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,

v.

REPUBLICAN PARTY OF VIRGINIA,

Intervenor-Defendant.

Civil Action No. 3:21-CV-756

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

Plaintiffs Democratic Party of Virginia ("DPVA") and DCCC, by and through counsel, file this Opposition to Intervenor-Defendant Republican Party of Virginia's ("RPV") Rule 12(b)(6) Motion to Dismiss and Memorandum in Support, ECF Nos. 42 & 43.[1]

[1] RPV originally filed its motion to dismiss and memorandum in support as a single document at ECF No. 41. It then re-filed those documents separately, with the motion to dismiss at ECF No. 42, and memorandum in support at ECF No. 43. Plaintiffs respond to the substantive arguments

INTRODUCTION

RPV's motion to dismiss Plaintiffs' Complaint for failure to state a claim misconstrues the procedural posture of this case, the applicable standards the Court must apply, governing law and precedent, and the allegations in the Complaint. Plaintiffs' allegations are more than sufficient to state a claim, and RPV's motion should be denied.[2]

First, RPV turns the legal standard this Court must apply on its head, urging it to accept RPV's alternative factual claims over those pleaded throughout the Complaint. The Court, of course, must accept Plaintiffs' well-pleaded factual allegations as true. This is not the time 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). Thus, the Court can and must ignore RPV's alternative factual contentions—such as its (albeit baseless) theory as to why prospective voters are deterred by the requirement that voters must provide their full social security number (the "Full SSN Requirement")—at this stage in the proceedings. *Second*, RPV incorrectly contends that *Greidinger v. Davis*, 988 F.2d 1344 (4th Cir. 1993), forecloses Plaintiffs' SSN Counts. The question presented here was not presented in *Greidinger*; however, both the reasoning and conclusion of the Fourth Circuit in that case supports *Plaintiffs*' position. *Third*, RPV similarly

made in the memorandum at ECF No. 43, referred to throughout this brief as RPV's motion to dismiss ("RPV Mot.").

[2] As referred to throughout this brief and other papers filed in this case, the SSN Counts are: Count I (alleging violation of First Amendment speech and associational guarantees), Count II (violation of Materiality Clause of Civil Rights Act), Count III (violation of Privacy Act), and Count VI (undue burden on right to vote in violation of First and Fourteenth Amendment). The Notice and Cure Counts are: Count IV (violation of procedural due process) and Count V (undue burden on right to vote in violation of First and Fourteenth Amendments). As Plaintiffs allege, the right-to-vote claims brought under the First and Fourteenth Amendments (Counts V and VI) are evaluated under the *Anderson-Burdick* test, *see* Compl. ¶¶ 133–43, and are at times referenced in this brief as Plaintiffs' "*Anderson-Burdick* claims."

misconstrues the broader substantive law implicated by Plaintiffs' claims, including as applicable to the First Amendment, Privacy Act, and Materiality Clause challenges to the Full SSN Requirement (Counts I, II, and III). RPV wrongly asserts that the Court lacks the power to remedy the procedural due process violation alleged in Count IV as to the Inequitable Notice and Cure Process. As to Plaintiffs' *Anderson-Burdick* claims (Counts V and VI), RPV urges an inappropriate application of that framework at the motion to dismiss stage.

For each of these reasons, as more fully explained below, RPV's motion to dismiss should be denied in its entirety.

LEGAL STANDARD

To avoid dismissal 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). The 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, 1988 WL 86620, at *1 (4th Cir. 1988) (internal citation omitted). The rules require "only a short and plain statement of the claim showing that the pleader is entitled to relief." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (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. Factual allegations must be construed in Plaintiffs', not RPV's, favor.

This Court is required to accept Plaintiffs' factual allegations as true, but RPV repeatedly invites this Court to credit RPV's alternative factual theories over those alleged in the Complaint. 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.*, 980 F.2d at 952. The Court's task at this stage is simply to determine whether Plaintiffs have provided Defendants with "fair notice" of their claims. *Wright v. North Carolina*, 787 F.3d 256, 265 (4th Cir. 2015) (quoting *Erickson*, 551 U.S. at 93). A motion to dismiss should be denied when the plaintiff's facts can be favorably construed to state a claim. *See Erickson*, 551 U.S. at 93.

