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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEVADA

REPUBLICAN NATIONAL COMMITTEE, NEVADA REPUBLICAN PARTY, and SCOTT JOHNSTON,

Plaintiffs,

v.

FRANCISCO AGUILAR, in his official capacity as Nevada Secretary of State; LORENA PORTILLO, in her official capacity as the Registrar of Voters for Clark County; WILLIAM "SCOTT" HOEN, AMY BURGANS, STACI LINDBERG, and JIM HINDLE, in their official capacities as County Clerks,

Defendants.

Case No. 2:24-cv-00518-CDS-MDC

INTERVENOR-DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' AMENDED COMPLAINT

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INTRODUCTION

Plaintiffs' Second Amended Complaint does not resolve the fundamental deficiencies that prompted the Court to dismiss their first two efforts. It does not adequately allege standing, because it does not allege facts showing that the organizational plaintiffs have suffered any concrete injury traceable to the alleged NVRA violations, rather than to the inherent demands of a political campaign or to Plaintiffs' own actions. And it does not adequately allege a substantive violation of the NVRA, because it relies on inapposite statistical comparisons and other facts that simply do not support an inference that Defendants are failing to conduct reasonable list maintenance, which is all that the NVRA demands. The Court should dismiss the Second Amended Complaint.

ARGUMENT

I. Plaintiffs lack standing.

A. The RNC and NVGOP fail to allege a traceable organizational injury.

The Second Amended Complaint, like those that came before it, fails to allege any concrete organizational harm to the RNC or NVGOP that is traceable to Defendants' alleged violations of the NVRA. First, Plaintiffs do not allege a concrete injury. *See Ariz. All. for Retired Ams. v. Mayes*, 117 F.4th 1165, 1181 (9th Cir. 2024) (explaining that "Article III standing cannot be based on . . . fanciful or speculative harm"). Their new allegations now explain that they use voter registration records "to determine whether [they] need[] to prioritize voter registration or voter turnout," 2d Am. Compl. ¶ 17, ECF No. 131 ("SAC"), and to "adjust the size, scope, and audience" for their voter contact efforts, *id.*, ¶ 18, but their core argument remains the same: when those records are "inaccurate," Plaintiffs cannot "effectively target eligible voters," *id.* ¶¶ 18–19, which harms their mission of "elect[ing] Republican candidates and turn[ing] out Republican voters," *id.* ¶ 17. Consequently, they argue they must "divert[] substantial resources to counteract the effects of the State's failure to maintain clean rolls." *Id.* ¶ 23. But Plaintiffs still fail to allege concretely "*how* voter lists have actually impaired RNC's ability to get voters to register and vote or elect candidates." Order Granting Defs.' Mots. to Dismiss at 15, ECF No. 121 ("MTD Order"). Plaintiffs' argument essentially boils down to the following: if Defendants conducted additional

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list maintenance, that would eventually result in somewhat more accurate voter rolls, which would in unspecified ways change Plaintiffs' funding allocations or electoral activities. They do not allege, however, that they have not been able to register or contact as many voters, or to chase as many ballots, that they have had to considerably increase their budget for voter engagement, or that they spend money differently in Nevada from in other states due to Defendants' alleged NVRA violations. Instead, Plaintiffs "merely provide general assertions of what has happened, without any concrete specifics," *id*., stopping short of pointing to an actual injury. Absent any concrete description of what Plaintiffs would do differently, this line of reasoning fails to allege a sufficiently concrete injury. *See Lujan v. Defs. of Wildlife*, 504 U.S. 555, 563–64 (1992) (holding that harm based on vague future plans does not support Article III standing). Plaintiffs attempt to gloss over this by arguing that they have suffered the same kind of injury at issue in *Havens*, *see* Opp'n to Defs.' Mot. to Dismiss SAC at 8–9, ECF No. 141 ("MTD Opp'n") (discussing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)), but this case is nothing like *Havens*. There, unlike here, there were concrete allegations explaining how the plaintiff HOME's core activities were adversely impacted by the information the organization received. Its injuries were "concrete and demonstrable." *See Havens*, 455 U.S. at 379. *See also* MTD Order at 15 (explaining that Plaintiffs' allegations are "unlike *Havens Realty Corp*. because there are no allegations explaining how . . . plaintiffs are currently unable to register voters, turn out Republican voters, or elect candidates"). The issue is not, as Plaintiffs assert, that Plaintiffs must be "totally barred" from engaging in their ordinary activities to allege a cognizable injury. MTD Opp'n at 9. It is that Plaintiffs' ordinary activities must be "actually impaired." MTD Order at 15. Plaintiffs' factual allegations simply do not plausibly support that conclusion.

