DOCKET NO. 15-1162

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

ROBERT C. SARVIS,

Plaintiff-Appellant,

v.

JAMES B. ALCORN, SINGLETON B. McALLISTER, AND CLARA BELLE WHEELER, in their official capacities as members of the Virginia State Board of Elections,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia, Richmond Division,
(3:14-cv-00479-REP, Hon. R.E. Payne, D.J.)

APPELLANT'S PETITION FOR PANEL REHEARING AND PETITION FOR REHEARING EN BANC

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July 5, 2016

Appellant, Robert C. Sarvis, by and through the undersigned counsel, pursuant to Rules 40 and 35 of the Federal Rules of Appellate Procedure, Local Rules 40(a)-(c) and 35(a), and I.O.P 40.1 and 40.2, hereby respectfully petitions the Panel assigned to this case and the entire Court, sitting *en banc*, to rehear this case based upon the following:

Local Rule 40(b) Statement

In the undersigned counsel's judgment, the following situations exist:

1. A material fact or legal matter was overlooked in the decision;

2. The opinion is directly in conflict with a decision of at least three other United States Courts of Appeals (the Sixth, Seventh, and Eighth Circuits) and with many other courts on the primary substantive legal question at issue and the conflict is not addressed anywhere in the opinion. The decision also conflicts on the primary procedural issue with decisions from this Court, the United States Supreme Court, and other courts, as will be explained below.

3. The proceeding involves one or more questions of exceptional importance.

F.R.A.P. 35 (b) Statement

The proceeding involves one or more questions of exceptional importance. First, it presents a question that is of constitutional significance for both candidates for public political and voters who seek to cast their vote for them and

the Panel's decision directly conflicts with the authoritative decisions of other United States Court of Appeals that have addressed the issue.[1] In fact, the Panel's decision completely overlooks or ignores each of these directly conflicting decisions, along with the decisions from several other courts around the country that directly conflict with the Panel's decision.

Secondly, the Panel's decision and its analysis under Rule 12(b)(6) of the Federal Rules of Civil Procedure conflicts with this Court's recent decisions that apply that Rule in light of *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).[2] The Panel's decision ignored the appropriate and limited inquiry applicable to a Rule 12(b)(6) motion, looking well beyond the Complaint and requiring much more than plausibility, while making its own findings of fact that contradict the allegations in the operative complaint and

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[1] *See Green Party of Tennessee v. Hargett*, 767 F.3d 533 (6th Cir. 2014); *McLain v. Meier*, 637 F.2d 1159, 1166-67 (8th Cir. 1980); *Sangmeister v. Woodard*, 565 F.2d 460 (7th Cir. 1977).

[2] *See e.g. Hall v. Greystar Mgmt. Servs., L.P.*, 2016 U.S. App. LEXIS 1012, (4th Cir., January 21, 2016)(Unpublished)(Rule 12(b)(6) motion tests the sufficiency of the complaint to see if it states a claim; it "does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses;" only appropriate inquiry is whether the complaint contains sufficient factual allegations, accepted as true, to "state a claim that is plausible on its face."); *SD3, LLC v. Black & Decker (U.S.) Inc.*, 2015 U.S. App. LEXIS 18834, *22-*23 (4th Cir., October 29, 2015)(Same); *Covey v. Assessor of Ohio County*, 777 F.3d 186, 191-192 (4th Cir. 2015)(Same).

conclusions of law that are unsupported and unsupportable from the record - which, of course, had not been developed in any meaningful way at this early juncture.

The Panel's decision is reported at *Sarvis v. Alcorn*, 2016 U.S. App. LEXIS 11094 (4th Cir., June 20, 2016).

The Panel's Decision Ignores or Overlooks Directly Conflicting Authoritative Decisions From at Least Three Other U.S. Courts of Appeals and a Whole Body of Ballot-Ordering Jurisprudence Dating Back to 1930.

The issue in this case is quite straightforward. The Panel was asked to decide whether a Complaint which alleges that Va. Code §24.2-613's mandate that for all ballots for elective office in Virginia the candidates must be ordered on the ballot such that major party candidates are listed first and minor party and independent candidates are listed last, violates the First and Fourteenth Amendment rights of minor party and independent candidates and of electors who wish to cast their vote for them and see them have a fair chance at being elected, states a claim for relief as a matter of law.

The Panel, considering the lower court's grant of the Rule 12(b)(6) *de novo*, as it was required to do, *Covey v. Assessor of Ohio County*, 777 F.3d 186, 191 (4th Cir. 2015, found that a challenge to this ballot-ordering statute failed to state a claim upon which relief could be granted. It arrived at its conclusion by

evaluating the burden it believes ballot-ordering places on a minor party or independent candidate (without evidence), *Sarvis*, 2016 U.S. App. LEXIS 11094 at *26 and the proffered state interests supporting it. *Id.* at *21-*26, based simply on the State's articulation of those interests and, of course, no chance for Mr. Sarvis to challenge their applicability or validity.

The Panel found no cognizable First Amendment or Fourteenth Amendment right to challenge a ballot-ordering statute that mandates that major party candidates have positional advantage over minor party and independent candidates on every ballot for elective office in the Commonwealth, without permitting any opportunity for discovery or fact-finding into the factors courts around the county have declared must be developed and considered in the face of this exact kind of challenge. *See e.g., Green Party of Tennessee v. Hargett*, 767 F.3d 533, 551 (6th Cir. 2014)("The effect of preferential ballot ordering on voter behavior involves questions of fact .... (the record) establishes only that there is a factual dispute as to whether ballot position sways voters, and if so, how much. This is precisely the sort of question that cannot be resolved on summary judgment."), *citing, McLain v. Meier*, 637 F.2d at 1166.[3]

[3] The operative complaint in the case, of course, alleges facts that assert in detail the implications the ballot-ordering statute has for minor-party and independent candidates and electors and explains how it violates their specified

The Panel's Opinion at *18-*20 purports to analyze the viability of a constitutional challenge to a ballot-ordering statute.

With all due respect, it is nothing less than shocking that the Panel's analysis completely omits from any and all discussion or even reference, the detailed and thoroughly reasoned decisions from three other United States Courts of Appeals which come to the opposite conclusion from this Panel and whose decisions cannot in any way be reconciled with this Panel's Rule 12(b)(6) dismissal of First and Fourteenth Amendment claims vis a vis a ballot-ordering statute that allocates positional advantage on the ballot to the major political parties and mandates positional disadvantage for minor party and independent candidates simply and solely based on their status as such.

None of these authoritative decisions from these sister Circuits is even mentioned, let alone distinguished. *See Green Party of Tennessee v. Hargett*, 767 F.3d 533 (6th Cir. 2014);[4] *McLain v. Meier*, 637 F.2d 1159, 1166-67 (8th Cir.

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constitutional rights, as well as how unjustified and unjustifiable the Commonwealth's purported interests are. It also alleges intentional discrimination in setting up the ballot ordering scheme. *See* JA 36-46.

[4] In *Hargett*, the ballot-ordering statute at issue requires that the two main major parties (Democratic and Republican) be listed first, then minor parties, and then independent candidates last - remarkably similar to the Virginia statute. *Hargett*, 767 F.3d at 540. The Sixth Circuit expressly recognized that a challenge to a ballot-ordering statute clearly raises a constitutionally cognizable claim and

1980);[5] *Sangmeister v. Woodard*, 565 F.2d 460 (7th Cir. 1977).[6]

Moreover, the Panel failed as well to refer to numerous state court decisions

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emphasized such a claim fundamentally involves a factual question which cannot be decided on summary judgment (much less on a motion to dismiss) and must be presented to the Court on the facts.

