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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

American Encore, an Arizona non-profit corporation; Karen Glennon, an Arizona individual; American First Policy Institute, a non-profit corporation,

Plaintiffs,

v.

Adrian Fontes, in his official capacity as Arizona Secretary of State; Kris Mayes, in her official capacity as Arizona Attorney General; Katie Hobbs, in her official capacity as Governor of Arizona,

Defendant.

No. CV-24-01673-PHX-MTL

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

INTRODUCTION

In Count One of Plaintiffs' Complaint, they challenge a single sentence in the 2023 Elections Procedures Manual that is fully supported by state law and works no injury on Plaintiffs either at present or in any circumstances sufficiently likely to arise in the foreseeable future. In particular, they allege that their voting rights are "degraded" by a provision that states that "[i]f the official canvass of any county has not been received by [the statutory deadline for counties to transmit their canvasses to the Secretary], the Secretary of State must proceed with the state canvass without including the votes of the missing county (i.e., the Secretary of State is not permitted to use an unofficial vote count in lieu of the county's official canvass)." (Doc. 16-1, at 4) (the "Canvass Provision"). Plaintiffs ask that this Court enjoin enforcement of this provision, but they have not put forward sufficient allegations to show that they have suffered or will imminently suffer a concrete and particularized injury based on its existence. But without a real threat that the Canvass Provision will actually disenfranchise Plaintiffs, any remedy this Court crafts will amount to an advisory opinion. This Court should not accept Plaintiffs' invitation to abandon its duty to only rule in cases or controversies where Plaintiffs have established Article III standing.

Plaintiffs' sprawling "Consolidated" Response to the Secretary's and the Attorney General's separate Motions to Dismiss and Reply in support of their two Motions for Preliminary Injunction ("PI") is a jumble of arguments on both counts of their Complaint and the two PI Motions. But despite their attempts to obfuscate and confuse, a simple fact remains—standing is the "irreducible constitutional minimum" that should both begin and end this Court's consideration of the Canvass Provision because Plaintiffs have not established any of the necessary components to give this Court subject matter jurisdiction over Count One of the Complaint.[1] *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992).

[1] As with the Defendants' separate Motions to Dismiss (Doc. 31, 33), the Secretary joins the Attorney General's Reply in Support of Motion to Dismiss Count 2 of the Complaint

ARGUMENT

I. All Plaintiffs Lack Standing to Challenge the Canvass Provision.

A. The Allegations of Plaintiffs' Complaint Do Not Support Representational Standing.

In his Motion to Dismiss, the Secretary focused the standing analysis on Plaintiff Karen Glennon because she is the only Plaintiff alleged to be a voter. (*See* Doc. 1, ¶¶ 19-21). Only a voter may face potential harm if their vote is not included in the certified results of an election. Indeed, when describing the organizational parties, American Encore and America First Policy Institute ("AFPI"), Plaintiffs did not assert that they faced disenfranchisement. Instead, they described their interests in "engaging in electioneering communications," "advanc[ing] or oppos[ing] legislation," and training "poll workers how to focus on election integrity"—*i.e.*, speech-related activities that are the subject of Count Two of the Complaint. (*Id.* ¶¶ 12-13, 24).

The Complaint's sole allegation regarding the organizational Plaintiffs' relationship to voters is that "Plaintiffs AFPI and American Encore's supporters and/or sympathetic voters and Plaintiff AFPI's members similarly will cast votes in the November 5, 2024 general election." (Doc. 1, ¶ 99). Based on this allegation and the others describing American Encore's activities, Plaintiffs have not pled that American Encore has any members at all, let alone members that are harmed by the Canvass Provision. (*See id.* ¶¶ 11-18). "Sympathetic voters" presumably is intended to mean voters who are sympathetic to issues the organizational Plaintiffs support. But the ability of voters who agree with Plaintiffs' policy positions to cast a ballot that is included in the

