IN THE
SUPREME COURT OF VIRGINIA

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Record No. 210770

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TREY ADKINS, et al.,

*Petitioners*,

v.

VIRGINIA REDISTRICTING COMMISSION, et al.,

*Respondents*.

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# RESPONSE TO VERIFIED PETITION FOR WRIT OF MANDAMUS

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## MOTION TO DISMISS

Respondents Virginia State Board of Elections, Robert H. Brink, John O'Bannon, and Jamilah D. LeCruise—Chairman, Vice-Chairman, and Secretary, respectively, of the Virginia State Board of Elections[1]—the Virginia Department of Elections, and Commissioner of the Department of Elections Christopher E. Piper (collectively, the State Elections Officials) move to dismiss the Verified Petition for Writ of Mandamus / Writ of Prohibition because petitioners lack standing and neither mandamus nor prohibition are available in these circumstances.

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[1] The State Board of Elections has two additional members that were not named as Respondents.

## BRIEF IN SUPPORT OF MOTION TO DISMISS

## INTRODUCTION

With the redistricting process already underway, petitioners—a group of prospective voters and one sitting state senator—bring this late-in-time challenge to a redistricting statute enacted nearly a-year-and-a-half ago. Less than three months before an election, petitioners ask this Court to impose the exceptional remedy of mandamus / prohibition on the State Elections Officials, commanding them to disregard the redistricting criteria established under Virginia Code § 24.2-304.04 (the Statutory Redistricting Criteria) as unconstitutional. But petitioners are situated no differently than other Virginia residents who might oppose the legislature's choices on this matter. Petitioners therefore lack standing to mount this challenge, particularly in the mandamus context where only a "clear" entitlement to relief will suffice.

Even if petitioners did have standing, relief would not be available through a writ of mandamus or prohibition for at least three reasons. *First*, the challenged Statutory Redistricting Criteria are entirely consistent with the Virginia and United States Constitutions. At minimum, any conflict is far from "clear." *Second*, mandamus is only

appropriate where officials have disregarded a clear ministerial duty. But the Election Officials have no clear ministerial duty to violate a Virginia statute. *Third*, even if petitioners were right on the merits (and they are not), mandamus would not be the proper vehicle for resolving their run-of-the-mill constitutional challenge. Such challenges can and should be resolved through suits for injunctive or declaratory relief in state or federal court. There is no reason petitioners could not seek their desired relief—if necessary on an expedited basis—through these traditional channels. In any case, petitioners should not be permitted to invoke this Court's extraordinary mandamus jurisdiction simply by declaring an emergency of their own making.

## STATEMENT OF THE CASE

### A. Legal Background

In January 2019, the Virginia Legislature introduced a joint resolution to amend the Virginia Constitution to address the potential for political bias in the redistricting process. See 2019 Va. Acts Ch. 821 (HJ 615). This resolution proposed the creation of a bipartisan Commission composed of sixteen members to create legislative districts for the United States House of Representatives and for the Senate and the House of Delegates of the General Assembly.

The following month, the General Assembly adopted the conference report submitted by each house containing the proposed constitutional amendment. Not long after, the General Assembly again passed the bill containing the amendment, making it eligible for placement on the November 2020 ballot for a vote by popular referendum. See 2020 Va. Acts Ch. 1071.[2]

During the same legislative session, another bill was introduced to provide more specific redistricting guidance. See 2020 Va. Acts Ch. 1229 (HB 1255). This bill—which was eventually codified as Virginia Code § 24.2-304.04 (the Statutory Redistricting Criteria)—passed on April 22, 2020, well in advance of the November 2020 election.[3]

On the November 2020 ballot, Virginia's voters were asked the following question:

> 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,

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[2] To place a proposed constitutional amendment on the ballot for approval by the Commonwealth's voters, the Virginia General Assembly must first approve the measure by a majority vote in two successive sessions. Va. Const. art. XII, § 1.

[3] See Virginia's Legislative Information Session, *2020 Session*, https://lis.virginia.gov/cgi-bin/legp604.exe?ses=201&typ=bil&val=hb1255 (last visited Sept. 1, 2021).

> 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?

2020 Va. Acts Ch. 1071. Nearly 66% said yes.[4] With this vote, the Virginia Constitution was amended to transfer redistricting authority from the General Assembly to the newly constituted Virginia Redistricting Commission (the Commission). Va. Const. art. II, § 6, 6-A.

Under the amended system, the bipartisan Commission is tasked with developing Virginia's redistricting maps, subject to an up-or-down vote of the General Assembly. See *id.* art. II, § 6-A. If the Commission is unable to develop the necessary maps before the specified deadline, or if the General Assembly fails to adopt the Commission's proposed maps by the specified deadline, the

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[4] See 2020 Va. Acts Ch. 1071; Virginia Department of Elections, 2020 *November General Official Results, Referendums* (last visited Sept. 1, 2021), https://results.elections.virginia.gov/vaelections/2020%20November%20General/Site/Referendums.html.

"districts shall be established by the Supreme Court of Virginia." *Id.* art. II, § 6-A(g).

These changes give the Commission significant discretion to develop political districts for the Commonwealth. Still, the General Assembly has crafted both statutory and constitutional guardrails to cabin that otherwise broad discretion.

Article II, § 6 of the Virginia Constitution states that "[e]very electoral district shall be composed of contiguous and compact territory" (the compactness requirement) "and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district" (the proportional population requirement). Article II, § 6 goes on to state that all districts "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" (the federal law requirement). And finally, Article II, § 6 adds that "[d]istricts shall provide, where practicable,

opportunities for racial and ethnic communities to elect candidates of their choice" (the candidate-of-choice requirement).

For its part, Virginia Code § 24.2-304.04 establishes nine statutory requirements for congressional and state legislative districts.

