

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

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

Plaintiffs,

v.

C.A. No.: 3:14CV479

**CHARLES E. JUDD,
DONALD PALMER,
and
KIMBERLY T. BOWERS,
each members of the
VIRGINIA STATE BOARD OF ELECTIONS**

Defendants.

**MEMORANDUM OF LAW IN SUPPORT
OF DEFENDANTS' MOTION TO DISMISS**

The defendants, Charles E. Judd, Donald Palmer, and Kimberly T. Bowers (collectively, “the Defendants”), by counsel, submit the following Memorandum of Law in support of their Motion to Dismiss pursuant to Federal Rules of Civil Procedure 8(a), 10(b), and 12(b)(6), with prejudice, the Complaint filed by the plaintiffs herein, Robert Sarvis, the Libertarian Party of Virginia, William Hammer, Jeffrey Carson, James Carr, William Carr, William Redpath, Paul F. Jones, Marc Harrold, and Bo Conrad Brown (collectively, “the Plaintiffs”).

I. FACTS

Virginia Code § 24.2-613 and Va. Code § 24.2-506(A) prescribe the form of Virginia's ballots and the method by which a candidate can qualify to appear on a ballot. Va. Code § 24.2-613 states, in relevant part, that a candidate for "federal, statewide, and General Assembly offices" will be identified "by the name of his political party" that nominated him for the office. Candidates that do not have a nominating political party will be identified as "Independent." *Id.* Independent candidates can also be nominated by a "recognized political party" that does not meet the other qualifications for being considered a "political party" pursuant to the definition found in Va. Code § 24.2-101 by meeting certain other qualifications set forth in §613. The main relevant difference between a "political party" defined by §101 and a "recognized political party" as defined in §613 for ballot identification purposes is that a §101 political party must have received "at least ten percent of the total vote cast for any statewide political office filled" in either of "the two preceding statewide general elections." There is no such requirement for §613 recognized political parties.

The individually-named plaintiffs (the "Candidates") are candidates for federal office in Virginia's upcoming November 2014 election. The Libertarian Party of Virginia (the "Libertarian Party"), which is fielding a slate of candidates in the election that includes some of the Candidates¹, is also a plaintiff.

On July 2, 2014, Plaintiffs filed this suit against the members of the State Board of Elections, individually and in their official capacity, seeking declaratory and injunctive relief from Va. Code §§ 24.2-613 and 24.2-506(A). The plaintiffs allege that these provisions violate their

¹ Robert Sarvis is the Libertarian Party candidate for a United States Senate seat from Virginia, William Redpath is the Libertarian Party candidate in Virginia's 10th Congressional District, William Hammer is the Libertarian Party candidate for the 6th Congressional District, James Carr is the Libertarian Party candidate for the 7th Congressional District, Jeffrey Carson is the Libertarian Party candidate for the 8th Congressional District, Marc Harrold is the Libertarian Party candidate for the 11th Congressional District, Paul F. Jones is the Libertarian Party candidate for the 5th Congressional District. Compl., p. 2-4. William Carr is an independent candidate for the 9th Congressional District and Bo Conrad Brown is an independent candidate for the 4th Congressional District. Compl., p. 4.

rights under the First and Fourteenth Amendments. Compl., p. 2, 5, and 10.

II. STANDARD OF REVIEW

A. Fed. R. Civ. P. 8(a), 10(b), and 12(b)(6)

Defendants bring this Motion to Dismiss pursuant to Fed. R. Civ. Pro. 8(a) and 10(b) for failure to set forth the claim in clear, simple, numbered paragraphs that are “each limited as far as practicable to a single set of circumstances,” and Fed. R. Civ. Pro. 12(b)(6), which provides for dismissal of a complaint for “failure to state a claim upon which relief can be granted.” The Complaint fails to state claim because it fails the plausibility test set forth in *Twombly*. This basis for the Defendants’ motion to dismiss should be evaluated under the standard of review set forth in *Twombly*, which requires that the Complaint must state on its face a “plausible” claim against the defendants.

