No. _____

In The Supreme Court of the United States

CHARLES JUDD, KIMBERLY BOWERS, AND DON PALMER, MEMBERS OF THE VIRGINIA BOARD OF ELECTIONS, IN THEIR OFFICIAL CAPACITIES,

Petitioners,

v.

LIBERTARIAN PARTY OF VIRGINIA AND DARRYL BONNER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

E. DUNCAN GETCHELL, JR.
Solicitor General of Virginia
dgetchell@oag.state.va.us
Counsel of Record

MICHAEL H. BRADY
Assistant Solicitor General
mbrady@oag.state.va.us

PATRICIA L. WEST
Chief Deputy Attorney General

WESLEY G. RUSSELL, JR.
Deputy Attorney General
wrussell@oag.state.va.us

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-7240
Facsimile: (804) 371-0200
Counsel for the Petitioners

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COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

In *Buckley* v. *American Constitutional Law Foundation*, this Court held that a state may not constitutionally require petition circulators to be registered to vote in that state, but strongly suggested in dicta that a residency requirement would be a permissible, less restrictive means of protecting against fraud, by ensuring that those who witness the signatures offered would be subject to the state's subpoena power. 525 U.S. 182, 196-97 (1999). The courts of appeals have since divided over whether the First Amendment invalidates state residency requirements, with two circuits upholding such a requirement or indicating agreement with the *ACLF* dicta, and four others extending *ACLF* to invalidate such requirements notwithstanding the strong dicta in that opinion.

The question presented for this Court's review is whether Virginia's requirement that signatures offered on ballot access petitions be witnessed by Virginia residents is narrowly tailored to furthering Virginia's compelling interest in policing election fraud through ensuring that the Commonwealth has the resources to confirm the identity, age and felony status of any potential signature witness and has the power to compel a witness's appearance in the event of an investigation or prosecution.

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PETITION FOR WRIT OF CERTIORARI

Virginia Attorney General Kenneth T. Cuccinelli, II, on behalf of defendants below, Charles Judd, Kimberly Bowers, and Don Palmer, in their official capacities as members of the Virginia State Board of Elections, respectfully petitions this Court for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 718 F.3d 308 and reprinted at Pet. App. 1-22. The opinion of the district court is reported at 881 F. Supp. 2d 719 and reprinted at Pet. App. 23-40.

JURISDICTION

The opinion and judgment of the court of appeals was entered on May 29, 2013. *See* Sup. Ct. R. 13(1). This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Const. amend. I.

The challenged Virginia statute provides, in pertinent part:

> The signature of each petitioner shall be witnessed . . . by a person who is a *resident of the Commonwealth* and who is not a minor or a felon whose voting rights have not been restored and whose affidavit to that effect appears on each page of the petition.

Va. Code Ann. § 24.2-543 (emphasis added).[1]

STATEMENT OF THE CASE

As in many other states, third-party and independent candidates for public office may place

[1] After the Fourth Circuit's decision, the Virginia General Assembly's amendments to Virginia Code § 24.2-543, found at 2013 Va. Acts chs. 521, 550, 684, became effective. *See* Va. Code Ann. § 1-214(A) (setting "the first day of July" as the effective date for all regular session acts that do not involve appropriations, decennial reapportionments, and emergencies). Because these changes merely reduce the number of required signatures and therefore do not affect the question presented, all references to Code § 24.2-543 will be to the version presently in force.

themselves on Virginia's presidential ballot by obtaining a certain number of voter signatures on a ballot access Petition. Because state election officials cannot possibly verify the authenticity of every signature, Virginia Code § 24.2-543 requires each signature to be witnessed by a person "who is not a minor or a felon whose voting rights have not been restored" and "who is a resident of the Commonwealth" of Virginia ("the witness residency requirement"). Many other states have similar requirements. Extending this Court's decisions in *Meyer* v. *Grant*, 486 U.S. 414 (1988), and *ACLF*, 525 U.S. 182, the Fourth Circuit struck down Virginia's witness residency requirement, finding that it was not the most narrowly tailored means of furthering the Commonwealth's compelling interest in policing election fraud and protecting the integrity of its elections.

In *ACLF*, this Court, in a divided opinion, struck a voter registration requirement as unconstitutional, but unanimously and strongly suggested that a state residency requirement would be upheld under its analysis based on the state's interest in ensuring subpoena power over the person gathering the signatures. In the nearly 15 years since *ACLF*, the courts of appeals have come down on both sides of the issue, with the majority of those courts giving short shrift to this Court's reasoning in *ACLF* and striking such restrictions on the ground that the courts could conceive of a less restrictive rule with the putative aim of ensuring amenability to process. This Petition

therefore presents a mature split among the circuits on a substantial question of federal law—whether the First Amendment, as interpreted by *ACLF*, nullifies the long-standing and, prior to judicial intervention, ubiquitous practice of requiring residency of those who participate in the time-sensitive processes vital to a state's election machinery.

Petition Circulating and the Witness Residency Requirement

Under Virginia law, minor political parties—"[a] group of qualified voters"—may place a candidate for the offices of President and Vice President of the United States on Virginia's ballot pursuant to Virginia Code § 24.2-543 by submitting a petition. "[Q]ualified voters" generally include all registered voters residing in the Commonwealth who are of the age of majority and have neither been convicted of a felony nor "adjudicated incapacitated." Va. Code Ann. § 24.2-543; *see also* Va. Const. art. II, § 1; Va. Code Ann. § 24.2-101. To successfully place the candidate on the ballot, the petition must include the signatures and resident addresses of "at least 5,000 qualified voters and include signatures of at least 200 qualified voters from each congressional district." Va. Code Ann. § 24.2-543. A time-sensitive process, the gathering of signatures may begin "on and after January 1 of the year of the presidential election only," and "[t]he petition shall be filed with the State Board by noon of the seventy-fourth day before the presidential election" to afford Virginia election

officials sufficient time to determine whether the requisite number of signatures of qualified voters have been submitted and to prepare the ballots accordingly. *Id.*

The act of signing must be witnessed by either "a constitutionally qualified candidate for President of the United States," or "a person who is a resident of the Commonwealth and who is not a minor or a felon whose voting rights have not been restored and whose affidavit to that effect appears on each page of the petition." *Id.* In 2012, there were nearly five and one-half million registered voters in Virginia who, by definition, met those requirements.[2] When the petition signatures are submitted, the Board verifies the attesting witness's identity, residency, age and felony status, using databases containing information about Virginians but not non-residents. J.A. 65, 177, 180-81, 194.[3] To circulate petitions, a non-resident must be accompanied by a resident qualified to witness the signatures.

The Virginia General Assembly first adopted a witness residency requirement over 40 years ago, *see* 1970 Va. Acts ch. 462, and many other states and the District of Columbia have similar requirements. *See, e.g.*, Conn. Gen. Stat. § 9-453e; Colo. Rev. Stat.

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[2] *See* Virginia State Board of Elections, Registration Turnout Statistics, http://www.sbe.virginia.gov/VotingStatistics.html.

[3] All J.A. cites are to the Joint Appendix filed in the Fourth Circuit in No. 12-1996, designated as Doc. 20 (Oct. 9, 2012).

§ 1-40-112(1); Mont. Code Ann. § 13-27-102(2)(a); N.Y. Elec. Law § 6-140(b); N.D. Const. art. III, § 3; Ohio Rev. Code Ann. § 3503.06(C)(1)(a); D.C. Code § 1-1001.16(h)(5). Despite this witness residency requirement, the Commonwealth has not lacked third-party representation on its presidential ballot.[4]

The reasons for this requirement are compelling. It enables Virginia election officials to confirm the identity of petition signature witnesses and verify that they are of age and are not felons—facts that plainly bear on the credibility of their attestation and to the signatures they submit. Pet. App. 36-37; *see* J.A. 194. This requirement also serves to ensure that the Commonwealth's investigatory and prosecutorial powers may be brought to bear where there are allegations of fraud, or simply mistakes, in the petition circulation process, whether by circulators, witnesses, or signatories. Pet. App. 37. When voter fraud is perpetrated by non-residents, as has happened in other states, those states have faced heighted difficulties in investigating and prosecuting those crimes. *See* Pet. App. 37-39. As the district court noted, "the [Virginia State Board of Elections] is unaware of any instance wherein an individual was extradited from one state to another to face

[4] No fewer than two and frequently four minor parties have obtained Virginia presidential ballot access in every presidential election year since 1996. *See* Virginia State Board of Elections, Election Results Table of Contents, http://www.sbe.virginia.gov/cms/Election_ Information/Election_Results/Index.html.

prosecution" for violation of state election laws. Pet. App. 39.

Respondent Libertarian Party of Virginia "regularly fields candidates for various state and federal-elected positions." Pet. App. 25. Lacking the requisite support at the polls, LPVA has not been recognized as a "political party" in Virginia for ballot access purposes and so has been obliged to obtain ballot access through the petition process. Pet. App. 25. Through petitioning, LPVA has successfully appeared on the ballot in every presidential election in Virginia since 1992, despite never garnering more than 0.6 percent of the vote in any of those elections.[5] J.A. 92; *see* Va. Code Ann. § 24.2-101. LPVA has primarily relied upon two resident Virginians who are paid circulators to gather petition signatures within the Commonwealth, although they are sometimes assisted by a handful of other volunteer resident petition circulators. Pet. App. 25; J.A. 92-93. However, as does the national Libertarian Party when circulating in other states with residency requirements, LPVA has at times satisfied the requirement by providing resident witnesses to non-resident professional circulators. J.A. 62, 102. LPVA claims that the requirement to assign witnesses "reduces the pool of circulators available to support the LPVA's presidential candidate" (presumably

[5] *See* Virginia State Board of Elections, Election Results Table of Contents, http://www.sbe.virginia.gov/cms/Election_Information/Election_Results/Index.html.

because there are so few Virginians who are willing to volunteer, or be paid to spend, their time supporting LPVA's cause), and burdens LPVA's ability "to choose the most effective means of conveying their message." J.A. 12.

Respondent Darryl Bonner, a professional petition circulator, member of the Libertarian Party, and resident of New York (formerly of Pennsylvania), was accompanied by one such resident witness when he circulated in Virginia on LPVA's behalf in the mid-2000s. Pet. App. 26 & n.1; J.A. 11, 112, 119. Although Bonner currently spends most of his time in Philadelphia, for nearly 20 years he has circulated petitions throughout the country, from California to New York, on behalf of a diverse array of political third parties and causes, including the Green Party, Constitution Party, Reform Party, Ron Paul for President Campaign, and the Libertarian Party. Pet. App. 26; J.A. 11, 105-06, 111-18, 120-23, 125-28, 234-35. When not circulating petitions, Bonner supports himself by working in Belize, in the film industry. J.A. 120-21, 123. Bonner has successfully obtained ballot access for every candidate or initiative for which he has gathered signatures, including the ones in Virginia and other states with witness residency requirements. J.A. 116-17, 124, 126, 132.

