United States District Court
Eastern District of Virginia
Richmond Division

Herb Lux, **Stephen Cruse**, **Andrew Mikel**, and **Eugene Foret**, *Plaintiffs*, *v.* **Nancy Rodrigues, Jean Cunningham,** and **Harold Pyon,** members of the Virginia State Board of Elections, in their official capacities, *Defendants*.	**Civ. No. 3:10-cv-00482-REP**

Plaintiffs' Reply in Support of Motion for Preliminary Injunction

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Introduction

Plaintiffs, Herb Lux, a candidate for the U.S. House of Representatives in Virginia's Seventh Congressional District, and three of his supporters, seek a preliminary injunction enjoining the enforcement of Virginia Code section 24.2-506 on the ground that it violates their rights protected by the First and Fourteenth Amendments to the U.S. Constitution. Specifically, Plaintiffs challenge the district-residency requirement, which requires all signatures on candidate petitions to be witnessed by a person eligible to vote for the candidate on whose behalf the petition is circulated. Although Mr. Lux is qualified to run for Congress in Virginia's Seventh Congressional District, the State Board of Elections refused to count any signatures on petitions that he personally circulated because he is not eligible to vote in the Seventh Congressional District. As a result, Mr. Lux failed to obtain the necessary number of signatures from qualified voters to have his name included on the November ballot. If the signatures on the petitions circulated by Mr. Lux are counted, Mr. Lux will have obtained more than 1,000 signatures, warranting a review to determine if at least 1,000 are from qualified voters.

A preliminary injunction is necessary because the deadline for printing the ballots for the November 2010 election is quickly approaching. And as a practical matter, until this matter is resolved, Mr. Lux will continue to be significantly hindered in his efforts to gain support, raise contributions, and generally advance his campaign. As set forth in Plaintiffs' opening brief and below, Plaintiffs have met the requirements for a preliminary injunction by demonstrating: (1) likely success on the merits; (2) irreparable harm; (3) that the equities favor Plaintiffs, and; (4) that an injunction is in the public interest.

Argument

I. Plaintiffs Have Likely Success on the Merits.

In their opening brief, Plaintiffs demonstrated that the district-residency requirement (1) burdens the freedoms of speech and association protected by the First Amendment; (2) imposes severe burdens on those rights (triggering strict scrutiny); and (3) is not narrowly tailored to a compelling government interest. (Pls.' Br. in Supp. of Mot. for Prelim. Inj. ("Pls.' Br.") 6–25.)

In their opposition, Defendants do not dispute that the district-residency requirement burdens First Amendment rights or that the district-residency restriction is subject to strict scrutiny. (Mem. of Law in Opp'n to Pls.' Mot for Prelim. Inj. ("Defs.' Br.") 6–12 (relying on *Libertarian Party of Virginia v. Davis*, 591 F. Supp. 1561 (E.D. Va. 1984), which applied strict scrutiny to a district-residency requirement applicable to presidential electors).)

Rather, Defendants rely almost exclusively on *Libertarian Party of Virginia v. Davis*, 591 F. Supp. 1561 (E.D. Va. 1984), *aff'd* 766 F.2d 865 (4th Cir. 1985), a decision that was hastily issued based on an uncontested motion to dismiss and that involved a constitutional challenge to a statutory provision completely inapplicable to independent candidates attempting to secure a place on the ballot. Defendants suggest *Davis* is controlling. (Defs.' Br. 6–8.) They are incorrect.

A. *Davis* is not controlling authority.

In *Davis*, the plaintiffs raised a constitutional challenge to Virginia's process for selecting presidential electors. *Davis*, 591 F. Supp. at 1562. Specifically, plaintiffs challenged Virginia Code section 24.1-159 (1987), which controlled how a group of voters that is not a political party could qualify presidential electors for the ballot. *Id.* The challenged statute required the group to submit a petition signed by a certain number of registered voters. *Id.* And like the candidate

qualification provision challenged here, the statute at issue in *Davis* contained a witness requirement, which required that signatures "be witnessed by a qualified voter *of the same congressional district*." *Id.* (emphasis added).

