

UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

1789 Foundation, Inc. d/b/a Citizen
AG, *et al.*,

Plaintiffs,

v.

Secretary Al Schmidt, *et al.*,

Defendants.

No. 3:24-cv-1865

Hon. Robert D. Mariani

**PRINCIPAL BRIEF IN SUPPORT OF DEFENDANTS' MOTION TO
DISMISS SUPPLEMENTAL COMPLAINT**

Date: February 19, 2025

JENNIFER C. SELBER
GENERAL COUNSEL

/s/ Thomas P. Howell

Thomas P. Howell

Deputy General Counsel

Governor's Office of General Counsel

30 N. 3rd Street, Suite 200

Harrisburg, PA 17101

(717) 460-6786

thowell@pa.gov

Michael J. Fischer

Executive Deputy General Counsel

30 N. 3rd Street, Suite 200
Harrisburg, PA 17101
(717) 831-2847
mjfischer@pa.gov

CAROLYN DELAURENTIS
CHIEF COUNSEL

Kathleen A. Mullen
Executive Deputy Chief Counsel
306 North Office Building
Harrisburg, PA 17120
(717) 783-0736
kamullen@pa.gov

Counsel for Secretary of the Commonwealth
Al Schmidt

RETRIEVEDFROMDEMOCRACYDOCKET.COM

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF CITATIONS	iv
BACKGROUND	1
STANDARD OF REVIEW	4
ARGUMENT	5
a. This Court does not have jurisdiction over Plaintiffs’ claims	5
b. Plaintiffs lack standing to bring this action	8
c. Plaintiffs ultimately fail to state a claim.....	13

RETRIEVEDFROMDEMOCRACYDOCKET.COM

TABLE OF CITATIONS

<u>CASES</u>	<u>PAGE(S)</u>
<i>Bellitto v. Snipes</i> , 268 F. Supp.3d 1328 (S.D. Fla. 2017).....	5, 6, 7
<i>Berg v. Obama</i> , 586 F.3d 234 (2009).....	12
<i>Bognet v. Degraffenreid</i> , 141 S. Ct. 2508 (2021).....	9
<i>Bognet v. Secretary Commonwealth of Pennsylvania</i> , 980 F.3d 336 (3d Cir. 2020).....	9, 10, 13
<i>Bolus v. Boockvar</i> , 3:20-cv-01882, 2020 WL 6880960, (M.D. Pa. Oct. 27, 2020), report and recommendation adopted, 2020 WL 6882623 (M.D. Pa. Nov. 23, 2020).....	9, 13
<i>In re Burlington Coat Factory Securities Lit.</i> , 114 F.3d 1410 (3d Cir. 1997).....	16
<i>Clapper v. Amnesty Int'l USA</i> , 568 U.S. 398 (2013).....	12
<i>Georgia State Conference of NAACP v. Kemp</i> , 841 F. Supp.2d 1320 (N.D. Ga. 2012).....	6
<i>Huertas v. City of Camden</i> , 245 Fed. Appx. 168 (3d Cir. 2007)	10
<i>Hunt v. Washington State Apple Advertising Comm'n</i> , 432 U.S. 333 (1977).....	13
<i>Lujan v. Defenders of Wildlife</i> , 504 U.S. 555 (1992).....	8, 9
<i>NAACP v. Button</i> , 371 U.S. 415 (1963).....	13
<i>Nigro v. Pa. Higher Educ. Assistance Agency</i> , No. 19-2000, 2020 WL 5369980 (M.D. Pa. Sept. 8, 2020).....	4
<i>Pennsylvania v. New Jersey</i> , 426 U.S. 660 (1976).....	12
<i>Pa. Prison Society v. Cortes</i> , 508 F.3d 156 (3d Cir. 2007).....	12, 13

Public Interest Legal Foundation v. Boockvar, 370 F. Supp. 3d 449 (M.D. Pa. 2019).....5

Public Interest Research Group v. Powell Duffryn Terminals, 913 F.2d 64 (3d Cir.1990).....13

