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

JUDICIAL WATCH, INC.; ILLINOIS FAMILY ACTION; BREAKTHROUGH IDEAS; and CAROL J. DAVIS,

Plaintiffs,

v.

THE ILLINOIS STATE BOARD OF ELECTIONS; and BERNADETTE MATTHEWS, in her capacity as the Executive Director of the Illinois State Board of Elections,

Defendants,

ILLINOIS AFL-CIO and ILLINOIS FEDERATION OF TEACHERS,

Intervenor-Defendants.

No. 1:24-cv-01867

Hon. Sara L. Ellis

INTERVENOR-DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

Plaintiffs lack standing to assert either of their claims, but, in any event, both fail on the merits. As a result, their Complaint must be dismissed under Federal Rule of Civil Procedure 12(b)(1) or Rule 12(b)(6).

Plaintiffs attempt to establish standing for their list maintenance claim based on the bare assertion that they have to spend more money to reach out to voters. But this allegation is insufficient to satisfy Article III's injury-in-fact requirement, whether described as "traditional economic harm" or a "diversion of resources" injury. And Plaintiffs fail to identify any adverse effects from State Defendants' alleged violation of NVRA Section 8(i) to allow them to pursue their public disclosure claim.

Nor do Plaintiffs adequately allege an NVRA violation—or even contest that they have done so with respect to their public disclosure claim. Their list maintenance claim relies almost entirely on EAVS data from a single two-year period, ignoring that such a snapshot does not and cannot serve as the NVRA list maintenance report card Plaintiffs make it out to be. This is not least of all because the NVRA requires a four-year waiting period before most voters may legally be removed from the rolls, making it impossible to look at that data and draw any plausible conclusion that Defendants are failing to engage in reasonable list maintenance as required by the NVRA. Plaintiffs also attempt to support their claim with inapposite Census data, their own unexplained "experience," and their unsubstantiated assumption that counties who reported "data not available" to certain survey questions are hiding their noncompliance with federal law. But they fail to identify any specific example of Illinois improperly keeping someone on the voter rolls whom the NVRA required be removed, or even to grapple with Illinois's numerous statutory provisions which describe, in detail, the state's "reasonable efforts" to comply with the NVRA,

and which regularly result in hundreds of thousands of voters being removed from the rolls. Plaintiffs just assume that Illinois must be violating the NVRA somehow. Such assumptions cannot support the inference that State Defendants are failing to conduct reasonable list maintenance in violation of the NVRA.

The motions to dismiss should be granted.

ARGUMENT

I. Plaintiffs lack standing to pursue their claims.

A. Plaintiffs lack standing on Count I.

Plaintiffs' opposition lays bare that their only alleged harm supporting their list maintenance claim is that "[t]hey have to pay more money to reach out to voters because there are more bad registrations on the rolls." ECF No. 61 at 5–6. But that is not sufficient to establish standing, whether described as "traditional economic harm" or a "diversion of resources" injury.[1]

Plaintiffs' attempt to distinguish "traditional economic harm" from a "diversions of resources" injury is misplaced. Although courts have not always been perfectly clear, a diversion of resources injury is best understood as a *type* of economic injury, with the diversion of resources line of cases explaining what an organization must show when it relies on an expenditure of its own resources for standing in federal court. *See, e.g.*, *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378–79 (1982). The Seventh Circuit has held that an organization "cannot convert ordinary program costs into an injury in fact" and must instead show a "disruption" that is "real" such that "its response is warranted." *Common Cause Ind. v. Lawson*, 937 F.3d 944, 955 (7th Cir. 2019) (cleaned up). Otherwise, organizations would be able to "spend [their] way into standing simply by expending money to gather information and advocate against the defendant's action"—

[1] Intervenor-Defendants join in but do not repeat State Defendants' arguments here.

something the Supreme Court has been clear they cannot do. *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 394 (2024).

