RECORD NO. 15-1478; CONSOLIDATED W/15-1483

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

24TH SENATORIAL DISTRICT REPUBLICAN COMMITTEE;
KENNETH H. ADAMS, individually and as Chairman of the 24th Senatorial District Republican Committee,

Plaintiffs - Appellants,

and

DANIEL MOXLEY,

Intervenor/Plaintiff,

v.

JAMES B. ALCORN, in his official capacity as Chairman of the Virginia State Board of Elections;
CLARA BELLE WHEELER, in her official capacity as Vice-Chairman of the Virginia State Board of Elections;
SINGLETON B. MCALLISTER, in her official capacity as Secretary of the Virginia State Board of Elections;
VIRGINIA DEPARTMENT OF ELECTIONS;
EMMETT W. HANGER, JR.,

Defendants - Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA AT HARRISONBURG

REPLY BRIEF OF APPELLANTS

Jeffrey R. Adams
WHARTON ALDHIZER & WEAVER, PLC
100 South Mason Street
P.O. Box 20028
Harrisonburg, VA 22801-7528
(540) 438-5333
jadams@wawlaw.com

Thomas E. Ullrich
WHARTON, ALDHIZER & WEAVER, PLC
125 South Augusta Street
Staunton, VA 24401
(540) 434-0316
tullrich@wawlaw.com

John C. Wirth
NELSON MCPHERSON SUMMERS & SANTOS
P.O. Box 1287
Staunton, VA 24402-1287
(540) 885-0346
johnwirth@nmsslc.com

Counsel for Plaintiffs - Appellants

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
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GLOSSARY

The "Act" means Section 24.2-509(B) of the Code of Virginia.

"Adams" means Appellant Kenneth H. Adams.

"Appellees" means all Appellees.

The "Appellees' Brief" means the Brief of All Appellees, Dkt. No. 41.

"Committee" means Appellant 24th Senatorial District Republican Committee.

"Hanger" means Appellee Emmett W. Hanger, Jr.

"Moxley" means Appellant Daniel Moxley.

The "Open Primary Law" means Section 24.2-530 of the Code of Virginia.

The "Plan" means the Plan of Organization of the RPV, as amended March 22, 2014.

The "RPV" means the Republican Party of Virginia.

ARGUMENT

I. Committee was not 'Untimely' and did not Waive Its Rights by Inaction.

To read Appellees' Brief, one would think this case is a contemporary *Jarndyce and Jarndyce*. On their account, Committee was given ample opportunity to "litigate [the] issue of Plan interpretation through final judgment." Appellees' Brief, p. 22. Thus, according to Appellees, Committee waived discovery by failing to demand it. Appellees' admission that the Rule 12(b)(1) motion, filed only three days before the preliminary injunction hearing, led to "final judgment" shows the impropriety of the District Court's adjudication of the merits of Committee's claims at this nascent stage of litigation. Consider a timeline of this litigation.

Hanger invoked his rights under the Act to dictate the method of nomination on February 24, 2015. [J.A. 17] Not incidentally, he delayed doing so until the very last day he could. Va. Code Ann. § 24.2-516.

Committee filed its complaint the next day, and filed a motion for preliminary injunction on March 3, six days later. [J.A. 4] The injunction motion had to be heard and decided before March 31, the day that Adams was required to declare whether nomination was to be by primary or another method. Va. Code §§ 24.2-527 *and* 529. Accordingly, the District Court scheduled a hearing on the preliminary injunction motion for March 23. [J.A. 6]

The Commonwealth filed its responsive pleading, a motion to dismiss, on Friday March 20. The same day the Commonwealth filed a memorandum in support of its motion to dismiss and in opposition to the preliminary injunction motion. [J.A. 5] This was the first time any party raised the interpretation of the Plan to contest standing.