Raines v. Byrd, 521 U.S. 811 (1997).....8

Russell v. DeJongh, 491 F.3d 130 (3d Cir. 2007)11

Warth v. Seldin, 422 U.S. 490 (1975).....9

Wood v. Raffensperger, 981 F.3d 1307 (11th Cir. 2020)11

Yaw v. Delaware River Basin Comm’n, 49 F.4th 302 (3d Cir. 2022).....8

Zimmerman v. Schmidt, 63 MAP 2024, 2024 WL 4284202 (Pa. Sept. 25, 2024).....12

UNITED STATES CONSTITUTION

U.S. Const. art. III.....9, 12

U.S. Const. art. III, § 2.....8

FEDERAL STATUTES

National Voter Registration Act (“NVRA”) 52 U.S.C. § 20501, *et seq.*6

52 U.S.C. § 20507(d).....17

52 U.S.C. § 20507(e)17

52 U.S.C. § 20507(i).....5, 6

52 U.S.C. § 20510.....6, 7

52 U.S.C. § 20510(b).....5, 6

52 U.S.C. § 20510(b)(1)5
52 U.S.C. § 20510(b)(2)5
52 U.S.C. § 20510(b)(3)6

PENNSYLVANIA STATUTES

25 Pa.C.S. § 150516
25 Pa.C.S. § 190111, 15
25 Pa.C.S. § 1901(d).....17
25 Pa.C.S. § 190217
25 P.S. § 3154.....11
Right to Know Law, 65 P.S. § 67.101, *et seq.*.....1

PENNSYLVANIA REGULATIONS

4 Pa. Code § 183.6..... 15

FEDERAL RULES OF CIVIL PROCEDURE

Fed. R. Civ. P. 12(b)(1)4
Fed. R. Civ. P. 12(b)(6)4

AND NOW comes the Defendant, Al Schmidt, Secretary of the Commonwealth, and submits this brief in support of his Motion to Dismiss Plaintiffs' Supplemental Complaint.

BACKGROUND

On October 29, 2024, one week before the 2024 general election, Plaintiffs brought this action seeking two separate, but ostensibly related injunctions: 1) one “enjoin[ing] the Department [of State] from continuing to refuse to make available the records Plaintiffs requested” in a public records request filed pursuant to state law (*see*, 65 P.S. § 67.101, *et seq.*); and 2) one ordering the Department to “prevent” certain “inactive” voters from casting a ballot in the upcoming 2024 election. Complaint ¶ 86. Plaintiffs made this request based upon state public records law (“Right to Know Law,” 65 P.S. § 67.101, *et seq.*), and the National Voter Registration Act (“NVRA,” 52 U.S.C. § 20501 *et seq.*).

By Opinion and Order of November 4, 2024, this Court denied Plaintiffs' request for a temporary injunction. Order of November 4, 2024, ECF No. 21. While the Court then expressed “grave doubts” that the parties possessed standing, it declined to dismiss the action immediately. Opinion of November 4, 2024 at 14, 18, ECF No. 20.

As anticipated by this Court's Opinion (Opinion of November 4, 2024 at 24-25) the Department of State Defendants responded to Plaintiffs' records request on November 12, 2024. Supplemental Complaint, ¶ 47. Thereafter, Plaintiffs sought leave to and then filed a Supplemental Complaint. Supplemental Complaint, ECF No. 46, filed January 22, 2025.

In their Supplemental Complaint, however, Plaintiffs make no effort to further establish their standing. Instead, Plaintiffs' new allegations acknowledge that the Department has responded to the records request, yet they continue to mischaracterize or misunderstand the import and purpose of those records. Supplemental Complaint at ¶¶ 42-49.

In fact, despite the Department's response, Plaintiffs' Supplemental Complaint continues to seek "an ex parte temporary restraining order" to "compel Defendants to provide public access to the records Citizen AG requested . . . by November 2, 2024." Supplemental Complaint ¶ 96. Similarly, Plaintiffs continue to request that this Court order the Department to remove voters from the voter rolls in accordance with the NVRA, despite presenting no evidence that it has not or will not do so. *See*, Supplemental Complaint at ¶ 120.

Of course, the Department has now responded to Plaintiffs' records request, and this Court has denied Plaintiffs' requests for temporary injunctive relief. Further,

the alleged “emergency” of the 2024 election (as well as the date November 2, 2024) has now passed.