Because Plaintiffs have failed to allege a concrete injury, this Court does not need to reach the issue of traceability. But Plaintiffs also continue to fail to allege any injuries that are directly traceable to Defendants' alleged conduct. The harms and wasted efforts Plaintiffs complain about—occasionally knocking on the wrong door or sending a mailer to a bad address—are familiar experiences to anyone who has ever worked on a political campaign, and they remain

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common occurrences even where states are in full compliance with the NVRA. Plaintiffs, of course, know this—which is why even they do not contend that the NVRA entitles them to perfect voter registration records. The issue is not, as Plaintiffs insist, that Defendants "improperly dispute" their factual allegations about traceable harm. *See* MTD Opp'n at 11. Rather, it is that even accepting that Plaintiffs rely on voter rolls, that the voter rolls may contain occasional inaccuracies, and that relying on imperfect voter rolls adversely impacts Plaintiffs' core activities, the legal conclusion that Defendants have therefore necessarily violated the NVRA or bear any responsibility for Plaintiffs' alleged injuries simply does not follow.

Plaintiffs again attempt to draw a parallel between their allegations and those in *Havens*, but this Court has already identified a key difference between the two cases: in *Havens*, there were allegations of "concrete" facts showing that defendants had given the nonprofit false information about available housing that prevented it from counseling its clients on what housing was available. MTD Order at 14–15 (citing *Havens*, 455 U.S. at 368–69). Here, in contrast, the connection between the allegedly inaccurate voter rolls and Defendants' alleged NVRA violation is far more attenuated and indirect, given that even NVRA complaint-jurisdictions will not have perfect rolls. Plaintiffs therefore must, but do not, allege facts plausibly showing that NVRA violations rather than unavoidable imperfections in voter registration data and Plaintiffs' own voluntary choices are responsible for the injuries they allege. *See Mayes*, 117 F.4th at 1173 (explaining that plaintiffs must show that their injury "likely was caused or likely will be caused by the defendant's conduct"); MTD Order at 4 ("*Havens Realty* extends only to cases in which an organization can show that a challenged governmental action directly injures the organization's pre-existing core activities and *does so apart from the plaintiffs' response to that governmental action.*" (emphasis added) (quoting *Mayes*, 117 F.4th at 1170)).

Moreover, if it were as obvious as Plaintiffs say it is that the registered voter numbers are wrong (and it is not, *see infra* Part II), then Plaintiffs would have only themselves to blame for making decisions in reliance on those numbers. Taking Plaintiffs' own arguments seriously, they could and should instead just multiply the national average voter registration rate by each county's

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population from over four years ago, which Plaintiffs apparently believe is an accurate predictor of the current actual number of eligible voters. *See* SAC ¶¶ 63–71 (arguing that Nevada's voter list must be out-of-date primarily because it diverges substantially from this number).

