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14 **UNITED STATES DISTRICT COURT**  
15 **DISTRICT OF ARIZONA**

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

19 Plaintiffs,

20 v.

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

23 Defendant.

No. CV-24-01310-PHX-DWL

**PLAINTIFFS' RESPONSE TO THE  
ARIZONA SECRETARY OF STATE'S  
MOTION TO DISMISS**

24 Plaintiffs Scot Mussi, Gina Swoboda, in her capacity as Chair of the Republican  
25 Party of Arizona, and Steven Gaynor ("Plaintiffs") file this Response to the Arizona  
26 Secretary of State's (the "Secretary") Motion to Dismiss, (ECF No. 20). Because Plaintiffs  
27 have alleged facts that establish standing and adequately state a claim for relief this Court  
28 should deny the Secretary's Motion to Dismiss.

## INTRODUCTION

1  
2 This case is not complicated. The National Voter Registration Act (“NVRA”)  
3 requires the Secretary to oversee voter roll maintenance programs across Arizona and  
4 ensure that there is uniform compliance with the NVRA. Here, the Secretary failed to  
5 perform his statutory duties under state and federal law.

6 Plaintiffs have properly alleged standing and a claim under Section 8 of the NVRA.  
7 *See* 52 U.S.C. § 20507. Section 8 requires states to “conduct a general program that makes  
8 a reasonable effort to remove the names of ineligible voters from the official lists of  
9 eligible voters by reason of . . . (A) the death of the registrant; or (B) a change in the  
10 residence of the registrant” to maintain accurate and updated voter-registration records in  
11 a uniform manner across the state. 52 U.S.C. § 20507(a)(4)(A)–(B). The NVRA requires  
12 each state to designate a state officer or employee as the chief state election official to be  
13 responsible for coordination of state responsibilities under the NVRA. 52 U.S.C. § 20509.  
14 Arizona law designates the Secretary as that individual. *See* A.R.S. §§ 41-121(A)(9), (13).

15 The NVRA includes a private right of action and empowers any person who is  
16 aggrieved by a violation to “provide written notice of the violation to the chief election  
17 official of the State involved.” 52 U.S.C. § 20510(b)(1). “If the violation is not corrected  
18 within 90 days after receipt of a notice, . . . the aggrieved person may bring a civil action  
19 in an appropriate district court for declaratory or injunctive relief.” 52 U.S.C. §  
20 20510(b)(2).

21 In pleading their case, Plaintiffs have followed the required notice procedures and  
22 brought this suit under the NVRA. Plaintiffs’ Complaint relies upon (1) public  
23 correspondence between the Secretary and the Arizona Legislature, and (2) publicly  
24 available data from trusted sources, including the U.S. Census Bureau, the Secretary of  
25 State registration database, and the U.S. Election Assistance Commission (“EAC”). Based  
26 on this data and correspondence, Plaintiffs have sufficiently alleged a claim under the  
27 NVRA. (*See* ECF No. 1 ¶¶ 101–07)

28

1 Rather than engaging in a proper Rule 12(b)(1) and 12(b)(6) analysis, however, the  
2 Secretary resorts to fear mongering, data distortion, and quibbling with Plaintiffs’ alleged  
3 facts—none of which are proper grounds for dismissal. The Secretary, along with the  
4 *amicus*, misrepresent and distort Plaintiffs’ Complaint “as part of a dangerous movement  
5 to use the courts to sow doubt about the 2024 election[s].” (ECF No. 28 at 6 (capitalization  
6 normalized)). Moreover, the Secretary accuses Plaintiffs’ expert of “guessing” with  
7 respect to his factual findings, even though the expert’s analysis is grounded in best-  
8 practices using only data from reliable public sources. (*See* ECF No. 1-1).

