IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:20-cv-02992-PAB-KMT

JUDICIAL WATCH, INC., et al.,
Plaintiffs,
v.

JENA GRISWOLD, Colorado Secretary of State in her official capacities, et al.,
Defendants.

COLORADO'S REPLY IN SUPPORT OF ITS MOTION TO DISMISS

Under both Democratic and Republican Secretaries of State, Colorado has built a model voting system—one that has resulted in one of the country's highest voter registration rates and that passes regular audits without any evidence of significant irregularities. Yet rather than celebrate Colorado's successful registration efforts, Plaintiffs sue to disrupt them.

Plaintiffs' allegations must be judged in light of the "considerable discretion" afforded states under § 8 of the NVRA. Br. of *Amicus Curiae* Judicial Watch, Inc. in Support of Pet'rs, *Husted v. A. Philip Randolph Inst.*, No. 16-980, at 4 (U.S. Mar. 10, 2017), https://tinyurl.com/y6b8szhw. In other words, Plaintiffs must plausibly allege that Colorado's list maintenance efforts are so unreasonable as to fall outside of the "great deal of freedom" the NVRA affords states "in crafting their list maintenance programs." *Id.* at 9. A collection of distorted and misapplied statistics is insufficient to do so. The Complaint should be dismissed.

ARGUMENT

I. Plaintiffs lack standing to maintain their claim.

Judicial Watch asserts that its core mission is to "monitor" election officials' NVRA compliance. Doc. 35 at 5. It claims injury here because it has expended resources "above and

beyond" its normal programmatic activities by monitoring, researching, and analyzing Colorado's compliance, even going so far as to "threaten a lawsuit in December 2019." *Id.* at 6.

Judicial Watch's attempt to expand the diversion-of-resources strand of Article III standing law should be rejected. To have standing under the diversion-of-resources line of cases, the plaintiff's ability to provide its services must be "perceptibly impaired" by the defendant's conduct. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (fair housing organization "devote[d] significant resources to identify and counteract [the defendants'] racially discriminatory steering practices" (internal quotation marks omitted)); *see also Centro de la Comunidad Hispana de Locust Valley v. Town of Oyster Bay*, 868 F.3d 104, 110 (2d Cir. 2017) ("enforcement [of day-laborer solicitation ordinance] will require [the plaintiff] to divert resources from other of its [pro-immigrant] activities to combat the effects of the Ordinance"). By contrast, an organization's mere "interest in a problem" is not enough to generate standing, *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972), even if the defendant's conduct operates to "setback" the group's organizational purpose. *Colo. Taxpayers Union, Inc. v. Romer*, 963 F.2d 1394, 1397 (10th Cir. 1992).

Here, Judicial Watch fails to allege how Colorado's list maintenance perceptibly impairs its monitoring activities. Unlike the plaintiff's counseling and housing referral services in *Havens* that were "frustrated by defendants' racial steering practices," 455 U.S. at 379 (quotations omitted), Judicial Watch can continue its monitoring activities and alert government officials and impacted voters to NVRA compliance issues regardless of how Colorado conducts

its list maintenance.[1] Judicial Watch identifies no program or function that it can no longer perform due to Colorado's list maintenance. *See Mountain States Legal Found. v. Costle*, 630 F.2d 754, 767 (10th Cir. 1980) (advocacy organization lacked standing because it made "no showing" that the challenged EPA actions would "impair [its] functions and activities"). Multiple circuit court cases are in accord, rejecting diversion-of-resource arguments when the organization expends resources to "fix[] a problem that otherwise would not affect the organization at all." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010); *see, e.g.*, *Fair Elections Ohio v. Husted*, 770 F.3d 456, 460–61 (6th Cir. 2014); *Lane v. Holder*, 703 F.3d 668, 674–75 (4th Cir. 2012).

