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

REPLY BRIEF OF APPELLANTS

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Introduction

Plaintiffs-Appellants Herb Lux, Stephen Cruse, Andrew Mikel, and Eugene Foret (hereinafter "Lux and his supporters") respectfully reply to the Response Brief of Defendants-Appellees Nancy Rodrigues, Jean Cunningham, and Harold Pyon (hereinafter "Board" or "Commonwealth") by making the following arguments and observations.

Initially, Lux and his supporters note that this case presents the question of whether an otherwise qualified candidate for the U.S. House of Representatives can be banned by law from collecting signatures in furtherance *of his own candidacy*. Such a restriction is not even rational. It defies common sense. And it does not even come close to passing the strict scrutiny that this Court must apply.

The Board has advanced essentially two primary arguments, neither of which addresses the core merits of the case: (1) that the appeal is moot; and (2) that *Libertarian Party of Virginia v. Davis*, 766 F.2d 865 (4th Cir. 1985), remains binding authority because it has not been undermined by subsequent U.S. Supreme Court precedent. (*See* Resp. Br. 10–25.) Those arguments are fully addressed below.

Lux and his supporters, however, wish to emphasize that the proper framework for analyzing this case, i.e., the *Meyer-ACLF* framework prescribed by the Supreme Court, is meticulously laid out, step by step, in their opening brief. (*See* Opening Br.

25–39.) The Board's position, of course, is that the *Meyer-ACLF* framework does not apply. But the Board made the strategic decision *not to argue*, in the alternative, that even if the *Meyer-ACLF* framework did apply, that it should still prevail. (For example, the Board made no effort to explain why the challenged statute should prevail against strict scrutiny analysis.)

In short, because this Reply Brief is focused on replying to arguments raised by the Board in its Response Brief, this brief necessarily focuses on refuting the twin arguments that *Davis* is still controlling and that the *Meyer-ACLF* analysis does not apply here. For briefing on exactly how the *Meyer-ACLF* framework applies in this case, the Court is referred to the Opening Brief, pages 25 through 39.

Argument

I. This Appeal Is Not Moot.

This appeal is not moot because it "fit[s] comfortably within the established exception to mootness for disputes capable of repetition, yet evading review." *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (*WRTL II*); *see also Brooks v. Vassar*, 462 F.3d 341, 348 (4th Cir. 2006). The capable-of-repetition-yet-evading-review exception applies where "'(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action

again.'" *Id.* (*quoting Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). This appeal satisfies both prongs of that test.

A. The Short Time Frame for Deciding Election Cases Satisfies the "Evading Review" Prong.

In this action challenging the constitutionality of Virginia's district-residency requirement, Va. Code § 24.2-506, "it would be entirely unreasonable to expect that [Lux and his supporters] could have obtained *complete judicial review* of [their] claim[ ] in time" for them to obtain just relief. *See WRTL II*, 551 U.S. at 462 (emphasis added; citation and internal quotation marks omitted). Lux and his supporters filed suit on July 13, 2010, less than three weeks after they were notified that the signatures Lux personally circulated would not be counted, and that, consequently, Lux's name would not appear on the November 2010 ballot. In late August 2010, Lux and his supporters lost in the district court; they are now appealing that decision to this Court. Yet, before this Court has even had a chance to consider the merits of the appeal, the 2010 election has come and gone.

Moreover, this appeal may not be finally decided even after *this* stage of the litigation. There awaits possible review by an en banc panel of this Court, as well as possible review by the U.S. Supreme Court. Thus, although Lux and his supporters did all in their power to obtain some measure of judicial relief before the election, it is evident that obtaining "complete judicial review"—from the district court all the

way up to, potentially, the U.S. Supreme Court—*before the 2010 election*, was not even a possibility. *Cf. Citizens United v. FEC*, 130 S. Ct. 876, 895 (2010) ("Today, Citizens United finally learns, two years after the fact, whether it could have spoken during the 2008 Presidential primary—long after the opportunity to persuade primary voters has passed.").

