UNITED STATES DISTRICT COURT

DISTRICT OF SOUTH DAKOTA

WESTERN DIVISION

ROSEBUD SIOUX TRIBE and their members, OGALALA SIOUX TRIBE and their members, and LAKOTA PEOPLE'S LAW PROJECT, Kimberly Dillion, and Hoksila White Mountain, Plaintiffs, v. STEVE BARNETT, in his official capacity as Secretary of State for the State of South Dakota and Chairperson of the South Dakota State Board of Elections; LAURIE GILL, in her official capacity as Cabinet Secretary for the South Dakota Department of Social Services; MARCIA HULTMAN, in her official capacity as Cabinet Secretary for the South Dakota Department of Labor and Regulation; and CRAIG PRICE, in his official capacity as Cabinet Secretary for the South Dakota Department of Public Safety, Defendants.	5:20-cv-05058-LLP REPLY TO PLAINTIFFS' RESPONSE TO DEFENDANTS' MOTION TO DISMISS

INTRODUCTION

The Defendants, Steve Barnett, in his official capacity as the Secretary of State for the State of South Dakota, Laurie Gill, in her official capacity as Cabinet Secretary of the South Dakota Department of Social Services, Marcia Hultman, in her official capacity as Cabinet Secretary for the South Dakota Department of Labor and Regulation, and Craig Price, in his official capacity as Cabinet Secretary for the South Dakota Department of Public Safety (collectively "the State"), by and through the undersigned attorneys, and hereby reply to Plaintiffs' Opposition to Defendants' Motion to Dismiss.

Plaintiffs (1) challenge the timeliness of Defendants' Motion to Dismiss; (2) encourage this Court not to address standing of each Plaintiff because only one Plaintiff needs standing for the suit to proceed; (3) assert that they provided adequate notice of their claims to the State to satisfy the NVRA notice requirement; (4) contend that Lakota People's Law Project (LPLP), Kimberly Dillon, and Hoksila White Mountain have alleged sufficient injury to establish Article III standing; and (5) reallege that the South Dakota Department of Labor and Regulation (DLR) is a public assistance agency subject to the NVRA's voter registration requirements.

The State will address each of these arguments, but none prevent this Court from granting the State's Motion to Dismiss.

ARGUMENT

I. Timeliness

In their Brief in Opposition, Plaintiffs allege that the State's "statutory standing defense is untimely." (Docket Doc. 92 at pg. 6). Plaintiffs list four stages of these proceedings at which they feel the State's statutory standing defenses would have been more appropriately raised. *Id.* at pg. 6-7. Plaintiffs contend that the State's tactic of raising these defenses via a Motion to Dismiss causes them undue prejudice. *Id.* at pg. 7.

Noticeably absent from Plaintiffs' timeliness objection is citation to any authority. Nowhere in Section II. A. of Plaintiffs' brief, nor elsewhere, do Plaintiffs point this Court to any authority from either statute or caselaw supporting their claim that the State's statutory standing defenses are untimely. This is because such authority does not exist. As the Eighth Circuit Court of Appeals has previously pointed out, "it is not [the] court's job to research the law to support [the parties'] argument. . . . ." in the absence of any cited legal authority. *Molasky v. Principal Mut. Life Ins. Co.*, 149 F.3d 881, 885 (8th Cir. 1998) (quoting *Lusby v. Union Pacific R.R. Co.*, 4 F.3d 639, 642 (8th Cir. 1993).

In filing its Motion to Dismiss, the State complied with this Court's Fifth Amended Rule 16 Scheduling Order. (Docket Doc. 70)*. The deadline for filing

* After the deadline for motions passed, this Court entered a Sixth Amended Rule 16 Scheduling Order pursuant to a joint request from the parties to extend the response briefing schedule. (Docket Doc. 91). However, the Fifth Amended Rule 16 Scheduling Order was in place at the time the motion at issue was filed.

