UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
Civil Action No. 3:21-cv-493

JERRY GREEN and LINDA PETROU, Plaintiffs, v. KAREN BRINSON BELL, in her official capacity as Executive Director of the North Carolina Board of Elections, Defendant.	)	**MEMORANDUM IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS**

Defendant Karen Brinson Bell, in her official capacity as Executive Director of the North Carolina State Board of Elections ("Director Bell"), files this memorandum in support of her Motion to Dismiss pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure.

INTRODUCTION

Plaintiffs allege that the State's Chief Election Officer, Director Bell, is failing to make reasonable efforts to remove registrants from the voter rolls in violation of the National Voter Registration Act of 1993 (NVRA). [D.E. 1, ¶ 1]. The Complaint should be dismissed because: (1) Plaintiffs lack standing due to inadequate presuit notice; (2) Plaintiffs lack standing due to lack of a concrete injury-in-fact; and (3) the Complaint fails to state a claim.

First, Plaintiffs sent a presuit letter to Director Bell on May 4, 2020 in which they alleged that certain counties in North Carolina have abnormally high numbers of registered voters in comparison to the total population of eligible voters. [D.E. 1-1, p. 4]. However, other than the bald conclusion that "something must be wrong," the letter failed to describe *how* North Carolina's list maintenance procedures were in violation of the NVRA. *Id.*, pp. 4-6. Instead, it requested generically that the State Board establish a "list maintenance program in compliance

with federal law," without explaining *what* procedures must change. *Id.*, p. 5.[1] Because Plaintiffs' presuit letter failed to describe any specific inadequacy in the State Board's list maintenance procedures to be remedied, the notice was insufficient. Thus, Plaintiffs have failed to meet their burden to establish standing to bring this claim under the NVRA.

Second, the private right of action created by the NVRA does not absolve Plaintiffs of their obligation to demonstrate Article III standing. The Supreme Court's recent ruling in *TransUnion v. Ramirez*, 141 S.Ct. 2190 (2021), reaffirms that a statutorily created cause of action does not relieve Plaintiffs of their burden to demonstrate a concrete and particularized injury bearing a close relationship to a harm traditionally recognized by courts in order to satisfy Article III's case or controversy requirement. Because Plaintiffs alleged injuries are speculative generalized grievances and unrelated to traditional remediable harms, they have failed to meet their burden to establish Article III standing.

Finally, Plaintiffs failed to state a claim upon which relief can be granted. In the Complaint, Plaintiffs allege that 40 counties have too many active registered voters compared to their adult citizens over the age of 18. [D.E. 1, ¶ 3]. However, Plaintiffs allegations, not citing actual numbers, misconstrue public registration figures by selecting outdated population totals from 2016 and then comparing those populations with 2020 registration rates. This is an inherently flawed analysis because populations change. In North Carolina, this change was dramatic over the last decade. Even if this was accurate, abnormal registration rates cannot serve as the sole basis for alleging a violation of the NVRA because there is no registration rate standard required by the NVRA, and because the NVRA itself inflates voter registration rolls.

[1] The letter also misstates federal law in multiple ways, as explained in section D of the Statement of Facts below.

For these reasons, Plaintiffs fail to state a claim upon which relief can be granted.

STATEMENT OF FACTS

A. Plaintiffs' Allegations.

Plaintiffs Jerry Green and Linda Petrou are registered voters in North Carolina, who regularly vote and are active members of their political party. [D.E. 1, ¶¶ 7-10].

Director Bell is the designated Chief Election Official of North Carolina tasked with coordinating and overseeing list maintenance required by the NVRA. *Id.*, ¶¶ 13, 27-30.

Plaintiffs claim that North Carolina has not met its obligations under the NVRA. *Id.*, ¶ 33. To reach this conclusion, Plaintiffs compared population estimates from the middle of the decade, centered on 2016, to the number of active registered voters at the end of the decade, February 2020. *Id.* Plaintiffs allege that this comparison revealed that nine counties have more registered voters than eligible voters. *Id.*, ¶ 34. Plaintiffs also allege that 31 counties have 90% or more of eligible voters registered. *Id.*, ¶ 35. Plaintiffs assert that this snapshot of rates are either abnormal or impossible and, therefore, North Carolina must not be meeting its list maintenance obligations under the NVRA. *Id.*, ¶¶ 36-41; 48-50.

Plaintiffs further extrapolate that if North Carolina is failing to follow its list maintenance obligations, then necessarily there must be ineligible voters who are registered and vote in elections, and if so, then that dilutes Plaintiffs' legitimate votes, undermines Plaintiffs' confidence in the integrity of elections, and burdens Plaintiffs' right to vote. *Id.*, ¶ 11. Plaintiffs assert that if this is occurring, it raises their concerns about election integrity and as a result they spend more time and resources monitoring North Carolina elections for fraud and abuse, mobilizing voters, educating the public, and lobbying elected officials. *Id.*

B. The NVRA

Congress enacted the NVRA to "promote the exercise" of the right to vote and to

overcome "discriminatory and unfair registration laws and procedures." 52 U.S.C. § 20501(a)(2)–(3). The NVRA requires states to expand voter registration opportunities, *Id.* §§ 20503–06, and imposes limits on states' ability to remove voters. *Id.* §§ 20507(a)(3), (b)–(d).

With these provisions, Congress sought to minimize "'purge systems' [that] had been used to 'violate the basic rights of citizens,' particularly members of 'minority communities.'" *Pub. Int. Legal Found., Inc. v. N.C. State Bd. of Elections*, 996 F.3d 257, 264 (4th Cir. 2021) (quoting S. Rep. No. 103-6, 18 (1993)). Thus, Congress designed the NVRA both to encourage voter registration, and "to ensure that once a citizen is registered to vote, he or she should remain on the voting rolls so long as he or she remains eligible to vote." S. Rep. No. 103-6 at 17. While Congress was "mindful of the need to keep accurate and current voter rolls," its overriding concern was that voter list-maintenance programs "can be abused and may result in the elimination of eligible voters from the rolls." *Id.* at 32.

