IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
AMARILLO DIVISION

AMERICA FIRST POLICY INSTITUTE et al.,

Plaintiffs,

vs.

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

Defendants.

No. 2:24-cv-152-Z

RULE 24(C) RESPONSIVE PLEADING OF PROPOSED INTERVENOR-DEFENDANTS LEAGUE OF WOMEN VOTERS, BLACK VOTERS MATTER, AND NAEVA

RULE 12(B) MOTION AND INCORPORATED MEMORANDUM OF LAW IN SUPPORT OF MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION OR, IN THE ALTERNATIVE, FOR FAILURE TO STATE A CLAIM

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INTRODUCTION

In March 2021, the President of the United States issued an executive order asking federal agencies to "evaluate ways in which the agency can, consistent with applicable law, promote voter registration and voter participation." Exec. Order No. 14019 (hereinafter "Executive Order" or "EO") § 3, 86 Fed. Reg. 13623 (Mar. 7, 2021). The EO has stood for over three and a half years—including through the entire 2022 election cycle. Yet now, on the eve of the 2024 Presidential election, Plaintiffs—a collection of nine Republican candidates, four state or county Republican Parties, two state election administrators, two local election administrators, and a conservative advocacy organization—seek emergency relief to (1) halt nonpartisan efforts to promote voter registration for eligible Americans and (2) block *state-approved* partnerships with federal agencies that are expressly permitted by federal law.

Plaintiffs' 98-page Amended Complaint is heavy on speculation, implausible conspiracies, and unwarranted deductions about the origins and possible effects of implementing the Executive Order. When rhetoric and conjecture is peeled away and one "proceed[s] to untangle the mass of the plaintiffs' [alleged] injuries," it becomes clear that no Plaintiff has standing to sue and—even if one did—the "sprawling suit" fails to state any viable claim for relief. *Murthy v. Missouri*, 144 S. Ct. 1972, 1988 (2024).

First, the Court lacks subject-matter jurisdiction because the Plaintiffs fail to plausibly allege standing. No Plaintiff has pled a cognizable injury, nor does the Amended Complaint explain how the Executive Order or any resulting agency activity caused their speculative and generalized grievances. Plaintiffs' theories and fears of "unlawful modifications to the election environment," Am. Compl. ¶ 37, are "undifferentiated, generalized grievance[s] about the conduct of government" and the "'integrity' of the election process" that are "insufficient to establish

standing." *Hotze v. Hudspeth*, 16 F.4th 1121, 1124 n.2 (5th Cir. 2021) (cleaned up). The candidate and party Plaintiffs fail to plausibly allege harms to their electoral prospects, either due to eligible voters being registered from demographic groups that allegedly generally favor Democrats or the hypothetical risk of ineligible voters being registered. And the election administrator Plaintiffs do not suffer a legally cognizable injury from performing the core obligations of their governmental duties—registering voters and adjudicating voter eligibility—regardless of the source of those additional registrations. Nor have they even plausibly alleged that the Executive Order has caused them to register more people. After parsing through allegations pertaining to non-defendant agencies and speculation about activities in places to which Plaintiffs have no connection, it is evident that Plaintiffs have failed to "demonstrate a substantial risk that, in the near future, they will suffer an injury that is traceable to a Government defendant and redressable by the injunction they seek." *Murthy*, 144 S. Ct. at 1981.

Second, the Amended Complaint fails to state a claim for relief. The primary themes underlying Plaintiffs' causes of action—*e.g.*, that the federal government will usurp state sovereignty by registering millions of voters against the will of the states; that agencies are exceeding their statutory authority under the Executive Order; that the federal government is conspiring to register voters *qua* Democrats; and that the Executive Order will force states to accept registrations of ineligible noncitizens and individuals with criminal convictions—are premised on speculation and unwarranted inferences and belied by the Amended Complaint itself. Further, their claims pursuant to the Administrative Procedure Act (APA), 5 U.S.C. §§ 500 *et seq.*, fail at the threshold. None of the alleged agency programming challenged by Plaintiffs creates enforceable rights or responsibilities, meaning there is no final agency action to challenge. And

because the Executive Order creates neither rights nor penalties enforceable at law, Plaintiffs' remaining *ultra vires* claim also fails.

At bottom, Plaintiffs have a political disagreement with the current Administration about promoting voter registration and voter participation in accordance with federal and state law. Overexaggerated puffery and speculation of hidden conspiracies cannot transform simple efforts to cooperate with state election authorities in accordance with federal law, and to provide and transmit voter registration information to the public into a violation of federal law. Because Plaintiffs lack standing, and because the Amended Complaint fails to state a claim upon which relief may be granted, the Court should dismiss the Amended Complaint with prejudice.

BACKGROUND

The National Voter Registration Act of 1993 ("NVRA") unequivocally authorizes the federal government to protect the right to vote. It states that "the right of citizens of the United States to vote is a fundamental right" and that "it is the duty of the Federal, State, and local governments to *promote* the exercise of that right." 52 U.S.C. § 20501(a)(1)–(2) (emphasis added). Congress passed the NVRA in 1993 "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office" and "to make it possible for Federal, State, and local governments to implement this chapter in a manner that enhances the participation of eligible citizens as voters." *See Id.* §§ 20501(b)(1)–(2). The NVRA has played an important role in progress toward this goal over the last almost 30 years, particularly by requiring

states to register eligible citizens who transact with state agencies such as departments of motor vehicles and public assistance and disability offices. 52 U.S.C. §§ 20504, 20506.[1]

Consistent with the NVRA, on March 7, 2021, President Biden issued EO 14019 on "Promoting Access to Voting," which recognized the Administration's policy "to promote and defend the right to vote for all Americans who are legally entitled to participate in elections." Exec. Order No. 14019 § 2, 86 Fed. Reg. 13623 (Mar. 7, 2021). Acknowledging that several federal laws, including the NVRA, assign the federal government a "key role" in protecting the right to vote, the EO announced that "[e]xecutive departments and agencies should partner with State, local, Tribal, and territorial election officials to protect and promote the exercise of the right to vote, eliminate discrimination and other barriers to voting, and expand access to voter registration and accurate election information." *Id.* § 1.