Republican National Committee v. Wetzel, No. 1:24CV25-LG-RPM, 2024 WL 3559623 (S.D. Miss. July 28, 2024), is not to the contrary. The evidence that the court relied upon in that case to find that the political party plaintiffs had demonstrated an "economic injury" was about their *diversion of resources*. *See, e.g.*, *id*. at *3–4 (finding the RNC established it would need to spend money on "ballot-chase programs and poll-watching activities" *that it would not otherwise undertake* during the relevant period but for the challenged law, which allowed for ballots to be counted if received up to five days after election day); *see also Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006) (finding Democratic Party had standing where it would need to "prepare a new and different campaign in a short time frame" if the challenged action took place).[2]

In contrast, courts have repeatedly found that an organization's allegations that it is merely "spending[] resources" in response to an election law or practice are *not* sufficient for standing—even though the expenditure may be an economic loss to the organization. *See, e.g.*, *Shelby Advocs. for Valid Elections v. Hargett*, 947 F.3d 977, 982 (6th Cir. 2020) (affirming dismissal of complaint); *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 865 (6th Cir. 2020) (holding a "plaintiff cannot create an injury" by spending time or money combating speculative concerns about ineligible voters fraudulently voting). The same is true in other areas of the law. *See, e.g.*, *In re Johnson & Johnson Talcum Powder Prod. Mktg., Sales Pracs. & Liab. Litig.*, 903 F.3d 278,

[2] *Wetzel* is distinguishable, and as a district court decision applying Fifth Circuit precedent, also not binding. Nor should the Court find it particularly persuasive given that, in *Bost*, the Seventh Circuit found that similar allegations were not sufficient to establish standing. *Bost v. Ill. State Bd. of Elections*, 114 F.4th 634, 642 (7th Cir. 2024). *Benkiser* (which *Wetzel* relied upon) is also an out-of-circuit decision, and—as noted above—involved political party plaintiffs who were able to show that they would have to significantly and drastically alter their activities to effectively campaign. Plaintiffs in this case are not political parties, nor do they make any similar allegations.

281 (3d Cir. 2018) ("A plaintiff alleging an economic injury as a result of a purchasing decision must do more than simply characterize that purchasing decision as an economic injury. The plaintiff must instead allege facts that would permit a factfinder to determine, without relying on mere conjecture, that the plaintiff failed to receive the economic benefit of her bargain.").

Similarly, here, all that Plaintiffs allege is that, if there are more ineligible voters on the rolls, they would need to "pay more money to reach out to voters," ECF No. 61 at 6, to conduct their advocacy activity. Putting aside for a moment whether this can satisfy Article III's injury-in-fact requirement, it is far from clear that this is traceable to State Defendants' actions. Indeed, Plaintiffs concede that "outdated registrations *ordinarily* may be found on Illinois's voter rolls," *Id.* at 3 (emphasis added), even if the state were in perfect compliance with the NVRA. This has to be the case, as the NVRA was designed to avoid purging voters from the rolls before it can be confirmed—by the voters themselves or through their failure to respond to notices from election officials and to vote in two consecutive elections—that any voter should no longer be on the rolls. 52 U.S.C. § 20507(d)(1). But on the injury-in-fact question, too, Plaintiffs entirely fail to allege that State Defendants' purported failures have forced Plaintiffs to do anything differently than they always have: they point to no *change* in their programming or urgency that would require them to expend more resources "in a short time frame," as in *Benkiser*, for example. *See* 459 F.3d at 586.[3]

Moreover, whether the injury that Plaintiffs claim to suffer is described as "traditional economic harm" or "diversion of resources," case law is clear that both are still subject to Article III's "concrete and particularized" requirements—which Plaintiffs' allegations fail to satisfy. *See*

[3] Plaintiffs also cite *De La Fuente v. Padilla*, 930 F.3d 1101, 1104 (9th Cir. 2019), but that case does not explain the basis of its injury finding and, in any event, concerns a political candidate operating under a tight election deadline—just like the political party plaintiffs in *Wetzel* and *Benkiser*—and the candidate specifically "estimated the cost of [the challenged] ballot access to be three to four million dollars." *Id.*

