No. 25A1240

IN THE

# Supreme Court of the United States

DON SCOTT, IN HIS OFFICIAL CAPACITY AS SPEAKER OF THE VIRGINIA HOUSE OF DELEGATES, *et al.*,

*Applicants,*

*v.*

RYAN T. MCDOUGLE, VIRGINIA STATE SENATOR AND LEGISLATIVE COMMISSIONER FOR THE VIRGINIA REDISTRICTING COMMISSION, *et al.*,

*Respondents.*

## REPLY IN SUPPORT OF EMERGENCY APPLICATION FOR STAY


JAY JONES
Attorney General

TILLMAN J. BRECKENRIDGE
Solicitor General

OFFICE OF THE ATTORNEY GENERAL
202 North Ninth Street
Richmond, VA 23219
(804) 786-2071
solicitorgeneral@oag.state.va.us

*Attorneys for the Commonwealth of Virginia*

MATTHEW A. SELIGMAN
*Counsel of Record*

GRAYHAWK LAW, P.C.
3015 Main Street, Suite 330
Santa Monica, CA 90405
(310) 571-5993
matthew@grayhawklaw.com

*Attorney for Applicants Don Scott, Scott Surovell, and L. Louise Lucas*



132169

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Statutes and Other Authorities**

## INTRODUCTION

Respondents do not defend the decision below. Instead, they raise a variety of alleged impediments to this Court's review. None of their arguments holds merit. It is not too late for relief: May 12 was an operational threshold, not a jurisdictional deadline or a concession that this Court is powerless to act. A stay would redress Applicants' injury: the judgment under review is the final judgment of the Supreme Court of Virginia, and staying it would suspend the decision preventing Virginia from using the congressional maps adopted through its lawmaking process. Nor can Respondents evade review through collateral proceedings in *Koski* or an out-of-record press statement by the Governor.

Respondents' preservation and jurisdictional objections fare no better. The principal Elections Clause violation is the judgment itself: the Supreme Court of Virginia transgressed the ordinary bounds of judicial review in a federal-election case and displaced authority the Constitution assigns to the State's lawmaking process. That claim arose when the state supreme court issued its decision. In any event, the federal election-law issues were presented and addressed below. And Respondents' "pure state-law" theory cannot survive the opinion's repeated reliance on federal election-day precedents—especially *Foster v. Love*—to define the dispositive term "election." The decision below is interwoven with federal law, rests on a serious misapprehension of that law, and should be stayed.

## ARGUMENT

### I. Respondents' assertion that any relief from this Court would be too late is incorrect.

Respondents begin with exaggeration—that it is already "too late" for relief. Opp. 7. Not so. Time grows short, but it is not yet too late. That is why this Court's intervention is urgently needed.

Respondents attempt to support their overstatement by cherry-picking language from a past filing by Applicants. This gambit falls apart upon examination. While Applicants stated in their Motion for Emergency Stay filed below that the declaration of the Virginia Commissioner of Elections, Steven L. Koski, identified May 12 as "the point of no return," App. 86a, Respondents omitted the full context of that statement. There, Applicants further explained that after May 12, a court order would "require reversing work already performed" which can produce "the very errors election administration is designed to prevent." App. 86a, 110a–111a. Applying the legally correct maps may now require additional work, but Respondents have not shown that relief is impossible.

Continuing their embellishment, Respondents next claim that "[a]fter May 12, whatever complaints Applicants had became 'uncorrectable.'" Opp. 8 (quoting App. 86a). But this is selective editing, not what Applicants actually wrote. Instead, Applicants stated that "[d]elay *beyond a certain point* becomes uncorrectable." App. 86a (emphasis added). Thus, May 12 is not the final deadline past which no relief can ever occur. Instead, it is an operational threshold past which the risk to a successful primary begins to compound. Each additional day of delay past that date materially

increases the probability that the Department of Elections will be unable to meet the May 28 target date for beginning primary preparations and, in turn, the June 18 federal deadline for absentee mailings to military and overseas voters. App. 110a–111a. Applicants said precisely this in their Emergency Application—"[t]he window for orderly administration of Virginia's congressional elections is closing rapidly." App. for Stay 24.

