IN THE SUPREME COURT OF VIRGINIA

PAUL GOLDMAN
P.O. BOX 17033
Richmond, VA 23221

Petitioner

V.

No._____

THE STATE BOARD OF ELECTIONS
Washington Building
1100 Bank Street, First Floor
Richmond, VA 23219

Mr. Robert Brink
in his capacity as Chairman of the
State Board of Elections
Washington Building,
1100 Bank Street, First Floor
Richmond, VA 23219

Mr. John O'Bannon,
in his capacity as the Vice Chair of the
State Board of Elections,
Washington Building,
1100 Bank Street, First Floor
Richmond, VA 23219

Ms. LeCruise,
in her capacity as the Secretary to the
State Board of Elections
Washington Building
1100 Bank Street, First Floor
Richmond, VA 23219

THE VIRGINIA DEPARTMENT OF
ELECTIONS,
Washington Building
1100 Bank Street, First Floor
Richmond, VA 23219

CHRISTOPHER PIPER,
in his official capacity as the Commissioner of the Virginia
Department of Elections
Washington Building
1100 Bank Street, First Floor
Richmond, VA 23219

Respondents

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VERIFIED PETITION FOR WRIT OF MANDAMUS

Petitioner, acting in his own capacity and pursuant to Va. Constitution Article VI, Section 1, and Va. Code Section 8.01-644, respectfully petitions this Court for an issuance of a writ of mandamus and/or writ of prohibition directed to Respondents, and in support thereof states:

1. Petitioner is a qualified voter in the Commonwealth of Virginia, planning to vote on Proposed Constitutional Amendment # 1 (hereinafter "the Redistricting Referendum") slated to be a ballot question on the November 3, 2020 election ballot.

2. Petitioner has formed a group to oppose the passage of the Redistricting Referendum.

3. Petitioner has been and will be injured by Respondents' continuing failure to perform their statutory duties as required in Va. Code Section 24.2-102 et seq.

4. "As soon as practicable after the seventy-fourth day before the presidential election, the State Board shall certify…the form of official ballot." Va. Code Section 24.2-614.

5. "Each registrar shall have the official ballot printed at least 45 days preceding the election." *Id.*

6. Absentee ballots must be made available "not later than 45 days prior to any election." Va. Code Section 24.2-612.

7. Accordingly, such ballots will soon be printed.

8. Time is thus of the essence.

9. Petitioner has a clear right to the relief sought.

10. Respondents have a legal duty to ensure petitioner's general right to vote, and his special right to cast an informed vote without the government putting its thumb on the scale in the Redistricting Referendum election, as guaranteed by Article I, Sections 2, 6, and 15, Article II, Sections 1 and 4 and Article XII, Section 1 of the Virginia Constitution.

11. The taking of evidence should not be necessary for disposition of this petition.

12. The proper party Respondents to this action are as follows: Robert Brink, the Chair of the State Board of Elections who is being sued in his official capacity; John O'Bannon, the Deputy Chair of the State Board who is being sued in his official capacity; Jamilah LeCruise, the Secretary of the State Board who is being sued in her official capacity; and Christopher Piper, the Commissioner of the Department of Elections who is being sued in his official capacity.

13. All the Respondents are residents of the Commonwealth.

WHEREFORE, Petitioner respectfully prays as follows:

That this Court will issue a writ of mandamus and/or a writ of prohibition:

(a) Ordering the Respondents to perform their legal duty to protect the "integrity" of the ballot by prohibiting the ballot question language ordered by the General Assembly from being printed on the 2020 ballot and such other relief as the Court may deemed warranted in this matter.

BALLOT WORDING AT ISSUE

14. "Should the Constitution of Virginia be amended to establish a redistricting commission, consisting of eight members of the General Assembly and eight citizens of the Commonwealth, that is responsible for drawing the congressional and state legislative districts that will be subsequently voted on, but not changed by, the General Assembly and enacted without the Governor's involvement and to give the responsibility of drawing districts to the Supreme Court of Virginia if the redistricting commission fails to draw districts or the General Assembly fails to enact districts by certain deadlines?" *elections.virginia.gov.* (See Casting a Ballot)

MEMORANDUM OF LAW

1. Petitioner is entitled to a writ of mandamus, or the alternative a writ of prohibition:

15. "Before a writ may issue, there must be a clear right in the petitioner to the relief sought, there must be a legal duty on the part of the respondent to perform

the act which the petitioner seeks to compel, and there must be no adequate remedy at law." *Board of Cty. Supervisors of Prince William Cty. v Hylton Enters., Inc.* 216 Va. 582, 584 (1976) (citation omitted) (mandamus).

A. **Petitioner has a clear right to the relief sought**

i. Ballot wording fails to alert voters they are being asked to turn Supreme Court of Virginia into a political body

16. The separation of powers doctrine is enshrined in Article III, Section 1 of the Constitution of Virginia. ("hereinafter Constitution").

17. It is also found in Article I, Section 5.

18. The principle has long been considered a key to public confidence in the judicial system. James Madison, *Federalist Papers* 48-49.

19. The principle stems from Section 5 of the Virginia Bill of Rights.

20. The judicial power of the Supreme Court of Virginia flows from Article VI ("hereinafter Court").

21. Such authority has always been intended to flow from the "case or controversy" doctrine involving properly aggrieved parties. *Ward v Charlton*, 177 Va. 101 (1941).

22. Upon information and belief, no high Court in America has been permanently delegated legislative power historically reserved to the Legislative Branch.

23. "Subject to the foregoing limitations, the General Assembly shall have the power to determine the original and appellate jurisdiction of the courts in the Commonwealth." Article VI, Section 1.

24. The power given the Supreme Court in proposed Article II, Section 6-A is *not* judicial power as defined in Article VI.

25. Given the supermajority requirements in the proposed amendment, the General Assembly has accepted turning the Court into a political body next year.

26. Redistricting is recognized as an inherently political process. See e.g. *Davis v Bandemer*, 478 U.S. 109 (1986).

27. "There is no surprise to anyone that this redistricting, like most, is highly political." *Wilkins v West*, 264 Va. 447, 571 S.E.2d 100, 199 (concurring opinion, Chief Justice Hassell).

