IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION
Case No. 3:21-CV-493-RJC-DCK

JERRY GREEN and LINDA PETROU,
Plaintiffs,

v.

KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina Board of Elections,
Defendant.

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

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INTRODUCTION

The arguments in Director Bell's motion to dismiss are often raised, and often rejected. The undersigned counsel saw them most recently in *Daunt v. Benson*. The *Daunt* case was for Michigan what this case is for North Carolina. It involved a similar plaintiff, raising a similar claim, based on similar evidence, in a similar complaint, after a similar presuit notice. When Michigan's chief election officer moved to dismiss on the three grounds raised here—lack of presuit notice, lack of Article III standing, and failure to state a claim—the Western District of Michigan denied the motion in full. If these allegations are not enough to initiate litigation, the court asked, then what would be? *Daunt v. Benson*, Doc. 376 at 19, No. 1:20-cv-522 (W.D. Mich. Nov. 3, 2020) (oral opinion) (attached as Ex. A). Plaintiffs like these are "exactly the kind of person that Congress had in mind" when it created a private cause of action to sue for violations of the NVRA's list-maintenance requirements. Instead of stopping this case before it starts, this Court should follow *Daunt*, deny the Director's motion to dismiss, and send this case to discovery.

BACKGROUND

North Carolina has stopped maintaining clean and accurate voter rolls. Forty counties have registration rates over 90%. Compl. (Doc. 1) ¶¶32-36, 3. While it would be great if 90% of eligible voters in these counties were registered to vote, registration rates across the State and nation are closer to 70%. ¶¶37-40. Rather than unusually high enthusiasm for voting, inflated rolls like these are a "telltale sign" that officials are failing to remove voters who have become ineligible. ¶42. In fact, nine of the forty counties with inflated rolls have registration rates over 100%—a mathematical impossibility. ¶¶34, 36, 3. The Justice Department and others have sued jurisdictions with similarly inflated registration rates, and those jurisdictions quickly admitted liability or agreed to clean up their rolls. ¶¶43-47. Worse, North Carolina is trending in the wrong direction: It is one of the few States whose rolls have become *more* inflated in recent years. ¶¶48, 33-35.

North Carolina is violating federal law. One of the NVRA's "main objectives" was to force States to "remov[e] ineligible persons from [their] voter registration rolls." *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1838 (2018). According to the bipartisan Carter-Baker Commission, inaccurate rolls are "'the root'" cause of most problems with U.S. elections. Compl. ¶22. They invite unlawful voting, dilute lawful votes, and decrease voters' confidence in elections. ¶22. Fraud, in particular, "is a real risk" that "has had serious consequences" in "North Carolina." *Brnovich v. DNC*, 141 S. Ct. 2321, 2348 (2021); *see* Compl. ¶¶23-25. To combat these ills, section 8 of the NVRA requires States to "conduct" a program that makes a "reasonable effort" to "remove the names of ineligible voters" who move or die. 52 U.S.C. §20507(a)(4). When States violate section 8, Congress created a private right of action that allows individuals who serve a presuit notice to sue. §20510(b). According to Congress, this scheme "ensure[s] that accurate and current voter registration rolls are maintained," safeguarding the "fundamental right" to vote and the "integrity of the electoral process." §20501(a)(1), (b)(3)-(4).

Plaintiffs brought this suit to remedy North Carolina's violation of the NVRA. Plaintiffs are Jerry Green and Linda Petrou. Both are residents of North Carolina, both live in counties with inflated voter rolls, and both actively vote in local and statewide elections. Compl. ¶¶7, 9, 35. Both also are highly active in electoral politics, holding various leadership roles in the Republican Party. ¶¶8, 10. North Carolina's sloppy list maintenance not only undermines Plaintiffs' confidence in elections and risks diluting their votes, but also requires them to divert their resources away from other priorities. ¶¶11-12. Those resources instead go to "monitoring North Carolina's elections for fraud and abuse," "mobilizing voters to counteract it," "educating the public about election-integrity issues," "persuading elected officials to improve list maintenance," and challenging illegal votes, as Petrou has done successfully before. ¶¶12, 10.

To redress their injuries, Plaintiffs sued Director Bell—the chief election official that the NVRA makes responsible for list maintenance in North Carolina. *See* ¶13 (citing N.C. Gen. Stat. §163-

27(d); and 52 U.S.C. §20509). Because this federal duty cannot be delegated, Director Bell is liable for any violation of the NVRA, even if the breakdown is occurring at the county level. *See* ¶¶27-31 (citing *United States v. Missouri*, 535 F.3d 844, 850 (8th Cir. 2008); *Scott v. Schedler*, 771 F.3d 831, 839 (5th Cir. 2014); and *Harkless v. Brunner*, 545 F.3d 445, 452 (6th Cir. 2008)).

Before suing, Plaintiffs served Director Bell with a presuit notice. ¶¶51-59. The notice was fairly detailed. *See* Notice (Doc. 1-1). Among other specifics, it identified Green and Petrou by name. *Id.* at 1. It explained that "Section 8 of the NVRA obligates states to conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters due to death or change of residence." *Id.* (cleaned up). It offered a range of statistics, comparing U.S. census data with the State's registration records, to show that voter registration rates in many counties were "abnormally, or in the case of counties with greater than 100% registration, impossibly, high." *Id.* at 3. It identified those counties by name and alleged that, as a result, North Carolina is "violating Section 8 of the NVRA." *Id.* at 2. It addressed "the curative steps needed to bring the state into compliance" and warned that doing so was needed to "avoid litigation." *Id.* Specifically, it notified Director Bell that Petrou and Green "will bring a lawsuit against you … if you fail to take specific actions to correct these violations of Section 8 within the 90-day timeframe specified in federal law." *Id.* at 1. The Director responded two months later, offering various criticisms of Plaintiffs' data and denying any liability under the NVRA. Compl. ¶60.

