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

DEMOCRATIC PARTY OF VA., ET AL.,	)	
	)	
Plaintiffs,	)	
	)	
v.	)	**Civil Action No. 3:21-CV-756**
	)	
ROBERT H. BRINK, ET AL.,	)	
	)	
Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' RULE 12(b)(6) MOTION TO DISMISS

Defendants Robert H. Brink, John O'Bannon, and Jamilah D. LeCruise, in their official capacities as Chairman, Vice-Chairman, and Secretary of the Virginia State Board of Elections (SBE)[1], and Christopher Piper, in his official capacity as Commissioner of the Virginia Department of Elections (ELECT), by counsel, submit this memorandum of law in support of their Rule 12(b)(6) Motion to Dismiss for Failure to State a Claim. Plaintiffs fail to plead that they have suffered an injury to a right protected by the First Amendment, Fourteenth Amendment, Civil Rights Act, or Privacy Act. The requirement that a full Social Security number (SSN) be provided when registering to vote and the absentee voting cure process are facially valid.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs sued three of the members of the SBE and the Commissioner of ELECT on December 7, 2021. ECF No. 1. Robert H. Brink, John O'Bannon, and Jamilah D. LeCruise are

[1] The State Board of Elections consists of five members pursuant to Virginia Code § 24.2-102(A). Plaintiffs name only three of the five members in their Complaint.

the Chairman, Vice-Chairman, and Secretary, respectively, of the Virginia State Board of Elections (SBE). In those roles, Brink, O'Bannon, and LeCruise are charged with, "supervis[ing] and coordinat[ing] the work of the county and city electoral boards and of the registrars to obtain uniformity in their practices and proceedings and legality and purity in all elections."[2] Christopher E. Piper is the Commissioner of the Virginia Department of Elections (ELECT) and is its principal administrative officer.[3]

Plaintiff Democratic Party of Virginia (DPVA) is a political party, as defined by Virginia Code § 24.2-101, and is the officially recognized state party committee for the Democratic Party in the Commonwealth of Virginia. *Id.* at ¶ 18. Plaintiff DCCC is the national congressional campaign committee of the Democratic Party, as defined by 52 U.S.C. § 30101(14). *Id.* at ¶ 22.

Plaintiffs challenge two very different requirements regarding voting in Virginia. The first concerns the initial requirement, the information required to be included on an individual's voter registration application. The second concerns the time period a voter is given to correct certain deficiencies in their absentee ballot. Both challenges fail.

First, Plaintiffs challenge the Virginia Constitution's requirement that all Virginia voter registrants must provide their full SSN when registering to vote (SSN Requirement). Va. Const. art II, § 2. The Complaint contains numerous unsupported claims described below that the SSN Requirement in the Virginia Constitution violates the United States Constitution and federal law by:

- infringing their freedom of speech and right to associate, ECF No. 1 ¶¶ 95-109 **(Count I)**;

[2] Va. Code § 24.2-102(A).
[3] Va. Code § 24.2-102(B).

- infringing unnamed voters' right to vote, *id*. at ¶¶ 110-118 (**Count II**);
- violating unnamed voters' rights under the Privacy Act of 1974, *id.* at ¶¶ 109-124 (**Count III**); and
- unconstitutionally burdening unnamed voters' right to vote, *id.* at ¶¶ 139-143 (**Count VI**).

Second, Plaintiffs challenge the process adopted by the Virginia General Assembly that permits voters to correct deficiencies in their absentee ballots on or before the close of the two and a half day canvass period following an election (the Cure Process). Legislation permitting no-excuse absentee voting was enacted in April 2020. In March 2021, Virginia Code § 24.2-709.1 was amended to provide that if an absentee voter returned an absentee ballot by the Friday immediately preceding the day of the election, and if the general registrar finds certain enumerated deficiencies, that the general registrar must notify the voter in writing or by email of the deficiency. The voter is entitled to make necessary corrections before noon on the Friday following the election. See Va. Code § 24.2-709.1(C). The Complaint contains numerous unsupported claims regarding the opportunity to cure deficient absentee ballots, namely that the Cure Process:

- Denies certain voters due process because they do not have as much time as other voters to cure their ballots, ECF No. 1 ¶¶ 125-132 (**Count IV**).; and
- Violates the Equal Protection Clause by treating voters who return their ballots by the Friday preceding election differently than the voters who return their ballots after the Friday preceding election day, id. at ¶¶ 133-137 (**Count V**).

