No. 12-1996

IN THE UNITED STATED COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LIBERTARIAN PARTY OF VIRGINIA, *et al.*,

Plaintiffs-Appellees,

v.

CHARLES JUDD, *et al.*,

Defendants-Appellants.

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

RESPONSE BRIEF OF APPELLEES

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ISSUES PRESENTED

1. Whether plaintiff Libertarian Party of Virginia (LPVA) has standing to challenge Virginia's requirement that signatures on third-party presidential ballot petitions must be Virginia residents, where the statute prevents the LPVA from associating with out-of-state supporters and reduces the total number of speakers available to propagate the LPVA's views.

2. Whether plaintiff Darryl Bonner has standing to challenge Virginia's requirement that signatures on third-party presidential ballot petitions must be Virginia residents, where the statute prevents Bonner from practicing his profession of collecting petition signatures in Virginia.

3. Whether Virginia's requirement that signatures on third-party presidential ballot petitions must be Virginia residents violates the First and Fourteenth Amendments of the United States Constitution, where the statute severely burdens the rights to free speech and free association and where the Commonwealth has offered only conclusory statements in justification of the statute.

STATEMENT OF THE CASE

Plaintiffs filed this action under 42 U.S.C. § 1983 on May 14, 2012. (J.A. 7.) The complaint challenged the requirement in Va. Code § 24.2-543 that petition circulators for non-party presidential candidates be residents of the Commonwealth

of Virginia, and sought a declaration that the statute is unconstitutional, and an injunction against its enforcement. (J.A. 7, 14.) A motion for preliminary injunction was filed with the complaint. Rather than rule on the preliminary injunction, on May 22, 2012, the district court set an expedited discovery schedule and ordered the parties to file dispositive motions within 30 days. (J.A. 17.) The parties filed cross-motions for summary judgment on June 21, 2012. (J.A. 27, 77.) On July 30, 2012, the district court granted plaintiffs' motion for summary judgment, denied defendants' motion for summary judgment, and enjoined enforcement of the residency requirement of Va. Code § 24.2-543. The defendants sought stays of the injunction from both the district court and this Court. Both were denied. (J.A. 298.)

STATEMENT OF FACTS

Plaintiff-Appellee Libertarian Party of Virginia ("LPVA") is a Virginia political organization dedicated to principles of personal and economic liberty that regularly fields candidates for president, Congress and state office. (J.A. 8.) 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. 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. Under the current version of Va. Code Ann. § 24.2-543, 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. Signatures witnessed by a non-resident are declared invalid. (J.A. 4)

As it has in past presidential campaigns, the LPVA collected signatures for the 2012 Libertarian presidential candidate using volunteer and paid circulators who are members of the LPVA and residents of Virginia. (J.A. 10.) 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. (*Id.*) In past campaigns, these two people have been responsible for collecting a significant number of the required signatures. (*Id.*) 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. (*Id.*) The LPVA intends to field presidential candidates in future races and expects to face similar constraints. (*Id.*) 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. (J.A. 63-64, 151-53.)

The state residency requirement imposed by Va. Code § 24.2-543 reduces the pool of circulators available to support the LPVA's presidential candidates, placing a severe burden on the candidates' and the LPVA's First Amendment rights by making it more difficult for them to disseminate their political views, to choose the most effective means of conveying their message, to associate in a meaningful way with the prospective solicitors for the purpose of eliciting political change, to gain access to the ballot, and to utilize the endorsement of their candidates implicit in the solicitors' efforts to gather signatures on the candidates' behalf. (J.A. 12.)

Plaintiff-Appellee Darryl Bonner circulates petitions for Libertarians and other third-party candidates in elections all over the country. (J.A. 11.) 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. (*Id.*) 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. (*Id.*.) Bonner would like to circulate petitions for the LPVA and its presidential candidates in Virginia, but, due to the residency requirement, is unable to do so without being accompanied by a Virginia resident to witness signatures. (*Id.*) Bonner attempted to collect signatures for the Green Party in Virginia in 2008, but found that being

accompanied by a non-professional Virginia resident significantly slowed the process down and inhibited his ability to communicate effectively with potential signatories. (J.A. 11, 109.)

