

DISTRICT COURT, CITY AND COUNTY OF DENVER, STATE OF COLORADO  1437 Bannock Street Denver, CO 80202		
<b>Plaintiff,</b>  VET VOICE FOUNDATION, LESLIE DIAZ, RANDY EICHNER, JOHN ERWIN, AMANDA IRETON, and GREGORY WILLIAMS,  v.  <b>Defendant,</b>  JENA GRISWOLD, in her official capacity as Colorado Secretary of State,  and  <b>Intervenor Defendants,</b>  VERA ORTEGON and WAYNE WILLIAMS.		▲ COURT USE ONLY ▲  Case No. 2022CV33456  Ctrm./Div.: 215
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<b>PLAINTIFFS' OPPOSITION TO THE SECRETARY'S MOTION TO DISMISS COUNT          TWO FOR LACK OF SUBJECT MATTER JURISDICTION</b>		

Plaintiffs Vet Voice Foundation, Randy Eichner, John Erwin, and Amanda Ireton (together, “Plaintiffs”) submit this opposition to the Secretary’s Motion to Dismiss Count Two for Lack of Subject Matter Jurisdiction.

### INTRODUCTION

The Secretary’s second Motion to Dismiss should be denied. The Secretary bases her motion on the withdrawal of two of the individual Plaintiffs, arguing that their withdrawal creates a “new” complaint, thus justifying her renewed motion to dismiss. But only one of the Secretary’s arguments is in any way related to these Plaintiffs’ participation in this case. The remainder of her motion is simply an ill-disguised effort to raise arguments that were raised and rejected already or that *could have been*—but were not—raised on her first motion. In either event, they should be rejected.

Vet Voice’s interests are the same as they were when this Court denied Defendant’s first Motion to Dismiss months ago, and the age of the youngest Plaintiff has not changed as a result of the withdrawal of Mr. Williams and Ms. Diaz. The Secretary’s copy-and-paste arguments on these points should be rejected out of hand as nothing more than what they are, either (a) a warmed over version of a previously-rejected argument, which is no more persuasive the second time around, or (b) a belated attempt to raise an argument that could have been brought months ago but was not (and is thus waived under Colorado Rule of Civil Procedure 12(g)).

The Secretary’s only *new* argument is that the other individual Plaintiffs now lack standing to bring their race-based equal protection claim. The Court need not address that concern, however, because Vet Voice has both organizational and associational standing to bring Plaintiffs’ age and race-related equal protection claims, and only one plaintiff need establish

standing for the case to proceed. Similarly, Ms. Ireton, who is 27, has standing to bring Plaintiffs’ equal protection claim on behalf of young voters.

The Secretary’s motion, in short, should be denied.

### **FACTUAL BACKGROUND**

In this litigation, Plaintiffs—individual voters and a veterans’ advocacy organization, Vet Voice Foundation—brought suit against Defendant, Colorado Secretary of State Jena Griswold, to prevent her from enforcing the Signature Matching Requirement as a violation of their constitutional rights. *See* SAC. The Signature Matching Requirement—a process in which county elections officials compare the signature on voters’ ballots to one or more signature on file with the county—results in tens of thousands of lawfully cast ballots being rejected each election. *Id.* ¶ 24. Worse, the burden of this scheme falls most heavily on younger and minority voters. *Id.* ¶ 26.

More than six months ago, the Secretary moved to dismiss Plaintiffs’ Second Amended Complaint for lack of standing. *See* First MTD (Feb. 28, 2023). In that motion, Defendant argued that: (1) Vet Voice lacked associational or individual standing, largely because it “is not a membership organization;” (2) the individual Plaintiffs lacked standing because they had not alleged an imminent, future harm; and (3) the individual Plaintiffs did not allege injury flowing from their county of residence. *Id.* at 14–25. The initial Motion to Dismiss did not mention anything related to Plaintiffs’ age-related equal protection claim. *See id.* This Court denied the motion on all fronts, holding that the individual Plaintiffs had been injured and Vet Voice had standing. Order on Mot. to Dismiss at 3–4 (Apr. 17, 2023). The litigation then proceeded to discovery.

