VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 22nd day of September, 2021.

Present: All the Justices

Trey Adkins, et al., Petitioners,

against Record No. 210770

Virginia Redistricting Commission, et al., Respondents.

Upon a Petition for Writs of Mandamus and Prohibition

Upon consideration of the petition for writs of mandamus and prohibition and the request for injunctive relief, the Court is of the opinion the writs should not issue and the request for injunctive relief should be denied.

Trey Adkins, David Eaton, Craig Stiltner, Robert Majors, Margaret Ann Asbury, Charles Stacy, and Senator Thurman Travis Hackworth (collectively, "the petitioners") petition for a writ of mandamus or, in the alternative, a writ of prohibition, directed to the Virginia Redistricting Commission and its members, Senator George L. Barker, Senator Mamie E. Locke, Senator Ryan T. McDougle, Senator Stephen D. Newman, Delegate Les R. Adams, Delegate Delores L. McQuinn, Delegate Margaret B. Ransone, Delegate Marcus B. Simon, MacKenzie K. Babichenko, Greta J. Harris, James Abrenio, Jose A. Feliciano, Jr., Richard O. Harrell III, Brandon Christopher Hutchins, Sean S. Kumar, and Virginia Trost-Thornton; the Virginia State Board of Elections and its Chairman, Robert H. Brink, its Vice Chair, John O'Bannon, and its Secretary, Jamilah D. LeCruise; and the Virginia Department of Elections and its Chairman, Christopher Piper, (collectively, "the respondents").

Alleging the statutory redistricting criteria stated in Code § 24.2-304.04 unlawfully conflict with the constitutional redistricting criteria stated in Article II, Section 6 of the Constitution of Virginia ("Section 6"), among other allegations, the petitioners request this Court to command the members of the redistricting commission to conduct the 2021 decennial redistricting process pursuant to Section 6, and "to refrain from using any criteria that conflict

with that provision." Similarly, the petitioners request this Court to command the State Board of Elections and its members to fulfill their statutory duty "to promote election uniformity, legality, and purity," Code § 24.2-103, by implementing new district maps that have been developed solely pursuant to the criteria found in Section 6. The petitioners also request that the Virginia Department of Elections and its Chairman be directed to assign voters to districts and publish district maps based on legislative districts that were developed with sole reference to the Section 6 criteria. In addition, the petitioners seek a permanent injunction prohibiting the respondents from implementing the redistricting criteria in Code § 24.2-304.04 "in all future redistricting processes."

I. BACKGROUND

In early April 2020, the General Assembly approved a ballot initiative by which the Commonwealth's citizens would consider whether to amend the Constitution of Virginia to create the redistricting commission, give that commission authority to propose new legislative districts every ten years, and vest the General Assembly with the power to approve or disapprove of the commission's proposals. Later that month, the General Assembly approved the enactment of Code § 24.2-304.04, which provides "Standards and criteria for congressional and state legislative districts" ("Statutory Criteria"). The Statutory Criteria became effective on July 1, 2020 and direct:

> Every congressional and state legislative district shall be constituted so as to adhere to the following criteria:
>
> 1. Districts shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district. A deviation of no more than five percent shall be permitted for state legislative districts.
>
> 2. Districts shall 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.

3. No 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. No 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. 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. The 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. Nothing 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.

4. Districts 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 choice either alone or in coalition with others.

5. Districts shall be drawn to preserve communities of interest. For purposes of this subdivision, a "community of interest" means a neighborhood or any geographically defined group of people living in an area who share similar social, cultural, and economic interests. A "community of interest" does not include a community based upon political affiliation or relationship with a political party, elected official, or candidate for office.

6. Districts shall be composed of contiguous territory, with no district contiguous only by connections by water running downstream or upriver, and political boundaries may be considered.

7. Districts shall be composed of compact territory and shall be drawn employing one or more standard numerical measures of individual and average district compactness, both statewide and district by district.

8. A map of districts shall not, when considered on a statewide basis, unduly favor or disfavor any political party.

9. The 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. Persons incarcerated in a federal, state, or local correctional facility shall be counted in the locality of their address at the time of incarceration, and the Division of Legislative Services shall adjust the census data pursuant to § 24.2-314 for this purpose.