28. Article VI is constructed to preserve the Court's image of an impartial umpire, long considered essential to keep public confidence in the legal system.

29. But should the Redistricting Referendum pass, the Court goes from umpire to pitcher on the ultimate political chess board contrary to Article VI.

30. The public perception of the Court as an evenhanded umpire above the politics of the political arena has long been considered essential to maintaining public confidence in the legal system.

31. But should Article II, Section 6-A pass, the supermajority rules in this amendment could easily force the Court to redistrict the state and thus face charges its electoral map unfairly favored one political side or certain powerful legislators.

32. Since Justices are selected by the General Assembly, the wisdom of the separation of powers doctrine in protecting the Court's non-political image is clear.

33. Petitioner believes right now is not the moment to risk the Court's image of impartiality on account of the General Assembly using Article XII to manipulate the electorate to unsuspectingly abandon the separation of powers doctrine.

34. Article IV, Section 14 specifically discusses the power of the General Assembly as regards granting power to the Court.

35. There is no reference to redistricting.

36. Neither Article IV, Section 14 nor Article VI, Section 1 suggest voters approving these provisions ever contemplated abandoning the separation of powers doctrine they enshrined in Article III, Section 1.

37. In that connection, the Referendum wording fails to alert voters to the fact that since a citizen can't sue the Court, he or she seemingly may lose their current right to seek judicial review of the failure of a redistricting map to abide by state law. See *Vesilind v. Virginia State Bd of Elections*, 813 S.E. 2d 739 (Va. Sup. Ct.) (2018).

38. Furthermore, when the normative challenge to a redistricting plan is filed in federal court, there is a risk of a federal judge being forced to directly criticize the Supreme Court of Virginia for not knowing federal redistricting law.

39. Therefore, assuming, *arguendo*, Article XII, Section 1 can be used by legislators to advocate abandoning the separation of powers doctrine, the current ballot wording fails to minimally alert voters to the unprecedented ramifications of their having been pushed into an affirmative vote.

40. Petitioner asserts Article XII, Section 1 must be read as demanding legislators ensure the public will cast a properly informed vote on such matters.

ii. Electorate being manipulated so government gets the result it wants

41. In the famed Virginia "poll tax" case, the U.S. Supreme Court deemed …the political franchise of voting" as a "fundamental political right, because preservative of all rights." *Harper v. Virginia Board of Elections*, 383 U.S. 663, 667 (1966) (citation omitted).

42. "[A] tight-time frame before an election does not diminish that right." *League of Women Voters of NC v. North Carolina,* 769 F. 3d. 224, 229 (4th Cir.) (2018).

43. States have regularly justified the need to protect voters from "confusion and undue influence." *Burson v. Freeman*, 504 U.S. 191, 199 (1992) (citation omitted).

44. But here, the government is creating the confusion and undue influence to greatly increase the chances of getting the election outcome it wants.

45. In a normative election, there are opposing candidates on the ballot vying to win having satisfied the ballot access laws. *Burson*, infra.

46. The laws controlling the form and content of such election ballots must be fair and not give a built-in electoral advantage to any side. See, e.g., *Anderson* supra.

47. In Virginia, candidates for office are not permitted to have a written statement on a specific issue attached to their names.

48. But a Redistricting Referendum special election is different.

49. Article IV gives the General Assembly the unilateral power to change *statutory law* without seeking public approval in a referendum.

50. Virginians long ago denied them such power to change *the Constitution.* https://edu.lva.virginia.gov/online_classroom/shaping_the_constitution/docconstitution_1902

51. For their protection, the people limited the General Assembly's options.

52. It could "call a (constitutional) convention." Article XII, Section 2.

53. Or, under Article XII, Section 1, legislators could either put the full text of a proposed amendment on the ballot or "submit such proposed amendment or amendments to…the people, in such manner as it shall prescribe."

54. The General Assembly chose a descriptive ballot question, adopting the final wording by a vote of 83-11 in the House of Delegates and 39-0 in the State Senate. https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+SB236.

55. Unlike the normative election, only one side – the General Assembly self-evidentially in favor of their own handiwork – has access to the ballot, indeed it knows voters will assume they can trust the wording to be a fair, transparent and full summary of the key provisions in the unseen actual amendatory text.

56. Those opposed, like Petitioner, have no such ballot access.

57. Yet citizens have the same basic suffrage rights and other constitutional protections as in the normative election. See e.g. *Meyer v. Grant,* 486 U.S. 414 (1988).

58. The only structural difference is a referendum election is a contest between the pro-side advocating passage and the anti-side advocating rejection.

59. Therefore, unlike the neutral "umpire" posture of the government in the normative election, here the Legislative Branch of the government gets to use its unique ballot access advantages to concoct the ballot wording, knowing it will be the key to the outcome given voter expectations.

60. Unsuspecting Virginians do not realize the pro-side wrote the ballot wording, not as understandably presumed neutral government officials required to

provide a fair, transparent, and full summary of key provisions in the unseen actual amendatory text.

61. There is nothing in Article XII, Section 1 ("hereinafter Article XII") permitting dilution or degrading the other basic First Amendment rights of those challenging the government's claims nor the State Board's duty to ensure "the legality and impurity in all elections." Va. Code Section 24.2-103.

62. In *Coleman v. Pross*, 219 Va. 143, 246 SE 2d 613 (1978), this court ruled "that in determining whether proposed amendments to the Constitution may properly be referred to the electorate, a standard of strict compliance with all specified prerequisites, rather than a standard of substantial compliance, must be applied." *Id* at 622-623.

63. In arriving at the *Coleman* doctrine, the Court said: "Voters have the right to act on the proposed constitutional amendments with confidence, secure in the knowledge that the proposals have been put to them...only after careful analysis." Id at 622.

64. While *Coleman* did not involve a challenge to an Article XII ballot question wording, Petitioner believes the opinion's rationale is instructive.

