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

LIBERTARIAN PARTY OF VIRGINIA and DARRYL BONNER Plaintiffs, v. CHARLES JUDD , KIMBERLY BOWERS , and DON PALMER, in their official capacities as members of the Virginia State Board of Elections, Defendants	CIVIL ACTION NO. _____

PLAINTIFFS' BRIEF IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION

The Plaintiffs respectfully submit this brief in support of their motion for preliminary injunction seeking to enjoin the Defendants from enforcing Virginia's state residency requirement for circulators of nominating petitions for independent presidential candidates.

I. BACKGROUND

Plaintiff Libertarian Party of Virginia (LPVA) is a Virginia political organization dedicated to principles of personal and economic liberty that regularly fields candidates for President, Congress, and state office. Plaintiff Darryl Bonner is a paid petition circulator who is a Libertarian and a resident of Pennsylvania. (Verified Compl. ¶¶ 5-6.) The defendants are members of the Virginia State Board of Elections.

Under Virginia law, the LPVA is not considered a "political party" because it has not "at either of the two preceding statewide general elections, received at least 10 percent of the total vote cast for any statewide office filled in that election." Va. Code Ann. § 24.2-101. (Verified Compl. ¶ 10.) Therefore, its Presidential candidates do not obtain a place on the general election

ballot through a primary or other nominating process, but by the petition process set forth in Va. Code Ann. § 24.2-543. (Verified Compl. ¶ 10.)

Under a previous version of Va. Code Ann. § 24.2-543, in order for its candidate to appear on the ballot, the LPVA must submit a petition that "shall be signed by at least 10,000 qualified voters and include signatures of at least 400 qualified voters from each congressional district," and "[t]he signature of each petitioner shall be witnessed by a person who is a qualified voter, or qualified to register to vote, and whose affidavit to that effect appears on each page of the petition." Only a resident of the Commonwealth of Virginia may be a qualified voter or qualified to register to vote. Va. Code Ann. § 24.2-101. Under a new version of Va. Code Ann. § 24.2-543, which was passed by the General Assembly in its 2012 session and took effect on March 7, 2012, petition signatures must be witnessed by a person who is a "legal resident of the Commonwealth and who is not a minor or a felon whose voting rights have not been restored." 2012 Virginia Laws Ch. 166. Thus, under both the former version and the new version of the statute, petition signatures must be witnessed by a resident of the Commonwealth of Virginia. (Verified Compl. ¶¶ 11-13) The deadline for LPVA to submit signatures on behalf of a candidate for the November 2012 presidential election is August 24, 2012.

The LPVA is currently collecting signatures for its presidential candidate using paid and volunteer circulators who are members of the LPVA and residents of Virginia. (Verified Compl. ¶ 16.) The Virginia residency requirement puts the LPVA and the candidate in a precarious position because only two paid professional circulators who are both Libertarians and residents of Virginia are consistently available. In past campaigns, those two individuals have been responsible for collecting a significant number of the required signatures. If either of them were to take ill or otherwise become unavailable, the LPVA would be unlikely to be able to collect the

required 10,000 signatures. (Verified Compl. ¶ 16.) Plaintiffs intend to field presidential candidates in future races and expect to face similar constraints.

Plaintiff Darryl Bonner circulates petitions for Libertarians and other third-party candidates in elections all over the country. Bonner considers his work an important means of expressing his belief that third-party candidates play an important role in the political system and should be allowed a place on the ballots. With respect to his work on behalf of Libertarians, Bonner believes that the work is an important way for him to convey Libertarian values and policies to citizens throughout the country. Bonner would like to circulate petitions for the LPVA and Clark in Virginia, but, due to the residency requirement, is unable to do so without being accompanied by a Virginia resident to witness the signatures. Bonner attempted to collect signatures for the Green Party in Virginia in 2008, but found that being accompanied by a non-professional Virginia resident significantly slowed the process down and inhibited his ability to communicate effectively with potential signatories. (Verified Compl. ¶¶ 18-19)

Plaintiffs challenge Va. Code Ann. § 24.2-543 under the First and Fourteenth Amendments to the United States Constitution, as enforced by 42 U.S.C. § 1983, and ask this Court for injunctive relief prohibiting state officials from enforcing this unconstitutional provision.

II. DISCUSSION

A plaintiff is entitled to a preliminary injunction if he can show "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *WV Ass'n of Club Owners and Fraternal Services, Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (citing *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7 (2008)).