Following the close of discovery and Plaintiffs’ Motion for Summary Judgment, the parties stipulated to the dismissal of two Plaintiffs who were no longer able to participate in the litigation. Stip. To Dismiss Pltfs. Diaz and Williams (Nov. 17, 2023); *see* Mot. for Summ. J. (Nov. 7, 2023). The Court granted the stipulation to dismiss Leslie Diaz and Gregory Williams on November 27, 2023. Order Granting Stip. To Dismiss Pltfs. Diaz and Williams (Nov. 27, 2023). This motion followed on November 20, 2023. *See* Second MTD (Nov. 20, 2023).

### LEGAL STANDARD

To establish standing, a plaintiff must show they (1) “have suffered an injury in fact, and (2) the injury must have been to a legally protected interest.” *Weld Cnty. Colo. Bd. of Cnty. Comm’rs v. Ryan*, 2022 COA 26, ¶ 12 (citing *Wimberly v. Ettenberg*, 570 P.2d 535, 539 (1977)). “Injury in fact exists if the action complained of has caused or has threatened to cause injury.” *Kreft v. Adolph Coors Co.*, 170 P.3d 854, 857 (Colo. App. 2007) (quoting *Rainier v. Colo. Gen. Assembly*, 810 P.2d 215, 218 (Colo. 1991)). In multi-plaintiff cases where each plaintiff raises the same claims and arguments, the court does not need to independently evaluate standing for each plaintiff—any one suffices. *E.g.*, *Lobato v. State*, 218 P.3d 358, 368 & n.9 (Colo. 2009) (“[I]t is not necessary to address the standing of parties bringing the same claims as parties with standing.”); *In re Title, Ballot Title & Submission Clause, & Summary for 1999-2000 No. 215*, 3 P.3d 11, 14 (Colo. 2000) (declining to address standing of party bringing claims identical to party with standing).

In Colorado, it is “relatively easy” to establish standing. *Marks v. Gessler*, 2013 COA 115, ¶ 81 (Colo. App. 2013) (quoting *Ainscough v. Owens*, 90 P.3d 851, 855–56 (Colo. 2004)). This is particularly true in the context of declaratory judgment actions, where the actual “injury

[requirement] is somewhat relaxed.” *Mt. Emmons Mining Co. v. Town of Crested Butte*, 690 P.2d 231, 240 (Colo. 1984). And the injury requirement in voting rights litigation is minimal: “[a]ny burden on the right to vote . . . constitutes an injury-in-fact for standing purposes.” *Common Cause of Colo. v. Buescher*, 750 F. Supp. 2d 1259, 1271 (D. Colo. 2010) (emphasis added). As is the requirement for a legally protected interest in constitutional challenges, “an interest in having a government that acts within the bounds of our state constitution” can suffice. *Ainscough*, 90 P.3d at 856.

When considering a motion to dismiss under Rule 12(b)(1), the Court may “weigh the evidence and satisfy itself as to the existence of its power to hear the case.” Order on Mot. to Dismiss at 2 (citing *Trinity Broad. of Denver, Inc. v. City of Westminster*, 848 P.2d 916, 925 (Colo. 1993)).

## ARGUMENT

### I. VET VOICE HAS STANDING TO BRING THE COUNT TWO CLAIMS.

This Court has already considered and rejected the Secretary’s challenge to Vet Voice’s standing. As this Court held, “Vet Voice has sufficiently alleged standing.” Order on Mot. to Dismiss at 3–4. Since that holding, no facts related to Vet Voice’s interest in this case have changed. And it is far too late in the day to seek reconsideration of the Court’s order. Colo. R. Civ. P. 121, § 1-15(11) (Motions for reconsideration “shall be filed within 14 days from the date of the order.”). As a result, it is the settled law of the case that Vet Voice has standing to bring all its claims, including those found in Count Two.

