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

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

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

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

OPENING BRIEF OF INTERVENOR-PLAINTIFF DANIEL MOXLEY

Rick Boyer
BOYER LAW FIRM, PLLC
Virginia State Bar No. 80154
P.O. Box 10953
Lynchburg, Virginia 24506
Telephone: 434-401-2093
Facsimile: 434-239-3651
Electronic Mail: rickboyerlaw@gmail.com

Counsel for Intervenor-Plaintiff Daniel Moxley

LANTAGNE LEGAL PRINTING 801 East Main Street Suite 100 Richmond, Virginia 23219 (804) 644-0477
A Division of Lantagne Duplicating Services

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: Kenneth Adams, et. al. v. James Alcorn, et. al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Daniel Moxley
(name of party/amicus)

who is Appellant/Intervenor, 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: Rick Boyer Date: 7-8-15

Counsel for: Daniel Moxley

CERTIFICATE OF SERVICE

****

I certify that on 7-8-15 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:

Rick Boyer
(signature)

7-8-15
(date)

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

STATEMENT OF JURISDICTION

The federal courts have subject matter jurisdiction because this matter arises under the First and Fourteenth Amendments to the Constitution and 42 U.S.C. §§ 1983 and 1988.

This Court has jurisdiction under 28 U.S.C. § 1291. This appeal is from an order of the United States District Court for the Western District of Virginia entered on April 2, 2015, which disposed of all claims. Appellants filed notices of appeal on May 1, 2015.

STATEMENT OF THE ISSUES

Appellants filed suit under 42 U.S.C. §§ 1983 and 1988 alleging that Section 24.2-509(B) of the Code of Virginia (the "Incumbent Protection Act," or "the Act"), which permits an incumbent elected official to choose the method of his own renomination, infringes Appellants' rights to freedom of association and equal protection in violation of the First and Fourteenth Amendments to the Constitution. The District Court dismissed Appellants' complaints for lack of subject matter jurisdiction, holding that the Republican Party of Virginia (the "RPV") has voluntarily submitted to the Act and incorporated it by reference into its Plan of Organization ("Party Plan") and therefore, any injury to Appellants is due to the independent action of the Party rather than the enforcement of the Act by Defendants.

1. Did the District Court err by prematurely dismissing the complaint for lack of subject matter jurisdiction at the pleading stage in arbitrary violation of its own rules?
2. Did the District Court err in dismissing Moxley's independent equal protection claim on the basis that the RPV had waived its free association rights?

STATEMENT OF THE CASE

This case presents constitutional questions regarding Section 24.2-509(B) of the Code of Virginia, otherwise known as the Incumbent Protection Act. *Marshall v. Meadows*, 105 F.3rd 904, 905, n. 1 (4th Cir. 1997). The Act discriminates in favor of incumbents to the detriment of political challengers and, more importantly, the interest of all citizens of the Commonwealth in a fair and competitive electoral process, irrespective of their Fourteenth Amendment right to equal protection.

Despite the gravity of the constitutional questions raised, the district court prematurely and erroneously dismissed this case at the pleading stage for lack of standing pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. [J.A. 369-370].

STATEMENT OF FACTS

Appellant Moxley adopts and incorporates by reference the Statement of Facts in Appellants' Opening Brief, for purposes of this brief.

SUMMARY OF THE ARGUMENT

I. With Regard to Appellant Moxley, the District Court Erred in Dismissing This Case for Lack of Subject Matter Jurisdiction at the Pleading Stage Without Allowing Moxley a Hearing on Defendants' Motion to Dismiss

The district court erred in dismissing Moxley's complaint for lack of subject matter jurisdiction. The court dismissed the case pursuant to Federal Rule of Civil Procedure ("FRCP") 12(b)(1). But in doing so, the court improperly denied Moxley a hearing to respond to Defendants' motions to dismiss.

