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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 MOTION TO
DISMISS**

(Oral Argument Requested)

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

7 INTRODUCTION

8 The National Voter Registration Act of 1993 ("NVRA") was enacted to "increase
9 the number of eligible citizens who register to vote in elections for Federal office" and
10 "enhance[] the participation of eligible citizens as voters." 52 U.S.C. § 20501(b)(1)-(2).
11 This lawsuit, however, seeks to force additional, unspecified measures to Arizona's
12 existing list maintenance program that would result in the removal of hundreds of
13 thousands of registrants based solely on misleading statistical analysis. Plaintiffs allege
14 that "at least 500,000 registered voters" should be removed, but also that "other reliable
15 data sources show[] that Arizona has between 1,060,000 and 1,270,000 unaccounted for
16 voters on the state voter rolls." (Docket Entry ("DE") 1 ¶¶ 8-9). Plaintiffs' numbers are
17 so disparate that it can mean only one thing: Plaintiffs are guessing. But speculative
18 purging of voter rolls is precisely the type of "discriminatory and unfair registration laws
19 and procedures" that NVRA is meant to prevent. 52 U.S.C. § 20501(a)(3).

20 The lawsuit should be dismissed for two reasons. First, Plaintiffs fail to meet the
21 bar for Article III standing. Plaintiffs' sole allegation of harm boils down to a claim of a
22 fear of possible vote dilution. But vote dilution is not a cognizable claim outside of
23 redistricting cases, and the potential vote dilution that Plaintiffs fear requires a series of
24 systematic failures that are speculative, at best. Moreover, members of groups who work
25 to turn out voters are not harmed by continuing to work to turn out voters, despite
26 believing that they have to work harder to achieve their electoral goals.

1 Second, even if Plaintiffs could satisfy the constitutional requirements to establish
2 standing to bring this suit, they fail to state a claim upon which relief can be granted.
3 Arizona performs list maintenance in compliance with NVRA. Indeed, Arizona's active
4 list maintenance programs exceed NVRA's requirements. Because unassailable facts
5 plainly belie Plaintiffs' claims, this Complaint should be dismissed.

6 **BACKGROUND**

7 **A. The National Voter Registration Act**

8 Pursuant to federal law, states may only remove voters from registration rolls: (1)
9 at the voter's request; (2) if a voter becomes ineligible as a result of criminal conviction
10 or an adjudication of mental incapacity; (3) if the voter has died; or (4) if the voter has
11 moved out of the jurisdiction. 52 U.S.C. § 20507(a)(3)-(4). States are required to
12 "conduct a general program that makes a reasonable effort to remove the names of
13 ineligible voters from the official lists of eligible voters by reason of [death and change
14 of address]." 52 U.S.C. § 20507(a)(3)-(4). There is some lag between when voters
15 become ineligible by moving out of the jurisdiction and when NVRA permits their
16 removal from the voter rolls. *See* 52 U.S.C. § 20507(d) (providing a state "shall not
17 remove the name of a registrant . . . on the ground that the registrant has changed
18 residence unless the registrant" does not take certain required steps for two consecutive
19 election cycles).

20 NVRA programs to remove voters who have changed residence prohibit
21 immediate removal, and require states to the following steps before removal. First, when
22 a county recorder receives notice that a registrant has moved out of a jurisdiction, the
23 county recorder must send a notice to the registrant. 52 U.S.C. § 20507(d)(1)(B), (d)(2).
24 If the registrant does not respond to the NVRA notice, *and* does not appear to vote in the
25 next two federal general elections, that voter may be removed from the rolls. 52 U.S.C.
26 § 20507(d)(1)(B). Thus, as a function of federal law, a person who moved out of
27 Arizona in 2019 would generally still be included in certain voter registration statistics.
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1 The federal government has been tracking voter registration and list maintenance
2 through the Election Administration and Voting Survey (“EAVS”) since 2004.
3 Following each general election, the EAVS report compiles data from around the
4 country in a readable, reliable, and uniform format to ensure compliance with NVRA.
5 “The EAVS provides the most comprehensive source of state and local jurisdiction-level
6 data about election administration in the United States.” Ex. 1 at i. The EAVS plays a
7 “vital role” in “identify[ing] trends,” deciding where to “invest resources to improve
8 election administration” and “secure U.S. election infrastructure.” *Id.*

9 According to EAVS, total active registration per Citizen Voting Age Population
10 (“CVAP”) in the United States as a whole was 85.4%, and two-thirds of all states had
11 higher active registration rates as a percentage of CVAP than Arizona. *Id.* at 135. The
12 majority of states report active registration rates of over 80% of CVAP, but not Arizona.
13 *Id.* at 142. Finally, “some states may report an active CVAP registration rate of 100% or
14 more . . . because the 2021 CVAP was used to calculate the 2022 registration rate and
15 because due to federal law, some ineligible voters may take up to two full election cycles
16 to be removed from the registration rolls.” *Id.* at 166. Arizona had a 100% response rate
17 to EAVS in 2022. *Id.* at 243.