Committee filed a response to the Commonwealth's memorandum two days later, on Sunday March 22. The motion for preliminary injunction was argued at a hearing the next day, Monday March 23, as were Hanger's and Moxley's motions to intervene. [J.A. 6]

The District Court granted Hanger's and Moxley's motions to intervene. Moxley filed a complaint in intervention and motion for preliminary injunction on March 26. The Commonwealth filed its motion to dismiss Moxley's complaint on April 1. The very next day, April 2, the District Court filed its Memorandum Opinion and Final Order and Judgment. [J.A. 8 *and* 371-375]

This timeline should be sufficient to establish that Committee did not sit on its rights. The entire matter was disposed of in one month and five days. The only urgency in the case was the March 31 deadline, before which the motions for preliminary injunction ideally should have been decided. Yet, having missed that deadline and no longer needing to render a decision on an expedited basis with

respect to the preliminary injunction, the District Court nevertheless reached the merits of the litigation.

Appellees assert that Committee failed to "seek, or even mention, discovery" on the issue of the Plan interpretation. Appellees' Brief, p. 6. However, the interpretation of the Plan was raised for the first time on a Friday, while the hearing on the motion for preliminary injunction–*the only hearing ever conducted in this matter*–was scheduled for the following Monday. If the limited record relied on by Committee at the preliminary injunction hearing was insufficient to establish likelihood of success on the merits, the District Court should have denied the preliminary injunction motion while affording Committee the procedural safeguard of discovery. The District Court was unjustified in assuming that an inability to build a factual record without the benefit of discovery over the course of a weekend meant that there was no relevant evidence to be adduced. Appellees are incorrect when they state that "Committee made clear they had said all they had to say." Appellees' Brief, p. 8. Rather, Committee had said all it reasonably could for the preliminary injunction motion and all it needed to say to survive a Rule 12(b)(1) motion.

II. The Interpretation of an Ambiguous Contract is a Factual Issue and Goes to the Merits.

A. The District Court Found the Plan Ambiguous.

A contract subject to two reasonable interpretations is ambiguous. *Aetna Cas. & Sur. Co. v. Fireguard Corp.*, 249 Va. 209, 215 (1995) ("an 'ambiguity' is defined as the condition of admitting of two or more meanings, of being understood in more than one way, or of referring to two or more things at the same time").

The District Court acknowledges that the Plan was susceptible to two competing, reasonable interpretations. Applying canons of construction to the Plan–the very act of which suggests that the Plan is not unambiguous on its face–"the court concludes that defendants' construction is the more reasonable one for several reasons." [J.A. 365] Thus, the District Court itself acknowledged the construction proffered by Committee was reasonable. Later the court states that the Plan "is best interpreted as the Party deferring to the Act." [J.A. 366] Again, this acknowledged that the court considered Appellees' interpretation to be the best but not the only one construction of the Plan.

B. The Interpretation of an Ambiguous Contract is a Merits Issue.

The issue of contract interpretation is a merits issue. *Powertech Tech, Inc. v. Tessera, Inc.*, 660 F.3d 1301, 1309-10 (Fed. Cir. 2011), *quoting MedImmune, Inc. v. Genentech, Inc.* 549 U.S. 118, 135-136 (2007) ("[e]ven if respondents were

correct that the licensing agreement . . . precludes this suit, the consequence would be that respondents win the case on the merits–not that the very genuine contract dispute disappears, so that Article III jurisdiction is somehow defeated").

The challenge to the jurisdictional allegations of the complaint was prematurely adjudicated by the District Court because the jurisdictional fact in question is intertwined with the merits of the case. As this court has cautioned:

> Where the jurisdictional facts are intertwined with the facts central to the merits of the dispute, a presumption of truthfulness should attach to the Plaintiff's allegations. In that situation, the Defendant has challenged not only the court's jurisdiction but also the existence of the Plaintiff's cause of action. A trial court should then afford the Plaintiff the procedural safeguards–such as discovery–that would apply were the Plaintiff facing a direct attack on the merits.

Kerns v. United States, 585 F.3d 187,193 (4th Cir. 2009), *quoting Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). In this case, the material jurisdictional fact in question is the interpretation of the Plan. However, construing the Plan goes to the heart of the merits of the case, the central question of which is: does the Act unconstitutionally burden the RPV's associational rights as expressed in the Plan? Therefore the court's dismissal of the complaint based upon adjudication of proper interpretation of the Plan was improper. *Id.*

Since the interpretation of an ambiguous contract raises material issues of fact, *Blitz v. Napolitano*, 700 F.3d 733 (4th Cir. 2012), is inapposite. In that case,

the District Court granted a Rule 12(b)(1) motion of the Transportation Security Administration ("TSA"), on the ground that the standard operating procedure ("SOP") challenged by plaintiffs was an order of the TSA subject to the exclusive jurisdiction of the Courts of Appeals. Whether the SOP was such an order was "purely a legal question", and so no discovery on that issue was required to decide the jurisdictional question. *Id.* at 739. In this case, the District Court found the Plan to be ambiguous, thus its interpretation is not purely a legal question.

