No. 10A-298

In the Supreme Court of the United States

HERB LUX, STEPHEN CRUSE, ANDREW MIKEL, AND EUGENE FORET, ***Appellants***

v.

NANCY RODRIGUES, JEAN CUNNINGHAM, AND HAROLD PYON, MEMBERS OF THE VIRGINIA STATE BOARD OF ELECTIONS, IN THEIR OFFICIAL CAPACITIES, ***Appellees*****,**

Appeal from Case No. 10-1997 in the
U.S. Court of Appeals for the Fourth Circuit

and

Case No. 3:10-CV-482-HEH in the
U.S. District Court for the Eastern District of Virginia

Reply to Appellees' Response in Opposition to Appellants' Application for a Writ of Injunction Pending Appeal

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To the Honorable John G. Roberts

Chief Justice of the United States and
Circuit Justice for the Fourth Circuit

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Introduction

To the Honorable John G. Roberts, Chief Justice of the United States and Circuit Justice for the U.S. Court of Appeals for the Fourth Circuit:

Appellants Herb Lux, Stephen Cruse, Andrew Mikel, and Eugene Foret respectfully reply to the Appellees' Response in Opposition to Appellants' Application for a Writ of Injunction Pending Appeal (hereinafter "Response Brief"), by making the following arguments and observations.

I. The Virginia Statute Imposes a Severe Burden (an Outright Ban) on Core Political Speech.

This case presents the question of whether under the U.S. Constitution Herb Lux, a candidate for the U.S. House of Representatives, may be restrained from circulating signature petitions in furtherance of *his own candidacy*. Under Virginia Code section 24.2-506, Lux is completely barred from so doing. Yet in its Response Brief, the Commonwealth argues that the burden on Lux's speech is "slight" and "minimal." (Response Brief 14–15.) How can a law that acts as a total ban on core political speech possibly be described as "slight" or "minimal"? 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 ban is total and complete*.

II. It Is Indisputable that Strict Scrutiny Applies.

"Because [the law] burdens political speech, it is subject to strict scrutiny," and therefore the burden is on the government to prove that the law furthers a compelling interest and is narrowly tailored to achieve that interest. *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 464 (2007) (*WRTL II*); *accord Citizens United v. FEC*, 130 S. Ct. 876, 898 (2010); *see also*

McConnell v. FEC, 540 U.S. 93, 205 (2003); *Austin v. Mich. State Chamber of Commerce*, 494 U.S. 652, 658 (1990); *FEC v. Mass. Citizens for Life*, 479 U.S. 238, 252 (1986) ("*MCFL*"); *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 786 (1978); *Buckley v. Valeo*, 424 U.S. 1, 44–45 (1976). Yet in spite of that clear standard, the Commonwealth argues that the statute is "nothing more than a ballot access provision." (Response Brief 15.) *Indeed, Virginia does not even attempt to justify the law under a strict scrutiny analysis*. Apparently, the Commonwealth recognized the futility of doing so because it is so indisputably clear that the statute could not withstand such scrutiny.

III. The Commonwealth Unsuccessfully Tries to Show that the Merits of the Case Are Not Indisputable.

The Commonwealth attempts to show that the merits of this case are not indisputable by invoking two things: (1) the procedural posture of the case (i.e., Appellants' failed attempts to secure injunctive relief in the courts below); and (2) the fact that there is a circuit split as to the constitutionality of *state*-residency circulator restrictions. Neither is persuasive.

Appellants failed to secure injunctive relief below because both the district court and the appellate court were bound by *Libertarian Party of Virginia v. Davis*, 766 F.2d 865 (4th Cir. 1985), a case that upheld the constitutionality (in another context) of a district-residency circulator restriction. *Davis*, however, was decided twenty-five years ago, and in those intervening years, this Court decided two key cases—*Meyer v. Grant*, 486 U.S. 414 (1988), and *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999) (*ACLF*)—that undercut the *Davis* analysis and in fact dictate the outcome here. The *Meyer-ACLF* analysis is spelled out plainly in Appellants' Application for a Writ of Injunction Pending Appeal (hereinafter

"Application"), and will not be repeated here.

