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' REPLY BRIEF

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I. NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

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 an administrative agency on behalf of appellant are as follows:

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IV. STATEMENT OF THE CASE

This case is simple. The plain language of Nevada law requires that ballots received after election day must be "postmarked on or before the day of the election" in order to count. NRS 293.269921(1)(b)(1). Yet the district court held that a postmark is *not* required for a ballot to count. To do so, the district court embraced the nonsensical idea of "non-visible postmarks," and held that Defendants may count ballots with "no visible postmark at all." [JA 285]. A ballot with a "non-visible postmark" is, of course, a ballot with no postmark. The district court's reasoning—and the Defendants' appeals to policy, legislative history, and semantic contortions—cannot overcome this fundamental fact: Nevada law requires ballots to be postmarked in order to count, and Defendants' policy is inconsistent with that requirement.

The 2024 general election is fast approaching. Requiring compliance with the postmark standard will not disrupt election administration. This case focuses on a narrow, discrete class of mail ballots, received after election day, without any postmark. Defendants already fully inform voters to ensure mail-ballots are postmarked and the volume of non-postmarked ballots is expected to be a small portion of all mail-ballots received, based on the recent primary election experience.

V. ARGUMENT

Nevada law requires mail ballots that are received after election day to be postmarked. The counting of such ballots, contrary to NRS 293.269921, will injure Plaintiffs in the upcoming election and they are entitled to injunctive relief.

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

The Plaintiffs do not oppose the timely intervention of some Democratic party to this litigation. [JA 200] Of note, no Democratic party, state or national, has ever sought to intervene. State Defendants ask this Court to adopt the trial court's misplaced application of Rule 19. They cite only *University of Nevada v. Tarkanian*, 95 Nev. 389, 396, 594 P.2d 1159, 1163 (1979) in support of their position that some Democratic party—State Defendants seem to have settled on "either" the Democratic National Committee or the Nevada State Democratic Party—is a necessary party to this case. State Br. 49. But *Tarkanian* demonstrates precisely why the joinder of competing political party in a case to enforce black-letter election law is not required.

In *Tarkanian*, UNLV's basketball coach sued the university after the university decided to suspend him based upon findings of fact arising out of an NCAA investigation. 95 Nev. at 394. The coach alleged that the NCAA's investigative processes were flawed and the university's reliance on them despite its own investigation which revealed no evidence of

wrongdoing deprived him of due process of law. *Id.* Tarkanian and the university stipulated to extensive facts in advance of trial, most of which the NCAA and its actions in the coach's investigation. *Id.* At trial, no witnesses were presented for the defense. On appeal before this Court, the NCAA filed as amicus curiae to argue that the litigation was essentially collusive between the university—which disagreed with the NCAA's investigative findings—and the coach—who similarly disagreed—and should therefore be dismissed for want of an actual case and controversy. *Id.* at 394-95. This Court declined to dismiss for lack of an actual controversy as urged by the NCAA, but instead held that given the NCAA's concrete contractual interest in mandating the university's submission to its investigatory authority, the case had to be remanded for joinder of the NCAA as a necessary party, and, eventually, a new trial on the merits. *Id.* at 396-97.

Neither the DNC, nor the Nevada State Democratic Party has anything like the concrete contractual interest of the NCAA in *Tarkanian*. As an initial matter, there can be no legally cognizable interest in "the perpetuation of unlawful [government] action." *Washington v. DeVos*, 481 F. Supp. 3d 1184, 1197 (W.D. Wash. 2020) (quotation omitted). To the extent the DNC or the Nevada State Democratic Party articulate some interest in the Memorandum's continued effectiveness that is not already adequately represented by the

Defendants, they would be free to intervene. They have not done so, even on appeal.[1]

Moreover, State Defendants do not even attempt to engage with the simple fact—pointed out in Petitioners' Opening Brief—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.*, *Nevada State Democratic Party v. Nevada Green Party, Francisco Aguilar*, No. 89186, 2024 WL 4116388 (Nev. Sept. 6, 2024) (Nevada GOP not treated as indispensable party). The DNC or Nevada State Democratic Party do not have a concrete legal interest—like a contract or property right—that will be impaired by this litigation such that their joinder is necessary under Rule 19. To be sure, ruling that an opposing political party is an indispensable party to this case would unnecessarily complicate future election cases in Nevada.[2]

B. Plaintiffs have standing.

The trial court wrongly held that Plaintiffs failed to establish standing. The parties generally agree on the legal standard that standing

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[1] It is still possible, as of this filing that either the DNC or the Nevada State Democratic Party, may follow the NCAA's example and seek to file an amicus brief.