Section 8 of the NVRA includes numerous safeguards to prevent states from improperly removing eligible voters from the rolls. *See* 52 U.S.C. §§ 20507(a)–(e). States are barred from removing voters from the rolls, except: (1) at the voter's request, or if the voter becomes ineligible due to (2) "criminal conviction or mental incapacity," (3) "death," or (4) "a change in residence" outside the voting jurisdiction. *Id.* § 20507(a)(3)–(4). To promote accurate and current voter rolls, Section 8 also requires states to conduct a "general program" that makes "a reasonable effort" to remove voters based on these last two grounds: death or moving outside the jurisdiction, *id.* § 20507(a)(4). This provision is the focus of the Complaint.

Subsection (c) is known as the NVRA's "safe harbor" provision, *Bellitto v. Snipes*, 935 F.3d 1192, 1203 (11th Cir. 2019), because it establishes a process by which a state "may meet" the "reasonable effort" requirement outlined above, 52 U.S.C. § 20507(c)(1). That process

entails sending an address-confirmation mailing to all voters for whom the U.S. Postal Service has a change-of-address notification on file. *Id.* § 20507(c)(1). Then, for voters who respond by confirming that they have moved out of the jurisdiction, a state may remove them from the rolls. *Id.* § 20507(d)(1)(A). For voters who do not respond to the mailing, a state may remove them from the rolls, but only if those voters fail to appear to vote in the jurisdiction in the two Federal general elections after the mailing. *Id.* § 20507(d)(1)(B).

Subsection (d) permits (though does not require) states to go beyond the Postal Service data to identify voters who may have moved and send the same address-confirmation mailing to them. *Id.* § 20507(d)(1).

C. North Carolina's Implementation of the NVRA.

North Carolina implements the requirements of the NVRA through the State Board and the 100 county boards of elections. The State Board and its executive director oversee the conduct of elections and the coordination of the State's duties under the NVRA. N.C.G.S. §§ 163-22(a), -27(d), 28, -82.2, -82.11, -82.12. The county boards conduct elections and manage voter registration in their jurisdictions. *Id.* §§ 163-33, -82.1(b), -82.6(a), -82.7, -82.8, -82.9.

North Carolina has adopted a detailed statute that implements the list-maintenance provisions of the NVRA. *See* N.C.G.S. § 163-82.14. To remove deceased voters on the rolls, the statute requires the state health department to provide the State Board a list of North Carolina residents who have died each month. *Id.* § 163-82.14(b). The State Board then forwards those names to each county to which the names pertain, and the county boards remove those names from the voter rolls. *Id.* County boards may also remove the name of any deceased voter if the voter's near relative or estate representative provides a signed statement of the voter's death. *Id.*

The statute also prescribes a program that county boards must follow to update the

records of voters who have moved. *Id.* § 163-82.14(d). County boards remove voters who have confirmed in writing that they have moved out of the jurisdiction. *Id.* § 163-82.14(d)(1). Otherwise, a county board may remove a voter for having moved only through the address-confirmation mailing process outlined in section 8(d) of the NVRA: the county board first sends an address-confirmation notice to the voter's address, and if the voter does not respond to confirm their address and fails to appear to vote in the jurisdiction in the next two Federal elections, that voter will be removed from the rolls. *Compare id.* § 163-82.14(d)(2), *with* 52 U.S.C. § 20507(d)(1)(B). Such a mailing program takes place "after every congressional election" and must be completed by April 15 of each odd-numbered year. N.C.G.S. §§ 163-82.14(a), (d)(2). These mailings are sent "to every registrant . . . if the county board has not confirmed the registrant's address by another means." *Id.* § 163-82.14(d)(2).

State law also permits the State Board to employ the NVRA's "safe harbor" method for removing voters who have moved by using the U.S. Postal Service's change-of-address records to identify voters to send address-confirmation mailings to. *Id.* § 163-82.14(a).

Pursuant to N.C.G.S. § 163-82.14(a), the State Board has adopted a detailed policy to instruct county boards on carrying out the requirements outlined above. *See* N.C. State Bd. of Elections, Maintaining the Voter Registration Database in North Carolina (July 27, 2017), *available at* https://go.aws/2Boq4RQ (and attached for reference as Exhibit A).[2]

Under this policy, the county boards send an address-confirmation mailing after every congressional election. Ex. A at 5. Because state law requires this biennial mailing to be sent to

[2] This Court may take judicial notice of the State Board's policies, records, and communications as they are official government records that are publicly available on the State Board website. *Fauconier v. Clarke*, 652 F. App'x. 217, 220 (4th Cir. 2016); *Philips v. Pitt Cnty. Mem. Hosp.*, 572 F.3d 176, 180 (4th Cir.2009); *Hall v. Virginia*, 385 F.3d 421, 424 & n.3 (4th Cir. 2004); *see also* Fed. R. Evid. 201.

only those voters for whom "the county board has not confirmed the registrant's address by another means," N.C.G.S. § 163-82.14(d)(2), the policy identifies ways a registrant confirms his or her address through "contact" with the elections boards: *e.g.*, voting, signing a petition, updating voter registration. Ex. A at 5-6. Once the county board has lost contact with a voter, the board sends an address-confirmation mailing. *Id.* at 5.