In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Supreme Court of the United States held that district courts must examine the complaint to determine whether the plaintiff has alleged facts sufficient to make a particular cause of action “plausible.” Specifically, although on a Rule 12(b)(6) motion all facts pled by the plaintiff are assumed to be true by the court, the plaintiff must “provide the ‘grounds’ of his ‘entitlement to relief’” which “requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action.” *Id.* at 555 (internal citation omitted). Thus, a complaint must provide defendants more than mere “notice” of those claims that a plaintiff may bring against them, but a well-pled complaint will show why the plaintiff is entitled to relief, rather than just make a blanket assertion that the plaintiff was injured:

Rule 8(a)(2) still requires a ‘showing’, rather than a blanket assertion, of entitlement to relief. Without some factual allegation in the complaint, it is hard to see how a claimant could satisfy the requirement of providing not only ‘fair notice’ of the nature of the claim, but also ‘grounds’ on which the claim rests.

Id. at 554 n.3 (citing 5 Wright & Miller § 1202, at 94, 95 ("Rule 8(a) 'contemplates the statement of circumstances, occurrences and events in support of the claim presented' and does not authorize a pleader's 'bare averment that he wants relief and is entitled to it'")). Importantly, however, the "plausibility" standard set forth in *Twombly* requires more than a mere possibility that a defendant has acted unlawfully. *Id.* at 556. In *Ashcroft v. Iqbal*, the Supreme Court of the United States stated that this plausibility standard applies to "all civil actions and proceedings in the United States district courts." 556 U.S. 662, 129 S. Ct. 1937, 1953 (2009). In the instant case, Plaintiffs have made generalized allegations that the Defendants have violated their constitutional rights under the First and Fourteenth Amendments, but have failed to allege sufficient facts to support their claims.

IV. ARGUMENT

A. Section 24.2-613 of the Code of Virginia is constitutional

Plaintiffs allege that Va. Code § 24.2-613, which establishes the manner in which ballot order is determined, violates the First and Fourteenth Amendments. The Supreme Court of the United States has established that courts are to evaluate constitutionality of statutes governing the conduct of elections by using the two prong balancing test established in *Anderson v. Celebrezze*, 460 U.S. 780 (1983) and modified in *Burdick v. Takushi*, 504 U.S. 428 (1992). As applied by the Supreme Court of the United States in *Burdick*, the *Anderson/Burdick* balancing test requires that:

a court considering a challenge to a state election law must weigh "the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate" against the "precise interests put forward by the State as justifications for the burden imposed by its rule," taking into consideration "the extent to which those interests make it necessary to burden the plaintiff's rights."

Id. at 434 (citing *Anderson*, 460 U.S. at 789; *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 213-14 (1986)). Accordingly, in this case the Plaintiffs must initially show that the challenged statute represents a burden on their rights. If Plaintiffs make this showing, the Court must then determine whether this burden is justified by an appropriate State interest.

In *Burdick*, the Supreme Court considered the constitutionality of Hawaii's ban on write in ballots. The Court held that when applying the *Anderson/Burdick* balancing test, a "severe" restriction on voters' First and Fourteenth Amendment rights requires regulations that are "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 interest in regulating its ballots is sufficient to justify the imposition of reasonable restrictions. *Id.* (internal quotations and citations omitted) The Federal Circuit Courts that have weighed the constitutionality of statutes that regulate the order of candidates on a ballot to favor candidates from established, major political parties over candidates running as independents or from newly-established parties have found the regulations to be constitutional under the *Anderson/Burdick* balancing test.