65. If the General Assembly must do the "careful analysis" demanded in *Coleman* on *procedural matters*, then surely voters have the constitutional right to

expect their government is required do the same "careful analysis" to ensure the key *substantive aspects* of the proposals are found in the ballot wording.

iii. Minority group right to fair election being denied

66. Virginia citizens do not have the right of Initiative and Referendum as in numerous states to directly seek changes to the Constitution. *Meyer*, infra.

67. The deciding General Assembly vote to put the proposed amendments on the ballot as required by Article XII passed narrowly (54-46). https://lis.virginia.gov/cgi-bin/legp604.exe?201+vot+HV1896+SJ0018

68. In *Howell,* supra, top General Assembly leaders sought judicial review.

69. Unfortunately, perhaps due to public opinion polls, this has not happened in the instant matter. "Poll: 72% …support redistricting Amendment." https://www.13newsnow.com/article/news/politics/poll-72-of-virginia-voters-support-redistricting-amendment/291-da3c8d6b-10f5-45cf-80cc-e4d6650de2fc.

70. But fortunately, the rights of minorities in Virginia do not depend on whether such rights are popular with powerful politicians or political majorities.

71. *Williams v Rhodes*, 393 U.S. 23 (1968) is the seminal case on the right of political minorities- in that case organized minority political parties out of favor with the majority in the state legislature – to have fair ballot access.

72. "We have repeatedly held that freedom of association is protected by the First Amendment." Id at 30.

73. Article I (Bill of Rights)of our Constitution embodies the principles in the First Amendment to the U.S. Constitution.

74. "Competition in ideas and governmental policies is at the core of our electoral process and of the First Amendment freedoms." Id at 33.

75. "New parties struggling for their place must have the time and opportunity to organize in order to meet reasonable requirements for ballot position, just as the old parties have had in the past." Id.

76. "History has amply proved the virtue of political activity by minority, dissident groups, which innumerable times have been in the vanguard of democratic thought...The absence of such voices would be a symptom of grave illness in our society." *Sweezy v. New Hampshire,* 354 U.S. 234, 250-251 (1957).

77. Thus the form of the expression of minority opinion – whether by a protected class, a burgeoning formalized political party or merely individuals associating ad hoc in a particular election to challenge the official government line – may vary but the constitutional issue is the right stretching from the Declaration of Independence for those challenging the majority view to have their fair day in the Court of public opinion.

78. Article XII, Section 2 allowed the State Legislature to a "call a convention to propose...specific amendments to, this Constitution, as the General Assembly in its call may stipulate."

79. In terms of such a call to convention, the "General Assembly shall provide by law for the election of delegates to such a convention."

80. In such an election, all individuals, and groups, regardless of their political opinion, would have equal access to the ballot and there could be no government thumb on the scale during the election either. *Anderson*, supra.

81. After the "competition in ideas" deemed fundamental to our constitutional liberties took place, the public would have elected such voices to be heard during the Convention deliberations.

82. Self-evidentially the campaign to elect delegates, following by a debate over whether to propose specific redistricting amendments, would be most protective of any minority opinion on the issue.

83. The General Assembly choose instead to decide the matter on its own.

84. Petitioner does not quarrel with its right as a matter of constitutional law.

85. Moreover, Petitioner recognizes *Williams* was grounded in a "violation of the Equal Protection Clause." Id at 34

86. But *Williams*, like *Meyer*, *Anderson* and 50 years of constitutional jurisprudence makes clear those holding minority political views not favored by a powerful majority can look to similar protections in First Amendment should the Equal Protection Clause of the 14th Amendment not apply.

87. It is not the color of the skin of those holding a minority view which requires protection, but the right of those holding a view at variance with the majority not to have such rights diluted, debased, if not effectively eliminated by state action.

88. Petitioner recognizes that even in a normative election, the State has a legitimate interest in regulating the number of candidates on the ballot. *Bullock v Carter* 405 US 134, 145 (1972).

89. But ballot access laws would violate the federal constitution should its laws effectively prohibit those with a minority opinion from getting their candidate or party on the election ballot unless the state can provide "the demonstration of an interest sufficiently weighty to justify the limitation." *Norman v Reed,* 502 U.S. 279, 288-89 (1992).

90. This would equally violate the Constitution of Virginia as well.

91. A referendum election is the ultimate pure "competition in ideas."

92. Petitioner accepts he is in the minority group in this contest.

93. In the normative election, state law makes it easy for him to qualify as candidate on the ballot so he could advocate for his position.

94. But the General Assembly has long interpreted Article XII as allowing them to restrict the ballot to only the views of the majority in the General Assembly.

95. Minority opinion is denied not merely equal ballot access but no ballot access whatsoever.

96. As a constitutional matter, there is nothing in Article II prohibiting putting the General Assembly from including a minority view in some form on the ballot.

97. States have the responsibility to insure the "proper functioning of a democracy." *John Doe No. 1 v Reed*, 561 U.S. 186, 130 S. Ct. 2811, 2819 (2010).

98. Dueling ballot questions, or excessively long referendum wording, could interfere with the proper functioning of the electoral process and the state has a right to regulate ballot content. See *Buckley v American Constitutional Law Foundation*, 552 U.S. 182 (1998).

99. Petitioner however asserts that giving the government's opinion, as in the instant matter such an enormous advantage over the minority group opinion can only be constitutionally justified if the fairness principle behind "viewpoint neutrality" is rigidly adhered to in the instant matter.

100. In the case of *Board of Regents of University of Wis. System v Southworth*, 529 US 217 (2000), students challenged the process laid out in "the referendum aspect of the University's program." Id at 235.

101. In a nutshell, certain students objected to paying a mandatory student fee because such funds helped "support student organizations engaging in political or ideological speech" contrary to said student's point of view. Id at 221. See also *Rosenberger v. Rector and Visitors of the University of Virginia*, 515 U.S. 819 (1995) (viewpoint discrimination).

102. "The whole theory of viewpoint neutrality is that minority views are treated with the same respect as are majority views. Access to a public forum, for instance, does not depend upon majoritarian consent." *University of Wisconsin* infra, at 235.

103. By analogy, Petitioner believes a referendum election is in effect the government creating a limited public forum to debate a matter of great public important, to wit a very substantive amending of the Constitution.