Bruce Majors is a Libertarian living in Washington, D.C. (J.A. 153.) He has volunteered for and donated money to a number of Libertarian candidates in Virginia, and would have liked to have circulated ballot petitions for them, but was precluded from doing so by Virginia's residency requirement for circulators. (J.A. 154.) But for the residency requirement, he would have circulated petitions on behalf of the Libertarian presidential candidate in Virginia in 2012. (J.A. 155.)

In his deposition, appellant Donald Palmer, the Secretary of the SBE, 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. (J.A. 66-7) 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. (J.A. 31.) 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. (J.A. 69.)

SUMMARY OF ARGUMENT

The district court correctly found that the plaintiffs have standing in this case. The LPVA stated in its verified complaint and maintained on summary judgment that Virginia's state residency requirement for petition circulators injured it by reducing the total pool of circulators available to it, thereby restricting its ability to associate with out-of-state supporters and to disseminate its message in the manner it deems most effective. The SBE's claim to the contrary is based on a willful misreading of the statute.

Plaintiff Darryl Bonner likewise has standing because he would like to circulate petitions in Virginia, but is barred from doing so because he is not a resident. Although a knee injury prevented Bonner from gathering signatures in the 2012 election, he is a professional petition circulator who will be affected by the residency requirement in future elections as well.

On the merits, the district court correctly held that Virginia's residency requirement is unconstitutional. The district court correctly evaluated the statute under strict scrutiny because the residency requirement severely burdens the plaintiffs' First Amendment rights. The SBE failed to meet its burden of proving that the requirement is narrowly tailored to serve a compelling government interest. Although the SBE repeatedly asserted that the requirement was necessary

to protect the integrity of the petition process, it produced no evidence to that effect.

ARGUMENT

I. PLAINTIFF LIBERTARIAN PARTY OF VIRGINIA HAS STANDING

Plaintiffs' verified complaint specifically describes the various injuries to their First Amendment interests caused by the requirement that petition circulators be Virginia residents:

> The state residency requirement imposed by Va. Code Ann. § 24.2-543 reduces the pool of circulators available to support the LPVA's presidential candidate placing a severe burden on the candidate's and the LPVA's First Amendment rights by making it more difficult for them to disseminate their political views, to choose the most effective means of conveying their message, to associate in a meaningful way with the prospective solicitors for the purposes of eliciting political change, to gain access to the ballot, and to utilize the endorsement of their candidate which can be implicit in a solicitor's efforts to gather signatures on the candidates' behalf.

(J.A. 12.) These are precisely the sorts of injuries that courts repeatedly identify in challenges to restrictions on petition circulators. For example, in *Meyer v. Grant*, 486 U.S. 414, 422-23 (1988), the Court held that a ban on paid petition circulators "limits the number of voices who will convey appellees' message and the hours they can speak and, therefore, limits the size of the audience they can reach." Moreover, "[t]he First Amendment protects appellees' 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. *See also Buckley v. American Constitutional Law*

Foundation, Inc., 525 U.S. 182, 193 (1999) ("Beyond question, Colorado's registration requirement [for petition circulators] drastically reduces the number of persons, both volunteer and paid, available to circulate petitions"); *Nader v. Blackwell*, 545 F.3d 459, 472 (6th Cir. 2008) ("[Candidate] was denied the use of the circulators of his choice, and [candidate]'s potential audience and the amount of speech about his views that he could generate was limited" by application of residency requirement); *Nader v. Brewer*, 531 F.3d 1028, 1036 (9th Cir. 2008); *Yes on Term Limits*, *Inc. v. Savage*, 550 F.3d 1023, 1028 (10th Cir. 2008); *Krislov v. Rednour*, 226 F.3d 851, 860-62 (7th Cir. 2000).