Respondents next invoke a news article in which Virginia's governor purportedly stated that "no matter the outcome" of this Application, "we will be running our elections beginning next month with early voting on the current maps that we have." Opp. 8. Governor Spanberger's candid acknowledgment of where things presently stand, which is not part of the record, does not foreclose this Court from acting. Indeed, her statement merely reiterates that the upcoming elections in Virginia will occur on "the current maps that we have" as required by the Supreme Court of Virginia's decision. But if this Court were to intervene and ultimately uphold the amendment that adopted new congressional maps, the duties would change and the Governor presumably would re-assess. Simply put, the Commonwealth will conduct its elections in the manner the law requires, and this Court's intervention will inform that conduct.

Lastly, Respondents complain that "Applicants don't ever mention when they need relief." Opp. 7. Applicants did not specify a particular date, but doing so is neither necessary nor required. The urgency is plain from the *Emergency*

Application—it communicates the upcoming deadlines and asks for "an immediate administrative stay." App. for Stay 23, 24.

## II. A stay would redress Applicants' injury.

Respondents next argue that the requested stay would not redress Applicants' injury. Opp. 8-10. Their argument rests on two premises: first, that Applicants requested the wrong relief because they sought a stay of the "judgment and mandate of the Supreme Court of Virginia," rather than a stay of the circuit court's judgment; and second, that the separate Koski injunction would remain in place. Neither premise defeats this Court's authority to grant meaningful interim relief.

To start, Applicants have sought precisely the relief appropriate in this Court. The judgment subject to review under 28 U.S.C. § 1257 is the final judgment of the Supreme Court of Virginia. That judgment affirmed the circuit court's judgment, declared the proposed constitutional amendment invalid, and held that the prior congressional maps "remain the governing maps for the upcoming 2026 congressional elections." App. 30a. That is the judgment now preventing Virginia from using the congressional districts authorized by the amendment and enacted by the General Assembly. Staying that judgment would suspend the operative state-court decision that inflicts Applicants' injury.

Respondents' contrary argument is empty formalism. They treat the Application as requesting a sterile stay of a ministerial mandate, disconnected from the judgment the mandate enforces. But the Application invokes this Court's stay authority under 28 U.S.C. § 2101(f), Supreme Court Rule 23, and the All Writs Act. Those authorities permit a stay of the "execution and enforcement" of a judgment

subject to this Court's review and any relief necessary to preserve this Court's jurisdiction. Applicants' request to stay the Supreme Court of Virginia's judgment and mandate therefore necessarily seeks to suspend enforcement of that judgment, including the circuit-court judgment as affirmed.

If Respondents' position were correct, this Court could rarely, if ever, stay a state high court judgment that affirms a lower-court injunction. A Respondent could always say that the lower-court judgment remains operative even if this Court stays the state supreme court's affirmance. That cannot be right. Section 2101(f) exists precisely so this Court may preserve its jurisdiction over final judgments subject to certiorari review. When the judgment under review is an affirmance, a stay of that judgment prevents enforcement of the judgment as affirmed. At minimum, this Court may construe the application to request that relief. Respondents have suffered no prejudice from that construction; their opposition devotes an entire section to arguing about the scope and effect of the requested stay.

Nor do the circuit court's alternative state-law grounds change the analysis. The Supreme Court of Virginia did not affirm on those grounds. It expressly declined to reach them. App. 3a-4a n.6. A state-law ground that the state court of last resort did not decide is not an adequate and independent ground barring this Court's review. If this Court grants certiorari and reverses or vacates the judgment below, the Supreme Court of Virginia may address any remaining state-law issues on remand. But unresolved alternative grounds do not make a stay of the judgment under review meaningless. The judgment actually entered by the Supreme Court of Virginia rests

on the Article XII theory challenged here, and that judgment is presently preventing Virginia from implementing its new congressional maps.

Respondents' reliance on *Koski* is equally misplaced. *Koski* is a separate case, brought by different plaintiffs, involving a separate injunction, in separate state-court appellate proceedings. It is not the final judgment under review in this application. A collateral order in a different case cannot insulate the final judgment here from this Court's interim review.

