Perry v. Judd et al Doc. 65

Civil Action No.: 3:11-cv-856-JAG

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

THE HONORABLE RICK PERRY,

Plaintiff,

and

THE HONORABLE NEWT GINGRICH, THE HONORABLE JON HUNTSMAN, JR., AND THE HONORABLE RICK SANTORUM

Plaintiff-Intervenors,

v.

CHARLES JUDD, *et al*.,
Defendants.

DEFENDANTS' BRIEF IN RESPONSE TO PLAINTIFF'S AND INTERVENORS' OPENING BRIEFS

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. Plaintiff and Intervenors Have Failed to Show Causation or Redressability Sufficient to Confer Standing. 2

II. Plaintiff and Intervenors Prejudicially Delayed Bringing Their Claims. 6

III. Plaintiff and Intervenors Have Failed to Show Irreparable Harm, That the Balance of Equities Tips in Their Favor, or That the Public Interest is Served by Disrupting the Election Process 10

IV. Plaintiff and Intervenors Have Failed to Show That They Would Certainly Prevail on the Merits of Their Constitutional Challenge 12

CONCLUSION 13

TABLE OF AUTHORITIES

Cases

Abbot Labs. v. Gardner, 387 U.S. 136 (1967) 7

Acierno v. New Castle Cnty., 40 F.3d 645 (3d Cir. 1994); 10

Buckley v. American Constitutional Law Foundation, 525 U.S. 182 (1999) 12

Calvary Christian Ctr. v. City of Fredericksburg, No. 3:11-cv-342, 2011 U.S. Dist. LEXIS 77489 (E.D. Va. July 18, 2011) 10

Constitution Party of Pa. v. Cortes, 433 Fed. Appx. 89 (3d Cir. May 19, 2011) 4, 5

Dobson v. Dunlap, 576 F. Supp. 2d 181 (D. Me. 2008) 9

EEOC v. Navy Fed. Credit Union, 424 F.3d 397 (4th Cir. 2005) 6

Fishman v. Schaffer, 429 U.S. 1325 (1976) (Marshall, Circuit Justice) 6

Fulani v. Hogsett, 917 F.2d 1028 (7th Cir. 1990) 6, 9, 11

Herndon v. N.C. State Bd. of Elections, 710 F.2d 177 (4th Cir. 1983) 9

Hirschfeld v. Bd. of Elections, 984 F.2d 35 (2d Cir. 1993) 10

Interactive Media Entm't & Gaming Ass'n, No. 09-1301, 2011 U.S. Dist. LEXIS 23383 (D.N.J. Mar. 7, 2011) 5

Kay v. Austin, 621 F.2d 809 (6th Cir. 1980) 1, 9

Kloth v. Microsoft Corp., 444 F.3d 312 (4th Cir. 2006) 6

Lance v. Coffman, 549 U.S. 437 (2007) 1

Lujan v. Defenders of Wildlife, 504 U.S. 555 (1992) 3

Lux v. Judd, 651 F.3d 396 (4th Cir. 2011) 2

Lux v. Rodrigues, 131 S. Ct. 5 (2010) 2, 12

McCarthy v. Briscoe, 429 U.S. 1317 (1976) (Powell, Circuit Justice) 6

Miller v. Brown, 462 F.3d 312 (4th Cir. 2006) 7

Muntaqim v. Coombe, 449 F.3d 371 (2d Cir. 2006) (en banc) (per curiam) 3, 5

Quince Orchard Valley Citizens Ass'n v. Hodel, 872 F.2d 75 (4th Cir. 1989) 11

Real Truth About Obama, Inc. v. FEC, 575 F.3d 342 (4th Cir. 2009) 10, 11

Renne v. Geary, 501 U.S. 312 (1991) 3

Siegel v. LePore, 234 F.3d 1163 (11th Cir. 2000) 13

Storer v. Brown, 415 U.S. 724 (1974) 1

Texas v. United States, 523 U.S. 296 (1998) 8

Winter v. NRDC, Inc., 555 U.S. 7 (2008) 2, 10, 11

Statutes

Va. Code Ann. § 24.2-521 .... 2, 7

Va. Code Ann. § 24.2-545B 2, 8, 13

Other Authorities

Virginia State Board of Elections, Election Results: February 29, 2000 Republican Party Presidential Primary Election, http://www.sbe.virginia.gov/ElectionResults/2000/Feb_primary/Results-Pres-Prim-by-Dist.html (last visited January 9, 2012) 4

