No. 10-A _______

In the Supreme Court of the United States

HERB LUX, STEPHEN CRUSE, ANDREW MIKEL,
AND EUGENE FORET, *Appellants*

v.

NANCY RODRIGUES, JEAN CUNNINGHAM,
AND HAROLD PYON, MEMBERS OF THE VIRGINIA STATE
BOARD OF ELECTIONS, IN THEIR OFFICIAL CAPACITIES, *Appellees*,

Appeal from Case No. 10-1997 in the
U.S. Court of Appeals for the Fourth Circuit

and

Case No. 3:10-CV-482-HEH in the
U.S. District Court for the Eastern District of Virginia

Application of Herb Lux, Stephen Cruse, Andrew Mikel, and Eugene Foret for a Writ of Injunction Pending Appeal

To the Honorable John G. Roberts

Chief Justice of the United States and
Circuit Justice for the Fourth Circuit

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September 20, 2010

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Application for a Writ of Injunction Pending Appeal

To the Honorable John G. Roberts, Chief Justice of the United States and Circuit Justice for the U.S. Court of Appeals for the Fourth Circuit:

Appellants Herb Lux, Stephen Cruse, Andrew Mikel, and Eugene Foret respectfully move for an order granting a writ of injunction, pending final action by the Fourth Circuit and possible review by the U.S. Supreme Court. This case presents the question of whether under the U.S. Constitution Herb Lux, a candidate for the U.S. House of Representatives, may be restrained from circulating signature petitions in furtherance of *his own candidacy*.

The Supreme Court has long recognized that petition circulation is "the most effective, fundamental, and perhaps economical avenue of political discourse" when it comes to election campaigns. *Meyer v. Grant*, 486 U.S. 414, 424 (1988). Yet under Virginia Code section 24.2-506, candidates for the U.S. House of Representatives such as Herb Lux are prohibited from circulating their own candidate petitions if they do not reside in the district for which they are campaigning. This despite the fact that the Constitution explicitly allows individuals to be elected to Congress from districts in which they do not reside. U.S. Const. art. I, § 2. Unless this Court issues a writ of injunction requiring the Virginia State Board of Elections to count and verify the signatures collected by Lux himself (and to place his name on the ballot should the verification process reveal that Lux obtained the statutorily required number of valid signatures), Lux will suffer irreparable injury because he will have forever lost the opportunity of running for office in the 2010 election (and his supporters will likewise have lost the opportunity to help their preferred candidate get elected). Because Virginia Code section 24.2-506 unconstitutionally infringes the First Amendment rights of Lux and his supporters, the provision must be

immediately enjoined.

Appellants have exhausted all possibilities of securing injunctive relief from the Fourth Circuit *in time to allow Lux to appear on the November ballot*. The U.S. District Court for the Eastern District of Virginia denied Appellants' motion for a preliminary injunction and granted Appellees' motion to dismiss the case under Federal Rule of Civil Procedure 12(b)(6). And the Fourth Circuit denied, without comment, Appellants' motion for an injunction pending appeal. Moreover, the Fourth Circuit has set the briefing schedule for considering the appeal of the district court's decision, but that schedule will not allow the Fourth Circuit to consider the merits of the case before the November election. Copies of (1) the Fourth Circuit's order denying Appellants' motion for an injunction pending appeal, (2) the Fourth Circuit's briefing schedule for the pending appeal, and (3) the District Court's opinion, are attached hereto.

Facts and Procedural History

Appellant Herb Lux is a candidate for the U.S. House of Representatives in Virginia's Seventh Congressional District. (District Court Opinion [hereinafter "Opinion"] at 2.) Lux, however, lives in the neighboring First Congressional District. (*Id.*)

Lux, an independent candidate, desires to have his name included on the November ballot. To appear on the ballot, Virginia law requires independent candidates for the U.S. House of Representatives to file a statement of qualification, a declaration of candidacy, and a petition signed by 1,000 qualified voters. Va. Code § 24.2-501, -505, -506. Each signature must be "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." *Id.* § 24.2-506 ("district-residency requirement") (emphasis added). For candidates for the U.S. House of Representatives, this means that all

petition circulators must live within the congressional district.

Lux timely filed a statement of qualification, declaration of candidacy, and seventy-eight candidate petitions, bearing approximately 1,220 signatures. (Opinion at 2.) On their face, the petitions contain a sufficient number of signatures to qualify Lux for the ballot. Virginia Code § 24.2-506(2). Sixty-three candidate petitions, bearing approximately 1,063 signatures, were circulated and witnessed by Lux. (Opinion at 2.) The remaining fifteen candidate petitions, bearing approximately 157 signatures, were circulated on behalf of Lux by residents of the Seventh District. (Opinion at 3.) Appellants Stephen Cruse, Andrew Mikel, and Eugene Foret are residents of the Seventh District and circulated at least one petition. (Opinion at 3.) Foret also signed Lux's petition as a qualified voter from the Seventh District. (Compl. ¶ 9.)

On June 21, the Board notified Lux that all petitions bearing his name as circulator would be excluded from the verification process. (Opinion at 3.) Citing section 24.2-506, the Board concluded that Lux is not qualified to circulate petitions—even for his own candidacy—because he is not a resident of the Seventh District. (Opinion at 3.) Lux cannot qualify for the ballot if the 1,063 signatures that he collected are excluded. Va. Code § 24.2-506(2).

On June 23, the Board issued its final ruling. (Compl. ¶ 33; Ex. C.) The Board noted that it only verified signatures witnessed by a resident of the Seventh District. (Compl. Ex. C.) The Board reaffirmed its prior ruling that Lux is ineligible to circulate petitions for his own candidacy because he is not a resident of the Seventh District. (Compl. ¶ 34; Ex. C.)

On July 13, 2010, Herb Lux and three of his supporters filed a Verified Complaint for declaratory and injunctive relief. (Dkts. 1 & 2.) The State Board of Elections opposed Lux and his supporters' motion for preliminary injunction and filed a motion to dismiss pursuant to Rule

12(b)(6). (Dkts. 10 & 13.)

