IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MISSOURI

JAY ASHCROFT, *et al.*, Plaintiffs, v. JOSEPH BIDEN, *et al.*, Defendants.	Case No. 4:24-cv-01062-SEP
THE STATE OF MISSOURI, ex rel. ANDREW BAILEY, in his official capacity as Missouri Attorney General Plaintiff, v. JOSEPH BIDEN, *et al.*, Defendants.	Case No. 4:24-cv-01063

DEFENDANTS' COMBINED MOTION TO DISMISS AND OPPOSITION TO PLAINTIFFS' MOTION FOR AN EXPEDITED PRELIMINARY INJUNCTION

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INTRODUCTION

In passing the National Voter Registration Act (NVRA) over thirty years ago, Congress charged the Federal Government with "the duty . . . to promote the exercise of" the right to vote and established a goal to "increase the number of eligible citizens who register to vote in elections for Federal office." Pub. L. No. 103-31, 107 Stat. 77 (1993) (codified at 52 U.S.C. § 20501(a)-(b)). Congress drafted the law to reverse decades of decline in voter participation—and every administration since has endeavored to enforce its provisions. S. Rep. No. 103-6, p. 2 (1993); GAO, *Voter Registration: Information on Federal Enforcement Efforts* (June 2019), https://perma.cc/C3RE-3FZ5. The current Administration has followed suit. Shortly after assuming office, President Biden issued an executive order reiterating that it "is the responsibility of the Federal Government to expand access to, and education about, voter registration and election information." Exec. Order No. 14019 (EO 14019), Promoting Access to Voting, 86 Fed. Reg. 13,623 (Mar. 7, 2021). And, to help inform the Administration's "future policy developments on voting access," the order solicited agencies "to brainstorm and identify ways that they 'can promote voter registration and voter participation'" within their statutory frameworks and consistent with the requirements of Federal and State law. *Am. First Legal Found. v. U.S. Dep't of Agric.*, No. CV 22-3029 (BAH), 2023 WL 4581313, at *7 (D.D.C. July 18, 2023) (quoting EO 14019 § 3) (emphasis removed). In response to the Executive Order, agencies have endeavored to take actions to provide nonpartisan voting information to the public, including for example, by modernizing Vote.gov and making the website more accessible to individuals with disabilities. Providing this type of direction to Executive Branch agencies is hardly groundbreaking. Indeed, it reflects the proper role of the President in the Constitutional scheme.

Plaintiffs have a different view. After waiting three and a half years, Plaintiffs filed omnibus complaints in late July and August of this year challenging the Executive Order and agencies' efforts to implement it. Compl., ECF No. 1, Case No. 4:24-cv-1062-SEP (Ashcroft Compl.); Compl., ECF No. 1., Case No. 24-cv-1063 (Missouri Compl.) (consolidated with

4:24-cv-1062-SEP). And, after waiting eight more weeks, they have run to Court seeking, on an expedited basis, a preliminary injunction against implementation of the Order by the President of the United States and at least *fifteen* different agencies—manufacturing a purported emergency based on nothing more than the long-scheduled election. *See* Joint Status Report (JSR) at 4, ECF No. 54. But Plaintiffs' sprawling effort to reform the activities of vast swaths of the Federal Government must fail because, as an initial matter, Plaintiffs do not establish any plausible injury that would give them standing to sue.

Plaintiffs' sole argument that they have suffered an injury from the Executive Order is that—should the agencies' efforts result in additional voters registering—they could be burdened with increased compliance costs associated with processing more voter registration forms, including forms that are, they allege, inaccurate, duplicative, or submitted for ineligible individuals. In fact, the types of nonpartisan activities that Federal agencies have undertaken in connection with the Executive Order are not plausibly injurious. For example, over the past three years, various agencies have been updating their websites and providing nonpartisan information to the public in all parts of the country—in rural and urban areas alike—about how people can register to vote (something the agencies were doing, planning to do, or had the authority to do even before the Executive Order issued). *See generally* The White House, *Fact Sheet: The Biden-Harris Admin. Continues to Promote Access to Voting* (March 5, 2023), https://www.whitehouse.gov/briefing-room/statements-releases/2023/03/05/fact-sheet-the-biden-harris-administration-continues-to-promote-access-to-voting/ (2023 White House Fact Sheet); The White House, *Fact Sheet: Biden-Harris Admin. Releases Rep. on Native Am. Voting Rights* (Mar. 24, 2022), https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/24/fact-sheet-biden-harris-administration-releases-report-on-native-american-voting-rights/ (2022 White House Fact Sheet); The White House, *Fact Sheet: President Biden to Sign Executive Order to Promote Voting Access* (Mar. 7, 2021), https://www.whitehouse.gov/briefing-room/statements-releases/2021/03/07/fact-sheet-president-biden-to-sign-executive-order-

to-promote-voting-access/ (2021 White House Fact Sheet). Plaintiffs fail to connect Federal agencies' provision of nonpartisan information about how people can register to vote—or updating the Vote.gov website—to any increase in voter registration forms, let alone an increase in inaccurate, fraudulent, or duplicative forms, as Plaintiffs claim. Indeed, one district court has recently rejected a similar challenge to EO 14019 and another has rejected a request for emergency injunctive relief, both times on standing grounds. *See Keefer v. Biden*, No. 1:24-CV-00147, 2024 WL 1285538 (M.D. Pa. Mar. 26, 2024), *appeal filed* No. 24-1716 (3d Cir. Apr. 23, 2024), *cert. denied before judgment*, 2024 WL 4427541 (Oct. 7, 2024); Order of September 15, 2024, *Am. First Pol'y Inst. v. Biden*, 2:24-cv-152-Z (N.D. Tex.), ECF No. 39. This Court should do the same.

Even if Plaintiffs could clear these jurisdictional hurdles, they fail to state a cognizable legal claim. Plaintiffs seek to bring a sprawling and unbounded challenge to innumerable planned or ongoing agency activities under the framework of the Administrative Procedure Act (APA). But Plaintiffs have failed to identify any discrete final agency action that could give rise to an APA claim. Indeed, their complaint and preliminary injunction motion make clear that they are not challenging any particular agency action. Instead, they are mounting a broad programmatic attack against the implementation of a Presidential policy initiative across the entirety of the government. The APA does not authorize courts to entertain those types of complaints. And if the Court were to reach the merits, it would find that Plaintiffs' arguments do not map on to and cannot be sustained under any recognizable standard for APA review—which is, itself, a good indication that Plaintiffs have gone far astray.

None of the other preliminary-injunction factors favors Plaintiffs either. Plaintiffs' extended delay in filing their "emergency" motion is itself a basis to conclude that they have not suffered any irreparable harm—which, in any event, they have not established. And their unbounded request for relief, which would by Plaintiffs' own admission come in the midst of election season, is contrary to the public interest in addition to being insufficiently specific to satisfy the requirements of Rule 65.

Tellingly, Plaintiffs have stated that the extraordinary remedy of a preliminary injunction on the eve of a national election is necessary in part because the Administration has allegedly declined to produce certain deliberative materials to Congress and has also withheld such documents under the Freedom of Information Act (FOIA). JSR at 5. But the agencies have been working to accommodate Congress's legitimate oversight interests in a manner consistent with the separation of powers and the legal obligations of the Executive Branch. And enjoining the entire government's implementation of a Presidential initiative on the basis of speculative fears about the Executive Branch's compliance with Congressional oversight is permitted by neither Article III nor any substantive legal authority.

Accordingly, the Court should dismiss this lawsuit pursuant to Rule 12(b)(1) and deny Plaintiffs' artificial emergency motion as moot.

