Record No. 10-2175

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

LIBERTARIAN PARTY OF VIRGINIA, MATTHEW MOSLEY, WILBUR WOOD, WILLIAM REDPATH, CATHERINE BARRETT and ROBERT BENEDICT,

Plaintiffs-Appellants,

v.

VIRGINIA STATE BOARD OF ELECTIONS,

Defendant-Appellee.

On Appeal from the United States District Court
For the Eastern District of Virginia
Alexandria Division

BRIEF OF DEFENDANT-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 R. MCCULLOUGH
Senior Appellate Counsel

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

Counsel for Defendant-Appellee

December 30, 2010

CORPORATE DISCLOSURE STATEMENT

Defendant-Appellee, the Virginia State Board of Elections, is an Agency of the Commonwealth of Virginia. Given its 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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JURISDICTIONAL STATEMENT

The State Board of Elections timely asserted sovereign immunity below. A final judgment disposing of all claims with respect to all parties was entered in the district court on September 16, 2010 in favor of defendant against plaintiffs. (J.A. at 123). The judgment was entered to give effect to an order dismissing the complaint on the grounds that it was barred by the Eleventh Amendment and failed to state a claim upon which relief could be granted. (J.A. at 122). Although plaintiffs timely filed a notice of appeal to this Court on October 16, 2010, (J.A. at 124), the sovereign immunity of the Commonwealth and its agencies deprives this Court of jurisdiction because there is no Article III case or controversy to resolve.

STATEMENT OF THE ISSUES

1. Is this case barred by sovereign immunity?

2. If not, is Virginia Code § 24.2-506 constitutional?

STATEMENT OF THE CASE

Virginia 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).

On June 3, 2010 plaintiffs filed this suit seeking declaratory and injunctive relief against the voter eligibility requirement for petition witnesses found in Va. Code § 24.2-506. (J.A. at 5-11). The State Board of Elections moved to dismiss and plaintiffs moved for summary judgment. (J.A. at 2). After a September 10, 2010, hearing, the district

court dismissed the complaint. (J.A. at 122). Judgment was entered September 16, 2010 (J.A. at 123), and a notice of appeal was filed on October 16, 2010. (J.A. at 124).

STATEMENT OF FACTS

On or about June 4, 2010 Matthew Mosley filed with the State Board of Elections petitions in support of his candidacy containing fewer than 1,500 signatures, some 873 of which were witnessed by petition circulators who are residents of Virginia but are not residents of the 8th Congressional District. (J.A. at 46). By letter to Mosley dated June 28, 2010, the State Board of Elections informed Mosley that he had failed to qualify as a candidate because he had not submitted a sufficient numbers of verified signatures. (J.A. at 48). To be a verified signature, the signature must belong to a "qualified voter," *i.e.*, a person qualified and registered to vote in the congressional district in question, **and** must "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." Va. Code § 24.2-506. In the letter, the State Board of Elections noted that, consistent with its standard practice, it

did not even attempt to verify signatures on the petitions that had been witnessed by persons who did not meet the witness requirement of Va. Code § 24.2-506.[1] (J.A. at 48).

Plaintiffs filed suit in the United States District Court for the eastern District of Virginia, challenging the constitutionality of Virginia's requirement that petition witnesses be eligible to vote. (J.A. at 5-11). Nowhere in the complaint did plaintiffs challenge the validity of the requirement that 1,000 verified signatures be collected by June 8, 2010 or allege that, but for the witness eligibility requirement, Mosley would have obtained 1,000 verified signatures. (*Id*.)

With respect to sovereign immunity, plaintiffs argued below that *Ex parte Young*, 209 U.S. 123 (1908), applies even when a state agency is sued solely in its own name so long as the relief sought is injunctive and prospective. (J.A. at 41). Plaintiff also stated: "If a determination were made that the plaintiffs should have resorted to the legal fiction of suing the Board in their official capacities rather than the Board as an entity, plaintiffs would seek to amend their complaint accordingly."