[2] Even if this Court were to determine joinder is required, the remedy would be to grant the preliminary injunction and to remand with instructions to join. This would be consistent with *Tarkanian* and Rule 19(a). Dismissal is only proper where a necessary party is not susceptible to joinder (e.g. service of process is impossible).

requires injury in fact, redressability, and causation. *Nat'l Ass'n of Mut. Ins. Cos. v. Dep't of Bus. & Indus., Div. of Ins.*, 524 P.3d 470, 476, 139 Nev. Adv. Op. 3 (Nev. 2023). "Standing is a question of law reviewed de novo." *Cotter on behalf of Reading Int'l, Inc. v. Kane*, 136 Nev. 559, 564, 473 P.3d 451, 456 (2020).

1. Standing based on diversion of organization resources.

Plaintiffs will devote additional resources to responding to Nevada's intention to count mail ballots received after election day without a postmark, establishing injury for standing. Defendants offer three primary arguments in response: (1) asserting the declarations were not admitted, (2) challenging the evidentiary basis of Plaintiffs' declarations supporting standing, and (3) contending as a matter of law the Plaintiffs evidence of additional resources diversion is merely "business as usual" insufficient to confer standing.

a. Plaintiffs' evidence of resource diversion was properly admitted.

The trial court admitted Plaintiffs' declarations about resource diversion into evidence: "So we'll **admit** them for that purpose." [JA 238 (emphasis added)]. That purpose was supporting Plaintiffs' standing. *Id.* The State Defendants wrongly claim that the transcript "does not show that the declarations were admitted into evidence" State Br. 14. On the contrary, the declarations were "admit[ed]" while the trial judge noted, contextually, that Nevada's rules for election contests provide that only

"deposition" testimony is required. See NRS 293.415 (election contest) ("The matters shall be tried and submitted so far as may be possible upon depositions and written or oral argument as the court may order.") But this is not an election contest, and the trial judge's observation that the Trump campaign in a 2020 election contest sought to admit exhibits in tension with the "deposition" requirement is apropos of nothing. [JA 237-38] At most, the trial judge was contrasting his discretionary decision to "admit" the declarations in this case (over Defendants' process objection) with the Nevada rules governing a different type of proceeding.

The trial judge properly exercised his discretion to admit the declarations. In the posture of a preliminary injunction hearing, courts routinely consider and admit non-deposition evidence, including declarations. *E.g. Hosp. Int'l Grp. v. Gratitude Grp., LLC*, 132 Nev. 980, 387 P.3d 208, *2 (2016). Lest there be any doubt, the written order discussed the weight and consideration of the declarations, which would be unnecessary if the declarations were not admitted, as the State Defendants assert.

Importantly, Defendants waived any objection to the admission of the declarations by failing to cross-appeal. It is too late to challenge (or deny) the admission of the declarations.

b. Defendants' evidentiary objections are misplaced.

Having admitted Plaintiffs' declarations, it was legal error for the court to decline to "consider" this relevant evidence. *Shores v. Glob. Experience Specialists, Inc.*, 134 Nev. 503, 505, 422 P.3d 1238, 1241 (2018) ("An abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination or it disregards controlling law"); *see also Ocean Beauty Seafoods, LLC v. Pac. Seafood Grp. Acquisition Co.*, 611 F. App'x 385, 386-87 (9th Cir. 2015). The Defendants try to bolster the trial court's refusal to "consider" the evidence by belated pointing to various evidentiary and procedural challenges. None succeed.

First, Defendants now complain of hearsay. They waived that objection by not saying a word about hearsay during the hearing. The only objection in the record was by Intervenors and was based on the timing of the disclosure: "Your Honor, just for the record, we would object to this. We didn't see them before the hearing. If we would have known that they were going to offer them, we **might** have asked to do cross-examination, for example, for the record." [JA 238 (Tr 47:6-10) (emphasis added)]. Any hearsay concern has been waived. The trial court order, understandably, was silent on hearsay. [JA 291]. If the trial court had hearsay concerns, then it could not have admitted the declarations (they were admitted).

Second, Defendants complain that the declarants were not subject to cross-examination. Evidence admitted by sworn statement is not normally subject to cross-examination. Preliminary injunction motions are frequently decided on written evidentiary submissions. *See Hosp. Int'l Grp.*, 132 Nev. 980, *2 ("a preliminary-injunction motion [may be decided] on written evidence when no conflict about the facts requires illumination by live testimony").

Third, relatedly, Defendants complain about when they received the declarations. The timing complied with the rules. It is within the sound discretion of the trial court to permit service of an affidavit or declaration at a time other than "serv[ice] with the motion," Nev. R. Civ. P. 6(c)(2), and the district court did so here. *See also* Nev. R. Civ. P. 43(c) ("Evidence on a Motion. When a motion relies on facts outside the record, the court may hear the matter on affidavit…"). Plaintiffs hardly could have disclosed the declarations sooner (they were executed the day before the hearing). [JA 272, 276]. The trial judge "admitted" the exhibits notwithstanding the timing.

