RECORD NUMBER: 10-1997

United States Court of Appeals

for the

Fourth Circuit

HERB LUX, STEPHEN CRUSE, ANDREW MIKEL, and EUGENE FORET,

Plaintiffs-Appellants,

– v. –

NANCY RODRIGUES, JEAN CUNNINGHAM and HARLD PYON, members of the Virginia State Board of Elections, in their official capacities,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA AT RICHMOND

OPENING BRIEF OF APPELLANT

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Corporate Disclosure Statement

Appellants Herb Lux, Stephen Cruse, Andrew Mikel, and Eugene Foret are natural persons. Under Federal Rule of Appellate Procedure 28(a)(1) and Local Rule 26.1, each Appellant states that there is no parent corporation or any publicly held corporation (or similarly situated master limited partnership, real estate investment trust, or other legal entity whose shares are publicly held or traded) that owns 10% or more of its stock.

Furthermore, Appellants unanimously state that there is no publicly held corporation (or similarly situated master limited partnership, real estate investment trust, or other legal entity whose shares are publicly held or traded) that is not a party to this litigation that has a direct financial interest in the outcome of this litigation. *See* Local Rule 26.1(a).

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Jurisdictional Statement

The district court had jurisdiction over this action under 42 U.S.C. § 1983 and 28 U.S.C. § 1331 because this is an action arising under the First and Fourteenth Amendments to the United States Constitution.

On August 26, 2010, the district court entered the order being appealed from in this litigation. Lux and his supporters filed their notice of appeal on August 27, 2010. The appeal is timely under Federal Rule of Appellate Procedure 4(a)(1)(A) because Appellants filed their notice of appeal within 30 days of the order.

This Court has jurisdiction under 28 U.S.C. § 1292(a)(1), an appeal from the denial of a motion for preliminary injunction, and 28 U.S.C. § 1291, an appeal from a final order.

Issue Presented

Whether Virginia Code section 24.2-506 contravenes the First Amendment inasmuch as it requires petition signatures to be witnessed by a resident of the relevant district and thereby prohibits an otherwise qualified candidate for the U.S. House of Representatives from circulating signature petitions in furtherance of his own candidacy.

Statement of the Case

On July 13, 2010, Herb Lux and three of his supporters filed a verified complaint for declaratory and injunctive relief in the U.S. District Court for the Eastern District of Virginia. (J.A. at 5.) They sought a preliminary injunction to require the Board to count the signatures. (J.A. at 14.) They also moved, pursuant to Federal Rule of Civil Procedure 65(a)(2), to consolidate the hearing on the motion for a preliminary injunction with the trail on the merits. The district court granted their motion to consolidate. (J.A. at 182.)

Board members Nancy Rodrigues, Jean Cunningham, and Harold Pyon—the Appellees here—opposed the motion for preliminary injunctive relief and moved to dismiss the claim under Federal Rule of Civil Procedure 12(b)(6). On August 23, 2010, the district court heard oral argument on both the motion to dismiss and the motion for a preliminary injunction. On August 26, 2010, the district court issued an order granting the Board's motion to dismiss and denying the motion for a preliminary injunction. (J.A. at 223.) On August 27, 2010, Lux and his supporters filed a notice of appeal. (J.A. at 240.)

Statement of Facts

Under Virginia law, an independent candidate for Congress may not appear on the ballot unless, among other things, he obtains 1,000 signatures from voters reg-

istered in the relevant congressional district. Va. Code § 24.2–506. In addition, each signature must be witnessed by a resident of that district ("district-residency requirement"). *Id.*

Appellant Herb Lux sought to run as an independent candidate for the U.S. House of Representatives in the 2010 election. (J.A. at 5–8.) Although Lux sought office in Virginia's Seventh District, he is a resident of Virginia's First District.[1] (J.A. at 6–7.)

On June 8, 2010, Lux timely filed with the Virginia State Board of Elections ("Board") seventy-eight candidate petitions, bearing approximately 1,220 signatures. (J.A. at 9.) Sixty-three candidate petitions, bearing approximately 1,063 signatures, were circulated and witnessed by Lux. (J.A. at 10.) The remaining fifteen candidate petitions, bearing approximately 157 signatures, were circulated on behalf of Lux by residents of the Seventh District. (J.A. at 10–11.)

Appellants Stephen Cruse, Andrew Mikel, and Eugene Foret are residents of the Seventh District and circulated at least one petition on Lux's behalf. (J.A. at 7, 10.) Foret also signed Lux's petition as a qualified voter from the Seventh District. (J.A. at 7.)

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[1] Pursuant to the Qualifications Clause, Lux is eligible to represent the Seventh District. U.S. Const. Art. I, § 2, cl. 2. (*See also* J.A. at 25 (letter from Board conceding Lux is otherwise qualified to run in the Seventh District).)

Lux resides in Spotslvania County, Virginia. (J.A. at 6.) Spotsylvania County is divided between the First and Seventh Districts. (J.A. at 6.)

On June 23, 2010, the Board, citing Virginia's district-residency requirement, concluded that Lux was not qualified to circulate petitions—even for his own candidacy—because he was not a resident of the Seventh District.[2] (J.A. at 11, 25.)

Summary of Argument

Contrary to the command to "make no law . . . abridging the freedom of speech," Virginia Code section 24.2-506 prohibits candidates for the U.S. House of Representatives such as Herb Lux from circulating their own candidate petitions if they do not reside in the district for which they are campaigning. This despite the fact that the Constitution explicitly allows individuals to be elected to Congress from districts in which they do not reside. U.S. Const. art. I, § 2.

In upholding this law, the district court below relied on *Libertarian Party of Virginia v. Davis*, 766 F.2d 865 (4th Cir. 1985). *Davis*, however, is distinguishable from this case because *Davis* did not involve a prohibition against the candidate himself as this case does.

But even if *Davis* were controlling here, it is no longer good law. Intervening Supreme Court precedent—namely *Meyer v. Grant*, 486 U.S. 414 (1988)—overturned the only basis on which *Davis* relied to uphold a district-resi-

[2] The Board verified the signatures witnessed by a resident of the Seventh District. (J.A. at 25.) Of the approximately 157 signatures witnessed by a resident of the Seventh District, 110 were deemed to be valid signatures of Seventh District registered voters. (J.A. at 25.)

dency restriction. In striking down a ban against paid petition circulators, *Meyer* held that a state cannot require that petition-circulators be activists. *Meyer* thus rejected *Davis*'s (only) rationale that a district-residency restriction is constitutionally permissible because it helps ensure that "at least one 'activist' [is] sufficiently motivated" to gather signatures.

Every federal circuit court to consider circulator-residency restrictions in the wake of *Meyer* and *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) (*ACLF*), has held that *Meyer* and *ACLF* control. Under those precedents, a law that bans large classes of persons from acting as petition circulators is deemed to impose substantial burdens on core political speech and is therefore sustained against a constitutional attack only if the government can prove that it is necessary to achieve a compelling governmental interest.

