**UNITED STATES DISTRICT COURT**
**NORTHERN DISTRICT OF TEXAS**

AMERICA FIRST POLICY INSTITUTE, *et al.*,

*Plaintiffs*,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States *et al.*,

*Defendants*.

Case No. 2:24-cv-00152-Z



**DEFENDANTS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS**

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## INTRODUCTION

Plaintiffs' opposition is largely non-responsive to Defendants' motion to dismiss. Resp., ECF No. 60. Plaintiffs disregard the text of the Executive Order they challenge. They do not engage with Defendants' detailed showing that various agencies' efforts to implement that Order—which have been made public over the course of the last three years—are strictly nonpartisan. They do not address the wealth of authority cautioning courts against speculating about how voters may respond to neutral, nonpartisan information. And they fail to heed this Court's admonition to provide "direct evidence" and "credible support" for their claims of partisan disadvantage. TRO Order, ECF No. 39 at 3-4. Instead, Plaintiffs continue to offer only "generalized statement[s]" about potential harms—which are "too broad to plausibly implicate the specific programs" Plaintiffs seek to challenge. *Id.* at 3. So their response still fails to establish Article III jurisdiction.

Plaintiffs also continue to argue that the numerous and largely unspecified agency activities they challenge can be reviewed under the Administrative Procedure Act (APA). But they fail to acknowledge—much less respond to—three separate threshold arguments Defendants made about why the APA does not permit their unbounded programmatic attack against the implementation of a Presidential policy initiative across the entire government. And despite Defendants moving, in the alternative, to dismiss all of Plaintiffs' claims pursuant to Rule 12(b)(6), Plaintiffs offer *no* merits defense of those claims at all.

Instead, Plaintiffs renew their request that the Court draw a plenary adverse inference against the government based on nothing more than the existence of other ongoing proceedings—and add a new request for discovery, seeking to fill unidentified gaps in Plaintiffs' own submissions. *See* Resp, ECF No. 60 at 18-25. These demands are untethered to any cognizable legal standard. And this Court should decline Plaintiffs' invitation to wade into proceedings that are ongoing in other districts and in Congress. Plaintiffs have failed, for the third time, to demonstrate any cognizable harm attributable to an Executive Order they waited three and a half years to challenge. Their complaint should be dismissed.

## ARGUMENT

### I. Plaintiffs Fail to Show Article III Standing

Defendants' motion detailed the "difficult" task Plaintiffs face "to thread the causation needle" between the Executive Order and their asserted injuries. *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 383 (2024). To satisfy Article III, Plaintiffs are required to make the "highly fact-dependent" showing that agencies distributing nonpartisan voting information will "likely le[a]d" innumerable "unregulated parties" to register and vote in "predictable"—and, from Plaintiffs' perspective, harmful—ways. *Id.* at 384; *see* MTD, ECF No. 25 at 14-15. Yet Plaintiffs have never provided any specific information linking a particular agency activity to any cognizable harm to election officials who receive registrations, to candidates who stand for elections, or to any other Plaintiff. MTD at 14-18; Sur-Reply, ECF No. 57 at 2-4. And their response fails to cure that flaw.

#### *A. Election Administrators Have Failed to Show Injury Traceable to the Executive Order*

As a legal matter, Plaintiffs cannot establish standing based on supposed burdens that election officials may face from new voter registrations for all the reasons Defendants set forth previously. *See* MTD at 19. By Plaintiffs' own admission, registering voters is a core part of those officials' jobs, Resp. at 6-7—and those officials do not "suffer any financial burden or harm to their personal property interests" from "chang[ing] the way [they] conduct their duties." *Crane v. Napolitano*, 920 F. Supp. 2d 724, 738 (N.D. Tex. 2013); *see also Crane v. Johnson*, 783 F.3d 244, 253–54 (5th Cir. 2015) (plaintiffs did not identify "any case" where officials "had standing to challenge a [federal] policy merely because it required [them] to change their practices").[1] Nor can the asserted "'drain on [the] resources'" of those officials' offices establish a "'concrete and demonstrable injury'" because it is well established that organizations, unlike sovereign States, must show "'perceptible impair[ment]' to [their] ability to carry out [their] mission" to satisfy Article III. *Louisiana Fair Hous. Action Ctr. v. Azalea Garden Properties, LLC*, 82 F.4th 345, 353 (5th Cir. 2023) (citation omitted); *see also* Sur-Reply at 5.

