IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JUDICIAL WATCH, INC., et al.,

Plaintiffs,

v.

THE ILLINOIS STATE BOARD OF ELECTIONS, et al.,

Defendants.

Civil Action No. 1:24-cv-01867

Judge Sara L. Ellis

PLAINTIFFS' OPPOSITION TO MOTION TO DISMISS

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Plaintiffs Judicial Watch, Inc. ("Judicial Watch"), Illinois Family Action ("IFA"), Breakthrough Ideas ("BI"), and Carol J. Davis submit this memorandum of law in opposition to the motion to dismiss filed by Defendant Illinois State Board of Elections and its Executive Director Bernadette Matthews. ECF 41.

BACKGROUND

The National Voter Registration Act of 1993 ("NVRA" or the "Act") was enacted for two stated purposes: first, to "increase the number of eligible citizens who register to vote" and "enhance[]" their "participation … as voters in elections for Federal office"; and second, "to protect the integrity of the electoral process" and "ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b). The NVRA seeks to increase voter participation in several ways. It mandates, for example, that offices providing public assistance accept voter applications, and that applications for driver's licenses also serve as registration applications (giving the law its popular name, "Motor Voter"). 52 U.S.C. §§ 20504, 20506.

The NVRA's second goal, ensuring election integrity and accurate, current voter rolls, is embodied in Section 8, which is the subject of this lawsuit. 52 U.S.C. § 20507. It requires states to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of" a registrant's death or change in residence. *Id.* § 20507(a)(4). It requires a state-designated "chief State election official to be responsible for coordination of State responsibilities" under the Act. *Id.* § 20509. And it requires states to retain and provide "all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters." *Id*. § 20507(i).

The NVRA provides that the registrations of those who have moved out of a jurisdiction may only be cancelled in two ways. First, those who confirm a change of address in writing are

removed from the rolls. 52 U.S.C. § 20507(d)(1)(A). Second, registrants who are sent a "postage prepaid [] pre-addressed return card" by forwardable mail asking them to confirm their address (the "Confirmation Notice"), fail to respond to it, and then fail to "vote[] or appear[] to vote" for two general federal elections—basically, a period of from two to four years—are removed from the rolls. *Id.* § 20507(d)(1)(B), (d)(2). One who fails to respond to a notice is designated "inactive" for the duration of that statutory waiting period. 11 C.F.R. § 9428.2(d). Such a registrant may still vote during that period (52 U.S.C. § 20507(e)), which stops the NVRA removal process and returns the voter to "active" status. But unless that happens, states have no discretion about removing a registration once the inactive period is over. To the contrary, "federal law makes this removal mandatory." *Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 767 (2018) (citations omitted).

States may define the events that trigger sending Confirmation Notices to start this process, and "States take a variety of approaches." *Husted*, 584 U.S. at 762 (citation omitted). One approach, the so-called "safe harbor," is set out in Section 8(c), which provides that states "may" meet the "reasonable effort" requirements of Section 8(a)(4) "by establishing a program" using "change-of-address information supplied by the Postal Service" to identify registrants who may have moved. 52 U.S.C. § 20507(c)(1)(A). Those identified are then sent Confirmation Notices. *Id.* § 20507(c)(1)(B)(ii). As discussed in point III *infra*, a safe harbor program only complies with the NVRA if it is actually used to identify and remove registrants. The safe harbor, moreover, has no application to any Illinois program to cancel the registrations of those who have died.

Depending on when a violation occurred, a person aggrieved by a violation of the NVRA may provide written notice to a state's chief election official either 90 or 20 days before bringing a civil suit. 52 U.S.C. § 20510(b)(1), (2). No notice is necessary, however, if a violation occurs within 30 days prior to a federal election. *Id.* § 20510(b)(3).

As discussed below, the complaint alleges (1) that Defendants have failed to implement the NVRA's required "general program that makes a reasonable effort" to remove voters who have moved or died; (2) that Defendant Matthews, who is Illinois' chief State election official (*see* Ill. Adm. Code tit. 26, § 216.100) has failed in her duty to coordinate state responsibilities under the Act; and (3) that Defendants have failed to retain and provide to Plaintiffs NVRA-related records they are required to provide. The support for these allegations derives primarily from Defendants' own admissions, in response to a survey conducted every two years by the federal Election Assistance Commission ("EAC") as it prepares a mandatory report to Congress, and in their correspondence with Plaintiffs. *See* ECF 1 ¶¶ 24-51, 54-58; 52 U.S.C. § 20508(a)(3); 11 C.F.R. § 9428.7. Defendants have moved to dismiss, arguing that Plaintiffs lack standing, that the Eleventh Amendment bars claims against Defendant Illinois State Board of Elections, and that the complaint fails to state a claim. ECF 41-1. This motion should be denied.

STANDARDS ON A MOTION TO DISMISS

"When examining a motion to dismiss, [courts] accept as true all well-pleaded facts in the complaint and draw reasonable inferences in favor of the plaintiff." *KAP Holdings, LLC v. Mar-Cone Appliance Parts Co*., 55 F.4th 517, 523 (7th Cir. 2022) (citation omitted). "To avoid dismissal, the complaint must state a claim to relief that is plausible on its face." *Id*. (citations and internal quotations omitted). However, a "complaint does 'not need detailed factual allegations,' but … 'enough to raise a right to relief above the speculative level.'" *Mack v. Resurgent Cap. Servs., L.P*., 70 F.4th 395, 405 (7th Cir. 2023) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "A complaint may meet this standard by pleading enough factual matter (taken as true) 'to raise a reasonable expectation that discovery will reveal evidence of' a necessary element of the claim." *Id*. (quoting *Twombly*, 550 U.S. at 556).

To determine "whether a complaint adequately pleads the elements of standing, courts apply the same analysis used to review whether a complaint adequately states a claim," namely, they "'accept as true all material allegations of the complaint, and … construe the complaint in favor of the complaining party.'" *Silha v. ACT, Inc*., 807 F.3d 169, 173 (7th Cir. 2015) (citations omitted);[1] *Spuhler v. State Collection Serv., Inc.*, 983 F.3d 282, 285 (7th Cir. 2020) ("a plaintiff may demonstrate standing by clearly pleading allegations that 'plausibly suggest' each element of standing when all reasonable inferences are drawn in the plaintiff's favor" (citations omitted)); *see also Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) ("At the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice" to show standing").

