No. 13-231

In The Supreme Court of the United States

CHARLES JUDD, KIMBERLY BOWERS, AND DON PALMER, MEMBERS OF THE VIRGINIA BOARD OF ELECTIONS, IN THEIR OFFICIAL CAPACITIES,

Petitioners,

v.

LIBERTARIAN PARTY OF VIRGINIA AND DARRYL BONNER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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In their opposition to the granting of the Petition of the members of the Virginia State Board of Elections, the Libertarian Party of Virginia (LPVA) and Darryl Bonner admit the existence of a split among the circuits over the constitutionality of witness-residency requirements. So to have something to say they characterize it as an insignificant split. Br. in Opp'n at 7-10. But as the amicus brief filed on behalf of seven other States attests, the issue touches vital aspects of state sovereign power, U.S. Const. art. I, § 4, cl. 1, implicating the constitutional existence of States as unique political communities, upsetting efforts to administer election processes and to prevent fraud, and also calling into question "the integrity of the initiative" as a tool of self-government. *See* Am. Br. of the States of Oklahoma, *et al.*, at 2-6 & nn.2 & 3. Moreover, the second-guessing of the need for residency restrictions for election administration that has become a trend in the lower courts is contrary to this Court's precedents regarding review of integrity policing measures and with the settled views of the peoples' representatives in the States, the majority of which have some form of state residency restriction for ballot access or initiative petition circulation. *See* Br. in Opp'n at 10-11 & n.8. Only a grant of certiorari can resolve this constitutional divide.

ARGUMENT

I. THE CIRCUITS ARE PLAINLY SPLIT, BOTH AS TO REASONING AND RESULTS, REGARDING THE CONSTITUTIONALITY OF RESIDENCY REQUIREMENTS FOR PETITION CIRCULATORS.

Respondents concede, as they must, that the courts of appeals are split on the constitutionality of state residency requirements for petition circulation. *See Lux* v. *Judd*, 131 S. Ct. 5, 7 (2010) (Roberts, C.J., in chambers) (noting the split). And Respondents conclusorily assert that those courts of appeals that have struck residency requirements have had the better of the argument without joining issue on the doctrinal and logical weaknesses of those decisions. Pet. 16-20 & n.6; Br. in Opp'n 7-10.

Instead they merely caricature the decision in *Initiative & Referendum Inst.* v. *Jaeger*, 241 F.3d 614 (8th Cir. 2001), ignoring, as the Fourth Circuit did in evaluating Virginia's witness-residency requirement, Va. Code Ann. § 24.2-543(A), that the restriction at issue actually prevents *no one* from engaging in "'interactive communication concerning political change that is appropriately described as "core political speech,"'" Br. in Opp'n 9 (quoting *Meyer* v. *Grant*, 486 U.S. 414, 422 (1988)); *see* Pet. 8-9. *Jaeger* expressly considered and rejected the argument that "the residency requirement prevents non-North Dakota residents from engaging in political speech by forbidding them from circulating

petitions," noting that they may "communicate their views on initiative measures" in various ways, including by "speak[ing] to voters regarding particular measures," "train[ing] residents on the issues involved and instruct[ing] them on the best way to collect signatures; and . . . even accompany[ing] circulators." 241 F.3d at 617. Because non-residents may do the same in Virginia, a fact Respondents conceded below, the Fourth Circuit's decision striking Virginia's witness-residency requirement plainly conflicts with *Jaeger*. *See* Pet. 7, 9.

Moreover, by adopting the view of some of its "sister circuits that residency restrictions bearing on petition circulators and witnesses burden First Amendment rights in a sufficiently severe fashion to merit the closest examination"—doing so without close engagement with the record, searching explanation, or due regard for *Jaeger*'s reasoning—the Fourth Circuit abandoned the balancing approach this Court has mandated in favor of a per se rule of invalidity for residency restrictions. Pet. App. 17. Having refused to weigh the relative burden on speech, the Fourth Circuit then adopted an unduly incredulous view of the relation between the Commonwealth's compelling government interest in protecting the integrity of elections by "policing lawbreakers among petition circulators," *Buckley* v. *Am. Constitutional Law Found.*, 525 U.S. 182, 196 (1999), and its requirement that petition circulators be Virginia residents. Pet. App. 20-21. Finally, it found that

Virginia's requirement was not narrowly tailored based upon an entirely fanciful alternative, an approach inconsistent with *ACLF*. 525 U.S. at 192 (eschewing a narrowly tailored analysis, but noting that "[o]ur judgment is informed by other means Colorado *employs* to accomplish its regulatory purposes" (emphasis added)); Pet. App. 21.

Moreover, the residency requirement is plainly linked to the compelling state interest of policing election fraud through the constitutional fact that the Commonwealth's investigative and subpoena authority is territorially bounded. *See* Pet. 12; Pet. App. 18-19. Furthermore, reported cases provided grounds for believing that a non-resident of the State may be more difficult to locate for questioning and bring to justice in the event concerns arise over the validity of signatures. *See, e.g.*, Amicus Br. of Oklahoma, *et al.*, at 4 & n.4; *Jaeger*, 241 F.3d at 616; *Maine Taxpayers Action Network* v. *Sec'y of State*, 795 A.2d 75, 77-78, 82 (Me. 2002) (recounting an instance in which a non-resident faked his identity, forged various attestations to submit three thousand initiative petition signatures, and "at some point left the state and could not be located by investigators"); *see also Doe* v. *Reed*, 130 S. Ct. 2811, 2819 (2010) (affirming that the "threat of fraud in this context is not merely hypothetical" and citing examples). The Constitution surely does not require legislators to disregard this or to deem unenforceable submissions to jurisdiction an effective substitute for independent