[1] Plaintiffs themselves seem to recognize that it is odd for election officials to claim injury from voter registrations. Perhaps that is why they go out of their way to confirm that they "welcome registration of eligible individuals." Resp. at 6. But Plaintiffs cannot sue on the basis of something "they've already been doing and want to keep doing." *In re Gee*, 941 F.3d 153, 163 (5th Cir. 2019).

Plaintiffs' response does not even attempt to address these foundational problems. *See* Resp. at 6-7. Instead, Plaintiffs attempt to analogize the burden on election officials to financial costs that Texas incurred from an immigration policy a decade ago in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (*DAPA*). But a harm to Texas's fisc is nothing like the ill-defined burdens Plaintiffs claim here. Nor have Plaintiffs established the kind of "especially direct" "causal chain" that the Fifth Circuit believed was present in *DAPA*, where the State challenged a specific federal program that made "at least 500,000 illegal aliens" newly eligible to apply for state drivers' licenses—and there was "little doubt that many would do so because driving is a practical necessity in most of the state." *DAPA*, 809 F.3d at 153, 156; *see also* Order, *Texas v. DHS*, Case No. 23-cv-0001, ECF No. 70 at 9-10 (S.D. Tex., Sept. 30, 2024) (listing immigration cases where Texas "established" costs from increased populations); *but see United States v. Texas*, 599 U.S. 670, 680 n.3 (2023) (recognizing that although "federal policies frequently generate indirect effects on state revenues or state spending," claims to standing based on "those kinds of indirect effects" are insufficient to satisfy Article III when they are "too attenuated").



Neither the Executive Order nor any agency activities implementing it increases the population of eligible voters or purports to alter the criteria for registering. Those criteria, including whatever procedures states create for "automatic voter registration," Resp. at 13, are—as the Executive Order itself recognizes—established by preexisting state and federal law. *See, e.g.*, EO 14019 § 3 (directing agencies to consider how they may provide information about "voter registration and vote-by-mail ballot applications forms *in a manner consistent with all relevant State laws*." (emphasis added)). Further, information about registering and voting is available from a wide variety of sources, including the states themselves. So Plaintiffs cannot just *assume* that nonpartisan voting information provided by the defendant agencies will lead someone to register. Rightly or not, voting is not "a practical necessity" for people the way driving is. *DAPA*, 809 F.3d at 156.[2] The public's registration and voting

[2] This fact is highlighted by a case Plaintiffs themselves cite. *See Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) ("A great many people who are eligible to vote don't bother to do so . . . . [t]he benefits of voting to the individual voter are elusive . . . and even very slight costs in

behavior is far too unpredictable—which is why the Supreme Court has repeatedly cautioned against making broad assumptions about voters' behavior. *See, e.g.*, *LULAC v. Perry*, 548 U.S. 399, 433 (2006) ("[A] State may not assum[e] from a group of voters' race that they think alike, share the same political interests, and will prefer the same candidates."). And it is also why courts have generally refused to credit speculation that facially neutral and broadly applicable voting rules will favor one party over another. *See* MTD at 17-18 (collecting cases).

All this means that, to establish standing here, Plaintiffs must actually trace some specific agency activities implementing the Executive Order to a materially burdensome increase in registrations.[3] But while the Executive Order has been in effect for three and a half years, and registration periods have nearly closed in many states, Plaintiffs' declarations are devoid of actual data showing that the named officials are facing a discernable increase in registrations at all—much less a burdensome increase that is attributable to a specific agency activity under the Executive Order. *See* Leland Decl. ¶¶ 17-24, ECF No. 61 (providing "turnout" and "registration" data for 2012, 2016, and 2020 but no data after the Executive Order); Katz Decl. ¶¶ 8, 11, ECF No. 61 (Executive Order "*could* result in an increase in deficient registrations" and "*could* increase" costs (emphasis added)); *see generally* MTD at 15-17 (detailing the absence of data in Plaintiffs' prior filings); Sur-Reply at 2-4 (same).



The closest Plaintiffs come to any kind of concrete showing of burden is their assertion that, over some unspecified period, the County Clerk of Allegan County in Michigan has seen some "increase in questions about registering college students" and an unquantified increase in "Federal Postcard Applications." Genetski Decl. ¶¶ 8, 10, ECF No. 61. But inquiries about college students voting is entirely unremarkable in the runup to an election, and Plaintiffs provide no indication that the questions they have received have anything to do with the federal agencies' activities they challenge. *See*

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time or bother or out-of-pocket expense deter many people from voting.").

