

# ESSAYS

## THE DOWNFALL OF “INCUMBENT PROTECTION”: CASE STUDY AND IMPLICATIONS

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## INTRODUCTION

On January 9, 2019, the United States Court of Appeals for the Fourth Circuit struck down Virginia Code section 24.2-509—Virginia’s long-standing<sup>1</sup> “Incumbent Protection Act” (or the “Act”).<sup>2</sup> The Incumbent Protection Act<sup>3</sup> was the only statute of its kind,<sup>4</sup> and had endured criticism by grassroots commentators.<sup>5</sup> Yet, the Incumbent Protection Act had long evaded scrutiny in the courtroom. Indeed, the Incumbent Protection Act’s courtroom history is labyrinthine, replete with interesting and significant commentaries on party rights, standing, and public policy preference for primaries. In fact, before its eventual demise, it had been implicated in several lawsuits bringing constitutional challenges to various Virginia election laws and had dodged one direct assault by defending on standing grounds.<sup>6</sup>

By the time the challenge to the Incumbent Protection Act culminated with the Fourth Circuit’s January 9, 2019 decision, litigation to dismantle it had been ongoing for almost five years between two different suits. Indeed, the Incumbent Protection Act was felled not by one, but two swings.

This Article chronicles the course of the litigation that ultimately toppled the Incumbent Protection Act. Spanning two lawsuits and no fewer than seven opinions, the story of the litigation provides insight to practitioners who hope to navigate the interlocking and overlapping hierarchies of party plans, state laws, and constitutional rights. Following the summary and analysis of the litigation, this Article will assess the ramifications of the two

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1. Act of Mar. 22, 1975, ch. 515, 1975 Va. Acts 1042, 1060–61 (originally codified at VA. CODE ANN. § 24.1-172 (Cum. Supp. 1975)).

2. 6th Cong. Dist. Republican Comm. v. Alcorn, 913 F.3d 393, 398 (4th Cir. 2019).

3. The “Incumbent Protection Act” is the informal name given to Virginia Code section 24.2-509(B). See, e.g., Marshall v. Meadows, 105 F.3d 904, 905 & n.1 (4th Cir. 1997).

4. 6th Cong. Dist. Republican Comm., 913 F.3d at 399 (“Virginia has not identified a single other state that has a statute like the Incumbent Protection Act[.]”).

5. See, e.g., John Massoud, *Commentary: The Death of the Incumbent Protection Act*, NVDAILY.COM (Feb. 14, 2018), [https://www.nvdaily.com/opinion/commentary-the-death-of-the-incumbent-protection-act/article\\_d251b82a-1e23-5ba6-95ba-56c40c0b8f1e.html](https://www.nvdaily.com/opinion/commentary-the-death-of-the-incumbent-protection-act/article_d251b82a-1e23-5ba6-95ba-56c40c0b8f1e.html) [https://perma.cc/33GH-RUD6].

6. See, e.g., Miller v. Cunningham (*Miller III*), 512 F.3d 98, 99, 101 (4th Cir. 2007); Adams v. Alcorn, No. 5:15cv00012, 2015 U.S. Dist. LEXIS 43366 at \*4, \*27 (W.D. Va. Apr. 2, 2015), *aff’d sub nom.* 24th Senatorial Dist. Republican Comm. v. Alcorn, 820 F.3d 624 (4th Cir. 2016).

Fourth Circuit opinions and will look ahead to issues likely of interest to future challengers to Virginia's election laws.

### I. OPERATION OF THE INCUMBENT PROTECTION ACT

At its heart, litigation of the Incumbent Protection Act was a study of justiciability. A fair approximation of the lawsuit would describe it as less about the constitutionality of the Incumbent Protection Act and more about who could challenge which parts of the Act. To understand and assess these arguments, one must first come to comprehend the mechanics of the Act. Its structure is paramount to evaluating the standing arguments that come later.

Overall, the Virginia Code allotted the power to choose the method of nomination through section 24.2-509's two subsections. Virginia Code section 24.2-509(A) operated as a general grant, imbuing political parties with the power to choose the method of nomination.<sup>7</sup> Virginia Code section 24.2-509(B) (the Incumbent Protection Act) curtailed this general grant. When incumbents sought re-nomination, Virginia Code section 24.2-509(B) reallocated the power of nomination away from the political party in its six sentences:

[1] Notwithstanding subsection A, the following provisions shall apply to the determination of the method of making party nominations.

[2],[3] 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, or absent any designation by him by the method of nomination determined by the party. A party shall nominate its candidates for election for a General Assembly district where there is more than one incumbent of that party

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7. VA. CODE ANN. § 24.2-509(A) (Repl. Vol. 2016). Section 24.2-509(A) states in its entirety:

The duly constituted authorities of the state political party shall have the right to determine the method by which a party nomination for a member of the United States Senate or for any statewide office shall be made. The duly constituted authorities of the political party for the district, county, city, or town in which any other office is to be filled shall have the right to determine the method by which a party nomination for that office shall be made.

*Id.*

for the district by a primary unless all the incumbents consent to a different method of nomination.

[4] A party, whose candidate at the immediately preceding election for a particular office other than the General Assembly (i) was nominated by a primary or filed for a primary but was not opposed and (ii) was elected at the general election, shall nominate a candidate for the next election for that office by a primary unless all incumbents of that party for that office consent to a different method.

[5] When, under any of the foregoing provisions, no incumbents offer as candidates for reelection to the same office, the method of nomination shall be determined by the political party.

[6] For the purposes of this subsection, any officeholder who offers for reelection to the same office shall be deemed an incumbent notwithstanding that the district which he represents differs in part from that for which he offers for election.<sup>8</sup>

Crucial to understanding the Incumbent Protection Act's function is observing that it created one set of rules for General Assembly offices (the House of Delegates and the Senate of Virginia) and one set of rules for everyone else (including candidates for Virginia's seats in the United States Congress).

Sentences 2 and 3 permitted General Assembly incumbents unfettered power to select the method of nomination. For all other offices, sentence 4 allowed the incumbent officeholder to insist that the party use a primary as its nomination method if the incumbent seeking re-election had been selected by primary in the previous election cycle. On the one hand, the Incumbent Protec-

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8. *Id.* § 24.2-509(B) (Repl. Vol. 2016). Sentences 1, 5, and 6 are generally applicable procedural rules, and nonsubstantive. *Id.* The first and fifth sentences of the Incumbent Protection Act define in general terms the scope of the Act's application. *Id.* Specifically, the first sentence acknowledges that the Incumbent Protection Act is an exception to the rule of section 24.2-509(A). *Id.* The fifth sentence provides that the Act does not apply to a nomination in which "no incumbents offer as candidates for reelection to the same office." *Id.* The sixth sentence defines incumbency broadly, ensuring that redistricting does not impair an incumbent's ability to use his or her power under the Incumbent Protection Act. *Id.* Specifically, it states that "[f]or the purposes of this subsection, any officeholder who offers for reelection to the same office shall be deemed an incumbent notwithstanding that the district which he represents differs in part from that for which he offers for election." *Id.* The first, fifth, and sixth sentences of the Incumbent Protection Act apply generally, and were nonfactors during the litigation on the Incumbent Protection Act.

tion Act granted the General Assembly incumbents the absolute power to choose the nomination method, and on the other, it empowered the non-General Assembly incumbents (that had previously been selected by primary) to veto the use of a nonprimary method.

Reallocating the power to select (or veto) nomination methods constrained the political parties' abilities to choose other methods available under Virginia law. For instance, Virginia allows nominations of candidates not only by a primary—which is conducted and funded by the state—but also “by methods other than a primary.”<sup>9</sup> “Such other methods, which are conducted and funded by the party, include (but are not limited to) a party convention;<sup>10</sup> a mass meeting, also known as a ‘caucus’; and a party canvass or unassembled caucus, also called a ‘firehouse primary.’”<sup>11</sup>

That is all to say that the Incumbent Protection Act's treatment of General Assembly races was textually distinct from its treatment of races for other offices. The Incumbent Protection Act ensured greater protections to General Assembly incumbents (unrestricted selection of the nomination method) than non-general General Assembly candidates (veto over nonprimary method)—and effectuated those protections in different subparts of Virginia Code section 24.2-509(B).

## II. LITIGATING THE INCUMBENT PROTECTION ACT

### A. *The First Litigation: Adams and the 24th Senatorial District Committee*

The first direct challenge to the Act commenced in 2015 when the 24th Senatorial District Republican Committee (the “24th Senatorial Committee”)—a legislative district committee of the Republican Party of Virginia—and its chairman filed a challenge to the Act.<sup>12</sup> Named as defendants were various members of the Virginia State Board of Elections and the Virginia Department of

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9. *Id.* § 24.2-510 (Repl. Vol. 2016).

10. *See id.* § 24.2-508(ii) (Repl. Vol. 2016).

11. *Miller v. Brown (Miller II)*, 503 F.3d 360, 362 (4th Cir. 2007); *see also* *Parson v. Alcorn*, 157 F. Supp. 3d 479, 485 (E.D. Va. 2016).

12. Complaint at 2, *Adams v. Alcorn*, No. 5:15cv00012, 2015 U.S. Dist. LEXIS 43366 (W.D. Va. Apr. 2, 2015), *aff'd sub nom.* 24th Senatorial Dist. Republican Comm. v. Alcorn, 820 F.3d 624 (4th Cir. 2016).

Elections (the “Commonwealth Defendants”).<sup>13</sup> The suit came after the 24th Senatorial Committee designated a convention as the method for selecting the Republican nominee to run for the 24th District’s Senate of Virginia seat for the 2015 election cycle.<sup>14</sup> In response, the incumbent state senator notified the Committee and the Virginia Department of Elections that he had designated a primary as the method of nomination.<sup>15</sup> The Virginia Department of Elections, in view of the Incumbent Protection Act, indicated its intention to hold a primary.<sup>16</sup> A formal conflict thus arose between the Committee, which had selected a convention, and the Commonwealth, which the Incumbent Protection Act directed to implement the incumbent officeholder’s choice of nomination. After the lawsuit was underway, both the incumbent officeholder and his challenger for the Republican nomination were granted leave to intervene.<sup>17</sup> As a result, the first challenge to the Incumbent Protection Act consisted of three plaintiffs: the 24th Senatorial Committee, its chairman, and a candidate challenging the incumbent.

The Commonwealth Defendants immediately moved to dismiss the lawsuit on standing grounds.<sup>18</sup> The Commonwealth Defendants pointed out that the 24th Senatorial Committee, as a creation of the Republican Party of Virginia (the “RPV”), was bound by the powers and limitations contained in the RPV’s Plan of Organization (the “Plan”).<sup>19</sup> The Plan included a delegation of authority to the 24th Senatorial Committee “to determine the method of nomination for candidates seeking the Republican nomination for the 24th Senate District.”<sup>20</sup> But—crucially—it also contained a concession: legislative district committees could only

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13. *Id.* at 3.

14. *Adams*, 2015 U.S. Dist. LEXIS 43366, at \*7.

15. *Id.* at \*2–3, \*6–7, \*9.

16. *Id.* at \*9.

17. *Id.* at \*2–3; *see also* Motion to Intervene at 2, *Adams*, No. 5:15cv00012, 2015 U.S. Dist. LEXIS 43366, ECF No. 17; Order, *Adams*, No. 5:15cv00012, 2015 U.S. Dist. LEXIS 43366, ECF No. 37. In his complaint, the intervenor candidate Moxley added an Equal Protection claim to the Committee’s First Amendment claims. Motion to Intervene, *supra*, at 2–3.

