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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF IDAHO

MARCH FOR OUR LIVES IDAHO and IDAHO ALLIANCE FOR RETIRED AMERICANS,

Plaintiffs,

v.

PHIL MCGRANE, in his official capacity as the Idaho Secretary of State,

Defendant.

Case No. 1:23-cv-00107-CWD

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

INTRODUCTION

Plaintiffs offer a capacious view of the Article III injury requirement that, if credited, would give any organization standing to challenge any law. As interest groups that register and educate voters, they say they are injured because they have to spend money educating voters about the change in law. This amounts to a generalized grievance that courts have long rejected as a basis for federal jurisdiction: it is always true that changes in the law require education about changes in the law, but that is not an injury. And "standing is not measured by the intensity of the litigant's interest or the fervor of his advocacy." *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 486 (1982). Plaintiffs cannot use "diversion of education resources" as a cloak to smuggle their policy objections into court as an Article III injury.

The fact that Plaintiffs cannot find a single injured voter also demonstrates that they lack a personal stake in the matter. Generic allegations of "confusion" and "difficulty" are not enough. Anyone eligible who wants to vote in Idaho in 2024 has more than a year to get a new free voter ID, and if there is an injured party lurking somewhere, they have time enough to file a claim. But Plaintiffs' projections and speculation about voter confusion only show their claims are not ripe.

Because Plaintiffs have no personal stake in the matter, they lack standing. Because no one is yet injured, the claims are unripe. And because an injunction against the Secretary would not be likely to give relief in any event, there is no redress to be had. This Court should dismiss the action for lack of jurisdiction.

ARGUMENT

I. Plaintiffs lack Article III standing and the Court lacks jurisdiction.

Plaintiffs cannot sue on behalf of the generic voter but must either "clearly" allege a diversion of resources and frustration of their own purposes or assert the associational rights of their own members. They fail to do either. They cannot convert generalized "voter confusion" into harm to their organizations or members.

A. Alleged harm from educating voters is business as usual.

Plaintiffs' alleged injury from spending resources to educate voters is no injury at all. The Supreme Court has "made it clear time and time again that an injury in fact must be both concrete *and* particularized." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016). Standing "is not dispensed in gross: a plaintiff's remedy must be tailored to redress the plaintiff's particular injury." *Gill v. Whitford*, 138 S. Ct. 1916, 1934 (2018) (cleaned up). Thus, to demonstrate organizational standing, Plaintiffs needed to allege "both a diversion of [their] resources and a frustration of [their] mission[s]." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (quoting *Fair Hous. of Marin v. Combs*, 285 F.3d 899, 902 (9th Cir. 2002)). Plaintiffs "cannot manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect [them] at all." *Id.* Nor can Plaintiffs use "business as usual" to shoehorn their policy objections into federal court as a diversion of resources. *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040–41 (9th Cir. 2015).

Plaintiffs' alleged injury is nothing more than business as usual. MFOL Idaho pleads that, under the status quo, young voters are "unfamiliar with the process" for registration, and that "educating them on the requirements and obtaining acceptable identification in time for the election is often onerous." Dkt. 20 at 6. So MFOL Idaho pleads that, since the law has changed, it must now divert additional resources "towards voter education from other programming," to educate them on the requirements for registration. *Id*. And the Alliance pleads that it must now spend time "educating its members about the stricter voter registration requirements and helping them obtain acceptable photo identification." *Id*. at 7. This is not enough.

Plaintiffs' theory that spending additional resources on education about the law is an injury would authorize any challenge by anyone to any law. Any organization, no matter its purpose, could allege that it educates citizens about some law and that, as a consequence of a change in the law, it has to spend more resources educating them about the change. Such an open-ended theory of standing would be equivalent to taxpayer standing: the very sort of generalized grievance that Article III rejects. Plaintiffs allege no specific diversion of resources, and so they lack standing.