For example, the Seventh Circuit affirmed the constitutionality of a ballot ordering procedure developed by the election officials of Cook County, Illinois in *Board of Election Commissioners of Chicago v. Libertarian Party of Illinois*, 591 F.2d 22, 25 (1979), *cert. denied*, 442 U.S. 918 (1979). The Cook County Board developed a ballot ordering scheme that created a two tier system in which "established political parties . . . that respectively polled at least five percent of the vote at the last election" were eligible to be selected in the county-wide lottery for the top ballot position. *Id.* at 23. The "new political parties" were listed below the established parties in the order in which they submitted their petition to be placed on the ballot. *Id.* As in the

case at issue challenging Virginia's §613, the Libertarian Party of Illinois challenged this tiered ballot ordering system as violating the Equal Protection Clause of the Fourteenth Amendment. *Id.*

While this case was decided before the Supreme Court heard *Anderson* and *Burdick*, the Seventh Circuit nonetheless engaged in a two-step analytical process in evaluating the constitutionality of the challenged ballot system. *Id.* at 25. In explaining its analysis, the Seventh Circuit noted that a statute which treats minority parties differently, without preventing ballot access or voters' freedom of choice, does not deny equal protection where the statute is "necessary to further an important state interest." *Id.*

The Seventh Circuit had previously decided that superior ballot placement was an advantage, and that a local practice in which election officials gave ballot placement priority to members of their own party violated the Fourteenth Amendment. *See Sangmeister v. Woodard*, 565 F.2d 460, 467 (7th Cir. 1977). However, other courts considering ballot ordering provisions that showed preference for candidates who were able to attract an affiliated party or for candidates who had already demonstrated they had a "significant modicum of support" by winning the support of a recognized party found that there was no significant harm in being listed below these candidates. *See Timmons v. Twin Citites Area New Party*, 520 U.S. 351, 358 (1997); *Jenness v. Fortson*, 403 U.S. 431, 441 (1971); *Meyer v. Texas*, 2011 U.S. Dist. LEXIS 50325, *17-19 (S.D. Tex. May 11, 2011); *Libertarian Party of Colorado v. Buckley*, 938 F. Supp. 687, 693 (D. Colo. 1996). Therefore, although the plaintiffs assert that appearing below §101 political parties on the ballot is a significant harm because there may be a "windfall vote" to whomever appears in the top position on the ballot, that assertion has not been found to be true as a matter of law and in fact should be greeted with some skepticism. *See New Alliance Party v.*

New York State Bd. of Elections, 861 F. Supp. 282, 295-97 (S.D.N.Y. 1994). In *New Alliance Party*, the court held that even if there was a demonstration that the top candidate could receive a “windfall vote,” there was no Constitutional right to that windfall. *Id.* Indeed, by organizing the ballot by placing established party candidates who have been vetted by parties with a demonstrated ability to attract a modicum of support from the general electorate first, and identifying the candidates by their party affiliation on the ballot, states may be preventing or minimizing the likelihood of a confused voter giving up in frustration and simply voting for whomever appears first. *See Meyer*, 2011 U.S. Dist. LEXIS 50325, *17-19 and cases discussed therein.

In *Libertarian Party of Illinois*, however, the Seventh Circuit held that election officials have a valid state interest in adopting a ballot format which decreases the likelihood of voter confusion, and therefore any injury caused by the loss of opportunity for a superior ballot position was balanced by the State’s interest in minimizing voter confusion. *Libertarian Party of Illinois*, 591 F.2d at 25. Specifically, the opinion found that where only the two major parties consistently nominate candidates for all open offices, maintaining a two-tier ballot format which places the established parties in the upper tier serves to minimize any voter confusion caused by variation in party ordering throughout a ballot, whereas placing all parties participating in any given election in a single tier could lead to a ballot format in which party order varies greatly from office to office, depending on which minor parties nominate candidates for which offices. *Id.* at 26. This would lead to less consistency than provided by a two-tier ballot order system which incorporates a single upper tier populated by major parties. *Id.*

In considering challenges raised against State procedures for determining ballot order, federal courts have concluded that States have a legitimate interest in enacting legislation which

serves to prevent voter confusion. In considering one such case, the Seventh Circuit held that:

A ballot placement system that places the major parties, each of whose candidates received substantially more votes than the candidates of minor parties at the preceding election, and who run full slates of candidates, in the top ballot positions, in an order determined by lottery, does not offend the *equal protection clause*, provided that the system is not adopted to disadvantage the minor parties but to improve the quality of the election.

