Record No. 10-1997

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

HERB LUX, STEPHEN CRUSE, ANDREW MIKEL and EUGENE FORET,

Plaintiffs-Appellants,

v.

NANCY RODRIGUES, JEAN CUNNINGHAM and HAROLD PYON, members of the Virginia State Board of Elections, in their official capacities,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of Virginia

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BRIEF OF APPELLEE

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

CHARLES E. JAMES, JR.
Chief Deputy Attorney General

E. DUNCAN GETCHELL, JR.
Solicitor General
dgetchell@oag.state.va.us
Counsel of Record

WESLEY G. RUSSELL, JR.
Deputy Attorney General
wrussell@oag.state.va.us
Counsel of Record

STEPHEN M. HALL
Assistant Attorney General

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for Defendants-Appellees

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CORPORATE DISCLOSURE STATEMENT

Defendants-Appellees Nancy Rodrigues, Jean Cunningham, and Harold Pyon are members of the Virginia State Board of Elections sued in their official capacities. Given their status, there are no disclosable entities within the meaning of Federal Rule of Appellate Procedure 28(a)(1) or Local Rule 26.1.

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STATEMENT OF THE ISSUES

1. Is this Appeal moot?

2. Has *Libertarian Party of Va. v. Davis*, 766 F.2d 865 (4th Cir. 1985), been so undercut by subsequent Supreme Court authority that a panel would be warranted in not following it?

STATEMENT OF THE CASE

Va. Code § 24.2-506 provides in relevant part:

> The name of any candidate for any office, other than a party nominee, shall not be printed upon any official ballots provided for the election unless he shall file along with his declaration of candidacy a petition therefor, on a form prescribed by the State Board, signed by the number of qualified voters specified below after January 1 of the year in which the election is held and listing the residence address of each such voter. **Each signature on the petition shall have been witnessed by a person who is himself a qualified voter, or qualified to register to vote, for the office for which he is circulating the petition and whose affidavit to that effect appears on each page of the petition**.
> . . . .
>
> The minimum number of signatures of qualified voters required for candidate petitions shall be as follows:
>
> . . . .
>
> For a candidate for the United States House of Representatives, 1,000 signatures.

(emphasis added).

Plaintiff Herb Lux sought to be a candidate in Virginia's Seventh Congressional District despite the fact that that he resides in the First Congressional District. (J.A. at 5, 25). Plaintiffs Stephen Cruse, Andrew Mikel, and Eugene Foret reside and are eligible to vote in the Seventh District. Although not required to be registered voters in order to witness petition signatures, they are registered in the Seventh District. (J.A. at 7). As such, they validly witnessed petition signatures on behalf of Lux. *Id*. However, it was impossible to qualify Lux based on the small number of signatures witnessed by Cruse, Mikel and Foret. (J.A. at 23, 25). Lux himself witnessed signatures on sixty-three candidate petitions. Foret signed one of those petitions. (J.A. at 7).

When the Board refused to verify the number of valid signatures on the petitions Lux witnessed owing to his lack of eligibility, plaintiffs Lux, Cruse, Mikel and Foret filed a Verified Complaint for Declaratory and Injunctive Relief in the United States District Court for the Eastern District of Virginia on July 13, 2010. (J.A. at 5). Plaintiffs one-count complaint claimed that the witness eligibility requirement violated *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), and its progeny. (J.A. at 13-14). By way of relief, plaintiffs

sought a declaratory judgment that the witness eligibility requirement was unconstitutional. They also sought preliminary and permanent injunctive relief against enforcement of that aspect of the statute and a mandatory injunction requiring the Board to count Lux's signatures. (J.A. at 14). Plaintiffs mounted no challenge to the 1,000 signature requirement.

Defendants filed an Opposition to the Motion for Preliminary Injunction on July 23, 2010 as well as a Motion to Dismiss and Supporting Memorandum on August 3, 2010. (J.A. at 3). Because of time constraints, the parties agreed to consolidate their motions for expedited hearing and disposition. (J.A. at 225). They also agreed "that the Court's ruling on the core issue governing Plaintiffs' Motion for Preliminary Injunction would also be dispositive of the Defendants' Motion to Dismiss." (J.A. at 239).

