IN THE UNITED STATES SUPREME COURT

Record No. 10A-298

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

-v.-

NANCY RODRIGUES, JEAN CUNNINGHAM, and HAROLD PYON, members of the Virginia States Board of Elections, in their official capacities, Appellees,

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RESPONSE TO APPLICATION FOR A WRIT OF INJUNCTION PENDING APPEAL

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Come now Nancy Rodrigues, Jean Cunningham, and Harold Pyon (the "SBE members"), in their official capacities as members of the Virginia State Board of Elections ("SBE"), and pursuant to the direction of the Court file their Response to the Application for a Writ of Injunction Pending Appeal ("App. Writ Inj."), filed by Herb Lux ("Lux"), and Stephen Cruse, Andrew Mikel, and Eugene Foret ("Lux's supporters").

INTRODUCTION

The Commonwealth of Virginia has a legitimate interest in regulating candidate access to its ballots. As the district court noted,

> States have a well-settled interest in protecting the political process and toward that end may enact regulations to safeguard against frivolous candidacies. To ensure an efficient election process, states may adopt measures to "avoid[] voter confusion caused by an overcrowded ballot." *Wood*, 104 F. Supp. 2d at 614-15 (citing *Clements*, 457 U.S. at 965, 102 S. Ct. at 2844.) Courts have historically recognized that states have a legitimate interest of the highest order "in keeping its ballots within manageable, understandable limits." *Lubin v. Panish,* 415 U.S. 709, 715, 94 S. Ct. 1315, 1319 (1974). The U.S. Supreme Court has also uniformly upheld ballot access provisions, such as the one presently before the Court, that may "condition access to the general election ballot by a minor-party or independent candidate upon a showing of a modicum of support among the potential voters for the office." *Munro,* 479 U.S. at 193, 107 S. Ct. at 536.

(Mem. Op. at 14).[1] *See also Anderson v. Celebrezze*, 460 U.S. 780, 788, n. 9 (1983) ("The State has the undoubted right to require candidates to make a preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates.") Virginia Code § 24.2-506 governs ballot access for petition candidates for various elective offices in the Commonwealth. Since July of 2001, Virginia Code § 24.2-506 has provided, in pertinent part, that, to appear on the ballot, a petition candidate for the United States House of Representatives must

> 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.

Id. The statute also provides that a candidate for the United States House of Representatives must submit petitions containing 1,000 signatures from registered voters in the relevant congressional district. *Id.* In the case of the 2010 elections, petition candidates for the United States House of

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[1] Order and Memorandum Opinion issued by the United States District Court for the Eastern District of Virginia on August 26, 2010.

Representatives had until June 8, 2010, to submit the necessary petitions. Va. Code § 24.2-507.

Thus, to appear on the ballot for the 2010 elections, a petition candidate for the United States House of Representatives had to submit petitions containing 1,000 **verified** signatures that were collected between January 1, 2010, and June 8, 2010. To be a verified signature, the signature must belong to a "qualified voter," i.e., a person qualified and registered to vote in the congressional district in question, **and** "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." Va. Code § 24.2-506.

FACTS AND STATEMENT OF THE CASE

Despite living in Virginia's 1st Congressional District, Lux decided to attempt to be a petition candidate for the United States House of Representatives in Virginia's 7th Congressional District. (Comp., Par. 6). As such, Lux was required to submit to the State Board of Elections petitions containing the signatures of 1,000 residents of the 7th Congressional District who were registered to vote in that district. To be counted, the signatures had to have been collected between January 1, 2010, and June

8, 2010, and had to have been witnessed by a person who was eligible to vote in the 7th Congressional District whose affidavit to that effect appeared on each page of the petition. At no time between January 1, 2010, and June 8, 2010, did Lux or anyone on his behalf challenge the constitutionality of Virginia Code § 24.2-506.

On the June 8, 2010 deadline, Lux submitted 78 candidate petitions. (Comp., Ex. A). According to Lux, the petitions submitted contained approximately 1,220 signatures. (Comp., Par. 19). Having received the petitions, the SBE began the process of determining whether the petitions contained the necessary 1,000 **verified** signatures—that is, they are signatures of registered voters in the 7th Congressional District 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." Va. Code § 24.2-506.

Consistent with its practices and Virginia Code § 24.2-506, the SBE began the signature verification process by reviewing the petitions to determine if they had been properly witnessed. (Comp., Ex. C). As a result, no attempt was made to verify the signatures on the 63 petitions that had been witnessed by Lux because he does not meet the statutory requirements to have witnessed the petitions. (Comp., Ex. B).