The plaintiffs in this case can satisfy these four requirements and, therefore, are entitled to preliminary relief.

A. Likelihood of Success on the Merits

In evaluating ballot access cases, courts must "be vigilant . . . to guard against undue hindrances to political conversations and the exchange of ideas." *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 192 (1999). The Supreme Court has twice considered statutes that restrict who may circulate petitions in support of a ballot measure, and has twice invalidated the restrictions. In *Meyer v. Grant*, 486 U.S. 414 (1988), the Court struck down Colorado's prohibition on paid petition circulators. Holding that the restriction was "a limitation on political expression subject to exacting scrutiny," 486 U.S. at 420, the Court found that the state had failed to justify the burden on advocates' free speech rights. In *Buckley*, the Court invalidated a requirement that petition circulators be registered voters of the state, holding that the "requirement cuts down the number of message carriers in the ballot-access arena without impelling cause." 525 U.S. at 197.

Although *Buckley* expressly reserved the question of whether residency requirements like the one at issue here would be unconstitutional, 525 U.S. at 197, nearly every court to consider the matter has relied on *Buckley* and *Meyer* to hold such requirements unconstitutional, in the context of both ballot initiative and candidacy petitions. *See Citizens in Charge v. Gale*, 810 F. Supp. 2d 916 (D. Neb. 2011) (invalidating state residency requirement for circulators of candidacy and ballot initiative petitions); *Yes on Term Limits v. Savage*, 550 F.3d 1023 (10th Cir. 2008) (invalidating state residency requirement for circulators of ballot initiative petitions); *Chandler v. City of Arvada, Colorado*, 292 F.3d 1236 (10th Cir. 2002) (invalidating district residency requirement for circulators of ballot initiative petitions); *Nader v. Blackwell*, 545 F.3d

459 (6th Cir. 2008) (invalidating state residency requirement for circulators of presidential candidacy petitions); *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008) (same); *Daien v. Ysursa*, 711 F.Supp.2d 1215 (D. Idaho 2010) (same); *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000) (invalidating residency requirement for circulators of petition for congressional candidacy petitions); *Lerman v. Board of Elections*, 232 F.3d 135 (2nd Cir. 2000) (invalidating district residency requirement for circulators of city council candidacy petitions). *See also, Lux v. Judd*, 651 F.3d 396 (4th Cir. 2011) (reversing dismissal of challenge to district residency requirement for circulators of congressional candidacy petitions). *But see Initiative and Referendum Institute v. Jaeger*, 241 F.3d 614 (8th Cir. 2001) (upholding state residency requirement for circulators of ballot initiative petitions).

As in the cases cited above, the residency requirement here imposes a serious burden on plaintiffs' First Amendment rights without being narrowly tailored to serve a compelling governmental interest.

1. Va. Code Ann. § 24.2-543 imposes severe burdens on political discourse and must be reviewed under a strict scrutiny standard.

In evaluating the constitutionality of an election law, "the rigorousness of [the court's] inquiry . . . depends upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). When constitutional rights "are subjected to 'severe' restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance." *Id.* (internal quotation marks and citation omitted). "But 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." *Id.* (internal quotation marks and citation omitted).

Nearly every court to consider the constitutionality of a residency requirement for petition circulation has subjected the requirement to strict scrutiny. *See, e.g.*, *Lerman*, 232 F.3d at 146; *Citizens in Charge*, 810 F. Supp. 2d at 925; *Daien*, 711 F. Supp. 2d at 1231; *Nader v. Blackwell*, 545 F.3d at 475; *Krislov*, 226 F.3d at 862; *Jaeger*, 241 F.3d at 616-7; *Nader v. Brewer*, 531 F.3d at 1036; *Chandler*, 292 F.3d at 1241; *Savage*, 550 F.3d at 1028; *Lux v. Judd*, No. 10-482, 2012 WL 400656 at *5 (E.D. Va. Feb. 8, 2012); Perry v. Judd --- F. Supp. 2d ----, 2012 WL 113865. *10 (E.D. Va. Jan. 13, 2012). As in these cases, the provision at issue in the present case undoubtedly places serious burdens on the First Amendment rights of the plaintiffs. Indeed, it burdens the free speech rights of nearly everyone who participates, or wishes to participate, in the presidential election process, including candidates, would-be petition circulators, and Virginia voters. The scope and severity of these burdens require the Court to evaluate the regulation using strict scrutiny.

a. Burden on Candidates

In *Meyer*, the Court explained that the circulation of a ballot initiative petition involves "the liberty to discuss publicly and truthfully all matters of public concern" at the core of the First Amendment. 486 U.S. at 414 (citation omitted). Such discussion is inherent in the petition process:

> Although a petition circulator may not have to persuade potential signatories that a particular proposal should prevail to capture their signatures, he or she will at least have to persuade them that the matter is one deserving of the public scrutiny and debate that would attend its consideration by the whole electorate. This will in almost every case involve an explanation of the nature of the proposal and why its advocates support it.

