No. __________

In the Supreme Court of the United States

ROBERT C. SARVIS,

Petitioner,

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,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

David I. Schoen
Counsel of Record
DAVID I. SCHOEN,
ATTORNEY AT LAW
2800 Zelda Road, Suite 100-6
Montgomery, AL 36106
(334) 395-6611
dschoen593@aol.com

Counsel for Petitioner

*Gibson*Moore Appellate Services, LLC
206 East Cary Street ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

QUESTION PRESENTED

This Court has long recognized, relying on expert studies, that there may well be a cognizable advantage to candidates for public elective office to be listed at the top of an election ballot and a material disadvantage to being listed last.

In this case the United States Court of Appeals for the Fourth Circuit held that candidates and voters have no First Amendment or Fourteenth Amendment (Equal Protection) right to challenge Virginia's ballot-ordering statute that requires the listing of major party candidates at the top of each ballot for public elective office and that relegates all minor party and independent candidates to the bottom of each ballot and upheld a Rule 12(b)(6) dismissal of the Complaint.

This decision creates a direct split of authority with every other United States Court of Appeals that has considered this important federal constitutional issue that implicates the constitutional rights of political candidates for public elective office and voters who wish to support them in elections around the country. It is vitally important for this Court to resolve this split of authority among the federal circuits and the states. Thus, the precise question presented is:

> Whether a Complaint brought by minor party candidates for public elective office and voters that challenges on First Amendment and Fourteenth Amendment Equal Protection grounds a state ballot-ordering statute that provides for all minor party candidates and independent candidates to be placed last on the ballot, with the major party candidates always listed at the top of each ballot, states a claim upon which relief can be granted.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED....................................... i

TABLE OF CONTENTS.. ii

TABLE OF AUTHORITIES...................................... v

PETITION FOR WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL AND
STATUTORY PROVISIONS INVOLVED................. 1

STATEMENT OF THE CASE 4

A. Proceedings Below 4

B. Relevant Facts Underlying the Decision Below 6

REASONS FOR GRANTING THE WRIT 8

The Fourth Circuit's Decision in this Case is Directly in Conflict with Decisions on this Exact Issue from Every Other United States Court of Appeals that has Decided this Same Important Matter of Federal Law and with Decisions of the Highest Court in States Across the Country and Cannot be Reconciled with this Court's Jurisprudence or a Whole Body of Ballot-Ordering Jurisprudence Dating Back at Least to 1930....... 8

This Court Should Resolve the Conflict and Provide Clear Guidance to the Lower Courts on this Important Matter of Federal Constitutional Law Impacting on the Rights of Political Candidates for Public Elective Office and Voters Across the Country 8

The Decision Below Ignores and is Contrary to the Decisions on this Exact Issue from Other Federal Circuits 10

The Decision Below Ignores and is Contrary to State High Court Decisions from Around the Country 12

The Lower Court Decision Ignores All Expert Studies 13

The Decision Below is Irreconcilable with Clearly Established Ballot-Access Analysis 15

The Fourth Circuit's Approach is Irreconcilable With Clearly Established Jurisprudence Under Fed. R. Civ. P. 12(b)(6) 20

CONCLUSION 23

APPENDIX:

Opinion, U.S. Court of Appeals for the Fourth Circuit entered June 20, 2016.................................... 1a

Opinion, U.S. District Court for the Eastern District of Virginia entered January 13, 2015 .... 23a

Order, U.S. Court of Appeals for the Fourth Circuit Denying Petition for Rehearing and Rehearing *En Banc* entered July 19, 2016.................................. 53a

TABLE OF AUTHORITIES

Page(s)

Cases:

Akins v. Secretary of State,
154 N.H. 67, 904 A.2d 702 (N.H. 2006) 12

Anderson v. Celebrezze,
760 U.S. 780 (1983) 18

Ashcroft v. Iqbal,
556 U.S. 662 (2009) 7, 20

Bell Atl. Corp. v. Twombly,
550 U.S. 544 (2007) 7

Bergland v. Harris,
767 F.2d 1551 (11th Cir. 1985) 19

Clingaman v. Beaver,
544 U.S. 581 (2005) 22

Clough v. Guzzi,
416 F. Supp. 1057 (D. Mass. 1976) 15

Conservative Party v. Walsh,
818 F. Supp. 2d 670 (S.D.N.Y. 2011) 12

Covey v. Assessor of Ohio County,
777 F.3d 186 (4th Cir. 2015) 7, 20

Credico v. New York State Bd. of Elections,
2013 U.S. Dist. LEXIS 109737
(S.D.N.Y., June 19, 2013) 21

Delaney v. Bartlett,
370 F. Supp. 2d 373 (M.D.N.C. 2004) 21

Elliott v. Secretary of State,
295 Mich. 245, 294 N.W. 171 (Mich. 1940)......... 12

Georgia Party of Ga. v. Georgia,
551 Fed. Appx. 982 (11th Cir. 2014) 18-19

Gilmore v. Gardner,
1994 WL 529922
(D. N.H., September 23, 1994)............................ 13

Gould v. Grubb,
14 Cal.3d 661, 122 Cal. Rptr. 377,
536 P.2d 1337 (Cal. 1975) 12

Graves v. McElderry,
946 F. Supp. 1569 (W.D. Okla. 1996) 13

Graves, Bd. of Election Comm'rs v.
Libertarian Party of Illinois,
591 F.2d 22 (7th Cir. 1979)................................... 13

Green Party of Ga. v. Georgia,
551 Fed. Appx. 982 (11th Cir. 2014) 16

Green Party of Tennessee v. Hargett,
767 F.3d 533 (6th Cir. 2014)......................... *passim*

Groesbeck v. Board of State Canvassers,
251 Mich. 286, 232 N.W. 387 (Mich. 1930)......... 12

Hall v. Greystar Mgmt. Servs., L.P.,
2016 U.S. App. LEXIS 1012
(4th Cir., January 21, 2016) 7, 20

Hall v. Merrill,
2016 U.S. Dist. LEXIS 135446
(M.D. Ala. Sept. 30, 2016) 18

Lee v. Keith,
463 F.3d 763 (7th Cir. 2006)................................22

Libertarian Party of Ill. v. Ill. State Board of Elections,
2016 U.S. Dist. LEXIS 22176
(N.D. Ill., February 24, 2016)..............................21

Lux v. Judd,
651 F.3d 396 (4th Cir. 2011)................................19

Mandel v. Bradley,
432 U.S. 173 (1977) 22

Mann v. Powell,
333 F. Supp. 1261 (N.D. Ill. 1969) 13

Matter of Holtzman v. Power,
62 Misc.2d 1020,
313 N.Y.S.2d 904 (NY 1970) 12

McLain v. Meier,
637 F.2d 1159 (8th Cir. 1980).............. 7, 10, 11, 16

McLaughlin v. N.C. Bd. of Elections,
65 F.3d 1215 (4th Cir. 1995)................................16

Morse v. Republican Party of Virginia,
517 U.S. 186 (1996) 14

Netch v. Lewis,
344 F. Supp. 1280 (N.D. Ill. 1972) 13

New Alliance Party v. New York Bd. of Elections,
861 F. Supp. 282 (S.D.N.Y. 1994) 15

Republican Party of N.C. v. Martin,
980 F.2d 943 (4th Cir. 1992)................................20

Sangmeister v. Woodard,
565 F.2d 460 (7th Cir. 1977) 7, 12, 16

SD3, LLC v. Black & Decker (U.S.) Inc.,
2015 U.S. App. LEXIS 18834
(4th Cir., October 29, 2015) 7

SD3, LLC v. Black & Decker (U.S.) Inc.,
801 F.3d 412 (4th Cir. 2015) 20, 21

Storer v. Brown,
415 U.S. 724 (1974) 22

Weisberg v. Powell,
417 F.2d 388 (7th Cir. 1969) 13

Statute:

28 U.S.C. § 1254(1) 1

Constitutional Provisions:

U.S. Const. amend. I... *passim*

U.S. Const. amend. XIV.................................... *passim*

U.S. Const. amend. XIV, § 1 1

Statutes:

Va. Code Ann. § 24.2-101 4

Va. Code Ann. § 24.2-613 .... 1, 4, 8, 17

Va. Code Ann. § 24.2-614 3

Rules:

Fed. R. Civ. P. 12(b)(6) .... *passim*

S. Ct. R. 10(a).. 8

S. Ct. R. 10(c) 8

Other Authorities:

R. Michael Alvarez, *Ballot Design Options*,
http://www.vote.caltech.edu/sites/default/
files/vtp_wp4.pdf (February 2002)...................... 14