Virginia State Board of Elections, Official Results: Commonwealth of Virginia 2004 February Democratic Presidential Primary, http://sbe.vipnet.org/feb2004/d_01.htm (last visited January 10, 2012). 5

Virginia State Board of Elections, Official Results: Commonwealth of Virginia 2008 February Republican Presidential Primary, http://www.sbe.virginia.gov/cms/documents/ElectionResults/Feb12_RepublicanPrimary.pdf (last visited January 9, 2012) 4

Virginia State Board of Elections, Schedule of General Elections, http://www.sbe.virginia.gov/cms/documents/CF/ReportCodes/2011_2015_5%20yr%20Election%20Calendar.pdf (last visited January 9, 2012) 9

Charles Judd, Kimberly Bowers, and Don Palmer, by counsel, state as follows in response to the Brief of plaintiff and the Brief of intervenors.

ARGUMENT

Although the Court's scheduling order called for briefing "on whether the Court should grant a preliminary injunction and, if so, what the Court should order," (Doc. 13 at 2), the briefs of plaintiff and intervenors do not discuss, much less meaningfully join issue on, several of the factors they must satisfy to be awarded what they admit is "preliminary . . . mandatory injunctive relief." (Doc. 1 at 7; Doc. 28 at 9). Instead, plaintiff and intervenors expend the bulk of their efforts on the merits of their constitutional challenge to Virginia's eligible voter circulator requirement, an issue that the court should conclude is academic in this case for four reasons. First, they all lack standing to challenge the circulator requirement, having failed to submit the statutorily required 10,000 valid signatures, a requirement the constitutionality of which they cannot plausibly contest. *See Storer v. Brown*, 415 U.S. 724, 726-27 (1974) (upholding state law requiring signatures from 5% of vote cast in previous general election as constitutional restriction on ballot access); *cf. Lance v. Coffman*, 549 U.S. 437, 439, 442 (2007) (holding that "[f]ederal courts must determine that they have jurisdiction before proceeding to the merits," that standing is a jurisdictional prerequisite, and dismissing an election law challenge for lack of standing). Second, they all are clearly subject to laches because they failed to mount a challenge to the law until after the time for collecting signatures had past and the primary is practically upon us. *See Kay v. Austin*, 621 F.2d 809, 813 (6th Cir. 1980) (holding that a candidate for President was "not entitled to [the] equitable relief" of having his name on the state's May 20th presidential primary ballot "as a result of laches" where the candidate filed suit on March 31 after "all the necessary preliminary work had been done for the paper ballots, voting machine strips, and punch cards"). Third, they have not claimed, much less shown, that all four *Winter* factors

favor the grant of preliminary, mandatory injunctive relief. *Winter v. NRDC, Inc.*, 555 U.S. 7, 20 (2008). Finally, even assuming that the Court were to conclude that any of them have standing to assert a challenge to the eligible voter circulator requirement, that those claims are not barred by laches, that the elements of irreparable harm, the balance of the equities, and the public interest favor any of them, the Court still could not conclude that the challenge is virtually certain to prevail, because both the Chief Justice, acting as Circuit Justice, and the Fourth Circuit have concluded otherwise in a similar case. *See Lux v. Rodrigues*, 131 S. Ct. 5, 7 (2010); *Lux v. Judd*, 651 F.3d 396, 404 (4th Cir. 2011); Case: 10-1997, Doc. 22.