18. *Adams*, 2015 U.S. Dist. LEXIS 43366, at \*4, \*15 (“Defendants seek dismissal of the plaintiffs’ complaints, as amended, pursuant to Fed. R. Civ. P. 12(b)(1), because the plaintiffs lack standing.”).

19. *Id.* at \*2, \*5–7, \*9, \*12–13.

20. *Id.* at \*2, \*5.

choose the method of nomination “where permitted to do so under Virginia law.”<sup>21</sup>

The 24th Senatorial Committee’s standing (and that of its chairman<sup>22</sup>) turned on the interpretation of the “where permitted to do so under Virginia law” language.

Both the district court and a split panel of the United States Court of Appeals for the Fourth Circuit sided with the Commonwealth Defendants. First, the panel concluded that the language of the Plan was unambiguous.<sup>23</sup> Because the terms of the Plan were unambiguous, the court need not look outside of the Plan to construe it.<sup>24</sup> Second, the panel found that the Plan’s “where permitted to do so under Virginia law” provision incorporated the Incumbent Protection Act and subordinated the nomination powers granted by other text in the Plan.<sup>25</sup> In effect, the Plan’s inclusion of that language was tantamount to a “voluntary choice” by the RPV to subordinate its power to choose a nomination method to Virginia law, specifically the Incumbent Protection Act.<sup>26</sup> Of course, where an alleged injury is due to a party’s voluntary choice, the party does not meet the required elements of standing.<sup>27</sup> Accordingly, any injury suffered by the 24th Senatorial Committee was caused by the independent choice of the RPV and

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21. *Id.* The Plan provision concerning the General Assembly candidates reads: “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.*” 24th Senatorial Dist. Republican Comm. v. Alcorn, 820 F.3d 624, 630 (4th Cir. 2016) (quoting Art. V, § D(1)(a) of the Plan).

22. In this first litigation, neither the district court nor the Fourth Circuit detected any difference between the 24th Senatorial Committee and its chairman for standing purposes. In all material respects, they were treated as a consolidated party. *See Adams*, 2015 U.S. Dist. LEXIS 43366, at \*2 (“The original plaintiffs are the 24th Senatorial District Republican Committee, which is a local committee of the Republican Party of Virginia (“RPV” or “the Party”), and its chairman, Kenneth H. Adams (*collectively, ‘the Committee’*)”) (emphasis added); *24th Senatorial Dist.*, 820 F.3d at 627.

23. *24th Senatorial Dist.*, 820 F.3d at 632 (“We conclude that the language of the Plan is clear and unambiguous.”).

24. *Id.* at 631 (citing *Hitachi Credit Am. Corp. v. Signet Bank*, 166 F.3d 614, 624 (4th Cir. 1999)).

25. *See id.* at 631–32.

26. *Id.*

27. *See, e.g., id.* at 630 (“We have previously held that where an alleged injury is caused by a voluntary choice made by the Virginia Republican Party and not the challenged state law, plaintiffs do not establish causation.”) (internal quotation marks and citations omitted); *Adams*, 2015 U.S. Dist. LEXIS 43366, at \*16 (“If the ‘alleged injury is caused by a voluntary choice made by the Virginia Republican party and not the [statute], the plaintiffs have not established causation,’ and have not shown that any injury is redressable by striking down the statute.”).

not by the Incumbent Protection Act.<sup>28</sup> Further, a favorable decision would not have redressed the committee's injury, as incumbents would have had the power to select the nomination method under the Plan no less than under the law.<sup>29</sup>

It is noteworthy that one of the judges at the Fourth Circuit (then-Chief Judge Traxler) dissented.<sup>30</sup> He observed that the law of a particular state includes the United States Constitution as the supreme law of the land, and therefore "an unconstitutional Virginia statute is no law at all."<sup>31</sup> It followed then, in Chief Judge Traxler's view, that the language "where permitted to do so under Virginia law" did "not include Virginia statutes that are void because they violate the U.S. Constitution."<sup>32</sup> Succinctly put, "the phrase 'Virginia Law' . . . cannot be construed to include *invalid* Virginia statutes."<sup>33</sup> The majority, of course, disagreed.<sup>34</sup> The appellants filed for rehearing en banc, which was denied.<sup>35</sup>

The Fourth Circuit's holding that the Plan unambiguously incorporated the Incumbent Protection Act, and subordinated legislative district committees, had the effect of shuttering the courthouse doors to an entire subgroup of the Republican Party—namely, every legislative district committee and their chairpersons. Going forward, if a legislative district committee intended to challenge the Incumbent Protection Act, it would have to first amend the Plan—a politically daunting proposition.

In addition to attacking the 24th Senatorial Committee's standing, the Commonwealth Defendants also challenged the candidate-plaintiff's standing.<sup>36</sup> The challenged candidate-plaintiff brought an Equal Protection claim.<sup>37</sup> The candidate-plaintiff theorized that the Incumbent Protection Act injured him

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28. *24th Senatorial Dist.*, 820 F.3d at 632–33.

29. *See id.*

30. *Id.* at 634 (Traxler, C.J., dissenting).

31. *Id.* at 636.

32. *Id.* at 636–37 (citing *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 469 (2015)).

33. *Id.* at 638.

34. The majority disagreed with Chief Judge Traxler's reliance on the *DIRECTV, Inc. v. Imburgia* Supreme Court decision. *Id.* at 632 & n.2. They distinguished *DIRECTV* as applying to incorporations of state law that had *already* been invalidated, rather than state law that was merely being challenged by the lawsuit at hand. *Id.*

35. Appellants' Petition for Rehearing En Banc, *24th Senatorial Dist.*, 820 F.3d 624 (4th Cir. 2016) (Nos. 15-1478, 15-1483), ECF Nos. 62, 63; Order, *24th Senatorial Dist.*, 820 F.3d 624 (4th Cir. 2016) (Nos. 15-1478, 15-1483) ECF Nos. 62, 63.

36. *24th Senatorial Dist.*, 820 F.3d at 633.

37. *Id.*

because, as a candidate for the 24th District's seat for the Senate of Virginia, he was similarly situated to the incumbent, yet disfavored by the Incumbent Protection Act.<sup>38</sup> Despite his seemingly similar position, the Incumbent Protection Act bestowed an unconstitutional advantage upon the incumbent by enabling him to choose the most advantageous nomination process.<sup>39</sup> That, according to the candidate-plaintiff, was injury enough.

The Fourth Circuit disagreed, and in a remarkably sweeping way.<sup>40</sup> The two-judge majority observed that neither the Plan nor state law granted challenging candidates the ability to choose the method of nomination.<sup>41</sup> Because challengers never possess the ability to choose the method of nomination, the Incumbent Protection Act takes nothing away from them, and therefore does not injure them.<sup>42</sup> In other words, the Incumbent Protection Act cannot invade a legally protectable interest that the challenger never possessed. By eliminating the challenging candidate from the case, the Fourth Circuit affirmed the district court's decision and dismissed the case.<sup>43</sup>

The Incumbent Protection Act survived the first constitutional challenge without ever having to face constitutional scrutiny. The plaintiffs and intervenor in the *Adams* and *24th Senatorial District* cases were each dismissed solely on justiciability grounds—and with ominous odds for a re-challenge. The Fourth Circuit interpreted the “where permitted to do so under Virginia law” language as voluntary consent by the RPV to the Act.<sup>44</sup> Therefore, any legislative district committee, such as the 24th Senatorial Committee, endeavoring to challenge the Incumbent Protection Act would have to hopscotch around the Fourth Circuit's ruling. Likewise, the Fourth Circuit's dismissal of the challenging candidate-plaintiff's Equal Protection claim effectively sidelined a whole class of potential plaintiffs; indeed, challenging candidates simply never have a legally protected interest in selecting the method of nomination.<sup>45</sup>

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38. *Id.*; see *supra* note 17.

39. See *supra* note 17.

40. See discussion *infra* Parts III.B–C.

41. *24th Senatorial Dist.*, 820 F.3d at 633.

42. *Id.*

43. *Id.* at 633–34.

44. See *supra* notes 23–26 and accompanying text.

45. See *supra* notes 41–43 and accompanying text.

The Fourth Circuit's opinion in *24th Senatorial District* left a minefield for potential litigants hoping to use judicial tools to overturn the Incumbent Protection Act. By eliminating Republican legislative district committees and challenging candidates from any party—and with incumbents (obviously) unlikely to challenge a statute that only helps them—the Fourth Circuit's decision left only so many possible plaintiffs able to establish a case and controversy.

B. *The Second Litigation: Fitzgerald and the 6th Congressional District Committee*

On February 24, 2017, a second challenge was filed targeting the Incumbent Protection Act.<sup>46</sup> This complaint had many similarities to the first litigation. Its causes of action proceeded on identical theories to the first litigation: facial and as-applied constitutional challenges founded on the First Amendment's guarantee of freedom of association and the Fourteenth Amendment's Equal Protection Clause.<sup>47</sup> In addition, the Complaint named the same Commonwealth Defendants.<sup>48</sup> But, apparently wise to the lessons of the *24th Senatorial District* case, the second litigation included plaintiffs of far greater variety. The panoply of plaintiffs included numerous classes of persons and entities representing several capacities within the Republican Party of Virginia:

- (1) committee-plaintiffs (the 20th House Committee, a legislative district committee, and the 6th Congressional Committee, a congressional district committee);
- (2) individual-plaintiffs (as Virginia voters and as members of the RPV);
- (3) candidate-plaintiffs (those persons who are nonincumbent prospective candidates for office); and
- (4) chairperson-plaintiffs.

Proceeding with many more and different classes of plaintiffs was clearly calculated to evade the successful standing arguments deployed by the Commonwealth Defendants in the prior litigation. Where the first litigation involved only a *legislative* dis-

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46. Complaint at 2, *Fitzgerald v. Alcorn*, 285 F. Supp. 3d 922 (W.D. Va. 2018), *aff'd sub nom.* 6th Cong. Dist. Republican Comm. v. Alcorn, 913 F.3d 393 (4th Cir. 2019) (No. 5:17-cv-16), ECF No. 1.

47. *Id.*

48. *Id.* at 1–2.

trict committee, its chairman, and a candidate-plaintiff, the second litigation crucially included a *congressional* district committee.<sup>49</sup> Legislative district committees select candidates for offices in the Virginia General Assembly, whereas congressional district committees select candidates for offices in the United States Congress.<sup>50</sup> Further, Plan language governing congressional district committees omitted the poisoned language: “where permitted to do so under Virginia law.”<sup>51</sup>

However, inasmuch as the second litigation sought a do-over of the first litigation, the residue of the Fourth Circuit’s *24th Senatorial District* decision proved to be an effective tool for the Commonwealth Defendants and a tricky obstacle for the plaintiffs. Indeed, not long after the plaintiffs filed their complaint, the Commonwealth Defendants moved to dismiss for lack of standing.<sup>52</sup>

### 1. The Candidate-Plaintiffs

The district court first dismissed the candidate-plaintiffs for lack of standing.<sup>53</sup> The candidate-plaintiffs were situated identically to the intervening challenger in the *24th Senatorial District* litigation and likewise alleged injury under an Equal Protection theory.<sup>54</sup> Finding that the candidate-plaintiffs had shown neither injury-in-fact nor redressability, the district court simply pointed to the *24th Senatorial District* precedent and ushered the candidate-plaintiffs to the exits.<sup>55</sup> Indeed, the candidate-plaintiffs did not even attempt to distinguish themselves from their earlier-litigation predecessors; rather, they argued, based on Supreme

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49. *Id.* at 1; *see supra* note 12 and accompanying text.

50. *See Fitzgerald*, 285 F. Supp. 3d at 927–28.

