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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

JUDICIAL WATCH, INC.; CONSTITUTION PARTY OF OREGON; SUNI DANFORTH; and HANNAH SHIPMAN,

Plaintiffs,

v.

TOBIAS READ, in his official capacity as the Oregon Secretary of State; and THE STATE OF OREGON,

Defendants.

Case No. 6:24-cv-01783

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT

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I. INTRODUCTION

Plaintiffs' list maintenance claim, Count I, seeks an order from this Court requiring Defendants to remove voters from the list of eligible voters in Oregon. But Plaintiffs do not have standing to bring that claim. Neither Judicial Watch nor the Constitution Party has suffered an organizational injury because the alleged injuries to Plaintiffs' voter outreach programs are effectively diversion-of-resources and frustration-of-mission injuries, which are insufficient to establish an organizational injury in fact under Article III. Any economic loss that the organizational plaintiffs have suffered as a result of the alleged NVRA violation is not within the zone of interests of the NVRA. Because the injury that establishes an injury in fact must be the same injury that falls within the zone of interests of the NVRA, Plaintiffs have not established organizational standing.

Nor do the individual plaintiffs have standing. Their alleged injuries are generalized grievances that could be raised by any other registered voter in Oregon. Even if the alleged injuries were sufficiently particular, they are speculative because the emotional injuries of discouraged participation and undermined confidence in elections rely on a vote dilution theory, which requires a series of improbable events to occur for it to materialize. Moreover, the alleged injuries are implausible because they require inferences that are not supported by the allegations, they rely on data taken from different years, and they fail to explain how failure to remove *inactive* voters injures Plaintiffs. Thus, this Court should dismiss the list maintenance claim.

As for Count II, the public records claim, Plaintiffs failed to provide adequate notice and that is fatal to that claim proceeding. Plaintiffs' claim is based on a cost estimate from the Secretary of State regarding how many hours it would take to respond to their public records request. Plaintiffs never responded to that estimate and then filed this lawsuit a few weeks before a federal election. That attempt to circumvent the NVRA's notice requirement fails because Count II complains of a discrete NVRA violation tied to Plaintiffs' particular public records

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request, not a systematic, ongoing NVRA violation. Thus, this Court should dismiss their public records claim.

II. ARGUMENT

A. Plaintiffs lack standing to assert their list maintenance claim (Count I).

1. The Amended Complaint alleges no cognizable injury to the Constitution Party of Oregon.

Plaintiffs argue that the Constitution Party has organizational standing because the Secretary's alleged failure to comply with the NVRA harms the Constitution Party's "pre-existing core activities." Pls.' Opp'n to Defs.' Mot. to Dismiss Am. Compl. 15, ECF No. 17. But the injuries they alleged are effectively that NVRA non-compliance has frustrated the Constitution Party's mission and caused it to spend more resources fulfilling that mission. Frustration-of-mission and diversion-of-resources injuries are insufficient to establish an Article III injury under *Food & Drug Administration v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 394–95 (2024), as the Ninth Circuit had recognized in *Arizona Alliance for Retired Americans v. Mayes*, 117 F. 4th 1165 (9th Cir. 2024), *reh'g en banc granted and opinion vacated*, 2025 WL 843314 (9th Cir. Mar. 18, 2025). The order granting rehearing en banc and vacating the Ninth Circuit's decision in *Arizona Alliance* does not render those arguments irrelevant. Rather, it simply means that this Court should apply the *Hippocratic Medicine* test to this case directly rather than *Arizona Alliance*'s application of *Hippocratic Medicine*. And *Hippocratic Medicine* dictates the same outcome in this case as *Arizona Alliance* did—Plaintiffs have not alleged organizational injury in fact.

Moreover, even if Plaintiffs have alleged a sufficient injury to establish Article III standing, that injury is an economic one that is outside the zone of interests of the NVRA. Thus, Plaintiffs have not established that the Constitution Party has standing for its voter roll maintenance claim.

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a. The Constitution Party's alleged injuries are effectively frustration-of-mission and diversion-of-resources arguments that fail under *Hippocratic Medicine*.

