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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' AMENDED MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT AND TO STAY DISCOVERY; MEMORANDUM OF POINTS & AUTHORITIES** Date: January 24, 2025 Time: 10:00 a.m. Dept: 6 Judge: The Honorable Charles R. Breyer Trial Date: Not set. Action Filed: October 4, 2024

PLEASE TAKE NOTICE that on January 24, 2025, at 10:00 a.m., or as soon thereafter as the matter may be heard before the Honorable Charles R. Breyer in Courtroom 6 of the San Francisco Courthouse, 450 Golden Gate Ave., San Francisco, California 94102, the Court will hear this motion to dismiss plaintiffs' first amended complaint for declaratory and injunctive relief ("FAC") and to stay discovery in this case unless and until plaintiffs' complaint has survived dismissal, filed by defendant Shirley Weber, Ph.D., in her official capacity as California Secretary of State, and defendant Lynda Roberts, in her official capacity as the Marin County Registrar of Voters ("defendants").

Defendants move to dismiss the FAC under Federal Rule of Civil Procedure 12(b)(1) on the ground that the court lacks subject-matter jurisdiction because plaintiffs do not and cannot demonstrate standing.

Defendants also move to dismiss the FAC under Federal Rule of Civil Procedure 12(b)(6) on the grounds that:

- Plaintiffs' first cause of action for violation of the Fourteenth Amendment (Equal Protection) fails to state a legally cognizable claim for relief.
- Plaintiffs' second cause of action for violation of the National Voter Registration Act (NVRA) fails to state a legally cognizable claim for relief because plaintiffs do not allege facts sufficient to establish a plausible claim for relief.
- Plaintiffs' third cause of action for violation of the Help America Vote Act (HAVA) fails to state a legally cognizable claim for relief because HAVA does not have a private right of action and, in any event, plaintiffs do not and cannot allege facts sufficient to state a violation of HAVA.

Finally, defendants move to stay discovery, including the requirements of Rule 26(a) and (f), and to take the January 24, 2025, Case Management Conference off calendar, unless and until plaintiffs' complaint has survived defendants' motion(s) to dismiss.

This motion is based on this filing, the memorandum of points and authorities in support of this motion, the papers and pleadings on file in this action, and such matters as may be presented to the court at the time of the hearing.

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INTRODUCTION & SUMMARY OF ARGUMENT

Plaintiffs, seven *pro se* individuals, brought this case on the eve of the November 5, 2024 General Election, seeking a temporary restraining order to prevent the Marin County Registrar of Voters from counting ballots cast by voters who, according to plaintiffs, had a mailing address outside of Marin County and were ineligible to vote. The court denied that request, holding that plaintiffs lack Article III standing and that each of the claims in plaintiffs' "sparse" first amended complaint ("FAC") was unlikely to succeed. *See* ECF No. 31 ("TRO Order") at 2. Plaintiffs' complaint has not changed since that order.

Defendants now move to dismiss the FAC without leave to amend, because plaintiffs lack Article III standing, and the court therefore lacks jurisdiction over this case. *See* TRO Order at 7–8. But even if plaintiffs could satisfy Article III, their bare-bones complaint still would not survive dismissal, because, as the court recognized, plaintiffs have not sufficiently alleged a violation of any law. *See id.* at 10–22. ***First***, as both this court and the Ninth Circuit have recognized, "alleging that their votes were diluted because of the inclusion of ineligible voters on the voting rolls is not enough" to state an Equal Protection claim, nor any other Fourteenth Amendment claim. *See id.* at 11 (citing *Election Integrity Project California, Inc.*, 113 F.4th 1072, 1095–96 (9th 2024)). ***Second***, plaintiffs' claim under the National Voter Registration Act ("NVRA") cannot survive, because plaintiffs do not allege any specific facts suggesting that defendants lack a "general program" that makes a "reasonable effort" to maintain the accuracy and currency of the voter rolls, as the NVRA requires. In fact, as the court acknowledged in its TRO order, plaintiffs do not allege specific facts showing that *any* ineligible voters remain on Marin County's voter rolls. TRO Order at 13. ***Finally***, Plaintiffs cannot state a claim under the Help America Vote Act ("HAVA"), because "HAVA does not create a private right of action", and plaintiffs' allegation that some number of registered voters have moved out of the county and are ineligible to vote in Marin has nothing to do with HAVA's error-rate limits for ballot-counting machines. *See* TRO Order at 21–22 ("Plaintiffs' interpretation of 52 U.S.C.