The law here severely burdens protected speech and association, most obviously by completely banning Lux, an otherwise qualified candidate for office, from circulating signature petitions in furtherance of his own candidacy. It also, however, restricts over 90% of Virginia's voting-age population from helping Lux gather signatures, and therefore has the inevitable effect of reducing the total quantum of political speech during an election "by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *See Buckley v. Valeo*, 424 U.S. 1, 19 (1976).

The law imposes severe burdens for no compelling reason. The district court below upheld the challenged law because, it said, the law furthered an interest in assuring sufficient activist support. *Meyer* rejected that very argument and held that states are able to adequately advance their interest in requiring a showing of "grass roots" activist support by enacting minimum signature thresholds. Virginia has enacted a minimum signature threshold and its legitimacy is not challenged here.

Furthermore, even on its own terms, the notion that the district-residency requirement is meant to demonstrate activist support is bellied by the fact that not all candidates are required, under the law, to show activist support. Candidates that live within the district are permitted to circulate their own petitions. If Virginia was truly interested in making candidates show activist support, an "activist-witness" requirement would apply to all candidates, not just some of them.

Because the Board cannot prove that the law is narrowly tailored to advance a compelling governmental interest, the district-residency requirement is unconstitutional and this Court should permanently enjoin its enforcement.

Argument

I. Standard of Review

This Court reviews a grant of a motion to dismiss under *de novo* review.

Duckworth v. State Admin. Bd. of Election Laws, 332 F.3d 769, 772 (4th Cir. 2003).

This Court reviews a denial of a preliminary injunction for abuse of discretion. *Giovani Carandola Ltd. v. Bason*, 303 F.3d 507, 511 (4th Cir. 2002). In so doing, this Court accepts "the [district] court's findings of fact absent clear error, but review[s] its legal conclusions *de novo*." *Id*. "[A] mistake of law by a district court is per se an abuse of discretion." *Dixon v. Edwards*, 290 F.3d 699, 718 (4th Cir. 2002).

When the district court's decision "'rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance,'" this Court reviews the district court's decision *de novo*. *Virginia Carolina Tools v. Int'l Tool Supply*, 984 F.2d 113, 116 (4th Cir. 1993) (citation omitted). Here the facts are established (there were no disputed facts below), the issues are purely legal, and the district court's decision rested solely on a premise as to the applicable rule of law; this Court therefore reviews the decision *de novo*.

II. *Libertarian Party of Virginia v. Davis* Is Distinguishable.

In denying Lux and his supporters' motion for preliminary injunction and granting the Board's motion to dismiss, the district court relied on this Court's decision in *Libertarian Party of Virginia v. Davis*, 766 F.2d 865 (4th Cir. 1985). *Davis* involved a challenge to a statute that governed how "a political organization

not qualifying as a 'political party'"—in that case, the Libertarian Party of Virginia—could "petition to secure a place on the Virginia ballot for its presidential and vice-presidential nominees." *Id.* at 866. Under the challenged law, to get its nominees on the ballot minor political parties were required to submit a petition signed by one-half of one percent of all registered voters, including at least two hundred from each of Virginia's congressional districts ("geographic requirement"). *Id.* The law also required each of the signatures to be witnessed by a resident of the same congressional district as the signer ("district-residency requirement"). *Id.*

On an unopposed motion to dismiss, the district court found that the district-residency requirement served an interest in showing "some indication of geographic as well as numerical support before devoting space on the ballot to a political aspirant" because "it does demonstrate that within each congressional district there is at least one 'activist' sufficiently motivated to shoulder the burden of witnessing signatures." *Libertarian Party of Va. v. Davis*, 591 F. Supp. 1561, 1564 (E.D. Va. 1984).[3] On appeal, this Court adopted the district court's rationale:

> [T]he requirement that the witness be from the same congressional district as the petition signer serves the important purpose of assuring "some indication of geographic as well as numerical support" by demon-

[3] According to the district court, the decision was reached "quickly . . . [on a] hurried study of the pertinent Supreme Court opinions." *Davis*, 591 F. Supp. at 1565.

> strating "that within each congressional district there is at least one 'activist' sufficiently motivated to shoulder the burden of witnessing signatures." It is difficult to imagine how the state could accomplish these objectives by less restrictive means.

Davis, 766 F.2d at 869–70 (*quoting Davis*, 591 F. Supp. at 1564).

Davis is distinguishable factually and legally from the present case. First, although *Davis* involved a district-residency requirement, it did not involve *a candidate who was prohibited from circulating his own petition*. The burden imposed when a candidate is prevented from circulating his own petition goes far beyond even the burden of being restricted in the ability to choose surrogates to gather signatures, which was the issue in *Davis*. There is no legitimate state interest in keeping *a candidate* from circulating his own petitions. Ultimately, voters will vote for or against the candidate, not the surrogate. Preventing the candidate from circulating his own petitions defies common sense.

Further, the statute in *Davis* controlled the process for placing a party's *presidential and vice-presidential nominees* on the ballot. Under Article Two, Section One of the U.S. Constitution, states have plenary power to determine the method of selecting *presidential* electors. *See Bush v. Gore*, 531 U.S. 98, 104 (2008) (*citing McPherson v. Blacker*, 146 U.S. 1, 35 (1892)). This statute here, by contrast, controls the process for placing an independent candidate *for the U.S. House of Representatives* on the ballot.

Not only does Virginia lack the plenary authority over such actions that it has when it comes to presidential electors, but it is prohibited from supplementing the exclusive qualifications set forth for the office in the text of the Constitution. *U.S. Term Limits v. Thornton*, 514 U.S. 779, 827 (1995). The Constitution explicitly allows a candidate to run for office in a congressional district where he does not reside, so long as he is a resident of the relevant state. U.S. Const. art. I, § 2. Because the only candidates prohibited from circulating their own petitions are candidates for U.S. House of Representatives *who do not reside in their own district*, it appears that the district-residency requirement is an "effort to dress eligibility to stand for Congress in ballot access clothing." *Thornton*, 514 U.S. at 829.

III. *Davis* Is Not Controlling.

A. *Davis* Is Contrary to *Meyer*.

Even if *Davis* were applicable, however, it is no longer good law. A decision of a panel of this Court becomes the law of the circuit and is ordinarily binding on other panels. *Etheridge v. Norfolk & W. Ry. Co.*, 9 F.3d 1087, 1090 (4th Cir. 1993). A panel decision is not controlling, however, where "a superseding contrary decision of the Supreme Court" has "specifically rejected the reasoning on which [the prior decision] was based." *Id.* at 1090–91 (*quoting Busby v. Crown Supply, Inc.*, 896 F.2d 833, 840–41 (4th Cir. 1990)). In this case, subsequent Supreme Court precedent — specifically *Meyer v. Grant*, 486 U.S. 414 (1988) —

rejected the very reasoning on which *Davis* was based. *Davis* is therefore no longer binding on this panel.