BACKGROUND

I. The Executive Order and Its Ongoing Implementation

In March 2021, President Biden issued Executive Order No. 14019, entitled "Promoting Access to Voting." 86 Fed. Reg. 13,623 (March 7, 2021). The President declared that "[i]t is the policy of [his] Administration to promote and defend the right to vote for all Americans who are legally entitled to participate in elections." *Id.* § 2. And, in furtherance of that policy, the Order directed Federal agencies to "consider ways to expand citizens' opportunities to register to vote and to obtain information about, and participate in, the electoral process." *Id.* § 3. Specifically, the head of each Federal agency was directed to "evaluate ways in which the agency can, as appropriate and consistent with applicable law, promote voter registration and voter participation." *Id.* § 3(a). The Order further directed each agency to consider ways that it can "provide relevant information . . . about how to register to vote, how to request a vote-by-mail ballot, and how to cast a ballot in upcoming elections[,]" "facilitate seamless transition from agencies' websites directly to State online voter registration systems or appropriate Federal websites," "provide access to voter registration services and vote-by-mail ballot applications[,]" "promote and expand access to

multilingual voter registration and election information," and "promote equal participation in the electoral process for all eligible citizens of all backgrounds[.]" *Id.* § 3(a)(i)-(v). The Order required each agency to submit to the Assistant to the President for Domestic Policy, within 200 days of the Order's issuance, "a strategic plan outlining the ways identified . . . that the agency can promote voter registration and voter participation." *Id.* § 3(b).[1]

Following issuance of the Executive Order, Federal agencies submitted their strategic plans to the White House. Declaration of Richard A. Sauber (White House Decl.) ¶¶ 7-12, *Am. First Legal Found. v. U.S. Dep't of Agric.*, No. 22-cv-3029 (D.D.C.), ECF No. 21-2. These "agency strategic plans solicited and received by the White House" generally "described potential agency actions for consideration," as well as "possible obstacles and ways to address them." *Id.* ¶ 8. Some agencies indicated that they had already begun undertaking particular initiatives in the preceding six months since Executive Order 14019 was issued. The strategic plans thus offered a "snapshot" at each agency of the "on-going development of potential actions" as of September 2021. Declaration of Ryan Law (Treasury Decl.) ¶ 14, *Am. First Legal Found. v. U.S. Dep't of Agric.*, No. 22-cv-3029 (D.D.C.), ECF No. 21-9. The strategic plans were reviewed by senior White House staff, who used them to provide feedback and guidance to agencies "regarding the content of their plans" and to "discuss the agencies' potential plans for implementation" of Executive Order 14019 generally. White House Decl. ¶¶ 11-12; *see also* Declaration of Richard A. Sauber, *Found. for Gov't Accountability v. U.S. Dep't of Just.*, No. 2:22-cv-252 (M.D. Fla.), ECF No. 68-1.

Some of the initiatives proposed by the agencies have since been implemented. *See, e.g.*, 2021 White House Fact Sheet (announcing several early-adopted agency actions). But not all. *See Am. First Legal Found.*, 2023 WL 4581313, at *7. The White House has released regular announcements of the nonpartisan activities that various agencies are undertaking.

[1] At relevant times, the "Assistant to the President for Domestic Policy" was Ambassador Susan E. Rice, who also served as Director of the Domestic Policy Council. White House Decl. ¶ 7.

See generally 2023 White House Fact Sheet; 2022 White House Fact Sheet; 2021 White House Fact Sheet. These include website updates and communications in which agencies encourage their "field offices to make nonpartisan information about voter registration available in customer service locations" around the country. 2023 White House Fact Sheet.

Consistent with that framework, the agency activities taken under the Executive Order—of which Plaintiffs only reference a small subset—reflect agencies finding ways to provide the public collectively, across all areas of the country, with nonpartisan information about elections and the registration process established by relevant state law. *See* Ashcroft Compl. ¶ 151-301; *see generally* 2023 White House Fact Sheet; 2022 White House Fact Sheet; 2021 White House Fact Sheet. For example, the Department of Agriculture (USDA) has stated in letters to state agencies administering nutrition assistance programs that it was "encouraging all USDA agency field offices to make nonpartisan information about voter registration available in customer service locations" around the country. 2022 White House Fact Sheet (noting that USDA's letters "encourage[d] the promotion of voter registration and non-partisan voting information" and "remind[ing] states of their responsibilities under the National Voter Registration Act"); *see also* 2023 White House Fact Sheet; 2021 White House Fact Sheet. These letters make clear that USDA is doing nothing more than "encourag[ing]" state agencies "to provide local program operators with promotional materials, including voter registration and *non-partisan, non-campaign election information*," and offering a non-exhaustive list of suggestions for how they can do so. Promoting Access to Voting through the Child Nutrition Programs, Pol'y & Program Dev. Div. (Mar. 23, 2022), https://tinyurl.com/USDA-Promoting-Voting-Access. The Department of the Interior stated that it would "explore options to expand access to voter registration on public lands across the country." 2023 White House Fact Sheet at 3. And so on. *Id.* (describing various agency activities); *see also* 2022 Fact Sheet.

II. Related Litigation

After the Executive Order issued, two nonprofit organizations submitted FOIA requests to a combined total of fifteen executive agencies, seeking the strategic plan that each agency submitted to the White House. *See Found. for Gov't Accountability v. U.S. Dep't of Just.*, 688 F. Supp. 3d 1151 (M.D. Fla. 2023); *Am. First Legal Found. v. USDA*, No. 22-3029, 2023 WL 4581313 at *2 (D.D.C. July 18, 2023), *appeal filed*, No. 23-5173 (D.C. Cir. July 31, 2023). Ultimately each agency responded to the FOIA request by informing the requesting organization that the requested plan was exempt from disclosure under FOIA pursuant to Exemption 5 based on the presidential communications privilege. *Ibid.* The organizations challenged the agencies' responses, resulting in two lawsuits, one currently before the U.S. Court of Appeals for the D.C. Circuit, *Am. First Legal Found*, and the other pending before the district court in the Middle District of Florida, *Found for Gov't Accountability.*

The D.C. district court upheld the agencies' assertions of Exemption 5. *Am. First Legal Found.*, 2023 WL 4581313 at *7, 10. The court explained that under the plain language of the Executive Order and based on the many declarations submitted by agency officials, the strategic plans that the agencies had submitted to the White House reflected "future possible actions" the agencies could take to "promote and defend the right to vote." As such, they were intended simply to aid White House advisors in "formulating the advice to be given to the President[.]" *Id.* at * 6-7 (internal quotation marks omitted). Accordingly, the court held that the agencies had properly invoked Exemption 5 based on the presidential communications privilege. *Id.* at *7.[2] In the other pending litigation, involving a single FOIA request submitted to the Department of Justice, the Middle District of Florida initially found that the Executive Order did not unambiguously demonstrate that the presidential communications privilege applies to the strategic plans but, following in camera review, it invited the government to file a renewed motion for summary judgment, which remains pending. *See Found. for Gov't Accountability*, 688 F. Supp. 3d at 1177.

[2] Plaintiffs' appeal to the D.C. Circuit was argued on September 5, 2024.

There are also several cases, similar to this one, in which plaintiffs seek to challenge E.O. 14019 and agencies' implementing activities directly. One district court has already dismissed such a lawsuit filed by Pennsylvania commonwealth legislators for lack of standing. *Keefer v. Biden*, No. 1:24-cv-00147, 2024 WL 1285538 (M.D. Penn. Mar. 26, 2024), *appeal filed*, No. 24-1716 (3d Cir.), *cert. denied before judgment*, No. 23-1162, 2024 WL 4427541. In reaching that decision, the court explained that the plaintiffs lacked standing as individual candidates because they failed to allege any "particular[ized] harm to their candidacies[,]" noting that "[a] vague, generalized allegation that elections, generally, will be undermined, is not the type of case or controversy that this court may rule on under Article III." *Id.* at * 10.[3]

Another court has already denied a motion for a temporary restraining order, holding that no plaintiff in that case has demonstrated standing because they had failed to "demonstrate a substantial threat that they will suffer irreparable injury if injunctive relief is denied." Order of September 15, 2024, at 5, *Am. First. Pol'y Institute v. Biden*, Case No. 2:24-cv-152 (N.D. Tex.).

III. This Case

Plaintiffs in this consolidated matter are the State of Missouri, a state official from the State of Arkansas, and Missouri state and local officials suing in their official capacities. They filed these lawsuits more than three years after the President signed EO 14019—on July 31, 2024, Ashcroft Compl., and August 1, 2024, Missouri Compl. In their Complaints, Plaintiffs allege that the Executive Order uses "federal taxpayer money and resources to fund what is, in all practical effect, a get-out-the-vote and ballot harvesting scheme favoring a select demographic of the electorate that favors President Biden and the Democrat Party." Ashcroft Compl. ¶ 46.

[3] The other pending cases are *Am. First. Pol'y Institute v. Biden*, Case No. 2:24-cv-152 (N.D. Tex. July 11, 2024); *Montana v. Biden*, 6:24-cv-1141 (D. Kan. Aug. 13, 2024).

Two months after filing their original Complaint, on September 25, 2024, Plaintiffs moved for a preliminary injunction. Pls.' Mem. in Supp. of Mot. for PI (Pls.' Br.) ECF No. 51. Defendants now oppose Plaintiffs' motion and move to dismiss the Complaint.

