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IN THE UNITED STATES DISTRICT COURT
 FOR THE NORTHERN DISTRICT OF CALIFORNIA

FRANCIS DROUGLLARD, et al.,

Plaintiffs,

v.

LYNDA ROBERTS, et al.,

Defendants.

3:24-cv-06969-CRB

**DEFENDANTS' REPLY IN SUPPORT
 OF AMENDED MOTION TO DISMISS
 PLAINTIFFS' FIRST AMENDED
 COMPLAINT**

Date: February 7, 2025
 Time: 10:00 a.m.
 Dept: 6
 Judge: The Honorable Charles R.
 Breyer
 Trial Date: Not set.
 Action Filed: October 4, 2024

INTRODUCTION

Plaintiffs’ opposition fails to respond substantively to Defendants’ argument that Plaintiffs lack Article III standing, instead repeating verbatim their “vote dilution” theory that this Court and the Ninth Circuit have already rejected. Plaintiffs’ first amended complaint (“FAC”) should be dismissed on this ground alone. Plaintiffs’ opposition also concedes that their constitutional claim and HAVA claim are without merit, leaving only Plaintiffs’ NVRA claim at issue. As to the merits of that claim, Plaintiffs’ do not address the fatal flaws Defendants pointed out in their motion to dismiss and in opposition to Plaintiffs’ TRO. Instead, Plaintiffs attempt to submit an improper declaration from Plaintiff Francis Douillard contending, once again, that ineligible out-of-state voters cast ballots in the 2024 General Election. Plaintiffs again miss the point: an out-of-state mailing address standing alone *is not conclusive, nor plausible, evidence that a voter is ineligible to vote in Marin County*. Even if Plaintiffs had Article III standing, which they do not, their NVRA claim fails as a matter of law—and Plaintiffs’ opposition does nothing to suggest otherwise. Accordingly, the Court should grant Defendants’ motion and dismiss Plaintiffs’ lawsuit in its entirety.

ARGUMENT

I. PLAINTIFFS FAILED TO RESPOND TO DEFENDANTS’ ARGUMENTS.

As an initial matter, Plaintiffs concede that their first and third claims should be dismissed. ECF No. 38 (Opp.) at 2 ¶ 1 (“Plaintiffs agree to voluntarily dismiss the First Cause of Action . . . and the Third Cause of Action[.]”). Thus, the Court should grant Defendants’ motion as to those two claims and dismiss them with prejudice.

Although the remainder of Plaintiffs’ opposition brief purports to address standing and their NVRA claim, the opposition does not actually respond to the arguments or legal authority raised by Defendants. *Compare* Opp. at 2–3 with ECF No. 37 (“Am. Mot.”) at 5–7 (plaintiffs’ fail to allege an injury in fact), 10–12 (Plaintiffs’ allegations do not state a plausible claim that Defendants violated the NVRA because, *inter alia*, defendants comply with the NVRA’s safe harbor provision, under California law). Plaintiffs’ failure to respond substantively to the arguments raised by Defendants is a concession as to the merits of those arguments. *See Ramirez*

1 *v. Ghilotti Bros. Inc.*, 941 F. Supp. 2d 1197, 1210 & n.7 (N.D. Cal. 2013) (holding that an
 2 argument was conceded where the responding party failed to address it in its opposition and
 3 collecting cases); *Scarlett v. Cnty. of Santa Clara*, No. 23-CV-06649-CRB, 2024 WL 4804978, at
 4 *6 (N.D. Cal. Nov. 15, 2024) (finding that a *pro se* litigant’s failure to respond to an argument in
 5 their opposition meant they conceded it). Accordingly, the Court should dismiss Plaintiffs’ FAC
 6 for lack of standing and failure to state a NVRA claim.

7 In addition, Plaintiffs have not meaningfully responded to Defendants’ arguments
 8 supporting its motion to stay discovery. *Compare* Opp. at 3 with Am. Mot. at 13–14. Plaintiffs
 9 do not explain why discovery should proceed when faced with a pleadings challenge that could be
 10 dispositive of the entire case and when no discovery is necessary to resolve the dispositive
 11 questions of law. *See* Am. Mot. at 14. They simply contend that allowing discovery “will ensure
 12 that Plaintiffs can present evidence supporting their allegations.” Opp. at 3 ¶ 6. But Defendants
 13 do not contend that Plaintiffs should not be permitted to pursue discovery to support their claims,
 14 only that this Court should first determine whether they have standing and whether they have
 15 stated any plausible claims. Discovery should not be used as a tool to *find* a plausible claim
 16 where none are pled—that would be the definition of a fishing expedition.¹ *See Lloyd v. Lakritz*,
 17 No. 15-cv-02478-PHX-DLR, 2016 WL 2865873, at *6–7 (D. Ariz. May 17, 2016) (finding
 18 plaintiff “may not throw out conclusory allegations in hopes of supporting her claims through
 19 discovery” and instead “must first state plausible claims against [the defendant]”; the “Court will
 20 not permit [the plaintiff] to engage in a fishing expedition”).