The declarations provide the appropriate factual basis for Plaintiffs to show how resources are being diverted on account of the challenged conduct, sufficient to provide standing. The question of resource diversion standing is a legal, not factual question, about whether the "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" the challenged class of ballots, [JA 270] are a "concrete and demonstrable injury to the organization's activities—with the consequent drain on the organization's resources…" *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). This Court should read the declaration and draw its own *legal* conclusions. The trial court's conclusory statement (in the portion of the opinion addressing irreparable harm, not standing) that the court "declines to consider or credit the declarations," was legal error. [JA 291]

c. Organizational Plaintiffs will be injured by expending resources as a result of the challenged governmental conduct.

Defendants try and undermine Plaintiffs' resource diversion by weakly speculating that Plaintiffs' evidence does not amount to use of "additional" resources. Defendants rely on the legal requirement that "[o]rganizations can show standing if a challenged law 'frustrated their organizational missions and . . . they diverted resources' as a result.' *Friends of the Earth v. Sanderson Farms, Inc.*, 992 F.3d 939, 942 (9th Cir. 2021)." State Br. 15. That is precisely what Plaintiffs' evidence shows. *See* Ceballos Decl. [JA 269] ("The RNC will … have to *expend resources* preparing for and engaging in *more extensive* post-election proceedings, *including specifically* training volunteers…") (emphasis added); *see also* Op. Br. 17-20. The evidence is, literally, that Plaintiffs will divert

additional resources to respond to the challenged conduct, precisely what is required for standing.

Defendants continue to draw attention to cases where courts found plaintiffs failed to show they would expend *additional* resources, and instead only pointed to business-as-usual activity. *See* State Br. 15-16. Those cases are entirely consistent with cases where plaintiffs did show additional resources being expended, and, accordingly, had standing. *See* Op. Br. 21 (citing cases).

Finally, Defendants object by claiming Plaintiffs would merely be "prepar[ing] to refile this suit" and that being "forced to expend resources to litigate the matter" cannot support standing. Intervenor Br. 19; State Br. 24 fn12. The specific training and monitoring efforts described by Cebellos and Watson are distinct from spending to support the underlying litigation. *See also* Op. Br. 20 (citing cases). Plaintiffs have 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 v. Cegavske*, 800 F.3d 1032, 1040 (9th Cir. 2015).

2. Standing based on competitive harm.

The counting of late, non-postmarked ballots will injure Plaintiffs, including one of the two major party candidates for President. The Defendants agree that a competitive harm arising from an election procedure can give "those injured parties [ ]the requisite concrete, non-

generalized harm to confer standing." *Mecinas v. Hobbs*, 30 F.4th 890, 898 (9th Cir. 2022).

In this Court's recent *Nevada Democratic Party* decision about the Green Party candidate appearing on the general election ballot, the plaintiff, the Nevada Democratic Party, had standing to protect its competitive interests. Presumably the injury to a major political party for application of broadly applicable election administration was uncontroversial, and no court or party questioned standing. Applying the same federal standing principles urged by the State Defendants (and adopted by the trial court), the only non-generalized grievance basis for an injury, and thus standing, would be how the Democratic Party candidate for President would be injured by voters' option to vote for Jill Stein, and that competitive harm must have been concluded to be unique to the Democratic Party. There is no other apparent basis for the Nevada Democratic Party to have standing in that case. The same logic applies to the Plaintiffs here who are injured by counting of certain late-arriving mail ballots, as backed up by ample evidence form the Secretary State from past elections, showing that party to be uniquely harmed. Indeed, the Nevada Democratic Party obtained their desired relief from this Court without putting on *any* evidence of competitive harm, while Plaintiffs here have put on ample evidence of such harm.

Defendants attempt to narrow the black letter standing law by arguing that plaintiffs "do not explain what is *unfair* about the postmark guidance," Intervenor Br. 20, and that the postmark guidance does not threaten Plaintiffs with "unique" harm relative to "electoral opponents." *Id.* This puts the cart before the horse. Counting more ballots that favor Democratic candidates, contrary to Nevada law, unfairly harms Plaintiffs.

Standing based on competitive harm should not be narrowed to only challenges to elections rules that directly apply to one candidate, as Defendants seem to suggest. Some election cases challege such laws, like *Mecinas,* which involved the order of names on ballots. That decision does not limit standing to those cases, however, it described competitive standing in broad terms:

> when regulations illegally structure a competitive environment—whether an agency proceeding, a market, or a reelection race—parties defending concrete interests (e.g., retention of elected office) in that environment suffer legal harm under Article III.