*First*—echoing the proportional population requirement in the Virginia Constitution—§ 24.2-304.04(1) requires that districts "be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district." The statute further limits population deviations for state legislative districts to "no more than five percent." *Id.*

*Second*—echoing the federal law requirement in the Virginia Constitution—§ 24.2-304.04(2) requires that districts "be drawn in accordance with the requirements of the Constitution of the United States, including the Equal Protection Clause of the Fourteenth Amendment, and the Constitution of Virginia; federal and state laws, including the federal Voting Rights Act of 1965, as amended; and relevant judicial decisions relating to racial and ethnic fairness."

*Third*—borrowing from the federal Voting Rights Act—§ 24.2-304.04(3) indicates that "[n]o district shall be drawn that results in a

denial or abridgement of the right of any citizen to vote on account of race or color or membership in a language minority group." Again, borrowing language from the federal statute, it adds that "[n]o district shall be drawn that results in a denial or abridgement of the rights of any racial or language minority group to participate in the political process and to elect representatives of their choice." *Id.* Moving next to federal case law interpreting the Voting Rights Act, § 24.2-304.04(3) goes on to say that:

> A violation of this subdivision is established if, on the basis of the totality of the circumstances, it is shown that districts were drawn in such a way that members of a racial or language minority group are dispersed into districts in which they constitute an ineffective minority of voters or are concentrated into districts where they constitute an excessive majority.

And again, returning to the text of the Voting Rights Act, the section concludes by noting that "[t]he extent to which members of a racial or language minority group have been elected to office in the state or the political subdivision is one circumstance that may be considered." *Id.* But this provision also makes clear that "[n]othing in this subdivision shall establish a right to have members of a racial or language minority

group elected in numbers equal to their proportion in the population." *Id.*[5]

*Fourth*—again echoing both the Voting Rights Act and the Virginia Constitution's candidate-of-choice requirement—§ 24.2-304.04(4) requires that districts "be drawn to give racial and language minorities an equal opportunity to participate in the political process" and that the districts not "dilute or diminish their ability to elect candidates of choice either alone or in coalition with others."

*Fifth*—drawing from longstanding traditional redistricting criteria —§ 24.2-304.04(5) requires that districts "be drawn to preserve communities of interest." It defines "community of interest" as "a neighborhood or any geographically defined group of people living in an area who share similar social, cultural, and economic interests." *Id.* But it adds that this term "does not include a community based upon political

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[5] This requirement is further mirrored in Va. Code § 24.2-126(A), which states, "[n]o voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by the state or any locality in a manner that results in a denial or abridgement of the right of any citizen of the United States to vote based on race or color or membership in a language minority group."

affiliation or relationship with a political party, elected official, or candidate for office." *Id.*

*Sixth*—echoing the Virginia Constitution's compactness requirement—§ 24.2-304.04(6) requires that districts "be composed of contiguous territory, with no district contiguous only by connections by water running downstream or upriver, and political boundaries may be considered."

*Seventh*—also echoing the compactness requirement—§ 24.2-304.04(7) requires that districts "be composed of compact territory and . . . be drawn employing one or more standard numerical measures of individual and average district compactness, both statewide and district by district."

*Eighth*, § 24.2-304.04(8) indicates that "[a] map of districts shall not, when considered on a statewide basis, unduly favor or disfavor any political party."

And *ninth*—echoing the proportional population requirement once more—§ 24.2-304.04(9) indicates that "[t]he whole number of persons reported in the most recent federal decennial census by the United States Bureau of the Census shall be the basis for determining district

populations, except that no person shall be deemed to have gained or lost a residence by reason of conviction and incarceration in a federal, state, or local correctional facility." For purposes of determining local population, § 24.2-304.04(9) directs mapmakers to count "[p]ersons incarcerated in a federal, state, or local correctional facility . . . in the locality of their address at the time of incarceration."

## B. Factual Background

Following these legislative developments, the Virginia Redistricting Committee held its first meeting on January 21, 2021.[6] The Committee has since begun the process of developing ground rules for the redistricting process.[7]

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[6] Virginia Redistricting Commission, *Virtual Meeting January 21, 2021 Agenda* (last visited Sept. 1, 2021), https://www.virginiaredistricting.org/2021/Data/public%20hearings/ag012121.pdf.

[7] Due to the novel coronavirus pandemic (COVID-19), the United States Census Bureau was delayed in transmitting the required initial census data to states for redistricting purposes until August 12, 2021. See, *Decennial Census P.L. 94–171 Redistricting Data*, U.S. Census Bureau (Aug. 12, 2021), https://www.census.gov/programs-surveys/decennial-census/about/rdo/summary-files.html; see also Ethan Herenstein, Alicia Bannon, & Thomas Wolf, *The Upcoming Census Redistricting Data Release, Explained*, Brennan Center (last updated Aug. 12, 2021) (last visited Sept. 1, 2021), brennancenter.org/our-work/research-reports/upcoming-census-redistricting-data-release-explained ("To get results out as soon as possible, the August 12 numbers were released in what the [B]ureau calls a 'legacy format'—essentially an

Virginia will hold its next general election on November 2, 2021. Localities are required to have official and absentee ballots prepared and printed at least forty-five days before election day (*i.e.*, by September 18, 2021). Va. Code § 24.2-612.

On August 13, 2021 (nearly a year-and-a-half after passage of the Statutory Redistricting Criteria and nine months after the relevant constitutional amendment was passed), a group of Virginia voters and a current Virginia Senator (petitioners) filed a petition for mandamus / prohibition relief in this Court. The petition asks the Court to command the State Elections Officials to disregard the Statutory Redistricting Criteria because, in petitioners' view, these criteria are unconstitutional. Petitioners seek to justify their need for mandamus relief by pointing out that—having waited until just before the November 2021 election to file—"time is" now "of the essence." Pet. 36.

This Court ordered expedited briefing on August 20, 2021.