18 **B. Arizona’s List Maintenance Program.**

19 Arizona conducts regular voter registration list maintenance, removing convicted
20 felons, people who have died, and other ineligible registrants from the voting rolls.
21 Arizona sent out nearly one million confirmation notices, and removed 432,498 voters
22 from registration rolls¹ in 2022 alone. *Id.* at 182, 188. Arizona removed 8.9%
23 registrants, as a percentage of the state’s total number of active registered voters in 2022.

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25 ¹ Plaintiffs rely on EAVS in their Complaint, and it is therefore incorporated by
26 reference. *Khoja v. Orexigen Therapeutics, Inc.*, 899 F.3d 988, 999, 1001-02 (9th Cir.
27 2018) (“[I]ncorporation by reference is a judicially created doctrine that treats certain
28 documents as though they are part of the complaint itself.”). Moreover, because the
EAVS is published by a federal agency and has indicia of trustworthiness, it is proper for
this Court to take judicial notice of it pursuant to Fed. R. Evid. 201. Consideration of
this information will not convert this motion to dismiss, pursuant to Fed. R. Civ. P.
12(b)(1) and (b)(6), to a motion for summary judgment.

1 This is a bit higher than, but generally consistent with, the national average removal rate
2 of approximately 8.5% of registrants. *Id.* at 188-89. In fact, Arizona’s rate of removal in
3 2022 that was higher than twenty-eight other states. (*Id.*). The EAVS data demonstrate
4 that Arizona maintains an active program to remove voters who have moved out of the
5 jurisdiction (18.9%), died (25.0%), failed to return a confirmation notice (40.5%), at the
6 voter’s request (11.6%), and upon felony conviction (3.5%). *Id.* at 188, 190. Arizona’s
7 data indicates that the state’s list maintenance program is at least as active, and in many
8 cases *more active*, in removing ineligible voters from the rolls than the rest of the
9 country, where voter removal rates were reported as 26.8% who moved, 25.6% have
10 died, 25.4% failed to return a confirmation notice, 4.5% at the voter’s request, and 1.4%
11 upon felony conviction. *Id.* at 190-91. In short, Arizona removes ineligible voters from
12 its registered voter list in compliance with the law.

13 In addition to state and federal statutes, Arizona elections officials must follow
14 the Elections Procedures Manual (“EPM”), which carries with it the force of law. A.R.S.
15 § 16-452(A), (D). The EPM provides fifty-five pages of guidance on processing and
16 validating voter registration, including a thirteen-page subsection titled “Voter
17 Registration List Maintenance.” Ex. 2, EPM Ch. 1. This directs how and when to verify
18 and cancel registrants who are deceased, felons, incapacitated, or moved. *Id.*

19 For example, when a county recorder receives notification that a voter has moved,
20 through the United States Postal Service’s (“USPS”) National Change of Address
21 (“NCOA”) service, returned mail, or through other mechanisms, the county recorder
22 must send non-forwardable official election mail to that registrant’s address. *Id.* at 46.
23 If that mail is returned undeliverable, the recorder must send a second notice (the “Final
24 Notice”) to the new address, if the USPS provides one, or the address on record if no
25 forwarding address is available within twenty-one days of the mail being returned to the
26 county. *Id.* The Final Notice must notify the registrant that they have thirty-five days to
27 update their record or they will be put in “inactive” status. *Id.* If the registrant does not
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1 update their voter registration record or appear to vote in the “four years from the date of
2 the Final Notice or following the second general election after the Final Notice,” the
3 registrant’s record will be canceled. *Id.* at 47. This procedure is set forth in detail in the
4 EPM, and a violation of these provisions is a class 2 misdemeanor. A.R.S. § 16-452(D).

5 In the legislative session in 2022, a number of new laws related to voter
6 registration and list maintenance were enacted. One bill, H.B. 2243, 2022 Ariz. Legis.
7 Serv. Ch. 370 (H.B. 2243) (West), added new list maintenance requirements—not
8 required by NVRA—and was scheduled to take effect beginning January 1, 2023.
9 However, parts of that law have been enjoined by this Court. *Mi Familia Vota v. Fontes*,
10 No. CV-22-00509-PHX-SRB, 2024 WL 862406 (D. Ariz. Feb. 29, 2024).

11 **C. Arizona’s Elections Are Secure.**

12 Plaintiffs claim they fear that ineligible voters may have an opportunity to vote in
13 Arizona elections, which undermines their confidence in Arizona’s elections as a whole.
14 (*See* DE 1 ¶ 104). This fear is ill-founded. Arizona requires registrants to demonstrate
15 proof of citizenship to register to vote, A.R.S. § 16-166, and requires voters to present
16 identification at the polls to cast a ballot. A.R.S. § 16-579(A). Ballots cast by mail
17 undergo signature verification to ensure that the individual signing the ballot is the
18 person registered, A.R.S. § 16-550.

