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. 3:12-cv-367

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

The plaintiffs, the Libertarian Party of Virginia and Darryl Bonner, by counsel and pursuant to Fed. R. Civ. P. 56, respectfully submit this Memorandum of Law in Support of their Motion for Summary Judgment.

INTRODUCTION

The First Amendment places a premium on political speech, especially speech about elections for public office. By imposing a state residency requirement on those who solicit signatures necessary for presidential candidates to appear on the ballot, Virginia reduces the quantity of such speech available in the state and directly infringes on the First Amendment rights of candidates, voters, petition circulators and political parties. The residency requirement set forth in Va. Code Ann. § 24.2-543 is an unconstitutional burden on plaintiffs' free speech, because Virginia cannot demonstrate that the provision is narrowly tailored to serve a compelling state interest.

STATEMENT OF UNDISPUTED MATERIAL FACTS

The Parties

1. 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. (Ex. 1, Verified Complaint ¶5).
2. Plaintiff Darryl Bonner ("Bonner") is a Libertarian and a paid professional petition circulator who lives outside of Virginia. (Ex. 1, Verified Complaint ¶6).
3. Defendant Charles Judd is the Chairman of the Virginia State Board of Elections ("the Board"). (Ex. 1, Verified Complaint ¶7.) Defendant Kimberly Bowers is the Vice-Chairwoman of the Board. (Ex. 1, Verified Complaint ¶8). Defendant Don Palmer is the Secretary of the Board. (Ex. 1, Verified Complaint ¶9).
4. As members of the Board, defendants are responsible for prescribing the forms for signature collection and for receiving petition signatures and certifying candidates for President and Vice President. Va. Code Ann. § 24.2-543.
5. Furthermore, defendants are charged with supervising and coordinating the work of the county and city electoral boards and registrars in properly administering the election laws of the state. Va. Code Ann. § 24.2-103.
6. Defendants are sued in their official capacities only. (Ex. 1, Verified Complaint ¶¶7-9).

The Virginia Statutory Scheme

7. 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.

8. Therefore, its presidential candidates do not obtain a place on the general election ballot through a primary or other statutory nominating process, but by the petition process set forth in Va. Code Ann. § 24.2-543. (Ex. 1, Verified Complaint ¶10.)
9. Under the previous version of Va. Code Ann. § 24.2-543, in order for its candidate to appear on the ballot, the LPVA was required to 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. (Ex. 1, Verified Complaint ¶11.)
10. Under a new version of Va. Code Ann. § 24.2-543, which was passed by the General Assembly in its 2012 session and went into 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. (Ex. 1, Verified Complaint ¶12.)
11. Therefore, 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.
12. Signatures witnessed by a non-resident are declared invalid. (Ex. 1, Verified Complaint ¶13.)
13. The deadline for non-"political party" organizations to collect signatures for a presidential candidate for the November 2012 presidential election is August 24, 2012. (Ex. 1, Verified Complaint ¶14.)

The Effects of the Residency Requirement

14. As it has in past presidential campaigns, LPVA is collecting signatures for the 2012 Libertarian presidential candidate using volunteer and paid circulators who are members of the LPVA and residents of Virginia. (Ex. 1, Verified Complaint ¶15.)
15. The Virginia residency requirement puts the LPVA in a precarious position because it is only aware of two paid professional circulators who are both Libertarians and residents of Virginia and who are consistently available. (Ex. 1, Verified Complaint ¶16.)
16. In past campaigns, these two people have been responsible for collecting a significant number of the required signatures. (Ex. 1. Verified Complaint ¶16.)
17. If either of them were to take ill or otherwise become unavailable, the LPVA would be unlikely to be able collect the required 10,000 signatures. (Ex. 1, Verified Complaint ¶16.)
18. The LPVA intends to field presidential candidates in future races and expects to face similar constraints. (Ex. 1, Verified Complaint ¶16.)
19. The Libertarian National Committee has existing relationships with many professional circulators throughout the country who could assist with the LPVA's petition efforts, but for the residency requirement. (Ex. 2, Redpath Deposition 17:21-18:15.)
20. The Virginia residency requirement is particularly burdensome for the LPVA this year because Virginia's decennial redistricting was only recently completed by the General Assembly and precleared by the United States Department of Justice. (Ex. 1, Verified Complaint ¶17.)

