IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:20-cv-02992-PAB

JUDICIAL WATCH, INC., *et al.*

Plaintiffs,

v.

JENA GRISWOLD, Colorado Secretary of State, in her official capacity, *et al.*,

Defendants.

MOTION TO INTERVENE AS DEFENDANTS

Pursuant to Federal Rule of Civil Procedure 24, Voto Latino and Vote.org ("Proposed Intervenors") move to intervene in this action as defendants to protect their interests and the interests of their constituents.

I. INTRODUCTION

Plaintiffs (hereinafter "Judicial Watch") have filed suit against the Colorado Secretary of State and the State of Colorado (together, "Colorado" or the "State") to improperly impose their preferences for how the State conducts list maintenance of its voter registration rolls. If Judicial Watch is successful, it will almost certainly result in the improper removal of *eligible*, *lawful* voters from Colorado's voter rolls—including, in particular, young and Latinx voters, who are among Proposed Intervenors' core constituencies. Those voters are also among the very communities that Congress recognized have a "long history" of being at the losing end of overly aggressive voter "purge systems" that were not only "highly inefficient and costly," but also had been used to "violate the basic rights of citizens," particularly "minority communities." S. Rep. No. 103-6, at 18 (1993). It is unfortunate that Judicial Watch now seeks to use the National Voter Registration

Act ("NVRA"), in which Congress attempted to impose safeguards to protect against such abuses, to force Colorado to perpetuate them.

The key tenants of the NVRA are to "promote the exercise" of the right to vote; overcome "discriminatory and unfair registration laws and procedures [that] can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities"; and "increas[e] the number of eligible citizens who register to vote" in federal elections. 52 U.S.C. §§ 20501(a)(2)-(3), (b)(1). Far from requiring the states to engage in broad and aggressive voter purge efforts, NVRA's Section 8 (the section that Judicial Watch purports to rely upon in this case) was intended to "ensure that once a citizen is registered to vote, he or she should remain on the voting list so long as he or she remains eligible to vote in that jurisdiction." S. Rep. No. 103-6, at 17 (1993). But if Judicial Watch succeeds in this action, the opposite result will likely follow: eligible voters will be removed from Colorado's voter registration rolls, undermining the NVRA and the missions of the Proposed Intervenors—two organizations dedicated to increasing voter registration and turnout nationwide, including in Colorado—and the work they have done to get voters registered in the first instance.

For the reasons set forth below, Proposed Intervenors are entitled to intervene in this case as a matter of right under Rule 24(a)(2). They have collectively helped millions of American citizens register to vote, particularly people of color and young people who are among the groups most likely to be casualties of voter purges like the one that Judicial Watch seeks to force Colorado to undertake here, and they have an interest in making sure that those efforts are not undermined by guarding against the improper removal of qualified voters from the voter registration list through excessive purge efforts. Intervention is needed to safeguard the substantial and distinct

legal interests of Proposed Intervenors, which will otherwise be inadequately represented in this litigation. In the alternative, Proposed Intervenors should be granted permissive intervention pursuant to Rule 24(b). In accordance with Rule 24(c), a proposed Motion to Dismiss is attached as Exhibit 1.

II. CERTIFICATE OF CONFERRAL

Pursuant to Local Rule 7.1, counsel for Voto Latino and Vote.org has conferred with counsel for the parties. Plaintiffs represented that they oppose this Motion to Intervene, and the defendants have represented that they do not oppose the same.

III. STATEMENT OF FACTS

A. Factual and Procedural Background

Colorado has established a robust voter maintenance program, which was enacted expressly to comply with section 8 of the NVRA. 8 C.C.R. § 1505-1:2.13 ("List Maintenance under section 8 of the National Voter Registration Act of 1993"); *see also* 8 C.C.R. § 1505-1:2.1 *et seq.* (outlining Secretary of State's obligations and activities regarding voter registration); C.R.S. § 1-1-107(1)(d) (2016) (powers and responsibilities of Secretary of State include coordinating state's actions to comply with NVRA). Nevertheless, on October 5, 2020, Judicial Watch filed the instant action alleging a violation of Section 8(a)(4) of the NVRA. Relying solely on their own opaque calculations, and without providing a single example of an actual ineligible voter on Colorado's registration lists, Judicial Watch claims that Colorado has "failed to fulfill [its] obligations under Section 8(a)(4) of the NVRA to conduct a general program that makes a reasonable effort to cancel the registrations of registrants who are ineligible to vote in Colorado's federal elections." Compl. ¶ 73, ECF No. 1. Judicial Watch seeks a declaration and injunction to

force Colorado to remove voters from the state's voter rolls. *Id*., Prayer for Relief. Additional voter purges are not only a likely consequence of this requested relief, *they are the intended effect*.

On October 7, 2020, this Court issued its Order on initial case management deadlines. *See* ECF No. 7. On November 6, 2020, the parties to the case filed a stipulated extension of time for the defendants to respond to the complaint. ECF No. 14. The defendants have until December 3, 2020 to so respond. *Id.* In short, no substantive actions have taken place in this action yet.

B. Voto Latino's and Vote.org's Interest in This Action

Proposed Intervenors each have significant interests in this action. The primary mission of these organizations is to increase voter registration, primarily among groups who have traditionally had lower participation, namely people of color and younger voters. Judicial Watch seeks to force Colorado to remove more voters from the rolls, which directly conflicts with these organizations' missions and would undermine the work they have done to help people across the country and in Colorado register to vote. Further, Judicial Watch's requested relief would force these organizations to either expend more resources or divert resources from existing resources to counter the effects of a more aggressive purging of the voter registration rolls.

1. Voto Latino

Voto Latino is a 501(c)(4) grassroots non-profit organization focused on educating and empowering a new generation of Latinx voters, as well as creating a more robust and inclusive democracy. Decl. of Danny Friedman ("Friedman Decl.") ¶¶ 2, 4. Its civic engagement campaigns have reached over 50 million Latinx households nationwide, including households in Colorado. *Id.* ¶ 3. As part of those efforts, Voto Latino assists individuals with registering to vote. As of

October 2020, Voto Latino had registered over 500,000 new voters across the country this year alone, including over 12,000 voters in Colorado. *Id.* ¶ 5.

Because Voto Latino's mission focuses on empowering a new generation of Latinx voters, its efforts have often focused on registering voters who are young and Latinx. *See id.* ¶ 6 (engagement with Latinx millennial and Gen Z voters). Voto Latino has a direct interest in ensuring that these voters remain on Colorado's voting rolls and are not removed by overly aggressive voter purges. Indeed, the removal of any eligible voters, and particularly those that Voto Latino has directly registered, not only frustrates its mission by directly undermining the efforts it has already taken to register voters across Colorado, but also means that Voto Latino will have to do more work to ensure that its voters are protected from such purges and to reregister those who are removed. *Id.* ¶ 9. In particular, Voto Latino would need to expend additional resources and staff time to educate Colorado's Latinx voters on when and how to maintain their voter registration. *Id.* ¶¶ 9, 10. Already, Voto Latino has increased efforts in North Carolina, Georgia, Wisconsin, and Florida in direct response to potential voter registration purges in those states. *Id.*

2. Vote.org

Vote.org is the largest 501(c)(3) nonprofit, nonpartisan voting registration and get-out-the-vote (GOTV) technology platform in America. Decl. of Andrea Hailey ("Hailey Decl.") ¶ 2. Vote.org helps individuals across the country, including in Colorado, register to vote. Vote.org has registered more than 6.1 million new voters and verified more than 15 million voters' registration status. *Id.* Since 2012, Vote.org has helped over 118,000 Coloradans register to vote, including more than 69,000 this year alone. *Id.* ¶ 5. Additionally, since 2012, Vote.org has helped over 260,000 Coloradans verify their registration status. *Id.*

