

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION**

THE HONORABLE RICK PERRY,

Plaintiff,

**THE HONORABLE NEWT GINGRICH, THE
HONORABLE JON HUNTSMAN, JR.,
and THE HONORABLE RICK SANTORUM,**

Intervenor-Plaintiffs,

Civil No. 3:11-CV-856

vs.

**CHARLES JUDD, KIMBERLY
BOWERS, and DON PALMER, members
of the Virginia State Board of Elections, in
their official capacities, and PAT MULLINS,
in his official capacity as Chairman of the
Republican Party of Virginia,**

Defendants.

FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

Pursuant to Federal Rule of Civil Procedure 15(a)(1)(A), The Honorable Newt Gingrich, the Honorable Jon Huntsman, Jr., and the Honorable Rick Santorum (collectively, “Intervening Plaintiffs”) complain against Defendants as follows:

Introduction

1. Intervening Plaintiffs are candidates for office of President of the United States. The dispute between Intervening Plaintiffs and Defendant members of the Virginia State Board of Elections (the “Board”) arises from Intervening Plaintiffs’ efforts to qualify for the March 6, 2012 Republican Primary election ballot.

2. The Board made a preliminary determination and failed to certify Intervening Plaintiffs Huntsman and Santorum for the March 6, 2012 Republican ballot because Intervening Plaintiffs Huntsman and Santorum did not submit a requisite number of signatures, as required by the Board, even though VA. CODE ANN. § 24.2-545 B makes the submission of signatures discretionary, rather than a mandatory requirement for ballot access in the presidential primary.

3. Defendant Mullins failed to certify Intervening Plaintiff Gingrich for the March 6, 2012 Republican ballot because Intervening Plaintiff Gingrich did not submit a requisite number of signatures, as required by Defendant Mullins, even though VA. CODE ANN. § 24.2-545 B makes the submission of signatures discretionary, rather than a mandatory requirement for ballot access in the presidential primary.

4. Additionally, Intervening Plaintiffs were unable to obtain a sufficient number of signatures from qualified voters to qualify for the Virginia Republican Party presidential primary ballot due to the Board's requirement that all petition circulators be eligible or registered qualified voters in Virginia.

5. Virginia's requirement for petition circulators to be either eligible or registered qualified voters in the state violates Intervening Plaintiffs' freedoms of speech and association protected by the First and Fourteenth Amendments to the United States Constitution. By enforcing the petition signature collection requirements in connection with Intervening Plaintiffs' candidacies, Defendants have violated the rights of Intervening Plaintiffs to engage in protected speech and association activities under the United States Constitution.

6. Because Intervening Plaintiffs seek access to the March 6, 2012 Republican Party primary ballot in Virginia, the deadline for printing those ballots is quickly approaching, and

because Intervening Plaintiffs have no adequate remedy at law, this Complaint seeks declaratory and injunctive relief in the form of preliminary and permanent injunctions.

Jurisdiction and Venue

7. This Court has jurisdiction pursuant to 28 U.S.C. §§ 1331, 1343, 1357, and 2284. Intervening Plaintiffs' action for declaratory and injunctive relief is authorized by 28 U.S.C. §§ 2201, 2202, and 2284, as well as by Federal Rules of Civil Procedure 57 and 65.

8. Venue is proper in this district, and in the Richmond Division, because Defendants are residents of or have their official offices in the Eastern District of Virginia, in the City of Richmond. 28 U.S.C. § 1391(b)(1); E.D. Va. R. 3(C).

9. Intervening Plaintiffs request that a three-judge court be convened to hear this cause pursuant to 28 U.S.C. § 2284.

Parties

10. Plaintiff Rick Perry is a resident and Governor of the State of Texas. Governor Perry satisfies all the requirements of Article II, Section 1, clause 5 of the United States Constitution and is otherwise eligible and qualified to serve as President of the United States.

11. Intervening Plaintiff Newt Gingrich is a resident of the Commonwealth of Virginia and former Speaker of the United States House of Representatives from the State of Georgia. Speaker Gingrich satisfies all the requirements of Article II, Section 1, clause 5 of the United States Constitution and is otherwise eligible and qualified to serve as President of the United States.