Plaintiffs seek support for their theory from the Ninth Circuit's decision in *La Raza*, but that decision is no help to their case. The *La Raza* plaintiffs alleged 1) a years' long "systematic[] fail[ure]" to provide voter registration forms to those seeking public assistance, 2) as required by federal law that, 3) resulted in a 95% drop in the number of applications submitted to public assistance offices. *La Raza*, 800 F.3d at 1035–36. Because of Nevada's alleged failure to do its job, the *La Raza* plaintiffs

alleged that they needed to step into the role of the state and provide resources that Nevada was required to provide at state expense. Specifically, they alleged these voters "should have been offered voter registration through Nevada's public assistance offices," and that plaintiffs had to redouble their efforts in those communities when they otherwise would have worked elsewhere. *Id.* at 1036–37.

This case does not even approximate a *La Raza* claim. Unlike in *La Raza*, Plaintiffs do not allege and have not shown a "precipitous" drop in voting registration in Idaho, among young people or otherwise. *La Raza*'s plaintiffs pled a known decline in registrations, coupled with specific efforts undertaken to adjust for Nevada's failure. But here, just 104 persons, a small fraction of a percent of total voters, used student ID to vote in the last election. Dkt. 29-3 (Column "Manual Search – Current Student ID Card"). Nor do Plaintiffs allege that the Secretary of State has failed to adequately educate on these laws—to the contrary, they have sued to prevent those laws from going into effect. And they do not allege any specific efforts they have undertaken or will undertake to educate about the law. Instead, they allege only general voter confusion about new rules and a generalized diversion of resources that they—just like any other organization that says it educates voters—would experience in challenging the law. "Where, as here, a case is at the pleading stage, the plaintiff must *clearly* … allege facts demonstrating each element" of standing. *Spokeo*, 578 U.S. at 338 (cleaned up) (emphasis added). Generic complaints do not suffice.

Plaintiffs' "diversion" theory is also inconsistent with the other specific allegations of their Complaint. Plaintiffs openly admit that young voters suffered from

"onerous" confusion and difficulty about what materials are required to register *even before* the challenged laws were enacted. Dkt. 20 at 6. Given that allegation, Plaintiffs cannot plausibly allege that the laws will cause voter confusion and thus a diversion of resources when Plaintiffs were already doing "onerous" work to educate voters. The Ninth Circuit has rejected the argument that time spent educating a person on advocacy methods that took time away from other similar calls constitutes resource diversion. *Am. Diabetes Ass'n v. U.S. Dep't of the Army*, 938 F.3d 1147, 1155 (9th Cir. 2019). This Court should reject the same argument here.

Plaintiffs cite a smattering of other factually unrelated cases that do not get them any closer to the starting line for resource diversion sufficient for organizational standing.[1] None of these decisions allow Plaintiffs to rely on "onerous" hurdles that exist already or on nebulous resource diversion arguments that do not say where the "resources" are taken from and where they are now going. *See Tex. State LULAC v. Elfant*, 52 F.4th 248, 253–56 (5th Cir. 2022); *accord Friends of the Earth v. Sanderson Farms, Inc.*, 992 F.3d 939, 942–44 (9th Cir. 2021) (rejecting advocacy groups' standing where activism was part of preexisting campaign and therefore no redirection of resources occurred). Plaintiffs have no injury and no standing.

[1] *Smith v. Pac. Props. and Dev. Corp.*, 358 F.3d 1098, 1105 (9th Cir. 2004) (standing for disability advocacy plaintiff under FHA where plaintiff had to monitor violations and promote compliance); *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982) (FHA standing for plaintiff that provided referrals to low income home seekers and was thwarted by racist steering practices); *Valle de Sol Inc. v. Whiting*, 732 F.3d 1006 (9th Cir. 2013) (plaintiff had standing where it sheltered illegal aliens in violation of state law and its staff reasonably feared prosecution); *Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 657 F.3d 936, 943 (9th Cir. 2011) (plaintiff presented "uncontradicted evidence" of new and specific expenditures).

