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

IN THE
United States Court of Appeals
FOR THE FOURTH CIRCUIT

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

Plaintiffs - Appellants,

and

DANIEL MOXLEY,

Intervenor/Plaintiff,

v.

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

Defendants - Appellees.

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

OPENING BRIEF OF APPELLANTS

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

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

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

Counsel for Plaintiffs - Appellants

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

Pursuant to Fourth Circuit Local Rule 26.1, Appellants make the following disclosures:

1. Is said party a publicly held corporation or other publicly held entity?
   Answer: No

2. Does said party have any parent corporations?
   Answer: No

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity?
   Answer: No

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))?
   Answer: No

5. Is party a trade association?
   Answer: No

6. Does this case arise out a bankruptcy proceeding?
   Answer: No

Dated: July 8, 2015

s/ Jeffrey R. Adams

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

And

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

Counsel for Plaintiffs – Appellants

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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

1. Appellants filed suit under 42 U.S.C. §§ 1983 and 1988 alleging that Section 24.2-509(B) of the Code of Virginia (the "Act"), which purports to permit an incumbent politician to choose the method of nomination to be used in his or her district, 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 the 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. Did the district court err by prematurely dismissing the complaint for lack of subject matter jurisdiction at the pleading stage?

2. Did the district court err in holding that the RPV voluntarily submitted to the Act and incorporated it by reference into the Plan?

3. Irrespective of the proper interpretation of the Plan, do Appellants have standing to challenge the constitutionality of the Act on equal protection grounds by virtue of their interest in the integrity of the electoral process as Virginia citizens and voters?

STATEMENT OF THE CASE

This case presents constitutional questions regarding Section 24.2-509(B) of the Code of Virginia, colloquially known as the Incumbent Protection Act. *Marshall v. Meadows*, 105 F.3d 904, 905, n. 1 (4th Cir. 1997). The Act empowers incumbent politicians to dictate their method of re-nomination, irrespective of the First Amendment associative rights of political parties and their members. Further, 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, and the manifest interest of the individual Appellants in the outcome of this case both as members of the RPV and as Virginia citizens and voters, 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.

STATEMENT OF FACTS

I. The Parties.

The RPV is no mere talking shop or think tank; it is a partisan political organization. Its most important purpose is to select, nominate, support and elect candidates to public office. The RPV is governed pursuant to the Plan. [J.A. 92] The members of a party "speak[] through their rules." *Democratic Party of U.S. v. Wisconsin ex rel. La Follette*, 450 U.S. 107, 122 (1981). Thus, the Plan is the RPV's definitive statement on any matter it addresses.

According to Article V, Section D of the Plan, a Legislative District Committee ("LDC") determines whether a candidate for the House of Delegates or State Senate "shall be nominated by Mass Meeting, Party Canvass, Convention or Primary, where permitted to do so under Virginia Law." [J.A. 115]

A. The 24th Senatorial District Republican Committee.

The 24th Senatorial District Committee (the "Committee") is the LDC for the 24th Senatorial District (the "District"). [J.A. 92] Its members are the chairmen of the Republican committees for the cities of Staunton and Waynesboro and the counties of Augusta, Culpeper, Greene, Madison and Rockingham, or a representative of a chairman who resides in the District, if the chairman does not reside in the District. [J.A. 115 *and* 118]. On December 3, 2014 the members of the Committee met at a properly called meeting, at which the Committee passed a

resolution designating a convention as the method for selecting the Republican nominee for the District for the 2015 election cycle. [J.A. 16]

B. The Chairman.

The Plan directs each Legislative District Committee to elect a chairman. [J.A. 115] Plaintiff Kenneth Adams was elected chairman of the Committee at the Meeting. [J.A 16]. The Plan directs the Chairman to "issue Calls for Legislative District Mass Meetings, Party Canvasses, or Conventions." [J.A. 115] Accordingly, on December 4, 2014, Mr. Adams issued a call for a convention to nominate a Republican candidate for the District and on December 4, 2014, Mr. Adams wrote Charlie Judd, then Chairman of the Virginia Board of Elections, and informed him of the Committee's decision to nominate by convention. [J.A. 16].

C. The Incumbent.

On February 24, 2015, Mr. Adams received a letter from Emmett W. Hanger, Jr., the incumbent Republican Senator for the District. In his letter, Sen. Hanger invoked the Act and designated a primary as the means of nomination for the Republican candidate in the District. He also enclosed a copy of "Form SBE-509(4)", by which he designated a primary as the means of nomination for the Republican candidate in the District. [J.A. 17]

D. The Challenger.

Appellant Daniel Moxley was a declared candidate for the Republican nomination for the 24th Senatorial District. [J.A. 330]

E. The Commonwealth.

Appellees James B. Alcorn, Clara Belle Wheeler, and Singleton McAllister are respectively the Chairman, Vice Chairman, and Secretary of the Virginia State Board of Elections (the "Board"). Each is sued in his or her official capacity. [J.A. 92] The Board implements and enforces the laws of Virginia related to elections, including the Act. *Va. Code Ann.* § 24.2-103.

Appellee Virginia Department of Elections (the "Department") is an agency of the Commonwealth of Virginia. The Department is responsible for, and conducts, the Board's administrative and programmatic operations, consistent with its delegated authority. [J.A. 93]

Subsequent to receiving Form 509(4) from Sen. Hanger, the Board issued an order dated February 25, 2015, directing the Secretary of the Electoral Board for the City of Waynesboro to cause a Republican primary to be held in the District. [J.A. 17 *and* 84] Such primary was held on June 9, 2015. Patricia Borns, *Hanger Defends Seat with GOP Primary Win*, STAUNTON NEWS LEADER, http://www.newsleader.com/story/news/local/2015/06/09/ emmett-hanger-prevails--three-way-state-senate-bid/28772885/ (accessed July 6, 2015).

