No. 18-1111

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

6TH CONGRESSIONAL DISTRICT COMMITTEE,

Plaintiff-Appellee,

v.

JAMES B. ALCORN, et al.,

Defendants-Appellants.

Appeal from the U.S. District Court
for the Western District of Virginia

BRIEF OF DEFENDANTS-APPELLANTS

MARK R. HERRING
Attorney General

STEPHEN A. COBB
Deputy Attorney General

TOBY J. HEYTENS
Solicitor General

MATTHEW R. MCGUIRE
Principal Deputy Solicitor General

MICHELLE S. KALLEN
Deputy Solicitor General

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7773 – Telephone
(804) 371-0200 – Facsimile
SolicitorGeneral@oag.state.va.us

October 22, 2018

Counsel for Defendants-Appellants

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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JAMES B. ALCORN, CLARA BELLE WHEELER, SINGLETON B. MCALLISTER, and
(name of party/amicus)

VIRGINIA DEPARTMENT OF ELECTIONS

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Signature: /s/ Matthew R. McGuire Date: 2/12/2018

Counsel for: Defendants - Appellants

CERTIFICATE OF SERVICE

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I certify that on 2/12/2018 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

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INTRODUCTION

This case involves a First Amendment challenge to a Virginia statute regulating the method by which political parties choose the candidates who will represent them in elections for the United States House of Representatives, both houses of the Virginia General Assembly, and various other non-statewide offices. The challenged provision is six sentences long, and it provides substantially different rules for elections to the Virginia General Assembly than for other non-statewide elections, including congressional elections. It is common ground that the only plaintiff who was ever properly before the district court—the 6th Congressional District Republican Committee (Sixth Congressional Committee or Committee)—participates *exclusively* in federal elections. Yet the district court still invalidated the statute in its entirety and permanently enjoined the defendant state officials from enforcing provisions of the statute that do not apply—and never have applied—to the Committee.

The district court's decision should be reversed for three reasons.

First, as explained in our fully briefed suggestion of mootness and motion to vacate the district court's judgment and injunction, this case

is moot and should be dismissed for lack of subject-matter jurisdiction. See 4th Cir. Doc. Nos. 25, 33.

Second, the only provisions that the Sixth Congressional Committee has standing to challenge are those regulating the elections in which it participates and those provisions are fully constitutional as applied to the Committee. The Supreme Court has considered "it too plain for argument . . . that a State may require parties to use the primary format for selecting their nominees," *California Democratic Party v. Jones*, 530 U.S. 567, 572 (2000) (internal quotation marks and citation omitted), which is the baseline rule that Virginia law provides for federal elections when the party's immediately previous nominee was chosen by a primary and successful in the general election. Although Virginia law permits use of a different method so long as both the party and any incumbents consent, that language *expands* the party's ability to control its nomination process and can *never* leave the party worse off than if the primary-only default rule were instead a (fully constitutional) mandatory one.

Third, the district court's remedial order is infected by several legal errors. For one thing, even if existence of the opt-out provision

rendered the rules for federal elections unconstitutional, the proper remedy would be to enjoin application of the opt-out provision and convert the statute's default rule about when a primary is required into a mandatory rule. More fundamentally, because "standing is not dispensed in gross," *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996), the district court exceeded its authority in addressing the constitutionally of—and then issuing an injunction against complying with—provisions that do not even apply to the only part properly before the court.

JURISDICTIONAL STATEMENT

Because this is an action under 42 U.S.C. § 1983, the district court had jurisdiction under 28 U.S.C. §§ 1331, 1343(3)-(4). This Court has appellate jurisdiction under 28 U.S.C. § 1291 because the district court entered a final judgment and permanent injunction on January 19, 2018, JA 1471-73, and the state elections officials filed a timely notice of appeal on January 26, 2018, JA 1474-75. See Fed. R. App. P. 4(a)(1)(A) (providing 30 days to file notice of appeal in a civil case).

ISSUES PRESENTED

1. Whether the district court's order and injunction should be vacated because this controversy is moot. See 4th Cir. Doc. Nos. 25, 33.

2. Whether the provisions of Virginia Code § 24.2-509(B) (Section 509(B)) governing the conduct of federal elections violate a political party's right to freedom of association under the First Amendment.

3. Whether the district court's injunction is infected by legal error, both because it enjoins parts of Section 509(B) that are fully constitutional and because it enjoins other parts of the statute that do not even apply to the only plaintiff who ever had standing to sue.

STATEMENT

1. "States have a major role to play in structuring and monitoring the election process including primaries." *California Democratic Party v. Jones*, 530 U.S. 567, 572 (2000). For federal elections, the Constitution provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof." U.S. Const. art. I, § 4, cl. 1. And, of course, "each State has the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Sugarman v. Dougall*, 413 U.S. 634, 647 (1973) (internal quotation marks and citation omitted).

In exercising this authority, the Virginia General Assembly has enacted detailed laws governing the qualification of candidates for office. See generally Va. Code Ann. tit. 24.2, ch. 5. Article 1 of Chapter 24.2 establishes requirements for all candidates, addressing matters like residency, statements of economic interest, and the like. See Va. Code Ann. §§ 24.2-500 to 504. Article 2 covers independent candidates and provides filing deadlines and signature requirements. See Va. Code Ann. §§ 24.2-505 to 507.

Article 3 covers nominations of candidates by political parties. See Va. Code Ann. §§ 24.2-508 to 24.2-511. It begins by acknowledging a party's broad powers to "make its own rules and regulations," "call conventions to proclaim a platform," "provide for the nomination of its candidates," "provide for the nomination and election of [party] committees," and "perform all other functions inherent in political party organizations." Va. Code Ann. § 24.2-508.