The SBE did conduct a review of the signatures collected on the 15 petitions that Lux submitted which had been properly witnessed in accordance with Virginia Code § 24.2-506. The 15 valid petitions contained 161 signatures. (Comp., Par. 31). The SBE reviewed those signatures and determined that, of those 161 signatures, "only 110 individuals were found to be registered in the 7th congressional district." (Comp., Ex. C). Thus, of the 161 signatures submitted on the 15 valid petitions, almost 32% of the signatures proved invalid.[2] Because Lux was far short of the 1,000 verified signatures that he needed to qualify for a spot on the ballot, the SBE, in a letter dated June 23, 2010, informed him that he would not be on the ballot. (*Id.*).

On July 13, 2010, twenty days after the SBE's June 23, 2010 letter, Lux and three supporters filed a Complaint in the United States District Court for the Eastern District of Virginia seeking declaratory and injunctive relief. Specifically, Lux sought to have Va. Code § 24.2-506's requirement that signatures on candidate petitions be "witnessed by a person who is himself a qualified voter, or qualified to register to vote, for the office for

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[2] Applying the same percentage of success to the petitions attested by Lux, the approximately 1,063 signatures (Comp., Par. 23) witnessed by him would yield 727 signatures of registered voters in the 7th Congressional District. Adding those signatures to the 110 verified signatures contained on the 15 valid petitions (727 + 110= 837) would still leave Lux 163 valid signatures short of qualifying for a place on the ballot.

which he is circulating the petition and whose affidavit to that effect appears on each page of the petition. . . ." declared unconstitutional. (Comp. at 10, Prayer for Relief). Lux did not explicitly seek to be placed on the November 10, 2010 ballot in the Complaint, but rather, sought an order compelling the SBE members "to verify and count all signatures contained on Herb Lux's candidate petitions regardless of whether the petition circulator satisfies the district residency requirement." (*Id.*).[3] Thus, Lux and his supporters did not and do not challenge the requirement that, as a petition candidate for the United States House of Representatives, Lux was required to submit 1,000 signatures collected from registered voters in the 7th Congressional District between January 1, 2010, and June 8, 2010.

In response to the Complaint, the SBE members filed a Motion to Dismiss for failure to state a claim and opposed the Motion for a Preliminary Injunction. After briefing by both sides had been completed, the district court held a hearing on August 23, 2010. From the bench, the district court informed the parties that it was denying the Motion for a Preliminary Injunction and granting the SBE members' Motion to Dismiss.

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[3] In the Motion for a Preliminary Injunction in the district court, Lux and his supporters sought to have the SBE members "certify [Lux] for the ballot **provided** that he has submitted a sufficient number of signatures from qualified voters." (Mot. for Prel. Inj. in district court, p. 1, Par. 2) (emphasis added).

The district court memorialized its ruling in an Order and Memorandum Opinion issued on August 26, 2010. In summarizing its ruling, the district court noted that Lux and his supporters "have failed to demonstrate that they are likely to succeed on the merits . . . ." (Mem. Op. at 15). In conclusion, the district court noted that "the Complaint fails to state a claim for relief that is plausible on it face. *See Twombly*, 550 U.S. at 570, 127 S. Ct. at 1974." (*Id.* at 16).

While Lux and his supporters did note an appeal of the district court's ruling on August 27, 2010, they took no steps to seek emergency relief from, or an expedited review in, the Fourth Circuit at that time. Rather, they elected to wait another week, filing their Emergency Motion for a Preliminary Injunction on the afternoon of September 3, 2010, the Friday before the Labor Day weekend holiday. The underlying appeal is still pending in the Fourth Circuit, and Lux and his supporters have never filed a Motion to Expedite the Appeal under the Fourth Circuit's Local Rule 12(c).

In their Emergency Motion for a Preliminary Injunction in the Fourth Circuit, Lux and his supporters claimed exigency, arguing that, "If the [Fourth Circuit] does not grant the relief sought by Lux and his supporters before **September 18, 2010,** Lux's name will not appear on the ballot . . . *in the 2010 election* and his supporters will likewise have lost the opportunity

to vote for their preferred candidate." (Em. Mot. for Prel. Inj. at 1) (emphasis in original). Accepting as true the representations made in their filing in the Fourth Circuit, it is already too late to grant Lux and his supporters the relief they seek.

Their focus on September 18, 2010, which is 45 days before the November 2, 2010 election, was based on their reading of Va. Code § 24.2-612, which requires local electoral boards to "make printed ballots available for absentee voting not later than 45 days prior to any election." *See also*, Uniformed and Overseas Citizens Absentee Voting Act, 42 U.S.C. § 1973ff-1(a)(8)(A) (generally requiring Virginia, when a uniformed services voter or other qualified overseas voter requests an absentee ballot at least 45 days prior to an election, to "transmit a validly requested absentee ballot to an absent uniformed services voter or overseas voter . . . not later than 45 days before the election . . . .") In essence, they accepted that once ballots are printed and sent to voters, the relief they seek is unobtainable.

