No. 13-15077

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL COUNCIL OF LA RAZA, *et al.*,

Plaintiffs-Appellants,

v.

ROSS MILLER, *et al.*,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of Nevada
Case No. 3:12-cv-00316-RCJ-VPC (Honorable Robert C. Jones)

OPENING BRIEF OF APPELLANTS NATIONAL COUNCIL OF LA RAZA, LAS VEGAS BRANCH OF THE NAACP AND RENO-SPARKS BRANCH OF THE NAACP

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Ninth Circuit Rule 26.1, Plaintiffs-Appellants National Council of La Raza, Las Vegas Branch of the NAACP (Branch 1111), and Reno-Sparks Branch of the NAACP (Branch 1112) make the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? __No__. If the answer is YES, list below the identity of the parent corporation or affiliate and the relationship between it and the named party: __N/A__.

2. Is there a publicly owned corporation, not a party to the appeal, that has financial interest in the outcome? __No__. If the answer is YES, list the identity of such corporation and the nature of the financial interest: __N/A__.

Dated: April 22, 2013

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TABLE OF AUTHORITIES

CASES

STATUTES

OTHER AUTHORITIES

STATEMENT OF JURISDICTION

The District Court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331 because the Complaint sets forth a cause of action that arises under a law of the United States, and 28 U.S.C. § 1343(a) because the Complaint is based on violations of a civil rights law of the United States, the National Voter Registration Act ("NVRA"), 42 U.S.C. § 1973gg, *et seq*.

The District Court dismissed the Complaint with prejudice on December 19, 2012. The District Court based this dismissal on two erroneous conclusions. First, it erroneously ruled that Plaintiffs-Appellants, National Council of La Raza ("NCLR"), Las Vegas Branch of the NAACP (Branch 1111) and Reno-Sparks Branch of the NAACP (Branch 1112) (hereinafter collectively "Plaintiffs") failed to provide sufficient pre-suit notice to Defendants-Appellees, Ross Miller, in his official capacity as Secretary of State of the State of Nevada, and Michael Willden, in his official capacity as Director of the Department of Health & Human Services as the State of Nevada (hereinafter collectively "Defendants"), to allow them to cure their violations -- even though Defendants *had withdrawn* their motion to dismiss based on insufficient notice on August 29, 2012. Second, the District Court erroneously ruled that Plaintiffs did not have Article III standing -- a determination the District Court made sua sponte.

On January 11, 2013, Plaintiffs filed a timely Notice of Appeal. ER-032.[1] This Court has jurisdiction pursuant to 28 U.S.C. § 1291 because the appeal is from a final judgment that disposes of all of the parties' claims. ER-001.

ISSUES PRESENTED

1. Whether the District Court erroneously held that Plaintiffs lacked standing to assert their claims where: (a) the Complaint alleged that Plaintiffs expended and will continue to expend resources related to voter registration that they would not have been required to expend but for the Defendants' past and ongoing violations of the NVRA; (b) the Complaint alleged that Plaintiffs Las Vegas NAACP and Reno-Sparks NAACP each have members who have suffered, and are continuing to suffer, injury as a result of Nevada's past and ongoing failure to comply with the NVRA; and (c) the District Court ruled before Plaintiffs had the opportunity to be heard on the standing issue or to request leave to amend to cure the purported deficiencies.

2. Whether the District Court erred in dismissing the Complaint on the ground that Plaintiffs failed to provide sufficient pre-suit notice to Defendants, where: (a) Defendants waived their defense regarding pre-suit notice by withdrawing their motion to dismiss; (b) the Complaint alleged ongoing and

[1] Documents cited herein and contained in the Excerpts of Record "ER" are cited by ER page number. References to the docket sheet are cited by Clerk's Record "CR" number.

continuing violations of the NVRA that were occurring within 30 days of the June 2012 federal election, such that notice was not required under the statute; and (c) to the extent notice was required, the NVRA provides for a 20-day pre-suit notice period where violations occur within 120 days of a federal election, and Plaintiffs sent a notice letter to Defendants, which identified ongoing violations of the NVRA.

3. Whether this case should be reassigned to a different District Judge on remand, where: (a) the District Court's dilatory scheduling of Plaintiffs' motion for preliminary relief unjustifiably prejudiced adjudication of that issue; (b) the District Court arbitrarily refused to grant routine pro hac vice applications of Plaintiffs' out-of-state counsel; (c) the District Court ruled on withdrawn motions; and (d) the District Court sua sponte dismissed the Complaint with prejudice without providing Plaintiffs an opportunity to be heard or amend, and where such actions by the District Court demonstrate that it would be difficult for the District Court to put out of its mind the views it previously expressed about the merits of the case and Plaintiffs' choice of counsel, and where reassignment would not result in the waste or duplication of judicial resources and would, at a minimum, preserve the appearance of justice.

STATEMENT OF THE CASE

This action arises under Section 7 of the NVRA. Section 7 requires state public assistance agency offices to provide voter registration services to applicants for public assistance benefits, as well as to clients seeking recertification, renewal, or a change of address (persons engaging in "covered transactions"). 42 U.S.C. § 1973gg-5. Specifically, the law requires public assistance offices to distribute voter registration application forms during these covered transactions unless the client declines in writing to receive one, and to provide assistance in filling out voter registration applications. *Id.*[2]

On June 11, 2012, Plaintiffs filed a Complaint in the United States District Court for the District of Nevada alleging that Defendants were systematically failing to provide for voter registration at Nevada Department of Health and Human Services ("DHHS") offices, as required by Section 7 of the NVRA. CR 1. The Complaint included detailed factual allegations demonstrating Section 7 violations, including low and declining numbers of voter registration applications submitted through public assistance agencies (despite an increasing number of public assistance clients), a wide gap in voter registration between high and low

[2] This Court most recently examined Congress' purposes in enacting the NVRA and construed the statute in *Gonzalez v. Ariz.*, 677 F.3d 383 (9th Cir. 2012), *cert. granted sub. nom., Ariz. v. Inter Tribal Council of Ariz.*, 133 S. Ct. 476 (2012). This Court also upheld the constitutionality of the NVRA in *Voting Rights Coal. v. Wilson*, 60 F.3d 1411 (9th Cir. 1995), *cert. denied*, 516 U.S. 1093 (1996).

income Nevadans, and specific examples from a December 2011 investigation showing that the DHHS: (a) was failing to ensure that its offices even had voter registration applications to distribute; (b) was regularly failing to provide voter registration applications to clients who indicated that they would like to register to vote; and (c) had a policy or practice of not providing voter registration applications to clients who did not affirmatively indicate that they wished to register to vote at that time, despite the NVRA's requirement that DHHS distribute voter registration applications to all clients except those who state in writing that they do not wish to register to vote.

The Complaint's filing was preceded by years of extensive non-litigation attempts to procure Defendants' compliance with their Section 7 voter registration responsibilities. Finally, on May 10, 2012, with the prospect of compliance remote, Plaintiffs sent a formal notice to Defendants pursuant to Section 11 of the NVRA, 42 U.S.C. § 1973gg-9, outlining the nature of the State's failures to provide voter registration services consistent with Section 7, and notifying Defendants that Plaintiffs would file a lawsuit if the State did not have a plan for compliance within 20 days (the "Notice Letter"). The Nevada Secretary of State's office thereafter contacted Plaintiffs, seeking an extension of time in which to respond to the Notice Letter and seeking to delay initial meetings with state officials until after the June 12 primary. Plaintiffs responded that they would agree

to Defendants' request if the State, in return, provided Plaintiffs with current organizational charts and management evaluation forms for the involved state agencies, and agreed to a meeting between Plaintiffs' counsel and senior decision makers from the agencies on or before the first week in June. The Nevada Secretary of State's Office rejected Plaintiffs' counter-offer. Accordingly, Plaintiffs filed the Complaint on June 11, 2012.

On July 3, 2012, Defendants filed an Answer to the Complaint along with a Motion to Dismiss on the ground that Plaintiffs did not provide notice and opportunity to cure the state's violations of the NVRA at least 90 days prior to filing suit. CR 21, 22. On July 20, 2012, Plaintiffs responded, arguing that: (a) notice was not required under the NVRA because the Complaint alleged violations that were occurring within 30 days of the June 12, 2012 federal election; and (b) if notice was required, the applicable notice period was 20 days because the notice letter asserted violations within 120 days of the same federal election. CR 30.

On July 6, 2012, Plaintiffs filed a motion for a preliminary injunction, seeking to require Defendants to take steps to comply with their Section 7 responsibilities in advance of the November 2012 general election. CR 24. Plaintiffs also asked the Court to convene immediately a scheduling conference, emphasizing the time-sensitive nature of their motion. Nevertheless, the District Court scheduled the hearing on the Preliminary Injunction Motion and the Motion

for Expedited Discovery, as well as Defendants' Motion to Dismiss, for October 9, 2012 -- two days *after* the voter registration deadline.[3] CR 29.

