**Record Nos. 12-1042 and 12-1047**

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**United States Court of Appeals**
**For the Fourth Circuit**

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**THE HONORABLE RICK PERRY,**
*Plaintiff – Appellee-Respondent*

**THE HONORABLE NEWT GINGRICH, THE HONORABLE JON HUNTSMAN, JR., AND THE HONORABLE RICK SANTORUM,**
*Intervenor-Plaintiffs,*

**v.**

**CHARLES JUDD, KIMBERLY BOWERS, AND DON PALMER,**
members of the Virginia Board of Elections, in their official capacities,
*Defendants – Appellants-Movants*

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

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# DEFENDANT-APPELLANTS' SUPPLEMENTAL EMERGENCY MOTION TO SUSPEND AMENDED PRELIMINARY INJUNCTION WHILE AN APPEAL IS PENDING

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**Rules**

Come now the defendant members of the State Board of Elections Charles Judd, Kimberly Bowers and Don Palmer, in their official capacities, pursuant to Rule 8(a)(2), and move the United States Court of Appeals for the Fourth Circuit or a single judge thereof to suspend the amended injunction entered against them on January 10, 2012 in the United States District Court for the Eastern District of Virginia.

## FACTS AND NATURE OF THE CASE

After defendants filed their Emergency Motion in No. 12-1042 on January 10, 2012, the district court issued an amended or supplemental order reaffirming its January 9 preliminary injunction. The substantive additions are these: (1) even though plaintiff and intervenors are seeking a mandatory preliminary injunction that would grant them on a preliminary basis all of the relief they could obtain after full trial on the merits, the district court found a substantial likelihood of success on the merits, and (2) without taking evidence by affidavit or live witness, the district court — contrary to the facts set forth in the Declaration filed in No. 12-1042 — found that "[t]he public interest . . . weighs heavily in favor of plaintiffs." Finally, the district

court declined "at this time, [to] make a preliminary judgment about the balance of the equities."

## REASONS FOR GRANTING RELIEF

### A. Likelihood of Success

First, the district court employed an incorrect legal standard in finding a substantial likelihood of success on the merits. Although cast as a temporary, prohibitory injunction, plaintiff's and intervenors' motions are, in substance, attempts to resolve the merits of the underlying suits and achieve preliminarily all of the relief they would be entitled to if they were to prevail at trial, i.e., be placed on the ballot. Within the realm of temporary injunctions, such motions are particularly disfavored and require a heightened showing of likelihood of success on the merits. *See, e.g.*, *Calvary Christian Ctr. v. City of Fredericksburg*, No. 3:11-cv-342, 2011 U.S. Dist. LEXIS 77489, at *3-4 (E.D. Va. July 18, 2011) ("The Fourth Circuit has viewed mandatory relief with caution, explaining that it 'should be granted only in those circumstances when the exigencies of the situation demand such relief.'") (quoting *In re Microsoft Corp. Antitrust Litig.*, 333 F.3d 517, 526 (4th Cir. 2003) (citing *Wetzel v. Edwards*, 635 F.2d 283, 286 (4th

Cir. 1980))))); *Cornwell v. Sachs*, 99 F. Supp. 2d 695, 704 (E.D. Va. 2000) ("a preliminary injunction that affords the movant substantially all the relief he may recover at the conclusion of a full trial on the merits" is "disfavored." (quoting *Tiffany v. Forbes Custom Boats, Inc.*, No. 91-3001, 1992 U.S. App. LEXIS 6268, at *21 (4th Cir. Apr. 6, 1992) (per curiam))). *See also*, *Lux v. Rodrigues*, 131 S. Ct. 5, 6 (2010) (Roberts, C.J., Circuit Justice) (applying an "indisputably clear" standard to an emergency motion for injunction intended to place plaintiff on ballot); *GTE Corp. v. Williams*, 731 F.2d 676, 678-79 (10th Cir. 1984) ("The burden on the party seeking a preliminary injunction is especially heavy when the relief sought would in effect grant plaintiff a substantial part of the relief it would obtain after a trial on the merits."). Because they seek what amounts to a preliminary, mandatory injunction that seeks to alter rather than maintain the status quo, it is insufficient for plaintiff and intervenors to merely demonstrate a likelihood of success on the merits. To satisfy the heightened standard, they must demonstrate that they are virtually certain to prevail. This they simply cannot do.