[3] Plaintiffs protest that they only have to show that the Executive Order is "a contributing factor" to their injury. Resp. at 13. But the Supreme Court had made clear that Article III is not satisfied by "attenuated links . . . where the government action is so far removed from its distant (even if predictable) ripple effects." *All. for Hippocratic Med.*, 602 U.S. at 383. And, in any event, Plaintiffs have not drawn any plausible connection between any action implementing the Executive Order and their asserted injury at all.

*id.* Indeed, Plaintiffs have pointedly failed to discover any such links despite visiting college campuses. *See* Jackson Dec. ¶¶ 8–9, ECF No. 61 (noting that "campaign staff has spent time and resources monitoring improper voter registration efforts at West Texas A&M University" but noting that they "did not observe improper voter registration efforts"); Sur-Reply at 3 (discussing prior declaration of Gina D'Andrea who visited a campus but found nothing objectionable); *see also* Genetski Decl. ¶¶ 10, 28 (noting "three registration forms from a registration drive on" a campus without further specifics).

Meanwhile, the Federal Postcard Application—which facilitates voting by military members and overseas citizens—has been used for decades, having been created pursuant to the Uniformed and Overseas Citizens Absentee Voting Act of 1986, 52 U.S.C. § 20301 *et seq.* *See generally* https://www.fvap.gov; *see also* Pub. L. No. 111-84, §§ 577-89 (2009) (establishing procedures for service members and overseas voters to submit registration and absentee ballot applications). Plaintiffs fail to identify any changes made to this program as a result of the Executive Order, much less ones that could be responsible for any asserted increases in questions or applications. *See* Resp. at 6-7.[4] This dooms their efforts to establish a causal chain.



Plaintiffs cannot end-run this evidentiary gap by generally postulating that registrations attributable to the Executive Order may burden officials because they are more likely to be incomplete or otherwise not "optimal." Resp. at 6-7. Especially in the absence of historic data about registrations—which are now winding down as the election approaches—Plaintiffs' claims on this score invite the Court to make generalized assumptions about the behavior of innumerable unregulated individuals. Yet, as demonstrated by the cases Defendants cited in their motion, courts rightly decline to find standing based on such speculation. *See, e.g.*, *Shelby Advocs. for Valid Elections v. Hargett*, 947 F.3d 977, 981 (6th Cir. 2020) ("[N]early all of the plaintiffs' allegations of past harm stem from human error" but "[t]hey do not allege—they cannot plausibly allege—that . . . officials *always* make these mistakes."); *see* MTD at 14 (citing cases). Plaintiffs, again, have no response to these authorities. Resp. at 6-7. But

[4] Further, Plaintiffs repeat that they "are not pressing claims against" the Department of Defense (DoD). *See* Resp. at 23 n.2. But DoD administers the Federal Voting Assistance Program, under which the Federal Postcard Application is distributed. So any burdens from that are irrelevant.

they are fatal to Plaintiffs' standing theories here.

*B.* *Candidates, Parties, and the Plaintiff Organization Lack Standing*

Plaintiffs' efforts to establish standing for candidates and political parties fare no better. Resp. at 7-11. Plaintiffs spend pages of their brief arguing that "competitive[] disadvantage" can be a cognizable injury. *Id.* at 7-10. But that is not the issue. Defendants do not dispute that, unlike the asserted burdens to election officials, competitive injury *may* be cognizable. *See* MTD at 13. The problem is that Plaintiffs have not established that the Executive Order creates a competitive disadvantage in the first place. To do that, Plaintiffs would, at a minimum, have to show that specific agency activities will lead (1) a significant and disproportionate number of Democratic voters to register in Plaintiffs' districts and (2) to ultimately cast ballots for Plaintiffs' opponents. *See* MTD at 14-15; Sur-Reply at 2.

Plaintiffs have not satisfied that burden. As Defendants explained, the activities contemplated by the Executive Order are strictly nonpartisan. And Plaintiffs cannot overcome that fact with generalized assumptions about the political preferences or voting patterns of people who interact with federal agencies. *See* Resp. at 10-11. Such speculation about voters on a nationwide scale runs headlong into all the logical and legal flaws that Defendants' motion detailed. MTD at 13-18. Indeed, Plaintiffs have not even established, as a preliminary matter, that any particular agency activity is leading to a meaningful number of new registrations in the relevant geographic areas. *See* MTD at 15; Sur-Reply at 3-4; *see also* TRO Order at 4 (explaining that Plaintiffs must demonstrate party-specific harm to establish Article III standing).

