

No. 13-231

IN THE
Supreme Court of the United States

CHARLES JUDD, ET AL.,

Petitioners,

—v.—

LIBERTARIAN PARTY OF VIRGINIA, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly held that a Virginia statute requiring that signatures on third-party presidential ballot petitions be witnessed by Virginia residents violates the First Amendment, where the Commonwealth failed to produce evidence that such a requirement served its compelling interests, or that less restrictive means would be ineffective.

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INTRODUCTION

In *Meyer v. Grant*, 486 U.S. 414 (1988), and *Buckley v. Am. Constitutional Law Found., Inc.*, 525 U.S. 182 (1999), this Court recognized that circulating ballot petitions is a form of “core political speech” because it “of necessity involves both the expression of a desire for political change and a discussion of the merits of the proposed change.” *Meyer*, 486 U.S. at 421. Indeed, the Court described it as “the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication.” *Id.* at 424. The Court further recognized that by limiting who is eligible to circulate petitions, the state “limits the number of voices who will convey the [petition proponent’s] message . . . and, therefore, limits the size of the audience they can reach.” *Id.* at 422-23. *See also Buckley*, 525 U.S. at 192 (noting that the petitioning restrictions challenged in that case “significantly inhibit[ed] communication with voters about proposed political change”).

Accordingly, in *Meyer*, this Court held that a prohibition on paid petition circulators could not satisfy the “exacting scrutiny” the First Amendment demands for restrictions on political expression. *Id.* at 420, 426. Likewise, in *Buckley*, the Court invalidated a requirement that petition circulators be registered voters of a state because it “cuts down the number of message carriers in the ballot-access arena without impelling cause.” 525 U.S. at 197. Faithfully applying these precedents, the Fourth Circuit found that prohibiting non-residents of Virginia from circulating petitions severely burdened core political speech, and was subject to strict

scrutiny. Pet. App. 18. Like every other circuit that has analyzed residency requirements under strict scrutiny, it concluded that the Commonwealth had not satisfied its burden to show that the restriction is narrowly tailored to serve a compelling government interest. Pet. App. 21.¹

The Commonwealth provides no persuasive reason to review this result. Every Court of Appeals to consider the question in the past decade has agreed that residency restrictions are unconstitutional and applied strict scrutiny in reaching that result. Moreover, the Commonwealth's prediction that the invalidation of residency requirements will unleash a torrent of petition fraud and undermine the integrity of elections is belied by the fact that twenty-seven states and the District of Columbia permit nonresidents to circulate petitions with no apparent damage to the petition process.

STATEMENT OF THE CASE

A. Virginia's Residency Requirement and its Effect on the Respondents

Respondent Libertarian Party of Virginia ("LPVA") is a Virginia political organization dedicated to principles of personal and economic liberty that regularly fields candidates for president, Congress and state office. J.A. 8.² Because the LPVA has not "at either of the two preceding

¹ Citations to "Pet. App." refer to the appendix to the Petition for Certiorari.

² Citations to "J.A." refer to the Joint Appendix filed in the court of appeals.

statewide general elections, received at least 10 percent of the total vote cast for any statewide office filled in that election,” Va. Code Ann. § 24.2-101, its presidential candidates do not obtain a place on the general election ballot through a primary or other statutory nominating process, but through the petition process set forth in Va. Code Ann. § 24.2-543. That statute requires candidates to obtain 5,000 petition signatures,³ which must be witnessed by a person who is a “legal resident of the Commonwealth and who is not a minor or a felon whose voting rights have not been restored.” *Id.* Signatures witnessed by a non-resident are declared invalid. J.A. 4.

In its presidential campaigns in Virginia, the LPVA has collected signatures for Libertarian candidates using volunteer and paid circulators who are members of the LPVA and residents of Virginia. J.A. 10. Nonetheless, the Virginia residency requirement puts the LPVA in a precarious position because it knows of only two professional circulators who are both Libertarians and residents of Virginia and who are consistently available. *Id.* These two individuals have been responsible for collecting a significant number of the required signatures in recent presidential campaigns in Virginia. *Id.* If either of them were to take ill or otherwise become unavailable, the LPVA would be unlikely to be able to collect all of the required signatures. *Id.* The Libertarian National Committee has existing relationships with many professional circulators throughout the country who could assist with the

³ Legislation enacted this year reduced this number from 10,000. See 2013 Virginia Laws Ch. 521.

LPVA's petition efforts, but for the residency requirement. J.A. 63-64, 151-55.