On March 23, 2015, the U.S. District Court for the Western District of Virginia, sitting in Harrisonburg, held a hearing on the motions of Moxley and Senator Emmett Hanger ("Hanger") to intervene as a Plaintiff and Defendant respectively, and on the motion of Plaintiffs Kenneth Adams and the 24th Senatorial District Republican Committee (collectively "Party Plaintiffs") for an emergency injunction against the Act. Defendants James Alcorn, et. al. (collectively "the Commonwealth") had previously filed a motion to dismiss the original complaint of Party Plaintiffs, but no motion to dismiss Moxley's complaint, as Moxley was not a party until the court granted his motion to intervene on March 23. Hanger did file a motion to dismiss on March 26, the same date Moxley filed his Complaint in Intervention.

Local Rule 11(c)(1) of the district court provides that a respondent to a motion has fourteen days time in which to submit a responsive brief. The court,

however, on April 2, 2015, issued an opinion dismissing the case and disposing of Moxley's claim. The district court arbitrarily disregarded not only Moxley's duly allotted time to prepare a responsive brief, but his right to a hearing on the motion to dismiss.

Accordingly, this Court should hold that the district court erred in dismissing Moxley's complaint while granting no opportunity for a responsive brief or hearing, in violation of the court's own rules.

II. Even if the District Court's Interpretation of the Effect of the Party Plan on Party Plaintiffs' Free Association Claim is Correct, Moxley Has Standing to Bring His Independent Equal Protection Claim

The district court offered a single ground for its dismissal. According to its holding, the language in the Plan of Organization ("Party Plan") of the RPV, "The Legislative District Committee shall determine [the party's nomination method] … where permitted to do so under Virginia Law," was a voluntary waiver of any constitutional claims by the Party against any Virginia legislative enactment. Crucially, however, the court dismissed not only the Party Plaintiffs' complaint, but Moxley's as well.

Even if the court's interpretation of the Party Plan is correct, Moxley's equal protection claim is independent of Party Plaintiffs' free association claim, and his injury under the Act is independent of any action taken by the Party. Thus his

standing to bring this action is preserved, and was improperly dismissed by the district court.

III. Moxley Satisfies the Elements of Standing and the Case Should Be Determined On the Merits.

To prove standing, a plaintiff must prove three elements: Injury, Causation and Redressability. Moxley's claim meets all three.

A. Injury

Moxley is injured by the Act's creation in incumbent elected officials of a "protected class," and its grant of unilateral power to select the renomination method incumbents believe conducive to their electoral success. All challenger candidates, indeed all other voters, are excluded from the class. The electoral prospects of challengers such as Moxley are damaged commensurately as the prospects of incumbents are aided by the Act, in a stark violation of the promise of equal protection.

B. Causation

The injury to Moxley's right to equal protection is caused not, as the district court suggested, by the RPV's voluntary waiver of its First Amendment rights, but by the operation of the Act. If Moxley's rights are in any manner damaged by RPV's submission to the Act, it is the Act, not a private party, that causes the constitutional violation.

C. Redressability

Action by the courts to strike down the Act would redress the injury to Moxley and others similarly situated. In fact, such action is the only possible redress.

Without the operation of the Act, the Party Plan places the choice of nomination methods completely with the Party, thus treating incumbents and challengers equally, as candidates similarly situated.

ARGUMENT

I. With Regard to Appellant Moxley, the District Court Erred in Dismissing This Case for Lack of Subject Matter Jurisdiction at the Pleading Stage Without Allowing Plaintiffs to Respond to Defendants' Motions to Dismiss

The district court's dismissal of Moxley's complaint was arbitrary and in violation of the court's own rules. Local Rule 11(c)(1) of the U.S. District Court for the Western District of Virginia provides, "Unless otherwise directed by the Court, the opposing party must file a responsive brief and such supporting documents as are appropriate within 14 days after service."[1] Moxley was not given the allotted time to respond to Defendants' motion to dismiss, nor given opportunity for a hearing on the motion.[2]

[1] Local rules for the U.S. District Court for the Western District of Virginia are available at http://www.vawd.uscourts.gov/media/519/local_rules.pdf.