Vote.org uses technology to simplify political engagement, increase voter turnout, and strengthen American democracy. *See id.* ¶¶ 4. Vote.org served more than ten times as many people this year as it did in 2018. *Id.,* ¶ 4. The organization works extensively to support low-propensity voters, which may include racial and ethnic minorities and younger voters who historically have low voter turn-out rates. *Id.* ¶ 3. Vote.org has a direct interest in ensuring that these voters remain on Colorado's voting rolls and are not removed by overly aggressive voter purges. Indeed, the removal of any eligible voters, and particularly those that Vote.org has directly registered, not only frustrates its mission by directly undermining the efforts it has already taken to register voters across Colorado, but it would require Vote.org to do more work to ensure that its voters are protected from such purges and to re-register those who are removed. Specifically, Vote.org would need to expend additional resources and staff time to build out processes to notify users of purges and steps users can take to maintain their registration, and it may need to establish systems to enable Colorado voters to identify whether they are "inactive," something currently Vote.org is unable to do. *Id.* ¶¶ 6-8.

IV. LEGAL STANDARD

Motions to intervene are governed by Federal Rule of Civil Procedure 24, which provides that non-parties may intervene in a pending action as of right if: "(1) the application is timely; (2) the applicant[s] claim[ ] an interest relating to the property or transaction which is the subject of the action; (3) the applicant[s'] interest may as a practical matter be impaired or impeded; and (4) the applicant[s'] interest is [not] adequately represented by existing parties." *W. Energy All. v. Zinke*, 877 F.3d 1157, 1164 (10th Cir. 2017); *see* Fed. R. Civ. P. 24(a)(2).

The Rule 24(a)(2) factors are intended to "capture the circumstances in which the practical effect on the prospective intervenor justifies its participation in the litigation, and those factors are not rigid, technical requirements." *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1198 (10th Cir. 2010) (quotation omitted). As a result, the Tenth Circuit "has historically taken a liberal approach to intervention and thus favors the granting of motions to intervene." *Kane Cnty., Utah v. United States*, 928 F.3d 877, 890 (10th Cir. 2019) (quoting *Zinke*, 877 F.3d at 1164). In addition, "the requirements for intervention may be relaxed in cases raising significant public interests." *Id.* Courts should also accept as true the non-conclusory factual allegations in the motion to intervene. *See, e.g.*, *Romero v. Bradford*, No. 08-CV-1055 MCA/LFG, 2009 WL 10708255, at *6 & n.1 (D.N.M. Apr. 13, 2009) (citing *Stadin v. Union Elec. Co.*, 309 F.2d 912, 917 (8th Cir. 1962)).

Parties are also allowed to intervene permissively upon order of the Court if they share a claim or defense with the main action or if they share a common question of law or fact. Fed. R. Civ. P. 24(b)(1).

V. ARGUMENT

A. Proposed Intervenors Should Be Permitted to Intervene by Right

Proposed Intervenors have a right to intervene in this action. Their motion to intervene is timely, they have a direct interest in this case that will be impaired by Judicial Watch's requested outcome, and their interest is not adequately represented.

1. Proposed Intervenors' motion is timely.

Judicial Watch filed their complaint on October 5, 2020. This motion follows expeditiously, before any answer has been filed or any significant action from the Court has occurred in the case. Defendants have appeared but have not yet filed a responsive pleading. There

has been no delay, and there is no possible risk of prejudice to other parties as intervention will not alter the timeline upon which this case will be adjudicated. *See Kane Cnty.*, 928 F.3d at 890-91 (10th Cir. 2019) ("The timeliness of a motion to intervene is assessed 'in light of all the circumstances, including the length of time since the applicant knew of his interest in the case, prejudice to the existing parties, prejudice to the applicant, and the existence of any unusual circumstances.'" (quoting *Utah Ass'n of Cntys. v. Clinton*, 255 F.3d 1246, 1250 (10th Cir. 2001)).

2. Proposed Intervenors claim an interest which is the subject of the action that would be directly impaired by this litigation.

To satisfy the second and third Rule 24(a) factors, a proposed intervenor must have an interest in the proceedings that is "direct, substantial, and legally protectable." *Coal. of Arizona/New Mexico Cntys. for Stable Econ. Growth v. Dep't of Interior*, 100 F.3d 837, 840 (10th Cir. 1996) ("*COANMC*"). "[T]he question of impairment is not separate from the question of existence of an interest." *Utah Ass'n of Cntys.*, 255 F.3d at 1253. An intervenor "must show only that impairment of its substantial legal interest is possible if intervention is denied. This burden is minimal." *Id.* (citation and quotation marks omitted); *WildEarth Guardians v. Nat'l Park Serv.*, 604 F.3d 1192, 1198 (10th Cir. 2010) ("With respect to Rule 24(a)(2), we have declared it 'indisputable' that a prospective intervenor's environmental concern is a legally protectable interest." (citation omitted)).

As organizations dedicated to registering Colorado voters, and particularly Colorado's young and Latinx voters, Proposed Intervenors have an interest in this litigation because their missions and registration efforts will be directly impaired if more aggressive voter purges are instituted and qualified voters—including some of the very individuals they have registered—are improperly removed from the voter registration list. *See, e.g.*, *Bellitto v. Snipes*, No. 16-cv-61474,

2016 WL 5118568, at *2 (S.D. Fla. Sept. 21, 2016) (finding a workers' union had distinct interest in intervening in a case challenging the list maintenance practices in Florida where some of its members might be unintentionally purged form the voter rolls).

Proposed Intervenors seek to intervene "for the purpose of challenging the plaintiff's claims with a view toward ensuring that no unreasonable measures are adopted that could pose an elevated risk of removal of legitimate registrations." *Pub. Int. Legal Found., Inc. v. Winfrey*, 463 F. Supp. 3d 795, 799 (E.D. Mich. 2020). That interest is "facially legitimate." *Id*. Indeed, registering eligible voters and ensuring that they are able to freely cast their ballots *by remaining registered to vote* directly forwards Proposed Intervenors' core missions. Here, Judicial Watch seeks to force Colorado to purge more voters from its rolls. Colorado is already enforcing the NVRA and maintaining its voter registration rolls. Judicial Watch does not dispute that the state sends address confirmations and removes ineligible voters from the rolls; instead, the gravamen of its lawsuit is that these removal rates *are too low* and the state should remove more voters from the voter registration list. Compl. ¶ 47. Yet, the very same Election Assistance Commission report that Judicial Watch parses in its Complaint states that Colorado *already* removed 289,247 voters from its voter registration rolls.[1] *See* Compl. ¶ 22. That amounts to 7.32% of all registered voters in the state. Accordingly, this lawsuit is clearly not about *whether* Colorado undertakes voter registration maintenance efforts for its voter rolls, but instead about *how many* registered voters Judicial Watch wants the state to cut from the rolls of voters in this state.

