No. 10-1997

United States Court of Appeals for the Fourth Circuit

Herb Lux, **Stephen Cruse**, **Andrew Mikel**,
and **Eugene Foret**, *Plaintiffs-Appellant*s

v.

Nancy Rodrigues, Jean Cunningham,
and **Harold Pyon,** members of the Virginia State
Board of Elections, in their official capacities, *Defendants-Appellees*

Appeal from the United States District Court for the
Eastern District of Virginia, Richmond Division

Plaintiffs-Appellants' Emergency Motion for Preliminary Injunction

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Mark Matney
MICHAEL C. TILLOTSON, LLC
13195 Warwick Blvd., Suite 2A
Newport News, VA 23602
757/969-5197
Counsel for Plaintiffs-Appellants

James Bopp, Jr.
Josiah Neeley
Scott F. Bieniek
Jared M. Haynie
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434
Lead Counsel for Plaintiffs-Appellants

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Introduction

The First Amendment to the United States Constitution, made applicable to the states by the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." The Supreme Court has long recognized that petition circulation is "the most effective, fundamental, and perhaps economical avenue of political discourse" when it comes to election campaigns. *Meyer v. Grant*, 486 U.S. 414, 424 (1988). Yet under Virginia Code section 24.2-506, candidates for U.S. House of Representatives such as Herb Lux are prohibited from circulating their own candidate petitions if they do not reside in the district for which they are campaigning. This despite the fact that the Constitution explicitly allows individuals to be elected to the Congress from districts in which they do not reside. U.S. Const. art. I, § 2. If this Court does not grant the relief sought by Lux and his supporters before **September 18, 2010**, Lux's name will not appear on the ballot and he will have forever lost his opportunity to run for office *in the 2010 election* (and his supporters will likewise have lost the opportunity to vote for their preferred candidate). Because Virginia Code section 24.2-506 unconstitutionally infringes the First Amendment rights of Lux and his supporters, the provision must be immediately enjoined.

Factual Background

Appellant Herb Lux is a candidate for the U.S. House of Representatives in Vir-

ginia's Seventh Congressional District.[1] (Opinion at 2.) Lux, however, lives in the neighboring First Congressional District.[2] (*Id.*)

Lux, an independent candidate, desires to have his name included on the November ballot. To appear on the ballot, Virginia law requires independent candidates for the U.S. House of Representatives to file a statement of qualification, a declaration of candidacy, and a petition signed by 1,000 qualified voters. Va. Code Ann. § 24.2-501, -505, and -506. Each signature must 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*." *Id.* § 24.2-506 ("district-residency requirement") (emphasis added). For candidates for the U.S. House of Representatives, this means that all petition circulators must live within the congressional district.

Lux timely filed a statement of qualification, declaration of candidacy, and seventy-eight candidate petitions, bearing approximately 1,220 signatures. (Opinion at 2.) On their face, the petitions contain a sufficient number of signatures to qualify Lux for the ballot. *Id.* § 24.2-506(2). Sixty-three candidate petitions, bearing approximately 1,063 signatures, were circulated and witnessed by Lux. (Opinion at 2.) The

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[1] Pursuant to the Qualifications Clause, Lux is eligible to represent the Seventh District. U.S. Const. Art. I, § 2, cl. 2. (*See also* Compl. Ex. C (letter from Board conceding Lux is otherwise qualified to run in the Seventh District).)

[2] Lux resides in Spotslvania County, Virginia. (Compl. ¶ 6.) Spotsylvania County is divided between the First and Seventh Districts. (*Id.*)

remaining fifteen candidate petitions, bearing approximately 157 signatures, were circulated on behalf of Lux by residents of the Seventh District. (Opinion at 3.) Appellants Stephen Cruse, Andrew Mikel, and Eugene Foret are residents of the Seventh District and circulated at least one petition. (Opinion at 3.) Foret also signed Lux's petition as a qualified voter from the Seventh District. (Compl. ¶ 9.)

On June 21, the Board notified Lux that all petitions bearing his name as circulator would be excluded from the verification process. (Opinion at 3.) Citing section 24.2-506, the Board concluded that Lux is not qualified to circulate petitions—even for his own candidacy—because he is not a resident of the Seventh District. (Opinion at 3.) Lux cannot qualify for the ballot if the 1,063 signatures that he collected are excluded. Va. Code Ann. § 24.2-506(2).

On June 23, the Board issued its final ruling. (Compl. ¶ 33; Ex. C.) The Board noted that it only verified signatures witnessed by a resident of the Seventh District. (Compl. Ex. C.) The Board reaffirmed its prior ruling that Lux is ineligible to circulate petitions for his own candidacy because he is not a resident of the Seventh District. (Compl. ¶ 34; Ex. C.)

On July 13, 2010, Herb Lux and three of his supporters filed a Verified Complaint for declaratory and injunctive relief. (Dkts. 1 & 2.) The State Board of Elections opposed Lux and his supporters' motion for preliminary injunction and filed a motion to dismiss pursuant to Rule 12(b)(6). (Dkts. 10 & 13.)

The district court held a hearing on both motions on August 23.[3] (Dkt. 28.) The district court entered an order granting the Board's motion to dismiss and denying the motion for a preliminary injunction on August 26. (Dkt. 30). Lux and his supporters filed a notice of appeal on August 27. (Dkt. 31).