II. Proceedings Below

The Committee and Mr. Adams (collectively, the "Party Plaintiffs") filed a complaint against the members of the Board and the Department (collectively, the "Commonwealth") for declaratory and injunctive relief. [J.A. 91 *et seq.*] Specifically, the Party Plaintiffs requested that the district court "declare . . . that Va. Code (1950) § 24.2-509 (B) is an unconstitutional violation of the First and Fourteenth Amendments to the Constitution of the United States" and "issue a preliminary and thereafter a permanent injunction prohibiting [the Commonwealth] from implementing a primary election to determine the Republican nomination for Virginia Senate District 24 for the 2015 general election cycle." [J.A. 99] In short, the Party Plaintiffs challenged the Act both as applied and facially.

Both Sen. Hanger and Mr. Moxley sought to intervene in the matter, as Defendant and Plaintiff, respectively. [J.A. 325]

On March 23, 2015 the district court conducted a hearing (the "Hearing") on (i) the Party Plaintiffs' Motion for Preliminary Injunction and (ii) the Motions to Intervene of Sen. Hanger and Mr. Moxley. [J.A. 199 *et seq.*]

On March 24, 2015 the district court issued an Order (the "Order") granting both Motions to Intervene. [J.A. 325-326] The Order also addressed scheduling, in two ways.

First, the district court dispensed with a hearing on the "Commonwealth defendants' motion to dismiss", based on the representation that no party requested a hearing on that motion. [J.A. 326] However, the district court did not dispense with a hearing on any dispositive motion that might be filed in response to Mr. Moxley's complaint in intervention. Indeed, in all propriety it could not, since Mr. Moxley was not a party until the Order granting leave to intervene was entered, and no motion to dismiss or other responsive motion had been filed to his, as yet, unfiled pleading.

Second, the district court established an expedited schedule for certain filings that necessarily followed. [J.A. 326-327] It is important to note two things about the scheduling portion of the Order. First, while it sets a deadline for Mr. Moxley to file his complaint in intervention, it set no deadline for either (i) the filing of responsive pleading to Mr. Moxley's complaint in intervention or (ii) the filing of a reply to such responsive pleadings.

Mr. Moxley filed a Complaint in Intervention on March 26, 2015, in which he challenged the Act both facially and as applied [J.A. 328 *et seq.*], and a motion for preliminary injunction. [J.A. 338 *et seq.*] On that same day, Mr. Hanger filed a Motion to Dismiss the claims of "Plaintiffs," presumably encompassing both the Party Plaintiffs and Mr. Moxley. [J.A. 345 *et seq.*] On April 1, 2015, the

Commonwealth filed a Motion to Dismiss Mr. Moxley's Complaint in Intervention. [J.A. 352 *et seq.*]

The motions to dismiss of the Commonwealth and Sen. Hanger invoked both Federal Rule of Civil Procedure ("Rule") 12(b)(1) and Rule 12(b)(6), arguing that the court lacked subject matter jurisdiction and that Party Plaintiffs and Mr. Moxley had failed to state a claim. Specifically, the Commonwealth and Sen. Hanger argued that by the words "where permitted to do so under Virginia law" in Article V, Section D the RPV submitted to the Act and incorporated it into the Plan, irrespective of the Act's constitutionality. In which case, according to the Commonwealth and Sen. Hanger, the Party Plaintiffs and Mr. Moxley lack standing and fail to state a claim, since any injury would be the result of the RPV's enactment and enforcement of the Plan. [Defendants' Combined Memorandum, Dkt. No. 26, p. 8, 11 *and* Memorandum in Support of Motion to Dismiss of State Senator Emmett W. Hanger, Jr., Dkt. No. 44, p.1]

Pursuant to Local Rule 11(c)(1) of the United States District Court for the Western District of Virginia, in the absence of direction from the district court otherwise, Mr. Moxley had fourteen days in which to file a brief in response to the Motions to Dismiss filed by Mr. Hanger and the Commonwealth Defendants. Notwithstanding which, on April 2, 2015, before Mr. Moxley filed a responsive

brief, the district court entered a Final Order and Judgment dismissing the claims of all of the Plaintiffs for lack of subject matter jurisdiction. [J.A. 371-372]

III. The Opinion

The rationale for the district court's judgment is set out in a Memorandum Opinion dated April 2, 2015 (the "Opinion"). [J.A. 355 *et seq.*] However, before addressing the rationale of the Opinion, it is necessary to identify a crucial error made by the district court in it.

A. Neither the Party Plaintiffs nor Mr. Moxley Conceded There Are No Issues of Disputed Fact.

The district court's Opinion states "[a]t the March 23, 2015 hearing before this court, the parties confirmed that there are no factual disputes that affect the merits of the case at this stage and that the parties disagree solely over issues of law." [J.A. 357] That is not correct.

For purposes of the Hearing–which was a hearing on the Party Plaintiffs' motion for preliminary injunction and the motions to intervene, but not any of the various motions to dismiss–the Party Plaintiffs agreed to forego any testimony and proceed on the basis of the facts contained in certain documents. The Commonwealth in turn agreed to stipulate authenticity of such documents for purposes of the motion for preliminary injunction only, but explicitly reserving the right to challenge such documents at any later stage of litigation. Moreover, the

limited nature of the factual stipulation of the parties at the Hearing is evident in the transcript of the Hearing (the "Transcript"), which reads as follows:

> THE COURT: * * *
> **I understand we're here today on plaintiffs' motion for preliminary injunction, Mr. Moxley's motion to intervene as a plaintiff, and Senator Hanger's motion to intervene as a defendant.**
> I think we'll go ahead and begin with the motion for preliminary injunction and then we can take up the intervention motions later. I will allow the putative intervenors to present argument **on the preliminary injunction motion**, and I'll accept that argument conditionally pending a rule on the motions to intervene.
> First of all, Counsel, do we have issues of disputed fact?
> MR. ADAMS: We believe we do not.