As voter purges increase, it is well-documented that along with ineligible voters, many

[1] U.S. Election Assistance Commission, *Election Administration and Voting Survey,* 82 (2019), www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf.

eligible voters are likely to be removed, including the very constituents that Proposed Intervenors serve. *See, e.g.*, Jonathan Brater et al., BRENNAN CENTER FOR JUSTICE, *Purges: A Growing Threat to the Right to Vote*, 15 & n.67 (2018), www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf (noting that Crosscheck, one of the programs used by Colorado to maintain the voter rolls, disproportionately affects non-white communities that are more likely to have common shared names); *see also id.* at 6 (reporting that 14 percent of voters in Hispanic-majority election districts were purged compared to 9 percent of voters in other districts); Alexa Ura, *Texas will end its botched voter citizenship review and rescind its list of flagged voters*, THE TEXAS TRIBUNE, Apr. 26, 2019, www.texastribune.org/2019/04/26/texas-voting-rights-groups-win-settlement-secretary-of-state/ (noting that Texas threatened the voting rights of naturalized U.S. citizens through voter registration roll purge); Sara Burnett, *88% of challenged Colorado voters are U.S. Citizens, check shows*, DENVER POST, Aug. 12, 2012, www.denverpost.com/2012/08/29/88-of-challenged-colorado-voters-are-u-s-citizens-check-shows. For this reason, Proposed Intervenors are particularly concerned that the purges Judicial Watch seeks will result in eligible voters being removed from the voter rolls, which would impair Proposed Intervenors' missions by making it more difficult for registered voters to maintain their registration and participate in the democratic process.

Proposed Intervenors worked hard in communities across Colorado to register voters who want to vote. That work would be frustrated if any of those voters were caught in a dragnet of culling voter registration lists. As a result, Proposed Intervenors have a strong interest in helping to ensure that any changes to Colorado's voter list maintenance do not sweep too broadly.

3. The interest represented by Proposed Intervenors is not adequately represented by existing parties.

While "an applicant for intervention as of right bears the burden of showing inadequate representation," that burden is "minimal" and requires only a "showing that representation 'may' be inadequate." *Sanguine, Ltd. v. U.S. Dep't of Interior*, 736 F.2d 1416, 1419 (10th Cir. 1984) (quoting *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n.10 (1972)). Proposed Intervenors seek to intervene not just to ensure Colorado's statutory duties are met, but also to ensure that their constituents—including thousands of voters registered by Proposed Intervenors—are protected from inadvertent removal from the voter rolls. *See supra*. Further, their interest is unique given that Proposed Intervenors often work with eligible young and Latinx voters, many of whom are part of the very communities that Congress had in mind when it designed the NVRA to protect against over-inclusive and over-aggressive voter purging efforts. *See, e.g.*, 52 U.S.C. § 20501(a)(2)-(3) (finding that "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities").

Courts have recognized that ensuring "no unreasonable measures are adopted that could pose an elevated risk of removal of legitimate registrations" is "sufficiently distinct from the interests of the [state] defendants." *Winfrey*, 463 F. Supp. 3d at 799, at *3; *Bellitto*, 2016 WL 5118568, at *2 (finding union had distinct interest compared to elected officials where union members might be unintentionally purged form the voter rolls); *Kobach v. U.S. Election Assistance Comm'n*, No. 13-cv-4095-EFM-DJW, 2013 WL 6511874, at *4 (D. Kan. Dec. 12, 2013) (voter registration organizations had specific and distinct interest that diverged from state regarding proof-of-citizenship requirements to vote).

And there is good reason for that. Defendants' stake in this lawsuit is defined solely by its statutory duties under state law and the NVRA. In contrast, Proposed Intervenors' missions are not just to ensure compliance with the law, but also to ensure that voters who have not historically had high voter turn-out are registered (and not then summarily and wrongfully removed from the rolls). For Voto Latino, this mission involves educating and empowering Latinx voters, many of whom are young. Friedman Decl. ¶ 6. Vote.org assists low-propensity voters, including racial and ethnic minorities and younger voters who historically have low voter turn-out rates, to get registered and vote via its online platform. Hailey Decl. ¶ 3. In this way, Proposed Intervenors are better positioned to serve as zealous advocates for voters within the communities most vulnerable to Judicial Watch's voter purge efforts, more than meeting the "minimal" burden required by this prong of Rule 24(a)'s test. *Sanguine, Ltd.* 736 F.2d at 1419; *see Nat. Res. Def. Council v. U.S. Nuclear Regul. Comm'n*, 578 F.2d 1341, 1346 (10th Cir. 1978) (explaining the possibility that the interests of the applicant and the parties may diverge "need not be great" in order to satisfy this minimal burden); *see also Cnty. Council of Sumter Cnty., S.C. v. United States,* 555 F. Supp. 694, 696-97 (D.D.C. 1983) (granting motion to intervene filed by group of African-American citizens because of their "local perspective on the current and historical facts at issue" and noting that there was "a long line of cases in which [courts] routinely allowed intervention by persons situated similarly" to such intervenors).

Proposed Intervenors' interest is also distinct from the general public interest advanced by the State defendants. *See COANMC*, 100 F.3d at 845 (noting government entity must represent the general public, which may be different from plaintiff's particular interest); *Winfrey,* 463 F. Supp. 3d at 799 (noting Sixth Circuit "has recognized that the interests of election officials in voting roll

maintenance are sufficiently distinct from those of elected officials and their constituents to warrant intervention by those who could be impacted by the results of the maintenance process"). And Vote.org's and Voto Latino's participation in this suit will assist the Court in clarifying issues and the effect of Judicial Watch's proposals on Colorado voters, particularly young voters and voters of color. *Cf*. *Kobach*, 2013 WL 6511874 at *4 (finding that (i) while government entities had a general "duty to represent the public interest," that duty was different from the specific interests of the proposed intervenors, who represented minority and underprivileged individuals; and (ii) the intervenor's experience, views, and expertise, particularly as to the effects of the state voting registration requirements at issue on voter registration efforts, would help to clarify, rather than clutter the issues in the action).

For these reasons, the Proposed Intervenors and the interests they represent fulfill each of the four criteria of Rule 24(a), and their motion to intervene should be granted.

B. Alternatively, Permissive Intervention is Warranted

Alternatively, Proposed Intervenors should be permitted to intervene pursuant to Rule 24(b) of the Federal Rules of Civil Procedure because their interests share common questions of law and fact to the main action. Fed. R. Civ. P. 24(b)(1) ("[T]he court may permit anyone to intervene who . . . has a claim or defense that shares with the main action a common question of law or fact.")

In determining whether to grant permissive intervention, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). As an initial matter, as explained *supra*, allowing Proposed Intervenors to

intervene will not unduly delay or prejudice adjudication. This litigation is in its nascent stages, no answer has been filed, and no substantive actions have taken place.

Proposed Intervenors raise common issues of laws and fact—namely, the legality of Colorado's current list maintenance program. Judicial Watch purports to seek Colorado's compliance with the list maintenance program set out in Section 8 of the NVRA. Proposed Intervenors seek to ensure that the goals of the NVRA are met and that no eligible voters are improperly removed from Colorado's voter rolls. Indeed, Section 8 of the NVRA was intended to "ensure that once a citizen is registered to vote, he or she should remain on the voting list so long as he or she remains eligible to vote in that jurisdiction." S. Rep. No. 103-6, at 17 (1993); *see also Vladez v. Herrera,* No. 09-668 JCH/DJS, 2010 WL 11465061, at *6 (D.N.M. Dec. 21, 2010)*, aff'd sub nom. Valdez v. Squier,* 676 F.3d 935 (10th Cir. 2012) ("One of the stated purposes of the NVRA is 'to establish procedures that will increase the number of eligible citizens who register to vote' and to enable governments to implement the statute's requirements "in a manner that enhances the participation of eligible citizens as voters." (citation omitted)); *see also Ferrand v. Schedler*, No. 11-926, 2012 WL 1570094, at *5 (E.D. La. May 3, 2012) ("The purpose of the NVRA is to make access to voter registration as broad as possible, particularly for impoverished Americans…."). While Judicial Watch and Proposed Intervenors have starkly differing perspectives—Judicial Watch arguing that the NVRA requires Colorado to purge more voters from the rolls and Proposed Intervenors explaining that it does not—the questions of law and fact that underlie these positions are the same and support permissive intervention.

