

No. 12-1996

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IN THE  
UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

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LIBERTARIAN PARTY OF VIRGINIA, *et. al.*,

*Appellees,*

v.

CHARLES JUDD, *et. al.*

*Appellants.*

---

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

---

**AMICUS CURIAE BRIEF OF THE THOMAS JEFFERSON  
CENTER FOR THE PROTECTION OF FREE EXPRESSION  
IN SUPPORT OF APPELLEES**

---

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Date: November 16, 2012

Counsel for: Amicus Brief

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I certify that on 11/16/2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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## **STATEMENT OF INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

The Thomas Jefferson Center for the Protection of Free Expression is a nonprofit, nonpartisan organization located in Charlottesville, Virginia.

Founded in 1990, the Center has as its sole mission the protection of free speech and press. The Center has pursued that mission in various forms, including the filing of *amicus curiae* briefs in this and other federal courts, and in state courts around the country.

### **STATEMENT OF ISSUES**

Although additional issues are briefed by the parties, *amicus*' brief focuses solely on the issue of whether the district court properly determined that Plaintiffs Darryl Bonner and the Libertarian Party of Virginia ("LPVA") have standing to challenge Va. Code § 24.2-543, requiring that all signatures on third-party presidential ballot petitions be witnessed by a Virginia resident.

### **ARGUMENT**

#### **I. PLAINTIFFS ARE ENTITLED TO A PRESUMPTION OF STANDING AS PETITION CIRCULATION IS CORE POLITICAL SPEECH**

Petition circulation is afforded the utmost First Amendment protection under the law, according to the Supreme Court of the United States. "[T]he

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<sup>1</sup> Pursuant to Fed. R. App. Proc. 29, all the parties have consented to the filing of this *amicus* brief. This brief was authored in whole by counsel for *amicus curiae*. No party or any person other than *amicus* contributed money to fund the preparation and submission of this brief.

circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as ‘core political speech.’” *Meyer v. Grant*, 486 U.S. 414, 421–22 (1988). As a result, First Amendment protection is “at its zenith” and any statute restricting circulation must overcome a burden that is “well-nigh insurmountable.” *Id.* at 425. The presumption, therefore, heavily favors those parties who challenge such restrictions. “[T]he First Amendment requires us to be vigilant . . . to guard against undue hindrances to political conversations and the exchange of ideas.” *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182, 192 (1999). The lower court showed appropriate deference to this guiding principle by prioritizing First Amendment protection of petition circulation and finding that these plaintiffs have standing to challenge Va. Code § 24.2-543. So, too, should this Court.

Even independent of the strength of First Amendment protection, Plaintiffs have standing because, where a statute regulates a group, it is presumed that any member of that group has standing. In *Lujan v. Defenders of Wildlife*, the Supreme Court held:

When the suit is one challenging the legality of government action or inaction, the nature and extent of facts that must be averred . . . in order to establish standing depends considerably upon whether the plaintiff is himself an object of the action (or forgone action) at



issue. If he is, *there is ordinarily little question that the action or inaction has caused him injury*, and that a judgment preventing or requiring the action will redress it.

504 U.S. 555, 561–62 (1992) (emphasis added). As a group of qualified voters attempting to have a candidate placed on the Virginia ballot, the plaintiffs plainly qualify as an object of Va. Code § 24.2-543. Therefore, under *Lujan*, there is “little question” that the plaintiffs are entitled to a presumption of standing.

## II. PLAINTIFFS SATISFY THE CONVENTIONAL STANDING TEST OF ARTICLE III

Under Article III’s conventional standing test for First Amendment challenges, a litigant must demonstrate three things. First, the existence of an injury in fact. Second, a causal connection between that injury and the alleged source. And third, a substantial likelihood that the injury is redressable by the relief requested. *Bennett v. Spear*, 520 U.S. 154, 162 (1997); *see also Lujan*, 504 U.S. at 560–61 (1992); *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, 72, 75 n. 20 (1978). Notably, “the injury required for standing need not be actualized.” *Davis v. Federal Election Com’n*, 554 U.S. 724, 734 (2008).

