UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Civil Action No. 3:21-cv-493

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.	)	**REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS**

Defendant Karen Brinson Bell, in her official capacity as Executive Director of the North Carolina State Board of Elections ("Director Bell"), files this Reply to Plaintiffs' Opposition to her Motion to Dismiss. Pursuant to Local Rule 7.1(e), this reply is limited to a discussion of only matters newly raised in the response. To the extent an argument is not addressed herein, Director Bell relies upon her initial memorandum as if set forth fully herein. [D.E. 20].

ARGUMENT

I. PLAINTIFFS' PRESUIT NOTICE WAS DEFICIENT.

As previously argued, Plaintiffs failed to provide notice of how Defendant was allegedly violating the NVRA before filing suit. In response, Plaintiffs assert that adequate notice only requires an explanation of why they think a violation is occurring. This argument fails for two reasons.

First, Plaintiffs incorrectly claim that a presuit notice need not explain "how" a defendant is allegedly violating the NVRA. [D.E. 35, pp. 11-14]. This argument cannot be correct, lest the presuit notice requirement be reduced to an empty formality. [*See* D.E. 20, pp. 11-12].

In Plaintiffs' presuit letter, they relied on inaccurate statistics to support their *belief* that

there was a violation. But this did not explain *how* Defendant was violating the NVRA. The NVRA does not set a statistical threshold for a violation of its voter list-maintenance requirements. Thus, Plaintiffs failed to provide Defendant with the opportunity to address the alleged violation as required by law. Nothing in Plaintiffs' opposition changes the fact that Plaintiffs' notice letter was "too vague to provide [the defendant] with 'an opportunity to attempt compliance.'" *Scott v. Schedler*, 771 F.3d 831, 836 (5th Cir. 2014) (quoting *Ass'n of Cmty. Organizations for Reform Now v. Miller*, 129 F.3d 833, 838 (6th Cir. 1997); *see also Ohio A. Phillip Randolph Inst. v. Husted*, 350 F. Supp. 3d 662, 672 (S.D. Ohio 2018). Thus, notice was insufficient to confer standing.

To counter Defendant's argument, Plaintiffs cite to district court orders in *Judicial Watch, Inc. v. King*, 993 F. Supp. 2d 919 (S.D. Ind. 2012), and *Am. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779 (W.D. Tex. 2015). While the notices at issue in these cases may have involved a similar dearth of information about how the defendant was allegedly violating the NVRA, those decisions cannot be squared with the appellate decisions requiring specific violations to be identified in a notice such that an elections board may attempt to correct any problems before facing a lawsuit. *See Scott*, 771 F.3d at 836; *Miller*, 129 F.3d at 838.

Plaintiffs' cited cases are also distinguishable. Unlike here, the defendants in those cases failed to explain to those courts why the voter registration statistics cited by the plaintiffs were consistent with NVRA compliance. See *Martinez-Rivera*, 166 F. Supp. 3d at 795; *King*, 993 F. Supp. 2d at 922 & n.2. Those decisions were therefore based on a misunderstanding of the NVRA and its operation. Furthermore, in *King*, the plaintiff notified the state that it had failed to continue specific "efforts to clean its voter rolls," which were required by an earlier consent decree with the United States. 993 F. Supp. 2d at 921. This shows that the state in *King* was

made aware of *specific practices* that the plaintiff complained were discontinued, allegedly in violation of the NVRA.

Finally, those courts also did not have the benefit of the Eleventh Circuit's extensive analysis in *Bellitto v. Snipes*, showing that these same statistics relied upon by the plaintiffs in those cases and Plaintiffs here do not show an NVRA violation. *See* 935 F.3d at 1208. In light of *Bellitto*, Plaintiffs' cited decisions were wrongly decided and they are not persuasive or instructive here.