[5] In *McLain*, again the Court was asked to consider a First and Fourteenth Amendment challenge to a ballot-ordering statute that favored major party candidates with top of ballot placement and independents were placed in the last column. *McLain*, 637 F.2d at 1166. The Eighth Circuit emphasized once again that "the effect of ballot placement is a matter of fact." *Id*. It had before it a fully developed record, including the various studies on the impact of ballot placement, the "windfall" effect of top placement, and had relevant evidence before it to consider - including the history of ballot placement vis a vis the election of last placed candidates - *Id.* at n.13. The Court found that in enacting its ballot ordering scheme that favored the major parties, the state had chosen to "serve the convenience of those voters who support incumbents and major party candidates at the expense of other voters. Such favoritism burdens the fundamental right to vote possessed by supporters of the last-listed candidates, in violation of the fourteenth amendment." *Id.* at 1167. It struck down the ballot-ordering statute as unconstitutional even under a rational basis test. It is impossible to reconcile this Panel's decision with *McLain* and, of course, the Panel did not even try. It just ignored or overlooked this authoritative decision from the Eighth Circuit.

[6] In *Sangmeister*, the Seventh Circuit again emphasized that a constitutional challenge to a ballot-ordering statute and the effect of ballot placement fundamentally involves a question of fact to be presented on a fully developed record. The Court noted the submission and consideration of several studies regarding the impact of ballot placement and found that providing an advantage with respect to placement (top placement) creates enough of an advantage, based simply on party status, so as to constitute an equal protection violation. The Court considered the proffered state administrative interests and rejected them - on the evidence. It is impossible to reconcile this Panel's Rule 12(b)(6) dismissal of Mr. Sarvis's ballot ordering claim with the decision in *Sangmeister*.

recognizing as constitutionally cognizable this exact kind of claim. *See e.g.*, *Akins v. Secretary of State*, 154 N.H. 67, 72-73, 904 A.2d 702, 706 (N.H. 2006); *Gould v. Grubb*, 14 Cal.3d 661, 122 Cal.Rptr. 377, 536 P.2d 1337, 1345-46 (Cal. 1975)(Applying strict scrutiny to ballot ordering challenge); *Matter of Holtzman v. Power*, 62 Misc.2d 1020, 1023, 313 N.Y.S.2d 904, 907 (NY 1970); *Elliott v. Secretary of State*, 295 Mich. 245, 294 N.W. 171 (Mich. 1940); *Groesbeck v. Board of State Canvassers*, 251 Mich. 286, 232 N.W. 387 (Mich. 1930). *See also, Conservative Party v. Walsh*, 818 F. Supp. 2d 670 (S.D..N.Y. 2011)(distinguishing a claim over first position from a claim alleging Equal Protection violation based on ordering position depending on status as small party or independent, noting laws designed to keep the little guy down); *Gilmore v. Gardner*, 1994 WL 529922 (D. N.H., September 23, 1994)*; Mann v. Powell*, 333 F. Supp. 1261 (N.D. Ill. 1969)(Three-judge court); *Netch v. Lewis*, 344 F. Supp. 1280, 1281 (N.D. Ill. 1972).[7] *See also, Weisberg v. Powell*, 417 F.2d 388, 393 (7th Cir. 1969)(discussing

[7] The Panel chose to refer to only one ballot-ordering challenge in which a court struck down a ballot-ordering statute as unconstitutional (Equal Protection grounds), *See Sarvis*, 2016 U.S. App. LEXIS 11094 at *19, *citing*, *Graves v. McElderry*, 946 F. Supp. 1569 (W.D. Okla. 1996) simply to juxtapose it with another case that upheld a ballot-ordering statute. Interestingly, the case with which the Panel juxtaposed *Graves*, *Bd. of Election Comm'rs v. Libertarian Party of Illinois*, 591 F.2d 22 (7th Cir. 1979), considered the challenge to the ballot-ordering statute on a fully developed evidentiary record - not on a Rule 12(b)(6) motion; moreover, the strong dissenting opinion by Judge Swygert, provides

candidates and their representatives who camped out overnight for a chance to be first on the ballot).

Further, the Panel's Opinion failed entirely to recognize, let alone refer to, the numerous expert studies explaining why there are constitutional implications for ballot ordering statutes based on party or independent status criteria and that explain the impact of preferential ordering on the candidates and on the electors. *See e.g.,* Barry Clayton Edwards, *Race, Ethnicity, and Alphabetically Ordered Ballots*, 13 Election L.J. 394 (November 3, 2014); Mary Beth Beazley, *Ballot Design as Fail-safe: An Ounce of Rotation is Worth a Pound of Litigation*, 12 Election L.J 18 (2013); Professor Barry C. Edwards, *Alphabetically Ordered Ballots Make Elections Less Fair and Distort the Composition of American Legislatures*, http://www.democraticaudit.com/?p=13868 (June 6, 2015); Professor Barry C. Edwards, *Alphabetically Ordered Ballots and the Composition of American Legislatures*, State Politics & Policy Quarterly Vol. 15(2) 171-191 (2015); R. Michael Alvarez, *Ballot Design Options*, http://www.vote.caltech.edu/sites/default/files/vtp_wp4.pdf (February 2002); Rebecca Wiseman, *So You Want to Stay a Judge: Name and Politics of the*

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further support that Mr. Sarvis's claim is a cognizable claim sufficient to survive a Rule 12(b)(6) motion and certainly must be deemed at least "plausible."

Moment May Decide Your Future, 18 J. L. & Politics 643 (Summer 2002).

The United States Supreme Court has recognized both the significance of ballot ordering and the value of taking expert testimony and considering expert studies in evaluating the impact - certainly giving further support to fact that Mr. Sarvis has stated a plausible claim.[8]

Indeed, the Panel even fails to note that in most cases in which the party challenging the ballot ordering statute lost on the merits, it was only after a fully developed factual record, as the court in such cases expressly recognized was required for ballot-ordering challenges, and most certainly not on a Rule 12(b)(6) motion. *See e.g., Clough v. Guzzi*, 416 F. Supp. 1057 (D. Mass. 1976)(Court considered full evidentiary record, history of ballot-ordering, expert testimony and studies, ballot access history, etc.)(cited by this Panel at *20); *New Alliance Party*

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[8] *Morse v. Republican Party of Virginia*, 517 U.S. 186, 197 n.13 (1996): "Research has shown that placement at the top of a ballot often confers an advantage to candidates so positioned. The classic study of the phenomenon is H. Bain & D. Hecock, *Ballot Position and Voter's Choice: The Arrangement of Names on the Ballot and its Effect on the Voter* (1957). *See also, Note,* California Ballot Position Statutes: An unconstitutional Advantage to Incumbents, 45 S. Cal. L. Rev. 365 (1972)(listing other studies); Note, Constitutional Problems with Statutes Regulating Ballot Position, 23 Tulsa L.J. 123 (1987). Some studies have suggested that the effect of favorable placement varies by type of election, visibility of the race, and even the use of voting machines. *See id.* at 127. While the research is not conclusive, it is reasonable to assume that candidates would prefer positions at the top of the ballot if given a choice."

v. New York Bd. of Elections, 861 F. Supp. 282 (S.D.N.Y. 1994)(Summary judgment after the parties were given an opportunity for full factual development)(cited by this Panel at *20).

In short, the Panel's decision overlooks, ignores, or just inexplicably rejects a long and solid line of jurisprudence from all parts of this country, going back at least to 1930, and including at least three United States Courts of Appeals, in concluding that a challenge to a ballot-ordering statute that mandates ballot position based exclusively on a candidate's party- affiliation (or lack of affiliation), with the major parties guaranteed positional advantage, fails even to state a claim upon which relief could be granted.

A constitutional challenge to a ballot-ordering statute that relegates minor party and independent candidates to last position and favors the major parties with top position, all based solely on such status has been recognized since at least 1930 as a cognizable claim, as the cases above demonstrate. Such a claim raises fact questions (e.g. burden on candidates and voters, degree of the burden, history, validity of state interests, available alternatives, intent, and on and on) and implicates the First and Fourteenth Amendment rights of candidates and voters.