Consistent with Virginia law, ballots were printed and made available to at least some voters prior to September 17, 2010. In fact, 13 of the 13 local electoral boards in the 7th Congressional District had already sent their ballots to the printer or had their voting machines programmed as of September 7, 2010. (September 7, 2010 Aff. of Nancy Rodrigues at Par. 6,

filed in the Fourth Circuit.) Additionally, the local electoral boards had already incurred more than $67,000 in expenses for the ballots already printed and the machines already programmed, meaning that changing the ballot as of September 7, 2010, would have essentially necessitated a doubling of those expenses. (*Id.* at Par. 7.)

Consistent with the instructions received from the Fourth Circuit, the SBE members filed their response to the Emergency Motion for a Preliminary Injunction on September 8, 2010. The Fourth Circuit denied the Emergency Motion for a Preliminary Injunction on September 15, 2010. Lux and his supporters initiated their current application by first e-mailing an unsigned version to counsel for the SBE members after the close of business on Friday, September 17, 2010. After the close of business on Monday, September 20, 2010, Lux and his supporters e-mailed a second version to counsel for the SBE members, indicating it was intended to correct "technical omissions" in the prior version.

Since the September 3, 2010 filing by Lux and his supporters in the Fourth Circuit, election activities in the 7th Congressional District have continued. As of September 20, 2010, absentee ballots had been sent to all voters in the 7th Congressional District that have requested them. September 24, 2010 Decl. of Nancy Rodrigues at Par. 5. In fact, some

voters have already returned their ballots or otherwise voted (e.g., in person absentee voting is allowed in Virginia). *Id.* at Par. 6-7. Specifically, as of September 23, 2010, 398 votes have already been cast in the race for Congress in Virginia's 7th Congressional District. *Id.* at Par. 8. Accordingly, Lux and his supporters now seek to enjoin an election in which voting has already begun.

STANDARD OF REVIEW

Parties seeking a preliminary injunction are requesting an extraordinary remedy. As this Court held in *Winter v. NRDC, Inc.*, 129 S.Ct. 365, 376-77 (2008),

> A preliminary injunction is an extraordinary remedy never awarded as of right. *Munaf*, 553 U.S., at __, 128 S. Ct. 2207, 171 L. Ed. 2d 1 (slip op., at 12). In each case, courts "must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Amoco Production Co.,* 480 U.S., at 542, 107 S. Ct. 1396, 94 L. Ed. 2d 542. "In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction." *Romero-Barcelo*, 456 U.S., at 312, 102 S. Ct. 1798, 72 L. Ed. 2d 91; see also *Railroad Comm'n of Tex. v. Pullman Co.*, 312 U.S. 496, 500, 61 S. Ct. 643, 85 L. Ed. 971 (1941).

To be entitled to the extraordinary remedy of a preliminary injunction, Lux and his supporters "must establish that [they are] likely to succeed on the merits, that [they are] likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, and that

an injunction is in the public interest." *Winter*, 129 S.Ct. at 374 (citations omitted).

While the burden on a party seeking a preliminary injunction is high, the burden faced by Lux and his supporters in the current procedural posture is even higher. In a case that also involved a party seeking to enjoin a Virginia statute pending appeal despite having lost in the lower federal courts, former Chief Justice Rehnquist, in his capacity as Circuit Justice for the Fourth Circuit, spelled out the heightened standard:

> applicants are seeking not merely a stay of a lower court judgment, but an injunction against the enforcement of a presumptively valid state statute. The All Writs Act, 28 U.S.C. § 1651(a) (1994 ed.), is the only source of this Court's authority to issue such an injunction. It is established, and our own rules require, that injunctive relief under the All Writs Act is to be used "'sparingly and only in the most critical and exigent circumstances.'" *Ohio Citizens for Responsible Energy, Inc. v. NRC*, 479 U.S. 1312, 1313, 93 L. Ed. 2d 692, 107 S. Ct. 682 (1986) (SCALIA, J., in chambers) (quoting *Fishman v. Schaffer*, 429 U.S. 1325, 1326, 50 L. Ed. 2d 56, 97 S. Ct. 14 (1976) (Marshall, J., in chambers)). Such an injunction is appropriate only if "the legal rights at issue are 'indisputably clear.'" 479 U.S. at 1313 (quoting *Communist Party of Ind. v. Whitcomb*, 409 U.S. 1235, 34 L. Ed. 2d 40, 93 S. Ct. 16 (1972) (REHNQUIST, CJ., in chambers)).

Brown v. Gilmore, 533 U.S. 1301, 1303 (2001) (Rehnquist, C.J., Circuit Justice). Lux and his supporters cannot meet this standard.