A. The Resident Circulator Requirement Presents a Concrete and Particularized Injury By Limiting the Quantum of Speech and Chilling Future Speech.

A plaintiff need not show that he has knowingly violated a non-resident ban to prove injury under Article III. *See Perry v. Judd*, 840 F. Supp. 2d 945, 955–56 (E.D. Va. 2012), *aff'd*, 471 F. App'x 219 (4th Cir. 2012). The fact that the restriction on non-resident circulators exists at all suffices to constitute an injury. As the court below properly noted, “The Board essentially criticizes the parties for not having engaged in voter fraud by circulating petitions in violation of the Virginia residency requirement.” Memorandum Opinion at 6. The real injury—and the reason that a presumption of injury in the case of non-resident bans exists—is the significant curtailment of core political speech that results from the law’s restraint on circulation. Virginia courts have ruled that such a curtailment constitutes an injury. The court in *Lux v. Judd*, 842 F. Supp. 2d 895, 900 (E.D. Va. 2012) stated plainly that:

Lux’s entitlement to relief turns not on his First Amendment right to have his name printed on the 2010 ballot, but on the severity of the statutory burden placed on his attempt to gain such access. The distinction is subtle but significant. Even if the Board had determined that Lux qualified as an independent candidate, it would have no legal bearing on the alleged undue burden imposed by having been deprived of the opportunity to gather signatures on behalf of his candidacy.

In this case, the undue burden on free speech consists of depriving Plaintiffs of the petition circulators of their choice, thereby forcing them to spend extra time and resources to locate and employ circulators who conform to the statute. *See Meyer v. Grant*, 486 U.S. 414, 421–22 (1988) (Restrictions on petition circulators “restricts political expression in two ways: First, it limits the number of voices who will convey appellees’ message . . . and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that appellees will garner the number of signatures necessary to place the matter on the ballot, thus limiting their ability to make the matter the focus of statewide discussion.”).

Other courts have recognized these burdens as distinct and palpable injuries under the Article III case and controversy requirements. Indeed, the Second, Sixth, Seventh, Ninth and Tenth Circuits have already applied the Supreme Court’s precedent to campaign issues more or less identical to those found here. *See, e.g., Lerman v. Bd. of Elections*, 232 F.3d 135 (2d Cir. 2000); *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008); *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000); *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008); *Yes on Term Limits v. Savage*, 550 F.3d 1023 (10th Cir. 2008).

In *Blackwell*, the Sixth Circuit, contemplating an Ohio law that required all circulators be Ohio residents, held that a plaintiff could allege a sufficient

injury by showing that he or she is presently or prospectively “subject to a government power that is regulatory, proscriptive, or compulsory in nature.” 545 F.3d at 471 (quoting *Laird v. Tatum*, 408 U.S. 1, 11 (1972)). Likewise, in *Brewer*, the Ninth Circuit held that an in-state circulator requirement presented a clear injury, severely burdening First Amendment rights by “significantly reducing the number of potential circulators.” 531 F.3d at 1036 (citing *Buckley*, 525 U.S. at 194–95). In *Krislov*, as here, the plaintiff was able to get “enough signatures to appear on the ballot,” yet the Seventh Circuit still found injury to the plaintiff’s First Amendment rights:

By being denied use of non-registered, non-resident solicitors, they were required to allocate additional campaign resources to gather signatures and were deprived of the solicitors (political advocates) of their choice. This in itself can be an injury to First Amendment rights. Second, because they were prohibited from using non-registered and non-resident circulators, they were limited in the choice and number of people to carry their message to the public. This injured the plaintiffs by limiting the size of the audience the candidates could reach and reducing the quantum of speech about the candidates’ political views that otherwise could be generated.