[J.A. 203 (emphasis added)]

When counsel for the Party answered the district court's question in the negative, it was clearly in the context of the motions that were before the court, the Party Plaintiffs' motion for preliminary injunction and the two motions for intervention. Indeed, in briefing their motion for preliminary injunction, the Party Plaintiffs made it clear that they did believe that there were issues of disputed fact.

> "However, this case is not merely distinguishable from *Marshall*, but in many critical aspects its polar opposite. In *Marshall* there was no question about the proper method of nomination, **no dispute about the interpretation of the Plan**, and no allegation that the defendants in the case had interfered with the Party's choice of its method of nomination."

[Plaintiffs' Reply to Defendants' Combined Memorandum, Dkt. No. 32, p. 7 (emphasis added)]

Likewise, Mr. Moxley never stated that there were no issues of disputed fact. Indeed, he never had the opportunity to do so. He was not afforded the opportunity to reply to the motions to dismiss his complaint in intervention, much less a hearing on such motions.

B. The Rationale of the Opinion.

The district court summarized the question before it thus: "[w]hether the plaintiffs have standing depends on whether only the Act, or also the Plan, allows the incumbent to select the method of nomination." [J.A. 363] Invoking several canons of construction – although not, as we will argue below, the rule most relevant to this case with important constitutional implications–the district court held that the words "where permitted to do so under Virginia Law" did not merely acknowledge the possibility of conflict between the Plan and Virginia law, but submitted to the Act and incorporated it into the Plan, irrespective of the Act's constitutionality. Accordingly, the district court concluded that Sen. Hanger had the right to select his method of nomination no less under the Plan than under the Act.

The district court did not find that the Plan was unambiguous. On the contrary, the district court held that "defendants' construction [of the Plan] **is the more reasonable one** for several reasons." [J.A. 365 (emphasis added)] Notwithstanding which, the district court granted the motions to dismiss, thereby

denying the Party and Mr. Moxley the ability to present any evidence to support their interpretation of the Plan.

IV. This Appeal.

Neither the Party Plaintiffs nor Mr. Moxley appealed the denial of their motions for preliminary injunction, nor did they move for an expedited appeal. The Party Plaintiffs elected not to appeal the denial of their motion for preliminary injunction for several reasons. First, the motion was heard on the basis of limited facts, contained in the documents to which the Commonwealth stipulated authenticity for purposes of the Hearing. The full record that the Party Plaintiffs intended to develop in discovery was not before the district court, in particular, with regard to the construction of the Plan. Second, the motion was heard on an expedited basis, due to the time constraints imposed by the electoral process. Accordingly, while the Party Plaintiffs disagree with the district court's judgment on preliminary injunction, they did not appeal that Portion of the final order. [J.A. 371]

The district court's ruling on the Rule 12(b)(1) motion is another matter. The Party Plaintiffs believe that ruling is premature, unjustified by the facts or the law, and has denied them their day in court on a matter of significance not only to them, but to every Virginia citizen and voter. Accordingly, the Party Plaintiffs

filed their notice of appeal on May 1, 2015 [J.A. 373 *et seq.*], as did Mr. Moxley. [J.A. 376 *et seq.*]

SUMMARY OF THE ARGUMENT

I. The District Court Erred By Prematurely Dismissing the Complaints for Lack of Subject Matter Jurisdiction at the Pleading Stage.

Standing challenges present in two ways. The defendant may allege that the facts alleged in the complaint are insufficient to establish standing. In such a facial challenge, the facts alleged in the complaint are presumed to be true, and the inquiry is to their sufficiency. Or, the defendant may allege that a jurisdictional fact alleged in the complaint is untrue. In such a factual challenge, the court may proceed with an evidentiary hearing to determine the truth or falsity of such jurisdictional fact.

There are two limits on a court's authority to dispose of a case at the pleading stage on a factual challenge. First, it is inappropriate for the court to dispose of a matter at the pleading stage if the jurisdictional fact in question is intertwined with the facts central to the merits of the dispute. A challenged jurisdictional fact is considered intertwined with the facts central to the merits of the case if it is determinative of both the jurisdictional question and the merits of the case. Second, if a court appropriately takes up a factual challenge, it must develop sufficient evidence to make the factual finding in question.

In this case, the challenged jurisdictional fact, the construction of the Plan, is dispositive of both jurisdiction and the merits of the dispute. If the Plan submits to

and incorporates the Act, then the Party Plaintiffs lack standing on their freedom of association claim, since any injury is due to the voluntary decision of the RPV rather than the enforcement of the Act. By the same token, if the Plan submits to and incorporates the Act, there is no infringement of the Party Plaintiffs' associative rights, and therefore their freedom of association claim fails on the merits. Accordingly, the challenged jurisdictional fact in this case is intertwined with the facts central to the merits of the dispute, and it was inappropriate for the district court to dispose of this case at the pleading stage pursuant to a Rule 12(b)(1) motion.

Moreover, even if resolution of the truth or falsity of the jurisdictional fact at the pleading stage were appropriate, the district court did not conduct an evidentiary hearing in order to make such a finding. Accordingly, the district court did not have any facts before it on which to make a finding that the jurisdictional facts alleged by the Party Plaintiffs were false.

II. The District Court Erred in its Construction of the Plan.

In its construction of the Plan, the district court ignores the plain meaning of the relevant language. In addition, the district court ignores the most important rule of construction to be applied to the Plan, that a contractual waiver of fundamental constitutional rights must be clear and compelling. Indeed, the

district court stands this rule on its head, holding that silence of the Plan in Article V, Section D is evidence of waiver.

III. On Their Facial Equal Protection Claim, the Party Plaintiffs and Mr. Moxley Have Standing as Virginia Citizens and Voters.

As citizens and voters of Virginia, the Party Plaintiffs and Mr. Moxley have an equal protection interest in the fairness of the electoral process. They have an interest in full and effective participation in the entire electoral process, of which all party nominations are a part. That interest is rendered a nullity if incumbents can entrench themselves in office to an unconstitutional extent. Whether the Act goes beyond what the constitution permits in this regard is not a jurisdictional question, or, at least, not merely so. That question is central to the merits of this dispute.