ARGUMENT

Before turning to the *Winter* factors which provide the rule of decision for the underlying claim, it is important to recognize the near impossible task Lux and his supporters face in demonstrating that it is "indisputably clear" that they are entitled to the relief sought. To reach such a conclusion, the Court must find that the decision of the district court is "indisputably" wrong. The Court must also find that the motions panel of the Fourth Circuit that denied the Emergency Motion for a Preliminary Injunction was "indisputably" wrong. The Court must also find that both the district court judge and the Fourth Circuit were "indisputably" wrong when they upheld a district residency requirement in *Libertarian Party of Va. v. Davis*, 766 F.2d 865 (4th Cir. 1985). Finally, the Court would have to find that Judge Brinkema, another judge of the United States District Court for the Eastern District of Virginia, was "indisputably" wrong when she rejected a similar constitutional challenge to Va. Code § 24.2-506 on September 16, 2010. *See Libertarian Party of Va. v. Virginia State Board of Elections*, 2010 U.S. Dist. LEXIS 97177 (E.D. Va. 2010).

That Lux and his supporters cannot carry this heavy burden is actually demonstrated by a review of their Application for a Writ of Injunction Pending Appeal. In it, they concede that the "Supreme Court has not

addressed, head-on, the issue of whether petition circulation activity may be constitutionally restricted by reference to the residency of the circulator." *Id.* at 4-5. Having conceded that this Court has not decided this specific issue, Lux and his supporters then concede that, regarding the cases to which they analogize, "a circuit-split has developed as to the constitutionality of circulator-residency requirements." *Id.* at 14. Given these concessions, it is virtually impossible to credibly maintain that the three district judges and two panels of the Fourth Circuit that have been called on to address district-residency requirements for candidate petition circulators imposed by Virginia law, all of which reached the same conclusion, are "indisputably" wrong. The only thing that is "indisputably clear" is that Lux and his supporters have not and cannot establish that they are entitled to the relief sought.

I. Lux and his supporters are unlikely to succeed on the merits.

The burden of establishing likelihood of success on the merits is a heavy one. As the district court noted,

> the Fourth Circuit pointed out in *Real Truth About Obama* [that] *Winter* requires that a plaintiff make a clear showing that it will likely succeed on the merits at trial. *Real Truth About Obama, Inc*, 575 F.3d at 346. This standard is far stricter than the requirements for preliminary injunctive relief in the Fourth Circuit prior to *Winter. Id.* at 347.

(Mem. Op. at 5-6). In the instant case, Lux and his supporters simply cannot demonstrate that they are likely to succeed on the merits.

A. The district court correctly determined that Lux and his supporters were unlikely to succeed on the merits.

Two conclusions were central to the district court's deciding that Lux and his supporters were unlikely to succeed on the merits. The first was that Virginia Code § 24.2-506 was nothing more than a ballot access provision. The second was that the Fourth Circuit's decision in *Libertarian Party of Va. v. Davis*, 766 F.2d 865, was binding on the district court and compelled the denial of the injunction. The district court was correct on both of these issues.

At the beginning of its inquiry, the district court noted that the parties agreed that that court should "apply the balancing test announced by the United States Supreme Court in *Anderson v. Celebrezze*, 460 U.S. 780, 103 S. Ct. 1564 (1983) . . . ." (Mem. Op. at 7). Applying the balancing test to the facts of this case, the district court found that the district residency requirement for circulators was a valid ballot access provision that imposed only a minimal burden on Lux and his supporters, holding that:

> **The district residency requirement at issue imposes no restrictions on Lux as a candidate or advocate, but only as a signature attester.** The only limitation imposed by Section 24.2-506 is that the person witnessing the signatures be a

> resident of the congressional district in which the candidate is seeking office.

(Mem. Op. at 11) (emphasis added). Given the finding of such a slight burden and the fact that Lux was actually able to communicate his message to the people with whom he spoke, the district court was correct in finding that Lux and his supporters were unlikely to succeed on the merits. Accordingly, they are not entitled to a preliminary injunction under *Winter*.

In addition to conducting the *Anderson* test, the district court noted that the Fourth Circuit has previously held that a district residency requirement for candidate petition circulators passed constitutional muster. Specifically, the district court wrote that:

> Although the U.S. Supreme Court has never squarely confronted the issue of the constitutionality of residency requirements for circulators of candidates' petitions, the U.S. Court of Appeals for the Fourth Circuit appears to have spoken clearly. In *Libertarian Party of Va. v. Davis*, 766 F.2d 865 (4th Cir. 1985), the Court had occasion to examine a statutory provision similar to Section 24.2-506. While the context of the challenge in [*Davis*] may have been different from the immediate case, the associated burden on First and Fourteenth Amendment rights was identical. At issue was former Section 24.1-159 of the Code of Virginia. "This provision dictates that each signature on the petition be witnessed and attested by a qualified voter from the same congressional district as the petition signer." *Id.* at 869.
>
> The Fourth Circuit concluded in [*Davis*] that

> the 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 demonstrating "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. *Id. at 869-70* (internal citations omitted).