LEGAL STANDARD

A preliminary injunction is an "extraordinary remedy" and "warranted only when the movant shows (1) a substantial likelihood of success on the merits, (2) irreparable injury if the injunction is not granted, (3) that the injury outweighs any harm to the other party, and (4) that granting the injunction will not disserve the public interest.'" *CAE Integrated, LLC v. Moov Techs., Inc.*, 44 F.4th 257, 261 (5th Cir. 2022). "The burden of persuasion on all of the four requirements" is "at all times upon the plaintiff." *Id.* (internal quotation marks omitted)

The Court applies similar standards in evaluating a motion to dismiss under both Rule 12(b)(1) and 12(b)(6). *See Jessie v. Potter*, 516 F.3d 709, 713 (8th Cir. 2008). A "complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face," but a "pleading that offers labels and conclusions or a formulaic recitation of the elements of a cause of action will not do." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citation omitted). In addressing the question whether this Court has Article III jurisdiction under Rule 12(b)(1), Plaintiffs bear the burden of demonstrating that it does. "A court deciding a motion under Rule 12(b)(1) must distinguish between a facial attack and a factual attack on jurisdiction." *Carlsen v. GameStop, Inc.*, 833 F.3d 903, 908 (8th Cir. 2016) (citation and internal quotation marks omitted). Under the facial-attack standard, "the court restricts itself to the face of the pleadings, and the non-moving party receives the same protections as it would defending against a motion brought under 12(b)(6)," meaning it accepts "as true all facts alleged in the complaint" and considers "only the materials that are necessarily embraced by the pleadings and exhibits attached to the complaint." *Id.* (citations and internal quotation marks omitted). For factual attacks, "the court considers matters outside the pleadings, and the non-moving party does not have the benefit of 12(b)(6) safeguards." *Id.*

ARGUMENT

This Court should dismiss this Complaint for lack of jurisdiction. In the alternative, it should dismiss Plaintiffs' claims on the merits. In all events, the Court should deny Plaintiffs' preliminary-injunction motion—both because it is moot and because Plaintiffs have failed to satisfy the standard for such extraordinary relief.

I. Plaintiffs Are Unlikely to Succeed on the Merits Because the Court Lacks Article III Jurisdiction

Plaintiffs' challenge to the three-year old Executive Order begins and ends with their failure to establish Article III jurisdiction. Federal courts do not "operate as an open forum for citizens to press general complaints about the way in which government goes about its business." *Food & Drug Admin. v. All. For Hippocratic Med.*, 602 U.S. 367, 378–79 (2024) (citations omitted). Rather, Article III of the Constitution "confines the federal judicial power to the resolution of 'Cases' and 'Controversies.'" *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021). Such a "case or controversy can exist only if a plaintiff has standing to sue." *United States v. Texas*, 599 U.S. 670, 675 (2023). Plaintiffs, however, run aground on this bedrock requirement because their Complaint fails to establish an "injury in fact" that is "concrete and particularized and actual or imminent, not conjectural or hypothetical," and "fairly traceable" to Defendant's actions. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338–39 (2016) (cleaned up). Indeed, all the injuries Plaintiffs allege are nothing more than "speculative fear[s]" that rest on a "highly attenuated chain of possibilities" involving an innumerable number of third parties—and thus fall far short of Article III's bar. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409, 410 (2013).

As a starting point, the Executive Order neither "require[s] [nor] forbid[s] some action by the plaintiff[s]" themselves (or, indeed, by any members of the public). *All. for Hippocratic Med.*, 602 U.S. at 382. Rather, the Order merely directs Federal agencies to "evaluate ways in which [they] can, as appropriate and consistent with applicable law, promote voter registration" in the course of their activities, EO 14019 § 3—which the agencies have done by

distributing nonpartisan general information to the public about voting and elections. *See, e.g.*, 2022 White House Fact Sheet.

Plaintiffs principally assert that they will be injured by the Executive Order because, through an attenuated chain of independent decisions by various third parties, they may suffer increased costs associated with ensuring compliance with state voting laws. But the Supreme Court has been emphatic that Plaintiffs generally "cannot rely on speculation about the unfettered choices made by independent actors not before the court[s]." *Clapper*, 568 U.S. at 415, n.5 (quotation marks omitted). Rather, to show that they have suffered an injury traceable to Defendants, as Article III requires, a "plaintiff must show that the 'third parties will likely react in predictable ways' that in turn will likely injure the plaintiffs." *All. For Hippocratic Med.*, 602 U.S. at 383 (cleaned up). *See, e.g.*, *Dep't of Comm. v. New York*, 588 U.S. 752, 768 (2019) (analyzing statistical studies showing predictable effect of census question on respondents' behavior). Even at the pleading stage, when considering "any chain of allegations for standing purposes," courts "reject as overly speculative those links which are predictions of future events (especially future actions to be taken by third parties)." *Arpaio v. Obama*, 797 F.3d 11, 21 (D.C. Cir. 2015) (internal quotation marks omitted); *Ineos USA LLC v. Fed. Energy Reg. Comm.*, 940 F.3d 1326, 1329 (D.C. Cir. 2019); *Finkelman v. Nat'l Football League*, 810 F.3d 187, 201 (3d Cir. 2016). After all, "[s]tanding is not an ingenious academic exercise in the conceivable." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 566 (1992) (citation omitted). So "the line of causation between the illegal conduct and injury—the links in the chain of causation—must not be too speculative or too attenuated." *All. for Hippocratic Med.*, 602 U.S. at 383 (cleaned up); *see also United States v. Texas*, 599 U.S. 670, 680 n.3 (2023) (adding that "when a State asserts" that its injury is based on indirect effects of Federal policy, "the State's claim for standing can become more attenuated").

To make that kind of connection here, Plaintiffs would have to credibly allege (and, to obtain a preliminary injunction, offer sufficient evidence to establish) a number of factual predicates. Most obviously, they would have to show that agencies providing information

will lead *some* number of people to register when they otherwise would not have done so. More specifically, they would have to show that agencies' actions will lead to an increase in duplicate registrations, ineligible registrations, and registrations containing errors. Pls.' Br. at 8. And they would have to show that those increased registrations will increase Missouri's compliance costs. Yet, for all their claims about supposed get-out-the-vote activities, Plaintiffs do not come close to having plausible allegations, much less evidence, to establish that chain. *See* Order of September 15, 2024 at 3, *Am. First Pol'y Inst.*, 2:24-cv-152-Z ("That conclusion does not follow from the foregoing predicates.").

Even accepting Plaintiffs allegations as true, they have done nothing to connect the Executive Order with *any* increase in new voter registrations—much less a significant number of them. Neither have they justified their assumption that the Order will lead to increased registrations, duplicate registrations, erroneous registrations, or registrations for ineligible individuals attributable to the Executive Order. Decl. of John Robert Ashcroft (Ashcroft Decl.) ¶ 2–5, ECF No. 51-9; Decl. of Kimberly Bell ¶¶ 2–6, ECF No. 51-10. Instead, Plaintiffs point to a single example of a voter registration form for an ineligible voter that was purportedly filled out by a "social services office." Pls' Br. 7–8; Bell Decl. ¶ 4. But Plaintiffs do not even attempt to connect the purported agency activity to the Executive Order or explain how it led to increased compliance costs for the state; in fact, Plaintiffs do not even make clear that the registration in question was filled out at a Federal agency. *See* Bell Decl. ¶ 4 (referring to a "social services office" and not the Social Security Administration). The declarants' fear of increased burdens based on the Executive Order is precisely the type of pure speculation that the Eighth Circuit has declined to find based on potential unobserved downstream consequences of a new policy or rule. *See Yellen*, 39 F.4th 1063, 1070 (8th Cir. 2022).

Although the Executive Order has been in effect since March 2021, Plaintiffs have failed to identify *any* historical data from elections since that time that would support their claims of increased compliance costs. They have not, for example, identified any increase in

registrations attributable to the agency activities they identify; nor have they pointed to any state- or district-wide evidence from the 2022 midterm election or any other election cycle to support any portion of the required causal chain.[4] *See generally* Pls.' Br. at 7–8; Ashcroft Decl.; Bell Decl.

Despite the order being in place for three and a half years with no apparent increased burden on Plaintiffs, they nevertheless ask this Court to assume that they will be subject to increased compliance costs between now and the election. Moreover, the election is only a few weeks away and some states' voter registration deadlines have already passed, including in Missouri and Arkansas, the two states involved in this lawsuit. So it is unlikely that Plaintiffs will see any increase in voter registration forms between now and the impending election. Plaintiffs' argument thus constitutes the very model of a speculative standing claim.

