DRAFT – PRIVILEGED & CONFIDENTIAL

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

DEMOCRATIC PARTY OF VIRGINIA and DCCC,

Plaintiffs,

v.

ROBERT H. BRINK, in his official capacity as the Chairman of the Board of Elections; JOHN O'BANNON, in his official capacity as Vice Chair of the Board of Elections; JAMILAH D. LECRUISE, in her official capacity as the Secretary of the Board of Elections; and CHRISTOPHER E. PIPER, in his official capacity as the Commissioner of the Department of Elections,

Defendants.

Civil Action No. 3:21-CV-756

PLAINTIFFS' OPPOSITION TO DEFENDANTS' RULE 12(b)(6) MOTION TO DISMISS

Plaintiffs Democratic Party of Virginia ("DPVA") and DCCC, by and through counsel, file this Opposition to Defendants' Rule 12(b)(6) Motion to Dismiss, ECF No. 29 (the "Motion").

INTRODUCTION

Plaintiffs challenge two aspects of Virginia election law through six separate counts. First, Plaintiffs challenge Virginia's mandate that voters provide their full social security number to register to vote (the "Full SSN Requirement") on the grounds that it violates the First Amendment (Count I), the Materiality Provision of the Civil Rights Act (Count II), the Privacy Act (Count III), and unconstitutionally burdens the right to vote (Count VI) (together, the "SSN Counts"). Next, Plaintiffs challenge Virginia's inequitable notice and cure procedures for absentee voters (the

"Inequitable Notice and Cure Process") on the grounds that they violate procedural due process (Count IV) and unconstitutionally burden the right to vote (Count V) (the "Notice and Cure Counts"). Defendants argue that each of these claims should be dismissed for failure to state a claim, but in doing so, they repeatedly misconstrue the procedural posture of this case, the applicable standards that this Court must apply, governing law and precedent, and even the allegations in the Complaint. Plaintiffs' allegations are more than sufficient at this stage in the proceedings, and Defendants' motion should be denied.

First, Defendants contend that Plaintiffs lack standing to pursue their claim that the Full SSN Requirement unconstitutionally burdens the right to vote (Count VI). Defendants raise this challenge in a single sentence, and nowhere challenge Plaintiffs' standing to pursue any of their other claims (including as against the Full SSN Requirement specifically, or to the Inequitable Notice and Cure Procedures under the same undue burden theory (Count V)). It is not clear why Defendants target this specific claim—and only this claim—on standing grounds, but whatever their rationale, they are wrong for same reasons that this Court recognized in *Lee v. Virginia State Board of Elections*, 188 F. Supp. 3d 577, 578 (E.D. Va. 2016) (Hudson, J.), *aff'd on other grounds*, 843 F.3d 592 (4th Cir. 2016).

Second, with respect to all the Notice and Cure Counts and all but one of the SSN Counts (Count III, brought under the Privacy Act), Defendants urge the Court to apply a higher pleading standard than the Rules permit at the motion to dismiss stage. As courts routinely recognize, the standard is not demanding. Plaintiffs need only provide a short and plain statement of the claim showing that they are entitled to relief, supported by facts that, if believed, make the claim plausible. Plaintiffs' Complaint—and each of the claims within it—easily clear this bar.

Third, with respect to the challenges to the Full SSN Requirement under the First and Fourteenth Amendments (Counts I and VI), and to the Inequitable Notice and Cure Process under the Due Process Clause (Count IV), Defendants improperly argue against the merits of Plaintiffs' factual allegations. Defendants repeatedly argue that Plaintiffs "fail to show" that their allegations are true, couching those arguments in terms of "evidence" and "merit." Setting aside the myriad of facts alleged in the Complaint that Defendants overlook in making this argument, Plaintiffs have no obligation at this stage to outright prove their claims. Again, Defendants misconstrue the standard on a motion to dismiss, where this Court is obligated to accept Plaintiffs' factual allegations as true, and Defendants' assertions of purportedly countervailing facts must be rejected.

Fourth, with respect to Plaintiffs' Privacy Act challenge to the Full SSN Requirement (Count III), Defendants ignore that *they* bear the burden of proof on any contention that they are exempt from compliance with the requirements of that Act. Thus, not only do Defendants fail to argue that Plaintiffs' allegations are insufficient to state a Privacy Act claim, they also fail to meet their burden to show that they are exempt from the Act's requirements.

Finally, Defendants' arguments against the sufficiency of Plaintiffs' allegations in support of their challenges to both provisions of Virginia law on the basis that they unconstitutionally burden the right to vote (Counts V and VI) fundamentally misunderstand the applicable law, including its application at the motion to dismiss stage. Under governing precedent, Plaintiffs' allegations are more than sufficient.

Defendants' motion to dismiss should be denied in its entirety.

LEGAL STANDARD

To survive a motion to dismiss under Rule 12(b)(6), a complaint need only include enough factual allegations to "raise a right to relief above the speculative level." *Bell Atl. Corp. v.*

Twombly, 550 U.S. 544, 555 (2007). Under Federal Rule of Civil Procedure 8(a)(2), these factual allegations need not be "detailed," but must be more than "an unadorned, the defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted). The Rule 8 pleading standard is "liberal," and motions to dismiss are "viewed with disfavor" and "rarely granted." *Hill, By & Through Covington v. Briggs & Stratton*, 856 F.2d 186 (4th Cir. 1988) (quoting 5 Charles Allan Wright & Arthur R. Miller, Federal Practice and Procedure § 1357 (1st ed. 1969)). The "core" of Rule 8 is that plaintiffs must give defendants "fair notice" of their claims. *Wright v. North Carolina*, 787 F.3d 256, 265 (4th Cir. 2015) (quoting *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)). Thus, Rule 8 "requires only a short and plain statement of the claim showing that the pleader is entitled to relief." *Erickson*, 551 U.S. at 93 (quotation omitted). The facts alleged must be "accepted as true" and viewed "in the light most favorable to the plaintiff." *Lucero v. Early*, 873 F.3d 466, 469 (4th Cir. 2017) (quotations omitted).