H. Bain & D. Hecock, *Ballot Position and Voter's Choice: The Arrangement of Names on the Ballot and its Effect on the Voter*
(1957) 14

Mary Beth Beazley, *Ballot Design as Fail-safe: An Ounce of Rotation is Worth a Pound of Litigation*,
12 Election L.J 18 (2013) 13

Barry Clayton Edwards, *Race, Ethnicity, and Alphabetically Ordered Ballots*,
13 Election L.J. 394 (November 3, 2014).......... 13

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)..14

Professor Barry C. Edwards, *Alphabetically Ordered Ballots and the Composition of American Legislatures*,
State Politics & Policy Quarterly
Vol. 15(2) 171-191 (2015) 14

Note, California Ballot Position Statutes: An unconstitutional Advantage to Incumbents,
45 S. Cal. L. Rev. 365 (1972) 14

Note, Constitutional Problems with Statutes Regulating Ballot Position,
23 Tulsa L.J. 123 (1987) 14

Rebecca Wiseman, *So You Want to Stay a Judge: Name and Politics of the Moment May Decide Your Future*,
18 J. L. & Politics 643 (Summer 2002) 14

PETITION FOR WRIT OF CERTIORARI

Robert C. Sarvis ("Sarvis") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at 826 F.3d 708 (4th Cir. 2016)(App. at 1a-22a).[1] The opinion from the district court is reported at 80 F. Supp. 3d 692 (E.D. Va. 2015)(App. at 23a-52a).

JURISDICTION

The judgment of the court of appeals was entered on July 19, 2016. On October 11, 2016, Chief Justice Roberts granted an extension of time within which Mr. Sarvis could file a petition for certiorari to and including December 16, 2016. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment 1:

> "Congress shall make no law ... abridging the freedom of speech ... or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

---

[1] References herein to "App. ..." are to the Appendix accompanying this Petition.

United States Constitution, Amendment 14, Section 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Va. Code Ann. § 24.2-613. Form of ballot

A. The ballots shall comply with the requirements of this title and the standards prescribed by the State Board.

B. For elections for federal, statewide, and General Assembly offices only, each candidate who has been nominated by a political party or in a primary election shall be identified by the name of his political party. Independent candidates shall be identified by the term "Independent." For the purpose of this section, any Independent candidate may, by producing sufficient and appropriate evidence of nomination by a "recognized political party" to the State Board, have the term "Independent" on the ballot converted to that of a "recognized political party" on the ballot and be treated on the ballot in a manner consistent with the candidates nominated by political parties. For the purpose of this section, a "recognized political party" is defined as an

organization that, for at least six months preceding the filing of its nominee for the office, has had in continual existence a state central committee composed of registered voters residing in each congressional district of the Commonwealth, a party plan and bylaws, and a duly elected state chairman and secretary. A letter from the state chairman of a recognized political party certifying that a candidate is the nominee of that party and also signed by such candidate accepting that nomination shall constitute sufficient and appropriate evidence of nomination by a recognized political party. The name of the political party, the name of the "recognized political party," or term "Independent" may be shown by an initial or abbreviation to meet ballot requirements.

C. Except as provided for primary elections, the State Board shall determine by lot the order of the political parties, and the names of all candidates for a particular office shall appear together in the order determined for their parties. In an election district in which more than one person is nominated by one political party for the same office, the candidates' names shall appear alphabetically in their party groups under the name of the office, with sufficient space between party groups to indicate them as such. For the purpose of this section, except as provided for presidential elections in § 24.2-614, "recognized political parties" shall be treated as a class; the order of the recognized political parties within the class shall be determined by lot by the State Board; and the class shall follow the political

> parties as defined by § 24.2-101 and precede the independent class. Independent candidates shall be treated as a class under "Independent", and their names shall be placed on the ballot after the political parties and recognized political parties. Where there is more than one independent candidate for an office, their names shall appear alphabetically, ... (Va. Code Ann. § 24.2-613)

STATEMENT OF THE CASE

A. Proceedings Below:

Robert C. Sarvis, a candidate for national public elective office in Virginia and a Virginia voter, along with other members of the Libertarian Party of Virginia, the Libertarian Party of Virginia, and an independent candidate filed a Complaint in federal district court challenging Virginia's ballot-ordering statute, Va. Ann. Code § 24.2-613, on First Amendment and Fourteenth Amendment (Equal Protection) grounds. The statute at issue, set out herein below, requires that for all ballots for public elective office in Virginia, the candidates of major established political parties be placed at the top of the ballot, while any candidate from a minor political party and independent candidates be placed at the bottom of the ballot.

The defendants, members of the State Board of Elections, filed a motion to dismiss the Complaint under Rule 12(b)(6) of the Federal Rules of Civil Procedure, asserting that such a constitutional challenge fails to state a claim upon which relief can be granted. The district judge granted that motion and dismissed the constitutional challenge out of hand and without any opportunity for discovery or for

facts to be adduced demonstrating the burden and injury to plaintiffs or the merits of the purported interests defendants' claimed in support of the statute.

Mr. Sarvis appealed, *pro se*, to the United States Court of Appeals for the Fourth Circuit. The district court decision was affirmed and a motion for rehearing and rehearing *en banc* was denied.

The Fourth Circuit's decision is directly at odds with decisions from the three federal circuit courts of appeals that have considered this exact issue; yet not one of the decisions from any of those courts is even mentioned in the Fourth Circuit's decision. Similarly, the Fourth Circuit's decision is irreconcilable with decisions from the majority of courts of last resort from States across the country; yet they were ignored.

The Fourth Circuit's decision reflects its own findings of facts, unsupported by any evidence - by definition, since the case was dismissed under Rule 12(b)(6) without the opportunity to adduce facts - and it simply ignores the entire body of well settled case law that holds the exact question at issue to fundamentally require the submission of evidence and findings of facts based on the evidence.

The decision below ignores not just the decisions on this subject from the other federal circuit courts of appeals and highest state courts. It ignores as well, the abundant number of expert studies explaining why ballot-ordering schemes implicate fundamentally important First and Fourteenth Amendment rights of candidates and voters, along with a decision from this Court referring to such studies.

The decision below also is irreconcilable with this Court's established Rule 12(b)(6) jurisprudence.

B. Relevant Facts Underlying the Decision Below:

The case presents a compelling issue that affects fundamental constitutional rights and which the lower court resolved in a manner that is in direct conflict with decisions from every other federal circuit court of appeals that has addressed the issue and with the highest courts of many states around the country, indeed, most of the states that have addressed the issue. The lower court's decision is in direct conflict with the language in a decision from this Court as well. The resolution of these conflicts requires this Court's guidance and action.

Under the Virginia statute at issue in this case, political candidates for public elective office who run for office either as independents or as the candidate of a minor political party are listed last on the ballot, behind all candidates from larger, more established parties as a matter of law.

Ensuring the major parties such positional advantage on the ballot as a matter of law clearly implicates the fundamental First and Fourteenth Amendment rights of both political candidates and citizens who would cast their votes for them and otherwise associate with them and their political viewpoints and platforms.

Contrary to a long line of authority and the decisions from every other federal court of appeals that has considered the issue, the lower court in this case found there to be no constitutional right implicated from such a ballot-ordering scheme and, therefore, found that a constitutional challenge to this ballot-ordering scheme fails to state a claim upon which relief could be granted as a matter of law.

The resolution of these issues will have very significant consequences in a broad context around the country and well beyond this case. The question at issue is of constitutional significance for both candidates for public political and voters who seek to cast their vote for them and lower court's decision directly conflicts with the authoritative decisions of every other United States Court of Appeals that have addressed the issue.[2]

In fact, the Fourth Circuit'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 its decision.

Secondly, the Fourth Circuit'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).[3]

---

[2] *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).

[3] *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).

The lower court 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 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.

REASONS FOR GRANTING THE WRIT

The Fourth Circuit's Decision in this Case is Directly in Conflict with Decisions on this Exact Issue from Every Other United States Court of Appeals that has Decided this Same Important Matter of Federal Law and with Decisions of the Highest Court in States Across the Country and Cannot be Reconciled with this Court's Jurisprudence or a Whole Body of Ballot-Ordering Jurisprudence Dating Back at Least to 1930.

This Court Should Resolve the Conflict and Provide Clear Guidance to the Lower Courts on this Important Matter of Federal Constitutional Law Impacting on the Rights of Political Candidates for Public Elective Office and Voters Across the Country.[4]

The issue in this case is quite straightforward. The Fourth Circuit was asked to decide, in the context of a Rule 12(b)(6) motion to dismiss, whether a Complaint which alleges that Va. Code § 24.2-613's mandate that for all ballots for elective office in

---

[4] *See* Rule 10(a) and (c) of the Rules of the Supreme Court of the United States.