**A. Vet Voice Has Organizational Standing.**

As this Court has already recognized, Vet Voice has organizational standing to advance the interest of its constituents and supporters. An organization has standing to challenge a law that adversely affects the organization’s mission or that “makes it difficult . . . for the organization to fulfill one of its essential purposes or goals.” *Common Cause of Colo. v. Buescher*, 750 F. Supp. 2d 1259, 1269 (D. Colo. 2010); *City of Greenwood Vill v. Petitioners for Proposed City of Centennial*, 3 P.3d 427, 437 (Colo. 2000) (holding that city had standing to sue where law adversely affect its “interest in expanding its population and tax base in the provision of local services”). Indeed, one of Vet Voice’s key goals is to “mobilize the most diverse group of veterans and military families in history.” Decl. of Janessa Goldbeck In Support Of Pls.’ Resp. to The Secretary’s Mot. to Dismiss Count Two (“Goldbeck Decl.”) ¶ 3. For Vet Voice, the increasing number of women and racial and ethnic minorities in the veteran community represents an opportunity to amplify new voices—voices that, in Colorado, are being stifled by the Signature Verification Requirement. *Id.* ¶ 4.

Vet Voice is similarly focused on boosting the influence of younger veterans and members of the military in its target states, including Colorado. *Id.* ¶ 5. Because Vet Voice is specifically concerned with protecting the votes of young veterans and veterans of color, a law that causes those votes to be cast aside in disproportionate numbers makes it difficult for Vet Voice to amplify those veterans’ voices in our democracy.

The Secretary argues that in Vet Voice’s 30(b)(6) deposition, Vet Voice limited its injury in such a way that it would exclude anything relating to “disparate treatment based on race- or age-based classifications.” Second MTD at 9. Hardly. As can be plainly seen from the portion

of Vet Voice’s deposition that the Secretary herself cites, the question was about “the nature of the injury Vet Voice is claiming in this lawsuit,” and the answer is there in black-and-white— Vet Voice seeks to “empower veterans, military, active duty military and military families,” and a procedure that disproportionately disenfranchises those groups “has a direct impact, negative impact on [Vet Voice’s] ability to fulfill [its] mission.” *Id.* Nothing in that question inquires about Vet Voice’s goals and objectives relating to young and minority veterans, so naturally the answer is more limited as well.

Indeed, the Secretary’s implication here borders on offensive—young people and people of color are most certainly valued members of our country’s military, so Vet Voice as an organization that seeks to amplify the voices of *all* veterans is obviously injured by the disproportionate exclusion of those groups of veterans from the franchise. The Secretary’s argument here necessarily suggests that advocating for veterans is advocating for white, older veterans. That’s simply wrong as a matter of fact.

**B. Vet Voice Has Associational Standing.**

And in any event, Vet Voices has associational standing. “[A]n 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. The Secretary claims, despite no changes to any facts related to Vet Voice since the Court

originally ruled on this precise issue, that Vet Voice now fails on the first two prongs of this test.<sup>1</sup> Second MTD at 8. The Secretary is incorrect.

First, Vet Voice has both supporters who are members of the racial minority groups at issue here, and so could also bring these equal protection claims in their own right.<sup>2</sup> Goldbeck Decl. ¶ 7. It is further not necessary for Vet Voice to identify a specific member in order to establish associational standing. *See DCCC v. Zirioux*, 487 F. Supp. 3d 1207, 1226–29 (N.D. Okla. 2020) (holding that organization plaintiffs had direct and associational standing to challenging voting laws without identifying individual members); *DSCC v. Simon*, No. 62-CV-20-585, 2020 WL 4519785, at \*11 (D. Minn. July 28, 2020) (same), *rev'd in part*, 950 N.W.2d 280, 286 n.4 (Minn. 2020) (“[B]ased on our review of the record, we agree that standing is not at issue.”).<sup>3</sup> According to the National Center for Veterans Analysis and Statistics at the U.S.

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<sup>1</sup> While Defendant presumably bases her renewed argument here on factual developments relating to the first prong—specifically the withdrawal of Ms. Diaz and Mr. Williams—she gives no reason to justify a second attempt at argument relating to the second prong. Second MTD at 8. Indeed, Defendant’s argument on this point is a transparent attempt at a second bite at the apple, as is made apparent by the fact that the only evidence she cites that was not available at the time of her first Motion to Dismiss is a few sentences from Vet Voice’s 30(b)(6) deposition. *Id.* at 9. The Court should disregard any of Defendant’s argument relating to the second prong as a successive motion on grounds available at the time of the first. *See also* Colo. R. Civ. P. 12(g) (“If a party makes a motion under this Rule but omits therefrom any defense or objection then available to that party . . . that party shall not thereafter make a motion based on the defense or objection so omitted.”).