More broadly, the state residency requirement imposed by Va. Code Ann. § 24.2-543 reduces the pool of circulators available to support the LPVA's presidential candidates. This places a severe burden on the candidates' and the LPVA's First Amendment rights by making it more difficult for them 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 candidates implicit in the solicitors' efforts to gather signatures on the candidates' behalf. J.A. 12.

Respondent Darryl Bonner circulates petitions professionally for Libertarians and other third-party candidates in elections across the country. J.A. 11. Bonner believes that the work is an important way for him to convey Libertarian values and policies to citizens throughout the country. *Id.* Bonner would like to circulate petitions for the LPVA and its presidential candidates in Virginia but, due to the residency requirement, is unable to do so without being accompanied by a Virginia resident to witness signatures. *Id.* Bonner attempted to collect signatures for the Green Party in Virginia in 2008, but 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. J.A. 11, 109.

B. The Commonwealth's Purported Justifications for the Residency Requirement

The Commonwealth asserts that the residency requirement is necessary to serve its interests in confirming the identity and qualifications of petition circulators, and preventing and punishing petition fraud. Its evidence in support of this assertion consists of conclusory statements in a declaration by the Secretary of the State Board of Elections that the Commonwealth “lack[s] access to the information necessary to evaluate the identity, residence, age, and felony/voting rights status of non-residents”; that he is “aware” of instances of petition fraud in the Commonwealth and elsewhere, including fraud by nonresident circulators; and he is “aware” of instances in which nonresident circulators suspected of petition fraud have fled the state. J.A. 178-79. No specifics of any of these “instances” are given. The Commonwealth submitted no evidence to show that requiring circulators to submit documentation of their age, address and felony status would be insufficient to serve its interest in identifying and qualifying circulators. Nor did it submit any evidence to show that requiring circulators to agree to submit to Virginia’s jurisdiction would be insufficient to serve its interest in investigating and punishing petition fraud.

C. Proceedings Below

Plaintiffs filed their complaint and motion for preliminary injunction on May 14, 2012. J.A. 7-16. Rather than rule on the preliminary injunction, on May 22, 2012, the district court set an expedited discovery schedule and ordered the parties to file

dispositive motions within 30 days. J.A. 17. On June 21, 2012, the plaintiffs filed a motion for summary judgment, seeking a declaration that the residency requirement was unconstitutional and an injunction against its enforcement. J.A. 27. The defendants filed a motion for summary judgment contesting plaintiffs' standing, but not raising any arguments on the merits. J.A. 77. On July 30, 2012, the district court granted plaintiffs' motion for summary judgment, denied defendants' motion for summary judgment, and enjoined enforcement of the residency requirement. Pet. App. 23-40.

A unanimous panel of the Fourth Circuit affirmed. Pet. App. 1-22. After rejecting the Commonwealth's contention that the plaintiffs lacked standing, Pet. App. 9-16,⁴ the Fourth Circuit followed this Court's legal framework for assessing election regulations: "when [First and Fourteenth Amendment] rights are subjected to 'severe' restrictions, the regulation must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); Pet. App. 17. Following the lead of nearly every court of appeals to consider the matter, the Fourth Circuit found that the statute imposed a severe burden on plaintiffs' First Amendment rights,

⁴ The Commonwealth's standing argument was premised on the fact that the LPVA had managed to gather enough signatures in each of the last two presidential elections to place its candidate on the ballot. Citing *Meyer*, both lower courts noted that ballot access alone did not address the impact of the residency requirement on the LPVA's ability to engage in political dialogue with potential petition signatories. Pet. App. 11, 31. The Commonwealth has not challenged that ruling in its petition.

and that strict scrutiny was warranted. Pet. App. 17-18, (citing *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023 (10th Cir. 2008); *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008); *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008)).

Applying that standard, the court of appeals noted that “federal 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.” Pet. App. 20 (quoting *Brewer*, 531 F.3d at 1037). The court observed that “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.” Pet. App. 20. Accordingly, the court found the residency requirement unconstitutional. *Id.*

REASONS FOR DENYING THE PETITION

I. THERE IS NOT A SIGNIFICANT CIRCUIT SPLIT

Nearly every circuit court to evaluate state residency requirements for petition circulators—and every one that has ruled in the past decade—has held those requirements to be unconstitutional. *Yes on Term Limits v. Savage*, 550 F.3d 1023 (10th Cir. 2008); *Nader v. Blackwell*, 545 F.3d 459 (6th Cir.