30 F.4th at 898.

Other election cases find standing based on competitive harm to a political party or candidate when the challenged law applies broadly. *E.g. Progressive Leadership Alliance of Nev. v. Cegavske*, Case No. 85434 (Nev. Oct. 3, 2022) (challenging hand count procedures that applied to all

candidates); *Shays v. Fed. Election Comm'n*, 414 F.3d 76, 87 (D.C. Cir. 2005); *Smith v. Boyle*, 144 F.3d 1060, 1062 (7th Cir. 1998) (challenge to at-large election rules based on competitive harm to Republican judicial candidates); *Democratic Party of the U.S. v. Nat'l Conservative Pol. Action Comm.*, 578 F. Supp. 797, 810 (E.D. Pa. 1983), *aff'd in part, rev'd in part sub nom.*, 470 U.S. 480 (1985) (Democratic Party had standing to challenge "political committee" expenditure limit); *Bay Cnty. Democratic Party v. Land*, 347 F. Supp. 2d 404, 422 (E.D. Mich. 2004) (Democratic Party had standing to challenge out-of-precinct provisional ballot counting policy).

Defendants also question the evidence that late-arriving mail ballots in Nevada strongly favor Democrats. In fact, the record uniformly shows that late-arriving ballots favor Democratic candidates in Nevada. Op. Br. 24-29. It is no answer to point out that roughly one quarter of mail-ballots come from unaffiliated voters. State Br. 12. Unaffiliated voter ballots do not change the fundamental math: Nevada sees more Democrat affiliated mail ballots than Republican affiliated mail ballots. The total of late-arriving ballots—consisting of Democratic, Republican, and Unaffiliated voters—break uniformly for Democratic candidates. Defendants have no answer to this well-documented phenomenon.

The State Defendants admit as much by speaking about "the gap between mail ballots case by Democratic and Republican voters." State

Br. 13. The "gap" is the problem, and it aptly describes the basis for competitive harm. State Defendants' own brief describes with mathematical precision the unbroken string of elections from 2020 to 2024 where Democratic mail votes outpaced Republican votes. State Br. 15. Every single election. While the State Defendants note the trend line favoring Democratic mail votes as "shrinking," the numbers show a persistent gap always disfavors Republicans. *Id.*

Finally, Defendants point out that trends in mail-ballots, even late-arriving mail ballots is not specific to the sub-set of mail-ballots which lack a postmark and are received after election day. State Br. 14. But it is undeniable that the subset of mail-ballots at issue come from the same, fully documented pool of mail ballots and thus the subset will harm Plaintiffs in the same way, even if on a smaller scale.

As to the potential loss of an election, Plaintiffs show that the challenge to late-arriving mail ballots threatens the potential loss of an election, based on recent past elections in Nevada which have been extremely close. Even if the "universe of mail ballots that arrive after election day without postmarks is vanishingly small," State Br. 19, the discrete set of ballots set to be counted contrary to NRS 293.269921 may well change the outcome of a close 2024 election. Nevada's last presidential election was among the closest in the nation and 2024 may be again.

C. Plaintiffs are likely to succeed on the merits.

Nevada law clearly and unambiguously requires late-arriving mail ballots to be postmarked on or before election day. NRS 293.269921. The district court effectively wrote the postmark requirement out of the statute by accepting Defendants' nonsensical argument that counting ballots with "non-visible" postmarks is consistent with the statute. Nevada law clearly and unambiguously requires rejection of such ballots.

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

This Court should apply Nevada's statute as-written, to require ballots be "postmarked on or before the date of the election." NRS 293.269921.

a. The plain language of NRS 293.269921.

The "plain and unambiguous" language of the statute should be given "its ordinary meaning..." *Employers Ins. Co. of Nev. v. Chandler*, 117 Nev. 421, 425, 23 P.3d 255, 258 (2001). In this case, the plain and ordinary meaning of the statute is easy to ascertain. NRS 293.269921 requires ballots to be "postmarked on or before the day of the election" and received by 5:00 pm on the fourth day after the election. The narrow exception, if "the date of the postmark cannot be determined," requires postmarked ballots to be received by 5:00 pm on the third day following the election. NRS 293.269921(2). Defendants parsing of this language,

like that of the trial court, does great violence to the simple and straightforward meaning. See Op. Br. 32-34.

The State Defendants also accuse Plaintiffs of focusing on "two cherry-picked words—'the postmark'—to concoct extra requirements" in the statute. State Br. 33. Plaintiffs readily admit to focusing on the critical requirement of the statute, including "the postmark." State Defendants logic would allow one to read any key requirements out of the law by characterizing the words as being "cherry picked." For instance, the requirement that late-arriving mail ballots arrive by "5:00 pm" could be discarded.

