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8 IN THE UNITED STATES DISTRICT COURT
9 DISTRICT OF NEVADA

10
11 NATIONAL COUNCIL OF LA RAZA, LAS)
VEGAS BRANCH OF THE NAACP)
12 (BRANCH 1111), and RENO-SPARKS)
BRANCH OF THE NAACP (BRANCH 1112),)

CASE NO. 3:12-cv-00316-RCJ-VPC

13 Plaintiffs.

DEFENDANTS' REPLY IN SUPPORT OF
MOTION TO DISMISS

14 vs.

15 ROSS MILLER, in his official capacity as)
16 Secretary of State of the State of Nevada; and)
17 MICHAEL WILLDEN, in his official capacity)
as Director of the Department of Health &)
18 Human Services of the State of Nevada,)

19 Defendants.

20
21 Defendants Ross Miller, Secretary of State, and Michael Willden, Director of the Department of
22 Health and Human Services, by and through counsel, Catherine Cortez Masto, Attorney General, and
23 Kevin Benson, Deputy Attorney General hereby replies to Plaintiffs' Opposition (#30) to Defendants'
24 Motion to Dismiss (#22).

25 INTRODUCTION

26 As discussed in the Defendant's Motion to Dismiss, the Plaintiffs' May 10, 2012 Notice Letter
27 does not identify any violation that occurred within 120 of a federal election. Nor does the Complaint
28 allege any such violations within that time period. Therefore, Defendants were entitled to a statutory

1 90-day period to cure any alleged violations under 42 U.S.C. § 1973gg-9(2)(b).

2 In response, Plaintiffs do not identify any specific violations that occurred within 120 days of
3 the June 12, 2012 primary. Instead, they argue that they did not need to show any particular violation
4 because their Notice Letter alleged ongoing, continuous violations. Therefore, according to Plaintiffs, it
5 must be inferred that such violations continued into the 120-day period before the June 12, 2012
6 primary election. *See Opps.*, p. 11. They further argue that, since the violations are allegedly ongoing,
7 they must have also occurred within 30 days of the June 12 primary election, and therefore no notice
8 was required at all. *See Opps.*, p. 11, ll. 10-14.

9 Stripped down to its essence, the legal question is whether simply alleging an ongoing or
10 continuous violation relieves a plaintiff of the notice and statutory time-to-cure periods provided under
11 the NVRA.

12 The Court must reject Plaintiffs' arguments because they render the notice provisions of the
13 NVRA nugatory and meaningless. Regardless of whether a continuous violation is alleged, a plaintiff
14 must give notice of at least one discrete violation within the 120-day period before a federal election in
15 order to take advantage of the shortened 20-day period to cure.

16 **POINTS AND AUTHORITIES**

17 I. Alleging a "continuing violation" is not sufficient to satisfy the notice provisions of
18 the NVRA.

19 Under the NVRA, there are three distinct notice and time-to-cure periods. Subsection 3 of 42
20 U.S.C. § 1973gg-9(b) states that if the violation occurs within 30 days of a federal election, no notice
21 and no time to cure is necessary before bringing suit. 42 U.S.C. § 1973gg-9(b)(3). Under Subsection 2,
22 if the violation occurs within 120 days, then the defendant must be given 20 days to cure. 42 U.S.C. §
23 1973gg-9(b)(2). If the violation occurs more than 120 days before a federal election, the defendant has
24 90 days to cure the alleged violation. *Id.*

25 If the Court accepts Plaintiffs' "continuing violation" theory, then the result is that these three
26 distinct categories are effectively wiped out of the law, and no notice or time to cure is ever required.
27 All that is necessary is to simply allege that there is a continuing violation, without ever identifying any
28 particular instance where the NVRA was violated. According to Plaintiffs, if a continuing violation is

1 alleged, it will necessarily always occur within 30 days of a federal election, and therefore no notice or
2 time to cure is required. *See* Opposition, p. 11, ll. 13-14 (describing Plaintiffs' 20-day notice in this case
3 as "gratuitous.").

4 Plaintiffs' position should be rejected because this would render the notice requirements
5 completely meaningless. Courts should not assume that Congress intended to pass vain or meaningless
6 legislation. *Int'l. Ass'n of Machinists v. BF Goodrich*, 387 F.3d 1046, 1057 (9th Cir. 2004). Nor should
7 statutes be construed in a way that makes their provisions superfluous or meaningless. *United States v.*
8 *Cabaccang*, 332 F.3d 622, 627 (9th Cir.2003).