As explained more fully below and in Plaintiffs' previously filed Opposition to the State Defendants' Motion to Dismiss, ECF No. 34, Plaintiffs have met their burden. RPV's baseless counter-factual arguments must be disregarded in favor of the factual allegations made in the Complaint. *Compare* Compl. ¶¶ 35–57, 61–70, 86, 139, 141–42, *with e.g.*, RPV's Mot. at 7, ECF No. 43 (making conclusory assertions that "[i]t is *Plaintiffs' actions*, approaching strangers and asking them for their SSNs to further the Plaintiffs' partisan political goals, that is discomfiting the prospective voters about the security of their SSNs" and "prospective voters are afraid to trust Virginia Democrats with their information") (emphasis in original); *see also id*. at 8–9 (arguing Full SSN Requirement "does not in any way stop Plaintiffs from encouraging people to vote or associating with them" and that "voters are uncomfortable sharing their social security numbers with Plaintiffs"); *id.* at 10 (arguing burden of Full SSN Requirement is due to Plaintiffs' actions); *id*. at 10–11 (arguing prospective voters do not trust Plaintiffs); *id*. at 11–12 (arguing "[i]t isn't costly" or "difficult" to provide a SSN and that asking for one "is no more burdensome than asking for [a] name, address, or birthdate"); *id*. at 13 (arguing Notice and Cure Counts arise "from a concern over voters who wait until right before the election to mail their defective absentee ballots"); *id*. at 16–18 (similar) (quotation and alteration omitted).

Likewise, the Court must reject RPV's demands that Plaintiffs prove their case in their Complaint, or RPV's contention that its countervailing view of the evidence may be accepted at

this stage in the proceedings. *See, e.g.*, RPV's Mot. at 6 (arguing Plaintiffs "failed to establish the state's use of SSNs is not 'not [sic] warranted'"); *id*. at 10 (arguing privacy laws do not implicate constitutional burdens regarding the right to vote); *id*. at 13–14 (arguing Plaintiffs have not "establish[ed]" a Privacy Act violation); *id*. at 14–15 (arguing Full SSN Requirement is not a burden); *id*. at 17–20 (arguing burden of notice and cure on the State is severe and only certain circumstances result in voters not receiving notice and an opportunity to cure).

These counter-allegations and merits arguments provide the principal support for RPV's arguments for dismissal of Counts III, IV, V, and VI. For these reasons alone, RPV's arguments that these Counts should be dismissed must be denied. For the reasons discussed below, RPV's remaining arguments should also be rejected.

II. *Greidinger v. Davis* supports Plaintiffs' SSN Counts.

RPV erroneously contends that the Fourth Circuit foreclosed all of Plaintiffs' claims against Virginia's Full SSN Requirement and forever "approved" that requirement in its decision in *Greidinger v. Davis*. *See* RPV's Mot. at 2, 4–6. The questions presented here, however, were not presented in *Greidinger*. Moreover, both the reasoning and conclusion of the Fourth Circuit in that case supports *Plaintiffs*; it does not provide a basis for dismissal on a 12(b)(6) motion.

Greidinger considered a prospective voter's challenge to Virginia law at the time, which required the dissemination of voters' SSNs to the public. 988 F.2d at 1348. The plaintiff alleged an *Anderson-Burdick* claim, arguing that this scheme imposed an undue burden on his right to vote in violation of the First and Fourteenth Amendments. *Id*. at 1348, 1352. The Fourth Circuit agreed. *Id*. at 1355. In reaching that decision, the Court found that requiring full SSNs to vote when there is the "possibility of a serious invasion of [the voters'] privacy" based on SSN disclosure imposes an intolerable burden on the right to vote that cannot be justified by a compelling state interest. *Id*.

