



# COMMONWEALTH of VIRGINIA

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November 27, 2024

Mr. Michael C. Carter  
Chair, Electoral Board of Hanover County  
Post Office Box 470  
Hanover, Virginia 23069

Dear Mr. Carter:

I am responding to your request for an official advisory opinion in accordance with § 2.2-505 of the *Code of Virginia*.

## Issue Presented

You ask whether Article II, § 3 of the Constitution of Virginia affords Virginia voters the right to choose to have their cast ballot counted by hand rather than counted by machine.

## Response

It is my opinion that Virginia voters do not have a constitutional right to have their ballots hand counted.

## Applicable Law and Discussion

The Constitution of Virginia secures qualified Virginians the right to vote in elections.<sup>1</sup> As indicated by its title, Article II, § 3 of the Constitution contains provisions related to the “Method of voting.”<sup>2</sup> It provides, in pertinent part, that “[i]n elections by the people, . . . [v]oting shall be by ballot *or* by machines for receiving, recording, and *counting* votes cast.”<sup>3</sup>

“It is a general rule that the words of a Constitution are to be understood in the sense in which they are popularly employed, unless the context or the very nature of the subject indicates otherwise.”<sup>4</sup> Thus, “we are guided by the principle that the Constitution was written to be understood by the voters;”<sup>5</sup> and

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<sup>1</sup> See VA. CONST. art. I, § 6 (“That all elections ought to be free; and that all men, having sufficient evidence of permanent common interest with, and attachment to, the community, have the right of suffrage . . . .”); VA. CONST. art. II, § 1 (setting forth the qualifications to vote).

<sup>2</sup> VA. CONST. art. II, § 3.

<sup>3</sup> *Id.* (emphasis added). The remainder of Article II, § 3 contains provisions that govern the form of ballots, ensure secrecy in casting votes, and allow for in person and absentee voting.

<sup>4</sup> *Old Dominion Comm. for Fair Util. Rates v. State Corp. Comm’n*, 294 Va. 168, 185 (2017) (quoting *Howell v. McAuliffe*, 292 Va. 320, 368 (2016)).

<sup>5</sup> *Id.* (quoting *District of Columbia v. Heller*, 554 U.S. 570, 576-77 (2008)).

“[w]hen constitutional language is clear and unambiguous, a court must give the language its plain meaning . . . .”<sup>6</sup> As such, “[t]he same rules which govern the construction of statutes[] are applicable to the construction of constitutions, and the meaning and purpose of [a section] are to be elicited from the terms employed therein, if possible, calling to our aid the ordinary rules of grammar.”<sup>7</sup> Constitutional provisions “should be interpreted so as to carry out the general principles of the government and not defeat them.”<sup>8</sup>

Article II, § 3 provides that “[v]oting shall be by ballot *or* by machines for . . . *counting* votes cast.” In its ordinary sense, “[t]he word ‘or’ is a disjunctive that provides an alternative.”<sup>9</sup> Said otherwise, the “disjunctive ‘or’ usually . . . separates words or phrases in the alternate relationship, indicating that either of the separated words or phrases may be employed without the other.”<sup>10</sup> It is thus used “to indicate alternative choices, [and] ‘impl[ies] an election to do one of two things.’”<sup>11</sup> There is no constitutional mandate that a vote, once cast, be counted manually. Accordingly, the plain language of Article II, § 3 simply sets forth two equally acceptable alternative methods for voting, including the counting of votes.<sup>12</sup>

Moreover, although qualified Virginians have the right to cast a vote and to have that vote counted, no part of Article II, § 3 grants a voter the right to choose the method by which his vote is counted. Rather, Article II, § 4 of the Constitution directs the General Assembly to “regulate the time, place, manner, conduct, and administration of . . . elections” and provides that the legislature “shall have power to make any other law regulating elections not inconsistent with this Constitution.”<sup>13</sup> The Supreme Court of Virginia has recognized “the broad nature of authority” associated with the use of voting machines.<sup>14</sup> I therefore conclude that, provided a counting method authorized under Article II, § 3 is employed, the directive that “[v]oting shall be by ballot *or* by machines for . . . *counting* votes” is satisfied.<sup>15</sup>

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<sup>6</sup> *Scott v. Commonwealth*, 247 Va. 379, 384 (1994).

