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

BARBARA H. LEE, *et al.*, *Plaintiffs*,	)	
v.	)	Civil Action No. 3:15CV357-HEH
VIRGINIA STATE BOARD OF ELECTIONS, *et al.*, *Defendants*.	)	

PROPOSED BRIEF BY *AMICUS CURIAE* PUBLIC INTEREST LEGAL FOUNDATION IN SUPPORT OF MOTION TO DISMISS

In challenging Virginia's voter identification law, felon voting rules, and purported long lines, Plaintiffs Lee, Brescoa, and the Democratic Party of Virginia (collectively, "Democrats") do not allege they lack the requisite voter identification, do not appear to be felons, and do not claim to have stood in a long line to vote. While the Democrats claim that hundreds of Virginians cannot vote because of the challenged voter identification statute, not one of them are co-plaintiffs in this case. Instead, the Democrats allege a string of factual and legal assertions which cannot possibly support a cause of action for which relief can be granted. Fundamentally, the Democrats are at odds with the American fact-of-life that voting and civic participation takes some nominal amount of time, and have repurposed that familiar American experience into a federal civil rights lawsuit.

Amicus Curiae Public Interest Legal Foundation hereby supports and expands upon Defendants's Motion to Dismiss (Dkt. 49) (hereinafter, "Motion") as the Democrats's Amended Complaint, among other failures, misstates the legal standards of the Voting Rights Act, misapplies a claim to a nonprotected class, and seeks relief for a nonjusticiable claim.

I. The Amended Complaint Misstates the Elements of a Section 2 Claim.

The Amended Complaint should be dismissed because it misstates the elements of a claim under Section 2 of the Voting Rights Act ("VRA"). 52 U.S.C. § 10301(a). Instead, it presents a statistical analysis borrowed from Section 5 preclearance standards. 52 U.S.C. § 10304. Defendants's Motion does not sufficiently address this failing. Nor does the Motion fully confront the Democrats's incorrect description of the requisite elements of a Section 2 claim. For example, it is not accurate to say that the Democrats "must allege an adverse and disparate impact." (Motion at 3.) A statistically disparate impact is not the touchstone of a Section 2 claim. Rather, a plaintiff must demonstrate some causal nexus between the challenged voting practice and actual electoral harms that have impaired the ability of minorities to elect candidates of their choice or to participate equally in the political process.

A. The Amended Complaint Advances a Section 5, Instead of a Section 2, Standard for Liability Under the VRA.

In its Amended Complaint, the Democrats present an incorrect and reimagined Section 2 standard. Under the Democrats's standard, any election law that has a bare statistical impact on any sector of the population that predominantly votes Democrat violates Section 2 when most minorities happen to vote for Democrats. Section 2, however, does not incorporate a disparate impact standard for liability. The speculative and theoretical disparate impact standard imagined and presented by the Democrats in the Amended Complaint disregards the exacting requirements of real-world causality which the Supreme Court has required in Section 2 cases.

The Democrats seek to import the analysis used by the Department of Justice in reviewing election law changes pursuant to Section 5 of the VRA by jurisdictions covered by Section 4 of the VRA. Under Section 5, covered jurisdictions had to show that there would be no statistical impact, or retrogression, on minorities in order to obtain federal preclearance for an

election law change. 52 U.S.C. § 10304(b) (referring to "diminishing the ability" of minorities to vote); *see generally Bush v. Vera*, 517 U.S. 952, 983 (1996) (referring to Section 5 as precluding any change that would lead to "a retrogression in the position of racial minorities") (internal citations omitted). But the coverage formula under Section 4, which captured all or parts of sixteen states, was struck down by the Supreme Court in *Shelby County v. Holder*, 133 S. Ct. 2612 (2013).[1] Section 5's statistical retrogression standard, therefore, was effectively rendered dormant.

Section 2 remains to prohibit racially discriminatory voting rules, but it does not employ the strict statistical retrogression trigger of Section 5, whatever Democrats might wish. The Supreme Court foreclosed using Section 2 as a substitute for Section 5's statistical retrogression standard in *Holder v. Hall*, 512 U.S. 874 (1994) . Statistical "retrogression is not the inquiry in § 2 . . . cases." *Holder* at 884. Nor are disparate impacts alone sufficient to state a claim under Section 2. *Irby v. Va. State Bd. of Elections*, 889 F.2d 1352, 1353 (4th Cir. 1989); *Johnson v. Governor of State of Fla.*, 405 F.3d 1214, 1228 (11th Cir. 2005) ("Despite its broad language, Section 2 does not prohibit all voting restrictions that may have a racially disproportionate effect.").