51. *Id.* at 932 (“[T]he 6th Congressional Committee presents no similar causation or redressability issues because Article IV of the Plan does not include the ‘where permitted to do so’ language.”).

52. *Id.* at 930.

53. *Fitzgerald v. Alcorn*, No. 5:17-cv-16, 2017 U.S. Dist. LEXIS 116614, at \*1 (W.D. Va. July 25, 2017). The Commonwealth Defendants filed a motion to dismiss seeking the dismissal of almost every plaintiff, and the Court granted it only with respect to the candidate-plaintiffs. The standing of the remaining plaintiffs were evaluated on cross-motions for summary judgment. *Id.*

54. *Id.* at \*2–3.

55. *Id.* at \*6 (“[B]inding Fourth Circuit precedent indicates that Candidate Plaintiffs lack standing to pursue their claims and must be dismissed.”).

Court precedent, that the Fourth Circuit had incorrectly decided the issue.<sup>56</sup>

## 2. The Individual-Plaintiffs

The individual-plaintiffs challenged the Act as registered voters and members of the RPV.<sup>57</sup> No plaintiff in the *24th Senatorial District* litigation had asserted First Amendment or Equal Protection injury on account of his or her identity as a registered voter or as a Republican. Nevertheless, the Commonwealth Defendants characterized the interests of registered voters and Republican party members as only a slight variation on the interests of candidate-plaintiffs.<sup>58</sup> The Commonwealth Defendants argued that, like the candidate-plaintiffs, Virginia voters and members of the RPV had “no authority under the Plan or state law to select their party’s means of nomination, and, therefore, the [Incumbent Protection] Act does not regulate any protected right belonging to the individual-plaintiffs.”<sup>59</sup> The district court agreed with the Commonwealth Defendants in reasoning that the *24th Senatorial District*’s holding that individuals who have no legally protectable interest in determining the nomination method are uninjured by the Incumbent Protection Act.<sup>60</sup>

Accordingly, the district court found each individual-plaintiff lacked standing, leaving only the committee-plaintiffs and the chairmen-plaintiffs.

## 3. The Chairmen-Plaintiffs

Also novel to the second litigation was the argument that chairmen had standing independent of their capacity as a repre-

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56. *Id.* (“[C]ounsel for plaintiffs did not try to distinguish *24th Senatorial [District]*’s treatment of Moxley from Candidate Plaintiffs’ circumstances. Rather, counsel contended that the Fourth Circuit simply got the issue wrong in *24th Senatorial [District]* and pointed to other precedent more favorable to Candidate Plaintiffs’ standing arguments.”).

57. *Fitzgerald*, 285 F. Supp. 3d at 945.

58. *See id.*

59. *Id.*

60. *Id.* (“Because neither Virginia law nor the Plan gives Moxley ‘a legally protected interest’ in determining the nomination method in the first place, he fails to make out ‘an invasion of a legally protected interest,’ i.e. actual injury, in this case. . . . The same conclusions apply to the individual-plaintiffs in this case: none have a legally protected interest in determining a nomination method.”) (quoting *24th Senatorial Dist. Republican Comm. v. Alcorn*, 820 F.3d 624, 633 (4th Cir. 2016)).

sentative of a committee.<sup>61</sup> The chairmen-plaintiffs contended that because Virginia Code section 24.2-1001 imposed the possibility of a misdemeanor for willful neglect of their statutory duties,<sup>62</sup> chairmen who refused to effectuate an incumbent's choice of nomination risked criminal prosecution.<sup>63</sup> That the possibility of prosecution could imbue committee chairmen with a protectable interest outside of their representative capacity was a novel theory, untested by prior election law cases.<sup>64</sup> However, the district court brushed it aside as unsubstantiated theory.<sup>65</sup> There had been no evidence adduced in discovery or submitted to the court that suggested the Commonwealth Defendants, or another state law authority, had ever prosecuted or threatened to prosecute under Virginia Code section 24.2-1001. The district court hypothesized that chairmen could only face criminal prosecution once a formal conflict had developed between the committee and incumbent, which would impose an obligation upon the chairperson to effectuate the incumbent's choice of nomination method.<sup>66</sup> Without a formal conflict, the chairperson would have no legal duty spurned; and, without a legal duty to refuse, insubordination was not possible and therefore no criminal penalties could arise. The district court simply found such a series of events too "conjectural" and "hypothetical."<sup>67</sup>

Having eliminated the candidate-plaintiffs and individual-plaintiffs as prescribed by *24th Senatorial District* and having found no evidence to support independent injury for chairmen-plaintiffs, the initial pack of plaintiffs that had started the litigation thinned to a mere two: one legislative district committee and one congressional district committee.

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61. *Id.* at 945–46.

62. VA. CODE ANN. § 24.2-1001(A) (Repl. Vol. 2016). Under Virginia law, a Class 1 misdemeanor is subject to "confinement in jail for not more than twelve months and a fine of not more than \$2,500, either or both." VA. CODE ANN. § 18.2-11(a) (Repl. Vol. 2014).

63. *Fitzgerald*, 285 F. Supp. 3d at 947.

64. *Id.* at 946 n.19 (explaining that the prior litigation involving chairmen-plaintiffs had considered the party chairmen as bringing claims and having standing derivative of their respective committees).

65. *Id.* at 947.

66. *See id.* at 947.

67. *Id.*

#### 4. The Legislative District Committee

The Plan created the same trouble for the 20th House Committee that it had made for the 24th Senatorial District Committee. Like its legislative district committee predecessor, the 20th House Committee was haunted by the “where permitted to do so under Virginia law” language in article V of the Plan.<sup>68</sup>

Though the Plan had not changed in the time between the first litigation and the second litigation, the 20th House Committee did have cause for optimism. Unlike the 24th Senatorial Committee, the 20th House Committee had secured an interpretative resolution from the State Central Committee of the RPV.<sup>69</sup> On June 27, 2015, the State Central Committee of the RPV passed a resolution declaring, in part:

1. The State Central Committee as the governing body of the Republican Party of Virginia, endowed with the authority to make definitive determinations about the application and interpretation of the Party Plan of Organization (“Plan”), hereby directs the Chairman to [v]indicate (sic) the Party’s rights violated by application of Virginia Code Section § 24.2-509 and a misapplication of the provisions of the plan by U.S. District Court for the Western District of Virginia in support of mistaken inclusion that the Party acceded to such violations of its rights.

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4. State Central Committee hereby resolves that the Act is not incorporated into the Party Plan nor is facilitated by or acceded to [by] the Plan.<sup>70</sup>

The intent of the resolution was obvious: to countermand the *Adams v. Alcorn* court’s incorporation of the Incumbent Protection Act into the Plan. Though the resolution had been secured during the first litigation (it was passed on June 27, 2015), the record before the district court had been closed and the *24th Senatorial District* court refused to consider it; therefore, the resolution con-

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68. *Id.* at 932 (“Article V of the Party’s Plan states that the 20th House Committee is permitted to select a nomination method ‘where permitted to do so under Virginia Law.’”).

69. *Id.* at 938 (“The Resolution was not presented to the district court in the prior challenge to the Act.”).

70. *Id.* at 938–39.

stituted a new fact not considered by either the district court or the Fourth Circuit in the first litigation.<sup>71</sup>

For the 20th House Committee, the resolution was a lifeline. Using it as operative evidence of the Plan's meaning, the 20th House Committee argued that the State Central Committee's interpretation of its own internal organizing documents should control.<sup>72</sup> In the view of the 20th House Committee, the State Central Committee's proclamation that the Plan does *not* incorporate the Incumbent Protection Act created a crucial distinction in the Plan considered by the courts in the *24th Senatorial District* litigation and the Plan now before the district court.<sup>73</sup> Not only had no one offered any evidence as to the RPV's interpretation of the Plan in *24th Senatorial District*, but now the State Central Committee of the RPV—the final arbiter of the Plan—had spoken, and spoken contrary to the Fourth Circuit's holding in the *24th Senatorial District* litigation.

At first blush, it might appear that the 20th House Committee held a strong hand. The interpretive body of the RPV had “corrected” the *24th Senatorial District's* interpretation in a way that supported the 20th House Committee's position. As such, the 20th House Committee forcefully argued that the June 27, 2015 resolution provided the district court with a blank slate upon which it might consider the import of the “where permitted to do so under Virginia law” provision.<sup>74</sup> Yet, the Commonwealth Defendants had a compelling counterargument. They contended that the June 27, 2015 resolution was not so much correction as it was contradiction. In their view, the RPV could not undo the Fourth Circuit's interpretation of the unambiguous Plan language by merely issuing a statement of disagreement.<sup>75</sup> If a court had ascertained the Plan's meaning as a matter of law, it was hardly within the power of the RPV to effectively vacate that interpretation.

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71. *Id.* at 938; *see also* 24th Senatorial Dist. Republican Comm. v. Alcorn, 820 F.3d 624, 632 (4th Cir. 2016) (“[T]he Committee's suggestion that the district court erred by failing to secure a definitive interpretation of the Plan from the Party is untimely and therefore waived, as any request should have been made to the district court.”).

72. *Fitzgerald*, 285 F. Supp. 3d at 939 (“The 20th House Committee argues that the Resolution, which has now been properly entered into the record, reflects a new fact that distinguishes this case from *24th Senatorial [District]*.”).

73. *Id.* at 938–39.

74. *Id.* at 939–41.

75. *Id.* at 941–42.

In the square-off between the Fourth Circuit and the RPV State Central Committee, the district court sided with the Fourth Circuit. Relying on the Supreme Court of Virginia's opinion in *Brotherhood of Locomotive Engineers v. Folkes*,<sup>76</sup> the district court acknowledged that construction of the organizing documents of unincorporated associations, such as the RPV, are typically left to the association.<sup>77</sup> That is, unless that construction would "substitute legislation for interpretation" or otherwise "transgress the . . . laws of the land."<sup>78</sup> Because the Fourth Circuit had already definitively concluded that the Plan's "where permitted to do so under Virginia law" language incorporates the Act, giving plenary effect to the RPV's contradictory and belated proclamation would "alter what the Fourth Circuit found to be the Plan's clear and unambiguous meaning."<sup>79</sup> The district court could simply not square such an outcome with the Supreme Court of Virginia opinion in *Folkes*. "As such, the provision on which the Fourth Circuit ha[d] spoken remain[ed] unaltered," and, like the 24th Senatorial District Committee in the first litigation, the 20th House District Committee was dismissed from the action.<sup>80</sup>

## 5. The Congressional District Committee: Standing and the Merits

### a. Standing

The one variety of plaintiff that had not yet challenged the Incumbent Protection Act was the RPV congressional district committee. Unlike its treatment of the legislative district committee, the Plan did not circumscribe the authority of the congressional district committee to be permitted under Virginia law.<sup>81</sup> There-

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76. 201 Va. 49, 58, 109 S.E.2d 392, 398 (1959).

77. *Fitzgerald*, 285 F. Supp. 3d at 939–42 ("Given the Fourth Circuit's holding that the 'where permitted to do so' language is clear and unambiguous, the only way in which a General Assembly committee could demonstrate causation is to persuade the Party to amend the Plan.").

78. *Id.* at 939–40 (quoting *Folkes*, 201 Va. at 58, 109 S.E.2d at 398).

79. *Id.* at 941.

80. *Id.* at 942 ("The 20th House Committee fails to show causation and will be dismissed from the case.").

81. *Id.* at 932. However, the 6th Congressional Committee is governed by article IV of the Plan, and—crucially—that article does not contain "where permitted to do so under Virginia Law." *Id.* ("Article V of the Party's Plan states that the 20th House Committee is permitted to select a nomination method 'where permitted to do so under Virginia Law.'"). In *24th Senatorial District*, the Fourth Circuit concluded that this language incorporated

fore, any deprivation suffered by the 6th Congressional District Committee (the “6th CDC”) resulted solely by operation of the Incumbent Protection Act, and invalidation of the Incumbent Protection Act would erase that deprivation.<sup>82</sup> The 6th CDC needed only show injury in fact.

