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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Scot Mussi, Gina Swoboda, in her capacity as Chair of the Republican Party of Arizona, and Steven Gaynor,

Plaintiffs,

v.

Adrian Fontes, in his official capacity as Arizona Secretary of State,

Defendant.

No. CV-24-01310-PHX-DWL

BRIEF OF AMICI CURIAE ARIZONA ALLIANCE FOR RETIRED AMERICANS AND VOTO LATINO IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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STATEMENT OF INTEREST

Amici curiae the Arizona Alliance for Retired Americans ("Alliance") and Voto Latino submit this proposed brief in support of Defendant's motion to dismiss the complaint filed by Plaintiffs Scot Mussi, Gina Swoboda, and Steven Gaynor (collectively, "Plaintiffs"). Amici's interest in this case is significant because they represent members and serve constituencies who face an acute risk from any systematic, court-ordered voter-roll purge using the National Voter Registration Act's ("NVRA") procedures.

The Alliance is a nonprofit corporation whose membership includes 51,000 retirees from every county in Arizona. The Alliance's mission is to ensure social and economic justice and protect the civil rights of retirees after a lifetime of work, including by ensuring that its members have access to the franchise and can meaningfully participate in Arizona's elections. The Alliance's members are 55 or older, and often have disabilities, illness, or mobility challenges, and it is common for the Alliance's members to be in the process of relocating to assisted living facilities, moving to be closer to or to move in with family, or transitioning into smaller homes for financial reasons. Many of the Alliance's members also often travel out of state to visit family or for personal travel. They are, as a result, at a particular risk of missing purge notices that are meant to advise them that their voter registration is at risk.

Voto Latino is the largest Latino advocacy organization in the nation. Its mission is to grow political engagement in historically underrepresented communities, especially in its core constituency of young, Latino voters. Since 2012, Voto Latino has registered over 60,000 voters in Arizona. To further its mission, Voto Latino spends significant resources on voter education and mobilization initiatives, including voter-registration drives; email and social-media campaigns; digital ads communicating directly with Latino voters; and text banking to encourage voters to vote, remind them to update their voter registrations, and inform them about available means of voting. Many of Voto Latino's constituents live on and around college campuses, change addresses frequently due to their age and financial

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circumstances, and rely on assistance to navigate the state's registration and pre-registration procedures. As a result, students and others in Voto Latino's core constituency often do not receive removal notices and learn later that they were purged from voter rolls.

To protect their members' and constituents' right to vote, the Alliance and Voto Latino have each been involved in voting rights litigation in Arizona, including related to voter-roll maintenance under the NVRA. Last election cycle, for example, they successfully challenged a newly enacted provision of Arizona law that conflicts with the NVRA's list-maintenance procedures by allowing county recorders to cancel certain registrations without notice or authorization. *Ariz. All. for Retired Ams. v. Hobbs*, 630 F. Supp. 3d 1180, 1192–94 (D. Ariz. 2022) (granting motion for preliminary injunction against provisions of SB 1260). As the court there recognized, these pro-voter groups have a significant interest in preventing unlawful purges that put voters at risk of removal. *See id.* & n.7. The Alliance and Voto Latino have also intervened as defendants and participated as amici in other challenges to election procedures in Arizona elections this election cycle.[1]

For all of these reasons, amici the Alliance and Voto Latino have a strong interest in supporting Defendants' motion to dismiss and offer a helpful and unique perspective in this litigation. They submit this brief to aid in the Court's adjudication of the pending motion to dismiss.

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[1] *See* Minute Order, *RNC v. Fontes*, CV2024-050553 (Maricopa Cnty. Super. Ct. May 10, 2024) (noting the Alliance and Voto Latino's intervention and granting motion to dismiss); Ruling and Order, *Ariz. Free Enter. Club v. Fontes*, No. S1300CV202300872 (Yavapai Cnty. Super. Ct. April 25, 2024) (noting the Alliance and Voto Latino's intervention and granting motion for summary judgment); Ruling and Order, *Ariz. Free Enter. Club v. Fontes*, No. S1300CV202300202 (Yavapai Cnty. Super. Ct. April 25, 2024) (same); Minute Order, *Strong Cmtys. Found. of Ariz. v. Yavapai County*, No. CV2024-002441 (Yavapai Cnty. Super. Ct. April 3, 2024) (granting the Alliance and Voto Latino's motion to intervene as defendants); Order, *Gould v. Mayes*, No. CV2024-000815 (Maricopa Cnty. Super. Ct. June 28, 2024) (granting the Alliance's motion to intervene as defendant); *see also* Order, *Petersen v. Fontes*, No. CV2024-001942 (Maricopa Cnty. Super. Ct. Mar. 7, 2024) (allowing the Alliance and Voto Latino to participate as amici); Minute Entry, *Am. Encore v. Fontes*, No. 2:24-CV-01673-MTL (D. Ariz. July 19, 2024) (allowing the Alliance to participate as amicus).