In this case, and in companion cases brought in Ohio and Wisconsin, plaintiffs are attempting to resurrect Section 5's statistical test and apply it nationwide through Section 2.[2] This Court should reject the Democrats's attempt to make an end-run around the *Shelby County*

[1] Before *Shelby County*, some counties in Virginia were covered by Section 4. Some were not. The Commonwealth was covered by Section 4 for statewide election law changes.

[2] *One Wis. Inst., Inc. v. Nichol*, Case No. 15-cv-324 (W.D. Wis.); *Ohio Org. Collaborative v. Husted*, Case No. 2:15-cv-1802 (S.D. Ohio). In the latter case, the plaintiffs are challenging Ohio's efforts to detect ineligible registrants by sharing data as part of an interstate compact among election officials to prevent double voting in federal elections, *inter alia*.

decision and Congress's creation of very different burdens for Section 2 as compared to Section 5. The Court should dismiss the Amended Complaint for its failure to state a cognizable claim pursuant to Section 2.

B. The History of the VRA and the *Shelby County* Decision Preclude Grafting Section 5's Retrogression Standard onto Section 2.

The VRA was enacted in 1965 to combat contemporaneous methods that were used to prevent minorities from registering to vote. Rather than formally disenfranchising minorities, some states had devised voting qualifications that were either only applied to minorities (such as separate tests) or effectively applied disproportionately to minorities (literacy tests). *See, e.g.*, *Miller v. Johnson*, 515 U.S. 900, 937 (1995); *South Carolina v. Katzenbach*, 383 U.S. 301, 310-11 (1966). Because of these procedures, the registration process was not equally open to all.

As recognized by the Supreme Court in *Shelby County*, the application of a disparate impact retrogression standard was a constitutionally burdensome means to combat a specific and grave historical problem. *Shelby County*, 133 S. Ct. at 2618; *see also id.* at 2632 (Thomas, J., concurring) (characterizing Section 5's retrogression standard as an unconstitutional burden). The Court struck down the Section 4 coverage formula because it no longer matched modern circumstances. *Id.* at 2618-19. Thus, while Section 2 remains to combat racial discrimination in election laws, it employs a different analysis than Section 5. If Section 2 were to employ a standard based on statistical disparate impacts, this burden on states would effectively raise the same constitutional concerns in *Shelby County* and impose an effective preclearance requirement (through the federal courts) on the entire country.

Simply, if the Section 2 standards presented by the Democrats here were correct, every state might face litigation for every voting change that might have the slightest adverse statistical

consequence for the political party preferred by a racial minority group. That would be an exceedingly perverse result, especially given the Supreme Court's opinion in *Shelby County*.

C. The Standard for a Section 2 Claim as Described in *Thornburg v. Gingles* Requires Real-World Causality.

Section 2(b) provides that a violation has occurred if, "based on the totality of the circumstances, it is shown that the political processes . . . are not equally open to participation" by a class based on race or color "in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." 52 U.S.C. § 10301(b). The Supreme Court established a framework for analyzing a case under Section 2(b) in *Thornburg v. Gingles*, 478 U.S. 30 (1986). According to *Gingles*, in order to proceed with a Section 2 claim, a plaintiff must establish (1) that the minority group is "sufficiently large and geographically compact to constitute a majority" in a district, *id.* at 50; (2) the prevalence of racially polarized voting, *id.* at 51; and (3) that minority candidates are consistently defeated by the majority voting bloc, *id.* Although the *Gingles* analysis related to a challenge to legislative districts, the emphasis on causality and tangible results contained in the third *Gingles* precondition is core to a Section 2 claim. For a federal court to intrude in a state's constitutional prerogative to run state elections, the challenged law must, in reality, result in unequal access to participation on account of race, or, concrete barriers to full participation. Otherwise, the federal intrusion would strain the federalist structure in the Constitution.

While the first of the above-mentioned *Gingles* preconditions to a Section 2 claim is unique to challenges to methods of election for legislative bodies, the second precondition is not. According to the second precondition, the plaintiff must show the existence of *racial* polarization. *Gingles*, 478 U.S. at 51. Here, the Democrats seek to redefine this concept into one of *partisan* polarization. In *Gingles*, the Court considered it a relevant factor whether minority

voters consistently voted one way and whether non-minority voters consistently voted a different way. *Id.* If this behavior occurred with sufficient frequency, elections could be characterized as racially "polarized." Here, instead of pleading racial polarization, as contemplated under *Gingles*, the Amended Complaint alleges that African-Americans and Hispanics statistically tend to vote Democratic. (AC ¶¶ 28, 36, 39.) Thus the Amended Complaint falls short of pleading facts sufficient for a Section 2 claim, and substitutes partisan preferences instead.