Rather than rescinding these now moot claims, however, Plaintiffs continue to maintain these allegations in the numbered paragraphs of the Supplemental Complaint, but appear to have abandoned them in their Prayer for Relief. Instead, Plaintiffs now request that this Court declare that Defendants’ “refusal to remove from its voter rolls . . . 77188 registrants who became ineligible voters on November 9, 2022” violated the NVRA; permanently enjoin Defendants from allowing certain voters to remain listed as eligible voters; declare that Defendants violated the NVRA; and compel Defendants to adhere to Plaintiffs’ interpretation of the NVRA.” Plaintiffs’ current request for relief is no more valid than the relief sought in their original complaint, and this Supplemental Complaint should be dismissed for similar reasons.

STANDARD OF REVIEW

Facial challenges to subject matter jurisdiction under Rule 12(b)(1) and motions to dismiss under Rule 12(b)(6) are evaluated under the same standard of review. *Nigro v. Pa. Higher Educ. Assistance Agency*, No. 19-2000, 2020 WL 5369980, at *5 (M.D. Pa. Sept. 8, 2020). The Court must consider whether the Supplemental Complaint contains sufficient plausible factual allegations to establish this Court's subject matter jurisdiction and whether it states a claim for relief that is plausible on its face. *Id.* at *4-5.

RETRIEVEDFROMDEMOCRACYDOCKET.COM

ARGUMENT

Plaintiffs' Supplemental Complaint must be dismissed because it is facially deficient and because the claims it raises do not vest this Court with jurisdiction. As in their original complaint, Plaintiffs have not met the pre-litigation requirements of the NVRA, have not established that they possess standing, and, perhaps most importantly, have not and cannot establish a violation of the NVRA.

a. This Court does not have jurisdiction over Plaintiffs' claims.

The NVRA requires that "written notice" of a purported violation be provided "to the chief election official of the State involved," and authorizes the commencement of litigation "[i]f the violation is not corrected within 90 days" of such notice. 52 U.S.C. § 20510(b)(1), (2). As this Court has explained, "[n]otice is a precondition to filing suit under the NVRA." *Public Interest Legal Foundation v. Boockvar*, 370 F. Supp. 3d 449, 456-57 (M.D. Pa. 2019) (dismissing subsection 20507(i) claim for failure to provide notice of purported violation to Pennsylvania chief election official prior to filing suit). Failure to provide the proper notice under the statute deprives the Court of jurisdiction to adjudicate those claims. *See Bellitto v. Snipes*, 268 F. Supp. 3d 1328, 1332 (S.D. Fla. 2017) ("[t]his Court's jurisdiction, therefore, stems directly from § 20510(b), and Plaintiffs' standing to bring suit depends upon compliance with the statute.").

Notice is sufficient under Section 20510 “when it (1) sets forth the reasons that a defendant purportedly failed to comply with the NVRA, and (2) clearly communicates that a person is asserting a violation of the NVRA and intends to commence litigation if the violation is not timely addressed.” *Public Interest Legal Foundation*, 370 F. Supp.3d at 456-57. Put otherwise, “the pre-suit notice requirement [] is violation specific.” *Bellitto*, 268 F. Supp. 3d at 1334 (dismissing subsection 20507(i) claim because plaintiff only sent defendant a single correspondence requesting documents under the NVRA and never notified defendant of purported NVRA violation after the request went unfulfilled); *Georgia State Conference of NAACP v. Kemp*, 841 F. Supp.2d 1320, 1335 (N.D. Ga. 2012) (dismissing plaintiff from NVRA suit because he failed to comply with notice requirement).

The NVRA also allows plaintiffs to bring suit to remedy violations that occur within thirty days of an election. 52 U.S.C. § 20510(b)(3). Citing this provision, Plaintiffs originally claimed they are exempt from the notice provision because the Department initially responded to their state law records request within the time permitted by state law. (Complaint ¶ 51). But *compliance* with a request for records cannot plausibly form the basis for *violation* of NVRA access provisions.¹ Nor could

¹ Notably, only Plaintiff Citizen AG filed the records request at issue. (Complaint Ex.3.) Plaintiff Golembiewski makes no assertion that he provided notice to Defendants under 52 U.S.C. § 20510(b).

it form the basis for a violation of any substantive provision of the NVRA. And in any event, Plaintiffs' more recent Supplemental Complaint appears to offer no excuse for this failure.²

Further, Plaintiffs do not, and cannot, make any contention that any violations have occurred within thirty days prior to the November 2024 election, which has now passed. Instead, Plaintiffs freely admit that their concerns are longstanding.

