IN THE SUPREME COURT OF THE STATE OF NEVADA

Supreme Court Case No. 89149

REPUBLICAN NATIONAL COMMITTEE; NEVADA REPUBLICAN PARTY; DONALD J. TRUMP FOR PRESIDENT 2024, INC.; and SCOTT JOHNSTON,
Appellants,

v.

FRANCISCO AGUILAR, in his official capacity as Nevada Secretary of State; State of NEVADA; STATE OF NEVADA; CARI-ANN BURGESS, in her official capacity as the Washoe County Registrar of Voters; JAN GALASSINI, in her official capacity as the Washoe County Clerk; LORENA PORTILLO, in her official capacity as the Clark County Registrar of Voters; LYNN MARIE GOYA, in her official capacity as the Clark County Clerk; VET VOICE FOUNDATION; and the NEVADA ALLIANCE FOR RETIRED AMERICANS,
Respondents.

Appeal from Order Denying Motion for Preliminary Injunction
First Judicial District Court, Case No. 24 OC 00101 1B
The Honorable James Russell

APPELLANTS' OPENING BRIEF

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I. NRAP 26.1 Disclosure Statement

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a):

There are no corporations or entities described in NRAP 26.1 appearing in this case as an appellant.

The names of all law firms whose partners or associates have appeared in this Court, the District Court, or ant administrative agency on behalf of appellant are as follows:

Ashcraft & Barr LLP; First & Fourteenth PLLC;

Sigal Chattah's Law Offices

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These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

/s/ Jeffrey F Barr

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IV. Jurisdictional Statement

This Court has jurisdiction pursuant to NRAP 3A(b)(3) in that this is a timely appeal of the District Court's refusal to grant Plaintiffs' motion for preliminary injunction.

The District Court issued its Order August 6, 2024 denying Plaintiffs' motion for preliminary injunction. The Notice of Entry of Order was timely served on Plaintiffs on August 7, 2024, and the Notice of Appeal was timely filed and served on Defendants on August 9, 2024. Appellant Republican National Committee; Nevada Republican Party; Donald J. Trump for President 2024, Inc.; and Scott Johnston ("Plaintiffs") were the plaintiffs below who were aggrieved by the Order. Accordingly, this Court has appellate jurisdiction to hear this matter pursuant to NRAP 3A(b)(3).

V. Routing Statement

This case is presumptively retained by the Supreme Court because the principal issues are (1) a question involving a ballot or election under NRAP 17(a)(2); (2) a question of first impression involving the Nevada Constitution and common law; and (3) a question of statewide public importance under NRAP 17(a)(11) and (12).

Resolution of this case requires the Court to interpret Nevada's election law regarding the counting of mail ballots received after election day without a postmark, NRS 293.269921, a ballot or election question, a matter of first impression, and to consider whether the Secretary of

State's guidance memorandum regarding the same violates the Administrative Procedure Act, all three of which are questions of statewide importance as they will impact the public through governing the 2024 general election.

VI. Statement of Issues Presented for Review

(1) Does NRS 293.269921 require mail ballots received after the polls close on election day to be postmarked in order to be counted?

(2) Did the Secretary of State violate the Nevada Administrative Procedure Act by issuing a Memorandum directing election officials to "interpret[]" mail-ballots with "no visible postmark" to comply with NRS 293.269921 and be counted?

(3) Is "some" Democratic party a necessary and indispensable party to this lawsuit under Nev. R. Civ. P. 19?

(4) Did the District Court error in denying Plaintiffs Motion for Preliminary Injunction?

VII. Statement of the Case

This is an appeal from the First Judicial District Court, Case No. 24 OC 00101 1B of a denial of a preliminary injunction in favor of Respondents in a case interpreting the counting of ballots under NRS 293.269921.

Nevada has a history of close, hotly contested elections, including for President. When an election is close, a small number of ballots can make the difference. Plaintiffs bring this lawsuit to address an admittedly small set of ballots: mail ballots received by elections officials after election day that lack any postmark. NRS 293.269921 unambiguously forbids county elections officials from counting these ballots. The existence of this type of ballot is not speculative. There will be hundreds, perhaps thousands, of such received in counties across Nevada during the upcoming high-turnout presidential election.

As demonstrated by Clark County's conduct during the primary election, Defendants will, contrary to this law, count this specific and discrete set of ballots unless this Court requires otherwise. In fact, the Secretary of State has taken the extraordinary step of issuing a "Memorandum" directing all county clerks to, effectively, disregard Nevada's law. In doing so, the Secretary did not even attempt to comply with the requirements of Nevada's Administrative Procedure Act. Plaintiffs, including the Nevada GOP, Republican National Committee,

and Presidential candidate Donald J. Trump, seek to enforce Nevada's clear law forbidding the counting of non-postmarked ballots received after election day. Enforcement of this commonsense law is extremely important to preventing mail ballots cast after election day from being counted. Enforcing this requirement will not burden Defendants' administration of the general election given Defendants' current instructions to voters comply with the law and how it will not materially affect ballot-processing procedures.

The case for enforcing Nevada's postmark requirement is particularly compelling given the Legislature's adoption of this requirement was deliberate. Nevada recently joined the minority of 18 States that allow for the limited counting of mail ballots received after election day. It did not join the super-minority of States, such as California, that allow ballots to be counted after election day without a postmark. Compare NRS 293.269921 ("the mail ballot must be … postmarked on or before the day of the election") with Cal. Elec. Code § 3020 (allowing counting when mail ballot "has no postmark" if other conditions are satisfied). There is no need for speculation. If the Nevada Legislature intended to allow the counting of some mail ballots received after election with "no postmark," as does California, it would have said so in NRS 293.269921. Instead, the Nevada Legislature joined the States that allow late-arriving mail ballots to be counted only if postmarked on or before election day.

Separately, the Secretary's recent Memorandum contradicts the plain statutory requirements and, if not corrected, will irreparably harm Plaintiffs in the upcoming general election. In order for Nevada to have "a uniform, statewide standard for counting ... all votes *accurately*", Nev. Const. art. II, § lA(10)(emphasis added), an injunction must issue enforcing Nevada's postmark requirement.

VIII. Statement of the Facts Relevant to the Issues

At issue is a critical component of Nevada's post-election day counting of ballots: the requirement that mail ballots received after election day be postmarked on or before election day.

A. Nevada's statutory scheme for late-arriving mail ballots.

There are numerous opportunities to vote in Nevada, including by mail. A mail ballot may be returned in person, deposited in a ballot drop box, or returned by mail. Nevada provides for mail ballots to be sent to all active registered voters who do not opt out of receiving a ballot by mail, and Nevada includes postage pre-paid return envelopes for returning mail ballots. [JA 25-26.]

Since 2020, Nevada law has provided that mail ballots may be counted if there is evidence they were mailed on or before election day but were not received by the clerk or registrar until after election day. (Prior to 2020, Nevada law did not permit the counting of any absent ballots received in the mail after election day. *See* NRS 293.317 (2019)).

These late-arriving ballots are subject to strict limits, as would be expected for the counting of additional ballots received after the election has been completed and the polls have closed.

The law states:

> [I]n order for a mail ballot to be counted for any election, the mail ballot must be … Mailed to the county clerk, and: (1) Postmarked on or before the day of the election; and (2) Received by the clerk not later than 5 p.m. on the fourth day following the election.

NRS 293.269921(1). Nevada law further provides that "[i]f a mail ballot is received by mail not later than 5 p.m. on the third day following the election and the date *of the postmark* cannot be determined, the mail ballot shall be deemed to have been postmarked on or before the day of the election." NRS 293.269921(2) (emphasis added). Consistent with this statutory requirement, Nevada election materials repeatedly inform voters that their ballots must be postmarked on or before election day. For example, the official mail ballot envelope tells voters to ensure the return envelope is postmarked using the following language:

> MUST BE POSTMARKED ON OR BEFORE ELECTION DAY AND RECEIVED BY THE ELECTION DEPARTMENT NOT LATER THAN 5:00PM THE FOURTH DAY FOLLOWING THE ELECTION.

[JA 27.] The same instruction carries over to the official return envelope, instructing voters that

> Your mail ballot must be postmarked on or before Election Day and received by the Election Department before 5:00pm on the fourth day after Election Day.

[JA 27.]

B. Nevada officials ignore the postmark requirement.

On April 23, 2024, the Deputy Secretary of State for Elections, Mark Wlaschin, testified before the Nevada Legislature's Advisory Committee on Participatory Democracy that Nevada's policy and practice is to count mail ballots "without a postmark" if they are received within three days of election day. *See* Deputy Secretary of State for Elections Mark Wlaschin, Testimony Before Nevada Advisory Committee on Participatory Democracy, April 23, 2024, available at 4/23/2024 - Secretary of State - Advisory Committee on Participatory Democracy - YouTube (starting at 1:30:09). https://bit.ly/473qMyO

On May 29, 2024, the Nevada Secretary of State's office issued a Memorandum to all County Clerks and Registrars to disregard the statutory postmark requirement. The Memorandum states:

> "[A] mail ballot that has no visible postmark should be interpreted to have an indeterminate postmark, and therefore should be accepted if it has been received by the clerk by mail not later than 5 p.m. on the third day following the election."

[JA 91.] According to the Memorandum, "it is the intent of the Office of the Secretary of State that this guidance be submitted as a regulation following the conclusion of the 2024 election cycle." *Id.*

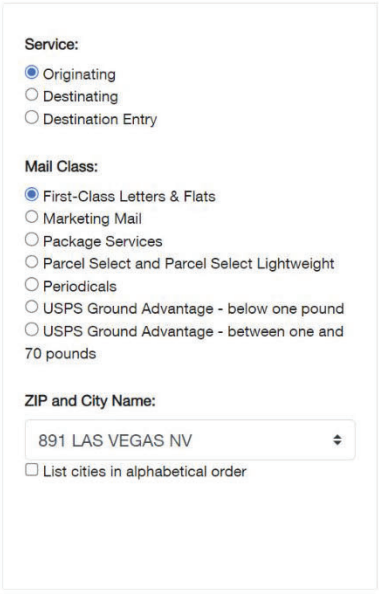
During the mail ballot counting process for the June 11, 2024 primary election, Clark County in fact received a number of ballots that lacked a postmark after election day, and those votes were counted, consistent with the guidance of the Memorandum. [JA 178-79.]