Virginia law also provides detailed rules about the method by which political parties choose their nominees. For statewide offices (including the United States Senate), the rule is straightforward: "[t]he duly constituted authorities of the state political party . . . determine the method by which the party nomination . . . shall be made." Va. Code Ann. § 24.2-509(A) (first sentence).

For other offices, the rules are more complicated and depend on the office involved. The general rule remains the same: the "duly constituted authorities" of the relevant part of the party (district, county, city, or town) "shall have the right to determine the method" of nomination. Va. Code Ann. § 24.2-509(A) (second sentence). But, for non-statewide offices, that general rule has exceptions that turn on

whether the office involves the state legislature or some other non-statewide office, including the United States House of Representatives.

All of the exceptions are contained in Virginia Code § 24.2-509(B) (Section 509(B)), which—per Local Rule 28(b)—is reproduced as an addendum to this brief.

Section 509(B)'s second and third sentences address elections for members of the Virginia General Assembly. They provide that, "where there is only one incumbent" of a given political party for the district in question, that "party shall nominate its candidate . . . *by the method designated by that incumbent*." § 509(B) (second sentence) (emphasis added). Under this rule, the only way a party gets a say in the process for choosing its nominee for a General Assembly election involving one of its own incumbents is if the incumbent declines to designate a nomination method, at which point the party chooses. See § 509(B) (second sentence).[1]

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[1] If there is more than one incumbent—for example, if the district lines changed since the last election—the party must use a primary "unless all the incumbents consent to a different method of nomination." § 509(B) (third sentence); see also § 509(B) (sixth sentence) (clarifying definition of "incumbent").

Elections for other non-statewide offices (including the United States House of Representatives) are addressed in Section 509(B)'s fourth sentence, and the rules for those offices differ substantially from those for the General Assembly. Unlike General Assembly elections—where, again, the application of different rules is triggered by the presence of at least one "incumbent of that party," § 509(B) (second and third sentences)—here the trigger involves the method of nomination used during the immediately previous election and the outcome of that election. For congressional elections, a party may nominate freely unless three conditions are satisfied: (i) during "the immediately preceding election," the party's nominee was chosen via a primary; and the person so nominated (ii) was successful in the previous general election; and (iii) remains a candidate for the current election. § 509(B) (fourth sentence); see also § 509(B) (fifth sentence) (providing rules for when the incumbent is not seeking reelection); Va. Code Ann. § 24.2-526 (providing that no primary will be conducted where only one candidate timely files to run).

The nature of the exception also differs substantially depending on whether the office in question is membership in the General

Assembly. Unlike General Assembly races—where the incumbent simply "designate[s]" the method of nomination, § 509(B) (second sentence)—other incumbent officeholders have no similar power. Instead, the statute provides that, whenever one of the candidates is an incumbent who was previously nominated by primary, the party in question *must* use a primary *unless* both the party and the incumbent officeholder agree on a different method. § 509(B) (fourth sentence) (stating that such "[a] party . . . . shall nominate a candidate for the next election for that office by a primary unless all incumbents of that party for that office consent to a different method"). Under this provision, a party can never be forced to use a nomination method other than a primary for congressional elections and the party gains the ability to opt out of the otherwise-applicable, primary-only rule so long as any incumbents also consent.

2. There have been at least two previous attempts to challenge the constitutionality of Section 509(B), both of which were brought by party committees and people involved in elections to the Virginia General Assembly. See, *e.g.*, *24th Senatorial Dist. Republican Comm. v. Alcorn*, 820 F.3d 624, 627 (4th Cir. 2016) (*24th Senate District*); *Miller*

v. Cunningham, 512 F.3d 98, 101 (4th Cir. 2007) (Wilkinson, J., dissenting from the denial of rehearing en banc). The Court did not reach the merits of the constitutional challenge to Section 509(B) in either case. In *Miller*, the Court concluded that Virginia's open-primary law (Virginia Code Ann. § 24.2-530) was "unconstitutional solely 'as applied to the narrow facts of th[at] case'" without reaching any separate questions about the constitutionality of Section 509(B). See *Miller*, 512 F.3d at 101 (Wilkinson, J., dissenting from the denial of rehearing en banc) (quoting *Miller v. Brown*, 503 F.3d 360, 368 (4th Cir. 2007) (further quotation marks and citation omitted). And in *24th Senate District*, the Court did not reach any merits question at all, holding instead that the relevant party committee "lack[ed] standing to bring th[at] suit." 820 F.3d at 633.

3. The current case originally had five plaintiffs—two organizations and three individuals. JA 16–17. One of the organizations was a party committee that fields candidates for election to the United States House of Representatives; the other was a party committee that fields candidates for elections to the Virginia House of Delegates. JA 17.

The individual plaintiffs sued as registered voters, party members, and officers in various party committees. JA 16–17.

The district court, however, concluded that all but one of the plaintiffs lacked standing and dismissed them from this suit. JA 1426–54. Those dismissals were not appealed and are thus now final. See *United States v. American Ry. Express Co.*, 265 U.S. 425, 435 (1924) ("[A] party who does not appeal from a final decree of the trial court cannot be heard in opposition thereto when the case is brought [to the appellate court] by the appeal of the adverse party."). The only remaining plaintiff is the 6th Congressional District Republican Committee (Sixth Congressional Committee or Committee), which participates exclusively in federal elections. See JA 30 (defining "District" as "Congressional District unless otherwise designated").