Argument

Lux and his supporters satisfy the requirements for a preliminary injunction. A court may issue a preliminary injunction if it determines that: (1) the movant is likely to suffer irreparable harm in the absence of preliminary relief; (2) the movant is likely to succeed on the merits; (3) the balance of the equities tips in the movant's favor; and (4) an injunction is in the public interest. *W. Va. Assoc. of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (*applying Winter v. Natural Res. Def. Council*, 129 S. Ct. 365, 374 (2008)).

I. Absent an Injunction, Lux and His Supporters Will Be Irreparably Harmed.

"[L]oss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Newsom ex rel. Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 261 (4th Cir. 2003) (*citing Elrod v. Burns*, 427 U.S. 347, 373

[3] Prior to the hearing, the district court issued an order granting Lux's motion to consolidate the hearing on their preliminary injunction motion with the trial on the merits pursuant to Rule 65(a)(2) of the Federal Rules of Civil Procedure. (Dkt. 26.)

(1976)). Here, the irreparable harm is particularly acute because the district-residency requirement, as applied, has prevented Lux—an otherwise qualified candidate for Congress—from circulating his own signature petitions, and consequently, from qualifying for the November ballot. Ballots are scheduled to be printed in the immediate future. According to state law, absentee ballots must be printed no later than September 18, 2010.[4] If this Court does not grant the relief sought by Lux and his supporters, Lux's name will not appear on the ballot and he will have forever lost his opportunity to run for office *in the 2010 election* (and his supporters will have lost the opportunity to vote for their preferred candidate).

"[I]n the context of an alleged violation of First Amendment rights, a plaintiff's claimed irreparable harm is 'inseparably linked' to the likelihood of success on the merits of plaintiff's First Amendment claim." *W. Va. Assoc. of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (*quoting W. Va. Assoc. of Club Owners & Fraternal Servs., Inc. v. Musgrave*, 512 F. Supp. 2d 424, 429 (S.D. W. Va. 2007)). As set forth below, the district-residency requirement unconstitutionally burdens protected freedoms of speech and association. Therefore, unless this Court grants their requested relief, Lux and his supporters will suffer

[4] Virginia Code section 24.2-612 requires the electoral board to "make printed ballots available for absentee voting not later than 45 days prior to any election." September 18th (a Saturday) is forty-five days before this year's November 2 election.

irreparable harm.

II. Lux and His Supporters Have Likely Success on the Merits.

The First Amendment provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The Supreme Court has consistently held that constitutional challenges to specific provisions of a state's election laws cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions.

> Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983). *See also Doe v. Reed*, 130 S. Ct. 2811, 2814 (2010) ("[T]he strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." (internal quotation marks omitted) (*quoting Davis v. FEC*, 128 S. Ct. 2759, 2775 (2008)).[5]

Laws that severely burden speech and association must be narrowly tailored to a compelling governmental interest. *Wash. State Grange v. Wash. State Republican*

[5] *Davis v. FEC*, 128 S. Ct. 2759 (2008), is not to be confused with *Libertarian Party of Virginia v. Davis*, 766 F.2d 865 (1985), cited throughout simply as *Davis*.

Party, 128 S. Ct. 1184, 1191 (2008); *Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 582 (2000); *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). It is within this legal framework that this Court must consider Virginia's district-residency requirement.

A. *Libertarian Party of Virginia v. Davis*.

In denying Lux's Motion for Preliminary Injunction and granting the Board's Motion to Dismiss, the District Court relied on this Court's decision in *Libertarian Party of Virginia v. Davis*, 766 F.2d 865 (1985). *Davis* examined a Virginia provision governing the qualification of presidential electors for the ballot. *Libertarian Party of Virginia v. Davis*, 591 F. Supp. 1561 (E.D. Va. 1984). Under the challenged law, to get on the ballot minor political parties were required to submit a petition signed by one-half of one percent of all registered voters, including a minimum of 200 from each of Virginia's congressional districts (the "geographic requirement"). *Id.* at 1562. The law also required each of the signatures to be witnessed by a resident of the same congressional district as the signer (the "district-residency requirement"). *Id.*

On an unopposed motion to dismiss, the district court found that the district-residency requirement served an interest in showing "some indication of geographic as well as numerical support before devoting space on the ballot to a political aspirant" because "it does demonstrate that within each congressional district there is at

least one 'activist' sufficiently motivated to shoulder the burden of witnessing signatures." *Id.* at 1564.[6] On appeal, this Court adopted the district court's rationale, stating that

> [T]he requirement that the witness be from the same congressional district as the petition signer serves the important purpose of assuring "some indication of geographic as well as numerical support" by demonstrating "that within each congressional district there is at least one 'activist' sufficiently motivated to shoulder the burden of witnessing signatures." It is difficult to imagine how the state could accomplish these objectives by less restrictive means.

Davis, 766 F.2d at 869–70 (citation omitted).

A decision of a panel of this Court becomes the law of the circuit and is ordinarily binding on other panels. *Etheridge v. Norfolk & Western Ry. Co.*, 9 F.3d 1087, 1090 (4th Cir. 1993). A panel decision is not controlling, however, where "a superseding contrary decision of the Supreme Court" has "specifically rejected the reasoning on which [the prior decision] was based." *Id.* at 1090–91 (*quoting Busby v. Crown Supply, Inc.*, 896 F.2d 833, 840–41 (4th Cir. 1990)). In this case, subsequent Supreme Court precedent has rejected and undercut the rationale of *Davis*, such that it is no longer controlling for this panel. Further, the factual and legal circumstances of this case differ from *Davis* such that, even were it controlling, *Davis* would not bar this Court from granting Appellants' requested relief.