When soliciting a signature, Bonner greets a prospective signer and asks whether the person is a registered voter of the state in which he is circulating. If so, Bonner follows up with a request "to take a moment and sign [his] petition"; if interest is

expressed, he identifies the "topic" or candidate seeking to be placed on the ballot and explains that the petition needs to be signed "just so [the topic can] be considered to be voted on" or "just to place the Libertarian Party on the ballot." Bonner also emphasizes that "[t]his is only for ballot access purposes," and assures the prospective signer that he or she will "get nothing in the mail." J.A. 118.

When working in Virginia and other states with a witness residency requirement, the hiring party has often assigned a witness to Bonner and, if need be, paid that witness to accompany Bonner. J.A. 116, 122-23, 125-26, 128-29, 131-32. The witness residency requirement thus diminishes Bonner's speech and association rights only to the extent that it "slow[s] the process down" and makes it more difficult "to communicate effectively with potential signatories." J.A. 11. Sometimes Bonner "could not collect signatures because no witness was available," because "the witness wanted to take a break," or because the witness would interrupt his "communication to potential signatories to state [his or her] own opinion[ ], which sometimes invited argument from the potential signatory and sometimes caused the potential signatory to decide not to sign the petition." J.A. 235. Yet Bonner himself "incurred no expenses" as a result of being accompanied by in-state witnesses, and he otherwise "approach[es] the petition signer in the same format," whether working with an assigned witness or not. J.A. 121, 123, 236.

Proceedings Below

On May 14, 2012, LPVA and Bonner filed a complaint in the Eastern District of Virginia against Charles Judd, Kimberly Bowers, and Don Palmer, in their official capacity as members of the Virginia State Board of Elections (collectively "the Board"), claiming that Virginia Code § 24.2-543's witness residency requirement violated their First and Fourteenth Amendment rights and seeking declaratory and injunctive relief. J.A. 7, 13-14. LPVA moved for summary judgment, arguing that the witness residency requirement severely burdened the speech and association rights of non-resident petition circulators because it prevented them from gathering signatures alone. J.A. 41-42. LPVA claimed that, "[e]ven if [Virginia's] interests were recognized as 'compelling,'" the requirement did not pass strict scrutiny because "Virginia could . . . require petition circulators to consent to state jurisdiction for subpoena purposes." J.A. 45-46.

The Board responded first by noting that "[i]t is beyond dispute that the Commonwealth has a compelling government interest in protecting the integrity of elections by preventing and punishing election fraud, including 'policing lawbreakers among petition circulators.'" J.A. 171 (quoting *ACLF*, 525 U.S. at 196). The Board noted that the possibility of fraud in the context of ballot access petitions is not hypothetical, offering examples in Virginia's recent history and from other states. J.A. 172. The Board maintained that the witness residency requirement is

narrowly tailored to that interest because it preserves the Commonwealth's ability "to confirm the identity, age, address, and felony status" of circulators and preserves the efficacy of the Commonwealth's subpoena power. J.A. 174.

The district court granted LPVA's motion for summary judgment. Finding that the witness residency requirement severely burdened the free speech rights of non-residents by depriving them of a means of engaging in core political speech, the court applied strict scrutiny. Pet. App. 36. The court did agree with the Board that the Commonwealth has a compelling interest in "protecting the validity of [its] electoral process," an interest served by the ability "to subject circulators to criminal prosecution and properly police election fraud." Pet. App. 36-37. It acknowledged that the ability to confirm the other eligibility requirements turned on the residence of the circulator. Pet. App. 37. Yet the district court nevertheless held the law unconstitutional, finding that it was not narrowly tailored to the Commonwealth's compelling interest.

It first emphasized that non-residents are not necessarily more likely to commit fraud than are residents. Pet. App. 38. More relevantly, the district court posited a requirement it claimed would more narrowly serve the relevant interest: "requir[ing] circulators to submit to [the Commonwealth's] subpoena power before becoming a circulator." Pet. App. 39. The court placed on the Board the burden of showing the necessity of requiring residency

rather than consent to jurisdiction for the purpose of fraud prosecution within the Commonwealth, and concluded it had not satisfied its burden. Pet. App. 39.

The Board appealed to the United States Court of Appeals for the Fourth Circuit, arguing first that strict scrutiny should not apply because the witness residency requirement does not impose a burden of sufficient severity, and in the alternative that even under strict scrutiny the witness residency requirement is the least restrictive means of advancing the Commonwealth's interest in policing election fraud. Pet. App. 18. The LPVA did "not seriously dispute that the prevention of election fraud is a compelling state interest." Pet. App. 18. The Board reiterated that that interest has three components: enabling identification of witnesses to confirm that "they are qualified by age and not disqualified by felon status"; facilitating the Commonwealth's timely location of petition signature witnesses "for investigatory or prosecutorial purposes"; and ensuring to the extent possible that witnesses will be subject to the Commonwealth's subpoena jurisdiction "to answer questions under oath concerning the circulation process, or to be prosecuted for criminal activity." Pet. App. 18. The Board reasoned that "the integrity of the petitioning process depends on state election official[s'] access to the one person who can attest to the authenticity of potentially thousands of signatures." Pet. App. 19 (internal quotation omitted).

The Fourth Circuit rejected that line of reasoning. First, without further consideration of the facts presented in this case, the court followed "[t]he triumvirate of 2008 decisions in" *Yes on Term Limits, Inc.* v. *Savage*, 550 F.3d 1023 (10th Cir. 2008); *Nader* v. *Blackwell*, 545 F.3d 459 (6th Cir. 2008); and *Nader* v. *Brewer*, 531 F.3d 1028 (9th Cir. 2008), and found that strict scrutiny applied. Pet. App. 17-18. Presuming that the witness residency requirement is "effective in combating fraud," the court focused on "[t]he more substantial question . . . whether [the requirement] . . . is, notwithstanding its efficacy, insufficiently tailored to constitutionally justify the burden it inflicts on the free exercise of First Amendment rights." Pet. App. 19. The Fourth Circuit relegated the other justifications offered for the witness residency requirement to a footnote, suggesting that Virginia election officials should require circulators to "supply such proof of eligibility as may be deemed sufficient," instead of the current process of independent verification. Pet. App. 20 n.8. The Fourth Circuit also dismissed the practical difficulty of enforcing "ostensible consent to the extraterritorial reach of the Commonwealth's subpoena power," the court cited decisions of the Seventh, Ninth, and Tenth Circuits for the proposition that "a binding legal agreement with the Commonwealth to comply with any civil or criminal subpoena that may issue" would more narrowly achieve the same interest. Pet. App. 20. Since the Board had not proven that "manifestly less restrictive" alternative unworkable with "concrete evidence of persuasive force," the Fourth Circuit held that the witness residency requirement

failed strict scrutiny and was therefore unconstitutional. Pet. App. 21. This Petition for a Writ of Certiorari followed.

REASONS FOR GRANTING THE PETITION

In *ACLF*, this Court held that Colorado's requirement that the circulators of ballot access petitions be registered voters was not narrowly tailored to the State's "strong interest in policing lawbreakers among petition circulators." 525 U.S. at 196. The Eighth Circuit recognized the limits of this holding, identified in *ACLF* itself in dicta, and upheld a state *residency* requirement. *Initiative & Referendum Inst.* v. *Jaeger*, 241 F.3d 614 (8th Cir. 2001). But since then the courts of appeals, most recently the Fourth Circuit below, have blindly followed each other in positing an obviously unworkable alternative to residency—consent to jurisdiction for non-residents. In so holding, the Fourth Circuit has deepened the split among the circuits as to the proper application of both this Court's decision in *ACLF* and of the least restrictive means analysis, ignoring *ACLF*'s strong dicta pointing in the opposite direction. This Court should grant this Petition to resolve this split, clarify the appropriate judicial role regarding questions of least restrictive alternatives, and determine whether states may use residency requirements to preserve the integrity of their election processes.

I. The Courts of Appeals Are Divided Over Whether the Holding in *Buckley* v. *ACLF* Properly Extends, Despite Strong Dicta to the Contrary, to State Witness Residency Requirements for Ballot Access Petition Signatures.

The Fourth Circuit's decision below directly conflicts with the Eighth Circuit's decision in *Jaeger*, 241 F.3d 614, and has therefore deepened the existing split among the circuits on the issue of whether states may constitutionally require petition circulators to be residents for the purpose of ensuring subpoena power over them. *See Lux* v. *Rodrigues*, 131 S. Ct. 5, 7 (2010) (Roberts, C.J., in chambers) (noting that "the courts of appeals appear to be reaching divergent results . . . with respect to the validity of state residency requirements"). Three other circuits have struck nearly identical requirements, *see Yes on Term Limits*, 550 F.3d 1023; *Blackwell*, 545 F.3d 459; and *Brewer*, 531 F.3d 1028, and a fourth has come down in dicta on the same side as the Eighth Circuit. *See Lerman* v. *Bd. of Elections*, 232 F.3d 135 (2d Cir. 2000). This Petition squarely presents this long developing split for this Court's resolution.

When the Eighth Circuit upheld North Dakota's residency requirement for ballot access petition circulators, it correctly held that "the State has a compelling interest in preventing fraud. . . . The residency requirement allows North Dakota's Secretary of State to protect the petition process from fraud and abuse by ensuring that circulators answer

to the Secretary's subpoena power." *Jaeger*, 241 F.3d at 616. The *Jaeger* Court listed several reasons why the requirement did not place a "severe burden . . . on those wishing to circulate petitions," including the high success rate of placing initiatives on North Dakota's ballot and the lack of evidence regarding any additional cost. *Id.* at 617. The court found it significant that non-residents could express support for ballot initiatives through alternative means, including by accompanying circulators: "The one restriction is that out-of-state residents cannot personally collect and verify the signatures, and that restriction is justified by the State's interest in preventing fraud." *Id.* Because the residency requirement served the state's compelling interest without severely burdening speech, the Eighth Circuit upheld it under the First Amendment.

The Fourth Circuit disregarded *Jaeger*'s reasoning and reached the same conclusion as the Ninth Circuit and two other circuits in striking down Virginia's witness residency requirement. Pet. App. 17 (mentioning *Jaeger*'s contrary holding without so much as seeking to distinguish it); *see also Lux*, 131 S. Ct. at 7 (Roberts, C.J., in chambers) (noting the circuit split). The Fourth Circuit did so even though Virginia's law is less restrictive than North Dakota's because in Virginia a non-resident can seek and collect signatures, and merely may not witness them. Because the Fourth Circuit reached its conclusion with minimal reasoning, the full character of the split is best illustrated by examining the holding of every

court of appeals that has reached the same conclusion.

