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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

FRANCIS DROUILLARD, et al., Plaintiffs, **v.** **LYNDA ROBERTS, et al.,** Defendants.	3:24-cv-06969-CRB **DEFENDANTS' JOINT OPPOSITION TO PLAINTIFFS' EX PARTE APPLICATION FOR TEMPORARY RESTRAINING ORDER** Date: November 4, 2024 Time: 10:00 a.m. Judge: Hon. Charles R. Breyer Action Filed: October 4, 2024

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INTRODUCTION AND SUMMARY OF ARGUMENT

Just days before the General Election, with voting already well underway, plaintiffs demand an extraordinary mandatory injunction to prevent defendants from counting mail-in ballots cast by some number of voters registered in Marin County. Plaintiffs' lawsuit is just one of many meritless, cookie-cutter "election integrity" lawsuits being filed across the nation seeking to undermine confidence in the results of the election before election day has even arrived.[1] Plaintiffs ask the court to interfere in Marin County's administration of the election based not on any actual violations of law or harm to them, but rather their allegations that a few hundred voters on Marin County's voter rolls are ineligible to vote because they have moved out of state, and that some of these allegedly ineligible voters might cast ballots in the November 5, 2024 election.

The court should deny plaintiffs' ex parte application for a TRO. ECF Nos. 10–12. ***First***, plaintiffs fail to show that they have Article III standing to seek a TRO. ***Second***, the injunction plaintiffs seek is barred by the National Voter Registration Act ("NVRA"), which—during the 90-day "quiet period" preceding an election—prohibits the sort of interference with the voter rolls that plaintiffs are seeking. *See* 52 U.S.C. § 20507(c)(2)(A). ***Third***, plaintiffs fail to demonstrate any prospect of success on the merits of their constitutional claims, their NVRA claim, or their Help America Vote Act ("HAVA") claim. The Ninth Circuit recently rejected constitutional challenges that are indistinguishable from the ones raised here. *Election Integrity Project California, Inc. v. Weber*, 113 F.4th 1072 (9th Cir. 2024) (hereinafter, "*EIPC*"). Plaintiffs' NVRA claim is foreclosed because the undisputed evidence shows defendants maintain the accuracy of Marin County's voter rolls by following the very procedures outlined in the NVRA's safe harbor provision (as codified in California law) for updating the records of voters who have changed their address. 52 U.S.C. § 20507(c)(1); Decl. of Lynda Roberts ("Roberts' Decl.").

[1] Just in the month of October, at least three district courts in Arizona, Nevada, and Michigan have all dismissed similar lawsuits. *See, e.g.*, *Strong Cmtys. Found. of Ariz. Inc. v. Stephen Richer*, No. 24-cv-02030-PHX-KML, 2024 WL 4475248 (D. Ariz. Oct. 11, 2024); *Republican Nat'l Comm. v. Benson*, No. 1:24-CV-262, 2024 WL 4539309 (W.D. Mich. Oct. 22, 2024); *Republican Nat'l Comm. v. Francisco Aguilar*, No. 2:24-cv-00518-CDS-MDC, 2024 WL 4529358 (D. Nev. Oct. 18, 2024). Groups, such as "United Sovereign Americans," have also brought numerous lawsuits across the country to cast doubt on election results. *See, e.g.*, *Md. Election Integrity, LLC v. Md. State Bd. of Elections*, No. 24-cv-00672-SAG, 2024 WL 2053773 (D. Md. May 8, 2024).

Plaintiffs' HAVA claim also fails as a matter of law because that statute does not grant a private right of action. And even if it did, the HAVA provision that plaintiffs cite—which sets maximum "error rate" technical specifications for *ballot counting machines*—has nothing to do with the accuracy of voter rolls or preventing supposedly ineligible voters from casting ballots. 52 U.S.C. § 21081(a)(5) (addressing "[t]he error rate of the voting system in counting ballots"). ***Finally***, the equities tip sharply against plaintiffs' requested TRO. The requested TRO would throw the Marin County Registrar's office into chaos *in the middle of* a presidential election. Absent compelling circumstances, federal courts refuse to intervene in the administration of an imminent election, and there is no reason to depart from that rule here.