Any burden imposed on the voter or political parties by these voter registration

requirements or the regulation of the timing of the end of the canvass period is minimal in comparison with Virginia's compelling interest in ensuring "fair and honest" elections. See *Greidinger v. Davis*, 988 F.2d 1344, 1345 (4th Cir. 1993) (noting that is appropriate for states to maintain substantial regulations regarding "the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates."). Accordingly, Plaintiffs fail to state a claim that Virginia's elections regulatory scheme is unconstitutional or unlawful.

LEGAL STANDARD

Pursuant to Rule 12(b)(6), a defendant may move to dismiss a complaint for "failure to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). In deciding a motion to dismiss under Rule 12(b)(6), the Court "accept[s] as true all well-pleaded allegations and view[s] the complaint in the light most favorable to the plaintiff." *Philips v. Pitt County Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009). But the complaint's factual allegations "must be enough to raise a right to relief **above the speculative level**" and "to state a claim to relief that is plausible on its face." *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) (emphasis added). "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) (emphasis added). Conclusory statements and facts "merely consistent with a defendant's liability" do not suffice to carry a complaint over 'the line between possibility and plausibility.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). The Court "'need not accept the [plaintiff's] legal conclusions drawn from the facts,' nor need it 'accept as true unwarranted inferences, unreasonable conclusions, or arguments.'" *Phillips*, 572 F.3d at 180

(quoting *Wahi v. Charleston Area Med. Ctr., Inc.*, 562 F.3d 599, 616 n.26 (4th Cir. 2009)).

The Supreme Court concluded that courts are to evaluate the 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 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 (quoting *Anderson*, 460 U.S. at 789; citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 213-14 (1986)). Plaintiffs must initially show that the challenged statute represents a burden on their rights. If they make this showing, the Court must then determine whether this burden is justified by an appropriate state interest. Where a state regulation imposes only minor burdens, under the *Anderson/Burdick* framework "a State's 'important regulatory interests' will usually be enough to justify 'reasonable, nondiscriminatory restrictions.'" *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997) (quoting *Burdick*, 504 U.S. at 434).

Plaintiffs DPVA and DCCC fail to show that any burden imposed on them by the challenged laws outweigh Virginia's compelling interest in its regulatory scheme. Virginia must be permitted to ensure that its elections are uniform, legal, and pure, as required under Virginia Code § 24.2-103(A), and that all qualified individuals under Article II, Section 1 of the Virginia Constitution are offered the opportunity to register to vote.

ARGUMENT

I. Plaintiffs Fail to Show that Virginia's SSN Requirement is Unconstitutional or

Violates Any Provision of Law

Virginia's requirement that a voter registration application include the applicant's SSN dates back to 1971. Plaintiffs state no more than vague allegations that unnamed individuals might not register to vote for fear of disclosing their SSN. Significantly, Plaintiffs do not allege with any specificity that particular individuals have or will refuse to register to vote as the result of the SSN Requirement. Instead, data shows that voters are eager to register, despite the SSN requirement, as voter registration is increasing. Plaintiffs' allegations are thus not only insufficient to sustain their claims of unconstitutionality and illegality, but are also contradicted by current voter registration data.

A. Virginia has a compelling state interest in requiring a voters' full SSN

When considered in the *Anderson/Burdick* framework, the First and Fourteenth Amendment claims are meritless. As the Fourth Circuit noted in a prior challenge to the requirement of a SSN on voter registration applications, the Commonwealth has a compelling interest in this requirement—namely that it assists elections officials in assuring that the voter is qualified to vote in the Commonwealth and assuring that voter registration rolls are maintained accurately.

> As a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if **some sort of order, rather than chaos**, is to accompany the democratic processes. In any event, the states have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates.

Greidinger v. Davis, 988 F.2d 1344, 1345 (4th Cir. 1993) (emphasis added).

In *Greidinger's* remand to the lower court, the Fourth Circuit explicitly instructed

Virginia to ensure that, going forward, voters' SSN were not disclosed when voter registration applications were made available for public inspection. *Id.* at 1355. At the time of Greidinger's suit, Virginia law made voter registration applications available for public inspection without a requirement that voters' SSN had to be redacted or otherwise protected from public inspection. *Id.* at 1347. Virginia law now contains an express prohibition on disclosure of SSN of registered voters. See Va. Code § 24.2-405(C) ("In no event shall any list furnished under this section contain the social security number, or any part thereof, of any registered voter . . .").