---

[1] Although no formal count has been completed, the State Board of Elections doubts that 1,000 verified signatures have been submitted.

(J.A. at 41). However, they have never actually moved to amend their complaint, leaving the State Board of Elections as the sole party-defendant.

On appeal, plaintiffs argue from the text of the Eleventh Amendment, in apparent ignorance of *Hans v. Louisiana*, 134 U.S. 1 (1890), that citizens of the same state can sue the State *eo nomine*. (Opening Br. at 6). They also argue that *Lerman v. Bd. of Elections*, 232 F.3d 135 (2d Cir. 2000), permits suits against election boards in their own name. (Opening Br. at 7). Of course, sovereign immunity can be waived, and *Lerman* nowhere discusses sovereign immunity or indicates that it was even raised by the defendants in that case.

SUMMARY OF ARGUMENT

The district court correctly found that the plaintiffs' claims are barred because plaintiffs sued an agency of the Commonwealth of Virginia in its own name. Plaintiffs' argument made below and on appeal that *Ex parte Young*, 209 U.S. 123, permits suit against state agencies in their own name so long as the relief sought is injunctive and prospective is an obvious misreading of *Ex parte Young*. The argument raised for the first time on appeal that the Eleventh Amendment and

associated principles of sovereign immunity do not bar suits by citizens against their own state is foreclosed by *Hans v. Louisiana*, 134 U.S. 1, and its progeny.

Should this Court reach the merits of plaintiffs' claim that Virginia's voter eligibility requirement for those witnessing signatures on ballot access petitions is invalid, it should affirm the district court's judgment that the requirement is valid under *Libertarian Party of Virginia v. Davis*, 766 F.2d 865 (4th Cir. 1985). That decision has been reinforced and not undercut by subsequent Supreme Court authority and is binding on subsequent panels of this Court.

I. PLAINTIFFS' CLAIMS ARE BARRED BY ELEVENTH AMENDMENT SOVEREIGN IMMUNITY.

The Eleventh Amendment and associated concepts of sovereign immunity bar suits brought by individuals against a State and its agencies whether the individual is a citizen of the same or a different State. *Hans*, 134 U.S. 1. *See also Kitchen v. Upshaw*, 286 F.3d 179, 183 n. 2 (4th Cir. 2002); *Bragg v. W.Va. Coal Ass'n.*, 248 F.3d 275, 291 (4th Cir. 2001); *Litman v. George Mason University*, 186 F.3d 544, 549 (4th Cir. 1999) (Eleventh Amendment "precludes citizens from bringing suits

in federal court against their own states."). Accordingly, the argument plaintiffs raise for the first time on appeal, that the Eleventh Amendment does not bar their claim because four of the five individual plaintiffs are residents of Virginia (Opening Br. at 6), is simply wrong.

The fact that plaintiffs named as defendant a state agency rather than the State itself does not alter the analysis. It is well established that not only are suits naming a State barred by the Eleventh Amendment, but suits that name state agencies are similarly barred, regardless of the type of relief sought. As the United States Supreme Court held in *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 100-01 (1984),

> It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment. See, *e.g., Florida Dept. of Health and Rehabilitative Services* v. *Florida Nursing Home Assn.*, 450 U.S. 147 (1981) *(per curiam); Alabama* v. *Pugh*, 438 U.S. 781 (1978) *(per curiam).* This jurisdictional bar applies regardless of the nature of the relief sought. See, *e.g., Missouri* v. *Fiske*, 290 U.S. 18, 27 (1933) ("Expressly applying to suits in equity as well as at law, the Amendment necessarily embraces demands for the enforcement of equitable rights and the prosecution of equitable remedies when these are asserted and prosecuted by an individual against a State").