2008); *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008).⁵

Following this Court’s reasoning in *Meyer* and *Buckley*, the Sixth, Ninth and Tenth Circuits—as well as the Fourth Circuit in this case—have recognized that laws that limit the pool of available petition circulators severely burden the core political speech of candidates and ballot initiative supporters and must satisfy strict scrutiny. *Yes on Term Limits*, 550 F.3d at 1028; *Blackwell*, 545 F.3d at 475; *Brewer*, 531 F.3d at 1036; Pet. App. 17-18.⁶ In each case, the courts found that the state had failed to meet its burden to prove that the residency requirement was narrowly tailored to serve its interest in protecting the integrity of the petitioning process. *Yes on Term Limits*, 550 F.3d at 1030-31; *Blackwell*, 545 F.3d at 476; *Brewer*, 531 F.3d at 1937-38; Pet. App. 20-21.

⁵ Additionally, the Seventh Circuit invalidated a statute requiring that circulators be registered and reside in the political subdivision in which candidate was seeking office, which for one of the plaintiffs—a candidate for United States Senate—was the entire state. *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000).

⁶ Although *Meyer* and *Buckley* involved initiative petitions rather than nominating petitions, the Fourth Circuit correctly noted, Pet. App. 10 at n.4, that neither this Court nor the lower courts have drawn a distinction between the two for First Amendment purposes. *See Buckley*, 525 U.S. at 191 (“Initiative petition circulators . . . resemble candidate-petition signature gatherers . . . for both seek ballot access.”); *Blackwell*, 543 F.3d at 475 (“There appears to be little reason to limit *Buckley*’s holding to initiative petition circulators . . . [I]n 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.”).

For its contention that the circuits are “divided” on this matter, Petitioners rely on the sole outlier: *Initiative & Referendum Institute v. Jaeger*, 241 F.3d 614 (8th Cir. 2001). *Jaeger*, the first Court of Appeals decision to consider a residency requirement, upheld it only by construing the nature of the burden on First Amendment rights contrary to this Court’s precedents. The court characterized that burden as “making it more costly and time consuming to collect signatures,” and criticized the plaintiffs for providing no evidence “regarding what the additional cost to the appellants would be.” *Jaeger*, 241 F.3d at 617. The court further cited “the high success rate” of ballot petitions as evidence that “no severe burden has been placed on those wishing to circulate petitions.” *Id.* But as *Meyer* and *Buckley* make clear, and *Yes on Term Limits, Blackwell, Brewer*, and the Fourth Circuit in the present case recognize, the First Amendment value of circulating petitions is more than simply achieving ballot access. Rather, it involves “interactive communication concerning political change that is appropriately described as ‘core political speech.’” *Meyer*, 486 U.S. at 422. Because it failed to appreciate this important communicative role of petition circulation, the Eighth Circuit did not apply strict scrutiny, and quickly concluded the minimal intrusion on free speech was outweighed by the state’s interest in preventing fraud.

After *Jaeger*’s false start, subsequent circuit court decisions have understood that this Court’s precedents require the application of strict scrutiny to residency requirements for petition circulators, and that such restrictions cannot survive that heightened standard of review. There is no reason

for the Court to disturb the clear consensus of the last decade that residency restrictions are unconstitutional.⁷

II. THE FOURTH CIRCUIT CORRECTLY APPLIED STRICT SCRUTINY IN THIS CASE.

Under a strict scrutiny standard, the government has the burden of *proving* that the challenged law is narrowly tailored to serve its compelling interests. *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004). In this case, the Commonwealth presented *no evidence at all* to support its contention that in order to prevent petition fraud, only state residents must be permitted to circulate petitions. The government’s sole evidentiary submission was a declaration by the Secretary of the State Board of Elections containing conclusory statements about unidentified “instances” of fraud in Virginia and other states. J.A. 178-79.

This failure of proof is particularly striking given that twenty-one states and the District of

⁷ The Petitioners also rely on dicta in an early Second Circuit case that New York’s requirement that petition circulators be residents of the relevant political subdivision was not necessary to ensure that circulators were subject to the state’s subpoena power because the state’s separate requirement that circulators be state residents already achieved that purpose. *Lerman v. Bd. of Elec.*, 232 F.3d 135, 150 (2nd Cir. 2000). Contrary to Petitioners’ suggestion, the court did not “strongly indicate[]” that a state residency requirement would be constitutional (Pet. at 20), but “conclude[d] only that these requirements are more narrowly tailored to the state’s interest in ensuring the integrity of the ballot access process than” the challenged provisions. *Id.* at n.14.