Id. at 27. Because of the legitimate State interest in establishing a ballot order that minimizes voter confusion, the Seventh Circuit held that, a plaintiff must show “an intentional or purposeful discrimination by authorities in which one class is favored over another” to show that a challenged method of determining ballot order violates the Fourteenth Amendment. *Id.* at 25 (quoting *Bohus v. Board of Election Comm’rs*, 447 F.2d 821, 822 (7th Cir. 1971)). In the case at bar, the Plaintiffs have failed to provide any evidence of “intentional or purposeful discrimination,” by the Defendants, and instead rely on broad allegations of violations of their equal protection rights.

In fact, on its face Va. Code § 24.2-613 does not create a system of intentional or purposeful discrimination because it does not prevent any party from gaining access to the top spot on the ballot. Despite the Plaintiffs’ allegations regarding the excessive burden imposed by the definitions of “political party” and “recognized political party” under § 24.2-613, and the unequal treatment between the two party classifications, the Plaintiffs cannot show that this burden prevents ballot access, or prevents any party from qualifying for the top ballot position.

The Plaintiffs have failed to plead a plausible claim against the Defendants on Count I, because they have failed to allege that § 24.2-613 imposes a burden on their First and Fourteenth Amendment rights which is not justified by the reasonable state interests in establishing ballot order procedures that minimize voter confusion. Therefore, Count I of the Complaint should be

dismissed.

B. Va. Code § 24.2-506(A) is constitutional

The Plaintiffs also allege that the ballot access requirements imposed pursuant to Va. Code § 24.2-506(A) on §613 recognized political parties violate these parties' rights under the First and Fourteenth Amendments. However, the Supreme Court of the United States has unequivocally held that a State may take reasonable steps to control ballot access, because it has a demonstrable interest in producing a ballot which does not cause voter confusion or frustrate the democratic processes associated with elections. *Munro v. Socialist Workers Party, et al.*, 479 U.S. 189 (1986).

The Court has also recognized the importance of proactive regulation in this area, as requiring states to show harm caused by a lack of ballot access limitations before enacting regulations would work against state efforts to effectively conduct elections:

To require States to prove actual voter confusion, ballot overcrowding, or the presence of frivolous candidacies as a predicate to the imposition of reasonable ballot access restrictions would invariably lead to endless court battles over the sufficiency of the 'evidence' marshaled by a State to prove the predicate. Such a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action. Legislatures, we think, should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights.

Id. at 195-96. Thus, a state need not show it has faced issues such as those listed above before acting to prevent their future development.

The federal courts have determined that statutes that entirely prevent ballot access represent severe burdens and must be justified by a compelling state interest in regulation under the *Anderson/Burdick* balancing test. *See, e.g., Libertarian Party of Ohio v. Blackwell*, 462 F.3d 579, 585-86 (6th Cir. 2005). In cases where courts considered the constitutionality of less

restrictive ballot access regulations, however, they have upheld those regulations when a State can demonstrate a relevant state interest served by the statute. *See, e.g., Meyer v. Texas*, 2011 U.S. Dist. LEXIS 50325, *19 (S.D. Tex. May 11, 2011). In *Meyer*, the federal district court considered challenges to Texas's ballot procedures on a similar basis as the challenges articulated in the present suit. In Texas, however, the statutory burdens on candidates who did not belong to an established party were more onerous than the conditions being challenged in the case at bar. For example, Texas's signature requirement required signatures from voters who had not voted in a party primary. *Id.* at *8. *Cf.* Va. Code § 24.2-506(A), which has no such limitation on which Virginia voters may be signatories. The Texas balloting scheme also had a tiered system for listing candidates, but the Texas system listed the parties that fielded a candidate in the last gubernatorial election in order of votes received in that election, then the ballot listed parties that did not field a candidate, then independent candidates, then write in candidates. *Meyer*, 2011 U.S. Dist. LEXIS 50325, * 17.

