IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No.: 1:22-cv-01365-CNS-MDB

CITIZENS PROJECT, COLORADO LATINOS VOTE, LEAGUE OF WOMEN VOTERS OF PIKES PEAK REGION, and BLACK/LATINO LEADERSHIP COALITION,

Plaintiffs,

v.

CITY OF COLORADO SPRINGS, AND SARAH BALL JOHNSON, IN HER OFFICIAL CAPACITY AS CITY CLERK,

Defendants.

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

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Not one Black or Hispanic voter has appeared in this case and argued that the City's election timing is discriminatory, and Plaintiffs cannot litigate their rights in their absence. Nor can Plaintiffs prevail on the merits when they do not, and cannot, articulate what voting burden applies unequally on the basis of race or language-minority status in April, but not in November. Because all facts germane to those two points are undisputed, the motion should be granted.

REPLY CONCERNING DISPUTED FACTS

Plaintiffs do not create a material fact dispute on at least the following points, which are sufficient (with the many admitted facts) for summary judgment.

14. No admissible evidence supports Plaintiffs' assertion that "Black and Hispanic residents of the City face higher informational burdens, are less likely to be mailed a ballot, and are more likely to prefer to vote in person which is not an option" in municipal elections. Opp. 3 (¶ 14). On the first point, Plaintiffs cite inadmissible lay opinion that voters of all groups have their "brains . . . set to November elections"—and gives no racial comparison. Ex. P at 115:23. On the second, Plaintiffs cite inaccurate testimony of their expert that a smaller pool of "active" voters receives ballots in City elections than in other Colorado elections, Ex. T at 36–40, when the same pool of active voters receives ballots in all elections, Colo. Rev. Stat. §§ 1-7.5-104, 1-7.5-107(3)(a)(I). On the third, Plaintiffs cite inadmissible lay opinion that minority voters "prefer[]" to vote in person, which that witness defined as a process where a voter "take[s] their mail-in ballot, go[es] in person, fill[s] it out, and turn[s] it in." Ex. TT (CP Dep.) at 264:15–25. But minority voters can fill out and return their mail-in ballots to drop-boxes in City elections in April.

16. Plaintiffs admit that "salience of elections is . . . one factor" behind a supposed turnout differential and cite no competent evidence that other causal factors are present in Colorado

Springs. Opp. 4 (¶ 16). Their citations include an observation not tied to Colorado Springs that "individual socioeconomic status and individual resources strongly predict voting," Ex. L at 34, and inadmissible lay opinion based on an unscientific "low voter turnout survey" that asked voters about even-year November turnout choices. Ex. TT at 261:18-262:12. This does not establish a causal connection grounded in or tied to a Colorado Springs-specific turnout analysis. Salience is the sole phenomenon Plaintiffs cite that might connect general sociological factors to April election timing. *See, e.g.,* Ex. TT at 267:15–268:4 ("turnout being higher citywide and districtwide" in November, "some of these issues [barriers to voting] seem to resolve themselves because more people are actually voting"); Ex. N at 4–5 (similar); Ex. J at 204:11–23; 219:1–220:6 (similar).

RESPONSE TO STATEMENT OF ADDITIONAL MATERIAL FACTS

17–42. The City disputes these alleged "facts," but they are not material.

ARGUMENT

I. Plaintiffs Lack Standing to Prosecute a Section 2 Claim

Plaintiffs formally disclaim associational standing on behalf of individual members. Opp. 2 (¶ 9). Because § 2 does not address corporate costs, Plaintiffs lack standing in their own right.

A. Plaintiffs identify no basis to assert rights of minority voters who neither join nor support their suit. Their first claimed interest, in "ensuring that the communities they serve . . . have equal access to the franchise," Opp. 9, does not even satisfy Article III. "[A]n organization's abstract concern with a subject" does not suffice. *Simon v. E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 40 (1976). Standing cannot be created by voting-related mission statements any more than it can be created by a "longstanding and sincere interest in rectifying . . . perceived

discrimination," *Newark Branch, N.A.A.C.P. v. Town of Harrison, N.J.*, 907 F.2d 1408, 1416 (3d Cir. 1990), or "the desire to achieve equality for a racial minority," *Young v. Klutznick*, 652 F.2d 617, 623 (6th Cir. 1981).