<sup>7</sup> *Moore v. Pullem*, 150 Va. 174, 195-96 (1928) (internal citations omitted).

<sup>8</sup> *Id.* at 194.

<sup>9</sup> *Dollar Tree Stores, Inc. v. Tefft*, 69 Va. App. 15, 25 (2018). *See also* 1985-86 Op. Va. Att’y Gen. 111, 112 (“The word ‘or’ in a statute is presumed to signify a disjunctive intent.”); 1997 Op. Va. Att’y Gen. 16, 17 (“The use of the disjunctive indicates that two separate alternatives were intended[.]”).

<sup>10</sup> *Rush v. Kijakazi*, 65 F.4th 114, 119 (4th Cir. 2023) (quoting 1A NORMAN SINGER & SHAMBIE SINGER, SUTHERLAND STATUTES AND STATUTORY CONSTRUCTION § 21:14 (7th ed. 2022)), *cert. denied*, 144 S. Ct. 999 (2024); *accord* 2001 Op. Va. Att’y Gen. 161, 163, 164 n.16 (citing 1A NORMAN J. SINGER, SUTHERLAND STATUTORY CONSTRUCTION § 21.14 (5th ed. 1993) for the proposition that the “disjunctive ‘or’ usually separates words in alternate relationship, indicating that either of [the] separated words may be used without [the] other”).

<sup>11</sup> 2016 Op. Va. Att’y Gen. 135, 139 (quoting *In re J. C. W., et al., Children*, 318 Ga. App. 772, 782 (2012)).

<sup>12</sup> *See Old Dominion Comm.*, 294 Va. at 185.

<sup>13</sup> VA. CONST. art. II, § 4. “[N]o one provision of the Constitution is to be separated from all the others and to be considered alone,” *Pierce v. Dennis*, 205 Va. 478, 482 (1964) (quoting *City of Portsmouth v. Weiss*, 145 Va. 94, 106, 107 (1926)); rather, “[t]he constitution must be viewed and construed as a whole . . . .” *Carlisle v. Hassan*, 199 Va. 771, 776 (1958) (citing *Barbour v. Grimsley*, 107 Va. 814 (1907)).

<sup>14</sup> *Falls Church Taxpayers League v. City of Falls Church*, 203 Va. 604, 611 (1962) (further acknowledging that the use of such machines may render compliance with otherwise applicable voting requirements unnecessary).

<sup>15</sup> The use of machines in voting has been constitutionally permitted in Virginia since 1902, when the Constitution provided in separate sections, that “[a]ll elections by the people shall be by ballot” and that “[t]he General Assembly may provide for the use . . . of machines for receiving, recording, and counting the votes cast [in elections.]” VA. CONST. of 1902, §§ 27, 37. In considering revisions to the Constitution in 1968, the Commission on Constitutional Revision commented that, under the subsequently adopted, redrafted single provision, “Voting is required to be by ballot or voting machines, the latter term encompassing both mechanical and electronic devices. It is intended that

The General Assembly calls for votes to be counted manually when they are cast by “paper ballot,” as defined for use in the Elections Title of the Virginia Code.<sup>16</sup> The General Assembly has limited the authority to use paper ballots to specific situations.<sup>17</sup> Outside of one of the statutorily enumerated circumstances, the use of paper ballots, *i.e.*, hand-counted ballots, is not permitted.<sup>18</sup> Instead, the General Assembly has directed localities to “provide for the use of electronic voting systems,” *i.e.*, ballot scanner machines, at all their precincts for every election.<sup>19</sup> The General Assembly also has enacted separate provisions related to the counting of votes cast via paper ballot and those cast via authorized voting systems.<sup>20</sup> In exercising its broad power to regulate elections in this manner, the General Assembly has

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ballots or machines, or both, in any combination (including future kinds of voting machines), may be used in elections.” REPORT OF THE COMMISSION ON CONSTITUTIONAL REVISION, HOUSE DOC. NO. 1 at 113 (Jan. 1, 1969).

<sup>16</sup> VA. CODE ANN. § 24.2-101 (Supp. 2024). Although sometimes used interchangeably in common parlance, the Code thus generally distinguishes between a “paper ballot” and a “printed ballot,” which “means a tangible ballot that is printed on paper and includes *both* machine-readable ballots *and* paper ballots.” *Id.* (emphasis added).