In *Meyer*, the Supreme Court was faced with the question of whether a Colorado statute that made it a felony to pay petition circulators was consistent with the First Amendment. 486 U.S. at 415–16. In holding the statute unconstitutional, *Meyer* clarified that restrictions on petition circulation are subject to strict scrutiny and rejected the notion that such restrictions serve any governmental interest in demonstrating a sufficient level of activist support. In a unanimous decision, the Court held that petition circulation is "core political speech" because it "involves both the expression of a desire for political change and discussion of the merits of the proposed change." *Id.* at 421–22. As *Meyer* noted, petition circulation is "the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication." *Id.* at 424.

Meyer held that restrictions on petition circulation imposed several substantial burdens on First Amendment rights. First, the Court held that prohibiting paid circulators limited the number of voices capable of carrying the message, the hours circulators can speak, and as a result, the size of the audience that can be reached. *Id.* at 422–23. Second, the restriction reduced the chances of qualifying for the ballot, making it less likely that the subject of the petition will become the focus of statewide discussion. *Id.* at 423. In short, restrictions on petition circulation reduce

the "total quantum of speech on a public issue," a concept completely foreign to the First Amendment's goal of prohibiting uninhibited and robust public debate. *Id.*; *see also Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

Meyer rejected the argument that the burdens were minimal because the statute left other avenues of expression open: "That appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protection. . . . That it leaves open 'more burdensome' avenues of communication, does not relieve its burden on First Amendment expression." 486 U.S. at 424.

From *Meyer*, it is clear that restrictions on petition circulation are not mere ballot access provisions, but are direct restraints on core political speech. The First Amendment protections in this context are at their "zenith," and the government's burden is "well-nigh insurmountable." *Id.* at 425. In light of the substantial burdens on speech, *Meyer* explained that restrictions on petition circulation must be "closely scrutinized and narrowly construed," and placed the burden on the state to make that showing. *Id.* at 423, 428 ("[T]he State has failed to justify [the statute]."). These are the hallmarks of strict-scrutiny analysis.

In an attempt to satisfy this high burden, Colorado argued the restriction on paid petition circulators advanced its interest in "making sure that an initiative has sufficient grass roots support to be placed on the ballot." *Id.* at 425. Rejecting this

argument, the Supreme Court noted that the modicum-of-support interest was "adequately protected by the requirement that no initiative proposal may be placed on the ballot unless the required number of signatures has been obtained." *Id.* at 425–26. Because the restriction on paid petition circulators imposed a severe burden on core political speech and was not narrowly tailored to a compelling governmental interest, the provision was unconstitutional.

Meyer is contrary to *Davis* on two grounds. First, *Meyer* held that restrictions on petition circulation are subject to strict scrutiny because they impose substantial burdens on core political speech. *See id.* at 425. *Davis*, however, failed to subject the district-residency requirement to strict scrutiny. Moreover, the district court in *Davis* described the burden of the residency restriction as "light." *Davis*, 591 F. Supp. at 1564. Because, per *Meyer*, the burden imposed by the district-residency requirement is constitutionally severe, *Davis* no longer controls.

Second, *Meyer* rejected the notion that a state can reference so-called "activist" petition circulators as a measure of public support for a candidate or ballot measure. *Meyer*, 486 U.S. at 425–26. *Davis*, on the other hand, held that requiring circulators to be from the same congressional district as the signer "serve[d] the important purpose of assuring some indication of geographic as well as numerical support by demonstrating that within each congressional district there is at least one 'activist' sufficiently motivated to shoulder the burden of witnessing signa-

tures." *Davis*, 766 F.2d at 869–70 (citation omitted). Under *Meyer*'s central holding, a state simply may not prohibit a candidate from using paid circulators, rather than activists, to gather the necessary signatures. *Meyer*, 486 U.S. at 415–16. Thus, the fact that a petition circulator for a candidate resides in a particular congressional district gives *no indication* of the support for that candidate in that district.

In short, *Davis*'s rationale, after *Meyer*, is constitutionally defunct. Under *Meyer*, states simply cannot require that petition-circulators be activists. *Meyer* rejected in the plainest terms *Davis*'s rationale (its only rationale) that a district-residency restriction helps ensure that "at least one 'activist' [is] sufficiently motivated" to gather signatures. Because *Davis* is no longer good law, this Court must make an independent analysis as to the constitutionality of the district-residency requirement.

B. *Davis* Is Contrary to *ACLF*.

Eleven years after *Meyer*, the Supreme Court decided *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 186–87 (1999) (*ACLF*), which struck down a Colorado statute that required petition circulators to be registered Colorado voters. *ACLF* began by affirming *Meyer*'s holding that (1) "[p]etition circulation . . . is 'core political speech,' because it involves 'interactive communication concerning political change,'" *id.* at 186 (*quoting Meyer*, 486 U.S. at 422),

and that (2) First Amendment protection for petition circulation is "at its zenith," *id.* at 187 (*quoting Meyer*, 486 U.S. at 425).

ACLF held that the voter-registration requirement "significantly inhibit[ed] communication with voters about proposed political change." *Id.* at 192. As in *Meyer*, the focus was on the number of circulators *excluded*, and the Court noted that Colorado "drastically reduce[d] the number of persons, both volunteer and paid, available to circulate petitions." *Id.* at 193. The Colorado statute excluded approximately 17% of Colorado voters from the ranks of eligible petition circulators. *ACLF*, 525 U.S. at 193 (1.9 million registered voters in Colorado, and at least 400,000 persons *eligible to vote* but not registered). *ACLF* held that such a reduction imposed several substantial burdens on protected First Amendment activity:

> [Colorado's voter-registration requirement] produces a speech diminution of the very kind produced by the ban on paid circulators at issue in *Meyer*. . . . [It] decreases the pool of potential circulators as certainly as that pool is decreased by the prohibition of payment to circulators. Both provisions "limi[t] the number of voices who will convey [the initiative proponents'] message" and, consequently, cut down "the size of the audience [proponents] can reach." In this case, as in *Meyer*, the requirement "imposes a burden on political expression that the State has failed to justify."

ACLF, 525 U.S. at 194–95 (citations and footnote omitted).

The Supreme Court once again rejected the notion that the burdens were less severe because other avenues of speech remained open. *Id.* at 195 (rejecting argu-

ment that burdens were less severe because it was "exceptionally easy to register to vote").

The Court squarely rejected Colorado's sole argument in defense of the statute—that the law was necessary to "ensure that circulators will be amenable to the Secretary of State's subpoena power, which in these matters does not extend beyond the State's borders." *Id.* at 196. In so doing, the Court examined "other means Colorado employ[ed] to accomplish its regulatory purposes,"and found that Colorado's "interest in reaching law violators . . . [was] served by the requirement . . . that each circulator submit an affidavit setting out . . . [his or her residential address]." *Id.* Because this address attestation adequately addressed Colorado's interest in ensuring that circulators were amenable to the state's subpoena power, the Court struck the voter-registration requirement as an unnecessary restriction on speech. *Id.* at 196–97.