BACKGROUND

This matter arises from plaintiffs' allegations that some voters registered in Marin County have moved out of the county or the state and are not eligible to vote there, but nonetheless cast ballots in the March 5, 2024 primary election and might do so again in the November 5, 2024 general election. ECF Nos. 11-5, 11-6. In August, plaintiffs conveyed these concerns to defendant Marin County Registrar of Voters ("ROV") Lynda Roberts, *id*., who examined plaintiffs' claims and responded that they are "inaccurate and misleading." ECF No. 11-7 at 1. The ROV explained that her office "continually processes changes to the registration database" using change-of-address data provided by the U.S. Postal Service, as required by state law, and that plaintiffs' reports are based on "outdated" information they obtained in December 2023, several months before the 2024 primary and nearly a year before the 2024 general election. *Id*. at 1–2. The ROV further explained that "[i]nformation about voters provided by third parties cannot alone trigger a change to a voter registration record," and that voters with out-of-state mailing addresses may still vote in California in several circumstances, such as being temporarily away for employment or business purposes, attending school, serving in the military, or temporarily living overseas. *Id*. On October 1, 2024, plaintiffs sent another letter to defendant Roberts disregarding her detailed explanation and reiterating their claims. ECF No. 11-8

Plaintiffs subsequently filed their complaint for declaratory and injunctive relief alleging that defendants Roberts and Dr. Shirley N. Weber, Ph.D., in her official capacity as the California

Secretary of State, had violated plaintiffs' rights under the Equal Protection Clause of the Fourteenth Amendment and violated the NVRA and HAVA. ECF No. 1 at ¶ 1, 5–7. Plaintiffs vaguely allege that "the actions of Defendants, including the failure to remove ineligible voters from registration rolls, allow illegal votes that dilute the votes of eligible voters, infringing Plaintiffs' rights to participate in a fair election." *Id.* 1 at ¶ 2. Ten days later, on October 14, 2024, plaintiffs filed the operative first amended complaint ("FAC"), which is largely the same as the original complaint, except that it adds allegations about the relief requested. ECF No. 9 at ¶ 11. *Ten days after that*, on October 24, 2024—less than two weeks before the November 5 General Election—plaintiffs filed the pending TRO application. ECF Nos. 10, 11, 12.

The crux of plaintiffs' TRO application, according to plaintiffs, is that some voters have allegedly moved outside of Marin County or outside of California, but remain on the Marin County voter rolls and could receive a vote-by-mail ballot and cast a vote. ECF No. 12-1. Based on random samples of voter roll data from various points in time, and "on information and belief," plaintiffs allege "there were 337 out-of-state and 1,162 out-of-county active registered voters on Marin County voter rolls." *Id.* at ¶ 19. And through a "canvassing effort," plaintiffs allege they "confirm[ed] that 140 of 337 out-of-state voters moved from the state." *Id.* at ¶ 20. Without any basis in law, plaintiffs contend that, "if only a small fraction of ineligible voters cast ballots in the [general election], then excessive ballot errors will occur that render the election results unreliable." *Id.* at ¶ 24.

Based on these allegations, plaintiffs assert three claims in the FAC: (1) violation of the Fourteenth Amendment (Equal Protection); (2) violation of the NVRA's requirement that states maintain a reasonable program to maintain the accuracy of voters rolls, under 52 U.S.C. § 20507(a)(4), (b); and (3) violation of HAVA's provision setting a permissible "error rate" for voting systems, under 52 U.S.C. § 21081(a)(5). ECF No. 9 at ¶¶ 12–20. In their TRO application, plaintiffs introduce two new claims for alleged violations of plaintiffs' right to substantive and procedural due process that do not appear in the FAC. ECF No. 12-1 at ¶¶ 29–33.

As relief, plaintiffs ask the court to compel defendants to "sequester" ballots returned by "ineligible voters" and enjoin defendants from counting those ballots in the General Election.

ECF Nos. 12 at 2; 10-4 (proposed order). They further request that the court require defendants to provide three daily "AVMR 130 – Cumulative Ballots Returned by Party & Return Status" reports, to plaintiffs and the court, during ballot processing. ECF No. 12 at 2.

Defendant Roberts has explained in her declaration in opposition to the TRO application that the requested relief, if granted, would "severely disrupt" her office's ability to process ballots received after entry of the order, and could make it impossible for her office to complete the counting and certification of the vote by the December 3, 2024 deadline. Roberts Decl. at ¶ 12.