The Constitution Party alleges the following injuries: (1) it wastes "significant time, effort, and money" trying to contact voters who have moved residences through in-person contact and mailings, Am. Compl. ¶¶ 101, 111–16, ECF No. 12; (2) it has had to cut back on its mailings because mailings are costly, Am. Compl. ¶¶ 108–09; (3) its ability to respond to friendly communications is impaired, Am. Compl. ¶¶ 117–20; and (4) its ability to retain its legal status as a minor political party is impaired, Am. Compl. ¶¶ 121–26; Pls.' Opp'n at 6–7, 15. Those injuries are insufficient to establish Article III standing under *Hippocratic Medicine*.

Allegations that a defendant's actions caused an organization to divert its resources or that a defendant's actions frustrated an organization's mission are insufficient to establish Article III standing. *All. for Hippocratic Med.*, 602 U.S. at 394–95 (rejecting claimed injuries that the organization's mission was "impaired" and that it had to divert resources). To establish standing under the *Havens Realty* approach, an organization must show that a defendant's challenged action directly injures the organization's pre-existing "core business activities." *All. for Hippocratic Med.*, 602 U.S. at 395 (discussing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 395 (1982)). An allegation that a voter outreach organization has had to engage in additional voter outreach is not a direct injury to the organization's pre-existing core business activities because no facts demonstrate that the organization was prevented from engaging in voter outreach, unlike the injury to core business activities in *Havens Realty*.

Standing under *Havens Realty* is narrow. The key fact that established the harm to a pre-existing activity in *Havens Realty* was that the organization also provided a housing counseling service. *All. for Hippocratic Med.*, 602 U.S. at 395 (discussing *Havens Realty*). It had standing because the defendant's racial steering practices resulted in the organization receiving false information about available housing, which directly harmed its ability to counsel its clients on housing availability. *Id.* Importantly, the organization's standing depended on its counseling

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services. *Id.* ("Critically, [the organization] not only was an issue-advocacy organization, but also operated a housing counseling service."). In other words, the organization in *Havens Realty* was unable to accurately counsel clients on available housing because its Black employees were told that no housing was available, when in fact, housing was available. *Havens Realty Corp.*, 455 U.S. at 366, 366 n.1, 368. The Supreme Court likened a *Havens Realty* injury to "a retailer who sues a manufacturer for selling defective goods to the retailer"—an action that has a direct effect and interferes with a core business activity. *All. for Hippocratic Med.*, 602 U.S. at 395.

The Constitution Party has failed to allege an injury under those cases. It alleges that the Secretary's noncompliance with the NVRA has caused it to waste resources contacting voters through mail and in-person outreach, has impaired its ability to respond to friendly communications, and impairs its ability to retain its party status. But those allegations establish only that the Constitution Party had to engage in costly additional outreach—to do more of what it already was doing—to achieve its mission and goals. That is exactly the kind of injury that the Supreme Court rejected in *Hippocratic Medicine*. 602 U.S. at 395. Thus, an organization does not establish standing because it spent additional resources to perform its pre-existing activities. *See Judicial Watch, Inc. v. Weber*, Case No. 2:24-cv-03750-MCS-PVC, slip op. at 5–6 (C.D. Cal. Feb. 11, 2025) (Popper Decl. Ex. 2 (ECF No. 18-2)) (holding that plaintiffs had failed to allege that the list maintenance violation "impacted their preexisting core business activities, i.e., promoting certain political beliefs and election candidates for the Libertarian Party"); *Republican Nat'l Comm. v. Burgess*, Case No. 3:24-cv-00198-MMD-CLB, 2024 WL 3445254, at *5 (D. Nev. July 17, 2024) ("[O]rganizations who train and hire poll watchers and ballot counters do not have standing to challenge the expansion of access to mail voting merely because it might create more work for them.").