But it is the third *Gingles* precondition where the Democrats fatally depart from standard requirements of Section 2 claims. According to the third precondition, a plaintiff must show that a voting regulation has had a concrete real-world electoral impact in that it has prevented minorities from participating or electing the candidates of their choice. *Gingles,* 478 U.S. at 51. A plaintiff must show some causality, where a particular election law has altered election outcomes. *Id.* (the practice effects racial discrimination in that it enables the majority "to defeat the minority's preferred candidate"). But here the Democrats have done nothing more than assert that the percentage of minorities without photo identification in certain parts of Virginia may be slightly higher than the state average. (AC ¶ 61.) No mention is made about concrete barriers to obtaining photo identification, except that one must spend time to obtain one. The Democrats have failed to show that the adjustments made to Virginia's voter identification requirement in 2013 have had or could have any actual real-world impact on anyone.

The Supreme Court's Section 2 cases do not focus on the supposed effect of a voting regulation in terms of statistical comparisons. Rather, they require an analysis of the equal opportunity to participate and of real-world results in elections. According to *Gingles*:

> The "right" question . . . is whether "*as a result of* the challenged practice or structure plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." . . . In order to answer this

> question, a court must assess the impact of the contested structure or practice on minority *electoral opportunities* "on the basis of objective factors."

Gingles, 478 U.S. at 44 (emphasis added). The Court was clearly not using "impact" in the sense of how convenient a given structure would be for racial sub-groups. Instead, it is referring to how the structure impacts actual access to election processes and how the structure has actually impacted real elections.

Focusing then on impacts to voting access and election results, a plaintiff "must demonstrate that, under the totality of the circumstances, the [practices] result in unequal access to the electoral process." *Id.* at 46. So the Democrats need to show, first, that minority registration or voting rates have been actually impacted as a result of the photo identification revisions or, second, that the ability of minorities to participate fully in the political process has been actually harmed, again, as a result of the photo identification requirement. Because they have espoused a radically different disparate impact analysis borrowed from Section 5 litigation, the Democrats have not even attempted to make such a demonstration here.[3]

The Amended Complaint refers to statistical data indicating that minorities in Virginia may have lower rates of education and employment. But it draws no link to how this prevents minorities from obtaining free photo identification. Contrast the poll tax and literacy tests that gave rise to the VRA. A poll tax or literacy test, for example, is a voting requirement that concretely results in unequal access to the electoral process. Again, *Gingles* focuses on whether a practice actually results in unequal access to the political process and an inability to elect

[3] The Seventh Circuit prudently recognized the radical consequences of accepting the Democrat's theory of Section 2 by recounting the following: "At oral argument, counsel for one of the two groups of plaintiffs made explicit what the district judge's approach implies: that if whites are 2% more likely to register than are blacks, then the registration system top to bottom violates § 2; and if white turnout on election day is 2% higher, then the requirement of in-person voting violates § 2." *Frank v. Walker*, 768 F.3d 744, 754 (7th Cir. 2014).

candidates of choice. *Id.* at 44-46, 50-51. It is insufficient under Section 2 to claim that a free photo identification requirement results in unequal access simply because driver's license data may show a slight variation in the current rates of possession of a driver's license.

Distilled to its essence, *Gingles* requires the court to look to real-world electoral results and to be able to draw a nexus between them and the challenged practice. *See, e.g.*, *Gonzalez v. Arizona*, 624 F.3d 1162, 1194 (9th Cir. 2010) ("The causation requirement is crucial.").[4] The issue is whether *minority* candidates win or lose and whether *minorities* are impeded from accessing the polls, not whether the Democrats will theoretically suffer the slightest statistical impact due to an election law. Based on the facts alleged in the Amended Complaint, Democrats cannot even present one individual who suffers any concrete inability to obtain the free state-provided photo identification. Section 2 doesn't give rise to a claim in such circumstances.

