IN THE

SUPREME COURT OF VIRGINIA

Record No. 201067

PAUL GOLDMAN,

Petitioner,

v.

THE STATE BOARD OF ELECTIONS, et al.,

Respondents.

RESPONSE TO VERIFIED PETITION FOR WRIT OF MANDAMUS AND/OR PROHIBITION

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MOTION TO DISMISS

Respondents State Board of Elections, Chairman Robert Brink, Vice-Chairman John O'Bannon, and Secretary Jamila D. LeCruise move to dismiss the verified petition for a writ of mandamus and/or prohibition because petitioner lacks standing, neither mandamus or prohibition is available in these circumstances, and Article XII, § 1 affords the General Assembly broad discretion to frame the ballot question regarding a proposed constitutional amendment.

BRIEF IN SUPPORT OF MOTION TO DISMISS

INTRODUCTION

As his filing makes clear, petitioner strongly opposes the proposed constitutional amendment to create a commission to draw congressional and state legislative districts in Virginia. And, to be sure, there may be serious questions about the wisdom of the proposed amendment and the process it would establish for redistricting, which (as petitioner points out (Pet. ¶¶ 24–32)) would shift responsibility for drawing maps from the legislature to this Court in some circumstances. But petitioner's disagreement with the proposed amendment does not afford him standing to challenge the General Assembly's decision to put it on the

ballot, nor does it render unconstitutional the language the legislature chose to describe it. Even if it did, relief would not be available through a writ of mandamus or prohibition.

STATEMENT

1. During its 2020 legislative session, the General Assembly voted to send to the voters a proposed constitutional amendment that would establish the Virginia Redistricting Commission and confer on it the responsibility to draw congressional and state legislative districts following each census. See 2020 Va. Acts Ch. 1071 (SB 236), § 6A(a), (b). Under the proposed amendment, the Commission would be required to submit plans for new districts by a certain date, the General Assembly would be required to vote on those plans without change, and any redistricting plan approved by the General Assembly would not be subject to veto by the Governor. § 6A(e), (f). If the Commission failed to agree on a plan to submit to the General Assembly by the deadline—or if the General Assembly failed to approve a submitted plan—responsibility for establishing congressional and legislative districts would fall to this Court. § 6A(f), (g).

2. The ballot language that is the subject of petitioner's

challenge was included in the legislation proposing the redistricting amendment and was finalized more than four-and-a-half months ago. See 2020 Va. Acts Ch. 1071, § 2 (SB 236) ("The ballot shall contain the following question . . . ."). The current form of the ballot language passed both houses of the General Assembly in March and was signed into law by the Governor on April 10, 2020.[1]

The election at which Virginians will consider the proposed redistricting amendment will take place on November 3, 2020. Local registrars must have the official ballot printed "at least 45 days preceding the election," Va. Code Ann. § 24.2-614—which this year is Saturday, September 19—and make absentee ballots available at the same time, § 24.2-612. As respondents have previously explained, election officials anticipate a surge in demand for mail-in ballots this year and have indicated that the process for printing ballots must begin earlier than in previous years. See Response to Mot. to Expedite at 1–2; see also Justin Mattingly & Andrew Cain, *Virginia Officials Prepare for*

[1] See Virginia's Legislative Information System, SB 236: Constitutional Amendment, Apportionment, Virginia Redistricting Commission (last visited September 3, 2020), *available at* https://lis.virginia.gov/cgi-bin/legp604.exe?201+sum+SB236.

Surge in Mail-in Voting After Practice Is Used Widely in Municipal Elections, Richmond Times Dispatch (May 22, 2020).[2] Indeed, some jurisdictions have *already* begun printing ballots and the rest are poised to do so imminently as of the day of this filing. Response to Mot. to Expedite at 1–2.

3. On August 27, 2020, petitioner (a single individual) sought an original writ of mandamus and/or prohibition in this Court and moved for an expedited hearing. Respondents did not object to expedited consideration and notified the Court that the process of printing ballots was already underway in some jurisdictions. See Response to Mot. to Expedite 2. This Court directed respondents to file a responsive pleading by 5 p.m. on September 4, 2020.

