UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

REPUBLICAN NATIONAL COMMITTEE, JORDAN JORRITSMA and EMERSON SILVERNAIL,

Plaintiffs,

v

JOCELYN BENSON, in her official capacity as Michigan Secretary of State and JONATHAN BRATER, in his official capacity as Director of the Michigan Bureau of Elections,

Defendants.

No. 1:24-cv-00262

HON. JANE M. BECKERING

Thomas R. McCarthy
Gilbert C. Dickey
Conor D. Woodfin
1600 Wilson Blvd, Suite 700
Arlington, Virginia 22209
703.243.9423
tom@consovoymccarthy.com
gilbert@consovoymccarthy.com
conor@consovoymccarthy.com

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
PO Box 30736
Lansing, Michigan 48909
517.335.7659
meingasth@michigan.gov
grille@michigan.gov

DEFENDANTS SECRETARY OF STATE JOCELYN BENSON AND DIRECTOR OF ELECTIONS JONATHAN BRATER'S REPLY BRIEF IN SUPPORT OF MOTION TO DISMISS

Heather S. Meingast (P55439)
Erik A. Grill (P64713)
Assistant Attorneys General
Attorneys for Defendants
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
Email: grille@michigan.gov
(P64713)

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ARGUMENT

I. Plaintiffs have not refuted Defendants' challenge to their standing to bring this complaint.

The NVRA requires that a private cause of action can only be brought by a person "aggrieved by a violation of [the NVRA]" and who provides "written notice of the violation to the chief election official of the State involved." 52 U.S.C. § 20510(b)(1). But here, neither RNC nor the individual voters have shown that they are "aggrieved" under principles of Article III standing.

A. The individual voters have failed to show a concrete and particularized injury that would establish standing.

Defendants' motion and brief challenged Plaintiffs Jorritsma and Silvernail's standing on the grounds that they failed to articulate any "concrete and particularized injury" and instead relied only on abstract "psychic" injuries and generalized grievances attributable to *all* citizens. Specifically, the Defendants' motion argued that Plaintiffs' subjective loss of confidence in elections and fears of possible fraud were insufficient to establish Article III standing. In their response, these Plaintiffs do not dispute that their standing is based on their own feelings of confidence or fear, and instead insist that these are sufficient. Their arguments, however, are at odds with federal law.

Again, loss of confidence in elections or abstract fears of unlawful voting fall far short of the kind of "concrete harm" required for Article III standing. *Glennborough Homeowners Ass'n v. United States Postal Serv*, 21 F.4th 410, 415 (6th Cir. 2021); cf. *Hein v. Freedom from Religion Found., Inc.*, 551 U.S. 587, 619–

20 (2007) (Scalia, J., concurring) (recognizing that a plaintiff whose only injury is subjective mental angst "lacks a concrete and particularized injury" under Article III). *See also Ladies Mem'l Ass'n, Inc. v. City of Pensacola, Fla.,* 34 F.4th 988, 993 (11th Cir. 2022) ("purely psychic injuries, like disagreeing with government action, are not concrete, so they do not give rise to standing.") (citing *Diamond v. Charles*, 476 U.S. 54, 67 (1986).); *Santos v. Dist. Council of N.Y.C. & Vicinity of United Brotherhood of Carpenters & Joiners of Am., AFL-CIO*, 547 F.2d 197, 200 (2d Cir. 1977) (explaining that "disappointment" in election results is "an emotional loss insufficient to establish standing" (internal quotation marks and citation omitted)). And merely invoking "the possibility and potential for voter fraud," based only on "hypotheticals, rather than actual events," does not suffice. *Donald J. Trump for President, Inc., v. Boockvar*, 493 F. Supp. 3d 331, 406 (W.D. Pa. 2020).

In response, Plaintiffs rely principally upon the district court opinion from Colorado in *Judicial Watch, Inc. v. Griswold*, 554 F. Supp. 3d 1091, 1104 (D. Col. 2021). First, it is worth noting that the Court in that case also held that the claim that, "purportedly bloated voter rolls could lead to fraudulent votes, which could diminish or dilute the individual plaintiffs' votes and have caused such a fear" was both a generalized grievance and hypothetical, and so did not support plaintiffs' standing. *Id.* at 1103 ("[Plaintiffs'] 'subjective fear' of a diminished vote 'does not give rise to standing.'). Plaintiffs do not address this part of the Court's opinion or reconcile it with their identical allegations.