A voter that does not respond to a confirmation mailing becomes an "inactive voter." *Id.* at 6. Inactive voters remain on the registration rolls; but if they appear to vote, they must attest that they reside at the address on file or update their address (if they've moved in county) to have their votes counted. *See* N.C.G.S. § 163-82.15(f). Once voters become inactive, they are removed from the voter rolls if they "do[] not vote or appear to vote" in the next two federal general elections. *Id.* § 163-82.15(d)(2); Ex. A at 7; *see* 52 U.S.C. § 20507(d)(1)(B).

In addition to this no-contact confirmation mailing, the State Board also implements the "safe harbor" provision of the NVRA, which it refers to as the National Change of Address (NCOA) process. Ex. A at 10. Twice a year, the State Board obtains NCOA records from the U.S. Postal Service and forwards the names of voters who have moved to the county boards. *Id.* at 12. The county boards mail these voters notice cards to confirm if they've moved. *Id.* at 14. Consistent with the NVRA's safe harbor process, 52 U.S.C. § 20507(c)(1)(B), the county boards will: (1) update a voter's registration record if the voter confirms an in-county move, (2) cancel the voter's registration if the voter confirms an out-of-county move, (3) make no change if the voter confirms the same residence as on their registration record, or (4) initiate the address-confirmation process outlined above if the county board receives no response. Ex. A at 16–18.

D. Plaintiffs' Presuit Correspondence on Defendants' List-Maintenance Practices.

Plaintiffs sent a single communication to the State Board on May 4, 2020, in the lead-up

to the 2020 general election. [D.E. 1, ¶ 52; D.E. 1-1]. The letter claimed that the State Board was violating section 8 of the NVRA by failing to ensure that certain counties were conducting adequate list maintenance to provide accurate voter rolls. [D.E. 1-1, p. 2].

The letter did not identify what the State Board or the county boards were doing that violated the NVRA. Instead, the letter engaged in the same unreliable comparison between mid-decade population estimates from the U.S. Census Bureau and end-of-decade registered voter lists to generate allegedly high rates of voter registration in certain counties. *Id.* at 4. In Plaintiffs' view, these figures automatically demonstrate that "North Carolina's failure to provide accurate voter rolls violates federal law, jeopardizes the integrity of the upcoming 2020 federal election, and signals to voters that elections in North Carolina are not properly safeguarded." *Id.*

The letter also plainly misstated federal law in multiple ways. It stated that the NVRA requires "immediate efforts" to "remove … [a]ll persons who are ineligible to vote by reason of a change in residence." *Contra N.C. State Conf. of NAACP v. Bipartisan Bd. of Elections & Ethics Enf't*, No. 1:16CV1274, 2018 WL 3748172, at *2 (M.D.N.C. Aug. 7, 2018) ("The means by which a state may remove a voter on change-of-residence grounds however is further restricted by other provisions of the NVRA."); *id.* at *12 (enjoining elections boards from removing registrants based on change in residency except in two specific circumstances). The letter also contended that federal law requires the removal of "[p]ersons who are presently incarcerated." [D.E. 1-1, p. 4]. The NVRA *permits* states to remove persons "as provided by State law, by reason of criminal conviction." 52 U.S.C.A. § 20507(a)(3)(B). North Carolina law, however, does require the removal of all persons who are serving a *felony* sentence only, and regardless of incarcerated status. N.C.G.S. § 163-82.14(c). Finally, the letter misread the NVRA by claiming the federal statute requires "immediate efforts" to "remove . . . [a]ll other ineligible voters"—

besides those who have died or moved out of jurisdiction. [D.E. 1-1, p. 4]. *Contra* 52 U.S.C. § 20507(a)(4) (requiring reasonable efforts to remove only deceased and moved registrants).

As stated in Plaintiffs' Complaint, Director Bell responded on July 31, 2020, writing that Plaintiffs' letter "does not explain how you believe the State Board of the county boards are violating the NVRA." See July 31, 2020 Letter from Director Bell to Plaintiffs' counsel, referenced in Plaintiffs' Complaint, ¶ 60, and attached hereto as Exhibit B.[3] The letter also notified Plaintiffs that they were failing to meet their statutory notice obligations under the NVRA, explaining that "[w]ithout a clear explanation of how you believe the law is being violated, your letter fails to provide the State Board or the county boards an opportunity to correct any supposed violation." *Id.* (citing *Scott v. Schedler*, 771 F.3d 831, 836 (5th Cir. 2014)).

Nonetheless, Director Bell's letter explained North Carolina's list-maintenance provisions in detail. Ex. B, pp. 3-5. These include compliance with the NVRA's prohibition against removing voters without confirming a voter has moved, including through the address-confirmation process that delays removal for years. *Id,* pp. 3-5. Director Bell noted that counties with higher transient populations, including significant student and military populations, are likely to have higher percentages of registered voters due to the delays built into the NVRA. *Id.*, pp. 6. She further explained that the data cited in Plaintiffs' letter was misleading and not accurate for comparative purposes. *Id.,* pp. 5-6. Finally, Ms. Bell invited Plaintiffs to explain what they believed the State and county boards were doing wrong. *Id*. Plaintiffs provided no

[3] In addition to being an official government communication subject to judicial notice as stated in footnote 2 above, this letter may be considered by the Court for all aspects of this motion as it was incorporated by reference into Plaintiffs' Complaint and is central to Plaintiffs' efforts to establish statutory standing. *Mode v. S-L Distribution Co.*, No. 3:18-cv-150, 2019 WL 1057045, at *4 n.4 (W.D.N.C. Mar. 6, 2019); *Naylor v. Wells Fargo Home Mortg.*, No. 3:15-cv-116, 2016 WL 55292, at *5 (W.D.N.C. Jan. 5, 2016).

reply until filing the Complaint 14 months later.

