IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDICIAL WATCH, INC., et al.,

Plaintiffs,

v.

THE ILLINOIS STATE BOARD OF ELECTIONS, et al.,

Defendants.

Civil Action No. 1:24-cv-01867

Judge Sara L. Ellis

PLAINTIFFS' OPPOSITION TO INTERVENOR-DEFENDANTS' MOTION TO DISMISS

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Plaintiffs submit this memorandum of law in opposition to the motion to dismiss submitted by Defendant-Intervenors the Illinois AFL-CIO and Illinois Federation of Teachers ("the Unions"). ECF 57.[1]

I. PLAINTIFFS HAVE PLEADED STANDING.

A. Plaintiffs Have Pleaded Standing Based on Traditional Economic Harm.

Citing Defendants' own public admissions, the complaint alleges, among other things, that more than one fifth of Illinois' counties are not removing registrants under NVRA Section 8(d)(1)(B) for failing to respond to a Confirmation Notice or vote in two consecutive general federal elections. ECF 1 ¶¶ 26-31 (23 counties reported removing few or no registrants under that provision); *id*. ¶¶ 32-37 (providing context to show noncompliance); *see* Fed. R. Evid. 801(d)(2) (concerning party admissions). Plaintiffs IFA and BI rely on the voter rolls to contact voters, and they suffer economic losses because Defendants' neglect of their federal list maintenance obligations makes those rolls less accurate. ECF 49 at 11 (citing ECF 1 ¶¶ 93-97).

Plaintiffs distinguished this kind of traditional, tangible injury from the "diversion of resources" approach found in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), and cited cases basing Article III standing on economic losses alone. ECF 49 at 12; *see also De La Fuente v. Padilla*, 930 F.3d 1101, 1104 (9th Cir. 2019) (likely cost of collecting signatures of 1% of voters conferred standing to challenge law). After filing their brief, Plaintiffs also cited as supplemental authority *Repub. Nat'l Comm. v. Wetzel*, No. 1:24cv25, 2024 U.S. Dist. LEXIS 132777 at *16 (S.D. Miss. July 28, 2024) (ECF 15), which explicitly observed that a political party's expenses (in that case due to a challenged ballot receipt law) conferred standing *both* "in the form of

[1] The Unions' brief responds directly to Plaintiffs' opposition (ECF 49) to Defendants' motion to dismiss (ECF 41) and does not separately set forth background facts or legal standards. In the same spirit, and to spare the Court from reading the same material again, Plaintiffs will forgo repeating those sections here, cross-referring to ECF 49 where appropriate. Terms defined there are used here as well.

economic loss and diversion of resources."

The Unions (like Defendants) barely refer to the point that IFA and BI can establish standing based on economic losses alone. They focus instead on the standards for showing a diversion of resources under *Havens*. The Unions do, however, attempt to distinguish *Wetzel*. They concede that "*Wetzel* observed that 'economic losses' *can* constitute injury-in-fact"—which was the reason Plaintiffs cited the case. ECF 57-1 at 8 n.2.[2] But the Unions argue that "the *Wetzel* court specifically limited this observation, noting that a plaintiff's '[v]ague assertions and speculation that the organization could have spent [its] funds elsewhere are insufficient' to support their standing." *Id*. (citing *Wetzel*, 2024 U.S. Dist. LEXIS 132777 at *8). The Unions conclude that "Plaintiffs fail to explain *how* their allegedly 'wasted' resources would otherwise be used[.]" *Id*.

The Unions miscite *Wetzel*, which was clearly referring to diversion-of-resources standing, not traditional economic harm. Thus, after observing that "'economic injury is a quintessential injury upon which to base standing,'" the *Wetzel* court went on to add that "[a]n organization's diversion of 'significant resources to counteract the defendant's conduct' will *also* satisfy this requirement … as long as the organization 'identifie[s] any specific projects that [it] had to put on hold or otherwise curtail in order to respond' to the defendant's actions." *Id*. at *8 (citations omitted) (emphasis added). The quote cited by the Unions ("Vague assertions …" etc.) then follows, and the case cited in support of that quote concerns diversion-of-resources standing. *Id*. at *8 (citing *NAACP. v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010)). In other words, the cited quote appears in a portion of the decision discussing standing *based on a diversion of resources*, and the limitation it sets forth applies only to that kind of standing. But nothing in *Wetzel*, or in any other case known to Plaintiffs, indicates that an organization pleading a *traditional, tangible,*

[2] *See also* ECF 57-1 at 7 (acknowledging that *Wetzel* held that "an organization *can* demonstrate standing by showing a diversion of resources or economic losses").

economic injury must explain how it would otherwise have used money that was lost.

