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**Pro hac vice application pending*

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UNITED STATES DISTRICT COURT
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.

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

RESPONSE IN OPPOSITION TO MOTION TO DISMISS [ECF NO.26]

INTRODUCTION

The arguments in the Secretary's motion to dismiss are often raised, and equally often rejected. Most recently, the Western District of North Carolina denied a motion to dismiss NVRA claims brought by voters in *Green v. Bell*, 2023 WL 2572210, at *7 (W.D.N.C. Mar. 20, 2023). Before that, the Western District of Michigan denied motions to dismiss in two different cases. *See Pub. Int. Legal Found. v. Benson* [*PILF*], 2022 WL 21295936, at *13 (W.D. Mich. Aug. 25, 2022); *Daunt v. Benson*, Doc. 376 at 19, No. 1:20-cv-522 (W.D. Mich. Nov. 3, 2020) (oral opinion, attached as Ex. A). And these recent cases rest on a body of precedent discussed in this brief. The *Green* case was for North Carolina what the *Daunt* case was for Michigan, and what this case is for Nevada.

All of these cases involved similar plaintiffs, raising a similar claim, based on similar evidence, in a similar complaint, following similar pre-suit notice. When North Carolina's and Michigan's chief election officials moved to dismiss on the three grounds raised here—lack of pre-suit notice, lack of Article III standing, and failure to state a claim—the district courts denied the motions in full. Instead of stopping this case before it starts, this Court should follow the well-established caselaw before it, deny the Secretary's motion to dismiss, and allow this case to proceed.

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BACKGROUND

Nevada has stopped maintaining clean and accurate voter rolls. Five of Nevada's seventeen counties have registration rates over 90%. Compl. (Doc. 1) ¶¶50-51. Although registering 90% of eligible voters is a laudable goal, registration rates across the State and nation are closer to 70%. ¶¶53-56. Inflated rolls like these are a telltale sign that officials are failing to remove voters who have become ineligible. ¶57. In fact, three of the five counties with inflated rolls have registration rates over 100%—a mathematical

impossibility. ¶50. The Justice Department and others have sued jurisdictions with similarly inflated registration rates, and those jurisdictions quickly admitted liability or agreed to clean up their rolls. ¶¶73-78.

The impossibly high registration rates are not the only indicators that Nevada is failing to maintain its rolls. Several counties have experienced high rates of residency changes in recent years, but they failed to remove voters for residency changes during that period. Compl. ¶63. Some counties removed none at all. ¶64. In addition, the State as a whole reports far more inactive voters than the national average, suggesting that Nevada is keeping inactive voters on the rolls rather than removing them. ¶66. Individual counties have rates of inactive voters that are double or triple the national and state averages, which is strong evidence that they are not making a reasonable effort to remove outdated registrations. ¶¶65, 68-69. In fact, 5,000 inactive registrations currently listed have been on the rolls for two full election cycles, which means they should have been removed after the 2022 election. ¶¶67. They weren't removed, which is direct evidence that Nevada is failing to fulfill its obligations under the NVRA.

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Nevada is violating federal law. One of the NVRA's "main objectives" is to force States to "remov[e] ineligible persons from [their] voter registration rolls." *Husted v. A. Philip Randolph Inst.*, 138 S. Ct. 1833, 1838 (2018). According to the bipartisan Carter-Baker Commission, inaccurate rolls are "the root" cause of "most problems encountered in U.S. elections." Compl. ¶38. Bloated rolls invite unlawful voting, dilute lawful votes, and decrease voters' confidence in elections. ¶¶38-41. Fraud, in particular, "is a real risk" that "has had serious consequences" in various States. *Brnovich v. DNC*, 141 S. Ct. 2321, 2348 (2021). The NVRA thus requires States to "conduct" a program that makes a "reasonable effort" to "remove the names of ineligible voters" who move or die from the

rolls. 52 U.S.C. §20507(a)(4). Congress created a private right of action that allows individuals who serve a pre-suit notice to sue States that violate the NVRA. *Id.* §20510(b). According to Congress, this scheme "ensure[s] that accurate and current voter registration rolls are maintained," which safeguards both the "fundamental right" to vote and the "integrity of the electoral process." *Id.* §20501(a)(1), (b)(3)-(4).

Plaintiffs—the Republican National Committee, the Nevada Republican Party, and Scott Johnston—brought this suit to remedy Nevada's violations. The RNC is the national committee of the Republican Party and represents over 30 million registered Republicans throughout the country. Compl. ¶¶9-10. The Republican Party of Nevada is a political party in Nevada that represents over 550,000 registered Republicans in the State. ¶¶15-16. Together, the RNC and the NVGOP represent the interests of the Republican Party and its members throughout the country and the State. They rely on voter rolls daily. Inflated rolls cause the party to waste resources recruiting and communicating with ineligible voters, which diverts resources from other mission-critical activities. ¶¶13-14. And to fulfill its mission, the Republican Party must monitor States to ensure they are properly maintaining their voter rolls. ¶13. When States such as Nevada fail to maintain their rolls, the RNC is forced to divert resources to combat the presence of ineligible voters on the registration lists. ¶¶12-13, 21-23.

The RNC and NVGOP are joined in this suit by Scott Johnston, a registered voter in Washoe County. Compl. ¶18. Mr. Johnston is a resident of Nevada who votes in local and statewide elections. ¶¶18-19. He is also active in electoral politics and has held various leadership roles in the Republican Party. ¶20. Nevada's sloppy list maintenance undermines Plaintiffs' confidence in elections and risks diluting the votes of their members and individual voters such as Mr. Johnston. To redress their injuries, Plaintiffs

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sued the Secretary of State—the chief election official responsible for list maintenance in Nevada. Compl. ¶24. Plaintiffs also sued the registrars and clerks of five counties with particularly problematic voter rolls. Compl. ¶¶25-29. Those county officials play a direct role in maintaining accurate voter registration records. ¶¶25-29.

Before suing, Plaintiffs served the Secretary with a pre-suit notice. Compl. ¶¶79-82. The notice was fairly detailed. *See* Notice (Doc. 1-1). It identified the RNC, the NVGOP, and Mr. Johnston by name. *Id.* at 1. It reminded the Secretary that the NVRA obligates Nevada "'to 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." *Id.* (quoting 52 U.S.C. §20507(a)(4)). It offered a wide range of statistics, including U.S. census data, to show that voter registration rates in many counties are abnormally or impossibly high. *Id.* at 3. It identified those counties by name and alleged that, as a result, Nevada is "violating Section 8 of the NVRA." *Id.* at 2. It addressed "the curative steps needed to bring the state into compliance" and warned that doing so was needed to "avoid litigation." *Id.* The Secretary responded one month later, denying any liability under the NVRA. Compl. ¶22. When Nevada failed to remedy its violation within the statutory timeframe, Plaintiffs filed this lawsuit. The Secretary now moves to dismiss this case under Rules 12(b)(6) and 12(b)(1). *See* Mot. (Doc. 26).

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LEGAL STANDARDS

A motion to dismiss under Rule 12(b)(6) "tests" whether the complaint satisfies Rule 8. *Thomson v. Caesars Holdings Inc.*, 661 F. Supp. 3d 1043, 1052 (D. Nev. 2023) (Silva, J.). Rule 8 in turn requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). "Specific facts are not necessary; the statement need only give the defendant fair notice of what the claim is and the

grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89, 93 (2007) (cleaned up). This standard is "liberal." *Id.* at 94. Courts must accept the complaint's factual allegations as true, allow all reasonable inferences from those allegations, and construe the complaint in the light most favorable to the plaintiff. *Edwards v. Signify Health, Inc.*, No. 2:22-cv-95, 2023 WL 3467558, at *2 (D. Nev. May 12, 2023) (Silva, J.).

After drawing all those inference in Plaintiffs' favor, the question is whether the complaint states a claim that is "'plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Plausible means a "reasonable inference that the defendant is liable." *Id.* It does not mean that liability is "probable," *id.*, or even that Plaintiffs are "likely to succeed," *Produce Pay, Inc. v. Izguerra Produce, Inc.*, 39 F.4th 1158, 1166 (9th Cir. 2022). "If there are two alternative explanations, one advanced by defendant and the other advanced by plaintiff, both of which are plausible, plaintiff's complaint survives a motion to dismiss under Rule 12(b)(6)." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011). To the extent the "parties proffer evidence" in their filings, "the court may not weigh [that] evidence in deciding a motion to dismiss." *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1151 (C.D. Cal. 2003) (collecting cases).

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When assessing a claim's plausibility, courts generally "'may not consider any material beyond the pleadings.'" *Lee v. City of Los Angeles*, 250 F.3d 668, 688 (9th Cir. 2001). Courts can consider "'the face of the complaint [and] materials incorporated into the complaint by reference,'" such as Plaintiffs' pre-suit notice. *See In re Sorrento Therapeutics, Inc. Sec. Litig.*, 97 F.4th 634, 641 (9th Cir. 2024). Courts also can take judicial notice of official documents for their "existence," but not for their "truth." *Lee*, 250 F.3d at 690. And in no event can the court take "judicial notice of *disputed* facts," *id.*, or use outside materials to contradict the factual allegations or inferences in the complaint. *Khoja v.*

Orexigen Therapeutics, Inc., 899 F.3d 988, 1003, 1014 (9th Cir. 2018). An outside document that "merely creates a defense to the well-pled allegations in the complaint" cannot "defeat otherwise cognizable claims." *Id.*

The same rules apply to the Rule 12(b)(1) motion. "When 'standing is challenged on the basis of the pleadings,'" the Court "must 'accept as true all material allegations of the complaint' and 'construe the complaint in favor of the complaining party.'" *Cal. Rest. Ass'n v. City of Berkeley*, 89 F.4th 1094, 1100 (9th Cir. 2024) (amended op.) (quoting *Pennell v. City of San Jose*, 485 U.S. 1, 7 (1988)). At this stage, "general factual allegations of injury resulting from the defendant's conduct may suffice," because the court must "presume that general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992) (cleaned up).