On July 24, 2012, eight pro bono attorneys who represent Plaintiffs in this litigation, and are from national voting rights organizations and Dechert LLP (a law firm with extensive voting rights expertise that previously has served as pro bono counsel in NVRA litigation in Ohio and Georgia) filed applications for admission pro hac vice in the District Court. CR 35-36, 39-44. Although the motions were routine and unopposed, on August 20, 2012, the Court issued a minute order scheduling an August 22 hearing on them. CR 54.

The District Court began the hearing by announcing that it intended to deny all but two of the unopposed applications. ER-038:17-22. The Court advised that it was not required to permit out-of-state lawyers to litigate in Nevada, explaining that, "Mr. Wicker [a partner in a small Reno, Nevada law firm who does not have prior voting rights litigation experience but had agreed to serve as local counsel on a pro bono basis] is very competent counsel." ER-038:10. The Court acknowledged that "of course, each of these civil plaintiffs have the right of counsel of their choosing," but "not multiple counsel, and I'm not obligated to

[3] The court subsequently moved the date to September 18, 2012 -- still too close in time to the registration deadline to have much, if any, practical effect. CR 31. Because counsel for Defendants was unavailable on that day and Plaintiffs' lead counsel was observing a religious holiday, the parties agreed to seek a new date earlier in September. CR 48. The Court refused and re-instituted the original October 9, 2012 hearing date. CR 51.

admit *pro hac vice* a lot of New York lawyers who in essence are representing their own interests, their own law firms' interests, rather than even the plaintiff that they represent." ER-0038:10-16.

On August 29, 2012, Plaintiffs filed a motion for reconsideration of the Court's oral ruling on the pro hac vice motions, explaining that Plaintiffs' ability to litigate the case would be prejudiced without sufficient counsel to assist in the fact-intensive discovery and evidence development that these cases require, and pointing out case law establishing that the Court's action amounted to an abuse of discretion. CR 62. The District Court never issued a written ruling on the pro hac vice applications or any ruling on the motion for reconsideration, effectively denying Plaintiffs the ability to seek appellate review or litigate the case.[4]

Also on August 29, 2012, Defendants agreed to withdraw their motion to dismiss, and the parties filed a joint stipulation to that effect.[5] CR 60. On September 17, 2012, the District Court issued a minute order vacating the oral

[4] On October 2, 2012, a case management conference was held before Magistrate Judge Valerie P. Cooke. After being informed that the Plaintiffs were still awaiting a ruling on the motion for reconsideration of the pro hac vice applications, Judge Cooke suspended all discovery until such time as a decision had been made on the applications. CR 67.

[5] Plaintiffs simultaneously agreed to withdraw their motion for a preliminary injunction, which had been rendered moot by the District Court's scheduling order. CR 61. Unaware that the motions had been withdrawn, on September 4, 2012, the United States Department of Justice filed a Statement of Interest in support of the Plaintiffs' motion for a Preliminary Injunction. CR 64.

argument that had been scheduled for October 9, 2012 on the withdrawn motion. CR 65.

On December 19, 2012, without conducting any additional briefing or argument, the District Court issued the Order at bar, dismissing the action with prejudice on the basis of the withdrawn motion to dismiss and a sua sponte determination that the Plaintiffs did not have Article III standing. CR 70. This appeal followed.

STATEMENT OF FACTS

National Voter Registration Act

A bipartisan Congress enacted the NVRA in 1993 to, *inter alia*, increase the number of citizens who register to vote, and thereby enhance voter participation in federal elections. 42 U.S.C. § 1973gg. The NVRA requires States to increase voter registration opportunities in several ways, including: making registration available by mail; including a voter registration form as part of all drivers' license applications; and providing voter registration services at public assistance offices, disability offices, and other locations. 42 U.S.C. §§ 1973gg-3, 1973gg-4, 1973gg-5.

Section 7 of the NVRA requires that each State designate certain agencies as "voter registration agencies," including "all offices in the State that provide public assistance" and offices that provide services to persons with disabilities. 42 U.S.C.

§ 1973gg-5(a)(2). All voter registration agencies must distribute voter registration applications, assist with the completion of the applications unless the applicant refuses such assistance, and accept the completed applications for transmittal to the appropriate election official. 42 U.S.C. § 1973gg-5(a)(4)(A).

Section 7 also requires voter registration agencies to provide forms ("voter preference forms"), which provide a variety of information to public assistance applicants and clients regarding voter registration at public assistance offices, and which also ask these individuals whether they would like to register to vote during the course of their public assistance transaction. 42 U.S.C. § 1973gg-5(a)(6)(A)-(B).

Congress considered Section 7 necessary to ensure the registration of "the poor and persons with disabilities who do not have driver's licenses and will not come into contact with the other principal place to register under this Act [motor vehicle agencies]." H.R. Rep. No. 103-66, at *19 (1993) (Conf. Rep.) (NVRA Conference Report); *see also* 42 U.S.C. § 1973gg(b)(1). Thus, failure to comply with Section 7 has a disproportionate impact on eligible low-income citizens, who are entitled, under federal law, to register to vote at state-designated voter registration agencies.

Parties

Plaintiffs National Council of La Raza, Las Vegas NAACP, and Reno-Sparks NAACP are strong advocates for civil rights and electoral participation among underrepresented groups. ER-060-63, ¶¶ 49, 52, 55. To that end, each of them has committed and continues to commit time and personnel to conducting voter registration drives in the State of Nevada. ER-060-63, ¶¶ 49-50, 52-53, 55-56.

As alleged in the Complaint, Plaintiffs are harmed by Defendants' failure to comply with the NVRA because, in response, they have been required to expend additional resources, including staff and volunteer time, on efforts to assist individuals with voter registration (including updating prior voter registration) who should have been offered registration through Nevada's public assistance offices. This diversion of resources is expected to continue in the future until Defendants' violations of their NVRA obligations are remedied. ER-060-64, ¶¶ 50-51, 53-54, 56-57. Many of those voter registration efforts focus on registering voters in low income neighborhoods, with residents who disproportionately rely on public assistance. ER-060-63, ¶¶ 50, 53, 56. In addition, Las Vegas NAACP and Reno-Sparks NAACP members, including individuals who have not been and will not be offered the opportunity to register to vote through DHHS offices, are harmed by Defendants' violations of the law, and will continue to be so harmed until

Defendants are required to comply with Section 7 of the NVRA. ER-062-64, ¶¶ 54, 57.

Defendant Miller is the chief election official in Nevada and is responsible for overseeing federal elections in Nevada. ER-051, ¶ 20. He is the "chief election official" responsible for coordination of Nevada's responsibilities under the NVRA. *Id.*

Defendant Willden is the Director of Nevada's Department of Health and Human Services ("DHHS"). ER-051, ¶ 21. DHHS is a state agency responsible for the administration of public assistance in the State of Nevada, including, but not limited to, the administration of the SNAP, Medicaid, TANF, and WIC programs. ER-055-56, ¶ 41. Defendant Willden, as Director of DHHS, is a state official responsible for ensuring that the registration opportunities mandated by Section 7 of the NVRA are provided by DHHS through its relevant divisions. *Id.*

Plaintiffs' Allegations Concerning Lack of Voter Registration Services at Nevada Public Assistance Office

Nevada has had a steadily worsening record of registering low income voters at its public assistance offices. This issue was brought to the attention of relevant state officials at least as early as 2008 by the organization Demos. ER-057, ¶ 45. Thereafter, Demos and relevant state officials engaged in discussions in an attempt

to improve public agency voter registration. ER-069.[6] Although the Secretary of State subsequently issued policy guidance, Defendants have not taken steps to effectively implement it. ER-057-58, ¶ 45.

The Notice Letter and Complaint identified multiple facts demonstrating a longstanding and ongoing failure to provide voter registration services at Nevada public assistance offices. First, the Secretary of State reported to the federal Election Assistance Commission ("EAC") that public assistance offices in the State submitted just 1,677 voter registration applications or registration change-of-address forms for the entire two-year, 2009-2010 reporting period, the lowest number Nevada has reported since the NVRA was enacted and less than five percent of the 39,444 registration applications reported in the 2001-2002 period. ER-056-57, ¶ 44; ER-070. This occurred even though the size of the population on public assistance has increased dramatically. ER-047, ¶ 12; ER-070.

Second, the Notice Letter and Complaint cited official Bureau of the Census data showing that only 47.6 percent of eligible Nevada citizens living in a household with a yearly income of less than $25,000 were registered to vote for the November 2010 election, compared to 72.4 percent of eligible citizens living in a

[6] As the Notice Letter was attached to the Complaint, it is properly considered in the context of a Rule 12(b)(6) dismissal. *See Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006).

household with a yearly income of more than $100,000 -- a "voter registration gap" of 24.8%. ER-056, ¶ 43; ER-070.