On August 26, the district court entered an order granting the Board's motion to dismiss and denying the motion for a preliminary injunction. (Dkt. 30). Lux and his supporters filed a notice of appeal on August 27. (Dkt. 31). On September 3, Lux and his supporters filed a motion for an injunction pending appeal in the Fourth Circuit. On September 15, the Fourth Circuit issued an order denying the motion for an injunction pending appeal. The order provided no reasoning. On September 16, the Fourth Circuit issued a briefing schedule for the appeal, but under that schedule the court will not reach the merits of the case before the November election. The practical reality of the Fourth Circuit's order is that Lux and his supporters will suffer irreparable injury to their First Amendment rights before they can so much as appeal, and preserve the issues in this case for that appeal.

Applicants intend to seek certiorari from this Court and believe there is a reasonable probability that the Court will ultimately grant such review. The Court has recently addressed a number of cases that dealt with citizen participation in the electoral process, in one form or another. *See, e.g.*, *Doe v. Reed*, 130 S. Ct. 2811 (2010) (petition signing); *Citizens United v. FEC*, 130 S. Ct. 876 (2010) (independent expenditures for or against candidates). Acting as a petition circulator is another avenue available to citizens who want to participate in the democratic process. It is core political speech because it "involves both the expression of a desire for political change and discussion of the merits of the proposed change." *Meyer*, 486 U.S. at 421–22.

Furthermore, 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. That is an important issue because circulator-residency restrictions prevent citizens from engaging in core political speech based on nothing more than their place of residence. Such restrictions are directly contrary to the First Amendment's purpose of facilitating public debate that is "uninhibited, robust, and wide-open." *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964). "A speaker's ability to persuade . . . provides no basis for government regulation of free and open public debate on what the laws should be," *Citizens United*, 130 S. Ct. at 923 (Roberts, C.J., concurring), and neither should a speaker's residence.

Standards for Granting a Writ of Injunction

The authority of this Court to grant a writ of injunction is found in the All Writs Act, 28 U.S.C. § 1651(a), which reads:

> The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law.

Although Applicants here are not seeking a stay, it is useful to review the standards used by the Court in assessing stay applications. The Court evaluates four factors to determine whether to grant a stay: (1) whether the stay applicant will be irreparably injured absent a stay; (2) whether the applicant has made a strong showing that he is likely to succeed on the merits; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. *Nken v. Holder*, 129 S. Ct. 1749, 1761 (2009). The factors are substantially the same as those considered in a preliminary injunction analysis, and the first two factors are the most critical. *Id.*

Applicants here seek more than a stay (which would operate upon the judicial proceeding itself); they seek injunctive relief. *See id.* at 1757–58. The grant of a writ of injunction, unlike a

stay, "does not simply suspend judicial alteration of the status quo but grants judicial intervention that has been withheld by lower courts." *Ohio Citizens for Responsible Energy, Inc. v. Nuclear Regulatory Comm'n*, 479 U.S. 1312, 1313 (1986) (Scalia, J., Circuit Justice). It therefore "demands a significantly higher justification than that described in . . . stay cases." *Id.* The most significant difference is that rather than having to make a "strong showing" of likelihood of success on the merits (the standard in stay cases), the Court will not issue a writ of injunction unless the legal rights at issue are "indisputably clear." *Turner Broad. Sys., Inc. v. FCC*, 507 U.S. 1301, 1301 (1993) (Rehnquist, C.J., Circuit Justice) (citation and internal quotation marks omitted). Applicants here meet the "significantly higher justification" required for the issuance of a writ of injunction because, as will be shown below, it is indisputably clear that a district-residency restriction that prevents *the candidate himself* from circulating his own petitions is unconstitutional.

Argument

A. Absent Swift Relief, Applicants Will Suffer Immediate and Irreparable Injury.

"The loss of First Amendment freedoms, even for minimal periods of time, constitute[s] irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373 (1976). Assuming that Lux has a constitutional right to circulate his own signature petitions, and that his supporters have a constitutional right to sign such petitions, the Applicants will suffer irreparable injury if this Court does not immediately order the injunctive relief requested herein.

Here, the irreparable harm is particularly acute because Virginia's district-residency requirement, as applied, has prevented Lux—an otherwise qualified candidate for Congress—from circulating his own signature petitions, and consequently, from qualifying for

the November ballot. In briefing before the Fourth Circuit, the Commonwealth maintained that all thirteen local electoral boards in the Seventh Congressional District have already either "sent their ballots to the printer or had their voting machines programmed." (Defs.-Appellees Resp. to Emergency Mot. for Prelim. Inj. 8.)

The harm to Applicants is truly irreparable because if this Court does not grant the relief sought by Lux and his supporters, Lux's name 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 have lost the opportunity to help their preferred candidate get elected). In short, the 2010 general election will happen only once. Lux may indeed have a chance to run for office again in the future, but each election cycle is different and the opportunity to run in *this election* will be lost unless he gets swift relief.

B. It Is Indisputably Clear that Applicants Will Ultimately Prevail on the Merits.

The First Amendment, applicable to the States through the Fourteenth Amendment, provides that "Congress shall make no law . . . abridging the freedom of speech." U.S. Const. amend. I. The Supreme Court has consistently held that constitutional challenges to specific provisions of a state's election laws cannot be resolved by any "litmus-paper test" that will separate valid from invalid restrictions.

> Instead, a court must resolve such a challenge by an analytical process that parallels its work in ordinary litigation. It must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is

unconstitutional.

Anderson v. Celebrezze, 460 U.S. 780, 789 (1983). *See also Doe v. Reed*, 130 S. Ct. 2811, 2814 (2010) ("[T]he strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights." (internal quotation marks omitted) (*quoting Davis v. FEC*, 128 S. Ct. 2759, 2775 (2008)).

