

## **VIRGINIA:**

*In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Wednesday the 9th day of September, 2020.*

Present: All the Justices

Paul Goldman,

Petitioner,

against              Record No. 201067

State Board of Elections, et al.,

Respondents.

Upon a Petition for Writs of Mandamus and Prohibition

Upon consideration of the petition for writs of mandamus and prohibition, the expedited motion to dismiss, and the expedited reply to the motion to dismiss, the Court is of the opinion the writs should not issue.

Paul Goldman petitions for a writ of mandamus or, in the alternative, a writ of prohibition, directed to the Virginia State Board of Elections, its Chairman Robert Brink, its Vice Chair John O'Bannon, and its Secretary Jamilah LeCruise, and the Virginia Department of Elections and its Chairman Christopher Piper (collectively, “the respondents”). Alleging the General Assembly’s approved language for the ballot question describing proposed amendments to Article II, Section 6 of the Constitution of Virginia is defective in several respects, Goldman asks this Court to direct the respondents “to perform their legal duty to protect the ‘integrity’ of the ballot by prohibiting the ballot question language ordered by the General Assembly from being printed” on the ballot for the general election to be held on November 3, 2020. For the reasons stated below, we dismiss the petition.

### I. BACKGROUND

In 2019, the General Assembly voted in favor of an amendment to Article II, Section 6 which would create a redistricting commission composed of eight members of the General Assembly and eight citizens. The proposed redistricting commission would be responsible for creating a redistricting plan for presentation to the General Assembly, which would then vote on the plan. Should the redistricting commission fail to create a plan or the General Assembly fail

to approve a plan, the amendment would require this Court to establish the Commonwealth's electoral districts. The General Assembly also approved a proposed amendment to Article II, Section 6 which would add language to the redistricting criteria. Acts of Assembly 2019, c. 0821.

In accordance with the requirements of Article XII, Section 1 of the Constitution of Virginia and Code § 30-19, the proposed amendments were referred to the 2020 General Assembly, which approved them and ordered that they be submitted to Virginia voters on the November 3, 2020 ballot. Acts of Assembly 2020, c. 1071. In particular, the General Assembly directed:

The ballot shall contain the following question:

"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, 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?"

*Id.*

Goldman argues the description of the proposed amendment, as worded in the ballot question, is unconstitutional under Article XII, Section 1 because it does not describe the amendment in a neutral manner, makes several omissions, and is "misleadingly and materially flawed."

Goldman also asserts that, as currently presented, the ballot question "dilutes, debases, and otherwise harms" his "rights of suffrage" and his "First Amendment political rights to defeat" the adoption of the proposed amendment. Goldman claims the respondents have a statutory duty to prevent such injury. In particular, Goldman identifies the respondents' duty under Code § 24.2-103(A) to ensure "legality and purity in all elections." Goldman asks this Court to compel the respondents to prohibit the language of the ballot question directed by the General Assembly "from being printed" on the November 3, 2020 ballot.

Although the language of the challenged ballot question was approved on April 10, 2020, Acts of Assembly 2020, c. 1071, Goldman filed the petition on August 28, 2020, and did not pay the filing fee until August 31, 2020. The ballot for the November 3, 2020 general election must

be certified by the State Board of Elections “[a]s soon as practicable after the seventy-fourth day before the” election, and the general registrars are required to have the ballots printed “at least forty-five days preceding the election.” Code § 24.2-614; *see also* Code § 24.2-612 (stating absentee ballots shall be made available at least forty-five days before the election).

## II. PETITION FOR A WRIT OF MANDAMUS

The writ of mandamus is “an extraordinary remedy employed to compel a public official to perform a purely ministerial duty imposed upon him by law.” *Howell v. McAuliffe*, 292 Va. 320, 351 (2016) (internal quotation marks and citation omitted). “A ministerial act is an act that one performs in obedience to a legal mandate and in a prescribed manner, without regard to his own judgment as to the propriety of the act to be done.” *Id.* (internal quotation marks and citation omitted). A mandamus petitioner must identify “a clear and unequivocal duty of a public official to perform the act in question.” *Smith v. Richmond Newspapers, Inc.*, 261 Va. 113, 118 (2001); *see Legum v. Harris*, 205 Va. 99, 102 (1964) (“It is essential to the issuance of a writ of mandamus that the legal right of the plaintiff . . . to the performance of the particular act, sought to be compelled, be clear, specific, and complete.”) (internal quotation marks omitted). Our inquiry “is merely to determine whether [the respondents] may be compelled” to perform in the manner Goldman alleges they must, and not whether the action Goldman seeks to compel would be “proper, wise, or desirable.” *Griffin v. Board of Supervisors*, 203 Va. 321, 329 (1962).

In *Howell*, 292 Va. at 328, the petitioners contended that executive orders restoring voting rights to certain felons were unconstitutional, and they sought to forestall the registration of these persons on the lists of qualified voters. The petitioners, as here, requested writs of mandamus and prohibition directed to the Board of Elections, its Chairman, Vice Chair, and Secretary, and the Department of Elections and its Commissioner. *Id.* at 329. We held the executive orders were ultra vires and that no election official in the Commonwealth had the discretion to enforce them. *Id.* at 351. “To the contrary,” we explained, “all such officials have a prospective duty to ensure that only qualified voters are registered to vote.” *Id.* at 351-52.