The Commonwealth and its elections officials, named as defendants here, are very attuned to ensuring that qualified Virginians are registered to vote while also simultaneously protecting the security of the personal information provided by applicants. In addition to attentiveness to their responsibility to maintain the confidentiality of SSNs[4], ELECT works closely with other Virginia agencies to ensure the continued strength of its information technology systems.

B. Plaintiffs fail to show that the SSN Requirement violates their First Amendment Rights (Count I)

1. Freedom of Speech is not infringed

Since 1971, Article II, Section 2 of the Constitution of Virginia has required that "[a]pplications to register shall require the applicant to provide the following information on a standard form: full name; date of birth; residence address; **social security number**, if any; whether the applicant is presently a United States citizen; and such additional information as may

[4] Of further note, ELECT was recognized for its commitment to cybersecurity by the Virginia Alliance for Secure Computing & Networking. See Va. Dep't of Elections, *Virginia Department of Elections CIO/CISO Wins Award for Strengthening the Commonwealth's Cybersecurity* (last visited January 12, 2022), https://www.elections.virginia.gov/news-releases/virginia-department-of-elections-ciociso-wins-award-for-strengthening-the-commonwealths-cybersecurity.html.

be required by law." (emphasis added). Plaintiffs allege that the SSN Requirement "chills Plaintiffs' First Amendment rights," ECF No. 1 ¶ 96, because it "hinders Plaintiffs' ability to conduct voter registration activities in the state" and "hinders Plaintiffs' associational rights by making it harder for them to successfully associate with voters who would support Democratic candidates in Virginia." Both claims are unfounded.

Plaintiffs rely on allegations that their right to enjoy core political speech under the First and Fourteenth Amendment were violated by the Commonwealth's collection of full or partial social security numbers. These claims must fail because Plaintiffs do not provide any non-speculative information that the SSN Requirement hindered their attempts to register voters. Further, Plaintiffs provide no information indicating that prospective voters would be further inclined to register if they were permitted to provide partial Social Security numbers to assist in voter registration. Plaintiffs do not allege that any individual refused to register to vote in any prior election as the result of the SSN Requirement. ECF No. 1 ¶¶ 1-7, 27-74. Rather, they merely rely on bare allegations that the "DCCC's and DPVA's **fear** that the full SNN Requirement will deter association and chill their First Amendment rights." *Id.* at ¶ 108. Such speculative assertions are no basis for a complaint regarding the SSN Requirement.

Plaintiffs' complaint is devoid of any actual account of a voter not registering to vote due to the SSN Requirement. Indeed, no individual voter is even a plaintiff in this matter. In Count I, Plaintiffs assert that the SSN Requirement "chills Plaintiffs' First Amendment rights." ECF No. 1 ¶ 96. Plaintiff organizations make bare assertions that voters **may** be discouraged from registering to vote due to the SSN Requirement and further that voter registration drives have been hindered by the SSN Requirement. ECF No. 1 ¶¶ 95-109. Similarly, Plaintiffs allege that

individuals are being "denied the right to vote based on an issue immaterial to their eligibility and qualifications to vote," ECF No. 1 ¶ 118, but unidentified voters who are not plaintiffs are insufficient to withstand a motion to dismiss.

Plaintiffs base their allegations that these unidentified, nameless voters fear providing their Social Security number because of a further unsupported claim that Virginia's voter registration system may be compromised. The Virginia Code plainly states that "[n]o election record containing an individual's social security number, or any part thereof, shall be made available for inspection or copying by anyone."[5] Plaintiffs simply rely on conjecture that voters *might* be deterred from registering because of an unfounded assertion that voter information will be illegally used in Virginia.[6]

Further, just as Plaintiffs fail to show that any individual has *actually* declined to register to vote, Plaintiffs similarly fail to show any evidence that they have been hindered in assisting voters to register to vote. Plaintiffs make unsubstantiated assertions that voters *may* not be registering to vote because of the SSN Requirement, but do not provide actual accounts of voters declining to register because of the SSN Requirement. Plaintiffs' claims are entirely speculative and, accordingly, Plaintiffs fail to state a claim under Count I of their Complaint.

2. Plaintiffs' Right to Freedom of Association is not infringed

Plaintiffs associational rights to acquire voters are not implicated. When considering the alleged impingement of associational rights,

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[5] Va. Code § 24.2-107.