There is clear and recent authority from the Fourth Circuit and the Chief Justice sitting as Circuit Justice that plaintiff and intervenors cannot satisfy the elevated standard of demonstrating likelihood of success on the merits applicable to a preliminary, mandatory injunction. Here, plaintiff and intervenors claim that the Virginia voter eligibility requirement placed by Va. Code Ann. § 24.2-545B on petition circulators is an unconstitutional burden on political speech, citing *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182 (1999); *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023 (10th Cir. 2008); *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008); *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008); *Chandler v. City of Arvada*, 292 F.3d 1236 (10th Cir. 2002); *Lerman v. Bd. of Elections in the City of New York*, 232 F.3d 135 (2d Cir. 2000); *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000); *Bogaert v. Land*, 572 F. Supp. 2d 883 (W.D. Mich. 2008); *Frami v. Ponto*, 255 F. Supp. 2d 962 (W.D. Wis. 2003); *Morrill v. Weaver*, 224 F. Supp. 2d 882 (E.D. Penn. 2002). (Case 3:11-cv-00856 Doc. 1 at 5-6, ¶¶ 25-28; Doc. 28 at 7-8, ¶¶ 37-38). The plaintiff in *Lux v. Rodrigues*, 736 F. Supp. 2d 1042 (E.D. Va. 2010), made substantially the same argument based upon substantially the same case authority in challenging the

requirement of Va. Code Ann. § 24.2-506 that congressional petition circulator/witnesses be voter eligible min the congressional district at issue. Lux lost in the district court because the Fourth Circuit had upheld similar requirements in *Libertarian Party of Va. v. Davis*, 766 F.2d 865 (4th Cir. 1985), on the ground that the requirement ensures a modicum of activist support in the relevant jurisdiction. *Lux*, 736 F. Supp. 2d at 1049-50. Lux then filed an Emergency Motion for Preliminary Injunction in the Fourth Circuit. (Case: 10-1997, Doc. 8). When that motion was denied (Case: 10-1997, Doc. 22), Lux sought relief from Chief Justice Roberts acting as Circuit Justice for the Fourth Circuit.

Chief Justice Roberts denied the motion making three points of significance for the present case. First, he found that an elevated "indisputably clear" legal standard applied to injunctions from a circuit justice. *Lux*, 131 S. Ct. at 6. This is not unlike the elevated standard for preliminary, mandatory injunctions which seek to obtain all the relief preliminarily which could be had after trial. Then, he noted that "we were careful in *American Constitutional Law Foundation* to differentiate between registration requirements, which were before the

Court, and residency requirements, which were not." *Id.* at 7. In fact, the Supreme Court has never ruled on residency requirements. Finally, the Chief Justice recognized that the lower court cases upon which both Lux and plaintiff here have relied are part of a circuit split. *Id.* That circuit split persists. *See Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 615-17 (8th Cir. 2001) (upholding state residency requirement) (citing *Kean v. Clark*, 56 F. Supp. 2d 719, 728-29, 732-34 (S.D. Miss. 1999) and *Initiative & Referendum Inst. v. Secretary of State*, No. Civ. 98-104-B-C, 1999 U.S. Dist. LEXIS 22071 (D. Me. Apr. 23, 1999)); *see also Hart v. Secretary of State*, 715 A.2d 165, 168 (Me. 1998) (upholding state residency requirements). When the Fourth Circuit decided *Lux* on the merits, it held that *Davis* had been sufficiently undercut that its rationale of guaranteeing a modicum of activist support was no longer controlling. *Lux v. Judd*, 651 F.3d 396, 398, 402, 404 (4th Cir. 2011). Even so, the Fourth Circuit did not find that Lux's challenge was so clear as to entitle him to relief against the in-district witness requirement on appeal. Indeed, it said the opposite:

> Our recognition that *Davis'*s abbreviated residency-requirement analysis has been superseded should not be confused for a determination that the provision challenged here offends Lux's constitutional rights. Neither *Meyer* nor

> *Buckley* addressed the particular witness residency requirement at issue in this case. Moreover, we do not read either decision as foreclosing the possibility that something more than a threshold signature requirement may, in some circumstances, be constitutionally permissible as a means of ensuring popular support or achieving another state interest.

*Id.* at 404. The Fourth Circuit further noted that on remand "[b]oth parties are free to advance additional arguments in light of our holding." *Id.*

Sufficient reasons for the state residency/voter eligibility requirement at issue here are not hard to find because they have been posited by the Supreme Court itself. In *American Constitutional Law Foundation*, the Supreme Court struck down a voter registration requirement because an unchallenged state residency requirement more narrowly served the same putative state interest, saying "[i]n sum, assuming that a residence requirement would be upheld as a needful integrity policing measure -- a question we, like the Tenth Circuit, have no occasion to decide because the parties have not placed the matter of residence at issue -- the added registration requirement is not warranted." 525 U.S. at 197 (internal citation omitted). The Supreme Court also approved of a voter eligibility requirement as a

more narrow substitute for a voter registration requirement, specifically noting that a voter eligibility requirement could be used as a proxy to weed out felons, minors and illegal aliens. *Id.* at 195 n.16 ("Persons eligible to vote, we note, would not include 'convicted drug felons who have been denied the franchise as part of their punishment, . . . . Even more imaginary is the dissent's suggestion that if the merely voter eligible are included among petition circulators, children and citizens of foreign lands will not be far behind.").