21. Because the petitions for LPVA's candidate must list the names of one elector from each Congressional district, LPVA could not prepare its petitions until it knew the boundaries of the Congressional districts. (Ex. 1, Verified Complaint ¶17.)
22. Thus, although the petition period began by statute on January 1, 2012, LPVA refrained from collecting signatures until the day after the Congressional redistricting plan was precleared by the Department of Justice on March 14, 2012. (Ex. 1, Verified Complaint ¶17.)
23. This delay caused the LPVA to lose 75 days of signature collection. (Ex. 1, Verified Complaint ¶17.)
24. This loss of time for circulating petitions makes it even more difficult than usual for the LPVA to collect enough signatures by the deadline without using nonresident circulators. (Ex. 1, Verified Complaint ¶17.)
25. Plaintiff Darryl Bonner circulates petitions for Libertarians and other third-party candidates in elections all over the country. (Ex. 1, Verified Complaint ¶18.)
26. Bonner considers his work an important means of expressing his belief that third-party candidates play a significant role in the political system and should be allowed a place on the ballots. (Ex. 1, Verified Complaint ¶18.)
27. 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. (Ex. 1, Verified Complaint ¶18.)
28. Bonner would like to circulate petitions for the LPVA and its presidential candidate in Virginia but, due to the residency requirement, is unable to do so without being

accompanied by a Virginia resident to witness signatures. (Ex. 1, Verified Complaint ¶19.)

29. 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. (Ex. 1, Verified Complaint ¶19.)
30. In his deposition, Defendant Don Palmer was unable to recall any experiences with out-of-state circulators that led him to believe that, as a class, they are more likely to commit fraud, or more likely to collect signatures that are fraudulent. (Ex. 3, Deposition of Donald Palmer, at 13-14 (June 15, 2012).)
31. Mr. Palmer stated that he has heard of examples of circulator fraud where the circulators subsequently left the state, but he did not know whether these individuals were out-of-state or in-state circulators. (*Id.* at 31.)
32. Mr. Palmer was unable to say whether states that do not have residency requirements for petition circulators have difficulty enforcing petition fraud laws due to an inability to subpoena out-of-state circulators. (*Id.* at 29.)

LEGAL STANDARD

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c); *see also Celotex Corp. v. Catrett,* 477 U.S. 317, 324 (1986). The Court must view the evidence in the light most

favorable to the non-moving party and draw all reasonable inferences in its favor. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 587 (1986).

ARGUMENT

1. THE OVERWHELMING WEIGHT OF AUTHORITY SUGGESTS THAT RESIDENCY REQUIREMENTS ON PETITION CIRCULATORS ARE UNCONSTITUTIONAL

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 "state regulations 'impos[ing] 'severe burdens' on speech…[must] be narrowly tailored to serve a compelling state interest" and that this particular regulation "cuts down the number of message carriers in the ballot-access arena without impelling cause." 525 U.S. at 192 n. 12, 197.

Although *Buckley* expressly reserved the question of whether residency requirements like the one at issue here are 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); *Frami v. Ponto*, 255 F.Supp.2d 962 (W.D. Wis. 2003) (invalidating district residency requirement, as applied to both Wisconsin residents who resided outside the political subdivision in which they circulated and to circulators who resided outside Wisconsin). *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); *Lux v. Judd*, 2012 WL 400656 *7 (E.D. Va. Feb. 8, 2012) (ruling, on remand, that the residency requirement is unconstitutional). *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); *Kean v. Clark*, 56 F. Supp. 2d 719 (S.D. Miss. 1999) (same).

Indeed, this Court, although ultimately declining relief on the basis of laches, found that an almost identical residency requirement to the one at issue here would "likely be declared unconstitutional." *Perry*, 2012 WL 113865 at *10 (discussing state residency requirements for circulators of petitions for presidential primary candidates, Va. Code Ann. § 24.2-545). The present motion asks this Court to now recognize explicitly that Virginia's residency restriction

on circulators imposes a serious burden on plaintiffs' First Amendment rights without being narrowly tailored to serve a compelling governmental interest.

2. VIRGINIA'S RESIDENCY REQUIREMENT FOR PETITION CIRCULATORS SEVERELY BURDENS THE FIRST AMENDMENT RIGHTS OF CANDIDATES, PETITION CIRCULATORS, POLITICAL PARTIES AND VOTERS AND MUST THEREFORE BE REVIEWED UNDER STRICT SCRUTINY

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; *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*, 2012 WL 113865 at *10 (E.D. Va. Jan. 13, 2012); *Frami*, 255 F.Supp.2d at 968; *Kean*, 56 F.Supp.2d at 730.