Any NVRA noncompliance that makes Plaintiffs' voter outreach activities "harder and less productive," Pls.' Opp'n at 15, is thus merely a diversion-of-resources theory by another name. Under *Hippocratic Medicine*, that alleged injury does not give rise to standing. *See* 602

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U.S. at 393–95 ("The medical associations respond that under *Havens Realty Corp. v. Coleman*, standing exists when an organization diverts its resources in response to a defendant's actions. That is incorrect." (citation omitted)). Since the Secretary's Motion to Dismiss was filed, another district court in this circuit rejected Judicial Watch's theory of standing. *See Weber*, Case No. 2:24-cv-03750-MCS-PVC. In evaluating a substantially similar complaint filed by Judicial Watch and the Libertarian Party of California, the district court held that their theory of party and advocacy group standing "is just a diversion-of-resources theory by another name." *Id.*, slip op. at 6 (quotation marks omitted) (rejecting arguments that the alleged injuries, the political party's outreach being "more difficult" and the party needing to "waste significant time, effort, and money" on outreach, were sufficient for Article III standing). Here, Plaintiffs have alleged that "it costs more money and effort to contact fewer voters." Pls.' Opp'n at 15 (quoting Am. Compl. ¶ 116). That injury is not sufficient to establish an injury in fact for a political party because all it shows is that the Constitution Party has to spend more resources supporting its overall mission. At most, that alleged injury is an economic injury for costs that the Constitution Party has incurred, and that economic injury is not within the zone of interests of the NVRA. *See infra*, § II.A.1.b.

Finally, the alleged injuries in this case are not like the direct injuries in *Havens Realty*. The Secretary of State, as the chief elections officer in Oregon, maintains the voter rolls. He does not maintain the voter rolls for the purpose of providing them to Plaintiffs, or to other political parties. Nor does he maintain them for political parties to be able to more easily further their partisan aims, whatever they may be. He maintains them for the purpose of administering elections in Oregon. Any injury to the Constitution Party's ability to maintain its party status is too attenuated from that purpose to establish an injury under *Havens Realty*.

Plaintiffs argue that the threat to the Constitution Party's legal status is a traditional Article III injury. Pls.' Opp'n at 16. However, there are multiple steps between Plaintiffs' voter outreach activities and losing their legal status as a minor political party.

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To allege an injury based on a failure to meet that target, Plaintiffs would need to show that they will spend money on voter outreach, that their voter outreach will result in significant numbers of failed voter contacts, that their successful voter contacts result in party registrations, and that having access to a more accurate list of voters would have saved them resources in the process. *See* Am. Compl. ¶¶ 124–26. In other words, the Constitution Party's injury appears to be that it faces an ultimatum between spending additional resources to recruit Constitution Party members or losing its minor party status. The former is an economic injury outside of the zone of interests that the NVRA protects. *See* § II.A.1.b, below. The latter is too attenuated from its success or failure to establish an injury in fact under Article III. Thus, any injury to the Constitution Party from the Secretary's alleged NVRA noncompliance is not sufficiently direct to fall in the narrow category of standing under *Havens Realty*.

b. Any injury that is sufficient to establish Article III standing is not within the zone of interests of the NVRA.

Plaintiffs argue that the Constitution Party's alleged injury to its ability to contact and register voters is within the zone of interests of the NVRA. Pls.' Opp'n at 21–23. But, as explained above, that injury is not legally cognizable under *Hippocratic Medicine*. At best, that leaves Plaintiffs with an alleged economic injury—the money spent engaging in any additional voter outreach that allegedly would not have been necessary but for NVRA noncompliance. That injury is not within the zone of interests of the NVRA.

To have standing, the alleged injury must satisfy both the Article III standing requirements and statutory standing requirements. *Viasat, Inc. v. Fed. Commc'n Comm'n*, 47 F. 4th 769, 779 (D.C. Cir. 2022); *accord Oberdorfer v. Jewkes*, 583 F. App'x 770, 773 (9th Cir. 2014) (holding that the plaintiff failed to establish statutory standing under NEPA's "zone of interests"). The zone of interests of the NVRA does not include economic injury to political parties or the preservation of a political party's status by providing access to relatively cheap voter registration lists. Rather, the zone of interests of the NVRA is set forth in its purposes: to

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increase the number of eligible voters registered to vote in federal elections, to enhance eligible voters' participation in federal elections, to "protect the integrity of the electoral process," and "to ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b). The NVRA thus was not enacted to help political parties save money, nor to ensure that political parties have access to relatively cheap voter lists.

