Nos. 15-1478 (L), 15-1483

In the United States Court of Appeals for the Fourth Circuit

KENNETH H. ADAMS, *et al.*

Appellants

v.

JAMES B. ALCORN, *et al.*

Appellees

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

BRIEF OF ALL APPELLEES

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August 11, 2015

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 15-1478 Caption: 24th Senatorial Dist. Republican Committee et al. v. Alcorn et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

James B. Alcorn, Clara Belle Wheeler, & Singleton McAllister, in their official capacities as the
(name of party/amicus)

members of the State Board of Elections, and the Virginia Department of Elections

who is appellees, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:
The above appellees are the members of a state public body and a state agency. They have no parent corporations but are part of the state government of the Commonwealth of Virginia.

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Joshua D. Heslinga Date: 5/5/2015

Counsel for: the above appellees

CERTIFICATE OF SERVICE

****

I certify that on 5/5/2015 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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5/5/2015 (date)

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case, except that a disclosure statement is **not** required from the United States, from an indigent party, or from a state or local government in a pro se case. In mandamus cases arising from a civil or bankruptcy action, all parties to the action in the district court are considered parties to the mandamus case.

Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements.

If counsel is not a registered ECF filer and does not intend to file documents other than the required disclosure statement, counsel may file the disclosure statement in paper rather than electronic form. Counsel has a continuing duty to update this information.

No. 15-1478 Caption: Adams, et al. v. Alcorn, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

State Sen. Emmett W. Hanger, Jr.
(name of party/amicus)

who is Appellee, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐ YES ☑ NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☑ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

Signature: /s/ Christopher B. Ashby Date: 5/22/2015

Counsel for: State Sen. Emmett W. Hanger, Jr.

CERTIFICATE OF SERVICE

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I certify that on 5/22/2015 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:

/s/ Christopher B. Ashby 5/22/2015
(signature) (date)

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GLOSSARY

Adams = Appellant Kenneth H. Adams, the Committee's Chairman and a Party member

Adams & Comm. Br. = Opening Brief of Adams & the Committee [Docket # 30]

Board = Appellees James B. Alcorn, Clara Belle Wheeler, and Singleton B. McAllister, in their official capacities as Chair, Vice-Chair, and Secretary, respectively, of the Virginia State Board of Elections

Committee = Appellant the 24th Senatorial District Republican Committee

Commonwealth = the Board and the Department

Department = Appellee the Virginia Department of Elections

Moxley = Intervenor-Plaintiff/Appellant Daniel Moxley, a candidate for the 2015 Republican nomination in the 24th Senatorial District and Party member

Moxley Br. = Opening Brief of Moxley [Docket # 32]

Party (or RPV) = The Republican Party of Virginia

Party Br. = Brief of Amicus Curiae The Republican Party of Virginia, Inc. in Support of Plaintiffs-Appellants [Docket # 33]

Plan = the Plan of Organization, the governing document of the Party (JA 151-91)

Sen. Hanger = Senator Emmett W. Hanger, Jr., the incumbent and the 2015 Republican nominee in the 24th Senatorial District

STATEMENT OF ISSUES PRESENTED

This Court has held that Party officials and members lack standing where their alleged injury is caused by a voluntary choice of the Party. Here, the Party chose in its governing document to limit local party officials' authority to determine the nomination method in state legislative elections, deferring where Virginia law provides for determining the nomination method in another way, and to give individual members no say in determining nomination methods. Do local party officials or individual party members have an injury that is caused by state action and redressable by the courts, as standing requires?

Interpretation of a written contract, such as the Party Plan, is a question of law. Appellants' counsel told the district court that there were no issues of disputed fact, entered the Plan and other documents into evidence without dispute, admitted Appellants had no evidence about the meaning of the Plan's key provision, and never mentioned discovery in extensive briefing and oral argument. May Appellants now claim – for the first time and without offering any excuse for not raising the issues below – that there are disputed facts and discovery is needed?

STATEMENT OF THE CASE

Appellees do not disagree with Appellants' description of the parties. *See* Adams & Comm. Br. at 4-6. The description of the claims, proceedings, and opinion below (*id.* at 7-13) is materially inaccurate and misleading, however.

1. The claims below were not as described on appeal.

Adams and the Committee challenged the constitutionality of Va. Code § 24.2-509(B), part of which the Commonwealth applied in mandating that a primary election be used to determine the 2015 nominee of the Party in the 24th Senatorial District. Adams and the Committee contended that the Commonwealth requiring a primary under § 24.2-509(B) "infringe[d] upon the defendants' [*sic*] right of free association secured by the First Amendment" because, they alleged, the Plan "delegate[d] the authority of the Party to determine the means of nomination" to the Committee, and the First Amendment protects "the process by which a political party 'select[s] a standard bearer…'." (JA 91, 95, 93.)

Adams and the Committee did not plead a claim under the Equal Protection Clause of the Fourteenth Amendment, contrary to their portrayal of their case now (*see* Adams & Comm. Br. at 17). As Moxley's counsel rightly observed, the Fourteenth Amendment's only relevance to Adams' and the Committee's pleading was its incorporation of the First Amendment's associational rights:

> the only mention of the Fourteenth Amendment the plaintiffs have made is simply the incorporation doctrine…. There's no equal protection argument that has been asserted by plaintiffs. Although they seem to have reserved the right that they could have raised it, they have not raised it up to a pretty significant point in the litigation.

JA 294; *see* JA 93 (¶ 7), 97 (¶ 22), 98 (¶ 27). For good reason, counsel for Adams and the Committee also did not claim below that they had brought a facial

challenge to Va. Code § 24.2-509(B). Circumstances in other cases may differ, and most of § 24.2-509(B) does not apply to the 2015 election in the 24th Senatorial District, making a facial challenge unnecessary and overbroad.[1]

By contrast, Moxley advanced a facial challenge under the Equal Protection Clause based on allegedly invidious discrimination between incumbents and all others, especially challengers. *See* JA 261, 330-35. Indeed, Moxley sought to intervene because "Plaintiffs' Complaint deals only with a First Amendment free association claim, and Plaintiffs do not have standing to assert an equal protection claim." (Moxley Mot. Intervene, W.D.Va. docket # 17, at 3.) Adams and the Committee responded that they "concur[red] with Moxley that the Act is unconstitutional on equal protection grounds" but argued that "it is not necessary for this Court to explore those grounds in this case, given that the Act is plainly a violation of the plaintiffs' rights to freedom of association." (Adams & Committee Resp. to Mot. Intervene, W.D. Va. docket # 28, at 2.) At the hearing, Moxley's counsel again argued that Adams and the Committee had not brought, and could

[1] Courts usually do not entertain unnecessarily broad constitutional challenges. *See, e.g.*, *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450 (2008) ("Facial challenges are disfavored for several reasons"); *Ayotte v. Planned Parenthood*, 546 U.S. 320, 328-29 (2006) ("Generally speaking, when confronting a constitutional flaw in a statute, we try to limit the solution to the problem. We prefer, for example, to enjoin only the unconstitutional applications of a statute while leaving other applications in force, or to sever its problematic portions while leaving the remainder intact.") (citations omitted).

not maintain, an equal protection claim. *See* JA 293-97. Adams and the Committee's counsel did not dispute those statements in response. *See* JA 303.