The EO further implements the NVRA's requirement that "each State shall designate other offices" and agencies—beyond those already specified in the statute—as additional "voter registration agencies," including "federal . . . offices." 52 U.S.C. § 20506(a)(3)(B)(ii). It does so by asking that federal agencies agree "to be designated as a voter registration agency" if—and *only* if—"requested by a State" and "practicable and consistent with applicable law." Exec. Order No. 14019 § 4(b). By encouraging federal agencies to accept requests by States for NVRA designation, the EO merely promotes the use of a long-standing provision of federal law.

The EO also includes other agency directives that are consistent with federal law and that do not directly register any voters. For example, it directs agencies to "evaluate ways in which the

[1] The NVRA contains multiple safeguards ensuring that all voter registration opportunities provided by designated government voter registration agencies are nonpartisan. *See* 52 U.S.C. § 20506(a)(5).

agency can, as appropriate and consistent with applicable law, promote voter registration and voter participation," including consideration of whether there are "ways to provide relevant information . . . about how to register to vote." Exec. Order No. 14019 § 3. The EO also directs the Director of the Office of Personnel Management "to provide recommendations . . . on strategies to expand the Federal Government's policy of granting employees time off to vote," *id.* § 6(a); and directs specific agencies to take steps "consistent with applicable law" to promote access to voter registration by individuals with disabilities, active-duty military members, individuals in federal custody who remain eligible to vote, and Native American communities, *id.* §§ 6–10.

On July 11, 2024, several Plaintiffs commenced this action challenging the EO's legality. Compl., *AFPI v. Biden*, 2:24-cv-152, at 1-2, 92, ECF No. 1. An Amended Complaint was filed on July 31, 2024. Am. Compl., *AFPI v. Biden*, 2:24-cv-152, at 2, 98, ECF No. 11. Plaintiffs took no action to seek relief until September 10, 2024, when they moved for a temporary restraining order and a preliminary injunction, requesting relief before September 16, 2024 predicated on the incorrect premise that early voting is set to begin in Pennsylvania on that day. TRO & Prelim. Inj., *AFPI v. Biden*, 2:24-cv-152, at 3, ECF No. 15.

On September 14, 2024, the Proposed Intervenor-Defendants League of Women Voters (the "League"), Black Voters Matter ("BVM") and Naeva (collectively, "Proposed Intervenor-Defendants"), which are nonpartisan, nonprofit organizations, filed a timely motion to intervene. In conformance with Rule 24(c) of the Federal Rules of Civil Procedure, the Proposed Intervenor-Defendants simultaneously filed this proposed motion to dismiss.

LEGAL STANDARD

When adjudicating a Rule 12(b)(1) motion to dismiss for lack of subject-matter jurisdiction, a court "must presume that a suit lies outside this limited jurisdiction, and the burden

of establishing federal jurisdiction rests on the party seeking the federal forum." *Howery v. Allstate Ins. Co.*, 243 F.3d 912, 916 (5th Cir. 2001). Because the motion is jurisdictional, it should be considered "before addressing . . . the merits." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

"To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead 'enough facts to state a claim to relief that is plausible on its face'" and to raise a right to relief "above the speculative level." *Bell Atl. Corp v. Twombly*, 550 U.S 544, 555 (2007); *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007) (citation omitted). Although the Court must accept well-pleaded factual allegations as true, it "will not strain to find inferences favorable to the plaintiffs and [] will not accept conclusory allegations, unwarranted deductions, or legal conclusions." *R2 Invs. LDC v. Phillips*, 401 F.3d 638, 642 (5th Cir. 2005) (cleaned up). Dismissal is required when there is no "more than a sheer possibility that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

ARGUMENT

I. Plaintiffs Lack Standing under Rule 12(b)(1).

Plaintiffs "bear[] the burden of establishing [their] standing." *Barilla v. City of Houston*, 13 F.4th 427, 431 (5th Cir. 2021) (cleaned up). To establish Article III standing, a plaintiff must show that it has "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo Inc. v. Robins*, 578 U.S. 330, 338 (2016); *see Murthy*, 144 S. Ct. at 1981.

Plaintiffs have not shown that they face an injury that is "actual or imminent, not conjectural or hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Nor can Plaintiffs show that any such injuries are caused by Defendants; Plaintiffs instead rely on

"speculative links . . . where it is not sufficiently predictable how third parties would react to government action or cause downstream injury to plaintiffs." *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 383 (2024) ("*Alliance*"). Because the challenged "government action is so far removed from its distant (even if predictable) ripple effects," Plaintiffs "cannot establish Article III standing." *Id.*

A. The Complaint Does Not Identify How the Executive Order Has Injured Any Particular Plaintiff.

Plaintiffs challenge the EO itself (in addition to agency actions that allegedly flowed from it), *see* Am. Compl. at Count 1, but they have failed to articulate a cognizable injury stemming from the EO itself. *See Louisiana v. Biden*, 64 F.4th 674, 681-83 (5th Cir. 2023). The inquiry into whether Plaintiffs have alleged a cognizable injury is governed by what the Order says and does. *See Trump v. Hawaii*, 585 U.S. 667, 697-98 (2018).

Plaintiffs make a variety of conclusory allegations about the EO. For example, the Amended Complaint alleges that the executive order is a "federal election takeover," *e.g.*, Am. Compl. ¶ 67; that its objective was to "obtain partisan advantage" for Democrats, *e.g.*, *id.* ¶ 367; and that it is "structured to increase voting by noncitizens," Am. Compl. ¶ 12; *see also id.* ¶¶ 15, 140-149, 336. But the language of the EO does not contemplate any takeover of state registration systems, any partisan voter registration, or any actions that would increase voting by noncitizens, much less *order* any agency do those things. To the contrary, the EO instructs agencies to take exploratory steps, such as to "*evaluate* ways in which the agency can, as appropriate and *consistent with applicable law*, *promote* voter registration and voter participation" for all "citizens," Exec. Order § 3(a) (emphasis added). The EO does not direct federal agencies to register any voters—it merely encourages agencies to accept designations "as a voter registration agency pursuant to section 7(a)(3)(B)(ii) of the National Voter Registration Act" "*if requested by a State*." *Id.* § 4

(emphasis added). And by its own terms, it seeks only to promote voter registration opportunities among "eligible Americans," and refers only to "non-partisan" registration efforts. *Id.* §§ 2-3.