See also Regents of the Univ. of California v. Doe, 519 U.S. 425, 429 (1997) (Suit is barred "not only [in] actions in which a state is actually named as the defendant, but also certain actions against state agents and state instrumentalities."); *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993) ("Absent waiver, neither a State nor agencies acting under its control may be subject to suit in federal court.") (internal quotation marks and citation omitted); *Alabama v. Pugh*, 438 U.S. 781, 782 (1978) ("There can be no doubt, however, that suit against the State and its Board of Corrections is barred by the Eleventh Amendment, unless Alabama has consented to the filing of such a suit."). Because plaintiffs conceded in their complaint that that the State Board of Elections is established by statute as "the agency responsible for overseeing, supervising and coordinating the administration of elections in Virginia," (J.A. at 7, ¶ 12), there can be no dispute that the State Board of Elections is entitled to the same immunity as the State itself. Thus, the district court correctly held that plaintiffs' claims were barred by sovereign immunity under the Eleventh Amendment.

Plaintiffs argued below that a State or one of its agencies can be sued in its own name under the *Ex parte Young* exception to sovereign immunity so long as only prospective injunctive relief is sought. Once again, this is simply wrong. *Ex parte Young* is a fiction which is triggered by suits against named individuals – not the State or its agencies – for prospective relief arising under federal law. Even then we are instructed that suit against individuals is a necessary but not inevitably a sufficient trigger for *Ex parte Young*. *See Idaho v. Coeur d' Arlene Tribe*, 521 U.S. 261, 267-70 (1997); *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 73-76 (1996).

The failure to follow the fiction by naming individuals is fatal. *See*, *e.g.*, *May v. North Texas State Hosp*., 351 Fed. Appx. 879, 880 (5th Cir. 2009) (dismissing suit because no individual state officer named and, therefore, *Ex parte Young* fiction inapplicable); *Law Offices of Christopher S. Lucas & Assocs. v. Disciplinary Bd. of the S. Ct. of Pa*., 128 Fed. Appx. 235, 237 (3rd Cir. 2005) ("The *Ex Parte Young* exception applies only in actions against individual state officers, and not to state agencies."); *Thompson v. Colorado*, 278 F.3d 1020, 1024-25 (10th Cir. 2001) ("Because no state official has been named as a defendant in this

suit, however, the *Ex Parte Young* exception to Eleventh Amendment immunity is not appropriate."); *Aguilar v. Texas Dep't of Criminal Justice*, 160 F.3d 1052, 1054 (5th Cir. 1998) ("To meet the *Ex Parte Young* exception, a plaintiff's suit alleging a violation of federal law must be brought against individual persons . . . ."). Thus, plaintiffs' decision to sue the State Board of Elections and no individual defendants is fatal to their claims.

Given that the suit against the State Board of Elections is the equivalent to a suit against a State and because the *Ex parte Young* exception does not apply, the only potential exceptions to the State Board of Elections' claim of immunity are abrogation and waiver. However, neither is applicable here, and plaintiffs have not argued that either exception is applicable. Furthermore, this Court has recognized that 42 U.S.C. "§ 1983 does not abrogate Eleventh Amendment immunity." *McConnell v. Adams*, 829 F.2d 1319, 1329 (4th Cir. 1987) (citing *Quern v. Jordan*, 440 U.S. 332, 341 (1979)). *See also Demuren v. Old Dominion Univ.*, 33 F. Supp. 2d 469, 474-75 (E.D. Va.), *aff'd*, 188 F.3d 501 (4th Cir. 1999). Because plaintiffs' claims were brought pursuant to 42 U.S.C. § 1983 (J.A. at 9-10, ¶ 25, 27), it is clear that the

State Board of Elections' Eleventh Amendment immunity has not been abrogated.

And while it is well established that "the state may voluntarily waive its eleventh amendment immunity. . . ," *McConnell*, 829 F.2d at 1328, there is no factual predicate here for such a claim. The State Board of Elections has consistently asserted its Eleventh Amendment immunity both in this Court and in the court below, and plaintiffs have not and could not argue waiver. Thus, the district court correctly held that plaintiffs' claims were barred by sovereign immunity under the Eleventh Amendment.

