IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF IOWA
CENTRAL DIVISION

ORCUN SELCUK; ALAN DAVID GWILLIAM; TINGTING ZHEN; MICHAEL BROKLOFF; and THE LEAGUE OF UNITED LATIN AMERICAN CITIZENS OF IOWA, Plaintiffs, vs. PAUL D. PATE, in his official capacity as the Iowa Secretary of State; BENJAMIN D. STEINES, in his official capacity as the Winneshiek County Auditor and Winneshiek County Commissioner of Elections; JAMIE FITZGERALD, in his official capacity as the Polk County Auditor and Polk County Commissioner of Elections, MELVYN HOUSER, in his official capacity as the Pottawattamie County Auditor and Pottawattamie County Commissioner of Elections, ERIN SHANE, in her official capacity as the acting Johnson County Auditor and acting Johnson County Commissioner of Elections; and KERRI TOMPKINS, in her official capacity as the Scott County Auditor and Scott County Commissioner of Elections, Defendants.	Case No. 4:24-cv-00390-SHL-HCA **BRIEF IN SUPPORT OF DEFENDANT PAUL D. PATE'S MOTION TO DISMISS PLAINTIFFS' COMPLAINT**

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INTRODUCTION

On October 22, 2024, State Defendant, Iowa Secretary of State Paul Pate, provided county election officials with a list of 2,176 registered voters who had self-identified as noncitizens to the Iowa Department of Transportation sometime in the past. Dkt. 1 ¶ 3. State Defendant then directed county election officials to challenge these ballots, requiring these voters to cast provisional ballots for subsequent voter eligibility review. *Id.* ¶ 38.

On October 30, 2024, four voters and one advocacy organization sued Secretary Pate and five county election officials decrying these actions. *See* Dkt. 1. Plaintiffs bring seven claims alleging violations of the U.S. Constitution based on the Equal Protection Clause, the Due Process Clause, and constitutional provisions governing the right to vote, as well as violations of multiple provisions of the National Voter Registration Act ("NVRA").

The 2024 election is over and so many of their claims are now moot. Further, while the Complaint may at first appear to contain a wealth of factual detail, a closer inspection reveals many conclusory allegations and factual gaps. Among those gaps, allegations that allow Plaintiffs to establish their standing to sue. Failure to meet this threshold requirement dooms their case.

Even if Plaintiffs cleared that threshold requirement, they fail to plausibly allege that State Defendant removed any voters from Iowa's registration rolls—a fatal flaw for many of their claims. They also fail to plausibly allege that State Defendant illegally discriminated against Iowans based on their citizenship status. That is because it is legal for a State to discriminate against noncitizens in its voting rules because noncitizens have no right to vote—indeed, it is both a federal and a State crime for a noncitizen to vote. And Plaintiffs' own allegations establish that State Defendant did not discriminate against voters based on naturalization status.

Further, Plaintiffs have not plausibly alleged that State Defendant denied them due process when State Defendant acted in accordance with State and federal law. For these reasons, the entire Complaint must be dismissed for failing to state a claim. *See* Fed. R. Civ. P. 12(*b*)(6).

PROCEDURAL BACKGROUND

Plaintiffs sued on October 30, 2024 (with early voting already underway), then requested a temporary restraining order and preliminary injunction on October 31. Dkts. 1, 9. Following expedited TRO briefing, the district court held a hearing on Plaintiffs' request on November 1, 2024. Dkts. 16, 21, 28. The parties submitted supplemental briefing on November 2, 2024 (Dkts. 30, 31), and the Court denied Plaintiffs' TRO and preliminary injunction request on November 3, 2024. Dkt. 32. The Court concluded that *Purcell v. Gonzalez*, 549 U.S. 1 (2006) cautioned the Court about granting injunctive relief near election day, especially considering recent U.S. Supreme Court decisions declining to review other election challenges. Dkt. 32 at 2 (citing *Beals v. Va. Coal. For Immigrant Rts.*, No. 24A407, 2024 WL 4608863 (U.S. Oct. 30, 2024) and *Repub. Nat'l Comm. v. Genser*, No. 24A408, 2024 WL 4647792 (U.S. Nov. 1, 2021).

This Court also recognized that "it appears to be undisputed that some portion of the names on Secretary Pate's list are indeed registered voters who are not United States Citizens." *Id.* at 3. The Court also held that Plaintiffs had not established any irreparable harm as "voters are still permitted to vote and have their ballots counted." *Id.* at 13. And even if the harm were irreparable, the Court "could not fashion injunctive relief that could solve the problem." *Id*. The Court then held that Plaintiffs were not likely to succeed on the merits of their claims because: 1) "the NVRA does not provide a basis for injunctive relief given that Secretary Pate has not removed anyone from the voter rolls"; 2) "Secretary Pate at least arguably imposed the type of "national-origin neutral" policy" that law suggests "would pass constitutional muster"; and 3) "it is less clear whether or to what extent the due process clause applies to the right to vote," "much less whether Plaintiffs' due process rights had been violated. *Id.* at 1–17.[1] Plaintiffs did not appeal that ruling.

