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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ARIZONA

Scot Mussi; Gina Swoboda, the 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-ESW

ARIZONA SECRETARY OF STATE'S REPLY IN SUPPORT OF MOTION TO DISMISS

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Defendant Arizona Secretary of State Adrian Fontes moves to dismiss the Complaint filed by Plaintiffs Scot Mussi, Gina Swoboda, and Steve Gaynor (collectively, "Plaintiffs") because they have failed to allege sufficient facts to invoke federal jurisdiction, and Plaintiffs' general concern about alleged ineligible voters on the voter rolls is insufficient to state a claim for which relief can be granted. The Complaint should be dismissed.

INTRODUCTION

Plaintiffs lack standing to conduct a wholesale removal of "a minimum of 500,000" and "possibly as many as 1,270,000" Arizona voters from the rolls. (DE 1 at 17). Moreover, they do not have any legal authority to do so based on supposition and statistical manipulation alone. Their purported "injury" is based on speculation upon speculation, specifically, that "Plaintiffs are injured because 'Arizona's inaccurate rolls undermine Plaintiffs' confidence in the integrity of Arizona elections, which also burdens their right to vote.'" (DE 29 at 5 (citing DE 1 ¶ 30)). But a nebulous lack of confidence in elections is not—and can not—be sufficient "harm" to grant standing in federal court, unless the federal courts are to be the final arbiters of every election in which a losing candidate, or a person who claims to have voted for a losing candidate, bemoans "concerns" that their vote *may* have been "diluted."

The National Voter Registration Act of 1993 ("NVRA") is a pro-voter statute. Congress' stated purpose in enacting NVRA was to "increase the number of eligible citizens who register to vote in elections for Federal office" and "enhance[] the participation of eligible citizens as voters." 52 U.S.C. § 20501(b)(1)-(2). As part of the process of passing NVRA into law, Congress worked together to include provisions regarding the removal of people who were verified as no longer eligible to vote in a given jurisdiction. Voters could be removed individually if they meet specific criteria, and in blocks via a state-designed program that requires a two-election cycle delayed removal, with a ban on non-individualized removals the ninety days before an election.

While a plaintiff *may* have statutory standing as a "person who is aggrieved by a violation of this chapter," assuming they can first meet Article III constitutional standing requirements, Plaintiffs themselves cannot demonstrate an actual, concrete grievance. Their allegation is that somewhere in the ballpark of 500,000 to 1.2 million people *may* be registered to vote but not living in the jurisdiction, and those people *may* nevertheless somehow vote, and those votes *may* be counted, and they *may* "dilute" the votes for Plaintiffs' preferred candidate. This stretches standing past its breaking point, and would create a "case" and "controversy" out of any person's self-reported and un-verifiable "concern" about any given governmental practice. This notion turns the idea of standing—a foundational bulwark to ensure a federal government of limited powers—on its head. This Court should refuse the invitation to foray into the proverbial political thicket and dismiss this case.

I. Plaintiffs Lack Standing to Bring this Suit.

It is hornbook law that the party asserting federal jurisdiction has the burden of demonstrating concrete and particularized injuries sufficient to maintain standing under Article III of the United States Constitution in the same manner and with the same degree of evidence required at later stages in the litigation. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). Standing is "substantially more difficult" to establish when the injury is the result of "unfettered choices made by independent actors not before the courts" whom the courts cannot control or predict." *Id.* at 562. As an initial matter, Plaintiffs' "Standard of Review" references dismissal under Rule 12(b)(6) alone, but the Secretary argues first that Plaintiffs' claims are barred by Rule 12(b)(1), which allows the consideration of facts to determine whether it has jurisdiction, "resolving factual disputes if necessary." *Thornhill Publ'g Co. v. Gen. Tel. & Elecs. Corp.*, 594 F.2d 730, 733 (9th Cir. 1979). The burden of proof to demonstrate sufficient evidence to support standing remains on the party asserting federal jurisdiction. *Indus. Tectonics, inc. v. Aero Alloy*, 912 F.2d 1090, 1092 (9th Cir. 1990). While this Court

need not consider matters considered outside the pleadings as a matter of law to determine that Plaintiffs in this case do not have standing, this Court is not confined to Plaintiffs' characterizations of the facts to determine whether federal jurisdiction exists; to do so would strip Article III's separation-of-powers protection. *See Lujan*, 504 U.S. at 560.