19 The 2020 and 2022 election spawned many lawsuits attacking the veracity of the
20 final results. All of these lawsuits failed. *See, e.g., Ward v. Jackson*, No. CV-20-0343-
21 AP/EL, 2020 WL 8617817 (Ariz. 2020); *Lake v. Hobbs*, No. 2 CA-CV23-0144, 2024
22 WL 2949331 (Ariz. App, June 11, 2024). Even Plaintiffs admit that there “is no
23 evidence that” the counties they argue have abnormally high registration rates
24 “experienced above-average voter participation compared to the rest of the country or
25 state.” (DE 1 ¶ 89). In short, despite intense scrutiny of Arizona’s elections since 2020,
26 there is no evidence that Arizona elections are not secure and properly conducted in
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1 accordance with the law, and even Plaintiffs agree that there is no evidence supporting
2 their fear of ineligible voters casting ballots in Arizona.

3 **D. Plaintiffs' Correspondence and This Lawsuit.**

4 Plaintiffs sent a letter to the Secretary on August 8, 2023, alleging that comparing
5 data "from the U.S. Census Bureau's 2017-2021 American Community Survey
6 [{"ACS"}] and the most up-to-date count of registered voters available from the Arizona
7 Secretary of State," four Arizona counties "all have greater than 100% voter registration"
8 and "nine others have suspiciously high rates of voter registration." (DE 1-3, 3). The
9 letter threatened a lawsuit if the "violations we have identified are not corrected," and
10 that "if litigation ensues, you risk bearing the financial burden of the full cost of the
11 litigation." (*Id.* at 4-5). The only information provided in the letter to support Plaintiffs'
12 claims was a comparison of "the most up-to-date count of registered voters," *i.e.*, from
13 2023, with ACS data from 2017-2021, which Plaintiffs claimed indicate "there are more
14 registered voters than eligible voters." (*Id.* at 2-3). Plaintiffs also requested information
15 on procedures and policies used by the Secretary to comply with NVRA.

16 The Secretary replied on August 15, 2023, explaining that after a review of the
17 data and the State's policies and procedures that "Arizona already maintains its voter
18 rolls in compliance with NVRA." (*Id.* at 7). The Secretary suggested Plaintiffs review
19 the EPM, which meticulously outlines the procedures that Arizona election officials
20 follow to comply with NVRA. Then, the Secretary took the additional step of reviewing
21 voter registration statistics to determine whether Plaintiffs' concerns had merit. The
22 Secretary concluded they did not, and provided data to support his allegations. (*Id.*).
23 Plaintiffs replied to the Secretary's letter on September 12, 2023, demanding the
24 Secretary comply with NVRA and accusing the Secretary of trying to mislead them by,
25 *inter alia*, specifically stating that certain data that Plaintiffs appeared to rely on was
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1 likely an undercount. (DE 1-3, 8). On June 3, 2024, Plaintiffs filed this lawsuit with a
 2 previously undisclosed report upon which their allegations rely.² (DE1-1).

3 ARGUMENT

4 **I. Plaintiffs Do Not Have Standing to Bring This Action.**

5 The United States Constitution limits federal court jurisdiction to actual cases and
 6 controversies. U.S. Const. Art. III, § 2. A statutory private right of action does not
 7 absolve the Plaintiffs of their burden to demonstrate that they satisfy the constitutional
 8 requirement of standing. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016). “[L]ack of
 9 Article III standing requires dismissal for lack of subject matter jurisdiction under
 10 Federal Rule of Civil Procedure 12(b)(1).” *Maya v. Centex Corp.*, 658 F.3d 1060, 1067
 11 (9th Cir. 2011). The party invoking federal jurisdiction bears the burden of establishing
 12 each element of standing. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014).
 13 “[A]t an ‘irreducible constitutional minimum,’” a plaintiff must demonstrate (1) an
 14 injury in fact, (2) that is fairly traceable to the defendant’s conduct, and (3) susceptible to
 15 redress by a decision in their favor.” *Lake v. Fontes*, 83 F.4th 1199, 1202-03 (9th Cir.
 16 2023) (cleaned up). Neither “abstract, theoretical concerns,” nor an “interest shared
 17 generally with the public at large in the proper application of the Constitution and laws,”
 18 will satisfy constitutional standing requirements. *Id.* (citations omitted).