When North Carolina failed to remedy its violation within the statutory timeframe, Plaintiffs filed this lawsuit. At the time, this Court was considering a related lawsuit brought by Judicial Watch—a suit that the State has since settled. *See Judicial Watch, Inc. v. North Carolina*, Doc. 69, No. 3:20-cv-211 (W.D.N.C. Dec. 20, 2021). Director Bell now moves to dismiss this case under Rules 12(b)(6) and 12(b)(1). *See* Mot. (Doc. 20).

LEGAL STANDARD

A motion to dismiss "tests" whether the complaint satisfies Rule 8, which in turn requires only "'a short and plain statement'" of the claim. *U.S. ex rel. Cooper v. Auto Fare, Inc.*, 2014 WL 2889993, at *1 (W.D.N.C. June 25) (Conrad, J.). "Specific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (cleaned up). This standard is "liberal." *Id.* at 94. Courts must accept the complaint's factual allegations as true, allow all reasonable inferences from those allegations, and construe the complaint in the light most favorable to the plaintiff. *Troche v. Bimbo Foods Bakeries Distribution, Inc.*, 2014 WL 1669112, at *6, *8 (W.D.N.C. Apr. 28) (Conrad, J.).

After all that construing, the question is whether the complaint states a claim that is "'plausible on its face.'" *Ospina v. Griesinger Assocs., Inc.*, 2022 WL 18739, at *2 (W.D.N.C. Jan. 3) (Conrad, J.). Plausible means a "reasonable inference" that the defendant is liable. *Id.* It does not mean that liability is "probable" or even "more plausible" than other explanations. *Houck v. Substitute Tr. Servs., Inc.*, 791 F.3d 473, 484 (4th Cir. 2015). Where "'two alternative explanations exist, one advanced by the defendant and the other advanced by the plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss.'" *Brown-Thomas v. Hynie*, 412 F. Supp. 3d 600, 611 (D.S.C. 2019) (cleaned up). Courts simply "'cannot weigh the facts or assess the evidence at this stage.'" *Ospina*, 2022 WL 18739, at *2; *accord Woods v. City of Greensboro*, 855 F.3d 639, 652 (4th Cir. 2017).

When assessing a claim's plausibility, courts typically must stick to the four corners of the complaint. *Dynamis, Inc. v. Dynamis.com*, 780 F. Supp. 2d 465, 471 (E.D. Va. 2011). Courts can consider documents attached to the complaint (*e.g.*, Plaintiffs' presuit notice), but not documents attached to the motion to dismiss that are merely referenced in the complaint (*e.g.*, the Director's response to the presuit notice). *Sira v. Morton*, 380 F.3d 57, 67 (2d Cir. 2004). Courts can also take judicial notice of official documents, but only for their "existence" rather than their "truth." *Kaspersky Lab, Inc. v. DHS*,

909 F.3d 446, 464 (D.C. Cir. 2018). And outside materials can never be used to *contradict* the factual allegations or inferences in the complaint. *See Glob. Network Commc'ns, Inc. v. City of N.Y.*, 458 F.3d 150, 156 (2d Cir. 2006); *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1014 (9th Cir. 2018). For example, "while the 2018 [EAVS] Report may help to provide context at summary judgment or trial, considering it at this stage to rebut plaintiffs' allegations would result in the Court weighing the parties' evidence, which is inappropriate." *Judicial Watch, Inc. v. Griswold*, 2021 WL 3631309, at *11 (D. Colo. Aug. 16). *Contra* Mot. 25, 13.

These "same" pleading rules govern motions to dismiss under both Rule 12(b)(6) and Rule 12(b)(1). *Wikipedia Found. v. NSA/CSS*, 857 F.3d 193, 208 (4th Cir. 2017). While courts have more leeway to consider outside materials under Rule 12(b)(1), Director Bell has not submitted any outside materials that pertain to this Court's subject-matter jurisdiction. Her two exhibits pertain to the merits of Plaintiffs' claim and Plaintiffs' so-called "statutory standing," which is another merits question that is "properly considered under Rule 12(b)(6)." *TBM Consulting Grp., Inc. v. Lubbock Nat'l Bank*, 2018 WL 2448446, at *3 (E.D.N.C. May 31). Because Director Bell "has not provided evidence to dispute the veracity of the jurisdictional allegations in the complaint," this Court "accepts facts alleged in the complaint as true just as it would under Rule 12(b)(6)." *Payne v. Chapel Hill N. Properties, LLC*, 947 F. Supp. 2d 567, 572 (M.D.N.C. 2013).

ARGUMENT

According to Director Bell, Plaintiffs failed to plead presuit notice, Article III standing, or a violation of section 8. She is mistaken on all three points, just as the defendants were mistaken on the same three points in *Daunt*. This Court should deny the motion to dismiss.

