**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 AMICUS PUBLIC INTEREST LEGAL FOUNDATION'S BRIEF IN SUPPORT OF DEFENDANTS' 12(b)(6) MOTION TO DISMISS**

Pursuant to this Court's March 7th, 2022, Order granting leave to file a response, ECF No. 55, Plaintiffs Democratic Party of Virginia ("DPVA") and DCCC, by and through counsel, file this Opposition to Amicus Public Interest Legal Foundation's ("PILF") brief in support of Defendants' Rule 12(b)(6) Motion to Dismiss, ECF No. 29.

## INTRODUCTION

PILF alone broadly challenges Plaintiffs' standing to assert all but Count IV in the Complaint.[1] Specifically, PILF contends that Plaintiffs lack standing to challenge Virginia's requirement that prospective voters provide their full social security number to register to vote (the "Full SSN Requirement") under the First Amendment (Count I), the Materiality Clause of the Civil Rights Act (Count II), the Privacy Act (Count III), and the First and Fourteenth Amendments' protections of the right to vote (Count VI) (collectively, the "SSN Counts"). PILF similarly contends that Plaintiffs lack standing to challenge the Inequitable Notice and Cure Process as an unconstitutional burden on voting rights under the First and Fourteenth Amendments (Count V).

In making these arguments, PILF contends either that Plaintiffs have no standing as organizations, or that Plaintiffs have not adequately alleged harm to themselves, their members, or their constituents. PILF is wrong on all fronts. Plaintiffs have standing on several independent grounds, including direct organizational standing and associational standing. Further, under well-established precedent, only one plaintiff need have standing on any ground for each claim to proceed. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006). PILF's arguments must be rejected.



## LEGAL STANDARD

To establish Article III standing, a litigant must allege (1) an injury-in-fact (2) fairly traceable to the challenged action of the defendant that is (3) likely to be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). PILF's standing arguments focus on the injury-in-fact requirement. Under well-established law, organizational plaintiffs "may have

[1] Count IV is Plaintiffs' Procedural Due Process challenge to Virginia's failure to provide all voters with the same notice and opportunity to cure technical deficiencies in absentee ballots, before they are rejected (the "Inequitable Notice and Cure Process"). *See* Compl. ¶¶ 125–32.

standing in [their] own right to seek judicial relief from injury to [themselves]," *Warth v. Seldin*, 422 U.S. 490, 511 (1975), as well as associational standing derived from threatened injuries to their members or constituents, *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Courts routinely find that political party committees meet these standards in cases such as this one, generally finding the injury-in-fact requirement met under one or more of the three following scenarios: *First*, political party committees are often found to have standing based on their having to divert resources to identify or counteract the allegedly unlawful action in frustration of their mission. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982); *see also Lee v. Va. State Bd. of Elections*, 188 F. Supp. 3d 577, 584 (E.D. Va. 2016) (Hudson, J.) (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") *aff'd on other grounds*, 843 F.3d 592 (4th Cir. 2016). *Second*, laws which threaten harm to the party's electoral prospects provide a competitive injury sufficient for Article III standing. *See*, *e.g.*, *Green Party of Tenn. v. Hargett*, 767 F.3d 533, 543–44 (6th Cir. 2014); *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006). *Third*, political party committees may have associational standing on behalf of members or constituents who are harmed. *See Hunt*, 432 U.S. at 343; *Lee*, 188 F. Supp. 3d at 584–85.



**ARGUMENT**

Plaintiffs have standing to pursue all six claims asserted in the Complaint. The Full SSN Requirement and the Inequitable Notice and Cure Process directly and concretely harm Plaintiffs' organizational missions both by requiring the diversion of resources and by injuring Plaintiffs' competitive prospects. *See* Compl. ¶¶ 18, 19–23, 137, 143. These laws also harm Plaintiffs' members, constituents, and supporters by derogating their right of association and right to vote.

*See id*. ¶¶ 1, 18–22, 118, 132, 137, 143. PILF's arguments to the contrary should be rejected.

## I. Plaintiffs have standing based on both direct harm to them as organizations and harm to their members and constituents.