Such challenges raised fact questions in 1930 and they raise fact questions in 2016. They raise fact questions in the Sixth, Seventh, and Eighth Circuits and

they raise fact questions in this Circuit.

In the ballot access context particularly, the court must examine the totality of the state's ballot access scheme in order to evaluate the burden imposed by the challenged provision, in light of all requirements for ballot access and to evaluate the interests claimed to justify the provision. *McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1223 (4th Cir. 1995). *See also, Green Party of Ga. v. Georgia*, 551 Fed. Appx. 982, 983-984 (11th Cir. 2014)(In ballot access cases, the court must give the parties an opportunity to adduce evidence from which the court can analyze on a fact-specific, case by case basis, the rights at issue, the burden imposed, and the strength and legitimacy of the interests offered to justify the burden);[9] This is another fundamental principle of ballot access jurisprudence

[9] The Panel in this case deemed it appropriate to simply accept the Commonwealth's proffered interests, without any independent inquiry or opportunity for Mr. Sarvis to challenge them, notwithstanding Rule 12(b)(6) case law generally, which directs the court not to consider the viability of defenses at this stage, and ballot access jurisprudence specifically, which requires a case by case evidentiary based evaluation of the legitimacy and strength of each claimed interest. *Georgia Party of Ga. v. Georgia*, 551 Fed. Appx. 982 (11th Cir. 2014); *Bergland v. Harris*, 767 F.2d 1551 (11th Cir. 1985); *Lux v. Judd*, 651 F.3d 396, 404 (4th Cir. 2011)(remanding case on appeal of Rule 12(b)(6) dismissal for fact-finding and an "independent analysis" of the state interest used to justify the ballot access regulation at issue). This Panel saw no need to actually allow Sarvis to have any evidentiary input into the equation. *Sarvis*, at *20. There is absolutely no authority permitting such an approach under Rule 12(b)(6); moreover, the Amended Complaint, whose factual assertions must be taken as true, specifically challenges these interests. J.A. 36-46.

overlooked by the Panel.

Mr. Sarvis must be given a chance to discover all relevant facts and adduce those facts in the record. This Panel overlooked or avoided all relevant authority demonstrating that such a challenge as Mr. Sarvis brought here clearly is a plausible claim for purposes of Rule 12(b)(6) analysis. The Panel's decision must be reheard.

The Panel's Approach is Irreconcilable With This Circuit's Rule 12(b)(6) Jurisprudence.

This Circuit consistently has enunciated the following principles in evaluating a Rule 12(b)(6) motion: "A motion to dismiss pursuant to Rule 12(b)(6) ... tests the legal sufficiency of a complaint to determine whether the plaintiff has properly stated a claim; 'it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses.'" *Hall v. Greystar Mgmt. Servs., L.P.*, 2016 U.S. App. LEXIS 1012, 14-*15 (4th Cir., January 21, 2016), *quoting from, Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). "At the motion-to-dismiss stage, the only appropriate inquiry for (the court) is whether (the complaint) contained sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id*. at *15, *quoting from* , *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Covey v Assessor of Ohio County*, 777 F.3d 186

(4th Cir. 2015)(*Accord);*

The Panel in this case, like the district court in *SD3, LLC v. Black & Decker (U.S.) Inc.*, 801 F.3d 412, 425-426 (4th Cir. 2015), appears to have imposed something more like a summary judgment analysis to the issue before it, rather than a Rule 12(b)(6) analysis, while imposing the double whammy of denying Mr. Sarvis any opportunity for discovery or to adduce evidence and while actually ignoring the detailed specific factual assertions in the operative complaint, rather than deeming them to be true.[10] This Panel, like the district court in *SD3*, seems to have confused the plausibility standard with a probability standard and then drew its own factual findings without a record or the opportunity to make a record.[11]

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[10] Throughout the amended complaint, Mr. Sarvis asserts detailed facts concerning the burden imposed, the unavailing nature of the purported reasons used to support the statute, the intent of the legislature in setting the ballot order as it did, etc. J.A. 36-46. All of that is ignored in the Opinion.

[11] For example, the Panel came to its own factual and legal conclusion about the severity of the burden imposed, notwithstanding the assertions in the amended complaint on the subject, without regard to the burden other elements of the statutory ballot access scheme as a whole place on minor party and independent candidates and without regard to the history of ballot access for such candidates - all of which must properly be taken into account under ballot access jurisprudence. The Panel took the same approach with respect to legal conclusions as well and used such conclusions as premises for the decision, even though the premises were absolutely mistaken. For example, the Panel expressly found at least twice that the ballot ordering statute at issue is "facially neutral and nondiscriminatory." *Sarvis*, 2016 U.S. App. LEXIS 11094 at *15 & *19. Respectfully, the Panel is absolutely wrong. The ballot ordering statute which bases its criteria for position on the

ballot exclusively on party affiliation, placing the major parties on top and the minor parties and independents on the bottom at a positional disadvantage (as expressly alleged in the amended complaint), is the epitome of a facially discriminatory statute in the ballot access context. *See Green Party of Tennessee v. Hargett*, 791 F.3d 684, 695 (6th Cir. 2015); *Libertarian Party of Ill. v. Ill. State Board of Elections*, 2016 U.S. Dist. LEXIS 22176, *11-*13 (N.D. Ill., February 24, 2016); *Credico v. New York State Bd. of Elections*, 2013 U.S. Dist. LEXIS 109737, *57 (S.D.N.Y., June 19, 2013); *Delaney v. Bartlett*, 370 F. Supp. 2d 373 (M.D.N.C., 2004).

Moreover, the premise for finding the statute to be facially nondiscriminatory is perhaps the most inappropriately arrived at premise in the Panel's Opinion, with all due respect. The Panel finds, citing only to the statute, that the statute "allows any political organization - of any persuasion - an evenhanded chance at achieving political party status and a first-tier position." *Sarvis*, *Id.*, at *16. In apparent support for this totally unsupported (and unsupportable) conclusion, the Panel notes that one party, other than the Democrats or Republicans, in the history of the scheme, some twenty years ago, qualified for first-tier ballot listing. *Id.* at *26, n.1. Respectfully, that finding supports Mr. Sarvis, not the Commonwealth, as a part of the relevant history that demonstrates the burden in attaining ballot access, - a burden which the amended complaint asserts is increased by the ballot ordering scheme at issue. This history is directly relevant and must be considered on the evidence. *See Storer v. Brown*, 415 U.S. 724, 742 (1974); *Mandel v. Bradley*, 432 U.S. 173, 177 (1977); *Lee v. Keith*, 463 F.3d 763, 769 (7th Cir. 2006).

The Panel's conclusion that, notwithstanding the onerous ballot access requirements Virginia law places on minor party candidates and independents, the playing field is even and wide open is again, unsupported and unsupportable. Indeed, the Panel's closing note: "We leave further resolution of this controversy to a different and better set of arbiters: the people, and through them, the political branches(.)" *Sarvis* at *26, reflects, perhaps a lack of familiarity with or a disagreement with the well known admonition from Justice O'Connor, in her concurring opinion in *Clingaman v. Beaver*, 544 U.S. 581, 603 (2005), in commenting on both the self-interests in which legislators generally act with respect to the rules of the electoral game and the vitally important role our courts

CONCLUSION

For all of the foregoing reasons, the case must be reheard by the Panel or reheard *en banc* by the entire Court. There are fundamentally important constitutional rights of political candidates and voters at stake here and the Panel's decision cannot be reconciled with authoritative decisions on this subject, all of which are completely overlooked or ignored in the decision. Mr. Sarvis has stated a plausible claim that Virginia's ballot ordering statute that mandates placement on the ballot by discriminating between major parties on the one hand and minor parties and independent candidates on the other, giving the former a placement advantage and the latter a placement disadvantage on every ballot violates the constitutional rights of candidates and voters in the context of the overall ballot access scheme. The claim is recognized as plausible in other Circuits and in other courts around the country and must be permitted to proceed here.

