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UNITED STATES DISTRICT COURT

DISTRICT OF ARIZONA

Mi Familia Vota,

Plaintiff,

v.

Adrian Fontes, in his official capacity as Arizona Secretary of State, et al.,

Defendant.

AND CONSOLIDATED CASES

No. 2:22-cv-00509-SRB (Lead)

INTERVENOR-DEFENDANTS SPEAKER TOMA AND PRESIDENT PETERSEN'S TRIAL MEMORANDUM

Pursuant to this Court's Order [Doc. 485], Intervenor-Defendants Speaker of the House Ben Toma and Senate President Warren Petersen (the "Legislators") hereby submit their trial memoranda. The Legislators join in the trial memos filed by the Attorney General's Office and the RNC.

I. Private Plaintiffs Lack Standing.

To establish standing, a plaintiff "must show [(1)] that [it] is under threat of suffering 'injury in fact' that is concrete and particularized; the threat must be actual and imminent, not conjectural or hypothetical; [(2)] it must be fairly traceable to the challenged action of the defendant; and [(3)] it must be likely that a favorable judicial decision will prevent or redress the injury." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009) (citation omitted). Standing must be established as of the time the complaint was filed. *See LA All. for Hum. Rts. v. Cnty. of Los Angeles*, 14 F.4th 947, 959 n.9 (9th Cir. 2021). "Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992). This means that at trial, plaintiffs must set forth specifics facts that are "supported adequately by the evidence adduced at trial." *Id.* (internal citation omitted).

Thus, even though the Court found Plaintiffs' allegations regarding organizational standing sufficient to overcome a motion to dismiss (Doc. 304 at 17), Plaintiffs bear the burden of putting forward evidence to support standing under either representational standing or organizational standing.

To establish representational standing, non-U.S. Plaintiffs must "identify members who have suffered the requisite harm." *Summers v. Earth Island Inst.*, 555 U.S. at 499. However, they have not established that any individual members have suffered or would suffer harm. Rather, in connection with the motion to dismiss, they relied upon "statistical

probabilities" that are insufficient to establish standing. *Id.* at 498-99. The "requirement of naming the affected members has never been dispensed with in light of statistical probabilities, but only where *all* the members of the organization are affected by the challenged activity." *Id.* at 498-99. Here, non-U.S. Plaintiffs cannot show representational standing because they have not identified individual members who have suffered an Article III "injury in fact." Notably, Non-U.S. Plaintiffs' witness list does not include any individual members of those organizations.

With respect to organizational standing, a plaintiff organization must show "that the defendant's behavior has frustrated its mission and caused it to divert resources in response to that frustration of purpose." *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 663 (9th Cir. 2021). Standing cannot be manufactured by incurring litigation costs; the organization "must instead show that it would have suffered some other injury if it had not diverted resources to counteracting the problem." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010). In other words, "[a]n organization may sue only if it was forced to choose between suffering an injury and diverting resources to counteract the injury." *Id.* n.4.

Here, in order to prove organizational standing, Plaintiffs must show that their resources were diverted away from another activity as a result of the Voting Laws, and that they would not have committed those resources but for the Voting Laws. It is not enough that non-U.S. Plaintiffs "continue[] doing what they were already doing" and going about "business as usual," just like the plaintiffs in *Friends of the Earth. See* 992 F.3d at 943. Moreover, an "abstract social interest in maximizing voter turnout … cannot confer Article III standing." *Fair Elections Ohio v. Husted*, 770 F.3d 456, 461 (6th Cir. 2014).

While generally, it suffices if one plaintiff has standing in a multiple plaintiff suit, this rule does not apply where plaintiffs have brought distinct claims. As the Supreme Court has recognized, "[a]t least one plaintiff must have standing to seek each form of relief

requested in the complaint." *Town of Chester, N.Y. v. Laroe Ests., Inc.*, 581 U.S. 433, 439 (2017). Accordingly, the Court held that a plaintiff intervenor "must have Article III standing in order to pursue relief that is different from that which is sought by a party with standing. That includes cases in which both the plaintiff and the intervenor seek separate money judgments in their own names." *Id.*

Here, non-U.S. Plaintiffs do not bring identical claims or seek identical relief. Moreover, each of the non-U.S. Plaintiffs seek attorneys' fees awards in their own names. Thus, each must prove that they individually have standing. *See Garnett v. Zeilinger*, 485 F. Supp. 3d 206, 215 (D.D.C. 2020) ("courts have held that *each* plaintiff must have standing in order to recover attorney's fees") (citing *Shaw v. Hunt*, 154 F.3d 161, 166 (4th Cir. 1998)).

