No. 24-3236

IN THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

JAY ASHCROFT, in his official capacity as Secretary of State for the State of Missouri, STATE OF MISSOURI ex rel. ANDREW BAILEY, ATTORNEY GENERAL, et al.,

Plaintiffs-Appellants,

v.

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

Defendants-Appellees.

On appeal from the United States District Court
for the Eastern District of Missouri

PLAINTIFFS-APPELLANTS' MOTION FOR INJUNCTION PENDING APPEAL AND FOR TEMPORARY ADMINISTRATIVE INJUNCTION PENDING RESOLUTION OF THIS MOTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page(s)**

Constitutional and Statutory Authority

Other Authorities

INTRODUCTION

In this case, Missouri and Arkansas election officials and the State of Missouri (collectively, "State Officials") challenge the Biden Administration's Executive Order 14019 ("EO 14019"), which directs federal agencies to perform partisan campaign activities like voter registration and mail-in ballot harvesting. The Order seeks to convert the federal bureaucracy into a voter-registration and get-out-the-vote organization designed to promote partisan goals, in partnership with third-party organizations with a dubious history of compliance with state election laws.

EO 14019 and its implementation are unlawful. Under the Constitution, the States—not federal agencies—have primary authority to regulate and oversee elections. By creating a federal electioneering bureaucracy by executive fiat, EO 14019 threatens the integrity of elections nationwide, encroaches on traditional state authority, and imposes ongoing costs on State election officials.

In the court below, Appellants provided undisputed evidence of burdens and costs that EO 14019 inflicts on the States, clearly demonstrating their standing under *Biden v. Nebraska*, 143 S. Ct. 2355 (2023), and *Department of Commerce v. New York*, 588 U.S. 752 (2019). Yet the district court, relying on an inapposite case that no party briefed—*Murthy v. Missouri*, 144 S. Ct. 1972 (2024)—held that state and local election officials lack standing to challenge EO 14019. That holding was

plainly in error. The Court should grant an injunction pending appeal against EO 14019 and its implementation by the Federal Defendants.[1]

BACKGROUND

I. Executive Order 14019 Purports to Federalize Voter Registration.

On March 7, 2021, President Biden issued EO 14019, *see* 86 Fed. Reg. 13,623. The Order was drawn from "an initiative" that the partisan, left-wing organization Demos "promoted as a priority for the Biden-Harris administration" and was "a focal point of [its] work for years." @Demos.org, X (Mar. 7, 2021, 12:24 PM), https://twitter.com/Demos_Org/status/1368613436318511109.

EO 14019 proclaims that a "duty" of the Federal Government is "to ensure that registering to vote and the act of voting be made simple and easy for all those eligible to do so." EO 14019, § 1. The Order states that it is the "responsibility of the Federal Government to expand access to, and education about, voter registration and election information, and to combat misinformation, in order to enable all eligible Americans to participate in our democracy." § 2. EO 14019 directs federal agencies and departments to "consider ways to expand citizens' opportunities to register to vote and to obtain information about, and participate in, the electoral

[1] For the reasons stated below, *see infra* Parts II-III, given the urgency of the relief sought and Appellants' ongoing irreparable injuries, "moving first in the district court" for this injunction pending appeal "would be impracticable." Fed. R. App. P. 8(a)(2)(A)(i). That said, Appellants are simultaneously filing a motion for injunction pending appeal in the district court, and will promptly notify this Court of any ruling.

process." § 3. Agency heads must "evaluate ways in which the agency can … promote voter registration and voter participation." § 3(a).