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 Fourth Circuit 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 purportedly evaluating the burden it believes ballot-ordering places on a minor party or independent candidate - by definition, given the Rule 12(b)(6) context - without providing even the opportunity for the parties to adduce any evidence bearing on the question. [App. 18a-22a] and the proffered state interests supporting it. [*Id*.]. The decision was based simply on the State's articulation of those interests (and no evidence supporting the interests) and, of course, no chance for Mr. Sarvis to challenge their applicability or validity.

The lower court 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.[5]

The Decision Below Ignores and is Contrary to the Decisions on this Exact Issue from Other Federal Circuits.

With all due respect, it is nothing less than shocking that the Fourth Circuit'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 the Fourth Circuit and whose decisions cannot in any way be reconciled with lower court'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

[5] 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 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.

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

---

[6] 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 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.

[7] 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 the lower court's decision with *McLain* and, of course, the curt below did not even try. It just ignored or overlooked this authoritative decision from the Eighth Circuit.

Sangmeister v. Woodard, 565 F.2d 460 (7th Cir. 1977).[8]

The Decision Below Ignores and is Contrary to State High Court Decisions from Around the Country.

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

---

[8] 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 the Fourth Circuit's Rule 12(b)(6) dismissal of Mr. Sarvis's ballot ordering claim with the decision in *Sangmeister*.

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).[9] *See also, Weisberg v. Powell*, 417 F.2d 388, 393 (7th Cir. 1969)(discussing candidates and their representatives who camped out overnight for a chance to be first on the ballot).

The Lower Court Decision Ignores All Expert Studies

Further, the Fourth Circuit 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*

---

[9] The lower court chose to refer to only one ballot-ordering challenge in which a court struck down a ballot-ordering statute as unconstitutional (Equal Protection grounds), [App. 16a], *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 court below 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 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."

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

This Court has recognized both the constitutional 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.[10]

---

[10] *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."

Not only did the Fourth Circuit fail entirely to mention the whole long and established line of authority recognizing the constitutional significance of a ballot-ordering scheme that relegates small party and independent candidates to the bottom of the ballot, the court failed to note that in most cases in which the small party or independent candidate 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.); *New Alliance Party 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). In short, the Fourth Circuit'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.

The Decision Below is Irreconcilable with Clearly Established Ballot-Access Analysis.

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 more) and implicates the First and Fourteenth Amendment rights of candidates and voters.[11]

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 in the States around the country in which their highest courts have so recognized and they raise fact questions in the Fourth Circuit, notwithstanding the decision below. In short, the Fourth Circuit's decision in this case is simply wrong and cannot be reconciled with this Court's jurisprudence or with any other United States Circuit Court of Appeals that has considered the constitutionality of a ballot-ordering scheme.

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

---

[11] *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).

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);

The Fourth Circuit ignored entirely what has long been an established fundamental tenet of analysis in ballot access jurisprudence. The requisite analysis established by this Court recently was reiterated yet again as follows:

> The Supreme Court has established an analytical framework for balancing the interests of political parties, candidates, and voters in engaging in the political process with the interests of States in conducting fair and effective elections. Under this framework, a court must first "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." .... **Second, the court must "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." .... Third, "the court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights.".... In this analysis, "the burden is on the state to 'put forward' the 'precise interests ... [that are] justifications for the burden imposed by its rule,'" and to "explain the relationship**

> **between these interests" and the challenged provision. .... "The State must introduce evidence to justify both the interests the State asserts and the burdens the State imposes on those seeking ballot access."**

Hall v. Merrill, 2016 U.S. Dist. LEXIS 135446 * (M.D. Ala. Sept. 30, 2016)(citations omitted), *quoting from Anderson v. Celebrezze*, 760 U.S. 780, 798 (1983)(emphasis added).

This is a fundamental principle of ballot access jurisprudence repeatedly enunciated by this Court and by courts around the country for well over thirty years; yet it was completely ignored by overlooked by the Fourth Circuit in this case, in favor of giving complete deference to Virginia's bald statement of its purported interests in favoring the major parties and relegating the minor parties and independent candidates to the bottom of every ballot.

Indeed, the Fourth Circuit even made findings of facts in support of Virginia's claimed interests, notwithstanding the procedural posture - a Rule 12(b)(6) motion to dismiss - and the absence, by definition, given that procedural posture, of evidence in support of and against such claimed interests.[12]

---

[12] The Fourth Circuit 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 and expressly prohibits exactly what the Fourth Circuit

In the absence of an actual record on this vitally important analytical element, the lower court apparently relied on nothing more than the viewpoint of the members of the panel and their own experience - clearly not an appropriate source in this context.[13]

Mr. Sarvis must be given a chance to discover all relevant facts and adduce those facts in the record. The lower courts in this case 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. This Court must review the decision below.

---

did here. *Anderson v. Celebrezze*, 760 U.S. 780, 798 (1983); *Georgia Party of Ga. v. Georgia*, 551 Fed. Appx. 982 (11th Cir. 2014)(State's claimed interests must be supported by evidence showing their applicability to the specific ballot access restriction at issue); *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). The lower court saw no need to actually allow Sarvis to have any evidentiary input into the equation. 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.

[13] A consideration of the Court's questions and comments during oral argument in this case, with all due respect, would tend to indicate that the decision was based, at least in part, on extraneous matters both beyond the record and without support anywhere, other than in a member of the Court's personal experience. For example, one member of the lower court panel opined that to him it made sense to list candidates from minor parties and independent candidates last on the ballot to make the voting process quicker and save him the aggravation of having to wait in a long line to vote. An official audio recording of oral argument is available for the Court's review.

The Fourth Circuit's Approach is Irreconcilable With Clearly Established Jurisprudence Under Fed. R. Civ. P. 12(b)(6).

The Fourth Circuit, like all other courts around the county, heretofore 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).* Nevertheless, in this case, this standard inexplicably was abandoned with respect to this important constitutional challenge.

The Fourth Circuit, 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.[14] Like the district court in *SD3*, the Fourth Circuit here 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.[15]

---

[14] 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. All of that was ignored in the Fourth Circuit's decision.

[15] For example, the court below 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 lower court 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 Fourth Circuit expressly found at least three time that the ballot ordering statute at issue is "facially neutral and nondiscriminatory." [App. 6a; 13a; 21a]. Respectfully, the lower court could not be more 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 lower court's decision. The lower court found, 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." [App. 13a-14a]. In apparent support for this totally unsupported (and unsupportable) conclusion, the court noted 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. [App. 3a, 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 lower court'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 Fourth Circuit'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(.)" [App. 22a], 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 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*.

CONCLUSION

For all of the foregoing reasons, this Honorable Court must grant the writ in this case and review the Fourth Circuit's decision in this case. There are fundamentally important constitutional rights of political candidates and voters at stake here and the Fourth Circuit's decision cannot be reconciled with authoritative decisions on this subject from all other federal circuit courts of appeal or with the highest courts of most states that have considered this exact issue, all of which are completely overlooked or ignored in the Fourth Circuit's 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 all other Circuits that have considered it and the State courts around the country identified above and must be permitted to proceed here. This Court's well established Rule 12(b)(6) jurisprudence demands action in this case on this importance constitutional question.

Respectfully Submitted,

/s/ David I. Schoen
David I. Schoen
Counsel of Record
Attorney at Law
2800 Zelda Road, Suite 100-6
Montgomery, Alabama 36106
Tel.: 334-395-6611
Fax: 917-591-7586
E-Mail: DSchoen593@aol.com

Counsel for Petitioner Robert C. Sarvis

APPENDIX
TABLE OF CONTENTS

Page:

Opinion in
U.S. Court of Appeals for the Fourth Circuit
entered June 20, 2016 .... 1a

Opinion in
U.S. District Court for the
Eastern District of Virginia
entered January 13, 2015 .... 23a

Order in
U.S. Court of Appeals for the Fourth Circuit
Denying Petition for Rehearing and
Rehearing *En Banc*
entered July 19, 2016 .... 53a

[ENTERED JUNE 20, 2016]

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-1162

LIBERTARIAN PARTY OF VIRGINIA; WILLIAM HAMMER; JEFFREY CARSON; JAMES CARR; MARC HARROLD; WILLIAM REDPATH; WILLIAM CARR; BO CONRAD BROWN; PAUL F. JONES,

Plaintiffs,

and

ROBERT C. SARVIS,

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.

