IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 20-cv-02992-PAB-KMT

JUDICIAL WATCH, INC., et al.,

Plaintiffs,

v.

JENA GRISWOLD,

Defendant.

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION FOR RECONSIDERATION OR CERTIFICATION UNDER 28 U.S.C. § 1292(b)

Plaintiffs Judicial Watch, Inc., Elizabeth Miller, Lorri Hovey, and Mark Sutfin ("Plaintiffs") submit this memorandum of law in opposition to defendant Secretary Griswold's ("Defendant's") Motion for Reconsideration Or, In the Alternative, for Certification Under 28 U.S.C. § 1292(b). Doc. 62.

Introduction

On August 16, 2021, this Court issued an order granting in part and denying in part Defendant's motion to dismiss. Doc. 57. Defendant filed a motion for reconsideration or for certification of an interlocutory appeal on August 30, 2021. Doc. 62. Defendant argues in this motion that a Supreme Court ruling, *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), issued on June 25, 2021, constitutes intervening authority that should cause this Court either to reconsider and alter its ruling or to certify an interlocutory appeal regarding it.

Nothing in Defendant's motion can justify the requested relief. As *TransUnion* itself proves, the supposedly new principle identified by Defendant was in fact stated in prior Supreme

Court cases. The motion for reconsideration reduces to an effort to argue a point Defendant did not raise, but could have raised, in prior briefing; and also to revisit previous arguments. These are inappropriate grounds for reconsideration. In any event the new and rehashed arguments fail.

Defendant also fails to make the exceptional showing necessary to justify an interlocutory appeal. In particular, even if Defendant were to prevail on the argument concerning standing it wishes to raise now (and Defendant should not prevail), an alternative ground for standing would still remain to be litigated. This fact, and the stay Defendant requests, mean that there would be no saving of judicial resources that would justify an interlocutory appeal.

ARGUMENT

I. The Request for Reconsideration Should be Denied.

A. Standards for a Motion for Reconsideration.

"Grounds warranting a motion to reconsider include (1) an intervening change in the controlling law, (2) new evidence previously unavailable, and (3) the need to correct clear error or prevent manifest injustice." *Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (citation omitted). Such a motion "is not appropriate to revisit issues already addressed or advance arguments that could have been raised in prior briefing." *Id*. (citations omitted).

The justification for a motion to reconsider must be strong. "[A]s a practical matter, to succeed in a motion to reconsider, a party must set forth facts or law of a strongly convincing nature to induce the court to reverse its prior decision." *Woodfork v. Jefferson Cty. Fairgrounds*, No. 20-cv-1173-WJM-NYW, 2021 U.S. Dist. LEXIS 120775, at *3 (D. Colo. June 29, 2021) (citations omitted). "Because the conditions that justify granting a motion to reconsider are rarely present, such motions are disfavored and should be equally rare." *Sports Rehab Consulting LLC*

v. Vail Clinic, Inc., No. 19-cv-2075-WJM-GPG, 2021 U.S. Dist. LEXIS 25270, at *5 (D. Colo. Feb. 10, 2021) (citation omitted).

In this motion, Defendant argues that there has been an intervening change in controlling case law. Doc. 62 at 6. For a new case to justify reconsideration, it must "generally or substantively alter existing law, such as by overruling it, or creating a significant shift in a court's analysis." *Teamsters Local 617 Pension & Welfare Funds v. Apollo Group, Inc.*, 282 F.R.D. 216, 224 (D. Ariz. 2012). Naturally, if the intervening case is distinguishable, it will not justify reconsideration. *See Tarver v. Ford Motor Co.*, No. CIV-16-548-D, 2017 U.S. Dist. LEXIS 130517, at *7 (W.D. Okla. Aug. 16, 2017) (denying reconsideration where "the facts of the present case" and an intervening case "are distinguishable").