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older, less user-friendly presentation that may require mapmakers to do some additional work sorting and organizing the data before they can start drawing lines. The same redistricting data will be re-released in a more user-friendly format no later than September 30.").

## LEGAL STANDARD

"Mandamus is an extraordinary remedy which may be used to compel a public official to perform a duty which is purely ministerial and which is imposed upon the official by law." *Gannon v. State Corp. Comm'n*, 243 Va. 480, 481–82 (1992). "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." *Id.* at 482 (quoting *Richmond-Greyhound Lines v. Davis*, 200 Va. 147, 151 (1958)). "Due to the drastic character of the writ, the law has placed safeguards around it." *Id.* (citation omitted). "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.* (citation omitted). "In doubtful cases, the writ will be denied" and will be granted only "where the right involved and the duty sought to be enforced are clear and certain." *Id.* (citation omitted).

Similarly, "[a] writ of prohibition is an extraordinary remedy employed to redress the grievance growing out of an encroachment of jurisdiction." *In re Commonwealth's Att'y for City of Roanoke*, 265 Va.

313, 316 (2003) (citation omitted) (quotation marks 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

The Court should deny this last-minute request for extraordinary relief. Neither the individual voters nor Senator Hackworth have standing to challenge the Statutory Redistricting Criteria. Even if they did, petitioners would still have no right to the writs they seek. Petitioners have not demonstrated a clear right to relief, the duties in question are not ministerial, and petitioners have an adequate remedy at law. Virginia's duly elected legislators enacted the Statutory Redistricting Criteria to implement, clarify, and supplement the analogous criteria contained in the Virginia Constitution. Petitioners' policy disagreement does not amount to a well-founded legal claim—and especially not a basis for mandamus. For these reasons, we ask the Court to dismiss the petition.

### I. Petitioners lack standing to challenge the enactment and application of the Statutory Redistricting Criteria

As both individual voters and prospective representatives,

petitioners lack standing to challenge the Statutory Redistricting Criteria.

Whether a 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); *Park v. Northam*, No. 200767, 2020 WL 5094626, at *4 (Va. Aug. 24, 2020) ("[T]he requirements of standing apply to petitioners seeking writs of mandamus.") (quoting *Westlake Props., Inc. v. Westlake Pointe Prop. Owners Ass'n*, 273 Va. 107, 120 (2007)). Standing doctrine has three requirements: (1) "the plaintiff [must show that he] has suffered an injury in fact"; (2) there must be "a causal connection between the injury and the conduct complained of"; and (3) the plaintiff must show that "it [is] likely, not merely speculative, the injury will be redressed by the court's favorable decision." *Mattaponi Indian Tribe v. Commonwealth*, 261 Va. 366, 376 (2001) (quotation marks omitted). Petitioners fail at step one.

### A. Petitioners lack standing as individual voters

As individual voters, petitioners state little more than a generalized interest in the proper implementation of the referendum for which they voted. That is insufficient to confer standing.

"To 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." *Park*, 2020 WL 5094626, at *4 (quoting *Wilkins v. West*, 264 Va. 447, 460 (2002)). "It is not enough to simply 'tak[e] a position and then challeng[e] the government to dispute it.'" *Id.* (quoting *Lafferty v. School Bd.*, 293 Va. 354, 365 (2017)). "[T]o establish . . . standing to seek mandamus relief, [a] petitioner[] [must] 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.*; see also *Howell*, 292 Va. at 330 ("As a general rule, without 'a statutory right, a citizen or taxpayer does not have standing to seek mandamus relief . . . unless he [or she] can demonstrate a direct interest, pecuniary or otherwise, in the outcome of the controversy that is separate and distinct from the interest of the public at large.'") (citation omitted).

Petitioners point to three alleged injuries suffered in their capacity as registered voters: (1) the invalidation of their votes for the 2020 constitutional amendment; (2) the dilution of their votes as a result of the removal of prisoners from the population count in their districts; and

(3) the injury caused by being forced to vote in unconstitutionally constructed districts. Pet. 29. None provides a basis for standing.

Petitioners' first injury amounts to little more than a desire to have the Government follow the law (or at least petitioners' understanding of it). That is a quintessential generalized grievance. See, *e.g.*, *United States v. Richardson*, 418 U.S. 166, 168–70 (1974) (dismissing for lack of standing a taxpayer suit challenging the Government's failure to disclose certain expenditures in violation of the constitutional requirement that "a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time"); *Lafferty*, 293 Va. at 364 ("[Z]ealous interest in [a] topic alone is not sufficient to create standing."). Petitioners fail to explain how they are any different from the many other voters who supported the 2020 amendment and wish to see it faithfully implemented. For that reason, petitioners' interest in the 2020 amendment, however genuine, has no bearing on their standing to bring this challenge.

Petitioners' second alleged injury—vote dilution—also fails. To be sure, vote dilution can form the basis for standing in certain limited circumstances. See *Howell*, 292 Va. at 334 ("emphasiz[ing] that [this

Court's] standing conclusion [based on vote-dilution theory] rests heavily on the unprecedented circumstances of this case"). Although petitioners gesture towards vote dilution, they subtly acknowledge that those affected by § 24.2-304.04(9) are not actually Virginia voters. See Pet. 22 (recognizing that incarcerated felons cannot vote in Virginia). The movement of individuals who cannot vote from one district to another cannot form the basis for a valid vote-dilution claim.[8] Petitioners' claim is all the more strange, given that the Commission is required to create districts of equal population. See Va. Const. art. II, § 6. Petitioners' potential new districts will therefore contain just as many people as every other district in the Commonwealth. And petitioners have no special entitlement to a district with a higher percentage of non-voters.