Defendants boldly state that the plaintiffs in *Davis* "challenged a predecessor statute to Virginia Code § 24.2-506," (Defs.' Br. 6.), the same provision challenged by Plaintiffs in the present litigation. Their assertion is *unequivocally false*. The provision challenged in *Davis*, Virginia Code section 24.1-159 (1987), is currently codified as Virginia Code section 24.2-543 (2010) and is not challenged here.[1]

Here, Plaintiffs challenge Virginia Code section 24.2-506 (2010), a statute that governs how *independent candidates* qualify to have their name included on the ballot. The predecessor to section 24.2-506 (2010) is section 24.1-167 (1987), a provision that was not challenged, or even mentioned, in *Davis*. This alone demonstrates that *Davis* is not controlling. Defendants rely almost exclusively on *Davis* to justify the district-residency requirement contained in Virginia Code section 24.2-506 (2010). Because *Davis* is not controlling, the arguments in Plaintiffs' opening brief remain largely undisputed by Defendants.

Moreover, there is a second, even more compelling, reason why *Davis*, which is not controlling, is not even persuasive: Virginia abandoned the very interest that *Davis* upheld as

[1] Throughout their brief, Defendants confuse Virginia's ballot-access requirements for *presidential electors* with Virginia's ballot-access requirements for *candidates*. Significantly, Defendants fail to explain *why* the analysis applicable to the presidential elector statute (i.e., the analysis employed in *Davis*) should apply with equal force to the candidate statute. The fact that Virginia may have a compelling interest in the former does not demonstrate it has an interest in the latter. *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 478 (2007) ("court applying strict scrutiny must ensure that a compelling interest supports *each application* of a statute restricting speech").

compelling. *Davis* upheld the district-residency requirement (in the context of presidential elector petitions) because it found that it was *necessary* to advance Virginia's *compelling* interest in ensuring that presidential electors have "at least one activist sufficiently motivated to shoulder the burden of witnessing signatures." *Davis*, 766 F.2d at 869–70. After *Davis* was decided, Virginia amended and re-codified the statute that was at issue in *Davis*. *Compare* Va. Code Ann. § 24.1-159 (1987), *with* Va. Code Ann. § 24.2-543 (1994). The 1994 amendment relaxed the district-residency requirement by allowing the witness to reside in the "same or a contiguous congressional district as the voter whose signature is witnessed."[2] 1994 Va. Laws Ch. 149 (H.B. 65). Then, in 2003, Virginia decided to completely abandon the district-residency requirement altogether. 2003 Va. Laws Ch. 477 (H.B. 1508). Thus, the only current limitation on a witness to a presidential elector petition is that he must be "a qualified voter, or qualified to register to vote." Va. Code Ann. § 24.2-543 (2010). In other words, he must be a Virginia resident. *Id.*

So to the degree that Defendants wish to argue that *Davis* is at least persuasive authority, the power of its persuasion has been significantly diminished by Virginia's subsequent decision to *abandon* the district-residency requirement as applied to circulators of petitions for presidential electors. After all, how necessary or compelling can the interest be when Virginia has, on its own accord, abandoned the pursuit of that interest altogether? That is not to say, however, that Virginia has abandoned its interest in assuring that presidential electors show a significant modicum of support, for the Commonwealth still requires that presidential electors obtain signatures from a specified number of voters, including a minimum number of signatures from

[2] Plaintiff Herb Lux would satisfy this requirement because he resides in a congressional district contiguous to Virginia's Seventh Congressional District.

each of Virginia's congressional districts. Indeed, over time, Virginia has *increased* the number of signatures required to show a modicum of support. *Compare* Va. Code Ann. § 24.1-159 (1987) (200 from each congressional district), *with* Va. Code Ann. § 24.2-543 (2010) (400 from each congressional district).

Significantly, Virginia has concluded, quite appropriately, that it can meet its interest in requiring presidential electors to demonstrate a minimum level of grass-roots support *without requiring that petition witnesses reside in the same congressional district as signatories.* Va. Code Ann. § 24.2-506 (2010). Virginia voluntarily abandoned the district-residency requirement (for presidential electors) because it believed it was unnecessary. Virginia's actions significantly undermine *Davis*'s findings that such a requirement was both necessary and compelling.

