

**IN THE
SUPREME COURT OF VIRGINIA**

Record No. 201067

PAUL GOLDMAN

Petitioner

v.

THE STATE BOARD OF ELECTIONS, et al.,

Respondents.

REPLY TO RESPONDENT'S RESPONSIVE PLEADING

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INTRODUCTION

“The only thing between us and the jungle is the people’s respect for the law” is a paraphrase of the famous observation from renowned Supreme Court Justice Oliver Wendell Holmes.

I. RESPONDENTS FAIL TO DISPUTE THE FATALLY FLAWED BALLOT WORDING

1. Respondents do not dispute the Petition’s factual analysis showing the ballot language makes no mention whatsoever of proposed substantive changes to Article II, Section 6 (redistricting criteria).
Pet. ¶ 122.
2. Their Responsive Pleading (hereinafter “Response”) treats the Article II, Section 6 proposal like the General Assembly ballot writers: it is the ghost amendment, not discussed in the Response, not mentioned on the ballot.
3. Respondents in their opening statement referenced just one *“proposed constitutional amendment”* dealing with the Virginia Redistricting Commission. Resp., pp. 2-4 (emphasis added).
4. But the Act cited clearly says there **two** distinct proposed amendments, one changing the criteria, the other changing the process for future redistricting.

5. Respondents do not dispute Petitioner's position that most Virginians get their basic knowledge of any proposed amendment from the government's ballot wording read immediately before casting a vote. Pet. ¶ 140.
6. While the Response cites the handout required by Va. Code Section 30-19.9, it does not dispute Petitioner's position that relatively few voters read the handout. Resp., p. 18, fn. 6. Pet. ¶ 132.
7. Accordingly, Respondents concede Petitioner's argument that most voters will be unaware that a vote to approve the Referendum is a vote to put the ghost amendment changes into their Constitution. Pet. ¶¶ 105, 232.

II. RESPONDENTS SEEMINGLY CONCEDE THE REFERENDUM ELECTION IS VIOLATIVE OF ARTICLE 1, SECTION 6

8. The Petition cited Article I, Section 6, entitled "Free Elections; consent of governed." Pet. ¶ 154.

9. This provision makes clear the fundamental importance to Virginians of the people's direct consent to the laws of the Commonwealth.
10. Article I, Section 6 has only one exception: Virginians agreed to be bound by laws approved by "their own representatives duly elected."
11. Unlike statutory changes, the people have specifically retained in Article XII, Section 1 the sole right to directly amend the Constitution and entirely took such power away from the General Assembly. *Staples v Gilmer*, 183 Va. 613 (1945), *Coleman v Pross*, 246 S.E. 2d 613 (1978). Pet. ¶¶ 179-184, 60-65.
12. Respondents, having waived their right to object to Petitioner's factual analysis in ¶¶ 5-7 infra, therefore by logical extension concede it is not possible for the people to "assent" as required by Article I, Section 6 to a ghost amendment never referenced in the ballot wording.

III. RESPONDENTS FAIL TO DISPUTE OTHER KEY FACTS

13. Respondents did not dispute Petitioner’s position on the other substantive omissions and/or mischaracterizations as regards the proposed Article II, 6-A. Pet. ¶¶ 160-168.

14. Respondents did not dispute Petitioner’s position on the use of public money. Pet. ¶¶ 171-174.

15. Respondents did not dispute Petitioner’s position that the General Assembly had weaponized its unique ballot access to its benefit. Pet. ¶ 156.

16. Respondents did not dispute Petitioner’s position that using this ballot access to advocate for the pro-government side amounted to campaigning inside the polling place in violation of 24.2-604. Pet. ¶¶ 234-235.

IV. PETITIONER REJECTS THE “CAVEAT EMPTOR” HERRING DOCTRINE

17. Respondents seemingly conceded the ballot wording in the instant matter would be unfair and inaccurate under *State ex. Rel. Voters First v. Ohio Ballot Board*, 978 N.E. 2d 119 (Ohio 2012). Resp., p. 17. Pet. ¶¶ 135-136.

18. But Respondents distinguish *Voters First* by saying unlike Article XII, the constitutional provision in *Voters First* specifically required that ballot language “properly identify the substance of the proposal to be voted upon”. *Voters First*, Id at 125. Resp., pp 16-17.

19. The Herring Doctrine is far more pernicious: it says the people of Virginia *affirmatively* agreed to allow the General Assembly to deceptively, misleadingly, unfairly, inaccurately, manipulate them in a Referendum election. Resp., p. 18.

20. This Doctrine is derived from these words in Article XII, Section 1: “it shall be the duty of the General Assembly to submit such proposed amendment or amendments to the voters... *in such manner as it shall prescribe...*” (emphasis added). Resp., pp. 17-18.

21. Under the Herring Doctrine, the people allegedly have agreed to give the General Assembly two options:

- (1) The **Full Truth** option of putting the full text on the ballot; or
- (2) the **Caveat Emptor** option where the General Assembly can propose two major structural changes but only tell the unsuspecting voter about one in the ballot wording.

22. Respondents offer no policy reason, much less any authority, for this unprecedented doctrine.

V. RESPONDENTS FAIL TO DISPUTE THIS IS A BALLOT ACCESS CASE

23. Petitioner believes the use of the government's unique ballot access in a Referendum election – as in the instant case – violates the Petitioner's protected constitutional rights. Pet. ¶¶ 151-156.