In any case, petitioners' claim is unripe. See *Mosher Steel-Virginia*

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[8] It bears noting that any vote-dilution theory here would be premised on the idea that petitioners are entitled to a *more concentrated* vote than voters from other districts (that is, a vote dilution theory would be predicated on an entitlement to a district where a disproportionately larger portion of the population counted for representation purposes cannot actually vote). But the United States Supreme Court has been crystal clear that "[t]he concept of 'we the people' under the Constitution visualizes no preferred class of voters but *equality* among those who meet the basic qualifications." *Gray v. Sanders*, 372 U.S. 368, 379–80 (1963) (emphasis added).

*v. Teig*, 229 Va. 95, 100 (1985) ("A justiciable controversy involves specific adverse claims based on present facts that are ripe for adjudication."). Until the Commission issues new maps, petitioners cannot know if the new districts created for them even contain a prisoner population.[9] Further, any potential decrease in funding based on revised population counts is "purely speculative" at this point in time. *Lafferty*, 293 Va. at 361. The relevant funding has been neither allocated by the General Assembly nor approved by the Governor.

Petitioners' third alleged injury fares no better. Petitioners again fail to explain how their interest in voting in constitutionally constituted districts is "separate from the interest of the general public." *Park*, 2020 WL 5094626, at *4; see also *Goldman*, 262 Va. at 372–73. And even where genuinely felt, such an abstract, dignitary harm is not ordinarily a sufficient basis for standing. See *Allen v. Wright*, 468 U.S. 737, 755–

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[9] Accord *In re Initiative Petition No. 426, State Question No. 810*, 465 P.3d 1244, 1255 (Okla. 2020) ("Once prisoners are reallocated to their pre-incarceration communities[,] new congressional and state legislative districts can be drawn. How such districts will be drawn and how equal they will be in total population numbers, for congressional districts at least, has not yet occurred and is premature for this Court to consider." (footnote omitted)).

56 (1984) (holding that general stigma of racial discrimination was insufficient to confer standing), *abrogated on other grounds by Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014). Moreover, here too, petitioners' claim will not fully ripen until the Commission actually creates (and the General Assembly ratifies) the districts that petitioners fear may violate constitutional standards. Until then, petitioners can only guess that they will suffer the indignity of voting in an unlawful district.

As this Court has already explained, "any attempt to identify in this forum which district or districts will be affected by legislative action in reconfiguring the districts is entirely speculative. The fact that a putative complainant's district may be affected is insufficient to establish the particularized injury required for standing in a redistricting case." *Wilkins v. West*, 264 Va. 447, 461 (2002) (emphasis omitted); see also Pet. 30 (relying on *Wilkins*).

### B. **Senator Hackworth also lacks standing**

Senator Hackworth, like the individual voters, asserts a generalized and abstract interest in competing in a constitutionally created district. Pet. 30. But like any other plaintiff, a legislator "cannot

simply allege a nonobvious harm, without more." *Wittman v. Personhuballah*, 578 U.S. 1076 (2016). And Senator Hackworth has provided no reason to believe he will be particularly injured by the creation of districts in conformity with the Statutory Redistricting Criteria. Absent that, Senator Hackworth has no more right to a constitutional district than any other Virginia citizen.

*LaRoque v. Holder*, 650 F.3d 777 (D.C. Cir. 2011), is not to the contrary. There, the D.C. Circuit found that a candidate for office had standing to challenge a delay in implementing certain changes to North Carolina's election procedures as a result of the preclearance requirements in Section 5 of the Voting Rights Act. *Id.* at 780. But the changes at issue in *LaRoque* affected both the financial cost of accessing the ballot as a prospective candidate and the candidate-in-question's competitive chances in the election. *Id.* at 786. Senator Hackworth claims neither of those injuries here. And to the extent Senator Hackworth does allege an interest in controlling the voters that fall within his district, that interest is not a legally cognizable one. Cf. *Moore v. United States House of Representatives*, 733 F.2d 946, 959 (D.C. Cir. 1984) (Scalia, J., concurring in result) ("In my view[,] no officers of the

United States, of whatever Branch, exercise their governmental powers as personal prerogatives in which they have a judicially cognizable private interest.”).

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

Beyond failing for lack of standing, the petition also fails because neither mandamus nor prohibition are available under these circumstances.

1. In addition to being unwarranted on the merits, mandamus relief would be inappropriate here because judicial intervention would significantly disrupt an ongoing political 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. Comm’n*, 243 Va. 480, 482 (1992) (citation omitted). Given that the process of determining new legislative districts for the Commonwealth is already underway, “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, 298, 305–06 (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). This is all the more true here where petitioners have waited until the eve of an election to challenge a nearly year-and-a-half-old law.[10]

2. Petitioners are 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 omitted), 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 Att'y for Roanoke*, 265 Va. 313, 316–17 (2003)

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[10] For similar reasons, and because the challenged statute was signed into law more than sixteen months ago on April 22, 2020 (see p. 4, *supra*), petitioners' claim may also be barred by laches. Although this Court does not appear to have addressed the operation of laches in a mandamus action, we are unaware of any cases wherein this Court prohibited its application. Accord *C. Givens Bros. v. Town of Blacksburg*, 273 Va. 281, 283 n.6 (2007) (declining to consider assignment of error involving laches).

(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*, 64 Va. (23 Gratt.) 51, 59 (1873) (emphasis omitted). The writ of prohibition "does not lie from a court to an executive officer." *Burch*, 71 Va. at 39. Because petitioners do not seek to compel the proper exercise of jurisdiction by an inferior court, their request for a writ of prohibition fails as a matter of law.[11]

## III. A writ of mandamus should not issue because petitioners satisfy none of the relevant criteria

Mandamus requires, at minimum, a showing of at least three things: (1) "a clear right in the petitioner to the relief sought;" (2) "a legal duty on the part of the respondent to perform the act which the petitioner seeks to compel;" and (3) "no adequate remedy at law." *Board of Cnty. Supervisors v. Hylton Enters., Inc.*, 216 Va. 582, 584 (1976). Petitioners have shown none of the three.