ARGUMENT

I. The Legal Standard.

There are three components of constitutional standing: (1) the plaintiff must allege that he or she 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 by the courts must be likely to redress the injury. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). The plaintiff bears the burden of establishing each prong of standing. *FW/PBS, 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)

A. Standing at the Pleading Stage.

While the burden of establishing standing is on the plaintiff, the weight of that burden changes during the course of litigation, and is at its lowest ebb at the pleading stage. "At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561 (quote and cite omitted).

There are two ways in which a defendant can challenge standing in a Rule 12(b)(1) motion. Either the defendant may bring a facial challenge and contend

that the allegations in the complaint are not sufficient on their face to establish standing or the defendant may bring a factual challenge and contend that one or more facts in the jurisdictional allegations in the complaint are not true. *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982) In a facial challenge, the facts alleged in the complaint are presumed to be true, and the question before the court is the sufficiency of the pleadings. In a factual challenge, "[a] trial court may then go beyond the allegations of the complaint and in an evidentiary hearing determine if there are facts to support the jurisdictional allegations." *Id.* However, in *Adams* this Court goes on to hold that "in those cases where the jurisdictional facts are intertwined with the facts central to the merits of the dispute . . . the entire factual dispute is appropriately resolved only by a proceeding on the merits." *Id.* (cites omitted)

B. The Standard of Review on Appeal.

This court has articulated the standard of review for cases such as this as follows:

> We review a district court's jurisdictional findings of fact on any issues that are not intertwined with the facts central to the merits of the plaintiff's claims under the clearly erroneous standard of review and any legal conclusions flowing therefrom *de novo*.

U.S. ex rel. Vuyyuru v. Jadhav, 555 F.3d 337, 348 (4th Cir. 2009) (cite omitted).

When applying this standard to this case, it is important to note two things. First, there was no evidence before the district court on the motions to dismiss.

Perforce, the district court could not and did not make any findings of fact. Second, the clearly erroneous standard only applies to jurisdictional findings of fact that "are not intertwined with the facts central to the merits of the plaintiff's claims." *Id.* The question of whether the facts are intertwined is before this Court *de novo*.

II. The District Court Erred by Prematurely Dismissing the Complaints for Lack of Subject Matter Jurisdiction at the Pleading Stage.

A. Dismissal at the Pleading Stage under Rule 12(b)(1) was Premature Because the Challenged Jurisdictional Fact is Intertwined with the Merits of the Case.

1. If a Fact is Determinative of Both Jurisdiction and the Merits of the Case, it is Intertwined.

Perhaps this Court's clearest guidance as to how to determine whether the jurisdictional facts and underlying merits of a case are intertwined is found in *Kerns v. U.S.*, 585 F. 3d 187 (4th Cir. 2009). In *Kerns*, the plaintiff brought a Federal Tort Claims Act claim. The complaint alleged that the government employee who caused the injury in question was acting within the scope of her employment, an allegation jurisdictionally necessary to establish a waiver of sovereign immunity by the government. The government brought a Rule 12(b)(1) motion, challenging the plaintiff's factual allegation that such employee was acting within the scope of her employment. The district court granted the government's motion and dismissed the case.

On appeal, this Court noted that the factual question whether the employee was acting within the scope of her employment also was dispositive of the question whether the government was liable on the underlying claim pursuant to *respondeat superior*. Thus, the factual question whether the employee was acting within the scope of her employment was determinative of the case against the government both jurisdictionally, because it would negate subject matter jurisdiction, and on the merits, because it had to be proved for the government to be liable on the underlying claim. In overturning the judgment of the district court and remanding the case for discovery, this Court stated that "[b]ecause the scope-of-employment issue is determinative of both jurisdiction and the underlying merits of an FTCA claim, dismissal under Rule 12(b)(1) is inappropriate unless the jurisdictional allegations are clearly immaterial or wholly unsubstantial and frivolous." *Kerns*, 585 F. 3d at 196, *citing Bell v. Hood*, 327 U.S. 678, 682 (1946).

2. The Construction of the Plan is Determinative of Both Standing and Party's Plaintiffs' Freedom of Association Claim.

In this case, the sole jurisdictional fact in question is the proper construction of the Plan. The Party Plaintiffs and Mr. Moxley have proffered one construction, according to which the Plan and Act are in conflict. The Commonwealth and Sen. Hanger have proffered another construction, in which the Plan and Act are in harmony. If the Plan and the Act are in harmony, there is no legally cognizable injury for standing purposes on the Party Plaintiff's freedom of association claim.

Thus, the proper construction of the Plan is determinative for jurisdictional purposes.

However, the proper construction of the Plan also is determinative of the merits of the Party Plaintiffs' underlying freedom of association claim. That claim is based on the allegation that the Act infringes on the associational rights of the RPV and the Party Plaintiffs by overriding the Plan, and that such infringement cannot be constitutionally justified. If the Plan and the Act are in harmony, there is no infringement and the claim fails on the merits. Put simply, it is manifest that the construction of the Plan is determinative of the merits of the case as well as of jurisdiction. Accordingly, dismissal of the complaint pursuant to Rule 12(b)(1) was inappropriate.

3. The Commonwealth and Sen. Hanger Implicitly Concede That the Plan is Dispositive of both Standing and the Merits of the Case.