If the Commonwealth allows all qualified residents to vote, it does not impose any voting procedure that limits minority opportunities. To show a lack of opportunity to vote or elect candidates of their choice, Democrats must be able to point to some objective benchmark against which the challenged statutes may be judged, not merely an alternative benchmark that is chosen simply because it *enhances* minority voting. Otherwise, a plaintiff could demand as part of a Section 2 remedy hypothetical alternative voting laws that would be increasingly more favorable to Democrats. This would create the preposterous circumstance where Section 2 would be used

[4] The United States Department of Justice ("DOJ") has consistently pleaded this causation element in its Section 2 cases, even in Section 2 cases not related to challenges to legislative districting. *See, e.g.*, Complaint at 3, *United States v. Long County, Ga.*, No. 06-040 (S.D. Ga. 2006) ("Unless enjoined by this Court, Defendants will continue to violate Section 2….by implementing standards, practices or procedures that deny Hispanic voters the opportunity to participate effectively in the political process on an equal basis with other members of the electorate."); Complaint at 13, *United States v. Ike Brown and Noxubee County*, No. 05-cv-33 (S.D. Miss. 2005). Note, all cases brought by the DOJ under Section 2 are available at http://www.justice.gov/crt/about/vot/litigation/recent_sec2.php#osceola_school.

to require every state to maximize the electoral prospects of minority voters, and Democrats when voting is racially polarized.

II. The Amended Complaint Misstates the Standard for an Intentional Discrimination Finding Under the Fifteenth Amendment and Pleads Insufficient Facts.

The Amended Complaint alleges that Virginia's voter identification law and failure to take action to reduce voting wait times were the result of intentional racial discrimination in violation of the Fourteenth and Fifteenth Amendments. (AC ¶¶ 118-20.) But the Amended Complaint misstates the elements and standard for bringing an intentional discrimination claim under those Amendments. (AC ¶¶ 79-82.) As a result, the Democrats's intentional discrimination challenge is not cognizable under the Supreme Court's jurisprudence and should be dismissed for failure to state a claim under Federal Rule of Civil Procedure 12(b)(1).

A plaintiff alleging intentional racial discrimination in violation of the Fourteenth and Fifteenth Amendments must plead its actual existence, even if through circumstantial facts. Invoking the Democrats's old stand-by, awareness of consequential disparate impacts, is insufficient to establish a *prima facie* case of discriminatory racial intent. Even if a practice disparately impacts members of a particular racial group, it will not be found to violate the Constitution unless the plaintiff demonstrates that the practice was motivated by a racially discriminatory intent. *Veasey v. Abbott*, 2015 U.S. App. LEXIS 13999 at *19 (5th Cir. 2015)

Proof can be offered with circumstantial and direct evidence of what the legislators contemporaneously intended. *Id.* Courts have looked to several factors as probative of whether a legislature was motivated by racial discrimination. All of these factors involve the actions, events, and statements occurring contemporaneously with the legislation. *Id.* It is inadequate to allege that legislators were aware of the potential discriminatory effect of a measure. *Id.* *20. "[P]urposeful discrimination requires more than intent as volition or intent as awareness of

consequences. It instead involves a decisionmaker's undertaking a course of action because of, not merely in spite of [the action's] adverse effects upon an identifiable group." *Ashcroft v. Iqbal*, 556 U.S. 662, 676-77 (2009) (internal quotation marks and citation omitted) (brackets in original). It is also incorrect to rely upon such unreliable evidence as "post-enactment speculation by opponents." *Veasey*, 2015 U.S. App. LEXIS at *25-29.

Yet that is precisely what the Democrats have done here. The Amended Complaint refers to three supposed sources of factual support for its claim of intentional discrimination. First, it quotes the *dissenting* opinion in the *Frank v. Walker*, Seventh Circuit opinion, in which the judge offers his opinion that there is no rational basis for photo identification laws because there is no such thing as voter-impersonation fraud, so therefore the only motivation could be discrimination. (AC ¶ 79.) Second, the Amended Complaint mentions a Project Vote study that historically disenfranchised groups are often accused of voter fraud for political purposes. (AC ¶ 80.) And third, it mentions an article that apparently found an association between the racial composition of a state and the likelihood that it would adopt voter identification laws. (AC ¶81.) All of these are irrelevant and inadequate to permit a claim of intentional discrimination to survive a motion to dismiss. These supporting facts are no more than conjecture from opponents of the challenged practices or are predictions of statistically discriminatory effects. *Veasey*, 2015 U.S. App. LEXIS 13999 at *25-29.

Thus, given that the Amended Complaint provides no reference to any direct or circumstantial evidence and relies on evidence that is unreliable and irrelevant, the Democrats have improperly pled the elements of an intentional discrimination claim. Consequently, the claim should be dismissed as unrecognized under any precedent so that this court lacks subject matter jurisdiction to hear it. Fed. R. Civ. P. 12(b)(1). Furthermore, even if the legal standard in

the Amended Complaint were correct, it alleges woefully inadequate facts to establish a claim and should be dismissed pursuant to Rule 12(b)(6).