I. Plaintiffs provided presuit notice.

The NVRA allows individuals to sue once the State's chief election official receives "written notice of the violation." 52 U.S.C. §20510(b)(1)-(2). No one disputes that, before filing this lawsuit, Plaintiffs gave Director Bell written notice of the allegations that now appear in their complaint. But

the Director claims that Plaintiffs' presuit notice was too "vague" to count as a notice. Mot. 11-16. The Director is incorrect.

Plaintiffs' notice satisfied the NVRA. It expressly put Director Bell on "statutory notice" that litigation was forthcoming. Notice 1, 4, 5. It identified the two plaintiffs here, "Jerry Green" and "Linda Petrou," by name. *Id.* at 1. It identified the exact provision of the NVRA that the State is violating: section 8's requirement to conduct a program that reasonably removes ineligible voters who have moved or died. *Id.* at 1-2. It also explained the reason why Plaintiffs believe there's a violation: nearly a dozen counties in North Carolina have impossibly high registration rates, and another two dozen counties have registration rates that far exceed the national and statewide averages. *Id.* at 3. The notice identified the counties with inflated voter rolls by name. *Id.* And it explained what data Plaintiffs used—a comparison of U.S. Census data to the State's list of registered voters—to make that determination. *Id.*

Courts have consistently upheld notices just like Plaintiffs'. Most notably, in *Daunt*, Plaintiffs' counsel filed a virtually identical notice for a voter in Michigan. *Compare* Notice, *with Daunt*, Doc. 31-1, No. 1:20-cv-522 (W.D. Mich. Sept. 30, 2020) (attached as Ex. B). When the defendants moved to dismiss for insufficient notice, the district court denied their motion. *Daunt*, Doc. 44, No. 1:20-cv-522 (W.D. Mich. Oct. 28, 2020). In its oral opinion, the court explained that the notice was "a fairly detailed statement of why the plaintiff thinks that there's a problem with the Michigan voter registration list … under Section 8"—specifically, that certain counties "have more registered voters than eligible voters … based on the census data." Ex. A at 15-16. Similarly, in *ACRU v. Martinez-Rivera*, the court upheld a notice that simply identified "the provision of section 8 that the Defendant was allegedly violating," cited "the evidence" for that violation (that one county's rolls had more registered voters than eligible voters), and "warn[ed] that the failure" to remedy this violation "could result in a lawsuit." 166 F. Supp. 3d 779, 795 (W.D. Tex. 2015) (*ACRU*). Plaintiffs did at least that much here.

Director Bell claims that Plaintiffs' notice was too "'vague.'" Mot. 11. More precisely, she thinks a notice must identify *specific* policies that the State should adopt, eliminate, or implement. Mot. 15. The Director also criticizes Plaintiffs' notice because, in her view, its statistics "do not demonstrate [a] lack of compliance" with section 8. Mot. 12-15. Notably, the Director makes these same arguments when she asks the Court to dismiss Plaintiffs' complaint under Rule 12(b)(6). *See* Mot. 25 ("as explained above"); Mot. 23 ("As stated above"); Mot. 23 ("As noted in Part I above"). But the Director never explains why a mere presuit notice must satisfy the pleading standard that applies to complaints that are filed in federal court.

The NVRA does not require the specificity that Director Bell demands. The notice provision asks for "notice of *the violation*," not notice of the precise source or the precise remedy. 52 U.S.C. §20510(b)(1) (emphasis added). As the Director admits, section 8 of the NVRA does not require "a particular method of compliance with the 'reasonable effort' provision." Mot. 21. It thus is "not surprising" if a presuit notice "does not contain any detailed allegations, inasmuch as the NVRA provision at issue does not contain any detailed requirements; it simply requires 'reasonable effort' on the part of the State." *Judicial Watch, Inc. v. King*, 993 F. Supp. 2d 919, 922 (S.D. Ind. 2012).

A presuit notice under the NVRA need only state the "general requirement" that the State is violating and the basic "reasons" for that conclusion. *Id.* Courts consistently reject calls for more. *E.g.*, *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1044 (9th Cir. 2015) (notice need not "specify that the violation has been actually observed" or identify a "'discrete violation'"). Including courts in North Carolina. *E.g.*, *Action NC v. Strach*, 216 F. Supp. 3d 597, 619-20 (M.D.N.C. 2016) (rejecting the State's argument that a presuit notice must contain "'sufficiently particularized information'"); *Voter Integrity Proj. NC, Inc. v. Wake Cty. Bd. of Elections*, 301 F. Supp. 3d 612, 617-18 (E.D.N.C. 2017) (similar).

Director Bell does not cite a single case deeming a notice like Plaintiffs' insufficient—or a single case deeming *any* notice too "vague" to satisfy the NVRA. Her primary cases involve plaintiffs

who failed to provide the defendant with any notice at all, or who tried to get credit for someone else's notice. *See Bellitto v. Snipes*, 221 F. Supp. 3d 1354, 1362-63 (S.D. Fla. 2016); *Ga. State Conf. of NAACP v. Kemp*, 841 F. Supp. 2d 1320, 1335 (N.D. Ga. 2012); *Scott*, 771 F.3d at 836. In *Scott*, for example, the court did not hold that the notice's allegations or statistics were "too vague" to satisfy the NVRA. *Cf.* Mot. 11-12. It held that a plaintiff who failed to send a letter could not get credit for someone else's letter; the other letter did not cover the tagalong plaintiff because it "did not mention [him] by name" and was "vague … *as to* [him]." 771 F.3d at 836 (emphasis added). But the letter *did* satisfy the NVRA for the plaintiff who actually sent it. *Id.* at 839-40.[1]