EO 14019 mandates that agencies implement "ways to provide relevant information … about how to register to vote;" "ways to … transition from agencies' websites directly to State online voter registration systems or appropriate Federal websites;" and "ways to provide access to voter registration services and vote-by-mail ballot applications." § 3(a)(i)–(iii). EO 14019 directs agencies to devise ways to distribute "voter registration and vote-by-mail ballot application forms, and [to provide] access to applicable State online systems for individuals who can take advantage of those systems; [to assist] applicants in completing voter registration and vote-by-mail ballot application forms in a manner consistent with all relevant State laws; and [to solicit and facilitate] approved, nonpartisan third-party organizations and State officials to provide voter registration services on agency premises." § 3(a)(iii)(A)-(C). Furthermore, the Order directs agencies to consider "whether, consistent with applicable law, any identity documents issued by the agency to members of the public can be issued in a form that satisfies State voter identification laws." § 3(a)(v).

The head of each federal agency was required to submit to the White House "a strategic plan outlining the ways identified" in which "the agency can promote voter registration and voter participation." § 3(b).

II. Federal Agencies Implement EO 14019.

Federal agencies have dutifully implemented EO 14019 pursuant to the plans required under § 3(b). The Department of Homeland Security, for example, has and is issuing documents that allow non-citizens, including illegal aliens, to register to vote and to vote. App.84; R. Doc. 51, at 3 & n.2 (gathering sources). The Department of Housing and Urban Development is advising public-housing authorities how to run voter registration drives and set up ballot boxes. Fred Lucas, *HUD Pushes Voter Registration Drives in Public Housing Under Biden's Executive Order*, THE DAILY SIGNAL (2022), https://www.dailysignal.com/2022/04/27/hud-pushes-voter-registration-drives-in-public-housing-under-bidens-executive-order/. "Previously, officials at many local public housing agencies said they couldn't get involved in voter registration because they accept money from the federal government." *Id.* The Department of Education directed that colleges could use Federal Work Study funds to support voter registration activities. *See* U.S. Dep't of Educ., Gen-22-05, Requirements for Distribution of Voter Registration Forms 1 (Apr. 21, 2022).[2]

Those are just some of many examples. *See* App.84–86; R. Doc. 51, at 3–5. Moreover, the full scope of the federal bureaucracy's implementation of EO 14019

[2] https://fsapartners.ed.gov/knowledge-center/library/dear-colleague-letters/2022-04-21/requirements-distribution-voter-registration-forms.

is concealed from the public. EO 14019's implementation plans were not published in the Federal Register, and the government has refused to produce them in response to FOIA requests or subpoenas from Congress. *See* App.85–86; R. Doc. 51, at 4–5 & n.7.

III. State Officials Challenge EO 14019's Federalization of Election Activity.

State election officials recognize that EO 14019 is unlawful and that converting every interaction between a federal agency and member of the public into a voter-registration drive causes "duplicate registrations, confuse[d] citizens, and" complications in overseeing voter registration and elections. *See* App.110; R. Doc. 51-5, at 2 (letter from fifteen Secretaries of State).

Secretaries of State Jay Ashcroft of Missouri and John Thurston of Arkansas, along with two Missouri local election officials—McDonald County Clerk Kimberly Bell and St. Charles County Election Director Kurt Bahr—filed this lawsuit on July 31, 2024, to challenge EO 14019. App.8; R. Doc. 1. The State of Missouri also filed suit (*Missouri v. Biden*, No. 4:24-cv-01063), and the two cases were consolidated. App.123; R. Doc. 55. The suits name President Biden and the heads of agencies known to be implementing EO 14019 as defendants (the "Federal Defendants"). *See* App.12–14; R. Doc. 1, at 5–7; Compl. ¶¶ 15–29, *Missouri v. Biden*, No. 4:24-cv-01063 (Aug 1, 2024).

On September 25, 2024, the State Officials filed a motion for a preliminary injunction. App.68; R. Doc. 48; *see also* App.74; R. Doc. 51. In support of the motion, they submitted declarations of state officials attesting to the specific harms that EO 14019 inflicts on the States. App.65; R. Doc. 1-11; App.115; R. Doc. 51-9.