ARGUMENT

I. Plaintiffs have standing.

With respect to Count VI *only*, in which Plaintiffs challenge the Full SSN Requirement as an undue burden on the right to vote under the First and Fourteenth Amendments, Defendants assert—without explanation or citation—that Plaintiffs "do not have standing to assert the right to vote of a Virginia voter has been impaired." Mem. of Law in Supp. of Defs.' Mot. to Dismiss ("Mot.") at 11, ECF No. 30. The type of claim alleged in Count VI is often referred to as an *Anderson-Burdick* claim, named after the balancing test that courts apply as a result of the U.S. Supreme Court's decisions in *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983), and *Burdick v. Takushi*, 504 U.S. 428, 434 (1992). Plaintiffs make a separate claim under this same doctrine against the Inequitable Notice and Cure provisions in Count V, but Defendants do not contend that

Plaintiffs lack standing to pursue that claim. *See generally* Mot. In any event, Defendants' challenge to any of Plaintiffs' claims on this ground is simply incorrect; courts routinely recognize that direct organizational harms to political parties are sufficient to confer standing, including for *Anderson-Burdick* claims in particular.

Under settled precedent, political parties are injured by the loss of resources required to ensure supporters can and do vote even in the face of laws that burden the exercise of the right to vote. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) (holding that the challenged law "injures the Democratic Party by compelling the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote"), *aff'd*, 553 U.S. 181, 189 n.7 (2008) ("We also agree with the unanimous view of [the Seventh Circuit] that the Democrats have standing to challenge the validity of [the photo I.D. law]"). Plaintiffs allege, among other things, that both the Full SSN Requirement and the Inequitable Notice and Cure Process directly and concretely harm their organizational missions, voting and voter registration efforts, the electoral prospects of their candidates, and force DPVA and DCCC to divert resources to counter the impact of the challenged laws. *See, e.g.*, Compl. ¶¶ 19–23, 137, 143. These allegations alone suffice to establish standing. *See, e.g.*, *Crawford*, 472 F.3d at 951. Indeed, this Court rejected the very argument Defendants now make when it concluded that the DPVA, in a case challenging Virginia's voter identification law and long voting lines, had standing to redress the harms it suffered directly as well as the harms to Democratic voters across the Commonwealth. *See Lee*, 188 F. Supp. 3d at 584 (concluding DPVA "has shown sufficient injury primarily in the form of diversion of time, talent, and resources to educate their voters and implement the requirements of the Virginia voter identification law").

Plaintiffs separately and independently have standing to bring suit on behalf of their

members, constituents, and supporters. This Court has recognized that DPVA has standing where it alleges that it has suffered "direct injury to its raison d'être" *and* that its individual members "would be sufficiently burdened to sue in their own right." *Lee*, 155 F. Supp. 3d at 578 (quoting *Ala. Legis. Black Caucus v. Alabama*, 135 S. Ct. 1257, 1268–70 (2015)); *see also, e.g.*, *Crawford*, 472 F.3d at 951 (finding the "Democratic Party also has standing to assert the rights of those of its members who will be prevented from voting by the new [photo I.D.] law"). As discussed further below, *see* § II.b *infra*, Plaintiffs need not identify specific voters who will be harmed by the challenged provisions; it is sufficient that some Democratic voters inevitably will be harmed. *See, e.g.*, *Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1254 (N.D. Fla. 2016) ("Plaintiff need not identify *specific* aspiring eligible voters who intend to register as Democrats and who will be barred from voting; it is sufficient that some inevitably will."); *see also* Compl. ¶¶ 19, 58–66, 101, 108, 143. Defendants cite no case and present no argument to the contrary.

II. Defendants' argument that certain Counts are insufficiently pleaded misreads the Complaint and the applicable standards.

Defendants argue that Counts I, II, IV, V, and VI—that is, all of Plaintiffs' Notice and Cure Counts and all but the Privacy Act challenge to the SSN Counts—are insufficiently pleaded, but Defendants misconstrue the standard (as well as ignore allegations set forth in the Complaint). The Supreme Court has continually admonished courts "not to impose heightened pleading requirements" on Rule 8, including "various requirements of particularity." *Aktieselskabet v. Fame Jeans, Inc.*, 525 F.3d 8, 16 (D.C. Cir. 2008). This Court should reject Defendants' invitation to do so here.

a. Plaintiffs more than adequately pleaded their claims in satisfaction of Rule 8.