Respectfully Submitted,

/s/ David I. Schoen

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play in keeping them honest and in line with the Constitution: "Although the State has a legitimate – and indeed critical – role to play in regulating elections, it must be recognized that it is not a wholly independent or neutral arbiter. Rather, the State is itself controlled by the political party or parties in power, which presumably have an incentive to shape the rules of the electoral game to their own benefit." Our courts have a limited but vitally important role "in reviewing electoral regulation." *Id*.

CERTIFICATE OF SERVICE

I hereby certify that on this 5th day of July, 2016, I have caused a true and accurate copy of the foregoing Petition for Rehearing and Petition for Rehearing en banc to be served on all counsel of record by filing the same through this Court's electronic filing system.

/s/ David I. Schoen
Counsel for Appellant Robert C. Sarvis

Document(1)

1. *Sarvis v. Alcorn, 2016 U.S. App. LEXIS 11094*

Client/Matter: -None-
Search Terms: sarvis and 15-1162
Search Type: Natural Language
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Content Type	Narrowed by
Cases	Court: 4th Circuit

Sarvis v. Alcorn

United States Court of Appeals for the Fourth Circuit

May 10, 2016, Argued; June 20, 2016, Decided

No. 15-1162

Reporter
2016 U.S. App. LEXIS 11094

LIBERTARIAN PARTY OF VIRGINIA; WILLIAM HAMMER; JEFFREY CARSON; JAMES CARR; MARC HARROLD; WILLIAM REDPATH; WILLIAM CARR; BO CONRAD BROWN; PAUL F. JONES, Plaintiffs, and , Plaintiff - Appellant, v. JAMES B. ALCORN, in his individual and official capacities as member of the Virginia State Board of Elections; SINGLETON B. MCALLISTER, in her individual and official capacities as member of the Virginia State Board of Elections; CLARA BELLE WHEELER, in her individual and official capacities as member of the Virginia State Board of Elections, Defendants - Appellees.

Prior History: **[*1]** Appeal from the United States District Court for the Eastern District of Virginia, at Richmond. (3:14-cv-00479-REP). Robert E. Payne, Senior District Judge.

Disposition: AFFIRMED.

Core Terms

ballot, elections, candidates, ordering, district court, voters, parties, political party, burdens, three-tiered, offices, tier, rights, Amendments, positions, windfall, motion to dismiss, strict scrutiny, regulations, voting, state interest, justifications, statewide, constitutional right, state legislature, general election, right to vote, nondiscriminatory, first-tier, Places

Case Summary

Overview
HOLDINGS: [1]-A political party member failed to show that a state's tiered ballot ordering law imposed more than the most modest burdens on the constitutional rights to free speech, free association, and equal protection, since all parties were subject to the same requirements and none were automatically elevated to the top of the ballot, the member was not denied access to the ballot, there was no denial of the right to vote, and the tiered ballot allocated any benefit of positional bias in a neutral and nondiscriminatory manner; [2]-The state had important interests in the tiered ballot ordering to reduce voter confusion and speed the voting process, to maintain party-order symmetry across many offices on the ballot, and to maintain a stable political system, and these regulatory interests justified reasonable, nondiscriminatory restrictions.

Outcome
Judgment affirmed.

LexisNexis® Headnotes

Governments > State & Territorial Governments > Elections

HN1 *Va. Code Ann. § 24.2-613* describes the form of ballot to be used in Virginia elections. It provides that for elections to federal, statewide, and General Assembly offices a candidate shall be identified by the name of his political party or by the term Independent. *§ 24.2-613*. The law also orders the ballot for elections to these offices in three tiers.

Governments > State & Territorial Governments > Elections

HN2 The first tier of election ballots in Virginia includes candidates from parties or political parties, which are defined as organizations of citizens that received at least 10 percent of the vote for any statewide office filled in either of the two preceding statewide general elections. *Va. Code Ann. § 24.2-101*. In addition, the Virginia Code provides that any organization seeking party or political party status must also have had a state central committee and an elected state chairman present in Virginia for six months prior to any nominee from that organization filing for office.

Governments > State & Territorial Governments > Elections

HN3 The second tier of election ballots in Virginia includes candidates from recognized political parties. For an organization of citizens to be designated a recognized

political party under the Virginia Code, that organization must have had a state central committee present in Virginia for six months prior to any nominee from that party filing for office, and the state central committee must be comprised of voters residing in each Virginia congressional district. *Va. Code Ann. § 24.2-613*. The organization must also have a duly elected state chairman and secretary as well as a party plan and bylaws.

Governments > State & Territorial Governments > Elections

HN4 The third tier of election ballots in Virginia includes independent candidates not associated with political parties or recognized political parties.

Governments > State & Territorial Governments > Elections

HN5 In addition to delineating the election ballot's three tiers, Virginia's ballot ordering law also specifies how candidates are ordered within the three tiers. In the first two tiers, candidate order is set by lot. Importantly, this order is replicated for each office on the ballot, creating party order symmetry across the ballot as a whole. In the third tier, candidate order is alphabetical by surname.

Governments > State & Territorial Governments > Elections

Constitutional Law > Elections, Terms & Voting

HN6 The legislature in each state of our federal system possesses the presumptive authority to regulate elections within that state's sovereign territory. This authority stems directly from the U.S. Constitution.

Constitutional Law > Elections, Terms & Voting

Governments > State & Territorial Governments > Elections

HN7 See *U.S. Const. art. I, § 4, cl. 1*.

Governments > State & Territorial Governments > Elections

Constitutional Law > Elections, Terms & Voting > Electoral College

HN8 *U.S. Const. art. II, § 1, cl. 2* accords treatment to presidential elections: each state shall appoint, in such manner as the legislature thereof may direct, a number of electors, who will then choose the President.

Governments > State & Territorial Governments > Elections

HN9 The states possess a broad power to prescribe the times, places, and manner of holding elections for senators and representatives, which power is matched by state control over the election process for state offices.

Governments > State & Territorial Governments > Elections

Constitutional Law > Elections, Terms & Voting

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

Constitutional Law > ... > Fundamental Freedoms > Freedom of Speech > Political Speech

HN10 State election regulations often implicate substantial voting, associational, and expressive rights protected by the *First* and *Fourteenth Amendments*. The *First Amendment*, as incorporated against the states by the *Fourteenth Amendment*, protects the rights of individuals to associate for the advancement of political beliefs and ideas. For example, it is beyond debate that freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the *Due Process Clause of the Fourteenth Amendment*, which embraces freedom of speech. Invidious classifications also violate rights protected by the *Equal Protection Clause of the Fourteenth Amendment*. These rights, however, are not absolute. All election laws, including perfectly valid ones, inevitably affect — at least to some degree — the individual's right to vote and his right to associate with others for political ends.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

HN11 In order to distinguish those laws whose burdens are uniquely unconstitutional from the majority of laws whose validity is unquestioned, a court employs the U.S. Supreme Court's decisional framework. The court considers the character and magnitude of the asserted injury to the rights protected by the *First* and *Fourteenth Amendments* that the plaintiff seeks to vindicate; identify and evaluate the precise interests put forward by the State as justifications for the burden imposed; and determine the legitimacy and strength of each of those interests and the extent to which those interests make it necessary to burden the plaintiff's rights. This balancing test requires hard judgments — it does not dictate automatic results.

