No. 18-1111

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THE SIXTH CONGRESSIONAL DISTRICT COMMITTEE,

Plaintiff-Appellee

v.

JAMES B. ALCORN, *et al*.

Defendants-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
(1:15-cv-00016)

APPELLEE'S RESPONSE IN OPPOSITION TO APPELLANTS' MOTION FOR A STAY PENDING APPEAL AND FOR EXPEDITED CONSIDERATION OF APPEAL

Appellee the 6th Congressional District Republican Committee (the "Committee"), by counsel, states as follows in response to Appellants' Motion for

a Stay Pending Appeal and for Expedited Consideration of Appeal. [Dkt. 38-1 (the "Motion")].

BACKGROUND

Section 24.2-509(B) of the Code of Virginia (the "Incumbent Protection Act" or "Act") grants incumbent politicians the power to dictate or, at the least, influence the method of nomination to be used by their political parties for the offices they hold. The Act is offensive to the freedom of association guaranteed by the First Amendment to the United States Constitution, which affords political parties the right to determine their internal rules and processes, including those processes by which they select their nominees for public office.

On February 24, 2017, the Committee brought a civil rights action under 42 U.S.C. § 1983 challenging the constitutionality of the Act in the United States District Court for the Western District of Virginia. [D. Ct. Dkt. No. 1] On January 19, 2018, the District Court granted the Committee's Motion for Summary Judgement and entered an Order, [D. Ct. Dkt. No. 58 (the "Injunction Order")], permanently enjoining the enforcement of the Act by Defendants. The Injunction Order was predicated on an Opinion of the same date, in which the District Court held the Act to be is facially unconstitutional. [D. Ct. Dkt. No. 56 (the "Opinion")]

Following the entry of the Injunction Order, Appellants appealed to this Court. In addition, Appellants filed a Motion to Stay Pending Appeal with the

District Court. [D. Ct. Dkt. No. 62] Central to the Appellants' Motion to Stay Pending Appeal was the imminent opening of the statutory window during which party chairpersons could report their chosen methods of nomination to the Virginia Board of Elections. [*Id*. at 1 (citing *Va. Code Ann.* § 24.2-516)] The District Court granted the Appellants' motion and issued an Order dated February 5, 2018 staying enforcement of the Injunction Order during Appellants' appeal in this matter. [D. Ct. Dkt. No. 72, attached as Exhibit A (the "Stay Order")] Accompanying the Stay Order was a Memorandum Opinion of the same date setting out the District Court's rationale for granting a stay. [D. Ct. Dkt. No. 71, attached as Exhibit B (the "Stay Opinion")] In the Stay Opinion, the District Court noted its skepticism of Appellants' likelihood of success on appeal, but held that "a stay could be appropriate if the remaining factors militate in favor of maintaining the status quo." [*Id*. at 2] The District Court concluded that both the Appellants' and the Committee's position on their respective injuries had merit, which required the court to weigh the public interest. [*Id*. at 3] The public interest identified by the District Court was preventing confusion in the electoral process, which was then on the cusp of a critical juncture–the selection of the nomination processes to be used for the November 2018 general election cycle. [*Id*. at 4]

On April 23, 2018, this Court issued a Briefing Order that would have ensured that briefing would be complete on July 16, 2018, well before the next election cycle in which the Act could be invoked. [Dkt. No. 24]

On May 23, 2018, Appellants brought a Suggestion of Mootness before this Court, in which they requested this Court dismiss the appeal without consulting the voluminous record adduced before the District Court. [Dkt. No. 25 (the "Suggestion")] The Suggestion invited this Court to find this appeal to be moot, despite the fact that the District Court held that this case "like others challenging election laws, falls 'comfortably within the established exception to mootness for disputes capable of repetition, yet evading review. '" [Opinion at 32, quoting *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 735 (2008).] Accordingly, the question of mootness was not extraneous to the appeal of this matter, but intrinsic to it.