104. "Of course, core political speech need not center on a candidate for office. The principles…extend equally to issue-based elections." *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995).

105. As a practical matter, the government knows the great majority of voters will ultimately approve or disapprove the Referendum largely on the viewpoint conveyed to them by the ballot wording they read right before casting a ballot.

106. Since only the majority view – written by the government actors who want the amendments adopted – is reflected in the wording, the *McIntyre* protection of the rights of the minority are diluted and debased if not fatally damaged by straying from "viewpoint neutrality" in the ballot wording.

iv. Scope of misleading ballot wording is historically unprecedented

107. In the title to the Act creating the referendum, the General Assembly referred to a "proposed amendment to Section 6 of Article II…and a proposed

amendment...adding Article II, Section 6-A." Chapter 1071 of the Acts of Assembly for the 2020 Session.

108. The proposed Article II, Section 6 essentially adds additional redistricting criteria.

109. In contrast, the proposed new Article II, Section 6-A focuses mainly on the creation of the Commission along with how it will operate.

110. The General Assembly chose to use one ballot question totaling 89 words for both amendments.

111. In the category of "Constitutional Amendments" on the Virginia Department of Elections website, the General Assembly appears to have put about 65 proposed amendments to the people since 1927.

historical.elections.virginia.gov

112. The two wordiest – in 1949 and 2006 – are roughly 100 words each. Id

113. In 1966, the only ballot question ran about 89 words. *Id.*

114. In 1972, the only ballot question ran about 72 words. *Id.*

115. In 2014, the only ballot question ran about 68 words. *Id.*

116. In 1928, there were 5 constitutional ballot questions put to the people, three of which totaled slightly over 60 words. *Id*

117. Multiple times the General Assembly has put more than one constitutional referendum on the same ballot: 1927 (3 separate questions), 1928 (5), 1944 (2),

1950 (2), 1960 (2), 1962 (3), 1970 (4), 1982 (2), 1986 (4), 1990 (3), 1994 (3), 1996 (5), 1998 (5), 2000 (2), 2002 (2), 2006 (3), 2012 (2). *Id.*

118. Under a separate "Referendum" category, there appears to be 17 other times the General Assembly put proposed constitutional amendments to the people: 2010 (3 different ballot questions), 1990 (1), 1982 (1), 1980 (3), 1978 (1), 1976 (6), 1974 (1) and 1972 (1). *Id.*

119. In 1976, there were four separate ballet questions for revisions to Article II. *Id.*

120. In 1980, there were two separate referendum ballot questions for amendments to the same Article X, Section 6. *Id.*

121. Therefore, while there is another unrelated constitutional ballot question, there is neither a technical nor historical policy reasons compelling the General Assembly to use only one ballot question for both redistricting amendments.

v. **Fatal material omission conceded by General Assembly**

122. There is no mention whatsoever of the criteria proposed to be added to Article II, Section 6.

123. The criteria addition in proposed Article II, Section 6 reads in its entirety: "Every electoral district shall be drawn in accordance with the requirements of federal and state laws that address racial and ethnic fairness, including the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United

States and provisions of the Voting Rights Act of 1965, as amended, and judicial decisions interpreting such laws. Districts shall provide, where practicable, opportunities for racial and ethnic communities to elect candidates of their choice." Chapter 1071, *infra*.

124. This complete omission of any reference to the new criteria is particularly unfathomable given the separate "explanation" handout required to be sanctioned by the appropriate General Assembly committee before being distributed to registrars pursuant to Va. Code Section 30-19.9.

125. This explanation "shall be limited to a neutral explanation." *Id.*

126. It can be found at *elections.virginia.gov.* (See Casting a Ballot).

127. The "explanation" contains these 23 words: "[t]he amendment also adds a requirement that districts provide, where practicable, opportunities for racial and ethnic minorities to elect candidates of their choice." *Id.*

128. The contrast to the ballot wording is constitutionally telling.

129. To meet the "neutral(ity)" requirement in Va. Code Section 30-19.9, the General Assembly concedes a fair, transparent and forthright heads-up to voters on the fact new redistricting criteria will be added if the Referendum passes.

130. The government intentionally left such mention out of the ballot wording.

131. Every voter will read the ballot wording right before voting.

132. A small minority may read the handout at some point before voting.

133. If fairness, transparency, and forthrightness require putting some notice of the new criteria in the sparsely read handout, surely no less would be required by Article II for the universally read ballot wording.

134. This failure to mention criteria changes in the ballot wording must be considered an effort to manipulate the electorate and damage Petitioner's protected minority right to a fair election to try and defeat the majority opinion.

135. "[I]n the larger community, in many instances, the only real knowledge a voter obtains on the issue…comes when he enters the polling place and reads the description…on the ballot." *State ex. Rel Voters First v Ohio Ballot Board*, 133 Ohio St. 3d 257, 265 (2012) (citations omitted).

136. "In order to pass constitutional muster, [t]he text of a ballot statement…must fairly and accurately present the question or issue to be decided in order to assure a free, intelligent and informed vote of the average citizen." *Id* (citation, quotation marks omitted).

137. "The burden of informing the public should not fall only on the press and opponent…the ballot title and summary must do this." *Askew v Firestone*, 421 So, 2d 151, 156 (1982).

138. "The problem, therefore, lies not with what (the wording) says, but rather with what it does not say." *Id.*

139. "It is the ballot…with which the voter comes into direct contact. The reasonable assumption is that he reads the question proposed on the ballot, and that his vote his cast upon consideration of the question so worded." *Ex parte Tipton*, 229 SC 471, 478 (1956).

140. "It is axiomatic that the majority of voters will derive their information about a proposed measure from the ballot title immediately before exercising the right of suffrage." *Parker v Priest*, 930 S.W. 2d 322, 325 (Ark. Sup. Ct) (1996).

141. "By **omitting the substantive criteria** for redistricting that would be applied by the Commission, the **ballot language…fails to inform the average voter** of the precise nature of the proposed constitutional citizen amendment". *Voters First*, infra at 268. (Emphasis added).