9 But the Secretary’s argument that “different data fields are more probative” is a  
10 textbook “battle of the experts” that is improper at this early stage of the case. The  
11 Secretary also incorrectly characterizes Plaintiffs’ claim as one of “vote dilution.”  
12 Although vote dilution may be a *result* of failing to maintain proper voter rolls, it is not  
13 the grounds upon which Plaintiffs’ NVRA claim is based. Regardless, the Secretary’s  
14 factual and data disputes are improper at the Rule 12 stage, and the Court should reject  
15 these improper (and incorrect) arguments.

16 This Court should therefore deny the Secretary’s Motion to Dismiss.

## 17 ARGUMENT

### 18 **I. STANDARD OF REVIEW.**

19 When evaluating a motion to dismiss, Federal Rule of Civil Procedure 12(b)(6)  
20 requires courts to do so based on the complaint and any documents incorporated into it by  
21 reference. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). When  
22 analyzing the motion to dismiss and complaint, the court must “accept all factual  
23 allegations in the complaint as true.” *Id.*; *see also In re Facebook, Inc. Securities*  
24 *Litigation*, 87 F.4th 934, 947–48 (9th Cir. 2023).

25 “To survive a motion to dismiss, a complaint must contain sufficient factual matter,  
26 accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*,  
27 556 U.S. 662, 678 (2009) (quotation omitted). A claim is facially plausible “when the  
28 plaintiff pleads factual content that allows the court to draw the reasonable inference that

1 the defendant is liable for the misconduct alleged.” *Id.* At the motion to dismiss stage, the  
2 courts “must accept as true all of the factual allegations contained in the complaint.” *Bell*  
3 *Atl. Corp. v. Twombly*, 550 U.S. 544, 572 (Stevens, J., dissenting) (quoting *Swierkiewicz*  
4 *v. Sorema N. A.*, 534 U.S. 506, 508 n. 1 (2002)).

## 5 **II. PLAINTIFFS HAVE STANDING TO BRING THIS ACTION.**

6 Plaintiffs have standing because they have adequately alleged an injury (1) in fact,  
7 (2) that is fairly traceable to the Secretary’s conduct, and (3) that is redressable by a  
8 decision in their favor. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016) (citing *Lujan v.*  
9 *Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)); *see also*, *Friends of the Earth, Inc. v.*  
10 *Laidlaw Environmental Services (TOC), Inc.*, 528 U.S. 167, 180–81 (2000).

### 11 **A. Plaintiffs Allege Injuries Sufficient to Satisfy Standing Requirements.**

12 In NVRA cases, a government’s alleged “noncompliance with the NVRA” that  
13 “undermines the individual plaintiffs’ confidence in the integrity of the electoral process  
14 and discourages their participation” is a sufficient injury for Article III standing purposes.  
15 *Judicial Watch, Inc. v. Griswold*, 554 F. Supp. 3d 1091, 1103–04 (D. Colo. 2021); *see also*  
16 *Green v. Bell*, No. 3:21-cv-00493, 2023 U.S. Dist. LEXIS 45989, at \*9 (W.D.N.C. Mar.  
17 19, 2023) (holding that allegations of inaccurate voter rolls leading to a lack of confidence  
18 in elections satisfies Art III’s injury requirement); *National Council of La Raza v.*  
19 *Cegavske*, 800F.3d 1032, 1042–45 (9th Cir. 2015) (holding that organizations have  
20 statutory standing to sue in order to remedy alleged violations of NVRA); *Public Interest*  
21 *Legal Foundation v. Boockvar*, 370 F.Supp.3d 449, 455-56 (M.D. Pa. 2019) (Article III  
22 injury requirement is met when plaintiff pleads harm that is related to one of the purposes  
23 of Congress passing the NVRA); *Public Interest Legal Foundation v. Bennett*, 2019 WL  
24 1112228 (S.D. Tex., Feb. 6, 2019) (similar); *American Civil Rights Union v. Martinez-*  
25 *Rivera*, 166 F.Supp.3d 779, 790–91 (W.D. Tex 2015) (similar).