Rule 8 does not require "detailed factual allegations," *Twombly*, 550 U.S. at 555, but the Complaint is nonetheless replete with them. Plaintiffs allege they are harmed by the Full SSN

Requirement because it hinders their ability to conduct voter registration drives, chills Plaintiffs' ability to associate with voters (Count I) and impedes the right to vote of countless eligible Virginians, including those among Plaintiffs' membership and constituency (Count VI). *See, e.g.*, Compl. ¶¶ 2–7, 18, 21–23, 57, 68–70, 96, 99–101, 108, 118, 124, 143. Similarly, the Complaint alleges in detail that the Inequitable Notice and Cure Process denies Plaintiffs and their members and voters their rights to procedural due process (Count IV) and unduly burdens their right to vote (Count V) by leaving to chance whether some of these voters will have a meaningful opportunity to cure defects in their ballots, *see, e.g.*, *id.* ¶¶ 8, 11, 19–23, 90, 132, 137—a point Defendants admit, *see* Mot. at 13 (acknowledging the General Assembly has made "a conscious determination" to provide to some, but not all, voters an opportunity to cure defects in timely returned ballots). Plaintiffs also allege in detail that the Full SSN Requirement is not a material requirement to be eligible to vote, in violation of the Civil Rights Act's Materiality Provision (Count II). *See, e.g.*, *id*. ¶¶ 2, 7, 27–34, 71–74, 110–18.[1]

These allegations are a far cry from the "labels and conclusions" and "formulaic recitation[s] of the elements of a cause of action" the Supreme Court has found insufficient under

[1] Defendants do not argue that Plaintiffs' Privacy Act claim (Count III) is insufficiently pleaded, but it, too, could survive such a challenge. *Compare* 5 U.S.C. § 552a (note) (prohibiting a state from denying individuals the right to vote if they refuse to disclose their SSN), *with* Compl. ¶¶ 27–29 (alleging that Virginia requires disclosure of a SSN to register to vote and rejects applications that fail to disclose), ¶¶ 32–34 (alleging Virginia did not uniformly require SSN disclosure prior to January 1, 1975, nor did it maintain a system of records for identity verification), ¶¶ 119–20, 122–24 (alleging Virginia is not exempt); *see also, e.g.*, *McKay v. Altobello*, No. CIV.A 96-3458, 1997 WL 266717 at *2 (E.D. La. May 16, 1997) (concluding Louisiana violated the Privacy Act where the state required disclosure of SSNs but failed to prove that it maintained an "operational" "system of records . . . before January 1, 1975" that "utilized" social security numbers "to verify the identification of the individual").

Rule 8. *Twombly*, 550 U.S. at 555. Defendants, however, incorrectly demand more.[2] Their motion on these grounds should be denied.

b. Plaintiffs are not required to identify a specific voter or member who has been or will be harmed by the challenged procedures at this stage in the proceedings.

With respect to Plaintiffs' challenges to both the Full SSN Requirement and the Inequitable Notice and Cure Process brought under the First and Fourteenth Amendments (Counts I, V, and VI), as well as the procedural due process claim against the Inequitable Notice and Cure Process (Count IV), Defendants contend that the claims must be dismissed because the Complaint does not identify "particular individuals" who have been injured by these procedures. *See* Mot. at 6–9, 17. Defendants frame this argument as a 12(b)(6) failure to state a claim issue, not a challenge to standing (with the sole exception discussed above, *see* § I, *supra*), but regardless of the lens through which it is viewed, Defendants are incorrect.

First, "[a]t the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss," the court must "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (quotation omitted). The "specificity" Defendants demand, *see, e.g.*, Mot. at 6, though pertinent to a motion for summary judgment, is not required at the pleading stage, *see Lujan*, 504 U.S. at 561. As for the "particular[ity]" Defendants seek, it is equivalent to seeking the granular "who, what, where, and when" details that Federal Rule of Civil

[2] In many cases, it is unclear what exactly "more" Defendants believe is required; repeatedly, they simply demand more "specific[s]" or "particular[s]." *See, e.g.*, Mot. at 6, 8–9, 11, 15–17. The exception is their demand for the identities of individual voters, but for reasons discussed, this is not required at this stage in the proceedings.

Procedure 9 requires of special matters such as claims that sound in fraud or mistake. But these specificities are neither necessary nor appropriate under Rule 8.

Courts—including the U.S. Supreme Court—have been unequivocally clear that, under Rule 8's notice pleading standard, "[s]pecific facts are not necessary." *Erickson*, 551 U.S. at 93. Nor must plaintiffs plead a "specific quantity of facts." *Aktieselskabet*, 525 F.3d at 16. It is sufficient that Plaintiffs have pleaded "factual content that allows the court to draw the reasonable inference that the defendant[s] [are] liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Moreover, the court must "draw all reasonable inferences in favor of the plaintiff" from the facts alleged. *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009). Because Defendants have "fair notice" of Plaintiffs' claims, the requirements of Rule 8 are satisfied. *Wright*, 787 F.3d at 265.

Second, courts routinely reject this exact argument in the voting rights context. It is eminently reasonable to infer that among Plaintiffs' members, constituents, and supporters are individual Virginia voters who have been harmed by the Full SSN Requirement and the Inequitable Notice and Cure Process for the reasons alleged in the Complaint. *Cf. Lee*, 155 F. Supp. 3d at 578 (citing *Lujan*, 504 U.S. at 561); *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015) (holding organization need not identify injured members where injury is clear and their specific identity is not relevant to defendants' ability to understand or respond); *Scott*, 215 F. Supp. 3d at 1254. Requiring Plaintiffs to name these individuals is unnecessary at the motion to dismiss stage. *See Lee*, 155 F. Supp. 3d at 577–78 (finding DPVA did not need to name individual members to survive a motion to dismiss); *see also Rhodes v. R & L Carriers, Inc.*, 491 F. App'x 579, 583 (6th Cir. 2012) (holding that "[t]he district court erred in demanding . . . detailed factual content

to survive a motion to dismiss," including "the names of applicants who were denied employment based on a discriminatory reason").

