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' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS

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INTRODUCTION

Defendants' motion to dismiss explained that Plaintiffs had failed to allege any specific facts establishing that they have suffered any injury attributable to Executive Order 14019, 86 Fed. Reg. 13,623 (Mar. 7, 2021), and had relied instead on "generalized statements" along with a speculative and unsubstantiated chain of assumptions. Defs.' Combined Mot. to Dismiss & Opp'n to Pls.' Mot. for an Expedited Prelim. Inj. (MTD) at 10–14, ECF No. 57. A similar showing was insufficient in the other cases challenging the Executive Order, and it is insufficient here. *See* Order (TRO Order), *Am. First Pol'y Inst. v. Biden*, 2:24-cv-152-Z (N.D. Tex. Sept. 15, 2024), ECF No. 39 (denying TRO); *see also 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. before judgment denied*, 2024 WL 4427541 (Oct. 7, 2024). Plaintiffs neither address these prior cases nor submit any additional evidence that could support their speculative claims of standing. And they do not address the wealth of authority Defendants cited cautioning against speculating about how voters may respond to neutral, non-partisan information. Their complaint thus fails to establish Article III jurisdiction and should be dismissed on that basis.

Nor does Plaintiffs' response rescue their claims on the merits. Their brief repeats the same conclusory claims about the Executive Order supposedly being impermissibly partisan and impinging on state authority over elections. But those claims are demonstrably wrong for the reasons that Defendants previously articulated—which Plaintiffs do not address in their response. This repetition fails to plausibly establish any right to relief. So even if Plaintiffs could establish Article III jurisdiction, their complaint should be dismissed for failure to state a claim.

ARGUMENT

I. Plaintiffs Have Not Shown Article III Standing

Defendants' motion to dismiss explained that Plaintiffs have failed to adequately show that they have suffered any injury from the Executive Order. MTD at 10–14. Plaintiffs'

asserted injuries depend on a "speculative" "line of causation" that requires unjustified inferences about the actions of innumerable third parties that are anything but "predictable." *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 383 (2024). Plaintiffs do not address these foundational problems but instead urge this Court to treat unsupported assumptions and possibilities as facts. *See* Pls.' Resp. to Defs.' Mot. to Dismiss & Reply to Defs.' Opp'n of Pls.' Mot. for an Expedited Prelim. Inj. (Resp.) at 5–6, ECF No. 60. That is not sufficient and fails to cure any of the legal and factual shortcomings that Defendants' motion previously identified.

A. Plaintiffs Have Failed To Establish that the Executive Order Imposes Any Cognizable Burden on State Resources

Plaintiffs contend that States and election officials are injured because they will have to process more registrations as a result of the Executive Order. Even assuming this is a cognizable injury, Plaintiffs have not identified any facts sufficient to show that injury: instead, their claims of burden from having to process voter registrations relies on a "highly attenuated chain of possibilities" involving a number of third parties. MTD at 10–12.

1. At the outset, the Executive Order has been in effect for three and a half years and registration periods have closed in many states. Yet, Plaintiffs' Complaint and their declarations are devoid of any data showing that the States and election officials involved in this lawsuit are facing a discernable increase in new voter registrations—much less a burdensome increase that is attributable to a specific agency activity under the Executive Order. This absence of data is fatal. Neither the Executive Order nor any agency activities implementing it increases the population of eligible voters or purports to alter the criteria for registering. Those criteria are—as the Executive Order itself recognizes—established by preexisting state law. *See, e.g.*, EO 14019 § 3 (directing agencies to consider how they may provide information about "voter registration and vote-by-mail ballot application forms *in a manner consistent with all relevant State laws*." (emphasis added)). Further, information about registering and voting is available from a wide variety of sources, including the states

themselves. So Plaintiffs cannot simply *assume* that nonpartisan voting information provided by the defendant agencies will lead someone to register in their states who would not otherwise have done so. The public's registration and voting behavior is complex and subject to local variance—which is why the Supreme Court has repeatedly cautioned against making broad assumptions about voters' behavior. *See, e.g.*, *Wisconsin Legislature v. Wis. Elections Comm'n*, 595 U.S. 398, 404–406 (2022); *LULAC v. Perry*, 548 U.S. 399, 433 (2006).