(Mem. Opinion at 12).

The finding by the district court that the same constitutional issue had been raised in *Davis* and rejected by the Fourth Circuit dictated a denial of the injunction. Even Lux and his supporters concede that, if *Davis* is controlling, the district court and any subsequent panel of the Fourth Circuit are bound by it under *Etheridge v. Norfolk & Western Railway Co.*, 9 F.3d 1087, 1090 (4th Cir. 1993). (Em. Mot. for Prel. Inj. at 8).

Given that *Davis* has never been explicitly overruled, Lux and his supporters are left to argue that it has been overruled by implication in subsequent decisions of the United States Supreme Court. In this, they are simply mistaken.

B. The Fourth Circuit's decision in *Davis* has not been overturned by subsequent decisions of the United States Supreme Court.

Lux and his supporters argue that, while *Davis* has never been explicitly overturned, its rationale has been "rejected and undercut" by

"subsequent Supreme Court precedent," namely *Meyer v. Grant,* 486 U.S. 414 (1988), which held that Colorado's attempt to criminalize paying petition circulators for a statewide initiative campaign was unconstitutional, and *Buckley v. American Constitutional Law Found.*, 525 U.S. 182 (1999), which held, in pertinent part, that Colorado's requirements that petition circulators for a statewide initiative campaign be registered voters and wear identification badges bearing their names, were unconstitutional. However, a review of the cases reveals that they are distinguishable from *Davis* and that neither rejects, either specifically or by implication, a district residency requirement for circulators in a single district race.

Unlike *Davis* and the instant case, neither *Meyer* nor *Buckley* dealt with a single district race or with a candidate seeking access to the ballot. Rather, both involved attempts to place an initiative on a state-wide ballot. Neither held that a state cannot place any restrictions on who may circulate petitions. Further, neither rejected the requirement at issue here, that a candidate petition circulator merely be eligible to vote for the candidate whose petition he is circulating. In fact, the Court in *Buckley* strongly suggested that an "eligible to vote" requirement would pass constitutional muster. In response to the dissent's argument that the Court's opinion

would be read to strike down all limiting state regulations and allow felons to be petition circulators, the Court stated:

> Persons eligible to vote, we note, would not include "convicted drug felons who have been denied the franchise as part of their punishment," see *post*, at 4 (REHNQUIST, C. J., dissenting), and could similarly be barred from circulating petitions. The dissent's concern that hordes of "convicted drug dealers," *post*, at 5, will swell the ranks of petition circulators, unstoppable by legitimate state regulation, is therefore undue. Even more imaginary is the dissent's suggestion that if the merely voter eligible are included among petition circulators, children and citizens of foreign lands will not be far behind. See *post*, at 6. This familiar parade of dreadfuls calls to mind wise counsel: "Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski it to the bottom." R. Bork, The Tempting of America: The Political Seduction of the Law 169 (1990). That same counsel applies to JUSTICE O'CONNOR's floodgate fears concerning today's decision, which, like *Meyer*, separates petition circulators from the proponents and financial backers of ballot initiatives. See *post,* at 13 (opinion concurring in judgment in part and dissenting in part).

Buckley, 525 U.S. at 195, n. 16. Given that the district residency requirement for candidate petition circulators found in Virginia Code § 24.2-506 is nothing more than the "eligible to vote" requirement that the *Buckley* court endorsed in *dicta*, it is impossible to credibly maintain that *Buckley* or the Court's earlier decision in *Meyer* clearly overturns the rationale of *Davis* that the district court applied to the instant case. Accordingly, Lux and his supporters are not entitled to a preliminary injunction under *Winter* and

certainly cannot demonstrate that it is "indisputably clear" that they are entitled to the relief sought.

II. Lux and his supporters have not shown that they will suffer irreparable harm if an injunction is not granted.

In the Emergency Motion for Preliminary Injunction in the Fourth Circuit, Lux and his supporters argued that

> If [the Fourth Circuit] does not grant the relief sought by Lux and his supporters, Lux's name will not appear on the ballot and he will have forever lost his opportunity to run for office *in the 2010 election* (and his supporters will have lost the opportunity to vote for their preferred candidate).

(Em. Mot. for Prel. Inj. At 5). Now they assert that, without this Court's intervention,

> Lux's name will not appear on the ballot and he will have forever lost his opportunity to run for office in the 2010 election (and his supporters will have lost the opportunity to help their preferred candidate get elected).

App. For Writ. Inj. at 7. However, just as in the Fourth Circuit, the specific harms they allege to have suffered are either inherently speculative or non-existent.

A. Lux has not established that, without the enforcement of the district residency requirement for petition witnesses, he would otherwise have qualified for the ballot.