Plaintiffs claim the facts which support their standing are: (1) "a government's alleged 'noncompliance with the NVRA' that 'undermines the individual plaintiffs' confidence in the integrity of the electoral process and discourages their participation' is a sufficient injury for Article III standing purposes"; (2) "voter dilution of Plaintiffs' legitimate votes" because of the alleged improper list maintenance; (3) the use of time and resources to "monitor[] Arizona's election for fraud and abuse, mobiliz[e] voters to counteract it, educat[e] the public about election-integrity issues, and persuad[e] eleced officials to improve list maintenance"; and (4) "spend more of their time and resources on get-out-the-vote efforts for like-minded individuals." (DE 29 4-5). Despite the fashion in which Plaintiffs have posed them, these are not four distinct harms; rather, all are derivations of a single concern, that votes Plaintiffs view as legitimate (and in favor of their preferred candidates) may be outnumbered by votes from voters that Plaintiffs view as illegitimate (and against their preferred candidates). This is not federally-cognizable harm.

A. Plaintiffs Cannot Satisfy the Constitutional Requirements for Federal Review.

NVRA is subordinate to the Constitution, and does not, nor can it, create a lower standing threshold than the Constitution requires via statute. Article III standing requires a plaintiff to show "concrete and particularized" injury in fact, a causal connection between the injury and harm, that is traceable to the challenged action of the defendant and not an independent third party, and that a favorable decision will likely redress that harm. *Lujan*, 504 U.S. at 560. Plaintiffs' claim is that people ineligible to vote may be on the registration rolls, and some of these ineligible voters may succeed in voting in

Arizona, and some of those votes could be in sufficient numbers against Plaintiffs' preferred candidates. This attenuated chain of ifs and maybes is hypothetical, and not concrete or particularized to the Plaintiffs. It is thus insufficient to support standing as a matter of law.

In a half-hearted attempt to overcome their inability to demonstrate a particularized and concrete harm, Plaintiffs recite a handful of district court decisions from other states, which allowed those plaintiffs to proceed past the motion to dismiss stage. (DE 29 at 4). However, these cases 1) do nothing to show that *these Plaintiffs* have standing in *this case*; and 2) are all easily distinguishable from the case at bar in any event. For example, Plaintiffs quote directly from *Judicial Watch, Inc. v. Griswold*. 554 F.Supp. 3d 1091, 1103-04 (D. Colo. 2021), in which the Colorado district court found that forty of the state's sixty-four counties had registration rates exceeding 100%, using contemporaneous data over a four-year period, and had an abysmally low percentage of removals and inactive voters. *Id.* at 1097. Unlike Colorado, which according to *Judicial Watch* was a national leader in failing to update its voter registration information, Plaintiffs use the same data that *Judicial Watch* plaintiffs did to analyze Arizona's NVRA compliance and come to markedly different results: Arizona sent 991,282 NVRA notices in 2022, a rate higher than all other states but Washington, and removed 432,498 registrants, including 175,284 registrants who failed to return a NVRA notice. Unlike Colorado, Arizona has historically removed voters from its registration lists at a rate higher than the vast majority of other states. Whether the *Judicial Watch* court correctly found those plaintiffs had standing (it did not), it is significantly different from this case and this Court should not follow its standing analysis. This Court is not bound to find standing based on Plaintiffs' self-serving alleged harm of undefined and amorphous concern about elections, when it is obviously contradicted by the list maintenance Plaintiffs have put in the record.