Virginia similarly amended its statutory scheme that controls how independent candidates *for statewide office* may secure a place on the ballot, and no longer imposes a district-residency requirement on petition circulators.[3] At the time *Davis* was decided, Virginia required the circulator of a *statewide* petition to be a resident of the same congressional district as the petition signer. Va. Code Ann. § 24.1-167 (1987). In 1993, Virginia relaxed the requirement to allow residents of the same or contiguous congressional districts to witness each of the signatures for statewide candidates. 1993 Va. Laws Ch. 407 (H.B. 1461). And in 2003, Virginia dropped the contiguity requirement altogether, allowing a single petition circulator to witness all petition signatures for statewide office, in each of Virginia's congressional districts. 2003 Va. Laws Ch. 477 (H.B. 1508).

[3] Statewide candidates are still required to obtain a minimum number of signatures in each of Virginia's congressional districts. Va. Code Ann. § 24.2-506(1) (2010).

B. The district-residency requirement imposes severe burdens on Plaintiffs' speech and associational rights.

Plaintiffs explained in their opening brief that the district-residency requirement imposes four severe burdens on their freedoms of speech and association. (Pls.' Br. 8–15.)

First, the district-residency requirement significantly reduces the number of persons eligible to circulate petitions, and thus reduces the size of the audience that Plaintiffs can reach. *See Meyer v. Grant*, 486 U.S. 414, 423 (1988); *Buckley v. Am. Constitutional Law Found., Inc.* ("*ACLF*"), 525 U.S. 182, 195 (1999). The district-residency requirement excludes nearly five million Virginia residents and more than 200 million residents of the United States from the ranks of eligible petition circulators. (Pls.' Br. 11–12.) *See Nader v. Brewer*, 531 F.3d 1028, 1036 (9th Cir. 2008) (residency requirement significantly burdened speech by reducing number of eligible circulators); *Chandler v. City of Arvada*, 292 F.3d 1236, 1242 (10th Cir. 2002) (same); *Lerman v. Bd. of Election in the City of New York*, 232 F.3d 135, 146 (2d. Cir. 2000) (same); *Krislov v. Rednour*, 226 F.3d 851, 860 (7th Cir. 2000) (same).

Second, the district-residency requirement burdens Plaintiffs' ability to select the most effective means of advancing their cause. *Meyer*, 486 U.S. at 424; *see also Cal. Democratic Party v. Jones*, 530 U.S. 567, 581 (2000). Here, the district-residency requirement prohibits a candidate from circulating *his own* petition. But Virginia allows nearly every other class of candidates the freedom to select the most effective means of advancing their cause (by circulating their own petitions). In fact, Virginia's statutory scheme prohibits only two classes of candidates from circulating their own petitions: non-district candidates for the U.S. House of Representatives and non-Virginian candidates for President. Va. Code Ann. § 24.2-506 (2010); *see also infra* n.10. Candidates for the U.S. House of Representatives who live in the

congressional district, and presidential candidates who live in Virginia are permitted to circulate their own petitions. Va. Code Ann. § 24.2-506 (2010). And all other candidates are eligible to circulate their own petitions. *See infra* n.10. Furthermore, candidates for Governor, Lieutenant Governor, Attorney General, and the U.S. Senate—each of whom must obtain at least 400 signatures from each of Virginia's congressional districts (paralleling the process for presidential electors)—are entitled to witness all required signatures, regardless of whether they live in the particular congressional district from whence they are soliciting signatures. In other words, *only non-district candidates for the U.S. House of Representatives and non-Virginian candidates for President must demonstrate the support of an "activist."*[4]

Third, the district-residency requirement restricts Mr. Lux's ability to associate in a meaningful way with individuals who sign his petition for the purpose of working together to elicit political change. *Meyer*, 486 U.S. at 421–22. The district-residency requirement also restricts the ability of individuals residing within the Seventh Congressional District from associating with their preferred candidate by preventing them from signing a petition personally circulated by their preferred candidate. *See Anderson v. Celebrezze*, 460 U.S. 780, 787–88 (1983) ("[V]oters can assert their preferences only through candidates or parties or both. . . . [A] candidate serves as a rallying-point for like-minded citizens.") Again, the district-residency requirement only prohibits two classes of eligible candidates from circulating their own petitions. *Infra* n.10. All other candidates are allowed to associate with voters by personally

[4] The under-inclusiveness of the interest advanced by the Commonwealth is addressed *infra* at 16.

circulating their own petitions, and all other voters can personally associate with their preferred candidate by signing a petition circulated by the candidate.[5]