226 F.3d at 857.

The Supreme Court has routinely recognized that, at the very least, restricting a plaintiff’s choice of petition circulators has a chilling effect on speech, and an objective chilling injury is a cognizable injury for the purpose of establishing standing. The Court first articulated this in *Socialist Workers Party*

*v. Attorney General*, 419 U.S. 1314 (1974), in which members of the Socialist Workers Party Youth Organization brought suit after they learned that the FBI planned to monitor their convention by way of confidential informants in the crowd. The Party complained that the activity would have the effect of dissuading some delegates from participating actively in the convention. The Court found that “[t]he specificity of the injury claimed by the applicants is sufficient . . . to satisfy the requirements of Art. III.” *Socialist Workers Party*, 419 U.S. at 1319. *See also Meese v. Keene*, 481 U.S. 465 (1987) (The DOJ’s labeling of a politician’s film as “political propaganda” would hurt the politician’s reelection chances; the threatened injury was “distinct and palpable” and demonstrated more than a “subjective chill.”); *Cf. Laird*, 408 U.S. at 13–14 (“Allegations of a subjective ‘chill’ are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm; ‘the federal courts established pursuant to Article III of the Constitution do not render advisory opinions.’”). The regulation embodied in Va. Code § 24.2-543 creates an injury analogous to those in *Socialist Workers Party* and *Meese* in that it objectively has the effect of making it more difficult for the LPVA to exercise its First Amendment right to circulate petitions in Virginia, while forbidding Darryl Bonner from doing so altogether.

B. Plaintiffs' Injuries are Actual and Imminent.

Both Bonner and the LPVA have clearly demonstrated the injuries resulting from Va. Code § 24.2-543 are “actual or imminent, not ‘conjectural’ or ‘hypothetical,’” *Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990) (quoting *Los Angeles v. Lyons*, 461 U.S. 95, 102 (1983)). The government predicates its standing arguments on the misconceived assertion that Plaintiffs’ injuries lack imminence. The Supreme Court has acknowledged that “‘imminence’ is concededly a somewhat elastic concept,” but one that “cannot be stretched beyond its purpose, which is to ensure that the alleged injury is not too speculative for Article III purposes.” *Lujan*, 504 U.S. at 564 n.2. As such, a “certainly impending” injury is sufficiently imminent. *Id.* These plaintiffs have alleged several ongoing injuries sufficient to satisfy this standard, notably the decreased freedom and control over their political messages, the impact of the statute on the reach of those messages, and chilling effects upon the exercise of their First Amendment rights.

The government, however, ignores these ongoing and immediate injuries, suggesting that an injury should be considered immediate only if the LPVA had failed to gain the required number of signatures or had current plans to use non-resident circulators. As the district court articulated, this argument misses a

critical point: the LPVA's admirable efforts to comply with the law, despite its infringement upon their rights, should not then bar them from challenging those infringements in court. To suggest otherwise would be to hold that the LPVA's standing was barred as they failed to engage in voter fraud by actively using out of state circulators. Indeed, "plaintiffs need not break the law in order to incur injury; the fact that their speech has been significantly curbed by the residency limitation is injury enough." Memorandum Opinion at 6.

It is true that Plaintiff Bonner was physically unable to engage in petition circulation in the lead up to the 2012 elections. However, Bonner's constitutional injuries stemming from the infringement of his First Amendment rights remain imminent due to his stated intention to circulate petitions in upcoming Virginia elections, and his track record of engaging in circulation. As such, Bonner clearly retains standing. Indeed, while "‘some day’ intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the ‘actual or imminent’ injury," intentions supported by a track record of past action and clearly articulated future plans should be sufficiently imminent. *Lujan*, 504 U.S. at 564. Courts assessing imminence with regard to petition circulation under the *Lujan* standard have typically looked to a plaintiff's past history of political

involvement and circulation, and his present desire to engage in petition circulation in the relevant state, as well as the impact of any charges that may be filled against him for crossing the “statutory Rubicon.” *See, e.g., Daien v. Ysursa*, 711 F. Supp. 2d 1215, 1223–25 (D. Idaho 2010) (“Daien has demonstrated more than a passing fancy about supporting independent presidential candidates, making his assertion that he intends to circulate petitions all the more plausible.”).