Yet, even with a system that created multiple tiers of candidates and that expressly favored the winner of the last gubernatorial election, the federal court upheld the ballot provisions as constitutional. The court held that under the *Anderson/Burdick* test, any minor injury to the plaintiff caused by the ballot regulations at issue “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.” *Id.* at *19 *(citing New Alliance Party v. New York State Bd. of Elections*, 861 F. Supp. 282, 296 (S.D.N.Y. 1994)).

The same rationale applies to the ballot provisions at issue in the instant case, although with stronger force, because any injury is lessened by Virginia’s scheme, which imposes fewer

restrictions on who is eligible to sign the petition for candidates who are not members of a §101 political party. Virginia's scheme is also far less prejudicial to new political parties in the ballot order, in that there are fewer "tiers" and there is no bias in favor of the party that won the prior year's gubernatorial election. In fact, Virginia looks back two statewide elections not just one, and Virginia only requires ten percent of the total votes cast to be eligible for the lottery to win the top ballot spot. Va. Code § 24.2-613. The holding of *Meyer* clearly demonstrates that Virginia's ballot provisions should pass the *Anderson/Burdick* balancing test and be found constitutional.

More broadly, federal courts, including the Fourth Circuit, have repeatedly upheld ballot access statutes which require candidates to submit petitions signed by eligible voters to be placed on the ballot. *See, e.g., Munro*, 497 U.S. 189; *Jenness v. Fortson*, 403 U.S. 431 (1971). In *Jenness v. Fortson*, the Supreme Court concluded that states have an important interest "in requiring some preliminary showing of a significant modicum of support before printing the name of a political organization's candidate on the ballot -- the interest, if no other, in avoiding confusion, deception, and even frustration of the democratic process at the general election." *Jenness*, 403 U.S. at 442. In a later case, the Court concluded that states "surely [have] a valid interest in making sure that minor and third parties who are granted access to the ballot are bona fide and actually supported on their own merits, by those who have provided the statutorily required petition or ballot support." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 366 (1996) (upholding Minnesota's ban on fusion candidates).

Similarly, courts have upheld statutes regulating ballot access which require a far greater number of signatures than the presently challenged requirement. *See, e.g., American Party of Texas, et al. v. White*, 415 U.S. 767 (1973) (noting that a statute which requires the provision of

3% or 5% of the last election's overall vote is not facially invalid); *Storer, et al. v. Brown*, 415 U.S. 724 (1973) (holding that a 5% petition signature requirement was not facially unconstitutional); *Jenness*, 403 U.S. 431 (upholding a Georgia statute which required independent candidates to submit petitions signed by 5% of registered voters to gain ballot access). These cases demonstrate that other states have imposed percentage-based ballot access petition requirements which far exceed the maximum number required under Virginia law, which is 10,000 signatures, a figure that is a far smaller percentage of the total votes cast than five or even three percent.

These cases suggest that courts have considered the relative burdens associated with qualifying as a political party through prior voter turnout and with gathering sufficient signatures for a successful ballot access petition, and determined that they do not represent improperly disparate requirements. In fact, Justice White's majority opinion in *Jenness* directly noted that members of an established party faced a greater barrier to ballot access, because these individuals were required to participate in a primary with a number of other party candidates, whereas under the Georgia law in question a minor party or independent candidate could gain access to the ballot by submitting a complete petition. *Jenness*, 403 U.S. at 440-441.

As Justice White suggested under a similar statutory scheme in *Jenness*, it is possible that the §613 recognized political parties in fact receive a greater benefit through the system established in § 24.2-613 than the §101 political parties, as the burden of gathering at most 10,000 signatures pales in comparison to the efforts required to garner over 200,000 votes in a statewide election. *Id.* In fact, those parties which qualify as "political parties" under § 24.2-101 have effectively provided a preliminary showing of support through their large electoral returns in one of the two prior statewide elections.

