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

18 **FRANCIS DROUILLARD, et al.,**
 19
 Plaintiffs,
 20
 v.
 21
 22 **LYNDA ROBERTS, et al.,**
 23
 Defendants.

3:24-cv-06969-CRB

**DEFENDANTS' 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

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

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

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

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

23 Finally, defendants move to stay discovery unless and until plaintiffs’ complaint has
24 survived defendants’ motion(s) to dismiss.

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

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23
24
25
26
27
28

TABLE OF CONTENTS

	Page
Introduction & Summary of Argument.....	1
Background	2
Legal Standard	4
Argument	4
I. Plaintiffs Cannot Meet Their Burden to Show An Injury In Fact, and Therefore They Lack Article III Standing.	5
II. Plaintiffs Have Failed to State Any Plausible Claims for Relief.	7
A. This court already decided plaintiffs’ vote dilution allegations are insufficient to state an equal protection claim and rejected plaintiffs’ due process theories.....	7
1. Equal Protection.....	8
2. Substantive & Procedural Due Process.....	8
B. Plaintiffs allege no facts suggesting defendants violated the NVRA.	9
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.	11
III. The Court Should Not Grant Plaintiffs Leave to Amend.....	12
IV. The Court Should Stay Discovery Pending Resolution of All Motions to Dismiss.....	13
Conclusion	14

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TABLE OF AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Page

CASES

Ashcroft v. Iqbal
556 U.S. 662 (2009)..... 4, 9

Balistreri v. Pacifica Police Dept.
901 F.2d 696 (9th Cir. 1990)..... 4

Bellitto v. Snipes
935 F.3d 1192 (11th Cir. 2019)..... 10

Bennett v. Yoshina
140 F.3d 1218 (9th Cir. 1998)..... 9

Bost v. Ill. State Bd. of Elections
114 F.4th 634 (7th Cir. 2024)..... 6

Dobrovolny v. Nebraska
100 F. Supp. 2d 1012 (D. Neb. 2000) 6

Election Integrity Project California, Inc. v. Weber (“EIPC”)
113 F.4th at 1072 (9th Cir. 2024)..... 6, 8

Husted v. A. Philip Randolph Inst.
584 U.S. 756 (2018)..... 10, 11

In re Nexus 6p Prod. Liab. Litig.
No. 17-CV-02185-BLF, 2017 WL 3581188 (N.D. Cal. Aug. 18, 2017)..... 13

Leadsinger, Inc. v. BMG Music Pub.
512 F.3d 522 (9th Cir. 2008)..... 12, 13

Lujan v. Defenders of Wildlife
504 U.S. 555 (1992)..... 4, 5

Missouri ex rel. Koster v. Harris
847 F.3d 646 (9th Cir. 2017)..... 13

Pub. Int. Legal Found. v. Boockvar
495 F. Supp. 3d 354 (M.D. Pa. 2020) 10

Republican Nat’l Comm. v. Aguilar
No. 2:24-CV-00518-CDS-MDC, 2024 WL 4529358 (D. Nev. Oct. 18, 2024)..... 6

Spokeo, Inc. v. Robins
578 U.S. 330 (2016), (May 24, 2016)..... 4, 5

1
2
3
4
5
6
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8
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19
20
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23
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25
26
27
28

TABLE OF AUTHORITIES
(continued)

Page

<i>WalkMe Ltd. v. Whatfix, Inc.</i>	
No. 23-CV-03991-JSW, 2024 WL 2788451 (N.D. Cal. May 29, 2024)	13
 <i>Wood v. McEwen</i>	
644 F.2d 797 (9th Cir. 1981).....	4, 13
 STATUTES	
United States Code, Title 52	
§ 20507	10
§ 20507(a)(4).....	10
§ 20507(c)	11
§ 20507(c)(1).....	10
§ 20507(d)(1)(B)	10
§ 20507(d)(1)(B)	11
§ 20510(b)(1)	6
§ 21081(a)(5).....	1
 COURT RULES	
Federal Rules of Civil Procedure	
12(b)(1)	4
12(b)(6)	4
15(a)(2).....	12
26(d)(1)	3

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1 § 21081(a)(5) as applying to voter rolls, or ballots cast by ineligible voters, has no basis in the
2 statute.”).