I. PLAINTIFFS HAVE CLEARLY ALLEGED THEIR STANDING TO BRING THE CLAIMS IN THIS LAWSUIT, UNDER SEVERAL DIFFERENT THEORIES.

To have standing, a plaintiff "must have (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) (citing *Lujan*, 504 U.S. at 560-561). At the pleading stage, "the plaintiff must 'clearly … allege facts demonstrating' each element." *Id*. (citation omitted). An injury in fact is one in which plaintiff claims to have "suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id.* at 339 (citing *Lujan*, 504 U.S. at 560). An injury may be "fairly traceable" even if it is not the "the very last step in the chain of causation." *Bennett v. Spear*, 520 U.S. 154, 168-69 (1997). "By particularized, we mean that the injury must

[1] This is the standard that applies where a 12(b)(1) motion makes a "facial challenge" contending that jurisdictional allegations in the complaint are inadequate. *Silha*, 807 F.3d at 173. By contrast, a "factual challenge" argues that there is no jurisdiction in fact, "even if the pleadings are formally sufficient." *Id.* (citation omitted). The motion to dismiss here is a facial challenge. Defendants do not dispute (and filed no affidavits contesting) the truth of Plaintiffs' jurisdictional allegations, but only their adequacy.

affect the plaintiff in a personal and individual way." *Lujan*, 504 U.S. at 560 n.1. "The Supreme Court has described a 'concrete' injury as an injury in fact, one that is real and not abstract, although it need not necessarily be tangible." *Mack*, 70 F.4th at 403 (quoting *Spokeo*, 578 U.S. at 339-40).

Plaintiffs are aware of no case alleging properly noticed violations of Section 8 of the NVRA that was dismissed for lack of an Article III injury.[2] In this case, Plaintiffs have alleged concrete and particularized injuries that are directly traceable to Defendants' alleged failures remove ineligible registrations from the rolls.

A. Plaintiffs IFA and BI have pleaded direct, monetary losses from Defendants' failure to comply with Section 8(a)(4) of the NVRA.

"[C]ertain harms readily qualify as concrete injuries under Article III. The most obvious are traditional tangible harms, such as … monetary harms." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 425 (2021) (citing *Spokeo*); *Mack*, 70 F.4th at 406 ("money damages are almost always found to be concrete harm" (citation omitted)); *Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006) ("economic injury is a quintessential injury upon which to base standing" (citations omitted)). Even where losses are "slight … an 'identifiable trifle' suffices" for standing. *Craftwood II, Inc. v. Generac Power Sys. Inc.*, 920 F.3d 479, 481 (7th Cir. 2019) (citation omitted); *Jackson Mun. Airport Auth. v. Harkins*, 98 F.4th 144, 149 (5th Cir. 2024) (en banc) (Ho, J., concurring)

[2] Plaintiffs know of only one order dismissing a Section 8 claim for lack of Article III jurisdiction for *any* reason. An oral order in *RNC v. Aguilar*, No. 2:24-cv-518 (D. Nev. June 20, 2024), Reporter's Transcript of Proceedings of June 18, 2024, ECF 96 at 71-75 (not available on Lexis or Westlaw), issued while this motion was being briefed, dismissed a Section 8 complaint, without prejudice, as not redressable or ripe because it was filed during the NVRA's 90-day, pre-election "freeze" period concerning voters who have moved. *See* 52 U.S.C. § 20507(c)(2). The order was not appealed, and the plaintiffs filed a new complaint within two weeks. *Aguilar*, ECF 98. Plaintiffs submit that the order was clearly erroneous. The NVRA eases the notice requirement in the runup to elections—in other words, *during* the statutory freeze period—which means that it expressly contemplates lawsuits being filed in that period. *Id*. § 20510(b)(2)-(3). And that period has no effect on orders to comply with the NVRA, to remove dead registrants, or to provide public records. The case is irrelevant here because Defendants did not make the same arguments.

("there's no *de minimis* exception to economic injury under Article III") (citations omitted); *see Mack*, 70 F.4th at 406 (standing to sue under the Fair Debt Collection Practices Act was based on a postage fee of $3.95).

Plaintiffs IFA and BI are both non-profits engaged in political advocacy. ECF 1 ¶¶ 93, 95. They both plead tangible, monetary injuries directly traceable to Defendants' failure to comply with the list maintenance provisions of the NVRA. IFA alleges that it "relies on Illinois' voter rolls to identify in-state voters and to contact them and encourage them to assist the candidates it supports by volunteering, organizing, contributing, and voting." *Id*. ¶ 94. IFA's "ability to contact Illinois voters is made more difficult because the voter rolls contain many outdated and ineligible registrations." *Id*. Accordingly, "Defendants' failure to timely remove ineligible registrants from Illinois' voter rolls causes [IFA] to waste significant time, effort, and money trying to contact voters listed on the rolls who no longer live at the registered address." *Id*. ¶ 97. Plaintiff BI likewise "relies on Illinois' voter rolls to contact Illinois voters to conduct its get-out-the-vote efforts and its advocacy and education missions." *Id*. ¶ 96. Like IFA, BI's ability to contact voters is made more difficult because Illinois' rolls include so many outdated registrations. *Id*.

The complaint thus alleges that IFA and BI are suffering direct, monetary losses because Defendants have failed to remove ineligible registrants from their voter rolls as required by the NVRA. No more is needed to establish their organizational standing. Defendants misapprehend this point when they simply assume that this injury must be framed as a "diversion of resources." ECF 41-1 at 20-21.[3] That kind of claim derives from *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982), where a Virginia nonprofit was held to have standing to challenge discriminatory housing practices that "frustrated … its efforts to assist equal access to housing" and made it

[3] All citations to filed documents are to page numbers assigned by ECF, not internal page numbers.

"devote significant resources to identify and counteract" them. The basis of such a "diversion of resources" claim, in other words, is that an organization has diverted its resources away from its usual, preferred activities in response to challenged conduct. *See* point I.B *infra*.

