IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:20-cv-02992-PAB-KMT

JUDICIAL WATCH, INC., et al.,
Plaintiffs,
v.

JENA GRISWOLD, Colorado Secretary of State in her official capacities,
Defendant.

DEFENDANT'S REPLY IN SUPPORT OF ITS MOTION FOR RECONSIDERATION OR, IN THE ALTERNATIVE, FOR CERTIFICATION UNDER 28 U.S.C. § 1292(b)

This case threatens to subject Colorado's election officials and infrastructure to burdensome discovery, even though the ultimate legal standard is one of significant deference. And at present, it threatens to do so on the basis of a single paragraph in Plaintiffs' Complaint, which was the subject of just a single paragraph in the Court's August 16, 2021 Order.

Particularly in light of *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021), the intangible and subjective injuries alleged by the individual Plaintiffs are a thin reed bearing extraordinary weight. The Secretary's requests for reconsideration, or, in the alterative, for certification for interlocutory appeal, will ensure that Plaintiffs' allegations are subjected to scrutiny before, rather than after, they are used to burden state and local election officials with time-consuming and meritless discovery.

ARGUMENT

I. The Tenth Circuit has recognized that *TransUnion* represents a change in controlling law.

In 2016, the Supreme Court held that the creation of a private right of action is not, itself, sufficient to confer standing on private parties. *Spokeo v. Robins*, 136 S. Ct. 1540, 1550 (2016).

The Secretary relied on *Spokeo*'s holding in her motion to dismiss. Colo.'s Mot. to Dismiss (Doc. No. 34) at 5.

In reaching this holding, the Supreme Court noted that "[i]n determining whether an intangible harm constitutes injury in fact, both history and the judgment of Congress play important roles." *Spokeo*, 136 S. Ct. at 1549. In this context, the Court mentioned that "it is instructive to consider whether an alleged intangible harm has a close relationship to a harm that has traditionally been regarded as providing a basis for a lawsuit in English or American courts." *Id.* From 2016 until *TransUnion* was issued, courts within the Tenth Circuit cited *Spokeo* 20 times; none cited the "close relationship" or "traditionally been regarded" language.

But earlier this year, the Supreme Court transformed this isolated comment from *Spokeo* into the key concept underlying its holding in *TransUnion*. 141 S. Ct. at 2200. As courts have recognized, as a result of *TransUnion*, "[t]hings have changed." *Cheatham v. Adams*, No. 4:20-CV-00865-LPR, 2021 WL 4313961, at *3 (E.D. Ark. Sept. 22, 2021). *See also Kola v. Forster & Garbus LLP*, No. 19-CV-10496 (CS), 2021 WL 4135153, at *8 (S.D.N.Y. Sept. 10, 2021) (calling citation to "pre-*TransUnion* cases" "unavailing").

The Tenth Circuit has embraced this shift. Two months after the Supreme Court issued *TransUnion*, and one day after this Court's August 16 Order, the Tenth Circuit "beg[an] with history" in assessing a plaintiff's standing under a statutory cause of action, and devoted multiple pages to "whether plaintiffs have identified a close historical or common-law analogue for their asserted injury." *Luipa v. Medicredit, Inc.*, 8 F.4th 1184, 1191 (10th Cir. 2021) (citing *TransUnion LLC*, 141 S. Ct. at 2204). After years of not incorporating *Spokeo*'s comment on historical analogies into its standing analyses, the circuit court immediately did so in light of

TransUnion. As the Tenth Circuit's behavior suggests, *TransUnion* represents the type of intervening change in controlling law that merits reconsideration. *See Servants of the Paraclete v. Does*, 204 F.3d 1005, 1012 (10th Cir. 2000) (citation omitted).

II. The individual Plaintiffs' lack of confidence does not bear a close relationship to a traditionally recognized harm.

In an effort to satisfy *TransUnion*'s "close relationship" requirement, Plaintiffs analogize their injuries to the line of cases recognizing and upholding the right to vote. Pl.'s Resp. (Doc. No. 71) at 5-7. But the harm the August 16 Order identifies to support the individual Plaintiffs' standing does not bear a close relationship with that preservative and fundamental right.