SUMMARY OF ARGUMENT

Congress enacted the NVRA to make it *easier* for qualified Americans to register and remain registered to vote. Plaintiffs improperly seek to weaponize the statute against voters by demanding this Court order Arizona to undertake new and baseless purges of the voter rolls mere months before the 2024 general election, all without plausibly alleging a deficiency in the state's current, reasonable list-maintenance activities. This case is part of troubling trend: In the past several months, political activists have filed similar suits in states across the country as part of a nationwide effort to remove voters from the rolls ahead of the 2024 general election.[2] Like those other cases, Plaintiffs' suit fails for several reasons.

Most importantly, Plaintiffs do not plausibly allege a violation of the NVRA. To do so, Plaintiffs would need to plead facts that suffice to show that Arizona is not making "reasonable efforts" at list maintenance. *See* 52 U.S.C. § 20507(a)(4). Plaintiffs offer no clear allegation as to how the Secretary's efforts fall short of the NVRA's "reasonable efforts" requirement. Instead, Plaintiffs focus exclusively on the results, contending that—in Plaintiffs' view—the numbers of registered voters in certain Arizona counties are too high or that too few voters have been removed. But Plaintiffs' statistical comparisons are misleading and ignore that the NVRA does not require—but in fact expressly *prohibits*—immediate removal of many voters, even if they may seem ineligible, to guard against wrongful disenfranchisement. *See, e.g.*, *id.* § 20507(d). These and other limitations on the NVRA's list-maintenance requirements provide an "obvious alternative explanation" for Plaintiffs' allegations about registration and removal rates, requiring Plaintiffs to provide some factual allegation suggestive of lawless, rather than lawful, conduct to plausibly allege a violation of law. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 566–67 (2007).

[2] *See, e.g.*, Complaint, *RNC v. Aguilar*, No. 2:24-cv-518 (D. Nev. Mar. 18, 2024), ECF No. 1; Complaint, *Pub. Int. Legal Found. v. Knapp*, No. 3:24-cv-1276 (D.S.C. Mar. 14, 2024), ECF No. 1; *RNC v. Benson*, No. 1:24-cv-262 (E.D. Mich. Mar. 13, 2024), ECF No. 1; Complaint, *Jud. Watch, Inc. v. Ill. State Bd. of Elections*, Case No. 1:24-cv-1867 (N.D. Ill. Mar. 5, 2024), ECF No. 1.

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1 Plaintiffs' belief that Arizona counties have too many people on their voter rolls is not
2 enough: The Rules require more than such a "naked assertion" to state a claim. *Id.* at 557.
3 That said, the Court need not even reach the question of whether Plaintiffs
4 adequately state a claim because they lack standing to even pursue this action. Their
5 purported injuries—worries about election integrity, the possibility of voter fraud and
6 dilution of their votes, and the expenditure of resources to address those speculative and
7 generalized grievances—fall far short of what Article III requires. Moreover, Plaintiffs
8 seek relief that this Court cannot grant. The NVRA prohibits any systematic voter removal
9 programs within 90 days of a federal primary or general election, which begins on August
10 7 for the November general election. *See* 52 U.S.C. § 20507(c)(2)(A). And to the extent
11 Plaintiffs rest their arguments on purported violations of state law, the Eleventh
12 Amendment prohibits this Court from ordering Defendant to comply with state law. *See*
13 *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). Accordingly,
14 Plaintiffs' requested relief—an injunction requiring the Secretary to "comply with any
15 existing procedures that Arizona has in place" to remove voters from the rolls, Compl. at
16 19, cannot be ordered before "Arizona's upcoming elections," *see* Compl. ¶ 100; *see also*
17 ECF No. 18 (Plaintiffs discussing "time-sensitive nature of this litigation—just weeks
18 before the primary election and four months away from the general election").

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19 **BACKGROUND**

20 **I. Arizona's Obligations Under the National Voter Registration Act**

21 The NVRA requires states to provide simplified, voter-friendly systems for
22 registering to vote. Congress enacted the NVRA to *expand* access to the franchise by
23 establishing "procedures that will increase the number of eligible citizens who register to
24 vote in elections for Federal office" and by making it "possible for Federal, State, and local
25 governments to implement [the NVRA] in a manner that enhances the participation of
26 eligible citizens as voters in elections for Federal office." 52 U.S.C. § 20501(b)(1)–(2).
27 To further its pro-voter purposes, the NVRA imposes strict restrictions on whether,
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when, and how a state may cancel a voter's registration. *See id*. § 20507(a)(3)–(4), (b)–(d). Outside of limited and carefully delineated exceptions, a state may not remove a voter until that voter has (1) failed to respond to a notice, and (2) not appeared to vote for two general elections—or roughly four years—following delivery of the notice. *Id.* § 20507(d)(1).[3] Congress therefore purposefully "limited the authority of states to encumber voter participation by permitting states to only remove registrants" in a carefully prescribed manner. *Am. C.R. Union v. Phila. City Comm'rs*, 872 F.3d 175, 182 (3d Cir. 2017).