But more importantly, the Colorado District Court's holding concerning the "loss of confidence" was based entirely on its conclusion that the U.S. Supreme Court had recognized the "'independent significance' of public confidence in the electoral process because it 'encourages citizen participation in the democratic process.'" *Judicial Watch*, 554 F. Supp. 3d at 1104. The district court's conclusion about this "independent significance" was based on one sentence from *Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008). But that case had nothing to do with in individual standing, let alone standing based upon a subjective loss of confidence in elections. Instead, the "independent significance" of public confidence was identified by the Court as a *state interest* justifying the alleged burdens imposed upon voters by requiring them to present photo identification. *Marion Cnty*, 553 U.S. at 196. The Court simply held that the "significance" of the public's confidence in elections was "independent" of the state's interest in preventing fraud. *Id.*

Moreover, the Supreme Court's opinion addressed only "*public* confidence," not any one individual's confidence in elections. *Id.* (emphasis added). The Court's conclusion that public confidence in elections supported a state interest in photo identification requirements does little (if anything) to support the conclusion that an individual voter may base their standing upon an alleged lack of confidence.

The response's citation to *Judicial Watch, Inc. v. King*, 993 F. Supp. 2d 919, 924 (S.D. Ind., 2012) is similarly flawed. The district court there also relied only upon the reference to the "independent significance" of public confidence in *Marion Cnty.* for its conclusion that, "If the state has a legitimate interest in preventing

that harm from occurring, surely a voter who alleges that such harm has befallen him or her has standing to redress the cause of that harm." *Id.* The district court cited no other authority for that conclusion. But nothing in *Marion Cnty.* supports that leap in reasoning, and instead the body of Article III standing law weighs against it.

In addition, granting individual voters standing based upon a raw allegation that they have subjectively "lost confidence" in elections would open the door for standing to challenge virtually any possible action or inaction by government relating to elections. In short, standing would become available to anyone willing to simply allege a subjective loss of confidence in elections. It is difficult to imagine a plaintiff in an election-related case who would not at least be willing to say that they experienced a "loss of confidence" if that meant their claims would be heard in federal court. This Court should decline Plaintiffs' invitation to undermine Article III standing based upon a misreading of a single sentence is one Supreme Court opinion.

But, outside of the misapplication of a single sentence from the Supreme Court's opinion in *Marion Cnty.*, the individual Plaintiffs offer no actual legal authority supporting their claim to standing. As even the Colorado District Court recognized in *Judicial Watch*—Plaintiffs' claim that their votes "might" be diluted is too abstract and generalized to support standing. 554 F. Supp. 3d at 1103. Because the individual Plaintiffs have failed to demonstrate standing, their claims must be dismissed.

B. The RNC has not demonstrated standing under a "diversion of resources" theory.

Defendants' motion and brief challenged RNC's standing where it was based upon RNC's supposed diversion of resources to investigate the State of Michigan's compliance with NVRA. Once again, Plaintiffs do not appear to dispute that this is an accurate description of their claim to standing. (See ECF No. 27, PageID.402.) Instead, they insist that their spending is enough to create standing. But their arguments are at odds with the recent decisions of the Sixth Circuit cited in the Defendants' motion—which RNC does not even address, let alone rebut.

RNC's argument appears to rest heavily—if not entirely—upon the Ninth Circuit's decision in *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1044 (9th Cir. 2015). Of course, as this Court is well aware, the decisions of other circuits are not binding on the Sixth Circuit, or on this Court. See e.g. *Cross Mt. Coal v. Ward,* 93 F.3d 211, 217 (6th Cir. 1996) ("In addition, this court has stated that even though the decisions of other circuits are entitled to our respect, they are not binding upon us.") Further, *La Raza* predates more recent opinions of the Sixth Circuit that reject standing based upon precautionary spending to combat "speculative future harms" or "speculative fears." *Shelby Advocates for Valid Elections v. Hargett,* 947 F.3d 977, 982 (6th Cir. 2020); *Buchholz v. Meyer Njus Tanick, PA*, 946 F.3d 855, 865 (6th Cir. 2020). As an organization, the RNC can "no more spend its way into standing based on speculative fears of future harm than an

individual can." *Shelby,* 947 F.3d at 982. Tellingly, the Plaintiffs' response does not address these cases *at all*. They do not attempt to distinguish them or seek to narrow them in any way. Their reliance on the Ninth Circuit's decision in *La Raza* is misplaced when there is Sixth Circuit precedent weighing against their position.