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

Argued: May 10, 2016 Entered: June 20, 2016

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

Affirmed by published opinion. Judge Wilkinson wrote the opinion in which Judge Agee and Senior Judge Davis joined.

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.

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 focuses chiefly upon the ballot ordering law found in Virginia Code § 24.2-613. 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.

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]

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

[1] We note that as recently as the mid-1990s, the Virginia Reform Party satisfied 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.

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.

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

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. 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

---

[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.

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 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

---

[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 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).

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 (1992), and Anderson v. Celebrezze, 460 U.S. 780 (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 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.

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 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 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.

We begin with the uncontroversial proposition that 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 Constitution. With regard to congressional elections, Article I Section 4 Clause 1 of the Constitution provides: "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." 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 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 (2013) (quoting Foster v. Love, 522 U.S. 67, 69 (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 (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 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 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 (2005) (quoting Tashjian v. Republican Party of Conn., 479 U.S. 208, 217 (1986)); see also Bush v. Palm Beach Cty. Canvassing Bd., 531 U.S. 70, 76 (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 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.

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 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 (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 (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.

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.

The nature of our inquiry is "flexible" and "depends upon the extent to which a challenged 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. 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 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 order even to appear on the general election ballot at all. 479 U.S. 189, 190 (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 (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 (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 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 "[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 (2009)).

The problem for Sarvis is that even if there is a windfall vote, his complaint would still fail 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 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 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 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 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 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 (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 (1986) (O'Connor, J., concurring).

The Constitution therefore unsurprisingly "permits [a state legislature] to decide that political stability 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 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

[ENTERED JANUARY 13, 2015]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF VIRGINIA Richmond Division

ROBERT C. SARVIS,
et al.,

Plaintiffs,

v. Civil Action No. 3:14cv479

CHARLES E. JUDD,
et al.,

Defendants.

MEMORANDUM OPINION

This matter is before the Court on DEFENDANTS' MOTION TO DISMISS (Docket No. 23). At oral argument, Plaintiffs' counsel moved to dismiss Count II of the AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF (Docket No. 20) and the motion was granted (Docket No. 33). For the reasons set forth below, the motion to dismiss will be granted as to the remaining claim, Count I.

FACTUAL BACKGROUND

The Libertarian Party of Virginia, several of its candidates for the United States Senate and House of Representatives, and one independent (non-party) candidate for the United States House of Representatives (collectively, the "Candidates") filed a complaint against members of the Virginia State Board of Elections ("Board of Elections"). (Docket No. 1.) Pursuant to an Amended Complaint, (Docket No. 20), the Candidates sought declaratory and injunctive

relief from Virginia laws and practices that assign independent candidates and candidates from smaller parties a lower place on the voting ballot. The Candidates allege that these laws and practices violate their First and Fourteenth Amendment rights. (Am. Compl., Docket No. 20, ¶¶ 40, 54.)

According to Virginia state law, a "party" or "political party" is an organization of citizens of the Commonwealth that, at either of the two preceding statewide general elections, received at least 10 percent of the total vote cast for any statewide office filled in that election. Va. Code § 24.2-101. To qualify as a "party" or "political party," the organization must have a state central committee and an office of elected state chairman both of which have been continually in existence for the six months preceding the filing of a nominee for any office. Id.

A "recognized political party," on the other hand, is "an organization that, for at least six months preceding the .filing of its nominee for [an] office, has had in continual existence a state central committee composed of registered voters residing in each congressional district of the Commonwealth, a party plan and bylaws, and a duly elected state chairman and secretary." § 24.2-613. A "recognized political party" need not have received 10 percent of the total vote cast either of the last two statewide for a statewide office in general elections. The Libertarian Party of Virginia is a recognized political party under Virginia law. (Am. Compl., Docket No. 20, ¶ 6.)

The Board of Elections assigns candidates a place on the ballot in the order prescribed by Va. Code § 24. 2-613. Id. ¶ 18. That provision requires that "political party" candidates appear first on the ballot in an

order determined by lot. Candidates representing "recognized political parties" appear next on the ballot in an order determined by lot. Independent (non-party) candidates appear last on the ballot in alphabetical order. Because the Candidates are not "political party" candidates, they cannot be placed in the first position on the next ballot. Id. ¶ 21. The Candidates allege that this violates their constitutional rights because candidates who are listed at the top of an election ballot receive an unfair "positional advantage" that fortuitously yields more votes than candidates not listed at the top of the ballot and Virginia has reserved this positional advantage for major parties. Id. ¶ 23, 29.

DISCUSSION

I. Legal Standard

The Commonwealth has filed a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). To 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." Robinson v. Am. Honda Motor Co., 551 F.3d 218, 222 (4th Cir. 2009) (quoting Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (citing Twombly, 550 U.S. at 556). A court "will accept the pleader's description of what happened . . . along with any conclusions that can be reasonably drawn therefrom," but "need not accept conclusory allegations encompassing the legal effects of the pleaded facts." Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (3d ed.

1998); Chamblee v. Old Dominion Sec. Co., L. L.C., 2014 WL 1415095, *4 (E.D. Va. 2014). "Twombly and Iqbal also made clear that the analytical approach for evaluating Rule 12(b)(6) motions to dismiss requires courts to reject conclusory allegations that amount to mere formulaic recitation of the elements of a claim and to conduct a context-specific analysis to determine whether the well-pleaded factual allegations plausibly suggest an entitlement to relief." Id. In considering a motion to dismiss, the court may "properly take judicial notice of matters of public record." Philips v. Pitt Cnty. Mem'l Hosp., 572 F.3d 176, 180 (4th Cir. 2009).

II. Count I: Ballot Order Under Virginia Code § 24.2-613 ·

The importance of a fair and functional electoral system to a representative democracy can hardly be gainsaid. Indeed, the Supreme Court has found it "beyond cavil that voting is of the most fundamental significance under our constitutional structure." Burdick v. Takushi, 504 U.S. 428, 433 (1992) (internal citations and quotations omitted).

Of course, the right to vote in any manner one wishes is not "absolute." See id. And, without a meaningful system to capture and reflect the will of the People, the right to vote is a mere abstraction. Therefore, while the rights of the voters are fundamental, "not all restrictions imposed by the States on candidates' eligibility for the ballot impose constitutionally-suspect burdens on voters 1 rights to associate or to choose among candidates." Anderson v. Celebrezze, 460 U.S. 780, 788 (1983). If elections "are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic

processes," Storer v. Brown, 415 U.S. 724, 730 (1974), then "[c]ommon sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections," Burdick, 504 U.S. at 433. Hence, States may enact "comprehensive and sometimes complex election .codes" notwithstanding the fact that "[e]ach provision of these schemes . . . inevitably affects - 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.

As the Candidates' complaint reflects, ballot access and voting rights restrictions affect "interwoven strands of liberty." Id. at 787. Ballot access restrictions, for example, "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). Because "the rights of voters and the rights of candidates do not lend themselves to neat separation," Anderson, 460 U.S. at 786, the Supreme Court has "minimized the extent to which voting rights cases are distinguishable from ballot access cases," Burdick, 504 U.S. at 438. Rather than conducting separate, crosscutting analyses of electoral restrictions under the rubrics of associative rights, expressive rights, due process, or equal protection, the Supreme Court has articulated a single framework for evaluating the constitutionality of state election laws "based . . . directly on the First and Fourteenth Amendments." Anderson, 460 U.S. at 787 n.7; see also Pisano, 743 F.3d at 934.

This framework, established in Anderson v. Celebrezze and refined in Burdick v. Takushi, holds that "the State's asserted regulatory interests need

only be 'sufficiently weighty to justify the limitation' imposed on the party's rights." Timmons v. Twin Cities Area New Party, 520 U.S. 351, 364 (1997) (quoting Norman v. Reed, 502 U.S. 279, 288-89 (1992)). To apply the Anderson/Burdick test, the Court is guided by the following procedure:

> [The Court] must first 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. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule. In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighing all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Anderson, 460 U.S. at 789. "Depend[ing] upon the extent to which a challenged regulation burdens First and Fourteenth Amendment rights," the regulation will either face strict scrutiny review or *a* more deferential standard of review. Burdick, 504 U.S. at 434. When the plaintiffs' "rights are subjected to 'severe' restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. But when a state election law provision imposes only 'reasonable, nondiscriminatory restrictions' upon the First and Fourteenth Amendment rights of voters, the State's important regulatory interests are generally sufficient to justify the restrictions." Id. (internal citations and

quotations omitted). In other words, modest burdens are balanced "against the extent to which the regulations advance the state's interests," Pisano, 743 F.3d at 936, but there is a presumption that important state interests are "generally sufficient to justify reasonable, nondiscriminatory restrictions," Wood v. Meadows (Wood II), 207 F.3d 708, 715-717 (4th Cir. 2000) (citing Anderson, 460 U.S. at 789). Justice O'Connor summarized the rationale for this flexible approach in Clingman v. Beaver:

> This regime reflects the limited but important role of courts in reviewing electoral regulation. 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. Recognition of that basic reality need not render suspect most electoral regulations. Where the State imposes only reasonable and genuinely neutral restrictions on associational rights, there is no threat to the integrity of the electoral process and no apparent reason for judicial intervention. As such restrictions become more severe, however, and particularly where they have discriminatory effects, there is increasing cause for concern that those in power may be using electoral rules to erect barriers to electoral competition. In such cases, applying heightened scrutiny helps to ensure that such limitations are truly justified and that the State's asserted interests are not

> merely a pretext for exclusionary or anticompetitive restrictions.