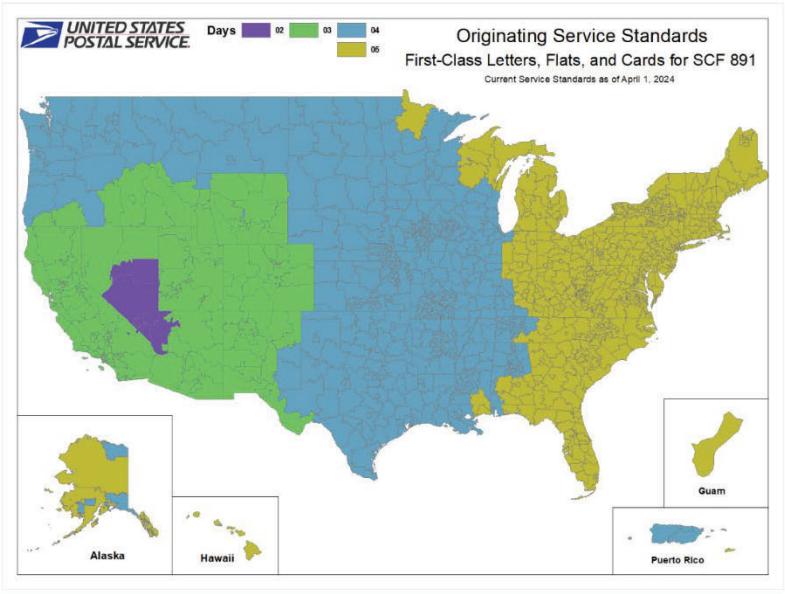
C. Election officials intend to ignore the postmark requirement for the 2024 general election.

Nevada will hold a general federal election on November 5, 2024. In addition to many local and state election matters, the general election will select presidential and vice-presidential electors and elect Representatives and a U.S. Senator from the State. Under Nevada law, mail ballots "postmarked on or before" November 5, 2024, and "[r]eceived by the clerk not later than 5 p.m." on November 9, 2024, will be counted. NRS 293.269921(1). Postmarked mail ballots whose postmark date "cannot be determined" may be counted if received on or before 5 p.m. on November 8, 2024. NRS 293.269921(2).

Consistent with Deputy Secretary Wlaschin's testimony and the Secretary of State office's May 29, 2024 Memorandum, election officials in Nevada have counted and will continue to count mail ballots that lack a postmark and are received by 5:00 p.m. on the third day following the election. Pursuant to this policy, Nevada election officials intend to count mail ballots that lack a postmark and are received on or before 5:00 p.m. on November 8, 2024. No Defendant has denied this.

Moreover, USPS routinely delivers mail inside of three days within Nevada. For example, the online Service Standard Map for first class





mail originating in any Las Vegas zip code shows the letter will be delivered to the Clark County Elections Department within two days. [JA 32.] It is therefore likely that mail ballots deposited in the mail after election day could arrive at mail-ballot processing facilities within the three-day deadline, and under the Defendants' policy, those untimely ballots would be counted if they do not bear a postmark.

D. Plaintiffs sought preliminary injunction to enforce compliance with Nevada's postmark requirement.

Plaintiffs filed this lawsuit on May 31, seeking declaratory and injunctive relief (excluding the June 11 primary election). [JA 1.] Plaintiffs filed an Amended Complaint on July 3 with updated factual allegations following the primary election. [JA 19.] Plaintiffs then filed a

motion for preliminary injunction. [JA 43.] The Court ordered a hearing on the preliminary injunction on August 2. [JA 192.] Defendants filed briefs opposing the preliminary injunction [JA 74 (intervenor), 104 (Clark), 117 (State), 130 (Washoe)] and the trial court granted intervention as Defendants to the Vet Voice Foundation and Nevada Alliance for Retired Americans. The trial court denied the preliminary injunction on August 6 [JA 300-315] (hereafter "Order") and Plaintiffs promptly appealed [JA 318.].

IX. Summary of the Argument

This case is about the proper interpretation of Nevada's election law requiring ballots received after election day to bear a postmark in order to be counted. NRS 293.269921. Plaintiffs seek preliminary injunctive relief prohibiting Nevada officials from counting these ballots, in accordance with the plain language of NRS 293.269921. Plaintiffs also challenge under the Nevada APA the Secretary of State's recent Memorandum ordering county elections officials to count these non-postmarked ballots despite the plain language of NRS 293.269921.

Plaintiffs will suffer irreparable harm if Nevada elections officials are permitted to count ballots received after election day with no postmark in the upcoming general election. To be clear, this suit addresses only the narrow set of ballots received without any postmark whatsoever. It is not a challenge to Nevada's general policy of counting ballots received after election day.

The district court erred in denying Plaintiffs' motion for preliminary injunction on several grounds. First, it held Plaintiffs—a collection of a national political party, state political party, political candidate and Nevada voter—somehow lacked standing to challenge Defendants' unlawful policy of counting non-postmarked ballots in violation of the statute. This was error: First, Plaintiffs' uncontested allegations and evidence demonstrate that the policy of counting non-postmarked ballots received after election day will require Plaintiffs to divert resources, including money and personnel that would otherwise be used for other purposes, to enhanced monitoring of ballot processing in order to protect the electoral interests of their candidates. Second, Plaintiffs will suffer competitive injury caused by Defendants' challenged conduct. Post-election day mail ballots, including the subset of such ballots at issue in this case, tilt heavily in favor of Democratic candidates in Nevada, thus making the competitive landscape worse for Plaintiffs and their candidates.

Conversely, the lower court also found that Plaintiffs' articulated competitive injury—though insufficient to support Plaintiffs' standing to sue—was substantial enough to require them to join "some Democratic Party" entity because these political competitors were supposedly indispensable parties to this case. The lower court's incorrect—and wholly inconsistent—application of NRCP 19 must be reversed. There is simply no authority that in cases involving challenges to election

procedures that all political parties must be joined as parties to the action. Nor do Democratic Party entities have a legally cognizable interest in the counting of ballots contrary to law.

Plaintiffs have also shown a clear likelihood of success on the merits. NRS 293.269921(1) unambiguously requires ballots to be postmarked "on or before" election day in order to count. Subsection (2) contains a narrow caveat: mail ballots where "the date of the postmark cannot be determined" count. But that caveat expressly requires the existence of "the postmark" in order to apply. Because the plain language of the postmark requirement indisputably requires a postmark, that should be the end of the matter.

But the Secretary's policy, which requires treating ballots without a "visible postmark" as an "indeterminate postmark" for purposes of NRS 293.269921(2), violates the plain language of the statute. It eviscerates the clear statutory postmark requirement by concocting the fanciful notion of a "non-visible postmark." The Secretary and the district court did not identify *any* authority in Nevada law or elsewhere that a non-visible postmark is a recognized concept, likely because the idea itself is ludicrous. A ballot with a "non-visible" postmark is in reality a ballot with no postmark at all and NRS 293.269921 clearly requires rejection of such ballots. This Court must reject the district court's attempt to write the postmark requirement out of the statute. This Court must reverse the

district court and hold that the Defendants' policy violates NRS 293.269921

Separately, Plaintiffs are likely to prevail under the Nevada APA because the Secretary's Memorandum was issued in abject violation of the APA's rulemaking requirements. The trial court held otherwise by creating an inappropriate exception to the APA for an "interpretation." There is no such exception under Nevada law. The Secretary was required to comply with standard rulemaking procedures. Because he did not, his Memorandum cannot stand.

X. Argument

Consistent with NRCP 65 and NRS 33.010, Plaintiffs sought a preliminary injunction before the general election on November 5, 2024. "NRS 33.010(1) authorizes a [preliminary] injunction when it appears from the complaint that the plaintiff is entitled to the relief requested and at least part of the relief consists of restraining the challenged act." *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans/or Sound Gov't*, 120 Nev. 712, 12 721, 100 P.3d 179, 187 (2004). "Before a preliminary injunction will issue, the applicant must show (1) a likelihood of success on the merits; and (2) a reasonable probability that the non-moving party's conduct, if allowed to continue, will cause irreparable harm for which compensatory damage is an inadequate remedy. In considering preliminary injunctions, courts also weigh the potential hardships to the

relative parties and others, and the public interest." *Id.* (quotation marks and citations omitted)."

Statutory construction is a question of law that this Court reviews *de novo*, and consequently, this Court gives no deference to the District Court's interpretation. *Carson City DA v. Ryder*, 116 Nev. 502, 504-05, 998 P.2d 1186, 1188 (2000).

A. Rule 19 does not require mandatory joinder of "some" Democrat party.

The trial court wrongly held that "some" Democrat party is indispensable to this case by badly misapplying Rule 19. NRCP 19(a)(1)(B)(i) requires the joinder of a party where that "party claims an interest relating to the subject of the action and is so situated that disposing of the action in the person's absence may … as a practical matter impair or impede the person's ability to protect the interest." The trial court adopted Defendants' novel argument that because quasi-rulemaking at issue allows the counting of ballots that tend to favor Democratic candidates, they were required to join "*some* Democratic Party," [JA 132 (emphasis in original)] as not only a necessary party, but an indispensable one.