"all motions, other than motions in limine" was February 9, 2022. *Id.* at ¶ 7. The State's Motion to Dismiss was filed on February 9, 2022. (Docket Doc. 73). Absent any authority to the contrary, the State's Motion to Dismiss was timely filed pursuant to this Court's scheduling order. Plaintiffs offered no basis on which they can challenge the timeliness of the State's motion.

II. Statutory Standing

Following the order established in its Motion to Dismiss, the State next addresses the statutory standing of Plaintiffs LPLP, Dillon, and White Mountain.

In its Motion to Dismiss, the State asserted that Plaintiffs LPLP, Dillon, and White Mountain did not have statutory standing because they failed to comply with the NVRA's notice requirement. (Docket Doc. 74 at pg. 4-6). *See also* 52 U.S.C. § 20510(b). Plaintiffs responded that separate notice from these Plaintiffs would have been "unnecessary and futile." (Docket Doc. 92 at pg. 7). Because Plaintiffs LPLP, Dillon, and White Mountain raise claims unique to each of them, notice would have given the State the opportunity to cure the defects and would not have been futile.

A person who is aggrieved by an alleged violation of the NVRA is required to provide notice to the State's chief election official. 52 U.S.C. § 20510(b). While the NVRA's notice provision appears to be framed as permissive, Courts have interpreted the requirement to be mandatory. *Scott v. Schedler*, 771 F.3d 831, 835 (5th Cir. 2014). *See also Ga. State Conference of NAACP v. Kemp,* 841 F.Supp.2d 1320, 1335 (N.D.Ga.2012). The purpose of the notice requirement

was to "provide states in violation of the Act an opportunity to attempt compliance before facing litigation." *Association of Community Organizations for Reform Now v. Miller*, 129 F.3d 833, 838 (6th Cir. 1997).

Plaintiffs allege that separate notice by LPLP, Dillon, and White Mountain would be unnecessary and futile because the State was already on notice of the alleged NVRA violations due to the Notice Letter sent by Plaintiffs on May 20, 2020. (Docket Doc. 74 at pg. 8-9). While Plaintiffs' Notice Letter provides ten pages of general allegations and statistical data, nowhere does it level specific allegations involving any particular individual. (Docket Doc. 44 Ex. A). Had the State been provided notice of the allegations as to Plaintiffs Dillon and White Mountain, it could have taken steps to ascertain the veracity of the allegations; and, if indeed true, take action to remedy those violations. But the State was not informed of these allegations until Plaintiffs filed their Amended Complaint on August 10, 2021, almost eleven months after the initial Complaint was filed on September 16, 2020. *See* (Docket Doc. 44) and (Docket Doc. 1).

In their Amended Complaint, Plaintiffs alleged that Dillon was turned away from the polls in 2020 due to the State's alleged failure to ensure that Dillon's voter registration application was properly accepted and transmitted. (Docket Doc. 44 at ¶ 60). Plaintiffs further allege that Hoksila White Mountain struggled to get his name added to the ballot for a city election. (Docket Doc. 44 at ¶ 64). This election was scheduled to take place on June 9, 2020. *Id.* at ¶ 65.

According to the Declaration submitted by Pamela Cataldo, the field investigation conducted by Plaintiffs occurred between October 7 and October 18, 2019. Ex. 1 (Cataldo Declaration pg. 2). Assuming some components of the concerns involving Dillon and White Mountain were brought to Plaintiffs' attention during their field investigation, Plaintiffs could have easily provided notice of those concerns in the Notice Letter sent on May 20, 2020. And the State could have attempted to remedy the concerns prior to the June 9 election in McLaughlin and Dillon being turned away from the polls in November of 2020. Such is the precise purpose of the NVRA notice requirement. *Miller*, 129 F.3d at 838. Instead, Plaintiffs presumptively chose to withhold this information, exacerbating the concerns of which they now complain.