Not only is it clear that the ballot access standards set out in § 24.2-506(A) are facially reasonable, but each of the individual Plaintiffs successfully gathered the requisite number of registered voter signatures to gain ballot access for the upcoming November 2014 federal election. Compl., p. 12. It is clear that Va. Code § 24.2-506(A) does not impose a severe burden on parties. The statute in no way prevents parties from exercising their associational rights under the First Amendment, nor does it impose disparate treatment on different parties in violation of the Fourteenth Amendment. Instead, this provision of the Virginia law furthers the Commonwealth's "relevant and legitimate" interest in ensuring that parties which gain ballot access have bona fide support, as held by the Supreme Court of the United States as a valid state interest. *See Munro*, 497 U.S. 189; *Jenness*, 403 U.S. 431. As the Plaintiffs have made no allegations which suggest a plausible challenge to this state interest, nor could they, Count II of the Plaintiffs' Complaint does not state a claim for relief. Accordingly, the defendants respectfully request that this court grant their motion to dismiss as to Count II of the Complaint with prejudice.

C. Defendants cannot be sued in their individual capacity

Plaintiffs' claims against the Defendants in their individual capacity are barred by the doctrine of qualified immunity. Qualified immunity protects "government officials performing discretionary functions . . . from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). In *Harlow*, the Supreme Court of the United States held that a strong public policy argument supports qualified immunity, so that "bare allegations of malice should not suffice to subject government officials to the costs of trial or the burdens of broad-reaching discovery." *Id.* Accordingly, the Supreme Court held that

"qualified immunity protects 'all but the plainly incompetent or those who knowingly violate the law.'" *Hope*, 536 U.S. at 752 (quoting *Malley v. Briggs*, 475 U.S. 335, 341 (1986)). "Officials are not liable for bad guesses in gray areas; they are liable for transgressing bright lines." *Johnson v. Caudill*, 475 F.3d 645, 651 (4th Cir. 2007). Because qualified immunity is "an immunity from suit rather than a mere defense to liability . . . it is effectively lost if a case is erroneously permitted to go to trial." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009)(quotation omitted).

It appears from the Complaint that the Plaintiffs are suing the Defendants solely in their official capacity for performing the ministerial acts prescribed by statute. However, to the degree the Complaint could be read as asserting a cause of action against the Defendants in their individual capacity for performing discretionary acts, that claim or claims would be barred by qualified immunity.

In order to determine the issue of qualified immunity, a court must ask: 1) whether the facts alleged make out a violation of a constitutional right and 2) whether that right was clearly established at the time of alleged misconduct. *Id.* at 232. "For a constitutional right to be clearly established, its contours must be sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Hope*, 536 U.S. at 739. In the case at bar, Plaintiffs have failed to plead facts which make out a violation of a constitutional right as discussed above. Even if this Court ultimately finds Virginia's ballot regulations to be unconstitutional, the case law upholding similar ballot regulations make it clear that Virginia's ballot regulations are not of a nature that would be clearly unconstitutional.

Furthermore, Plaintiffs have also failed to plead any alleged misconduct on the part of the individual defendants other than conformance with the law, as provided under §§ 24.2-506(A)

and 24.2-613. The Eastern District of Virginia has noted that in the Fourth Circuit “[s]uits against officials in their individual capacities cannot succeed absent proof of some degree of personal involvement in the alleged deprivation of rights.” *McDonald v. Dunning*, 706 F. Supp. 1156, 1160 (E.D. Va. 1991)(citing *Vinnedge v. Gibbs*, 550 F.2d 926, 928-29 (4th Cir. 1977); *Bennett v. Gravelle*, 323 F. Supp. 203, 214 (D. Md.), *aff’d* 451 F.2d 1011 (4th Cir. 1971), *cert. denied*, 407 U.S. 917, 92 S. Ct. 2451 (1972)). In the case at bar, the Plaintiffs do not allege any personal involvement by any of the defendants. Instead, the allegations are tied to the Defendants’ ministerial acts as members of Virginia’s State Board of Elections, carrying out statutory provisions. Indeed, the Plaintiffs allege that the statutes themselves are unconstitutional, rather than that the Defendants exercised their discretion in an unconstitutional way. Therefore, each of the individual Defendants should be dismissed and this court should hold they are sued only in their official capacities.