Bost, 114 F.4th at 642 (discussing Article III injury requirements for resource-based harm); *In re Recalled Abbott Infant Formula Prod. Liab. Litig.*, 97 F.4th 525, 529 (7th Cir. 2024) (finding plaintiffs' claimed economic harm not sufficiently concrete or particularized to support standing). Indeed, any expenditure of resources on "bad mailings and useless home visits," is even further downstream from State Defendants' purported failure to engage in reasonable list maintenance procedures, making it far too conjectural to qualify as a cognizable injury here. *See Bost*, 114 F.4th at 642 (finding injury insufficient where "it was Plaintiffs' choice to expend resources to avoid a hypothetical future harm").

For all of these reasons, the Court should find that Plaintiffs have failed to establish standing to pursue Count I and dismiss that claim for lack of jurisdiction under Rule 12(b)(1).

B. Plaintiffs lack standing on Count II.

In support of their standing to pursue Count II, Plaintiffs simply assert that this Court should follow the approach of the non-binding opinions that they like and ignore decisions that they do not. *See* ECF No. 61 at 7–9. But that is not how the law works.

Under binding Supreme Court precedent, Plaintiffs must identify "adverse effects" of their "asserted informational injury" to satisfy Article III. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 441–42 (2021) (cleaned up). All Plaintiffs can muster, however, is that Judicial Watch's "ability to advance its organizational mission has been harmed because it has been denied access to the public records it requested." ECF No. 61 at 8. But even in the non-binding case whose outcome Plaintiffs like—*Citizens for Resp. & Ethics in Wash. v. FEC*, No. 22-CV-3281 (CRC), 2023 WL 6141887, at *5 (D.D.C. Sept. 20, 2023)—the court cited specific allegations from the complaint about how the failure to disclose hindered the plaintiff's programmatic activity and mission. Here, there are no such allegations in the Complaint, and even now, Judicial Watch repeats only that it "fulfills its mission through public records requests," but does not explain in any detail what it

would do with the information requested if received, or how the lack of such information affects its operations. *See* ECF No. 61 at 7–9. Likewise, Judicial Watch does not allege that the withheld information "is necessary to engage in public advocacy about a pressing matter of policy" or "is essential to furthering Plaintiffs' mission." *Id.* at 7 (quoting *Campaign Legal Ctr. v. Scott*, 49 F.4th 931, 940 (5th Cir. 2022) (Ho, J., concurring in the judgment)).

And, Plaintiffs' disagreement aside, *Public Interest Legal Foundation, Inc. v. Nago*, No. CV 23-00389 LEK-WRP, 2024 WL 3233994, at *5–6 (D. Haw. June 28, 2024), provides yet another reason to find that Plaintiffs lack standing here. Plaintiffs have not yet requested voter data from the counties that maintain it, and their injury is therefore merely "prospective" and cannot be an "injury in act." *Id.* This claim, too, should be dismissed under Rule 12(b)(1).

II. Count I fails to state a plausible claim upon which relief may be granted.

If the Court were to reach the merits, it should find that Count I must also be dismissed for failure to state a claim under Rule 12(b)(6). Plaintiffs are wrong that the EAVS data "present[s] a formidable case" about Illinois's NVRA compliance. ECF No. 61 at 10. Federal courts have warned that an "EAVS snapshot" can "in no way be taken as a definitive picture of what a county's registration rate is, 'much less any indication of whether list maintenance is going on and whether it's … reasonable.'" *Bellitto v. Snipes*, 935 F.3d 1192, 1208 (11th Cir. 2019) (alteration in original).