[6] According to the district court, the decision was reached "quickly . . . [on a] hurried study of the pertinent Supreme Court opinions." *Davis*, 591 F. Supp. at 1565.

B. The Supreme Court's Subsequent Decisions in *Meyer* and *ACLF* Overturn the Basis of This Court's Decision in *Davis*.

1. The Rationale in *Meyer* Is Contrary to *Davis*.

In *Meyer v. Grant*, the Supreme Court clarified that restrictions on petition circulation are subject to strict scrutiny and rejected the notion that such restrictions serve any governmental interest in demonstrating a sufficient level of activist support. In a unanimous decision, the Court held that petition circulation is "core political speech" because it "involves both the expression of a desire for political change and discussion of the merits of the proposed change." *Id.* at 421–22. As *Meyer* noted, petition circulation is "the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication." *Id.* at 424.

The Court therefore held that restrictions on petition circulation imposed several substantial burdens on First Amendment rights. First, the Court held that prohibiting paid circulators limited the number of voices capable of carrying the message, the hours circulators can speak, and as a result, the size of the audience that can be reached. *Id.* at 422–23. Second, the restriction reduced the chances of qualifying for the ballot, making it less likely that the subject of the petition will become the focus of statewide discussion. *Id.* at 423. In short, restrictions on petition circulation reduce the "total quantum of speech on a public issue," *id.* at 423, a concept completely foreign to the First Amendment's goal of prohibiting uninhibited and robust public

debate. *See Buckley v. Valeo*, 424 U.S. 1, 14 (1976).[7]

From *Meyer*, it is clear that restrictions on petition circulation are not ballot access requirements, but are direct restraints on speech. The First Amendment protections in this context are at their "zenith," and the government's burden is "well-nigh insurmountable." *Meyer*, 486 U.S. at 425. In light of the substantial burdens, *Meyer* explains that restrictions on petition circulation must be "closely scrutinized and narrowly construed," the hallmarks of strict-scrutiny analysis. *Id.* at 423.

In an attempt to satisfy this high burden, Colorado argued the restriction on paid petition circulators advanced its interest in "making sure that an initiative has sufficient grass roots support to be placed on the ballot." *Id.* at 425. Rejecting this argument, the Supreme Court noted that the modicum of support interest was "adequately protected by the requirement that no initiative proposal may be placed on the ballot unless the required number of signatures has been obtained." *Id.* at 425–26. Because the restriction on paid petition circulators imposed a severe burden on core political speech and was not narrowly tailored to a compelling government interest, the provision was unconstitutional.

Meyer is contrary to *Davis* on two grounds. First, *Meyer* held that restrictions on

[7] *Meyer* rejected the argument that the burdens were minimal because the statute left other avenues of expression open. 486 U.S. at 424 ("That appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protection.").

petition circulation are subject to strict scrutiny because they impose substantial burdens on core political speech. *See id.* at 425. *Davis*, however, failed to subject the district-residency requirement to strict scrutiny. Indeed, the district court in *Davis* described the burden of the residency restriction as "light." *Davis*, 591 F. Supp. at 1564. Because, per *Meyer*, the burden imposed by the district-residency requirement is constitutionally severe, *Davis* no longer controls.

Second, *Meyer* undercuts the notion that petition circulators serve as a barometer of public support for a candidate. *Davis* held that requiring circulators to be from the same congressional district as the signer "serve[d] the important purpose of assuring some indication of geographic as well as numerical support by demonstrating that within each congressional district there is at least one 'activist' sufficiently motivated to shoulder the burden of witnessing signatures." *Davis*, 766 F.2d at 869–70 (citation omitted). Under *Meyer*, however, a state may not prohibit a candidate from using paid circulators rather than activists to gather the necessary signatures. Thus, the fact that a petition circulator for a candidate resides in a particular congressional district gives no indication of the support for that candidate in that district.

2. The Rationale in *ACLF* Is Contrary to *Davis*.

ACLF begins by affirming *Meyer*'s holding that (1) "[p]etition circulation . . . is 'core political speech,' because it involves 'interactive communication concerning political change,'" *id.* at 186 (*quoting Meyer*, 486 U.S. at 422), and that (2) First

Amendment protection for petition circulation is "at its zenith," *id.* at 187 (*quoting Meyer*, 486 U.S. at 425). *ACLF* held the voter-registration requirement imposed on petition circulators "significantly inhibit[ed] communication with voters about proposed political change." *Id.* at 192. As in *Meyer*, the focus was on the number of circulators *excluded*, and the Court noted that Colorado "drastically reduce[d] the number of persons, both volunteer and paid, available to circulate petitions." *Id.* at 193.[8]

The Supreme Court affirmed that such a reduction imposed several substantial burdens on protected First Amendment activity:

> [Colorado's voter-registration requirement] produces a speech diminution of the very kind produced by the ban on paid circulators at issue in *Meyer*. . . . [It] decreases the pool of potential circulators as certainly as that pool is decreased by the prohibition of payment to circulators. Both provisions "limi[t] the number of voices who will convey [the initiative proponents'] message" and, consequently, cut down "the size of the audience [proponents] can reach." In this case, as in *Meyer*, the requirement "imposes a burden on political expression that the State has failed to justify."

ACLF, 525 U.S. at 194–95 (citations and footnote omitted).