[6] Publicly available voter registration statistics do not support a claim that Virginians are reticent to register to vote. In 2021, 35,978 individuals registered to vote, more than 10,000 as many voters as registered in 2020. Compare *2021 New Registrants by Locality*, https://www.elections.virginia.gov/media/registration-statistics/2021/11/reg-stats-nov-pdf/pdfnovember-2021-stats-for-web/Monthly_New_Registrant_By_Locality_2021_12_01_053159.pdf with 2020 New Registrants by Locality, https://www.elections.virginia.gov/media/ registration-statistics/2020/01/New_Registrant_By_Locality.pdf (both webpages last accessed January 11, 2022).

> 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. It then must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule.

Marcellus v. Va. State Bd. of Elections, 849 F.3d 169, 171 (4th Cir. 2017).

Plaintiffs have made no substantive allegation that they have suffered actual injury from the requirements under either the SSN Requirement or the Cure Process. Qualified voters may register to vote as they prefer, be it with a representative from Plaintiffs' organization, at a state agency, or online. All requirements regarding registration to vote are applied equally to **all** Virginia voters.

Simultaneously, the Commonwealth is required to carry out a plethora of tasks in order to ensure that each election is carried out properly and that only qualified voters case their ballot.

C. Plaintiffs Fail to Show that Requiring Applicants to Provide their Social Security Number Violates the Civil Rights Act (Count II)

Section (a)(2)(B) of the Civil Rights Act of 1957 states,

> No person acting under color of law shall . . . deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission *is not material* in determining whether such individual is qualified under State law to vote in such election[.]

52 U.S.C. § 10101(a)(2)(B).

Accordingly, Plaintiffs fail to show that the requirement to provide a Social Security number when registering to vote is immaterial, and Plaintiffs fail to state a claim under Count II of their Complaint. Plaintiffs have registered voters successfully thus far during years in which the SSN Requirement was in place.

D. Plaintiffs' claim that the Social Security Number Requirement violates the Privacy Act of 1974 is without merit (Count III)

Section 7(a)(1) of the Privacy Act of 1974 "makes it unlawful for a state to deny individuals the right to vote if they refuse to disclose their SSN," ECF No. 1 ¶ 120. However, as even Plaintiffs acknowledge, Virginia is exempted from this rule: "[a] state may be excused from this law only if it *required* the disclosure of SSNs to verify individuals' identities before January 1, 1975." *Id.* The statute does not apply to any disclosure of a social security number to any state agency maintaining a system of records in existence and operating before January 1, 1975, if such disclosure was required under statute or regulation adopted prior to such date to verify the identity of an individual.[7]

Virginia's SSN Requirement has been in place in the Virginia Constitution since 1971. Va. Const. art. II, sec. 2. Where the SBE and ELECT operate in full compliance with the federal Constitution and federal law, the Commonwealth's SSN Requirement is not a violation of any federal law. Thus, Virginia is exempt from section 7 of the Privacy Act of 1974, and Plaintiffs fail to state a claim under Count III of their Complaint.

E. Plaintiffs' claim that the Social Security Number Requirement burdens their right to vote is without merit (Count VI)

Plaintiffs' claim that the SSN Requirement is an unconstitutional burden on their right to vote is without basis or merit. Plaintiffs provide no evidence that any voter who may vote for a candidate supported by their organizations has been hindered by the SSN Requirement. Indeed, none of the named Plaintiffs are actual Virginia voters. Rather, Plaintiffs raise speculative claims about potential voter impact that have not yet been shown to occur. Accordingly, Plaintiffs do not have standing to assert the right to vote of a Virginia voter has been impaired nor do they show

[7] Privacy Act of 1974 § 7(a)(2)(A)-(B).

any evidence that the right to vote of any Virginia voter has been impaired. As such, Plaintiffs fail to state a claim as to Count VI of their Complaint.

II. Plaintiffs Fail to Show that the Cure Process is Unconstitutional or Violates the Law

Virginia voters have forty-five days prior to the election to cast an absentee ballot. While voters have no inherent right to cure deficiencies in their absentee ballots, in 2021, the General Assembly created a notice and cure process to ensure that Virginians who cast ballots that were technically deficient had their ballots counted and voices heard (the Cure Process).[8] The deadline for these voters to cure the deficiencies is by noon on the Friday following the election, also known as the end of the canvass period.[9] Voters are given this opportunity to cure if:

- an absentee voter returns an absentee ballot by the Friday immediately preceding the day of the election;
- the general registrar finds certain deficiencies in the ballot or accompanying paperwork, as explained in more detail in Virginia Code § 24.2-707; and
- the general registrar notifies the voter in writing or by email of the deficiency and of the voter's ability to cure.[10]

A. Plaintiffs Fail to Show that the Cure Process denies due process (Count IV)

Contrary to Plaintiffs' allegations, Virginia provides more than ample due process for voters who vote absentee and whose ballots are discovered to contain curable deficiencies. The cure process is neutral in its application—applying to any Virginia voter who votes absentee regardless of their protected status—and gives any Virginian who falls within the scope of the law an opportunity to make their vote count when they otherwise would not.