Nader v. *Brewer* considered Arizona's residency requirement for the circulators of ballot access petitions for independent candidates. 531 F.3d at 1030, 1038. Dismissing the fact that the Arizona provision was "less restrictive than the provision invalidated in [*ACLF*] because [it did] not require circulators to be actual registered voters," the *Brewer* Court found persuasive that other federal courts had considered a consent to jurisdiction requirement a more narrowly tailored means to the subpoena enforcement end.[6] *Id.* at 1036-37. The Ninth Circuit

[6] *Brewer* cites *Chandler* v. *City of Arvada*, 292 F.3d 1236 (10th Cir. 2002), *Krislov* v. *Rednour*, 226 F.3d 851 (7th Cir. 2000), and *Frami* v. *Ponto*, 255 F. Supp. 2d 962 (W.D. Wis. 2003), to support its conclusion that a consent to jurisdiction would be a more narrowly *tailored* means of serving the same interest. Yet neither *Chandler* nor *Krislov* squarely dealt with the feasibility of a signed agreement as a replacement for subpoena jurisdiction over state residents. *Chandler* involved a *city* residency requirement, and although the city cited its own subpoena jurisdiction as its interest supporting its residency requirement, 292 F.3d at 1242-44, certainly the State still possessed subpoena power outside the city limits. *Krislov* involved a voter registration and "political subdivision residency requirement" that amounted to a state residency requirement for a candidate for the U.S. Senate, but very little of *Krislov*'s reasoning is applicable in that less restrictive context. 226 F.3d at 856, 863-66. Furthermore, the state in *Krislov* did not claim its interest in ensuring subpoena power over circulators as a justification, and the court suggested consent to jurisdiction only at the very end of the opinion in a footnote without considering

(Continued on following page)

noted but failed to engage Arizona's argument that this supposed alternative is "unworkable" because many paid circulators are "'nomadic.'" *Id.* at 1038. The court mentioned *Jaeger*'s contrary holding only to declare it unpersuasive without further distinguishing it, and struck the residency requirement as unconstitutional. *Id.* at 1036-38.

Two other circuits also held residency requirements for Petition circulators unconstitutional later that same year. The Sixth Circuit, despite noting that "the record and briefs [before it did] not contain the usual evidence and arguments about whether Ohio's law is narrowly tailored to achieve a compelling interest," nevertheless held without further support or reasoning that it saw "little reason to uphold the exclusion of [non-residents] from the ranks of circulators." *Nader* v. *Blackwell*, 545 F.3d at 475-76.

The Tenth Circuit's opinion in *Yes on Term Limits, Inc.* v. *Savage* also followed *Brewer*'s holding, although unlike *Blackwell* that court did articulate additional reasoning. 550 F.3d at 1025, 1029-30. Positing that "Oklahoma could provide criminal penalties for circulators who fail to return when a protest occurs," the *Yes on Term Limits* Court dismissed Oklahoma's counterargument that enforcing a consent to jurisdiction on an out-of-state

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its workability. *Id.* at 866 n.7. *Frami* simply relied on *Chandler*. *Frami*, 255 F. Supp. 2d at 970.

individual is prohibitively costly and difficult. *Id.* at 1030. Instead the court found dispositive the lack of proof that "as a class, non-resident petition circulators who sign such agreements are less likely to submit to questioning than residents." *Id.* Because the court found that the record contained insufficient evidence on this point, it struck the residency requirement as not "a narrowly tailored means of meeting [Oklahoma's] compelling interest." *Id.* at 1031. Neither *Blackwell* nor *Yes on Term Limits* cited the Eighth Circuit's contrary opinion in *Jaeger* in reaching the opposite conclusion. And none of these courts have cited any real-world examples of a jurisdiction furthering its enforcement interest through consent to jurisdiction agreements with non-residents rather than with residency requirements.

Prior to all of these cases, but after this Court's decision in *ACLF*, the Second Circuit addressed a similar restriction and in dicta reached the opposite conclusion from that of the Fourth Circuit. *Lerman* applied *ACLF* to strike New York's requirement that petition signature witnesses be residents of the district for which they were gathering signatures. 232 F.3d at 139. In doing so, that court noted that subpoena jurisdiction is the "usual justification" for state residency requirements. *Id.* at 150. Given that the State's subpoena power would run beyond the voting district, the stricter district-specific voter registration requirement was not narrowly tailored to the State's compelling interest in "ensuring integrity and preventing fraud in the electoral process," but

the court strongly indicated that a state residency requirement itself would be upheld on that ground. *Id.* at 149-50 & n.14.

In sum, the courts of appeals, without substantial reasoning, with no prior example of a state effectively utilizing a consent to jurisdiction agreement, and without any reason in criminal law to believe such an agreement would be effective, have substituted their judgment for that of state elected officials and state election officers regarding the prevention and prosecution of election fraud. In doing so they have struck commonsense election law restrictions that obviously further a compelling government interest in favor of brain-spun alternatives that lack even facial plausibility. The incongruity of this approach with the judicial office and the disuniformity it has created militate in favor of review by this Court.

II. The Recent Trend in the Courts of Appeals Is Contrary to the Clear, Unanimous Dicta of This Court in *Buckley* v. *ACLF*.

The Fourth Circuit and other courts of appeals that have struck down residency requirements have improperly expanded the holding of this Court's decision in *ACLF*, ignoring strong contrary dicta in that opinion. Despite striking Colorado's voter registration requirement, the *ACLF* Court assumed and strongly implied that the residency requirement (which had not been challenged) was a constitutional

less restrictive means of achieving the same end. The *ACLF* majority also mentioned approvingly several restrictions on petition circulators directly served by Virginia's witness residency requirement. None of the courts that have struck residency requirements have squarely addressed this concern. Accordingly, this Court should grant this Petition to clarify its reasoning in *ACLF* and correct the erroneous interpretation of the courts of appeals.

In *ACLF*, Colorado argued that its voter registration requirement was necessary "to ensure that circulators will be amenable to the Secretary of State's subpoena power," in order to enforce its election regulations. 525 U.S. at 196. The *ACLF* Court recognized Colorado's "strong interest in policing law breakers among petition circulators," the same interest that Virginia has asserted in this case, and agreed that it was compelling. *Id.* at 196. It concluded, however, that a *voter* registration requirement was not narrowly tailored to that interest. Instead, the Court found that "the requirement . . . that each circulator submit an affidavit" listing the address of his residence, which had to be in Colorado, adequately served that interest. *Id.* Because Colorado's *residency* requirement had not been challenged below, the Court did not directly address the constitutionality of that restriction. Yet on the way to striking down the voter registration requirement, the Court assumed "that a residence requirement would be upheld as a needful

integrity-policing measure." *Id.* at 197. The Court noted that the court below had explicitly recognized that the residency requirement "more precisely achieved the State's subpoena service objective." *Id.* (quotation marks omitted). Only in the context of that assumption did the Court hold that "the added registration requirement is not warranted." *Id.*

The conclusion that a state residency requirement is constitutionally permissible was supported, not only by the majority, but also by the concurring and dissenting opinions in *ACLF*. *See id.* at 211 (Thomas, J., concurring in the judgment) ("The Tenth Circuit assumed, and so do I, that the State has a compelling interest in ensuring that all circulators are residents."); *id.* at 217 (O'Connor, J., concurring in part and dissenting in part) ("I believe that the requirement that initiative petition circulators be registered voters is a permissible regulation of the electoral process." (internal citation omitted)); *id.* at 230 (Rehnquist, C.J., dissenting) (expressing support for the interpretation of the majority's reasoning from which "it necessarily follows . . . that a State may limit petition circulation to its own residents"). In no case since *ACLF* has this Court retreated from this implicit endorsement of the very restriction that the Fourth Circuit held to be unconstitutional.

In striking down the voter registration requirement, the *ACLF* majority noted several other permissible restrictions on petition circulator eligibility. Yet the Fourth Circuit and other courts of

appeals have also ignored the interplay between residency requirements and enforcement of those restrictions, a fact that provides additional, independent justification for the restriction. *See Doe* v. *Reed*, 130 S. Ct. 2811, 2819-20 (2010) (holding that a compelled public disclosure requirement for signers of petitions withstood strict scrutiny because the requirement aids state election officials' "efforts to ferret out invalid signatures," and "can help cure the inadequacies of the verification and canvassing process"). According to this Court, "convicted drug felons who have been denied the franchise as part of their punishment" and "children and citizens of foreign lands" may all be denied the privilege of circulating petitions. *ACLF*, 525 U.S. at 194 n.16 (quotation marks omitted). Yet the Fourth Circuit disregarded Virginia's interest in ensuring that witnesses meet these requirements, giving no weight to the difficulties in verifying the identity of non-residents. *See* Pet. App. 18-19, 20 n.8. As the record shows, Virginia can search its own records to determine whether its residents satisfy these fundamental criteria, but the Commonwealth does not have access to similar records for those residing in other states. J.A. 177, 180-81, 194. In dismissing this justification, the Fourth Circuit failed to fully account for the logical implications of this Court's discussion of the topic in *ACLF*.

III. The Fourth Circuit Improperly Decided an Important Question of Federal Law By Minimizing the Commonwealth's Compelling Interest of Protecting the Electoral Process from Fraud and By Misapplying Least Restrictive Means Analysis.

This Court has repeatedly recognized not only the States' strong interest in policing election fraud, but also in "ferret[ting] out invalid signatures caused not by fraud but by simple mistake," an interest that is substantially furthered by ensuring that the witness, if not the circulator, will be available for follow-up inquiry. *Reed*, 130 S. Ct. at 2819 ("The State's interest in preserving the integrity of the electoral process is undoubtedly important," and "is particularly strong with respect to efforts to root out fraud."); *Timmons* v. *Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) ("States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder."); *Burdick* v. *Takushi*, 504 U.S. 428, 433 (1992) ("'[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'" (quoting *Storer* v. *Brown*, 415 U.S. 724, 730 (1974)); *Meyer*, 486 U.S. at 425 (recognizing the States' interest "in protecting the integrity of the initiative process"); *Anderson* v. *Celebrezze*, 460 U.S. 780, 788 n.9 (1983) ("We have upheld generally applicable and evenhanded restrictions that protect

the integrity and reliability of the electoral process itself.").