At most, *Koski* presents an additional obstacle that Applicants are separately litigating. But redressability does not require one order to eliminate every possible barrier to complete relief. It is enough that a stay would remove one operative legal barrier, suspend the judgment in this case, and preserve this Court's ability to resolve the federal questions before election deadlines make relief impossible. *See Massachusetts v. EPA*, 549 U.S. 497, 525-26 (2007). Respondents do not dispute that the judgment below independently declares the amendment invalid and the prior congressional maps operative for the 2026 elections. Staying that judgment would therefore redress Applicants' injury, even if collateral litigation remains.

Respondents' rule would invite gamesmanship. A state-court judgment presenting serious federal election-law questions could evade this Court's emergency review whenever parallel litigants secured a second injunction in a separate state proceeding. That is not how this Court's jurisdiction works. The question here is whether the final judgment in this case is reviewable and whether staying that judgment would provide meaningful relief. The answer to both questions is yes.

The Governor's press statement does not change that conclusion. Respondents cite a news report quoting the Governor as saying that elections will proceed on the existing maps. Opp. 10. But a press statement is not a court order, not a jurisdictional limitation, and not a waiver of Applicants' federal claims. The legal injury here arises from judicial orders that disable Virginia from giving effect to its constitutional amendment and congressional redistricting legislation. Executive predictions about election administration cannot moot this application or strip this Court of authority to stay the judgment under review.

This Court therefore can and should grant effective interim relief. To the extent there is any doubt about the precise formulation, Applicants request a stay of the May 8, 2026 judgment and mandate of the Supreme Court of Virginia, including enforcement of the circuit-court judgment as affirmed, and any further relief necessary to preserve this Court's jurisdiction pending disposition of the forthcoming petition for certiorari.

## III. Respondents' preservation objection misunderstands the federal questions presented.

Respondents also argue that Applicants forfeited their federal claims because they did not raise them below in precisely the form presented to this Court. Opp. 10-12. That argument fails at the threshold. The principal Elections Clause violation asserted here is not an antecedent federal defense that Applicants were required to preserve before the state courts rendered judgment. It is the Supreme Court of Virginia's judgment itself.

Under *Moore v. Harper*, state courts retain authority to interpret state constitutions, but they may not "transgress the ordinary bounds of judicial review" in a way that arrogates to themselves the authority the Elections Clause assigns to the State's lawmaking process. 600 U.S. 1, 36 (2023). That is Applicants' claim here. The violation occurred when the Supreme Court of Virginia, in a case determining which congressional districts Virginia may use for federal elections, displaced the Commonwealth's lawmaking process through an unprecedented construction of state law. Applicants could not have "preserved" in the circuit court a claim that the Supreme Court of Virginia would later commit that federal error.

Respondents' reliance on *Cardinale v. Louisiana*, 394 U.S. 437 (1969), therefore misses the point. *Cardinale* addresses the ordinary rule that this Court generally will not consider a federal claim that could have been raised in the state courts but was not. That rule has no application where the federal violation is the decision of the state court of last resort itself. In that circumstance, the federal claim necessarily arises from the judgment presented for this Court's review.

This Court has recognized that distinction. When "the state-court decision itself is claimed to constitute a violation of federal law," the claim does not depend on ordinary preservation in the courts below. *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*, 560 U.S. 702, 712 n.4 (2010). Likewise, where a state court's own ruling deprives a party of a federal right, the federal question may be raised at the first meaningful opportunity after that ruling. *See Brinkerhoff-Faris Trust & Savings Co. v. Hill*, 281 U.S. 673, 677-78 (1930). That

is this case. Applicants do not ask this Court to review some unpreserved objection to an evidentiary ruling, pleading defect, or trial-court order. They ask this Court to review whether the final judgment of the State's highest court exceeded the federal limits imposed by the Elections Clause.

Respondents' fixation on whether Applicants cited *Moore* below is thus beside the point. *Moore* is not a new claim; it is the controlling authority explaining the constitutional limit that the judgment below transgressed. This Court has repeatedly held that once a federal claim is properly before it, a party may invoke additional arguments and authorities in support of that claim. *See Lebron v. National Railroad Passenger Corp.*, 513 U.S. 374, 379 (1995); *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992). Preservation rules do not require litigants to anticipate the precise way a state supreme court might subsequently violate federal law and cite in advance every decision that will later demonstrate the error.

