In the
Supreme Court of the State of Nevada

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

Appellants,

vs.

FRANCISCO V. AGUILAR, in his official capacity as NEVADA SECRETARY OF STATE; 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.

Case No.: **89149**

First Judicial District Court
Case No.: 24 OC 00101 1B

INTERVENOR-RESPONDENTS' BRIEF

BRADLEY S. SCHRAGER (NSB 10217)
DANIEL BRAVO (NSB 13078)
BRAVO SCHRAGER LLP
6675 S. Tenaya Way, Suite 200
Las Vegas, Nevada 89113

DAVID R. FOX (NSB 16536)
RICHARD A. MEDINA (*pro hac vice*)
MARCOS MOCINE-MCQUEEN (*pro hac vice*)
ELIAS LAW GROUP LLP
250 Massachusetts Avenue NW, Suite 400
Washington, D.C. 20001

Attorneys for Intervenor-Respondents Vet Voice Foundation and the Nevada Alliance for Retired Americans

N.R.A.P. 26.1 DISCLOSURE

Pursuant to N.R.A.P. 26.1, the undersigned counsel of record certifies that there are no persons or entities as described in N.R.A.P. 26.1(a) that must be disclosed.

The following law firms have appeared and/or are expected to appear in this Court on behalf of Intervenor-Respondents:

Bradley Schrager and Daniel Bravo of Bravo Schrager LLP.

David R. Fox, Richard A. Medina, and Marcos Mocine-McQueen of Elias Law Group LLP.

Dated this 13th day of September, 2024.

BRAVO SCHRAGER LLP

By: */s/ Bradley S. Schrager*

Bradley S. Schrager (NSB 10217)
Daniel Bravo (NSB 13078)
6675 South Tenaya Way, Suite 200
Las Vegas, Nevada 89113
Email: bradley@bravoschrager.com
Email: daniel@bravoschrager.com

David R. Fox (NSB 16536)
Richard A. Medina (*pro hac vice*)
Marcos Mocine-McQueen (*pro hac vice*)
ELIAS LAW GROUP LLP
250 Massachusetts Avenue NW, Suite 400
Washington, D.C. 20001
Email: dfox@elias.law
Email: rmedina@elias.law
Email: mmcqueen@elias.law

Attorneys for Intervenor-Respondents, Vet Voice Foundation and the Nevada Alliance for Retired Americans

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INTRODUCTION

The district court properly rejected the effort by Appellants—the RNC, the Nevada Republican Party, Donald J. Trump for President 2024, Inc., and Scott Johnston ("Plaintiffs")—to disrupt Nevada's election administration on the eve of the general election. Nevada law provides a simple rule: mail ballots returned by mail will be counted if they are postmarked by election day and delivered to the county clerk within four days after. NRS 293.269921(1)(b). But Nevada law recognizes that in rare circumstances, "the date of the postmark cannot be determined." NRS 293.269921(2). And Nevada law provides that where that is so, "the mail ballot shall be deemed to have been postmarked on or before the day of the election," as long as election officials receive it by the third day after the election. *Id.*

Plaintiffs asked the district court to disrupt this sensible system just months before election day by introducing a new and completely arbitrary distinction between ballots for which "the date of the postmark cannot be determined" because it is smudged or illegible, and ballots for which "the date of the postmark cannot be determined" because the ballot, although delivered by mail, has no visible postmark at all. That

distinction appears nowhere in the text of the statute, and introducing it would serve no coherent purpose, because there is no practical difference between a ballot received by mail with a smudged postmark and one with no visible postmark at all. In each case, there is no definitive evidence of when the ballot was mailed, and Nevada law provides that in each case, the ballot must be "deemed to have been postmarked" on time and therefore must be counted if received within three days of the election. NRS 293.269921(2).

Adopting Plaintiffs' arbitrary distinction would directly harm Nevada voters. Voters have no control over whether the postal service properly postmarks their ballots. So if Plaintiffs prevail, voters would need to return their ballots by a means other than mail to avoid the danger of disenfranchisement for a postal service error. Such a result would undermine the Legislature's choice to adopt universal vote by mail and a practical rule to ensure that voters who timely return their ballots are not disenfranchised through no fault of their own.

In addition to rejecting Plaintiffs' argument on the merits, the district court properly held that Plaintiffs lack standing to challenge a pro-voter, nondiscriminatory rule that does nothing to harm Plaintiffs,

specifically. Whether on merits or standing grounds, the district court's decision was correct, and this Court should affirm.

COUNTERSTATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Did the district court abuse its discretion by denying Plaintiffs' preliminary injunction motion due to their lack of standing and the fact that their arguments are contrary to the plain text of Nevada law?

STATEMENT OF THE CASE

Plaintiffs filed this case on May 31, 2024, challenging the Secretary of State's interpretation of NRS 293.269921(2), the statute governing voters' return of mail ballots to election officials. JA0001. The district court (Judge Russell) granted the motion to intervene by Intervenor-Respondents Vet Voice Foundation and the Nevada Alliance for Retired Americans ("Intervenors") on June 28. Dist. Ct. Dkt. 46. On July 3, Plaintiffs filed an amended complaint and a preliminary injunction motion. JA0018, 42.

The district court denied Plaintiffs' preliminary injunction motion at a hearing on August 2, JA00189, and entered a written order to that effect on August 6, JA00277. Plaintiffs appealed that denial on August 8,

JA00318, and the Court granted expedited consideration of the appeal on August 20. The appeal is set for oral argument on October 8.

