

**IN THE
SUPREME COURT OF VIRGINIA**

Record No. 260127

DON SCOTT, in his official capacity as Speaker of the House of
Delegates, et al.,

Appellants,

v.

RYAN T. McDOUGLE, Virginia State Senator and Legislative
Commissioner for the Virginia Redistricting Commission, et al.,

Appellees.

**Brief of Amicus Curiae Restoring Integrity and Trust in
Elections Supporting the Appellees, McDougle et al.**

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INTRODUCTION

Article XII, Section 1, of the Virginia Constitution is an important safeguard of democratic participation and this honorable Court should not countenance legislative actions that functionally render it a nullity. Article XII, Section 1 requires that, after the legislature votes on a constitutional amendment, the amendment be “referred to the General Assembly at its first regular session held after the next general election of members of the House of Delegates.” This requirement, referred to here as the “intervening election requirement,” appears in many state constitutions and dates back to the founding era. Intervening election requirements were originally adopted for a specific purpose: to allow voters to consider the constitutional amendment (and who supported or opposed it) when voting for legislators.

The legislature’s actions in this case defeated that purpose. By ignoring the intervening election requirement, the General assembly deprived as many as 1.5 million Virginians of their constitutional right to participate in the amendment process. Contrary to Appellants’ suggestions, the Circuit Court was correct to consider that when evaluating this case. This Court should affirm the order below and

prevent the legislature from functionally gutting a storied and important safeguard of democracy in the Virginia Constitution.

INTERESTS OF AMICUS¹

Restoring Integrity and Trust in Elections (RITE) is a 501(c)(4) non-profit organization with the mission of protecting democratically enacted election laws from attack and abuse by partisan actors and officials working to threaten or dilute the right of qualified citizens to vote. As part of its mission, RITE seeks to defend the electoral process from tactics that undermine its integrity or sow distrust among the public.

RITE believes that when legislatures engage in practices clearly calculated to circumvent constitutional election safeguards, the legitimacy of the election process and public trust therein are eroded. It therefore submits this brief to encourage the Court to preserve the integrity of the Virginia Constitution.

¹ Pursuant to Virginia Supreme Court Rule 5:30, no party's counsel authored this brief in whole or in part, and no person or entity other than amici curiae, their counsel, or their members made a monetary contribution intended to fund the brief's preparation or submission.

ARGUMENT

The intervening election requirement is not, as Mr. Scott and his allies would have it, a technical timing requirement. Nor is it some idiosyncratic or vestigial provision of the Virginia Constitution. Intervening election requirements are common, dating back to the founding era, and serve an important substantive purpose. The actions of the legislature in this case thwarted that purpose and potentially injured more than a million Virginians.

I. Intervening election requirements are commonplace safeguards of democratic participation.

Intervening election requirements like Virginia's are common across the United States and serve as an important safeguard of democratic principles. Such requirements have a rich history of protecting popular participation in the constitutional amendment process and should not be brushed off as technical timing requirements. Founding-era state governments adopted these requirements in order to increase democratic legitimacy by allowing public participation in the amendment process, and they still fulfill that function today. This Court should consider that purpose in evaluating this case.

A. The Circuit Court did not err in considering the intervening election requirement's purpose.

Contrary to the Commonwealth's suggestion, both this Court and the Circuit Court can properly consider the history and purpose of a constitutional provision when determining its meaning. When interpreting a law of any kind, this Court avoids interpretations that would "defeat its essential purpose." *Vlaming v. W. Point Sch. Bd.*, 895 S.E.2d 705, 736 (2023) (quoting *Graham v. Community Mgmt. Corp.*, 805 S.E.2d 240 (2017)). And when interpreting the Virginia Constitution, the Court has recognized that "[t]he purpose and object sought to be attained by the framers of the constitution is to be looked for, and the will and intent of the people who ratified it is to be made effective." *Dean v. Paolicelli*, S.E.2d 506, 511 (1952). Indeed, this Court has previously used historical analysis to identify and apply the purpose of constitutional provisions. *See, e.g., Howell v. McAuliffe*, 788 S.E.2d 706, 720 (2016) (using historical analysis to determine the scope of the Virginia Constitution's anti-suspension provision).

It was entirely appropriate for the Circuit Court to appeal to the purpose of the intervening election requirement. Historical and contextual analysis confirms the requirement was designed as a

safeguard of public participation in the state constitutional amendment process by ensuring voters can consider a candidate's stance on a prospective amendment when electing legislators.