The Court also described what it called "an arsenal of safeguards" available to Colorado, post-*ACLF*, to address its "substantial interests in regulating the ballot-initiative process." *Id.* at 204–05. Among them, the Court observed that "[t]o ensure grass roots support, Colorado conditions placement of an initiative proposal on the ballot on the proponent's submission of [a certain number of] valid signatures." *Id.* at 205.

As with *Meyer*, *ACLF* is contrary to *Davis* on two grounds. First, *ACLF* af-

firms that restrictions on petition circulation are subject to strict scrutiny because they impose substantial burdens on core political speech. *Id.* at 192 n.12. Second, *ACLF* held that the state's interest in ensuring that candidates demonstrate a modicum of support is adequately served by the signature threshold, not by placing restrictions on who may serve as petition circulators. *Id.* at 204–05.

In dicta, *ACLF* indicated that although the *voter-registration* requirement was unconstitutional, a *state-residency* requirement might nonetheless be constitutional. *Id.* at 196–97. This statement, however, has no bearing on the validity of the district-residency requirement at issue here.

In *ACLF*, the Court spoke favorably of a *state*-residency requirement because the Court recognized that it might be a necessary means of protecting the state's interest in preventing fraud in ballot circulation activities. According to the Court, requiring circulators to be state residents might be a necessary (and therefore constitutional) means of ensuring "that circulators will be amenable to the Secretary of State's subpoena power, *which in these matters does not extend beyond the State's borders*." *Id.* (emphasis added). Because Virginia's subpoena power is fully operative throughout the commonwealth without regard to congressional districts, the Board has not argued (rightfully so) that Virginia's district-residency requirement is supported by an interest in preventing fraud or preserving the effectiveness of Virginia's subpoena power. (J.A. at 71 (conceding that effectiveness of

subpoena power "is not at issue here").) Accordingly, *ACLF*'s statement does not support the constitutionality of the provision at issue here.

C. Other Circuits Have Applied *Meyer* and *ACLF* to Strike Down Residency Requirements.

Since *Meyer* and *ACLF*, numerous federal courts have invalidated circulator residency requirements under the First Amendment. In the closely analogous case of *Krislov v. Rednour*, 226 F.3d 851, 856, 859–62 (7th Cir. 2000), the Seventh Circuit invalidated an Illinois law which required petition circulators to be residents and registered voters of the same congressional district for which the candidate was seeking office. Consistent with *Meyer* and *ACLF*, the court explained that the restriction imposed a severe burden by inhibiting the right to ballot access, limiting the candidates' ability to associate with a class of circulators, limiting the candidates' ability to choose the most effective means of communication, and reducing the candidates' ability to disseminate a political message to a wider audience. *Id.* at 860. *Krislov* held that the district-residency requirement imposed a severe burden because it excluded millions of potential petition circulators, thereby reducing the number of individuals capable of disseminating the candidates' message and the potential audience that they could reach.[4] *Id.* at 860–62.

[4] The congressional candidate in *Krislov* was required to submit 660 signatures, *Krislov*, 226 F.3d at 859, approximately 340 *less* than the 1,000 valid signatures required of congressional candidates in Virginia, Va. Code § 24.2-506(2).

In another analogous case, *Lerman v. Board of Elections in the City of New York*, the Second Circuit invalidated as contrary to the First Amendment a New York statute that required petition signatures to be witnessed by "'resident[s] of the political subdivision in which the office or position is to be voted for.'" 232 F.3d 135, 138 (2d Cir. 2000) (*quoting* N.Y. Elec. L. § 6-132(2) (McKinney 1998)). Applying the *Meyer-ACLF* framework, the court first found that the "petition circulation activity at issue in this case . . . clearly constituted core political speech" because it "'of necessity involve[d] both the expression of a desire for political change and a discussion of the merits of the proposed change.'" *Id.* at 146 (*quoting Meyer*, 486 U.S. at 421). The court then held that it was "clear" that the same-political-subdivision residency restriction "severely burden[ed] political speech" by (1) "'drastically reduc[ing] the number of persons . . . available to circulate petitions,'" *id.* (*quoting ACLF*, 525 U.S. at 193); and (2) "substantially burden[ing] the right to political association," *id.* at 147.

Finally, *Lerman* held that the New York law was not narrowly tailored to advance any compelling state interest, and in fact, did not "bear even a rational relationship to any of the[ ] three justifications [advanced by the State], let alone the narrowly tailored relationship that strict scrutiny demands." *Id.* at 149. New York argued that the same-political-division residency requirement was a necessary means to ensure that there was a "'modicum of support'" in each district before a

candidate could appear on the ballot (this is the same argument the Board is making here, and is the lone rationale relied on in *Davis*). *Id.* at 151. The court acknowledged that requiring a candidate to show a modicum of support was a legitimate state interest because it helped to avoid "confusion, deception, and even frustration of the democratic process." *Id.* (*quoting Jenness v. Fortson*, 403 U.S. 431, 442 (1971)). "However," the court retorted, "that interest already is advanced by the requirement that candidates obtain a minimum number of signatures from district residents." *Id.*

Citing *Meyer v. Grant*, the court held that "[i]n light of that requirement [i.e., the minimum signature requirement], the state's interest in requiring a "modicum of support" from within the district *bears no relationship whatsoever to who actually witnesses or circulates the petition*." *Id.* (emphasis added). Having found that the statute had "no 'plainly legitimate sweep" at all," *Lerman* held the statute invalid on its face under the overbreadth doctrine. *Id.* at 153 (citation omitted); *see also United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010) ("In the First Amendment context, however, this Court recognizes 'a second type of facial challenge,' whereby a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" (*quoting Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449 n.6 (2008))).

In *Chandler v. City of Arvada*, the Tenth Circuit struck down, under the First Amendment, a city ordinance that prohibited nonresidents of Arvada, Colorado, from circulating signature petitions in the city of Arvada. 292 F.3d 1236, 1239 (10th Cir. 2002). Applying the *Meyer-ACLF* framework, the court began by recognizing that petition circulation is "'core political speech' because it involves 'interactive communication concerning political change.'" *Id.* at 1241 (*quoting ACLF*, 525 U.S. at 186).