At the time that Appellants brought the Suggestion, they filed a Motion to Suspend Briefing Schedule with this Court, [Dkt. No. 26], which this Court granted. [Dkt. No. 27]

For its part, the Committee had already brought a Motion to Vacate Stay before the District Court, arguing that with the nomination methods for the November 2018 election cycle determined, there was no longer any possibility that enforcement of the Injunction Order would cause confusion in the electoral process. [D. Ct. Dkt. No. 84] The District Court granted the Committee's motion

and entered an Order vacating the Stay, [D. Ct. Dkt. No. 102], and provided its rationale for doing so in a Memorandum Opinion. [D. Ct. Dkt. No. 101 (the "Vacatur Opinion")]

In the Motion, Appellants ask this Court to reinstate the Stay, despite the District Court's careful consideration of the matter in light of the full record as set out in the Stay Opinion and Vacatur Opinion.

STANDARD OF REVIEW

The factors to be considered by a court when determining whether to grant a stay are:

> (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies.

Hilton v. Braunskill, 481 U.S. 770, 776 (1987) (citations omitted).

"[A]n applicant for a stay bears a heavy burden of persuasion." *Graddick v. Newman*, 453 U.S. 928, 933 (1981). It is critical for a court to bear in mind that a stay is an "intrusion into the ordinary processes of administration and judicial review." *Nken v. Holder*, 556 U.S. 418, 427 (2009). "A stay is not a matter of right, and its issuance depends on the circumstances of a particular case." *Id.* at 420.

An applicant's burden is even higher when the applicant moves an appellate court for a stay previously denied by a trial court. "Ordinarily, when a party seeking a stay makes application to an appellate judge following the denial of a similar motion by a trial judge, the burden of persuasion on the moving party is substantially greater than it was before the trial judge." *Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970); *see also Cumberland Telephone & Telegraph Co. v. Louisiana Public Service Commission*, 260 U.S. 212, 219 (1922).

ARGUMENT

I. Appellants Cannot Establish *Any* of the *Hilton* Factors that Would Weigh in Favor of Reinstating the Stay.

Appellants cannot establish any of the factors that would militate in favor of this Court reinstating the Stay. Accordingly, this Court should reject the Appellants' request to reinstate the Stay.

A. Appellants are not Likely to Succeed on Appeal.

1. Appellants Misconstrue *Hilton*.

In the Motion, Appellants cite *Hilton* for the proposition that "[t]he first [*Hilton*] factor is satisfied '[w]here the State' shows 'a substantial case on the merits.'" [Motion, p. 7] The Appellants' abridged recitation of *Hilton* excises the Supreme Court's caveat that a "substantial case on the merits" suffices only when factors two and four of the stay analysis weigh in the moving party's favor. *Hilton*, 481 U.S. at 778. Otherwise, the movant must make a "strong showing" that it is

likely to prevail on the merits. *See, e.g., Long v. Robinson*, 432 F.2d 977, 979 (4th Cir. 1970); *see also Nken*, 556 U.S. at 435 ("[T]he 'possibility' standard is too lenient."). Applying the proper standard for determining whether the first factor is satisfied in this case, it is clear that it is not.

2. Appellants' Justiciability Arguments are Unavailing.

In the Motion, Appellants argue that "regardless of whether this case was ever justiciable, it has become non-justiciable on appeal." [Motion, p. 7] Specifically, they argue that because the Act "will not apply to [the Committee] before 2022 *at the earliest*" this case is moot. [*Id.*]

