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.

REPLY BRIEF OF THE COMMONWEALTH

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INTRODUCTION

Respondents' first sentence in their Opening Brief invokes the will of the People to have non-partisan drawing of districts, adopted in 2020, and the rest of their brief asks this Court to override the People's decision to change that to temporarily allow partisan redistricting. The People were given the opportunity to change their minds based on changed circumstances, and they decided to enter Virginia into a national political squabble. That is their right, and the Court should not act as a veto over the vote of the People.

Respondents propose that this Court veto the People by re-writing Article XII three times over. They would re-define "the next general election of the House of Delegates," which the Constitution fixes to a specific date, by reference to a statutory voting period. They would convert an internal legislative resolution into a judicially enforceable constitutional limit. And they would elevate a statute—one whose constitutional correlate was deliberately removed in 1971—into a pre-requisite to amendment. None of that appears in the Constitution.

The Constitution instead prescribes a specific process for amendment. Two successive General Assemblies must approve the proposal, separated by an intervening election, and it is then submitted to the people. That allocation is by design: the framers empowered the General Assembly to propose amendments and the people to decide whether to adopt them. That sequence was followed here, and the voters approved the amendment.

Respondents' arguments are not, ultimately, about what the Constitution says. They reflect dissatisfaction with the timing of a legislative decision, the substance of a proposed amendment, and the political consequences that may follow. But policy dissatisfaction is not a legal basis to invalidate an amendment. Courts enforce the constitutional process; they do not revise it to secure political outcomes one side prefers.

Questions about partisan intent, voter regret, or the wisdom of the amendment are for the people to decide—and under the Constitution, they already have. The circuit court's contrary rulings cannot be reconciled with Article XII, and the judgment below should be reversed.

ARGUMENT

I. Article XII's requirements were satisfied at every step.

A. The November election was the intervening election.

Article XII requires that a proposed amendment be approved twice, with "the next general election of members of the House of Delegates" intervening between those approvals. Va. Const. art. XII, § 1. The Constitution defines that election as occurring on "the Tuesday succeeding the first Monday in November." Va. Const. art. IV, § 3. That sequence was followed here, and Respondents do not seriously dispute that. They instead dispute the definition. They ask this Court to re-define the constitutional term "election" to encompass the period during which early voting is available, Br. 29–33, displacing the Constitution's fixed date with statutory voting procedures. That theory has no grounding in Virginia law, no support in the authorities they cite, and no limiting principle.

Virginia has drawn that controlling distinction for nearly a century. In *Moore v. Pullem*, this Court upheld Virginia's absentee voter's act and explained that constitutional provisions governing voting "relate to and prescribe the conditions which must be performed before the time of the

election in order to qualify the citizen for voting on the day of the election." 150 Va. 174, 188–89 (1928). The election is the event on the constitutionally fixed day. Ballots cast before that day are preparation for that event, not the event itself, which is why early voting is called early voting: it is casting a ballot to be counted on Election Day, not before it or in place of it. The dictionary definitions, popular references, and campaign rhetoric Respondents invoke, Br. 29–30, describe the voting process, not the constitutionally fixed date on which the election occurs. Respondents attempt to narrow *Moore* as a case about "where" voters could cast ballots, not "when." Br. 35. That reading cannot survive *Moore*'s own text: absentee provisions prescribe "the conditions which must be performed before the time of the election." 150 Va. at 189. *Moore* answers this case.

The constitutional text confirms that distinction. Article IV, § 3 fixes election day, and where the Constitution's language is clear, courts are "not at liberty to search for meaning, intent or purpose beyond the instrument." *Harrison v. Day*, 200 Va. 439, 448 (1959). Respondents' own federal authorities confirm the Commonwealth's reading. *Foster v.*

Love defined "election" as "the combined actions of voters and officials meant to make a final selection of an officeholder," and held that an election is consummated on the federally fixed day. 522 U.S. 67, 71–72 & n.4 (1997). Applying *Foster*, three Circuits upheld early-voting laws because the election remains "unconsummated" until the constitutionally fixed day. *See Voting Integrity Project v. Bomer*, 199 F.3d 773, 776 (5th Cir. 2000); *Millsaps v. Thompson*, 259 F.3d 535, 547 (6th Cir. 2001); *Voting Integrity Project v. Keisling*, 259 F.3d 1169, 1176 (9th Cir. 2001).

Respondents' remaining authorities do less work still. Br. 31-32. Each applies the prudential *Purcell* principle to decline disturbing ongoing state election procedures. The "happening right now" and "in the middle of it" language Respondents cite justified denying late-stage injunctive relief, not defining "election." *See Pierce v. N.C. State Bd. of Elections*, 97 F.4th 194, 227 (4th Cir. 2024); *New Ga. Project v. Raffensperger*, 976 F.3d 1278, 1283 (11th Cir. 2020). The same is true of *Koski v. RNC*, 926 S.E.2d 289, 292 (Va. 2026), a stay order on whether an injunction would "interfer[e] with the holding of an election," not a substantive definition of Article XII's timing.