§ 21081(a)(5) as applying to voter rolls, or ballots cast by ineligible voters, has no basis in the statute.").

The arguments in this motion are not new. This court already recognized these fatal flaws in plaintiffs' complaint, in its 25-page TRO order. Yet, plaintiffs made no attempt to amend their complaint after that order. Plaintiffs apparently recognize, correctly, that amendment would be futile. They have not suffered a particularized injury, and even if they could allege standing, their allegations about voters moving out of state do not amount to an equal protection violation, an NVRA violation, or a HAVA violation. The court should therefore dismiss the complaint without leave to amend. And, until the court has determined whether plaintiffs have standing and can state any claims, discovery should be stayed, defendants should be relieved from the requirements of Rule 26(a)(1)(A) and Rule 26(f), and the January 24, 2025, Case Management Conference ("CMC") should be vacated.

BACKGROUND

On October 4, 2024, plaintiffs filed a complaint for declaratory and injunctive relief against defendants California Secretary of State Shirley N. Weber, Ph.D., and Marin County Registrar of Voters Lynda Roberts. ECF No. 1 ("Compl."). Plaintiffs alleged 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," which, according to plaintiffs, constitutes a violation of plaintiffs' equal protection rights, the NVRA, and HAVA. *See* Compl. ¶ 2. Ten days later, plaintiffs amended their complaint and clarified that they seek an injunction requiring defendants to "exclude ballots returned by ineligible voters from the count in the November 5, 2024, general election" and to comply with the NVRA. ECF No. 9 ("FAC") ¶ 11.

On October 24, 2024, less than two weeks before the 2024 General Election, and after voting had already commenced, plaintiffs filed an ex parte application for a temporary restraining order, based on the claims in their FAC, as well as two new, unalleged theories that plaintiffs' substantive and due process rights were at risk. ECF No. 12-1 ("TRO Mem.") at 6–9. In their TRO request, plaintiffs revealed that an organization called Patriot Force CA had used the

National Change of Address Database and Marin County voter roll information from December 2023 to identify 994 registered voters in Marin County with mailing addresses outside of Marin County. *Id.* ¶¶ 3, 8. Working together with Patriot Force CA, four of the named plaintiffs then collected declarations from people at the registered voters' Marin County addresses in an attempt to show that they had moved out of the jurisdiction and were no longer eligible to vote. *See id.* ¶¶ 9, 20. Based on this "canvassing effort," and on "information and belief", plaintiffs alleged that 131 voters had moved out of the state.[1] *Id.* ¶¶ 19–21. Plaintiffs alleged that 89 of those voters were still on the voter rolls as of September 2024. *Id.* ¶ 21. Inexplicably, plaintiffs also alleged that they expected 142 ineligible voters to cast ballots in the 2024 General Election. *Id.* ¶ 3. On this basis, plaintiffs asked the court for an emergency injunction requiring defendants to intercept, "sequester," and not count "ballots returned by ineligible voters." ECF No. 12 ("TRO Mot.") ¶ 2. After hearing oral argument on November 4, 2024, this court denied plaintiffs' request for a TRO, holding that plaintiffs lack Article III standing and each claim was fundamentally flawed such that none were likely to succeed on the merits. *See* TRO Order.

The parties subsequently stipulated to extend defendants' deadline to respond to the FAC, because plaintiffs were considering amending their complaint a second time. ECF No. 32. But rather than amending a second time to address the defects identified by the court, plaintiffs instead emailed defendants and offered to dismiss their claims if defendants responded to interrogatories and document requests that were attached, for the first time, to that email. *See* ECF No. 33-2 (Ex. B to Pls.' Not. of Discovery Dispute) at 1 (November 25, 2024 email from Drouillard to Buxton) ("We propose voluntarily dismissing without prejudice on the condition that Defendants answer our Interrogatories and produce the requested documents."). Defendants declined the settlement offer. *Id.* (November 25, 2025 email from Buxton to Drouillard). Two days later, plaintiffs filed a Notice of Discovery Dispute, which this court referred to the Magistrate Judge and is still pending. *See* ECF Nos. 33–35. To date, the parties have not had a Rule 26(f) conference, so neither party may properly serve discovery yet. *See* Fed. R. Civ. P.