Plaintiffs also argue that local election officials will be injured by the need to "address whatever identification requirements the agencies arrive at pursuant to their latitude under EO 14019 § 3(a)(v)." Ashcroft Decl. ¶ 5; *see* Pls.' Br. at 2, 7. But the cited provision of the Executive Order merely instructs agencies to "evaluate ways in which the agency can, as appropriate and consistent with applicable law, promote voter registration and voter participation" by considering "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*." EO 14019 § 3(a)(v) (emphasis added). States set their own standards for what types of identification documents citizens can use to register to vote, so Plaintiffs are simply incorrect that the Order gives Federal agencies any "latitude" on this subject. *Cf. Missouri v. Yellen*, 39 F.4th 1063, 1069 (8th Cir. 2022) (rejecting Missouri's argument that it

[4] To be sure, even if Plaintiffs had presented historical evidence, that would not automatically mean that they have standing now. *See, e.g.*, *O'Shea v. Littleton*, 414 U.S. 488, 496-97 (1974) (finding that, although past harm can have predictive value as to the likelihood of repeated injury, the repetition of plaintiffs' past injury was too speculative to support standing). But it could, at least, give some plausible color to their allegations.

will be injured by increased compliance costs based on the Secretary of Treasury's "potential interpretation" of a statute).

This absence of any evidence or data connecting the Executive Order or its implementation to increases in voter registrations or increases in erroneous registrations means that Plaintiffs' fears about increased burden are nothing more than "speculation about the unfettered choices made by independent actors not before the courts"—on a nationwide scale. *Clapper*, 568 U.S. at 415, n.5.

* * *

Throughout their complaint and preliminary injunction motion, Plaintiffs repeatedly reference Congressional hearings and letters, analysis from the Heritage Foundation, and statements of State political officials. *See, e.g.*, Pls. Br. at 5–6 & n.6, 21. These repeated citations merely demonstrate that the Executive Order is being debated in the political arena. By mischaracterizing their policy dispute as a legal one, Plaintiffs improperly ask this Court to step into the role of the political branches. But our "system of government leaves many crucial decisions to the political processes, where democratic debate can occur and a wide variety of interests and views can be weighed." *All. for Hippocratic Med.*, 602 U.S. at 380. This Court should therefore follow the lead of the district court in *Keefer* and dismiss the challenge for lack of jurisdiction. *See Keefer*, 2024 WL 1285538, at *10.

II. Plaintiffs Are Unlikely to Succeed on the Merits of their Separation of Powers Claim, Which Should Be Dismissed

Apart from jurisdiction, Plaintiffs' arguments should be dismissed because they fail on the merits. As a starting point, Plaintiffs assert that the President lacked Constitutional and statutory authority to issue the Executive Order. Pls.' Br. at 16-17; Ashcroft Compl. ¶¶ 95-102 (Count II). But this claim misconstrues both the Executive Order and the President's role in the Constitutional scheme.

Article II, § 1 of the Constitution provides that the "executive Power shall be vested in a President." Art. II § 1, cl. 1. That power, courts have explained, "necessarily encompasses

'general administrative control of those executing the laws' . . . throughout the Executive Branch of government." *Bldg. & Const. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 32 (D.C. Cir. 2002) (quoting *Myers v. United States,* 272 U.S. 52, 164 (1926)); *see also Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 213 (2020) ("[L]esser officers must remain accountable to the President, whose authority they wield."). Indeed, "faithful execution of the laws enacted by the Congress . . . ordinarily allows and frequently requires the President to provide guidance and supervision to his subordinates." *Bldg. & Const. Trades Dep't, AFL-CIO*, 295 F.3d at 32; *see also Sierra Club v. Costle,* 657 F.2d 298, 406 n.524 (D.C. Cir. 1981).

Not surprisingly, Presidents of both parties regularly exercise their "general administrative control" to oversee how agency officials carry out their statutory responsibilities within the bounds of their discretion—including by requiring that agencies submit their rulemaking for review to the Office of Management and Budget, which both "issue[s] guidance to federal agencies" and "ensur[es] agency consistency with broader presidential priorities." *Louisiana v. Biden*, 64 F.4th 674, 678 & n.6 (5th Cir. 2023) (citation omitted); *see, e.g.*, Exec. Order No. 13,990, § 5, 86 Fed. Reg. 7037 (Jan. 20, 2021) (EO 13990); Exec. Order No. 13,798, 82 Fed. Reg. 21,675 (May 4, 2017); Exec. Order No. 13,279, 67 Fed. Reg. 77,141, § 2 (Dec. 12, 2002) (directing agencies, "to the extent permitted by law," to be guided by certain principles when "formulating and implementing policies that have implications for faith-based and community organizations").

The Executive Order here is of the same ilk. As detailed above, the President issued the Order because he wished agencies to consider what nonpartisan actions they could take consistent with various statutory mandates and the general goals of the NVRA. To that end, the Order "'solicited the strategic plans [from agencies] in order to inform future policy developments on voting access.'" *Am. First Legal Found.*, 2023 WL 4581313, at *6. In this way, the Order was devoted "'to the internal management of the executive branch.'" *California v. EPA*, 72 F.4th 308, 318 (D.C. Cir. 2023) (quoting *Meyer v. Bush*, 981 F.2d 1288, 1296 n.8 (D.C. Cir. 1993)). And rather than "create any private rights," the order "simply

serve[d] as presidential directives to agency officials to consider certain policies when making regulatory decisions." *California*, 72 F.4th at 318 (quoting *Meyer*, 981 F.2d at 1296 n.8).

Contrary to Plaintiffs' claims, Pls.' Br. at 17, this type of Presidential instruction is entirely unremarkable and required no explicit "statutory mandate or delegation of congressional authority:" it was justified, instead, by the President's "general constitutional powers to direct . . . executive branch officials." *Chen Zhou Chai v. Carroll*, 48 F.3d 1331, 1338–39 (4th Cir. 1995); *see generally Sierra Club*, 657 F.2d at 406 (the "authority of the President to control and supervise executive policymaking is derived from the Constitution"); *Orbital ATK, Inc. v. Walker*, No. 1:17-cv-163 (LMB/IDD), 2017 WL 2982010, at *9 (E.D. Va. July 12, 2017) (noting that the President can act under his "inherent authority to direct Executive Branch officials" without "a delegation of Congress's lawmaking authority"). As the Supreme Court explained a century ago, the President "may properly supervise and guide" his subordinates as part of his efforts "to secure th[e] unitary and uniform execution of the laws." *Myers*, 272 U.S. at 135. Doing so does not "violate[] the Separation of Powers"—to the contrary, it is fully consistent with the Constitutional scheme. Pls.' Br. at 17.

III. Plaintiffs Are Unlikely to Succeed on the Merits of their Other Constitutional Claims, Which Should Likewise Be Dismissed

Plaintiffs' other constitutional claims fare no better. Without offering any analysis or explanation, their complaint and brief summarily assert that the Executive Order "usurp[s] the duties of the States" to conduct elections in violation of the Elections and Electors Clauses as well as the Tenth Amendment. Pls.' Br. at 9-15; Ashcroft Compl. ¶¶ 83-108 (Counts I-III). But nothing about the Executive Order implicates any of these provisions.

1. Start with the Elections Clause, which provides that State legislatures may prescribe the "Times, Places and Manner of holding Elections for Senators and Representatives," subject to Congress's regulation. U.S. Const. art. I, § 4, cl. 1. The Supreme Court has explained that the Clause allows State legislatures "to prescribe the *procedural mechanisms* for holding congressional elections." *Cook v. Gralike*, 531 U.S. 510, 523 (2001)

(emphasis added); *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832 (1995) ("The Framers intended the Elections Clause to grant States authority to create procedural regulations."). Those procedural rules may concern, for example, where citizens may vote, how voting booths will be "supervis[ed]," and the process for "counting" votes and "publi[shing] [the] election returns"—in other words, the mechanisms for the election itself. *Cook*, 531 U.S. at 523–24. Meanwhile, the Electors Clause grants State legislatures the right to "define the method" of selecting Electors, *Moore v. Harper*, 600 U.S. 1, 27 (2023), which States traditionally exercise by "appoint[ing] a slate of electors selected by the political party whose candidate has won the State's popular vote," *Chiafalo v. Washington*, 591 U.S. 578, 581 (2020).

On its face, the Executive Order has nothing to say about any of these matters. The Order sets no procedural rule governing any Federal congressional or Presidential election. No provision of the of the Executive Order purports to determine or establish who is allowed to vote, how people may vote, when or where they may vote, or how those votes may be counted. *See Cook*, 531 U.S. at 523–24; *see generally* EO 14019. Nor does anything in the Executive Order purport to define how States will conduct elections or how Electors will be chosen in any State. Rather, the Order merely directs agencies to consider how they may attempt to provide accurate nonpartisan information about voting and assist voters "in completing voter registration and vote-by-mail ballot application[s] forms *in a manner consistent with all relevant State laws*." *See* EO 14019 § 3 (emphasis added). Likewise, the Order does not override State voter-identification requirements, but instead explicitly directs agencies to consider whether "any identity documents issued by the agency . . . can be issued in a form that *satisfies State voter identification laws*." *Id.* (emphasis added). So, far from "supplant[ing] or circumvent[ing]," Pls.' Br. at 3, State procedures or requirements, the Order seeks to facilitate voter participation in a manner that the States themselves have prescribed.