With respect to Plaintiffs' Materiality Clause claim (Count II) and *Anderson-Burdick* claims (Counts V and VI), PILF wrongly contends Plaintiffs lack standing because they are organizations that do not vote. *See* PILF Amicus Br. at 5–6, ECF No. 44. This is contrary to the holding of numerous courts that political organizations such as Plaintiffs can challenge laws based on burdens to the right to vote. *See, e.g.*, *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) (holding state Democratic party had standing to challenge voter ID law because the "new 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"); *Ariz. Democratic Party v. Hobbs*, 485 F. Supp. 3d 1073, 1086 (D. Ariz. 2020), *vacated and remanded on other grounds*, 18 F.4th 1179 (9th Cir. 2021) (holding Arizona Democratic Party had organizational standing to bring challenge to state policy not allowing for curing of missing signatures on absentee ballots); *Democratic Party of Ga., Inc. v. Crittenden*, 347 F. Supp. 3d 1324, 1336 (N.D. Ga. 2018) (holding Georgia Democratic Party had both organizational and associational standing to bring *Anderson-Burdick* challenge regarding rejection of absentee ballots and the constitutionality of the statutory framework for curing and counting provisional ballots).



PILF's argument runs contrary to bedrock standing principles, which recognize that organizations have (1) direct standing if they must divert resources and their mission is harmed by the challenged laws, or (2) associational standing on behalf of members or constituents. To find otherwise would be to conclude that *Crawford v. Marion County Election Board*, 553 U.S. 181 (2008), was decided by the U.S. Supreme Court without jurisdiction. *See, e.g.*, Pls.' Opp. to Defs.'

Mot. to Dismiss at 5, ECF No. 34 (discussing settled precedent establishing that political parties are injured and have standing to challenge laws that burden the exercise of the right to vote). This Court implicitly rejected substantially the same argument in *Lee*, when it found that DPVA had standing in a case challenging Virginia's voter identification law and long voting lines. *See* 188 F. Supp. 3d at 584 (same). For the reasons discussed at greater length in Plaintiffs' Opposition to the State Defendants' Motion to Dismiss at 5–6, which Plaintiffs incorporate by reference, these arguments must be rejected.

PILF makes much the same argument with respect to Plaintiffs' Privacy Act claim (Count III) and, for the same reasons, it should be rejected. Specifically, PILF argues that Plaintiffs lack standing to bring a Privacy Act challenge because "they have not had anything denied to them," contending the Act protects a right held by individuals, not organizations. PILF Amicus Br. at 5–6. But Virginia's alleged violation of the Privacy Act—requiring a full SSN to register to vote—harms Plaintiffs *directly*, as well as their members and supporters. *See* Compl. ¶¶ 18–23.



## II. Plaintiffs need not identify specific voters who have been or will be harmed, or specific instances of harm, in order to have standing to pursue their claims.

With respect to Plaintiffs' First Amendment challenge (Count I) and Materiality Clause challenge (Count II) to the Full SSN Requirement, PILF demands that Plaintiffs allege far more than Article III requires. PILF's arguments are misplaced and should be rejected.

*First*, PILF's contention that Plaintiffs must "identif[y]" a member of their organizations that has suffered or will suffer harm to establish standing, PILF Amicus Br. at 4 (First Amendment claim); *see also id.* at 5 (Materiality Clause claim), is without merit for several reasons. As a threshold matter, to the extent there is any such requirement, it is relevant to associational standing only; Plaintiffs have standing on two other bases. PILF does not appear to contest this, making its argument largely irrelevant.

In any event, as discussed at greater length in Plaintiffs' Opposition to the State Defendants' Motion to Dismiss at 9–10 (citing and discussing cases), which is incorporated by reference, courts routinely reject this exact argument in the voting rights context. *See also, e.g.*, *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1160 (11th Cir. 2008) (finding organizations had standing to challenge voter registration statute even though it was impossible to know in advance which members would be injured, explaining "[w]hen the alleged harm is prospective, we have not required that the organizational plaintiffs name names because every member faces a probability of harm in the near and definite future"); *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004) (finding political parties and unions had standing to challenge voting procedures involving provisional ballots even though they "ha[d] not identified specific voters" who would be injured); *Gwinnett Cnty. NAACP v. Gwinnett Cnty. Bd. of Registration & Elections*, 446 F. Supp. 3d 1111, 1120 (N.D. Ga. 2020) (similar). PILF's argument to the contrary should be rejected.



*Second*, PILF's contention that Plaintiffs lack standing to pursue their First Amendment claim because they have not alleged specific "instance[s]" of harm, PILF Amicus Br. at 4, is similarly unavailing. This level of granularity is not necessary at this stage, where the court must "presum[e] that general allegations embrace those specific facts that are necessary to support the claim." *Lujan*, 504 U.S. at 561. Plaintiffs have described how the Full SSN Requirement causes an injury to their First Amendment rights in a sufficient manner for the Court to presume the specifics facts to support their claim. *See, e.g.*, Compl. ¶¶ 95–109. This is all that is necessary.