Applying the *Celebrezze* balancing test, the Court has consistently held that laws that severely burden speech and association must be narrowly tailored to a compelling governmental interest. *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1191 (2008); *Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 582 (2000); *Buckley v. Am. Constitutional Law Found., Inc.,* 525 U.S. 182, 192 n.12 (1999) (*ACLF*); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992).

1. The Supreme Court's Decisions in *Meyer* and *ACLF* Provide the Appropriate Framework for Analyzing the Case.

The balancing test announced in *Celebrezze* provides the framework for analyzing election regulations generally. *Meyer v. Grant*, 486 U.S. 414 (1988), and *Buckley v. American Constitutional Law Foundation* ("*ACLF*"), 525 U.S. 182 (1999), provide the specific framework for analyzing *petition circulation regulations*.

a. *Meyer v. Grant.*

In *Meyer v. Grant*, the Supreme Court clarified that restrictions on petition circulation are subject to strict scrutiny and rejected the notion that such restrictions serve any governmental interest in demonstrating a sufficient level of activist support. In a unanimous decision, the Court

held that petition circulation is "core political speech" because it "involves both the expression of a desire for political change and discussion of the merits of the proposed change." *Id.* at 421–22. As *Meyer* noted, petition circulation is "the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication." *Id.* at 424.

The Court therefore held that restrictions on petition circulation imposed several substantial burdens on First Amendment rights. First, the Court held that prohibiting paid circulators limited the number of voices capable of carrying the message, the hours circulators can speak, and as a result, the size of the audience that can be reached. *Id.* at 422–23. Second, the restriction reduced the chances of qualifying for the ballot, making it less likely that the subject of the petition will become the focus of statewide discussion. *Id.* at 423. In short, restrictions on petition circulation reduce the "total quantum of speech on a public issue," *id.* at 423, a concept completely foreign to the First Amendment's goal of prohibiting uninhibited and robust public debate. *See Buckley v. Valeo*, 424 U.S. 1, 14 (1976).

Meyer explicitly rejected the argument that the burdens were minimal because the statute left other avenues of expression open. 486 U.S. at 424 ("That appellees remain free to employ other means to disseminate their ideas does not take their speech through petition circulators outside the bounds of First Amendment protection.").

From *Meyer*, it is clear that restrictions on petition circulation are not mere ballot access requirements, but are direct restraints on speech. The First Amendment protections in this context are at their "zenith," and the government's burden is "well-nigh insurmountable." *Meyer*, 486 U.S. at 425. In light of the substantial burdens, *Meyer* explained that restrictions on petition circulation must be "closely scrutinized and narrowly construed," the hallmarks of strict-scrutiny

analysis. *Id.* at 423.

In an attempt to satisfy this high burden, Colorado argued the restriction on paid petition circulators advanced its interest in "making sure that an initiative has sufficient grass roots support to be placed on the ballot." *Id.* at 425. Rejecting this argument, the Supreme Court noted that the modicum of support interest was "adequately protected by the requirement that no initiative proposal may be placed on the ballot unless the required number of signatures has been obtained." *Id.* at 425–26. Because the restriction on paid petition circulators imposed a severe burden on core political speech and was not narrowly tailored to a compelling government interest, the provision was unconstitutional.

b. *Buckley v. American Constitutional Law Foundation* (*ACLF*).

Eleven years later, in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999) (*ACLF*), the Court affirmed *Meyer*'s holding that (1) "[p]etition circulation . . . is 'core political speech,' because it involves 'interactive communication concerning political change,'" *id.* at 186 (*quoting Meyer*, 486 U.S. at 422), and that (2) First Amendment protection for petition circulation is "at its zenith," *id.* at 187 (*quoting Meyer*, 486 U.S. at 425). *ACLF* held that Colorado's voter-registration requirement imposed on petition circulators "significantly inhibit[ed] communication with voters about proposed political change." *Id.* at 192. As in *Meyer*, the focus was on the number of circulators *excluded*, and the Court noted that Colorado "drastically reduce[d] the number of persons, both volunteer and paid, available to circulate petitions." *Id.* at 193.[1]

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[1] The Colorado statute excluded approximately 17% of Colorado voters from the ranks of eligible petition circulators. *ACLF*, 525 U.S. at 193 (1.9 million registered voters in Colorado, and at least 400,000 persons *eligible to vote* but not registered). Virginia's district-residency

The Court affirmed that such a reduction imposed several substantial burdens on protected First Amendment activity:

> [Colorado's voter-registration requirement] produces a speech diminution of the very kind produced by the ban on paid circulators at issue in *Meyer*. . . . [It] decreases the pool of potential circulators as certainly as that pool is decreased by the prohibition of payment to circulators. Both provisions "limi[t] the number of voices who will convey [the initiative proponents'] message" and, consequently, cut down "the size of the audience [proponents] can reach." In this case, as in *Meyer*, the requirement "imposes a burden on political expression that the State has failed to justify."

Id. at 194–95 (citations and footnote omitted). And the Court once again rejected the notion that the burdens were less severe because other avenues of speech remained open. *Id.* at 195 (rejecting argument that burdens were less severe because it was "exceptionally easy to register to vote").

Colorado argued the law was necessary to "ensure that circulators will be amenable to the Secretary of State's subpoena power, which in these matters does not extend beyond the State's borders." *Id.* at 196. The Court's judgment, however, was "informed by other means Colorado employ[ed] to accomplish its regulatory purposes," *id.* at 192, and in that light, the Court held, Colorado's "interest in reaching law violators . . . [was] served by the requirement, upheld below, that each circulator submit an affidavit setting out, among several particulars, [his or her residential address]," *id.* The Court held that this address attestation adequately addressed Colorado's interest in ensuring that circulators were amenable to the state's subpoena power, and therefore struck the voter-registration requirement as an unnecessary restriction on speech. *Id.*

The Court also described what it called "an arsenal of safeguards" that were still available

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requirement excludes far more potential petition circulators.

to Colorado, post-*ACLF*, to address its "substantial interests in regulating the ballot-initiative process." *Id.* at 204–05. Among them, the Court noted that "[t]o ensure grass roots support, Colorado conditions placement of an initiative proposal on the ballot on the proponent's submission of [a certain number of] valid signatures." *Id.* at 205.