II. Plaintiffs do not allege facts showing a violation of the NVRA.

Plaintiffs also continue to fail to state a claim on the merits. Section 8 of the NVRA requires only a "'reasonable effort to remove the names' of voters who are ineligible 'by reason of' death or change in residence." *Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 761 (2018) (quoting 52 U.S.C. § 20507(a)(4)). Plaintiffs fail to allege a violation of this requirement because—despite three attempts to do so—they still make no allegations about what it is about Nevada's list-maintenance procedures that falls short of the required reasonable effort. They instead make allegations only about *results*: they say there are too many registered voters, and too many inactive voters. But the NVRA regulates the means, not the ends: it requires a reasonable effort, and Plaintiffs do not allege anything about Nevada's effort that could show it to be unreasonable. As another court recently put it in rejecting a substantially identical NVRA claim, "the quality of the pleading does not permit the Court to infer more than a mere possibility of misconduct." *Republican Nat'l Comm. v. Benson*, No. 1:24-cv-262, 2024 WL 4539309, at *14 (W.D. Mich. Oct. 22, 2024). That does not suffice. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007).

Nevada law contains detailed list maintenance provisions, which require election officials to follow a process to make voters inactive, and ultimately cancel their registrations, if mailed notices are returned as undeliverable, NRS 293.530(1)(c), and to cancel their registration if the official learns of their death, NRS 293.540(2)(a). Nevada law also requires election officials to "compare the statewide voter registration list to the vital statistics records maintained by the State Registrar of Vital Statistics" *daily* to identify deceased voters, NAC 293.464(1), and it authorizes election officials to "use any reliable and reasonable means" to update the voter registration list, NRS 293.530(1)(a), and to "enter into an agreement with the United States Postal Service" to obtain change of address information for use in list maintenance, NRS 293.5303, 293.5307.

Plaintiffs allege neither that these legal procedures are facially inadequate nor any concrete

facts showing that they are not being followed. Plaintiffs do not, for example, identify any procedure that would be required to render Nevada's maintenance efforts "reasonable" that Nevada law does not already mandate or authorize election officials to undertake. Nor do Plaintiffs identify any deficiency with the procedures that are authorized. Plaintiffs' theory must, therefore, be that the procedures are not being followed. But "in the absence of clear evidence to the contrary, courts [are to] presume that [public officials] have properly discharged their official duties." *Hebrard v. Nofziger*, 90 F.4th 1000, 1009 (9th Cir. 2024) (alterations in original) (quoting *United States v. Chem. Found.*, 272 U.S. 1, 14–15 (1926)). "This presumption of regularity applies equally to a state official's compliance with state law." *Id.* (citing *Nieves v. Bartlett*, 587 U.S. 391, 400 (2019)). Where a claim depends on the conclusion that a state official violated state law, a plaintiff must allege facts supporting that conclusion to avoid dismissal for failure to state a claim. *See id.* Plaintiffs make no such allegations.

Plaintiffs' allegations fall into two categories. First, they rely on allegations about *results*: they say Defendants must be doing something wrong because the list maintenance results are supposedly so poor. In support of this argument, they point to purportedly too-high registration rates in several Nevada counties, to a higher-than-average percentage of inactive voters, and to 4,684 inactive voters who, they say, should have had their registrations cancelled. None of these sets of allegations supports an inference that Defendants have violated the law, nor can they overcome the presumption that Defendants have followed it. *See id*. at 1009; *Benson*, 2024 WL 4539309, at *14.

The supposedly high registration rates that Plaintiffs allege are an obvious artifact of a poor statistical comparison: Plaintiffs are comparing the number of registered voters *in 2024* with the population of Nevada counties *in 2020*: four years earlier. *See* Intervenor-Defs' Mot. to Dismiss SAC at 16–17 ("MTD SAC"). Nevada's population has rapidly grown, so it is no surprise that the number of registered voters has grown, too—that obvious fact does not provide any reason to question Defendants' list maintenance efforts. Plaintiffs have no answer to this point. They complain that they are using the most up-to-date data available, MTD Opp'n at 21, but the fact

remains: their data is too out-of-date to support an inference of wrongdoing by Defendants, given the "obvious alternative explanation" that Nevada's population has simply grown. *Twombly*, 550 U.S. at 566–68; *Benson*, 2024 WL 4539309, at *13. And that some other courts have accepted a comparison based on ACS data, in other states that were perhaps not experiencing such rapid population growth, *see* MTD Opp'n at 21, does nothing to support Plaintiffs' use of it in fast-growing Nevada.