Second, even if Plaintiffs were only required to explain why they think a violation is occurring, showing here is still insufficient. This is because the unreliable and misleading statistics upon which their entire factual foundation is built do not support even that showing. [D.E. 35, pp. 14-17]. Multiple courts and the federal agency administering the NVRA have repeatedly cautioned against this type of comparison. [D.E. 20, pp. 12-14]. In fact, the NVRA's required procedures for removing voters often result in this type of statistical data. *Id.*, 14-15. Therefore, reliance on this data is misleading and does not support the inference of a violation. Stated differently, how could an elections agency possibly know how to change its NVRA compliance when confronted with statistics that the federal administrators of the NVRA say are consistent with compliance? This inherent uncertainty proves that Plaintiffs' presuit "notice" was a mere hollow gesture at checking a box before hauling an elections agency into federal court.

In response, rather than address the unreliable nature of their allegations, Plaintiffs try to waive away the flaws in their data by claiming the "criticisms of Plaintiffs' data are irrelevant," based on the theory that no matter how facially flawed the data is, the data alone states a plausible claim to survive a motion to dismiss. [D.E. 35, p. 14]. However, even if a presuit

notice were only required to satisfy a plausibility standard, the statistics Plaintiffs rely upon do not meet even that bare minimum. As stated in Defendant's initial memorandum, Plaintiffs' particular statistics are highly misleading and inaccurate because they compare 2016 voting-age population data to 2020 voter registration data in a State with significant population gains during the same time period. [D.E. 20, pp. 12-15]. Even under the plausibility standard applied to Rule 12(b)(6) motions, courts are not required "to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Veney v. Wyche*, 293 F.3d 726, 730 (4th Cir. 2002). Thus, Plaintiffs cannot simply ignore the argument that their allegations are demonstrably misleading, and this Court is not required to accept those allegations as sufficient to demonstrate a possible violation by Defendant.

An elections agency cannot be required to disregard the obvious flaws in data presented to it to show an alleged NVRA violation, and pretend that there is some way to determine how to come into compliance with the NVRA based on that unusable data. Again, if the NVRA's presuit notice requirement is to serve any purpose, it must give a public agency enough information to attempt to come into compliance with the NVRA.

For all remaining arguments raised by Plaintiffs in this section and not directly addressed herein, Defendant relies upon her previously submitted memorandum of law.

II. PLAINTIFFS LACK THE CONCRETE INJURY-IN-FACT NECESSARY TO CONFER STANDING.

Plaintiffs' opposition fails to counter the legal requirement that an injury "premised on a speculative chain of possibilities" is not sufficient confer Article III standing. *Clapper v. Amnesty, Int'l USA*, 568 U.S. 398, 410 (2013) (citing *Summers v. Earth Island Inst.*, 555 U.S. 488, 496 (2009)). "Injury in fact is a constitutional requirement, and it is settled that Congress cannot erase Article III's standing requirements by granting the right to sue to a plaintiff who

would not otherwise have standing." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 136 S. Ct. 1540, 1547-48, 194 L. Ed. 2d 635 (2016) (internal quotations omitted). The speculative nature of Plaintiffs' alleged injuries, all relying upon inaccurate data, and all requiring multiple steps in a series of possible events, justify dismissal of these claims for lack of jurisdiction.

In the opposition, Plaintiffs argue that they are injured by (1) diversion of resources, (2) loss of voter confidence, and (3) vote dilution.

With respect to the first contention, diversion of resources is an organizational injury not capable of conferring an injury on an individual, Plaintiffs attempt to sidestep this principle of law by quoting cases out of context. For instance, Plaintiffs state, "[t]he 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." [D.E. 35, p. 18 (quoting *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015) (emphasis added).] However, the quoted portion of the opinion from the court in *La Raza* was considering a diversion-of-resources injury claimed by the NAACP, among other organizations, based on the organization diverting efforts that it would have expended towards registering voters that the State failed to register in violation of section 7 of the NVRA. *La Raza*, 800 F.3d at 1040. This theory of injury is not applicable here because Plaintiffs are not organizations diverting resources from the accomplishment of certain organizational goals.

