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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

PROPOSED INTERVENOR-DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

ORAL ARGUMENT REQUESTED

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6), Proposed Intervenor-Defendants Rise Action Fund ("RISE"), the Institute for a Progressive Nevada ("IPN"), and the Nevada Alliance for Retired Americans ("The Alliance") (collectively, "Proposed Intervenors"), file this proposed motion to dismiss the complaint filed by Plaintiffs Republican National Committee ("RNC"), Nevada Republican Party ("NVGOP"), and Scott Johnston (collectively, "Plaintiffs").

POINTS AND AUTHORITIES

Congress enacted the National Voter Registration Act of 1993 ("NVRA") to make it *easier* for qualified voters to register and remain registered to vote. Yet under the guise of enforcing the NVRA, Plaintiffs—the RNC, the NVGOP, and a Republican voter—seek to weaponize the statute by demanding this Court order Nevada's election officials to undertake a rushed and baseless purge of the voter rolls shortly ahead of the 2024 General Election, all without plausibly alleging a single deficiency in Nevada's "reasonable efforts" to conduct list maintenance. Plaintiffs' effort does not come out of the blue. In the past several months, the RNC and other activist organizations have filed similar NVRA suits in states across the country as part of a nationwide effort to cull voter rolls ahead of the 2024 General Election.[1] As with those other efforts, Plaintiffs' suit here fails both for lack of jurisdiction and because it does not plausibly allege a violation of the NVRA.

To start, each Plaintiff lacks standing. Their purported injuries—concerns about the integrity of Nevada elections, the dilution of their votes, and the expenditure of resources to advance those generalized grievances—fall short of what Article III demands.

Plaintiffs' complaint fares no better on the merits. To plausibly allege a violation of the NVRA, Plaintiffs must plead facts which, taken as true, suffice to show that Nevada is not making "reasonable effort[s]" at list maintenance. *See* 52 U.S.C. § 20507(a)(4). Yet Plaintiffs do not include a single factual allegation of what, specifically, it is about Defendants' list maintenance

[1] *See, e.g.*, *Pub. Int. Legal Found. v. Knapp*, Case No. 3:24-cv-1276-JFA (D.S.C. Mar. 14, 2024), ECF No. 1; *Republican Nat'l Comm., et al. v Benson, et al.*, Case No. 1:24-cv-262 (W.D. Mich. Mar. 13, 2024), ECF No. 1; *Jud. Watch, Inc., et al. v. Ill. State Bd. of Elections, et al.*, Case No. 1:24-cv-1867 (N.D. Ill. Mar. 5, 2024), ECF No. 1.

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efforts that they believe falls short of the NVRA's requirements. Plaintiffs instead focus exclusively on the results, contending that the numbers of registered voters in some Nevada counties are too high, or that too few voters have been removed. But Plaintiffs' statistical comparisons are misleading, and they are, in any event, entirely consistent with Defendants' compliance with the NVRA's discrete, balanced requirements for list maintenance, which do not demand—and would not be expected to produce—immediate removal of all ineligible voters. *E.g.*, *Pub. Int. Legal Found. v. Benson*, No. 1:21-CV-929, 2024 WL 1128565, at *11 (W.D. Mich. Mar. 1, 2024) (explaining the NVRA does not require a "perfect effort[] to remove registrants") ("*PILF*"). The NVRA, for example, *requires* Nevada to wait two federal election cycles before removing voters based on a change of residence, *see* 52 U.S.C. § 20507(d), and deems Nevada compliant with the NVRA's list-maintenance requirements if it requests and uses U.S. Postal Service change of address data in a specified way, even if it does nothing else, *see id.* § 20507(c).

These and other limitations on the NVRA's list-maintenance requirements provide an "obvious alternative explanation" for Plaintiffs' allegations about registration and removal rates, requiring Plaintiffs to provide some factual allegation suggestive of lawless rather than lawful conduct. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 566–68 (2007). Plaintiffs' observation that several Nevada counties appear to have too many people on their voter rolls does not suffice because it is entirely consistent with compliance with the NVRA and Nevada's similar statutory removal requirements. If this complaint were enough, "pleading [an NVRA] violation against almost any [state] would be a sure thing." *Id.* at 566. The Federal Rules require more than such a "naked assertion" devoid of "further factual enhancement." *Id.* at 557.!