The district court granted the Sixth Congressional Committee's motion for summary judgment and denied the defendants' cross motion for summary judgment. JA 1417–70. The court concluded that the Committee had standing, JA 1427–45, and that its claims were otherwise justiciable, JA 1445–50. The court determined that Section 509(B) "fails constitutional muster" because it "provides express

statutory benefits to incumbents at the expense of political parties' associational rights." JA 1465. The district court acknowledged that "only the fourth sentence of the challenged statute directly applies to the 6th Congressional Committee." JA 1466. But the court viewed the overbreadth doctrine as permitting it to invalidate parts of the statute—those governing General Assembly elections—that have no applicability to the Sixth Congressional Committee. JA 1467–68. The district court thus declared Section 509(B) "facially unconstitutional" in its entirety, JA 1471, and permanently enjoined the defendants (various state entities and officials sued in their official capacity) from enforcing any portion of that statute, JA 1473.

SUMMARY OF ARGUMENT

The district court's decision and injunction should be reversed for three reasons.

First, this Court should dismiss the appeal and vacate the district court's orders because the underlying controversy has been rendered moot by the Sixth Congressional Committee's voluntary decision to use a convention rather than a primary to select its candidate for the 2018 general election. See Suggestion of Mootness & Mot. to Vacate the

District Court's Judgment & Injunction (4th Cir. Doc. No. 25); Reply in Supp. of Suggestion of Mootness & Mot. to Vacate the District Court's Judgment & Injunction (4th Cir. Doc. No. 33).

Second, the only provisions of Section 509(B) that the Sixth Congressional Committee has standing to challenge are those that apply to it and those provisions are fully constitutional. See *infra* Part I. The general rule is that the Committee gets to pick its own method of nomination—an outcome that is plainly constitutional. Section 509(B) establishes a different baseline rule that applies if and only if: (i) the Committee chooses to use a primary; (ii) the nominee selected by that Committee-selected primary wins the general election; and then (iii) that candidate chooses to stand for reelection. But that baseline rule—use a primary—is also constitutional because the Supreme Court has considered "it too plain for argument . . . that a State may *require* parties to use the primary format for selecting their nominees." *California Democratic Party v. Jones*, 530 U.S. 567, 572 (2000) (internal quotation marks and citation omitted) (emphasis added).

To be sure, Section 509(B) permits departures from that baseline use-a-primary rule so long as both the Committee and any incumbent

officeholder agree to do so. But that opt-out provision likewise does not violate the Committee's rights to freedom of association because it increases the Committee's ability to control its own nominating process and can never leave the Committee worse off than if the primary-only default rule were changed to a mandatory one.

Third, the district court's remedial order and injunction are infected by several serious legal errors. See *infra* Part II. Even if the opt-out language in Section 509(B)'s fourth sentence raised constitutional problems, the proper remedy would be to sever just that language while leaving the rest of the sentence intact. More fundamentally, any constitutional defect in the statutory provisions that apply to the Sixth Congressional Committee—those regulating federal elections—cannot justify a remedial order invalidating separate (and different) portions of the statute that *do not* apply to the Committee. To be sure, the overbreadth doctrine sometimes permits a person to whom a statutory provision may constitutionally be applied to gain relief from that provision by invoking the constitutional problems that would be raised by applying that same provision to someone else. But that "narrow exception to the general rule" that a party may only

invoke its own constitutional rights, *United States v. Chappell*, 691 F.3d 388, 394 (4th Cir. 2012), does not permit a party to radically expand the scope of permissible relief by raising objections to statutory provisions that do not even apply to it in the first place.

STANDARD OF REVIEW

This Court reviews a district court's decision to grant summary judgment de novo. *Variety Stores, Inc. v. Wal-Mart Stores, Inc.*, 888 F.3d 651, 659 (4th Cir. 2018). Summary judgment is proper only if the moving party demonstrates "that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a).

This Court reviews the district court's decision to award injunctive and declaratory relief for an abuse of discretion. See *U.S. Airline Pilots Ass'n v. Awappa, LLC*, 615 F.3d 312, 320 (4th Cir. 2010) (injunctive relief); *see also Wilton v. Seven Falls Co.*, 515 U.S. 277, 289-90 (1995) (declaratory relief). That said, "[t]he abuse-of-discretion standard does not preclude an appellate court's correction of a district court's legal or factual error" because "[a] district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law."

Highmark, Inc. v. Allcare Health Mgmt. Sys., 134 S. Ct. 1744, 1748 n.2 (2014) (internal quotation marks and citation omitted); accord *United States v. Srivastava*, 540 F.3d 277, 287 (4th Cir. 2008) ("a district court necessarily abuses its discretion when it makes an error of law").

ARGUMENT

Our arguments that this case is moot are fully briefed, and we will not repeat them here. See Suggestion of Mootness & Mot. to Vacate the District Court's Judgment & Injunction (4th Cir. Doc. No. 25); Reply in Supp. of Suggestion of Mootness & Mot. to Vacate the District Court's Judgment and Injunction (4th Cir. Doc. No. 33). Instead, this brief will focus on two other problems with the district court's order and injunction: (i) Section 509(B) does not violate the Sixth Congressional Committee's constitutional rights; and (ii) the district court's judgment and injunction rest on several legal errors.

Although this case began as a broad challenge by numerous plaintiffs, the dispute has narrowed significantly. Most of the plaintiffs were dismissed for lack of standing, and the only remaining plaintiff—the Sixth Congressional Committee—can never be directly affected by

several of the statutory provisions covered by the district court's injunction.