During the hearing in the district court, Plaintiffs conceded that their constitutional challenge in this case mirrored the constitutional challenge that this Court rejected in *Davis*, 766 F.2d at 865. (J.A. at 193-195). Specifically, the district court and Plaintiffs' counsel engaged in the following colloquy:

> THE COURT: But the constitutionality of the witness provision was framed the same way in [*Davis*] as it is in the immediate case, you would have to concede that?
>
> MR. BIENICK: I think I would have to. That it was framed in the sort of the same frame.

(J.A. at 195, ln. 6-11).

In its Memorandum Opinion of August 26, 2010, the district court held that the witness eligibility requirement is a ballot access requirement which the court was constrained to uphold under the principles set forth in *Davis*, 766 F.2d 865. (J.A. at 238).

Plaintiffs noted their appeal on August 27, 2010. (J.A. at 4). On September 3, 2010 they filed their Emergency Motion for Preliminary Injunction in this Court. That filing recited: "If this Court does not grant the relief sought by Lux and his supporters before **September 18, 2010**, Lux's name will not appear on the ballot and he will not appear on the ballot and he will have forever lost his opportunity to run for office *in the 2010 election* (and his supporters will likewise have lost the opportunity to vote for their preferred candidate)." (Doc. 8-1 at 8).

In their response, Defendants noted that the September 18 date for mailing absentee ballots (actually September 17, because the 18th fell on a weekend), was a deadline that at least two jurisdictions within

the Seventh District had already anticipated. (Doc. 20-1 at 13-14). With respect to irreparable harm, Defendants noted that the harm to Lux was speculative and the harm to his supporters non-existent. With respect to Lux, the Board's review of 161 signatures legally witnessed by his co-plaintiffs produced a disqualification rate of almost 32%. Applying that rate to those signatures witnessed by Lux which the Board refused to verify would leave Lux 173 signatures short. (*Id.* at 21-22). As for the lack of harm to Lux's supporters, their witnessed signatures have been counted and they were able to vote for Lux through write-ins despite his failure to achieve ballot status. Va. Code Ann. §§ 24.2-101, 24.2-644(C), 24.2-648. On September 15, 2010 this Court denied Plaintiffs' motion for injunctive relief. (Doc. 22).

Plaintiffs next applied to Chief Justice Roberts in chambers as Circuit Justice seeking "an injunction requiring the Virginia State Board of Elections to count signatures that [Lux] collected in an effort to place himself on the congressional ballot." *Lux v. Rodrigues*, 561 U.S. ___, 177 L. Ed. 2d 1045 (2010). Because Plaintiffs sought a preliminary mandatory injunction pending appeal, they were required to "demonstrate that 'the legal rights at issue are' indisputably clear.'"

177 L. Ed. 2d at 1047 (internal quotation marks and citations omitted). For the purpose of the question before him, the Chief Justice accepted that Plaintiffs

> "may very well be correct that the Fourth Circuit precedent relied on by the District Court – *Libertarian Party of Va. v. Davis*, 766 F.2d 865 (1985) – has been undermined by our more recent decisions addressing the validity of petition circulation restrictions . . . *see Meyer v. Grant*, 486 U.S. 414, 422, 428 (1988) (invalidating a law criminalizing circulator compensation and describing petition circulation as 'core political speech'); *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 186-187 (1999) (holding unconstitutional a requirement that petition circulators be registered voters)."

However, the Chief Justice also particularly 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 197." *Id.* The Chief Justice denied Plaintiffs' request for an injunction. *Id.*

STATEMENT OF FACTS

Lux was permitted to begin obtaining signatures after January 1, 2010. Va. Code Ann. § 24.2-506 (2006). In this election cycle, he was required to file his petitions by 7:00 p.m. on June 8, 2010. Va. Code § 24.2-507. According to Lux's counsel, Lux did not follow the law with

respect to witnessing signatures because he misread the candidate packet given to him by the State Board of Elections. (J.A. at 195-96). As a consequence of that mistake, he was not in a position to challenge earlier the constitutionality of the eligibility requirement.