at 1352, 1355. The Court expressly rejected the argument that the Full SSN Requirement was necessary to prevent voter fraud. *Id*. at 1354. Indeed, it found that the Full SSN Requirement was so inessential to Virginia's election scheme that it could be jettisoned entirely. *See id*. at 1355 (remanding case with instructions that Virginia could either "delet[e] the requirement that a registrant disclose his SSN," or "eliminat[e] the use of SSNs in voter registration records open to public inspection and contained in voter registration lists provided to" the public, to cure disclosure injury asserted by plaintiff). Although the plaintiff did not bring a First Amendment claim (as Plaintiffs do here), the Court recognized that such claims are similarly subject to strict scrutiny. *Id*. at 1352.[3]

RPV ignores all of this in favor of a single footnote that contains no legal analysis or citation. In that footnote, the Court "note[d]"—rather than held—"that Virginia's voter registration scheme imposes a substantial burden on [the plaintiff's] fundamental right to vote only to the extent that the scheme permits the public disclosure of his SSN. If the scheme provided for only the receipt and internal use of the SSN by Virginia, no substantial burden would exist." *Id.* at 1354 n.10. The footnote is textbook *dicta* and does not control. *See Jamison v. Wiley*, 14 F.3d 222, 235 (4th Cir. 1994) (explaining "any language" regarding an "issue . . . not presented" to the court "must necessarily be regarded as dicta"); *Waine v. Sacchet*, 356 F.3d 510, 517 (4th Cir. 2004)

[3] Although RPV claims that strict scrutiny is never applied using *Anderson-Burdick*, RPV's Mot. at 15, the Fourth Circuit did just that in *Greidinger* after finding that the disclosure scheme imposed a substantial burden on the right to vote. *See Greidinger*, 988 F.2d at 1351–52 (recognizing strict scrutiny applies where statute imposes substantial burden on right to vote); *see also McLaughlin v. N.C. Bd. of Elections*, 65 F.3d 1215, 1221 (4th Cir. 1995) (explaining if court finds that rights are severely burdened "strict scrutiny applies," but if a lesser burden is imposed, "the court must balance the character and magnitude of the burdens imposed against the extent to which the regulations advance the state's interests").

("[D]icta cannot serve as a source of binding authority . . . .") (citation omitted).

At most, the footnote provides the Court's perspective on the particular burden and injury allegations brought by the specific plaintiff involved in that case; it cannot properly be read to forever find no burden—regardless of the factual allegations made, evidence advanced, or even nature of the legal claims presented—to any future plaintiff. The footnote offers no comment even remotely germane to Plaintiffs' claims arising under entirely different legal theories, including the First Amendment, the Materiality Clause of the Civil Rights Act, or the Privacy Act (Counts I, II, and III)—none of which were at issue in *Greidinger*. And to find the footnote controlling *even with regard to* Plaintiffs' *Anderson-Burdick* claim (Count VI) would ignore the admonishment by the Supreme Court in *Crawford v. Marion County Election Board*, which makes clear that there is no "litmus test" to separate valid from invalid restrictions; in every case courts must weigh the specific burdens asserted by the plaintiffs against the state's asserted interest in the restriction and "make the 'hard judgment' that our adversary system demands." 553 U.S. 181, 190 (2008).

Things have changed since *Greidinger*, and Plaintiffs' factual allegations reflect that. Among other things, Plaintiffs allege that changing technology, cyber-criminal activity, and geopolitics in recent years have directly impacted and increased the burden posed by the Full SSN Requirement. *See* Compl. ¶¶ 36–54. The Court is not free to disregard these allegations, which are quite different from the claims made by the plaintiff in *Greidinger* nearly 20 years ago. Moreover, the Supreme Court held in *Americans for Prosperity Foundation v. Bonta*, 141 S. Ct. 2373, 2388 (2021), that the risk of disclosure of sensitive information can impose constitutional injuries, even when the state, by law, purports to protect that information from disclosure.