[1] Plaintiffs' alleged number of out-of-state voters is not consistent throughout their papers. Elsewhere, for example, they state that 140 voters were "confirmed" to have moved out of state. TRO Mem. ¶¶ 13, 20.

26(d)(1) ("A party may not seek discovery from any source before the parties have conferred as required by Rule 26(f)[.]").

On December 9, 2024, Mr. Drouillard requested to meet and confer with defendants regarding the "discovery dispute," pursuant to Magistrate Judge Kang's standing order. *See* Buxton Decl. ¶ 3. Counsel for Defendant Weber met and conferred with Mr. Drouillard and Mr. Turnacliff on December 18, 2024. *See id*. Just prior to that meeting, Mr. Drouillard sent defendants' counsel an unsolicited proposed discovery plan, which proposed a December 20, 2024 deadline for initial disclosures. *Id.* ¶ 2. Counsel for Defendant Weber objected to the discovery plan, and proposed that the parties have a Rule 26(f) conference, discuss a discovery plan, and exchange Rule 26(a) disclosures after the court decides this motion to dismiss and to stay discovery. *Id.* ¶ 4. Plaintiffs have not yet communicated their position on the proposal, prompting this amended motion to clarify that, in addition to a stay of discovery, defendants seek relief from the requirements of Rule 26(a)(1)(A) and Rule 26(f) and request the court vacate the CMC schedule for January 24, 2025. *Id.* ¶¶ 3, 6.

Defendants now move to dismiss the FAC in its entirety and to stay all discovery and case management proceedings pending the resolution of challenges to the pleadings.

LEGAL STANDARD

To survive a motion to dismiss under Rule 12(b)(1), plaintiffs bear the burden of showing that they have standing to bring their claims under Article III of the Constitution. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992). At the pleading stage, plaintiffs must "clearly . . . allege facts demonstrating" each element of standing, otherwise the case must be dismissed for lack of subject matter jurisdiction. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016), *as revised* (May 24, 2016) (citation omitted).

A dismissal under Rule 12(b)(6) is proper where a claim either "lack[s] a cognizable legal theory" or the plaintiff has not alleged "sufficient facts" to support a cognizable legal theory. *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990) (citation omitted). To survive a motion to dismiss, a complaint must also contain "sufficient factual matter," that, if "accepted as true," states a claim that is "plausible on its face," meaning that the allegations

"allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). The Court need not accept as true formulaic or conclusory allegations. *Id.* at 681–82.

Finally, district courts have discretion to stay discovery pending a motion to dismiss where the motion may dispose of the entire case, and resolving the motion will not require any resort to discovery. *See Wood v. McEwen*, 644 F.2d 797, 801 (9th Cir. 1981).

ARGUMENT

Defendants move to dismiss the FAC without leave to amend, because, as this court has already ruled, plaintiffs do not have standing. Even if plaintiffs had standing, their claims cannot survive dismissal. ***First***, their constitutional claims—both the equal protection claim in the FAC and the due process arguments advanced at the TRO stage—are based on theories that this court and the Ninth Circuit have rejected. ***Second***, plaintiffs' allegation that some voters have mailing addresses outside of the county does not plausibly suggest that any ineligible voters were permitted to vote, let alone that defendants' voter list maintenance program violates the NVRA. ***Finally***, plaintiffs cannot state a HAVA claim, because there is no private right of action under HAVA and, in any event, HAVA does not set an "error rate" for counting ballots or maintaining accurate voter rolls.

Because discovery would unnecessarily burden the parties and the court until it has been determined that plaintiffs have standing and can state a claim, defendants further move the court to enter a stay of discovery and relieve defendants from the requirements of Rule 26(a)(1)(A) and Rule 26(f) and vacate the CMC, pending resolution of this motion to dismiss, and any subsequent pleadings challenges.

I. PLAINTIFFS CANNOT MEET THEIR BURDEN TO SHOW AN INJURY IN FACT, AND THEREFORE THEY LACK ARTICLE III STANDING.

To establish standing, a plaintiff must show, "first and foremost," an injury in fact. *Spokeo, Inc.*, 578 U.S. at 338 (cleaned up). To confer Article III standing, an injury in fact must be "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Lujan*, 504 U.S. at 560 (cleaned up).

Having considered plaintiffs' FAC and the evidence introduced in support of their TRO request, this court previously concluded that plaintiffs lack Article III standing to pursue any of their claims because "[p]laintiffs have no particularized injury." *See* TRO Order at 7–8. That finding remains true; plaintiffs have alleged nothing new since that order. Accordingly, this court lacks subject matter jurisdiction over this case, and it must be dismissed.