LEGAL STANDARDS

Under Rule 12(b)(1), the burden of proving subject-matter jurisdiction is on the Plaintiff. *See Evans v. B.F. Perkins Co.*, 166 F.3d 642, 647 (4th Cir. 1999). When a defendant challenges the factual predicate of subject matter jurisdiction, a court "is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991); *see also Evans*, 166 F.3d at 647; *Velasco v. Gov't of Indon.*, 370 F.3d 392, 398 (4th Cir. 2004). Statutory standing under the NVRA is jurisdictional. *Bellitto v. Snipes*, 221 F. Supp. 3d 1354, 1361 (S.D. Fla. 2016); *see also Judicial Watch, Inc. v. State of North Carolina, et al.* No. 3:20-cv-211, Dkt. No. 61, pp. 5-6 (W.D.N.C. August 20, 2021).

Under Rule 12(b)(6), a complaint must contain facts sufficient "to raise a right to relief above the speculative level" and to satisfy the court that the claim is "plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 570 (2007). A claim is plausible "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged"—which requires more than facts "that are merely consistent with a defendant's liability." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted).

In evaluating a Rule 12(b)(6) motion, the Court considers the allegations in the Complaint and any materials incorporated therein, as well any document submitted by the movant that is "integral to the complaint and there is no dispute about the document's authenticity." *Goines v. Valley Cmty. Servs. Bd.*, 822 F.3d 159, 166 (4th Cir. 2016). The Court may also take judicial notice of public records when considering a Rule 12(b)(6) motion. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322, 127 S. Ct. 2499, 168 L. Ed. 2d

179 (2007) (recognizing that a court may consider during Rule 12(b)(6) review any "documents incorporated into the complaint by reference, and matters of which a court may take judicial notice"); *see also* Fed. R. Evid. 201. This includes taking judicial notice of voting-age population statistics that are publicly available on official government websites. *Hall v. Virginia*, 385 F.3d 421, 424 & n.3 (4th Cir. 2004).

ARGUMENT

I. PLAINTIFFS CANNOT ESTABLISH STATUTORY STANDING DUE TO FATALLY DEFICIENT PRESUIT NOTICE.

Plaintiffs were required to provide clear notice of how Defendants were allegedly violating the NVRA before filing suit. It did not do so.

Before filing an action alleging a violation of the NVRA, a plaintiff must "provide written notice of the violation to the chief election official of the State involved," 52 U.S.C. § 20510(b)(1), and afford the election official an opportunity to correct the violation within 90 days, *id.* § 20510(b)(2). "[F]ailure to provide notice is fatal" to a plaintiff's standing. *Bellitto*, 221 F. Supp. 3d at 1362 (quoting *Scott v. Schedler*, 771 F.3d 831, 836 (5th Cir. 2014)). The purpose of the notice requirement is to "provide states in violation of the Act an opportunity to attempt compliance before facing litigation." *Ass'n of Cmty. Organizations for Reform Now v. Miller*, 129 F.3d 833, 838 (6th Cir. 1997). Accordingly, if a notice letter is "too vague to provide [the defendant] with 'an opportunity to attempt compliance,'" the notice will be insufficient to confer standing. *Scott*, 771 F.3d at 836 (quoting *Miller*, 129 F.3d at 838); *see also Ohio A. Phillip Randolph Inst. v. Husted*, 350 F. Supp. 3d 662, 672 (S.D. Ohio 2018).

With respect to the alleged violation of the NVRA's "reasonable effort" provision, Plaintiffs' May 2020 letter to Director Bell is too vague to serve its statutory purposes because it failed to explain how they were violating the NVRA. [D.E. 1-1]. Plaintiffs merely cited the

provision of the NVRA's Section 8 that requires a "reasonable effort" to remove certain ineligible voters, but did not identify what elections administrators were doing that was unreasonable. *Id.*, pp. 1-2. When Director Bell responded alerting Plaintiffs to this deficiency, and providing a detailed explanation of the list-maintenance procedures undertaken by the State and county boards, including a link to those written policies, Plaintiffs still failed to provide any clarifying explanation. *See* Ex. B, pp. 1-4; Ex. A.

Thus, Plaintiffs knew exactly what efforts the State and county boards were undertaking to remove ineligible voters. But what the State and county elections boards were doing wrong in that process, was left to the imagination. Plaintiffs' inability to identify what effort, or lack thereof, was unreasonable under the NVRA failed to provide "an opportunity to attempt compliance before facing litigation." *Miller*, 129 F.3d at 838. Defendants were offered only a "vague" allegation of unreasonableness. *Scott*, 771 F.3d at 836; *Husted*, 350 F. Supp. 3d at 672.

Plaintiffs' notice letter also included alleged ratios of registered voters in 2020 versus the voting-age population in specific counties in a date range centered on 2016. [D.E. 1-1, p. 3]. These figures do not show that a state or county board is violating the NVRA, much less how. In an memorandum and recommendation in *Judicial Watch*, this Court's found that a similar statistical analysis in "the notices/letters sent by Plaintiff to Defendants […] were too vague to provide them an opportunity to attempt compliance before facing litigation." No. 3:20-cv-211, Dkt. No. 61, pp. 18-19 (W.D.N.C. August 20, 2021) (citations omitted). In *Scott*, the plaintiff gave notice of statistics about voter registration to assert a claim for a violation of the voter registration provisions of the NVRA. 771 F.3d at 836. There too, the statistics of registration rates were insufficient to notify the State how it was violating the NVRA's requirements. *Id.*

Plaintiffs' statistics fail to give adequate notice of a violation here, in particular, because

the NVRA *prevents* states from removing significant numbers of voters that are suspected of having moved. For voters who have not expressly confirmed that they have moved out of jurisdiction, the NVRA sets forth a lengthy address-confirmation process that delays *by four years*, at minimum, the removal of these voters. *See* 52 U.S.C. § 20507(d).