[1] Plaintiffs also filed an emergency motion for expedited discovery on November 5, 2024 (Dkt. 40), which the Court denied. Dkt.46.

ARGUMENT

I. All claims of Selcuk, Gwilliam, Zhen, and Borkloff are moot.

This Court's role is limited "'to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles or rules of law which cannot affect the matter in issue in the case before it.'" *Oil Workers v. Missouri*, 361 U.S. 363, 367 (1960) (quoting *Mills v. Green*, 159 U.S. 651, 653 (1895)). As such, "[q]uestions of mootness are matters of subject matter jurisdiction." *Charleston Hous. Auth. v. U.S. Dep't of Agric.*, 419 F.3d 729, 739 (8th Cir. 2005). "A case becomes moot and therefore no longer a Case or Controversy for purposes of article III when the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome. *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (cleaned up); *accord Noem v. Haaland*, 41 F.4th 1013, 1016 (8th Cir. 2022). The Court is constrained from addressing any issues presented by moot cases. *South Dakota v. Hazen*, 914 F.2d 147, 149 (8th Cir. 1990). It is of no consequence that the controversy was live at earlier stages . . . ; it must be live when [the Court] decide[s] the issues. *Id.* at 150.

Here, Mr. Selcuk, Mr. Gwilliam, Ms. Zhen, and Mr. Borkloff ("Individual Plaintiffs") no longer have a live dispute as the question sought to be adjudicated has been mooted by the 2024 election. *See Flast v. Cohen*, 392 U.S. 83, 95 (1968).

Individual Plaintiffs make seven requests in their prayer for relief:

- A declaration that Defendants' challenged self-identified noncitizen ballots violates federal law and the U.S. Constitution;
- Rescission of the list of 2,176 names despite that list definitively including noncitizens registered to vote;
- An order that the Secretary notify county election commissioners that they may not challenge a voter's eligibility due to their status on the self-identified noncitizen voter list;
- An order that the local officials retract notice letters sent to self-identified noncitizens;
- An order that Defendants "restore the status of any persons who were removed from Iowa's voting rolls, including being placed on inactive status" due to being on the list; and

- An order to take undefined "steps as are necessary" to alert "all individuals on the list of Affected Voters"—including those that are noncitizens or have not yet tried to vote—that they may vote.

Dkt. 1 at 30.

Their requests all concern the list of self-identified noncitizen voters created for the November 5, 2024 election. That election is over. All ballot challenges—whether based on noncitizenship, residency, or age—have been made and resolved. All election results have been certified. And none of the Individual Plaintiffs has reported an inability to successfully cast a ballot. Indeed, as this Court noted, even before the election, Secretary Pate stated that he "is no longer challenging the eligibility of the named Plaintiffs who submitted statements, under oath, in this proceeding confirming they are United States citizens." Dkt. 32 at 13. This statement mooted Individual Plaintiffs' claims even before Election Day.

Courts commonly find that temporally contingent claims can become moot and dismiss those claims after they indeed become moot. *See, e.g.*, *Noem*, 41 F.4th at 1017 (suit over fireworks permitting during the Fourth of July in 2021 moot because the court cannot change what happened last year); *Stevenson v. Blytheville Sch. Dist. No. 5*, 762 F.3d 765, 770 (8th Cir. 2014) (request for injunction during the 2013-2014 school year moot as that school year is complete); *Miss. River Revival, Inc. v. City of Minneapolis*, 319 F.3d 1013, 1015 (8th Cir. 2003) (noting some plaintiffs conceded their initial claims for injunctive and declaratory relief [we]re moot after the permits they were seeking to block eventually were issued); *N.D. Rural Dev. Corp. v. U.S. Dep't of Labor*, 819 F.2d 199, 200 (8th Cir. 1987) (appeal moot in 1987 when it concerned an entity s participation in [a] 1985–87 grant competition). The same principle applies here. The 2024 election is over and nothing the Court does can change that.

To be sure, election-related issues often satisfy the mootness exception for claims that are capable of repetition yet evade review. *See Libertarian Party v. Bond*, 764 F.2d 538, 539 n.1 (8th Cir. 1985). This exception applies "when (1) the challenged action is of too short a duration to be litigated fully," and "(2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Ark. AFL-CIO v.* FCC, 11 F.3d 1430, 1436 (8th Cir. 1993). But

Individual Plaintiffs' claims do not qualify because there is no reasonable expectation that Individual Plaintiffs will be subject to the same action again. *First*, "Secretary Pate has stated that he is no longer challenging their eligibility to vote as they have submitted statements, under oath, in this proceeding confirming they are United States citizens." Dkt. 32 at 13.