The district court quickly determined that the 6th CDC “plainly” had a legally protected interest in selecting the method of nomination: the Plan gave congressional committees unfettered ability to choose the nomination method, which the Incumbent Protection Act took away.<sup>83</sup> However, the more problematic quandary was whether such an injury was “actual or threatened.”<sup>84</sup>

The incumbent for the 6th CDC had previously been selected by primary in the 2016 election cycle, so the Incumbent Protection Act entitled him to be selected by that nomination method in the 2018 election cycle.<sup>85</sup> The Act, therefore, applied. But, the Commonwealth Defendants argued, without either the incumbent or the committee having revealed a preference for the nomination method, there was no case or controversy between the two.<sup>86</sup> Indeed, the 6th CDC might also have chosen a primary, or the incumbent might also have consented to a convention, or both parties might have opted for a firehouse primary. If the 6th CDC and the incumbent agreed on a method of nomination, the 6th CDC would hardly suffer injury by the Act. The response by the 6th CDC was twofold: one based in fact and one based in law.

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the Act, and therefore, the alleged injury was caused by the Party’s Plan, not the Act. 820 F.3d 624, 630–33 (4th Cir. 2016) (dismissing a committee-plaintiff for failing to show causation element of standing). “However, the 6th Congressional Committee presents no similar causation or redressability issues because Article IV of the Plan does not include the ‘where permitted to do so’ language.” *Fitzgerald*, 285 F. Supp. 3d at 932. In the words of the district court: “the 6th Congressional Committee’s power to select a nomination method is limited only by the Act, not the Party’s voluntary choice to restrict its authority.” *Id.* Unconstrained by the language of the Plan, the 6th Congressional Committee set up a clean challenge to the Incumbent Protection Act.

82. *Fitzgerald*, 285 F. Supp. 3d at 942 (“The 6th Congressional Committee’s injury is not ‘caused by a voluntary choice made by the Virginia Republican Party.’ Rather, the [Incumbent Protection] Act is the sole cause of its injury.”) (quoting *Marshall v. Meadows*, 105 F.3d 904, 906 (6th Cir. 1997)).

83. *Id.* at 932 (citing *Williams v. Rhodes*, 393 U.S. 23, 30 n.6 (1968)).

84. *Id.* (“Whether this alleged injury is actual or threatened, however, requires closer examination.” *Id.* (quoting *Miller v. Brown* (*Miller I*), 462 F.3d 312, 316 (4th Cir. 2006))).

85. *Id.* at 927.

86. *Id.* at 933 n.9 (“[D]efendants argue that an incumbent and a party committee need to at least announce their intentions to select different methods of nomination for an upcoming cycle.”).

Again, having learned from the *24th Senatorial District* litigation, the plaintiffs developed a formidable factual record—replete with data explained by expert testimony—to support their allegations of injury. As the district court observed, “[W]here a challenge to a statute does not arise from its active enforcement, courts often look to the general enforcement history of the statute in determining whether a plaintiff’s rights are sufficiently threatened.”<sup>87</sup> To that end, the 6th CDC identified over 100 instances in which incumbents had invoked their power under the Incumbent Protection Act in recent election cycles.<sup>88</sup> The 6th CDC expert, Dr. Jeffrey Jenkins, incorporated that data into his analysis, explaining that the various methods of nomination have meaningful differences, and incumbents utilize the Incumbent Protection Act to maximize their chances for re-election.<sup>89</sup> Unlike the chairmen-plaintiffs,<sup>90</sup> the 6th CDC had shown “a realistic danger,” far from “imaginary or speculative.”<sup>91</sup>

Even so, the Commonwealth Defendants argued, regardless if incumbents in other places and at other times had invoked the Incumbent Protection Act, there must be some conflict between *these* parties as to the nomination method in order for the Incumbent Protection Act to injure the 6th CDC.<sup>92</sup> The district court, and ultimately the Fourth Circuit, disagreed—and did so based

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87. *Id.* at 934.

88. *Id.*

89. *Id.* at 935, 950. It is worth observing that Dr. Jenkins’s testimony was crucial to several aspects to the litigation. Not only was Dr. Jenkins’s testimony relied on by the district court in assessing standing, but his testimony also became indispensable to the Fourth Circuit in its strict scrutiny analysis. 6th Cong. Dist. Republican Comm. v. Alcorn, 913 F.3d 393, 404 (4th Cir. 2019); *Fitzgerald*, 285 F. Supp. 3d at 935. Dr. Jenkins’s role in interweaving data with theory to create a narrative affirms what is evident from other election law cases: that expert testimony from statisticians or political scientists is indispensable. Compare *Parson v. Alcorn*, 157 F. Supp. 3d 479, 490 (E.D. Va. 2016) (finding that plaintiff’s sole witness simply lacked evidentiary basis to testify regarding African American voting patterns), with *Lee v. Va. State Bd. of Elections*, 188 F. Supp. 3d 577, 606–07 (E.D. Va. 2016), *aff’d*, 843 F.3d 592 (4th Cir. 2016) (evidencing battling experts over whether Virginia’s voter identification law unconstitutionally suppressed minority and young voters).

90. See *supra* note 62 and accompanying text.

91. *Fitzgerald*, 285 F. Supp. 3d at 935 (citing *Babbitt v. United Farm Workers Nat’l Union*, 442 U.S. 289, 298 (1979)).

92. *Id.* at 932–33 n.9 (“[D]efendants argue that an incumbent and a party committee need to at least announce their intentions to select different methods of nomination for an upcoming cycle.”).

upon the Fourth Circuit's powerful opinion in *Miller v. Brown*, widely known as "*Miller I*."<sup>93</sup>

The Fourth Circuit's *Miller I* decision is potent.<sup>94</sup> There, the 11th Senatorial District Republican Committee and its chairman sued the then-members of the Board of Elections. The suit began on April 12, 2005, challenging application of Virginia's open primary law<sup>95</sup> for the 2007 election cycle.<sup>96</sup> The *Miller I* defendants filed a motion to dismiss, asserting that a formal conflict was too remote in time to establish injury-in-fact.<sup>97</sup> Because the incumbent (1) had not yet officially declared his candidacy; and (2) could ultimately be unopposed for nomination (in which case no primary would be necessary), the "defendants' position [was] that Plaintiffs' arguments [were] contingent on events that may never come to pass."<sup>98</sup> In addition, the district court noted that the period within which the nomination method is chosen had not opened, so no actual (or "formal") conflict between the incumbent and the committee was yet possible.<sup>99</sup> Reasoning that the alleged injuries were neither actual nor threatened, the district court granted the motion to dismiss.<sup>100</sup>

The Fourth Circuit reversed and remanded, holding that "[b]ecause campaign planning decisions have to be made months, or even years, in advance of the election to be effective, the plaintiffs' alleged injuries are actual and threatened."<sup>101</sup> Further, "[t]he mere existence of the open primary law causes these decisions to be made differently than they would absent the law, thus meeting the standing inquiry's second requirement of a causal connection between the plaintiffs' injuries and the law they challenge."<sup>102</sup> In short, the *mere existence* of the open primary law distorted political decisionmaking, causing actual and threatened injuries suffi-

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93. 462 F.3d 312 (4th Cir. 2006).

94. See discussion *infra* Part III.A; 462 F.3d 312 (4th Cir. 2006).

95. VA. CODE ANN. § 24.2-530 (Repl. Vol. 2011) ("All persons qualified to vote, pursuant to §§ 24.2-400 through 24.2-403, may vote at the primary. No person shall vote for the candidates of more than one party.")

96. *Miller v. Brown (Miller I)*, 462 F.3d 312, 315–16 (4th Cir. 2006).

97. *Miller v. Brown*, 394 F. Supp. 2d 794, 798, 803 (E.D. Va. 2005).

98. *Id.* at 798–99.

99. *Id.* at 802.

100. *Id.* at 802–03.

101. *Miller I*, 462 F.3d at 317–18, 321 (citation omitted).

102. *Id.* at 318 (citation omitted).

cient for standing—despite the fact that election officials had not, and could not yet have, enforced it for the 2007 election cycle.<sup>103</sup>

In *Fitzgerald v. Alcorn*, the district court found the plaintiff in *Miller I* and the 6th CDC committee-plaintiffs to be similarly situated:

The committee-plaintiffs' uncertainty as to what method will control the nomination of their general election candidates for upcoming elections is sufficient injury to demonstrate standing. This is so regardless of whether a committee ultimately agrees with its incumbent's choice of a nomination method. The committee-plaintiffs have demonstrated that the uncertainty caused by the Act "dramatically changes the plaintiffs' decisions about campaign financing, messages to stress, and candidates to recruit . . . months, or even years, in advance of the election." That uncertainty is palpable given the Act's repeated invocation by incumbents and enforcement by defendants.<sup>104</sup>

Obvious in the district court's opinion (echoing *Miller I*) is that whether a committee ultimately agrees with its incumbent's choice of a nomination method is not determinative.<sup>105</sup> In fact, the district court found that *Miller I* applied even when the parties agreed.<sup>106</sup> Under the *Miller I* paradigm, the committee-plaintiffs demonstrated a real, immediate, and direct threat to their constitutional rights of free association.<sup>107</sup> Because the 6th CDC had also demonstrated causation and redressability,<sup>108</sup> the case proceeded to the merits.

#### b. Merits (Constitutional Scrutiny)

Like in the first litigation, the Commonwealth Defendants' standing arguments were powerful and persuasive. They unholstered the *24th Senatorial District* litigation frequently and deployed it to great effect—so much so that after the district court

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103. A discussion of the expanse of this language is found *infra* at Part III.A.

104. *Fitzgerald v. Alcorn*, 285 F. Supp. 3d 922, 936–37 (W.D. Va. 2018) (citation omitted).

105. *Id.* at 936.

106. *Id.* at 932 (citation omitted) ("In December 2016, Delegate Bell informed the 20th House Committee that he would choose a convention as the method of nomination for the 2017 general election. Independent of Delegate Bell's choice, the 20th House Committee also preferred a convention.")

107. *Id.* at 937.

108. *See supra* text accompanying note 81–82.

completed its standing analysis, only the 6th CDC remained in the case.

Because only a congressional district committee remained, it is important to remember that the Incumbent Protection Act applied differently to the General Assembly offices (i.e., the legislative district committee) than other offices such as congressional positions (i.e., the congressional district committee).<sup>109</sup> Though the 6th CDC survived the standing carnage, its ability to eliminate the entire Incumbent Protection Act (all six sentences), as opposed to only the sentence that directly and textually applied to it (sentence 4), was suspect. In one sense, the fight shifted to standing all over again: did the 6th CDC have standing to seek invalidation of the part of the Incumbent Protection Act that did not apply to it? Therefore, both the district court and the Fourth Circuit undertook two-tiered analyses on the merits of the case: first, they inquired whether the fourth sentence of the Incumbent Protection Act was unconstitutional; second, they grappled with whether the court could remedy the unconstitutional aspects of the Act by striking down the entire statute.