On October 30, 2024, the district court denied the motion on standing grounds. App.7; R. Doc. 68. First, the district court held that the claim that EO 14019 imposes costs on the States is too speculative. *Id.* at 6. Next, it concluded that the State Officials failed to "draw a causal connection between any action taken pursuant to the EO and an increase in costs." *Id.* Finally, in analyzing the State Officials' interests in fair and honest elections, the court held that the State Officials "do not specifically allege the involvement of any third-party organization in implementing the EO; nor do they allege any third-party action that threatens the actual or apparent integrity of the election." *Id.* at 7.

On November 3, 2024, the State Officials appealed.

ARGUMENT

"To be entitled to an injunction pending appeal, appellants … must show (1) the likelihood of success on the merits; (2) the likelihood of irreparable injury to appellants absent an injunction; (3) the absence of any substantial harm to other interested parties if an injunction is granted; and (4) the absence of any harm to the

public interest if an injunction is granted." *Shrink Mo. Gov't PAC v. Adams*, 151 F.3d 763, 764 (8th Cir. 1998).

I. The State Officials Demonstrate Likelihood of Success on the Merits.

A. The State Officials Have Standing.

Standing requires a plaintiff who has "suffered an injury in fact—a concrete and imminent harm to a legally protected interest, like property or money—that is fairly traceable to the challenged conduct and likely to be redressed by the lawsuit." *Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023). The State Officials are entitled to "special solicitude in the standing analysis," which means "imminence and redressability are easier to establish here than usual." *Gen. Land Office v. Biden*, 71 F.4th 264, 274–75 (5th Cir. 2023) (quotations omitted).

1. The State Officials face monetary harms.

"For standing purposes, a loss of even a small amount of money is … an 'injury.'" *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 464 (2017). Here, "State and local election officials will be forced to bear the expenses caused by EO 14019 and to pay for these costs from state and local revenue." App.116; R. Doc. 51-9, at 3. There are two such expenses. First, there are the costs of processing every new voter registration produced by EO 14019. Reviewing and processing new registrations "imposes a significant administrative burden and cost upon county clerks and election officials." *Id.*; *see also*, *e.g.*, App.119–120; R. Doc. 51-10, at 2–

3; App.26–28; R. Doc. 1, at 19–21. As Bell states, "[t]he review and vetting of those voter registration applications and requests for mail-in ballots imposes a significant administrative burden and cost upon county clerks and election officials." App.65–66; R. Doc. 1-11, ¶ 5; *see also* App.116; R. Doc. 51-9, ¶ 4.

Second, there are expenses caused by the fact that "involving Federal agencies in the voter registration process will produce duplicate registrations, confuse citizens and complicate the duties of county clerks and election officials." App.27; R. Doc. 1, at 20; *see* App.110; R. Doc. 51-5, at 2; App.115; R. Doc. 51-9, at 2; App.119; R. Doc. 51-10, at 2.

Both expenses give rise to standing. Federal programs that impose financial costs on States inflict Article III injuries. *Nebraska*, 143 S. Ct. at 489. That includes federal policies that impose direct out-of-pocket costs, and those that increase costs of administering state programs. *See Texas v. United States*, 809 F.3d 134, 155 (5th Cir. 2015), *aff'd by an equally divided court*, 579 U.S. 547 (2016) (driver's licenses); *see also*, *e.g.*, *Texas v. Biden (MPP I)*, 10 F.4th 538, 547 (5th Cir. 2021) (per curiam).

Processing voter registration applications creates undisputed costs. Federal agencies who are implementing an executive order whose stated goal is "to expand access to … voter registration," EO 14019 § 2, will increase the number of voter registrations applications and thus those costs. It is not speculative to conclude that

the Federal Defendants are increasing voter registrations in the relevant States—as many openly proclaim they are doing. That fact alone establishes standing.