Interestingly, one of the main arguments advanced by the Board in its briefing *before the election* was that Lux and his supporters had run out of time to challenge the district-residency requirement (for purposes of obtaining relief before the 2010 election). In briefing filed in this Court on September 8, 2010—nearly two full months before Election Day—the Board argued that an injunction to print Lux's name on the ballot would cause "real harm" to Virginia and her citizens by "disrupt[ing] the orderly conduct of an election." (Doc. 20-1, at 20.) Thus, one can see that the available Time frame to resolve a legal challenge involving an election is, in reality, often cut short many weeks before the election takes place. This fact makes it all the less likely that a dispute could be completely resolved in time for adequate relief *before* an election.

B. This Case Is "Capable of Repetition."

Lux and his supporters also satisfy the capable-of-repetition prong of the test. Specifically, they are able to demonstrate a reasonable expectation that, in the future, they will again be constrained by Virginia's district-residency requirement. *See*

Krislov v. Rednour, 226 F.3d 851, 858 (7th Cir. 2000) ("no doubt" that case was not moot where candidate "articulated an interest" in running for office again); *see also Lerman v. Bd. of Elections in the City of N.Y.*, 232 F.3d 135, 141 (2d Cir. 2000) (mootness argument "necessarily fails" because the issues presented "'will persist in future elections, and within a time frame too short to allow resolution through litigation'" (*quoting Fulani v. League of Women Voters Educ. Fund*, 882 F.2d 621, 628 (2d Cir. 1989))).

1. As to Lux, the Case Is "Capable of Repetition."

The Board argues separately that the appeal is moot (1) as to Lux and (2) as to his supporters. As to Lux, it raises the novel argument that because Virginia is scheduled to redistrict its electoral districts in 2011, this case is not reasonably capable of repetition. The Board argues that it is *possible* that by virtue of the redistricting, Lux, who currently resides in the First District, will end up in the Seventh District (where he sought to run for office in 2010). And if that scenario plays out, the Board concludes, the case will be moot (as to Lux) because Lux would no longer be banned from circulating his own petitions if, in the future, he ran for office in the Seventh District. (Resp. Br. 14–15.)

The Board's argument, though creative, falls flat for at least four reasons. First, and most obviously, the Board is speculating as to how the General Assembly will redistrict. The Board admits as much in its brief. (Resp. Br. 14 (district boundaries are

"presently unknown and unknowable").) Lux has indicated an interest in running for office again (J.A. at 12), and a case that is otherwise capable of repetition yet evading review does not suddenly become moot because a speculative future event *might* happen.

Second, even if the Board's hypothetical scenario did come to pass (and there is no reason to anticipate that it will), there is nothing in the Constitution or anywhere else that prohibits Lux from seeking a seat in the U.S. House of Representatives from one of Virginia's other congressional districts. In 2010, Lux evaluated the political landscape and chose to run in the Seventh District. In 2012, depending on where Lux feels he has the best chance to win and where he can make the greatest impact, he may very well choose to run in some other district that is not the district of his residence.

Third, even if the district boundaries were redrawn such that Lux became a resident of the Seventh District, and even if Lux chose to run again in the Seventh District, even then, the district-residency requirement would operate to Lux's harm because he has indicated a desire, in the future, "to recruit other petition circulators, including individuals who live outside Virginia's Seventh Congressional District, to circulate petitions on his behalf." (J.A. at 12.)

And fourth, even if Lux did not run at all in the 2012 election, this case would not be moot. Although courts have made "canonical statements" to the effect that the

capable-of-repetition-yet-evading-review exception requires that the dispute giving rise to the case be capable of repetition *by the same plaintiff*, *e.g.*, *WRTL II*, 551 U.S. at 462, "the courts, perhaps to avoid complicating lawsuits with incessant interruptions to assure the continued existence of a live controversy, do not interpret the requirement literally, at least in abortion and election cases." *Majors v. Abell*, 317 F.3d 719, 723 (7th Cir. 2003); *see Dunn v. Blumstein*, 405 U.S. 330, 333 n.2 (1972); *cf. Krislov*, 226 F.3d at 858; *but cf. Van Wie v. Pataki*, 267 F.3d 109, 114–15 (2d Cir. 2001).