That starting point is critical to this appeal. "[S]tanding is not dispensed in gross." *Lewis v. Casey*, 518 U.S. 343, 358 n.6 (1996). Because the Sixth Congressional Committee participates solely in federal elections: (i) the only issue properly before the district court was whether Section 509(B)'s rules governing *those* elections violate the right of freedom of association protected by the First Amendment; and (ii) any remedial order must likewise be limited to ameliorating any constitutional harms caused by the provisions that apply to the Committee.

I. The provisions of Section 509(B) that govern federal elections do not violate the First Amendment.

The district court erred by holding that Section 509(B) violates the Sixth Congressional Committee's right to freedom of association. See JA 1454–65. To begin, the court's analysis does not accurately describe Virginia's rules governing the only elections in which the Committee participates. And, properly understood, those rules are fully constitutional.

1. The district court correctly acknowledged that the "only" portion of Section 509(B) that "directly applies to the 6th Congressional Committee" is "the fourth sentence," JA 1466, which establishes rules for elections that do not involve members of the General Assembly. But, at several points along the way, the district court's analysis does not accurately describe how that provision works.

For example, the district court stated near the outset that Section 509(B) "gives incumbents the statutory power to select a nomination method over their party's objection." JA 1456. Although that description may be accurate when it comes to elections for the *state* legislature, see *supra* p.7, it simply is not true when it comes to other elections, including the only elections in which the Sixth Congressional Committee participates. For those elections, no incumbent has any ability to pick any nomination method. To the contrary, unless the incumbent was previously nominated via a primary (a decision that was, itself, under the party's control), the party's ability to select the method of nomination remains fully intact. See § 509(B) (fourth sentence). And even if the incumbent was previously nominated by primary, a congressional incumbent's *only* power is to grant or withhold

consent from *the party's* proposal to opt-out of the otherwise applicable rule that the later nomination must also be made through a primary. See § 509(B) (fourth sentence) (requiring the party to use a primary in such circumstances "*unless* all incumbents of that party for that office consent to a different method" (emphasis added)).

The district court also painted with an overly broad brush when it said that Section 509(B) "does not mandate a particular type of nomination method," JA 1464, and "does not limit the type of nomination methods the 6th Congressional Committee may use," JA 1463. That certainly is true when there is no incumbent, where the incumbent is not a member of the political party in question, or where any incumbent was not previously selected using a primary. § 509(B) (fourth and fifth sentences). But it is not true where one of the candidates is an incumbent who was previously nominated via a primary. In that situation, Section 509(B) provides that the party in question "*shall* nominate a candidate for the next election for that office by a primary *unless*" both the party and the incumbent agree to use a different method. § 509(B) (fourth sentence) (emphasis added).

2. Those differences matter. It surely is not unconstitutional to tell a political party that it may choose its own nomination method. And that is precisely what Virginia law tells the Sixth Congressional Committee for any election where there is no incumbent or where the incumbent is not affiliated with the Committee's political party or was not previously nominated via a primary. See § 509(B) (fourth and fifth sentences). Indeed, that was the rule under which the Committee operated for the November 2018 congressional elections and it is the rule under which the Committee is already guaranteed to be operating for the November 2020 election as well. See 4th Cir. Doc. Nos. 25, 33.

There is likewise no constitutional problem with Virginia's decision to establish a baseline rule favoring use of a primary in some circumstances. To the contrary, the Supreme Court has repeatedly declared 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 a democratic fashion." *California Democratic Party v. Jones*, 530 U.S. 567, 572 (2000) (quoting *American Party of Tex. v. White*, 415 U.S. 767, 781 (1974)); accord *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 203 (2008)

(same).[2] So if Virginia had mandated that the Committee *always* use a primary—whether across the board or only in situations where the incumbent officer holder was previously selected via a primary and wishes to stand for reelection—there can be little doubt that such a rule would be constitutional. See *infra* p. 29–30 (describing valid state interests that could produce a limited primary-only rule).

The only question, therefore, is whether Virginia has violated the Sixth Congressional Committee's constitutional right to freedom of association by providing an opt-out procedure over which the Committee has an absolute veto. In particular, the question is whether Section 509(B)'s fourth sentence is rendered unconstitutional because it allows the Committee not to use a primary so long as (i) the Committee

[2] The district court described these repeated and unequivocal statements by the Supreme Court as "dictum." JA 1463. But, as this Court has recognized, "carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative." *Wynne v. Town of Great Falls*, 376 F.3d 292, 298 n.3 (4th Cir. 2004). For the same reason, the district court's discussion of the practical differences between primaries and other nomination methods, see JA 1458–60, is simply irrelevant. The question is whether Virginia may constitutionally require a primary, not whether the Sixth Congressional Committee may have reasons for preferring another method.

wants to use a different method, *and* (ii) the incumbent officeholder consents to the Committee's proposed alternative.

To state such a question is to reveal its profound strangeness. The existence of the "unless" clause can *never* leave the Committee worse off than if that clause did not exist (because the Committee retains an absolute right to veto any non-primary method proposed by the incumbent). And the presence of that clause expands the Committee's control over its nomination process by providing the Committee with the opportunity to replace a fully constitutional default method (a primary) with one the Committee would find preferable. That is not the stuff of which a freedom of association violation is made.

3. The decisions cited by the district court are not to the contrary. See JA 1456 (district court acknowledging that "[n]o binding authority . . . has examined the burden associated with a statute like the one at issue here"). In fact, two of the decisions repeatedly cited by the district court—the Supreme Court's decisions in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), and *New York State Bd. of Elections v. Lopez Torres*, 552 U.S. 196 (2008), see JA 1455–56,

1460, 1463–64—are among those that have considered it "too plain for argument" that States may mandate primaries. See *supra* p.20-21.