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ARGUMENT

I. Plaintiffs Provided Pre-Suit Notice.

The NVRA allows individuals to sue once the State's chief election official receives "written notice of the violation." 52 U.S.C. §20510(b)(1)-(2). No one disputes that, before filing this lawsuit, Plaintiffs gave the Secretary written notice of the violation. The Secretary says that pre-suit notice did not "plausibly allege any violation." Mot. 11-12. But the "[n]otice is an 'announcement,'" not a pleading. *Green*, 2023 WL 2572210, at *3. No court requires the notice letter to satisfy a Rule 8 pleading standard. "Plaintiffs' pre-suit notice announces a violation of the NVRA, so it satisfies the statute's notice requirement." *Id.*

Plaintiffs' notice satisfied the NVRA. It expressly put the Secretary on "statutory notice" that litigation was forthcoming. Notice 1, 4, 5. It identified the three plaintiffs here by name. *Id.* at 1. It identified the exact provision of the NVRA that the State is

violating: section 8's requirement to conduct a program that reasonably removes ineligible voters who have moved or died. *Id.* at 1, 2. The notice identified counties by name that had unusually or impossibly high registration rates. *Id.* And it explained what data Plaintiffs used—a comparison of U.S. Census data to the State's list of registered voters—to make that determination. *Id.*

Courts have consistently upheld notices nearly identical to Plaintiffs'. In *Green*, Plaintiffs' counsel filed a virtually identical notice for voters in North Carolina. *Compare* Notice, *with Green v. Bell*, Doc. 1-1, No. 3:21-cv-493 (W.D.N.C. Sept. 17, 2021) (attached as Ex. B). When the defendants moved to dismiss for insufficient notice, the district court denied the motion. *Green*, 2023 WL 2572210, at *3. The court emphasized that "the statute requires notice of 'the *violation*,'" and "does not require notice of the violation's *cause*." *Id.* (quoting 52 U.S.C. §20510(b)(1)). In Michigan, the court in *Daunt* reached the same conclusion for a nearly identical letter. Doc. 44, No. 1:20-cv-522 (W.D. Mich. Oct. 28, 2020). And in *PILF v. Benson*, a different Michigan judge explained in detail why the Secretary's arguments here are wrong. 2022 WL 21295936, at *6-9. There, as here, the Secretary "challenge[d] the *quality* of the notice," which the court rejected because the notice "set forth the manner in which" the Secretary "failed to comply with the NVRA's list maintenance requirements" and stated that the plaintiffs "would commence litigation if the purported violation was not timely addressed." *Id.* at *7, 9.

Yet another court upheld a notice that simply identified "the provision of section 8 that the Defendant was allegedly violating," cited "evidence" for that violation (that one county's rolls had more registered voters than eligible voters), and "warn[ed] that the failure" to remedy this violation "could result in a lawsuit." *ACRU v. Martinez-Rivera*, 166 F. Supp. 3d 779, 795 (W.D. Tex. 2015). Plaintiffs did at least that much here. As the

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Secretary admits, the NVRA requires him to make "a reasonable effort to remove voters who become ineligible based on death or change of residence," but it "does not provide a numerical threshold." Mot. 13. It is thus "not surprising" when a letter "does not contain any detailed allegations, inasmuch as the NVRA provision at issue does not contain any detailed requirements; it simply requires 'reasonable effort' on the part of the State." *Jud. Watch, Inc. v. King*, 993 F. Supp. 2d 919, 922 (S.D. Ind. 2012).

The Secretary suggests that the information in the notice letter must satisfy a Rule 8 pleading standard, Mot. 12, but neither Congress nor any court requires such a high bar. The one case the Secretary cites undercuts his argument. *See Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032 (9th Cir. 2015). In *La Raza*, the Ninth Circuit reversed the dismissal of NVRA claims because the district court imposed too high a bar on the notice letter. *Id.* at 1043. That the plaintiffs could have notified the Secretary of "some of the violations [they] uncovered" earlier did not defeat the "reasonable possibility" that "the violations were continuing" at the time of the complaint. *Id.* at 1044. The Secretary seizes on dicta that "[a] plaintiff *can satisfy* the NVRA's notice provision by plausibly alleging" an "ongoing, systematic violation," *id.* (emphasis added), but nothing about that brief sentence *requires* a plaintiff to meet a Rule 8 pleading standard in the notice letter. *See Brown v. Davenport*, 596 U.S. 118, 141 (2022) ("This Court has long stressed that 'the language of an opinion is not always to be parsed as though we were dealing with [the] language of a statute.'").

A pre-suit notice need only state the "general requirement" that the State is violating and the basic "reasons" for that conclusion. *King*, 993 F. Supp. 2d at 922. Courts consistently reject calls for more. *E.g.*, *La Raza*, 800 F.3d at 1044 (notice need not "specify that the violation has been actually observed" or identify a "'discrete violation'");

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Action NC v. Strach, 216 F. Supp. 3d 597, 619-20 (M.D.N.C. 2016) (rejecting the State's argument that a pre-suit notice must contain "'sufficiently particularized information'"); *Voter Integrity Proj. NC, Inc. v. Wake Cty. Bd. of Elections*, 301 F. Supp. 3d 612, 617-18 (E.D.N.C. 2017) (similar); *Nat'l Coal. for Students with Disabilities Educ. & Legal Def. Fund v. Scales*, 150 F. Supp. 2d 845, 852 (D. Md. 2001) (conclusory allegation that a public assistance office "failed to provide voter registration services to its clients" was sufficient notice under the NVRA). The Secretary does not cite a single case deeming a notice like Plaintiffs' insufficient.

As for the statistics, the Secretary's criticisms of that data are irrelevant. Plaintiffs' statistics are enough to state a plausible claim under the Federal Rules, *see infra* Section III.A, so they are "more than sufficient" to provide pre-suit notice under the NVRA, *Ga. State Conf. of NAACP v. Kemp*, 841 F. Supp. 2d 1320, 1334 (N.D. Ga. 2012). Notice is given even if the State disputes that "the information offered" suggests a violation of the NVRA, and even if the State believes the notice does not provide "'an adequate basis upon which to investigate possible violations.'" *Id.* The NVRA does not require Plaintiffs to win their case—before it is even filed—in a battle of letters with the State.

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II. Plaintiffs have plausibly alleged Article III standing.

Standing requires injury, causation, and redressability. Importantly, Congress created a private right of action for violations of the NVRA, including section 8's list-maintenance requirement. *See* 52 U.S.C. §20510(b). Courts evaluating Article III standing "must afford due respect to Congress's decision." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2204 (2021) (citing *Spokeo, Inc. v. Robins*, 578 U.S. 330, 340-41 (2016)). Congress's judgment is "instructive and important" because the legislature is "well positioned to identify intangible harms that meet minimum Article III requirements." *Spokeo*,

578 U.S. at 341. In fact, Congress can "'articulate chains of causation that will give rise to a case or controversy where none existed before.'" *Id.* And Congress can "'elevate to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law." *TransUnion*, 141 S. Ct. at 2204-05. Because all Plaintiffs here seek the same relief under the same claim, "the Article III injury requirement is met if only one plaintiff has suffered concrete harm." *Juliana v. United States*, 947 F.3d 1159, 1168 (9th Cir. 2020). Plaintiffs have standing under a variety of theories, any one of which is sufficient to deny the Secretary's motion.

A. The RNC and the NVGOP have organizational standing.

There is ordinarily little question that political parties have standing to challenge a State's failure to comply with federal election laws. *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251, 1266 (N.D. Ga. 2019) (holding that the "need to divert resources from general voting initiatives or other missions of the organization" establishes standing "[i]n election law cases"). The complaint alleges that Defendants' violation of the NVRA inflates the voter rolls and causes Plaintiffs to divert their resources to address the fallout. Compl. ¶¶13-14, 17, 21-23 "[T]here can be no question" that diversions of resources are an "injury in fact." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). The diversion injures Plaintiff because they "would have spent" their resources on "some other aspect" of their mission had the defendant "complied with the NVRA." *La Raza*, 800 F.3d at 1040. It is therefore "sufficient to confer standing" that a defendant's misconduct causes the plaintiff to, for example, spend resources registering additional voters. *Id.*; *Action NC*, 216 F. Supp. 3d at 616-18. In these circumstances, courts "have no difficulty concluding that Plaintiffs have adequately alleged that the injury they suffer is attributable to the State." *La Raza*, 800 F.3d at 1041.

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The Secretary's counterarguments are unavailing. The Secretary first argues that the resource-diversion allegations are "general, not specific to Nevada." Mot. 9. That misreads the complaint, which explicitly alleges that Plaintiffs "would have expended" their resources "on other activities," "[w]ere it not for *Defendants' failure* to comply with their list-maintenance obligations." Compl. ¶23 (emphasis added); *id.* ¶¶21-22. Regardless, "even when it is 'broadly alleged,'" a diversion-of-resources injury is sufficient "at the pleading stage." *La Raza*, 800 F.3d at 1041; *PILF*, 2022 WL 21295936, at *6 (allegations that the plaintiff organization "diverted resources that could have been expended in other states to address Michigan's alleged voter roll deficiencies" were sufficient); *League of Women Voters of Ariz. v. Reagan*, 2018 WL 4467891, at *4 (D. Ariz. Sept. 18) (allegation that plaintiffs "diverted resources to register voters rather than … other activities … due to Defendant's alleged noncompliance with the NVRA" was "sufficiently plausible to meet the low bar" of alleging standing at the pleading stage (cleaned up)); *Nat'l Press Photographers Ass'n v. McCraw*, 504 F. Supp. 3d 568, 581 (W.D. Tex. 2020) (explaining that the complaint need not identify "man-hours expended or specific activities resources were diverted away from" at the pleading stage (cleaned up)).

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Though unnecessary at the pleading stage, the complaint provides significant detail on how Defendants' violations affect Plaintiffs' scarce resources. Plaintiffs use "voter registration lists to determine [their] plans and budgets" and to "estimate voter turnout." Compl. ¶14. Political parties rely on accurate registration records to determine "the number of staff" and the "number of volunteers" needed "in a given jurisdiction," as well as how much they "will spend on paid voter contacts." ¶14. Bloated voter rolls cause political parties to "misallocate their scarce resources" in ways that damage their mission. ¶92. In addition, Plaintiffs must divert additional resources to educating voters,

increasing confidence in the election, monitoring Nevada's elections for fraud and abuse, persuading election officials to improve list maintenance, and other activities. ¶¶22-23. These allegations show "that it is plausible" that Plaintiffs have "suffered injury because of the Defendants' alleged failure to comply with the NVRA and therefore [have] standing to bring [their] List Maintenance Claim." *King*, 993 F. Supp. 2d at 925.