The philosophy behind the deadline for curing is not an intention to provide all voters an

[8] Va. Code § 24.2-709.1(C).
[9] By way of example, in 2021, the general election occurred on Tuesday November 2. Thus, any voter who returned an absentee ballot on or before Friday, October 27 would be notified by the General Register and given the opportunity to cure the deficiencies in their ballot by noon on Friday, November 5.
[10] *Id.*

equal amount of time to cure, but rather to ensure that as many voters as possible are offered the opportunity to cure their ballots while also allowing the general registrars and local elections officials the time to conduct the election and close the election at the end of the canvass period. This philosophy reflects a conscious determination by the General Assembly that a voter's opportunity to cure must be balanced with the need to permit understaffed and under-resourced localities to focus the last week of the voting period on conducting full and fair elections that can be finalized at the end of the canvass period. Permitting a voter whose ballot contains deficiencies to cure after the end of the canvass period, as Plaintiffs suggest, prevents the election from ending and the local elections officials from publishing the results. Public perception, key to the trust in election integrity, suffers when vote tallies are modified past a reasonable time after the election. Just like the compelling governmental interest in requiring social security numbers on voter registration applications, the General Assembly and elections officials must balance the desire to allow as many voters to cure deficient absentee ballots in a timely manner with the very real need to maintain trust in elections officials and election results.[11]

A voter does not have an absolute right to cure mistakes in their ballot to the extent that such cure would impair the government's interest in ensuring a fair election with final results. Voters have ample opportunity to ensure that their ballots are cast and any defects are corrected. Accordingly, Plaintiffs fail to state a claim under Count IV of their Complaint.

B. Plaintiffs Fail to Show that the Cure Process violates the Equal Protection Clause (Count V)

Plaintiffs' claim that the Cure Process is facially unconstitutional because it violates the Equal Protection Clause of the Fourteenth Amendment is without merit. ECF No. 1 ¶¶ 133-37.

[11] See Va. Code §§ 24.2-654-24.-675 (regarding sealing voting equipment, ascertaining results, and reporting results).

To successfully attack the Cure Process as facially unconstitutional, Plaintiffs must establish "that no set of circumstances exists under which [the Cure Process] would be valid," *United States v. Salerno*, 481 U.S. 739, 745 (1987), or that the statute lacks any "plainly legitimate sweep," *Washington v. Glucksberg*, 521 U.S. 703, 740, n.7 (1997) (Stevens, J., concurring in judgments) (internal quotation marks omitted).[12]

The Equal Protection Clause of the Fourteenth Amendment provides that "[n]o State shall . . . deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "In order to survive a motion to dismiss an equal protection claim, a plaintiff must plead sufficient facts to demonstrate plausibly [(1)] that he was treated differently from others who were similarly situated and [(2)] that the unequal treatment was the result of discriminatory animus." *Equity in Ath., Inc. v. Dep't of Educ.*, 639 F.3d 91 (4th Cir. 2011).

As a general principle of Equal Protection Clause jurisprudence, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest." *United States v. Timms*, 664 F.3d 436, 445 (4th Cir. 2012) (quoting *City of Cleburne v. Cleburne Living Ctr., Inc.*¸473 U.S. 432, 440 (1985)). "However, high levels of scrutiny will be applied if a statute implicates a fundamental right or suspect class." *Id.* Plaintiffs fail to provide a legal basis for their assertion that there is fundamental right to cure absentee ballots received any time after the Friday immediately preceding an election. Plaintiffs also fail to identify themselves as a member of a protected class that in unconstitutionally burdened by

[12] The Supreme Court disfavors facial challenges, noting that they should be used sparingly and only in exceptional circumstances. See *Ayotte v. Planned Parenthood of N. New England*, 546 U.S. 320, 328-30 (2006) (discussing the preference for as-applied challenges); David L. Franklin, Facial Challenges, Legislative Purpose and the Commerce Clause, 92 IOWA L. REV. 41, 55-56 (2006) ("The Court has explained that the act of striking down a statute on its face stands in tension with several traditional components of the federal judicial role, including a preference for resolving concrete disputes rather than abstract or speculative questions; a deference to legislative judgments; and a reluctance to resort to the 'strong medicine' of constitutional invalidation unless absolutely necessary.")

the Cure Process. In fact, Plaintiffs identify **no protected class** who would be unfairly disadvantaged by the Cure Process. Accordingly, the constitutionality of the Cure Process must be assessed with a rational basis review.