544 U.S. 581, 603 (2005) (O'Connor, J., concurring) (emphasis added). The foregoing principles guide the analysis of the Candidates' contention that the Commonwealth has offended their rights by using a ballot that provides a "positional advantage" that, in turn, channels "windfall votes" to the Commonwealth's largest parties, while depriving smaller parties and independent candidates of the same opportunity to capture those "windfall votes."

A. The Candidates' Burden

The first step in the Anderson/Burdick analysis is to "consider the character and magnitude of the asserted injury" to the Candidates' constitutional rights. Examining the character and magnitude of the burden is pivotal because this assessment determines whether the Commonwealth's interests must be compelling and whether the Commonwealth's selected means must be narrowly tailored to its interests. When the restrictions imposed by the Commonwealth are neutral in character and reasonable in magnitude, the Court conducts a more deferential constitutional analysis and the Commonwealth's important interests will usually prevail.

The alleged burden in this case is that "candidates listed lower on the ballot are placed at a disadvantage compared to those who are listed in the top positions" due to a phenomenon known as "positional bias." (Am. Compl., Docket No. 20, ¶ 25); (Tr. of Oral Arg. 6, 44). "Positional bias" is the notion that higher ballot position - especially the first ballot position - "carries with it a certain statistical advantage." Clough v.

Guzzi, 416 F. Supp. 1057, 1062 (D. Mass. 1976). This perceived advantage is said to exist because of "the voting habits of a segment of the total electoral vote sometimes referred to as the 'windfall vote' or 'donkey vote', *i.e.,* the vote cast by citizens who are either uninformed about or indifferent to any or all of the candidates for a particular office on the ballot." Id. at 1063. According to this theory, the candidates placed higher on the ballot receive more votes than those placed lower on the ballot *"not* from any thoughtful or meaningful choice by voters, but from . . .voter fatigue, apathy or confusion." Graves v. McElderry, 946 F. Supp. 1569, 1579 (W.D. Okla. 1996).

Of course, the existence of this phenomenon alone is not - and could not be - the burden; rather, the restriction at issue is Virginia's statutory scheme, which involves placing the candidates of the established, and larger, parties ahead of smaller parties and independents on the ballot, thereby depriving the Candidates of an opportunity to reap the windfall vote. That occurs because the Commonwealth uses the so-called "tiered ballot order," a method employed by twenty-one other states. (Def. Ex. 2, State Survey, Docket No. 24-2.) The Commonwealth places "political parties" first, "recognized political parties" second, and independent (non-party) candidates third. Va. Code § 24. 2-613. Within the first and second categories, candidate order is determined by random drawing. Id. Within the third category, candidates are ordered alphabetically. Id. In order to qualify as a political party and be eligible for the first tier lottery, a party must receive at least 10 percent of the total vote cast for any statewide office in either of the two preceding general elections. Id. § 24. 2-101. The cumulative

effect of ballot-ordering regulations is to reserve the so-called "positional advantage" for larger parties with more widespread support. Cf. Pisano, 743 F. 3d at 933 ("When deciding whether a state's filing deadline is unconstitutionally burdensome, we evaluate the combined effect of the state's ballot-access regulations.").

The existence and degree of the "windfall-vote phenomenon" that underlies the asserted "positional advantage" theory is highly debated and subject to a multitude of confounding variables. See Clough, 416 F. Supp. at 1063 ("A number of written studies . . . purpor[t] to demonstrate the effects of the designation . . . of first position on the outcome of elections. Some of them support, and some contradict, plaintiff's factual premise."); New Alliance Party v. New York State Bd. of Elections, 861 F. Supp. 282, 288-90 (S.D.N.Y. 1994) (discussing the effect of incumbency, party affiliation, and race visibility on positional bias) However, for the purpose of resolving this motion, the Court assumes that the windfall vote phenomenon[1] exists and that some positional advantage accrues to those candidates whose names appear at the top of the ballot.

The Court is also initially skeptical that the windfall vote, if it does exist, is a burden of constitutional concern. It is not entirely clear that positional bias claims should have any constitutional

---

[1] The exact quantification of this phenomenon is not at issue. When asked at oral argument whether the Candidates intended to introduce evidence of the percentage at stake, counsel responded that their proposed expert "will not give a number." {Tr. of Oral Arg. 59.) Instead, counsel for the Candidates took the view that the number does not make a difference. Id.

significance because the theory of injury for such claims has been predicated to date upon the troubling notion that "windfall" votes are meaningless compared to "real" votes and thereby dilute the impact of votes cast by more "thoughtful" or "informed" voters.[2]

In typical vote dilution cases, malapportionment among fixed districts results in votes from large districts counting for less than votes cast in small districts because it takes a larger number of voters in the former district to have the same electoral impact as a smaller number of voters in the latter district. That form of disenfranchisement violates the constitutional principle of "one person, one vote" because each individual's vote is not accorded the same weight. See Reynolds v. Sims, 377 U.S. 533, 567 (1964).

On the other hand, under the prevailing positional bias case law, the Court is implicitly asked to look behind the motivations of individual voters and hold that their *reasons* for voting are invalid and have had the effect of making other voters' ballots less meaningful as a result. It is worth remembering that the "windfall vote" is not just a statistical anomaly of the social sciences; it represents individuals who went to the polls and cast ballots in a constitutionally protected exercise of their democratic rights. And, "an

---

[2] See Gould v. Grubb, 536 P.2d 1337, 1343 (Cal. 1975) (holding that an "election practice which reserves such an advantage for a particular class of candidates inevitably dilutes the weight of the vote of all those electors who cast their ballots for a candidate who is not included within the favored class"); Graves, 946 F. Supp. at 1579 ("This accrual of randomly or irrationally selected windfall votes causes a dilution of the number of votes which are meaningfully and thoughtfully cast by more careful or interested voters at the election polls.").

irrational vote is just as much of a vote as a rational one." New Alliance, 861 F. Supp. at 297. If candidates want the votes of uninformed voters, they should inform them. Clough, 416 F. Supp. at 1067 ("[Candidates] have access to those voters and may, in theory and possibly in practice, so educate them as to eliminate the donkey vote and thus eliminate the statistical position bias."). Moreover, and perhaps unfortunately, there is "no constitutional right to a wholly rational election, based solely on reasoned consideration of the issues and the candidates' positions, and free from other 'irrational' considerations." Id; see also Schaefer v. Lamone, 2006 U.S. Dist. LEXIS 96855, *12 (D. Md. Nov. 30, 2006), aff'd, 248 Fed. App'x. 484 (4th Cir. 2007).

Yet, the Candidates here have not explicitly cast their complaint in terms of vote dilution. Their contention is that ballot ordering requirements deprives them of a chance at the "windfall vote."

The ballot is accepted as "the state devised form through which candidates and voters are permitted to express their viewpoints." Graves, 946 F. Supp. at 1578. Because the ballot is an inherently and necessarily limited vehicle for political expression, the format and structure of the ballot may implicate expressive rights and present a cognizable restriction for the purposes of conducting the Anderson/Burdick analysis. See Burdick, 504 U.S. at 437-39 (weighing petitioner's claimed right to cast a "protest vote" under the Anderson framework and holding that the State's restriction "imposes only a limited burden on voters' rights to make free choices" because elections serve "to winnow out and finally reject all but the chosen candidates" rather than "a generalized expressive function").

Even assuming that positional bias exists and that it may be cause for constitutional concern, the Court concludes – and the parties agree - that the burden at issue in this case is not severe. (Tr. of Oral Arg. 45, 53.) Notwithstanding that agreement, it is useful to understand why the alleged burden is not a severe one.