The Unions also argue that any reliance on *Wetzel* is "undermined" by the decision in *RNC v. Burgess*, No. 3:24-CV-198, 2024 U.S. Dist. LEXIS 126371 (D. Nev. July 17, 2024), *appeal docketed*, No. 24-5071 (9th Cir. Aug. 19, 2024). The plaintiffs there challenged a law like the one in *Wetzel*, which allowed the receipt of ballots after election day. The plaintiffs claimed a diversion of resources on the ground that the law "requires them to 'spend money on mail ballot chase programs and post-election activities.'" *Id*. at *13. The court determined that the plaintiffs had not shown causality, because they only had to conduct the "same [ballot chase] activities a few days earlier"; and because "additional poll watching and mail ballot counting" was not strictly necessary as there was no claim that the "mail ballot receipt deadline harms the integrity" of the counting process. *Id*. at *14, *16 (citations omitted). But this holding does not "undermine" the point for which Plaintiffs cited *Wetzel*, which is that a traditional, economic injury, and a *Havens*-type claim for a diversion of resources, are two distinct bases for standing. Indeed, as noted, the Unions now seem to admit this. ECF 57-1 at 7; 8 n.2. More basically, IFA and BI's injury *is* directly traceable to Defendants' failure to comply with the NVRA. The existence of large numbers of ineligible registrations on Illinois' voters rolls increases the likelihood of bad mailings and useless home visits. And there are *more* outdated registrations than there otherwise would be because Defendants are not following removal procedures mandated by the NVRA. Note that Plaintiffs are not claiming that Illinois' voter rolls must be perfect, nor do they deny that outdated registrations may be found on any voter list. Rather, Plaintiffs' claim is comparative. However many outdated registrations ordinarily may be found on Illinois' voter rolls, *that number is greater because Defendants are not complying with the NVRA*. *See* ECF 1 ¶¶ 94, 96 (IFA's and BI's "ability to contact Illinois voters is *made more difficult*") (emphasis added). This constitutes an injury in fact.

A Seventh Circuit ruling decided (as so many cases seem to have been) while this motion was being briefed reached the same conclusion as *RNC v. Burgess* and is distinguishable on the same grounds. In *Bost v. Ill. State Bd. of Elections*, No. 23-2644, 2024 U.S. App. LEXIS 21142 at *12 (7th Cir. Aug. 21, 2024), Rep. Michael Bost alleged that Illinois' late ballot receipt law forced him to "continue to fund his campaign for two additional weeks after Election Day to contest any objectionable ballots," and to "send poll watchers … to monitor the counting of the votes after Election Day to ensure that any discrepancies are cured." The Court rejected this as a basis for standing, observing that harm must be "actual and imminent" and "certainly impending." *Id.* (citations omitted). The Court held that "it was Plaintiffs' choice to expend resources to avoid a hypothetical future harm—an election defeat." *Id.* at *13. Taking judicial notice of the fact that Rep. Bost won his last election with 75% of the vote, the Court concluded that he was "electing to undertake expenditures to insure against a result that may or may not come." *Id.* at *14, *15. By contrast, Plaintiffs IFA and BI have endured, and will continue to endure, direct, monetary losses because the number of bad registrations on Illinois' rolls is greater than it would be if Defendants complied with the NVRA's removal provisions. Nothing about their losses is speculative or depends on the outcome of any particular election. Nor can the expenditures they are undertaking be characterized in any way as discretionary. If they stop contacting voters, then IFA and BI are no longer political entities, and their status as 501(c)(4) nonprofits is essentially meaningless.

Plaintiffs IFA and BI have alleged standing based on their tangible, economic injuries.