Courts have routinely allowed for permissive intervention by organizations like the Proposed Intervenors here in similar cases. *See, e.g.*, *Winfrey*, 463 F. Supp. 3d at 796 (granting

permissive intervention to organization dedicated to voter registration) (citing *League of Women Voters of Mich. v. Johnson*, 902 F.3d 572, 579 (6th Cir. 2018)); *Kobach,* 2013 WL 6511874, at *4 (approving permissive intervention when movants had "clearly shown their interests in either increasing participation in the democratic process, or protecting voting rights, or both, particularly amongst minority and underprivileged communities"). This Court should, in the alternative, grant permissive intervention to allow Proposed Intervenors to participate in this suit.

CONCLUSION

For the aforementioned reasons, Proposed Intervenors respectfully request that the Court grant their motion to intervene.

DATED this 17th day of November 2020

Respectfully submitted,

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By: *s/ Lindsey Dunn*

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Attorneys for Proposed Intervenors

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following individuals:

Peter G. Baumann
Eric Robert Holway
T. Russell Nobile
Grant T. Sullivan
John Stuart Zakhem

By: *s/ Lindsey Dunn*

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Defendants.

DECLARATION OF DANNY FRIEDMAN IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS

Pursuant to 28 U.S.C. § 1746, I, Danny Friedman, declare as follows:

1. My name is Danny Friedman. I am over the age of 18, have personal knowledge of the facts stated in this declaration, and can competently testify to their truth.

2. I am Managing Director of Voto Latino, a 501(c)(4) nonprofit, social welfare organization that engages, educates, and empowers Latinx communities across the United States.

3. Since Voto Latino's inception, its civic engagement campaigns have reached over 50 million Latinx households, including households in Colorado.

4. Voto Latino's mission is to increase civic participation among Latinx communities and to ensure that Latinx people, including the approximately 650,000 eligible Latinx voters in Colorado,[1] are enfranchised and included in the democratic process. To accomplish its mission, Voto Latino works in key states with significant Latinx populations, including Colorado, Texas,

[1] *See* Ruth Igielnik & Abby Budiman, *The Changing Racial and Ethnic Composition of the U.S. Electorate*, Pew Research Center (Sept. 23, 2020), https://www.pewresearch.org/2020/09/23/the-changing-racial-and-ethnic-composition-of-the-u-s-electorate/

Arizona, Nevada, Pennsylvania, North Carolina, Florida, New Mexico, and Georgia. Voto Latino has also established an online Election Center that allows individuals to check their registration status, request their ballots, and research candidates. This platform is available here: https://votolatino.org/electioncenter/.

5. Since its inception, one of Voto Latino's main priorities has been to help eligible Latinx voters register to vote. In 2020, Voto Latino assisted over 500,000 individuals in registering to vote. Voto Latino began working in Colorado in October 2017, and the organization has facilitated the registration of more than 90,000 Colorado voters. In 2020, Voto Latino has helped to register over 12,000 new Colorado voters register to vote. Rates of Latinx voter turnout increased in the 2020 general election across the country and in Colorado.

6. In Colorado specifically, Voto Latino has concentrated on engaging and mobilizing Latinx millennial and Gen Z voters through a digital engagement strategy, in addition to its regular voter registration efforts in the state. Voto Latino has also worked with partners on the ground in Colorado to coordinate voter engagement events.

7. If successful, efforts across the country to purge voters from the rolls, including by Plaintiffs in Colorado, will make it more difficult for some voters to maintain their voter registration, which would be particularly problematic for eligible Latinx voters. If the registrations of eligible Latinx voters are cancelled, it is highly likely that many of those voters will be disenfranchised. The risk of disenfranchisement is heightened for eligible Latinx voters in Colorado—Voto Latino's constituents—because of: language barriers; typographical, data entry, and clerical errors in state voter registration lists; ineffective mail delivery; failure to receive confirmation of registration status mailings due to housing instability and displacement related to

economic hardship or job loss; and confirmations not being delivered back to election officials for any number of reasons, such as voter inexperience with the confirmation process.

8. Further efforts to purge eligible voters from the rolls in Colorado will likely disproportionately affect younger and Latinx voters, as has been the case across the country. Reasons for this disproportionate effect include, but are not limited to,[2] housing insecurity, frequency of relocating, commonality of certain surnames, and language barriers, all of which raises the risk that the Colorado Secretary of State and the counties might receive erroneous information about a voter's residence that could result in the voter being removed from the voter rolls despite remaining in the jurisdiction in which they are registered.

9. Should the Court issue the relief requested by Plaintiffs, and as a result Colorado implements more aggressive efforts to remove voters from the rolls, it would create additional barriers to maintaining voter registration. As a result, Voto Latino would need to expend additional resources and staff time to educate Colorado's Latinx voters on when and how to maintain their voter registration. For example, this might include building out tools in Voto Latino's online Election Center to not only check but *maintain* voter registration status. In addition, Voto Latino may have to reallocate existing resources from around the country to Colorado if aggressive voter registration purging efforts were planned. For example, Voto Latino increased its presence and activities in 2020 in the states of North Carolina, Georgia, Wisconsin, and Florida in response to potential voter registration purges in those jurisdictions. Voto Latino may also need to develop new educational materials and programs designed specifically for voters in Colorado, particularly

[2] *See* Jonathan Brater *et al*., *Purges: A Growing Threat to the Right to Vote*, Brennan Center for Justice, 15 & n.67 (2018), www.brennancenter.org/sites/default/files/2019-08/Report_Purges_Growing_Threat.pdf.

those who are young and Latinx, that address how eligible voters can maintain their voter registration status.

10. Voto Latino has finite resources to do its work, and any resources spent on voter education to avoid improper registration cancellations would strain the organization's resources available for other activities. For example, Voto Latino estimates that additional spending relating to aggressive voter registration purges in Colorado could create additional costs, in terms of staff time and technological resources, totaling thousands, if not tens of thousands, of dollars.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: November 13, 2020

By: DocuSigned by: Danny Friedman 9624566949FA40A...

Danny Friedman
Managing Director
Voto Latino

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DECLARATION OF ANDREA HAILEY IN SUPPORT OF MOTION TO INTERVENE AS DEFENDANTS

Pursuant to 28 U.S.C. § 1746, I, Andrea Hailey, declare as follows:

1. My name is Andrea Hailey. I am over the age of 18, have personal knowledge of the facts stated in this declaration, and can competently testify to their truth.

2. I am CEO of Vote.org, the largest 501(c)(3) nonprofit, nonpartisan voting registration and get-out-the-vote ("GOTV") technology platform in America. Vote.org has helped register more than 6.1 million new voters, verified more than 15 million voters' registration status, helped submit more than 5.3 million requests for absentee ballots, and assisted over 51 million website users by providing registration links and deadlines, polling location details, and other essential voting information for each state. Vote.org also leverages its research-backed GOTV program each year, targeting underserved voters in regularly scheduled and special elections.