As an initial matter and as argued in Part X.F, *infra*, no voter or political party has a legally cognizable interest in the counting of ballots contrary to law. However, even if "some Democratic Party" may be affected—even negatively—by an order of the Court enforcing NRS

293.269921 as written, they are not a "necessary" party under Rule 19(a). This is because only the threatened impairment of a particular and clear legal right—such as the impairment of a contract or right to property—qualifies a third party for mandatory joinder under Rule 19. *Las Vegas Police Protective Ass'n, Inc. v. Eighth Jud. Dist. Ct. in & for Cnty. of Clark*, 138 Nev. Adv. Op. 59, 515 P.3d 842, 848 (2022).

The trial court's error in applying Rule 19 is easily understood in the context of argument of Plaintiffs' motion. At argument, counsel for the Secretary of State pointed the trial court to an order it had entered in February of this year in *Nevada Republican Party v. Aguilar*, No 23 OC 00000051 (Div. I) (order denying motion for preliminary injunction (July 21, 2023) [JA 213-14.] That case is inapposite here. That suit challenged AB 126, which required Nevada's major political parties to participate in a presidential preference primary election. There, the court held that the Nevada Democratic Party was a necessary and indispensable party, because if the NVGOP succeeded in having AB 126 declared unconstitutional, it would automatically strip the Nevada Democratic Party of its statutorily created right to have the State conduct a presidential primary election including its candidates. See *id.*, at 3-4. The Nevada Democratic Party's potential loss of a concrete legal right granted to it by statute—is the *sine qua non* of the sort of interest protected by Rule 19 for mandatory joinder.

Not so here. The Democratic Party does not have a concrete legal right to enforcement of the Defendants' unlawful policy disregarding the statutory postmark requirement. Federal courts applying Fed. R. Civ. P. 19 have also held that political parties are not necessary parties in a fight over the requirements of an election law to voters. *See, e.g.*, *Fulani v. McKay*, 2007 WL 959308 at*3 (S.D.N.Y. March 29, 2007) ("That the other political parties might be affected-even negatively affected-by a holding invalidating [an election law], does not make them necessary parties").

Indeed, recent history demonstrates that Democrats see no need to name Republicans when they sue under Nevada's election laws and Nevada's courts have not applied Rule 19 to dismiss those suits. *See, e.g.*, *Cortez Masto for Senate and Democratic Senatorial Campaign Committee v. Clar County, et al.*, No. A-22-860996-W (Clark. Co. Dist. Ct.). And this is perfectly sensible: the ordinary way political parties protect their interests in cases brought by other political actions is intervention. While "some Democratic party" may have a cognizable interest in the outcome of this litigation sufficient to support intervention under NRCP 24,[1] it does not have a concrete legal right that will be necessarily impaired, the standard for mandatory joinder. Where a third party is not "necessary,"

[1] Plaintiffs' Counsel noted at argument that the Democratic National Committee routinely intervenes in matters filed by the RNC, including in *Burgess* and the RNC does not, as a matter of course, oppose such intervention. [JA 200-01.] It is notable that "some Democratic Party" has not yet sought to intervene, even on appeal.

it cannot be indispensable such that that party's non-joinder requires dismissal. *Makah Indian Tribe v. Verity*, 910 F.2d 555, 559 (9th Cir. 1990) ("Only if the absent parties are 'necessary' and cannot be joined must the court determine whether in 'equity and good conscience' the case should be dismissed under Fed.R.Civ.P. 19(b)."). There are hundreds of cases challenging election procedures filed across the country every election cycle—all of which invariably will affect the Republican and Democratic parties and courts simply do not apply Rule 19's mandatory joinder rule to require both political parties to be present in all such cases.

Because "some Democratic Party" cannot be an indispensable party to this litigation, Rule 19 is no impediment to Plaintiffs' likelihood of success on the merits.

B. Plaintiffs have standing.

The trial court wrongly held that Plaintiffs likely could not establish standing to challenge Defendants' disregard of the statutory postmark requirement. Collectively, Plaintiffs represent every potential type of plaintiff – a candidate, a state political party, a national political party, and a Nevada voter – that could conceivably challenge this open and notorious violation of Nevada election law in advance of the election. If none of these plaintiffs have standing, then no party would ever have standing to challenge even brazen violations of Nevada election law outside of a post-election contest, when it may be too late to remedy the legal violation. Plaintiffs have pleaded and will suffer two distinct forms

of injury as a result of Defendants' actions: resource diversion and competitive harm.

1. Standing based on resource diversion.

Plaintiffs have firmly established standing on account of the additional resources they will be required to devote to responding to Defendants intention to count mail ballots received after election day without a postmark. The trial court committed reversable error by declining to find standing based on the undisputed factual record.

As an initial matter, no one disputes that political parties, candidates, and organizations can demonstrate standing through diversion of resources caused by election laws and policies. *See, e.g.*, *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015); *Crawford v. Marion Cnty. Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd*, 553 U.S. 181 (2008); *Arcia v. Fla. Sec'y of State*, 772 F.3d 1335, 1341 (11th Cir. 2014); *Mi Familia Vota v. Fontes*, No. CV-22-00509-PHX-SRB, 2024 WL 862406, at *30 (D. Ariz. Feb. 29, 2024); *Fair Fight Action, Inc. v. Raffensperger*, 413 F. Supp. 3d 1251, 1266 (N.D. Ga. 2019). "[A]n organization has direct standing to sue where it establishes that the defendant's behavior has frustrated its mission and caused it to divert resources in response to that frustration of purpose." *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 663 (9th Cir. 2021).

The district court held that Plaintiffs did not demonstrate diversion of resources for one reason only: because Plaintiffs already plan to devote

resources to election integrity activities, they did not show they must spend *additional* resources to counteract the harm caused by counting non-postmarked ballots. Order at 6. This is incorrect. The district court failed to even acknowledge the ample record evidence that Plaintiffs must expend additional resources toward election integrity efforts because of Defendants' policy of counting non-postmarked ballots. The district court admitted unrebutted declarations at the preliminary injunction hearing that show Plaintiffs must divert additional resources to post-election monitoring of ballot processing to accomplish their mission as a result of Defendants' unlawful actions.[2]

The first declarant, Alida Ceballos, an Observer for the Republican Party during the 2024 primary election, is "personally familiar with how the [RNC] devotes resources to monitor and observe the processing and counting of ballots in Nevada after election day, including recent elections and how it will do so in the upcoming general election." [JA 269-72 (Ceballos Decl. ¶ 5).] Her declaration stated:

- "During the Primary Election held on June 11, 2024 the RNC expended resources to monitor and count mail ballots received

[2] In its written order, the district court declined to consider or credit the declarations for purposes of establishing irreparable harm, Order at 15, but the declarations were undoubtedly admitted as evidence without objection by Defendants and can therefore be considered by this Court when assessing the likelihood of establishing standing. [JA 238 (Tr. 47:4-5)].

after election day, including in particular the receipt and counting of any mail ballot received that lacked a postmark." *Id.* ¶ 6.

- "The RNC will, if the practice of tabulating non-postmarked ballots received after election day is not enjoined by this Court, have to *expend resources* preparing for and engaging in *more extensive* post-election proceedings, *including specifically* training volunteers to document all instances of ballots received without a postmark after election and seeking these ballots' segregation from other ballots with postmarks in order to preserve the ability of the RNC to contest a close election on this basis." *Id.* ¶ 7 (emphasis added).

- "If the RNC was not required to expend resources monitoring and seeking the segregation of ballots received without a postmark after election day, then *those resources would be spent on other activities* to further the interest of the RNC…" *Id.* ¶ 8 (emphasis added).

- "To effectively monitor, track, and respond to the handling of non-postmarked ballots after election day, the RNC would need to *use additional organization time, training, and use of an increased number of election observers and staff* to monitor and document the receipt and counting of mail ballots received after election day that lack a postmark." *Id.* ¶ 11 (emphasis added).

- "In particular, if the Defendants are not enjoined from the counting of mail ballots received after election day that lack a postmark then the RNC will be required to *expend additional resources*, above and beyond those that would otherwise be used, to accurately monitor the receipt and handling and counting of mail ballots received after election day that lack a postmark." *Id.* ¶ 12 (emphasis added).

Another declarant, Alex Watson, the executive director of the Nevada Republican Party, is "personally familiar" with how the NVGOP uses resources to monitor the counting of ballots received after election day, "including mail ballots that lack any postmark." [JA 274-76 (Watson Decl.).] Watson likewise attests that:

- "The NVGOP will, if the practice of tabulating non-postmarked ballots received after election day is not enjoined by this Court, have to *expend resources* preparing for and engaging in *more extensive* post-election proceedings, *including specifically* training volunteers *to document all instances of ballots received without a postmark after election day and seeking these ballots' segregation* from other ballots with postmarks in order to preserve the ability of the NVGOP to contest a close election on this basis." *Id.* ¶ 9 (emphasis added).

- "If the NVGOP was not required to expend resources monitoring and seeking the segregation of ballots received without a postmark after election day, then *those resources would be spent on other activities* to further the interest of the NVGOP in supporting the successful election of Republican candidates such as encouraging Republican voters whose ballots are rejected for a missing signature to cure these ballots with county elections offices." *Id.* ¶ 10 (emphasis added).

- "Based on past practice and experience, the NVGOP will, if the practice is not enjoined by this Court, need to *expend additional resources* to monitor the receipt and seek the segregation of mail ballots after election day that lack a postmark, and those resources would be available for use in other NVGOP activities if no ballots lacking a postmark were counted after election day. Indeed, the resources and observers used by the NVGOP for the June 11 primary election was not sufficient to accurately and fairly monitor the receipt and counting of mail ballots lacking a

> postmark that were received after election day." *Id.* ¶ 11 (emphasis added).