BACKGROUND

I. Nevada's obligations under the National Voter Registration Act

The NVRA is a federal law that requires states to provide simplified, voter-friendly systems for registering to vote. Congress enacted the NVRA specifically to *increase* access to the franchise by establishing "procedures that will increase the number of eligible citizens who register to vote in elections for Federal office" and by making it "possible for Federal, State, and local

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governments to implement [the NVRA] in a manner that enhances the participation of eligible citizens as voters in elections for Federal office." 52 U.S.C. § 20501(b)(1)–(2). Congress also made a finding in the NVRA 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." *Id.* § 20501(a)(3)

To further those pro-voter purposes, the NVRA imposes strict restrictions on whether, when, and how a state may cancel a voter registration. *See id.* § 20507(a)(3)–(4), (b)–(d).Outside of a limited and carefully delineated list of exceptions, a state may not remove a voter from its rolls until that voter has (1) failed to respond to a notice and (2) not appeared to vote for two general elections—or roughly four years—following delivery of the notice. *Id.* § 20507(d)(1).[2] Congress therefore purposefully "limited the authority of states to encumber voter participation by permitting states to only remove registrants" in a carefully prescribed manner. *Am. C.R. Union v. Phila. City Comm'rs*, 872 F.3d 175, 182 (3d Cir. 2017).

Congress also mandated that states maintain a "general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters," 52 U.S.C. § 20507(a)(4). But Congress did not demand perfection from the states. The "NVRA requires only a 'reasonable effort,' not a perfect effort, to remove registrants," *PILF*, 2024 WL 1128565 at *11, and states need not "use duplicative tools or [] exhaust every conceivable mechanism" to comply with the NVRA's "reasonable effort" requirement, *Bellitto v. Snipes*, 935 F.3d 1192, 1207 (11th Cir. 2019). This balanced approach reflects the twin policy objectives of the NVRA—to "enhance[] the participation of eligible citizens as voters" and also "to protect the integrity of the electoral process." *See* 52 U.S.C. § 20501(b). And it further reflects Congress's judgment that it is better to tolerate some ineligible voters remaining on the rolls past their point of ineligibility than to permit the erroneous removal—and potential disenfranchisement—of eligible voters.

[2] A state may immediately cancel a person's registration only where the voter requests to be removed from the rolls or if the voter is convicted of a disenfranchising felony under state law. *Id.* § 20507(a)(3)(A)–(B).

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To aid states in establishing their list-maintenance programs, Congress also built a "safe harbor" provision into the NVRA, identifying specific procedures that would, *per se*, satisfy the statutory obligation to undertake a "reasonable effort" at list maintenance. *See id.* § 20507(c). A state meets "the [reasonable effort] requirement of subsection (a)(4) by establishing a program under which . . . change-of-address information supplied by the Postal Service . . . is used to identify registrants whose addresses may have changed." *Id.* § 20507(c)(1). This data "is collected in the National Change of Address database, [and] this process is known as the NCOA Process." *Bellitto*, 935 F.3d at 1204. Accordingly, under the NVRA, participating in the NCOA Process "constitutes a reasonable effort" at removing the names of ineligible voters under Section 20507(a)(4). *Id.* at 1205; *see also Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 777 (2018). By the plain terms of the statute, such an effort is immune from attack as inadequate, so long as it complies with the specific statutory requirements. !

Nevada permits county officials to avail themselves of this safe harbor. Under Nevada law, "the county clerk in each county may enter into an agreement with the United States Postal Service" to "obtain the data compiled by the United States Postal Service concerning changes of addresses of its postal patrons for use by the county clerk to correct the portions of the statewide voter registration list relevant to the county clerk." NRS 293.5303. If a county enters into such an agreement, "the county clerk shall review each notice of a change of address filed with the United States Postal Service by a resident of the county and identify each resident who is a registered voter and has moved to a new address." *Id.* 293.5307.

Beyond the safe harbor provision, Nevada has also codified into state law the NVRA's requirement that—prior to having their registration cancelled—a voter must first (1) receive a written notice, (2) not respond to that written notice, and (3) subsequently fail to appear to vote in the following two general elections. *See Id.* 293.530(1)(c). It has also enacted a robust set of laws for identifying and removing registered voters who are no longer qualified to vote in a given county. Among other requirements, county clerks must update a voter's registration in the Secretary of State's database when they receive information that a voter has moved to a new

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jurisdiction, *id.* 293.527; remove voters from the rolls when they have personal knowledge of an individual's death or if an authenticated certificate of the death of the person is filed in the county clerk's office, *id.* 293.540; remove voters upon a determination that they have been convicted of a felony or upon receipt of a court order directing the cancellation to be made, *id.*; and use "any information regarding the current address of an elector . . . to correct information in the statewide voter registration list." *See id.* 293.525(4). Nevada was also one of the first seven states to form the Electronic Registration Information Center ("ERIC"), which permits states to use motor vehicle registration and Social Security Administration data, among other sources, to maintain voter rolls.[3]

II. Plaintiffs' Complaint

On March 18, the RNC, NVGOP, and Scott Johnston filed suit against the Secretary of State, the Registrar of Voters for Clark County, and the county clerks for Carson City and Douglas, Lyon, and Storey Counties ("Defendants"), alleging that Defendants have violated their list maintenance obligations under Section 8 of the NVRA. Compl. ¶¶ 93–97, ECF No. 1. The assumption underlying Plaintiffs' complaint is that Defendants *must* be violating the NVRA because five Nevada counties have what Plaintiffs believe are "impossibly high registration rates." Compl. ¶ 70. But nowhere does the complaint identify any specific example of Nevada improperly keeping someone on the voter rolls whom the NVRA required be removed, or any particular procedure that Nevada fails to use that the NVRA requires. Nor do Plaintiffs grapple with Nevada's numerous statutory provisions which describe, in detail, the state's "reasonable efforts" to comply with the NVRA. Plaintiffs just *assume* that Nevada must be violating the NVRA somehow.