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with Prejudice (Doc. 50). And like the Attorney General, in this Reply, the Secretary focuses on the allegations of the Complaint and relevant law, and not the evidentiary and extra-record citations contained in Plaintiffs' Consolidated Response and Reply (Doc. 47). But by not treating this Reply as an opportunity to submit a surreply to Plaintiffs' Motion for Preliminary Injunction (Doc. 26), the Secretary does not concede the accuracy or merit of the matter outside the Complaint that Plaintiffs included in their "Consolidated" filing.

state canvass is exactly the same as those voters who are unsympathetic to Plaintiffs' causes. This is precisely the type of vote dilution claim that the Ninth Circuit soundly rejected within the last month. *See Election Integrity Project Calif., Inc. v. Weber* ("*EIPCa*"), No. 23-55726, 2024 WL 3819948, *13 (9th Cir. Aug. 15, 2024) ("A vote dilution claim requires a showing of disproportionate voting power for some voters over others.").

AFPI, on the other hand, alleges that it is a membership organization. As such, it could theoretically demonstrate representational standing by making specific, factually-supported allegations of injury to those members. But the Complaint merely alleges that AFPI "has about 300,000 members who are widely dispersed throughout the United States," who "routinely advocate for governmental policies to their peers, including in Arizona." (*Id.* ¶ 29). Absent from the Complaint's allegations is any concrete assertion that AFPI's members include *Arizona registered voters* who plan to vote in the 2024 General Election.

In the Declaration of Catharine Cypher that accompanied Plaintiffs' Motion for Preliminary Injunction regarding Count One, Cypher asserted that people become members of AFPI by signing up to receive email from the organization, that it has approximately 2600 members in Arizona, and that based on her experience with AFPI's membership, she estimates that "approximately more than half of AFPI's members are registered voters." (*See* Doc. 26-5, ¶¶ 6-9). In short, it is clear that Ms. Cypher is only guessing that AFPI members include registered Arizona voters who plan to vote in November. This is a far cry from meeting the requirement that organizational plaintiffs "make *specific allegations* establishing that at least one identified member had suffered or would suffer harm." *Summers v. Earth Island Institute*, 555 U.S. 488, 498 (2009) (emphasis added) (requiring "affidavits . . . showing, through specific facts . . . that one or more of [its] members would . . . be 'directly' affected by the allegedly illegal activity") (quoting *Lujan*, 504 U.S. at 563).

Plaintiffs argue that they need not specifically identify any injured members because the Ninth Circuit "see[s] no purpose to be served by requiring an organization to identify by name the member or members injured." *Natl. Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015). But that exception to the rule in *Summers* applies only "[w]here it is relatively clear, *rather than merely speculative*, that one or more members have been or will be adversely affected by a defendant's action." *Id.* (emphasis added). But injury to voters from the Canvass Provision is wholly speculative. As such, something more than Plaintiffs' vague and conclusory allegations about AFPI's members' injury is required.

Plaintiffs attempt to avoid this requirement for organizational standing by making a specious and frankly outrageous argument that it would be dangerous for them to identify any of their members because the Secretary "has made clear his willingness to invite retaliation against those who sue him." (Doc. 47, at 22). But the Secretary expressing his opinion of the effect of an organization's litigation efforts on election officials' ability to provide voters with an opportunity to cast their votes in an environment free from intimidation and harassment does not constitute any threat against voters. Indeed, the reason the Secretary spoke out was because he feared harm to voters. Nor does Plaintiffs' overwrought characterization of the Secretary's comments excuse Plaintiffs from meeting the requirements of organizational standing.[2]

At bottom, even if this Court were to conclude that AFPI has met the requirement for representational standing, Plaintiffs have alleged no injury to AFPI's members that is different from what Plaintiff Karen Glennon has alleged. Accordingly, as explained in

[2] It merits note that the Secretary's statements that Plaintiffs characterize as "invit[ing] retaliation" all came in the aftermath of the Maricopa County Superior Court's ruling in *Arizona Free Enter. Club v. Fontes*, No. CV2024-002760 on August 5—after Plaintiffs filed their Complaint and Motion for Preliminary Injunction in this action. None of the Secretary's alleged statements calls for retaliation against the Arizona Free Enterprise Club or its members. Indeed it is Plaintiffs who added "and, presumably, its members" to their description of the Secretary's statements. (Doc. 47, at 10).

the Secretary's Motion to Dismiss and discussed below, none of the Plaintiffs have established Article III standing to challenge the Canvass Provision.