B. Plaintiffs lack associational standing because they can do no more than speculate that even a single member could sue.

Plaintiffs cannot establish associational standing because they neither identify any members who "would otherwise have standing to sue in their own right" nor allege that "the interests [they] seek[] to protect are germane to the organization's purpose." *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977). Plaintiffs suggest they can proceed under Ninth Circuit law that allows an organization "*without*" formal members to sue if the plaintiff serves "a specialized segment" of the community. Dkt. 34 at 11; *see Am. Unites for Kids v. Rousseau*, 985 F.3d 1075, 1096 (9th Cir. 2021). But that standard does not apply here: both Plaintiffs allege they have members. Dkt. 20 at 5–6. And the Supreme Court has expressly rejected the notion that mere "statistical probabilities" can stand in for the strict requirement of identifying an injured member. *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009).

On this point too, Plaintiffs say that they have shown standing under *La Raza*, which interpreted the *Summers* requirement. There, the Ninth Circuit held that identifying injured members was not strictly necessary "where it is relatively clear, rather than speculative" that members "have been or will be adversely affected by a defendant's action" *and* "where the defendant need not know the identity of a particular member to understand and respond" to a claim. *La Raza*, 800 F.3d at 1041. But it is far from "relatively clear" here.

Predictions of voter confusion under a new statute that is not yet in effect are "sheer speculation." *See Wash. State Grange v. Wash. State Republican Party*, 552

U.S. 442, 454 (rejecting facial challenge to law requiring party preference designation based on the likelihood of voter confusion). Voter confusion claims are speculative by nature; what a voter thinks about the new requirements as opposed to the old ones cannot be known. That is especially so where Plaintiffs allege that voters already need an "onerous" amount of education under current law. As in *Washington State Grange*, this is both "the heart of [Plaintiffs'] case—and ... the fatal flaw in their argument." *Id.* Moreover, without a specific member identifying what exactly is "confusing," it is impossible to tell where exactly the constitutional infirmity lies. *La Raza* demands more than mere speculation, but that is all that Plaintiffs offer here.

Two statements by the Alliance in support of associational standing reveal even more problems with Plaintiffs' claims. First, the Alliance's sole theory of injury to its members is that certain hypothetical retirees who have recently moved to Idaho and do not wish to renew driver's licenses will have to pay for voter ID or wait six months to get a new free ID. Dkt. 20 at 6–7, 10–11. And second, Plaintiffs concede that they have no objection to the State's provision of free voter ID, which is why they say they do not need to join the Secretary of Transportation. Dkt. 34 at 15. Put together, these two statements necessarily imply that those who have free voter ID available to them have no injury. If the Alliance's members are injured only because they must pay for voter ID, and if Plaintiffs do not challenge the issuance of free voter ID, then those who can get a free voter ID are not injured.

This also means that if Plaintiffs do not challenge the issuance of free voter ID, then they can have no quarrel with the de minimis requirements necessary to obtain

a free ID. And since every one of Plaintiffs' members who will otherwise be eligible to vote can get a free voter ID, then by their own concessions, none of them are injured. There is therefore a fundamental mismatch between the injury the Plaintiffs' plead for purposes of standing (a hypothetical person who cannot obtain a free ID) and Plaintiffs' claims for relief (which seek to void voter ID requirements for registration entirely). Plaintiffs' concessions thus doom their theory of injury.

C. The claims are not redressable against the Secretary because he could not compel county clerks to comply with his advice.