3 The arguments in this motion are not new. This court already recognized these fatal flaws
4 in plaintiffs’ complaint, in its 25-page TRO order. Yet, plaintiffs made no attempt to amend their
5 complaint after that order. Plaintiffs apparently recognize, correctly, that amendment would be
6 futile. They have not suffered a particularized injury, and even if they could allege standing, their
7 allegations about voters moving out of state do not amount to an equal protection violation, an
8 NVRA violation, or a HAVA violation. The court should therefore dismiss the complaint without
9 leave to amend. And, until the court has determined whether plaintiffs have standing and can
10 state any claims, discovery should be stayed.

11 **BACKGROUND**

12 On October 4, 2024, plaintiffs filed a complaint for declaratory and injunctive relief against
13 defendants California Secretary of State Shirley N. Weber, Ph.D., and Marin County Registrar of
14 Voters Lynda Roberts. ECF No. 1 (“Compl.”). Plaintiffs alleged that “the actions of Defendants,
15 including the failure to remove ineligible voters from registration rolls, allow illegal votes that
16 dilute the votes of eligible voters, infringing Plaintiffs’ rights to participate in a fair election,”
17 which, according to plaintiffs, constitutes a violation of plaintiffs’ equal protection rights, the
18 NVRA, and HAVA. *See* Compl. ¶ 2. Ten days later, plaintiffs amended their complaint and
19 clarified that they seek an injunction requiring defendants to “exclude ballots returned by
20 ineligible voters from the count in the November 5, 2024, general election” and to comply with
21 the NVRA. ECF No. 9 (“FAC”) ¶ 11.

22 On October 24, 2024, less than two weeks before the 2024 General Election, and after
23 voting had already commenced, plaintiffs filed an ex parte application for a temporary restraining
24 order, based on the claims in their FAC, as well as two new, unalleged theories that plaintiffs’
25 substantive and due process rights were at risk. ECF No. 12-1 (“TRO Mem.”) at 6–9. In their
26 TRO request, plaintiffs revealed that an organization called Patriot Force CA had used the
27 National Change of Address Database and Marin County voter roll information from December
28 2023 to identify 994 registered voters in Marin County with mailing addresses outside of Marin

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

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

27 ¹ Plaintiffs’ alleged number of out-of-state voters is not consistent throughout their papers.
28 Elsewhere, for example, they state that 140 voters were “confirmed” to have moved out of state.
TRO Mem. ¶¶ 13, 20.

1 Defendants now move to dismiss the FAC in its entirety and to stay discovery pending the
2 resolution of challenges to the pleadings.

3 LEGAL STANDARD

4 To survive a motion to dismiss under Rule 12(b)(1), plaintiffs bear the burden of showing
5 that they have standing to bring their claims under Article III of the Constitution. *See Lujan v.*
6 *Defenders of Wildlife*, 504 U.S. 555, 561 (1992). At the pleading stage, plaintiffs must
7 “clearly . . . allege facts demonstrating” each element of standing, otherwise the case must be
8 dismissed for lack of subject matter jurisdiction. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338
9 (2016), *as revised* (May 24, 2016) (citation omitted).

10 A dismissal under Rule 12(b)(6) is proper where a claim either “lack[s] a cognizable legal
11 theory” or the plaintiff has not alleged “sufficient facts” to support a cognizable legal theory.
12 *Balistreri v. Pacifica Police Dept.*, 901 F.2d 696, 699 (9th Cir. 1990) (citation omitted). To
13 survive a motion to dismiss, a complaint must also contain “sufficient factual matter,” that, if
14 “accepted as true,” states a claim that is “plausible on its face,” meaning that the allegations
15 “allow[] the court to draw the reasonable inference that the defendant is liable for the misconduct
16 alleged.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). The Court need not accept as
17 true formulaic or conclusory allegations. *Id.* at 681–82.

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

21 ARGUMENT

22 Defendants move to dismiss the FAC without leave to amend, because, as this court has
23 already ruled, plaintiffs do not have standing. Even if plaintiffs had standing, their claims cannot
24 survive dismissal. **First**, their constitutional claims—both the equal protection claim in the FAC
25 and the due process arguments advanced at the TRO stage—are based on theories that this court
26 and the Ninth Circuit have rejected. **Second**, plaintiffs’ allegation that some voters have mailing
27 addresses outside of the county does not plausibly suggest that any ineligible voters were
28 permitted to vote, let alone that defendants’ voter list maintenance program violates the NVRA.