Moreover, this Court has acknowledged both that "[t]he threat of fraud in this context is not merely hypothetical," *Reed*, 130 S. Ct. at 2819, and that States may act proactively, rather than waiting for the same known or anticipated evils to be visited upon its elections. *See Crawford* v. *Marion Cnty. Election Bd.*, 553 U.S. 181, 194-96 (2008) (holding that States may act to prevent electoral fraud even where "[t]he record contains no evidence of any such fraud actually occurring in [the State in question] at any time in its history."); *Munro* v. *Socialist Workers Party*, 479 U.S. 189, 195-96 (1986) ("Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights."). Yet, in substituting its judgment for that of the General Assembly, the Fourth Circuit effectively minimized and disregarded this compelling interest in at least two ways.

First, the Fourth Circuit failed to recognize that Virginia's witness residency requirement does not burden speech even to the extent that other States' residency requirements have. Specifically, Virginia does not prohibit anyone from engaging in "'core political speech.'" *Meyer*, 486 U.S. at 422. When hired by the LPVA to circulate petitions in Virginia, Bonner was not prevented from talking to potential

signatories or obtaining signatures; quite the contrary, he has successfully placed candidates on Virginia's ballot as a resident of Pennsylvania. The only restriction Virginia has placed on non-resident circulators is that they work with a resident of Virginia, whose job is simply to witness the signatures and attest to their validity.

Second, assuming that on these facts strict scrutiny is the proper standard for assessing the constitutionality of a residency requirement like Virginia's, the Fourth Circuit and the other courts of appeals have simply ignored fundamental principles of our constitutional order and impermissibly substituted their judgment for that of state legislatures. In holding that a signed consent to jurisdiction would be a less restrictive means of serving the same interest served by the witness residency requirement, the Fourth Circuit ignored this Court's well established articulation of least restrictive means analysis and disregarded the Commonwealth's legitimate concerns regarding the workability of the proposed alternative. Before an individual is charged with a crime, the Commonwealth is unable to extradite someone in, say, California. This is a fact of our constitutional order, *see* U.S. Const. art. IV, § 2, cl. 2, and one that is well recognized in Virginia law. *See* Va. Code Ann. §§ 19.2-72, -76, -77, -79; *id.* §§ 52-8, -20; Va. Sup. Ct. R. 3A:12(C). Even after a charge, extradition for election law violations is unheard of. *See* Va. Code Ann. §§ 19.2-108–112. And quite apart from the obvious

legal and practical hurdles, a hypothetical regulatory enforcement tool that has never been implemented and which on its face does not address many of the various interests served by the challenged restriction does not suffice as a less restrictive alternative, as it is neither "available" nor "workable." Hence, it is not a true alternative. *See Fisher* v. *Univ. of Tex. at Austin*, 133 S. Ct. 2411, 2420 (2013) ("[S]trict scrutiny imposes on the university the ultimate burden of demonstrating . . . that *available*, *workable* race-neutral alternatives do not suffice." (emphasis added)); *Ashcroft* v. *ACLU*, 542 U.S. 656, 666 (2004) (noting, in the First Amendment context, that it is for "the court [to] ask whether the challenged regulation is the least restrictive means among *available, effective alternatives*." (emphasis added)).

In embracing the consent to jurisdiction model of enforcement, neither the Fourth Circuit nor any of the other courts of appeals sharing its conclusion has cited any instance where a State has implemented this supposedly less-restrictive alternative to address the subpoena power conundrum, and Petitioners are unaware of any such example. Instead, the courts have emphasized the lack of evidence that fraud levels differ between residents and non-residents rather than acknowledging the real difference which partially motivates the distinction drawn by Virginia Code § 24.2-543: the likelihood that the individual will remain within the Commonwealth and thereby be located and made subject to its subpoena jurisdiction. And, plainly, the consent to jurisdiction

requirement does nothing to further the Commonwealth's interests in independently confirming the individual's identity, age, and felony status. Although the Commonwealth does bear the burden of proving the necessity of a particular restriction, it is not the duty or prerogative of the federal courts to tell a State exactly how *much* it should seek to vindicate that interest within general constitutional limits. *See Burson* v. *Freeman*, 504 U.S. 191, 207-09 (1992) (refusing to second-guess the legislature on the size of the buffer zone around the voting location after having determined that some buffer zone was necessary to protect a compelling interest, and noting that "this Court never has held a State to the burden of demonstrating empirically the objective effects on political stability that [are] produced by the voting regulation in question." (quotation marks omitted)). Because the Fourth Circuit and other courts of appeals have applied strict scrutiny unreasonably by relying on the existence of an untested and unworkable alternative to a state residency requirement, this Court should also grant the Petition to clarify the proper application of strict scrutiny in the election regulation context.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that this Court grant the Petition for Writ of Certiorari and reverse the judgment of the Fourth Circuit.

Respectfully submitted,

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

E. DUNCAN GETCHELL, JR.
Solicitor General of Virginia
dgetchell@oag.state.va.us
Counsel of Record

MICHAEL H. BRADY
Assistant Solicitor General
mbrady@oag.state.va.us

PATRICIA L. WEST
Chief Deputy
Attorney General

WESLEY G. RUSSELL, JR.
Deputy Attorney General
wrussell@oag.state.va.us

OFFICE OF THE
ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-7240
Facsimile: (804) 371-0200
Counsel for the Petitioners

August 16, 2013

APPENDIX

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LIBERTARIAN PARTY OF VIRGINIA; DARRYL BONNER,

Plaintiffs-Appellees,

v.

CHARLES JUDD, in his official capacity as member of the Virginia State Board of Elections; KIMBERLY BOWERS, in her official capacity as member of the Virginia State Board of Elections; DON PALMER, in his official capacity as member of the Virginia State Board of Elections,

Defendants-Appellants.

THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION,

Amicus Supporting Appellees.

No. 12-1996

Appeal from the United States District Court
for the Eastern District of Virginia, at Richmond.
John A. Gibney, Jr., District Judge.
(3:12-cv-00367-JAG)

Argued: March 20, 2013

Decided: May 29, 2013

Before KING, DIAZ, and FLOYD, Circuit Judges.

Affirmed by published opinion. Judge King wrote the opinion, in which Judge Diaz and Judge Floyd joined.

ARGUED: Earle Duncan Getchell, Jr., OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellants. Rebecca Kim Glenberg, AMERICAN CIVIL LIBERTIES UNION FOUNDATION OF VIRGINIA, Richmond, Virginia, for Appellees. **ON BRIEF:** Kenneth T. Cuccinelli, II, Attorney General of Virginia, Michael H. Brady, Assistant Attorney General, Patricia L. West, Chief Deputy Attorney General, Wesley G. Russell, Jr., Deputy Attorney General, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellants. J. Joshua Wheeler, THE THOMAS JEFFERSON CENTER FOR THE PROTECTION OF FREE EXPRESSION, Charlottesville, Virginia, for Amicus Supporting Appellees.

OPINION

KING, Circuit Judge:

In the spring of 2012, the Libertarian Party of Virginia (the "LPVA") began to circulate petitions throughout the Commonwealth in the hope of collecting enough signatures to place its national candidate for President of the United States on the ballot for the November general election. To achieve

ballot access for its candidate, the LPVA was required to obtain the signatures of 10,000 qualified Virginia voters, with each of the Commonwealth's eleven congressional districts contributing at least 400 signatures toward the total. *See* Va. Code § 24.2-543.[1] In accordance with Virginia law, signatures on nominating petitions must be witnessed either by the candidate personally, or by a person who is a "resident of the Commonwealth and who is not a minor or a felon whose voting rights have not been restored" (the "witness residency requirement" or the "requirement"). *Id.*

On May 14, 2012, the LPVA, joined by Darryl Bonner, a Pennsylvania Libertarian and professional petition circulator (collectively, the "plaintiffs"), filed the underlying action in the Eastern District of Virginia, seeking injunctive and declaratory relief pursuant to 42 U.S.C. § 1983. The plaintiffs' verified Complaint alleges that the witness residency requirement impermissibly burdens their rights to free speech and free association under the First Amendment, as made applicable to the Commonwealth by the Fourteenth Amendment. The named defendants are the three members of the

[1] The LPVA must petition for ballot access pursuant to section 24.2-543 because it is not a "political party," defined as "an organization of citizens of the Commonwealth which, at either of the two preceding statewide general elections, received at least 10 percent of the total vote cast for any statewide office filled in that election." Va. Code § 24.2-101.

Virginia State Board of Elections (collectively, the "Board"), sued in their official capacities as administrators of the Commonwealth's election laws.

The plaintiffs explain that the LPVA uses both paid professionals and unpaid volunteers to circulate nominating petitions and collect signatures. *See* Complaint ¶ 15.[2] Only two of those professionals are LPVA members, *see id.* ¶ 16, and are thus permitted, on the basis of their Virginia residency, to attest to the signatures they collect. In contrast, nonresident professionals like Bonner must work in tandem with a resident of Virginia, whose sole purpose is to function as a witness. While circulating petitions in Virginia for the Green Party during 2008, Bonner "found that being accompanied by a non-professional Virginia resident significantly slowed the process down and inhibited his ability to communicate effectively with potential signatories." *Id.* ¶ 19.[3]

Consequently, according to the plaintiffs, the witness residency requirement "reduces the pool of

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[2] The Complaint is found at J.A. 7-16. (Citations herein to "J.A. ___" refer to the contents of the Joint Appendix filed by the parties to this appeal.)

[3] Bonner elaborated during discovery that, during the 2008 petition drive, his witness-partners occasionally "wanted to take a break when I wanted to continue working. Witnesses sometimes interrupted my communication to potential signatories to state their own opinions, which sometimes invited argument from the potential signatory and sometimes caused the potential signatory to decide not to sign the petition." J.A. 109.

circulators available," thereby rendering it more difficult for LPVA members "to disseminate their political views, to choose the most effective means of conveying their message, to associate in a meaningful way with the prospective solicitors for the purpose of eliciting political change, to gain access to the ballot, and to utilize the endorsement of their candidate" with respect to signature-collecting efforts. Complaint ¶ 21. Bonner is likewise adversely affected, the plaintiffs maintain, in that the requirement "restrict[s] the nature of support he can offer candidates, restrict[s] the type of speech he can engage in[,] . . . and restrict[s] his right to associate with the LPVA and with the candidates and voters of Virginia." *Id.* ¶ 22. These deleterious effects cause the witness residency requirement to fail strict scrutiny analysis under the First Amendment, the plaintiffs say, because it "is not narrowly tailored to further a compelling government interest." *Id.* ¶ 33.