LEGAL STANDARD

A temporary restraining order is "an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion." *Lopez v. Brewer*, 680 F.3d 1068, 1072 (9th Cir. 2012) (cleaned up); *accord Winter v. Natural Res. Def. Council, Inc.*, 555 U.S. 7, 22 (2008). The party seeking a TRO must establish: (1) a likelihood of success on the merits; (2) a likelihood of irreparable harm absent preliminary relief; (3) that the balance of equities tips in the plaintiff's favor; and (4) that an injunction is in the public interest. *See Winter*, 555 U.S. at 20. In the alternative, the moving party must demonstrate that "serious questions going to the merits were raised," that "the balance of hardships tips sharply in the [petitioner's] favor," and that the other two *Winter* elements are satisfied. *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134–35 (9th Cir. 2011) (quotation omitted). A plaintiff seeking a "mandatory," rather than "prohibitory," injunction must clear an even higher threshold. *Hennessy-Waller v. Snyder*, 529 F. Supp. 3d 1031, 1036–37 (D. Ariz. 2021), *aff'd sub nom. Doe v. Snyder*, 28 F.4th 103 (9th Cir. 2022). Because mandatory injunctions go "well beyond simply maintaining the status quo," they are "particularly disfavored" and are generally "not granted unless extreme or very serious damage will result and are not issued in doubtful cases[.]" *Marlyn Nutraceuticals, Inc. v. Mucos Pharma GmbH & Co.*, 571 F.3d 873, 879 (9th Cir. 2009).

ARGUMENT

I. PLAINTIFFS LACK ARTICLE III STANDING.

As a threshold issue, plaintiffs lack Article III standing. Specifically, they have no injury in fact and fail to show their claimed injuries are redressable by the court. The TRO application should be denied on that basis alone.

A. Plaintiffs have not suffered a particularized injury.

Standing requires that the litigant "seek relief for an injury that affects him in a 'personal and individual way.'" *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013). In other words, the litigant "must possess a 'direct stake in the outcome' of the case." *Id.* (citation omitted). "A litigant raising only a generally available grievance about government—claiming only harm to his and every citizen's interest in proper application of the Constitution and laws, and seeking relief that no more directly and tangibly benefits him than it does the public at large—does not state an Article III case or controversy." *Id.* at 706 (cleaned up). These principles apply in election cases, like this one, where the Supreme Court has "long recognized that a person's right to vote is 'individual and personal in nature'" and only "voters who allege facts showing disadvantage to themselves as individuals have standing to sue to remedy that disadvantage." *Gill v. Whitford*, 585 U.S. 48, 65–66 (2018) (cuations omitted).

Here, plaintiffs have no "direct stake" in the outcome of this action sufficient to support Article III standing. To start, plaintiffs have not even alleged that they are registered voters in Marin County, that they have voted in any prior election, or that they intend to vote in the upcoming election. *See Gill*, 585 U.S. at 65–66 ("To the extent the plaintiffs' alleged harm is the dilution of their votes, that injury is district specific."). More fundamentally, plaintiffs' alleged injury is a generalized grievance that is not unique to plaintiffs. Plaintiffs allege that Marin County's voter rolls include some "ineligible" voters, that some of them might vote, and that would "dilute[e] legally cast votes and diminish[] election reliability." ECF No. 9 at ¶ 8. The Ninth Circuit has recently rejected this same theory of standing. In *EIPC*, the Ninth Circuit affirmed the dismissal of an identical vote dilution claim brought under the Equal Protection Clause, and held that "whether evaluated in the context of Article III or on the merits, the relevant

principle is the same: the mere fact that some invalid ballots have been inadvertently counted, without more, does not suffice to show a distinct harm to any group of voters over any other." 113 F.4th at 1089 n.13. Indeed, courts of appeal and district courts across the nation have come to the same conclusion that a generalized vote dilution theory like plaintiffs' is insufficient to establish Article III standing. *See id.* ("To our knowledge, every court to have considered a "vote dilution" claim [like plaintiffs'] has rejected the claim"); *Wood v. Raffensperger*, 981 F.3d 1307, 1314–15 (11th Cir. 2020) ("Vote dilution in this context is a paradigmatic generalized grievance that cannot support standing."); *Bost v. Illinois State Bd. of Elections*, 114 F.4th 634, 640 (7th Cir. 2024); *Strong Cmtys. Found. of Arizona*, 2024 WL 4475248, at *8 (D. Ariz. Oct. 11, 2024); *Aguilar*, 2024 WL 4529358, at *3–4; *Md. Election Integrity*, 2024 WL 2053773, at *1, 4; *Benson*, 2024 WL 4539309, at *9. This court should follow controlling Ninth Circuit precedent and deny plaintiffs' request for a TRO for lack of standing.