Fourth, the district-residency requirement makes it less likely that candidates such as Mr. Lux will be able to garner enough signatures to qualify for the ballot, preventing Plaintiffs from making Mr. Lux's candidacy the focus of district-, state-, and nation-wide discussion. *See Meyer*, 486 U.S. at 423; *ACLF*, 525 U.S. at 194, 197; *Krislov*, 226 F.3d at 860. The Supreme Court has, on more than one occasion, recognized that the realities of the electoral process ensure that the inability to qualify for the ballot is, for all practical purposes, the end of virtually all contested political campaigns. *See U.S. Terms Limits, Inc. v. Thornton*, 514 U.S. 779, 830–31 (1995) (even the most entrenched incumbent will have difficulty winning a write-in campaign).

Because the district-residency requirement imposes severe burdens on Plaintiffs' freedoms of speech and association, the statute must be narrowly tailored to serve a compelling government interest.[6] *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1191 (2008); *Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *Cal. Democratic Party*, 530 at 582; *ACLF*, 525 U.S. at 192 n.12; *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Defendants have failed to demonstrate that the district-residency requirement is narrowly tailored to any interest, let alone a compelling interest.

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[5] The under-inclusiveness of the interest advanced by the Commonwealth is addressed *infra* at 16.

[6] Defendants do not appear to contest that the district-residency requirement imposes severe burdens on protected First Amendment activity. By citing *Davis*, it appears Defendants are suggesting only that the statute is supported by a compelling government interest. (Defs.' Br. 6–8.) As set forth below, and in Plaintiffs' opening brief, the district-residency requirement is not narrowly tailored to a compelling government interest.

C. The district-residency requirement is not narrowly tailored to a compelling governmental interest.

Relying on *Davis*, Defendants assert a single interest in support of the district-residency requirement: namely, that it is necessary to advance the Commonwealth's compelling interest in ensuring that a candidate has adequate voter *and activist* support within the congressional district.[7] (Defs.' Br. 12.) Defendants fail to offer any evidence, other than the court's analysis in *Davis*, to support their position that the district-residency requirement is narrowly tailored to a compelling government interest in ensuring sufficient "activist" support. *See Gonzales v. O Centro Espirita Beneficente Uniao do Vegetal*, 546 U.S. 418, 430–31 (2006) (strict scrutiny not satisfied by "categorical approach," but rather, requires a case-by-case determination of the question); *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 664 (1994) (state must demonstrate "recited harms are real, not merely conjectural, and that the regulation will in fact alleviate those harms in a direct and material way"). *See also Nixon v. Shrink Missouri Gov't PAC*, 528 U.S. 377, 378 (2000) ("The quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised.").

Before addressing why the purported interest advanced by Virginia in support of the district-residency requirement is neither compelling nor narrowly tailored, Plaintiffs wish to emphasize the limited nature of their as-applied challenged.

[7] "Voter" support is addressed by the signature requirement and is not at issue in this case.

First, Plaintiffs have not challenged the signature threshold itself. To resolve this case, the Court need not decide the extent of the burden imposed by the 1,000-signature requirement contained in section 24.2-506(2) or Virginia's interest in such a requirement.[8]

Second, Plaintiffs have not challenged the requirement that all signatures must be witnessed, or that the witness affidavit must be notarized. Again, to resolve this case, the Court need not decide the extent of the burden imposed by the witness requirement itself, or Virginia's interest in such a requirement.

Third, because Plaintiffs are all residents of Virginia, to resolve this case, the Court need not decide whether Virginia has a compelling government interest in ensuring that all petition circulators are Virginia residents.

Plaintiffs' challenge is limited to section 24.2-506's requirement that each signature be "witnessed by a person who is himself a qualified voter, or qualified to register to vote, *for the office for which he is circulating the petition* and whose affidavit to that effect appears on each page of the petition."[9] Va. Code Ann. § 24.2-506 (emphasis added). And it is limited to the fact that the statute precludes an otherwise qualified candidate for the U.S. House of Representatives

[8] Defendants suggest that the Court should consider the district-residency requirement in light of the "very minimal numerical requirement for signatures." (Defs.' Br. 12–13.) Defendants ignore Supreme Court precedent that requires each statutory provision that burdens the freedoms of speech and association to be supported by its *own* government interest. *See FEC v. Wis. Right to Life, Inc.* ("*WRTL-II*"), 551 U.S. 449, 478 (2007). The fact that Virginia's signature requirement might be one of the lowest in the nation is irrelevant to the analysis of the district-residency requirement. *Id.* The signature requirement is designed to demonstrate a modicum of *voter* support. If Virginia is concerned that 1,000 signatures is insufficient, it can raise the threshold. The signature requirements offers no justification for Virginia's alleged "activist" requirement.