Most fundamentally, Plaintiffs cannot rely on an EAVS snapshot to demonstrate that the removal numbers alleged in the complaint are "too small on their own." ECF No. 61 at 14. The EAVS data on which Plaintiffs rely covers only a two-year period. But the NVRA *forbids* removing a voter due to possible change in residence until that voter has failed to vote in at least two federal general elections—a *four-year* lag period, meant to protect against improper removal. *See* 52 U.S.C. § 20507(d). Moreover, the NVRA does not require a voter's removal immediately

after they fail to vote in two consecutive federal general elections; it merely *prohibits* removal of such a voter before that has occurred. *See id.* § 20507(b)(2). Thus, a county reporting few, or even zero, Section 8(d)(1)(B) removals in a single two-year period is entirely consistent with the NVRA, so long as the state's efforts, overall, constitute a "reasonable effort" to remove voters based on a change in residence. *Id.* § 20507(a)(4). And, as State Defendants have explained, Illinois has codified robust procedures that require—and result in—the regular removal of hundreds of thousands of registrations due to changes of address. *See* ECF No. 41-1 at 21–23.

Plaintiffs fail to grapple with the NVRA's statutory scheme and offer no explanation for their insistence that zero Section 8(d)(1)(B) removals in a handful of counties, in a two-year period, is "always too small." ECF No. 61 at 14. For the same reasons, Plaintiffs' attempt to compare the number of Section 8(d)(1)(B) removals reported by different counties in 2022 is unavailing. Because counties are not required to remove any voters under this provision at any specified time, they certainly are not required to do so on the same schedule as other counties. At bottom, Plaintiffs fail to explain how purportedly small numbers of reported removals under Section 8(d)(1)(B) between the 2020 and 2022 elections falls short of the NVRA's list maintenance requirements.

Plaintiffs' attempt to "suppl[y] context" to the EAVS data reveals nothing about whether the data demonstrate non-compliance with the NVRA. *See* ECF No. 61 at 10. Start with Plaintiffs' allegation—which they emphasize in their brief—that the EAVS data demonstrates that "15 Illinois jurisdictions have more registered voters than citizens of voting age." Compl. ¶ 79; ECF No. 61 at 10. The 2022 EAVS Report explicitly warns that:

> [D]ata on registered and eligible voters as reported in the EVAS should be used with caution, as these totals can include registrants who are no longer eligible to vote in that state but who have not been removed from the registration rolls because the removal process laid out by the NVRA can take up to two elections cycles to be completed.

U.S. Election Assistance Comm'n, Election Administration and Voting Survey 2022 Comprehensive Report at 140 (citing examples in footnotes); *see also Jud. Watch, Inc. v. North Carolina*, No. 3:20-CV-211-RJC-DCK, 2021 WL 7366792, at *10 (W.D.N.C. Aug. 20, 2021) (observing this same cautionary note in 2018 EAVS survey). The EAVS thus advises that "states should expect to see high voter registration rates," meaning that "such information, without more, does not" provide a meaningful inference of "non-compliance with the NVRA." *Jud. Watch, Inc.*, 2021 WL 7366792, at *10.

Moreover, Plaintiffs compare the EAVS data on total registrations to the 2021 American Community Survey ("ACS") data produced by the U.S. Census Bureau to estimate the current population of several Illinois counties. The Eleventh Circuit has observed that such ACS data may "significantly underestimate[] the population" of a county for a variety of reasons, including because it "asks who has resided in the household in the two-month period" preceding the survey, thereby "exclud[ing] many college students, military personnel" and others who may not reside in an area for the full year. *Bellitto*, 935 F.3d at 1208. The Census Bureau has cautioned that "[d]ue to the variance inherent in survey estimates," it "do[es] not recommend combining survey data from the [American Community Survey] with administrative record data, such as those produced as part of voter tallies."[4] Yet Plaintiffs do just that in their Complaint, despite the Census Bureau's warning that "the margin of error could be around 90 percent."[5]

Judicial Watch v. Pennsylvania underscores that an EAVS snapshot cannot show non-compliance with the NVRA. As explained in Intervenor-Defendants' brief, the district court in the