2. Circuit Courts Have Unanimously Held that *Meyer* and *ACLF* Control the Analysis in Assessing the Constitutionality of Circulator-Residency Requirements.

Every federal circuit court that has considered circulator-residency requirements since *Meyer* and *ACLF* has held that *Meyer* and *ACLF* control. *See Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1027–31 (10th Cir. 2008) (applying *Meyer-ACLF* framework to state-residency requirement); *Nader v. Blackwell*, 545 F.3d 459, 474–77 (6th Cir. 2008) (applying *Meyer-ACLF* framework to state-residency and voter-registration requirements); *Nader v. Brewer*, 531 F.3d 1028, 1034–38 (9th Cir. 2008) (applying *Meyer-ACLF* framework to state-residency requirement); *Chandler v. City of Arvada*, 292 F.3d 1236, 1241–44 (10th Cir. 2002) (applying *Meyer-ACLF* framework to city-residency requirement); *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 615–17 (8th Cir. 2001) (applying *Meyer-ACLF* framework to state-residency requirement); *Lerman v. Bd. of Elections in the City of New York*, 232 F.3d 135, 145–53 (2d Cir. 2000) (applying *Meyer-ACLF* framework to political-subdivision-residency requirement); *Krislov v. Rednour*, 226 F.3d 851, 858–66 (7th Cir. 2000) (applying *Meyer-ACLF* framework to district-residency and voter-registration requirements).

Insofar as Applicants are aware, not a single court *in any jurisdiction* has held—as the District Court held below—that circulator-residency restrictions are merely "ballot access provisions," (Opinion at 14), that "should generally be upheld," (*id.* at 13).

In the closely analogous case of *Krislov v. Rednour*, 226 F.3d 851, 856, 859–62 (7th Cir. 2000), the Seventh Circuit invalidated an Illinois law which required petition circulators to be residents and registered voters of the same congressional district for which the candidate was seeking office. Consistent with *Meyer* and *ACLF*, the court explained that the restriction imposed a severe burden by inhibiting the right to ballot access, limiting the candidates' ability to associate with a class of circulators, limiting the candidates' ability to choose the most effective means of communication, and reducing the candidates' ability to disseminate a political message to a wider audience. *Id.* at 860. *Krislov* held that the district-residency requirement imposed a severe burden because it excluded millions of potential petition circulators, thereby reducing the number of individuals capable of disseminating the candidates' message and the potential audience that they could reach.[2] *Id.* at 860–62.

Circuit courts have split over whether a *state*-residency requirement can be constitutional after *Meyer* and *ACLF*. *Compare, e.g.*, *Nader v. Brewer*, 531 F.3d 1028, 1034–38 (9th Cir. 2008) (invalidating state-residency requirement), *with Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 615–17 (8th Cir. 2001) (upholding state-residency requirement). The rationale used to uphold *state*-residency requirements, however, does not support the conclusion that a *district*-residency requirement is constitutional. For example, in *Jaeger*, the Eighth Circuit upheld North Dakota's *state*-residency requirement because it advanced the state's "compelling interest in

[2] The congressional candidate in *Krislov* was required to submit 660 signatures, *Krislov*, 226 F.3d at 859, approximately 340 *less* than the 1,000 valid signatures required of congressional candidates in Virginia, Va. Code § 24.2-506(2) (2010).

preventing fraud" by "ensuring that circulators answer to the Secretary's subpoena power."[3] 241 F.3d at 616. A *district*-residency requirement, by contrast, does not advance an anti-fraud interest because a state's subpoena power applies equally to all state residents, regardless of the congressional district in which they reside. Therefore, *Jaeger* only serves to reinforce the illegitimacy of a *district*-residency restriction.

In sum, *Meyer* and *ACLF* control a court's analysis of the constitutionality of petition circulation restrictions. Both decisions strongly support Applicants' arguments on the merits. In addition, a circuit-split has developed as to the constitutionality of circulator-residency requirements. Only two circuits—the Fourth and the Eighth—have upheld such restrictions, and the Eighth Circuit is alone in doing so after *Meyer* and *ACLF*. *Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 615–17 (8th Cir. 2001) (upholding state-residency requirement); *Libertarian Party of Virginia v. Davis*, 766 F.2d 865 (4th Cir. 1985) (district-residency requirement). On the other hand, five circuits—the Second, Sixth, Seventh, Ninth, and Tenth—have struck them down. *Yes on Term Limits, Inc. v. Savage*, 550 F.3d 1023, 1027–31 (10th Cir. 2008) (striking state-residency requirement); *Nader v. Blackwell*, 545 F.3d 459, 474–77 (6th Cir. 2008) (same); *Nader v. Brewer*, 531 F.3d 1028, 1034–38 (9th Cir. 2008) (same); *Chandler v. City of Arvada*, 292 F.3d 1236, 1241–44 (10th Cir. 2002) (striking city-residency requirement); *Lerman v. Bd. of Elections in the City of New York*, 232 F.3d 135, 145–53 (2d Cir. 2000) (striking political-subdivision-residency requirement); *Krislov v. Rednour*, 226 F.3d 851, 858–66 (7th Cir. 2000) (striking district-residency requirement).

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[3] The circuit split created by *Jaeger* may be explained by the fact that North Dakota cited an incident where over 17,000 signatures had to be invalidated because of fraudulent activities by out-of-state petition circulators. 241 F.3d at 616.

Whatever dispute there may be as to the constitutionality of *state*-residency restrictions, *not a single court anywhere has upheld a district-residency restriction*. *See Preserve Shorecliff Homeowners v. City of San Clemente*, 158 Cal. App. 4th 1427, 1443–44 (2008) ("We are aware of no case since [*ACLF*] and its quickly-gestated progeny of *Krislov*, *Lerman*, and [an Arizona court of appeals case] that has upheld a requirement of circulator residency in a given *political subdivision*." (emphasis in original)). That fact alone is strong evidence that Virginia's district-residency requirement is indisputably unconstitutional.