Had Lux mounted a challenge shortly after January 1, 2010, it appears from the schedule that has been met in this matter that he could have obtained review on the merits before ballots were printed, particularly if he had moved in this Court for expedited review. It should be noticed that no such motion has ever been filed in this appeal.

The election for which Lux had sought ballot access was duly conducted on November 2, 2010. Because Lux resides near the boundary of the First and Seventh Congressional Districts, and sought ballot access only as an independent candidate, it is sheer speculation that he will run again after the upcoming decennial redistricting under circumstances where he is not a resident of the Seventh District because the lines of the District may be drawn in a way that includes him. As a consequence, any argument that Lux's predicament is capable of repetition yet evading review is purely speculative. Because

that exception to mootness depends upon a probability that the same issue will arise between the same parties, it is not applicable here.

SUMMARY OF ARGUMENT

Although the "capable of repetition yet evading review" exception to mootness is frequently invoked in election cases, there is no *per se* elections exception to mootness. Instead, a litigant invoking the exception must demonstrate the probability that the same controversy will arise in the future between the same parties. Under the unique facts of this case, that burden cannot be sustained because it is sheer speculation and surmise that Lux will not be a resident of the Seventh Congressional District should he decide to run again as an independent candidate. That is so because the Virginia Constitution requires the General Assembly to redistrict in 2011. Because Lux's constitutional challenge arises from the fact that his lack of residency in the district prevented him from witnessing petition signatures, and because he lives near the boundary between the First District and the Seventh, it is presently unknown and unknowable whether this dispute is capable of recurrence.

With respect to the merits claim, there is binding circuit authority in *Davis* that the voter-eligibility requirement for witnessing candidate petition signatures is a valid ballot access requirement that does not severely burden core political speech. That holding has not been undercut by subsequent Supreme Court authority. Instead, there is clear *dicta* in *American Constitutional Law Foundation* that voter eligibility requirements are presumptively constitutional even in the context of ballot initiative petitioning. Imposing the same requirement on witnessing candidate petitions is at least two steps further removed from core political speech than was the situation in *American Constitutional Law Foundation*. Although there is a circuit split on the question of residency requirements for candidate petition circulators, a circuit split in no way deprives *Davis* of precedental force. Finally, because witnessing is not itself speech at all, the conclusion of the district court that the voter-eligibility requirement for witnessing is a reasonable ballot access requirement because it demonstrates the existence of minimal activist support would remain legally correct even if the district court had not also been constrained by *Davis*.

ARGUMENT

I. This Appeal is Moot

As this Court has recognized, "[t]he doctrine of mootness constitutes a part of the constitutional limits of federal court jurisdiction." *Brooks v. Vassar,* 462 F.3d 341, 348 (4th Cir. 2006), *cert. denied*, 550 U.S. 934 (2007). "Federal courts have no power to hear moot cases, and because a case can become moot at any time—even after the entry of a final judgment—the doctrine prevents a federal court of appeals from exercising its appellate jurisdiction in a case that becomes moot." *Id.* (citing *Mellen v. Bunting,* 327 F.3d 355, 363-64 (4th Cir. 2003), *cert. denied*, 541 U.S. 1019 (2004)).

To be sure, a case is not moot, and "the exercise of federal jurisdiction may be appropriate, however, if a party can demonstrate that the apparent absence of a live dispute is merely a temporary abeyance of a harm that is 'capable of repetition, yet evading review.'" *Brooks*, 462 F.3d at 348 (citation omitted). In certain circumstances, challenges to laws governing ballot access and elections survive mootness problems under the rubric of being "capable of repetition, yet evading review." *Storer v. Brown*, 415 U.S. 724, 737, n.8 (1974); *Miller*

v. Brown, 503 F.3d 360, 364, n.5 (4th Cir. 2007). However, a review of the specific facts in this particular case demonstrates that it does not satisfy the necessary elements to be considered "capable of repetition, yet evading review," and thus, should be dismissed as moot.