3. Vote.org was originally founded as Long Distance Voter ("LDV"), which served as a comprehensive online resource for absentee ballot information. In 2016, LDV rebranded itself as Vote.org. On Election Day 2016, Vote.org ran the single largest non-partisan SMS GOTV drive in America, providing polling location information to over 1 million low-propensity voters.

Vote.org defines "low-propensity voters" as infrequent or unlikely voters depending on their voting history. Infrequent voters have some voting history but do not vote often, and young, newly registered voters have no voting history, meaning that they are categorized as unlikely voters. These low-propensity voters include racial and ethnic minorities and younger voters who historically have low voter turn-out rates. Vote.org works to overcome barriers these low-propensity voters face in registering to vote and voting by, among other things, purchasing radio advertising in communities of color and conducting expansive outreach to young voters who have no voting history.

4. Vote.org's mission is to use technology to simplify political engagement, increase voter turnout, and strengthen American democracy. In 2020, Vote.org served more than ten times more people than it served in 2018. Vote.org works extensively with communities of color, and part of Vote.org's mission is engaging with and registering voters who are young and diverse.

5. Since 2012, Vote.org has helped over 118,000 Coloradoans register to vote, including more than 69,000 individuals in 2020 alone. Additionally, since 2012, Vote.org has helped over 260,000 Coloradoans verify their voter registration status. In addition, over 750,000 Coloradans have accessed Vote.org for its services and information during that time.

6. Efforts across the country to conduct aggressive voter purging, including the increased purge requested by Plaintiffs here, are likely to make it more difficult for voters to maintain their registration, particularly for (1) low-propensity voters, who may be unfamiliar with processes related to voting and ballot access and (2) younger voters who may relocate frequently. As a result, Vote.org would need to divert existing resources from around the country to assist voters in Colorado, especially low-propensity voters, with education on when and how to *maintain*

their voter registration. Vote.org seeks to protect the registration status of the over 750,000 website users in Colorado who have utilized Vote.org's services.

7. Further, Vote.org has limited staff, and efforts to purge voter registration rolls means that the organization's resources need to be diverted to track such potential purges and build out processes to (a) notify its registrants of such purges and (b) identify steps its registrants can take to maintain their registration. Such efforts would require Vote.org to spend tens or hundreds of thousands of additional dollars. For example, in Colorado, Vote.org does not currently identify voters who are "inactive"—those who would be at increased risk of losing their registration status under Plaintiffs' requested relief given their lack of recent voting history. Given that Vote.org's system is not currently able to report whether a voter in Colorado is considered an "active" or an "inactive" voter, Vote.org would need to create new procedures and systems to allow Colorado voters to assess and verify their "active" or "inactive" registration status. In addition, Vote.org would likely see increased use of its voter verification tool. A spike in the number of users accessing this tool could create additional costs to the organization. All told, efforts to further purge voters in Colorado would likely divert hundreds of hours of staff time and create considerable monetary costs for Vote.org.

8. Vote.org has limited resources to do its work, and any resources spent on general voter education or creating new processes in response to Plaintiffs' requested relief would necessarily take away from our other key activities.

I declare under penalty of perjury that the foregoing is true and correct.

DATED: November 14, 2020

By: DocuSigned by:
56041466FFA4428

Andrea Hailey
Chief Executive Officer
Vote.org

Exhibit 1

Exhibit 1

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:20-cv-02992-PAB

JUDICIAL WATCH, INC., *et al.*

Plaintiffs,

v.

JENA GRISWOLD, Colorado Secretary of State, in her official capacity, *et al.*,

Defendants.

[PROPOSED] INTERVENORS-DEFENDANTS' MOTION TO DISMISS

Proposed Intervenors-Defendants Voto Latino and Vote.org (collectively, "Intervenors") move to dismiss this case with prejudice pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) on the grounds that Plaintiffs lack standing and have failed to state a claim upon which relief may be granted.

I. INTRODUCTION

Plaintiffs Judicial Watch, Elizabeth Miller, Lorri Hovey, and Mark Sutfin (collectively, "Plaintiffs") brought this case in an attempt to force Colorado to take more aggressive measures to remove voters from its rolls. Plaintiffs couch their challenge as an alleged failure to comply with Section 8(a)(4) of the National Voter Registration Act ("NVRA"), 52 U.S.C. § 20507(a)(4). But there are no NVRA violations here. The voter list maintenance process required under Colorado law and codified in statute and regulation satisfies the NVRA, which expressly provides that a state "may meet the requirement of subsection (a)(4) by establishing a program" that utilizes change-of-address information from the United States Postal Service. Colorado has established such a program and has removed hundreds of thousands of voters from the rolls in accordance

with its governing laws in just the last two years. Plaintiffs' complaint does not even mention the relevant Colorado law, much less make a plausible case that it runs afoul of the NVRA. More fundamentally, Plaintiffs fail to establish that they have Article III standing to pursue their claims. The Court should accordingly dismiss the case under Rule 12(b)(1) for lack of jurisdiction or, in the alternative, under Rule 12(b)(6) for failure to state a claim.

II. BACKGROUND

A. The National Voter Registration Act

Congress enacted the NVRA "primarily to increase the number of citizens eligible to vote in elections for federal office." *Dobrovolny v. Neb.*, 100 F. Supp. 2d 1012, 1030 (D. Neb. 2000). In doing so, Congress found that "the right of citizens of the United States to vote is a fundamental right" and "discriminatory and unfair registration laws and procedures can have a direct and damaging effect on voter participation in elections for Federal office and disproportionately harm voter participation by various groups, including racial minorities." 52 U.S.C. § 20501(a).

Chief among the concerns that prompted the NVRA was voter purging—states' unceremonious cancelations of eligible voters' registrations in a way that "violate[d] the basic rights of citizens," a practice that has a particularly detrimental impact on the voting rights of Americans from "minority communities." S. Rep. No. 103-6, 18 (1993). To prevent improper voter purging, the NVRA regulates and limits the circumstances under which a state may remove registrants from the voter registration rolls. *See, e.g.*, *Bellitto v. Snipes*, 935 F.3d 1192, 1201 (11th Cir. 2019) ("Congress sought to increase voter registration and to limit purging efforts that could impede the exercise of the franchise, while at the same time ensuring that voter rolls remain accurate and current").

Section 8(a)(4) of the NVRA, the voter list maintenance requirement, requires states to "conduct a general program that makes a reasonable effort" to remove the names of voters who have become ineligible because they relocated or died. 52 U.S.C. § 20507(a)(4). While the NVRA does not define "reasonable effort," Section 8(c) details a process for states to satisfy their obligations under Section 8(a)(4): by "establishing a program" that uses information from the United States Postal Service's ("USPS") National Change of Address database to identify registrants whose addresses may have changed and sends address confirmation notices to these voters (the "NCOA process"). *Id.* § 20507(c). The NCOA process operates as a "safe harbor": if a state establishes such a program then it has, as a matter of law, made "a reasonable effort" to remove voters who became ineligible because of relocation in compliance with Section 8(a)(4) NVRA. *Bellitto*, 935 F.3d at 1205.