As the Committee argued in its Response to Appellants Suggestion of Mootness, Appellants' justiciability argument is incorrect for two reasons. [Dkt. No. 31 (the "Response")] First, Appellants ignore the nature of the injuries caused by the Act, which are ongoing. As the uncontroverted testimony provided by the Committee to the District Court establishes, the very existence of the Act has a distorting effect on political decision making even before it is or even can be invoked. [Opinion at 18 ("The uncontroverted testimony from Jenkins and the committee chairmen shows that the Act need not be formally invoked to affect the campaign planning decisions of the committee-plaintiffs.")] As this Court found in *Miller v. Brown*, 462 F.3d 312 (4th Cir. 2006) ("*Miller I*"), such a distorting effect constitutes an injury-in-fact sufficient to establish standing. Moreover, that

distorting effect continues in the 2020 election cycle. The Committee knows that choosing a primary in 2020 would effectively subject it to the Act for as long as the primary-nominated incumbent chose to stand for re-election. Thus, even in 2020 election cycle the mere existence of the Act will continue to distort the Committee's decision-making related to its core and constitutionally-protected function of selecting the method of nomination for the Republican candidate for the 6th Congressional District. Thus, the Committee's injury is ongoing and the case is not moot.

Second, even were this case moot, the exception to mootness for cases capable of repetition, yet evading review would apply. With regard to the likelihood of repetition required, the Supreme Court could not be clearer:

> Our concern in these cases, as in all others involving potentially moot claims, was whether the controversy was *capable* of repetition and not, as the dissent seems to insist, whether the claimant had demonstrated that a recurrence of the dispute was more probable than not.

Honig v. Doe, 484 U.S. 305, 318 n. 6 (1988) (emphasis in original). In short, the burden on the Committee is not to show a high likelihood of repetition, merely the capability and reasonable expectation of reoccurrence.

The courts have been equally clear that the exception does not require repetition to be imminent. *See Christian Knights of Ku Klux Klan Invisible Empire, Inc. v. District of Columbia*, 972 F.2d 365, 371 (D.C. Cir. 1992) (the Supreme

Court has "considered it sufficient if the events were capable of repetition 'at any time.'") (citing *Washington v. Harper*, 494 U.S. 210, 219 (1990)).

Applying the general standard to election cases, this Court requires merely the "reasonable expectation" that the claimant will be subject to the challenged action in "future election cycles." *Lux v. Judd*, 651 F.3d 396, 399 (4th Cir. 2011). Reasonable expectation requires no more than the "real possibility" of recurrence. *Id.* at 401.

In applying the "real possibility" of recurrence in the context of election laws, the courts often encounter plaintiffs who have stood for office and challenged an election law. Inevitably, the lawsuit spills into the following election cycle. In such cases, the courts must determine whether there is a real possibility that individual will again run for office, and therefore again be subjected to the election law in question. *See, e.g., Int'l Org. of Masters, Mates & Pilots v. Brown*, 498 U.S. 466, 473 (1991) ("[E]ven though [the respondent] lost the election [for a labor union office] by a small margin, the case is not moot. Respondent has run for office before and may well do so again."). The Committee's situation is entirely different from such candidates. The Committee is an inherently political actor; it participates in *every* election cycle. Indeed, its first and most important function is to choose the method of nomination. [Opinion at 45 ("the Party's Plan instructs that the 6th Congressional Committee 'shall determine' the means by which the

Republican candidate is nominated in the district"] The Committee must continue to participate in the political process; it is obligated to do so. Accordingly, there is not only a real possibility, but a virtual certainty, that the Committee will be subjected to the Act's distorting effects during future election cycles—including during the 2020 election cycle, when the Committee will decide whether or not to nominate its candidate by primary.

3. The Act is Clearly Unconstitutional.

Arguing that the Act is constitutional, Appellants state that "[t]he Supreme Court has deemed it 'too plain for argument' that 'a State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in democratic fashion.' *California Democratic Party v. Jones*, 530 U.S. 567, 572 (2000) (internal quotation marks and citations omitted)." [Motion, p. 8] Omitted along with the quotation marks and citations are the Supreme Court's result in that case and its rationale in reaching that result, both of which stand for exactly the opposite proposition than the one advanced by Appellants.