Third, the Notice Letter and Compliant cited evidence obtained from in-person visits to Nevada DHHS offices in December 2011, which confirmed that the small and declining number of persons registering to vote at state public assistance offices is attributable substantially, if not entirely, to the failure of DHHS to provide voter registration opportunities. Two of the nine DHHS offices visited *did not even have voter registration applications available*, and had not had registration applications available for more than a year. ER-058-59, ¶ 46; ER-070-71. The investigation also included interviews with public assistance clients immediately following their completion of a transaction covered by Section 7 of the NVRA, and fewer than 50 percent of these clients had been asked during the transaction whether they wanted to register to vote. *Id.* Four of the five clients who specifically checked "Yes" in response to the NVRA-mandated question on the voter preference form (asking if they would "like to apply to register to vote here today") did not receive a voter registration application. *Id.* And office staff uniformly told the investigator that they do not provide voter registration applications to clients who leave the NVRA-mandated question blank, even though the NVRA requires distribution of voter registration applications to those clients. *Id.*

Finally, the Complaint described the Nevada DHHS policies, consistent with what was revealed in the investigation, to not provide voter registration applications to clients who leave the NVRA-mandated question blank. ER-058, ¶ 46(b); *see also* ER-111-12 ("Nevada DWSS TANF and SNAP Application Processing Policy," § 146(7)); ER-141-42 ("Nevada DWSS Child Care Policy Manual, Child Care Program Overview," Dec. 1, 2009, § 123.4).

SUMMARY OF ARGUMENT

The District Court's dismissal of Plaintiffs' Complaint with prejudice was in error and should be reversed, and the case should be reassigned to a different judge.

First, the District Court's sua sponte ruling that Plaintiffs lack Article III standing to pursue their claim for violation of the National Voter Registration Act was improper. Although the District Court was ruling on the adequacy of the standing alleged in the Complaint, it applied the more stringent standard reserved for summary judgment. The Complaint makes allegations that are more than sufficient at this stage of the proceeding as to both organizational standing based on Plaintiffs' diversion of resources and associational standing based on prospective harm to Plaintiffs' members. Moreover, regardless of the merits of the dismissal, the District Court further erred in failing to provide Plaintiffs an opportunity to present their arguments as to why they have Article III standing and

in failing to provide Plaintiffs an opportunity to amend their Complaint to cure any supposed deficiencies.

Second, the District Court's ruling that the case should be dismissed with prejudice on the ground that Plaintiffs failed to provide adequate notice to Defendants was improper. As an initial matter, the District Court was without power to rule on the issue, which is non-jurisdictional, because Defendants waived the argument by withdrawing their motion to dismiss. Beyond that, dismissal was erroneous. Under the NVRA, no notice is required prior to filing a lawsuit for violations that occur within 30 days of a federal election, and Plaintiffs' Complaint plausibly alleged violations occurring at the time the Complaint was filed, which fell within that window. In addition, even if notice were required, Plaintiffs did provide adequate notice by sending a Notice Letter 32 days prior to filing suit, outlining violations that were continuing to occur at the time of the Notice Letter. Because those violations occurred within 120 days of a federal election, Plaintiffs were entitled to file a lawsuit after only 20 days' notice, and the provision of 32 days' notice was more than sufficient.

Finally, the District Court's conduct in this case warrants reassignment to a different judge, both on the ground of personal bias and on the ground of "unusual circumstances." The District Court's attitude toward Plaintiffs and their counsel -- including its commentary to counsel at a pro hac vice hearing, its arbitrary

limitation of Plaintiffs to only two pro hac vice counsel in this complex voting rights case, its sua sponte Article III standing dismissal without providing an opportunity to be heard or amend, its dismissal for inadequate notice based on a withdrawn motion, and its attribution of "ulterior motives" to Plaintiffs in its dismissal Order -- meets the requisite standards for reassignment on either ground.

ARGUMENT

I. THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFFS LACK ARTICLE III STANDING

Organizations have Article III standing to enforce the NVRA if they have either "organizational standing" -- that is, standing to sue to remedy harms being done to the organization itself -- or "associational standing" -- that is, standing to sue on behalf of members who are injured. Here, the NAACP Plaintiffs have sufficiently alleged both organizational standing and associational standing, and NCLR has sufficiently alleged organizational standing.

Nevertheless, without the benefit of briefing or argument, the District Court erroneously held that Plaintiffs lacked standing to bring claims for violations of Section 7 of the NVRA. The District Court concluded sua sponte that all Plaintiffs lack organizational standing because the Complaint did not allege specific facts showing that they diverted resources to voter registration. ER-022-24. In making that erroneous determination, the District Court improperly assumed that Plaintiffs likely would have spent the exact same resources on the exact same voter

registration activities regardless of Defendants' violations. *Id*. The District Court also held that the NAACP Plaintiffs lack associational standing because they did not name specific individual members of the organizations who have been denied the opportunity to register to vote as a result of Defendants' violations. ER-022; ER-026. The District Court's dismissal of the Complaint with prejudice on those grounds was in error.

A. Standard of Review

Dismissal for lack of standing is considered a dismissal based on lack of subject-matter jurisdiction, and is reviewed *de novo*. *See Virgin v. Cnty. of San Luis Obispo*, 201 F.3d 1141, 1142 (9th Cir. 2000) (citing *Crist v. Leippe*, 138 F.3d 801, 803 (9th Cir.1998)). In considering dismissal of a complaint for lack of subject-matter jurisdiction, the federal courts must accept the allegations in the complaint as true and construe them in the manner most favorable to the non-moving party. *N. Cnty. Cmty. Alliance, Inc. v. Salazar*, 573 F.3d 738, 741-42 (9th Cir. 2009).

B. Plaintiffs' Allegations Were Sufficient to Establish Organizational Standing Based Upon the Diversion of Their Resources Traceable to Defendants' Legal Violations

An organization is entitled to sue on its own behalf for injuries it has sustained. *Warth v. Seldin*, 422 U.S. 490, 511 (1975). As this Court has explained:

> The question is simply whether the organization satisfies the usual requirements for standing. As a constitutional matter, a plaintiff must make the following showings:
>
> > (1) it has suffered an "injury in fact" that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Am. Fed. of Gov't Employees Local 1 v. Stone, 502 F.3d 1027, 1032 (9th Cir. 2007) (quoting *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs., Inc.*, 528 U.S. 167, 180-81 (2000)). An organization sustains a concrete injury in fact where it has diverted resources to counteract the illegal acts of the defendant, impairing the organization's ability to engage in other activities. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982).

Here, Plaintiffs easily meet the threshold for alleging standing at the initial pleading stage. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992) ("general factual allegations of injury resulting from the defendant's conduct may suffice, for on a motion to dismiss [the court] presume[s] that general allegations embrace those specific facts that are necessary to support the claim.") (quotations omitted); *see also, e.g.*, *Florida State Conference of N.A.A.C.P. v. Browning*, 522 F.3d 1153, 1164-66 (11th Cir. 2008) (plaintiff not required to quantify diversion of resources from one voter registration activity to another to establish organizational

standing); *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181, 189 n.7 (2008). Specifically, the Complaint alleges that as a result of Nevada's ongoing noncompliance with Section 7, Plaintiffs have been and will be forced to divert substantial resources to voter registration activities, which they would otherwise spend on other activities if more low-income citizens registered to vote through Nevada's public assistance offices. ER-048, ¶ 14; ER-060-63, ¶¶ 49-53, 55-56.[7] These factual allegations clearly meet the standard for alleging diversion of resources at the motion to dismiss stage.

Not surprisingly, Nevada did not challenge Plaintiffs' standing to bring this litigation, because civil rights organizations that focus on encouraging voting by minorities and low income groups have routinely been found to have standing to enforce the NVRA. Indeed, the primary authority relied on by the District Court

[7] While general allegations of diversion of resources are themselves sufficient for standing, as discussed above, Plaintiffs' Complaint went further by including specific factual allegations about their diversion of resources. *See* ER-060-61, ¶¶ 49-51 (discussing details of NCLR's voter registration program and diversion of resources, including staff and volunteer time, that "would have been and would be spent on other activities of NCLR, including voter education and information, as well as voter registration efforts intended to register persons the NVRA is not designed to cover" but for Defendants' Section 7 violations); ER-062, ¶ 53 (discussing details of Las Vegas NAACP's voter registration program and diversion of resources, noting that "[b]ut for defendants' violations of Section 7 of the NVRA, the Las Vegas NAACP would be able to allocate substantial resources to other activities central to its mission."); ER-063, ¶ 56 (discussing details of Reno-Sparks NAACP's voter registration program and diversion of resources, noting that "[b]ut for defendants' violations of Section 7 of the NVRA, the Reno-Sparks NAACP would be able to allocate substantial resources to other activities central to its mission.").

