UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS

AMERICA FIRST POLICY INSTITUTE, *et al.*,

Plaintiffs,

v.

JOSEPH R. BIDEN, JR., in his official capacity as President of the United States *et al.*,

Defendants.

Case No. 2:24-cv-00152-Z

DEFENDANTS' SUR-REPLY IN OPPOSITION
TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

This Court was right to refuse Plaintiffs' alarmist request to restrain implementation of a three-and-half-year-old Executive Order. TRO Order, ECF No. 39. That Executive Order announced a general goal "to enable *all* eligible Americans to participate" in elections. Exec. Order 14019, Promoting Access to Voting, 86 Fed. Reg. 13,623 (Mar. 7, 2021) (emphasis added). And, consistent with that purpose, federal agencies have been distributing nonpartisan information about voting registration and State law requirements to the public nationwide—none of which advantages any particular candidate, party, or campaign. *See generally* Defs' MTD and PI Opp'n, ECF No. 25 at 9-12 (Defs' Opp.). So it is not surprising that Plaintiffs' motion for emergency relief offered "vague" and "generalized statement[s]" that implementation of the Executive Order would hurt Plaintiffs' electoral prospects, but presented "no direct evidence to support [that] claim." TRO Order, ECF No. 39 at 3-4. As Defendants' prior brief detailed, Plaintiffs' unsupported fears of the Executive Order are just that. Defs' Opp. at 14-19.

Plaintiffs themselves were evidently concerned that their prior submissions were insufficient. After reviewing Defendants' brief, Plaintiffs decided to submit three additional

declarations—but those new declarations say even less than Plaintiffs' prior filings. *See* ECF No. 36-2. Each of them contains only a few short paragraphs, stating simply that the declarants' "investigation [of the Executive Order] continues." *Id.* at 4, 7. In other words, two months after filing this case and almost a week after asking for the extraordinary remedy of a preliminary injunction and temporary restraining order, Plaintiffs can confidently assert only that they are still studying what the effects of the Executive Order might be.

Such bland assertions bring Plaintiffs no closer to demonstrating standing—much less establishing that Plaintiffs have suffered any irreparable harm that would justify the extraordinary remedy of a preliminary injunction. The Court should therefore deny Plaintiffs' request for a preliminary injunction just as it denied their request for temporary relief.

ARGUMENT

I. The New Declarations Do Not Remedy Any Shortcoming of Plaintiffs' Prior Standing and Irreparable Harm Theories

Defendants' prior brief explained the burden Plaintiffs bear "to thread the causation needle" in this matter. *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 383 (2024). To establish a concrete and particularized injury traceable to the Executive Order—as Article III requires—Plaintiffs must do more than "speculat[e] about the unfettered choices made by independent actors." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 415, n.5 (2013); *see also All. Hippocratic Med.*, 602 U.S. at 383. Rather, they must provide actual evidence showing that: (1) agencies distributing general and nonpartisan voter registration information to people nationwide will lead a disproportionate number of Democratic voters to register (when they otherwise would not have done so); (2) those newly-registered voters will then cast ballots; and (3) those ballots will negatively impact Plaintiffs' vote tally. Defs' Opp. at 14-19; TRO Order at 2, ECF No. 39 (explaining that Plaintiffs must provide "direct evidence to support [their] claim of increased Democratic voter turnout").

Plaintiffs had not offered evidence to support any of these elements previously. Defs' Opp. at 14-19. Rather, as this Court recognized, they relied on "generalized allegation[s] of

partisan harm" without offering any concrete evidence connecting that harm to specific agency activities. TRO Order, ECF No. 39 at 2 (quoting *Nelson v. Warner*, 12 F.4th 376, 385 (4th Cir. 2021)). That made "the links in the chain of causation . . . too speculative [and] too attenuated" for Article III purposes. *All. Hippocratic Med.*, 602 U.S. at 383 (cleaned up). Yet Plaintiffs' new declarations do not even attempt to fix this flaw.