Similarly, Plaintiffs need not identify an "actual account of a voter not registering to vote due to the [Full] SSN Requirement," Mot. at 8, or the Inequitable Notice and Cure Process, *id*. at 17. With respect to the Inequitable Notice and Cure Process, Plaintiffs have alleged that it will disenfranchise Virginia voters, thereby severely burdening Plaintiffs and their members, constituents, and supporters, and will irreparably frustrate Plaintiffs' missions. *See, e.g.*, Compl. ¶¶ 133, 137, 139, 143. These allegations give Defendants' "fair notice" of Plaintiffs' claims and are more than sufficient to survive the motion to dismiss. *Wright*, 787 F.3d at 265. This is true for both of Plaintiffs' claims that the challenged laws and procedures impose an undue burden on the right to vote (Counts VI and V)—the *Anderson-Burdick* claims. It is settled law that *Anderson-Burdick* claims need not allege an outright denial of the right to vote; rather, the court must "weigh the character and magnitude of the asserted injury to the . . . rights that the plaintiff seeks to vindicate against the precise interests put forward by the State as justification 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." *Burdick*, 504 U.S. at 434 (citing *Anderson*, 460 U.S. at 789). Under this standard, burdens short of the complete denial of the right to vote have been found sufficient to state a claim, and even sufficient to be unconstitutional. *See, e.g.*, *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666 (1966) (finding $1.50 poll tax violative of equal protection); *Obama for Am. v. Husted*, 697 F.3d 423, 425 (6th Cir. 2012); *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1209 (N.D. Fla. 2018); *Common Cause Ind. v. Marion Cnty. Election Bd.*, 311 F. Supp. 3d 949, 977 (S.D. Ind. 2018), *vacated and remanded on other grounds*, 925 F.3d 928 (7th Cir. 2019).

Likewise, Plaintiffs need not allege an actual denial of their First Amendment rights for those rights to be unconstitutionally chilled. Defendants' argument ignores that Plaintiffs have alleged that the Full SSN Requirement hinders their free speech and associational rights by making it more difficult for them to conduct voter registration drives, recruit canvassers, and register voters. *See, e.g.*, Compl. ¶¶ 96, 99–101. As discussed further below, the harm that the laws impose on Plaintiffs' own First Amendment rights are more than sufficient to plead their First Amendment claim (Count I).

c. Plaintiffs sufficiently pleaded a threat of chill in support of their First Amendment challenge to the Full SSN Requirement (Count I).

In Count I, Plaintiffs allege that the Full SSN Requirement chills their First Amendment rights by hindering their ability to conduct voter registration drives—which are pure political speech—and making it more difficult for them to associate with voters who would support Democratic candidates in Virginia. *See* Compl. ¶¶ 95–109. Many potential voters are unable to provide their full SSN or unwilling to do so in light of increasing and serious concerns over the vulnerability of such sensitive personal information to breaches and hacks. *See id*. ¶ 101. These same concerns impose logistical barriers on Plaintiffs to protect voters' sensitive SSN data. *See id*. Plaintiffs' detailed allegations are more than sufficient to state a First Amendment claim. *See Wright*, 787 F.3d at 265. Yet, Defendants argue that this claim is insufficiently pleaded.

Not only does Defendants' argument ignore the relevant precedent, it also mischaracterizes what Plaintiffs allege in the Complaint by cherry picking from allegations within it. Defendants point the Court to a truncated quote from Paragraph 108 of the Complaint that discusses Plaintiffs' "fear" that the Full SSN Requirement will chill their First Amendment rights and "may" discourage voters from registering to vote. Mot. at 8. In fact, Plaintiffs' full allegation reads:

"DCCC's and DPVA's fear that the Full SSN Requirement will deter association and chill their First Amendment rights is real and pervasive." Compl. ¶ 108. Plaintiffs then explain in detail the factual basis for that real and pervasive fear, which suffice to make it a concrete harm. *See id.* ¶¶ 108–09. As recognized by the Supreme Court, First Amendment rights may be unconstitutionally burdened by "real and pervasive" fears of a "deterrent effect" from broadly applicable laws that chill association. *See Ams. For Prosperity Found. v. Bonta*, 141 S. Ct. 2373, 2384 (2021).

Moreover, as *Bonta* makes clear, the mere *risk* of chill is sufficient to establish a First Amendment violation. *See id*. at 2388 (recognizing that "[e]xacting scrutiny is triggered by state action which *may* have the effect of curtailing the freedom to associate, and by the *possible* deterrent effect of disclosure [of identity]") (quotations and alterations omitted). In other words, a state law that "creates an unnecessary risk of chilling" may violate the First Amendment. *See id*. (quotation omitted). This risk can exist even if it is "indirect," *id*. at 2384 ("Narrow tailoring is crucial where First Amendment activity is chilled—even if indirectly—[b]ecause First Amendment freedoms need breathing space to survive.") (quotation omitted), and even if the general public would not receive sensitive information compelled to be disclosed, *see id*. at 2388 (noting that "disclosure requirements can chill association even if there is no disclosure to the general public") (quotation and alterations omitted). Defendants cite no law to the contrary. Plaintiffs' allegations are more than sufficient.

d. The fact that the Full SSN Requirement does not entirely halt voter registration activities does not preclude Plaintiffs' challenge to the Full SSN Requirement under the Materiality Provision of the Civil Rights Act (Count II).

Plaintiffs' Civil Rights Act materiality claim (Count II) is also sufficiently pleaded. Defendants' request that it be dismissed is conclusory, at best, and wholly inadequate as a matter

of law. The Civil Rights Act provides, in relevant part, that "[n]o person . . . 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 . . . registration, . . . 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) (emphasis added). Plaintiffs allege that Virginia law has only five criteria for an individual to be eligible to vote—that is, only five criteria material to a voter's eligibility—and disclosure of a full SSN is not one of them. *See* Compl. ¶ 114. The vast majority of states do not require a full SSN to register an individual to vote. *Id*. ¶ 7. Even the language of Virginia's requirement, on its face, makes clear that a full SSN is not material, as it requires a voter disclose their full SSN "*if*" they have one. Va. Const. art. II, § 2 (requiring a full social security number, "if any").