The Secretary of State is not the one who would directly enforce the requirements for photo ID. In Idaho, these prerogatives belong to county clerks, who are responsible both for registering voters and for conducting elections. Idaho Code § 34-208. And the Secretary of State has only limited ability to compel compliance with his mandates even when he does issue guidance to the counties—he must bring a lawsuit against them and prove the validity of those directives, or like any other citizen, complain to a county prosecutor. Idaho Code § 34-212. Thus, Plaintiffs cannot show that "the injury they will suffer ... is 'fairly traceable' to the 'allegedly unlawful conduct' of which they complain" from the Secretary of State or that an order against the Secretary of State can redress their harm. *California v. Texas*, 141 S. Ct. 2104, 2113 (2021) (quoting *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 342 (2006)).

Plaintiffs point to the Ninth Circuit's decision in *Mecinas*, which addresses other state secretaries operating different systems, but says nothing about whether *Idaho's* Secretary can redress their injuries. *Mecinas v. Hobbs*, 30 F.4th 890, 900 (9th Cir. 2022). *Mecinas* arose out of Arizona, which publishes an Election Procedures

Manual promulgated by the Arizona Secretary of State, and where a violation of this binding statewide administrative law is a class 2 misdemeanor. *Id.* (citing Ariz. Rev. Stat. § 16-452(C)). That's not the case in Idaho: the Secretary of State issues directives, but those are not criminally enforceable by him. He can only compel compliance through a writ of mandamus. Idaho Code § 34-213(1). Thus, if he files an action, he must prevail in a contested judicial proceeding, which is a far cry from the immediate criminal penalty that attaches to *any* violation of the Arizona manual. Idaho's Secretary of State can prescribe a voter registration form, but he cannot force any clerk to process or accept it without filing a separate action and proving the validity of his action. Idaho Code §§ 34-202, -203, -212(1). Even an action brought by a county prosecutor must demonstrate that a clerk violated a lawful directive from the Secretary. Idaho Code § 34-212(1). In Arizona, no discretion is afforded for disobedience to the EPM. Having failed to join the right actors, "an injunction would not give [Plaintiffs] legally enforceable protection from the allegedly imminent harm." *Haaland v. Brackeen*, No. 21-376, 2023 WL 4002951, at *18 (U.S. June 15, 2023). Here too, relief against the Secretary cannot redress Plaintiffs' claims.

D. Plaintiffs' claims are unripe because the speculative harm is eliminated by the six months for members to acquire free voter ID.

Plaintiffs miss the point on ripeness. The Court must consider whether 1) the issues presented are fit for judicial decision, and 2) withholding consideration causes hardship to the parties. *Addington v. U.S. Airline Pilots Ass'n*, 606 F.3d 1174, 1179 (9th Cir. 2010). The case is not fit for a judicial decision because Plaintiffs offer nothing but speculation as to whether anyone anywhere will be harmed. They offer

nothing but speculation as to whether any voter will ever be confused by the updated statutes and that any resources will therefore be diverted to compensate. *See Pac. Legal Found.*, 659 F.2d. at 916. Again, the six months between when the two laws come into effect matters: every potentially affected member can place themselves in the camp eligible for free voter ID. And more than a year will pass before the next election. Plaintiffs say it would always be "too soon" or "too late" to sue, but where Plaintiffs' theory of standing hinges on voter confusion, it makes sense to wait to see if any member fails to get an ID card or suffers any confusion when the laws go into effect. There is no "certainly impending" harm and no election where these laws have been tested, so the claims are unripe. *See Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923); *Carter v. Carter Coal Co.*, 298 U.S. 238, 287 (1936).

II. Because Plaintiffs eventually complied with rules governing service the Court has personal jurisdiction over the Secretary.

After the State instructed Plaintiffs to comply with applicable civil rules on service of process, Plaintiffs did so. *See* Fed. R. Civ. P. 4(j)(2)(B); Idaho R. Civ. P. 4(d)(4)(A). Because Plaintiffs corrected their defective service of process, the State concedes the Court now has jurisdiction over the Secretary in his official capacity.

CONCLUSION

The Court should dismiss the Complaint for lack of jurisdiction.

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DATED: June 21, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 21, 2023, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which sent a Notice of Electronic Filing to the following persons:

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