Moreover, even *La Raza* offers little support for their position here. There, the Ninth Circuit reversed the district court's conclusion that the plaintiff organizations—the National Council of La Raza, and the Las Vegas and Reno chapters of the NAACP—lacked standing where they alleged that "but for" the state's failure to register voters, they would not have had to spend their resources registering those voters. 800 F.3d at 1039. In short, the organizations' spending was a response to, or effort to mitigate, the state's action. But that is not at all what RNC alleges here. They are not claiming that they are allocating resources to register voters, or even to perform some role that Michigan has failed to perform. Instead, their allegations are conspicuously abstract, hypothetical, and not causally connected to any action taken by the Defendants here.

The RNC alleges that—because it is "concerned that Defendants' failure to comply with NVRA" increases the risk of fraud, it "monitors state and local election officials' compliance with their NVRA list maintenance obligations through publicly available records *from jurisdictions across the nation."* (ECF No. 1, PageID.4, ¶ 16)(emphasis added.) By its express terms, this allegation is not based on anything the State of Michigan does or does not do, but is a generalized concern about compliance with NVRA nationwide. Simply put, Defendants did not make the RNC

spend anything, and the alleged spending was done to determine *whether* the Defendants may not be complying with NVRA.

Next, RNC alleges that inaccurate lists "may" cause it to misspend money or resources trying to contact voters who should have been removed from Michigan's voter registration list. (*Id.*, ¶ 17.) This allegation, however, is speculative and unaccompanied by any allegation that "misspending" has actually occurred.

Lastly, the RNC alleges that it "expended considerable time and resources investigating Defendants'" alleged failure to comply with the NVRA. (*Id.*, PageID.6, ¶¶ 24-25.) Again, this was not spending caused by the Defendants' alleged non-compliance with NVRA—such as what was described by the Ninth Circuit in *La Raza*—and instead it was an effort to determine *whether* the Defendants were complying with NVRA.

In short, RNC admits that its alleged spending was not to counteract or ameliorate the effects of any alleged non-compliance with NVRA. Instead, it was spending based to "monitor" and determine whether Defendants were complying with federal law. It is, simply put, RNC trying to spend its way into an alleged injury. This is precisely what the Sixth Circuit has rejected. RNC lacks standing, and so its claims must be dismissed.

II. Plaintiffs have not stated a plausible claim that Defendants have failed to make a "reasonable effort" to remove ineligible persons from the list of registered voters.

In the motion and brief, Defendants emphasized that Plaintiffs have not claimed that they can identify even a single voter in any Michigan county that is

ineligible to be registered but nonetheless appears as an active voter in the QVF. Not even *one* ineligible voter. Plaintiffs' response does not deny this. Plaintiffs' response also does not dispute any of the legal authority in Defendants' brief that describes the State of Michigan's program for the removal of ineligible voters, and they do not deny that Michigan's program—as described—constitutes a "reasonable effort" under NVRA.

Instead, Plaintiffs' claims rely on allegations concerning Plaintiffs' own comparison of the state's Qualified Voter File (QVF) to data from the 2020 census, from which they calculate that there are more registered voters than voting-age persons in many Michigan counties. Whether Plaintiffs' claims fail under Fed. R. Civ. P. 12(b)(6) thus reduces to the question of whether Plaintiffs have stated a plausible claim that there are more registered voters than eligible voters.

As stated in the Defendants' brief, the inquiry as to plausibility is "a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.... [W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (quoting Fed. R. Civ. P. 8(a)(2)). Thus, in evaluating the sufficiency of a plaintiff's pleadings, this Court may make reasonable inferences in the non-moving party's favor, "but [this Court is] not required to draw [P]laintiffs' inference." *Aldana v. Del Monte Fresh Produce, N.A., Inc.*, 416 F.3d 1242, 1248 (11th Cir. 2005). Here, Defendants are appealing to the Court's experience and

common sense to reject claims that are unaccompanied by facts and based entirely on Plaintiffs unsupported conclusions.