In November 2020, Virginians approved the proposed constitutional amendments to create the redistricting commission. The relevant revisions to Section 6 were as follows, with the stricken through text being removed and the underlined text being added:

> Members of the House of Representatives of the United States and members of the Senate and of the House of Delegates of the General Assembly shall be elected from electoral districts established ~~by the General Assembly~~ pursuant to Section 6-A of this Constitution. 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. The ~~General Assembly shall reapportion the~~ Commonwealth shall be

reapportioned into electoral districts in accordance with this section and Section 6-A in the year ~~2011~~ 2021 and every ten years thereafter.

Voters also approved the addition of Article II, § 6-A to the Constitution ("Section 6-A"). In relevant part, Section 6-A provides that,

> [i]n the year 2020 and every ten years thereafter, the Virginia Redistricting Commission . . . shall be convened for the purpose of establishing districts for the United States House of Representatives and for the Senate and the House of Delegates of the General Assembly pursuant to Article II, Section 6 of this Constitution.

Section 6-A also delineates how the members of the redistricting commission will be selected and sets deadlines for the redistricting process once the commission receives the federal "census data" necessary to inform its work.

The petitioners contend the Statutory Criteria are unconstitutional and, therefore, the redistricting commission should not consider them when revising Virginia's legislative districts. The petitioners allege they each intend to vote or run for office in a district that the redistricting commission will redraw and argue they will be injured should the commission rely on the invalid Statutory Criteria because, among other reasons, their respective districts will be illegally constituted.

II. PETITION FOR A WRIT OF MANDAMUS

We conclude the petitioners have failed to demonstrate mandamus lies to direct the work of the redistricting commission or the various election officials the petitioners name as respondents. "A writ of mandamus is an extraordinary remedy that may be used to compel a public official to perform a purely ministerial duty that is mandatory in nature and is imposed on the official by law." *Goldman v. Landsidle*, 262 Va. 364, 370 (2001) (citations omitted); *see also Kellar v. Stone*, 96 Va. 667, 669 (1899) ("At common law the writ of mandamus will be issued, directed to any person or corporation or inferior court, 'requiring them to do some particular thing, therein specified, which appertains to their office or duty.'" (quoting 3 William Blackstone, Commentaries *110)). "Before a writ of mandamus may issue there must be a clear right in the petitioner to the relief sought, there must be a legal duty on the part of the respondent to perform the act which the petitioner seeks to compel, and there must be no adequate remedy at

law." *Brd. of Cnty. Supr's v. Hylton Enterprises, Inc.*, 216 Va. 582, 584, (1976) (citing *Richmond-Greyhound Lines v. Davis*, 200 Va. 147, 152 (1958)). Mandamus "is not a preventive remedy; its purpose and object is to command performance, not desistance." *Brd. of Supr's v. Combs*, 160 Va. 487, 498 (1933); *see also Brd. of Supr's v. Heatwole*, 214 Va. 210, 212-15 (1973) ("Mandamus should be reserved to discharge its principal purpose, i.e., to enforce a clearly established right and to enforce a corresponding imperative duty created or imposed by law" (quoting *Stroobants v. Highway Comm.*, 209 Va. 275, 278 (1968)). Thus, mandamus "is exercised for the purpose of stimulating rather than of restraining [] action." James L. High, *A Treatise on Extraordinary Legal Remedies*, § 32, p. 32 (1874). While the function of an injunction is "to restrain motion and enforce inaction," the function of mandamus is "to set in motion and compel action." *Id*. at § 6, pg. 10. An injunction preserves the status quo, while "the very object of [mandamus] is to change the status of affairs and to substitute action for inactivity." *Id.*