Beyond these provisions, and to further its purpose of increasing voter participation and preventing unconstitutional voter purging, the NVRA strictly limits states' cancellations of voter registrations. Under the NVRA, a county cannot cancel a voter's registration based on relocation unless (i) the county receives written notice from the voter that she has moved outside the jurisdiction or (ii) the county receives information that the voter's residence has changed, the voter fails to respond to a notice of address confirmation from the county regarding the change in residence, *and* the voter fails to vote in two consecutive federal general elections after the county's notice. 52 U.S.C. § 20507(d). As a result, and because federal general elections occur every two years, if a voter fails to respond to a notice of address confirmation, the voter's name must remain on the rolls for at least two years after the notice issued. *Id.*

B. The NCOA Process in Colorado Law

Colorado implements the requirements of the NVRA through the Secretary of State (the "Secretary") and the individual counties. The Secretary oversees the conduct of elections and the coordination of the State's duties under the NVRA. C.R.S. § 1-1-107. For their part, the counties manage their residents' voter registrations through the statewide voter registration list database. *See, e.g.*, C.R.S. §§ 1-1-110, 1-2-302.

Colorado has established and codified, in statute and regulation, NVRA Section 8(c)'s "clearly delineated procedure to comply with its statutory obligations concerning change of address." *Bellitto*, 935 F.3d at 1204; *see also* C.R.S. § 1-2-302(3.5), 1-2-302.5; 8 C.C.R. § 15015-1:2.13 ("List Maintenance under section 8 of the National Voter Registration Act of 1993").[1]

Under Colorado's NCOA process, the Secretary conducts a monthly search in the NCOA database to identify voters who have moved, C.R.S.§ 1-2-302.5(1), and also receives a daily file from the Colorado Department of Revenue showing every resident who has either received a new driver's license or updated current address information, *id.* § 1-2-213. *See also* 52 U.S.C. § 20507(c)(1). The Secretary provides this information to the counties. C.R.S. § 1-2-302.5(2). If the Secretary's information indicates the voter has moved out of state, the county where the voter is registered marks the voter as "inactive" in the statewide voter registration database and sends an address confirmation card to the voter's registration address. *Id.* § 1-2-302.5(2)(b)(III); *id.* § 1-2-603(2); *see* 52 U.S.C. §§ 20507(c)(1)(B)(ii), (d)(2).

[1] Plaintiffs' Complaint relies on purported data relating to voters who allegedly become ineligible because they relocated. Plaintiffs do not allege or cite data to suggest that Colorado has failed to make a reasonable effort to remove the names of deceased voters. In any event, Colorado statutes also require the Secretary to coordinate the voter list with agency death records, *see* C.R.S. § 1-2-302(3.5)(a), and Plaintiffs make no allegation that the Secretary has not done so.

Inactive voters, unlike active voters, do not automatically receive their ballots by mail. C.R.S. § 1-7.5-107(3)(a)(I). An inactive voter's registration is cancelled once the voter fails to vote in two consecutive general elections. *Id.* § 1-2-302.5(2)(b)(III)(B); 52 U.S.C. § 20507(d)(1)(B)(ii). An inactive voter is still able to vote in person, but only after completing a signature card with their current address. C.R.S. § 1-2-605(3); *id.* § 1-7-110(1)(a); 52 U.S.C. § 20507(d)(2)(A). Colorado law directly tracks the NVRA and provides no additional limitations on the cancellation of a voter's registration other than those required by the NVRA—if the NVRA permits cancellation, so does Colorado law.

C. The Present Case

Making no mention of any of the laws or regulations that govern Colorado's list maintenance program, Plaintiffs allege that Colorado violates NVRA Section 8(a)(4) by baldly asserting that Colorado fails to "conduct a general program that makes a reasonable effort to cancel the registrations of registrants who are ineligible to vote in Colorado's federal elections." Compl. ¶ 73, ECF No 1. The complaint seeks a permanent injunction ordering Defendants to "develop and implement a general program that makes a reasonable effort to remove the registrations of ineligible registrants from the voter rolls in Colorado." *Id.* at 14, ¶ c. Intervenors now move to dismiss because the complaint does not state a claim for relief and because Plaintiffs lack standing.

III. LEGAL STANDARD

Dismissal is appropriate under Federal Rule of Civil Procedure 12(b)(1) if the Court lacks subject-matter jurisdiction over the claims alleged in the Complaint. Challenges based on a plaintiff's Article III standing fall under Rule 12(b)(1). *See Baker v. USD 229 Blue Valley*, No. 20-3054, 2020 WL 6437964, at *3 (10th Cir. Nov. 3, 2020).

Under Rule 12(b)(6), a case should be dismissed if the facts in the complaint, accepted as true, do not support the plaintiff's legal claim to entitle the plaintiff to relief. *Sutton v. Utah State Sch. for Deaf & Blind*, 173 F.3d 1226, 1236 (10th Cir. 1999). "The court's function on a Rule 12(b)(6) motion is . . . to assess whether the plaintiff's complaint alone is legally sufficient to state a claim for which relief may be granted." *Miller v. Glanz*, 948 F.2d 1562, 1565 (10th Cir. 1991). To withstand a Rule 12(b)(6) motion, it must be "plausible and not merely possible that the plaintiff is entitled to relief under the relevant law." *Christy Sports, LLC v. Deer Valley Resort Co.*, 555 F.3d 1188, 1192 (10th Cir. 2009).

IV. ARGUMENT

A. The Court should dismiss Plaintiffs' case for lack of subject-matter jurisdiction because Plaintiffs do not have Article III standing.

Plaintiffs cannot satisfy the "irreducible constitutional minimum" of standing because they have not alleged that they have experienced an injury in fact sufficient under Article III. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992). An injury in fact is an invasion of a legally protected interest which is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical. *Id*. at 560. Conjectural, hypothetical injuries—those that require the court to make logical leaps and assume the development of a situation that is not borne out by the facts—cannot provide the basis for standing. *See id.* at 571. Yet conjectural and hypothetical injuries are all that Plaintiffs have alleged here. As such, their complaint fails to satisfy Article III and must be dismissed.

1. Judicial Watch has not suffered an injury in fact.

The complaint does not demonstrate that Judicial Watch has been directly injured in fact because it has not adequately alleged any cognizable harm to itself. Although it attempts to allege

a diversion of resources injury to it as an organization, Judicial Watch fails to allege that it diverted resources to counteract harm that perceptibly impaired the organization's ability to carry out its mission. Instead, Judicial Watch alleges that it has been injured by having to expend resources "to investigate, address, research, and counteract Defendants' failure to comply with their NVRA voter list maintenance obligations," which were diverted from "[its] regular, programmatic activities" or which would not have been expended "at all." Compl. ¶¶ 61-63. These allegations are insufficient to support standing.

Importantly, Judicial Watch fails entirely to explain whether or how it had to divert resources to programs designed to counteract any purported injury to its organizational interests, other than to the investigation that led to this litigation. But the "diversion of resources to litigation or investigation in anticipation of litigation" on its own "does not constitute an injury in fact sufficient to support standing." *Equal Rts. Ctr. v. Post Props., Inc.*, 633 F.3d 1136, 1140 (D.D.C. 2011). To hold otherwise would permit plaintiffs to "manufacture standing" and impermissibly "secure a lower standard for Article III standing," *Clapper for Amnesty Int'l USA*, 568 U.S. 398, 416 (2013), based on nothing more than an organization's abstract policy interest, or its interest in determining whether the government is following the law. It is well established that neither of these interests, by themselves, are sufficient to satisfy Article III standing. *See, e.g.*, *Sierra Club v. Morton*, 405 U.S. 727, 738-39 (1972) (finding "a mere 'interest in a problem,' no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem, is not sufficient by itself" to confer standing); *see also Lujan*, 504 U.S. at 573-74 ("We have consistently held that a plaintiff raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and

laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy.").