Tellingly, Plaintiffs' brief never actually explains how any aspect of the Executive Order supposedly tramples on "traditional State sovereignty over the conduct of elections." Pls.' Br. at 14; *see id.* at 24. Nor does the brief explain how any agency providing information

about State voter registration requirements supposedly "undermines the States' ability to review and determine the qualification of individual eligibility to cast a ballot" or "maintain current and accurate voter rolls." Pls.' Br. at 12. Indeed, Plaintiffs' arguments on these grounds cite no language or provision of the Executive Order or agency activity *at all*. *Id.* at 8, 12 (stating without a single reference to the language of the Executive Order or any agency action that Executive Order 14019 "undermines" Missouri's ability to determine voter eligibility, "enforce constitutional voter identification requirements," and "maintain current and accurate voter rolls").

In the absence of any concrete argument or explanation, Plaintiffs' claims appear to come down to the idea that *any* federal action related to elections—even ones as anodyne as providing information about *State* voting registration requirements—violates State authority. But Plaintiffs cite no precedent to support such a remarkable proposition. *See id.* That is not surprising. Were that the case, any number of federal actions could be seen as having an effect on elections, such as granting time off to allow government employees to go vote on election day. *See* EO 14019 § 6. Indeed, the "Federal Government has a longstanding policy of granting employees a limited amount of administrative leave to vote in Federal, State, county, or municipal elections or in referendums on any civic matter in their community." *See* U.S. Office of Personnel Mgmt., *Fact Sheet: Administrative Leave*, https://perma.cc/Y22Z-DZWJ. This policy predates the Executive Order by decades. *See* U.S. Office of Personnel Mgmt., *Excused Absence for Voting* (Oct. 27, 2004) (explaining OPM's "tradition[]" of providing agencies "information on the Federal Government's longstanding policy"), https://perma.cc/4GSW-WSQZ. Yet no court, to Defendants' knowledge, has ever found those policies unconstitutional—much less a violation of the Elections or Electors Clause.

2. Plaintiffs' generalized invocation of the Tenth Amendment fails for similar reasons. *See* Pls.' Br. at 14-15. Contrary to Plaintiffs' suggestion, the Tenth Amendment is not implicated merely because agencies providing nonpartisan election information to the general population *may* result in local election officials having to process some additional

number of "voter registrations [or] mail-in ballot requests" under the State's own voting requirements—something that, as explained above, Plaintiffs have failed to establish. *Id.* at 15. Rather, as the Supreme Court has made clear, the Tenth Amendment and related federalism doctrines prohibit the Federal Government from "issu[ing] direct orders to the governments of the States" or "'command[ing] the States' officers . . . to administer or enforce a *federal* regulatory program.'" *Murphy v. Nat'l Collegiate Athletic Ass'n*, 584 U.S. 453, 471, 473 (2018) (quoting *Printz v. United States*, 521 U.S. 898, 935 (1997)) (emphasis added); *see also New York v. United States*, 505 U.S. 144, 178, 188 (1992) (Congress can "regulate matters directly and [] pre-empt contrary state regulation" but cannot "compel the States to enact or administer a federal regulatory program.").

Here, however, the Executive Order does not command State officers to do anything at all; all its instructions are directed to Federal agencies. *See generally* EO 14019 § 2. And none of the implementing activities that Plaintiffs reference command States either. For example, Plaintiffs falsely assert, based on a news article, that the Department of Housing and Urban Development (HUD) "instructed . . . public housing authorities . . . to run voter registration drives." *See* Pls.' Br. at 3-4. But the underlying document the article references is merely a guidance document the agency issued in response to "inquiries from" public housing agencies—which, far from instructing or directing those agencies to do anything, merely explained that it may be "permissible" for those agencies to run "voter registration drive[s]," but only if allowed by "the voter registration laws of [their] state." Office of Public and Indian Housing, *Announcements*, https://perma.cc/B9EE-W7Z7 (Feb. 9, 2022). Indeed, the guidance explicitly cautions that "[m]any rules about voting are set by states, so [agencies] should check with their counsel to ensure that all activities are compliant with local and state law." *Id.* Other agencies have provided similar information.[5]

[5] *See, e.g.*, GSA Memorandum, Public Builds Service, https://perma.cc/2HAW-E5TY (Feb. 28, 2022) (GSA may, "on a case-by-case basis," allow "non-partisan voter registration drive[s]" to be "conducted in a federally owned facility" but "only after

Plaintiffs cannot seriously suggest that providing information about State requirements—or reminding officials of their obligations under existing legal frameworks—tramples on federalism principles. Such reminders in no way "command a state government to enact" legislation or press "state officers" into federal service. *Murphy*, 584 U.S. at 472 (quotation omitted); *see also Printz*, 521 U.S. at 935 (holding that a Federal statute could not require state and local law enforcement officers to perform background checks and related tasks in connection with applications for handgun licenses). Nor would a commandeering problem arise if Plaintiffs had demonstrated that the Executive Order led them to incur some cost or burden from processing some additional amount of new registrations—something which, as explained above, they have not actually established. *See supra* pp. 10–14. No Constitutional provision prohibits the Federal Government from undertaking activities merely because such activities may indirectly impose costs on States or state officials, in the election context or otherwise. *Cf. Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 15 (2013) (recognizing that the National Voter Registration Act imposes valid limitations and requirements on State officials); *Haaland v. Brackeen*, 599 U.S. 255, 295 (2023) (noting that States do not always "have standing to bring constitutional challenges when [they are] complicit in enforcing federal law"). Were it otherwise, the standing inquiry for States challenging Federal programs would be coextensive with the merits—which is emphatically not the law. *See, e.g.*, *Biden v. Nebraska*, 143 S. Ct. 2355, 2365 (2023) ("Before addressing the legality of the Secretary's program, we must first ensure that the States have standing to challenge it."); *see generally California v. Texas*, 593 U.S. 659, 679–80 (2021) (noting that "[n]o one claims" that provisions that impose "pocketbook injuries" on state plaintiffs "violate the Constitution").

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consultation with the Office of General Counsel"); *see also* 2022 White House Fact Sheet (noting, for example, that USDA "issued letters to state agencies administering nutrition assistance programs to *encourage* the promotion of voter registration and non-partisan voting information" and "remind[ing] states of their responsibilities under the National Voter Registration Act" (emphasis added)).

* * *

In short, neither the Executive Order nor the agency activities implementing it trample on any Constitutional principle. Plaintiffs are unlikely to prevail on Counts I-III of their Complaint, and those Counts should be dismissed.

IV. Plaintiffs' Invocation of the Hatch Act Is Unavailing

Similarly unavailing is Plaintiffs' passing invitation for the Court to infer that the Executive Order and the implementing activities by various agencies have an impermissible partisan purpose in violation of the Hatch Act.

By its plain terms, the Executive Order is strictly *non*partisan. It announces the general purpose of "expand[ing] access to, and education about, voter registration and election information . . . in order to enable *all* eligible Americans to participate" in elections. EO 14019 § 2 (emphasis added). And, consistent with that purpose, it directs agencies to "evaluate ways in which [they] can, *as appropriate and consistent with applicable law*, promote voter registration" in the course of their activities. *Id.* § 3 (emphasis added); *see also id.* § 12(b) ("This order shall be implemented consistent with applicable law."). As Plaintiffs themselves recognize, "applicable law" includes the Hatch Act's restrictions on Federal employees engaging in partisan political activity while on duty. *See, e.g.*, 5 U.S.C. § 7324(a)(2); *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 470 (1995) (noting "the prohibition of the Hatch Act . . . on partisan political activity by all classified federal employees"); *Phillips v. City of Dallas*, 781 F.3d 772, 780 (5th Cir. 2015) (noting that the law "preclude[s] federal government employees from a very broad range of political activity, including (among other political pursuits): raising money for, publicly endorsing, or campaigning for political candidates"). Thus, the Executive Order contemplated that the initiatives agencies undertake *could* include "soliciting and facilitating approved, *nonpartisan* third-party organizations and State officials to provide voter registration services on agency premises." EO 14019 § 3(a)(iii)(C) (emphasis added). But no provision of the Executive Order directs or allows

agencies to utilize their resources for the purposes of benefitting a particular party or campaign.

