

**VIRGINIA:**

**IN THE SUPREME COURT OF VIRGINIA**

**VERIFIED PETITION FOR WRIT OF MANDAMUS**  
**AND MEMORANDUM IN SUPPORT OF VERIFIED PETITION**

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

Petitioners, )

v. )

VIRGINIA REDISTRICTING COMMISSION, )

and )

SENATOR GEORGE L. BARKER, )  
Member of the Commission )  
in his official capacity, )

and )

SENATOR MAMIE E. LOCKE, )  
Member of the Commission )  
in her official capacity, )

and )

SENATOR RYAN T. MCDOUGLE, )  
Member of the Commission )  
in his official capacity, )

Civil Action No.:

**SERVICE TO BE  
PERFECTED  
AND RETURNED TO  
COURT  
FORTHWITH**

and )  
)  
)  
SENATOR STEPHEN D. NEWMAN, )  
Member of the Commission )  
in his official capacity, )  
)  
and )  
)  
DELEGATE LES R. ADAMS, )  
Member of the Commission )  
in his official capacity, )  
)  
and )  
)  
DELEGATE DELORES L. MCQUINN, )  
Member of the Commission )  
in her official capacity, )  
)  
and )  
)  
DELEGATE MARGARET B. RANSONE, )  
Member of the Commission )  
in her official capacity, )  
)  
and )  
)  
DELEGATE MARCUS B. SIMON, )  
Member of the Commission )  
in his official capacity, )  
)  
and )  
)  
MACKENZIE K. BABICHENKO, )  
Co-Chair of the Commission )  
in her official capacity, )  
)  
and )



and )  
)  
VIRGINIA STATE BOARD OF ELECTIONS, )  
)  
and )  
)  
ROBERT H. BRINK, )  
Chairman of the State Board of Elections )  
in his official capacity, )  
)  
and )  
)  
JOHN O'BANNON, )  
Vice-Chair of the State Board of Elections )  
in his official capacity, )  
)  
and )  
)  
JAMILAH D. LECRUISE, )  
Secretary of the State Board of Elections )  
in her official capacity, )  
)  
and )  
)  
VIRGINIA DEPARTMENT OF ELECTIONS, )  
)  
and )  
)  
CHRISTOPHER E. PIPER, )  
Commissioner of the Department of Elections )  
in his official capacity, )  
)  
)  
Serve: Attorney General Mark Herring )  
202 North Ninth Street )  
Richmond, VA 23219 )  
)  
Respondents. )

**VERIFIED PETITION FOR WRIT OF MANDAMUS**  
**AND MEMORANDUM IN SUPPORT OF VERIFIED PETITION**

August 13, 2021

A handwritten signature in black ink, appearing to read "M. Brett Hall". The signature is fluid and cursive, with the first letters of the first and last names being capitalized and prominent.

M. Brett Hall, Esq.  
Virginia Bar No: 92267  
Hall Law Firm, PLLC  
148 W. Jackson St.  
Gate City, Va. 24251  
276-690-2525  
mbretthall.law@gmail.com  
*Counsel for Petitioners*

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**VERIFIED PETITION FOR WRIT OF MANDAMUS**

Petitioners, by and through the undersigned attorneys and pursuant to Va. Const. Art. VI, Section 1 and Code Section 8.01-644, respectfully petition this Court for the issuance of a writ of mandamus directed to Respondents, and in support thereof state:

1. Petitioners Trey Adkins, David Eaton, Craig Stiltner, Robert Majors, Margaret Asbury, Charles Stacy, and Senator T. Travis Hackworth are qualified voters who live and are registered to vote in the Commonwealth and who plan to vote in the 2022 midterm elections. Petitioner Hackworth is a Member of the Senate of Virginia representing a district that will be redrawn this year by the Virginia Redistricting Commission.

2. Mr. Adkins currently resides at 4603 Old Lesters Fork Road, Grundy, Virginia 24614. He is an elected member of the Buchanan County Board of Supervisors representing the Knox District.

3. Mr. Eaton currently resides at 87 Country Oaks Drive, Honaker, Virginia 24260. He is an elected member of the Board of Supervisors of Russell County representing District 4.

4. Mr. Stiltner currently resides at 1024 Coconut Road, Grundy, Virginia 24614. He is an elected member of the Buchanan County Board of Supervisors representing the Rock Lick District.

5. Ms. Asbury currently resides at 7316 Abb's Valley Road, Bluefield, Virginia 24605. She is an elected member of the Tazewell County Board of Supervisors representing the Northern District.

6. Mr. Majors currently resides at 244 Martin Farm Road, Cedar Bluff, Virginia 24609. He was employed for over twelve years, from November 1998 through February 2011, as a mental health counselor at Keen Mountain Correctional Center in Buchanan County, Virginia and still lives in a state senate district containing five state or federal correctional facilities.

7. Mr. Stacy currently resides at 518 Sable Lane, Bluefield, Virginia 24605. He is an elected member of the Tazewell County Board of Supervisors representing the Eastern District.

8. Senator T. Travis Hackworth currently resides at 300 Laymans Drive, Richlands, Virginia 24641. He is a Member of the Virginia Senate representing the 38th District, which includes five (5) state correctional facilities. Petitioner Hackworth intends to run for reelection in 2023, an election in which he will be competing on a district map drawn by the Commission.

9. Petitioners have been injured by Respondents' implementation of Virginia Code Section 24.2-304.04, which contains a set of statutory criteria that purport to govern the deliberations of the Virginia Redistricting Commission. These criteria were enacted by the General Assembly outside of the constitutional

amendment process outlined in Va. Const. Art. XII, Section 1, and violate both the antidiscrimination provisions of Article I, Section 11 and the constitutional redistricting criteria contained in Article II, Section 6 of the Virginia Constitution.

10. The United States Census Bureau released 2020 legacy format data on August 12, 2021. Unless this Court clarifies which set of criteria the Virginia Redistricting Commission is legally obligated to follow, the 2021 redistricting process will commence shortly using criteria that violate the state constitution. Accordingly, relief should be awarded by October 1, 2021 to ensure that the 2021 redistricting process is completed using only the criteria contained in Article II, Section 6 of the Virginia Constitution.

11. Petitioners have a clear right to the relief they seek. Respondents have a legal duty to ensure that this and all future decennial redistricting processes are conducted in compliance with the Virginia Constitution. Petitioners have no adequate remedy at law.

12. Because the 2020 Census data was recently released and the Commission will soon begin drawing new maps, Petitioners request expedited consideration of this petition. Furthermore, because the disposition of the instant petition presents weighty issues that will affect all future decennial redistricting processes in the Commonwealth of Virginia, Petitioners request an opportunity to present oral argument in this matter to the Court.