I. Plaintiff and Intervenors Have Failed to Show Causation or Redressability Sufficient to Confer Standing.

Plaintiff and intervenors seek preliminary, mandatory injunctive relief -- they demand to be placed on Virginia's presidential primary ballot. They claim that the eligible voter circulator requirement violates their First Amendment rights of speech and association, and this entitles them to the requested relief. *See* Va. Code Ann. §§ 24.2-521; 24.2-545B. While they perfunctorily challenge the ten thousand signature requirement of Va. Code Ann. § 24.2-545B as unconstitutional in Count II of their complaints, plaintiff and intervenors implicitly concede, by failing to argue otherwise in their opening briefs, that the numeric challenge is without merit as shown in Defendants' Memorandum in Opposition. *See* (Doc. 36 at 2-3). Thus, plaintiff and intervenors are left contending that, having failed to abide by a valid prerequisite to their appearing on the ballot, the Court nonetheless should entertain their challenge to a *separate* prerequisite, which any of them could have challenged when they announced, and, having found *that* requirement invalid, order that their names be placed on the ballot. The conclusion simply does not follow.

Because the supposition that they would have obtained 10,000 valid signatures but for the circulator restriction could be based on nothing more than speculation and surmise, it is not that requirement that has injured them. In an Article III case and controversy sense, they have no palpable injury fairly traceable to the circulator requirement. *See, e.g.*, *Muntaqim v. Coombe*, 449 F.3d 371, 376 (2d Cir. 2006) (en banc) (per curiam) (holding that an inmate's "inability to vote in New York arises from the fact that he was a resident of California, not because he was a convicted felon subject to the application of New York Election Law," and thus that "he has suffered no 'invasion of a legally protected interest'" as a result of his felon status, as "there is no causal connection between New York Election Law . . . and [the inmate's] inability to vote in New York, and a favorable decision of this Court on his claim that New York Election Law . . . violates the VRA would do nothing to enfranchise him." (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992)); *cf. Renne v. Geary*, 501 U.S. 312, 319 (1991) (noting that "there is reason to doubt . . . that the injury alleged by [certain] voters can be redressed by a declaration of [a state election law's] invalidity or an injunction against its enforcement" where "[a] separate [state] statute, the constitutionality of which was not litigated in this case," may impose the same requirement as the statute challenged. For "[o]verlapping enactments can be designed to further differing state interests, and invalidation of one may not impugn the validity of another.").

Furthermore, neither intervenor Gingrich nor intervenor Santorum were injured by the circulator requirement on the ground that it prohibits "otherwise qualified candidates for the Office of President of the United States from circulating their own candidate petitions," as both of them are vote eligible residents of the Commonwealth. *See* (Doc. 28 at 2-3, ¶¶ 7, 9, at 6, ¶ 32; Doc. 38 at 3-4, ¶¶ 11, 13, at 7-8, ¶ 36). Of course, none of the intervenors have so much as alleged an intent to circulate his own petitions. In sum, with respect to the plaintiff and all of the

intervenors, "there is simply no allegation in the . . . Complaint[s], other than conclusory assertions, that the [voter eligibility circulator requirement] is responsible for the [petition signature submission] difficulties," because none of them claims to have attempted or even desired to employ circulators that did not meet Virginia's requirements or that any of the signatures they submitted were struck for non-compliance with the circulator requirement. *See Constitution Party of Pa. v. Cortes*, 433 Fed. Appx. 89, 93 (3d Cir. May 19, 2011) (noting that a party's difficulty in finding candidates, rather than being "caused by the potential imposition of fees," might rather have been caused "by a change in general public opinion, a change in the effectiveness of recruitment strategies or party leadership, or any multitude of other factors"); *see* (Doc. 1 at 1, ¶ 2; Doc. 28 at 1-2, ¶ 2, 30 at 2, ¶ 6; Doc. 38 at 2, ¶ 6).

Of course, the fact "that five of the seven nationally recognized candidates for [the Republic presidential nomination] were excluded from the ballot," (Doc. 37 at 4), does not prove that the voter eligible circulator requirement prevented their submitting 10,000 valid signatures, especially when one considers that six candidates made the same ballot four years ago under the same rules, *see* Virginia State Board of Elections, Official Results: Commonwealth of Virginia 2008 February Republican Presidential Primary, http://www.sbe.virginia.gov/cms/documents /ElectionResults/Feb12_RepublicanPrimary.pdf (last visited January 9, 2012); and five did in 2000. *See* Virginia State Board of Elections, Election Results: February 29, 2000 Republican Party Presidential Primary Election, http://www.sbe.virginia.gov/ ElectionResults/2000/Feb_primary/Results-Pres-Prim-by-Dist.html (last visited January 9, 2012). In 2004, nine candidates met the statutory requirements to appear on the Democratic Presidential Primary Ballot, including five candidates (Sharpton, Lieberman, Kucinich, Gephardt, and Larouche) who each received fewer than 4% of the votes in the primary. Virginia