12. Intervening Plaintiff Jon Huntsman, Jr. is a resident and former Governor of the State of Utah. Governor Huntsman satisfies all the requirements of Article II, Section 1, clause 5

of the United States Constitution and is otherwise eligible and qualified to serve as President of the United States.

13. Intervening Plaintiff Rick Santorum is a resident of the Commonwealth of Virginia and former U.S. Senator for the Commonwealth of Pennsylvania. Senator Santorum satisfies all the requirements of Article II, Section 1, clause 5 of the United States Constitution and is otherwise eligible and qualified to serve as President of the United States.

14. As officers and members of the Virginia State Board of Elections (the “Board”), Defendants Charles Judd (Chairman), Kimberly Bowers (Vice-Chair), and Don Palmer (Secretary) have authority to make rules and regulations, issue instructions, and provide information consistent with the election laws, including VA. CODE ANN. § 24.2-545 B, to the county and city electoral boards and registrars to promote the proper administration of election laws. VA. CODE ANN. § 24.2-103.

15. As Chairman of the Republican Party of Virginia (the “Party”), Defendant Pat Mullins, in his official capacity Chairman of the Party, is responsible for certifying to the Board all candidates who meet the statutory requirements for placement on the ballot. VA. CODE ANN. § 24.2-545 B. The Party is one of only two entities recognized in Virginia as a political party. VA. CODE ANN. § 24.2-101.

Statutory Scheme

16. In Virginia, a candidate seeking the nomination of a national political party for the Office of President of the United States must complete a Consent/Declaration Form. VA. CODE ANN. § 24.2-545 B. *See* Plaintiff’s First Amended Complaint for Declaratory Judgment and Injunctive Relief (“Plaintiff’s First Amended Complaint”), Exhibit A.

17. The candidate “*may*” then file petitions with the Board signed by at least 10,000 qualified voters, including at least 400 qualified voters from each congressional district in the Commonwealth of Virginia, who attest that they intend to participate in the primary of the same political party as the candidate for whom the petitions are filed. VA. CODE ANN. § 24.2-545 B.

18. If a candidate files signature petitions from at least 10,000 qualified voters, then based upon the official form prescribed by the Board, such petition signatures must be collected after July 1, 2011 by a registered voter or someone eligible to vote in Virginia who signs the petition in the presence of a notary. *See* Plaintiff’s First Amended Complaint, Exhibit B.

19. In that event, the petitions must be filed by the primary filing deadline. VA. CODE ANN. § 24.2-545 B. In this instance, the Board’s filing deadline was Thursday, December 22, 2011. VA. CODE ANN. § 24.2-544 B.

20. The State Board then turns the petitions over to the Party. VA. CODE ANN. § 24.2-544 B.

21. By the statutory deadline, the Party then certifies to the Board the candidates who are qualified to appear on the presidential primary ballot. VA. CODE ANN. §§ 24.2-527 and 24.2-544 B. The deadline for the Republican presidential primary was Tuesday, December 27, 2011 by 5:00 PM.

22. Finally, the Board conducts a drawing of candidate names for placement on the presidential primary ballot. VA. CODE ANN. § 24.2-545 C.

Facts

23. Intervening Plaintiff Gingrich declared himself a candidate for the Office of President of the United States on May 11, 2011.

24. Intervening Plaintiff Huntsman declared himself a candidate for the Office of President of the United States on June 21, 2011.

25. Intervening Plaintiff Santorum declared himself a candidate for the Office of President of the United States on June 6, 2011.

26. On May 16, 2011, Intervening Plaintiff Gingrich filed his Statement of Candidacy with the Federal Election Commission.

27. On June 28, 2011, Intervening Plaintiff Huntsman filed his Statement of Candidacy with the Federal Election Commission.

28. On June 6, 2011, Intervening Plaintiff Santorum filed his Statement of Candidacy with the Federal Election Commission.

29. On December 22, 2011, Intervening Plaintiffs Gingrich and Santorum signed and affirmed, in the presence of a notary, their Declarations of Candidacy for the Commonwealth of Virginia.

30. Intervening Plaintiff Huntsman could not or did not sign or affirm, in the presence of a notary, a Declaration of Candidacy for the Commonwealth of Virginia because he could not or did not meet the petition signature requirements of VA. CODE ANN. § 24.2-545 B due to the Board's condition that all petition circulators be eligible or registered qualified voters in Virginia.