The three declarations come from an employee of America First Policy Institute, Gina D'Andrea, and two named Plaintiffs who are candidates for federal and State office (Barry Loudermilk and Matthew Krause, respectively). ECF No. 36-2 Ex. 1, D'Andrea Decl.; *id.* Ex. 2, Krause Decl.; *id.* Ex. 3, Loudermilk Decl. One of those declarations, from a sitting member of Congress, states that the "Committee on House Administration" in the U.S. House of Representatives issued subpoenas "to various federal agencies seeking information on their implementation of Executive Order 14019," but had not yet received "documents that the Committee considered responsive." Loudermilk Decl. ¶¶ 3-6. And the other two declarations assert that "[a]fter this lawsuit was filed on July 11, 2024," the declarants "attempt[ed] to gather evidence of specific acts being taken by federal agencies to implement" the Executive Order. D'Andrea Decl. ¶ 2; Krause Decl. ¶ 1 (same). That "investigation" included "visiting a college campus," D'Andrea Decl. ¶ 3, "stopping by two federal health centers," *id.* ¶ 4, and "visiting Post offices," Krause Decl. ¶ 2. The only evident discovery from these visits, however, is that the one declarant who visited an unspecified "college campus" "saw a banner encouraging students to vote." D'Andrea Decl. ¶ 3. No declarant states that he or she found "voter registration materials" on any visit—let alone that those materials were being distributed by federal agencies (which, in any event, would be entirely proper for the agencies to do). *See* D'Andrea Decl. ¶¶ 1-5; Krause Decl. ¶¶ 1-2. Instead, all three assert that their "investigation continues." D'Andrea Decl. ¶ 5; Krause Decl. ¶ 2; Loudermilk Decl. ¶ 6.

This pointed failure to identify *any* objectionable materials—much less to connect any such materials to any activity by any federal agency—is telling. Forget showing that agencies

providing nonpartisan voter registration information to the public will lead a significant and disproportionate number of Democratic votes in Plaintiffs' districts. *See* Defs' Opp. at 14-15. Plaintiffs do not even show, as a preliminary matter, that agency activities they seek to challenge are leading to any relevant increase in voter registrations at all. Their declarations thus do not even begin to tackle the first link in the lengthy causation chain.

Plaintiffs cannot excuse this evidentiary failure by alleging an "improper lack of transparency" on the part of the Administration. D'Andrea Decl. ¶ 5; Krause Decl. ¶ 2. Plaintiffs' complaint does not seek to enforce a Freedom of Information Act (FOIA) request or a subpoena. *See infra* p.7; FAC at 94-95 (prayer for relief). Rather, Plaintiffs' own theory of injury is that some kinds of nonpartisan voter-registration materials would sway the public in measurable and electorally significant ways. TRO Order, ECF No. 39 at 3; *see also* FAC ¶¶ 92-94; see also id. ¶¶ 119-122; see, e.g., Pls' Br at 1, 27-30. That Plaintiffs cannot identify any such materials even after conducting an investigation undermines their entire theory of harm in this case.

At bottom, Plaintiffs' allegations again amount to nothing more than assertions of "generalized harms." TRO Order, ECF No. 39 at 2 (quoting *Nelson*, 12 F.4th at 385). That, as this Court correctly recognized, is insufficient to invoke the Court's jurisdiction. *Id.* And it falls far short of Plaintiffs' burden to justify the extraordinary remedy of injunctive relief.

II. The New Declarations Do Not Articulate Any Cognizable Harm at All, Much Less Harm that Would Warrant an Injunction

Nor can the new declarations be said to advance some new theory of injury that would succeed where Plaintiffs' prior theories failed.

Even if Plaintiffs' declarations could be construed as a claim that the Executive Order is leading them to expend some amount of resources as part of their "investigations," D'Andrea Decl. ¶ 5, it is well established that "standing cannot be conferred by a self-inflicted injury," *Zimmerman v. City of Austin*, 881 F.3d 378, 389 (5th Cir. 2018). *See also Clapper*, 568 U.S. at 416 ("[R]espondents cannot manufacture standing merely by inflicting harm on

themselves based on their fears of hypothetical future harm that is not certainly impending."). Indeed, the Supreme Court has been emphatic that a Plaintiff who has not demonstrated a non-speculative and "concrete injury caused by a defendant's action cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action." *All. Hippocratic Med.*, 602 U.S. at 394. So—just as parties cannot satisfy Article III requirements solely by expending money to avoid a "speculative threat" of surveillance, *Clapper*, 568 U.S. at 415–16, or by incurring costs to "conduct their own studies" about a drug that the FDA has approved, *All. Hippocratic Med.*, 602 U.S. at 394—Plaintiffs cannot leap over the complex chain of causation their theory requires merely by "visiting a college campus" or "stopping by two federal health centers looking for voter registration materials" in unspecified states, D'Andrea Decl. ¶¶ 3-4.