But the monetary losses endured by IFA and BI are more straightforward. Because they are relying on Defendants' inaccurate registration list to obtain voters' addresses, they are sending mail to addresses where voters no longer live, and knocking on doors to reach voters who are no longer there. The money and time lost as a result are not "diverted" to less favored activities. They are simply thrown away, causing a direct economic loss. By way of analogy, if IFA or BI owned property that was being damaged by a neighbor, or if they made a contract that a counterparty was breaching, they could claim an economic loss conferring standing to sue. They would not *also* have to allege how they were forced to divert funds from other, preferred activities.

Federal courts in this and other circuits have routinely concluded that political actors have standing based on their economic injuries alone, without also requiring proof of a diversion of resources. For example, in *Libertarian Party of Ill. v. Scholz*, 872 F.3d 518, 522-23 (7th Cir. 2017), standing was based on a "full slate" requirement that "raise[d] the cost of ballot access" to a minor party and so was "a continuing burden on its ability to field candidates." That decision did not mention *Havens* or rely on any "diversion of resources." *See Nader v. Keith*, 385 F.3d 729, 736 (7th Cir. 2004) (observing that plaintiff would have had standing based on fact "it would cost him more" to comply with election code "than if the challenged provisions were invalidated"); *Krislov v. Rednour*, 226 F.3d 851, 856-57 (7th Cir. 2000) (plaintiffs had standing to challenge requirement that circulators be local, registered voters where candidates had to "allocate additional campaign resources to gather signatures"); *Benkiser*, 459 F.3d at 586 (party had "direct standing" to challenge opposing candidate's late removal from the ballot that "would cause it economic loss").

In their brief, Defendants note that the proper enforcement of the NVRA results in outdated voter registrations being placed in an inactive status for years. ECF 41-1 at 22. They then argue that Plaintiffs, especially IFA and BI, "cannot establish that their alleged injury—difficulty contacting Illinois voters resulting from the voter registration list including ineligible voters—is traceable to the State's action," as opposed to being the normal result of registrations being inactivated during the NVRA's statutory waiting period, or that "an order from this Court would redress their alleged injury." *Id*. This argument is fundamentally flawed. To begin with, it asserts, in effect, that Plaintiffs must *disprove* a specific factual contention, *viz*., that Defendants' inaccurate rolls are due to the ordinary workings of the NVRA rather than their own neglect. This ignores the basic rules governing this motion, where all factual allegations are construed as true and all inferences are drawn in favor of Plaintiffs. Indeed, Defendants' argument, properly understood, is nothing more than a gratuitous factual assertion about the merits, which must be assumed to favor Plaintiffs when determining standing. *See Sierra Club v. U.S. E.P.A*., 774 F.3d 383, 389 (7th Cir. 2014) ("[I]n reviewing the standing question, the court must … assume that on the merits the plaintiffs would be successful in their claims.") (citation and internal quotations omitted); *FEC v. Ted Cruz for Senate*, 596 U.S. 289, 298 (2022) (when evaluating standing, federal courts must "accept as valid the merits of [plaintiffs'] legal claims") (citation omitted).

In any case, even as a merits argument, Defendants' unsupported suggestion that Illinois' inaccurate voter rolls might be due to *too much* enforcement of the NVRA, rather than too little, is baseless. Citing Defendants' own admissions, the complaint alleges that, over a two-year measuring period, 23 Illinois counties reported removing 15 or fewer registrants under the NVRA's notice-and-waiting-period procedure, with 11 of those counties reporting *zero* such removals during that time. ECF 1 ¶¶ 26, 29-30. These 23 counties, with 980,089 total registered

voters, removed a combined 100 registrations under the relevant procedures in those two years. *Id.* ¶ 30. For context, the complaint notes that notice-and-waiting-period removals are usually the most numerous kind (*id.* ¶ 27); that such removal numbers should not be that low, and should never be zero (*id.* ¶ 31);[4] that 11.8% of Illinois residents move each year (*id.* ¶ 32); that 344,000 residents moved out of state in a recent year (*id.* ¶ 33); and that "tiny Pope County, Illinois, with 2,772 voter registrations, removed 175 registrations" under the same provision in the same time period, which is more than those 23 counties combined (*id.* ¶ 36). Add to this that 34 Illinois counties reported no data on such removals (*id.* ¶ 38), 19 counties reported no data on death removals (*id.* ¶ 39), 29 counties reported no data on NVRA Confirmation Notices (*id.* ¶ 43); 22 counties did not report inactive registrations (*id.* ¶ 46); and the chief State election official admitted she "does not have access to local election authorities' list maintenance records" (*id.* ¶ 56), and it is plain, whether or not inferences are drawn in Plaintiffs' favor, that Illinois' inaccurate voter rolls are *not* due to ordinary NVRA enforcement, but to a colossal failure to comply with the Act.

Because Plaintiffs IFA and BI have clearly alleged economic injuries arising from Defendants' failure to comply with the list maintenance provisions of the NVRA, they have standing, and this Court has jurisdiction over their claims. *See Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2 (2006) ("[T]he presence of one party with standing is sufficient to satisfy Article III's case-or-controversy requirement." (citations omitted)).

B. Plaintiffs IFA, BI, and Judicial Watch have pleaded standing based on a diversion of their resources to counteract Defendants' failure to comply with the NVRA.

As set forth above, IFA and BI have pleaded direct, economic injuries conferring standing. In the alternative, they have alleged institutional costs that establish their standing under a

[4] Whatever the final evidence shows regarding Defendants' "reasonable effort" under the NVRA, the failure to remove *any* voters after the statutory inactive period is objectively unreasonable.

"diversion of resources" theory. Judicial Watch also has alleged this kind of standing.

Common Cause Ind. v. Lawson, 937 F.3d 944, 948-49 (7th Cir. 2019) involved a challenge to an Indiana law that authorized *immediate* removal of registrants believed to have moved, notwithstanding the NVRA's prescribed waiting period of two general federal elections. Each organizational plaintiff there was a "non-profit entity that advocates for voter access, conducts voter education to promote voter access, helps voters overcome any challenges they face trying to vote, and helps voters register to vote (or re-register if needed)." *Id*. at 951. Considering a motion for preliminary relief, the Court found an injury in fact where the plaintiffs "will be required to increase the time or funds (or both) spent on certain activities to alleviate potentially harmful effects" of the law, and where "their missions will be thwarted" because such efforts "will displace other projects they normally undertake." *Id*. at 952. In short, standing existed where the law cost plaintiffs "time and money they would have spent differently or not spent at all." *Id*. at 954.