In light of *American Constitutional Law Foundation*, and the treatment of the *Lux* case in the Fourth Circuit and by the Chief Justice, it is simply not possible for plaintiff or the intervenors to demonstrate the near certainty of success required of them. Indeed, they cannot even satisfy the ordinary *Winter* standard. Not only has the Supreme Court intimated that residency/voter eligibility requirements are valid, but *American Constitutional Law Foundation* and its predecessor, *Meyer v. Grant*, 486 U.S. 414 (1988), are ballot initiative cases. And in such cases "[t]he circulation of an initiative petition of necessity involves both the expression of a desire for political

change and a discussion of the merits of the proposed change." *Meyer*, 486 U.S. at 421. This distinction matters.

> Initiative-petition circulators, the Tenth Circuit recognized, resemble handbill distributors, in that both seek to promote public support for a particular issue or position. Initiative-petition circulators also resemble candidate-petition signature gatherers, however, for both seek ballot access.

*American Constitutional Law Foundation,* 525 U.S. at 190-91 (internal citation omitted). With respect to the latter aspects, "States allowing ballot initiatives have considerable leeway to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally." *Id.* at 191. And the Court assumed, without deciding, that the need to have circulators within the state subpoena power falls within that broad leeway. *Id.* at 196-97. Even with respect to the handbill-type aspects of ballot initiative petitioning, the Supreme Court has said that "'no litmus-paper test' will separate valid ballot-access provisions from invalid interactive speech restrictions; we have come upon 'no substitute for the hard judgments that must be made.'" *Id.* at 192 (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

Because the Supreme Court has never invalidated a statewide residency/voter eligibility requirement and has never invalidated a

circulator requirement outside of initiative cases, the lower court cases upon which plaintiff and intervenors rely which relate to initiative or less than state-wide residency/voter eligibility requirements are readily distinguishable. *See Yes on Term Limits, Inc.*, 550 F.3d 1023 (ballot initiative); *Chandler*, 292 F.3d 1236 (city-residency requirement); *Lerman*, 232 F.3d 135 (district-residency requirement); *Bogaert*, 572 F. Supp. 2d 883 (district-residency requirement); *Frami v. Ponto*, 255 F. Supp. 2d 962 (district-residency requirement); *Morrill*, 224 F. Supp. 2d 882 (district-residency requirement). Of the cases cited by plaintiff and intervenors in the district court, three remain to be considered.

*Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008), is procedurally complex in two separate ways. First, prior to the 2004 election, Ralph Nader was removed from the Ohio ballot after 2,700 signatures were invalidated.

> In October 2004, a federal district court denied Nader's request for injunctive relief, the state courts denied his request for mandamus relief, and [the Sixth Circuit] denied his emergency appeal. In November 2005, [the Sixth Circuit] dismissed his regular appeal as moot.

*Blackwell*, 545 F.3d at 462. Then, in 2006, Nader sued Blackwell, Ohio's Secretary of State during the 2004 election, under § 1983 for nominal damages. *Id.* at 462, 469.

The district court never reached the constitutional merits but dismissed on standing, qualified immunity and absolute immunity. *Id.* at 462. Despite affirming the district court on qualified immunity, the Sixth Circuit purported to reach the constitutional merits *vel non* and to declare the candidate ballot access voter registration and residency requirements unconstitutional. *Id.* at 462, 474, 477-78.

Locating the opinion of the Court is also complex. Judge Moore wrote a one-paragraph opinion in which she said: "I also concur in Judge Clay's opinion, making his opinion the opinion of the court. Judge Clay joins my opinion, making this the opinion of the court." *Id.* at 478. Judge Clay wrote a four-paragraph opinion in which he disagreed with Chief Judge Bogg's statement "that [t]his suit is a civil action for money damages against Blackwell in his personal capacity. It is not another chance for Nader to litigate the constitutionality of § 3503.6, the constitutionality of which is being challenged directly in other cases." *Id.* Judge Clay also limited his adoption of Judge Moore's

opinion: "I join Chief Judge Bogg's opinion only insofar as it does not conflict with the views expressed in this concurring opinion and Judge Moore's concurring opinion." *Id.* at 479. From Chief Judge Bogg's opinion - which, in this respect, does not contradict the concurring opinions and is the opinion of the Court - we learn that the registration/residency requirement was at the county and precinct level. *Id.* at 467 n.2. Thus, *Blackwell* turns out to be another distinguishable district residency case, in which there was no occasion for the court to consider the justifications for statewide residency and voter eligibility discussed in *American Constitutional Law Foundation*.