First, the result: in *California Democratic Party* the Supreme Court *struck down* California's mandatory blanket primary statute, on the basis that it violated the First Amendment associational rights of political parties. *Cal. Democratic Party*, 530 U.S. at 586. Far from providing *carte blanche* to the states to intervene

in political parties' processes for choosing their nominees, the Supreme Court enforced a clear constitutional limit on the State's power to do so.

Second, the rationale: the Court "vigorously affirm[ed] the special place the First Amendment reserves for the process by which a political party selects a standard bearer who best represents the party's ideologies and preferences." *Id.* at 576 (citation and quotation marks omitted). Thus, the holding of *California Democratic Party* strongly affirms the First Amendment associational rights of political parties to determine the process by which they choose their nominees.

a. <u>The Act is Subject to Strict Scrutiny</u>.

This Court has held that "[r]egulations that impose a severe burden on association rights are subject to strict scrutiny, and a court applying this level of review may uphold the regulation only if it is narrowly tailored and advances a compelling state interest. However, if a statute imposes only modest burdens, then a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *S.C. Green Party v. S.C. State Election Comm'n*, 612 F.3d 752, 756 (4th Cir. 2010) (internal quotes and citations omitted).

A party's associational rights include the right to choose its leaders and also to choose the process by which those leaders are chosen. *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 229 (1989) ("Freedom of association also encompasses a political party's decisions about the identity of, and the process for

electing, its leaders."). As as the Supreme Court recognized in *California Democratic Party*, the most important leaders of any political party are its nominees for public office. *See also Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 372 (1997) (STEVENS, J., dissenting). Accordingly, the courts consistently apply strict scrutiny when analyzing statutes that intrude into the manner in which political parties select their nominees, whether they uphold such statutes, *Lightfoot v. March Fong Eu*, 964 F.2d 865, 873 (9th Cir. 1992) (applying strict scrutiny in upholding statute requiring use of primary for certain offices), or strike them down. *Cal. Democratic Party*, 530 U.S. at 586 (applying strict scrutiny in striking down blanket primary system because of forced association in nomination process) *and Eu*, 489 U.S. at 233 (applying strict scrutiny in striking down a statute which dictated the manner in which political parties chose their leaders).

b. Appellants Have Not and Cannot Meet Their Burden of Establishing that the Act is Narrowly Tailored to Advance a Compelling State Interest.

Because the Act intrudes into the manner in which the Committee selects its nominee, strict scrutiny applies. Thus, Appellants bear the burden of establishing that it is narrowly tailored to advance a compelling state interest. *See, e.g., Eu*, 489 U.S. at 222. Moreover, that determination "is not to be made in the abstract, by asking whether fairness, privacy, etc., are highly significant values; but rather by

asking whether the *aspect* of fairness, privacy, etc., addressed by the law at issue is highly significant." *Cal. Democratic Party*, 530 U.S. at 584 (emphasis in original). The question is whether the interest asserted by Appellants is compelling "*in the circumstances of this case*." *Id.* (emphasis in original).

It is important to clarify the insurmountable obstacle facing the Appellants. They must make a substantial case on the merits under a strict scrutiny standard. To make this showing, the Appellants re-cast the Incumbent Protection Act as a mandatory primary statute. In doing so, they assert a state interest in the use of primaries for nominations and contend the Act passes constitutional muster under *Californian Democratic Party* as a mandatory primary statute because it "generally" requires a primary. [Motion at 8] However, this argument fails for two reasons.

First, even were the statute a mandatory primary statute, it would still fail because it would create forced association. For a mandatory primary to pass constitutional muster it must not force a political party to associate with those whom it does not wish to associate. *Cal. Democratic Party*, 530 U.S. at 575 ("In no area is political association's right to exclude more important than in the process of selecting its nominee."). The Supreme Court struck down California's mandatory blanket primary precisely because of exactly such impermissible forced association. *Id.* at 577 ("Proposition 198 forces political parties to associate with –

to have their nominees, and hence their positions, determined by – those who, at best, have refused to affiliate with the party and, at worst, have expressly affiliated with a rival. In this respect, it is qualitatively different from a closed primary.").