Constitutional Law > The Judiciary > Case or Controversy > Constitutionality of Legislation

Constitutional Law > Elections, Terms & Voting

Governments > State & Territorial Governments > Elections

HN12 The nature of a court's inquiry concerning the constitutionality of state election laws is flexible and depends upon the extent to which a challenged regulation burdens *First* and *Fourteenth Amendment* rights. Laws imposing only modest burdens are usually justified by a state's

important regulatory interests. Laws imposing severe burdens, on the other hand, must be narrowly drawn to advance a state interest of compelling importance. They are thus subject to strict scrutiny. However, the class of laws facing this higher scrutiny is limited. Subjecting too many laws to strict scrutiny would unnecessarily tie the hands of states seeking to assure that elections are operated equitably and efficiently.

Governments > State & Territorial Governments > Elections

HN13 Virginia's ballot ordering law allows any political organization — of any persuasion — an evenhanded chance at achieving political party status and a first-tier ballot position. *Va. Code Ann. §§ 24.2-101*, *24.2-613*.

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

HN14 To survive a *Fed. R. Civ. P. 12(b)(6)* motion to dismiss for failure to state a claim, a complaint must provide enough facts to state a claim that is plausible on its face, and that to reach facial plausibility, the plaintiff must plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.

Counsel: ARGUED: David I. Schoen, DAVID I. SCHOEN, ATTORNEY AT LAW, Montgomery, Alabama, for Appellant.

Stuart Alan Raphael, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellees.

ON BRIEF: Robert C. ***Sarvis***, Alexandria, Virginia, Appellant, Pro se.

Mark R. Herring, Attorney General of Virginia, Rhodes B. Ritenour, Deputy Attorney General, Anna T. Birkenheier, Assistant Attorney General, Matthew R. McGuire, Assistant Attorney General, Erin R. McNeill, Assistant Attorney General, Trevor S. Cox, Deputy Solicitor General, OFFICE OF THE ATTORNEY GENERAL OF VIRGINIA, Richmond, Virginia, for Appellees.

Judges: Before WILKINSON and AGEE, Circuit Judges, and DAVIS, Senior Circuit Judge.

Opinion by: WILKINSON

Opinion

WILKINSON, Circuit Judge:

Robert ***Sarvis***, a political figure in the Libertarian Party of Virginia, brings a constitutional challenge to Virginia's three-tiered ballot ordering law. The district court found no merit in ***Sarvis***'s arguments and accordingly dismissed his challenge for failure to state a claim under *Fed. R. Civ. P. 12(b)(6)*. We now affirm.

I.

Sarvis's attack **[*2]** focuses chiefly upon the ballot ordering law found in *Virginia Code § 24.2-613*. ***HN1*** That law describes the form of ballot to be used in Virginia elections. It provides that for elections to "federal, statewide, and General Assembly offices" a candidate "shall be identified by the name of his political party" or by the term "Independent." *Va. Code Ann. § 24.2-613*. Of principal concern to this case, the law also orders the ballot for elections to these offices in three tiers.

HN2 The first tier includes candidates from "parties" or "political parties," which a related section of the Code defines as organizations of citizens that received at least 10 percent of the vote for any statewide office filled in either of the two preceding statewide general elections. *Va. Code Ann. § 24.2-101*. In addition, the Code provides that any organization seeking "party" or "political party" status must also have had a state central committee and an elected state chairman present in Virginia for six months prior to any nominee from that organization filing for office. Id. The only organizations currently designated "parties" or "political parties" under the Code are the Republican Party and the Democratic Party.[1]

HN3 The second tier includes candidates from "recognized political parties." For an organization of citizens to be designated a "recognized political party" under the Code, that organization must have had a state central committee present in Virginia for six months prior to any nominee from that party filing for office, and the state central committee must be comprised of voters residing in each Virginia congressional district. *Va. Code Ann. § 24.2-613*. The organization must also have a duly elected state chairman and secretary as well as a party plan and bylaws. Id. The Libertarian Party of Virginia has been designated a "recognized political party" under the Code.

[1] We note that as recently as the mid-1990s, the Virginia Reform Party satisfied **[*3]** the applicable requirements to be designated a "political party" and thus was part of the first-tier ballot listing on the 1996 general election ballot. Cf. J.A. 61, 95, and 97.

HN4 Finally, the third tier of the ballot includes "[i]ndependent candidates" not associated with "political parties" or "recognized political parties." Id.

HN5 In addition to delineating the election ballot's three tiers, Virginia's ballot ordering law also specifies how candidates are ordered within the three tiers. In the first two tiers, candidate order is set by lot. Importantly, this order **[*4]** is replicated for each office on the ballot, creating party order symmetry across the ballot as a whole. In the third tier, candidate order is alphabetical by surname. Id.[2]

In July 2014, just a few months before the November 2014 elections, ***Sarvis*** and others members of the Libertarian Party of Virginia along with the Libertarian Party of Virginia itself and one independent candidate filed a complaint that named as defendants certain members of the Virginia State Board of Elections. The complaint alleged that the three-tiered ballot ordering law found in *Virginia Code § 24.2-613* violated their constitutional rights under the *First* and *Fourteenth Amendments*. ***Sarvis*** and his co-plaintiffs sought relief from the law prior to the November 2014 elections.[3]

In September 2014, the plaintiffs and the Commonwealth both determined that the litigation would not be resolved prior to the November 2014 elections. But the parties and the district court agreed that, should ***Sarvis*** and his co-plaintiffs intend to seek elected office in the future, their case would remain ripe beyond the November 2014 elections under the capable of repetition yet evading review doctrine. The plaintiffs thus amended their complaint to reflect their interest in seeking relief from the ballot ordering law with regard to future elections, and the litigation continued on this basis. ***Sarvis*** in particular alleged that he would be "a candidate for national office in Virginia in the 2016 election." J.A. 32. The amended complaint asked that the district court enjoin the law during the "2015 **[*6]** statewide elections and the 2016 and beyond general elections" and issue "an order directing the defendants to assign ballot positions to all ballot-qualified candidates and parties on a random basis without regard to party status." J.A. 46.

Shortly thereafter, Virginia filed a motion to dismiss under *Rule 12(b)(6)*, claiming that the amended complaint failed to state a claim upon which relief could be granted. The district court granted Virginia's motion to dismiss in January 2015. ***Sarvis*** *v. Judd, 80 F. Supp. 3d 692, 695 (E.D. Va. 2015)*. The district court based its decision primarily on the framework established by the Supreme Court in *Burdick v. Takushi, 504 U.S. 428, 112 S. Ct. 2059, 119 L. Ed. 2d 245 (1992)*, and *Anderson v. Celebrezze, 460 U.S. 780, 103 S. Ct. 1564, 75 L. Ed. 2d 547 (1983)*. In those decisions, the Supreme Court held that courts should review *First* and *Fourteenth Amendment*-based challenges to state election laws by weighing the severity of the burden the challenged law imposes on a person's constitutional rights against the importance of the state's interests supporting that law. *Burdick, 504 U.S. at 434*; *Anderson, 460 U.S. at 789*.

Sarvis and his co-plaintiffs, the Commonwealth of Virginia, and the district court all agreed that the burden imposed by the three-tiered ballot ordering law was not severe enough to warrant strict scrutiny. The district court gave two principal reasons for this conclusion. First, the law is politically neutral in that it does **[*7]** not entrench particular political parties in favorable positions on the election ballot. ***Sarvis****, 80 F. Supp. 3d at 701-02*. Second, the law does not exclude any prospective candidate from the ballot altogether. *Id. at 702-03*.

Turning to the question of Virginia's interests, the district court noted three justifications offered by Virginia for the ballot ordering law: avoiding voter confusion, creating party-order symmetry, and favoring parties with demonstrated public support. *Id. at 703*. Before assessing the merits of these justifications, however, the district court determined that Virginia had described the nature and purpose of the three justifications with sufficient precision. Disagreeing with the plaintiffs, the district court held that neither additional factual development of the case nor more concrete empirical support for Virginia's justifications was necessary before it could properly rule on Virginia's motion to dismiss. *Id. at 703-06*. The district court then reviewed Virginia's three justifications and determined that each was important. *Id. at 706-08*.