State Board of Elections, Official Results: Commonwealth of Virginia 2004 February Democratic Presidential Primary, http://sbe.vipnet.org/feb2004/d_01.htm (last visited January 10, 2012). Furthermore, intervenor Gingrich has stated publicly that the cause of his failure to submit 10,000 valid signatures was the fraudulent generation of 1,500 signatures by a resident circulator. *See* (Doc. 36 Ex. A); Ex. A (reporting that intervenor Gingrich conceded that "his campaign's failure to qualify for Virginia's primary ballot" "'was our fault'").

From this record it appears, or will appear, that it is just as likely that the actions of some third party or the voluntary choices of the plaintiff and intervenors caused them not to submit 10,000 signatures, whether those acts or choices were the fraudulent acts of an eligible circulator, the decision of Virginia's citizens to not sign a petition on the behalf of plaintiff and intervenors, or the plaintiff's and intervenors' failure to commit resources to circulating petitions in the Commonwealth. Therefore, the Court must conclude that plaintiff and intervenors have not shown that their injury is fairly traceable to Virginia's circulator requirement.

Finally, there is no redressability and therefore no standing because a favorable ruling for plaintiff and intervenors on the circulator requirement would not entitle them to the remedy of having their names placed on the ballot. (Doc. 37 at 4; Doc. 39 at 4). This is so because their entitlement to appear on the ballot is barred by the independent requirement to submit 10,000 valid signatures. *See Muntaqim*, 449 F.3d at 376; *Interactive Media Entm't & Gaming Ass'n*, No. 09-1301, 2011 U.S. Dist. LEXIS 23383, at *15-17 (D.N.J. Mar. 7, 2011). Both causation and redressability are jurisdictional prerequisites to obtaining relief and, because they are not present, the Court should not entertain the constitutional question. *See Constitution Party of Pa.*, 433 Fed. Appx. at 93 n.1 (affirming dismissal of a constitutional challenge to ballot access requirements for failure to show causation and noting that the failure to show redressability

requires the same result). Nor is this case like *McCarthy v. Briscoe*, 429 U.S. 1317 (1976) (Powell, Circuit Justice), which historically has been limited to its remarkable facts. *See Fishman v. Schaffer*, 429 U.S. 1325, 1328 (1976) (Marshall, Circuit Justice) (distinguishing *McCarthy*, which granted emergency injunctive relief, on the ground that *McCarthy* "presented 'no novel issue of constitutional law,'" there being "no question that Texas had clearly violated the constitutional requirements for ballot access" under settled case law, but refusing relief in that case because the constitutional issue there presented was "at best a close question").

II. Plaintiff and Intervenors Prejudicially Delayed Bringing Their Claims.

The equitable defense of laches creates an independent bar to claims for injunctive relief where it is shown that the "plaintiffs failed to pursue their injunctive claims with diligence and that their failure prejudiced [the defendant]." *Kloth v. Microsoft Corp.*, 444 F.3d 312, 325 (4th Cir. 2006). A "lack of diligence" may be shown wherever "a plaintiff has unreasonably delayed in pursuing his claim," *EEOC v. Navy Fed. Credit Union*, 424 F.3d 397, 409 (4th Cir. 2005), and a lack of diligence is not excused while plaintiff pursues an alternative avenue of relief. *Kloth*, 444 F.3d at 325-26.