The remaining cases cited by Plaintiffs in this argument all relate to organizational injuries, not individual plaintiffs suing in their individual capacities. *See Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Scales*, 150 F. Supp. 2d 845, 849 (D. Md. 2001); *Action NC v. Strach*, 216 F. Supp. 3d 597, 616-18 (M.D.N.C. 2016*); League of Women Voters of Ariz. v. Reagan*, No. CV-18-02620-PHX-JAT, 2018 U.S. Dist. LEXIS 159302, at *10-12 (D.

Ariz. Sep. 18, 2018); and *Nat'l Press Photographers Ass'n v. McCraw*, 504 F. Supp. 3d 568, 581 (W.D. Tex. 2020).

Finally, Plaintiffs repeatedly cite throughout their argument to an oral opinion issued in 2020 by a district court in Michigan. *See Daunt v. Benson*, Dkt. No. 376, Case No. 1:20-cv-522 (W.D. Mich. Nov. 3, 2020) (attached to Plaintiffs' opposition as Ex. A. [D.E. 35-1]. The ruling denied a motion to dismiss and found that the individual had standing to bring claims under the NVRA. *Id.*, pp. 17-19. This unpublished and unwritten decision appears to be the only case Plaintiffs can cite for the proposition that an individual can rely on an organizational standing theory to invoke the court's jurisdiction. Even then, and unlike a written decision, the oral statement on which Plaintiffs are relying does not cite to any authority to support that conclusion. *Id.* at 18. ("And I don't think that matters that he's doing so or alleging his interest in doing so as an individual as opposed to an organization. The fact that he is expressing the same kind of concern that the organization did in the American Civil Rights Union case from the Western District of Texas is, I think, fundamentally the point.").

Plaintiffs' second alleged injury, lost confidence in elections, requires a series of speculative events to occur in succession in order to reach Plaintiffs' alleged injury. Plaintiffs claim they are injured solely on the basis that they have personally lost confidence in election integrity because they think inaccurate statistics demonstrate too many ineligible voters are registered. The speculative nature of Plaintiffs' lost confidence in elections, requires this Court to travel along a series of possible events in sequence to reach the speculative injury. Plaintiffs are attempting to string together (1) an inaccurate statistical analysis (2) to assert a possible violation of the NVRA, (3) which they think is caused by something unidentified that the State is doing or not doing, (4) that if it exists, may or may not have resulted in ineligible voters voting in

elections, (5) resulting in them forming the opinion that they should question confidence in elections. This Court should reject each leap in this convoluted course of possible events as speculative and incapable of being the basis for a concrete and particularized injury.

Moreover, this is precisely the type of undifferentiated, generalized grievance based upon an alleged violation of the law by a government actor that the Supreme Court expressly rejected on multiple occasions. *See Lance v. Coffman*, 549 U.S. 437, 439-442 (2007) (collecting cases holding that an injury premised on an allegation that the government is not following the law is insufficient to confer Article III standing.)

Here, Plaintiffs' injury boils down to an allegation that the NVRA has not been followed by Defendant, which Plaintiffs claim caused them to lose confidence it elections. "[T]he problem with this allegation should be obvious: The only injury plaintiffs allege is that the law, [elections clause], has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past." *Id.* at 442; *see also Fairchild* v. *Hughes*, 258 U.S. 126 (1922) (Not following the law for ratification of amendment insufficient for standing); *Ex parte Levitt*, 302 U.S. 633 (1937) (Not following the law for appointment of Supreme Court Justice insufficient for standing); *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 344 (2006) (Challenge to state tax and spending decisions insufficient for standing); and *Lujan* v. *Defenders of Wildlife*, 504 U.S. 555, 573-77 (1992) (Refusing to convert an "undifferentiated public interest in executive officers' compliance with the law into an 'individual right' vindicable in the courts").

