DISTRICT COURT, CITY & COUNTY OF DENVER, COLORADO 1437 Bannock Street Denver, CO 80203 **Plaintiffs:** VET VOICE FOUNDATION, LESLIE DIAZ, RANDY EICHNER, JOHN ERWIN, AMANDA IRETON, and GREGORY WILLIAMS **v.** **Defendant:** JENA GRISWOLD, in her official capacity as Colorado Secretary of State and **Intervenor Defendants,** VERA ORTEGON and WAYNE WILLIAMS	**COURT USE ONLY** Case No. 2022CV33456 Ctrm./Div.: 215
Attorneys for Defendant: PHILIP J. WEISER Attorney General EMILY BURKE BUCKLEY, #43002* Senior Assistant Attorney General PETER G. BAUMANN, #51620* Senior Assistant Attorney General KYLE M. HOLTER, #52196 Assistant Attorney General Colorado Department of Law Ralph L. Carr Colorado Judicial Center 1300 Broadway Denver, Colorado 80203 Telephone: (720) 508-6152 Email: emily.buckley@coag.gov; peter.baumann@coag.gov; kyle.holter@coag.gov *Counsel of Record	

THE SECRETARY'S MOTION TO DISMISS COUNT TWO FOR LACK OF SUBJECT MATTER JURISDICTION

In this action, Plaintiffs bring three claims against the Secretary, including a disparate treatment claim alleging that Colorado's mail-ballot system discriminates against "young, Latino, Black, and Asian voters, whose ballots are rejected at much higher rates than are those of older white voters." 2d Am. Compl. ¶ 111 (Feb. 2, 2023). But none of the Plaintiffs fall into the classes of voters allegedly subject to unequal treatment under the system. Because none of the named Plaintiffs are subject to the allegedly disparate treatment, none have standing to maintain this claim.

Accordingly, the Court should dismiss Count Two of the Complaint.

CERTIFICATE OF COMPLIANCE WITH C.R.C.P. 121 § 1-15(8)

The Secretary's counsel conferred with counsel for Plaintiffs and the Intervenor Defendants by videocall on November 20, 2023. Counsel for the Plaintiffs indicated that Plaintiffs oppose the relief requested in this Motion. Counsel for the Intervenors indicated that the Intervenors do not oppose the relief requested in this Motion.

FACTUAL BACKGROUND

In Count Two, Plaintiffs allege that Colorado's signature verification procedure for mail ballots subjects young, Latino, Black, and Asian voters to disparate treatment. 2d Am. Compl. ¶ 111. As of the time that Complaint was filed, none of the Plaintiffs are Asian, but one identified as a Latina, *id.* ¶ 14, and one identified as Black, *id.* ¶ 19. *See also* Ex. A.

But the parties have now stipulated to dismiss both those Plaintiffs from the litigation. *See* Stipulation to Dismiss Plaintiffs Diaz and Williams (Nov. 17, 2023). Now, none of the individual Plaintiffs identify as Latino, Black, or Asian, Ex. A (Ireton Dep. Tr.) at 34:19–25; Ex.

B (Erwin Dep. Tr.) at 51:1–7, and the youngest Plaintiff, Amanda Ireton, is 27. Ex. C (Ireton Voting Profile). The organizational Plaintiff, Vet Voice Foundation, is a military veterans advocacy organization. Its mission is to "empower Veterans across the country to become civic leaders and policy advocates by providing the support, training, and tools they need to continue their service and find new missions at home." Ex. D (Vet Voice Mission Statement).