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[2] Somewhat different rules govern the tiered ballot used for elections for the offices of President and Vice President of the United States. See Va. Code Ann. §§ 24.2-543, -613, -614.

[3] The plaintiffs' amended complaint before the district court also targeted Virginia Code § 24.2-506, a law establishing a signature requirement some prospective candidates must meet to be placed on the ballot in the first place. However, the plaintiffs later voluntarily dismissed this claim at oral argument before the district court. ***Sarvis***'s appellate briefs reference **[*5]** the signature requirement, and it is thus unclear whether he is attempting to revive this claim on appeal. In any event, we will not consider this issue in light of the plaintiffs' decision to dismiss it below. See Unioil, Inc. v. E.F. Hutton & Co., 809 F.2d 548, 555 (9th Cir. 1986) ("As a general rule, a plaintiff may not appeal a voluntary dismissal because it is not an involuntary adverse judgment against him."), overruling on other grounds recognized by In re Keegan Mgmt. Co., 78 F.3d 431, 435 (9th Cir. 1996).

Finally, in weighing the plaintiffs' burdens against Virginia's interests, the district court ruled that the interests put forward by Virginia outweighed any minor burdens the ballot ordering law imposed **[*8]** on ***Sarvis*** and his co-plaintiffs. The district court accordingly granted Virginia's motion to dismiss the amended complaint. *Id. at 708-09*. ***Sarvis*** alone appeals that order.

II.

Sarvis's main argument on appeal is that Virginia's three-tiered ballot ordering law advantages candidates from what he calls ″major parties″ and disadvantages candidates like him that hail from what he calls ″minor parties.″ According to ***Sarvis***, this conferral of advantages and disadvantages violates expressive and associational rights, the right to cast a vote for a candidate of one's choice, and the right to stand for election, all of which are protected by the *First Amendment*. In addition, ***Sarvis*** contends that the ballot ordering law's unequal treatment of candidates runs afoul of the *Fourteenth Amendment's Equal Protection Clause*. Appellant's Opening Br. 12-13.

Sarvis premises his constitutional challenge largely on what the district court termed the ″windfall vote″ theory. *Sarvis, 80 F. Supp. 3d at 699*. According to this theory, in any given election, some voters will vote for candidates appearing at the top of the ballot because of those candidates' prominent ballot positions. ***Sarvis*** argues that Virginia's ballot ordering law, in conjunction with this capricious voter bias, places an improper burden on candidates **[*9]** from minor parties. Before the district court, however, ***Sarvis*** stated that his expert would not testify about the exact extent of the bias in ***Sarvis***'s specific situation. *Id. at 700 n.1*.

Although he concedes that the burden imposed by the three-tiered ballot ordering law is not subject to strict scrutiny, ***Sarvis*** contends that the district court's Anderson/Burdick analysis nevertheless underestimated the magnitude of the burden imposed by the law. At the same time, he argues that the court's analysis over-credited the interests Virginia offered to support the law.

Finally, in addition to disagreeing with the substance of the district court's analysis of the burdens imposed and interests furthered by the ballot ordering law, ***Sarvis*** argues that the district court erred in rejecting his claims at the motion to dismiss stage. He states that the district court should have allowed discovery so as to better ascertain how the ballot ordering law burdens candidates who are not listed in the ballot's first tier, and how it does or does not actually further the interests Virginia offers in support of the law.

III.

HN6 We begin with the uncontroversial proposition that the legislature in each state of our federal system **[*10]** possesses the presumptive authority to regulate elections within that state's sovereign territory. This authority stems directly from the Constitution. With regard to congressional elections, *Article I Section 4 Clause 1 of the Constitution* provides: ***HN7*** ″The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.″ ***HN8*** Article II Section 1 Clause 2 accords similar treatment to presidential elections: ″Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors,″ who will then choose the President. And a state's authority to regulate elections for its own offices is simply a basic incident of our federal system. The Constitution nowhere confers — at least not as an initial matter — authority on the federal government to regulate elections for state offices.

These constitutional provisions are the product of the Framers' extensive debate concerning the roles that the state and federal governments would play in regulating elections. See, e.g., The Federalist No. 59 (Alexander Hamilton) (arguing for federal control over congressional **[*11]** elections); The Anti-Federalist No. 7 (Cato) (arguing for state control over congressional elections). It is no surprise that the precise compromise that the Framers struck differs for each type of election. For instance, the Framers chose to ″invest[] the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to pre-empt state legislative choices.″ *Arizona v. Inter Tribal Council of Arizona, Inc., 133 S. Ct. 2247, 2253, 186 L. Ed. 2d 239 (2013)* (quoting *Foster v. Love, 522 U.S. 67, 69, 118 S. Ct. 464, 139 L. Ed. 2d 369 (1997)*). With regard to presidential elections, however, the Framers adopted a different approach: the Electoral College. They then gave state legislatures the authority to decide the manner through which the electors from each state would be appointed. *McPherson v. Blacker, 146 U.S. 1, 35, 13 S. Ct. 3, 36 L. Ed. 869 (1892)*.

Of course, the Reconstruction Amendments along with later amendments such as those providing for the election of Senators ″by the people″ (1913) and prohibiting denial of the right to vote ″on account of sex″ (1920) materially altered the division of labor established by the Framers for the regulation of elections. *U.S. Const. amends. XVII*, *XIX*. And various federal statutes, most notably the Voting Rights

Act of 1965, passed pursuant to those amendments have made still further alterations. Most of these steps were deeply necessary and long overdue. Through them all, however, the Constitution **[*12]** has continued to preserve for state legislatures the presumptive authority to regulate both the larger and smaller aspects of the federal and state elections occurring within that state's boundaries.

Indeed, the Supreme Court has consistently recognized this enduring tenet of our constitutional order, noting that ***HN9*** the states possess a ″broad power to prescribe the Times, Places and Manner of holding Elections for Senators and Representatives, which power is matched by state control over the election process for state offices.″ Clingman v. Beaver, 544 U.S. 581, 586, 125 S. Ct. 2029, 161 L. Ed. 2d 920 (2005) (quoting Tashjian v. Republican Party of Conn., 479 U.S. 208, 217, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986)); see also Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 76, 121 S. Ct. 471, 148 L. Ed. 2d 366 (2000) (per curiam) (noting state legislatures' broad power over the appointment of presidential electors).

This arrangement is not only long-standing — it also makes a certain sense. All other things being equal, it is generally better for states to administer elections. It is true that smaller units of government can act oppressively toward minority citizens within their borders and against unpopular points of view. But local administration also allows for greater individual input and accountability; a distant bureaucracy is in danger of appearing out of reach and out of touch. Even Alexander Hamilton, who vigorously supported greater federal control **[*13]** over congressional elections, acknowledged the point: allowing ″local administrations″ to regulate elections ″in the first instance″ may, ″in ordinary cases,″ be ″more convenient and more satisfactory.″ The Federalist No. 59. All of this is to say that a lot of thought stretching over centuries has gone into our electoral system as it now generally operates. The text and history of the Constitution, well established Supreme Court precedent, and the structural principles inherent in our federal system counsel respect for the Virginia General Assembly's power to administer elections in Virginia.

IV.

A.

Mindful of state legislatures' longstanding authority to regulate elections, we turn first to an examination of the alleged burdens imposed by Virginia's three-tiered ballot ordering law.

