

VIRGINIA:

IN THE COURT OF APPEALS OF VIRGINIA

**G. PAUL NARDO, in his official
capacity as Clerk of the Virginia
House of Delegates, et al.,**)

Case No. CL25-1582

Appellants,)

Record No. Pending

And)

**DON SCOTT, in his official
capacity as Speaker of the
Virginia House of Delegates,**)

Intervenor-Appellant)

v.)

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

Appellees.)

**EMERGENCY MOTION TO STAY ORDER OF THE CIRCUIT COURT
FOR THE COUNTY OF TAZEWELL**

Defendants G. Paul Nardo, Susan Clarke Schaar, and Tara Perkinson, in their official capacities (hereinafter, the “legislative clerk appellants”), by counsel and pursuant to Rule 5A:2 of the Rules of the Supreme Court of Virginia, respectfully moves this Honorable Court to issue an emergency stay of the January 27, 2026, order entered by the Circuit Court for the County of Tazewell. *See*

January 27, 2026, Order, Exh. A. The legislative clerk appellants respectfully request that this Court waive the 10-day response period under Rule 5A:2(b), particularly in light of the circuit court’s ruling that the proposed constitutional amendment is “PROHIBIT[ED] . . . from being submitted to the voters for their consideration.” *Id.* at 6. The legislative clerk appellants filed a notice of appeal in the circuit court on January 28, 2026, and contemporaneously transmitted the notice to this Court. *See* Notice of Appeal, Exh. B. The legislative clerk appellants hereby adopt in full the emergency motion to stay filed by intervenor-appellant Scott, including but not limited to the discussion of the clear errors committed by the circuit court as grounds for a stay of the January 27, 2026, order.

Introduction

On January 27, 2026, the Circuit Court for Tazewell County entered an order declaring a proposed constitutional amendment which has not yet become law unconstitutional, while at the same time issuing an injunction requiring the Clerk of the Circuit Court for Tazewell County to post the proposed constitutional amendment. This order followed a January 21, 2026, hearing before the circuit court on appellees’ second motion for preliminary injunction. At the conclusion of the hearing, the circuit court asked for supplemental briefing on the issue of ripeness, to be submitted by January 31, 2026. Moreover, the circuit court informed the parties that following receipt of the parties’ briefing, the circuit court

would rule no later than February 12, 2026. No other matters were taken up by the circuit court during the January 21, 2026, hearing. On January 27, 2026, without notice to the parties and in violation of the circuit court's own procedural schedule given directly to the parties at the conclusion of the January 21, 2026, hearing, the circuit court issued its ruling disposing of the entire case. The circuit court provided no notice to the parties that it intended to rule on matters other than the second motion for preliminary injunction, at the time the only matter before the circuit court. The circuit court provided no opportunity to the parties to argue the merits of the case before issuing its ruling of January 27, 2026. Additionally, the circuit court entered this order without ruling on a demurrer and a plea of immunity filed by the legislative clerk appellants, and without ruling on a demurrer filed by the intervenor-appellant. By issuing the January 27, 2026, order, the circuit court ignored serious challenges to its subject matter jurisdiction and disposed of the entirety of the case without notice to the parties or an opportunity to be heard on the merits.

In the order, the circuit court declared that "any and all matters, motions, actions and votes regarding House Joint Resolution 6007 . . . are ORDERED to be VOID AB INITIO." January 27, 2026, Order, Exh. A, at 5. The circuit court further issued a "TEMPORARY and PERMANENT INJUNCTION, requiring the Clerk of the Circuit Court of Tazewell County to post the proposed Constitutional

Amendment at least ninety (90) days BEFORE the next ensuing election of the members of the House of Delegates election [sic].” *Id.* at 6. This order is a final order because it “disposes of the entire matter before the court, including all claim(s) and all cause(s) of action against all parties, gives all the relief contemplated, and leaves nothing to be done by the court except the ministerial execution of the court’s . . . order.” Rule 1:1(b). In the alternative, the circuit court’s order is appealable as an interlocutory order under Va. Code § 17.1-405(A)(5) because the order involves “an equitable claim in which the . . . order . . . adjudicates the principles of a cause.” Va. Code § 17.1-405(A)(5); *see also* Rule 1:1C(b) (allowing this Court to enter “an order staying all or part of the proceedings in the circuit court”).

The constitutional doctrines violated by the circuit court’s order, including the separation of powers and the related doctrine of legislative immunity, are of such vital importance that they demand final appellate adjudication before the order is allowed to take effect. Moreover, the public’s interest in determining the jurisdictional bounds of each co-equal branch of government in this context, including the prohibition on any attempt by the judiciary “to interfere with the process of legislation,” *Scott v. James*, 114 Va. 297, 304, 76 S.E. 283, 285 (1912), is paramount.