[2] The court stated clearly the reasons for the hearing: "I understand we're here today on plaintiffs' motion for a preliminary injunction, Mr. Moxley's motion to

A review of the timeline is instructive. Moxley moved to intervene as a plaintiff on March 13, 2015. The Commonwealth filed a motion to dismiss Party Plaintiffs' complaint on March 20. [J.A. at p. i]. The hearing on Moxley's motion (and Sen. Hanger's motion to intervene as a defendant) was held on March 23, and the court granted both intervention motions. *Id*. at 326. Hanger filed a motion to dismiss on March 26, the same date that Moxley filed his complaint in intervention. *Id*. at p. ii. The court dismissed the case on April 2, 2013. *Id*. at 357.

As Moxley was not a party to the case until the order granting his motion on March 23, the Commonwealth's motion to dismiss necessarily related only to Party Plaintiffs' complaint, grounded in free association, and not to Moxley's equal protection complaint. And according to the court's Local Rule 11(c)(1), Moxley had fourteen days to respond to Hanger's motion to dismiss, as well as to any such motion proffered by the Commonwealth and relating to Moxley's complaint.[3] Instead, less than one week after Hanger's motion to dismiss, and with no opportunity to respond, the court dismissed the entire matter. [J.A. 357].

While time was of the essence in addressing Plaintiffs' request for injunctive relief, no such constraints prevented the court from giving Moxley his right under

---

intervene as a plaintiff, and Senator Hanger's motion to intervene as a defendant." [J.A. 203]. The court never requested argument on any motions to dismiss, which in any event could not have applied to Moxley's complaint, as Moxley had not yet been admitted as a party.

[3] Local rules for the U.S. District Court for the Western District of Virginia are available at http://www.vawd.uscourts.gov/media/519/local_rules.pdf.

the rules to respond to the motion to dismiss his claim, before dismissing it outright.

With regard to questions of standing, "on a motion to dismiss we presum[e] that general allegations [in a complaint] embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). (quote and citation omitted). At the injunction hearing on March 23, 2015, Defendants contended in essence, and the district court agreed, that facts in the jurisdictional allegations in Party Plaintiffs' complaint were not true – that is, that the language of the Party Plan itself was a voluntary waiver of any constitutional claims by the Party, rather than a general statement that the Party would operate according to law, as Party Plaintiffs contended. When a challenge is made to jurisdictional facts alleged in a complaint, a trial court may "go beyond the allegations of the complaint and in an evidentiary hearing determine if there are facts to support the jurisdictional allegations." *Adams v. Bain,* 697 F.2d 1213, 1219 (4th Cir. 1982). Yet the district court provided no such hearing. Thus, the salient factual finding on which the court based its dismissal was made with no opportunity for Moxley or any other party to adduce related evidence.

In fact, the court made clear that the March 23 hearing was not a hearing on any motion to dismiss: "[W]e're here today on plaintiffs' motion for a preliminary

injunction, Mr. Moxley's motion to intervene as a plaintiff, and Senator Hanger's motion to intervene as a defendant." [J.A. 203].

Thus not only has Moxley been denied his right to the equal protection of the laws, but also his proper procedural "day in court" to defend that right. Accordingly, this Court should find that the district court erred and acted arbitrarily in its holding that Moxley lacked standing in this case.

III. Even if the District Court's Interpretation of the Effect of the Party Plan on Party Plaintiffs' Free Association Claim is Correct, Moxley Has Standing to Bring His Independent Equal Protection Claim

Aside from the denial of Moxley's rights to respond to the motion to dismiss, the district court's own words show that the difference in standing posture between Moxley and Party Plaintiffs was not adequately considered.

The district court offered a single ground for its dismissal of the case: its interpretation of the Party Plan and its resulting conclusion that the Party had waived any constitutional objection to the Act, thus denying Plaintiffs standing. [J.A. 369-370].