Plaintiffs' reliance on legislative history is selective. Plaintiffs quote Congressman Swift's statement that inaccurate voter rolls are the "bane of every election official" and are costly to political parties. Pls.' Opp'n at 22. However, that statement was made in the context of the Congressman explaining that the drafting committee had learned of many "questionable and some blatantly discriminatory" ways in which voters were being *removed* from voter lists. Popper Decl. Ex. 3, at 2 (136 Cong. Rec. 1243 (1990)). The goal of the NVRA's list maintenance requirement was to stop those practices. It was the drafting committee's "clear intent that no one is to be removed from the registration rolls without clear evidence the he or she no longer qualifies to vote." Popper Decl. Ex. 3, at 2 (136 Cong. Rec. 1243 (1990)). Despite Plaintiffs' argument to the contrary, preventing political parties from incurring high costs when using voter lists was not part of the purpose of the NVRA—especially when considered as an injury in this lawsuit that seeks to remove voters from the voter lists rather than increase access and registration.

Moreover, Plaintiffs reliance on *Association of Community Organizations for Reform Now v. Fowler*, 178 F.3d 350 (5th Cir. 1999) ("ACORN"), for its holding that the NVRA encompasses a broad zone of interests is misplaced. *See* Pls.' Opp'n at 20–21. First, neither the Ninth Circuit nor the Supreme Court has adopted that holding. Second, this Court should not adopt that holding because the question presented to the court in that case was different from the question in this case. In *ACORN*, the district court held that ACORN, the organization that engaged in voter registration activities, was not a "person" under the NVRA because it "does not vote and cannot register to vote." *ACORN*, 178 F.3d at 355, 365. In reversing that decision, the

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Fifth Circuit examined whether the NVRA's phrase "person who is aggrieved" included organizations as well as individuals. *Id.* at 362–65. It did not examine the *kinds* of injuries that are included in the NVRA's zone of interests. *Id.* Even if it had, the Supreme Court's decision in *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118 (2014), demonstrates that the zone of interests test is case-specific: in every case, the court must determine whether the plaintiff, and the plaintiff's alleged injury, fall within the zone of interests of the applicable statute. *See id.* at 131–32 ("We thus hold that to come within the zone of interests in a suit for false advertising under [the Lanham Act], a plaintiff must allege an injury to a commercial interest in reputation or sales."). Thus, any holding that ACORN had an injury within the NVRA's zone of interests does not extend to the Constitution Party's alleged injuries in this case.

Plaintiffs have not met that burden, and their attempt to use their economic injury to satisfy Article III standing while using their voter outreach injury to stay within the NVRA's zone of interests fails to establish that the Constitution Party has standing.

2. Plaintiffs have failed to establish standing for the individual voters, and thus, associational standing for Judicial Watch and the Constitution Party.

Plaintiffs assert two injuries that apply to all four plaintiffs: that their confidence in the integrity of the electoral process is undermined and that their participation is discouraged by their subjective beliefs about the reliability of Oregon's electoral processes. Pls.' Opp'n at 24. Neither of those injuries is sufficient to establish standing.

a. Plaintiffs' allegations of undermined confidence and discouraged participation are generalized grievances.

Plaintiffs argue that not all members of the public could raise a discouraged participation injury because "discouraged participation is unique and particular to Plaintiffs" and "is not common to all members of the public." Pls.' Opp'n at 27. To support that argument, Plaintiffs argue that they have established an injury in fact by alleging that "*their* concerns about the integrity of the electoral process undermined *their* confidence and discouraged *their* participation

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in the democratic process." Pls.' Opp's at 27.[1] But those allegations still do not explain how their undermined confidence or discouraged participation is distinct from that same injury to other registered voters in Oregon. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573–74 (1992) ("We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy."). And most district courts to consider the question—and every district court in the Ninth Circuit to do so—have rejected an individual plaintiff's concerns about the integrity of elections and discouraged participation as generalized grievances. *See* Defs.' Mot. to Dismiss at IV.A.1.c, pp. 11–13, ECF No. 13. The claims in this case are about the alleged injuries to Plaintiffs based on their interest in the proper administration of the NVRA in Oregon, and they do not have standing to bring that claim without a showing that they have been injured in a distinct way from other registered voters.[2]