B. The Organizational Plaintiffs Have Pleaded Standing Based on a Diversion of Their Resources.

The foregoing economic injuries may equally be framed as diversions of institutional resources. *See* ECF 49 at 14. In contesting this point, the Unions ignore the principles governing notice pleading and motions to dismiss, where all reasonable inferences are drawn in Plaintiffs'

favor. *See Spuhler v. State Collection Serv., Inc.*, 983 F.3d 282, 285 (7th Cir. 2020) ("a plaintiff may demonstrate standing by clearly pleading allegations that 'plausibly suggest' each element of standing when all reasonable inferences are drawn in the plaintiff's favor" (citations omitted)); *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice" (citation omitted)).

The Unions argue that "Plaintiffs' diversion-of-resources allegations" are "bare." ECF 57-1 at 7. They claim that "[n]either IFA nor BI specify any way in which its ability to contact voters is actually diminished by Illinois's list maintenance practices, any tradeoffs State Defendants' actions have compelled it to make, or how its mission has been harmed." *Id*. at 8. To see how wrong the Unions are, remember that Plaintiffs IFA and BI have alleged that they endure out-of-pocket losses attributable to Defendants' neglect of their federally mandated list maintenance obligations. Plaintiffs have thus alleged something even more concrete than the shift in mission seen in other diversion-of-resources cases. Compare *Havens*, 455 U.S. at 379 (nonprofit "frustrated by defendants' racial steering practices in its efforts to assist equal access to housing … had to devote significant resources to identify and counteract" such practices) (internal quotations omitted); *Common Cause Ind. v. Lawson*, 937 F.3d 944, 952 (7th Cir. 2019) (nonprofit that helped voters register and vote was injured when "required to increase the time or funds (or both) spent … to alleviate potentially harmful effects" of a state law that contravened the NVRA, which efforts "displace[d] other projects they normally undertake).

Plaintiffs' economic losses are a more direct injury than those in *Havens* or *Lawson*. Accordingly (and given that all reasonable inferences are drawn in Plaintiffs' favor) the questions implicitly raised by the Unions have easy answers. How are IFA's and BI's "ability to contact voters … actually diminished by Illinois's list maintenance practices"? ECF 57-1 at 8. They have

to pay more money to reach out to voters because there are more bad registrations on the rolls. What are the "tradeoffs State Defendants' actions have compelled [them] to make"? *Id*. These involve *every activity they do*, because actual monetary losses necessarily affect everything an organization does. Plaintiffs describe their other activities. ECF 1 ¶ 93 (IFA engages in "political advocacy and lobbying" as the "legislative action arm of the Illinois Family Institute" as well as "publicly endors[ing] and support[ing] candidates"); *id*. ¶ 95 (BI engages in "policy advocacy and education" that "highlight[s] the virtue of taxpayer-centric and liberty-focused policies"). How have IFA's and BI's "mission[s] … been harmed"? ECF 57-1 at 8. Their core activities as political entities—*viz*., contacting voters to encourage them to volunteer, organize, contribute, and vote for their favored candidates (ECF 1 ¶¶ 94, 96)—have become more costly and difficult.[3]

The Unions try to portray IFA's and BI's injuries as minor, describing them as "occasionally knocking on the wrong door or sending a mailer to a bad address," and as "negligible inefficiencies." Of course, the Unions' belittling modifiers ("occasionally," "negligible") do not appear in the complaint, nor are they evidence, nor are they relevant to a motion where inferences are drawn in Plaintiffs' favor.[4] In any case, even "an 'identifiable trifle' suffices" for standing. *Craftwood II, Inc. v. Generac Power Sys. Inc*., 920 F.3d 479, 481 (7th Cir. 2019) (citation omitted). The Unions also question Plaintiffs' use of "Illinois' raw registered voter list … as distinct from the more targeted data sources routinely used by campaigns." ECF 57-1 at 9. This argument really amounts to a positive—and unsupported—factual assertion that Plaintiffs could have used a better

[3] The Unions contest Judicial Watch's diversion-of-resources claim on the same grounds raised by Defendants, namely, that its efforts in Illinois are part of its normal activities. ECF 57-1 at 10. Plaintiffs fully responded to this argument. *See* ECF 49 at 16, 17 (pointing out that Judicial Watch "endured *extra* costs," and that whether "new burdens fall within an organization's existing mission is irrelevant. As the Seventh Circuit noted, 'we have a hard time imagining … why it is that an organization would undertake any additional work if that work had nothing to do with its mission.'" (citing *Lawson*, 937 F.3d at 955)).