This delay required by the NVRA renders flawed the analysis relied upon by Plaintiffs. In a 2020 report of the U.S. Election Assistance Commission, the federal agency repeatedly warns against drawing conclusions about NVRA compliance based on the registration rates in that report, precisely because of the lag time the NVRA requires for the removal of voters. *See* U.S. Election Assistance Comm'n, Election Administration and Voting Survey, 2020 Comprehensive Report at 126, 135, https://www.eac.gov/sites/default/files/document_library/files/2020_EAVS_Report_Final_508c.pdf, last visited November 15, 2021 [hereinafter "EAVS 2020 Report"].

The NVRA also prevents states from carrying out any systematic programs to remove voters during long periods of time—90 days before every federal primary and general election (*i.e.*, six months out of every two years). 52 U.S.C. § 20507(c)(2)(A). The federal report in its notice also warns that this aspect of NVRA compliance causes ineligible voters to remain on the rolls. EAVS 2020 Report at 135. This type of evidence, having a high number of inactive voters, simply means that a state is diligently sending regular confirmation mailings and tracking non-responses in compliance with the NVRA. Relying on the 2018 version of the EAVS report, this Court in its memorandum and recommendation in *Judicial Watch* found that "[i]f states should expect to see high voter registration rates, such information, without more, does not seem to provide adequate notice/evidence of non-compliance with the NVRA." No. 3:20-cv-211, Dkt. No. 61, p. 19, (W.D.N.C. August 20, 2021).

The NVRA also expressly sanctions a method of compliance with the "reasonable effort" provision that misses a large portion of likely ineligible voters. The NCOA's safe-harbor process, which relies on moves reported to the U.S. Postal Service, is all a state must do to comply with the "reasonable effort" requirement with respect to people who have moved. 52 U.S.C. § 20507(c)(1). And that process fails to reach up to 40% of voters who move, as the Supreme Court has noted. *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1840 (2018).

In other words, the NVRA itself is "partly responsible for inflated lists of registered voters." *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 192 (2008).

Finally, comparing registered voters to population, as Plaintiffs did in their letters, ignores important limitations on any conclusions that can be drawn from such a comparison. Unlike the NVRA provisions that inflate the number of registered voters, nothing similarly inflates the population count. Moreover, the population estimates in the U.S. Census Bureau's America Community Survey for 2014 to 2018 ("ACS") on which Plaintiffs rely provides estimates of populations for that period only and are particularly unreliable in this context. A five-year estimate takes data drawn from the preceding five years and estimates the *midpoint* of that data. *Bellitto*, 935 F.3d at 1208. Therefore, Plaintiffs' 2014 to 2018 report is actually estimating 2016 population. *Id.* In contrast, the registration figures Plaintiffs used as comparison are from 2020. Therefore, Plaintiffs are not comparing apples to apples because they fail to account for four years of population growth.

As a result, many growing areas show artificially high registration rates under Plaintiffs' calculation. *See* N.C. Off. of State Budget & Mgmt., Projected Population Change in North Carolina Counties: 2010-2020, https://bit.ly/2Wkwp8w; *cf. Bellitto*, 935 F.3d at 1208 ("[I]n a jurisdiction with a substantially growing population, like Broward County, using the 2014 five-

year estimate, therefore, would significantly underestimate the population for 2014, because it did not account for growth since 2012."). Also, registration figures in the State Board's 2020 records reflect voters registered in the lead up to the 2020 Presidential election, meaning that they reflect the height of voter registration before a major general election. *See* 52 U.S.C. § 20507(c)(2)(A); *Bellitto*, 935 F.3d at 1208 (explaining how this can lead to misleading conclusions about NVRA compliance). Accordingly, due to the NVRA's own pre-removal procedures that require waiting through two federal elections of inactivity, it would not be until *after* the 2020 general election that a large number of inactive voters would be removed from the registration list. *See* N.C. State Bd. of Elections, County Boards of Elections Begin Regular Voter List Maintenance Processes (Jan. 14, 2021), https://www.ncsbe.gov/news/press-releases/2021/01/14/county-boards-elections-begin-regular-voter-list-maintenance (estimating that "380,000 inactive voters" would be removed in early 2021 due to the NVRA process).

Thus, Plaintiffs utilized artificially lower population numbers from 2016 as the denominator, and artificially higher registration rates from early 2020 as the numerator, in order to generate artificially higher rates of voter registration.

This case stands in contrast to cases finding that notice was sufficient. In *Georgia State Conf. of N.A.A.C.P. v. Kemp*, 841 F. Supp. 2d 1320 (N.D. Ga. 2012), the plaintiffs pointed to specific state policies that violated specific provisions of the NVRA, along with supporting facts. *Id.* at 1333–34. And in *Judicial Watch, Inc. v. King*, 993 F. Supp. 2d 919 (S.D. Ind. 2012), plaintiff explained to election officials that the state had abandoned compliance with a consent decree executed with the United States over prior specific NVRA violations. *Id.* at 921.

Because the figures reported in Plaintiffs' letters do not demonstrate lack of compliance, the letters did not give the State or county boards the "opportunity to attempt compliance before

facing litigation." *Miller*, 129 F.3d at 838. Plaintiffs therefore lack standing.

II. PLAINTIFFS CANNOT ESTABLISH ARTICLE III STANDING BECAUSE THEY LACK A CONCRETE INJURY-IN-FACT.

Even in cases asserting a federal statutory cause of action, such as this one, a plaintiff is still required to demonstrate a concrete and particularized harm based on a traditional harm recognized by courts, as required under Article III, to invoke the jurisdiction of a federal court. *TransUnion*, 141 S. Ct. at 2204-07. Plaintiffs have failed to meet this burden.