3. The Fourth Circuit Is Alone (and Is Wrong) in Upholding a *District*-Residency Requirement.

Twenty-five years ago (before *Meyer* and *ACLF* were decided), in a case called *Libertarian Party of Virginia v. Davis*, 766 F.2d 865, 869–70 (4th Cir. 1985), the Fourth Circuit upheld, against a First Amendment challenge, a Virginia statute that required circulators to reside in *the same district* in which they circulated petitions. The statute there was distinct from the one at issue here because the statute in *Davis* governed the ability of presidential electors—not candidates for the U.S. House of Representatives—to qualify for the ballot. *See Libertarian Party of Virginia v. Davis*, 591 F. Supp. 1561 (E.D. Va. 1984). More importantly, though, the rationale the court used to uphold the district-residency requirement is flawed and is directly contrary to the Supreme Court's analysis in *Meyer* and *ACLF*.

On an unopposed motion to dismiss, the district court in *Davis* found that the district-residency requirement served an interest in showing "some indication of geographic as well as numerical support before devoting space on the ballot to a political aspirant" because "it demonstrate[s] that within each congressional district there is at least one 'activist' sufficiently

motivated to shoulder the burden of witnessing signatures." *Id.* at 1564.[4] On appeal, the Fourth Circuit adopted the district court's rationale, stating that:

> [T]he requirement that the witness be from the same congressional district as the petition signer serves the important purpose of assuring "some indication of geographic as well as numerical support" by demonstrating "that within each congressional district there is at least one 'activist' sufficiently motivated to shoulder the burden of witnessing signatures." It is difficult to imagine how the state could accomplish these objectives by less restrictive means.

Davis, 766 F.2d at 869–70 (citation omitted).

Meyer and *ACLF* undermine *Davis* to the point that it cannot possibly be good law. When one applies the appropriate analysis, it is plain that Applicants have made a strong showing that they will likely prevail on the merits.

Meyer and *ACLF* are contrary to *Davis* on two grounds. First, *Meyer* and *ACLF* held that restrictions on petition circulation are subject to strict scrutiny because they impose substantial burdens on core political speech. *ACLF*, 525 U.S. at 192 n.12; *see Meyer*, 486 U.S. at 425. *Davis*, however, failed to subject the district-residency requirement to strict scrutiny. Indeed, the district court in *Davis* described the burden of the residency restriction as "light." *Davis*, 591 F. Supp. at 1564.

Second, *Meyer* and *ACLF* held that the state's interest in ensuring that candidates demonstrate a modicum of support is adequately served by the signature threshold, not by placing restrictions on who may serve as petition circulators. *ACLF*, 525 U.S. at 204–05; *Meyer*, 486 U.S. at 425–26. *Davis*, on the other hand, held that requiring circulators to be from the same congressional district as the signer "serve[d] the important purpose of assuring some indication

[4] According to the district court, the decision was reached "quickly . . . [on a] hurried study of the pertinent Supreme Court opinions." *Davis*, 591 F. Supp. at 1565.

of geographic as well as numerical support by demonstrating that within each congressional district there is at least one 'activist' sufficiently motivated to shoulder the burden of witnessing signatures." *Davis*, 766 F.2d at 869–70 (citation omitted). *Meyer* held, however, that a state may not prohibit a candidate from using paid circulators rather than activists to gather the necessary signatures, *Meyer*, 486 U.S. at 428, and therefore, the fact that a petition circulator for a candidate resides in a particular congressional district gives no indication of the support for that candidate in that district.

4. Virginia's District-Residency Requirement Is Indisputably Unconstitutional.

Virginia's district-residency requirement is subject to strict scrutiny because it severely burdens core political speech. *Wash. State Grange v. Wash. State Republican Party*, 128 S. Ct. 1184, 1191 (2008); *Clingman v. Beaver*, 544 U.S. 581, 586 (2005); *Cal. Democratic Party v. Jones*, 530 U.S. 567, 582 (2000); *ACLF*, 525 U.S. at 192 n.12; *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997); *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); see also *Krislov v. Rednour*, 226 F.3d 851, 863 (7th Cir. 2000). The district-residency requirement is unconstitutional because it is not narrowly tailored to any compelling government interest.

a. Petition Circulation Is Core Political Speech.

The district court below incorrectly assessed the impact of the district-residency requirement on protected First Amendment expression and association by suggesting the restriction "imposed no restrictions on Lux as a candidate or advocate, but only as a signature attester." (Opinion at 11.) As a result, the district court referred to the district-residency requirement as a "ballot access provision" (*id.* at 14) and subjected it to rational basis review (*id.*

at 15).[5]

The district court's analysis is inconsistent with *Meyer* and *ACLF*, which held that petition circulation is core political speech because it involves "interactive communication concerning political change." *ACLF*, 525 U.S. at 186 (*quoting Meyer*, 486 U.S. at 422). Indeed, *Meyer* recognized that petition circulation is "the most effective, fundamental, and perhaps economical avenue of political discourse, direct one-on-one communication." *Meyer*, 486 U.S. at 424. Because such political discourse is at the heart of the First Amendment, the First Amendment's protections are at their "zenith." *ACLF*, 525 U.S. at 187.

Like the statutes in *Meyer* and *ACLF*, the district-residency requirement prohibits a class of individuals from serving as petition circulators. The result of a prohibition against paid circulators (*Meyer*), non-registered voters (*ACLF*), or non-district residents (Va. Code § 24.2-506) is the same—a class of persons is prohibited from engaging in core political speech. And because the burdens of such a restriction are severe, the restriction is subject to strict scrutiny. *ACLF*, 525 U.S. at 192 n.12; *Meyer*, 486 U.S. at 425; *see also Krislov*, 226 F.3d at 863.

b. Virginia's District-Residency Requirement Is Subject to Strict Scrutiny.