The evidence supports that common-sense conclusion. The district court's own analysis provides quotes from Secretary Ashcroft and Bell saying EO 14019 *will* do just that. App.5–6; R. Doc. 68, at 5–6. The complaint contains similar allegations. App.26–28; R. Doc. 1, at 19–21. Further, as the record shows, App.20, 26–27; R. Doc. 1, at 13, 19–20; App.115; R. Doc. 51-9, at 2; App.119; R. Doc. 51-10, at 2, increasing the number of voter registration applications "will produce duplicate registrations, confuse citizens and complicate the duties of county clerks and election officials," thus producing costs and burdens that "fall[] on local officials" such as the plaintiffs here, App.27–28; R. Doc. 1, at 20-21. An increase in voter registration applications will result in an increase in erroneous applications.

That suffices to establish standing. "When assessing standing at the preliminary injunction state, this circuit has assumed the complaint's allegations are true and viewed them in the light most favorable to the plaintiff." *Dakotans for Health v. Noem*, 52 F.4th 381, 386 (8th Cir. 2022). Plaintiffs' claims are predictive, at least in part. But that does not bar standing, contrary to the district court's reasoning. App.6; R. Doc. 68, at 6. "[F]uture injuries … suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Dep't of Commerce v. New York*, 588 U.S. 752, 767 (2019) (quotations omitted). The

evidence here far exceeds that bar. The declarations attest that there is, and there "will" continue to be, an increase in costs and expenses to state agencies. Moreover, both common sense and the Federal Defendants' admissions demonstrate that the federal agencies are complying with President Biden's directive to increase voter registration—which increases the applications the State Officials must process.

That suffices, regardless of whether the State Officials had shown past injury. *But see* App.5; R. Doc. 68, at 5. In fact, the State Officials seek only *prospective* relief, *see* App.41; R. Doc. 1, at 34, so anticipated *future* injuries are necessary to establish standing, while past financial injuries "are relevant only for their predictive value." *Murthy v. Missouri*, 144 S. Ct. 1972, 1987 (2024). The district court's analysis faulting the State Officials for providing evidence that they "will" suffer injuries, therefore, misses the mark.

In any event, the district court ignored the State Officials' undisputed evidence of past and current injuries, which demonstrates an overwhelming likelihood of ongoing and future injury. The State Officials attested that they "*have* suffered" from "expenses caused by EO 14019." App.36; R. Doc. 1, at 29 (emphasis added); *see also* App.116; R. Doc. 51-9, ¶ 4 (Secretary Ashcroft attesting that federal agency action "*imposes* a significant administrative burden and cost") (emphasis added). The State Officials provided a 2022 letter from the secretaries of state of fifteen other States predicting cost increases "[i]f" EO 14019 is implemented, App.110; R. Doc.

51-5, at 2—which it was. The State Officials also produced a 2024 letter from the Mississippi Secretary of State saying DOJ's implementation efforts "led" ineligible people to attempt to register to vote, App.62; R. Doc. 1-8, at 20.

Nothing indicates that the costs EO 14019 inflicts are localized; rather, the costs facing one State are imposed on all other States. Furthermore, Bell provides an example of a non-citizen was registered "at a social services office," App.119; R. Doc. 51-10, at 2, which she "believed … to be the result of the EO," App.6; R. Doc. 68, at 6. That provides a specific example of past injury.

Second, the State Officials showed that those increased costs are traceable to EO 14019. EO 14019 directs federal agencies to register and turn out voters. *See* § 2. The Federal Defendants are doing exactly that. Indeed, the President's constitutional authority to "supervise [] those who wield executive power on his behalf" indicates that the agencies are doing as EO 14019 directs. *Seila Law LLC v. CFPB*, 591 U.S. 197, 204 (2020); *see also Bldg. & Constr. Trades Dep't., AFL-CIO v. Allbaugh*, 295 F.3d 28, 32 (D.C. Cir. 2002).