Consistent with that framework, the agency activities actually taken under the Executive Order—of which Plaintiffs only reference a small subset—reflect agencies finding ways to provide the general public, across all areas of the country, with *nonpartisan* information about elections and the registration process established by relevant state law. *See generally* 2023 White House Fact Sheet; 2022 White House Fact Sheet; 2021 White House Fact Sheet. So, for example, the USDA has stated that it was "encouraging all USDA agency field offices to make *nonpartisan* information about voter registration available in customer service locations" around the country. 2023 White House Fact Sheet (emphasis added); *see* 2022 White House Fact Sheet (noting that USDA "issued letters to state agencies administering nutrition assistance programs to *encourage* the promotion of voter registration and non-partisan voting information" (emphasis added)). The Department of the Interior stated that it would "explore options to expand access to voter registration on public lands across the country." 2023 White House Fact Sheet at 3. And so on. *Id.* (describing various agency activities); *see also* 2022 White House Fact Sheet. These materials provide no indication that they are meant to target any group based on partisanship or to provide a partisan advantage. To the contrary, these materials—like the Executive Order generally—are plainly designed to include more people in the political process *without* regard to their political preferences or affiliation.

The fact that the Executive Order does not instruct agencies to engage in (and agencies are *not* in fact engaged in) targeted "get-out-the-vote and ballot harvesting campaign[s]," Pls.' Br. at 18, means that none of those activities implicate the Hatch Act's prohibition against Federal employees engaging in "political activity" while on duty, 5 U.S.C. § 7324(a). Indeed, Plaintiffs identify no case supporting their theory that facially nonpartisan activity like providing general voter registration information should be construed as partisan merely because that information is received by "individuals receiving government benefits and

services." Pls.' Br. at 18. That theory is both baseless and unbounded—and could, among other things, draw into question activity undertaken by the Secretary of Defense and Secretary of State under the Uniformed and Overseas Citizens Absentee Voting Act. *Compare, e.g.*, 52 U.S.C. §§ 20301, 20305 (specifying activities that officials must undertake to facilitate voting by members of the military and overseas voters) *with* 5 U.S.C. § 7324(a)(3) (prohibiting "political activity" "while wearing a uniform or official insignia" or on duty). Plaintiffs do not come close to justifying that result.

Plaintiffs' unsupported claim that the Executive Order violates the Hatch Act should therefore be dismissed. *See* Ashcroft Compl. ¶¶ 109-116 (Count IV).

V. Plaintiffs Are Unlikely to Succeed on the Merits of Their APA Claim

Disposing of Plaintiffs' above challenges leaves only their seven-sentence, conclusory APA claim. Pls.' Br. at 19. But the APA is inapplicable here for numerous threshold reasons, and even if it were applicable, Plaintiffs' claim fails in any event.

1. The Supreme Court has been clear that a plaintiff cannot invoke the APA to attack the entirety of government programs "consisting principally of . . . many individual" activities. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 893 (1990). Rather, to properly invoke a cause of action under the APA, plaintiffs' challenge must target a "circumscribed, discrete agency action[]" that exhibits a "characteristic of discreteness," and not present a "broad programmatic attack" on government operations. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62-64 (2004). "A broad agency program is not a final agency action within the meaning of 5 U.S.C. § 704." *Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 813 (8th Cir. 2006).

If there were ever a case of an impermissible programmatic challenge, Plaintiffs' attack on the government's "on-going executive policymaking" is it. *Am. First Legal Found.*, 2023 WL 4581313, at *7. Both the complaint and the preliminary injunction motion make clear that they are challenging efforts to implement the Executive Order across vast swaths of the Federal Government. *See* Pls.' Br. at 1-5; Ashcroft Compl. ¶¶ 10-24 (naming fifteen Federal agencies as Defendants). Indeed, neither Plaintiffs' stated claims in their Complaints nor their

preliminary injunction motion even identifies a specific *agency*, much less which agency activity, the APA challenge targets. *See* Ashcroft Compl. ¶¶ 83-116. And while Plaintiffs' motion plucks out a few examples of agency activities, the injunction Plaintiffs seek confirms that the relief they want is completely unbounded. *See* Pls.' Br. at 24, 26 (requesting a "nationwide" "preliminary order enjoining President Biden and the executive branch agencies from implementing EO 14019 or taking any action or spending any funds directed by EO 14019"). That is, Plaintiffs seemingly seek the cessation of EO-related activities government-wide.

This attack on an unspecified litany of agencies and completed or planned activities that may or may not be directed by EO 14019 is plainly not a challenge to discrete and reviewable "agency action." Indeed, courts regularly find that significantly narrower programs operated by a *single* agency are not amenable to APA review. *See, e.g.*, *NAACP v. Bureau of the Census*, 945 F.3d 183, 190 (4th Cir. 2019) (declining to review under APA operational plan for the 2020 Census); *City of New York v. U.S. Dep't of Def.*, 913 F.3d 423, 434 (4th Cir. 2019) (challenge to Department of Defense alleged systemic failure to report certain types of information not cognizable under APA); *see also San Luis Unit Food Producers v. United States*, 709 F.3d 798, 808 (9th Cir. 2013) (holding that "a broad, programmatic challenge to [an agency's] operation and management of [a statutory obligation] . . . [is] not cognizable under the APA"). Plaintiffs' complaint exceeds the scope of those challenges many times over.

Defendants are unaware of a single case in which a court invoked the APA to review anything close to the kind of sprawling and unfocused challenge that Plaintiffs assert here. And, if the suit were to proceed, it is entirely unclear how the Court could begin to evaluate whether all of the unspecified agencies and agency activities related to the Executive Order should have gone through "notice-and-comment." Pls.' Br. at 19. The impossibility of this task is a good indication that "the broad, sweeping nature of the allegations that the plaintiffs have elected to assert" are not cognizable under the APA. *NAACP*, 945 F.3d at 191.

2. Separately, even if Plaintiffs trained their challenge on some specified and limited set of discrete and circumscribed agency activity, that would not solve the problem. The APA allows judicial review only of a "final agency action," meaning an action that (1) "'mark[s] the consummation of the agency's decisionmaking process'" and (2) "'by which rights or obligations have been determined, or from which legal consequences will flow.'" *Hawkes Co., Inc. 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)). Neither factor is met here.

First, the Executive Order by definition cannot constitute "final agency action" because it merely directed agencies to consider actions *they* could take to promote access to voting. In other words, it marked the beginning of other agencies' "decisionmaking processes—not the "consummation" of any such process.

Second, agency activities related to the Executive Order are "on-going." *Am. First Legal Found.*, 2023 WL 4581313, at *7. Further, even when it comes to the activities the agencies have completed—many of which involve providing information or updating a website—none of those "commit the [agency] to any particular course of action." *Luminant Generation Co., LLC v. EPA*, 757 F.3d 439, 442 (5th Cir. 2014). After making one website change or issuing one letter the agency may issue another one—or it "could choose to withdraw or amend the notice or take no further action." *Id.* In this way, the activities do "not end the [agencies'] decisionmaking." *Id.* So, almost regardless of how narrowly Plaintiffs frame their challenge, they cannot identify something that represents the "culmination" of agency decision-making.

Third, the agency activities implementing the Executive Order do "not 'determine rights or obligations' or create 'legal consequences.'" *Louisiana State v. U.S. Army Corps of Eng'rs*, 834 F.3d 574, 584 (5th Cir. 2016). The common through-line among all these activities is that they are designed to provide *information* about voting, consistent with the requirements of state law. Providing such information "does not regulate [Plaintiffs] and cannot bind" them to anything at all. *Id.*; *see also Texas v. EEOC*, 933 F.3d 433, 442 (5th Cir. 2019) (noting

that "final agency action" exists "where agency action withdraws an entity's previously-held discretion [because] that action alters the legal regime [and] binds the entity"); *Nat'l Ass'n of Home Builders v. Norton*, 415 F.3d 8, 15 (D.C. Cir. 2005) ("[I]f the practical effect of the agency action is not a certain change in the legal obligations of a party, the action is non-final for the purpose of judicial review."). Indeed, the website updates, letters, and informational bulletins Plaintiffs reference are even less legally significant than "general policy statements with no legal force," which are not final agency action. *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 808 (D.C. Cir. 2006). Yet courts regularly consider letters of advice or notification non-final even where they appear serious because the agency provides notice that the recipient is violating the law. *See Luminant Generation*, 757 F.3d at 442; *see, e.g.*, *Holistic Candlers & Consumers Ass'n v. FDA*, 664 F.3d 940, 941–42 (D.C. Cir. 2012) (deeming non-final and non-reviewable fifteen "warning letters" sent from FDA to fifteen manufacturers advising them of potential legal violation). There is nothing remotely close to that here.

