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

DEMOCRACTIC PARTY OF VIRGINIA AND DCCC, Plaintiffs, v. ROBERT H. BRINK, in his official capacity as the Chairman of the Board of Elections, *et al.*, Defendants, v. REPUBLICAN PARTY OF VIRGINIA, Intervenor-Defendant	)	Civil Case No. 3:21-cv-00756-HEH

REPLY TO PLAINTIFFS' OPPOSITION TO INTERVENOR-DEFENDANT'S RULE 12(b)(6) MOTION TO DISMISS

The Republican Party of Virginia (RPV), by and through counsel, replies to Plaintiff's Opposition to RPV's Rule 12(b)(6) Motion to Dismiss (ECF No. 45, Plaintiffs' "Opposition") as follows.

INTRODUCTION

RPV's Motion to Dismiss and Memorandum in Support (ECF No. 42 and 43, collectively "Motion to Dismiss") is based on law, not just a difference of opinion over factual claims. The Court of Appeals for the Fourth Circuit in *Greidinger v. Davis* was clear: "Virginia's voter registration scheme imposes a substantial burden on [Plaintiff's] fundamental right to vote only to the extent that the scheme permits the public disclosure of his [Social Security Number ("SSN")]. *If the scheme provided for only the receipt and internal use of the SSN by Virginia, no*

substantial burden would exist." 988 F.2d 1344, 1354 n.10 (4th Cir. 1993) (emphasis added). Moreover, as a matter of law, "[f]actual allegations must be enough to raise a right to relief above the speculative level" and may not simply be "labels and conclusions." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiffs' Complaint does not rise above the level of labels, conclusions, and speculation.

The Fourth Circuit has plainly and explicitly rejected the argument Plaintiffs advance in this case. In *Greidinger* the Fourth Circuit held that a scheme that provided only for the receipt and internal use of SSNs by the Commonwealth does not impose a substantial burden on a person's right to vote. Yet the Plaintiffs ignore this inconvenient holding and invite the Court to travel through the looking glass to discover broad new legal theories in *Greidinger* to support their case. Those to-be-discovered theories are not there, but the holding that forecloses the Plaintiffs' argument is there in plain view.

Plaintiffs also claim that RPV set forth "alternative factual theories" in its Motion to Dismiss. Opposition at 3. This is not the case. RPV is not asking this Court to accept an "alternative" set of facts. Rather, it is asking the Court to look at the Plaintiffs' Complaint and recognize that the emperor has no clothes. What Plaintiffs characterize as their alternative factual contentions are little more than speculation and conclusory statements that are legally insufficient to state a claim, even under the relatively generous Federal pleading standards.

Finally, Plaintiffs claim that the RPV "misunderstands" the substantive law. Opposition at 8. However, it is the Plaintiffs who seek to invent and contort the relevant legal standards.

A. The Complaint's Alleged First Amendment Claim in Count I is Meritless

As the Fourth Circuit made clear in *Greidinger*, the Commonwealth's SSN requirement does not pose a "substantial burden" if the collection of SSNs is for internal use only. 988 F.2d at

1354 n.10; *see also id.* at n.11 ("Unquestionably, Virginia has a compelling state interest that is narrowly tailored in the receipt and internal use of a SSN. The internal use of SSNs assists in, among other things, identifying voter duplication and tracking felons.").

To get around this clear statement of law, Plaintiffs first cite to *Americans for Prosperity Foundation v. Bonta*, for the proposition that a First Amendment injury may arise from the mere risk that sensitive information may be disclosed to the public, making the person less likely to exercise their associational rights. 141 S. Ct. 2373, 2388 (2021); *see* Opposition at 9. This argument takes *Bonta* out of context. *Bonta* was a case about providing the donor lists of nonprofit organizations to state governments as a matter of course. The "sensitive information" the Plaintiffs and the Court were concerned about was not personally identifiable information for its own sake. Rather, it was the fact of a person's association with a given nonprofit organization, which would be revealed by the disclosure of an organization's donor lists. The risk of harassment the Court was concerned about in *Bonta* was harassment based on one's associations, and the fear was that the risk of harassment based on associations would prevent people from associating in the first instance. There is nothing about a social security number that reveals private associations; all Americans have a social security number, regardless of whether they are Republicans, Democrats, Green Party Members, Libertarians, Communists, or any other political association. Because social security numbers alone do not reveal expressive associations, Plaintiff's reference to *Bonta* is a non-sequitur.