STATEMENT OF FACTS

Voting by mail is extremely popular in Nevada. In the most recent full federal election cycle, over half of Nevada voters cast mail ballots in both the primary and general elections.[1] In the February 6, 2024 presidential primary, nearly eighty percent of Nevada voters cast mail ballots.[2] And in the June 2024 primary, sixty-five percent did so.[3] This follows a broad expansion of mail voting in Nevada enacted by the Legislature in 2021. *See* Act of June 2, 2021, Ch. 248, 2021 Nev. Laws 1213, 1214 (A.B. 321). Among other election reforms, A.B. 321 provided for universal mail voting in all elections. *Id.* It expanded and made permanent Nevada's response to the COVID-19 pandemic, which ensured that all active eligible voters received a ballot in the mail, a pro-

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[1] *See Voter Turnout*, Nev. Sec'y of State, https://silverstateelection.nv.gov/vote-turnout/ (last accessed September 13, 2024) (showing 56.7% of primary voters cast mail ballots and 51.21% of general election voters in 2022).

[2] *See 2024 Turnout Reporting*, Nev. Sec'y of State, https://www.nvsos.gov/sos/elections/election-information/2024-election-information/2024-turnout-reporting (last accessed September 13, 2024)

[3] *See supra* n.1.

voter reform that resulted in record voter turnout. Mins. of the Meeting of the Assembly Comm. on Legislative Operations and Elections at 3-4, Nevada Legislature, 81st Session (Apr. 1, 2021), *available at* https://www.leg.state.nv.us/Session/81st2021/Minutes/Assembly/LOE/Final/663.pdf (Apr. 1 Hearing Minutes).

Voters can return mail ballots by hand to their county clerk, via a designated drop box, or by mail. NRS 293.269921(1). This appeal involves only ballots returned by mail. To be counted, ballots returned by mail must be: "(1) [p]ostmarked on or before the day of the election; and (2) [r]eceived by the clerk not later than 5 p.m. on the fourth day following the election." NRS 293.269921(1)(b). Nevada law recognizes, however, that sometimes, "the date of the postmark cannot be determined." NRS 293.269921(2). And it provides that if such ballots are "received by mail not later than 5 p.m. on the third day following the election," they "shall be deemed to have been postmarked on or before the day of the election." NRS 293.269921(2).

This no-postmark-date provision is the focus of this case. On April 23, 2024, Deputy Secretary of State Mark Wlaschin explained in public testimony that the no-postmark-date provision applies to ballots received

by mail that lack any visible postmark, as well as those with a visible postmark but no legible date. JA0029. And on May 29, Wlaschin sent county election officials a memorandum ("Memorandum") providing guidance on the interpretation of NRS 293.269921(2) to this effect. JA0091-92. Nothing in the record, however, suggests that this was a change of interpretation by the Secretary of State's office, rather than a continuation of the office's existing understanding of Nevada law.

The no-postmark-date provision affects a relatively small number of ballots. The vast majority of ballots returned by mail have a legible postmark date; of those that do not, the vast majority have a visible postmark but no legible date. In the recent primary election, zero ballots in Washoe County and 25 ballots in Clark County were returned by mail and received after election day with no visible postmark at all. JA0177-79

SUMMARY OF THE ARGUMENT

This appeal focuses on a single provision of Nevada law governing voters' return of mail ballots to election officials, NRS 293.269921. Nevada voters can return mail ballots by mail or by delivering them by hand to a county clerk or an official ballot drop box. NRS 293.269921(1).

This appeal involves only ballots returned by mail. To be counted, such ballots must be "[p]ostmarked on or before the day of the election" and "[r]eceived by the clerk not later than 5 p.m. on the fourth day following the election." NRS 293.269921(1). But Nevada law further provides that "if . . . 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," so long as election officials receive it by the third day after election day. NRS 293.269921(2).

The district court properly rejected Plaintiffs' effort to disrupt this simple statutory framework just months before election day by introducing an arbitrary distinction between ballot envelopes with postmarks that lack a legible postmark date and envelopes that lack a visible postmark at all.

At the outset, Plaintiffs lack standing. They say they have suffered an injury due to a diversion of resources and a competitive injury to their candidates' electoral prospects. But Plaintiffs failed to show that the Secretary's interpretation will force them to divert resources, because their allegations show that they will monitor mail ballot counting *regardless* of whether ballots without a postmark are counted. And

Plaintiffs' assertion that their candidates suffered a "competitive disadvantage" fails because voters for all candidates are treated the same under the postmark guidance, regardless of party.

Plaintiffs are also unlikely to succeed on the merits. Nothing in the plain text of the statute supports a distinction between ballots with a postmark and no legible date and ballots with no visible postmark at all. In both cases, "the date of the postmark cannot be determined." *Id.* Nor is there any policy rationale for such a distinction. An indecipherable postmark provides election officials with no additional information that a ballot arriving in the mail without a postmark does not. And Plaintiffs' procedural claim under the Nevada Administrative Procedure Act fares no better. The Secretary's Memorandum is merely an "interpretation" that the Secretary has specific statutory authority to issue, and which is therefore explicitly exempted from the APA's definition of "regulation" and the associated procedural requirements.

Finally, Plaintiffs' request for a preliminary injunction also fails because they failed to present any evidence of irreparable harm, and because as an equitable matter, imposing Plaintiffs' irrational distinction between illegible postmarks and missing postmarks just months before

election day would cause grave harm to the public interest by arbitrarily disenfranchising voters due to circumstances entirely outside their control.

The Court should affirm.

