy at law, it would not be *adequate* given the redistricting timetable. "[A] remedy is 'adequate' only if it is 'equally as convenient, beneficial, and effective as … mandamus.'" *Id.* (quotation omitted). It "must reach the whole mischief, and secure the whole right of the party in a perfect manner, at the present time and in the future." *McClaugherty v. McClaugherty*, 180 Va. 51, 48 (1942).

An declaratory judgment action does not satisfy this test because it would take ample time to litigate and, potentially, to appeal to this Court, even as the legislature votes next month to adopt maps drawn pursuant to unconstitutional considerations. Moreover, it is not clear that Petitioners *could* have sought a declaratory judgment given that such actions are not appropriate "where claims and rights asserted have fully matured, and the alleged wrongs have already been suffered." *Pure Presbyterian Church of Wash. v. Grace of God Presbyterian Church*, 296 Va. 42, 55

[7] Virginia's 2021 elections will take place on the current maps no matter how this Court decides this case due to the delayed release of 2020 Census data. *See* Va. Const. Art. II, § A(d). The issue should not be confused: This case is about the *ongoing* protection of Petitioners' voting rights if maps are drawn and adopted using the Statutory Criteria, not anything that will happen in the imminent 2021 election.

(2018). Petitioners claim that their rights to vote and compete for office in constitutionally constructed districts *have* already matured, because the Commission is drawing new maps pursuant to unconstitutional criteria. Furthermore, the Commission itself has "urge[d] this Court to resolve this mandamus proceeding quickly to ensure that the Commission can complete its work within the governing timelines." Response Br. for Va. Redistricting Comm'n at 5. Clearly, the Commission is aware the clock is ticking and believes it can satisfy its responsibilities if this Court expeditiously provides an answer.

Respondents also claim that the 16 months between enactment of the Statutory Criteria and the filing of Petitioners' lawsuit could render the Petition barred by laches, *see* Response Br. at 23 n.10, but it was not clear until the Commission received the 2020 Census data on August 12, 2021 that it did not intend to decide which source of law to follow. If the Commission had voluntarily opted to follow only the constitutional criteria and applicable federal law, then Petitioners' claims would never have ripened. Hence, Petitioners' claims were not ripe until the Commission initiated the ongoing redistricting process using the Statutory Criteria, and it will be difficult for this, or any other Court, to fashion appropriate relief after unconstitutional maps have actually been adopted by the General Assembly.

CONCLUSION

This Court should grant Petitioners' requested writ of mandamus.

Respectfully submitted,

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

By: 

M. Brett Hall, Esq.
Virginia Bar No: 92267
Hall Law Firm, PLLC
148 W. Jackson St.
Gate City, Va. 24251

Jason Torchinsky (VSB #47481)
Jonathan Lienhard (VSB #41648)
Philip M. Gordon (VSB #95621)
Holtzman Vogel Baran
Torchinsky Josefiak PLLC
15405 John Marshall Hwy.
Haymarket, Va. 20169

Counsel for Petitioners

CERTIFICATE OF SERVICE AND FILING

I certify under Rule 5:26(h) that on September 10, 2021, this document was filed electronically with the Court through VACES. This brief complies with Rule 5:7(b)(7) because the portion subject to that rule does not exceed 10 pages.

This document has been served via email on the following:

M. Brett Hall; mbretthall.law@gmail.com
Counsel for Petitioner

Heather Hays Lockerman; HLockerman@oag.state.va.us
Carol L. Lewis; CLewis@oag.state.va.us
Michelle S. Kallen; MKallen@oag.state.va.us
Brittany J. Record; BRecord@oag.state.va.us
Counsel for Virginia State Board of Elections and Virginia Department of Elections

H. Christopher Bartolomucci; cbartolomucci@schaerr-jaffe.com
Gerald Hebert; hebert@voterlaw.com
Counsel for Virginia Redistricting Commission Respondents

By: 
M. Brett Hall, Esq.