Virginia also points to the circuit split over circulator-residency requirements. But this argument is more smoke than fire. *Davis* is the only circuit court decision to uphold a *district*-residency requirement, and that anomaly can be explained by the fact that *Davis* was decided without the benefit of *Meyer* and *ACLF*. In other words, post-*Meyer* and -*ACLF*, there is no circuit split as to *district*-residency restrictions. And while it is true that, post-*Meyer* and -*ACLF*, a single circuit (the Eighth Circuit) has upheld a *state*-residency restriction, *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 616–17 (8th Cir. 2001), there are three reasons why that decision should have no bearing on the outcome of this case. First, in upholding North Dakota's state-residency restriction, *Jaeger* relied on the state's interest in preventing fraud by ensuring that circulators were subject to the state's subpoena power. *Id.* Virginia has unequivocally (and correctly) conceded that the subpoena power "is not at issue here." (Defs.' Memo. of Law in Opp'n to Pls.' Mot. for Prelim. Inj. 9.). So the only rationale in the only circuit-court case upholding a *state*-residency restriction is simply inapposite here.

Second, even if *Jaeger* did apply (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, Inc. v. Savage*, 550 F.3d 1023, 1027–31 (10th Cir. 2008) (striking state-residency requirement); *Nader*

v. Blackwell, 545 F.3d 459, 474–77 (6th Cir. 2008) (same); *Nader v. Brewer*, 531 F.3d 1028, 1034–38 (9th Cir. 2008) (same); *Chandler v. City of Arvada*, 292 F.3d 1236, 1241–44 (10th Cir. 2002) (striking city-residency requirement); *Lerman v. Bd. of Elections in the City of New York*, 232 F.3d 135, 145–53 (2d Cir. 2000) (striking political-subdivision-residency requirement); *Krislov v. Rednour*, 226 F.3d 851, 858–66 (7th Cir. 2000) (striking district-residency requirement).

Finally, the question here is completely different 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. *Jaeger*, 241 F.3d at 616–17. Whatever merit there is to that proposition, it has absolutely no bearing on whether the *candidate himself*—a resident of the Commonwealth—can be barred from circulating signature petitions *in furtherance of his own candidacy*.

IV. The Commonwealth's Attempt to Distinguish *Meyer* and *ACLF* Fails.

Virginia next tries to distinguish *Meyer* and *ACLF*. Its main argument is that *ACLF* seemed to indicate, in dicta, that a state-residency requirement might be constitutional. (Response Brief 17–18.) The first problem with that 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). But as indicated above, Virginia makes no pretense that the subpoena power is at issue here, and so *ACLF*'s dicta, as slender a reed as it may be, is simply

beyond the Commonwealth's reach.

V. It Is Not Too Late to Grant Relief to Lux and His Supporters.

An order to count Lux's signatures (and to place him on the ballot if his signatures qualify) is the only remedy that will effectively ensure that Lux and his supporters are not deprived of their First Amendment rights. The fact that this challenge has arisen "close to an election is unremarkable in a challenge like this." *See WRTL II*, 551 U.S. at 472. By definition, an aggrieved candidate will not be prejudiced until his signatures—like Lux's here—are submitted to, and rejected by, the State Board of Elections—and none of that is ever likely to take place at a time when an election is not pending in the near future. Lux and his supporters are not guilty of laches nor have they waited until the eve of the election to vindicate their rights. *See Liddy v. Lamone*, 919 A.2d 1276, 1290–91 (Md. 2007) (recognizing that unjustified delay in vindicating rights and waiting until just prior to the election to seek redress may substantially prejudice the State). Rather, they have acted with all diligence to preserve their First Amendment freedoms and have only been barred from relief due to the fact that the courts below were bound by a Fourth Circuit case (*Davis*) that is clearly out of sync with subsequent Supreme Court First Amendment jurisprudence.

Moreover, this Court can grant the relief Lux and his supporters seek without unduly prejudicing the Commonwealth. *See Norman v. Reed*, 502 U.S. 279, 287 (1992) (Court granted emergency relief 12 days before election to enable candidates to be on ballot). The fact that absentee ballots have been printed and sent is not grounds for denying relief here. Virginia makes much ado of the myriad issues surrounding the re-printing of ballots and the possible retraction of already-submitted ballots. But Lux and his supporters are simply asking that Lux's name be

printed on the November ballot (assuming he has at least 1,000 valid signatures). That relief can be fashioned in any equitable manner, and if equity so requires, the Court can order that Lux's name be printed on only those ballots that will be available at voting booths on November 2. In other words, Lux's name would not appear on any absentee ballots. In such a scenario, the complications arising from already-sent-out absentee ballots would disappear, while at the same time, the First Amendment rights of Lux and his supporters would be materially vindicated.