In all events, the relevant federal issues were fairly presented and passed upon below. Applicants argued that the legally operative "election" occurred on Election Day, not throughout the early-voting period, and they invoked federal election law to support that point. The Scott Applicants' opening brief argued that "[f]ederal law and Virginia law are in accord," cited the Elections Clause, cited 2 U.S.C. § 7, and relied on *Foster*, *Keisling*, *Millsaps*, and *Bomer* to explain that treating early voting as part of the "election" would create serious conflict with the federal election-day framework. App. 153a-54a. The Commonwealth likewise relied on *Foster* and argued that early and absentee voting do not redefine when the legally operative election occurs. App.

197a. The Supreme Court of Virginia then addressed that federal-law framework. The majority relied on federal election-day precedents, including *Foster*, *Millsaps*, *Keisling*, *Bomer*, and *Wetzel*, to derive its understanding of when an "election" occurs. App. 19a-20a.

Respondents' Supremacy Clause objection fails for the same reason. Applicants did not need to use the words "Supremacy Clause" as a talisman. They argued that the relevant state-law term should be construed consistently with federal election law and that Respondents' contrary interpretation would create conflict with the federal election-day statutes. The Supreme Court of Virginia understood the issue that way and expressly rejected the dissent's view that its interpretation conflicted with federal law, stating that "[n]o persuasive, much less binding, federal law supports the dissent's implied claim that our interpretation of Article XII, Section 1 violates the Supremacy Clause of the United States Constitution." App. 28a. That is adjudication, not forfeiture.

Respondents also say the federal election-day statutes were not "at issue" because the 2025 House of Delegates election was a state election. Opp. 12. That conflates preservation with the merits. Applicants do not contend that 2 U.S.C. § 7 directly regulated the 2025 House of Delegates election. They contend that the Supreme Court of Virginia materially relied on federal election-day precedents to define the term "election," misread those precedents, and then used that misreading to invalidate a constitutional amendment and congressional redistricting framework governing the 2026 federal elections. The resulting judgment determines which

congressional districts Virginia may use for elections to the United States House of Representatives. That is more than enough to present a federal question under the Elections Clause and the Supremacy Clause.

Respondents' "first view" argument is therefore backwards. This Court would not be considering an abstract theory never implicated below. It would be reviewing the actual judgment and reasoning of the Supreme Court of Virginia, including that court's treatment of federal election-law precedents and its express rejection of the dissent's federal-law objection. And as to *Moore*, the federal violation is the judgment itself. That claim could not ripen until the Supreme Court of Virginia issued the decision now before this Court.

The preservation objection thus fails twice over. The federal election-day and Supremacy Clause issues were fairly presented and actually addressed. And the *Moore* claim does not depend on ordinary issue preservation below because it challenges the Supreme Court of Virginia's own final judgment as an Elections Clause violation. This Court has jurisdiction to review that judgment and to prevent a state court, in a federal-election case, from transgressing the ordinary bounds of judicial review and displacing authority the Constitution assigns to the State's lawmaking process.

## IV. The Supreme Court of Virginia's interpretation of "election" was interwoven with federal law.

Everyone agrees that the crux of the decision below was the meaning of the term "election" in Article XII, Section 1 of the Virginia Constitution. Opp. 14; App. 22a. The critical question, then, is whether the Supreme Court of Virginia's holding

on the meaning of "election" relied on federal law. If it was based on federal law, review by this Court is proper, as even Respondents concede. Opp. 13. Respondents and two of the Amici strain to try to minimize the below decision's reliance on federal law, arguing that the Supreme Court of Virginia "merely cit[ed] a federal case." Opp. 13; *see also* Brief of Amicus Curiae State of West Virginia in support of Respondents at 5 ("[t]he opinion's lone engagement with federal authority [was] a passing reference to federal sources"); Brief of Amicus Curiae The American Center for Law and Justice in Opposition to a Stay at 4 (opinion merely "cite[d] to some federal cases."). But the text of the decision demonstrates otherwise—the Supreme Court of Virginia relied *heavily* on federal law in determining its definition of "election."