Judicial Watch's contrary position has no limiting principle. It would allow any organization that disagrees with the way a state has exercised its "considerable discretion" under the NVRA to open the courthouse doors and trigger the burdens of civil discovery by merely claiming that it "monitors" the government's compliance with the law. The U.S. Supreme Court has repeatedly held that simply disagreeing with the government, or demonstrating that the government has failed to follow required procedures, does not confer standing absent a concrete

[1] Judicial Watch's decision to monitor, research, and analyze Colorado's list maintenance activities was a voluntary choice it made, primarily in anticipation of litigation. It was not forced upon it by Colorado. Consistent with *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013), multiple circuit courts recognize that these types of self-imposed decisions do not confer standing. *See, e.g.*, *Ass'n for Retarded Citizens of Dallas v. Dallas Cty. Mental Health & Mental Retardation Ctr. Bd. of Trustees*, 19 F.3d 241, 244 (5th Cir. 1994); *see also Nat'l Ass'n of Home Builders v. U.S. Army Corps of Eng'rs*, 663 F.3d 470, 475 (D.C. Cir. 2011) (organization opposed to nationwide water discharge permit lacked standing despite expending resources "commenting on and responding" to the permit). Plaintiffs' reliance on a single out-of-state district court decision finding standing for an organization that self-inflicted its own injury should be rejected because it contravenes the weight of this authority. Doc. 35 at 6–8 (citing *Am. Civ. Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779 (W.D. Tex. 2015)).

injury in fact. *See Whitmore v. Arkansas*, 495 U.S. 149, 160 (1990); *Valley Forge Christian Coll. v. Ams. United for Separation of Church & State*, 454 U.S. 464, 483 (1982). Applying that settled rule here confirms that Judicial Watch lacks standing.

Plaintiffs' reliance on inapposite Supreme Court cases should be rejected. *Purcell v. Gonzalez*, 549 U.S. 1 (2006) says nothing about Article III standing, while *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 189 n.7 (2008) stated in a footnote without analysis that a political party could challenge a state's voter ID law. The Court said nothing about the diversion-of-resources theory of standing.[2] Accordingly, Judicial Watch lacks organizational standing.

Plaintiffs' attempt to bolster the standing of Judicial Watch's individual members suffers similarly. Besides alleging a generalized grievance affecting all voters equally that does not confer standing, *see* Doc. 34 at 6, Plaintiffs claim that its individual members suffered injury because they have lost "confidence in the legitimacy of the elections" in Colorado. Doc. 35 at 8 (quotations omitted). Plaintiffs cite a single district court case finding standing on this ground, *Judicial Watch, Inc. v. King*, 993 F. Supp. 2d 919 (S.D. Ind. 2012). But Plaintiffs' reliance on its members' feelings of fear or apprehension to establish standing is at odds with well-established Supreme Court and Tenth Circuit precedent: the "psychological consequence presumably produced by observation of conduct with which one disagrees" does not confer standing. *Valley Forge*, 454 U.S. at 485; *see Schaffer v. Clinton*, 240 F.3d 878, 884 (10th Cir. 2001). Even the court cited by Plaintiffs applies this general rule to reject standing based on mere feelings. *See*

[2] *Crawford* on the whole supports Colorado, not Plaintiffs, because it recognizes that the NVRA "restrict[s] States' ability to removes names from the lists of registered voters." 553 U.S. at 192. Plaintiffs' complaint fails to reconcile its claim with this fact under the NVRA, further confirming that it pleads a legal theory that is "merely consistent with" liability, not a plausible claim for relief. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotations omitted).

Indiana Democratic Party v. Rokita, 458 F. Supp. 2d 775, 810–11 (S.D. Ind. 2006). Accordingly, Judicial Watch's individual members also lack standing.[3]

II. Plaintiffs' failure to satisfy the notice provision cannot be excused.

Where, as here, a statute's general rule is subject to an exception, the statute must be interpreted in a way "that allows the rule's exception to function as just that—an exception." *In re Woods*, 743 F.3d 689, 699 (10th Cir. 2014). Excusing notice in this case would expose states to meritless but discovery-intensive NVRA litigation—exactly what Congress sought to avoid by including the notice requirement in the first place.

The Tenth Circuit recently affirmed the importance of interpreting statutory exceptions so as not to undermine the statute's general rule. *Bd. of Cty. Comm'rs of Boulder Cty. v. Suncor Energy (U.S.A.)*, 965 F.3d 792, 806–07 (10th Cir. 2020). The federal removal statute establishes a general rule that orders of remand are "not reviewable" by the Court of Appeals, "except that an order remanding a case . . . pursuant to section 1442 or 1443 of this title shall be reviewable by an appeal or otherwise." 28 U.S.C. § 1447(d). In *Suncor*, a district court denied each of seven grounds for removal. 965 F.3d at 799. But because one of the grounds was an exception listed in § 1447(d), defendants argued that the Tenth Circuit could review the entire remand order. *Id.* at 801. The Tenth Circuit rejected that interpretation, instead adopting one which would "preserve[], rather than erode" the general rule, and prevent a "serious and unacceptable risk of the exception consuming the rule." *Id.* at 806–07 (footnote and quotations omitted).