[4] Nor are they factually accurate, as Plaintiffs will show at trial.

list. Plaintiffs are not obliged on this motion to rebut such adverse factual speculations.[5]

Plaintiffs have pleaded an Article III injury based on a diversion of resources.[6]

C. Plaintiffs Have Standing to Pursue a Violation of Section 8(i) of the NVRA.

Plaintiff Judicial Watch's mission is "to promote transparency, integrity, and accountability in government and fidelity to the rule of law." ECF 1 ¶ 82. Founded in 1994, it "fulfills its mission through public records requests," among other means. *Id*. It uses public records laws "to monitor state and local election officials' compliance with their NVRA list maintenance obligations" and publishes its findings. *Id*. ¶ 88; *see Judicial Watch, Inc. v. Lamone*, 399 F. Supp. 3d 425, 445 (D. Md. 2019) (noting Judicial Watch's "resources and [NVRA-related] expertise"). In this case, Judicial Watch requested information concerning Confirmation Notices, which are critical to states' list maintenance programs, and so to Judicial Watch's efforts to judge their effectiveness. *See* ECF 1 ¶¶ 11-13, 16(d), 18, 27, 41-44, 57-61. Although the NVRA requires Defendants to keep lists of voters who were sent Confirmation Notices and information about any responses, they admit that they do not have such records. 52 U.S.C. § 20507(i)(2); ECF 1 ¶ 58.

The complaint thus sets forth how Judicial Watch's ability to accomplish its organizational mission has been impaired because Defendants failed to keep and provide the requested records. This is an informational injury. Establishing such an injury "is 'not … burdensome.'" *Campaign Legal Center v. Scott*, 49 F.4th 931, 940 (5th Cir. 2022) (Ho, J., concurring in the judgment) (citation omitted). Judge Ho suggested that informational injury could exist where withheld information "is necessary to engage in public advocacy about a pressing matter of policy" or "is essential to furthering Plaintiffs' mission to protect" voting rights. *Id*.; *see* ECF 49 at 20-23.

The Unions argue that Plaintiffs have merely described "a generalized interest in whether

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[5] At trial, Plaintiffs IFA and BI will show that the State's list is all that they can afford.

[6] The Unions do not address Plaintiffs' standing as voters. *See* ECF 49 at 18-20.

the law is being followed." ECF 57-1 at 12. They are wrong. Judicial Watch's mission, which is *not* generally shared, has been compromised. This point is illustrated in *Citizens for Responsibility & Ethics in Wash. v. FEC*, No. 22-cv-3281, 2023 U.S. Dist. LEXIS 167635 at *15-16 (D.D.C. Sep. 20, 2023), where a nonprofit watchdog devoted to "empowering voters and exposing corruption" by monitoring campaign finance records alleged that failing to provide disclosures "hindered" its "programmatic activities." In finding informational injury, the court observed that it "does not stem from a bare desire that others comply with the law but rather [the plaintiff's] own, individualized interest in carrying out its organizational goals." *Id*. at *17. The court pointedly noted that *TransUnion LLC v. Ramirez*, 594 U.S. 413 (2021) did not "change but rather encapsulate[d]" the approach of "assessing whether [the plaintiff's] failure to receive the requested disclosures would harm its ability to advance its organizational mission." *Id*. at *18. Judicial Watch has standing here because its ability to advance its organizational mission has been harmed because it has been denied access to the public records it requested.