Next, the court recognized that the city-residency restriction imposed "'severe burdens'" on political speech by reducing the available pool of circulators, limiting "political conversation and association," and restricting "the overall quantum of speech" during an election. *Id.* at 1241–43. Because it severely burdened political speech, the court held, the law must be "narrowly tailored to serve a compelling state interest." *Id.*

The city argued that the residency restriction was necessary to prevent "fraud, malfeasance, and corruption in municipal elections" because, "without it, the [city] clerk has no authority to subpoena nonresidents for a petition protest hearing." *Id.* at 1242. The court, however, thought otherwise. It struck down the law because, it said, even assuming that the power to subpoena nonresidents was essential, the law was "substantially broader than necessary" because the city "could achieve its interest without wholly banning nonresidents from circulating petitions in

Arvada." *Id.* at 1243–44. For example, the court explained, the city could require prospective circulators, as a prerequisite to circulating petitions, to "agree to submit to the jurisdiction of the Arvada Municipal Court for the purpose of subpoena enforcement." *Id.* at 1244.

Several circuits have gone so far as to declare *state*-residency requirements unconstitutional under the *Meyer-ACLF* framework. *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1027–31 (10th Cir. 2008); *Nader v. Blackwell*, 545 F.3d 459, 474–77 (6th Cir. 2008); *Nader v. Brewer*, 531 F.3d 1028, 1034–38 (9th Cir. 2008); *Krislov v. Rednour*, 226 F.3d 851, 855, 859–62 (7th Cir. 2000).[5] These cases held (1) that petition circulation is "core political speech"; (2) that the state-residency restriction at issue imposed a severe burden on that speech;[6] (3) that the restriction could be upheld only if it were narrowly tailored to a compelling governmental interest; and (4) that the state-residency restriction was not narrowly tailored because the state could achieve its interests by less restrictive means. *Yes on Term Limits*, 550 F.3d at 1028, 1030; *Blackwell*, 545 F.3d at 475–76; *Brewer*,

[5] *Krislov* invalidated a law that, as applied, imposed a *district*-residency restriction on the plaintiff-candidate for U.S. House of Representatives, and a *state*-residency requirement on the plaintiff-candidate for U.S. Senate. 226 F.3d at 855.

[6] *Yes on Term Limits, Inc. v. Savage* did not address in express terms the severity of the burden. It nevertheless held that "strict scrutiny is the correct legal standard" where the government has limited the "quantum of [political] speech through its residency requirements for petition circulators." 550 F.3d at 1028.

531 F.3d at 1035–37; *Krislov*, 226 F.3d at 858–66.

Although no circuit court has upheld, post-*Meyer* and -*ACLF*, a *district*-residency restriction, a circuit-split has developed over the constitutionality of *state*-residency restrictions. *Compare, e.g.*, *Nader v. Brewer*, 531 F.3d 1028, 1034–38 (9th Cir. 2008) (invalidating state-residency requirement), *with Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 615–17 (8th Cir. 2001) (upholding state-residency requirement). The Eighth Circuit, however, is the only circuit that has *upheld* a state-residency requirement.

The rationale used to uphold *state*-residency requirements does not support the conclusion that a *district*-residency requirement is constitutional. In *Initiative & Referendum Institute v. Jaeger*, the Eighth Circuit upheld North Dakota's *state*-residency requirement because it advanced the state's "compelling interest in preventing fraud" by "ensuring that circulators answer to the Secretary's subpoena power."[7] 241 F.3d at 616. But regardless of whether a *state*-residency restriction is truly narrowly tailored (the Sixth, Seventh, Ninth, and Tenth Circuits thought otherwise), a *district*-residency restriction does not advance an anti-fraud interest *at all* because a state's subpoena power applies equally to all state residents, without regard to the congressional district in which they reside. Therefore, *Jaeger* only

[7] *Jaeger* may also be explained by the fact that North Dakota cited an incident where over 17,000 signatures had to be invalidated because of fraudulent activities by out-of-state petition circulators. 241 F.3d at 616. There are no such facts here.

serves to reinforce the illegitimacy of a *district*-residency restriction.

Further, even if *Jaeger* did apply here (and it does not), its reasoning and analysis were sparse at best. *See Nader v. Brewer*, 531 F.3d 1028, 1036–37 (9th Cir. 2008) (characterizing *Jaeger* as a "brief" opinion that the court "d[id] not find . . . persuasive"). *Jaeger* dedicated a single (Westlaw) page to its analysis, findings, and conclusion. *Jaeger*, 241 F.3d at 616–17. By contrast, every other circuit court to address the issue has, after undertaking a more thorough analysis, concluded that circulator-residency restrictions are unconstitutional, regardless of whether those restrictions be state-based, district-based, or city-based. *Yes on Term Limits*, 550 F.3d at 1027–31 (striking state-residency requirement); *Blackwell*, 545 F.3d at 474–77 (same); *Brewer*, 531 F.3d at 1034–38 (same); *Chandler*, 292 F.3d at 1241–44 (striking city-residency requirement); *Lerman*, 232 F.3d at 145–53 (striking political-subdivision-residency requirement); *Krislov*, 226 F.3d at 858–66 (striking district-residency requirement).

Moreover, the question here is distinct from the question the Eighth Circuit addressed in *Jaeger*. *Jaeger* held that out-of-state circulators could be banned from gathering petitions for a ballot initiative measure. 241 F.3d at 616–17. Whatever merit there is to that proposition, it has little if any bearing on whether the candidate himself—a resident of the Commonwealth—can be barred from circulating signature petitions in furtherance of his own candidacy.

Insofar as Lux and his supporters are aware, not a single court has held—as the district court held below—that circulator-residency restrictions are merely "ballot access provisions," (J.A. at 237), that "should generally be upheld," (J.A. at 236). *See Preserve Shorecliff Homeowners v. City of San Clemente*, 158 Cal. App. 4th 1427, 1443–44 (2008) ("We are aware of no case since [*ACLF*] and its quickly-gestated progeny of *Krislov*, *Lerman*, and [an Arizona court of appeals case] that has upheld a requirement of circulator residency in a given *political sub-division*.").

In sum, every federal circuit recognizes that *Meyer* and *ACLF* control the analysis. In every case but one, the circuits have applied *Meyer* and *ACLF* to strike down circulator-residency restrictions. And the only rationale (the anti-fraud interest) in the only case upholding a circulator-residency restriction (the state-residency restriction in *Jaeger*) is inapplicable here.

IV. Virginia's District-Residency Requirement Is Unconstitutional.

Virginia's district-residency requirement is subject to strict scrutiny because it severely burdens core political speech. *See*, *e.g.*, *ACLF*, 525 U.S. at 192 n.12; *Meyer*, 486 U.S. at 422–25, 428; *Yes on Term Limits*, 550 F.3d at 1027–31; *Blackwell*, 545 F.3d at 474–77; *Brewer*, 531 F.3d at 1034–38; *Chandler*, 292 F.3d at 1241–44; *Lerman*, 232 F.3d at 147–49; *Krislov*, 226 F.3d at 863. The district-residency requirement is unconstitutional because it is not narrowly tailored to any

compelling governmental interest.