HN10 State election regulations often ″implicate substantial voting, associational and expressive rights protected by the First and Fourteenth Amendments.″ Pisano v. Strach, 743 F.3d 927, 932 (4th Cir. 2014) (citation omitted). ″The First Amendment, as incorporated against the states by the Fourteenth Amendment, protects the rights of individuals to associate for the advancement of political beliefs and ideas.″ S.C. Green Party v. S.C. State Election Comm'n, 612 F.3d 752, 755-56 (4th Cir. 2010). For example, it is ″beyond debate that freedom to engage in association for the advancement of beliefs and ideas **[*14]** is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment, which embraces freedom of speech.″ Anderson, 460 U.S. at 787 (quoting NAACP v. Alabama, 357 U.S. 449, 460, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958)). ″[I]nvidious″ classifications also violate rights protected by the Equal Protection Clause of the Fourteenth Amendment. Williams v. Rhodes, 393 U.S. 23, 30, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968). These rights, however, are not absolute. All election laws, including perfectly valid ones, ″inevitably affect[] — at least to some degree — the individual's right to vote and his right to associate with others for political ends.″ Anderson, 460 U.S. at 788.

HN11 In order to distinguish those laws whose burdens are uniquely unconstitutional from the majority of laws whose validity is unquestioned, we employ the Supreme Court's Anderson/Burdick decisional framework. We ″consider the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate″; ″identify and evaluate the precise interests put forward by the State as justifications for the burden imposed″; and ″determine the legitimacy and strength of each of those interests″ and ″the extent to which those interests make it necessary to burden the plaintiff's rights.″ Anderson, 460 U.S. at 789. This balancing test requires ″hard judgments″ — it does not dictate ″automatic″ results. Id. at 789-90.

HN12 The nature of our inquiry is ″flexible″ and ″depends upon the extent to which a challenged **[*15]** regulation burdens First and Fourteenth Amendment rights.″ Burdick, 504 U.S. at 434. Laws imposing only ″modest″ burdens are usually justified by a state's ″important regulatory interests.″ S.C. Green Party, 612 F.3d at 759. Laws imposing ″severe″ burdens, on the other hand, ″must be 'narrowly drawn to advance a state interest of compelling importance.'″ Burdick, 504 U.S. at 434 (citation omitted). They are thus subject to ″strict scrutiny.″ McLaughlin v. N.C. Bd. of Elections, 65 F.3d 1215, 1221 (4th Cir. 1995). However, the class of laws facing this higher scrutiny is limited. Subjecting too many laws to strict scrutiny would unnecessarily ″tie the hands of States seeking to assure that elections are operated equitably and efficiently.″ Burdick, 504 U.S. at 433.

Here, Virginia's three-tiered ballot ordering law imposes only the most modest burdens on ***Sarvis***'s free speech, associational, and equal protection rights. The law is facially neutral and nondiscriminatory — neither ***Sarvis***'s Libertarian Party nor any other party faces a disproportionate burden. All parties are subject to the same requirements. None are automatically elevated to the top of the ballot. ***HN13*** Virginia's ballot ordering law thus allows any political organization — of any persuasion — an evenhanded chance at achieving political party status and a first-tier ballot position. *Va. Code Ann. §§ 24.2-101, -613*.

Sarvis complains that the bar for **[*16]** achieving first-tier political party status is nonetheless too high, but he exaggerates the difficulty of this goal. An organization may obtain first-tier political party status if any of its candidates for any office receives 10 percent of the vote in either of the two preceding statewide general elections. And, in any case, his complaint is inapposite because he may be present on the ballot in all events. ***Sarvis*** did appear on the ballot in the past, and he may do so again in the future. What is denied, therefore, is not ballot access, but rather access to a preferred method of ballot ordering. But mere ballot order denies neither the right to vote, nor the right to appear on the ballot, nor the right to form or associate in a political organization.

Comparing this relaxed regime with statutes upheld in other cases demonstrates that Virginia's ballot ordering law imposes only a minimal burden on *First* and *Fourteenth Amendment* rights. For example, in Munro v. Socialist Workers Party, the Supreme Court considered the constitutionality of a Washington state law requiring that "a minor-party candidate for partisan office receive at least 1% of all votes cast for that office in the State's primary election" in **[*17]** order even to appear on the general election ballot at all. *479 U.S. 189, 190, 107 S. Ct. 533, 93 L. Ed. 2d 499 (1986)*. The Court upheld the law, because Washington "ha[d] not substantially burdened the 'availability of political opportunity.'" *Id. at 199* (citation omitted). Other cases have found that a complete prohibition on write-in voting imposed only "very limited" burdens on constitutional rights, *Burdick, 504 U.S. at 437*, and that a law barring candidates from appearing on the ballot as candidates of more than one political party "does not severely burden" associational rights. *Timmons v. Twin Cities Area New Party, 520 U.S. 351, 359, 117 S. Ct. 1364, 137 L. Ed. 2d 589 (1997)*. Indeed, the Court has even held that a state may prohibit independent candidates from appearing on the ballot if they "had a registered affiliation with a qualified political party" during the previous year. *Storer v. Brown, 415 U.S. 724, 726-28, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974)*. Viewed in the light of these regulations, ***Sarvis***'s squabbles with his particular position on the ballot appear almost inconsequential. The ballot ordering law does not deny anyone the ability to vote for him, nor his ability to appear on the Virginia ballot with his preferred party affiliation.

Sarvis himself recognizes the limits of the ballot ordering law's burdens, as he concedes that this case "does not rise to a level of strict scrutiny." J.A. 183-84. He nonetheless maintains that the **[*18]** law "creates a serious consequential burden," because "[c]andidates in inferior ballot positions have a strong likelihood of getting fewer votes than they would otherwise" under the theory of windfall voting. Appellant's Opening Br. 3. The theory is that uninformed or undecided voters are more likely to choose candidates listed higher on the ballot. In ***Sarvis***'s view, Virginia's ballot ordering law thus grants an advantage to candidates from major political parties, and determining the magnitude of this advantage requires that the case "go forward on the merits for the development of a full factual record." Appellant's Opening Br. 13.

Sarvis's demand for discovery, however, misapprehends the nature of a motion to dismiss. Here, the district court properly recognized that ***HN14*** "[t]o survive a *Rule 12(b)(6)* motion to dismiss, a complaint must 'provide enough facts to state a claim that is plausible on its face,'" ***Sarvis***, *80 F. Supp. 3d at 696* (quoting *Robinson v. Am. Honda Motor Co., 551 F.3d 218, 222 (4th Cir. 2009)*), and that to reach facial plausibility, ***Sarvis*** must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id. (quoting *Ashcroft v. Iqbal, 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009)*).

The problem for ***Sarvis*** is that even if there is a windfall vote, his complaint would still fail **[*19]** to raise the "reasonable inference" that Virginia's ballot ordering law creates constitutionally significant burdens. The fact remains that, "windfall" or not, the Virginia ballot ordering law still does not "restrict access to the ballot or deny any voters the right to vote for candidates of their choice." *Sonneman v. State, 969 P.2d 632, 638 (Alaska 1998)*. The law instead "merely allocates the benefit of positional bias, which places a lesser burden on the right to vote." Id. And contrary to ***Sarvis***'s cursory equal protection argument, Appellant's Opening Br. 12-13, it makes this allocation in a neutral, nondiscriminatory manner. Compare *Graves v. McElderry, 946 F. Supp. 1569, 1582 (W.D. Okla. 1996)* (holding that an Oklahoma law placing Democratic Party candidates in the highest ballot positions violated the *Equal Protection*

Clause), with *Bd. of Election Comm'rs of Chicago v. Libertarian Party of Ill., 591 F.2d 22, 25-27 (7th Cir. 1979)* (holding that an Illinois county's facially neutral two-tiered ballot ordering system did not violate the *Equal Protection Clause*).