WHEREFORE, Petitioners respectfully pray as follows:

That this Court will issue a writ of mandamus:

(a) Commanding the Virginia Redistricting Commission and Members James Abrenio, Greta J. Harris, Brandon Hutchins, Sean S. Kumar, Mackenzie K. Babichenko, Jose A. Feliciano Jr., Richard O. Harrell III, Virginia Trost-Thornton, Sen. George Barker, Sen. Mamie Locke, Del. Delores McQuinn, Del. Marcus Simon, Del. Les Adams, Del. Margaret Ransone, Sen. Ryan McDougale, and Sen. Steve Newman to conduct the 2021 decennial redistricting process “pursuant to Article II, Section 6 of” the Virginia Constitution, Va. Const. Art. II, § A, and to refrain from using any criteria that conflict with that provision;

(b) Commanding the State Board of Elections and Chairman Robert H. Brink, Vice-Chair John O’Bannon, and Secretary Jamilah D. LeCruise to fulfill their statutory duty “to promote election uniformity, legality, and purity,” Va. Code § 24.2-103, by only implementing new district maps that comply with the requirements of Article II, Section 6 of the Virginia Constitution; and

(c) Commanding the Department of Elections and Commissioner Christopher E. Piper to fulfill its redistricting-related duties, *see* Va. Code § 24.2-103.1, by only assigning voters to districts and publishing maps that were prepared in accordance with Article II, Section 6 of the Virginia Constitution.

**MEMORANDUM IN SUPPORT OF**  
**VERIFIED PETITION FOR WRIT OF MANDAMUS**

**INTRODUCTION**

After years of unsuccessful attempts at redistricting reform, on April 10, 2020, the General Assembly passed and placed before the people of the Commonwealth a proposed constitutional amendment (hereinafter the “2020 Amendment”) establishing an independent redistricting commission (the “Commission”) empowered to draw congressional and state legislative district maps in all future decennial redistricting cycles. On November 3, 2020, the people of Virginia passed the Amendment by a wide margin, with 65.69% in favor and 34.31% opposed. By approving the 2020 Amendment, the people of Virginia empowered the Commission to exercise complete authority over the creation of redistricting maps in the Commonwealth.

Unfortunately, only days after voting to submit the 2020 Amendment to the voters on the November ballot, the General Assembly approved a second redistricting-related bill—this time with substantially less fanfare. This second bill, House Bill 1255, included a set of standards and criteria (the “Statutory Criteria”) that the Commission is ostensibly bound to follow. *See* Va. Code Ann. § 24.2-304.04. Some of the Statutory Criteria duplicate (and embellish) the constitutional criteria adopted by Virginia voters in November 2020, while others, such as

Sections 24.2-304.04(3), (4), and (9), directly contradict those requirements. None of the Statutory Criteria were ever voted on or approved by the people.

By passing the Statutory Criteria shortly after submitting the 2020 Amendment to the people, the Virginia General Assembly has deftly clawed back control over the process, pretending to delegate all authority over future redistricting to the Commission while retaining ultimate power in the form of Statutory Criteria designed to achieve a specific outcome. Virginia voters understandably assumed that passage of the 2020 Amendment would end the process of legislators gerrymandering districts for personal, geographic, or partisan advantage. Sadly, thanks to the Statutory Criteria, very little has changed. The General Assembly still controls the redistricting process on the front end by imposing detailed (and unconstitutional) criteria the Commission is legally obligated to follow, and then decides on the back end whether the maps drawn by the Commission under the legislature's direction meet with its approval. While it may look as if the legislature has ceded its redistricting power to the Commission, in reality it has left nothing to chance.

Petitioners are seven registered Virginia voters—six of whom are state or local elected officials—who supported the 2020 Amendment and support the current independent redistricting commission. They all reside in Southwest Virginia and vote in districts that will be redrawn this year by the Commission.



Petitioner Hackworth, an incumbent state senator from the 38th District, represents a district that will be redrawn this year by the Commission and in which he intends to compete for reelection. Petitioners reasonably expected that amending the state constitution would have an actual effect: Namely, stripping the state legislature of its redistricting authority to prevent politicians from unfairly manipulating district boundaries to achieve a particular political result. But the General Assembly has prevented the creation of a genuinely independent Commission by its *ultra vires* action. Furthermore, the Statutory Criteria directly threaten Petitioners' individual right to vote by artificially reducing total population counts in their Southwest Virginia districts, thereby depriving them and the Southwest region of political power—and their districts of necessary public resources—while also deliberately diluting the votes of citizens residing in other parts of the Commonwealth.

The Statutory Criteria are unconstitutional for two separate reasons: First, the Statutory Criteria were unconstitutional on the day they were enacted because the General Assembly, without the consent of the people, bypassed Virginia's constitutional amendment process to impose criteria requiring the Commission to redistrict in a manner that violates the Virginia Constitution's equal population and equal protection requirements, thereby violating Article XII, Section 1, Article II, Section 6, and Article I, Section 11 of the Virginia Constitution, respectively; and Second, the Statutory Criteria adopted by the legislature mandate a blatantly

unconstitutional result that conflict with the separate redistricting criteria adopted by the people and codified in Article II, Section 6 of the Virginia Constitution.

For all these reasons, Petitioners urge this Court to issue writs of mandamus and prohibition<sup>1</sup> ordering Respondents to adhere only to the redistricting criteria found in Article II, Section 6 of the Virginia Constitution as they commence the 2021 redistricting process. Petitioners also request that the Court permanently enjoin Respondents from implementing the Statutory Criteria to ensure that Respondents in future redistricting cycles will adhere only to the legally sound requirements of the Virginia Constitution.

### **STATEMENT**

Petitioners support the Commission and the constitutional authority of its members to undertake the first truly nonpartisan, independent redistricting process ever to occur in Virginia's history. However, the General Assembly undermined multiple provisions of the Virginia Constitution when it enacted the Statutory Criteria to severely constrain the Commission. The Respondents in this action are implicated in those violations because they are the governmental entities implementing and enforcing the Statutory Criteria in the 2021 redistricting process.

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<sup>1</sup> Petitioners are familiar with Virginia caselaw holding that a writ of prohibition issues from a "superior court[] of common law to the inferior courts, to restrain the latter from excess of jurisdiction." *Burch v. Hardwicke*, 64 Va. 51,58-59 (1873). In the interest of seeking complete relief for their injuries, Petitioners have included a plea for a writ of prohibition based on substantially the same rationale supporting their request for a writ of mandamus.

Respondents James Abrenio, Greta J. Harris, Brandon Hutchins, Sean S. Kumar, Mackenzie K. Babichenko, Jose A. Feliciano Jr., Richard O. Harrell III, Virginia Trost-Thornton, Sen. George Barker, Sen. Mamie Locke, Del. Delores McQuinn, Del. Marcus Simon, Del. Les Adams, Del. Margaret Ransone, Sen. Ryan McDougle, and Sen. Steve Newman are the members of the Virginia Redistricting Commission and are sued in their official capacities. The Commission is the sixteen-member independent body tasked with conducting all decennial redistricting in Virginia after the adoption of the 2020 Amendment. It is the sole institution vested by the people with authority over congressional and state legislative district map-drawing per Article II, Section A of the Virginia Constitution. That section requires the Commission to “establish[] districts . . . pursuant to Article II, Section 6 of” the Virginia Constitution (hereinafter the “Constitutional Criteria”). Va. Const. art. II, § A. That duty to redistrict pursuant to the Constitutional Criteria is ministerial and non-discretionary. Respondents are not performing this constitutional duty due to the contrary provisions of the Statutory Criteria, which they are also currently obligated to follow.

Respondents Robert H. Brink, John O’Bannon, and Jamilah D. LeCruise are the members of the Virginia State Board of Elections and are sued in their official capacities. The State Board is a governmental body tasked by state law with promoting “legality and purity in all elections” and ensuring “that major risks to election integrity are (i) identified and assessed and (ii) addressed as necessary to

promote election uniformity, legality, and purity.” Va. Code Ann. § 24.2-103(A). The State Board also oversees the operations of the Department of Elections to ensure that it performs its legal duties. *Id.* These duties are ministerial and non-discretionary. Respondents are not performing these duties because they are enforcing Statutory Criteria that violate the state constitution.