Moreover, the cases that Plaintiffs cite in support of their injuries—broadly speaking, that courts take an "expansive view" of the types of harms that give rise to justiciable voting rights claims—are inapposite. First, this case does not involve a voting rights claim, nor any other type

[1] Notably, Plaintiffs appear to accept that their vote dilution injury is insufficient to establish standing and do not defend that alleged injury in their Opposition to Defendants' Motion to Dismiss. *Compare* Am. Compl. ¶ 83 (listing injuries to individual plaintiffs as including "instilling in them the fear that their legitimate votes will be nullified or diluted by unlawful ones"), *with* Pls.' Opp'n at 27 ("While vote dilution may be categorized as [a] generalized grievance, since a fraudulent vote case in an election would diminish the value of each honest vote equally[.]" (quotation marks omitted)).

[2] Petitioners also assert, without citation or a corresponding allegation in the Amended Complaint, that "[n]ot all members of the public have concerns about the integrity of the electoral process due to inflated registration rolls." However, as the District Court's opinion in *Republican Nat'l Comm. v. Aguilar*, Case No. 2:24-cv-00518-CDS-MDC, 2024 WL 4529358, at *5 (D. Nev. Oct 18, 2024), demonstrates, "[m]aintaining the integrity and confidence in elections is consistent sentiment and is reflected as an issue in cases filed across the country." *See id.* at *5, *5 n.6 (citing cases filed around the country claiming injuries based on undermined confidence and articles about the erosion of confidence in election integrity).

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of constitutional claim. The injuries that give rise to standing to challenge a state election law as an unconstitutional burden on a plaintiff's right to vote are different than the injuries that Plaintiffs assert here, which seek to enforce a statutory administrative obligation in an effort to decrease the number of other individuals registered to vote. Second, most of the cases discussing a "slight burden" on voting rights that Plaintiffs cite are not about standing, but about the *Anderson-Burdick* test that the courts apply to determine whether a state law is constitutional—that is, that courts balance the alleged injury to the right to vote against the State's justification for burdening the right to vote. *See Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008) (describing "public confidence in the integrity of the electoral process" as a state interest with "independent significance" while conducting the constitutional balancing test for challenges to state election regulations); *Burdick v. Takushi*, 504 U.S. 428, 437–38 (1992) (addressing the merits of claims that a state's prohibition on write-in voting violated voting and associational rights under the First and Fourteenth Amendments); *Anderson v. Celebrezze*, 460 U.S. 780, 780–81 (1983) (addressing the merits of claims that a state's early filing deadline violated voting and associational rights under the First and Fourteenth Amendments); *Fish v. Schwab*, 957 F.3d 1105, 1121–24 (10th Cir. 2020) (discussing the test that courts apply to claims that a "state law unconstitutionally burdens a plaintiff's right to vote under the Equal Protection Clause"); *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1351–52 (11th Cir. 2009) (addressing standing in a Fourteenth Amendment Equal Protection challenge to a voter-identification law).

Third, Plaintiffs' alleged undermined confidence and discouraged participation injuries are emotional injuries that are insufficient to confer standing. They are no different from a subjective belief that elections lack integrity. *See Humane Soc. of the U.S. v. Babbitt*, 46 F.3d 93, 98 (D.C. Cir. 1995) ("General emotional 'harm,' no matter how deeply felt, cannot suffice for injury-in-fact for standing purposes."). Without any allegations that Plaintiffs have personally suffered stress, anxiety, or other mental health consequences because of the Secretary's conduct, Plaintiffs' feelings of discouragement and lack of confidence cannot establish an Article III

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injury. *Cf. Krottner v. Starbucks Corp.*, 628 F.3d 1139, 1142 (9th Cir. 2010) (holding that a plaintiff who alleged suffering emotional harm because his laptop was stolen had standing). This Court should reject Plaintiffs' standing arguments because they have not sufficiently alleged an injury in fact.

Because the harms that Plaintiffs allege are indistinguishable from the harm to all other registered voters in Oregon, they have not satisfied the particularity requirement of Article III standing. Therefore, this Court should follow the other district courts that have rejected undermined confidence and discouraged participation as cognizable injuries under Article III, and it should dismiss Plaintiffs' list maintenance claim for lack of standing.

b. Plaintiffs' arguments that any injury is not speculative fail.