At the same time, while Congress required that states maintain a "general program that makes a reasonable effort to remove the names" of voters who have died or moved "from the official lists of eligible voters," 52 U.S.C. § 20507(a)(4), Congress did not demand perfection. The "NVRA requires only a 'reasonable effort,' not a perfect effort, to remove registrants." *Pub. Int. Legal Found. v. Benson* ("*PILF*"), No. 1:21-CV-929, 2024 WL 1128565, at *11 (W.D. Mich. Mar. 1, 2024). And states need not "use duplicative tools or [] exhaust every conceivable mechanism" to comply with the "reasonable effort" requirement. *Bellitto v. Snipes*, 935 F.3d 1192, 1207 (11th Cir. 2019). This balanced approach reflects the twin policy objectives of the NVRA: to "enhance[] the participation of eligible citizens as voters" and "to protect the integrity of the electoral process." 52 U.S.C. § 20501(b). It also reflects Congress's judgment that it is better to tolerate some ineligible voters remaining on the rolls past their point of ineligibility than to permit the erroneous removal—and potential disenfranchisement—of eligible voters. Because of this policy choice, voter rolls are *expected* to contain more names than those who are eligible. As such, courts reject NVRA claims based on "snapshot[s]" of the number of registered voters at a given moment. *E.g.*, *Bellitto*, 935 F. 3d at 1208.

Arizona has enacted robust procedures to identify and remove registered voters who are no longer qualified to vote in their jurisdiction. *See* A.R.S. § 16-165(A)(2)–(5) (removal

[3] A state may immediately cancel a person's registration when a voter requests to be removed from the rolls, if a voter is convicted of a disenfranchising felony under state law, or upon verification of a voter's death. *Id.* § 20507(a)(3)(A)–(C), (a)(4).

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procedures for various categories of ineligible voters, including deceased Arizonans, individuals adjudicated incapacitated, and those convicted of a felony); *id.* § 16-165(D) (removal based on mental incapacitation); *id.* § 16-165(E) (removal based on department of health death records); *id.* § 16-165(F) (removal based on out-of-state license records); *id.* § 16-166(A) (inactive status based on U.S. Postal Service address verification); *id.* § 16-166(E) (inactive status based on change of address information); Ariz. Sec'y of State, State of Ariz. 2023 Elections Procedure Manual, 36–48 (Dec. 30, 2023) ("EPM").[4] And while the Secretary maintains the statewide database of voters, county election officials play a significant role in the state's list-maintenance protocols. *See id.*

As for voters who may have moved, "[o]ne of the principal ways" the state "ensure[s] the accuracy of registration records is to update records based on a registrant's change of address." EPM 45. County recorders receive information about a voter's potential address change in various ways: from the Secretary (who periodically receives reports containing information from the Department of Transportation and information from other states), directly from the voter, from the U.S. Postal Service's National Change of Address ("NCOA") service, or through returned mail. *Id.* at 38–40, 45. Arizona is also part of the Electronic Registration Information Center ("ERIC"), which provides states with nationwide motor vehicle registration and Social Security Administration data, among other sources. *Id.* at 39, 45. When information from these sources suggests that a voter may have moved, Arizona follows the procedures "outlined in the NVRA." *Id.* at 46. County recorders may also cancel registrations based on information from "reliable sources." *Id.* at 38 (citing A.R.S. § 16-165(A)(2)).[5] For voters who have died, election officials receive

[4] The EPM has the force of law. *Ariz. Pub. Integrity All. v. Fontes*, 475 P.3d 303, 308 (Ariz. 2020). The 2023 EPM is available at: https://apps.azsos.gov/election/files/epm/2023/EPM_20231231_Final_Edits_to_Cal_1_11_2024.pdf.

[5] The NVRA includes a safe-harbor procedure: states may meet their obligation to conduct "reasonable" list maintenance by using NCOA data to identify voters who may have moved and cancel such registrations according to the NVRA process. *See* 52 U.S.C. § 20507(c)(1).

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data from the state department of health via the Secretary of State, verify the deaths, and remove voters from the rolls. A.R.S. § 16-165(E). In short, Arizona's several voter removal procedures constitute "a reasonable effort" as required by the NVRA.

