

NOT FOR PUBLICATION

FILED

UNITED STATES COURT OF APPEALS

APR 7 2025

FOR THE NINTH CIRCUIT

MOLLY C. DWYER, CLERK
U.S. COURT OF APPEALS

SUSAN VANNESS; ALEXANDREA
SLACK; MARTIN WALDMAN; ROBERT
BEADLES,

Plaintiffs - Appellants,

v.

FRANCISCO V. AGUILAR, in his official
capacity as Nevada Secretary of
State; JOSEPH LOMBARDO, in his official
capacity as Governor of the State of
Nevada,

Defendants - Appellees.

No. 24-2910

D.C. No.

2:23-cv-01009-CDS-MDC

MEMORANDUM*

Appeal from the United States District Court
for the District of Nevada
Cristina D. Silva, District Judge, Presiding

Argued and Submitted March 7, 2025
Las Vegas, Nevada

Before: RAWLINSON, MILLER, and DESAI, Circuit Judges.

Plaintiffs, all former poll observers, ballot runners, or ballot-counting
observers in Nevada, challenge Nevada’s Election Worker Protection Act (“SB

* This disposition is not appropriate for publication and is not precedent
except as provided by Ninth Circuit Rule 36-3.

406”) as overbroad and vague in violation of the First and Fourteenth Amendments to the United States Constitution and Article I of the Nevada Constitution. The district court dismissed plaintiffs’ claims for lack of Article III standing. We have jurisdiction under 28 U.S.C. § 1291. We affirm.

We review the district court’s dismissal for lack of standing de novo. *Unified Data Servs., LLC v. Fed. Trade Comm’n*, 39 F.4th 1200, 1209 (9th Cir. 2022). We presume all facts alleged in the complaint are true and construe the pleadings “in the light most favorable to the nonmoving party,” *id.* (quotation omitted), and we may affirm on any ground supported by the record, *Jones v. Allison*, 9 F.4th 1136, 1139 (9th Cir. 2021).

To have standing, plaintiffs must allege an “injury in fact” that is “fairly traceable” to the defendant’s conduct and would be redressable by a favorable decision from the court. *Unified Data Servs.*, 39 F.4th at 1209–10 (quotation omitted). To establish an injury in fact in a pre-enforcement, facial challenge, plaintiffs must allege (1) that they intend “to engage in a course of conduct arguably affected with a constitutional interest,” (2) that their proposed conduct is “proscribed by a statute,” and (3) that “there exists a credible threat of prosecution thereunder.” *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 160 (2014) (quotation omitted). Ultimately, plaintiffs “must have ‘an actual and well-founded fear that the law will be enforced against [them],’” which, “[i]n the free speech context . . . will only inure

if the plaintiff's intended speech arguably falls within the statute's reach." *Cal. Pro-Life Council, Inc. v. Getman*, 328 F.3d 1088, 1095 (9th Cir. 2003) (quoting *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988)).

Plaintiffs allege that they will not participate in their regular election observation activities during the 2024 elections cycle because they fear prosecution under SB 406. According to their complaint, these activities include "poll watching/observing" and "election watching/observing" as authorized by Nevada Revised Statutes section 293.274. Plaintiffs also allege that, but for SB 406, they would not only observe elections, but "voic[e] dissent to actions they observe" with "the intent to have that wrongful conduct corrected." Plaintiffs worry that their dissent will be interpreted as an "attempt to use . . . intimidation with the intent to . . . [i]nterfere with the performance of the duties of any elections official," in violation of SB 406. Nev. Rev. Stat. § 293.705(1)(a).

SB 406 does not proscribe election observation activities authorized by Nevada law. Indeed, SB 406 expressly excludes election observation activities from its scope. Nev. Rev. Stat. § 293.705(5)(a)(1). Thus, plaintiffs fail to plausibly allege that poll observation is even arguably proscribed by SB 406.

Although SB 406 arguably proscribes plaintiffs' intent to correct elections officials, they cannot establish an injury in fact because they have not alleged a "credible threat of enforcement." To determine whether a credible threat of

enforcement exists, the court looks to three factors: (1) “whether the plaintiffs have articulated a concrete plan to violate the law in question,” (2) “whether the prosecuting authorities have communicated a specific warning or threat to initiate proceedings,” and (3) “the history of past prosecution or enforcement under the challenged statute.” *Unified Data Servs.*, 39 F.4th at 1210 (quotation omitted).

Plaintiffs’ complaint fails to allege a “concrete plan to violate the law in question.” *Id.* at 1210. It does not “say when, to whom, where, or under what circumstances” they intend to “voice [their] dissent,” beyond noting that they would lodge their complaints during the general period of the 2024 elections cycle with elections officials. *Lopez v. Candaele*, 630 F.3d 775, 791 (9th Cir. 2010) (quotation omitted). Plaintiffs’ vague allegations amount to “some day intentions” to do something to an elections official that *might* be misinterpreted as intimidating. *Unified Data Servs.*, 39 F.4th at 1211 (quotation omitted). This is not a specific, concrete plan to engage in conduct arguably proscribed by SB 406.

Plaintiffs’ fear of prosecution hinges on the Nevada Attorney General’s 2020 tweet, which they allege is a specific threat of enforcement. But the Attorney General could not have threatened plaintiffs with enforcement of SB 406 in 2020 because SB 406 did not exist in 2020. Further, the tweet—at most—threatened to prosecute *voter* intimidation, not the intimidation of *elections officials*. Plaintiffs have not alleged any other facts to demonstrate that they face a “credible threat of enforcement” for

voicing their disagreement with elections officials. They therefore lack standing. *See Unified Data Servs.*, 39 F.4th at 1211.