In the FAC, plaintiffs allege that they will be harmed if ineligible voters are permitted to vote, because their voting power will be "dilut[ed]" by the ineligible votes. *See* FAC ¶ 8. This allegation is "plainly inadequate" to show a particularized injury. TRO Order at 7 (citing, *inter alia*, *Gill v. Whitford*, 585 U.S. 48, 65–66 (2018)). As the court previously recognized, controlling Ninth Circuit authority makes clear that plaintiffs' "vote dilution" theory describes a generalized grievance, not an injury particular to plaintiffs, as is required for standing. *Id*. at 7–8. "[W]hether 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." *Election Integrity Project California, Inc. v. Weber* ("*EIPC*"), 113 F.4th at 1089 n.13 (quoted in TRO Order at 7).[2]

After defendants pointed out this problem in their opposition to plaintiffs' TRO, plaintiffs filed a brief stating that "although their papers failed to sufficiently highlight it, . . . two of them are running for public office. Their races will necessarily be affected, and they stand to be injured as a result." ECF No. 26 (Pls.' App. for Stay) ¶ 10; *see also* ECF No. 25 (Drouillard Decl. in Support of Stay) ¶ 3. In its TRO Order, the court correctly concluded that this also fails to establish standing. TRO Order at 6 n.11. Plaintiffs provide no explanation of how their races would "necessarily be affected" by allowing ineligible voters to vote; the allegation that they might receive fewer votes if ineligible voters were permitted to cast ballots is "entirely

[2] To the extent plaintiffs claim they are injured by "diminish[ed] election reliability" (FAC ¶ 8), the same logic applies: diminished reliability of elections would equally affect all Marin County voters, and indeed all California voters, and would not establish that plaintiffs have suffered any injury distinct from other voters. *See Republican Nat'l Comm. v. Aguilar*, No. 2:24-CV-00518-CDS-MDC, 2024 WL 4529358, at *5–6 (D. Nev. Oct. 18, 2024) (rejecting argument that plaintiff's "undermined confidence in the integrity of Nevada's elections" confers standing, because it is "not an injury that is distinct from that of any other registered voter" and "is too speculative").

hypothetical." TRO Order at 6 n. 11 (citing, *inter alia*, *Bost v. Ill. State Bd. of Elections*, 114 F.4th 634, 641–642 (7th Cir. 2024)). Indeed, taking all of plaintiffs' allegations and arguments as true, it is equally possible that any votes cast by ineligible voters were *for* the two plaintiff-candidates. A speculative injury like this one is not sufficient to confer standing. *See Bost*, 114 F.4th at 641–64.

In sum, plaintiffs have not alleged, in any of their papers, a particularized and imminent injury: plaintiffs' allegations of "vote dilution" and "diminished election reliability" are generalized grievances, not particularized injuries, and plaintiffs' unpled allegation that ineligible voters could affect two of the plaintiffs' races for office is speculative.[3] Without an injury in fact, plaintiffs lack Article III standing, and this court lacks subject matter jurisdiction. This, alone, is grounds for dismissal.

II. PLAINTIFFS HAVE FAILED TO STATE ANY PLAUSIBLE CLAIMS FOR RELIEF.

Even if plaintiffs could satisfy the requirements of Article III, the court should still dismiss the FAC, because it lacks sufficient allegations to state any claims. *See* TRO Order at 9–22 (finding plaintiffs' claims were unlikely to succeed on the merits). Plaintiffs' equal protection claim is fatally flawed, and the unpled due process theories advanced at the TRO stage, even if pled in an amended complaint, fare no better. This court and the Ninth Circuit have held that plaintiffs' vote dilution theory is not an equal protection or procedural due process violation, and plaintiffs have not alleged anything more than garden variety election irregularities, which are insufficient to state a substantive due process claim. Plaintiffs do not state an NVRA claim, because plaintiffs' allegation that some voters have out-of-county mailing addresses does not plausibly suggest defendants have violated the NVRA. Lastly, plaintiffs cannot state a HAVA claim, because HAVA does not create a private right of action and, even if it did, plaintiffs misstate its requirements.