Nor does the Section 509(B) suffer from the constitutional defects identified in *Jones* or *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208 (1986), both of which involved constitutional challenges to state laws mandating who may (or may not) participate in a given party's primary. See *Jones*, 530 U.S. at 585 (invalidating California law requiring a "blanket" primary in which all voters may participate in any party's primary); *Tashjian*, 479 U.S. at 231 (invaliding Connecticut law requiring a "closed" primary in which parties were forbidden from allowing independent voters to participate). Section 509(B) does not say anything about who may (or may not) participate in the Sixth Congressional Committee's primaries, and the Committee has not raised a facial or an as-applied challenge to the provision of Virginia law addressing that question. See Va. Code Ann. § 24.2-530 (Section 530) ("Who may vote in primary"). Cf. *Miller v. Brown*, 503 F.3d 360, 371 (4th Cir. 2007) (holding that Section 530 "is facially constitutional but unconstitutional as applied to the Committee" that was the plaintiff in that case). In addition, unlike the statutes struck down in *Jones* and

Tashjian, Virginia does not require a political party to use *any* particular method for nominating candidates for federal elections unless the party first makes its own voluntary decision to use the state-run primary system and certain other conditions are then met. See Va. Code Ann. §§ 24.2-509(B), 24.2-512 through 24.2-538 (applicable laws if a party selects a primary).

The final Supreme Court decision on which the district court mainly relied—*Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214 (1989)—is even further afield. As the district court explained, the state law at issue in *Eu* pervasively regulated the internal operations of political parties by "bann[ing] parties from endorsing primary candidates, 'dictate[ing] the size and composition of the state central committees; . . . specif[ying] the time and place of committee meetings; and limit[ing] the dues parties may impose on members,' among other regulations." JA 1461 (quoting *Eu*, 489 U.S. at 217–19). Virginia law does nothing of that sort. To the contrary, Virginia law specifically recognizes the authority of political parties to "perform all . . . functions inherent in political party organization," including the ability to "make [their] own rules and regulations," "call a

conventions . . . for any . . . purpose," and "provide for the nominations and elections of its state, county, city, and district committees." Va. Code Ann. § 24.2-508.

II. Even if Section 509(B) violated the Committee's First Amendment rights, the district court's injunction is infected with several legal errors.

As explained in the previous Part, the provisions of Section 509(B) that apply to the only plaintiff who ever had standing do not violate the Constitution. But, even if they did, the district court's remedial order also reflects two serious legal errors. *First*, the district court did not conduct a proper severability analysis for the only provisions of Section 509(B) that actually apply to the Committee. *Second*, the district court erred in viewing overbreadth doctrine as allowing it to enjoin enforcement of provisions that do not apply to the only plaintiff who was every properly before it.

A. If Section 509(B)'s rules for federal elections are unconstitutional, the proper remedy is to sever the "unless" clause and thus require a primary in all such circumstances.

1. The district court repeatedly made clear that the constitutional defect it perceived in Section 509(B) is that it gives incumbents any role whatsoever in choosing the method of nomination.

See, *e.g.*, JA 1465 ("At bottom, the Act provides express statutory benefits to incumbents at the expense of political parties' associational rights.").[3] Even if that were right, the proper remedy would be to sever the portion of Section 509(B) that provides for such a role, while leaving the remainder of the statute intact.

As we have explained, Section 509 prescribes a three-step process for determining the method of nomination for congressional elections. The general rule is that the relevant party committee picks the method of nomination. See § 509(A) (second sentence). But the rule changes if the party chose to use a primary to pick its nominee during the immediately preceding election and that nominee was elected during the general election. See § 509(B) (fourth sentence). Then, the baseline rule is that the party *must* use a primary the next time as well. *Id.* But this primary-only rule may, in turn, be waived so long as both the party

[3] See also JA 1461–62 ("The Act allows the incumbent to prevent the 6th Congressional Committee from conducting its own party canvas or convention, following its own procedures, and funding its own nominating process whenever the incumbent sees fit."); JA 1463 ("Providing incumbents with a statutory right to dictate political parties' internal affairs, especially in the realm of selecting candidates, imposes a severe burden on the parties' associational rights that triggers strict scrutiny."); accord JA 1456–60.

and any incumbents who are running in the current election agree to a different method. *Id.*

These last two steps are reflected in the fourth sentence of Section 509(B), which separates them into textually distinguishable parts shown below as subparts [a] and [b]:

> [a] *A party*, whose candidate at the immediately preceding election for a particular office other than the General Assembly (i) was nominated by a primary or filed for a primary but was not opposed and (ii) was elected at the general election, *shall nominate a candidate for the next election by a primary*
>
> [b] *unless* all incumbents of that party for that office consent to a different method.

§ 509(B) (fourth sentence) (emphasis added).

2. For reasons that have already been explained, it should be common ground that subpart [a] is constitutional and that any constitutional defect lies solely in subpart [b]. See *supra* p.20–21. The question, then, involves one of proper remedy.

"Generally speaking, when confronting a constitutional flaw in a statute, [courts] try to limit the solution to problem." *Ayotte v. Planned Parenthood*, 546 U.S. 320, 328 (2006). The reason is straightforward: because "[a] ruling of unconstitutionality frustrates the intent of the elected representatives of the people," courts must "try not to nullify

more of a legislature's work than is necessary." *Id.* at 329 (internal quotation marks and citation omitted)). Even when a statute has constitutional problems, therefore, the "prefer[red]" course is to "severe its problematic portions while leaving the remainder intact." *Id.* at 328-29.