As the Seventh Circuit has elaborated, "A candidate plaintiff no more has a duty to run in every election in order to keep his suit alive than an abortion plaintiff has a duty to become pregnant again at the earliest possible opportunity in order to keep her suit alive. Politicians who are defeated in an election will often wait years before running again; obviously this doesn't show they're not serious about their political career. . . . If a suit attacking an abortion statute has dragged on for several years after the plaintiff's pregnancy terminated, the court does not conduct a hearing on whether she may have fertility problems or may have decided that she doesn't want to become pregnant again. And similarly in an election case the court will not keep interrogating the plaintiff to assess the likely trajectory of his political career." *Majors*, 317 F.3d at 722–23.

The proposition that candidates need not show that they plan to run again for

office to overcome a mootness challenge is further buttressed by *Moore v. Ogilvie*, 394 U.S. 814 (1969), the first U.S. Supreme Court case to establish that ballot access cases are not mooted merely because the election is over. There, the Court affirmed its jurisdiction over the case, *despite the fact that the plaintiffs there, who were seeking political office in the 1968 election, had made no assertion that they "intend[ed] to participate as candidates in any future Illinois election." Id.* at 819 (Stewart, J., dissenting) (emphasis added). The Court held, "[W]hile the 1968 election is over, the burden . . . placed on the nomination of candidates for statewide offices remains and controls future elections, as long as Illinois maintains her present system . . . . The problem is therefore 'capable of repetition, yet evading review.'" *Id.* at 816 (*quoting S. Pac. Terminal Co. v. Interstate Commerce Comm'n*, 219 U.S. 498, 515 (1911)); *see also Richardson v. Ramirez*, 418 U.S. 24, 35 (1974) (pointing out that the controversy in *Moore v. Ogilvie* was not moot even though "the particular candidacy [there] was not apt to be revived in a future election").

Although this case would not be moot even if Lux were *not* planning to run for office again, the fact that Lux has indicated that he is "considering running in a future election" (J.A. at 12) makes the mootness question an easy one. This appeal is not moot, and this Court therefore has jurisdiction despite the fact that the 2010 election has come and gone.

2. As to Lux's Supporters, the Case Is "Capable of Repetition."

The Board also argues that the appeal is moot as to Lux's supporters who have joined this suit. Each of Lux's supporters, however, has indicated a desire to associate, in the future, with their preferred candidates by circulating and signing candidate petitions on their behalf. (J.A. at 12.) They expect, not unreasonably, that they will be ineligible to sign or circulate at least some candidate petitions because of the ban imposed by Virginia's district-residency requirement. *Id.*

The Board's mootness arguments, both as to Lux and as to his supporters, seem to stem from an erroneous legal assumption: namely, the Board has wrongly concluded that the capable-of-repetition-yet-evading-review doctrine requires that every detail of the case repeat itself. (*See* Resp. Br. 12–14.) When faced with a similar mootness argument raised by the FEC in an election case (i.e., the argument that everything has to come together again in just the same way or else the case is moot), the Supreme Court retorted, "History repeats itself, but not at the level of specificity demanded by the FEC." *WRTL II*, 551 U.S. at 463. The key to the mootness question in this case is whether there is a reasonable probability that, in the future, Virginia's district-residency requirement will again be enforced to restrict Lux and his supporters' free speech and associational rights. There is no doubt that such a showing has been made.

II. Lux's Supporters Have Standing.

The Board also contends that Lux's supporters lack standing altogether. (*See* Resp. Br. 15.) Their standing, however, is not even a close question. Article III standing requires every plaintiff to show that he has suffered an "injury in fact," that the challenged action caused the injury, and that the injury can likely be redressed by the cause of action. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992).

Lux's supporters who helped circulate and sign his candidate petitions[1] suffered a cognizable injury when the Board refused to count the signatures Lux personally circulated. Their efforts in circulating and signing Lux's petitions were not a mere symbolic gesture of goodwill. They had a concrete purpose: to help get Lux's name on the ballot. Lux's supporters were not content, as the Board confusingly insinuates in its brief, to sign and circulate signature petitions, only to be left with the option of voting for Lux as a write-in candidate. (*See* Resp. Br. 15.) Lux was their candidate and they wanted him on the ballot. *Cf. U.S. Terms Limits, Inc. v. Thornton*, 514 U.S. 779, 830–31 (1995) (even the most entrenched incumbent will have difficulty winning a write-in campaign).[2]

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[1] All three supporters circulated petitions on behalf of Lux. Only one supporter, Eugene Foret, signed a candidate petition circulated by Lux himself. (J.A. at 10.)

