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,

and

Plaintiffs - Appellants,

DANIEL MOXLEY,

V.

Intervenor/Plaintiff,

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

APPELLANTS' PETITION FOR REHEARING EN BANC

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

Appeal: 15-1478 Doc: 58 Filed: 05/03/2016 Pg: 2 of 22

TABLE OF CONTENTS

		rage
TABLE OF	AUTHORITIES	ii
STATEME	NT REQUIRED BY	RULE 35(b)1
I.	The Decision of the Panel Majority is in Conflict with Supreme Court Precedent	
II.	This Proceeding Involves a Question of Exceptional Importance	
BACKGRO	UND	2
I.	The Nomination and Election	
II.	Prior Proceedings	
ARGUME	VT	5
I.	The Decision of the Panel Majority is in Conflict v	
	A. An Unconsti	tutional Law is No Law at All5
		nct, "Law" Unambiguously Means "Valid
	C. Waiver of a	Fundamental Right Requires Clear Evidence9
	1. The Pa	anel Majority Misreads the Plan9
		Panel Majority Inverts the Proper Rule of ruction
II.	This Proceeding Involves a Question of Exceptional Importance11	
CONCLUS	ION	14
CERTIFIC	ATE OF SERVICE .	16

Appeal: 15-1478 Doc: 58 Filed: 05/03/2016 Pg: 3 of 22

TABLE OF AUTHORITIES

CASES

<u>Pag</u>	<u> 5e</u>
24th Senatorial District Republican Committee v. Alcorn, No. 15-1478, No. 15-1483, 2016 U.S. App. LEXIS 7028 (4th Cir. Apr. 19, 2016)	4
Aetna Ins. Co. v. Kennedy ex rel. Bogash, 301 U.S. 389 (1937)1	1
AT&T Mobility L.L.C. v. Concepcion, 563 U.S. 333 (2011)	.7
Cal. Democratic Party v. Jones, 530 U.S. 567 (2000)	. 1
Curtis Publishing Co., v. Butts, 388 U.S. 130 (1967)1	.1
DIRECTV, Inc. v. Imburgia, 136 S. Ct. 463 (2015)	9
Eu v. S.F. Cty. Democratic Central Committee, 489 U.S. 214 (1989)1	2
Hollins v. Methodist Healthcare, Inc., 379 F. Supp. 2d 907 (W.D. Tenn. 2005) aff'd 474 F.3d 223 (6th Cir. 2007)1	. 1
Howlett v. Rose, 496 U.S. 356 (1990)	5
Lightfoot v. March Fong Eu, 964 F.2d 865 (9th Cir. 1992)1	.3
Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803)	.4

Miller v. Cunningham, 512 F.3d 98 (4th Cir. 2007)
Sambo's Restaurants, Inc. v. Ann Arbor, 663 F.2d 686 (6th Cir. 1981)
Ex parte Siebold, 100 U.S. 371 (1880)
Spiak v. Seay, 185 Va. 710 (1946)5
United States v. Sterling, 732 F.3d 292 (4th Cir. 2013)
Valley Forge Christian College v. Americans United for Separation of Church & Sate, 454 U.S. 464 (1982)15
STATUTES AND CODES
Va. Code Ann. § 24.2-509(B)
CONSTITUTION
Const. amend. I
Const. amend. XIV
OTHER AUTHORITIES
Federal Arbitration Act6

STATEMENT REQUIRED BY RULE 35(b)

I. The Decision of the Panel Majority Conflicts with Supreme Court Precedent.

The decision of the Panel majority in this case "turns on the meaning of the clause 'where permitted to do so under Virginia Law." *24th Senatorial Dist. Republican Comm. v. Alcorn*, No. 15-1478, No. 15-1483, 2016 U.S. App. LEXIS 7028 at *13 (4th Cir. Apr. 19, 2016). The Panel majority construed the term "Virginia Law" to include Section 24.2-509(B) of the Code of Virginia (the "Incumbent Protection Act") whether or not it is unconstitutional.