26 This type of alleged injury is neither speculative, nor hypothetical because the lack  
27 of confidence is a *present* condition, not something that might happen in the future. *See*  
28 *Judicial Watch, Inc.*, 554 F. Supp. 3d at 1104 (“Nor are these fears speculative or

1 hypothetical. The individual plaintiffs are not worried that their confidence *could* be  
2 undermined at some point in the future; their confidence is undermined now.”). Here,  
3 Plaintiffs have alleged exactly that. Plaintiffs are injured because “Arizona’s inaccurate  
4 rolls undermine Plaintiffs’ confidence in the integrity of Arizona elections, which also  
5 burdens their right to vote.” (ECF No. 1 ¶ 30.) Said differently, “based on Arizona’s  
6 inaccurate voter rolls, Plaintiffs’ votes risk being diluted, and their confidence in elections  
7 is undermined.” (ECF No. 1 ¶ 31.)<sup>1</sup>

8 While pleading a lack of confidence in elections is sufficient for Art. III injury  
9 purposes, Plaintiffs have also adequately alleged injury in an additional three ways. *First*,  
10 Plaintiffs have been, are currently, and will continue to be injured by voter dilution of  
11 Plaintiffs’ legitimate votes because “the Secretary does not maintain accurate voter rolls,  
12 [so] ineligible voters have an opportunity to vote in Arizona elections.” (ECF No. 1 ¶ 29.)  
13 *Second*, Plaintiffs are required to “spend more time and resources monitoring Arizona’s  
14 elections for fraud and abuse, mobilizing voters to counteract it, educating the public about  
15 election-integrity issues, and persuading elected officials to improve list maintenance” due  
16 to the Secretary’s failure to maintain accurate voter rolls. (ECF No. 1 ¶ 32.) *Third*,  
17 inaccurate voter rolls compel Plaintiffs to “spend more of their time and resources on get-  
18 out-the-vote efforts for like-minded individuals—eligible voters who, because the  
19 Secretary does not maintain accurate voter rolls, lack confidence in the accuracy and  
20 integrity of Arizona’s elections.” (ECF No. 1 ¶ 33.) This required diversion of resources  
21 “would otherwise be spent on other projects and activities that would advance their goals.”  
22 (ECF No. 1 ¶ 33); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)  
23 (organizations have standing to sue in their own right for the time and resources they are  
24 forced to expend due to defendant’s conduct).

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26  
27 <sup>1</sup> As there are multiple Plaintiffs in this matter, it is important to note that the “presence of  
28 one party with standing is sufficient to satisfy Article III’s case-or-controversy  
requirement. *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 52 n.2  
(2006) (internal citation omitted).

1           Additionally, Plaintiff Gina Swoboda, in her capacity as Chair of Arizona GOP, is  
2 injured by inaccurate voter rolls because it frustrates the AZ GOP’s mission and diverts its  
3 resources. Arizona GOP’s mission is to elect Republican candidates through voter  
4 mobilization, education, and identification efforts. In pursuing this mission, Swoboda and  
5 her organization “rel[y] upon accurate voter registration rolls to engage in electoral  
6 activity, contact voters, get out the vote, monitor the integrity of elections, protect the  
7 efficacy of AZ GOP adherents’ votes, and decide how to allocate limited resources.” (ECF  
8 No. 1 ¶ 25). However, the Secretary’s failure to maintain accurate voter rolls frustrates this  
9 mission by forcing the AZ GOP to divert and expend additional resources on voter  
10 mobilization, education, and identification efforts. Indeed, in his Motion to Dismiss, the  
11 Secretary explicitly acknowledges that these alleged facts are sufficient to support  
12 standing. (See ECF No. 20 at 10–11) (citing *Smith v. Pac. Prop. and Dev. Corp.*, 358 F.3d  
13 1097, 1105 (9th Cir. 2004) (holding standing requires both a frustration of an  
14 organization’s mission and diversion of resources to combat the injurious behavior)).