In the August 16 Order, the Court rejected the allegation that "purportedly bloated voter rolls could lead to fraudulent votes, which could diminish or dilute the individual plaintiffs' votes and have caused such fear." Order (Doc. 57) at 15. The Court correctly held that this alleged injury – "that noncompliance with the law could dilute the individual plaintiffs' votes" – was both generalized and hypothetical. *Id.* at 16. It then considered whether standing could rest on "the individual plaintiffs' concerns that noncompliance with the NVRA undermines [their] confidence in the integrity of the electoral process and discourages their participation." *Id.* Here, the Court held that the individual Plaintiffs were suffering an injury in fact because "their confidence [in the integrity of the electoral process] is undermined now." *Id.*

This, then, is the current basis for Plaintiffs' standing. First, that they are concerned about Defendant's alleged NVRA noncompliance, and second that these concerns have undermined their confidence in the electoral system. The question before this Court, then, and ultimately on appeal, is whether "concerns" about a jurisdiction's NVRA compliance satisfy Article III's

standing requirement when those concerns allegedly act to undermine the individuals' confidence in the electoral process.[1]

Answering this question in the affirmative lacks a limiting principle. *See David v. Alphin*, 704 F.3d 327, 338 (4th Cir. 2013) (finding plaintiffs' "theories of standing unpersuasive" where they "rest on a highly speculative foundation lacking any discernible limiting principle"). By definition, a plaintiff filing suit has "concerns" about whether the defendants are satisfying their legal obligations. If those concerns undermine a plaintiff's confidence in the relevant scheme, and that ensuing lack of confidence is sufficient to convey standing, then there is no limitation on who can bring suit under a statutory cause of action. *Cf. Lance v. Coffman*, 549 U.S. 437, 442 (2007) ("The only injury plaintiffs allege is that the law—specifically the Elections Clause—has not been followed. This injury is precisely the kind of undifferentiated, generalized grievance about the conduct of government that we have refused to countenance in the past.").

Moreover, to find standing on this basis is to stretch *TransUnion*'s "close relationship" beyond its breaking point. Defendant agrees in the fundamental importance of the right to vote. *See Reynolds v. Sims*, 377 U.S. 533, 561-62 (1964). But that is not the right asserted here. Here, Plaintiffs ask this Court to start with the *constitutional* right to vote, trace it to the importance of confidence in the electoral system in supporting that right, all the way to the individual Plaintiffs' concerns about noncompliance with a *statutory* scheme that allegedly undermine that confidence.

[1] Far from a "straw-man" argument, Pl.'s Resp. (Doc. No. 71) at 9 n.3, the Court's invocation of the individual Plaintiffs' "concerns" was key to its standing determination. The individual Plaintiffs' alleged injury is their lack of confidence in the electoral process. But this lack of confidence is only relevant if it is fairly traceable to their concerns about the Secretary's list maintenance practices. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). Their alleged injury thus stems from those "concerns."

That is too far afield to establish a "close relationship" between the fundamental right to vote—which Defendants agree is a traditionally recognized harm—and Plaintiffs' alleged concerns. *See Clapper v. Amnesty Int'l v. USA*, 568 U.S. 398, 414 n.5 (2013) (a plaintiff's reliance on an "attenuated chain of inferences" will not support standing).

In contrast, the cases Plaintiffs cite all involve an actual burden or abridgment of the right to vote. Pl.'s Resp. (Doc. No. 71) at 6-8. In the reapportionment context, for example, voters are directly harmed by the creation of districts that have the *direct* effect of diluting individuals' votes. *See, e.g.*, *Reynolds v. Sims*, 377 U.S. 533, 568 (1964) ("Simply stated, an individual's right to vote for state legislators is unconstitutionally impaired when its weight is in a substantial fashion diluted when compared with votes of citizens living on other parts of the State."). In *Thornburg v. Gingles*, 478 U.S. 30, 47-71 (1986), the Supreme Court invalidated processes that had the *direct* effect of preventing minority voters from electing candidates of their choice. *Id.* at 51 (holding that to state a claim under Section 2 of the Voting Rights Act, plaintiffs must show "that the white majority votes sufficiently as a bloc to enable it . . . usually to defeat the minority's preferred candidate."). And in the *Anderson-Burdick* line of cases, courts wrestle with how to evaluate burdens which impose *direct* limitations on an individual's right to vote. *See, e.g.*, *Fish v. Schwab*, 957 F.3d 1105, 1128-29 (10th Cir. 2020) (applying *Anderson-Burdick* to strike down law which prevented 31,089 individuals from registering to vote).