Although waiver is not an issue in this case, the ability of States and their agencies to waive Eleventh Amendment immunity undermines plaintiffs' reliance on *Lerman v. Bd. of Elections*, 232 F.3d 135, which they cite for the proposition that suits may be brought against "election administration agencies" in their own names. (Opening Br. at 7). In its opinion in *Lerman*, the Second Circuit recites that the defendant electoral board "moved for dismissal pursuant to Fed. R. Civ. P. 12(b)(6) . . . ," but does not suggest that the issue of sovereign immunity was raised. *Lerman*, 232 F.3d at 139. Because the

defendant board in *Lerman* was free to waive its Eleventh Amendment immunity, and apparently chose to do so by not raising the issue, the decision in *Lerman* does not have any bearing on the issue of whether the State Board of Elections is entitled to immunity in this case. Thus, the plaintiffs' reliance on *Lerman* is misplaced, and the district court correctly held that plaintiffs' claims were barred by sovereign immunity under the Eleventh Amendment.

II. SHOULD THIS COURT REACH THE MERITS THE DECISION OF THE DISTRICT COURT IS DUE TO BE AFFIRMED.

A. The prior panel decision of this Court in *Davis* is controlling.

The merits of this case rise or fall on the standard of review. As plaintiffs acknowledge:

> According to the district court, strict scrutiny is not appropriate because the residency requirement at issue is not a severe restriction on plaintiffs' constitutional rights, and plaintiff Mosley does not fall into a suspect class. Rational basis review is appropriate because the residency requirement is a "neutral, non-discriminatory measure designed to ensure efficient and fair elections and to serve an important state interest in protecting the political process and 'avoiding confusion caused by an overcrowded ballot'" (citing *Wood v. Quinn*, 104 F. Supp.2d 611, 614-15 (E.D. Va. 2000)) and to "require candidates to make a

> preliminary showing of substantial support in order to qualify for a place on the ballot, because it is both wasteful and confusing to encumber the ballot with the names of frivolous candidates" (citing *Anderson v. Celebrezze*, 460 U.S. 780, 788 n. 9 (1983)). Further, *Libertarian Party of Virginia v. Davis*, 591 F. Supp. 1561 (E.D. Va. 1984), *aff'd*, 766 F.2d 865 (4th Cir. 1985) is controlling, and supports dismissing this action for failure to state a claim. (App. 110-15).

(Opening Br. at 7-8).

Not only have plaintiffs correctly summarized the decision below, plaintiffs do not contend that the district court's analytic framework is incorrect in a ballot access case. (Opening Br. at 11) ("Voting regulations imposing "severe burdens" must be narrowly tailored to a compelling state interest, but "reasonable, nondiscriminatory restrictions" will usually be justified by "important regulatory interests."). Instead, plaintiffs' claim is that a voter eligibility requirement for signature witnesses burdens core political speech and triggers strict scrutiny. This claim, in turn, is based upon an over-reading of *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 183 (1999), and *Meyer v. Grant*, 486 U.S. 414 (1988).

The voter eligibility requirement for witnessing signatures for candidates of the type in question 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; *Lux v. Rodrigues*, 2010 U.S. Dist. LEXIS 89042 (E.D. Va. 2010). *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 it is overruled by a subsequent en banc opinion of this court or a 'superseding contrary decision of the Supreme Court.'" *Etheridge v. Norfolk & W. Railway Co.*, 9 F.3d 1087, 1090-91 (4th Cir. 1993) (citation omitted) (finding prior panel decision no longer binding because subsequent decision of the United States Supreme Court "specifically rejected the reasoning on which our [prior] decision . . . was based. . . .").