Construing "Virginia Law" to include unconstitutional enactments conflicts with Supreme Court precedent. *See Howlett v. Rose*, 496 U.S. 356 (1990), *Ex parte Siebold*, 100 U.S. 371 (1880) *and Marbury v. Madison*, 5 U.S. (1 Cranch) 137 (1803). Indeed, only days after the panel heard oral argument in this case, the Supreme Court held that functionally identical language did not encompass unconstitutional enactments, but only referred to "*valid* state law." *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 469 (2015) (emphasis in original).

Further, the Panel majority's decision is based in part on the fact that the Republican Party of Virginia (the "Party") did not explicitly reserve its right to bring a constitutional challenge to the Incumbent Protection Act. However, the burden is not on a party to explicitly reserve its constitutional rights. It is well-

Appeal: 15-1478 Doc: 58 Filed: 05/03/2016 Pg: 6 of 22

settled that a contractual waiver of fundamental rights must be clear and compelling. *Sambo's Rests.*, *Inc. v. Ann Arbor*, 663 F.2d 686 (6th Cir. 1981).

II. This Proceeding Involves a Question of Exceptional Importance.

Alone among the States, Virginia has a statute which purports to grant incumbent politicians seeking re-nomination the power to determine the method by which their party nominates candidates for the offices they hold. Appellants allege that the Incumbent Protection Act unconstitutionally infringes the fundamental First Amendment associational rights of the Party to determine the method by which it selects its nominees. This question of fundamental rights has not and cannot be addressed by another court until this Court takes up the question. Moreover, the questions raised in this proceeding relate to the integrity of the electoral process. Accordingly, they affect every Virginian.

BACKGROUND

I. The Nomination and Election.

The Party's most important purpose is to select, nominate, support and elect candidates to public office. Accordingly, in its Plan of Organization (the "Plan") the Party has established rules for determining the methods by which it nominates its candidates.

Article V, Paragraph D of the Plan states that a Legislative District Committee ("LDC") shall determine whether the Party candidate for the House of

Delegates or State Senate "shall be nominated by Mass Meeting, Party Canvass, Convention or Primary, where permitted to do so under Virginia Law." [J.A. 115] The 24th Senatorial District Committee (the "Committee") is the LDC for the 24th Senatorial District (the "District"). [J.A. 92] On December 3, 2014 the Committee chose a convention as the method for selecting the Party nominee for the District for 2015. [J.A. 16]

On February 24, 2015, Kenneth H. Adams, Chairman of the Committee, received a letter from Emmett W. Hanger, Jr., the incumbent Republican Senator for the District. He enclosed a copy of Form SBE-509(4), by which he invoked his rights under the Incumbent Protection Act and designated a primary as the means of nomination for the Republican candidate in the District. [J.A. 17] After receiving Form SBE-509(4) from Sen. Hanger, the Virginia State Board of Elections (the "Board") issued an order directing the Secretary of the Electoral Board for the City of Waynesboro to cause a Republican primary to be held in the District. [J.A. 17 and 84] Such primary was held on June 9, 2015.

II. Prior Proceedings.

The Committee and Mr. Adams (collectively, "<u>Appellants</u>") filed a complaint against the Board for declaratory and injunctive relief. [J.A. 91 *et seq.*] Specifically, Appellants requested that the district court "declare . . . that Va. Code (1950) § 24.2-509 (B) is an unconstitutional violation of the First and Fourteenth

Appeal: 15-1478 Doc: 58 Filed: 05/03/2016 Pg: 8 of 22

Amendments to the Constitution of the United States" and "issue a preliminary and thereafter a permanent injunction prohibiting [the Board] from implementing a primary election to determine the Republican nomination for Virginia Senate District 24 for the 2015 general election cycle." [J.A. 99]