Because Plaintiffs have provided no factual allegations demonstrating a net increase in the number of registration forms they must process attributable to the Executive Order, it follows that they have not demonstrated that the Executive Order will generate "more work" for state officials. Indeed, by Plaintiffs' own admission, registering voters is a core part of the states and those officials' existing duties. Resp. at 5–6. And they have not provided any facts or data showing that the challenged Executive Order will make their work "significantly more difficult" or otherwise strain their resources. *See Crane v. Johnson*, 783 F.3d 244, 254 (5th Cir. 2015).[1] In the absence of such allegations or data, the Court cannot assume that Plaintiffs have suffered any cognizable injury.

For all these reasons, the harms that Plaintiffs claim are nothing like the financial costs that Texas claimed from an immigration policy a decade ago in *Texas v. United States*, 809 F.3d 134 (5th Cir. 2015) (*DAPA*) *aff'd by an equally divided court*, 579 U.S. 547 (2016), relied on by Plaintiffs. Plaintiffs have not established the kind of "especially direct" "causal chain" that the Fifth Circuit believed was present in *DAPA*, where the State challenged a specific federal program that made "at least 500,000 illegal aliens" newly eligible to apply for state drivers' licenses—and there was "little doubt that many would do so because driving is a practical necessity in most of the state." *Id.* at 153, 155, 156; *see also* Order at 9-10, *Texas v. DHS*, Case No. 23-cv-0001, ECF No. 70 (S.D. Tex., Sept. 30, 2024) (listing immigration cases where

[1] Plaintiffs themselves confirm that they "welcome registration of eligible individuals." Resp. at 5. But Plaintiffs cannot sue on the basis of something "they've already been doing and want to keep doing." *In re Gee*, 941 F.3d 153, 163 (5th Cir. 2019).

Texas "established" costs from increased populations); *but see United States v. Texas*, 599 U.S. 670, 680 n.3 (2023) (recognizing that although "federal policies frequently generate indirect effects on state revenues or state spending," claims to standing based on "those kinds of indirect effects" are insufficient to satisfy Article III when they are "too attenuated"). Rightly or not, voting is not "a practical necessity" for people the way driving is. *DAPA*, 809 F.3d at 156.[2]

2. Plaintiffs cannot overcome these deficiencies by positing that the registrations submitted as a result of the Executive Order will be more likely to contain false information, incomplete information, duplicate existing registrations, or be submitted on behalf of individuals who are ineligible to vote than forms submitted through other means. Those assumptions are all completely speculative. *See, e.g.*, *Shelby Advocs. for Valid Elections v. Hargett*, 947 F.3d 977, 981 (6th Cir. 2020) ("[N]early all of the plaintiffs' allegations of past harm stem from human error" but "[t]hey do not allege—they cannot plausibly allege—that . . . officials *always* make these mistakes."). The only facts Plaintiffs have alleged are that agencies have provided accurate information to individuals about how to register to vote, consistent with state laws. Plaintiffs have not alleged that Federal agencies submitted registration forms or mail-in-ballot applications on behalf of anyone in Missouri or Arkansas. And there is no reason to believe that individuals who receive accurate voter registration information from the Federal government are more likely than others to fill out a registration form incorrectly, to fill out a form despite already being registered to vote, or to submit a voter registration form despite being ineligible. Indeed, this ineligible-voter argument is doubly unfounded because it presupposes individuals who are ineligible to vote under a state's voter-registration rules will receive accurate information about that state's voter-registration requirements and use

[2] This fact is highlighted by a case Plaintiffs themselves cite. *See Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007) ("A great many people who are eligible to vote don't bother to do so . . . . [t]he benefits of voting to the individual voter are elusive . . . and even very slight costs in time or bother or out-of-pocket expense deter many people from voting.") *aff'd* 553 U.S. 181 (2008).

that information to complete a voter registration form, but not to ensure they are in fact eligible to vote in that state. That is a wholly unsupported and unreasonable inference.