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[5] The district court relied on *Burdick v. Takushi*, 504 U.S. 428, 434 (1992), and applied rational basis review to the district-residency requirement. (Opinion at 13.) *Burdick* held that "when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, 'the State's important regulatory interests are generally sufficient to justify' the restrictions." *Burdick*, 504 U.S. at 424 (citation omitted).

In *ACLF*, the Supreme Court held that restrictions on petition circulation are subject to strict scrutiny and refused to characterize such restrictions as "reasonable, non-discriminatory" restrictions. *ACLF*, 525 U.S. at 192–97. By identifying petition circulation as core political speech, *ACLF* held that regulations that prohibit people from circulating petitions are different in kind from ballot access provisions, such as signature thresholds or filing deadlines. *See ACLF*, 525 U.S. at 204–05.

The district-residency requirement imposes severe burdens on protected First Amendment activity. *ACLF*, 525 U.S. at 194–95; *Meyer*, 486 U.S. at 422–23. It reduces the number of persons capable of carrying Herb Lux's message, and therefore, the size of the audience that Lux and his supporters can reach. *ACLF*, 525 U.S. at 194–95; *Meyer*, 486 U.S. at 422–23. It also decreases the likelihood that Lux will qualify for the ballot, making it more difficult for Lux and his supporters to make his campaign the focus of state-wide attention. *ACLF*, 525 U.S. at 194–95; *Meyer*, 486 U.S. at 422–23. And the district-residency requirement is particularly burdensome as applied to Lux because it prevents him, an otherwise qualified candidate, from circulating his *own* petitions.

The district court concluded that the burdens of the district-residency requirement are not severe because Virginia's statute leaves people free to pursue other more burdensome avenues of communication.[6] (Opinion at 11–12.) *Meyer* rejected this approach, noting that the focus is on what activity is *excluded*, not what activity remains permissible under the statute.[7] *Meyer*, 486 U.S. at 424. The government need not completely ban speech to run afoul of the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech."

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[6] The district court discounted the burdens, noting that "[t]he witness need not even be a registered voter" and added that "there is no requirement that petition circulators wear identification badges or register in any fashion." (Opinion at 11-12.) This is the type of analysis that was rejected by *Meyer*. 486 U.S. at 418 (rejecting district court's holding that statute did not burden First Amendment rights because it did not place any restraint on their own expression or measurably impair efforts to place initiatives on the ballot).

[7] "[P]rohibiting candidates from using signatures gathered by forbidden circulators does not specifically preclude these circulators from speaking for the candidates. But by making an invitation to sign the petition a thoroughly futile act, it does prevent some highly valuable speech from having any real effect. Robbed of the incentive of possibly obtaining a valid signature, candidates will be unlikely to utilize non-registered, non-resident circulators to convey their political message to the public." *Krislov*, 226 F.3d at 861 n.5.

U.S. Const. amend. I.

The First Amendment protects Lux's ability to choose what he believes to be the most effective method of advancing his candidacy. *Meyer*, 486 U.S. at 424; *Cal. Democratic Party*, 530 U.S. at 581. The record demonstrates that candidates prefer to circulate their own petitions. For example, Catherine Crabill, a former candidate for the U.S. House, noted that voters were impressed that she personally collected signatures. (Dkt. 24, Decl. of Crabill ¶ 9 (They said it was "refreshing . . . to see me out there personally gathering these signatures in the hot, humid, uncomfortable conditions.").) Floyd Bayne, another independent candidate running for Congress in the Seventh District, personally collected nearly 1,700 of his 1,991 signatures. (Dkt. 27-1, Lux Decl. Ex. 1.) In other words, personal petition circulation by a candidate is "the most effective, fundamental, and perhaps economical avenue of political discourse." *Meyer*, 486 U.S. at 424.

The district-residency requirement also excludes a substantial number of potential petition circulators. Virginia's voting-age population exceeds 5 million,[8] but only 480,000 live within the Seventh District.[9] In other words, the statute prohibits 91% of Virginians from circulating petitions on behalf of Herb Lux. By comparison, the registered-voter restriction, ruled unconstitutional in *ACLF*, prevented only 17% of the voting-age population from circulating

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[8] U.S. Dep't of Commerce, *Profiles of General Demographic Characteristics: 2000 Census of Population and Housing: Virginia* 1 (Table DP-1) (May 2001), *available at* www2.census.gov/census_2000/datasets/100_and_sample_profile/Virginia/2kh51.pdf.

[9] U.S. Dep't of Commerce, *Profiles of General Demographic Characteristics: 2000 Census of Population and Housing: Congressional District 7, Virginia (110th Congress)* (Table DP-1), *available at* www.factfinder.census.gov (110th Congressional District Summary File (100-Percent)).

petitions.[10] 525 U.S. at 193 (2.3 million eligible voters, 400,000 unregistered). If a 17% reduction is severe, then a 91% reduction must also be severe.[11]

The district court ignored the fact that the district-residency requirement "drastically reduces the number of persons, both volunteer and paid, available to circulate petitions," *ACLF*, 525 U.S. at 193, and thus has the "inevitable effect of reducing the total quantum of speech on a public issue," *Meyer*, 486 U.S. at 423. The central burden identified in *Meyer* and *ACLF* was absent from the district court's analysis.

The district-residency requirement also restricts Lux's ability to associate with individuals who sign his petition for the purpose of working together to elicit political change. *See Meyer*, 486 U.S. at 421–22 (First Amendment protects right to advocate political change). By the same token, it restricts his supporters' ability to associate in a meaningful way with the candidate of their choice, Lux, for the purpose of eliciting political change (i.e., by helping their preferred candidate appear on the ballot). To these non-candidate citizens, this act of association—aimed at directly affecting public policy by influencing who is elected to public office—may be the most significant and fundamental avenue of political expression at their disposal. *See Celebrezze*, 460 U.S. at 787–88 ("[V]oters can assert their preferences only through candidates or parties or both. . . . [A]n election campaign is an effective platform for the expression of views on the issues of

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[10] *ACLF* struck the voter registration requirement even though it was "exceptionally easy to register." *ACLF*, 525 U.S. at 195 (internal quotation marks omitted). The only way Lux can become a qualified circulator is to move his residence to the Seventh District—a significantly more difficult undertaking than registering to vote.