These examples are representative of other operative language in the EO, which is aimed at promoting agency *deliberations* rather than concrete action; such deliberations cannot possibly injure Plaintiffs in any way. For instance, agencies are directed to "consider[]" ways to "provide voter registration," *id.* § 3(a)(iii)(C), and "consider[]" making "vote.gov" more accessible, *id.* § 3(a)(ii). As an agency "consider[s] ways to provide access to registration services and vote-by-mail applications," it *may*, in its discretion, "evaluate" whether the agency could "solicit[] and facilitate[] approved, nonpartisan third-party organizations and State officials to provide voter registration services on agency premises" "as appropriate and consistent with applicable law." *Id.* §§ 3(a)(iii), (iii)(C). There can be no injury in fact from the EO where the agencies are free to "exercise discretion" to implement the EO as "appropriate and consistent with applicable law." *Louisiana*, 64 F.4th at 679-81.

Plaintiffs further fail to identify any "actual or imminent" injury, *Lujan*, 504 U.S. at 560, because nothing in the EO mandates any changes to legally protected interests. For instance, the EO does not order states to change how they process voter registration forms. Nor does it mandate any person actually register to vote or cast a ballot. Moreover, registration *itself* depends on the actions of state election officials, who must independently decide to designate federal agencies under the NVRA, and those are independent third parties not before this Court. *See, e.g.*, *Reule v. Jackson*, No. 23-40478, 2024 WL 3858127, at *5 (5th Cir. Aug. 19, 2024) ("[I]it is well established that standing cannot exist where the injury 'depends on the unfettered choices made by independent actors not before the court whose exercise of broad and legitimate discretion the courts cannot presume either to control or to predict.'" (quoting *Lujan*, 504 U.S. at 562)). And Plaintiffs'

claimed injuries are not redressable, because nothing prevents states from independently implementing the NVRA by designating federal agencies as "voter registration agencies" even absent the EO. Plaintiffs' generalized fears of illegality are insufficient to establish standing.

B. The Complaint Does Not Identify How Any Defendant Agency's Action Has Injured Any Plaintiffs.

Plaintiffs raise numerous theories of harm arising from agency conduct, none of which passes muster under Article III standing requirements.

Plaintiffs' Generalized Grievances: At bottom, Plaintiffs seek to make voter registration less available *for others*. But enfranchising others does not cause actionable injury. As the Supreme Court recently confirmed in reversing a standing determination by the Fifth Circuit, a plaintiff may not invoke federal jurisdiction when, as here, its only purpose in doing so is to make it more difficult for others to obtain some benefit. In *Alliance*, "pro-life doctors and associations" sued the FDA under the [APA] but did not plausibly allege that the FDA was "requiring them to do or refrain from doing anything." 602 U.S. at 372–74. Rather, the plaintiffs wanted the FDA to make the drug mifepristone "more difficult for other doctors to prescribe and for pregnant women to obtain." *Id.* at 374. The Court explained that "a plaintiff's desire to make a drug less available *for others* does not establish standing to sue." *Id.* The same is true here: Plaintiffs' interest in making voter registration less available for others does not establish their Article III standing.

Plaintiffs catastrophize about broadly framed, vague fears: President Biden and Vice President Harris are coming to usurp state elections, ineligible voters will soon fill the rolls, federal agencies are running rampant beyond their lawful limits, and so on. But they lack any concrete allegations that would allow the Court to draw such unwarranted conclusions. No matter how it is framed, an effort to stop allegedly unlawful registration activities amounts to an "injury to the right 'to require that the government be administered according to the law,'" which "is a

generalized grievance" and not a cognizable injury. *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020) (citation omitted); *see Alliance*, 602 U.S. at 381. An "undifferentiated, generalized grievance about the conduct of government" is "insufficient to establish standing." *Hotze*, 16 F.4th at 1124 & n.2 (cleaned up); *Hollingsworth v. Perry*, 570 U.S. 693, 706 (2013) ("[A] generalized grievance, 'no matter how sincere,' is insufficient to confer standing.").

Rather, Plaintiffs must show that "a particular defendant" caused "a particular plaintiff's" injury. *Murthy*, 144 S. Ct. at 1988. Behind the bluster, a close inspection of each Plaintiff's various purported injuries reveals that no Plaintiff possesses standing against these Defendants.

AFPI: The Amended Complaint is devoid of any allegations of injury specific to Plaintiff America First Policy Institute. It asserts nothing beyond the vague, generalized grievances addressed above. These are insufficient to establish standing.

Candidate and Party Plaintiffs: The nine individuals suing in their "capacity as a candidate for office" and the four political party Plaintiffs sue either because they have "an interest in being re-elected . . . [or] elected," Am. Compl. ¶ 35, or "an interest in seeing the candidates nominated by the party not hindered by unlawful modifications to the election environment." Am. Compl. ¶ 37. The Amended Complaint seems to suggests that these Plaintiffs are injured because their electoral prospects will be harmed, either by eligible voters being registered in a manner that favors Democrats or by the unlawful registration of ineligible voters. But Plaintiffs plead theories, not facts. Even those theories were supported by well-pleaded facts, their injuries would not be traceable to Defendants.

To begin, the Amended Complaint does not plausibly allege a concrete injury to Plaintiffs' electoral prospects. Plaintiffs do not offer *any* non-conclusory allegation of partisan voter registration by the federal government either generally or where Plaintiffs compete for office.

Instead, they allege that certain federal agencies may provide general information on voter registration, that some agencies have accepted or asked for designations by states as NVRA voter registration agencies, and that subgroups of the general population served by some of those agencies are statistically more likely to vote for Democrats.[2] They then ask the Court to infer from those factual allegations that the EO "is a blatant and unlawful effort to use taxpayer money to help elect Democratic candidates, including Vice President Kamala Harris as the presumptive nominee of the Democratic Party for President." Am. Compl. ¶¶ 4, 310. In so pleading, Plaintiffs invite the Court to "strain to find inferences favorable to the plaintiffs" based on "conclusory allegations" and "unwarranted deductions." *R2 Invs. LDC*, 401 F.3d at 642 (internal quotation marks omitted).