### A. Petitioners have not established a clear entitlement to relief

Petitioners have not and cannot establish a clear entitlement to relief because their underlying claims lack merit. Nothing in the

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[11] Indeed, even petitioners seem to recognize that a writ of prohibition would be inappropriate in this context. See Pet. 8 n.1.

Statutory Redistricting Criteria is contrary to the Virginia Constitution. At a very minimum, it cannot be said that these criteria so clearly offend state constitutional requirements that a writ of mandamus should issue.

Petitioners offer three main reasons why the Statutory Redistricting Criteria should be disregarded as unconstitutional. *First*, petitioners take issue with the process by which the General Assembly enacted the Statutory Redistricting Criteria, arguing that it failed to follow the required procedures for amending the Virginia Constitution. *Second*, petitioners argue that the Statutory Redistricting Criteria conflict with the Constitutional Redistricting Criteria outlined in Article II, § 6 of the Virginia Constitution. And *third*, petitioners argue that the Statutory Redistricting Criteria conflict with the anti-discrimination provision in Article I, § 11 of the Virginia Constitution.

None of these arguments has merit.

1. The Virginia General Assembly was not required to follow the procedures for amending the state constitution to enact the Statutory Redistricting Criteria. There is a simple reason: The Statutory Redistricting Criteria are statutory. And as with most statutes, the Statutory Redistricting Criteria were never intended to (and in fact do

not) amend Virginia's Constitution. There is no reason why the Virginia legislature would be required to follow the constitutional amendment process to enact a statute.

What petitioners seem to really mean is that the General Assembly lacked *authority* to pass the Statutory Redistricting Criteria without amending the Constitution. But this is a tough hill to climb. "The authority of the General Assembly shall extend to all subjects of legislation not . . . forbidden or restricted" under the Constitution. Va. Const. art. IV, § 14; see also *Quesinberry v. Hull*, 159 Va. 270, 274 (1932) ("[The General Assembly] can do those things which are not forbidden by the State or Federal Constitutions, or which are not repugnant to those elementary social rights upon which society, as we know it, rests."). Thus, to prevail, petitioners must identify some direct conflict between the Virginia Constitution and the statutory criteria they challenge. See *City of Newport News v. Elizabeth City Cnty.*, 189 Va. 825, 831 (1949) ("[I]t must be remembered that every presumption is made in favor of the constitutionality of an act of the legislature.").

This they cannot do. By and large, the Statutory Redistricting Criteria mirror or directly implement the Constitutional Redistricting

Criteria in Article II, § 6. And where the Statutory Redistricting Criteria go further, they do so only to supplement or clarify the Constitutional Redistricting Criteria, not to contradict them. See pp. 36, *infra*.

Petitioners' emphasis on the constitutional requirement that the Commission "be convened for the purpose of establishing districts . . . pursuant to Article II, Section 6 of this Constitution" has no relevance here. Va. Const. art. II, § 6-A. This requirement speaks to how the Commission is "convened," not how it goes about the mapmaking process. But in any event, there is no reason the Commission cannot enact districts "pursuant to Article II, Section 6" while also adhering to the Statutory Redistricting Criteria because the two are not mutually exclusive in any way. And it would be a tremendous stretch to read this language as stripping the General Assembly of all power to legislate on the subject of redistricting, as petitioners appear to do.

2. Petitioners next argue that the Statutory Redistricting Criteria conflict with the Constitutional Redistricting Criteria found in Article II, § 6. A brief walk through the nine specific criteria at issue helps illustrate the weakness of petitioners' argument.

Section 24.2-304.04(1) requires that districts "be so constituted as

to give, as nearly as is practicable, representation in proportion to the population of the district;" and it limits population deviations for state legislative districts to "no more than five percent." Far from undermining the Constitutional Redistricting Criteria, this provision mirrors and implements them. Like § 24.2-304.04(1), Article II, § 6 requires that districts "be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district." There is nothing contradictory about these two provisions.

Section 24.2-304.04(2) next requires that districts "be drawn in accordance with the requirements of the Constitution of the United States, including the Equal Protection Clause of the Fourteenth Amendment, and the Constitution of Virginia; federal and state laws, including the federal Voting Rights Act of 1965, as amended; and relevant judicial decisions relating to racial and ethnic fairness." Once again, the Virginia Constitution contains nearly identical language. Article II, § 6 states that all districts "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." As before, one struggles to see the conflict.

Section 24.2-304.04(3) likewise takes its cues from the Voting Rights Act and the cases that interpret it (both of which Article II, § 6 affirmatively requires mapmakers to follow, see *supra*). Section 24.2-304.04(3) first indicates that "[n]o district shall be drawn that results in a denial or abridgement of the right of any citizen to vote on account of race or color or membership in a language minority group." This language comes almost word-for-word from the Voting Rights Act. See 52 U.S.C. § 10301(a) ("No voting qualification or prerequisite to voting or standard, practice, or procedure shall be imposed or applied by any State or political subdivision *in a manner which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color, or [membership in a protected language group]*.") (emphasis added).

Again, borrowing language from the federal statute, § 24.2-304.04(3) next indicates that "[n]o district shall be drawn that results in a denial or abridgement of the rights of any racial or language minority group to participate in the political process and to elect representatives

of their choice." Likewise, the Voting Rights Act defines a "denial or abridgement" of the right to vote as "established" where "the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of a class of citizens protected by subsection (a) *in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice*." 52 U.S.C. § 10301(b) (emphasis added).

Section 24.2-304.04(3) next goes on to say that:

> A violation of this subdivision is established if, on the basis of the totality of the circumstances, it is shown that districts were drawn in such a way that members of a racial or language minority group are dispersed into districts in which they constitute an ineffective minority of voters or are concentrated into districts where they constitute an excessive majority.