III. The Democrats's Challenge to Virginia's Alleged Long Lines at Polling Places Should be Dismissed under Federal Rules of Civil Procedure 12(b)(1) and (6).

A. Long Wait Times Are Not a "Standard, Practice, or Procedure" Under the VRA.

The Democrats allege that Virginia's long wait times at polling places violate Section 2 of the VRA. (AC ¶¶ 105-107.) But Section 2 regulates only a "voting qualification or prerequisite to voting, or standard, practice, or procedure." 52 U.S.C. § 10301(a); *see also Holder*, 512 U.S. at 892 (Thomas, J., concurring). The Democrats's challenge is therefore not cognizable under Section 2 because "long lines, delays and confusion—in and of themselves—do not constitute any 'practice or procedure' of the [Defendants]." *Coleman v. Bd. of Educ.*, 990 F. Supp. 221, 232 (S.D.N.Y. 1997). Consequently, this Court lacks jurisdiction to hear this claim, and it should therefore be dismissed. Fed. R. Civ. P. 12(b)(1).

B. Alternatively, Democrats Have Not Alleged Sufficient Facts About Long Lines to State a Claim for Relief.

To state a cognizable claim, a party must allege "factual content that allows the court to draw the reasonable inference that defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. The Democrats have fallen woefully short in this regard. The Amended Complaint makes one vague reference to the "policies" that have allegedly caused long wait times. (AC ¶ 107.) Yet it does not even attempt to explain what those policies are, who made them, how they have resulted in long wait times in general (and for minorities, specifically), or whether such policies can even be attributed to the Defendants. Indeed, what allegations are made concerning the cause of long wait times suggest that the Commonwealth's General Assembly—not the Defendants—is to blame. (AC ¶ 90-91); *see United States v. Jones*, 57 F.3d 1020, 1023 (11th

Cir. 1995) (challenged conduct is not a "standard, practice, or procedure" if it is "not the result of any deliberate act by defendants.").

As one court has explained, long lines "may reflect nothing more than the ineffectiveness or inefficiency of individual election workers." *Coleman*, 990 F. Supp. at 232. The Democrats seek to make random and unpredictable events associated with election administration the basis for a cause of action under the VRA. That they may not do. Under the "[Section] 2 analysis, a 'standard, practice, or procedure' must be more than a 'run-of-the-mill mistake' that one would expect in the normal course of an election." *Id.* at 227.

At most, the Democrats's lone allegation concerning unexplained policies is a "bare assertion[] . . . amount[ing] to nothing more than a 'formulaic recitation of the elements of'" a Section 2 claim, (*see* AC ¶ 105-107), which is not entitled to a presumption of truth. *Iqbal*, 556 U.S. at 681 (internal citations omitted). Such threadbare allegations do not allow this Court to draw *any* inference, let alone a "reasonable" inference, that the Defendants are liable for the misconduct alleged. *Id*. at 678. Furthermore, the Amended Complaint does not allege that long wait times have prevented *anyone* from voting on account of their race, a necessary element of a Section 2 claim. *See, e.g.*, *Broyles v. Texas*, 618 F. Supp. 2d 661, 677 (S.D. Tex. 2009) (dismissing claim regarding long lines where plaintiffs "offer[ed] no specific examples of voters who wanted to vote but could not wait.").

Under Virginia law, any person who is in line to vote by 7:00 p.m., is entitled to cast a ballot.[5] For that reason, this Court has already rejected an attempt to challenge Virginia's alleged long lines. *Va. State Conference of NAACP Branches v. Kaine*, No. 3:08cv692 (E.D. Va.,

[5] Casting a Ballot, Virginia Department of Elections, http://elections.virginia.gov/casting-a-ballot (last visited Sept. 15, 2015).

preliminary injunction denied, Nov. 3, 2008 (Dkt. 45)) ("For the reasons stated from the bench, including in particular the existence of curbside voting and the fact that everyone who is in line by 7:00 p.m. tomorrow will be permitted to vote, as mandated by Virginia law, any prospective harm to the plaintiffs is outweighed by the certain and substantial harm to the defendants and the public that would be caused by issuing the injunction.").[6] Indeed, any person's decision to leave the line is his or her own decision. While long lines "may cause people to be inconvenienced, inconvenience does not result in a denial of 'meaningful access to the political process.'" *Jacksonville Coal. for Voter Prot. v. Hood*, 351 F. Supp. 2d 1326, 1335 (M.D. Fla. 2004) (citing *Osburn v. Cox*, 369 F.3d 1283, 1289 (11th Cir. 2004)).