[3] For these same reasons, plaintiffs fail to allege that they have statutory standing to bring their NVRA claim, which requires that a plaintiff show they are "aggrieved" by the alleged violation of the law. *See* 52 U.S.C. § 20510(b)(1); *see also Dobrovolny v. Nebraska*, 100 F. Supp. 2d 1012, 1032 (D. Neb. 2000) ("[P]laintiffs do not have standing as 'aggrieved persons' under the NVRA because they do not allege that their rights to vote in a federal election have been denied or impaired.").

A. This court already decided plaintiffs' vote dilution allegations are insufficient to state an equal protection claim and rejected plaintiffs' due process theories.

In their FAC, plaintiffs attempt to allege only one constitutional claim, under the Equal Protection Clause of the Fourteenth Amendment. FAC ¶¶ 13–14. In their TRO request, plaintiffs tacked on two additional constitutional "claims" based on the same core allegation that some number of registered voters had moved out of the county and were no longer eligible to vote: one for a procedural due process violation, and one for a substantive due process violation. *See* TRO Mem. ¶¶ 29–33. None of these can survive dismissal; the court has already found that plaintiffs' allegations in the FAC and in their TRO request do not amount to any kind of Fourteenth Amendment violation. *See* TRO Order at 10–16. As set out below, the court's reasoning at the TRO stage applies equally here and requires dismissal of plaintiffs' first claim without leave to amend.

1. Equal Protection

Plaintiffs' equal protection claim is based on their allegations that the Equal Protection Clause "safeguards voters from dilution of their votes by unlawful votes case by ineligible voters," and that "[b]y failing to remove ineligible voters from the rolls, Defendants have sanctioned election practices that reduce the weight and impact of votes cast by eligible voters." FAC ¶¶ 13–14. As this court recognized, "[t]his is very similar to the theory that the Ninth Circuit rejected in *Election Integrity Project California*, 113 F.4th 1072." TRO Order at 11. There, the plaintiffs argued that the State was improperly counting some invalid mail-in ballots, and that this "diluted" the votes cast by in-person voters in violation of the Equal Protection Clause. This failed as a matter of law because, "even assuming some ineligible voters cast ballots, plaintiffs do not allege that they disproportionately suffered injury as a result." *Id.* (quoting *EIPC*, 113 F.4th at 1087). Rather, "any diminishment in voting power that resulted was distributed across all votes equally," and therefore plaintiffs' equal protection rights were not violated. *Id.* (quoting *EIPC*, 113 F.4th at 1087). So, too, here. As this court held in its TRO Order, plaintiffs do not allege that any candidate, individual, or group was disproportionately harmed by allegedly ineligible voters potentially casting votes in the General Election. More

specifically, in order to state a "vote dilution" claim, plaintiffs would have to allege facts showing that their votes were *weighted* differently than other votes, which they do not, and cannot, do. *EIPC*, 113 F.4th at 1087. Therefore, under *EIPC* and the court's reasoning in the TRO Order, the court should dismiss plaintiffs' equal protection claim without leave to amend.

2. Substantive & Procedural Due Process

In their TRO request, plaintiffs argued for the first time that defendants violated their substantive and procedural due process rights. ECF No. 10-1 ¶¶ 28–33. While plaintiffs never amended to add these claims, as they must if they intend to pursue them, the court already found that plaintiffs' due process arguments are non-starters. Therefore, any amendment to add these claims would be futile, and dismissal of the FAC without leave to amend is appropriate.

Plaintiffs argued in their TRO request that defendants violated their substantive due process rights by allegedly permitting 994 ineligible voters to cast ballots, of which plaintiffs guessed, without support, 142 will be cast and counted. TRO Order at 13–14 (citing TRO Mem. ¶¶ 4, 21–22); *see also* TRO Mem. ¶ 3. Putting aside the myriad of issues with that number, which the court described as "problematic," this court correctly rejected plaintiffs' argument, finding that this number represented such a small fraction of a percent of the total number of votes likely to be cast, that plaintiffs could not show that the election was "fundamentally unfair" as a result. TRO Order at 13, 15. This court found that, as in *Bennett v. Yoshina*, 140 F.3d 1218 (9th Cir. 1998), plaintiffs' allegations here suggest '"no disenfranchisement or meaningful vote dilution' . . . because '[e]very ballot submitted was counted, and no one was deterred from going to the polls." TRO Order at 15 (quoting *Bennett*, 140 F.3d at 1227). At best, plaintiffs allege the kind of "garden variety election regularity" that the Ninth Circuit has found fails to state a constitutional violation. *See Bennett*, 140 F.3d at 1226. Amendment to add a substantive due process claim on these grounds would therefore be futile, and the court should not allow it.