Even in cases involving laws and regulations related to elections, a moot case must be dismissed. As the United States Supreme Court has recently recognized, "Article III's 'case-or-controversy requirement subsists through all stages of federal judicial proceedings . . . . [I]t is not enough that a dispute was very much alive when suit was filed.'" *FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449, 461-62 (2007) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990)). In dealing with a challenge to regulations governing election advertising, the Court noted that the "capable of repetition, yet evading review" exception "applies where '(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.'" *Spencer v. Kemna,* 523 U.S. 1, 17 (1998) (internal quotation marks and brackets omitted) (*cited in*

Wisconsin Right to Life, Inc., 551 U.S. at 462.)[1] Lux and his supporters have not and cannot meet this test.

Regarding Lux, the record does not demonstrate that there is any "reasonable expectation that [he] will be subject to the same action again." For Lux to be subject to "the same action," *i.e.*, having the State Board of Elections refuse to review purported signatures from allegedly qualified voters as a result of the voter qualification witness requirements of Va. Code § 24.2-506, the following will have to occur: (1) Lux will have to decide to be a candidate for Congress, (2) he will have to fail to obtain the nomination of a political party as defined in Va. Code § 24.2-101 for the congressional district for which he wishes to be a candidate, (3) petitions for his candidacy must be circulated and sufficient signatures obtained to raise a colorable claim that at least 1,000 registered voters in that district have signed such petitions, (4) he

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[1] Even election law cases cited by Lux and his supporters have held that the two-part test for applying the doctrine of "capable of repetition, yet evading review" applies in the election law context. *See*, *e.g.*, *Krislov v. Rednour*, 226 F.3d 851, 858 (7th Cir. 2000) ("This exception to the mootness doctrine is applicable . . . where the challenged situation is likely to recur and the same complaining party would be subjected to the same adversity."); *Lerman v. Bd. Of Elections*, 232 F.3d 135, 141 (2d Cir. 2000) (same).

will have to make the conscious decision to witness his own petitions despite his now having the knowledge that only persons eligible to vote in the relevant congressional district may serve as petition witnesses and/or be unable to find even one activist residing in the district who is willing to witness a sufficient number of signatures for him, and (5) he will have to reside in a district other than the one in which he is running. Given the degree of speculation inherent in any, let alone all, of these conditions being met, it simply cannot be said that there is a "reasonable expectation" that Lux will ever again be subject to the witness residency requirement of Va. Code § 24.2-506.

Even if the Court were to assume that Lux, with no change in his address, will seek to run for Congress in the Seventh Congressional District in the future; will not receive the nomination of a political party as defined in Va. Code § 24.2-101; will obtain sufficient signatures to raise a colorable claim that at least 1,000 registered voters from the Seventh Congressional District have signed such petitions; and will be the only witness for those petition signatures, it would still be sheer speculation that the requirements of Va. Code § 24.2-506 regarding who may witness candidate petitions would prevent Lux's petitions from

being reviewed because whether Lux will or will not actually reside in the Seventh Congressional District when the next election occurs is presently unknown and unknowable.

Virginia will begin the process of decennial Congressional redistricting in 2011. U.S. Const., art. I, § 2; amend. XIV. In Virginia, the decennial reapportionment is governed by Article II, § 6 of the Virginia Constitution, which provides, in pertinent part, that:

> Members of the House of Representatives of the United States . . . shall be elected from electoral districts established by the General Assembly. Every electoral district shall be composed of contiguous and compact territory and shall be so constituted as to give, as nearly as is practicable, representation in proportion to the population of the district. **The General Assembly shall reapportion the Commonwealth into electoral districts in accordance with this section in the year 2011** and every ten years thereafter.
>
> Any such decennial reapportionment law shall take effect immediately and not be subject to the limitations contained in Article IV, Section 13, of this Constitution.
>
> The districts delineated in the decennial reapportionment law shall be implemented for the November general election for the United States House of Representatives, Senate, or House of Delegates, respectively, that is held immediately prior to the expiration of the term being served in the year that the reapportionment law is required to be enacted . . .