Plaintiffs never engage with any of the authorities Defendants cited or with the substance of Defendants' arguments. Resp. at 9-11. Instead, they generally protest that they do not need "quantitative data" where there is "at least general data that would lend itself to an inference of specific impact." Resp. at 9. Tellingly, however, the principal case that Plaintiffs cite for this proposition, *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949 (7th Cir. 2007), reviewed trial court proceedings where the parties demonstrated concrete impacts of a specific statutory provision on identified voting blocks in one State. *See Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 795-809 (S.D. Ind. 2006)

(detailing plaintiffs' evidence), *aff'd sub nom. Crawford*, 472 F.3d 949.[5] Plaintiffs do not come close to that kind of showing here. Rather, in the space of two conclusory sentences, they point to new declarations that merely offer the same generalized opinions by the candidates and a previously undisclosed "expert" that unidentified agencies are *likely* to interact with Democratic voters—and that such interactions may ultimately disadvantage Republican candidates' electoral prospects. *See* Jackson Decl. ¶¶ 6-24, ECF No. 61 (identifying no link between agency activities and increases in registrations); Meuser Decl. ¶¶ 7-23, ECF No. 61 (same); Tiffany Decl. ¶¶ 6-27, ECF No. 61 (same); Krause Decl. ¶¶ 5-13, ECF No. 61 (same); Essayli Decl. ¶¶ 6-18, ECF No. 61 (same); Gorka Decl. ¶¶ 7-30, ECF No. 61 (same); Shepard Decl. ¶¶ 7-37, ECF No. 61 (same); Rice Decl. ¶¶ 7-24, ECF No. 61 (same),; *see also* Kincaid Decl. ¶¶ 10-41, ECF No. 61 (proffered expert opining about political preferences of various "communities targeted by EO 14019").

But these "general" assertions that people who "'interfac[e] with the Federal Government [are] likely to vote for Democratic candidates'" do not overcome this Court's prior observation that such "broad" statements do not "plausibly implicate the specific programs" Plaintiffs are trying to challenge. TRO Order at 3. In the absence of actual data or information connecting the Executive Order or its implementation to voter registrations in Plaintiffs' specific areas, Plaintiffs' fears about electoral disadvantage are nothing more than "speculation about the unfettered choices made by independent actors not before the courts." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 415, n.5 (2013). Precedent forecloses finding standing based on that kind of speculation. MTD at 13-14.



*C. Plaintiffs' Remaining Standing Theories Fail*

Disposing of Plaintiffs' other standing theories leaves only their newly asserted claim that agency actions implementing the Executive Order injure States by threatening them with "potential loss of federal funding." Resp. at 11-13, 15. This is a perplexing argument. Any alleged loss of funding is a sovereign interest of a State—but no State appears in this case as a Plaintiff. *See* FAC ¶¶

[5] Meanwhile, the other cases they cite, including *DAPA* and a case related to a federal vaccine mandate, have nothing to do with elections at all, and do not address the same causation problems at issue here. *See* Resp. (citing *DAPA* and *Louisiana v. Biden*, 55 F.4th 1017, 1035 (5th Cir. 2022)).

17-34, ECF No. 11 (listing Plaintiffs). Rather, Plaintiffs appear to be invoking that interest as a basis to support the standing of State election officials. But Plaintiffs cite no authority to suggest that those officials are empowered to sue to vindicate potential financial losses to the State. Resp. at 12 (citing Ohio and Montana legal codes). And nothing about those officials' duties to monitor and administer elections suggests that they can invoke financial losses to the State as a personal injury. *See id.* So those officials' fears of funding loss are nothing more than a "wholly abstract and widely dispersed" generalized grievance shared by all State officials and residents, which cannot establish jurisdiction under Article III. *Raines v. Byrd*, 521 U.S. 811, 829 (1997); *Lance v. Coffman*, 549 U.S. 437, 439 (2007) ("[A] plaintiff raising only a generally available grievance about government . . . does not state an Article III case or controversy." (citing *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560–561 (1992)); *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 344 (2006) (explaining why taxpayer standing is prohibited).