The evidence, likewise, supports that conclusion. Bell's declaration indicates federal workers fill out voter registration forms for clients. App.119; Doc. 51-10, at 2. That is a direct causal connection; it is more than enough for Article III, which "requires no more than *de facto* causality." *Dep't of Commerce*, 588 U.S. at 768 (quotations omitted). The State Officials' "burden" is to "show[] that third parties

will likely react in predictable ways" to government action. *Id.* Here, that requires predicting only that federal agencies will obey, and are obeying, a direct order from the President—something they never dispute they are doing. Likewise, "the predictable effect of Government action on the decisions of third parties," *id.*, is that federal agencies pushing people to register to vote will cause to people register to vote. *Id.*

Each additional registration imposes financial and administrative costs on the state agencies—costs which are amplified when errors in registration inevitably occur. For example, the Mississippi Secretary of State pointed out that DOJ's voter-registration activities among the federal prison population involves "misleading information concerning their right to both register and vote in Mississippi." App.62; R. Doc. 1-8, at 20. Furthermore, both he and the Texas Attorney General noted that such errors are inevitable where, as required by EO 14019, federal agencies work with outside third parties. App.62–63; R. Doc. 1-8, at 20–21; App.113; R. Doc. 51-6, at 2; *see* EO 14019 § 3(a)(iii)(C). The district court discounted the latter evidence because "no Plaintiff … is from Texas or Mississippi." App.6; R. Doc. 68, at 6 n.3. But those statements corroborate the State Officials' claims that similar errors occur in Missouri and Arkansas.

Thus, on the question of standing, *Department of Commerce* is controlling, and *Murthy*, on which the district court erred, is inapposite. *See* App.6; R. Doc. 68,

at 6. In *Murthy*, unlike here, sophisticated, independent third parties had a history of engaging in the type of conduct that the plaintiffs claimed the government was pressuring them to do. *See* 144 S. Ct. at 1987. In *Murthy*, there was evidence showing the platforms "had independent incentives to moderate content and often exercised their own judgment." *Id.* at 1987–88. There is nothing like that here. Further, in *Murthy*, "the parties [took] discovery." *Id.* at 1986. The resulting 26,000-page record, the Court held, made it "especially important to hold the plaintiffs to their burden" to establish standing. *Id.* at 1991 n.7. Here, by contrast, the Federal Defendants have defied FOIA requests and stonewalled subpoenas to disclose their implementation plans, concealing evidence of traceability.

The district court never justified applying *Murthy*'s narrow, fact-bound analysis to the very different facts of this case. Indeed, the Federal Defendants did not even request it do so. They cited *Murthy* only once, and only to argue that a nationwide injunction is improper. App.166; R. Doc. 58, at 43.

2. The State Officials have an interest in fair, honest, and orderly elections.

The State Officials also have standing to vindicate their interest in election integrity, which the Federal Defendants' work with third-party registration and ballot harvesting organizations undermines. App.26, 28; R. Doc. 1, at 19, 21. The State Officials contend that "certain third-party organizations have in the past engaged in activities that resulted in improper voter registrations." App.6; R. Doc. 68, at 6; *see*

also App.62–63; R. Doc. 1-8, at 20–21. The district court rejected this theory of standing because "Plaintiffs do not … allege the involvement of any third-party organization in implementing the EO; nor do they allege any third-party action that threatens the actual or apparent integrity of the election." App.6–7; R. Doc. 68, at 6–7. The latter claim disregards the record evidence just noted. The former misses that EO 14019 says federal agencies "*shall*" work with "nonpartisan third-party organizations … to provide voter registration services … ." § 3(a)(iii)(C) (emphasis added).

The States have a sovereign right to exercise "power over individuals and entities within the relevant jurisdiction—this involves the power to create and enforce a legal code, both civil and criminal." *Alfred L. Snapp & Son, Inc. v. Puerto Rico ex rel. Barez*, 458 U.S. 592, 601 (1982). But EO 14019 creates a novel voter-registration and ballot-harvesting organization that is difficult, if not impossible, for the State Officials to regulate: the federal bureaucracy. When paired with third-party organizations, the "system is ripe for abuse [and] corruption." App.113; R. Doc. 51-6, at 2.