for its conclusion that the Complaint failed to allege organizational standing was a decision at the summary judgment stage, not on a motion to dismiss, and the Fifth Circuit held that ACORN *had standing* to sue for Louisiana's non-compliance with Section 7 of the NVRA. *Ass'n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 361-62 (5th Cir. 1999).[8] Moreover, courts in numerous other NVRA lawsuits containing similar allegations (including lawsuits wherein NAACP organizations were plaintiffs) have held that such allegations suffice to demonstrate organizational standing. *See, e.g.*, *Harkless v. Brunner*, 545 F.3d 445, 458-59 (6th Cir. 2008) (holding that district court should have allowed plaintiffs to amend to add allegations of voter registration activities, which were sufficient for standing); *Ga. State Conference of N.A.A.C.P. v. Kemp*, 841 F. Supp. 2d 1320, 1336 (N.D. Ga. 2012) ("These allegations plainly satisfy the injury prong of the Article III test for standing."); *Ferrand v. Schedler*, No. 2:11-cv-00926-LMA-JCW, slip op. at 5-7 (E.D. La. July 21, 2011) (denying defendants' motion to dismiss plaintiff Louisiana

[8] The *Fowler* court itself recognized the significant difference between the evidentiary standing it was considering at summary judgment and the lower standard applicable to a motion to dismiss: "Before we begin this analysis, however, we note the difference in procedural posture between the case at bar and *Havens Realty*. *Havens Realty* dealt with standing based on the pleadings, while in this case, the district court considered the appellees' summary judgment motion. . . . Therefore, to demonstrate standing, ACORN must point to specific summary judgment evidence showing that it was 'directly affected' by Louisiana's alleged NVRA violations." *Fowler*, 178 F.3d at 357.

State Conference of NAACP for lack of standing)[9]; *Ass'n of Cmty. Orgs. for Reform Now v. Scott*, No. 08-4084-CV-C-NKL, slip op. at 15-16 (W.D. Mo. July 15, 2008) (finding devotion of scarce resources to litigation instead of other voter registration activities suffices to confer standing).[10]

C. The Complaint's Allegations Were Sufficient To Establish Associational Standing for the NAACP Plaintiffs

An organization may assert standing on behalf of its members if: (1) the members would have standing to sue in their own right; (2) the interests the organization seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation in the lawsuit of each of the individual members. *Hunt v. Washington State Apple Adver. Comm.*, 432 U.S. 333, 343 (1977). The District Court concluded that the NAACP Plaintiffs did not satisfy the first prong of *Hunt* because the Complaint did not name specific NAACP members who have been harmed by Nevada's noncompliance with the NVRA.[11]

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[9] This decision is included in the accompanying addendum.
[10] This decision is included in the accompanying addendum.
[11] The District Court based this requirement on *Summers v. Earth Island Institute*, 555 U.S. 488 (2009). In that case, a group of environmental organizations lacked standing to challenge a Forest Service Act because they could not demonstrate that any of their members were likely imminently to use the forest service lands in question. *Id.* at 499-500. *Summers* is inapposite here, because the NAACP Plaintiffs have members who are and/or will be recipients of public assistance in Nevada, ER-049-50, ¶¶ 18-19, and therefore those members face a concrete and ongoing harm -- that of disenfranchisement.

The District Court's sua sponte ruling is directly contrary to the rule in this Circuit that individual members need not be named where the alleged harm to the organization's members is prospective. *See Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 862 n.16 (9th Cir. 2011) ("When the alleged harm is prospective, we have not required that the organizational plaintiffs name names [of individual members] because every member faces a probability of harm in the near and definite future.") (quoting *Browning*, 522 F.3d at 1160), *rev'd en banc on other grounds*, 678 F.3d 1013 (9th Cir. 2011). To allege that prospective harm is immediate "requires only that the anticipated injury occur within some fixed period of time in the future, not that it happen in the colloquial sense of soon or precisely within a certain number of days, weeks, or months." *Browning*, 522 F.3d at 1161; *see also Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 211–12 (1995). Here, the harm to Plaintiffs' members is as immediate as the next time they apply for benefits, renew, recertify or change their address and are not offered the opportunity to register to vote.

It is particularly true that organizational plaintiffs need not name individual members in order to have associational standing where the organizations have alleged prospective interference with their members' right to vote. The Sixth Circuit has held that an organization has standing to assert the rights of members who will be injured, without naming specific members, because "by their nature,

mistakes cannot be specifically identified in advance." *Sandusky County Democratic Party v. Blackwell*, 387 F.3d 565, 574 (6th Cir. 2004). The Eleventh Circuit's decision in *Browning*, meanwhile, is particularly on point. The court held in *Browning*, a lawsuit challenging a Florida voter registration statute, that plaintiffs were not required to name individual members who would be denied an opportunity to register to vote by the statute in order to plead associational standing. *Browning*, 522 F.3d at 1160-64. The prospective nature of the harm dictates that the NAACP Plaintiffs need not name those specific members it believed would not receive registration assistance in the future.

D. The District Court Erred in Dismissing the Case With Prejudice for Lack of Article III Standing Without Providing Plaintiffs an Opportunity to Present Arguments or Amend their Complaint

The District Court compounded its erroneous sua sponte dismissal for lack of Article III standing by doing so without giving Plaintiffs an opportunity to present their arguments as to why standing existed or to amend the Complaint. *Cal. Diversified Promotions, Inc. v. Musick*, 505 F.2d 278, 280-81 (9th Cir. 1974) ("Here the trial judge should have given notice of his intention to dismiss, an opportunity to submit a written memorandum in opposition to such motion, a hearing, and an opportunity to amend the complaint to overcome the deficiencies raised by the court.") (quotations omitted); *see also Haines v. Kerner*, 404 U.S. 519, 521 (1972); *Mazarek v. St. Paul Fire & Marine Ins. Co.*, 519 F.3d 1025, 1034

(9th Cir. 2008); *cf. Trest v. Cain*, 522 U.S. 87, 92 (1997) ("We do not say that a court must always ask for further briefing when it disposes of a case on a basis not previously argued. But often, as here, that somewhat longer (and often fairer) way 'round is the shortest way home.").

When all of the circumstances are considered, it is evident that the District Court's failure to allow Plaintiffs an opportunity to make their case for Article III standing materially and unnecessarily prejudiced them. First, had Plaintiffs been given the opportunity to do so, they could have pointed out that the reliance on *Fowler*, a summary judgment case, was clearly erroneous. Second, the District Court's assertion that "it is likely similar defenses [to those raised in *Fowler*] would be raised if their standing were challenged," ER-020, in addition to being without any basis, effectively deprived Plaintiffs of their due process right to make their case.

Had the Court allowed briefing on the matter, Plaintiffs would have, at a bare minimum, been able to seek leave to amend their complaint. As this Court has noted in a different case, "the district court might have suggested to the plaintiff . . . that he could move to amend the complaint in order to correct the record." *Snell v. Cleveland, Inc.*, 316 F.3d 822, 827-28 (9th Cir. 2002).[12]

[12] Here, not only did the Court fail to give Plaintiffs the opportunity to amend, it went a step further by dismissing the matter *with prejudice* -- precluding the Plaintiffs from correcting for any alleged deficiencies and repleading.

Instead, the District Court failed to even consider the prospect that Plaintiffs could have cured any supposed standing deficiencies through amending their Complaint. The Order notes specific types of facts that, if alleged, would provide standing. As to organizational standing, the District Court indicated that voter registration efforts specifically connected to public assistance offices apparently would have been sufficient. ER-021-22. As to associational standing, allegations of injury to "a single member" would have been sufficient. ER-025. Though Plaintiffs contest the District Court's narrow view of what factual scenarios would give rise to standing, given the opportunity, Plaintiffs could have amended the Complaint to address any supposed deficiencies. It is indeed likely that they could have added additional facts in support of Article III standing. *See Potter v. McCall*, 433 F.2d 1087, 1088-89 (9th Cir. 1970) ("The court cannot know, without hearing the parties, whether it may be possible for appellant to state a claim entitling him to relief, however strongly it may incline to the belief that he cannot."). In a nearly identical NVRA case, the Sixth Circuit held that a district court erred in finding the organization ACORN was not a proper party to the suit and "should have permitted the plaintiffs' motion to amend, which has the effect of curing any purported deficiency in ACORN's argument in favor of standing." *Harkless*, 545 F.3d at 458-59.

II. THE DISTRICT COURT ERRED IN HOLDING THAT PLAINTIFFS FAILED TO COMPLY WITH THE NOTICE REQUIREMENTS OF THE NVRA

As an additional ground for dismissal, the District Court held that "[b]ecause Plaintiffs failed to provide proper statutory notice before filing the Complaint, they lack statutory standing, and dismissal is proper under Rule 12(b)(6) for failure to state a claim." ER-001.

Section 11 of the NVRA, 42 U.S.C. § 1973gg-9(b), sets forth the process by which persons aggrieved by violations of the NVRA may bring suit. There are several alternatives. First, at any time an aggrieved person can send a letter to the state's chief election official providing "written notice of the violation." *Id.* at 9(b)(1). If the violation is not corrected within 90 days after receipt of the notice letter, but more than 30 days before the election, the aggrieved person may file suit for declaratory or injunctive relief. *Id.* at 9(b)(2). Second, if the violation occurs within 120 days of a federal election, the aggrieved person must still send a letter providing written notice of the violation but need wait only 20 days before filing suit. *Id.* Third, if the violation occurs within 30 days of a federal election, then the aggrieved person need not provide notice at all before filing suit. *Id.* at 9(b)(3).