verification under the subpoena power. *See Florida Bar* v. *Went For It, Inc.*, 515 U.S. 618, 628 (1995) (recognizing that in "other First Amendment contexts, [the Court] ha[s] permitted litigants to justify speech restrictions by reference to studies and anecdotes pertaining to different locales altogether, or even, in a case applying strict scrutiny" in the election law context, "to justify restrictions based solely on history, consensus, and 'simple common sense'" (internal citations omitted) (quoting *Burson* v. *Freeman*, 504 U.S. 191, 211 (1992))). In any case, *Jaeger* went one way on tailoring, 241 F.3d at 616-17 (noting that "[t]he one restriction is that out-of-state residents cannot personally collect and verify the signatures," and concluding that "that restriction is justified by the State's interest in preventing fraud"), and the other courts of appeals have gone the other way, *see* Pet. App. 20-21, contrary to clear dicta from this Court. *See* Pet. 21-22.

Finally, it is neither unusual nor inappropriate, as Respondents imply, for this Court to grant certiorari to decide an issue at the intersection of residency and state power in which only one circuit was on one side of the issue. *See, e.g.*, *McBurney* v. *Young*, 133 S. Ct. 1709, 1714, 1720 (2013) (noting that several states had state residency requirements for FOIA like the Virginia law challenged, that the Third Circuit, unlike the Fourth, had held such state residency requirements unconstitutional, and that it "granted certiorari to resolve this conflict,"

ultimately upholding the authority of the States). Here, the Fourth Circuit's decision is plainly "in conflict with the decision of" the Eighth Circuit, and other lower courts, "on the same important matter," and so merits certiorari. Sup. Ct. R. 10(a).

II. THE TREND IN THE LOWER COURTS, INCLUDING THE FOURTH CIRCUIT BELOW, HAS BEEN TO REJECT THIS COURT'S BALANCING APPROACH TO TRADITIONAL ELECTION LAW REGULATIONS IN FAVOR OF A CATEGORICAL BAN ON RESIDENCY RESTRICTIONS.

Respondents correctly note that the side of the circuit split which they support and which the Fourth Circuit joined takes the position that strict scrutiny always applies to residency requirements, because they theoretically operate to "limit the pool of available petition circulators." *See* Br. in Opp'n 8. And Respondents fault *Jaeger* for upholding North Dakota's residency requirement by considering the extent of the burden imposed in conjunction with the state interest to be furthered. Br. in Opp'n 8-9. Respondents' position accurately reflects the growing hostility of the lower courts to regulation of electoral processes, which this Court has long and repeatedly cautioned must be "'substantial'" if elections "'are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic

processes.'" *Burdick* v. *Takushi*, 504 U.S. 428, 433 (1992) (quoting *Storer* v. *Brown*, 415 U.S. 724, 730 (1974)); *see Crawford* v. *Marion Cnty. Election Bd.*, 553 U.S. 181, 190 (2008) ("Rather than applying any 'litmus test' that would neatly separate valid from invalid restrictions, . . . a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands."). In reflexively applying strict scrutiny without due weight for the burden and the compelling interest involved, the Fourth, Sixth, Ninth and Tenth Circuits have broken not only with the Eighth Circuit but also with this Court's precedents.

As recently as 2008, this Court affirmed that lower courts, in evaluating the constitutionality of "'evenhanded restrictions that protect the integrity and reliability of the electoral process itself,'" must apply the "balancing approach" set forth in *Anderson* v. *Celebrezze*, 460 U.S. 780 (1983). *See Crawford*, 553 U.S. at 189-90 (quoting *Anderson*, 460 U.S. at 788 n.9). Under that test, lower courts

> must first consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden

> imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests, it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson, 460 U.S. at 789. And the *ACLF* Court itself counseled courts to remember that States have "*considerable leeway* to protect the integrity and reliability of the initiative process, as they have with respect to election processes generally," applying *Anderson* balancing to the more burdensome voter registration restrictions there. 525 U.S. at 191-92 & n.12 (emphasis added); *see id.* at 192-97.

Ignoring this guidance and refusing to grapple with the "character and magnitude of the asserted injury," these circuits have instead treated as identical the right to request signatures from registered voters for ballot access or ballot initiative purposes with the right to legally verify their authenticity. Not only does the latter activity involve no "interactive communication concerning political change," *Meyer*, 486 U.S. at 422, it also is directly relevant to the State's interest in ensuring the authenticity of the signatures and "the integrity and reliability of the electoral process itself." In this case, the Fourth Circuit chose to ignore the evidence that

Va. Code Ann. § 24.2-543(A) imposed no substantial burden on LPVA or Bonner and disregarded the absence of evidence regarding its burden on anyone else. *See* Pet. 7-9, 13; Br. in Opp'n 3-4.

Finally, the Fourth Circuit imposed an impossible burden that the Commonwealth must disprove by "concrete evidence of persuasive force" that a regulatory measure that at this writing apparently has never been tried anywhere—consent to jurisdiction for non-resident petition circulators—"would be unworkable or impracticable." Pet. App. 21.

CONCLUSION

The Court should thus grant this Petition to resolve the circuit split over whether state residency requirements may practically be utilized as a "needful integrity-policing measure." *ACLF*, 525 U.S. at 197. Wherefore the Petition should be granted, the judgment of the Fourth Circuit reversed, and the

constitutionality of Virginia's witness-residency requirement, Va. Code Ann. § 24.2-543(A), upheld.

Respectfully submitted,

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