The plaintiffs filed their Complaint about three months in advance of the deadline for the LPVA to submit signatures. In light of the time-sensitive nature of the dispute, the district court conducted a conference call with the parties on May 22, 2012, directing that discovery immediately commence and be completed within thirty days. The Board answered the Complaint on May 25, 2012, denying that the plaintiffs were entitled to redress. Following the close of discovery, on June 21, 2012, the parties filed cross-motions for summary judgment, with the Board's motion premised entirely on its assertion that

the plaintiffs have not suffered a legally cognizable injury and thus lack standing to sue.

On July 30, 2012, the district court issued a Memorandum Opinion in conjunction with a conforming Order, in which it denied the Board's motion as to standing and granted the plaintiffs' motion on the merits. The court therefore declared the witness residency requirement unconstitutional and permanently enjoined its enforcement.[4]

Subsequently, on August 13, 2012, the court denied the Board's motion to stay the Order pending appeal. The Board noticed this appeal the following day, and it moved us for a stay on August 24, 2012,

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[4] The district court's Order provided, in pertinent part, that "the defendants and their successor members of the Virginia State Board of Elections are hereby PERMANENTLY ENJOINED from enforcing the state residency requirement with respect to the circulation of petitions for independent candidates for the Office of President of the United States." Order 1. Although "[f]acial challenges are disfavored," *Wash. State Grange v. Wash. State Republican Party,* 552 U.S. 442, 450 (2008), they are permitted on overbreadth grounds "because the 'statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression.'" *Hardwick ex rel. Hardwick v. Heyward,* 711 F.3d 426, 441 (2013) (quoting *Broadrick v. Oklahoma,* 413 U.S. 601, 612 (1973)). Nevertheless, "'a law should not be invalidated for overbreadth unless it reaches a substantial number of impermissible applications.'" *Hardwick,* 711 F.3d at 426 (quoting *New York v. Ferber,* 458 U.S. 747, 771 (1982)). The Board does not contend that, if the witness residency requirement is declared unconstitutional, such declaration should be confined solely to the requirement's application to the plaintiffs.

the deadline for the LPVA to submit its petitions. Thereafter, on September 6, 2012, we denied the requested stay. The parties then proceeded to brief the issues identified for appeal, and they presented oral argument on March 20, 2013. Having now fully considered the submissions and arguments of the parties, we affirm in all respects the judgment of the district court.

I.

We review de novo the district court's disposition of the cross-motions for summary judgment, evaluating them seriatim. *See Desmond v. PNGI Charles Town Gaming, L.L.C.,* 630 F.3d 351, 354 (4th Cir. 2011). With respect to both motions, we are required to view the facts and all justifiable inferences arising therefrom in the light most favorable to the nonmoving party, in order to determine whether "'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *Woollard v. Gallagher,* 712 F.3d 865, ___ (4th Cir. 2013) (quoting Fed. R. Civ. P. 56(a)). A dispute is genuine if "a reasonable jury could return a verdict for the nonmoving party." *Dulaney v. Packaging Corp. of Am.,* 673 F.3d 323, 330 (4th Cir. 2012). A fact is material if it "'might affect the outcome of the suit under the governing law.'" *Henry v. Purnell,* 652 F.3d 524, 548 (4th Cir. 2011) (quoting *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986)).

II.

We first examine the district court's ruling denying summary judgment to the Board, whose motion contended that the plaintiffs were bereft of standing to sue and, thus, that the court was without jurisdiction over the dispute. *See Steel Co. v. Citizens for a Better Env't,* 523 U.S. 83, 94 (1998) ("'On every writ of error or appeal, the first and fundamental question is that of jurisdiction.'") (quoting *Great S. Fire Proof Hotel Co. v. Jones,* 177 U.S. 449, 453 (1900)). Standing is part and parcel of the constitutional mandate that the judicial power of the United States extend only to "cases" and "controversies." U.S. Const. art. III, § 2; *see Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992) ("[T]he core component of standing is an essential and unchanging part of the case-or-controversy requirement of Article III.").

Constitutional standing comprises three elements: (1) the plaintiff is required to have sustained an injury in fact; which (2) must be causally connected to the complained-of conduct undertaken by the defendant; and (3) will likely be redressed if the plaintiff prevails. *See Lujan,* 504 U.S. at 560-61. The burden of establishing each element is on the plaintiff, which, in the context of this appeal, requires the "set[ting] forth by affidavit or other evidence specific facts, which for purposes of the summary judgment motion will be taken to be true." *Id.* at 561 (citation and internal quotation marks omitted). In challenging the district court's adverse ruling on

its summary judgment motion, the Board maintains that neither the LPVA nor Bonner has sufficiently demonstrated the existence of a threshold injury in fact.

A.

The Board portrays the LPVA's First Amendment claim as grounded in the latter's anxiety that its resident petition circulators might become incapacitated such that it would be compelled to replace either or both – if at all – with nonresident circulators made less efficient by the witness residency requirement. *See* Complaint ¶ 16 ("In past campaigns, these two people have been responsible for collecting a significant number of the required signatures. If either of them were to take ill or otherwise become unavailable, the LPVA would be unlikely to be able to collect the required 10,000 signatures."). Pointing out that the LPVA has succeeded in placing its presidential candidate on the Virginia ballot since 1992, *see* J.A. 92, and that both resident circulators were actively collecting signatures throughout the 2012 petition period at least until the close of discovery, *see id.* at 81, the Board depicts the mere threat of changed circumstances as impermissibly "'conjectural or hypothetical,'" and not the "'actual or imminent'" injury necessary to satisfy the standing requirement. *Lujan,* 504 U.S. at 560 (quoting *Whitmore v. Arkansas,* 495 U.S. 149, 155 (1990) (citation and internal quotation marks omitted)). The Board's

characterization, insofar as it misperceives the essence of the petition circulation process, too narrowly circumscribes the proper contours of the LPVA's claim.

In *Meyer v. Grant,* a unanimous Supreme Court determined that petitions "of necessity involve[ ] both the expression of a desire for political change and a discussion of the merits of the proposed change." 486 U.S. 414, 421 (1988). Indubitably, restrictions on this sort of "core political speech" can affect the ultimate goal of ballot access. *Id.* at 422-23 (deducing that Colorado statute criminalizing the payment of petition circulators "makes it less likely that [proponents of an initiative measure] will garner the number of signatures necessary to place the matter on the ballot"). Although the LPVA has yet to fail in its quadrennial quest to gather sufficient signatures in Virginia on behalf of its party's presidential candidate, the Board's exclusive focus on those past successes ignores the means by which that end has been, and is, achieved. *Cf. Buckley v. Am. Constitutional Law Found., Inc.,* 525 U.S. 182, 192 (1999) (affirming invalidation of Colorado initiative petition enactments as "significantly inhibit[ing] communication with voters about proposed political change").[5]

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[5] Though the decisions in *Meyer* and *Buckley* each involved challenges to laws governing initiative petitions and not nominating petitions, the Supreme Court noted in the latter case that "[i]nitiative-petition circulators . . . resemble

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Mindful of the Court's analysis in *Meyer,* we observe that those circulating nominating petitions need not succeed in convincing potential signatories that the candidate will prevail, but the circulators "will at least have to persuade them that [the candidate] is . . . deserving of the public scrutiny and debate that would attend . . . consideration by the whole electorate." 486 U.S. at 421. Almost invariably, this will "involve an explanation of the nature of the proposal," e.g., the candidate's political views or the party's platform, "and why its advocates support" them. *Id.* Taking as true the uncontested averments of the plaintiffs, we cannot help but agree that the witness residency requirement inevitably "limits the number of voices who will convey [the] message and hours they can speak and, therefore, limits the size of the audience they can reach." *Id.* at 422-23.[6]

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candidate-petition signature gatherers . . . , for both seek ballot access." *Buckley,* 525 U.S. at 191. In *Nader v. Blackwell,* the court of appeals mused that "[t]here appears to be little reason to limit *Buckley*'s holding to initiative-petition circulators. . . . Indeed, common sense suggests that, in the course of convincing voters to sign their petitions, candidate-petition circulators engage in at least as much interactive political speech – if not more such speech – than initiative-petition circulators." 545 F.3d 459, 475 (6th Cir. 2008) (internal quotation marks omitted); *see also Lux v. Judd,* 651 F.3d 396, 403 n.5 (4th Cir. 2011) (discerning no meaningful distinction, for purposes of First Amendment analysis, between initiative petitions and nominating petitions, nor between circulators of petitions and witnesses thereto).

[6] The verified Complaint faithfully tracks the concerns expressed by the Supreme Court in *Meyer,* alleging, among other

(Continued on following page)

It is therefore immaterial that the LPVA can, in spite of the witness residency requirement, circulate

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things, that the witness residency requirement "reduces the pool of circulators available to support the LPVA's presidential candidate[,] placing a severe burden on the candidate's and the LPVA's First Amendment rights by making it more difficult for them to disseminate their political views [and] to choose the most effective means of conveying their message." Complaint ¶ 21. Bruce Majors, a Washington, D.C. resident, submitted an affidavit on behalf of the LPVA in opposition to the Board's motion for summary judgment, in which he stated that, but for the requirement, he would have volunteered as a petition circulator and organized other volunteers during the 2012 campaign. *See* J.A. 155. In a separate affidavit filed at the same time, William Redpath, a former Chair of the Libertarian National Committee, confirmed that elimination of the requirement would afford the LPVA "more control over its own messaging and over the logistical details of its ballot access drives." *Id.* at 152.

The Board maintains that these eleventh-hour affidavits asserted for the first time "a present interest in engaging non-resident circulators, fundamentally altering LPVA's claim of legal injury," in stark juxtaposition to the more speculative prospect of the party failing to amass sufficient signatures in some future election. Br. of Appellants 23. According to the Board, the affidavits should be disregarded insofar as they contradict the prior sworn allegations of the Complaint. *See, e.g., In re Family Dollar FLSA Litig.,* 637 F.3d 508, 512 (4th Cir. 2011) (reciting "well established" rule that party cannot avoid adverse entry of summary judgment by attempting to conjure genuine issue of fact through self-serving affidavit that conflicts with prior testimony). Nonetheless, "for the rule . . . to apply, there must be a bona fide inconsistency." *Spriggs v. Diamond Auto Glass,* 242 F.3d 179, 185 n.7 (4th Cir. 2001). No such inconsistency is present here, in that the affidavits merely detail and lend context to the nature of the LPVA's injury, which the Complaint sets forth in general terms by allusion to *Meyer.*

its petitions to enough of the electorate to permit the collection of 10,000 signatures, if it is also true that, absent the requirement, the petition circulators could approach and attempt to persuade an even larger audience. An encumbrance thus alleged, whose presence is properly evidenced on summary judgment, constitutes an injury in fact for standing purposes.

B.