A writ will not issue in "doubtful cases," and the petitioner must show a clear and specific legal right to be enforced. *Gannon v. State Corp. Comm'n*, 243 Va. 480, 482 (1992) (quoting *Richmond-Greyhound Lines*, 200 Va. at 151-52 (1958)); *see also Gilliam v. Harris*, 203 Va. 316, 318 (1962) (affirming the writ "should be issued only where there is a clear and specific legal right to be enforced, or a duty which ought to be and can be performed"). Accordingly, "mandamus is never granted in anticipation of a supposed omission of duty, however strong the presumption may be that the persons whom it is sought to coerce by the writ will refuse to perform their duty when the proper time arrives." High, § 12, p. 14. "In other words, the relator must show that the respondent is actually in default in the performance of a legal duty then due at his hands." *Id.*; *see also Gleaves v. Terry*, 93 Va. 491, 496 (1896) ("until it is shown that the right" sought to be enforced has been denied, mandamus "should not issue"); 2 T.C. Spelling, *A Treatise on Injunctions and Extraordinary Remedies*, § 1385, pg. 1196 (1901) ("A relator is not entitled to the writ unless he can show a legal duty then due at the hands of the respondent; and until that time arrives when the duty should be performed, no threats or predetermination not to perform it can take the place of such default").

Here, the petitioners do not seek to compel the respondents to perform an action they have failed or refused to undertake. Instead, the petitioners attempt to use mandamus as a substitute for injunction, asking the Court to prevent the respondents from taking certain actions.

Specifically, the petitioners ask this Court to preclude the respondents from considering the Statutory Criteria[1] and implementing district maps developed from those criteria and to "grant injunctive relief prohibiting Respondents from implementing the Statutory Criteria in all future redistricting processes." For this mandamus does not lie.

Further, the petitioners have failed to show the elections officials they name as respondents are in default of any duty imposed on them by law. Instead, they presume the elections officials will fail in their duties by implementing, publishing, and assigning voters to new district maps that do not comply with the constitutional requirements. However, no new maps have been created, thus there is nothing for the elections officials to implement and they cannot be in default of any duty owed by them.[2] For these reasons, mandamus is denied.

III. PETITION FOR A WRIT OF PROHIBITION

The writ of prohibition is traditionally issued by a superior court to an inferior court "to restrain the latter from excess of jurisdiction." *Howell*, 292 Va. at 353 n.19 (internal quotation marks and citation omitted). Although a writ of prohibition "may issue to restrain a quasi-judicial body from attempting to exceed its judicial powers, or attempting to usurp unauthorized judicial powers," *Bee Hive Min. Co. v. Indus. Comm'n of Va.*, 144 Va. 240, 242–43 (1926), this matter does not involve the use of judicial powers. Accordingly, prohibition does not lie.

[1] Although the petitioners attempt to cast this as a positive duty, asking the Court to direct the redistricting commission members to "use only criteria contained within the state constitution," they are nonetheless asking the Court to restrain, rather than compel action.

[2] This Court has not hesitated to use mandamus to invalidate an unconstitutional law or order and to compel officials to act as though the statute or order were a nullity. *See Howell v. McAuliffe*, 292 Va. 320 (2016); *Brown v. Saunders*, 159 Va. 28 (1932). However, in each of those cases, the respondents had a particular duty that could be compelled by mandamus which they had failed to perform. In *Howell*, for example, the Department of Elections and its Commissioner had clear and unequivocal obligations to "[r]equire the general registrars to enter the names of all registered voters into the [voter registration] system and to change or correct registration records as necessary," to "[r]equire the general registrars to delete from the record of registered voters the name of any voter who . . . has been convicted of a felony," and to "[r]etain information received regarding . . . felony convictions" which they had failed to perform. *Id.* at 352 (quoting Code §§ 24.2-404(A)(2), (A)(4), and (A)(6)). In *Brown*, the respondents had refused to accept notices for candidacy at large from petitioners, relying on a redistricting statute that this Court determined was invalid. *Id.* at 47-48. No similar failure has occurred here.

IV. INJUNCTIVE RELIEF

This Court's original jurisdiction is constitutionally limited and therefore we do not grant a permanent injunction. Va. Const. Art. VI, § 1.

IV. CONCLUSION

Having determined the petitioners are not entitled to a writ of mandamus, a writ of prohibition, or injunctive relief for the reasons stated, we dismiss the petition.

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Teste:

Acting Clerk