Yet in its entire order, the court never recognized that Moxley's procedural posture, just as his constitutional claim, differed from that of the Party Plaintiffs. The court held that

> The Party's voluntary decision to limit the authority of the LDC in its Plan and to allow the incumbent to decide upon the method of selecting a nominee is … the cause of any alleged injury to the plaintiffs. For these same reasons, this

> court cannot redress any injury caused by the Party's governing Plan. Plaintiffs have failed to meet their burden to establish standing. *Id*.

The issue of Moxley's standing was never independently discussed in the court's holding. *Id*. The court appears to have simply rolled the issue of his standing with regard to his equal protection claim into its holding relative to Party Plaintiffs' free association claim. But Moxley's position with regard to the Party Plan language the district court found dispositive is completely different from that of Party Plaintiffs, both procedurally and constitutionally.

Even assuming that the lower court is correct that the RPV volitionally waived its free association rights by virtue of the Party Plan language, Moxley's equal protection claim is an independent claim, and any action of the Party that waives its own rights has no bearing on the injury caused to Moxley by the operation of the Act.

> [C]onstitutional rights … may be contractually waived where the facts and circumstances surrounding the waiver make it clear that *the party foregoing its rights has done so of its own volition, with full understanding of the consequences.*….
> *Erie Telecommunications, Inc. v. City of Erie, Pa.*, 853 F. 2d 1084, 1096 (3d Cir. 1988) (emphasis added).

Moxley has plainly made no waiver of his rights "of [his] own volition." He has never been granted a hearing on any motion to dismiss his equal protection complaint. Regardless of any finding made by the district court that the Party voluntarily submitted to any deprivation of its free association rights imposed by §

24.2-509(B), the deprivation of Moxley's rights to equal protection imposed by the Act is independent of any Party action.[4]

Thus, even if the dismissal of Party Plaintiffs' complaint on standing grounds was correct under the district court's rationale, the dismissal of Moxley's independent constitutional claim against the Act was improper and an error of law.

Accordingly, this Court should hold that dismissal of the case as to Moxley for lack of subject matter jurisdiction was improper and an abuse of judicial discretion, and should grant Moxley a full hearing on the merits.

---

[4] The Supreme Court and this Court have held that, for certain purposes, states can and do imbue private parties with "state functions," rendering the private parties "state actors." See, e.g., *Smith v. Allwright*, 321 U.S. 649 (1944); *Rice v. Elmore*, 165 F. 2d 387 (4th Cir 1947). When this occurs, the Court treats the private party as it treats the state, and forbids it from acting in a way that would be a constitutional violation if imposed by a government.

> When primaries become a part of the machinery for choosing officials, state and national, … [i]f the State requires a certain electoral procedure, prescribes a general election ballot made up of party nominees so chosen and limits the choice of the electorate in general elections for state offices, practically speaking, to those whose names appear on such a ballot, it endorses, adopts and enforces the discrimination [imposed by private political parties]…. This is state action …. *Smith*, 321 U.S. at 664.

If the district court intended to suggest that the party's action in "incorporating" state law into the Party Plan denies Moxley standing, this is an error of law. Any such action would only render the Party a "state actor" imposing the Act's unconstitutional deprivation upon Moxley. His standing would thus be unaffected by the Party's actions.

III. Moxley Satisfies the Elements of Standing and the Case Should Be Determined On the Merits.

There are three elements of constitutional standing: (1) the plaintiff must allege that he suffered 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. *Lujan*, 504 U.S. at 560-561. The plaintiff bears the burden of establishing each prong. *FW/PSB, Inc. v. Dallas*, 493 U.S. 215, 231 (1990), overruled in part on unrelated grounds, *City of Littleton v.Z.J. Gifts D-4, LLC*, U.S. 774 (2004).

Moxley's claim meets all three elements.