[2] In *U.S. Terms Limits, Inc. v. Thornton*, 514 U.S. 779, 830 n.43 (1995), the Supreme Court noted that in over 1,300 U.S. Senate elections since the passage of the Seventeenth Amendment in 1913, only one had been won by a write-in candi-

The Board's enforcement of the district-residency restriction, therefore, hurt not only Lux himself, who was denied a place on the ballot, but also all his supporters who had worked and associated together for the very purpose of helping their preferred candidate appear on the ballot. *See Anderson v. Celebrezze*, 460 U.S. 780, 787–88 (1983) ("[V]oters can assert their preferences only through candidates or parties or both. . . . The exclusion of candidates . . . burdens voters' freedom of association, because an 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."); *Lubin v. Panish*, 415 U.S. 709, 716 (1974) (voters assert their preferences through candidates).

Their injury is directly traceable to the enforcement of the district-residency restriction; and it is absolutely redressable by a court order declaring the challenged

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date. In 2010, Lisa Murkowski of Alaska became the first person to win a U.S. Senate seat as a write-in candidate since Strom Thurmond of South Carolina did it in 1954. Ken Smith, *Murkowski on the Brink of History: Write-in Candidate May Be Second Ever to Win U.S. Senate Seat*, Turnagain Times, Nov. 4, 2010, at www.turnagaintimes.com/current%20issue/2010-11-04/senator-murkowski.html.

The fact that Murkowski was able to pull off the improbable, however, has little bearing on this case. Not only was Murkowski an incumbent-candidate and a strong contender in her party's primary election, she also had the good fortune of having a household name in Alaska politics. Her father, Frank Murkowski, served as a U.S. Senator from Alaska for more than twenty years, and as governor of the state from 2002 to 2006. The Murkowskis are to Alaska what the Kennedys are to Massachusetts.

An independent candidate like Herb Lux has none of those things going for him. His chances of winning as a write-in candidate are, for all practical purposes, nil.

provision unconstitutional and enjoining its enforcement.

Furthermore, even if Lux's supporters did not suffer a cognizable injury of their own (and they did), they would still have standing here because of the First Amendment exception to the ordinary rule that a party may assert only a violation of its own rights. In the First Amendment context, "litigants are permitted to challenge a statute not [only] because their own rights of free expression are violated, but [also] because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Virginia v. Am. Booksellers Assoc., Inc.*, 484 U.S. 383, 392–93 (1988) (citation, internal quotation marks, internal brackets, and ellipses omitted); *see also Majors*, 317 F.3d at 722 ("[A] plaintiff who is harmed by the infringement of another person's right of free speech has standing to challenge that infringement.").

Here, Lux's supporters (and all Virginians, for that matter) were harmed by the application of Virginia Code section 24.2-506, which operated, in this case, to infringe on a candidate's free speech and associational rights—and, in perhaps countless unknown other cases, to induce would-be candidates and supporters to refrain from protected speech and association activities for fear of violating the law.

Lux and his supporters therefore have standing to vindicate their own rights, as well as those of ordinary citizens not before this court.

III. *Davis* Is Not Binding on this Panel.

The Board all but concedes that Lux and his supporters should win this appeal if *Libertarian Party of Virginia v. Davis*, 766 F.2d 865 (4th Cir. 1985), does not control the outcome. In its response brief, the Board dedicates all of *one paragraph* to its argument that it should prevail "[e]ven if *Davis* had never been written." (Resp. Br. 26.)

To quote Kipling, the Board has "risk[ed] it [all] on one turn of pitch-and-toss."[3] Unless *Davis* controls, the Board cannot prevail. *Davis* does not control.

A. *Davis* Is Distinguishable.

Davis is distinguishable from this case. Lux and his supporters made that argument in their opening brief (*see* Opening Br. 7–10), and the Board did not make a serious effort to refute it. The entirety of the Board's counter-argument on this point is that, at oral argument before the district court, counsel for Lux and his supporters conceded that *Davis* "framed" the constitutional question in the same sort of way that it is framed here. (Resp. Br. 3–4.)