The closest Plaintiffs come to an allegation of a partisan bias in the Executive Order is a demonstrably false, misattribution of a quotation to Vice President Harris. Their speculation about alleged partisanship hinges on an allegation that "Vice President Kamala Harris recently admitted that the purpose of the executive order is 'to try to boost turnout among key voting blocs this November,'" Am. Compl. ¶ 89; *see id.* ¶ 370. As is evident from the article itself (incorporated into the Amended Complaint), **the Vice President never said that**—*Axios* did in an editorial comment.

Absent any concrete allegations of partisan manipulation, Plaintiffs are left with statistics and speculation. But partisans suffer no Article III injury-in-fact simply because of the possibility that an individual could be registered to vote who belongs to a demographic that is statistically

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[2] Like the NVRA, the Executive Order seeks to promote voting for "*all eligible Americans*" and addresses barriers faced by specific groups, including "people of color." *Compare* EO §§ 1-2; 7-10, *with, e.g.*, 52 U.S.C. § 20501(a)(2) ("[I]t is the duty of the Federal, State, and local governments to promote the exercise of [the right to vote].")

more likely to vote for another party or candidate. By Plaintiffs' own logic, they would suffer a cognizable Article III injury whenever a newly eligible 18-year-old, a person of color, or a newly naturalized citizen is presented with the opportunity to register. That is not a cognizable injury.

And even accepting *arguendo* their impermissible inferential leap that the Executive Order's promotion of voter registration could be deemed "partisan" based on generalized statistics, Plaintiffs cherry pick subgroups that support their conspiracy, while intentionally disregarding others that defeat the hypothesis. For example, Plaintiffs identify, Am. Compl. ¶ 46, but then conveniently ignore that the EO prioritizes promoting voter registration among military service members and veterans. But according to a source cited in the Amended Complaint, those who have served in the military are more likely to support Republicans. *See* Am. Compl. ¶ 170 (citing *Changing Partisan Coalitions in a Politically Divided Nation*, Pew Rsch. Ctr. 44 (Apr. 9, 2024), *available at* https://tinyurl.com/Pew-Changing-Coalitions. This alone renders Plaintiffs' allegations conjecture. Ultimately, Plaintiffs' theory of partisan injury is nothing more than a frivolous "conspiracy theory"—it is "[l]ong on invective and virtually devoid of any relevant facts." *Modelist v. Miller*, 445 F. App'x 737, 740 (5th Cir. 2011).

Plaintiffs also complain that "the agency actions implementing [the EO] creates *the risk* of a significant number of ineligible individuals actually registering." Am. Compl. ¶ 74 n.4 (emphasis added). As a threshold matter, the candidate and party Plaintiffs do not explain how noncitizens registering to vote would injure them beyond a mere "generalized grievance" that it would be unlawful. *Hollingsworth*, 570 U.S. at 706. Moreover, Plaintiffs' own complaint belies their conclusions about the specter of voting by ineligible noncitizens and individuals with criminal convictions. As Plaintiffs recognize, the EO only contemplates informing or assisting *eligible* citizens to register to vote. *See* Am. Compl. ¶ 71 n.4 ("[T]he EO's language is limited to "eligible

individuals . . . ."). Plaintiffs do not and cannot point to any noncitizens or other ineligible individuals being registered to vote as a result of the EO or subsequent agency actions, much less in geographic areas where they compete in elections. They only speculate that noncitizens or other individuals ineligible to vote *might* be registered because they interact with federal agencies. *Id.* ("[T]he agency actions implementing it creates *the risk* of a significant number of ineligible individuals actually registering." (emphasis added).

"[T]he mere possibility that [such a line of] causation is present is not enough; the presence of an independent variable between either the harm and the relief or the harm and the conduct makes causation sufficiently tenuous that standing should be denied." *Arpaio v. Obama*, 797 F.3d 11, 20 (D.C. Cir. 2015) (rejecting similar theory of causation); *see Donald J. Trump for President, Inc. v. Boockvar*, 493 F. Supp. 3d 331, 342 (W.D. Pa. 2020) (no injury when alleged "there is a risk of voter fraud by other voters" and explain that "[t]he problem with this theory of harm is that it is speculative, and thus Plaintiffs' injury is not 'concrete'—a critical element to have standing in federal court"). Further, Plaintiffs' argument necessarily presumes that election officials will act out of compliance with law by attempting to registering ineligible voters. Alleged injuries premised on such an assumption are not sufficient to invoke federal jurisdiction. *See City of Los Angeles v. Lyons*, 461 U.S. 95, 105-06 (1983).[3]

[3] Further, for reasons addressed in more detail in the discussion of the Amended Complaint's failure to state a claim, even if Plaintiffs had plausibly alleged that more individuals were being registered and that somehow injured them, their injury would be traceable to the state's decision to designate certain federal agencies as NVRA voter registration agencies, not to the EO. *See, e.g.*, Am. Compl. ¶¶ 224-26, 228-29, 261, 264, 269, 296, 300 (describing federal agencies accepting or requesting designation by states). Nor would it be remedied by invalidating the EO—the EO does not require such designations, and even in the absence of the EO, states are freely able to request such designations and federal agencies are free to grant them.

Accordingly, these thirteen party and candidate plaintiffs have failed to allege facts sufficient to support standing.

Election Administrator Plaintiffs: The remaining four Plaintiffs—election officials in Ohio (Plaintiff LaRose) and Montana (Plaintiff Jacobsen), and municipal election officials in particular counties in Michigan (Plaintiff Geneski) and Wisconsin (Plaintiff Pinnow), all allege an "interest in avoiding unnecessary costs or other increased administrative burden resulting from unlawful federal agency action." Am. Compl. ¶ 36. These Plaintiffs also fail to demonstrate standing.