Finally, as admitted by the Public Interest Legal Fund ("PILF") in filings submitted to this Court, PILF obtained and republished online Virginia voters' full SSNs well after *Greidinger* was

decided, demonstrating that Defendants' purported safeguards have not sufficed to protect that highly sensitive information from public dissemination—even after Virginia eliminated the public disclosure scheme that was at issue in *Greidinger*. *See* Pls.' Opp. to PILF Mot. to Intervene at 4, ECF No. 25. For all of these reasons, Plaintiffs are likely to be able to prove that the Full SSN Requirement imposes a substantial burden on the right to vote, for the same reasons that the Fourth Circuit found the disclosure scheme unconstitutional in *Greidinger*. *See* 988 F.2d at 1352, 1355 (framing the injury at issue in that case as "the fact that the SSN may be *potentially* disseminated . . . with the attendant *possibility* of a serious invasion of one's privacy") (emphases added).

III. RPV misunderstands the substantive law at issue.

Much like the State Defendants' motion to dismiss, RPV's motion misconstrues the substantive law regarding Plaintiffs' First Amendment (Count I), Materiality Clause (Count II), and Privacy Act (Count III) claims. Plaintiffs incorporate here the respective portions of their Opposition to Defendants' Motion to Dismiss that address the proper law by which to review the sufficiency of Plaintiffs' allegations. *See* Pls.' Opp. to Defs.' Mot. to Dismiss at 6–14, 20–21. To the extent RPV's arguments and legal misgivings vary from those of the State Defendants, Plaintiffs briefly address RPV's unique positions below.[4]

[4] RPV offers some novel legal positions on the substantive law pertaining to the SSN Counts that simply cannot support dismissal here, but which are not explored in the subsections below. These include RPV's belief that if Plaintiffs take the position that the Full SSN Requirement impacts racial minorities, then Plaintiffs should have brought a seventh cause of action under the Voting Rights Act, as well as RPV's argument that Plaintiffs' issue in challenging the Full SSN Requirement is truly with unspecified "privacy laws" that protect against the disclosure of sensitive consumer information. *See* RPV's Mot. at 7–8. RPV does not explain how either argument supports dismissal, and neither does. The racial impact of the Full SSN Requirement relates to the effectiveness and necessity of voter registration drives to Plaintiffs' missions, and Plaintiffs do not argue that they should not have to comply with privacy laws. Instead, they argue that they should not have to bear the costs of compliance *in the first instance* because the Commonwealth has no

A. Plaintiffs sufficiently allege a First Amendment challenge to the Full SSN Requirement (Count I).

RPV fundamentally misconstrues the law applicable to Plaintiffs' First Amendment claim. This is reflected, for instance, in RPV's argument that it has "difficult[y]" envisioning how the Full SSN Requirement affects "a person other than the voter." RPV's Mot. at 5 (emphasis removed). RPV need only look to the Supreme Court's recent decision in *Americans for Prosperity Foundation v. Bonta*, in which the Court determined that a First Amendment injury may arise from the mere *risk* that sensitive information may be disclosed to the public, making persons less willing to exercise their associational rights as a result. 141 S. Ct. at 2388. In *Bonta*, as here, the information was protected from public disclosure by law. *Id*. at 2387–88 & n.*.

The Court must accept as true Plaintiffs' factual allegations that such a risk is severe at this stage in the proceedings. And as Plaintiffs allege, the risk has become far more significant in the nearly 20 years since *Greidinger* was decided, and even more so in the past few years, as American election databases have become a prime target for hackers. *See, e.g.*, Compl. ¶¶ 38–57; *cf. Bonta*, 141 S. Ct. at 2388 (noting risks of harassment and privacy violations "are heightened in the 21st century and seem to grow with each passing year, as 'anyone with access to a computer [can] compile a wealth of information about' anyone else, including . . . sensitive details as the person's home address") (citation omitted).