In other words, *Davis*, like this case, dealt with a First Amendment challenge to a district-residency requirement. But that similarity, alone, does not close the book. As explained in the Opening Brief, the case here, because of its *factual* underpin-

[3] Rudyard Kipling, "If," *available at* http://poetry.poetryx.com/poems/1229/ (last visited Dec. 2, 2010).

nings, is distinct in several respects from *Davis*. (*See* Opening Br. 7–10.) Most notably, this case deals with a candidate who has been banned from gathering signatures *in furtherance of his own candidacy*. *Davis* did not have to confront that bewildering application of the law.

B. *Meyer* Is Directly Contrary to *Davis*.

Even if this Court does not distinguish *Davis*, however, it is still not bound by *Davis*. Like any other panel decision of this Court, *Davis* would ordinarily be binding on this panel. *Etheridge v. Norfolk & W. Ry. Co.*, 9 F.3d 1087, 1090 (4th Cir. 1993). It is not binding, however, because "'a superseding contrary decision of the Supreme Court'" has "specifically rejected the reasoning on which [it] was based." *Id.* at 1090–91 (*quoting Busby v. Crown Supply, Inc.*, 896 F.2d 833, 840–41 (4th Cir. 1990)). Specifically, *Meyer v. Grant*, 486 U.S. 414 (1988), rejected the very reasoning on which *Davis* was based. And eleven years later, *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182 (1999) (*ACLF*), reaffirmed *Meyer*.

Meyer held that a state may not, consistent with the First Amendment, prohibit a candidate from using paid circulators rather than activists. *Meyer*, 486 U.S. at 415–16. *Davis* held just the opposite. *Davis* held, against a First Amendment challenge, that restricting the circulation of candidate petitions to only district residents is a constitutionally legitimate way of ensuring "activist" support. *Davis*, 766 F.2d at 869–70. In other words, per *Meyer*, candidates *cannot be forced* to use activists to

collect signatures, but per *Davis*, the government *can force* a candidate to use activists to collect signatures.

Meyer held that an activist requirement violated the First Amendment; *Davis* held that an activist requirement did not violate the First Amendment. *Meyer* rejected an activist requirement; *Davis* enforced one. *Meyer* rejected the state's asserted interest in activist support *because of* the corresponding signature requirement; *Davis* upheld the state's asserted interest in activist support *in spite of* the corresponding signature requirement. *Meyer* applied *strict scrutiny* because it viewed restrictions on who may serve as petition circulators as imposing severe burdens on "core political speech"; *Davis* applied *rationale basis review* because it viewed restrictions on who may serve as petition circulators as imposing minimal burdens on speech. (*See* Opening Br. 10–14.)

The cases are in direct tension, and only one of them can stand. Under *Etheridge*, 9 F.3d at 1090–91, it is *Davis* that must give way.

C. *Meyer* and *ACLF* Are Not Distinguishable on the Ground that They Were Ballot Initiative Cases.

Because *Meyer* and *ACLF* are so directly contrary to *Davis*, the Board is forced to attempt to distinguish them from this case. The main thrust of the Board's argument is that *Meyer* and *ACLF* are distinguishable because this case involves petition circulation for a *candidate*, whereas those cases dealt with petition circulation for a

ballot initiative. (Resp. Br. 19–20, 22–25.)

The Board argues that because initiative petitions "implicate more speech interests than candidate petitions" (Resp. Br. 25), to invoke *Meyer* or *ACLF* here is to prove too much. *Meyer* and *ACLF* treated petition circulation as "core political speech," invoked strict scrutiny against laws that restricted large classes of people from circulating petitions, and struck them down against arguments that they were needful measures to show "activist" support. (*See* Opening Br. 10—18.) But, the Board asserts, *Meyer* and *ACLF* did all of that because, and only because, those cases were dealing with *ballot initiative* petitions; if they had arisen in the context of *candidate* petitions, they would have come out the other way.

In support of its position (that candidate petitions merit less constitutional protection than ballot initiative petitions), the Board is unable to cite a single case. Nor is it able to proffer any reasoning. The Board has not explained *why* circulating petitions for a ballot initiative "implicate[ ] more speech interests" than circulating petitions for a candidate, nor can Lux and his supporters think of any reason why that would be the case.