Columbia impose no state residency restrictions on petition circulators.⁸ If, as Petitioners would have this Court believe, the residency requirement is essential to maintaining the integrity of the petition process, the Commonwealth should have been able to produce at least one declaration from an official in one of these states documenting at least one incident in which the state was unable to investigate or prosecute suspected petition fraud because of the involvement of nonresident petitioners.

Nor has the Commonwealth provided any evidence to support its claim that requiring circulators to submit to state jurisdiction for subpoena purposes—a solution repeatedly endorsed by federal courts—would not effectively serve its interests in ensuring their presence for any investigation or prosecution. *See Yes on Term*

⁸ Ala. Code § 17-9-3(a)(3); Ark. Code § 7-9-103; Colo. Rev. Stat. § 1-40-112; Del. Code. Ann. § 3002; Fla. Stat. § 99.095; Ga. Code Ann. § 21-2-170; Haw. Rev. Stat. § 11-113; 10 Ill. Comp. Stat. 5/28-3; Ind. Code §§ 3-8-6-2 *et seq.*; Iowa Code §§ 45.1 *et seq.*; Ky. Rev. Stat. Ann. § 118.315; La. Rev. Stat. Ann. § 18:465; Md. Code Ann., Elec. Law § 6-204; Mass. Gen. Laws Ch. 53, § 7; Minn. Stat. § 204B.07; Nev. Admin. Code § 293.182; N.J. Stat. Ann. § 19:13-7; N.M. Stat. § 1-8-49; N.C. Gen. Stat. § 163-122; Or. Rev. Stat. §§ 249.740, 249.072; R.I. Gen. Laws § 17-14-10; S.C. Code Ann. § 7-11-70; Tenn. Code Ann. §§ 2-5-101 *et seq.*; Tex. Elec. Code Ann. § 141.065; Vt. Stat. Ann. tit. 17, § 2402; Wash. Rev. Code 29A.56.630; W. Va. Code § 3-5-23; Wis. Stat. Ann. § 8.15(4)(a). Both California and the District of Columbia amended their laws this year to eliminate residency requirements. The District of Columbia also added a requirement that nonresidents consent to the District's subpoena power. 2013 Cal. Legis. Serv. Ch. 278; 60 D.C. Reg. 11535 (Aug. 9, 2013).

Limits, 550 F.3d at 1029-30; *Brewer*, 531 F.3d at 1037; *Krislov*, 226 F.3d at 866 n.7. As the Fourth Circuit observed, “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.” Pet. App. 21.

Lacking any actual evidence, Petitioners simply assert as obvious that requiring circulators to consent to jurisdiction for subpoena purposes is an inadequate alternative because the Commonwealth may not extradite a person from another state without charging him with a crime. Pet. at 26. But as the Tenth Circuit explained, the Commonwealth “could provide criminal penalties for circulators who fail to return when a protest occurs.” *Yes on Term Limits*, 550 F.3d at 1030. And “[s]urely 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.” Pet. App. 21.⁹

⁹ The Petitioners also proclaim that the consent-to-jurisdiction alternative would be in derogation of “our constitutional order,” citing Article IV, Section 2, Clause 2 of the Constitution. Pet. at 26. But that clause merely provides that a person who commits a crime in one state and flees to another shall be extradited upon demand of the executive of the prosecuting state. It in no way limits a state’s ability to enter into other arrangements for ensuring that a person who commits wrongdoing in the state is amenable to process.

Finally, the Petitioners erroneously claim that the conclusion of the Fourth Circuit (and three other circuits) that residency requirements are unconstitutional contradicts this Court’s “strong dicta” in *Buckley*. To the contrary, the *Buckley* Court merely noted the Tenth Circuit’s remark that a residency requirement “more precisely achieved” the state’s objective than a voter registration requirement, and went on to observe that residency was “a question we . . . have no occasion to decide because the parties have not placed the matter of residence at issue.” *Buckley*, 525 U.S. at 197.¹⁰ Having been presented with that question in this case, the Fourth Circuit—like the Sixth, Ninth and Tenth Circuits—correctly concluded that residency requirements do not pass constitutional muster.

¹⁰ The Court has noted that it is “not bound to follow ... dicta in a prior case in which the point now at issue was not fully debated.” *Central Virginia Community College v. Katz*, 546 U.S. 356, 363 (2006). The language from *Buckley* cited by Petitioners does not even rise to the level of dicta.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that the Court deny the Petition for Certiorari.

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