The purpose of this tiered system is evident. While Congress wanted to "provide states in violation of the Act an opportunity to attempt compliance before facing litigation," *Assn. of Cmty. Orgs. For Reform Now v. Miller* ("*ACORN v.*

Miller"), 129 F.3d 833, 838 (6th Cir. 1997), Congress also concluded that this interest is outweighed in the lead-up to a federal election by the need to ensure prompt compliance.[13] The plain language of the NVRA provides that no notice is required where, as here, violations occurred within 30 days of a federal election, and, alternately, only 20 days' notice is required where, also as here, violations occurred within 120 days of a federal election. *See* 42 U.S.C. § 1973gg-9(b)-(c). It is well established that "'when the statute's language is plain, the sole function of the courts -- at least where the disposition required by the text is not absurd -- is to enforce it according to its terms.'" *Lamie v. U.S. Tr.*, 540 U.S. 526, 534 (2004) (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank*, 530 U.S. 1, 6 (2000)); *see also Campbell v. Allied Van Lines Inc*., 410 F.3d 618, 622 (9th Cir. 2005) ("'We have long held that there is a strong presumption that the plain language of [a] statute expresses congressional intent, rebutted only in rare and exceptional circumstances, when a contrary legislative intent is clearly expressed.'") (quoting *United States v. Tobeler*, 311 F.3d 1201, 1203 (9th Cir. 2002)).

[13] The District Court placed significant weight on the curative purpose of the notice requirement, ER-010-11, ER-012-13, without taking into account Congress' clear intent to reduce and ultimately eliminate the notice period for violations occurring within a certain time period prior to a federal election.

A. Standard of Review

This Court "review[s] de novo a district court's dismissal of a complaint under Fed. R. Civ. P. 12(b)(6) for failure to state a claim." *Starr v. Baca*, 652 F.3d 1202, 1205 (9th Cir. 2011) (citing *Caviness v. Horizon Cmty. Learning Ctr., Inc.*, 590 F.3d 806, 811-12 (9th Cir. 2010)). In considering dismissal of a complaint for failure to state a claim, the federal courts must accept the allegations in the complaint as true and construe them in the manner most favorable to the non-moving party. *See, e.g., Manzarek*, 519 F.3d at 1031.

To survive dismissal, those allegations and inferences must show that a right to relief is not merely possible, but plausible. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) ("allegations must be enough to raise a right to relief above the speculative level"); *Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009). *Twombly* and *Iqbal* do not, however, require the Complaint to disprove every conceivable defense at the initial pleading stage. Rather, the Complaint need only "plausibly suggest an entitlement to relief, such that it is not unfair to require the opposing party to be subjected to the expense of discovery and continued litigation." *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011) (explaining that the complaint should include "sufficient allegations of underlying facts to give fair notice and to enable the opposing party to defend itself effectively"); *N.M. State Inv. Council v. Ernst & Young LLP*, 641 F.3d 1089, 1094 (9th Cir. 2011) (court "will hold a dismissal

inappropriate unless the complaint fails to" state a plausible claim on its face). As demonstrated below, the factual allegations in the Complaint did far more than "plausibly suggest" that Nevada was routinely violating the NVRA by failing to offer voter registration at public assistance agencies at the time of the Complaint.

B. The Court Erred in Ruling On Defendants' Withdrawn Motion.

As an initial matter, the District Court plainly erred in dismissing the Complaint for failure to provide sufficient pre-suit notice, when Defendants themselves had withdrawn their motion premised on that argument in favor of litigating the action on the merits.[14]

The Supreme Court's decision last term in *Wood v. Milyard*, 132 S.Ct. 1826 (2012), is instructive. That case addressed the authority of a federal court to raise on its own motion a defense that a party had declined to assert. The State of Colorado had informed the district court that it would neither challenge nor concede the timeliness of Wood's habeas petition, and the district court rejected Wood's claims on the merits. *Id.* at 1829. On appeal, the Tenth Circuit affirmed the denial of Wood's petition, but solely on the ground that it was untimely. *Id.*

[14] Indeed, by the time Defendants' motion to dismiss had been withdrawn, more than 90 days had elapsed since the Notice Letter without a hearing on the preliminary injunction application that was simultaneously withdrawn by Plaintiffs or any meaningful progress on the litigation. Accordingly, at that time, Plaintiffs could have cured any purported shortcomings in the Complaint by amending.

The Supreme Court reversed. Writing for the seven Justice majority, Justice Ginsburg explained:

> Does court discretion to take up timeliness hold when a State *is aware of a limitations defense, and intelligently chooses not to rely on it in the court of first instance*? The answer *Day* instructs is "no": A court is not at liberty, we have cautioned, to bypass, override, or excuse a State's deliberate waiver of a limitations defense. . . . The Tenth Circuit, we accordingly hold, abused its discretion by resurrecting the limitations issue instead of reviewing the District Court's disposition on the merits of Wood's claims.

Id. at 1830 (citations omitted) (emphasis added); *see also Day v. McDonough*, 547 U.S. 198, 199 (2006).[15]

The reasoning in *Wood* dictates the same result here. Like the statute of limitations defense, the defense in an NVRA lawsuit regarding the alleged failure to provide proper pre-suit notice is a non-jurisdictional affirmative defense to be raised by the defendant. ER-015; *see also, e.g., Zipes v. Trans World Airlines*, 455 U.S. 385, 393 (1982) ("filing a timely charge of discrimination with the EEOC is not a jurisdictional prerequisite to suit in federal court, but a requirement that, like a statute of limitations, is subject to waiver, estoppel, and equitable tolling"); *Payne v. Peninsula Sch. Dist.*, 653 F.3d 863, 867-71 (9th Cir. 2011) (holding that

[15] To the extent an abuse of discretion standard applies, the Supreme Court has indicated that it is a per se abuse of discretion for a court to consider a waived defense. *See Day*, 547 U.S. at 199 ("And the Court would count it as an abuse of discretion to override a State's deliberate waiver of the limitations defense"). Moreover, Justice Thomas argued in his concurrence in the judgment in *Wood*, joined by Justice Scalia, that federal courts are wholly without power to consider a statute of limitations defense not raised in a pleading. 132 S.Ct. at 1835-36.

exhaustion of administrative proceeding under Individuals with Disabilities Education Act ("IDEA") was affirmative defense, not a jurisdictional requirement); *see also Jones v. Bock*, 549 U.S. 199, 211 (2007) (administrative exhaustion requirement of the Prison Litigation Reform Act of 1995 (PLRA) is an affirmative defense even though "[t]here is no question that exhaustion is mandatory under the PLRA and that unexhausted claims cannot be brought in court.").

Here, accordingly, it was Defendants' prerogative to raise or waive the pre-suit notice defense. The District Court's grant of the withdrawn motion to dismiss was therefore in error per the reasoning set forth in *Wood*.

C. No Pre-Suit Notice Was Required Because The Complaint Alleged Ongoing Violations of the NVRA Occurring in the Thirty Days Before The June 2012 Primary Election

The District Court correctly recognized that Plaintiffs filed their Complaint within 30 days of the June 12, 2012 federal primary election. ER-015. The District Court also correctly recognized that the Complaint could not be dismissed on notice grounds if the allegations plausibly stated a claim that NVRA violations were occurring at the time the Complaint was filed. ER-014; ER-017. But the District Court erred in concluding that the Complaint failed to state a claim that NVRA violations were continuing to occur.

The District Court's statement that the Complaint contains a "single allegation of past and ongoing violations" is patently incorrect. ER-015. To the contrary, the Complaint is replete with allegations of ongoing, systemic and longstanding violations of the NVRA.[16] *See* ER-045, ¶ 7; ER-047, ¶ 14; ER-055, ¶ 42; ER-059, ¶ 47; ER-061, ¶ 51; ER-064, ¶ 59; ER-064, ¶ 60.

More importantly, as discussed below, these allegations were supported by specific evidence citied in the Complaint, including the statistical data from the EAC regarding public assistance voter registration and census bureau data, ER-056, ¶¶ 43, 44, and descriptions of observations from the on-the-ground investigation of public assistance offices conducted by the Plaintiffs in December 2011. ER-058-59, ¶ 46.

The Complaint, therefore, specifically alleged in numerous instances that Defendants' violations of Section 7 of the NVRA were "ongoing" and "continuing." The plain meaning of those terms makes clear that the allegations referred to violations that were occurring at the time the Complaint was filed. *See, e.g.*, Merriam-Webster Online Dictionary, available at www.merriam-webster.com ("ongoing" means "being actually in process," and "continuing" means

[16] For example, the Complaint alleges in no uncertain terms that, "[t]here is widespread ongoing noncompliance with the requirements of Section 7 . . . . Defendants have violated, and unless enjoined will continue to violate, Section 7 of the NVRA . . . .," ER-055, ¶ 42, and further goes on to assert that, "[t]he violations of the NVRA described in the notice letter have not been remedied." ER-059, ¶ 47.