Under Article III, if a plaintiff has not suffered an injury, there is no standing, *see Allen v. Wright*, 468 U.S. 737, 750 (1984); *Miller v. Brown*, 462 F.3d 312, 316 (4th Cir. 2006), and the matter should be dismissed for lack of subject matter jurisdiction. *White Tail Park, Inc. v. Stroube*, 413 F.3d 451, 459 (4th Cir. 2005). To satisfy Article III's standing requirement, Plaintiffs must establish the following:

> (1) an injury-in-fact (i.e., a concrete and particularized invasion of a legally protected interest); (2) causation (i.e., a fairly traceable connection between the alleged injury in fact and the alleged conduct of the defendant); and (3) redressability (i.e., it is likely and not merely speculative that the plaintiff's injury will be remedied by the relief plaintiff seeks in bringing suit).

Id. Plaintiffs bear the burden of establishing the elements of standing and must support each element with sufficient factual allegations. *Id.* at 458. The injury must be both concrete *and* particularized. *Spokeo, Inc. v. Robins* , 136 S. Ct. 1540, 1548 (2016). "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Beck v. McDonald* , 848 F.3d 262, 270 (4th Cir. 2017) (quoting *Spokeo,* at 1548).

To demonstrate a concrete injury, a plaintiff must allege an injury that actually exists, not one based on speculation. *Spokeo,* at 1548 ("When we have used the adjective 'concrete,' we have meant to convey the usual meaning of the term — 'real,' and not 'abstract.'")

Particularization requires that the plaintiff "personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979). A generalized grievance common to all members of the public will not satisfy particularity. *United States v. Richardson*, 418 U.S. 166, 176-80 (1974) (rejecting a claim challenging appropriations to the CIA by a taxpayer as a generalized grievance); *see also Spokeo*, at 1548 (collecting cases to restate that particularity requires the alleged injury to be a person, distinct, actual or threatened, and not undifferentiated).

The Supreme Court in *TransUnion* clarified these requirements as they pertain to statutory causes of action. A plaintiff does not satisfy the injury-in-fact requirement by merely alleging a federal statutory violation by the defendant. 141 S. Ct. at 2205 ("[T]his Court has rejected the proposition that 'a plaintiff automatically satisfies the injury-in-fact requirement whenever a statute grants a person a statutory right and purports to authorize that person to sue to vindicate that right.'" (quoting *Spokeo*, 578 U. S. at 341)). Instead, the complaint must also establish a concrete injury, in which "the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts." *Id.* at 2204-05 (quoting *Spokeo*, at 340-41).

Here, the Plaintiffs, Mr. Green and Ms. Petrou, allege only speculative generalized harms without any connection to a traditional cause of action recognized by courts. The single factual allegation on which all of Plaintiffs' claims are based, is that they think there are more registered voters than there should be in certain counties in North Carolina. From this single flawed statistical analysis, Plaintiffs extrapolate out that if those numbers are correct, then *possibly* there are ineligible voters voting. [D.E. 1, ¶ 11]. There is no factual basis supplied for this allegation, but nonetheless, it is from this speculative assertion of voter fraud that Plaintiffs claim they are

injured, because their votes are diluted and because this makes them concerned about election integrity. *Id.,* ¶¶ 11-12. Plaintiffs then assert several injuries more commonly associated with organizations. *Id.*, ¶ 12. Plaintiffs claim that because they are concerned about election integrity, their time and resources are diverted to monitoring elections, mobilizing voters, educating the public, and lobbying elected officials. *Id.* Notably, there is no allegation that Plaintiffs are suing as representatives of any association or political party. *Id.*, p. 1; and ¶¶ 7-12.

Because the injuries alleged by Plaintiffs required several speculative steps chained together, Plaintiffs have failed to allege a concrete injury. These alleged injuries all rely on several leaps of speculation from the initial allegation of inaccurate voter rolls to an unsupported claim that ineligible voters are voting on to the last step that Plaintiffs' own subjective concerns about election integrity have injured them. None of these are *actual* harms caused by Defendant and experienced by Plaintiffs. They are instead speculative concerns based on inaccurate analysis and unsupported worries about voter fraud.

Plaintiffs have also failed to demonstrate that the alleged injuries are particularized to them. On their face, these are generalized grievances that, even if true, have no specific impact on these Plaintiffs as opposed to any other voter in North Carolina. Plaintiffs have therefore failed to differentiate how they are specifically and personally injured by North Carolina's list-maintenance procedures.

Finally, nothing in Plaintiffs' Complaint shows that they are asserting any harm traditionally recognized as giving rise to a cause of action in American courts. Plaintiffs' generalized claims are precisely the type of matters the Supreme Court has held fall outside this Court's subject matter jurisdiction. *TransUnion*, 141 S. Ct. at 2214. Plaintiffs make blanket allegations of inaccuracy, without identifying how the NVRA has been violated, and then claim

that gives rise to standing because of the statutory cause of action created by the NVRA. But even if their allegations about North Carolina's voter rolls were reliable, Plaintiffs have failed to allege anything other than a generalized grievance disconnected from any traditional harm. Importantly, Plaintiffs' claim is not against the State's handling of *their* voter registration; instead, they claim that the State is improperly handling *other, unidentified peoples'* registrations. Defendant is aware of no traditionally recognized remediable injury under American jurisprudence that is akin to Plaintiffs' claim to being injured by voter rolls that allegedly include other people that shouldn't be on the rolls. This fails under *TransUnion*.

Moreover, if standing can be established for an NVRA claim by a litigant alleging unrealized concerns about election integrity, then any unharmed person could sue at any time, forcing the State to respond to numerous frivolous matters. Such a regime runs contrary to the *TransUnion* holding that Article III must be satisfied regardless of whether a federal statute permits private causes of action. *TransUnion*, 141 S. Ct. at 2207.