The Secretary also argues that "costs of litigation" are insufficient to support standing, but the argument is a strawman. Mot. 10-11. Nothing in the complaint cites litigation costs as an injury. The Secretary misconstrues other costs as litigation costs, but courts have rejected that bait-and-switch. *See ACRU*, 166 F. Supp. 3d at 790 ("Defendant remains free to present evidence" that certain monitoring and compliance activities "merely amount to 'litigation costs' … on a motion for summary judgment," but "such an argument on a motion to dismiss is premature"). Here, Plaintiffs' costs monitoring voter rolls and communicating with election officials are a consequence of Defendants violating the NVRA, not of Plaintiffs filing this lawsuit. These costs are "paired with an allegation that such costs are fairly traceable to the defendant's conduct," *id.* at 788, and thus sufficient to allege standing. *See PILF*, 2022 WL 21295936, at *5 (costs incurred "reviewing and analyzing Michigan's voter roll, investigating Defendant's list maintenance practices, and purchasing copies of the [voter files] and analyzing them against verifiable death records" satisfied organizational standing).

Defendants' NVRA violations also directly harm Plaintiffs' mission. This as an independent injury in NVRA cases. *Id.* at *6 (allegation that the Secretary's "failure to comply with the NVRA impairs [plaintiff's] essential and core mission of fostering compliance with federal election laws and promoting election integrity"). Plaintiffs' core mission includes electing Republican candidates, representing the interests of Republican

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voters, and maintaining confidence in the integrity of elections. Compl. ¶¶12-13. Ensuring States have clean voter rolls is essential to those goals. ¶¶19, 21, 31, 38. At "this stage," a "plausible allegation" that Plaintiffs' "ability to carry out [their] mission of cleaning up voter registration rolls has been 'perceptibly impaired' by the Defendants' alleged statutory violation" is sufficient to plead standing. *King*, 993 F. Supp. 2d at 925.

B. Voters have standing under the NVRA.

Mr. Johnston and Republican voters also have independent bases for standing.

First, Defendants' violations undermine their "confidence in the integrity of Nevada elections." Compl. ¶¶19, 90. Voter confidence has "'independent significance'" according to the Supreme Court because it "'encourages citizen participation in the democratic process.'" *Jud. Watch, Inc. v. Griswold*, 554 F. Supp. 3d 1091, 1104 (D. Col. 2021) (quoting *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 197 (2008) (op. of Stevens, J.)); *accord Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Undermining voter confidence thus burdens the right to vote, and "[t]here can be no question that a plaintiff who alleges that his right to vote has been burdened by state action has standing to bring suit to redress that injury." *King*, 993 F. Supp. 2d at 924.

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Courts have repeatedly recognized this injury as a basis for standing in section 8 cases. *E.g.*, *Green*, 2023 WL 2572210, at *4; *Daunt*, Ex. A at 18-21; *Griswold*, 2021 WL 3631309, at *7; *King*, 993 F. Supp. 2d at 924. This injury is not "generalized" because "there is no indication that undermined confidence and discouraged participation are 'common to all members of the public.'" *Griswold*, 2021 WL 3631309, at *7 (quoting *Lance v. Coffman*, 549 U.S. 437, 440 (2007)). Mr. Johnston is a registered voter in Nevada who votes in the very local and statewide elections that are suffering from bloated rolls. *See* Compl. ¶¶18, 20, 63, 68. The RNC and the NVGOP represent hundreds of

thousands of voters like him. ¶10, 16. Their injuries are not "speculative or hypothetical": they "already exist[]" because their "confidence is undermined now." *Griswold*, 2021 WL 3631309, at *7.

If there were any doubt that these injuries are sufficient, this Court should defer to Congress's judgment that inflated rolls undermine the "integrity of the electoral process." 52 U.S.C. §20501(b)(3)-(4). "When Congress 'elevates intangible harms into concrete injuries,' a plaintiff need not allege 'any additional harm beyond the one Congress has identified.'" *PILF v. Boockvar*, 370 F. Supp. 3d 449, 455 (M.D. Pa. 2019) (quoting *Spokeo*, 578 U.S. at 341; *In re Horizon Healthcare Servs. Inc. Data Breach Litig.*, 846 F.3d 625, 633 (3d Cir. 2017)). Courts have thus found these congressionally designated injuries sufficient to satisfy Article III.

Second, Defendants' violations injure Plaintiffs by risking the dilution of their right to vote. Burdens on the right to vote are concrete, particularized injuries that support standing. *King*, 993 F. Supp. 2d at 924. That right "'can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'" *Id.* (quoting *Purcell*, 549 U.S. at 4). Courts thus recognize that "vote dilution can be a basis for standing." *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020). Bloated voter rolls dilute the votes of eligible voters by facilitating fraudulent or otherwise ineligible votes. Compl. ¶¶19, 90. This injury is not a generalized grievance, *contra* Mot. 7-8, even though it's suffered by many Nevada voters, and even though the amount of dilution might be relatively slight. *See Baker v. Carr*, 369 U.S. 186, 208 (1962); *Spokeo*, 578 U.S. at 339 ("The fact that an injury may be suffered by a large number of people does not of itself make that injury a nonjusticiable generalized grievance."). And their injuries are "particularized because the Plaintiffs allege that

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their votes are being diluted." *Green*, 2023 WL 2572210, at *4. The "harm of vote dilution is concrete and actual or imminent, not conjectural or hypothetical." *Kravitz v. Dep't of Com.*, 336 F. Supp. 3d 545, 558 (D. Md. 2018) (cleaned up).

This injury is also not "speculative." Mot. 8. While the Secretary focuses on intentional voter fraud, Mot. 8, bloated voter rolls invite all kinds of ineligible voting—fraudulent, intentional, accidental, and innocent—all of which dilute Plaintiffs' lawful votes. Nor is the link between inflated rolls and voter fraud overly speculative. It has been observed by the Carter-Baker Commission, Compl. ¶38, a well-respected authority relied on by the Supreme Court. *E.g.*, *Brnovich*, 141 S. Ct. at 2347-48; *Crawford*, 553 U.S. at 193-94, 197 (op. of Stevens, J.). Regardless, Plaintiffs are seeking "forward-looking, injunctive relief," so Article III allows them to sue over not just actual fraud, but also the "risk of" fraud. *TransUnion*, 594 U.S. at 435. "Fraud is a real risk" in Nevada and elsewhere, as courts have reiterated many times. *Brnovich*, 141 S. Ct. at 2348; *see* Compl. ¶¶38-39 (collecting cases). The complaint even details specific, recent instances of voter fraud in Nevada. Compl. ¶40. The link between inflated voter rolls and increased risks of illegal voting is not attenuated. *Contra* Mot. 8. It is obvious and well established.

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Even if these events would be too speculative in a vacuum, "'Congress has the power'" to make it satisfy Article III, as it did here by enacting a private right of action for violations of the NVRA. *Spokeo*, 578 U.S. at 341. The Secretary relies on other, non-NVRA cases questioning vote dilution as "'speculative' at this juncture." Mot. 7 (quoting *Donald J. Trump for President, Inc. v. Cegavske*, 488 F. Supp. 3d 993, 1000 (D. Nev. 2020)). But those cases did not "arise under a situation like the National Voter Registration Act where Congress has articulated the private right of action." *Daunt*, Ex. A at 20. Congress's judgment warrants respect, especially because harm to voters under the NVRA

bears "a close relationship to a harm traditionally recognized as providing a basis for a lawsuit in American courts." *Green*, 2023 WL 2572210, at *4 (quoting *TransUnion*, 141 S. Ct. at 2213). Plaintiffs "are asserting 'a plain, direct and adequate interest in maintaining the effectiveness of their votes,' not merely a claim of 'the right possessed by every citizen to require that the government be administered according to law.'" *Baker*, 369 U.S. at 208 (quoting *Coleman v. Miller*, 307 U.S. 433, 438 (1939)). Courts have long recognized that vote dilution and losses of voter confidence burden the right to vote. And burdens on constitutional rights are classic examples of "intangible injuries" that satisfy Article III. *Spokeo*, 578 U.S. at 340.

* * *

Any of these theories demonstrates standing at the pleading stage. Plaintiffs' allegations are even stronger in light of Congress's creation of a private right of action for violations of the NVRA. So long as the Court finds that at least one Plaintiff "has standing," it "need not consider whether the [other parties] also have standing to do so." *Horne v. Flores*, 557 U.S. 433, 446 (2009). Courts confronting similar NVRA claims have approved every theory of injury suffered by Plaintiffs here. This Court likewise should recognize that at least one of these injuries is adequately pleaded and proceed to the merits.

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III. Plaintiffs have plausibly alleged NVRA violations.

Section 8 of the NVRA "requires States to 'conduct a general program that makes a reasonable effort to remove the names' of voters who are ineligible 'by reason of' death or change in residence." *Husted*, 138 S. Ct. at 1838 (quoting 52 U.S.C. §20507(a)(4)). The law makes the removal of dead or relocated voters "mandatory." *Id.* at 1842. Plaintiffs plausibly alleged that Nevada is not complying with this duty.

A. Courts have held that inordinately high active voter registration rates plausibly suggest an NVRA violation.

The allegations regarding high registration rates alone raise a reasonable inference of liability. The complaint alleges that at least five counties have registration rates that are abnormally or impossibly high compared to the rest of the State and the rest of the country. Compl. ¶¶3-5, 50-56. These "unreasonably high registration rate[s]" create a "strong inference of a violation of the NVRA" that is "sufficient," on its own, to survive a motion to dismiss. *ACRU*, 166 F. Supp. 3d at 805. "Other courts" agree that "a registration rate in excess of 100%" indicates that a jurisdiction is "not making a reasonable effort to conduct a voter list maintenance program in accordance with the NVRA." *Griswold*, 2021 WL 3631309, at *10; *e.g.*, *Voter Integrity Proj. NC*, 301 F. Supp. 3d at 620; *Green*, 2023 WL 2572210, at *5; *ACRU*, 166 F. Supp. 3d at 793; *Daunt*, Ex. A at 16.