In their response, Plaintiffs raise three arguments. First, they shrug off Defendants' argument that their complaint fails to identify any specific flaw in Defendants' program for the removal of ineligible voters. Plaintiffs dismiss "Defendants' demand for specificity," reasoning that NVRA "requires reasonable list maintenance, not specific policies." (ECF No. 27, PageID.412.)

But Defendants' "demand for specificity," of course, was based upon *Pub. Int. Legal Found. v. Boockvar,* 495 F. Supp. 3d 354, 359 (M.D. Penn., Oct. 20, 2020), where the Court held, "the NVRA does not require perfection," and that "[w]ithout allegation, let alone proof, of a specific breakdown in Pennsylvania's voter registration system, we cannot find that the many procedures currently in place are unreasonable." Here, Plaintiffs are unwilling—if not unable—to explain what exactly they think the Defendants are "omitting," or how Defendants are allegedly "failing" conduct list maintenance.

In other words, Plaintiffs appear to be resorting to some variation of *res ipsa loquitur*—something *must* be wrong with the Defendants' program, but Plaintiffs do not know what it is. But Plaintiffs cite to no law or case anywhere in the nation supporting the position that such a rationale states a viable claim under NVRA. Again, NVRA does not require a perfect program, but instead only a program that makes a "reasonable effort" to remove ineligible voters. Plaintiffs have made no allegation even attempting to explain how Michigan's program does not make a

"reasonable effort." Instead, Plaintiffs rely on conclusory allegations, and insist that this Court is obligated to accept their conclusions as true at "the pleading stage."

But federal courts are not obligated to accept as true legal conclusions couched as factual allegations. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). While detailed factual allegations are not necessary, the allegations must be sufficiently detailed to create more than speculation of a cause of action. *Id.* A claim is plausible if the factual allegations are sufficient to allow "the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *HDC, LLC v. Ann Arbor*, 675 F.3d 608, 611 (6th Cir. 2012). Plaintiffs must state a claim that is not merely possible, but plausible. *Iqbal*, 556 U.S. at 678.

Here, Plaintiffs are trying to insist that their mere allegation that the program is unreasonable must be accepted as true. But this Court is not obligated to accept Plaintiffs' conclusions. Further, Plaintiffs' inability to articulate any deficiency in the program—or in how it is administered—renders their claims implausible, and thus legally insufficient.

Plaintiffs' second and third arguments are that the Court is obligated to accept their allegations as true, and that the Director of Elections' response—including where he explains why Plaintiffs' claims about the census data and voter registration are incorrect—cannot be considered because they deliberately chose *not* to include that document in their complaint. These arguments essentially run together to form the thrust of Plaintiffs' argument: they contend that it is sufficient

for them to merely allege that there are more voters than there are voting-age persons, and this Court must accept that as true.

Plaintiffs' arguments in this respect are out of alignment with well-established federal law requiring that plaintiffs must make allegations sufficient to state a claim that is *plausible*. But a claim is not plausible when it is based entirely on a plaintiff's unsupported conclusions. Here, Plaintiffs have not made factual allegations sufficient to state a claim, and they are instead seeking to rely on the possibility that Defendants are not complying with NVRA.

For example, as was raised in Defendants' motion, Plaintiffs allege that, "Having a high percentage of inactive registrations is an indication that a state or jurisdiction is not removing inactive registrations after two general federal elections." (ECF 1, PageID.13, ¶62.) But the Michigan Department of State website openly states:

> State and local election officials were able to identity a significant number of registered voters who appeared to have changed address through the statewide mailing of absent voter ballot applications in 2020, the first statewide election mailing in at least a decade. State and local officials used applications that were returned as undeliverable to mark voters as inactive and send notices of cancellation in 2021 and without action by these voters the registrations will be cancelled after the two-federal-election waiting period expires in 2024. Because of this, many more voter registrations were identified and will be cancelled after 2024 than after 2022.[1]

[1] *See* Voter registration cancellation procedures, available at https://www.michigan.gov/sos/~/link.aspx?_id=0CA77C36E2D44E0DBCAB875DE164507F&_z=z (accessed April 15, 2024).