The Democrats have not alleged facts to support a claim that any minority group has been excluded from meaningful access to the political process due to the interaction of racial bias in the community with the challenged voting system and thus have not alleged "enough facts to state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). This challenge to Virginia's alleged long lines should therefore be dismissed. Fed. R. Civ. P. 12(b)(6).

IV. Factual Inadequacies Throughout the Amended Complaint Warrant Dismissal.

Federal Rule of Civil Procedure 8 "requires a *showing of entitlement* to relief." *Francis v. Giacomelli*, 588 F.3d 186, 192 (4th Cir. 2009) (emphasis in original). Such a showing cannot be made by mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of

[6] In contrast to the plaintiffs in this case, the plaintiff in *Kaine* identified a "standard, practice, or procedure" that allegedly resulted in long lines forming at polling locations, namely, that election officials in certain Virginia counties had adopted "plans," under which voting machine and pollworker resources were misallocated. *Kaine*, No. 3:08cv692, Dkt. 1 at 3. Although the issue was not briefed by the parties, this is presumably why the plaintiff's challenge was allowed to proceed under Section 2 of the VRA.

action." *Twombly*, 550 U.S. at 555. To survive a motion to dismiss under Rule 12(b)(6), "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). The plausibility standard "asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678. It requires the plaintiff to articulate facts, when accepted as true, that "raise a right to relief above the speculative level," *Twombly*, 550 U.S. at 555, and "show" that the plaintiff has stated a claim entitling him to relief, *id*. at 557.

The Amended Complaint is riddled with factual allegations that, even if true, do not entitle them to relief. Many of these allegations bear no relevance to the claims, while others are simply conclusory. Most of the purported facts in the Amended Complaint are a jumble of talking points of various interest groups and academics long opposed to robust state control over elections and laws designed to promote election integrity. Taken together, they fail to state a plausible claim that the Defendants have violated Section 2, and the Amended Complaint should be dismissed under Rule 12(b)(6).

Importantly, the Democrats rest their claims on allegations that the challenged practices harm Democrats. (*See, e.g.*, AC ¶ 3 ("a law designed to reduce disproportionately the turnout of these core Democratic constituencies and Democratic voters more broadly"), ¶ 10 ("Virginia's voter ID law, long wait times to vote, and requirement that nonviolent felons be re-enfranchised on an individual basis … disproportionately suppress the vote of Democrats."), ¶ 71 ("Democratic voters in Virginia are disproportionately likely not to have a form of ID that can be used for voting under the voter ID law and are disproportionately likely to be burdened by that law."), ¶ 116 ("the General Assembly, in enacting the voter ID law and failing to take action to prevent long wait times to vote from recurring, intended to suppress … the vote of Democrats

because of the way they are expected to vote.")) The Amended Complaint also includes information about each individual's tie to the Democrats. (AC ¶¶ 8- 9 (each plaintiff "is a Democrat, has voted for Democratic candidates, and intends to vote for Democratic candidates….").) And, of course, the Virginia Democratic Party itself is a plaintiff.

As a threshold matter, Democrats are not a protected class under the VRA, a defense, unfortunately, that is largely missing from Defendants's Motion.[7] "Section 2 protects [minority] voters against defeat on account of race or color, not on account of political platform." *League of United Latin Am. Citizens, Council No. 4434 v. Clements*, 999 F.2d 831, 879 (5th Cir. 1993) (en banc) (citing *Whitcomb v. Chavis*, 403 U.S. 124, 154-55 (1971) ("The mere fact that one interest group or another . . . has found itself outvoted and without legislative seats of its own provides no basis for invoking constitutional remedies where . . . there is no indication that this segment of the population is being denied access to the political system."); *see also Nipper v. Smith*, 39 F.3d 1494, 1515 (11th Cir. 1994) ("The existence of some form of racial discrimination therefore remains the cornerstone of section 2 claims; to be actionable, a deprivation of the minority group's right to equal participation in the political process must be on account of a classification, decision, or practice that depends on race or color, not on account of some other racially neutral cause."). The Democrats's allegations thus do not plausibly demonstrate harm that is cognizable under the VRA and its claims should therefore be dismissed.

[7] Virginia rightfully recognizes that none of the plaintiffs have standing to bring this action. (Motion at 12-17.) Indeed, neither Lee nor Brescia alleges any harm to their right to vote as consequence of Virginia's voter identification law, its felon disenfranchisement law, or Virginia's long lines at polling places. What harm they do allege relates to others not before the court or their ability to elect Democrats, neither of which can establish standing under the VRA. *Harvey v. Showalter*, 908 F. Supp. 2d 736, 738 (E.D. Va. 2012) (alleged harm to "other candidates" not before the court insufficient to establish standing under VRA, "unless [plaintiffs] also allege some individual injury that they have personally suffered.") (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992)).