LEGAL STANDARD

Whether a plaintiff has standing is a question of subject matter jurisdiction subject to challenge under Colo. R. Civ. P. 12(b)(1).[1] *See, e.g., TABOR Found. v. Colo. Dep't of Health Care Pol'y & Fin.*, 2020 COA 156, ¶ 6 n.3. Because the Secretary raises a factual attack on Plaintiffs' standing under Rule 12(b)(1), "the plaintiff has the burden of proving jurisdiction, and the trial court is authorized to make appropriate factual findings." *Medina v. State*, 35 P.3d 443, 452 (Colo. 2001) (citations omitted). In conducting this review, the Court has discretion to review "affidavits, documents, and even [conduct] a limited evidentiary hearing to resolve the disputed jurisdictional facts," and the allegations in the complaint "have no presumptive truthfulness." *Id.*

[1] The Secretary previously moved to dismiss all claims based on lack of standing. *See* Mot. to Dismiss (Feb. 28, 2023). Ordinarily, successive motions for the same relief are discouraged. *See generally Bd. of Cnty. Comm'rs of Teller Cnty. v. Dist. Ct. in & for Teller Cnty.*, 472 P.2d 128, 129 (Colo. 1970). However, the stipulated dismissal of two of the named Plaintiffs has materially altered the facts giving rise to this Motion, essentially creating a new Complaint for relief. Thus, the grounds upon which the Secretary challenges Plaintiffs' standing as to Count Two were not—and could not—have been raised in the Secretary's initial Motion to Dismiss. Moreover, issues of subject matter jurisdiction, such as standing, may be raised and ruled upon at any time. *See Shekarchian v. Maxx Auto Recovery*, 2019 COA 60, ¶ 16 ("[A] claim challenging standing. . .may be raised at any time); Colo. R. Civ. P. 12(h)(3).

"[A] plaintiff must demonstrate standing for each claim he seeks to press." *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006). To demonstrate standing to bring a particular claim, a plaintiff (1) "must have suffered an injury in fact," (2) "to a legally protected interest as contemplated by statutory or constitutional provisions." *Aurora Urban Renewal Auth. v. Kaiser*, 2022 COA 5, ¶ 14 (quotations omitted). Because Plaintiffs seek only prospective relief, they must show "that the challenged statute or regulation will likely cause tangible detriment" to them in the future. *Citizens Progressive All. v. Sw. Water Conservation Dist.*, 97 P.3d 308, 311 (Colo. App. 2004). Past injury is insufficient to confer standing to seek prospective relief because the purpose of an injunction "is to prevent further harm," not to remedy past injury. *Graham v. Hoyl*, 402 P.2d 604, 606 (Colo. 1965); *see also City of Northglenn v. Bd. of Cty. Comm'rs*, 2016 COA 181, ¶ 11 (holding that plaintiffs seeking a declaratory judgment "must show . . . that they *will* suffer an injury in fact from the challenged regulation") (emphasis added).

ARGUMENT

Despite bringing a disparate treatment claim on behalf of "young, Latino, Black, and Asian voters," 2d Am. Compl. ¶ 111, Plaintiffs themselves fit into none of these categories. If Colorado's Signature Matching Program discriminates against these groups—which the Secretary vehemently disputes—no Plaintiff has suffered a cognizable injury as a result.

Plaintiffs cannot advance third-party claims on behalf of absent parties. Because Plaintiffs themselves have not been, and will not be, harmed by the allegedly disparate treatment they seek to remedy, Count 2 must be dismissed in its entirety.

I. None of the Individual Plaintiffs have standing to advance disparate treatment claims on behalf of Latino, Black, or Asian voters.

Count 2 of the Complaint alleges that Latino, Black, and Asian voters have their ballots held for cure under the Signature Matching Program at a higher rate than White voters. 2d Am. Compl. ¶ 111. But none of the Individual Plaintiffs identify as Latino, Black, or Asian, which precludes them from bringing a disparate treatment claim on behalf of those absent parties.

Count 2 arises under Art. II, § 25 of the State Constitution, which provides that "[n]o person shall be deprived of life, liberty or property, without due process of law." Section 25 includes "the right to equal protection of the laws." *Western Metal Lath v. Acoustical & Const. Supply, Inc.*, 851 P.2d 875, 880 (Colo. 1993). It is also "well-established" that the "substantive application" of this provision is identical to its federal equal protection counterpart. *Colo. Ins. Guaranty Assoc. v. Sunstate Equipment Co., LLC*, 2016 COA 64, ¶ 19 (quotations omitted).