Second, this is not a class or collective action; Individual Plaintiffs can litigate only their own claims not the claims of any other voters on the Secretary's list. So to the extent Plaintiffs argue the claims of other voters may evade review, those claims are not before this Court.

Third, Iowa has spent months trying to obtain the list of known noncitizens on the State's list from the federal government. The United States has confirmed that there are noncitizens registered to vote on the State's list of 2,176 voters, and the federal government compiled that list no later than Friday, October 25. Dkt. 16 at 6. The United States Citizenship and Immigration Services ("USCIS") reached out to the Secretary of State's office "to offer assistance in further refining" the list that had been provided to county auditors. Dkt. 16, Ex. A ¶ 30. On October 29, USCIS stated to Michael Ross, Chief of Staff and Deputy Secretary of State, that despite having checked the immigration statuses of the individuals on the list, USCIS was not able to share the updated information. *Id.* ¶ 31. USCIS told the Secretary of State that "[w]e do not want [Iowa USCIS staff] to release to release any information to the [Iowa Secretary of State]." *Id.* ¶ 32 (quoting Ex. D at 1). Senators Grassley and Ernst both joined in calling for USCIS to transmit this data. *See* Charles E. Grassley & Joni K. Ernst, Letter to Director Jaddou, https://perma.cc/6LJA-2CXK (Oct. 31, 2024).

Outside this litigation, Iowa has worked diligently to obtain an official list of noncitizen voters from the federal government, so it does not need to rely on voter self-identifications again. On December 3, 2024, Iowa sued the U.S. Department of Homeland Security and USCIS to obtain that list. *See Bird v. Mayorkas*, No. 4:24-cv-00423 (S.D. Iowa Dec. 3, 2024). That litigation is ongoing. *Id.* Meanwhile, after months of negotiation, on January 28, 2024, Iowa obtained access to the Systematic Alien Verification for Entitlements program to assist in voter verification. *Id.* at

Dkt. 1 ¶¶ 9–10. Based on those efforts, it is not reasonable to expect that Plaintiffs will be subject to the same action in another election again.

II. Plaintiffs lack standing.

Federal courts are courts of limited jurisdiction, so courts first determine whether a plaintiff has Article III standing before reaching the merits. *See Dept. of Educ. v. Brown*, 600 U.S. 551, 560 (2023). Standing requires a plaintiff establish three threshold elements: Plaintiff "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial decision." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). If a Plaintiff cannot establish standing, a Court need not proceed to the merits. *Brown*, 600 U.S. at 560–561.

A. Plaintiffs lack standing because their alleged harm is not redressable.

In denying Plaintiffs' injunction request, this Court found that Plaintiffs' requested relief would not redress their alleged harm. Dkt. 32 at 13. *First*, "Secretary Pate's letter was sent to county commissioners, not directly to voters, and thus it is unclear what purpose it would serve to require him to 'retract' the letter." *Id. Second*, because county commissioners already had taken steps to comply with the letter before the election, [a]n order requiring county commissioners to 'retract' those letters or cease other efforts to confirm citizenship likely would engender more confusion than it resolves. *Id.* at 13–14. *Third*, and most importantly, "some portion of the 2,176 names on Secretary Pate's list—reportedly twelve percent (*id.* at 3)—are indeed ineligible to vote due to noncitizenship." *Id.* at 14. "If the Court were to order a 'retraction' of the list or otherwise stop his efforts to challenge those voters, local election officials arguably would be required to let those voters cast a ballot despite their ineligibility to do so. It goes without saying that this would be inappropriate." *Id.* Ultimately, the Court held, "the injunctive relief proposed by Plaintiffs would create as many problems as it would solve." *Id.*

B. LULAC lacks organizational standing because it has not identified any member that has suffered the requisite harm.

"[A] party generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). A membership organization, however, may sue on behalf of its members if "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Missouri Protection and Advoc. Servs., Inc. v. Carnahan*, 499 F.3d 803, 809 (8th Cir. 2007). A membership organization need not show that all its members have standing, only that one of them does. *See Iowa League of Cities v. EPA*, 711 F.3d 844, 869 (8th Cir. 2013). But it must identify its members who have suffered the requisite harm. *See Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 602 (8th Cir. 2022).