These allegations present "a short and plain statement of the [materiality] claim showing that [Plaintiffs are] entitled to relief." *Erickson*, 551 U.S. at 93. Defendants' only retort is that Plaintiffs have successfully registered voters while the Full SSN Requirement has been in place. *See* Mot. at 10. Not only does that fact have no bearing on the sufficiency of Plaintiffs' claim that the requirement is not material, it takes the illogical view that a restrictive law that conditions the right to vote on immaterial requirements is beyond challenge, so long as some other voters have overcome it. Plaintiffs have sufficiently given Defendants "fair notice" of their violation of the Materiality Clause. *Wright*, 787 F.3d at 265; *see also* Compl. ¶¶ 110–18. That is all they must do.

Moreover, elsewhere in their motion to dismiss, Defendants actually lend credence to Plaintiffs' materiality claim. In arguing against Plaintiffs' undue burden claims, Defendants (incorrectly) assert that Plaintiffs claim harm due to "the Commonwealth's collection of full *or partial* social security numbers." Mot. at 8 (emphasis added). To be clear, Plaintiffs do not

challenge a collection of "partial social security numbers." Virginia law requires the collection of *full* social security numbers, not partial numbers, and it is that law that Plaintiffs challenge. Defendants' suggestion that it collects and/or relies upon "partial social security numbers" is therefore confounding. But if Virginia does collect partial social security numbers to register Virginians to vote, that would be further proof that Virginia's Full SSN Requirement is not material for voter registration purposes. Discovery will help answer this question, but at this stage in the proceedings, Plaintiffs have more than sufficiently pleaded this claim.

III. Defendants' challenges based on the merits are improper and must be rejected.

In contending that Plaintiffs' First Amendment and *Anderson-Burdick* challenges to the Full SSN Requirement (Counts I and VI), and their procedural due process challenge to the Inequitable Notice and Cure Process (Count IV), should be dismissed, Defendants ignore basic blackletter law about the deference that this Court must give Plaintiffs' pleaded facts at the motion to dismiss stage. Defendants improperly ask this Court to dismiss these counts based on Defendants' contention that Plaintiffs' allegations are meritless in light of Defendants' countervailing factual positions. But the Court must "tak[e] care to avoid any invitation to resolve factual disputes at the pleading stage." *Ridenour v. Multi-Color Corp.*, 147 F. Supp. 3d 452, 455 (E.D. Va. 2015). Defendants extend this invitation twice; the Court should reject it in both instances.

a. Defendants improperly ask the Court to weigh the merits of Plaintiffs' challenges to the Full SSN Requirement under the First and Fourteenth Amendments (Counts I and VI).

First, Defendants ask the Court to reach a decision on the merits to dismiss Plaintiffs' First Amendment and *Anderson-Burdick* challenges to the Full SSN Requirement (Counts I and VI), arguing that the Commonwealth adequately protects voters' SSN information (*see* Mot. at 7, 9),

and that Plaintiffs' allegations to the contrary are "unfounded" (*id.* at 9 & n.6) and "unsupported" (*id.* at 9). These arguments are misplaced at the motion to dismiss stage. Defendants' insistence that they are "very attuned" to maintaining strong information technology systems and the confidentiality of voters' full SSNs, *id*. at 7, presents alternative facts, and it would be inappropriate for the Court to consider them on a motion to dismiss. The purpose of a motion to dismiss under Rule 12(b)(6) is not to "resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses." *Republican Party of N.C. v. Martin*, 980 F.2d 943, 952 (4th Cir. 1992). Nor should the court "make any judgment about the probability of the plaintiff's success." *Aktieselskabet*, 525 F.3d at 17. The court's inquiry is "limited to whether the allegations constitute 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Martin*, 980 F.2d at 952 (quoting *Bolding v. Holshouser*, 575 F.2d 461, 464 (4th Cir. 1978)).

Not only are Plaintiffs' claims adequately pleaded, they are also supported and well-founded by allegations found throughout the Complaint. Defendants' alternative factual assertions are not only introduced at the wrong time, they are legally irrelevant: it is not necessary for this Court to find that Virginia has been sloppy in its attempt to protect voters' full SSNs (a fact that Plaintiffs anticipate being able to prove)[3]; it is sufficient that there is a reasonable fear of a *risk* of disclosure. *See Bonta*, 141 S. Ct. at 2388 & n.* (rejecting argument that Attorney General's "security measures" safeguarded confidential information and concluding that "[w]hile assurance of confidentiality may reduce the burden of disclosure to the State, they do not eliminate it"). And, as Plaintiffs allege, over the past forty years, voters have become increasingly reticent to disclose

[3] As the briefing on PILF's attempt to intervene demonstrates, there are significant questions of fact surrounding Virginia's ability to maintain the confidentiality of voters' full SSN numbers. PILF's response in support of its motion to intervene admitted that it in fact obtained—and republished—documents from the Commonwealth that included voters' full SSN numbers. *See* PILF Reply at 3, ECF No. 26; *see also* Pls.' Opp. to PILF Mot. to Intervene at 4–5, ECF No. 25.

their SSNs due to increased awareness of the risks of identity theft, the debilitating cost of such theft, and the recent prevalence of cyber-attacks and hackers, including particular threats aimed directly at American elections databases. *See* Compl. ¶¶ 36–56, 108.