To begin, the tiered approach here at issue is politically neutral notwithstanding the fact that it favors the traditional two-party system. The Supreme Court has "repeatedly upheld reasonable, politically neutral regulations that have the effect of channeling expressive activity at the polls." Burdick, 504 U.S. at 438. Thus, when a regulation is facially neutral and not "unreasonably exclusionary," it "may, in practice, favor the traditional two-party system." Timmons, 520 U.S. at 367.[3] That is Virginia's tiered-system.

First, Virginia's laws do not entrench particular, identifiable parties in power or foreclose smaller parties and independents from competing in any meaningful way.[4] By placing *any* party that has received at least 10 percent of the vote in the first tier

[3] Anderson distinguished between restrictions that permissibly "favor a 'two-party system'" and those that impermissibly favor "two particular parties - the Republicans and the Democrats - and in effect ten[d] to give them a complete monopoly" through the "virtual exclusion of other political aspirants from the political arena." Anderson, 460 U.S. at 802 (citing Williams v. Rhodes, 393 U.S. at 23, 31-32).

[4] The ballot ordering laws provide a reasonable and neutral system with a first tier threshold that can be, and has been, surpassed by third parties. (Def. Ex. 1, Declaration of Custodian of Records, Docket No. 24-1, at ¶¶ 6, 7, Ex. E at 32, Ex. F at 35) (listing the Virginia Reform Party, f/k/a Virginia Independent Party, first on the 1996 general election ballot after its 1994 nominee for U.S. Senate received 11.4% of the vote).

of the ballot, the regulation "in no way freezes the status quo, but implicitly recognizes the potential fluidity of American political life." Jenness v. Fortson, 403 U.S. 431, 439 (1971).

Second, tiered ballot ordering laws, such as Virginia's, that distinguish between parties with widespread electoral support and parties with less demonstrable electoral success have also been found neutral specifically in contrast to ballot ordering laws that place particular parties first on the ballot. Compare Graves, 946 F. Supp. at 1579 (holding unconstitutional a law that "effectively selects Democratic party candidates for public office for the top position . . . on any General Election ballot.") and Sangmeister v. Woodard, 565 F.2d 460, 462 (7th Cir. 1977) (holding unconstitutional a "practice by Illinois County Clerks of placing their own political party in the first or top position on voting ballots in all general elections") with Libertarian Party of Colorado v. Buckley (Buckley I.), 938 F. Supp. 687, 692 (D. Colo. 1996) ("Unlike the ballot position statute at issue in Graves, Colorado's statute is facially neutral. It does not classify candidates eligible for the first-tier ballot positions by party affiliation, nor does it relegate 'all candidates for public office other than those nominated by the Republican or Democratic Parties' to a second-tier position as Plaintiffs suggest.") and Bd. of Election Comm'rs of Chicago v. Libertarian Party of Illinois, 591 F.2d 22, 25 (7th Cir. 1979) ("In Sangmeister, [we required on remand] that 'the procedure adopted be neutral in character.' Different treatment of minority parties that does not exclude them from the ballot, prevent them from attaining major party status if they achieve widespread support, or prevent any voter from voting for the

candidate of his choice, and that is reasonably determined to be necessary to further an important state interest does not result in a denial of equal protection.").

Even if the law could be considered facially discriminatory against smaller parties with limited electoral support, a discriminatory burden is not *ipso facto* a severe one. See Reform Party of Allegheny Cnty. v. Allegheny Cnty. Dep't of Elections, 174 F.3d 305, 312, 315 (3d Cir. 1999) (holding that prescribing different fusion rules for major and minor parties "is, on its face, discriminatory," but applying "an intermediate level of scrutiny . . . to weigh, against the burdens imposed, any plausible justification the State has advanced"). The Fourth Circuit, for example, has not treated laws that classify on this basis as inherently severe. Compare McLaughlin v. N. Carolina Bd. of Elections, 65 F.3d 1215, 1221 (4th Cir. 1995) ("[T]he burden that North Carolina's ballot access restrictions impose on protected interests is undoubtedly severe.") with Pisano, 743 F.3d at 936 ("[W]e conclude that the [filing deadline] burden on Plaintiffs is modest. Because the deadline does not impose a severe burden, . . .we simply 'balance the character and magnitude of the burdens imposed against the extent to which the regulations advance the state's interests [.]' "). Here, as in Libertarian Party of Colorado v. Buckley (Buckley II), 8 F. Supp. 2d 1244, 1248 (D. Colo. 1998), the alleged discriminatory burden is "all but illusory" because "the Libertarian Party need only obtain 10% of the vote to [qualify for the first tier on the ballot]. . . . [A]ny assertion that 10% of the vote is unattainable reveals self-doubt uncharacteristic of any political

party, let alone one whose candidates have already qualified for the ballot in previous elections." Id.

Next, the ballot order regulation in Virginia is also a far cry from the kinds of restrictions that warrant strict scrutiny. For example, as in Timmons, the Virginia ballot format does not "restrict the ability of the [party] and its members to endorse, support, or vote for anyone they like. The laws do not directly limit the party's access to the ballot. They are silent on parties' internal structure, governance, and policymaking." Timmons, 520 U.S. at 363. As the Sixth Circuit has explained, "If a restriction does not affect a political party's ability to perform its primary functions, such as organizing, recruiting members, and choosing and promoting a candidate, the burden typically is not considered severe." Green Party of Tennessee v. Hargett, 767 F.3d 533, 547 (6th Cir. 2014) (internal quotations omitted).

The Candidates do not allege that they have been excluded from competing on the ballot. They have not been. There is no disputing that those who desire to vote for a Libertarian candidate or any other recognized political party or independent candidate can find their candidate of choice on the ballot, "a task made faster and easier by virtue of" the tiered design. See Schaefer, 2006 U.S. Dist. LEXIS 96855, at *12. "All that [the Candidates] really alleg[e] is that [their] opportunity to capture the windfall vote has been impeded." New Alliance, 861 F. Supp. at 295. That singular allegation of infirmity is significant because it demonstrates that the Commonwealth's restriction in no way "limit[s) the opportunities of independent-minded voters to associate in the electoral arena." Anderson, 460 U.S. at 794. Furthermore, the argument that "windfall voters" are prevented from

associating with the party of their choosing is an argument at war with itself. By definition, windfall voters have disregarded association in making their choice. If they have not, then they are not windfall voters. In short, any burden imposed by Virginia's ballot order statute is a minor one.

Neither the Candidates nor the Commonwealth argue that strict scrutiny is warranted here. (Tr. of Oral Arg. 45, 53.) The Court agrees. Those who desire to vote for a recognized political party candidate or an independent candidate face no barrier to doing so. Because the regulations at issue impose, at most, a modest burden on the Candidates' First and Fourteenth Amendment rights, the Court will undertake the more deferential constitutional analysis.

B. The State's Interests

Under the second step of the Anderson/Burdick framework, the Court must "identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule." Anderson, 460 U.S. at 789. Because the regulations pose only a modest burden, the regulations need not be compelling or narrowly tailored. Burdick, 504 U.S. at 434. The Commonwealth advances three justifications for its tiered ballot order: avoiding voter confusion, party-order symmetry, and favoring parties with demonstrated public support.

Before evaluating the legitimacy and strength of the Commonwealth's identified interests, however, the Court must address the Candidates' threshold contention that such evaluation is not permissible at this juncture because the Commonwealth has not demonstrated through empirical evidence that its

laws further or advance the foregoing interests. (Tr. of Oral Arg. 45-47.) The Candidates rely upon Reform Party of Allegheny Cnty. v. Allegheny Cnty. Dep't of Elections to make the point that courts must "insist on knowing the relation between the classification adopted and the object to be attained" and that, "unlike rational basis review, the intermediate standard of review . . . 'does not permit the Court to supplant the precise interests put forward by the State with other suppositions.'" 174 F.3d at 315-16. The Candidates also argue that the Supreme Court has required more demanding evidentiary support under the intermediate standards of review applied in gender-based equal protection claims and certain free speech claims. See United States v. Virginia, 518 U.S. 515, 536, 539 (1996) (undertaking a "searching analysis" and finding "no persuasive evidence in th[e] record" that the rule in question was "in furtherance of a state policy of 'diversity'"); Turner Broad. Sys., Inc. v. F.C.C., 520 U.S. 180, 195 (1997) (according "substantial deference to the predictive judgments of Congress," but "assur[ing] that, in formulating its judgments, Congress has drawn reasonable inferences based on substantial evidence").