At most, Plaintiffs cite publicly available statistics from 2020 and 2022 in support of their claims. Supplemental Complaint ¶¶ 36-38. Beyond these, Plaintiffs reference records that were provided *after* the November 2024 election. Supplemental Complaint ¶¶ 35, 42-49. These records cannot plausibly establish any violation, let alone one occurring within thirty days before the 2024 general election.

Further, even if Plaintiffs had plausibly pled a violation relating to records access (which they have not), they may not “bootstrap” that alleged violation to the complaints that they proffer about 2020 and 2022 voter data. Instead, it is well-established that each purported NVRA violation requires separate notice under section 20510. *See, e.g., Bellitto*, 268 F. Supp. 3d at 334. Plaintiffs do not even contend that they provided notice as to their allegations regarding 2020 and 2022

² Plaintiffs again allege that their allegations relate to violations “that occurred within thirty (30) days of a federal election;” however, as more fully set forth *infra*, Plaintiffs' claims date from at least 2022. Further, the election that might otherwise obviate such notice requirements has long-passed, and no federal election is scheduled to be held within the next thirty days.

voter data. As such, this court lacks jurisdiction over their claims, and their motion for injunctive relief should be denied.

b. Plaintiffs lack standing to bring this action.

Even if Plaintiffs had provided notice, though, they still lack standing. The U.S. Constitution confines a federal court's jurisdiction to "Cases" and "Controversies." U.S. Const. art. III, § 2. This limit is enforced by requiring that plaintiffs establish standing, which in turn requires them to demonstrate that they suffered (1) an injury in fact, (2) caused by the conduct complained of, and that is (3) capable of judicial remedy. *Yaw v. Delaware River Basin Comm'n*, 49 F.4th 302, 310 (3d Cir. 2022).

For injury in fact, a plaintiff cannot rely upon a general interest "in the proper application of the Constitution and laws." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 (1992). Injuries must be personal to the plaintiff as well as "concrete" and "particularized." *Raines v. Byrd*, 521 U.S. 811, 818-19 (1997); *see also Yaw*, 49 F.4th at 311, 314-15. Here, accepting their non-conclusory allegations, Plaintiffs have not alleged any concrete, particularized injury specific to them.

The Supplemental Complaint makes abundantly clear that the claimed injury here is that Plaintiffs wish to ensure that Defendants adhere to the NVRA. Supplemental Complaint ¶¶ 112-120. This is no more than the type of allegations of

generalized injury that have repeatedly been deemed insufficient for Article III standing purposes.

Similarly, Plaintiffs' interest in "protection against vote dilution" is insufficient to confer standing. Complaint ¶ 105, Supplemental Complaint ¶ 54. A generalized grievance that is "undifferentiated and common to all members of the public" is insufficient to establish standing. *Lujan*, 504 U.S. at 575. "[W]hen the asserted harm is a 'generalized grievance' shared in substantially equal measure by all or a large class of citizens, that harm alone normally does not warrant exercise of jurisdiction." *Warth v. Seldin*, 422 U.S. 490, 499 (1975) (citation omitted); *see also Bognet v. Secretary Commonwealth of Pennsylvania*, 980 F.3d 336, 349 (3d Cir. 2020), *vacated as moot by Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021).

This Court rejected similar a similar "vote dilution" theory of standing in *Bolus v. Boockvar* where a plaintiff sought to enjoin the use of ballot drop boxes, alleging that the use of these drop boxes meant that "his vote could be diluted due to voter fraud." No. 3:20-cv-01882, 2020 WL 6880960, at *3 (M.D. Pa. Oct. 27, 2020), *report and recommendation adopted*, 2020 WL 6882623 (M.D. Pa. Nov. 23, 2020). Initially, the Court held that this claim did not meet the basic requirements for standing, because it merely raised a generalized grievance that "could conceivably be raised by any voter in the Commonwealth." *Id.* at *4.