Subject Matter Jurisdiction

Legislative clerk appellants respectfully submit that this Court must evaluate whether the circuit court ever had subject matter jurisdiction over this case, both as to separation of powers and ripeness under *Scott* and as to legislative immunity. During the entirety of this case, the constitutional amendment process has been, and remains, ongoing, and therefore this case is not ripe for adjudication. *See id.*; *see also Jett v. Nardo*, Case No. CL25-5352 (Richmond Cir. Ct. Nov. 5, 2025) (citing *Scott*, 114 Va. at 304, 76 S.E. at 285); *Fund for Animals, Inc. v. Va. State Bd. of Elections*, 53 Va. Cir. 405, 2000 WL 1618006, at *3 (Richmond Cir. Ct. 2000) (citing *Scott*, 114 Va. at 304, 76 S.E. at 285); *Marshall v. Warner*, 64 Va. Cir. 389, 2004 WL 963528, at *3 (Richmond Cir. Ct. 2004) (citing *Scott*, 114 Va. at 304, 76 S.E. at 285); *McEachin v. Bolling*, 84 Va. Cir. 76, 2011 WL 10909615, at *3 (Richmond Cir. Ct. 2011) (citing *Scott*, 114 Va. at 304, 76 S.E. at 285). Moreover, the legislative clerk appellants are absolutely legislatively immune, not just from judgment, but from suit. *See Edwards v. Vesilind*, 292 Va. 510, 525, 790 S.E.2d 469, 478 (2016) (“[W]hen it applies, legislative privilege confers immunity from . . . civil suit.”).

As the legislative clerk appellants and intervenor-appellant submitted to the circuit court through their demurrers, plea of immunity, briefs in opposition to appellees’ motions for temporary restraining orders and preliminary injunctions, as

well as in oral argument at three separate hearings, these issues, namely separation of powers and legislative immunity, deprived the circuit court of subject matter jurisdiction. But the circuit court never addressed these jurisdictional matters, instead rendering declaratory judgment and injunctive relief on the entirety of the case. These issues have rendered this action nonjusticiable since its initial filing. Consequently, this matter is not a case of actual controversy, and thus the circuit court's rulings up to this point, including the January 27, 2026, order, are advisory opinions prohibited under Virginia law. *See Rebh v. Cnty. Bd. of Arlington Cnty. Va.*, 303 Va. 379, 380, 908 S.E.2d 439, 441 (2024) (“In Virginia, ‘the courts are not constituted to render advisory opinions, to decide moot questions or to answer inquiries which are merely speculative.’” (quoting *Commonwealth v. Harley*, 256 Va. 216, 219–20, 504 S.E.2d 852, 854 (1998))); *City of Fairfax v. Shanklin*, 205 Va. 227, 230, 135 S.E.2d 773, 775–76 (1964) (“[T]he courts are not constituted, and the declaratory judgment statute was not intended to vest them with authority, to render advisory opinions, to decide moot questions or to answer inquiries which are merely speculative.”); *Smith v. Allen Creek Assocs., LLC*, 85 Va. App. 611, 623–24, 918 S.E.2d 783, 789 (2025) (“[A]n actual controversy is a prerequisite to a court having authority. . . . This prerequisite can be referred to as the requirement of a justiciable controversy. . . . Without an actual controversy, any opinion

rendered by the court is advisory, which the court lacks jurisdiction to render.”
(internal citations omitted)).

Subject matter jurisdiction is the foundation of the judiciary’s power to act and may be raised at any time, before any court. *See Andrews v. Richmond Redevelopment & Hous. Auth.*, 292 Va. 79, 85, 787 S.E.2d 96, 99 (2016) (“[L]ack of subject matter jurisdiction may be raised at any time, in any manner, before any court ,or by the court itself.” (quoting *Nelson v. Warden of the Keen Mt. Corr. Ctr.*, 262 Va. 276, 281, 552 S.E.2d 73, 75 (2001))).

The foundational nature of subject matter jurisdiction warrants the imposition of a stay of the circuit court’s January 27, 2026, order. “[A] stay operates upon the judicial proceeding itself. It does so either by halting or postponing some portion of the proceeding, or by temporarily divesting an order of enforceability.” *Nat’l Ass’n for the Advancement of Colored People (Hanover Cnty. Chapter) v. Commonwealth*, 74 Va. App. 702, 713, 871 S.E.2d 662, 667 (2022) (quoting *Nken v. Holder*, 556 U.S. 418, 428 (2009)). A stay prevents “some action before the legality of that action has been conclusively determined” by “temporarily suspending the source of authority to act—the order or judgment in question,” and operates to “suspend[] judicial alteration of the status quo.” *Id.* (quoting *Nken*, 556 U.S. at 428–29).