B. There Has Been No Change in Controlling Law.

The only argument Defendant makes in support of reconsideration is that there has been an intervening change in controlling law. Doc. 62 at 6. Defendant's motion is fundamentally flawed for the simple reason that there has been no such change. Defendant asserts that *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), which was decided on June 25, 2021, "expanded" previous case law when it

> emphasized—even opening its opinion with this point—that a plaintiff seeking standing based on a statutory cause of action only satisfies the injury-in-fact requirement if their injury "has a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts." 141 S. Ct. at 2204 (quotations omitted).

Doc. 62 at 3-4.

The claim that this is an innovation in *TransUnion* is simply not so. The *TransUnion* opinion itself, in the quote Defendant cites, plainly attributed this principle to a case from five

years ago. "[T]his Court's opinion in *Spokeo* v. *Robins* indicated that courts should assess whether the alleged injury to the plaintiff has a 'close relationship' to a harm 'traditionally' recognized as providing a basis for a lawsuit in American courts." *TransUnion*, 141 S. Ct. at 2204 (citing *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1549 (2016)). *Spokeo* in turn cited *Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 774 (2000) ("Article III's restriction … is properly understood to mean 'cases and controversies of the sort traditionally amenable to, and resolved by, the judicial process.'"); and *Steel Co. v. Citizens for Better Environment*, 523 U.S. 83, 102 (1998) ("We have always taken [Article III] to mean cases and controversies of the sort traditionally amenable to and resolved by the judicial process."). *See also Coleman v. Miller*, 307 U.S. 433, 460 (1939) (Frankfurter, J., concurring) (the framers "gave merely the outlines of what were to them the familiar operations of the English judicial system … Judicial power could come into play only in matters that were the traditional concern of the courts at Westminster").

Because *TransUnion* does not change controlling law, it cannot be used as a basis for reconsideration. *Teamsters Local 617*, 282 F.R.D. at 224 (reconsideration is not warranted for "cases which merely confirm, clarify or explain existing case law"). Indeed, Defendant could have cited *Spokeo* in the motion to dismiss and made the argument that is being made here. Defendant failed to do so, however, and it is inappropriate to rely on a motion for reconsideration to attempt to raise it now. *Servants of the Paraclete*, 204 F.3d at 1012 (reconsideration "is not appropriate to … advance arguments that could have been raised in prior briefing"); *Bouard v. Ramtron Int'l Corp.*, No. 12-cv-00494-WYD-MJW, 2014 U.S. Dist. LEXIS 49009, at *3 (D. Colo. April 9, 2014) (motions to reconsider are not to be used as a "second chance when a party has failed to present

its strongest case in the first instance") (citations and internal quotations omitted).[1]

In an effort to find something new in *TransUnion*, Defendant also argues that it identifies "Article II concerns" along with potential Article III problems "at play when Congress grants a statutory cause of action." Doc. 62 at 4; *see TransUnion*, 141 S. Ct. at 2207. This lone reference to Article II in *TransUnion* is not further developed or applied in the case and is irrelevant to its outcome. Moreover, given that a lack of standing under Article III would suffice to dismiss any federal case, it is hard to see what this point adds. Defendant also claims that "[s]cholars have begun to note the significant new ground treaded [in] *TransUnion*," but the two cited articles make no reference to the potential effect on voting laws or cases. Doc. 62 at 4. For that matter, neither does *TransUnion*, 141 S. Ct. at 2200, or *Spokeo*, 136 S. Ct. at 1542, both of which were class actions under the Fair Credit Reporting Act.

In sum, there has been no change in controlling law. Defendant simply proposes an argument that could have been made, but was not made, in the motion to dismiss. As this is not a proper ground for moving to reconsider, Defendant's motion should be denied.

C. If the Court Reaches It, Defendant's Argument Should be Rejected Because Plaintiffs Have Alleged Injuries Closely Related to Harms Traditionally Recognized as Providing Bases for Standing in Voting Cases.