B. Plaintiffs' claimed injuries cannot be redressed by the proposed TRO.

In order to establish Article III standing, a plaintiff must also show that their injury is likely to be redressed by a favorable judicial decision. Even assuming plaintiffs could show they have suffered an injury (which they cannot), the relief they request from the court cannot redress that injury—therefore, they fail to meet the redressability element of standing as well.

Because plaintiffs waited months to file their complaint, and then another three weeks to file this TRO application, the hearing is set for the day before the General Election. By then, Marin County's ROV will have already opened and processed many mail-in ballots—that process began before this application was filed. Roberts Decl. at ¶¶ 9–11; *see also id.* at ¶¶ 8–12. As plaintiffs concede, once mail-in ballots are "removed from their return envelopes" the voter "cannot be identified." ECF No. 12-1 at ¶ 5. And for that reason, it is too late for the court to issue an order redressing plaintiffs' claimed injuries; the ROV could not sequester all ballots submitted by allegedly ineligible voters who moved out of state, because ballots that have already been opened and removed from the envelope cannot be tied back to individual voters. Roberts Decl. at ¶¶ 9–11. Thus, as a consequence of plaintiffs' decision to file a TRO on the eve of the election, plaintiffs' injury is not redressable, and plaintiffs lack standing to bring this request.

II. THE RELIEF PLAINTIFFS SEEK IS TIME-BARRED UNDER THE NVRA.

Even assuming plaintiffs have standing, which they do not, the relief they seek is barred by the NVRA. The NVRA strictly prohibits systematic cancellation of voters' registration within 90 days of a federal election. 52 U.S.C. § 20507(c)(2)(A). This is because "systematic cancellation programs can cause inaccurate removal and eligible voters removed days or weeks before Election Day will likely not be able to correct the State's errors in time to vote." *Mi Familia Vota v. Fontes*, 691 F. Supp. 3d 1077, 1093 (D. Ariz. 2023) (cleaned up). Here, the 90-day "quiet period" began on August 7, 2024—more than two months before plaintiffs filed their last-minute TRO application—and prohibits exactly the kind of relief plaintiffs are requesting.

Specifically, in the 90-day quiet period, the NVRA precludes any effort to remove "batches of registrations based on a set procedure." *Mi Familia Vota*, 691 F. Supp. at 1092 n.8 (citing *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1344 (11th Cir. 2014)). Indeed, the Department of Justice recently issued guidance explaining that the NVRA's 90-day quiet period "applies to list maintenance programs based on third-party challenges derived from any large, computerized data matching process." *Voter Registration List Maintenance: Guidance under Section 8 of the National Voter Registration Act, 52 U.S.C. § 20507*, U.S. Department of Justice (Sept. 2024), at 4.[2] Plaintiffs' suit is just that—a third-party challenge to voter eligibility based on a computerized data matching process. *See* ECF Nos. 11 at ¶ 11; 11-7 (defendant Roberts explaining that the 2023 dataset plaintiffs are relying on is "outdated"). Plaintiffs' TRO application would also require the Marin County ROV to systematically cross-check every mail-in ballot submitted by active, registered voters against a list of supposedly "ineligible" voters generated by plaintiffs. And finally, plaintiffs' request for a TRO compelling defendants to "sequester" and ***not count*** ballots cast by voters on plaintiffs' list would have precisely the same effect as removing those voters from the voter rolls: it would prevent them from voting. *See* ECF No. 12 at 2. Plaintiffs' requested injunction thus falls within the NVRA's "quiet period" prohibition, and as such, would force defendants to violate federal law. The court should deny plaintiffs' TRO application on this basis as well.

[2] Available at https://www.justice.gov/crt/media/1366561/dl.

III. EVEN IF PLAINTIFFS HAD STANDING, AND THEY DO NOT, PLAINTIFFS ARE UNLIKELY TO SUCCEED ON THE MERITS.

Plaintiffs also fail to show a likelihood of success on the merits of any of their three claims. Therefore, the court should deny plaintiffs' TRO application and need not consider the remaining elements under *Winter*. *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015).

A. Plaintiffs do not allege disparate treatment of votes, nor any widespread disenfranchisement that would constitute a constitutional claim.

Plaintiffs allege that counting votes cast by allegedly "ineligible" voters would violate their constitutional rights to equal protection and substantive and procedural due process,[3] by diluting the votes of eligible voters and causing "errors" in the vote count. ECF Nos. 9 at ¶ 2; 12-1 at ¶¶ 30, 33 (alleging that election results "may contain well beyond 10,000 errors"). The Ninth Circuit recently rejected both of these theories in *EIPC*.