To be sure, "the touchstone for any decision about remedy is legislative intent, for a court cannot use its remedial power to circumvent the intent of the legislature." *Ayotte*, 546 U.S. at 330 (internal quotation marks and citation omitted). But here there is no reason to doubt that the Virginia legislature would have preferred that subsection [a] continue to operate even if subsection [b] were rendered inoperative.

To the contrary, there is every reason to believe that it would have preferred such a result to one striking down Section 509(B)'s fourth sentence in its entirety. For one thing, subsection [b] begins with the word "unless" and is thus, by its terms, framed as an exception to a general rule. What is more, even without subsection [b], subsection [a] is "(1) constitutionally valid, (2) capable of functioning independently, and (3) consistent with [the legislature's] basic objectives in enacting

the statute." *United States v. Booker*, 543 U.S. 220, 258-59 (2005) (internal quotation marks and citation omitted). Absent subsection [b], subsection [a] would require a party to use a primary *whenever* its previous nominee was selected by a primary, that nominee was in turn chosen by the people as a whole in the general election, and that same nominee wishes to stand for office again. See § 509(B) (fifth sentence) (providing that when "no incumbents offer as candidates for reelection to the same office, the method of nomination shall be determined by the political party"). Such a rule would directly further the Supreme Court's observation about the valid state interest underlying mandatory primary laws: "assur[ing] that intraparty competition is resolved in a democratic fashion." *Jones*, 530 U.S. at 572.

To be sure, Virginia has not required that primaries be held in all circumstances. But it is hard to see how telling political parties that they do not always have to use a primary violates their constitutional rights—especially in situations where reasons for the difference in treatment are readily apparent. When there is no incumbent, Virginia could sensibly choose to emphasize party autonomy and flexibility. But when a person who was previously chosen to be a party's standard-

bearer via a primary and then chosen by the electorate as a whole to represent them, a State may reasonably decide that the decision whether to retain that person should be made by a broader and more representative group of party members than those who generally participate in non-primary nomination methods. Because the district court identified no reason to doubt that "the legislature [would] have preferred what is left of its statute to no statue at all," *Ayotte*, 546 U.S. at 330, the court erred in not limiting any remedy to subsection [b].

B. The district court erred by assessing the constitutionality of and enjoining provisions of Section 509(B) that do not apply to the only party properly before it.

Section 509(B) includes six distinct sentences. See *supra* p.7–9. The first, fifth, and sixth sentences apply to all non-statewide elections, but the district court never concluded that any of those provisions violated the Committee's constitutional rights.[4] The district court acknowledged that "only the fourth sentence of the challenged

[4] The first sentence simply makes clear that the following sentences modify the general rules set forth in Section 509(A). See § 509(B) (first sentence) ("Notwithstanding subjection A, the following provisions shall apply to the determination of the method of making party nominations."). The fifth sentence provides that when no incumbent is running in the current election, "the method of nomination shall be determined by the political party." The sixth sentence clarifies the meaning of "incumbent" in the second, third, and fourth sentences.

statute"—which governs non-statewide elections for offices other than the Virginia General Assembly—"directly applies to the 6th Congressional Committee." JA 1466. Yet the district court nonetheless declared Section 509(B) in its entirety to be "facially unconstitutional," JA 1471, and permanently enjoined the defendant state officials from enforcing any of its provisions, see JA 1473, including provisions that do not apply to the Committee. That too was error.

1. It should be common ground that the Sixth Congressional Committee would lack standing to challenge the constitutionality of statutory provisions that do not apply to it. "[S]tanding is not dispensed in gross." *Town of Chester v. Laroe Estates*, 137 S. Ct. 1645, 1651 (2017) (internal quotation marks and citation omitted), and the fact that a plaintiff has standing to challenge one provision of a statute does not mean that it has standing to challenge every other provision of that same statute. See *Davis v. Federal Election Commission*, 554 U.S. 724, 733–34 (2008) ("The fact that Davis has standing to challenge § 319(b) does not necessarily mean that he also has standing to challenge the scheme of contribution limitations that apply when § 319(a) comes into play."); *Blum v. Yaretsky*, 457 U.S. 991, 999 (1982) ("a plaintiff who has

been subject to injurious conduct of one kind [does not] possess by virtue of that injury the necessary stake in litigating conduct of another kind, although similar, to which he has not been subject"). Section 509(B)'s second and third sentences apply exclusively to elections for the Virginia General Assembly. Because the Sixth Congressional Committee does participate in such any such elections, it is thus, at most, a "[c]oncerned bystander[ ]" with respect to those provisions. *Ansley v. Warren*, 861 F.3d 512, 517 (4th Cir. 2017).

2. Nor can the district court's sweeping injunction be upheld as a valid exercise of equitable discretion. As the Supreme Court has explained, "[t]he actual-injury requirement would hardly serve [its] purpose" if a court that has jurisdiction based on a specific type of injury suffered by a specific party was then authorized, as matter of equity, to seek to remedy "*all* inadequacies" in related areas. *Lewis v. Casey*, 518 U.S. 343, 357 (1996). Instead, "[t]he remedy must *of course* be limited to the inadequacy that produced the injury in fact that the plaintiff has established." *Id.* (emphasis added). Indeed, even where a major constitutional decision about the Brady Handgun Violence Prevention Act raised "important questions" about how other, directly

related provisions of that same statute would apply going forward, the Supreme Court emphasized that it "ha[d] no business answering" those questions because the only parties before it were not "[b]urden[ed]" by those provisions. *Printz v. United States*, 521 U.S. 898, 935 (1997). The same analysis holds true here.