B. Plaintiffs also claim an interest in conserving "resources," without citing evidence for that assertion. Opp. 10. Even if that might support Article III standing—which the City does not concede—it does not make any Plaintiff "aggrieved" under 52 U.S.C. § 10302(a). Because § 2 protects "the right of [a] citizen of the United States to vote," *id.* § 10301(a), the right to sue belongs to "voters," *Roberts v. Wamser*, 883 F.2d 617, 621 (8th Cir. 1989). Presumptively applicable zone-of-interest and proximate-cause tests compel the same conclusion. *See Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 130, 132 (2014); Mot. 10–11. Plaintiffs respond that the word "person" may include a corporate person. Opp. 10. But § 2 still does not protect their *financial* interests. Plaintiffs must be "aggrieved," which means "suffering from an infringement or denial of legal rights," *Aggrieved*, Webster's Third New International Dictionary (1971); *see, e.g.*, *Wisconsin Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2071 (2018) (adjectives restrict the nouns they modify). In this way, the "breadth" of the private right "varies according to the provisions of law at issue." *Lexmark*, 572 U.S. at 130. For example, a corporate person might be aggrieved under VRA § 11(b), which protects voters *and* "any person . . . urging or aiding any person to vote," 52 U.S.C. § 10307(b); *see Colo. Mont. Wyo. State Area Conf. of NAACP v. U.S. Election Integrity Plan*, No. 1:22-cv-00581, 2023 WL 1338676, *4 (D. Colo. Jan. 31, 2023). In § 2, by contrast, Congress protected "the right . . . to vote" of each "citizen." 52 U.S.C. § 10301(a). Plaintiffs are therefore incorrect to suggest that anyone with Article III standing may sue. *See* Opp.

9–10.[1]

Arguing to the zone-of-interests test, Plaintiffs erroneously invoke *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170 (2011), which they say "did *not* limit standing to only individuals directly subject to discriminatory action." Opp. 9. But the plaintiff in *Thompson* was "fired" by his employer, which "violated Title VII." *See* 562 U.S. at 172–73. He could sue only because he was among the "employees" Title VII "protect[s]" and "not an accidental victim of the retaliation." *Id.* at 178. *Thompson* limited the private right to employees, and not, for example, an employee's parent, *see Simmons v. UBS Fin. Servs., Inc.*, 972 F.3d 664, 669–70 (5th Cir. 2020), a non-employee spouse, *see Underwood v. Dep't of Fin. Servs. State of Fla.*, 518 F. App'x 637, 643 (11th Cir. 2013), or beneficiary, *see Tovar v. Essentia Health*, 857 F.3d 771, 776–77 (8th Cir. 2017). *Thompson* certainly does not support a suit by employee-related non-profit corporations looking to save costs for employee outreach. So too here.

C. Precedent interpreting § 2 supports the City. *Roberts* is not an "outlier." Opp. 8. Many decisions cite it as stating "well-settled" law. *See, e.g., White-Battle v. Democratic Party of Va.*, 323 F. Supp. 2d 696, 702 (E.D. Va. 2004). The only disapproving authority found it too expansive in finding any § 2 private action. *See* Mot. 7 n.2. Plaintiffs dismiss all decisions not directly involving "a voter engagement or civil rights organization." Opp. 8. But their position

[1] Plaintiffs' authorities concerning the word "aggrieved" are not informative. Each predates *Lexmark* and *Thompson*. Additionally, *ACORN v. Fowler*, 178 F.3d 350 (5th Cir. 1999), relied on dictum in *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205 (1972), which *Thompson* later deemed "ill-considered." 562 U.S. at 176. *Ozonoff v. Berzak*, 744 F.2d 224, 228 (1st Cir. 1984), erroneously assumed the Administrative Procedure Act's "aggrieved" person standard contains no zone-of-interests test—when later authority held the opposite, *see Thompson*, 562 U.S. at 177. And Plaintiffs misread *FEC v. Akins*, 524 U.S. 11 (1998), in the same manner rejected in *Grand Council of Crees (of Quebec) v. FERC*, 198 F.3d 950, 954–55 (D.C. Cir. 2000).

conflicts with every case holding § 2 protection "is confined to persons whose voting rights have been denied or impaired," *McGee v. City of Warrensville Heights*, 16 F. Supp. 2d 837, 845–46 (N.D. Ohio 1998), which is a standard Plaintiffs do not satisfy.