Here, Plaintiff IFA is a "501(c)(4), non-profit political advocacy and lobbying organization" and the "legislative action arm of the Illinois Family Institute." *Id*. ¶ 93. It "endorses and supports candidates who support its core principles" by "identify[ing] in-state voters" and "contact[ing] them" to "encourage them to assist the candidates it supports by volunteering, organizing, contributing, and voting." *Id*. ¶¶ 93, 94. Plaintiff BI is "a 501(c)(4) policy advocacy and education network that advances" its causes by "contact[ing] Illinois voters to conduct its get-out-the-vote efforts and its advocacy and education missions." *Id*. ¶¶ 95, 96. Both IFA and BI have alleged that the many ineligible registrations on Illinois' voters rolls lead to a significant waste of "time, effort, and money" when they try to contact voters at bad addresses. ECF 1 ¶¶ 94, 96, 97. As set forth *supra* in point I.A, the complaint abundantly alleges that Defendants remove too few outdated registrations. Thus, the complaint alleges (1) IFA's and BI's core institutional activities,

(2) how they incur real, out-of-pocket costs because of Illinois' inaccurate voter rolls, and (3) how these inaccurate rolls are due to Defendants' noncompliance with the NVRA.

For its part, Judicial Watch alleges that its "concerns with Illinois' list maintenance practices led it" to contact the State about these practices, "to analyze the State's responses," to "send its Notice Letter threatening a lawsuit," to "research and analyze" Defendants' responses, and to "conduct analyses of Illinois' registration rates, removal rates, Confirmation Notice statistics, and inactive rates." *Id*. ¶ 89. The "substantial resources" expended as a result were for "staff time, investigating Defendants' failure" to comply with the NVRA, "communicating with Illinois officials" and others about this failure, and "researching statements made by Defendants in their correspondence." *Id*. ¶ 90. These resource costs are alleged to be "distinct from and above and beyond Judicial Watch's regular, programmatic efforts to monitor" NVRA compliance. *Id*. ¶ 91. "Were it not for Defendants' failure to comply" with the NVRA, "Judicial Watch would have expended these same resources on its regular, programmatic activities or would not have expended them at all." *Id*. ¶ 92. These allegations state an injury from a diversion of resources. *See Am. Civ. Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789-790 (W.D. Tex. 2015) ("monitor[ing]" events, "compil[ing] statistics," "visits," and "discussions" before filing suit to address a failure to comply with the NVRA's list maintenance provisions supported organizational standing).

Defendants argue that *Lawson* can be distinguished because that Court determined that the plaintiffs' injury "is either imminent or has already begun." ECF 41-1 at 20, quoting *Lawson*, 937 F.3d at 951. But the same is true here. Plaintiffs are not speculating about costs that *may be* inflicted on them in the future by their reliance on Illinois' inaccurate rolls. They already endure these costs. *See* ECF 1 ¶¶ 94, 96 ("ability to contact Illinois voters *is* made more difficult"); ¶ 97 ("Defendants' failure to timely remove ineligible registrants from Illinois' voter rolls *causes* [IFA] to waste significant time, effort, and money trying to contact voters … who no longer live at the registered

address."); *id*. ¶ 90 ("Judicial Watch *has expended* substantial resources") (emphases added).

With respect to Judicial Watch in particular, Defendants argue that because "most of the alleged diversion of resources is squarely within [its] already established *nationwide* campaign, it is unclear how the organization has had to expend substantial resources beyond the work that it was already performing." ECF 41-1 at 17 n.7. Defendants lose this argument at the outset by using the word "most," because even "slight" losses or "an "'identifiable trifle' suffices" for standing. *Craftwood II*, 920 F.3d at 481 (citation omitted). More fundamentally, the issue is whether Judicial Watch endured *extra* costs, which it clearly has alleged. ECF 1 ¶¶ 91-92. "The question is what additional or new burdens are created" by the challenged conduct. *Lawson*, 937 F.3d at 955 (citation omitted). Whether these new burdens fall within an organization's existing mission is irrelevant. As the Seventh Circuit noted, "we have a hard time imagining … why it is that an organization would undertake any additional work if that work had nothing to do with its mission." *Id*.

Defendants also cite *Shelby Advocs. for Valid Elections v. Hargett*, 947 F.3d 977, 982 (6th Cir. 2020) to argue Plaintiffs should not be allowed to "bootstrap their way into standing by 'inflicting harm on themselves based on their fears of a hypothetical future harm.'" ECF 41-1 at 21. But that is not what happened here. As set forth above, monetary losses have already been endured by Plaintiffs and are not "hypothetical future harm." Nor can they be characterized as "self-inflicted" merely because they were willingly incurred in response to Defendants' conduct. "What matters is whether … activities were undertaken because of" Defendants' conduct, "not whether 'they are voluntarily incurred or not.'" *Lawson*, 937 F.3d at 956 (citation omitted).

Under the liberal standards governing notice pleading, all three organizational Plaintiffs

have clearly pleaded standing based on a diversion of their resources.[5]

C. Plaintiffs Carol J. Davis, and Judicial Watch as an association representing its members, have standing as voters.

Plaintiff Carol J. Davis, and Judicial Watch on behalf of its individual members who are Illinois voters,[6] independently have standing based on the allegation that "Defendants' failure to comply with their NVRA voter list maintenance obligations … undermin[es] their confidence in the integrity of the electoral process, discouraging their participation in the democratic process, and instilling in them the fear that their legitimate votes will be nullified or diluted." ECF 1 ¶ 85.

The Supreme Court, in *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006), observed that

> Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy. Voter fraud drives honest citizens out of the democratic process and breeds distrust of our government. Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised.