STANDARD OF REVIEW

"Because the district court has discretion in determining whether to grant a preliminary injunction, this court will only reverse the district court's decision when the district court abused its discretion or based its decision on an erroneous legal standard or on clearly erroneous findings of fact." *Excellence Cmty. Mgmt. v. Gilmore*, 131 Nev. 347, 351, 351 P.3d 720, 722 (2015) (internal quotation omitted). "A party seeking a preliminary injunction must show a likelihood of success on the merits of their case and that they will suffer irreparable harm without preliminary relief." *Shores v. Global Experience Specialists, Inc.*, 134 Nev. 503, 505, 422 P.3d 1238, 1241 (2018). The moving party "must make a prima facie showing through substantial evidence that it is entitled to the preliminary relief requested." *Id.* at 507. "[C]ourts also weigh the potential hardships to the relative parties and others, and the public

interest." *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 721, 100 P.3d 179, 187 (2004).

ARGUMENT

I. Plaintiffs are unlikely to succeed on the merits.

A. Plaintiffs lack standing.

Plaintiffs are unlikely to succeed on the merits of their claims first because they lack standing to raise them. With exceptions not relevant here, Nevada courts "generally require[] the same showing of injury-in-fact, redressability, and causation that federal cases require for Article III standing." *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) (*NAMIC*). Article III standing requires a plaintiff to show that it has (1) "suffered an injury in fact," (2) that is "fairly traceable to the challenged action of the defendant," and (3) that is "likely" to be "redressed by a favorable [judicial] decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992) (cleaned up). An injury-in-fact requires: (1) the "invasion of a legally protected interest," (2) an injury that is both "concrete and particularized," and (3) an injury that is "actual or imminent, not conjectural or hypothetical." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 339

(2016) (quoting *Lujan*, 504 U.S. at 560). "The burden of proving the jurisdictional requirement is properly placed on the plaintiff." *Morrison v. Beach City LLC*, 116 Nev. 34, 36 (2000).

Plaintiffs lack standing because they have failed to adequately show that they have suffered a concrete and particularized injury in fact. *NAMIC*, 524 P.3d at 476. On appeal, they assert two theories of standing: organizational injury based on a diversion of resources and a competitive injury to their candidates' electoral prospects. But they have not presented evidence to support either theory, and their arguments fail as a matter of law in any event.

Two federal courts, faced with nearly identical allegations of resource diversion and competitive harm, have recently held that similarly situated plaintiffs—including some of the same plaintiffs here—lack standing. In both *RNC v. Burgess*, No. 3:24-cv-00198-MMD-CLB, 2024 WL 3445254 (D. Nev. July 17, 2024), and *Bost v. Illinois State Board of Elections,* No. 23-2644, 2024 WL 3882901 (7th Cir. Aug. 21, 2024), the plaintiffs challenged the practice of counting ballots arriving after election day, arguing that counting such ballots would force them to divert resources and would also negatively affect their election

prospects. Both the Nevada federal district court and the U.S. Court of Appeals for the Seventh Circuit rejected those standing theories. If anything, the standing allegations here are even weaker. Both *Burgess* and *Bost* concerned *all* ballots delivered by mail after election day, while this case concerns only those that, through a post-office error, are not visibly postmarked.[4]

1. Plaintiffs presented no admissible evidence to support standing.

Plaintiffs have provided no meaningful evidentiary support for their asserted injuries. In their Motion for a Preliminary Injunction, they rested their claimed injuries entirely on the Amended Complaint's unsworn allegations, not evidence. JA 0055. But to obtain a preliminary injunction requires evidence, not just allegations. "[I]n the absence of testimony or exhibits establishing the material allegations of the complaint, . . . the application for a preliminary injunction [should be]

[4] Plaintiffs attempt to undermine *Bost* by characterizing it as a divided opinion that is an "outlier." Br. at 30 n.3. But they ignore that the federal district court in *Burgess*, applying Ninth Circuit law on diversion of resources, came to the same conclusion. 2024 WL 3445254, at *4-*5. And the *Bost* panel was unanimous in rejecting the same "competitive-injury" theory of standing that Plaintiffs pursue here. *Bost*, 2024 WL 3882901, at *7 (Scudder, J., dissenting in part).

denied." *Coronet Homes, Inc. v. Mylan*, 84 Nev. 435, 437, 442 P.2d 901, 902 (1968); *see also Chattah v. Cegavske*, No. 85302, 2022 WL 4597416, at *1 (Nev. Sept. 29, 2022) (unpublished disposition) (similar).

Plaintiffs overwhelmingly fail to provide such evidence. In their Motion, they cited a total of four exhibits: the challenged memorandum, two barebones declarations from election observers describing the counting of ballots without visible postmarks, and a one-page Clark County "Quick Guide" that does not mention postmarks. *See* JA0047. These exhibits show, at most, that Clark and Washoe County are following the Secretary's challenged guidance. None does anything to support Plaintiffs' allegations of injury and irreparable harm, which turn on alleged but unproven diversions of resources and alleged but unproven disparities in the partisanship of late-arriving mail ballots. JA0055. Plaintiffs' failure to provide any evidence supporting their claimed injury was by itself a sufficient reason for the district court to deny their Motion. *Coronet*, 84 Nev. at 437, 442 P.2d at 902.

