No. 24-1985

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

REPUBLICAN NATIONAL COMMITTEE, JORDAN JORRITSMA, and EMERSON SILVERNAIL,

Plaintiffs-Appellants,

v.

JOCELYN BENSON, in her official capacity as Michigan Secretary of State; JONATHAN BRATER, in his official capacity as Director of the Michigan Bureau of Elections,

Defendants-Appellees.

On Appeal from the United States District Court for the Western District of Michigan, No. 1:24-cv-262 (Beckering, J.)

APPELLANTS' REPLY BRIEF

Thomas R. McCarthy
Gilbert C. Dickey
Conor D. Woodfin
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
tom@consovoymccarthy.com
gilbert@consovoymccarthy.com
conor@consovoymccarthy.com

Counsel for Appellants

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INTRODUCTION

An organization has a cognizable injury when its preexisting activities are harmed. *See FDA v. All. for Hippocratic Medicine*, 602 U.S. 367, 393 (2024). The RNC has alleged exactly that kind of injury, explaining that Defendants' NVRA violations hinder the RNC's ability to elect Republicans and turn out voters by making it more difficult to contact voters and form effective electoral strategies.

But Defendants largely ignore this injury. They spend much of their brief arguing that the individual Plaintiffs don't have voter standing and that the RNC doesn't have associational standing. *See* Red Br. 32-43. But this appeal does not raise those issues. Plaintiffs appealed only the RNC's standing as an organization. *See* Blue Br. 12-28. It did not appeal the district court's dismissal of the individual Plaintiffs' standing or the RNC's associational standing. As long as "one party has standing to bring a claim, the identical claims brought by other parties to the same lawsuit are justiciable." *Phillips v. Snyder*, 836 F.3d 707, 714 n.2 (6th Cir. 2016). So the standing (or "lack of standing") of the individual Plaintiffs "does not affect" the Court's "ability to reach" the merits if it concludes that the RNC has organizational standing. *Id.*

Defendants next try to frame the RNC's organizational standing as a "diversion of resources" injury. Red Br. 41-50. But the RNC has not relied only on a diversion of resources to show injury. What matters is whether the organization suffers a setback to its "core business activities." *All. for Hippocratic Med.*, 602 U.S. at 395. The complaint alleges that it has. That the RNC spends money to cure those injuries is good evidence

that the RNC's core activities have been "perceptibly impaired" by Defendants' actions. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

When Defendants finally turn to the harms to the RNC's operations, they invert the motion-to-dismiss standard, arguing that a strained and unfavorable reading defeats standing. Red Br. 46-47. Focusing on the word "may" in a single allegation, they argue that the RNC's injuries are not concrete. *Id.* at 47. But Defendants ignore other allegations explaining harms to the RNC's operations. Blue Br. 14-16. And they ignore the RNC's explanation in its opening brief that the word "may" in this allegation indicates that the RNC would suffer this harm unless Defendants cleaned the voter rolls. *Id.* at 23.

On the merits, Defendants litigate this motion-to-dismiss appeal with summary-judgment arguments. Their arguments confirm that the district court elevated the pleading standard for Plaintiffs. They dispute the complaint's factual allegations, preferring their own data and methodologies. They rely exclusively on cases that resolved similar claims at summary judgment or trial, ignoring half a dozen district court cases that rejected each of their arguments at the pleading stage. They resist plausible inferences from the facts by recasting those inferences as legal conclusions. And they attempt to bring in external evidence that is neither appropriate nor relevant to resolving the motion to dismiss. Were there any doubt that Defendants are attempting to convert this appeal into a summary-judgment dispute, they remove it by introducing new voter

data "as of the date of this brief" to contest Plaintiffs' data. Red Br. 18. The Court should reject these arguments and reverse the district court's judgment.