When analyzing a constitutional challenge to a specific provision of a state's election law,

> a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983); *see also Doe v. Reed*, 130 S. Ct. 2811, 2814 (2010) ("'[T]he strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.'" (*quoting Davis v. FEC*, 128 S. Ct. 2759, 2775 (2008)).

This Court, however, need not start its analysis from scratch because the Supreme Court has consistently held that laws that severely burden political speech are subject to strict scrutiny, in which case the burden is on the government to prove that the law furthers a compelling interest and is narrowly tailored to achieve that interest. *Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010); *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 464 (2007) (*WRTL II*); *see also Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1191 (2008); *Clingman*

v. Beaver, 544 U.S. 581, 586 (2005); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 582 (2000); *ACLF*, 525 U.S. at 192 n.12; *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

Moreover, *Meyer* and *ACLF* provide the proper legal framework for scrutinizing laws that prescribe who may and may not circulate signature petitions. Under the *Meyer-ACLF* analysis, (1) petition circulation is recognized as core political speech; (2) the extent of the burdens imposed on that speech is measured by, among other things, looking to the number of potential circulators that are excluded by operation of the restriction; and (3) laws that substantially burden petition circulation are valid only if they are narrowly tailored to a compelling governmental interest, and the burden is on the government to make that showing. *ACLF*, 525 U.S. at 192–97 ("'State has failed to justify' the law (*quoting Meyer*, 486 U.S. at 428)); *Meyer*, 486 U.S. at 422–25, 428.

A. Petition Circulation Is Core Political Speech.

The district court below incorrectly assessed the impact of the district-residency requirement on protected First Amendment expression and association by suggesting the statute "imposed no restrictions on Lux as a candidate or advocate, but only as a signature attester." (J.A. at 234.) As a result, the district court referred to the district-residency requirement as a "ballot access provision[ ]" (J.A.

at 237) and subjected it to rational basis review (J.A. at 238).[8]

The district court's analysis is contrary to *Meyer* and *ACLF*, which held that petition circulation is "'core political speech'" because it involves "'interactive communication concerning political change.'" *ACLF*, 525 U.S. at 186 (*quoting Meyer*, 486 U.S. at 422). Because such political discourse is at the heart of the First Amendment, the First Amendment's protections are at their "'zenith.'" *ACLF*, 525 U.S. at 187 (*quoting Meyer*, 486 U.S. at 425).

B. The District-Residency Requirement Severely Burdens Political Speech and Therefore Is Subject to Strict Scrutiny.

Virginia's district-residency requirement imposes severe burdens on core political speech. First and foremost, it acts as an outright ban on Lux's ability to personally collect signatures. The fact that under the law Lux is "free" to delegate petition-circulation to others only emphasizes the fact that as to Lux himself, *the*

[8] The district court relied on *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), and applied rational basis review to the district-residency requirement. (J.A. at 13, 15.) *Burdick* held that "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 424 (citation omitted).

In *ACLF*, the Supreme Court held that restrictions on petition circulation are subject to strict scrutiny and refused to characterize such restrictions as "reasonable, non-discriminatory" restrictions. *ACLF*, 525 U.S. at 192–97. Notably, *ACLF* did not follow *Burdick*'s invitation to treat the petition-circulation restriction as a mere ballot access provision. Quite the contrary, by identifying petition-circulation as core political speech, *ACLF* held that regulations that prohibit people from circulating signature petitions are different in kind from ballot access provisions, such as signature thresholds or filing deadlines. *See ACLF*, 525 U.S. at 204–05.

ban is total and complete. That alone is a sufficient reason to find that the law severely burdens core political speech and is thus subject to strict scrutiny. But there are many more reasons, too.

The district-residency requirement excludes a substantial number of potential petition circulators. By so doing, it "limits the number of voices who [can convey Lux's] message and the hours they can speak and, therefore, limits the size of the audience they can reach." *Meyer*, 486 U.S. at 422–23; *accord ACLF*, 525 U.S. at 194–95. It has, in other words, "the inevitable effect of reducing the total quantum of speech on a public issue." *Meyer*, 486 U.S. at 423.

Virginia's voting-age population exceeds 5 million,[9] but only 480,000 live within the Seventh District.[10] The statute, then, prohibits 91% of Virginians from circulating petitions on behalf of Lux. By comparison, the voter-registration restriction ruled unconstitutional in *ACLF* prevented only 17% of the voting-age

[9] U.S. Dep't of Commerce, *Profiles of General Demographic Characteristics: 2000 Census of Population and Housing: Virginia* 1 (Table DP-1) (May 2001), *available at* www2.census.gov/census_2000/datasets/100_and_sample_profile/Virginia/2kh51.pdf.

[10] U.S. Dep't of Commerce, *Profiles of General Demographic Characteristics: 2000 Census of Population and Housing: Congressional District 7, Virginia (110th Congress)* (Table DP-1), *available at* www.factfinder.census.gov (110th Congressional District Summary File (100-Percent)).

population from circulating petitions.[11] 525 U.S. at 193 (2.3 million eligible voters, 400,000 unregistered). If a 17% reduction is severe, then a 91% reduction must also be severe.[12]

The Virginia law "decreases the pool of potential circulators as certainly as that pool is decreased by the prohibition" against paid circulators (*Meyer*) or non-registered voters (*ACLF*). *ACLF*, 525 U.S. at 194. In all three cases, the result is the same—a class of persons is prohibited from engaging in core political speech. And in this case, the prohibition extends to the candidate himself.

The district court ignored the fact that the district-residency requirement "drastically reduces the number of persons, both volunteer and paid, available to circulate petitions," *ACLF*, 525 U.S. at 193, and thus has the "inevitable effect of reducing the total quantum of speech on a public issue," *Meyer*, 486 U.S. at 423. In other words, the central burden identified in *Meyer* and *ACLF* was absent from the district court's analysis.

The district-residency requirement burdens speech and association in other

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[11] *ACLF* struck the voter registration requirement even though it was "'exceptionally easy to register.'" *ACLF*, 525 U.S. at 195 (citation omitted). The only way Lux can become a qualified circulator is to move his residence to the Seventh District—a significantly more difficult undertaking than registering to vote.

[12] For an independent candidate, with modest financial resources, and who relies on significant volunteer support, any reduction in the pool of eligible circulators is a substantial burden. *Krislov*, 226 F.3d at 862.

ways, too. The First Amendment protects Lux's ability to choose what he believes to be the most effective method of advancing his candidacy, *Meyer*, 486 U.S. at 424, and the statute here thwarts that. The record demonstrates that candidates prefer to circulate their own petitions. For example, Catherine Crabill, a former candidate for the U.S. House of Representatives, noted that voters were impressed that she personally collected signatures. (J.A. at 176 (They said it was "refreshing . . . to see me out there personally gathering these signatures in the hot, humid, uncomfortable conditions.").) And Floyd Bayne, another independent candidate running for Congress in the Seventh District (the same district in which Lux sought to run), personally collected nearly 1,700 of his 1,991 signatures.[13] (J.A. at 222.) In other words, personal petition circulation by a candidate is just what *Meyer* said it was: "the most effective, fundamental, and perhaps economical avenue of political discourse." *Meyer*, 486 U.S. at 424. For Lux, the district-residency requirement takes that option off the table.