3. Even though Section 509(B)'s second and third sentences do not apply to the only party properly before it, the district court concluded that the overbreadth doctrine permitted it to enjoin Section 509(B) in its entirety. See JA 1467–70. The district court's analysis, however, rests on a significant error about how overbreadth doctrine works.

The general rule is that "a person to whom a statute may constitutionally be applied will not be heard to challenge the statute on the ground that it may be conceivably applied unconstitutionally to others, in situations not before the Court." *Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973).

"The First Amendment overbreadth doctrine, however, carves out a narrow exception to the general rule." *United States v. Chappell*, 691 F.3d 388, 394 (4th Cir. 2012); accord *Virginia v. Hicks*, 539 U.S. 113,

118 (2003) (describing overbreadth doctrine as "an exception to [the] normal rule regarding the standards for facial challenges"). Its function is straightforward: because an overly broad law may deter constitutionally protected speech, the overbreadth doctrine sometimes permits a party to whom a statute *may* be constitutionally be applied to challenge the statute on the ground that its application could violate the constitutional rights of others not before a Court. See *Board of Trustees of the State Univ. of N.Y. v. Fox*, 492 U.S. 469, 483 (1989) (stating that the overbreadth doctrine "enables [a litigant] to benefit from the statute's unlawful application *to someone else*"); *Chappell*, 691 F.3d at 394–95 (noting that "the Supreme Court has 'allowed persons to attack overly broad statutes even though the conduct of the person making the attack is clearly unprotected and could be proscribed by a law drawn with requite specificity'" (quoting *New York v. Ferber*, 458 U.S. 747, 769 (1982)). So, for example, a person whose conduct would have constituted common-law seditious libel may raise a constitutional challenge to a prosecution under the Alien and Sedition Acts, and a person who sells material that is, in fact, legally obscene may

nonetheless raise a constitutional challenge to prosecution under a law criminalizing distributing "indecent" material.

But, contrary to the district court's reasoning, there is no rule that permits a plaintiff to "raise[] an overbreadth challenge to a statutory provision that is not applicable to him." JA 1468. Such an outcome would be inconsistent with the whole premise of the overbreadth doctrine, which has always been understood as an exception to the general rule about a party's ability to mount a facial constitutional challenge to a statute that *does* apply to that party rather than a roving commission to attack the constitutionality of statues that cause the party no harm.

The only decision that the district court cited in support of its contrary view is *Secretary of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947 (1984) (*Munson*). See JA 1468. But the challenged law in that case *was* "applicable to" the challenging party, and the language cited by the district court involved a different issue: third-party standing.

Munson involved a constitutional challenge to a Maryland statute barring charitable organizations from spending more than 25% of any funds that they raised on fundraising expenses. 467 U.S. at 950. The

plaintiff was a professional fundraising company whose clients included charitable organizations that operated in Maryland. *Id.* "Because its contracts call[ed] for payment in excess of 25% of the funds raised for a given event," the fundraising company was "subject . . . to civil restraint and criminal liability" under the Maryland statute and thus "suffered both threatened and actual injury as a result of the statute" it wished to challenge. *Id.* at 954–55.[5]

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[5] The same is true of the other decisions cited by the district court in the relevant section of its opinion. The plaintiff employees in *Broadrick* (see JA 1467–48) were directly "subject to the proscriptions of" the statute they "s[ought] to have . . . declared unconstitutional." 413 U.S. at 603. The lead plaintiff in *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (see JA 1468), was an organization whose signs were taken down pursuant to the municipal ordinance whose constitutionality it changed. 466 U.S. at 791–92. The challenging party in *United States v. Booker*, 543 U.S. 220 (2005) (see JA 1469), was a criminal defendant who claimed it violated his Sixth Amendment rights to sentence him under the Federal Sentencing Guidelines. 543 U.S. at 227–28. The plaintiff in *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442 (2008) (JA 1469–70), was a political party that claimed its First Amendment rights were violated by a state law requiring it to associate with candidates did not endorse. 522 U.S. at 448. And the plaintiff in *New York State Club Association, Inc. v. New York*, 487 U.S. 1 (1998) (see JA 1468) was an organization whose members were "suffering immediate or threatened injury to their associational rights as a result of the [challenged] Law's enactment." 487 U.S. at 8–10 (internal quotation marks and citation omitted). See *Friend of the Earth v. Laidlaw Envtl. Servs. (TOC)*, 528 U.S. 167, 181 (2000) (describing

The prudential standing issue in *Munson* arose because the company was "not a charity and d[id] not claim that its own First Amendment rights have or will be infringed by the challenged statute." 467 U.S. at 955. This was a potential problem because, as the Court emphasized, a "plaintiff generally must assert its own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Id.* (citation omitted). But the Supreme Court held that the company could raise its customers' First Amendment rights because "[t]he activity sought to be protected is at the heart of the business relationship between [the company] and its customers, and [the company's] interests in challenging the statute are completely consistent with the First Amendment rights of the charities it represents." *Id.* at 958; accord *Craig v. Boren*, 429 U.S. 190, 194–97 (1976) (holding that a vendor had a third-party standing to raise the Equal Protection rights of 18-20 year old males to whom state law precluded it from selling beer).

None of that has anything to with this case. Most fundamentally, unlike the plaintiff company in *Munson*, the Sixth Congressional

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circumstances where an association has third-party standing to bring suit on behalf of its members).