Even putting aside that insurmountable problem, Plaintiffs again fail to connect their fears of funding loss to the Executive Order. The only specific agency activity that Plaintiffs identify as supposedly threatening a loss of funding to the State is a Department of Education (ED) letter that reminded institutions of higher education about their obligations under the Higher Education Act. Resp. at 11-12; *see also* MTD at 26-27 (explaining that the letter does not create or alter any legal obligations). But, as Plaintiffs themselves acknowledge, this letter merely quotes the language of the Higher Education Act, which has long required institutions receiving federal funding to "make a good faith effort to distribute [] mail voter registration form[s] . . . to each student . . . physically in attendance at the institution, and to make such forms widely available to students at the institution." 20 U.S.C. § 1094(a)(23). Plaintiffs nowhere explain how, by referencing this longstanding requirement, the letter imposed a new or additional obligation—or otherwise threatened State funding. Resp. at 11-12.

That leaves Plaintiffs' generalized complaints that "States have interests in election integrity." Resp. at 13. But—again—no Plaintiff here is a State. And Plaintiffs have not offered any concrete evidence to substantiate their fears that anything might compromise the integrity of the election. *See* MTD at 20. In any event, their unsupported speculation about the possibility of ineligible people voting is a classic form "of undifferentiated, generalized grievance about the conduct of government

that" affects all members of the public equally and which courts "have refused to countenance in the past." *Lance*, 549 U.S. at 442. Defendants' motion cited more than a dozen cases holding that alleged concerns about "illegitimate or otherwise invalid ballots" is "an insufficient injury in fact to support standing." *Republican Nat'l Comm. v. Burgess*, No. 3:24-CV-00198-MMD-CLB, 2024 WL 3445254, at *6 (D. Nev. July 17, 2024); *see* MTD at 20. Plaintiffs do not respond to any of these authorities or offer anything beyond "vague, generalized allegation that elections, generally, will be undermined"—which, as another district court noted when rejecting an analogous challenge to the Executive order, "is not the type of case or controversy that this court may rule on under Article III." *Keefer v. Biden*, No. 1:24-CV-00147, 2024 WL 1285538, at *10 (M.D. Pa. Mar. 26, 2024), *appeal pending* No. 24-1716 (3d Cir.).

Finally, neither America First Policy Institute nor any other Plaintiff can establish standing by pointing to unquantified expenditures of time and money "to counteract the EO's implementation with education programming" about election integrity. Resp. at 13. As Defendants previously detailed—and as Plaintiffs fail to acknowledge—standing cannot be based on such "self-inflicted injury." *Zimmerman v. City of Austin*, 881 F.3d 378, 389 (5th Cir. 2018). *See* Sur-Reply at 5.[6] Just as organizations could not satisfy Article III by incurring costs to "conduct their own studies" about a drug that the FDA has approved, *All. for Hippocratic Med.*, 602 U.S. at 394, so too Plaintiffs cannot short-circuit the complex chain of causation required in this case by expending "time, effort, and resources to assess" the extent to which they might disagree with the policies of the Executive Order. Resp. at 13.



## II. Plaintiffs Have Failed to Establish That Their Claims Are Cognizable Under the APA

Given Plaintiffs' continued failure to establish Article III jurisdiction, there is no need for this Court to further consider the other threshold defects in Plaintiffs' APA claims. But here too Plaintiffs fail to respond to the jurisdictional flaws Defendants identified.

[6] This same principle also renders irrelevant Plaintiffs' assertions that their campaigns have been expending resources in supposed response to the Executive Order—as well as their assertion that state officials must "analyze the new guidance" and determine whether it affects them or the public. Leland Dec. ¶¶ 5-6; *see also* Genetski Dec. ¶ 6; TRO Order at 4 ("[I]t is not clear . . . that committing additional resources to a political election is a cognizable standing injury anyway.").

1. As Defendants' motion explained, MTD at 22-24, Plaintiffs' complaint presents a broad and unbounded challenge to the activities of "*all* [] federal agencies," whether expressly identified in the complaint or not, that those agencies are "taking, *or planning to take*, [] to implement the EO." FAC ¶ 45 (emphasis added). But the APA cannot be used to mount a "'broad programmatic attack'" on even a *single* agency's activities—much less to launch an across-the-board fusillade against an unspecified list of agencies' ongoing policymaking. MTD at 22 (quoting *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62-64 (2004)). Indeed, Defendants' motion cited numerous cases rejecting APA challenges to "significantly narrower programs"—and identified some of the many legal and logistical problems that the Court would face were it to attempt to apply APA standards here. MTD at 23.