In its order denying plaintiffs' TRO request, the court further held that plaintiffs' procedural due process theory was unlikely to succeed, because plaintiffs had failed to show they have been deprived of any constitutionally protected liberty or property interest. As this court pointed out, "[p]laintiffs have not experienced any deprivation of that right. They are able to vote. . . . The

'inadvertent counting of some invalid ballots' does not 'burden the ability of any voter to cast a lawful ballot.'" TRO Order at 16 (quoting *EIPC*, 113 F.4th at 1089). Any amendment to plaintiffs' FAC to add a procedural due process claim would suffer from this same deficiency, and would be futile; therefore, the court should not permit plaintiffs a third chance to amend their complaint to add a procedural due process claim.

B. Plaintiffs allege no facts suggesting defendants violated the NVRA.

Plaintiffs' NVRA claim fails on the merits. Plaintiffs allege that defendants have violated the NVRA by failing to implement "programs to ensure only eligible voters remain on voter registration rolls . . . ." FAC ¶ 16. In support of that sweeping conclusion, the FAC only alleges that there are "numerous" ineligible voters on the rolls who have "either moved out of state" or are "otherwise unqualified". FAC ¶ 8. These vague and conclusory allegations cannot support an NVRA claim. *Iqbal*, 556 U.S. at 678.

The FAC does not allege how defendants' voter list maintenance program violates the NVRA. The NVRA requires states to conduct "a general program that makes a reasonable effort to remove the names of ineligible voters from official lists of eligible voters by reasons of . . . a change in the residence of the registrant." 52 U.S.C. § 20507(a)(4). The NVRA's "safe harbor" provision, *id.* § 20507(c)(1), sets forth one option for states to demonstrate compliance with that requirement. The NVRA also prohibits states from removing voters based on a change of address unless the voter has been sent a returnable residency confirmation card that meets certain requirements, failed to respond, and failed to vote in two consecutive federal elections. *Id.* § 20507(d)(1)(B). As explained in defendants' TRO opposition, California law complies with the NVRA's safe harbor provision. *See* ECF No. 20 (TRO Opp.) at 11 (citing Cal. Elec. Code. §§ 2222, 2225, 2226 (describing process of mailing residency confirmation cards to voters who have moved and canceling the registrations of voters who have failed to respond and failed to vote in two consecutive federal elections)). Plaintiffs do not allege that the California Elections Code fails to comply with the NVRA, nor do they allege that defendants have failed to implement the California Elections Code.

Instead, defendants appear to contend that, because some number of ineligible voters are allegedly present on Marin County's voter rolls, the State's voter list maintenance program must not be "reasonable." But the NVRA does not require that a state or county have a perfect voter list maintenance program. *See Bellitto v. Snipes*, 935 F.3d 1192, 1207 (11th Cir. 2019) ("[T]he NVRA only requires that Broward County make a reasonable effort, not an exhaustive one[.]"); *Pub. Int. Legal Found. v. Boockvar*, 495 F. Supp. 3d 354, 359 (M.D. Pa. 2020) ("[T]he NVRA does not require perfection."). In fact, the Supreme Court has expressed skepticism that the NVRA has any "reasonableness" requirement separate and apart from the procedural requirements set forth in 52 U.S.C. § 20507. *See Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 778 (2018) (expressing skepticism that a "supposed 'reasonableness' requirement" exists in the NVRA, and that it "authorizes the federal courts to go beyond the restrictions set out in [52 U.S.C. § 20507 subsection (c)] . . . and to strike down any state law that does not meet their own standard of 'reasonableness'"). But "[w]hatever the meaning of § 20507(a)(4)'s reference to reasonableness," *id.*, plaintiffs' bare allegation that some ineligible voters remain on the voter rolls does not plausibly suggest defendants have failed to maintain a "general program" that makes a "reasonable effort" to remove voters who have moved out of the county, when plaintiffs have alleged no facts suggesting that defendants are not following the procedures set out in state law and the NVRA's safe harbor provision.