15           In short, Plaintiffs are Arizona voters that are directly harmed by the Secretary’s  
16 violation of the NVRA, including harm to their constitutional right to vote in Arizona  
17 elections. As a result, Plaintiffs have adequately alleged particularized, individual harm  
18 sufficient to establish standing.

19           **B. Plaintiffs’ Injuries Are Attributable to the Secretary.**

20           The Secretary is responsible for maintaining voter rolls in compliance with the  
21 NVRA, and thus, any violation of this statutory responsibility is attributable to the  
22 Secretary. Specifically, the NVRA requires each State to “designate a State officer or  
23 employee as the chief State election official to be responsible for coordination of State  
24 responsibilities under” the law. 52 U.S.C. § 20509. Under Arizona law, the Secretary of  
25 State is designated as that individual pursuant to A.R.S. § 41-121(A)(9) & (13). Further,  
26 as Arizona’s chief election official, the Secretary “may not delegate the responsibility to  
27 conduct a general program to a local official and thereby avoid responsibility if such a  
28

1 program is not reasonably conducted.” *United States v. Missouri*, 535 F.3d 844, 850 (8th  
2 Cir. 2008).

3 Here, Plaintiffs allege an NVRA violation stemming from the Secretary’s failure to  
4 properly establish<sup>2</sup> and carry-out an NVRA-compliant program to maintain Arizona voter  
5 rolls. This violation is attributable to the Secretary because he has failed to fulfill his  
6 statutory duties under the NVRA. In his Motion to Dismiss, the Secretary does not dispute  
7 that, as a matter of law, he has this role and responsibility.

8 Nevertheless, the Secretary attempts to shirk this responsibility, and thereby  
9 undercut Plaintiffs’ standing argument, by distorting Plaintiffs’ data and disregarding  
10 Plaintiffs’ harm as “a direct result of a misapprehension of the statistics upon which they  
11 rely.” (ECF No. 20 at 11). However, this argument goes to the weight of the factual  
12 evidence and is improper at this stage of litigation in assessing Plaintiffs’ standing  
13 allegations.

14 The Secretary is also wrong on the law. Simply put, the Secretary’s artful  
15 interpretation of the data interpretation does not change the fact that, as a matter of law,  
16 the subject NVRA violations are directly attributable to him. Indeed, the final death knell  
17 for the Secretary’s standing argument comes from his own Motion to Dismiss, because he  
18 explicitly acknowledges that he has the responsibility of keeping and removing voters from  
19 Arizona’s voting rolls consistent with the NVRA. (*See* ECF No. 20 at 11) (“These  
20 registrants will be removed (or not) according to law<sup>3</sup>, but the Secretary is required to keep  
21 those voters on the rolls unless NVRA or another applicable law requires their removal.”).

22  
23  
24 <sup>2</sup> It is important to note, that before the Secretary can carry-out NVRA-compliant voter  
25 roll maintenance, he must first develop a program. Based on his own repeated admissions,  
26 he has failed to even develop a program. (*See* ECF Nos. 1-2; 1 ¶ 17) (The Secretary has  
27 repeatedly admitted to the Arizona Legislature that his voter roll maintenance “process is  
28 in development”). How can the Secretary administer a non-existent program?

<sup>3</sup> It is important to note that the language the Secretary uses is still not in compliance with  
the NVRA. The point of the NVRA is not that “these registrants will be removed (or not),”  
but that the Secretary has, and maintains, a program first to identify the ineligible  
registrants and then, second, to remove them according to the law. The Secretary casually  
glosses over the first requirement.

1 Thus, it is undisputed that an alleged NVRA violation related to the maintenance of voter  
2 rolls is traceable to the Secretary. This ends the traceability inquiry in this case.