142. Petitioner asserts the pernicious government action here amounts to an unconstitutional manipulation of the electorate. See *Wilkins v West,* 264 Va. 667 (2002) and *Howell v McAuliffe*, 788 S.E. 2d 706 (2016).

143. While not suggesting an exhaustive review, Petitioner asserts the 93 years of Constitutional Referendum language does not suggest a ballot wording so compromised as this one. historical.elections.virginia.gov

144. In *Howell*, the unconstitutional manipulation and dilution resulted from an illegal increase of the electorate by roughly 5%. This could swing an election.

145. Here, the unconstitutional manipulation and dilution of the vote of Petitioner's right to contest the view of the government suffers substantially greater dilution and damage.

146. Well over 50% of the voters are being manipulated to trust the government's description and thus doubt Petitioner's claim that Virginians are being lulled into approving fundamental changes intentionally omitted from the ballot wording.

vi. Government has weaponized its ballot access to injure opponents

147. There will be more than 2,400 precincts and likely near 6,000,000 registered voters by election day. *elections.virginia.gov* (See Results/Reports)

148. The politicians running the General Assembly are fully aware of the prohibitive cost to the minority to counter their manipulative ballot language.

149. The referendum process is supposedly designed to "give citizens a voice on questions of public policy" (citation omitted) *Eastlake v Force Enterprises, Inc.,* 426 U.S. 668, 673 (1976).

150. Those on the pro-Amendment side are self-evidentially not damaged by ballot question wording further tilting the already tilted process in their favor.

151. But Petitioner and other opponents are injured in fact by government officials giving themselves an unfair advantage to use their ballot access to dilute, debate if not effectively destroy their opponents chance to win the election.

152. "The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury" *Marbury v Madison*, I Cranch 137, 163 (1803).

153. "A citizen's right to a vote free of arbitrary impairment by state action has been judicially recognized as a right secured by the (US) Constitution," listing several instances. *Baker v. Carr*, 369 U.S. 186, 208 (1962) (citations omitted).

154. The guarantee of a "free" election is enshrined in Article I, Section 6 of the Constitution.

155. The government's role in ensuring access to the ballot is limited to evenhanded administration of neutral laws, not advocating for one side or another. *Anderson v Celebrezze,* 460 U.S. 780 (1982).

156. Article XII becomes a pernicious politicized weapon for disinformation if the General Assembly's official handout must be "neutral" but it has the unfettered right to manipulate the election results by the ballot wording at issue.

157. The ballot wording at issue is inconsistent to constitutional right of the people to make for themselves all changes to the constitution. *Staples*, supra.

vii. Materially flawed ballot wording highlights danger of unfettered discretion

158. Petitioner asserts *Coleman's* requirement of "strict compliance" with Article XII *procedural* strictures are mocked when the ballot wording fails to extend the

same required "careful analysis" to the description of the *substantive contents* in the proposed constitutional changes.

159. Petitioner incorporates, for efficiency purposes, the specific omissions as to criteria and separation of powers already discussed at length.

160. In addition, the ballot wording says all "citizen" members of the commission will be "citizens of the Commonwealth."

161. This is inaccurate since the proposed Article II, Section 6-A only uses the term "citizen", moreover leaving the General Assembly to define the term.

162. Interestingly, the "explanation" handout is careful not to claim citizen members must be "citizens of the Commonwealth."

163. Petitioner believes this discrepancy, while minor, is indicative of an "unfettered discretion" mindsight.

164. In addition, the ballot wording omits mention of the supermajority requirements.

165. Petitioner is not saying the language must list every supermajority permutation.

166. But the failure to include any hint of a supermajority requirement is a material omission since voters would naturally assume majority rules unless alerted.

167. In addition, the ballot wording fails to mention that all the "citizen" members are selected from lists supplied by partisan leaders of the General Assembly, and thus not necessarily political independents as is implied.

168. By "not including, at a minimum, who would be selecting the commission members" the language "fails to properly identify one of the key elements of the proposed constitutional amendment." *Voters First*, infra.

169. The totality of the problems and omissions in the ballot language overcome the "presumption of validity" that might otherwise attach to legislation. See *Coleman*, infra at 620.

170. The totality of these omissions and other flaws demonstrates the need to extend judicial review beyond *Coleman's* procedural holding.

viii. Unconstitutional use of public funds

171. A leading case on the issue of using public funds to put a government thumb on the scale in a referendum election is *Citizens to Protect Public Funds v. Board of Education*, 13 N.J. 172 (New Jersey Sup. Ct 1953) written by Justice William Brennan before his service on the United States Supreme Court.

172. *Citizens* discusses the government's duty when putting a referendum to the voters – school bond issue – it hopes voters to approve.

173. "We do not mean that the public body formulating the program is otherwise restrained from advocating and espousing its adoption by the voters…**It is the**

expenditure of public funds in support of one side only in a manner which gives the dissenters no opportunity to present their side which is outside the pale." *Id* at 181-182. (Emphasis added).

174. *Citizens* reminds us that in a referendum election called by the government, the government's unfair advantage is so pervasive yet not often appreciated.

175. Indeed, the need to protect the public from the misleading ballot wording in this matter was anticipated by Article I, Section 15 of the Constitution of Virginia entitled, "Qualities necessary to preservation of free government."

176. A "free government rests, as does all progress, upon the broadest possible diffusion of knowledge." *Id.*

177. Further, "That no free government…can be preserved by any people, but by a firm adherence to justice…and virtue." *Id.*

178. "A fundamental precept of this nation's democratic electoral process is that the government may not "take sides" in election contests or bestow an unfair advantage on one of the several competing factions." *Stanson v Mott*, 17 Cal. 3d 206, 217 (Cal. Sup. Ct 1976).

179. As stated clearly in *Staples v. Gilmer*, 183 Va. 613 (1945), "the power to amend or revise in whole or part the Virginia Constitution resides in the people, not the State Legislature." *Id* at 624 (citation omitted).

180. In *Staples*, the General Assembly had put a ballot question to the people of Virginia: namely, do you want to call a constitutional convention?