In asserting that these fears are "unfounded," Defendants point to the fact that more individuals registered to vote in Virginia in 2021 than in 2020. *See* Mot. at 9 n.6. But a mere increase in the raw number of registrants says nothing about the *rate* of registration among eligible residents; increases may be attributable to other causes like increasing voting age population. Registration numbers might have been even *greater* in the absence of the Full SSN Requirement. In any event, Defendants' argument attacks the merits of Plaintiffs' allegations, not their sufficiency to state a claim under Rule 12(b)(6). Plaintiffs' allegations are not "unfounded"; Defendants just disagree with them. The proper place to test such disagreement is in discovery and further proceedings on the merits, not on a motion to dismiss.

Defendants' similar characterization of Plaintiffs' allegations regarding the security of Virginia's voter registration system as "unsupported," Mot. at 9, again takes issue with the merits of the allegations rather than their sufficiency. Plaintiffs pleaded ample factual allegations to support their claims. For example, they allege that the Virginia Department of Elections acknowledged an actual attempt to hack the state's election structure in 2016, following which the Department recognized that "the attempt underscored *the need to invest in a more secure system* . . . ." Compl. ¶ 53 (citing Va. Dep't of Elections, *Democracy Defended*, https://www.elections.virginia.gov/defend-democracy/ (last visited Dec. 7, 2021)) (emphasis added). Nevertheless, Defendants argue that Plaintiffs' allegations lack support simply because Virginia law prohibits the inspection or copying of voters' SSNs. *See* Mot. at 6, 9. Again, the mere fact that Virginia law attempts to protect voters does not mean either that (1) they successfully do

protect them, or that (2) fears that the Commonwealth will be unable to protect them do not operate to unjustifiably chill speech and associational rights and suppress voting rights. If anything, the fact that the Commonwealth has a law to protect this information itself indicates that the Commonwealth recognizes the risks that disclosure of this information carry to individual voters. As it should.

In any event, at this stage in the proceedings, the Court is required to accept Plaintiffs' allegations that "[p]rohibitions on dissemination of SSNs do not eradicate the unnecessary risk to voters' SSNs, especially from cyber-attacks or accidental exposure. Nor do they remove the violations of Plaintiffs' constitutional rights." Compl. ¶ 109 (citing *Bonta*, 141 S. Ct. at 2388 ("While assurances of confidentiality may reduce the burden of disclosure to the State, they do not eliminate it.")); *cf. id.* (recognizing the "heightened" and "grow[ing]" risk that "anyone with access to a computer can compile a wealth of [sensitive] information about anyone else") (quotation and alteration in original omitted). The Court is not required to accept that because Virginia wants and means to protect this highly sensitive information, they will always be successful in doing it (or that concern that they will not be able to is unfounded). In fact, its legal mandate at this stage in the proceedings is the opposite: it is required to accept *Plaintiffs'* pleaded facts as true. *See Lucero*, 873 F.3d at 469. In applying that standard, the Court should "avoid any invitation to resolve factual disputes" at this early stage. *Kensington Volunteer Fire Dep't v. Montgomery County*, 684 F.3d 462, 467 (4th Cir. 2012).

b. Defendants improperly ask the Court to weigh the merits of Plaintiffs' procedural due process challenge to the Inequitable Notice and Cure Process (Count IV).

With respect to Plaintiffs' procedural due process claim in Count IV, Defendants' improper invitation that the Court weigh the merits at this early stage misconstrues both Plaintiffs' allegations and the law.

First, Defendants assert that "[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." Mot. at 13. But Plaintiffs have not alleged that voters have an "absolute right" to cure their ballots. Plaintiffs allege that, "[b]ecause Virginia allows all registered voters to exercise their fundamental right to vote by mail, there is a constitutionally protected liberty interest involved in the process of casting an absentee or mail-in ballot and in having that ballot counted." Compl. ¶ 127 (citing *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp 3d 158, 227 (M.D.N.C. 2020) (holding "North Carolina, having authorized the use of absentee ballots, must afford appropriate due process protections to the use of the absentee ballots") (quotation marks omitted)).

The right to vote is not explicit in the Constitution, but the right to due process is. Defendants conflate the right to vote with the separate and independent (and expressly guaranteed) constitutional right to procedural due process that attaches once a state decides to create an absentee voting regime. Multiple courts have recognized this distinction and have considered—and granted relief to address—similar claims. *See, e.g.*, *Democracy N.C.*, 476 F. Supp. at 228–29 (finding North Carolina had no statewide procedures for notifying voters about errors in their absentee ballots or for providing voters an opportunity to challenge rejections, and enjoining state board of elections from rejecting absentee ballots without due process); *see also Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018) ("Courts around the country have recognized that '[w]hile it is true that absentee voting is a privilege and a convenience to voters, this does not grant the state the latitude to deprive citizens of due process with respect to the exercise of this privilege.'") (quoting *Raetzel v. Parks/Bellemont Absentee Election Bd.*, 762 F. Supp. 1354, 1358 (D. Ariz. 1990)); *Zessar v. Helander*, No. 05 C 1917, 2006 WL 642646, at *5 (N.D. Ill. Mar. 13,

2006) ("The right to vote by absentee ballot is not, in and of itself, a fundamental right. But once the State permits voters to vote absentee, it must afford appropriate due process protections, including notice and a hearing, before rejecting an absentee ballot.").