2. The individual plaintiffs and Judicial Watch's Colorado members have not suffered an injury in fact.

Plaintiffs have also failed to demonstrate that Defendants' alleged conduct directly injures the individual plaintiffs or Judicial Watch's members who are Colorado voters. Instead of pleading facts to support the allegation that these individual voters have suffered particularized, concrete injuries, Plaintiffs assert that Defendants' conduct "undermin[es] their confidence in the integrity of the electoral process, discourage[es] their participation in the democratic process, and instill[s] in them the fear that their legitimate votes will be nullified or diluted." Compl. ¶ 65. These alleged injuries cannot constitute an injury in fact because they are hypothetical and conjectural. And even assuming these injuries were concrete, they would be insufficient to establish standing because they are generalized grievances shared by voters across Colorado.

To start, these alleged injuries are not particularized to the individual plaintiffs or Judicial Watch's members. The individual plaintiffs and Judicial Watch's members have no more interest in confidence in election integrity, avoiding discouragement from participating in the electoral process, or avoiding the dilution of their votes than does "every citizen[] . . . in proper application of the Constitution and laws." *Lujan*, 504 U.S. at 573. Plaintiffs' vote dilution allegation and the other alleged injuries would affect *all* Colorado voters, not merely Plaintiffs. *See, e.g.*, *Bognet v. Sec'y Commonwealth of Pennsylvania*, No. 20-3214, 2020 WL 6686120, at *12 (3d Cir. Nov. 13, 2020) ("Put another way, [a] vote cast by fraud or mailed in by the wrong person through mistake, or otherwise counted illegally, has a mathematical impact on the final tally and thus on the proportional effect of every vote, but no single voter is specifically disadvantaged. . . . Such an

alleged "dilution" is suffered equally by all voters and is not "particularized" for standing purposes. The courts to consider this issue are in accord." (quotations and citations omitted)). Plaintiffs seek relief "that no more directly and tangibly benefits [them] than it does the public at large," and therefore the alleged injury cannot constitute an injury in fact. *See Lujan*, 504 U.S. at 574; *see also Bognet*, 2020 WL 6686120 at *12-*14; *Bd. of Cnty. Comm'rs of Sweetwater Cnty. v. Geringer*, 297 F.3d 1108, 1112 (10th Cir. 2002) ("[T]he plaintiff's claim must not be a generalized grievance shared in substantially equal measure by all or a large class of citizens." (quotations omitted)). Accordingly, these injuries are impermissibly generalized grievances that cannot support standing.

Beyond being generalized, Plaintiffs' discussion of individual voters' injuries is conjectural at best and patently false at worst. Plaintiffs' vote-dilution theory requires the Court to find, "by surmise or guesswork" and "without proof or sufficient evidence," *see* CONJECTURE, Merriam-Webster Dictionary, not only that ineligible voters are currently on the voter rolls in Colorado—a point that Plaintiffs do not actually allege in the complaint—but also that those hypothetical ineligible voters will improperly cast ballots in future elections *and* that those ballots will be cast for opponents of the candidates for whom the individual plaintiffs vote. Because "[t]his parade of horribles may never come to pass," Plaintiffs' allegations are too conjectural to constitute an injury in fact. *Bognet*, 2020 WL 6686120 at *16 (internal quotations and citations omitted). Indeed, because a claim of vote dilution by fraud is inherently generalized and speculative, courts across the country have rejected it on standing grounds. [2] *See also id.* at *12 (collecting cases).

[2] *See, e.g.*, *Donald J. Trump for President, Inc. v. Way*, Civil Action No. 20-10753 (MAS) (ZNQ), 2020 WL 6204477, at *6 (D.N.J. Oct. 22, 2020); *Donald J. Trump for President, Inc. v. Boockvar*, No. 2:20-cv-966, 2020 WL 5997680, at *59 (W.D. Pa. Oct. 10, 2020); *Donald J. Trump for President, Inc. v. Cegavske*, No. 2:20-CV-1445 JCM (VCF), 2020 WL 5626974, at *4 (D. Nev.

And the allegation that the individual plaintiffs will suffer imminent injury by being discouraged from participating in the electoral process is flatly contradicted elsewhere in the complaint, which notes that each individual plaintiff is a registered voter in Colorado who *intends to vote* in their counties of residence. Compl. ¶¶ 5-7.

Because Plaintiffs fail to allege an injury in fact sufficient to satisfy Article III, they necessarily fail to establish that an injury was caused by Defendants or is redressable by this Court. The complaint should be dismissed for lack of subject-matter jurisdiction.

B. The Court should dismiss Plaintiffs' case because the complaint does not contain allegations supporting a claim for which relief can granted.

1. Plaintiffs do not have statutory standing.[3]

Plaintiffs lack statutory standing to bring this case because they failed to give notice to Defendants before bringing suit, as is required by the NVRA. As a threshold matter, "[d]espite the [NVRA's] apparent permissive language, no standing is conferred without proper written notice." *Am. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 806 (W.D. Tex. 2015); *see also* 52 U.S.C. § 20510(b). There is an exception to the notice requirement "[i]f the violation occurred within 30 days before the date of an election for Federal office." 52 U.S.C. § 20510(b)(3).

Plaintiffs do not allege that they provided proper written notice to Defendants before filing this suit, and the exception does not save the complaint. Plaintiffs assert that "[b]ecause the

Sept. 18, 2020); *Martel v. Condos*, No. 5:20-cv-131, 2020 WL 5755289, at *4 (D. Vt. Sept. 16, 2020); *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926–27 (D. Nev. 2020); *Am. Civ. Rts. Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015).

[3] "[D]ismissal for lack of statutory standing is effectively the same as a dismissal for failure to state a claim, and a motion to dismiss on this ground is brought pursuant to Rule 12(b)(6), rather than Rule 12(b)(1)." *Leyse v. Bank of Am. Nat'l Ass'n*, 804 F.3d 316, 320 (3d Cir. 2015) (quotations and citations omitted).

violations set forth herein occurred within 30 days before the date of a federal election, no notice is required prior to filing this action." Compl. ¶ 72. This conclusory allegation is unavailing. As discussed below, Plaintiffs allege no facts indicating that Defendants violated the NVRA at all, *see infra* at IV.B.3, much less within 30 days of the election by failing to cancel voter registrations. Moreover, Plaintiffs cannot make such allegations because the NVRA *prohibits* Defendants from cancelling voter registrations within 90 days of the election. 52 U.S.C. § 20507(c)(2)(A). Plaintiffs cannot argue in good faith that Defendants *violated* the NVRA by failing to purge the voter rolls within 30 days of the election when to do so would violate the NVRA's prohibition on cancelling registrations within 90 days of the election.

2. Plaintiffs' failure to allege that Colorado does not comply with the NVRA's safe-harbor provision is fatal to their complaint.