Plaintiffs have also pleaded that the Full SSN Requirement chills *Plaintiffs*' (not only voters') ability to associate, because voters are understandably hesitant to disclose their full SSNs

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sufficiently compelling reason to force voters to disclose their full SSNs to register to vote. Both claims are sufficiently pleaded; RPV's suggestion that Plaintiffs should have pursued alternative claims not only inaccurately interprets Plaintiffs' allegations, but also ignores that Plaintiffs are the master of their complaint and under no obligation to pursue every potential legal claim that any observer muses they might have.

to register to vote, making Plaintiffs less likely to be able to effectively associate with those prospective voters to elect their candidates and advance their political cause. *See* Compl. ¶¶ 95–109. Under *Bonta* such a chill is sufficient to not only state, but prove, a First Amendment claim. 141 S. Ct. at 2388.

RPV's assertion that "there is no cognizable act of the state at issue in this lawsuit that inhibits Plaintiffs' election-related speech and association," RPV's Mot. at 6, is also wrong as a matter of both fact and law. The Full SSN Requirement is precisely such an act, and that act inhibits Plaintiffs' voter registration drives, which constitute core election-related speech and association activities. *See League of Women Voters of Fla. v. Browning*, 863 F. Supp. 2d 1155, 1158 (N.D. Fla. 2012) (finding voter registration drives are "pure speech"); *League of Women Voters v. Hargett*, 400 F. Supp. 3d 706, 722 (M.D. Tenn. 2019) (finding voter registration drives "a core First Amendment activity"). Plaintiffs have alleged that voter registration drives are key to Plaintiffs' ability to associate with voters in furtherance of their missions. *See* Compl. ¶¶ 18, 22, 99–101. This Court must accept those allegations as true at this stage. It is also well recognized that Plaintiffs may challenge laws that injure their ability to effectively associate and to advance their missions. *See, e.g.*, *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 954–58 (1984) (concluding professional fundraiser had third-party standing to challenge statute as violation of clients' First Amendment right to hire him); *Eisenstadt v. Baird*, 405 U.S. 438, 446 n.5 (1972) ("[I]n First Amendment cases we have relaxed our rules of standing without regard to the relationship between the litigant and those whose rights he seeks to assert precisely because application of those rules would have an intolerable, inhibitory effect on freedom of speech.").

Finally, RPV's insistence that because DPVA maintains a working website, "[n]othing" in the Full SSN Requirement "prevents anyone from speaking with or joining the Virginia

Democratic Party," is also wrong. RPV's Mot. at 8. The Supreme Court in *Meyer v. Grant*, 486 U.S. 414 (1988), rejected virtually the same argument. *Meyer* involved a First Amendment challenge to Colorado's prohibition on paying initiative-petition circulators. Like RPV here, the state argued "that even if [a] statute imposes some limitation on First Amendment expression, the burden is permissible because other avenues of expression remain open." *Id*. at 424. The Court disagreed, noting that the mere fact that other avenues remained open did not "relieve" the state of "its burden on First Amendment expression." *Id*. The First Amendment protects both the right to "advocate" for a cause and the "select[ion]" of the best means for doing so. *Id*. Just like the petition circulation process at issue in *Meyer* was deemed a particularly effective "direct one-on-one communication" with voters, *id*., voter registration drives "bridge inevitable gaps in registration and especially are necessary to reach" underserved voters. *See* Compl. ¶¶ 60–63. RPV's argument that Plaintiffs have failed to state a claim should be rejected.

B. Plaintiffs sufficiently allege a challenge to the Full SSN Requirement under the Materiality Clause (Count II).

RPV does not dispute that a full SSN is immaterial to eligibility to vote in Virginia, and for that reason alone, its request that this Court dismiss Count II must be denied. 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; disclosure of a full SSN is not one of them. *See* Compl. ¶ 114. Yet, Virginia maintains the

Full SSN Requirement to reject voter registrations. *Id*. ¶ 29.

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. Contrary to RPV's argument that Plaintiffs should have identified specific instances of voters being unable to vote due to the Full SSN Requirement, *see* RPV's Mot. at 9, Plaintiffs' general allegations regarding the Materiality Clause claim "embrace those specific facts that are necessary to support the claim" and are sufficiently pleaded. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (quotation omitted); *see also* Pls.' Opp. to Defs.' Mot. to Dismiss at 12–13 (explaining how Plaintiffs' allegations are sufficient to state a claim).