Plaintiffs sought to supplement their allegations by producing additional declarations at the August 2 hearing. Plaintiffs wrongly state that the declarations were admitted "without objection," Br. at 17, but

the transcript shows that Intervenors objected to the admission of the declarations on the grounds that they were not provided to the parties in advance of the hearing and there was no opportunity for cross examination. JA000238. The transcript further shows that Judge Russell agreed with that objection, explaining that the cross-examination issue is "why only deposition testimony is usually allowed." *Id.* The transcript does not show that the declarations were admitted into evidence, and Judge Russell's order expressly "declin[ed] to consider or credit these declarations, which were not provided to Defendants in advance of the hearing, and which were executed by witnesses who were not made available for cross-examination." JA000314. Plaintiffs do not challenge that ruling, which was not an abuse of the district court's considerable discretion over evidentiary matters.[5]

[5] The remainder of Plaintiffs' "evidence" and "data" is hearsay within hearsay in the form of news articles in which a writer quotes figures from an unknown source. Br. at 25–28. When, as here, articles are offered to "prove the truth of the matter asserted" they are hearsay and the district court was not obligated to credit them. *Keller v. Stanton*, 134 Nev. 967, *2 (Nev. App. 2018).

2. Plaintiffs lack standing based on a diversion of resources theory.

Even if the Court looks to Plaintiffs' unsworn allegations and the declarations that were excluded from evidence, they fail to establish organizational standing. Organizations 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) (citing *Am. Diabetes Ass'n v. U.S. Dep't of the Army*, 938 F.3d 1147, 1154 (9th Cir. 2019)); *cf. NAMIC*, 524 P.3d at 477 n.1 (acknowledging an assertion of standing "due to the time and money" spent responding to a rule). Here, this would require Plaintiffs to show that the counting of mail ballots without visible postmarks "perceptibly impair[s] [Plaintiffs'] ability to provide the services they were formed to provide." *E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 765 (9th Cir. 2018) (cleaned up); *NAMIC*, 524 P.3d at 477 n.1 (finding that an organization lacked standing because it was "unclear whether expending . . . resources frustrated [the association's] organizational mission"). That means they "affirmative[ly]" "expend[] additional resources that they would not have otherwise expended" because of the challenged law, not that they merely conduct "business as

usual" in continuing "existing advocacy." *Friends of the Earth*, 992 F.3d at 942–43 (internal quotations omitted); *Burgess*, 2024 WL 3445254, at *4 (finding plaintiffs lacked standing when they could not show the challenged regulation "will cause them to expend additional resources that they would not otherwise have expended, and in ways that they would not have expended them."). And the diversion must be in response to a concrete, imminent, actual harm. *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 402 (2013).

The district court correctly found that Plaintiffs do not satisfy these requirements. Plaintiffs argue that that counting of ballots without visible postmarks forces them to "divert additional resources to post-election monitoring of ballot processing," specifically by training and deploying volunteers to monitor ballot processing to identify ballots without postmarks. Br. at 17–19. But Plaintiffs' own pleadings say they will "devote[] significant resources to mail-ballot-chasing operations and election integrity activities, including post-election day activities, *such as monitoring the processing and counting of mail ballots*," *regardless of whether ballots without a visible postmark are counted*. JA0023 (emphasis added). Plaintiffs do not allege that counting ballots with no

visible postmark will, for example, result in additional counting sites or a larger volume of mail ballots and so provide no explanation as to why the postmark guidance requires any *additional* monitoring or training beyond their already-robust program. Nor do they offer even a hint of what "other activities" the resources might be spent on were it not for the postmark guidance. Br. at 18–19.

Plaintiffs therefore fail to allege any basis for concluding that their mail ballot chase programs and post-election activities are specifically attributable to ballots received without a postmark, rather than "business as usual." *Friends of the Earth*, 992 F.3d at 942–43. The district court correctly observed that "regardless of what happens in this case, mail ballots will be a central component of Nevada elections, and many of them will be counted after election day," that Plaintiffs have plans to monitor that counting regardless of whether mail ballots without visible postmarks are counted, and that "the same amount of resources would be expended" regardless of what happens in this case. JA000305.

Moreover, any resource expenditure Plaintiffs will make specifically due to ballots received without a postmark also "is not certainly impending" and is "speculative at best." *Bost*, 2024 WL 3882901

at *5. Under Nevada law all mail ballots must be in the mail by election day, NRS 293.269921(1)(b), so Organizational Plaintiffs' "electoral fate is sealed at midnight on Election Day, regardless of the resources [they] expend[] after the fact." *Bost v. Ill. State Bd. Of Elections*, 684 F. Supp. 3d 720, 733–34 (N.D. Ill. 2023). As one federal circuit court has explained

> [F]or [a candidate] to have standing to enjoin the counting of ballots arriving after Election Day, such votes would have to be sufficient in number to change the outcome of the election to [the candidate's] detriment. . . . [The candidate here] does not allege as much, and such a prediction was inherently speculative when the complaint was filed. The same can be said for [the candidate's] alleged wrongfully incurred expenditures and future expenditures.

Bognet v. Sec'y Commonwealth of Pennsylvania, 980 F.3d 336, 351-52 (3d Cir. 2020), *cert. granted, judgment vacated sub nom. Bognet v. Degraffenreid*, 141 S. Ct. 2508 (2021) (vacated on grounds of mootness). Similarly, here, "it [i]s Plaintiffs' choice to expend resources to avoid a hypothetical future harm." *Bost*, 2024 WL 3882901, at *5. Thus, Plaintiffs do not allege any "concrete, non-speculative injuries." *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 662 (9th Cir. 2021).