The Supreme Court once again rejected the notion that the burdens were less severe because other avenues of speech remained open. *Id.* at 195 (rejecting argument

[8] The Colorado statute excluded approximately 17% of Colorado voters from the ranks of eligible petition circulators. *ACLF*, 525 U.S. at 193 (1.9 million registered voters in Colorado, and at least 400,000 persons *eligible to vote* but not registered). Virginia's district-residency requirement excludes far more potential petition circulators. *See infra* pp. 22–23.

that burdens were less severe because it was "exceptionally easy to register to vote").

Colorado argued the law was necessary to "ensure that circulators will be amenable to the Secretary of State's subpoena power, which in these matters does not extend beyond the State's borders." *Id.* at 196. The Court's judgment, however, was "informed by other means Colorado employ[ed] to accomplish its regulatory purposes," *id.* at 192, and in that light, the Court held, Colorado's "interest in reaching law violators . . . [was] served by the requirement, upheld below, that each circulator submit an affidavit setting out, among several particulars, [his or her residential address]," *id.* The Court held that this address attestation adequately addressed Colorado's interest in ensuring that circulators were amenable to the state's subpoena power, and therefore struck the voter-registration requirement as an unnecessary restriction on speech.

The Court also described what it called "an arsenal of safeguards" available to Colorado post-*ACLF* to address its "substantial interests in regulating the ballot-initiative process." *Id.* at 204–05. Among them, the Court noted that "[t]o ensure grass roots support, Colorado conditions placement of an initiative proposal on the ballot on the proponent's submission of [a certain number of] valid signatures." *Id.* at 205.

As with *Meyer*, *ACLF* is contrary to *Davis* on two grounds. First, *ACLF* affirms that restrictions on petition circulation are subject to strict scrutiny because they

impose substantial burdens on core political speech. *Id.* at 192 n.12. Second, *ACLF* held that the state's interest in ensuring that candidates demonstrate a modicum of support is adequately served by the signature threshold, not by placing restrictions on who may serve as petition circulators. *Id.* at 204–05.

C. Other Circuits Have Applied *Meyer* and *ACLF* to Strike Down Circulator-Residency Requirements.

Every federal circuit court that has considered circulator-residency requirements since *Meyer* and *ACLF* has held that *Meyer* and *ACLF* control. *See Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1027–31 (10th Cir. 2008) (applying *Meyer-ACLF* framework to state-residency requirement); *Nader v. Blackwell*, 545 F.3d 459, 474–77 (6th Cir. 2008) (applying *Meyer-ACLF* framework to state-residency and voter-registration requirements); *Nader v. Brewer*, 531 F.3d 1028, 1034–38 (9th Cir. 2008) (applying *Meyer-ACLF* framework to state-residency requirement); *Chandler v. City of Arvada*, 292 F.3d 1236, 1241–44 (10th Cir. 2002) (applying *Meyer-ACLF* framework to city-residency requirement); *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 615–17 (8th Cir. 2001) (applying *Meyer-ACLF* framework to state-residency requirement); *Lerman v. Bd. of Elections in the City of New York*, 232 F.3d 135, 145–53 (2d Cir. 2000) (applying *Meyer-ACLF* framework to political-subdivision-residency requirement); *Krislov v. Rednour*, 226 F.3d 851, 858–66 (7th Cir. 2000) (applying *Meyer-ACLF* framework to district-residency and voter-registration requirements).

Insofar as Appellants are aware, not a single court has held—as the District Court held below—that circulator-residency restrictions are merely "ballot access provisions," (Opinion at 14), that "should generally be upheld," (*id.* at 13). *See Preserve Shorecliff Homeowners v. City of San Clemente*, 158 Cal. App. 4th 1427, 1443–44 (2008) ("We are aware of no case since [*ACLF*] and its quickly-gestated progeny of *Krislov*, *Lerman*, and [an Arizona court of appeals case] that has upheld a requirement of circulator residency in a given *political subdivision*." (emphasis in original)).

In the closely analogous case of *Krislov v. Rednour*, 226 F.3d 851, 856, 859–62 (7th Cir. 2000), the Seventh Circuit invalidated an Illinois law which required petition circulators to be residents and registered voters of the same congressional district for which the candidate was seeking office. Consistent with *Meyer* and *ACLF*, the court explained that the restriction imposed a severe burden by inhibiting the right to ballot access, limiting the candidates' ability to associate with a class of circulators, limiting the candidates' ability to choose the most effective means of communication, and reducing the candidates' ability to disseminate a political message to a wider audience. *Id.* at 860. *Krislov* held that the district-residency requirement imposed a severe burden because it excluded millions of potential petition circulators, thereby reducing the number of individuals capable of disseminating the candidates' message and the

potential audience that they could reach.[9] *Id.* at 860–62.

Circuit courts have split over whether a *state*-residency requirement can be constitutional after *Meyer* and *ACLF*. *Compare, e.g.*, *Nader v. Brewer*, 531 F.3d 1028, 1034–38 (9th Cir. 2008) (invalidating state-residency requirement), *with Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 615–17 (8th Cir. 2001) (upholding state-residency requirement). The rationale used to uphold *state*-residency requirements, however, does not support the conclusion that a *district*-residency requirement is constitutional. For example, in *Jaeger*, the Eighth Circuit upheld North Dakota's *state*-residency requirement because it advanced the state's "compelling interest in preventing fraud" by "ensuring that circulators answer to the Secretary's subpoena power."[10] 241 F.3d at 616. A *district*-residency requirement, by contrast, does not advance an anti-fraud interest because a state's subpoena power applies equally to all state residents, regardless of the congressional district in which they reside. Therefore, *Jaeger* only serves to reinforce the illegitimacy of a *district*-residency restriction.