Darryl Bonner is a registered Libertarian, who for roughly twenty years has worked as a campaign circulator or canvasser for independent parties and candidates. Bonner has previously circulated petitions in Virginia prior to at least two recent elections. Bonner considers petition circulation and canvassing to be powerful tools for expressing political beliefs and he intends to circulate in Virginia, yet will refrain from circulating in Virginia, while the in-state requirement exists due to his understandable refusal to engage in what would be considered voter fraud. The impact of Virginia’s resident circulator law on Bonner is in no way speculative or abstract. Bonner’s intentions are not the amorphous “some day” ones which the *Lujan* Court decried; instead his intentions are backed by a track record of circulation in Virginia and a clear



intention to continue circulating in upcoming elections as soon as he is physically able to do so.

C. The Injuries Suffered by Plaintiffs are Fairly Traceable to Va. Code § 24.2-543 and Redressable by the Court.

At the most basic level, the spirit of the Article III case and controversy requirement is satisfied in this case. The case and controversy requirement exists to clarify a dispute and make it ripe for adjudication. “[I]n terms of Article III limitations on federal court jurisdiction, the question of standing is related only to whether the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.” *Flast v. Cohen*, 392 U.S. 83, 101 (1968). In essence, standing ensures that the party seeking relief has “alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.” *Baker v. Carr*, 369 U.S. 186, 204 (1962). The government argues that this controversy will never be ripe and the dispute will never be clarified until the plaintiffs actually break the law, but well-established standing doctrine contradicts that idea. These plaintiffs have developed their claim as far as Article III requires, and therefore deserve the satisfaction of standing.

Article III standing doctrine also dictates that injuries be “fairly traceable” to conduct of the defendant and be likely to be redressed by a favorable decision in court. *Allen v. Wright*, 468 U.S. 737, 751 (1984). There can be no doubt in this case that, but for the enforcement of Va. Code § 24.2-543, Plaintiffs would be free to exercise their First Amendment rights through the use of out-of-state petition circulators. The Supreme Court has recognized that but-for causation is sufficient to establish causal connection for the sake of Article III standing. *See Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72–81 (1978).

A favorable decision by this Court to remove the impediments causally connected to the injury would result in a redressing of the complained-of injury, as it would allow the plaintiffs to circulate petitions in accordance with their First Amendment rights. Put another way, “the redressability requirement ensures that a plaintiff ‘personally would benefit in a tangible way from the court’s intervention.’” *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 162 (4th Cir. 2000) (quoting *Warth v. Seldin*, 422 U.S. 490, 508 (1975)). “Because the district court has the ability to enjoin the enforcement of the statute, the harm is sufficiently redressable in this suit.” *Krislov*, 226 F.3d at 858.

Petition circulation enjoys the highest form of protection under the First Amendment. As such, plaintiffs challenging a government restriction of such core political speech are entitled to a presumption of injury, and thus of standing as well. Injury is presumed because Plaintiffs are the objects of the challenged regulation. However, even if this were not so, Plaintiffs have satisfied the Article III standing test by demonstrating injury (both actual and a chilling effect), causal connection of that injury to the residency requirement, and the ability of this Court to redress that injury. This Court should uphold the district court's determination that Plaintiffs have standing to challenge the unconstitutional infringement of protected speech imposed upon them by Va. Code § 24.2-543.

## CONCLUSION

For the foregoing reasons, *amicus* respectfully requests that this Court affirm the district court's denial of Defendant's motion for summary judgment.

Respectfully Submitted,

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 12-1996

Caption: LIBERTARIAN PARTY OF VA v. CHARLES JUDD

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(s) J. Joshua Wheeler

Attorney for Amicus Curiae

Dated: November 16, 2012

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November 16, 2012

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Date