"In the context of elections, this means that any claim against a state electoral procedure must be expressed expeditiously. As time passes, the state's interest in proceeding with the election increases in importance as resources are committed and irrevocable decisions are made. The candidate's . . . claims to be . . . a serious candidate . . . with a serious injury become less credible by their having slept on [his or her] rights." *Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990) (internal citation omitted). As in *Fulani*, the credibility of plaintiff's and intervenors' claims suffer from their delay in raising them and their threat to the public interest. Plaintiff and intervenors contend that an earlier assertion of their challenge to the circulator and numeric requirements could not have been made, because they would have earlier been barred by the

doctrine of ripeness. (Doc. 37 at 4, 10-12; Doc. 39 at 4, 10-12). This argument is inconsistent with plaintiff and intervenors theory of the case -- an abridgement of their First Amendment rights of speech and association, which occurred, if at all, when they allegedly were forced to forego employing circulators that did not meet the requirements of Va. Ann. Code § 24.2-521 or, for purposes of their numeric requirement challenge to Va. Ann. Code § 24.2-545B, made efforts to obtain more than the number of signatures they contend is constitutionally permissible. Also, the argument is a non-serious application of ripeness doctrine.

"Analyzing ripeness is similar to determining whether a party has standing," *see Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006), and also has a unique prudential prong in which courts must "balance the fitness of the issues for judicial decision with the hardship to the parties of withholding court consideration. A case is fit for judicial decision [under the prudential rules] when the issues are purely legal and when the action in controversy is final and not dependent on future uncertainties." *Id.*; *see Abbot Labs. v. Gardner*, 387 U.S. 136, 149 (1967). It is apparent that plaintiff and intervenors could have asserted the same injury in fact to the rights to disseminate information and associate for political purposes free of the circulator and numeric requirements that they do now as soon as they learned of the challenged requirements. *See, e.g.*, *Abbott Labs.*, 387 U.S. at 153 ("Where the legal issue presented is fit for judicial resolution, and where a regulation requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance, access to the courts . . . must be permitted."); *Miller*, 462 F.3d at 319 (holding that a pre-enforcement challenge to Virginia's open primary laws as violating "plaintiffs' First Amendment rights to freely associate" was "fit for judicial review" despite the law not being capable of being applied for two years because it "present[ed] a purely legal question" and the hardships favored early resolution, as the "primary

election likely would be resolved before an action brought" after the law had been enforced by the State Board of Elections "could reach final decision."). Unlike the cases relied upon by plaintiff and intervenors, such as *Texas v. United States*, 523 U.S. 296, 300 (1998), the only uncertainty was whether plaintiff and intervenors would "seek[] the nomination of [a] national political party for the office of President of the United States" on Virginia's Republican Presidential Primary ballot, Va. Code Ann. § 24.2-545B, and so be subject to the long-established circulator and numeric requirements. According to plaintiff and intervenors complaints, these matters were decided, in all cases, more than four months prior to the deadline for filing collected petition signatures, a process that could begin in July of 2011. *See* SBE-545. (Doc. 1 at 4, ¶¶ 4, 19; Doc. 28 at 5, ¶¶ 22-24, 29-30; Doc. 30 at 7, ¶¶ 31, 34; Doc. 38 at 6, ¶¶ 26-28, 33-34). Thus, plaintiff and intervenors possessed any standing that they would ever enjoy to challenge the circulator and numeric requirements long before they were denied entry on the ballot.

It is also apparent on the face of plaintiff's and intervenors' complaints that they unreasonably delayed in asserting their challenges, instead choosing "to comply with Virginia's" laws. (Doc. 37 at 12; Doc. 39 at 12). Although the circulator and numeric requirements have been in place for years, and intervenor Gingrich, intervenor Santorum, intervenor Huntsman, and plaintiff Perry have been official candidates for the Republican nomination since May 16, June 6, June 28, and August 15, 2011, respectively, the candidates admit that they delayed to challenge until after a determination that they were ineligible to be placed on the ballot had been made and publicly announced. (Doc. 1 at 4, ¶¶ 4, 19; Doc. 28 at 5, ¶¶ 22-24, 29-30; Doc. 30 at 7, ¶¶ 31, 34; Doc. 38 at 6, ¶¶ 26-28, 33-34). Plaintiff's challenge, filed December 27, 2011, thus came less than two weeks before completion of the ballot printing preparations, while intervenors'

