

Unconstitutional Residency Requirement for Circulating Ballot Petitions

*Perry v. Judd (3:11-cv-856) and Shuttleworth v.
Moran (3:12-cv-257) (John A. Gibney, Jr., E.D. Va.)*

Two weeks before absentee ballots were to be ordered from printing companies for the 2012 Republican presidential primary in Virginia, Texas Governor Rick Perry filed a federal complaint alleging that his ballot petition was wrongfully rejected four days previously. Among his claims, Perry alleged that Virginia unconstitutionally required persons collecting petition signatures to be Virginia residents. The judge instructed the parties to provide other disqualified candidates with notice of the suit so that they could seek to intervene. On the day that ballot printing was to be ordered, the judge ruled that the ballots should not be printed until after a hearing four days later. The district judge and the court of appeals determined that Perry should have challenged ballot petition rules at the beginning of the petition period rather than at the end. The district judge also opined that it was unconstitutional to require signature gatherers to be residents. A few months later, a would-be candidate for a congressional primary election challenged the residency requirement because it caused him to be just a few signatures short of the requirement for the primary ballot. Perhaps in light of the district judge's earlier opinion, the candidate was certified for the ballot.

Subject: Getting on the ballot. *Topics:* Getting on the ballot; laches; primary election.

Two weeks before local election boards were to order absentee ballots from printing companies for the 2012 Republican presidential primary in Virginia, Texas Governor Rick Perry filed a federal complaint in the Eastern District of Virginia's Richmond courthouse alleging that his ballot petition was wrongfully rejected four days previously.¹ Among his claims, Perry alleged that Virginia unconstitutionally required persons collecting petition signatures to be Virginia residents.² On the day after he filed his complaint, Perry filed a motion for a temporary restraining order and a preliminary injunction.³

1. Complaint, *Perry v. Judd*, No. 3:11-cv-856 (E.D. Va. Dec. 27, 2011), D.E. 1 [hereinafter *Perry Complaint*]; *Perry v. Judd*, 840 F. Supp. 2d 945, 949, 951, 953 (E.D. Va. 2012); see Amended Complaint, *Perry*, No. 3:11-cv-856 (E.D. Va. Jan. 4, 2012), D.E. 30 [hereinafter *Perry Amended Complaint*]; see also Andrew Cain, *Perry Files Suit to Get on Primary Ballot*, Richmond Times-Dispatch, Dec. 28, 2011)

2. *Perry Amended Complaint*, *supra* note 1, at 11–12; *Perry Complaint*, *supra* note 1, at 5–6; *Perry*, 840 F. Supp. 2d at 949.

3. Motion, *Perry*, No. 3:11-cv-856 (E.D. Va. Dec. 27, 2011), D.E. 7; see Andrew Cain, *Perry Files Emergency Motion to Get His Name on Ballot*, Richmond Times-Dispatch, Dec. 29, 2011.

On December 28, 2011, the day after the complaint was filed, Judge John A. Gibney, Jr., set the case for hearing on the following day.⁴ At the hearing, Judge Gibney set a second hearing for January 13, 2012; briefing was ordered completed by January 11, and answers were due January 3.⁵ Judge Gibney made clear that he would not permit any delays.⁶ He decided that other Republican presidential candidates disadvantaged by Virginia's ballot petition restrictions should be invited to intervene,⁷ so he ordered the defendants to provide contact information for them, and he ordered the plaintiffs to provide the other candidates with case filings.⁸ On January 4, Judge Gibney granted intervention to Newt Gingrich, John Huntsman, Jr., and Rick Santorum.⁹

On Monday, January 9, the day that absentee ballots were to be ordered from the printers, Judge Gibney held a telephonic conference: "I am trying to figure out how we can proceed with this case without having the Commonwealth moot it or attempt to build a [laches] defense by printing and circulating ballots."¹⁰ Over its objection, Judge Gibney directed the commonwealth's board of elections to instruct local boards not to print or send out absentee ballots until after the Friday hearing.¹¹ Virginia's elections board immediately appealed Judge Gibney's direction, but the appeal was not heard before Judge Gibney's January 13 hearing.¹²

On January 10, Judge Gibney denied a January 9 pro se motion to intervene by a more minor presidential candidate.¹³ At the January 13 hearing, Judge Gibney denied a non-party citizen's motion to dismiss the case, de-

4. Docket Sheet, *Perry*, No. 3:11-cv-856 (E.D. Va. Dec. 27, 2011).

Tim Reagan interviewed Judge Gibney for this report by telephone on September 4, 2013.