Respondent Christopher E. Piper is the Commissioner of the Virginia Department of Elections and is sued in his official capacity. The Department of Elections is a governmental body tasked by state law with assigning voters to the correct congressional and state legislative districts and publicizing on its website the official maps adopted by the Commission. *Id.* § 24.2-103.1. These duties are ministerial and non-discretionary. Respondents are not performing these duties because they are enforcing Statutory Criteria that violate the state constitution.

The ongoing failure of Respondents to perform their constitutional duty to enforce the Constitutional Criteria in the 2021 redistricting process ensures that new maps will be drawn using Statutory Criteria that flatly violate the state constitution, thereby artificially reducing the political representation of Petitioners’ districts in Southwest Virginia and deliberately diluting votes on the basis of race in other districts statewide. Time is of the essence in preventing the creation of congressional and state legislative districts that are drawn using unconstitutional criteria.

## ARGUMENT

### **I. Petitioners are Entitled to the Issuance of a Writ of Mandamus.**

In order for the Court to grant a writ of mandamus, Petitioners must demonstrate: (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.” *Bd. of Cnty. Supervisors v. Hylton Enters., Inc.*, 216 Va. 582, 584 (1976). Petitioners can make all three required showings here.

#### **A. Petitioners Have a Clear Right to the Relief Sought.**

The Statutory Criteria clearly violate at least three separate provisions of the Virginia Constitution. First, the Statutory Criteria were enacted unilaterally by the General Assembly in violation of the amendment process outlined in Article XII, Section 1 of the Virginia Constitution. Second, the Statutory Criteria violate Article II, Sections 6 and A because they violate Virginia’s preexisting equal population requirement through their promotion of prison gerrymandering and conflict with the Constitutional Criteria as amended by Virginia voters in November 2020. Third, the Statutory Criteria require the Commission to discriminate on the basis of race when drawing new districts in violation of the antidiscrimination provision of Article I, Section 11.

Because the Statutory Criteria are unconstitutional, Petitioners have a clear right to a writ directing Respondents to discharge their duties to ensure that new districts are drawn in accordance with the Constitutional Criteria. Allowing the 2021 redistricting process to proceed using the Statutory Criteria injures Petitioners because those criteria were not lawfully approved by the people through the constitutional amendment process and because the districts that Petitioners vote in and that Petitioner Hackworth competes for office in will be unconstitutionally constructed.

**1. Virginia voters amended the Virginia Constitution both to create an independent redistricting commission and to provide it with criteria to guide its deliberations.**

The Virginia Constitution outlines one—and only one—route for enacting constitutional amendments. Prospective amendments are first proposed in the General Assembly, and then must be “agreed to by a majority of the members elected to each of the two houses.” Va. Const. Art. XII, § 1. Then, “at its first regular session held after the next general election of members of the House of Delegates,” the proposed amendment must be approved for a second time by a majority of members in both chambers. *Id.* Only after the proposed amendment has been twice approved by a majority of both chambers of the General Assembly in consecutive legislative sessions is it submitted to the voters for popular approval, at which point it officially becomes law. *Id.* These requirements are not optional. This

Court has held that “strict compliance with these mandatory provisions is required in order that all proposed constitutional amendments shall receive the deliberate consideration and careful scrutiny that they deserve.” *Coleman v. Pross*, 219 Va. 143, 154 (1978).

In November 2020, Virginia voters approved the 2020 Amendment by a wide margin, adding one new section to the Virginia Constitution creating an independent redistricting commission and amending a second section to add criteria for the Commission to follow when redistricting.<sup>2</sup> The summary of the proposed amendment provided to voters explained that it “would *shift the responsibility of drawing these election districts* from the General Assembly and the Governor to a bipartisan commission . . . .”<sup>3</sup> The 2020 Amendment was structurally straightforward: one part (Section A) answered the question of *who* would draw future districts, and the other part (Section 6) answered the question of *how* those districts would be drawn.

The new Article II, Section A created the Commission. In relevant part, Section A requires that “[i]n the year 2020 and every ten years thereafter, the Virginia Redistricting Commission [] shall be convened for the purpose of

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<sup>2</sup> For the precise text of the ballot question approved by Virginia voters, see Va., Dep’t of Elections, *Proposed Amendments for 2020*, <https://www.elections.virginia.gov/proposed-constitutional-amendment-2020/> (attached as Exhibit 1).

<sup>3</sup> *Id.* (emphasis added).

establishing districts for the United States House of Representatives and for the Senate and House of Delegates of the General Assembly *pursuant to Article II, Section 6 of this Constitution.*” Va. Const. Art. II, § A(a) (emphasis added).

The General Assembly is not entirely absent from Virginia’s new redistricting process, but its constitutional role in redistricting is now narrowly circumscribed. Section A gives the General Assembly three distinct tasks related to redistricting: (1) determining the manner in which the Commission’s eight citizen commissioners will be selected, including the criteria by which individuals will qualify for selection; (2) for the four leaders of the General Assembly, submitting lists of candidates to fill the citizen commissioner roles; and (3) deciding, by an up-or-down vote, whether the maps drawn by the Commission and submitted to the General Assembly will ultimately be adopted. That’s it. Notably absent from this short list is the ability to draw maps or any authority over devising the criteria that the Commission uses to draw maps.

As made clear by Article II, Section A, the Commission’s deliberations are guided by the criteria found in Article II, Section 6—and *only* by those criteria (the “Constitutional Criteria”). The Constitutional Criteria, which were also amended by Virginia voters as part of the 2020 Amendment to add language addressing racial and ethnic fairness, now read in their entirety as follows:

Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to



give, as nearly as is practicable, representation in proportion to the population of the district. 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.

Va. Const. Art. II, § 6. Virginia’s requirement that districts “be so constituted as to give, as nearly as practicable, representation in proportion to the population of the district[,]” which is highly relevant to Petitioners’ claims here, predated both the 2020 Amendment *and* the Statutory Criteria.

The Constitutional Criteria also reiterate 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.” *Id.* Petitioners do not challenge the Constitutional Criteria in Article II, Section 6—after all, Petitioners and an overwhelming majority of their fellow Virginians supported their adoption. What Petitioners do object to, and what most Virginia voters were likely unaware of when they voted to adopt the 2020 Amendment, is that an alternative set of redistricting criteria were enacted by the General Assembly without ever being submitted to the people for

approval—criteria that mandate a radically different result. These unconstitutional Statutory Criteria are the basis of the instant challenge.

**2. The General Assembly enacted an alternate set of redistricting criteria, the Statutory Criteria, that never underwent the constitutional amendment process.**

As evidenced by the 31-point margin by which the 2020 Amendment passed, the proposal to shift redistricting authority from the General Assembly to a new independent redistricting commission was extremely popular among Virginia voters—but not all voters supported the effort. Members of the General Assembly, for instance, many of whom voiced public support for the proposal, were unenthusiastic about the prospect of relinquishing their authority over the redistricting process.<sup>4</sup> It was difficult, however, for Members of the General Assembly to openly oppose the creation of a redistricting commission given favorable public opinion on the matter, so they opted for the next best thing: rather than publicly oppose an amendment that was likely to be approved (or restart the entire process by passing an amendment that contained their preferred criteria), the General Assembly decided instead to simply strip the nascent Commission of its most meaningful power.