Moreover, Plaintiffs' allegations are unequivocally supported by the governing law itself. The Full SSN Requirement recognizes that a full SSN is not required to vote in Virginia. *See* Va. Const. art. II, § 2 (requiring a full social security number, "if any"). Virginia law does not list a social security number as a qualification for eligibility to vote. *See id*. § 1. Finally, as discussed above, the Fourth Circuit has recognized that the Full SSN Requirement is a non-essential requirement. *See Greidinger*, 988 F.2d at 1354–55; *supra* § II. RPV's attempt to read an intent element into the legal requirements of a Materiality Clause claim (*see* RPV's Mot. at 9–10) is, by contrast, not supported by any governing law, including the relevant portions of the Civil Rights Act, which are concerned only with the effect of non-material requirements. *See* 52 U.S.C. § 10101(a)(2)(B).

C. Plaintiffs sufficiently allege a challenge to the Full SSN Requirement under the Privacy Act (Count III).

Regarding Plaintiffs' challenge to the Full SSN Requirement under the Privacy Act (Count III), RPV again misunderstands the governing law and attempts to flip the burden both on the

motion to dismiss standard and on the substantive law. RPV contends that Plaintiffs have "not establish[ed]" that Virginia did not condition the right to vote on disclosing a SSN before 1975, arguing that, as a result, Virginia is exempted from the Privacy Act under the Act's limited "grandfather" provision. RPV's Mot. at 10–11.[5]

Plaintiffs, however, need not "establish" any factual matter at this stage; they need merely provide "a short and plain statement of the claim showing that [they are] entitled to relief." *Erickson*, 551 U.S. at 93 (quotation omitted). Plaintiffs have done so here, alleging that Virginia did not uniformly require a full SSN for voter registration before 1975 and citing evidence for that contention. *See* Compl. ¶¶ 34, 122–23; Pls.' Opp. to Defs.' Mot. to Dismiss at 20–21.

Notably, RPV does not dispute that the Privacy Act forbids conditioning the right to vote on disclosing one's SSN, but rather argues that Virginia is exempt from compliance. RPV's Mot. at 13. This, however, is a matter upon which the Defendants bear the burden of proof, and one in which Plaintiffs—having pleaded sufficient facts to establish a violation of the Act on its face—are entitled to discovery. *See Schwier v. Cox*, 412 F. Supp. 2d 1266, 1270 (N.D. Ga. 2005), *aff'd*, 439 F.3d 1285 (11th Cir. 2006). RPV's argument as to what Virginia, a separate party, did and when it did it is due no weight on this Motion. Accordingly, RPV's contention that this claim must be dismissed should be rejected.

[5] Under the Act's "grandfather" provision, a state is exempt from the Act's prohibition on conditioning a right on the disclosure of a SSN if the state (1) maintained a "system of records" before January 1, 1975, and (2) required the disclosure of an individual's full SSN to verify an individual's identity under that system of records. *Schwier v. Cox*, 412 F. Supp. 2d 1266, 1270 (N.D. Ga. 2005), *aff'd*, 439 F.3d 1285 (11th Cir. 2006) (quoting Pub. L. 93–579, 88 Stat. 1896 (1974), 5 U.S.C. § 552a (note)).

D. This Court has the power to remedy the Inequitable Notice and Cure Process.

RPV ignores foundational constitutional law to suggest that the power to remedy the Inequitable Notice and Cure Process is beyond this Court's reach, *see* RPV's Mot. at 14–15; it is not. It is axiomatic that federal courts can enjoin the enforcement of legislative enactments that run afoul of the Constitution. *See* U.S. Const. art. VI, para 2; *see also, e.g.*, *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1331 (11th Cir. 2019) (declining to stay district court order extending deadline to cure ballots with mismatched signatures and observing that federalism "demands the supremacy of federal law when state law offends federally protected rights"). This Court is no exception. To the extent RPV questions Defendants' ability to comply with Plaintiffs' requested relief, *compare* RPV's Mot. at 14, *with* Compl. ¶¶ 92, 130—notwithstanding RPV's third-party perspective as to what Virginia is and is not capable of doing—that is an issue for discovery and not a motion to dismiss. *Revene v. Charles Cnty. Comm'rs*, 882 F.2d 870, 872 (4th Cir. 1989) (explaining that the issue on a motion to dismiss is not to resolve factual disputes but whether the pleading, taken as true, is sufficient to permit the claimant "to offer evidence to support the claims" (quotation omitted)).