Lux's claim of irreparable harm is that, without enforcement of the district residency requirement for petition witnesses, he would have

qualified for the ballot. *Id.* However, at best, this claim is speculative, and therefore, Lux has not met his burden to "establish that he is . . . likely to suffer irreparable harm in the absence of preliminary relief . . . ." *Winter*, 129 S.Ct. at 374 (citations omitted).

Specifically, neither Lux nor his supporters challenge Virginia Code § 24.2-506's requirement that he obtain the signatures of 1,000 registered voters from the 7th Congressional District before being placed on the ballot. Thus, the only way the enforcement of the district residency requirement for witnesses found in Virginia Code § 24.2-506 could potentially harm Lux at all is if he collected the requisite number of signatures.

Lux concedes in his Complaint that the SBE conducted a review of the signatures collected on the 15 petitions that had been properly witnessed in accordance with Virginia Code § 24.2-506. The 15 valid petitions contained 161 signatures. (Comp., Par. 31). The SBE reviewed those signatures and determined that, of those 161 signatures,

> only 110 individuals were found to be registered in the 7th congressional district. They are identified with an R in the left hand-column. Those marked with an NQ are registered voters in another congressional district and, therefore, cannot be counted. The remaining signers either are not registered (NR), could not be identified (CI) either because the name was illegible or no residence address was provided or no one by that name was registered at that address listed on the petition, or were duplicates (DUP).

(Comp., Ex. C). Thus, of the 161 signatures submitted on the 15 valid petitions, almost 32% of the signatures proved invalid. Applying the same percentage of success to the petitions attested to by Lux that were not counted, the approximately 1,063 signatures (Comp., Par. 23) witnessed by Lux would have yielded 727 signatures of registered voters in the 7th Congressional District. Adding those signatures to the 110 verified signatures contained on the 15 valid petitions (727 + 110= 837) would still leave Lux 163 valid signatures short of qualifying for a place on the ballot. Because there is no reason to believe that Lux would have obtained a higher percentage of valid signatures than his petition circulators who actually live in the 7th Congressional District, Lux has failed to establish that it is likely that enforcement of the district residency requirement for witnesses kept him off of the ballot. Accordingly, he is not entitled to a preliminary injunction under *Winter* and certainly has not demonstrated that it is "indisputably clear" that he is entitled to the relief sought.

B. The harm alleged by Lux's supporters is not merely speculative, it is non-existent.

The harm alleged by Lux's supporters in the Fourth Circuit, that they will be denied the "opportunity to vote for their preferred candidate," (Em. Mot. for Prel. Inj. at 5), is not merely speculative, but is non-existent. Regardless of whether the district residency requirement for circulators is

enforced, Lux's supporters remain free to vote for him if they so choose because, under Virginia law, they are free to vote for him regardless of whether or not he appears on the ballot.

Virginia Code § 24.2-644(C) provides, in pertinent part, that:

> it shall be lawful for any voter to vote for any person other than the listed candidates for the office by writing or hand printing the person's name on the official ballot. No check or other mark shall be required to cast a valid write-in vote.

See also Va. Code § 24.2-101 (including a "write-in candidate" within the definition of "candidate") and Va. Code § 24.2-648 (providing for write-in votes when voting machines are utilized as opposed to paper ballots). Because any supporters of Lux who wish to vote for him can do so whether or not he appears on the ballot, Lux's supporters have not and will not suffer the harm alleged in the Emergency Motion for Preliminary Injunction.

Apparently, recognizing that the harm they claimed in the Fourth Circuit was non-existent, Lux's supporters have relabeled the claimed harm as losing "the opportunity to help their preferred candidate get elected[ ]." App. for Writ. Inj. at 7. However, the change in labels does not alter the fact that Lux's supporters have suffered no harm.

First, they remain free to vote for Lux as a write-in candidate. Second, they are free to "help [Lux] get elected" by encouraging others to do the same and engaging in the exact same political advocacy as every other

supporter of a candidate in the 7th Congressional District can. Finally, because all of the supporters who are parties to this action live in the 7th Congressional District (Comp. at Par.7-9), they were free to circulate and witness candidate petitions for Lux and were free to witness the petitions that Lux himself circulated. In short, the statute did not restrict their activities in any way, and thus, their unwillingness or inability to secure 1,000 verified signatures meeting the requirements of Virginia Code § 24.2-506 speaks volumes. Accordingly, they are not entitled to a preliminary injunction under *Winter* and certainly have not demonstrated that it is "indisputably clear" that they are entitled to the relief sought.[4]

III. The equities in this case do not favor Lux and his supporters.

Neither Lux nor his supporters has shown that the balance of the equities tip in their favor. In fact, a careful review of the issue reveals that the equities demand that no injunction be entered.

First, the only arguments Lux and his supporters offer regarding the balance of the equities/harms is contained in one paragraph of their Application for a Writ of Injunction Pending Appeal. App. Writ. Inj. at 26-27.