Here, LULAC alleges only that "at least some LULAC members are Affected Voters" on the Secretary of State's list. Dkt. 1 ¶ 17. But it does not allege that any of the Individual Plaintiffs are LULAC members, nor do they identify any other individuals allegedly on the State's list of self-identified noncitizens. An organization must identify particular members and their injuries to establish associational standing. *See Becerra*, 55 F.4th at 601. LULAC does not. And the allegation that LULAC has more than 500 active members in Iowa (Dkt. 1 ¶ 17) is not enough. "A court cannot 'accept[]the organizations' self-descriptions of their membership' because the court has an independent obligation to assure that standing exists.'" *Becerra*, 55 F.4th at 602 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 499 (2009). "While it is certainly possible—perhaps even likely—that one individual will meet all th[e] criteria, that speculation will not suffice." *Id.* (quoting *Summers*, 555 U.S. at 499). When an organization fails to identify members who have suffered the requisite harm, that organization lacks standing to sue on behalf of unnamed members.

C. LULAC's alleged diversion of resources does not give it direct standing.

A membership organization may also have direct standing if it can establish its own injury, traceability, and redressability. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982). But "an organization that has not suffered a concrete injury caused by a defendant's action cannot spend its way into standing." *FDA v. All. For Hippocratic Med.*, 602 U.S. 367, 394 (2024).

Here, LULAC alleges it "has been forced to spend resources it would otherwise have devoted to [voter education and registration] efforts to instead informing concerned members about" the Secretary's list of self-identified nonvoters. Dkt. 1 ¶ 17. But an organization "cannot spend its way into standing simply by expending money to gather information and advocate against" government conduct. *See All. for Hippocratic Med.*, 602 U.S. at 394. Secretary Pate did not force LULAC to divert these resources; LULAC's choices to make different funding decisions do not give rise to direct standing. LULAC's alleged injuries are exactly the type of self-inflicted injuries or setbacks to "abstract social interests" and advocacy work that do not support direct standing.

II. All claims must be dismissed because Plaintiffs fail to plead sufficient facts to state a claim for relief that is plausible on its face.

Because Individual Plaintiffs' claims are moot and because all Plaintiffs lack standing, this complaint should be dismissed, and this Court need not address the merits of Plaintiff's complaint. But if this Court does so, Plaintiffs' claims should still be dismissed because none of Plaintiffs' claims state a claim for relief that is plausible on its face.

A complaint that fails to state a claim upon which relief can be granted must be dismissed. Fed. R. Civ. P. 12(*b*)(6). While a complaint need not contain "detailed factual allegations" to state a claim, a plaintiff must provide more than "unadorned, the-defendant-unlawfully-harmed-me accusation[s]." *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)); *see also* Fed. R. Civ. P. 8(*a*)(1)-(3). Complaints that offer nothing more than "labels or conclusions" or "formulaic recitation of the elements of a cause of action" are not sufficient. *Iqbal*, 556 U.S. at 678. "Nor does a complaint suffice if it tenders 'naked assertion[s]'

devoid of 'further factual enhancement.'" *Id*. (quoting *Twombly*, 550 U.S. at 557). To survive a motion to dismiss, the complaint must "contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id*. at 678 (quoting *Twombly*, 550 U.S. at 570). Facial plausibility exists "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. This "plausibility" standard is not the equivalent of a "probability requirement," but requires "more than a sheer possibility that a defendant has acted unlawfully." *Id*. (quoting *Twombly*, 550 U.S. at 557).

In evaluating the sufficiency of a complaint under a 12(b)(6) motion, a court must accept the factual allegations as true. *Id*. There is no such requirement that the Court accept the legal conclusions set forth in a complaint as true. *Id*. Courts evaluate plausibility under *Iqbal* and *Twombly* by "'draw[ing] on [their own] judicial experience and common sense'" and will consider "only the materials that are 'necessarily embraced by the pleadings and exhibits attached to the complaint.'" *Whitney v. Franklin Gen. Hosp*., 995 F. Supp. 2d 917, 925 (N.D. Iowa 2014) (citing *Whitney v. Guys*, 700 F.3d 1118, 1127 (8th Cir. 2012); *Mattes v. ABC Plastics, Inc*., 323 F.3d 695, 697 n.4 (8th Cir. 2003)). When deciding a motion to dismiss, "a court may consider the complaint and documents whose contents are alleged in a complaint and whose authenticity no party questions, but which are not physically attached to the pleading." *Kushner v. Beverly Enters., Inc*., 317 F.3d 820, 831 (8th Cir. 2003).

