

**IN THE  
SUPREME COURT OF VIRGINIA**

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**Record No. 210770**

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**Trey Adkins, et al.,**

**Petitioners,**

**v.**

**Virginia Redistricting Commission, et al.,**

**Respondents.**

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**Memorandum of Law of Fair Lines America, Inc. as  
*Amicus Curiae* in Support of Petitioners**

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# TABLE OF CONTENTS

TABLE OF AUTHORITIES .....	ii
ARGUMENT .....	1
I.    The Virginia Constitution Preempts Any Contrary Provision of State Statutory Law.....	1
A.    Under The Virginia Constitution, Only The Independent Redistricting Commission May Establish Electoral Districts. ....	3
1.    Article II, Section 6 Ensures the Independence of the Redistricting Commission. ....	4
2.    Virginia Code Section 24.2-304.04 Conflicts with Article II, Section 6 of the State Constitution.....	5
3.    Va. Code Section 24.2-304.04’s Novel Criteria are Unconstitutional. ....	6
II.   The Inclusion of Particular Criteria in Article II, Section 6 Necessarily Excludes Any Factors Not Included in That Criteria. ....	7
A.    The Canon of <i>Expressio Unius</i> Requires the Constitutional Amendment to be Afforded Its Full Meaning And Effect.....	7
B.    The Constitution’s Limitation of Redistricting Factors Forecloses the Legislature from Adding New or Conflicting Factors. ....	9
CONCLUSION.....	10
CERTIFICATE OF SERVICE.....	12

## TABLE OF AUTHORITIES

### CASES

<i>Bentley Funding Grp., L.L.C. v. SK&amp;R Grp., L.L.C.</i> , 269 Va. 315 (2005).....	10
<i>Biscayne Contrs., Inc. v. Bd. of Supervisors of Fairfax Cnty.</i> , 103 Va. Cir. 306 (2019) .....	8
<i>Blake v. Marshall</i> , 152 Va. 616 (1929).....	2
<i>Brown v. Saunders</i> , 159 Va. 28 (1932).....	6
<i>Carter v. Nelms</i> , 204 Va. 338 (1963).....	9
<i>Commonwealth ex rel. Va. Department of Corrections v. Brown</i> , 259 Va. 697 (2000).....	8
<i>Freeman v. Quicken Loans, Inc.</i> , 566 U.S. 624 (2012) .....	5
<i>Jackson v. Fidelity &amp; Deposit Co.</i> , 269 Va. 303 (2005).....	9-10
<i>Maretta v. Hillman</i> , 283 Va. 34 (2012).....	6
<i>Wilkins v. West</i> , 264 Va. 447 (2002).....	2

### CONSTITUTIONS AND STATUTES

Va. Const., Art. II, § A .....	3, 8, 9
Va. Const., Art. II, § 6.....	3, 4, 6, 8, 9
Va. Const., Art. IV, § 14 .....	1, 2
Va. Code Ann. § 24.2-304.04.....	5, 6, 7

### OTHER AUTHORITIES

Ahmed & Perry, “Constitutional Statutes,” (2015) ( <a href="https://adamdperry.files.wordpress.com">https://adamdperry.files.wordpress.com</a> ) <i>citing</i> Halsbury’s Laws of England (4th ed., 1995) vol. 44(1), para 1300.....	4-5
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## ARGUMENT

Fair Lines America, Inc.<sup>1</sup> submits this *amicus curiae* brief on behalf of Petitioners Trey Adkins, David Eaton, Craig Stiltner, Robert Majors, Margaret Ann Asbury, Charles Stacy, and Senator Thurman Travis Hackworth. The brief addresses two legal principles that will aid the Court in its evaluation of the instant Petition: State constitutional preemption of contrary state statutory law, and the canon of statutory construction *expressio unius est exclusio alterius*. Both principles support the Petitioners' interpretation of Virginia law.