First, vote dilution that does not disproportionately affect any particular group of voters is not a basis for an equal protection or due process claim. *See EIPC*, 113 F.4th at 1082, 1087. In *EIPC*, the Ninth Circuit considered and rejected arguments—the exact same arguments made here—that California "officials have mistakenly counted invalid mail-in ballots, uniquely 'diluting' the voting power of those who choose to cast their ballots in person or who vote in certain counties." *Id.* at 1085. The Ninth Circuit held that plaintiffs failed to state an equal protection claim on this basis, because no votes were disproportionately weighted over others; rather, all voters would be affected in precisely the same manner. *See id.* at 1087. The Ninth Circuit further noted that "[t]o our knowledge, every court to have considered a 'vote dilution' claim analogous to the one raised by [the plaintiff] in this case has rejected the claim." *Id.* at 1089 n.13 (collecting authority). ***Second***, plaintiffs' substantive due process claim cannot succeed, because plaintiffs do not, and cannot, allege anything more than "garden variety irregularities" in election administration. "'It is hornbook law,' . . . that a showing of mere 'garden variety election irregularities' is insufficient to state a due process violation. . . . Garden

[3] Plaintiffs do not assert a substantive or procedural due process claim in the FAC and the failure to do so means it cannot be a basis for relief. *See* Fed. R. Civ. P. 8(a)(2); *Jones v. Pollard*, No. 21-cv-162-GPC-BGS, 2023 WL 4728802, at *2 n.4 (S.D. Cal. July 24, 2023) (declining to address claim that "was not raised in [plaintiff's] complaint") (collecting authorities).

variety irregularities have historically included . . . ***the counting of some votes that were illegally cast***. . . ." *EIPC*, 113 F.4th at 1096 (emphasis added). In order to succeed on a substantive Due Process claim, plaintiffs must plausibly allege that defendants have caused "massive disenfranchisement," or a "complete lack of integrity" in the election. *Id.* at 1096-97. Plaintiffs have not even come close.

As an initial matter, plaintiffs' allegations presume in error that every voter who has changed their address is ineligible to vote in Marin County. *See* ECF No. 12-1 at ¶¶ 10, 16. To be clear, a change of address outside of Marin County, without more, does *not* mean a voter is necessarily ineligible to vote in Marin County. A voter may vote where they reside, and a voter does not necessarily lose their residency (and thus ability to vote) if they move to another state. Cal. Elec. Code §§ 2000(a), 2021(a), 2025. Indeed, the California Elections Code allows voters to change mailing addresses temporarily but maintain the same domicile for purposes of voting, to allow, for example, college students and overseas members of the military to vote in their hometown elections while they are temporarily living elsewhere. *See id.* §§ 2021(a), 2025, 2033; *see also* ECF No. 11-7 at 2. Plaintiffs' overblown allegations about "994" "ineligible" voters receiving mail-in ballots and voting on November 5th are based on a misunderstanding of the law and, at best, "establish nothing more than the *potential* for irregularity," which is insufficient to state a constitutional claim. *EIPC*, 113 F.4th at 1097.

Even if plaintiffs were able to show, conclusively, that the voters in question have permanently relocated out of state—and they have come nowhere close to doing so—plaintiffs' allegations still fall well short of the "massive disenfranchisement" necessary to state a substantive due process claim. For example, in *EIPC*, the plaintiff "allege[d] that thousands of ineligible registrants have incorrectly remained on the voter rolls, thousands of [vote by mail] ballots have been mailed to incorrect addresses or to individuals who were likely ineligible to vote, and tens of thousands of duplicate vote-by-mail ballots have been mailed to registered voters. . . ." 113 F.4th at 1097. The court found that, although "[t]hese allegations undoubtedly describe purported errors in the administration of California's elections," there is no "plausible connection between these errors and any 'massive disenfranchisement' of voters or 'pervasive'

counting of invalid ballots." *Id.* at 1098 (citation omitted). So too here. Plaintiffs state in conclusory fashion that the election is "fundamentally unfair," but provide no support other than their allegations that some ineligible voters may vote. ECF No. 12-1 at ¶ 29. Under controlling Ninth Circuit law, this is insufficient to state a substantive due process claim, let alone establish that plaintiffs are likely to succeed on the merits of their claim.