9 The cases Plaintiffs rely on do not support their argument that merely alleging a continuing
10 violation is sufficient to bypass all of the notice requirements. They rely on three cases, all of which
11 dealt with the Clean Water Act: *San Francisco BayKeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153 (9th Cir.
12 2002); *Sierra Club v. Union Oil Co. of California*, 853 F.2d 667 (9th Cir. 1988); *Waterkeepers Northern*
13 *California v. AG Industrial Mfg., Inc.*, 375 F.3d 913 (9th Cir. 2004). *See* Opps., pp. 12-13.

14 The Clean Water Act ("CWA") requires notice to be given 60 days before filing suit, in all
15 citizen lawsuits. 33 U.S.C. § 1365(b). Additionally, regulations prescribe what the notice letter must
16 contain. 40 C.F.R. § 135.3(a); *BayKeeper*, 309 F.3d at 1157. In none of those cases was it disputed that
17 the plaintiffs did not wait the requisite 60 days. Unlike the NVRA, the CWA does not provide for
18 different notice periods that depend on when the violation occurred. As discussed below, even when a
19 continuing violation is alleged, plaintiffs under the CWA must always give at least 60 days' notice.

20 In *Union Oil*, the issue was whether the Clean Water Act allows a citizen to sue for "wholly
21 past" violations, or whether it is necessary that there must be a continuing violation in order for federal
22 courts to have jurisdiction over a citizen lawsuit. 853 F.2d at 669. That case was decided by the Ninth
23 Circuit following reversal and remand by the U.S. Supreme Court to reconsider the Ninth Circuit's
24 original holding in light of the Court's decision in *Gwaltney v. Chesapeake Bay Foundation*, 484 U.S.
25 49 (1987). *Id.* at 668.

26 In *Gwaltney*, the Court held that, unlike government regulators, citizens cannot sue for *past*
27 violations; they may bring suit for civil penalties under the CWA only if they are also seeking to *enjoin*
28 or otherwise abate an ongoing violation. 484 U.S. at 58-59. The Court construed the CWA's language

1 permitting citizens suits against “any person... who is alleged to be in violation” to mean that the
2 person must *presently* be in violation, i.e., that there must be a continuing violation, rather than just a
3 wholly past violation, in order for federal courts to have jurisdiction over citizen claims. *Id.* at 57, 64.

4 As the Court observed, if citizens were permitted to sue for a wholly past violation, the
5 requirement to give 60 days’ notice to the alleged violator would serve no purpose, since the violation
6 would already have been remedied. *Id.* at 60. In such cases, “the requirement of notice to the alleged
7 violator becomes gratuitous.” *Id.* Thus the Court found that the notice provisions of the CWA supported
8 its holding that citizen plaintiffs are not permitted to sue for only past violations. *Id.*

9 In *Union Oil*, the Ninth Circuit reinstated its previous decision after remand from the U.S.
10 Supreme Court, finding that the citizen plaintiffs had adequately alleged a continuing violation, as the
11 U.S. Supreme Court held was necessary for jurisdiction. 853 F.2d at 670. It applied the standard laid
12 down in *Gwaltney* specific to citizen suits under the CWA. *Id.*

13 In short, the issue in *Gwaltney* and *Union Oil* was not whether a continuing violation relieved
14 plaintiffs of complying with the 60-day period to cure. The issue was whether alleging a continuing
15 violation was necessary for a private cause of action the CWA, or whether citizen plaintiffs could sue
16 for only wholly past violations. Relying in part on the requirement to give 60 days’ notice before suing,
17 the Court concluded that there must be a continuing violation; otherwise, the notice requirements serve
18 no purpose. Thus, if anything, these cases Defendants’ position that, even if a continuing violation is
19 alleged, they still must give notice before suing.

20 Furthermore, unlike the CWA, the NVRA clearly contemplates discrete, past violations. The
21 NVRA repeatedly refers to persons “aggrieved,” and when violations “occurred” in the past tense. *See*
22 42 U.S.C. § 1973gg-9(b). The CWA, by contrast, was written entirely in the present tense, and referred
23 to potential future harm, which the Court characterized as “[o]ne of the most striking indicia” that
24 citizens could only sue for on-going violations. *Gwaltney*, 484 U.S. at 59.