The Secretary deems these allegations insufficient for three main reasons. First, he claims that the NVRA permits States to rely on the U.S. Postal Service's change-of-address information as a "safe harbor." Mot. 13. Second, the Secretary claims that, instead of poor list maintenance, the inflated rolls could be caused by population growth or the NVRA's limits on how fast voters can be removed. Mot. 13-14. And third, the Secretary disputes the data. Mot. 15-19. None of these arguments are a reason to dismiss a complaint at the pleading stage. Notably, the Secretary's primary authority for why Defendants haven't violated the NVRA is a case that was decided *at trial*, after the court received "extensive expert testimony." *Bellitto v. Snipes*, 935 F.3d 1192, 1207-08 (11th Cir. 2019). Earlier in the litigation, the district court *denied* the defendant's motion to dismiss, rejecting the same arguments the Secretary makes here. *Bellitto v. Snipes*, 221 F. Supp. 3d 1354, 1365 (S.D. Fla. 2016).

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First, the so-called "safe harbor" for USPS data is not a reason to dismiss the complaint. The NVRA allows a State to "meet the requirement of subsection (a)(4)" by relying on "change-of-address information supplied by the Postal Service." 52 U.S.C. §20507(c)(1). The Secretary suggests the USPS data may be inaccurate, Mot. 13, but courts have found that argument "unconvincing" at this early stage. *ACRU*, 166 F. Supp. 3d at 793-94. If the USPS data were the sole cause of inflated rolls, the counties named in the complaint would not be outliers among the rest of the State. Compl. ¶¶55-57. Rather, "it is more likely that the Defendant's failure to maintain the voter rolls caused the registration rate to climb," which raises a "'strong inference'" that "is adequate to survive a motion to dismiss." *ACRU*, 166 F. Supp. 3d at 794.

Even if the argument were sound, the Secretary doesn't back it up with evidence. The Secretary doesn't even claim that the State or counties actually rely on USPS information. *See* Nev. Rev. Stat. §293.530(1) (counties may "use any reliable and reasonable means" to determine whether a voter has moved residences). And even if the Secretary were to introduce new evidence in reply showing that some counties use USPS data, that would not prove that the Defendants consistently and accurately apply that data, or that they follow through in removing voters. The USPS data is meaningless unless States actually *use* it, and ensure that county officials are using it, too. *See* 52 U.S.C. §20507(c)(1)(A) (requiring that the change-of-address information "is used"). Whether the State is complying with "subsection (c)(1)" and whether that compliance "defeats Plaintiff[s'] claims" is a "fact-based argument more properly addressed at a later stage of the proceedings." *Bellitto*, 221 F. Supp. 3d at 1366; *accord Voter Integrity Proj. NC*, 301 F. Supp. 3d at 620 (similar); *Griswold*, 2021 WL 3631309, at *11 (similar).

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The provision is also not a "safe harbor," at least not in the way that the Secretary means. The NVRA requires States to remove voters who have moved, 52 U.S.C. §20507(a)(4)(B), and restricts how States can remove those voters, *id.* §20507(d). The process in subsection (c)(1) is thus a "permissible" way to satisfy these "mandates and accompanying constraints." *A. Philip Randolph Inst. v. Husted*, 838 F.3d 699, 707 (6th Cir. 2016), *rev'd*, 138 S. Ct. 1833. It is not a *sufficient* way to satisfy section 8's list-maintenance requirements. A process that admittedly permits "a substantial number of voters who have moved out of the jurisdiction" to remain on the rolls and fails to reach "40 percent of people who move," Mot. 13, is hardly a "reasonable effort" to conduct list maintenance, 52 U.S.C. §20507(a)(4)(B). Even if the provision were a safe harbor, it only pertains to a States' "obligations regarding change of address." *Bellitto*, 935 F.3d at 1210. Section 8 also requires States to remove voters who become ineligible due to "death," 52 U.S.C. §20507(a)(4)(A), and USPS data does not ensure Defendants are complying with that separate duty. *Bellitto v. Snipes*, 302 F. Supp. 3d 1335, 1356-57 (S.D. Fla. 2017).

Second, Plaintiffs do not have to disprove possible alternative explanations for Nevada's inflated rolls at this stage. *See Starr*, 652 F.3d at 1216. The Secretary argues that Plaintiffs must rebut "the possibility that the alternative explanation is true," Mot. 16, but he relies on a case in which "only one" of two "possible explanations" could be true, and "only one of which results in liability," *In re Century Aluminum Co. Sec. Litig.*, 729 F.3d 1104, 1108 (9th Cir. 2013). But the allegations here are "plausible," not merely "possible," and this case does not present two alternative scenarios, "only one of which can be true." *Id.* Even if the NVRA or population growth were responsible for some inflation of the rolls—and the Secretary does not say how much—that does not *exclude* the plausibility that deficient list-maintenance is responsible for the rest. To the extent there

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is "a potentially reasonable explanation for the high registration rate, … the validity of that explanation is not appropriate for determination at this early stage of the litigation, where the court views the factual allegations and inferences drawn therefrom in favor of [Plaintiffs]." *Voter Integrity Proj. NC*, 301 F. Supp. 3d at 619. The Secretary's alternative explanations are especially unpersuasive because they are contradictory. On one hand, he claims that the rolls *are* inflated because the NVRA does not allow counties to quickly remove ineligible voters. Mot. 14. On the other hand, he claims that the rolls *are not* inflated because he reads the data differently. Mot. 15-18. These theories cannot render Plaintiffs' contrary inference of "substandard list maintenance" implausible. Compl. ¶57.

Third, the Secretary's criticisms of Plaintiffs' data are irrelevant. Again relying on the post-trial *Bellitto* case, he argues that census data is "insufficient to prove an NVRA violation." Mot. 15 (citing *Bellitto*, 935 F.3d at 1207-08). But at this stage, Plaintiffs don't need to "prove" anything. Even if the evidentiary disputes could be considered at this stage, they are unpersuasive. The Secretary disputes the census data, Mot. 15-18, but the U.S. Election Assistance Commission uses the census numbers to estimate voter turnout and registration "because of its availability for the majority of jurisdictions … and because it provides a more accurate picture of the population covered by the [survey]." U.S. Election Assistance Comm'n, *Election Administration and Voting Survey 2022 Comprehensive Report* 7 (June 2023), perma.cc/28SQ-T24L; *see also* Compl. ¶¶60-63.

The Secretary next quibbles with Plaintiffs' use of the five-year census estimate instead of the one-year estimate. Mot. 16-17. But the Census Bureau says that five-year estimate is the "[m]ost reliable" of the American Community Surveys.[1] In contrast, the one-year estimate is more "current" but "[l]less reliable," and it only has "[d]ata for areas

[1] U.S. Census Bureau, *When to Use 1-year or 5-year Estimates* (Sept. 2020), perma.cc/LJ8K-WJYQ

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with populations of 65,000+," *id.*, which excludes *all but two* of Nevada's counties.[2] Next, the Secretary's use of old registration rates from 2019 and 2020 is self-defeating. Mot. 16.-17. Plaintiffs challenge the registration practices of today, not those of five years ago. To the extent there is disagreement about which data best measures those practices, "the fact-intensive dispute about the accuracy and significance of the Plaintiffs' statistics must be resolved at the summary-judgment stage or at trial." *Green*, 2023 WL 2572210, at *5.

Plaintiffs' methodology has been repeatedly upheld. Their "census data is reliable," *ACRU*, 166 F. Supp. 3d at 791, especially since Plaintiffs used "the most recent census data available at the time of the filing of [their] complaint," *Voter Integrity Proj. NC*, 301 F. Supp. 3d at 619. Regardless, this Court cannot dismiss the complaint even if it suspects that the "registration numbers may not be unreasonably high in context or there may be a reasonable explanation for them." *Griswold*, 2021 WL 3631309, at *11. At "the motion to dismiss stage, the Court does not 'weigh potential evidence that the parties might present'" in this manner. *Id.* The Secretary's disputes about "the reliability" and "significance" of "Plaintiffs' statistics" thus cannot defeat "a 'reasonable inference' that the defendant is liable." *Green*, 2023 WL 2572210, at *5.

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B. The many other allegations in the complaint plausibly allege an NVRA violation.

Although courts have held that Plaintiffs' voter-registration data states a claim, the complaint here does not rest on those numbers alone. The complaint documents examples of six jurisdictions with similarly high registration rates who, after they were sued, essentially agreed that their rolls were inflated. *See* Compl. ¶¶73-78. The complaint also rules out alternative explanations for these inflated rolls. ¶¶57-58. And it details

[2] Nev. Legislature Research Div., *Population of Counties in Nevada* (Aug. 2021), perma.cc/NY8M-RFP6.

even more data demonstrating that certain counties are not keeping up with residency changes, ¶¶59-64, and not removing voters even after marking them inactive, ¶¶65-69.

Start with residency changes. The Secretary says little about this data, but courts have recognized that it alleges an NVRA violation. *Compare Griswold*, 554 F. Supp. 3d at 1108 ("the 2018 EAC Report shows that 30 Colorado counties reported removing fewer than 3% of voters," even though "18% of Coloradans were not living in the same house as a year ago"), *with* Compl. ¶¶62-63 (the 2020-2022 EAC Report shows that two counties "reported removing less than 2% of their registration lists for residency changes" even though "more than 15% of Nevada's residents were not living in the same house as a year ago"). The Secretary obfuscates by changing the words of the statute: he claims the State can't "systematically act" on residence changes in the 90 days before an election. Mot. 14. That's false. The provision he cites says that the State cannot "systematically *remove*" voters from the rolls 90 days before an election. 52 U.S.C. §20507(c)(2)(A). Nothing in the NVRA prohibits Defendants from moving voters to inactive status before an election. In any event, these alternative explanations are irrelevant, and even the Secretary can't explain why some counties removed *no voters* for failing to respond to an address-confirmation notice. Compl. ¶64. The complaint contrasts a highly mobile population with unusually stagnant list-maintenance for those moves. ¶¶62-64. That data raises a plausible inference of a violation. *Griswold*, 554 F. Supp. 3d at 1108.

Even if Nevada had a "reasonable program" to maintain its rolls, how Nevada treats the inactive registrations on the rolls shows that it is not *implementing* that program. The complaint alleges that Nevada's rate of inactive registrations (16%) is much higher than the national average (11%). Compl. ¶65-66. The Secretary argues that shows Nevada is aggressively canceling registrations, Mot. 20-21, but that makes no sense. At

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most, it shows that Nevada is effective at *almost* canceling registrations but fails to actually remove those voters from the rolls. In other words, a "high 'inactive registration rate'" is evidence that, even if the State is "availing itself of the NVRA's safe harbor," it may "not actually be implementing it." *Griswold*, 554 F. Supp. 3d at 1097, 1108.