Virginia law requires that all voters are qualified to participate in a party's primary. *Va. Code Ann.* § 24.2-530. Moreover, the uncontradicted expert testimony adduced by Appellee below established that in the absence of partisan registration, it would be impossible to meaningfully close a state run primary in Virginia. Accordingly, in law and in fact, primaries in Virginia necessarily are open. Accordingly, even if the Act were a mandatory primary statute, it would fail constitutional muster because of forced association.

Second, the Act is not a mandatory primary statute. On its face, the Act never of itself requires a nomination to be made by primary. To the contrary, the Act allows the use of a nomination method other than a primary so long as an incumbent prefers that other method. *Va. Code Ann.* § 24.2-509(B). Indeed, with regard to General Assembly incumbents the Act allows an incumbent to unilaterally dictate a non-primary method if he or she wishes. *Id.*

Moreover, the evidence adduced below shows that incumbents regularly use the Act to select nomination methods other than primaries. "In 2015, at least 27 incumbent state senators exercised their powers to choose their parties' nomination methods. Four of those senators selected party-run methods. In 2013, at least 82

members of the House of Delegates used their power under the Act to select a nomination method, eight of whom selected party-run methods." [Opinion at 15, n. 10 (citations omitted)] Thus, in fact as well as in law, the Act is an incumbent choice statute, not a mandatory primary statute.

Needless to say, Appellants do not asset any state interest, compelling or otherwise, in favoring incumbents. Instead, they mere asserted a state interest in the use of primaries for nominations, without providing any testimony or evidence to make the essential connection between that asserted state interest and the actual text and enforcement of the Act.

And, to be fair, how could they? The text of the Act is against them. As argued above, the Act is not a mandatory primary statute, of the kind upheld in *Lightfoot*, 964 F.2d at 866. The Act is designed not to mandate primaries, but to empower incumbents.

Far from vindicating the interests, such as fairness and participation, that justify state intrusion into the nomination process, *Lightfoot*, 964 F.2d at 872 (mandatory primary statute justified by state's interest in taking "power over the political process from the hands of party bosses and special interest into the hands of the people"), the Act actually makes that process of choosing the method of nomination less participatory and less fair. It takes that power to choosing the method of nomination away from the Committee, constituting of over 30

volunteers who are required by the party's rules to have no personal stake in the outcome of the nomination, and hands it to the single individual who is personally interested in the outcome of the nomination process. *Miller v. Brown*, 502 F.3d 360, 369 (4th Cir. 2007) ("*Miller II*") (when incumbent politician exercises his or her power under the Act, he or she is acting as an individual and not as a representative of his or her political party).

But what really gives the game away is that the Act does not even apply if no incumbent stands for re-election. *Va. Code Ann.* § 24.2-509(B) ("When, under any of the foregoing provisions, no incumbents offer as candidates for reelection to the same office, the method of nomination shall be determined by the political party."). If the interest vindicated by the statute were actually the state's asserted interest in the use of primaries, the Act would apply whether or not an incumbent stands for re-election. The fact that the Act only applies if an incumbent stands for reelection as much as admits that the determining factor here is the interest of incumbents, rather than Appellants' supposed interest in the use of primaries.

Clearly, Appellants have not established that the Act is narrowly tailored to vindicate Appellant's asserted state interest in the use of primaries. Equally clearly, the Act is narrowly tailored to vindicate the private interest of incumbents in influencing the method of nomination for the offices they hold. Accordingly, it

cannot withstand strict scrutiny and the Appellants cannot make out any showing, much less a strong showing, they will succeed on the merits.