Plaintiffs bring claims under the U.S. Constitution and the NVRA. But nearly all these claims suffer from one of two fundamental flaws: 1) that challenging a voter's ballot is the same as removing that voter from the registration rolls, and 2) that citizens and noncitizens must be given equal voting rights and protections when, as a matter of constitutional law, noncitizens have no right to vote at all. These flaws doom Plaintiffs' claims based on the Equal Protection Clause (Count I), right to vote provisions (Count II), and the NVRA (Counts IV–VI). Plaintiffs' Due Process (Count III) and public records (Count VII) claims also fail because they allege only that Defendants are acting consistently with federal law. As such, all Plaintiffs' claims should be dismissed for failure to state a claim.

A. Counts IV through VII should be dismissed because Plaintiffs have conceded that Secretary Pate did not remove any voters from Iowa's voter rolls.

Plaintiffs allege violations of four provisions of the NVRA:

1. The "90-Day-Provision," which prohibits a State from "systematically" removing voters from voter registration rolls within 90 days of an election, 52 U.S.C. § 20507 (Count IV);
2. The anti-discrimination provision, which requires that voter list maintenance programs be "uniform" and "nondiscriminatory," 52 U.S.C. § 20507(b)(1) (Count V);
3. The proof-of-citizenship provision, which limits the proof of citizenship that may be requested during voter registration, 52 U.S.C. §§ 20508(b)(1), 20505(a)(1)–(2) (Count VI); and
4. The public disclosure provision, which governs preservation and disclosure of records related to voter registration list maintenance, 52 U.S.C. § 20507(i) (Count VII).

Dkt. 1 ¶¶ 132–152.

Plaintiffs base their NVRA claims on allegations that State Defendant sought to "remov[e] . . . supposedly ineligible voters from the rolls." Dkt. 1 ¶ 58. But this Court held in its order denying Plaintiffs' TRO and preliminary injunction that "[h]ere, Secretary Pate has not removed anyone from the voter rolls, but rather is simply requiring voters on the list of 2,176 to vote via provisional ballots." Dkt. 32 at 10; *see also id.* at 2 ("Secretary Pate's letter does not remove anyone from the voter rolls—but rather, at most, requires those voters to use provisional ballots.")' id. at 11 ("Secretary Pate did not remove anyone from the voter rolls, but decided to require the use of provisional ballots by some voters.").

Indeed, "Plaintiffs have wisely conceded that the NVRA does not provide a basis for injunctive relief given that Secretary Pate has not removed anyone from the voter rolls, but rather has simply required the use of provisional ballots." *Id.* at 14. Formal admissions to a court create judicial admissions that replace the need for evidence on the subject. *See Warner Bros. Entm't v. X One X Prods.*, 840 F.3d 971, 978 (8th Cir. 2916). "[J]udicial admissions are binding for the purpose of the case in which the admission is made." *Gonzalez v. Barr*, 929 F.3d 595, 597 (8th Cir. 2019) (quoting *State Farm Ins. Co. v. Worthington*, 405 F.2d 683, 686 (8th Cir. 1968)) (internal quotation marks omitted). Because Plaintiffs concede that State Defendant has not

removed any voters from Iowa's registration rolls, they cannot state an NVRA claim upon which relief can be granted. For these reasons, Counts IV through VII should be dismissed.

B. Even if Plaintiffs try to disavow these concessions, Count IV through VII still should be dismissed because Plaintiffs have not pled sufficient facts to support claims based on the removal of voters from Iowa voter rolls.

Even if Plaintiffs try to disavow their concession that State Defendant has not removed any voters from the rolls, their conclusory allegations on removal do not state plausible NVRA claims.

Plaintiffs must provide more than "labels or conclusions" or "'naked assertion[s]' devoid of 'further factual enhancement'" to survive a motion to dismiss. *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 557). But Plaintiffs have not done so. Plaintiffs allege only that State Defendant issued a letter to county election officials "with the purpose of ultimately removing those supposedly ineligible voters." Dkt. 1 ¶ 58; *see also id.* at ¶ 136 ("The Voter Purge Program also has the purpose of removing these voters from the rolls."); *id.* ("The Program's express purpose is to . . . remove those supposedly ineligible voters from the rolls.").

But Plaintiffs do not allege that any voters have been removed from Iowa voter rolls. Nor do they explain how a letter directing "county election precinct staff to review the list of Affected Voters prior to the upcoming general election and challenge ***any ballot*** cast by an Affected Voter" somehow removes that voter's registration from the rolls. *See id.* ¶ 54. Conclusory allegations with no factual basis are not enough.

Even Plaintiffs' conclusory allegations cannot support their claims because challenging a voter's ballot and removing that voter from the rolls simply are not the same thing. Removal means that the voter is no longer registered, and unregistered voters cannot cast ballots on Election Day. But every person on the State's list could cast ballots and, on proof of eligibility, those votes were counted. That necessarily means they were not removed from the voter rolls. Even if a voter's provisional ballot had rejected—whether due to voter ineligibility, lack of documentation, or some other reason—that voter remains registered to vote. In contrast, removal from the rolls requires a multi-step process following a separate legal challenge and involving a full hearing and appeal

procedures. Iowa Code §§ 48A.15–.16. And for registration challenges made fewer than seventy days before a regularly scheduled election, that multi-step process could not even occur until after the current election. *Id.* § 48A.14(4).