181. "In submitting the question to the electors whether there shall be a convention, the legislature is performing an exclusive function for the people delegated to it." *Id.*

182. The *Staples* opinion recognizes that on matters of constitutional amendments, the State Legislature is akin to an agent.

183. Using this analogy, the General Assembly, as any agent, may make a proposal for is principal – here the people – to consider.

184. But only the principal gets to decide whether to approve what the agent is requesting the principal do.

185. "Agency has been defined as the relationship which results from the manifestation of consent by one person to another that the other shall act on his behalf and subject to his control" (citations omitted) *Raney v Barnes Lumber Corp.* 195 Va. 956, 966 (1954).

186. "The power of control is the determining factor in ascertaining the alleged agent's status." (citation omitted) *Allen v Lindstrom*, 379 SE 2d 450, 454 (Va. Sup. Ct. 1989).

187. Article I, Section 2 clearly says "all power is vested in, and consequently derived from, the people, that magistrates are their trustees and servants, and at all times amendable to them."

188. "An agency is a fiduciary with respect to the matters within the scope of his agency." *HB Ltd. Partnership v Wimmer*, 257 SE 2d 770, 733 (1979).

189. Conceptually therefore, Article XII differs fundamentally from Article IV.

190. Whereas Article IV gives legislators power to enact legislation without seeking public approval, Article XII intentionally takes it away for constitutional amendments.

191. Thus, in this sphere, Article XII relegates legislators to the role of agents, requiring them to give their principals a fair, transparent, and full summary of the key provisions of proposed constitutional changes in any description ballot wording.

192. To read Article XII any other way would, in effect, authorize the "agent" to play "constitutional truth or dare" with the "principal."

ix. Standing

193. In *Howell*, infra, both dissenting opinions cite *Goldman v Landsidle,* 262 Va. 364 (2001) – indeed, one dissent said simply: "The Principles from *Goldman v Landsidle* Control." *Howell*, *infra* at 726-727 (dissenting opinion of Justice Mims).

194. The *Howell* majority disagreed, saying plainly the "underlying interest protected by our standing analysis in ***Wilkins*** – **the right of Virginia voters to seek judicial review of unconstitutional manipulations of the electorate** – parallels the interest asserted by petitioner in this case. **The specific manipulation is different** but the standing analysis is the same." Id at 714." (emphasis added)

195. The *Howell* opinion says "each petitioner (in *Howell*), as a Virginia registered voter planning to vote in the 2016 General Election, is directly affected by the allegedly unconstitutional expansion of the statewide electorate and has standing to challenge" the Governor's Executive order at issue in that matter. *Id.*

196. In 1965, famed civil rights attorney Henry Howell sued over an unconstitutional redistricting, apparently representing one lone voter. *Wilkins v Davis*, 205 Va. 803 (1965).

197. "A petition for a writ of mandamus was filed in this court (citations omitted) against the secretary and members of the State Board of Elections by the petitioner, Jack R. Wilkins, who alleged that he is a citizen of the Commonwealth, a duly qualified voter, and taxpayer, and sues on behalf of himself and all other citizens of the Commonwealth similarly situated." *Id* at 804.

198. For purposes of a challenge to a mandamus motion then, as now, the facts alleged by petitioner are assumed to be true for purposes of establishing standing.

199. The Howell majority found *Goldman v Landsidle* distinguishable.

200. The instant matter is likewise distinguishable.

201. *Goldman* did not involve constitutionally protected political rights.

202. *Goldman* did not involve a constitutional provision creating an election, nor one enacted to protect the rights of suffrage or rights of the minority opinion to fairly contest an election without the government's thumb on the scale.

203. *Goldman* did not involve a situation where the Va. Supreme Court had previously ruled on the need to hold the General Assembly to "strict compliance" given the weighty nature of changes to the fundamental law of the Commonwealth.

204. *Goldman* did not involve a circumstance where the General Assembly recognized the need to make sure its spending of public dollars on an official handout had to be "neutral" and not take sides.

205. Moreover, by the time this court rendered its decision in *Goldman v Landsidle*, the Petitioner had already persuaded the Attorney General of Virginia, the State Comptroller of Virginia, and the General Assembly to adopt Petitioner's view of the Constitution: to wit, the legislative pay raise at issue violated Article IV, Section 5. See *Earley v Landsidle*, 514 SE 2d 153 (1999).

206. Petitioner, hoping to avoid the expense of this instant action, has likewise tried to get state officials to voluntarily take action to protect the Constitution.

207. Unlike *Goldman*, this has not yet happened.

208. Unlike *Goldman*, the gravamen of the instant case is not whether the General Assembly violated the Constitution to get members increased compensation.

209. Here the issue is enormously more important as the General Assembly is asserting unfettered power to use its unique ballot access to get unsuspecting voters to changes undermining other provisions in the Constitution, while putting at risk the image of an impartial judiciary above the political fray.

210. The U.S. Supreme Court has described standing in terms of "illumination of difficult constitutional questions" as cited by this Court in *Cupp v. Board of Sup'rs of Fairfax County*, 318 SE 2d. 407, 412 (1984): "The essence of the standing inquiry is whether the parties seeking to invoke the court's jurisdiction have "alleged such *a personal stake in the outcome of the controversy* as to assure the concrete adverseness which sharpens the prescription of issues upon which the court so largely depends for illumination of difficult constitutional questions." (citations omitted)

211. Petitioner believes he is precisely such a petitioner.

212. Petitioner is not merely asserting an injury suffered by all citizens equally.

213. According to the polls he is the minority on this issue, since 70% of the people in a poll published taken 9 months ago said they supported the proposed amendment. https://cnu.edu/wasoncenter/surveys/2019-12-16/.

214. Assuming the public is likewise currently inclined, the misleadingly and materially flawed ballot wording at issue is particularly damaging to Petitioner, but self-evidentially not those on the pro-side.

215. Article XII ballot access cannot be permitted to be wielded by the Legislative Branch to dilute, debase if not effectively destroy the constitutionally protected political rights of those opposed to the government's position, thus denying the even-handed neutral government role in the election process long required for a free and fair election.