In comparison to the slog over the case's justiciability, neither the district court nor the Fourth Circuit had much trouble finding the fourth sentence of the Incumbent Protection Act unconstitutional. Both courts applied the *Anderson-Burdick* balancing test in assessing whether a state election law impermissibly infringes on First Amendment association rights.<sup>110</sup> The analysis began, as it so often does, by acknowledging that "[the Supreme Court] vigorously affirm[s] the special place the First Amendment reserves for, and the special protection it accords, the process by which a political party 'select[s] a standard bearer who best represents the party's ideologies and preferences.'"<sup>111</sup> Therefore, statutes

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109. See *supra* text accompanying notes 8–9. The second and third sentences apply to General Assembly offices, and the fourth sentence applies to other offices (such as Congress). In short, the General Assembly incumbents had the absolute right to choose the nomination method, and the non-General Assembly incumbents (previously selected by primary) had a veto over the use of a nonprimary method.

110. 6th Cong. Dist. Republican Comm. v. Alcorn, 913 F.3d 393, 400 (4th Cir. 2019); *Fitzgerald*, 285 F. Supp. 3d at 948.

111. *Cal. Democratic Party v. Jones*, 530 U.S. 567, 575 (2000) (quoting *Eu v. S.F. Cty. Democratic Cent. Comm.*, 489 U.S. 214, 224 (1989)); see, e.g., *6th Cong. Dist. Republican Comm.*, 913 F.3d at 402 ("The Supreme Court is 'vigorous[]' in affirming the 'special protection' owed to the associational rights of political parties as they pertain to the parties' choice of nominees.").

that severely burden a party's associational rights must be "narrowly tailored" to advance a "compelling government interest."<sup>112</sup>

The Fourth Circuit (in affirming the district court) found the Incumbent Protection Act's burden to be "manifestly severe."<sup>113</sup> In their view:

[T]his is a case in which the state has decided that the wishes of a party's adherents must, in certain circumstances, be subordinated wholesale to the wishes of a single individual whose self-interest is self-evident; in these circumstances, the party's adherents are entirely shut out of the choice of nomination method—severely burdening their associational rights.<sup>114</sup>

Accordingly, in order to prevail, the Commonwealth Defendants needed to show that the Act was narrowly tailored to vindicate a compelling government interest.

In response, the Commonwealth Defendants put forth a clever argument. In *California Democratic Party v. Jones*, the Supreme Court stated, "We have considered it 'too plain for argument,' for example, that a State may require parties to use the primary format for selecting their nominees, in order to assure that intra-party competition is resolved in a democratic fashion."<sup>115</sup> That was not the only time the Supreme Court had said it, and there was every indication that the Supreme Court had meant it.<sup>116</sup>

The Commonwealth Defendants parlayed the Supreme Court's language into a creative argument: if it was "too plain for argument" that a state could require political parties to *always* use a primary, then it followed, in the view of the Commonwealth Defendants, that the state could require a primary *sometimes*.<sup>117</sup> In other words, if it were "too plain for argument" that states could mandate primaries and the constitutional concern contemplated the usurpation of the party's internal governance, then surely it would also be "too plain for argument" that a state might annex

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112. *6th Cong. Dist. Republican Comm.*, 913 F.3d at 403 (citing *Cal. Democratic Party*, 530 U.S. at 581–82).

113. *Id.* at 403.

114. *Id.* at 404 (emphasis omitted).

115. *Cal. Democratic Party*, 530 U.S. at 572 (quoting *Am. Party of Tex. v. White*, 415 U.S. 767, 781 (1974)).

116. *See, e.g.*, *N.Y. State Bd. of Elections v. Torres*, 552 U.S. 196, 203 (2008); *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 237 (1986) (Scalia, J., dissenting); *Am. Party of Tex.*, 415 U.S. at 781 (1974).

117. Brief of Defendants-Appellants at 2, 13–14, *6th Cong. Dist. Republican Comm.*, 913 F.3d 393 (No. 18-1111), ECF No. 44.

the party's autonomy by requiring a primary *sometimes*. Certainly, if the state could take the proverbial mile, it could also take the proverbial inch.<sup>118</sup>

Recasting the Incumbent Protection Act as an “almost-Mandatory Primary Act” was a key argument for the Commonwealth Defendants on appeal.<sup>119</sup> Not only did they utilize the argument to contend the fourth sentence of the Incumbent Protection Act itself was constitutional, they also used the theory to advocate against blanket invalidation.<sup>120</sup> After it became clear that the 6th CDC was the only remaining party and the battle moved to the nature of the remedy, the Commonwealth Defendants keyed in on the fourth sentence's veto power over a non-primary method. Arguing that, at worse, a political party would end up with a primary, the Commonwealth Defendants forcefully argued that the Incumbent Protection Act could be saved if only the court would construe it as a mandatory primary act.<sup>121</sup>

The Fourth Circuit declined the invitation. The Fourth Circuit found it “implausible that the General Assembly would seek to vindicate [an] interest in [promoting primaries in] such an odd, uneven, and underinclusive fashion.”<sup>122</sup> Instead, the court observed, the “text and structure of the law gives rise to the strong suggestion that the Incumbent Protection Act serves a different interest: the interest, unsurprisingly, in incumbent protection.”<sup>123</sup> In sum,

[i]f [the Incumbent Protection Act] truly were a mandatory primary statute its constitutionality would be “too plain for argument.” But it is not: The statute does not by itself require any organ of a Virginia

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118. *Id.*

119. The eventual opinion from the Fourth Circuit suggests that the strategy was well-conceived. *6th Cong. Dist. Republican Comm.*, 913 F.3d at 404 (“If [the Incumbent Protection Act] truly were a mandatory primary statute its constitutionality would be ‘too plain for argument.’”). Though ultimately rejected, the Supreme Court's “too plain for argument” language seems to have exerted some influence on the opinion, most obviously manifesting in the opinion's conclusion:

Our decision is a narrow one. It is directed at a discrete constitutional imbalance created by permitting single office holders to negate the associational rights of political parties in an area central to the party's very reason for being. Our ruling in no way limits the ability of states to enact “reasonable regulations of parties, elections, and ballots.”

*Id.* at 408 (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)).

120. Brief of Defendants-Appellants, *supra* note 117, at 30–31.

121. *Id.* at 25–30.

122. *6th Cong. Dist. Republican Comm.*, 913 F.3d at 404.

123. *Id.*

political party to use a primary as a method of nomination. Instead, the statute delegates the power to force the party to use a primary to the incumbent office holder.<sup>124</sup>

Rejection of the Commonwealth Defendants' characterization of the Incumbent Protection Act essentially resolved the constitutional question in favor of the 6th CDC.<sup>125</sup> The Commonwealth Defendants advanced virtually no other argument that the Incumbent Protection Act survived strict scrutiny. Accordingly, the fourth sentence of the Incumbent Protection Act was invalidated.<sup>126</sup>

## 6. Remedy (the Forms)

Having determined that part of the Incumbent Protection Act was unconstitutional, the identity of the plaintiff became very important to the scope of the remedy. The 6th CDC did not select the method of nomination for General Assembly offices; accordingly, the text of the second and third sentences of the Act did not directly apply to it. Yet, the 6th CDC asked the Fourth Circuit to affirm the district's injunction of the Incumbent Protection Act in its entirety.<sup>127</sup>

The parties fought over the scope of the remedy in several conceptual theaters. The parties traded arguments over whether the severability doctrine provided an appropriate basis to invalidate the entire Act.<sup>128</sup> And, they debated whether the overbreadth doctrine's "strong medicine," widely attributed to *Broadrick v. Oklahoma*<sup>129</sup> and distilled by the Supreme Court in *Members of City Council of Los Angeles v. Taxpayers for Vincent*<sup>130</sup> and *Secretary of Maryland v. Joseph H. Munson Co.*,<sup>131</sup> could reach language in a statute that does not directly injure the party before the

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124. *Id.* (citations omitted).

125. The Commonwealth Defendants made virtually no argument that the Incumbent Protection Act could survive strict scrutiny. *See id.*

126. *Id.* at 405.

127. *Fitzgerald v. Alcorn*, 285 F. Supp. 3d 922, 953 (W.D. Va. 2018), *aff'd sub nom.* 6th Cong. Dist. Republican Comm. v. Alcorn, 913 F.3d 393 (4th Cir. 2019) ("The 6th Congressional Committee requests an injunction that prohibits the Board and the Department from enforcing the entirety of Virginia Code section 24.2-509(B).").

128. Brief of Defendants-Appellants, *supra* note 117, at 25–30; Response Brief of Appellee at 46–58, 6th Cong. Dist. Republican Comm., 913 F.3d 393 (No. 18-1111), ECF No. 51.

129. 413 U.S. 601, 613 (1973).

130. 466 U.S. 789, 799–801 (1984).

131. 467 U.S. 947, 958–59 (1984).

court.<sup>132</sup> The 6th CDC even proposed that the court conceive the statute as a single unity, with dual implementation provisions, so that the 6th CDC could bring the entirety of the statute before the court.<sup>133</sup>

However, there proved to be a simpler solution: the Commonwealth Defendants' own forms.

As the administrative apparatus that regulates and referees the election process, the Department of Elections performs its duties, in part, by soliciting and receiving information from various political institutions throughout the Commonwealth.<sup>134</sup> It carries out this function by propagating various forms.<sup>135</sup> As the Fourth Circuit explained,

[T]he Department issues a series of forms for incumbents and party committees to notify the Commonwealth which nomination method they plan to use, as they are required to do by law. These forms reflect the Department's understanding of how to apply the Incumbent Protection Act.<sup>136</sup>

Between resolution of the first litigation and initiation of the second litigation, the Department promulgated new forms to govern the 2016 election cycle.<sup>137</sup> The 2016 election cycle included elections for the United States Congress, so these new forms were transmitted to congressional district committees.<sup>138</sup> Acknowledging that the Incumbent Protection Act applies differently to General Assembly offices than it does to congressional offices, one would expect two separate forms.<sup>139</sup> But the Department used *identical* forms for everyone—a single form for General Assembly offices and everyone else:

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132. Brief of Defendants-Appellants, *supra* note 117, at 33–40; Response Brief of Appellee, *supra* note 128, at 47–51.

133. Response Brief of Appellee, *supra* note 128, at 46–58.

134. *Id.* at 8.

135. *Id.*

136. 6th Cong. Dist. Republican Comm. v. Alcorn, 913 F.3d 393, 406 (4th Cir. 2019) (citations omitted).

137. *Id.* at 407 (“[T]he congressional nomination forms were inexplicably changed for the 2016 congressional elections to reflect the Act’s more fulsome General Assembly protections instead.”).

138. *Id.* at 399–400, 406.

139. This is so because the Department of Elections would need different information for congressional offices to know if the Act applied, such as if the candidate had previously selected by a primary.

[T]hroughout the 2016 election cycle and through the filing of this lawsuit, these forms applied the Act's second and third sentences, which should only apply to incumbent members of the General Assembly, to the 6th Congressional Committee as well. Incumbent members of Congress were given the same plenary power to designate *any* method of nomination no matter the circumstance, as if they were incumbent members of the General Assembly.<sup>140</sup>

Juxtaposition of the forms best makes the point.<sup>141</sup>

DESIGNATION OF METHOD OF NOMINATION for SENATE OF VIRGINIA 2015	2016 DESIGNATION OF METHOD OF NOMINATION
<p style="text-align: center;">***</p> <p>I, the undersigned incumbent of the Senate of Virginia district indicated above, <b>am seeking re-election</b> and designate the following method of nomination to be used in determining the party's candidate for this <i>office subject to the forthcoming November general election</i>.</p>	<p style="text-align: center;">***</p> <p>I, the undersigned incumbent of the district indicated above, <b>am seeking re-election</b> and designate the following method of nomination to be used in determining the party's candidate for this <i>office subject to the coming November general election</i>.</p>

Despite the different powers of state Senators and Congressmen under the Act, the forms were virtually identical. Each granted the incumbent the power to “designate” the method of nomination. In the same way, the certification form promulgated for the General Assembly district committee chairmen in 2015 was virtually identical to the certification form issued to congressional district committee chairmen in 2016.<sup>142</sup>

140. *6th Cong. Dist. Republican Comm.*, 913 F.3d at 406.