(emphasis added). Thus, pursuant to the Virginia Constitution, redistricting of Virginia's Congressional Districts will occur in 2011, and

therefore, even if the Court were to assume that all of the other factors necessary to subject Lux to the requirements of Va. Code § 24.2-506 will be satisfied in the future, it would still be entirely speculative to conclude that Lux will live outside of the Seventh Congressional District when the next election for Congress is held. Accordingly, he has not met the two prong test for "capable of repetition, yet evading review" set forth by the Supreme Court in *Wisconsin Right to Life*, and this case should be dismissed as moot.

With respect to Lux's supporters, to the extent that they ever had a cognizable Article III case and controversy, it is clear that no such case or controversy exists now. In an earlier filing with this Court, they asserted that their claimed injury was that they were being denied the "opportunity to vote for their preferred candidate" in the 2010 election. (Doc. 8-1 at 12). However, this claimed injury is and was non-existent irrespective of the requirements of Va. Code § 24.2-506. Virginia law allows voters to vote for candidates regardless of whether the candidate appears on the ballot. Lux's supporters, therefore, were free to vote for whomever they chose. *See, e.g.,* Va. Code § 24.2-644(C) (allowing for write-in votes); § 24.2-101 (including a "write-in candidate" within the

definition of "candidate"); § 24.2-648 (providing for write-in votes when votes are cast on voting machines rather than paper ballots).

With respect to "capable of repetition, yet evading review," there is simply no issue applicable to Lux's supporters that places them properly before the Court. As residents of the Seventh Congressional District, they were free to circulate and witness petitions for Lux. In fact, it is undisputed that they did so. (J.A. at 7). In any future race, assuming all of the factors listed above for Lux are met, including that he runs in the Seventh Congressional District while living somewhere else, they would presumably remain free to circulate petitions for Lux, witness petitions for Lux, and even vote for Lux. What cannot be assumed, however, is that they are more likely than not to fail to obtain 1,000 signatures unless theirs are combined with Lux's under circumstances that make him ineligible to witness signatures.

II. *Davis* is Controlling in This Candidate Ballot Access Case.

1. Subsequent Decisions of the Supreme Court have not undercut *Davis*.

This is a case in which accurate taxonomy dictates the result. First, as Plaintiffs conceded at oral argument in the district court,

constitutional challenges to state election laws are governed by the balancing test of *Anderson v. Celebrezze*, 460 U.S. 780, 789-90 (1983) (J.A. at 186, 230). Second, in ballot access cases, States are conceded to have a weighty interest in preventing ballot crowding and confusion by insuring the existence of minimum support for would-be candidates. *Lubin v. Panish*, 415 U.S. 709, 715 (1974); *Munro v. Socialist Workers Party*, 479 U.S. 189 (1986). The voter eligibility requirement for witnessing signatures for candidates under review here has been consistently and authoritatively held to be a valid ballot access measure because it insures the existence of a minimum of activist support within the relevant territory. *Davis*, 766 F.2d 865; *Libertarian Party of Va. v. Virginia State Bd. of Elections*, 2010 U.S. Dist. LEXIS 97177 (E.D. Va.). *See also Wood v. Quinn*, 104 F. Supp. 2d 611 (E.D. Va.), *aff'd* 230 F.3d 1356 (4th Cir. 2000) (upholding state-wide and district signature requirements); *Amarasinghe v. Quinn*, 148 F. Supp. 2d 630 (E.D. Va. 2001) (upholding 1,000 Congressional signature requirement).