The Commonwealth falsely asserts that the sole basis for standing alleged in the complaint is that the LPVA "may be interested in associating with non-resident petition circulators, should their resident circulators prove unavailable." (Appellants' Br. at 22.) The complaint simply does not say this. Rather, the complaint alleges:

> 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. In past campaigns, these two people 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. The LPVA intends to field presidential candidates in future races and expect to face similar constraints.

(J.A. 10.) Nowhere does the complaint state – or even suggest – that the LPVA will make use of out-of-state petitioners *only* if their two Virginia resident

circulators are unavailable. Instead, the complaint states that the residency requirement *presently* "reduces the pool of circulators available to support the LPVA's presidential candidate," thereby imposing *present* burdens on the LPVA's First Amendment rights. (J.A. 12.)

Thus, at the summary judgment stage, the LPVA did not "change its allegations of legal injury," as the Commonwealth claims (Appellants' Br. at 23), but provided additional support for the allegations of present injury made in the verified complaint. The declaration of William Redpath explains the difficulty of finding sufficient volunteers and paid circulators, and how the residency requirement contributes to that difficulty. It notes that "but for the residency requirement for petition circulators, the LPVA would seek additional assistance from out-of-state professional circulators and volunteers. Accordingly, the LPVA would have more control over its messaging and over the logistical details of its ballot access drives if it were able to rely on out-of-state circulators." (J.A. 152.) None of this is in any way inconsistent with the allegations in the complaint. To the contrary, it elaborates on the injuries described in those allegations.[1]

[1] Thus, the Commonwealth's suggestion that the declarations plaintiff submitted in support of summary judgment must be disregarded (Appellants' Br. at 24) is incorrect. *See Spriggs v. Diamond Auto Glass*, 242 F.3d 179, 186 (4th Cir. 2001) ("Of course, for the rule [against admitting an affidavit that contradicts prior deposition testimony] to apply, there must be a bona fide inconsistency."); *Shaw v. Stroud*, 13 F.3d 791, 804 (4th Cir. 1994) (declaration that adds to, but does not contradict, deposition testimony, should not be stricken as inconsistent).

II. PLAINTIFF DARRYL BONNER HAS STANDING

The SBE further claims that Darryl Bonner lacks standing because his leg injury prevented him from circulating petitions in Virginia in 2012. But Bonner has a petition circulating business, which he has operated since 1993, in states all across the country. (J.A. 106, 112-120.) Virginia's residency requirement affects him far beyond the 2012 election. As the district court explained, "Bonner has a well-established history of circulating petitions in Virginia and has indicated his intent to circulate in the future." (Ex. 2, July 30, 2012 Mem. Op. at 6.) Virginia's law prevents him from doing so. He has therefore stated sufficient injury to be entitled to injunctive relief. *See Daien v. Ysursa*, 711 F.Supp.2d 1215, 1224-25 (D. Idaho 2010) (Petition circulator had standing because he supported independent presidential candidates in the past and "demonstrated more than a passing fancy about supporting independent presidential candidates, making his assertion that he intends to circulate petitions all the more plausible."); *Idaho Coalition United for Bears v. Cenarrusa*, 234 F.Supp.2d 1159, 1162 (D. Idaho 2001) (Plaintiff ballot initiative circulators had standing, despite the lack of circulating petitions at the time of suit, because their "past activities in sponsoring initiatives lend credibility to their allegations about their future plans").