4. The Remedy is Supported by the Law and the Record.

The Appellants urge this Court to issue a stay pending appeal on the basis of their argument that the District Court's facial invalidation was overbroad. The Motion does nothing to advocate against the Supreme Court's edict that when courts invalidate statutes, they retain only those portions that are "constitutionally valid." *United States v. Booker*, 543 U.S. 220, 258-59 (2005) (citations omitted). Undertaking this analysis, the District Court concluded that *Broderick v. Oklahoma*, 413 U.S. 601, 612 (1973) compelled invalidation, especially because the Committee had satisfactorily framed the issues in the case. [Opinion at 52, citing *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 958 (1984).] The voluminous record demonstrates Incumbent Protection Act inflicts identical harms upon General Assembly and Congressional committees. Indeed, they suffer injuries for the same reason: it burdens their freedom to order their own internal processes.

Appellants give no reason as to why they are likely to show that *Booker* and *Broderick* do not properly frame the remedy given by the District Court. Accordingly, Appellants have made no showing that they are likely to succeed on the merits.

B. Appellants Will Experience no Injury Absent a Stay.

A state is not injured by an injunction which prevents the enforcement of an unconstitutional statute. To the contrary, such an injunction benefits the state, because a state is not harmed by injunctive relief preventing it from enforcing likely unconstitutional restrictions. *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (internal quotes and citation omitted). Moreover, in *Giovani Carandola*, this Court reviewed a preliminary injunction enjoining the enforcement of a statute. In this case, the parties had the benefit of discovery and their counsel represented at the hearing on cross motions for summary judgment that a trial was not necessary to render a decision in the case. [Opinion at 8 ("Both sides made clear at the October 26 hearing that they anticipate that the court will resolve this case on summary judgment.")] Accordingly, this Court can have even more confidence in the correctness of the District Court's holding that the Incumbent Protection Act is unconstitutional.

Since the Order enjoins the enforcement of a manifestly unconstitutional statute, it does not and cannot cause any harm to Defendants, which are an agency and agents of the Commonwealth. On the contrary, the Order is a form of civic and legal hygiene that benefits the Defendants and, as discussed below, all Virginians.

C. The Committee and Other Parties Interested in the Proceeding Will Be Substantially Injured by the Reinstatement of the Stay.

The crux of Appellant's argument is that the Committee will not suffer injury, and therefore the stay will not impact them. The Committee refutes that argument above, by describing the ongoing injuries to the Committee caused by the Act's distorting effect on its political decision making, and that of potential candidates for the Republican nomination for the 6th Congressional District.

Further, *Nken* and *Hilton* direct courts to consider "whether issuance of the stay will substantially injure the other parties interested in the proceeding." *Nken*, 556 U.S. at 426; *Hilton*, 481 U.S. at 776. It is beyond dispute that the Act burdens General Assembly committees—very offices for which political parties will nominate candidates in February 2019. [Opinion at 53] Indeed, the Act limits General Assembly committees' ability to select a nomination method even *more* than it restricts non-General Assembly committees. General Assembly incumbents have unilateral power to dictate the method of nomination to be used for the offices they hold. *Va. Code Ann.* § 24.2-509(B). Reinstating the stay would injure such committees by depriving them of the benefit of the Permanent Injunction and subjecting them to the Act during the November 2019 election cycle, which begins in February 2019. *Va. Code Ann.* § 24.2-516.

D. The Public Interest Lies in Upholding the District Court's Decision to Vacate the Stay.

The sole case cited by Appellants in arguing that the public interest lies reinstating the Stay is *O'Brien v. Brown*, 409 U.S. 1 (1972), on the basis of the public's interest in "allowing the political processes to function free from judicial supervision." [Motion at 10-11] In *O'Brien* the Supreme Court declined to intervene "in the internal determinations of a national political party, on the eve of its convention, regarding the seating of delegates." *O'Brien*, 409 U.S. at 4. In its decision to refrain from doing was driven in large measure by "[v]ital rights of association guaranteed by the Constitution" which undergirded "the large public interest in allowing the political processes to function free from judicial supervision." *Id.* at 4-5.