As for the notice's statistics, the Director's criticisms of Plaintiffs' data are irrelevant. Plaintiffs' statistics are enough to state a plausible claim under the Federal Rules, *see infra* III, so they are "more than sufficient" to provide presuit notice under the NVRA. *Ga. NAACP*, 841 F. Supp. 2d at 1334. The NVRA asks plaintiffs to give the State "notice." 52 U.S.C. §20510(b). Notice is given even if the State disputes that "the information offered" suggests a violation of the NVRA, and even if the State believes the notice does not provide "'an adequate basis upon which to investigate possible violations.'" *Ga. NAACP*, 841 F. Supp. 2d at 1334. The Director's criticisms of Plaintiffs' statistics are irrelevant because a notice need only state "[t]he general proposition" that a State is "not complying with the mandates of the NVRA"; the "statistics … simply serve as factual support for that general proposition." *Id.* Like the defendant in *ACRU*, the Director argues that Plaintiffs' "letter was too vague to provide notice" because having "more names than there are citizens eligible to vote … is not an NVRA violation" by itself. 166 F. Supp. 3d at 795. But as in *ACRU*, this argument is "misplaced."

[1] The Director's other authorities aren't even arguably relevant. Those cases either found no violation of the NVRA's notice provision, or did not address the sufficiency of the plaintiff's notice. *See ACORN v. Miller*, 129 F.3d 833, 838 (6th Cir. 1997) (notice unnecessary); *King*, 993 F. Supp. 2d at 922 (notice sufficient); *Ohio A. Phillip Randolph Inst. v. Husted*, 350 F. Supp. 3d 662, 671-72 (S.D. Ohio 2018) (sufficiency of notice waived); *Bellitto v. Snipes*, 935 F.3d 1192 (11th Cir. 2019) (sufficiency of notice not addressed).

Id. "[H]aving too many registered voters on county registration rolls is *evidence* that the [Defendant] has violated Section 8 of the NVRA," and providing that evidence in a notice "gives the Defendant enough information to diagnose the problem." *Id.* The NVRA does not require plaintiffs to win their case—before it is even filed—in a battle of letters with the State.

While Magistrate Judge Keesler recommended dismissing the complaint in *Judicial Watch* for insufficient notice, that recommendation does not undermine Plaintiffs' notice here. To the extent Judge Keesler accepted the Director's view of what a notice must do, Plaintiffs respectfully disagree for the reasons just given. But even under the Director's heightened standard, Judge Keesler thought the sufficiency of the notice in *Judicial Watch* was a "close call." Doc. 61 at 18, No. 3:20-cv-211 (W.D.N.C. Aug. 20, 2021).

That call should go the other way here. The primary defect with the notice in *Judicial Watch*, Judge Keesler reasoned, was that "the *same* EAVS report cited by Plaintiff" warns that the NVRA itself can cause registration rates over 100%. *Id.* at 19. But Plaintiffs' notice does not rely on the EAVS report or its underlying data; it relies on the Director's *own* data on the number of registered voters in each county. *See* Notice 3. Plaintiffs' notice also dispels this alternative hypothesis by comparing the registrations rates in the counties with inflated rolls to the registration rates statewide and nationwide. *Id.* If the NVRA is inflating rolls by barring counties from quickly removing ineligible voters, then that inflation should affect *all* jurisdictions; yet the counties that Plaintiffs identified have registration rates that far exceed the rest. *Id.* Further, Plaintiffs' notice identifies inflated rolls in over three dozen counties, where the *Judicial Watch* notice identified only one county. *Id.* Perhaps a single set of inflated rolls can be blamed on an innocent coincidence, but Plaintiffs' additional, far broader evidence cannot. This Court cannot deem Plaintiffs' notice insufficient without splitting with *Daunt*, a case where the Western District of Michigan approved an indistinguishable notice. *See* Ex. A at 15-16.

Even if Plaintiffs' notice were deficient, any lack of specificity should be equitably excused. While Director Bell calls it "jurisdictional," Mot. 10, the NVRA's notice provision is a classic claim-processing rule that "is not jurisdictional." *ACRU v. Phil. City Comm'rs*, 2016 WL 4721118, at *4 (E.D. Pa. Sept. 9); *see also Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 128 n.4 (2014) (the phrase "statutory standing" is "misleading" because "'the absence of a valid … cause of action does not implicate subject-matter jurisdiction'"). Courts thus can excuse noncompliance when the equities favor it. *See Vance v. Whirlpool Corp.*, 716 F.2d 1010, 1012 (4th Cir. 1983). Courts have done just that, even in cases where the plaintiff provided no notice at all. *E.g.*, *ACORN*, 129 F.3d at 838.

The equities favor Plaintiffs here. Plaintiffs indisputably *did* provide presuit notice. Director Bell's only complaint is that their notice should have included more details—a weak complaint, at best. Any lack of detail did not prejudice Director Bell: Her thorough response reveals that she understood exactly what provision of the NVRA she was accused of violating, exactly what evidence Plaintiffs were relying on, the quality of that evidence, and Plaintiffs' intent to sue if the inflated rolls were not addressed. *See Ga. NAACP*, 841 F. Supp. 2d at 1334 (deeming notice sufficient where "the defendants' brief" revealed that "they were informed of the plaintiffs' position"). That her response described Plaintiffs' evidence as insufficient does not mean that she lacked *notice* of what that evidence was, lest every defendant be given the power to stop an NVRA lawsuit by unilaterally declaring the allegations in the notice too "vague" or "nonspecific." Nor would providing additional details have done any good here. According to the Director, the State's current list-maintenance procedures satisfy the NVRA "as a matter of law." Mot. 20. So even if Plaintiffs had identified "specific action or inaction," the Director believes this evidence would have been "irrelevant" because the State uses a supposed "'safe harbor'" that protects it from "litigation like this." Mot. 23, 21. The NVRA does not compel plaintiffs to attempt such "futile acts." *ACORN*, 129 F.3d at 838.