Although plaintiffs contend that *Meyer* and *American Constitutional Law Foundation, Inc.*, 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. In

fact, *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 dreadfuls 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 likewise does 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, *Meyer*, 486 U.S. at 421-22 ("[T]he 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 proposal may be placed on the ballot unless the required number of signatures has been obtained.").

Here, the speech interests of those plaintiffs whose petition signatures were not verified because of their failure to meet the voter eligibility requirement found in Va. Code § 24.2-506 were not burdened at all because they said whatever they pleased in seeking petition signatures. Nor would these speech interests have been burdened at all if the law had been obeyed. Obtaining a voter-eligible witness, who does not even have to be registered to vote, but who is eligible to vote in the district, to witness the collected signatures would not have changed

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

American Constitutional Law Foundation of course was a 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. (citing *Meyers*). 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*.

B. 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 language); *Krislov v. Rednour*, 226 F.3d 851, 856, 859-62 (7th Cir. 2000). *But see Initiative & Referendum Inst. v. Jaeger*, 241 F.3d 614, 615-17 (8th Cir. 2001) (upholding State residency requirement) (citing *Kean v. Clark*, 56 F. Supp. 2d 719 (S.D. Miss. 1999)); *Hart v. Secretary of State*, 715 A.2d 165 (Me. 1998) (same).

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 also be noticed. First, both the Tenth Circuit opinion 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 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 1045, 1047 ("Lux himself notes that the courts 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.

C. Plaintiffs' efforts to Distinguish or otherwise Evade *Davis* are Unsuccessful.

When this Court affirmed the district court in *Davis* it characterized the voter eligibility requirement as "important," saying:

> … the 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." *Libertarian Party of Virginia v. Davis*, 591 F. Supp. at 1564.

Davis, 766 F.2d at 869-70.

Despite plaintiffs' argument to the contrary, the fact that Va. Code § 24.2-506 applies to non-major party candidates for public offices, while the statute at issue in *Davis* has been amended and re-codified as Va. Code § 24.2-543 (2010) and applies to non-major party presidential electors, is of no doctrinal significance. (*See* Opening Br. at 21). The fact that the statute challenged in *Davis* no longer contains an in-district requirement does nothing to weaken the *Davis* rationale. (*Id.*). Nor does it matter that Catherine Barrett is a resident activist (*Id.* at 22 n. 4), because she manifestly was unwilling to "shoulder the burden" to get the necessary signatures as required by *Davis*. Nor is it true that the 1,000 signature requirement renders the voter eligibility requirement unnecessary as a matter of law. *Davis* clearly holds otherwise.

CONCLUSION

This is a garden variety candidate ballot access case. Reasonable regulations are upheld as a matter of course in such cases. That is what happened in *Davis*. That is what happened below. Plaintiffs' attack on *Davis* is premised on an impermissible over-reading of *Meyer* and *American Constitutional Law Foundation*. In this case, however, those merits issues should never be reached because there is an inescapable Eleventh Amendment sovereign immunity bar under *Hans v. Louisiana*. *See Constantine v. Rectors and Visitors of George Mason University*, 411 F.3d 474, 482-83 (4th Cir. 2005) (Eleventh Amendment issue should usually be addressed first.). Wherefore for all the reasons stated above and in the opinion of the district court the judgment should be AFFIRMED.

Respectfully submitted,

/s/ E. Duncan Getchell, Jr.
Counsel

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 R. MCCULLOUGH
Senior Appellate Counsel

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

Counsel for Defendant-Appellee

December 30, 2010

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 4,598 words.

/s/ E. Duncan Getchell, Jr.
Counsel

CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2010, I electronically filed the foregoing BRIEF OF DEFENDANT-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 December 30, 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 following:

Gary Sinawski, Esquire
180 Montague Street
25th Floor
Brooklyn, NY 11201
Telephone: (516) 971-7783
Fax: (347) 721-3166
Email: gsinawski@aol.com

/s/ E. Duncan Getchell, Jr.
Counsel