Although not drawn from the text of the Voting Rights Act, this requirement parrots Supreme Court case law interpreting it. See, *e.g.*, *Thornburg v. Gingles*, 478 U.S. 30, 46 n.11 (1986) ("Dilution of racial minority group voting strength may be caused by the dispersal of blacks into districts in which they constitute an ineffective minority of voters or from the concentration of blacks into districts where they constitute an

excessive majority."); *Abbott v. Perez*, 138 S. Ct. 2305, 2338 n.2 (2018) ("The § 2 'results' test focuses, as relevant here, on vote dilution accomplished through cracking or packing, *i.e.*, 'the dispersal of [a protected class of voters] into districts in which they constitute an ineffective minority of voters or from the concentration of [those voters] into districts where they constitute an excessive majority.'") (quoting *Gingles*, 478 U.S. at 46 n.11).

And finally, returning to the text of the Voting Rights Act once more, § 24.2-304.04(3) concludes by noting that "[t]he extent to which members of a racial or language minority group have been elected to office in the state or the political subdivision is one circumstance that may be considered," though adding that "[n]othing in this subdivision shall establish a right to have members of a racial or language minority group elected in numbers equal to their proportion in the population." Here too, the Voting Rights Act contains almost identical language. See 52 U.S.C. § 10301(b) ("The extent to which members of a protected class have been elected to office in the State or political subdivision is one circumstance which may be considered: Provided, That nothing in this section establishes a right to have members of a protected class elected

in numbers equal to their proportion in the population.”).

Section 24.2-304.04(4) is more of the same. It requires that districts “be drawn to give racial and language minorities an equal opportunity to participate in the political process and” that districts not “dilute or diminish their ability to elect candidates of choice either alone or in coalition with others.” Here too, the statute’s requirement derives from the Virginia Constitution, the Voting Rights Act, and Supreme Court case law. See Va. Const. art. II, § 6 (“Districts shall provide, where practicable, opportunities for racial and ethnic communities to elect candidates of their choice.”); 52 U.S.C. § 10301(b) (focusing Voting Rights Act inquiry on equality of opportunity to elect candidates of choice and equality of opportunity to participate in the political process); *Gingles*, 478 U.S. at 46 n.11 (describing dilution of minority voting strength as basis for Section 2 violation); see also *Growe v. Emison*, 507 U.S. 25, 41 (1993) (“Assuming (without deciding) that it was permissible for the District Court to combine distinct ethnic and language minority groups

for purposes of assessing compliance with § 2 [of the Voting Rights Act . . . .").[12]

Section 24.2-304.04(5) next requires that districts "be drawn to preserve communities of interest." This provision, it is true, is not drawn directly from the Virginia Constitution like the others. But importantly, nothing in the Virginia Constitution indicates that this consideration is invalid. In any case, preserving communities of interest is a traditional redistricting tool that has long been used (and approved of) in this context. See, *e.g.*, *Bush v. Vera*, 517 U.S. 952, 977 (1996) (describing "maintaining communities of interest and traditional boundaries" as "traditional districting principles").[13]

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[12] There is an outstanding Circuit split as to whether Section 2 of the Voting Rights Act requires the creation of coalition or "influence" districts involving multiple minority groups acting in concert to elect representatives of choice. See *Pope v. Cnty. of Albany*, 687 F.3d 565, 572 n.5 (2d Cir. 2012) (describing split). But even if not affirmatively required by the Voting Rights Act, petitioners fail to explain why this additional gloss is inconsistent with Article II, § 6 of the Virginia Constitution.

[13] Petitioners argue vaguely that subsection (5) "could conceivably be manipulated to disperse minority voting power." Pet. 27. But naked supposition that a provision *could* be manipulated is hardly enough to justify mandamus relief based on a facial challenge to the Statutory Redistricting Criteria's constitutionality—particularly not where such

Sections 24.2-304.04(6) and (7) require that districts "be composed of contiguous territory, with no district contiguous only by connections by water running downstream or upriver, and political boundaries may be considered" and that they "be composed of compact territory and . . . drawn employing one or more standard numerical measures of individual and average district compactness, both statewide and district by district." Once again, the Virginia Constitution contains an analogous requirement. Article II, § 6 states that "[e]very electoral district shall be composed of contiguous and compact territory."

Section 24.2-304.04(8) indicates that "[a] map of districts shall not, when considered on a statewide basis, unduly favor or disfavor any political party." While this provision, like (5), supplements rather than implements the Constitutional Redistricting Criteria, petitioners again point to no hostility between the two. That is, nothing in the Virginia Constitution *requires* mapmakers to "favor or disfavor any political party" when drawing new districts. In fact, even petitioners seem to lack the courage of their own conviction on this score. Much like with

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manipulation would be contrary to other statutory and constitutional requirements.

subsection (5), petitioners state only that subsection (8) "go[es] above and beyond what is required by the state constitution and potentially violate[s] its antidiscrimination clause." Pet. 27. But in the absence of an actual conflict, there is nothing inappropriate about § 24.2-304.04(8). And regardless, "potentially" is hardly the language of clear entitlement to relief.

Finally, Section 24.2-304.04(9) explains how mapmakers should count incarcerated inmates for purposes of creating legislative districts with equal populations (a requirement of both the Virginia and United States Constitutions). More specifically, it directs mapmakers to count "[p]ersons incarcerated in a federal, state, or local correctional facility . . . in the locality of their address at the time of incarceration," rather than in their place of incarceration. Va. Code § 24.2-304.04(9).