The complaint likewise says very little about how Nevada's current list-maintenance practices injure Plaintiffs. Scott Johnston alleges that his fear that Defendants are violating their list maintenance obligations has injured him by undermining his confidence in Nevada elections and by causing him to worry that ineligible voters will dilute his legitimate vote. Compl. ¶ 19.

[3] *See* Nev. Sec'y of State, *Voter Registration List Maintenance*, https://www.nvsos.gov/sos/elections/voters/voter-record-maintenance.

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Similarly, Plaintiffs RNC and NVGOP allege that their belief that Defendants are violating their list maintenance obligations has injured them by forcing them to "spend more time and resources monitoring Nevada elections for fraud and abuse, mobilizing voters to counteract it, educating the public about election-integrity issues, and persuading elected officials to improve list maintenance." Compl. ¶ 21. Based on these concerns, Plaintiffs ask this Court to enter far ranging relief: in addition to a declaratory judgment that Defendants are violating Section 8 of the NVRA, Plaintiffs demand an order instructing Defendants to develop and "reasonable and effective" registration list-maintenance programs to cure the violations they believe must exist, and to enter a permanent injunction barring Defendants from violating the NVRA in the future.

LEGAL STANDARD

Standing is a "threshold matter central to [the court's] subject matter jurisdiction" under Rule 12(b)(1). *Bates v. United Parcel Serv., Inc.*, 511 F. 3d 974, 985 (9th Cir. 2007). To establish Article III standing, a plaintiff must sufficiently allege (1) a "concrete" and "particularized" injury-in-fact, actual or imminent, (2) that is fairly traceable to the defendant's conduct, and (3) is likely to be redressed by a favorable decision from the court. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338–39 (2016). Plaintiffs, as "[t]he party invoking federal jurisdiction, bear[] the burden of establishing these elements." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

"Rule 12(b)(6) permits dismissal on the basis of either (1) the 'lack of a cognizable legal theory,' or (2) 'the absence of sufficient facts alleged under a cognizable legal theory.'" *Newlands Asset Holding Tr. v. SFR Invs. Pool 1, LLC*, No. 3:17-cv-00370-LRH-WGC, 2017 WL 5559956, at *2 (D. Nev. Nov. 17, 2017) (quoting *Balistreri v. Pacifica Police Dep't*, 901 F. 2d 696, 699 (9th Cir. 1990)). To survive a motion to dismiss under Rule 12(b)(6), a complaint must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Twombly*, 550 U.S. at 570). Although a court must "take all of the factual allegations in the complaint as true," *id*. (citing *Twombly*, 550 U.S. at 555), "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Twombly*, 550 U.S. at 555. "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the

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complaint has alleged—but it has not 'show[n]'—'that the pleader is entitled to relief.'" *Iqbal*, 556 U.S. at 679 (second alteration in original) (quoting Fed. R. Civ. P. 8(a)(2)).

ARGUMENT

I. Plaintiffs have failed to plausibly allege standing.

Plaintiffs have failed to plausibly allege any "concrete and particularized" injuries-in-fact that can support standing. *Lujan*, 504 U.S. at 560–61. Each of their purported bases for standing—concerns about election integrity, vote dilution, and vague claims of having to spend resources in response to Nevada list-maintenance procedures—are woefully insufficient. The complaint should be dismissed for lack of subject-matter jurisdiction under Rule 12(b)(1).

A. Plaintiffs' concerns and fears about election integrity are speculative, generalized grievances that are not cognizable under Article III.

According to the complaint, the RNC and its members are "concerned" that Nevada's current list-maintenance practices fall short of the NVRA's requirements, thus "undermin[ing] the integrity of elections" in Nevada. Compl. ¶ 13. Plaintiff Scott Johnston, a registered Republican voter in Nevada, similarly "fears" that ineligible voters may cast ballots in Nevada, "undermin[ing] his confidence in the integrity of Nevada elections." *Id.* ¶ 19.