In his claim, Moxley asserted he had "no vote at all" and had been denied "any voice whatsoever" in the choice of nomination method (JA 264, 334), but he also admitted that he was not entitled to override a Party choice. If the Committee had chosen a primary, Moxley conceded that he would have been "uninjured" and had "no legal claim to any other method of nomination," and "[t]here would be no equal protection violation." (Moxley Mem., W.D. Va. docket # 42, at 19.)[2]

2. The district court ruled only after Appellants had presented all of the evidence and argument they had.

The issue of standing – and particularly the Party's limited delegation of authority in the Plan – was central to the decision regarding preliminary injunctive relief. Indeed, all parties agreed that the likelihood of success on the merits was determinative with respect to the appropriateness of preliminary injunctive relief. *E.g.*, JA 212 (counsel for Adams and the Committee: "The defendants, I believe,

[2] Although Moxley's Complaint did not attach and incorporate the Plan as Adams & the Committee had done (*see* JA 92), the Plan was expressly referenced in Moxley's Complaint (JA 329 (¶ 3)) and was integral to Moxley's request for a convention, which relied on the Plan and the Committee's claim of authority. *See* JA 329, 333-35 (¶¶ 3, 16, 23, 25 & 28(D)). Moreover, Moxley's Complaint incorporated an earlier Moxley brief that explicitly discussed the Plan. *See* JA 335 (first ¶ 27) (incorporating W.D. Va. docket # 33). And no one challenged the Plan's authenticity. The Plan is properly considered at the pleadings stage as to all claims. *See Philips v. Pitt County Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009); *see also Zak v. Chelsea Therapeutics Int'l*, 780 F.3d 597, 606-07 (4th Cir. 2015).

and we, agree that the other three requirements for preliminary injunctive relief are, in fact, collapsed into success on the merits in this case").[3]

The district court received all of the argument and evidence Appellants had.

Appellants extensively argued standing and interpretation of the Party Plan even prior to the hearing below. After the Commonwealth filed its motion to dismiss, putting those matters front and center, the district court received a 21-page response brief from Adams and the Committee (W.D. Va. docket # 32) and an 18-page response brief from Moxley (W.D. Va. docket # 33). Nowhere in those briefs did anyone seek, or even mention, discovery.

The district court then held a hearing that lasted more than two hours. *See* JA 200-306. At that hearing, counsel for Appellants did far more than confirm for the district court that there were no issues of disputed fact (JA 203), although that alone should be sufficient to preclude criticism of the district court's statement that there were no factual disputes. JA 357. Appellants also entered into evidence, with no objection or reservation by the Commonwealth, all the documents they chose to introduce. JA 285.[4] When the district court asked specifically whether

[3] *Accord* Commonwealth's Combined Mem., W.D. Va. docket # 26, at 15; Plaintiffs' Reply, W.D. Va. docket # 32, at 10; Moxley Resp., W.D. Va. docket # 33, at 7 ("the primary question for this Court's determination is the likelihood that Intervenor will prevail on the merits").

[4] As stated on JA 285, the exhibits in evidence consisted of the Declaration of Adams (JA 15-18) and the attachments to the Amended Complaint (JA 103-191).

there was any evidence about the key phrase in the Plan limiting the Party's delegation of authority to the Committee, counsel for Appellants said no: "THE COURT: Is there any evidence you can provide me as to – as to why that particular phrase is in that part of the plan and not in other portions of the plan? [COUNSEL:] MR. [JEFFREY R.] ADAMS: Not any evidence, no." JA 223.

Counsel for Moxley too had a full opportunity to present whatever Moxley wanted to present at the hearing. Even before its formal decision on intervention, the district court heard argument from Moxley's counsel on the request for preliminary injunctive relief and on intervention. *See* JA 203, 256-68, 289-302.

No one sought, or even mentioned, discovery at the hearing. *See* JA 312.

After the hearing, the district court entered an order that granted Moxley's and Sen. Hanger's intervention motions, noted the parties' agreement that no hearing on the Commonwealth's motion to dismiss was necessary, and stated the district court's view that no additional argument or hearing was necessary. (Order, W.D. Va. docket # 37, at 2.) Nonetheless, the district court granted Appellants' request for further briefing, encouraging the parties to incorporate prior arguments where appropriate. *Id.* at 2-3.

Appellants submitted further briefs arguing that they had standing and opposing dismissal. *See* W.D. Va. docket #s 39 (Adams and the Committee) & 45 (Moxley). Again, no one sought, or even mentioned, discovery.

Moxley also filed his own request for a preliminary injunction (*see* W.D. Va. docket #s 41 & 42), and Sen. Hanger filed a motion to dismiss that simply echoed the Commonwealth's (*see* W.D. Va. docket #s 43 & 44). The filings that followed from Adams and the Committee made clear they had said all they had to say. *See* W.D. Va. docket #s 47 (a one-page brief opposing Sen. Hanger's motion by incorporating prior argument) & 50 (a one-page response maintaining that Moxley's motion was unnecessary but supporting preliminary injunctive relief).

By the time of its motion to dismiss Moxley's Complaint in Intervention, the Commonwealth also had said all it had to say, summarizing and incorporating prior argument after stating the facts. (*See* W.D. Va. docket #s 55 & 56.)

It is no wonder that the district court saw no need for still more briefing or a further hearing. The district court's ruling was in no sense premature.

Nor was the district court's ruling contrary to its rules. The district court's local rules allow it to dispense with a hearing and normal briefing. *See* W.D. Va. Local Rules (Civil) 11(b) ("the Court may determine a motion without an oral hearing") & 11(c)(1) (setting forth the briefing schedule that applies "[u]nless otherwise directed by the Court"). Given that the Party Plan and standing had been argued to the point of exhaustion, there is no basis to question the district court's exercise of its discretion in ruling without a further hearing or briefing.

3. The district court based its standing ruling on a straightforward application of the Plan and this Court's prior cases.

This is the third case in this Court concerning application of Virginia's election laws to the Party in light of provisions in the Plan.

In *Marshall v. Meadows*, 105 F.3d 904 (4th Cir. 1997), after an incumbent United States Senator chose a primary election as the nomination method, Party members challenged Va. Code § 24.2-530, the open primary law. This Court held plaintiffs had not shown the causation and redressability elements of standing because the primary resulted from the Party's choice. 105 F.3d at 906-07. The Party had rejected a Plan amendment calling for a different nomination method than the incumbent had chosen pursuant to Virginia law. *Id.* at 905.

In *Miller v. Brown*, after an incumbent (this time a state Senator) again chose a primary election, Party officials again challenged Virginia's open primary law. This Court first held that the challenge was justiciable. 462 F.3d 312, 314 (4th Cir 2006) ("*Miller I*"). This Court then held that § 24.2-530 was facially constitutional but unconstitutional as applied. 503 F.3d 360, 371 (4th Cir 2007) ("*Miller II*"). The Party had amended the Plan to provide for a closed primary, and the local committee had acted consistent with the Plan. *Id.* at 362-63.

In this case too, the district court's opinion (JA 355-70) looked to the Party Plan, which is "the RPV's definitive statement on any matter it addresses." Adams & Comm. Br. at 4; *accord* Moxley Br. at 2 (adopting that Statement of Facts). No

one disputed that the Plan should be interpreted under Virginia law using ordinary contract principles (JA 365), and the district court determined and applied the plain meaning of the Plan. *See* JA 365-67. The district court rejected Appellants' interpretation of the Plan's key provision, Article V § D(1)(a) (JA 163), because Appellants' interpretation "is not what the provision says and … is not its plain meaning." JA 367. Because the Party chose to defer to Virginia law, rather than give local Party officials (the Committee) or members (Adams and Moxley) the authority to contradict an incumbent's choice of nomination method under Va. Code § 24.2-509(B), the district court then reached the result that follows from *Marshall* and *Miller I & II* – dismissal for lack of standing. JA 367-70.