B. Plaintiffs' Claims of Disenfranchisement Are too Speculative to Afford Standing.

To invoke this Court's jurisdiction, Plaintiff bears the burden of establishing each element of standing. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). "[A]t an 'irreducible constitutional minimum,'" a plaintiff must have (1) suffered an injury in fact, (2) that is fairly traceable to the defendant's conduct, and (3) susceptible to redress by a decision in their favor. *Lake v. Fontes*, 83 F.4th 1199, 1202-03 (9th Cir. 2023) (cleaned up). Neither "abstract, theoretical concerns," nor an "interest shared generally with the public at large in the proper application of the Constitution and laws," will satisfy constitutional standing requirements." *Id.*

Plaintiffs offer two alternative injuries to support their claim that they have standing to challenge the Canvass Provision—complete disenfranchisement or the "degrad[ing]" of their right to vote "from unconditional to conditioned on how officials choose to discharge their duties." (Doc. 47, at 27). But, as a matter of law, neither alleged injury is sufficient to demonstrate standing. The first is too speculative and is not fairly traceable to the challenged EPM provision. *See, e.g., Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). While the second is no injury at all. *See, e.g., Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (recognizing that there must be "substantial regulation of elections").

Plaintiffs have not established that they have "suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339 (2016) (*quoting Lujan*, 504 U.S. at 560 (1992)). A "concrete" and "particularized" injury must be "real," not "abstract." *Id.* And it must be "certainly impending." *Clapper*, 568 U.S. at 409. But Plaintiffs' allegations of the possible future harm of disenfranchisement due to the

Canvass Provision are "far too speculative and conjectural" to establish standing. *Drake v. Obama*, 664 F.3d 774, 781 (9th Cir. 2011).

Indeed, Plaintiffs' Response proves this point. As in the Complaint, they point to Cochise County's delayed canvass in 2022 and one member of the Pinal County Board of Supervisors' "flirtation" with not performing his mandatory statutory duty to canvass the 2024 Primary Election. (Doc. 47, at 28). But neither of these events led to the Secretary excluding any county's results from the statewide canvass. Moreover, the steps that the Defendants have taken since the 2022 election—seeking mandamus relief against the members of the Cochise County Board of Supervisors who refused to timely canvass, prosecuting those members for violating their statutory duties, and including the Canvass Provision in the EPM, make the prospect of a county not carrying out its mandatory duty at the time required by law even less likely than before.

Having no actual incident of a canvassing failure to demonstrate that Plaintiffs face imminent injury, they instead dream up yet another fantastical scenario where a County would fail to timely canvass an election. Plaintiffs imagine what would happen if three members of the Maricopa County Board of Supervisors, "driving in a car together in late November 2024 . . . get into a fatal crash" depriving the Board of a quorum, thus preventing it from timely canvassing the election. (Doc. 47, at 30). This is precisely the kind of "long chain of hypothetical contingencies that have never occurred in Arizona and must take place for any harm to occur." *Lake*, 83 F.4th at 1204 (cleaned up). Plaintiffs' imagined scenario, "is the kind of speculation that stretches the concept of imminence 'beyond its purpose.'" *Id.* (quoting *Lujan*, 504 U.S. at 564 n.2). And this Court must not "entertain 'imaginary' cases." *See EIPCa*, 2024 WL 3819948, at *13 (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449-50 (2008).

To the extent that Plaintiffs claim that they have standing for a claim against the Attorney General arising out of the Canvass Provision, the "long chain of hypothetical

contingencies" gets even longer. *Lake*, 83 F.4th at 1204. Indeed, Plaintiffs argue that the Attorney General could prosecute the Secretary for not implementing the Canvass Provision. (Doc. 47, at 38). Setting aside that non-enforcement of the Canvass Provision is precisely what Plaintiffs desire, adding one more link to the chain only weakens Plaintiffs' standing argument. As such, Plaintiffs have failed to plead a plausible "real and immediate threat of" harm to their right to vote, and their claim regarding the Canvass Provision based on disenfranchisement fails at the first step of the standing analysis. *Id.* (quoting *City of Los Angeles v. Lyons,* 461 U.S. 95, 103 (1983)).