[9] The Court could save the statute simply by striking the italicized text, which would essentially result in a state-residency requirement on petition circulators.

from circulating *his own* candidate petition.[10] Virginia simply cannot demonstrate that it has a compelling government interest in preventing an otherwise qualified candidate from circulating his own candidate petition.

Defendants rely almost exclusively on the court's analysis in *Davis*. However, *Davis* devotes a single paragraph to its discussion of the district-residency requirement. 591 F. Supp. at 1564. The remaining portion of the five-page opinion is devoted to the signature requirement (which included a geographic-dispersion requirement). *Id.* at 1563–65. And it is improper to rely on the analysis of the signature requirement to support the district-residency requirement. Virginia must demonstrate that each provision of section 24.2-506 serves its interests in a direct and material way. *Turner Broad. Sys.*, 512 U.S. at 664; *see also FEC v. Wis. Right to Life, Inc.* ("*WRTL-II*"), 551 U.S. 449, 478 (2007) ("court applying strict scrutiny must ensure that a compelling interest supports *each application* of a statute restricting speech"). In other words, the analysis of the signature requirement is independent of the analysis required to pass on the

[10] As set forth above, the statute impacts only a small class of prospective candidates. Because all candidates for any office of the Commonwealth or its political subdivisions must be residents of the jurisdiction they wish to represent, Va. Code Ann. § 24.2-500, all such candidates will satisfy the district-residency requirement (be it the Commonwealth-at-large or a political subdivision thereof).

Likewise, a candidate for the U.S. Senate must be a resident of Virginia, U.S. Const. art. I, § 3 cl. 3, so a Senate candidate will always be a resident of the relevant district (the Commonwealth-at-large).

Therefore, the district-residency requirement impacts only candidates for the U.S. House of Representatives who do not reside within the congressional district and presidential candidates who are not Virginia residents. And further, a single petiton circulator can circulate a petition for a non-Virginian presidential candidate, which requires signatures from each of Virginia's congressional districts.

constitutionality of the district-residency requirement.[11] The fact that Virginia had a compelling interest in a district-residency requirement in *Davis*, a case involving presidential electors, tells us little about the Commonwealth's interest in a district-residency requirement for candidates. *See WRTL-II*, 551 U.S. at 478. And, as set forth above, Virginia abandoned the activist requirement for presidential electors and virtually all candidates. *Supra* at 3-5; Va. Code Ann. §§ 24.2-506, -543 (2010).

Moreover, while *Davis* upheld the district residency requirement when it granted Virginia's *uncontested motion to dismiss*, it expressed some doubt that the district-residency requirement served a compelling government interest. The district court stated that the district-residency requirement "may be of only *marginal* additional benefit." *Davis*, 591 F. Supp. at 1564 (emphasis added). This "marginal" benefit is hardly the compelling government interest required by strict scrutiny. *See Turner Broad. Sys.*, 512 U.S. at 664 (must alleviate harms in "direct and material way").

And the district court was ruling on an *uncontested* motion to dismiss, *id.* at 1563, on a hurried study of precedent, *id.* at 1565. Plaintiffs certainly understand the *Davis* court's desire to reach a decision quickly so that the Libertarian Party could pursue a meaningful appeal, but the decision is not the hallmark of the vigilant and detailed analysis required to guard against "undue hindrances to political conversations and the exchange of ideas." *ACLF*, 525 U.S. at 192.

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[11] As noted above, Plaintiffs have not challenged the signature requirement. As Plaintiffs noted in their opening brief, the signature requirement ensures that prospective candidates have at least a modicum of support. (Pls.' Br. 14.) The district-residency requirement does little to advance this interest because it allows a single circulator to witness all of the petition signatures. If Virginia is concerned that its ballot access statute is too permissive (Defs.' Br. 12), the more narrowly-tailored solution is to raise the signature requirement.