That inference must be drawn in Plaintiffs' favor, but the inference isn't even necessary: the complaint identifies some 5,000 inactive voters currently on the rolls that were listed in the June 10, 2019 voter file. Compl. ¶67. The Secretary compares these registrations to the total number of inactive voters, but that misses the point. Mot. 19-20. These 5,000 voters have been listed as inactive for two federal election cycles, which means that even by the Secretary's own data, these registrations should have been cancelled after the 2022 election. 52 U.S.C. §20507(b)(2). The NVRA requires States to "conduct" a list-maintenance program, not to simply *have* a list-maintenance program. *Id.* §20507(a)(4); *see Bellitto*, 935 F.3d at 1205-06 (defendants must demonstrate as a "factual" matter that they "reasonably used [the enacted] process"). Nevada's treatment of inactive registrations demonstrates it is failing to remove ineligible voters from the rolls.

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In a final attempt to avoid plausible allegations, the Secretary demands the Court close its eyes to data that was not included in the notice letter. Mot. 19-21. But no court has held that the letter freezes the evidence or arguments that plaintiffs can rely on in a lawsuit. The Secretary cites a case in which the court declined to allow one plaintiff to "piggyback" on the notice provided by another plaintiff, *Scott v. Schedler*, 771 F.3d 831, 836 (5th Cir. 2014), but all Plaintiffs here were named in the notice. The NVRA requires only "written notice" of "the violation." 52 U.S.C. §20510(b)(1). Here, both the letter and the complaint allege a violation of section 8's requirement that States remove the names of ineligible voters. *Id.* §20507(4)(A)-(B). The notice need only state "[t]he general

proposition" that a State is "not complying with the mandates of the NVRA"; the "statistics … simply serve as factual support for that general proposition." *Ga. NAACP*, 841 F. Supp. 2d at 1334. Regardless, because the NVRA's notice provision "is not jurisdictional," *ACRU v. Phil. City Comm'rs*, 2016 WL 4721118, at *4 (E.D. Pa. Sept. 9), courts can and have excused the requirement even in cases where the plaintiff provided no notice at all. *E.g.*, *ACORN v. Miller*, 129 F.3d 833, 838 (6th Cir. 1997). The Secretary can show no prejudice from more data, particularly where he continues to maintain that *none* of the data—no matter when he learned of it—amounts to a violation. Mot. 19-20.

Citing nothing, the Secretary concludes by arguing that Plaintiffs should have requested records from the Secretary of State that could have shed light on why Nevada's voter rolls are deficient. Mot. 22-23. Neither Congress nor the courts have imposed such a requirement. The NVRA requires pre-suit notice, not pre-suit exhaustion. In fact, requesting records is a *separate claim* under the NVRA that is independent of the claim for failure to conduct list maintenance. *See* 52 U.S.C. § 20507(h)(i). Plaintiffs sometimes bring both claims, *PILF*, 2022 WL 21295936, at *1, but often they bring just the list-maintenance claim, *Green*, 2023 WL 2572210, at *6. Tying together a motion that disputes the facts, the Secretary cites *Bellitto*, the post-trial case, one final time for the proposition that "courts ultimately rely" on details about "counties' methodologies" to determine whether the State has violated the NVRA. Mot. 23. But whatever evidence this Court "ultimately" relies on is not what governs this motion. Plaintiffs plausibly state a claim with a plethora of allegations approved by numerous courts.

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CONCLUSION

The court should deny the motion to dismiss. If the Court grants the motion, it should also grant leave to amend. *Harris v. Amgen*, 573 F.3d 728, 737 (9th Cir. 2009).

Dated: April 29, 2024

Respectfully submitted,

/s/ Jeffrey F. Barr

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Exhibit A

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UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ANTHONY DAUNT,

Plaintiff,

DOCKET NO. 1:20-cv-522

vs.

JOCELYN BENSON, in her official capacity as Michigan Secretary of State; JONATHAN BRATER, in his official capacity as Director of the Michigan Bureau of Elections; SHERYL GUY, in her official capacity as Antrim County Clerk; DAWN OLNEY, in her official capacity as Benzie County Clerk; CHERYL POTTER BROWE, in her official capacity as Charlevoix County Clerk; KAREN BREWSTER, in her official capacity as Cheboygan County Clerk; SUZANNE KANINE, in her official capacity as Emmet County Clerk; BONNIE SCHEELE, in her official capacity as Grand Traverse County Clerk; NANCY HUEBEL, in her official capacity as Iosco County Clerk; DEBORAH HILL, in her official capacity as Kalkaska County Clerk; JULIE A. CARLSON, in her official capacity as Keweenaw County Clerk; MICHELLE L. CROCKER, in her official capacity as Leelanau County Clerk; ELIZABETH HUNDLEY, in her official capacity as Livingston County Clerk; LORI JOHNSON, in her official capacity as Mackinac County Clerk; LISA BROWN, in her official capacity as Oakland County Clerk; SUSAN I. DEFEYTER, in her official capacity as

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Otsego County Clerk MICHELLE STEVENSON, in her official capacity as Roscommon County Clerk; and LAWRENCE KESTENBAUM, in his official capacity as Washtenaw County Clerk,

Defendants.

_____/

TRANSCRIPT OF HEARING ON MOTION TO DISMISS AND

RULE 16 SCHEDULING CONFERENCE

BEFORE THE HONORABLE ROBERT J. JONKER, CHIEF JUDGE

GRAND RAPIDS, MICHIGAN

October 27, 2020

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Court Reporter: Glenda Trexler
Official Court Reporter
United States District Court
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110 Michigan Street, N.W.
Grand Rapids, Michigan 49503

Proceedings reported by stenotype, transcript produced by computer-aided transcription.

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Grand Rapids, Michigan

October 27, 2020

3:57 p.m.

P R O C E E D I N G S

THE COURT: All right. We're here on the case of Daunt against Benson, 1:20-cv-522, at the Rule 16. There are motions to dismiss pending from the State defendants as well as one of the intervenors.

Let's start with appearances and we'll go from there. For the plaintiff?

MR. NORRIS: Good afternoon, Your Honor, Cam Norris for the plaintiff, Mr. Daunt.

THE COURT: All right. Thank you.

And for the defendants?

MS. BRIGGS: Good afternoon, Your Honor, Assistant Attorney General Elizabeth Husa Briggs on behalf of Secretary of State Jocelyn Benson and Director of Elections Jonathan Brater.

THE COURT: All right. Thank you.

For our intervenors who do we have?

MS. BRAILEY: Emily Brailey on behalf of Philip Randolph and Rise, Inc.

THE COURT: Thank you.

MS. PRESCOTT: Good afternoon, Your Honor, Sarah Prescott, local counsel for the same.

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MR. DONNINI: And good afternoon, Your Honor, George Donnini from Butzel Long on behalf of the intervenor defendant League of Women Voters.

THE COURT: All right. Thank you.

For today's purposes if you use the microphone right in front of you, you're probably going to be best off. Especially if you want to stay masked, which is fine. It will be easier for us to hear. Just sit down, pull the microphone close. If anybody can't sit down in court -- and I get that, lawyers are not used to sitting down in court -- feel free to walk over to the podium and use the microphone there. Either way.

We're here for the Rule 16, and, of course, that's a scheduling conference. You know, I did want to hear from the parties, especially the moving parties, on the motion to dismiss. We had the original motion to dismiss directed to the initial Complaint. At that time it wasn't clear to me anyway whether the plaintiff would be seeking relief in advance of next Tuesday's election or whether it was simply seeking relief down the road in the fullness of time so to speak.

If I'm understanding it right, Mr. Norris, your relief is directed to, you know, down the road and nothing specific to next Tuesday. Is that right?

MR. NORRIS: Correct, Your Honor.

THE COURT: Okay. Then there was an

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Amended Complaint and another response. The reason I bring it up is because, you know, I had reviewed the briefing and case law in that first round, and, of course, now again in the second round, I know the briefing isn't complete, but I have to say it doesn't seem like a hard standing case to me. It seems like somebody like this plaintiff has standing, and if this plaintiff doesn't, I don't know who does under a National Voting Rights Act kind of claim. And, frankly, I think the only National Voting Rights Act case I saw in the briefing from any of the moving parties is one that granted standing ultimately. It was the Texas case. So I want to make sure I understand where the moving parties are going on that, but I'm not inclined, from what I've seen so far, to think that there's much chance of a standing dismissal, at least on Rule 12.

So let me go to Ms. -- is it Ms. Briggs?

MS. BRIGGS: That's fine, Your Honor.

THE COURT: Okay. Pull that forward and make sure I understand at least the essence of where you are on it, and then we'll talk to any of the moving parties on the intervening side who want to address it as well. Go ahead.

MS. BRIGGS: Well, Your Honor, we do believe that Mr. Daunt has not established standing. And I would point you -- I mean, if you're focusing on the Texas case in particular, Mr. Daunt is not -- Mr. Daunt is an individual. He's not --

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THE COURT: Well, let me start out with do you have any National Voting Rights Act case other than the American Civil Rights Union case?

MS. BRIGGS: I don't believe so, Your Honor, but we do have cases definitely dealing with --

THE COURT: I get that, but under the NVRA that's the only one I saw. At least that's the only one you can think of right now.

MS. BRIGGS: Okay.

THE COURT: And at the end of the day, at least some plaintiffs had standing in that case, right?

MS. BRIGGS: Not individuals, Your Honor.

THE COURT: I said at least some plaintiffs had standing in that case, right?

MS. BRIGGS: Only the organizations.

THE COURT: So some plaintiffs had standing in that case.

MS. BRIGGS: The organizations, but they did not have the --

THE COURT: Did some plaintiff have standing in that case or not?

MS. BRIGGS: Yes, but not as individuals.

THE COURT: Okay. So if Mr. Daunt joined an organization he could have standing? Is that the position?

MS. BRIGGS: Well, the organization would have to be

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the plaintiff.

THE COURT: All right. Anything else on the standing argument from the State defendants?