Consistent with this insight, in upholding Indiana's voter ID laws in *Crawford v. Marion County Election Bd*., 553 U.S. 181, 196 (2008) the Supreme Court credited the State's legitimate

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[5] While this motion was being briefed, the Supreme Court issued a ruling rejecting a claim of *Havens*-type standing by medical associations who asserted that the FDA's rule on the abortion pill mifepristone caused them to use resources "drafting citizen petitions to FDA as well as engaging in public advocacy and public education," and "conduct[ing] their own studies" to "better inform their members and the public" about the drug's risks. *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 370 (2024). To the extent that it applies to the facts of this case, it supports Plaintiffs' standing. The Court noted that the nonprofit plaintiff in *Havens* was not only "an issue-advocacy organization, but also operated a housing counseling service," so that the defendant's "actions directly affected and interfered with [its] core business activities." *Id*. at 395. This is equally true of IFA and BI. Their core activities include using the state's voter rolls to contact voters and engage in get-out-the-vote and other hands-on electoral efforts, and they suffer real costs because those rolls are unreliable. *See* ECF 1 ¶¶ 94, 96, 97. Further, Judicial Watch, like the plaintiff in *Havens*, does more than public advocacy and education, as it litigates where necessary to enforce the NVRA. *Id*. ¶¶ 82, 86, 89.

[6] An association may sue for its members when any one "would have individual standing to sue, the interests involved are germane to the organization's purpose, and neither the claim nor requested relief are of the type that would require individual member participation." *Shakman v. Clerk of Cook Cty*., 994 F.3d 832, 840 (7th Cir. 2021) (citing *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)). Defendants argue that Judicial Watch must name at least one member with standing. ECF 41-1 at 20. Plaintiff Carol J. Davis is, in fact, a member of Judicial Watch. If the Court deems it necessary for its associational standing, Judicial Watch respectfully requests leave to plead this fact or to show it by affidavit.

"interest in counting only the votes of eligible voters." But it further noted that, while "closely related to the State's interest in preventing voter fraud, *public confidence in the integrity of the electoral process has independent significance*, because it encourages citizen participation in the democratic process." *Id.* at 197 (emphasis added).

In *Judicial Watch, Inc. v. King*, 993 F. Supp. 2d 919, 920 (S.D. Ind. 2012), the plaintiffs sued Indiana for failing to conduct list maintenance required by the Act. Judicial Watch alleged that its members were injured by "Indiana's failure to comply with the NVRA list maintenance requirements because that failure 'undermin[es] their confidence in the legitimacy of the elections … and thereby burden[s] their right to vote.'" *Id.* at 924. In denying a motion to dismiss for lack of standing, the court, citing *Crawford*, reasoned that "[i]f the state has a legitimate interest in preventing" the undermining of voters' confidence, "surely a voter who alleges that such harm has befallen him or her has standing to redress the cause of that harm." *Id.*; *see id*. at 924 n.6 (finding that Judicial Watch had "associational standing to pursue its claim on behalf of its members who are registered to vote in Indiana" who otherwise had individual standing to sue). Other courts have reached the same conclusion.[7] *See Green v. Bell*, No. 3:21-cv-00493, 2023 U.S. Dist. LEXIS 45989, at *10 (W.D.N.C. Mar. 19, 2023) (claims that "North Carolina's 'inaccurate rolls' undermine [the plaintiffs'] confidence in the state's elections, which further 'burdens their right to vote[] … qualify as injuries in fact"); *Judicial Watch, Inc. v. Griswold*, 554 F. Supp. 3d 1091, 1104 (D. Colo. 2021) ("undermined confidence and discouraged participation are [not] 'common to all members of the public.' … Nor are these fears speculative or hypothetical. … plaintiffs are not

[7] Note that the complaint speaks only to the *concerns* of Carol J. Davis and Judicial Watch's members as registered voters. It does not specifically allege that these individuals have been *directly* harmed by fraud or vote dilution. Defendants miss this point. *See*, *e.g.*, ECF 41-1 at 1 ("Plaintiffs instead rely on fearmongering claims, such as election fraud and vote dilution."). All of Defendants' arguments and citations regarding vote dilution as an independent injury (*id*. at 18-19 & n.6) are irrelevant to this motion because that kind of injury has not been alleged.

worried that their confidence *could* be undermined at some point in the future; their confidence is undermined now.") (citation omitted). *But see Am. Civ. Rights Union*, 166 F. Supp. 3d at 799-800, 803 (accepting standing based on diverted resources but rejecting standing based on a loss of voter confidence, noting disagreement with *King*).

Plaintiffs respectfully submit that the reasoning in *King*, the only ruling in this circuit considering NVRA standing based on voters' undermined confidence, and in *Green* and *Griswold* which followed it, is persuasive on this issue.

D. Plaintiffs Judicial Watch, IFA, and Carol J. Davis have standing based on Defendants' failure to provide records pursuant to Section 8(i) of the NVRA.

In an August 2023 inquiry letter to Defendant Matthews, Judicial Watch requested several categories of documents under the NVRA's public records provision, which requires states to maintain and provide "all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency" of voter lists. ECF 1 ¶ 53; 52 U.S.C. § 20507(i). The first request, seeking the names and addresses of those to whom Confirmation Notices were sent and information about their responses, is identified in the Act as a category of public records covered by this provision. *Id*. § 20507(i)(2). In her response, Defendant Matthews admitted that "SBE does not possess documents responsive to this request." ECF 1 ¶ 58. Plaintiffs' statutory notice letter identified this fact as an NVRA violation. *Id*. ¶ 80.[8]

Defendants argue that "Plaintiffs must also have an informational injury to have standing

[8] As the complaint was filed within 30 days of Illinois' March 19 federal primary, Plaintiff BI was exempt from the NVRA's notice requirement. *See* 52 U.S.C. § 20510(b)(3). Thus, BI did not participate in the November 2023 notice letter. However, the ability to sue for particular violations of Section 8(i) may be limited to those making specific requests under that provision. For that reason, BI did not join the Section 8(i) claim in the complaint. *See* ECF 1 ¶ 107. Defendants argue that IFA and Ms. Davis also cannot join that claim, since Judicial Watch alone made the initial records request in August 2023. ECF 41-1 at 23-24. Without conceding that point, none of these issues need to be decided on this motion if it is determined, as argued in the text, that Judicial Watch has standing to sue for a violation of Section 8(i). *See Rumsfeld*, 547 U.S. at 52 n.2 ("one party with standing is sufficient to satisfy" Article III) (citations omitted)).

to assert a claim based on a violation of Section 8(i)," which requires them to "identify any downstream consequences from failing to receive the required information." ECF 41-1 at 24 (citing *TransUnion*, 594 U.S. 413; *Campaign Legal Center v. Scott*, 49 F.4th 931 (5th Cir. 2022)). As Judge Ho noted, however, the evidence needed to show informational injury "is 'not … burdensome.'" *Campaign Legal Center*, 49 F.4th at 940 (Ho, C.J., concurring in the judgment) (citation omitted). With respect to a claim under Section 8(i),

> There may be any number of ways that Plaintiffs [] can establish a "downstream consequence" that they will suffer if denied the information they seek. Perhaps the information is necessary to engage in public advocacy about a pressing matter of policy—as was the case for Washington Legal Foundation and others in *Public Citizen* [*v. Dep't of Justice*, 491 U.S. 440 (1989)]. Perhaps the information is essential to furthering Plaintiffs' mission to protect the voting rights of various communities. Perhaps they can articulate yet another need for the information.