No persuasive authority supports Plaintiffs. Most decisions they cite, Opp. 8, address Article III standing, not statutory standing. *Common Cause/Ga. v. Billups*, 554 F.3d 1340, 1350–51 (11th Cir. 2009); *Fla. State Conf. of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1165–66 (11th Cir. 2008); *Sixth Dist. of Afr. Methodist Episcopal Church v. Kemp*, 574 F. Supp. 3d 1260, 1272 (N.D. Ga. 2021); *Fla. State Conf. of NAACP v. Lee*, 576 F. Supp. 3d 974, 981–82 (N.D. Fla. 2021). One, *La Unión del Pueblo Entero v. Abbott*, 614 F. Supp. 3d 509 (W.D. Tex. 2022), addressed an organization that asserted the rights of individual members, *id.* at 516–31, who are arguably within § 2's right of action, Mot. 9–10. That is not the case here. Opp. 3 (¶ 11). Another recognized that only "aggrieved voters" may sue, but erroneously inferred statutory standing under § 2 from a decision addressing Article III, associational standing under the Equal Protection Clause. *Compare Ne. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 624 (6th Cir. 2016), *with Ala. Leg. Black Caucus v. Alabama*, 575 U.S. 254, 271 (2015).

That organizations often sue with or for minority voters only emphasizes that Plaintiffs could not find *one* who supports their case. It says much that Plaintiffs impugn the motives of the City's mayor—its most prominent minority leader—without evidence and say their interests better align with minority voting interests than his—even though he *is* a minority voter who enjoys § 2 protection. Opp. 10–11. It is difficult to follow Plaintiffs' insistence that they can sue even if their goals conflict with the interests of voters § 2 protects. Opp. 11 n.2. Voters—not Plaintiffs—are

"the best proponents of their own rights." *Singleton v. Wulff*, 428 U.S. 106, 114 (1976).[2]

II. Plaintiffs Cannot Take Their Section 2 Claim to Trial

Plaintiffs strive mightily to transform their policy views into a cognizable § 2 claim. Their opposition does everything but say, in plain English, how the City's election timing causes Black and Hispanic voters in the City to have "less opportunity" than white voters. 52 U.S.C. § 10301(a).

A. The City did not "ignor[e] the operative legal standard." Opp. 2. The black-letter law of § 2 is "the requirement that voting be 'equally open,'" which "may stretch . . . to some degree to include consideration of a person's ability to *use* the means that are equally open." *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2338 (2021). The City's motion explained this standard and argued to it. Mot. 11–15. Plaintiffs are wrong to fault the City for not instead addressing an alternative "two-part test" some courts developed pre-*Brnovich* that turns on "disparate effect." Opp. 11 (citation omitted). Those decisions do not survive *Brnovich*, which rejected any test that "turn[s] almost entirely" on "disparate impact." 141 S. Ct. at 2340–41.

Plaintiffs also err in criticizing the City for not analyzing each of "the Senate or *Brnovich* factors." Opp. 12. Those factors are probative only insofar as they speak to "the touchstone" of "whether voting is 'equally open,'" and this requires a threshold showing of a "burden imposed by a challenged voting rule." *Brnovich*, 141 S. Ct. at 2338. Plaintiffs' contrary view may condemn rules that do not make voting unequally difficult for minorities, if, say, the rule is novel by 1982 standards and the justification is tenuous. But § 2 liability does not arise from mere policy disagreements, which is why § 2 case law imposes "necessary preconditions" as a gateway to

[2] Unrebutted evidence shows that "candidates well to the left of the median Colorado Springs voter are routinely elected" in April elections and that the current Mayor received the support of liberal interests. Ex. K at 5–6. Racial minorities are entitled to prefer that timing if they wish.

multi-factor balancing, to restrict § 2 scrutiny to systems that may "impede the ability of minority voters to elect representatives of their choice." *Thornburg v. Gingles*, 478 U.S. 30, 48 (1986); *see also Allen v. Milligan*, 143 S. Ct. 1487, 1503 (2023). In the same vein, *Brnovich* requires an initial showing of "obstacles and burdens that block or seriously hinder voting." 141 S. Ct. at 2338.