C. Plaintiffs' Feared "Qualification" of their Right to Vote Is Not a Cognizable Injury.

Plaintiffs can only get to an injury that is not wholly speculative, by arguing that the mere existence of the Canvass Provision "degrades" their right to vote from an unqualified right to one that is conditioned on election officials complying with their legal duties. (Doc. 47, at 2). Essentially, Plaintiffs' theory seems to be that that their right to vote is diminished because the fear that the votes from one or more counties will not be included in the state canvass looms over them. But, as discussed in the preceding section, that fear is of a scenario that is exceptionally unlikely to ever come to pass. Moreover, virtually any regulation of voting could cause the "degradation" of which Plaintiffs complain. *See Burdick*, 504 U.S. at 433 ("Election laws will invariably impose some burden upon individual voters."). For example, a housebound voter could fear that election officials might fail to mail them a ballot in time to vote. But that fear does not a concrete injury make.

Indeed, Plaintiffs' fear that the Secretary will use the Canvass Provision to exclude the votes of all the voters in a county is no more concrete for plaintiffs than it is for another voter who fears their vote will not be counted because someone might hack voting equipment, that illegal, ineligible, duplicate, purely fictitious ballots might be counted, or because some ineligible mail ballots might slip through a county's security

measures. *See Lake*, 83 F.4th at 1203-04*; Bowyer v. Ducey*, 506 F. Supp. 3d 699, 707 (D. Ariz. 2020); *EIPCa,* 2024 WL 3819948, at *11 n.13. But unfounded or overblown fears such as those Plaintiffs express do not actually burden the right to vote. As such, Plaintiffs cannot establish the concrete injury sufficient to demonstrate standing.

Moreover, Plaintiffs admit that the harm they allege is not particularized. Indeed, they expressly assert that "[a]ll Arizona voters are clearly affected by the very same diminution of their right to vote." (Doc. 47, at 22). Consequently, their allegations of the "degradation" of their right to vote "are nothing more than generalized grievances that any one of the [4-plus] million Arizonans [eligible to vote] could make if they were so allowed." *Bowyer*, 506 F. Supp. 3d at 711 (concluding that Plaintiffs lacked standing to assert a vote dilution claim).

II. The Eleventh Amendment Bars Plaintiff's Claim.

Plaintiffs argue that the Eleventh Amendment does not bar their claim regarding the Canvass Provision because their claim is purely federal and not a state law claim masquerading as a federal claim in an effort to evade sovereign immunity. (Doc. 47, at 32-33). They complain that the Secretary did not identify the state law claim they have tried to dress up as a federal claim to avoid this constitutional bar. (*Id.* at 33). But Plaintiffs' Response also includes lengthy discussion of how the Canvass Provision is inconsistent with Arizona law defining the Secretary's duty to canvass—*i.e.,* the state law claim that shows that the *Ex Parte Young* exception to Eleventh Amendment Immunity does not cover Count One.[3] (*See* Doc. 47, at 13-15).

[3] It merits note that in the parallel state court proceeding involving one of the Plaintiffs in this case, Plaintiff AFPI made a claim that the Canvass Provision was void because it violated Arizona law. *Arizona Free Enter. Club v. Fontes*, No. CV2024-002760, 1st Am. Compl. ¶¶ 146-48 (Ariz. Super. Ct. Maricopa Cnty.). After the parties consulted in advance of filing motions to dismiss in that case, including discussion of the repeal of A.R.S. § 16-648(C), Plaintiffs, including AFPI, voluntarily dismissed that claim. *Id.* Pl's. Not. of Limited Voluntary Dismissal, at 2. AFPI now raises here a slightly different claim based on state law that it could have pursued in the state court action, but declined to.