The Board also contests Bonner's standing, but its challenge steers a slightly different tack than that taken with the LPVA. Bonner disclosed, by way of background, that he has been a professional petition circulator and canvasser since about 1993, and that he is the CEO of his own company, Central Petition Management. *See* J.A. 111-12. Bonner has collected signatures all across the country, deriving substantial income from his efforts. *See id.* at 112-17, 121. He recalled having circulated nominating petitions in Virginia in at least two elections prior to 2012, *see id.* at 109, and Bonner "considers his work an important means of expressing his belief that third-party candidates play a significant role in the political system and should be allowed a place on the ballots," Complaint ¶ 18.

Bonner, however, revealed at his deposition that an injury to his right knee for which he would require surgery had scotched his immediate plans to circulate petitions for the LPVA. *See* J.A. 132-33. Though it

concedes that "Bonner's theory of [constitutional] injury could on its face support his case," Br. of Appellant 22, the Board insists that Bonner's physical incapacity to engage in protected speech and association in Virginia with respect to the 2012 campaign trumps the legal incapacity that would otherwise be imposed by the witness residency requirement.

The Board couches its argument against Bonner's standing in terms of imminency, relating to the threshold presence of an injury in fact, but we think it plain that the objection is more appropriately characterized as one concerning the second *Lujan* element, that of causation. Fulfillment of that element necessitates only that the alleged injury be "'fairly traceable'" to the complained-of action. *See MacDonald v. Moose,* 710 F.3d 154, 161-62 (4th Cir. 2013) (quoting *Lujan,* 504 U.S. at 560-61 (internal citation omitted)). Imposition of the stringent proximate cause standard, derived from principles of tort law, has been held to "wrongly equate[ ] injury fairly traceable to the defendant with injury as to which the defendant's actions are the very last step in the chain of causation." *Bennett v. Spear,* 520 U.S. 154, 168-69 (1997). The Supreme Court has therefore recognized the concept of concurrent causation as useful in evaluating whether the pleadings and proof demonstrate a sufficient connection between the plaintiff's injury and the conduct of the defendant, such that a court ought to assert jurisdiction over the dispute.

Thus, if the witness residency requirement is at least in part responsible for frustrating Bonner's attempt to fully assert his First Amendment rights in Virginia, the causation element of *Lujan* is satisfied, and he can attempt to hold the Board accountable notwithstanding the presence of another proximate cause. In that vein, it is well to remember that Bonner's claim is not that the requirement has precluded him, as a nonresident of Virginia, from circulating nominating petitions at all, but that he may only do so when accompanied by a resident witness.

Whereas a knee ailment like the one afflicting Bonner would have disabled any circulator or witness without regard to residency, the law of which Bonner complains targets him and others of his ilk with laser precision; consequently, Bonner's legal disability relates more closely to his asserted injury than does his physical infirmity. Moreover, Bonner's medical condition is ephemeral and, presumably, will have sufficiently improved by 2016, but if the witness residency requirement then remains on the books, he will yet be prohibited from circulating petitions unencumbered. Lastly, we imagine that Bonner could have overcome his uncooperative knee long enough to sit down on a street corner and solicit passersby for a few signatures (he did, after all, manage to attend his scheduled deposition). Had that happened, Bonner undoubtedly would not have been as effective as when healthy, but his limited efficacy would have

been even further hindered by the presence of a resident witness.

There is substantial basis, then, to conclude that, when it comes to encumbrances upon Bonner's exercise of his First Amendment rights, the witness residency requirement and his medical infirmity are, to a discernible degree, complementary of each other. The latter did not supplant the former in the chain of causation. We can therefore say with a modicum of confidence that the requirement is a concurrent cause of Bonner's alleged constitutional injury.[7]

III.

We next consider the district court's award of summary judgment to the plaintiffs on the merits of their claims. As the law has developed following the Supreme Court's decisions in *Meyer v. Grant,* 486 U.S. 414 (1988), and *Buckley v. American Constitutional Law Foundation,* 525 U.S. 182 (1999), a consensus has emerged that petitioning restrictions like the one at issue here are subject to strict scrutiny

[7] We note finally that, so long as either the LPVA or Bonner has demonstrated the requisite standing, we possess jurisdiction to decide the constitutional question before us and determine the propriety of declaratory and injunctive relief. *See Village of Arlington Heights v. Metro. Housing Dev. Corp.,* 429 U.S. 252, 264 & n.9 (1977) (observing that presence of "at least one . . . plaintiff who has demonstrated standing" obviated the need to "consider whether the other . . . plaintiffs have standing to maintain the suit").

analysis. *See Yes on Term Limits, Inc. v. Savage,* 550 F.3d 1023 (10th Cir. 2008) (applying strict scrutiny to overturn Oklahoma prohibition on nonresident circulators of initiative petitions); *Nader v. Blackwell,* 545 F.3d 459 (6th Cir. 2008) (declaring unconstitutional, as failing strict scrutiny, Ohio ban on nonresidents circulating nominating petitions); *Nader v. Brewer,* 531 F.3d 1028 (9th Cir. 2008) (invalidating, pursuant to strict scrutiny analysis, Arizona deadline and residency provisions relating to nominating petitions and circulator-witnesses). The Ninth Circuit in *Brewer* recited the general rule that "the severity of the burden the election law imposes on the plaintiff's rights dictates the level of scrutiny applied by the court." 531 F.3d at 1034 (citing *Burdick v. Takushi,* 504 U.S. 428, 434 (1992)).

Hence, "an election regulation that imposes a severe burden is subject to strict scrutiny and will be upheld only if it is narrowly tailored to serve a compelling state interest." *Brewer,* 531 F.3d at 1035 (citing *Burdick,* 504 U.S. at 434). The triumvirate of 2008 decisions in *Savage, Blackwell,* and *Brewer* demonstrate a general agreement among our sister circuits that residency restrictions bearing on petition circulators and witnesses burden First Amendment rights in a sufficiently severe fashion to merit the closest examination. *But see Initiative & Referendum Inst. v. Jaeger,* 241 F.3d 614, 616 (8th Cir. 2001) (upholding North Dakota proscription against nonresident initiative-petition circulators because "the regulation does not unduly restrict speech").

The Board contests the application of strict scrutiny only insofar as it presses its contention that the LPVA's assertion of injury can only be deemed contingent upon future circumstances, i.e., the sudden unavailability of resident circulators. The severity of the burden imposed by the witness residency requirement, according to the Board, is thereby attenuated commensurately. Having rejected the Board's position in connection with its argument that the LPVA lacks standing, we deem it equally without force on the merits. Strict scrutiny is the proper standard.

A.

The Board maintains that the witness residency requirement serves the Commonwealth's interest in policing fraud potentially permeating the electoral process, in that: (1) it is less difficult to confirm the identities of resident witnesses, and thereby ensure they are qualified by age and not disqualified by felon status; (2) witness residents in Virginia are subject to being subpoenaed by the authorities to answer questions under oath concerning the circulation process, or to be prosecuted for criminal activity; and (3) residents are simply easier to locate for investigatory or prosecutorial purposes. The plaintiffs do not seriously dispute that the prevention of election fraud is a compelling state interest. *See Savage,* 550 F.3d at 1028 (assuming, arguendo, that state had a "compelling interest in protecting and policing both the integrity and the reliability of its

initiative process"); *Brewer,* 531 F.3d at 1037 ("A state's interest in ensuring the integrity of the election process and preventing fraud is compelling." (citation omitted)); *Jaeger,* 241 F.3d at 616 (recognizing state's "compelling interest in preventing fraud").

B.

The more substantial question, and the crux of this appeal, is whether the Commonwealth's enactment banning all nonresidents from witnessing nominating petitions – a measure we presume to be effective in combatting fraud – is, notwithstanding its efficacy, insufficiently tailored to constitutionally justify the burden it inflicts on the free exercise of First Amendment rights. *See Krislov v. Rednour,* 226 F.3d 851, 863 (7th Cir. 2000) ("[W]e must take into account . . . other, less restrictive means [the state] could reasonably employ[, though it] need not use the least restrictive means available, as long as its present method does not burden more speech than is necessary to serve its compelling interests." (citations omitted)). The Board insists that the integrity of the petitioning process depends on "state election official access to the one person who can attest to the authenticity of potentially thousands of signatures," Br. of Appellants 34, access made more difficult, perhaps, if the witness resides beyond the subpoena power of the state.

The plaintiffs counter that the Commonwealth could compel nonresidents, as a condition of witnessing signatures on nominating petitions, to enter into a binding legal agreement with the Commonwealth to comply with any civil or criminal subpoena that may issue. Indeed, "[f]ederal courts have generally looked with favor on requiring petition circulators to agree to submit to jurisdiction for purposes of subpoena enforcement, and the courts have viewed such a system to be a more narrowly tailored means than a residency requirement to achieve the same result." *Brewer,* 531 F.3d at 1037 (citing, inter alia, *Chandler v. City of Arvada,* 292 F.3d 1236, 1242-44 (10th Cir. 2002); *Krislov,* 226 F.3d at 866 n.7). More recently, in *Savage,* the Tenth Circuit reiterated that "requiring non-residents to sign agreements providing their contact information and swearing to return in the event of a protest is a more narrowly tailored option." 550 F.3d at 1030.[8]

According to the Board, ostensible consent to the extraterritorial reach of the Commonwealth's subpoena power does not guarantee the requisite access, because nonresident witnesses must yet be located and retrieved, perhaps by extradition or rendition. There are few guarantees in life, however, and it is hardly an iron-clad proposition that a

[8] Such an agreement might also require prospective witnesses to attest to their fitness to serve and, with respect to both residents and nonresidents, supply such proof of eligibility as may be deemed sufficient.

similarly situated resident witness will be amenable to service and comply with a lawfully issued subpoena.

Simply stated, the Board has produced no concrete evidence of persuasive force explaining why the plaintiffs' proposed solution, manifestly less restrictive of their First Amendment rights, would be unworkable or impracticable. *See Ashcroft v. ACLU,* 542 U.S. 656, 665 (2004) ("[T]he burden is on the Government to prove that the proposed alternatives will not be as effective as the challenged statute."). Surely nonresidents with a stake in having the signatures they have witnessed duly counted and credited – whether that stake be political, financial, or otherwise – will possess the same incentive as their resident counterparts to appear at the Commonwealth's request and answer any questions concerning the petitioning process.

Having fallen short of adducing the quantum of proof necessary to place into issue the relative effectiveness of the plaintiffs' proposed alternative to the patently burdensome witness residency requirement, the Board cannot prevail. Given the facts as developed below and viewed in the proper light, we have scant choice but to conclude, as the district court did, that the requirement fails strict scrutiny and is unconstitutional.

IV.

Pursuant to the foregoing, the judgment of the district court is affirmed.