Petitioners resist the obvious here by pointing to places where the Statutory Redistricting Criteria use language that goes "beyond" the Constitutional Redistricting Criteria. See Pet. 24 (arguing that the terms "excessive majority" and "ineffective minority" in subsection (3) do not appear in the Virginia Constitution); *id.* at 24, 26 (arguing that "in coalition with others" does not appear in the Virginia Constitution); *id.*

at 28 (arguing that subsections (6) and (7) create more stringent requirements than those contained in the Virginia Constitution). For one thing, petitioners are simply wrong to suggest that these criteria are novel. The terms "excessive majority" and "ineffective minority," in fact, appear in Supreme Court case law describing the Voting Rights Act (and this case law is incorporated into Article II, § 6 by reference). See *Gingles*, 478 U.S. at 46 n.11. As to terms that do not expressly appear in Supreme Court case law or in the Constitution of Virginia, petitioners fail to establish that the General Assembly is limited to parroting the Virginia Constitution. Far from it. "The authority of the General Assembly shall extend to all subjects of legislation *not herein forbidden or restricted"* under the Constitution. Va. Const. art. IV, § 14 (emphasis added). There is thus no reason why the General Assembly cannot go "beyond" the requirements outlined in Article II, § 6 so long as it does not contradict them.

Petitioners also take specific aim at subsection (9). They argue that this provision conflicts with the proportional population requirement in Article II, § 6 because it relocates prison inmates for purposes of the population count. But Section 24.2-304.04(9) promotes population

equality. Article II, § 1 of the Virginia Constitution states that "[r]esidence, for all purposes of qualification to vote, requires both domicile and a place of abode." This Court has defined domicile as "residence at a particular place, accompanied by intention to remain there for an unlimited time." *State-Planters Bank & Tr. v. Commonwealth*, 174 Va. 289, 295 (1940). The challenge of determining the proper domicile of an incarcerated inmate thus turns on a discretionary judgment about where those inmates intend to remain "for an unlimited time." The General Assembly was well within its powers to conclude that most inmates will intend to return back home (when possible) and thus that they should be counted in "the locality of their address at the time of incarceration," Va. Code § 24.2-304.04(9), rather than in their place of incarceration. Accord *Reynolds v. Sims*, 377 U.S. 533, 579 (1964) ("So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.").

Numerous other States likewise count inmates based on their address at the time of incarceration as opposed to place of incarceration for redistricting purposes.[14] A holding for the petitioners would thus call into question the laws of at least thirteen other States, even as courts resoundingly reject legal challenges to such methods. See, *e.g.*, *In re*

[14] See, *e.g.*, Cal. Elec. Code § 21003(d) (2020) ("request[ing]" that incarcerated individuals be deemed "as residing at that person's last known place of residence, rather than at the institution of that person's incarceration . . . ."); Colo. Rev. Stat. Ann. § 2-2-902 (2021) (requiring incarcerated individuals be counted at their "residential addresses . . . rather than their place of incarceration"); Conn. Gen. Stat. 21-13 § 1(c)(2)(A) (2021) (same); Del. Code Ann. tit. 29, § 804A(b) (2010) (same); 730 Ill. Comp. Stat. Ann. 205/2-20, eff. Jan. 1, 2025 (same); Md. Code Ann., Elec. Law § 8-701(a)(1)(ii) (2020) (same); Md. Code Ann., State Gov't § 2-2A-01(a)(2) (2020) (same); Mich. Comp. Laws Ann. § 117.27a(5) (2021) (requiring that "[r]esidents of state institutions who cannot by law register in the city as electors [] be excluded from population computations"); Nev. Rev. Stat. § 360.288(1) (2019) (counting incarcerated individuals based on their place of residence before incarceration); N.J. Stat. Ann. § 52:4-1.4(b)(1) (2020) (same); N.Y. Legis. Law § 83-m(13)(b) (2011) (same); Tenn. Code Ann. § 5-1-111(h) (2021) (allowing county legislative bodies to exclude incarcerated individuals "from any consideration of representation"); Wash. Rev. Code § 44.05.140(4)(a) (2019) (requiring that incarcerated individuals be counted at their "last known place of residence"); see also A Legis. Reapportionment Commission Resolution (Pa. Aug. 16, 2021), accessible at https://www.redistricting.state.pa.us/resources/press/Resolution%204A.pdf (resolving that individuals incarcerated in state facilities be counted "at the address . . . where the individual was last domiciled in this Commonwealth immediately prior to being sentenced to incarceration").

*Initiative Petition No. 426, State Question No. 810*, 465 P.3d 1244 (Okla. 2020) (reallocation of prisoners to home addresses for purposes of redistricting did not violate requirements of equal protection and equal representation); *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 897 (D. Md. 2011), aff'd, 567 U.S. 930 (2012) (Maryland did not violate one person one vote principle by adjusting raw census data to count inmates of state or federal prisons to be counted as residents of their last known residence before incarceration); *Knox Cnty. Democratic Cent. Comm. v. Knox Cnty. Bd.*, 597 N.E.2d 238, 239–40 (Ill. App. 1992); *Little v. New York State Task Force on Demographic Rsch. & Reapportionment*, No. 2310-2011 at 7–10 (N.Y. Sup. Ct. Dec. 1, 2011).[15] The United States Supreme Court, in fact, has been clear that it has not "suggested that the States are required to include aliens, transients, short-term or temporary residents, *or persons denied the vote for conviction of crime* in the apportionment base by which their legislators are distributed and against which compliance with the Equal Protection Clause is to be measured." *Burns*

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[15] Some courts have even held that the decision to count inmates in the district of their incarceration is improper. See *Calvin v. Jefferson Cnty. Bd. of Comm'rs*, 172 F. Supp. 3d 1292, 1303, 1323 (N.D. Fla. 2016).

*v. Richardson*, 384 U.S. 73, 92 (1966) (emphasis added).

3. Unable to point to any real incongruity between the Statutory Redistricting Criteria and the Constitutional Redistricting Criteria, petitioners allege instead a conflict with the anti-discrimination clause in Article I, § 11 of the Virginia Constitution.

Article I, § 11 of the Virginia Constitution safeguards "the right to be free from any governmental discrimination upon the basis of religious conviction, race, color, sex, or national origin." This provision is coextensive with the Equal Protection Clause of the Fourteenth Amendment in the United States Constitution. See *Archer v. Mayes*, 213 Va. 633, 638 (1973).