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<sup>4</sup> See Daniella Cheslow, *In Virginia, Democrats Urge Voters to Reject Redistricting Reform They Once Backed*, NPR (Oct. 12, 2020), <https://www.npr.org/local/305/2020/10/12/922991632/in-virginia-democrats-urge-voters-to-reject-redistricting-reform-they-once-backed> (noting that “[l]ast year, Democrats flipped the General Assembly, and now some have changed their stance [on establishing an independent commission].”)

The General Assembly's role in the constitutional amendment process can be summed up in a single sentence: each chamber of the legislature must approve a proposed amendment by a majority vote in two consecutive legislative sessions, after which the amendment is submitted to the people for final consideration and approval. With regard to the 2020 Amendment, the General Assembly initially performed its proper constitutional role before deviating wildly from script. The 2020 Amendment was first proposed and approved in the 2019 Regular Session. *See* Acts 2019, cc. 821 and 824). On November 5, 2019, the required intervening General Assembly election was held. On April 10, 2020, the General Assembly completed its role in the constitutional amendment process by formally submitting the 2020 Amendment to the voters for the November ballot. *See* Acts 2020, cc. 1070, 1071, 1196. At this point, the General Assembly's engagement in the amendment process was finished and the 2020 Amendment should not have been subject to further legislative revision.

Nevertheless, immediately after submitting the 2020 Amendment to the voters for popular approval, the General Assembly acted to reclaim the redistricting authority it had just given away. On April 22, 2020, less than two weeks after submitting the 2020 Amendment for popular approval, the General Assembly enacted House Bill 1255. This bill added a new section to the Virginia Code entitled "Standards and criteria for congressional and state legislative

districts” that contains the Statutory Criteria challenged here. *See* Va. Code Ann. § 24.2-304.04. House Bill 1255 was not proposed as a constitutional amendment and was never submitted to Virginia voters for their consideration, yet it purported to supersede—and in some cases, contradict—the criteria that actually were popularly approved. To put it simply, the changes wrought by the Statutory Criteria never received “the deliberate consideration and careful scrutiny that they deserve.” *Coleman*, 219 Va. at 154.

The Statutory Criteria were hence procedurally invalid on the day they were enacted. While it is perfectly lawful for the General Assembly to promulgate criteria intended to govern future redistricting processes, that criteria *must* be enacted through the proper constitutional channels. After all, “[t]he power to amend or revise in whole or in part the Virginia Constitution resides in the people, *not in the state legislature.*” *Staples v. Gilmer*, 183 Va. 613, 623 (1945). The constitutional amendment procedure in Article XII, Section 1 does not appear there by happenstance; “[t]he people of Virginia have placed [Article XII, Section 1] in the Constitution to define the means by which it may be revised and amended.” *Id.* And that procedure “must be followed if a valid revision or amendment is to result.” *Id.*

In this case, where the state constitution was lawfully amended to shift authority over the redistricting process, the General Assembly *did* enact criteria

which the voters subsequently approved: The Constitutional Criteria found in Article II, Section 6. But the General Assembly *does not* have the authority to continue unilaterally revising an amendment via purely legislative action after it has been submitted for popular approval. To permit such perpetual *ultra vires* action would turn each future constitutional amendment into a Trojan Horse, one which might look innocuous on the ballot but which has been stuffed full of so many substantive legislative changes by the day of its ratification (or even afterwards) that it has been transformed into an entirely different animal.

By the time Virginia voters went to the polls in November 2020, the General Assembly had essentially created a win-win situation. If voters rejected the amendment, which was unlikely, the General Assembly would simply retain the redistricting authority it had always exercised; whereas if voters adopted the amendment, the new commission would be created but it would be robbed from the moment of its birth of any meaningful discretion over drawing districts. The General Assembly could thereby avoid jumping in front of the moving train of redistricting reform because it rested content with the knowledge that it remained in the driver's seat. There is no authority in Virginia law for such a bait-and-switch.

### **3. The Statutory Criteria violate Article II, Section 6 and Article I, Section 11 of the Virginia Constitution.**

The Statutory Criteria were not adopted using the Article XII, Section 1 procedure for amending the state constitution, but that is not their only constitutional flaw. While the General Assembly bypassed the sole lawful avenue for constitutional amendment—*i.e.*, popular approval through the amendment process—when it enacted the Statutory Criteria, it did so in service of criteria that supersede and even contradict the plain commands of preexisting equal population and antidiscrimination requirements of the Virginia Constitution, as well as the additional Constitutional Criteria that Virginia voters adopted in November 2020. Hence, in addition to their procedural invalidity, the Statutory Criteria were facially invalid on the day they were enacted because they mandate that the Commission create districts with manifestly unequal populations in violation of Article II, Section 6, discriminate upon the basis of race in violation of Article I, Section 11, and were then rendered further invalid when voters adopted the Constitutional Criteria concerning racial and ethnic fairness in November 2020.

Even before voters amended the Virginia Constitution in 2020, it required that all districts “be so constituted as to give, as nearly as is practicable, representation in proportion to the equal population of the district.” Va. Const. Art. II, § 6. This is not solely a command of the state constitution; the U.S. Supreme Court has also held that the federal Equal Protection Clause requires states to

“make an honest and good faith effort to construct districts, in both houses of its legislature, as nearly of equal population as is practicable.” *Reynolds v. Sims*, 377 U.S. 533, 577 (1964).

Article I, Section 11 operates as a state antidiscrimination clause, functionally equivalent to the federal Equal Protection Clause. It mandates that “the right to be free from any governmental discrimination on the basis of religious conviction, race, color, sex, or national origin shall not be abridged . . . .” This Court has interpreted this provision as “no broader than the equal protection clause of the Fourteenth Amendment to the Constitution of the United States.” *Archer v. Mayes*, 213 Va. 633, 638 (1973). The standard for assessing an equal protection violation under the federal constitution applies even in cases such as this that present no federal claim. *See Wilkins v. West*, 264 Va. 447, 467 (2002).

Article II, Section A mandates that the Commission draw districts pursuant to the criteria contained in Section 6. As part of the 2020 Amendment, voters also amended Section 6 to add a requirement that every district “be drawn in accordance with the requirements of federal and state laws that address racial and ethnic fairness,” mentioning in particular the Fourteenth Amendment to the U.S. Constitution and the Voting Rights Act. Va. Const. Art. II, § 6. The Statutory Criteria, however, do not count as such a source of law, both because of the unconstitutional process by which they were enacted and because of their

substantive discriminatory content. Sections 24.2-304.04(3), (4), and (5) of the Code affirmatively further an *unfair* result with regard to minority voting power, while Sections 24.2-304.04(8) and (9) (and the parallel prison gerrymandering statute at Section 24.2-314) have nothing to do with racial or ethnic fairness at all and everything to do with creating districts of *unequal* population. Even seemingly benign provisions that mimic requirements found in the Constitutional Criteria, such as Sections 24.2-304.04(6) and (7), add additional interpretive gloss not derived from the state constitution.