3 But, to set the record straight, Plaintiffs note that the Secretary is also wrong on the  
4 facts. Specifically, Plaintiffs' expert has proffered reliable data from the U.S. Census  
5 Bureau, the Secretary of State registration database, and the EAC. This data demonstrates  
6 that Arizona's voter rolls contain an implausibly high number of registered voters that  
7 reflects a failure to properly remove ineligible voters. Plaintiffs have also proffered  
8 statements from the Secretary himself demonstrating his failure to properly implement  
9 NVRA procedures. (*See* ECF Nos. 1-2; 1 ¶ 17) ("The Secretary has admitted to the Arizona  
10 Legislature that he has not implemented an NVRA-compliant program to remove the  
11 names of ineligible voters from the official registration lists. Indeed, in every quarterly  
12 report since January 2023 provided to the Senate President and Speaker of the House—  
13 where the Secretary is required to account for voter roll list maintenance—the Secretary  
14 avers that the 'process is in development' rather than outlining his voter list maintenance  
15 procedures.").

### 16 **C. Plaintiffs' Requested Relief Will Redress the Plaintiffs' Claim.**

17 Plaintiffs bring this NVRA suit because they have been injured by the Secretary's  
18 failure to maintain Arizona's voter rolls in compliance with the NVRA. As a remedy,  
19 Plaintiffs seek both a declaration and injunction requiring the Secretary to comply with the  
20 NVRA. Thus, if the requested relief is granted by this Court, Plaintiffs' injuries would be  
21 redressed.

22 The Secretary's only response to redressability is to ignore Plaintiffs' central  
23 allegation in this lawsuit; that he has violated his voter roll maintenance duties under the  
24 NVRA. (*See* ECF No. 20 at 12). Specifically, without any legal basis, the Secretary,  
25 employing a remarkable capacity for circular logic, essentially re-writes Plaintiffs'  
26  
27  
28



1 Complaint by asserting (in a rather self-serving manner) that since he already complies  
2 with the NVRA, there is no wrong to redress.

3 This is nonsense. It is axiomatic that if Plaintiffs prevail in this suit—*i.e.*, the Court  
4 finds that the Secretary is violating the NVRA—then Plaintiffs’ requested relief would  
5 compel the Secretary to remedy this violation, which in turn redresses Plaintiffs’ injuries.

6 Once again, the Secretary, to justify his argument, engages in a factual debate about  
7 whether he did indeed comply with his duties under the NVRA. Arguing about the factual  
8 record is, of course, improper in the context of a motion to dismiss, and is an analysis best  
9 performed at a later stage in the case when there has been “further development of the  
10 record.” *See Judicial Watch, Inc.*, 554 F. Supp. 3d at 1108–09 (citation omitted); *see also*  
11 *Green*, 2023 U.S. Dist. LEXIS 45989, at \*14 (holding that analysis of purported NVRA  
12 compliance at the motion to dismiss stage is improper, and that “further development of  
13 the record” is necessary before such an analysis could be undertaken).<sup>4</sup>

14 This Court should not allow the Secretary to disguise his circular logic and  
15 presuppositions as a basis for dismissing this suit for a lack of standing.

16 A similar NVRA case out of a sister district court in the Ninth Circuit illustrates  
17 how a simple agreement that the government follow already existing state and federal  
18 requirements for voter list maintenance can lead to removing over 1 million otherwise  
19 invalid names from the state voter rolls. *See Judicial Watch, Inc. v. Logan*, No. 2:17-cv-  
20 8948, 2018 U.S. Dist. Lexis 151333, (C.D. Cal. 2017). Plaintiffs in the *Logan* case brought  
21 allegations similar to what Plaintiffs bring here—that when comparing CVAP to registered  
22 voters, several counties exceeded 100% of available voters that were registered.

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23 <sup>4</sup> Although the Secretary outlines what he asserts is his voter list maintenance process in  
24 his Motion to Dismiss, he has also stated to the legislature on multiple occasions that  
25 portions of his voter list maintenance program are “in development” and provided little to  
26 no details of his program. (*See, e.g.*, ECF Nos. 1-2). In discussing his voter list maintenance  
27 program, the Secretary seeks to have his cake and eat it too. When he has an affirmative  
28 duty to disclose details of his program to the Legislature, he provides little to no  
information—*i.e.*, program is “in development”. However, when filing a motion to dismiss  
to escape litigation, he has no problem stating that he is carrying-out a fully developed and  
detailed program. The Secretary’s conflicting statements alone create a fact issue that is  
improper to decide at this early stage.