Far from "continuing ongoing activities" or conducting "business as usual," Order at 6, Plaintiffs demonstrated they must "expend[] additional resources that they would not otherwise have … in ways that they would not have expended them." *Nat'l Council of La Raza*, 800 F.3d at 1040. The additional organization time, training, and number of election observers and staff required to monitor and document the processing of non-postmarked ballots are necessary to protect the interests of Plaintiffs' federal, state, and local candidates, who will need such evidence to challenge the counting of non-postmarked ballots in post-election proceedings. See NRS 293.269931(1)(right to observe counting process); NRS 293.410(2)(right to contest election). Such enhanced monitoring will require significant additional resources, but in any event, "[t]he fact that the added cost has not been estimated and may be slight does not affect standing, which requires only a minimal showing of injury." *Crawford*, 472 F.3d at 951. Not only will Plaintiffs have to devote resources to enhanced monitoring and evidence-gathering, but they will have to devote resources to efforts to ensure that Defendants handle the contested ballots appropriately—e.g., by preserving ballots with non-postmarked envelopes so that Plaintiffs and their candidates do not forever lose the ability to prevent them from being counted.

These additional activities are necessary to protect the electoral interests of Plaintiffs' candidates, which is at heart of political parties' and campaigns' "mission[s]." *E. Bay Sanctuary Covenant*, 993 F.3d at 663. Absent an injunction, the Defendants' unlawful policies will remain in effect during the November general election. But for Defendants' unwillingness to enforce the postmark requirement, Plaintiffs would not need to devote resources to enhanced monitoring, evidence-gathering, and efforts to preserve legal remedies and could instead devote such resources to advance their candidates' interests in other ways.

The fact that Plaintiffs already devoted some resources to post-election day election integrity efforts does not mean they are not injured by the *additional* expenditure of resources caused by Defendants' unlawful policy. In *Nat'l Council of La Raza*, for example, the Ninth Circuit held that plaintiff organizations that regularly engaged in voter registration assistance had standing based on having to devote more resources to voter registration assistance. 800 F.3d at 1039-40. In *Mi Familia Vota*, the Democratic Party had standing to challenge citizenship verification and investigation laws based on having to register new voters and further train staff on communicating about the effects of these voting laws to potential voters. 2024 WL 862406, at *27 & *30. While voter registration and communications training are undoubtedly "business as usual" for political parties, Order at 6, having to devote *additional* resources to these activities to effectively respond to

challenged laws constitutes an injury for purposes of standing. The same analysis from *Mi Familia Vota* applies here: although Plaintiffs engage in post-election observation of ballot processing, they must devote additional resources to enhanced post-election efforts to effectively counteract Defendants' unlawful policy and protect their candidates' electoral interests.

Plaintiffs' uncontested evidence that they need to devote additional resources to enhanced post-election day ballot observation that would otherwise be used for other mission-critical activities conclusively demonstrates standing based on diversion of resources.

2. Plaintiffs have demonstrated competitive injury.

Counting non-postmarked ballots will cause competitive injury to Plaintiffs and the candidates they support.

> "If an allegedly unlawful election regulation makes the competitive landscape worse for a candidate or that candidate's party than it would otherwise be if the regulation were declared unlawful, those injured parties have the requisite concrete, non-generalized harm to confer standing."

Mecinas v. Hobbs, 30 F.4th 890, 898 (9th Cir. 2022). Thus, political parties and candidates suffer injury when "forced to participate in an 'illegally structure[d] competitive environment.'" *Id.* (quoting *Shays v. FEC*, 414 F.3d 76, 87 (D.C. Cir. 2005)).

The district court held that Plaintiffs did not demonstrate competitive injury because they did not show "potential loss of an

election," Order at 4 (quoting *Drake v. Obama*, 664 F.3d 774, 783 (9th Cir. 2011)), or that they operate under a "state-imposed disadvantage," *id.* (quoting *Mecinas*, 30 F.4th at 899). The district court relied heavily on a recent federal district court decision, *RNC v. Burgess*, 3:24-CV-00198-MMD-CLB, 2024 WL 3445254 (D. Nev. July 17, 2024), *appeal pending*. Of course, the federal district court's decision is not binding on this Court, and this Court should reject its holding. The court in *Burgess*, and the district court here, drastically narrowed the competitive standing inquiry for political parties and candidates. The *Burgess* decision misread Ninth Circuit precedent, which makes clear that a regulation that "makes the competitive landscape worse" for political parties and candidates is sufficient to establish competitive injury. *Mecinas*, 30 F.4th at 898; *see also Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020) ("An inaccurate vote tally is a concrete and particularized injury to candidates."); *Texas Democratic Party v. Benkiser*, 459 F.3d 582, 586 (5th Cir. 2006) (competitive injury occurs if the "chances of victory would be reduced").

As the Amended Complaint and record evidence demonstrate regarding the partisan lean of post-election day ballots, [JA 17-10], *infra* pp.23-25, counting non-postmarked ballots received after election day certainly "makes the competitive landscape worse" for Republican candidates up and down the ballot in Nevada. *Mecinas*, 30 F.4th at 898.

Plaintiffs have shown based on specific data from the last two elections that the specific ballots at issue are known, in Nevada, to heavily favor Democrat candidates. [JA 17-19.] The trial court ignored this evidence and simply declared, incredibly, that "Organizational Plaintiffs have failed to establish that late-arriving mail ballots without postmarks skew Democratic." Order at 5. This statement was contrary to every shred of factual evidence in the case and, candidly, defies common sense. See [JA 34-37 (Am. Compl. ¶¶ 69, 76).] Moreover, Defendants did not introduce any contrary evidence plausibly suggesting that post-election day ballots do not favor Democrats.

Indeed, the trial court and Defendants *admit* elsewhere that the ballots at issue stand to reduce Democrat favoring ballots, for that is the only basis to hold that "some" Democratic party was an indispensable party, namely on account of the challenged ballots being likely to favor Democrats, and therefore harm Republicans. Order at 9 ("Taking Plaintiffs' allegations as true, it would follow that their requested relief would directly harm Democrats by preventing the counting of some Democratic mail ballots…. The Democrat party would have an … interest in ensuring the maximum number of Democratic mail ballots are counted."). *See also* Part X.A, *supra*. While the potential harm to Democratic candidates from enforcing Nevada's unambiguous requirement that ballots received after election day bear a postmark is not legally cognizable, the circularity of the trial court's reasoning in this

regard is remarkable: what is sauce for the goose is sauce for the gander. The trial court cannot at once conclude the "some Democratic Party" is necessary to this case and at the same time assert that the ballots at issue in this litigation are somehow not tilted in favor of Democratic candidates. That is enough to establish standing by competitive injury.

In any event, Plaintiffs amply demonstrated "*potential* loss of an election." Order at 4 (quoting *Drake*, 664 F.3d at 783) (emphasis added). The record evidence uniformly shows that late-arriving ballots favor Democratic candidates up and down the ballot and that such ballots have flipped the results of close elections. For example, a Republican candidate for Clark County Commission with a 2,700 vote lead on election night lost by just 30 votes after arrival of post-election day ballots out of more than 150,000 cast. See [JA 34 (Am Compl ¶ 69).] In the 2022 Nevada election for U.S. Senate, media reported that late-arriving mail ballots favored the Democrat and helped swing the final election results. [JA 35-36 (¶ 76) (citing Jacob Solis, *Cortez Masto defeats Laxalt in Senate race, securing majority for Democrats*, The Nevada Independent, Nov. 12, 2022, available at https://bit.ly/4fVZMVS)

Republican Adam Laxalt had led Democrat Catherine Cortez Masto by around 23,000 votes following Election Day, but the remaining mail ballots favored Cortez Masto by a more than 2-to-1 margin, and Laxalt lost the race by fewer than 8,000 votes.

This dynamic of late-arriving ballots breaking in favor of Democratic candidates is not surprising and is virtually certain to occur again in the 2024 general election. The Defendant Secretary of State's own data confirms the reality of a partisan disparity in mail ballots. See Nev. Sec'y of State, 2020 General Election available at https://bit.ly/3X16FfO (In Nevada's 2020 general election, 60.3% of Democratic voters voted by mail, compared to just 36.9% of Republican voters); Nev. Sec'y of State, 2022 General Election Turnout, available at https://bit.ly/3YSmtEk (In the 2022 general election, 61.3% of Democrats and just 40% of Republicans voted by mail). In addition, in the Nevada 2024 primary elections, Democratic voters disproportionately voted by mail as compared to Republican voters. Office of Nev. Sec'y of State, 2024 Presidential Preference Primary Turnout: Cumulative Presidential Preference Primary Election Turnout – Final (Feb. 20, 2024) https://bit.ly/4cM2CtW (numbers showing 80.14% of total Democrat vote by mail; 75.13 of total Republican vote by mail); Office of Nev. Sec'y of State, 2024 Primary Election Official Turnout (June 21, 2024) https://bit.ly/4cUeBWp (numbers showing 74.% of total Democrat vote by mail; 52.67% of total Republican vote by mail).

Mail ballots from Democratic voters frequently arrive late in part because "Democratic get-out-the-vote drives—which habitually occur shortly before election day—may delay maximum Democratic voting…" Ed Kilgore, Why Do the Last Votes Counted Skew Democratic?

Intelligencer (Aug. 10, 2020) https://nym.ag/3Mg4ekC ("Democrats tend to voter later."). Indeed, data from the Nevada Secretary of State's office and county election offices indicates that there were approximately 50% more late-arriving ballots from registered Democratic voters than registered Republican voters in both the 2020 and 2022 general elections. [JA 35.]