C. Interpreting the Plan According To its Own Terms is Not Parol Evidence.

Appellees argue that the District Court could not have deferred to the interpretation procedure provide in Article X of the Plan, because that would be recourse to evidence of the parties' intent inadmissible under the parol evidence rule. Appellee's Brief, p. 21. This argument is wrong for two reasons. First, the parol evidence rule only applies to an unambiguous agreement; as stated above, the District Court did not find the Plan unambiguous. Second, Article X of the Plan is not "beyond the instrument itself". Appellees' Brief, p. 21, *quoting Coretel Va., L.L.C. v. Verizon Va., L.L.C.*, 752 F.3d 364, 370 (4th Cir. 2014). Definitively interpreting the Plan pursuant a process contained in the Plan is not recourse to parol evidence; it is giving effect to every provision of the Plan.

D. The District Court Ignored the Most Important Rule of Construction.

Finally, it is worth reminding this Court that, as set forth in Committee's Opening Brief, the District Court ignored the most important canon of construction: a contractual waiver of constitutional rights must be clear and compelling. As construed by the Appellees and the District Court, the Plan constitutes a waiver, ratification and incorporation of any provision of the Virginia Code–present or, presumably, future–that limits the Committee's power to select a method of nomination. Yet the District Court neither asked nor answered the question whether the purported waiver is clear and compelling.

III. The Act Violates the Committee's Associational Rights.

Appellees state that "[t]he Commonwealth has the authority to dictate the Party's nomination method." Appellees Brief, p. 29. To support this bald assertion, Appellees invoke a number of cases in which courts have upheld, or left undisturbed, statutes by which states mandated particular nomination methods. However, Appellees' assertion is based on both (i) a mischaracterization of the Act and (ii) a superficial reading of the cases.

A. Mischaracterization of the Act.

Appellees treat the Act as a mandatory primary statute, asserting that the Act gives the Commonwealth the authority to require the RPV to use a particular

method of nomination. Appellees Brief, p. 31 ("The State's authority to require a particular nomination method is not an outlier…").

However, by the Act the Commonwealth does not 'require particular nomination method.' Rather, the Act grants the power to require a particular nomination method to incumbent politicians. Put simply, the Act is not a mandatory primary statute, it is an incumbent choice statute. Once attention is paid to the Act itself, rather than merely to the outcome of its application in this case, it is easy to identify it as an incumbent choice statute and distinguish it from a mandatory primary statute.

B. Analysis of the Appellee's Cases.

Appellees' reliance on *Miller v. Brown*, 503 F.3d 360 (4th Cir. 2007) ("*Miller II*") is misplaced. Appellees characterize *Miller II* as "rejecting the Party committee's assertion that it had a right to choose a closed primary." Appellees Brief, p. 29. Actually, in *Miller II* this Court found that the party committee did have the right to a closed process and the Open Primary Law was in fact struck down on an as-applied basis. *Miller II*, 503 F.3d at 371. More to the point in this case, the *Miller II* plaintiffs challenged the Open Primary Law only; they did not challenge the Act. Indeed, the Act was directly addressed in the *Miller* line of cases only in Judge Wilkinson's dissent to this Court's refusal to hear an appeal *en banc*. *Miller v. Cunningham*, 512 F.3d 98 (4th Cir. 2007) ("*Miller III*"). In *Miller*

III Judge Wilkinson opined that this Court should overturn the Act on both freedom of association and equal protection grounds *sua sponte*.

Consider also *Am. Party of Tex. v. White*, 415 U.S. 767 (1974). In that case, the plaintiffs challenged a Texas statute that required smaller political parties to nominate by convention, while requiring larger parties to nominate by primary. However, *Am. Party of Texas* was a ballot access case brought on equal protection grounds, not a freedom of association case. Moreover, the law in question was a mandatory primary (and, for smaller parties, mandatory convention) statute. The state, not incumbents, determined the method of nomination through objective criteria contained in the statute. That law was not an incumbent choice statute such as the Act.