II. Plaintiffs' Complaint

On June 3, three individual Arizona residents filed suit against the Secretary of State, alleging that the Secretary is violating his list-maintenance obligations under Section 8 of the NVRA. Compl. ¶¶ 71, 102–03. The gravamen of Plaintiffs' complaint is that the Secretary *must* be violating the NVRA because Arizona counties have "implausibly high" rates of voter registration in Plaintiffs' opinion. *Id.* ¶ 7. Plaintiffs conclude so because they believe the state's total registration numbers exceed what should be "*expected*" according to a purported expert who derived estimates of registered voters from federal surveys and compared them to state-level data. *Id.* ¶¶ 7, 74 n.5. Plaintiffs also point to correspondence from the Secretary to leaders of the Arizona Legislature stating that one category of state-level notice and cancellation procedures related to voters who may have moved are "in development," interpreting this to mean "that the general maintenance program required of states by the NVRA does not currently exist in Arizona." *Id.* ¶¶ 3, 17, 71. But nowhere does the complaint identify any instance of Arizona improperly keeping someone on the voter rolls whom the NVRA required be removed, or any procedure that Arizona fails to use that the NVRA requires. Nor do Plaintiffs acknowledge Arizona's numerous statutory provisions that describe the state's "reasonable efforts" to comply with the NVRA. Plaintiffs simply assume that Arizona must be violating the NVRA because there are more voters on the rolls than Plaintiffs believe there should be.

The complaint likewise fails to plausibly establish any injury to Plaintiffs because of Defendant's list-maintenance practices. Plaintiffs do little more than claim an interest in the Secretary following the law, while contending that the Secretary's voter-roll practices

In Arizona, county recorders are authorized to use NCOA data for list-maintenance purposes. *See* A.R.S. § 16-166(E); EPM 45–46.

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"undermine [their] confidence in Arizona's electoral system" and "risk dilution" of their votes if "ineligible" voters were to cast ballots. *Id.* ¶ 104. Plaintiffs also allege they or organizations they lead that are not parties to the case will spend resources to address the Secretary's purported failure to comply with the NVRA. *Id.* ¶ 105.

As relief, Plaintiffs ask this Court to order an overhaul of Arizona's list-maintenance procedures: in addition to a declaratory judgment that the Secretary is violating Section 8 of the NVRA, Plaintiffs demand an injunction instructing the Secretary to develop and implement "reasonable and effective" registration list-maintenance programs and implement existing voter-removal procedures as set forth in Arizona law. *Id.* at 19.

ARGUMENT

I. Plaintiffs fail to plausibly allege standing.

Plaintiffs fail to plausibly allege any "actual or imminent" and "concrete and particularized" injuries-in-fact to them because of the activities they challenge. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (citation omitted). Each of their purported bases for standing—worries about election integrity, the specter of voter fraud and vote dilution, and vague allegations that they or non-party organizations will spend resources in response to Arizona's list-maintenance procedures—fall far short of Article III's requirements.

A. Plaintiffs' desire for the government to follow the law and worries about election integrity and vote dilution are not cognizable.

Plaintiffs' subjective and unsubstantiated worries about Arizona's compliance with the NVRA—and their supposed effect on Plaintiffs' faith in the integrity of Arizona's elections, *see* Compl. ¶¶ 22, 26, 28, 104—are not cognizable harms.

Plaintiffs' "concern [about] obedience to law" is an "abstract and indefinite" harm that fails to supply an injury-in-fact. *Novak v. United States*, 795 F.3d 1012, 1018 (9th Cir. 2015) (quoting *Fed. Election Comm'n v. Akins*, 524 U.S. 11, 23 (1998)). Such concern about whether a federal election requirement "has not been followed" is "precisely the kind of undifferentiated, generalized grievance about the conduct of government that [courts]

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have refused to countenance." *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (per curiam) (dismissing case challenging Colorado law as violating Elections Clause for lack of standing); *see also FDA v. All. for Hippocratic Med.*, Nos. 23-235 & 23-236, 2024 WL 2964140, at *6 (U.S. June 13, 2024) ("[A] citizen does not have standing to challenge a government regulation simply because the plaintiff believes that the government is acting illegally."); *Jewel v. Nat'l Sec. Agency*, 673 F.3d 902, 909 (9th Cir. 2011) (holding a "generally available grievance about government . . . does not state an Article III case or controversy") (quoting *Lujan*, 504 U.S. at 573–74).

The same is true of Plaintiffs' generalized concerns about election integrity. Those allegations fail to constitute a cognizable injury-in-fact for another reason as well—"[c]ourts have universally concluded that an alleged injury related to a lack of confidence" in election administration "is 'too speculative to establish an injury in fact.'" *Thielman v. Fagan*, No. 3:22-CV-01516, 2023 WL 4267434, at *4 (D. Or. June 29, 2023) (quoting *Lake v. Hobbs*, 623 F. Supp. 3d 1015, 1028–29 (D. Ariz. 2022)), *aff'd sub nom. Thielman v. Griffin-Valade*, No. 23-35452, 2023 WL 8594389 (9th Cir. Dec. 12, 2023). The complaint states that "Arizona [] has experienced known cases of voter fraud," Compl. ¶ 44, but nowhere does it identify any instance of fraud, let alone suggest that any fraud has resulted from Arizona's list-maintenance efforts. While the complaint makes a passing reference to a two-decade-old federal report on elections that contained a few lines about voter rolls and possible fraud, *id.* ¶ 43, it makes no connection between any fraud and Defendant's list-maintenance procedures. Merely invoking "the possibility and potential for voter fraud," based only on "hypotheticals, rather than actual events," does not suffice. *Donald J. Trump for President, Inc., v. Boockvar*, 493 F. Supp. 3d 331, 406 (W.D. Pa. 2020). Plaintiffs' "subjective fear" about the prospect of voter fraud thus "does not give rise to standing." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 418 (2013).