The district court resisted the only reasonable conclusion from this evidence based on the alleged unknown candidate preferences of unaffiliated voters, who have cast 27.6% of mail ballots over the last two general elections. Order at 4-5. But this finding ignores the uncontested record evidence that post-election day mail ballots have invariably improved Democratic candidates' vote margins relative to Republican candidates—across numerous election cycles, in primary and general elections, and in races for federal, state, and local office in Nevada. *See* [JA 35-36.] (describing Democratic tilt of late-arriving ballots in 2022 US Senate election and 2020 Clark County Commission election); *see also* Colton Lochhead, *Joe Lombardo wins Nevada governor's race after Sisolak concedes*, Las Vegas Review Journal, Nov. 11, 2022, https://bit.ly/3Xk5IRq (describing "mail-in ballots counted in the days following the election breaking heavily for Democrats" and that "Sisolak needed Democrat-leaning mail-in ballots to close the gap that Lombardo had built on Election Day, a scenario that played out in the Nevada's races for U.S. Senate, secretary of state and treasurer"); Megan Messerly

et al., *Biden secures majority of votes in presidential race in Nevada day after being declared the victor*, Nevada Independent, Nov. 8, 2020, https://bit.ly/4cG9Zmy (reporting that Joe Biden was "winning mail ballots in Clark County by about a 2-1 margin" and that late-arriving mail ballots were benefiting Democratic candidates in multiple congressional and state legislative districts). Thus, the unrebutted evidence shows that late-arriving mail ballots in Nevada in recent elections invariably benefit Democratic candidates. The lack of specific evidence regarding partisan preferences of unaffiliated voters does not disturb that conclusion.

The district court also resisted the mountains of evidence of the Democratic tilt of late-arriving mail ballots by saying it is "far from guaranteed" that Nevada voters will continue their same mail voting trends. Order at 5. But competitive standing does not require a "guaranteed" outcome. Nobody can guarantee an election result. A "potential" loss of an election is sufficient to establish competitive standing. *Drake*, 664 F.3d at 783. Indeed, the Supreme Court has emphasized that plaintiffs are not required "to demonstrate that it is literally certain that the harms they identify will come about." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 414 n.5 (2013). In any event, it is the district court that "speculat[ed]," without any evidence introduced by Defendants, that the same well-established trends from multiple previous elections may not repeat themselves. Order at 5.

The district court also relied on *Burgess*'s holding that plaintiffs may not rely "on speculation about the unfettered choices made by independent actors' to establish standing." Order at 4 (quoting *Burgess*, 2024 WL 3445254 at *2). As an initial matter, the plaintiffs in *Burgess* challenged the legality of counting any ballots received after election day. Here, Plaintiffs are not challenging any law or policy that would impact voters' voting patterns, because enforcing the postmark requirement does not alter any rules regarding when ballots are due. *Burgess* is therefore inapposite on that point. Moreover, under the district court's holding, virtually all election litigation would be precluded because *all* challenges to vote counting procedures necessarily involve the independent actions of third parties. That has never been the law in Nevada, *Progressive Leadership Alliance of Nev. v. Cegavske*, Case No. 85434 (Nev. Oct. 3, 2022) (challenge to hand counting ballot procedures that relies on harms from how independent actors vote), and it would be a mistake to adopt such a restrictive rule for standing in election disputes.

These allegations of an unfair advantage distinguish this lawsuit from those challenges to emergency laws enacted due to concerns about COVID, as cited by the trial court and Defendants where plaintiffs lacked the specific and credible allegations or evidence of competitive harm. *See, e.g.*, *Donald J. Trump for President, Inc. v. Cegavske*, 488 F. Supp. 3d 993 (D. Nev. 2020). For example, in *Bost*, the trial court held the plaintiffs did "not specify how they, individually, are or will be harmed in a concrete

and particularized way," contrasting with Plaintiffs' evidence in this case about challenged late-arriving ballots systemically favoring Democrat candidates and thus particularly harming Plaintiffs. *Bost v. Ill. St. Bd. of Elections*, 684 F.Supp.3d 720, 729-30 (N.D. Ill. 2023).[3] Likewise, in *Wood* a single voter raised claims that the Eleventh Circuit noted likely could be brought by political candidate, such as Plaintiff Donald J. Trump for President 2024, Inc. in this case. *Wood v. Raffensperger*, 981 F.3d 1307, 1314 (11th Cir. 2020) ("if Wood were a political candidate harmed by the recount, he would satisfy this requirement"). In *Bognet*, one of the flurries of emergency cases challenging Pennsylvania's counting of mail ballots in the Covid-19 impacted 2020 general election, the court rested its rejection of the candidate's standing because he failed to "offer any

[3] Earlier this week, the Seventh Circuit issued a divided opinion affirming the trial court. *Bost v. Illinois State Bd. of Elections*, No. 23-2644, 2024 WL 3882901 (7th Cir. Aug. 21, 2024). To the extent this recent opinion undermines resource diversion standing for political candidates, it is mistaken. As the dissenting opinion highlights, the decision put the Seventh Circuit at odds with virtually every federal appellate court, including the U.S. Supreme Court's decision in *FDA v. Alliance for Hippocratic Medicine*, 602 U.S. 367, 379 (2024), upholding standing based on resource diversion. *See id.*, 2024 WL 3882901, at *10 (Scudder, J., dissenting in part) (Candidate Bost "is an active stakeholder who ought to be permitted to raise his claim in federal court.") At most, the Seventh Circuit decision is, for now, an outlier that conflicts with the long line of cases recognizing standing based on resource diversion and competitive injury in the Ninth Circuit. *See generally Mecinas,* 30 F.4th at 898.

evidence tending to show that as greater proportion of mailed ballots received after Election Day … would be cast for Bognet's opponent." *Bognet v. Sec'y of Commonwealth of Pa.*, 980 F.3d 336, 351 (3d Cir. 2020). Plaintiffs in this case offer precisely this sort of evidence that was lacking in *Bognet*. See Part X.B.

Because Plaintiffs have provided evidence of concrete competitive harm this case cannot be dismissed as those relying on mere generalized grievance. In Nevada, due to the nature of mail-ballot voting patterns, the challenged conduct *uniquely* harms Republican candidates and advantages Democrat Candidates. That is enough to establish standing.

Plaintiffs therefore have standing to pursue this claim now before ballots at issue can potentially cause a Republican candidate to lose an election.

C. Defendants' policy allowing counting of non-postmarked ballots violates NRS 293.269921.

Nevada law allows late-arriving mail ballots to be counted *if postmarked* on or before the election. NRS 293.269921. Defendants have instead elected to count ballots with no "visible" postmark, contrary to the plain meaning of the law the legislature recently passed. The district court rejected the plain meaning of Nevada law when it declared that "[i]f the Legislature intended to demand that ballots without a visible postmark be rejected, it could easily have said so." The Legislature, in fact, did say so in NRS 293269921 "the mail ballot *must be* …

[p]ostmarked on or before the date of the election." This Court too should say so.

1. The plain language of NRS 293.269921 requires postmarks for late-arriving mail ballots.

"[W]hen the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it." *Employers Ins. Co. of Nev. v. Chandler*, 117 Nev. 421, 425, 23 P.3d 255, 258 (2001). Here, the statute could not be clearer. In order for a mail ballot received after election day to count, it must be "postmarked on or before the day of the election" and received by 5:00 pm on the fourth day after the election. NRS 293.269921(1). However, if "the date of the postmark cannot be determined," the ballot is presumed postmarked by election day and will count if received by 5:00 pm on the third day following the election. NRS 293.269921(2).

In all instances, a mail ballot received after election day requires a postmark in order for it to count. The limited exception for ballots to count where "the date of the postmark cannot be determined" still requires the presence of a postmark on the ballot envelope, because the statute speaks in terms of "*the* postmark." *Id.* Moreover, the statute specifies the exact piece of information in "the postmark" that must be indeterminate in order for the exception to apply: the postmark's "date." For an election official to evaluate "the date of the postmark," there must first be a postmark. Without a postmark there is no date to determine (or

fail to determine). There is simply no way to read subsection (2) of the statute to excuse the presence of a postmark altogether.

The district court's interpretation cannot be squared with the plain language of NRS 293.269921. When "conducting a plain language reading" of a statute, courts must "avoid an interpretation that renders language meaningless or superfluous." *Nev. Dep't of Corrs. v. York Claims Servs.*, 131 Nev. 199, 203, 348 P.3d 1010, 1013 (2015) (cleaned up); see also *In re Parental Rights as to S.M.M.D.*, 272 P.3d 126, 132–33 (Nev. 2012) ("This court generally avoids statutory interpretation that renders language meaningless or superfluous."); *Badger v. Eighth Jud. Dist. Ct.*, 373 P.3d 89, 94 (Nev. 2016); *Karcher Firestopping v. Meadow Valley Contr.*, 125 Nev. 111, 113, 204 P.3d 1262, 1263 (2009); *Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("courts must give effect, if possible, to every clause of a statute"). The lower court and Secretary's interpretation do just that. In treating a ballot with "no visible postmark" as having "an indeterminate postmark" for purposes of NRS 293.269921(2), they read the postmark requirement out of the statute and thereby render it meaningless. Consider the relevant portion of the statute:

> 1. Except as otherwise provided in subsection 2 … in order for a mail ballot to be counted for any election, the **mail ballot must be**:
>
> …
>
> (1) **Postmarked** on or before the day of the election;

> 2. If a mail ballot is received by mail not later than 5 p.m. on the third day following the election and the **date of the postmark cannot be determined**, the mail ballot shall be deemed to have been postmarked on or before the day of the election.

NRS 293.269921 (emphasis added). The district court's interpretation of subsection (2) renders subsection (1)'s postmark requirement a virtual nullity. Moreover, the district court's interpretation effectively strikes language from subsection (2). The version of the statute as interpreted by the district court would read:

> 2. If a mail ballot is received by mail not later than 5 p.m. on the third day following the election ~~and the date of the postmark cannot be determined~~, the mail ballot shall be deemed to have been postmarked on or before the day of the election.