II. Plaintiffs' Claims Do Not Meet the Prudential Ripeness Test.

"[A] claim is not ripe for adjudication when it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" *Texas v. United States*, 523 U.S. 296, 300 (1998) (citation omitted). In evaluating prudential ripeness, the Court "is guided by two overarching considerations: the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1141 (9th Cir. 2000) (citation omitted). "Courts have regularly declined on prudential grounds to review challenges to recently promulgated laws or regulations in favor of awaiting an actual application of the new rule." *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 837 (9th Cir. 2012). A facial challenge particularly can present ripeness concerns. *See Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 450–51 (2008) ("Claims of facial invalidity often rest on speculation. As a consequence, they raise the risk of premature interpretation of statutes on the basis of factually barebones records.") (internal quotation omitted).

A claim is not ripe when it "is riddled with contingencies and speculation that impede judicial review." *Trump v. New York*, 141 S. Ct. 530, 535 (2020). Consequently, in *Trump v. New York*, a case was not ripe because "[t]he Government's eventual action will reflect both legal and practical constraints, making any prediction about future injury just that—a prediction." *Id.* at 536.

Here, non-U.S. Plaintiffs' allegations regarding the allegedly unduly burdensome effect of the Voting Laws are entirely speculative, especially as they relate to potential bad faith investigations, database comparisons, or hypothesized disparate effects, which may never occur. Neither the County recorders nor the Secretary of State have started enforcing the Voting Laws, and thus no one can say for certain what impact, if any, the Voting Laws may have. Defendants' rebuttal expert testimony will underscore the speculative and conjectural nature of the Plaintiffs' experts' conclusions. For example, arguments that the county recorders cannot be trusted to implement H.B. 2243's list maintenance provisions in a non-discriminatory manner rely heavily on vague hypotheticals posed to the recorders during depositions. In addition, predictions that the counties will engage in disparate enforcement of citizenship verification requirements are premised on methodologically flawed analyses of registration cancelation data. *See* Report of M. Hoekstra Rebutting Portions of M. McDonald Report, ¶¶ 12-15, 87-92; Report of J. Richman, ¶¶ 60-83.

Plaintiffs' claims are more appropriately raised in an as-applied challenge involving concrete facts, rather than an expert's hypothesis about potential scenarios. Deferring those types of claims would "enhance the likelihood [the claims] will be resolved correctly on the basis of historical facts rather than speculation." *Purcell v. Gonzalez*, 549 U.S. 1, 6 (2006) (Stevens, J., concurring). Allowing the "process [to] run its course not only brings 'more manageable proportions' to the scope of the parties' dispute ... but also 'ensures that we act *as judges*, and do not engage in policymaking properly left to elected representatives." *Trump*, 141 S. Ct. at 536; *accord Renne v. Geary*, 501 U.S. 312, 323 (1991) ("Determination

of the scope and constitutionality of legislation in advance of its immediate adverse effect in the context of a concrete case involves too remote and abstract an inquiry for the proper exercise of the judicial function.").

III. Private Plaintiffs Lack a Cause of Action Under Section 10101.

Non-U.S. Plaintiffs' Section 10101 claims also fail because they lack a private right of action under this statute. Section 10101 contains a detailed remedy provision which contemplates only an action brought by the U.S. Attorney General. Accordingly, "the majority of courts" hold that the materiality statute "is only enforceable by the United States in an action brought by the Attorney General." *Hayden v. Pataki*, 2004 WL 1335921, at *5 (S.D.N.Y. June 14, 2004); *accord Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 630 (6th Cir. 2016); *Dekom v. New York*, 2013 WL 3095010, at *18 (E.D.N.Y. June 18, 2013) (collecting cases), *aff'd*, 583 F. App'x 15 (2d Cir. 2014). Although the Court declined to reach this issue in its decision on the State's motion to dismiss, it should do so as part of the final judgment.