The additional allegations in plaintiffs' TRO request, if added to an amended complaint, would not save plaintiffs' NVRA claim. In their TRO request, plaintiffs allege that they have identified 89 voters who have mailing addresses outside of Marin County. *See* TRO Mem. ¶¶ 21–22. This court already recognized that this allegation does not suggest defendants' voter list maintenance program violates the NVRA—in fact, it does not even suggest that there are *any* ineligible voters on Marin County's voter rolls. *See* TRO Order at 17. It is lawful for a voter to stay registered in Marin County while they are temporarily out of the county or state for employment or business purposes, attending school, serving in the military, or living overseas. *See* TRO Opp. at 2, 9 (citing Cal. Elec. Code §§ 2021(a), 2025, 2033). What is more, the NVRA *prohibits* defendants from removing voters on the basis that they have moved, unless they have

failed to respond to a residency confirmation card and failed to vote in two consecutive federal elections. *See* 52 U.S.C. § 20507(d)(1)(B). Therefore, even assuming that some of the voters identified by plaintiffs have in fact left the county and do not intend to return, that would not suggest any problem with defendants' voter list maintenance program, let alone that the program fails to meet the NVRA's "reasonableness" requirement, if one exists. *See Husted*, 584 U.S. at 778. The NVRA does not require or even permit states to immediately remove voters who appear to have established a mailing address outside the jurisdiction. Plaintiffs' NVRA claim should therefore be dismissed.

C. Plaintiffs' HAVA claim cannot survive dismissal, because there is no private right of action under HAVA, and plaintiffs do not allege any HAVA violation.

In their third cause of action, plaintiffs attempt to plead a claim under the HAVA statute, arguing that "[t]he excessive number of ballot errors generated by votes cast by ineligible voters in Marin County exceeds the error rate permitted under HAVA." FAC ¶ 20. This claim fails as a matter of law, as this court found in its TRO Order. *See* TRO Order at 21–22. "HAVA does not create a private right of action," and therefore plaintiffs' claim is not cognizable. *Id.* at 21.

Even if plaintiffs could bring a HAVA claim, HAVA does not set an "error rate" for elections or voter list maintenance, it sets an "error rate" for ballot-counting machines. *See id.* at 22 (citing 52 U.S.C. § 21081(a)(5) (setting error rate for "voting systems") and 52 U.S.C. § 21081(b) (defining "voting system" as the "equipment" used in voting and the "practices and associated documentation used" in conjunction with that equipment)). Plaintiffs' allegations about ineligible voters casting ballots and causing "errors" are thus irrelevant to HAVA compliance. No amendment will save this claim, and the court should therefore dismiss it with prejudice.

III. THE COURT SHOULD NOT GRANT PLAINTIFFS LEAVE TO AMEND.

Under Rule 15(a), leave to amend "shall be freely given when justice so requires," Fed. R. Civ. P. 15(a)(2), but the "decision of whether to grant leave to amend nevertheless remains within the discretion of the district court." *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 532 (9th Cir. 2008). Courts routinely deny leave to amend where amendment would be futile or where

plaintiffs have "repeatedly fail[ed] to cure deficiencies by amendments previously allowed." *Id.* (citation omitted). Both are true here. ***First***, no additional details can save plaintiffs' complaint. As outlined above, even if plaintiffs amended their complaint to add all the allegations made at the TRO stage, plaintiffs would still lack Article III standing and their claims would still be fundamentally flawed. ***Second***, plaintiffs have had multiple opportunities to raise additional facts, and have failed to do so. Plaintiffs amended their complaint once as of right. Then, after defendants made the arguments raised herein in their TRO briefing, plaintiffs had the opportunity at the TRO hearing to highlight additional, relevant facts. They did not do so. After that hearing, the Court issued a 25-page order denying plaintiffs' TRO request and explaining, in detail, why plaintiffs do not have Article III standing and why each of plaintiffs' claims is not likely to succeed. The parties then stipulated to extend defendants' response deadline, primarily because plaintiffs represented that they intended to amend their complaint. *See* ECF No. 32 (Stipulation). Yet plaintiffs never did so. Plaintiffs have therefore had at least two opportunities to amend their complaint already. The court need not spend any more judicial resources adjudicating these same issues a third time. The court can, and should, dispose of this case once and for all, without leave to amend.[4] *See Leadsinger*, 512 F.3d at 532 (affirming dismissal of complaint without leave to amend where amendment would be futile).