31. On December 22, 2011, Intervening Plaintiff Gingrich submitted to the Board 11,050 petition signatures of purportedly eligible Virginia voters, of which less than 10,000 were ultimately verified as registered voters on the Board's registration rolls. Intervening Plaintiff Huntsman, due to the burden imposed by VA. CODE ANN. § 24.2-545 B and associated Board policies, was unable to submit petitions containing the signatures of qualified Virginia voters.

32. Intervening Plaintiff Santorum collected in excess of 8,000 petition signatures of purportedly eligible Virginia voters and on December 22, 2011 attempted to submit the petitions to the Board. The Board refused to accept these signatures because the number submitted did not exceed the discretionary statutory requirement that candidates submit 10,000 petitions signed by registered voters on the Board's registration rolls.

33. On December 22, 2011, the Virginia State Board of Elections made a preliminary determination and publically announced that Intervening Plaintiffs Huntsman and Santorum had not submitted enough petition signatures, as required by the Board, and would not be certified for the placement of their names on the presidential primary ballot, even though the signature petition component of VA. CODE ANN. § 24.2-545 B is permissive and not mandatory. Defendants have thus misapplied VA. CODE ANN. § 24.2-545 B.

34. On December 23, 2011, Defendant Mullins made a preliminary determination and publically announced that Intervening Plaintiff Gingrich had not submitted enough petition signatures, as required by Defendant Mullins, and would not be certified for the placement of his name on the presidential primary ballot, even though the signature petition component of VA. CODE ANN. § 24.2-545 B is permissive and not mandatory. Defendants have thus misapplied VA. CODE ANN. § 24.2-545 B.

35. Additionally, Virginia's requirement for petition circulators to be either eligible or registered qualified voters in the state imposes a severe burden on Intervening Plaintiffs' freedoms of speech and association because it substantially limits the number of eligible petition circulators.

36. Virginia's requirement for petition circulators to be either eligible or registered qualified voters in the state imposes a severe burden on Intervening Plaintiffs' freedoms of

speech and association because it prohibits otherwise qualified candidates for the Office of President of the United States from circulating their own candidate petitions.

37. Virginia's requirement for petition circulators to be either eligible or registered qualified voters in the state prohibited Intervening Plaintiffs from recruiting petition circulators who live outside the Commonwealth of Virginia to circulate petitions on their behalf.

38. Intervening Plaintiffs have no adequate remedy at law.

Count 1 – Submission of Petition Signatures is Discretionary

39. Intervening Plaintiffs re-allege and incorporate by reference all of the allegations contained in all of the preceding paragraphs.

40. The plain language of VA. CODE ANN. § 24.2-545 B makes the submission of signature petitions permissive and not mandatory, as stated by Defendant Mullins, as a means of gaining access to the presidential primary ballot for the Commonwealth of Virginia. Specifically, the statute states:

Any person seeking the nomination of the national political party for the office of President of the United States, or any group organized in this Commonwealth on behalf of, and with the consent of such person, *may file* with the State Board petitions signed by at least 10,000 qualified voters, including at least 400 qualified voters from each congressional district in the Commonwealth, who attest that they intend to participate in the primary of the same political party as the candidate for whom the petitions are filed. Such petitions *shall* be filed with the State Board by the primary filing deadline. Such petitions *shall* be filed with the State Board by the primary filing deadline. The petitions *shall* be on a form prescribed by the State Board and *shall* be sealed in one or more containers to which is attached a written statement giving the name of the presidential candidate and the number of signatures on the petitions contained in the containers. Such person or group *shall* also attach a list of the names of persons who would be elected delegates and alternate delegates to the political party's national convention if the person wins the primary and the party has determined that its delegates will be selected pursuant to the primary. The slate of delegates and alternates *shall* comply with the rules of the national and state party.

The State Board *shall* transmit the material so filed to the state chairman of the party of the candidate immediately after the primary filing deadline. The sealed containers containing the petitions for a candidate *may* be opened only by the state chairman of the party of the candidate. The state chairman of the party *shall*, by the deadline set by the State Board, furnish to the State Board the names of all candidates who have satisfied the requirements of this section. Whenever only one candidate for a party's nomination for President of the United States has met the requirements to have his name on the ballot, he will be declared the winner and no presidential primary for that party will be held.

VA. CODE ANN. § 24.2-545 B (emphasis added).