In dismissing Appellants' claim for lack of subject matter jurisdiction, the District Court summarized the question before it thus: "[w]hether the plaintiffs have standing depends on whether only the [Incumbent Protection] Act, or also the Plan, allows the incumbent to select the method of nomination." [J.A. 363] The district court held that the Party submitted to the Act and incorporated it into the Plan, irrespective of the Act's constitutionality, by the qualifying language "where permitted to do so under Virginia Law" (the "Qualifying Language"). Accordingly, any injury suffered by Appellants was, according to the District Court, the result of the choice of the Party, not the enforcement of the Act.

A divided Panel of this Court affirmed the decision of the District Court. Specifically, the Panel majority "conclude[d] that the language of the Plan is clear and unambiguous: the Plan delegates to the Committee the authority to determine the nomination method unless Virginia law otherwise limits that authority. Where Virginia law sets forth an alternative method of nomination, the Plan does not give the Committee the authority to supersede or challenge that determination." *24th Senatorial Dist. Republican Comm.*, 2016 U.S. App. LEXIS 7028 at *18-19.

Accordingly, the Panel majority read the Qualifying Language as acceding to the Incumbent Protection Act and, presumably, any other statute present or future, that circumscribes an LDC's power to choose the method of nomination, irrespective of the validity of such statutes.

ARGUMENT

I. The Decision of the Panel Majority Conflicts with Supreme Court Precedent.

The decision of the Panel majority to affirm is grounded on the assumption that "the contractual term 'Virginia Law' includes Virginia statutes that are void for unconstitutionality." *24th Senatorial Dist. Republican Comm.*, 2016 U.S. App. LEXIS 7028 at *21 (Traxler, J., dissenting). However, this assumption is in conflict with several of the most fundamental decisions of the Supreme Court relating to the supremacy of U. S. Constitution, and the role of the federal courts.

A. An Unconstitutional Law is No Law at All.

The U. S. Constitution is Virginia law. This has been both acknowledged by the Supreme Court of Virginia, *Spiak v. Seay*, 185 Va. 710, 712 (1946) ("The provision of the Constitution of the United States on interstate extradition, together with the Acts of Congress on the subject, are a part of the supreme law of the land and therefore a part of the law of each State."), and affirmed by the U.S. Supreme Court. *Howlett*, 496 U.S. at 367 ("[T]he Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature.").

Because the U. S. Constitution is Virginia law, an unconstitutional Virginia law is no law at all. It is axiomatic that "[a]n unconstitutional law is void, and is as no law." *Ex parte Siebold*, 100 U.S. at 376; *see also Marbury*, 5 U.S. at 180 ("a law repugnant to the constitution is void"). Accordingly, "the ordinary and natural meaning of 'Virginia Law' does not include Virginia statutes that are void because they violate the U.S. Constitution." *24th Senatorial Dist. Republican Comm.*, 2016 U.S. App. LEXIS 7028 at *29 (Traxler, J. dissenting).

B. "Law" Unambiguously Means "Valid Law".

Only days after oral argument in this case, the Supreme Court interpreted contract language nearly identical to the Qualifying Language. *DIRECTV*, 136 S. Ct. at 469. Specifically, the Court was called upon to decide whether the language "law of your state" encompasses invalid state law.

In order to understand the Supreme Court's decision, some background is in order. DIRECTV entered into a service contract with its customers. The contract includes an arbitration provision, with the proviso that the arbitration provision is unenforceable if the "law of your state" makes waivers of class arbitration unenforceable. The contract also includes a provision stating that the arbitration provision "shall be governed by the Federal Arbitration Act." *Id.* at 466.

At the time the contract was executed, California case and statutory law purported to make waivers of class arbitration waivers unenforceable (the

"Discover Bank Rule"). Accordingly, "the parties likely believed that the words 'law of your state' included California law that then made class-arbitration unenforceable." *Id.* at 468-69. However, in 2011 the Supreme Court held in that the *Discover Bank* Rule was preempted and invalidated by the Federal Arbitration Act. *AT&T Mobility L.L.C. v. Concepcion*, 563 U.S. 333 (2011).