Specifically, the Department of Elections and its Commissioner have 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.” *Id.* at 352 (quoting Code §§ 24.2-404(A)(2), (A)(4), and (A)(6)). The Board of Elections and its Chairman, Vice Chair, and Secretary have a clear and unequivocal obligation to “institute procedures to ensure” that the Department of Elections and its Commissioner fulfill each of their obligations. *Id.* (quoting Code § 24.2-404(C)). In light of the executive orders’ unconstitutionality, we directed the respondents to act in accordance with these ministerial duties. *Id.*

Significantly, in *Howell*, the petitioners identified specific duties imposed upon the respondents by statute that required the acts the petitioners sought to compel without regard to the respondents’ judgment or discretion. *See Board of Supervisors v. Combs*, 160 Va. 487, 496 (1933) (stating a mandamus petitioner “must show a clear legal right to have the duty sought to have coerced, *done in the manner specified in the application and by the defendant*”) (internal quotation marks omitted and emphasis in original). Here, by contrast, Goldman has not identified a clear and unequivocal statutory duty that requires the respondents to act, without judgment or discretion, in the specific manner Goldman seeks to compel.

Goldman asserts that, pursuant to Code § 24.2-103(A), the respondents have a ministerial duty to prohibit the printing of ballots containing the challenged ballot question language. He is incorrect. Code § 24.2-103(A) addresses the duty of the Board of Elections, through the Department of Elections, to “supervise and coordinate” the work of local electoral boards “to obtain uniformity in their practices and proceedings and legality and purity in all elections.” *Id.* In furtherance of this duty, the Board of Elections shall identify and assess major risks to election integrity and address those risks “as necessary to promote election uniformity, legality, and purity.” *Id.* In many circumstances, it appears, fulfilling these duties would require the Board of Elections to exercise discretion. *See Richlands Medical Ass’n v. Commonwealth, ex rel. State Health Com’r*, 230 Va. 384, 387 (1985) (“Mandamus will not lie to control [the] manner in which [a] public official exercises discretion.”).

More importantly, Code § 24.2-103(A) does not clearly and unequivocally state the respondents must prohibit the printing of ballots on the ground that the language of a ballot question is defective. *See Lehman v. Morrisett*, 162 Va. 463, 469 (1934) (stating “[a] duty to be enforceable by mandamus must be specific in its nature, and of such character that the court can prescribe a definite act or series of acts which will constitute a performance of that duty”)

(internal quotation marks omitted). Code § 24.2-103(A) assigns the respondents no duty at all with respect to the printing of ballots containing questions describing proposed constitutional amendments. *See Williams v. Matthews*, 248 Va. 277, 283 (1994) (holding a sheriff had no clear, ministerial duty to force entry to execute pretrial detinue seizure orders, in part, because “[i]n none of the statutes governing . . . [those] orders is there explicit authority for a sheriff to forcibly enter a dwelling house to execute such orders”); *see also Signal Corp. v. Keane Fed. Sys. Inc.*, 265 Va. 38, 46 (2003) (stating courts may not add language to statutes).

Further, other provisions of law, including Article XII, Section 1, confirm the respondents have no role in determining the language of the ballot question, which is decided by the General Assembly. *See Williams*, 248 Va. at 283-84 (looking to related statutes to confirm that the General Assembly did not clearly intend to abrogate the common law and impose an implicit duty on sheriffs to force entry to execute detinue seizure orders); *see also* Va. Const. art. XII, § 1 (stating it is “the duty of the General Assembly to submit such proposed amendment or amendments to the voters qualified to vote in elections by the people, in such manner as it shall prescribe and not sooner than ninety days after final passage by the General Assembly”); Code § 30-19 (stating that if a majority of members of each house agree to the proposed amendment, “the same shall be submitted to the people . . . by a bill or resolution introduced for such purpose”).

The respondents’ duty related to this subject is limited to ensuring the ballot question, in the form decided by the General Assembly, appears on the upcoming general election ballot. *See* Acts of Assembly 2020, c. 1071 (directing that “[t]he ballot shall contain the following question”). Code § 24.2-614 requires the Board of Elections to certify to the general registrars “the form of official ballot for the presidential election which shall be uniform throughout the Commonwealth.” Code § 24.2-615 further provides that “[a] separate question shall be presented for each of the following: proposed amendments to the Constitution submitted to the qualified voters at one election; . . . candidates for President, Vice President, and presidential electors; and candidates for the Congress of the United States.” Together, Code § 24.2-614, Code § 24.2-615, and the Act of the General Assembly directing the language of the ballot question endow the Board of Elections with a ministerial duty to certify the official ballot, containing separate questions for the candidates for President, Vice President, and presidential electors, the candidates for Congress, and the proposed constitutional amendments. Issuing a

writ of mandamus directing the respondents to prohibit the printing of ballots would frustrate, rather than compel, the respondents' performance of this ministerial duty. Therefore, mandamus does not lie.

### 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.

### IV. CONCLUSION

Having determined Goldman is not entitled to a writ of mandamus or a writ of prohibition for the reasons stated, we dismiss the petition.

A Copy,

Teste:

Douglas B. Robelen, Clerk

By:



A handwritten signature in black ink, appearing to read "Douglas B. Robelen".

Deputy Clerk