*Krislov v. Rednour*, 226 F.3d 851, 855 (7th Cir. 2000), involves both district and statewide registration requirements. Because it is a registration case there was no occasion to consider the justifications for statewide residency and voter eligibility requirements discussed by the Supreme Court and they were not raised by defendants. *Id.* at 863-66.

Plaintiff and intervenors have exactly one case from the Ninth Circuit on point and in their favor. In *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008), a statewide residency/voter eligibility requirement was found unconstitutional because the state interest in having circulators

subject to subpoena could have been accomplished through the more narrow means of requiring out-of-state circulators to consent to state jurisdiction. *Id.* at 1037-38. This illustrates why the Supreme Court distinguished between initiatives and ordinary ballot access in *American Constitutional Law Foundation*: if every ballot integrity provision is subject to strict scrutiny it will always be possible to think of some alternative requirement that is arguably more narrow. This is not what the Supreme Court intends.

> It has never been suggested that the [Supreme Court's case law] automatically invalidates every substantial restriction on the right to vote or to associate. Nor could this be the case under our Constitution where the States are given the initial task of determining the qualifications of voters who will elect members of Congress. Art. I, § 2, cl. 1. Also Art. I, § 4, cl. 1, authorizes the States to prescribe "the Times, Places and Manner of holding Elections for Senators and Representatives." Moreover, as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. In any event, the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates. It is very unlikely that all or even a large portion of the state election laws would fail to pass muster . . . .

*Storer*, 415 U.S. at 729-30. "[T]he State's important regulatory interests are generally sufficient to justify reasonable, nondiscriminatory restrictions," *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983), including on the process by which candidates are placed on the ballot. *See Am. Party of Tex.*, 415 U.S. at 783-84.

A State is not required to use the least restrictive means "'so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation.'" *Ward v. Rock Against Racism*, 491 U.S. 781, 799 (1989) (quoting *United States v. Albertini*, 472 U.S. 675, 689 (1985)). *Brewer* thus is seen to stand on a doubtful foundation inasmuch as direct subpoena authority is more effective than an undertaking to be subject to out-of-state jurisdiction. And, of course, *Brewer* does not even discuss the important interests that a voter eligibility requirement advances in avoiding the use of felons, children and illegal aliens as petition circulators. *American Constitutional Law Foundation*, 525 U.S. at 195 n.16.

*Brewer* cannot satisfy plaintiff's burden of demonstrating the requisite likelihood of success on the merits. In the first place, it is directly contradicted by a decision from the Eighth Circuit as *Brewer*

itself recognizes. *Brewer*, 531 F.3d at 1036-37 (citing *Jaeger*, 241 F.3d at 617). Even more decisively, when *Brewer* was presented to the Fourth Circuit and to the Chief Justice in *Lux,* it was found to be insufficient to entitle *Lux* to relief. The constitutionality of statewide residency/voter eligibility requirements has been assumed by the Supreme Court, and neither plaintiff nor intervenors can demonstrate a near certainty of success on the merits because the question, from their point of view, is at best unsettled.

### B. Finding That The Public Interest Would be Served By A Preliminary Injunction Without Having Sufficient Evidence On The Issue Before It Either By Affidavit Or Through Testimony Was Error.

The district court found that the public interest was served by preserving the ability of citizens to possibly vote for plaintiff or intervenors. The district court also found that it was mathematically possible to enter an injunction without violating state or federal law or the consent decree. But defendants had filed a witness disclosure indicating an intent to prove that violations of law and election disruption would be the likely result of a preliminary injunction. (Case 3:11-cv-00856 Doc. 22). In granting a preliminary injunction a court may not assume facts. Instead there must be "substantial proof" of

record. *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). Here, there is none to support the finding of the district court, which took no evidence.

### C. The Failure Of The District Court To Weigh The Equities Was Error.

A preliminary injunction must be supported by all four *Winter* factors. *Real Truth About Obama, Inc. v.* FEC, 575 F.3d 342, 346 (4th Cir. 2009). Standing alone, the fact that the district court declined to weigh the equities "at this time" is sufficient to render the injunction improper.

## CONCLUSION

Wherefore, this Court should suspend the amended judgment enacted by the district court.

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I hereby certify that on this 10th day of January, 2012, I electronically filed the foregoing upon the United States Court of Appeals for the Fourth Circuit via the Court's CM/ECF system, which will send notice of such filing to the following, who are registered CM/ECF users:

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