1 **Finally**, plaintiffs cannot state a HAVA claim, because there is no private right of action under
2 HAVA and, in any event, HAVA does not set an “error rate” for counting ballots or maintaining
3 accurate voter rolls.

4 Because discovery would unnecessarily burden the parties and the court until it has been
5 determined that plaintiffs have standing and can state a claim, defendants further move the court
6 to enter a stay of discovery pending resolution of this motion to dismiss, and any subsequent
7 pleadings challenges.

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

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

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

19 In the FAC, plaintiffs allege that they will be harmed if ineligible voters are permitted to
20 vote, because their voting power will be “dilut[ed]” by the ineligible votes. See FAC ¶ 8. This
21 allegation is “plainly inadequate” to show a particularized injury. TRO Order at 7 (citing, *inter*
22 *alia*, *Gill v. Whitford*, 585 U.S. 48, 65–66 (2018)). As the court previously recognized,
23 controlling Ninth Circuit authority makes clear that plaintiffs’ “vote dilution” theory describes a
24 generalized grievance, not an injury particular to plaintiffs, as is required for standing. *Id.* at 7–8.
25 “[W]hether evaluated in the context of Article III or on the merits, the relevant principle is the
26 same: the mere fact that some invalid ballots have been inadvertently counted, without more, does
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1 not suffice to show a distinct harm to any group of voters over any other.” *Election Integrity*
 2 *Project California, Inc. v. Weber* (“EIPC”), 113 F.4th at 1089 n.13 (quoted in TRO Order at 7).²

3 After defendants pointed out this problem in their opposition to plaintiffs’ TRO, plaintiffs
 4 filed a brief stating that “although their papers failed to sufficiently highlight it, . . . two of them
 5 are running for public office. Their races will necessarily be affected, and they stand to be injured
 6 as a result.” ECF No. 26 (Pls.’ App. for Stay) ¶ 10; *see also* ECF No. 25 (Drouillard Decl. in
 7 Support of Stay) ¶ 3. In its TRO Order, the court correctly concluded that this also fails to
 8 establish standing. TRO Order at 6 n.11. Plaintiffs provide no explanation of how their races
 9 would “necessarily be affected” by allowing ineligible voters to vote; the allegation that they
 10 might receive fewer votes if ineligible voters were permitted to cast ballots is “entirely
 11 hypothetical.” TRO Order at 6 n. 11 (citing, *inter alia*, *Bost v. Ill. State Bd. of Elections*, 114
 12 F.4th 634, 641–642 (7th Cir. 2024)). Indeed, taking all of plaintiffs’ allegations and arguments as
 13 true, it is equally possible that any votes cast by ineligible voters were *for* the two plaintiff-
 14 candidates. A speculative injury like this one is not sufficient to confer standing. *See Bost*, 114
 15 F.4th at 641–64.

16 In sum, plaintiffs have not alleged, in any of their papers, a particularized and imminent
 17 injury: plaintiffs’ allegations of “vote dilution” and “diminished election reliability” are
 18 generalized grievances, not particularized injuries, and plaintiffs’ unpled allegation that ineligible
 19 voters could affect two of the plaintiffs’ races for office is speculative.³ Without an injury in
 20

21 _____
 22 ² To the extent plaintiffs claim they are injured by “diminish[ed] election reliability” (FAC
 23 ¶ 8), the same logic applies: diminished reliability of elections would equally affect all Marin
 24 County voters, and indeed all California voters, and would not establish that plaintiffs have
 25 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”).

26 ³ For these same reasons, plaintiffs fail to allege that they have statutory standing to bring
 27 their NVRA claim, which requires that a plaintiff show they are “aggrieved” by the alleged
 28 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.”).

1 fact, plaintiffs lack Article III standing, and this court lacks subject matter jurisdiction. This,
2 alone, is grounds for dismissal.