To be sure, confidence in the electoral process carries independent significance. *See Crawford v. Mario Cnty. Election Bd.*, 553 U.S. 181, 197 (2008). But as courts (including within this district) have held, that lack of confidence alone is insufficient to satisfy Article III standing. Earlier this year, several voters brought suit regarding alleged irregularities in the 2020

presidential election. *See O'Rourke v. Dominion Voting Sys. Inc.*, No. 20-cv-03747-NRN, 2021 WL 1662742 at *1 (D. Colo. April 28, 2021). Among the allegations were that at least one plaintiff had "lost any faith in the existing form of government" as a result of the alleged irregularities. *Id.* at *1. Notwithstanding this allegation, the court rejected the argument that the plaintiffs had standing to maintain their suit, citing to the myriad cases arising out of the 2020 election that reached the same result. *Id.* at 4-10. The issue wasn't even close—the court later sanctioned the plaintiffs' counsel after finding they had no good-faith basis for asserting standing for their clients. *See O'Rourke v. Dominion Voting Sys. Inc.*, __ F. Supp. 3d __, 2021 WL 3400671, at *24 (D. Colo. Aug. 3, 2021).

Many of the cases cited in *O'Rourke* rejected standing on the ground that vote-dilution-by-fraud claims are a "generalized grievance about the operation by government." *O'Rourke*, 2021 WL 1662742, at *5. As this Court noted, such hypothetical generalized grievances are insufficient to confer standing. Order (Doc. No. 57) at 15 ("A fraudulent vote cast in an election would diminish the value of each honest vote equally. This is just the sort of grievance that is plainly undifferentiated and common to all members of the public.").

This highlights the second problem with Plaintiffs' theory. As currently postured, the undermined confidence in the election (based on hypothetical concerns of fraudulent vote dilution) alleged by the individual Plaintiffs has created the premise upon which standing is conferred even though the actual thing which they fear would not. Order (Doc. No. 57) at 15. It cannot be that a plaintiff who lacks confidence in the electoral process due to abstract concerns about registration compliance suffers an injury even though a plaintiff whose vote is *actually diluted* as a result of noncompliance does not.

Finally, the Court should not be persuaded by the reasoning in *Judicial Watch, Inc. v. King*, 992 F. Supp. 2d 919, 924 (S.D. Ind. 2012). First, *King* predates both *TransUnion* and *Spokeo*, and therefore does not assess whether the plaintiffs' alleged harm bears a close relationship with a traditionally recognized basis for suit. More importantly, *King* flies in the face of established precedent regarding generalized grievances and speculative harm. *See ACRU v. Martinez-Rivera*, 166 F. Supp. 3d 779, 803 n.18 (W.D. Tex. 2015) (Report and Recommendation) ("respectfully disagree[ing]" with the *King* court's holding that "undermined confidence" in the election could satisfy standing). As the *ACRU* court concluded, "complaints of undermined confidence and potential vote dilution are nothing but a generalized grievance about government, complaining that an official should be required to follow the law." *Id.* at 803. Such complaints are insufficient to confer standing.

III. Judicial Watch's potential organizational standing provides no grounds to forego reconsideration or an interlocutory appeal.

Next, Plaintiffs argue that an interlocutory appeal will not "materially advance" this litigation because "[e]ven if Defendant prevails on the interlocutory appeal, this case would not be dismissed. . . . Rather, Judicial Watch would proceed on the basis of its organizational standing." Pl.'s Resp. (Doc. No. 71) at 14. But the Court has not held that Judicial Watch *can* proceed on the basis of its organizational standing. Order (Doc. No. 57) at 19 n.10. At present, this case is moving into time-consuming and expensive discovery solely on the basis of the individual Plaintiffs' lack of confidence in Colorado's model electoral system. That process will be in vain if the Court of Appeals agrees with Defendant that the individual Plaintiffs lack standing, regardless of Judicial Watch's organizational standing.

Even if this Court ultimately concludes Judicial Watch does have organizational standing, the litigation will be materially advanced by turning to that basis for Plaintiffs' standing now rather than later. As the case stands, jurisdictional discovery will encompass only the individual Plaintiffs' allegations of harm. But if the Court of Appeals later invalidates the individual Plaintiffs' standing, entirely *different* discovery will be necessary to test the basis of Judicial Watch's organizational standing allegations even if the case proceeds on those grounds on remand. Either way, the parties and the Court will waste time litigating a case under a disproven theory of jurisdiction. *See Grimes v. Cirrus Indus., Inc.*, No. CIV-08-1222-D, 2010 WL 2541664, at *2 (W.D. Okla. June 18, 2010) (citing 16 Wright, Miller, & Cooper, Fed. Prac. & Proc. § 3930 n.25 (2d ed. 1996) (noting that a "growing number of decisions have accepted question[s] as controlling if possible reversal may save time for [the] court or litigants").