N.Y. State Bd. of Elections v. Lopez-Torres, 552 U.S. 196 (2008) is entirely inapposite. The *Lopez-Torres* plaintiffs were candidates for office who asserted that a mandatory convention statute denied them a fair opportunity to prevail in the electoral process in violation of their purported first amendment rights. The Supreme Court rejected the plaintiffs' claim, holding that the asserted right to a fair opportunity to prevail was entirely novel. More relevant for our purposes, the Supreme Court held that plaintiffs could not bring a freedom of association claim challenging the statute. According to the Court, the plaintiffs were "in no position to rely on the right the First Amendment confers on political parties to structure

their internal party processes and to select the candidate of their party's choosing. Indeed, both the Republican and Democratic state parties have intervened from the very early stages of this litigation to defend New York's electoral law." *Id.* at 203. Thus, *Lopez-Torres* has no application to Committee's freedom of association claim, which has been brought by party officials in their official capacity and which the RPV itself has supported by filing its brief *amicus curiae*.

Finally, there is *Lightfoot v. March Fong Eu*, 964 F.2d 865, 872 (9th Cir. 1992), the first and only case to uphold a statute that mandates a method of nomination in the face of a freedom of association challenge. As in *Am. Party of Texas*, the court in *Lightfoot* was confronted with a mandatory primary statute, not an incumbent choice statute. Moreover, in upholding a mandatory primary statute the *Lightfoot* court did not blithely assume that the state had *carte blanche* to dictate a method of nomination. Rather, as discussed more fully below, the court subjected the statute to a strict scrutiny analysis and upheld it only on the basis of a compelling governmental interest.

This Court must do no less. Rather than merely invoke the outcomes of superficially similar–and, in some instances, obviously dissimilar–cases, it is necessary to engage in meaningful legal analysis to determine whether the interests asserted by Appellees are constitutionally sufficient to support the Act. Moreover, "[t]hat 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 v. Jones*, 530 U.S. 567, 584 (2000) (emphasis in original).

Cal. Democratic Party is perhaps the ideal place to conclude our discussion of Appellees' assertion that "the Commonwealth has the power to determine the Party's nomination method." Appellees quote *Cal. Democratic Party* to the effect that "a State may require parties to use the primary format for selecting nominees, in order to assure that intraparty competition is resolved in a democratic fashion." Appellee's Brief, pp. 30-31, *quoting Cal. Democratic Party*, 530 U.S. at 572. That statement is true, in principle. However, those seemingly unequivocal words are found in a decision in which the Supreme Court overturned, on freedom of association grounds, California's statute mandating a blanket primary. *Id.* at 586. Accordingly, *Cal. Democratic Party* itself requires more than an invocation of its general language. It requires this Court to determine the proper level of scrutiny and apply it to the actual text of the Act.

C. The Act is Subject to Strict Scrutiny.

The standard applied to challenges to statutes that infringe on the associational rights of political parties has been repeatedly and clearly articulated by the Supreme Court. "If the challenged law burdens the rights of political parties and their members, it can survive constitutional scrutiny only if the State shows

that it advances a compelling state interest and is narrowly tailored to serve that interest." *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989) (citations omitted). This rule was subsequently refined by the Supreme Court in *Clingman v. Beaver*, 544 U.S. 581 (2005). In that case the Court stated:

> Regulations that impose severe burdens on associational rights must be narrowly tailored to service a compelling state interest. However, when regulations impose lesser burdens, "a State's important regulatory interest will usually be enough to justify reasonable, nondiscriminatory restrictions."

Id. at 586-587 (citations omitted).

The associational rights of political parties relate not only with *whom* a party and its members associate, but *how* that party and its members govern themselves. The Supreme Court has "continually stressed that when States regulate parties' internal processes they must act within limits imposed by the Constitution." *Cal. Democratic Party*, 530 U.S. at 573 (citations omitted); *see also Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224 (1986) ("the structure which best allows [a political party] to pursue its political goals, is protected by the Constitution.").