216. In effect, the government is weaponizing its ballot access to spread the chloroform of conformity, if not impose a reverse literacy test, to defeat the right of an informed vote so essential to any referendum.

217. In the case of *Miller v. Moore,* 169 F. 3d. 1119 (8th Cir. 199), the Court said voters had suffered an injury in fact and could challenge a state election ballot label law that "greatly diminish(ed) the likelihood that the candidates of their choice will prevail in the election." *Id* at 1123.

218. In the instant case, Petitioner is similarly injured in fact – a fact the experienced politicians in the General Assembly can be presumed to know.

219. Such a circumstance would not be allowed in the normative election contest between opposing candidates holding opposite views on these same constitutional proposals. See *Anderson,* infra.

220. In such matters of one-sided ballot access in the normative election, no one would question the Petitioner's right to sue to both get on the ballot and insist on an even-handed government role in the election. Id.

221. The policy reasons seem equally compelling, if not more so, in this instant matter given the government's unabashedly putting its thumb on the scale.

x. Additional Injury to Petitioner

222. Yesterday, the Court issued an opinion in the matter of *Park v. Northam*, Record No.200767

223. This Court had been asked to rule on a "Petition for a Writ of Mandamus" by Ms. Park, the owner of a restaurant, and one other petitioners.

224. In discussing the "injury" element to the standing issue, the Court cited *Howell*, infra for the proposition that the "purpose of the personalized injury requirement is to prevent courts from improvidently answering "abstract questions that may be interesting and important to the public but lack any real errors injuriously affecting the complaining litigants." (internal quotation marks omitted).

225. Later in the opinion, the Court cited *Fleenor v Dorton*, 187 Va. 659, 665 (1948) for the proposition "that a court could not infer a fact necessary to obtain a writ of mandamus where the fact was not alleged."

226. Further in the opinion, the Court said "(a)s we have previously stated when denying the mandamus relief, we will not "anticipate prospective conditions which

may never arise in order to declare a law unconstitutional." (citing *Lehman v Morrissett*, 162 Va. 463, 470 (1934).

227. Petitioner has been recognized for his expertise in running statewide political campaigns. Dwayne Yancey, *When Hell Froze Over* (1988)

228. In the normative election, certain candidates or political parties have certain major advantages over their opponents.

229. But these advantages, or disadvantages, are not due to the government using its unique power to advocate for one side or the other.

230. There can be no "free" election as guaranteed by Article I, Section 2 if the government can use its unique and immense powers to pick winners and losers.

231. Petitioner, therefore, based on his long experience and expertise, can say without fear of contradiction that the General Assembly has put its thumb on the scale to turn the normative neutral election process into one greatly benefitting the government's pro-side to the intentional detriment of Petitioner's right to suffrage and associate with others to win the election.

232. The General Assembly understands the wording on the Referendum ballot is the key to the election, since most voters do not read the constitutional amendments themselves.

233. "Courts have recognized that some restrictions on political candidates violate the Constitution because of their derivative effect on the right to vote." *Hutchinson v Miller*, 797 F. 2d 1279, 1282 (4th. Cir. 1986).

234. State law forbids campaigning inside a polling place. Va, Code. Section 24.2-604.

235. State law forbids the government officials at the polling both from providing campaign literature from any side, and while authorized representatives of a political party are allowed in the polling area, such person is only there to observe and cannot engage in any advocacy activity. Va. Code Section 604.4.

236. State regulation of elections is thus geared to prevent one side or the other gaining the huge advantage of using the ballot to have the "last say" before the votes are actually cast.

237. Therefore fair, evenhanded ballot access for all points of view is recognized as a pillar to the electoral process. "Virginia's ballot ordering law thus allows any political organization – of any persuasion - an evenhanded chance at achieving political party status and first-tier ballot position." *Libertarian Party v. Alcorn* 826. F. 3d 708,714 (4th. Cir. 2010).

238. Petitioner is not questioning the state's right to put a ballot question on the ballot, indeed one written by the very government official advocating its adoption. *Timmons v. Twin Cities,* 520 U.S. 351 (1997).

239. But *Twin Cities* is very instructive.

240. In a nutshell, Minnesota permitted a candidate from appearing on the same ballot as the nominee of two different parties for the same office. Id at 354.

241. The party denied having said candidate on its ballot line filed suit.

242. The Court found that such a limitation – in effect denying a party the right to put a candidate on its ballot who had already agreed to run as another party's nominee – was justified state action.

243. "The laws do not directly limit the party's access to the ballot." Id at 363.

244. "We conclude that the burdens Minnesota imposes on the party's First and Fourteenth Amendment associational rights – though not trivial – are not severe." Id at 363.

245. "Ballots serve primarily to elect candidates, not as forums of political expression." Id.

246. Self-evidentially, the Referendum election in the instant matter is precisely the opposite.

247. In *Timmons* the candidate at issue would still be on the ballot and petitioners could still vote for him although not on their party line.

248. In the Referendum election at issue, only one side is on the ballot, indeed the word on the matter seen by voters, indeed likely the first and only explanation, is

ballot wording they assume to be a fair, transparent summary of the key provisions in the unseen proposed constitutional changes.

249. *Timmons* says the state can make it harder for individuals to associate to get their viewpoint across in an election, thus making it harder to win.

250. But unlike *Timmons*, Petitioner is not merely denied access to the ballot for his views, but the ballot language itself chosen by the pro-government side is geared to injure Petitioner's right to a fair opportunity to have his political position prevail.

251. In the instant matter, injury to Petitioner's constitutionally protected political rights under Article I of the Constitution of Virginia - which includes the basic first amendment electoral protections in the federal constitution – suffer severe, not trivial, particularized injury.

xi. Standard of Review

252. Petitioner asserts the usual heavy deference given legislative acts should not apply in the case of ballot referendum wording.

253. Unlike the enactment statues, the General Assembly can only propose a constitutional amendment and ask the people to pass it.

254. Therefore, to give the same deference to the ballot wording written by the General Assembly majority advocating for its passage would, is not justified.

255. Petitioner says that upon prima facie evidence of the wording having a material omission, the Court should give no deference to the General Assembly.