AFFIRMED

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA

Richmond Division

LIBERTARIAN PARTY
OF VIRGINIA and
DARRYL BONNER,

Plaintiffs,

v.

CHARLES JUDD, KIMBERLY BOWERS, and DON PALMER, Members of the Virginia State Board of Elections, in their official capacities,

Defendants.

Civil Action No.
3:12cv367-JAG

MEMORANDUM OPINION

(Filed Jul. 30, 2012)

This matter is before the Court on the parties' cross-motions for summary judgment. In this case, the Libertarian Party of Virginia, a third-party political organization, and Darryl Bonner (collectively, "the plaintiffs"), a paid professional petition circulator and resident of Pennsylvania, seek to place a Libertarian presidential candidate on the Virginia ballot. To appear on the ballot, Virginia law requires candidates or the political parties to submit a petition with certain minimum signature requirements. These petitions may only be circulated by Virginia residents. The plaintiffs argue that limiting petition circulators to Virginia residents

violates the First and Fourteenth Amendments of the Constitution. They ask the Court to issue a declaratory judgment finding Virginia's residency requirement on petition circulators unconstitutional, as well as a permanent injunction against the requirement's enforcement.

Defendants Charles Judd, Kimberly Bowers, and Don Palmer (collectively "the Board"), members of the Virginia State Board of Elections, argue that the plaintiffs have not been injured by the law. The Board asks the Court to dismiss the plaintiffs' claim for lack of standing and, thus, lack of subject matter jurisdiction.

Ultimately, the Court finds that the state-residency restriction on ballot circulation injures both plaintiffs; they have standing to challenge the law pursuant to their Constitutional rights to free speech and political expression. Accordingly, the defendants' motion for summary judgment will be denied.

Furthermore, the Court finds the restriction on out-of-state petition circulators to be unconstitutional. The law places a severe burden on the plaintiffs' freedom of speech and is not narrowly tailored to promote a compelling state interest. Accordingly, the plaintiffs' motion for summary judgment will be granted. The defendants shall be enjoined from enforcing the unconstitutional restriction contained in Va. Code § 24.2-543.

I. Background

The Libertarian Party of Virginia ("the LPVA") is a third-party political organization that regularly fields candidates for various state and federal-elected positions. As a party that failed to garner 10 percent of the total votes cast in either of the two most recent statewide general elections, the LPVA is not recognized as a "political party" in Virginia. *See* Va. Code § 24.2-101. To appear on the ballot, non-political parties like the LPVA must submit a petition signed by at least 10,000 qualified Virginia voters, including at least 400 qualified voters from each of Virginia's eleven congressional districts. Va. Code § 24.2-543. In addition, each signature must be witnessed by a legal Virginia resident who is neither a minor nor a felon with restored voting rights – this is the specific restriction at issue in the case. *Id.*

In order to ensure its candidates appear on the ballot in Virginia, the LPVA uses both volunteer and paid professionals to circulate petitions and collect the requisite signatures. The LPVA states that it is aware of only two professional circulators who are members of the Libertarian party, residents of Virginia, and consistently available to circulate petitions. (Pls.' Compl. ¶ 16.) According to the LPVA, it has relied on these two paid circulators to obtain signatures in past elections and its continued success in obtaining ballot access depends on those individuals' efforts. The LPVA's national counterpart, the Libertarian National Committee, has existing relationships with paid circulators who could

supplement the LPVA's petition circulation, but cannot because of Virginia's residency restriction.

Darryl Bonner, a New York resident and registered Libertarian, is a self-employed professional campaign circulator and canvasser. He has circulated petitions for nearly twenty years, working exclusively for third-party candidates and organizations in various states, including Virginia.[1] Bonner is suffering from a knee injury, however, which requires surgery and limits his ability to physically circulate petitions at present. He currently works in Pennsylvania as a coordinator for the Libertarian Party.

Bonner considers circulating petitions an important means of expressing his political beliefs regarding third-party candidates, specifically their ability to appear on the ballot. In the past, Bonner has circulated petitions in states with residency requirements by working with a state resident who served as the official signature witness ("resident-witness"). He found this accompaniment cumbersome and a hindrance to effectively communicating his beliefs, as resident-witnesses were not consistently available and would often need to rest when Bonner wanted to continue collecting signatures. Additionally, resident-witnesses would sometimes interrupt Bonner's conversations with potential signatories to assert their own opinions, leading to argument and, in some

[1] Bonner circulated petitions in Virginia in either 2004 or 2006 and in 2008 (Bonner's Resp. to Defs.' Interrog. No. 4.)

instances, causing the individual to decide against signing the petition. (Bonner's Resp. to Defs.' Interrog. No. 5.) Bonner would like to circulate petitions in Virginia, but cannot do so without a resident-witness, which allegedly slows his signature-gathering efforts and inhibits his ability to effectively communicate with the voting public. (Pls.' Compl. ¶¶ 18-19.)

The LPVA and Bonner challenge Va. Code § 24.2-543 on the grounds that it inhibits their constitutional rights to free speech and political expression.

II. Standard of Review

Under Rule 56(c) of the Federal Rules of Civil Procedure, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The relevant inquiry in a summary judgment analysis is "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251-52 (1986). In reviewing a motion for summary judgment, the Court must view the facts in the light most favorable to the non-moving party. *Id.* at 255. In reviewing cross motions for summary judgment, as in the immediate case, the Court must review each motion separately on its own merits " 'to

determine whether either of the parties deserves judgment as a matter of law.'" *Rossignol v. Voorhaar,* 316 F.3d 516, 523 (4th Cir. 2003) (quoting *Philip Morris, Inc. v. Harshbarger,* 122 F.3d 58, 62 n.4 (1st Cir. 1997)).

Summary judgment must be granted if the nonmoving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett,* 477 U.S. 317, 322 (1986). To defeat an otherwise properly supported motion for summary judgment, the nonmoving party "must rely on more than conclusory allegations, mere speculation, the building of one inference upon another, the mere existence of a scintilla of evidence, or the appearance of some metaphysical doubt concerning a material fact." *Lewis v. City of Va. Beach Sheriff's Office,* 409 F. Supp. 2d 696, 704 (E.D. Va. 2006) (internal quotation marks and citations omitted). Of course, the Court cannot weigh the evidence or make credibility determinations in its summary judgment analysis. *Williams v. Staples, Inc.,* 372 F.3d 662, 667 (4th Cir. 2004).

III. Discussion

As a preliminary matter, the Court finds that the plaintiffs have standing to bring the present action challenging the constitutionality of the residency restriction on petition circulators for presidential

candidates. Further, the Court finds that Va. Code § 24.2-543 is unconstitutional because it unduly restricts the plaintiffs' First Amendment right to free speech. The plaintiffs are entitled to an injunction for the reasons stated below.

A. Standing

Article III standing is a fundamental jurisdictional requirement that defines and limits a court's power to resolve cases and controversies. *Miller v. Brown,* 462 F.3d 312, 316-21 (4th Cir. 2006); *Emery v. Roanoke City Sch. Bd.,* 432 F.3d 294, 298 (4th Cir. 2005). Standing requires that a litigant have a personal stake in the outcome of a controversy as a result of having suffered some actual or threatened injury. *Kay v. Austin,* 621 F.2d 809, 811 (6th Cir. 1980) (citing *Davis v. Passman,* 442 U.S. 228, 239 n.18 (1979)); *see Warth v. Seldin,* 422 U.S. 490, 498-501 (1975). Accordingly, a litigant must demonstrate: (1) a distinct and palpable injury, (2) a fairly traceable causal connection between the claimed injury and the challenged conduct, and (3) a substantial likelihood that the injury is redressable by the relief requested. *Bennett v. Spear,* 520 U.S. 154, 162 (1997); *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560-61 (1992); *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.,* 438 U.S. 59, 72, 75 n.20 (1978).

Here, the Board claims that both plaintiffs lack standing as neither is presently injured nor in danger of injury by the ballot-circulator restriction. According

to the Board, because the plaintiffs do not have immediate plans to use non-resident circulators in Virginia, they are not presently harmed by the regulation. This argument misses the point – the plaintiffs' constitutional rights were infringed because the Virginia law hinders the plaintiffs' current ability to circulate in Virginia despite any past or future plans for expression. The Board essentially criticizes the parties for not having engaged in voter fraud by circulating petitions in violation of the Virginia residency requirement. The 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.

Moreover, the fact that Bonner is limited in his physical ability to circulate petitions is irrelevant to the Court's instant analysis. Bonner has been circulating petitions for nearly twenty years, often in several states per year including Virginia, and considers his work "an important way . . . to convey Libertarian values and policies to citizens throughout the country." (Bonner's Resp. to Defs.' Interrog. No. 5.) Bonner has a well-established history of circulating petitions in Virginia and has indicated his intent to circulate in the future. Bonner is injured, not incapable of circulation, and his present mobility restriction in no way decreases his credibility.[2] *See,*

[2] Additionally, the fact that Bonner is paid to circulate petitions has no bearing on whether the activity is less

(Continued on following page)

e.g., Daien v. Ysursa, 711 F. Supp. 2d 1215 (D. Idaho 2010) (holding that an individual's past political activities and intent to circulate petitions in the future demonstrated "more than a passing fancy" and supported his claim of standing); *accord Idaho Coal. United for Bears v. Cenarrusa,* 234 F. Supp. 2d 1159, 1162 (D. Idaho 2001).