In *Eu* the Supreme Court applied strict scrutiny and ruled unconstitutional provisions of California election law that (1) dictated the size and composition of state central committees; (2) established the term of office and eligibility requirements of state central committee chairs; (3) mandated the time and place of state central and county committee meetings; and (4) set the dues county

committee members are required to pay. *Eu*, 489 U.S at 218 *and* 233. All these provisions related to internal processes of the party. None were related in any way to forced association with non-adherents. Thus, it is clear that strict scrutiny is not reserved only for state action that forces a party and its members to associate with non-adherents. Strict scrutiny also is applied when state action severely burdens a party's internal processes, even if the state action does not result in forced association.

Among the most important internal processes of any political party are those it uses to select it leaders. Accordingly, a party's associational rights encompass the right to choose its leaders and also to choose the process by which those leaders are chosen. *Id.* at 229 ("Freedom of association also encompasses a political party's decisions about the identity of, and the process for electing, its leaders.").

The most important leaders of any political party are its nominees for public office. The nominees of a party are in large measure the public face of the party. *See Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 372 (1997) (STEVENS, J., dissenting). The Supreme Court "vigorously affirm[s] the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party selects a standard bearer who best represents the party's ideologies and preferences." *Cal. Democratic Party*, 530 U.S. at 576 (citation and quotation marks omitted).

The Act intrudes into the process by which the RPV selects its candidates, that "special place" subject to the "special protection" of the First and Fourteenth Amendments. *Cal. Democratic Party*, 530 U.S. at 575. Thus, it imposes a severe burden on the associational rights of Committee and the RPV and is subject to strict scrutiny.

D. The Act Does Not Advance a Compelling State Interest.

Since the Act severely burdens the associational rights of Committee and the RPV, the next question is: does the Act advance a compelling state interest? It is important to note that this is not an abstract inquiry. Defendants cannot cherry pick an interest found to be compelling in another context and merely assert it here. The question is whether the interest asserted by Defendants is compelling "*in the circumstances of this case*." *Cal. Democratic Party*, 530 U.S. at 584 (emphasis in original).

1. The Integrity and Fairness of the Electoral Process is a Compelling State Interest.

The Supreme Court has found a number of interests to be compelling in various circumstances. For example, a New York law requiring that individuals enroll in a political party approximately eleven months prior to voting in that party's primary was upheld. The Court reasoned that the state had a compelling interest in preventing 'party raiding,' "whereby voters in sympathy with one party designate themselves as voters of another party so as to influence or determine the

results of the other party's primary." *Rosario v. Rockefeller*, 410 U.S. 752, 760 (1973). But, in the very same year the Court struck down a similar Illinois law. *Kusper v. Pontikes*, 414 U.S. 51 (1973). The deadline for changing party affiliation in the Illinois statute was twenty-three months prior to the next primary election, a full year longer than the eleven month period approved in *Rosasio*. The Court ruled that the long delay between registration and primary participation was not reasonably related to the state's interest in preventing party raiding.

The movement of candidates, rather than voters, was addressed by the Court in *Storer v. Brown*, 415 U.S. 724 (1974). In *Storer* the Court upheld a provision of California law prohibiting an individual from running for office in the general election as an independent if, during the same election cycle, he was a candidate in a primary election or a registered member of a political party. The asserted interests of the state were two-fold. First, the state had an interest in protecting the integrity of the nomination process as the forum for resolving intraparty contests. Second, the state had an interest in avoiding a multiplication of candidates on the ballot.

In *Lightfoot*, the one case in which a court upheld a mandatory primary statute in the face of a freedom of association challenge, the compelling interest relied upon by that court is of more than passing interest here. In upholding a mandatory primary statute, the court invoked the state's interest in moving political

decision making out of proverbial "smoke filled rooms" and making the electoral process more democratic. *Lightfoot*, 964 F.2d at 872 (cite omitted).

Unlike the statute in *Lightfoot*, the Act does not mandate primaries. To the contrary, incumbents can and do invoke it to demand other, less democratic nomination methods, cloaked with the full force and authority of the Commonwealth. Indeed, in the 2015 election cycle, two incumbent Virginia Senators invoked the Act to choose a nomination process other than a primary. [J.A. 82] Accordingly, the statute does not vindicate, either in principle or in practice, the Commonwealth's asserted interest in mandating primaries as the most democratic means of settling intraparty disputes.