LEGAL STANDARD

1. "A writ of mandamus is an extraordinary remedial process, which is not awarded as a matter of right but in the exercise of sound judicial discretion." *Gannon v. State Corp. Com'n*, 243 Va. 480, 482 (1992). "Due to the drastic character of the writ, the law has placed

[2] *available at* https://roanoke.com/news/virginia/virginia-officials-prepare-for-surge-in-mail-in-voting-after-practice-is-used-widely-in/article_f2fe6cbf-593e-5f0d-b9e3-8a5e83739e2a.html.

safeguards around it." *Id.* "Consideration should be had for the urgency which prompts an exercise of the discretion, the interests of the public and third persons, the results which would follow upon a refusal of the writ, as well as the promotion of substantial justice." *Id.* "In doubtful cases, the writ will be denied" and mandamus will be granted only "where the right involved and the duty sought to be enforced are clear and certain." *Id.*

2. "A writ of prohibition is an extraordinary remedy employed to redress the grievance growing out of an encroachment of jurisdiction." *In re Commonwealth's Attorney for City of Roanoke*, 265 Va. 313, 316 (2003) (quotations omitted). "The writ does not lie to correct error but only to prevent exercise of the jurisdiction of the court by the judge to whom it is directed when the judge either has no jurisdiction or is exceeding his/her jurisdiction." *Id.* at 316–17.

ARGUMENT

Petitioner raises numerous policy arguments against the proposed redistricting amendment. But those arguments, no matter how persuasive, are better suited for debate at the ballot box than in this Court. The single *legal* claim raised in the petition—that the ballot

language the General Assembly directed to be used to describe the proposed amendment violates Article XII, § 1 of the Virginia Constitution—fails for at least three reasons.[3] *First*, petitioner lacks standing. *Second*, petitioner fails to state a claim for which mandamus relief is available and likewise fails to state a proper claim for a writ of prohibition. *Third*, Article XII, § 1 affords the General Assembly broad discretion to submit a proposed amendment to the voters "in such manner at it shall prescribe." Va. Const. art. XII, § 1. For all of those reasons, the petition should be dismissed.

I. Petitioner lacks standing to challenge the ballot language

1. Whether petitioner has standing to seek a writ of mandamus or prohibition "is a threshold issue and a question of law." *Howell v. McAuliffe*, 292 Va. 320, 330 (2016); see *id.* (emphasizing that the "general requirements of standing apply to applications for writs of mandamus and prohibition").

"The concept of standing concerns itself with the characteristics of

[3] Although petitioner makes passing references to other constitutional violations, see, *e.g.*, Pet. ¶¶ 73, 100, 103, 142, 175, 251, he "fails to develop [his] argument" on these points. *Coward v. Wellmont Health System*, 295 Va. 351, 367 (2018). Accordingly, "the[se] issue[s] [are] waived." *Id.*

the [individuals] who file[] suit." *Westlake Props., Inc. v. Westlake Pointe Prop. Owners Ass'n*, 273 Va. 107, 120 (2007) (internal quotation marks and citations omitted). "It is not enough to simply 'tak[e] a position and then challeng[e] the government to dispute it.'" *Park v. Northam*, Record No. 200767, at 5 (Aug. 24, 2020) (*Park* Order) (quoting *Lafferty v. School Ed. of Fairfax Cnty.*, 293 Va. 354, 361, 365–66 (2017)). Rather, "[t]o have standing to challenge governmental action, a party must allege facts indicating he or she has suffered a 'particularized' or 'personalized' injury due to the action." *Id.* (quoting *Wilkins v. West*, 264 Va. 447, 460 (2002)). "[T]o establish . . . standing to seek mandamus relief, [a] petitioner[] ha[s] to identify a specific statutory right to relief or a direct—special or pecuniary—interest in the outcome of this controversy that is separate from the interest of the general public." *Id.* at 6.[4]

2. Petitioner falls well short of meeting those standards.

[4] Although petitioner makes passing reference to several statutes (see Pet. ¶¶ 3, 61), he does not explain how those statutes have been violated, much less allege that "any of those statutes 'gives [him] a legally enforceable right to have a court compel [respondents] to perform [their] duties in the manner [he] request[s].'" *Park* Order at 6 n.3 (quoting *Goldman v. Landsidle*, 262 Va. 364, 374 (2001)).

a. Petitioner insists that this Court's decision in *Howell v. McAuliffe*, 292 Va. 320 (2016), resolves the standing question in his favor. See Pet. ¶¶ 193–200. But the *Howell* Court took pains to "emphasize that [its] standing conclusion rest[ed] heavily on the unprecedented circumstances of [that] case," 292 Va. at 334, which involved a particular type of previously recognized injury—vote dilution—that the plaintiff voters would experience as a *direct* result of the challenged action. See *id.* at 332 (explaining that all registered voters were "*directly* affected by the allegedly unconstitutional expansion of the statewide electorate" (emphasis added)).