LPLP also raises unique concerns that were not provided to Defendants in the initial Notice Letter. The Notice Letter was sent by Plaintiffs' counsel for Rosebud Sioux Tribe and Ogalala Sioux Tribe. (Docket Doc. 44 Ex. A). The Notice Letter addresses alleged violations on the Pine Ridge and Rosebud reservations as well as in Pierre, Rapid City, and Eagle Butte. *Id.* But in their Amended Complaint, Plaintiffs assert that LPLP does outreach with other populations, including Lakota communities in North and South Dakota. (Docket Doc. 44 at ¶ 51). Had LPLP provided notice as required by the NVRA, the State would have been privy to crucial information, notifying them that allegations were being leveled in regions beyond those listed above.

Scott v. Schedler is informative with regard to Plaintiffs LPLP, Dillon, and White Mountain. There, Plaintiff Scott, a Louisiana resident, was allegedly denied

voter registration services through a public assistance agency. Subsequently, Plaintiff NAACP sent a letter that failed to mention Schedler to the Louisiana Secretary of State's Office, alleging non-compliance with the NVRA. *Scott*, 771 F.3d at 834. Plaintiffs Scott and NAACP later simultaneously filed a joint complaint against SOS Schedler. *Id.* The Fifth Circuit Court of Appeals ultimately determined that "the NAACP's notice letter was too vague to provide Schedler with 'an opportunity to attempt compliance' as to Scott 'before facing litigation.'" *Id.* at 836. Plaintiffs in this case similarly denied the State any opportunity to attempt compliance as to Plaintiffs LPLP, Dillon, and White Mountain prior to facing litigation.

Congress specifically included a notice requirement in the NVRA to allow States to cure alleged violations without the need for litigation. *Miller*, 129 F.3d at 838. Plaintiffs provided various generalized allegations of NVRA noncompliance in their May 20, 2020, Notice Letter. (Docket Doc. 44 Ex. A). And the State attempted to resolve those general concerns through a response letter dated June 5, 2020. Ex. 2 (State's Response letter). Unsatisfied with the follow up provided by the State, Plaintiffs filed their Complaint. (Docket Doc. 1). Had Plaintiffs provided the specific information included in their Amended Complaint, they might have received more directed responses. And this is precisely the purpose of the NVRA's notice requirement. Plaintiffs should not be rewarded for failing to provide notice of alleged violations and, thus, prejudicing Defendants by denying them the opportunity to cure any concerns. LPLP, Dillon, and White Mountain should be dismissed from this

suit pursuant to their failure to provide notice as required by 52 U.S.C. § 20510(b).

III. Article III Standing

In its Motion to Dismiss, the State challenged Plaintiffs LPLP, Dillon, and White Mountain's Article III standing. In response, Plaintiffs assert that only one plaintiff needs Article III standing for the case to proceed. One Plaintiff must have standing for each claim they seek and for each form of relief. *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 734 (2008) (quoting *DaimlerChrysler Corp. V. Cuno*, 547 U.S. 332, 352 (2006); *Town of Chester, N.Y. v. Laroe Estates, Inc.*, 137 S.Ct. 1645, 1650 (2017). "[S]tanding is not dispensed in gross." *Town of Chester, N.Y., 137 S.Ct. at 1650*. Plaintiffs Rosebud Sioux Tribe and Oglala Sioux Tribe don't have standing for each claim alleged in the Complaint. Not all Plaintiffs raise the same issues and claims. In the Plaintiffs' Amended Complaint, the diversion of resources claim was only alleged by LPLP. *See* (Docket Doc. 44 at ¶ 57). Furthermore, LPLP does not allege where in South Dakota, nor does it name to which tribe or tribes, their resources had to be diverted for voter engagement work. *Id.* at ¶¶ 51-58. The Rosebud Sioux Tribe and Oglala Sioux Tribe did not allege any claims that they had to divert resources.