5. Minutes, *Perry*, No. 3:11-cv-856 (E.D. Va. Dec. 29, 2011), D.E. 14 [hereinafter *Perry* Minutes]; see *Perry*, 840 F. Supp. 2d at 949; see also Frank Green, *Judge Sets Timetable for Perry's Bid to Get on Va. Ballot*, Richmond Times-Dispatch, Dec. 30, 2011.

6. Interview with Hon. John A. Gibney, Jr., Sept. 4, 2013.

7. *Id.*

8. *Perry* Minutes, *supra* note 5; Notice of Service, *Perry*, No. 3:11-cv-856 (E.D. Va. Dec. 30, 2011), D.E. 15.

9. Order, *Perry*, No. 3:11-cv-856 (E.D. Va. Jan. 4, 2012), D.E. 27; *Perry*, 840 F. Supp. 2d at 949; see Amended Intervenor Complaint, *Perry*, No. 3:11-cv-856 (E.D. Va. Jan. 6, 2012), D.E. 38; Intervenor Complaint, *id.* (Jan. 4, 2012), D.E. 28; see also Frank Green, *Santorium, Gingrich, Huntsman Join Perry's Ballot Suit*, Richmond Times-Dispatch, Jan. 5, 2012.

10. Transcript at 4, *Perry*, No. 3:11-cv-856 (E.D. Va. Jan. 9, 2012, filed Jan. 9, 2012), D.E. 47 [hereinafter Jan. 9, 2012, Transcript].

11. Opinion, *id.* (Jan. 10, 2012), D.E. 54; Order, *id.* (Jan. 9, 2012), D.E. 46; Jan. 9, 2012, *Perry* Transcript, *supra* note 10, at 8–11; see Frank Green, *Federal Judge Says to Wait on GOP Ballot*, Richmond Times-Dispatch, Jan. 10, 2012; Larry O'Dell, *Judge in Perry's Va. Suit Blocks Absentee Ballots*, Newport News Daily Press, Jan. 10, 2012, at A9.

"Just for the record, both Friday and Monday are state holidays." Jan. 9, 2012, *Perry* Transcript, *supra* note 10, at 12 (remarks by an attorney appearing for the commonwealth's board of elections).

12. Docket Sheets, *Perry v. Judd*, Nos. 12-1042 and 12-1047 (4th Cir. Jan. 10, 2012).

13. Order, *Perry*, No. 3:11-cv-856 (E.D. Va. Jan. 10, 2012), D.E. 50; see Intervention Motion, *id.* (Jan. 9, 2012), D.E. 45.

clined the citizen's request to participate in the hearing, and accepted the motion as an *amicus curiae* brief.¹⁴

After the January 13 evidentiary hearing, Judge Gibney ruled that laches barred the candidates' requested relief; they should have brought the action at the beginning of the signature-collection period rather than at the end.¹⁵ On January 19, the court of appeals agreed: "Movant had every opportunity to challenge the various Virginia ballot requirements at a time when the challenge would not have created the disruption that this last-minute lawsuit has."¹⁶

"To allow the parties a complete review on any appeal, . . . [Judge Gibney addressed] the other issues raised by the parties."¹⁷ In particular, "the Court believes that the residency requirements for petition circulators will likely be declared unconstitutional."¹⁸

Judge Gibney's on-the-record views as to the constitutionality of requiring collectors of ballot petition signatures to be state residents may have helped to shorten the life of a time-sensitive case filed later in 2012.

On Friday, April 6, a plaintiff wishing to challenge the incumbent in a June 12 primary election for the Democratic nomination for one of Northern Virginia's representatives in Congress filed a federal complaint alleging that the plaintiff was wrongfully denied a place on the primary ballot.¹⁹ According to the complaint, the plaintiff was "17 signatures short of the required 1,000" and approximately 36 signatures were disqualified because they were collected by the campaign manager who worked in Virginia but lived in Mary-

14. Transcript at 4–5, *id.* (Jan. 13, 2012, filed Jan. 17, 2012), D.E. 82 [hereinafter Jan. 13, 2012, *Perry* Transcript]; Order, *id.* (Jan. 13, 2012), D.E. 70; *see* Motion, *id.* (Jan. 11, 2012), D.E. 67.