Plaintiffs' asserted diversion injury also faces another fundamental problem—the activities they describe are merely preparation to refile this suit. Plaintiffs admit that the purpose of their efforts to "monitor and

document" ballots received without a postmark would be to gather "*evidence* to challenge the counting of non-postmarked ballots in *post-election proceedings*." Br. at 20 (emphasis added). But "an organization's diversion of resources to litigation or to investigation in anticipation of litigation is considered a 'self-inflicted' budgetary choice that cannot qualify as an injury in fact for purposes of standing." *Crossroads Grassroots Pol'y Strategies v. Fed. Election Comm'n*, 788 F.3d 312, 317 (D.C. Cir. 2015). Plaintiffs cannot bootstrap organizational standing for a preliminary injunction by arguing that without one, they will be forced to spend resources to litigate the matter later.

3. Plaintiffs lack competitive standing.

Plaintiffs' alternative theory of standing based on hypothetical harm to their electoral prospects also fails. To establish standing under that theory, Plaintiffs must either (1) "allege that they have been injured by the 'potential loss of an election,'" or (2) show that "'they are forced to compete under the weight of a state-imposed disadvantage.'" *Burgess*, 2024 WL 3445254 at *2 (first quoting *Drake v. Obama*, 664 F.3d 774, 783 (9th Cir. 2011), then quoting *Mecinas v. Hobbs*, 30 F.4th 890, 899 (9th Cir. 2022)).

As the district court noted, the arguments Plaintiffs offer in support of their assertion of a competitive injury all suffer from the same fault—Plaintiffs do not explain what is *unfair* about the postmark guidance. JA000304 ("The challenged guidance applies equally to all candidates and all voters, so no one is 'specifically disadvantaged' by it.") (citing *Bost* 684 F. Supp. 3d at 737–38); *see also Bognet*, 980 F.3d at 351 (finding a lack of competitive standing where "all candidates in Pennsylvania, including Bognet's opponent, are subject to the same rules"). The postmark guidance therefore does not threaten Plaintiffs with any "harms that are unique from their electoral opponents." *Donald J. Trump for President, Inc. v. Cegavske*, 488 F. Supp. 3d 993, 1003 (D. Nev. 2020). The voters that support Plaintiffs stand to be benefitted as much by postmark guidance as those who support their opponents.

If counting ballots without a postmark "makes the competitive landscape worse for Republicans," Br. at 23, it is because their voters choose not to take advantage of mail voting, not because they are the subject of any differential treatment by the state. The Secretary's interpretation therefore is not a "state-imposed disadvantage" because "[a]ny 'advantage' that Democrats may gain from the [challenged

interpretation] is one that appears to be equally available to, but simply less often employed by, Republicans." *Burgess*, 2024 WL 3445254, at *3. The primary case relied upon by Plaintiffs underlines this flaw in their assertion of a competitive injury. In *Mecinas v. Hobbs* the state's system of ordering candidate names on the ballot ensured that the candidates of certain parties would always appear above those of others and so the candidates of the disfavored parties faced the burden of being "forced to compete under the weight of a state-imposed disadvantage" but Plaintiffs face no such singling out by officials. 30 F.4th at 894-95. Instead, all Plaintiffs have shown is that many of their voters have chosen in past elections not to vote by mail—likely in no small part because of Plaintiffs' own efforts to undermine mail voting, including through baseless lawsuits like this one. That is a self-imposed injury, not one caused by the challenged conduct.

Plaintiffs devote pages to arguing that it is "virtually certain" that mail ballots delivered after election day will break "in favor of Democratic candidates," Br. at 26, but the district court weighed Plaintiffs' purported evidence—almost entirely comprised of unsworn hearsay in the form of newspaper articles—and found Plaintiffs' assertions to be too speculative

to establish standing. JA000303. After weighing the evidence presented to it, the district court found that Plaintiffs' broad stroke conclusions about voting patterns "far from guaranteed that Nevada voters will continue their same mail ballot voting trends." JA000281 (citing *Burgess*, 2024 WL 3445254, at *2). Moreover, all of Plaintiffs' evidence involves mail ballots in general, not the tiny number of mail ballots that may be delivered without a visible postmark. Nothing in the record establishes which candidates are favored by the small number of voters whose mail ballots end up delivered without a postmark. "It is therefore inherently speculative that mail ballots received in Nevada [without a postmark] will favor Democratic candidates and that, if they do, such votes will be sufficient in number to change the outcome of the election to Republicans' detriment." *Burgess*, 2024 WL 3445254, at *2 (cleaned up).

Intervenors are unaware of any case in which a court found that it had jurisdiction because a plaintiff thought that *throwing out ballots cast by qualified voters* would likely hurt their opponent more than them. As the Third Circuit observed in *Bognet*, is it not clear "how counting *more* timely cast votes would lead to a *less* competitive race." 980 F.3d at 351. And Plaintiffs' claim that many Democratic voters across the country

vote by mail and may do so closer to election day, Br. at 26–27, does not demonstrate that the postmark guidance threatens Plaintiffs' electoral prospects through any "unfair advantage" or "harms that are unique from their electoral opponents." *Cegavske*, 488 F. Supp. 3d at 1003.

Finally, Plaintiffs' claim that ballots voted before, but received after, election day "favor Democratic candidates," and "flipped the results of close elections," Br. at 25, also does not state a cognizable injury for standing purposes—competitive or otherwise. Any "lead" before all ballots are counted is an arbitrary consequence of the order in which ballots are counted. Unlike a game of musical chairs, where the winner is whoever happens to be sitting when the music stops, American elections end when all the ballots are counted. Nevada law confirms: the certificate of election is ultimately delivered to the "person[] having the highest number of votes," NRS 293.393, 293.034—not whoever happens to be leading at some point on election night. Plaintiffs have no legal entitlement to any "early lead" in an election; this basis for standing must be rejected as well.