ARGUMENT

I. The RNC has standing because it suffers an injury to its electoral mission.

As *Alliance for Hippocratic Medicine* clarifies, interference with an organization's "core business activit[y]" is a cognizable injury. 602 U.S. at 395. Diversion of resources is not by itself an Article III injury. Diverting resources to further "public advocacy and public education" or to "advocate against the defendant's action," for example, do not demonstrate that the organization has suffered an independent injury. *Id.* at 394. Spending money to further such generalized interests does not convert them into a "concrete injury." *Id.* But when an organization diverts resources to counteract harms that "directly affected and interfered with" the organization, those expenses are good evidence that the organization has suffered an injury. *Id.* at 395.

The RNC alleged this kind of cognizable injury. The RNC alleged several "core business activities" that are "directly affected" by bloated voter rolls. *Id.* The RNC's mission is ensuring "the ability of Republican voters to cast, and Republican candidates to receive, effective votes in Michigan elections." Compl., R.1, PageID#3. And its core activities include estimating voter turnout, staffing jurisdictions, and contacting voters. *Id.* at PageID#4. Bloated voter rolls interfere with these activities and cause "economic, financial, and political injury" to the RNC. *Id.* at PageID#19. These injuries are more

than setbacks to the RNC's "'abstract social interests.'" *Contra* Red Br. 41. They are "concrete and demonstrable injur[ies] to the organization's activities." *Havens Realty*, 455 U.S. at 379.

Defendants try to sidestep these injuries, focusing instead on the RNC's additional allegations about "diversion of resources." Red Br. 42-45. They point, for example, to the RNC's allegations that its members are concerned with election integrity and that it has expended resources investigating Defendants' list-maintenance. Red. Br. 42. But the RNC did not assert standing merely because it spent resources investigating and opposing Defendant's list maintenance. *Cf. Tenn. Conf. of the NAACP v. Lee*, 105 F.4th 888, 903 (6th Cir. 2024) (rejecting a "categorical rule" that resource diversion is a cognizable injury). Defendants overlook that the RNC diverted resources to counteract the harms that "Defendants' inaccurate voter rolls" impose on the RNC's preexisting core activities. Compl., R.1, PageID#19. So long as the organization alleges those harms—as the RNC does here—"there can be no question that the organization has suffered injury in fact." *Havens Realty*, 455 U.S. at 379.

Defendants miss this point again when they assert that the RNC is "attempting to distance" itself from a "'diversion of resources' theory." Red. Br. 45. The "consequent drain on the organization's resources" has always been a part of organizational standing. *Havens Realty*, 455 U.S. at 379. But the resources must be diverted to address a "concrete and demonstrable injury to the organization's activities." *Id.* Whether the allegations could be characterized as a "'diversion of resources' theory"

is irrelevant. Red. Br. 45-46. What matters is whether the complaint alleges an "injury to the organization's activities," followed by a "consequent drain on the organization's activities." *Havens Realty*, 455 U.S. at 379. The complaint satisfies those criteria.

In fact, even the RNC's interests in "election integrity" are more concrete than Defendants suggest. Red Br. 43. The complaint explains in detail how "[i]naccurate voter rolls that contain 'ineligible, duplicate, fictional, or deceased voters' invite 'fraud.'" Compl., R.1, PageID#8 (quoting Comm'n on Federal Election Reform, Building Confidence in U.S. Elections 10 (Sept. 2005)). Even if voter fraud is difficult to detect, "the risk of voter fraud [is] real," and can "affect the outcome of a close election." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008) (op. of Stevens, J.). Moreover, "regardless of whether fraud is detected, 'the perception of possible fraud contributes to low confidence in the system.'" Compl., R.1, PageID#8 (quoting Carter-Baker Report, at 18). Defendants claim these fears are speculative, but the complaint also details recent documented instances of fraud in Michigan. *See id.* at PageID#9. To achieve its mission to turn out Republican voters and elect Republican candidates, the RNC must "monitor[] Michigan elections for fraud and abuse, mobiliz[e] voters to counteract it, educat[e] the public about election-integrity issues, and persuad[e] elected officials to improve list maintenance." *Id.* at PageID##5-6. Even if an individual voter can't rely on those injuries for standing, political parties who must work to turn out voters suffer concrete injuries when voters are discouraged from participating in the election. *Cf. Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) ("Confidence in the integrity of our

electoral processes is essential to the functioning of our participatory democracy."). The scope of these issues is a factual question, but the complaint identifies a "real" risk that has direct consequences for electing candidates and turning out voters. *Crawford*, 553 U.S. at 196 (op. of Stevens, J.). At this stage, those allegations suffice.