The other cases Plaintiffs cite do no better. *National Council of La Raza v. Cegavske*, 800 F.3d 1032, 1034-37 (9th Cir. 2015), found that plaintiffs had constitutional and statutory standing because the state failed to provide voter registration materials and assistance to people who visit and make requests of certain public assistance offices as required by Section 7 of NVRA, thus depriving the very individuals that NVRA was passed to help enfranchise of the ability to register to vote. *Id.* Unlike the Plaintiffs here, specific individuals in *Cegavske* were denied a voter registration form at their Department of Health and Human Services office, which is an actual, concrete, and particularized harm that provided the plaintiff organizations with standing to sue. In *Public Interest Legal Foundation v. Boockvar*, a memorandum decision from the Middle District of Pennsylvania, the court found standing when elections officials affirmatively refused, in violation of NVRA, to provide the plaintiff organization with access to voter registration records after an actual "glitch . . . [that] had enabled noncitizens to register to vote when acquiring or renewing drivers' licenses." 370 F.Supp.3d 449, 453 (M.D. Penn. Feb. 26, 2019). *See also*, *Green v. Bell*, 2023 WL 2572210 (Mar. 20, 2024) (denying dismissal when defendant asserted pre-suit notice required by NVRA was insufficient under the law); *Public Interest Legal Foundation v. Bennett*, 2019 WL 1116194 (S.D. Tex. Feb. 6, 2019) (not reported) (finding standing where elections officials refused to produced records are required by NVRA); *Amer. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp.3d 779, 789 (W.D. Tex. Mar. 30, 2015) (dismissing claims for lack of standing due to undermining confidence in the election system and risk of vote dilution as generalized grievance, but allowing the organization's claims to continue).

This Court is not bound by any of these decisions, and given the legal distinctions between those cases and the case at bar, this Court should decline to follow them. Moreover, this Court should not allow an individual to manufacture a grievance and insodoing enmesh the federal courts in lawsuits whenever a person alleges that their

confidence in the election system is somehow "undermined." *Cf. Rucho v. Common Cause*, 588 U.S. 684, 695-96 (2019) (explaining why federal courts reject partisan re-districting cases as nonjusticiable and as not resolvable according to legal principles).

While Plaintiffs may believe that their self-reported (and self-serving) lack of confidence is not speculative or hypothetical, none of them said they would not vote or could not vote due to their subjective belief regarding Arizona's list maintenance. If Plaintiffs' concerns are taken seriously, there is no limit to the type of claim that such self-assessed "concern" could transform into a constitutional controversy. For example, assume that Plaintiffs concerns regarding the state's list maintenance procedures are resolved. What happens when a plaintiff's concerns are then directed to candidate or initiative qualification, early voting procedures, counting procedures, or post-election procedures? Do these individuals, or others similarly situated, have standing to inflict their angst on all Arizonans (and in a Presidential election year potentially all Americans)? Of course not. *See F.D.A. v. Alliance for Hippocratic Medicine*, 144 S. Ct. 1540, 1552 (2024) ("[F]ederal courts [do not] operate as an open forum for citizens 'to press general complaints about the way in which government goes about its business.'").

It is impossible to square Plaintiffs' vision of standing with the Constitution's Article III limits. In 2023, the Ninth Circuit analyzed standing in a case, like this one, where Plaintiffs alleged "concerns" about vote dilution and the security of Arizona's elections. *Lake v. Fontes*, 83 F.4th 1119, 1204 (9th Cir. 2023). In that case, plaintiffs alleged specific voting equipment in Arizona may be "hackable" by nefarious actors in a way that could change the outcome of the election. *Id.* The *Lake* plaintiffs, like the Plaintiffs here, also provided reports with their complaint to support their allegations. *Id.* at 1202. In the end, however, the district court and then the Ninth Circuit held that the *Lake* plaintiffs relied on a chain of hypotheticals that were "insufficient to plead a plausible 'real and immediate threat of' election manipulation" and dismissed the claim for lack of standing. *Id.* at 1204.

B. Plaintiffs' Alternative Arguments for Standing Are Insufficient.

Curiously, Plaintiffs also appear in their Response to assert standing under a diversion of organizational resources theory, but there are no organizational plaintiffs named as parties. (DE 29 at 5) (asserting harms such as "spend[ing] 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 "spend[ing] more of their time and resources on get-out-the-vote efforts" and citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). The Plaintiffs in this case are individuals—not organizations—and thus cannot assert any alleged harm the organization(s) would purportedly suffer. Even if Plaintiffs had included an organizational plaintiff, however, its alleged harm would still be to the same vote dilution "concern" that is insufficient to confer standing for the actual Plaintiffs to this case. *Lake*, 83 F.4th at 1204.