21 **II. PLAINTIFFS HAVE NOT—AND CANNOT—ALLEGE AN INJURY IN FACT.**

22 To establish standing, Plaintiffs contend that there is a “direct harm” to them as voters
 23 because the FAC alleges “the inclusion of ineligible voters in Marin County’s voter rolls dilutes
 24 their votes,” and that “courts have recognized this as sufficient to establish standing under the
 25 NVRA.” Opp. at 2 ¶ 4. Plaintiffs do not cite any authority for this proposition, and they ignore
 26 the authority that Defendants cite to the contrary. *Id.*; Am. Mot. at 6 (quoting *Election Integrity*

27 ¹ Indeed, Plaintiffs’ offer to dismiss their entire lawsuit in exchange for Defendants
 28 responding to their discovery requests confirms that they are on a fishing expedition. Am. Mot. at
 3 (citing ECF No. 33-2).

1 *Project California, Inc. v. Weber*, 113 F.4th 1072, 1089 n.13 (9th Cir. 2024). Plaintiffs further
2 argue, again without citing any authority, that inaccurate voter rolls “undermine[] the integrity of
3 elections,” which “directly impacts Plaintiffs’ ability to participate in fair elections.” *Id.*

4 As Defendants argued, and as this Court already found, an allegation of generalized vote
5 dilution does not satisfy the injury in fact requirement. Am. Mot. at 6 (citing ECF No. 31 (TRO
6 Order) at 7). Plaintiff’s allegation that they are harmed by diminished election integrity also fails
7 for the same reason as a generalized vote dilution theory: it affects all Marin County voters
8 equally and does not show that Plaintiffs have suffered an injury distinct from other voters. *Id.* at
9 6 n.2. Plaintiffs’ latest articulation of this same theory, that the alleged failure to comply with the
10 NVRA “impacts Plaintiffs’ ability to participate in fair elections,” similarly applies to all voters
11 generally, not just Plaintiffs, and therefore fails to confer standing. Opp. at 2 ¶ 4.a.

12 Plaintiffs also argue that they satisfy Article III standing, because they have alleged that
13 Defendants failed to comply with the NVRA’s requirements to make a “reasonable effort” to
14 maintain accurate voter rolls. Opp. at 2 ¶ 4.b. Plaintiffs appear to conflate Article III standing,
15 which is a prerequisite to bringing any claim in federal court, with statutory standing under the
16 NVRA, which requires that a plaintiff be “aggrieved” by an alleged violation. 52 U.S.C.
17 § 20510(b)(2). Nothing in the FAC, nor the opposition, suggests that Plaintiffs have been
18 “aggrieved” by an alleged NVRA violation, which requires showing that their right to vote has
19 been denied or impaired. *See Dobrovolny v. Nebraska*, 100 F. Supp. 2d 1012, 1032 (D. Neb.
20 2000) (“[P]laintiffs do not have standing as ‘aggrieved persons’ under the NVRA because they do
21 not allege that their rights to vote in a federal election have been denied or impaired.”). And even
22 if Plaintiffs had statutory standing under the NVRA, they would still need to meet Article III’s
23 standing requirements, including an injury in fact. They have not, and cannot, do so here.

24 Because Plaintiffs lack an injury in fact, they lack Article III standing, and this Court lacks
25 subject matter jurisdiction. Accordingly, the Court should grant Defendants’ motion to dismiss
26 this case for lack of subject matter jurisdiction.

III. PLAINTIFFS HAVE NOT ALLEGED A PLAUSIBLE NVRA VIOLATION.

On the merits of their NVRA claim, Plaintiffs simply repeat their conclusory allegations or point to facts not alleged in the FAC. Opp. at 3. None of it states a violation of the NVRA.

First, Plaintiffs restate their allegation that Marin County’s voter rolls “contain numerous ineligible voters, including individuals who have moved out of state.” Opp. at 3. Plaintiffs again argue that this shows Defendants failed to implement a “general program” that makes a “reasonable” effort to remove ineligible voters. *Id.* However, as Defendants explained in this motion and in their opposition to the TRO, this allegation alone does not suggest a failure to implement a reasonable program as required under the NVRA. Am. Mot. at 10; ECF No. 20 (TRO Opp.) at 11. The mere fact that a voter with an out-of-state address may be on the Marin County voter rolls does not lead to the inference that Defendants’ voter roll maintenance program is unreasonable, because the NVRA has strict rules governing the removal of voters from the rolls. *See* Am. Mot. at 10–12; TRO Opp. at 10–11. The Court already so held when it denied Plaintiffs’ request for a TRO, explaining that “[a]lthough Plaintiffs complained again at the motion hearing that Defendants are taking too long to remove from the voter rolls voters who have changed their residence, the NVRA envisions a careful and deliberate—i.e., not immediate—process.” TRO Order at 18 (citing 52 U.S.C. § 20507(d)(1)). And Plaintiffs’ contentions that Defendants’ implementation of the NVRA is “insufficient” and does not meet the “reasonable effort” standard (Opp. at 3)—a standard called into doubt by the Supreme Court—is just a bare conclusion, insufficient to support an NVRA claim. *See* Am. Mot. at 11 (citing *Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 778 (2018)).