III. VIRGINIA'S RESIDENCY REQUIREMENT IS UNCONSTITUITONAL

While the SBE is correct that one Court of Appeals has upheld a state residency requirement for petition circulators, *Initiative and Referendum Institute v. Jaeger*, 241 F.3d 614 (8th Cir. 2001), the great weight of the authority holds that such requirements are unconstitutional. *See Yes on Term Limits v. Savage*, 550 F.3d 1023 (10th Cir. 2008); *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008); *Nader v. Brewer,* 531 F.3d 1028 (9th Cir. 2008); *Citizens in Charge v. Gale*, 810 F. Supp. 2d 916 (D. Neb. 2011); *Daien v. Ysursa*, 711 F.Supp.2d 1215 (D. Idaho 2010).[2] The district court correctly followed the lead of those courts in holding that Virginia's residency requirement is unconstitutional.

A. Strict Scrutiny Applies Because the Residency Requirement Severely Burdens First Amendment Rights.

When evaluating state election laws, the level of scrutiny depends on the degree of burden imposed on First Amendment rights. "Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests' will usually be enough to justify

[2] Although the SBE acknowledges that *Nader v. Brewer* struck down a residency requirement no different from the one at issue here, it simply ignores *Yes on Term Limits* and *Nader v. Blackwell*, both of which also held such provisions unconstitutional.

reasonable, nondiscriminatory restrictions." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (internal quotation marks and citations omitted).

Here, as explained above, the residency restriction severely burdens the LPVA's free speech rights because it reduces the pool of people available to disseminate the LPVA's message in Virginia and restricts its ability to associate with out-of-state supporters. The residency requirement severely burdens Bonners speech by prohibiting him from circulating petitions in Virginia unless accompanied by a witness who is a state resident, which significantly impairs his ability to deliver his message effectively. (J.A. 54, 109.) These are precisely the type of injuries that courts have consistently held to trigger strict scrutiny. *Yes on Term Limits*, 550 F.3d at 1028; *Lerman v. Board of Elections*, 232 F.3d 135, 146 (2nd Cir. 2000); *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 v. City of Arvada, Colo.*, 292 F.3d, 1236, 1241 (10th Cir. 2002); *Frami v. Ponto*, 255 F.Supp.2d 962, 968 (2003) (W.D. Wis. 2003).

The SBE's claim that the residency requirement does not severely burden the plaintiffs' First Amendment rights is simply a reiteration of its claims about standing. As demonstrated in Parts I and II above, these arguments are fallacious.

B. The Residency Requirement Cannot Survive Strict Scrutiny.

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); *Yes On Term Limits,* 550 F.3d at1028; *Nader v. Brewer*, 531 F.3d at 1037. Virginia is unable to overcome this considerable hurdle as to either of its asserted interests.

1. The Residency Requirement is Not Narrowly Tailored to Serve the State's Asserted Interest in Confirming the Identity and Qualifications of Petition Circulators

The SBE claims that it has a compelling interest in confirming the identity and qualifications of petition circulators. But less restrictive means are available to achieve this purpose. For example, the State could require petition circulators to provide a photo identification stating the circulator's name, age and address. Circulators could also be required to attest under penalty of perjury that they are who they say they are, that they are over eighteen years of age, and that they have not been convicted of a felony.

The SBE's ability to check a circulator's felony status is identical for residents and nonresidents: In either case, the SBE can easily determine whether

the person has been convicted of a felony in Virginia, and (they claim), cannot as easily determine whether the person has been convicted of a felony outside of Virginia. The SBE is apparently willing to take the word of resident petition circulators that they have not been convicted of a felony out of state. There is no evidence to suggest that non-residents are more likely than residents to lie about whether they have committed a felony in another state.

2. *The Residency Requirement is Not Narrowly Tailored to Serve the State's Asserted Interest in Policing Petition Fraud.*

The Commonwealth claims it has a strong state interest in policing lawbreakers and preserving the integrity of the electoral process. (Appellants' Br. at 26-28.) 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.