When they turn to the RNC's allegations of harm to its preexisting core activities, Defendants don't dispute that this kind of harm can suffice for standing. Instead, they rely on an unfavorable construction of a single allegation. That allegation explicitly describes some of the RNC's election activities most affected by bloated voter rolls: "If voter registration lists include names of voters who should no longer be on the list, the RNC may spend more resources on mailers, knocking on doors, and otherwise trying to contact voters." *Id.* at PageID#4. But defendants argue that the word "may" in that allegation rendered the RNC's injuries insufficiently concrete. Red Br. 46-47. That argument is wrong for at least three reasons.

First, focusing on a single word ignores the other allegations that directly allege "economic, financial, and political injury" to the RNC. *Id.* at PageID#19. The RNC explains that it "relies on registration lists to estimate voter turnout, which informs the number of staff the RNC needs in a given jurisdiction, the number of volunteers needed to contact voters, and how much the RNC will spend on paid voter contacts." *Id.* at PageID#4. And its core mission is "to elect Republican candidates to state and federal office." *E.g.*, *id.* at PageID#3. Plaintiffs allege that these activities are impaired by

Defendants' NVRA violations. *See id.* at PageID#19. At this stage, those allegations are sufficient, but Defendants never address them.

Second, the "may" sentence is sufficient on its face. As the RNC explained in its opening brief, in context the word "may" is conditional, not hypothetical. Blue Br. 23. But the allegation explains the harm to the RNC's forward-looking election activities if the Defendants don't clean up the State's voter rolls. When Plaintiffs filed their Complaint in March 2024, they anticipated that "[i]n November 2024," the RNC's "candidates will appear on the ballot in Michigan for numerous federal and state offices." Compl., R.1, PageID#3. Each activity in the "may" sentence describes pre-election activities: sending out "mailers, knocking on doors, and otherwise trying to contact voters." *Id.* at PageID#4. Whether harm to those activities would occur depended on whether the Defendants comply with the NVRA before the 2024 election. And because the RNC participates in elections each cycle, those harms are recurring. Defendants never address this explanation but instead insist, with no explanation, that the allegation must be read as "hypothetical." Red Br. 47.

Third, the allegations must be construed in the light most favorable to Plaintiffs. The complaint includes both "backward-looking costs" as well as "imminent future injury" resulting from Defendants' NVRA violations. *Shelby Advocs. for Valid Elections v. Hargett*, 947 F.3d 977, 982 (6th Cir. 2020). At the pleading stage, the alleged harms are at least plausible. *See Tenn. Conf. of the NAACP*, 105 F.4th at 904 ("a plaintiff's burden"

only "increases" after "the suit moves past the pleadings"). And that plausibility cannot be defeated by a strained reading to render injuries insufficiently concrete.

Defendants point out that the complaint here doesn't contain the exact language of the RNC's similar NVRA complaint in North Carolina. Red Br. 48. But the absence of duplicate language hardly justifies a circuit split. Both complaints explain the RNC's mission, core activities, and present and future injuries from bloated voter rolls. *See Republican Nat'l Comm. v. N.C. State Bd. of Elections*, 120 F.4th 390, 397 (4th Cir. 2024). Both complaints seek relief under the NVRA. But the district court here is the only one to conclude that it lacks jurisdiction.

* * *

Even if the Court doesn't reverse the judgment by holding that the complaint alleges an Article III injury, the Court should at a minimum vacate and remand with instructions to permit Plaintiffs to amend. Defendants dispute the propriety of amendment, but they don't dispute that the district court's dismissal should have been "'without prejudice.'" *Pratt v. Ventas, Inc.*, 365 F.3d 514, 523 (6th Cir. 2004). That concession is reason enough to vacate and remand. *See Burkeen v. A.R.E. Accessories, LLC*, 758 F. App'x 412, 416 (6th Cir. 2018) ("[B]ecause it is unclear whether the dismissal should have been with prejudice, we VACATE the judgment and REMAND for the district court to reconsider whether the dismissal should have been without prejudice and whether Plaintiffs should be permitted to amend the complaint.").