The Commonwealth and Sen. Hanger moved to dismiss the complaints of the Party Plaintiffs under **both** Rule 12(b)(1) and Rule 12(b)(6). Central to their argument for dismissal under both Rules is their construction of the Plan. Arguing for dismissal pursuant to Rule 12(b)(1), the Commonwealth states that "[g]iven that there is no conflict between the Plan and Virginia law in this case, Plaintiffs do not have the injuries alleged in the Complaint." [Defendants' Combined Memorandum, Dkt. No. 26, p. 8] Likewise, in its argument for dismissal under

Rule 12(b)(6), the Commonwealth states "Plaintiffs have failed to state a claim for two reasons. First, the Plan is consistent with Virginia law." [Defendants' Combined Memorandum, Dkt. No. 26, p. 11 (internal cite omitted)] Sen. Hanger takes up and incorporates these arguments for himself. [Memorandum in Support of Motion to Dismiss of State Senator Emmett W. Hanger, Jr., Dkt. No. 44, p. 1 (incorporating by reference the arguments made in pages two through twelve of Defendants Combined Memorandum)]

Of course, Rule 12(b)(1) relates to subject matter jurisdiction while Rule 12(b)(6) relates to the merits of the underlying claim. By grounding their arguments for dismissal under both Rule 12(b)(1) and Rule 12(b)(6) on the proper construction of the Plan, the Commonwealth and Sen. Hanger implicitly–arguably even explicitly–concede that the proper construction of the Plan is both a jurisdictional fact–hence its relevance for Rule 12(b)(1) purposes–and a fact central to the underlying merits of the case–hence its relevance to Rule 12(b)(6).

Because the proper construction of the Plan is determinative of both the jurisdiction question of standing and the underlying merits of this case, the district court erred in disposing of this matter pursuant to Rule 12(b)(1), and should have let the matter proceed to discovery. *Kerns*, 585 F.3d at 196.

B. Assuming, *Arguendo*, that the Jurisdictional Fact was not Intertwined with the Merits of the Case, the District Court Failed to Develop Evidence Sufficient to Dismiss the Case on a Factual Challenge.

The language of *Adams* is permissive; "[a] trial court *may* go beyond the allegations of the complaint." *Adams*, 697 F.2d at 1219 (emphasis added). Moreover, should a district court seek to invoke *Adams*, the onus is on the court to act, to "conduct evidentiary proceedings, and resolve the disputed jurisdictional facts." *Kerns*, 585 F.3d at 193. Indeed, even if such a hearing is conducted, it must develop facts sufficient to properly resolve the jurisdictional issue. *Adams*, 697 F.2d at 1220 ("**We conclude that not only were there not sufficient facts developed at the 12(b)(1) hearing to resolve the jurisdictional issue**, but that the facts are so intertwined with the facts upon which the ultimate issues on the merits must be resolved, that 12(b)(1) is an inappropriate basis upon which to ground the dismissal." (emphasis added)).

In this case, even if we assume *arguendo* that it would have been appropriate for the district court to conduct an evidentiary hearing and make findings of fact, it did not do so. Accordingly, even if the relevant jurisdictional fact were not intertwined with the merits of the case, the district court improperly dismissed the case based on a factual challenge without developing sufficient facts to resolve the jurisdictional issue.

Concededly, the Party did waive a hearing on the motions to dismiss (although Mr. Moxley did not). However, the district court gave no indication that it intended to conduct an evidentiary hearing and make findings of fact. Indeed, as set forth in A., above, such a hearing would have been inappropriate, given that the jurisdictional fact in question is intertwined with the merits of the case. Accordingly, the Party Plaintiffs reasonably understood themselves to be waiving legal argument, not an evidentiary hearing, and were content to stand on their briefing of the legal issues.

In the absence of an evidentiary hearing and findings of fact, under *Lujan* and *Adams* the district court should have presumed the facts in the Complaints of Mr. Moxley and the Party were true for purposes of the Rule 12(b)(1) Motions to Dismiss. Since the Complaints are facially sufficient to establish standing, the district court erred in disposing of this matter pursuant to Rule 12(b)(1).

C. The Existence of a Factual Dispute Distinguishes this Case from *Marshall v. Meadows*.

The *Marshall* plaintiffs challenged Section 24.2-530 of the Virginia Code (the "Open Primary Law"), which provides that state-run primaries are open to all qualified voters irrespective of party affiliation. *Marshall*, 105 F.3d at 905. In that case the uncontested facts were that both the incumbent, invoking the Act, and the RPV, acting in accordance with the Plan, chose a state-run primary as the method

of nomination. Moreover, it was uncontested that the RPV made its choice freely, and was fully aware that the method it chose was open to all comers.

Based on the uncontested facts, this Court held that the *Marshall* plaintiffs lacked standing to bring a freedom of association challenge to the application of the Open Primary Law, since it was the free and informed decision of the RPV, no less than the Open Primary Law itself, that permitted non-members of the RPV to participate in the primary.

The Rule 12(b)(1) motion of *Marshall* challenged the sufficiency of the pleadings–a standing challenge of the first type–not the veracity of a jurisdictional fact alleged in the pleadings. In *Marshall*, the facts were uncontested, and the pleadings were sufficient to adjudicate the motion to dismiss on a facial basis.

This case presents quite differently. In fact it is *Marshall's* photo negative. Neither the Commonwealth nor Sen. Hanger have challenged the sufficiency of the pleadings to establish standing, they challenged the veracity of a particular fact pled: the construction of the Plan. Accordingly, the district court should not have proceeded along the lines in *Marshall* and disposed of the matter at the pleading stage.

III. The District Court Erred in Holding That the Plan Submits to and Incorporates the Act.

In granting the Rule 12(b)(1) motions, the district court held that "[t]he [RPV's] voluntary decision to limit the authority of the LDC in the Plan and to

allow the incumbent to decide upon the method of selecting a nominee is a decision the Party is permitted to make and is the cause of any alleged injury to the plaintiffs. For these same reasons, the court cannot redress any injury caused by the [RPV's] governing Plan. Plaintiffs have failed to meet their burden to establish standing." [J.A. 369-370] The district court reached its decision based on its construction of Article V, Section D, in particular the words "where permitted to do so under Virginia Law."