For all these reasons, this Court should not dismiss Plaintiffs' complaint for failure to provide presuit notice. Plaintiffs' notice was sufficient under the governing law, and any deficiency would be minor and properly excused.

II. Plaintiffs plausibly alleged Article III standing.

Standing requires injury, causation, and redressability. Importantly, Congress created a private right of action for violations of the NVRA, including section 8's list-maintenance requirement. *See* 52 U.S.C. §20510(b). Though not decisive, courts evaluating Article III standing "must afford due respect to Congress's decision." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340-41 (2016)). Congress's judgment is "instructive and important" because the legislature is "well positioned to identify intangible harms that meet minimum Article III requirements." *Spokeo*, 578 U.S. at 341. In fact, Congress can "'articulate chains of causation that will give rise to a case or controversy where none existed before.'" *Id.* Congress also can "'elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *TransUnion*, 141 S. Ct. at 2204-05 (quoting *Spokeo*, 578 U.S. at 341).

Plaintiffs sufficiently alleged standing here. Notably, Director Bell does not cite *a single case* where a complaint under section 8 was dismissed at the pleading stage for lack of Article III standing. Many cases have held the opposite. *E.g.*, *ACRU*, 166 F. Supp. 3d at 790-91; *King*, 993 F. Supp. 2d at 924-25; *Griswold*, 2021 WL 3631309, at *7-8. As the *Daunt* court said about a similar complaint, individuals like Plaintiffs are "exactly the kind of person that Congress had in mind" when it decided who could sue for violations of section 8. Ex. A at 19. Plaintiffs' alleged injuries—the "potential for extra work and resources policing the validity and propriety of the election," the "potential for a cloud on the election," and the "potential for dilution"—are "a plausible basis for standing articulated under Article III." *Id.* at 21.

Diversion of Resources: Plaintiffs are especially active in electoral politics in North Carolina. Compl. ¶¶7-12. As alleged in their complaint, the Director's violation of section 8 inflates the voter rolls and causes Plaintiffs to divert their resources to address the fallout. Compl. ¶¶11-12. "[T]here can be no question" that a diversion of resources is an "injury in fact." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). The diversion injures the plaintiff because she "would have spent" her resources on "some other aspect" of her mission had the defendant "complied with the NVRA." *La Raza*, 800 F.3d at 1040. That a defendant's misconduct causes the plaintiff to, for example, spend resources registering additional voters is "sufficient to confer standing." *Action NC*, 216 F. Supp. 3d at 616-18; *accord Nat'l Coalition for Students with Disabilities Educ. & Legal Fund v. Scales*, 150 F. Supp. 2d 845, 850 (D. Md. 2001). These diversion-of-resources injuries are concrete and particularized—not generalized grievances. *La Raza*, 800 F.3d at 1040.

The Director does not dispute that Plaintiffs have adequately alleged a diversion-of-resources injury. Nor could she. *See id.* at 1040 (explaining that a diversion-of-resources injury is sufficient "at the pleading stage," "even when it is 'broadly alleged'"); *League of Women Voters of Ariz. v. Reagan*, 2018 WL 4467891, at *4 (D. Ariz. Sept. 18) (finding the allegation that plaintiffs "diverted resources to register voters rather than … other activities … due to Defendant's alleged noncompliance with the NVRA" to be "sufficiently plausible to meet the low bar" of alleging standing at the pleading stage (cleaned up)); *Nat'l Press Photographers Ass'n v. McCraw*, 504 F. Supp. 3d 568, 581 (W.D. Tex. 2020) (explaining that a complaint need not identify "man-hours expended or specific activities resources were diverted away from" at the pleading stage (cleaned up)). As the court explained in *Daunt*, allegations like Plaintiffs' are "the same kind of concern" recognized in other NVRA cases and are

"plausible" at the pleading stage, given that Plaintiffs are "voter[s] in the state and active in Republican politics." Ex. A at 17-18.[2]

The Director notes in passing that diversion-of-resources injuries are "more commonly associated with organizations," Mot. 18, but she cites no case that bars individuals from vindicating these injuries. *Daunt* holds the opposite. This injury counts under Article III, the court, even when the resources are being diverted by "an individual as opposed to an organization." Ex. A at 17. Organizations, after all, are simply groups of individuals. *NAACP v. Ala. ex rel. Patterson*, 357 U.S. 449, 459 (1958). And an organization, as the Supreme Court explained in the seminal case about diversion-of-resources standing, has no greater ability to invoke this theory than an individual. *See Havens Realty*, 455 U.S. at 378 ("In determining whether [an organization] has standing … we conduct the same inquiry as in the case of an individual"). Privileging organizations over individuals has no support in logic or law.