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[4] Even if Lux's supporters did not have the write-in option, they would not be entitled to a preliminary injunction. Like Lux himself, they have failed to establish that it is likely that Lux would have qualified for the ballot if the district residency requirement for witnesses had not been enforced.

In that paragraph, Lux and his supporters do not attempt to address the balance of the equities, but rather, simply assert that the Commonwealth's harms are "significantly less" than their alleged harms given that they believe they will prevail on their constitutional claim. *Id*. On the terms of the very argument they advance, Lux and his supporters fail to satisfy the balance of the equities prong of the injunction standard if the district court could have reasonably found, as it did, that they "have failed to demonstrate that they are likely to succeed on the merits . . . ." (Mem. Op. at 15). Thus, because Lux and his supporters are unlikely to succeed on the merits for the reasons stated above and by the district court, they have failed to demonstrate that the balancing of the equities favors entry of a preliminary injunction.

However, even if Lux and his supporters could establish that they are likely to succeed on the merits, the equities would still not favor the entry of an injunction. Balancing the harms that would be suffered by Lux and his supporters versus the harms that would be caused by the entry of the injunction leads to the conclusion that no injunction should be entered.

The harm Lux alleges he will suffer, that without enforcement of the district residency requirement for petition witnesses he would have qualified for the ballot, is speculative at best. Further, the harm allegedly suffered by

his supporters, that they will be denied the opportunity to support their preferred candidate, is not merely speculative, but is non-existent given their continuing ability to vote for or otherwise support Lux as a write-in candidate if they so choose.

In stark contrast to these speculative and non-existent harms, real harm will be caused by the entry of an injunction because the entry of the injunction will disrupt the orderly conduct of an election. As noted above, 13 of the 13 affected local electoral boards have already spent or committed to spend more than $67,000 for the printing of ballots that have already been ordered and for the programming of voting machines which has already occurred. September 7, 2010 Aff. of Nancy Rodrigues, Par. 6-7. Further, if the Court were to order the SBE to begin the process of verifying the signatures contained on the petitions circulated by Lux, the signatures could not be verified and, assuming that Lux actually obtained a sufficient number of valid signatures to qualify for the ballot, new ballots could not be printed so that absentee voters could begin receiving ballots by the already passed deadline imposed by Virginia Code § 24.2-612. Additionally, voting in the 7th Congressional District has already begun, creating any number of logistical and legal hurdles (e.g., Do ballots that have already been cast count? Can new absentee ballots be sent to voters in time to allow them to

revote if the previously cast ballots are held not to count? Will the change in the ballots cause significant confusion for voters in determining whether or not their votes will be counted or do they need to vote again?, etc.) Finally, accepting as true the representations made in their filing in the Fourth Circuit, Lux and his supporters have conceded that it is already too late to grant them the relief they seek. (Em. Mot. for Prel. Inj. at 1).

While all of these burdens, in and of themselves, are sufficient to tilt the balance of the equities against entry of an injunction, the fact that delays occasioned by Lux and his supporters have either caused or exacerbated these burdens further tilts the balance of the equities against the entry of an injunction. As the Fourth Circuit has recognized, it is appropriate to consider delays occasioned by a party seeking an injunction in determining whether or not to grant the injunction. *Quince Orchard Valley Citizens Ass'n v. Hodel*, 872 F.2d 75, 80 (4th Cir. 1989) (the fact that a party seeking an injunction delayed doing so is "quite relevant to balancing the parties' potential harms."). *See also*, *Westermann v. Nelson*, 409 U.S. 1236, 1236-37 (1972) (Douglas, J., Circuit Justice) (denying writ of injunction after Court of Appeals denied a preliminary injunction in an election case "not because the cause lacks merit but because orderly election processes would likely be disrupted by so late an action.")

Here, Lux and his supporters could have challenged the statute at any point during the petition circulation period between January 1, 2010, and June 8, 2010, but chose not to do so. They could have immediately sought injunctive relief when the SBE notified Lux he did not qualify for the ballot on June 23, 2010, but they chose not to do so, instead waiting another 20 days to file their challenge. Lux and his supporters could have used the time between the August 23, 2010 ruling from the bench and the entry of the Order on August 26, 2010, to draft motions for emergency relief in the Fourth Circuit, but they chose not to do so. Lux and his supporters could have sought emergency relief in the Fourth Circuit when they noted their appeal of the district court's decision on August 27, 2010, but they chose not to do so, instead waiting an additional week to file their Emergency Motion for Preliminary Injunction on the afternoon before a holiday weekend. The foregoing history clearly refutes Lux's assertion that "he moved as fast as he possibly could" to challenge the district-residency requirement for petition witnesses. App. for Writ. Inj. at 27.