Defendant also call the Plaintiffs interpretation a "hyper-fixation" that "misses the textual forest for the trees." State Br. 34. It is Defendants who distort the statute by reading words out of the text. *See* Op. Br. 33-34. Intervenors are mistaken when they suggest Plaintiffs interpretation "would add words to the statute that are not there." Intervenor Br. 25. The words are already there.

If the legislature wanted to allow mail ballots without postmarks to be counted, as Defendants desire, it could have done so directly. For example, Oregon has a similar statute which says that "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." ORS 253.070. Intervenor Defendants eschew the comparison to other states by bizarrely claiming "Plaintiffs point to other states that purportedly require postmarks" but the Intervenor Defendants then quote as support laws in District of Columbia ("postmarked or otherwise proven to have been sent on or before election day") and Massachusetts ("postmark, if legible, shall be evidence of timing mailing"), Intervenor Br. 34, as if those states do not plainly use a postmark requirement to determine timely mailing. The comparison to other state statutes strongly favors Plaintiffs interpretation.

b. Legislative history and public policy support Plaintiffs' interpretation.

The Nevada Legislature sensibly drafted a statute that requires a postmark to be present for a ballot to be counted if voted before the conclusion of the election. Defendants repeatedly invoke the concept of absurdity to argue that the Legislature, instead, should have drafted a law that does not require any postmark and simply counts all ballots received up to 5:00 pm on the third day after the election. The Legislature's policy choice was sound. Relying on postmarks to ensure that ballots arriving after election day are valid comports with a policy of ensuring all legitimately cast votes counted and it provides an easily administrable rule for preventing fraud.

The Defendants also fixate on Legislature's choice to permit a safe-harbor, with a shorter deadline, for the rare instance when a ballot has a

postmark where "the date of the postmark cannot be determined." The rationale seems to be that since the date of mailing cannot be determined when there is a smudged postmark, therefore the Legislature must have intended for ballots without any postmark or date, to be acceptable. *See* State Br. 33. But the safe-harbor provision is limited to indeterminate postmarks, not naked ballots with no postmark and no indicia of being mailed in the normal course. *See* Op. Br. 35.

As to legislative history, all parties agree that no consideration is appropriate unless this Court disagrees with the trial court, and everyone else, finds that NRS 293.269921 is ambiguous. It is not. The court need not look past the plain meaning. *Great Basin Water Network v. State Eng'r*, 234 P.3d 912, 918 (Nev. 2010). But if it were ambiguous, the legislative history strongly supports Plaintiffs interpretation.

The legislative history of NRS 293.269921 show that the Legislature did not intend to count ballots that arrive late and without a postmark. Reason and public policy both favor the Plaintiffs' reading of the statute. "This court determines the Legislature's intent by evaluating the legislative history and construing the statute in a manner that conforms to reason and public policy." *A.J. v. Eighth Judicial Dist. Court in & for Cnty. of Clark*, 394 P.3d 1209, 1213 (Nev. 2017) (cleaned up).

The legislature has always intended to maintain the integrity and security of elections in Nevada. The postmark requirement, through the

early forms of NRS 293.269921, is an element of that intention. Furthermore, "statutes with a protective purpose should be liberally construed in order to effectuate the benefits intended to be obtained." *Id*. The protective purpose of NRS 293.269921 is that ballots should not be counted if they are cast too late, fraudulently, or otherwise in a manner inconsistent with appropriate voting procedure.

Assemblyman Frierson assumed that ballots would have postmarks on them: "It is simply inaccurate to reflect that there is not a postmark date."[3] The predecessor to NRS 293.269921 further shows the Legislature did not intend for ballots without postmarks to be counted. Historically, Nevada did not allow absent ballots to be counted unless received prior to the close of the polls. NRS 293.317. It was only with AB345 in 2019 that Nevada introduced accepting late ballots.[4] The original language from NRS 293.269921 first appeared in AB345. The bill made many adjustments to election procedure, including allowing ballots received up to 7 days after the election to count, if postmarked. Frierson explained the expectation that the "absent ballot *must be postmarked on or before Election Day* and received by the clerk within seven days after the

[3] Hearing Before the Assembly Committee on legislative Operations and Elections, 81st Leg. (Nev., April 1, 2021) (testimony of Assemblyman Frierson), available at https://bit.ly/4gwBLVw

[4] Available at https://bit.ly/47BHbug

election."[5] Frierson likewise expressed this same sentiment earlier in the proceedings. "Assembly Bill 345 allows a clerk to accept an absentee ballot *that is postmarked up to and including Election Day* if the absentee ballot is received not more than seven days after the election."[6] Committee Counsel for the Assembly Committee on Legislative Operations and Elections, Kevin Powers, agreed: "This amendment would also concern…when absentee ballots—those that are *postmarked in a timely fashion by election day*—are being counted after the election."[7] These comments were reiterated in the Minutes of the Assembly Committee on Ways and Means (Nev., May 23, 2019).[8]