19 **A. Plaintiffs Assert No Injury Sufficient to Sustain Standing.**

20 Plaintiffs claim an interest in “supporting the enforcement of laws such as the
 21 NVRA that promote fair and orderly elections.” (DE 1 ¶¶ 22, 26, 28). Due to their
 22 mistaken belief that the Secretary and all fifteen independently-elected county recorders
 23 do not comply with Arizona law, federal law, and the EPM, Plaintiffs allege that

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 25 ² Plaintiffs’ report is improper under Fed. R. Civ. P. 10(c). Unlike judicially-noticeable
 26 information and exhibits, which may be considered by this Court at this stage, neither the
 27 report nor allegations which rely upon it are entitled to the presumption of validity.
 28 *Interstate Nat. Gas Co. v. Southern Calif. Gas Co.*, 209 F.2d 380 384 (9th Cir. 1953) (“A
 motion to dismiss pursuant to Rule 12(b) . . . admits all well pleaded facts, but does not
 admit facts which the court will judicially notice as not being true nor facts which are
 revealed to be unfounded by documents included in the pleadings or introduced in
 support of the motion.”).

1 “ineligible voters have an *opportunity* to vote in Arizona elections, *risking* the dilution of
2 Plaintiffs’ legitimate vote.” (*Id.* ¶ 29) (emphasis added). They further allege their
3 beliefs “undermine Plaintiffs’ confidence in the integrity of Arizona elections, which
4 also burdens their right to vote.” (*Id.* ¶ 30). They allege these assumptions about
5 Arizona’s voter rolls result in spending “more time and resources monitoring Arizona’s
6 elections” and “get-out-the-vote efforts for like-minded individuals . . . [who] lack
7 confidence in the accuracy and integrity of Arizona’s elections.” (*Id.* ¶ 32-33). None of
8 these allegations are concrete or cognizable harms sufficient to confer standing.

9 First, Plaintiffs are not entitled to bring a federal lawsuit just to confirm that laws
10 are being followed to their liking. The Constitution’s standing requirement “reflects a
11 due regard for the autonomy of those most likely to be affected by a judicial decision,”
12 and “is not to be placed in the hands of ‘concerned bystanders,’ who will use it simply as
13 a ‘vehicle for the vindication of value interests.’” *Diamond v. Charles*, 476 U.S. 54, 62
14 (1986). “The requirement that the plaintiff possess a personal stake helps ensure that
15 courts decide litigants’ legal rights in specific cases, as Article III requires, and that
16 courts do not opine on legal issues in response to citizens who might ‘roam the country
17 in search of governmental wrongdoing.’” *Food and Drug Admin. v. Alliance for*
18 *Hippocratic Medicine*, 602 U.S. --, 2024 WL 2964140 at *5 (2024). Indeed, this is one
19 of a number of cookie-cutter lawsuits in which citizens are roaming the country, making
20 unfounded allegations of governmental wrongdoing. Plaintiffs’ wish that the Secretary
21 comply with NVRA (which he is already doing) is insufficient to establish standing.

22 Plaintiffs’ next allegation, that “ineligible voters have an opportunity to vote,”
23 which “risk[s] the dilution of Plaintiffs’ legitimate vote” is both too speculative and not a
24 cognizable claim. (DE 1 ¶ 29). Plaintiffs’ own Complaint admits that “[t]here is no
25 evidence that these counties experienced above-average voter participation compared to
26 the rest of the country or state.” (*Id.* ¶ 89). They acknowledge that their claimed harm
27 does not exist. Even if one assumes that Plaintiffs’ feared harm does not *yet* exist—but
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1 could theoretically occur in the future—such harm would only arise after a cascade of
2 independent actions. Such harm could result only after: (1) an ineligible voter requests
3 an early ballot or presents at a polling place; (2) casts a ballot; (3) that ineligible ballot is
4 tabulated; and (4) sufficient other ineligible voters engage in the same series of steps in a
5 number sufficient to “dilute” Plaintiffs’ votes. This is precisely the type of “‘long chain
6 of hypothetical contingencies that have never occurred in Arizona and ‘must take place
7 for any harm to occur’” that has been repeatedly rejected by federal courts. *Lake*, 83
8 F.4th at 1204. And even if these problems did not bar Plaintiffs’ standing, federal courts
9 do not recognize a generalized “vote dilution” harm outside of redistricting cases. *See*,
10 *e.g. Gill v. Whitford*, 585 U.S. 48, 68 (2018) (rejecting standing premised on an “interest
11 ‘in their collective representation in the legislature’”) (internal citations omitted).