Not insignificantly, other courts have recognized that already-sent-and-received absentee ballots are not a sufficient justification to perpetuate wrongful exclusions from the ballots. *See State ex rel. Owens v. Brunner*, 926 N.E.2d 617 (Ohio 2010) (ordering name to be placed on ballot when commission wrongfully refused to include his name, even though absentee ballots had been sent out and other ballots printed); *State ex rel. Rife v. Franklin County Bd. of Elections*, 640 N.E.2d 522, 524–25 (Ohio 1994) (requiring placement on ballot even though absentee ballots had been printed and sent); *Spencer v. Bd. of Ed. of City of Schenectady*, 333 N.Y.S.2d 308 (N.Y. Sup. 1972) (ordering new election for candidate that was wrongfully excluded from the ballot).

VI. Absent Relief, Both Lux and His Supporters Will Suffer Immediate, Irreparable Harm.

Virginia argued that Lux and his supporters will not suffer immediate harm because it was "rank speculation" for them to contend that Lux had even a remote chance at appearing on the ballot. (Response Brief 29.) That, of course, misses the entire point because Lux has submitted enough signatures, on their face, to warrant a review by the State Board of Elections. Virginia also argues that Lux's supporters will not suffer in any meaningful way because they can

still vote for Lux by write-in. But Lux's supporters signed his petitions to help him appear on the ballot, and that is of course thwarted if Lux's name does not appear on the ballot.

VII. First Amendment Cases Like This One Demand More Vigorous Judicial Protection Than the Typical, Non-First Amendment Case.

Lux and his supporters argued in their Application to the Court that it is indisputably clear, in light of *Meyer* and *ACLF*, that they will prevail on the merits (essentially, that once *Davis* is out of the picture, there is nothing left impeding them from prevailing on the merits). Although Lux and his supporters continue to believe, and to argue here, that it is indeed indisputably clear that they will prevail on the merits, nevertheless, Lux and his supporters remind the Court that "[w]here the First Amendment is implicated, the tie goes to the speaker, not the censor," *WRTL II*, 551 U.S. at 474, or in other words, the Court resolves close cases in "favor of protecting speech." *Id.* at 474 n.7. Appellants therefore submit that in First Amendment cases, a lesser standard apply—namely that before an injunction issue, appellants must show "a significant possibility that the judgment below will be reversed," *Phillip Morris USA Inc. v. Scott*, No. 10A273, slip op. at 2 (Sept. 24, 2010) (Scalia, J., Circuit Justice), or at the very least, that appellants must make a "strong showing" that they will ultimately prevail on the merits, *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009).

The First Amendment is a "fixed star in our constitutional constellation," *W. Va. Bd. of Ed. v. Barnette*, 319 U.S. 624, 642 (1943), and where First Amendment rights are at stake, as they are here, no administrative bureaucracy nor even legislative body should be allowed to thwart those rights. The judiciary stands uniquely as the last line of defense to First Amendment freedoms. Lux and his supporters pray this Court to vindicate those freedoms here. Thus, while

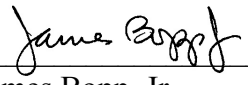
they continue to argue it is indisputably clear that they will ultimately prevail, they submit that even if this Court finds some inkling of doubt in their arguments on the merits, that it nevertheless grant the requested relief based on a "strong showing" or "significant possibility" of their ultimate likelihood of success.

Conclusion

For the foregoing reasons, Lux and his supporters request that an order be entered requiring the Virginia State Board of Elections to immediately count and verify the signatures Lux personally collected and, if there are at least 1,000 valid signatures, to place Lux's name on the ballot in the Seventh Congressional District.

September 28, 2010

Respectfully Submitted,



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Certificate of Service

I, James Bopp, Jr., a member of the bar of this court, certify that on September 28, 2010, I served a copy of the *Reply to Appellees' Response in Opposition to Appellants' Application for a Writ of Injunction Pending Appeal* with the following individuals at the addresses listed below by placing a copy for delivery by Federal Express, and served a courtesy copy of the same via email:

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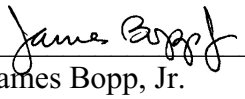

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