As set forth above, Defendant has presented no basis for reconsideration. If the Court does reconsider the issue of standing, however, Plaintiffs respectfully submit that its initial ruling was

[1] Note also that *TransUnion* was decided on June 25, 2021, and this Court issued its decision on August 16, 2021. Defendant had over seven weeks to notify the Court of any allegedly new authority. Defendant excuses this failure on the ground that the complaint "focus[ed] on organizational standing," and it was "not anticipate[d] that the Court would focus on individual standing." Doc. 62 at 6 n.1. Yet both bases for standing were raised in the complaint and argued in the briefs. Defendant's mistaken "focus" cannot excuse this failure to raise the argument earlier.

correct. Defendant now argues that Plaintiffs must identify "a close historical or common-law analogue for their asserted injury." Doc. 62 at 6 (citing, *inter alia, TransUnion*, 141 S. Ct. at 2204). Plaintiffs can identify a number of such analogues. Note that this is a flexible inquiry, in which

> we are meant to look for a "close relationship" in kind, not degree. In other words, while the common law offers guidance, it does not stake out the limits of Congress's power to identify harms deserving a remedy. Congress's power is greater than that: it may elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law.

Lupia v. Medicredit, Inc., No. 20-1294, 2021 U.S. App. LEXIS 24547, at *13 (10th Cir. Aug. 17, 2021) (quoting *Gadelhak v. AT&T Servs., Inc.*, 950 F.3d 458, 462-63 (7th Cir. 2020) (Barrett, C.J.), *cert. denied*, 2021 U.S. LEXIS 2052 (April 19, 2021)).

For well over a century the Supreme Court has acknowledged voting to be "a fundamental political right, because preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886); *see Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964) ("Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society."). Given the critical importance of the franchise, "any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id.* at 562. Accordingly, the Supreme Court's jurisprudence has not limited standing in voting cases only to those citizens who have been completely deprived of the right to vote. On the contrary, when it comes to voting rights, the Supreme Court has long taken an expansive view of the kinds of harm that give rise to justiciable claims. For example:

(1) The reapportionment cases established that voters' rights are violated if legislative districts have unequal populations, so that votes cast in more populous districts are worth less than votes cast in less populous districts. *See Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds*, 377 U.S. at 568 (state legislative districts); *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964) (congressional

districts). In *Baker*, which first held that such claims were justiciable, the dissent dismissed the idea that voting rights had been infringed: "Appellants invoke the right to vote and to have their votes counted. But they are permitted to vote and their votes are counted. They go to the polls, they cast their ballots, they send their representatives to the state councils." *Baker*, 369 U.S. at 299-300 (Frankfurter, J., dissenting). But the majority adopted a broader approach to the relevant injury, holding that "voters who allege facts showing disadvantage to themselves as individuals have standing to sue." *Id*. at 206. Thus, the allegation that malapportioned districts "disfavor[] the voters" in over-populated counties stated an injury under the Fourteenth Amendment. *Id*. at 207.

(2) In *Thornburg v. Gingles*, 478 U.S. 30, 47-51 (1986), the Court interpreted Section 2 of the Voting Rights Act (52 U.S.C. § 10301) to forbid multimember or at-large voting systems in circumstances where they usually result in the defeat of candidates supported by minority voters. To prevail on such a claim, there was no need to show an outright denial of the right to vote. Nor was it necessary to show that the electoral system was motivated by a racially discriminatory purpose. *Gingles*, 478 U.S. at 34. Rather, the injury consisted of the fact that the system had the *effect* of impairing minority voters' "ability to elect representatives of their choice." *Id*. at 46.