Petitioners largely target § 24.2-304.04(3), (4), and (5)—the provisions that implement the Voting Rights Act and related case law—as somehow inconsistent with Article I, § 11's protections. But the United States Supreme Court has already upheld the Voting Rights Act as constitutionally valid. See *Mississippi Republican Exec. Comm. v. Brooks*, 469 U.S. 1002, 1003 (1984) (summarily affirming decision finding that Section 2 is a valid exercise of Congress's power under the Fifteenth Amendment). It thus follows that the provisions here—which echo the

Voting Rights Act's language and case law—likewise do not violate Article I, § 11.

Petitioners boldly suggest that the Voting Rights Act passed constitutional scrutiny only because of the extensive evidentiary record before Congress at the time. See Pet. 25. Even if true, petitioners fail to explain why the Virginia legislature would not be justified in relying on this same record to incorporate these federal requirements into its own law. In any case, the point seems to be a moot one. States have an independent obligation to follow federal law, whether or not the State's constitution or statutory law requires it. Accordingly, if this Court were to disregard these requirements under Virginia law, the State Elections Officials would still have an independent obligation to follow them as a matter of federal law. See *Board of Supervisors v. Combs*, 160 Va. 487, 496 (1933) ("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.") (quotation marks and citation omitted).

Petitioners' argument suffers from yet another fatal flaw. If compliance with the Voting Rights Act violates Article I, § 11, then Article

II, § 6 does too. Indeed, Article II, § 6—just like the Statutory Redistricting Criteria—mandates compliance with the Voting Rights Act and related case law. And petitioners themselves elsewhere acknowledge that Article II, § 6 "reiterate[s] the familiar requirements of federal voting law by requiring Virginia's future map-drawers to create majority-minority districts 'where practicable' to enable racial and ethnic minority groups 'to elect candidates of their choice.'" Pet. 15 (citation omitted).

To be sure, if any of the provisions in the Statutory Redistricting Criteria are applied in a discriminatory manner, nothing prevents petitioners from bringing an as-applied challenge at that time. But until then, petitioners can claim no entitlement to relief, let alone a clear one.[16]

### B. The State Elections Officials have no ministerial duty to disregard state law

Petitioners also cannot show the violation of a ministerial duty because petitioners seek to command the State Elections Officials to

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[16] Any as-applied challenge to the Statutory Redistricting Criteria would be unripe because the Commission has yet to create any maps, let alone submit them for the General Assembly's approval. See *Abbott Lab'ys v. Gardner*, 387 U.S. 136, 148 (1967) (The "basic rationale [of the ripeness doctrine] is to prevent the courts, through avoidance of premature adjudication, from entangling themselves in abstract disagreements.").

violate state law.

Mandamus "does not lie to compel the performance of a discretionary duty." *Griffin v. Bd. of Supervisors*, 203 Va. 321, 328 (1962). To prevail, petitioners must therefore establish the existence of a "purely ministerial duty" involving no discretion on the part of the relevant state officials. *Id.* But state officials are not duty-bound to disregard state law—even in the face of constitutional challenge. And that is precisely what petitioners ask this Court to command them to do.

Petitioners point to the State Election Officials' statutory obligation "to promote election uniformity, legality, and purity" in all elections. Va. Code § 24.2-103. But the terms "uniformity" "legality" and "purity" are designed to permit substantial discretion—especially in the redistricting context. See *Vera*, 517 U.S. at 984 (reemphasizing "the importance of the States' discretion in the redistricting process"). Section 24.2-103—much like the undefined "duty" to disregard unconstitutional statutes—is thus not an appropriate basis for mandamus relief.

### C. **Petitioners have an adequate alternative remedy**

The Court should also dismiss the petition because petitioners have a clear and adequate alternative: a lawsuit for injunctive or declaratory

relief. See *Stroobants v. Fugate*, 209 Va. 275, 278 (1968) ("Virginia's Declaratory Judgment Law, as amended, provides petitioners with an adequate remedy at law. Accordingly, there is no occasion for them to resort to the extraordinary writ of mandamus or for this court to exercise its original jurisdiction.").

Petitioners attempt to point to the need for immediate relief in light of the upcoming election. But any urgency here is of petitioners' own making. The Statutory Redistricting Criteria were enacted on April 22, 2020. The constitutional amendment establishing the Virginia Redistricting Commission was adopted by the people of Virginia on November 3, 2020. And the Commission held its first meeting on January 21, 2021. Petitioners waited until August 13, 2021—one year and four months after the passage of the Statutory Redistricting Criteria, more than nine months after the adoption of the constitutional amendment, and more than six months after the Commission first began the process of redistricting—to file this petition. Petitioners can only blame themselves for any time pressure associated with a traditional constitutional challenge. See *Benisek v. Lamone*, 138 S. Ct. 1942, 1944 (2018) ("In considering the balance of equities among the parties, we

think that plaintiffs' unnecessary, years-long delay in asking for preliminary injunctive relief weighed against their request."); *Fishman v. Schaffer*, 429 U.S. 1325, 1330 (1976) (Marshall, J., in chambers) ("[T]here are several additional factors militating against the extraordinary relief sought. First, the applicants delayed unnecessarily in commencing this suit."). In any case, both state and federal courts provide avenues for litigants to proceed expeditiously and obtain fast relief. Whether they choose to pursue those options or not, this Court need not circumvent the ordinary process to award "extraordinary" relief in this case.

## CONCLUSION

The petition for a writ of mandamus should be dismissed.

Respectfully submitted,

Virginia State Board of Elections, Robert H. Brink, John O'Bannon, and Jamilah D. LeCruise, Chairman, Vice-Chairman, and Secretary, respectively, of the Virginia State Board of Elections, the Virginia Department of Elections, and Commissioner of the Department of Elections Christopher E. Piper

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## CERTIFICATE OF SERVICE AND FILING

I certify under Rule 5:26(h) that on September 1, 2021, 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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