If the Legislature did not want to require a postmark on mail ballot envelopes, it would not have imposed subsection (1)'s postmark requirement. If the Legislature wanted to allow counting of any non-postmarked ballot for three days, it would not have limited the exception to where "the date of the postmark cannot be determined." Alternatively, the drafter could have expressly stated, as California does, that any ballot shall be counted "with or without a postmark." Nevada did neither and instead used specific language addressing postmarks where the date cannot be determined (i.e., the date is smudged or otherwise illegible).

The fundamental flaw in the district court's statutory interpretation was buying into Defendants' notion of "visible" vs. "non-visible" postmarks. Order at 8-9. The district court asserted that interpreting NRS 293.269921 according to its plain language creates an

"arbitrary distinction" between ballots with illegible postmarks and ballots "with no visible postmark at all." Order at 9. But there is nothing "arbitrary" about this distinction. A "non-visible" postmark means simply the ballot envelope is not postmarked. There is no authority in the law or in common sense that the idea of a "non-visible postmark" even exists as a concept.

The district court said that "[w]hether a postmark is smudged, torn, or absent altogether, the date of the postmark 'cannot be determined' so the statute equally applies." Order at 9. But when a postmark is "smudged" or "torn," there is still a postmark on the envelope, but when a postmark is "absent altogether," that means the envelope is not postmarked. The statute decidedly does not treat such scenarios "equally," because the statute requires a postmark and allows a narrow exception only when the date of it "cannot be determined." NRS 293.269921(1)-(2). Moreover, nobody disputes that the statute only allows for mail ballots to count on the *fourth* day after the election if there is a proper postmark, again, clearly distinguishing between postmarked ballots in a non-arbitrary way. NRS 293.269921(1)(b)(2). Statutory postmark requirements—clearly articulated in statutes in Nevada and states around the country—cannot be elided by inventing out of thin air the absurd fiction of a non-visible postmark.

The district court's statement that "no provision in the statute addresses that specific category of ballots"—i.e., ballots with non-visible postmarks—underscores the point. Order at 10. The Nevada statute, nor any statutory postmark requirement across the country, addresses non-visible postmarks, because non-visible postmarks are just simply

envelopes without postmarks. The district court said: "If the Legislature intended to demand that ballots without visible postmarks be rejected, it could easily have said so." *Id.* But the Legislature did say so when it said that "in order for a mail ballot to be counted for any election, the mail ballot must be … postmarked on or before election day." NRS 293.269921(1). In other words, the Legislature's directive is that non-postmarked ballots—or ballots with non-visible postmarks, to adopt the district court's terminology—must be rejected.

The district court's "structural" argument fares no better. Order at 9-10. It maintained that its interpretation of the statute does not render any provision superfluous because subsection (1) "applies to ballots whose postmark dates *can* be determined," while subsection (2) "applies where the date of the postmark cannot be determined." Order at 9. Thus, these subsections "are plainly intended to cover all ballots delivered to election officials by mail: those with determinable postmark dates, and those without. There is no third set of rules." *Id.* This argument ignores the full scope of subsection (1). As the district court correctly recognizes, subsection (1) requires: (a) acceptance of ballots with postmarks dated on or before election day and (b) rejection of ballots with postmarks dated after election day. But the district court ignores a third scenario: ballots that do not have a postmark at all. Subsection (1) requires rejection of such ballots because they are not "postmarked on or before election day." NRS 293.269921(1). The district court's interpretation therefore does render this requirement of subsection (1) superfluous.

The deeming clause of NRS 293.269921(2) reinforces Plaintiffs'

interpretation. This clause only makes sense if the ballots subject to the exception of that subsection are ballots with a physical postmark present. The structure is "if" a condition is met, then "the mail ballot shall be deemed" to have a property. That property illuminates the unmistakable meaning and fits with the structure of NRS 293.269921. If the ballot meets the exception, *then* the ballot "shall be deemed to have been **postmarked on or before the date of the election.**" NRS 293.269921(2)(emphasis added). That fits with the subsection 1 requirement that mail ballots "must be" "**postmarked on or before the date of the election**." The language is identical and it must mean the law requires a postmark to be present. That reading is fully consistent and places the emphasis on the legally significant date of the postmark.

The district court's interpretation also conflates "indeterminate" and "cannot be determined." *See* Order at 9 ("It does not matter whether a postmark is illegible or absent altogether; the date of a postmark is still indeterminate in both scenarios."). The statutory standard is not whether the date is "indeterminate." The standard is whether "the date of the postmark *cannot be determined*." For the "date of the postmark" to be indeterminate then it *is* not determined. See *indeterminate*, MERRIAM-WEBSTER COLLEGIATE DICTIONARY (11th ed. 2020) ("not definitely or precisely determined or fixed: vague"). Here, that would mean that there is a postmark date, but election officials just do not know precisely what it is. The date exists whether we know it or not. In the case of a *missing*

postmark, (i.e. no "visible" postmark in the parlance of the Memorandum) there is no date to determine. In this way, indeterminate and indeterminable are not interchangeable. If something is "indeterminable," it is "incapable of being definitely fixed or ascertained." Indeterminable, MERRIAM-WEBSTER COLLEGIATE DICTIONARY (11th ed. 2020). A ballot with no postmark is more naturally described as being "indeterminable" and not indeterminate (or "cannot be determined"). Where there is no postmark it is not possible to evaluate the date because the date does not exist. Where there is no postmark date, there is nothing for the election officials to "determine" or fail to determine. It is illogical to discuss, for example, the color of a car that does not exist. If there is no car, it would not be appropriate to say that "the color of the car cannot be determined." Similarly, if there is no postmark, it is illogical to discuss the date of the postmark. It is a category error.[4]

2. Legislative intent and sound public policy confirm postmarks are required.

The language of NRS 293.269921 is unambiguous, and therefore the court must "give that language its ordinary meaning and not go

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[4] The district court speculated that Plaintiffs' insistence on the presence of a postmark as required by NRS 293.269921 could somehow prevent the counting of non-postmarked ballots received before election day. Order at 11. This ignores the purpose of the postmark requirement: to give some indicia that the ballot was cast before the polls closed. This is why Plaintiffs are not seeking an injunction preventing the counting of any ballots received on or before election day.

beyond it." *Nev. Dep't of Corrs.*, 131 Nev. at 203. But even if the language were ambiguous, it must be interpreted "consistently with what reason and public policy would indicate the Legislature intended." *Id.* at 204 (citation omitted). Here, the Nevada Legislature made a policy choice to extend the ballot-receipt deadline past election day for ballots received through the mail. To ensure that such ballots were mailed by the time the polls close, the Legislature imposed a requirement that they be postmarked on or before election day.

Postmark requirements are ubiquitous. The vast majority of states that allow counting of ballots received after election day require a postmark proving the ballot was mailed by election day.[5] One of the

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[5] Alaska Stat. § 15.20.081(e) (a ballot "must be postmarked on or before election day" and received within 10 days of the election); Cal. Elec. Code § 3020 (allowing counting of mail ballot "has no postmark" if other conditions are satisfied); D.C. Code Ann § 1-1001.05(a)(10A) (election officials shall "accept absentee ballots postmarked or otherwise proven to have been sent on or before the ay of the election" and received within 7 days of the election); Kan. Stat. Ann. § 25-1132 (procedure for counting ballots "which are postmarked or are otherwise indicated by the United States postal service to have been mailed on or before the close of the polls"); Mass. Gen. Laws Ann. 54 § 93 (absent voting ballots received within three days should have proof of being mailed prior to end of election, and "[a] postmark, if legible, shall be evidence of the time of mailing."); Miss. Code Ann. § 23-15-637(1)(a) (absentee ballots "must be postmarked on or before the date of the election and received by the registrar no more than five (5) business days after the election"); Ohio Rev. Code Ann. § 3509.05(D)(2) ("any return envelope that is postmarked prior to the day of the election shall be delivered to the director prior to the fifth day after the election"); Tex. Election Code Ann. § 86.007 (a mailed ballot that "bears a cancellation mark of a common or contract

reasons so many states that count ballots received after election day, including Nevada, have adopted a postmark requirement is to ensure that ballots mailed after election day are not counted. While California is among the rare exceptions[6] in adopting a law that *does not require a postmark* to accept a mail ballot received after the election, such states make clear in their statutes that there is no postmark requirement, in contrast to Nevada, which makes clear that a postmark *is* required. No state permits a voter to drop off a ballot after election day.

In any event, Nevada is not California. The Legislature elected, instead, to join the broader roster of States that will accept ballots after election day in the mail, but only if they are postmarked. This basic

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carrier" can be counted if received within one day of the election); Utah Code Ann. § 20A-3a-204(2)(a) ("to be valid, a ballot that is mailed must be clearly postmarked before election day" and received "before noon on the day of the official canvass following the election"); Va. Code 24.2-709(B) (absentee ballots received "before noon on the third day after the election and postmarked on or before the date of the election shall be counted"); W. Va. Code § 3-3-5(g)(2) (absentee ballots will be accepted if "the ballot bears a postmark of the United States postal Service dated no later than election day" and received before the canvassers convene).

[6] See Ill. Rev. Stat. CH 10 §5/19-8 (requiring a postmark on a ballot on or before election day, but expressly allowing a properly dated voter affirmation to substitute for a missing postmark); N.D. Cent. Code § 16.1-07-09, 16.1-15-25 ("Any envelope without a postmark" must be received by mail before the canvassing board meets); O.R.S. 253.070(4) ("If the elector returns the ballot by mail, and a postal indicator is not present or legible, the ballot shall be considered to be mailed on the date of the election and may be counted if the ballot is received no later than seven calendar days after the election.").

safeguard is amply supported by reason and public policy. It protects the security and integrity of the election by preventing ballots that are mailed after election day from being counted.