Separation of Powers/Scott v. James

This Court should stay the January 27, 2026, order during the pendency of this appeal because the order impermissibly invades the province of the legislature, thereby violating the separation of powers. *Scott v. James*, 114 Va. at 304, 76 S.E. at 285. This order and its declarations contradict the same court's order of January 13, 2026, fourteen days prior to the order appealed from. In that order, not only did the circuit court deny appellees' second motion for temporary restraining order, it expressly recognized that:

[A]mending the Constitution is a process left exclusively to the sound judgment of the Legislature that proposes amendments and the citizens that ratify or reject them . . . [i]n the Separation of Power doctrine established by the U.S. Constitution as well as the Constitution of Virginia, the Court's role in these situations is limited to scrutinizing the Constitutionality of any action of the Legislature is [sic] at the conclusion of the act, not in the process thereof."

January 13, 2026, Order, Exh. C, at 2 (citing *Scott*, 114 Va. 297). Moreover, as was presented to the circuit court during the January 21, 2026, hearing, in *Scott*, the Supreme Court of Virginia made clear that the time for judicial assessment of constitutionality is following the citizens' vote on the amendment in question:

[I]n the case at bar, the amending of the Constitution is the making of a permanent law for the people of the state, by which they are to be governed in the future; and the courts cannot interfere to stop any of the proceedings while this permanent law is in process of being made. If the amendment is not adopted, of course, no question will ever

come before the court. If, upon completion of the proceedings, the validity of the amendment is assailed, on the ground that the several provisions of the Constitution have not been complied with, then the courts can pass upon the validity of the amendment.

Scott, 114 Va. at 304, 76 S.E.2d at 285. Thus, notwithstanding its own earlier ruling of January 13, 2026, which embraced *Scott v. James* and the constitutional requirement of the separation of powers, the January 27, 2026, order both fails even to mention *Scott v. James* and the separation of powers, and violates this constitutional principle.

Absolute Legislative Immunity

Additionally, the circuit court issued the order without ruling on the legislative clerk appellants' plea of immunity, despite the circuit court's previous order of January 13, 2026, wherein the circuit court relied, in part, on this immunity in denying the second motion for TRO. *See* January 13, 2026, Order, Exh. C, at 1–2. The circuit court ruled as follows:

“The Court finds that the current case poses an analogous situation to *Chase v. Senate of Va.*, 539 F. Supp. 3d 562 (E.D. Va. 2021), where the Court therein reasoned that,

‘Here, the Court, persuaded by the reasoning in *Rangel* and *Harwood*, concludes that legislative immunity extends to *Schaar*. First, as in *Rangel*, the Virginia Constitution requires both houses of the General Assembly to maintain a journal of proceedings. Second, as in both *Rangel* and *Harwood*, there is no allegation that [*572] *Schaar* committed any wrongdoing. Rather, her job is to act as the agent of the senators in complying with a facially neutral

constitutional provision. *Cf Harwood*, 69 F.3d at 631. On these facts, Schaar is entitled to partake of the legislative immunity that would have been afforded to the state senators.’

Likewise, this Court cannot find that any of these three Clerks have committed, or will commit, any wrongdoing by carrying_ out their respective duties as Clerks and agents of their employer legislators.

The Court therefore **DENIES** Plaintiffs' Emergency Motion for Temporary Restraining Order.”

January 13, 2026, Order, Exh. C, at 1–2.

Without an express ruling on the plea of immunity, the legislative clerk appellants likely cannot directly petition the Supreme Court of Virginia for review of the issue under Va. Code § 8.01-670.2. *See Knudsen v. Taylor*, 922 S.E.2d 532 (Va. 2025) (mem.) (holding that a circuit court must “first enter an order denying a plea of immunity before such ruling can be eligible” for review by the Supreme Court of Virginia pursuant to Va. Code § 8.01-670.2).

Thus, similar to the absence of any mention of *Scott v. James* or the separation of powers, the January 27, 2026, order includes no decision whatever regarding the legislative clerk appellants’ plea of immunity. Such non-adjudication of the plea, especially following the circuit court’s order of January 13, 2026, provides another basis on which the circuit court’s order of January 27, 2026, should be stayed.