Section 24.2-304.04(9) doesn't attempt to hide the ball; it affirmatively requires the Commission to redistribute persons in a manner that will result in districts with blatantly unequal population counts. This unconstitutional requirement has a particular impact on Petitioners in this action, all of whom reside within districts located in Southwest Virginia. That provision requires “[p]ersons incarcerated in a federal, state, or local correctional facility” to be counted for redistricting purposes “in the locality of their address at the time of incarceration.” Va. Code Ann. § 24.2-304.04(9). In other words, the Statutory Criteria demand that incarcerated persons be counted for redistricting persons somewhere other than the place where they are actually incarcerated.

Although incarcerated felons do not vote in Virginia, Section 24.2-304.04(9) will still succeed in “unpacking” the population of districts in which prisons are



located and thereby reduce the voting power and representation of permanent residents of such districts such as Petitioners. Virginia prisons are typically located in rural districts with greater Republican voting strength, particularly in the Southside and Southwest regions of the Commonwealth in which Petitioners are voting permanent residents (and, in Petitioner Hackworth’s case, an elected state senator).<sup>5</sup> The people like Petitioners who reside in these communities often expend substantial local resources to support their local correctional facilities—including use of the local utility infrastructure (power, water, sewer) and healthcare infrastructure (such as local doctors, hospitals, and emergency rooms). Artificially reducing the populations of these areas to reassign their non-voting populations to other parts of the Commonwealth creates real and significant funding and planning problems for Petitioners’ rural communities. The General Assembly has thereby advanced a legal fiction—*i.e.*, the fiction that incarcerated persons live somewhere other than the place they actually reside—that will have real-world consequences for Petitioners and the communities they live in and represent. Petitioners will still bear all of the responsibility to care for the people in their prisons, without any of the political representation they would otherwise be entitled to receive.

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<sup>5</sup> See *Virginia Prison Facilities*, available at: [https://www.google.com/maps/d/u/0/viewer?msa=0&mid=1mx4YinSW8TrfOxCxXQbUB9\\_xaGk&ll=37.51521043292835%2C-79.592327&z=7](https://www.google.com/maps/d/u/0/viewer?msa=0&mid=1mx4YinSW8TrfOxCxXQbUB9_xaGk&ll=37.51521043292835%2C-79.592327&z=7).

Section 24.2-304.04(3) of the Statutory Criteria contains language that allegedly protects against vote dilution in a manner mirroring Section 2 of the federal Voting Rights Act. Buried within this provision, however, is the standard that must be used to establish a violation:

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*.

Va. Code Ann. § 24.2-304.04(3) (emphasis added). This standard works in conjunction with the following section, which mandates that “[d]istricts shall be drawn to give racial and language minorities an equal opportunity to participate in the political process and shall not dilute or diminish their ability to elect candidates of their choice either alone *or in coalition with others*.” *Id.* § 24.2-304.04(4) (emphasis added). The key terms “ineffective minority” and “excessive majority” were left undefined by the General Assembly.

This language goes further than the federal Voting Rights Act—and U.S. Supreme Court cases interpreting it—which is itself legislation designed to achieve the goals of the Fourteenth and Fifteenth Amendments. As explained, Article I, Section 11 of Virginia’s constitution goes no further than those federal constitutional protections. *See Archer*, 213 Va. at 638. In addition, it is clear from

U.S. Supreme Court precedent that the federal Voting Rights Act’s Section 2 requirements are presumed to satisfy strict scrutiny—but *only* after the adopting Congress and subsequent amendments established a substantial evidentiary record. *See, e.g., Miss. Republican Exec. Comm. v. Brooks*, 469 U.S. 1002 (1984) (summarily affirming lower court decision finding Section 2, as amended in 1982, constitutional). There is no indication that such a record was developed before the General Assembly adopted the Statutory Criteria, particularly since they were enacted at a time when the Commonwealth was subject to stay-at-home orders from the Governor.<sup>6</sup>

The Statutory Criteria might be cloaked in vote dilution language, but in reality they provide the Commonwealth with a rationale for *diluting* minority votes and a defense for situations in which that rationale is challenged. The Statutory Criteria justify “cracking” majority-minority districts—in other words, deliberately targeting those districts for revision due to the race of the citizens who reside there—under the theory that, for example, a 65% minority population is unlawfully “excessive” under the Statutory Criteria, even though that may be the number required to elect that language or racial minority group’s candidate of choice.

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<sup>6</sup> *See* Office of the Governor, *Executive Order Number 55: Temporary Stay at Home Order Due to Novel Coronavirus*, (Mar. 30, 2020), available at: [https://www.governor.virginia.gov/media/governorviriniagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-\(COVID-19\).pdf](https://www.governor.virginia.gov/media/governorviriniagov/executive-actions/EO-55-Temporary-Stay-at-Home-Order-Due-to-Novel-Coronavirus-(COVID-19).pdf).

Then, when a plaintiff brings a vote dilution challenge to a district map, the Commonwealth will hide behind the Statutory Criteria and argue that minority votes have not been diluted even when a district's once numerically effective minority population dwindles to, say, 25%. After all, the Commonwealth will contend, even if it has been reduced to a negligible proportion of a district's population, the minority group in question could conceivably elect its candidate of choice "in coalition with others"—whatever that means. Va. Code Ann. § 24.2-304.04(4). In the absence of statutory definitions or caselaw to the contrary, the Commonwealth will thereby succeed in redistributing minority voters in a manner that runs afoul of the constitutional ban on racial discrimination in Article I, Section 11 and dilutes the constitutionally protected ability of those voters "to elect candidates of their choice" per Article II, Section 6.

Unlike the preceding sections, Section 24.2-304.04(8) does not pretend to cloak itself in the language of vote dilution; it simply adds an entirely new requirement that is not reflected in the state constitution at all, requiring that the final district map "shall not, when considered on a statewide basis, unduly favor or disfavor any political party." As with the novel terms of art found elsewhere in the Statutory Criteria, the General Assembly made no attempt to explain what is meant by "unduly favor or disfavor." On its face, this provision has nothing to do with advancing "racial and ethnic fairness." It appears intended instead to target the

perceived threat of partisan gerrymandering, but that is not a goal outlined anywhere in the Constitutional Criteria. Moreover, the very creation of a bipartisan redistricting commission was intended to eliminate that threat; it was not the place of the General Assembly to adopt additional criteria simply because they did not believe the Constitutional Criteria went far enough towards achieving that goal. Once again, the General Assembly has promulgated criteria that go above and beyond what is required by the state constitution and potentially violate its antidiscrimination clause.

The purpose of Section 24.2-304.04(5) is not entirely clear, but it is likewise not reflected in the state constitution and could conceivably be manipulated to disperse minority voting power in a manner that violates Article I, Section 11 and Article II, Section 6. This provision advances the novel requirement that the Commission must draw districts “to preserve communities of interest,” which it defines as “a neighborhood or any geographically defined group of people living in an area who share similar social, cultural, or economic interests.” By elevating amorphous “interests” over shared attributes such as race or language, the Statutory Criteria violate the contrary Constitutional Criteria requiring the Commission to enable racial and ethnic communities to elect candidates of their choice “where practicable.” Va. Const. Art. II, § 6.

Even those portions of the Statutory Criteria that appear to restate elements of the Constitutional Criteria, such as Sections 24.2-304.04(6) and (7), go above and beyond what is required by the state constitution. These provisions replicate the constitutional requirement that districts be compact and contiguous, but then go further: Contiguity is defined in the Statutory Criteria as meaning no district can be connected “only be water running downstream or upriver,” and compactness as requiring the use of “one or more standard numerical measures of individual and average district compactness.” *Id.* § 24.2-304.04(6), (7). As it turns out, the General Assembly is perfectly capable of defining terms that first appear in the Constitution, but unwilling to define the terms that the legislature creates itself.