B. Plaintiffs misconstrue how *Brnovich*'s test applies in practice. For example, they insist no "facially neutral policy" would ever violate "the City's view of § 2," Opp. 13, and accuse the City of arguing that election timing cannot "violate the VRA," *id.* 8. But the City's motion identified rules that might fail under § 2 that are both facially neutral and set election times. Mot. 14–15. An obstacle need not be facially race-based to be an obstacle. *Brnovick*, 141 S. Ct. at 2333.

Plaintiffs do little to address the City's point that § 2 is not offended where "members of different races have the same opportunity to vote, but go to the ballot box at different rates." *Brnovich*, 141 S. Ct. at 2358 (Kagan, J., dissenting). A § 2 claim founded on theories of salience and concurrence does precisely that. It measures choices, not burdens. Plaintiffs respond with case law and Department of Justice preclearance letters under VRA § 5, which they say embrace their theory. *See* Opp. 18–19. Even if that is so (which is unclear), § 5 is unlike § 2, *see Georgia v. Ashcroft*, 539 U.S. 461, 478 (2003) (outlining that "contrast"), and does not contain the same equal-opportunity touchstone. *See* 52 U.S.C. § 10304. The § 2 case Plaintiffs cite treated "off-cycle" elections as one factor to weigh after vote-dilution preconditions were proven, not as a stand-alone violation, *see United States v. Vill. of Port Chester*, 704 F. Supp. 2d 411, 444 (S.D.N.Y. 2010), which is all the legislative history Plaintiffs cite supports, *see* S. Rep. No. 97–417 at 144 n.105.

Plaintiffs insist their theory is not "novel," Opp. 18, but cite no § 2 case invalidating an off-cycle election. That is not for lack of opportunity. More than half of United States cities held non-

November elections in the 1980s, and more than one third do today. Ex. N at 2. It is hard to believe Plaintiffs' assurance that this case "has limited implications for any future challenge," Opp. 20, when their evidence consists of national trends, *see supra* RCDF ¶¶ 14, 16; *infra* § II.C, and typical voting patterns, including in odd-year November elections, *see* Ex. K at 15–19, 23–26. One of Plaintiffs' experts advocates that all elections occur "on the same day as national contests," Ex. UU (Hajnal Dep. Ex. 11) at 1, which Plaintiffs complain cannot be achieved democratically. *See* Opp. 20. Hence, this test case. If it is just about "local" conditions in Colorado Springs, *id.* at 19, why do Plaintiffs rely on three experts who cannot even name the City's mayor? *See id.* at 3 (¶ 12).

C. There is an absence of evidence to support Plaintiffs' case under the correct standard. Summary judgment is often granted to defendants in § 2 cases, *Ga. State Conf. of NAACP v. Fayette Cnty. Bd. of Comm'rs*, 775 F.3d 1336, 1345 (11th Cir. 2015), and should be here.

Plaintiffs do not describe how it could be unequally difficult for minority voters to vote in April. This is not like a case where minority voters are absent or working on election day. Mot. 15. Plaintiffs say the City's timing is "unlawful *for the same reason*" but just extrapolate on *why* "minority members [are] less able to leave work," Opp. 15, when the question is *what* timing-related obstacle exists here. Election timing can violate § 2 in the absent-migrant-worker case because an obstacle—work schedules—can be avoided by holding elections when migrant workers are home. But Plaintiffs cite no evidence that minorities in Colorado Springs experience April-specific scheduling conflicts, and no one has to leave work to vote by mail. Nor do Plaintiffs connect their arguments to April elections. The "discrimination" Plaintiffs blame, Opp. 15, does not manifest itself in April and then suddenly disappear on one Tuesday in November.