Rather than risk the burden of two separate rounds of discovery, it is far better and more efficient to settle the disparate bases for Plaintiffs' standing now by receiving the Tenth Circuit's final word. And Plaintiffs' authorities do not suggest otherwise. Pl.'s Resp. (Doc. No. 71) at 13. In *Grimes*, the court concluded that "whether [it] lacks jurisdiction" *was* a controlling question. 2010 WL 2541664, at *3. The court only rejected the request for an interlocutory appeal because resolution in the movant's favor would have dismissed only one named defendant, leaving several others. *Id.* at *4. Here, as currently postured, a conclusion that the individual Plaintiffs lack jurisdiction would result in dismissal, because no other basis for jurisdiction has been established. Similarly, in *Heaton v. Soc. Fin., Inc.* No. 14-cv-05191-THE, 2016 WL 232433, at *6 (N.D. Cal. Jan. 20, 2016), the court denied certification because the order in question addressed only one of several claims advanced by the plaintiff. Even if the Court of Appeals

disagreed with the court's conclusion, the case would still proceed as to the other claims. *Id.* But here, a determination that Plaintiffs lack standing would terminate the litigation.

Indeed, even if this Court determines that Judicial Watch has organizational standing, the wildly divergent authorities cited by the parties on the diversion-of-resources theory of standing confirms there is substantial ground for differences of opinion, easily satisfying the standard for interlocutory appeal. *Compare* Colo.'s Mot. to Dismiss (Doc. No. 34) at 6-7 and Reply (Doc. No. 44) at 2-4, *with* Pl.'s Opp. (Doc. No. 35) at 6-9. Finally resolving each basis for Plaintiffs' standing now will not only streamline the scope of discovery, it will narrow the relevant issues for the Court to resolve on the merits should the case reach that point.

IV. Reconsideration, or an interlocutory appeal, are appropriate in light of the unique facts and law in this case.

As explained above, Plaintiffs' arguments against reconsideration based on Defendants' alleged failure to raise these issues previously are unavailing. *See supra* at 1–3. Defendants *did* challenge the individual Plaintiffs' standing in their motion to dismiss. Colo.'s Mot. to Dismiss (Doc. No. 34) at 5-6. And regardless, because it goes to the court's subject matter jurisdiction, "standing may be raised at any time in the judicial process." *Powder River Basin Resource Council v. Babbitt*, 54 F.3d 1477, 1484 (10th Cir. 1995).

Second, Plaintiffs are correct that neither *Spokeo* nor *TransUnion* arose in the context of the NVRA – and that the Supreme Court has not applied those holdings to "voting laws or cases." Pl.'s Resp. (Doc. No. 71) at 5. But that fact weighs in favor of certification. *See Reese v. BP Exploration (Alaska) Inc.*, 643 F.3d 681, 688 (9th Cir. 2011) ("[W]hen novel legal issues are presented, on which fair-minded jurists might reach contradictory conclusions, a novel issue may

be certified for interlocutory appeal without first awaiting development of contradictory precedent.").

The Supreme Court has sent an unmistakable message that claims arising under a statutory cause of action should be closely scrutinized to ensure that Congress is not "enact[ing] an injury into existence." *TransUnion LLC*, 141 S. Ct. at 2205 (quotations omitted). How that review should unfold in the context of the NVRA is a significant, unsettled question that would benefit from explication at the Court of Appeals before the parties proceed down the path of "protracted and expensive" discovery. *Burchett v. Bardahl Oil Co.*, 470 F.2d 793, 796 (10th Cir. 1972); *see also* 16 Wright, Miller & Cooper, Fed. Prac. & Proc. § 3930 (3d ed. 2002) ("The level of uncertainty required to find a substantial ground for difference of opinion should be adjusted to meet the importance of the question in the context of the specific case. If proceedings that threaten to endure for several years depend on an initial question of jurisdiction, . . . certification may be justified at a relatively low threshold of doubt.").

CONCLUSION

The Secretary of State respectfully requests that the court reconsider its holding that the individual Plaintiffs having standing, or, in the alternative, certify an interlocutory appeal under 28 U.S.C. § 1292(b).

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