12 Finally, Plaintiffs’ beliefs about the status of Arizona’s voter rolls, and the actions
13 they undertake as a result of those beliefs, do not make this a federal case. Plaintiffs’
14 asserted lack of confidence in Arizona’s elections is not a state-created burden on the
15 right to vote and does not provide standing. *Food & Drug Admin.*, 2024 WL 2964140
16 at *14 (explaining that plaintiffs’ “sincere legal, moral, ideological, and policy
17 objections . . . alone do not establish a case or controversy in federal court.”). A concern
18 about public confidence in the election is just that—public—not individualized. *See*
19 *Drake v. Obama*, 664 F.3d 774, 782 (9th Cir. 2011) (holding Plaintiff lacked standing
20 because he “has no greater stake in this lawsuit than any other United States citizen.”).
21 Likewise, any steps Plaintiffs choose to take are not state-created harms, but voluntary
22 actions taken due to their own mistaken beliefs. To the extent Plaintiffs conduct “get-
23 out-the-vote efforts to convince like-minded individuals,” that is precisely the kind of
24 activity in which they voluntarily engage, not an activity undertaken to counteract
25 alleged list maintenance deficiencies.³ *See Rodriguez v. City of San Jose*, 930 F.3d 1123,

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28 ³ Moreover, Plaintiffs cannot assert the alleged harms to the organizations of which they
are members, because they are not named in this suit. *Warth v. Seldin*, 422 U.S. 490,
499 (1975); *Mills v. United States*, 742 F.3d 400, 406-07 (9th Cir. 2014).

1 1134 (9th Cir. 2019) (holding standing requires both a frustration of an organization’s
2 mission and diversion of resources to combat the injurious behavior). Plaintiffs have
3 failed to assert a particularized, individual harm sufficient to confer standing.

4 **B. Plaintiffs’ Asserted Injury Is Not Attributable to the Secretary.**

5 Plaintiffs’ alleged harm is a direct result of a misapprehension of the statistics
6 upon which they rely; they can only produce “discrepancies” between the CVAP and
7 registrants when they use *total* registered voters, rather than *active* registered voters.
8 Thus, for example, Plaintiffs rely upon a CVAP of 5,322,581 people in Arizona in 2022.
9 (DE 1 at 16, Table III.B.1). Comparing Plaintiffs’ CVAP with a *total* of 4,833,160
10 registrants results in the 90.8% on which Plaintiffs rely. (*Id.*). However, there were only
11 4,143,929 *active* registered voters in 2022, resulting in an active registration rate of
12 77.8% using Plaintiffs’ CVAP. EAVS data reported a CVAP of 5,216,518 for Arizona,
13 producing an active registration rate of 79.4% of CVAP for the state. Whether using
14 Plaintiffs’ CVAP, or the CVAP from EAVS, Arizona’s active registrants as a percentage
15 of CVAP (77.8% or 79.4%) is significantly lower than the United States’ total active
16 registration rate of CVAP of 85.4%. Ex. 1 at 162, 168. And EAVS specifically warns
17 against Plaintiffs’ conflation of statistics, especially the use of *total* registered voters.
18 (DE 1, Ex. 1 at 140) (“However, data on registered and eligible voters as reported in the
19 EAVS should be used with caution, as these totals can include registrants who are no
20 longer eligible to vote in that state but who have not been removed from the registration
21 rolls because the removal process laid out by the NVRA can take up to two election
22 cycles to be completed.”). Indeed, Arizona reported a lower percentage of registered
23 voters compared to CVAP than all but nine other states. Ex. 1 at 162-66.

24 In short, the statistics Plaintiffs allege demonstrate Arizona’s failure to comply
25 with NVRA are directly traceable to inactive registrants. These registrants will be
26 removed (or not) according to law, but the Secretary is required to keep those voters on
27 the rolls unless NVRA or another applicable law requires their removal. *See* 52 U.S.C.
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1 § 20507(d). Plaintiffs' asserted injury is attributable not to any inaction or malfeasance
2 by the Secretary, but is a direct result of NVRA itself.

3 **C. The Requested Order Will Not Redress Plaintiffs' Grievances.**

4 Plaintiffs' Complaint seeks a declaration and injunction requiring the Secretary to
5 comply with NVRA, a law with which he already complies. Indeed, Arizona's list
6 maintenance procedures *go further* than what is required by NVRA. Arizona already
7 processes and cancels deceased registrants based on monthly data obtained from the
8 Arizona Department of Health Services and other reliable sources, Ex. 2 at 37-38,
9 routinely receives lists of felons and people who are adjudicated incompetent from
10 Arizona courts and other courts, for cancellation, *id.* at 38-39, and removes ineligible
11 voters who move based on returned election mail and USPS's NCOA service, *id.* at 45-
12 48. No injunction is required.

13 The Secretary complies with NVRA, and there is no credible allegation of harm
14 traceable to the Secretary that could remedy Plaintiffs' claimed concerns. For these
15 reasons, Plaintiffs lack standing to bring this action pursuant to Article III and Rule
16 12(b)(1) of the Federal Rules of Civil Procedure.

17 **II. There Is No Set of Facts that Would Entitle Plaintiffs to Relief.**

18 Fed. R. Civ. P. 12(b)(6) requires dismissal of a complaint which fails to state a
19 claim upon which relief can be granted. "To survive a motion to dismiss, a complaint
20 must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is
21 plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted).
22 "[W]hen the allegations in a complaint, however true, could not raise a claim of
23 entitlement to relief, this basic deficiency should . . . be exposed at the point of minimum
24 expenditure of time and money by the parties and the court.'" *Bell Atlantic Corp. v.*
25 *Twombly*, 550 U.S. 544, 558 (2007).