"continuous," which is defined as "marked by uninterrupted extension in space, time, or sequence."). Under any reasonable construction of the Complaint, Plaintiffs adequately alleged that Nevada officials were violating the NVRA *at the time* the Complaint was filed. Consequently, because Plaintiffs alleged violations occurring "within 30 days before" the federal primary, no notice was required, and the timing of the notice that the Plaintiffs did in fact provide is irrelevant.

Rather than accept the ordinary meaning of Plaintiffs' pleading or construe the allegations in the light most favorable to Plaintiffs, as it was required to do, the District Court erroneously concluded that the allegations in the Complaint referred to the time of the investigation in December 2011, rather than to the time they were made in June 2012. ER-015 ("The *ongoing* allegations alleged in the Complaint must, by lack of any other reference, be in reference to the December 2011 violations.") (emphasis in original); ER-016 ("The court rules that a plaintiff fails to comply with the NVRA's notice provision" where "the date of the investigation wherein the violations were discovered falls outside the 30-day pre-election window"); *cf.* ER-014 ("the aggrieved person must give notice of the specific violation with the date of its occurrence"). Because the District Court took the erroneous position that the Plaintiffs' allegations of Section 7 violations were limited to the specific transactions reviewed in the December 2011 investigation,

which occurred more than 120 days before a federal election, it concluded that 90 days' notice prior to filing suit was required.

Taken in context with the totality of the Complaint's content, however, the Complaint's identification of specific dates and instances of NVRA noncompliance observed during this investigation were clearly offered as examples to illustrate the broader allegations and provided additional evidence of Defendants' ongoing systemic failures to provide voter registration. It is entirely unreasonable to read these allegations as a series of isolated problems for which only piecemeal relief was sought. The NVRA specifically authorizes prospective relief to cure violations generally, and it does not limit relief to providing redress only to particular individuals. *See* 42 U.S.C. § 1973gg-9(b)(2) (permitting "declaratory or injunctive relief *with respect to the violation*") (emphasis added); *Valdez v. Herrera*, No. 09-CV-0668, slip op. at 6 (D.N.M. Aug. 13, 2010) (denying class certification as unnecessary in NVRA lawsuit because "the same relief would be afforded to all potential class members" in any event).[17] Thus, the District Court erred when it treated the term "violation" as incident-specific.[18]

[17] This decision is included in the accompanying addendum.

[18] The District Court's attempt to limit the meaning of words "the violation" in Section 11 of the NVRA to the violations that occurred during individual transactions is both nonsensical and damaging to the purpose of the NVRA. Plaintiffs must be able to sue not only for a single violation during a single transaction, but also for policies or practices that result in the continued repetition

At a minimum, the District Court's selective interpretation ignored the allegations that Defendants' policies and procedures -- which were in effect both in December 2011 and at the time of the Complaint -- violated the NVRA. ER-046-47, ¶ 43; ER-058-59, ¶ 46. The Complaint alleged that DHHS employees in "each . . . office visited" told investigators that voter registration applications are only provided to "clients who check 'Yes' in response to the question whether they 'would . . . like to register to vote today.'" ER-058, ¶ 46(b).[19] The plain language of the statute, however, requires that "all persons engaging in covered transactions receive a voter registration form application unless they specifically decline, in writing, to receive such an application." *See* 42 U.S.C. § 1973gg-5(a)(6)(A)(ii); *Valdez v. Squier*, 676 F.3d 935, 947 (10th Cir. 2012) (holding that when an applicant does not answer the voter preference question, the agency must provide the applicant with a voter registration form). These allegations regarding Defendants' illegal practice with respect to blank voter preference forms alone

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of violations. Otherwise, the overall policy or practice of violating the NVRA will continue to evade review.

[19] The state's policies are not subject to factual dispute, and the actual written policies, of which the District Court was entitled to take judicial notice, *see Barron v. Reich*, 13 F.3d 1370, 1377 (9th Cir. 1994) (holding that the court may take judicial notice of "[r]ecords and reports of administrative bodies" without converting a motion to dismiss into a summary judgment motion), contain the same violation. ER-111-12 ("Nevada DWSS TANF and SNAP Application Processing Policy," § 146(7)); ER-141-42 ("Nevada DWSS Child Care Policy Manual, Child Care Program Overview," Dec. 1, 2009, § 123.4).

were sufficient to state a plausible claim of ongoing violations of Section 7 at the time the Complaint was filed.

Moreover, considered in context and taken as a whole, the Complaint's allegations show longstanding violations of the NVRA and at a minimum give rise to a plausible inference that such violations were continuing during the 30 days prior to the June 2012 primary and at the time the Complaint was filed.

In addition to Defendants' policies and procedures, which indisputably were in effect when the Complaint was filed and on their face violate the NVRA, the Complaint alleged that the State's own data, as reported to the Election Assistance Commission ("EAC"), show a massive and continuing decline in voter registration through public assistance agencies over time, despite an increased public assistance caseload, ER-056-57, ¶ 44, and that there is a significant gap between the registration rates of low income and high income Nevada citizens. ER-056, ¶ 43. The Complaint further alleged that even though Nevada officials had been advised in 2008 that their public assistance agencies were failing to provide voter registration as required by the NVRA, they failed to rectify the problems; the State's data showed that just 1,677 voter registrations -- an all-time low -- had been submitted through public assistance agencies in the most recent reporting period (2009-2010). ER-056-57, ¶¶ 44-45. Finally, the Complaint alleged multiple areas

of ongoing non-compliance with Section 7 requirements at public assistance offices, based upon the recently observed examples. ER-058-59, ¶ 46.

The District Court erred because it considered the allegations of EAC figures and the December 2011 investigation in isolation from each other,[20] rather than in totality, and then refused to evaluate the allegations in the light most favorable to the Plaintiff. *See, e.g., Doe v. United States*, 419 F.3d 1058, 1062 (9th Cir. 2005) (a court considering 12(b)(6) dismissal must "tak[e] all . . . allegations as true and draw all reasonable inferences . . . in [plaintiffs'] favor"); *cf. Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322-23 (2007) (in determining sufficiency of scienter claims in a § 10(b) securities case, which has a *heightened* pleading standard, court considers "all of the facts alleged, taken collectively . . . not whether any individual allegation, scrutinized in isolation, meets that standard.").

For example, the District Court stated that it "disagrees" with the Plaintiffs' position that the EAC data from Nevada suggests a lack of compliance with Section 7 by the public assistance agencies in Nevada, and instead speculated that the EAC data reflected the results of Plaintiffs' own efforts to register low income voters. ER-016-17. But it is a fundamental principle that when evaluating a motion to dismiss, all allegations of material fact are taken as true and construed in

[20] The opinion did not consider at all whether any other allegations stated a plausible claim of ongoing violations.

the light most favorable to the nonmoving party. *See, e.g.*, *Manzarek*, 519 F.3d at 1031.[21] A court is not free to "disagree" with the plaintiff's factual allegations.

Similarly, the District Court found that the December 2011 investigations occurred too long before June 2012 to give rise to a plausible claim, ER-013-14, even though, as noted, those allegations were merely examples demonstrative of broader systematic and ongoing violations. In any event, past violations strongly suggest a likelihood of future violations. *See Californians for Disability Rights, Inc. v. Cal. Dept. of Transp.*, No. C 06-5125, 2009 WL 2982840, at *5 (N.D. Cal. Sept. 14, 2009) (evidence of construction of facilities not in compliance with the Americans with Disabilities Act "more than two or three years prior to the filing of" the lawsuit "provide[d] support for Plaintiffs' contention that [defendant's] policies and practices continue[d] to violate federal law").

[21] Similarly, the District Court improperly considered the Defendants' factual responses, based on its internal records, to three declarations submitted by Plaintiffs in connection with their motion for a preliminary injunction to reject the factual allegations made in the Complaint. ER-018; ER-081-89. Such consideration of matters outside the Complaint constituted reversible error. *See Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1061 (9th Cir. 2008) ("Review is limited to the complaint, materials incorporated into the complaint by reference, and matters of which the court may take judicial notice."); 5B Charles A. Wright & Arthur R. Miller, Federal Practice & Procedure § 1356 (3d ed. 2010) ("the district court's inquiry essentially is limited to the content of the complaint"). Moreover, the District Court not only considered this evidence, it also reached a conclusion that in light of the factual evidence provided by the Defendants, the declarations were not credible, which again clearly violates the fundamental principal that all evidence at the motion to dismiss stage should be viewed in a light most favorable to the plaintiff.