Frierson's comments underscore the goal of keeping elections accessible and secure. "I cannot emphasize enough how much work has gone into making sure that we make it easier for eligible voters, *but we*

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[5] Hearing on A.B. 345 Before the Senate Committee on Finance, 80th Leg. (Nev., June 2, 2019) (testimony of Assemblyman Frierson) (emphasis added), available at https://bit.ly/4ewbAwt

[6] Hearing on A.B. 345 Before the Assembly Committee on Legislative Operations and Elections, 80th Leg. (Nev., April 9, 2019) (testimony of Assemblyman Frierson) (emphasis added), available at https://bit.ly/4ewa2mk

[7] Hearing on A.B. 345 Before the Assembly Committee on Legislative Operations and Elections, 80th Leg. (Nev., April 11, 2019) (testimony of Committee Counsel Powers) (emphasis added) https://bit.ly/3zz3yUE

[8] Available at https://bit.ly/3XNU1CD

also make it easier to catch ineligible voters and discount those ballots."[9] The legislature increased access to voting by allowing ballots to be counted so long as they are postmarked. Testimony from Matt Griffin, representative for the Center for Secure and Modern Elections, echoed this same idea: the bill "is very cautious in its approach. It makes absolutely no compromises to security, but it also expands the ability to vote to a lot of folks."[10] Eliminating the postmark requirement would compromise security—something that the legislature was intent on avoiding.

The legislature was willing to tighten requirements for the sake of security. In fact, in the same bill (AB345), Frierson moved the cutoff for when voters can request a mail ballot from 7 to 14 days before the election. Frierson said, "I know it seems to be going in the opposite direction in providing less time, but this is trying to be responsible and realistic."[11] Mirroring this willingness to tighten security measures, NRS

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[9] Hearing on A.B. 345 Before the Assembly Committee on Legislative Operations and Elections, 80th Leg. (Nev., April 9, 2019) (emphasis added)

[10] Hearing on A.B. 345 Before the Assembly Committee on Legislative Operations and Elections, 80th Leg. (Nev., April 9, 2019) (testimony of Matt Griffin), available at https://bit.ly/4ewa2mk

[11] Hearing on A.B. 345 Before the Assembly Committee on Legislative Operations and Elections, 80th Leg. (Nev., April 9, 2019) (testimony of Assemblyman Frierson) (emphasis added).

293.269921 further contracts options from AB345, moving the receipt deadline from 7 to 4 days post-election.

Nothing in the history of NRS 293.269921 or its predecessor, NRS 293.317, reflects an intention to count ballots lacking a postmark. Frierson himself admitted that the ballots *must have a postmark*. The only evidence Defendants put forward was in one comment after Frierson was asked by an opponent of the bill, and even there, he assumed that valid ballots would have postmarks. See Op. Br. 46. Defendants' suggestion that the Legislature contemplated including ballots without postmarks is at best an incomplete look at the legislative history.

c. Constitutional avoidance does not apply.

The canon of constitutional avoidance does not save Defendants interpretation because there is no constitutional violation to be avoided. The overwhelming majority of states do not accept any ballots received after election day, no matter the indicia of being put in the mail prior to the end of the election. Op. Br. 39.[12] And the vast majority of states that count ballots received after election day require a postmark. Op. Br. 40-41. Defendants' position would require the Court to believe all those states have blatantly unconstitutional election laws.

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[12] *See generally* National Conference of State Legislatures, Table 11: Receipt and Postmark Deadlines for Absentee/Mail Ballots (updated June 12, 2024) ("Thirty two states require absentee/mail ballots returned by mail to be received on or before Election Day."). https://bit.ly/3MUpxIK

The outlier case cited by Defendants does not prove otherwise. *See* Op. Br. 44-45 (citing *DCCC v. Kosinski*, 614 F.Supp.3d 20 (S.D.N.Y. 2022)). Rather than admit that their overbroad reading of one case would defeat most of country's voting laws, State Defendants gloss it as rejecting rules that "make it harder for voters to vote." State Br. 41. That reading is too broad. Almost any election law with a deadline or a limit could be said to make it harder for voters to vote compared to a universe where that law or deadline does not exist. Of course, elections must contain rules and deadlines to function. In fact, mail voting makes it easier for voters to cast a ballot, and requiring a basic election security safeguard as part of that expansion of voting opportunities to ensure that ballots are mailed on time does not convert Nevada's generous mail voting rules into an unconstitutional burden on voting rights. Constitutional avoidance requires more than Defendants' conclusory analysis.

d. The "spirit" of the law and substantial compliance do not apply.