Defendants respond only that the district court invited Plaintiffs to amend *before* it accepted briefing on the motion to dismiss—and before the Supreme Court issued *Alliance for Hippocratic Medicine*. *See* Red Br. 48-49. But that invitation just restates Rule 15's option to either respond to a motion to dismiss or file an amended complaint. Opting to oppose dismissal rather than amending the complaint does not obviate later amendment. Indeed, "when a motion to dismiss a complaint is granted, courts typically permit the losing party leave to amend." *PR Diamonds, Inc. v. Chandler*, 364 F.3d 671, 698-99 (6th Cir. 2004) (ultimately denying leave to amend because "[t]he Complaint had already been amended once" and "final judgment was not entered until nearly five months" after the court dismissed the amended complaint), *abrogated on other grounds Frank v. Dana Corp.*, 646 F.3d 954, 961 (6th Cir. 2011).

Amendment is all the more appropriate because Defendants don't argue that the typical reasons for denying amendment apply. They don't point to "undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of allowance of the amendment, [or] futility of the amendment." *Foman v. Davis*, 371 U.S. 178, 182 (1962). At most, Defendants point to a single instance (not "repeated" instances) of not seeking to amend *before* the court resolved the first motion to dismiss. And they suggest that a simple amendment would cure the alleged jurisdictional defect, were the RNC to include allegations like those in the Fourth Circuit case. *See* Red Br. 47-48. Remanding with leave to amend supports the Supreme Court's "well-established

preference for allowing claims to be decided on their merits where possible." *Burkeen*, 758 F. App'x at 416 (citing *Foman*, 371 U.S. at 182). So even if the Court agrees that the complaint fails to allege standing, it should vacate and remand with instructions to permit Plaintiffs to amend their complaint.

II. Plaintiffs plausibly alleged that Defendants are violating the NVRA.

Because the district court dismissed the complaint for failure to allege standing, the court lacked jurisdiction to reach the merits. It erred by reaching the merits anyway. *Wilkins v. Jakeway*, 183 F.3d 528, 533 n.6 (6th Cir. 1999). Defendants don't dispute that assignment of error. Even if this Court were to reach the merits, Defendants' arguments confirm that this case should be resolved at the fact stage, not the allegation stage. Defendants misstate the governing standard, continue to dispute the facts, rely exclusively on post-pleading cases, resist plausible inferences, and bring in external evidence to dispute the allegations. The Court should reject their arguments.

A. Defendants misstate the governing standard.

Defendants impose a pleading burden that no court has adopted. They argue that "at no point in the complaint did Plaintiffs contend that Michigan has *no* program to remove ineligible voters." Red Br. 51. But the NVRA requires more than just "a program." *Contra id.* Section 8 "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 v. A. Philip Randolph Inst.*, 584 U.S. 756, 761 (2018) (emphasis added) (quoting 52 U.S.C. §20507(a)(4)). Plaintiffs explained that because the

statute doesn't require specific policies, the complaint doesn't need to identify specific policies. Blue Br. 39-40. "Ferreting out the most likely reason for the defendants' actions is not appropriate at the pleadings stage." *Watson Carpet & Floor Covering, Inc. v. Mohawk Indus.*, 648 F.3d 452, 458 (6th Cir. 2011).