challenge did not come until January 4, 2012, five days before the last practical day for printing ballots, the preparation for which will be all but complete and printing begun by the time this matter is heard in court.[1] *See Kay*, 621 F.2d at 813 (holding that a claim for entitlement to be on a ballot was barred by laches when the candidate filed suit after "all the necessary preliminary work had been done"); *Dobson v. Dunlap*, 576 F. Supp. 2d 181, 187-88 (D. Me. 2008) (denying a motion for preliminary injunction to place a candidate's name on a ballot because the challenge to the nomination petition process was barred by laches when presented nearly two months before the election, after "the printer had already begun the ballot printing process"). (Doc. 22 at 2). Having had months to conclude that the circulator and numeric requirements violate their rights, plaintiff and intervenors nonetheless waited until they had received an unfavorable conclusion on their application, and until the primary was less than two months away, to assert their claims. *See* Virginia State Board of Elections, Schedule of General Elections, http://www.sbe.virginia.gov/cms/documents/CF/ReportCodes/2011_2015_5%20yr%20Election%20Calendar.pdf (last visited January 9, 2012). Thus, to avoid "encourag[ing] parties who could raise a claim to lay by and gamble upon receiving a favorable decision . . . and then, upon [receiving an unfavorable one], seek to undo the . . . results in a court action," *Herndon v. N.C. State Bd. of Elections*, 710 F.2d 177, 182 (4th Cir. 1983), these untimely claims for extraordinary relief must now be denied, as the "resources [have been] committed and irrevocable decisions [have been] made." *Fulani*, 917 F.2d at 1031.

[1] Printing of ballots had already occurred most of Virginia's 134 electoral jurisdictions prior to entry of the Court's orders of January 9 and 10, 2012. (Doc. 46; Doc. 54).

III. Plaintiff and Intervenors Have Failed to Show Irreparable Harm, That the Balance of Equities Tips in Their Favor, or That the Public Interest is Served by Disrupting the Election Process

Although the "extraordinary remedy" of a preliminary injunction "is never awarded as of right," *Winter*, 555 U.S. at 24, for the court to not abuse its discretion in awarding preliminary relief, plaintiff and intervenors "must establish" that they are " likely to suffer irreparable harm in the absence of preliminary relief, . . . that the balance of equities tips in [their] favor, and . . . that an injunction is in the public interest.'" *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346 (4th Cir. 2009) (quoting *Winter*, 555 U.S. at 20). And, as previously shown, "[a] party seeking a mandatory preliminary injunction that will alter the status quo bears a particularly heavy burden in demonstrating its necessity." *Acierno v. New Castle Cnty.*, 40 F.3d 645, 653 (3d Cir. 1994); *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) (same).

Plaintiff and intervenors have not shown that failure to hold the circulator requirement unconstitutional is nearly certain to cause them to suffer irreparable harm, because they admit that they complied with that requirement, are no longer circulating petitions, and thus could only be harmed by the denial to place their names on the ballot. To the extent that this harm would be irreparable and would result from a failure to grant preliminary relief, it does so only because of plaintiff's and intervenors' inexcusable delay in bringing suit. And a party's delay will not be credited to its balance sheet for purposes of finding an irreparable harm. *Hirschfeld v. Bd. of Elections*, 984 F.2d 35, 39 (2d Cir. 1993). Furthermore, the circulator requirement is not the cause of plaintiff's and intervenors' harm of not being placed on the ballot, as that results from their failure to satisfy the constitutionally valid numeric requirement. Thus, plaintiff and intervenors have not and cannot satisfy the requirement that they demonstrate a likelihood of

irreparable harm flowing from the court's failure to hold the circulator requirement unconstitutional.