In 2008, two customers brought suit against DIRECTV in California state court. DIRECTV invoked the contract and requested arbitration, but the trial court denied the request. *DIRECTV*, 136 S. Ct. at 466. DIRECTV appealed to the California Court of Appeals. In 2014, the Court of Appeals affirmed, construing "the law of your state" to mean "the law of California including the *Discover Bank* rule and irrespective of that rule's invalidation in *Concepcion*." *Id.* at 468.

The Supreme Court granted DIRECTV's petition for *certiorari* and reversed the decision of the Court of Appeals. In doing so, the Court held that "the law of your state" as used in the contract was unambiguous. Moreover, the Court held that the ordinary meaning of that phrase is "*valid* state law." *Id.* at 469.

The application of *DIRECTV* to the present case is obvious. The term "law of your state" is functionally equivalent to the term "Virginia Law." In each case, the language refers not to a particular statute to be incorporated by reference, but to state law as a totality. In neither case did the language in question refer to state law as it existed at a particular time or state law without reference to federal law.

The similarities between this case and *DIRECTV* go deeper. In both cases the contractual language in question presupposes that for an enactment to be "law" it must have binding force. In *DIRECTV* the Supreme Court notes that "the contract refers to 'state law' that makes the waiver of class arbitration 'unenforceable.'" *Id.* The Court goes on to state that "an in-valid state law would not make a contractual provision unenforceable." *Id.* Likewise, the Qualifying Language states that the Committee has the power to select the method of nomination "where *permitted* to do so under Virginia law." (emphasis added). Of course, if unconstitutional, the Incumbent Protection Act does not prohibit the Committee from selecting the method of nomination, in which case, the Committee is permitted to select the method of nomination pursuant to the Party's First Amendment associational rights and Section 24.2-509(A) of the Code of Virginia...

The Panel majority attempts to distinguish *DIRECTV* from this case, by pointing out the Incumbent Protection Act has not yet been ruled unconstitutional, while the *Discover Bank* Rule had been invalidated when the Supreme Court ultimately ruled in *DIRECTV*. *24th Senatorial Dist. Republican Comm.*, 2016 U.S. App. LEXIS 7028 at *15 n.2. However, on closer examination the cases are not discordant, but in harmony. The Supreme Court invalidated the *Discover Bank* Rule in 2011. Yet the Court found that the invalidity of the *Discover Bank* Rule was dispositive in a case filed in 2008 and relating to a contract executed even

earlier. As the Court notes, "judicial construction of a statute ordinarily applies retroactively." DIRECTV, 136 S. Ct. at 469 (citation omitted).

C. <u>Waiver of a Fundamental Right Requires Clear Evidence</u>.

Article II, Section 24 of the Plan reads as follows:

Primary is as defined in and subject to the Election Laws of the Commonwealth of Virginia, except to the extent that any provision of such laws conflict with this Plan, infringe the right to freedom of association, or are otherwise invalid.

[J.A. 107]. The Panel majority noted the presence of an explicit reservation of constitutional rights in Article II, Section 24, and the absence of any such reservation of rights in the Article V, Paragraph D. The Panel majority concluded "if the Party had intended to preserve its ability to unilaterally choose the method of nomination for legislative districts, it could have done so. Similarly, if it had intended to give the Committee the authority to challenge a provision of Virginia law, it could have done so." *24th Senatorial Dist. Republican Comm.*, 2016 U.S. App. LEXIS 7028 at *14-15. However, this conclusion is based on a misreading of the Plan and actual inverts the relevant rule of construction.