Defendants rely on the "spirit" of Nevada election law to support the re-writing of NRS 293.269921. According to Defendants, NRS 293.127(1)(c) requires the Court to liberally construe the law to count non-postmarked ballots. State Br. 37. This echoes the trial court order. See Op. Br. 41-42. Because Defendants consider compliance with the postmark requirement to be "unreasonable" they claim the hortatory

language in NRS 293.127(1)(c) requires more votes to be counted, rules notwithstanding. Nevada's carefully delineated election law deserves more respect.

Just this month, this Court rejected similar arguments in *Nevada Democratic Party v. Nevada Green Party* where this Court found that liberal construction in the form of substantial compliance did not allow the detailed requirements for signature gathering by petition to be ignored. 2024 WL 4116388, at *5.

2. The Secretary of State violated the Nevada APA.

The Secretary of State cannot accomplish by interpretation what requires regulation. If interpretations could accomplish the same ends as regulations, then the purpose of the APA would be undermined. The difference between an interpretation and a regulation is not a mere label affixed by the Secretary. *See Gen. Motors Corp. v. Ruckelshaus*, 742 F.2d 1561, 1565 (D.C. Cir. 1984). There is a substantive difference:

> An agency engages in rulemaking when it promulgates, amends, or repeals '[a]n 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.' An 'interpretive ruling,' on the other hand, 'is merely a statement of how the agency construes a statute or a regulation according to the specific facts before it.

Labor Com'r of State of Nevada v. Littlefield, 123 Nev. 35, 39, 153 P.3d 26, 29 (2007). The Secretary admits that what he is trying to do is

intended to be regulation. There would be no need, otherwise, to submit the "guidance" in the Memorandum as a regulation after the election. [JA 92 ("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.")].

If the State were correct, the Secretary would be incentivized to not issue a regulation until after the period for doing so under the APA has closed, NRS 293.247(1), thereby evading compliance with APA requirements. The State Defendants complaint that "the Secretary would be dramatically limited" if the Memorandum had to comply with the APA. State Br. 46. The APA is, by design, a limitation on agency authority.

If there is a critical issue, the APA "allows for the adoption of emergency regulations," State Br. 49 fn.18, but the Secretary refused to even follow the procedures for a temporary regulation. The Secretary knows that has a duty under NRS 293.247 ("shall adopt regulations") to promulgate regulations for the conduct of counting mail-in ballots. NRS 293.269921 became law in 2021. The Secretary has had ample time to fulfill his duty to promulgate these regulations rather than issue a Memorandum mere weeks before a primary election.

The Secretary issuing an order, the Memorandum, that "is prospective and general in nature." It is of "such major policy concern and

of such significance to all" voters "that it cannot be characterized as … outside of the statutory definition of a regulation." *Pub. Serv. Comm'n of Nevada v. Sw. Gas Corp.*, 662 P.2d 624, 627 (Nev. 1983). The Secretary's proposed rule is of general application—applying to the entire state and all voters. "[T]his court has not hesitated to invalidate agency actions in which the agency was formulating a rule of policy or general application and not merely making an interpretive ruling according to the facts before it." *State Farm Mut. Auto. Ins. Co. v. Comm'r of Ins.*, 958 P.2d 733, 738 (Nev. 1998). Nonetheless, where the Secretary's interpretation contradicts the plain language of a statute, the Court gives the interpretation, "no deference." *Indep. Am. Party of State v. Lau*, 110 Nev. 1151, 1155, 880 P.2d 1391, 1393 (1994).

Defendants argue that because "the Secretary intends that the 'guidance be submitted as a regulation following the conclusion of the 2024 election cycle' the Memorandum makes clear that it is currently not a regulation." Intervenor Br. 41. Actually, the admission confirms that the Memorandum is merely an ad hoc rulemaking that the Secretary waited too long to promulgate.

The Memorandum certainly constitutes rulemaking. In *Labor Commissioner of State of Nevada v. Littlefield*, this Court reviewed a putative rule and considered whether it must comply with the APA. The Court reached this conclusion for three reasons, all of which apply here:

"First, such action falls within the definition of a regulation under NRS 233B.038. Second, there is no express or implied exemption from the APA for adding, deleting, or substantially modifying worker classifications. Third, policy considerations support this result." 135 Nev. at 40. Just as there, the Secretary's Memorandum constitutes a rule.

D. Plaintiffs will be irreparably injured without an injunction and the public interest favors an injunction.

Plaintiffs will suffer irreparable harm if Defendants are not enjoined from counting non-postmarked ballots received after election day. *League of Women Voters of N. C., v. North Carolina*, 169 F.3d 224, 247 (4th Cir. 2014) ("[O]nce the election occurs, there can be no do-over and no redress"). Defendants' responses on both irreparable harm and public interest mirror the merits arguments. For the same reasons, Plaintiffs face irreparable injury, and the public interest favors an injunction. Of note, Defendants do not seem to disagree that there is "no public interest in the perpetuation of unlawful [government] action." *DeVos*, 481 F. Supp. at 1197 (quotation omitted), they merely disagree about whether the Memorandum and related policy is lawful.