Petitioner's claims are far afield from those asserted in *Howell*. Even crediting all of petitioner's allegations, no vote dilution would follow "directly" from the action complained of—here, the inclusion of the challenged language on the November 3 ballots. According to petitioner, by drafting a misleading description of the redistricting amendment, the General Assembly made it more likely that the amendment will pass. See, *e.g.*, Pet. ¶¶ 104, 105, 150. But no matter how much more likely passage might be as a result of the ballot language, there is no guarantee that the amendment will be approved

and, if the proposed amendment fails, there will be no change to the status quo. And even if the amendment is approved, it is impossible to know what the result of the newly constructed commission's work would be, much less whether petitioner's or anyone else's votes will be diluted as a result of that work. Accordingly, unlike the petitioners in *Howell*—who this Court repeatedly emphasized claimed a direct and immediate injury (see 292 Va. at 332–34)—petitioner's alleged injury relies on "future or speculative facts," which cannot confer standing. *Lafferty*, 293 Va. at 361.

b. Absent inapt comparisons to the vote-dilution injury alleged in *Howell*, it is apparent that petitioner does not claim an interest in this case that is "separate from the interest of the general public." *Park* Order at 6; see also *Goldman v. Landsidle*, 262 Va. 364, 372–73 (2001). Petitioner asserts that he is a "recognized . . . expert[] in running statewide political campaigns" and claims "experience and expertise" on the issues involved in this case. Pet. ¶¶ 227, 231. But this Court has already considered and rejected those sorts of arguments by holding that "zealous interest in [a] topic alone is not sufficient to create standing." *Lafferty*, 293 Va. at 364.

Nor does it matter that petitioner claims to be among the class of would-be voters who oppose the proposed constitutional amendment that the challenged ballot language describes. Regardless of their substantive views on the redistricting amendment, any Virginia citizen might share petitioner's view that the language the legislature chose to describe it is somehow deficient. For that reason, petitioner cannot establish that he maintains an "interest in the proceedings different from that of the public at large." *Goldman*, 262 Va. at 374. In any event, petitioner "offers no facts to support [his] assertion" that the ballot language is particularly damaging to him as compared with supporters of the proposed amendment, and his "bald concern" that the language the General Assembly chose will make passage more likely "cannot afford him standing." *Park* Order at 6; see also *Lafferty*, 293 Va. at 361–62 (student's factually unsupported assertion of fear of discipline for violating his school's revised anti-discrimination policy did not establish an "injury sufficient for standing" to challenge the policy's legality).

II. Neither mandamus nor prohibition is an appropriate vehicle for relief here

Beyond failing for lack of standing, neither mandamus nor prohibition would be available under these circumstances.

1. a. "It is well settled as a fundamental principle in the law of mandamus . . . that courts will not grant this extraordinary remedy where to do so would be fruitless and unavailing." *Board of Sup'rs of Amherst Cty. v. Combs*, 160 Va. 487, 496 (1933). As this Court has explained, "[i]f it appear[s] that the writ would be ineffectual to accomplish the object in view, either from the want of power of the respondent to perform the act required, or on the part of the court granting the writ to compel its performance, the court will refuse to interfere." *Id.* at 496–97; see also *Park* Order at 11.