15. *Perry v. Judd*, 840 F. Supp. 2d 945, 949, 953–55, 960–61 (E.D. Va. 2012); *see* Jan. 13, 2012, *Perry* Transcript, *supra* note 14, at 157 ("THE COURT: . . . I can't figure out for the life of me how I can put them on the ballot if they don't have the signatures."); *see also* Frank Green, *Judge Won't Add Candidates to Va. Primary*, *Richmond Times-Dispatch*; Anita Kumar, *4 GOP Candidates Lose Lawsuit to Get on Va. Primary Ballot*, *Wash. Post*, Jan. 14, 2012, at A6; Larry O'Dell, *Judge Rejects GOP Primary Ballot Appeal*, *Newport News Daily Press*, Jan. 14, 2012, at A3; Michael D. Shear, *4 Candidates Denied Ballot Spots in Virginia*, *N.Y. Times*, Jan. 14, 2012, at A14.

Judge Gibney's concerted efforts to quickly resolve the immediate issue were substantially assisted by good briefs and arguments ably prepared in short order. Interview with Hon. John A. Gibney, Jr., Sept. 4, 2013.

16. *Perry v. Judd*, 471 F. App'x 219, 220 (4th Cir. 2012); *see* Michael Martz, *Decks Cleared for GOP Primary*, *Richmond Times-Dispatch*, Jan. 22, 2012 ("Perry has since dropped out of the Republican presidential race. Only U.S. Rep. Ron Paul of Texas and former Massachusetts Gov. Mitt Romney will appear on the primary ballot in Virginia."); Larry O'Dell, *Appeals Court Refuses to Add Perry to Va. Ballot*, *Newport News Daily Press*, Jan. 18, 2012, at A5.

17. *Perry*, 840 F. Supp. 2d at 955.

18. *Id.* at 958.

19. Complaint, *Shuttleworth v. Moran*, No. 3:12-cv-257 (E.D. Va. Apr. 6, 2012), D.E. 1.

land.²⁰ With his complaint, the plaintiff filed a motion for a temporary restraining order and a preliminary injunction.²¹

The court assigned the case to Judge Robert E. Payne, who recused himself on April 9.²² Judge Gibney held a conference call with the parties on April 10 to determine whether the parties needed anything from the court immediately.²³ The parties told Judge Gibney that they were in negotiations.²⁴ On April 27, Judge Gibney granted the plaintiff a voluntary dismissal.²⁵

News media reported that party officials certified the plaintiff for the primary ballot after they discovered that they had initially miscounted his ballot application signatures.²⁶ In the election, the incumbent prevailed.²⁷

On May 29, 2013, the court of appeals affirmed a July 30, 2012, holding by Judge Gibney in a third case that a residency requirement for collectors of ballot petition signatures is unconstitutional absent narrow tailoring to a compelling interest, which Virginia had not shown.²⁸

20. *Id.* at 9–11.

21. Motion, *id.* (Apr. 6, 2012), D.E. 2.

22. Recusal, *id.* (Apr. 9, 2012), D.E. 5.

23. Docket Sheet, *id.* (Apr. 6, 2012); Interview with Hon. John A. Gibney, Jr., Sept. 4, 2013.

24. Interview with Hon. John A. Gibney, Jr., Sept. 4, 2013.

25. Order, *Shuttleworth*, No. 3:12-cv-257 (E.D. Va. Apr. 27, 2012), D.E. 10.

26. Ben Pershing, *In Va. Race, Underdog Targets Ethics Issue*, Wash. Post, May 24, 2012, at B1 (describing the underlying facts as murky).

27. *See Rep. Moran Handles Primary Challenge, Heads to General Election*, Arlington Sun Gazette, June 13, 2012.

28. *Libertarian Party of Virginia v. Judd*, 718 F.3d 308 (4th Cir. 2013), *aff'g* 881 F. Supp. 2d 719 (E.D. Va. 2012), *cert. denied*, 571 U.S. 1071 (2013); *see* Andrew Cain, *Judge Strikes Down Va. Law on Ballot Petitions*, Richmond Times-Dispatch, Aug. 1, 2012; *Court Rejects Ballot Access Provision*, Staunton Daily News Leader, May 30, 2013, at A3; Larry O'Dell, *Judge Strikes Down Va. Petition-Circulator Law*, Newport News Daily Press, Aug. 1, 2012, at A4.