Nor does the Secretary "shirk" his responsibility by noting the federal legal requirement that voters who may have moved without affirmatively canceling their registration record cannot be immediately removed from the registration rolls. (DE 31 at 7). The Secretary correctly cites the controlling law—informing the Court that removing those voters before two federal cycles had passed, or within ninety days of a federal election (which started August 7, 2024 and extends through the 2024 General Election)—would violate federal law. 52 U.S.C. § 20507(c)-(f). This is not an abdication of responsibility by the Secretary, but a demonstration of his fealty to the law and the duty of candor to the Court. Simply put, Plaintiffs' "concerns" about Arizona elections are not only not concrete and particularized to these Plaintiffs, they are a function of federal law and not caused by the Secretary.

Finally, the Secretary explained that there are no harms to redress, and given Arizona's robust list maintenance system, no order could be crafted which comports with NVRA *and* gets Arizona's voter registration statistics to Plaintiffs' un-defined goldilocks

zone. Plaintiffs accuse the Secretary of using circular logic, but in the same breath maintain that they "bring this NVRA suit because they have been injured by the Secretary's failure to maintain Arizona's voter rolls in compliance with the NVRA," but with a "declaration and injunction requiring the Secretary to comply with the NVRA," their harms would be redressed. (DE 31 at 8). *Post hoc, ergo propter hoc*. Plaintiffs argue that it is "axiomatic" that if the Secretary is ordered to follow the law, then that would relieve Plaintiffs injury. (*Id.*) The Secretary already follows the law. Under Plaintiffs' own reasoning, that is sufficient to warrant dismissal.

This Court should dismiss this case for lack of standing, without leave to amend, as any amendment would do no more than "assert a 'generalized interest in seeing that the law is obeyed,' an interest that 'is neither concrete nor particularized.'" *Lake*, 83 F.4th at 1203. Plaintiffs must, at an "irreducible constitutional minimum" demonstrate they have standing before they are allowed to try to use NVRA to disenfranchise their fellow Americans. *See, e.g. Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). They do not have standing; their claim should be dismissed.

II. Plaintiffs Fail to State a Claim for which Relief Can be Granted.

Plaintiffs' next argue that the Secretary's Rule 12(b)(6) argument "engages in rebuttal of veracity and accuracy of Plaintiffs' factual claims." (DE 31 at 10). Wrong. The Secretary provides an extensive explanation that "the Secretary's *conduct* complies with the NVRA," (DE 31 11), by providing in detail what the county recorders are required to do by law, including the procedures promulgated by the Secretary in the Elections Procedures Manual ("EPM") which carries the force of law. (DE 20 at 12-14). What more Plaintiffs desire from the Secretary (or this Court) is impossible to divine. At best, Plaintiffs' desired remedy appears to be that Arizona cut off voter registration at some percentage of the citizen voting age population ("CVAP") from a former census. But such a remedy is not required for the state be in compliance with NVRA, and it is forbidden by the state and federal constitutions.

Under the Rule 12(b)(6) standard in the Federal Rules of Procedure this Court is required to treat "well-plead, factual allegations as true," but the same consideration is not provided to legal conclusions or so-called facts which are false on their face. *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001). The federal rules do not require this Court to accept that 2+2=5. Plaintiffs' assertions that Arizona is out of compliance because of a unilaterally-determined "suspiciously high" number of voter registrations as a percentage of CVAP need not be blindly accepted. This is particularly true when, as here, Arizona is well within the average range for registration rates as a percentage of CVAP compared to the other states, and because Arizona removes more voters than most other states in nearly every category reported by the Elections Assistance Commission in the 2022 Election Administration and Voting Survey ("EAVS").

Plaintiffs' use of EAVS data in their Complaint and expert report enables this Court to consider it for a Rule 12(b)(6) motion to dismiss. This Court can consider facts that cannot be reasonably disputed when ruling on a 12(b)(6) motion to dismiss. *See, e.g. Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007). The Plaintiffs' report, however, does not qualify for judicial notice and is not entitled to an assumption of validity. *Interstate Nat. Gas Co. v. So. Calif. Gas Co.*, 209 F.2d 380, 384 (9th Cir. 1953). Plaintiffs' allegation that the Secretary is providing improper expert analysis is incorrect—it is simply math from judicially noticeable sources cited by Plaintiffs.