IV. Collective Legislative Intent Cannot Be Proven via Testimony of an Individual Legislator's Motive.

When the legislature's motive is pertinent in a case, "it is the motivation of *the entire legislature*, not the motivation of a handful of voluble members, that is relevant." *S.C. Educ. Ass'n v. Campbell*, 883 F.2d 1251, 1262 (4th Cir. 1989) (emphasis added). The motives of a single legislator, even if stated publicly, cannot be imputed to the legislature as a whole. *See United States v. O'Brien*, 391 U.S. 367, 383-84 (1968) ("What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork."); *N.L.R.B. v. SW Gen., Inc.*, 580 U.S. 288, 307 (2017) ("floor statements by individual legislators rank among the least illuminating forms of legislative history").

As a noted commentator has underscored:

> Attribution of the statements of some members of the decisionmaking body to the others cannot properly be justified on a theory of adoption by silence or the fiction of delegated authority to speak.

Paul Brest, Palmer v. Thompson: An Approach to the Problem of Unconstitutional Legislative Motive, The Supreme Court Review, Vol. 1971, p. 124 (1971).

Individual legislators vote to adopt a bill for many reasons. Few of the legislators will have been involved in the drafting of the bill, and they may not even be well-acquainted with all of its provisions. For example, in *Va. Uranium, Inc. v. Warren*, ___ U.S. ___, 139 S. Ct. 1894, 1907-08 (2019) (plurality opinion), the Supreme Court warned:

> Trying to discern what motivates legislators individually and collectively invites speculation and risks overlooking the reality that individual Members of Congress often pursue multiple and competing purposes, many of which are compromised to secure a law's passage and few of which are *fully realized in the final product.*

(Emphasis added.) *Cf. City of Las Vegas v. Foley*, 747 F.2d 1294, 1297 (9th Cir. 1984) (the court "prevents inquiry into the motives of legislators because it recognizes that such inquiries are a hazardous task," since "individual legislators may vote for a particular statute for a variety of reasons"); *In re Kelly*, 841 F.2d 908, 912 n.3 (9th Cir. 1988) ("To the extent that legislative history may be considered, it is the official committee reports that provide the authoritative expression of legislative intent . . . Stray comments by individual legislators . . . cannot be attributed to the full body that voted on the bill. The opposite inference is far more likely.") (internal citations omitted); *Campbell*, 883 F.2d at 1261 ("It is manifestly impossible to determine with certainty the motivation of a legislative body by resorting to the utterances of individual members thereof-even statements made by sponsors and authors of the act-since there is no way of knowing why those, who did not speak, may have supported or opposed the legislation.").

And the Supreme Court has recently rejected use of a "cat's paw" theory of imputing a bill's sponsors allegedly improper motives onto other members, who acted as unwitting dupes: "Under our form of government, legislators have a duty to exercise their judgment

and to represent their constituents. It is insulting to suggest that they are mere dupes or tools." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350, 210 L. Ed. 2d 753 (2021).

In fact, we are not aware of any case that has found the intention of the legislature by virtue of testimony of one or more individual legislators. An individual legislator is not competent to testify about another legislator's motives, and Fed. R. Evid. 602 limits testimony to a witness's "personal knowledge of the matter." Moreover, the Court affirmed that Toma and Petersen cannot waive the legislative privilege for any other member, and therefore cannot offer testimony regarding another member's motivation. Doc. 535 at 6.

Accordingly, testimony of one or more individual legislators of their personal motives or views is not admissible, relevant evidence of the legislature's collective intent. The bills at issue were passed 47 to 38 (H.B. 2492) and 47 to 39 (H.B. 2243). An individual legislator's testimony more than a year after the bills were passed cannot reveal the collective motivation of the other 46 legislators who voted "aye" in 2022. *See Barber v. Thomas*, 560 U.S. 474, 486 (2010) ("And whatever interpretive force one attaches to legislative history, the Court normally gives little weight to statements, such as those of the individual legislators, made *after* the bill in question has become law.").