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[9] The congressional candidate in *Krislov* was required to submit 660 signatures, *Krislov*, 226 F.3d at 859, approximately 340 *less* than the 1,000 valid signatures required of congressional candidates in Virginia, Va. Code Ann. § 24.2-506(2) (2010).

[10] The circuit split created by *Jaeger* may be explained by the fact that North Dakota cited an incident where over 17,000 signatures had to be invalidated because of fraudulent activities by out-of-state petition circulators. 241 F.3d at 616.

In sum, *Meyer* and *ACLF* control a court's analysis of the constitutionality of petition circulation restrictions. Both decisions are contrary to *Davis* and, as such, *Davis* does not control the decision of this Court.

D. *Davis* Is Distinguishable.

Even should this Court determine that *Davis* remains binding precedent for this Circuit, the case is distinguishable factually and legally from the present circumstances. While *Davis* involved a district-residency requirement, *Davis* did not involve a candidate who was prohibited from circulating his own petition. The burden imposed when a candidate is prevented from circulating his own petition goes far beyond even the burden of being restricted in choosing which surrogates to use as circulators, which was the issue in *Davis*. There is no legitimate state interest in keeping a candidate from circulating his own petitions. In fact such interest runs counter to a voter's preference to talk directly to a candidate to determine their support. Given that it is the candidate the voter would ultimately vote for or against, not a surrogate, preventing a candidate from being able to circulate his own petitions defies common sense.

Further, *Davis* involved a dispute concerning the selection of presidential electors, and under Article Two, Section One of the U.S. Constitution, states have plenary power to determine the method of selecting electors. *See Bush v. Gore*, 531 U.S. 98, 104 (2008) (*citing McPherson v. Blacker*, 146 U.S. 1, 35 (1892)). This case, by

contrast, involves elections for the U.S. House of Representatives. Not only does Virginia lack the plenary authority over such actions that it has when it comes to presidential electors, but it is prohibited from supplementing the exclusive qualifications set forth for the office in the text of the Constitution. *U.S. Term Limits v. Thornton*, 514 U.S. 779, 827 (1995). The Constitution explicitly allows candidates to run for office in a congressional district where they do not reside, so long as they are a resident of the relevant state. U.S. Const. Art. I, § 2. Because the only candidates prohibited from circulating their own petitions are candidates for U.S. House of Representatives who do not reside in their own district, it appears that the district-residency requirement is an "effort to dress eligibility to stand for Congress in ballot access clothing." *Thornton*, 514 U.S. at 829.

E. Virginia's District-Residency Requirement is Unconstitutional.

Virginia's district-residency requirement is subject to strict scrutiny because it severely burdens core political speech. *See*, *e.g.*, *ACLF*, 525 U.S. at 192 n.12; *Krislov*, 226 F.3d at 863. The district-residency requirement is unconstitutional because it is not narrowly tailored to any compelling government interest.

1. Petition Circulation Is Core Political Speech.

The district court below incorrectly assessed the impact of the district-residency requirement on protected First Amendment expression and association by suggesting

the restriction "imposed no restrictions on Lux as a candidate or advocate, but only as a signature attester." (Opinion at 11.) As a result, the district court referred to the district-residency requirement as a "ballot access provision" (*id.* at 14) and subjected it to rational basis review (*id.* at 15).[11]

The district court's analysis is inconsistent with *Meyer* and *ACLF*, which held that petition circulation is core political speech because it involves "interactive communication concerning political change." *ACLF*, 525 U.S. at 186 (*quoting Meyer*, 486 U.S. at 422). Indeed, *Meyer* recognized that petition circulation is "the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication." *Meyer*, 486 U.S. at 424. Because such political discourse is at the heart of the First Amendment, the First Amendment's protections are at their "zenith." *ACLF*, 525 U.S. at 187.

Like the statutes in *Meyer* and *ACLF*, the district-residency requirement prohibits

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[11] The district court relied on *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), and applied rational basis review to the district-residency requirement. (Opinion at 13.) *Burdick* held that "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 424 (citation omitted).

In *ACLF*, the Supreme Court held that restrictions on petition circulation are subject to strict scrutiny and refused to characterize such restrictions as "reasonable, non-discriminatory" restrictions. *ACLF*, 525 U.S. at 192–97. By identifying petition circulation as core political speech, *ACLF* held that regulations that prohibit people from circulating petitions are different in kind from ballot access provisions, such as signature thresholds or filing deadlines. *See ACLF*, 525 U.S. at 204–05.

a class of individuals from serving as petition circulators. The result of a prohibition against paid circulators (*Meyer*), non-registered voters (*ACLF*), or non-district residents (Va. Code Ann. § 24.2-506) is the same—a class of persons is prohibited from engaging in core political speech. And because the burdens of such a restriction are severe, the restriction must survive strict scrutiny. *ACLF*, 525 U.S. at 192 n.12; *Meyer*, 486 U.S. at 425; *Yes on Term Limits*, 550 F.3d at 1028; *Krislov*, 226 F.3d at 863; *Lerman*, 232 F.3d at 149.