[4] Kurt Hildebrand, *Republican National Committee Names Douglas in Voter Roll Lawsuit*, TAHOE DAILY TRIB. (Mar. 31, 2024), https://www.tahoedailytribune.com/news/republican-national-committee-names-douglas-in-voter-roll-lawsuit.
[5] *Id.*

Pennsylvania case emphasized that the NVRA "does not require a perfect removal effort; it only requires states to "make[ ] a reasonable effort" to remove registrants who have died or changed their residence. *Jud. Watch, Inc. v. Pennsylvania*, 524 F. Supp. 3d 399, 407 (M.D. Pa. 2021) (quoting 52 U.S.C. § 20507(a)(4)). Accordingly, the district court rejected Judicial Watch's attempt to allege an NVRA violation based on a comparison between an EAVS snapshot and U.S. Census population estimates, just as Plaintiffs do here. *Id.* at 407–08. Although Plaintiffs attempt to disclaim it now, their complaint explicitly relies on the Census Bureau's estimate of the number of Illinois residents who have moved since 2022 to support their allegation that "[t]here is no possible way" certain Illinois counties are making a reasonable effort to "cancel the registrations of voters who have become ineligible because of a change of residence." Compl. ¶¶ 31–33.

Nor does the subsequent history of *Judicial Watch v. Pennsylvania* suggest that purportedly "low" removal rates under Section 8(d)(1)(B) state a claim under the NVRA "on their own." ECF No. 61 at 14. The fact that one court allowed Judicial Watch to amend a complaint to add allegations reflecting up-to-date EAVS data does not mean Plaintiffs here have adequately alleged an NVRA violation. The amended complaint included allegations about reported Section 8(d)(1)(B) removals over a *four-year period* extending from November 2016 through November 2020, and alleged that plaintiffs had identified several Pennsylvania counties that admitted they had not been removing registrants as required until they received a notice letter. *See* Br. in Support of Mot. to Amend Compl., *Jud. Watch, Inc. v. Pennsylvania*, Case No. 1:20-cv-00708, (M.D. Pa. Aug. 25, 2021), ECF No. 79 at 8, 10 (attached hereto as Exhibit 1). The amended complaint did not rely exclusively on data reported in a single EAVS survey—reflecting a two-year period—to support an inference of an NVRA violation, as Plaintiffs do here. This subsequent history is thus

a poor comparison and does nothing to support Plaintiffs' assertion that they have "clearly" stated a claim. *See* ECF No. 61 at 9.

Plaintiffs next double down on their assertion that reporting "data not available" to certain survey questions suggests non-compliance with the NVRA. In Plaintiffs' view, such responses are "indisputabl[y] . . . a bad thing" because "not knowing this data impairs Illinois's list maintenance efforts, rendering it unable to assess whether it or its counties are complying with the NVRA." ECF No. 61 at 13. That normative conclusion is no basis to find an NVRA violation; Plaintiffs are not the State, and State Defendants themselves have stated that they are "doing more than the minimum" to comply with the NVRA's list maintenance requirements. *See* ECF No. 41-1 at 21–23.[6] Moreover, Plaintiffs once again suggest that jurisdictions "'often' do not 'report data that suggests non-compliance.'" ECF No. 61 at 14, n.10 (quoting Compl. ¶ 40). Although they attempt to walk it back, *see id.*, this assertion is nothing more than a thinly veiled suggestion that counties are covering up non-compliance with a federal law by concealing unfavorable data. But besides alluding to their own "experience," Plaintiffs offer no support whatsoever for these allegations. *Id.* They do not even *attempt* to identify any specific county that had data available and chose not to report it because it would reveal their non-compliance with the NVRA. Nor do they purport to identify any voter, in any county, who was improperly kept on the voter rolls whom the NVRA required—or even allowed—to be removed. Rejecting Plaintiffs' wholly unsupported allegations does not require the Court to draw inferences in Intervenor-Defendants' favor, as Plaintiffs