The irony of Appellants' reliance on *O'Brien* is not lost on the Committee, given that it is litigating this case to permit the Committee's First Amendment associational rights to function free from outside supervision, influence, or control. In any event, enforcing the Injunction Order does not lead to the kind of intrusive court oversight that would have been required in *O'Brien*. Indeed, the effect of the Injunction Order is entirely negative, merely requiring Appellants to refrain from enforcing the Act in light of its obvious unconstitutionality. It does not require or contemplate this Court or any other court having to administer or oversee elections. *Id*. (declining to oversee the credentials committee of the Democratic National

Convention regarding the seating of delegates). Thus, the only public interest cited by Appellants is not only specious, but actually militates against reinstating the Stay.

On the other hand, the public interest weighs heavily against reinstating the Stay, for at least two reasons. First, as the Fourth Circuit has repeatedly held, "[u]pholding constitutional rights surely serves the public interest." *Centro Tepayac v, Montgomery County*, 722 F.3d 184, 191-92 (4th Cir. 2013)(quoting *Giovani Carandola, Ltd.* 303 F. 3d at 507); *see also Newsom v. Albemarle County Sch. Bd.*, 354 F.3d 249, 261. For all the reasons discussed above, the District Court found that the Incumbent Protection Act clearly violates the First Amendment association rights of political parties. Accordingly, it is in the public interest to deny the Motion.

Moreover, there is a public interest in the fairness of the electoral process, an interest which the judiciary has a basic obligation to protect. *United States v. Carolene Products Co.*, 304 U.S. 144, 152, n. 4 (1938). It has long been clear that the Incumbent Protection Act unfairly and unconstitutionally favors incumbents. *Miller v. Cunningham*, 512 F.3d 98 (2007) (Wilkinson, J., dissenting from denial of rehearing *en banc*) ("The first important issue not addressed by the panel opinion is the constitutionality of Virginia's incumbent selection provision, *Va. Code Ann.* § 24.2-509(B) (2006). To me, the unconstitutionality of this provision is

clear."). The Act has distorted Virginia politics long enough and it would be against the public interest to extend its pernicious effect even one day longer.

II. The Briefing Schedule in this Matter has been Driven Entirely by Appellants, and their Motion to Expedite Should be Read in that Light.

This appeal likely would be well on its way to resolution before the commencement of the November 2019 election process if the initial briefing schedule established by this Court had been maintained. It was Appellants who moved to set that schedule aside, in order for this Court to hear a motion that raised issues that had been directly addressed by the District Court in the Opinion and which could only properly be resolved by reference to the record established in the District Court.

Having occasioned unnecessary delay in this appeal, at a time when the Stay was in place and delay suited them and the incumbents whose power they are seeking to protect, there is a certain irony in Appellants' Motion for Expedited Consideration. Accordingly, to the extent that this Court modifies the briefing schedule in this appeal in order to accommodate Appellants' request to have the matter heard during oral arguments in December, the Committee asks that any reduction in the response times for briefing the matter be levied against Appellants and not the Committee.

CONCLUSION

This Court should deny Appellants' Motion for a Stay. To the extent that this Court accommodates Appellants Motion for Expedited Consideration, such accommodation should not prejudice the Committee.

Respectfully Submitted,

The 6th Congressional District Republican Committee, by Counsel

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that the foregoing complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Times New Roman , a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A), because it contains 5,048 words, excluding the parts exempted by Fed. R. App. P. 32(f), according to the count of Microsoft Word.

/s/ Jeffrey R. Adams
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CERTIFICATE OF SERVICE

I hereby certify that on this 27th day of September, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification such filing to counsel of record.

/s/ Jeffrey R. Adams
Counsel for Plaintiff-Appellee