Nevada's supposedly high rate of inactive voters does not help Plaintiffs either. Note at the outset a contradiction: voters are made inactive only as a result of list maintenance. *See* NRS 293.530(1)(g). A high percentage of inactive voters therefore shows that Nevada is conducting list maintenance, not failing to conduct it. Plaintiffs' only possible complaint about these inactive voters would be that they should have been fully removed from the rolls. But both Nevada law and the NVRA restrict when that can happen: only after voters fail to vote for two subsequent federal election cycles, over four years. *See* NRS 293.530(1)(c), 52 U.S.C. § 20507(d)(1)(B)(ii). Until that has happened, the NVRA *prohibits* the cancellation of these voters' registrations.

The fact that Nevada has a 16% inactive rate, compared to an 11% national average, could therefore be suggestive of a list-maintenance problem only if it could be explained by the inclusion of a substantial number of inactive voters who could and should have had their registration cancelled. But the Second Amended Complaint affirmatively alleges facts that rule out that explanation. Plaintiffs helpfully allege that they have only identified *4,684* inactive voters across the entire state who have been on the inactive list long enough that their registrations should have been cancelled. *See* SAC ¶ 89. That represents less than 0.2% of Nevada's almost 2.4 million registered voters.[1] The rest of the inactive voters could not possibly have been removed under the Second Amended Complaint's own allegations, because they have not been inactive for two general election cycles. So, whatever the cause of Nevada's 16% inactive rate as compared to the

[1] *See Voter Registration Statistics,* Off. of Nev. Sec'y of State (Dec. 1, 2024), https://www.nvsos.gov/sos/home/showpublisheddocument/15635/638693404182230000. Plaintiffs incorporated these statistics by reference in their Second Amended Complaint. *See* SAC ¶ 63 (relying on the "most up-to-date" count of registered voters available from the Nevada Secretary of State).

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11% national average, the Second Amended Complaint affirmatively disproves that it is a matter of Defendants' failure to follow Nevada's list maintenance procedures, as would be required for Plaintiffs to state a claim.

That leaves the second category of Plaintiffs' allegations: a handful of more specific complaints about particular procedures. Plaintiffs level four such complaints, but none suffices to support their claims. First, Plaintiffs point to their allegation that there are 4,684 voters who have been inactive for more than two federal election cycles. MTD Opp'n at 23–24. Plaintiffs say this shows that Defendants are not following Nevada law, which would require removal if inactive voters failed to vote, or otherwise reactivate their registrations, for two federal elections. *Id.* (citing NRS 293.530). But as Intervenors explained, and Plaintiffs ignore, Plaintiffs' allegations show no such thing: it is entirely possible that this tiny portion of Nevada's registered voters were inactive, became reactivated, and then became inactive again between the two snapshots on which Plaintiffs rely. MTD SAC at 18. Tellingly, Plaintiffs have no answer to this point.

Second, Plaintiffs point to voters registered at alleged non-residential addresses. MTD Opp'n at 24–25. This is wrong twice over. Plaintiffs' blithe statement that voters "couldn't 'actually reside,'" *id*. (quoting NRS 293.486(1)), in parking lots or demolished buildings ignores that homeless individuals, and others who may not have a traditional residence, are entitled to register and vote, too, by providing a street address closest to where they actually reside. NRS 293.486(1). It also ignores that the character of buildings changes: before demolished buildings were demolished, people may have lived there, and the NVRA does not permit, much less require, election officials to immediately cancel the registration of voters whose prior place of residence is demolished—they must wait until the individual fails to vote for two federal election cycles. *See* NRS 293.530(1)(c); 52 U.S.C. § 20507(d)(1)(B)(ii). In a companion lawsuit in Washoe County nearly identical to the *Kraus* case that Plaintiffs rely on for this point, the Washoe Registrar has provided an exhaustive demonstration of the fact that many of the supposedly "non-residential" addresses at which voters are supposedly registered were residential buildings quite recently, and that the voters who used to live at them have been or soon will be the subject of list maintenance