Next, Plaintiffs seek to cobble together a claim by joining two separate concepts: whether voter registration drives are First Amendment activities and whether an organization has standing to challenge laws that inhibit their ability to effectively associate. Opposition at 10. With respect to standing, RPV has not challenged Plaintiffs' standing. If there was an actual

restriction on Plaintiffs' ability to conduct a voter registration drive, RPV agrees that, as one of two major political parties in Virginia, Plaintiffs would have standing to challenge it.

Instead, RPV disagrees that Plaintiffs have alleged an actual restriction. The restrictions in *Meyer v. Grant*, 486 U.S. 414 (1988) directly limited how the Plaintiffs in that case could engage in protected activity. There is no analogous restriction in the Commonwealth's SSN requirement. Plaintiffs are free to hold voter registration drives and seek to attract new voters however they see fit. What they cannot do is neglect to collect required information just because doing so might be inconvenient. An alternative view lacks a limiting principle and would make any requirement to provide voter information as part of the voter registration process a potential First Amendment violation. After all, it is entirely likely that there are people who do not like giving their name or home addresses to strangers with clipboards, however, some level of information is plainly necessary to maintain voter rolls.

Accordingly, Plaintiffs have failed to state a claim under the First Amendment.

B. The Complaint's Civil Rights Materiality Claim in Count II is Meritless

There are three problems with Count II: 1) Plaintiffs have failed to show the SSN requirement is immaterial; 2) Plaintiffs have failed to allege that any voter has actually been denied the right to vote because they either refused to provide or misstated their SSN; and 3) Plaintiffs have failed to allege any intent that the SSN requirement would increase errors or omissions, thus providing an excuse to disqualify potential voters.

First, Plaintiffs claim that RPV does not dispute that a full SSN is immaterial to eligibility to vote in Virginia. Opposition at 11. On this point at this time, we defer to the Commonwealth of Virginia, which is responsible for assessing voter qualifications and stated in its Memorandum in Support of Motion to Dismiss (ECF No. 30) "Plaintiffs fail to show that the requirement to

provide a Social Security number when registering to vote is immaterial." ECF No. 30 at 10. As the party who filed suit and is claiming the violation, the Plaintiffs bear the burden of proof and they have not pleaded a sufficient factual allegation.

Second, Plaintiffs have failed to allege that any voter has actually been denied the right to vote because they refused to provide or misstated their SSN. Even after their Opposition, Plaintiffs still have not alleged that any voter has been denied the right to vote due to the SSN requirement. Instead, Plaintiffs claim that their "general allegations regarding the Materiality Clause claim 'embrace those specific facts that are necessary to support the claim' and are sufficiently pleaded." Opposition at 12 (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). This is little more than the sort of "formulaic recitation of the elements of a cause of action" that the Court in *Twombly* said "will not do." 550 U.S. at 555.

Finally, Plaintiffs make no allegation that the Commonwealth's SSN requirement was intended to create an excuse to disqualify eligible voters. *See generally Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308 (N.D. Ga. 2018) (Section 10101(a)(2)(B) of the Civil Rights Act "was 'intended to address the practice of requiring unnecessary information for voter registration with the intent that such requirements would increase the number of errors or omissions on the application forms, thus providing an excuse to disqualify potential voters.'" (quoting *Schwier v. Cox*, 340 F.3d 1284, 1294 (11th Cir. 2003)).

C. The Complaint's Privacy Act Allegation in Count III is Meritless

The Complaint does not dispute that the Commonwealth's SSN requirement existed prior to January 1, 1975, during the period covered by the grandfather clause in the Privacy Act, and alleges no specific facts that, even if taken as true, would support a conclusion that the grandfather clause does not apply to the Commonwealth.

Instead, Plaintiffs claim that the mere assertion that "Virginia did not uniformly require a full SSN for voter registration before 1975," combined with claims that "not all county registrars automatically rejected applications lacking SSNs" *in 1972* and that "Virginia did not even create a voter registration roster based on SSNs until sometime in or after *1974*." Opposition at 13; Complaint (ECF No. 1) at ¶ 123 (emphasis added).

The first part of Plaintiff's argument is a conclusory statement, which is insufficient under *Twombly*. 550 U.S. at 555 (holding that "labels and conclusions . . . will not do").

The second two factual claims are insufficient to support Plaintiffs claims. Even when taken as true, not rejecting applications *in 1972* and not implementing a voter registration roster until *1974* does not mean that a uniform system of records was not in place by *1975*.

D. There is No Denial of Due Process as Alleged in Court IV

The Complaint acknowledges, as it must, that there is no Constitutional right to an absentee ballot. Since there is no Constitutional right to an absentee ballot, there is no Constitutional right to cure a defective absentee ballot for up to a week after the election. *See generally* Complaint at ¶ 126 (acknowledging that "[t]o determine whether a plaintiff has been denied procedural due process in violation of the Due Process Clause of the Fourteenth Amendment, a court first asks whether a constitutional protected liberty interest is at stake.").