Committee has suffered neither "threatened [nor] actual injury as a result of" provisions of Section 509(B) that apply solely to elections in which it does not participate. *Munson*, 467 U.S. at 954–55. That difference alone renders the district court's reliance on *Munson* inappropriate.

The district court reasoned that the provisions governing such elections "significantly compromise the associational rights of General Assembly committees." JA 1468 (internal quotation marks and citation omitted). Even if that were true, the Sixth Congressional Committee has never claimed to be invoking the constitutional rights of the General Assembly committees, and the district court did not conclude that the Committee has third-party standing to do so.

Nor could the Committee establish third-party standing in any event. The Committee is not an organization whose members are directly affected by the provisions of Section 509(B) governing General Assembly elections. See *Friend of the Earth v. Laidlaw Envtl. Servs. (TOC)*, 528 U.S. 167, 181 (2000) (describing circumstances where an association has third-party standing to bring suit on behalf of its members). The Committee likewise does not have the sort of direct

contractual relationship with the party committees whose First Amendment rights would be involved that provided the basis for third-party standing in *Munson.* In short, there is no basis here for any exception to the rule that a plaintiff "must assert its own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Munson*, 467 U.S. at 955 (citation omitted).

* * *

The district court believed strongly that the entirety of Section 509(B) "is plainly unconstitutional," JA 1676 (opinion vacating stay pending appeal), and that the constitutional invalidity of Section 509(B)'s second and third sentences "is a foregone conclusion" because those provisions "burden[] General Assembly committees in all the ways that [the fourth sentence] burdens non-General Assembly committees." JA 1469. The district court also repeatedly stated that it saw no need "kick this issue of this plainly unconstitutional statute down the road." JA 1659; see also JA 1678 (similar); accord JA 1635 (stating that "this Court chose not to kick the can anymore").

But there are other, equally important, principles at stake here. It is a "bedrock principle" that "Article III of the Constitution limits the

federal judicial power to the resolution of 'Cases' or 'Controversies'" and that "the exercise of judicial power is restricted to litigants who seek to rectify a *personal and discrete* harm." *Ansley*, 861 F.3d at 517 (emphasis added). The only party who was ever properly before the district court is not harmed by the provisions of Section 509(B) governing elections to the Virginia General Assembly. Because the Sixth Congressional Committee was, at most, a "concerned bystander[]" with respect to such provisions, *Diamond v. Charles*, 476 U.S. 54, 62 (1986) (citation omitted), the district court had no lawful authority to enjoin their operation in this case. See *Printz*, 521 U.S. at 935 (stating that the Court "ha[d] no business" addressing questions about provisions that "burden only" parties who were not before it).

CONCLUSION

Because the underlying controversy is moot, the appeal should be dismissed for lack of subject-matter jurisdiction and the district court's order and injunction should be vacated. See 4th Cir. Doc. Nos. 25, 33.

If the Court determines it has jurisdiction, the district court's order and injunction should be reversed because the only provisions of Virginia Code Ann. § 24.2-509(B) that apply to the Sixth Congressional

Committee do not violate the Constitution. In the alternative, the district court's injunction should be narrowed to enjoin only the final "unless" clause of Section 509(B)'s fourth sentence.

Respectfully submitted,

JAMES B. ALCORN, et al.

By: /s/

Mark R. Herring
Attorney General

Stephen A. Cobb
Deputy Attorney General

Matthew R. McGuire (VSB #84194)
Principal Deputy Solicitor General

Toby J. Heytens (VSB #90788)
Solicitor General

Michelle S. Kallen
Deputy Solicitor General

Office of the Attorney General
202 North Ninth Street
Richmond, Virginia 23219
(804) 786-7773 – Telephone
(804) 371-0200 – Facsimile
SolicitorGeneral@oag.state.va.us

Counsel for Defendants-Appellants

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in 14-point Century, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 28.1(e)(2)(A)(i), because it contains 7,434 words, excluding the parts exempted by Rule 32(f), according to the count of Microsoft Word.

/s/

Matthew R. McGuire

CERTIFICATE OF SERVICE

I hereby certify that on October 22, 2018, I electronically filed the foregoing brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/
Matthew R. McGuire

ADDENDUM PURSUANT LOCAL RULE 28(B)

Virginia Code § 24.2-509. Party to determine method of nominating its candidates for office; exceptions.

A. The duly constituted authorities of the state political party shall have the right to determine the method by which a party nomination for a member of the United States Senate or for any statewide office shall be made. The duly constituted authorities of the political party for the district, county, city, or town in which any other office is to be filled shall have the right to determine the method by which a party nomination for that office shall be made.

B. Notwithstanding subsection A, the following provisions shall apply to the determination of the method of making party nominations. A party shall nominate its candidate for election for a General Assembly district where there is only one incumbent of that party for the district by the method designated by that incumbent, or absent any designation by him by the method of nomination determined by the party. A party shall nominate its candidates for election for a General Assembly district where there is more than one incumbent of that party for the district by a primary unless all the incumbents consent to a different method of nomination. A party, whose candidate at the immediately preceding election for a particular office other than the General Assembly (i) was nominated by a primary or filed for a primary but was not opposed and (ii) was elected at the general election, shall nominate a candidate for the next election for that office by a primary unless all incumbents of that party for that office consent to a different method.

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.

For the purposes of this subsection, any officeholder who offers for reelection to the same office shall be deemed an incumbent notwithstanding that the district which he represents differs in part from that for which he offers for election.