B. The purpose of the intervening election requirement is to allow popular participation in the amendment process.

Intervening election requirements are commonplace across the nation. Currently, Delaware, Connecticut, Hawaii, Indiana, Iowa, Massachusetts, Nevada, New Jersey, New York, Tennessee, Vermont, Virginia, Pennsylvania, and Wisconsin all have some form of intervening election requirement for legislatively proposed constitutional amendments.² Such provisions used to be even more common. Between the founding and the early 19th century, a majority of states adopted an intervening election requirement into their constitutional amendment process. See Jonathan L. Marshfield, *Forgotten Limits on the Power to Amend State Constitutions*, 114 Nw. U. L. Rev. 65, 116 (2019). This included Maryland, Georgia, Missouri, Arkansas, South Carolina, and

² Del. Const. Art. XVI, § 1; Conn. Const. Art. XII; Haw. Const. Art. XVII, § 3; Ind. Const. Art. XXVI, § 1; Iowa Const. Art. X, § 1; Mass Const. pt. I, art. XLVIII.III, § 2; Nev. Const. Art. XVI, § 1; N.J. Const. Art. IX, § 1; N.Y. Const. Art XIX, § 1; Ten. Const. Art. XI, § 3; Vt. Const. ch. II, § 72; Va. Const. art. XII, § 1; Penn. Const. Art. XI, § 1; Wis Const. Art. XII, § 1.

Florida. See Walter Fairleigh Dodd, *The Revision and Amendment of State Constitutions* 122–23 (1910).

As far as amicus is aware, no legislature has ever attempted to circumvent one of these requirements to ram through a constitutional amendment. None of the parties' briefs have identified any such effort—at least until this case. And for good reason. Intervening election requirements have historically been recognized as important safeguards of democratic participation and deliberation when amending the foundational governing law of the state.

The purpose of intervening election requirements is to allow popular participation in the constitutional amendment process. It, in effect, allows voters to consider how a candidate voted on a constitutional amendment when deciding whether to vote for them. Indeed, at the time states first adopted these requirements, they were the primary way voters participated in the amendment process. At the time of the founding, state constitutions varied widely in their amendment processes. Five provided for constitutional amendment only by convention, three provided for constitutional amendment by legislative action, and six contained no provisions for amendment at all. See Dodd

at 118. As states began to more widely adopt provisions allowing their constitution to be amended by legislative action, “[i]t was thought not to be sufficient to have constitutional amendments adopted ... simply by an increased majority of a single legislature.” *Id.* at 122. To solve this problem, states adopted intervening election requirements to allow popular participation in the process. “The people were presumed to have passed upon the amendment in the election of a new house of representatives, and if a proposed amendment were one of great popular interest, it would naturally have been made an issue in this election.” *Id.* Or, as another historian describes it, the requirement “permitted the people to register their approval of amendments indirectly, by giving them a chance in an intervening election to unseat legislators who supported an unpopular amendment.” John Dinan, *The American State Constitutional Tradition* 74 (2016). In this way, the intervening election requirement allows the people to “by their votes express their views on proposed amendments.” G. Alan Tarr, *Popular Constitutionalism in State and Nation*, 77 *Ohio St. L.J.* 237, 270 (2016).

The historical record therefore demonstrates that intervening election requirements were adopted in order to facilitate popular

participation in the constitutional amendment process. The fact that the requirement allows voters to consider a candidate's position on an amendment when voting is not an accident, it is the central purpose of the constitutional requirement.

Nor is it an accident that the requirement remains in the Virginia Constitution. Toward the close of the twentieth century, many states eliminated their intervening election requirement because it delayed the passage of amendments. *See* Dinan at 75. As states moved from annual to biannual elections, many repealed their intervening election requirements to avoid “putting off too long what may be essential amendments.” *The Debates of the Constitutional Convention of the State of Iowa [1857]*, 617 (statement of Mr. Hall). As states adopted more direct democratic methods of ratification, some moved away from intervening election requirements. Virginia did not. Indeed, the fourteen states identified above decided to keep the intervening election requirement rather than smooth the way for constitutional amendments by removing it. A delegate at the 1864 Nevada constitutional convention explained why: “the arguments are very strong in favor of requiring such a lapse of time,” so that amendments would be ‘adopted upon due reflection, and

not subject to the charge of being passed by means of excitement and passion.” Dinan at 75 (quoting Official Report of the Debates and Proceedings in the Constitutional Convention of the State of Nevada [1864], 528 (statement of Mr. Nourse). In other words, the intervening election requirement prevents the legislature from rushing constitutional amendments without securing public support across multiple legislative sessions.