Though claims alleging a violation of the right to vote are generally analyzed under *Anderson-Burdick*'s balancing test, claims alleging a violation of due process are analyzed under the test set out in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976). *See* Compl. ¶¶ 125–32. And, indeed, courts have noted that when a claim *can* be analyzed under an explicit constitutional textual source of rights, it should not use a more subjective standard. *See Albright v. Oliver,* 510 U.S. 266, 273 (1994) ("Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be the guide for analyzing these claims.") (quotation marks omitted) (plurality op.); *Evans v. Chalmers*, 703 F.3d 636, 646 n.2 (4th Cir. 2012) (quoting *Albright* for the same). Thus, the proper question at this stage is simply whether Plaintiffs have plausibly alleged a violation of procedural due process. That test asks (1) is there a private interest that will be affected by the official action, (2) is there a risk of erroneous deprivation of that interest through the procedures used, (3) what is the probable value, if any, of additional or substitute procedural safeguards, and finally, (4) what is the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail? *Mathews*, 424 U.S. at 335. Plaintiffs have alleged sufficient facts as to each element. *See* Compl. ¶¶ 125, 128–132.

Defendants' argument to dismiss this claim, again, is improperly grounded in their factual dispute of Plaintiffs' allegations. They assert, for instance, that "Virginia provides more than ample due process for voters who vote absentee . . ." and that the Commonwealth has an interest in

"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." Mot. at 12–13. These arguments do not challenge the sufficiency of Plaintiffs' allegations; they challenge their merits, previewing the types of factual questions that the Court will have to grapple with as the matter proceeds. Under the appropriate legal standard, they must be rejected at this stage, and Defendants' motion on these grounds, denied. *See Kensington Volunteer Fire Dep't*, 684 F.3d at 467.

IV. Plaintiffs adequately pleaded their challenge to the Full SSN Requirement under the Privacy Act (Count III).

Plaintiffs' allegations supporting their Privacy Act claim (Count III) sufficiently provide Defendants "fair notice" of the claim. *Wright*, 787 F.3d at 265. Plaintiffs allege that Virginia requires disclosure of a full SSN to register to vote or else the application must be rejected, Compl. ¶¶ 28, 29, 119, and that the Privacy Act prohibits denial of the right to vote for failure to disclose a SSN, *id.* ¶ 120. The Privacy Act exempts some states from compliance, but "only if [the state] *required* the disclosure of SSNs to verify individuals' identities before January 1, 1975." *Id.* Plaintiffs allege that Virginia did not universally require voters to provide their full SSNs before 1975 to register to vote and that Virginia did not use disclosed SSNs for voter registration identification purposes before 1975. *See* Compl. ¶¶ 122–23.

Defendants' only argument in support of its request to dismiss Count III is that the Commonwealth is exempt from the application of the Privacy Act. At best, this argument constitutes a defense to Count III, and that is beyond the scope of a motion to dismiss under Rule 12(b)(6). *See Martin*, 980 F.2d at 952 ("A motion to dismiss under Rule 12(b)(6) tests the sufficiency of a complaint; importantly, it does not resolve contests surrounding the facts, the merits of a claim, or the applicability of defenses."). It is also a defense that is necessarily grounded in fact, and it is *Defendants* who bear the burden of demonstrating that they are exempt. *See*

Schwier v. Cox, 412 F. Supp. 2d 1266, 1271 (N.D. Ga. 2005), *aff'd*, 439 F.3d 1285 (11th Cir. 2006). They fail to do so. Instead, Defendants simply contend—without evidence—that the Full SSN Requirement "has been in place" since 1971. Mot. at 11. That is not enough.

To qualify for the exemption, Defendants must show "(1) that [Virginia] maintained a system of records operating before January 1, 1975; and (2) that the system required the disclosure of an individual's SSN to verify the identity of that individual." *Schwier*, 412 F. Supp. 2d at 1270 (original alteration omitted). A system of records does not "require" a voter to disclose a SSN within the meaning of the Privacy Act unless it requires such disclosure uniformly across the state. *See id*. at 1273. As a practical matter, Plaintiffs allege that Virginia has *not* consistently required the disclosure of voters' full SSN. *See* Compl. ¶ 34. And even on its face, the Full SSN Requirement acknowledges that not every individual eligible to vote may have a social security number assigned. Va. Const. art. II, § 2 (requiring a full social security number, "if any"). Thus, as a legal matter, Virginia also does not uniformly require the disclose of a voter's SSN to verify the identity of the voter. *See Schwier*, 412 F. Supp. 2d at 1273 (concluding that Georgia did not require a SSN by law because "the registration form used prior to January 1, 1975, stated, after the blank for the SSN, 'if known at the time of application'").

Defendants make no attempt to address, let alone rebut, the Privacy Act's specific exemption criteria regarding when the Commonwealth (1) began to maintain a system of records containing SSNs (2) that were used to verify the identities of potential voters. *See* Privacy Act of 1974 § 7(a)(2)(A)–(B). Consequently, Defendants do not meet their burden to show that they are exempt from the Act's requirements.

V. The *Anderson-Burdick* framework applies to Plaintiffs' challenges alleging an undue burden on the right to vote (Counts VI and V).

Defendants misunderstand the law with respect to Plaintiffs' claims alleging an undue

burden on the right to vote and ask this Court to dismiss them for failing to include allegations that have no legal bearing on issues before the Court. Under the First and Fourteenth Amendments, state officials cannot implement election practices that unduly burden the right to vote. This includes the Full SSN Requirement (Count V) and the Inequitable Notice and Cure Process (Count VI). *See* Compl. ¶¶ 133–43.