Plaintiffs argue that their alleged injuries are not speculative because their confidence is currently undermined. Pls.' Opp'n at 26–27. In support of that argument, they cite *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006), and *Crawford*, 553 U.S. at 196. But those cases are inapposite. Neither case concerned standing.

Purcell involved an injunction pending appeal on the ground that "the balance of the harms and the public interest counseled in favor of denying the injunction" of election procedures in the weeks right before an election. *Purcell*, 549 U.S. at 4. The Supreme Court reasoned, when exercising *equitable* discretion to issue an injunction, a court must consider that "orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Id.* at 4–5. What is now known as the *Purcell* principle—"that federal courts ordinarily should not enjoin a state's election laws in the period close to an election," *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (Kavanaugh, J., concurring)—is unrelated to standing.

Crawford involved a challenge to a state's voter-identification law under the Fourteenth Amendment. 553 U.S. at185–187. In determining the merits of whether the law violated the Fourteenth Amendment, the Court balanced the state's justifications for the law against the

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burden on the right to vote. *Id.* at 191–200. In examining the state's justification for the law, it explained that preventing voter fraud and safeguarding voter confidence are separate legitimate justifications for state laws regulating elections. *Id.* at 196–97. That case did not address standing, and it certainly did not characterize undermined voter confidence as an injury that establishes standing.

Plaintiffs have not established a concrete injury. Although Plaintiffs allege that they are discouraged from participating in elections and their confidence in elections is undermined, Am. Compl. ¶ 83, those injuries are speculative.[3] Those injuries are speculative because they are necessarily based on Plaintiffs' fear of ineligible voters casting votes that are counted as legitimate. *See* Am. Compl. ¶ 82 ("[Plaintiffs] are concerned that failing to comply with [NVRA] obligations impairs the integrity of elections by increasing the opportunity for ineligible voters to receive and cast ballots for federal elections in Oregon."). The hypothetical chain of events that results in ineligible voters' ballots being counted requires multiple safeguards in the election system to fail to detect the unlawful vote before it gets counted. Because Plaintiffs' alleged injuries of discouraged participation and lost confidence in elections are inextricably intertwined with their fear of vote dilution, their alleged injuries are speculative. This Court should reject Plaintiffs' arguments to the contrary and dismiss the NVRA list maintenance claim for lack of standing.

3. Plaintiffs have not plausibly alleged any injury.

a. Plaintiffs do not plausibly allege a failure to remove active voters.

Plaintiffs point to only two allegations to show that Oregon has failed to make reasonable efforts to remove ineligible registrants from its list of active voters: (1) that Oregon counties did not respond to federal survey questions requesting the number of Confirmation Notices mailed

[3] Plaintiffs again appear to have abandoned their argument that vote dilution is a sufficient injury for Article III standing purposes in the section of their brief addressing Defendants' argument that the alleged injuries are speculative. *See* Pls.' Opp'n at 24–27.

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and received and (2) that the Census Bureau's population estimates for the period 2018 to 2022 were lower than the number of active registered voters in October 2024 for certain counties. Pls.' Opp'n at 9–13. Neither allegation "nudges [their] claims" of injury "across the line from conceivable to plausible." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

Plaintiffs first point to allegations that Oregon counties did not report to the U.S. Election Assistance Commission the number of Confirmation Notices they sent and received. Plaintiffs then jump to conclude that "Oregon officials cannot ensure the accuracy and currency of Oregon's voter registration list" without such a count. Pls.' Opp'n at 11 (citing Am. Compl. ¶ 67). But that conclusory allegation is a leap in logic: whether counties are sending and acting on Confirmation Notices is not the same as whether they are counting the number of Confirmation Notices in such a way that the figure is readily available for survey responses. It is only by confusing these two separate actions—doing and counting—that Plaintiffs argue that the counties' lack of EAC responses are relevant, let alone sufficient to allege injury.