Instead, the Secretary explains that Plaintiffs have failed to state a claim upon which relief can be granted by providing the Court with a thorough explanation of the various procedures undertaken by officials across the state, including the penalty for violating them. (DE 20 at 12-14). Plaintiffs call this circular, but an explanation of the procedures that the Secretary undertakes to comply with NVRA is one of the categories of information Plaintiffs demanded in their communications with the Secretary. When the State provides a thorough explanation of the procedures that state employees swear

to uphold—upon pain of criminal penalty—and provides information from a report subject to judicial notice (and described by Plaintiffs as indisputable) to establish that the Secretary is in fact carrying out these duties, that is not circular.

Moreover, despite Plaintiffs' protestations that comparing Arizona's removal rates to other states is immaterial, it is important to compare how all the states are complying with NVRA's list maintenance requirements to determine if Arizona is doing well or poorly. Indeed, one of the cases that Plaintiffs cited that allowed a plaintiff to survive the motion to dismiss does so in part by comparing Colorado's inactive registration rate with "the median inactive registration rate nationwide." *Judicial Watch*, 554 F.Supp.3d at 1097. The Plaintiffs want this Court to ignore the national data precisely because it shows that Arizona is a national leader in list maintenance. If Arizona is failing to conduct appropriate list maintenance under NVRA, it is doubtful that any state is complying with NVRA. But to think that *all* chief election officers are refusing to comply with federal law, and their state laws created to implement (and in the case of Arizona, exceed) NVRA's requirements, is simply unbelievable. It is the text of NVRA that governs, not Plaintiffs' wishes. And the record clearly demonstrates that the Secretary does comply with NVRA's list maintenance procedures.

Additionally, the Secretary pointed out a glaring flaw in Plaintiffs' alleged concerns regarding registered voters as a percentage of CVAP; specifically, that NVRA requires voters who have moved (but did not self-cancel) to remain on the voter registration rolls, creating a lag of two election cycles. The U.S. Census only requests information from people at the address where they are currently found. The EAVS data is not reported at the same exact time as the U.S. Census, and as a matter of federal law, requires maintaining voters on the voter roll when the U.S. Census may indicate a new person resides there. It is "axiomatic" then, that Address A may have a registration record for Voter Y and Voter Z, when the U.S. Census only records Voter Z at that

address. This is not math, nor witness testimony; it is a basic logic puzzle, and it puts the lie to Plaintiffs claims.

Finally, Plaintiffs mischaracterize the Secretary's letters to the legislature as an admission of non-compliance with NVRA, but this recently-created requirement of state law has nothing to do with NVRA. These letters (DE 1-2) were created by A.R.S. § 16-165(M), which was enacted in its current form in 2022 (thirty years *after* the passage of NVRA), and were not created for compliance with NVRA. The sections cited by Plaintiffs do not provide data for registrations cancelled pursuant to NVRA. And most importantly, there is no data to report in certain categories because of a federal lawsuit which ultimately blocked implementation of the cancellation provisions that the letter would have reported. *See Mi Familia Vota v. Hobbs*, CV-22-01374-PHX-GMS Doc. 534 (D. Ariz. Sept. 14, 2023). The Secretary's letters thus demonstrate he assiduously *complies* with NVRA and federal law, they are not "admissions" that he is violating it.

Even if Plaintiffs could satisfy the constitutional standing requirements (they do not), Plaintiffs claims still fail to demonstrate that the Secretary is not conducting list maintenance as required by NVRA. As a matter of law, the Secretary does *more* than NVRA requires to maintain Arizona's voter registration list. And as a matter of judicially-noticeable fact, relied on by Plaintiffs in their Complaint, and therefore subject to consideration in a 12(b)(6) motion to dismiss, Arizona actively conducts all NVRA-required list maintenance. Indeed, by nearly every recorded metric Arizona is a national leader in list maintenance. Plaintiffs do not state a claim upon which relief can be granted, and their Complaint should be dismissed.

CONCLUSION

Plaintiffs cannot demonstrate a concrete and individualized harm, and their claims are simply not plausible under Plaintiffs' own standards. The Secretary complies with NVRA, regardless of Plaintiffs' self-serving "concerns." Plaintiffs' Complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(1) and (b)(6).

Respectfully submitted this 9th day of August, 2024.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 9th day of August, 2024, I filed the forgoing document electronically through the CM/ECF system, which caused all parties or counsel of record to be served by electronic means, as more fully reflected on the Notice of Electronic Filing.

/s/Monica Quinonez