Hence, the Statutory Criteria violate the state constitution in myriad substantive ways in addition to the *ultra vires* manner of their enactment. Section 24.2-304.04(9) redistributes the prison populations of rural conservative districts like Petitioners’ to artificially reduce their voting strength and weaken their position with respect to funding and planning matters, while Sections 24.2-304.04(3), (4), and (5) manipulate majority-minority districts in order to disperse minority voters. Sections 24.2-304.04(6) and (7), while mimicking state constitutional language, redefine it to mean something else. All of these requirements fly in the face of contrary state constitutional commands that the Commission draw districts that offer “representation in proportion to the

population of the district” and “opportunities for racial and ethnic communities to elect candidates of their choice” while protecting people “from governmental discrimination upon the basis of . . . race.” Va. Const. Art. II, § 6; Art. I, § 11. By enacting the Statutory Criteria, the General Assembly made clear that it believed that its idiosyncratic—and unconstitutional—preferences should prevail over state law.

#### **4. Petitioners Have a Clear Right to Compel Respondents to Comply With Their Statutory Duties.**

For the foregoing reasons, the Statutory Criteria are unconstitutional. Respondents’ continuing failure to discharge their constitutional duty to redistrict “pursuant to Article II, Section 6” of the Virginia Constitution and their statutory duty “to promote election uniformity, legality, and purity” directly injures Petitioners by overriding their votes for the 2020 Amendment, unlawfully reducing their districts’ populations, discriminating on the basis of race, and forcing them to vote or compete electorally in new districts that were unconstitutionally constructed pursuant to the Statutory Criteria. Va. Const. Art. II, § A(a); Va. Code § 24.2-103. Petitioners thus have a clear right to have this Court compel Respondents to comply with their constitutional and statutory duties to redistrict only in accordance with the Constitutional Criteria.

The Virginia Constitution guarantees to all voters a “right of suffrage” and a “right to be free from any governmental discrimination upon the basis of . . .

race[.]” Va. Const. art. I, §§ 6, 11. This Court held in a previous case involving allegations that a redistricting plan violated the Virginia Constitution’s compactness and contiguity requirements that “[i]f a district fails to meet the [Article II, § 6] requirements, residents of that district are *directly affected* by the legislature’s failure to comply with the Constitution of Virginia.” *Wilkins*, 264 Va. at 460. This is because voters generally have standing to challenge a law when it “dilute[s] voting power and diminish[es] the effectiveness of representation.” *Jamerson v. Womack*, 26 Va. Cir. 145, 146 (1991), *aff’d*, 244 Va. 506 (1992).

Here, while the Statutory Criteria will be used to draw new districts statewide, they will have a particularly deleterious impact on the voters of Southwest Virginia due to the operation of the prison gerrymandering requirement at Section 24.2-304.04(9). The reallocation of incarcerated persons residing within their districts to other parts of the Commonwealth will clearly “dilute [Petitioners’] voting power and diminish the effectiveness of [their] representation.” *Jamerson*, 26 Va. Cir. at 146. Indeed, that appears to be the point of this requirement. Petitioner Hackworth is even further injured by the Statutory Criteria because he will be forced to compete for reelection in 2023 before an invalidly constituted electorate absent the requested relief from this Court. *See LaRoque v. Holder*, 650 F.3d 777, 787 (D.C. Cir. 2011) (holding that a candidate has standing to challenge



a law that would force him “to compete in an ‘illegally structured [campaign] environment” such as this).

Moreover, this Court has jurisdiction to adjudicate a conflict between a provision of the state constitution and a statute adopted by the General Assembly. “When a State legislature passes an apportionment bill, it must conform to constitutional provisions prescribed for enacting any other law, and whether such requirements have been fulfilled is a question to be determined by the court when properly raised.” *Brown v. Saunders*, 159 Va. 28, 35 (1932). In cases where “the provisions in question constitute limitations upon the legislative power of apportionment, . . . then whether those limitations have been exceeded is likewise a question for judicial determination. *The legal question involved is whether or not the act of the legislature is in conflict with the mandate of the Constitution.*” *Id.* at 36 (emphasis added).

In *Brown*, this Court considered whether the discretionary limit imposed by the Virginia Constitution’s requirement that congressional districts contain “as near as practicable an equal number of inhabitants” (then contained in Section 55, but now located in the same Article II, Section 6 at issue here) had been exceeded by a General Assembly apportionment plan featuring districts that varied widely in population. *Id.* at 35-37. The Court determined that the legislation in question *did*

plainly “conflict with the constitutional requirement” and was therefore invalid, necessitating the award of a writ of mandamus. *Id.* at 46-48.

Here, the legislature has ignored the same equal population requirement vindicated in *Brown*, as well as the antidiscrimination provision of Article I, Section 11 and the clear command of Article II, Section A that future redistricting be conducted “pursuant to Article II, Section 6”—*i.e.*, the Constitutional Criteria. All of these provisions constitute a limit on the discretion of the legislature over apportionment; the legislature (and now, after the adoption of the 2020 Amendment, the Commission to which redistricting authority has been delegated) has the freedom to draw districts so long as they do not violate the equal population principle, discriminate on the basis of race, or skirt the requirements of the Constitutional Criteria. The General Assembly has flouted all of these requirements here by requiring the Commission to draw districts in accordance with blatantly unconstitutional Statutory Criteria.

The constitutional violations wrought in this case are not the sole responsibility of the General Assembly either; each of Respondents is implicated in Petitioners’ injuries by their continuing enforcement of the unconstitutional Statutory Criteria. In the recent case *Howell v. McAuliffe*, this Court evaluated whether the Governor’s 2016 executive order extending voting rights to all felons on a categorical basis conflicted with the incremental procedure for rights

restoration outlined in the state constitution. 292 Va. 320, 382-30 (2016). The Court held that the Governor’s action plainly exceeded the limited clemency power vested in him by the Virginia Constitution and was therefore *ultra vires*. *Id.* at 350. Because the order was unconstitutional, the Court also held that “no election official in the Commonwealth has the discretion to enforce them” and awarded the requested writ of mandamus. *Id.* at 351-52. Here, Petitioners cannot obtain full relief from the legislature; it is necessary that every component of Virginia’s election administration apparatus be commanded to follow the Constitutional Criteria.

This Court has not been reticent about issuing writs of mandamus when state election laws have been found to violate the state constitution. *See, e.g., Wilkins v. Davis*, 205 Va. 803, 813-14 (1965); *Brown*, 159 Va. at 47-48. The Virginia caselaw is clear: When state law and the state constitution come into direct conflict, the constitution wins every time.

**B. Petitioners Have a Legal Duty to Perform the Acts that Petitioners Seek to Compel.**

To obtain a writ of mandamus, Petitioners must identify “a clear and unequivocal statutory duty that requires the respondents to act, without judgment or discretion, in the specific manner [Petitioners] seek[] to compel.” *Goldman v. State Bd. of Elections*, 2020 Va. Unpub. LEXIS 21, at \*6-7 (2020). Petitioners have met this burden. Respondents have a legal duty to obey the tenets of the

Virginia Constitution, which necessarily includes redistricting pursuant to the Constitutional Criteria. This duty is mandatory, not discretionary. A “choice” between following the constitution or a contrary statute, as demonstrated *supra*, is no real choice at all.