2. Virginia's district-residency requirement is subject to strict scrutiny.

The district-residency requirement imposes severe burdens on protected First Amendment activity. *ACLF*, 525 U.S. at 194–95; *Meyer*, 486 U.S. at 422–23. It reduces the number of persons capable of carrying Herb Lux's message, and therefore, the size of the audience that can Lux and his supporters can reach. *ACLF*, 525 U.S. at 194–95; *Meyer*, 486 U.S. at 422–23. It also decrease the likelihood that the Lux will qualify for the ballot, making it more difficult for Lux and his supporters to make his campaign the focus of state-wide attention. *ACLF*, 525 U.S. at 194–95; *Meyer*, 486 U.S. at 422–23. And the district-residency requirement is particularly burdensome as applied to Herb Lux because it prevents him, an otherwise qualified candidate, from circulating his own petitions.

The district court concluded that the burdens of the district-residency requirement are not severe because Virginia's statute leaves people free to pursue other more

burdensome avenues of communication.[12] (Opinion at 11–12.) *Meyer* rejected this approach, noting that the focus is on what activity is *excluded*, not what activity remains permissible under the statute.[13] *Meyer*, 486 U.S. at 424. The government need not completely ban speech to run afoul of the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I.

The First Amendment protects Lux's ability to choose what he believes to be the most effective method of advancing his candidacy. *Meyer*, 486 U.S. at 424; *Cal. Democratic Party*, 530 U.S. at 581. The record demonstrates that candidates prefer to circulate their own petitions. For example, Catherine Crabill, a former candidate for the U.S. House, noted that voters were impressed that she personally collected signatures. (Dkt. 24, Decl. of Crabill ¶ 9 (They said it was "refreshing . . . to see me

[12] The district court discounted the burdens, noting that "[t]he witness need not even be a registered voter" and added that "there is no requirement that petition circulators wear identification badges or register in any fashion." (Opinion at 11-12.) This is the type of analysis that was rejected by *Meyer*. 486 U.S. at 418 (rejecting district court's holding that statute did not burden First Amendment rights because it did not place any restraint on their own expression or measurably impair efforts to place initiatives on the ballot).

[13] "[P]rohibiting candidates from using signatures gathered by forbidden circulators does not specifically preclude these circulators from speaking for the candidates. But by making an invitation to sign the petition a thoroughly futile act, it does prevent some highly valuable speech from having any real effect. Robbed of the incentive of possibly obtaining a valid signature, candidates will be unlikely to utilize non-registered, non-resident circulators to convey their political message to the public." *Krislov*, 226 F.3d at 861 n.5.

out there personally gathering these signatures in the hot, humid, uncomfortable conditions.").) Floyd Bayne, another independent candidate running for Congress in the Seventh District, personally collected nearly 1,700 of his 1,991 signatures. (Dkt. 27-1, Lux Decl. Ex. 1.) In other words, personal petition circulation by a candidate is "the most effective, fundamental, and perhaps economical avenue of political discourse." *Meyer*, 486 U.S. at 424.

The district-residency requirement also excludes a substantial number of potential petition circulators. Virginia's voting-age population exceeds 5 million,[14] but only 480,000 live within the Seventh District.[15] In other words, the statute prohibits 91% of Virginians from circulating petitions on behalf of Herb Lux. By comparison, the registered-voter restriction, ruled unconstitutional in *ACLF*, prevented only 17% of the voting-age population from circulating petitions.[16] 525 U.S. at 193 (2.3 million

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[14] U.S. Dep't of Commerce, *Profiles of General Demographic Characteristics: 2000 Census of Population and Housing: Virginia* 1 (Table DP-1) (May 2001), *available at* www2.census.gov/census_2000/datasets/100_and_sample_profile/Virginia/2kh51.pdf.

[15] U.S. Dep't of Commerce, *Profiles of General Demographic Characteristics: 2000 Census of Population and Housing: Congressional District 7, Virginia (110th Congress)* (Table DP-1), *available at* www.factfinder.census.gov (110th Congressional District Summary File (100-Percent)).

[16] *ACLF* struck the voter registration requirement even though it was "exceptionally easy to register." *ACLF*, 525 U.S. at 195 (internal quotation marks omitted). The only way Lux can become a qualified circulator is to move his residence to the Seventh District—a significantly more difficult undertaking than registering to vote.

eligible voters, 400,000 unregistered). If a 17% reduction is severe, then a 91% reduction must also be severe.[17]

The district court ignored the fact that the district-residency requirement "drastically reduces the number of persons, both volunteer and paid, available to circulate petitions," *ACLF*, 525 U.S. at 193, and thus has the "inevitable effect of reducing the total quantum of speech on a public issue," *Meyer*, 486 U.S. at 423. The central burden identified in *Meyer* and *ACLF* was absent from the district court's analysis.

The district-residency requirement also restricts Lux's ability to associate with individuals who sign his petition for the purpose of working together to elicit political change. *See Meyer*, 486 U.S. at 421–22 (First Amendment protects right to advocate political change). By the same token, it restricts his supporters' ability to associate in a meaningful way with the candidate of their choice, Lux, for the purpose of eliciting political change (i.e., by helping their preferred candidate appear on the ballot). To these non-candidate citizens, this act of association—aimed at directly affecting public policy by influencing who is elected to public office—may be the most significant and fundamental avenue of political expression at their disposal. *See Celebrezze*, 460 U.S. at 787–88 ("[V]oters can assert their preferences only through candidates or parties or both. . . . [A]n election campaign is an effective platform for the expres-

[17] For an independent candidate, with modest financial resources, and who relies on significant volunteer support, any reduction in the pool of eligible circulators is a substantial burden. *Krislov*, 226 F.3d at 862.

sion of views on the issues of the day, and a candidate serves as a rallying-point for like-minded citizens."). The district court opinion ignores the burdens on Lux's supporters, three of whom joined the suit, who have been denied the right to vote for their chosen candidate.