Finally, the Unions cite *Pub. Int. Legal Found., Inc. v. Nago*, Civ. No. 23-389, 2024 U.S. Dist. LEXIS 114259 at *13-14 (D. Haw. June 28, 2024),[7] another case decided while this motion was being briefed, which concerned a plaintiff who requested voter records from Hawaii's chief state election official, but not, as local regulations required, from the four counties where the voters resided. The court reasoned that, until the counties received and acted on the request, the plaintiff "has yet to be denied information" and so has no informational injury. *Id*. Plaintiffs respectfully submit that this case was wrongly decided. As observed in the complaint, "[t]he NVRA and related federal regulations require the State of Illinois, and not its counties, cities, or local authorities, to

[7] The case will be appealed, but not until next month. The plaintiffs filed a notice that they would not amend the complaint and sought an appealable order. *Nago*, ECF 60. The court ordered that the case be dismissed without prejudice on October 29, 2024 if no amended complaint is filed by then. *Id.*, ECF 61.

maintain and make available statewide records of Confirmation Notices sent and of responses to them." ECF 1 ¶ 59 (citing 52 U.S.C. § 20507(i) ("Each State shall …"); 11 C.F.R. § 9428.7(a), (b)(8) (chief state election official "shall" report the "statewide number" of Confirmation Notices and responses)). Allowing a state to delegate its public record duties to its counties would make Section 8(i) prohibitively costly or even impossible to use. In Illinois, Plaintiffs would have had to contact 108 local jurisdictions just to learn whether they could or would provide the requested information. This might have required scores of negotiations, scores of notice letters, and, possibly, scores of federal lawsuits—all to obtain records the NVRA explicitly requires "each state" to retain, and to provide "at a reasonable cost." (And this effort might have to be repeated in state after state. As just one example, Texas has 254 counties.) This new practice is contrary to the text of Section 8(i) and would frustrate its operation and purposes. *See Lamone*, 399 F. Supp. 3d at 444-45 (state restriction on Section 8(i) disclosures was barred under doctrine of obstacle preemption); *see also Project Vote v. Long*, 682 F.3d 331, 334-35 (4th Cir. 2012) (Section 8(i) disclosures identify "error and fraud," "ensur[e] that voter lists include eligible voters and exclude ineligible ones," and support "public confidence in the essential workings of democracy").

II. PLAINTIFFS HAVE CLEARLY STATED A CLAIM.

"[A]llegations in the Complaint must be viewed in context" and "read together[.]" *Babcock v. Lakin*, No. 21-cv-268, 2022 U.S. Dist. LEXIS 21732 at *9 (S.D. Ill. Feb. 7, 2022). *See Doe v. Purdue Univ.*, 928 F.3d 652, 670 (7th Cir. 2018) ("Taken together, [the plaintiff's] allegations raise a plausible inference" of a Title IX claim); *Matrixx Initiatives, Inc. v. Siracusano*, 563 U.S. 27, 46 n.13 (2011) (allegation "in combination with the other allegations, is sufficient to survive a motion to dismiss" a securities claim); *see SoftView LLC v. Apple Inc.*, No. 10-389, 2012 U.S. Dist. LEXIS 104677 *16-17 (D. Del. July 26, 2012) (while "none of the allegations standing alone

adequately alleges" knowledge of patents, the plaintiff "has not merely alleged only one of these inadequate allegations, but all three. Taken in combination," they showed a "plausible basis").

Defendants reported to the EAC that 11 Illinois counties removed zero registrations under the NVRA's notice-and-waiting-period procedure in a two-year period, and that 12 other counties removed fewer than 15 each. ECF 1 ¶¶ 28-29. In all, these 23 counties, with a combined total of almost a million registrants, removed a combined total of 100 registrations under that provision in that period. *Id*. ¶ 30. Allegations that over a fifth of Illinois' counties removed few or no registrations under a critical NVRA provision are more than enough to state a claim for noncompliance. The complaint also supplies context showing that these are low removal numbers, including Plaintiffs' experience (*id*. ¶¶ 27, 31, 34);[8] how many state residents move each year (*id*. ¶¶ 32, 33); and data showing that Stephenson County, with 28,385 registrations, removed 5,214, and that Pope County, with only 2,772 registrations, removed 175, under that provision in that two-year period (*id*. ¶¶ 35-36). It notes that 15 counties had more registered voters than citizens of voting age. *Id*. ¶ 78. (Defendants and the Unions have said nothing about Stephenson or Pope County or these high registration rates.) The complaint also alleges that 52 counties reported "Data not available" in crucial NVRA-related categories (*id*. ¶¶ 38-48), and that Defendant Matthews admitted she had no "access to local election authorities' list maintenance records." *Id*. ¶ 56.