(3) Administrative burdens on voting are judged under the Supreme Court's *Anderson-Burdick* balancing test. A "challenge to a state election law" requires courts to "weigh 'the character and magnitude of the asserted injury' … 'the precise interests put forward by the State as justifications' … [and] 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)). This scrutiny "will wax and wane with the severity of the burden imposed" on voting rights. *Fish v. Schwab*, 957 F.3d 1105, 1124 (10th Cir. 2020). Yet "*Anderson-*

Burdick scrutiny is required even … when the burden imposed may appear slight." *Id*. This means that voters enduring even a "slight" burden will have standing to challenge state election laws. *See*, *e.g.*, *Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1351 (11th Cir. 2009) ("Even if [individual plaintiffs] possessed an acceptable form of photo identification, they would still have standing to challenge the statute that required them to produce [it] to cast an in-person ballot.").

Federal courts have recognized constitutional and statutory standing based on similarly indirect, inchoate, or partial burdens, barriers, or inconveniences in a number of voting contexts[2]—including under the NVRA. As Plaintiffs discussed at length in their opposition to the motion to dismiss (Doc. 35 at 8-9), the same Section 8(a)(4) claims at issue here were asserted in *Judicial Watch, Inc. v. King*, 993 F. Supp. 2d 919 (S.D. Ind. 2012). That court cited the Supreme Court's declaration that "the right of suffrage can be denied by a debasement or dilution of … a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise." *Id*. at 924 (quoting, *inter alia*, *Reynolds*, 377 U.S. at 555). It cited the Supreme Court's observation that "[v]oter fraud drives honest citizens out of the democratic process," and that "[v]oters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised." *Id.* (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006)). It also cited Supreme Court precedent holding that states have an independent interest in protecting public confidence "in the integrity and legitimacy of representative government." *Id.* (quoting *Crawford v. Marion Cnty. Election Bd*., 553 U.S. 181,

[2] *See also, e.g., Ill. State Bd. of Elec. v. Socialist Workers Party*, 440 U.S. 173, 184 (1979) (a burden on *candidates* is also a burden on *voters'* rights to freely associate and to express political preferences); *U.S. v. Saylor*, 322 U.S. 385, 386 (1944) (upholding a charge that stuffing a ballot box injured citizens "in the free exercise" of their "rights and privileges," which included the right "to have their votes … given full value," unimpaired "by fictitious ballots fraudulently cast").

197 (2008)). The *King* court ultimately held that Judicial Watch's members could plead injury due to NVRA noncompliance that "undermin[es] their confidence in the legitimacy of the elections … and thereby burden[s] their right to vote.'" *Id.* The court reasoned that "[i]f the state has a legitimate interest in preventing" the undermining of voter confidence, "surely a voter who alleges that such harm has befallen him or her has standing to redress the cause of that harm." *Id.* Thus, the court's conclusion was simply another application of the pragmatic principle that has formed the basis for standing in so many voting rights cases: "voters who allege facts showing disadvantage to themselves as individuals have standing to sue." *Baker*, 369 U.S. at 206.

This Court reached the same conclusion as the court in *King*. As in *King*, the complaint set forth "the individual plaintiffs' concerns that noncompliance with the NVRA undermines the individual plaintiffs' confidence in the integrity of the electoral process and discourages their participation."[3] Doc. 57 at 16. The Court correctly observed that the "individual plaintiffs are not worried that their confidence *could* be undermined at some point in the future; their confidence is undermined now." *Id*. (distinguishing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013)). As the foregoing review of voting claims shows, the injury identified by this Court has a close relationship to injuries identified in historical precedents conferring Article III standing on the basis of inchoate burdens and disadvantages suffered by voters.