Finally, PILF's contention that DCCC has no standing to assert a First Amendment claim because it does not run voter registration drives, PILF Amicus Br. at 4, ignores the allegations of the Complaint. As the Complaint alleges, DCCC contributes resources to "conduct voter

registration drives in Virginia," and is harmed "in the same way" as DPVA by the Full SSN Requirement. Compl. ¶¶ 22–23. DCCC also has concrete plans to engage in additional registration in Virginia this year, and it has already opened a headquarters from which it plans to conduct this activity. *Id*. ¶ 23. That this activity will occur in the future does not, as PILF suggests, *see* PILF Amicus Br. at 4–5, render it an insufficient injury for purposes of standing. *See, e.g.*, *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979) (holding that plaintiffs "do[] not have to await the consummation of threatened injury to obtain preventive relief"); *Fla. State Conf. of NAACP*, 522 F.3d at 1160–61 (holding NAACP had standing to address future harm from Florida voter registration statute). DCCC's past and planned diversion of resources give it standing.

**III. The Civil Rights Act has a private right of action.**

PILF's final argument is also without merit. PILF erroneously contends that the Materiality Clause of the Civil Rights Act has no private right of action. PILF supports this argument by pointing to a provision of the Act allowing the Attorney General to institute a civil action, which PILF claims must mean that only the Department of Justice may enforce the Act. PILF Amicus Br. at 7–8 (quoting 52 U.S. § 10101(c)). In support, PILF relies on the Eleventh Circuit's decision in *Schwier v. Cox*, 340 F.3d 1284, 1295 (11th Cir. 2003), and the Sixth Circuit's decision in *Northeast Ohio Coalition for the Homeless v. Husted*, 837 F.3d 612, 630 (6th Cir. 2016). *See* PILF Amicus Br. at 8. In fact, *Schwier* concluded the exact opposite and repudiated the Sixth Circuit's reasoning that formed the basis for the holding in *Northeast Ohio Coalition for the Homeless*.

The Eleventh Circuit actually found that the provision PILF directs this Court's attention to was intended "to provide means of *further* securing and protecting the civil rights of persons," and private individuals had been suing for violations of § 10101 under 42 U.S.C. § 1983 for eighty years. *See id*. at 1295; *see also id.* at 1296 (citing *Morse v. Republican Party of Va.*, 517 U.S. 186,

193 (1996), in noting that the provision of the Voting Rights Act prohibiting poll taxes did not foreclose a private right of action even though it also gave the Attorney General the right to sue for violations of the provision). Accordingly, the *Schwier* court concluded that the Materiality Clause *could* be enforced by a private right of action under § 1983, *id*. at 1297—as Plaintiffs have sought to do here. And *Schwier* compellingly repudiated *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000), which is the decision upon which PILF's citation to *Northeast Ohio Coalition for the Homeless* ultimately relies. *See* PILF Amicus Br. at 8 (citing *N.E. Ohio Coal. for the Homeless*, 837 F.3d at 630, which states that the decision to find no private right of action was solely due to *McKay* and the Sixth Circuit requirement that "a published prior panel decision remains controlling authority"). As stated in *Schwier*:

> In *McKay* [*v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000)], the Sixth Circuit relied entirely on *Willing v. Lake Orion Community Schools Board of Trustees*, 924 F. Supp. 815, 820 (E.D. Mich. 1996), which in turn relied entirely on *Good v. Roy*, 459 F. Supp. 403, 405–06 (D. Kan. 1978). Thus, the extent of the analysis relied on by the Sixth Circuit is the following from *Good:* "Furthermore, subsection (c) provides for enforcement of the statute by the Attorney General with no mention of enforcement by private persons . . . . [T]he unambiguous language of Section 1971 will not permit us to imply a private right of action." 459 F. Supp. at 405–406.



340 F.3d at 1294. The *Schwier* court did not find this paltry reasoning persuasive, and neither should this Court. Instead, the Court should conclude Plaintiffs have standing to bring their Materiality Clause claim.

## CONCLUSION

Plaintiffs have standing to assert all of the counts alleged in this action. PILF's arguments to the contrary should be rejected.

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Respectfully Submitted:

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**CERTIFICATE OF SERVICE**

I hereby certify that on March 14, 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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