Before critiquing the district court's reasoning, it is important to note the full import of what it held. It did not merely hold that the quoted language served as a limit on the power of the LDC. If that were the case, the district court would have contented itself with saying that the RPV had "limit[ed] the authority of the LDC in the Plan." However, the district court goes on to say that RPV has affirmatively "allow[ed] the incumbent to decide upon the method of selecting a nominee." In effect, the district court has held that the quoted language incorporates the Plan into the Act, since nowhere in the Plan itself is an incumbent given the power to select the method of nomination for his or her district.

A The District Court Ignored the Plain Meaning of the Plan.

The district court ignored the plain meaning of at least three of the eight words in question: "where permitted to do so under Virginia Law." Specifically,

the district court ignored the plain meaning of the words "permitted" and "Virginia Law."

1. The Antonym of Permit is Prohibit.

Permit is defined as "[t]o suffer, allow, consent, let." BLACK'S LAW DICTIONARY, 1140 (6th ed. 1990) Its most obvious antonym, prohibit, is defined as "[t]o forbid by law." *Id.*, 1212. The border between permission and prohibition is legal constraint. Under a plain reading of the language in question, the Committee had the authority to select the method of nomination for the District unless it was constrained from doing so by a binding provision of Virginia law. Which leads to the deceptively simple question: What is Virginia law?

2. What is Virginia Law?

The United States Constitution is Virginia law. This has been both acknowledged by the Supreme Court of Virginia, *Spiak v. Seay*, 185 Va. 710,712 (1946) ("The provision of the Constitution of the United States on interstate extradition, together with the Acts of Congress on the subject, are a part of the supreme law of the land and therefore a part of the law of each State."), and affirmed by the Supreme Court of the United States. *Howlett v. Rose*, 496 U.S. 356, 367 (1990) ("[T]he Constitution and laws passed pursuant to it are as much laws in the States as laws passed by the state legislature.").

On the other hand, an unconstitutional law is no law at all. As the Supreme Court has put it, "[a]n unconstitutional law is void, and is no law." *Ex parte Siebold*, 100 U.S. 371, 376 (1880) *see also Marbury v. Madison*, 5 U.S. 137, 180 (1803) ("a law repugnant to the constitution is void").

Accordingly, in order to determine what is and what is not Virginia law, one has to determine whether the 'law' in question is repugnant to the United States Constitution. Of course, this case clearly is an attempt to determine whether or not the Act is in fact Virginia law, or an unconstitutional enactment that does not deserve that dignity.

This is one great irony of the district court's decision. On the one hand, the district court holds that the Plan submits to and incorporates Virginia law, including the Act, by reference. On the other hand, the district court holds that the Party Plaintiffs–including the Committee, itself a creature of the Plan–do not have standing to determine what Virginia law actually is.

B. *Expressio Unius est Exclusio Alterius*.

In construing the Plan, the Court relies heavily on *expressio unius est exclusio alterius*. *See, e.g., Smith Barney, Inc. v. Critical Health Sys.*, 212 F.3d 858 (4th Cir. 2000). However, that canon is an unreliable guide in this case.

1. Applied to Paragraph V, Section D.

The district court notes that the Plan delegates the authority to select the method of nomination for other offices to bodies other than LDCs. And in those delegations of authority the phrase "where permitted to do so under Virginia Law" does not appear. The district court interpreted this to mean that the inclusion of those words in Article V, Section D was intentional, "given the history of cases regarding the Incumbent Protection Act and the Open Primary Law" and therefore that language "is best interpreted as the Party deferring to the Act." [J.A. 366] However, the Party Plaintiffs submit that prior recent litigation relating to these issues supports exactly the opposite conclusion.

The most important recent litigation regarding the Act is the *Miller* line of cases. *Miller v. Brown*, 462 F.3d 312 (4th Cir. 2006) ("*Miller I*"), *Miller v. Brown*, 503 F.3d 360 (4th Cir. 2007) ("*Miller II*") *and Miller v. Cunningham*, 512 F.3d 98 (4th Cir. 2007) ("*Miller III*"). As in this case, the *Miller* litigation was a constitutional challenge to an election law brought by a Republican senatorial LDC. However, the *Miller* plaintiffs did not challenge the constitutionality of the Act. Rather, they challenged the constitutionality of the Open Primary Law, as applied to a primary designated by an incumbent under the Act.

The only substantive discussion of the constitutionality of the Act in the *Miller* decisions is in Judge Wilkinson's dissent to this Court's denial of *en banc*

review in *Miller III*. Judge Wilkinson states that the court should agree to hear the matter *en banc* and take up the apparent unconstitutionality of the Act *sua sponte*. In *Miller III* the constitutionality of the Act was neither raised nor briefed by the parties. Given that neither *Miller* nor any other reported case challenged the constitutionality of the Act, "the history of cases regarding the Incumbent Protection Act and the Open Primary Law" is a thin reed on which to base any construction of the Plan to submit to and incorporate the Act.

In any event, had the district court not prematurely dismissed the case pursuant to Rule 12(b)(1), the Party Plaintiffs and Mr. Moxley would have had the ability to discover documents and secure testimony related to the drafting and enactment of relevant portions of the Plan, which could provide evidence as to why the language in question appears only in Article V, Section D. Further, the premature dismissal of this case prevented the Party Plaintiffs from securing a definitive interpretation of that language from the RPV pursuant to Article X of the Plan [J.A. 126], a process of which the district court was aware. [J.A. 369]

2. Applied to the Definition of Primary.

The district court also applies *expressio unius* principles to the definition of primary contained in Article II, Paragraph 24 of the Plan:

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

[J.A. 107]

The district court noted the presence of an explicit reservation of constitutional rights in Article II, Paragraph 24, and the absence of any such reservation of rights in Article V, Section D. Again employing *expressio unius* principles, the district court held that the lack of a reservation of constitutional rights in Article V, Section D established that the Party had willingly waived such rights. As the court stated, in reference to Article V, Paragraph D, "[h]ad the RPV wanted to express that it would follow the Act, but only insofar as it did not infringe on the Party's associational rights, it could have done so. It did not." [J.A. 367]

However, the two provisions are more different than similar. Note that Article II, Paragraph 24 is quite specific. It clearly states that the something outside the Plan is being incorporated by reference into it. Moreover, it precisely identifies what is being incorporated, the statutory definition of primary. By contrast, Article V, Paragraph D does not have any language of incorporation. Nor does it identify what is ostensibly being incorporated, instead merely referencing Virginia law.