Much of the rest of Defendant's motion consists of more or less blatant attempts to reargue points raised in the motion to dismiss. For example, Defendant argues that "recognition of [the]

[3] Defendant seizes on the word "concerns" in this formulation and relies on it as a one-word summary of the basis of Plaintiffs' standing. Much of Defendant's brief is devoted to this straw-man argument. Doc. 62 at 7-9. But this shorthand utterly fails to convey the Court's ruling on standing, which is about undermined voter confidence and discouraged participation.

state interest" in "maintaining public confidence in the electoral process" is "insufficient to confer concrete harm on *individuals* who lack confidence in state election procedures." Doc. 62 at 7. This ignores Plaintiffs' prior argument on this very point. *See* Doc. 35 at 9 (given the state's interest in ensuring public confidence in elections described in *Crawford*, "surely a voter who alleges that such harm has befallen him or her has standing to redress the cause of that harm") (quoting *King*, 993 F. Supp. 2d at 924). Defendant also argues that Plaintiffs' "concerns" were about "future, hypothetical events," citing *Clapper*. Doc. 62 at 8. This argument ignores the fact that this Court expressly distinguished *Clapper* on the ground that Plaintiffs are injured *now*. Doc. 57 at 16. A motion to reconsider should not be used simply to revisit previously argued issues. *Woodfork*, 2021 U.S. Dist. LEXIS 120775, at *3 (motion to reconsider "is not at the disposal of parties who want to rehash old arguments") (citations and internal quotations omitted).

Finally, Defendant suggests that Judicial Watch might "manufacture its own standing by cultivating concern amongst its members" by means of Tweets which post-date the filing of this lawsuit and are unrelated to it. Doc. 62 at 9 n.2. In fact, Plaintiffs' "undermined confidence and discouraged participation" (Doc. 57 at 16)—not, as Defendant would have it, their "concerns"—are due to Defendant's atrocious record of list maintenance, as amply alleged in the complaint.

If the Court reconsiders its ruling regarding standing, it should rule in favor of Plaintiffs.

II. The Request for an Interlocutory Appeal Should Be Denied.

A. Standards for an Interlocutory Appeal Under 28 U.S.C. § 1292(b).

Federal law provides for "appellate jurisdiction from 'final decisions of the district courts.'" *Anderson Living Trust v. WPX Energy Prod., LLC*, 904 F.3d 1135, 1139 (10th Cir. 2018) (quoting 28 U.S.C. § 1291). This was a deliberate policy choice. Precluding "immediate review of

interlocutory orders" guards against "'piecemeal, prejudgment appeals,' which 'undermine[] "efficient judicial administration" and encroach[] upon the prerogatives of district court judges, who play a "special role" in managing ongoing litigation.'" *Id*. (citing, *inter alia*, *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009)). "Preventing such appeals thus preserves 'a healthy legal system.'" *Id*. (citation omitted); *see Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 436 (1985) ("Implicit in § 1291 is Congress' judgment that the *district judge* has primary responsibility to police the prejudgment tactics of litigants" and can better do so "if the appellate courts do not repeatedly intervene to second-guess prejudgment rulings.") (citation omitted).

Accordingly, "[i]nterlocutory appeals have long been disfavored in the law, and properly so." *Carpenter v. Boeing Co*., 456 F.3d 1183, 1189 (10th Cir. 2006). They are permitted under 28 U.S.C. § 1292(b) if a district court certifies "[1] that the interlocutory order involves 'a controlling question of law [2] as to which there is substantial ground for difference of opinion and [3] that an immediate appeal … may materially advance the ultimate termination of the litigation.'" *Anderson*, 904 F.3d at 1139 (quoting § 1292(b)). But courts "have repeatedly emphasized how rare these appeals should be." *Dorato v. Smith*, 163 F. Supp. 3d 837, 895 (D.N.M. 2015).

A "controlling question of law" is one where "immediate appellate reversal of the order in question will result in some *immediate effect* on the course of the litigation and in some resource savings to the court or the litigants." *Grimes v. Cirrus Indus., Inc.*, No. CIV-08-1222-D, 2010 U.S. Dist. LEXIS 60889, at *6-7 (W.D. Okla. June 18, 2010) (citations omitted). "Section 1292(b) is not 'intended merely to provide review of difficult rulings in hard cases.'" *Jordan v. Maxim Healthcare Servs.*, No. 15-cv-01372-KMT, 2017 U.S. Dist. LEXIS 215176, at *11 (D. Colo. May 9, 2017) (citations omitted).