41. In *Zinone v. Lee's Crossing Homeowner's Association, et al.*, 714 S.E.2d 922 (Va. S. Ct. 2011), the Virginia Supreme Court held that when the General Assembly of the Commonwealth uses permissive "may" language in a statute and then uses "shall" language in the same statute to address a similar subject, it must be presumed that the difference in the choice of language was intentional. As the Virginia Supreme Court explained:

"We look to the plain meaning of the statutory language, and presume that the legislature chose, with care, the words it used when it enacted the relevant statute.' Moreover, when the General Assembly has used specific language in one instance, but omits that language and when addressing a similar subject elsewhere in the Code, we must presume that that the difference in the choice of language was intentional." *Id.* at 925.

42. As applied here to VA. CODE ANN. § 24.2-545 B, a careful reading of the statute shows that the General Assembly used, and "chose with care," permissive "may" language in describing the signature component. The General Assembly then used mandatory "shall" language in specifying the form and substance of any signature petitions, if filed. In short, this shows that the General Assembly intended to make the signature petition component in VA. CODE ANN. § 24.2-545 B discretionary on the part of a candidate for the presidential primary, and not mandatory as directed by Defendants. There is no basis for Defendants to impose a different standard than the General Assembly did in VA. CODE ANN. § 24.2-545 B. The

Defendants' refusal to certify Intervening Plaintiffs for the March 6, 2012 Republican Primary ballot is therefore based on a misapplication of VA. CODE ANN. § 24.2-545 B and must be vacated by this Court.

**Count 2 – The Requirement that Petition Circulators Be
Virginia Residents is Unconstitutional**

43. Intervening Plaintiffs re-allege and incorporate by reference all of the allegations contained in paragraphs 1 through 38 above.

44. In *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) ("*ACLF*"), the Supreme Court held that a Colorado law requiring all petition circulators to be registered Colorado voters violated the First Amendment to the United States Constitution.¹ The Court held that the restriction imposed severe burdens on core political speech, *id.* at 192, was subject to strict scrutiny, *id.* at 192 n.12, and that the state's interests were not sufficient to justify the imposed burdens, *id.* at 192.

45. Applying the *ACLF* standard, numerous courts have ruled that state- or district-residency requirements violate the First Amendment. See *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023 (10th Cir. 2008) (state-residency requirement); *Nader v. Brewer*, 531 F.3d 1028 (9th Cir. 2008) (same); *Nader v. Blackwell*, 545 F.3d 459 (6th Cir. 2008) (same); *Chandler v. City of Arvada*, 292 F.3d 1236 (10th Cir. 2002) (city-residency requirement); *Lerman v. Bd. of*

¹ The American Constitutional Law Foundation did not challenge Colorado's residency requirement because the registration requirement also required a circulator to reside in Colorado. *ACLF*, 525 U.S. at 189 n.3. Virginia's requirement is more restrictive than the Colorado provision. In Virginia, not only must the circulator be a qualified voter (*i.e.*, a Virginia resident), but they also must be eligible to vote for the candidate for whom they are circulating the petition.

Elections in the City of New York, 232 F.3d 135 (2d Cir. 2000) (district-residency requirement); *Krislov v. Rednour*, 226 F.3d 851 (7th Cir. 2000) (state- and district-residency requirements); *Bogaert v. Land*, 572 F. Supp. 883 (W.D. Mich. 2008) (district-residency requirement); *Frami v. Ponto*, 255 F. Supp. 2d 962 (W.D. Wis. 2003) (same); *Morrill v. Weaver*, 224 F. Supp. 2d 882 (E.D. Penn. 2002) (same).

46. VA. CODE ANN. § 24.2-545 B's requirement for petition circulators to be either eligible or registered qualified voters in the state violates freedoms of speech and association protected by the First and Fourteenth Amendments to the United States Constitution.

47. Virginia's unconstitutional requirement for petition circulators to be either eligible or registered qualified voters in the state prohibited Intervening Plaintiffs from recruiting other petition circulators and obtaining the necessary petition signatures for ballot access.

Count 3 – Virginia's 10,000 Signature Requirement is Unconstitutional

48. Intervening Plaintiffs re-allege and incorporate by reference all of the allegations contained in paragraphs 1 through 38 above.