The closest Plaintiffs come to substantiating any of these assumptions is a single example of an ineligible voter being registered by someone at a "social services office." But even in that example, Plaintiffs do not tie a voter registration form allegedly submitted on someone's behalf by an employee at a "social services" office to the challenged Executive Order or any particular agency activity conducted in response to that Order. In fact, as Defendants noted in their motion to dismiss, Plaintiffs do not even make clear whether that individual was registered at a Federal or state agency. MTD at 12; *cf.* 52 U.S.C. § 20506(a)(2) (requiring states to designate as "voter registration agencies" offices that provide "public assistance" and "services to persons with disabilities").

B. Plaintiffs' Other Standing Theories Fail

Plaintiffs fare no better with their various other miscellaneous theories of injury which are likewise entirely speculative and implausible.

For example, Plaintiffs argue that they will suffer increased costs associated with section 3(a)(v) of the Executive Order, which instructs Federal 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). But Plaintiffs have not provided a single example of agencies issuing new forms of identification in response to the Executive Order over the past three and a half years. *See generally, e.g.*, The White House, *Fact Sheet: The Biden-Harris Admin. Continues to Promote Access to Voting* (Mar. 5 2023), available here (no reference to any agency issuing new forms of identification); The White House, *Fact Sheet: Biden-Harris Admin. Releases Rep. on Native Am. Voting Rights* (Mar. 24, 2022), available here (same); The White House, *Fact Sheet: President Biden to Sign Exec. Order to Promote Voting Access* (Mar. 7, 2021), available here (same). So Plaintiffs' unsupported fears

of having to devise new trainings for some new forms of identification now just several weeks before the election are just that. Further, even if Plaintiffs could point to some new form of identification attributable to the Executive Order, "those kinds of indirect effects" are insufficient to establish Article III standing because they are "too attenuated." *Texas*, 599 U.S. at 680 n.3.

Plaintiffs also argue that the Executive Order will force schools to spend money or risk Federal funding. Yet Plaintiffs again fail to connect their fears of funding loss to the Executive Order. The only specific agency activity that Plaintiffs identify as supposedly threatening a loss of funding to the State is a Department of Education (ED) letter that reminded institutions of higher education about their obligations under the Higher Education Act. Resp. at 7. But, as Plaintiffs themselves acknowledge, this letter merely quotes the language of the Higher Education Act, which has long required institutions receiving federal funding to "make a good faith effort to distribute [] mail voter registration form[s] . . . to each student . . . physically in attendance at the institution, and to make such forms widely available to students at the institution." 20 U.S.C. § 1094(a)(23). Plaintiffs nowhere explain how, by referencing this longstanding requirement, the letter imposed a new or additional obligation—or otherwise threatened Federal funding. *See* Resp. at 7.

Finally, Plaintiffs argue that the Executive Order somehow injures the States' "compelling constitutional interest in the integrity of elections." *Id.* at 9. But Plaintiffs have not offered any plausible allegations or concrete evidence to substantiate their fears that anything related to the Executive Order might compromise the election's integrity. *See* MTD at 12. The only facts Plaintiffs cite in support of this theory predate the existence of the Executive Order, *see* Resp. at 9–10 (citing *Fish v. Kobach*, 304 F. Supp. 3d 1027, 1044 (D. Kan. 2018)); *State: More than 100 non-citizens have voted in Ohio*, Feb. 17, 2017, Dayton Daily News). Even accepting as true Plaintiffs' assertion that noncitizens are likely to register to vote and potentially cast ballots, Plaintiffs have not "explain[ed] the relationship" between that "past generalized harm[] . . . and the alleged imminent harm" that the Executive Order will