This does not change merely because one of the declarants is an employee of a non-profit organization. The Fifth Circuit has been clear that "an organization does not automatically suffer a cognizable injury in fact by diverting resources in response to a defendant's conduct." *El Paso Cnty. v. Trump*, 982 F.3d 332, 343 (5th Cir. 2020); *see also Louisiana Fair Hous. Action Ctr., Inc. v. Azalea Garden Properties, L.L.C.*, 82 F.4th 345, 353 (5th Cir. 2023) (same). Rather Article III injury requires "that diversion of resources . . . concretely and 'perceptibly impair[s]' the [organization's] ability to carry out its purpose." *N.A.A.C.P. v. City of Kyle, Tex.*, 626 F.3d 233, 239 (5th Cir. 2010) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)); *El Paso Cnty., Texas v. Trump*, 982 F.3d 332, 343 (5th Cir. 2020) (same); *Tenth St. Residential Ass'n v. City of Dallas, Texas*, 968 F.3d 492, 500 (5th Cir. 2020) (same). In other words, "the 'perceptible impair[ment]' to an organization's ability to carry out its mission, not the 'drain on the organization's resources,' is the 'concrete and demonstrable injury.'" *Louisiana Fair Hous.,* 82 F.4th at 353 (quoting *Havens*, 455 U.S. at 379). Here, however, Plaintiffs' complaint includes absolutely no allegations of harm to the non-profit organization. *See* FAC ¶¶ 15-17. And the declaration likewise does not even suggest

that one employee's investigation has in any way "impaired [the organization's] ability to achieve its mission." *Id.* Nor would that be a credible claim.

III. The New Declarations Do Not Justify Plaintiffs' Delay in Seeking the Preliminary Injunction

Finally, Plaintiffs' reply in support of their preliminary injunction motion suggests that they view the declarations as providing a basis to excuse their delay in seeking preliminary relief. *See* ECF No. 38 at 9. In Plaintiffs' telling, the supposed need to "investigat[e]" the agencies' implementation of the Executive Order delayed their presentation of the motion to this Court. *Id.* The glaring flaw in this claim, however, is that Plaintiffs' investigation has evidently not produced any evidence of injury at all. *See supra* at p.3. That does not excuse Plaintiffs' delay—rather, it makes clear that there was no need to move for an injunction in the first place. *VanDerStok v. Garland*, 625 F. Supp. 3d 570, 585 (N.D. Tex. 2022) (denying injunction with respect to parties for whom "the Court is left guessing at what injuries it or its members will suffer").

Nor are Plaintiffs' excuses for the delay reasonable on their own terms. As Defendants previously observed, Plaintiffs are challenging an Executive Order that was published in March 2021 and a variety of agency implementing activities that have been ongoing for over three years. Defs' Opp. at 40-41. So the arguments Plaintiffs attempt to raise here have been available to them since before the 2022 midterm election. *Id.* Plaintiffs' declarations do not acknowledge this fact or explain what additional information Plaintiffs needed to obtain. As a result, the declarations do not come close to justifying Plaintiffs' decision to file an emergency motion six days before early voting would begin. *See Pastel Cartel, LLC v. FDA*, 2023 WL 9503484, at *4 (W.D. Tex. Dec. 14, 2023) (finding no irreparable harm based in part on fact that plaintiff "waited" six weeks after filing complaint "to request a preliminary injunction").

Plaintiffs' reply again attempts to sweep all of these repeated evidentiary failures under the rug by pointing to Defendants' withholding of materials in unrelated longstanding FOIA

litigation and alleged failure to comply with Congressional subpoenas. ECF No. 38 at 9; Loudermilk Decl. ¶¶ 3-6. But, of course, this isn't a FOIA case, and Plaintiffs' claim of injury in this case is not that they are entitled to some information that is being withheld. And, as Defendants already explained, Plaintiffs' aspersions do not withstand scrutiny. The government has released responsive documents to Congress and pursuant to FOIA requests—and the one court that has entered judgment in the FOIA litigation concluded the government's withholdings were justified. *See Am. First Legal Found. v. U.S. Dep't of Agric.*, No. 22-3029, 2023 WL 4581313 (D.D.C. July 18, 2023) (sustaining the government's invocation of executive privilege); *Found. for Gov't Accountability v. U.S. Dep't of Just.*, 688 F. Supp. 3d 1151, 1158-59 (M.D. Fla. 2023) (reserving judgment on whether certain withholdings were justified under FOIA). So both factually and legally, Plaintiffs cannot demand that the Court draw an adverse inference from those proceedings, just as they cannot demand that the Court insert itself in the ongoing exchange between the Administration and Congress. *See Trump v. Mazars USA, LLP*, 591 U.S. 848, 858-67 (2020) (explaining that "congressional demands for presidential documents have" historically "been resolved by the political branches without involving" the courts).

Even more fundamentally, the Supreme Court has explicitly rejected the idea that parties can lessen or shift their burden to satisfy the preliminary injunction factors by pointing the finger at the government. *See 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 may well harbor deep policy disagreements with the Administration's legal positions and with the policy embodied in the Executive Order. But that does not excuse them from articulating some real, concrete, and certainly impending injury. Their failure to do so precludes Article III jurisdiction—and it certainly precludes the possibility of injunctive relief.

CONCLUSION

For these reasons and those articulated in Defendants' prior briefing, the Court should deny Plaintiffs' motion for a preliminary injunction.

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Respectfully submitted,

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