[3] Because Judicial Watch's members lack standing, the organization itself lacks associational standing. *Hunt v. Wash. State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977) (associational standing requires that "members would otherwise have standing to sue").

So too here. The NVRA must be construed to preserve, rather than erode, the presumption in favor of notice. Because a jurisdiction's list maintenance efforts can only be judged over time, plaintiffs have wide latitude to choose when to file suit. *See* 52 U.S.C. § 20507(6)(1)(B). Thus, if a § 8 plaintiff can avoid giving notice simply by compiling outdated, publicly available statistics and filing within 30 days of a federal election, there will be no incentive to engage in the collaborative process envisioned by the statute.

Plaintiffs point to the language of the notice exception and accuse Colorado of attempting to "rewrite the NVRA." Doc. 35 at 10. But "the meaning of statutory language, plain or not, depends on context." *Hamer v. City of Trinidad*, 924 F.3d 1093, 1103 (10th Cir. 2019) (quotation omitted). Here, that context reflects a clear intent—expressed through legislative history and the text itself—for NVRA allegations to first be raised informally so as not to burden states and courts with needless, but discovery-intensive, litigation.

Under Plaintiffs' narrow focus on the language of § 20510(b)(3) alone, notice could be excused based on past elections. A plaintiff could simply allege 1) a "violation," that 2) "occurred within 30 days before the date of an election for Federal office," 52 U.S.C. § 20510(b)(3), and file without notice. Even if the election in question occurred in 2018, and the complaint was filed in 2020. But it would twist the NVRA beyond recognition for plaintiffs to be able to avoid giving notice based on violations that allegedly occurred within 30 days of long past elections. Clearly, then, the exception applies only to upcoming elections, and in cases in which that election imposes some urgency on the proceedings.

National Council of La Raza v. Cegavske, 800 F.3d 1032 (9th Cir. 2015) does not suggest otherwise. *Cegavske* involved a claim under § 7 of the NVRA, which "seeks to increase

registration of the poor and persons with disabilities who do not have driver's licenses[.]" *Id.* at 1035 (quotation omitted). If a state is violating § 7, it is possible for a plaintiff to allege that violation and obtain judicial relief within 30 days, allowing sufficient time to register eligible voters for the upcoming election. On the other hand, states are categorically prohibited by the NVRA from removing most ineligible voters within 30 days of an election, even if a court were to find the state's list maintenance unreasonable. 52 U.S.C. § 20507(c)(2)(A). Simply put, there are good reasons to treat a § 7 claim differently than an allegation of unreasonableness under § 8, because the former is based on the possibility that people who should be able to vote in an imminent election are unlawfully prevented by a state from doing so.

To the extent *Cegavske* stands for the narrow proposition that filing a claim within 30 days of a federal election categorically exempts the plaintiff from the NVRA's notice provision, this Court is not bound by that holding. Such an interpretation would be inconsistent with the purpose and intent of the NVRA, all expressed clearly through the statutory text and structure. Congress created a general rule requiring notice for alleged NVRA violations, while maintaining a minor exception for extraordinary circumstances. The Court should decline Plaintiffs' invitation to interpret the statute in a way that transforms the exception into the rule.

III. Plaintiffs do not plausibly allege that Colorado's procedures are unreasonable.

Plaintiffs' failure to satisfy the NVRA's notice procedures also infects the plausibility of the Complaint's allegations. In responding to Colorado's Motion to Dismiss, Plaintiffs imply that discovery is necessary to assess Colorado's compliance with the statutory safe-harbor. Doc. 35 at 12. But the NVRA is designed to ensure that such information is available to plaintiffs and the Court from the outset of the litigation.

Under the NVRA, states are required to provide information regarding NVRA compliance to potential plaintiffs. 52 U.S.C. § 20507(i). Congress's expectation was that plaintiffs would arrive in court with more than conclusory, incomplete, and outdated statistics. Potential NVRA plaintiffs should have complete information as to a defendant's list maintenance activities, and presumably—if plaintiffs are still pursuing a claim considering this information—evidence that the jurisdiction is failing to meet its obligations. Congress did not intend for a state to be subject to costly and time-consuming litigation based on the mere possibility that its records—which could have been accessed prior to the litigation—*might* display evidence of noncompliance. From the outset of a case like this one there should be no dispute as to the scope of a defendant's list maintenance activities. Only whether such activities are "reasonable."