Such subjective and unsubstantiated "concerns" or "fears" about Nevada's compliance with the NVRA—and their supposed impact on the integrity of Nevada's elections—are not cognizable harms. Instead, they are precisely the sort of "generally available grievance about government [that] does not state an Article III case or controversy." *Jewel v. NSA*, 673 F.3d 902, 909 (9th Cir. 2011) (quoting *Lujan,* 504 U.S. at 573–74). Such "common concern [about] obedience to law" is an "abstract and indefinite" harm that fails to supply an injury-in-fact. *Novak v. United States*, 795 F.3d 1012, 1018 (9th Cir. 2015) (quoting *Fed. Election Comm'n v. Akins,* 524 U.S. 11, 24 (1998)). There is nothing *particularized* about Plaintiffs' fears—all Nevadans share a common desire for lawful elections, rendering Plaintiffs concerns "plainly undifferentiated and common to all members of the public." *Lujan*, 504 U.S. at 575 (quoting *U.S. v. Richardson*, 418 U.S. 166, 171 (1974)) (cleaned up). Indeed, the Supreme Court has already held that mere concern

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about whether a federal election requirement "has not been followed" is "precisely the kind of undifferentiated, generalized grievance about the conduct of government that [courts] have refused to countenance." *Lance v. Coffman*, 549 U.S. 437, 442 (2007) (dismissing case challenging Colorado law as violating the Elections Clause for lack of standing). Plaintiffs allege no more with respect to their "concern" about whether the NVRA is being followed and their "fear" about the ensuing consequences. In "seeking relief that no more directly and tangibly benefits [Plaintiffs] than it does the public at large," the complaint "does not state an Article III case or controversy." *Id.* at 439 (quoting *Lujan*, 504 U.S. at 573–74).

Plaintiffs' concerns about possible voter fraud stemming from the alleged NVRA violation fail to supply an actionable injury for an entirely separate reason as well—they are purely speculative. The complaint insists that "[v]oter fraud is very real in Nevada," Compl. ¶ 40, but makes no effort to tie any alleged instance of voter fraud to Nevada's list-maintenance efforts or compliance with the NVRA. For example, Plaintiffs point to two convictions for double voting in Nevada over the past eight years, but do not explain how either incident was attributable to NVRA violations by Defendants, or preventable by the relief Plaintiffs seek. Similarly, the complaint makes scattershot reference to outside circuit decisions making generic statements about the importance of election integrity, as well as a single line from the two-decade old Carter-Baker Commission report on elections. Compl. ¶¶ 38–39. But it fails to plausibly allege that voter fraud attributable to poor list-maintenance *presently* exists in *Nevada*. Merely invoking "the possibility and potential for voter fraud," based only on "hypotheticals, rather than actual events," does not suffice. *Donald J. Trump for President, Inc., v. Boockvar*, 493 F.Supp.3d 331, 406 (W.D. Pa. 2020); *cf. Thielman v. Fagan*, No. 3:22-CV-01516-SB, 2023 WL 4267434, at *4 (D. Or. June 29, 2023) (explaining that "courts have universally concluded that an alleged injury related to a lack of confidence" in election administration "is 'too speculative to establish an injury in fact'") (quoting *Lake v. Hobbs*, 623 F. Supp. 3d 1015, 1028–29 (D. Ariz. 2022)), *aff'd sub nom. Thielman v. Griffin-Valade*, No. 23-35452, 2023 WL 8594389 (9th Cir. Dec. 12, 2023). Plaintiffs' "subjective fear" about the prospect of voter fraud "does not give rise to standing." *Clapper v.*

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Amnesty Int'l USA, 568 U.S. 398, 418 (2013).

Moreover, such a theory of standing raises serious traceability and redressability concerns, as there is no reason to think Plaintiffs' requested relief will resolve their groundless and speculative fears about voter fraud. *See Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000) (explaining it must be "likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision"). That is particularly true here because, even "following a favorable decision," any future acts of voter fraud will "still depend on 'the unfettered choices made by independent actors not before the courts.'" *Novak*, 795 F.3d at 1020 (quoting *ASARCO Inc. v. Kadish,* 490 U.S. 605, 615 (1989)); *cf. Levine v. Vilsack*, 587 F.3d 986, 997 (9th Cir. 2009) (explaining that a "pleading directed at the likely actions of third parties . . . would almost necessarily be conclusory and speculative").

In sum, Plaintiffs cannot invoke this Court's jurisdiction based on nothing but fear and concern about whether Nevada is adhering to the NVRA. *See Allen v. Wright*, 468 U.S. 737, 754 (1984) ("This Court has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court."). !