The Candidates' position is not an illogical one. First, the standard of review applied to modest burdens under Anderson/Burdick occasionally has been characterized as "intermediate" by courts. See, e.g., Reform Party of Allegheny Cnty., 174 F.3d at 314. Second, courts employing the Anderson/Burdick framework frequently refer to the State's "important regulatory interests," which bears a striking similarity to most intermediate scrutiny tests. See United States v. Virginia, 518 U.S. at 533 ("The States must show at least that the challenged

classification serves important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.") (internal quotations omitted); Turner, 520 U.S. at 189 ("A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests."). Lastly, the Fourth Circuit itself has remanded a filing deadline case "for further factual development as to the burdens [of a filing deadline], and as to the interests of the Commonwealth in imposing that deadline." Wood v. Meadows (Wood I), 117 F. 3d 770, 776 (4th Cir. 1997) (emphasis added).

However, the weight of authority is not on the Candidates' side. Although there is a *presumption* that reasonable and nondiscriminatory election regulations will usually be upheld when the State proffers important state interests, Wood I, 117 F.3d at 773, the Anderson/Burdick test itself has been described as "flexible" because the "State's asserted regulatory interest need only be sufficiently weighty to justify the limitation imposed." Timmons, 520 U.S. at 364 (quoting Norman, 502 U.S. at 288-89). If the test consistently demanded intermediate scrutiny, the Burdick Court would not have found the "legitimate interests asserted by the State [to be] sufficient to outweigh the limited burden that the [restriction] impose[d) upon [the State's) voters." 504 U.S. at 440 (emphasis added); see also Beaver, 544 U.S. at 587 ("We are persuaded that any burden [the restriction] imposes is minor and justified by legitimate state interests.") (emphasis added). These

holdings bespeak a balancing test with a wide spectrum of outcomes. See Anderson, 460 U.S. at 789 (declining to apply a "litmus-paper test"); Pisano, 743 F.3d at 936 (balancing the "character and magnitude of the burdens imposed against the extent to which the regulations advance the state's interests"); Democratic-Republican Org. of New Jersey v. Guadagno, 900 F. Supp. 2d 447, 453 (D.N.J. 2012) aff'd, 700 F.3d 130 (3d Cir. 2012) (holding that Anderson "promulgated a less categorical system of classification" that is a "weighing process" not "pegged into the three [scrutiny] categories"). And, while the Fourth Circuit in Wood I remanded for factual development both as to the burdens and the interests, the Anderson framework had not yet been applied by the lower court *at all.* Wood I, 117 F.3d at 774. When the Plaintiff in that case appealed again, alleging that "the state must factually demonstrate the extent to which its interests make it necessary to burden the plaintiff's rights" even short of strict scrutiny, the Court firmly rejected the proposition, explaining that such an analysis is generally "limited to [regulations] that constitute an unreasonable, discriminatory burden." Wood II, 207 F.3d at 715, 716.[5]

It is true that, under Anderson, the Court must "identify and evaluate the *precise* interests put forward by the State," but precision does not equate

---

[5] In Wood II, the plaintiff argued that the Commonwealth was required to "factually demonstrate" with empirical evidence the extent to which the State interest necessitates the burden at issue. Id. at 715. The Fourth Circuit held that "the Anderson test simply does not require that a state justify 'reasonable, nondiscriminatory ballot access restrictions in this manner." Id. at 716.

to empiricism. The Court "insist[s] on knowing the relation between the classification adopted and the object to be attained" and will not "speculate about possible justifications" or "supplant the precise interests put forward by the State" with merely conceivable interests as it might under rational basis review. Reform Party of Allegheny Cnty., 174 F.3d at 315-16. But there is a difference between requiring the Commonwealth to clearly articulate precise interests with arguments tethered by reason and requiring the Commonwealth to produce hard data evidencing the teleological relation between the law and its stated aims.

Unless strict scrutiny is warranted, the Commonwealth need only marshal its interests and present a logical nexus. That enables the Court to conduct the weighing of precise interests required by Anderson. If the Commonwealth makes "no effort . . . to show why [its] interests justify [the regulation]" or the Court finds the reasons "unpersuasive" or the law "too broad or too narrow" to be justified, then the Court can hold the latter insufficient. Id. at 316-18. The Supreme Court has instructed no differently. See Timmons, 520 U.S. at 366 n.10 (weighing the State's "strong interest in the stability of [its] political syste(m)" based on the State's briefing and oral arguments); id. at 375, 377 (Stevens, J., dissenting) (noting that "the State's asserted interests must at least bear some plausible relationship to the burdens it places on political parties" and "the State has not convincingly articulated" how the statute advances its interest); id. at 383 (Souter, J., dissenting) (holding that "our election cases restrict our consideration to 'the precise interests put forward by the State'" and

courts must "judge the challenged statutes only on the interests the State has raised in their defense").

Moreover, it would be a curious rule that demanded the Commonwealth to prove empirically that its law furthered an interest that it did not need to prove empirically. In Timmons, the Supreme Court was quite clear that it did not require "elaborate, empirical verification of the weightiness of the State's asserted justifications." 520 U.S. at 364. "States are not required 'to make a particularized showing of the existence of voter confusion . . . prior to the imposition of reasonable restrictions.'" Pisano, 743 F. 3d at 937 (citing Munro v. Socialist Workers Party, 479 U. S. 189, 194-95 (1986)). Rather, "Legislatures . . . should be permitted to respond to potential deficiencies in the electoral process with foresight . . . , provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." Munro, 479 U.S. at 195. Holding otherwise "would invariably lead to endless court battles over the sufficiency of the 'evidence' marshaled by a State." Id. The same considerations apply here. The Candidates have aired conclusory doubt about the ballot's efficacy and thereby claim to have raised a factual dispute that forecloses dismissal at this stage of the case. However, the Commonwealth should not be made to carry a burden that is not legally its to bear. Demanding empirical evidence to support the imposition of every routine and ordinary electoral regulation would "hamper the ability of States to run efficient and equitable elections." Beaver, 544 U.S. at 593.[6] And, it

---

[6] Moreover, the conclusory allegations on which the Candidates rely would not suffice under Twombly and Iqbal even if the law were otherwise.

runs contrary to the explicit holdings of the Supreme Court and the Fourth Circuit.

In order to "identify and evaluate" governmental interests when the State has implemented reasonable and nondiscriminatory electoral restrictions, the Court must rely solely upon the precise interests put forth by the State, determine the legitimacy and strength of the interests, and ensure that the State's articulated rationale bears a plausible relationship to the burden imposed. The Court does not require elaborate, empirical verification that the State's interest is a weighty one or that the regulation chosen advances that interest. This approach distinguishes even the most forgiving Anderson analysis from rational basis review but exhibits an appropriate deference to the legislature's reasonable and nondiscriminatory judgments in a field explicitly reserved for a coequal branch. U.S. Const. art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof").

1. Avoiding Voter Confusion

The first interest identified by the Commonwealth is its interest in avoiding voter confusion. Developing and ordering ballots in a comprehensible and logical fashion helps prevent voter confusion and constitutes a compelling interest. See Schaefer, 2006 U.S. Dist. LEXIS 96855 at *12; see also New Alliance, 861 F. Supp. at 296 (holding that states have a compelling interest in "organizing a comprehensible manageable ballot."). As the court explained in New Alliance,

> A manageable ballot is one where the parties, offices and candidates are presented in *a* logical and orderly arrangement. Were the

> ballot to be arranged in a scattershot fashion, the average voter would be unable to discern an underlying rationale to the ballot's organization. Identifying candidates who can demonstrate the support to qualify for party affiliation and separating them from those who cannot is one method of keeping the ballot in a format that the voter can easily read and assimilate.

861 F. Supp. at 296.

According to the Commonwealth, tiered ballot ordering, unlike randomized and alphabetical ordering, allows voters to easily and quickly find candidates by party. (Def.' s Mot. To Dismiss, Docket No. 24, at 15.) By "simplifying the ballot order" and "having a clear ordering [by] party," the Commonwealth avoids voter confusion and makes it easier for voters to find candidates by party affiliation. (Tr. of Oral Arg. 22, 33-34.)

The Commonwealth's justification is not just plausible. It is eminently reasonable and logical. The Commonwealth has identified, and properly advanced, a state interest that is at least important, if not compelling.

2. Party-Order Symmetry

The second interest identified by the Commonwealth is its interest in party-order ballot symmetry. Streamlining the ability for voters to engage in "straight party voting" through party levers or other devices is an "important interest" because it speeds up the election process. See Meyer v. Texas, 2011 WL 1806524, *5 (S.D. Tex. 2011). In addition, courts have found that "constructing a symmetrical

pattern on the ballot" also falls within the "need to construct and order a manageable ballot and prevent voter confusion." New Alliance, 861 F. Supp. at 297.