SUMMARY OF THE ARGUMENT

This case requires application of an unambiguous written contract, the Party Plan, and of this Court's prior cases concerning standing and the Party Plan. Those are matters of law. This case does not involve any factual disputes, as Appellants' counsel confirmed below, and there is no basis for discovery.

The Committee is a "Legislative District Committee" of the Party, with such authority as the Party has delegated in its governing document, the Plan. Unlike the unqualified delegations to other types of Party committees, the Plan limits the authority of Legislative District Committees, providing that the Committee shall determine the nomination method "where permitted to do so under Virginia Law."

The plain meaning of the Plan is that the Party defers in cases where Virginia law sets forth another way to determine the nomination method, as the operative part of Va. Code § 24.2-509(B) does here. The Plan does not give Party members, like Adams and Moxley, any role in determining the nomination method.

The Party has the right to limit the Committee's authority and defer to the incumbent's choice of nomination method under Virginia law, and the Party has done so. Prematurely assuming that Va. Code § 24.2-509(B) is unconstitutional does not alter the result because the Party is free to defer to the incumbent's choice even assuming that imposing that choice would be unconstitutional without the Party's deference. Courts do not abdicate contract interpretation to private parties, and doing so here would be inconsistent with the Plan, which does not contain an alternative dispute resolution provision. The argument for deference to the Party also is untimely – Appellants may not litigate Plan interpretation to final judgment, then argue for the first time on appeal that courts should not interpret the Plan.

Given the Plan's plain meaning, Appellants lack standing, so this Court lacks subject matter jurisdiction. Any injury results from the Party's voluntary decision in the Plan and therefore is not traceable to Va. Code § 24.2-509(B) or redressable by the courts. Moreover, the Committee, Adams, and Moxley have no cognizable injury because they have no right to determine the nomination method. The Plan does not give Party committees, officials, and members such a right.

And, under the case law of this Court and the United States Supreme Court, the Commonwealth may dictate the Party's nomination method.

Alternatively, equal protection claims fail as a matter of law. Litigants seeking a constitutional rewrite of how state law treats parties and candidates because of alleged unfairness must show a lack of opportunity to access the ballot. No one has claimed, or can claim, such a lack of opportunity here. Moreover, under current law, rational basis scrutiny applies, and Va. Code § 24.2-509(B) serves valid state interests and has a reasonable basis. This case would be a poor vehicle to rewrite the law due to theoretical concerns about the political process.

This Court should not indulge the attempts by Adams and the Committee to remake their case on appeal. They presented all of the argument and evidence they had below, expressly telling the district court that there were no factual disputes and that they had no evidence about the meaning of the Plan's key provision. They never sought discovery below. They did not plead an equal protection claim or press a facial challenge to Va. Code § 24.2-509(B). On appeal, they have not even attempted to show that refusal to consider the newly-raised issues would be plain error or would result in a fundamental miscarriage of justice.

The district court's dismissal of the case should be affirmed.

ARGUMENT

I. Standard of Review

In this appeal, this Court must decide two questions of law, which are reviewed de novo.

First, this Court must decide whether the district court correctly interpreted the key provision in the Party Plan. The Plan is a contract, and interpretation of a written contract is a question of law, reviewed de novo. *E.g.*, *Seabulk Offshore, Ltd. v. Am. Home Assur. Co.*, 377 F.3d 408, 418 (4th Cir. 2004). Disagreement about a contract's meaning presents a legal question, not a factual dispute. And allegations in pleadings that are inconsistent with the Plan do not create a factual dispute or allow claims to survive a Rule 12 motion. *See, e.g.*, *Fayetteville Investors v. Commercial Builders, Inc.*, 936 F.2d 1462, 1465 (4th Cir. 1991) ("in the event of conflict between the bare allegations of the complaint and any exhibit attached pursuant to Rule 10(c), Fed. R. Civ. P., the exhibit prevails").

Second, this Court must decide whether Appellants have the standing necessary to establish subject matter jurisdiction. Whether subject matter jurisdiction exists also is a question of law, reviewed de novo. *E.g.*, *Lee Graham Shopping Ctr., LLC v. Estate of Kirsch*, 777 F.3d 678, 680 (4th Cir. 2015). Standing turns on whether Appellants have authority to select the nomination method where Virginia law provides for the nomination method to be determined

in another way, and the Plan and case law are determinative.

Appellants' heavy reliance on *Kerns v. United States*, 585 F.3d 187 (4th Cir. 2009), is misplaced because the scope of employment question in *Kerns* required consideration of various facts, not interpretation of a written contract. *See id.* at 190-91, 196. As this Court explained subsequently in *Blitz v. Napolitano*, 700 F.3d 733 (4th Cir. 2012), *Kerns* "has no analog" in a proceeding focused on a purely legal question, such as the meaning and effect of a statute or a contract. *Id.* at 739. In *Blitz*, this Court decided "whether the Checkpoint Screening SOP constitutes an order under [49 U.S.C.] § 46110." *Id.* Here, this Court must determine the Plan's meaning and its legal effect on standing, which likewise is "purely a legal question that can be readily resolved in the absence of discovery." *Id.*

II. The district court correctly interpreted the Party Plan.

It is undisputed, under well-settled Virginia law, that the Plan is a contract between the members of the Party, to be interpreted using ordinary contract principles. JA 365 (citing *Gottleib v. Econ. Stores, Inc.*, 102 S.E.2d 345, 351 (Va. 1958)). The plain meaning of the Plan establishes that the Party did not grant the Committee and other legislative district committees, much less individual Party members like Adams and Moxley, the authority to determine the nomination method where an incumbent designates a method under Va. Code § 24.2-509(B).

A. The Plan limits the authority delegated to legislative district committees, deferring to Virginia law where Virginia law sets forth another way to determine the nomination method.

The Committee is a creation of the Party, to which the Party has delegated certain duties and authority in the Plan. *See* JA 92 (¶ 3), 95 (¶ 13). The key delegation states: "The Legislative District Committee shall determine whether candidates for Legislative District public office shall be nominated by Mass Meeting, Party Canvass, Convention or Primary, **where permitted to do so under Virginia Law**." JA 163 (art. V § D(1)(a), emphasis added).

The Plan's "where permitted to do so under Virginia Law" qualification on the Committee's authority must be given its plain meaning. *E.g.*, *Hitachi Credit Am. Corp. v. Signet Bank*, 166 F.3d 614, 624 (4th Cir. 1999) (applying Virginia's "plain meaning" rule and the well-established principle that "In interpreting a contract, a court should … give meaning to every clause where possible."); *accord* JA 365 (quoting *TravCo Ins. Co. v. Ward*, 736 S.E.2d 321, 325 (Va. 2012)).