B. Plaintiffs' generalized and speculative vote dilution fears are not actionable.

Mr. Johnston also alleges that Defendants' list maintenance practices "dilute his legitimate vote." Compl. ¶ 19; *see also id.* ¶ 90 (similar on behalf of RNC and NVGOP supporters). This, too, offers nothing more than a generalized grievance: "Plaintiffs' purported injury of having their votes diluted due to ostensible election fraud may be conceivably raised by any Nevada voter." *Paher v. Cegavske*, 457 F. Supp. 3d 919, 926 (D. Nev. 2020). "Such claimed injury therefore does not satisfy the requirement that Plaintiffs must state a concrete and particularized injury." *Id.*; *see also Wood v. Raffensperger*, 981 F.3d 1307, 1314–15 (11th Cir. 2020) ("Vote dilution in this context is a paradigmatic generalized grievance that cannot support standing.") (quotation marks omitted). Indeed, courts across the county have *uniformly* rejected such a vote dilution theory of standing in a "veritable tsunami" of decisions. *O'Rourke v. Dominion Voting Sys. Inc.*, No. 20-CV-03747-NRN, 2021 WL 1662742, at *9 (D. Colo. Apr. 28, 2021) (collecting cases), *aff'd,* No.

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21-1161, 2022 WL 1699425 (10th Cir. May 27, 2022).[4] Such a theory fails to supply a *particularized* grievance because no single voter's ballot is "diluted" to any greater extent than another.[5] Decisions reaching that conclusion within this Circuit—and within this District—are legion. *See, e.g.*, *Donald J. Trump for President, Inc. v. Cegavske*, 488 F. Supp. 3d 993, 1000 (D. Nev. 2020) ("Plaintiffs' alleged injury of vote dilution is impermissibly 'generalized' and "speculative'") (quoting *Drake v. Obama*, 664 F.3d 774, 783 (9th Cir. 2011)); *Paher*, 457 F. Supp. 3d at 926; *see also Wash. Election Integrity Coal. United v. Wise*, No. 2:21-CV-01394-LK, 2022 WL 4598508, at *4 (W.D. Wash. Sept. 30, 2022) (collecting cases and concluding that similar allegations of vote dilution do not create standing); *Bowyer v. Ducey*, 506 F. Supp. 3d 699, 711 (D. Ariz. 2020) ("As courts have routinely explained, vote dilution is a very specific claim that involves votes being weighed differently and cannot be used generally to allege voter fraud."). On top of this legal deficiency, Plaintiffs' vote dilution theory is infirm because it rests upon the same speculation discussed above. Simply put, there is no reason to think their votes will in fact be diluted by "illegitimate" votes absent the relief they request. *See supra* I(A). Plaintiffs have

[4] *See, e.g.*, *Hall v. D.C. Bd. of Elections*, No. CV 23-1261 (ABJ), 2024 WL 1212953, at *4 (D.D.C. Mar. 20, 2024) ("At bottom, they are simply raising a generalized grievance which is insufficient to confer standing."); *Testerman v. N.H. Sec'y of State*, No. 23-CV-499-JL-AJ, 2024 WL 1482751, at *4 (D.N.H. Jan. 9, 2024) ("[C]ourts that have considered voters' standing in circumstances similar to those here have uniformly rejected individual standing claims based on allegations of dilution resulting from allegedly illegal votes being cast."); *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 596, 608 (E.D. Wis. 2020) (noting several courts have concluded that similar claims of vote dilution are "generalized grievance[s]"); *Martel v. Condos*, 487 F.Supp.3d 247, 253 (D. Vt. 2020) ("If every voter suffers the same incremental dilution of the franchise caused by some third-party's fraudulent vote, then these voters have experienced a generalized injury."); *Am. C.R. Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 789 (W.D. Tex. 2015) ("[T]he risk of vote dilution[is] speculative and, as such, [is] more akin to a generalized grievance about the government than an injury in fact.").

[5] Plaintiffs' generalized vote dilution theory differs from those cases recognizing an injury in the redistricting context, where a law *minimizes* a voter's or a group of voters' voting strength or ability to access the political process *as compared to other voters*. *See, e.g.*, *Baker v. Carr*, 369 U.S. 186, 207–08 (1962). In those cases, a vote dilution injury arises because of a "concern[] with votes being weighed *differently*." *Bognet v. Sec'y Commonwealth of Pa.*, 980 F.3d 336, 355 (3d Cir. 2020) (emphasis added); *see also Wood*, 981 F.3d at 1314 (explaining why vote dilution may be an injury "in the racial gerrymandering and malapportionment contexts" but not in the context raised here). No court has distorted that theory in the manner suggested by Plaintiffs here, where the alleged counting of "illegitimate" ballots dilutes the voting power of all Nevadans equally.

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therefore failed to plausibly allege standing on this basis.