A. Actual Injury

Moxley's injury is plain on its face. The Act removes the choice of a party's nomination method from the party and its voters, and places it in the exclusive hands of the incumbent. "By facially favoring current officeholders, Virginia's incumbent selection provision … threatens the 'fundamental principle of our representative democracy,' that 'the people should choose whom they please to govern them.' *Miller v.Cunningham*, 512 F.3d 98, 104 (4th Cir. 2007) (Wilkinson, J., dissenting from denial of reh'g. en banc) (citations omitted). This "shut[s] down the political process and violat[es] the most essential requirements of equal protection." *Id*. at 101. While all voters are certainly injured by the Act, its clearest victims are challenger candidates such as Moxley.

The Act is so plainly facially discriminatory, not just in its effect but its clear purpose, as to deny even a rational basis in any "public purpose."

> The term 'rational' includes a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class. Thus, the word 'rational' — for me, at least — includes elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially. *Cleburne v. Cleburne Living Center, Inc*., 473 US 432, 452 (1985) (Stevens, J, concurring).

There can be no "legitimate *public* purpose" to an Act, the "purpose" of which is so clearly to benefit the incumbent legislator alone.

Judge Wilkinson, in *Miller v. Cunningham*, echoes the opinion of Justice Stevens as it would apply to the Act. He suggests that Act's plain meaning reveals the lack of any "public purpose," and argues that the Act facially discriminates "in favor of existing officeholders, by compelling political parties to 'nominate [their] candidate[s] for election . . . by the method[s] designated' by incumbents. In doing so, the law leaves no doubt as to who its purported beneficiaries are — the incumbents in Virginia's General Assembly." *Miller*, 512 F. 3d 98 at 103 (Wilkinson, J., dissenting from the denial of reh'g *en banc*).

By creating a "protected class" of incumbent officeholders such as Hanger, and invidiously discriminating against all other similarly situated candidates and potential candidates for the same office, such as Moxley, the Act eviscerates the

promise of "equal protection of the laws." The injury to Moxley is as apparent as it is constitutionally impermissible.

B. Causation

The district court held that Moxley has no standing to challenge the Act, holding that any injury is in fact caused by the RPV, via its voluntary submission to any Virginia legislative enactment. This, the court appears to hold, is the cause of Moxley's injury.

> [T]he Plan does not confer the authority on the Committee to select a method in the circumstances here. Thus, its 'injury,' if any, is not caused by the Act, but by the limited delegation in the Plan itself. [J.A. 369].

The district court resolves to its satisfaction any dispute between Party Plaintiffs and RPV, by declaring the Party Plan a voluntary submission to state legislative enactments, even unconstitutional ones. *Id*. But the court offers no indication how the Party's voluntary waiver of its First Amendment right can effect a "volitional," "knowing" or "intentional" waiver by Moxley of his Fourteenth Amendment rights. It may be fairly presumed that it could not do so.

Even if the RPV voluntarily submits its nomination processes to an unconstitutional state law, it is the Act and not the Party that primarily imposes the injury to Moxley. But for the Act, the Party Plan treats Moxley and Hanger

equally, leaving the choice of nomination methods to the party committee.[5] The Party Plan in no way requires unequal treatment between a challenger and an incumbent, except where required to do so by state law. *Id*.

By its very terms, the Act forbids the Party to treat Moxley, or other challengers, equally with Hanger, or other incumbents. "A party *shall* nominate its candidate for election for a General Assembly district where there is only one incumbent of that party for the *district by the method designated by that incumbent*." [Code of Virginia § 24.2-509(B) (emphasis added)]. The plain language of the statute itself works the unconstitutional deprivation. The Party is given no choice but to comply. On its face, "the incumbent selection provision … facially discriminates in favor of incumbents, shutting down the political process and violating the most essential requirements of equal protection." *Miller*, 512 F. 3d 98 at 101 (Wilkinson, J., dissenting from the denial of reh'g *en banc*). Only a declaration that the Act is unconstitutional can end the infringement of Moxley's right to equal protection.