E. RPV's *Anderson-Burdick* arguments regarding the Inequitable Notice and Cure Process (Count V) are premature.

RPV's contention that Plaintiffs' *Anderson-Burdick* challenge to the Inequitable Notice and Cure Process (Count V) should be dismissed is a premature, impermissible attack on the merits and cannot properly justify dismissal of this claim at this stage in the proceedings.[6] Indeed, RPV

[6] RPV appears to include Count IV in its attack on the merits of Plaintiffs' *Anderson-Burdick* claim concerning the Inequitable Notice and Cure Process, but this argument is misplaced. Count IV raises a due process claim, which is distinct and separate from the *burden* claim raised in Count

does not challenge the sufficiency of Plaintiffs' allegations in support of that claim. RPV's Mot. at 15–20. Instead, RPV argues that the Ninth Circuit's decision in *Arizona Democratic Party v. Hobbs*, 18 F.4th 1179 (9th Cir. 2021), should control the merits determination here. RPV's Mot. at 17. RPV is wrong on two counts. *First*, this assertion ignores very important differences between Virginia's law and the Arizona law at issue in *Hobbs*; in particular, Virginia's process leaves some voters without notice that their ballots have been flagged as defective at all. *Compare, e.g.*, *Hobbs*, 18 F.4th at 1184 (explaining Arizona's interpretation gives all voters with signature issues notice, with some permitted a longer opportunity to cure), *with* Compl. ¶¶ 81–88 (explaining that Virginia's system may provide some voters with no notice of defects on their ballot whatsoever).

Second, as noted above, *Anderson-Burdick* requires the Court to evaluate each claim that comes before it on the evidence presented, carefully considering the burden of the laws in question, weighing them against the specific justifications set forth by the state for the rule, and then determine whether the rule does in fact advance those interests. *Crawford*, 553 U.S. at 190–91. RPV has placed several of Plaintiffs' factual allegations in dispute by asserting countervailing facts, including for Plaintiffs' *Anderson-Burdick* claims. *See* § I, *supra*. But now is not the time to "resolve contests surrounding the facts" or "the merits of a claim," *Republican Party of N.C.*, 980 F.2d at 952, let alone follow an out-of-circuit case, about a distinguishable law, decided on the merits after a bench trial, *see Hobbs*, 18 F.4th at 1185. Doing so is no substitute for the "'hard

V. A due process claim is not subject to *Anderson-Burdick* review. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (providing the appropriate test for the sufficiency of due process claims). RPV fails to address the relevant standard and makes no argument that Plaintiffs fail to sufficiently plead their Count IV due process claim.

judgment' that our adversary system demands." *Crawford*, 553 U.S. at 190.[7] Endorsing RPV's argument here would violate both the appropriate standard on a 12(b)(6) motion to dismiss and the Supreme Court's admonishment in *Crawford*.

CONCLUSION

For the reasons set forth above, the Court should deny in its entirety RPV's motion to dismiss.

Dated: February 22, 2022

Respectfully Submitted:

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[7] Accordingly, because RPV has challenged the sufficiency of Plaintiffs' *Anderson-Burdick* allegations by asserting countervailing facts, this is not an *Anderson-Burdick* case that may be resolved on a motion to dismiss. *See Fusaro v. Cogan*, 930 F.3d 241, 259 (4th Cir. 2019) (explaining that *Anderson-Burdick* cases appropriate for resolution on a motion to dismiss are those for which the resolution "depends on legal—rather than factual—sources and considerations") (citation omitted).

CERTIFICATE OF SERVICE

I hereby certify that on February 22, 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

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