141. *Id.*

142. Response Brief of Appellee, *supra* note 128, at 11.

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## INCUMBENT PROTECTION

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<p>Notice of Party Nomination Method – 2015 Election for Senate of Virginia</p> <p>***</p> <p>I, the undersigned Chairman of the _____ Party Committee of the Senate District indicated below, do hereby certify to the Department of Elections that: [CHECK ONE]</p> <p>The incumbent is of my party, <b>is seeking re-election</b> and has designated the method of nomination indicated below.</p> <p>The incumbent is of my party, <b>is seeking re-election</b> and has not designated a method of nomination. Therefore, my party has designated the method of nomination indicated below.</p> <p>The incumbent is not of my party <b>OR</b> is not seeking re-election and my party has designated the method of nomination indicated below.</p>	<p>Notice of Party Nomination Method – 2016 November General Election</p> <p>***</p> <p>I, the undersigned Chairman of the _____ Party Committee of the District indicated below, do hereby certify to the Department of Elections that: [CHECK ONE]</p> <p>The incumbent is of my party, <b>is seeking re-election</b> and has designated the method of nomination indicated below.</p> <p>The incumbent is of my party, <b>is seeking re-election</b> and has not designated a method of nomination. Therefore, my party has designated the method of nomination indicated below.</p> <p>The incumbent is not of my party <b>OR</b> is not seeking re-election and my party has designated the method of nomination indicated below.</p>
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Because the forms reflected apparently universal implementation of the General Assembly-only second and third sentences, the Fourth Circuit concluded that the Commonwealth Defendants had effectively applied the second and third sentences against the 6th CDC.<sup>143</sup>

By using the forms to connect the second and third sentences to the 6th CDC, the Fourth Circuit avoided the complicated, clunky, and murky overbreadth and severability analyses employed by the district court.<sup>144</sup> Able to properly bring the entire Incumbent Protection Act into consideration through the forms, the Fourth Circuit described patent constitutional offense:

The Department [of Elections] fails to identify a single circumstance where the Act's second and third sentences could be lawfully applied.

143. *6th Cong. Dist. Republican Comm.*, 913 F.3d at 406 (“It is plain therefore that, on those facts, the Committee suffered a sufficiently ‘concrete’ injury in fact to sustain its challenge to the second and third sentences of the Act. Because of the forms, any candidate that the 6th Congressional Committee wished to recruit, or anyone contemplating an electoral challenge to the incumbent, faced the prospect of having to compete in a nomination process selected by that incumbent.”).

144. *See* *Fitzgerald v. Alcorn*, 285 F. Supp. 3d 922, 955–56 (W.D. Va. 2018), *aff’d sub nom.* *6th Cong. Dist. Republican Comm. v. Alcorn*, 913 F.3d 393 (4th Cir. 2019); *see also* Brief of Defendants-Appellants, *supra* note 117, at 25–40; Response Brief of Appellee, *supra* note 128, at 46–58.

And we find none. The second and third sentences not only share the constitutional infirmities of the fourth sentence but exhibit those infirmities to an even greater degree. The fourth sentence allows some incumbents to force a primary under certain designated circumstances. The second sentence goes further by empowering incumbents to impose their choice of any method of nomination no matter what the party prefers under almost any circumstances.<sup>145</sup>

Thus, the route for relief was far more direct. Without resorting to overbreadth or straining the severability doctrine, the 6th CDC obtained complete relief for all of the plaintiffs, including for those whose claims were dismissed for lack of standing. At long last, after two lawsuits spanning nearly four years, the Fourth Circuit invalidated the Incumbent Protection Act.

### III. THE AFTERMATH

This Article will not attempt to reflect on the many district and appellate court holdings made throughout the course of these litigations.<sup>146</sup> Indeed, the opinions produced throughout these litigations serve as useful guideposts that practitioners might use to navigate future cases—in particular, to anticipate justiciability issues that sunk so many of these parties. Given that the litigations produced two Fourth Circuit opinions, they clarified or advanced the law in several respects, and it is appropriate to note a few.

#### A. *Miller I and Standing*

Throughout the litigation, the Commonwealth Defendants consistently argued that the plaintiffs could not be injured unless and until a conflict arose between the plaintiffs (such as the committee) and the incumbent. A conflict arose, for instance, when an incumbent's use of his or her power under the Incum-

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145. *6th Cong. Dist. Republican Comm.*, 913 F.3d at 408.

146. Indeed, an important and unmentioned aspect of the second litigation was the district court's stay of its injunction to eliminate confusion on the eve of an election cycle, *Fitzgerald v. Alcorn*, No. 5:17-cv-16, 2018 U.S. Dist. LEXIS 18942, at \*6 (W.D. Va. Feb. 5, 2018) ("Given the election decisions that need to be made as early as this Wednesday for the 2018 election cycle, the court finds that the public interest in avoiding confusion in the impending nominating process weighs in favor of granting a stay pending appeal."), and then its vacating the stay when the imminence of the election passed, *Fitzgerald v. Alcorn*, No. 5:17-cv-16, 2018 U.S. Dist. LEXIS 163883, at \*9 (W.D. Va. Sept. 24, 2018) ("Vacatur of the stay now provides defendants months to notify their party chairpersons of the injunction.").

bent Protection Act contradicted a committee's selected method.<sup>147</sup> As ammunition for that argument were two seemingly favorable fact patterns:

1. That both the incumbent for the 20th House District and the 20th House Committee had declared their preference for a convention.<sup>148</sup>
2. That neither the incumbent congressman for the 6th congressional district, nor the 6th Congressional Committee, had announced a preferred method of nomination.<sup>149</sup>

At the very least, no conflict—formal or otherwise—existed between an incumbent and a committee-plaintiff at the time the second litigation commenced.<sup>150</sup>

And, by the time the Fourth Circuit heard the appeal, the Commonwealth Defendants were in an ostensibly better position. The 6th congressional district Republican incumbent had announced his decision to not seek re-election, and without the compulsion of the Incumbent Protection Act to select a primary, the 6th CDC had chosen to select their nominee through a convention.<sup>151</sup> Therefore, the Incumbent Protection Act could not operate against the Committee until *at least* 2022.<sup>152</sup> Indeed, even that scenario was far from certain. The 6th CDC nominee in 2020 would have to be selected through a primary and subsequently win the general election (thus becoming an incumbent). The Commonwealth Defendants strenuously argued that this scenario created a controversy too remote in time and circumstance—mooting the case.<sup>153</sup> In fact, the Commonwealth Defendants went even further by contending that this confluence of events was so

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147. *Fitzgerald*, 285 F. Supp. 3d at 933 n.9 (“[D]efendants argue that an incumbent and a party committee need to at least announce their intentions to select different methods of nomination for an upcoming cycle.”).

148. *Id.* at 932. *Marshall v. Meadows* contained a facially similar fact pattern in that the candidate and party had both selected an open primary as the method of nomination, but the Fourth Circuit declined to analyze injury-in-fact as the plaintiffs “unquestionably” failed to demonstrate causation or redressability. 105 F.3d 904, 906 (4th Cir. 1997); see also *Miller I*, 462 F.3d at 318 (distinguishing *Marshall v. Meadows*).

149. *Fitzgerald*, 285 F. Supp. 3d at 932–33.

150. *Id.* at 933.

151. Suggestion of Mootness and Motion to Vacate the District Court’s Judgment and Injunction at 2, 6th Cong. Dist. Republican Comm. v. Alcorn, 913 F.3d 393 (4th Cir. 2019) (No. 18-1111), ECF No. 25.

152. *Id.* at 5.

153. *Id.* at 6.

implausible that it also defeated the extremely generous<sup>154</sup> “capable of repetition, yet evading review” exception.<sup>155</sup>

*Miller I* obliterated the Commonwealth Defendant’s argument.<sup>156</sup> Not only did the Fourth Circuit find that the case was eligible for the “capable of repetition, yet evading review”<sup>157</sup> exception, but extraordinarily also held that the case was not even moot!<sup>158</sup> As described by the Fourth Circuit:

The injuries inflicted by laws that distort the primary process, like the Incumbent Protection Act, are not confined to the short duration of any particular primary, but instead reflect the reality that “campaign planning decisions have to be made months, or even years, in advance of the election to be effective.” The 6th Congressional Committee’s claims thus did not become moot with the passing of the 2018 election season. The dispute over the Act’s fourth sentence, rather, is alive and well.<sup>159</sup>

Read to its conceivable breadth, *Miller I* supports the proposition that so long as the challenged statute (whether an incumbent choice statute, open primary statute, or some other suspect law) influences, undermines, or distorts campaign planning decisions, then a putative plaintiff has demonstrated injury-in-fact. Under this reading, one must wonder whether *Miller I* simply holds too much, and whether there are any limitations to *Miller I* standing. Indeed, those Fourth Circuit plaintiffs who lost on *Miller I* argu-

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154. The exception applies when “(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again.” *FEC v. Wisc. Right to Life, Inc.*, 551 U.S. 449, 462 (2007) (quoting *Spencer v. Kemna*, 523 U.S. 1, 17 (1998)). Election-related disputes are among the cases most commonly found to be “capable of repetition, yet evading review.” *See, e.g.*, *Davis v. FEC*, 554 U.S. 724, 735 (2008); *Int’l Org. of Masters v. Brown*, 498 U.S. 466, 473 (1991); *Storer v. Brown*, 415 U.S. 724, 737, n.8 (1974); *Moore v. Ogilvie*, 394 U.S. 814, 816 (1969).

155. Suggestion of Mootness and Motion to Vacate the District Court’s Judgment and Injunction, *supra* note 151, at 7–10.

156. *Fitzgerald v. Alcorn*, 285 F. Supp. 3d 922, 932 (W.D. Va. 2018), *aff’d sub nom.* 6th Cong. Dist. Republican Comm. v. Alcorn, 913 F.3d 393 (4th Cir. 2019). To be sure, the plaintiffs did not simply point to *Miller I*, but they procured expert testimony corroborating the injuries envisioned by *Miller I*. *Id.* at 935. In particular, plaintiffs’ expert, Dr. Jeffrey Jenkins, testified in deposition that effects of the Act entered into the political calculus well in advance of the nomination period. *Id.* (“Jenkins states that ‘the mere existence of the Act may add . . . uncertainty for potential high-quality challengers (and the staff, volunteers, and donors who would consider committing to their campaign).’”).

157. *See supra* note 154.

158. *6th Cong. Dist. Republican Comm.*, 913 F.3d at 407–08.