Exacting scrutiny is necessary because of the type and quantity of speech burdened by the residency restriction. As this Court recently explained, "[w]hen a state's election law directly

implicates core political speech, such as petition circulation, the Supreme Court has uniformly subjected the challenged restriction to strict scrutiny and required that the legislation be narrowly tailored to serve a compelling government purpose." *Lux*, 2012 WL 400656 at *5 (on remand from the Fourth Circuit, invalidating district residency requirement for persons circulating petitions for congressional candidates). Further, strict scrutiny is "employed where the quantum of speech is limited due to restrictions on…the available pool of circulators or other supporters of a candidate or initiative, as in [*Buckley*] and *Meyer*." *Chandler*, 292 F.3d at 1242-43, *quoting Campbell v. Buckley*, 203 F.3d 738, 745.

That *Buckley* and *Meyer* involved ballot access petitions, while plaintiffs here challenge restrictions on circulators of candidate petitions, is not a distinction affecting the level of constitutional scrutiny. Petition circulation, in the general sense, implicates "'core political speech,' because it involves 'interactive communication concerning political change.'" *Buckley*, 525 U.S. at 186, *quoting Meyer*, 486 U.S. at 421-22. *See also Lerman*, 232 F.3d at 148, ("[T]here is no basis to conclude that petition circulation on behalf of a candidate involves any less interactive political speech than petition circulation on behalf of a proposed ballot initiative. The nature of the activity is identical in each instance."). Moreover, an unduly burdensome restriction, regardless of the type of petition being circulated, "decreases the pool of potential circulators" and thus "produces a speech diminution." *Buckley*, 525 U.S. at 194.

Indeed, several courts of appeal have stated that, to the extent the distinction is even relevant, "the burden on candidates is *even greater* than that placed on those who circulate petitions for ballot initiatives." *Krislov*, 226 F.3d at 861 (emphasis added). This is because the proponent of a ballot initiative will generally speak on behalf of one narrow issue, "while the typical candidate embodies a broad range of political opinions," forcing their solicitor to "speak

to a broader range of political topics." *Id*. Thus, a law "precluding a class of people from soliciting signatures on behalf of a candidate…has the potential to squelch a greater quantity and a broader range of political speech than laws which only restrict initiative proponents." *Id*. at 861-62. *See also Nader v. Blackwell*, 545 F.3d at 475; *Lerman*, 232 F.3d at 149 ("Indeed, if the distinction between candidate and initiative ballot access petition bears any relevance at all, it may well suggest the *opposite* conclusion from that reached by the District Court- namely, that the witness residence requirement places an even greater burden on candidate petition circulators than on initiative petition circulators") (emphasis in original).

In sum, "the rationale is the same: the provision limits the number of voices who can convey the candidates' messages, thereby reducing 'the size of the audience [the candidates] can reach.'" *Perry*, 2012 WL 113865 at *9, *quoting Buckley*, 525 U.S. at 194-5. The Supreme Court's reasoning in applying strict scrutiny and invalidating circulator restrictions squarely applies to the candidate petition context, as repeatedly confirmed by subsequent decisions. See *Nader v. Brewer*, 531 F.3d at 1036; *Krislov*, 226 F.3d at 863; *Frami*. 255 F. Supp. 2d at 967-68; *Lux,* 2012 WL 400656 at *5; *Chandler*, 292 F.3d 1242-43; *Perry*, 2012 WL 113865 at *8.

The provision at issue here undoubtedly reduces the quantity of protected speech and "directly infringes upon the First Amendment rights of candidates, voters, petition circulators, and political parties*." Perry,* 2012 WL 113865 at *10. The scope and severity of these burdens, therefore, 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 reduces the number of eligible circulators, as Virginia has done here via Va. Code Ann. § 24.2-543, it undermines candidate speech in several 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."[1] *Id.* at 422-23. Second, it "deprive[s] [the candidates] of the solicitors (political advocates) of their choice." *Krislov* 226 F.3d at 857. 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." *Meyer*, 486 U.S. at 424. This is

[1] Limiting the number of circulators is particularly burdensome on non-party candidates. "Candidates who do not have broad support must count on only a few supporters, and if they are not registered to vote or do not live in the district, the already small pool of volunteers will evaporate, thus greatly limiting the candidates' ability to disseminate their message and obtain the required signatures. By contrast, candidates with the full support of established parties might easily afford to have non-voting citizens excluded from the much larger pool of potential petition circulators…[F]or some minor candidates, parting with one or two avid circulators could significantly impact their campaigns." *Krislov*, 226 F.3d at 862.

particularly important in the petition context, since "direct one-on-one conversation" is "the most effective, fundamental, and perhaps economical avenue of political discourse." *Id.*

The residency restriction at issue here impacts candidates First Amendment rights in a third way - namely, it "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.