Given that Lux and his supporters have known or should have known of the November 2 election day and the requirement that absentee ballots be available to voters **at least** 45 days before election day, it was incumbent on them to move with all reasonable speed to seek relief. The

fact that they chose not to move with all reasonable speed further tilts the balance of the equities against them. Accordingly, they are not entitled to a preliminary injunction under *Winter* and certainly have not demonstrated that it is "indisputably clear" that they are entitled to the relief sought.

IV. An injunction is not in the public interest.

Similar to the manner in which they address the "balance of the equities" prong of the *Winter* injunction inquiry, Lux and his supporters only offer one paragraph regarding the public interest prong of the *Winter* test in their application. App. Writ. Inj. at 27. The argument amounts to nothing more than an assertion that, if they have convinced the Court that they are likely to succeed on the merits, *ipse dixit*, the injunction is in the public interest. Thus, Lux and his supporters effectively concede that they fail to satisfy the public interest prong of the injunction standard if the district court could have reasonably found, as it did, that they "have failed to demonstrate that they are likely to succeed on the merits . . . ." (Mem. Op. at 15).

Once again, even if the Court were to determine that Lux and his supporters are likely to succeed on the merits, the argument fails to take into consideration the significant issues and harms inherent in stopping the orderly processes of an election. To grant the injunction sought by Lux and

his supporters would necessitate directing state election officials to stop the other things they are doing to ensure an orderly election process in November and engage in the process of determining whether Lux even has the requisite number of signatures from registered voters in the 7th Congressional District. That, in and of itself, is not in the public interest.

This is especially true given that it is no more than rank speculation that Lux would qualify for the ballot if the district residency requirement for petition witnesses were not enforced. At best, all Lux and his supporters have shown is that it is possible that he might have qualified for the ballot without the district residency requirement for witnesses. It is not in the public interest to upset the orderly processes of the November elections on the mere chance that the district residency requirement for witnesses kept Lux off of the ballot.

Assuming that the Court were to order the signatures counted and Lux had somehow significantly outperformed his other circulators in the percentage of valid signatures he had obtained to the point where he actually had 1,000 valid signatures, he would presumably seek a Court order placing him on the ballot, further disrupting the electoral processes especially if election officials were ordered to go to the considerable expense and effort necessary to recall and destroy previously printed

ballots, some of which have already been sent to voters and returned as actual ballots cast. September 24, 2010 Aff. of Nancy Rodrigues, Par. 5-8. Finally, given that it already less than 45 days to the election, the statutory rights of absentee voters in Virginia will be adversely affected. *See* Va. Code § 24.2-612.

These costs and harms will be borne by the public-- the electorate of the 7th Congressional District and the taxpayers. It is not in their interest to incur these costs and bear these harms on the chance that, whenever the merits of the constitutional claims are reached, Lux and his supporters will prevail, and thus, there is a chance that he was entitled to a place on the ballot. This is especially true given the confusion and possible disenfranchisement that would occur if ballots already sent and votes already cast have to be set aside.

Given the procedural similarities to the instant case, the decision in *Westermann v. Nelson*, 409 U.S. 1236 (Douglas, J., Circuit Justice), is instructive. In that case, the petitioners "complain[ed] of their inability to get on the ballot in Arizona for the November 7, 1972, election." *Id.* Their district court case was dismissed, and they sought "to appeal to the Court of Appeals but were denied a preliminary injunction" by the Court of Appeals. *Id.* They then sought an injunction from Justice Douglas as Circuit

Justice, who denied the injunction, noting that the "orderly election processes would likely be disrupted by" an injunction. *Id.* at 1236-37. In reaching this result, Justice Douglas recognized that

> [t]he complaint may have merit. But the time element is now short and the ponderous Arizona election machinery is already under way, printing the ballots. Absentee ballots have indeed already been sent out and some have been returned. The costs of reprinting all the ballots will be substantial and it may well be that no decision on the merits can be reached by the Court of Appeals in time to reprint the ballots excluding petitioners, should they lose on the merits.

Id. at 1236.

Based on the foregoing, Lux and his supporters are not entitled to a preliminary injunction under *Winter* and have not demonstrated that it is "indisputably clear" that they are entitled to the relief sought.

CONCLUSION

For the reasons stated above, the Court should deny the Emergency Motion for Preliminary Injunction.

RESPECTFULLY SUBMITTED,

NANCY RODRIGUES, JEAN CUNNINGHAM, and HAROLD PYON, members of the Virginia State Board of Elections, in their official capacities, Defendants-Appellees

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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of September, 2010, I filed an original, plus two copies of the foregoing RESPONSE TO APPLICATION FOR A WRIT OF INJUNCTION PENDING APPEAL, which includes an attachment of the Declaration of Nancy Rodrigues, with the Clerk of Court via first class, postage prepaid, U.S. Mail and a PDF copy by email to dbickell@supremecourt.gov.

Two copies has also been mailed via first class, postage prepaid, U.S. Mail to counsel, along with a PDF as follows:

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