Defendants also argue that dicta in *ACLF* suggests a residency requirement is constitutional. (Defs.' Br. 8–10.) Defendants mix apples and oranges. *ACLF* held that Colorado could not impose a registered-voter requirement on petition circulators. 525 U.S. at 197. Colorado had argued the registered-voter provision was necessary to ensure that petition circulators were subject to the state's subpoena power. *Id.* at 196. Rejecting this argument, the Supreme Court suggested that a state-residency requirement might be a more narrowly-tailored, and perhaps constitutional, alternative to address the asserted state interest. *Id.* at 197. Because the plaintiffs in *ACLF* had not challenged the state-residency requirement, neither the Supreme Court nor the Tenth Circuit decided whether a *state-residency* requirement is constitutional. *Id.* Nothing in the opinions spoke of a further requirement that would restrict petition circulators to political subdivisions within the state. As noted above, this Court need not decide whether Virginia could impose a *state-residency* requirement to decide the narrow as-applied challenge brought by Plaintiffs.

As Plaintiffs indicated in their opening brief, since *ACLF*, the circuits have split on the constitutionality of *state-residency* requirements. (Pls.' Br. 9–10.) The overwhelming majority of courts have held that state-residency requirements are unconstitutional because they are not narrowly tailored to serve a compelling government interest. *See 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); *Chandler v. City of Arvada*, 292 F.3d 1236 (10th Cir. 2002); *Lerman v. Bd. of Election in the City of New York*, 232 F.3d 135 (2d Cir. 2000); *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000); *Bogaert v. Land*, 572 F. Supp. 2d 883, 902 (W.D. Mich. 2008); *Frami v. Ponto*, 255 F. Supp. 2d 962 (W.D. Wis. 2003); *Morrill v. Weaver*,

223 F. Supp. 2d 882 (E.D. Pa. 2002). *But see Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614 (8th Cir. 2001); *Kean v. Clark*, 56 F. Supp. 2d 719 (S.D. Miss. 1999); *Initiative & Referendum Inst. v. Maine*, 1999 WL 33117172 (D. Me. 1998).

Moreover, each of the cases that upheld a *state-residency* requirement relied on the government's interest in ensuring that petition circulators can be easily located and are subject to the government's subpoena power. *See Jaeger*, 241 F.3d at 616; *Kean*, 56 F. Supp. 2d at 773; *Initiative & Referendum Inst. v. Maine*, 1999 WL 33117172, at *15.

Defendants correctly concede that Virginia's interest in ensuring that circulators are subject to the Commonwealth's subpoena power cannot support the district-residency requirement because Plaintiffs are all residents subject to the Commonwealth's subpoena power. (Defs.' Br. 9.) Absent the subpoena-power interest, each of the cases cited by Defendants offers no support for Virginia's district-residency requirement.

Moreover, courts are unanimous on the narrow question presented by Plaintiffs' as-applied challenge: district-residency requirements are unconstitutional because they are not narrowly tailored to a compelling government interest.[12] *See Lerman*, 232 F.3d at 153 (striking district-residency requirement); *Krislov*, 226 F.3d at 866 (same); *Bogaert*, 572 F. Supp. 2d at 906 (same); *Frami*, 255 F. Supp. at 971 (same). Defendants have failed to cite a single case upholding a district-residency requirement. Nor have Defendants tried to distinguish *Krislov*, a case involving an almost identical factual scenario. 226 F.3d 851. Moreover, the court in *Krislov*

[12] In *Chandler*, the Tenth Circuit struck a city ordinance requiring petition circulators to be city residents. 292 F.3d at 1245. Because the city is a home-rule jurisdiction, Plaintiffs believe it would be appropriate to consider the prohibition equivalent to that of a state-residency requirement and have not included it among the cases striking district-residency requirements.

went to great lengths to explain how a district-residency requirement burdens the freedoms of speech and association, why those burdens are substantial, why strict scrutiny applies, and why the district-residency requirement is not narrowly tailored to a compelling state interest. *Id*. Defendants acknowledge *Krislov* but make no attempt to explain why the court's reasoning was incorrect. (Defs.' Br. 11.)