Plaintiffs argue that state law gives the Secretary options beyond instituting a mandamus action to force a county to meet its canvassing obligation. But this is based on Plaintiffs' misreading of the canvassing statutes and their adding words to the state law that are not there. First, they argue that A.R.S. § 16-648 mandates that the Secretary canvass "'all' statewide votes." (Doc. 47, at 14). But A.R.S. § 16-648 does not say that. It says that the Secretary must canvass all *offices* and *ballot measures* for which the Secretary is the filing officer, it is silent on which votes are included in that canvass. *Id.* And Plaintiffs' remaining statutory discussion, of A.R.S. §§ 16-643, -644, -645(A), and -646, relates to statutes that impose duties on the governmental body conducting an election—*i.e.,* a city, town, or county—to canvass the elections they conduct. None of the cited statutes relate to the Secretary's duty. Indeed, throughout the canvassing article in Title 16, only A.R.S. §§ 16-642(A)(2), -645(B)-(F), -646(B), and -648 set forth the Secretary's duties. Among those duties are the requirement that the Secretary "shall canvass" "not later than" a date certain, depending on whether the election is a primary or a general election. A.R.S. § 16-642(A)(2). Plaintiffs never explain how the Secretary can lawfully disregard this mandatory statutory duty.

As the foregoing discussion shows, Plaintiffs' claim regarding the Canvass Provision turns on application of state law. As such it is barred by the Eleventh Amendment. Courts have repeatedly rejected similar state law claims cloaked as federal law violations. *See, e.g.*, *Lake v. Hobbs*, 623 F. Supp. 3d 1015, 1030 (D. Ariz. 2022) ("Courts have repeatedly rejected alleged federal constitutional claims that rely on a determination that state officials have not complied with state law."); *Bowyer*, 506 F. Supp. 3d at 716 ("where the claims are state law claims, masked as federal law claims" Eleventh Amendment immunity applies) (citing *Massey v. Coon*, 865 F.2d 264 (9th Cir. 1989)). The remedy if the harm Plaintiffs fear ever comes to pass is in state court, and this Court should not become "impermissibly 'entangled, as an overseer and micromanager, in the minutiae of state election processes." *Lake*, 623 F. Supp. 3d at

1030 (quoting *Ohio Democratic Party v. Husted*, 834 F.3d 620, 622 (6th Cir. 2016)) (cleaned up).

III. Plaintiffs Also Fail to State a Claim for Relief Under Rule 12(b)(6).

The Secretary acknowledges that if Plaintiffs in fact voted, and their votes were not included in the final results for the races that are included in the state canvass, that could constitute a severe burden on their right to vote. *See EIPCa,* 2024 WL 3819948, at 17. It is for that reason that the Secretary has committed to "use all lawful means . . . including seeking judicial remedies," to avoid that result. (*See* Doc. 26-3). Consequently, the burden on Plaintiffs' right to vote under the presently existing circumstances is not severe, and is little more than a nagging fear that something might go wrong in the process. That fear, is not a severe burden, and is therefore wholly insufficient to override the Secretary's interest in promulgating the Canvass Provision that serves to encourage counties to meet their mandatory obligation to timely canvass their elections.

It follows inexorably from Plaintiffs' failure to establish standing that, as a matter of law, they have not demonstrated an unconstitutional burden on their right to vote. Plaintiffs' vote dilution or (diminution) theory is not a cognizable constitutional claim. *See EIPCa*, 2024 WL 3819948, at *11 n.13. Indeed, the Supreme Court and the Ninth Circuit "have repeatedly upheld as 'not severe' " regulations impacting the right to vote "that are generally applicable, even-handed, politically neutral, and . . . protect the reliability and integrity of the election process." *Id.* at *8 (quoting *Dudum v. Arntz*, 640 F.3d 1098, 1106 (9th Cir. 2011) (alteration in original)). Plaintiffs' purported fear that their votes will not be included in the statewide canvass, if some as-yet unknown and unknowable intervening bad act prevents timely transmission of a county's canvass to the Secretary is nowhere near enough to outweigh the Secretary's interest in promulgating a rule concerning his nondiscretionary duty to canvass within the statutory time frame.

CONCLUSION

For the foregoing reasons, the Court should dismiss Count One with prejudice.

RESPECTFULLY SUBMITTED this 5th day of September, 2024.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of September, 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/Karen J. Hartman-Tellez