Where the Democrats do address racial discrimination, its allegations are wholly irrelevant and fall short of establishing a plausible right to relief. Attempting to portray the Commonwealth in a negative light, these allegations begin with a long but irrelevant history of racial discrimination in Virginia. (AC ¶¶ 16-23, 29-30.) All of these alleged facts are at least three decades old, while some harken back centuries. (*See* AC ¶ 17 ("For over 200 years, African Americans were enslaved in Virginia.").) Recently, the Supreme Court has curtailed use of such incendiary and outdated examples as evidence of present discrimination. In *Shelby County*, the Supreme Court explained that the VRA's encroachment on the States's Constitutional authority to regulate elections cannot be based on "decades-old data and eradicated practices," but can be justified only by "current needs" to prevent discrimination. 133 S. Ct. at 2627. Slavery in the Commonwealth in 1815 has no role in the instant litigation, except to inflame passions.

Relying on *Shelby County*, the Fifth Circuit recently vacated the district court's finding that Texas's voter identification law was motivated by a discriminatory intent because the evidence on which that finding was made was decades old and was therefore not probative of present circumstances. "[T]he relevant 'historical' evidence," explained the court, "is relatively recent history, not long-past history." *Veasey*, 2015 U.S. App. LEXIS 13999 at *23. Nearly all of the allegations concerning discrimination in the Commonwealth are even older than the evidence rejected in *Veasey*. Under *Shelby County*, such evidence is insufficient to support a claim for relief under the VRA.

Other factual allegations in the Amended Complaint fail to establish or support a *prima facie* case for the proffered claims. Neither the enforcement of federal immigration laws by state police officers (AC ¶ 25) nor the lending practices of a private bank (AC ¶ 33) is probative of whether minorities—or the actual plaintiffs—are able to obtain the needed photo identification to

vote. Indeed, the VRA "forbids discrimination by 'race or color' but does not require states to overcome societal effects of private discrimination that affect the income or wealth of potential voters." *Frank,* 768 F.3d at 753, *cert. denied by Frank v. Walker*, 135 S. Ct. 1551 (2015).

One allegation which arguably qualifies as a "use of overt or subtle racial appeal[] in political campaigns" (Senate Factor 6), a statement by United States Senator George Allen, demonstrates the weak factual foundations of the Amended Complaint. Allen allegedly used a racial slur to describe his opponent's campaign volunteer. (AC ¶ 37.) On this decade old foundation, Democrats's build their case. Senator Allen's isolated statement was made nine years ago and he has not held office since that election. His statement does not reflect the current political climate nor demonstrate a "current need[]" to justify federal intrusion into controlling the Commonwealth's elections. *Shelby County,* 133 S.Ct. at 2627.

The factual allegations in the Amended Complaint concerning felon disenfranchisement are even thinner. Importantly, Democrats do not challenge Virginia's decision to disenfranchise felons generally. They challenge only Virginia's decision to restore voting rights to felons on an individual basis, rather than restoring them automatically upon release from incarceration. (AC ¶¶ 92-99.)

The Equal Protection Clause expressly permits states to disenfranchise felons. *Richardson v. Ramirez,* 418 U.S. 24 (1974). To overcome that presumption of validity, the Plaintiffs must "allege[] facts that, if true, would be sufficient to establish intentional discrimination in [Virginia's] *current* disenfranchisement law." *Johnson v. Governor of Fla.*, 405 F.3d 1214, 1218 (11th Cir. 2005) (emphasis in original). Construing the Amended Complaint liberally, there is but one allegation in that regard: "African-Americans are far more likely than whites to be incarcerated in Virginia." (AC ¶ 35.) Such a fact, which is apparently true in all

states,[8] does not permit this Court to draw a "reasonable inference" that the decision to restore voting rights to *all* felons, regardless of race, on an individual basis was adopted with the intent to discriminate against minorities. Despite the disparate impact of felony disenfranchisement laws, they are routinely upheld despite Section 2. *See Simmons v. Galvin*, 575 F.3d 24, 30-42 (1st Cir. 2009); *Johnson*, 405 F.3d at 1227-32; *Wesley v. Collins*, 791 F.2d 1255, 1260-62 (6th Cir. 1986). Absent an allegation that Virginia's felony disenfranchisement laws were intentionally enacted, in fact, to discriminate, the claim must be dismissed.