Contrary to Plaintiffs' conclusory assertions, the Commonwealth's Notice and Cure provisions do not disenfranchise anyone. *See Ariz. Democratic Party v. Hobbs*, 18 F.4th 1179, 1187 (9th Cir. 2021) ("Whenever voters fail to comply with a voting prerequisite, their votes are not counted and they are, as Plaintiffs use the term, disenfranchised. If the burden imposed by a challenged law were measured by the consequence of noncompliance, then every voting prerequisite would impose the same burden and therefore would be subject to the same degree of

scrutiny (presumably strict if the burden is disenfranchisement). But this cannot be true . . . .") (quoting *Ariz. Democratic Party v. Hobbs*, 485 F.Supp.3d 1073, 1087-1088 (D. Ariz. 2020)); *see also Mathews v. Eldridge*, 424 U.S. 319, 335 (1976) (To establish a due process claim, plaintiffs must first identify "the private interest that will be affected by the official action.").

All voters have the same opportunity to vote. Any potential defect with an absentee ballot is wholly the fault of the voter, not the result of improper state action. *See Rosario v. Rockefeller*, 410 U.S. 752, 758 (1973) ("[I]f [voters who failed to meet a registration deadline's] plight can be characterized as disenfranchisement at all, it was not caused by [the law], but by their own failure to take timely steps to effect their enrollment."). Moreover, there are multiple avenues for voters to avoid the concerns Plaintiffs raise, such as submitting their absentee ballot earlier or voting on Election Day.

Plaintiffs' Complaint fails to state a cognizable claim under the Due Process clause.

E. The Commonwealth's Ballot Cure Procedures Do Not Impose an Unconstitutional Burden as Alleged in Count V

The Commonwealth's ballot cure provisions do not impose a "severe burden" as alleged by Plaintiffs. *See Hobbs*, 18 F.4th at 1187 ("The election-day deadline for submitting a completed ballot imposes, at most, a minimal burden."). To the contrary, the Commonwealth's ballot cure provisions add an additional element of leniency for voters who submit defective ballots. *See Id.* 1188 (noting that "15 states effectively disallow correction of a missing signature.").

Plaintiffs make two arguments in response to RPV's Motion to Dismiss. First, Plaintiffs claim that the Commonwealth's law is distinguishable from the law in *Hobbs* because "Virginia's process leaves some voters without notice that their ballots have been flagged as defective at all." Opposition at 15. However, this distinction is not relevant. Ballot curing is an exception to the general rule that voters should get their ballots right the first time. There is no

indication in *Hobbs* that ballot curing is generally required, or that it is an all or nothing proposition. Instead, the court noted that 15 states had no ballot curing provision for missing signatures, suggesting that the Commonwealth's law, like Arizona's, "falls in the middle of the spectrum." *Hobbs*, 18 F. 4th at 1188.

Second, Plaintiffs claim that Count V should survive a motion to dismiss because it really presents a question of contested facts. Opposition at 15. However, Plaintiffs have not alleged any factual circumstances that distinguish this case from *Hobbs*. Instead, Plaintiffs rely on "labels and conclusions, and a formulaic recitation of the elements of a cause of action," which the Court has already said are legally insufficient. *Twombly*. 550 U.S. at 555.

What is before the Court is not a question of contested facts. It is rather a question of whether the bare facts Plaintiffs have alleged are legally sufficient, even if accepted as true, to constitute a claim. The ruling in *Hobbs* persuasively suggests that they are not. This Court should accordingly find that Count V fails to state a claim.

F. The Allegation that the Social Security Number Requirement is an Unconstitutional Burden on the Right to Vote in Count VI is Meritless

Like the ballot curing provisions, the Commonwealth's SSN requirement is at most a minimal burden on the right to vote. Providing a SSN is no more burdensome that providing a voter's name, birthdate, or address, "burdens" that are minimal, at most.

As with Plaintiffs' challenge to the notice and curing provisions, the issue with Count VI is not a matter of competing factual claims. It is a question of whether Plaintiffs' conclusory statements are legally sufficient to support a claim. They are not. Merely adding the adjective "severe" does not change the underlying factual circumstances.

CONCLUSION

For the reasons set forth above, and in RPV's Motion to Dismiss, Plaintiffs have failed to state a claim upon which relief may be granted. Accordingly, this Court should dismiss all six counts in Plaintiffs' Complaint.

Dated: February 28, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send a notification of such filing to all counsel of record in this action.

Dated: February 28, 2022

By: /s/ David A. Warrington
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