Even assuming plaintiffs adequately allege an injury in fact, they have failed to establish that their injury is “fairly traceable” to the defendants’ conduct. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992) (alterations omitted). “[T]he causation element of standing requires the named defendants to possess authority to enforce the complained-of provision.” *Matsumoto v. Labrador*, 122 F.4th 787, 799 (9th Cir. 2024) (quoting *Bronson v. Swenson*, 500 F.3d 1099, 1110 (10th Cir. 2007)). Plaintiffs sue Nevada’s Governor and Secretary of State, but they have not alleged that either defendant has the authority to enforce SB 406. Plaintiffs have thus failed to allege an “injury in fact” that is “fairly traceable” to the defendants’ conduct and lack Article III standing.

AFFIRMED.

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Information Regarding Judgment and Post-Judgment Proceedings

Judgment

- This Court has filed and entered the attached judgment in your case. Fed. R. App. P. 36. Please note the filed date on the attached decision because all of the dates described below run from that date, not from the date you receive this notice.

Mandate (Fed. R. App. P. 41; 9th Cir. R. 41-1 & -2)

- The mandate will issue 7 days after the expiration of the time for filing a petition for rehearing or 7 days from the denial of a petition for rehearing, unless the Court directs otherwise. To file a motion to stay the mandate, file it electronically via the appellate electronic filing system or, if you are a pro se litigant or an attorney with an exemption from the electronic filing requirement, file one original motion on paper.

Petition for Panel Rehearing and Petition for Rehearing En Banc (Fed. R. App. P. 40; 9th Cir. R. 40-1 to 40-4)

(1) Purpose

A. Panel Rehearing:

- A party should seek panel rehearing only if one or more of the following grounds exist:
 - A material point of fact or law was overlooked in the decision;
 - A change in the law occurred after the case was submitted which appears to have been overlooked by the panel; or
 - An apparent conflict with another decision of the Court was not addressed in the opinion.
- Do not file a petition for panel rehearing merely to reargue the case.

B. Rehearing En Banc

- A party should seek en banc rehearing only if one or more of the following grounds exist:
 - Consideration by the full Court is necessary to secure or maintain uniformity of the Court's decisions; or
 - The proceeding involves a question of exceptional importance; or

- The opinion directly conflicts with an existing opinion by another court of appeals or the Supreme Court and substantially affects a rule of national application in which there is an overriding need for national uniformity.

(2) Deadlines for Filing:

- A petition for rehearing or rehearing en banc must be filed within 14 days after entry of judgment. Fed. R. App. P. 40(d).
- If the United States or an agency or officer thereof is a party in a civil case, the time for filing a petition for rehearing is 45 days after entry of judgment. Fed. R. App. P. 40(d).
- If the mandate has issued, the petition for rehearing should be accompanied by a motion to recall the mandate.
- See Advisory Note to 9th Cir. R. 40-1 (petitions must be received on the due date).
- An order to publish a previously unpublished memorandum disposition extends the time to file a petition for rehearing to 14 days after the date of the order of publication or, in all civil cases in which the United States or an agency or officer thereof is a party, 45 days after the date of the order of publication. 9th Cir. R. 40-4.

(3) Statement of Counsel

- A petition should contain an introduction stating that, in counsel's judgment, one or more of the situations described in the "purpose" section above exist. The points to be raised must be stated clearly.

(4) Form & Number of Copies (9th Cir. R. 40-1; Fed. R. App. P. 32(c)(2))

- The petition shall not exceed 15 pages unless it complies with the alternative length limitations of 4,200 words or 390 lines of text.
- The petition must be accompanied by a copy of the panel's decision being challenged.
- An answer, when ordered by the Court, shall comply with the same length limitations as the petition.
- If a pro se litigant elects to file a form brief pursuant to Circuit Rule 28-1, a petition for panel rehearing or for rehearing en banc need not comply with Fed. R. App. P. 32.

- The petition or answer must be accompanied by a Certificate of Compliance found at Form 11, available on our website at www.ca9.uscourts.gov under *Forms*.
- Attorneys must file the petition electronically via the appellate electronic filing system. No paper copies are required unless the Court orders otherwise. If you are a pro se litigant or an attorney exempted from using the appellate ECF system, file one original petition on paper. No additional paper copies are required unless the Court orders otherwise.

Bill of Costs (Fed. R. App. P. 39, 9th Cir. R. 39-1)

- The Bill of Costs must be filed within 14 days after entry of judgment.
- See Form 10 for additional information, available on our website at www.ca9.uscourts.gov under *Forms*.

Attorneys Fees

- Ninth Circuit Rule 39-1 describes the content and due dates for attorneys fees applications.
- All relevant forms are available on our website at www.ca9.uscourts.gov under *Forms* or by telephoning (415) 355-8000.

Petition for a Writ of Certiorari

- The petition must be filed with the Supreme Court, not this Court. Please refer to the Rules of the United States Supreme Court at www.supremecourt.gov.

Counsel Listing in Published Opinions

- Please check counsel listing on the attached decision.
- If there are any errors in a published opinion, please send a letter **in writing within 10 days** to:
 - Thomson Reuters; 610 Opperman Drive; PO Box 64526; Eagan, MN 55123 (Attn: Maria Evangelista, maria.b.evangelista@tr.com);
 - **and** electronically file a copy of the letter via the appellate electronic filing system by using the Correspondence filing category, or if you are an attorney exempted from electronic filing, mail the Court one copy of the letter.

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Form 10. Bill of Costs

Instructions for this form: <http://www.ca9.uscourts.gov/forms/form10instructions.pdf>

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The Clerk is requested to award costs to *(party name(s))*:

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