Plaintiffs' loss of confidence in elections arises from their belief that Defendant is not following the NVRA. If opinions and beliefs based upon an alleged failure to follow the law are sufficient to create a concrete and particularized injury, then there is no limit to Article III

standing. Any plaintiff may claim injury based on their feelings, and not particularized or concrete injuries. Instead, the Court should rejected these alleged injuries for what they are, nothing more than speculation based on unsupported conclusions.

Plaintiffs' third alleged injury is based upon a similar speculative chain of events to reach the possibility of vote dilution. The reliance on inaccurate statistical data undermines their first leap to reach the conclusion that ineligible voters are registered. From that point they leap further out to assume that ineligible registrants are actually voting and thereby diluting their votes. Nothing in the opposition provides a factual basis to support Plaintiffs' conclusion that ineligible voters diluted their vote in any election.

Therefore, because Plaintiffs' asserted injuries all rely on a factual foundation of misleading and inaccurate statistics, and require layers of speculative events pieced together to reach an injury, the Court should dismiss for lack for standing.

For all remaining arguments raised by Plaintiffs in this section and not directly addressed herein, Defendant relies upon her previously submitted memorandum of law.

III. THE COMPLAINT FAILS TO STATE A CLAIM FOR VIOLATION OF THE "REASONABLE EFFORT" PROVISION OF THE NVRA.

Defendant's processes constitute a "reasonable effort" as a matter of law, and they exceed the minimum effort required by the NVRA. Plaintiffs' misleading statistics cannot rebut this.

The purpose of a Rule 12(b)(6) motion is to ferret out claims that would be a waste of the parties' and the court's resources. See *Francis v. Giac*omelli, 588 F.3d 186, 193 & n.2 (4th Cir. 2009) (discussing the *Twombly* and *Iqbal* decisions as reflecting the Supreme Court's concern with "strike suits"). Where there are cases that have persuasively demonstrated that the same legal claims based on similar facts were unsuccessful, even in a distinct procedural posture, such cases are important to consider when determining whether the allegations cross the line from

conceivable to plausible. See, e.g., *Grimes v. Gov't Employees Ins. Co.*, No. 1:18-CV-798, 2019 WL 3425227, at *9 (M.D.N.C. July 30, 2019) (dismissing complaint where a Virginia court had granted summary judgment in a case presenting "a similar factual scenario" as that alleged in the plaintiff's complaint).

The inaccurate nature of Plaintiffs' statistical data comparing 2016 population to 2020 voter registration statistics, and relevant alternative explanations, have been explained thoroughly both in the initial moving papers and touched upon again in this brief. [D.E. 20, pp. 12-15]. Moreover, the alternative explanations for why data like that might exist has also been thoroughly explained. *Id.* pp. 20-25. Nothing in Plaintiffs' opposition changes the analysis.

However, Plaintiffs do make an inaccurate claim in attempting to rebut this argument. In Plaintiffs' opposition, they assert that "[t]he complaint also updates the numbers from the presuit notice, using the most recent census data and registration numbers." [D.E. 35, p. 23 (citing D.E. 1, ¶¶ 33-35)]. But a review of the paragraphs cited in the Complaint by Plaintiffs reveals that it is not "the most recent census data" being used by Plaintiffs to update their statistics but similarly outdated census data from 2017 being compared to later voter registration data. [D.E. 1, ¶¶ 34]. Under both the original notice letter, and the "most recent" data asserted in the Complaint, Plaintiffs continue to use unreliable comparisons between four-year-old census data and 2020 voter registration data. The 2020 United States Census data is available, but Plaintiffs have never sought to present that data.

Faced with these criticisms, Plaintiffs claim that the inaccuracy of their statistics is irrelevant. [D.E. 35, p. 23] That is not the case. Again, this Court is under no obligation "to accept as true allegations that are … unwarranted deductions of fact …." *Veney*, 293 F.3d at 730 (4th Cir. 2002). Nor can Plaintiffs hide behind the minimum threshold of plausibility.