It remains far from clear, moreover, that federal courts possess the power to rule that some voters' choices are less constitutionally meaningful than the choices of other supposedly more informed or committed voters. This whole windfall vote theory casts aspersions upon citizens who expressed their civic right to participate in an election and made a choice of their own **[*20]** free will. Who are we to demean their decision? ″There is 'no constitutional right to a wholly rational election, based solely on a reasoned consideration of the issues and the candidates' positions, and free from other 'irrational' considerations.'″ *Schaefer v. Lamone, No. 1:06-cv-00896-BEL, 2006 U.S. Dist. LEXIS 96855, at *13 (D. Md. Nov. 30, 2006)* (quoting *Clough v. Guzzi, 416 F. Supp. 1057, 1067 (D. Mass. 1976)*, aff'd, *248 F. App'x 484 (4th Cir. 2007)*. As noted, ***Sarvis*** says that his expert would not testify as to the exact degree of positional bias caused by Virginia's law, but this admission is unnecessary to our analysis. ″[A]ccess to a preferred position on the ballot so that one has an equal chance of attracting the windfall vote is not a constitutional concern.″ *New Alliance Party v. N.Y. State Bd. of Elections, 861 F. Supp. 282, 295 (S.D.N.Y. 1994)*. Even without ***Sarvis***'s admission, the windfall vote theory would thus fail to raise an inference of any cognizable constitutional burden on *First* or *Fourteenth Amendment* rights.

Given that the Virginia ballot ordering law does not restrict candidate access to the ballot or deny voters the right to vote for the candidate of their choice, or otherwise require strict scrutiny, we have no need to conduct the kind of empirical analysis into burdens that would essentially displace the authority of state legislatures with the views of expert witnesses. That is not to say, however, that our analysis is **[*21]** at an end. In order to be sure that the district court did not improperly dismiss ***Sarvis***'s complaint, we need to make certain that important state interests support Virginia's ballot ordering law.

B.

Virginia's three-tiered ballot ordering law is supported by ″important regulatory interests.″ *Timmons, 520 U.S. at 358*. In particular, the law may assist the voting process by reducing voter confusion and preserving party-order symmetry across different offices on the ballot. Additionally, the law may also reduce multi-party factionalism and promote political stability.

Sarvis again insists that we may not weigh these interests without discovery. Appellant's Opening Br. 20. But ″elaborate, empirical verification of [] weightiness″ is not required. *Timmons, 520 U.S. at 364*. To hold otherwise would ″invariably lead to endless court battles″ over the quality of the state's evidence, *Munro, 479 U.S. at 195*, and to a corresponding loss of certainty over the rules by which we select our whole government. We therefore do not ″require that a state justify″ reasonable and nondiscriminatory rules ″in this manner.″ *Wood v. Meadows, 207 F.3d 708, 716 (4th Cir. 2000)*. In cases where strict scrutiny does not apply, we ask only that the state ″articulate[]″ its asserted interests. *Id. at 717*. This is not a high bar, and Virginia has **[*22]** cleared it here. Reasoned, credible argument supports its stated interests.

First, Virginia's three-tiered ballot ordering law serves the important state interest of reducing voter confusion and speeding the voting process. While ***Sarvis***'s complaint is vague about how his preferred ballot listing would actually operate, J.A. 46, it is clear that he wishes to move ballot ordering among parties and candidates to a more purely random system. Virginia's system, by contrast, emphasizes voter familiarity and more predictable order. Listing candidates by party allows voters to more quickly find their preferred choice for a given office, especially when party loyalties influence many voters' decisions. And in an environment where many voters not only hold party loyalties but also tend to be loyal to one of only a few major parties, it again aids the voting process to list candidates from those parties first on the ballot. ***Sarvis***'s request for a court decree commanding Virginia to randomly order its ballot betrays not only a flawed conception of federal judicial power. It is also suspect as a practical matter. Random ordering risks requiring voters to decipher lengthy multi-office, multi-candidate **[*23]** ballots in order to find their preferred candidates.

″Election officials have good reason to adopt a ballot format that minimizes″ this sort of ″confusion.″ *Bd. of Election Comm'rs of Chicago, 591 F.2d at 25*. For each extra minute that a voter spends deciphering his ballot in the voting booth, dozens or more voters may spend another minute in line. This all adds up. Long election lines may frustrate voters attempting to exercise their right to vote. Hour long lines at some polling locations have led many to complain that election officials had discouraged their exercise of the franchise. See, e.g., Fernanda Santos, In Arizona, Voters Demand: Why the Lines?, N.Y. Times, March 25, 2016, at A13. Reducing the risk of this sort of disincentive is undoubtedly an important state interest.

Second, and relatedly, Virginia's ballot ordering law also has the advantage of maintaining party-order symmetry

across many offices on the ballot. Within the first two ballot tiers, party order is determined by lot. Va. Code Ann. § 24.2-613. The names of all party-affiliated candidates for particular offices then appear "in the order determined for their parties." Id. This is so for all "federal, statewide, and General Assembly offices." Id.

The effect of all this is to create "a **[*24]** symmetrical pattern on the ballot." New Alliance Party, 861 F. Supp. at 297. The ballot law ensures that if a party's candidate for United States Senator is listed second, for example, then candidates from that party will be second in lists for other offices as well. This again advances the state's interest in "efficient procedures for the election of public officials." S.C. Green Party, 612 F.3d at 759. It makes the ballot more easily decipherable, especially for voters looking for candidates affiliated with a given party.

Finally, the ballot ordering law may also favor Virginia's "strong interest in the stability of [its] political system[]." Timmons, 520 U.S. at 366. "Maintaining a stable political system is, unquestionably, a compelling state interest." Eu v. S.F. Cty. Democratic Cent. Comm., 489 U.S. 214, 226, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989). While minor parties have long been an important feature of political protest and American democratic life, it is also entirely legitimate for states to correlate ballot placement with demonstrated levels of public support. Indeed, there are many who believe that "the emergence of a strong and stable two-party system in this country has contributed enormously to sound and effective government." Davis v. Bandemer, 478 U.S. 109, 144-45, 106 S. Ct. 2797, 92 L. Ed. 2d 85 (1986) (O'Connor, J., concurring).

The Constitution therefore unsurprisingly "permits [a state legislature] to decide that political stability **[*25]** is best served through a healthy two-party system," Timmons, 520 U.S. at 367, as opposed to shifting coalitions of multiple party entities. Of course, state latitude in this regard is not unlimited. While a state legislature may not "completely insulate the two-party system from minor parties' or independent candidates' competition and influence," it may "enact reasonable election regulations that may, in practice, favor the traditional two-party system," and "temper the destabilizing effects of party-splintering and excessive factionalism." Id.

Structuring ballot order to prefer parties already strong enough to reach first-tier party status under the Virginia Code may further this stabilizing goal. In ***Sarvis***'s view, after all, a windfall vote of some magnitude is inevitable. Assuming this is true, some party or candidate will benefit. Some party or candidate has to be listed first. But Virginia's ballot ordering law ensures that at least the beneficiary will not be some entity with little actual public support. Of course, we acknowledge that the two major parties may possess a self-interest in preserving their preferred status, but we will not leap from that fact to the conclusion that a requirement of demonstrated **[*26]** public support is somehow inimical to the public good. Reinforcing through facially neutral and nondiscriminatory methods affiliations already democratically expressed by large portions of the public simply does not offend the Constitution.

V.

Having identified the asserted state interests furthered by Virginia's three-tiered ballot ordering law, we must at last weigh them against the law's burdens on the plaintiff's *First* and *Fourteenth Amendment* rights. Burdick, 504 U.S. at 434. Here our job is easy — this case is one of the "usual[]" variety in which the "State's important regulatory interests . . . justify reasonable, nondiscriminatory restrictions." Timmons, 520 U.S. at 358 (citation and internal quotation marks omitted).

The three-tiered ballot ordering law imposes little burden on ***Sarvis***'s constitutional rights, and Virginia articulates several important interests supporting the law. In these circumstances, we have "no basis for finding a state statutory scheme unconstitutional." Wood, 207 F.3d at 717. We leave further resolution of this controversy to a different and better set of arbiters: the people, and through them, the political branches.

AFFIRMED