C. Plaintiffs fail to allege a cognizable diversion of resource injury.

Finally, the RNC and NVGOP cannot "manufacture [an] injury" by "simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." *E. Bay Sanctuary Covenant v. Biden*, 993 F. 3d 640, 663 (9th Cir. 2021) (citing *La Asociacion de Trabajadores de Lake Forest v. Lake Forest*, 624 F. 3d 1083, 1088 (9th Cir. 2010)). Instead, such organizations must plausibly allege that they "would have suffered some other injury" had they "not diverted resources to counteracting the problem." *Id.* Specifically, they must explain how a challenged act "frustrated [their] mission[s] and caused [them] to divert resources in response to that frustration of purpose." *Id.*

The two organizational plaintiffs fail to meet this standard. They allege that "[b]ecause Defendants do not maintain accurate voter rolls," they "must spend more of their time and resources monitoring Nevada elections for fraud and abuse, mobilizing voters to counteract it, educating the public about election-integrity issues, and persuading elected officials to improve list maintenance." Compl. ¶ 21. But their "bare and conclusory allegations are insufficient to show that [Nevada's list maintenance] has frustrated [their] mission[s] by harming—even bearing whatsoever upon—any of the organization[s'] activities." *Our Watch With Tim Thompson, v. Bonta*, No. 2:23-CV-00422-DAD-DB, 2023 WL 4600117, at *6 (E.D. Cal. July 18, 2023); *see also United States. v. Rock Springs Vista Dev. Corp.*, No. CV-S-97-1825JBR(RLH), 1999 WL 1491621, at *5 (D. Nev. July 2, 1999) (finding plaintiff failed to adequately allege frustration of mission absent concrete and demonstrable injury to organization's activities), *aff'd sub nom. United States v. Rock Springs Vista Dev.*, 8 F. App'x 837 (9th Cir. 2001).

The organizational plaintiffs also fail to allege that they have "diverted resources to counteract[] the problem." *E. Bay Sanctuary Covenant*, 993 F.3d at 663. The complaint merely alleges Plaintiffs "would have expended those resources on other activities or would not have expended them at all" and that they have had to "misallocate their scarce resources in ways they otherwise would not have." Compl. ¶¶ 23, 92. Plaintiffs' admission that they likely "would not

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have expended [such resources] at all" fundamentally undercuts their claim of organizational injury altogether. And their vague allusion to "other programs" they *might* have allocated resources towards fails to show both that their mission has actually been harmed or that these organization have "diverted resources for some identified purpose." *Nat'l Coal. of Latino Clergy & Christian Leaders v. Arizona*, No. CV 10-943-PHX-SRB, 2010 WL 11586703, at *8 (D. Ariz. Dec. 10, 2010).

As with their other purported injuries, Plaintiffs' supposed diversion of resources is also entirely speculative. The complaint itself makes this abundantly clear, alleging no more than that "the RNC *may* spend more resources" if voter lists are not purged, or "*may* misallocate its scarce resources." Compl. ¶ 14 (emphases added). But Plaintiffs cannot create standing by "divert[ing] resources to combat an impermissibly speculative injury." *Cegavske*, 488 F. Supp. 3d at 1003. Because they have failed to allege any injury stemming from Nevada's list maintenance practices, any resources they spend in response are expended to address an illusory problem. *See Clapper*, 568 U.S. at 416 (holding a plaintiff "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending"). Put differently, the RNC and NVGOP "cannot manufacture standing by first claiming a general interest in lawful conduct and then alleging that the costs incurred in identifying and litigating instances of unlawful conduct constitute injury in fact." *Project Sentinel v. Evergreen Ridge Apartments*, 40 F. Supp. 2d 1136, 1139 (N.D. Cal. 1999). Instead, they must allege they "would have suffered some other injury if [they] had not diverted resources to counteracting the problem." *La Asociacion*, 624 F.3d at 1088. But the complaint fails to identify any non-speculative, non-generalized injury Plaintiffs face as a result of Nevada's list maintenance practices. *See supra* I(A)–(B).

II. Plaintiffs have failed to plausibly allege any violation of the NVRA.

As Plaintiffs acknowledge, all the NVRA requires is that states "conduct a general program that makes a *reasonable effort* to remove the names of ineligible voters from the official lists of eligible voters" due to death or change of residence. Compl. ¶ 32 (citing 52 U.S.C. § 20507(a)(4))

(emphasis added). To adequately allege a violation of this requirement, Plaintiffs must plausibly allege Defendants have been *unreasonable* in their list maintenance efforts. Yet Plaintiffs do nothing of the sort because they allege nothing at all about Defendants' actual list maintenance efforts. They do not allege, for example, that Nevada's statutory list-maintenance regimen fails to meet the floor set by the NVRA, nor do they anywhere allege that any of the Defendants is failing to adhere to these statutory requirements. Nothing in the complaint "permit[s] the court to infer more than the mere possibility of misconduct," *Iqbal*, 556 U.S. at 679, and accordingly the complaint "has not 'shown that the pleader is entitled to relief," *id.* (quoting Fed. R. Civ. P. 8(a)(2)) (cleaned up).