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

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

16 **A. This court already decided plaintiffs’ vote dilution allegations are**
17 **insufficient to state an equal protection claim and rejected plaintiffs’ due**
18 **process theories.**

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

1 1. Equal Protection

2 Plaintiffs’ equal protection claim is based on their allegations that the Equal Protection
3 Clause “safeguards voters from dilution of their votes by unlawful votes cast by ineligible
4 voters,” and that “[b]y failing to remove ineligible voters from the rolls, Defendants have
5 sanctioned election practices that reduce the weight and impact of votes cast by eligible voters.”
6 FAC ¶¶ 13–14. As this court recognized, “[t]his is very similar to the theory that the Ninth
7 Circuit rejected in *Election Integrity Project California*, 113 F.4th 1072.” TRO Order at 11.
8 There, the plaintiffs argued that the State was improperly counting some invalid mail-in ballots,
9 and that this “diluted” the votes cast by in-person voters in violation of the Equal Protection
10 Clause. This failed as a matter of law because, “even assuming some ineligible voters cast
11 ballots, plaintiffs do not allege that they disproportionately suffered injury as a result.” *Id.*
12 (quoting *EIPC*, 113 F.4th at 1087). Rather, “any diminishment in voting power that resulted was
13 distributed across all votes equally,” and therefore plaintiffs’ equal protection rights were not
14 violated. *Id.* (quoting *EIPC*, 113 F.4th at 1087). So, too, here. As this court held in its TRO
15 Order, plaintiffs do not allege that any candidate, individual, or group was disproportionately
16 harmed by allegedly ineligible voters potentially casting votes in the General Election. More
17 specifically, in order to state a “vote dilution” claim, plaintiffs would have to allege facts showing
18 that their votes were *weighted* differently than other votes, which they do not, and cannot, do.
19 *EIPC*, 113 F.4th at 1087. Therefore, under *EIPC* and the court’s reasoning in the TRO Order, the
20 court should dismiss plaintiffs’ equal protection claim without leave to amend.

21 2. Substantive & Procedural Due Process

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

27 Plaintiffs argued in their TRO request that defendants violated their substantive due process
28 rights by allegedly permitting 994 ineligible voters to cast ballots, of which plaintiffs guessed,

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

13 In its order denying plaintiffs’ TRO request, the court further held that plaintiffs’ procedural
 14 due process theory was unlikely to succeed, because plaintiffs had failed to show they have been
 15 deprived of any constitutionally protected liberty or property interest. As this court pointed out,
 16 “[p]laintiffs have not experienced any deprivation of that right. They are able to vote. . . . The
 17 ‘inadvertent counting of some invalid ballots’ does not ‘burden the ability of any voter to cast a
 18 lawful ballot.’” TRO Order at 16 (quoting *EIPC*, 113 F.4th at 1089). Any amendment to
 19 plaintiffs’ FAC to add a procedural due process claim would suffer from this same deficiency,
 20 and would be futile; therefore, the court should not permit plaintiffs a third chance to amend their
 21 complaint to add a procedural due process claim.

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

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

1 The FAC does not allege how defendants' voter list maintenance program violates the
2 NVRA. The NVRA requires states to conduct "a general program that makes a reasonable effort
3 to remove the names of ineligible voters from official lists of eligible voters by reasons of . . . a
4 change in the residence of the registrant." 52 U.S.C. § 20507(a)(4). The NVRA's "safe harbor"
5 provision, *id.* § 20507(c)(1), sets forth one option for states to demonstrate compliance with that
6 requirement. The NVRA also prohibits states from removing voters based on a change of address
7 unless the voter has been sent a returnable residency confirmation card that meets certain
8 requirements, failed to respond, and failed to vote in two consecutive federal elections. *Id.*
9 § 20507(d)(1)(B). As explained in defendants' TRO opposition, California law complies with the
10 NVRA's safe harbor provision. *See* ECF No. 20 (TRO Opp.) at 11 (citing Cal. Elec. Code
11 §§ 2222, 2225, 2226 (describing process of mailing residency confirmation cards to voters who
12 have moved and canceling the registrations of voters who have failed to respond and failed to
13 vote in two consecutive federal elections)). Plaintiffs do not allege that the California Elections
14 Code fails to comply with the NVRA, nor do they allege that defendants have failed to implement
15 the California Elections Code.