B. Plaintiffs' statutory claim fails as a matter of law.

Plaintiffs are also unlikely to succeed on the merits because Nevada law simply does not impose the arbitrary distinction between ballots without visible postmarks and ballots without legible postmark dates that Plaintiffs seek to impose. Nevada treats all ballots delivered by mail for which "the date of the postmark cannot be determined" the same—they are *all* "deemed to have been postmarked on or before the day of the election." NRS 293.269921(2).

"In interpreting a statute, this court looks to the plain language of the statute and, if that language is clear, this court does not go beyond it." *Valenti v. State, Dep't of Motor Vehicles*, 131 Nev. 875, 879, 362 P.3d 83, 85 (2015). If the statute is ambiguous, the court "must resolve that ambiguity by looking to the statute's legislative history and construing the statute in a manner that conforms to reason and public policy." *Id.* Here, the statute is unambiguous in not imposing the arbitrary distinction Plaintiffs seek, and the statute's legislative history, reason, and public policy all require rejecting Plaintiffs' claims.

1. The statute's plain text does not make the distinction Plaintiffs assert.

The plain text of NRS 293.269921 simply does not impose an arbitrary distinction between ballots with an illegible postmark date and ballots with no visible postmark, as Plaintiffs claim. To the contrary, the statute provides that whenever, and for whatever reason, "the date of the postmark cannot be determined" on a ballot delivered by mail, the ballot will be "deemed to have been postmarked on or before the day of the election" if it arrives by the end of the third day following the election. NRS 293.269921(2).

Nothing about subsection 2's text turns on the *reason* that the postmark date cannot be determined. The statute does not say it applies only to postmarks whose date "cannot be determined" because they are smudged, torn, or faded. It applies equally where, for instance, the date cannot be read because the postal service machine was out of ink, or an envelope slipped through without being stamped. Plaintiffs' interpretation—that Subsection (2) applies only to ballots with a visible postmark but no legible postmark date—would add words to the statute that are not there.

Plaintiffs' argument that Subsection (1) distinguishes between postmarked and non-postmarked ballots, and "in all instances" requires a postmark, Br. at 32, 35, misses the point. When a ballot satisfies Subsection (2)'s requirements, it is "deemed to have been postmarked" on time, so it also satisfies Subsection (1). The question in this case is simply what Subsection (2)'s requirements demand. And they demand only two things: that the "date of the postmark cannot be determined" and that the ballot be delivered within 3 days of election day.

A contrary rule would serve no purpose. Nevada law does not require ballots to have a postmark for the sake of a postmark. It requires a postmark specifically for the purpose of establishing the date of mailing. In particular, Subsection (1) requires that a ballot be "postmarked *on or before the date of the election*." NRS 293.269921(1). That makes sense: the vast majority of ballots returned by mail will have legible postmark dates, and this requirement serves to ensure that such ballots are counted only if they were timely mailed. But that leaves an issue: what to do with ballots for which the "date of the postmark cannot be determined," whether because the date is illegible or because there is

no visible postmark at all. Subsection (2) answers that question: count it if received within three days.

There would be no reason, in answering that question, to distinguish between ballots with a postmark but no legible date and ballots with no visible postmark at all. The postmark date is the *only* relevant "piece of information," Br. at 32, required by Subsection (1). A postmark without a date is therefore a functionally useless ink smudge. It provides no information of any value to election officials.

NRS 293.269921 thus creates two overlapping ballot receipt deadlines: four days after election day and three days after election day. Determining which deadline applies depends on the answer to a binary, yes or no question: Can the date of the postmark be determined? If the answer to that question is yes, then Subsection (1) applies. Under Subsection (1), if the date of the postmark is on or before election day, and the ballot has arrived within four days, then the ballot gets counted. But if the date of the postmark is *after* election day, *or* if the ballot arrives more than 4 days after election day, then the ballot is not counted. If, on the other hand, the answer to the question "can the date of the postmark be determined" is no, then Subsection (2) applies, and the ballot will be

counted if—and only if—it arrives by 5 p.m. on the third day after the election.[6]

Plaintiffs attempt to resist this straightforward conclusion with a meandering tour through the definitions of "indeterminate," "cannot be determined," and "indeterminable." Br. at 37–38. But this is sophistry at best. The terms are at least near-synonyms. The upshot of Plaintiffs' linguistic argument appears to be that a ballot with no postmark has an "indeterminable" date, rather than an "indeterminate" one. Br. at 38. But Plaintiffs' own definition of "indeterminable"—"incapable of being definitely fixed or ascertained"—is obviously equivalent to the statutory standard, "cannot be determined." Plaintiff's confusing linguistic discussion therefore provides no basis to question Defendants' and the district court's construction of the statute.[7]

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[6] Plaintiffs are therefore wrong to say that Defendants' and the district court's construction of the statute eliminates the requirement that "the date of the postmark cannot be determined" from subsection (2). Br. at 34. In the vast majority of cases, ballots returned by mail will have a legible postmark date, so that requirement from subsection (2) will not be met, and the ballot will be counted if and only if it satisfies subsection (1).

[7] Moreover, to the extent there is any daylight between the terms, "indeterminable" is slightly narrower than, but fully subsumed within, "indeterminate," as "square" is to "rectangle." Plaintiffs' own definitions

Finally, applying Subsection (2) to ballots with missing postmarks does nothing to undermine Subsection (1)'s general rule and does not render any part of the statute meaningless. It does not "render[] Subsection (1)'s postmark requirement a virtual nullity," Br. at 34, because it provides that in order to qualify for the 4-day receipt deadline, a ballot must be postmarked on or before election day, and because for ballots that do have a visible postmark with a legible date—which is the vast majority of them—Subsection (1)'s requirement that they be postmarked before election day will be fully enforced.