Respondents' contrary rule also fails on its consequences. If early voting defines when the constitutional election begins, Article XII's amendment window expands or contracts every time the General Assembly adjusts the voting statute. That is not a constitutional rule; it is a statutory one dressed in constitutional clothing. Respondents themselves concede the principle: "[t]he early-voting statute cannot change the constitution." Br. 34. They quote that rule and then ask this Court to violate it.

B. The intervening-election requirement is structural, not a voter-notice guarantee.

Respondents insist that the purpose of the intervening-election requirement is to give voters an opportunity to cast informed ballots after notice of a proposed amendment. Br. 32–33. The Constitution says no such thing. It requires only that a proposed amendment be "referred to the General Assembly" after "the next general election of members of the House of Delegates." Va. Const. art. XII, § 1. That is a structural requirement, not an informational one. Article XII operates in "precise language and minute detail," and the Court reviews text, not extra-textual purported purposes. *Coleman v. Pross*, 219 Va. 143, 152 (1978).

The Constitution's voter participation mechanism is the referendum, not the intervening election. Article XII, § 1 requires that amendments approved by both General Assemblies be submitted to the people. That submission is how the people exercise that role. The intervening election is a check on the General Assembly that forces the process to take long enough for measured and reasoned consideration; the referendum is the check by the people.

Respondents' individual voter narrative cannot fill the gap. They open and close their brief with the story of Camilla Simon, who purportedly cast an early ballot and later regretted it when her delegate introduced an amendment she opposed. Her disappointment is understandable, but it is not a constitutional violation. Early voting is a statutory option voters may exercise, with obvious and known tradeoffs. Courts cannot re-write constitutional processes to remedy perceived inequities in political outcomes, but the Constitution provides the remedy. Ms. Simon and every other voter in Virginia had a right to reject the amendment through the referendum—exactly as Article XII intends. The People chose not to do so.

II. The 2024 Special Session was lawfully in session, and its internal rules are not constitutional limits.

A. A validly convened special session is not subject to non-constitutional limits.

Respondents do not dispute that the 2024 Special Session was validly convened. They contend instead that its subject matter was constitutionally limited by an internal procedural resolution, HJR 6001, which organized the session's order of business. Br. 13–20. That theory has no basis in the Constitution. Article IV, § 7 expressly assigns each house the authority to "settle its rules of procedure," and resolutions like HJR 6001 are exercises of that authority, tools for organizing legislative business, not limits on constitutional power.

Virginia law confirms the distinction. Courts may not "overthrow legislative determination[s] . . . with respect to [the legislature's] own procedure." *Albemarle Oil & Gas Co. v. Morris*, 138 Va. 1, 11 (1924); *see also Wise v. Bigger*, 79 Va. 269, 281–82 (1884); *Marshall Field & Co. v. Clark*, 143 U.S. 649, 672–73 (1892). Internal legislative procedures are for the legislature, not the courts, to enforce. Respondents invoke *U.S. v. Ballin*, but *Ballin* confirms the rule that each house "determine[s] its rules of proceedings." 144 U.S. 1, 5 (1892).

Respondents cite no Virginia authority for their rule, and the Commonwealth has not found any either. They rely most on *In re Interrogatory on House Joint Resolution 20-1006*, 500 P.3d 1053 (Colo. 2020). But the Colorado Constitution, expressly limits special sessions to specified subjects. *Id.* at 1068–69. Virginia's Article IV, § 6 contains no analogous limiting language, and that difference is dispositive.

The timeline independently forecloses Respondents' theory. The General Assembly's application for the Special Session (HJR 428) was adopted on April 17, 2024, and the procedural resolution regarding the agenda (HJR 6001) was adopted nearly a month later, *after* the session already had been called. An internal rule adopted after a session begins cannot retroactively define the authority that convened it.

Respondents' rule also has no limiting principle. If internal procedural resolutions are constitutional constraints, every procedural dispute becomes a constitutional question, and every legislative act becomes vulnerable to judicial invalidation. That would entangle courts in the legislature's day-to-day governance, which separation of powers forbids. *Marshall Field*, 143 U.S. at 672–73.

B. Respondents' functus officio theory fails.

Respondents' alternative argument—that the 2024 Special Session terminated by operation of law when the 2025 regular session convened—was rejected by the circuit court. R. 596. The court found no constitutional or statutory bar to continuing the Special Session and noted Respondents themselves had done so when previously in the majority. R. 596. That conclusion is correct and dispositive.

Article IV, § 6 speaks directly to the duration of legislative sessions. It imposes explicit limits on regular sessions: 30 days in odd-numbered years and 60 days in even-numbered years, each extendable by a two-thirds vote. It imposes no duration limit on special sessions, and no bar on special sessions running across or concurrently with regular sessions. The framers knew how to impose temporal limits when they wanted to, and they chose not to do so for special sessions.

Respondents' authority confirms the point. In *State ex rel. Heck's Discount Centers, Inc. v. Winters*, 132 S.E.2d 374, 377–79 (1963), the West Virginia Supreme Court of Appeals terminated a legislative session by operation of law because the West Virginia Constitution limited

regular sessions to 60 days. Respondents also invoke Justice Russell's observation at oral argument that a continuous special session "seems at odds with the structure of the Constitution." Br. 21–22. But an oral argument observation in an unrelated appointments dispute is not a holding, and it cannot override Article IV, § 6's text. Nor does invoking Governor McAuliffe's 2015 letter help. One governor's position in a political dispute is not precedent and cannot alter constitutional text.