At the core of an equal protection claim arising under Article II, section 25 is a claim of disparate treatment. The constitutional protection is violated when one person or group of persons is treated more harshly than similarly situated peers. *See, e.g., Bd. of Cty. Commrs. Of Saguache Cty. v. Flickinger*, 687 P.2d 975, 983 (Colo. 1984) (quoting *N.Y. City Transit Auth. v. Beazer*, 440 U.S. 568, 587–88 (1979)); *People v. Dean*, 2012 COA 106, ¶ 12.

Here, Plaintiffs claim the Signature Matching Procedures treats Latino, Black, and Asian voters more harshly than similarly situated White voters. This claim is sharply disputed. But it is undisputed that none of the Individual Plaintiffs face any threat of injury from this allegedly disparate treatment in the future.

"Colorado's third-party standing rule prevents a party from asserting the claims of third parties who are not involved in the lawsuit." *Jones v. Samora*, 2016 COA 191, ¶ 26 (quotations omitted). And in the constitutional context, "[a] party does not have standing to challenge the constitutionality of a statute unless that party is *directly affected* by the alleged constitutional defect." *People v. Kibel*, 701 P.2d 37, 43 (Colo. 1985) (emphasis added). This holds true for equal protection claims. *See e.g., McKinley v. Dunn*, 349 P.2d 139, 142 (Colo. 1960) (declining to consider equal protection claim where claimants were "not in the class . . . so affected).

This rule is not unique. Under federal law (and analogous state law) it is well-established that "even if a governmental actor is discriminating on the basis of race, the resulting injury 'accords a basis for standing only to those persons who are personally denied equal treatment by the challenged discriminatory conduct.'" *United States v. Hays*, 515 U.S. 737, 743–44 (1995); *see also L.A. All. for Hum. Rts. v. Cnty. of Los Angeles*, 14 F.4th 947, 958 (9th Cir. 2021) (where plaintiffs "did not allege or present any evidence that any individual Plaintiff or [organization] member is Black" . . . plaintiffs did "not ma[k]e a clear showing that any individual Plaintiff has standing for the race-based claims"); *cf. State v. Bradle*y, 223 A.3d 62, 70 (Conn. App. 2019), aff'd, 341 Conn. 72, 266 A.3d 823 (2021) ("Simply put, the defendant's equal protection claim seeks to redress rights of racial minorities, a class of which he is not a member. Consequently, the defendant has not demonstrated that he has a personal interest that has been or could ever be at risk of being injuriously affected by the alleged discrimination in the enactment of the statute"); *Racine Steel Castings v. Hardy*, 426 N.W.2d 33, 36 (Wis. 1988) (A person cannot "challenge the unequal protection afforded to members of a class unless he is a member of that

class."); *E. Liverpool v. Columbiana Cty. Budget Comm.*, 870 N.E.2d 705, 711 (Ohio 2007) (where a plaintiff is "not within the class allegedly discriminated against . . . it lacks standing").

To demonstrate standing, a plaintiff (1) "must have suffered an injury in fact," (2) "to a legally protected interest as contemplated by statutory or constitutional provisions." *Aurora Urban Renewal Auth.*, 2022 COA 5, ¶ 14 (quotations omitted). Here, the legally protected interest Plaintiffs invoke is the interest in equal treatment stemming from Article II, section 25, but they do not personally suffer an "injury in fact" stemming from allegedly disparate treatment of Latino, Black, and Asian voters. Because Individual Plaintiffs lack standing to maintain those claims, they should be dismissed.

II. The same analysis applies to Plaintiffs' claim concerning "young" voters.

Count Two of the Second Amended Complaint also alleges disparate treatment to "young" voters. 2d Am. Compl. ¶ 111. The Complaint repeatedly references 18-21 year old voters when discussing age, *see, e.g.*, 2d Am. Compl. ¶¶ 26, 81, 82, but the youngest Plaintiff, Amanda Ireton, is 27. Ex. C. Thus, Plaintiffs lack standing to bring any claims or present any evidence predicated on disparate treatment of voters under the age of 27.