25 Under the particular statutory framework of the CWA, including its notice provisions, an
26 allegation of a continuing violation was not just permitted, it was *necessary* for the court to have subject
27 matter jurisdiction. In this case, by contrast, if simply alleging an on-going violation was sufficient
28 notice for purposes of Subsection 3 (which does not require notice when a violation occurs within 30

1 days of a federal election), then the notice requirements under Subsection 2 would be effectively
2 eviscerated.

3 This is demonstrated by Plaintiffs' argument that, because they alleged a continuous violation,
4 they were actually not required to give any notice at all, since one could infer that a continuing violation
5 would have occurred within 30 days of the June 12, 2012 primary election. *See Opps.*, p. 11, ll. 10-13.
6 In other words, according to Plaintiffs, no notice and time to cure is ever required under the NVRA, so
7 long as the plaintiff simply alleges an on-going violation.

8 The plain language of the NVRA shows that this result was not Congress' intent. Congress
9 would not have bothered to provide for three different levels of notice if it had intended that no notice is
10 necessary for continuing violations. Nor would it have referred to violations in the past tense. Instead,
11 Congress provided a specific "stepped" approach based on when the violation occurred: the closer to
12 the election, the less time is allowed to cure. This is a sensible and careful approach that appropriately
13 balances the interests of persons who might be aggrieved, while also affording a reasonable opportunity
14 for the state to cure any alleged violations without facing litigation. *See Association of Community*
15 *Organizations for Reform Now v. Miller*, 129 F.3d 833, 838 (6th Cir. 1997) (purpose of the NVRA's
16 notice requirements are to allow an opportunity to cure before litigation is filed).

17 Additionally, even if a violation is continuous or on-going, that alone provides no reason to
18 excuse compliance with the notice requirements. Even continuing violations may be simply the result of
19 oversight or a misunderstanding of what is required, which may be easily remedied, if the defendant is
20 given the chance. By contrast, the cases where courts have excused non-compliance with the NVRA's
21 notice requirements either involve situations where a discrete violation was shown within 30 days of the
22 election, or where the defendants have affirmatively stated that they will not comply with the NVRA,
23 and have no intention of ever doing so.

24 For example, in *National Coalition for Students with Disabilities v. Scales*, 150 F.Supp.2d 845,
25 851-52 (D.Md. 2001), the court found that plaintiffs were not required to give notice because the
26 complaint adequately alleged that a particular, named student was not given voter registration materials
27 when she went to a disabilities office within 30 days of a federal election.

28 ////

1 In *Miller*, 129 F.3d at 835, Michigan's governor issued an executive order declaring that the
2 state would not comply with the NVRA unless federal funds were made available to do so. Under these
3 circumstances, the court concluded that giving formal notice, especially where defendants already had
4 actual notice, would be futile. *Id.* at 838.

5 In *Georgia State Conference of N.A.A.C.P. v. Kemp*, 841 F.Supp.2d 1320, 1333-34 (N.D.Ga.
6 2012), the plaintiffs sent a notice letter dated January 25, 2011, which alleged systemic and ongoing
7 violations as a result of Georgia's policy that it only provided voter registration forms to public
8 assistance clients who applied in person. In that case, the NAACP and other organizational plaintiffs
9 waited more than 90 days to file suit, therefore the timing of filing the complaint was not at issue for
10 those plaintiffs. *See id.*; *see also* Complaint (Docket #1) Case No. 1:11-CV-1849-CAP (filed June 6,
11 2011).

12 However, the court found one individual plaintiff, Murphy, failed to give proper notice, and his
13 situation was not made known to the defendants until they were served with the complaint. *Id.* at 1335.
14 Although he alleged that he was not offered voter registration forms during his contacts with public
15 assistance agencies (*id.* at 1324), there was nothing alleging that he was a member of, or similarly
16 situated to the NAACP or other organizational plaintiffs, or that he was represented by them, such that
17 the January 25, 2011 letter could be found to have notified defendants of his situation. *Id.* at 1335. The
18 court also noted that the particulars of his claim were unique to him. *Id.* The court therefore dismissed
19 Murphy's claims for lack of proper notice. *Id.*

20 Accordingly, whether or not an ongoing violation is alleged, the NVRA requires that plaintiffs
21 show at least one discrete violation that occurred within the 120-day time period in order to invoke the
22 shorter 20-day period to cure. *See* 42 U.S.C. § 1973gg-9(b)(2). This effectuates all parts of the NVRA's
23 notice requirements. It is also consistent with the NVRA's use of the past tense when referring to
24 violations. But most importantly, it carries out the purpose of the notice requirements, which is to give
25 the defendants a reasonable time to cure the alleged violations before facing litigation. *Miller*, 129 F.3d
26 at 838.