In light of the contrast between the specificity of Article II, Paragraph 24 and the breadth of Article V, Paragraph D, it is clear that the provisions do different things. Article II, Paragraph 24 clearly incorporates one specific

provision of Virginia law. Article V, Paragraph D, on the other hand, contains no language of incorporation and refers generally to Virginia law. Given this lack of specificity, both as to the existence and the scope of incorporation, it cannot be a submission to and incorporation of the Act into the Plan. The more natural and obvious reading is as an acknowledgement of the potential for conflict between the Act and the Plan, as clarified by Judge Wilkinson in his dissent to *Miller III*, and a statement that the outer limits of an LDC's authority to select the method of nomination are defined by the coercive force of Virginia law.

C. Contractual Waiver of Constitutional Rights Must be Established by Clear and Compelling Evidence.

The district court construed the Plan as submitting to the Act and incorporating its terms, irrespective of its constitutionality. To put it another way, the district court holds that the Plan contractually waives any constitutional objection to the Act. This is implicit throughout the Opinion, and explicit when the district court states "[h]ad the RPV wanted to express that it would follow the Act, but only insofar as it did not infringe on the Party's associational rights, it could have done so. It did not." [J.A. 367]

By placing the burden on the RPV to reserve its constitutional rights, the district court ignores and actually inverts the most important rule of construction applicable to this case. Important statutory and constitutional rights are not waived by silence, only by a clear and compelling waiver.

When a contract provision is alleged to constitute a waiver of a statutory right "it is presumed, in the absence of clear evidence to the contrary, that one has not precluded himself from exercising a right granted by statute." *VNB Mortg. Corp. v. Lone Star Industries, Inc.*, 215 Va. 366, 371 (1974).

An even higher showing is required to establish waiver of constitutional rights. As the Sixth Circuit has stated:

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

Sambo's Restaurants, Inc. v. Ann Arbor, 663 F.2d 686, 690 (6th Cir. 1981) *quoting Aetna Ins. Co. v. Kennedy ex rel. Bogash*, 301 U.S. 389, 393 (1937) *and Curtis Publishing Co., v. Butts*, 388 U.S. 130, 145 (1967) (cites omitted).

While in *Sambo's* the agreement purporting to waive First Amendment rights was with a state actor, there is nothing to suggest that the rule does not apply to an asserted waiver of First Amendment rights by agreement between private parties. Indeed, the "clear and compelling" rule has been applied with equal force to a purported contractual waiver of First Amendment rights between private parties. *See Hollins v. Methodist Healthcare, Inc.*, 379 F. Supp, 2d 907 (W.D. Tenn. 2005) *aff'd* 474 F.3d 223 (6th Cir. 2007) (applying the rule to hold that private accreditation agreement did not waive First Amendment rights).

Article V, Paragraph D falls far short of a clear and compelling statement of the Party's intent to waive its fundamental right to free association protected by the First and Fourteenth Amendments. Accordingly, the district court's construction of that language as a waiver of such rights is untenable.

IV. On Their Facial Equal Protection Claim, Party Plaintiffs and Mr. Moxley Have Standing As Citizens of Virginia.

With regard to their facial equal protection claims, Plaintiffs have standing to challenge the Act merely as citizens and qualified voters, irrespective of their status as party members and their role in the nomination process under the Plan.[1]

A. Party Nominations are Part of the Wider Electoral Process.

The processes by which political parties nominate their candidates for public office are not "wholly public affairs that States may regulate freely." *Cal. Democratic Party v. Jones*, 530 U.S. 567, 572-73 (2000). However, such processes are part of the wider electoral process, and as such they are subject to regulation by the state so long as the limits imposed by the Constitution are respected. *See, e.g., Lightfoot*, 964 F.2d 865, 873 (9th Cir.1992) ("We therefore hold 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." (footnote omitted))

[1] At the district court, this argument was not briefed by the Party Plaintiffs, but was raised by them at the Hearing by Counsel for the Party. [J.A. 248] Of course, Mr. Moxley was not afforded the opportunity to brief or argue this point.

B. The Judiciary Has an Obligation to Keep the Political Process Open.

The courts have long recognized that, pursuant to the equal protection clause of the Fourteenth Amendment, "the judiciary has a basic obligation to keep the political process open and well-functioning." *Miller III*, 512 F.3d at 102, *citing U.S. v. Carolene Products Co.*, 304 U.S. 144, 152, n.4 (1938) (Wilkinson, J. dissenting). The courts' obligations in this regard extend to the legislative process, *Lucas v. Forty-Fourth General Assembly*, 377 U.S. 713, 753-54 (1964) (Steward, J. dissenting) and the electoral process. *Baker v. Carr*, 369 U.S. 186, 261-62 (1962) (Clark, J., concurring).

It follows, then, that at least as to the facial equal protection claim of the Party Plaintiff and Mr. Moxley, the proper construction of the Plan is irrelevant. If the Act is unconstitutional, its enforcement in any nomination process, Republican, Democratic, Libertarian or Green, implicates the rights of all citizens of Virginia to a free and fair electoral process. In which case, the real question, at least with regard to the equal protection claim, is whether the Party Plaintiffs or Mr. Moxley have suffered an actual injury for standing purposes.

C. Actual Injury.

1. Mr. Moxley.

Mr. Moxley's actual injury is obvious. He was a candidate for the Republican nomination for the District. Yet Sen. Hanger was given the unilateral

right to select the nomination process and Mr. Moxley had no voice with respect to that process. Such "[u]nequal treatment can serve as an injury in fact." *Citizen Ctr. v. Gessler*, 770 F. 3d 900, 913 (10th Cir. 2014). Accordingly, the fact of the discrimination between Mr. Moxley and Sen. Hanger is sufficient to establish Mr. Moxley's injury.