First, the Amended Complaint does not plead facts establishing that any ineligible people *have* registered to vote. While Plaintiffs allege "individuals in Ohio and Wisconsin have [] been registered to vote as a result of agency actions implementing the EO," Am. Compl. ¶ 77, Plaintiffs do not allege that these individuals were *ineligible* to vote. Furthermore, the Amended Complaint does not allege any additional registration has occurred in Thornapple, Wisconsin (for which Plaintiff Pinnow is responsible)), Allegan County, Michigan (for which Plaintiff Geneski is responsible), or anywhere in Montana. *See* Am. Compl. ¶¶ 74-80, 274-75, 300. Nor do these Plaintiffs allege specific increased costs or burdens arising from Defendants' actions; they only allege such burdens "on information and belief." Am. Compl. ¶ 81. This is insufficient to establish injury. *See generally Murthy*, 144 S. Ct. at 1988 (standing requires showing "particular defendant" caused "particular" plaintiffs' injury).

Moreover, reviewing and accepting registrations is something election officials are required to do regardless of the EO. *See, e.g.*, 52 U.S.C. § 20507(a)(1) ("[E]ach State shall . . . ensure that any eligible applicant is registered to vote in an election."). Because the challenged laws "require Plaintiffs to do what they've already been doing . . . , they do not have standing to challenge them." *See In re Gee*, 941 F.3d 153, 163 (5th Cir. 2019); *see also Air Prods. & Chem.,*

Inc. v. Gen. Servs. Admin., 700 F. Supp. 3d 487, 498-99 (N.D. Tex. 2023) (quoting *Trump*, 592 U.S. at 536); *cf. United States v. Elmer*, No. CR.A. 08-20033-01KHV, 2008 WL 4369310, at *10 (D. Kan. Sept. 23, 2008) (finding no injury when challenged federal law did not require the party "to do anything differently than he was already required to do under state law").

Nor do the Election Administrator Plaintiffs sufficiently allege causation. The Amended Complaint does not specify any particular action by the Defendant agencies in any of their jurisdictions. *See* Am. Compl. ¶¶ 74-81. Plaintiffs allege only that people have been registered in Ohio and Wisconsin (but again, not specifically in Thornapple, Wisconsin) "as a result" of unspecified "agency actions implementing the EO." Am. Compl. ¶ 77. That is a conclusion, not a factual allegation. Plaintiffs identify no specific agency action *in the jurisdictions where Plaintiffs administer elections*. Am. Compl. ¶¶ 167-187 (Dept. of Education), ¶¶ 194-209 (Dept. of Health and Human Services), 210-215 (Dept. of Homeland Security), 216-220 (Dep. of Housing and Urban Development), 223-233 (Dep. of Interior), 234-260 (Dept. of Justice). Indeed, the Amended Complaint does not even assert that any specific agencies actually *caused* any injuries within the jurisdiction related to the responsibilities of these four election officials.

* * *

In sum, the Amended Complaint contains no factual allegations that tie any of these Plaintiffs' purported injuries to Defendants' agency action to implement the EO. Because no Plaintiff has sufficiently alleged Article III, the Amended Complaint must be dismissed in its entirety.

II. The Amended Complaint Fails to State a Claim Under Rule 12(b)(6).

The Amended Complaint fails to state a claim on which relief can be granted. The same primary theories underlie each of the causes of action in this meandering complaint, but each

unravels into speculation and conclusory assertions at the slightest inspection. Because none of the alleged actions create any enforceable rights or responsibilities, Plaintiffs' APA claims against agency programming and their *ultra vires* claim against the President fail as a matter of law.

A. Neither the Executive Order Nor Alleged Agency Conduct Conflict With State Administration of Elections

When confronted with actual law, Plaintiffs' rhetoric of a partisan conspiracy and the specter of ineligible registration crumbles. None of the alleged conduct interferes with state law.

First, the federal government is not usurping state sovereignty by registering people against the will of the states, and the Amended Complaint does not plausibly allege otherwise. States continue to control their own election apparatuses, which—as they must—allow eligible individuals to register to vote. For instance, Texas law sets forth a number of eligibility requirements for registration, Tex. Elec. Code § 13.001, and the procedures for approval or denial of an application, *id.* § 13.071. Neither the EO nor any of the alleged agency conduct interferes with any of these provisions. Rather, the Amended Complaint alleges federal agencies might "make nonpartisan information about voter registration available," *e.g.*, Am. Compl. ¶ 153, provide links to Vote.gov (a long-established website that connects to state voter registration resources), *see, e.g.*, *id.* ¶¶ 174, 188, or offer "assistance with voter registration," *e.g.*, *id.* ¶ 196. Plaintiffs gloss over that, in each instance, an agency is alleged to offer information about or assist with voter registration opportunities *administered by the states themselves*.

Second, Plaintiffs' conclusory assertion that agencies are exceeding statutory authority falls apart upon minimal examination of the Amended Complaint's plausible factual allegations. First, many of the challenged actions are *required* under federal statutory law, as acknowledged by the sources Plaintiffs cite. For example, Plaintiffs complain that "USDA is engaged in voter registration outreach through its child nutrition programs, including SNAP and WIC," and has

"has issued letters to state agencies administering SNAP and WIC programs, including those located in the State of Texas, instructing them to carry out voter-registration activities with federal funds." Am. Compl. ¶¶ 154-55. But the cited sources acknowledge that state SNAP and WIC offices are public assistance agencies that *must* offer voter registration opportunities because they are mandatory voter registration agencies under Section 7 of the NVRA. 52 U.S.C. § 20506.

Similarly, Plaintiffs attack the strawman of federal agency offices self-declaring as NVRA voter registration agencies without designations by states. *See, e.g.*, Am. Compl. ¶¶ 385-400. Yet Plaintiffs acknowledge, "under NVRA § 7, States initiate a designation process by designating specific federal offices within the State as locations for voter registration." *Id.* ¶ 393. Consistent with that, Plaintiffs' allegations merely claim that certain agency offices have *asked states* for designations or have been *designated by states*. *See, e.g.*, *id.* ¶¶ 224-26, 228-29, 261, 264, 269, 296, 300 (describing federal agencies accepting or requesting designation by states).