Even if one assumes that the lack of a postmark is not an indication of fraud, sound policy favors clear evidence that a late-accepted ballot was in fact mailed before the election concluded. The postmark requirement ensures that only ballots cast on or before election day are counted. *See Bush v. Hillsborough Cnty. Canvassing Bd.*, 123 F. Supp. 2d 1305, 1317 (N.D. Fla. 2000).

The district court invoked Nevada's voter intent statute as requiring the "spirit of Nevada's election laws" to favor the "counting, not rejecting, of votes." Order at 10 (citing NRS 293.127(1)(c)). This law is, of course, more meaningful than saying, "don't reject any votes." The district court's boundless interpretation of that provision would put every election procedural rule in jeopardy. NRS 293.127(1)(c) provides that Nevada's election laws must be construed "to the end that … [t]he real will of the electors is not defeated by any informality or by failure substantially to comply with the provisions of this title *with respect to the giving of any notice or the conducting of an election or certifying the results thereof*." (emphasis added). The provision protects electors against the failures of elections officials in giving notice, or conducting or certifying an election. Properly enforcing the postmark requirement is not a failure of election officials in conducting the election any more than properly

enforcing the four-day post-election ballot receipt deadline is not a failure of election officials. NRS 293.127(1)(c) cannot be read to prohibit proper enforcement of election laws. It simply clarifies that voters should not bear the consequences of *mistakes* by election officials. It cannot be read to allow election officials to *disregard* election laws.

The trial court also invoked public policy as not holding the lack of postmarks against voters because the "smudging or omission of a postmark" are "entirely outside voters control" and, as a matter of constitutional avoidance, the votes should count. Order at 11-12. The district court's highly cursory analysis of the constitutionality of postmark requirements must be disregarded. The *Anderson-Burdick* test, which governs the constitutionality of election procedures, requires a fact-intensive analysis that weighs the magnitude of the burden on the right to vote against the state interests promoted by the challenged procedure. *See Burdick v. Takushi*, 504 U.S. 428, 441 (1992). The district court did not even mention the relevant test or standards and simply assumed that proper application of the postmark requirement violates the Constitution because it can result in some ballots not counting. The district court did not find any facts regarding the burden on the right to vote—which requires consideration of numerous factors, including voters' other options to cast a ballot, their ability to mail their ballots well before election day, and their right to ask a post office employee to postmark the ballot envelope in front of them. The district court also did

not attempt to weigh the magnitude of that burden against Nevada's interests in enforcing the postmark requirement.

Moreover, a voter's decision to cast a mail ballot necessarily entails subjecting himself to circumstances "outside the voter's control." Order at 12. For example, USPS delays might cause a timely-mailed ballot to returned after the four-day post-election deadline, but that is not sufficient justification for election officials to unilaterally alter the post-election day deadline. It was the Legislature's decision to strike the balance between allowing additional opportunities for voters to return their mail ballots and requiring basic safeguards to prevent counting of mail ballots returned after election day. Election officials cannot unilaterally alter this legislative balance based on fears of USPS errors, which are inherent in any mail voting system.[7] The relevant question is not whether the Secretary's interpretation "conforms to reason and public policy," as the district court asserted, Order at 12, but whether his interpretation is "consistent[] with what reason and public policy *would indicate the Legislature intended*." *Nev. Dep't of Corrs.*, 131 Nev. at 203 (emphasis added). Because the Legislature clearly evidenced an intent to balance its expansion of opportunities to cast a ballot with basic (and commonly accepted) safeguards around mail ballots—amply supported

[7] A voter who is concerned about the risks of USPS error can choose to return a mail ballot to election offices or via ballot drop boxes, cast an early ballot in person, or vote on election day.

by reason and public policy—it is the Secretary's interpretation that is inconsistent with what the Legislature intended.

At bottom, determining the constitutionality of the postmark requirement is not appropriate for this action. If litigants want to challenge the constitutionality of the postmark requirement, they can file a separate action where proper factfinding and analysis can occur. This Court should reject the district court's summary treatment of the constitutionality of an important election security measure adopted by more than a dozen states. And the district court's fly-by analysis of the constitutionality of the postmark requirement should not factor into this Court's decision as to whether Defendants' policy is consistent with NRS 293.269921.

The decision doesn't name the *constitutional* conflict to be avoided; because there is none. Nobody has a right to have a mail ballot counted *after* election day. Many states simply refuse to count *any* ballot received after election day, postmark or not. If there were a true constitutional conflict, then those states laws (most of the country) would be unconstitutional. In reality, the lack of voter control over a postmark is a red herring. The single federal decision the district court points at to suggest otherwise, *DCCC v. Kosinski*, is mistaken, and does not fully support Defendants position in any event, since the Court only ordered counting of non-postmarked ballots for a *single* day, because the court wanted to "avoid any risk of counting ballots that were filled out after the

close of polls". *DCCC v. Kosinski*, 614 F.Supp.3d 20, 44 (S.D.N.Y. 2022) (granting only "a modified version of the relief DCCC requests"). Indeed, as shown in Section VIII(A) *supra*, Nevada elections officials, including defendants Washoe County and Clark County already—correctly—advise voters to exercise their control over their ballot to ensure it is postmarked or returned by election day.

The district court also wrongly invokes the specter of legislative history. Legislative history does not come into play when the statute is unambiguous, *Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014), such as here, but even if it did, the legislative intent supports Plaintiffs' understanding of the law. The trial court did not find the statute ambiguous, instead offering a legally unsound interpretation according to the plain text. See Order at 11 ("Even if the plain text of the Postmark Provision were ambiguous, traditional canons of construction further support rejecting Plaintiffs' reading.") In passing, then, the trial court went on to point to an ambiguous statement from one legislator as evidence of a no-postmark-required interpretation. Even if relevant, the legislative history does not support the Defendant's position.

The district court pointing to part of an answer given by Assemblyman Frierson during a Committee that is ambiguous, but describes "envelops that were not postmarked or the postmark was illegible, smudged or otherwise damaged to where it could not be read …" Order at 13. The comment, however, came in response to Assemblyman

Matthews' multi-part question: (1) why is it good to accept ballots with a postmark that cannot be determined? (2) how often does a ballot come back without a postmark date? and (3) are there other states with similar provisions? Minutes of the Meeting of the Assemb. Comm. On Legis. Operations & Elections, 2021 Leg., 81st Sess. At 20-21 (Nev. 2021).[8] Assemblyman Frierson did not appear to address question (1) or (3) and only partially addressed question (2). Moreover, Assemblyman Frierson's answer to question (2) begins by saying that "[i]t is simply inaccurate to reflect that there is not a postmark date." His answer thus appears to rely on a common misconception, namely, that prepaid postage envelopes are—as a rule—not postmarked because they are prepaid. Thus, when considering the entire context, it is clear the Legislature did not consider the question of counting ballots that lack a postmark after election day. Regardless, the incomplete snapshot of legislative history cannot overcome the plain text of the statute passed, which expressly requires postmarks.

Finally, the district court wrongly adds words to the statute by interpretation. If the Legislature wanted NRS 293.269921 to require the counting of ballots with no postmarks, it would have said so directly. The lower court cites *In re Lowry*, 40 Nev. Adv. Op. 38, 549 P.3d 483, 485 (2024) to say that "[w]hen a statutory provision lays out specific

[8] See https://bit.ly/4fYWcuc

requirements, but makes no mention of others, Nevada courts presume that such 'omissions' by the Legislature were intentional." Order at 9. This citation supports the argument that the Legislature could have included language that would clearly require the election officials to count ballots with no postmark. It could have included a phrase within NRS 293.269921(2) such as "the date of the postmark cannot be determined *or is not present*." It could have added a separate provision adding the requirement to include ballots with no postmark. It could have adjusted Subsection (2) to say, "and if it cannot be determined whether the ballot was postmarked by the appropriate date or postmarked at all." There legislature used no such language and instead specified that ballots must include a postmark.

D. Defendant Secretary of State violated Nevada APA.

The trial court additionally erred by failing to enjoin the Secretary of State's recently issued "Memorandum" that directs elections officials to count non-postmarked ballots for complete failure to follow the requirements of the Nevada Administrative Procedures Act ("APA"). The trial court's abbreviated analysis, citing no case law, offered only a single reason for allowing this improper rulemaking to stand: an "interpretation" is not subject to the APA and the Secretary of State's general authority NRS 293.247(4) governs. Order at 14. This cannot be case. If true, it would mean the Secretary of State would never need to comply with the APA, as the generic interpretive authority would provide

some sort of blanket exemption. This Court rejected this precise theory in *Nevada State Democratic Party v. Nevada Republican Party*, 256 P.3d 1, 7 (Nev. 2011), the very case cited by Defendants briefs.[9]

As an initial matter, the Memorandum "interpretation" is a regulation within the meaning of NRS 233B.038(1)(a). A "regulation" subject to the Nevada APA includes any agency "rule, standard, directive or statement of general applicability which effectuates or interprets law or policy, or describes the organization, procedure or practice requirements of any agency." NRS 233B.038. The Nevada Secretary of State is an agency. An agency "makes a rule when it does nothing more than state its official position on how it interprets a requirement already provided for and how it proposes to administer its statutory function."

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[9] In *Nevada State Democratic Party*, one political party challenged the ability of a candidate to "self nominate" for special election, and the Nevada Secretary of State (and other political party) opposed the lawsuit by offering a contrary interpretation of election law. There was no APA challenge. In affirming the trial court's injunction, the Nevada Supreme Court declined to "defer" to the Secretary's published interpretation of the law in question because the interpretation (much like the Memorandum challenged here) "was an insufficient method" and regulations were required, so "deference to the Secretary's interpretation … is not appropriate." *Id.* The case does not create a freestanding right to "interpretation" exempt from the APA, as Intervenor-Defendants suggest. Just as NRS 304.250 in *Nevada State Democratic Party* required the Secretary of State to adopt regulations (not interpretations), so too does NRS 293.124 require the Secretary of State "adopt such regulations as are necessary to carry out the provisions of this section." This mandate, not NRS 293.247(4) controls.