exacerbate that purported problem. *See* TRO Order at 3 ("That conclusion does not follow from the foregoing predicates."); *see also* Preliminary Injunction, *United States v. Alabama*, Case No. 2:24-cv-1254 (N.D. Ala. Oct. 16, 2024), ECF No. 90 (describing inaccuracy of allegations concerning noncitizen registration). Accordingly, Plaintiffs' fears are nothing more than "speculation about the unfettered choices made by independent actors not before the court," which is insufficient. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 415 n.5 (2013) (cleaned up); *see also Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 376, 380 (W.D. Pa. 2020) (rejecting as "too speculative" plaintiffs' claim that use of mail-in voting drop boxes presents "heightened risk of fraud" that would "impact Republicans more than Democrats"); *Donald J. Trump for President, Inc. v. Way*, No. 20-10753, 2020 WL 6204477, at *6 (D.N.J. Oct. 22, 2020) ("[I]t would [] be speculative to find that because there was mail-in ballot fraud in past New Jersey elections, fraud will also occur in the November 2020 General Election"); *Memphis A. Philip Randolph Inst. v. Hargett*, 978 F.3d 378, 387 (6th Cir. 2020) (rejecting arguments that signature verification requirements would harm plaintiffs because those "allegations involve two layers of speculation about the upcoming election").

II. Plaintiffs' Claims Should be Dismissed Because They Fail to State a Plausible Claim for Relief

Apart from failing to establish jurisdiction, Plaintiffs' response also fails to show that they have cognizable claims. That response repeats the same unsupported claims of supposed partisan bias they made in their prior brief. But Plaintiffs do not tie those claims to any specific agency activity. Nor do they even acknowledge the reality of the Executive Order and its implementation that Defendants laid out in their opening brief. Such "naked assertions," which rest on nothing more than "labels" and "conclusory statements," fail to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

A. The Executive Order Reflects the President's Constitutional Role

As a starting point, Plaintiffs continue to misunderstand the nature and purpose of the Executive Order in ways that doom their separation-of-powers claim (Count II). Plaintiffs do not dispute—because they cannot—that the President has Constitutional authority "to provide guidance and supervision" to agencies on how to administer their statutory mandates. *Bldg. & Const. Trades Dep't, AFL-CIO v. Allbaugh*, 295 F.3d 28, 32 (D.C. Cir. 2002); *see generally Myers v. United States*, 272 U.S. 52, 163-4 (1926) (President's power necessarily encompasses "general administrative control of those executing the laws"). Instead, Plaintiffs question what statutory mandates the Executive Order directs agencies to interpret—and suggest that no such mandates exist. Resp. at 16. But this gets the purpose of the Executive Order exactly backwards.

By its plain terms, the Executive Order directs agencies to "consider" the provisions of the underlying statutes each of them is responsible for administering—and to "evaluate ways in which" those statutes can be read harmoniously with "the duty" Congress established in the NVRA for the federal government "to promote the exercise of the right to vote." EO 14019 § 1, 3; *see generally* 52 U.S.C. § 20501(a)–(b) (charging the federal government with this "duty" and establishing the goal to "increase the number of eligible citizens who register to vote in elections for Federal office"). In some cases, the connection between the agency's underlying statutory grants and the NVRA's goals are obvious. For example, as Plaintiffs recognize, the Department of Education is responsible for enforcing the provisions of the Higher Education Act, which has long required institutions receiving Federal funding to "make a good faith effort to distribute [] mail voter registration form[s] . . . to each student . . . physically in attendance at the institution." 20 U.S.C. § 1094(a)(23).