The Court then observed that the alleged injury to voting was “speculative and hypothetical” because “[w]holly lacking” from the complaint was “any allegation that collecting ballots in locations other than the office of the County Election Board results in fraudulent ballots.” *Id.* Similarly, in *Huertas v. City of Camden*, a claim that a city zoning plan would dilute the Hispanic vote was “purely speculative” because it alleged that the plan “if approved and implemented, might displace some indeterminate number of Hispanics from the city, and thus might have the effect of diluting the Hispanic vote.” 245 Fed. Appx. 168, 172 (3d Cir. 2007) (emphasis in original).

Here, Plaintiffs similarly claim that Mr. Golembiewski “will be irreparably harmed as a Pennsylvania voter” because his “fundamental right to vote” was or will be undermined.” Complaint ¶ 104, Supplemental Complaint ¶ 5. But Plaintiffs’ claims ultimately rely upon the mere supposition that unidentified individuals whose registrations they claim should have been cancelled will be permitted to vote despite all protections in state and federal law that prevent such error.

Such averments are plainly insufficient to confer standing. Plaintiffs’ own averments establish the Complaint’s deficiency – they concede that Mr. Golembiewski’s “concern” is equally shared with *all* Pennsylvania voters. Supplemental Complaint ¶ 5. Such complaints that affect all voters equally are generalized grievances and incapable of conferring standing. *See Bognet*, 980 F.3d

at 352 (dismissing vote “dilution” claims for lack of standing); *see also Wood v. Raffensperger*, 981 F.3d 1307, 1314-15 (11th Cir. 2020) (dismissing claim based on interest that “only lawful ballots are counted” as generalized grievance insufficient for standing).

Similarly, interests that “only lawful ballots are counted” or that “government be administered according to the law” are generalized interests that do not permit standing. *Wood*, 981 F.3d at 1314. And precedent “uniformly” holds that even an allegation that executive action violated a duly enacted statute “is not an injury for standing purposes.” *Russell v. DeJongh*, 491 F.3d 130, 134 (3d Cir. 2007). Ultimately, there is nothing in the Supplemental Complaint (nor could there be) that identifies how any Plaintiff is affected by the conduct challenged in this case in a way that is any different from any other member of the public, and Plaintiffs thus lack standing.

Nor are Plaintiffs’ claims redressable in this action. The processes that Plaintiffs take issue with are administered by counties and the relief they seek is ultimately from counties. Under Pennsylvania law, it is county registration commissions that conduct voter list maintenance, including cancelling voter registrations. 25 Pa.C.S. § 1901. Further, it is county boards of elections that tabulate votes. 25 P.S. § 3154. While they describe relief from the Secretary—including compelling the Defendants to undertake list maintenance actions—these

actions are undertaken by Counties, who are not parties to this action. *See, e.g., Zimmerman v. Schmidt*, 63 MAP 2024, 2024 WL 4284202, at *1 (Pa. Sept. 25, 2024) (finding Secretary is not an indispensable party in case challenging County ballot activity). Despite supplementing their Complaint, Plaintiffs have taken no action to remedy this deficiency.

Finally, Plaintiff Citizen AG asserts that it has organizational or associational standing because it expended resources “to investigate, address, research, and counteract” the Department’s list maintenance processes. Complaint ¶ 82, Supplemental Complaint ¶ 61. This is not a basis for organizational standing. *See Pa. Prison Soc. v. Cortes*, 508 F.3d 156, 162-63 (3d Cir. 2007) (describing the two possible bases for organizational standing: direct harm to the organization’s interest and associational standing based on its members).

Indeed, the organization’s decision to analyze state voter registration records does not give it standing to challenge those records. *Pennsylvania v. New Jersey*, 426 U.S. 660, 664 (1976). Rather, it presents both a generalized grievance, *see Berg v. Obama*, 586 F.3d 234, 239-40 (2009), and a type of self-inflicted harm that does not create standing, *see Clapper v. Amnesty Int’l USA*, 568 U.S. 398, 418 (2013) (“If the law were otherwise, an enterprising plaintiff would be able to secure a lower standard for Article III standing simply by making an expenditure based on a

nonparanoid fear.”). Here, the fact that Citizen AG has determined to expend resources cannot of itself create standing.