IV. THE COURT SHOULD STAY DISCOVERY PENDING RESOLUTION OF ALL MOTIONS TO DISMISS.

Despite the obvious flaws in plaintiffs' FAC and their failure to comply with Rule 26, plaintiffs insist on prematurely pursuing discovery against defendants. *See* ECF No. 33. Therefore, defendants respectfully request that the court stay discovery, vacate the CMC on calendar for January 24, and relieve defendants from the requirements of Rule 26(a)(1)(A) and Rule 26(f) until the court has determined plaintiffs may proceed with any of their claims. *See*

[4] If the court finds, as it should, that plaintiffs do not have standing, it should dismiss this case without leave to amend for lack of jurisdiction. *See Missouri ex rel. Koster v. Harris*, 847 F.3d 646, 656 (9th Cir. 2017) ("In general, dismissal for lack of subject matter jurisdiction is without prejudice."). If the court declines to follow its TRO Order and finds that plaintiffs do have standing, and therefore the court does have jurisdiction over the case, it should dismiss the complaint for failure to state a claim, without leave to amend and *with prejudice*.

L.R. 16-2(d) (allowing parties to move for "relief from an obligation imposed by . . . [Rule] 26 or the Order Setting Initial Case Management Conference").

Courts have "discretion to stay discovery pending the resolution of motions to dismiss." *WalkMe Ltd. v. Whatfix, Inc.*, No. 23-CV-03991-JSW, 2024 WL 2788451, at *1 (N.D. Cal. May 29, 2024) (citation omitted); *see also Wood*, 644 F.2d at 801–02 (court did not abuse discretion when it stayed discovery because "there was a real question whether" the plaintiff "presented a substantive basis" for allowing his claims). In determining whether to stay discovery pending resolution of motions to dismiss, courts consider: (1) "whether the pending motion is potentially dispositive of the entire case, or at least dispositive on the issue at which discovery is directed" and (2) "whether the pending dispositive motion can be decided absent additional discovery." *WalkMe Ltd.*, 2024 WL 2788451, at *1 (citation omitted). Both factors weigh in favor of granting a stay here. This motion to dismiss is likely dispositive of the entire case: this court has already held that plaintiffs do not have Article III standing to bring this suit, and, even if they did, this motion challenges the sufficiency of each of plaintiffs' claims. *See In re Nexus 6p Prod. Liab. Litig.*, No. 17-CV-02185-BLF, 2017 WL 3581188, at *2 (N.D. Cal. Aug. 18, 2017) (staying discovery pending motion to dismiss because the "personal jurisdiction argument is potentially dispositive of the entire case" as to moving defendant). And no discovery is necessary to resolve this motion, which is based solely on questions of law. Accordingly, good cause exists to stay discovery in this case, relieve defendants of any requirement to participate in a Rule 26(f) conference or make Rule 26(a) disclosures, and vacate the CMC, until this motion to dismiss—and any subsequent motions to dismiss—are resolved, and the court has determined that plaintiffs may proceed with at least one claim.

CONCLUSION

For the foregoing reasons, defendants respectfully request that the court stay discovery pending resolution of the pleadings and dismiss this case without leave to amend.

Dated: December 20, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

Case Name: ***Drouillard, Francis, et al. v. Lynda Roberts, et al.***
Case No.: **3:24-cv-06969-CRB**

I declare:

I am employed in the Office of the Attorney General, which is the office of a member of the California State Bar, at which member's direction this service is made. I am over the age of 18 years and not a party to this matter; my business address is: 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On December 20, 2024, I served the following documents described as:

1. **DEFENDANTS' AMENDED MOTION TO DISMISS PLAINTIFFS' FIRST AMENDED COMPLAINT AND TO STAY DISCOVERY; MEMORANDUM OF POINTS & AUTHORITIES**

2. **DECLARATION OF MARIA F. BUXTON IN SUPPORT OF AMENDED MOTION TO DISMISS AND STAY DISCOVERY**

3. **[PROPOSED] ORDER GRANTING DEFENDANTS' AMENDED MOTION TO DISMISS AND STAY DISCOVERY**

by transmitting true copies via this Court's CM/ECF system to the participants who are registered CM/ECF users, and by transmitting true copies via electronic mail to the following E-mail addresses:

SEE ATTACHED "SERVICE LIST"

I declare under penalty of perjury under the laws of the State of California and the United States of America the foregoing is true and correct.

Executed on December 20, 2024, at San Francisco, California.

Vanessa Jordan	Vanessa Jordan
Declarant	Signature

SERVICE LIST: SERVED BY E-MAIL

Case Name: ***Drouillard, Francis, et al. v. Lynda Roberts, et al.***
Case No.: **3:24-cv-06969-CRB**

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