Not only does the Act not make the nomination process more democratic, it actually makes the process of selecting the method of nomination less fair and less participatory. In this case the Plan empowered a group of seven individuals from different communities, all of whom were required to be personally disinterested in the outcome, to choose the nomination method. [J.A. 16] The Act stripped that power away from Committee and handed it to the incumbent. Far from taking decision making out of smoke filled rooms and making it more participatory, the Act takes the decision making out of the hands of a committee of seven and gives it to one interested individual. Thus, it makes choosing the method of nomination less fair and less participatory.

2. The Act Does Not Vindicate any Compelling State Interest.

Appellees identify two compelling interest in Appellees' Brief, "the fairness of the party's nominating process" and "democratic fashion" or "character" of the nomination process. Appellees' Brief, pp. 30-31. However, Appellees provide no explanation how the Act actually advances these admittedly compelling state interests.

The text and effect of the Act favor incumbents, not fairness, the democratic character of the electoral process, or the use of primaries. In each and every case in which the Act applies, a single incumbent, acting unilaterally, or all incumbents, acting jointly, can dictate the method of nomination. The supposed bias in favor of primaries only takes effect if the incumbents do not exercise that power, and only with regard to certain offices. In fact, far from being an expression of a bias in favor of primaries, the Act allows incumbents to demand a nomination method other than a primary, even if the party has chosen to nominate by primary.

Consider also the scope of the Act. The Incumbent Protection Act is carefully crafted in such a manner that it applies only if there is an incumbent to protect. It does not apply if no incumbent runs for re-election. Va. Code Ann. § 24.2-509(B). If the Act was intended to enhance the fairness and democratic character of the electoral process, it would apply whether or not an incumbent

stood for election. Thus, the intent of the Act is the same as its effect; to favor incumbents.

The Act has neither the effect nor the intent of encouraging primaries as a preferred method of nomination. Rather, the Act has the effect and intent of empowering incumbents. That is not a compelling state interest.

3. The Act Militates Against the Fairness and Democratic Character of the Electoral Process.

The Act tilts the political playing field in the favor of incumbents, by granting them legal and procedural advantages denied to every other participant in the political process. Of course, incumbents "already possess numerous structural advantages over their electoral competition: money, name-recognition, staff, etc. To this pre-existing array of *de facto* advantages, Virginia's incumbent selection provision now adds the *de jure* advantage that the incumbent can dictate his or her recommended preference as to renomination procedures over a party's express wishes." *Miller III*, 512 F.3d at 103-104 (Wilkinson, J., dissenting). The effect of the Act is not to ameliorate some unfairness in the electoral process, but to add advantage to advantage. Accordingly, the Act undermines rather than vindicates the Commonwealth's compelling interest in the fairness of the electoral process. Moreover, by privileging the interests of incumbents over the associational rights of political parties and the right of the public to a fair and open political process, the Act is aristocratic rather than democratic.

E. The Act is Not Narrowly Tailored.

It is easy to envision a statute that is narrowly tailored to serve the Commonwealth's interest in requiring or encouraging primaries as the most democratic method of resolving intraparty disputes. The *Lightfoot* court upheld just such a mandatory primary statute. However, as discussed above the Act is not that statute. It neither requires nor encourages primaries in the first instance. On the contrary, in every instance in which it applies, the Act grants arbitrary authority to interested individuals, subject to no objective criteria, with which they can and will advance their individual interests. It is hard to envision a less tailored statute.

F. The Act Cannot Withstand Even the Reduced Scrutiny for 'Lesser Burdens'.

Assuming, *arguendo*, the Act is not subject to strict scrutiny, it still has to withstand *Clingman's* reduced scrutiny for 'lesser burdens' on political parties' freedom of association. *Clingman*, 544 U.S. at 586-587 ("when regulations impose lesser burdens, a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.") (citation and quotes omitted).