In the only section of the decision below that focuses on the meaning of "election," Section II.C., the Supreme Court of Virginia does not rely on a single Virginia state court case for the definition of election. A handful are cited mostly in footnotes, but they only support general propositions such as the requirement of strict compliance with the constitutional amendment process and statutory construction canons. App. 10a, 15a, 21a, 22a. Even Respondents do not seriously contend that the lower court relied on state law to define "election." Opp. 14 (arguing that the court supported its conclusion with a variety of sources such as treatises and dictionaries but not mentioning state law).

Instead, to define "election," the decision below relied on federal case law and lexical theory that applies equally to both state and federal law. In Section II.C., the Supreme Court of Virginia discusses six cases when analyzing the legal definition of

election. App. 18a–19a. All six are federal cases, including two decided by this Court. The decision below repeats its discussion of four of these federal cases in Section II.D.4 to rebut the dissent's arguments. App. 27a–28a. That alone shows that the decision below relied on federal law to interpret "election."

An even closer look makes it definitive. The Supreme Court of Virginia in its decision states "[w]hen the law speaks of an 'election,'" it 'plainly refer[s] to the *combined actions* of voters and officials meant to make a final selection of an officeholder.'" App. 19a (quoting *Foster v. Love*, 522 U.S. 67, 71 (1997)) (emphasis added). This "combined actions" language first appears in the decision below on page 19, App. 19a, and it comes directly from this Court's precedent in *Foster*. This initial reference specifies that the law in the statement "[w]hen the law speaks of an 'election'" is *federal* law. App. 19a. The Supreme Court of Virginia then either repeats the "combined actions" phrase from *Foster* or references *Foster* directly (or both) *six more times* in its decision. So, the Supreme Court of Virginia in the decision below does not hide its reliance on federal law—it openly embraces its complete dependence on it.

For instance, the decision below on page 20 states that "[t]he '*combined actions*' definition of 'election,'" undermines the Commonwealth's arguments and once again cites to *Foster*. App. 20a (emphasis added). The fact that the Supreme Court of Virginia labels its definition of election as "combined actions" and explicitly states that it is based on *Foster* is revealing. It does so again on page 22, stating "we hold that the definition of 'general election' in Article XII, Section 1 describes the *combined*

*actions* of voters casting ballots and officers of election receiving those votes and closing the polls on the last day of the election." App. 22a (emphasis added). Once again, the Supreme Court of Virginia uses the "combined actions" definition from *Foster* and expressly says that it is the holding of the decision below. It then goes further, explaining that "[t]he plain and ordinary meaning of the expression matches the historical definition embraced by the courts and legal scholars." App. 22a. The reference to "courts" is to *federal* courts.

On page 25, the Supreme Court of Virginia repeats itself, once again relying on the "combined actions" language: "[t]he meaning of 'election' is fixed as the *combined actions* of voters casting ballots and officers of election receiving those votes and closing the polls on the last day of the election." App. 25a (emphasis added). Again on page 26, the lower court relies on federal case law, this time on the Fifth Circuit's decision in *Republican Nat'l Comm. v. Wetzel*, 120 F.4th 200, 209 (5th Cir. 2024), *cert. granted sub nom.*, *Watson v. Republican Nat'l Comm.*, 146 S. Ct. 355 (2025). App. 26a ("our belief that '[h]istory confirms that 'election' includes both ballot casting and ballot receipt'"). On pages 27 and 28 of the decision below, the Supreme Court of Virginia attempts to address the dissent's arguments by engaging in an extensive analysis of federal rather than state case law. App. 27a–28a. Once again, this entails more discussion of *Foster*. In fact, the Supreme Court of Virginia in describing the holding of the Fifth Circuit's decision in *Voting Integrity Project, Inc. v. Bomer*, 199 F.3d 773, 776 (5th Cir. 2000), stated that it was "relying on the *Foster* definition of 'election.'" App. 28a.

On page 29, the decision below one last time reiterates its holding—"[t]o us, it is common sense that the phrase 'general election,' as used in the context of Article XII, Section 1, includes the *combined actions* of citizens casting votes and election officials receiving those votes and closing the polls on the last day of the election." App. 29a (emphasis added). As before, the Supreme Court of Virginia relies on the *Foster* "combined actions" to include early voting in the definition of "election."