27 In this case, there has not been any blanket refusal by Defendants to comply with the law, like in
28 *Miller*. Nor have Plaintiffs shown any discrete violation within 30 (or even 120) days of the June

1 primary, like in *Scales*. Instead, this case is like *Kemp*, where the court found that notice was proper for
2 the plaintiffs who waited the required 90 days, but dismissed the plaintiff who failed to give any notice,
3 even though the other plaintiffs had alleged continuous and ongoing violations.

4 Since Plaintiffs in this case have not given notice of any violation of the NVRA that occurred
5 within 120 days of the June 12, 2012 primary, the Defendants are entitled to 90 days to cure the alleged
6 violations. 42 U.S.C. § 1973gg-9(b)(2). Thus the Plaintiffs have not complied with the notice
7 requirements, regardless of whether they allege a continuing or ongoing violation. Notice is mandatory,
8 and failure to give notice requires dismissal. *Broyles v. Texas*, 618 F.Supp.2d 661, 691-92 (S.D.Tex.
9 2009) (*aff'd* 381 Fed.Appx. 370 (5th Cir. 2010)).

10 II. The existence of an allegedly “flawed” policy does not excuse giving proper notice.

11 First, whether or not the Complaint (as opposed to the Notice Letter) alleged continuous
12 violations is irrelevant because the Complaint itself cannot serve as “notice” under the NVRA, unless it
13 clearly alleges a specific violation that occurred within 30 days of a federal election. *See Broyles*, 618
14 F.Supp.2d at 691 (notice ineffective when the only “notice” to defendants came in the form of a
15 summons and complaint); *cf. Scales*, 150 F.Supp.2d at 851-52 (notice was not necessary because the
16 complaint alleged a discrete violation that occurred within 30 days of election).

17 Thus to the extent the Complaint states that the alleged violations are the result of current
18 policies, the Complaint itself cannot be the basis for sufficient notice. *See Opps.*, p. 11, ll. 6-14. Since
19 the Complaint does not allege any discrete violation that occurred within 30 days before the June 12,
20 2012 primary, notice was still required. 42 U.S.C. § 1973gg-9(b)(2).

21 Second, contrary to Plaintiffs’ arguments, even if the alleged violation is the result of a written
22 policy, that does not excuse them from the notice requirements. *See Opps.*, p. 11, ll. 10-13 (arguing that
23 a flawed policy is, on its face, an ongoing violation that continues until the policy is remedied, and
24 therefore no notice is required at all, because the policy will continue within 30 days of an election).

25 As discussed above, the NVRA’s notice requirements are chiefly aimed at allowing defendants
26 a time to cure the violations before facing litigation. *Miller*, 129 F.3d at 838. Fixing a “flawed policy” is
27 exactly the kind of remediation that the NVRA contemplates and encourages. That purpose would be
28 frustrated, however, if plaintiffs could file suit without notice whenever they discover what, in their

1 opinion, is an illegal policy.

2 This case is a prime example of why notice is required, even if the alleged violations result from
3 a written policy.¹ Plaintiffs claim that DWSS' manual for processing applications is incorrect because it
4 states that when clients fail to check either the "yes" or "no" box under the question asking if they
5 would like to register to vote, that this is treated as a declination. *See Opps.*, p. 11, n. 5. For the
6 proposition that this practice is illegal, Plaintiffs rely on a Tenth Circuit decision that was decided
7 February 21, 2012. *See Valdez v. Squier*, 676 F.3d 935 (10th Cir. 2012). No other circuit court before or
8 since has held that failing to check either box is *not* a declination to register to vote. And of course, the
9 Tenth Circuit's decision is not binding law in Nevada. Therefore it is very much an open question
10 whether the policy is in fact "flawed" in any respect.