While the Cure Process provides some voters, those whose absentee ballots are received the week before the election, notice of the opportunity to cure, the fact that voters whose ballots are received after the Friday before the election does not create disparate treatment for a protected class of voters. Instead, the Commonwealth, for reasons of election integrity and efficiency explained above, created a cut-off date that equally effects all voters, whether they are a part of a protected class or not.

Thus, Plaintiffs fail to satisfy the requirement that they allege facts sufficient to show that the defendants "acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." *Sigma Lambda Upsilon/Señoritas Latinas Unidas Sorority, Inc. v. Rector & Visitors of the Univ. of Va.*, 503 F. Supp. 3d 433, 447 (W.D. Va. 2020) (quotation omitted). In this context, "discriminatory intent 'implies more than intent as volition or intent as awareness of consequences." *Sylvia Dev. Corp. v. Calvert County*, 48 F.3d 810, 819 n.2 (4th Cir. 1995) (quotation omitted). Instead, the plaintiff must show that the defendants "selected or reaffirmed a particular course of action at least in part because of, not merely in spite of, its adverse effects upon an identifiable group." *Id.* (internal quotation marks and citation omitted). As courts have recognized, this is "no simple task." *Villanueva v. City of Scottsbluff*, 779 F.3d 507, 511 (8th Cir. 2015).

Plaintiffs fail the second element of their equal protection claim because they fail to identify themselves—or any of their members, constituents, or supporters—as members of a

protected class that might trigger heightened scrutiny. Plaintiffs argue that the Cure Process discriminates between individuals who may return deficient absentee ballots on the Friday before a general election and individuals who may return deficient absentee ballots after that Friday. "Individuals who may return deficient absentee ballots after the Friday before a general election" are not a protected class within Equal Protection Clause jurisprudence.

Under a rational basis review, the legislature, in creating categories of treatment, "need not actually articulate at any time the purpose or rationale supporting its classification." *Heller v. Doe*, 509 U.S. 312, 320 (1993). "Instead, a classification must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Id.* (quotation marks and citation omitted). "[T]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it, whether or not the basis has a foundation in the record." *Id.* at 320-21 (quotation marks and citation omitted). Moreover, "courts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Id.* at 321 (quotation marks and citation omitted).

The Cure Process reflects the Commonwealth's legitimate state interest in ensuring that as many absentee ballots are able to be counted as possible while balancing the reality that general registrars are required to accomplish a myriad of responsibilities in the four days before an election and the days before the election results are certified by the local electoral board. These tasks include:

1) Preparing pollbooks.[13]

2) Certifying the number of ballots received prior to the election.[14]

3) Sealing ballots.[15]

4) Dividing ballots into packages for each precinct; delivery of absentee ballots.[16]

5) Locking and securing voting equipment.[17]

6) Counting ballots.[18]

7) Ascertaining results and delivering those results to the State Board of Elections.[19]

Further, the Cure Process does not unduly burden any voter's right to vote. "Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections . . . even though election laws inevitably affect[] — at least to some degree — the individual's right to vote and his right to associate with others for political ends." *Marcellus v. Va. State Bd. of Elections*, 849 F.3d 169, 174 (4th Cir. 2017) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)) (internal citations omitted).

Plaintiffs provide no evidence that any voter in Virginia has been hindered in voting by the Absentee Voting Cure Process. Nor is any named plaintiff an actual Virginia voter that alleges they have been injured by the Cure Process.

Accordingly, due to Plaintiffs' failure to provide anything other than mere speculation as to why the Cure Process violates voters' rights despite the legitimate basis grounded in practical needs to conduct elections, Plaintiffs fail to state a claim under Count V.

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[13] Va. Code § 24.2-611(D)-(E).
[14] Va. Code § 24.2-618.
[15] Va. Code § 24.2-619.
[16] Va. Code § 24.2-620.
[17] Va. Code § 24.2-634.
[18] Va. Code § 24.2-665.
[19] Va. Code §§ 24.2-667, -667.1, -671.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on January 12, 2022, I electronically filed a true and accurate copy of the foregoing with the Court's CM/ECF system, which will then send a notification of such filing to the parties.

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