1 Complaint, *Judicial Watch, Inc. v. Logan*, No. 2:17-cv-8948, (C.D. Cal. Dec. 13, 2017),  
2 ECF No. 1. In *Judicial Watch, Inc. v. Logan*, the defendants entered into a settlement  
3 agreement with the plaintiffs where they would essentially follow the law as presently  
4 outlined and specifically ensure that those who did not timely respond to address notices  
5 would be removed from voter rolls. Notice of Settlement, *Judicial Watch, Inc. v. Logan*,  
6 No. 2:17-cv-8948, (C.D. Cal. Jan. 13, 2019), ECF No. 96. In the months that followed Los  
7 Angeles County alone reported the removal of over 1.2 million ineligible voters from the  
8 County voter rolls. See *Judicial Watch: Los Angeles County Confirms Removal of 1.2*  
9 *Million Ineligible Voters From Rolls as Part of Lawsuit Settlement*, Judicial Watch (Feb.  
10 23, 2023) <https://www.judicialwatch.org/los-angeles-county-lawsuit-settlement/>. It is  
11 worth noting that Maricopa County, Arizona, is the second most populous voting  
12 jurisdiction in the United States, second only to Los Angeles County, California. See  
13 <https://www.maricopa.gov/5539/Voting-Equipment-Facts>.

### 14 **III. PLAINTIFFS HAVE PROPERLY STATED A CLAIM UNDER THE NVRA.**

15 As noted above, throughout his motion, the Secretary simply abandons the Rule  
16 12(b)(6) standard and engages in rebuttal of veracity and accuracy of Plaintiffs' factual  
17 claims. This is improper at the motion to dismiss stage, and it demonstrates why the  
18 Secretary's Motion to Dismiss should be denied.

19 A prime example of this is the Secretary's assertion that "active" registered voters  
20 is the correct metric to utilize (as opposed to "total" registered voters). At bottom, this  
21 dispute is a standard "battle of the experts" that is properly addressed *after* the motion  
22 dismiss stage of the case. Worse yet, the Secretary makes these factual assertions without  
23 any expert report or declarations; rather, the Secretary simply relies upon unfounded  
24 assertions made by their counsel and expects the Court to dismiss the suit on this basis.  
25 (ECF No. 20 at 17–18.)

26 To be clear, all of the data relied upon by Plaintiffs is reliable government data from  
27 the U.S. Census Bureau, the Secretary of State registration database, and the EAC. The  
28 Secretary himself recognizes that this data "is appropriate for judicial notice." (ECF No.

1 20 at 13.) This data serves as the basis for Plaintiffs’ factual allegations in support of their  
2 NVRA claim, and at this motion to dismiss stage, the Court must accept these factual  
3 allegations as true.

4 In another attempt to create a factual dispute, the Secretary argues that the existence  
5 of some of the provisions of the EPM somehow prove that he has complied with the  
6 NVRA. (*See* ECF No. 20 at 13–16). However, simply citing some of the provisions in the  
7 EPM does not support his conclusory allegation that he complied with his duties under the  
8 NVRA. The inquiry in this case centers on whether the Secretary’s *conduct* complies with  
9 the NVRA and not whether the EPM dictates certain responsibilities and procedures. In  
10 fact, the Secretary has expressly acknowledged that his NVRA program is incomplete and  
11 thus non-compliant. (*See* ECF Nos. 1-2; 1 ¶ 17 (“The Secretary has admitted to the Arizona  
12 Legislature that he has not implemented an NVRA-compliant program . . . the Secretary  
13 avers that the ‘process is in development’ rather than outlining his voter list maintenance  
14 procedures.”). Because the Secretary has already acknowledged that portions of his NVRA  
15 program are merely “in development,” at a minimum, his current reversal creates a factual  
16 dispute as to whether he had an NVRA-compliant program in place prior to this suit. *See*  
17 *supra.* at 7–9.