Courts have confronted the Board's argument before. And they have rejected it. In *Krislov v. Rednour*, for example, the Seventh Circuit rejected the argument that *Meyer* and *ACLF* were "distinguishable" because "they involved ballot access petitions for initiatives and not candidates." 226 F.3d at 861. To the extent the distinction

was relevant at all, the Court thought "it suggest[ed] that the burden on the candidates [was] even greater than that placed on those who circulate petitions for ballot initiatives" because "the ballot initiative proponent will generally seek support for the one narrow issue presented in the initiative, while the typical candidate embodies a broad range of political opinions, and thus those who solicit signatures on their behalf must speak to a broader range of political topics." *Id.* The Court concluded, "By precluding a class of people from soliciting signatures on behalf of a particular candidate, th[is] . . . law has the potential to squelch a greater quantity and broader range of political speech than laws which only restrict initiative proponents." *Id.* at 861–62.

And the Second Circuit, in *Lerman v. Board of Elections in the City of New York*, came to the same conclusion—namely, that to the extent the distinction was relevant at all, it showed that circulating petitions on behalf of candidates should merit *greater* First Amendment protection than circulating ballot initiative petitions. 232 F.3d at 148–49.

In this case, the Board recognizes, as it must, that none of the federal circuits to address this issue, whether directly or indirectly, has agreed with its position. It is thus left to argue that those circuits which have declined to distinguish *Meyer* and *ACLF* on the basis of candidate versus ballot initiative petitioning (i.e., all the circuits that have addressed the issue) have "reflexively applied" *Meyer* and *ACLF*. (Resp. Br. 22.) Nevertheless, given *Krislov*'s and *Lerman*'s detailed explanation, cited above,

and the Board's corresponding lack of explanation, it appears that it is not the circuit courts that have "reflexively applied" *Meyer* and *ACLF*, but the Board that has "reflexively rejected" *Meyer* and *ACLF*.

D. *ACLF*'s Dicta Does Not Support the Board's Position.

The Board next argues that *Meyer* and *ACLF* are distinguishable from this case because *ACLF* seemed to indicate, in dicta, that a state-residency requirement might be constitutional. (Resp. Br. 19, 21.) The first problem with this argument is that *ACLF* spoke favorably of a *state*-residency requirement, not a *district*-residency requirement. *ACLF*, 525 U.S. at 196–97. Even more damning, however, is that *ACLF* spoke favorably of a state-residency requirement in the context of the state's asserted interest in 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).

In other words, *ACLF* was saying, states have a "strong interest in policing lawbreakers among petition circulators by ensuring that circulators will be amenable to the Secretary of State's subpoena power," and a *state*-residency requirement advances that interest because the state's subpoena power does not reach beyond *state* borders. *Id.* at 184. But here, there is no question that Virginia's *district*-residency restriction has nothing to do with ensuring jurisdiction over lawbreaking circulators. The sole justification raised in defense of the *district*-residency restriction here is that it is a

permissible means of ensuring "activist" support in each district. The "activist" support interest is not even remotely related to an interest in preventing fraud by ensuring jurisdiction over lawbreaking circulators. The Board itself has acknowledged as much. (J.A. at 71 (conceding that effectiveness of subpoena power "is not at issue here.") Yet it continues to try to stretch *ACLF*'s dicta—which spoke favorably of a state's fraud or subpoena interest—to fit the asserted interest here, which is the "activist" support interest. That dicta is a glove that simply does not fit.

E. *Meyer* and *ACLF* Are Not Distinguishable on the Ground that the Restrictions at Issue There Were Restrictions on "Circulators" Rather Than "Witnesses."

Finally, the Board tries to distinguish *Meyer* and *ACLF* by asserting that *Meyer* and *ACLF* dealt with restrictions on "circulators," whereas Virginia's district-residency restriction imposes limitations only on "witnesses." (Resp. Br. 20–21.) This distinction is meaningless. The restrictions at issue in *Meyer* and *ACLF,* and the restriction at issue here, operate on the very same group of people—namely, those who gather petition signatures. In this context, the terms "witness" and "circulator" are interchangeable.