<sup>2</sup> Despite the Court unequivocally rejecting Defendant’s argument about any distinction between Vet Voice’s “supporters” and the members required for associational standing, Defendant again attempts to raise this issue. *Compare* Order on Mot. to Dismiss at 4 (“Defendant’s arguments . . . that Vet Voice must be a membership organization and that it must identify specific members who have been disenfranchised, finds no support in Colorado law.”) *with* Second MTD at 8 n.3 (“Discovery has confirmed that Vet Voice has no members. Instead, it has ‘supporters.’”); *see also* *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 344–45 (1977) (an organization without members can establish associational standing if the organization’s interests may be adversely affected by the outcome of the litigation).

<sup>3</sup> As the Secretary herself notes, because the Colorado Supreme Court relied on the federal standard in creating the test of associational standing and the federal standard is identical to the state standard, “the Court may rely on federal authority.” Second MTD at 9 n.4 (citing *Warne v. Hall*, 2016 CO 50, ¶¶ 13–17).



Department of Veterans Affairs, there are over 385,000 veterans living in Colorado as of 2020.<sup>4</sup> Racial and ethnic minorities make up 27% of living veterans, Goldbeck Decl. ¶ 7, and nearly 9% of veterans are under the age of 35.<sup>5</sup> It is mathematically obvious that there are Vet Voice constituents (veterans) who are members of the minority groups in question and at risk of having their ballot discarded based on the Signature Verification Requirement.

Second, as was previously established, “[t]he interest that Vet Voice seeks to protect is germane to its purposes.” Order on Mot. to Dismiss at 3. This was broadly true at the time of the Secretary’s first Motion to Dismiss, and remains true where young and minority voters are concerned. Vet Voice seeks to protect the votes of veterans, which increasingly includes these specific demographic groups—groups that are targeted in larger numbers by the Signature Verification Requirement. See Goldbeck Decl. ¶ 7. Finally, as this Court also previously determined, Vet Voice’s participation in this case (generally and in relation to the Count Two claims) does not require the participation of individual members. Order on Mot. to Dismiss at 4.

Because Vet Voice has organizational and associational standing to bring Plaintiffs’ race and age-related claims, the Secretary’s motion should be denied.

## **II. THE SECRETARY’S ATTEMPT TO DISMISS PLAINTIFFS’ AGE-RELATED CLAIM IS TOO LITTLE, TOO LATE.**

Similarly, the Secretary’s motion to dismiss Plaintiffs’ age-related equal protection claim should be rejected for two reasons. First, by failing to raise the issue in her first motion, the Secretary has waived the argument. Second, even if considered on the merits, it is meritless.

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<sup>4</sup> Dept. of Veterans Affs., *Veteran Population per Fiscal Year*, [https://www.va.gov/vetdata/veteran\\_population.asp](https://www.va.gov/vetdata/veteran_population.asp) (last accessed Dec. 7, 2023).

<sup>5</sup> U.S. Dept. of Com., *U.S. Census Bureau Releases Key Stats on Nation’s Veteran Population* (Nov. 10, 2021), <https://www.commerce.gov/news/blog/2021/11/us-census-bureau-releases-key-stats-nations-veteran-population> (last accessed Dec. 7, 2023).

**A. The Secretary Waived Her Argument to Dismiss Plaintiffs’ Age-Related Claims By Not Raising It In Her First Motion.**