49. Virginia's requirement that a presidential primary candidate collect signatures from 10,000 qualified voters, including at least 400 qualified voters from each congressional district in the Commonwealth, who attest that they intend to participate in the primary of the same political party as the candidate for whom the petitions are signed and filed violates freedoms of speech and association protected by the First and Fourteenth Amendments to the United States Constitution.

Prayer for Relief

Based on each and all of the grounds set forth above, Intervening Plaintiffs humbly pray that this Court grant and issue the following relief:

1. A declaratory judgment that the permissive “may” language in VA. CODE ANN. § 24.2-545 B makes the signature petition component in the presidential primary ballot access statute discretionary;

2. Vacation of Defendants’ refusal to certify Intervening Plaintiffs for the March 6, 2012 Republican Primary ballot because such refusal is based on a misapplication of VA. CODE ANN. § 24.2-545 B;

3. A declaratory judgment that the requirement for petition circulators to be either eligible or registered qualified voters in the state provision contained in VA. CODE ANN. § 24.2-545 B is facially unconstitutional and/or as applied to Intervening Plaintiffs;

4. Preliminary and permanent injunctions enjoining Defendants, and all successors in office, from enforcing the requirement for petition circulators to be either eligible or registered qualified voters in the Commonwealth;

5. Preliminary and permanent mandatory injunctions compelling Defendants to certify Intervening Plaintiffs as candidates for the Republican Party presidential primary ballot;

6. Reasonable costs and attorneys’ fees incurred as a consequence of Intervening Plaintiffs’ efforts to safeguard their constitutionally protected rights, pursuant to 42 U.S.C. § 1988 and any other statute or authority; and

7. Any other relief this Court in its discretion deems just and appropriate.

Date: January 6, 2012

Respectfully submitted,

The Honorable Newt Gingrich
The Honorable Jon Huntsman, Jr.
The Honorable Rick Santorum

/S/

J. Christian Adams (VA Bar #42543)
Election Law Center, PLLC
300 N. Washington St., Suite 405
Alexandria, VA 22314
Tel: 703-963-8611
Fax: 703-740-1773
adams@electionlawcenter.com

Stefan C. Passantino
J. Randolph Evans
Benjamin P. Keane
McKenna Long & Aldridge, LLP
1900 K St. NW
Washington, DC 20009
Tel: 202-496-7500
Fax: 202-496-7756

ATTORNEYS FOR INTERVENOR-
PLAINTIFF NEWT GINGRICH
Pro Hac Vice applications pending

Craig Engle
Arent Fox LLP
1050 Connecticut Avenue, NW
Washington, DC 20036-5339
Tel: 202-857-6000
Fax: 202-857-6395

ATTORNEY FOR INTERVENOR-
PLAINTIFF JON HUNTSMAN, JR.
Pro Hac Vice application pending

Cleta Mitchell
Foley & Lardner LLP
3000 K Street, N.W.
Suite 600
Washington, DC 20007-5109
Tel: 202-672-5300
Fax: 202-672-5399

ATTORNEY FOR INTERVENOR-
PLAINTIFF RICK SANTORUM
Pro Hac Vice application pending

CERTIFICATE OF SERVICE

I hereby certify that on January 6, 2012, I will electronically file the foregoing document with the Clerk of the Court using the CM/ECF System, which will then send a notification of such filing (NEF) to all counsel of record:

E. Duncan Getchell, Jr.
Wesley G. Russell
Office of the Attorney General
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
dgetchell@oag.state.va.us
wrussell@oag.state.va.us
Counsel for Defendants Charles Judd, Kimberly Bowers and Don Palmer, Members of the Virginia State Board of Elections, in their official capacity

Joseph N. Lief
Virginia International Raceway
1245 Pinetree Road
Alton, Virginia 24520
Telephone: (434) 822-7700
Counsel for Defendants Charles Judd, Kimberly Bowers and Don Palmer, Members of the Virginia State Board of Elections, in their official capacity

Lee Elton Goodman
LeClairRyan, A Professional Corporation
1701 Pennsylvania Ave NW
Suite 1045
Washington, DC 20006
lee.goodman@leclairryan.com
Counsel for Defendant Pat Mullins, in his official capacity as Chairman of the Republican Party of Virginia

Charles M. Sims (VSB No. 35845)
LeClairRyan, A Professional Corporation