159. *Id.* at 407 n.2 (citation omitted).

ments failed on shortcomings in their causation arguments, not their injury-in-fact allegations.<sup>160</sup>

One limiting principle might be the ripeness doctrine, which ensures that courts adjudicate issues presented in “clean-cut and concrete form.”<sup>161</sup> Because *Miller I* standing permits plaintiffs to sue years in advance, defendants may well shift the analysis from standing to ripeness. To determine whether a case is ripe, courts in the Fourth Circuit balance “the ‘fitness of the issues for judicial decision’ and the ‘hardship to the parties of withholding court consideration.’”<sup>162</sup> Just as a plaintiff cannot assert standing based on an alleged injury that lies at the end of a “highly attenuated chain of possibilities,” a plaintiff’s claim is not ripe for judicial review “if it rests upon contingent future events that may not occur as anticipated, or indeed may not occur at all.”<sup>163</sup>

At first pass, the ripeness doctrine is a well-measured constraint. It may well be that a putative plaintiff’s injuries are made unripe by the intervening vagaries of intraparty decision making, an unknowable political climate, and the ever-evolving organizational documents of the political parties. Yet, as compelling as these arguments may be in other contexts, the *Miller I* court raised them and dismissed them. Simply put, “[b]ringing lawsuits on the eve of pending elections disrupts the electoral process.”<sup>164</sup> Where the plaintiffs’ injuries have manifested, as they do with relative ease under *Miller I*, election law plaintiffs “would suffer undue hardship by waiting until the eve of the election to seek a decision in their case.”<sup>165</sup> Indeed, by obtaining a ruling earlier rather than later, “plaintiffs will have adequate time to make effective campaign decisions,” while “[w]aiting until the last minute to seek a final ruling will severely diminish the effectiveness of these decisions.”<sup>166</sup> At its core, the ripeness inquiry is a balancing act, and the Fourth Circuit has devised weighty counterbal-

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160. See, e.g., *Greenville Cty. Republican Party Exec. Comm. v. Greenville Cty. Election Comm’n*, 604 F. App’x 244, 255 (4th Cir. 2015) (distinguishing *Miller I* on the basis that the alleged injury was fairly traceable to the political party itself, not the challenged statutory system).

161. *Rescue Army v. Mun. Court of Los Angeles*, 331 U.S. 549, 584 (1947).

162. *Franks v. Ross*, 313 F.3d 184, 194 (4th Cir. 2002) (quoting *Ohio Forestry Ass’n v. Sierra Club*, 523 U.S. 726, 733 (1998)).

163. *South Carolina v. United States*, 912 F.3d 720, 730 (4th Cir. 2019) (internal quotations and citations omitted).

164. *Miller v. Brown (Miller I)*, 462 F.3d 312, 320 (4th Cir. 2006).

165. *Id.* at 321.

166. *Id.* (“The plaintiffs’ injuries become worse each day decision is delayed.”).

ances to dismissing early-filed election suits on ripeness grounds.<sup>167</sup>

Future defendants might opt to countermand *Miller I*s (and now the affirming influence of *6th Congressional District*) effect by attacking the factual predicates of a plaintiff's argument.<sup>168</sup> Indeed, the plaintiffs in the *6th Congressional District* litigation had come to court with a convincing documentary record and unopposed expert testimony to complement their *Miller I* arguments.<sup>169</sup> But where a plaintiff plausibly alleges that the law in question distorted its decision-making processes or whatever comes within the ambit of "campaign planning decisions," it is difficult to see the plaintiff failing to make out injury-in-fact.<sup>170</sup>

To say the *Miller I* decision is expansive is not a criticism of it, nor does it suggest that *Miller I* is an outlier or unfounded. In fact, the Tenth Circuit in *New Mexicans for Bill Richardson v. Gonzales*<sup>171</sup> and the Third Circuit in *Constitution Party of Pennsylvania v. Aichele*<sup>172</sup> analyzed similar fact patterns and reached similar holdings. But noting the implications of *Miller I* does show its force.

Yet, to some, the potency of *Miller I* may not even be all that problematic. First, the rule *Miller I* encourages the resolution of election law challenges on the merits, and soon enough so that plaintiffs can have their remedy in time for an election.<sup>173</sup> Second,

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167. *Cf.* *Cooksey v. Futrell*, 721 F.3d 226, 240 (4th Cir. 2013) ("Much like standing, ripeness requirements are also relaxed in First Amendment cases.")

168. *See, e.g., Ravalli Cty. Republican Cent. Comm. v. McCulloch*, 154 F. Supp. 3d 1063, 1074, 1076 (D. Mont. 2015) (rejecting plaintiff's argument that *Miller I*, without supporting evidence, was enough to decide the constitutionality of a statute on the merits).

169. *Fitzgerald v. Alcorn*, 285 F. Supp. 3d 922, 935–36 (W.D. Va. 2018), *aff'd sub nom.* *6th Cong. Dist. Republican Comm. v. Alcorn*, 913 F.3d 393 (4th Cir. 2019).

170. "[T]o establish standing depends considerably upon whether the plaintiff is himself an object of the action . . . . If he is, there is ordinarily little question that the action or inaction has caused him injury . . . ." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561–62 (1992).

171. 64 F.3d 1495, 1500 (10th Cir. 1995).

172. 757 F.3d 347, 366–67 (3d Cir. 2014).

173. To be sure, courts have often remarked on the "relaxed" justiciability rules surrounding election law cases. *See, e.g., Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 300 n.12 (1979) ("Challengers to election procedures often have been left without a remedy in regard to the most immediate election because the election is too far underway or actually consummated prior to judgment."); *Hall v. Sec'y, Alabama*, 902 F.3d 1294, 1303 (11th Cir. 2018) ("[R]egarding election cases, candidates have often been allowed to challenge restrictions on candidacy after completion of the election immediately involved and without any showing of plans to become involved in any future election.") (internal quotation marks omitted).

to the extent advocates of judicial restraint seek curtailment, *Miller I*, itself, may have already supplied the solution. There,<sup>174</sup> as well as in the *6th Congressional District* litigation,<sup>175</sup> the issue was presented as a single legal question, without the need for resolution of murky factual questions.<sup>176</sup> Where the legal theory is data-driven or newly enacted laws have uncertain, debatable, or modest influence, ripeness might pose a more serious obstacle to election law plaintiffs than it did in either *Miller I* or *6th Congressional District*.

In any event, *6th Congressional District* generated important follow-up questions, and perhaps warning signs, regarding standing in election law cases and the breadth of *Miller I*.

#### B. 24th Senatorial District and Equal Protection

In stark contrast to the generosity of the *Miller I* standing for committee-plaintiffs is the restrictiveness of the *24th Senatorial District* standing for candidate-plaintiffs. The *24th Senatorial District* court's holding that, as a necessary precondition to standing, candidate-plaintiffs must have a legally protectable interest in choosing the method of nomination, is a bombshell and paradigm-shifting.<sup>177</sup> The Fourth Circuit held that neither Virginia law nor the Plan gave the candidate-plaintiff "a legally protected interest" in determining the nomination method, and therefore, the candidate-plaintiff suffered no "invasion of a legally protected interest."<sup>178</sup> Relatedly, the *24th Senatorial District* court concluded that even if it assumed that the candidate had suffered injury from the Incumbent Protection Act, it could not redress that injury because a favorable court decision would not confer upon the

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174. *Miller v. Brown (Miller I)*, 462 F.3d 312, 319 (4th Cir. 2006) ("The only issue in the case is whether Virginia's open primary law violates the plaintiffs' First Amendment rights to freely associate, which presents a purely legal question.").

175. *Fitzgerald v. Alcorn*, 285 F. Supp. 3d 922, 944 (W.D. Va. 2018), *aff'd sub nom.* 6th Cong. Dist. Republican Comm. v. Alcorn, 913 F.3d 393 (4th Cir. 2019) (citing to *Miller I*'s discussion of ripeness and stating "[t]he same is true as regards the Incumbent Protection Act at issue in this case").

176. In the *6th Congressional District* litigation, such a statement is belied by the voluminous record framing the injuries suffered by the plaintiffs. See *Fitzgerald*, 285 F. Supp. 3d at 930 n.8 & 934–35.

177. 24th Senatorial Dist. Republican Comm. v. Alcorn, 820 F.3d 624, 633 (4th Cir. 2016); see *supra* text accompanying notes 41–43. As of writing, the authors have located no cases citing to the decision as a basis to dismiss a plaintiff seeking relief on Equal Protection grounds.

178. *24th Senatorial Dist.*, 820 F.3d at 633.

candidate the ability to choose the method of nomination.<sup>179</sup> The court observed that even in the absence of the Incumbent Protection Act, a candidate would still be subordinate to the legislative district committee's selection of nomination.<sup>180</sup> The *24th Senatorial District* decision therefore teaches that Equal Protection plaintiffs must allege a deprivation—*besides* unequal treatment—that may be restored by a favorable decision.<sup>181</sup>

As intriguing as the holding is, the *24th Senatorial District* reasoning appears to be at odds with Equal Protection analyses, broadly. An illustrative case is *Northeastern Florida Chapter of Associated General Contractors of America v. City of Jacksonville*, where a contractors' association alleged injury-in-fact by a city ordinance that gave preferential treatment to certain minority-owned businesses.<sup>182</sup> The Court of Appeals held that "petitioner could not establish standing because it failed to allege that one or more of its members would have been awarded a contract but for the challenged ordinance."<sup>183</sup> The Supreme Court reversed, reasoning:

When the government erects a barrier that makes it more difficult for members of one group to obtain a benefit than it is for members of another group, a member of the former group seeking to challenge the barrier need not allege that he would have obtained the benefit but for the barrier in order to establish standing. The "injury in fact" in an equal protection case of this variety is the denial of equal treatment resulting from the imposition of the barrier, not the ultimate inability to obtain the benefit.<sup>184</sup>

The Supreme Court followed a similar analysis in *Clements v. Fashing*.<sup>185</sup> There, the plaintiffs alleged Equal Protection injury by the "automatic resignation" provision of the Texas Constitution.<sup>186</sup> That provision mandated immediate resignation of many,

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179. *Id.*

180. *Id.* ("Accordingly, even if the Act were held unconstitutional, the Party is not precluded from 'voluntarily elect[ing]' to defer to the incumbent's choice, 'which it is legally entitled to do.' And 'there is nothing [we] can do to prevent' the Party from deferring to the incumbent's choice.") (citation omitted).

181. *Cf. id.* at 635 n.3 (Traxler, C.J., dissenting) ("[The challenging candidate's] alleged interest in depriving his opponent of that advantage, and thereby increasing his own prospects for winning the nomination, is sufficient to establish his standing.")

182. 508 U.S. 656, 658–61 (1993).

183. *Id.* at 664.

184. *Id.* at 666.

185. 457 U.S. 957, 962 (1982).

186. *Id.* at 960.

but not all, state officeholders upon their announcement of a candidacy for another office. Several plaintiffs alleged that were it not for the consequences of doing so, they would have announced their candidacy.<sup>187</sup> The Supreme Court rejected the claim that the dispute was “merely hypothetical” and that the allegations were insufficient to create an “actual case or controversy.”<sup>188</sup> Importantly, the Court found that the injury was the “obstacle to [the plaintiffs’] *candidacy*.”<sup>189</sup> Nowhere did the Court lament the failure of the plaintiffs to allege that they actually would have been elected if not for the “automatic resignation” provision.

The common ground among these cases fortifies the notion that the heart of injury under Equal Protection theories is unequal treatment—treatment that undermines the opportunity to compete on an equal basis.<sup>190</sup> Observe that the remedy for a successful Equal Protection claim is not necessarily to obtain the benefit previously withheld; rather, a court might place parties on equal planes by cancelling a benefit previously conferred to the favored class. The principle is well-evidenced in *Heckler v. Mathews*.<sup>191</sup>

That case centered on a provision of the Social Security Act that required certain male workers (but not female workers) to make a showing of dependency as a condition for receiving full spousal benefits.<sup>192</sup> Interestingly, Congress drafted companion legislation (a “severability clause”) that prevented a court from cancelling the provisions excluding those certain male workers, which would cure the discriminatory treatment by conferring full spousal benefits to those certain male workers.<sup>193</sup> In other words, Congress had enacted legislation that conferred gender-selective benefits, but also drafted away a court’s ability to extend those benefits to the other gender.

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187. *Id.* at 962.

188. *Id.*

189. *Id.* (emphasis added).

190. *Gratz v. Bollinger*, 539 U.S. 244, 262 (2003) (finding the denial of an opportunity to compete for admission to college on an equal basis to be adequate to confer standing).