18 Next, the Secretary claims that Plaintiffs are “seek[ing] to force additional,  
19 unspecified measures to Arizona’s existing list maintenance program.” (ECF No. 20 at 2.)  
20 However, this is patently false and appears nowhere in Plaintiffs’ Complaint. Plaintiffs  
21 seek simple compliance with the NVRA and voter roll removals that are required by  
22 federal and state law—nothing more, nothing less.

23 Likewise, the Secretary’s assertion that Plaintiffs’ expert is “guessing” is also  
24 baseless. (ECF No. 20 at 2.) Plaintiffs’ expert employed the most rigorous methodology  
25 available to any expert, (*See* ECF No. 1-2), and relied upon data that the Secretary  
26 concedes should be judicially noticed. (ECF No. 20 at 13.) The Secretary’s “guessing”  
27 accusation misconstrues Plaintiffs’ expert’s attempt to provide the Secretary with every  
28 “benefit of the doubt” by comparing different census data periods with all the available

1 reliable sources of Arizona’s number of registered voters. (See ECF Nos. 1-2; 1 ¶¶ 36–58)  
2 Simply put, Plaintiffs’ expert looked at three different census estimates to determine  
3 CVAP—(1) 5-year 2017-2021 ACS CVAP; (2) 5-year 2018-2022 ACS CVAP; and (3) 1-  
4 year 2022 ACS CVAP—all from the U.S. Census Bureau and all reliable. *Id.* The expert  
5 then compared the different CVAP numbers against three different reliable sources to  
6 determine the number of registered voters in Arizona—(1) EAVS as reported by Arizona;  
7 (2) the Current Population Survey conducted by the U.S. Census Bureau; and (3) the  
8 Cooperative Election Study developed and maintained by leading academic institutions  
9 such as Harvard, Dartmouth, Georgetown, and Yale. *Id.* The “benefit of the doubt”  
10 difference between smallest registered voter number and the largest possible number from  
11 the national surveys is about 500,000. *Id.* The fact that *all* of the data sets indicate a lack  
12 of proper voter list maintenance actually serves as increased evidence of noncompliance  
13 on the part of the Secretary, not the other way around.

14 The Secretary’s comparison of Arizona’s voter roll removal numbers to those of  
15 other States is also irrelevant and unavailing. The Secretary argues that because Arizona  
16 sent “991,282 NVRA notices to Arizona registrants in 2022, a rate higher than any other  
17 state except Washington” then it is confirmed “that Arizona election officials comply with  
18 the statutory and regulatory requirements regarding list maintenance activities.” (ECF No.  
19 20 at 15). This logic is fatally flawed. The fact that other states have lower rates of voter  
20 removal has no bearing on whether Arizona is properly complying with the NVRA. The  
21 Secretary’s comparison of Arizona’s removal rate to the national average removal rate is,  
22 for the same reasons, baseless and overly simplistic. (ECF No. 20 at 15–16.) These faux  
23 statistical comparisons fail to provide any support for the Secretary’s assertion that he is  
24 complying with the NVRA.

25 The Secretary’s “my data fields are better” argument presents yet another factual  
26 issue that is not proper for this stage of litigation. The type of allegations made by Plaintiffs  
27 in this case are routinely accepted by courts as sufficient to plausibly raise an actionable  
28 claim. See *Judicial Watch, Inc.*, 554 F. Supp. 3d at 1107–08 (assuming allegations in

1 complaint are true, alleging that counties have a voter registration rate that exceeds 100%  
2 is sufficient to state a plausible claim); *see also Green*, 2023 U.S. Dist. LEXIS 45989, at  
3 \*12–14 (holding that allegations showing that at least 9 counties had voter registration  
4 rates that exceeded 100% creates a “strong inference of a violation of the NVRA”) (internal  
5 citation omitted).