Injunction Lacked Required Findings

Moreover, the circuit court issued a temporary and permanent injunction without making any finding of fact or even mentioning Rule 3:26 or its elements. Particularly, for example, the circuit court made no finding regarding the threshold requirement of irreparable harm. *See Cartograf USA, Inc. v. Comerica Bank*, 85 Va. App. 1, 19, 915 S.E.2d 761, 770 (2025) (“Rule 3:26 establishes as a threshold requirement that ‘[a] court may issue a preliminary injunction only if it first determines that the movant will more likely than not suffer irreparable harm without the preliminary injunction.’” (quoting Rule 3:26)). Without such required findings, the injunction lacks a basis in law, and therefore should be stayed.

Short-Circuit of the Legal Process

Further, the circuit court’s ruling should be stayed because it adjudicated the entirety of the case when the only matter before it at the January 21, 2026, hearing was a motion for preliminary injunction. As discussed above, the circuit court directed a 10-day briefing schedule and advised the parties the circuit court would rule no later than February 12, 2026. Again, the circuit court had yet to take up the filed demurrers, the plea of legislative immunity, as well as the merits and/or evidence relating to the declaratory judgment requested.

The circuit court cannot take a preliminary matter and use it to decide the entirety of the case, in the process denying the parties their right to present

argument to the circuit court on the merits. Two demurrers and a plea of immunity remained pending and unadjudicated when the circuit court entered its order of January 27, 2026. Moreover, the three hearings in this matter have adjudicated solely preliminary and procedural matters: an October 29, 2025, hearing on appellees' first motion for temporary restraining order; a December 12, 2025, hearing on appellees' motion for leave to amend, the legislative clerk appellants' objection to venue and motion to venue, and intervenor-appellant's motion to transfer venue and motion to intervene; and a January 21, 2026, hearing on plaintiffs' second motion for preliminary injunction. None of these matters gave the circuit court the right to resolve this case in its entirety, particularly when it ignored pending responsive pleadings, which themselves could have been dispositive of this case. This civil action was not, and is not, ripe for adjudication on the merits, and the circuit court's adjudication of the entirety of this case robs the legislative clerk appellees of their due process rights to notice and an opportunity to be heard. *See Seyfarth, Shaw, Fairweather & Geraldson v. Lake Fairfax Seven Ltd. P'ship*, 253 Va. 93, 95, 480 S.E.2d 471, 472 (1997) ("Indeed, we have stated on several occasions that we disapprove the grant of motions which 'short circuit' the legal process thereby depriving a litigant of his day in court and depriving this Court of an opportunity to review a thoroughly developed record on appeal." (collecting cases)).

The circuit court issued declaratory judgment, making findings of fact, on a preliminary motion, without taking evidence, and without giving the parties the opportunity to be heard on the merits, much less to submit issues of fact to a jury, a right afforded by Va. Code § 8.01-188 (“When a declaration of right or the granting of further relief based thereon shall involve the determination of issues of fact triable by a jury, such issues may be submitted to a jury in the form of interrogatories, with proper instructions by the court, whether a general verdict be required or not.”). The circuit court’s disregard of process and its failure even to address the issue of subject matter jurisdiction as described, and its *sua sponte* adjudication of the entire case without notice, warrants the imposition of a stay of the January 27, 2026, order.

Rule 5A:2(a) Certification

Pursuant to Rule 5A:2(a), all other parties to the appeal have been informed of the intended filing of this motion. Intervenor-appellant Don Scott consents to the granting of this motion. Counsel for appellees informed counsel for the legislative clerk appellants that appellees intend to file a response in opposition.

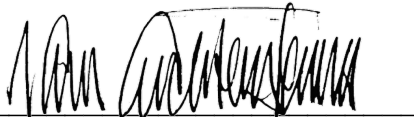
Conclusion

For the reasons stated herein, and in the emergency motion to stay filed by intervenor-appellant Scott, the legislative clerk appellants respectfully request that this Court issue an emergency stay of the circuit court’s January 27, 2026, order,

and pursuant to Rule 5A:2(a)(2), the legislative clerk appellants ask that this Court waive the 10-day response period and enter the stay as soon as possible.

Respectfully submitted,

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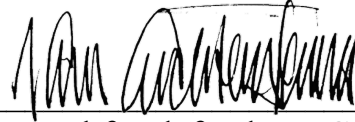
CERTIFICATE OF SERVICE

I certify that the foregoing *Emergency Motion to Stay the Order of the Circuit Court for the County of Tazewell* was served by email on counsel of record on January 28, 2026, as follows:

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A handwritten signature in black ink, appearing to be "Tara Perkinson", written above a horizontal line.

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