Clingman's reduced scrutiny requires that the restriction in question be reasonable. As discussed above, while Appellees have invoked state interests from other contexts, they have not made any connection between those interests and the actual text of the Act, which cloaks interested individuals in arbitrary power and

vindicates no interests but those of incumbent politicians. In the absence of any legitimate governmental interest, the Act is unreasonable.

Clingman's reduced scrutiny also requires that the restriction in question be nondiscriminatory. This cannot merely mean invidious discrimination subject to the equal protection clause of the Fourteenth Amendment; after all, such discrimination would already be subject to strict or intermediate scrutiny, in which case the lesser scrutiny of *Clingman* would be utterly irrelevant. Accordingly, the discrimination referenced in *Clingman* can only mean intentional discrimination favoring certain participants in the political process.

The Act discriminates on its face in favor of incumbents and, as discussed above, does so in a way that increases, rather than ameliorates, the structural advantages incumbents already enjoy. As Committee has set forth in its Opening Brief, the Act discriminates against not merely political challengers but also, and more importantly, the interest of the public in a fair and open electoral process. Accordingly, the Act is not nondiscriminatory.

Because the Act is both unreasonable and discriminatory, it fails even the reduced scrutiny of *Clingman* for lesser burdens on political parties' associational rights.

CONCLUSION

Committee's complaint brings a credible constitutional challenge to the Act, an election law of public significance. Yet the District Court prematurely dismissed the complaint at the pleadings stage, based on disputed jurisdictional facts that are intertwined with the merits of the case. Accordingly, this Court should reverse the Final Order and Judgment of the District Court, and remand this case for further proceedings.

Respectfully submitted,

s/ Jeffrey R. Adams
Thomas E. Ullrich (VSB No. 28737)
Jeffrey R. Adams (VSB No. 43411)
WHARTON, ALDHIZER & WEAVER, PLC
125 S. Augusta St.
Staunton, VA 24401
Telephone: 540-885-0199
Facsimile: 540-213-0390
Email: jadams@wawlaw.com
Email: tullrich@wawlaw.com

And

John C. Wirth (VSB No. 37334)
NELSON, MCPHERSON, SUMMERS & SANTOS, L.C.
12 N. New St.
Staunton, VA 24401
Telephone: 540-885-0346
Facsimile: 540-885-2039
Email: johnwirth@nmsslc.com
Counsel for Plaintiffs – Appellants

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume requirement of Fed. R. App. P. 32(a)(7)(B)(ii), because it contains 4,791 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface (Times New Roman) using Microsoft Word in 14-point font.

August 25, 2015

s/ Jeffrey R. Adams
Thomas E. Ullrich (VSB No. 28737)
Jeffrey R. Adams (VSB No. 43411)
WHARTON, ALDHIZER & WEAVER, PLC
125 S. Augusta St.
Staunton, VA 24401
Telephone: 540-885-0199
Facsimile: 540-213-0390
Email: jadams@wawlaw.com
Email: tullrich@wawlaw.com
Counsel for Plaintiffs – Appellants

CERTIFICATE OF SERVICE

I hereby certify that on August 25, 2015, I filed the foregoing Reply Brief of Appellants with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by hand delivery and electronically using the CM/ECF system, which will send electronic notification of such filing to all counsel of record.

Joshua D. Heslinga
OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA
900 East Main Street
Richmond, VA 23219
jheslinga@oag.state.va.us

Anna T. Birkenheier
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA
900 East Main Street
Richmond, VA 23219
abirkenheier@oag.state.va.us

Counsel for Appellees

Christopher B. Ashby
ASHBY LAW PLLC
717 Princess Street
Alexandria, VA 22314
chris@ashby-law.com

Counsel for Appellee
Emmett W. Hanger, Jr.

Richard D. Boyer
BOYER LAW FIRM, PLLC
P.O. Box 10953
Lynchburg, VA 24506
rickboyerlaw@gmail.com

Counsel for Intervenor/Plaintiff

s/ Jeffrey R. Adams

Thomas E. Ullrich (VSB No. 28737)
Jeffrey R. Adams (VSB No. 43411)
WHARTON, ALDHIZER & WEAVER, PLC
125 S. Augusta St.
Staunton, VA 24401
Telephone: 540-885-0199
Facsimile: 540-213-0390
Email: jadams@wawlaw.com
Email: tullrich@wawlaw.com