MS. BRIGGS: Well, we've also argued that we do not believe his letter, the February 26th letter, is sufficient. That he doesn't give sufficient notice as to what his actual -- he doesn't identify any policy or procedure or any -- basically any reason by which the Secretary of State or the director -- why Michigan's general program are not sufficient under the NVRA.

THE COURT: All right. Anything else on the State side?

MS. BRIGGS: Well, we don't believe that a generalized -- we believe basically what he's shown is that -- and what he's alleged is that this is just a generalized grievance. He's just appearing just on behalf as a Michigan voter and there's nothing specific. He's not even alleging to be representative or involved in any politics with respect to the specific counties at issue or that he alleges are showing erroneous, for lack of a better word, erroneous voter registration numbers, so . . .

And Article III standing, Your Honor, does require more than just a generalized grievance about an alleged problem with government activity. It does require a concrete and direct injury. And it does require something that could be

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fairly redressable from this Court.

Mr. Daunt is not associated even or does not even allege to be associated with many of the counties that he claims the data showing that there's a problem with. Under the case law, Your Honor, as we briefed, that's a -- standing is a threshold issue, and he's not established standing.

THE COURT: Okay.

MS. BRIGGS: Thank you.

THE COURT: Thank you.

From the intervenors, I don't think that there was a motion from the League of Women Voters, but there were from some of the others. So I don't know who would like to speak on behalf of the moving parties on the intervenor side.

MS. BRAILEY: Your Honor, I can speak. This is Emily Brailey on behalf of Philip Randolph and Rise.

THE COURT: Okay. Thank you.

MS. BRAILEY: We largely agree with what Ms. Briggs has stated. We agree with everything in that motion to dismiss, including about the generalized grievance issue and that plaintiff doesn't have standing.

And I'll add that we also don't think there is an injury in fact about -- related to voter fraud or vote dilution.

THE COURT: Or dilution? Okay.

MS. BRAILEY: Or vote dilution. I think that -- you

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know, we rest on the cases we cited in our brief. There's a lot of recent precedent where their complaints can't stand on such small evidence of or no evidence of voter fraud.

THE COURT: Do you have any National Voter Rights Act case? I don't think you cited the Texas case, but --

MS. BRAILEY: That's correct, Your Honor.

THE COURT: But do you have any other National Voter Rights Act case --

MS. BRAILEY: No, Your Honor, but I am happy to provide --

THE COURT: -- on voter registration? Go ahead.

MS. BRAILEY: I'm sorry. I'm happy to provide additional briefing if you would like us to do that.

THE COURT: Do you know if there is any case?

MS. BRAILEY: Not off the top of my head right now.

THE COURT: All right. Thank you.

MS. BRAILEY: And in addition, you know, we also think the remaining factors of standing including causation and redressability cannot be met here.

And on top of that, I mean, I guess you're only asking about standing right now, but we also have the 12(b)(6) failure to state a claim.

THE COURT: Yeah, go ahead. You can touch on that too if you want to.

MS. BRAILEY: So, again, this goes back to vote

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dilution and whether that can even be recognized as a claim in this context. And really it's only been addressed in the reapportionment cases. And even if it is recognized outside of those contexts, the plaintiff would need to show at least that he's part of a group that is purportedly having its votes diluted, and that just doesn't appear in this Complaint.

And finally, we echo a lot of what the State has in their motion to dismiss regarding the current list maintenance program and that there's just no evidence in that Complaint that Michigan is not already implementing a reasonable and adequate maintenance program.

THE COURT: All right. Thank you.

I don't know if -- I can't remember, Ms. Prescott, are you representing the League of Women Voters or are you representing the same groups or --

MS. PRESCOTT: The same groups, Your Honor.

THE COURT: Okay. Do you want to add anything on their behalf?

MS. PRESCOTT: No, I don't. Thank you.

THE COURT: All right. And from Mr. Donnini, I didn't see a motion from your clients. Do you want to have anything to say on this? And just stay seated if you do.

MR. DONNINI: Sure, Your Honor. It is a habit of mine.

Your Honor, we did file an Answer. I would just

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point out that we believe also -- we believe the arguments in the motions to dismiss that were filed are meritorious. We don't think that this states a valid claim upon which relief can be granted. And that is in our Answer. However, we did file an Answer and we are prepared to move forward if it does survive, but for the arguments that have been made in court and in the briefing, we agree that this case does not state a claim and ought to be dismissed.

THE COURT: All right. I know your time to respond hasn't fully run yet from the plaintiff's side, Mr. Norris, but do you want to be heard at all today on where you're going with that? I know you touched in your earlier response on the notice letter, not really on the other issues.

MR. NORRIS: Thank you, Your Honor. Just briefly. Your Honor is correct that there have been NVRA cases in the past filed under Section 8, and those cases have been litigated past the 12(b) stage. These are not cases that are normally dismissed for lack of standing.

And one point that I would add to the prior case law, I believe all the NVRA-specific cases that have been cited all predate the Supreme Court's decision in Spokeo, which Your Honor, I'm sure, is familiar with. And in Spokeo the Supreme Court made very clear as a holding for the first time that Congress can actually affect how the Article III inquiry works. And here we have an express cause of action from

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Congress that allows individuals to bring claims under Section 8 of the NVRA. That statute says individuals. It allows people like Mr. Daunt to sue if they file the requisite presuit notice letter, as he did.

And as the Court explained in Spokeo, Congress can elevate theories of causation and types of injuries that might not otherwise satisfy Article III and by recognizing those theories can make them satisfy Article III. And we think that's precisely the case with the NVRA.

But even aside from Spokeo, even pre-Spokeo these types of claims are cognizable and plaintiffs have standing to bring them, like Mr. Daunt does.

THE COURT: All right.

MS. BRIGGS: May I respond, Your Honor?

THE COURT: Go ahead. Sure.

MS. BRIGGS: The private cause of action authorized under the NVRA is only available to a person who has been aggrieved, and Mr. Daunt has not shown any way in which he's been aggrieved. Or at least there's not any factual allegation even in the Complaint as amended that supports that.

Secondly, I would point you to page 17 in the State's brief, page ID 320, where we identify and distinguish cases in which -- we distinguish Mr. Daunt's allegations from those in which the Sixth Circuit and the other circuits have found standing in the context of the NVRA. And so we have addressed

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that as well, Your Honor.

Mr. Daunt's allegations in his Complaint even as amended don't rise to that level. He's not shown that he's aggrieved.

THE COURT: All right. And anything else, Ms. Brailey?

MS. BRAILEY: Yes, Your Honor. We agree that he has not alleged that he's aggrieved, but on top of that, as we mentioned in our brief on page 3, we also argue that Article III standing is a requirement in and of itself in addition to being aggrieved under the statute. And I would also like to note that, you know, after the response we would like the opportunity to have a reply and we can provide an NVRA-focused brief if that would be helpful to the Court.

THE COURT: All right. Well, I don't think any additional briefing is needed at this stage, to tell you the truth. And, of course, a ruling on a motion under Rule 12 doesn't mean it's the end of the issue. Rule 56 is always there. But for Rule 12 purposes I don't think there's any reason to go forward with further briefing because I think the motions as they stand need to be denied.

I think there's clear standing established as a matter of allegations here and at least a plausible claim stated, which is all that needs to be happening at this stage of the case. And I'll just briefly articulate why I think

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that's the case.

The parties are, of course, correct in their briefing that you need under 52 U.S.C. § 2510 a person aggrieved, and then, of course, under Article III of the Constitution somebody is aggrieved that still satisfies the constitutional requirements of standing.

In addition, under the National Voter Registration Act you'd also have to show that the individual involved or the person aggrieved satisfied the notice requirement. I think they are all established here. At least as a matter of pleading. Which doesn't mean that the plaintiff ultimately prevails but does, I think, mean that the plaintiff gets to go beyond where they are right now.

With respect, first of all, to the notice letter, the notice letter is attached to the First Amended Complaint, and it's, in my view, a fairly detailed statement of why the plaintiff thinks that there's a problem with the Michigan voter registration lists and in particular that the defendants haven't followed through on their obligation to come up with under Section 8 an appropriate general program to remove voters that don't belong on the registration list because they have moved or because there has been a death. And I don't think it's incumbent on the plaintiff in a notice letter to say "Here is the existing program of the state and here are the particular flaws in it." I think it is simply incumbent on the

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plaintiff to say "Here is why I think there's a problem and why I don't think whatever program you're using, if any, is up to the task."

And certainly on the face of things, at least in Leelanau County if you have more registered voters than eligible voters living, at least based on the census data, a reasonable inference, or at least a plausible inference is there's a problem with the system that's been used to address the voter registration list. And there's additional specific examples given. I don't know if those numbers are going to hold up. I don't know if that's going to be explained in some other fashion. But I do think for purposes of a notice letter as well as the allegations of the First Amended Complaint which largely repeat that detail, there's at least a plausible case for a problem with the Section 8 obligation. And whether or not the State has a program, whether or not it's implemented a program, and whether or not it's reasonable, those are merits issues that, of course, aren't decided today and the plaintiff may ultimately not prevail, but I think they have done enough to get that far.

What the plaintiff's First Amended Complaint includes in addition to what's in the notice letter is additional factual basis that the plaintiff says illustrates the reasons for their concern in terms of the I think it was about 500,000 or so returns that came back when the Secretary of State sent

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out the absentee applications earlier. It was after the notice letter but before the First Amended Complaint. And I think that adds to the plausibility for purposes of the 12(b)(6) and also gets into where we'll go next which is whether or not Mr. Daunt is an aggrieved person under the statute and sufficiently pleading a basis for standing with Article III.

I think that Mr. Daunt in the First Amended Complaint really relies on three main categories of injury that he says are concrete and particularized. He is a voter in the state of Michigan. He is concerned about the possibility that his vote would be diluted. But he's not only focused on that. He's also concerned about the general cloud on the outcome of an election if the registration lists aren't properly purged and reflecting somebody -- or a list that's complied with the Section 8 requirement. And he's concerned that he has to spend extra time and effort policing the efforts of the secretary and the director of elections to make sure these lists are where they need to be and to make sure that the voting is coming off properly. And I don't think that matters that he's doing so or alleging his interest in doing so as an individual as opposed to an organization. The fact that he is expressing the same kind of concern that the organization did in the American Civil Rights Union case from the Western District of Texas is, I think, fundamentally the point. And he alleges a plausible basis for why he as an individual voter in the state and active

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in Republican politics in his case would be interested and concerned about that, and for purposes of alleging injury I think that's sufficient.