In short, the Virginia residency requirement for candidate petition circulators "drastically reduces the number of persons, both volunteer and paid, available to circulate petitions," *Buckley*, 525 U.S. at 183. 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

"Representative democracy in any populous unit of governance is unimaginable without the ability of citizens to band together in promoting among the electorate candidates who espouse their political views." *California Democratic Party v. Jones*, 530 U.S. 567, 574 (2000). Thus, "the right of individuals to associate for the advancement of political beliefs" is "fundamental." *Illinois State Board of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (internal quotation marks and citation omitted). Because political organizations such as the LPVA play a large role in organizing like-minded individuals for the advancement of common political beliefs, their free speech rights are likewise burdened by the residency

requirement. The residency requirement limits a political organization's ability to associate with non-resident citizens and to achieve a place on the ballot.

C. Burden On 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*, 232 F.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, as an out-of-state circulator supporting an independent candidate, he "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.")

Virginia has posited that an out-of-state circulator like Plaintiff Bonner can "easily hire qualified residents" to circumvent Va. Code Ann. § 24.2-543. Doc. 10, Defendant's Response to Plaintiffs' Motion for Preliminary Injunction, at 9. This argument ignores the reality that "the practical effect of the residency requirement is to exclude [non-state circulators] from the signature gathering process." *Daien*, 711 F.Supp.2d at 1232. To participate in the petition process, Bonner must be accompanied by non-professional Virginia residents, which he found to slow the process down and inhibit his ability to communicate effectively with potential signatories. Verified Complaint at 19.

Overall, Virginia's state residency requirement acts as a severe burden on the protected free speech and association rights of out-of-state petition circulators.

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, 564 (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 1232. *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 1241-2, the state residency requirements severely burdens the First Amendment rights of Virginia voters.

3. VIRGINIA CANNOT DEMONSTRATE A COMPELLING INTEREST THAT WOULD JUSTIFY THE SEVERE BURDENS IMPOSED ON PLAINTIFFS

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).

Virginia is unable to overcome this considerable hurdle. The Commonwealth claims it has a strong state interest in policing lawbreakers and preserving the integrity of the electoral

process. *See* Ex. 4, Defendants' Answers to Plaintiffs' First Set of Interrogatories, Interrogatory No 1, pp. 1-2. While prevention of election fraud is generally considered a compelling interest, *Lerman*, 232 F.3d at 149, the dangers are more remote at the petitioning stage than at the balloting stage, and the interest is therefore less critical. *Id. See also Meyer*, 486 U.S. at 427, *Krislov*, 226 F.3d at 865.

Moreover, the government "must show that the 'recited harms are real, not merely conjectural' and that the regulation will in fact materially alleviate the anticipated harm." *Krislov*, 226 F.3d at 865, *quoting Turner Broadcasting Sys., Inc. v. F.C.C.,* 512 U.S. 622, 644 (1994). There is simply no evidence to suggest that a non-resident petition circulator would be more at risk for obtaining an invalid signature than a resident circulator. Additionally, several courts have "rejected the idea that non-residents are inherently less honest." *Perry*, 2012 WL 113865 at *10, citing *Nader v. Brewer*, 531 F.3d at 1037; *Yes on Term Limits*, 550 F.3d at 1029. When states have been unable to proffer evidence that non-residents pose a threat to ballot integrity, courts accordingly give less weight to the state's alleged interest. See *Krislov*, 226 F.3d at 866 n. 7 ("[I]f the use of non-citizens were shown to correlate with a high incidence of fraud, a State might have a compelling interest in further regulating noncitizen circulators."); *Lerman*, 232 F.3d at 149 ("[W]ere defendants able to establish that the use of non-resident petition circulators did, in fact, pose a demonstrable threat to the integrity of the signature collection process, we would be obliged to give greater weight to that argument."); *Nader v. Brewer*, 531 F.3d at 1037 ("[T]he state [did not] ever contend that its history of fraud was related to non-resident circulators, a history that might justify regulating non-residents differently from residents."); *Frami*, 255 F.Supp.2d at 970. ("Yet defendant has not even alleged that the state has experienced problems in the past with non-resident petition circulators or that such circulators

are more likely to engage in fraud that [sic] in-state or in-district circulators"). All Virginia has done here is "posit the existence of the disease sought to be cured." *Turner*, 512 U.S. at 664 (1994) (*citing Quincy Cable TV, Inc. v. F.C.C.*, 768 F.2d 1434, 1455 (1985)).