Those principles bar relief here. Petitioner seeks an order forbidding various executive officials from issuing ballots containing the language to which he objects. See, *e.g.*, Pet. ¶ 12. But petitioner does not deny that the legislature is empowered to propose a constitutional amendment via a ballot initiative, as it did with the redistricting amendment. See Pet. ¶¶ 83–84. And even if this Court were to forbid respondents from issuing ballots with the challenged language, neither this Court nor respondents would determine what words or phrases would replace it—that responsibility belongs to the General Assembly, which could exercise its discretion to draft replacement language

petitioner might still find objectionable. For that reason, "it is at best unclear whether directing [respondents] not to [issue ballots containing the challenged language] could provide any actual relief to" petitioner. *Park* Order at 11.

b. Mandamus is also inappropriate here for another reason—judicial intervention at this point would significantly disrupt an ongoing electoral process. Like a request for an injunction, a petition for a writ of mandamus requires "[c]onsideration . . . for the urgency which prompts an exercise of the discretion, the interests of the public and third persons, the results which would follow upon a refusal of the writ, as well as the promotion of substantial justice." *Gannon v. State Corp. Com'n*, 243 Va. 480, 482 (1992). Given that the process of printing ballots is already underway, see pp. 3–4, *supra*—and ordering changes at this late stage would disrupt local officials' efforts to meet statutorily imposed deadlines and risk disenfranchising hundreds of thousands of voters who have requested mail-in ballots—"the interests of the public and third persons" and "the promotion of substantial justice" heavily favor non-intervention. Accord *Scott v. James*, 114 Va. 297 (1912) (declining to entertain a request to enjoin the Secretary of the

Commonwealth from distributing ballots containing a measure to amend the Constitution on the ground that the General Assembly was not authorized to propose amendments to two constitutional provisions in a single ballot question).[5]

2. Petitioner is likewise not entitled to a writ of prohibition. "[P]rohibition is a proceeding between *courts* bearing the relation of supreme and inferior," *Burch v. Hardwicke*, 71 Va. (30 Gratt.) 24, 39 (1878) (emphasis added), and the writ is issued "*only* to prevent exercise of the jurisdiction of the court by the judge to whom it is directed when the judge either has no jurisdiction or is exceeding his/her jurisdiction," *In re Commonwealth's Attorney for City of Roanoke*, 265 Va. 313, 316–17 (2003) (quotations omitted) (emphasis added). The "restriction of the writ [of prohibition] to judicial proceedings—to courts alone—has been distinctly and repeatedly sanctioned by this court." *Burch v. Hardwicke*,

[5] For similar reasons, and because the challenged ballot language was included in legislation signed into law on April 10, 2020 (see pp. 2–3, *supra*), petitioner's claim may also be barred by laches. This Court, however, does not appear to have addressed the operation of laches in a mandamus action. See *C. Givens Brothers, LLC v. Town of Blacksburg*, 273 Va. 281, 283 n.6 (2007) (declining to consider assignment of error involving laches). Because petitioner is not entitled to mandamus in any event, the Court need not resolve that question here.

64 Va. (23 Gratt.) 51, 59 (1873). Because petitioner does not seek to compel the proper exercise of jurisdiction by an inferior court, his request for a writ of prohibition fails as a matter of law.

III. The General Assembly has broad discretion to select ballot language

As previously noted, the petition raises numerous policy arguments against the proposed redistricting amendment that warrant substantial consideration at the ballot box. But petitioner's *legal* claim fails because the Constitution affords the legislature broad discretion to submit a proposed constitutional amendment to the voters as it sees fit.

Article XII, § 1 reads as follows:

> Any amendment or amendments to this Constitution may be proposed in the Senate or House of Delegates, and if the same shall be agreed to by a majority of the members elected to each of the two houses, such proposed amendment or amendments shall be entered on their journals, the name of each member and how he voted to be recorded, and referred to the General Assembly at its first regular session held after the next general election of members of the House of Delegates. If at such regular session or any subsequent special session of that General Assembly the proposed amendment or amendments shall be agreed to by a majority of all the members elected to each house, then it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the voters qualified to vote in elections by the people, in such manner as it shall prescribe and not sooner than ninety days after final passage by the General Assembly. If a majority of those

> voting vote in favor of any amendment, it shall become part of the Constitution on the date prescribed by the General Assembly in submitting the amendment to the voters.

Va. Const. art. XII, § 1.

Although petitioner repeatedly states that he "is not questioning" the General Assembly's power to propose an amendment through a ballot question (see Pet. ¶¶ 84, 238), he insists that Article XII, § 1 imposes an implicit obligation on the legislature to ensure that the language it uses to describe a proposed amendment is sufficiently solicitous of minority views *and* that private parties may turn to the courts to seek enforcement of that obligation. See, *e.g.*, Pet. ¶¶ 65, 95. Neither the text of Article XII, § 1 nor the authorities petitioner cites support that claim.