Moreover, having facially reasonable policies does not mean that Defendants are following those policies. Blue Br. 40. Whether other evidence "establishes Defendant's full compliance" with the NVRA "and defeats Plaintiff's claims is a fact-based argument more properly addressed at a later stage of the proceedings." *Bellitto v. Snipes*, 221 F. Supp. 3d 1354, 1365-66 (S.D. Fla. 2016). At this stage, Plaintiffs "plead sufficient facts" that "'[b]y failing to implement a program which takes reasonable steps'" to remove voters, Defendants have "'violated NVRA and other federal list maintenance statutes.'" *Id.*

B. Defendants continue to dispute the facts.

That Defendants attempt to rebut Plaintiffs' factual allegations with data of their own is good evidence that this case should go to discovery. But even if this Court were not reviewing a 12(b)(6) motion, it should reject Defendants' evidence.

Defendants start by arguing that the Plaintiffs' methodology is deficient because it "include[s] both active and inactive registered voters." Red Br. 23 (emphasis omitted). But that's false. Both the complaint and the notice letter "[c]ompar[e] the registered *active* voter count to the 2022 Census data." Compl., R.1, PageID#11 (emphasis added);

see also Compl. Ex. A, R.1-1, PageID#25 (notice letter). In addition to being premature, Defendants' factual disputes are just plain wrong.

Defendants attempt to introduce new data available "as of the date of [their] brief." Red Br. 18. But "[t]his court has long maintained that 'a party may not … introduce new facts in its brief on appeal.'" *United States v. Husein*, 478 F.3d 318, 335 (6th Cir. 2007) (cleaned up). Introducing new data and external evidence to dispute Plaintiffs' factual allegations isn't just procedurally improper. Defendants admit that their publicly available data contained errors. *See* Red Br. 24 n.16. They say those errors have "since been corrected, and the information currently displayed is accurate." *Id.* But without discovery and procedure to test those claims, the Court has no way of knowing whether Defendants' data is accurate. The very purpose of the pleading stage is to avoid these evidentiary disputes before all the evidence can be gathered and tested.

Even if their evidence were relevant, and even if it were accurate, Defendants' raw numbers don't rebut Plaintiffs' comparative statistics. Defendants assert that "[a]s of March 2024, more than 800,000 voter registrations have been cancelled." Red Br. 18. But that number represents cancellations "[s]ince 2019." Red Br. 17. And 800,000 cancellations over a 5-year period, multiple election cycles, and several rounds of list maintenance does not prove that Defendants are implementing a reasonable program

in a State with over 7.5 million voting-age citizens.[1] That number also represents "the first such effort by a Secretary of State in over a decade" to clean up the State's voter rolls, Red Br. 18, which came only after these same Defendants settled another NVRA lawsuit and agreed to mail out change-of-address notices, *Daunt v. Benson*, Doc. 58, No. 1:20-cv-522 (W.D. Mich. Feb. 16, 2021). Cleaning out a decade-long backlog is hardly a "reasonable effort" of routine list maintenance.

Defendants' raw cancellation numbers are meaningless by themselves. Defendants argue that these are "large numbers," but they don't support that judgment. Red Br. 18. Without a point of comparison, it's impossible to tell whether those numbers represent a reasonable effort. Plaintiffs provide numerous points of comparison: population data, inactive registrations, registration rates between counties, registration rates of other States, and residency changes, for example. *See* Compl., R.1, PageID##10-15. Defendants provide none.

C. Defendants' best cases all made it past the pleading stage.

Defendants rely exclusively on cases that resolved similar factual disputes at summary judgment, during preliminary injunction proceedings, or after trial. Start with the Western District of Michigan case, which held on summary judgment that Michigan's efforts to remove deceased voters were reasonable. *See Pub. Int. Legal Found.*

[1] *See* U.S. Election Assistance Comm'n, *Election Administration and Voting Survey 2022 Comprehensive Report* 163 (June 2023), perma.cc/28SQ-T24L (cited in Compl., R.1, PageID#13).