### I. The Virginia Constitution Preempts Any Contrary Provision of State Statutory Law.

While preemption is commonly understood to occur when federal law conflicts with contrary state law, it can also occur when a state constitutional provision conflicts with a state statutory provision. This principle of intra-state law preemption is reflected in Article IV, Section 14 of the Virginia Constitution, which holds that “[t]he authority of the General Assembly shall extend to all subjects of legislation *not herein forbidden or*

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<sup>1</sup> Fair Lines America is a Virginia nonstock corporation which is a non-profit, non-partisan organization that provides education in the fields of demography, geographic information systems, and political science and legal studies. Fair Lines America supports fair and legal redistricting through comprehensive data gathering, processing and deployment, dissemination of relevant news and information, and strategic investments in redistricting-related reforms and litigation.

*restricted.*” Va. Const. Art. IV, § 14 (emphasis added). The state constitution does attempt to cabin the possible scope of constitutional preemption by noting that “[t]he omission in this Constitution of specific grants of authority . . . shall not be construed to deprive the General Assembly of such authority . . . unless such purpose plainly appear.” *Id.* Nevertheless, if the Virginia Constitution specifically restricts or limits the legislature’s authority over a given subject, then the General Assembly may not contravene the Constitution by means of contrary statutes.

The Supreme Court of Virginia has affirmed that “the General Assembly has the authority to enact any statute which is not prohibited by the Constitution; that the presumption is in favor of the statute; and that the burden of showing that it contravenes the Constitution is upon those who aver it does.” *Blake v. Marshall*, 152 Va. 616, 625 (1929). This is a high bar for invalidating statutes, but not an insurmountable one. The Court has also held that a statute can be invalidated “if it clearly violates a constitutional provision” and is “plainly repugnant” thereto. *Wilkins v. West*, 264 Va. 447, 464 (2002). This is how constitutional preemption looks in practice; although the Court must endeavor to find a challenged statute constitutional if possible, in cases of a clear contrast the statute is always

the law that must ultimately yield. The Virginia Constitution is supreme within the legal realms that it regulates, just as the federal constitution is.

**A. Under The Virginia Constitution, Only The Independent Redistricting Commission May Establish Electoral Districts.**

Here, in the realm of redistricting, the purpose of the relevant constitutional provision does not need to be inferred—it is plainly stated within the constitutional text. The Virginia Constitution was specifically amended in 2020 to shift redistricting authority from the General Assembly, where such authority had always previously resided, to a new independent redistricting commission. Article II, Section A of the Constitution stipulates:

[i]n the year 2020 and every ten years thereafter, the Virginia Redistricting Commission (the 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*.

Va. Const. Art. II, § A(a) (emphasis added). This sentence makes two things clear: The Commission was created to conduct all future decennial redistricting, and in order to be truly independent, the Redistricting Commission is required to conduct its work pursuant to a single source of law—the redistricting criteria contained in Article II, Section 6 of the Virginia Constitution.

## **1. Article II, Section 6 Ensures the Independence of the Redistricting Commission.**

Article II, Section 6 lays out the precise factors that the Commission is legally obligated to consider in its map-drawing. These factors include: (1) geographic contiguity and compactness; (2) equal population; (3) obedience to “federal and state laws that address racial and ethnic fairness,” specifically the Fourteenth Amendment’s Equal Protection Clause and the Voting Rights Act of 1965; and (4) a requirement that, “where practicable,” districts should be drawn to enable “racial and ethnic communities to elect candidates of their choice.” Va. Const. Art. II, § 6. By enshrining the factors to be considered in the Virginia Constitution, the people ensured that the Redistricting Commission’s deliberative acts would remain independent from the legislature’s political partisanship. Although any legislation appearing to affirm the use of the constitutionally enumerated criteria in redistricting would likely be lawful, it would nevertheless be problematic under the canon of *generalia specialibus* and could create potential difficulties with the canon against surplusage.<sup>2</sup>

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<sup>2</sup> *Generalia specialibus no derogant* is a canon of statutory construction which teaches that when the legislature makes a special provision regulating a certain situation, it is unlikely that it later intended the same situation to be regulated under the umbrella of a general provision. See Ahmed & Perry, “Constitutional Statutes,” (2015) (<https://adamdperry.files.wordpress.com>) *citing* Halsbury’s Laws of England

However, because the Constitution preempts conflicting statutes, any legislation attempting to mandate a contrary outcome would be absolutely null and void.