Likewise, the Department of Defense is primarily responsible for administering the Uniformed and Overseas Citizens Absentee Voting Act of 1986, 52 U.S.C. § 20301 *et seq.*, which requires that states and territories allow members of the uniformed services serving away from home, their family members, and U.S. citizens who are residing outside the

country to register and vote absentee in Federal elections. *See* Pub. L. No. 111-84, the Military and Overseas Voter Empowerment (MOVE) Act of 2009, Pub. L. No. 111-84, §§ 577-89, 123 Stat. 2190 (2009) (establishing procedures for service members and overseas voters to submit registration and absentee ballot applications). But for other agencies the connection may be less direct, or the underlying statutory authorities less well known to the President and his staff. For this reason, the Executive Order was specifically designed to get agencies "to brainstorm" that issue and to advise the President in ways that would help inform "on-going executive policymaking." *Am. First Legal Found. v. U.S. Dep't of Agric.*, No. CV 22-3029, 2023 WL 4581313, at *7 (D.D.C. July 18, 2023).[3]

As Defendants detailed in their opening brief, this is an ordinary form of policymaking direction—which does not require any kind of explicit statutory authorization because it inheres in the President's constitutional role. *See* MTD at 15 (citing analogous Executive Orders of prior Presidents). And that remains true even if the policy the President directs agencies to pursue is characterized as "a substantive directive." Resp. at 17. The precedents Defendants cited make clear that Article II gives the President the ability to direct substantive policy. MTD at 15 (collecting cases).

All this is doubly true here, where (contrary to Plaintiffs' suggestion) there *is* an overarching "duty" for federal agencies that Congress set forth in the NVRA, 52 U.S.C. § 20501(a)—and the President directed agencies to explore how they can meet that duty "consistent with applicable law," EO 14019 § 3. Simply put, the policy the President is directing agencies to pursue is something Congress itself has prescribed, and the careful

[3] For similar reasons, there is neither anything suspicious nor improper about the Executive seeking to maintain the confidentiality of agencies' internal recommendations and analyses. *Contra* Resp. at 15. Because the President solicited and "received [agencies'] information as an integral part of his direct presidential policymaking on voting rights issues," that information is properly subject to the presidential communications privilege, which "protect[s] factual information 'revelatory of the President's deliberations,' including reports regarding implementation of a particular course of action that the President has decided to pursue." *Am. First Legal Found.*, 2023 WL 4581313, at *7-8 (citations omitted)).

reservation about complying with all relevant restrictions ensures that the agencies pursue that policy within the proper bounds of their discretion. *See, e.g.*, *Bldg. & Const.*, 295 F.3d at 33 (inclusion of "[t]o the extent permitted by law" provision means that "if an executive agency, such as the FEMA, may lawfully implement the Executive Order, then it must do so" but "if the agency is prohibited, by statute or other law, from implementing the Executive Order, then the Executive Order itself instructs the agency to follow the law"). Under these circumstances, Plaintiffs have no plausible claim that the President is improperly contravening agencies' "organic statutes" or the Hatch Act in a way that raises separation of powers concerns, Resp. at 17.

B. *The Executive Order Does Not Implicate Federalism Principles*

Plaintiffs' response also does not support their federalism claims (Counts I and III). In a single conclusory sentence, Plaintiffs repeat their assertion that, by directing agencies to provide voter registration and election information, the Executive Order "violates the Elections . . . [and] Electors Clause[s] of the Constitution." *Id.* at 19-20. But this "unadorned" assertion does not even attempt to engage with the substance of those Clauses—much less establish a plausible legal claim. *Iqbal*, 556 U.S. at 678.

As Defendants' opening brief explained, the Election and Electors Clauses grant States the specific power "to prescribe the procedural mechanisms for holding congressional elections," *Cook v. Gralike*, 531 U.S. 510, 523 (2001), and the right to "define the method" of selecting Electors, *Moore v. Harper*, 600 U.S. 1, 27 (2023). But nothing in the Executive Order even remotely implicates those principles. The Order sets no procedural rule governing any election; no provision 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 direct how States must conduct elections or how Electors will be chosen in any State. To the contrary, rather than supplanting any State procedure or requirements, the Order explicitly directs agencies to consider how they can facilitate "voter