A "substantial ground for a difference of opinion" means "difficult, novel, and involv[ing] 'a question on which there is little precedent or one whose correct resolution is not substantially guided by previous decisions.'" *Am. Fid. Assur. Co. v. Bank of N.Y. Mellon*, No. CIV-11-1284-D, 2014 U.S. Dist. LEXIS 183099, at *10 (W.D. Okla. Dec. 12, 2014) (citation omitted).

Whether an appeal "materially advance[s] the ultimate termination of the litigation is closely tied" to whether it "involve[s] a controlling question of law." *Jackson Cty. Emples. Ret. Sys. v. Ghosn*, No. 3:18-cv-01368, 2021 U.S. Dist. LEXIS 109945, at *13 (M.D. Tenn. June 11, 2021) (citation and internal quotations omitted). This element is shown where resolution of a legal question "would avoid trial" or "substantially shorten the litigation"—in other words, "when it saves judicial resources and litigant expense." *Id*. (citation and internal quotations omitted).

B. Defendant Fails to Make the Showing Necessary for an Interlocutory Appeal.

Defendant has established none of the elements necessary to set aside the ordinary progress of federal litigation for the sake of a "rare," "disfavored," interlocutory appeal.

The most obvious problem with Defendant's motion is that Plaintiffs pleaded and argued a second basis for Judicial Watch's standing, namely, organizational standing. Specifically, the complaint alleged that Judicial Watch expended resources "to investigate, address, research, and counteract" Defendant's noncompliance with the NVRA. Doc. 1, ¶ 62; *see id*., ¶¶ 38, 40, 45, 46, 52, 54, 55, 58, 59, 60, 61. It further alleged that these lost resources were distinct from Judicial Watch's regular work and that, but for Defendant's noncompliance, they would have been spent on regular activities or not at all. *Id*., ¶¶ 62, 63. As previously explained in the briefing, this diversion of resources establishes Judicial Watch's organizational standing. Doc. 35 at 5-7.

The Court determined that the individual Plaintiffs had standing based on their

"undermined confidence and discouraged participation." Doc. 57 at 16. It then determined that Judicial Watch had standing on behalf of its members, under the doctrine of "associational standing." *Id*. at 17-19; *see also* Doc. 1, ¶¶ 66-69 (allegations supporting associational standing). The Court thus concluded that it "need not reach the question of whether Judicial Watch also has organizational standing." Doc. 57 at 19 n.10.

In these circumstances, Defendant's proposed appeal of the issue of individual standing does not raise "a controlling question of law," from which "an immediate appeal … may materially advance the ultimate termination of the litigation." 28 U.S.C. § 1292(b). Even if Defendant prevails on the interlocutory appeal, this case would not be dismissed. It would be remanded to the district court to determine the issue of organizational standing. Thus, a ruling on the interlocutory appeal would not result in an "*immediate effect*" on the litigation or in "resource savings to the court or the litigants." *Grimes*, 2010 U.S. Dist. LEXIS 60889, at *6-7 (citations omitted). Nor would it "avoid trial" or "substantially shorten the litigation." *Jackson Cty. Emples.*, 2021 U.S. Dist. LEXIS 109945, at *13 (citation and internal quotations omitted). Rather, Judicial Watch would proceed on the basis of its organizational standing. *See Heaton v. Soc. Fin., Inc.*, No. 14-cv-05191-TEH, 2016 U.S. Dist. LEXIS 6690, at *18 (N.D. Cal., Jan. 20, 2016) (where a "decision would only dispose of one claim, not the entire suit," the "proposed appeal does not concern a controlling issue of law") (citation omitted); *Hamby v. Morgan Asset Mgmt*., 741 F. Supp. 2d 844, 852 (W.D. Tenn. 2010) ("Rejection of one theory may not be controlling when another theory remains available that may support the same result.") (quoting Wright, Miller & Cooper,16 Federal Practice & Procedure § 3930 (2d ed. 1996)).