Id.

Plaintiffs plead the necessary facts here. The complaint alleges that "Plaintiff Judicial Watch's mission is to promote transparency, integrity, and accountability in government and fidelity to the rule of law. The organization, which has been in existence since 1994, fulfills its mission through public records requests and litigation, among other means." ECF 1 ¶ 82. Judicial Watch is especially focused on voter list maintenance pursuant to the NVRA:

> In response to the concerns of its members, Judicial Watch commenced a nationwide program to monitor state and local election officials' compliance with their NVRA list maintenance obligations. As part of this program, Judicial Watch utilizes public records laws to request and receive records and data from jurisdictions across the nation about their voter list maintenance efforts. It then analyzes these records and data and publishes the results of its findings to the jurisdictions, to its members, and to the general public.

Id. ¶ 88. This effort obviously includes Illinois. *See id*. ¶ 86 ("Protecting the voting rights of Judicial Watch members who are lawfully registered to vote in Illinois is germane to Judicial Watch's mission."). And the complaint particularly alleges how Confirmation Notices, the subject

of Judicial Watch's unfulfilled request to Illinois, are crucial to conducting list maintenance under the NVRA. They are "a necessary first step … to removing the outdated registrations of voters who changed address. The failure to respond to this notice makes the registration inactive and starts the NVRA's statutory 'clock,' after which the registration is cancelled." *Id*. ¶ 42.

In light of these allegations, the "downstream consequences" to Judicial Watch if it cannot obtain the requested documents and information regarding Confirmation Notices are clear: It will be unable to determine the extent to which Defendants are complying with the NVRA. It will thus be unable to execute its "program to monitor state and local election officials' compliance with their NVRA list maintenance obligations." *Id*. ¶ 88. Note that this mission is consistent with the purpose of Section 8(i), which "embodies Congress's conviction that Americans who are eligible under law to vote have every right to exercise their franchise, a right that must not be sacrificed to administrative chicanery, oversights, or inefficiencies." *Project Vote v. Long*, 682 F.3d 331, 334-35 (4th Cir. 2012). *See also Bellitto v. Snipes*, No. 16-cv-61474- BLOOM/Valle, 2018 U.S. Dist. LEXIS 103617, at *13 (S.D. Fla. Mar. 30, 2018) (NVRA public disclosure provisions "convey Congress's intention that the public should be monitoring the state of the voter rolls and the adequacy of election officials' list maintenance programs"). Withholding Section 8(i) records from organizations like Judicial Watch thus undermines the purpose of the Act. *See Judicial Watch v. Lamone*, 399 F. Supp. 3d 425, 445 (D. Md. 2019) ("Organizations such as Judicial Watch … have the resources and expertise that few individuals can marshal. By excluding these organizations from access to [voter registration records], the State law undermines Section 8(i)'s efficacy").

Defendants' final argument is that there are no "downstream consequences" to Plaintiffs because they "were not denied access to this information. Instead, Defendants simply informed Plaintiffs that the information relating to confirmation notices is available from the local election

authorities." ECF 41-1 at 24. But whether this "access" was sufficient to comply with Section 8(i) is a merits issue, which should not be resolved on a motion to dismiss. *Illinois Conservative Union v. Ill.*, No. 20-cv-5542, 2021 U.S. Dist. LEXIS 102543 (N.D. Ill. June 1, 2021), which also concerned a claim under Section 8(i), is instructive. The defendants there similarly argued that "Plaintiffs suffered no informational injury because Defendants provided them with access to the requested information, just not in Plaintiffs' preferred format." *Id*. at *10. In rejecting this argument, the Court held that "this is a merits question, not one that affects the standing inquiry." *Id*. (citing, *inter alia*, *United States v. Funds in the Amount of $239,400*, 795 F.3d 639, 645 (7th Cir. 2015) ("They may or may not succeed on the merits, but that is a different question [than whether parties have standing].") (alteration original)).

Indeed, Plaintiffs in this case flatly deny that Illinois' responsibilities under Section 8(i) can be delegated to local officials as Defendants claim. "The NVRA and related federal regulations require the State of Illinois, and not its counties, cities, or local authorities, to maintain and make available statewide records of Confirmation Notices sent and of responses to them." ECF 1 ¶ 59; *see* 52 U.S.C. § 20507(i) ("Each State shall …"); ECF 1 ¶ 64 ("[r]equiring a party who seeks … public records guaranteed by Section 8(i) … to individually contact 108 Illinois counties and cities to make the same requests, and then to follow up in each … makes using the NVRA public records provision exponentially harder"). These legal contentions must be accepted as valid when determining standing at this stage of the litigation. *See Ted Cruz for Senate*, 596 U.S. at 298 (court evaluating standing must accept plaintiffs' legal claims as valid).

Plaintiff Judicial Watch has alleged that the NVRA provides a right to public records, that it was denied records the NVRA required to be disclosed, and that this denial caused it downstream injuries. That is sufficient to plead an informational injury under Article III.