3. In any event, there is no merit to Plaintiffs' suggestion that unspecified agency activities implementing the Executive Order should have gone through notice and comment rulemaking. Pls.' Br. at 19. The APA's notice-and-comment requirements apply only to "substantive" or "legislative" rules, *not* to interpretative statements or general pronouncements of policy. *Mendoza v. Perez*, 754 F.3d 1002, 1020–21 (D.C. Cir. 2014); *see* 5 U.S.C. § 553(b). A "rule is legislative if it supplements a statute, adopts a new position inconsistent with existing regulations, or otherwise effects a substantive change in existing law or policy." *Mendoza*, 754 F.3d at 1021. By contrast, actions that "clarify a statutory or regulatory term, remind parties of existing statutory or regulatory duties, or 'merely track' preexisting requirements and explain something the statute or regulation already required," are interpretative. *Id.* (alteration omitted) (quoting *Nat'l Family Planning & Reprod. Health Ass'n, Inc. v. Sullivan*, 979 F.2d 227, 236–37 (D.C. Cir. 1992)); *see also Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 97 (2015) (noting a "critical feature of interpretive rules is that they are

issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers" (quotation omitted)); *Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984) (agency action determined to be interpretative rule where it was explicitly based upon an analysis of the meaning of the statute).

Providing nonpartisan information about voting—or even encouraging other entities to make such information available—does not even rise to the level of an interpretative rule because agencies are not setting forth any interpretation of any substantive law provision. And providing information about voting under existing rules certainly does not amend or establish any requirement or obligation. As a result, the nonpartisan informational materials would not trigger the APA's procedural requirements even if those requirements were applicable.

Plaintiffs cannot get around this fact by asserting without any support or elaboration that "many actions agencies [have] taken . . . constitute reversals of agency positions or amend[sic] regulations." Pls.' Br. at 19. Such "naked assertion[s] devoid of [] factual enhancement"—which fail to identify even the relevant agency, much less a targeted activity—are nothing more than "mere conclusory statements, [which] do not suffice" even at the pleading stage of an action. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). And they certainly fall far short of satisfying the much higher standard for showing entitlement to injunctive relief.

VI. Plaintiffs Fail on the Other Preliminary Injunction Factors

Nor can Plaintiffs demonstrate that any of the other preliminary injunction factors weigh in their favor. The "limited purpose" of a "preliminary injunction is merely to preserve the relative positions of the parties until a trial on the merits can be held." *Univ. of Tex. v. Camenisch*, 451 U.S. 390, 395 (1981). As a result, an "indispensable prerequisite to issuance of a preliminary injunction is prevention of irreparable injury." *Tate v. Am. Tugs, Inc.*, 634 F.2d 869, 870 (5th Cir. 1981). No such injury exists here.

1. Plaintiffs' primary argument is that their purported injuries are irreparable because compliance "'with [an agency order] later held invalid almost *always* produces . . . irreparable harm.'" Pls.' Br. at 22 (quoting *Louisiana v. Biden*, 55 F.4th 1017, 1034 (5th Cir. 2022)). That argument is doubly flawed. Plaintiffs do not claim they are subject to some order issued by a Federal agency with which they must comply. *See Burgess v. Fed. Deposit Ins. Corp.*, 871 F.3d 297, 299 (5th Cir. 2017) (explaining that the Federal Deposit Insurance Corporation had "issued an order assessing a civil penalty against Burgess and requiring his withdrawal from the banking industry"). Rather, their claim is that the Federal Government is engaging in impermissible efforts to register voters without authority to do so. Nothing about that claim suggests that any Plaintiff is the "object" of any federal regulatory regime. *See* Pls.' Br. at 21. Plaintiffs' argument, moreover, collapses the irreparable harm inquiry with the merits. And courts, including the Supreme Court, have cautioned against doing so. *See, e.g.*, *Benisek v. Lamone*, 585 U.S. 155, 158 (2018) ("As a matter of equitable discretion, a preliminary injunction does not follow as a matter of course from a plaintiff's showing of a likelihood of success on the merits."); *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008) ("Issuing a preliminary injunction based only on a possibility of irreparable harm is inconsistent with our characterization of injunctive relief as an extraordinary remedy.").

Plaintiffs also argue that they will be harmed because of their compliance costs and their fear that the Executive Order will somehow "compromise[] the integrity of the 2024 Presidential election." Pls.' Br. at 22. But Plaintiffs have not alleged any actual costs of compliance to support that argument—nor could they because the Executive Order does not impose any compliance obligations on states or state officials. *See R.J. Reynolds Vapor Co.* v. *Food & Drug Admin.*, 65 F.4th 182, 194 (5th Cir.2023) (finding irreparable injury where complying with an FDA order would have required the plaintiff to take its product off the market). And Plaintiffs' election-integrity argument fails because Plaintiffs have offered no concrete evidence to substantiate their fears that anything might compromise the integrity of the election.

2. Plaintiffs' own litigation conduct further undermines their assertions of irreparable harm. The Supreme Court has emphasized that "a party requesting a preliminary injunction must generally show reasonable diligence." *Benisek*, 585 U.S. at 159; *see also* 11A Wright, Arthur & Miller, Federal Practice and Procedure § 2948.1 (3d ed. 2024) ("A delay by plaintiff after learning of the threatened harm may be taken as an indication that the harm would not be serious enough to justify a preliminary injunction."). Yet Plaintiffs have displayed no such urgency: Plaintiffs have known about the Executive Order since it was issued three and a half years ago.

Courts around the country have rejected claims of irreparable harm after delays measured in *months*, not years. *See, e.g., Tough Traveler, Ltd. v. Outbound Prod.*, 60 F.3d 964, 968 (2d Cir. 1995) (four months); *Citibank, N.A. v. Citytrust*, 756 F.2d 273, 276 (2d Cir. 1985) (ten weeks); *Boire v. Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1193 (5th Cir. 1975) (three months); *AARP v. U.S. Equal Emp. Opportunity Comm'n*, 226 F. Supp. 3d 7, 22 (D.D.C. 2016) (five months); *Vita-Mix Corp. v. Tristar Prod., Inc.*, No. 1:07-cv-275, 2008 WL 11383504, at *9 (N.D. Ohio Sept. 30, 2008) (collecting cases). Plaintiffs' decision to wait more than three years to bring this action categorically "militates against the issuance of a preliminary injunction by demonstrating that there is no apparent urgency to the request for injunctive relief." *Symetra Life Ins. Co. v. Rapid Settlements Ltd.*, 612 F. Supp. 2d 759, 774 (S.D. Tex. 2007). And their further decision to wait two months after filing their initial complaint to move for preliminary relief only highlights the lack of any emergency. *See* JSR at 4. Plaintiffs were plainly on notice of their objections to the agency conduct at issue here by the time they filed the complaint, just as they were on notice about the election schedule. Plaintiffs could have moved for preliminary relief years ago, notwithstanding any congressional requests or the long-pending FOIA litigation.

None of Plaintiffs' explanations for the inordinate delay hold water. At various points, Plaintiffs imply that the timing of this lawsuit is related to various congressional requests. *See, e.g.*, Pls.' Br. at 25; JSR at 5. But Congress's informational requests simply have nothing to

do with Plaintiffs' legal claims that various agency conduct exceeds statutory authority or otherwise procedurally or substantively violates the APA. Those claims have been available to Plaintiffs since the Executive Order was issued and the relevant agency conduct undertaken. Plaintiffs were not in the dark about those activities. The Executive Order itself was published in the Federal Register, 86 Fed. Reg. 13,623 (Mar. 7, 2021), and much of the agency conduct implementing the Executive Order Plaintiffs now challenge was made contemporaneously public and announced in White House Fact Sheets.

Nor does the imminent commencement of early voting in certain States justify Plaintiffs' claimed emergency. The Executive Order and Plaintiffs' objections to it in large part involve providing access to voter registration and information about elections. *See* EO 14019 §§ 3 ("Expanding Access to Voter Registration and Election Information"), 4 (instructing agencies to agree to State designations as voter registration agencies); Pls.' Br. at 12–14 (discussing various agencies' voter registration activities). But Federal law permits States to close voter registration up to 30 days before a Federal election. 52 U.S.C. § 20507(a)(1). And many States do. *See* Ohio Rev. Code Ann. § 3503.19(A) (thirtieth day before an election); Ga. Code Ann. § 21-2-224(a) (fifth Monday prior to a general election); *see generally* National Conf. of State Legislatures, Voter Registration Deadlines (Dec. 11, 2023), https://www.ncsl.org/elections-and-campaigns/voter-registration-deadlines. Those periods are rapidly closing. If Plaintiffs were truly concerned about the impact of the Executive Order on voter *registration*, they would not have waited until now to move for preliminary relief. Instead, Plaintiffs' asserted urgency is tied to the commencement of early voting in certain states. But an injunction now against activities related to voter registration would have no effect on early voting.