Virginia's entire argument is premised on *Davis* and the notion that the district-residency requirement adds an "activist" support requirement (presumably the district-resident witness) to the voter support requirement (1,000 signatures). (Defs.' Br. 8.) The argument ignores how the statute actually applies in practice to candidates in Virginia, is contrary to Virginia's published guidance about the circulation of candidate petitions, is unsupported by case law (except for *Davis*, which is not controlling), and creates constitutional problems of its own.

First, the statute requires but a single activist. *See* Va. Code Ann. § 24.2-506 (no minimum number of petition circulators). Requiring one activist hardly seems compelling. *Davis*, 591 F. Supp. at 1564 (district-residency requirement is of "marginal additional benefit"). Plaintiffs can think of at least two statutory regimes that might demonstrate an actual interest in activist support. First, like petition signers, Virginia could require a minimum number of petition circulators. In the alternative, Virginia could state that no petition circulator can witness more than a specified percentage of signatures. Yet Virginia's statute does neither. A single eligible voter can witness every signature. And Defendants ignore the fact that three "activists" have joined Plaintiff Lux in the present suit. (Compl. ¶¶ 7–9.) The "activists" may not have circulated all of the petitions, but they certainly collected some valid signatures on behalf of their chosen

candidate. (Compl. ¶¶ 7–9.) Defendants fail to explain why the presence of these activists is insufficient to meet Virginia's interest in activist support.

Moreover, Virginia does not even require most candidates to demonstrate activist support before being granted access to the ballot. Candidates for U.S. Senate and any office of the Commonwealth or its political subdivisions are eligible to circulate their own candidate petitions. *Supra* n.10; *see also* State Board of Elections, *November 2, 2010 Elections: Candidacy Requirements for Local Offices*, July 9, 2010, at 5, *available at* www.sbe.virginia.gov/cms/documents/Cidates/Bulletins/2010Nov_LocalOffices.pdf.

Even a candidate for President or for the U.S. House of Representatives could circulate his own petition if he lives in Virginia (President) or in the district (U.S. House). *See, e.g.*, State Board of Elections, *November 2, 2010 Election: Candidacy Requirements for U.S. House in November 2010*, Dec. 12, 2009, at 5, *available at* www.sbe.virginia.gov/cms/documents/Cidates/Bulletins/10Nov_USH.pdf ("Petitions can be circulated by either the candidate or another person who is either registered, or eligible to be registered, to vote in the district in which the candidate is seeking election.").

The fact that a large number of candidates can circulate their own petitions, negating the need to demonstrate "activist" support, renders the statute woefully underinclusive. If Virginia had an interest in requiring activist support, it would prohibit all candidates from circulating their own petitions. *See Republican Party of Minn. v. White*, 536 U.S. 765, 780 (2002) ("[Statute] is so woefully underinclusive as to render belief in that purpose a challenge to the credulous."). Defendants simply cannot explain why Virginia prohibits only two small subsets of candidates from circulating their own candidate petitions.

Defendants' proffered interest also raises its own constitutional problems. First, it implicates Plaintiff Lux's rights under the Equal Protection Clause by treating classes of candidates for the U.S. House of Representatives differently based on whether they reside in the congressional district. *See Williams v. Rhodes*, 393 U.S. 23, 30 (1968) ("In determining whether or not a state law violates the Equal Protection Clause, we must consider the facts and circumstances behind the law, the interests which the State claims to be protecting, and the interests of those who are disadvantaged by the classification."). As set forth above, candidates who live within the congressional district are permitted to circulate their own candidate petitions, whereas Mr. Lux, who lives outside the district, is not. Virginia has failed to offer a single justification for this classification.

Second, because the district-residency requirement prohibits only non-district candidates for the U.S. House of Representatives and non-Virginian candidates for President from circulating their own candidate petitions, the district-residency requirement serves as a de facto qualification for office. Under the Qualifications Clauses, the states are prohibited from supplementing the exclusive qualifications set forth in the text of the Constitution for such offices. *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 827 (1995). And because only these federal candidates are prohibited from circulating their own candidate petitions, it appears that the district-residency requirement is an "effort to dress eligibility to stand for Congress in ballot access clothing" because it disqualifies only non-district candidates for the U.S. House of Representatives and non-Virginian candidates for President from circulating their own candidate petitions. *Id.* at 829. In *Thornton*, the Supreme Court added that a statute with the "obvious effect of evading the requirements of the Qualifications Clauses by handicapping a class of candidates cannot stand."