The Supreme Court has held that restrictions on who may ultimately disseminate ballot petitions injure circulators, regardless of the effort's ultimate success. *Meyer v. Grant,* 486 U.S. 414, 422-24 (1988). Other circuits have specified, and this Court agrees, that restrictions on petition circulation causes injury by depriving people of their choice of advocates and by limiting the pool of circulators who carry their message – thus reducing the size of their audience and requiring organizations to allocate precious resources elsewhere. *See Nader v. Blackwell,* 545 F.3d 459, 472 (6th Cir. 2008); *Nader v. Brewer,* 531 F.3d 1028, 1035 (9th Cir. 2008); *Krislov v. Rednour,* 226 F.3d 851, 857-58 (7th Cir. 2000); *Lerman v. Bd. of Elections,* 232 F.3d 135, 142-43 (2d Cir. 2000). The fact that both plaintiffs have ultimately been successful in past petition efforts in no way shows that the residency restriction is harmless to the plaintiffs. The injury to the plaintiffs is clearly

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important to him. If anything, the fact that Bonner has chosen to dedicate his career to supporting causes he believes in demonstrates a commitment to his beliefs and supports his claim of injury.

established and more than adequate to entitle the parties to standing.[3]

B. The Constitutionality of the Residency Requirement

1. Level of Scrutiny

Circulating ballot petitions and its concomitant political dialogue are protected speech under the First Amendment. *See Meyer,* 486 U.S. at 421-22 ("the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech.'"); *Buckley v. Am. Constitutional Law Found., Inc.,* 525 U.S. 182, 186-87 (1999); *Lux v. Judd,* No. 3:10cv482, 2012 WL 400656, at *4-5 (E.D. Va. Feb. 8, 2012). Regulations which impose severe burdens on individual freedoms are subject to strict scrutiny, whereas regulations which impose lesser burdens are subject to less stringent review. *Timmons v. Twin Cities Area New Party,* 520 U.S. 351, 358 (1997); *Burdick v. Takushi,* 504 U.S. 428, 434 (1992). The Supreme Court's decision in *Buckley v. American Constitutional Law Foundation,* 525 U.S. 182 (1999) is instructive and guides the Court's analysis in the

[3] The Court also finds that there is a traceable causal connection between the plaintiffs' injury and the restriction on circulator residency. Moreover, there is a substantial likelihood that the injury can be redressed via an injunction issued by this Court. As the plaintiffs satisfy all three elements of standing, the Board's motion for summary judgment will be denied.

instant matter. In *Buckley,* the Supreme Court struck down a Colorado regulation that required ballot initiative circulators be registered voters, holding that the requirement "cuts down the number of message carriers in the ballot-access arena without compelling cause." *Id.* at 197.

The Court recognizes that neither *Buckley* nor any subsequent Supreme Court cases have addressed the precise issue before the Court: whether a state residency requirement for ballot petitioners should be upheld. In deciding *Buckley,* the Supreme Court expressly chose not to address the state residency requirement of the Colorado statute. *See id.* at 645 (noting that the constitutionality of the state residency requirement is "a question we, like the Tenth Circuit, have no occasion to decide") (internal citation omitted). Since the *Buckley* decision, however, the weight of decisions from courts of appeals has held residency requirements as violative of First Amendment free speech rights. *See Blackwell,* 545 F.3d 459 (holding that an Ohio law requiring candidate petition circulators to be registered to vote and residents of the state implicated and violated out-of-state circulators' First Amendment rights); *Yes on Term Limits v. Savage,* 550 F.3d 1023 (10th Cir. 2008) (striking down an Oklahoma statute banning the use of non-resident initiative and referendum petition circulators); *Krislov,* 226 F.3d 851 (striking down a statute requiring that candidate petition circulators be registered voters in the political subdivision in which the candidate is seeking office on the grounds

that it violated non-residents of the state's First Amendment free speech rights in circulating on behalf of a U.S. Senate candidate).

This year, the Court has addressed a similar residency requirement in Virginia. *See Lux,* 2012 WL 400656. Like the instant case, the law at issue required independent congressional candidates to secure signatures on petitions to appear on the ballot; in addition, the law required that petition circulators be residents of the district in which the candidate seeks office. *See* Va. Code § 24.2-506. Under the instruction of the Fourth Circuit, this Court analyzed the restriction in light of *Buckley* and *Meyer.*[4] *See Lux v. Judd,* 651 F.3d 396 (4th Cir. 2011). Within that framework, this Court held that the district residency requirement on petition circulation involved core political speech protected by the First Amendment and was, therefore, subject to strict scrutiny. *Lux,* 2012 WL 400656, at *4-5. Neither *Lux* nor any Fourth Circuit case addresses whether *state* residency restrictions on petition circulators involve core political speech.

Directly on point, however, is *Nader v. Brewer,* in which the Ninth Circuit struck down an Arizona law that required petition circulators to be state

[4] *Meyer* involved a state regulation which criminalized compensating petition circulation. 486 U.S. 414 (1988). The Supreme Court invalidated it as an undue restriction on First Amendment freedom of speech.

residents. 531 F.3d 1028. Extending *Buckley* to voter eligibility and state residency requirements, the Ninth Circuit found that, despite the "millions of potential Arizona circulators, the residency requirement nevertheless excludes from eligibility all persons who support a candidate but who, like Nader himself, live outside the state of Arizona." *Id.* at 1036. In so doing, the state residency requirement "create[d] a severe burden on Nader and his out-of-state supporters' speech, voting and associational rights." *Id.* The Ninth Circuit held that these burdens implicated the plaintiffs' First Amendment rights and the regulation was therefore subject to strict scrutiny. *Id.*; *see also, e.g., Blackwell,* 545 F.3d 459; *Yes on Term Limits,* 550 F.3d 1023; *Krislov,* 226 F.3d 851; *Citizens in Charge v. Gale,* 810 F. Supp. 2d 916 (D. Neb. 2011); *Daien,* 711 F. Supp. 2d 1215. The Court agrees with the rationale in *Brewer.* As in *Brewer,* the restriction before the Court is less burdensome than those before the Supreme Court in *Buckley.* Yet, the rationale is the same: the provision ultimately limits the number of voices who can convey the candidates' messages, thereby reducing "the size of the audience [the candidates] can reach." *Buckley,* 525 U.S. at 194-95.

The First Amendment places a premium on political speech, particularly speech about political change. The drafters fashioned the First Amendment "to assure unfettered interchange of ideas for the bringing about of political and social changes desired by the people." *Krislov,* 226 F.3d at 858 (quoting *Roth*

v. United States, 354 U.S. 476, 484 (1957)). By imposing a state residency requirement on petition circulators, the Board deprives non-residents of a means to engage in core political speech and reduces the quantity of such speech available to its residents. *See Perry v. Judd,* 3:11cv856, 2012 WL 113865, at *10 (E.D. Va. Jan. 13, 2012). This deprivation directly infringes upon the Constitutional rights of candidates, voters, petition circulators, and political parties and is subject to the most exacting scrutiny by this Court.

2. Strict Scrutiny Analysis

a. Virginia's Compelling State Interest

Applying a traditional strict scrutiny analysis, the Board carries a heavy burden in justifying the state residency restriction. It must show not only that it achieves a compelling state interest, but also that it is no broader in scope than necessary to achieve that purpose. *Timmons,* 520 U.S. at 359. In the context of the First Amendment, the Court must "be vigilant . . . to guard against undue hindrances to political conversations and the exchange of ideas." *Buckley,* 525 U.S. at 192 (quoting *Meyer,* 486 U.S. at 421).

Here, the Court finds that the residency restriction clearly seeks to achieve a compelling state interest. The Board argues that the residency restriction is in place to protect the integrity of elections and to prevent and punish fraud. It is well established that states have a compelling interest in

protecting the validity of their electoral process. *Doe v. Reed,* 130 S. Ct. 2811, 2819 (2010); *Purcell v. Gonzalez,* 549 U.S. 1, 4 (2006). As the Board claims, the regulation enables it to confirm the identities of petition circulators and ensure that these individuals are subject to Virginia's subpoena power, which is necessary in order to subject circulators to criminal prosecution and properly police election fraud.[5]

b. Narrowly Tailored

Despite the Commonwealth's compelling interest, the law at issue is unconstitutional because the residency requirement is not narrowly tailored. The Commonwealth must show that the restriction is no broader in scope or burdensome than necessary to achieve its purpose. *Brewer,* 531 F.3d at 1037; *Krislov,* 226 F.3d at 863. The Board fails to establish that allowing non-residents to circulate petitions increases the instances of fraud. To establish the need to regulate non-resident circulators, the Board relies on defendant-Palmer's deposition and declaration noting

[5] This Court is somewhat skeptical as to whether or not submission to the Commonwealth's subpoena power actually achieves the state's compelling state interest. As we have recognized, "the critical signature on the petition is not that of the circulator, but that of the voter" who is necessarily subject to the state's subpoena power by virtue of residency. *Perry,* 2012 WL 113865, at *10. Though the Board certainly has a compelling interest in preserving the electoral process's integrity, it does not necessarily follow that meeting this goal requires petition circulators to submit to the Commonwealth's subpoena power.

instances of campaign fraud in other states. Yet, the Court is unconvinced that such bald assertions are sufficient to establish a need to exclude non-residents from serving as petition circulators.

As an initial matter, the Board in no way establishes that non-residents are more likely to commit fraud then residents. The Board fails to allege a single instance of voter fraud in Virginia involving a non-resident.[6] While the Board does cite instances of non-residents engaging in voter fraud elsewhere, this allegation does not support the contention that the fraud was committed because these individuals were non-residents. Moreover, the Court is not persuaded that such an argument is valid, as multiple courts have rejected the idea that nonresidents are inherently less honest. *See, e.g., Meyer,* 486 U.S. at 426; *Brewer,* 531 F.3d at 1037; *Yes on Term Limits,* 550 F.3d at 1029.

Additionally, the Board contends that the residency requirement is necessary to ensure that circulators are within the state's subpoena power. The courts in *Brewer, Yes on Term Limits, Chandler, Citizens in Charge,* and *Perry* have all stated that

[6] Additionally, nearly each incident proffered involves merely accusations of fraud, as opposed to a finding of fraudulent activities. Challenging the validity of petition signatures is an oft-employed political tactic which, if successful, serves to eliminate some competition on the ballot Accordingly, such accusations of voter fraud, without more, amount to nothing more than the opposition's typical procedure.

such an interest is not narrowly tailored, as states could require circulators to submit to their subpoena power before becoming a circulator. Beyond bald assertions that such submission is ineffective and that the Board is unaware of any instance wherein an individual was extradited from one state to another to face prosecution, the Board has failed to demonstrate how such a requirement would be insufficient. No evidence has been presented that Virginia has been unable to prosecute a fraudulent circulator because he or she was not a resident of the Commonwealth. Likewise, difficulties other states have faced in prosecuting non-residents engaging in petition fraud are unhelpful without further information as to those states' efforts to police fraud and regulate elections. In short, the Board has failed to show that the Virginia law requiring petition circulators to be residents of the Commonwealth is a narrowly tailored means to preserve the integrity of the electoral process.

For these reasons, Virginia's residency requirement on petition circulation cannot withstand strict scrutiny. The Court finds that Va. Code § 24.2-543 violates the First and Fourteenth Amendments to the United States Constitution. The Court will grant summary judgment to the plaintiffs.

IV. Conclusion

In sum, the Court finds that the plaintiffs have standing because the regulation burdens their

Constitutional rights to free speech and political expression. Further, the residency requirement is unconstitutional as it is not narrowly tailored to achieve its purpose and promote a compelling state interest. Accordingly, the defendants' motion for summary judgment will be denied; the plaintiffs' motion for summary judgment will be granted.

The Court will enter an appropriate order.

Date: July 30, 2012 /s/ John A. Gibney, Jr.
Richmond, VA John A. Gibney, Jr.
United States District Judge