Finally, the district-residency requirement limits the size of the audience that Appellants can reach and has the effect of making it less likely that Lux and his supporters will garner enough signatures to qualify Lux for the ballot, thus preventing them from making Lux's candidacy the focus of district-, state-, and nation-wide discussion. *See Meyer*, 486 U.S. at 423 (recognizing burden imposed by Colorado law that limited plaintiffs' ability to make their ballot proposal "the focus of statewide discussion"); *ACLF*, 525 U.S. at 194, 197 (statute "produce[d] a speech diminution" akin to that in *Meyer*).

In sum, Virginia's district-residency requirement severely burdens protected freedoms of speech and association and is therefore subject to strict scrutiny.

3. Virginia's District-Residency Requirement Fails Strict Scrutiny.

Virginia's district-residency requirement fails strict scrutiny because Virginia failed to demonstrate that it is narrowly tailored to a compelling state interest. A law can fail to be narrowly tailored in one of several ways. It may be overinclusive if it restricts speech that does not implicate the government's compelling interest in the statute. *Simon & Schuster v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121 (1991).

The regulation may also be underinclusive if it fails to restrict speech that does implicate the government's interest. *Republican Party of Minn. v. White*, 536 U.S. 765, 779–80 (2002). Finally, a regulation is not narrowly tailored if the state's compelling interest can be achieved through a less restrictive means. *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 75 (1990).

Relying on *Davis*, the district court held that the district-residency requirement served a single interest—"assuring some indication of geographic as well as numerical support by demonstrating that within each congressional district there is at least one 'activist' sufficiently motivated to shoulder the burden of witnessing signatures." (Opinion at 12 (*quoting Davis*, 766 F.2d at 869-70).) This is just another way of describing the "modicum-of-support interest," which is designed to prevent frivolous candidacies and overcrowding on the ballot.[18] (Opinion at 14.) *Meyer* held, however, that the modicum-of-support interest is adequately protected by the signature requirement. 486 U.S. at 425–26; *see also ACLF*, 525 U.S. at 205 (signature requirement protects interest in requiring candidates to show "grass roots support"). Here, Vir-

[18] Virginia failed to present any evidence that it has a ballot-crowding problem. (*See* Decl. of Richard Winger ¶ 6 ("Virginia has never suffered from a crowded ballot in general elections for the United States House of Representatives. The most crowded general election ballot for any regularly-scheduled United States House of Representatives election in Virginia history was in 1904 when there were six candidates in Virginia's Third Congressional District.").)

Moreover, even if Virginia had such a problem, the district-residency requirement remains unconstitutional because the signature requirement is a less restrictive alternative. *Meyer*, 486 U.S. at 425–26.

ginia's requirement that Lux submit at least 1,000 valid signatures from qualified voters adequately protects Virginia's modicum-of-support interest.

The district-residency requirement is also underinclusive because it does not prohibit paid petition circulators. By allowing candidates to pay petition circulators, Virginia allows candidates to secure a place on the ballot without demonstrating any activist support—paid-petition circulators work for a financial reward, not to demonstrate support for a candidate. The hiring of paid circulators reflects nothing more than the strength of a candidate's financial backing. *See White*, 536 U.S. at 780 ("[Statute] is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.").

The district-residency requirement is also underinclusive because it does not require all candidates to demonstrate "activist" support. Candidates that live within the district are permitted to circulate their own petitions. Va. Code Ann. § 24.2-506. In fact, there are two independent candidates in the Seventh District race. Both men satisfy the qualifications for Congress set forth in the Constitution, and both personally collected more than 1,000 signatures. (Dkt. 27, Decl. of Lux ¶ 4.) However, only one has been certified for the ballot. The only difference between the two is that Floyd Bayne resides within the Seventh District and Herb Lux does not. If Virginia was serious about requiring activist support, it would prohibit all candidates from circulating their own petitions. *See White*, 536 U.S. at 780.

The circuit split that has developed with respect to *state*-residency requirements also demonstrates that a *district*-residency requirement is unconstitutional. *Compare Yes on Term Limits*, 550 U.S. at 1030–31 (striking state-residency requirement), *with Jaeger*, 241 F.3d at 616–17 (upholding state-residency requirement). Every case that has examined a state-residency requirement has done so through the lens of the state's interest in policing fraud by ensuring that petition circulators are subject to the state's subpoena power. *See*, *e.g.*, *Jaeger*, 241 F.3d at 616–17; *Kean v. Clark*, 56 F. Supp. 2d 719, 733 (S.D. Miss. 1999). The Board correctly conceded that such an interest cannot support a restriction that limits petition circulation to a political subdivision within a state (i.e., a *district*-residency requirement) because the state's subpoena power extends to all persons within its borders. (Defs.' Mem. of Law in Opp'n to Pls.' Mot. for Prelim. Inj. 9.) Thus, *Jaeger*'s rationale for upholding a *state*-residency requirement is inapposite as applied to a *district*-residency requirement.