Voter Confidence: Director Bell also says little about Plaintiffs' second injury: their "undermine[d] … confidence in the integrity of North Carolina elections." Compl. ¶¶11, 15. Voter confidence has "'independent significance,'" according to the Supreme Court, because it "'encourages citizen participation in the democratic process.'" *Griswold*, 2021 WL 3631309, at *7 (quoting *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008) (op. of Stevens, J.)); *accord Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Undermining voter confidence thus burdens the right to vote, and "[t]here can be no question that a plaintiff who alleges that his right to vote has been burdened by state action has standing to bring suit to redress that injury." *King*, 993 F. Supp. 2d at 924.

[2] In fact, the would-be intervenors allege similar diversions of resources as the "interest" that gives them the right to intervene. *See* Mot. to Intervene (Doc. 16) 3, 7. As the *Daunt* court observed, Plaintiffs must have standing if these movants have a right to intervene. An intervenor's resource-based interest under the NVRA and a plaintiff's resource-based injury under the NVRA "are both sides of the same coin." Ex. A at 19.

Courts have repeatedly recognized this injury as a basis for standing in section 8 cases. *E.g.*, Ex. A at 18-21; *Griswold*, 2021 WL 3631309, at *7; *King*, 993 F. Supp. 2d at 924. This injury is not "generalized": "there is no indication that undermined confidence and discouraged participation are 'common to all members of the public.'" *Griswold*, 2021 WL 3631309, at *7. Plaintiffs are registered voters in North Carolina who vote in the very local and statewide elections that are suffering from bloated rolls. *See* Compl. ¶¶7, 9, 11. Nor is their injury "speculative or hypothetical": it "already exists" because their "confidence is undermined now." *Griswold*, 2021 WL 3631309, at *7. If any doubt remained, this Court should defer to Congress's judgment that inflated rolls undermine the "integrity of the electoral process" and that citizens should be able to sue to vindicate this harm. 52 U.S.C. §20501(b)(3)-(4); *see Spokeo*, 578 U.S. at 341.

Vote Dilution: Director Bell's violations of section 8 also injure Plaintiffs by risking the dilution of their votes. Compl. ¶11. Burdens on the right to vote are concrete, particularized injuries that easily support standing. *King*, 993 F. Supp. 2d at 924. And this right "'can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Id.* (quoting *Purcell*, 549 U.S. at 4). Bloated voter rolls dilute the votes of eligible voters by facilitating fraudulent or otherwise ineligible votes. Compl. ¶¶11, 15. The "harm of vote dilution is concrete and actual or imminent, not conjectural or hypothetical." *Kravitz v. U.S. Dep't of Com.*, 336 F. Supp. 3d 545, 558 (D. Md. 2018) (quoting *Dep't of Com. v. U.S. House of Representatives*, 525 U.S. 316, 331-32 (1999); cleaned up). This injury is not a generalized grievance, even though it's suffered by many voters and even though the amount of dilution might be small. *See Baker v. Carr*, 369 U.S. 186, 208 (1962); *United States v. SCRAP*, 412 U.S. 669, 690 n.14 (1973).

This injury is not overly "speculative." Mot. 17-18. While Director Bell focuses on intentional voter "fraud," Mot. 17-18, bloated voter rolls invite all kinds of ineligible voting—fraudulent, intentional, accidental, and innocent—all of which dilute Plaintiffs' lawful votes. Nor is the link between

inflated rolls and voter fraud overly speculative. It has been observed by the Carter-Baker Commission, Compl. ¶22, a well-respected authority that the Supreme Court has cited many times. *E.g.*, *Brnovich*, 141 S. Ct. at 2347-48; *Crawford*, 553 U.S. at 193-94, 197 (op. of Stevens, J.). And regardless, Plaintiffs are seeking "forward-looking" relief, so Article III allows them to sue over not just fraud, but also the "risk of" fraud. *TransUnion*, 141 S. Ct. at 2210. "Fraud is a real risk" in "North Carolina" and elsewhere, as courts have reiterated many times. *Brnovich*, 141 S. Ct. at 2348; *see* Compl. ¶23 (collecting cases). The link between inflated voter rolls and increased risks of illegal voting does not require "several leaps of speculation." Mot. 18. It is obvious and well established.[3]

Even if this "'chain[] of causation'" would be too speculative in a vacuum, "'Congress has the power'" to make it satisfy Article III, as it did here by enacting a private right of action for violations of section 8. *Spokeo*, 578 U.S. at 341. Director Bell does not cite any cases holding that vote dilution is not a valid theory of standing. If she does so for the first time in reply, this Court should be skeptical of any cases that predate *Spokeo* or that do not "arise under a situation like the National Voter Registration Act where Congress has articulated the private right of action." Ex. A at 20. Congress's judgment warrants respect, especially because the harms it identified in the NVRA bear "a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts." *TransUnion*, 141 S. Ct. at 2213. As explained, courts have long recognized that vote dilution and losses of voter confidence burden the right to vote. And burdens on constitutional rights are classic examples of "intangible injuries" that satisfy Article III. *Spokeo*, 578 U.S. at 340.

Under any of these theories, Plaintiffs have sufficiently alleged standing at the pleading stage. Plaintiffs' allegations are even stronger given Congress's creation of a private right of action for

[3] At times, Director Bell seems to argue that Plaintiffs lack standing because the State is not, in fact, violating the NVRA. *E.g.*, Mot. 17-18. These arguments incorrectly conflate standing with the merits. When assessing standing, this Court must assume that the State is violating the NVRA. *Equity in Athletics, Inc. v. Dep't of Educ.*, 639 F.3d 91, 99 (4th Cir. 2011).

violations of section 8. The Supreme Court's decision in *TransUnion*—the only authority that Director Bell discusses—reaffirms that Congress can articulate new theories of standing, *see* 141 S. Ct. at 2204-05, and that plaintiffs can sue based on a "risk of future harm" when they seek forward-looking relief (as opposed to damages), *see id.* at 2210.