III. Plaintiffs cannot save their claims using the organizational Plaintiff.

Plaintiffs may argue that although none of their individual Plaintiffs have standing to maintain Count Two, the organizational Plaintiff, Vet Voice, has associational standing to pursue a disparate treatment claim on behalf of its members. But Vet Voice cannot satisfy the requirements for associational standing as to a race- or age-based disparate treatment claim.

An "organization has associational standing when: (1) its members would otherwise have standing to sue in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members of the lawsuit." *Colo. Union of Taxpayers Found. v. City of Aspen*, 2018 CO 36, ¶ 10. As to Count Two, Vet Voice fails the first two prongs of this test.

In denying the Secretary's initial Motion to Dismiss, the Court found that *City of Aspen*'s first prong was satisfied because "the individual plaintiffs, whose interests are also represented by Vet Voice, have standing to sue." Order on Motion to Dismiss (April 17, 2023).[2] Where none of the individual Plaintiffs have standing to maintain Count Two, and Vet Voice has not identified any "members" that would,[3] it also lacks standing.

Moreover, disparate treatment on the basis of age or race is not germane to Vet Voice's purpose. A claim is "germane" to an organization's purpose where the organization's purpose gives it a "stake in the resolution of the dispute." *City of Aspen*, 2018 CO 36, ¶ 12 (quoting *United Food & Commercial Workers Union Local 751 v. Brown Grp., Inc.*, 517 U.S. 544, 555–56 (1996)); *see also Nat. Lifeline Assoc. v. Fed. Commc'ns Comm'n*, 983 F.3d 498, 508 (D.C.

[2] Discovery has confirmed that the individual plaintiffs are not veterans, nor are they "constituents or supporters" of Vet Voice. Ex. E (30(b)(6) Dep. Tr. of Vet Voice Foundation) at 20:3–10.

[3] Discovery has confirmed that Vet Voice has no members. Instead, it has "supporters." Ex. E at 45:24–46:3. According to Vet Voice, its "supporters" are those people who have "opted in" to receive emails from Vet Voice. *Id.* at 46:2–16.

Cir. 2020) ("The germaneness requirement mandates pertinence between litigation subject and organizational purpose.") (quotations omitted).[4]

Vet Voice is a military veterans advocacy organization. Its mission is to "empower Veterans across the country to become civic leaders and policy advocates by providing the support, training, and tools they need to continue their service and find new missions at home." Ex. D (Vet Voice's Mission Statement). Nothing in Vet Voice's mission statement mentions race, or age, or challenging allegedly disparate treatment on those bases. *Id.* Vet Voice's sole interest in this lawsuit relates to its military- and veteran-based mission.

> **Q:** Ms. Goldbeck, what is the nature of the injury Vet Voice is claiming in this lawsuit?
> **A:** Vet Voice Foundation's mission is to empower veterans, military, active duty military and military families to have a voice in our democracy by participating in civic processes. And one key element of that mission is to empower veterans [and] military families to vote in elections. And the nature of the injury is that Colorado's Signature Matching Procedure disenfranchises disproportionately military voters and their families. So it has a direct impact, negative impact on our ability to fulfill our mission.

Ex. E at 26:7–19.

Nothing in Vet Voice's own formulation of its injury relates to disparate treatment based on race- or age-based classifications.

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[4] In enunciating the test for associational standing, the Colorado Supreme Court relied, in part, on the federal standard, and the federal standard is identical to the state standard, so the Court may rely on federal authority. *See generally Warne v. Hall*, 2016 CO 50, ¶¶ 13–17.

CONCLUSION

Because Plaintiffs are not part of the classes allegedly discriminated against in Count Two, they lack standing to maintain that claim and it should be dismissed.

Dated this 20th day of November 2023.

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CERTIFICATE OF SERVICE

I hereby certify that on the 20th day of November 2023, a copy of the foregoing **MOTION TO DISMISS COUNT TWO FOR LACK OF SUBJECT MATTER JURISDICTION** was served, via Colorado Courts e-filing, on the following:

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