Plaintiffs further contend that they have alleged sufficient facts to show Defendants failed to follow required NVRA procedures, such as changing a voter’s status from “active” to “inactive” following a voter’s move out of the state or county, sending residency confirmation cards, or adhering to the timelines for removing ineligible voters. Opp. at 3 ¶ 5.c. None of those allegations are in the FAC.² And even if they were, they are insufficient to allege a plausible

² The unpled allegation that Defendants are not changing a voter’s status from “active” to “inactive” is not even a requirement of the NVRA; it is a requirement of California law. *See* Cal. Elec. Code §§ 2225(f); 2226(a)(2), (c).

NVRA violation because they are legal conclusions. Plaintiffs have not alleged any facts indicating that any of these procedures are not being followed by Defendants. *Cf.* TRO Order at 18 (“Plaintiffs fail to articulate why the efforts described here to maintain Marin County’s voter rolls are not ‘reasonable’ or why they do not comply with 52 U.S.C. §§ 20507(a)(4), 20507(c)(1),[] or 20507(d)(3).”). Thus, Plaintiffs have not alleged a plausible violation of the NVRA’s requirement that Defendants maintain a general program that makes a reasonable effort to remove ineligible voters who have changed residence. 52 U.S.C. § 20507(a)(4).

IV. PLAINTIFFS’ DECLARATION IS IMPROPER AND PROVIDES NO REASON TO GRANT LEAVE TO AMEND IN ANY EVENT.

In an improper attempt to salvage their NVRA claim, Plaintiffs attach a new declaration of Plaintiff Francis Drouillard, purporting to detail additional, unpled “evidence” in support of the NVRA claim. ECF No. 38-1 (Drouillard Decl.). Plaintiffs do not cite the declaration in their opposition brief. Regardless, the Court should not consider evidence, other than judicially noticeable facts, outside of the pleadings on a motion to dismiss. *United States v. Ritchie*, 342 F.3d 903, 908–09 (9th Cir. 2003) (finding that it is improper to consider declarations and exhibits attached to an opposition on a motion to dismiss).

In any event, nothing in Plaintiff Drouillard’s declaration should change the Court’s analysis, nor counsels in favor of granting leave to amend. Plaintiff Drouillard states that he recently purchased election results data concerning the November 5, 2024 General Election. Drouillard Decl. ¶ 2. Based on a comparison of this new data with data of voters who allegedly moved out of state, Plaintiff Drouillard asserts—“[o]n information and belief”—that 576 ballots were cast in the past election by voters who reside out of state. *Id.* ¶¶ 3–6. Even if these facts were alleged in a subsequently amended complaint, they would not plausibly suggest that Defendants are failing to conduct a general program that makes a reasonable effort to remove ineligible voters. 52 U.S.C. § 20507(a)(4). Again, an out-of-state address, without more, does not mean that a voter is necessarily ineligible to vote in Marin County. *See* TRO Order at 13. California law allows voters to vote where they reside, and “[n]ot all voters who change their address are ineligible to vote: a voter does not necessarily lose his residency if he moves to

1 another state[.]” *Id.* (citing Cal. Elec. Code §§ 2021(a), 2025). The California Elections Code
2 allows a voter to change their address but maintain the same domicile for purposes of voting, to
3 allow, for example, college students and overseas members of the military to vote in their
4 hometown elections while temporarily living elsewhere. *Id.*

5 In short, Plaintiffs’ new, improper declaration only shows that granting leave to amend
6 would be futile, as Defendants argued in their motion to dismiss. *See* Am. Mot. at 12–13.
7 Despite having numerous opportunities to remedy the deficiencies identified by Defendants and
8 the Court, Plaintiffs continue to insist that voters with out-of-state addresses on the voter rolls
9 necessarily constitutes a violation of the NVRA. *Id.* at 13. Because an out-of-state address does
10 not necessarily mean a given voter is ineligible, and because Plaintiffs have alleged no facts
11 suggesting that Defendants are failing to follow state law procedures for updating the voter rolls
12 when a voter moves—procedures that comply with the NVRA’s safe harbor provision, *id.* at 10,
13 the Court should grant Defendants motion to dismiss *without* leave to amend.

14 CONCLUSION

15 For the reasons explained above and in Defendants’ motion, the Court should grant
16 Defendants’ motion to dismiss without leave to amend.

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1 Dated: January 17, 2025

Respectfully submitted,

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DECLARATION OF SERVICE BY E-MAIL

Case Name: ***Drouillard, Francis, et al. v. Lynda Roberts, et al.***

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 18 years of age or older and not a party to this matter; my business address is: 455 Golden Gate Avenue, Suite 11000, San Francisco, CA 94102-7004.

On January 17, 2025, I served the attached:

**DEFENDANTS' REPLY IN SUPPORT OF AMENDED MOTION TO DISMISS
PLAINTIFFS' FIRST AMENDED COMPLAINT**

by transmitting a true copy via electronic mail, addressed as follows:

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 and that this declaration was executed on January 17, 2025, at San Francisco, California.

C. Tobin

Declarant

/s/C Tobin

Signature

SA2024304641

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No. **3:24-cv-06969-CRB**

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