[11] For an independent candidate, with modest financial resources, and who relies on significant volunteer support, any reduction in the pool of eligible circulators is a substantial burden. *Krislov*, 226 F.3d at 862.

the day, and a candidate serves as a rallying-point for like-minded citizens."). The district court opinion ignores the burdens on Lux's supporters, three of whom joined the suit, who have been denied the right to help their preferred candidate appear on the ballot and ultimately win the election.

Finally, the district-residency requirement limits the size of the audience that Appellants can reach and has the effect of making it less likely that Lux and his supporters will garner enough signatures to qualify Lux for the ballot, thus preventing them from making Lux's candidacy the focus of district-, state-, and nation-wide discussion. *See Meyer*, 486 U.S. at 423 (recognizing burden imposed by Colorado law that limited plaintiffs' ability to make their ballot proposal "the focus of statewide discussion"); *ACLF*, 525 U.S. at 194, 197 (statute "produce[d] a speech diminution" akin to that in *Meyer*).

In sum, Virginia's district-residency requirement severely burdens protected freedoms of speech and association and is therefore subject to strict scrutiny.

c. Virginia's District-Residency Requirement Fails Strict Scrutiny.

Virginia's district-residency requirement fails strict scrutiny because Virginia failed to demonstrate that it is narrowly tailored to a compelling state interest. A law can fail to be narrowly tailored in one of several ways. It may be overinclusive if it restricts speech that does not implicate the government's compelling interest in the statute. *Simon & Schuster v. N.Y. State Crime Victims Bd.*, 502 U.S. 105, 121 (1991). It may be underinclusive if it fails to restrict speech that *does* implicate the government's interest. *Republican Party of Minn. v. White*, 536 U.S. 765, 779–80 (2002). And finally, it is not narrowly tailored if the state's compelling interest can be achieved through a less restrictive means. *Rutan v. Republican Party of Ill.*, 497 U.S. 62,

75 (1990).

Relying on *Davis*, the district court below held that the district-residency requirement served a single interest—"assuring some indication of geographic as well as numerical support by demonstrating that within each congressional district there is at least one 'activist' sufficiently motivated to shoulder the burden of witnessing signatures." (Opinion at 12 (*quoting Davis*, 766 F.2d at 869–70).) This is just another way of describing the "modicum-of-support interest," which is designed to prevent frivolous candidacies and overcrowding on the ballot.[12] (Opinion at 14.) *Meyer* held, however, that the modicum-of-support interest is adequately protected by the signature requirement. 486 U.S. at 425–26; *see also ACLF*, 525 U.S. at 205 (signature requirement protects interest in requiring candidates to show "grass roots support"). Here, Virginia's requirement that Lux submit at least 1,000 valid signatures from qualified voters adequately protects Virginia's modicum-of-support interest.

Moreover, the district-residency requirement is underinclusive because it does not require all candidates to demonstrate "activist" support. Candidates that live within the district are permitted to circulate their own petitions. Va. Code § 24.2-506. In fact, there are two independent candidates in the Seventh District race. Both men satisfy the qualifications for Congress set forth in the Constitution, and both personally collected more than 1,000 signatures.

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[12] Virginia failed to present any evidence that it has a ballot-crowding problem. (*See* Decl. of Richard Winger ¶ 6 ("Virginia has never suffered from a crowded ballot in general elections for the United States House of Representatives. The most crowded general election ballot for any regularly-scheduled United States House of Representatives election in Virginia history was in 1904 when there were six candidates in Virginia's Third Congressional District.").)

Moreover, even if Virginia had such a problem, the district-residency requirement remains unconstitutional because the signature requirement is a less restrictive alternative. *Meyer*, 486 U.S. at 425–26.

(Dkt. 27, Decl. of Lux ¶ 4.) However, only one has been certified for the ballot. The only difference between the two is that Floyd Bayne resides within the Seventh District and Herb Lux does not. If Virginia was serious about requiring activist support, it would prohibit all candidates from circulating their own petitions. *See White*, 536 U.S. at 780.

Tthe district-residency requirement is also underinclusive because it does not prohibit paid petition circulators. By allowing candidates to pay petition circulators, Virginia allows candidates to secure a place on the ballot without demonstrating any activist support—paid-petition circulators work for a financial reward, not to demonstrate support for a candidate. The hiring of paid circulators reflects nothing more than the strength of a candidate's financial backing. *See White*, 536 U.S. at 780 ("[Statute] is so woefully underinclusive as to render belief in that purpose a challenge to the credulous.").

The circuit split that has developed with respect to *state*-residency requirements also demonstrates that a *district*-residency requirement is unconstitutional. *Compare Yes on Term Limits*, 550 U.S. at 1030–31 (striking state-residency requirement), *with Jaeger*, 241 F.3d at 616–17 (upholding state-residency requirement). Every case that has examined a state-residency requirement has done so through the lens of the state's interest in policing fraud by ensuring that petition circulators are subject to the state's subpoena power. *See*, *e.g.*, *Jaeger*, 241 F.3d at 616–17; *Kean v. Clark*, 56 F. Supp. 2d 719, 733 (S.D. Miss. 1999). The Board correctly conceded that such an interest cannot support a restriction that limits petition circulation to a political subdivision within a state (i.e., a *district*-residency requirement) because the state's subpoena power extends to all persons within its borders. (Defs.' Mem. of Law in Opp'n to Pls.' Mot. for Prelim. Inj. 9.) Thus, *Jaeger*'s rationale for upholding a *state*-residency requirement is

inapposite as applied to a *district*-residency requirement.