Other provisions of the Plan making similar delegations to other Party committees omit the "where permitted to do so under Virginia Law" qualification. *See* JA 158 (art. III § D(1)(b), providing that "It [the State Central Committee] shall determine whether candidates for statewide public office shall be nominated by Convention, Party Canvass or Primary."); JA 162 (art. IV § D(1)(a), providing that "The [Congressional] District Committee shall determine whether candidates

for District public office shall be nominated by Convention, Party Canvass or Primary."); JA 165 (art. VI § D(1)(a), providing that "The Unit Committee shall determine whether candidates for local and constitutional public offices shall be nominated by Mass Meeting, Party Canvass, Convention, or Primary and whether Unit Chairman and Committee members shall be elected by Mass Meeting, Party Canvass, Convention, or Primary."). The Plan's omission of the "where permitted to do so under Virginia Law" qualification in parallel provisions underscores that inclusion of the qualification in Article V § D(1)(a) was deliberate and meaningful.

The Plan's plain meaning is clear and unambiguous: the Plan delegates to the Committee the authority to determine the nomination method only where Virginia law permits the Committee to make that determination. Where Virginia law sets forth another way to determine the nomination method (such as by giving the incumbent the right to choose), the Plan does not give the Committee authority to contradict the determination that follows from Virginia law.

Article V § D(1)(a) also does not contemplate or grant authority to challenge a provision of Virginia law that sets forth another way to determine the nomination method. Another provision of the Plan makes clear that the Party understood how to use the Plan to support a challenge to Virginia law. *See* JA 367 (discussing art. II ¶ 24, which can be found at JA 155 and provides: "'Primary' is as defined in and subject to the Election Laws of the Commonwealth of Virginia, except to the

extent that any provisions of such laws conflict with this Plan, infringe the right to freedom of association, or are otherwise invalid.").

Applying principles of construction is unnecessary where a contract is clear, as the Plan is, but principles of construction also support giving "where permitted to do so under Virginia Law" its natural meaning. *See, e.g.*, *Coretel Va., LLC v. Verizon Va., LLC*, 752 F.3d 364, 366 (4th Cir. 2014) ("a contract must be interpreted as a whole, giving effect to all its terms"); JA 366 (citing *expressio unius est exclusio alterius* and *Smith Barney, Inc. v. Critical Health Sys.*, 212 F.3d 858, 861 (4th Cir. 2000), for the proposition that "where particular language appears in one section, but is omitted in another, the omission is deemed intentional"); *Ward*, 736 S.E.2d at 325 ("No word or clause in the contract will be treated as meaningless if a reasonable meaning can be given to it, and there is a presumption that the parties have not used words needlessly.").

No detour into antonyms (Adams & Comm. Br. at 28) is required to understand the Plan's limiting phrase. The Plan logically reflects the Party's awareness and acceptance of Va. Code § 24.2-509.

By giving the Committee the right to determine the nomination method only "where permitted to do so under Virginia Law" (JA 163), the Party delegated authority only where Virginia law allows the Committee to make that choice. Where Virginia law provides for determining the nomination method in another

way, the Party has not delegated authority to the Committee. The Plan's limitation of the Committee's authority makes clear that the Party defers to how Virginia law determines the nomination method – and, in particular, to Va. Code § 24.2-509 because that is the provision of Virginia law that addresses how a party selects legislative district candidates.

The Plan does not give individual members, such as Adams and Moxley, any authority to determine nomination methods, and Appellants and the Party have not contended that individual members have any such right or authority.

B. The Plan's limitation on the Committee's authority is an exercise of the Party's right to defer to the incumbent's choice, not a waiver of rights.

The Party could have given legislative district committees the same unqualified delegation of authority to determine the nomination method that the Party gave other types of committees. But the Party also had a right to delegate in a more limited way, and the Party chose to limit legislative district committees' authority. The Party's voluntary decision to limit the Committee's authority is a choice to use the other means provided by Virginia law, particularly Va. Code § 24.2-509(B), to determine the nomination method for the Party's legislative district candidates. As with each of the other decisions memorialized in the Plan, the choice to defer to Virginia law in Article V § D(1)(a) is an exercise of the Party's rights, not a waiver of rights.

C. To assume that Va. Code § 24.2-509(B) is unconstitutional for purposes of interpreting the Plan would be improper but still would not change the result.

The argument that Va. Code § 24.2-509(B) is not "Virginia Law" for purposes of interpreting the Plan because § 24.2-509(B) is unconstitutional (*see* Adams & Comm. Br. at 28-29) obviously assumes that § 24.2-509(B) is unconstitutional. That assumption is wrong: § 24.2-509(B) is constitutional, especially in a case like this one, where applying§ 24.2-509(B) is perfectly consistent both with the Party's rules in the Plan and, as discussed in § III(B)(2) *infra*, with the Commonwealth's right to impose a primary. The assumption of unconstitutionality is also improperly premature: determining § 24.2-509(B)'s constitutionality is the purpose of this case. Unless and until a final court ruling holds § 24.2-509(B) unconstitutional, that subsection remains a valid part of Virginia law. Appellants may not assume the constitutional end result as a way of cherry-picking to which laws the Plan defers.

The assumption of unconstitutionality is unavailing in any event. The Party has the right to defer to the incumbent's choice of nomination method, as it has done, even assuming *arguendo* that § 24.2-509(B) would be unconstitutional as applied without the Party's agreement. For example, a Virginia statute that imposed limits on the terms of Party officials would be unconstitutional. *Eu v. San Francisco County Democratic Central Committee*, 489 U.S. 214, 229-33 (1989).

Yet the Party would remain free to adopt term limits in the Plan, including by reference to such a statute. Thus, even if this Court were to indulge the erroneous and premature assumption of § 24.2-509(B)'s unconstitutionality, the result is the same because of the Plan.

Appellants protested below that the Commonwealth's interpretation of the Plan shackles the Party to an unconstitutional law. As the district court noted (JA 369 n.14), the Party may delegate authority differently in the future simply by amending the Plan, which the Party has done many times over the last decade. *See Miller II*, 503 F.3d at 362-63 (describing how a June 4, 2004 amendment to the Plan allowed excluding certain voters from a primary election and how local party officials then acted "[c]onsistent with the amendments to the Plan," thereby laying the necessary groundwork for the First Amendment claim in that case); JA 152 (listing numerous dates on which the Plan was amended).

D. The argument that the courts should abdicate to the Party the task of interpreting the Plan is unsupported by law, inconsistent with the Plan, and untimely.

The argument that the district court erred in failing to ascertain and defer to the Party's interpretation of the Plan is meritless for three reasons.

First, courts do not resolve contract disputes by asking private entities with an interest in the dispute what they think the contract means. To the contrary, it is a "fundamental rule that, when the written terms of an agreement are clear,

evidence of the parties' intent 'is utterly inadmissible.'" *Coretel Va., LLC*, 752 F.3d at 370; *accord Robinson-Huntley v. George Wash. Carver Mut. Homes Ass'n*, 756 S.E.2d 415, 418 (Va. 2014) (stating the rules that "a contract is not ambiguous merely because the parties disagree as to the meaning of the terms used" and that "When an agreement is plain and unambiguous on its face, the Court will not look for meaning beyond the instrument itself.").