2. Legislative history confirms the error in Plaintiffs' interpretation.

The Court need go no further to resolve this case. But if there were any ambiguity in the statute, the Court should resolve it "by looking to the statute's legislative history and construing the statute in a manner that conforms to reason and public policy." *Valenti*, 131 Nev. at 879, 362

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show that "indeterminate" means "not definitely or precisely determined or fixed," while "indeterminable" means "incapable of being definitely fixed or ascertained." Br. at 37–38. Something that is "incapable of being definitely fixed or ascertained"—as Plaintiffs say the postmark date of an unpostmarked ballot is—by definition also is "not definitely or precisely determined or fixed." Everything "indeterminable" is therefore also "indeterminate." And so, whatever Plaintiffs intended to argue here, it does nothing to help their claims.

P.3d at 85 (citations omitted); *see also A.J. v. Eighth Judicial Dist. Ct. in and for Cnty. of Clark*, 133 Nev. 202, 207, 394 P.3d 1209, 1214 (2017) (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." (internal quotation marks omitted)). Plaintiffs have no answer to the clear legislative history demonstrating that Subsection 2 was meant to apply to non-postmarked ballots as well as ballots with illegible postmarks.

Here, the Legislature explicitly considered the very interpretive question at issue, and the bill's sponsor directly confirmed what is apparent from the face of the statute: NRS 293.269921(2) applies equally to mail ballots lacking a postmark as to those with illegible postmarks. Specifically, during debate on A.B. 321 in the Assembly Committee on Legislative Operations and Elections, the bill's sponsor, then-Speaker Frierson, was asked by Assemblyman Matthews: "I am wondering why you believe it is good policy for us to accept mail ballots where the postmark date cannot be determined, and I am wondering if we know how often that happens where a ballot comes back *without a postmark date*." April 1 Hearing Minutes at 20-21 (emphasis added). Speaker

Frierson responded: "To the extent that there were envelopes that *were not postmarked* or the postmark was illegible, smudged, or otherwise damaged to where it could not be read—I think similar to the postmark requirement of three days—any of those that came in within that same period of time *would be counted* and anything that came in after that would not be counted." *Id.* at 21 (emphasis added).

Speaker Frierson's statement could not be more clear or explicit: it was the intent of the Legislature in enacting NRS 293.269921(2) that ballots lacking a visible postmark would be counted if they arrived within three days of election day, just the same as ballots with an illegible or smudged postmark. And his interlocutor, Assemblyman Matthews, similarly understood that subsection (2) would encompass ballots "without a postmark date"—not just those with smudged or illegible dates.

Plaintiffs' attempt to recharacterize Speaker Frierson's comments makes no sense. Br. at 45-46. The full exchange speaks for itself. Speaker Frierson clearly understood Assemblyman Matthews to be asking about ballots that are not postmarked. Speaker Frierson dispelled the misconception that "prepaid postage envelopes" are routinely not

postmarked. Br. at 46; April 1 Hearing Minutes at 21. He then went on to say that "to the extent that there were envelopes that were not postmarked"—however unlikely that might be—those ballots "would be counted." *Id*. There is nothing "ambiguous" about this legislative history. Br. at 45.

Plaintiffs also argue that the Court should ignore the legislative history because the text of the statute unambiguously supports their position. As explained, that is simply not so—if anything, the statutory text unambiguously *refutes* Plaintiffs' arbitrary distinction between ballots with illegible postmarks and those lacking a visible postmark. But in any event, "even the most basic general principles of statutory construction must yield to clear contrary evidence of legislative intent." *A.J.*, 133 Nev. at 206, 394 P.3d at 1213 (quoting *Nat'l R.R. Passenger Corp. v. Nat'l Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974)). The evidence here is clear as can be—the Legislature intended to reach both types of ballots and understood that its legislation would do so.

3. The Secretary's interpretation conforms to reason and public policy.

The Secretary's interpretation also "conforms to reason and public policy," *Great Basin Water Network v. Taylor*, 126 Nev. 187, 196, 234 P.3d

913, 918 (2010), while Plaintiffs' interpretation defies common sense. As the district court noted, "[t]he no-postmark-date provision is designed to ensure that timely-cast ballots are not discarded due to circumstances—such as the smudging or omission of a postmark—that are entirely outside the voter's control." JA000311. This rationale applies equally to ballots with no visible postmark as to ballots with illegible postmark dates. Distinguishing between the two would be entirely arbitrary.

There is no practical distinction between a "smudged" or "torn" postmark and a missing postmark. To use Plaintiffs' articulation of the "purpose of the postmark requirement": a ballot with a smudged postmark provides no more "indicia that the ballot was cast before the polls closed" than does a ballot with no postmark. Br. at 38 n.4. An illegible postmark merely confirms that on some indeterminate date, the postmarked ballot entered the mail stream. But that fact is also confirmed by the fact that the ballot itself—whether visibly postmarked or not—is delivered by the postal service. And Subsection (2) as a whole applies only to ballots delivered by mail.