registration and vote-by-mail ballot application forms *in a manner consistent with all relevant State laws*." *See* EO 14019 § 3 (emphasis added). Indeed, Defendants detailed all this in their motion—yet Plaintiffs' brief offers no response. Elsewhere in their brief—though, notably, not as part of their merits arguments—Plaintiffs also continue to claim that "election officials stand in the same situation as" state officials who were unconstitutionally commandeered to enforce a federal regulatory program in *Printz v. U.S.*, 521 U.S. 898 (1997). Resp. at 6. But, as Defendants observed, Plaintiffs have never plausibly identified how any portion of the Executive Order or any agency's implementing activity commands local election officials (or any other state officer) to do anything at all. MTD at 19–20. Rather, Plaintiffs' argument appears to be that any hypothetical burden that state officials may experience as an incidental effect of federal policy raises Tenth Amendment problems. But that is not the law. *See generally Texas*, 599 U.S. at 680 n.3 (recognizing that although "federal policies frequently generate indirect effects on state revenues or state spending," claims to standing based on "those kinds of indirect effects" are insufficient to satisfy Article III when they are "too attenuated"). As all the cases Defendants previously cited demonstrate, 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. *See Arizona v. Inter Tribal Council of Ariz., 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").

C. *Plaintiffs' Other Miscellaneous Objections Lack Merit*

Disposing of Plaintiffs' conclusory constitutional claims leaves a general complaint, untethered from any articulated legal framework, that the Executive Order is a supposedly partisan effort to benefit the Democratic party. *See* Resp. at 14–15. But these arguments

ignore the plain language of the Executive Order and fail for all the reasons Defendants previously articulated.

1. As Defendants detailed, the Executive Order neither directs nor allows agencies to utilize their resources for the purposes of benefitting a particular party or campaign. MTD at 21–22. Its plain language speaks of "expand[ing] access" to voter information for "*all* eligible Americans," and it specifically directs agencies to comply with all preexisting laws. EO 14019 § 3 (emphasis added); *see supra* pp. 9–10. These laws include, among other things, provisions that forbid federal employees from "interfering with . . . the election of any candidate" for federal office, 18 U.S.C. § 595; prohibitions against using "expenditures" to induce people "to vote for or against any candidate," *id.* § 597; and strict requirements that federal employees not engage in "political activity" while on duty, 5 U.S.C. § 7324(a). Consistent with these and other legal proscriptions, all the agency activities implementing the Order 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 generally* MTD at 6, 22 (describing agency activities).

Plaintiffs ignore the plain text of the order and the agencies' implementing activities—indeed, this portion of their argument mentions neither. *See* Resp. 14-15. Instead, Plaintiffs baldly assert that the Order "is designed and intended to increase the number of ballots cast by the Democrat [sic] Party's core constituencies," and claim that the Order was "designed" and supported by a "left-wing [] organization." *Id.* at 14–15. Notably, even the materials from that group that Plaintiffs cite in their brief speak only about the way in which the Executive Order would help facilitate voting by *all* Americans and makes no reference to benefitting any one party. *See* Resp. at 14 n.8 (citing *Exec. Action to Advance Democracy: What the Biden Harris Admin. & the Agencies Can Do to Build a More Inclusive Democracy*, Demos (Dec. 3, 2020)) (urging "new administration" to take specified action "to help ensure the integrity of our elections and strengthen opportunities for civic participation for *all* Americans" (emphasis added)); *id.* (citing *Demos Applauds Biden's Executive Order Aimed at Facilitating Voter*

Registration, Urges Strong Follow-Through, Demos (March 7, 2021)) (applauding the Executive Order as helping "to ensure more Americans can participate in elections").