Plaintiffs' failure to allege anything about Defendants' actual list maintenance efforts is particularly striking because the NVRA entitles Plaintiffs to obtain exactly the sort of information that would enable Plaintiffs to make such allegations, were there any factual basis for them. States are required to "maintain for at least 2 years and . . . make available for public inspection . . . all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters." 52 U.S.C. § 20507(i). There was therefore no need for Plaintiffs to *assume*, as the Complaint does, that Nevada's efforts must have been unlawful—Plaintiffs could easily have requested access to the relevant records, determined what was actually done, and made allegations about why it violates the NVRA, if indeed it does. There is therefore even less of a reason in NVRA cases than in other cases to indulge the assumption that "discovery will reveal evidence" of illegality. *Twombly*, 550 U.S. at 556.

The gist of Plaintiffs' complaint is that Nevada *must* not be complying with the NVRA because, based on U.S. Census data, several counties "have more active registered voters than voting-eligible citizens, and two other counties have suspiciously high rates of active voter registration." Compl. ¶ 49; *see also id.* ¶¶ 48–78 (similar). But that allegation merely assumes what Plaintiffs are obliged to plausibly allege—that the named election officials are not complying with the minimum requirements of the NVRA. The numbers Plaintiffs' point to are "equally consistent with lawful conduct" and, "under *Twombly,* plaintiffs have not pleaded facts that would move their

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allegations from merely possible to plausible." *In re Graphics Processing Units Antitrust Litig.*, 527 F. Supp. 2d 1011, 1023 (N.D. Cal. 2007).

This complaint nowhere accounts for the fact that Congress "designed [the NVRA] to protect voters from improper removal and only provide[d] very limited circumstances in which states may remove them" from the rolls. *Am. C.R. Union*, 872 F.3d at 182. The law *purposefully* "limits the methods which a state may use to remove individuals from its voting rolls and is meant to ensure that eligible voters are not disenfranchised by improper removal." *U.S. Student Ass'n Found. v. Land*, 546 F.3d 373, 381 (6th Cir. 2008). Most notably, the law forbids removing a voter due to possible change in residence until that voter has failed to vote in at least two federal general elections—a four-year lag period, incorporated directly into Nevada law, meant to protect against improper removal. *See* 52 U.S.C. § 20507(d); *see also* NRS 293.530(1)(c)(4). Congress therefore elected to permit some ineligible voters to remain on the rolls for several years while the statutorily-prescribed removal process occurs. Courts have thus recognized that "the NVRA requires only a 'reasonable effort,' not a perfect effort." *PILF*, 2024 WL 1128565, at *11. "[T]he statute requires nothing more of the state." *Bellitto*, 935 F.3d at 1203, 1207 ("The failure to use duplicative tools or to exhaust every conceivable mechanism does not make [a state's] effort unreasonable.").

In view of the NVRA's requirements and limitations, and Nevada's own statutory requirements mirroring the NVRA, Plaintiffs' allegation that there are too many voters on the rolls in some counties fails to suggest anything "more than the mere possibility of misconduct." *Iqbal*, 556 U.S. at 679. The numbers Plaintiffs point to are equally consistent with Nevada simply adhering to the rigorous removal processes established by Congress and incorporated into Nevada law, including the safe harbor provision. *See* NRS 293.503(3)–(5); 293.525(4); 293.527; 293.530; 293.5303; 293.5307; 293.540. That is not enough to plead a violation of the NVRA. "[A]t the pleading stage," allegations must "plausibly suggest[]," and "not merely [be] consistent with," a legal violation. *Twombly*, 550 U.S. at 557; *see also Redlands Country Club Inc. v. Cont'al Cas. Co.*, No. CV-10-1905-GAF-DTBX, 2011 WL 13224843, at *3 (C.D. Cal. Jan. 28, 2011)

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("Allegations that are equally consistent with lawful and unlawful conduct are insufficient under *Twombly*."). "To render their explanation plausible, plaintiffs must do more than allege facts that are merely consistent with both their explanation and defendants' competing explanation." *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013) (concluding "Plaintiffs have not offered allegations of this nature here"). It is therefore not enough to point to the "sheer number of . . . registered voters [as] a hallmark of an unreasonable list maintenance program." *Pub. Int. Legal Found. v. Boockvar*, 495 F. Supp. 3d 354, 359 (M.D. Pa. 2020) (cleaned up). Under the NVRA, there is nothing "unreasonable" about having what appears to be an excessive number of voters on the rolls at one moment in time.

Moreover, as several courts have noted, there is good reason *not* to take Plaintiffs' numbers at face value, even at the pleading stage. Their data relies, in the first instance, upon 2022 American Community Survey ("ACS") data produced by the U.S. Census Bureau to estimate the current population of several Nevada counties. *E.g.*, Compl. ¶ 50. The Eleventh Circuit in *Bellitto* observed that such ACS data may "significantly underestimate[] the population" of a county for a variety of reasons, including because it "asks who has resided in the household in the two-month period" preceding the survey, thereby "exclud[ing] many college students, military personnel" and others who may not reside in an area for the full year. 935 F.3d at 1208. The Census Bureau itself has cautioned that "[d]ue to the variance inherent in survey estimates," the Census Bureau "do[es] not recommend combining survey data from the [American Community Survey] with administrative record data, such as those produced as part of voter tallies."[6] Yet Plaintiffs do just that in their complaint, despite the Census Bureau's warning that "the margin of error could be around 90 percent." *Id.*