Each of Plaintiffs' causes of action are premised on these speculative, conclusory theories. Without them, Plaintiffs are unable to state a claim.

B. The Amended Complaint Fails to State a Claim Under the APA

Critically, Plaintiffs have not identified any "final agency action" that is a prerequisite for maintaining an APA claim.

1. <u>The EO is Not an Agency Action Because the President of the United States is Not An Agency</u>

As a threshold matter, it is black letter law that an executive order is not a final *agency* action. *Franklin v. Massachusetts*, 505 U.S. 788, 801 (1992). That is because "under the APA[,] the President is not an agency." *Louisiana v. Biden*, 622 F. Supp. 3d 267, 288 (W.D. La. 2022) (citing *Dalton v. Specter*, 511 U.S. 462 (1994)). As such, Plaintiffs' APA claims can only be

predicated upon, and proceed against, any follow-on agency conduct taken in connection with the EO. All of Plaintiffs' claims against the EO itself must be dismissed.

2. Plaintiffs Do Not Otherwise Plead a Final Agency Action

To obtain judicial review pursuant to the APA, Plaintiffs must allege and challenge a specific "agency action," 5 U.S.C. § 706, defined as "the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U.S.C. § 551(13); *Norton v. S. Utah Wilderness All.*, 542 U.S. 55, 62-63 (2004) (holding that APA requires a "discrete" agency action for judicial review). And Plaintiffs must plead a particular, identifiable agency rule or decision; the APA does not permit "a 'broad programmatic attack'" on swaths of agency conduct. *Walmart Inc. v. U.S. Dep't of Just.*, 517 F. Supp. 3d 637, 655 (E.D. Tex. 2021) (citation omitted) *aff'd* 21 F.4th 300 (5th Cir. 2021).

Plaintiffs' claims do not clear this threshold hurdle. First, as is evident from the fact that Plaintiffs have sued swaths of the federal government, the Amended Complaint is not targeted at any specific agency decision. Rather, the Amended Complaint asserts that it is challenging unspecified "agency actions"—*plural*—as to *each* Federal Defendant. *E.g.*, Am. Compl. ¶¶ 158, 166, 187. Such a broad challenge seeks a "disfavored obey the law injunction" that falls well outside the APA's ambit. *See Walmart*, 517 F. Supp. 3d at 655 (internal quotation marks omitted); *cf. Ala.-Coushatta Tribe of Tex. v. United States*, 757 F.3d 484, 490 (5th Cir. 2014) (noting that a "challenge to the entirety of the [EPA's] 'land withdrawal review program' is 'not [a challenge to] an 'agency action' within the meaning of § 702, much less a 'final agency action' within the meaning of § 704" (quoting *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 890 (1990)).

But even assuming *arguendo* that the APA allows Plaintiffs to challenge many unspecified agency actions at once, such broad allegations are still insufficient. This is because the APA

waives sovereign immunity only for "final" agency actions. 5 U.S.C. § 704. For each of the six Defendant agencies, the Amended Complaint does not allege actionable "final agency" actions.

To qualify as a final agency action, the challenged conduct must constitute: (1) "the consummation of the agency's decision making process," and (2) a decision "by which rights or obligations have been determined, or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 178 (1997). For each of the six Defendant agencies, Plaintiffs fail at both steps—they cite nothing that represents the consummation of the agency's decision-making process, and they do not identify anything by which the Plaintiffs' rights or obligations have been determined.

Most of the Amended Complaint does not even cite to any *agency* document that even describes an agency action. *See, e.g.*, Am. Compl. ¶¶ 159-166 (citing only Ex. H, the White House fact sheet, to challenge DOD conduct). Where Plaintiffs do cite an agency document, much of the Amended Complaint describes agency decisions as "tentative" "ruling[s] of a subordinate official" that necessarily do not reflect the consummation of agency decision-making. *See Abbott Labs. v. Gardner*, 387 U.S. 136, 151 (1967). For example, the Amended Complaint characterizes the Department of Justice as having "initiated a process" and failed to "implement" a "commitment." Am. Compl. ¶¶ 238, 240 (internal quotation marks omitted). Similarly, the challenged GSA "Operational Guidance" cited in the Amended Complaint first requires consultation "with the Office of General Counsel" before granting a permit for registration activities. *See* Am. Compl. ¶ 192. "'When completion of an agency's processes may obviate the need for judicial review, it is a good sign that an intermediate agency is not final.'" *Nat'l Immig. Project of Nat'l Laws. Guild v. Exec. Off. of Immigr. Rev.*, 456 F. Supp. 3d 16, 31 (D.D.C. 2020) (quoting *CSX Transp., Inc. v. Surface Transp. Bd.*, 774 F.3d 25, 30 (D.C. Cir. 2014))

The agency conduct alleged in the Amended Complaint does not fix any rights or responsibilities on the Plaintiffs. In order to be reviewable, an action must "read[] like a ukase. It [must] command[], [] require[], [] order[], [or] dictate[]" that the regulated public do or refrain from doing something. *See Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1023 (D.C. Cir. 2000); *see also Walmart*, 21 F.4th at 308 In other words, it "affect[s] a regulated party's possible legal liability[, and] . . . tend[s] to expose parties to civil or criminal liability for non-compliance." *Louisiana State v. U.S. Army Corps of Eng'rs*, 834 F.3d 574, 583 (5th Cir. 2016). Here, however, no agency conduct creates, for example, a "binding contract" for Plaintiffs, *e.g.*, *Air Prods.*, 700 F. Supp. 3d at 499; mandates that Plaintiffs do or refrain from doing anything; or creates a right for anyone to actually register to vote.

This is clear when one considers the alleged conduct of each of the six Defendant agencies.