[*PILF*] *v. Benson*, 721 F. Supp. 3d 580, 600 (W.D. Mich. 2024). Defendants don't just rely on the legal conclusions of the *PILF* district court. They use that case's factual record and the district court's "recent experience" with Michigan's voter rolls to dispute the allegations in this case. Red Br. 53. They argue that in *PILF v. Benson*, "the court also observed that 'federally collected data shows that Michigan is consistently among the most active states in the United States in cancelling the registrations of deceased individuals.'" (quoting *PILF*, 721 F. Supp. 3d at 596). But "a court cannot adopt by reference the findings of another court in another case." *Hamilton v. Davidson*, 833 F.2d 1012 (6th Cir. 1987) (unpublished op.). While the district court could take "judicial notice" of the "public record" in *PILF*, that notice "clearly cannot extend to consideration of such allegations for [their] truth." *In re CMS Energy Sec. Litig.*, 2005 WL 8154422, at *4 (E.D. Mich. Jan. 7, 2005) (citing *Amini v. Oberlin College*, 259 F.3d 493, 502 (6th Cir. 2001)). The district court's reliance on *PILF* shows that it dismissed Plaintiffs' complaint because it disagreed with the factual allegations, not because they failed to state a claim.

Bellitto v. Snipes further undermines Defendants' position. 935 F.3d 1192 (11th Cir. 2019). That case was resolved at trial, after the court received "extensive expert testimony" about registration rates and list-maintenance systems. *Id.* at 1207-08. In both *Bellitto* and *PILF*, the district courts denied the defendants' motions to dismiss, rejecting similar arguments that Defendants make here. *See Bellitto*, 221 F. Supp. 3d at 1365; *PILF v. Benson*, 2022 WL 21295936, at *9 (W.D. Mich. Aug. 25, 2022).

Finally, Defendants rely on an order denying "a motion for a preliminary injunction." Red Br. 53-54 (citing *PILF v. Boockvar*, 495 F. Supp. 3d 354, 356-57 (M.D. Pa. 2020)). But even the Western District of Michigan recognized in *PILF* that preliminary injunction motions are "qualitatively different from the motion to dismiss before this Court." *PILF*, 2022 WL 21295936, at *8 n.3. The Pennsylvania case settled before the court ruled on the 12(b)(6) motion. *See PILF*, Doc. 44, No. 1:20-cv-1905 (M.D. Pa., Apr. 1, 2021). All three cases confirm that whether a State has conducted a "reasonable effort" to maintain its voter rolls is a fact-intensive question.

Defendants liken Plaintiffs' allegations to a *res ipsa loquitur* theory of negligence. Red Br. 59-60. But the analogy proves too much. *Res ipsa loquitur* "entitles a plaintiff to a permissible inference of negligence from circumstantial evidence." *Woodard v. Custer*, 702 N.W.2d 522, 525 (Mich. 2005) (cleaned up). The doctrine permits a *jury* to infer that a defendant behaved negligently. *See id.* at 526-27. At the pleading stage, Plaintiffs are not just permitted those inferences—they're entitled to them. And they need only supply allegations, not "evidence." *Id.* at 525.

Numerous courts have thus held that nearly identical allegations raise an inference of an NVRA violation. They've held that "[a]n implausible 105% voter registration rate" in just one county "indicates that Defendant has failed to make reasonable efforts to conduct voter list maintenance programs." *Am. C.R. Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 805 (W.D. Tex. 2015). They've upheld Plaintiffs' methodology comparing "[c]ensus data and voter registration data." *Jud. Watch, Inc. v.*

King, 993 F. Supp. 2d 919, 921 (S.D. Ind. 2012). They've upheld comparisons among counties. *E.g.*, *Voter Integrity Project NC, Inc. v. Wake Cnty. Bd. of Elections*, 301 F. Supp. 3d 612, 619-20 (E.D.N.C. 2017). They've inferred from "high 'inactive registration rate[s]'" that a State may "not actually be implementing" the NVRA's removal requirements. *Jud. Watch, Inc. v. Griswold*, 554 F. Supp. 3d 1091, 1097, 1108 (D. Colo. 2021). And they've inferred from high relocation rates that counties overcount voters who have moved away. *See id.* at 1108. Defendants overlook these cases when they argue that "Plaintiffs cite to no law or case anywhere in the nation supporting the position that such a rationale states a viable claim under the NVRA." Red Br. 59-60.