II. RECENT DECISIONS BY THIS COURT ESTABLISH THAT SOVEREIGN IMMUNITY DOES NOT BAR NVRA CLAIMS AGAINST THE STATE BOARD.

Defendant Illinois State Board of Elections briefly argues that the Eleventh Amendment bars claims against it. ECF 41-1 at 14.[9] This Court squarely held otherwise in the context of an NVRA lawsuit in *Ill. Conservative Union v. Ill*., No. 20-cv-5542 (N.D. Ill. Sept. 28, 2021), Order, ECF 29.[10] The Court noted that "under the plan of the Convention doctrine, no Congressional abrogation is required where the States implicitly agreed to give up aspects of their sovereign immunity by joining together to create the federal government." *Id.* at 2. Because the "Supreme Court has recognized that the Elections Clause expressly delegates power concerning federal elections to the States," this means "that the Constitution divested the States of any original power over elections and gave that power to the federal government." *Id.* "Therefore, under the plan of the Convention doctrine, the Court finds that Plaintiffs may proceed against the State and the Board [the Illinois State Board of Elections]." *Id*. at 3; *accord*, *Public Interest Legal Found. v. Matthews*, 589 F. Supp. 3d 932, 939 (C.D. Ill. 2022) (Where the "NVRA is allegedly violated by a state, the plan of the Convention doctrine applies. Therefore, the Court finds that the Board, as an agency of the State of Illinois, is not entitled to sovereign immunity under the plan of the Convention doctrine and may be sued.").[11] For these reasons, the State Board may be sued here.

III. THE COMPLAINT UNQUESTIONABLY STATES CLAIMS FOR RELIEF.

All of Defendants' arguments that the complaint fails to state a claim amount to blatant

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[9] Defendants rightly did not move to dismiss claims against Defendant Matthews on this ground, as she can be sued in her official capacity for injunctive relief. *See Ex parte Young*, 209 U.S. 123 (1908).

[10] This Court's September 28, 2021 decision on sovereign immunity is unavailable on Lexis, so the relevant order is attached as Exhibit 1.

[11] *But see Bost v. Ill. State Bd. of Elections*, No. 22-2754, 2023 U.S. Dist. LEXIS 129509 (N.D. Ill. Jul. 26, 2023), *appeal pending*, No. 23-2644 (7th Cir. Argued Mar. 28, 2024) (determining that sovereign immunity barred action against State Board in challenge to state law allowing ballot receipt after election day).

efforts, unsupported by affidavits or sworn testimony, to dispute the facts Plaintiffs have alleged and to construe factual inferences in Defendants' favor. These arguments should be rejected given the well-known standards governing this motion, which direct courts to "accept as true all well-pleaded facts … and draw reasonable inferences in favor of the plaintiff." *KAP Holdings*, 55 F.4th at 523 (citation omitted).[12]

Relying on assertions from their own correspondence, Defendants argue that Illinois is utilizing the NVRA's "safe harbor" provision. ECF 41-1 at 25 (citing ECF 1-2 at 2). That provision allows states to meet the "reasonable effort" requirement of Section 8(a)(4) "by establishing a program" using "change-of-address information supplied by the Postal Service" to identify registrants who may have moved, who are then subject to the usual NVRA procedures, including Confirmation Notices. 52 U.S.C. § 20507(c)(1)(A), (B). But even assuming Defendants have such a program (which is not conclusively established by an unsworn assertion in their correspondence) it is a different, factual matter as to whether they actually *use* it. As the Eleventh Circuit noted, "an election official in order to comply with the NVRA and take advantage of the safe-harbor provision must not only identify potentially ineligible registrants using the [Post Office's] database and mailing procedures, *but must also actually remove those ineligible registrants from the rolls*." *Bellitto v. Snipes*, 935 F.3d 1192, 1204 (11th Cir. 2019) (citation omitted) (emphasis added).

[12] Indeed, Defendants' attempts to argue the facts are particularly misguided given that the NVRA's standard requires a program that makes "a reasonable effort" to remove certain ineligible registrants. 52 U.S.C. § 20507(a)(4). In a number of different contexts, "reasonableness" has been held to be unsuitable for determination on a motion to dismiss. *Cf. Oakley v. Dolan*, 980 F.3d 279, 284 (2d Cir. 2020) (principle that reasonable force is a fact question applies "with even greater force at the motion to dismiss stage, where a court must assume the truth of the plaintiff's allegations and avoid resolving factual disputes"); *Levine v. Am. Psychological Ass'n*, 766 F.3d 39, 48 (D.C. Cir. 2014) (deciding reasonableness of reliance on misrepresentations not appropriate on motion to dismiss); *Brown v. Cook Cty.*, Case No. 17-8085, 2018 U.S. Dist. LEXIS 106746, at *35 (N.D. Ill. June 26, 2018) (reasonableness of employer's response to harassment was "better-suited for a summary judgment motion than a motion to dismiss") (citation omitted).

For this reason, courts addressing a "safe harbor" argument in a motion to dismiss have uniformly denied dismissal on that ground. *See Judicial Watch*, 554 F. Supp. 3d at 1108-09 ("While it appears undisputed that this is Colorado's program, the Court has no information about Colorado's compliance, and the Court finds that determining whether Colorado has availed itself of the safe harbor cannot be resolved without 'further development of the record.'" (citing *Voter Integrity Project NC, Inc. v. Wake Cnty. Bd. of Elections*, 301 F. Supp. 3d 612, 620 (E.D.N.C. 2017) ("Whether [the county board of election's] compliance is sufficient to satisfy the 'safe harbor' provision is best resolved after further development of the record."); and *Bellitto v. Snipes*, 221 F. Supp. 3d 1354, 1366 (S.D. Fla. 2016) ("compliance with subsection (c)(1) [the safe harbor] … is a fact-based argument more properly addressed at a later stage of the proceedings" than on a motion to dismiss)). Here, relying on Defendants' own admissions, the complaint plausibly alleges that over one fifth of Illinois' counties are *not* removing the registrations of voters who failed to respond to a Confirmation Notice, under the safe harbor provision, or under any other program concerning such registrants. *See* ECF 1 ¶¶ 26-31 (23 counties reported removing 15 or fewer registrants under the Confirmation Notice procedure in a two-year period, and 11 reported zero removals); *see id*. ¶¶ 32-37 (providing context and showing how these low numbers establish noncompliance). Those allegations easily state a claim for noncompliance with the NVRA, which Defendants cannot defeat simply by making gratuitous assertions about their safe harbor program.