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in the ordinary course. *See* Ex. A, Mot. to Dismiss Pet. for Writ of Mandamus, *Kraus v. Burgess*, No. CV24-01051 (2nd Jud. Dist., Washoe Cnty. July 15, 2024), attached hereto as Ex. A.[2]

Third, Plaintiffs point to the Secretary's mailing of postcards to registered voters shortly before the presidential primary election, alleging that the Secretary did not track undeliverable postcards for list maintenance purposes. SAC ¶ 90. That, of course, occurred after Plaintiffs' December 4, 2023 notice letter, and shortly before an election, at a time when election officials were prohibited by the NVRA from conducting any systematic list maintenance program. 52 U.S.C. § 20507(c)(2)(A). And Plaintiffs' own allegations confirm that they do not, in fact, know whether the Secretary maintained records of undeliverable postcards for later use. *See* SAC ¶¶ 90–91 (after alleging that the Secretary did not track undeliverable postcards, alleging in the alternative that "even if information about undeliverable postcards is available to the Secretary," the Secretary did not yet share that information with the counties). "[T]he Court need not accept inconsistent allegations in a complaint as true." *Sacco v. Mouseflow, Inc.*, No. 2:20-cv-2330, 2022 WL 4663361, at *2 (E.D. Cal. Sept. 30, 2022) (citing cases). Moreover, neither the NVRA nor Nevada state law requires the Secretary to track these postcards specifically. *See* NRS 293.530(1)(f) (requiring *county clerks* to "use any postcards which are returned to correct the portions of the statewide voter registration list which are relevant to the county clerk"); *Bellitto v. Snipes*, 935 F.3d 1192, 1207 (11th Cir. 2019) ("[t]he failure to use duplicative tools or to exhaust every conceivable mechanism does not make [a defendant's] effort unreasonable").

Finally, Plaintiffs once more return to allegations stemming from a November ProPublica article that "at least part of the explanation for high inactive registration rates is that state officials were 'assigning voters to the wrong precincts and mislabeling voters as 'inactive.'"[3] Importantly, in that very same article, state officials make clear they fixed these issues ahead of the November

[2] The Court may take judicial notice of "matters of public record" in ruling on a motion to dismiss. *MGIC Indem. Corp. v. Weisman*, 803 F.2d 500, 504 (9th Cir. 1986).

[3] SAC ¶ 88 (quoting Anjeanette Damon & Nicole Santa Cruz, *Nevada Says It Worked Out the Kinks in Its New Voter System in Time for The Election, but Concerns Remain*, ProPublica (Nov. 2, 2024), https://www.propublica.org/article/nevada-voter-registration-election-managementsystem-concerns [perma.cc/KNP6-P7AS].

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election.[4] Likewise, the sole, former elected official who lodged these complaints was on administrative leave during the period leading up to the November election when these issues would have been addressed, which is why she readily conceded that she has "no direct knowledge of what her office has done since her last day at work on Sept. 25."[5]

Thus, neither the general allegations about the results of Defendants' list maintenance nor the allegations about specific purported problems in fact supports an inference that Defendants have violated the NVRA, particularly given the applicable presumption of regularity. The Court should dismiss Plaintiffs' claims for failure to state a claim.

CONCLUSION

For the reasons stated above, Plaintiffs' Second Amended Complaint should be dismissed.

Dated: January 7, 2025

Respectfully submitted,

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[4] Damon & Santa Cruz, *supra* note 3.
[5] *Id.*

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of January, 2025, a true and correct copy of INTERVENOR-DEFENDANTS' REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFFS' SECOND AMENDED COMPLAINT was served via the United States District Court's CM/ECF system on all parties or persons requiring notice.

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