Davis is controlling on a subsequent panel of the Fourth Circuit unless, as Plaintiffs contend, "'a superseding contrary decision of the Supreme Court' has 'specifically rejected the reasoning on which [the

prior decision] was based.'" (Appellant's Br. at 10) (quoting *Etheridge v. Norfolk & W. Ry. Co.*, 9 F.3d 1087, 1090 (4th Cir. 1993)).

Although Plaintiffs contend that *Meyer v. Grant*, 486 U.S. 414 (1988), and *Buckley v. American Constitutional Law Foundation, Inc.*, 525 U.S. 182, 186-87 (1999), undercut *Davis*, neither case specifically rejected the reasoning of *Davis* or of any of the candidate ballot access decisions of the Supreme Court on which *Davis* rests. As Chief Justice Roberts noted, the Supreme Court was "careful in *American Constitutional Law Foundation* to differentiate between registration requirements, which were before the Court, and residency requirements, which were not. *Id.* at 197.'" 177 L. Ed. 2d at 1047.

In fact, Lux and his supporters have tacitly conceded as much. In their filing with Chief Justice Roberts, they conceded that "the Supreme Court has not addressed, head-on, the issue of whether petition circulation activity may be constitutionally restricted by reference to the residency of the circulator." Appl. for a Writ of Inj. Pending Appeal at 4-5.

The circumstances supporting the continued vitality of *Davis* actually are even stronger than as stated by the in-chambers opinion in

Lux. *American Constitutional Law Foundation* contains strong *dicta* approving voter eligibility requirements. In answer to then Chief Justice Rehnquist's concerns that felons and minors could become petition circulators under the majority's opinion, the majority distinguished between an unconstitutional requirement that ballot initiative circulators be registered voters and the presumptively constitutional requirement that circulators be eligible to vote. As the majority opinion declared,

> Persons eligible to vote, we note, would not include "convicted drug felons who have been denied the franchise as part of their punishment," see *post*, at [229] (Rehnquist, C.J., dissenting), and could similarly be barred from circulating petitions. The dissent's concern that hordes of "convicted drug dealers," *post*, at [230], will swell the ranks of petition circulators, unstoppable by legitimate state regulation, is therefore undue. 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. See *post*, at 231-232. This familiar parade of dreadful calls to mind wise counsel: "Judges and lawyers live on the slippery slope of analogies; they are not supposed to ski to the bottom."

525 U.S. at 194 n.16. (citation omitted).

Meyer and *American Constitutional Law Foundation* do not provide a rule of decision contrary to *Davis*. In *Meyer,* the use of paid political circulators to obtain signatures for a ballot initiative was

treated as a form of political speech under *Buckley v. Valeo*, 424 U.S. 1 (1976). The Court itself distinguished between the core political speech interest that it protected by striking down Colorado's ban on paid ballot initiative circulators, 486 U.S. at 421-22 (". . . the circulation of a petition involves the type of interactive communication concerning political change that is appropriately described as 'core political speech'"), and the ballot access interests that it did not subject to heightened scrutiny. *Id.* at 425-26 (The ballot access "interest is adequately protected by the requirement that no initiative be placed on the ballot unless the required number of signatures has been obtained.").

Here, Lux's speech interest was not burdened at all because he was acting under the misapprehension that he was a qualified witness and therefore said whatever he chose. Nor would his speech interest have been burdened at all if he had correctly understood the requirements of the statute. Obtaining a voter-eligible witness, who does not even have to be registered to vote, and who is resident in the district to witness the signatures he collected, would not have changed

the content of any of Lux's political speech. Unlike the restriction in *Meyer*, the limitation is not on circulators, but on witnesses.