Plaintiffs do not address any of these defects or respond to any of the cases that Defendants cited. Resp. at 15-17. They do not explain how their limitless "all-of-government" challenge, FAC ¶ 45, could possibly be permissible when precedent establishes that even much narrower challenges to a single agency's programs are not. *See S. Utah Wilderness All.*, 542 U.S. at 64-67 (rejecting, as an impermissibly "broad programmatic attack," a plaintiff's claim that agency failed in duty "to protect public lands in Utah from damage caused by [off-road-vehicle] use"). And they do not even attempt to wrestle with the practical impossibility of evaluating whether an unspecified list of agency activities must have gone through notice and comment rulemaking, whether those activities improperly departed from prior policy, or whether those activities were somehow pretextual. *Id.* This "failure to respond to arguments constitutes abandonment or waiver of the issue." *Kellam v. Servs.*, No. 3:12-CV-352-P, 2013 WL 12093753, at *3 (N.D. Tex. May 31, 2013); *see also United States v. Reagan,* 596 F.3d 251, 254 (5th Cir. 2010) (holding that a failure to adequately brief an argument results in waiver); *Firestone Fin. Corp. v. Meyer*, 796 F.3d 822, 825 (7th Cir. 2015) ("[A] party generally forfeits an argument or issue not raised in response to a motion to dismiss."). Plaintiffs cannot proceed under the APA.

2. Nor does Plaintiffs' response address their other fatal threshold problem: namely, that none of the agency activities Plaintiffs have targeted constitute reviewable "final agency action" because (1) those activities are ongoing, meaning they do not reflect the consummation of a decision-making process, and (2) do not affect anyone's rights or obligations. MTD at 24-27. Plaintiffs skip

over the first factor entirely. *See* Resp. at 15-17. And as for the second, Plaintiffs never explain how merely providing nonpartisan information to the public about *State* law requirements imposes any "obligations on those receiving" the information or "modif[ies] [any] legal rights." Resp. at 16.

Indeed, Defendants' motion detailed at length how the various activities identified in the White House fact sheets—including the letter sent by ED, which Plaintiffs repeatedly reference—merely convey advice or information, which is something courts have repeatedly held does not constitute final agency action and is even less significant than the types of "'general policy statements'" that courts have declined to review under the APA. MTD at 27-28 (quoting *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 808 (D.C. Cir. 2006)). Plaintiffs do not engage on any of these details or respond to any of these authorities—instead merely asserting that "[m]any of the" unidentified implementing activities are final because the "EO ordered agency heads to take *action*, which means that they must deliberate, decide, and then act." Resp. at 17. But these types of empty semantics map on to no known standard of APA review and cannot begin to save Plaintiffs' claims.

In short, Plaintiffs' response demonstrates that they cannot establish the existence of final agency action. Their APA claims should therefore be dismissed for failure to establish the "jurisdictional prerequisite of judicial review" under the APA. *Louisiana State v. United States Army Corps of Engineers*, 834 F.3d 574, 584 (5th Cir. 2016).



## III. The Complaint Should be Dismissed Because Plaintiffs Fail to Respond to Defendants' Rule 12(b)(6) Arguments

Plaintiffs' failure to preserve their claims is even more stark on the merits. In addition to challenging jurisdiction, Defendants moved to dismiss the complaint under Rule 12(b)(6), explaining that every count of Plaintiffs' complaint failed as a matter of law because (1) the Executive Order reflected a proper exercise of the President's constitutional authority, and (2) all the of the identified agency implementing activities were consistent with law. MTD at 35-37 (addressing Count I); *id.* at 28-35 (addressing "Counts II through XI"). Yet despite this clear invocation of Rule 12(b)(6) as a separate a basis for dismissing both the *ultra vires* and the APA claims, Plaintiffs' response offers no rebuttal to the merits of those arguments, which spanned ten pages in Defendants' brief.

To be sure, Plaintiffs included two pages nominally addressing the merits of some of their claims as part of their reply on the TRO-PI motion. *See* TRO-PI Reply at 6-7, ECF No. 38. But Plaintiffs stated that they were only doing so to the extent needed to secure preliminary relief, and that they would oppose Defendants' motion separately. *Id.* at 2, n.1.[7] And, consistent with that promise, Plaintiffs' MTD response now includes the same arguments about final agency action that Plaintiffs previously included in the reply. Resp. at 16-17. Their failure to do the same for the merits of their claims should be construed as a deliberate forfeiture. *See, e.g.*, *Clayton v. U.S. Xpress, Inc.*, 538 F. Supp. 3d 707, 713 (N.D. Tex. 2021) (where plaintiff responded to motion for summary judgment on one claim but did "not address or respond to the Motion regarding" a second claim, the plaintiff "abandoned or waived" the second claim (citing caselaw)); *Charboneau v. Box*, No. 4:13-CV-678, 2017 WL 1159765, at *13 (E.D. Tex. Mar. 29, 2017) ("[A] plaintiff's failure to brief an argument in the plaintiff's response to a motion to dismiss generally results in waiver of such argument."). Accordingly, Plaintiffs' claims should be dismissed pursuant to Rule 12(b)(6) as well.