Coury v. Whittlesea-Bell Luxury Limousine, 102 Nev. 302, 305, 721 P.2d 375, 377 (1986); *Las Vegas Transit Sys., Inc. v. Las Vegas Strip Trolley*, 105 Nev. 575, 578, 780 P.2d 1145, 1146 (1989); *Dunning v. Nevada State Bd. of Physical Therapy Examiners*, 132 Nev. 963 (2016) (unpublished disposition) (policy of "general applicability" constitutes regulation). The Memorandum was sent to all county clerks and registrars and was "provided for consistent and clear guidance regarding the interpretation of NRS 293.269921(2)." The Memorandum is described as "guidance" that is "to be submitted as a regulation following the conclusion of the 2024 election cycle". *Id.*

The Memorandum was "a statement of general applicability that effectuated agency policy" and therefore regulation and not mere interpretive ruling. *State Farm Mut. Auto. Ins. Co. v. Comm'r of Ins.*, 958 P.2d 733, 738, 114 Nev. 535, 544 (1998). It is blackletter law that when "an agency engages in conduct that constitutes the making of a regulation, it must adhere to the notice and hearing requirements set forth under NRS 233B.060 and 233B.061." *Id.* at 724.

The APA "sets forth minimum procedural requirements, such as notice and a hearing, when agencies engage in rulemaking activity" and "[t]he notice and hearing requirements are not mere technicalities; they are essential to the adoption of valid rules and regulations." *Id.* at 531 (citation omitted). Consistent with the APA, when "an agency engages in conduct that constitutes the making of a regulation, it must adhere to the

notice and hearing requirements set forth under NRS 233B.060 and 233B.061." *Johnson*, 121 Nev. at 528. An agency "cannot act without notice and a reasonable opportunity to be heard and must act within constitutional limits." *Checker, Inc. v. Pub. Serv. Comm'n*, 84 Nev. 623, 634, 446 P.2d 981, 988 (1968).

It is undisputed that the Secretary implemented the regulation without notice or hearing. *See S. Nevada Operating Engineers Contract Compliance Tr. v. Johnson*, 121 Nev. 523, 530, 119 P.3d 720, 725 (2005). If NRS 293.269921(2) requires interpretation, the Secretary must comply with the notice and hearing requirements of NRS 233B.040 or NRS 233B.060. The Nevada APA requires regulations to provide notice and an opportunity for a hearing before the regulation becomes effective.

As a regulation, the Memorandum is void for failure to comply with the notice and hearing requirements of the APA. Indeed, the Memorandum acknowledges the regulatory nature of the Secretary's interpretation when it states, "it is the intent of the Office of the Secretary of State that this guidance be submitted as a regulation following the conclusion of the 2024 election cycle." [JA 91.] Courts do not defer to the Secretary of State when "the plain language of the election statute" contradicts the interpretation, as it does in this case. *See Independent American Party v. Lau,* 10 Nev. 1151, 1155, 880 P.2d 1391, 1393 (Nev. 1994).

Moreover, the Memorandum—regardless of notice and hearing—

would be an invalid regulation contrary to and inconsistent with the statute at issue, NRS 293.269921. Administrative agencies may not adopt regulations contrary to statute and it "acts without authority when it promulgates a rule or regulation in contravention of the will of the legislature as expressed in the statute, or a rule or regulation that exceeds the scope of the statutory grant of authority." *Scott v. Angelone*, 771 F. Supp. 1064, 1066–67 (D. Nev. 1991), aff'd, 980 F.2d 738 (9th Cir. 1992); *see also Ruley v. Nevada Bd. of Prison Comm'rs*, 628 F. Supp. 108, 111 (D. Nev. 1986) ("agency may not make a rule or regulation that is out of harmony with or goes beyond the scope of its statutory grant of authority").

In sum, the Memorandum violates the Nevada APA and the trial court erred in not enjoining the application of the memorandum. *See* NRS 233B.110; and *State Bd. of Equalization v. Sierra Pac. Power Co.*, 97 Nev. 461, 466, 634 P.2d 461, 464 (1981) (declaring regulation invalid for failure to follow APA notice and hearing requirements).

E. Plaintiffs will be irreparably injured without an injunction.

Absent a grant of Plaintiffs' motion, election officials will count non-postmarked ballots received after election day in the upcoming November election. The district court rejected Plaintiffs irreparable injury for the same reasons it declined to find standing and held that NRS 293.269221 allows ballots without a postmark to be counted. Order at 14. But for the

reasons outlined above, Plaintiffs are likely to establish standing and succeed on the merits of its statutory and APA claims.

Plaintiffs will suffer irreparable harm if Defendants are not enjoined from counting non-postmarked ballots received after election day. In the election context, harms sustained by violations of election law are irreparable if not enjoined prior to the election occurring. "[O]nce the election occurs, there can be no do-over and no redress," making the injury "real and completely irreparable if nothing is done to enjoin [the challenged] law." *League of Women Voters of N. C. v. North Carolina*, 169 F.3d 224, 247 (4th Cir. 2014).

Here, "[t]he counting of votes that are of questionable legality threatens irreparable harm." *Carson*, 978 F.3d at 1061. Plaintiffs and their candidates have an interest "in ensuring that the final vote tally accurately reflects the legally valid votes cast." *Id.* at 1058. If allowed to stand, Defendants' disregard of the postmark requirement will "foreclose[]" electoral opportunities for Plaintiffs and their candidates that cannot be restored after the fact. *Brown v. Chote*, 411 U.S. 452, 457 (1973) (candidate opportunities "irreparably lost"); *see also Mecinas*, 30 F.4th at 898 (political party is harmed if "an allegedly unlawful election regulation makes the competitive landscape worse for a candidate or that candidate's party than it would otherwise be if the regulation were declared unlawful"); *id.* (recognizing injury "that results from being forced to participate in an 'illegally structure[d] competitive

environment'"). Of course, there is also no legal recourse for diverting and expending resources to counteract an unlawful policy. Once those funds are spent, there is no way to recover them.

Tens of thousands of ballots are received after election day in Nevada. The counting of non-postmarked ballots in violation of state law will affect the results of Nevada elections, to the detriment of Republican candidates, because late-arriving ballots are disproportionately cast by Democratic voters. See Part X.B, *supra*. Indeed, ballots received after election day have swung elections in Democratic candidates' favor in recent election cycles. Counting non-postmarked ballots will continue to cause Plaintiffs and their candidates to lose elections and force them to compete in a worse and unlawful "competitive landscape." *Mecinas*, 30 F.4th at 898. These harms are irreparable. *Carson*, 978 F.3d at 1061.

F. The balance of hardships and public interest favor an injunction.

The balance of hardships weighs strongly in Plaintiffs' favor. Plaintiffs face irreparable harm to their electoral prospects and competitiveness and voting rights, and permanent loss of diverted resources, if the postmark requirement is not enforced.

Because Plaintiffs will suffer injury to their constitutional rights, "the balance of hardships tips decidedly in the plaintiff's favor." *Greater Chautauqua Fed. Credit Union v. Marks*, 600 F. Supp. 3d 405, 433 (S.D.N.Y. 2022). Allowing the Secretary to continue to implement his

interpretation of NRS 293.269921 while this lawsuit proceeds it is also likely to lead to voter confusion and administration of the November general election.

In contrast, the Secretary will suffer no harm if prohibited from implementing his interpretation authorizing the illegal counting of non-postmarked ballots received after election day. Defendants "cannot suffer harm from an injunction that merely ends an unlawful practice." *R.I.L-R v. Johnson*, 80 F. Supp. 3d 164, 191 (D.D.C. 2015). Enforcing the postmark requirement—in accordance with Nevada law and Defendants' own instructions to voters—will not require substantial alteration of post-election day ballot processing, as it would simply add one additional checkpoint for officials inspecting ballot envelopes.

Finally, there is "no public interest in the perpetuation of unlawful [government] action." *Washington v. DeVos*, 481 F. Supp. 3d 1184, 1197 (W.D. Wash. 2020) (quoting *League of Women Voters of United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016)). "To the contrary, there is a substantial public interest in having governmental agencies abide by the … laws that govern their existence and operations." *Id.* There is a particularly strong public interest in enforcing election laws meant to safeguard the integrity of the electoral process. *See Purcell v. Gonzalez*, 549 U.S. 1, 4, (2006) ("Confidence in the integrity of our electoral processes is essential to the functioning of our participatory democracy."). Accordingly, there is a substantial public interest in requiring

Defendants to comply with the statutory postmark requirement.

The district court ignored all of these interests favoring an injunction. Instead, the district court said only that "the public interest is served by ensuring that the maximum number of legitimate votes are counted. Order at 15. This circumscribed analysis is reversible error. Of course, the public interest in being able to have a ballot counted is always implicated in election cases, but that interest is not limitless and there are numerous other interests supporting application of election laws and procedures, as described above. Election laws and procedures cannot be ignored simply because more people might be able to cast a ballot in their absence. "[A]s a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes." *Storer v. Brown*, 415 U.S. 724, 730 (1974).

XI. Conclusion

For the foregoing reasons, Plaintiffs ask this court to reverse the district court's denial of preliminary injunction and to either immediately enjoin Defendants from counting mail ballots received after election day without a postmark, or to remand this case to the district court with instructions to enter the same injunction.

XII. Attorney's NRAP 28.2 Certification

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font.

I further certify that this brief complies with the page-or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed **13,711 words**.

Finally, I hereby certify that I have read this appellate brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix here the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 23rd day of August 2024.

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