The district-residency requirement also restricts Lux's ability to associate with individuals who sign his petition for the purpose of working together to elicit po-

[13] Floyd Bayne is an independent candidate running for Congress in the Seventh District in the November 2010 election. To qualify as a candidate on the ballot, Bayne had to comply with the same requirements Lux had to comply with, with the exception that Bayne was permitted to witness signature petitions in furtherance of his own candidacy (because he resides in the Seventh District). Bayne personally collected 1,692 of the 1,991 signatures he submitted to the Board. (J.A. at 222.) The Board did not reject the signatures he personally witnessed.

litical change. *See Meyer*, 486 U.S. at 421–22 (First Amendment protects right to advocate political change). By the same token, it restricts his supporters' ability to associate in a meaningful way with the candidate of their choice for the purpose of eliciting political change (i.e., by helping their preferred candidate appear on the ballot). To these non-candidate citizens, this act of association—aimed at directly affecting public policy by influencing who is elected to public office—may be the most significant and fundamental avenue of political expression at their disposal. *See Celebrezze*, 460 U.S. at 787–88 ("[V]oters can assert their preferences only through candidates or parties or both. . . . [A]n election campaign is an effective platform for the expression of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens."). The district court opinion ignores the burdens on Lux's supporters, three of whom joined the suit, who have been denied the right to help their preferred candidate appear on the ballot by signing a petition circulated by Lux himself.

The statute decreases the likelihood that Lux will qualify for the ballot, making it more difficult for him and his supporters to make his campaign the focus of state-wide attention. *See ACLF*, 525 U.S. at 194–95; *Meyer*, 486 U.S. at 422–23 (recognizing burden imposed by Colorado law that limited plaintiffs' ability to make their ballot proposal "the focus of statewide discussion").

In spite of all these substantial burdens on political speech and association, the

district court concluded that the burdens of the district-residency requirement are not severe because Virginia's statute leaves people free to pursue other more burdensome avenues of communication. (J.A. at 234–35.) Specifically, the district court discounted the burdens by observing that "[t]he witness need not even be a registered voter" and adding that "there is no requirement that petition circulators wear identification badges or register in any fashion." (J.A. at 234–35.) *Meyer*, however, rejected this analytical approach, and held that the proper focus is on what activity is *excluded*, not what activity remains permissible under the statute.[14] *Meyer*, 486 U.S. at 424. The government need not completely ban speech to run afoul of the First Amendment's command to "make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

In sum, Virginia's district-residency requirement severely burdens protected freedoms of speech and association, and therefore the burden is on the Board to prove that the law is narrowly tailored to a compelling governmental interest. *See, e.g.*, *WRTL II*, 551 U.S. at 464; *ACLF*, 525 U.S. at 192 n.12; *Meyer*, 486 U.S. at 425; *Yes on Term Limits*, 550 F.3d at 1028; *Krislov*, 226 F.3d at 863; *Lerman*, 232

[14] "[P]rohibiting candidates from using signatures gathered by forbidden circulators does not specifically preclude these circulators from speaking for the candidates. But by making an invitation to sign the petition a thoroughly futile act, it does prevent some highly valuable speech from having any real effect. Robbed of the incentive of possibly obtaining a valid signature, candidates will be unlikely to utilize non-registered, non-resident circulators to convey their political message to the public." *Krislov*, 226 F.3d at 861 n.5.

F.3d at 149.

C. The District-Residency Requirement Fails Strict Scrutiny.

Virginia's district-residency requirement fails strict scrutiny because the Board cannot demonstrate that it is narrowly tailored to a compelling governmental interest. A law can fail to be narrowly tailored in one of several ways. It may be overinclusive if it restricts speech that does not implicate the government's compelling interest in the statute. *Simon & Schuster v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121 (1991). It may be underinclusive if it fails to restrict speech that does implicate the government's interest. *Republican Party of Minn. v. White*, 536 U.S. 765, 779–80 (2002). Finally, it is not narrowly tailored if the state's compelling interest can be achieved through a less restrictive means. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 (1990).

Relying on *Davis*, the district court held that the district-residency requirement served a single interest—"assuring some indication of geographic as well as numerical support by demonstrating that within each congressional district there is at least one 'activist' sufficiently motivated to shoulder the burden of witnessing signatures." (J.A. at 235 (*quoting Davis*, 766 F.2d at 869–70).) This is just another way of describing the "modicum-of-support interest," which is designed to prevent frivolous candidacies and overcrowding on the ballot. (J.A. at 237.) As discussed above, *Meyer* held that the modicum-of-support interest is adequately protected by

the signature requirement. 486 U.S. at 425–26; *see also ACLF*, 525 U.S. at 205 (signature requirement protects interest in requiring candidates to show "grass roots support"). Here, Virginia's requirement that Lux submit at least 1,000 valid signatures from qualified voters adequately protects Virginia's modicum-of-support interest.

Moreover, Virginia failed to present any evidence that it has a ballot-crowding problem, let alone any evidence that a district-resident "activist" requirement would alleviate this problem in a direct and material way. (*See* J.A. at 105 ("Virginia has never suffered from a crowded ballot in general elections for the United States House of Representatives. The most crowded general election ballot for any regularly-scheduled United States House of Representatives election in Virginia history was in 1904 when there were six candidates in Virginia's Third Congressional District.").)

When strict scrutiny applies, the burden is on the government to prove the constitutionality of the statute. *See, e.g.*, *WRTL II*, 551 U.S. at 464. And to satisfy its burden, the government must provide more than speculative, categorical answers. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006) (strict scrutiny not satisfied by "categorical approach," but requires case-by-case determination). "It must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in

a direct and material way." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (citation and internal quotation marks omitted). It must, in other words, "do more than simply posit the existence of the disease sought to be cured." *Id.*

The Board's argument suffers from the same deficiency that Colorado's argument suffered from in *ACLF*: "[T]he State has failed to satisfy its burden of demonstrating that [ballot overcrowding in Virginia] is a real, rather than a conjectural, problem." *See Turner*, 512 U.S. at 664. And furthermore, even if Virginia had such a problem (and there is no evidence that it does), the district-residency requirement remains unconstitutional because increasing the number of signatures required for ballot access is a less restrictive means of supporting this interest. *See Meyer*, 486 U.S. at 425–26.

In addition, the district-residency requirement is underinclusive because it does not prohibit paid petition circulators (indeed, it cannot under *Meyer*). By allowing candidates to pay petition circulators, Virginia allows candidates to secure a place on the ballot without demonstrating any "activist" support at all. Paid petition circulators work for a financial reward, not to demonstrate support for a candidate, and the hiring of paid circulators therefore reflects nothing more than the strength of a candidate's financial backing. *See White*, 536 U.S. at 780 ("[Statute] is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.").