B. The State Officials Are Likely to Succeed on the Merits.

Because the district court ruled on standing, the Court reviews the merits *de novo*. *See Carson v. Simon*, 978 F.3d 1051, 1059 (8th Cir. 2020) (per curiam).

1. EO 14019 is unconstitutional and violates federal law.

1. This Court has the "power to compel subordinate executive officials to disobey illegal Presidential commands." *Soucie v. David*, 448 F.2d 1067, 1072 n.12 (D.C. Cir. 1971); *see also Chamber of Commerce of U.S. v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996). As the State Officials demonstrated below, *see* App.89–100; R. Doc. 51, at 8–19, EO 14019 is an illegal Presidential command.

First, EO 14019 violates the Elections and Electors Clauses of Article I, § 4, cl. 1; Article II, § 1, cl. 2; and the Seventeenth Amendment. Taken together, those provisions primarily vest the regulation of elections, including federal elections, in the States. Converting the federal bureaucracy into a voter-registration and ballot-harvesting entity, therefore, encroaches on traditional state authority. EO 14019 effectively creates an entire federal scheme of voter registration and get-out-the-vote efforts. Federal agencies must "provide" information about voter registration and "access to voter registration services and vote-by-mail ballot applications." EO 14019 § 3(a)(i), (iii). The entity with primary authority over that activity is the States.

The Elections Clause permits *Congress* to make laws affecting "[t]he Times, Places, and Manner of holding Elections for Senators and Representatives." U.S. CONST. art. I, § 4, cl. 1. That has been interpreted to encompass voter registration. *See Arizona v. Inter Tribal Council of Ariz., Inc. (ITCA)*, 570 U.S. 1, 8–9 (2013).

The Elections Clause provides the basis for the NVRA, 52 U.S.C. § 20506(a)(3)(B)(ii), (b). *See Harkless v. Brunner*, 545 F.3d 445, 454 (6th Cir. 2008) (stating that "Congress enacted the NVRA" under the Elections Clause.).

But EO 14019 does not rely on the NVRA or any other federal statute. Neither EO 14019 nor the Federal Defendants cite any statutory authority justifying its mandates. *See* App.139–41; R. Doc. 58, at 16–18. Rather, in the district court, the Federal Defendants argued that EO 14019 merely provides information to voters. *See id.* But the Order does much more than that. EO 14019 directs federal bureaucrats to "*assist* voters 'in completing voter registration and vote-by-mail ballot applications forms in a manner consistent with all relevant State laws.'" App.150; R. Doc. 58, at 27 (emphasis added) (alterations and emphasis omitted) (quoting EO 14019 § 3). As the NVRA illustrates, to do that, the Federal Defendants must rely on a *congressional* act. "[A]n agency literally has no power to act … unless and until Congress confers power upon it." *La. Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

Thus, it does not matter that EO 14019 contains saving clauses, such as statements limiting agency actions to those "consistent with all relevant State laws," *e.g.*, EO 14019 § 3(a)(iii)(B), or requiring that the order "be implemented consistent with applicable law," § 12(b). EO 14019 requires agency action absent statutory authority, which is unlawful and, in the election context, unconstitutional. Moreover,

those are just "boilerplate savings clause[s]." *City and County of San Francisco v. Trump*, 897 F.3d 1225, 1242 (9th Cir. 2018). EO 14019's unconstitutional mandates cannot be rescued by overriding their "clear and specific language" with generally worded savings clauses. *Id.* at 1239.

Second, for the same reasons, EO 14019 violates the separation of powers. "The President's power, if any, to issue the order must stem either from an act of Congress or from the Constitution itself." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 585 (1952). Here, neither the Constitution nor any federal statute authorizes the Order. *See also* App.89–90; R. Doc. 51, at 16–17.