American Constitutional Law Foundation was another ballot initiative case. Indeed, it involved the same Colorado law reviewed in *Meyer,* including post-*Meyer* amendments to it. Although the Court agreed with the Tenth Circuit in striking down a voter registration requirement as an unreasonable burden on core political speech, it recognized that States have valid interests in preventing fraud and in regulating ballot access. 525 U.S. at 187, 191. With respect to initiative petitions, the Court recognized that "initiative-petition circulators . . . resemble handbill distributors, in that both seek to promote public support for a particular issue or position." *Id.* at 190-91. On the other hand, "[i]nitiative-petition circulators also resemble candidate-petition signature gatherers . . . for both seek ballot access." *Id.* at 191. Under this latter heading both the Tenth Circuit and the Supreme Court "upheld, as reasonable regulations of the ballot-initiative process, [an] age restriction, [a] six-month limit on petition circulation, and [an] affidavit requirement." *Id.* With respect to a voter eligibility requirement, the Court stated in strong *dicta* that such a

requirement could be imposed to prevent felons, minors and aliens from acting as collectors. *Id.* at 194 n.16. The suggestion of the Supreme Court that a voter eligibility requirement would not trigger strict scrutiny, but is instead presumptively reasonable and valid, does not undercut *Davis*. Instead it supports both the holding and rationale of *Davis*.

2. The Fact that a Circuit Split has occurred Subsequent to the *Davis* decision does not deprive it of binding force.

Because initiative petitioning is as much like handbill cases as it is like pure ballot access cases, decisions applying the *Meyer* framework to initiative cases are not instructive with respect to this simple ballot access witnessing case. *See Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023 (10th Cir. 2008); *Chandler v. City of Arvada*, 292 F.3d 1236 (10th Cir. 2002).

Those circuits that have reflexively applied the *Meyer* framework to simple candidate ballot access cases involving residency requirements for petition circulators have "skied down the slippery slope of analogy" without noticing the dicta in *American Constitutional Law Foundation*, which identifies voter-qualification requirements as

presumptively constitutional. *See Nader v. Blackwell*, 545 F.3d 459, 474-76 (6th Cir. 2008); *Nader v. Brewer*, 531 F.3d 1028, 1034-38 (9th Cir. 2008); *Lerman v. Bd. of Elections*, 232 F.3d 135, 138 (2d Cir. 2000) (rejecting district court's distinction between initiative petitions and candidate petitions without noticing the relevant Supreme Court dicta); *Krislov v. Rednour*, 226 F.3d 851, 856, 859-72 (7th Cir. 2000). *See also 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 (S.D. Miss. 1999)); *Initiative & Referendum Inst. v. Secretary of State*, 1999 U.S. Dist. LEXIS 22071 (D. Maine)); *Hart v. Secretary of State*, 715 A.2d 165 (Me. 1998) (upholding State residency requirement).

Because the cases striking down state or district residency requirements treat candidate petitioning as core political speech, they are in tension with *Davis,* although none of the cases cite *Davis*. Two things should be noticed. First, both the Tenth Circuit and the majority opinion in *American Constitutional Law Foundation* assumed, without deciding, that residency requirements for circulators were constitutional. 525 U.S. at 197 ("In sum, assuming that a residence

requirement would be upheld as a needful integrity-policing measure – a question we, like the Tenth Circuit, see 120 F.3d at 1100, have no occasion to decide because the parties have not placed the matter of residence at issue – the added registration requirement is not warranted."). *See also* 525 U.S. at 211 ("The Tenth Circuit assumed, and so do I, that the State has a compelling interest in ensuring that all circulators are residents.") (Thomas, J., concurring in the result). The fact that the courts that have struck down residency requirements have done so contrary to the expectation of the Supreme Court suggests that they are over-reading *American Constitutional Law Foundation*.

Second, it should be noted that *American Constitutional Law Foundation* treats the presumptively constitutional voter eligibility issue as separate and distinct from the residency requirement. So the existing circuit split is on the question whether candidate petitions involve core political speech, not whether a circulator voter eligibility requirement is constitutional, or whether a witness voter eligibility requirement is valid.