In any case, 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). The SBE simply has not offered any evidence that allowing non-resident petition circulators would disrupt their ability to protect the integrity of the petitioning process. The SBE relies entirely on the declaration of its secretary, defendant Don Palmer, to demonstrate the necessity for

the residency requirement. But the declaration does not contain any concrete facts to support that proposition. Palmer repeatedly states that he is "aware" of certain "instances" of problems involving non-resident circulators, without providing the specifics of any of these instances. (J.A. 178-79.) Such conclusory statements do not create a dispute of material fact. *See Brinkley v. Harbour Recreation Club*, 180 F.3d 598, 609 (4th Cir. 1999); *Evans v. Technologies Applications & Service Co*., 80 F.3d 954, 962 (4th Cir. 1996); *Guinness PLC v. Ward*, 955 F.2d 875, 901 (4th Cir. 1992).[3]

Further, Paragraph 5 of Palmer's declaration flatly contradicts his deposition testimony. The declaration states: "I am aware of instances in which non-resident persons suspected of being responsible for discovered circulator fraud have fled the State in which the suspected fraud was committed, leaving the case unresolved." (J.A. 179.) But in his deposition, Palmer stated that he has heard of "anecdotal" stories of circulators fleeing the state, but was unsure whether these anecdotes pertained to in-state or out-of-state circulators. (J.A. 196.) Declarations that contradict prior deposition testimony do not create a genuine issue of material fact. *Barwick v. Celotex Corp.*, 736 F.2d 946, 960 (4th Cir. 1984).

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[3] Additionally, Palmer asserts no personal knowledge as to paragraphs 4 through 6 of his declaration. To the extent that Palmer is "aware" of particular "instances" because he has been informed by election officials of other states, the statements are inadmissible hearsay. *Evans*, 80 F.3d at 692, citing *United States v. Hassan El,* 5 F.3d 726, 731 (4th Cir.1993), *cert. denied,* 511 U.S. 1006 (1994).

Courts have not credited the mere assertion that non-residents pose a threat to ballot integrity in the absence of concrete evidence. 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* 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*, 225 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"). As in those cases, 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)).

Moreover, courts have held that a residency requirement is not narrowly tailored to serve the government's compelling interest in controlling petition fraud, because alternative, less restrictive means were available. "Federal courts have generally looked with favor on requiring petition circulators to agree to submit to

jurisdiction for purposes of subpoena enforcement, and the courts have viewed such a system to be a more narrowly tailored means than a residency requirement to achieve the same result." *Nader v. Brewer*, 531 F.3d at 1037. *See also Yes on Term Limits*, 550 F.3d at 1030; *Daien*, 711 F.Supp.2d at 1235. [4] "In addition, [the state] could provide criminal penalties for circulators who fail to return when a protest occurs."[5] *Yes on Term Limits*, 550 F.3d at 1030.

Here, the SBE simply has provided no evidence that such alternatives proposed by other courts would be insufficient. Importantly, "[t]he burden 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. As noted earlier, the SBE's evidence consists of no more than a few conclusory statements by appellant Palmer to the effect that he is "aware" of petition fraud cases involving non-resident petition circulators in other states, and he is "aware" of cases in which a non-resident petitioner suspected of fraud had fled the state, making it difficult to resolve the case. No specifics were given as to any of these alleged instances. It is impossible to tell from these vague statements whether non-residents are more likely to commit fraud than residents, whether the states have been unable to bring wrongdoers to justice, or whether alternatives such as requiring submission to

[4] In *Jaeger*, the one circuit-level case upholding residency requirements, such an alternative was neither presented nor considered.

[5] Such a solution would overcome the SBE's objection that a criminal charge is needed in order to request extradition from another state. (Appellant's Br. 36-37.)

jurisdiction or imposing criminal penalties on circulators who fail to return to the state where these incidents occurred had a procedure to require circulators to submit to the state's subpoena power or criminal sanctions for circulators who failed to return to the state would be effective. As the district court explained, "[b]eyond bald assertion that such submission is ineffective and that the Board is unaware of any instance wherein an individual was extradited from one state to another to face prosecution, the Board has failed to demonstrate how such a requirement would be insufficient." (J.A. 284.)