Third, and finally, plaintiffs' half-hearted procedural due process claim, which is not even alleged in their FAC, is also unlikely to succeed. To state a procedural due process claim challenging a state's election procedures, as plaintiffs attempt here, a plaintiff must show that "the nature and extent of the alleged burden on the right to vote" outweighs the State's interest in "maintaining its chosen system of election administration." *EIPC*, 113 F.4th at 1083. The only "burden" alleged here is that, absent judicial intervention, plaintiffs' votes will be "diluted" without adequate process. ECF No. 12-1 at ¶ 33. This fails as a matter of law because the Ninth Circuit held the "dilution" of votes resulting from the counting of ineligible votes "is no burden at all" on the right to vote. *EIPC*, 113 F.4th at 1089.

B. Defendants have complied with the NVRA's safe harbor provision, and plaintiffs do not allege anything to the contrary.

In the pending TRO application, plaintiffs assert that defendants have not "made a reasonable effort" to maintain the voter rolls in Marin County. ECF Nos. 12-1 at ¶¶ 34–35; 9 at ¶¶ 15–17. But plaintiffs fundamentally misunderstand what the NVRA requires and, consequently, fail to plausibly allege that defendants have not complied with the NVRA. In fact, defendants have dutifully implemented the NVRA and complied with its safe harbor provision set forth in 52 U.S.C. § 20507(c)(1). *See Bellitto v. Snipes*, 935 F.3d 1192, 1203–05 (11th Cir. 2019) (discussing safe harbor provision).

The NVRA requires states to conduct a general program that makes a reasonable effort to remove the names of voters who have become ineligible on account of death or change of address." *Bellitto*, 935 F.3d at 1199; 52 U.S.C. § 20507(a)(4). The NVRA further dictates precisely *how* states can conduct such a reasonable program, in its "safe harbor" procedure in 52 U.S.C. § 20507(c)(1). That procedure allows states to use change-of-address information

supplied by the United States Postal Service through its National Change of Address program (NCOA) to identify registrants who may have changed residences. *Id.* If NCOA data indicates that a voter has left the registrar's jurisdiction, the registrar must send the voter a specific notice on which the voter can state their current address and which states how the voter can continue to be eligible to vote. *Id.* § 20507(c)(1)(B) (ii), (d)(2). The registrar must then correct its voter rolls based on the information contained in response to the notice provided. *Id.* § 20507(d)(3). Only if the registrant does not respond to the notice and does not appear to vote *in the next two federal general elections* can the registrar *remove* the registrant's name.[4] *Id.* § 20507(d)(1)(B). Thus, the federally mandated process for determining whether a registrant who has moved out of state has become ineligible to vote as a result of their changed address can, and in many cases does, take more than four years to complete.

California law implements the NVRA's safe harbor approach. The Secretary of State obtains NCOA data from the California Employment Development Department and forwards the information to county elections officials through a statewide voter registration system known as "Vote Cal." Cal. Elec. Code. § 2222. Upon receiving NCOA data indicating a voter has moved out-of-state, a forwardable notice that follows the NVRA's requirements is sent to the voter so that they can verify or correct their address information. *Id.* § 2225(a)(2), (c). California elections officials also place the registration records of voters whose residence cannot be confirmed on "inactive" status, meaning they do not receive election materials in the mail, including a mail-in ballot, but are still allowed to vote. *Id.* §§ 2225(f); 2226(a)(2), (c). Election officials then cancel those voter registrations when all relevant NVRA requirements are satisfied. *Id.* § 2226(b).

Defendants follow these procedures whenever NCOA change of address data is updated in Vote Cal. Roberts Decl. at ¶ 3. The Vote Cal system sends periodic alerts to the Marin County

[4] A registrant can also confirm in writing that they have changed their residence to a place outside the registrant's jurisdiction. 52 U.S.C. § 20507(d)(1)(A); Roberts Decl. at ¶ 7. However, the DOJ's NVRA guidance explicitly provides that "[a] third-party submission—such . . . as a challenge based solely on public database information—is not confirmation by the registrant of a change of address" and thus is not a basis for canceling a voter's registration. Voter Registration List Maintenance: Guidance under Section 8 of the National Voter Registration Act, 52 U.S.C. § 20507, U.S. Department of Justice (Sept. 2024), at 4.