The district-residency requirement is also underinclusive because it does not require *all* candidates to demonstrate "activist" support. Candidates that live within the district are permitted to circulate their own petitions. Va. Code § 24.2-506. Here, two men sought to run as independent candidates in the Seventh District race in 2010—Herb Lux and Floyd Bayne. Both men satisfied the qualifications for Congress set forth in the Constitution, and both personally collected more than 1,000 signatures. (J.A. at 10, 220, 222.) However, only one was certified for the ballot. The only difference between the two is that Floyd Bayne resides within the Seventh District and Herb Lux does not. If Virginia was serious about requiring activist support, it would prohibit *all* candidates from circulating their own petitions. *See White*, 536 U.S. at 780.

Finally, in briefing before the district court, the Board tried to downplay the underinclusiveness of the statute by arguing that "from [its] view, a candidate can be an activist circulator in his own district if necessary," and that "the thrust of *Davis* was to have *someone in the district who will actively promote the candidacy*." (J.A. at 130 (emphasis in original).) Such a justification, however, is nothing more than disguised political protectionism. Its unabashed aim is to "help[ ] . . . prevent non-residents from influencing politics within the district." *See Lerman*, 232 F.3d at 152. Far from being compelling, such an interest is not legitimate at all because it contravenes the underlying intent and purpose of the First

Amendment. *Id.*[15] The Second Circuit explained:

> A desire to fence out non-residents' political speech—and to prevent both residents and non-residents from associating for political purposes across district boundaries—simply cannot be reconciled with the First Amendment's purpose of ensuring "the widest possible dissemination of information from diverse and antagonistic sources."

Id. (*quoting Krislov*, 226 F.3d at 866); *see also Yes on Term Limits*, 550 F.3d at 1029 n.2 (rejecting state's purported interest in "restricting the process of self-government to members of its own community" and adding that to accept such an interest would have "far-reaching consequences" (internal quotation marks omitted)); *Krislov*, 226 F.3d at 866 ("question[ing the] legitimacy" of a state's interest in "preventing citizens of other States from having any influence" on its elections).

Virginia is not the first state to argue that circulator-residency restrictions are a necessary means to advance an interest in ensuring that only district voters be allowed to influence district politics. *See, e.g.*, *Krislov*, 226 F.3d at 865. This argument, however, conflates a state's legitimate interest in ensuring that district residents alone be permitted to *select and elect* their representatives, with the wholly illegitimate interest of *banning non-resident political speech*.[16] Because Virginia's

[15] It is important to note that a congressman's vote affects everyone in the Commonwealth, and for that matter in the country, not just those individuals within the boundary of a district.

[16] To the extent the Commonwealth contends that it has an interest in ensuring that only district residents be permitted to *select and elect* their representatives, Appellants agree. *See Supreme Court of N.H. v. Piper*, 470 U.S. 274, 282 n.13

district-residency requirement advances only the latter, illegitimate interest, it cannot survive strict scrutiny.

Conclusion

For the foregoing reasons, Lux and his supporters respectfully request that this Court declare Virginia Code section 24.2-506 unconstitutional, facially and as applied, and permanently enjoin enforcement of the same.

(1985) ("A State may restrict to its residents, for example, both the right to vote, and the right to hold state elective office." (citation omitted)); *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68–69 (1978) ("[A] government unit may legitimately restrict the right to participate in its political processes to those who reside in its borders."). But that valid interest is fully protected by several other provisions of Virginia law. Specifically, Virginia prohibits non-district residents from signing nominating petitions, voting in primary elections, and voting in the general election. Va. Code §§ 24.2-506 (only qualified voters may sign candidate petitions); 24.2-101 (qualified voter must be a resident of the Commonwealth and of the precinct in which he offers to vote); 24.2-400 (a qualified voter who is registered to vote is "entitled to vote in the precinct where he resides"); 24.2-530 (who may vote in primary).

Request for Oral Argument

Appellants respectfully request that this case be submitted to oral argument before a panel of this Court.[17]

October 26, 2010

Respectfully submitted,

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[17] Appellants also note that another case currently pending in this Court, *Libertarian Party of Virginia v. Virginia State Board of Elections*, No. 10-2175, involves a similar challenge to the district-residency requirement found in Virginia Code section 24.2-506.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 10-1997 **Caption:** Lux, et al. v. Rodrigues, et al.

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Attorney for Lux, et al. (Appellants)

Dated: 10/26/2010

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I hereby certify that on October 26, 2010, I filed the appropriate number of paper copies of the foregoing document with the Clerk of the Court, and electronically filed the same document with the Clerk of Court using the CM\ECF System.

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Virginia Code section 24.2-506

Pursuant to Federal Rule of Appellate Procedure 28(f), Appellants hereby reproduce Virginia Code section 24.2-506 in its entirety. The challenged portion of the statute appears in italics.

***

Petition of qualified voters required; number of signatures required; certain towns excepted

The name of any candidate for any office, other than a party nominee, shall not be printed upon any official ballots provided for the election unless he shall file along with his declaration of candidacy a petition therefor, on a form prescribed by the State Board, signed by the number of qualified voters specified below after January 1 of the year in which the election is held and listing the residence address of each such voter. Each signature on the petition shall have been witnessed by a person who is himself a qualified voter, or qualified to register to vote, *for the office for which he is circulating the petition* and whose affidavit to that effect appears on each page of the petition.

Each voter signing the petition may provide on the petition the last four digits of his social security number, if any; however, noncompliance with this requirement shall not be cause to invalidate the voter's signature on the petition.

The minimum number of signatures of qualified voters required for candidate petitions shall be as follows:

1. For a candidate for the United States Senate, Governor, Lieutenant Governor, or Attorney General, 10,000 signatures, including the signatures of at least 400 qualified voters from each congressional district in the Commonwealth;

2. For a candidate for the United States House of Representatives, 1,000 signatures;

3. For a candidate for the Senate of Virginia, 250 signatures;

4. For a candidate for the House of Delegates or for a constitutional office, 125

signatures;

5. For a candidate for membership on the governing body or elected school board of any county or city, 125 signatures; or if from an election district not at large containing 1,000 or fewer registered voters, 50 signatures;

6. For a candidate for membership on the governing body or elected school board of any town which has more than 1,500 registered voters, 125 signatures; or if from a ward or other district not at large, 25 signatures;

7. For membership on the governing body or elected school board of any town which has 1,500 or fewer registered voters, no petition shall be required;

8. For a candidate for director of a soil and water conservation district created pursuant to Article 3 (§ 10.1-506 et seq.) of Chapter 5 of Title 10.1, 25 signatures; and

9. For any other candidate, 50 signatures.