Third, EO 14019 violates the Tenth Amendment. The Federal Defendants' implementation of EO 14019 unconstitutionally coopts State officials to implement a federal program. The NVRA requires State officials to do certain acts regarding voter registration. *See*, *e.g.*, 52 U.S.C. § 20507(a). Together, EO 14019 and those laws coopt State officials into aiding the Federal Defendants in accomplishing EO 14019's goals. That violates the Tenth Amendment, which prohibits the federal government from compelling States from "enact[ing] or enforce[ing] a federal regulatory program" or "conscripting the State's officers" to do so. *Printz v. United States*, 521 U.S. 898, 935 (1997).

The fact that EO 14019 involves federal elections does not save it. First, as just discussed, there is no congressional authorization for the law. Second, EO

14019 does not involve *just* federal elections. Section 3 does not differentiate between federal elections and state and local elections, which States have authority to regulate under the Tenth Amendment. By authorizing federal agencies to engage in voter registration and ballot harvesting for state and local elections, EO 14019 encroaches on authority reserved to the States.

2. Furthermore, the Federal Defendants' plans to implement EO 14019 are procedurally deficient under the APA. The federal agencies sued are subject to the procedural requirements of the APA. *See* 5 U.S.C. § 551(1). Their plans implementing EO 14019 are final agency actions under the Supreme Court's "pragmatic approach … to finality." *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 578 U.S. 590, 599 (2016) (quotations omitted). The plans are the consummation of each agency's decision making, *see* EO 14019 § 3(b) (requiring agency heads to "submit … a strategic plan," not a rough draft), and determine "rights or obligations" and have "legal consequences." *Hawkes Co. v. U.S. Army Corps. of Eng'rs*, 782 F.3d 994, 999 (8th Cir. 2015) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)). For example, for the Department of Agriculture to say USDA field offices can provide voter-registration information, *see* App.139; Doc. 58, at 6, reflects a final agency decision to do so. That decision—that the pertinent entity has a right to engage in electoral activity—is common to all the EO 14019 implementation plans at issue here.

Moreover, "[s]o long as [those plans are] extant [they have] the force of law." *United States v. Nixon*, 418 U.S. 683, 695 (1974). If, for example, a USDA field office provides voter registration information, it cannot be punished for it. Those plans also changed agency rules. For example, before HUD said otherwise, "officials at many local public housing agencies said they couldn't get involved in voter registration because they accept money from the federal government." Lucas, *supra*. That new right to engage in electoral activities is a legislative rule. *See Iowa League of Cities v. EPA*, 711 F.3d 844, 873 (8th Cir. 2013). Each plan, therefore, was required by the APA to go through notice-and-comment. *See* 5 U.S.C. § 553(b), (c). They did not. They must therefore be set aside. *See* 5 U.S.C. § 706(2)(D); *Iowa League of Cities*, 711 F.3d at 875.

2. At a minimum, the serious legal questions presented here justify injunctive relief.

Because the State Officials are likely to succeed on the merits, an injunction pending appeal is appropriate. *See*, *e.g.*, *Brady v. NFL*, 640 F.3d 785, 789 (8th Cir. 2011) (per curiam). At the very least, the foregoing shows that "the 'merits of [this] appeal … involve substantial questions of law which remain to be resolved.'" *Nebraska v. Biden*, 52 F.4th 1044, 1047 (8th Cir. 2022) (per curiam) (quoting *Walker v. Lockhart*, 678 F.2d 68, 71 (8th Cir. 1982)). Where that is true, and where "'the equities are otherwise strongly in [the movant's] favor, the showing of success

on the merits can be less.'" *Walker*, 678 F.2d at 71 (quoting *Dataphase Sys., Inc. v. C. L. Sys., Inc.*, 640 F.2d 109, 113 (8th Cir. 1981) (en banc)).