Taken together, the allegations in the complaint present a formidable case that Defendants

[8] Plaintiffs have considerable experience enforcing the NVRA. Aside from NVRA-related research and communications, they have commenced the following cases: *Judicial Watch, Inc. v. Weber*, No. 2:24-cv-3750 (C.D. Cal. 2024); *Judicial Watch, Inc. v. Valentine*, No. 1:22-cv-3952 (E.D.N.Y. 2022); *Judicial Watch, Inc. v. Griswold*, No. 20-cv-2992 (D. Colo. 2020); *Judicial Watch, Inc. v. North Carolina*, No. 3:20-CV-211 (W.D.N.C. 2020); *Ill. Conservative Union v. Illinois*, No. 20 C 5542 (N.D. Ill. 2020); *Judicial Watch, Inc. v. Pennsylvania*, No. 1:20-cv-708 (M.D. Pa. 2020); *Judicial Watch, Inc. v. Adams*, Civil No. 3:17-cv-94 (E.D. Ky. 2017); *Judicial Watch, Inc. v. Lamone*, No. ELH-17-2006 (D. Md. 2017); *Judicial Watch, Inc. v. Logan*, No. 2:17-cv-8948 (C.D. Cal. 2017); *Judicial Watch, Inc. v. King*, No. 1:12-cv-800 (S.D. Ind. 2012); *Judicial Watch, Inc. v. Husted*, No. 2:12-cv-792 (S.D. Oh. 2012).

have failed to comply with the NVRA. Other NVRA complaints that have relied on similar allegations have been held to state a claim. *See, e.g., Judicial Watch, Inc. v. Griswold*, 554 F. Supp. 3d 1091, 1107 (D. Colo. 2021) (allegations that "public records and statistical analysis" of EAC data showed "high registration rates … [and] that the Secretary sends too few Confirmation Notices, removes too few registrants, and has too high a number of inactive voters" stated a claim); *see also Green v. Bell*, No. 3:21-cv-00493, 2023 U.S. Dist. LEXIS 45989 at *12-13 (W.D.N.C. Mar. 19, 2023) ("'unreasonably high registration rate[s]'" of greater than 100% "raise a 'strong inference of a violation of the NVRA'" (citing *Am. Civ. Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 805 (W.D. Tex. 2015); *Voter Integrity Proj. NC, Inc. v. Wake Cnty. Bd. of Elections*, 301 F. Supp. 3d 612, 618-20 (E.D.N.C. 2017); *Griswold*, 554 F. Supp. 3d at 1107-09)).

The Unions' challenges to Plaintiffs' claims are unavailing. They invoke the "presumption of regularity" (ECF 57-1 at 10), by which, "'in the absence of clear evidence to the contrary,' courts presume that public officers 'have properly discharged their official duties.'" *McDonough v. Anoka Cnty.*, 799 F.3d 931, 948 (8th Cir. 2015) (citations omitted). It is doubtful, however, that this factual presumption even applies to motions to dismiss. *See Dorce v. City of N.Y.*, 608 F. Supp. 3d 118, 142 n.9 (S.D.N.Y. 2022) ("The Court also declines to consider the presumption of regularity at the motion to dismiss stage … 'since presumptions are evidentiary standards that are inappropriate for evaluation at the pleadings stage.'") (citation omitted). But even if it did apply, Plaintiffs allegations have rebutted it. *See McDonough*, 799 F.3d at 948 ("Whatever weight the 'presumption of regularity' might otherwise have at this [motion to dismiss] stage in the litigation," the plaintiffs "have sufficiently rebutted it" by their allegations) (citation omitted).

The Unions let the modifiers do the work when they contend that Plaintiffs are "twisting the data" to "misrepresent and grossly overstate the relevance" of "isolated survey responses."