Finally, in briefing before the district court, the Board tried to downplay the underinclusiveness of the statute by arguing that "from [its] view, a candidate can be an activist circulator in his own district if necessary," and that "the thrust of *Davis* was to have *someone in the district who will actively promote the candidacy*." (Defs.' Br. in Support of their Mot. to Dismiss 19 (emphasis in original).) Such a justification, however, is nothing more than disguised political protectionism. Its unabashed aim is to "help[ ] . . . prevent non-residents from influencing politics within the district." *See Lerman*, 232 F.3d at 152. Far from being compelling, such an interest is not legitimate at all because it contravenes the underlying intent and purpose of the First Amendment. *Id.*[13] The Second Circuit explained:

> A desire to fence out non-residents' political speech—and to prevent both residents and non-residents from associating for political purposes across district boundaries—simply cannot be reconciled with the First Amendment's purpose of ensuring "the widest possible dissemination of information from diverse and antagonistic sources."

Id. (*quoting Krislov*, 226 F.3d at 866); *see also Yes on Term Limits*, 550 F.3d at 1029 n.2 (rejecting state's purported interest in "restricting the process of self-government to members of its own community" and adding that to accept such an interest would have "far-reaching consequences" (internal quotation marks omitted)); *Krislov*, 226 F.3d at 866 ("question[ing the] legitimacy" of a state's interest in "preventing citizens of other States from having any influence" on its elections).

Virginia is not the first state to argue that circulator-residency restrictions are a necessary

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[13] It is important to note that a congressman's vote affects everyone in the Commonwealth, and for that matter in the country, not just those individuals within the boundary of a district.

means to advance an interest in ensuring that only district voters be allowed to influence district politics. *See, e.g.*, *Krislov*, 226 F.3d at 865. This argument, however, conflates a state's legitimate interest in ensuring that district residents alone be permitted to *select and elect* their representatives, with the wholly illegitimate interest of *banning non-resident political speech*.[14] Because Virginia's district-residency requirement advances only the latter, illegitimate interest, it cannot survive strict scrutiny. For this reason, Appellants are likely to succeed on the merits of this appeal.

C. The Issuance of a Writ of Injunction Will Not Substantially Harm the Commonwealth.

The harm that will befall the Commonwealth of Virginia, should it be required to count the signatures Lux submitted (and ultimately, to place his name on the ballot if he ends up meeting the signature requirement), is significantly less, and is in fact different in kind, than the harm that Applicants will incur absent an injunction. It is true that the Commonwealth will likely have to re-print some ballots (in the Seventh Congressional District), but that is a small price to pay to uphold the constitutional rights of the Applicants here and to see justice done. This

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[14] To the extent the Commonwealth contends that it has an interest in ensuring that only district residents be permitted to *select and elect* their representatives, Appellants agree. *See Supreme Court of N.H. v. Piper*, 470 U.S. 274, 282 n.13 (1985) ("A State may restrict to its residents, for example, both the right to vote, and the right to hold state elective office." (citation omitted)); *Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 68–69 (1978) ("[A] government unit may legitimately restrict the right to participate in its political processes to those who reside in its borders."). But that valid interest is fully protected by several other provisions of Virginia law. Specifically, Virginia prohibits non-district residents from signing nominating petitions, voting in primary elections, and voting in the general election. Va. Code §§ 24.2-506 (only qualified voters may sign candidate petitions); 24.2-101 (qualified voter must be a resident of the Commonwealth and of the precinct in which he offers to vote); 24.2-400 (a qualified voter who is registered to vote is "entitled to vote in the precinct where he resides"); 24.2-530 (who may vote in primary).

relatively modest financial burden, and other administrative inconveniences in having to count and verify Lux's signatures, amount to the entirety of the Commonwealth's potential harm. They are not enough to warrant denying what the Constitution mandates.

D. The Public Interest Is Served by Issuing a Writ of Injunction.

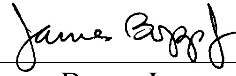
Finally, the public interest is served by allowing Lux, a qualified candidate for office in every way, to appear on the ballot. Even at this relatively late juncture, there is ample time to count the signatures and, if necessary, re-print the ballots with Lux's name on them. Lux moved as fast as he possibly could after receiving word, on June 21, 2010, that the signatures he personally collected would not be counted. It would be manifestly unjust if he were prevented from appearing on the ballot merely because his address is not within the Seventh Congressional District. There is no justification for a requirement that keeps *the candidate himself* from being able to circulate his own petitions. On November 2, Virginians in the Seventh Congressional District may or may choose Lux as their representative in Congress, but they should not be precluded from making that decision by the enforcement of a law that is indisputably unconstitutional.

Conclusion

For the foregoing reasons, Applicants request that an order be entered requiring the Virginia State Board of Elections to immediately count and verify the signatures Lux personally collected and, if there are at least 1,000 valid signatures, to place Lux's name on the ballot in the Seventh Congressional District.

September 20, 2010

Respectfully Submitted,



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No. 10-A _______

In the Supreme Court of the United States

HERB LUX, STEPHEN CRUSE, ANDREW MIKEL,
AND EUGENE FORET, ***Appellants***

v.

NANCY RODRIGUES, JEAN CUNNINGHAM,
AND HAROLD PYON, MEMBERS OF THE VIRGINIA STATE
BOARD OF ELECTIONS, IN THEIR OFFICIAL CAPACITIES, ***Appellees*****,**

Appeal from Case No. 10-1997 in the
U.S. Court of Appeals for the Fourth Circuit

and

Case No. 3:10-CV-482-HEH in the
U.S. District Court for the Eastern District of Virginia

Application of Herb Lux, Stephen Cruse, Andrew Mikel, and Eugene Foret for a Stay in the Form of an Injunction Pending Appeal

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To the Honorable John G. Roberts

Chief Justice of the United States and
Circuit Justice for the Fourth Circuit

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September 20, 2010

Certificate of Service

I, James Bopp, Jr., a member of the bar of this court, certify that on September 20, 2010, I served a copy of the *Application of Herb Lux, Stephen Cruse, Andrew Mikel, and Eugene Foret for a Writ of Injunction Pending Appeal*, together with the *Appendix*, with the following individuals at the addresses listed below by placing a copy for delivery by Federal Express, and served a courtesy copy of the same via email upon the following persons:

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