11 But more to the point: prior to the Tenth Circuit's recent decision, no one could have understood
12 that a policy treating the failure to check either box as a declination was illegal, since the NVRA itself
13 requires the forms to state that failure to check either box is a declination to register to vote. *See* 42
14 U.S.C. § 1973gg-5(a)(6)(B)(iii) (requiring forms to clearly state: "IF YOU DO NOT CHECK EITHER
15 BOX, YOU WILL BE CONSIDERED TO HAVE DECIDED NOT TO REGISTER TO VOTE AT
16 THIS TIME."). Additionally, the fact that the Tenth Circuit's decision is from another jurisdiction and
17 is not binding in Nevada makes notice all the more important.

18 Giving notice to the defendants that their policy is or might be illegal, in light of a new
19 interpretation of the law, allows defendants an opportunity to evaluate the policy, the law, and to take
20 any necessary corrective action. Particularly where the change in law is recent and is not binding on
21 defendants, excusing plaintiffs from giving any notice at all simply because a policy exists frustrates
22 rather than furthers the Congressional intent to allow defendants a reasonable time to come into
23 compliance before facing litigation.

24 Finally, Plaintiffs argue that the declarations of Ms. Phillips and Ms. Hulbert that they were not
25 given the opportunity to register to vote on June 19, 2012 demonstrate the continuing nature of the
26 violations. *See Opps.*, p. 7, ll. 11-18. However, each of the alleged violations on June 19, 2012 occurred
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28 ¹ Defendants do not concede that there are or have been any violations of the NVRA. Rather, for purposes of this Motion to Dismiss, it is only assumed *arguendo*. Furthermore, the May 10, 2012 notice did not identify any written policy that allegedly violates the NVRA.

1 more than 120 days from a federal election. Therefore they cannot be used to invoke a shorter time to
2 cure period. See 42 U.S.C. § 1973gg-9(b)(2) (if violation occurred more than 120 days from a federal
3 election, defendants have 90 days to cure).

4 Even if, as Plaintiffs contend, these incidents offer “evidence” of a continuing violation,² that is
5 not sufficient to excuse them from the notice provisions. Alleging a particular violations *after* filing the
6 Complaint does not serve the purpose of giving notice, since obviously at that point the Defendants
7 have no opportunity to cure. This is no different than relying on allegations that appear for the first time
8 in the Complaint, which, absent a discrete violation within 30 days of an election, is not proper notice
9 under the NVRA. See *Broyles*, 618 F.Supp.2d at 691 (notice ineffective when the only “notice” to
10 defendants came in the form of a summons and complaint).

11 **CONCLUSION**

12 In sum, the NVRA has three very specific notice provisions. These provisions are designed to
13 give defendants (who are invariably state agencies) different amounts of time to cure violations,
14 depending on how long before the election it occurred. Sensibly, the NVRA permits a longer period to
15 cure if the violations occurred longer than 120 days before the election. In this case, Plaintiffs have not
16 identified a single violation that occurred within 120 days before the June 12, 2012 primary. Instead,
17 they argue that they need not do so simply because they alleged an ongoing violation.

18 But this construction would render the notice requirements practically meaningless. It is also at
19 odds with the plain language of the NVRA and the case law interpreting it. Nothing in the NVRA
20 permits an exception to the notice requirements for ongoing or continuous violations. Nor have the
21 courts held that alleging an ongoing violation is by itself sufficient to bypass the notice requirements.

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² As discussed in the Defendants’ opposition to the Motion for Preliminary Injunction, neither of these incidents shows any violation of the NVRA.

CERTIFICATE OF SERVICE

I declare that I am an employee of the State of Nevada and on this 30th day of July, 2012, I served a copy of the foregoing Defendants' Reply in Support of Motion to Dismiss, by U.S. District Court CM/ECF Electronic filing to:

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I further declare that I am an employee of the State of Nevada and on this 30th day of July, 2012, I served a copy of the foregoing Defendants' Reply in Support of Motion to Dismiss, by mailing the foregoing document via United States Postal Service to the following:

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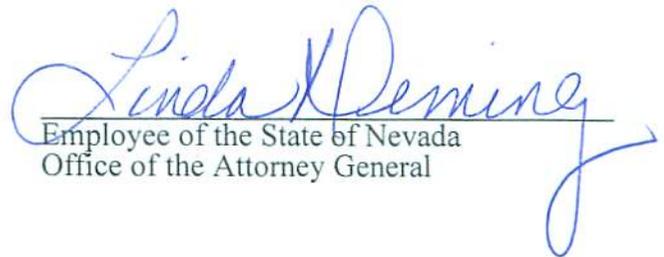
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