Defendant acknowledges that the issue of organizational standing has yet to be decided but

seems unsure as to what to do about it. Defendant argues at one point that "[i]f the Court on reconsideration concludes that the individual plaintiffs lack standing and proceeds to evaluate Judicial Watch's organizational standing" it should reject it. Doc. 62 at 9. Discussing its motion for an interlocutory appeal, Defendant then suggests that "if the Court concludes that Judicial Watch's organizational standing provides an alternative basis for jurisdiction, it should certify the question for interlocutory appeal." *Id*. at 10. These requests are not part of the relief requested for this motion. *Id*. at 1. More to the point, these requests do not make sense here. The Court has not ruled on organizational standing, so it can neither reconsider the issue nor certify it for appeal.

With their motion, Defendant has also requested a stay of proceedings pending appeal. Doc. 62 at 14.[4] This is a further reason to deny Defendant's request. Courts have logically found that the possibility of a stay pending an interlocutory appeal means that it would *not* materially advance the termination of the litigation. *Heaton*, 2016 U.S. Dist. LEXIS 6690, at *15 ("If the Court certified the interlocutory appeal and stayed the proceedings, the trial would be delayed for months while the Court waited for a ruling."); *Hetrick v. Ideal Image Dev. Corp.*, No. 8:07-cv-871-T-33TBM, 2008 U.S. Dist. LEXIS 106071, at *10 (M.D. Fla. Dec. 30, 2008) ("an appeal of the standing issue would impede, rather than advance, the ultimate termination of the litigation, especially because [the defendant] seeks a stay pending the requested appeal").

As a final point, there is not a "substantial ground for a difference of opinion" regarding the question of individual standing raised by Defendant. The clear indicia of such a question

[4] Plaintiffs oppose this request, as they opposed extending Defendant's time to answer (Doc. 58), because it would delay discovery. It has been almost a year since this lawsuit commenced and the claims have not been dismissed. Yet Plaintiffs have only had limited discovery, on consent.

include a ruling "contrary to the rulings of all courts of appeals"; a circuit split where the Tenth Circuit "has not spoken on the point"; complex "under foreign law"; or "novel and difficult questions of first impression." *Dorato*, 163 F. Supp. 3d at 880 (citation omitted). None of these are present here. Note in particular that this factor *does not* mean that "a court is the first to rule on a particular question"; that "counsel contends that one precedent rather than another is controlling"; that a party has a "strong disagreement with the Court's ruling"; that "settled law might be applied differently"; or that there are "a dearth of cases." *Couch v. Telescope Inc.*, 611 F.3d 629, 633-34 (9th Cir. 2010) (citations and internal quotations omitted). Rather, "courts must examine to what extent the controlling law is unclear." *Id.* at 633; *see Am. Fid. Assur. Co. v. Bank of N.Y. Mellon*, 2014 U.S. Dist. LEXIS 183099, at *10 ("difficult, novel … 'little precedent … correct resolution is not substantially guided by previous decisions'") (citation omitted). Given the principles of standing applied in voting cases discussed *supra* in section I.C, the question of individual standing under the NVRA is substantially guided by previous decisions.

Defendant has not justified its request for certification of an interlocutory appeal.

CONCLUSION

For the foregoing reasons, Defendant's motion for reconsideration or for certification under 28 U.S.C. § 1292(b) should be denied.

September 20, 2021

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CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2021, I served a true and complete copy of the foregoing **PLAINTIFFS' MEMORANDUM IN OPPOSITION TO MOTION FOR RECONSIDERATION OR CERTIFICATION UNDER 28 U.S.C. § 1292(b)** upon all parties through ECF:

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