ECF 57-1 at 14. Note that where 23 Illinois counties report few or no relevant removals (ECF 1 ¶ 30), 34 report no data about such removals (*id*. ¶ 38), 19 report no data about deceased registrants (*id*. ¶ 39), 29 report no data about Confirmation Notices (*id*. ¶ 43), and 22 report no data about inactive registrations (*id*. ¶ 46), the relevant survey responses are no longer "isolated."

But the focus of the Unions' argument is that "***The Commission itself makes clear that the EAVS data is not meant to be parsed at a granular level***" (ECF 57-1 at 15)—as if bolding and italics made it true. The only support they offer are quotes from the EAC Report that its data makes it possible "to produce a generalizable understanding of core aspects of the election process and the management challenges faced by election officials" and allows election officials to "manage election oversight, conduct issue analysis and strategic planning, and create training and promotional materials." *Id*.; *see* ECF 41-2 at 5. These quotes do not confirm the Unions' bolded statement, nor do they foreclose other uses of the data. The Unions do not quote, moreover, the first line of the same paragraph, which says that "[t]he EAVS provides the most comprehensive source of state and local jurisdiction-level data about election administration in the United States"; and they quote around the observation that the survey data provides "crucial information every two years about how federal elections are conducted[.]" *Id.* These cut against the Unions' baseless assertion that "the EAVS is not a tool to determine states' compliance or non-compliance with the NVRA." ECF 57-1 at 15. In any case, the EAC Report itself contains only the (hearsay) opinions of non-parties, which should not weigh against Plaintiffs on a motion to dismiss. *See Griswold*, 554 F. Supp. 3d at 1108 (considering the EAC Report "at this stage to rebut plaintiffs' allegations would result in the Court weighing the parties' evidence, which is inappropriate").

Claiming "there is no formal 'certification' process," the Unions argue that Plaintiffs' references to "data Illinois certified to the EAC" (ECF 1 ¶¶ 28, 29) are a "misleading word choice

underscor[ing] their attempt to assign arbitrary and entirely misleading meaning to the EAVS data." ECF 57-1 at 11. The Unions should read the EAC Report, which, in describing how survey data was collected and verified, explains that "the EAC requested that the state's chief election officer certify their state's 2022 Policy Survey and EAVS submissions as accurate and complete." ECF 41-2 at 251. Only Florida and Oregon did not sign a certification form. *Id.* at 251 n.12.

The Unions suggest that no negative inferences can be drawn from the failure of so many Illinois counties to report NVRA-related data. They argue that reporting "Data not available" is not the same as not reporting data, but is something the counties are "allow[ed]" to do (ECF 57-1 at 16); that the "better interpretation" is that counties reported this "when, for whatever reason, the data necessary to answer the survey question was not available to them at the time" (*id*. at 17); and that failing to report data that "was actually available to them" would "simply establish that they failed to report data they had" (*id*.). Leaving aside whether any of these apparently tautological explanations makes sense, they all seek to have factual inferences ("interpretations") drawn in favor of the movants, in order to portray the counties' neglect of their reporting duties as a neutral act. The Court should not draw inferences in favor of the Unions on this motion.[9]

It is, moreover, indisputable that the lack of reliable NVRA data is not neutral, but is a bad thing. The whole purpose of the EAVS is to obtain that data, and none of the benefits to state officials described in the EAC Report (ECF 41-2 at 5) are possible without it. More to the point, not knowing this data impairs Illinois' list maintenance efforts, rendering it unable to assess whether it or its counties are complying with the NVRA. For this reason, the counties' failure to report numerical data "raise[s] a plausible inference" that Defendants do not have an NVRA-

[9] The Unions also argue that "federal regulations only require states to report *statewide* data; there is no separate duty to report county-level data." ECF 57-1 at 17. It is hard to know what to make of this point given that the only way to obtain statewide data is to aggregate county data.

compliant program—especially when "[t]aken together" with the other allegations. *Purdue Univ.*, 928 F.3d at 670; *see also U.S. v. Missouri*, 535 F.3d 844, 851 (8th Cir. 2008) (lack of local compliance "remains relevant to determining whether or not" a state "is reasonably 'conduct[ing] a general program'" of voter list maintenance).[10]