Furthermore, *Voter Integrity Project NC, Inc. v. Wake County. Board of Elections*, 301 F. Supp. 3d 612 (E.D.N.C. 2017) and *American Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779 (W.D. Tx. 2015) are distinguishable from this case in a key way. In those cases, the plaintiffs successfully used EAC and census data to state a claim that *individual counties* were in violation of § 8 of the NVRA. Here, Plaintiffs attempt to use that same data—still in individual counties—to claim that Colorado's *entire program* of list maintenance is unreasonable. But because Plaintiffs chose to sue Colorado on a statewide basis, the relevant data is that which reflects Colorado's statewide list maintenance activities, not those of individual counties. And using the same metrics Plaintiffs have chosen, the EAC offers no plausible indicia that Colorado's statewide list maintenance practices are "unreasonable."

1. *Excessive Registration Rates as a Percentage of Citizens of Voting Age*. Compl. ¶¶ 26–35. The national registration rate is 91.6%, just below Colorado's rate of 97.4%. U.S.

Election Assistance Commission, *Election Administration and Voting Survey* (2018 EAC Report), at 49, 48.[4] Nearly 60% of states have registration rates over 90%, and two states and the District of Columbia have statewide rates exceeding 100%. *Id.* at 48.

2. *Low Numbers of Removals, Specifically for Failing to Respond to a Confirmation Notice.* Compl. ¶¶ 36–42. Nationwide, 8.17% of registered voters were removed between 2016 and 2018, only a tick over Colorado's figure of 7.32%. 2018 EAC Report at 83, 82. But in Colorado, 59.60% of those removals were for failure to return a confirmation notice, compared to 35.26% nationwide. *Id.* Just five states reported a greater percentage of removals based on the failure to return a confirmation notice than did Colorado. *Id.*
3. *Low Numbers of Confirmation Notices Sent*. Compl. ¶¶ 43–48. Nationwide, states sent confirmation notices to 11.58% of active voters, just above Colorado's rate of 9.44%. 2018 EAC Report at 79, 78. Twenty-one states have rates lower than Colorado's. *Id.*
4. *High Inactive Registration Rates*. Compl. ¶¶ 49–57. Nationwide, 10% of registrations are inactive. 2018 EAC Report at 61. In Colorado, that figure is 13.33%. *Id.* at 55.

Plaintiffs sued Colorado, not individual counties. And the data upon which Plaintiffs rely simply does not show that Colorado's efforts differ so much from those of its peers that they plausibly fall outside the "considerable freedom" afforded to states in designing and implementing their list maintenance programs. 2018 EAC Report at 51. This is especially true because "the removal process laid out by the NVRA can take up to two election cycles to be

[4] The 2018 EAC Report is available at: https://tinyurl.com/y5dax8yv. *See also* Compl. ¶ 21; *Jacobsen v. Deseret Book Co.*, 287 F.3d 936, 941 (10th Cir. 2002) (permitting court to consider documents "referred to in the complaint" and "central to the plaintiff's claim").

completed," requiring that the EAVS data on registered and eligible voters be "used with caution." *Id.* at 47.

At bottom, Plaintiffs purposefully avoided collecting full information about Colorado's list maintenance efforts so they can rely instead on outdated and incomplete data. But even that analysis, when done on a statewide level, does not plausibly suggest that Colorado's efforts are "unreasonable."

IV. The NVRA did not abrogate Colorado's sovereign immunity.

Congress knows how to expressly abrogate the States' sovereign immunity under the Eleventh Amendment when it wishes to do so. It has done so before. *See, e.g.*, 42 U.S.C. § 12202. Plaintiffs cite no similar language in the NVRA demonstrating Congress's "unmistakably clear" statement abrogating the States' immunity. *Seminole Tribe of Florida v. Florida*, 517 U.S. 44, 56 (1996) (quotations omitted). Indeed, Plaintiffs candidly acknowledge that at least two courts have found Congress did *not* abrogate the States' immunity in the NVRA. Doc. 35 at 15. Were *both* courts mistaken about Congress's "unmistakably clear" statement? Clearly not. Rather, Congress intended to create a cause of action under the *Ex Parte Young* framework against only officials who neglect their NVRA duties, not states themselves.

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