The "high number" of inactive registrations, therefore, are not a reflection of a failure of Michigan's program, but instead were the *result* of Michigan's efforts to identify and slate ineligible voters for removal. According to Plaintiffs' arguments, their allegation is sufficient, and anything else is an issue for discovery.

Similarly, Plaintiffs contend that this Court cannot consider Director Brater's letter responding to the identical allegations raised in Plaintiffs' complaint. Director Brater noted that Plaintiffs appeared to be including both "active" and "inactive" voters when calculating the number of voters in various counties and explained that "inactive" voters could not be removed without following the requirements of federal law, and he provided the actual number of *active* registered voters in each of the counties identified by Plaintiffs. (ECF No. 19-3, PageID.316-329, p 4-5.) Plaintiffs have no substantive answer to this argument—they do not attach any records on which their allegation is based or cite to publicly available records confirming their claim. Rather, they insist that their calculations were based on "active" voters because…the allegation says so.

In other words, Plaintiffs' analysis of census data was based on active voters not because of any documentary support or affidavit corroborating that claim, but simply because they allege that it was:

> Defendants' evidentiary dispute is also just plain wrong. They assert that Plaintiffs compare census data to "the *total* (not active) number of records in Michigan's QVF" to arrive at artificially high numbers. Mot. 26. That's false. The complaint repeatedly compares "the most up-to-date count of *registered active voters* available from the Michigan Bureau of Elections" to conclude that six dozen counties "have suspiciously high rates of active voter registration." Compl. ¶47

(ECF No 27, PageID.413.)

Plaintiffs overstate the authority of their own allegations. They are not entitled to allege their own reality to the exclusion of any competing information. By way of analogy, if Plaintiffs alleged in the complaint that there *no* eligible voters anywhere in the State of Michigan, that is not a conclusion that this Court would be obligated to accept, and a claim premised on such an allegation would not be plausible. Such allegations would be contrary to the Court's experience and common sense.

But Plaintiffs' allegations here are no better. Plaintiffs allege—without support—that their information is more accurate than official state records, that the Director of Elections' official response to them was false, and that their conclusions are beyond question. Plaintiffs' refusal to directly address any challenge to their conclusions speaks volumes. In its April 16, 2024 order, this Court specifically invited Plaintiffs to amend their complaint to resolve any pleading deficiencies, but the Plaintiffs chose not to do so. See ECF No. 22, PageID.325-326. If Plaintiffs had information demonstrating that the State of Michigan website or Director Brater's statements were wrong, it should have been a simple matter to amend their complaint to include allegations that at least attempting to show how the Defendants were wrong. If nothing else, Plaintiffs should have made allegations articulating more precisely the source of their "active voter" statistics. Because they have affirmatively refused to do so, it is reasonable to infer that Plaintiffs have no such information.

Because Plaintiffs cannot articulate any flaw in Michigan's program for the removal of ineligible voters, or how that program is administered, or how the Defendants' response to their NVRA notice letter was wrong, their claims are simply not plausible, and the complaint should be dismissed under Fed. R. Civ. P. 12(b)(6).

CONCLUSION AND RELIEF REQUESTED

For these reasons, and the reasons stated in the earlier brief, Defendants Secretary of State Jocelyn Benson and Director of Elections Jonathan Brater respectfully request that this Honorable Court enter an order dismissing the complaint in its entirety, together with any other relief that the Court determines to be appropriate under the circumstances.

Respectfully submitted,

s/Erik A. Grill

Erik A. Grill (P64713)
Heather S. Meingast (P55439)
Assistant Attorneys General
Attorneys for Defendants Benson and Brater
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
Email: grille@michigan.gov
(P64713)

Dated: June 17, 2024

CERTIFICATE OF SERVICE

I hereby certify that on June 17, 2024, I electronically filed the foregoing paper with the Clerk of the Court using the ECF system which will send notification of such filing of the foregoing document as well as via US Mail to all non-ECF participants.

s/Erik A. Grill
Erik A. Grill (P64713)
P.O. Box 30736
Lansing, Michigan 48909
517.335.7659
Email: grille@michigan.gov
P64713