Viewing the Complaint as a whole, the allegations complement one another. Taken together, the allegations of comprehensive statewide statistics, eyewitness corroboration, and specific policy violations plausibly allege that Nevada public assistance agencies are not complying with the NVRA. Even standing on their own, the State's minimal and declining numbers of voter registration applications from public assistance agencies in recent years, at the same time the public assistance caseload has skyrocketed, strongly suggests ongoing violations of the NVRA. Here, those statistics *combined* with specific instances of non-compliance unearthed in December 2011 and the state's practices that on their face violate the NVRA, strongly suggest ongoing violations of the NVRA. Thus, the Complaint's allegations were "neither 'bald' nor 'conclusory,'" *Starr v. Baca*, 652 F.3d 1202, 1216 (9th Cir. 2011), and for purposes of assessing the sufficiency of the pleading they require drawing the "reasonable inference that [the Defendants are] liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. [22]

[22] Although the sufficiency of Plaintiffs' allegations had already been briefed, it was also improper for the District Court to dismiss the lawsuit for failure to state a claim without affording Plaintiffs the opportunity to replead. Plaintiffs could not reasonably have been expected to seek leave to amend the Complaint to allege additional facts that supported its allegations of systematic and ongoing NVRA violations because the motion to dismiss based on insufficient notice had already been withdrawn prior to the District Court's ruling. *See Bowen v. Chrysler Corp.*, No. 93-15433, 1993 WL 430074, at *1 (9th Cir. Oct. 22, 1993) (claim should not be dismissed either for lack of jurisdiction or for failure to state a claim without the court giving "adequate notice of the complaint's deficiencies and the opportunity to amend"); *Rojo v. Bonnheim*, CV 09-2762-R (MLG), 2009 WL 1972068, at *3

D. If Notice Was Required, the Notice Letter Was Sufficient

As discussed above, Plaintiffs were not required to provide notice prior to filing the present lawsuit, because they alleged ongoing violations occurring within 30 days of a federal election. Nonetheless, on May 10, 2012, Plaintiffs sent Defendants a Notice Letter describing the *systematic and ongoing* violations of Section 7 as of the date of the Notice Letter. The Notice Letter advised that:

1) "Nevada is *not* in compliance with Section 7 of the National Voter Registration Act";
2) "Nevada's public assistance offices *still have not* achieved compliance with their obligations under the NVRA";
3) "Nevada *is systematically* failing to provide the voter registration services mandated by the NVRA at its public assistance offices"; and
4) "offices *are failing to regularly* distribute voter registration applications."

ER-069-71 (emphasis added).

In other words, the Notice Letter alleged violations prior to *and as of* May 10, 2012. To support these allegations of systematic and ongoing violations, the Notice Letter provided several pieces of factual evidence, including the statistical data from the EAC and a description of the findings from the on-the-ground investigation that the Plaintiffs conducted in Nevada in December 2011. *Id.*

(C.D. Cal. July 6, 2009) ("In dismissing a complaint for failure to state a claim, a district court must ordinarily grant leave to amend, even if not requested, unless the deficiencies in the pleadings could not possibly be cured by the allegation of other facts.").

The Defendants failed to take corrective action following receipt of the Notice Letter, and the next federal election was scheduled for June 12, 2012 -- less than 120 days after the Notice Letter had been sent, and therefore less than 120 days after the alleged violations. ER-060, ¶ 48. Plaintiffs were therefore justified in filing their Complaint more than 20 days after the Notice Letter was sent. 42 U.S.C. § 1973gg-9(b).

The purpose of the NVRA's notice requirement is to provide state officials with sufficient information to understand the allegations being made so that they can attempt to correct the violations. *See ACORN v. Miller*, 129 F.3d at 838. The notice letter, however, need not contain detailed allegations in order to accomplish this goal.

In *Judicial Watch, Incorporated v. King*, No. 1:12-cv-800, 2012 WL 6114897 (S.D. Ind. Dec. 10, 2012), the district court held that a notice letter was sufficient where it did not even "state unequivocally" that a violation had occurred, but rather spoke "of an 'apparent violation,' [stated] that the available information 'strongly suggests' non-compliance with the NVRA, and [used] language such as 'we believe' that a violation has occurred." *Id.* at *2. In that case, the court reasoned that the notice letter, "when read as a whole, makes it clear that Judicial Watch is asserting a violation of the NVRA and plans to initiate litigation if its concerns are not addressed in a timely manner." *Id.* In *Georgia State Conference*

of N.A.A.C.P. v. Kemp, the district court held that a notice letter very similar to the Notice Letter in this case was sufficient, in part, because it gave concrete figures that supported the claim and showed "a precipitous decline in voter registration through Georgia public assistance offices over a 12-year period." 841 F. Supp. 2d at 1334.

The Notice Letter in this case put Defendants on distinct notice about their systematic and ongoing failure to provide voter registration services. The Notice Letter provided specific factual information to Defendants, including statistical data:

- from the Election Assistance Commission ("EAC") showing that the number of voter registration applications submitted at Nevada public assistance offices had decreased more than 95% since 1999 (from 39,444 in 1999-2000 to 1,677 in 2009-2010), while during the same period, the number of food stamps applicants had nearly quadrupled (from 62,796 to 239,080); and
- from the Census Bureau, showing that in 2010, only 47.6% of low income Nevadans were registered to vote, compared to 72.4% of high income Nevadans.

ER-070. The Plaintiffs alleged in the Notice Letter that this data from Nevada demonstrates that there is a longstanding and ongoing failure to provide NVRA-mandated voter registration services at public assistance agencies in Nevada. These data were sufficient to put the Defendants on notice that there were serious ongoing problems with Section 7 compliance in Nevada.

Moreover, the description of the findings from the on-the-ground investigation that the Plaintiffs conducted in Nevada in December 2011 provided clear examples of the nature of the Section 7 violations that were occurring. ER-070-71. In particular, the Notice Letter put Defendants on notice about: (a) the substantial decrease in voter registration applications submitted to public assistance agencies over time, despite dramatic increases in the number of individuals receiving public assistance in Nevada; (b) a significant gap between the registration rates of low income and high income Nevada citizens; (c) the systematic policy or practice, revealed through the December 2011 field investigation, resulting in a failure to provide voter registration applications to clients who did not respond to the NVRA-mandated question asking if they would "like to register to vote here today"; (d) the total absence of voter registration applications at some public assistance offices; and (e) the systematic failure to provide voter registration applications even to clients who respond "yes" to the NVRA mandated question asking if they would "like to register to vote here today." ER-069-71. This information contained in the Notice Letter is mirrored by nearly identical allegations in the Complaint, so it cannot be said that any additional allegations were sprung upon Defendants when the Complaint was filed. Therefore, like the notice letters in *Judicial Watch* and *Kemp*, the actual *substance*

of the Notice Letter in this case was sufficient to put Defendants on notice as to how they were violating the NVRA and to allow them to remedy the problems.[23]

As with the allegations in the Complaint, the District Court read the Notice Letter in a light unfavorable to Plaintiffs, ignoring the obvious implication of the specific factual allegations that Defendants were engaged in systematic and ongoing violations of Section 7. The District Court ignored the Plaintiffs' allegation of ongoing, and therefore, current, violations of Section 7 in the Notice Letter and erroneously proceeded as though the evidence provided by the December 2011 investigations were specific, set-in-time violations -- as though the Notice Letter *only* alleged violations of Section 7 for those specific points in time

[23] This is consistent with Ninth Circuit precedent regarding notice letters under the Clean Water Act. The Clean Water Act's notice provision requires that plaintiffs must provide notice to alleged violators and wait sixty days before filing suit. 33 U.S.C. § 1365(a)-(b)). As with the NVRA, the notice is "intended . . . to give alleged violators an opportunity to comply with the [Act]." *San Francisco BayKeeper, Inc. v. Tosco Corp.*, 309 F.3d 1153, 1157 (9th Cir. 2002). The Ninth Circuit strictly construes the notice requirements, *id.*, but even under a strict construction, "[n]otice is sufficient if it is reasonably specific and if it gives 'the accused company the opportunity to correct the problem.'" *WaterKeepers N. Cal. v. AG Indus. Mfg., Inc.*, 375 F.3d 913, 917 (9th Cir. 2004) (quoting *San Francisco BayKeeper*, 309 F.3d at 1158); *see also id.* at 920 ("The point of the Act's notice letter is not to *prove* violations, it is to inform the polluter 'about what it is doing wrong' and to allow it an 'opportunity to correct the problem.'"); *Natural Res. Def. Council v. Sw. Marine*, 236 F.3d 985, 997 (9th Cir. 2000) (finding adequate notice in part because Defendants made changes that were responsive to the notice letter, and therefore "obviously understood at least some of the alleged violations.").

when the investigation was conducted in December 2011.[24] To the contrary, those specific findings, while violations in their own right, were referenced as *evidence* of the broader systemic violations that were continuing to occur, just as the statistical data was provided as evidence of the widespread nature of the problem. Those examples simply provided further notice to Defendants of the extremely widespread nature of the problem that was occurring as of May 10, 2012 when the notice letter was sent; and how they might attempt to remedy it. *See, e.g.*, *Kemp*, 841 F. Supp. 2d at 1334 (holding that the notice letter need not even include specific results of investigations: "The general proposition -- that Georgia was not complying with the mandates of the NVRA . . . -- is set out clearly in the notice letter. The letter's statistics and investigation result simply serve as factual support for that general proposition."); *cf. Natural Res. Def. Council v. Sw. Marine*, 236 F.3d 985, 999 (9th Cir. 2000) (several different violations may be combined to present a picture of overall inadequacies).