Both the Rosebud Sioux Tribe and Oglala Sioux Tribe brought this action only on behalf of themselves and as parens patriae on behalf of their members. *Id.* at ¶ 3 and ¶ 50. Plaintiff Hoksila White Mountain is a member of the Standing Rock Sioux Tribe and does not belong to Plaintiffs Rosebud Sioux

Tribe or Oglala Sioux Tribe. *Id.* at ¶ 62. Plaintiff Hoksila White Mountain's claimed injury is that the Defendants' failure to comply with NVRA "injured his past candidacy for mayor of McLaughlin and threatens to undermine his prospects for successfully running for local office." *Id.* The Rosebud Sioux Tribe and Oglala Sioux Tribe did not allege any claims with regards to their members not being able to run for office because of the Defendants' alleged actions or inactions.

In addition, the Court has the authority to determine whether a subsequent Plaintiff should be allowed to ride the coattails of an existing Plaintiff's standing. Here, the Court should exercise its discretion to dismiss Plaintiffs LPLP, Dillon, and White Mountain not only due to their lack of Article III standing, but also for lack of statutory standing as explained above.

A. This Court should exercise its discretion with regard to the "one-plaintiff rule" and find that it does not apply here.

To have standing under Article III of the U.S. Constitution, a plaintiff must demonstrate an "injury-in-fact" which is "fairly traceable" to the challenged action of the Defendant, and which is capable of redress by a favorable decision from the Court. *Association of Community Organizations for Reform Now v. Fowler*, 178 F.3d 350 (5th Cir. 1999) (quoting *Bennett v. Spear*, 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997)). As Plaintiffs point out, only one plaintiff needs to have standing when all plaintiffs seek the same relief. *Town of Chester v. Laroe Estates, Inc.*, 137 S.Ct. 1645, 1651, 198 L.Ed.2d 64 (2017).

Despite Plaintiffs' encouragement that this Court need not address the standing of all parties, what some courts have dubbed the "one-plaintiff rule" is not mandatory. *MMV v. Garland*, 1 F.4th 1100, 1111 (D.C. Cir. 2021). While a Court "'need not' decide the standing of each plaintiff seeking the same relief. . .", this rule does not "*prohibit* the court from paring down a case by eliminating plaintiffs who lack standing. . ." *Id.* (internal citations omitted) (emphasis in original). Here, given the other standing issues raised by the State, this Court should exercise its discretion and consider standing for each Plaintiff individually.

B. Plaintiffs LPLP, Dillon, and White Mountain lack Article III standing.

As the State asserts in its Motion to Dismiss, Plaintiffs LPLP, Dillon, and White Mountain have not suffered sufficient "injuries-in-fact" to support Article III standing. (Docket Doc. 74 at pg. 6-12). An "injury-in-fact" necessitates an invasion of a legally protected interest that is "concrete and particularized" as well as "actual or imminent" and not "conjectural" or "hypothetical." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S.Ct. 2130, 119 L.Ed.2d 351 (1992) (internal citations omitted). There must be a "causal connection" between the alleged injury and the conduct spurring the plaintiff's complaint. *Id.* And it must be likely, rather than speculative, that the injury may be redressed by a favorable decision. *Id.* These Plaintiffs have not demonstrated a concrete injury sufficient to support Article III standing.

Plaintiffs assert that LPLP's diversion of resources to voter registration is sufficient to demonstrate an "injury-in-fact." (Docket Doc. 92 at pg. 12-16). As

Plaintiffs allege in their Complaint and the State underscores in its Motion to Dismiss, one of LPLP's primary missions is to mobilize tribal members to register to vote. *See* (Docket Doc. 44 at ¶ 52-57) and (Docket Doc. 74 at pg. 9-10). Plaintiffs contend, generally, that absent the State's alleged NVRA violations, LPLP would have obligated its resources to other purposes. (Docket Doc. 44 at ¶ 58). Such general allegations are insufficient to support a "concrete and particularized" injury as required for Article III standing. *Lujan*, 504 U.S. at 560-61.