Plaintiffs also allege that their "votes risk being diluted" because of Arizona's list-maintenance procedures. Compl. ¶ 31. This, too, has been repeatedly rejected by courts as

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insufficient to establish Article III standing: "Plaintiffs' purported injury of having their votes diluted due to ostensible election fraud may be conceivably raised by any [Arizona] voter." *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926 (D. Nev. 2020). "Such claimed injury therefore does not satisfy the requirement that Plaintiffs must state a concrete and particularized injury." *Id.*; *see also Bowyer v. Ducey*, 506 F. Supp. 3d 699, 712 (D. Ariz. 2020) (rejecting vote dilution claim because it raised only generalized grievances). Indeed, a "veritable tsunami" of courts across the country, including in this Circuit, have *uniformly* rejected such a vote-dilution theory of standing. *O'Rourke v. Dominion Voting Sys. Inc.*, No. 20-CV-03747-NRN, 2021 WL 1662742, at *9 (D. Colo. Apr. 28, 2021) (collecting cases), *aff'd,* No. 21-1161, 2022 WL 1699425 (10th Cir. May 27, 2022).

B. Plaintiffs fail to adequately allege monetary or resource-based harm.

Nor have Plaintiffs sufficiently alleged any other injuries that could support their standing. Plaintiffs claim that they "must spend more time and resources monitoring Arizona's elections for fraud and abuse, mobilizing voters to counteract it, educating the public about election-integrity issues, and persuading elected officials to improve list maintenance" and that they must "spend more of their time and resources on get-out-the-vote efforts for like-minded individuals." Compl. ¶¶ 32–33. But their "bare and conclusory allegations are insufficient to show that [Arizona's list maintenance] has" required such actions. *See Our Watch With Tim Thompson v. Bonta*, 682 F. Supp. 3d 838, 848 (E.D. Cal. 2023). Indeed, despite Plaintiffs' awareness of the alleged deficiencies for more than ten months, the complaint lacks any allegation of what "time and resources" have been spent, what Plaintiffs have done to "mobilize voters," how they have "educate[d] the public about election integrity issues" or "persuade[d] elected officials" to act, Compl. ¶¶ 32–33, or how and from what Plaintiffs have been "required to divert their resources," *id.* ¶ 105, as a result of those deficiencies. The complaint is thus "devoid of any allegations" about how the Secretary's activities "specifically impact[]" Plaintiffs, and they have at most "pled facts

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suggesting that [their] values have been undermined." *Our Watch*, 682 F. Supp. 3d at 848. More is required.

Even if Plaintiffs had sufficiently pled an injury based on expenditure of resources, they cannot create standing by "divert[ing] resources to combat an impermissibly speculative injury." *Donald J. Trump for President v. Cegavske*, 488 F. Supp. 3d 993, 1003 (D. Nev. 2020). Because Plaintiffs have failed to allege a non-speculative injury stemming from Arizona's list-maintenance practices, any resources spent in response are expended to address an illusory problem. Plaintiffs' alleged election-integrity injuries derive from "speculative fears" based on a "chain of contingencies," and are thus "self-inflicted" and "insufficient to establish a cognizable injury." *Doe v. Bonta*, 101 F.4th 633, 640 (9th Cir. 2024) (quoting *Clapper*, 568 U.S. at 410–11); *see also Clapper*, 568 U.S. at 416 (holding a plaintiff "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending"); *see supra* Section I.A. Put differently, Plaintiffs "cannot manufacture standing by first claiming a general interest in lawful conduct and then alleging that the costs incurred in identifying and litigating instances of unlawful conduct constitute injury in fact." *Project Sentinel v. Evergreen Ridge Apartments*, 40 F. Supp. 2d 1136, 1139 (N.D. Cal. 1999).[6] This theory of