Because the Notice Letter asserts violations that were occurring as of the date of the letter, which was within 120 days of the June 12 primary, Plaintiffs

[24] For example, the District Court incorrectly claims "[Defendant] Miller received the notice letter dated May 10, 2012, alleging Nevada's public assistance offices were *still* in violation of the NVRA. Here, the adverb *still* refers to the time between the alleged noncompliance in 2008 and the December 2011 investigation," rather than between 2008 and the date of the notice letter. ER-012. The District Court provides no explanation for this illogical conclusion.

were entitled to rely on an abbreviated 20-day notice period, if pre-suit notice was required at all.

III. THE DISTRICT COURT'S HOSTILITY TOWARDS PLAINTIFFS' CLAIMS WARRANTS REASSIGNMENT TO A DIFFERENT DISTRICT JUDGE

This Court's supervisory powers under 28 U.S.C. § 2106 permit reassignment upon a showing of personal bias or where "unusual circumstances" are present. *United Nat'l Ins. Co. v. R & D Latex Corp*., 242 F.3d 1102, 1118 (9th Cir. 2001). Both personal bias and unusual circumstances are present here. Courts in this Circuit consider three factors to determine whether unusual circumstances exist: (1) whether the original judge would have substantial difficulty in putting out of his mind previously expressed views or findings determined to be erroneous; (2) whether reassignment is advisable to preserve the appearance of justice; and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness. *Id.* at 1118–19 (citing *United States v. Sears, Roebuck & Co*., 785 F.2d 777, 779–80 (9th Cir. 1986)). The first two of these factors are of equal importance, and a finding of either of the two would support reassignment. *Sears*, 785 F.2d at 780; *United States v. Mikaelian*, 168 F.3d 380, 388 (9th Cir.1999).

The District Court from the outset ignored the time-sensitive nature of Plaintiffs' claims by scheduling the hearing on the Preliminary Injunction Motion,

the Motion for Expedited Discovery, and Defendants' Motion to Dismiss for two days *after* the voter registration deadline.[25] The District Court's subsequent rulings only further demonstrate its palpable hostility to and predisposition against Plaintiffs' claims. For example, at a hearing on unopposed pro hac vice admission applications, the District Court declared its intention to deny all but two of eight unopposed applications. In denying those other applications in an oral ruling, the District Court stated that civil plaintiffs are not entitled to "multiple counsel, and I'm not obligated to admit *pro hac vice* a lot of New York lawyers who in essence are representing their own interests, their own law firms' interests, rather than even the plaintiff that they represent." *See* ER-038:7-16. When Plaintiffs argued that a case of this magnitude would require numerous lawyers due to its discovery intensive nature, the Court agreed but noted, " . . . maybe you should proffer one or two of those law firm members to take the State Bar. . . . That would be the more appropriate route." ER-043:4-7. The District Court subsequently ignored entirely

[25] This was not the only time during the 2012 election season that the District Court sought to evade meaningful appellate review of its orders in election-related cases. On the same day the District Court announced its intention to deny the pro hac vice applications in this case, Judge Jones issued a preliminary injunction in another case enjoining the state of Nevada from offering (as provided for under state law) voters the option of voting for "none of the above." *Townley v. Miller*, 693 F.3d 1041, 1042 (9th Cir. 2012). In issuing the injunction, he stated that a "[w]ritten ruling of the Court will issue." *Id.* Judge Jones failed to issue such a written order so as to allow for appellate review, instead scheduling a hearing on a request for a stay of his order for September 14, a week after the deadline for printing the ballots. *Id.* at 1044 (Reinhardt, J. concurring).

Plaintiffs' motion for reconsideration of that oral ruling -- it never issued a written ruling on the pro hac vice applications or any ruling on the motion for reconsideration, effectively denying Plaintiffs the ability to seek appellate review or litigate the case.

Unfortunately, the District Court's prejudicial conduct did not stop there. On December 19, 2012, the District Court issued its order improperly and erroneously dismissing this action with prejudice on the basis of a withdrawn motion to dismiss for failure to give sufficient notice and a sua sponte determination that Plaintiffs lacked Article III standing without providing Plaintiffs an opportunity to be heard or to amend. This Court has ordered reassignment of cases on remand in precisely these situations. *See United States v. Jacobs*, 855 F.2d 652, 656–57 (9th Cir. 1988) (reassignment warranted where, *inter alia*, trial judge dismissed indictment "summarily and erroneously" and denied the motion for reconsideration); *Evon v. Law Offices of Sidney Mickell*, 688 F.3d 1015, 1034 (9th Cir. 2012) (reassignment warranted where the record reflected an "unfortunate dismissive attitude by the district judge" both toward the plaintiff's attorney and the class plaintiff sought to represent); *see also Mitchell v. Maynard*, 80 F.3d 1433, 1450 (10th Cir. 1996) ("The history of the case, combined with evidence of [the Judge's] expressions of his disapproval toward [the plaintiff], his attorney and his

claims indicate that in order to prevent any probability of unfairness or appearance of impropriety we should direct a new judge to hear the case on remand.").

Even if this Court does not find that the *ad hominem* attacks on Plaintiffs and their public interest and pro bono "New York lawyers" constitute a personal bias, this Court can and should find that the appearance of justice demands a reassignment on remand.[26] Indeed, the District Court's inflammatory characterizations of the plaintiffs' actions -- concluding that the failure to send a notice letter when the investigation occurred "suggests an ulterior motive," ER-013, that the Plaintiffs "hastily scrambled three witnesses" in support of their

[26] In the event the Court concludes that reassignment is not warranted, it should still direct the District Court to expeditiously rule on the unopposed motion to reconsider the pro hac vice petitions and further direct the Court that the mere fact that attorneys are from another state does not provide a basis to deny a pro hac vice motion. *See, e.g., U.S. for Use & Benefit of Lord Elec. Co. Inc. v. Titan Pacific Const. Corp.*, 637 F. Supp. 1556, 1562 (W.D. Wash. 1986) (recognizing party's "right to employ counsel of its own choosing"); *see also United States v. Lillie*, 989 F.2d 1054, 1056 (9th Cir. 1993) (citation omitted), *overruled on other grounds by United States v. Garrett*, 179 F.3d 1143 (9th Cir. 1999) (recognizing party's "right to the counsel of his choice includes the right to have an out-of-state lawyer admitted pro hac vice."); *Sanders v. Russell*, 401 F.2d 241 (5th Cir. 1968) (overruling decision from the United States District Court for the Southern District of Mississippi limiting pro hac vice appearances in civil rights case); ABA Model Rule on Pro Hac Vice Admission, cmt. 6, available at http://www.americanbar.org/groups/professional_responsibility/committees_commissions/commission_on_multijurisditional_practice/mjp_comm_iadc3.html ("In accordance with traditional pro hac vice practice, there is a strong presumption that the application should be granted unless there is an affirmative reason to deny it. The client should ordinarily be permitted representation by the counsel of the client's choice unless either the client is unable to appreciate evident risks of inadequate representation or there is a threat to non-client interests.").

preliminary injunction motion, ER-018, and that Plaintiffs were guilty of "tactics of delaying," ER-018 -- suggests that the appearance of justice has perhaps already been compromised.

Furthermore, the improperly made and erroneous sua sponte rulings below, on a standing issue that had not been raised or briefed and on a notice issue that had been withdrawn, strongly suggest that the District Court will have substantial difficulty putting aside those previously expressed findings. Thus, reassignment is appropriate under either of the two factors discussed, each of which alone is sufficient. Finally, at this relatively early stage, before discovery has commenced, reassignment would not entail any significant waste or duplication of judicial resources.

CONCLUSION

For the foregoing reasons, the District Court's dismissal of the Complaint should be reversed and, on remand, the action should be assigned to a different District Judge.

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STATEMENT OF RELATED CASES

Appellants are unaware of any related cases pending in this Court.

CERTIFICATE OF COMPLIANCE
WITH FED. R. APP. P. 32(A)(7)

I hereby certify that the foregoing brief complies with the type-volume limitation provided in Federal Rule of Appellate Procedure 32(a)(7)(B) because the brief contains 10,540 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). The foregoing brief complies with the typeface requirements and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because the brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 in font size 14 Times New Roman style.

/s/ Neil A. Steiner

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on April 22, 2013.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Neil A. Steiner