II. The Remaining Equitable Factors Support an Injunction.

1. The State Officials also face irreparable harm absent relief. The costs EO 14019 imposes are not recoverable, and thus they "qualify as irreparable harm." *Iowa Utils. Bd. v. FCC*, 109 F.3d 418, 426 (8th Cir. 1996). Similarly, the harm to the State Officials' interest in free and fair elections "is … impossible to quantify in terms of dollars," which renders it irreparable. *Med. Shoppe Int'l, Inc. v. S.B.S. Pill Dr., Inc.*, 336 F.3d 801, 805 (8th Cir. 2003). That harm also prevents the State Officials "from effectuating statues enacted by representatives of [their] people," which has "long" been held to constitute irreparable injury. *Labrador v. Poe ex rel. Poe*, 144 S. Ct. 921, 923 (2024) (Gorsuch, J., concurring in grant of stay) (quotations omitted).

2. Regarding harm to the opposing party and the public interest, those "factors merge when," as here, "the [federal] Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). There is no harm in issuing an injunction. Those who have registered under agency programs implementing EO 14019 will not be affected. Nor is there any record evidence that those who will be voting in the imminent election will be harmed. To the contrary, the polling places and vote-

gathering locations set up by State law, including periods of no-excuse absentee voting, *see*, *e.g.*, § 115.277.1, RSMo, will be unaffected by any injunction.

Purcell v. Gonzalez, 549 U.S. 1 (2006) (per curiam), does not support the Federal Defendants. Voters have a clear path to exercising their franchise: the means established by state law. Far from "confusion and [a] consequent incentive to remain away from the polls," *id.* at 5, clarifying that state law governs electoral activities lessens confusion and reduces the voter fraud that "drives honest citizens out of the democratic process," "breeds distrust of our government," and causes voters to "feel disenfranchised." *Id.* at 4. In fact, because the Federal Defendants are interfering with State election law, they are disregarding "the constitutionally mandated locus for election decisions" and *Purcell*'s rationale "works to prevent" that interference. *Carson*, 978 F.3d at 1062.

Finally, "the public's true interest lies in the correct application of the law." *Kentucky v. Biden*, 23 F.4th 585, 612 (6th Cir. 2022). Accordingly, "[t]here is generally no public interest in the perpetuation of unlawful agency action." *League of Women Voters of U.S. v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016). "[O]ur system does not permit agencies to act unlawfully even in pursuit of desirable ends." *Ala. Ass'n of Realtors v. Dep't of Health & Human Servs.*, 594 U.S. 758, 766 (2021) (per curiam).

III. The Court Should Also Enter a Temporary Administrative Injunction Pending Its Decision on This Motion.

The Court should also immediately grant a temporary administrative injunction against EO 14019's implementation pending the resolution of this stay motion. *See Brady v. NFL*, 638 F.3d 1004, 1005 (8th Cir. 2011) (granting an "administrative stay … to give the court sufficient opportunity to consider the merits of the motion for a stay pending appeal"). Though we are on the eve of the general election, the imminent harm of these activities will continue. Many States allow provisional ballots to be "cured" and counted during the week following Election Day by the submission of documents purporting to validate a ballot that, when cast, was not eligible to be counted. The documents EO 14019 directs government agencies to provide could be decisive in post-Election Day provisional ballot "cure" campaigns. In 2008, the winner of the Franken-Coleman Senate race changed from Coleman to Franken when 312 ballots were counted for Franken in the post-election recount. The Presidency was determined in the 2000 election by 537 ballots. The unconstitutional and unlawful efforts directed by EO 14019 could be decisive in a post-election certification and would undermine the public confidence in the integrity and legitimacy of the election.

CONCLUSION

For those reasons, the Court should grant an injunction pending appeal.

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CERTIFICATE OF SERVICE

I hereby certify that on November 4, 2024, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ Mark F. (Thor) Hearne, II

CERTIFICATE OF COMPLIANCE

I hereby certify that this document complies with the type-volume limit of Fed. R. App. P. 27(d) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,194 words.

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Dated: November 4, 2024