486 U.S. at 421. Similarly, circulating a petition to put a candidate on the ballot requires circulators to explain and answer questions about a candidate's positions, and to persuade

signatories that the candidate's ideas are serious enough to warrant his or her appearance on the state ballot.

For candidates, therefore, the petition process is a vital means for conveying their message to voters. When the state regulations reduce the number of eligible circulators, it undermines candidate speech in two ways:

> First, it limits the number of voices who will convey [the candidate's] message and the hours they can speak and, therefore, limits the size of the audience they can reach. Second, it makes it less likely that [the candidate] will garner the number of signatures necessary to place the matter on the ballot, thus limiting [his or her] ability to make the [candidacy] the focus of statewide discussion.

Id. at 422-23. While there are other means for candidates to spread their message, "[t]he First Amendment protects [candidates'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing." *Id.* at 424.

Additionally, the restriction "burdens [candidates'] right to associate with a class of circulators." *Krislov*, 226 F.3d at 860:

> Although the [Virginia] provision does not go so far as to specifically prohibit candidates from associating with individuals who are not residents of [Virginia] . . ., it still substantially burdens this right of association by preventing the candidates from using signatures gathered by these circulators . . . . By doing so, the law inhibits the expressive utility of associating with these individuals because these potential circulators cannot invite voters to sign the candidates' petitions . . . .

Id. at 861.

As in *Meyer* and *Buckley*, the Virginia residency requirement "drastically reduces the number of persons, both volunteer and paid, available to circulate petitions," *Buckley*, 525 at 193. In doing so, it severely burdens this important means of communication for candidates and limits candidate's ability to associate with many potential supporters.

b. Burden on Political Organizations

Because political organizations such as the LPVA play a large role in advocating for their candidates' place on the ballot, their free speech rights are likewise burdened by the residency requirement. Virginia's residency requirements restrict their ability to advocate for their candidate through the circulation of petitions, and burdens their ability to associate with potential circulators who reside out of state.

c. Burden on Would-Be Petition Circulators

Because those circulating the petitions, such as plaintiff Bonner, are the ones most directly engaging in the effort to persuade voters of the value of a particular candidate, it follows that the residency requirement also gravely diminishes the free speech rights of out-of-state residents who wish to circulate petitions in Virginia. In fact, many of the cases that have considered the constitutionality of residency requirements have been filed and won by the circulators themselves. *See Lerman*, 232F.3d 135; *Daien*, 711 F. Supp. 2d 1215; *Nader v. Brewer*, 531 F.3d 1028.

The residency restriction affects the free speech rights of out-of-state circulators in a number of ways. First, it deprives them of the opportunity to persuade voters in Virginia of the viability of their candidate. Although the restriction "does not specifically preclude these circulators from speaking for the candidates . . . .[,] 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.

Second, the residency requirement "limit[s] the nature of the support [a circulator] can offer" to his or her candidate of choice, because it "completely precludes [a circulator] from participating in the single most critical part of . . . a candidacy . . . that of obtaining sufficient nominating signatures to appear on the [state] ballot." *Daien*, 711 F.Supp.2d at 1224. Third, an out-of-state circulator "has an interest in who qualifies for President in every state," and the candidate he supports is "burdened in [his or her] attempt to gain ballot access in [Virginia] because they are not permitted to enlist the assistance of non-[Virginia] residents to circulate petitions." *Id.*

Finally, just as the residency requirement burdens a candidate's right to expressive association with potential out-of-state circulators, it burdens the circulators' right to associate with a candidate and with the voters of Virginia. *See Lerman*, 232 F.3d at 143 (noting circulator's "rights to engage in interactive political speech and expressive political association across electoral district boundaries.") In sum, the Free Speech rights of out-of-state petition circulators are severely burdened by Virginia's state residency requirement.

d. Burden on Voters

Not only are those disseminating information – the candidates and the circulators – burdened by Virginia's regulation, those who would receive the information – voters – are burdened as well. "[T]he Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557 (1969). "This right is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution." *Bd. of Educ., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982). By reducing the number of available petition circulators, the residency restriction "restricts the speech available to [Virginians], who benefit from the free exchange of ideas and political dialogue that comes from

petition circulation." *Daien*, 711 F.Supp.2d at 1231. *See also Krislov*, 226 F.3d at 859 n.3 ("Of course, the restriction also affects the rights of . . . those who might hear their message.")