Registrar of Voters ("ROV"), and the ROV makes changes in response to that data. *Id.* The actions taken in response to change of address data depend on whether the registered voter has moved within Marin County, to another county within California, or has moved out of state or otherwise has a non-forwardable address. *Id.* at ¶ 3–7. Of particular relevance here, if NCOA data indicates the voter has moved to a new address outside of California or if there is no forwarding address, the Marin ROV sends a forwardable address confirmation mailing that complies with the requirements of 52 U.S.C. § 20507(d)(2) and updates the voter's record to inactive. Roberts Decl. at ¶ 6. An inactive voter is not mailed any election materials, including a vote by mail ballot. *Id.* If the voter does not respond to the notice or does not vote in any election within the next two federal general election cycles following the mailing of the notice, then Marin ROV cancels the voter's registration record as required by California law. *Id.*

In sum, defendants follow the procedures required by state law and the NVRA's safe harbor provision. Plaintiffs have not alleged otherwise, let alone supported their conclusory allegations with *evidence* sufficient to obtain their TRO application on the eve of the election. And indeed, the very relief plaintiffs ask this court to impose would require defendants to disregard the NVRA's express safeguards and procedures for determining eligibility for removal from the voting rolls following out-of-state moves in favor of plaintiffs' own homegrown assessment of voter eligibility, which the ROV has explained is misleading and based on outdated information. ECF No. 11-7. A TRO premised on alleged violations of the NVRA is therefore not only unwarranted but also would almost certainly itself violate the NVRA.

C. There is no private right of action to enforce HAVA.

Plaintiffs cannot prevail on the merits of their final claim—that defendants are in violation of HAVA—because "HAVA does not create a private right of action in federal court." *Oels v. Dunleavy*, No. 3:23-cv-00006-SLG, 2023 WL 3948289, at *2–3 & n.16 (D. Alaska June 12, 2023) (granting a motion to dismiss *pro se* plaintiffs' HAVA claim); *Bellitto*, 935 F.3d at 1202 (concluding that "HAVA creates no private cause of action") (citing 52 U.S.C. §§ 21111, 21112); *Am. Civil Rights Union v. Philadelphia City Commissioners*, 872 F.3d 175, 181 (3d Cir. 2017) (same); *see also Brunner v. Ohio Republican Party*, 555 U.S. 5, 5–6 (2008) (vacating TRO

requiring Ohio's Secretary of State to update its voter registration database to comply with § 303 of HAVA because the respondents "are not sufficiently likely to prevail on the question whether Congress has authorized the District Court to enforce § 303 in an action brought by a private litigant to justify the issuance of a TRO").

In any event, plaintiffs deliberately misinterpret the provision of HAVA that they contend defendants have violated. ECF No. 12-1 at ¶ 36; 9 at ¶ 23. HAVA provides that:

> ***[t]he error rate of the voting system in counting ballots*** (determined by taking into account only those errors which are attributable to the voting system and not attributable to an act of the voter) shall comply with the error rate standards established under section 3.2.1 of the voting systems standards issued by the Federal Election Commission which are in effect on October 29, 2002.

52 U.S.C. § 21081(a)(5) (emphasis added). Plaintiffs equate "voting systems"—i.e., the hardware and software used to count ballots—with the entire administration of an election. Plaintiffs are wildly off-base. HAVA defines "voting system" as "the total combination of mechanical, electromechanical, or electronic ***equipment*** (including the software, firmware, and documentation required to program, control, and support the equipment)" and "the practices and associated documentation used" for the equipment. 52 U.S.C. § 21081(b) (emphasis added). The Federal Election Commission's voting system standards similarly only apply to equipment such as, "[b]allot printers," "[b]allot cards and sheets," "[b]allot displays," "[v]oting booths and enclosures," "[v]oting devices," and the like. *Voting system Standards Volume 1: Performance Standards*, Federal Election Commission (April 2002) at §§ 3.1, 3.2.1.[5] In other words, the HAVA provision plaintiffs allege will be violated has nothing to do with the maintenance of voter rolls, and counting mail-in ballots cast by supposedly ineligible voters is not the kind of counting "error" governed by HAVA. Plaintiffs cannot show their HAVA claim is likely to succeed.