To frame its interest in more specific terms – the ability to compel a petition circulator's participation in a criminal proceeding should fraud occur – does not assist the Commonwealth here. *See* Ex. 4, Defendants' Answers to Plaintiffs' First Set of Interrogatories, Interrogatory No 1, pg. 2. This Court has been "skeptical that subpoena power over out-of-state circulators is a compelling state interest" since the "critical signature" on the petition form is that of the voter, not the circulator. *Perry*, 2012 WL 113865 at *10. By definition, registered voters are Virginia residents and therefore susceptible to whatever examination or investigation the authorities deem necessary to conduct. *Id.*

Finally, Virginia unsuccessfully alleges that the residency requirement is justified by the state's interest in ensuring minimal popular support. *See* Ex. 4, Defendants' Answers to Plaintiffs' First Set of Interrogatories, Interrogatory No 1, pg. 2. As the Fourth Circuit recently noted in *Lux*, the argument that the circulator residency requirement serves the state's interest in "ensuring a threshold level of grassroots support" does not survive *Meyer* and *Buckley*, which held that the interest was adequately protected by the requirement that a certain number of residents *sign* the petitions. *Lux*, 651 F.3d at 403.

Accordingly, Virginia has failed to demonstrate a compelling state interest.

4. VA. CODE ANN. § 24.2-543 IS NOT THE LEAST RESTRICTIVE MEANS TO ACCOMPLISH THE STATE'S GOALS

Even if its interests were recognized as "compelling," strict scrutiny demands that Virginia demonstrate that its residency requirement is the least restrictive method available. In evaluating the law, it is necessary to "take into account the other mechanisms the State currently

employs to serve the statute's purpose, as well as other, less restrictive means it could reasonably employ." *Krislov*, 226 F.3d at 863.

Instead of categorically excluding all non-residents from the petitioning process, Virginia could, as various courts have suggested, require petition circulators to consent to state jurisdiction for subpoena purposes. Indeed, "[f]ederal courts have generally looked with favor on requiring petition circulators to agree to submit to jurisdiction for purposes of subpoena enforcement, and the courts have viewed such a system to be a more narrowly tailored means than a residency requirement to achieve the same result." *Nader v. Brewer,* 531 F.3d at 1037. *See also Chandler*, 292 F.3d at 1244 (finding that "the City could achieve its interests without wholly banning non-residents" by requiring circulators to submit to jurisdiction for subpoena enforcement); *Yes on Term Limits*, 550 F.3d at 1030 (stating that Oklahoma could "require that in order to circulate petitions, non-residents enter into agreements *with the state*…") (emphasis in original); *Daien*, 711 F.Supp.2d at 1235 (holding that Idaho could require petition circulators to consent to subpoena jurisdiction as "an alternative and less restrictive means" than a residency requirement for ensuring enforcement of election law). In fact, mandatory submission to subpoena power may be a more effective means of accomplishing the state's goals than Va. Code Ann. § 24.2-543. The residency requirement arguably contains a loophole for resident circulators who subsequently leave the state's jurisdiction, thus avoiding Virginia's subpoena power. *See Chandler*, 292 F.3d at 1244.

Virginia has responded that this remedy is "inadequate on its face" and that alternatives to direct subpoena power are "illusory." Doc. 10, Defendant's Response to Plaintiffs' Motion for Preliminary Injunction, at 9. However, the state's burden is not met by these mere assertions, unsupported by facts and evidence. It is on the government "to prove that the proposed

alternatives will not be as effective as the challenged statute." *Yes on Term Limits*, 550 F.3d at 1030 (quoting *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004). The state has clearly not met its burden.

Overall, Virginia has failed to demonstrate that it is necessary to burden plaintiffs' First Amendment rights in order to meet their asserted interests.

CONCLUSION

For the foregoing reasons, summary judgment in favor of plaintiffs should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 21st day of June, 2012, I filed the foregoing document with the Clerk of Court using the CM/ECF system, which will automatically send a copy to the following:

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