E. Plaintiffs Have Failed to Properly Request Injunctive Relief

Preliminary injunctive relief is “an extraordinary remedy never available as of right,” and is made available to a plaintiff only upon a “clear showing” “that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest.” *Winter v. NRDC, Inc.*, 555 U.S. 7, 20, 22, 24 (2008) *accord Monsanto Co. v. Geerston Seed Farms*, 130 S. Ct. 2743, 2756, 2761 (2010) (reversing an award of injunctive relief as an abuse of discretion); *Dewhurst v. Century Aluminum Co.*, 649 F.3d 287, 290 (4th Cir. 2011). A plaintiff must show each of these four factors. *Real Truth About Obama, Inc. v. FEC*, 575 F.3d 342, 346 (4th Cir. 2009), *vacated by* 130 S. Ct. 2371 (2010), *reinstated in pertinent part by* 607 F.3d 355 (4th Cir. 2010); *see Monsanto*, 130 S. Ct. at 2737 (“An injunction should issue only if the traditional four-

factor test is satisfied.”).

In this case, while the Plaintiffs have entitled Count III as “Preliminary and Permanent Injunctive Relief,” they fail to present arguments addressing each of the four requisite elements of a request for preliminary injunctive relief. Instead, Plaintiffs state the irreparable harm that justifies preliminary relief is simply that the alleged harm caused by the ballot scheme cannot be repaired by money damages. Compl, ¶ 57. However, as discussed above, any alleged harm is balanced by the state interest in regulating who appears on the ballot and in what order. Therefore, any “irreparable harm” justifying a preliminary injunction in the plaintiff’s favor is balanced by a corresponding harm to the state’s interests that weigh against an injunction.

Thus the plaintiffs cannot prevail on the requirement that a balance of the equities is in favor of a preliminary injunction. Contrary to their unsupported assertion that the plaintiffs will be harmed if there is no preliminary relief and that the members of the Board of Elections will suffer no harm whatsoever, the cases discussed above articulate harm to the state’s interests in regulating the ballot. Courts considering the balance of harms under the *Anderson/Burdick* test have found the state’s interest to prevail. Therefore, the plaintiffs’ unsupported assertion that the balance of equities tips in their favor fails as a matter of law. On the contrary, any harm suffered by the plaintiffs is so minimal that it is justified by the state’s interest and the voters’ interests in having a ballot that minimizes confusion and requires candidates to meet reasonable minimum standards to appear on the ballot.

Indeed, that the harms being weighed in this case are the alleged harms to the plaintiffs and whether that harm is justified by minimizing the harms to the public by having a ballot crowded with candidates that cannot meet even reasonable standards, in a random order determined by lottery for each office, forcing voters to wade through the sea of potential

candidates with no organizing principle whatsoever. On its face, the public would be clearly harmed by the award of any injunctive relief, much less preliminary injunctive relief which would be awarded before the plaintiffs have had to make any real proof that they have been harmed at all.

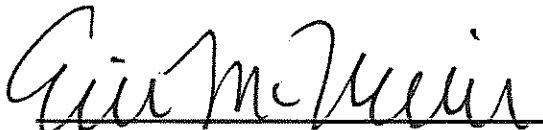
All of these arguments combine to defeat the final prong for preliminary injunctive relief: a likelihood that the party requesting the preliminary injunction is likely to prevail on the merits. The case law cited above articulates time and time again the failure of challenges to state ballot regulatory schemes that are even more onerous than Virginia's on the same arguments that the plaintiffs have asserted in the instant case.

V. Conclusion

Defendants respectfully request that this Motion to Dismiss be granted, that Plaintiff's Complaint be dismissed in its entirety and with prejudice because no amendment could cure the defects identified above, and that the Defendants be awarded their costs incurred herein.

Respectfully Submitted,

CHARLES E. JUDD,
DONALD PALMER,
and
KIMBERLY T. BOWERS
by counsel



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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of August 2014, I will electronically file the foregoing **Brief in Support of Motion to Dismiss** with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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