In addition to depriving Virginia residents of speech by out-of-state petition circulators educating them about potential candidates, the residency restriction burdens voters' First Amendment rights by limiting their choices on the ballot. "By limiting the choices available to voters, the State impairs the voters' ability to express their political preferences." *Illinois State Board of Elections*, 440 U.S. at 184. By reducing the "overall quantum of speech available to the election or voting process," *Chandler*, 292 F.3d at 1242-3, the state residency requirements severely burdens the First Amendment rights of Virginia voters.

2. The burdens imposed by Va. Code Ann. § 24.2-543 cannot be justified by a compelling government interest.

Because the residency restriction imposes a severe burden on First Amendment rights, the Court must determine if it is narrowly tailored to serve a compelling government interest. *Burdick*, 504 U.S. at 434. When a state regulation burdens political speech and is subject to strict scrutiny, the plaintiff challenging the regulation does not carry the burden of demonstrating that it is unconstitutional. Instead, the government must prove that the regulation furthers a compelling government interest and is narrowly tailored to achieve that interest. *Federal Election Com'n v. Wisconsin Right To Life, Inc.*, 551 U.S. 449, 450-1 (2007). In doing so, the government "must do something more than merely posit the existence of the disease sought to be cured." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994) (*citing Quincy Cable TV, Inc. v. F.C.C.*, 768 F.2d 1434, 1455 (1985)).

In this case, defendants will be unable to meet this burden because there is simply no legitimate state interest to be protected by prohibiting out-of-state petition circulators. Therefore, Plaintiffs have shown likely success on the merits.

B. Irreparable Harm

"The loss of First Amendment rights, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 353 (1976). Thus, "in 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." *WV Ass'n of Club Owners and Fraternal Services, Inc. v. Musgrave*, 553 F.3d 292, 298 (4th Cir. 2009) (citing *Winter v. Natural Res. Defense Council, Inc.*, 555 U.S. 7 (2008)).

As discussed in detail in the previous section, the harm in this case is clear. Absent a preliminary injunction, Plaintiffs will suffer a deprivation of their constitutional rights under the First Amendment. As explained above, it is exceedingly probable that plaintiffs will prevail on their claim that Virginia's residency restriction violates their First Amendment rights. Because plaintiffs will be deprived of their First Amendment rights if Virginia is not enjoined from enforcing the residency restrictions, they will be irreparably harmed if an injunction does not issue.

C. The Balance of Equities

As discussed above, the plaintiffs will suffer irreparable harm if the Defendant enforces Virginia's residency requirement for petition circulators. On the other hand, Defendants can claim no harm resulting from the issuance of a preliminary injunction. Even assuming, *arguendo*, that enjoining the statute would harm the election process, no conceivable harm would outweigh the harm suffered by the plaintiffs, namely, a violation of their First Amendment rights.

D. The Public Interest

The health and well-being of a democracy depends upon choice in the ballot box. Enjoining the enforcement of the residency restriction will result in greater access to the ballot

for minor party and independent candidates. Therefore, the public has a strong interest in barring enforcement of Va. Code Ann. § 24.2-543. On the other hand, the public interest would be impaired by enforcement of the residency restriction by diminishing choice on Election Day.

III. CONCLUSION

Because the movants will likely succeed on the merits and suffer irreparable harm if the injunction does not issue, and because the balance of harms and impact on the public interest favor issuance of the preliminary injunction, this Court should grant Plaintiffs' motion.

Dated: May 14, 2012

Respectfully submitted:

REBECCA K. GLENBERG (VSB No. 44099)
American Civil Liberties Union of Virginia Foundation, Inc.
530 East Main Street, Suite 310
Richmond, Virginia 23219
(804) 644-8080
(804) 649-2733 (fax)
rglenberg@acluva.org

KATIE O'CONNOR (*pro hac vice* pending)
American Civil Liberties Union Foundation, Inc.
230 Peachtree Street, NW, Suite 1440
Atlanta, Georgia 30303
(404) 523-2721
(404) 653-0331 (fax)
koconnor@aclu.org

ATTORNEYS FOR THE PLAINTIFFS