Department of Agriculture: The alleged action by the Department of Agriculture affects no rights or responsibilities. Its Rural Housing Service does no more than "*encourage* the provision of nonpartisan voter information;" it does not mandate it. Am. Compl. ¶ 151 (emphasis added). Similarly, the complaint alleges USDA's Food and Nutrition Service "*encourages* State agencies administering the Child Nutrition Programs to provide local program operators with promotional materials, including voter registration and non-partisan, non-campaign election information[.]" Am. Compl. ¶¶ 154-55 & Ex. M, USDA, "Promoting Access to Voting through the Child Nutrition Programs (Mar. 23, 2022), at 1 (emphasis added). It offers optional "ideas" to State agencies, including "post[ing] information on their website." *Id.* at 2. And as for Plaintiffs' allegation that USDA has issued letters to state agencies administering SNAP and WIC programs . . . instructing them to carry out voter-registration activities[,]" Am. Compl. ¶ 155, under the NVRA, federal law already requires these precise agencies to carry out voter registration activities.

52 U.S.C. § 20506(a)(2)(A). An agency letter that "restate[s]" legal obligations imposed elsewhere is necessarily not a final agency action. *Nat'l Pork Producers Council v. EPA*, 635 F.3d 738, 756 (5th Cir. 2011). At no point does the Amended Complaint specify how the Department of Agriculture creates any obligations *for anyone*, including the Plaintiffs.

Department of Justice: Similarly, the Department of Justice's alleged actions create no rights or responsibilities for Plaintiffs. As set forth in the Amended Complaint, the extent of this conduct is programmatic changes at pretrial and carceral detention facilities that provide additional access to voter registration materials for *eligible* detainees and convicts. *E.g.*, Am. Compl. ¶¶ 235, 237-238, 240-241 & Exs. H, I & L. Typical of these allegations is the assertion that the Department of Justice will produce a guide for BOP prisoners "that describes each state's voting rules for individuals with criminal convictions" and "producing a plain language guide to federal voting rights law . . . [with] basic information about the voter registration process. Am. Compl. ¶¶ 252-53. DOJ has also allegedly "created an online resource for the public that will provide links to state-specific information about registering and voting [and] detail the Department's enforcement of federal voting rights laws," and has "doubled the number of voting rights attorneys taking steps to ensure compliance with voting rights statutes and issuing guidance, and is "filing statements of interest in ongoing litigation." Am. Compl. ¶¶ 234, 251, 256. None of these allegations explains how this activity by DOJ has created rights or responsibilities.

Department of Education: The Amended Complaint alleges that Department of Education's conduct has involved: (i) preparing a series of tool kits "of resources and strategies for increasing civil engagement at the elementary school, secondary school, and higher education level," Am. Compl. ¶¶ 167-69, (ii) adding a "link to vote.gov on the Federal Student Aid website to make information about voting more accessible to college students," Am. Compl. ¶ 174, and

(iii) reminding "educational institutions of their existing obligations and encourage institutions to identify further opportunities to assist eligible students with voter registration." Am. Compl. ¶ 171 & Exs. H, J at 1 & n.1. Again, none of these allegations explain how the DOE's conduct has affected the rights or responsibilities of the Plaintiffs or any regulated person. Rather, the described conduct focuses on either making information available, or promoting conduct that is consistent with existing law (which as noted is not final agency action, *see Nat'l Pork Producers Council*, 635 F.3d at 756). The Higher Education Act already requires colleges and universities to make "a good faith effort to distribute a mail voter registration form, requested and received from the State, to each student . . . and to make such forms widely available to students at the institution." 20 U.S.C. § 1094(a)(23)(A).

Department of Interior: Plaintiffs assert that the Department of Interior has provided "information on registration and voting . . . at schools operated by the Bureau of Indian Education and Tribal Colleges and Universities" and, where states consented, has offered two such tribal college facilities as voter registration agencies. Am. Compl. ¶¶ 223-231. The latter is specifically authorized by the NVRA, which empowers States to "designate[]" "Federal and nongovernmental offices" "as [v]oter registration agencies" with their agreement. 52 U.S.C. § 20506(3)(B)(ii). Plaintiffs also allege that the Department plans to "display Vote.org signage in national park entrances and visitor centers across the country." Am. Compl. ¶ 231. None of these actions imposes obligations upon the Plaintiffs.

Department of Homeland Security: The Amended Complaint alleges that U.S. Citizenship and Immigration Services ("USCIS") will issue "updated policy guidance . . . to standardize and lift up best practices for voter registration services, including providing a clear roadmap for how to successfully partner with state and local election administration officials and nonpartisan

organizations to provide voter registration applications to all new Americans." Am. Compl. ¶ 213. However, USCIS' Policy Manual, which contains all such guidance, states that it "does not create any substantive or procedural right or benefit that is legally enforceable by any party against the United States or its agencies or officers or any other person." The Manual does invite "election officials from state or local governments" to provide registration services at naturalization ceremonies. Am. Compl. ¶ 210. But these provisions do not create any *right* for any person to in fact register to vote or even attend a naturalization ceremony, and they certainly do not create rights or obligations for Plaintiffs.

Department of Health and Human Services ("HHS"): The Amended Complaint's allegations about HHS concern activities where HHS is merely providing information about voter registration or access to voter registration resources. Am. Compl. ¶¶ 195 (launch of a "new voting access hub . . . [to provide] tools and resources to help . . . older adults and people with disabilities . . . understand and exercise their right to vote"), 206 (emailing "voter registration information to every person . . . who signs up for health insurance through the Affordable Care Act"); 203 "mak[ing] it easier for consumers using HealthCare.gov to connect to voter registration services and receive assistance").

The Amended Complaint further alleges that HHS has also delivered nonbinding guidance on voter registration activities. The Amended Complaint notes that this guidance has stressed that certain health centers "have *discretion*, to the extent permitted by applicable law, to support non-partisan voter registration efforts," but recommends that they first "consult with their own legal counsel" to ensure they comply with all "federal, state, and local legal restrictions." Am. Compl. ¶ 204 (quoting Health Resources & and Services Administration, "Voter Registration and Health Centers" (Mar. 2022) *available at* https://perma.cc/4X8J-Q5TZ (emphasis added). To the extent

this agency communication could even constitute guidance given the number of caveats incorporated, such a non-substantive "guidance document" is not a "final agency action." *Walmart*, 21 F.4th at 308, 311. These are not "marching orders" to regulated parties, and certainly not in the enforcement of any regulation or law that creates rights or responsibilities. *See Neese v. Becerra*, No. 2:21-CV-163-Z, 2022 WL 1265925, at *9 (N.D. Tex. Apr. 26, 2022) (internal quotation marks omitted) (HHS policy guidance that announced how agency would enforce rules was, contrary to the agency's characterization, a final agency action); *Nat'l Pork Producers*, 635 F.3d at 756.