<sup>17</sup> As expressly provided by § 24.2-646.1,

The official paper ballot shall be used by a voter to cast his vote only in one of the following circumstances:

1. The official paper ballot is the only ballot in use in the precinct.
2. The official paper ballot is used by voters voting outside of the polling place pursuant to § 24.2-649.1.
3. The voter is casting a provisional ballot.
4. The voter is provided an official paper ballot or copy thereof pursuant to § 24.2-642 when voting equipment is inoperable or otherwise unavailable.
5. The official absentee paper ballot voted in accordance with (§ 24.2-700 et seq.).
6. The voter is provided an official paper ballot for a presidential election pursuant to § 24.2-402 or for federal elections pursuant to § 24.2-453.

<sup>18</sup> “[A] statute stating the manner in which something may be done . . . also evinces the legislative intent that it not be done otherwise.” 1990 Op. Va. Att’y Gen. 132, 133. *See* 1955-56 Op. Va. Att’y Gen. 78, 78 (responding in the negative to the question whether a precinct using voting machines was permitted to furnish paper ballots to voters preferring to use such ballot because under the statutory scheme then in effect “the utilization of voting machines was intended as a substitute for . . . voting by paper ballots”); 1964-65 Op. Va. Att’y Gen. 112, 113 (advising against permitting “voters to vote with paper ballots where a voting machine is being used” except in specific circumstances authorized by statute). *See* § 24.2-1011 (2023) (providing that a voter is required to vote the particular ballot provided by the officers of election).

<sup>19</sup> Section 24.2-626(A) (2023). The Code defines “voting system[s]” to include “direct recording electronic machines,” § 24.2-101; however, the use of such machines, which are “machine[s] on which a voter touches areas of a computer screen, or uses other control features, to mark a ballot and his vote is recorded electronically,” *id.*, is currently prohibited in Virginia. Section 24.2-626(B). A “ballot scanner machine” is an “electronic counting machine in which a voter inserts a marked ballot to be scanned and the results tabulated.” Section 24.2-101.

<sup>20</sup> *Compare* §§ 24.2-665 & -666 (2023) (paper ballots), *with* §§ 24.2-657 & -658 (2023) (voting systems). I note that while the General Assembly generally has mandated the use of machines to tally votes, the legislature has made allowances for manual counting in extraordinary circumstances that it has determined warrant such method. *See* §§ 24.2-642(B) (2023) (providing that “ballots may be counted manually or as directed by the electoral board” when an operable scanner is not available); 24.2-802.2 (2023) (providing for the hand counting of certain ballots, *e.g.*, ballots rejected by a scanner, when conducting a recount); 24.2-671.2 (2023) (allowing for hand counting as necessary upon conduction of a risk-limiting audit).

provided that Article II, § 3's directive that voting be "by ballot *or* by machines" is met, and no voter rights are infringed when a cast vote is counted by machine rather than by hand.<sup>21</sup>

In sum, the Constitution of Virginia establishes alternatively acceptable methods for voting in the Commonwealth, and Article II, § 3 expressly contemplates the use of "machines for receiving, recording, and *counting* votes cast." Moreover, I find nothing in the plain language of Article II, § 3 that confers upon voters a right to choose to have their votes counted via a particular method.

### Conclusion

Accordingly, it is my opinion that Virginia voters do not have a right under Article II, § 3 of the Constitution of Virginia to have their votes counted by hand rather than machine.<sup>22</sup>

With kindest regards, I am,

Very truly yours,

A handwritten signature in black ink, appearing to read "Jason S. Miyares", written in a cursive style.

Jason S. Miyares  
Attorney General

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<sup>21</sup> "Whenever a statute is enacted by the legislature, it is a legislative declaration that it is a constitutional enactment, and when approved by the Governor it is an executive declaration to the same effect." *Weiss*, 145 Va. at 104.

<sup>22</sup> Your inquiry arises from the questioning by some of guidance issued by the Virginia Department of Elections. ELECT's Official Advisory of March 4, 2024 (available upon request from ELECT), contained the statement, "Voters do not have the authority to request that their ballot be hand counted as an alternative to utilizing electronic voting or counting machines." In light of the conclusion reached in this Opinion, I further conclude that this guidance does not conflict with Article II, § 3 of the Constitution of Virginia.