



3. On information and belief, the Mercer County Ballot Commissioners and Clerk Moyer chose to list those candidates who are members of the party (Republican) of the most recently elected President first on the ballot.<sup>1</sup> Therefore, the republican candidates for all offices up for election in 2020 in Mercer County are listed first on the ballot.

4. On information and belief, after the conclusion of the scheduled meeting of Ballot Commissioners, the proposed Mercer County Ballot (attached hereto as Exhibit A), was submitted to Mac Warner in his official capacity as West Virginia Secretary of State (hereinafter “Secretary Warner”).

5. On information and belief, such proposed 2020 Mercer County Ballot has been approved and ratified by the Secretary of State.

6. The proposed 2020 Mercer County Ballot has also been published on the Mercer County Election Office website.

7. Candidates listed first on a ballot benefit from a human tendency to choose the first candidate in a list of names. Accordingly, this proposed ballot would give certain candidates a significant advantage over others based solely on partisan affiliation.

8. The actions of the Defendants are in violation of the First and Fourteenth Amendments because such actions dilute votes for candidates whose political party is not favored by the Statute.

9. Further, the Defendants actions are in violation of the Fourteenth Amendment’s Equal Protection Clause because such actions treat one major political party (and its candidates, members, constituencies, and supportive voters and organizations) differently from the other

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<sup>1</sup> The West Virginia legislature enacted the state’s Ballot Order Statute in 1991. Such statute provided that “[t]he party whose candidate for president received the highest number of votes at the last preceding election is to be placed in the left, or first column, row or page, as is appropriate to the voting system...”

major party by granting an electoral advantage based solely on the party's performance in the last presidential election.

10. Mr. Oakley is running for the office of District 3-County Commissioner as a non-party candidate.

11. Due to the actions described above Mr. Oakley was placed after his republican counterpart solely due to the republican party's performance in the last presidential election.

12. On August 10, 2020, this Court filed an order addressing these exact unconstitutional actions. Two of the defendants in this current matter, Secretary Warner and the Ballot Commissioners, were even Defendants to such previously adjudicated matter. *See Case 3:19-cv-00898 Order August 10, 2020.*

13. It would be redundant and unnecessary to cite the entire legal analysis described in detail throughout the 41-page Order. However, the order explicitly describes the actions detailed above as being blatantly unconstitutional and unlawful. Further, the order **“PERMANENTLY ENJOINS** the defendants<sup>2</sup> from issuing any ballots prepared following the protocol described in §3-6-2(c)(3). In place of §3-6-2(c)(3), the defendants must implement a ballot ordering system that comports with the United States Constitution and other applicable law until the West Virginia legislature adopts a permanent alternative.”

14. The actions of the Defendants are a clear and unequivocal violation of this previously ordered permanent injunction.

15. This Court has jurisdiction over this matter as the underlying cause of action is one based on a violation of the United States Constitution.

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<sup>2</sup> As noted, both Secretary Warner and the Ballot Commissioners were named in the previous action, and therefore were directly already enjoined.

16. Pursuant to Rule 65(b) of the Federal Rules of Civil Procedure, this court may issue a temporary restraining order without written or oral notice to the adverse party if “immediate and irreparable injury, loss, or damage will result to the movant before the adverse party can be heard in opposition.”

17. On information and belief, the Secretary of State has already begun to print unconstitutional and unlawful ballots and will continue to print such ballots.

18. Without the requested relief such actions described above would cause an immediate and irreparable injury to the Plaintiff and would result in a permanent negative impact on the federal, state, and county elections.

19. Further, while the urgency of this matter would not permit or allow sufficient notification to be provided to the adverse parties, the Plaintiff notified the adverse parties of this Motion and corresponding Memorandum, via electronic mail, certified mail, and through the hiring of a process server, immediately after the filing of such documents.

20. The Plaintiff consents to give security in an amount that the court considers proper to pay the costs and damages sustained by any party found to have been wrongfully enjoined or restrained. However, the Plaintiff also alleges that the potential risk of having wrongfully enjoined or restrained any party is minimal due to the clear illegality of each party’s actions.

21. Therefore, all required conditions precedent to filing this motion have been met by the Plaintiff.

**PRAYER FOR RELIEF**

WHEREFORE, due to the urgency, and the potential for an immediate and irreparable injury, loss, or damage the Plaintiff respectfully requests that this Court temporarily restrain the

Defendants from proceeding with the proposed 2020 Election Ballot as such ballot is in violation of the Constitution of the United States of America, and violates the direct permanent injunction of this Court. Additionally, it is requested that this Court restrain Defendants from printing or preparing any ballots which were prepared following the protocol described in West Virginia Code §3-6-2(c)(3).

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