At bottom, Plaintiffs are invoking this Court's jurisdiction based solely on their belief that the State is not complying with a federal statute, not based on any concrete, particularized harm to *them*. This, they cannot do. As *TransUnion* explains, "In our view, unharmed plaintiffs who seek to sue under such a law are still doing no more than enforcing general compliance with regulatory law. And under Article III and this Court's precedents, Congress may not authorize plaintiffs who have not suffered concrete harms to sue in federal court simply to enforce general compliance with regulatory law." *Id.* at 2207 n.3. Because Plaintiffs failed to allege a concrete and particularized injury, and failed to identify a traditional cognizable harm as required by *TransUnion*, the Complaint should be dismissed for failure to satisfy Article III standing.

III. THE COMPLAINT FAILS TO STATE A CLAIM FOR VIOLATION OF THE "REASONABLE EFFORT" PROVISION OF THE NVRA.

Defendants' processes constitute a "reasonable effort" as a matter of law, and they exceed the minimum effort required by the NVRA. Plaintiffs' misleading statistics cannot rebut this.

A. The NVRA Accords Considerable Discretion to States in Undertaking a "Reasonable Effort" to Remove Voters.

The NVRA accords great deference to the states to design "a general program that makes a reasonable effort" to remove voters. 52 U.S.C. § 20507(a)(4). States must balance the tension between protecting eligible voters from unwarranted removal and keeping voter lists current. *Bellitto*, 935 F.3d at 1198 ("Undoubtedly, a maximum effort at purging voter lists could minimize the number of ineligible voters, but those same efforts might also remove eligible voters."). In furtherance of this balance, the NVRA "does not define what a 'reasonable effort' entails," *id.* at 1205, thereby reserving for states "substantial discretion" in crafting their list-maintenance programs. *Common Cause v. Brehm*, 432 F. Supp. 3d 285, 313 (S.D.N.Y. 2020).

The federal agencies that enforce and implement the NVRA have repeatedly recognized the significant degree of discretion provided by the "reasonable effort" provision. The U.S. Department of Justice, which enforces the NVRA through civil actions against the States, *see* 52 U.S.C. § 20510(a), confirms that states "*have discretion* under the NVRA . . . in how they design their general program, and States currently undertake a variety of approaches to how they initiate the notice process . . . ." U.S. Dep't of Justice, NVRA Questions and Answers, No. 36 (March 11, 2020), https://bit.ly/31IenAL (emphasis added) [hereinafter USDOJ Q&A]. The U.S. Election Assistance Commission, which is charged with monitoring state NVRA activities and reporting its findings to Congress, 52 U.S.C. §§ 20505(a)(1), 20508(a), similarly notes that "States and territories have considerable freedom to choose when, where, and how these functions are performed." EAVS 2020 Report, *supra*, at 133 (emphasis added). Finally, the Federal Election Commission, which until 2002 had the duties currently assigned to the Election

Assistance Commission, *see* Pub. L. No. 107-252, § 802, published a guide to compliance with the NVRA shortly after the law was enacted, noting that the "list maintenance requirements of the Act . . . permit the States considerable latitude in designing appropriate procedures." *See* Fed. Election Comm'n, Implementing the National Voter Registration Act of 1993 at 5-3 (Jan. 1, 1994), https://bit.ly/31w4ZA0 (emphasis added) [hereinafter "FEC Report"].

Accordingly, any claim that the NVRA prescribes a particular method of compliance with the "reasonable effort" provision is contradicted by the text of the Act, the cases interpreting it, and the interpretation of the agencies that enforce the law.

B. Defendants' List Maintenance Activities Comply With the NVRA.

Not only does the "reasonable effort" provision accord "wide latitude" to the states, *id.*, the law also prescribes a safe harbor procedure that a state may implement to avoid unnecessary litigation like this. Defendants implement such a procedure, thereby defeating Plaintiffs' claim.

The Complaint's allegations and incorporated documents show that the State and county boards implement the National Change of Address process, which establishes compliance with the "reasonable effort" provision for voters who have moved. *See* 52 U.S.C. § 20507(c)(1); *Bellitto*, 935 F.3d at 1203; *Condon v. Reno*, 913 F. Supp. 946, 953 (D.S.C. 1995); USDOJ Q&A, *supra*, No. 35. The NCOA process is carried out twice a year. Ex. A, p. 12. The county boards send mailings to voters on their rolls who have been identified through the NCOA process, and if the voter confirms that he or she has moved out of jurisdiction, that voter is removed. *Id.*, pp. 14, 16. If the voter fails to respond, the county sends an address-confirmation mailing and removes the voter after receiving no contact in the span of two federal elections, *id.*, pp. 17–18, consistent with the NVRA, *see* 52 U.S.C. §§ 20507(c)(1)(B)(ii), (d)(2). Plaintiffs' Complaint makes no allegation that the State fails to properly conduct this process. The use of the NCOA process

therefore establishes that the State and county boards comply with the law.

Plaintiffs likewise make no allegations that the State or county boards are failing to conduct a reasonable program to remove voters who have died, which is the other category of ineligible voters that are required to be removed under the "reasonable effort" provision. In fact, such voters are removed by county boards based upon records provided by the state health department on a monthly basis. N.C.G.S. § 163-82.14(b); Ex. A, p. 24. Those records report deaths occurring in North Carolina and in 35 other states. Ex. A, p. 24. In *Bellitto*, the Eleventh Circuit held that by carrying out these two processes, a state complies with the NVRA's "reasonable effort" provision *as a matter of law*. 935 F.3d at 1205. Therefore, the Complaint states no plausible claim for a violation of the NVRA's "reasonable effort" provision.