The Unions characterize the complaint as alleging that removal numbers under Section 8(d)(1)(B) "are 'too small' *because*" of census data showing how many residents move. ECF 57-1 at 18 (citing ECF 1 ¶¶ 32-33) (emphasis added). That "because" is misleading. The removal numbers alleged in the complaint are too small on their own. This is especially true of counties reporting zero removals in a two-year period. Zero is always "too small." *See* ECF 1 ¶ 34 ("that number should never be zero"). It is also incorrect to imply that census data about mobility is the *only* context relevant to low removal numbers. It does supply context, *along with* other facts alleged in the complaint, including Plaintiffs' experience, high registration rates, unreported county data, removals in compliant counties, and Defendant Matthews' lack of information about county data, all of which should be "[t]aken together." *Purdue Univ.*, 928 F.3d at 670.

The Unions argue that *Judicial Watch, Inc. v. Pennsylvania*, 524 F. Supp. 3d 399, 407-08 (M.D. Pa. 2021) rejected the idea that "the number of Section 8(d)(1)(B) removals should approach the number of moves estimated by the Census Bureau." ECF 57-1 at 18. But the complaint here does not allege that. It is ironic, moreover, that the Unions cite that case. The initial complaint was dismissed against four county defendants (but not the state) when updated EAVS data showed that

[10] Relying on their own mashup of ECF 1 ¶¶ 40-41, the Unions assert that Plaintiffs "boldly intimate" that counties' failure to supply data amounts to "an admission that nearly half of Illinois counties ignored their reporting obligations to the EAC because the data was not favorable to them, evidencing counties' non-compliance." ECF 57-1 at 16 (cleaned up). This mischaracterizes those allegations. Paragraph 40 makes the observation, consistent with human nature, that "[i]n Plaintiffs experience, jurisdictions do not ignore their reporting obligations" where "the data is favorable to them," but "often" do not "report data that suggests non-compliance." Paragraph 41 notes that "Illinois admitted to the EAC that almost one third of its counties" did not report Section 8(d)(1)(B) data, and alleges that this violates the NVRA.

Section 8(d)(1)(B) removals were far higher than previously reported. 524 F. Supp. 3d at 406-07. An amended complaint filed against five other counties proceeded on the same theories presented here, including the new data from the EAC survey. *See* Ex. 1 (First Amended Complaint), ¶¶ 42-57, 58-61. The court granted leave to amend based on the plaintiff's allegations of "'extremely low removal rates' for each of the newly named counties," and allegations that "these low removal rates demonstrate that the Commonwealth defendants have failed to comply with their statewide obligations under the NVRA." *See* Ex. 2 (Order) at 3.[11] Thus, the Pennsylvania case, like *Judicial Watch, Inc. v. Griswold*, supports Plaintiffs' claims.

Finally, the Unions repeat Defendants' suggestion that other categories of list maintenance activities somehow "make up for" the list maintenance failures Plaintiffs identify in the complaint. ECF 57-1 at 18. They also repeat the argument that Plaintiffs were not denied access to requested records, but merely told that they should be sought from local authorities. *Id.* at 19. These arguments were previously addressed, and the Court is respectfully referred to those discussions. ECF 49 at 22-23, 29-30. Plaintiffs merely note here that the idea that they "rushed to this Court to seek relief" (ECF 57-1 at 19) is untrue, given that their first letter to Defendants was sent in August 2023, while the complaint was filed in March 2024.

CONCLUSION

For the reasons set forth above, the Union's motion to dismiss should be denied.

September 13, 2024

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[11] The case later settled. *See* https://www.judicialwatch.org/wp-content/uploads/2023/05/JW-v-PA-NVRA-Settlement-Agreement-00708-1.pdf (including reporting obligations and monetary payment).

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CERTIFICATE OF SERVICE

I certify that on September 13, 2024, I caused a copy of the foregoing **Plaintiffs' Opposition to Intervenor-Defendants' Motion to Dismiss** to be filed electronically on CM/ECF, which will cause a notice of filing to be sent to all counsel of record who have entered appearances.

/s/ Robert D. Popper
Robert D. Popper