D. Defendants resist plausible inferences.

Defendants can't avoid plausible inferences by labeling every allegation as a "legal conclusion." Red. Br. 57-60. Nowhere in Plaintiffs' briefing do they "insist that their mere allegation that the program is unreasonable must be accepted as true." *Contra* Red Br. 60. Rather, the complaint is full of *factual* allegations. The Court must accept as true, for example, that "53 counties have active voter registration rates at or above 100 percent of their citizen voting-age populations." Compl., R.1, PageID#11. Because it's impossible to have more registered voters than voting-age citizens, that allegation alone raises a plausible inference that the State is not conducting reasonable list maintenance. *See Am. C.R. Union*, 166 F. Supp. 3d at 805. The numerous "[o]ther methodologies" detailed in the complaint further support that inference. Compl., R.1, PageID#13. These factual allegations are not "legal conclusions." *Contra* Red Br. 57.

Defendants next attempt to resist the inferences from those facts. They argue that "neither the District Court nor this Court need accept [those inferences] as true." Red Br. 57 (citing *Total Benefits Plan. Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 434 (6th Cir. 2008)). They suggest that the inferences are "unwarranted," *id.*, but they support that argument with only an empty "appeal[] to the Court's experience and common sense," Red Br. 57-58. They don't explain why the inferences are unreasonable, nor do they confront the numerous district court opinions that drew those inferences. *See supra* Section II.C.

Alternative explanations for Michigan's bloated rolls are neither relevant nor persuasive. "[T]he mere existence of more likely alternative explanations does not automatically entitle a defendant to dismissal." *16630 Southfield Ltd. P'ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 505 (6th Cir. 2013). In any event, the complaint rules out those alternative possibilities. *See* Compl., R.1, PageID#12 ("There is no evidence that these counties experienced above-average voter participation compared to the rest of the country or State. The only explanation for these discrepancies is substandard list maintenance."). And the complaint highlights litigation over "[s]imilarly bloated voter rolls in other States" (including Michigan) that led to settlements after the States agreed to clean up their rolls. *Id.* at PageID##15-17. Taken as a whole, the complaint "contain[s] sufficient factual matter … to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

E. Defendants' external evidence cannot defeat Plaintiffs' plausible allegations.

Defendants urge the Court to look at their response to Plaintiffs' notice letter. Red Br. 61-66. But the letter doesn't help them. It largely restates the same arguments they make in their briefing. Defendants' primary grievance seems to be that the Plaintiffs didn't send a third letter responding to their response. *See* Red Br. 65. But the NVRA requires only "written notice of the violation to the chief election official of the State involved." 52 U.S.C. §20510(b)(1). The notice requirement permits the State to *correct* the violation. If "the violation is not corrected," Plaintiffs can sue. *Id.* §20510(b)(2). And Defendants didn't correct anything—they disputed every claim, as they continue to do here. The NVRA does not require Plaintiffs to litigate this case in letters before filing a lawsuit. And the reason Plaintiffs waited "three months before filing this lawsuit," Red Br. 65, is because the NVRA requires it, 52 U.S.C. §20510(b)(2).

In any event, the Court doesn't need to reach these issues because it would be improper to consider Defendants' response letter. Defendants acknowledge that courts generally cannot consider matters outside the pleadings when ruling on a 12(b)(6) motion. Red Br. 61. But they urge this Court to apply an exception for "exhibits attached to defendant's motion to dismiss" that "are referred to in the complaint and are central to the claims." *Id.* (quoting *Rondigo, L.L.C. v. Twp. of Richmond*, 641 F.3d 673, 681 (6th Cir. 2011)). The complaint refers to the parties' "correspondence," but it doesn't discuss the Defendants' response letter in any detail. Compl., R.1, PageID#6.

Defendants exaggerate the importance of their response by claiming it "was central to Plaintiffs' claims in this case." Red Br. 63. They don't explain *why* the response is central to Plaintiffs' claims. And the cases they rely on show that Defendants' unilateral response to a notice letter is not "central" to the claims in this case in a way that "services agreements" signed by both parties are "central" to a breach-of-contract claim. *Weiner v. Klais & Co.*, 108 F.3d 86, 88-89 (6th Cir. 1997). Holding otherwise would allow any Defendant to slip outside material into a motion to dismiss just by sending the Plaintiffs a letter that touches on the claims in the suit.