Meyer and *ACLF* dealt with different portions of the same Colorado statutory scheme. Under Colorado's scheme, as it existed at the time *Meyer* and *ACLF* were decided, an initiative question could not be certified to appear on the ballot unless proponents of the initiative gathered a certain number of signatures from registered

Colorado voters. *ACLF*, 525 U.S. at 205; *Meyer*, 486 U.S. at 416. Before the signature sheets could be filed with the secretary of state, the law required the persons who gathered the signatures (the "circulators") to, among other things, "sign affidavits attesting that each signature is the signature of the person whose name it purports to be." *Meyer*, 486 U.S. at 417; *accord ACLF*, 525 U.S. at 189 n.7. In addition, *ACLF* makes clear that under the Colorado scheme circulators were also required to attest that "each signature thereon was affixed in the circulator's presence." *ACLF*, 525 U.S. at 189 n.7.

Colorado's affidavit requirement described above is in every material respect *identical* to the affidavit requirement at issue here. Virginia Code section 24.2-506 requires (1) that all signatures be "witnessed" by (in this case) a district resident, and (2) that the person gathering, or "witness[ing]," the signatures sign an "affidavit to that effect" on every signature petition. Moreover, Virginia's signature petition form, reprinted in the Joint Appendix, states that the person gathering signatures (identified on the form as "CIRCULATOR") "must swear or affirm in the affidavit on the reverse side of this form" that he or she "personally witnessed each signature." (J.A. at 27 (capitalization altered).)

Plainly, there is no material difference between the Colorado and Virginia requirements relating to circulators. In both cases, circulators are required (1) to personally witness each signature and (2) to sign an affidavit that they did in fact personally

witness each signature. Accordingly, there is no merit to the Board's argument that "[u]nlike the restriction in *Meyer*, the limitation [in this case] is not on circulators, but on witnesses." (Resp. Br. 21.)

IV. Virginia's District-Residency Restriction Is a Severe Burden on Speech and Association.

On its face, Virginia's district-residency restriction acts as an outright ban on Lux's political speech and his ability to associate with his supporters (and their corresponding ability to associate with him), specifically as it pertains to Lux's freedom to gather the necessary signatures to enable him to appear on the ballot. The Board counters that, on the contrary, all Lux had to do to comply with the law was bring along a qualified "witness" as he gathered signatures. (Resp. Br. 20–21.) That Lux was "free" to bring along a qualified witness is, of course, true enough, but it does not support the Board's position. In fact, it cuts against it.

To argue that Lux is perfectly free to gather signatures but only if accompanied by someone else is to argue that Lux, acting alone, is not free at all. The fact that the law bans Lux from gathering signatures unless he is accompanied by someone else only emphasizes that as to Lux himself, *the ban is total and complete*. In *ACLF*, the Supreme Court struck down a law that prevented unregistered voters from gathering signatures. *ACLF*, 525 U.S. at 194–97. That law, like the one at issue here, left unregistered voters "free" to gather all the signatures they

wanted *so long as they were accompanied by a registered voter*. *See id.* The Court nonetheless treated the restriction as a total ban on the speech of unregistered voters. *Id.* at 192–97.

And finally, the Board makes its argument of last resort. In spite of the district-residency requirement, the Board insists that Lux was free to say "whatever he chose." (Resp. Br. 20.) Taken literally, this too is true. Under the law, Lux can *say* whatever he wants. The problem is that the law prevents his speech from having any practical effect at all.

In *Krislov*, the Seventh Circuit rejected the suggestion that it should give a similar provision of law a highly technical interpretation: "As this court has previously noted, prohibiting 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." *Krislov*, 226 F.3d at 861 n.5. "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." *Id.*

"'Constitutional rights would be of little value if they could be . . . indirectly denied.'" *Harman v. Forssenius*, 380 U.S. 528, 540 (1965) (*quoting Smith v. Allwright*, 321 U.S. 649, 664 (1944)). The Board's suggestion that this Court

should interpret Virginia's district-residency requirement in an ultra-technical way, in order to avoid the free speech issues raised by the statute, is reminiscent of a similar argument presented to the Supreme Court, wherein the government argued that limits on expenditures for campaign-related speech did not technically restrict anyone's ability to speak. The Court wisely responded, "Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." *Buckley v. Valeo*, 424 U.S. 1, 19 n.18 (1976).

In this case, the law does not even grant Lux his token "tank of gasoline," but rather, tells him he is free to sit in his parked automobile all he wants; if he wants to get anywhere, he has to get in someone else's car—someone, that is, who lives in the Seventh District.

Conclusion

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.

December 6, 2010

Respectfully submitted,

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UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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

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Dated: 12/6/2010

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