IV. THE EQUITIES TIP SHARPLY AGAINST PLAINTIFFS' REQUESTED TRO.

Even if plaintiffs could show a likelihood of success, the TRO should still be denied because they fail to make a clear showing that they are likely "to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in [their] favor, [or] that an

[5] Available at: https://www.eac.gov/sites/default/files/eac_assets/1/28/Voting_System_Standards_Volume_I.pdf.

injunction is in the public interest." *Winter*, 555 U.S. at 20. In fact, plaintiffs have not clearly shown they will suffer *any* harm—much less the "extreme" harm necessary for a mandatory injunction. *Marlyn Nutraceuticals*, 571 F.3d at 879. In contrast, defendants and the public *will* suffer if the court issues a temporary restraining order.[6]

A. Plaintiffs have not shown that they will suffer irreparable harm.

Plaintiffs' claim of irreparable harm merely regurgitates their deficient standing arguments. ECF No. 12-1 at ¶¶ 26, 39. Plaintiffs identify no restrictions or burdens on their right to vote, and they may cast their ballots in accordance with the law, notwithstanding their efforts to deprive others of the same right. Their concern is merely a speculative one—that purportedly ineligible voters might cast ballots in the upcoming general election. In other words, plaintiffs' right to vote and to have their votes counted is *not* at stake here—consequently, they face no risk of irreparable harm. *Cf. Marchant v. N.Y.C. Bd. of Elections*, 815 F. Supp. 2d 568, 578 (E.D.N.Y. 2011) (finding no irreparable harm where right to vote was not actually at stake).

Plaintiffs inexplicable delay in filing this request for a TRO—***just days*** before the November 5 election, and several months after they first brought their concerns to the Marin County ROV—also weighs heavily against granting relief. *See Benisek v. Lamone*, 585 U.S. 155, 159 (2018) (noting that "a party requesting a preliminary injunction must generally show reasonable diligence . . . in election law cases as elsewhere"). Plaintiffs admit they have been aware of these "issues" since at least March 5, 2024, when the primary election occurred. ECF Nos. 11 at ¶¶ 5–7; 11-2; 12-1 at ¶ 2. Yet they did not bring their concerns to the Marin County ROV until August 1, 2024 (ECF 11 at ¶ 17) and did not file suit until the election was only weeks away. Then, plaintiffs waited almost ***three weeks*** more before filing this "emergency" TRO application. Meanwhile, voting has already begun in Marin County. *See* Roberts Decl. at ¶¶ 8–11. Plaintiffs offer no excuse for their lengthy delay, which seriously undercuts their request for extraordinary relief. By significantly delaying, plaintiffs have put the court in the position of directly interfering with the administration of an ongoing election, something that courts have

[6] The balance of harms and the public interest "merge where a government agency is a party." *Assurance Wireless USA v. Reynolds*, 100 F.4th 1024, 1031 (9th Cir. 2024).

repeatedly held is an extraordinary step that should only be taken in the most compelling of circumstances. *See Short v. Brown*, 893 F.3d 671, 676 (9th Cir. 2018); *Strong Cmtys. Found. of Arizona*, 2024 WL 4475248, at *11–12 (explaining that "[e]ven if plaintiffs had standing, their injunction request would be denied because they waited too long before seeking relief" and did so shortly before an election).

B. The balance of the equities and the public interest tip sharply against issuing the requested TRO.

As noted above, federal courts have repeatedly recognized that the public interest is not served by a mandatory injunction interfering with a state's administration of an imminent election. *See Ariz. Democratic Party v. Hobbs*, 976 F.3d 1081, 1086 (9th Cir. 2020); *see also Shelley*, 344 F.3d at 919 (The law "recognizes that election cases are different from ordinary injunction cases[,]" and that "[i]nterference with impending elections is extraordinary[.]"). This caution stems from the fact that "state and local election officials need substantial time to plan for elections[,]" and that "[r]unning elections state-wide is extraordinarily complicated and difficult." *Merrill v. Milligan*, 142 S. Ct. 879, 880 (2022) (granting stay) (Kavanaugh, J., concurring). Here, plaintiffs fail utterly to explain how the public interest would be served by the extraordinary injunction they seek. To the contrary, interfering with the ROV's processing of ballots, as plaintiffs demand, would only sow chaos and confusion while the presidential election is already well underway and *prevent timely certification of the election* in Marin County. Roberts Decl. at ¶ 12. The public interest demands that Marin County elections officials be permitted to continue to do their job and administer this election in accordance with federal and California law. Plaintiffs' extraordinary, last-minute demand that the court effectively take over the ROV's role and decide who is eligible to vote in Marin County, and who is not—based on outdated, fragmentary information provided by the plaintiffs, without notice to or input from the affected voters—should be squarely rejected.

CONCLUSION

For the foregoing reasons, the Court should deny plaintiffs ex parte application for a temporary restraining order.

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Respectfully submitted,

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