The balance of the equities and the public interest favor denying this request for preliminary, mandatory injunctive relief. "'In exercising their sound discretion, courts of equity should pay particular regard for the public consequences in employing the extraordinary remedy of injunction.'" *Real Truth About Obama*, 575 F.3d at 347 (4th Cir. 2009) (quoting *Winter*, 555 U.S. at 24). And, in considering the equities and public interest, it bears reemphasizing that it is plaintiff and intervenors who have delayed bringing this suit. *See Fishman*, 429 U.S. at 1330 (denying a motion for injunctive relief from a district court's decision in part on the ground that "applicants delayed unnecessarily in commencing this suit" until after the printing and distribution of ballots had begun). The fact of delay in the election context increases the harm to the state defendants and the public "as resources are committed and irrevocable decisions are made." *Fulani*, 917 F.2d at 1031. Conversely, "[i]n determining the weight to be accorded to the [plaintiffs'] claims," courts give less credence to claims of harm where the suit was belatedly pursued under long-established law. *See Respect Maine PAC v. McKee*, 622 F.3d 13, 16 (1st Cir. 2010) (noting that "the case law on which [plaintiffs] rely is not new"); *Quince Orchard Valley Citizens Ass'n v. Hodel,* 872 F.2d 75, 79-80 (4th Cir. 1989) (that a party seeking an injunction delayed doing so is "quite relevant to balancing the parties' potential harms."). As defendants will demonstrate at the January 13, 2012 hearing, granting plaintiff and intervenors this relief at the eleventh hour would lead to voter confusion, increased expense, disruption of the election processes, and violation of state and federal statutes as well as of this Court's consent decree. *See* (Case 3:08-cv-00709-RLW Doc. 75). As this Court recognized, "local electoral officials must mail absentee ballots to overseas voters who request them no later than . . . January 21,

2012." (Doc. 54 at 3). As the 13th itself is a state holiday, the 14th and 15th are a Saturday and Sunday, the 16th is a state and federal holiday, and the 20th is a Saturday, a decision mandating that all 134 electoral districts add plaintiff's and intervenors to the ballot would have to be completed in four days, the 17th through the 20th, to avoid violating state and federal law. Furthermore, such an effort would require the expenditure of vast resources and create significant redundancies, which is bound to breed voter confusion and delay. In view of the significant harms to the public interest that relief portends, the Court should decline to exercise its equitable discretion in favor of dilatory candidates.[2]

IV. Plaintiff and Intervenors Have Failed to Show That They Would Certainly Prevail on the Merits of Their Constitutional Challenge

Despite plaintiff's and intervenors' inattention to the point, whether or not they are entitled to preliminary relief is not based on whether this Court would be disposed to rule on the merits that their constitutional contentions are correct as a matter of law. It must be objectively demonstrated to a near certainty that plaintiff and intervenors will prevail at every level. That standard cannot be met here because this case raises a "novel issue of constitutional law," *see Fishman*, 429 U.S. at 1328 (distinguishing *McCarthy*, 429 U.S. at 1320), because the question of the validity of a state residency requirement has produced a circuit split and been expressly reserved by the Supreme Court. *Lux*, 131 S. Ct. at 7 (recognizing the existence of a circuit split on the residency requirement for petition circulators and that the Supreme Court had reserved the issue). Similarly, the Supreme Court has, for analytical purposes, assumed the validity of voter eligibility requirements in *Buckley v. Am. Constitutional Law Found.*, 525 U.S. 182, 197 (1999). Issues that have been expressly reserved for decision, such as a state residency requirement for

[2] It also harms Governor Romney and Congressman Paul who committed sufficient time, money, and other resources to meet the statutory requirements. Having incurred the necessary costs, the complying candidates are harmed if this Court exempts the noncomplying candidates from incurring those same costs.

petition circulators, or been assumed valid by the Supreme Court, can never be shown to be almost certainly invalid. At best for plaintiff and intervenors, the question is simply unresolved at the preliminary stage.

Finally, to the extent the Court entertains arguments contained in amended complaints not contemplated by the briefing schedule, it should reject plaintiff's and intervenors' contention that "the requirement" that 10,000 signatures be submitted, per Va. Code Ann. § 24.2-545B, is not a really a requirement at all. This argument is contrary to settled Virginia law as demonstrated in Defendants' Memorandum in Opposition. *See* (Doc. 36 at 17-22). And, in any case, the arguments of subsections I, II, and III would still apply to bar the Court from granting the requested relief under that theory. *See Siegel v. LePore*, 234 F.3d 1163, 1176-78 (11th Cir. 2000).

CONCLUSION

Because plaintiff's and intervenors' claims are barred by the lack of standing, unreasonable, prejudicial delay, and a failure to satisfy each of the four requirements for preliminary injunctive relief, the Motion for Preliminary Injunction must be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of January, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing (NEF) to the following counsel of record for Plaintiff and Intervenors:

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I further certify that some of the participants in the case are not registered CM/ECF users. I have mailed one copy of the foregoing document by First-Class Mail to the following non-CM/ECF participant:

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