Thus, to the extent that Plaintiffs try to offer testimony from Messrs. Toma and Petersen with respect to their personal views of the challenged laws (if the Ninth Circuit denies the Legislators' petition for writ of mandamus), or offers similar testimony from another legislator including former Senators Teran and Quezada (listed on Plaintiffs' witness list as "may call" witnesses), that testimony cannot constitute evidence of the legislature's collective intent.

In *Arlington Heights*, the Supreme Court counseled that "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Vill. of Arlington*

Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977). This includes a consideration of the impact of a law, "the historical background . . . particularly if it reveals a series of official actions taken for invidious purposes," and the "legislative or administrative history . . . especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Id.* Only in some undefined "extraordinary instances"—*which were not present in that case*—might testimony of individual legislative members about the "purpose" of the "official action" be considered, and even in such "extraordinary instances" such testimony "frequently will be barred by privilege." *Id.* at 268. The Supreme Court, however, did not hold that individual motives would be competent to show collective legislative intent.

Here, Toma's and Petersen's individual motives (or that of any other individual legislator) are irrelevant to the larger inquiry of the legislature's intent. Rather, collective intent can be shown by the publicly available legislative record.

That public record shows that the Challenged Laws were intended to ensure that persons who are not eligible to vote are not allowed to register to vote in Arizona. *See, e.g.*, March 28, 2022 House Summary for H.B. 2492, *available at* https://www.azleg.gov/legtext/55leg/2R/summary/H.HB2492_032822_TRANSMITTED.pdf ("Outlines additional requirements to be verified before a person is properly registered to vote"); March 30, 2022 Letter from Governor Ducey, *available at* https://www.azleg.gov/govlettr/55leg/2r/hb2492.pdf ("Election integrity means counting every lawful vote and prohibiting any attempt to illegally cast a vote. H.B. 2492 is a balanced approach that honors Arizona's history of making voting accessible without sacrificing security in our elections."); June 22, 2022 Senate Fact Sheet for H.B. 2243, https://www.azleg.gov/legtext/55leg/2R/summary/S.2243GOV_ASPASSEDCOW.pdf ("Requires a county recorder to cancel the voter registration of a person for whom the county recorder receives and confirms information that the person is not a U.S. citizen, is

not an Arizona resident or has been issued a driver license or nonoperating license in another state.").

V. The Legislature Need Not Wait for Conclusive Evidence Before Legislating but Can Proactively Address Issues.

Plaintiffs do not have any evidence establishing an improper collective motive. Rather, Plaintiffs assert via expert testimony that instances of voter fraud are rare, and thus there is no need to implement additional measures to ensure that persons who register to vote in Arizona are U.S. citizens. This expert testimony is flawed on several levels, as will be shown by Defendants' rebuttal experts.

Regardless, Plaintiffs' underlying reasoning is also flawed. The Legislature need not wait for an injury to happen before addressing an issue. Legislatures "should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutionally protected rights." *Burson v. Freeman*, 504 U.S. 191, 209 (1992) (emphasis and citation omitted); *see also Munro v. Socialist Workers Party*, 479 U.S. 189, 195–96 (1986) (rejecting argument that State had to prove "actual voter confusion" because "[s]uch a requirement would necessitate that a State's political system sustain some level of damage before the legislature could take corrective action"); *Feldman v. Arizona Sec'y of State's Off.*, 843 F.3d 366, 390 (9th Cir. 2016) ("Courts recognize that legislatures need not restrict themselves to a reactive role . . . .").

"[I]t should go without saying that a State may take action to prevent election fraud without waiting for it to occur and be detected within its own borders." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2348, 210 L. Ed. 2d 753 (2021). Accordingly, "because a government has such a compelling interest in securing the right to vote freely and effectively, th[e] Court never has held a State 'to the burden of demonstrating

empirically the objective effects on political stability that [are] produced' by the voting regulation in question." *Burson*, 504 U.S. at 208-09 (citation omitted).