Hoksila White Mountain has similarly failed to demonstrate a "concrete and particularized" injury-in-fact. Mr. White Mountain alleges in Plaintiffs' Amended Complaint that he was "not offered an opportunity to register to vote" and was "directed to a separate office" for voter registration when applying for a driver's license in Corson County, South Dakota. (Docket Doc. 44 at ¶ 90). He later claims that, while engaging with the Department of Social Services (DSS), he was either not offered voter registration services or that he registered to vote and later learned that he was not added to the polls. *Id.* at ¶ 130. Mr. White Mountain's contention is essentially that, even though he is not sure how, he was not provided adequate voter registration services. He asserts that either DSS failed to offer him voter registration, or they did it incorrectly, but that somehow, some way, DSS did not fulfill its obligations. Such broad allegations, without some factual support, cannot provide for a "concrete and particularized" injury sufficient to confer Article III standing. *Lujan*, 504 U.S. at 560-61.

Finally, Kimberly Dillon has also failed to demonstrate an "injury-in-fact." Ms. Dillon alleges that she registered to vote during transactions with DSS but was later turned away from the polls for being unregistered. (Docket Doc. 44 at ¶ 60 and 129). Ms. Dillon provides no factual support that an error by a DSS employee prevented her from voting. Ms. Dillon admits that she completed a voter registration application during her DSS interaction as required by the NVRA. (Docket Doc. 44 at ¶ 60). Nowhere does she allege what caused her registration to go undocumented. *See generally* (Docket Doc. 44) and Ex. 3 (Declaration of Kimberly Dillon). It is impossible for a DSS employee to confirm whether the information provided on a voter registration form is accurate. A voter registration failure that is not due to an error by DSS staff cannot constitute an NVRA violation. Because Ms. Dillon has not provided any facts to explain why she was not properly registered to vote, she has failed to allege a "concrete and particularized" injury-in-fact to support Article III standing. *Lujan*, 504 U.S. at 560-61.

IV. South Dakota Department of Labor and Regulation

Plaintiffs claim that the State "merely [denies] the truth of Plaintiffs' factual allegations" that the South Dakota Department of Labor and Regulation (DLR) does not provide public assistance. (Docket Doc. 92 at pg. 21). The State does not merely deny this allegation but has refuted it through reference to South Dakota law which demonstrates that DLR is not a public assistance agency pursuant to the NVRA. Because DLR is not a public assistance agency pursuant to 52 U.S.C. § 20506, it need not provide voter registration services.

Plaintiffs allege that DLR is a public assistance agency because it co-administers the Temporary Assistance for Needy Families Program (TANF) with DSS. (Docket Doc. 44 at ¶ 70). But as the State points out in its original Motion to Dismiss, South Dakota does not provide DLR with any authority to direct or administer the TANF program. (Docket Doc. 74 at pg. 12-13). The TANF program is directed, administered, and implemented by DSS. SDCL Ch. 28-7A. Further, as Bill McEntaffer, DLR Director of Field Operations, explains in his deposition, DLR employees refer TANF applicants to DSS to complete their TANF application. Ex. 4 (McEntaffer Dep. Transcript pg. 16). Form DSS-EA-301 is the application for TANF. DLR does not accept the DSS-EA-301 application and does not determine eligibility for TANF. Ex. 5 (McEntaffer Dep. Transcript 49:21-50:22; 56:4-9; 59:7-60:13; 62:8-63:11).

Because DLR does not accept and DLR staff do not provide assistance with the TANF application as alleged by Plaintiffs, DLR is not a public assistance agency. Additionally, TANF applicants will receive assistance, including voter registration services, when they complete their application with the assistance of DSS staff. DLR is not a public assistance agency as contemplated by 52 U.S.C. § 20506 and does not fall under the NVRA. For these reasons, Defendant Hultman should be dismissed as a Defendant from this action.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss should be granted in its entirety.

Dated this 31st day of March, 2022.

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CERTIFICATE OF SERVICE

I hereby certify that on the 31st day of March, 2022, I electronically filed the foregoing with the Clerk of the Court for the United States District Court for the Western Division by using the CM/ECF system. Participants in this case who are registered CM/ECF users will be served by the CM/ECF system.

/s/ Clifton E. Katz
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