If allowing nonresidents to circulate petitions were actually as problematic as SBE claims, they should have been able to file at least one declaration from an official in *one* of the approximately twenty-one states[6] that allow nonresidents to circulate petitions about at least *one* incident in which the state was unable to investigate or prosecute suspected petition fraud because of the involvement of nonresident petitioners. Instead, they submitted only defendant Palmer's bare assertion that he was "aware" of such instances.

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[6] Ala. Code §17-9-3(a)(3); Del. Code Ann. tit. 15, §3002; Fla. Srat. § 99.095; Ga. Code Ann. § 21-2-170; Haw. Rev. Stat. § 12.3-6; 10 ILCS 5/28-3; Ind. Code. § 3-8-6-2 *et seq*.; Kan. Stat. Ann. § 118.315; La. Rev. Stat. § 18:465; Mass. Gen. Laws Ch. 53 § 7; Mo. Rev. Stat. §116.080; N.J. Stat. Ann. 19:13-3-7; N.M. Stat. § 1-8-(48-52); Or. Rev. Stat. §§ 249.740, 249.072; R.I. Gen. Laws § 17-14-10; S.C. Code Ann. § 7-11-70; Tenn. Code Ann. §§ 2-5-101; Tex. Elec. Code Ann. § 141.065; Vt. Code Ann. Tit. 17, § 2402(b); Wash. Rev. Code § 29A.20.151; W. Va. Code § 3-5-23.

In the absence of actual evidence that the residency requirement is narrowly tailored to the SBE's interest in protecting the integrity of the petition process, the SBE turns to three reported cases that it claims demonstrates the need for such a requirement. (Appellants' Br. at 35-36.) These cases, however, are inapposite. In *Jaeger*, the alleged fraud was committed by state *residents* who fled the state. 241 F.3d at 616. If anything, this demonstrates that any difficulty the state may have prosecuting nonresident circulators applies equally to resident circulators who leave the state. *In re Initiative Petition No. 379* involved nonresident circulators, but the only fraud they committed was violating the residency requirement itself. 155 P.3d 32 (Okla. 2006.) There was no indication that the circulators forged signatures or otherwise acted improperly with respect to the petitions themselves. In other words, but for the residency requirement, the circulators' actions were completely lawful.[7] The third case, *Montanans for Justice v. State*, 146 P.3d 759 (Mont. 2006) does contain disturbing instances of fraud committed by nonresidents. But it does not suggest that there were any problems with investigating the fraud or prosecuting wrongdoers. Nor does it indicate whether any such problems would have been ameliorated by measures such as requiring circulators to submit to state court jurisdiction or criminalizing the failure to appear when there is a protest.

[7] Oklahoma's residency requirement was later invalidated by the Tenth Circuit. *Yes on Term Limits, supra.*

In sum, although SBE repeatedly asserts that the residency requirement is needed in order to maintain the integrity of the petition process, it has not submitted any evidence to *prove* this. Without such evidence, the requirement cannot survive strict scrutiny.

CONCLUSION

For the foregoing reasons, the appellees respectfully request that the judgment of the district court be affirmed.

Respectfully submitted,

LIBERTARIAN PARTY OF VIRGINIA
DARRYL BONNER

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/s/

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CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

Pursuant to Rule 32(a)(7) of the F.R.A.P.

1. This brief has been prepared using fourteen-point, proportionally spaced, serif typeface: Microsoft Word, Times New Roman, 14 point.

2. Exclusive of the table of contents, table of authorities and the certificate of service, this brief contains 4671 words.

/s/
Rebecca K. Glenberg

CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of November, 2012, I electronically, filed a true and correct copy of the foregoing with the Clerk's CM/ECF system, which will serve a copy upon all counsel of record.

/s/
Rebecca K. Glenberg