The Commonwealth argues that tiered ballot ordering, unlike randomized and alphabetical ordering, also makes party symmetry across off ices possible. (Def.'s Mot. to Dismiss, Docket No. 24, at 15); (Tr. of Oral Arg. 23). "Voters see that the order is the same in each contest, making it easier to find the party-affiliated candidate of their choosing." (Def.'s Mot. to Dismiss, Docket No. 24, at 15.) In addition, "if you want to vote along party lines, it makes it easier for you to do that." (Tr. of Oral Arg. 22.)

Courts have recognized the government's interest in reducing voter confusion through a logical and comprehensible ballot format and improving the speed and ease with which voters cast their ballots. By maintaining the same party order across all offices on the ballot, the Commonwealth has implemented a system that is likely to improve the accuracy and efficiency of the voting process, an important state interest.

3. Favoring Parties with Demonstrated Public Support

The third interest identified by the Commonwealth is its interest in favoring parties that have demonstrated widespread support. This interest has been articulated in many ways, "political stability," "preventing excessive factionalism," and "preventing party-splintering," although these labels are not entirely interchangeable. In Timmons, the Supreme Court held that States "have a strong interest in the stability of their political systems" and can "enact reasonable election regulations that may,

in practice, favor the traditional two-party system." 520 U.S. at 366-67. Although "unreasonably exclusionary restrictions" will not be upheld, several courts have found it reasonable to condition ballot position upon past electoral performance or ballot access method. See Bd. of Election Comm'rs of Chicago, 591 F.2d at 27 ("[W]e think that it was permissible to . . . make the ballot as convenient and intelligible as possible for the great majority of voters, who, history indicated, would wish to vote for a candidate of one of the two major parties."); New Alliance, 861 F. Supp. at 299 ("[T]o assure the orderly conduct of elections, a State may design a ballot which rationally distinguishes between those entities that previously attracted significant public support and those that did not."); Meyer, 2011 WL 1806524 at *6 ("[F]ederal courts have noted a state's legitimate interests in basing ballot placement upon a showing of past strength among the electorate."); Democratic-Republican Org. of New Jersey, 900 F. Supp. 2d at 459 ("[I]t is important for voters to easily identify these candidates and parties on the ballot, which is accomplished by ensuring that candidates for political parties are clearly separated on the ballot from candidates nominated by petition.").

The Commonwealth contends that its ballot does not solely advantage two parties, but rather encourages "larger parties over a multiplicity of parties" by favoring "parties that have ten percent or more of the vote." (Tr. of Oral Arg. 25.) By placing larger parties at the top of the ballot, the Commonwealth gives "most voters who favor one of the major party candidates the easiest ability to find them on a ballot, particularly if [there are] a number

of candidates on the ballot." Id. at 34.[7] The Commonwealth claims that such an interest is permissible in the wake of Timmons.

The Commonwealth is correct. "The Constitution permits the Legislature to decide that political stability is best served through a healthy two-party system." Timmons, 520 U.S. at 367. If Virginia employs reasonable and neutral ballot ordering regulations, these regulations may favor the consolidation of larger parties. It is also quite plausible that the ballot format makes voting easier and more efficient for the vast majority of voters. By distinguishing between parties that have garnered more widespread electoral support and those that have not, the ballot provides a logical order that enhances the ability of voters to quickly comprehend important and objective information about the candidates and that fosters the stability of Virginia's political system.

C. The Constitutional Analysis

The final step in the Anderson/Burdick analysis is to weigh all of the factors and consider the extent to which the Commonwealth's interests make it necessary to burden the plaintiff's rights. See Anderson, 460 U.S. at 789. Because the ballot ordering regulations are reasonable and neutral, there is a presumption that the State's important regulatory interests will prevail. Id. at 788. Virginia

---

[7] The Court takes judicial notice of the fact that "[t]he vast majority of voters will choose a candidate from one of the major parties." (Def.'s Mot. to Dismiss, Docket No. 24, at 16.) See Hall v. Virginia, 385 F. 3d 421, 424 n. 3 (4th Cir. 2004) (noting it was proper during Rule 12 (b)(6) review to consider publicly available statistics on an official government website).

has recited a number of interests that are important, if not compelling, and has shown that its ballot design furthers those interests. The ballot ordering regulation is constitutional on that basis alone.

Yet, even if the Commonwealth's classification based on a reasonable threshold of prior electoral success required weighing, the burden alleged here would remain a minor one and the statute would survive Anderson's balancing test. "[T]o the extent that the plaintiff[s] experienc[e] any injury to [their] constitutional rights from [their] inability to be listed first on the ballot, that minor injury is outweighed by the state's regulatory interests in organizing a clear and intelligible ballot, presenting a logical arrangement based on the reasonable and nondiscriminatory basis of historical strength of support, and displaying candidates in a simple way that avoids voter confusion." Meyer, 2011 WL 1806524 at *6; see also Schaefer, 2006 U.S. Dist. LEXIS 96855 at *12 ("Even assuming that the burden on candidates and voters rises to the level of a constitutional harm, the State's interests outweigh that burden."); Buckley II, 8 F. Supp. 2d at 1249 ("Assuming, for the sake of argument, that the Ballot Position Statute infringes even slightly on voting rights, I reiterate my conclusion . . . that the character and magnitude of any such infringement is outweighed by the State's interest in regulating and organizing their elections.") (internal quotations omitted); Democratic-Republican Org. of New Jersey, 900 F. Supp. 2d at 459-60 ("Because the Plaintiffs' burden, if any, is negligible, any reasonable regulatory interest provided by the State will ensure the statutes' constitutionality under Anderson . . . I am satisfied that [the statutes] do not violate the

Equal Protection Clause or the First Amendment."). The Court concurs in the thoughtful analyses conducted by its sister courts throughout the country.

While randomized or rotational ballots may address the phenomenon of which the Candidates' complain (capture of the "windfall vote"), even courts that have found ballot ordering provisions constitutionally infirm have not found it "appropriate . . . to mandate a single form of procedure that must be followed in every election." Gould, 536 P.2d at 1343. This hesitancy reflects the very reason for a deferential review of the ballot design chosen by the Commonwealth. As the court observed in Clough v. Guzzi,

> [N]one of the available alternatives are themselves without disadvantages. Alphabetical order or a lottery would, in the end, give only one candidate first position, and would arguably entail an even more arbitrary system than the present one. The rotational system, . . . which a number of states have adopted, would presumably allow all candidates to occupy first position on an equal number of ballots, and thus share equally in the advantage. However, the system is more burdensome to administer and more costly because of the necessity of printing more than one ballot; some critics say that it is also more susceptible to tabulation error. Without meaning to overstate these difficulties, which may well be offset by the greater equity or appearance of equity provided by the rotational system, still we cannot say that a legislature could not rationally give some weight to them in declining to adopt such a system.

Clough, 416 F. Supp. at 1068. If Virginia has articulated a sufficiently weighty reason for its ballot design and employed reasonable regulations in its service, then the Commonwealth has acted within constitutional bounds and this Court may not stand in judgment of that discretion properly exercised by the legislative body. Virginia has met its obligations.

For the foregoing reasons, the Commonwealth's tiered ballot ordering law is constitutional and the Commonwealth's motion to dismiss will be granted as to Count I.

CONCLUSION

For the foregoing reasons, DEFENDANTS' MOTION TO DISMISS (Docket No. 23) will be granted as to Count I and denied as moot as to Count II, which has been dismissed voluntarily by the plaintiffs.

It is so ORDERED.

/s/
Robert E. Payne
Senior United States District Judge

Richmond, Virginia
Date: January 13, 2015

[ENTERED JULY 19, 2016]

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 15-1162
(3:14-cv-00479-REP)

LIBERTARIAN PARTY OF VIRGINIA; WILLIAM HAMMER; JEFFREY CARSON; JAMES CARR; MARC HARROLD; WILLIAM REDPATH; WILLIAM CARR; BO CONRAD BROWN; PAUL F. JONES

Plaintiffs

and

ROBERT C. SARVIS

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

O R D E R

The court denies the petition for rehearing and rehearing en banc. No judge requested a poll under Fed. R. App. P. 35 on the petition for rehearing en banc.

Entered at the direction of the panel: Judge Wilkinson, Judge Agee, and Senior Judge Davis.

For the Court

/s/ Patricia S. Connor, Clerk