Thus, Plaintiffs' allegations simply cannot support claims for relief based on the removal of voters from voter rolls.

C. Counts I, II, and V should be dismissed because they rely on disparate treatment of citizens and noncitizen in voting, which is not illegal because noncitizens are constitutionally prohibited from voting.

Counts I, II, and V all turn on allegations that State Defendant has discriminated against noncitizens in violation of the Equal Protection Clause, the constitutional right to vote, and the nondiscrimination provision of the NVRA. Dkt. 1 ¶¶ 109–125, 138–141. The Equal Protection Clause requires "that all persons similarly situated should be treated alike." *Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985). Constitutional and statutory voting provisions impose similar requirements. *See* U.S. Const. amend XIV; 52 U.S.C. § 20507(b)(1). But the Secretary's list treated all persons similarly who registered to vote in the last ten years but attested to the State that they were not a U.S. citizen. Sharing credible information in that way with local election officials does not amount to differential treatment based on national origin. Further, the statutory ballot-challenge procedure at issue here, which has been in effect for decades, is identical for anyone who offers a ballot—whether that ballot challenge is based on residency, youth, felon status, or self-identification as a noncitizen.

Plaintiffs allege that the distinction drawn is based on national origin. That would be novel in this context. Indeed, as noted at the TRO hearing—and as conceded by Plaintiffs' counsel on rebuttal—nation-of-origin discrimination has never been found under the circumstances alleged. Put another way, national-origin discrimination has not been applied by courts in an election context where the differently situated persons are alleged to be Americans born in America and Americans born anywhere else. National-origin discrimination tends to rely on discriminating against persons coming from a nation (or, more rarely, a region). State Defendant has not found a

single election case, or any other type of case in the Eighth Circuit, where the status of a naturalized citizen as opposed to a natural born citizen created the presumption of discrimination.

That makes sense. Noncitizens—whose unifying feature is, definitionally, that they are not Americans—have no right to vote. Not under Iowa law nor under federal law. Any distinction drawn by the Secretary is therefore one prescribed by Iowa and federal law. Plaintiffs' theory requires applying heightened scrutiny to the right to vote in general, because that right distinguishes between citizens and noncitizens. That cannot be right.

Plaintiffs fail to plead discriminatory conduct that can support their claims in Counts I, II, and V, and they should be dismissed.

D. Counts I, II, and V fail to plead sufficient facts plausibly alleging a classification based on citizenship status in violation of the Constitution or the NVRA.

Plaintiffs also based their discrimination claims on allegations that State Defendant's actions "target[] recently naturalized citizens for voter challenges, law enforcement investigations, and unwarranted scrutiny for exercising their right to vote." Dkt. 1 ¶ 2. "In the right-to-vote context, . . . equal protection of the laws has been interpreted to provide 'a constitutionally protected right [for each citizen] to participate in elections on an equal basis with other citizens in the jurisdiction.'" *Carlson v. Wiggins*, 675 F.3d 1134, 1138 (8th Cir. 2021) (quoting *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972)). In this context, a naturalized citizen "stands on equal footing with the native citizen in all respects, save that of eligibility for the presidency." *Luria v. United States*, 231 U.S. 9, 22 (1913). But Plaintiffs' allegations do not plausibly allege that State Defendant has discriminated against voters based on their naturalization status.

Plaintiffs allege that "many (likely the vast majority)" of the voters on the State's list of 2,176 "are naturalized citizens who lawfully obtained a driver's license at some point prior to naturalizing." Dkt. 1 ¶ 34; *see also id.* ¶¶ 45, 48, 116–118, 140. But Plaintiffs also allege that thousands of people are naturalized each year. *See* Dkt, 1 ¶ 3 ("According to data maintained by the State, 4,097 persons were naturalized as U.S. citizens in 2022 alone."). Placed side by side,

these two allegations demonstrate a fundamental flaw in Plaintiff's argument. According to Plaintiffs, 4,097 were naturalized in 2022 alone, yet only 2,176 people appear on State Defendant's list. Thus, even if every single voter on the list were naturalized in 2022—which is not alleged—approximately half of those naturalized residents were not included on the list. This percentage shrinks even more once the thousands of citizens naturalized in other years are accounted for. Thus, based on Plaintiffs' own allegations, State Defendant's list must be based on something other than naturalization status.