More fundamentally, Plaintiffs again fail to identify any case supporting their theory that facially nonpartisan policy like providing general voter registration information *becomes* partisan merely because of where the policy originated or who supports it. *See* Resp. at 14–15. Federal officials hold listening sessions and seek involvement from all sorts of stakeholders on a range of policy issues—and it would be remarkable if the established presumption of regularity for agency activities were discarded simply because a particular organization issued a press release or advocated for a policy initiative. *See, e.g.*, *Wilburn v. Astrue*, 626 F.3d 999, 1003–04 (8th Cir. 2010) (noting the presumption of regularity that is afforded public officers in the discharge of their duties in a variety of contexts). By Plaintiffs' logic, activity undertaken by the Secretary of Defense under the Uniformed and Overseas Citizens Absentee Voting Act, Pub. L. 99-410, 100 Stat. 924 (1986), could be deemed impermissibly partisan if it were supported by a left- or right-leaning group—or if a specific political candidate expressed support for the program. *See, e.g.*, 52 U.S.C. §§ 20,301, 20,305 (specifying activities that officials must undertake to facilitate voting by members of the military). Defendants are unaware of any court that has adopted such a standard.

2. Plaintiffs separately repeat, in passing, that agency actions implementing the Executive Order violate the APA—though they do not specify how. *See* Resp. at 17-18.[4] But here again Plaintiffs do not respond to the precedent Defendants cited establishing that the APA does not allow a "broad programmatic attack" on the diverse implementation activities across federal agencies that are ongoing under the Executive Order. *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62-64 (2004); *see also Sierra Club v. U.S. Army Corps of Eng'rs*, 446 F.3d 808, 813 (8th Cir. 2006) ("A broad agency program is not a final agency action within

[4] Notably, Plaintiffs do not raise an APA claim in their complaint. *See* Compl. ¶¶ 83-116 (Counts I-IV). And, confusingly, they raise these arguments within the portion of their response discussing separation of powers. Resp. at 16-18.

the meaning of 5 U.S.C. § 704."); *see generally* MTD at 24. Plaintiffs also do not address Defendants' explanation that the unspecified agency activities Plaintiffs challenge are not reviewable as "final agency action" because they do not "mark the consummation of the agency's decisionmaking process" and (2) do not determine "rights or obligations" or establish "legal consequences." *Hawkes Co. v. U.S. Army Corps of Eng'rs*, 782 F.3d 994, 999 (8th Cir. 2015) (quoting *Bennett v. Spear*, 520 U.S. 154, 177–78 (1997)) (internal quotation marks omitted) *aff'd*, 578 U.S. 590 (2016); *see* MTD at 25-26.[5] Instead, Plaintiffs repeat that the "implementing actions directed" by the Executive Order should be seen as "final agency actions" because they supposedly "impos[e] obligations" on recipients and "modify[] the legal right . . . to vote." Resp. at 18. But none of that is true.

As Defendants previously detailed, the common through-line among all the agency implementing activities is that they are designed to provide *information* about voting under existing state and Federal law requirements. MTD at 25-26. Plaintiffs do not explain how merely providing nonpartisan information to the public imposes any obligations on those receiving the information or modifies any legal rights. Resp. at 18. Defendants' motion detailed how the types of informational activities agencies have undertaken here are even less significant than the "general policy statements" that courts have historically declined to review under the APA. MTD at 25-26 (quoting *Ctr. for Auto Safety v. Nat'l Highway Traffic Safety Admin.*, 452 F.3d 798, 808 (D.C. Cir. 2006)).

Plaintiffs do not respond to any of the authorities Defendants have cited and do not even specify the particular provision of the APA they claim the unspecified agency actions violate. Resp. at 18. That merely confirms that Plaintiffs lack a viable APA (or other) claim.

[5] Plaintiffs seem to suggest at one point that the Executive Order *itself* violates the APA. Resp. at 18. But it is well established that "the President is not an agency within the meaning of the" APA and so the Executive Order "may not be reviewed under the APA standards." *Franklin v. Massachusetts*, 505 U.S. 788, 796 (1992).

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.

Dated: October 21, 2024

Respectfully submitted,

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