Neither does the fact that its members are “lawfully registered to vote” in Pennsylvania and “concerned” about “integrity of elections” or “fear that their legitimate votes will be nullified or diluted” confer standing. Complaint ¶¶ 54, 55, Supplemental Complaint ¶¶ 54, 55. These, too, are the “generalized grievances” of *Bognet* and *Bolus*, and the fact that they are shared by an organization, rather than an individual, does nothing to confer standing. *See Pennsylvania Prison Soc. v. Cortes*, 508 F.3d 156, 163 (3d Cir. 2007) (association may assert claims on behalf of its members, but *only where the record shows that the organization's individual members themselves have standing to bring those claims.*” (emphasis added)) (citing *Hunt v. Washington State Apple Advertising Comm’n*, 432 U.S. 333, 343 (1977); *NAACP v. Button*, 371 U.S. 415, 428 (1963); *Public Interest Research Group v. Powell Duffryn Terminals*, 913 F.2d 64, 70 (3d Cir. 1990)).

Plaintiffs have made no attempt to remedy these deficiencies since their original complaint. And despite supplementing the complaint and acknowledging that the Department in fact responded to their records request, Plaintiffs continue to lack standing.

c. Plaintiffs ultimately fail to state a claim.

Even if Plaintiffs were to somehow overcome the foregoing jurisdictional hurdles, Plaintiffs fail to state a claim under the NVRA. Plaintiffs' assertion of an NVRA violation must fail because it is based upon a misstatement or misunderstanding of the Election Assistance Commission's Election Administration and Voting Survey (EAVS) data they cite, as well as the data that the Department provided in response to their records request.³ That data cannot plausibly support a claim under the NVRA.

Specifically, Plaintiffs continue to incorrectly assert that 277,768 inactive registrants who failed to respond to confirmation notices and did not vote in two consecutive federal elections remained registered. Supplemental Complaint ¶ 3. They do so despite the fact that the very documents upon which they rely directly contradict this assertion.

As previously explained in the Secretary's response to Plaintiffs' request for TRO/PI, ECF No. 17, the numbers that Plaintiffs cite do not reflect "individuals" or "voters." Rather, as clearly identified in the report that Plaintiffs cite "[t]he number reported in A8a includes *initial notices* sent to voters who appear to have moved

³ Plaintiffs' complaint continues to make allegations regarding the Department's obligation, and an alleged failure, to provide records under the NVRA. However, as discussed *supra*, Plaintiffs have received the records available under the NVRA and their prayer for relief appears to have abandoned such records disclosure claims.

based upon information received pursuant to the National Change of Address program.” 2022 EAVS, ECF No. 46-5, at 187 (emphasis added).

Plaintiffs compound this error by misinterpreting the data that they received in response to their NVRA/RTK request. As explained in the documents that the Department provided, Pennsylvania counties often send more than one notice to the same voter: an initial confirmation notice based on information from the U.S. Postal Service’s National Change of Address list and, if there is no response or the response comes back as undeliverable, an additional address verification notice. 25 Pa.C.S. § 1901; 4 Pa. Code § 183.6. Therefore, the numbers representing voters in 6a (voters sent initial confirmation notices or “NCOA notices”) and 6b (voters sent address verification notice or “AVN notices”) include many of the same voters (i.e., the same voter may be counted at least once in 6a and at least once in 6b). Supplemental Complaint ¶ 47. “Summing” those numbers, as Plaintiffs do in a furtive effort to support their claim, makes no sense.

And even with respect to the 23,600 figure, no conclusion can be drawn and Plaintiffs make no averments supporting that their status is improper. That number, representing voters who did not vote in either the 2020 or 2022 general elections, who did not respond to an AVN and who were not listed as cancelled in the Department’s data (as set forth in the RTKL/NVRA response) does not provide any basis for finding that a violation of the NVRA occurred. Plaintiffs have not and

cannot plead that these voters are erroneously listed as active or “not cancelled.” As set forth in the very response upon which Plaintiffs rely (but which they neglect to include), “[a] voter record can be changed from inactive to active status and *thus avoid cancellation even where the voter does not vote*. For example, if a voter contacts the election office or attempts to re-register to vote, their status may be changed to active....”⁴ See Ex. A. (emphasis added).