Indeed, this Court identified this precise flaw in denying Plaintiffs' request for injunctive relief. Dkt. 32 at 3. As this Court explained, "according to the United States Census Bureau and Office of Homeland Security data, there are more than 79,000 naturalized citizens in Iowa in total, including more than 32,000 who were naturalized between 2013 and 2022." *Id.* As such, "Pate's list contains, at most, only a tiny percentage of these citizens." *Id.* And for that reason, Counts I, II, and V should be dismissed.

E. Counts III must be dismissed because Plaintiffs fail to plead sufficient facts plausibly alleging a viable due process claim.

Plaintiffs allege State Defendant violated their due process rights by denying them the ability to contest their placement on the Secretary of State's list or to contest any ballot challenge. Dkt. 1 ¶¶ 126–131. But they fail to recognize that the provisional ballot system itself guarantees all the process that is due. Although the equal protection clause applies to the right to vote, it is less clear whether or to what extent the due process clause applies. *See Richardson v. Tex. Sec'y of State*, 978 F.3d 220, 228–31 (5th Cir. 2020). Even if it does, "'[t]o set forth a procedural due process violation, a plaintiff, first, must establish that his protected liberty or property interest is at stake. Second, the plaintiff must prove that the defendant deprived him of such an interest without due process of law.'" *Schmidt v. Des Moines Pub. Sch.*, 655 F.3d 811, 817 (8th Cir. 2011) (quoting *Gordon v. Hansen*, 168 F.3d 1109, 1114 (8th Cir. 1999)). "'Due process is a flexible concept, requiring only such procedural protections as the particular situation demands.'" *Id.* (quoting *Clark v. Kan. City Mo. Sch. Dist.*, 375 F.3d 698, 702 (8th Cir.2004)).

Plaintiffs have not alleged that State Defendant has denied any person the ability to vote, let alone that State Defendant has done so without giving that person due process of law. Indeed, Plaintiffs admit that "county election official must require Affected Voters to cast a provisional ballot." Dkt. 1 ¶ 38. While Plaintiffs dispute the sufficiency of this process, federal law expressly permits this long-established State procedure. *See* 52 U.S.C. § 21082(a) (specifically allowing an individual "to cast a provisional ballot" if "an election official asserts that the individual is not eligible to vote[.]"). Courts in the Eighth Circuit has repeatedly held that a plaintiff cannot establish a due process claim when adequate state-law remedies are available to address the violation. *See, e.g.*, *Schmidt*, 655 F.3d at 818; *Zakrzewski v. Fox*, 87 F.3d 1011, 1014 (8th Cir. 1996); *Weimer v. Amen*, 870 F.2d 1400, 1403 (8th Cir. 1989); *Nathaniel v. Iowa Dep't of Hum. Servs.*, 2005 WL 8157815, at *8 (S.D. Iowa Sept. 16, 2005) (citing *Parratt v. Taylor*, 451 U.S. 527, 543–44 (1981), *overruled on other grounds by Daniels v. Williams*, 474 U.S. 327 (1986)).

Here, Iowa's provisional ballot process has been in place for more than two decades. *See* Iowa Code § 49.79(1) (enacted in 2002). This process is consistent with federal voting law and the Constitution. Indeed, the Help America Vote Act ("HAVA") specifically allows an individual "to cast a provisional ballot" if "an election official asserts that the individual is not eligible to vote[.]" 52 U.S.C. § 21082(a); *see also Repub. Nat'l Comm. v. Wetzel*, 120 F.4th 200, 212 (5th Cir. 2024) ("HAVA establishes a procedure for provisional voting when a voter's eligibility is in question."). That "is designed to recognize and compensate for, the improbability of 'perfect knowledge' on the part of election officials." *Sandusky Cty. Dem. Party v. Blackwell*, 387 F.3d 565, 570 (6th Cir. 2004) (citation omitted). The provisional-ballot process is meant to allow for further review "when, one hopes, perfect or at least more perfect knowledge will be available" and "the vote will be counted or not, depending on whether the person was indeed entitled to vote at that time and place." *Id.* (quoting *Fla. Dem. Party v. Hood*, 2004 WL 2414419, at *13 (N.D. Fla. Oct.21, 2004)).

Because this longstanding federally authorized process provides an adequate remedy for someone with a challenged ballot, Count III should be dismissed.

F. Count VII should be dismissed because Plaintiffs seek records that cannot be legally released under State and federal law.

Count VII asks Defendants to release the list of self-identified noncitizen voters. Dkt. 1 ¶¶ 149–152. But that request cannot be legally granted because releasing that information would violate State and federal law. The information here was received from the Department of Transportation subject to various memoranda of understanding both with the Secretary of State's office and with the federal government. So the State Defendant cannot release it.