Plaintiffs' discussion of turnout patterns also does not work. Opp. 15. Even assuming

Plaintiffs' way of viewing turnout were correct, *but see* Mot. 12 n.3, it does not point to a voting obstacle. That is because Plaintiffs' experts measure "which" elections "voters are more focused on / more interested in / more likely to vote in." Ex. J at 33:12–13. Measuring the difference between turnout in "a higher-salience election" and a lower-salience election speaks at most to "higher interest" by voters, *id.* at 33:2–5, 16, not to a burden—like a work conflict—that "hinders voting," Opp. 15; *Salas v. Sw. Texas Jr. Coll. Dist.*, 964 F.2d 1542, 1556 (5th Cir. 1992) ("Obviously, a protected class is not entitled to § 2 relief merely because it turns out in a lower percentage than whites to vote."). The concept of a voting burden remains elusive.

Plaintiffs' arguments become only less focused from there. They criticize the City's mail-in voting system and the supposed absence of early voting, alleging that "minority voters are less likely to vote by mail and more likely to have ballots rejected." Opp. 17. But they rely on national studies and inadmissible lay opinion. *See supra* RCDF ¶¶ 14, 16. No admissible evidence shows that minorities *in Colorado Springs* dislike mail voting, need early voting, or see their mail-in ballots rejected at disproportionate rates. (So much for a local appraisal.) Besides, if they had such evidence, the § 2 claim would lie against those systems, not April elections. Plaintiffs also complain that voters who do not vote in April "have no opportunity to vote at any other time." Opp. 17. But if the City hosted November elections, voters could not vote at any other time (including in April). They also complain that the City mails ballots only "to *active* registered voters," Opp. 17, but the same is true in November, *see supra* RCDF ¶ 16. And, again, if that system were discriminatory, the challenge would lie against it. The election timing is not to blame.

D. Everything else Plaintiffs say goes to the totality of the circumstances, which cannot be addressed without the "precondition[]" of a voting burden. *Thornburg*, 478 U.S. at 49–50. As

an initial matter, the City's motion explained why summary judgment is warranted on the factors identified in Plaintiffs' complaint. *See* Mot. 18–20. Plaintiffs have no response.

What Plaintiffs do say is irrelevant. It is not enough that Plaintiffs might show "a history of . . . discrimination," Opp. 18, which is insufficient for a § 2 claim and will always be shown. Plaintiffs' historical expert could not name one jurisdiction that lacks a history of discrimination by his standard. Ex. VV (Romero Dep.) 58:1–5. This case is as weak as it comes: he could identify no voting-related discrimination in Colorado Springs more recently than 1984. *Id.* at 143:3–6. And Plaintiffs are wrong that the City's election-timing—the same as Denver's—is unusual, as judged by a national standard in 1982. *See Brnovich*, 141 S. Ct. at 2338–39; Ex. N at 2. Besides, "unusual" policy, Opp. 1, does not violate § 2 if it does not create unequal voting obstacles.

The same error undermines Plaintiffs' criticism of the City for not "offer[ing] a single rationale" for its election timing. Opp. 17. No obstacle to voting needs justification here. To be clear, the City's choice finds support in compelling policies, *see, e.g.*, Ex. A at 31–32, which do not require "empirical verification," *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997). As just one justification, the City outlined the benefit of more than a century of continuity, Mot. 2 (¶¶ 2, 4), with undisputed facts, *see* Opp. 2 (¶¶ 2, 4). Plaintiffs forget that, as with many procedural rules, "it is less important what" the timing is "than that there be a rule whereby [the] timetable may be known." *Miner v. Atlass*, 363 U.S. 641, 649 (1960). Implicit in Plaintiffs' position is that, because Congress chose November elections—for reasons few remember—other governments must as well. It is *that* idea that creates a constitutional problem. *See* Mot. 16–17.

CONCLUSION

The Court should grant the motion and enter summary judgment for the City.

Dated: August 30, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on this 30th day of August, 2023, the foregoing was filed on the Court's EM/ECF system. Notice of this filing will be sent to all counsel of record by the Court's system. Copies of this filing can be obtained from the Court's system.

/s/ Richard B. Raile
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