Plaintiffs' complaint should also be dismissed pursuant to Rule 12(b)(6) because the NVRA itself forecloses Defendants' liability. Conspicuously left out of the complaint is the fact that the NVRA includes a statutory safe harbor—Section 8(c)'s NCOA process, *id.* § 20507(c)—the adoption of which satisfies a state's obligations under Section 8(a)(4). *See Bellitto*, 935 F.3d at 1203-05. Plaintiffs fail to mention that Colorado has adopted Section 8(c)'s NCOA process, and they do not allege that Defendants are not complying with that process. They do not allege that Defendants fail to regularly check the National Change of Address database to identify voters who have moved, C.R.S. § 1-2-302.5(1), to receive a daily file from the Colorado Department of Revenue showing every resident who has either received a new driver's license or updated current address information, *id.* § 1-2-213, or to forward this information to the counties for address verification notices to be issued, *id.* § 1-2-302.5(2). These omissions doom the complaint's viability. *See Public Interest Legal Foundation v. Boockvar*, --- F. Supp. 3d ---, No. 1:20-CV-

1905, 2020 WL 6144618, at *3 (M.D. Pa. Oct. 20, 2020) (M.D. Penn. Oct. 20, 2020) ("Plaintiff does not allege that this program itself is deficient, nor does it point to a specific breakdown that makes the program 'unreasonable.' . . . Without allegation, let alone proof, of a specific breakdown in Pennsylvania's voter registration system, we cannot find that the many procedures currently in place are unreasonable.").

Plaintiffs' sole claim is that Defendants are violating the NVRA's list-maintenance requirements, but Defendants' undisputed implementation of the NVRA's safe-harbor NCOA process "constitutes a reasonable effort at identifying voters who have changed their addresses." *Bellitto*, 935 F.3d at 1205. Because Defendants are firmly anchored in Section 8(c)'s safe harbor, Plaintiffs' case should be dismissed for failure to state a claim upon which relief can be granted.

3. Plaintiffs' factual allegations do not support a plausible claim for relief.

Plaintiffs' complaint should be dismissed not just because of its glaring omission of Defendants' implementation of the NVRA's statutory safe harbor, but also because of the immateriality of its factual allegations. Plaintiffs' allegations rely on an amalgamation of old data points from which one cannot plausibly infer that Defendants are currently violating the NVRA. In considering whether Plaintiffs' factual allegations satisfy Rule 12(b)(6), the court must "ask whether [the statistical allegations] nudge[] [Plaintiffs'] claims across the line from conceivable to plausible." *Frappied v. Affinity Gaming Black Hawk, LLC*, 966 F.3d 1038, 1053 (10th Cir. 2020) (quotations omitted). The answer to that question here is a resounding "no." Plaintiffs base their case on four alleged calculations—each based on undisclosed numbers—that do nothing to nudge their claim from merely conceivable to plausible.

First, Plaintiffs compare outdated registration data from one source (the U.S. Election

Assistance Commission Report) with outdated residency data from another (the Census Bureau's population estimate from 2013 to 2018), conduct some veiled arithmetic, and allege that certain counties in Colorado had registration rates that exceeded 100% of their voting age populations *more than two years ago*. *See* Compl. ¶¶ 21-35. Even if these uncorroborated numbers were accurate, they say nothing about the *current* registration rates in each Colorado county and therefore do not bear on the *current* efficacy of Defendants' NCOA process. Moreover, the complaint relies on data about the over-18 population, ignoring 17-year-old Coloradans registered to vote. *Id.* ¶ 24; C.R.S. § 1-2-101. Plaintiffs also ignore that even if there had been registration rates in certain counties between 2013 and 2018 that exceeded 100%, by the end of 2018 Colorado had removed 289,247 ineligible voters—more than 7% of its registered voters—from its voter list. U.S. Election Assistance Commission, *Election Administration and Voting Survey*, 82 (2019).[4]

Second, Plaintiffs point to "low numbers of removals" from Colorado's voter list and allege that "[a] removal rate below 1.5% per year . . . is too low to comply with the NVRA's reasonable effort requirement." Compl. ¶¶ 36-42. But without providing any information as to how many voters *should* have been removed from the voter list (a number not provided by Plaintiffs), these numbers are meaningless and cannot support a conclusion that the rate is too low or, more critically, that Defendants are violating the NVRA. Indeed, as discussed *supra* at IV.B.2, Colorado's statutory scheme tracks the NVRA's safe harbor provision, which demonstrates

[4] If a document "is referred to in the complaint and is central to the plaintiff's claim, a defendant may submit an indisputably authentic copy to the court to be considered on a motion to dismiss." *See GFF Corp. v. Associated Wholesale Grocers, Inc.*, 130 F.3d 1381, 1384 (10th Cir. 1997). This resource is available online at https://www.eac.gov/sites/default/files/eac_assets/1/6/2018_EAVS_Report.pdf#page=91. *See O'Toole v. Northrop Grumman Corp.,* 499 F.3d 1218, 1225 (10th Cir. 2007) ("It is not uncommon for courts to take judicial notice of factual information found on the world wide web.").

compliance with the NVRA. Nothing in the complaint alleges anything to the contrary.

Moreover, Plaintiffs' removal-rate data is inherently flawed as it compares census information about residents "living in the same house as a year ago" to the number of registration removals. Compl. ¶ 39. Not only are the data outdated, but Plaintiffs conflate "residents" with "registered voters" and assume that anybody living in a different house moved to a different voting jurisdiction. Data about the number of moves by *residents*—a much larger group that includes minors and non-citizen—are uninformative about how many *registered voters* changed homes. Moreover, data about the number of people who changed homes are uninformative about how many moved to a different voting jurisdiction. To be informative, a removal rate would consider the number of *registered voters* who moved to a *different jurisdiction*. But Plaintiffs calculate a rate using a different, and much larger, number. As a result, their rate is meaningless.

Third, Plaintiffs allege that "low numbers of address confirmation notices [are] sent to Colorado registrants" and make the conclusory assertion that a jurisdiction "cannot be compliant with the NVRA" if it "sends relatively few such notices." *Id.* ¶¶ 43-48. Again, these numbers mean nothing without context, which Plaintiffs fail to provide. And, again, Plaintiffs rely on inapposite data, pointing to unspecified "recent census data" purportedly showing that 9% to 24% of residents in counties with "low" numbers of address confirmation notices reported not living in the same house as a year ago. *Id.* ¶ 40. But these numbers conflate *residents* with *registered voters* and include residents who are not of voting age or are otherwise ineligible. Plaintiffs' data also do not reveal how many residents—let alone registered voters—moved to a different jurisdiction. As a result, the allegation about "low" registration notices cannot support an inference that Defendants have not made a reasonable effort under Section 8(a)(4) of the NVRA.

Fourth, Plaintiffs claim that some counties have "high inactive registration rates," and make the conclusory assertion that "[h]aving a high percentage of inactive registrations" indicates a violation of the NVRA. *Id*. ¶¶ 49-57. In fact, the opposite is likely true. Voters become inactive when they fail to respond to the statutory notice. *See* C.R.S. § 1-2-302.5(2)(b)(III); *id*. § 1-2-603(2); *see also* 52 U.S.C. § 20507(c)(1)(B)(ii); *id.* § 20507(d)(2). And the NVRA bars states from cancelling a voter's inactive registration until that voter has failed to cast a ballot in two general elections after receiving the notice. As a result, the more diligent a state is about reviewing information on voter relocation and sending out address confirmation notices, the more inactive voters the state will have. A high rate of inactive voters is the natural consequence of the NVRA's NCOA process, which Colorado has adopted. *See supra* II.B.

For these reasons, Plaintiffs' factual allegations do not plausibly support their claim that Defendants have failed to make reasonable efforts to comply with the NVRA and, therefore, the complaint should be dismissed.

V. CONCLUSION

For the aforementioned reasons, Intervenors respectfully request that the Court grant its motion to dismiss with prejudice.

DATED this 17th day of November 2020.

Respectfully submitted,

By: *s/ Lindsey Dunn*

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CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following individuals:

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