Second, for the courts to abdicate their contract interpretation role would be inconsistent with the Plan. The Plan does not require Party members – much less third parties not bound by the Plan, such as the Commonwealth – to get a ruling from inside the Party before, or rather than, bringing suit. The case cited by the Party, *Seal & Co., Inc. v. A.S. McGaughan Co., Inc.*, 907 F.2d 450 (4th Cir. 1990), actually highlights the reason that deferring to the Party is inappropriate: doing so is inconsistent with the Plan's terms. In *Seal & Co.*, parties to a government contract (and their subcontractors) had agreed to be bound by the contract's mandatory alternative dispute resolution (ADR) terms. *See* 907 F.2d at 452. Here, the Plan has no mandatory ADR terms. To the contrary, Article X § A(1) of the Plan is permissive, providing that certain persons "**may request** a ruling or interpretation of the State Party Plan from the General Counsel" and that such a ruling may be appealed to the State Central Committee. (JA 176, emphasis added.) Moreover, in citing Article X § A and asserting that "[t]he district court had ample

opportunity … to obtain the Party's interpretation" (Party Br. at 7-8), the Party ignores that courts do not appear in Article X § A(1)'s exclusive list of who "may request a ruling or interpretation."[5] This Court should decline the invitation from Appellants and the Party to disregard more of the Plan's terms.

Finally, the claim that the district court erred by interpreting the Plan, rather than asking the Party to do so, is untimely and therefore waived. Even ignoring that the Plan does not provide for mandatory interpretation or dispute resolution within the Party, Appellants are not permitted to litigate an issue of Plan interpretation through final judgment in a district court, then argue for the first time on appeal that the courts should obtain and defer to a ruling by the Party. *See Helton v. AT&T Inc.*, 709 F.3d 343, 360 (4th Cir. 2013) ("an 'issue[ ] raised for the first time on appeal generally will not be considered' absent a showing that 'refusal to consider the newly-raised issue would be plain error or would result in a fundamental miscarriage of justice.'"); *cf. Rota-McLarty v. Santander Consumer USA, Inc.*, 700 F.3d 690, 702 (4th Cir. 2012) (a litigant defaults its right to arbitration "where it 'so substantially utiliz[es] the litigation machinery that to

[5] To the extent Appellants or the Party argue that the State Central Committee's June 27 resolution (Party Br. at 3) is an authoritative interpretation of the Plan, they further disregard the Plan's terms. Plan interpretation begins with a ruling by the Party's General Counsel, and the State Central Committee makes a "final decision" only "upon timely appeal." JA 177 (art. X § C); *see* JA 176 (art. X § A) (a general counsel ruling binds Party members "unless and until overturned upon appeal" to the Appeals Committee or the State Central Committee).

subsequently permit arbitration would prejudice the party opposing the stay'"). The *Rota-McLarty* opinion specifically noted that parties should not "game the system, such as by seeking arbitration after the district court's unfavorable disposition of a motion or discovery dispute." *Id.* at 702 n.12. That is exactly what Appellants are doing by seeking Party interpretation of the Plan only after the district court's unfavorable disposition of the Commonwealth's Rule 12 motion.

The record in this case underscores that the argument for Party interpretation of the Plan is untimely. Adams and the Committee clearly had the opportunity to obtain a Party interpretation prior to the lawsuit and simply failed to do so. In early December 2014, two months prior to suit and at approximately the same time that his counsel was writing legal arguments to the Board (*see* JA 76), Adams sought and received an interpretation from then-General Counsel Patrick M. McSweeney regarding duties of Legislative District Committees under Article V of the Plan. Letter from McSweeney to Adams (December 7, 2014), *available at* http://rpv.org/wp-content/uploads/2014/06/20141207_GCRuling_LDC_DutiesandPotentialLiability.pdf (last visited August 9, 2015).[6] That Adams and McSweeney neglected interpretation of Article V

[6] A copy of this letter was submitted to the district court as Exhibit 2 to the Commonwealth's Combined Memorandum. *See* W.D. Va. docket # 26-2.

The letter opined that the Party Plan did not require Adams or the Committee to certify a primary, an issue that appeared in this lawsuit below (*see* JA 97 (¶ 19) &

(footnote continued on next page…)

§ D(1)(a)'s "where permitted to do so under Virginia Law" limitation (JA 163) cannot somehow be transformed on appeal into a failure of the district court.

III. The courts lack subject matter jurisdiction because Appellants lack standing.

"Article III gives federal courts jurisdiction only over 'cases and controversies.'" *Miller I*, 462 F.3d at 316 (quoting U.S. CONST. art. III, § 2, cl. 1). The doctrine of standing is "an integral component of the case or controversy requirement." *Id.* (citing *Marshall v. Meadows*, 105 F.3d 904, 906 (4th Cir. 1997)). The three requisite components of standing are that (1) the plaintiffs must have suffered an injury-in-fact, "an actual or threatened injury that is not conjectural or hypothetical"; (2) "the injury must be fairly traceable to the challenged conduct"; and (3) "a favorable decision must be likely to redress the injury." *Id.* (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Because the Plan defers to an incumbent's choice of nomination method under Va. Code § 24.2-509(B), Appellants lack each of the elements of standing.

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361 (n.9)) but is not mentioned in Adams' & the Committee's Opening Brief and so is not part of this appeal. *E.g.*, *Mayfield v. NASCAR*, 674 F.3d 369, 377 (4th Cir. 2012) ("A party's failure to raise or discuss an issue in his brief is to be deemed an abandonment of that issue.").

McSweeney, who is sole counsel on the Party's amicus brief in this appeal, was replaced as the Party's General Counsel by Chris Marston sometime between January 24, 2015, and March 16, 2015, according to ruling letters of those dates on the Party's website. *See* RPV, General Counsel Rulings, *at* http://www.virginia.gop/general-counsel-rulings/ (last visited August 9, 2015).

The district court therefore correctly dismissed the case for lack of subject matter jurisdiction. Moreover, Appellants' portrayal of the Commonwealth's and the Party's relative authority over determination of nomination methods is erroneous, which further demonstrates Appellants' lack of a cognizable injury.

A. Causation and redressability are missing because any injury is a result of the Party's choice.

This Court twice has considered the constitutionality of Virginia's open primary law, Va. Code § 24.2-530, as applied after an incumbent's designation of nomination method under Va. Code § 24.2-509(B). In *Miller II*, this Court held that § 24.2-530 was facially constitutional (503 F.3d at 368) but unconstitutional as applied because in that instance Virginia law conflicted with the Party's Plan with respect to a closed primary. *See id.* at 362-63. In *Marshall v. Meadows*, this Court dismissed the challenge for lack of standing. 105 F.3d at 906-07. The different outcomes flowed from whether, in each case, there was a conflict between application of Virginia elections statutes and the Party's Plan.

Where the Party's choices in the Plan are responsible for the nomination method about which litigants complain, the causation and redressability elements of standing are missing:

> Because the alleged injury is caused by a voluntary choice made by the Virginia Republican Party and not the Open Primary Law, the plaintiffs have not established causation. The Virginia Republican Party has made its choice to conduct a party primary in the manner it

> desires and there is no reason for us to interfere with that voluntary decision….
>
> Finally, the plaintiffs have not demonstrated that their alleged injury can be redressed if we declared the Open Primary Law unconstitutional. If the Virginia Republican Party voluntarily elects an "open" primary, which it is legally entitled to do, then there is nothing this court can do…

Marshall, 105 F.3d at 906-07 (citation and footnote omitted).

The Plan expresses the Party's voluntary decision to limit the Committee's authority, by delegating authority to determine the nomination method only "where permitted to do so under Virginia Law." (JA 163.) The Party is legally entitled to allow its incumbent officeholders to choose the nomination method. The Party has done so here by deferring where Virginia law does not permit the Committee to choose, such as where the law provides for the nomination method to be determined through an incumbent's designation under Va. Code § 24.2-509(B).