16 Instead, defendants appear to contend that, because some number of ineligible voters are
17 allegedly present on Marin County's voter rolls, the State's voter list maintenance program must
18 not be "reasonable." But the NVRA does not require that a state or county have a perfect voter
19 list maintenance program. *See Bellitto v. Snipes*, 935 F.3d 1192, 1207 (11th Cir. 2019) ("[T]he
20 NVRA only requires that Broward County make a reasonable effort, not an exhaustive one[.]");
21 *Pub. Int. Legal Found. v. Boockvar*, 495 F. Supp. 3d 354, 359 (M.D. Pa. 2020) ("[T]he NVRA
22 does not require perfection."). In fact, the Supreme Court has expressed skepticism that the
23 NVRA has any "reasonableness" requirement separate and apart from the procedural
24 requirements set forth in 52 U.S.C. § 20507. *See Husted v. A. Philip Randolph Inst.*, 584 U.S.
25 756, 778 (2018) (expressing skepticism that a "supposed 'reasonableness' requirement" exists in
26 the NVRA, and that it "authorizes the federal courts to go beyond the restrictions set out in [52
27 U.S.C. § 20507 subsection (c)] . . . and to strike down any state law that does not meet their own
28 standard of 'reasonableness'"). But "[w]hatever the meaning of § 20507(a)(4)'s reference to

1 reasonableness,” *id.*, plaintiffs’ bare allegation that some ineligible voters remain on the voter
 2 rolls does not plausibly suggest defendants have failed to maintain a “general program” that
 3 makes a “reasonable effort” to remove voters who have moved out of the county, when plaintiffs
 4 have alleged no facts suggesting that defendants are not following the procedures set out in state
 5 law and the NVRA’s safe harbor provision.

6 The additional allegations in plaintiffs’ TRO request, if added to an amended complaint,
 7 would not save plaintiffs’ NVRA claim. In their TRO request, plaintiffs allege that they have
 8 identified 89 voters who have mailing addresses outside of Marin County. *See* TRO Mem. ¶¶ 21–
 9 22. This court already recognized that this allegation does not suggest defendants’ voter list
 10 maintenance program violates the NVRA—in fact, it does not even suggest that there are *any*
 11 ineligible voters on Marin County’s voter rolls. *See* TRO Order at 17. It is lawful for a voter to
 12 stay registered in Marin County while they are temporarily out of the county or state for
 13 employment or business purposes, attending school, serving in the military, or living overseas.
 14 *See* TRO Opp. at 2, 9 (citing Cal. Elec. Code §§ 2021(a), 2025, 2033). What is more, the NVRA
 15 *prohibits* defendants from removing voters on the basis that they have moved, unless they have
 16 failed to respond to a residency confirmation card and failed to vote in two consecutive federal
 17 elections. *See* 52 U.S.C. § 20507(d)(1)(B). Therefore, even assuming that some of the voters
 18 identified by plaintiffs have in fact left the county and do not intend to return, that would not
 19 suggest any problem with defendants’ voter list maintenance program, let alone that the program
 20 fails to meet the NVRA’s “reasonableness” requirement, if one exists. *See Husted*, 584 U.S. at
 21 778. The NVRA does not require or even permit states to immediately remove voters who appear
 22 to have established a mailing address outside the jurisdiction. Plaintiffs’ NVRA claim should
 23 therefore be dismissed.

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

27 In their third cause of action, plaintiffs attempt to plead a claim under the HAVA statute,
 28 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

1 matter of law, as this court found in its TRO Order. *See* TRO Order at 21–22. “HAVA does not
2 create a private right of action,” and therefore plaintiffs’ claim is not cognizable. *Id.* at 21.

3 Even if plaintiffs could bring a HAVA claim, HAVA does not set an “error rate” for
4 elections or voter list maintenance, it sets an “error rate” for ballot-counting machines. *See id.* at
5 22 (citing 52 U.S.C. § 21081(a)(5) (setting error rate for “voting systems”) and 52 U.S.C.
6 § 21081(b) (defining “voting system” as the “equipment” used in voting and the “practices and
7 associated documentation used” in conjunction with that equipment)). Plaintiffs’ allegations
8 about ineligible voters casting ballots and causing “errors” are thus irrelevant to HAVA
9 compliance. No amendment will save this claim, and the court should therefore dismiss it with
10 prejudice.