26 "Where the well-pleaded facts do not permit the court to infer more than the mere
27 possibility of misconduct, the complaint has alleged—but it has not 'show[n]'—'that the
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1 pleader is entitled to relief.” *Ashcroft*, 556 U.S. at 679. Only well-plead factual
2 allegations are entitled to a presumption of veracity, and then the court must determine
3 whether these facts plausibly entitle the plaintiff to relief. *Id.* The general rule to accept
4 well-plead factual allegations as true does not apply to plainly incorrect allegations.
5 “The court need not, however, accept as true allegations that contradict matters properly
6 subject to judicial notice or by exhibit.” *Sprewell v. Golden State Warriors*, 266 F.3d
7 979, 988 (9th Cir. 2001).

8 In assessing a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the court may
9 take judicial notice of facts that cannot be reasonably disputed because they can be
10 determined “from sources whose accuracy cannot reasonably be questioned.” Fed. R.
11 Evid. 201(b); *Tellabs, Inc. v. Makor Issues & Rts., Ltd.*, 551 U.S. 308, 322 (2007)
12 (instructing courts to “consider matters of which a court may take judicial notice” and
13 documents incorporated into the complaint by reference when deciding a motion to
14 dismiss under Rule 12(b)(6)). Plaintiffs rely in their Complaint and attached report⁴ on
15 U.S. Census Bureau data, Secretary of State registration data, and data from the U.S.
16 Election Assistance Commission (“EAC”) for their claims. This data is appropriate for
17 judicial notice, is incorporated by reference, and can be considered in this motion to
18 dismiss without converting it a motion for summary judgment. *Khoja*, 899 F.3d at 999.
19 Plaintiffs’ report, however, does not qualify for judicial notice pursuant to Fed. R. Evid.
20 201, and is not entitled to an assumption of validity at this stage. *Interstate Nat. Gas Co.*
21 *v. Southern Calif. Gas Co.*, 209 F.2d at 384; *see also* Fed. R. Civ. P. 7, 8, and 10
22 (defining allowed pleadings and setting forth the appropriate scope of pleadings and
23 exhibits).

24 **A. Arizona Conducts NVRA-Compliant List Maintenance.**

25 Whatever “reasonable efforts” NVRA requires for list maintenance, Arizona
26 objectively exceeds NVRA’s standards. The fact that Arizona had 797,221 inactive

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28 ⁴ The Court should not consider the conclusions in Plaintiffs’ report at this stage when Defendant has not had an opportunity to provide his own expert analysis. *See supra* n. 2.

1 voters as of April 2024 demonstrates that Arizona engages in “reasonable efforts to
2 remove the names of ineligible voters from the official lists of eligible voters” when they
3 have moved out of the jurisdiction. 52 U.S.C. § 20507(a)(4)-(f).⁵ The State’s list
4 maintenance efforts are demonstrated by the following four processes.

5 First, the state’s robust list maintenance program is codified by statute and
6 described in detail in the EPM. Ex. 2 at 36-54. The officers involved in voter
7 registration and list maintenance—the Secretary and the fifteen Arizona county
8 recorders—are elected officials. They each take an oath of office to uphold the U.S. and
9 Arizona constitutions. A.R.S. § 38-231(E). Given these facts, these dedicated officials
10 are entitled to a presumption of good faith, and this Court “must be wary of plaintiffs
11 who seek to transform federal courts into ‘weapons of political warfare’ that will deliver
12 victories that eluded them ‘in the political arena.’” *Alexander v. S. Car. State Conf. Of*
13 *the NAACP*, 144 S. Ct. 1221, 1236 (2024). Even if this Court does not presume good
14 faith on the basis of the various officials responsible for list maintenance, Plaintiffs’
15 allegations would require that all these people refuse to follow the law and are willing to
16 risk criminal prosecution to do so. This is not plausible.

17 Second, Arizona’s list maintenance occurs at regular intervals as part of a
18 methodical program that goes above and beyond the list maintenance process required
19 by NVRA. For example, Arizona uses NCOA information provided by USPS to start
20 the NVRA removal process, otherwise known as NVRA’s “safe harbor” provision. 52
21 U.S.C. § 20507(c)(1) (“A State may meet the requirement of subsection (a)(4) [list
22 maintenance] by establishing a program under which change-of-address information
23 supplied by the Postal Service . . . is used to identify registrants whose addresses may
24 have changed . . .”); Ex. 2 at 45-48. Additionally, Arizona’s EPM requires list
25 maintenance to include a process to remove registrants who have moved based on
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27 ⁵ In order to cast a ballot, an inactive voter must appear at a polling place, provide voter
28 identification as required by A.R.S. § 16-579, and affirm their residence within the
jurisdiction. A.R.S. §16-583(A).