Of course, in the end, it does not matter whether the circuit split is deep or shallow. The fact that circuit courts subsequent to *Davis* may

have opened up a split does not make *Davis* any less binding as authority within this circuit. Cf. *Lux v. Rodrigues*, 561 U.S. ___, 177 L. Ed. 2d at 1047 ("Lux himself notes that the Court of Appeals appear to be reaching divergent results in this area, at least with respect to the validity of state residence requirements. Accordingly, even if the reasoning in *Meyer* and *American Constitutional Law Foundation* does support Lux's claim, it cannot be said that his right to relief is 'indisputably clear.'"). (Roberts, C.J., in chambers) (citation omitted).

This Court in *Davis* found that a voter eligibility requirement for witnessing candidate petitions is a valid ballot access requirement. No decision of the Supreme Court undercuts this ruling. Instead, *American Constitutional Law Foundation* supports this result in *dicta* even in the context of initiative petitions, which implicate more speech interests than candidate petitions or signature witnessing. As a consequence, the Supreme Court has neither undercut nor foreshadowed that it would reverse *Davis* should it choose to address the circuit split. Therefore, *Davis* remains binding authority just as the district court found.

III. The Virginia Voter-Eligible Witness Requirement Does Not Burden Core Political Speech.

Even if *Davis* had never been written, the district court's conclusion that the voter-eligible witnessing requirement does not severely burden core political speech would remain valid. As the district court said,

> The district residency requirement at issue imposes no restrictions on Lux as a candidate or advocate, but only as a signature attester. The only limitation imposed by Section 24.2-506 is that the person witnessing the signatures be a resident of the congressional district in which the candidate is seeking office. The witness need not even be a registered voter in that district, as long as they reside there. Moreover, there is no requirement that petition circulators wear identification badges or register in any fashion. Nonresident independent candidates, such as Lux, may use as many qualified surrogates as they wish to collect signatures and promote their candidacy.

(J.A. 234-35). There is no sense in which witnessing restrictions are themselves burdens on speech *qua* speech based upon the handbill analogy available in ballot initiative circulator cases. Because the witnessing limitation is a reasonable regulation of ballot access based upon a requirement to show minimal activist support, the decision below is sound and due to be affirmed.

CONCLUSION

This case should be dismissed as moot. In the alternative the judgment of the district court should be affirmed.

Respectfully submitted,

KENNETH T. CUCCINELLI, II
Attorney General of Virginia

E. DUNCAN GETCHELL, JR.
Solicitor General
dgetchell@oag.state.va.us
Counsel of Record

STEPHEN M. HALL
Assistant Attorney General

November 23, 2010

CHARLES E. JAMES, JR.
Chief Deputy Attorney General

WESLEY G. RUSSELL, JR.
Deputy Attorney General
wrussell@oag.state.va.us
Counsel of Record

OFFICE OF THE ATTORNEY GENERAL
900 East Main Street
Richmond, Virginia 23219
Telephone: (804) 786-2436
Facsimile: (804) 786-1991

Counsel for Defendants-Appellees

CERTIFICATE OF COMPLIANCE WITH RULE 32(A)

1. This brief has been prepared using fourteen point, proportionally spaced, serif typeface: Microsoft Word 2007, Century Schoolbook, 14 point.

2. Exclusive of the table of contents, table of authorities and the certificate of service, this brief contains 5,400 words.

/s/E. Duncan Getchell, Jr.
Counsel

CERTIFICATE OF SERVICE

I hereby certify that on November 23, 2010, I electronically filed the foregoing BRIEF OF APPELLEE with the United States Court of Appeals for the Fourth Circuit using the Court's CM/ECF system, which will send a notification of such filing to registered CM/ECF users. I further certify that on November 23, 2010, eight paper copies were hand-delivered to the Clerk's Office and two copies were mailed by first-class, postage prepaid, U.S. Mail upon the attorneys listed as follows:

James Bopp, Jr.
Scott F. Bieniek
Jared Haynie
Josiah Neeley
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, IN 47807
Telephone: (812) 232-2434
Facsimile: (812) 235-3685

/s/ E. Duncan Getchell, Jr.
Counsel