What Respondents ultimately offer is historical practice that does not even support its point: no prior legislature has continued a special session across a regular session, but their brief establishes that many thought it possible, and the political branches ultimately decided against it in those situations. The Court did not intervene to re-write unambiguous text. That "no one has done this before" is an observation about legislative preference, not a rule of law.

III. Code § 30-13 is not an Article XII pre-requisite.

A. Statutes do not create constitutional mandates.

Respondents' statutory-compliance theory relies on *Coleman*, where the Court examined whether two successive General Assemblies

had approved the same amendment. 219 Va. at 158–59. The "specified prerequisites" the Court enforced were Article XII's own requirements. *Id.* Nothing in *Coleman* suggests that statutory provisions, particularly those not incorporated into the Constitution, become constitutional ones—a rule that would freeze every implementing statute in place. Respondents' attempts to extend *Coleman* fare no better: *Fauber*'s reading of "all employees" in a town charter and *Staples*'s treatment of limits on a constitutional convention reach neither Article XII nor the statutes orbiting it. *Fauber v. Town of Cape Charles*, 79 Va. App. 660, 672 (2024); *Staples v. Gilmer*, 183 Va. 613 (1945).

Article XII contains no publication requirement, and that omission was deliberate. The 1902 Constitution required proposed amendments to be published for three months before a vote. Va. Const. of 1902, art. XV, § 196. The 1971 Constitution removed that condition and replaced it with a different safeguard: approval by two separately elected General Assemblies. This Court has recognized as much, explaining that the 1971 Constitution "eliminated many detailed provisions of the 1902 Constitution deemed to be of less than constitutional dimension and more

appropriately left for legislative disposition." *Coleman*, 219 Va. at 152. Professor Howard, the principal architect of the 1971 Constitution, confirmed the consequence: because Article XII no longer contains a publication requirement, "an amendment cannot be challenged on the ground that publication was insufficient." A.E. Dick Howard, 2 Commentaries on the Constitution of Virginia 1175 (1974). Respondents' out-of-state authorities only reinforce the point. Each arose under a state constitution that expressly required publication. *See McCreary v. Speer*, 162 S.W. 99, 101–02 (Ky. 1914); *Graham v. Jones*, 3 So.2d 761, 771 (La. 1941); *League of Women Voters v. Utah*, 559 P.3d 11, 22 (Utah 2024); *Mayer v. Adams*, 186 S.E.2d 420, 424 (Ga. 1936).

Respondents' counterarguments do not change the analysis. Br. 37-38, 40-42. Section 30-13's retention and amendment confirm only that it is a statute, which no constitutional pre-requisite can be. That clerks, until this litigation, treated § 30-13 as mandatory says nothing about whether it is a constitutional pre-requisite—clerks administer statutes, and this Court determines their constitutional status. And Article XII's

"manner" clause authorizes the mechanics of submission; it does not convert every implementing statute into a constitutional condition.

B. The remedy Respondents seek has no basis in Virginia law.

Even if § 30-13 imposed a strict requirement, invalidating a constitutional amendment on statutory grounds has no basis in Virginia law. In *Woodard v. Commonwealth*, this Court held that publications "are not themselves legislative enactments" and that "any error in the tables does not alter the legislative provision." 214 Va. 495, 498 (1974). The circuit court's own order confirms as much: after finding a violation, it ordered corrective posting, a remedy that makes sense only if § 30-13 governs ministerial duties. A constitutional pre-requisite admits no such cure. The statute's own terms confirm the point: § 30-13 specifies no consequence for non-compliance, governs only clerical conduct, and like other "shall" commands of that kind, is treated as directory. *Rickman v. Commonwealth*, 294 Va. 531, 537 (2017); *Jamborsky v. Baskins*, 247 Va. 506, 511 (1994). A ministerial lapse therefore does not invalidate a constitutional amendment.

Respondents' fallback appeal to the ballot question fares no better. They contend that the phrase "restore fairness in the upcoming election" is misleading, Br. 40, but Article XII leaves the manner of submission to the General Assembly, which need only reference or summarize the amendment rather than present it in neutral or exhaustive terms. 1949 Op. Va. Att'y Gen. F-1 at 67 (Oct. 4, 1949). And to be misleading, ballot language must reasonably sow confusion over what it means to vote "yes" or vote "no." *Id.* at 66–67; Howard, *supra*, at 1174. Anyone who voted in this election came specifically to vote on this amendment. If ever there was a time to trust that the electorate educated itself on an amendment, 1949 Op. Va. Att'y Gen. F-1 at 68, it is this one, where the people who voted did not stumble upon a referendum when voting for their favorite candidates. The People came to the polls and made their policy decision to enter a national political conflict by adopting partisan maps for the remainder of this decade's Congressional elections. That is their right.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the circuit court.

Respectfully submitted,

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