**2. Virginia Code Section 24.2-304.04 Conflicts with Article II, Section 6 of the State Constitution.**

As noted in Petitioners' Petition for Writ of Mandamus, Va. Code Section 24.2-304.04 reiterates several of the constitutional requirements, such as geographic contiguity and compactness, and elsewhere the statute attempts to "define" the terms employed in the Constitution (definitions which, it should be noted, are not derived from the state constitution). See Va. Code Ann. § 24.2-304.04(6), (7). Other provisions, however, completely depart from the text of the Constitution, and advance novel criteria, including the provision that would require the Commission to reallocate prison populations in a way that leads to unequally populated districts and to avoid creating majority-minority districts even where the creation of such districts is practicable. See, e.g., *id.* at (3), (9).

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(4th ed., 1995) vol. 44(1), para 1300. Similarly, the canon against surplusage teaches that statutory language should not be interpreted in a manner that results in the mere repetition of other terms or provisions, although the United States Supreme Court has recognized "the regrettable but not uncommon" tendency of lawyers to draft in precisely this manner. See *Freeman v. Quicken Loans, Inc.*, 566 U.S. 624, 635 (2012).



### **3. Va. Code Section 24.2-304.04's Novel Criteria are Unconstitutional.**

The Virginia Constitution's command that the Commission redistrict "pursuant to Article II, Section 6" while refraining from identifying any additional lawful source of redistricting criteria serves the important constitutional purpose of protecting the independent discretion of the Commission. To be sure, if this Court can find a way to read Section 24.2-304.04 consistent with the state Constitution, then it is obligated to do so; but if it cannot, then it must hold the challenged statute null and void, as this Court has previously done with other laws that conflicted with higher sources of authority, whether federal or state. See, e.g., *Maretta v. Hillman*, 283 Va. 34 (2012) (invalidating a section of the Virginia Code after finding that it violated the Federal Employees' Group Life Insurance Act); *Brown v. Saunders*, 159 Va. 28, 47-48 (1932) (holding that a reapportionment plan enacted by the General Assembly was unconstitutional because it violated the Virginia Constitution's equal population requirement).

Because the Commission can only redistrict in accordance with the criteria contained in Article II, Section 6, non-constitutional factors cannot sway its deliberations so that, within its sphere, the Commission remains politically independent. The inclusion of *any* additional statutory factors will re-inject political maneuvering into the Commission's deliberations, and

therefore directly conflict with the Constitution's plain language and intent. For this reason, the provisions of Va. Code Section 24.2-304.04 are unconstitutional, even insofar as they may appear simply to parrot the requirements of the state Constitution.

**II. The Inclusion of Particular Criteria in Article II, Section 6 Necessarily Excludes Any Factors Not Included in That Criteria.**

As described above, the provisions of the state constitution and the provisions of state statutes do not operate in total isolation; the former has a profound limiting effect on the permissible scope of the latter. Even if the constitution does not directly preempt state law by stating a clearly contrary proposition, it can still occupy the field in certain areas of law by its very inclusion of some provisions but not others. Even if the Court finds that the General Assembly could lawfully promulgate redistricting criteria, the legislature was not empowered to "fill in the blanks" when the answers it supplied are of a different kind than those contained within the state constitution.

**A. The Canon of *Expressio Unius* Requires the Constitutional Amendment to be Afforded Its Full Meaning And Effect**

*Expressio unius est exclusio alterius* is the relevant canon of statutory construction. "This maxim provides that where a statute speaks in specific terms, an implication arises that omitted terms were not intended to be

included within the scope of the statute.” *Commonwealth ex rel. Va. Dep’t of Corrections v. Brown*, 259 Va. 697, 704 (2000). In other words, where a statute provides a list of items, the assumption is that the list is complete and cannot be supplemented by additional items provided by some other source of law. If the Constitution does not speak to a particular issue, then the legislature is writing on a blank slate when it regulates in that area; but if the Constitution contains “specific and express” terms, see *Biscayne Contrs., Inc. v. Bd. of Supervisors of Fairfax Cnty.*, 103 Va. Cir. 306, 307 (2019), then *expressio unius est exclusio alterius* applies.