C. North Carolina Officials Exceed the "Reasonable Effort" Requirement.

Elections officials in North Carolina go beyond the minimum federal requirements and carry out various other activities to remove ineligible voters.

For example, the elections boards remove voters convicted of a state felony on a daily basis, after a 30-day notice period to account for potential data errors. N.C.G.S. § 163-82.14(c); Ex. A, p. 28. Voters convicted of federal felonies are removed quarterly. Ex. A, p. 29.

The State and county boards also conduct an address-confirmation mailing every odd-numbered year. N.C.G.S. § 163-82.14(d)(2); Ex. A, p. 5. This mailing is sent to every voter who has had no contact with the county board (through voting, registration changes, etc.) for a period spanning the previous two general elections, which amounts to a no-contact period of two years and three months. *See* Ex. A, p. 5. If a voter confirms they have moved, the county will remove that voter from the rolls. *Id.* But pursuant to the NVRA, the State and county boards *may not* remove any voter who fails to respond to the mailing, until two federal elections have taken place without the voter participating in an election. *See id.* at 7; 52 U.S.C. §

20507(d)(1)(B); N.C.G.S. § 163-82.15(d)(2).

Plaintiffs' Complaint fails to allege any specific action or inaction by the State and county's voter list-maintenance procedures are improper, so it is impossible for Defendant to fully respond. However, because Defendants conduct the NCOA "safe harbor" process, any dispute over the State Board's *supplementary* list-maintenance efforts is irrelevant to the issue of NVRA compliance. But even disregarding the NCOA process, the Complaint fails to allege, much less state a claim, with respect to any deficiency in Defendants' list-maintenance practices.

D. The NVRA Does Not Set a Ceiling on Voter Registration Rates.

Finally, the only factual basis cited by Plaintiffs in support of their claim is the misleading statistics about voter registration to suggest the State and county boards are not removing enough voters. Such statistics cannot form the basis of a valid claim.

The theory underlying Plaintiffs' use of these statistics is that there is some maximum permissible ratio of registered voters to population, and some maximum permissible percentage of inactive voters, and if a jurisdiction exceeds those numbers, it must be violating the "reasonable effort" provision. *Res ipsa loquitur* is not a cognizable theory for an NVRA claim. Plaintiffs' suggestion otherwise finds no support in the statute or case law. It also misconstrues the operation of the NVRA, which ensures that many ineligible voters will persist on the rolls as inactive voters for some time before a state can remove them.

As stated above, compliance with the NVRA leads to "inflated lists of registered voters." *Crawford*, 553 U.S. at 192. The NVRA greatly expands voter registration opportunities, 52 U.S.C. §§ 20503–06, while it greatly restricts the removal of voters from the rolls, 52 U.S.C. §§ 20507(a)(3), (b)(2), (c)(2)(A), (d). As noted in Part I above, the major restrictions that account for inflated rolls are the two-election-cycle delay in removing voters, and the prohibition on

conducting any removal programs for six months out of every two years. 52 U.S.C. § 20507(c)(2)(A), (d)(1)(B). The NVRA also expressly bars states from removing voters because they fail to vote. *Id.* §20507(b)(2). States must be cautious in designing their list-maintenance procedures to avoid violating this provision. *See* FEC Report, *supra*, at 5-21 (cautioning against sending confirmation mailings to all registrants, because some voters who continue to reside in the jurisdiction may fail to respond, thereby resulting in the removal of voters for failure to vote).

While these provisions cause voter rolls to be inflated, the efforts the NVRA requires states to undertake for the removing ineligible voters are modest. *Am. Civil Rights Union v. Philadelphia City Comm'rs*, 872 F.3d 175, 179 (3d Cir. 2017) (discussing the NVRA's "limited requirements" for removal). Although the law *permits* the removal of four categories of ineligible voters, it only *requires* the removal of two of those categories, subject to the restrictions above. *Id.* at 183; *Bellitto*, 935 F.3d at 1200, 1203. The law also explicitly sanctions a method of complying with the "reasonable effort" provision—the NCOA process—that misses up to 40% of voters who have moved. *Husted*, 138 S. Ct. at 1840. As the Third Circuit explained when considering these provisions, "given the importance of the right to vote," the NVRA's Section 8 "is designed to protect voters from improper removal and only provides very limited circumstances in which states may remove them." *Am. Civil Rights Union*, 872 F.3d at 182. Accordingly, citing voter registration numbers that approach the number of eligible voters does not suggest a violation of the "reasonable effort" provision.

It is for these reasons that the federal agency charged with implementing the NVRA has explicitly cautioned against using apparently high registration rates or inactive voters to draw conclusions about compliance with the law. EAVS 2020 Report at 126, 133, 135. The EAVS Report explains, "[b]ecause some of the states' processes to remove a registrant from the voter

registration rolls can take up to two federal general election cycles to complete, it is inevitable that registration rolls will contain some number of voter records for individuals who are no longer eligible to vote." *Id.* at 135. The 2018 version of this report further clarified, "[s]ome states appear to have registration rates that exceed 100 percent of the state's [citizen voting age population] because of the long time period involved in removing ineligible voting records required by NVRA." *See* U.S. Election Assistance Comm'n, Election Administration and Voting Survey, 2018 Comprehensive Report at 49, https://bit.ly/2Zlrx3L, last visited November 15, 2021. These reports dismantles Plaintiffs' only theory of a violation. Even assuming some level of voter registration could suggest an NVRA violation, the statistics Plaintiffs rely on are highly misleading, as explained above with regard to Plaintiffs' insufficient notice. See Part I; *see Bellitto*, 935 F.3d at 1208.

CONCLUSION

For the foregoing reasons, Defendant respectfully requests that Plaintiffs' Complaint be dismissed with prejudice.

Respectfully submitted this the 15th day of November, 2021.

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