* * *

In sum, none of the agency conduct alleged in the amended complaint comes anywhere close to "affect[ing] a regulated party's possible legal liability[, or] . . . expos[ing] parties to civil or criminal liability for non-compliance." *Louisiana State*, 834 F.3d at 583. As such, the complaint does not plead any final agency action. Without that, Plaintiffs cannot state an APA claim.

C. The Amended Complaint Fails to State an *Ultra Vires* Claim

An *ultra vires* claim mirrors an APA claim in form and substance. *See Louisiana v. Biden*, 622 F. Supp. 3d 267, 288 (W.D. La. 2022). As such, similar to the APA's cause of action for final agency actions "otherwise not in accordance with law," 5 U.S.C. § 706(2)(A), the salient question in an *ultra vires* claim is whether an "authorizing statute, [the Constitution], or another statute places discernible limits on the President's discretion" to undertake a particular executive action. *Mountain States Legal Found. v. Bush*, 306 F.3d 1132, 1136 (D.C. Cir. 2004). In other words, to state a claim against an executive order as *ultra vires*, the President must have directed someone "to violate an express prohibition of . . . another statute [or the Constitution]." *Chamber of Com. v. Reich*, 74 F.3d 1322, 1331 (D.C. Cir. 1996) (Silberman, J.).

As addressed above, Plaintiffs have identified no law that the EO could possibly violate, nor could they. First off, the EO draws on provisions of "[t]he Constitution and laws of the United States prohibit[ing] racial discrimination and protect[ing] the right to vote," and references statutes like "[t]he Voting Rights Act of 1965 and other Federal statutes implement[ing] those protections and assign[ing] the Federal Government a key role in remedying disenfranchisement and unequal access to the polls," as well as "the National Voter Registration Act of 1993," through which "Congress found that it is the duty of Federal, State, and local governments to promote the exercise of the fundamental right to vote." And even if the EO did not rest upon such ample authority, it "does not[] create any right or benefit" and by its terms must "be implemented consistent with applicable law [including state law] and subject to the availability of appropriations." Rather than creating enforceable rights or responsibilities, it asks for input from federal agencies. For the same reason that no Plaintiff could have been injured by the EO, Plaintiffs' *ultra vires* claim fails, too.

CONCLUSION

The Amended Complaint should be dismissed with prejudice.

Dated: September 14, 2024

Respectfully submitted,

Ryan Patrick Brown
TX Bar No. 24073967
Ryan Brown, Attorney at Law, P.L.L.C.
1222 S Fillmore St.
Amarillo, TX 79101
(806) 372-5711
info@ryanbrownattorneyatlaw.com

John A. Freedman*
Samuel D. Kleinman*
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave. NW
Washington, DC 20001
(202) 942-5000

/s/ *Edgar Saldivar*
Edgar Saldivar
TX Bar No. 24038188
Thomas Buser-Clancy*
TX Bar No. 24078344
Ashley Harris*
TX Bar No. 24123238
Adriana Piñon*
TX Bar No. 24089768
ACLU FOUNDATION OF TEXAS, INC.
1018 Preston St.
Houston, TX 77002
(713) 942-8146
esaldivar@aclutx.org

john.freedman@arnoldporter.com
sam.kleinman@arnoldporter.com

Niyati Shah*
Noah Baron*
Alizeh Ahmad*
ASIAN AMERICANS ADVANCING JUSTICE-AAJC
1620 L Street, NW, Suite 1050
Washington, DC 20036
(202) 296-2300
nshah@advancingjustice-aajc.org
nbaron@advancingjustice-aajc.org
aahmad@advancingjustice-aajc.org

Rose Murray*
Ahmed Soussi*
SOUTHERN POVERTY LAW CENTER
201 Saint Charles Ave., Suite 2000
New Orleans, Louisiana 70170
(504) 579-3175
rose.murray@splcenter.org
ahmed.soussi@splcenter.org

tbuser-clancy@aclutx.org
aharris@aclutx.org
apinon@aclutx.org

Sarah Brannon*
Jacob van Leer*
Voting Rights Project
ACLU FOUNDATION
915 15th St. NW
Washington, DC 20005
(202) 210-7287
sbrannon@aclu.org
jvanleer@aclu.org

Sophia Lakin*
Ming Cheng*
Voting Rights Project
ACLU FOUNDATION
125 Broad St.
New York, NY 10004
MCheung@aclu.org

Ming Cheung*
Voting Rights Project
ACLU FOUNDATION
125 Broad St.
New York, NY 10004
MCheung@aclu.org

Leah J. Tulin*
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
1140 Connecticut Ave. NW, Suite 1150
Washington, DC 20036
(202) 650-6397
tulinl@brennan.law.nyu.edu

Lauren Miller Karalunas*
BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW
120 Broadway, Suite 1750
New York, NY 10271
(646) 292-8310
millerl@brennan.law.nyu.edu

Attorneys for League of Women Voters and Black Voters Matter

Jacqueline D. De León*
Allison A. Neswood*
NATIVE AMERICAN RIGHTS FUND
250 Arapahoe Ave.
Boulder, CO 80302
(303) 447-8760
jdeleon@narf.org
neswood@narf.org

Samantha B. Kelty*
TX Bar No. 24085074
NATIVE AMERICAN RIGHTS FUND
950 F St. NW, Suite 1050,
Washington, DC 20004
(202) 785-4166
kelty@narf.org

Attorneys for Naeva

**Application for Admission Pro Hac Vice Forthcoming*

CERTIFICATE OF SERVICE

I certify that on September 14, 2024, the foregoing document was filed on the Court's CM/ECF system which sent notification of such filing to all counsel of record.

/s/ Edgar Saldivar
Edgar Saldivar

Counsel for Proposed Intervenor-Defendants