## IV. Plaintiffs' Request for Adverse Inferences Is Wholly Unjustified

Rather than engage with the substance of Defendants' arguments, Plaintiffs renew their demand for the Court to fill any "gaps in the evidentiary record" by drawing an adverse inference that unspecified agency activities "are inflicting . . . irreparable harms" on Plaintiffs. Resp. at 18-19. But this demand ignores the facts—and finds no support in any legal authority.

As Defendants explained in their brief, Plaintiffs' suggestion that Defendants are "withholding [] evidence" in other proceedings is as untrue as it is irrelevant. Resp. at 18. The government released numerous responsive documents pursuant to the cited FOIA requests, and the fact that it invoked established exemptions for others is unremarkable. *See Found. for Gov't Accountability v. U.S. Dep't of Just.*, 688 F. Supp. 3d 1151, 1158-59, 1178 (M.D. Fla. 2023) (acknowledging government's prior release

[7] Plaintiffs' abbreviated treatment of these issues in their reply is unpersuasive in any event. Defendants' motion explained in detail how the Executive Order was an exercise of the President's constitutional authority to supervise Executive Branch agencies. MTD at 35-37. And it articulated all the ways in which Plaintiffs' APA claims misconceived various agency activities. *Id.* at 28-35. Plaintiffs' reply did not wrestle with the details of any of those arguments. *See* TRO-PI Reply at 6-7.

of numerous responsive records, and reserving judgment on whether three specific withholdings were justified under FOIA). Indeed, the government produced extensive evidence, including declarations from senior White House officials, explaining why the very narrow set of documents there were protected by a FOIA exemption for privileged materials—a position that court then *sustained*. *Am. First Legal Found. v. U.S. Dep't of Agric.*, No. 22-3029, 2023 WL 4581313 (D.D.C. July 18, 2023), *appeal pending*. Finally, multiple federal agencies are actively engaged in the constitutional accommodation process regarding requests from congressional committees, which is the appropriate procedure for information requests between co-equal branches of government to be handled and resolved.

Plaintiffs here, however, are not suing over a FOIA request and are not Congress. Nor have they shown that any requests for information they made in this action have been ignored. Rather, it is *Defendants* that have challenged Plaintiffs to provide information necessary to satisfy well-established Article III standards. Plaintiffs identify no case where a court deployed adverse inferences against a party that bears no obligation to provide material. *See, e.g.*, *Int'l Chem. Workers Union v. Columbian Chemicals Co.*, 331 F.3d 491, 497 (5th Cir. 2003) ("[W]hen a subpoena is ignored, a party can draw an adverse inference . . . [but] in this case, the Union was never granted a subpoena."). Nor do they cite any case where a court used adverse inferences to shift Plaintiffs' Article III burden to a government defendant and just assumed that Plaintiffs had been harmed. *See* Resp. at 19.



The unsupported nature of Plaintiffs' request is confirmed by the fact that they are not asking for adverse inferences to fill any specific or identified gap in a record. *See, e.g.*, *Ward v. Thompson*, No. 22-16473, 2022 WL 14955000, at *2 (9th Cir. Oct. 22, 2022) (Plaintiffs' invocation of the Fifth Amendment before committee used to infer that Plaintiffs' "conduct during the period in question went beyond simple discussions with her political associate"); *United States Sec. & Exch. Comm'n v. Collector's Coffee, Inc.*, 697 F. Supp. 3d 138, 154-55 (S.D.N.Y. 2023) (drawing adverse inference from party's invocation of Fifth Amendment right on specific topic). Rather, they are asking the Court to presume wholesale illegality on the part of innumerable and unidentified agencies based on a handful of FOIA disputes that to date have been adjudicated in the government's favor and on ongoing accommodation discussions between multiple federal agencies and Congress.