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[6] To the extent Plaintiffs intend to do so, they cannot assert the rights of non-party organizations that are allegedly spending resources in response to the Secretary's list-maintenance activities or otherwise impacted by them. Bedrock standing principles require that parties "assert their own rights rather than rely on the rights or interests of third parties." *Hong Kong Supermarket v. Kizer*, 830 F.2d 1078, 1081 (9th Cir. 1987). Though Plaintiffs Mussi and Swoboda lead organizations not party to this litigation, Compl. ¶¶ 21, 23, they cannot claim the purported injuries to those absent organizations as their own to establish standing because organizational standing turns on "whether the organization itself has suffered an injury in fact." *We Are Am./Somo Am., Coalition of Ariz. v. Maricopa Cnty. Bd. of Supervisors*, 809 F. Supp. 2d 1084, 1094 (D. Ariz. 2011). And while limited exceptions to that fundamental principle exist—such as when (1) "the party asserting the right has a close relationship with the person who possesses the right" and (2) "there is a hindrance to the possessor's ability to protect his own interests," *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 764 (9th Cir. 2018) (quoting *Sessions v. Morales-Santana*, 582 U.S. 47, 57 (2017), no such exceptions exist here, and the complaint nowhere contains allegations otherwise. Accordingly, the Court should not consider any purported impact of the Secretary's list-maintenance activities on non-party organizations. *See, e.g.,* Compl. ¶ 25 (describing the Republican Party of Arizona's purported use of voter rolls).

standing too fails.

II. Plaintiffs fail to plausibly allege any violation of the NVRA.

As Plaintiffs acknowledge, all the NVRA requires is that states "conduct a general program that makes a *reasonable effort* to remove the names of ineligible voters" from the rolls due to death or change of residence. Compl. ¶ 37 (emphasis added) (citing 52 U.S.C. § 20507(a)(4)). Plaintiffs' meager attempt to cast doubt on the state's reasonable efforts to remove ineligible voters relies on misleading and faulty data and ignores Arizona's robust list-maintenance procedures. In short, nothing in the complaint creates a plausible inference that Arizona has failed to make "reasonable efforts" to maintain its voter rolls.

A. Plaintiffs' legal theory ignores the text and purpose of the NVRA.

The gist of Plaintiffs' complaint is that Arizona *must* not be complying with the NVRA because, in Plaintiffs' view, "all Arizona counties have exceptionally high rates of registered voters." *Id.* ¶ 85; *see also id.* ¶¶ 72–99.[7] But the numbers Plaintiffs point to are "equally consistent with lawful conduct" and thus, "under *Twombly*, plaintiffs have not pleaded facts that would move their allegations from merely possible to plausible." *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1023 (N.D. Cal. 2007).

Plaintiffs nowhere account for the fact that Congress "designed [the NVRA] to protect voters from improper removal and only provide[d] very limited circumstances in which states may remove them" from the rolls. *Am. C.R. Union*, 872 F.3d at 182. To that end, the law purposefully "limits the methods which a state may use to remove individuals from its voting rolls and is meant to ensure that eligible voters are not disenfranchised by improper removal." *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 381 (6th Cir. 2008). Most notably, if a voter fails to respond to a notice about a possible change of address, the NVRA forbids removing the voter until they fail to appear to vote in at least two federal

[7] Throughout the complaint, Plaintiffs cite the total number of registered voters, including inactive voters, which leads to an artificially inflated number of registrants because multiple Arizona statutes require placing potentially ineligible voters on inactive status in various circumstances before removal. *See, e.g.*, A.R.S. §§ 16-165 (F), 16-166(A), (E).

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general elections—a four-year lag period meant to protect against improper removals, which has been incorporated into Arizona law. 52 U.S.C. § 20507(d); *see* A.R.S. § 16-166(E). In other words, Congress elected to permit some ineligible voters to remain on the rolls for several years while the statutorily prescribed removal process occurs. Courts have thus recognized that states need not "immediately remove every voter who may have become ineligible," and that "the NVRA requires only a 'reasonable effort,' not a perfect effort." *PILF*, 2024 WL 1128565, at *11. "[T]he statue requires nothing more of the state." *Bellitto*, 935 F.3d at 1203.

Considering the NVRA's narrow requirements and strict limitations, Plaintiffs' allegation that there are too many voters on the rolls is consistent with Arizona adhering to the removal processes established by Congress. Plaintiffs allege only that there appear to be more registrants than estimates of the number of individuals who are *qualified* to vote at any given time. *See* Compl. ¶¶ 7–15, 73–89. But the NVRA *requires* that potentially ineligible voters remain on the rolls for years before removal. Because "Plaintiffs must do more than allege facts that are merely consistent with both their explanation and defendants' competing explanation," *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1105 (9th Cir. 2013), it is not enough to state a claim to point to the "sheer number of . . . registered voters . . . [as] a hallmark of an unreasonable list maintenance program." *Pub. Int. Legal Found. v. Boockvar*, 495 F. Supp. 3d 354, 359 (M.D. Pa. 2020) (cleaned up). Under the NVRA, there is nothing "unreasonable" about having what looks like an excessive number of voters on the rolls at one moment in time.