1. <u>The Panel Majority Misreads the Plan.</u>

The Panel majority concluded that the Party waived its right to bring a constitutional challenge to the Incumbent Protection Act by reading the Qualifying Language in light of Article II, Section 24. However, a close reading of the

provisions shows that they are very different. Those differences account for the Party's decision to include a reservation of rights in one but not the other.

Article II, Section 24 incorporates a specific provision of Virginia election law into the Plan: the statutory definition of primary. There is no language of incorporation in Article V, Paragraph D. Article II, Paragraph 24 refers to and draws from the "Elections Laws of the Commonwealth of Virginia." This reasonably could be construed to exclude reference to any legal authority outside the title of the Code of Virginia related to elections, including federal constitutional law. Article V, Paragraph D refers to "Virginia Law" which, properly construed, includes federal constitutional law.

In light of these differences, it is obvious why the Party reserved it rights in Article II, Section 24 but not in Article V, Paragraph D. Given the specific language of incorporation and the specific reference to the "Elections Laws of the Commonwealth of Virginia" the Party reserves its constitutional rights out of an abundance of caution, lest it be construed to specifically and intentionally incorporate a definition of primary at odds with its federal constitutional rights. In Article V, Paragraph D such caution is not (or at least should not be) necessary, because, first, there is no language of incorporation which would serve to import unconstitutional matter into the Plan and, second, the term "Virginia Law" unambiguously includes the federal law and excludes statutes invalidated by it.

2. The Panel Majority Inverts the Proper Rule of Construction.

By placing the burden on the Party to reserve its constitutional rights, the Panel majority not only misreads the Plan; it inverts the most important rule of construction applicable to this case. Fundamental rights are not waived by silence; waiver must be established by clear and compelling evidence.

[I]t is well established that courts closely scrutinize waivers of constitutional rights, and "indulge every reasonable presumption against a waiver." In the First Amendment context the evidence must be "clear and compelling" that such rights were waived.

Sambo's Rests., 663 F.2d at 690 quoting Aetna Ins. Co. v. Kennedy ex rel. Bogash, 301 U.S. 389, 393 (1937) and Curtis Publishing Co., v. Butts, 388 U.S. 130, 145 (1967) (citations omitted); see also Hollins v. Methodist Healthcare, Inc., 379 F. Supp, 2d 907 (W.D. Tenn. 2005) aff'd 474 F.3d 223 (6th Cir. 2007) (applying the Sambo's rule to private accreditation agreement). Accordingly, the Panel majority's conclusion that the Party's failure to reserve its First Amendment associational rights in Article V, Paragraph D constitutes a waiver of those rights is incorrect and contrary to well-established precedent.

II. <u>This Proceeding Involves a Question of Exceptional Importance</u>.

Political parties have a First Amendment associational right to determine the method by which they select their candidates. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 576 (2000) ("Unsurprisingly, our cases vigorously affirm 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." (citation and quotation marks omitted)). However, like other fundamental rights, this right is not absolute; rather, statutes which burden it generally are subject to strict scrutiny. *See, e.g., Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 222 (1989) ("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." (citations omitted)). Virginia, alone among all the States, has enacted a statute which purports to grant incumbent politicians the power to determine the method by which their party will nominate candidates for the offices they hold.

Appellants allege that the Incumbent Protection Act unconstitutionally infringes the First Amendment associational rights of the Party to determine the method by which it selects its nominees for public office. Accordingly, this case addresses a question of fundamental rights. Because the Incumbent Protection Act is unique to Virginia, this question cannot be addressed by another Circuit Court of Appeals. Moreover, this question has not been addressed by the Supreme Court. Thus, "[t]here can be no doubt that this issue is one of exceptional importance, a fundamental First Amendment question that has not been directly addressed by the

Supreme Court or our Sister Circuits." *United States v. Sterling*, 732 F.3d 292, 294 (4th Cir. 2013) (Gregory, J., dissenting).