III. Plaintiffs plausibly alleged a violation of the NVRA.

Section 8 of the NVRA "requires States to 'conduct a general program that makes a reasonable effort to remove the names' of voters who are ineligible 'by reason of' death or change in residence." *Husted*, 138 S. Ct. at 1838 (quoting 52 U.S.C. §20507(a)(4)). In other words, the law makes the removal of dead or relocated voters "mandatory." *Id.* at 1842. Plaintiffs plausibly alleged that North Carolina is not complying with this duty.

Plaintiffs' data alone raises a reasonable inference of liability. As alleged in the complaint, over three dozen counties have registration rates that are abnormally, or sometimes impossibly, high compared to the rest of the State and country. Compl. ¶¶3, 34-36, 40. These "unreasonably high registration rate[s]" create a "strong inference of a violation of the NVRA" that is "sufficient," on its own, to survive a motion to dismiss. *ACRU*, 166 F. Supp. 3d at 805. Especially where the "census data" suggests there are "more registered voters than eligible voters living," the complaint creates "a plausible inference [that] there's a problem with the system that's been used to address the voter registration list." Ex. A at 16. "Other courts" agree that "a registration rate in excess of 100%" indicates that the State is "not making a reasonable effort to conduct a voter list maintenance program in accordance with the NVRA." *Griswold*, 2021 WL 3631309, at *10; *e.g.*, *Voter Integrity Proj. NC*, 301 F. Supp. 3d at 620. The Director cites no cases to the contrary.

Although Plaintiffs' statistics are sufficient, their complaint does not rest on the numbers alone. It documents examples of jurisdictions with similarly high registration rates who, after they were sued, agreed that their rolls were inflated. *See* Compl. ¶¶43-47. The examples include the State of

Michigan who, after failing to dismiss a similar complaint in *Daunt*, agreed to slate 177,000 voters for removal. ¶47. The complaint also updates the numbers from the presuit notice, using the most recent census data and registration numbers. *Compare* ¶33, *with* ¶¶34-35. That update revealed an additional four counties with inflated rolls, meaning that North Carolina "is one of the few States whose rolls are currently become *more* inflated." ¶48. The complaint also rules out potential alternative explanations for the inflated rolls. *See* ¶¶37-41. And it points to other list-maintenance tools that North Carolina is not using, ¶¶49, 25, only adding to the pressure on the existing policies.

Director Bell deems these allegations sufficient for three main reasons. First, she claims that, instead of poor list maintenance, the inflated rolls could be caused by population growth or the NVRA's limits on how fast voters can be removed. Mot. 23-25. Second, she faults Plaintiffs for not identifying specific policies that North Carolina should change. Mot. 23. Third, she claims that North Carolina cannot be liable because it complies with section 8's supposed "safe harbor." Mot. 21-22. None of these arguments are a reason to dismiss a complaint at the pleading stage. Notably, the Director's primary authority is a case that was decided *at trial*, after the court received "extensive expert testimony." *Bellitto*, 935 F.3d at 1207-08. Earlier in the litigation, the district court denied the defendant's motion to dismiss on grounds similar to the ones below. *Bellitto*, 221 F. Supp. 3d at 1365-66.

Alternative Explanations: The Director's criticisms of Plaintiffs' statistics are irrelevant. Plaintiffs do not have to disprove possible alternative explanations for North Carolina's inflated rolls at the pleading stage. *Houck*, 791 F.3d at 484. Even if the Director "advanced a potentially reasonable explanation for the high registration rate, … the validity of that explanation is not appropriate for determination at this early stage of the litigation, where the court views the factual allegations and inferences drawn therefrom in favor of [Plaintiffs]." *Voter Integrity Proj. NC*, 301 F. Supp. 3d at 619. The Director's alternative explanations are especially unpersuasive because they are internally contradictory. On the one hand, she claims that the rolls *are* inflated because the NVRA does not allow

counties to quickly remove ineligible voters. Mot. 23-25. On the other hand, she claims that the rolls *are not* inflated because the population is growing. Mot. 14-15, 25. These abstract, contradictory theories cannot render Plaintiffs' inference of "substandard list maintenance" implausible. Compl. ¶41.

Apart from being irrelevant at this stage, the Director's theories are also unpersuasive. Even if the NVRA's slow removal process or population growth are responsible for *some* of the inflation in these counties' rolls, the Director never quantifies their effects. Nor does she try to argue that the effects are large enough to explain all (or even most) of the inflation in the rolls. *Cf.* Mot. 25 (merely stating that "'some number'" of ineligible voters on the rolls are due to the NVRA). The Director has access to the number of inactive voters who are still on the rolls, but she neither shares it nor argues that the data would meaningfully change if those voters are removed. *See* Mot. 7, 13, 23-24. Further, Plaintiffs' complaint does not flatly assert that certain counties have high registration rates; it explains that the rates in these counties are far higher than the registration rates in other counties and States. Compl. ¶¶36-41. That comparison fatally undermines the Directors' alternative hypotheses. She does not explain how the NVRA could inflate the rolls in some jurisdictions but not others. She does not explain why the inherent inflation caused by the NVRA would be getting worse only in North Carolina. ¶48. And she does not suggest that population growth in the counties with inflated rolls has been unusually high compared to other jurisdictions.