6 Even if the Court were to entertain these baseless assertions, the Secretary’s attacks  
7 fail to undercut the Plaintiffs’ alleged NVRA claim. Interestingly, the Secretary attacks the  
8 ACS data relied upon by Plaintiffs’ expert. (*See* ECF No. 20 at 15–17.) Yet, the ACS is  
9 the *only* source of CVAP data in the country and is used by the U.S. Department of Justice  
10 in Voting Rights Act litigation.<sup>5</sup> Moreover, the Election Administration and Voting Survey  
11 (“EAVS”) uses the CVAP data in its own reporting of voter turnout.<sup>6</sup>

12 The Secretary’s inability to explain the disparities in voter roll reporting across  
13 counties further supports Plaintiffs’ NVRA claim. The NVRA requires that the Secretary  
14 adopt a “uniform” program for voter list maintenance in Arizona. *See* 52 U.S.C. §  
15 20507(b)(1). To the extent there are differences in voter roll reporting across counties, (*see*  
16 ECF No. 1 ¶ 99), the Secretary is required to identify and understand these differences  
17 given his statutory duty to maintain a “uniform” program, 52 U.S.C. § 20507(b)(1). The  
18 Secretary’s inability to identify and understand these disparities—coupled with his  
19 unfinished “in development” NVRA program and rampant voter roll issues—underscores  
20 the Secretary’s failure to comply with the NVRA.

21 The Secretary, as well as the *amicus*, attempt to portray Plaintiffs as part of a  
22 national conspiracy to undermine election integrity. That is baseless. This case is readily  
23 distinguishable from other election cases brought across the country. Unlike in other  
24 election cases referenced by the Secretary and *amicus*, Plaintiffs here rely upon expert

25  
26 <sup>5</sup> *Citizen Voting Age Population by Race and Ethnicity*, United States Census Bureau (Jan.  
27 23, 2024), [https://www.census.gov/programs-surveys/decennial-census/about/voting-  
rights/cvap.2019.html](https://www.census.gov/programs-surveys/decennial-census/about/voting-rights/cvap.2019.html).

28 <sup>6</sup> *Election Administration and Voting Survey (EAVS) Comprehensive Report*, United States  
Election Assistance Commission (June 20, 2024), [https://www.eac.gov/research-and-  
data/studies-and-reports](https://www.eac.gov/research-and-data/studies-and-reports).

1 methodology that analyzes reliable, publicly available data from the U.S. Census Bureau,  
2 the Secretary of State registration database, and the EAC. They have contracted a well-  
3 regarded expert to conduct a voter data analysis utilizing expert methodology and this  
4 reliable data. (See ECF No. 1-1). Plaintiffs are also Arizona citizens who have brought a  
5 cause of action expressly permitted by the NVRA, and their cause of action is focused  
6 solely on ensuring the integrity of Arizona's voter rolls. Unable to prevail on the Rule  
7 12(b)(1) and 12(b)(6) standards, the Secretary and *amicus* have resorted to diversion,  
8 fearmongering, and hyperbole. These improper, extra-judicial attacks should not distract  
9 from the fact that the Plaintiffs have properly established standing and an NVRA claim.

10 **CONCLUSION**

11 For the foregoing reasons, this Court should deny the Secretary's Motion to Dismiss  
12 pursuant to Rules 12(b)(1) and 12(b)(6).

13 Respectfully submitted this 25th day of July 2024.

14  
15 /s/ Andrew Gould

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**CERTIFICATE OF SERVICE**

I hereby certify that on this 25th day of July 2024, I caused the foregoing document to be electronically transmitted to the Clerk’s Office using the CM/ECF System for Filing, which will send notice of such filing to all registered CM/ECF users.

/s/ Andrew Gould  
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