Attempts to distinguish *Marshall v. Meadows* merely because there is disagreement in this case about the Plan's meaning (*see* Party Br. at 15) are unpersuasive. It is well-settled under Virginia law that disagreement between litigants over the meaning of a written contract does not make that contract ambiguous or otherwise alter its meaning. *See, e.g.*, *Robinson-Huntley*, 756 S.E.2d at 418 ("a contract is not ambiguous merely because the parties disagree as to the meaning of the terms used"). And portraying the disagreement over interpretation of a written contract as a "factual dispute" (Adams & Comm. Br. at 25-26) offers

only further error. *See* § I, *supra*.

Because the Party voluntarily chose to defer to Virginia law, under which Sen. Hanger designated the nomination method, the causation and redressability required for standing are absent.

B. Appellants lack the injury required for standing.

There is no cognizable injury in being denied something to which one has no right. Because none of the Appellants have a right to determine the nomination method, they do not have the injury required for standing.

1. Party committees, officials, and members have a right to determine the nomination method only to the extent the Party allows, and the Party has not given Appellants any such right.

As argued *infra*, the Party's right to determine the nomination method used to select its candidates is limited by the Commonwealth's authority. But whatever rights the Party has, those rights accrue to Party committees, officials, and members only to the extent the Party delegates its rights. Here, the Plan makes clear that the Party has not delegated any right to determine the nomination method to individual officials and members (including Adams and Moxley), and that the Party has chosen to give only a limited delegation to legislative district committees, including the Committee. That limited delegation allows the Committee to determine the nomination method only "where permitted to do so under Virginia Law" (JA 163) and does not include the authority to displace or

contradict determinations of the nomination method under Va. Code § 24.2-509(B) (including but not limited to a choice by the incumbent where there is only one incumbent in a state legislative election). *See* § II(A), *supra*.

The claim that any resident voter has standing (*see* Adams & Comm. Br. at 37-39) has no support in law and actually threatens the rights of the Party. Voters who choose to become members of the Party are bound by the Party Plan, which is an enforceable contract between the members under Virginia law. JA 365 ("No party disputes that the Plan should be interpreted as a contract between the members and interpreted using ordinary contract principles.") (citing *Gottlieb v. Econ. Stores, Inc.*, 102 S.E.2d 345, 351 (Va. 1958)). Voters who do not associate with the Party through membership have no right to participate in, much less determine, the Party's nomination method. *See California Democratic Party v. Jones*, 530 U.S. 567, 577 (2000) (finding the forced association of California's blanket primary impermissible and distinguishing it from a closed primary because, under a closed primary, "even when it is made quite easy for a voter to change his party affiliation the day of the primary, and thus, in some sense, to 'cross over,' at least he must formally *become a member of the party*; and once he does so, he is limited to voting for candidates of that party.") (emphasis in original). Accepting the remarkable claim that any voter has standing to challenge application of Va. Code § 24.2-509(B) undermines the Plan within the Party and

also threatens a constitutional violation by allowing Democrats or other voters with whom the Party does not wish to associate to use litigation to override the Party's choice in the Plan of how to determine the nomination method. *See Miller II*, 503 F.3d at 365 ("Freedom of association would prove an empty guarantee if associations could not limit control over their decisions to those who share the interests and persuasions that underlie the association's being.") (quoting *Democratic Party of the United States v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 n.22 (1981)).

Because Adams, the Committee, and Moxley do not have a right to determine the nomination method in this case, the Commonwealth's refusal to give effect to their preference for a convention is not an actual injury.

2. The Commonwealth has the authority to dictate the Party's nomination method.

The fatal flaw in Appellants' claims runs even deeper than Appellants assuming rights that the Party has chosen not to delegate to them. Appellants and the Party overstate the Party's rights in the first place.

"[A] party has no constitutional right" to a primary or any particular nomination method; rather, "states may dictate the method by which political parties select their nominees." *Miller II*, 503 F.3d at 368 (rejecting the Party committee's assertion that it had a right to choose a closed primary because Virginia law allows primaries and describing the holding of *American Party of*

Texas v. White, 415 U.S. 767, 781 (1974)). In *American Party of Texas*, the State did not just impose particular nomination methods; Texas law mandated different methods for different parties.[7] The Supreme Court upheld Texas's strict regime, labeling it "too plain for argument" that states may mandate that a political party use a particular method to select nominees. 415 U.S. at 781.

In recent years, even as the Supreme Court has upheld parties' rights against forced association and to organize internally, the Court has continued to affirm that states have the authority to impose nomination methods on parties and a legitimate interest in doing so. *See N.Y. State Bd. of Elections v. Lopez Torres*, 552 U.S. 196, 203 (2008) ("when the State gives the party a role in the election process," such as allowing candidates' party affiliation on the general election ballot, "the State acquires a legitimate governmental interest in ensuring the fairness of the party's nominating process, enabling it to prescribe what that process must be");[8] *California Democratic Party*, 530 U.S. at 572 ("a State may require parties to use

[7] *See* 415 U.S. at 772-73 (statewide primaries required for "major parties"), 773-74 (parties whose candidate for governor received more than 2% but less than 200,000 votes may use primaries or conventions), 774 (parties who polled less than 2%, such as those who brought the case, required to use conventions and to provide signed petitions if the convention did not evidence the required support), 775 ("unaffiliated nonpartisan or independent candidates" required to qualify by submitting an application or petition with the requisite signatures).

[8] The Commonwealth grants political parties the same "role in the election process" identified in *Lopez Torres* as "enabling [the State] to prescribe what [a party's nominating] process must be" (552 U.S. at 203): identifying candidates on the general election ballot by the name of their party. *See* Va. Code § 24.2-613.

the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion") (citing *American Party of Texas*, 415 U.S. at 781). Indeed, Appellants seem to concede the Commonwealth's authority to impose a nomination method. *See* Adams & Comm. Br. at 35 (quoting the holding in *Lightfoot v. Eu*, 964 F.2d 865, 873 (9th Cir. 1992), that "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.").

The State's authority to require a particular nomination method is not an outlier; it is one aspect of the States' "broad power" to regulate elections, for both federal and state offices. *Wash. State Grange*, 552 U.S. at 451; *accord Clingman v. Beaver*, 544 U.S. 581, 586 (2005) ("The Constitution grants States 'broad power to prescribe the 'Times, Places and Manner of holding Elections for Senators and Representatives,' Art. I, § 4, cl. 1, which power is matched by state control over the election process for state offices.'") (quoting two prior cases). Both the United States Constitution and Virginia Constitution recognize the Commonwealth's broad power to exercise control over the election process.[9]

[9] *See* U.S. CONST. art. I § 4; VA. CONST. art. II § 4. Election regulation is "one of the few areas in which the [U.S.] Constitution expressly requires action by the States" and contains an "express delegation[] of power to the States to act." *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 804-05 (1995).

Miller II removed forced association as a concern in primary elections in Virginia. *See* JA 360-61. Given that and the Commonwealth's well-established power to mandate that parties use a particular nomination method, Appellants have no cognizable injury in the application of Virginia law exercising that power.

IV. In the alternative, any equal protection claim in this case fails as a matter of law.

There is an alternative basis to affirm the district court's dismissal of equal protection claims in this case: Appellants have failed to satisfy the Supreme Court's standard for claims of unfairness in how states regulate parties and candidates, and, at least where applying Va. Code § 24.2-509(B) imposes a primary election, the statute satisfies the applicable standard of review.[10]

A. The Supreme Court requires a showing of lack of opportunity to appear on the ballot, and such a claim has not been made and cannot be made in this case.