The Democrats then present a parade of "reports" and "studies" unrelated to the circumstances in the Commonwealth to support their other claims. No "right to relief" can be reasonably inferred from the "reports" and "studies." For example, the Amended Complaint presents a 2014 analysis conducted by the Government Accountability Office ("GAO"), which claims that voter identification laws resulted in decreased voter turnout in Kansas and Tennessee. (AC ¶ 56.) Not only is this study fundamentally flawed, it has nothing to do with Virginia. The GAO failed to take into account that there was no statewide U.S. Senate race in 2012, meaning there were no get-out-the-vote efforts that usually coincide with such races. *See* Hans Von Spakovsky, The Heritage Foundation, *Revisiting the Lessons from the Voter ID Experience in Kansas: 2014*, April 10, 2015, http://www.heritage.org/research/reports/2015/04/revisiting-the-lessons-from-the-voter-id-experience-in-kansas-2014. The GAO also based its claim that voter identification laws were to blame for decreased turnout by comparing turnout in Kansas with turnout in Maine, which does not have a voter identification requirement. *Id*. But Maine, unlike Kansas, held a statewide election for Senate in the year the data was collected, making the

[8] *See* Racial/Ethnic Disparity in Incarceration, The Sentencing Project, http://www.sentencingproject.org/map/map.cfm (last visited Sept. 15, 2015).

comparison inappropriate. When compared to turnout in *Kansas* during the last year a there were no Senate or statewide offices on the ballot (2000), the 2012 turnout—when identification was required to vote—was actually higher.[9] *Id.* Lastly, because the GAO study focused only on Kansas and Tennessee, it is of little to no value in litigation against Virginia, even if its findings are accepted as true.

Illustrating further the Democrats's failure to allege sufficient facts to support a claim is the significantly flawed 2006 "Citizens Without Proof" survey conducted by the Brennan Center. The Amended Complaint's claim to this Court is that "millions" of American citizens do not have identification required to vote and that minorities are less likely to possess these forms of identification. (AC ¶ 62.) What the Democrats omit is that the survey preposterously used the responses of only 987 individuals to arrive at the staggering figure of millions of disenfranchised Americans. Hans Von Spakovsky, National Review, *New Myths on Voter ID*, October 13, 2011, http://www.nationalreview.com/corner/279991/new-myths-voter-id-hans-von-spakovsky. The Brennan Center survey didn't simply ask whether respondents had identification; it asked whether identification was "readily available." *Id*. Consistent in its shortcomings, the survey question about citizenship verification did not ask whether the respondents had the necessary documentation to prove they were citizens; it asked whether the documentation was "in a place where you can quickly find it if you had to show it tomorrow." *Id*. Most troublingly, the Brennan Center did not ask whether respondents were actual or likely voters, registered voters, or even eligible voters, thus wholly distorting the usefulness of the conclusions on which Democrats now rely. *Id*. To add statistical insult to injury, like the GAO analysis, the Brennan Center "Citizens

[9] GAO also made several mistakes with respect to Tennessee that cast doubt on the reliability of the analysis. Most notably, GAO purchased its turnout data from a self-declared "progressive" political data company rather than use the official data collected by the State of Tennessee.

Without Proof" study is not specific to Virginia, where photo identification is available, free of charge, at *any* general registrar's office in the Commonwealth.

The Democrats attempt to make up for their lack of reliable, relevant data with the use of "naked assertions devoid of further factual enhancement," which are not entitled to any presumption of validity. *Iqbal*, 556 U.S. at 678, 681 (brackets and quotations omitted); (AC ¶¶ 57, 66, 71, 82 ("Upon information and belief, the voter ID law was intended to suppress disproportionately the vote of African-American, Latino, young, and Democratic voters in Virginia.").) Far from alleging "enough facts to state a claim to relief that is plausible on its face," *Twombly*, 550 U.S. at 570, the Amended Complaint patronizingly paints minority communities as unable to overcome the marginal "costs" associated with voting, such as the time spent. (AC ¶ 64.) These "costs," are in reality the familiar American experience of doing something more than nothing to vote. A Section 2 case cannot be sustained on this theory. *See also Texas v. Holder*, 888 F. Supp. 2d 113, 126 (D.D.C. 2012) ("there are certain responsibilities and inconveniences that citizens must bear in order to exercise their right to vote") (vacated and remanded on other grounds). Section 2 requires facts that "show" minorities will suffer actual electoral harms if the challenged laws remain in place. For the foregoing reasons, the Democrats have not done that, and the Amended Complaint should be dismissed under Rule 12(b)(6).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of September, 2015, I transmitted the foregoing document to the named parties' emails by means of an electronic filing pursuant to the ECF system.

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