The point that the plaintiff makes about Spokeo and the statutory cause of action is, I think, also important. You know, I think so many of us, both at the bench and the bar, from the Supreme Court point of view look at Spokeo as a case that denied standing on a statutory claim or at least found it inadequate as presently alleged and wanted to go back and have the lower courts review it under the new standard. And so it's easily cited and I think to some extent potentially misunderstood as a case that makes standing unusually difficult for a plaintiff seeking to enforce a private right of action under a congressional statute. But in fact, as the Ninth Circuit found on remand in Spokeo, 867 F.3d. 1108 in 2017, the fact that Congress makes a decision to create a private right of action is something that the Court is obligated under the Supreme Court's decision and then as interpreted now by the circuits, Second Circuit, Ninth Circuit, when the Congress says "We have the following interests," and here we have a variety of interests at issue in the Voter Registration Act, but two of them certainly are concerned with exactly what Mr. Daunt says he's concerned with, the integrity of the electoral process in ensuring that accurate and current voter registration roles are maintained, when Congress lays

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those out and says here is a private right of action for a person aggrieved to enforce it, and that person, Mr. Daunt in this case, comes forward, that's close to almost -- I won't say a slam dunk -- but close to saying if not Mr. Daunt, then who? This is exactly the kind of person that Congress had in mind to protect these interests for the reasons that Mr. Daunt articulates in the First Amended Complaint.

The intervenors are here, and I thought their claim for intervention was clear enough because they are concerned with also making sure that the other interests of the National Voter Registration Act are recognized and enforced and that we don't unduly purge voter roles, making it more difficult for eligible citizens to register or to participate in elections. They are both sides of the same coin, and I think this is exactly the way Congress thought the interests would be vindicated and protected on all sides. So for me when you have a congressionally created private right of action like this to address exactly the interests that Mr. Daunt says he's suffering from a fear of losing, you have intervenors on the other side who want to make sure things don't go off the rails in removing people who deserve to be there or discouraging them from registering, we have exactly the interests aligned that I think Congress, first of all, had in mind and that the Supreme Court in Spokeo and the circuits following Spokeo have recognized as part and parcel of what's involved in a statutory

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cause of action.

I already touched on the American Civil Rights Union case which I think -- we might have missed something -- but I think it's the only National Voter Registration Act case I saw cited by anybody on the standing issue, did result in standing for the plaintiff, albeit not on every theory advanced but at least on multiple theories. And the only other cases that I saw outside of the NVRA context that talked about general dilution or fear of dilution I think are all readily distinguishable and that none of those arise under a situation like the National Voter Registration Act where Congress has articulated the private right of action and reasons for it.

The other case that I think was referenced of interest in probably the State briefing, it might have been the intervenors, was the Buchholz case from our circuit under the Fair Debt Collection Practices Act where standing was not recognized, but that's a perfect example of where the interests that the party plaintiff was talking about was not within the scope of the cause of action that Congress had set up, and I think in that case the trial court here, Judge Quist, and then the Sixth Circuit affirming him said, "No, that's not right. We don't have Article III standing here even though you might have a technical issue under the statute." And that's because in Buchholz the complaint was that the lawyers were harassing the plaintiff by writing him letters, telling him he had to pay

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on a debt that he didn't contest. And undoubtedly that may have created anxiety, but not the kind of anxiety that was at the root of the Fair Debt Collection Practices Act.

And I think in this case the situation is quite different. The concerns that Mr. Daunt articulates around potential for dilution, potential for a cloud on the election, and potential for extra work and resources policing the validity and propriety of the election are exactly interests that are within the scope of the NVRA, just as the interests the intervenors intend to protect are other interests on the other side of the NVRA coin. So from my perspective there is proper notice in advance. There is at least a plausible basis for a cause of action alleged under the National Voter Registration Act and a plausible basis for standing articulated under Article III. So for those reasons I'm going to deny the pending motions to dismiss.

Of course, the parties remain free to raise all these issues as the record develops in addition to the merits, and that's what we'll litigate going forward. But the motions I'm denying today.

The schedule is really not something the parties disagree about very much. At least once the motions are decided. So let me do this: I'll articulate deadlines that I would propose and then see if anybody has comments or objections to that or concerns about it or anything else that

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we need to address.

From a scheduling point of view I'd start with paragraph 5 of your Joint Status Report on joinder, and rather than have a specific date, which is pretty early in any case, I'm simply going to say do that by motion if and when a party thinks there's a need to do that, or a stipulation if everybody agrees, but I won't give you a separate date for that.

For discovery overall I'm going to propose June 30 of next year, which is a little longer than you're thinking but I think appropriate. And I'd key a series of expert disclosures off that. If you're going to use an expert on an issue where you have the burden of proof, disclose with reports by March 31. Any other expert you're using disclose by April 30. And if you need a rebuttal expert after that, something surprises you in the April 30 disclosure, disclose with reports by May 15.

We'd give you a motion cutoff of July 31, and then I would set a second Rule 16 sometime after the motions are filed so we can get together, find out what's going to be litigated substantively in those motions, whether there's room at that point for ADR, maybe there is, maybe there isn't, and what else needs to be happening from a scheduling point of view. So those would be the overall deadlines I'd be prepared to set today.

For discovery limits my inclination would be to do

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just the generic discovery limits at this point under the rules which would be 10 depositions per side as the current limit with the seven-hour presumptive limit, 25 interrogatories. I think the parties want to limit it to 25 requests for admission. That's fine with me too.

So let me start with the plaintiff, Mr. Norris, concerns, questions, or other things we need to take up from your perspective?

MR. NORRIS: Thank you, Your Honor. I think the only disputed question in the status report was the number of depositions.

THE COURT: Right.

MR. NORRIS: We initially sued several county defendants because that's, you know, the data we have, and the Complaint suggests problems at the county-wide level. And we would like to be able to depose all the county defendants. However, we don't feel strongly about an initial 10 depositions. Perhaps the county defendants are not fruitful avenues for discovery, and maybe we'll find that out. As long as -- I think my colleagues have already expressed to me that if we need additional depositions we can raise that by motion later and they would be accommodating.

THE COURT: Okay. Let's go to Ms. Briggs for the defendants.

MS. BRIGGS: Your Honor, Mr. Norris is correct, we do

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believe that 10 depositions is plenty. And with respect to the counties, based on your September order he can submit interrogatories and requests for admission to the counties, and I don't -- it seems to me that whatever information he may need to get from them could be gotten from them in that way. So from our perspective 10 depositions is plenty given this case.

THE COURT: Okay. Ms. Brailey.

MS. BRAILEY: We also agree that 10 depositions is plenty, and we also agree that the federal rule set these limits and we think it's fair to abide by them. And, again, we agree that if we need to reassess down the road we would be amenable to conferencing.

THE COURT: Okay. Ms. Prescott, anything you want to add?

MS. PRESCOTT: No, Your Honor.

THE COURT: All right. Mr. Donnini.

MR. DONNINI: Your Honor, we agree as well, but I don't have anything further to add.

THE COURT: Okay. Well, I'm going to go ahead with the deadlines that I outlined, then, and the discovery limits. It doesn't preclude a motion down the road if the plaintiff says "Hey, I need depositions that go beyond that," or it doesn't preclude the parties from agreeing to that if they see it the same way by that time. But I do think that for starting purposes the presumptive limits make sense here. Even from the

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allegations that the plaintiff has in the First Amended Complaint, there's going to be some counties that are more the focus of interest than others. And beyond that, as Ms. Briggs indicates, there are opportunities short of deposition to get information that may satisfy what the parties need or at least provide a basis for the Court down the road to say "Well, I think some additional depositions are needed" or not.

So that's what I'm going to do is stick with the presumptive limits for now. But, of course, anybody is free to either seek protective orders limiting that or adding to that if the facts develop on the ground differently.

From any party's perspective are there other things that should be addressed today? Plaintiff?

MR. NORRIS: No, Your Honor.

THE COURT: Or defense?

MS. BRIGGS: No, Your Honor.

THE COURT: Or intervenors?

MS. BRAILEY: No, Your Honor.

MR. DONNINI: No, Your Honor.

THE COURT: Okay. Thank you all. See you next time.

MS. BRIGGS: Thank you.

THE CLERK: Court is adjourned.

(Proceeding concluded at 4:29 p.m.)

* * * * *

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I further certify that the transcript fees and format comply with those prescribed by the court and the Judicial Conference of the United States.

Date: November 3, 2020

/s/ Glenda Trexler

Glenda Trexler, CSR-1436, RPR, CRR

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Exhibit B

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Exhibit A

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May 4, 2020

Karen Brinson Bell
Executive Director
North Carolina State Board of Elections
430 N. Salisbury St., 3rd Floor
6400 MSC
Raleigh, NC 27063
karen.bell@ncsbe.gov

Dear Ms. Bell:

As you are aware, the National Voter Registration Act ("NVRA") requires states to maintain an accurate and current voter registration roll for elections for federal office. Based on our analysis, 36 North Carolina counties appear to be in violation of Section 8 of the NVRA. By comparing publicly available voter registration records with the U.S. Census Bureau's 2014-2018 American Community Survey of citizen voting age population, we have determined that ten counties—Brunswick, Chatham, Currituck, Dare, Durham, Johnston, Mecklenburg, Orange, Union, and Wake—have more registered voters than adult citizens over the age of 18. Furthermore, we have identified 26 counties—Buncombe, Cabarrus, Camden, Carteret, Cherokee, Clay, Davie, Forsyth, Franklin, Guilford, Halifax, Henderson, Iredell, Jones, Lincoln, Macon, Madison, Moore, Nash, New Hanover, Pender, Polk, Transylvania, Watauga, Wilson, and Yancey—that have voter registration rates that exceed 90 percent of adult citizens over the age of 18, a figure that far eclipses the voter registration rate nationwide in recent elections. This evidence strongly suggests that these counties are not conducting appropriate list maintenance to ensure that the voter registration roll is accurate and current, as required by federal law.