To determine whether these laws impose an undue burden on the right to vote in violation of the First and Fourteenth Amendment, federal courts apply the *Anderson-Burdick* balancing test. If the burden is severe, the policy imposing that severe burden "must be 'narrowly drawn to advance a state interest of compelling importance.'" *Burdick*, 504 U.S. at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)). But even if the burden is less than severe, the court asks whether a state interest justifies the burden imposed, by "weigh[ing] 'the character and magnitude of the asserted injury to the rights . . . 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).

The Fourth Circuit has made clear that the *Anderson-Burdick* framework applies to "equal-protection-based challenges to state election laws." *Marcellus v. Va. State Bd. of Elections*, 849 F.3d 169, 180 n.2 (4th Cir. 2017); *see also Sarvis v. Judd*, 80 F. Supp. 3d 692, 697–98 (E.D. Va. 2015), *aff'd sub nom. Libertarian Party of Va. v. Alcorn*, 826 F.3d 708 (4th Cir. 2016). Yet Defendants rely on a bevy of cases involving the application of the Equal Protection Clause *outside* of the *Anderson-Burdick* framework. *See* Mot. at 14–16. These cases, which largely assess the equal protection claims of protected classes of persons, are inapposite.

Anderson itself recognized that the court's "prior election cases resting on the Equal

Protection Clause of the Fourteenth Amendment" apply the "fundamental rights" strand of that clause, not the strand dealing with suspect classifications. 460 U.S. at 787 n.7 (quotation omitted). Thus, Plaintiffs need not allege a protected class unfairly disadvantaged by the Inequitable Notice and Cure Process (as Defendants erroneously contend). *See* Mot. at 15. Nor must they allege that Defendants acted with discriminatory purpose. *See id*. Election cases applying the *Anderson-Burdick* framework do not require such allegations. *See Anderson*, 460 U.S. at 793 n.15 (noting that voting-power-disparity cases "cannot be described by reference to discrete and precisely defined segments of the community as is typical of inequities challenged under the Equal Protection Clause") (quoting *Bullock v. Carter*, 405 U.S. 134, 144 (1972); *see also Burdick*, 504 U.S. at 438. Defendants' argument, therefore, reflects a fundamental misunderstanding of the law, and is just not applicable.[4]

Finally, Defendants imply that Plaintiffs' allegations are insufficient because they do not show that the Inequitable Notice and Cure Process is invalid in all possible circumstances. *See* Mot. at 14. But the distinction between facial and as-applied challenges is irrelevant at the pleading stage; it goes solely "to the breadth of the remedy employed by the Court, not what must be pleaded in a complaint." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 331 (2010). Regardless, Plaintiffs need not show that the Inequitable Notice and Cure Process is invalid in all possible circumstances. In *Crawford v. Marion County Election Board*—a case involving a facial challenge

[4] From these inapposite cases, Defendants pull the principle that "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." Mot. at 14 (quoting *United States v. Timms*, 664 F.3d 436, 445 (4th Cir. 2012)). But courts "discard[] this presumption (and the deferential, rational basis scrutiny it entails) . . . in cases involving suspect classes *or fundamental rights*." *Marcellus*, 168 F. Supp. 3d at 877 (emphasis added).

to Indiana's voter ID law—a majority of the Supreme Court ruled that *Anderson-Burdick* requires consideration of whether a statute "imposes 'excessively burdensome requirements' on *any class of voters*," and explained that the "relevant" burdens were "those imposed on persons who are eligible to vote but do not possess a current photo identification" and that "[t]he fact that most voters already possess a valid driver's license . . . would not save the statute." 553 U.S. 181, 198, 202 (plurality op.) (quoting *Storer v. Brown*, 415 U.S. 724, 738 (1974)) (emphasis added); *see also id.* at 199; *id.* at 212–14 (Souter, J., dissenting) (similar); *id.* at 239 (Breyer, J., dissenting) (similar).

Likewise, whether the Inequitable Notice and Cure Process is constitutional must be assessed from the vantage point of voters actually burdened by the statute—i.e., those that return timely ballots that are flagged for rejection due to a technical defect and given no notice or meaningful opportunity to cure the ballot. *See* Compl. ¶¶ 79–88, 134–37. The Commonwealth may not subject these voters, absent an adequate state interest, to additional burdens on voting. *See Bush v. Gore*, 531 U.S. 98, 104–05 (2000) ("Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another."). Plaintiffs' allegations supporting Counts V and VI are legally sufficient, and Defendants' Motion should be denied.

CONCLUSION

For the reasons set forth above, the Court should deny Defendants' motion to dismiss.

Dated: January 26, 2022

Respectfully Submitted:

/s/ Haley Costello Essig

Haley Costello Essig, VA Bar No. 85541
Kathryn E. Yukevich, VA Bar No. 92621
Marc E. Elias*
Elisabeth C. Frost*
John Geise*

Joel J. Ramirez*
ELIAS LAW GROUP LLP
10 G St NE Ste 600
Washington, DC 20002
Telephone: 202.968.4490
Facsimile: 202.968.4498
MElias@elias.law
EFrost@elias.law
HEssig@elias.law
JGeise@elias.law
JRamirez@elias.law
KYukevich@elias.law

* Admitted *pro hac vice*

Counsel for Plaintiffs DPVA and DCCC

CERTIFICATE OF SERVICE

I hereby certify that on January 26, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will then send a notification of such filing to all parties.

/s/ Haley Costello Essig

Haley Costello Essig, VA Bar No. 85541
ELIAS LAW GROUP LLP
10 G St NE Ste 600
Washington, DC 20002
Telephone: 202.968.4490
Facsimile: 202.968.4498
HEssig@elias.law

Counsel for Plaintiffs DPVA and DCCC