The complaint elsewhere relies upon the 2022 Election Administration and Voting Survey ("EAVS") produced by the U.S. Election Assistance Commission to show the number of inactive registrations in Nevada. *E.g.*, Compl. ¶¶ 60–66. But federal courts have warned that an "EAVS

[6] Kurt Hildebrand, *Republican National Committee names Douglas in voter roll lawsuit*, TAHOE DAILY TRIB. (Mar. 31, 2024), https://www.tahoedailytribune.com/news/republican-national-committee-names-douglas-in-voter-roll-lawsuit.

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snapshot"—which is all that Plaintiffs provide in the report—can "in no way be taken as a definitive picture of what a county's registration rate is, 'much less any indication of whether list maintenance is going on and whether it's … reasonable.'" *Bellitto,* 935 F. 3d at 1208 (alteration in original) (citation omitted). The 2022 EAVS Survey itself, incorporated by Plaintiffs into their complaint, warns that:

> [D]ata on registered and eligible voters as reported in the EVAS should be used with caution, as these totals can include registrants who are no longer eligible to vote in that state *but who have not been removed from the registration rolls because the removal process laid out by the NVRA can take up to two elections cycles to be completed.*

2022 EAVS at 140[7] (emphasis added) (citing examples in footnotes); *see also Jud. Watch, Inc. v. North Carolina*, No. 3:20-CV-211-RJC-DCK, 2021 WL 7366792, at *10 (W.D.N.C. Aug. 20, 2021) (observing this same cautionary note in 2018 EAVS survey). The EAVS thus advises that "states should expect to see high voter registration rates," meaning that "such information, without more, does not" provide a meaningful inference of "non-compliance with the NVRA." *Jud. Watch*, 2021 WL 7366792, at *10. Accordingly, the data sources in the complaint are not fit for the purposes chosen by Plaintiffs, as both courts and the authors of such data have recognized.

Plaintiffs point to little else to support any inference that Nevada is falling short of the NVRA's requirements. For example, Plaintiffs nowhere acknowledge Nevada's own comprehensive statutory removal procedures, *see* NRS 293.503(3)–(5); 293.525(4); 293.527; 293.530; 293.5303; 293.5307; 293.540, never mind "allege that this program itself is deficient" or "point to a specific breakdown that makes the program 'unreasonable.'" *Boockvar*, 495 F. Supp. 3d at 359. "Without allegation, let alone proof," of such a breakdown, the court cannot infer "that the many procedures currently in place are unreasonable." *Id.* The complaint notes that a number of counties "currently have inactive registration rates . . . well above the state and national averages." Compl. ¶ 68. But it nowhere explains what inference the Court should draw from this. That roughly half of Nevada's counties have inactive registration rates above the *state* average is

[7] U.S. Election Assistance Comm'n, *Election Administration and Voting Survey 2022 Comprehensive Report*, (June 2023), https://www.eac.gov/sites/default/files/2023-06/2022_EAVS_Report_508c.pdf ("2022 EAVS").

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mere common sense yet, by Plaintiffs' strained reasoning, somehow supplies an inference that these counties are violating federal law. No greater inference can be drawn from comparison to national averages. And, tellingly, Plaintiffs point to Nevada counties that they have not even named in this suit. *Compare* Compl. ¶¶ 25–29 (naming officials in Clark, Douglas, Lyon, and Storey Counties, as well as Carson City, as defendants) *with id.* ¶ 63 (pointing to removal rates in Mineral and Esmerelda Counties) *and* ¶ 68 (pointing to inactive registration rates in Elko, Eureka, Humbolt, Lincoln, Mineral, Nye, Washoe, and White Pine Counties). This shoddiness illustrates the reaching nature of Plaintiffs' complaint—point to some stray pieces of data consistent with any number of factual scenarios, and let the Court fill in the rest.

At bottom, the complaint offers no basis to infer that the named Defendants, or any election official in Nevada, is not complying with the NVRA. The "naked assertion" that Nevada's voter rolls are too high—a fact entirely consistent with the purposeful design of NVRA—"stops short of the line between possibility and plausibility" of entitled to relief. *Twombly*, 550 U.S. at 557. To hold otherwise would impermissibly lower the pleading bar established in *Twombly* and *Iqbal*, and in effect eviscerate any pleading requirement for NVRA claims. The complaint should be dismissed.

CONCLUSION

For the reasons stated above, Plaintiffs' complaint should be dismissed.

April 15, 2024

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CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of April, 2024 a true and correct copy of INTERVENOR-DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT was served via the United States District Court's CM/ECF system on all parties or persons requiring notice.

By: */s/ Dannielle Fresquez*
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