Plaintiffs' other allegation—that ten counties had fewer eligible voters circa 2020 than were registered in October 2024—is also inadequate. Even if the number of active voters exceeding Census estimates of the eligible voters plausibly suggests list maintenance failures, pointing to those data points taken from separate points in time does not. Plaintiffs decry pointing to the facial illogic of their "study" as impermissible "weighing" of evidence, Pls.' Opp'n at 12–13, but "[d]etermining whether a complaint states a plausible claim … [is] a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009). The Court should not find that measurements of population and registration figures taken four years apart are sufficient to support a plausible claim of injury.

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b. Plaintiffs do not plausibly allege they were injured by a failure to remove inactive voters.[4]

Plaintiffs cannot allege an injury stemming from Oregon's purported failure to remove individuals from inactive voter lists. As Plaintiffs concede, inactive voters do not receive ballots, so there is no plausible injury to their confidence in elections. Pls.' Opp'n at 8. They further acknowledge that the Constitution Party "primarily uses Oregon's voter rolls to contact voters whose registrations are listed as active…." Pls.' Opp'n at 8 (quoting Am. Compl. ¶ 99).

Nevertheless, Plaintiffs argue that the Constitution Party uses lists of inactive voters "'to keep track of its own members whose registrations have become inactive.'" *Id.* (quoting Am. Compl. ¶ 99). Plaintiffs never explain how the action they claim the Secretary must take—to cancel these voters' registrations—would help the Constitution Party or any other plaintiff. If those names were removed from the inactive list altogether, that would not aid the Constitution Party's efforts to contact those individuals.

B. Plaintiffs' failure to provide statutory notice requires dismissal of their public records claim (Count II).

Plaintiffs argue that their failure to provide the statutorily required 90-days' notice under 52 U.S.C. § 20510(b)(1) is excused because they filed immediately before a federal election. Not so. Notice is only excused "[i]f the *violation* occurred within 30 days before the date of an election for Federal office…." 52 U.S.C. § 20510(b)(3) (emphasis added). Plaintiffs allege the Secretary of State violated the NVRA when it provided a cost estimate of 5,000 labor hours to fulfill Plaintiffs' public records request, to which Plaintiff never responded. *See* Am. Compl. ¶ 74 ("The foregoing response [i.e., email] shows that Defendants have failed to comply….").

Plaintiffs do not allege, for example, that the Secretary violated the public notice provision by failing to produce documents after Plaintiffs offered to pay the costs of the search and production. Instead, the purported violation was complete upon the delivery of the State's

[4] Plaintiffs erroneously refer to the Secretary's motion as "conceding" certain facts alleged in the Amended Complaint. The Secretary's admission or denial of the Amended Complaint's allegations will be provided in the Secretary's answer, if one is required to resolve this case.

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response providing a cost estimate, to which the Plaintiffs apparently objected *sub silentio* and now claim is not "a reasonable cost" as allowed under the NVRA. 52 U.S.C. § 20507(*i*). If Plaintiffs' claim is tied to some other action, Plaintiffs have not identified it.

The Ninth Circuit has held that no prior notice is required when a plaintiff files suit in the runup to an election to challenge a state's *continuing* violation of NVRA. Thus, prior notice was not required when a plaintiff filed suit the day before a federal election challenging a state's "systematic and ongoing violation" of the NVRA based on the state "systematically failing to provide the voter registration services mandated by the NVRA at its public assistance offices." *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1035, 1042 (9th Cir. 2015) (quotation marks omitted). That is because the court could infer that the state defendant was continuing not to comply with an ongoing NVRA obligation: providing the opportunity to register to vote when applying for public benefits. *Id.* at 1043–44.

Count II of Plaintiffs' Amended Complaint is different. Plaintiffs do not allege a "systematic and ongoing" NVRA violation. Rather, they allege that the Secretary's response to their public records request violated the NVRA. That is a discrete NVRA violation tied to a particular public records request, and *National Council of La Raza* expressly acknowledges that a plaintiff cannot circumvent the notice requirement for "discrete violations" by waiting until a federal election is imminent to file suit. 800 F.3d at 1043 ("If Plaintiffs had provided notice of discrete violations that had occurred more than 120 days before June 12, but had not occurred thereafter, they would have had to wait 90 days from the date of their notice before bringing suit.").

Thus, Plaintiffs' failure to provide prior notice of their public records claim requires dismissal.

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III. CONCLUSION

The motion to dismiss should be granted.

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Respectfully submitted,

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