In other words, voters who were previously cancelled due to lack of activity will often reregister, or inactive voters could be reactivated by voting or otherwise confirming their status with the county election board. Notices are also sent for voters who move within a county, and these notices would not typically result in a cancellation, because the voter’s qualification to vote in that particular county has not been affected, only their address. Inactive voters could die, which would mean that they would be cancelled through a different process. 25 Pa.C.S. § 1505. Plaintiffs neglect to consider all of the above reasons why a “non-responsive” voter who does not vote in two elections might NOT be cancelled at the time that the Department provides data. Instead, Plaintiffs continue to inappropriately rely on historical “snapshots.” Such reliance is always faulty because voter list maintenance

⁴ Because this document is referenced and explicitly relied upon by Plaintiffs it is appropriate to attach the complete document here. See *In re Burlington Coat Factory Securities Lit.*, 114 F.3d 1410, 1426 (3d Cir. 1997) (district court ruling on motion to dismiss may properly consider such document).

is not static. These figures simply represent the status of data retrieved as of the date of the request, and the fact that a voter registration was once cancelled does not mean that it will properly remain cancelled as of the date data is requested. Indeed, to accept Plaintiffs' argument is to maintain that individuals who do not respond to NCOA or NVA notices *forever forfeit* their right to vote. That is not the law, and that is not what the data demonstrates.

Thus, Plaintiffs do not and cannot plausibly establish that Pennsylvania has, is, or will violate the NVRA.⁵ Essentially, Plaintiffs' theory of there being some specified group of 277,768 (or 77,188) inactive voters that should have been cancelled is based on a flawed foundation, and cannot plausibly support a claim for relief.

For all of these reasons, Defendants' Motion to Dismiss should be granted, and Plaintiffs' Supplemental Complaint should be dismissed.

⁵ Further, while plaintiffs seek to compel "future compliance" with the NVRA, they have offered no averment that might demonstrate that such compliance will not occur. Rather, pursuant to both the NVRA and Pennsylvania law, inactive voters are already required to provide affirmation of their residence prior to voting. 52 U.S.C. § 20507(e); 25 Pa.C.S. § 1902. And inactive voters who fail to vote in two consecutive (federal) general elections are cancelled. 52 U.S.C. § 20507(d); 25 Pa.C.S. § 1901(d). And the very EAC data that Plaintiffs submitted with their Complaint shows that Pennsylvania's counties do a robust job with respect to voter list maintenance. *See* Compl. Ex. 2 at 189 (2022 EAVS report showing 360,132 voters removed as result of failure to respond to confirmation notice and vote in two consecutive federal elections).

Michael J. Fischer
Executive Deputy General Counsel
30 N. 3rd Street, Suite 200
Harrisburg, PA 17101
(717) 831-2847
mjfischer@pa.gov

Kathleen A. Mullen
Executive Deputy Chief Counsel
306 North Office Building
Harrisburg, PA 17120
(717) 783-0736
kamullen@pa.gov

Respectfully submitted,

JENNIFER C. SELBER
GENERAL COUNSEL

/s/ Thomas P. Howell

Thomas P. Howell (Bar. No. 79527)
Deputy General Counsel
30 N. 3rd Street, Suite 200
Harrisburg, PA 17101
(717) 460-6786
thowell@pa.gov

*Counsel for Secretary of the
Commonwealth Al Schmidt*

RETRIEVEDFROMDEMOCRACYDOCKET.COM

CERTIFICATE OF WORD COUNT

I hereby certify that, in accordance with Local Rule 7.8, Defendants principal brief is no more than 7,500 words. This Brief in Support of Defendant’s Motion to Dismiss the Supplemental Complaint is 3,717 words. I have used the word count feature of the word processing system to make this certification.

Date: February 19, 2025

/s/ Thomas P. Howell
Thomas P. Howell
Counsel for Defendant

RETRIEVEDFROMDEMOCRACYDOCKET.COM

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing was served on all counsel of record on February 19, 2025, by this Court's CM/ECF system.

/s/ Thomas P. Howell
THOMAS P. HOWELL

RETRIEVEDFROMDEMOCRACYDOCKET.COM