24. Since the Respondents chose not to refute any of the ballot access assertions, they are deemed conceded.

VI. PETITIONER REJECTS EVERY CLAIM OF WAIVER, LACHES, AND FAILURE TO DEVELOP

25. Respondents waiver claims rely on an inapposite tort case related to parental rights and are rejected. Resp., p. 6, fn. 3.

26. Petitioner rejects the failure to develop claim made by Respondent. Resp., p. 7, fn. 4.

27. Petitioner asks Court to order the laches claim by Respondent (p. 13, fn. 5) be stricken since the Office of Attorney General knows

they are not entitled to equitable relief.

VII. RESPONDENTS STANDING ARGUMENT IS INAPPOSITE

28. Respondents reliance on *Goldman v Landsidle* is inappropriate, as *Howell* made clear at 740, fn. 5. Resp., pp. 6, 8-9 (*Howell*).

29. The Petition points out – without dispute from Respondent – that the constitutionally protected rights granted by specific provisions to the Petitioner apply -equally in a Referendum election. *McIntyre v. Ohio Election Comm’n*, 514 U.S. 334 (1995). Pet. ¶¶ 104-106.

30. Respondents readings of *Westlake Props., Inc. v. Westlake Pointe Prop. Owners Ass’n*, 273 Va. 107 (2007), *Park v Northam* (Aug. 24 order), *Lafferty v. School Ed of Fairfax Cnty.*, 293 Va. 354 (2017), are rejected. Resp., pp. 7, 9-12.

VIII. RESPONDENTS VIEW OF SPECIFIC INJURY TO PETITIONER IS REJECTED

31. Respondents not disputed that the General Assembly is using manipulative ballot language to get voters to approve the amendments.

32. Respondents mistakenly says Petitioner is basing injury on the possible “result of the newly constructed commission’s work.”

Resp., pp. 7-8.

33. Petitioner rejects Respondents claim that “no matter how much more likely passage might be as a result of the ballot language”, any assessment of injury is impossible until the votes are counted.

Resp., pp. 8-9.

34. Petitioner’s rights at issue can be diluted, devalued, and injured not merely by laws denying said rights but by state action which unfairly burdens the exercise of such rights. *Reynolds v. Sims* 377

U.S. 533 (1964). Pet. ¶ 266.

35. Injury to Petitioner is therefore specific and particularized because the grant of rights is to him as a citizen irrespective of what others may feel or do. Pet. ¶ 10, 70, 76, 87, 95, 151, 153, 212, 214, 218, 251.

IX. RESPONDENTS CLAIMS ON MANDAMUS AND PROHIBITION ARE REJECTED

36. Without exception, Petitioner rejects the claims of fact and law in the Section II of the Brief. Resp., pp. 10-14.

37. Respondent creates a strawman by saying “petitioner does not deny” that the legislature can propose a ballot referendum since this misstates the case: to wit, this matter is about the government abusing that very power. Resp., p. 11.
38. Respondent further creates another strawman by saying a Mandamus would not work because even if the Court agreed with Petitioner – and the Respondent – that the ballot wording is unacceptable, “petitioner might still find [any new wording] objectionable.” Resp., pp. 11-12.
39. Petitioner rejects this view and the cases cited since he fails to see how the Commonwealth benefits for holding the Referendum election given the Respondent’s concessions. Resp., pp. 10-14.
40. Petitioner further rejects the claim that Mandamus is “inappropriate” here because “judicial intervention at this point would significantly disrupt an ongoing electoral process.” Resp., p. 12.
41. *Gannon v. State Corporation Com’n*, 243 Va. 480 (1992) (did not involve an election) and *Scott v. James* 114 Va. 297 (1912) (decided under a different Constitution) are cited but rejected by Petitioner. Resp., pp. 4-5, 12.

42. A referendum election is not as time-sensitive as the normative candidate election that fills government posts.
43. Article XII does not require the Referendum election to be held in November.
44. Stopping the Referendum election does not affect the General Election.
45. The Petition stated – without dispute in the Response – that Petitioner tried to alert the Attorney General before filing suit. Pet. ¶ 206.

X. RESPONDENTS CONCEDE PETITIONER’S SEPARATION OF POWERS ARGUMENT

46. Again, unable to refute Petitioner, Respondent does not address the Petition’s discussion of the 244-year history of the separation of powers doctrine. Pet. ¶ 19.
47. Accordingly, Respondent concedes Petitioner’s claim that the ballot language fails to alert voters to this radical departure from this essential legal principal. Pet. ¶¶ 16-18.

CONCLUSION

48. The foregoing has shown Respondent has conceded the key facts in this matter.

49. The fact is the ballot summary is fatally flawed in that it omits material substantive changes that cause, in effect, the voters to vote blindly.

50. Justice and the Constitution demand far more.

51. Accordingly, Petitioner finds even greater cause to grant him either a writ of Mandamus and/or writ of Prohibition and such other relief as the Court deems may be warranted.

Respectfully submitted,

Petitioner

By: /s/ Paul Goldman

CERTIFICATE OF SERVICE AND FILING

I certify that on this 8th day of September, 2020, a copy of the foregoing has been sent to theytens@oag.state.va.us, the email address for Mr. Toby J. Heytens, who is the Solicitor General and the attorney who signed the Response for the Respondents.

Word Count 1591

/s/ Paul Goldman

Paul Goldman