In the face of the many references to federal case law and the specific reliance on the definition of election from *Foster*, it is simply not plausible for Respondents and their amici to credibly argue that the decision below "merely cit[ed] a federal case," Opp. 13, or only contained "a passing reference to federal sources." Brief of Amicus Curiae State of West Virginia in support of Respondents at 5. Nor is Respondents' argument correct that "[n]othing about the Virginia Supreme Court's reasoning 'rested materially on its understanding of federal election law.'" Opp. 14. To the contrary, even a cursory examination demonstrates that the *only* law relied on by the Supreme Court of Virginia in defining "election" in its decision was federal. And its reliance on that federal law, particularly *Foster*, was substantial and outcome-determinative.

Thus, there can be no question that the Supreme Court of Virginia's decision below was "interwoven with the federal law," and this Court may intervene to ensure that the state court's decision complies with federal law. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). In particular, this Court's "role when a state court's interpretation of state law has been influenced by an accompanying interpretation of federal law" is

to correct the lower court's "misapprehensions" about the scope of federal law. *Three Affiliated Tribes of Fort Berthold Rsvr. v. Wold Eng'g, P.C.,* 467 U.S. 138, 153 (1984).

Respondents attempt to escape review by this Court by arguing that the adequate and independent state ground doctrine "applies only when two independent sources of law—one state and one federal—constrain the same conduct, and the state high court has invoked both." Opp. 13. Not true. While that is one basis for invoking the doctrine, this Court has long recognized another—when the non-federal ground is so interwoven with the federal grounds as not to be an independent matter. *Long*, 463 U.S. at 1038, n.4; *Florida v. Powell*, 559 U.S. 50, 56 (2010); *Three Affiliated Tribes*, 467 U.S. at 153. It is that second basis that is invoked here, App. for Stay 1, 12, and Respondents have no response.

If the Supreme Court of Virginia had intended to decide the decision below only on state law grounds and refer to federal law only for the purposes of guidance, it was required to "include a plain statement in its judgment or opinion that the federal cases are being used only for the purpose of guidance and do not themselves compel the result that the court has reached." *Long*, 463 U.S. at 1041. But the majority declined to include such a plain statement in its decision. It could not have. That, when combined with the extensive reliance on federal law in the decision, necessitates that this Court follow the rule in *Long*—"we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Ibid.*

Lastly, Respondents do not even attempt to counter Applicants' argument that the Supreme Court of Virginia's application of federal law was gravely mistaken. Nevertheless, the Emergency Application explains in detail why the Supreme Court of Virginia misinterpreted the federal case law, including *Foster*. App. for Stay 14–16. The dissent below also describes the majority's misapprehensions of federal law. App. 37a–39a. It stands unrefuted that the Supreme Court of Virginia misapplied federal law.

Respondents' argument that the decision below rests on pure state-law grounds is incorrect, as demonstrated above through the lower decision's extensive reliance on federal case law, especially *Foster*. Therefore, there is a substantial federal issue at stake here, and as explained in the Emergency Application, it was wrongly decided. The Supreme Court of Virginia's "misconception of federal law" in the decision below has profound practical importance not just to Virginia but also to the Nation. This Court should intervene to rectify the error as soon as possible.

## CONCLUSION

The application should be granted. This Court should issue an immediate administrative stay and stay the judgment and mandate of the Supreme Court of Virginia pending disposition of Applicants' forthcoming petition for certiorari.

Respectfully submitted,


JAY JONES
Attorney General

TILLMAN J. BRECKENRIDGE
Solicitor General

OFFICE OF THE ATTORNEY GENERAL
202 North Ninth Street
Richmond, VA 23219
(804) 786-2071
solicitorgeneral@oag.state.va.us

*Attorneys for the Commonwealth of Virginia*

MATTHEW A. SELIGMAN
*Counsel of Record*

GRAYHAWK LAW, P.C.
3015 Main Street, Suite 330
Santa Monica, CA 90405
(310) 571-5993
matthew@grayhawklaw.com

*Attorney for Applicants Don Scott, Scott Surovell, and L. Louise Lucas*