All this suggests that, instead of seeking a traditional evidentiary ruling, Plaintiffs are attempting to draw this Court into those entirely separate disputes. Precedent counsels otherwise. *See Trump v. Mazars USA, LLP*, 591 U.S. 848, 858-67 (2020) (explaining that historically, information disputes between the political branches have been "hashed out in the 'hurly-burly, the give-and-take of the political process between the legislative and the executive'" (citation omitted)); *W. Gulf Maritime Ass'n v. ILA Deep Sea Local 24*, 751 F.2d 721, 728 (5th Cir. 1985) ("The federal courts have long recognized that the principle of comity requires federal district courts—courts of coordinate jurisdiction and equal rank—to exercise care to avoid interference with each other's affairs.").[8] The only reasonable inference to draw is that Plaintiffs themselves know they have not met their burden—and that their complaint should be dismissed.



## V. Discovery Is Inappropriate and Unjustified

Plaintiffs' request for discovery rests on no firmer footing. It is black-letter law that courts permit jurisdictional discovery only when jurisdiction "turns on a disputed fact." *In re MPF Holdings US LLC*, 701 F.3d 449, 457 (5th Cir. 2012). But where, as here, "a party makes a Rule 12(b)(1) motion without including evidence, the challenge to subject matter jurisdiction is facial"—and raises no factual dispute. *Murphy v. Amarillo Nat'l Bank*, No. 2:20-CV-048-Z, 2021 WL 40779, at *3 (N.D. Tex. Jan. 5, 2021) (citing *Hunter v. Branch Banking & Tr. Co.*, No. 3:12-CV-2437-D, 2013 WL 607151, at *2 (N.D. Tex. Feb. 19, 2013)); *see also Davila v. United States,* 2011 WL 13138088, at *12 (W.D. Tex. 2011) (denying motion for jurisdictional discovery because the United States' motion was a facial, not factual challenge); *AccuCredit Associates, LLC v. Diversified Global Systems, LLC*, 2019 WL 11276332, at *2 n.4 (D.N.J. 2019) (rejecting jurisdictional discovery where defendants made facial, not factual, challenge).

This absence of a factual dispute is evident from the filings in this case. Although Plaintiffs have now submitted three sets of declarations in support of their efforts to establish harm, Defendants have never contested the facts asserted in those declarations. Rather, Defendants have merely

[8] Indeed, Plaintiffs spend several pages of their brief disputing Defendants' position in another case that the Presidential Communications Privilege is available with respect to some documents. *See* Resp. at 20-21. At best, this could be seen as an effort to secure an advisory opinion.

explained why Plaintiffs' own allegations, accepted as true, persistently fall short of establishing causation. *See* MTD at 14-17; Sur-Reply at 3-5. Defendants have not, for example, contested the fact that Plaintiffs may be "continuing to investigate" the Executive Order; that they are receiving questions about registrations; or that they have some unexplained concerns about the Order's allegedly partisan effects. *See* MTD 14-17; Sur-Reply at 3-5. Rather, Defendants have detailed that all these general statements are insufficient as a legal matter to withstand dismissal because they fail to connect any asserted injury to any identified activity by any particular defendant agency. *See id.* This is a far cry from the kinds of cases Plaintiffs cite in their brief, most of which deal with parties contesting personal jurisdiction on the basis of disputed facts. *See* Resp. at 21-22.

Tellingly, Plaintiffs do not even detail which particular "evidentiary gaps" in their jurisdictional showing they would try to fill with discovery. Resp. at 22. Instead, they merely assert that they would propound undefined interrogatories and seek Rule 30(b)(6) depositions about the implementation of the Executive Order across six different agencies—and also seek production of "strategic plans" that another court concluded are subject to a FOIA exemption for privileged information. Resp. at 22-23. This has all the features of a fishing expedition borne out of Plaintiffs' frustration with other proceedings. And that impression is only reinforced by Plaintiffs' suggestion that discovery would address whether agency activities "pursue[d] an improper partisan objective" or were based on "pretext." Resp. at 23. These questions, Plaintiffs admit, bear on the merits of their APA claims rather than on jurisdiction. *Id.* Yet it is well established that Courts review APA claims based on "the administrative record already in existence, not some new record" created through discovery—so even if Plaintiffs could satisfy the APA's jurisdictional prerequisites, they would have no legitimate basis to seek discovery on those topics here. *Camp v. Pitts*, 411 U.S. 138, 142 (1973).

In short, Plaintiffs have a burden to clearly allege facts demonstrating the elements of Article III jurisdiction. They have not done that. This case should be dismissed.

## CONCLUSION

For these reasons, the Court should dismiss Plaintiffs' amended complaint for lack of subject-matter jurisdiction or, in the alternative, for failure to state a claim.

Dated: October 11, 2024

Respectfully submitted,

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