[5] Party Plan, Article D.V.1.a: "*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. [J.A. 163] (emphasis added). But for the Act, the clause "where permitted to do so under Virginia Law" would in essence be void language, leaving the nomination method to the Committee to determine.

The Act itself operates – with or without the RPV – to deny Moxley and all challengers the equal protection of the laws. The constitutional violation flows from, and is part and parcel of, the Act.

Thus the action of the Act, not the Party Plan, causes Moxley's injury, and indeed, should the district court's ruling stand, places the injury beyond any possibility of redress.

C. Redressability

The district court held that Moxley has no standing; that he has presented no claim that the courts can redress. [J.A. 369-370]. Perversely, it is only the court-imposed application of the interplay between the Act and the Party Plan that renders Moxley's injury non-redressable.

Given that the stark injury to Moxley is plainly inflicted by the operation of the Act, a decision declaring the Act unconstitutional is in fact the proper, and only, redress.

D. This Case is Ripe For Resolution By This Court

This case is extraordinarily significant. "Maintaining a stable political system is, unquestionably, a compelling state interest." *Eu v. San Francisco County Democratic Central Comm.*, 489 US 214, 226 (1989). A final resolution would provide stability to an area of Virginia election law that has been litigated since 2007. "[F]ailure to address the constitutionality of this provision can only

mean more litigation down the road." *Miller*, 512 F. 3d 98, 101 (4th Cir. 2007) (Wilkinson, J., dissenting from denial of reh'g. en banc).

While certainly factfinding "is the basic responsibility of district courts, rather than appellate courts," *Pullman-Standard v. Swint*, 456 US 273, 291 (1982), with regard to Moxley the district court's mistake is one of law and not fact. "[W]here findings are infirm because of an erroneous view of the law, a remand is the proper course unless the record permits only one resolution of the factual issue." *Id*. at 292 (emphasis added). The district court's interpretation of the Party Plan as a voluntary submission to the Act has no factual bearing whatsoever on Moxley's standing, and the court's apparent conclusion that it does is a pure mistake of law. The issue before this court, regarding Moxley, is a pure question of constitutional law, and the important factfinding role of the district court is not implicated. The case is thus a proper subject for appellate resolution.

Certainly it is generally appropriate for an appeals court, on a standing appeal, to resolve the standing issue only and remand the case. But this case, which began with a time-sensitive request for an emergency injunction [J.A. 334]6 remains time-sensitive. Political parties in Virginia will determinations nomination methods for U.S. Congress by December or January, as any convention processes

[6] Both appellants (here specifically Moxley) noted in their Memoranda in Support of Motion for Preliminary Injunction in the court below that the strictures of the election calendar required prompt adjudication of the request for injunction.

would begin in February 2016. Candidates, and more importantly the voters, need a final resolution of this issue.

"Narrow rulings have much to commend them as a general matter, particularly in the constitutional context." *Miller*, 512 F. 3d 98, 99 (4th Cir. 2007) (Wilkinson, J., dissenting from denial of reh'g. en banc).

> But in the area of election law, a narrow ruling can sometimes be a real mistake. Political campaigns require substantial planning…. The very least courts owe those who hold and seek public office is a clear understanding of the ground rules by which they must compete. *Id.*

Undoubtedly, should this Court grant standing and order further proceedings below, this case will return to this Court for final resolution.7 Failure to address the merits in this Court will only postpone clarity and stability in the political process. "These questions must assuredly be litigated and it is not right to kick the can down the road when those seeking elective office deserve explicit guidance from the courts…." *Miller*, 512 F. 3d 98, 99 (4TH Cir. 2007) (Wilkinson, J., dissenting from denial of reh'g. en banc).