Regardless, Defendants' response letter does nothing more than restate the arguments in their briefing. Defendants describe "the existence and structure of Michigan's program" for list maintenance. Red Br. 63. But describing the program doesn't rebut Plaintiffs' allegations that the program is failing. Defendants "identified several steps Michigan has taken to improve its program," Red Br. 63-64, but those steps—even if true—don't rebut the plausible inference that Michigan's program is still deficient. Defendants discuss "Michigan's participation in the ERIC program." Red Br. 64. But Michigan participated in that program when the same district court held that plaintiffs stated a plausible claim that Defendants were violating the NVRA—twice. *See PILF*, 2022 WL 21295936, at *13; *Daunt*, Doc. 46, No. 1:20-cv-522. And Defendants claim to spot a "flaw" in Plaintiffs' "figures," asserting that they "includ[e] both 'active' and 'inactive' voters." Red Br. 64. But as Plaintiffs have explained, *see supra* Section II.B,

Defendants are the ones who are mistaken about those figures. In short, Defendants' response letter raises no points that Plaintiffs haven't already addressed in their briefing.

But if the Court is inclined to consider the response letter, nothing in the letter can rebut Plaintiffs' factual allegations. At most, the Court could consider items that "verify the complaint" and do "not rebut, challenge, or contradict anything in the plaintiffs' complaint." *Song v. City of Elyria*, 985 F.2d 840, 842 (6th Cir. 1993). But under no circumstances can the court "consider items that would refute the factual allegations in Plaintiff's Complaint." *Jarvis v. Cooper*, 2013 WL 1289272, at *2 n.2 (E.D. Mich. Mar. 28, 2013); *accord Mediacom Se. LLC v. BellSouth Telecomms., Inc.*, 672 F.3d 396, 401 (6th Cir. 2012) (reversing the dismissal of a complaint when the trial court considered a settlement agreement that contradicted the complaint's allegations). An outside document that "merely creates a defense to the well-pled allegations in the complaint" cannot "defeat otherwise cognizable claims." *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 1002, 1014 (9th Cir. 2018). Plaintiffs' claims are plausible independent of Defendants' response.

* * *

This Court should reverse the district court's judgment dismissing the complaint for lack of standing. The court misapplied precedent and misconstrued the allegations in granting the 12(b)(1) motion. But if this Court agrees that the district court properly granted the 12(b)(1) motion, it has at least two reasons to vacate and remand. First, because the district court failed to specify whether it was dismissing the complaint

without prejudice and with leave to amend. And second, because the district court improperly reached the merits even after concluding that it lacked jurisdiction to do so.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's judgment. In the alternative, the Court should vacate and remand with instructions to allow Plaintiffs to amend their complaint.

Dated: April 8, 2025

Respectfully submitted,

/s/ Thomas R. McCarthy

Thomas R. McCarthy
Gilbert C. Dickey
Conor D. Woodfin
CONSOVOY MCCARTHY PLLC
1600 Wilson Blvd., Ste. 700
Arlington, VA 22209
(703) 243-9423
tom@consovoymccarthy.com
gilbert@consovoymccarthy.com
conor@consovoymccarthy.com

Counsel for Appellants

CERTIFICATE OF COMPLIANCE

This brief complies with Federal Rule of Appellate Procedure 32(a)(7) because it contains no more than 6,500 words, excluding the parts that can be excluded. This brief also complies with Rule 32(a)(5)-(6) because it is prepared in a proportionally spaced face using Microsoft Word 2016 in 14-point Garamond font.

Dated: April 8, 2025 */s/ Thomas R. McCarthy*

CERTIFICATE OF SERVICE

I filed this brief on the Court's electronic filing system, which will email everyone requiring notice.

Dated: April 8, 2025 */s/ Thomas R. McCarthy*