Petitioners have identified the specific constitutional and statutory commands requiring Respondents to redistrict the Commonwealth in accordance with the Constitutional Criteria. Article II, Section A of the Virginia Constitution requires the Respondent Commission to redistrict “pursuant to Article II, Section 6 of this Constitution.” It mentions no additional sources of criteria that can lawfully guide the Commission’s deliberations. The Respondent State Board and Department of Elections have corresponding statutory duties to redistrict in adherence to the state constitution: The State Board must act “to promote election uniformity, legality, and purity” and it must ensure that the Department does the same. Va. Code § 24.2-103. It is not clear how enforcing district maps that violate the Virginia Constitution would satisfy this obligation.

In essence, Petitioners ask this Court to compel Respondents “to perform a prospective non-discretionary act.” *Town of Front Royal v. Front Royal & Warren Cnty. Indus. Park Corp.*, 248 Va. 581, 587 (1994). That is precisely the kind of relief that the writ of mandamus exists to provide. *Id.* The Constitutional Criteria, as amended, do not exist to affirm the legislature’s “purported unlimited

discretion” over redistricting, but were instead specifically adopted by the people to limit the authority of the General Assembly *and* the Commission “to the enforcement of the terms and conditions” supplied by the state constitution. *Id.* at 586. Compliance with the Constitutional Criteria is mandatory. Respondents do not have lawful “discretion” to ignore the clear requirements of law.

### **C. Petitioners Have No Adequate Remedy at Law.**

The final inquiry in an award of mandamus relief is whether Petitioners have an adequate remedy at law. That is not the same as inquiring whether Petitioners *could have* obtained the relief sought in “a subordinate, local court,” because the ultimate object of mandamus relief is “to prevent a failure of justice.” *Clay v. Ballard*, 87 Va. 787, 788-89 (1891). In cases “where the object is to enforce obedience to a public statute, it has been invariably held that the writ is demandable as of right.” *Id.* at 790. Here, Petitioners ask this Court “to obey the mandate of the fundamental law” and enforce “the sovereign will of the people, speaking through the Constitution” by commanding Respondents to redistrict in accordance with the requirements of that Constitution. *Brown*, 159 Va. at 48.

Virginia law permits Petitioners to seek writs of mandamus and prohibition, as well as declaratory judgments and injunctive relief, in a circuit court with jurisdiction over their claims. Va. Code Ann. §§ 8.01-184, 8.01-186. However, this lengthy route to obtaining relief would not be “adequate” in the present

circumstances. Adequacy in this context requires that the remedy “reach the whole mischief, and secure the whole right of the party in a perfect manner, at the present time and in the future . . .”. *McLaugherty v. McLaugherty*, 180 Va. 51, 68 (1942). This inquiry does not happen in a vacuum, particularly not in cases like this where time is of the essence. “Consideration must be given to *the urgency that prompts the exercise of the discretion*, the public interest and interest of other persons, *the results that will occur if the writ is denied*, and the promotion of substantial justice.” *Goldman v. Landsidle*, 262 Va. 364, 370-71 (2001) (emphasis added). Furthermore, there is precedent from this Court indicating that declaratory judgments should not be sought “where some other mode of proceeding is provided[,]” which this Court’s original jurisdiction over mandamus actions allows for here. *Liberty Mut. Ins. Co. v. Bishop*, 211 Va. 414, 421 (1970).

In this instance, the passage of time will work an irreparable injury unless this Court grants the relief sought. The Census Bureau released local-level data on August 12, 2021, which state entities such as the Respondent Commission will use to immediately commence the 2021 redistricting process.<sup>7</sup> Unless this Court grants Petitioners’ requested relief, this redistricting process will proceed with the Statutory Criteria as its guiding light, leading the Commonwealth towards the

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<sup>7</sup> U.S. Census Bureau, *Census Bureau to Hold News Conference on Release of 2020 Redistricting Data*, (Aug. 5, 2021), available at: <https://www.census.gov/newsroom/press-releases/2021/news-conference-2020-census-redistricting-data.html>.

rocky shoals of years of voting rights litigation (and depriving Petitioners of the political representation to which they are entitled for untold years to come). It is unlikely that Petitioners could conclude litigation in a circuit court and seek Supreme Court appellate review of this matter before such time as Respondents have formally adopted unconstitutional maps. It is difficult to imagine a more urgent matter, or one that would affect more Virginia citizens over a longer period of time, than the adoption of unconstitutional district maps that will govern all Virginia elections for the next decade.

Given the foregoing, “[e]ven if other more leisurely proceedings may [be] available,” Petitioners are *still* entitled to mandamus “unless the other remedies [are] equally convenient, beneficial and effective.” *Early Used Cars, Inc. v. Province*, 218 Va. 605, 610 (1977). Here, the alternative remedies are manifestly inadequate. Moreover, the award of the relief sought in this case would not prejudice the Respondents. Petitioners seek to make Respondents’ legal obligations *clearer*, both for their benefit and that of the voting public, since Respondents are currently laboring under contrary commands emanating from two conflicting provisions of state law. If this Court provided a definitive answer as to which set of criteria Respondents should follow and enforce, all parties would benefit from that clarity.

## CONCLUSION

The General Assembly acted outside of the prescribed constitutional amendment process and its limited role in redistricting under the 2020 Amendment when it enacted Statutory Criteria that substantively violate the Constitutional Criteria adopted by the people, as well as preexisting constitutional equal population and antidiscrimination requirements. Therefore, Petitioners pray that this Court award a writ of mandamus ordering Respondents to follow only the redistricting criteria found in the Constitution of Virginia when conducting the 2021 redistricting process—*i.e.*, that criteria contained in Article II, Section 6. Petitioners also request that Respondents be permanently enjoined from utilizing the Statutory Criteria in all future redistricting cycles in order to ensure the protection of Petitioners' rights on a continuing basis.

### **Count One: Writ of Mandamus**

Petitioners restate the foregoing allegations as if those allegations were fully set forth in this paragraph.

The Virginia Supreme Court has jurisdiction to issue writs of mandamus and prohibition in all cases where such writs could issue under the common law. Va. Code Ann. § 17.1-309.

Petitioners have established that Respondents have a clear and unequivocal statutory duty requiring them to use only criteria contained within the state



constitution to conduct the 2021 redistricting process. This duty is mandatory, not discretionary; the Commission is required to measure all maps against an established set of redistricting criteria, and the Commission's discretion only comes into play when assessing whether the maps ultimately produced by the Commission satisfy that constitutional standard.

Respondents' clear and unequivocal legal duty emanates from Article II, Sections 6 and A of the Virginia Constitution. Section A requires that the Commission redistrict pursuant to the provisions of Section 6, and Section 6 outlines a limited set of criteria that the Commission is obligated to follow, including an equal population requirement. Respondents are also obligated to adhere to the antidiscrimination provisions of Article I, Section 11.

The Statutory Criteria highlighted in the instant Complaint plainly conflict with the constitutional requirement that districts reflect equal populations, that individuals be protected against discrimination on the basis of race, and that districts allow minority voting opportunities. Most of the Statutory Criteria do not appear among the criteria in Section 6, and even those that do (such as the contiguity and compactness requirements) add additional language and requirements not present in the state constitution. The Statutory Criteria are therefore void *ab initio*.