[6] The implication in Plaintiffs' assertion is that the state's procedures are not being followed, in direct contravention of the presumption of regularity afforded to public officials in the discharge of their official duties. *Hebrard v. Nofziger*, 90 F.4th 1000, 1009 (9th Cir. 2024). Although Plaintiffs half-heartedly suggest that the presumption might not apply at the motion to dismiss stage, the Ninth Circuit in *Hebrard* affirmed the dismissal of a claim that depended on the conclusion that a state official violated state law, when the plaintiff failed to allege facts supporting that conclusion. *Id.*

suggest. Rather, the Court need only "draw on its judicial experience and common sense" to find that Plaintiffs' allegations with respect to the "data not available" responses "do not permit the court to infer more than the mere possibility of misconduct." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009).

Plaintiffs also rely on their own "experience" to support their list maintenance claim. But they do not explain how this experience leads them to the belief that Illinois's reported removal numbers are "absurdly small." Compl. ¶ 31. While they cite several cases they have "commenced" to challenge various states' list maintenance procedures, they conspicuously do not identify any case where a court has found a state's Section 8(d)(1)(B) removals to be "too low." The fact that Plaintiffs have filed NVRA lawsuits across the country therefore lends little credence to their allegation that Illinois is violating their list maintenance duties.[7]

Plaintiffs' allegations taken together—as they insist they must be—fail to demonstrate that any removable voter has been left on the state's voter rolls or illustrate any systemic issue plaguing Illinois's list maintenance efforts. The single two-year snapshot on which they rely cannot and does not demonstrate a failure to make a reasonable effort to remove voters after the statutorily required four-year waiting period. Nor does the purported "context" Plaintiffs supply transform

[7] Plaintiffs cite two out-of-circuit cases in which list maintenance claims under the NVRA were allowed to proceed past the motion to dismiss stage based on EAC and Census data, ECF No. 61 at 11, but neither is binding here, and this Court should not follow them because they appear to rest on a misunderstanding of the NVRA. Of particular note, neither *Judicial Watch v. Griswold*, 554 F. Supp. 3d 1091 (D. Colo. 2021), nor *Green v. Bell*, No. 3:21-CV-00493-RJC-DCK, 2023 WL 2572210 (W.D.N.C. Mar. 20, 2023), considered the NVRA's mandatory four-year waiting period before most voters can be legally removed from the rolls, rendering a two-year snapshot of reported removals inapposite. *See* 52 U.S.C. § 20507(b)(2). Moreover, both cases relied on *American Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 805 (W.D. Tex. 2015), and *Voter Integrity Project NC, Inc. v. Wake County Board of Elections*, 301 F. Supp. 3d 612, 618–20 (E.D.N.C. 2017), for the conclusion that high registration rates raised an inference of an NVRA violation. But that proposition was more recently rejected in *Judicial Watch, Inc.*, 2021 WL 7366792, at *10.

the EAVS snapshot they rely on into a plausible inference that Illinois has violated the NVRA. Without more, they have failed to state a claim.

III. Count II fails to state a plausible claim upon which relief may be granted.

Plaintiffs do not dispute that Count II fails to state a claim. Nor could they, considering Section 8(i)(1) of the NVRA merely requires the state to "make available for public inspection and . . . photocopying . . . all records concerning" voter registration lists. 52 U.S.C. § 20507(i)(1). The correspondence Plaintiffs attached to their own Complaint shows that State Defendants informed Plaintiffs where that data was available for inspection and copying, but Plaintiffs failed to follow through obtaining that information. Such facts do not establish any failure on the part of State Defendants.

CONCLUSION

For the foregoing reasons, Intervenor-Defendants Illinois AFL-CIO and Illinois Federation of Teachers respectfully request that the Court dismiss Plaintiffs' complaint.

September 27, 2024

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I, Sarah F. Weiss, certify that on September 27, 2024, I electronically filed the foregoing **INTERVENOR-DEFENDANTS' MOTION TO DISMISS** with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all attorneys of record.

I certify under penalty of perjury that the foregoing is true and correct.

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