II. The legislature’s actions in this case thwart the intervening election requirement’s purpose.

With the purposes of the intervening election requirement in mind, it is clear that the legislature has not complied with it. By passing the amendment after the start of early voting, the legislature deprived hundreds of thousands of Virginians of the substantive protections of the intervening election requirement. There is no dispute those early voters were not afforded the right to participate in the next “intervening” election before the legislature took the second vote on the proposed amendment.

As the Circuit Court in this case correctly recognized, the purpose of the intervening election requirement weighs heavily in favor of holding

that the election begins when early voting begins. Contrary to Appellants' suggestion, this purposive analysis is not in conflict with the plain text of the Virginia Constitution. The plain meaning of the term "election" includes the entire process of selecting a person to occupy an office. *See* ELECTION, Black's Law Dictionary (12th ed. 2024) ("The process of selecting a person to occupy an office (usu. a public office), membership, award, or other title or status."). If anything, it is Mr. Scott and his ilk who must fight the plain meaning of the text. It is only common sense that when people are voting, an election is happening.

Consider how the early voters had no opportunity to vote on the legislators who passed the initial constitutional amendment referral. For those voters, and the election as a whole, the election could not serve as an "intervening" election that followed the initial legislative vote. By adopting the amendment mid-election, the legislature effectively disenfranchised those who had already cast their vote. The Virginia Constitution guarantees that voters will have an opportunity to pass upon an amendment in an intervening election, and early voters were denied that right in this case.

The Commonwealth is relatively blasé about this, noting that “[t]he consequences of early and absentee balloting are known to the voter: the voter commits to the early vote regardless of what happens between casting the ballot and Election Day.” Opening Br. of the Commonwealth at 20. But this argument cannot be brushed off so easily. First, because an intentional and calculated decision by elected officials to evade voter scrutiny is no “October surprise” or late-breaking news. Second, because early voting is not some niche accommodation or anomaly in Virginia’s voting system. If the legislature can deprive early voters of their rights when adopting constitutional amendments, it can deprive up to *half of all voters* of their rights.

An enormous percentage of Virginians vote early each year. In the last two presidential election years, more than half of Virginians have voted absentee either in-person or by mail. In 2020, 2.68 million of the 4.48 million ballots cast were cast absentee.³ The trend continued after the pandemic and in 2024, 2.3 million of the 4.5 million ballots cast in the

³ See *Registration / Turnout Reports*, Virginia Department of Elections <https://www.elections.virginia.gov/resultsreports/registrationturnout-statistics/> (last visited April 8, 2026).

election were cast absentee. *Id.* The proportion is lower in non-presidential years, but the numbers are still high. In 2021, 2022, and 2023, 36% 32%, and 33% of ballots were cast absentee, respectively. *Id.* In the 2025 election, almost 1.5 million Virginians voted absentee, 42% of the total votership.⁴

Thus, the legislature’s tactics in this case injured more than a million Virginians. Had it undertaken these steps in a presidential election year, the number would have been between two and three million. Certainly, those voters were permitted to cast ballots in the election, but they were deprived of their constitutionally guaranteed right to “render a verdict [on the proposed amendment] by unseating legislators.” Tarr, 77 Ohio St. L.J. at 270–71. By depriving voters of their rights, the legislature undermined the central purpose of the intervening election requirement.

⁴ See *2025 November General Election*, Virginia Department of Elections (November 4, 2025) <https://enr.elections.virginia.gov/results/public/virginia/elections/2025-November-General>.

CONCLUSION

In order to uphold the integrity of the Virginia Constitution and its intervening election requirement, the Court should uphold the ruling of the Circuit Court and rule for the Speaker of the Virginia House of Delegates.

Dated: April 13, 2026

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 13, 2026, I caused a true and correct copy of the foregoing Brief to be electronically filed with the court using the VACES system in compliance with Rule 5:1B.

I further certify that on April 13, 2026, I caused a copy of the foregoing to be served, via electronic mail, upon the following:

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