Petitioner relies heavily on *Coleman v. Pross*, 219 Va. 143 (1978), where this Court held that several proposed amendments were invalid because the General Assembly that considered them omitted one of four proposed amendments agreed to by the previous General Assembly. *Id.* at 150–51. But *Coleman* was quite different from this case. In *Coleman*, this Court emphasized that "a presumption of validity . . . attaches to . . . any statute enacted into law by the General Assembly," including

proposals to amend the Constitution. 219 Va. at 153. The Court explained, however, that "[u]nder the *unambiguous* language of Article XII, Section 1, if any constitutional amendments are proposed in one house, 'the same' must be agreed to by a majority of the members elected to each house, referred to the next regular session after the intervening general election of House of Delegates members, agreed to by a majority of the members elected to each house, and submitted to the qualified voters." *Id.* at 154 (emphasis added). The Court thus concluded that "strict compliance with these mandatory provisions" was required before a proposed amendment could be submitted to the voters. *Id.*

Here, in contrast, there is no constitutional language, unambiguous or otherwise, requiring a ballot question to describe every detail of the proposed amendment or include minority views. *Coleman*, 219 Va. at 154. To the contrary, the text of Article XII, § 1 specifically acknowledges the General Assembly's broad discretion "to submit . . . proposed . . . amendments to the voters qualified to vote in elections by the people*, in such manner as it shall prescribe*." Va. Const. art. XII, § 1 (emphasis added); see *Fund for Animals v. Virginia State Bd. of*

Elections, 53 Va. Cir. 405, at *2 (Richmond Cir. Ct. 2000) (rejecting claim that Article XII, § 1 requires the ballot to include the text of a proposed amendment and recognizing that the legislature is empowered to submit an amendment to voters in the manner it chooses). For that reason, this Court's holding in *Coleman* does nothing to advance petitioner's claim.

The Supreme Court of Ohio's decision in *State ex rel. Voters First v. Ohio Ballot Board*, 978 N.E. 2d 119 (Ohio 2012) (*Voters First*), likewise does not support petitioner's argument. Petitioner relies on language in that decision for the proposition that, "'to pass constitutional muster, [t]he text of a ballot statement . . . must fairly and accurately present the question or issue to be decided.'" Pet. ¶ 136 (quoting *Voters First*, 978 N.E. 2d at 126). But the state constitutional provision at issue in *Voters First* differed from Virginia's in critical respects. Unlike Article XII, § 1—which empowers the General Assembly to submit a proposed amendment to the voters "in such manner as it shall prescribe"—the constitutional provision at issue in *Voters First* specifically *required* that any ballot language "properly identify the substance of the proposal to be voted upon." *Voters First*,

978 N.E. 2d at 125. Regardless of whether it would be preferable for it to do so, our current state constitution contains no such language.[6] And because the Virginia Constitution expressly recognizes the General Assembly's power to "prescribe" the "manner" in which a proposed amendment will appear on the ballot, Va. Const. art. XII, § 1, the challenged ballot language does not run afoul of Article XII, § 1.

CONCLUSION

The verified petition for a writ of mandamus and/or prohibition should be dismissed.

Respectfully submitted,

THE STATE BOARD OF ELECTIONS; *et al.*

By: */s/ Martine E. Cicconi*

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[6] Instead, the Code of Virginia requires the Board of Elections to provide an explanation of a proposed amendment. Under Code § 30-19.9, the Board is required to print and deliver the explanation to local registrars for posting at polling places on election day; to post the explanation on the internet; and to publish it in newspapers once in the week before voter registration ends and once in the week leading up to the election. Petitioner does not take issue with the explanation provided by the Board of Elections. See Pet. ¶¶ 124–129.

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CERTIFICATE OF SERVICE AND FILING

I certify under Rule 5:26(h), and pursuant to the Court's June 2, 2020 Order *In Re: Electronic Filing of Pleadings During COVID-19 Emergency*, on September 4, 2020, this document was filed electronically with the Court through VACES. This brief complies with Rule 5:26(b) because the portion subject to that rule does not exceed 50 pages. A copy was electronically mailed to:

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