> The plausibility standard is not akin to a "probability requirement," but it asks for more than a sheer possibility that a defendant has acted unlawfully. Where a complaint pleads facts that are "merely consistent with" a defendant's liability, it "stops short of the line between possibility and plausibility of 'entitlement to relief.'"

Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). Here, because the statistics offered are consistent with lawful list maintenance practices, the Complaint fails to cross the threshold between possible and plausible. *Id.* at 680 (holding that a claim for unlawful action was implausible where allegations were "not only compatible with, but indeed was more likely explained by, lawful . . . behavior").

Rather than respond to the argument that the entire factual basis for their claim is unreliable and inaccurate, Plaintiffs inappropriately attempt to shift the burden to Defendant to prove a negative: that the elections boards are *not* violating the NVRA. [D.E. 35, pp. 23-24]. At the pleading stage, it is *Plaintiffs'* burden to allege facts that are sufficient to conclude that Defendant is violating the NVRA. This, they have not done. The Federal Rules of Civil Procedure do not allow Plaintiffs to go on a court-sanctioned fishing expedition to try to find some theory of a violation of law, based merely on statistics that are (1) misleading and (2) consistent with compliance with the law, as a matter of established law.[1] Plaintiffs' inability to even articulate a theory for how the NVRA is being violated demonstrates the failure of their complaint. [D.E. 35, pp. 25-26].

Finally, for the first time in the response, Plaintiffs assert the factual allegation that individual counties are not following NVRA list-maintenance rules. *Id.*, p. 25 (citing Compl. ¶¶3, 4, 36, 41, 62) ("Merely having a policy on the books does not satisfy the NVRA if the State is not

[1] In any event, Defendant did clearly explain the elections boards' compliance with the NVRA in both the presuit letter response (D.E. 21-2) and in her initial moving papers. [D.E. 20, pp. 20-25].

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.") This contradicts Plaintiffs repeated theory of liability that Defendant Director Bell is not following list-maintenance procedures required by the NVRA. [D.E. 1, ¶¶ 4, 11-13, 27-31, 50, 54, 56, 62-64]. The allegation that counties themselves are not following list-maintenance procedures is an entirely new factual allegation that does not appear in Plaintiffs' Complaint. To be sure, Plaintiff does utilize its inaccurate comparison of 2016 data to 2020 data to assert that certain counties have abnormally high registration rates, but not once in the Complaint, and certainly not in the paragraphs cited by Plaintiffs (3, 4, 36, 41, or 62), do Plaintiffs allege the counties themselves are engaging in some act or omission in violation of the NVRA. [D.E. 1].

To survive a motion to dismiss, it is the complaint that "must contain sufficient factual matter . . . 'to state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 663 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A district court may look outside the four corners of the complaint in considering a Rule 12(b)(6) motion in limited circumstances, such as taking judicial notice of matters of public record, including statutes, documents incorporated into the complaint by reference, and documents attached to the motion to dismiss, so long as they are integral to the complaint and authentic. *United States ex rel. Oberg v. Pa. Higher Educ. Assistance Agency*, 745 F.3d 131, 136 (4th Cir. 2014). But nothing in these cases permit Plaintiffs to invent new allegations, or new theories of liability, in response to a motion to dismiss that are not already contained within their complaint or meet these limited exceptions.

Because the factual allegations on which Plaintiffs base this entire action are misleading and do not support any inference that the State is violating the NVRA, Plaintiffs have failed to

state a plausible claim and the complaint should be dismissed.

For all remaining arguments raised by Plaintiffs in this section and not directly addressed herein, Defendant relies upon her previously submitted memorandum of law.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that Plaintiffs' Complaint be dismissed with prejudice.

Respectfully submitted this the 11th day of March, 2022.

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