For starters, the Secretary has waived any argument attacking Plaintiffs’ age-related claims. The Secretary could have—but didn’t—challenge these claims in her first motion to dismiss. Under settled Colorado law and the Colorado Rules of Civil Procedure, by failing to assert the argument in the first motion, the Secretary has waived it now (as is clear even from the case law the *Secretary herself* cited). Second MTD at 3 n.1; *see Henry L. Doherty & Co. v. Youngblut*, 185 P. 257, 258 (Colo. 1919) (“It is a favor to permit successive motions to dismiss on grounds available at former motions.”); *Bd. of Cnty. Comm’rs of Teller Cnty. v. Dist. Ct. in & for Teller Cnty.*, 472 P.2d 128, 129 (Colo. 1970) (moving party had waived defenses available to them at the time they filed first motion to dismiss); *see also* Colo. R. Civ. P. 12(g) (“If a party makes a motion under this Rule but omits therefrom any defense or objection then available to that party . . . that party shall not thereafter make a motion based on the defense or objection so omitted.”); *In re Marriage of Booker*, 833 P.2d 734, 739 (Colo. 1992) (defenses omitted from 12(b) motion are waived); *Luebke v. Luebke*, 143 P.3d 1088, 1092 (Colo. App. 2006) (“C.R.C.P. 12(g) provides that if a party omits available defenses or objections from a C.R.C.P. 12 motion, that party may not raise those issues in a subsequent motion.”) .

The Secretary asserts that the dismissal of Ms. Diaz and Mr. Williams “materially altered the facts . . . essentially creating a new Complaint for relief.” Second MTD at 3 n.1. But Ms. Diaz and Mr. Williams are 31 and 45 years old, respectively. SAC ¶¶ 14, 19. Ms. Ireton has always been the youngest Plaintiff, including at the time of Defendant’s original Motion to Dismiss. The grounds for Defendant’s Motion to Dismiss Count Two as it relates to young voters were therefore available when Defendant originally moved to dismiss for lack of standing.

This is not an argument that “could not . . . have been raised in the Secretary’s initial Motion to Dismiss.” Second MTD at 3 n.1. Because it is untimely (by months), the Court should reject it out of hand.

**B. Ms. Ireton Has Individual Standing to Bring Plaintiffs’ Claims Concerning “Young” Voters.**

And even if it were not so untimely, the Secretary’s argument in any event fails on the merits. The Secretary’s argument is premised on mischaracterizing Plaintiffs’ claim concerning young voters as being solely about voters between the ages of 18 and 21. *See* Second MTD at 7. While it is true that the youngest voters are victims of the Signature Matching Requirement at the highest rates, Plaintiffs’ claims are not so limited. Plaintiffs’ Complaint clearly states that when compared to voters over forty, ballots are rejected “seven times as often for voters aged 22–30” and “three times as often for voters 31–40 years old.” SAC ¶ 81. These voters clearly fall within the class of “young voters” who are “*up to* nearly fifteen times more likely to be disenfranchised than older voters.” *Id.* ¶ 111 (emphasis added). Nowhere in Plaintiffs’ actual equal protection claim is “young voters” defined as voters between 18 and 21. *See id.* ¶ 108–14. Because Ms. Ireton is, as the Secretary correctly notes, 27, she falls within this class and certainly has standing to bring this claim. *See* Second MTD at 7.

The Court should therefore deny Defendant’s Motion on this point for two reasons: (1) the grounds for the Secretary’s Motion were available at the time of her initial Motion, but the Secretary failed to bring this argument at that time; and (2) regardless, Ms. Ireton has standing.

## CONCLUSION

The Secretary's transparent attempt to renew her previously rejected motion to dismiss should be rejected, *again*. This motion does little more than rehash previously considered and rejected arguments or disingenuously attempt to paint arguments that could have been but were not raised in the Secretary's first motion to dismiss as based on "new facts." None of this is even remotely sufficient. The Secretary's arguments remain as flawed as they were the first time this Court rejected them. And her new arguments have either been waived or are based on a misreading of Plaintiffs' well-pled Complaint. Vet Voice has both organizational and associational standing to bring Plaintiffs' race- and age-related equal protection claims. And Ms. Ireton has (and has always had) individual standing to bring Plaintiffs' age-related claims.

Respectfully, the Secretary's motion should be rejected.

DATED this 11th day of December, 2023.

Respectfully submitted,

**PERKINS COIE LLP**

By: s/ Kevin J. Hamilton

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**CERTIFICATE OF SERVICE**

I certify that on December 11, 2023, a true and correct copy of the foregoing was served via the Colorado Court's E-Filing system, addressed to the following:

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