191. 465 U.S. 728 (1984).

192. *Id.* at 731.

193. *Id.* at 736–37 (describing the legislation as “an effort by Congress to mandate the outcome of any challenge to the validity of the [pension offset] exception by making such a challenge fruitless. Even if a plaintiff achieved success in having the gender-based classification stricken, he would derive no personal benefit from the decision, because the pension offset would be applied to all applicants without exception”) (internal quotation marks omitted).

The Supreme Court found clear injury in the plaintiff's allegation that "as a nondependent man, he receive[ed] fewer benefits than he would if he were a similarly situated woman."<sup>194</sup> Further, the Court found that it could redress the injury—even if it could not increase the spousal benefits given to the nondependent man:

Although the severability clause would prevent a court from redressing this inequality by increasing the benefits payable to [the plaintiff], we have never suggested that the injuries caused by a constitutionally underinclusive scheme can be remedied only by extending the program's benefits to the excluded class. To the contrary, we have noted that a court sustaining such a claim faces "two remedial alternatives: [it] may either declare [the statute] a nullity and order that its benefits not extend to the class that the legislature intended to benefit, or it may extend the coverage of the statute to include those who are aggrieved by the exclusion."<sup>195</sup>

It is enough that the court could withdraw the benefits from the favored class or extend the benefits to an excluded class.<sup>196</sup> Like the spousal benefits conferred in *Heckler v. Mathews*,<sup>197</sup> the ability to select the method of nomination conferred by the Incumbent Protection Act need not be shared or transferred to afford plaintiffs relief—it need only be withdrawn.

Election law cases, as if on intuition, seem to recognize this principle. For instance, the guarantee of fair competition—that candidates will race on the same course—is found in election law cases beyond the Equal Protection realm. Indeed, "[t]he well-established concept of competitors' standing" coheres closely with Equal Protection injury.<sup>198</sup> For instance, *Texas Democratic Party v. Benkiser*, cited by the *24th Senatorial District* dissent, considered whether the Texas Democratic Party had standing to challenge the Republican Party of Texas's use of the Texas election law to strike an unviable Republican candidate from the ballot.<sup>199</sup> The Fifth Circuit found that replacing the unviable Republican

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194. *Id.* at 738.

195. *Id.* (quoting *Welsh v. United States*, 398 U.S. 333, 361 (1970) (Harlan, J., concurring)).

196. *Id.* at 740.

197. *Id.*

198. See *Schulz v. Williams*, 44 F.3d 48, 53 (2d Cir. 1994).

199. *24th Senatorial Dist. Republican Comm. v. Alcorn*, 820 F.3d 624, 634–35 n.3 (4th Cir. 2016) (Traxler, C.J., dissenting); *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006).

candidate would weaken the Democratic candidate's chances of victory and therefore found injury-in-fact.<sup>200</sup>

To frame the problem in Equal Protection terms: it is hard to conceive how a candidate might receive different treatment under a statutory scheme *without* "threatened loss of political power."<sup>201</sup> Accordingly, as long as the distinctive treatment shifts the probability of eventual victory, there is no meaningful difference between Equal Protection injury in the general sense and "competitors' standing."

*24th Senatorial District* is at apparent odds with these holdings and these concepts. Observe that the logic of *Benkiser* is entirely incompatible with *24th Senatorial District*: how could the Texas Democratic Party have a legally protected interest in running against a properly balloted Republican Party of Texas candidate? For that reason, *24th Senatorial District* could be read to effectively foreclose Equal Protection claims from persons disfavored by state election law.<sup>202</sup> Rare will be the case that a competitor-plaintiff will be able to demonstrate a legally protectable interest in the substantive right afforded to its adversary; indeed, the challenged grant of power often creates the cause of action in the first place. *24th Senatorial District* could likewise amount to the Fourth Circuit leashing "competitors' standing"; though, the opinion is silent as to why the free reign afforded by the Second, Fifth, and Ninth Circuits to challengers is incorrect.<sup>203</sup>

In any event, future candidate-plaintiffs (or even individuals, registered voters, or members of a political party hoping to challenge unconstitutional laws) will be well-advised to locate legally protected interests outside of unequal treatment or decreased odds of prevailing in the election. Else, they will have the unenviable task of maneuvering the inevitable standing opposition founded on the *24th Senatorial District* opinion.

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200. *Benkiser*, 459 F.3d at 586.

201. *Id.* at 587.

202. *Heckler v. Mathews*, 465 U.S. 728, 739 (1983) ("[T]he right to equal treatment guaranteed by the Constitution is not co-extensive with any substantive rights to the benefits denied the party discriminated against.").

203. *24th Senatorial Dist.*, 820 F.3d at 633 (disregarding contrary opinions as "out of circuit").

### C. *Miller II* and Mandatory “Open” Primaries in Virginia

Finally, it is appropriate to say a word about the tangential role of Virginia’s open primary statute in the *6th Congressional District* appellate proceedings. The invocation of primaries became pertinent in appellate proceedings when the Commonwealth Defendants contended that they could parlay the Incumbent Protection Act—a scheme that tended to result in primaries—into a constitutionally sanitized mandatory primary system.<sup>204</sup> Though the Fourth Circuit resisted the temptation to characterize the Incumbent Protection Act as a mandatory primary act, it flatly stated: “if [the Incumbent Protection Act] truly were a mandatory primary statute its constitutionality would be ‘too plain for argument.’”<sup>205</sup>

The observation is probative in light of the Fourth Circuit’s previous consideration of the interplay between an incumbent’s use of the Incumbent Protection Act to designate a primary and Virginia’s Open Primary Law.<sup>206</sup> In *Miller II*,<sup>207</sup> the Fourth Circuit identified constitutional infirmity when the Incumbent Protection Act combined with the Open Primary Law. There, the plaintiffs sought declaratory relief from the Open Primary Law under facial and as-applied theories.<sup>208</sup> The court found that the Open Primary Law was not facially unconstitutional because it had some permissible applications, but went on to decide that an incumbent’s use of the Incumbent Protection Act to compel an open primary violated the party’s associational rights.<sup>209</sup> In so deciding, the *Miller II* court concluded, as the Board of Elections in that case had conceded, that “if a political party is compelled to select its candidates by means of a state-run primary, the State[] may not force [the] party to include . . . voters [in] that primary.”<sup>210</sup> The court was sensitive to the constitutional harm inflicted by “forced association,” but, it found such harm lacking where the political party could avail itself of other “closed” nomination

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204. See *supra* note 119.

205. 6th Cong. Dist. Republican Comm. v. Alcorn, 913 F.3d 393, 404 (4th Cir. 2019).

206. VA. CODE ANN. § 24.2-530 (Repl. Vol. 2011).

207. 503 F.3d 360 (4th Cir. 2007).

208. *Id.* at 363.

209. *Id.* at 371.

210. *Id.* at 368 (quoting Opening Brief at 16, *Miller II*, 503 F.3d 360 (4th Cir. 2016)).

methods.<sup>211</sup> In other words, if the political party selected a state-run primary, it must take that primary system as it finds it—which, in Virginia, is an “open” primary.<sup>212</sup> But, if a political party desires a closed primary, it is welcome to fund a private one itself.<sup>213</sup>

The danger identified in *Miller II* was that the Incumbent Protection Act could result in a unique manifestation of forced association because incumbents could impose a state-run “open” primary upon a political party. The holding therefore was narrow. The mixture of the Incumbent Protection Act’s “coercion” with the Open Primary Law’s “forced association” gave rise to the Fourth Circuit’s conclusion that Virginia’s Open Primary Law had unconstitutional applications. The *6th Congressional District* litigation removed a necessary component to that constitutionally offensive coupling when it struck down the Incumbent Protection Act.

Because the *Miller II* court left for another day the propriety of the Open Primary Law when it is not forced upon the party by incumbent fiat, uncertainty remains as to the ramifications of the Fourth Circuit’s open primary holding.<sup>214</sup> To be sure, the *Miller II* court clearly and repeatedly declined to bestow blanket constitutional blessing upon the Open Primary Law.<sup>215</sup> Yet, in the aftermath of *6th Congressional District*, it is difficult to see the genesis of the kind of compulsion found offensive in *Miller II*. As long as the party has other options—and under Virginia law, a primary is

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211. *Id.* at 367 (“Virginia allows political parties to nominate candidates not only by state-run primary but also by other methods controlled and funded by the party. And, by merely choosing any of these other options, a party is free to limit its candidate selection process to voters who share its political views.”).

212. *See id.* at 368 (“[A] party is free to select from various methods of nomination in which it can exclude voters who do not share its views—including a closed primary conducted and funded by the party. It is only when the party chooses to hold a primary operated and funded by the state that it must allow all voters to participate.”).

213. *Id.* at 362 & n.3 (“A firehouse primary is the functional equivalent of a state-run primary except that the party operates and funds the entire process.”).

214. *Miller v. Cunningham*, 512 F.3d 98, 106 (4th Cir. 2007) (Wilkinson, J., dissenting from decision to deny rehearing en banc) (“To repeat once more: clarity in election law is critically important, and the implications of the panel’s decision are not clear.”).

215. *Miller II*, 503 F.3d at 367 (“Here, we need not decide whether Virginia’s open primary statute, viewed in isolation, impermissibly burdens a political party’s right to associate with those who share its beliefs.”); *id.* at 366–67 n.6 (“In any event, we need not resolve today whether the act of voting in one party’s primary affiliates a voter with the party sufficiently to protect the party’s right to associate with those who share its political beliefs.”).

far from mandatory—choosing a primary that the Commonwealth of Virginia requires to be open is hardly “forced.”<sup>216</sup> Yet, consider the Fourth Circuit’s curious dicta—“[i]f [the Incumbent Protection Act] truly were a mandatory primary statute its constitutionality would be ‘too plain for argument.’”<sup>217</sup> Were Virginia to move toward a mandatory primary system, these questions of compulsion would resurface.<sup>218</sup> Indeed, the author of *6th Congressional District*, Judge Wilkinson, has already launched a preemptive defense of a mandatory open primary.<sup>219</sup> For the time being, however, *6th Congressional District*, by excising the Incumbent Protection Act, has removed coercion from the constitutional equation.

### CONCLUSION

In excising the Incumbent Protection Act from the Virginia Code, the judiciary fulfilled its obligation to keep the political process open and well-functioning by striking down manifestly unconstitutional election laws.<sup>220</sup> Yet, the story of the Incumbent Protection Act has little to do with its constitutional merit, and much to do with who could contest that merit. Though the Incumbent Protection Act eventually fell, the various courts and judges found standing lacking more often than not.

In that respect, the extent to which *24th Senatorial District* and *6th Congressional District* stake out the rights of prospective plaintiffs in election law cases remains to be seen. That these cases constrict and impair some plaintiffs, and boost and progress others, may well ensure that they are mainstays as standing guideposts. But these cases are likewise vulnerable to broad and impactful interpretations not readily susceptible to limitation and not obviously limited in application. For that reason, these cases, like the Incumbent Protection Act, may one day fall away.

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216. *Id.* at 368 (“[B]ecause Virginia makes available to political parties multiple options for restricting their candidate selection process to individuals of their choosing, the refusal by the state to fund and operate a closed primary does not burden parties’ right of association.”).

217. 6th Cong. Dist. Republican Comm. v. Alcorn, 913 F.3d 393, 404 (4th Cir. 2019).

218. *See generally Miller*, 512 F.3d at 105–12 (Wilkinson, J., dissenting from decision to deny rehearing en banc) (discussing the constitutionality of Virginia’s open primary law despite the 4th Circuit’s decision not to address the issue).

219. *Id.*

220. *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).