Besides concerns with political stability, judicial economy argues for this Court to resolve this case on the merits. As the Louisiana Supreme Court noted, "When the entire record is before the appellate court, remand for a new trial produces delay of the final outcome and congestion of crowded dockets while

[7] Indeed, the prior dismissal on standing grounds in district court was appealed within thirty days by both plaintiffs. Appellants Joint Brief, p. 1.

adding little to the judicial determination process." *Gonzales v. Xerox Corp.*, 320 So. 2d 163, 166 (1975). This is especially so when, as here, appeal back to this Court is essentially certain, regardless of the outcome below.8

Nor is Moxley's injury mooted by his loss to Hanger in the June 9, 2015, Republican primary. This is a classic example of an injury "capable of repetition yet evading review."9 Moxley's suit was filed March 13, 2015. It was certainly timely when filed, and the injury to Moxley, as a potential challenger again in 2019, is ongoing.

CONCLUSION

Wherefore, Appellant Moxley respectfully prays this honorable Court to hold that his Complaint meets the three requirements of standing outlined in *Lujan*. In addition, Moxley prays this honorable Court to decide this case on the merits, and to declare the Act unconstitutional as a violation of the guarantee of the equal protection of the laws.

In the alternative, Moxley respectfully prays this honorable Court to hold that the district court erred in dismissing his claim for lack of subject matter jurisdiction and/or for failure to state a claim on which relief can be granted, that

---

[8] *Id.*

[9] Friends of Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc., 528 US 167, 190-91 (2000) (upholding the principle that a case is not moot if it is "capable of repetition yet evading review").

his Complaint in Intervention meets the requirements of constitutional standing, and to remand the case for further proceedings in accord with this ruling.

Respectfully submitted,

Daniel Moxley
By Counsel

Date: July 8, 2015

_____\s_____
Rick Boyer
BOYER LAW FIRM, PLLC
Virginia State Bar No. 80154
Boyer Law Firm, PLLC
P.O. Box 10953
Lynchburg, VA 24506
Telephone: 434-401-2093
Facsimile: 434-239-3651
Electronic Mail: rickboyerlaw@gmail.com

CERTIFICATE OF COMPLIANCE

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume requirement of the Order of this Court dated June 24 2015, because:

[x] this brief contains 4,575 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

[x] this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman type style.

Date: July 8, 2015

_____\s_____

Rick Boyer
BOYER LAW FIRM, PLLC
Virginia State Bar No. 80154
Boyer Law Firm, PLLC
P.O. Box 10953
Lynchburg, VA 24506
Telephone: 434-401-2093
Facsimile: 434-239-3651
Electronic Mail: rickboyerlaw@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on this 8th day of July, 2015 I transmitted the foregoing document to the named parties' email addresses by means of an electronic filing pursuant to the ECF system.

_____\s_____
Rick Boyer, Esq.
VSB No. 80154

John C. Wirth
VSB No. 37334
Nelson, McPherson, Summers and Santos, L.C.
12 N. New St.
Staunton, VA 24401
Telephone: 540-885-0346
Facsimile: 540-885-2039
E-Mail: johnwirth@nmsslc.com

And

Thomas E. Ullrich – VSB No. 28737
Jeffrey R. Adams – VSB No. 43411
Wharton, Aldhizer and Weaver, PLC
125 S. Augusta St.
Staunton, VA 24401
Telephone: 540-885-0199
Facsimile: 540-213-0390
E-Mail: tullrich@wawlaw.com
jadams@wawlaw.com

Counsel for Plaintiffs

Joshua David Heslinga, Esq.
Office of the Attorney General
900 E. Main St.
Richmond, VA 23219
joshdh@gmail.com, jheslinga@oag.state.va.us

Anna T. Birkenheier, Esq.
Office of the Attorney General
900 E. Main St.
Richmond, VA 23219
abirkenheier@oag.state.va.us

Counsel for Defendants

Christopher Ashby, Esq.
Ashby Law, PLLC
(202) 281-5463
Chris@Ashby-Law.com

Counsel for Intervenor/Defendant Emmett W. Hanger, Jr.