3. The remaining factors—harm to the opposing party and the public interest—likewise weigh against an injunction. *See Nken v. Holder*, 556 U.S. 418, 432 (2009) (the factors merge when the government is a party). An injunction here would frustrate the public's interest in removing "prohibitively inconvenient" barriers to "voter registration" that

"discourage or even prevent qualified voters from registering and participating in elections." *Ass'n of Cmty. Orgs. For Reform Now v. Miller*, 129 F.3d 833, 834-35 (6th Cir. 1997).

Further, an injunction would also run against the *Purcell* principle, which counsels "that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 589 U.S. 423, 424 (2020) (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006)). As the Supreme Court has repeatedly noted, court "orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls." *Purcell*, 549 U.S. at 4-5. Courts have applied *Purcell* to disapprove injunctions related to all manner of election-related activities, including activities related to voter registration. *See Tenn. Conf. of the NAACP v. Lee*, 105 F.4th 888, 897 (6th Cir. 2024).

The concerns underlying *Purcell*—the risk of voter confusion and risk of discouraging voting—apply with full force here, where Plaintiffs seek—mere days before voting begins in certain States—to terminate various nonpartisan activities that are designed to encourage individuals to register to vote in accordance with State law. To be sure, the executive branch and its agencies do not set the rules for any State's election. But the relief Plaintiffs seek may nevertheless cause nationwide voter confusion. And giving credence to Plaintiffs' speculative claims of voter fraud and non-citizen voting may well discourage legitimate voters from registering and heading to the polls.

VII. Any Injunctive Relief Should Be Appropriately Tailored, and Plaintiffs Have Failed to Justify the Vague and Sweeping Relief that They Demand

For the reasons explained above, Plaintiffs' preliminary-injunction motion should be denied and their case should be dismissed. But if the Court were to enter an injunction, the scope of the relief that Plaintiffs seek is plainly inappropriate and—indeed—Plaintiffs make no effort to justify it.

The Supreme Court has repeatedly made clear that preliminary relief should be no broader than necessary to remedy any demonstrated harms of the named Plaintiffs. "A

plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 585 U.S. 48, 73 (2018); *California*, 593 U.S. at 672 ("Remedies [] ordinarily 'operate with respect to specific parties'" (citation omitted).). And "injunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (quotation omitted).

Here, Plaintiffs demand a sweeping, indefinite, government-wide, and universal injunction that is utterly inconsistent with traditional equitable principles. And rather than provide the kind of extraordinary showing that could justify such an extraordinary demand, Plaintiffs merely argue that it is necessary because "the election [must] be conducted in a uniform and equal manner." Pls.' Br. at 24. Those demands are improper.

1. To start, when a court orders "the government to take (or not take) some action with respect to those who are strangers to the suit, it is hard to see how the court could still be acting in the judicial role of resolving cases and controversies." *Dep't of Homeland Sec. v. New York*, 140 S. Ct. 599, 600 (2020) (Gorsuch, J., concurring); *Trump v. Hawaii*, 585 U.S. 667, 721 (2018) (Thomas, J., concurring). Such universal injunctions defy "foundational principles" that "a federal court may not issue an equitable remedy more burdensome to the defendant than necessary to redress the plaintiff's injuries." *Labrador v. Poe ex rel. Poe*, 144 S. Ct. 921, 923 (2024) (Gorsuch, J., joined by Thomas & Alito, JJ., concurring) (quotation omitted); *see also id.* at 931 (Kavanaugh, J., joined by Barrett, J., concurring) ("[P]rohibiting nationwide or statewide injunctions may turn out to be the right rule as a matter of law."). That is why courts have counseled "judicial restraint" in this area. *See, e.g.*, *Louisiana v. Becerra*, 20 F.4th 260, 263 (5th Cir. 2021). "At a minimum, a district court should think twice—and perhaps twice again—before granting universal anti-enforcement injunctions against the federal government." *Arizona v. Biden*, 40 F.4th 375, 396 (6th Cir. 2022) (Sutton, C.J., concurring).

Plaintiffs' entire justification for this lawsuit is the purported burden on Missouri and its state and local officials who administer elections, such the costs of training election

officials. Pls.' Br. at 25. Plaintiffs offer no explanation for why a nationwide injunction is necessary to address the state-specific harms they seek to avoid. And issuing a nationwide injunction to address party-specific harms is antithetical to the proper role of the judiciary, which is limited to resolving "Cases" and "Controversies" to redress the injuries of specific parties. *See Murthy v. Missouri*, 144 S. Ct. 1972, 1985 (2024); *Gill*, 585 U.S. at 73 ("A plaintiff's remedy must be tailored to redress the plaintiff's particular injury.").

2. Plaintiffs' proposed injunction fails for another reason: it lacks the required specificity. Rule 65(d)(1) requires "[e]very order granting an injunction" to "(A) state the reasons why it issued; (B) state its terms specifically; and (C) describe in reasonable detail—and not by referring to the complaint or other document—the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1)(A)-(C). "This drafting standard means 'that an ordinary person reading the court's order should be able to ascertain from the document itself exactly what conduct is proscribed.'" *State of Louisiana v. Biden*, 45 F.4th 841, 846 (5th Cir. 2022) (quoting *U.S. Steel Corp. v. United Mine Workers of Am.*, 519 F.2d 1236, 1246 n.20 (5th Cir. 1975)).

Plaintiffs' requested relief does not come close to meeting this standard. To begin, the scope of Plaintiffs' requested injunction is entirely unclear. Their Prayer for Relief and preliminary injunction motion both ask the Court to "enjoin the Defendants from taking any action to implement EO 14019 or spending any funds or making Federal employees or facilities available to implement EO 14019." Ashcroft Compl. at 34; Missouri Compl. at 27; Pls.' Br. at 26. But the nebulous nature of Plaintiffs' claims makes it impossible to know what conduct falls inside or outside that proposed prohibition. For example: the Executive Order instructs each agency, "if requested by a State," to agree "to be designated as a voter registration agency" under the NVRA "to the greatest extent practicable and consistent with applicable law." EO 14019 § 4. The NVRA expressly authorizes Federal agencies to agree to such a designation by a State. 52 U.S.C. § 20506(a)(3)(B)(ii), (b). At least three States have designated Federal offices as voter registration agencies. Plaintiffs refer to a host of loosely

defined agency actions as being "directed by EO 14019." Pls.' Br. at 8. But there is no way to determine whether the Federal agencies' service as voter registration agencies or the Department of State's and Department of Defense's efforts to help overseas voters and members of the military vote would be prohibited "actions implementing EO 14019," Pls.' Br. at 25, and therefore enjoined if Plaintiffs' motion is granted, or permitted to continue because the underlying statutory authority long predates the Executive Order.

The problems do not end there. Plaintiffs also fail to specify whether their proposed injunction would cover routine historical practices that are touched on by the Executive Order and for which the Government's authority has never been questioned. For example, as noted above, the "Federal Government has a longstanding policy of granting employees a limited amount of administrative leave to vote in Federal, State, county, or municipal elections or in referendums on any civic matter in their community." *See* U.S. Office of Personnel Mgmt., *Fact Sheet: Administrative Leave*, https://perma.cc/Y22Z-DZWJ. This Federal policy of providing limited paid administrative leave (also known as "excused absence") for the time necessary to vote predates the Executive Order by decades. *See* U.S. Office of Personnel Mgmt., *Excused Absence for Voting* (Oct. 27, 2004) (explaining OPM's "tradition[]" of providing agencies "information on the Federal Government's longstanding policy"), https://perma.cc/4GSW-WSQZ. The Executive Order directs the heads of executive agencies to provide recommendations related to these policies, EO 14109 § 6, but the agencies' authority to grant that leave is not derived from the Executive Order. *See OPM Fact Sheet: Administrative Leave* (citing 5 U.S.C. §§ 301-302 for "the inherent authority for heads of agencies to prescribe regulations for the government of their organizations"). Yet Plaintiffs' proposed injunction is unclear about the extent to which it would run to these longstanding practices that are arguably encompassed by the Executive Order.

CONCLUSION

For these reasons, this Court should dismiss Plaintiffs' Complaints for lack of subject matter jurisdiction or, in the alternative, for failure to state a claim; and it should deny

Plaintiffs' motion for a preliminary injunction as moot.

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Respectfully submitted,

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