256. As Petitioner has previously stated, the *Coleman* "careful analysis" standard of strict compliance should be extended to whether the ballot wording has been so carefully worded to ensure the public has been given a fair, transparent full summary of the key provisions in the proposed amendments.

257. There are not always easy litmus tests for election law review. *Anderson*, infra.

258. By the General Assembly's own "explanation", the ballot wording isn't "neutral". Va. Code Section 30-19.9

259. The ballot wording makes no reference to the proposed Article II, Section criteria.

260. On top of that, Petitioner has shown any number of significant flaws in the ballot wording compared to the actual constitutional text.

261. Extrapolating the *Coleman* rationale of the "careful analysis" owed by the General Assembly to the voter to substantive matters therefore seems fair, indeed Petitioner believes any appropriate standard of review, except one giving the State Legislature unfettered discretion, will find the current ballot wording lacking proper constitutional rigor.

262. Petitioner asserts that under *Anderson*, the "neutral" standard the General Assembly imposed on itself in Va. Code Section 30-19.9 would be a bare minimum.

B. RESPONDENTS HAVE A LEGAL DUTY TO PERFORM THE ACTS THAT PETITIONER SEEKS TO COMPEL

263. For the foregoing reasons, the Redistricting Referendum dilutes, debases, and otherwise harms Petitioner's rights of suffrage, along with his other First Amendment political rights to defeat a government proposal he it feels will harm himself and the Commonwealth.

264. The government is supposed to be the umpire, acting through Respondents.

265. Petitioner thus has a clear right to have this Court compel Respondents to comply with their statutory duties to prevent such injury.

266. "The right of suffrage can be denied...by wholly prohibiting the free exercise of the franchise." *Reynolds v. Sims*, U.S. 533, 55 (1964).

267. This Court has been willing to entertain issuance of the writ of mandamus through its original jurisdiction in such election cases as in *Brown v Saunders*, 159 Va. 28 (1932), *Wilkins v Davis* 205 Va. 803 (1965), *Wilkins v West*, 264 Va. 447 (2002) and *Howell*, infra.

268. Supreme Court ballot access jurisprudence, while giving states latitude to protect the integrity and safety of an election process, would not condone the state action in this instant matter. *Anderson*, infra.

C. PETITIONER HAS NO ADEQUATE REMEDY AT LAW

269. The remedies open to petitioner – an action for an injunction or a writ of mandamus in a Circuit Court – are neither "at law," nor are they "adequate."

270. The gravamen in the instant matter is not whether Petitioner might have a possible alternative remedy but whether there is an "adequate" alternative remedy "at law."

271. The fact "a subordinate, local court was open to the petitioner" to seek a writ of mandamus didn't equate into his being required "to have pursued his remedy in that Court..." *Clay v Ballard*, 87 Va. 787, 13 S.E. 262, 263 (1891).

272. *Clay*, supra said further that "where the object is to enforce obedience to a public statute it has been invariably held that the writ is demandable of right." *Id.*

273. While injunctive relief is available in Richmond Circuit Court, this is not a remedy "at law."

274. To receive such an injunction, Petitioner would need to "establish the "traditional prerequisites...irreparable harm and lack of an adequate remedy at law" before a request for injunctive relief could be granted." *Levisa v. Consolidation,* 662 SE 2d Va. 44, 53 (2008).

275. Moreover, for a remedy to be considered adequate, the legal remedy "must be equally as convenient, beneficial and effective as the proceeding of mandamus." *Cartwright v. Commonwealth Transportation Comm'r of Va.,* 613 SE 2d. 449 (2005) (quotation marks omitted.)

276. Since time is of the essence, Petitioner has properly sought the mandamus requested.

277. Petitioner fails to see the prejudice to Respondents should this Court choose to review this matter through its original mandamus authority.

278. The mandamus having been filed with a motion for an expedited hearing given the urgency and importance of the matters at issue.

279. Petitioner believes granting such mandamus relief would be justified since there would be no prejudice "suffered by any party and harm rather than good would result from sending the parties back to try the same issues, to be raised by different pleadings." *May v. Whitlow*, 201 Va. 533, 538 (1960).

280. The General Assembly has time to remedy what the Court decides needs fixing.

II. ON A WRIT OF PROHIBITION

281. Based on the foregoing, Petitioners are entitled to a writ of prohibition should a writ of mandamus not lie. "The write of prohibition, as its name imports, is one which commands the person to whom it is directed not to do something

which the court...the court is informed he is about to do." *In re Commonwealth*, 278 Va. 1, 17, 677 SE 2d 236, 243 (Va. Sup. Ct. 2008).

282. Since a challenge to the ballot wording of statewide referendum, while common in many others appears to one of first impression in the Commonwealth, and since none of the petitioner's inquiries to state government officials received a substantive reply as to matters herein, Petitioner is pleading in the alternative.

CONCLUSION

For the reasons set forth above, we respectfully request this Court enter a writ of mandamus, or in the alternative a writ of prohibition ordering Respondents (1) to perform their legal duty to protect the "integrity" of the ballot by prohibiting the ballot question language ordered by the General Assembly from being printed on the 2020 ballot and such other relief as the Court may order.

Dated: August 26, 2020

Respectfully submitted,

_____

Paul Goldman

VERIFICATION

Pursuant to Va. Code Section 8.01-4.3, I verify under penalty of perjury that the foregoing is true and correct to the best of my knowledge.

Paul Goldman
August 26, 2020

COMMONWEALTH OF VIRGINIA
CITY OF RICHMOND

Subscribed and Sworn to before me this 26th day of August, 2020.

KEIONA DEANDRA REDD
NOTARY PUBLIC
REG # 7830761
MY COMMISSION EXPIRES
3/31/2023
COMMONWEALTH OF VIRGINIA

Notary Public

CERTIFICATE OF SERVICE

Pursuant to Va. Code. Section 2.2-507, Petitioner has on this 26th day of August served on the Office of Attorney General, at its regular email service@oag.state.va.us, this Motion, in the Office's capacity as counsel to Respondents Mr. Brink, Ms. LeCruise, Mr. O'Bannon, and Mr. Piper.