While Plaintiffs note that the Secretary has reported that some state-level list-maintenance procedures in Arizona are "in development," Plaintiffs nowhere acknowledge Arizona's existing comprehensive statutory removal procedures, *see* A.R.S. § 16-165(A)(2)–(5), (D), (E), (F); *id.* § 16-66(A), (E); EPM 36–48, never mind "allege that this program itself is deficient" or "point to a specific breakdown that makes the program 'unreasonable.'" *Boockvar*, 495 F. Supp. 3d at 359. "Without allegation, let alone proof,"

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of such a breakdown, the Court cannot infer "that the many procedures currently in place are unreasonable." *Id.*

B. The data on which Plaintiffs rely is unreliable, improper, and when properly understood, only undermine their claim.

As several courts have found, there is good reason *not* to take the numbers in Plaintiffs' complaint at face value. Their data relies on the 2022 American Community Survey ("ACS") produced by the Census Bureau to estimate current populations of several Arizona counties. *E.g.*, Compl. ¶ 76. As the Eleventh Circuit observed, this ACS data may "significantly underestimate[] the population" of a county for various reasons, including because it "asks who has resided in the household in the two-month period" preceding the survey, thereby "exclud[ing] many college students, military personnel" and others who may not reside in an area for the full year. *Bellitto*, 935 F.3d at 1208. The Census Bureau itself has cautioned that "[d]ue to the variance inherent in survey estimates," it "do[es] not recommend combining survey data from the [ACS] with administrative record data, such as those produced as part of voter tallies."[8] Yet Plaintiffs do just that, despite the Census Bureau's warning that "the margin of error could be around 90 percent."[9]

For Arizona's allegedly high registration rate, Plaintiffs rely on the 2022 Election Administration and Voting Survey ("EAVS") produced by the U.S. Election Assistance Commission. *E.g.*, Compl. ¶¶ 94–95, 98. But courts have warned that an "EAVS snapshot" can "in no way be taken as a definitive picture of what a county's registration rate is, 'much less any indication of whether list maintenance is going on and whether it's … reasonable.'" *Bellitto*, 935 F. 3d at 1208 (cleaned up). The EAVS itself, relied on by Plaintiffs in their complaint, warns that:

> [D]ata on registered and eligible voters as reported in the EAVS should be used with caution, as these totals can include registrants who are no longer

[8] Kurt Hildebrand, *Republican National Committee names Douglas in voter roll lawsuit*, TAHOE DAILY TRIB. (Mar. 31, 2024), https://www.tahoedailytribune.com/news/republican-national-committee-names-douglas-in-voter-roll-lawsuit (quoting statement of Census Bureau representative).

[9] *Id.*

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> eligible to vote in that state *but who have not been removed from the registration rolls because the removal process laid out by the NVRA can take up to two elections cycles to be completed.*

2022 EAVS at 140 (emphasis added)[10]; *see also Jud. Watch, Inc. v. North Carolina*, No. 3:20-CV-211-RJC-DCK, 2021 WL 7366792, at *10 (W.D.N.C. Aug. 20, 2021) (observing the same cautionary note in 2018 EAVS survey). The EAVS thus advises that "states should expect to see high voter registration rates," meaning that "such information, without more, does not" provide a meaningful inference of "non-compliance with the NVRA." *Jud. Watch*, 2021 WL 7366792, at *10. As a result, Plaintiffs' data sources are not fit for the purposes chosen by Plaintiffs, as both courts and the authors of such data have recognized.

Relying on these problematic sources, Plaintiffs purport to "incorporate[]" an "expert report" prepared for this litigation by Thomas M. Bryan to "support[]" "[a]ll the data discussed" in the complaint. Compl. ¶ 7 n.1; *see* Compl. Ex. 1, ECF No. 1-1 ("Bryan Rep."). But under Federal Rule of Civil Procedure 10(c) and Ninth Circuit precedent applying it, such "evidentiary" material is not properly part of the complaint and cannot be considered at the pleading stage. *See, e.g.*, *DeMarco v. DepoTech Corp.*, 149 F. Supp. 2d 1212, 1219–22 (S.D. Cal. 2001); *see also United States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003). As various courts have recognized, considering an expert affidavit on a motion to dismiss not only blurs the distinction between the pleading and summary judgment stages of litigation but also undermines the district court's role as a "'gatekeeper' with respect to expert testimony" under Federal Rule of Evidence 702. *DeMarco*, 149 F. Supp. 2d at 1221–22 (quoting *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999)); *accord Nguyen v. Simpson Strong-Tie Co.*, No. 19-CV-07901, 2020 WL 5232563, at *4 (N.D. Cal. Sept. 2, 2020) ("Most district courts within [the Ninth Circuit] have concluded that it is inappropriate to consider an expert affidavit on a motion to dismiss . . . whether or not the affidavit is attached to the complaint." (citation omitted)). These concerns have particular

[10] U.S. Election Assistance Commission, Election Administration and Voting 2022 Comprehensive Report (June 2023), https://www.eac.gov/sites/default/files/2023-06/2022_EAVS_Report_508c.pdf.