Litigants must show a lack of opportunity to appear on the ballot in order to use the U.S. Constitution to force changes in state law regarding candidate selection based on claims that disparities in law are unequal or unfair.

As discussed above, when confronted with a challenge to Texas election laws that imposed different requirements on different political parties, the Supreme

[10] The Commonwealth does not concede that applying Va. Code § 24.2-509(B) to require a non-primary method of nomination would be unconstitutional. The qualification in this argument reflects the principle of avoiding unnecessarily broad constitutional rulings. *See* p.4 n.1, *supra.*

Court upheld Texas law, labeling it "too plain for argument" that states may mandate that a political party use a particular method to select nominees. *See* pp.29-30, *supra*; *American Party of Texas*, 415 U.S. at 781. The litigants in that case did not allege a burden on First Amendment rights alone but also claimed that Texas's laws "violate the *Equal Protection Clause of the Fourteenth Amendment* as invidious discriminations against new or small political parties." *Id.* at 780. The Supreme Court responded that the litigants' burden to show discrimination "is not satisfied by mere assertions that small parties must proceed by convention when major parties are permitted to choose their candidates by primary election." *Id.* at 781. Merely identifying disparities in state law was insufficient because the Court was "unwilling to assume" that meeting Texas's requirements "imposes a substantially greater hardship on minority party access to the ballot." *Id.* at 783. The Court rejected the assertion that Texas was "freez[ing] the status quo" and concluded that Texas "affords minority political parties a real and essentially equal opportunity for ballot qualification." *Id.* at 787-88. Because those claiming to be discriminated against had failed to show a real lack of opportunity for ballot access, their challenge to the differing requirements of Texas election law failed.

In *Lopez Torres*, the Supreme Court set a similar standard for cases alleging disparities in how state law treats candidates. New York required parties to select nominees for Supreme Court Justice through a hybrid system – "at a convention of

delegates chosen by party members in a primary election." 552 U.S. at 198. Candidates unhappy with the procedure imposed under state law, along with voters who supported those candidates and a public interest group, sued, "contend[ing] that New York's election law burdened the rights of challengers seeking to run against candidates favored by party leadership, and deprived voters and candidates of their rights to gain access to the ballot and to associate in choosing their party's candidates." *Id.* at 201. Lower courts granted an injunction requiring a direct primary and held that there was a constitutional right to a "realistic opportunity to participate in [a political party's] nominating process, and to do so free from burdens that are both severe and unnecessary." *Id.* at 202 (alteration in original). The Supreme Court reversed, finding "no support in our precedents" for a claim that the Constitution imposes a requirement that candidates "have a fair chance of prevailing in their parties' candidate-selection process." *Id.* at 204. The Court noted that the litigants could "vote in the election for delegates" and could "run in that election" and that nothing in state law compelled anyone's vote or barred a candidate "from attending the convention and seeking to persuade the delegates." *Id.* at 204-05. As for claims that the general election was "uncompetitive," the Court said that competitiveness interests "are well enough protected so long as all candidates have an adequate opportunity to appear on the general-election ballot." *Id.* at 207. The Court declined to "enter the morass" of trying to make elections

sufficiently fair or competitive. *Id.* at 209.[11]

The common theme in *American Party of Texas* and *Lopez Torres* is that courts should not use the Constitution to tinker with state election law to address perceived unfairness in differing treatment of parties or candidates unless a litigant can show a real lack of adequate opportunity to access the ballot.

Appellants have made no claim that Va. Code § 24.2-509(B) creates a lack of opportunity to access the ballot, and no such claim is possible in this case. By his own allegations, Moxley met the requirements to compete for the Republican nomination. JA 333 (¶ 18.) In fact, Moxley was not the only challenger who qualified for the ballot and ran against Sen. Hanger in the June 2015 primary.[12] And there is good reason why Appellants and the Party now fail to offer anything more than a conclusory assertion that § 24.2-509(B) somehow undermines "a level playing field." (Party Br. at 22.) The Commonwealth provides a fair opportunity to access the ballot through modest requirements that apply to every candidate equally. *See, e.g.*, Va. Code § 24.2-521 (250 signatures for state Senate races).

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[11] Two justices wrote in concurrence "to emphasize the distinction between constitutionality and wise policy." *Lopez Torres*, 552 U.S. at 209 (Stevens, J., concurring). A state's election laws need not be the best laws possible or worthy of endorsement to pass constitutional muster. *See id.*

[12] *See* Va. Dept. of Elections, 2015 June Republican Primary Results, *at* http://results.elections.virginia.gov/vaelections/2015%20June%20Republican%20Primary/Site/Member%20Senate%20of%20Virginia%20%28024%29.html (last visited August 9, 2015) (showing Sen. Hanger's defeat of Moxley and another candidate, Marshall W. Pattie).

Moxley never alleged, and could not allege, the lack of an adequate opportunity to persuade Republican voters to support him; he and the other challenger had a free and fair opportunity to persuade Republican primary voters. Any claim that application of Va. Code § 24.2-509(B) gives an unfair advantage in cases like this one simply fails to meet the Supreme Court's standard.

B. Applying Va. Code § 24.2-509(B) does not violate equal protection.

Under current equal protection law, there can be little doubt that Va. Code § 24.2-509(B) is subject only to rational basis review and that it passes that review. Where § 24.2-509(B) results in a primary, it serves important state interests and has a reasonable basis. This case would be a poor vehicle to rewrite the law because theoretical concerns about § 24.2-509(B) having a negative effect on the political process do not apply where a primary results from § 24.2-509(B), and there are no allegations or evidence of theoretical concerns becoming reality.

1. Rational basis scrutiny applies.

"In the equal-protection context, a 'challenged classification need only be rationally related to a legitimate state interest unless it violates a fundamental right or is drawn upon a suspect classification such as race, religion, or gender.'" *Ameur v. Gates*, 759 F.3d 317, 327 (4th Cir. 2014), *cert. denied by* 135 S. Ct. 1155 (U.S. Jan. 20, 2015).

Va. Code § 24.2-509(B) does not violate a fundamental right. As discussed

above, it does not violate associational rights – much less impose the "severe" burden required for heightened scrutiny. *See Clingman*, 544 U.S. at 592 ("But not every electoral law that burdens associational rights is subject to strict scrutiny…. strict scrutiny is appropriate only if the burden is severe"). Moxley's Brief does not mention – and therefore has abandoned (*Mayfield*, 674 F.3d at 377) – any claim that § 24.2-509(B) infringes upon the right to vote. In any event, such a claim would be meritless. As the district court noted, § 24.2-509(B) affects only the method of nomination, not the right to vote. *See* JA 361 ("the parties are in agreement that the universe of voters who will be permitted to vote for the Republican nominee for the seat is the same pool of voters, regardless of whether a convention or a primary is the voted method. That is, the Plan directs that the same qualifications will permit a voter to participate in the RPV's conventions and primaries.") (citations to JA 222-23, 234, 276-77 & the Plan, JA 153, omitted).

Nor does Va. Code § 24.2-509(B) draw distinctions based on race or any other recognized suspect classification. The statute does not discriminate against any recognized protected class, and no one has alleged such discrimination.

Because Va. Code § 24.2-509(B) does not violate a fundamental right or discriminate against a protected class, there is no basis for heightened scrutiny.

2. At least where Va. Code § 24.2-509(B) results in a primary election, it serves important state interests and has a reasonable basis.