Id. at 831. And given the Supreme Court's dicta that "Federal legislators speak to national issues that affect the citizens of every state," it could be argued that the Supreme Court would disapprove of any residency requirement for petition circulators, state or district, that applied to federal candidates.[13] *Id.* at 785–86.

Given that *Davis* is not controlling, and that Virginia has failed to demonstrate that the district-residency requirement is narrowly tailored to serve a compelling government interest, Plaintiffs have demonstrated likelihood of success on the merits.

II. Absent a Preliminary Injunction, Plaintiffs Will Suffer Irreparable Harm.

Defendants do not contest that Plaintiffs will suffer irreparable harm in the absence of injunctive relief in their opposition and Plaintiffs rely on the arguments set forth in their opening brief. (Pls.' Br. 24.)

III. The Balance of Hardships Favors Plaintiffs.

As Plaintiffs set forth in their opening brief, "a governmental agency is in no way harmed by issuance of a preliminary injunction which prevents it from enforcing a regulation, which . . . is likely to be found unconstitutional." *Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003).

It is also somewhat ironic that Defendants expressed that they would be burdened by having to count the signatures on petitions witnessed by Mr. Lux. (Defs.' Br. 13.) As set forth in the Verified Complaint, Defendants continued to verify the petitions witnessed by district residents

[13] The Supreme Court's dicta in *ACLF* about state-residency requirements concerned restrictions on circulators of state initiative petitions. 525 U.S. at 187. The case tells us little about how the Supreme Court would react to a residency requirement that restricted the circulation of petitions for candidates for federal office. *Turner* suggests that the Supreme Court might view such restrictions as violations of the Qualifications Clauses.

even after the Board determined that it would be a futile effort. (Compl. ¶¶ 31–33.) Having already demonstrated a willingness to review the signatures when Mr. Lux had no chance of qualifying if his signatures were not counted, it hardly seems like an additional burden if the Board is ordered to review additional signatures if this Court determines that the district-residency requirement is likely unconstitutional.

Thus, the balance of hardships favors Plaintiffs.

IV. The Public Interest Favors an Injunction.

Finally, the public interest favors an injunction because it is always in the public interest to vindicate constitutional rights. *See Newsom*, 354 F.3d at 261.

Defendants respond that Virginia has an interest in protecting voters from confusion and over-crowded ballots. (Defs.' Br. 13.) Plaintiffs agree. However, that interest is served by the signature requirement. As set forth above, the district-residency requirement simply does not address this interest. Moreover, as set forth in the declaration of Richard Winger, Virginia has never had more than six candidates on the ballot for a regularly schedule election for the U.S. House of Representatives. (Decl. of Richard Winger ¶ 6.) In other words, Virginia cannot even demonstrate that it has a ballot crowding issue, let alone that the addition of Mr. Lux to the ballot will create such a problem. And if Virginia remains concerned that an injunction will result in overcrowded ballots, the answer is to simply raise the signature threshold.

Conclusion

Because Plaintiffs have demonstrated (1) likelihood of success on the merits; (2) irreparable harm in the absence of injunctive relief; (3) the equities favor Plaintiffs, and; (4) an injunction is in the public interest, this Court should grant Plaintiffs' motion for preliminary injunction and:

1. Enjoin Defendants from enforcing the district-residency requirement in Virginia Code section 24.2-506, as applied to Plaintiffs;

2. Order the Virginia State Board of Elections to immediately verify and count the signatures on petitions witnessed by Mr. Lux, and;

3. Require only a nominal security bond.

Plaintiffs note that Defendants have not filed an opposition to Plaintiffs' motion to consolidate the hearing on the preliminary injunction with the trial on the merits pursuant to Fed. R. Civ. P. 65(a)(2). (Dkt. 4.) For the reasons stated in the brief in support thereof, (Dkt. 5), the Court should grant Plaintiffs' motion to consolidate.

July 29, 2010

Respectfully Submitted,

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*Pro hac vice application pending.
**Of counsel, pending full admission to the U.S. District Court for the Eastern District of Virginia

Certificate of Service

I hereby certify that on the 29th day of July, 2010, I electronically filed the foregoing document described as **Plaintiffs' Reply in Support of Motion for Preliminary Injunction** with the Clerk of Court using the CM/ECF system which will send notification of such filing to:

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