VI. The Court Presumes that the Legislature Acted in Good Faith.

The party claiming "that a state law was enacted with discriminatory intent" bears the burden of proof, not the State. *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). Although legislative decisions are not immune from review, courts must afford state legislatures a presumption of good faith. *Id.* at 2324; *Fusilier v. Landry*, 963 F.3d 447, 464 (5th Cir. 2020). "[T]he the Supreme Court has long cautioned against the quick attribution of improper motives, which would interfere with the legislature's rightful independence and ability to function." *Fusilier*, 963 F.3d at 464. "Only the clearest proof could suffice to establish the unconstitutionality of a statute on [the] ground [of improper legislative motive.]" *Flemming v. Nestor*, 363 U.S. 603, 617 (1960).

To be clear, although Plaintiffs intend to present historical evidence of past discrimination in Arizona, "[t]he allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination. Past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Abbott*, 138 S. Ct. at 2324–25 (cleaned up).

In terms of showing a discriminatory purpose, the Plaintiffs must show "more than intent as volition or intent as awareness of consequences. It implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part 'because of,' not merely 'in spite of,' its adverse effects upon an identifiable group." *Pers. Adm'r of Massachusetts v. Feeney*, 442 U.S. 256, 279 (1979) (citations omitted).

VII. The Legislature Undisputedly Has a Compelling Interest in Election Integrity.

"A State indisputably has a compelling interest in preserving the integrity of its election process." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (*per curiam*) (internal quotation marks omitted)." "There is no question about the legitimacy or importance of the State's

interest in counting only the votes of eligible voters. Moreover, the interest in orderly administration and accurate recordkeeping provides a sufficient justification for carefully identifying all voters participating in the election process. While the most effective method of preventing election fraud may well be debatable, the propriety of doing so is perfectly clear." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 196 (2008).

While related, a state's interest in protecting "public confidence in the integrity of the electoral process has independent significance, because it encourages citizen participation in the democratic process." *Id.* at 197. The Ninth Circuit, in line with several "sister circuits," recognizes that "it is practically self-evidently true that implementing a measure designed to prevent voter fraud would instill public confidence." *Feldman v. Arizona Sec'y of State's Off.*, 843 F.3d 366, 391 (9th Cir. 2016) (citation omitted).

Although Defendants anticipate that Plaintiffs will argue that Defendants must prove actual voter fraud, neither *Burdick* nor *Crawford* put such a burden on the State. *See Common Cause/Georgia v. Billups*, 554 F.3d 1340, 1353–54 (11th Cir. 2009) ("The NAACP and voters argue that the district court erred by not requiring Georgia to prove both that in-person voter fraud existed and that requiring photo identification is an effective remedy, but Georgia did not have that burden of proof."). To the contrary, *Anderson/Burdick* treats the State's interests as a "legislative fact." *Frank v. Walker*, 768 F.3d 744, 750 (7th Cir. 2014). Put another way, the court does not "require elaborate, empirical verification of the weightiness of the State's asserted justifications." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997).

VIII. Plaintiffs Have Not Met Their Burden on a Facial Challenge.

"The severity of the burden that an election law imposes is a factual question on which the plaintiff bears the burden of proof." *Democratic Party of Haw. v. Nago*, 833 F.3d 1119, 1122–24 (9th Cir. 2016) (citation omitted). "[P]laintiffs asserting a facial challenge 'bear a heavy burden of persuasion,' the magnitude of which the Supreme Court has

reminded" must be given "'appropriate weight.'" *Feldman*, 843 F.3d at 388 (citing *Crawford*, 553 U.S. at 200). To meet this burden, Plaintiffs must show more than pure speculation. *Cf. Chicanos Por La Causa, Inc. v. Napolitano*, 558 F.3d 856, 866 (9th Cir. 2008) ("In any event, a speculative, hypothetical possibility does not provide an adequate basis to sustain a facial challenge."). As discussed in the Attorney General's trial memo, Plaintiffs cannot meet that burden because their claims rely upon speculation.

IX. Conclusion.

For the foregoing reasons and the reasons discussed in the memos filed by the RNC and the Attorney General's Office, the Court should enter judgment for the Defendants.

RESPECTFULLY SUBMITTED this 19th day of October, 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on October 19, 2023, I electronically transmitted a PDF version of this document to the Clerk of Court, using the CM/ECF System for filing and for transmittal of a Notice of Electronic Filing.

In addition, a hard copy was hand-delivered to:

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