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Congress enacted the NVRA "to protect the integrity of the electoral process." 52 U.S.C. § 20501(b)(3). Specifically, it enacted Section 8 "to ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b)(4). Retaining voter rolls bloated with ineligible voters harms the electoral process, heightens the risk of electoral fraud, and undermines public confidence in elections. After all, "[c]onfidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (per curiam). Section 8 of the NVRA obligates states to "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. 52 U.S.C. § 20507(a)(4). And as the U.S. Supreme Court has recently confirmed, "federal law makes this removal mandatory." *Husted v. A. Philip Randolph Institute*, 138 S. Ct. 1833, 1842 (2018).

This letter provides statutory notice that Jerry Green, Linda Petrou, and Donald Bardes, acting as registered North Carolina voters with a substantial interest in secure elections, will bring a lawsuit against you and, if appropriate, against the counties named in this letter, if you fail to take specific actions to correct these violations of Section 8 within the 90-day timeframe specified in federal law. Furthermore, while we hope to avoid litigation, we

nonetheless formally request that the North Carolina State Board of Elections and the 36 counties named in this letter, to the extent that they maintain separate records, take steps to preserve documents as required by Section 8(i) of the NVRA. 52 U.S.C. § 20507(i)(1)-(2).

As the Executive Director of the North Carolina State Board of Elections, you are responsible for coordinating the required statewide list maintenance under the NVRA. The NVRA requires each state to "designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under" the law. 52 U.S.C. § 20509. North Carolina law designates the Executive Director as the state's chief election officer. N.C. Gen. Stat. § 163-27(d). This letter explains how we concluded that North Carolina and the 36 named counties are violating Section 8 of the NVRA, and the curative steps needed to bring the state into compliance with the law and avoid litigation.

I. The NVRA Protects Election Integrity by Requiring Reasonable Efforts Be Made to Maintain Accurate and Current Lists of Registered Voters.

North Carolina's voter registration list maintenance program must be "uniform, non-discriminatory, and in compliance with the Voting Rights Act." 52 U.S.C. § 20507(b)(1). Section 8 requires that states "remove the names of ineligible voters from the official lists of eligible voters by reason of (A) the death of the registrant, or (B) a change in the residence of the registrant" to outside of his or her current voting jurisdiction. 52 U.S.C. § 20507(4)(A)-(B).

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Additionally, the Help America Vote Act ("HAVA") mandates that states adopt computerized statewide voter registration lists and maintain them "on a regular basis" in accordance with the NVRA. 52 U.S.C. § 21083(a)(2)(A). States must "ensure that voter registration records in the State are accurate and are updated regularly," a process which must include making a "reasonable effort to remove registrants who are ineligible to vote from the official list of eligible voters." 52 U.S.C. § 21083(a)(4). HAVA's list maintenance mandates include coordination with "State agency records on death" and "State agency records on felony status" to facilitate the removal of individuals who are deceased or rendered ineligible under state law due to felony conviction. 52 U.S.C. § 21083(a)(2)(A)(ii)(I)-(II).

As the chief election official for North Carolina, the responsibility rests with you to coordinate and oversee the list maintenance activities of local and county election officials. *See, e.g., Scott v. Schedler*, 771 F.3d 831, 839 (5th Cir. 2014) (noting that "the NVRA's centralization of responsibility counsels against . . . buck passing"); *U.S. v. Missouri*, 535 F.3d 844, 850 (8th Cir. 2008) (noting that a state or chief election official "may not delegate the responsibility to conduct a general program to a local official and thereby avoid responsibility if such a program is not reasonably conducted"); *see also* N.C. Gen. Stat. § 163-82.14 (setting forth requirements for the NCSBE and county boards of election to conduct voting list maintenance activities).

II. Ten North Carolina Counties Have More Registered Voters Than Voting-Eligible Citizens; 26 Others Have Suspiciously High Rates of Voter Registration.

Based on data gathered from the U.S. Census Bureau's 2014-2018 American Community Survey and the most up-to-date count of registered voters available from the State Board of Elections, North Carolina appears to be failing to meet its list maintenance obligations. Comparing the registered voter count to the 2014-2018 American Community Survey reveals that the following counties have greater than 100% voter registration: Brunswick (101.8%), Chatham (104.1%), Currituck (101.5%), Dare (105.4%), Durham (105.5%), Johnston (100%), Mecklenburg (104.9%), Orange (104.5%), Union (102.5%), and Wake (104.2%). In other words, there are more registered voters than eligible voters. This plainly shows that voter registration records are not being maintained. Meanwhile, 26 other counties across the state—Buncombe (98.2%), Cabarrus (99%), Camden (96.5%), Carteret (93.9%), Cherokee (94.5%), Clay (97.8%), Davie (92.6%), Forsyth (96.6%), Franklin (90.7%), Guilford (96.1%), Halifax (90.2%), Henderson (94.4%), Iredell (96.2%), Jones (92.4%), Lincoln (92.8%), Macon (95%), Madison (93.9%), Moore (94.2%), Nash (92.8%), New Hanover (94.8%), Pender (92.9%), Polk (92%), Transylvania (91.9%), Watauga (98.1%), Wilson (92.7%), and Yancey (95.7%)—purport to have more than 90% (in some cases, approaching 100%) of their citizen voting-age populations registered to vote.

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These voter registration rates are abnormally, or in the case of counties with greater than 100% registration, impossibly, high. This constitutes strong evidence that North Carolina's voter rolls are not being properly maintained. According to the U.S. Census Bureau, only 66.9% of the citizen voting-age population was registered nationwide in the November 2018 election. *See* U.S. Census Bureau, Voting and Registration in the Election of November 2018, Table 4a, Reported Voting and Registration, for States: November 2018, bit.ly/2T52i3U. Similarly, only 70.3% of the citizen voting-age population was registered in the November 2016 election. *See* U.S. Census Bureau, Voting and Registration in the Election of November 2016, Table 4a, Reported Voting and Registration, for States: November 2016, bit.ly/32mKNyZ; *see also* U.S. Census Bureau, Historical Reported Voting Rates, Table A-3b, Reported Voting and Registration for Total and Citizen Voting-age Population by State: Congressional Elections 1974 to 2018, bit.ly/2vf1cJz. The U.S. Census Bureau further reported that North Carolina's statewide voter registration rates for the 2018 and 2016 elections were 69.3% and 74.6% of the citizen voting-age population, respectively. *Id.* Thus, these 36 counties are significant outliers, touting voter registration rates 20 to 30 percentage points higher than the national figures from 2018 and 2016, and 15 to 25 percentage points above the state figures for the same period. Discrepancies on this scale almost certainly cannot be attributed to above-average voter participation, but instead point to deficient list maintenance.

North Carolina's failure to provide accurate voter rolls violates federal law, jeopardizes the integrity of the upcoming 2020 federal election, and signals to voters that elections in North Carolina are not being properly safeguarded.

III. Avoiding Litigation

The NVRA includes a private right of action, empowering any "person who is aggrieved by a violation" of the statute to bring a civil action in federal district court for declaratory or injunctive relief. 52 U.S.C. § 20510(b)(1)-(2). If the violations we have identified are not corrected within 90 days of receipt of this letter, we will have no choice but to file a lawsuit. *See* 52 U.S.C. § 20510(b)(2).

We hope to avoid litigation and would welcome immediate efforts by your office to bring North Carolina into compliance with Section 8. We ask that you establish, if one has not already been initiated, a comprehensive and nondiscriminatory list maintenance program in compliance with federal law. Specifically, this program must identify and remove the following categories of individuals from the official lists of eligible voters:

1. All persons who are ineligible to vote by reason of a change in residence;
2. Deceased individuals;
3. Persons who are presently incarcerated;
4. All other ineligible voters.

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We also ask that you, and should they wish to respond separately, each named county, respond in writing within 45 days of the date of this letter. This response should fully describe the efforts, policies, and programs you are taking, or plan to undertake prior to the 2020 general election to bring North Carolina into compliance with Section 8. This response should also note when you plan to begin and complete each specified measure and the results of any programs or activities you have already undertaken. We also ask you to advise us what policies are presently in place, or will be put in place, to ensure effective and routine coordination of list maintenance activities with the federal, state, and local entities outlined below. Finally, we seek a description of the specific steps you intend to take to ensure routine and effective list maintenance on a continuing basis beyond the 2020 election. In order to avoid litigation, we may seek certain reasonable assurances that you will affirmatively undertake these efforts, including the execution of a settlement agreement.

Should you refuse to comply with Section 8 and thus necessitate legal action, you should be aware that the NVRA authorizes courts to award "reasonable attorney fees, including litigation expenses, and costs" to the prevailing party. 52 U.S.C. § 20510(c). Therefore, if litigation ensues, you risk bearing the financial burden of the full cost of the litigation.

IV. Preservation of Records

We further ask that you take steps to preserve certain records as required under the NVRA, should they be needed in the future or for possible litigation. 52 U.S.C. § 20507(i). These documents and records include, but are not limited to:

1. A copy of the most recent voter registration database for the state of North Carolina and for each named county, including pertinent information on each

voter (name, date of birth, home address, voter activity, and active or inactive status);

2. Internal communications and emails of the North Carolina State Board of Elections' office, applicable county boards of elections, and any divisions, bureaus, offices, third party agents, and contractors relating to voter list maintenance;
3. All emails or other communications between the North Carolina State Board of Elections and county elections officials concerning their list maintenance activities, their duties to maintain accurate and current lists, and any consequences arising from a failure to do so;
4. All email or other communications between the North Carolina State Board of Elections and any state or federal offices and agencies, in which the North Carolina State Board of Elections seeks or obtains information about registered voters who have moved, been convicted and imprisoned, died, or are otherwise ineligible, for use in list maintenance activities; and
5. All email or other communications between the North Carolina State Board of Elections and any other state, as well as email and communications with the Interstate Voter Registration Cross-Check Program, the Electronic Registration Information Center, the American Association of Motor Vehicle Authorities, and the National Association for Public Health Statistics and Information Systems, regarding obtaining information about voters who are deceased or who have moved for use in list maintenance activities.

We look forward to working with you in a productive fashion to ensure the accuracy and currency of North Carolina's voter rolls and to protect the integrity of its voting process. While we hope to avoid litigation, if we do not receive the requested response, and if North Carolina fails to take the necessary curative steps to resolve the issues identified in this letter, you will be subject to a lawsuit seeking declaratory and injunctive relief.

We look forward to your response.

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Sincerely,

/s/ William S. Consovoy

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