Rational-basis review is "a 'deferential' standard that asks only whether [the legislature] had a 'reasonable basis for adopting the classification.'" *Ameur*, 759 F.3d at 328; *accord Wilkins v. Gaddy*, 734 F.3d 344, 348 (4th Cir. 2013) (noting that "the fit between the enactment and the public purposes behind it need not be mathematically precise" and that "the statute will pass constitutional muster" under rational-basis review as long as there is "a reasonable basis for adopting the classification, which can include 'rational speculation unsupported by evidence or empirical data'") (citing *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 315 (1993)).

"The rational basis standard thus embodies an idea critical to the continuing vitality of our democracy: that courts are not empowered to 'sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations.'" *Wilkins*, 734 F.3d at 348 (quoting *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976)).

Applying Va. Code § 24.2-509(B) to mandate a primary serves important state interests and has a reasonable basis, easily satisfying rational basis review.

It is well-settled that primaries have democratic benefits. *See, e.g.*, *California Democratic Party*, 530 U.S. at 572 ("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"). Indeed, the Supreme Court has described primaries as "more favorable to insurgents" than other candidate selection processes. *Lopez Torres*, 552 U.S. at 205. Primaries also meet the State's important interests in a fair and orderly electoral process. *See Storer v. Brown*, 415 U.S. 724, 730 (1974) ("there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes"). Mandating a primary after application of Va. Code § 24.2-509(B) serves these important interests.

The Commonwealth's administrative interests related to elections also are sufficient for § 24.2-509(B) to survive rational basis review because the statute provides an easily-administered system for choosing between permissible nomination methods. *See Clingman*, 544 U.S. at 593 ("States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.").

There is a reasonable basis for Va. Code § 24.2-509(B)'s long-standing legislative judgment that ordering a primary after an incumbent's choice benefits democracy, not merely incumbents. Allowing a non-primary nomination method only with incumbent agreement "assured those voters who had supported a candidate previously that their majority voice could not be bypassed in succeeding elections by means of intra-party maneuvering without the consent of the person

they had elected." 1973-74 Op. Att'y Gen. Va. 152, 153; 1973 Va. AG LEXIS 373 at 4. As the Supreme Court stated in *Lopez Torres*, "we have … permitted States to set their faces against 'party bosses' by requiring party-candidate selection through processes more favorable to insurgents, such as primaries." 552 U.S. at 205. The legislative judgment that allowing incumbents to designate a primary actually promotes democracy is supported by experience and case law and more than adequate to provide a rational basis for Va. Code § 24.2-509(B).[13]

It is true that Va. Code § 24.2-509(B) theoretically would allow an incumbent to designate a non-primary method of nomination when the party prefers a primary, but there is no evidence that actually happens. The record shows that, in each Senate district where an incumbent chose a non-primary method in 2015, the relevant party chair concurred. *See* JA 149-50. And this case, *Miller II*, and *Marshall v. Meadows* all exemplify that disputes over nomination method occur when party bosses seek to use non-primary methods to oust an

[13] *Marshall v. Meadows* noted in passing that Va. Code § 24.2-509(B) "is known generally as the Incumbent Protection Act." 105 F.3d at 905 n.1. As examination of the briefs in that case shows, however, that unofficial, derogatory name was used – without citation – only by those challenging the statute. *See* 1996 WL 33414248 (Appellants' Br.); 1996 WL 33414623 (Appellees' Br.); 1996 WL 33414249 (Intervenor-Appellee Br.); 1996 WL 34496396 (Reply Br.). Rather than repeating litigants' self-serving and disparaging appellations for state statutes, which lower courts then feel compelled to follow (*see* JA 355 n.1), future decisions instead should follow the example of *Miller II*, which did not apply a name when referencing § 24.2-509(B). *See* 503 F.3d at 362, 368, 369, 370.

incumbent that the voters support. This Court need not and should not close its eyes to that reality when ruling on Va. Code § 24.2-509(B)'s constitutionality.[14]

Particularly given that no one has even alleged any ill effects of the Commonwealth's decades of experience with Va. Code § 24.2-509(B), this case is a poor vehicle to use theoretical concerns about a negative effect on the political process to rewrite the law of equal protection.

In sum, where applying Va. Code § 24.2-509(B) results in mandating a primary election, a fair and democratic process, the statute serves important state interests, a rational basis exists, and litigants who would prefer some other nomination method have no basis to claim that the Constitution requires the Commonwealth to consider their nomination method preferences.

V. Attempts to remake this case on appeal, including the untimely and vague request for discovery, should be rejected.

With the exception of Moxley's consistent, albeit unpersuasive, advance of a facial equal protection challenge to Va. Code § 24.2-509(B), the case described on appeal looks little like the case pleaded and argued in the district court.

Below, Appellants' counsel agreed there were no disputed facts; presented

[14] There is considerable irony in Appellants now claiming to stand for "[t]he right of citizens to fully and effectively participate in the political process" (Adams & Comm. Br. at 39), after they sued to void Sen. Hanger's choice of a primary and force a convention, in which citizens' participation is more difficult due to the greater time and effort required to attend and participate in a convention.

evidence (including the Plan, a written contract properly considered at the pleadings stage, *see supra* at § I & p.5 n.2); admitted that Appellants had no further evidence about the meaning of the Plan's key provision; and never even mentioned discovery. *See supra* at pp.5-8. On appeal, Appellants protest that they were denied discovery and the chance to present evidence regarding a purported factual dispute that actually is a purely legal matter of contract interpretation. Even now, Appellants do not specify what evidence would be discovered and admissible; instead, they seek to launch a fishing expedition in the hopes of reviving their case.

Below, Adams and the Committee brought a First Amendment associational rights claim, did not address application of the law in any circumstances other than their own, and did not plead or state that they were mounting a facial challenge (*see supra* at pp.3-4), even as their case was repeatedly described as an as-applied challenge during argument (*see* JA 236, 285-86, 293). On appeal, they emphasize "facial equal protection claims" that consist of nothing more than assertions of unequal or disparate treatment, coupled with theoretical concerns about the political process that lack foundation in current equal protection law.

Appellants have not even attempted to show that "'refusal to consider the newly-raised issue[s] would be plain error or would result in a fundamental miscarriage of justice,'" the threshold for consideration of claims and arguments raised for the first time on appeal. *Helton*, 709 F.3d at 360; *accord Muth v. United*

States, 1 F.3d 246, 250 (4th Cir. 1993) ("Appellant may not argue a 'continuing injury' theory in this court because he did not raise the issue in the district court below. As this court has repeatedly held, issues raised for the first time on appeal generally will not be considered.").

This Court should reject Adams' and the Committee's attempt to litigate one set of issues through final judgment below, then present a different case on appeal.

CONCLUSION

This Court should affirm the district court's dismissal of this case for lack of subject matter jurisdiction because Adams, the Committee, and Moxley have failed to show the elements of standing, given the Party's voluntary decision in the Plan. If need be with respect to equal protection claims, this Court should affirm on the alternate ground that Appellants have failed to state a claim.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

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 Times New Roman, a proportionally spaced font, and that it complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 10,754 words, according to the count of Microsoft Word, excluding the parts exempted by Rule 32(a)(7)(B)(iii).

I further certify that, on August 11, 2015, I electronically filed the foregoing brief with the Clerk of this Court using the appellate CM/ECF system. The participants in the case are registered CM/ECF users, and service will occur electronically through the appellate CM/ECF system.

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