Of course, Mr. Moxley's injury is not merely the fact of the discrimination in favor of Sen. Hanger, but its effect. Incumbent legislators such as Sen. Hanger "already possess numerous structural advantages over their electoral competition: money, name-recognition, staff, etc. To this pre-existing array of *de facto* advantages, Virginia's incumbent selection provision now adds the *de jure* advantage that the incumbent can dictate his or her recommended preference as to renomination procedures over a party's express wishes." *Miller III*, 512 F.3d at 103-04 (Wilkinson, J., dissenting). As this Court held in *Miller II*, that power is not held as a representative of a political party; it is held, and wielded, in the incumbent's individual interests. *Miller II*, 503 F.3d at 369.

2. The Party Plaintiffs.

The federal courts have repeatedly held that citizens and voters have standing to bring an equal protection challenge to the electoral process. For example, in *Baker v. Carr*, the Supreme Court held that voters had standing to challenge an arbitrary and capricious apportionment statute that resulted in

disproportionate representation in Tennessee. *See, e.g., Baker*, 369 U.S. at 206 ("voters who allege facts showing disadvantage to themselves as individuals have standing to sue" (footnote omitted)).

The primary limitation to voter standing is that a plaintiff must establish that he or she personally suffered an injury. For example, while an individual who resides in a racially gerrymandered district has standing to challenge the composition of such district, an individual who does not reside within the district does not. *United States v. Hays*, 515 U.S. 737, 744-45 (1995) Likewise, an individual who was not in a district disadvantaged by legislative apportionment did not have standing to challenge such apportionment. *Garcia v. 2011 Legislative Reapportionment Comm'n*, 559 Fed. Appx, 128, 134 (3d Cir. 2014). In this case, Mr. Adams, the other members of the Committee and Mr. Moxley are all residents of the District.

In considering whether the Party Plaintiffs have suffered an actual injury for purposes of determining whether they have standing as voters, it is helpful to remind oneself of the nature of their equal protection interest in this case.

> [R]epresentative government is in essence self-government through the medium of elected representatives of the people, and each and every citizen has an inalienable right to full and effective participation in the political processes of his State's legislative bodies. Most citizens can achieve this participation only as qualified voters through the election of legislators to represent them.

Reynolds v. Sims, 377 U.S. 533, 565 (1964).

The right of citizens to fully and effectively participate in the political process by electing legislators is rendered a nullity if incumbents can enact discriminatory laws and thereby entrench themselves in office. The Act is exactly such a law. It facially discriminates in favor of incumbents and clearly has the intent and effect of making it more difficult for incumbents to be removed from office. Whether it does so "to an unconstitutional extent," *Miller III*, 512 F.3d at 104 (Wilkinson, J. dissenting), is not a jurisdiction question, or at least not merely so. That question goes to the merits of the case. Accordingly, as discussed above, that is a question to be decided on the merits, not on a Rule 12(b)(1) motion at the pleading stage.

CONCLUSION

This case presents important constitutional questions, of interest to every Virginia citizen and voter.

The district court erred in dismissing this case pursuant to Rule 12(b)(1) at the pleading stage of litigation. The district court's ruling on standing was premature because the jurisdictional fact in question was intertwined with the facts central to the merits of the case.

Moreover, the district court misconstrued the Plan as submitting to the Act and incorporating it by reference. In particular, the district court conceded that it construed the Plan as a waiver of constitutional rights, but never addressed relevant authority that requires such a waiver to be clear and compelling.

Finally, as to the facial equal protection claim, the Party Plaintiffs and Mr. Moxley have standing as Virginia citizens and voters.

Accordingly, the Party Plaintiffs request that this Court reverse the Order of the district court, and remand this case for further proceedings.

STATEMENT WITH RESPECT TO ORAL ARGUMENT

Appellants 24th Senatorial District Committee and Kenneth Adams request that this Court schedule this matter for oral argument.

On the merits, this case is a challenge to the so-called Incumbent Protection Act (the "Act"), a Virginia election statute that facially discriminates in favor of incumbent politicians.

Allowing this case to be resolved on the merits will clarify the dubious status of the Act. In a prior case in which the Act was implicated, but not challenged, Judge Wilkinson of this Court stated that the unconstitutionality of the Act is obvious. He went on to suggest that this Court overturn the Act *sua sponte*. *Miller v. Cunningham*, 512 F.3d 98, 99 *et seq.* (4th Cir. 2007) (Wilkinson, J., dissenting). While the Court declined to overturn the act *sua sponte*, there is and will continue to be uncertainty about the constitutionality of the Act until it is definitively addressed by this Court.

Moreover, the Act infringes the right of every Virginia citizen and voter to full and effective participation in the electoral process, protected by the equal protection clause of the Fourteenth Amendment. Accordingly, a decision on the merits will address a matter of critical and continuing public interest.

The specific question presented is whether Appellants have standing. However, even the procedural issue presented is this case is one of public interest.

The question of standing turns on the construction of the Plan of Organization ("Plan") of the Republican Party of Virginia ("RPV"), as it relates to the nomination of candidates for the Virginia General Assembly. While the RPV is a private organization, the nominations it conducts are part of the wider electoral process. Accordingly, the public has an interest in the proper construction of the Plan, which is one of the issues presented for appeal.

Respectfully submitted,

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

And

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

Counsel for Plaintiffs – Appellants

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume requirement of the Order of this Court dated June 24 2015, because it contains 8,632 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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

July 8, 2015

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

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2015, I filed the foregoing Opening Brief of Appellants with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by hand delivery and electronically using the CM/ECF system, which will send electronic notification of such filing to all counsel of record.

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

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

Counsel for Appellees

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

Counsel for Appellee
Emmett W. Hanger, Jr.

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

Counsel for Intervenor/Plaintiff

s/ Jeffrey R. Adams

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