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force here, as Mr. Bryan's "vitae" itself acknowledges that his expert "testimony and analysis were not credited" in other proceedings. Bryan Rep. at 40, 42; *see also, e.g.*, *Singleton v. Merrill*, 582 F. Supp. 3d 924, 1008 (N.D. Ala. 2022) ("Because Mr. Bryan consistently had difficulty defending both his methods and his conclusions, and repeatedly offered opinions without a sufficient basis, and because we observed internal inconsistencies in his testimony on important issues, we find that his testimony is unreliable."), *aff'd sub nom. Allen v. Milligan*, 599 U.S. 1 (2023).

Even taking Plaintiffs' suspect data and faulty theories at face value, the numbers suggest nothing besides a "reasonable" voter-roll maintenance program. Arizona's registration data, cited by Plaintiffs elsewhere, combined with their ACS data shows a registration rate of 77.8% in 2022, lower than at least one of the survey comparisons Plaintiffs claim represent expected registration rates. Compl. ¶ 81 & Bryan Rep. ¶ 55 (alleging expert's calculations result in 81.4% registration based on 2022 CES Post-Election Survey); *id.* ¶ 80 n.6. Plaintiffs also observe that Maricopa County sent hundreds of thousands of NVRA notices and subsequently removed 131,682 voters who received notices from the rolls, but do not allege that this violates the NVRA in any way. *Id.* ¶ 95. Indeed, the EAVS also shows that 432,498 voters were removed from the rolls in Arizona during the two-year period Plaintiffs claim that no reasonable program was being conducted, confirming what the Secretary stated to Plaintiff Mussi last year: Arizona is actively removing voters from the rolls. Compl., Ex. 3 at 7, ECF No. 1-3.[11]

Other isolated data points Plaintiffs offer indicate nothing other than a "reasonable" effort. Plaintiffs repeatedly claim that about 30,000 deceased voters were wrongly left on the rolls. *See, e.g.*, Compl. ¶ 12. But Plaintiffs compare apples to oranges: they report the total number of deaths and then "assume[] 100%" of these individuals were registered and thus should have been removed. Bryan Rep. ¶ 65. While "the Arizona Department of

[11] *See* U.S. Election Assistance Comm'n, 2022 EAVS Data Brief for Arizona (2022), https://www.eac.gov/sites/default/files/2023-10/2022_EAVS_Data_Brief_AZ_508c.pdf; *see also* Bryan Report, ¶ 60.

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Health Services provides the Secretary of State a record of the death of a resident of the state, [] not everyone who is included in that list is a registered voter." *See* Compl. Ex. 2 at 2, ECF No.1-2.[12] Assuming 69.9% of the total 143,278 deceased Arizonians were registered to vote (a registration rate Plaintiffs claim is reasonable, Compl. ¶ 7), means about 100,151 deceased Arizonians were likely registered voters who should have been removed from the rolls. Given that Plaintiffs admit that 108,103 voters were removed using death records, *id*. ¶ 12, Plaintiffs fail to show any gap at all.

III. Plaintiffs seek relief that is unavailable.

Any injunctive relief Plaintiffs seek for 2024 is unavailable because the NVRA prohibits systematic voter removals during the 90-day period before a federal election. 52 U.S.C. § 20507(c)(2)(A). The 2024 general election will be on November 5, and the blackout period before it begins on August 7, less than two weeks from today. With such limited time remaining before the blackout period, the Court cannot order any systematic voter list maintenance before the 2024 general election without violating the NVRA's clear prohibition on purging voters within the months just before federal elections. Plaintiffs also request that the Court enter "[a]n injunction requiring the Secretary to fully comply with any existing procedures that Arizona has in place" for list maintenance. Compl. at 19. The Supreme Court has made clear that a federal court cannot order state officials to comply with state law. *See Halderman*, 465 U.S. at 98–100. Thus, this Court also cannot provide this portion of the relief Plaintiffs seek. *See Lucas v. Ariz. Sup. Ct. Fiduciary Certification Program*, No. CV09-2599, 2010 WL 2573557, at *1–2 (D. Ariz. June 23, 2010) (finding court lacked authority under the Eleventh Amendment to compel Arizona state officers to comply with state law), *aff'd*, 457 F. App'x 689 (9th Cir. 2011).

CONCLUSION

For all of these reasons, Plaintiffs' complaint should be dismissed.

[12] While Plaintiffs' "expert" adjusted these figures for citizenship and voting age, he made no other adjustments and assumed that 100% of these voters were registered. Bryan Rep. ¶ 65.

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1 RESPECTFULLY SUBMITTED this 31st day of July, 2024.

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