Iowa Code section 321.11 makes all DOT records available for public inspection, except those which are made confidential and not permitted to be open. That code section states that "personal information shall not be disclosed subject to 18 U.S.C. § 2721 unless the person whose personal information is requested has provided express written consent allowing disclosure." Under both Iowa Code section 321.11 and 18 U.S.C. § 2721, "personal information" is defined as "information that identifies a person, including a person's photograph, social security number, driver's license number, name, address, telephone number, and medical or disability information, but does not include information on vehicular accidents, driving violations, and driver's status or a person's zip code." 18 U.S.C. § 2725; Iowa Code § 321.11(2). Personal information may be provided only to an officer or employee of a law enforcement agency or an employee of a federal or state agency or political subdivision acting in their official capacity, or to the Department of Inspections, Appeals and Licensing to investigate. Iowa Code § 321.11(3).

Iowa Code section 22.7(66) creates a privilege for personal information contained on electronic driver's license or nonoperator's identification card records. That is because that information is provided by the licensee or card holder to the department of transportation "for use by law enforcement, first responders, emergency medical service providers, and other medical personnel responding to or assisting with an emergency." The requested information is from the department of transportation, relating to information on their drivers' licenses, and is "for use by law enforcement." is very straightforward in its protection of personal information provided to the DOT for purposes of a driver's license or other identification document.

Iowa law makes clear that the DOT may not provide personal information to anyone outside of government without that persons' express written authorization. *Milligan v. Ottumwa Police Dep't* held that because the personal identifying information sought by the citizen came from the vehicle registration and driver's license database its public disclosure was "presumptively prohibited under the [Drivers Privacy and Protection Act] and Iowa Code § 321.11." *Milligan v. Ottumwa Police Dep't*, 937 N.W.2d 97, 99–100 (Iowa 2020), *as amended* (Jan. 21, 2020).

As noted in *Milligan*, the federal Drivers Privacy and Protect Act ("DPPA") prohibits a state department of motor vehicles from "knowingly disclosing or making available to any person or entity personal information about any individual obtained in connection with a motor vehicle record." 18 U.S.C. § 2721(a) (emphasis added); *see also Maracich v. Spears*, 570 U.S. 48, 57 (2013) (citing *Reno v. Condon*, 528 U.S. 141, 144 (2000)). The federal definition of personal information matches Iowa Code section 321.11.

While no cases interpret that law in Iowa or the Eighth Circuit, in *Public Interest Legal Foundation v. Boockvar*, the Foundation sued Pennsylvania state officials seeking the production, under the National Voter Registration Act of records documenting that noncitizens were registering to vote through the Pennsylvania Department of Motor Vehicles due to a "glitch" in their system which allowed noncitizens to register when the renewed their licenses. *Pub. Int. Legal Found. v. Boockvar*, 431 F. Supp. 3d 553 (M.D. Pa. 2019). The court first found that the NVRA disclosure provision was not limited to information related to a registrant's death or change in residence. It then explained that the requestor had identified information subject to NVRA disclosure. Accordingly, the court held the DPPA barred disclosing the protected information.

In sum, like the records requested in *Boockvar*, the records compiled by the Iowa Secretary of State involved an analysis matching noncitizen driver's license number, including the indication that the individuals attested to not being a citizen, against the driver's license numbers of registered voters. These records are protected under DPPA against any requests, whether made as a Freedom of Information request or under the disclosure provision of the NVRA. Iowa's DOT code has a

matching protection for personal information obtained by the DMV in issuing a driver's license which gives the same protections at the state level.

As State Defendant cannot legally grant the requested relief, Count VII must be dismissed.

CONCLUSION

For these reasons, Plaintiffs' Complaint must be dismissed due to mootness, lack of standing, and failure to state a claim under Rule 12(*b*)(6) of the Federal Rules of Civil Procedure.

Respectfully submitted,

BRENNA BIRD
Attorney General of Iowa

ERIC WESSAN
Solicitor General

/s/ Breanne A. Stoltze
BREANNE A. STOLTZE
Assistant Solicitor General
Department of Justice
Hoover State Office Building
Des Moines, Iowa 50319
(515) 281-5164/6957
(515) 281-4209 (fax)
eric.wessan@ag.iowa.gov
breanne.stoltze@ag.iowa.gov
ATTORNEYS FOR STATE DEFENDANT

PROOF OF SERVICE

The undersigned certifies that the foregoing instrument was served upon each of the persons identified as receiving a copy by delivery in the following manner on January 29, 2025:

☐ U.S. Mail	☐ FAX
☐ Hand Delivery	☐ Overnight Courier
☐ Federal Express	☐ Other
☒ CM/ECF	

Signature: */s/ Breanne A. Stoltze*