Plaintiffs' methodology, by contrast, has been repeatedly upheld. Their "'census data is reliable,'" especially since they used "the most recent census data available at the time of the filing of [their] complaint." *Voter Integrity Proj. NC*, 301 F. Supp. 3d at 619. In all events, this Court cannot dismiss the complaint because it suspects that the "registration numbers may not be unreasonably high in context or there may be a reasonable explanation for them." *Griswold*, 2021 WL 3631309, at *11. At "the motion to dismiss stage, the Court does not 'weigh potential evidence that the parties might present.'" *Id.*

Specific Reforms: Director Bell errs again when she faults Plaintiffs for not alleging a "specific" policy that the State should adopt or use. Mot. 23. The NVRA requires States to "conduct" a list-maintenance program, not to simply *have* a list-maintenance program. 52 U.S.C. §20507(a)(4); *see Bellitto*, 935 F.3d at 1205-06 (defendant wins only if she demonstrates as a "factual" matter that she "reasonably used [the enacted] process"). Merely having a policy on the books does not satisfy the NVRA if the State is not following the policy, or if the State is not ensuring that the counties are following the policy. Plaintiffs allege just that, based on the massively inflated voter rolls in over three dozen counties. *E.g.*, Compl. ¶¶3, 4, 36, 41, 62. The correctness of Plaintiffs' allegation cannot be resolved at this stage. *See Griswold*, 2021 WL 3631309, at *11 ("While it appears undisputed that this is Colorado's [enacted] program, the Court has no information about Colorado's compliance … without 'further development of the record.'").

The Director's demand for specificity also ignores the nature of section 8 claims. As explained above, Plaintiffs cannot be expected to plead something beyond what the statute requires. The statute requires reasonable list maintenance, not specific policies, so identifying specific policies that the State must adopt or repeal cannot be part of the plaintiff's pleading burden. *See King*, 993 F. Supp. 2d at 922. Similarly, Plaintiffs' claim relies on an omission: that the Director is *failing* to conduct proper list maintenance. "[L]ittle factual detail is necessary or available when a plaintiff is alleging that the defendant failed to act." *Arvizu v. Medtronic Inc.*, 41 F. Supp. 3d 783, 792 (D. Ariz. 2014); *accord Washington v. Baenziger*, 673 F. Supp. 1478, 1482 (N.D. Cal. 1987); *Hobbs v. Powell*, 138 F. Supp. 3d 1328, 1343 (N.D. Ala. 2015). In all events, the Federal Rules do not require complaints to plead "[s]pecific facts." *Erickson*, 551 U.S. at 93. All that's required is "fair notice of what the … claim is and the grounds upon which it rests." *Id.* Plaintiffs provided that information here.

Safe Harbor: Section 8(c)(1) of the NVRA provides that a State "may meet the requirement of subsection (a)(4)" by relying on "change-of-address information supplied by the Postal Service."

52 U.S.C. §20507(c)(1). Citing nothing, the Director asserts that the State's supposed use of this process necessarily "defeat[s] Plaintiffs' claim" at the pleading stage. Mot. 21. Not so.

Subsection (c)(1) is not a basis to dismiss Plaintiffs' complaint. If the provision is a safe harbor, it only possibly fulfills States' "obligations regarding change of address." *Bellitto*, 935 F.3d at 1210. Section 8 also requires States to remove voters who become ineligible due to "death," 52 U.S.C. §20507(a)(4)(A), and subsection (c)(1) does not possibly ensure that North Carolina is complying with that separate duty. *See Bellitto v. Snipes*, 302 F. Supp. 3d 1335, 1356-57 (S.D. Fla. 2017). Further, subsection (c)(1) is meaningless unless States actually *use* it (and ensure that county officials are using it). *See* 52 U.S.C. §20507(c)(1)(A) (requiring that the change-of-address information "is used"). North Carolina's severely inflated voter rolls plausibly suggest that some counties are not. Whether the State is complying with "subsection (c)(1)" and whether that compliance "defeats Plaintiff[s'] claims" are "fact-based argument[s] more properly addressed at a later stage of the proceedings." *Bellitto*, 221 F. Supp. 3d at 1366; *accord Voter Integrity Proj. NC*, 301 F. Supp. 3d at 620 ("Whether [defendant's] compliance is sufficient to satisfy the 'safe harbor' provision is best resolved after further development of the record."); *Griswold*, 2021 WL 3631309, at *11 (similar).

Lastly, subsection (c)(1) is not a "safe harbor" to begin with, at least not in the way that the Director uses that term. The NVRA requires States to remove voters who have moved, 52 U.S.C. §20507(a)(4)(B), and restricts how States can remove those voters, §20507(d). The process in subsection (c)(1) is thus a "permissible" way to simultaneously satisfy these "mandates and accompanying constraints." *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 707 (6th Cir. 2016), *rev'd*, 138 S. Ct. 1833. It is not a *sufficient* way to satisfy section 8's list-maintenance requirements. A change-of-address process that admittedly "fails to reach up to 40% of voters who move," Mot. 14, is hardly a per se "reasonable effort" to conduct list maintenance, 52 U.S.C. §20507(a)(4)(B).

CONCLUSION

This Court should deny the Director's motion to dismiss.

Respectfully submitted,

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