Here, the Court is faced with a scenario in which the state constitution sets forth “specific and express” factors that the Commission is legally required to consider when redistricting. *Id.* As explained *supra*, Article II, Section A mandates that redistricting be conducted “pursuant to Article II, Section 6 of this Constitution,” and Section 6 provides four—*and only four*—considerations appropriate for Commission consideration. While those with a partisan agenda may now assert that the voters who adopted the 2020 amendment that enacted Section A and expanded the criteria in Section 6 may have intended to leave the list open to addition, that is not how the constitutional text reads, and it is decidedly not how constitutional analysis operates. “*The question here is not what [they-the voters] intended*

*to enact, but what is the meaning of that which [they] did enact.” Carter v. Nelms*, 204 Va. 338, 346 (1963)(emphasis added). Having amended their Constitution, the people of Virginia expressed their desire for partisan-free redistricting in the clearest manner possible. The people’s constitutional expression cannot be repealed by legislative attempts to redefine the meaning of the words used in the amendment.

**B. The Constitution’s Limitation of Redistricting Factors Forecloses the Legislature from Adding New or Conflicting Factors.**

The constitutional text governing redistricting is spare, but unmistakable in its meaning. The Commission is required to establish districts “pursuant to Article II, Section 6.” Va. Const. Art. II, § A(a). It would have been a relatively simple matter to add “. . . or such other criteria as the General Assembly may enact,” and yet no such open-ended proviso was included. Similarly, the list of permissible redistricting criteria in Section 6 is short but definitive. After listing the four relevant considerations described above, the constitutional text quickly moves on to other matters. There is no saving clause which insinuates that the General Assembly can add to this short list a fifth consideration (or a ninth).

Even if this Court wanted to, it “cannot add language to a statute the General Assembly has not seen fit to include.” *Jackson v. Fid. & Deposit*

Co., 269 Va. 303, 313 (2005). Here, the General Assembly twice passed the relevant constitutional amendment before submitting it to the people for ratification; hence, the legislature had an opportunity to add language preserving their authority to promulgate additional redistricting criteria at the very beginning of this process, but did not do so. Traditional canons of statutory construction require this Court to interpret such omission as “an intent to exclude” additional criteria, and not to simply chalk it up to absence of mind. *Bentley Funding Grp., L.L.C. v. SK&R Grp., L.L.C.*, 269 Va. 315, 330 (2005). When they amended their Constitution, the people of Virginia did not grant the General Assembly the power to dilute, change or repeal the amendment by non-constitutional means. Having placed an amendment limiting its authority before the people in the manner authorized by law, the General Assembly may not now seek this Court’s assistance in regaining the power that it ceded to the people’s Redistricting Commission. Therefore, the petition for a writ of mandamus should be granted.

## **CONCLUSION**

The doctrines of constitutional supremacy and *expressio unius est exclusio alterius* both support Petitioners’ arguments. The former indicates that the state constitution overrides statutory law whenever there exists a

conflict between the two, and the latter indicates that courts should interpret specific lists as necessarily excluding any items that were not expressly enumerated. Here, Article II, Section 6 of the state constitution clearly conflicts with the contrary redistricting criteria enacted by the General Assembly, and the specificity of the redistricting factors that *are* enumerated in the constitution should lead this Court to conclude that the drafters of the 2020 Amendment intended to exclude all other factors from consideration.

Respectfully submitted this 1<sup>st</sup>  
day of September, 2021.

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## CERTIFICATE OF SERVICE AND COMPLIANCE

I certify under Rule 5:26 that on September 1, 2021, this document was filed electronically with the Court, via VACES, in Portable Document Format to the Clerk's Office. A copy was electronically mailed to all counsel of record: M. Brett Hall, Esquire, Counsel for the Petitioner, mbretthall.law@gmail.com; and Michelle S. Kallen, Esquire, Office of the Attorney General, MKallen@oag.state.va.us, Counsel for the Virginia State Board of Elections Respondents and the Virginia Department of Elections Respondents; and H. Christopher Bartolomucci, Esquire and J. Gerald Hebert, Esquire, at cbartolomucci@schaerr-jaffe.com and hebert@voterlaw.com, counsel for the Virginia Redistricting Commission Respondents.

I further certify that this memorandum, not including the cover page, table of contents, table of authorities, and certificate, contains 2,306 words.

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