This case presents a clear conflict between two provisions of state law, with the Constitutional Criteria mandating one approach by the Commission and the Statutory Criteria requiring the inverse.

Petitioners request that this Court affirm the supremacy of the Virginia Constitution by issuing the requested writ of mandamus ordering Respondents to follow *only* the redistricting criteria contained in the state constitution when drawing new districts based upon 2020 census data.

WHEREFORE, Petitioners request (i) a writ of mandamus ordering Respondents to follow only the criteria contained in Article II, Section 6 of the Virginia Constitution when conducting the 2021 redistricting process; (ii) their costs in bringing this action as permitted by Virginia Code Section 8.01-648; and (iii) such additional relief as this honorable Court deems just, necessary and appropriate.

### **Count Two: Permanent Injunction**

To protect Petitioners' rights from further infringement under the guise of the Statutory Criteria, Petitioners request that this Court grant injunctive relief prohibiting Respondents from implmenting the Statutory Criteria in all future redistricting processes. This Court has recognized that a petition for writ of mandamus as Petitioners have submitted here "allow[s] the petitioners to obtain both a determination of the validity of the redistricting *and* injunctive relief to

prevent injury from its implementation.” *Jamerson*, 26 Va. Cir. at 148-49, *aff’d*, 244 Va. 506.

Here, where the Commission is currently operating under two conflicting state law commands and the application of the Statutory Criteria will result in the drawing of districts that violate the state constitution, injunctive relief is appropriate to bar the application of the Statutory Criteria and ensure that all future decennial redistricting processes are conducted using only criteria twice approved by the General Assembly and subsequently ratified by the people.

Petitioners have a high likelihood of success on the merits of this action because they are likely to demonstrate that the Statutory Criteria violate Article I, Section 11 and Article II, Section 6 of the Virginia Constitution by mandating contrary results.

Petitioners will suffer irreparable harm if injunctive relief is not granted because the impending 2021 redistricting process, if conducted using the Statutory Criteria, would constitute a continuing interference with Petitioners’ voting rights.

No remedy at law can adequately vindicate Petitioners’ right to have the Commission and other Respondents adhere to the Constitutional Criteria that were adopted by Virginia voters as part of the 2020 Amendment because of the imminence of the impending 2021 redistricting process.

If injunctive relief is granted, Respondents will not suffer damage because their obligations will only be made clearer: They will be required to draw and implement new districts using *only* the criteria found in Article II, Section 6 of the Virginia Constitution. If no injunctive relief is granted, then their legal obligations will remain unclear.

No public interest would be harmed by granting injunctive relief to Petitioners, and in fact the public interest will be served by vindicating the rights of voters under the Virginia Constitution.

WHEREFORE, Petitioners request (i) entry of an order permanently enjoining Respondents from obeying or enforcing the Statutory Criteria in future decennial redistricting processes on the basis of their unconstitutionality; (ii) their costs in bringing this action as permitted by Virginia Code Section 8.01-648; and (iii) such additional relief as this honorable Court deems just, necessary and appropriate.

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

By



M. Brett Hall, Esq.  
Virginia Bar No: 92267  
Hall Law Firm, PLLC  
148 W. Jackson St.  
Gate City, Va. 24251  
276-690-2525  
mbretthall.law@gmail.com  
Counsel for Petitioners

Verifications follow.

**CERTIFICATE OF SERVICE**

I certify that on the 13th day of August 2021, a true courtesy copy of the foregoing Complaint was served on the below parties and counsel of record via USPS First Class Mail and on the Attorney General of Virginia via email. Personal service by process server to be perfected and completed forthwith:

Virginia Redistricting Commission  
900 East Main Street  
Richmond, Virginia 23219

James Abrenio  
Virginia Redistricting Commission  
900 East Main Street  
Richmond, Virginia 23219

Greta J. Harris, Co-Chair  
Virginia Redistricting Commission  
900 East Main Street  
Richmond, Virginia 23219

Brandon Hutchins  
Virginia Redistricting Commission  
900 East Main Street  
Richmond, Virginia 23219

Sean S. Kumar  
Virginia Redistricting Commission  
900 East Main Street  
Richmond, Virginia 23219

Mackenzie K. Babichenko, Co-Chair  
Virginia Redistricting Commission  
900 East Main Street  
Richmond, Virginia 23219

Jose A. Feliciano Jr.  
Virginia Redistricting Commission  
900 East Main Street  
Richmond, Virginia 23219

Richard O. Harrell III  
Virginia Redistricting Commission  
900 East Main Street  
Richmond, Virginia 23219

Virginia Trost-Thornton  
Virginia Redistricting Commission  
900 East Main Street  
Richmond, Virginia 23219  
Sen. George Barker  
Virginia Redistricting Commission  
900 East Main Street  
Richmond, Virginia 23219

Sen. Mamie Locke  
Virginia Redistricting Commission  
900 East Main Street  
Richmond, Virginia 23219

Del. Delores McQuinn  
Virginia Redistricting Commission  
900 East Main Street  
Richmond, Virginia 23219

Del. Marcus Simon  
Virginia Redistricting Commission  
900 East Main Street  
Richmond, Virginia 23219

Del. Les Adams  
Virginia Redistricting Commission  
900 East Main Street  
Richmond, Virginia 23219

Del. Margaret Ransone  
Virginia Redistricting Commission  
900 East Main Street  
Richmond, Virginia 23219

Sen. Ryan McDougle  
Virginia Redistricting Commission  
900 East Main Street  
Richmond, Virginia 23219

Sen. Steve Newman  
Virginia Redistricting Commission  
900 East Main Street  
Richmond, Virginia 23219

Virginia State Board of Elections  
1100 Bank Street  
Richmond, Virginia 23219

Chairman Robert H. Brink  
Virginia State Board of Elections  
1100 Bank Street  
Richmond, Virginia 23219

Vice-Chair John O'Bannon  
Virginia State Board of Elections  
1100 Bank Street  
Richmond, Virginia 23219

Secretary Jamilah D. LeCruise  
Virginia State Board of Elections  
1100 Bank Street  
Richmond, Virginia 23219

Virginia Department of Elections  
1100 Bank Street  
Richmond, Virginia 23219

Commissioner Christopher E. Piper  
Virginia Department of Elections  
1100 Bank Street  
Richmond, Virginia 23219

A handwritten signature in black ink, appearing to read "M. Brett Hall". The signature is stylized with a large, looped initial "M" and a long, sweeping horizontal stroke at the end.

M. Brett Hall, Esq.  
Virginia Bar No: 92267



**VERIFICATION**

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

8/13/21

/s/Trey Adkins

Date

Trey Adkins

**VERIFICATION**

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

8/13/21

/s/David Eaton

Date

David Eaton

**VERIFICATION**

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

8/13/21

/s/Craig Stiltner

Date

Craig Stiltner

**VERIFICATION**

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

8/13/21

/s/Margaret Ann Asbury

Date

Margaret Ann Asbury

**VERIFICATION**

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

8/13/21

/s/Robert Majors

Date

Robert Majors

**VERIFICATION**

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

8/13/21

/s/Charles Stacy

Date

Charles Stacy

**VERIFICATION**

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

8/13/21

/s/Thurman Travis Hackworth

Date

Senator Thurman Travis Hackworth