Defendants also argue that their participation in the Electronic Registration Information Center (ERIC) shows that they are "doing more than the minimum requirements of the NVRA." ECF 41-1 at 25. Like their other arguments about Plaintiffs' claims, this contention raises factual questions which should not be decided on a motion to dismiss. The complaint, moreover, specifically alleges why "[p]articipation as a member of ERIC does not ensure compliance with

the NVRA." ECF 1 ¶ 70. It notes that "ERIC recently has been plagued by accusations of partisanship and ineffectiveness and has been rapidly losing member states," and that its current members "contain only 40% of the total U.S. population." *Id.* ¶¶ 71-72. It notes that recent census data shows that only one of the five states most Illinoisans move to is a member of ERIC. *Id.* ¶ 73. And, importantly, it notes Defendants' admission that data from the ERIC program is "merely shared with local election authorities. It is left to those authorities to 'confirm any matches and make the required updates to the applicable voter records.'" *Id.* ¶ 74. Considering the facts alleged and drawing all reasonable inferences in Plaintiffs' favor, the complaint plausibly alleges that Defendants and local election authorities are *not* removing ineligible voter records. This states a claim for an NVRA violation.

Aside from the outright failure of 23 Illinois counties to remove registrants who fail to respond to Confirmation Notices, the complaint also listed counties who lack data that is crucial to list maintenance efforts under the NVRA. Again relying on Defendants' own admissions to the EAC, the complaint notes that 34 counties could only report "Data not available" regarding Confirmation Notice removals, and 19 of these reported the same thing for death removals. ECF 1 ¶¶ 38-39. In addition, 29 counties reported "Data not available" regarding the number of Confirmation Notices sent, and 22 counties said the same thing about the number of inactive registrations. *Id.* ¶¶ 43, 46. In all, "[f]ifty-two of 108 Illinois jurisdictions failed to report any data to the EAC in one or more of the crucial data categories identified above." *Id.* ¶ 48. For her part, Defendant Matthews confirmed that she "does not have access to local election authorities' list maintenance records." *Id.* ¶ 56. Apparently, no one in Illinois has access to this data.

In response, Defendants cite the EAC's most recent report to Congress, the Election Administration and Voting Survey 2022 Comprehensive Report (EAVS), which contains a chart

indicating "that Illinois had a 99.6% survey response rate with a 99.9% response rate for section A, which covers voter registration and notices sent to voters who were thought to have moved and voters who were removed from the voter registration list." ECF 41-1 at 26, citing ECF 41-2 at 255. Defendants maintain that this "disprove[s]" and "belie[s]" the allegations in the complaint that so many Illinois counties failed to report NVRA-related data. *Id*.

There are several basic flaws in this argument. Yet again, Defendants are arguing facts and factual inferences, which is inappropriate on a motion to dismiss. But even ignoring that point, and ignoring as well the hearsay problems with using the EAC's report, Defendants have misread the relevant pages of that report. In describing the methodology used to determine the data in the chart Defendants cite, the report explains: "Response rates were calculated as the percentage of jurisdictional responses within a state that were not left blank (i.e., had a numerical response of zero or greater *or a response of 'Data not available,'* 'Does not apply,' or 'Valid skip')." ECF 41-2 at 257 (emphasis added). In other words, a county's response "Data not available" was *counted as a survey response* rather than as a non-response. Regardless of why the EAC made that peculiar choice in compiling the data, it means that the response rates reported by the EAC are wholly consistent with the complaint's allegations that 52 counties reported "Data not available" in those crucial categories. *See* ECF 1 ¶¶ 38-39, 43, 46, 48. Indeed, it is odd that Defendants would doubt this. As alleged in the complaint, "States' responses to EAC surveys are compiled in datasets available online in several different software formats, at https://www.eac.gov/research-and-data/datasets-codebooks-and-surveys." *Id*. ¶ 26. The parties and the Court may view the dataset cited in the complaint (Version 1.0 released June 29, 2023) and confirm the "Data not available" indication for each county, in columns CZ (Confirmation Notice removals), CX (removals for

death), CJ (Confirmation Notices sent), and G (inactive registrations).[13]

Defendants next offer to "look[] at the granular data" (ECF 41-1 at 27), although this is, to repeat, exactly what the Court ought not to do on a motion to dismiss. Based on their review, however, Defendants argue that the *total* number of removals of ineligible voters *in all categories* by Illinois counties identified in the complaint is, in their view, significant. *Id*. They similarly argue that the aggregate numbers of Confirmation Notices sent and of ineligible registrations cancelled *statewide*, are, in their view, reasonable, or reasonable compared to other states. *Id.* These purely factual assertions, which are unsupported by expert or other testimony, are in any case inappropriate to determine on a motion to dismiss.

These arguments are also misguided. The total number of removals of ineligible voters in all categories includes, by way of example, voters who notified the state in advance or in writing that they were moving, or, alternatively, voters who *did* respond to a Confirmation Notice by confirming that they were moving. Defendants appear to be suggesting that a significant number of removals of registrations in these categories should be found to absolve or "make up for" a failure to remove the ineligible registrations of voters in other categories—like those who do not respond to a Confirmation Notice, or who have died. In a similar vein, Defendants appear to argue that counties that *do* appear to remove adequate numbers of ineligible registrations under the NVRA's notice-and-waiting-period procedure (two such counties are identified in the complaint, *see* ECF 1 ¶¶ 35-36) somehow "make up for" counties that do not. These are dubious propositions. There is no plausible reason why the failure of one fifth of Illinois' counties to remove registrations under the notice-and-waiting-period procedure, or the failure of one half of Illinois' counties to possess crucial NVRA data, is absolved by whatever NVRA compliance there is. In any case, these

[13] For reference, the survey questions are available online at https://www.eac.gov/sites/default/files/EAVS%202022/2022_EAVS_FINAL_508c.pdf.

issues should be determined by the merits inquiry in the proceeding, not on a motion to dismiss.

Finally, Defendants move to dismiss Count II (under Section 8(i)) by repeating their argument that "Plaintiffs were not denied access to this information. Rather, the Board simply informed Plaintiffs that the requested information is maintained with the local election authorities." ECF 41-1 at 28. As stated *supra* in part I.D, whether this "access" comports with Section 8(i) is a merits question which should not be decided on this motion. *See Illinois Conservative Union*, 2021 U.S. Dist. LEXIS 102543, at *10 (adequacy of access under Section 8(i) was a merits question).

In sum, Defendants' arguments that Plaintiffs fail to state a claim blatantly ignore the basic standards governing motions to dismiss, and simply attempt to argue the facts, and inferences from the facts, in Defendants' favor. Yet even as merits arguments Defendants' assertions clearly fail.

CONCLUSION

For the reasons set forth above, Defendants' motion to dismiss should be denied.

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