1 information obtained from other government sources indicating a registrant has moved
2 out of their county or out of the state. *Id.* at 39-45. This list maintenance is in addition
3 to the regular removal of people who die, or are adjudicated ineligible due to felony
4 convictions or court declarations of incompetence. *Id.* at 36-39. Plaintiffs' reliance on
5 the letters reporting various removal programs is misplaced. (DE 1 at ¶¶ 17, 71). The
6 quarterly letters are not a part of NVRA "list-maintenance duty" and are a creation of
7 very recent statutory change still in active litigation. (*Id.* at ¶ 71). The A.R.S. § 16-
8 165(M) letters which Plaintiffs cite are inapposite. In short, Arizona's list maintenance
9 programs are robust, exceeding the list maintenance requirements of NVRA.

10 Third, the reported data confirms that Arizona election officials comply with the
11 statutory and regulatory requirements regarding list maintenance activities. According to
12 EAVS, Arizona sent 991,282 NVRA notices to Arizona registrants in 2022, a rate higher
13 than any other state except Washington. Ex. 1 at 182-83. In 2022 alone, Arizona
14 removed 432,498 registrants, including 175,284 registrants who did not return a NVRA
15 notice. *Id.* at 188. This was a rate that was 45.8% higher than the national average of
16 removals for people who fail to respond to NVRA notices. *Id.* at 188-89. Notably,
17 Arizona removed a higher percentage than the national average of not only voters who
18 failed to respond to NVRA notices, but also voters who requested to be removed (11.6%
19 versus 4.5%), felons (3.5% versus 1.4%), and registrants who are adjudicated
20 incompetent (0.2% versus 0.1%). *Id.* at 190-91. As a result, Arizona removed a higher
21 percentage of voters from its rolls than the national average (8.9% versus 8.5%). And
22 2022 was not an outlier, but consistent with Arizona's robust list maintenance program.
23 The 2020 EAVS⁶ indicates Arizona removed 350,841 registrants (7.4% versus a national
24 removal rate of 8.2%), and the 2018 EAVS⁷ indicates Arizona removed 437,701

26 ⁶ Election Admin. & Voting Survey, Election Ass. Comm'n, 165-66 (2020) *available at*
27 https://www.eac.gov/sites/default/files/document_library/files/2020_EAVS_Report_Final_508c.pdf.

28 ⁷ Election Admin. & Voting Survey, Election Ass. Comm'n, 82-83 (2018) *available at*
https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf.

1 registrants, or 10.23% of registrants, compared to the national rate of 8.17% of
2 registrants. Unlike the report included by Plaintiffs as an attachment to their Complaint,
3 these data are amenable to judicial notice and may be considered by this Court when
4 ruling on a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(6). This data clearly
5 shows that Plaintiffs cannot state a plausible claim that Arizona does not conduct a
6 “reasonable effort” to ensure accurate voter rolls.

7 Finally, Arizona’s vigorous list maintenance program is evidenced by the data on
8 registrants. Active registrations as a portion of CVAP are lower in Arizona than the
9 nation as a whole. Ex. 1 at 162, 166. Indeed, the CVAP in EAVS is slightly lower than
10 the CVAP used in Plaintiffs’ Complaint and accompanying report, but active registered
11 voters are the same. *Compare* (DE 1 ¶ 77) (reporting CVAP for 2022 as 5,322,581) *with*
12 EAVS (providing CVAP from 2022 as 5,216,518). When the denominator shrinks, but
13 the numerator remains constant, the percentage as a whole grows. Therefore, because
14 the CVAP from EAVS is smaller than Plaintiffs’ CVAP, the EAVS data is more
15 favorable to Plaintiffs. Indeed, EAVS data provides Arizona has a rate of 79.4% of
16 active voters as a percentage of CVAP, compared to 77.8% of active voters as a
17 percentage of CVAP using Plaintiffs’ data in 2022. This is far short of the national
18 average of 85.4%. Ex. 2 at 166. In sum, there is no factual basis for Plaintiffs’ claim
19 that Arizona does not engage in “reasonable efforts” to remove ineligible voters from the
20 voter rolls. Indeed, Arizona has a well-established, rigorous list maintenance program,
21 as established by data stretching back multiple election cycles. Plaintiffs’ Complaint
22 cannot state a claim upon which relief may be granted, and should be dismissed.