Party nomination processes are part of the electoral process. Indeed, it is only because they are part of the wider electoral process that they are subject to regulation by the State, so long, of course, as the limits imposed by the Constitution are respected. *See, e.g., Lightfoot v. March Fong Eu*, 964 F.2d 865, 873 (9th Cir. 1992) ("the State's interest in enhancing the democratic character of the election process overrides whatever interest the Party has in designing its own rules for nominating candidates." (footnote omitted)). Accordingly, this proceeding is not merely of interest to candidates, challengers, or members of the Party, but to all Virginians with a stake in election, which is to say all Virginians.

The Supreme Court has held that the fairness of the electoral process is a compelling state interest. *Eu*, 489 U.S. at 231 ("[A] state may enact laws that interfere with a party's internal affairs when necessary to ensure that elections are fair and honest." (citation omitted)). This proceeding raises a question that goes to the heart of the fairness of that electoral process: can incumbent politicians give themselves, in addition to the *de facto* advantages they already enjoy, the *de jure* right to determine the process by which they will stand for re-nomination? *Miller v. Cunningham*, 512 F.3d 98, 103-04 (4th Cir. 2007) (Wilkinson, J., dissenting). To ask the question is to answer it; the unfairness of the Incumbent Protection Act is

obvious on its face. The Act favors incumbents over challengers, certainly, but that is the least of it. It also favors incumbents over the political parties whose standards they supposedly bear. Most importantly, the Act "surely threatens to entrench Virginia's incumbents to an unconstitutional extent," favoring incumbents over the citizens they are elected to serve. *Id.* at 104 (Wilkinson, J., dissenting).

CONCLUSION

"It is emphatically the province and duty of the judicial department to say what the law is." *Marbury*, 5 U.S. at 177. Appellants ask this Court to discharge this duty and determine whether the Incumbent Protection Act is law.

The Panel majority responds with a paradox. On the one hand, the Panel majority holds that the Appellants are bound by "Virginia Law." On the other hand, the Panel majority rules that Appellants have no standing to petition the federal courts for a determination what "Virginia Law" actually is.

This outcome is not demanded by the standing doctrine, either in principle or in practice. In principle, the standing requirement protects the jurisdiction of the federal courts by ensuring that only cases and controversies are heard and decided by them. Appellants' allegations are "sufficient to establish that the dispute would 'be resolved . . . in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action,' as the standing doctrine requires." 24th Senatorial Dist. Republican Comm., 2016 U.S. App. LEXIS 7028 at *37 (Traxler,

J., dissenting) quoting Valley Forge Christian Coll. v. Americans United for Separation of Church & State, 454 U.S. 464, 471 (1982).

In practice, a favorable decision of the federal courts would provide redress to the Appellants. If the Incumbent Protection Act is unconstitutional the Committee is "permitted" to select the method of nomination for the District pursuant to its federal constitutional and Virginia statutory rights.

And there is little doubt that the Incumbent Protection Act is unconstitutional. Indeed, it "is plainly unconstitutional." *Miller*, 512 F.3d at 103 (Wilkinson, J., dissenting). In *Miller* this Court declined Judge Wilkinson's invitation to take up the question of the constitutionality of the Act *sua sponte* in a case in which no party had raised the issue. That was an understandable exercise of judicial restraint. In this case the Act has been placed squarely before this Court. The parties to this matter have and will litigate the matter vigorously, and in a concrete factual context. A favorable decision of this Court will provide real redress to Appellants. Accordingly, Appellants ask this Court to accept jurisdiction, and to declare the Act unconstitutional.

Appeal: 15-1478 Doc: 58 Filed: 05/03/2016 Pg: 20 of 22

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: jadams@wawiaw.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 SERVICE

I hereby certify that on May 3, 2016, I filed the foregoing Petition for Rehearing *En Banc* with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit 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. Appeal: 15-1478 Doc: 58 Filed: 05/03/2016 Pg: 22 of 22

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