Finally, in briefing before the district court, the Board tried to downplay the underinclusiveness of the statute by arguing that "from [its] view, a candidate can be an activist circulator in his own district if necessary," and that "the thrust of *Davis* was to have *someone in the district who will actively promote the candidacy*." (Defs.' Br. in Support of their Mot. to Dismiss 19 (emphasis in original).) Such a justification, however, is nothing more than disguised political protectionism. Its unabashed aim is to "help[ ] . . . prevent non-residents from influencing politics within the dis-

trict." *See Lerman*, 232 F.3d at 152. Far from being compelling, such an interest is not legitimate at all because it contravenes the underlying intent and purpose of the First Amendment. *Id.*[19] The Second Circuit explained:

> A desire to fence out non-residents' political speech—and to prevent both residents and non-residents from associating for political purposes across district boundaries—simply cannot be reconciled with the First Amendment's purpose of ensuring "the widest possible dissemination of information from diverse and antagonistic sources."

Id. (*quoting Krislov*, 226 F.3d at 866); *see also Yes on Term Limits*, 550 F.3d at 1029 n.2 (rejecting state's purported interest in "restricting the process of self-government to members of its own community" and adding that to accept such an interest would have "far-reaching consequences" (internal quotation marks omitted)); *Krislov*, 226 F.3d at 866 ("question[ing the] legitimacy" of a state's interest in "preventing citizens of other States from having any influence" on its elections).

Virginia is not the first state to argue that circulator-residency restrictions are a necessary means to advance an interest in ensuring that only district voters be allowed to influence district politics. *See, e.g.*, *Krislov*, 226 F.3d at 865. This argument, however, conflates a state's legitimate interest in ensuring that district residents alone be permitted to *select and elect* their representatives, with the wholly illegitimate interest

[19] It is important to note that a congressman's vote affects everyone in the Commonwealth, and for that matter in the country, not just those individuals within the boundary of a district.

of *banning non-resident political speech*.[20] Because Virginia's district-residency requirement advances only the latter, illegitimate interest, it cannot survive strict scrutiny. For this reason, Appellants are likely to succeed on the merits of this appeal.

III. The Balance of Harms Favors Lux and His Supporters.

The third prerequisite to the grant of a preliminary injunction is that the balance of the equities "tips" in favor of the party moving for a preliminary injunction, meaning that the burden imposed on the movant if a preliminary injunction is *not granted* outweighs the burden that *granting* a preliminary injunction would impose on the party opposing the preliminary injunction. *Winter*, 129 S. Ct. at 374, 378. In another First Amendment case, this Court has held that "[w]ith respect to the harm that would befall if an injunction were put in place, [a governmental agency] is in no way harmed by issuance of a preliminary injunction which prevents it from enforcing a regulation,

[20] To the extent the Commonwealth contends that it has an interest in ensuring that only district residents be permitted to *select and elect* their representatives, Appellants agree. *See Supreme Court of N.H. v. Piper*, 470 U.S. 274, 282 n.13 (1985) ("A State may restrict to its residents, for example, both the right to vote, and the right to hold state elective office." (citation omitted)); *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68–69 (1978) ("[A] government unit may legitimately restrict the right to participate in its political processes to those who reside in its borders."). But that valid interest is fully protected by several other provisions of Virginia law. Specifically, Virginia prohibits non-district residents from signing nominating petitions, voting in primary elections, and voting in the general election. Va. Code Ann. §§ 24.2-506 (only qualified voters may sign candidate petitions); 24.2-101 (qualified voter must be a resident of the Commonwealth and of the precinct in which he offers to vote); 24.2-400 (a qualified voter who is registered to vote is "entitled to vote in the precinct where he resides"); 24.2-530 (who may vote in primary).

which . . . is likely to be found unconstitutional." *Newsom*, 354 F.3d at 261.

IV. The Public Interest Favors Lux and His Supporters.

The final prerequisite to the grant of a preliminary injunction is that it serve the public interest. In another First Amendment case, this Court has held that "[s]urely, upholding constitutional rights serves the public interest." *Newsom*, 354 F.3d at 261. Because Lux and his supporters have shown a likelihood of success on the merits of their claim, granting a preliminary injunction here will have the effect of "upholding constitutional rights." Granting the injunction therefore serves the public interest.

Conclusion

For the foregoing reasons, Appellants respectfully request this Court grant their motion for preliminary injunction.

September 3, 2010

Respectfully submitted,

/s/James Bopp, Jr.

James Bopp, Jr., Ind. Bar #2838-84
Josiah Neeley, Tx. Bar #24046514
Scott F. Bieniek, Ill. Bar #6295901
Jared M. Haynie, Va. Bar #79621
Bopp, Coleson & Bostrom
1 South 6th Street
Terre Haute, Indiana 47807
Telephone: (812) 232-2434
Facsimile: (812) 235-3685
Lead Counsel for Plaintiffs-Appellants

Mark Matney, Va. Bar #34950
Michael C. Tillotson, LLC
13195 Warwick Blvd., Suite 2A
Newport News, Virginia 23602
Telephone: (757) 969-5197
Facsimile: (757) 969-5988
Counsel for Plaintiffs

Certificate of Service

I hereby certify that on September 3, 2010, I electronically filed the foregoing with the Clerk of Court using the CM\ECF System. I further certify that on September 3, 2010, I served upon the below listed non-CM/ECF participants copies of this document by first-class mail postage prepaid and by email at the listed addresses.

Stephen M. Hall, VSB #44132
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
shall@oag.state.va.us
Counsel for Defendants-Appellees

/s/James Bopp, Jr.
James Bopp, Jr., Ind. Bar #2838-84
Bopp, Coleson & Bostrom
1 South 6th Street
Terre Haute, Indiana 47807
Telephone: (812) 232-2434
Facsimile: (812) 235-3685
Counsel for Plaintiffs-Appellants