At bottom, the equitable factors favor Plaintiffs. If Defendants are allowed to conduct the election without enforcing the postmark requirement, Plaintiffs are left without a remedy. Once a ballot is separated from a non-postmarked envelope and tabulated, there is no

way to put the genie back in the bottle. Thus, an injunction would prevent irreparable harm, would not harm Defendants, and would serve the public interest.

E. Issue preclusion provides no independent grounds for affirmance.

The State Defendants argue that Plaintiffs' standing is precluded because of a 2020 case in federal court, *Donald J. Trump for President, Inc. v. Cegavske*, Case No. 2:20-cv-01445-JCM-VCF (D. Nev. August 24, 2020). As an initial matter, *Cegavske* was wrongly decided. Even if *Cegavske* were correctly decided, "[i]n order for collateral estoppel to apply: (1) the parties to the prior action must be identical to, or in privity with, the parties in the current action; (2) the initial ruling must have been on the merits and final; and (3) the issues in the two actions must be identical." *Clark v. Columbia/HCA Info. Servs., Inc.*, 117 Nev. 468, 481, 25 P.3d 215, 224 (2001). Defendants cannot satisfy prongs one and three.

Donald J. Trump for President 2024, Inc. was not party to the 2020 *Cegavske* case. According to the Federal Election Commission, the Donald J. Trump for President 2024, Inc. and Donald J. Trump for President, Inc. (the 2020 campaign committee, now registered with the FEC as Make America Great Again PAC) both currently exist as separate entities. Separate Statements of Organization, separate FEC filings, separate FEC ID numbers, separate registration dates, different

elections, and different vice presidential candidates. It is not the case that the same entity has changed its "nominal identity." The Trump Campaign in this case is a separate entity with different interests.

Second, the issues here are not "identical" to those in *Cegavske*, there Plaintiffs asserted broad federal constitutional claims. Here, Plaintiffs assert a narrow state law claim challenging the validity of the Memorandum as contrary to the express language of NRS 293.269921 or in the alternative as having been adopted in violation of the Nevada APA—neither of which was a claim in the federal case. Unlike *Cegavske*, Plaintiffs here have made specific allegations regarding how this specific departure from controlling state law causes them specific harm. *Cegavske* was dismissed, in part, because of the federal court's finding that plaintiffs in that case did not make such allegations in connection with their broad constitutional claims. Nor did the federal court have occasion to address the injury caused by the Secretary's violation of the APA.

The RNC and NVGOP are not precluded from asserting their standing in this court by the federal district court's decision in *Cegavske*. Even if they were, the Trump Campaign cannot be precluded because they were not parties to *Cegavske*. Collateral estoppel from a federal case with different claims does not apply to his narrow state-law claim.

F. The doctrine of laches provides no independent ground for affirmance.

Finally, the State Defendants urge the Court to affirm on the

independent ground of laches. Echoing a failed argument advanced by Washoe and Clark Counties below, the State Defendants argue that laches applies because Plaintiffs somehow knew of the Secretary's interpretation of NRS 293.269921(2) to permit the counting of non-postmarked ballots received after election day either four years ago under then-effective AB4, or earlier this year when the policy was, according to the County Defendants, already in effect for the presidential preference and primary elections. State Br. 53-54. Any suggestion that Petitioners unreasonably delayed in bringing this lawsuit falls flat.

The Memorandum was issued on Wednesday, May 29, 2024. This lawsuit was filed the immediately following Monday, June 3, 2024, only five days later. Despite the late issuance of the Memorandum, Petitioners went out of their way to be sure to request relief only for the general election to avoid any potential prejudice to elections officials during the then-pending primary election.

The State Defendants' suggestion that voters could be misled if a preliminary injunction enters also makes no sense. As shown in the pleadings and noted in Petitioners' Opening Brief, County Defendants already conspicuously advise voters that their ballots must be postmarked on or before election day in at least three places: on the outer envelope in which voters receive their ballots, on the return envelope which voters use to return their ballots, and on the instructions voters receive with their ballots. Petitioners seek targeted relief such that all an

injunction will do is ensure Defendants comply with NRS 293.269921(2) consistent with the instructions they are already issuing to Nevada voters. *See Georgia Coal. for People's Agenda, Inc. v. Kemp*, 347 F. Supp. 3d 1251, 1259 (N.D. Ga. 2018) (declining to apply laches where early voting had begun). Hence, there is no possibility for voter confusion and no basis for the application of laches.

VI. 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.

VII. ATTORNEY'S NRAP 32 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 [6,954] 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 20th day of September 2024.

/s/ Jeffrey Barr

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