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

12 Under Rule 15(a), leave to amend “shall be freely given when justice so requires,” Fed. R.
13 Civ. P. 15(a)(2), but the “decision of whether to grant leave to amend nevertheless remains within
14 the discretion of the district court.” *Leadsinger, Inc. v. BMG Music Pub.*, 512 F.3d 522, 532 (9th
15 Cir. 2008). Courts routinely deny leave to amend where amendment would be futile or where
16 plaintiffs have “repeatedly fail[ed] to cure deficiencies by amendments previously allowed.” *Id.*
17 (citation omitted). Both are true here. **First**, no additional details can save plaintiffs’ complaint.
18 As outlined above, even if plaintiffs amended their complaint to add all the allegations made at
19 the TRO stage, plaintiffs would still lack Article III standing and their claims would still be
20 fundamentally flawed. **Second**, plaintiffs have had multiple opportunities to raise additional
21 facts, and have failed to do so. Plaintiffs amended their complaint once as of right. Then, after
22 defendants made the arguments raised herein in their TRO briefing, plaintiffs had the opportunity
23 at the TRO hearing to highlight additional, relevant facts. They did not do so. After that hearing,
24 the Court issued a 25-page order denying plaintiffs’ TRO request and explaining, in detail, why
25 plaintiffs do not have Article III standing and why each of plaintiffs’ claims is not likely to
26 succeed. The parties then stipulated to extend defendants’ response deadline, primarily because
27 plaintiffs represented that they intended to amend their complaint. *See* ECF No. 32 (Stipulation).
28 Yet plaintiffs never did so. Plaintiffs have therefore had at least two opportunities to amend their

1 complaint already. The court need not spend any more judicial resources adjudicating these same
 2 issues a third time. The court can, and should, dispose of this case once and for all, without leave
 3 to amend.⁴ *See Leadsinger*, 512 F.3d at 532 (affirming dismissal of complaint without leave to
 4 amend where amendment would be futile).

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

7 Despite the obvious flaws in plaintiffs' FAC and their failure to comply with Rule 26,
 8 plaintiffs insist on prematurely pursuing discovery against defendants. *See* ECF No. 33.
 9 Therefore, defendants respectfully request that the court stay discovery until the court has
 10 determined plaintiffs may proceed with any of their claims.

11 Courts have "discretion to stay discovery pending the resolution of motions to dismiss."
 12 *WalkMe Ltd. v. Whatfix, Inc.*, No. 23-CV-03991-JSW, 2024 WL 2788451, at *1 (N.D. Cal. May
 13 29, 2024) (citation omitted); *see also Wood*, 644 F.2d at 801–02 (court did not abuse discretion
 14 when it stayed discovery because "there was a real question whether" the plaintiff "presented a
 15 substantive basis" for allowing his claims). In determining whether to stay discovery pending
 16 resolution of motions to dismiss, courts consider: (1) "whether the pending motion is potentially
 17 dispositive of the entire case, or at least dispositive on the issue at which discovery is directed"
 18 and (2) "whether the pending dispositive motion can be decided absent additional discovery."
 19 *WalkMe Ltd.*, 2024 WL 2788451, at *1 (citation omitted). Both factors weigh in favor of
 20 granting a stay here. This motion to dismiss is likely dispositive of the entire case: this court has
 21 already held that plaintiffs do not have Article III standing to bring this suit, and, even if they did,
 22 this motion challenges the sufficiency of each of plaintiffs' claims. *See In re Nexus 6p Prod.*
 23 *Liab. Litig.*, No. 17-CV-02185-BLF, 2017 WL 3581188, at *2 (N.D. Cal. Aug. 18, 2017) (staying
 24 discovery pending motion to dismiss because the "personal jurisdiction argument is potentially
 25 dispositive of the entire case" as to moving defendant). And no discovery is necessary to resolve

26 ⁴ If the court finds, as it should, that plaintiffs do not have standing, it should dismiss this
 27 case without leave to amend for lack of jurisdiction. *See Missouri ex rel. Koster v. Harris*, 847
 28 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*.

1 this motion, which is based solely on questions of law. Accordingly, good cause exists to stay
2 discovery in this case until this motion to dismiss—and any subsequent motions to dismiss—are
3 resolved, and the court has determined that plaintiffs may proceed with at least one claim.

4 **CONCLUSION**

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

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Dated: December 16, 2024

Respectfully submitted,

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SA2024304641

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

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

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