23 **B. The Facts as Alleged Do Not Support a Plausible Claim for Relief.**

24 Ultimately, the entire basis for Plaintiffs’ Complaint is that Arizona allegedly has
25 an implausibly high number of registered voters. Plaintiffs insist that *all* registrants,
26 rather than active registrants, should be compared to CVAP to determine if Arizona’s
27 voter rolls are non-compliant with NVRA. (DE 1, ¶ 80 n.6). However, as explained,
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1 comparing total registrants rather than active registrants results in percentages that are
2 significantly higher than one might expect if people who move out of the jurisdiction
3 were automatically canceled. Ex. 1 at 140 (cautioning not to use total registered voters
4 because “these totals can include registrants who are no longer eligible to vote in the
5 state but who have not been removed from the registration rolls because the removal
6 process laid out by the NVRA can take up to two election cycles to be completed.”).
7 That is the result of the requirements of federal law and is not evidence of improper list
8 maintenance. Because NVRA does not allow the automatic cancellation of voters who
9 do not respond to notices—but *requires* the state to maintain those registrants on inactive
10 status for two federal election cycles—there will be people on Arizona’s inactive list
11 who cannot be removed, but would have to establish that they are eligible to vote if they
12 came to the polling place on election day. *See* A.R.S. § 16-583(A).

13 Plaintiffs have failed to marshal facts that establish a plausible claim for relief.
14 But comparing Plaintiffs’ reported CVAP to the active registered voters in the state
15 demonstrates that Arizona’s ratio of registrants to CVAP is not inflated. Comparing
16 Arizona’s registrants to the United States as a whole—whether the more accurate active
17 registrants as a percentage of CVAP, which is 79.4% for Arizona and 85.4% for the
18 United States, or skewed to include all registrants, including those who cannot yet be
19 removed due to the requirements of NVRA, which is 92.6% for Arizona and 94.7% for
20 the United States—belies Plaintiffs’ claims. Ex. 1 at 162, 166. As the Supreme Court
21 explained in *Brnovich v. Democratic Nat’l Comm.*, “statistical manipulation” can be
22 “highly misleading” and “mask” the issues. 141 S. Ct. 2321, 2345 (2012).

23 The fact that Plaintiffs have included a so-called expert report does not “nudge”
24 them over the line to establish a plausible claim. *Twombly*, 550 U.S. at 570. As an
25 initial matter, the report is not part of the pleading, and therefore is not entitled to a
26 presumption of veracity. Fed. R. Civ. P. 7, 10. As a practical matter, any plaintiff would
27 be able to survive a motion to dismiss by attaching a report to their complaint, which
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1 would eviscerate the intentions of reducing costs and burdens on the parties and the
2 courts that animate Rule 12(b)(6). *Id.* at 557-58. But putting that aside, the facts as
3 alleged in Plaintiffs’ Complaint and Plaintiffs’ report are obviously implausible. At the
4 outset, Plaintiffs’ report states (in a footnote) that “[m]y analysis focuses on total
5 registered voters, not active registered voters, because inactive registered voters would
6 still be required to be a part of the Voting Eligible Population.” (DE 1-1 9 n.6).
7 However, inactive registrants are precisely the registrants who are most likely to have
8 moved out of the jurisdiction and thus *not be included* in the Census data. *See, e.g.* Ex. 2
9 at 45-48 (explaining the lengthy, legally-required process of maintaining a voter who has
10 moved out of the jurisdiction on the voter registration rolls as an inactive voter).

11 It is *only* by using the data this way—with CVAP as a denominator, which will
12 *not* include people who have moved out of the jurisdiction, and total registered voters as
13 the numerator, which *must* include registrants who have moved out of the jurisdiction—
14 that Plaintiffs can construct “implausibly” high voter registration rates. When inactive
15 voters, *i.e.*, those voters who were not in Arizona for the Census to count, are excluded,
16 Arizona’s voter registration rate drops to 79.4% of active voters as a percentage of
17 CVAP, slightly below the 81.4% that Plaintiffs’ report supports as reasonable for
18 Arizona based on Census reports. (DE1-1 11, ¶ 22).

19 Plaintiffs’ claims are simply not plausible under Plaintiffs’ own standards.
20 Cherry-picking statistics to create a report that appears superficially reasonable does not
21 create a plausible claim for relief that withstands review under the federal rules of civil
22 procedure. Plaintiffs’ Complaint should be dismissed.

23 **CONCLUSION**

24 Plaintiffs’ Complaint should be dismissed for lack of standing pursuant to Fed. R.
25 Civ. P. 12(b)(1), and failure to state a plausible claim for relief pursuant to Fed. R. Civ.
26 P. 12(b)(6).
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Respectfully submitted this 25th day of June, 2024.

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CERTIFICATE OF CONFERRAL

I certify that counsel for the Plaintiffs and Defendant Arizona Secretary of State met and conferred in good faith via video and teleconference, as required by L. R. Civ. P. 12.1(c) before this Motion was filed. After discussing the arguments raised in the Motion, the conferees were unable to agree that the Plaintiffs’ pleading was curable by amendment.

DATED this 25th day of June, 2024.

/s/ Kara Karlson

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 25th day of June, 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