Plaintiffs do not even *attempt* to explain why it would make any sense for the Legislature to allow the counting of ballots received by mail

with smudged postmarks but not those received by mail with missing postmarks. They argue that a postmark helps "[t]o ensure that such ballots were mailed by the time the polls close." Br. at 39. True enough. But a postmark with an illegible date does not further that goal any more than a missing postmark does. The Legislature nevertheless chose to authorize the counting of ballots without determinable postmark dates, while shortening the receipt deadline for such ballots to reduce the risk of counting ballots cast post-election. In short, Plaintiffs have identified no "sound policy" rationale for accepting ballots with illegible postmarks but rejecting ballots with missing postmarks. Br. at 41.

To bolster the soundness of the unspecified policy rationale for their interpretation, Plaintiffs point to other states that purportedly require postmarks. Br. at 39 n.5. But many of the states they cite do not require postmarks at all. They, like Nevada, use postmarks as one possible indicator that a ballot has been timely mailed. Alaska, for instance, explicitly does *not* require a postmark: it provides that "*[i]f* the ballot is postmarked, it must be postmarked on or before election day." Alaska Stat. § 15.20.081. The District of Columbia counts ballots that are "postmarked or *otherwise proven* to have been sent on or before the day

of the election." D.C. Code § 1-1001.05(a)(10A) (emphasis added). Massachusetts provides that "[a] postmark, if legible, shall be evidence of the time of mailing," but does not *require* a postmark as a precondition to counting the ballot. Mass. Gen. Laws 54 § 93. And California, as Plaintiffs note, provides for counting ballots with "no postmark, a postmark with no date, or an illegible postmark." Cal. Elec. Code § 3020(b)(2). The bottom line is that every state does this somewhat differently, but Nevada's approach does not make it any sort of outlier.

There is more. Plaintiffs' interpretation would produce results that even they acknowledge would be contrary to the statute's purpose. While Plaintiffs' complaint specifically targets ballots arriving after election day, their interpretation would, by its plain terms, apply to *any* ballot that arrives in the mail at the county clerk's office without a visible postmark—even those that arrive before or on election day. Subsection (1) allows for the counting only of "[p]ostmarked" ballots—so non-postmarked ballots cannot be counted under that provision no matter when they arrive. NRS 293.269921(1)(b)(1). And nothing in Subsection (2) distinguishes between ballots arriving before election day and those arriving after (but within three days of) election day. As a result, if

Plaintiffs were right that non-postmarked ballots arriving *after* election day may not be counted under Subsection (2), then it would seem to follow that such ballots arriving *before* election day cannot be counted under that provision either.

Plaintiffs effectively concede this point. They do not dispute that their interpretation of the statute would seem to require rejecting unpostmarked ballots received even before election day. Br. at 38 n.4. They argue instead that to reject such ballots would "ignore[] the purpose of the postmark requirement: to give some indicia that the ballot was cast before the polls closed." Br. at 38 n.4. That is precisely the point. Discarding obviously timely ballots because they lack a postmark is not just contrary to the statute's purpose—it is an absurd result that the Legislature could not possibly have intended. *See Tate v. State, Bd. of Medical Examiners*, 131 Nev. 675, 678, 356 P.3d 506, 508 (2015) ("Statutes should be construed so as to avoid absurd results."). It therefore weighs strongly against Plaintiffs' interpretation.

Moreover, once one accepts that "the purpose of the postmark requirement" is "to give some indicia that the ballot was cast before the polls closed," Br. at 38 n.4, then the absurdity of the distinction Plaintiffs

seek to draw is unavoidable. A postmark with an illegible date provides no more "indicia that the ballot was cast before the polls close" than a ballot with no visible postmark does. Even Plaintiffs admit that the Legislature nevertheless required that ballots with illegible postmark dates be counted if received within three days of election day, and there is no reason that the Legislature would not have wanted ballots without visible postmarks to be counted under the same circumstances.

Finally, the district court appropriately applied the canon of constitutional avoidance to reject Plaintiffs' interpretation of NRS 293.269921. "[W]hen statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Degraw v. Eighth Judicial Dist. Ct.*, 134 Nev. 330, 333, 419 P.3d 136, 139 (2018) (quoting *Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018)).

The constitutional question to be avoided here is not, as Plaintiffs assert, whether there is a "right to have a mail ballot counted *after* election day." Br. at 44. It is whether voters may constitutionally be disenfranchised when they have "follow[ed] the state's instructions to

vote timely," but "nonetheless" their ballots are not postmarked, and are consequently invalidated. *Gallagher v. N.Y. State Bd. of Elections*, 477 F. Supp. 3d 19, 45 (S.D.N.Y. 2020). At least two federal courts have answered that question in the negative. *See id.*; *DCCC v. Kosinski*, 614 F. Supp. 3d 20, 56 (S.D.N.Y. 2022). In both cases, Plaintiffs presented evidence demonstrating that, despite having been timely mailed, ballots in New York were not regularly postmarked by the postal service. *See DCCC*, 614 F. Supp.3d at 56. The courts also credited evidence tending to show that ballots arriving two days after election day were virtually certain to have been mailed on or before election day. *Id.* Applying the *Anderson-Burdick* framework, both courts concluded that "these circumstances likely constitute a severe burden on the right to vote, meaning that the state's interest must be compelling and its regulation narrowly drawn to serve that interest." *Id.* at 57 (citing *Burdick v. Takushi*, 504 U.S. 428, 434 (1992)). And "[w]hile the state's interest in counting only those ballots that are completed by Election Day is certainly compelling, that interest cannot justify disenfranchising voters who complied with that requirement when the state has available

alternatives that will serve that interest equally well without disenfranchising voters." *Id.*

That same scenario is presented here. Nevada law instructs voters that, to have their ballots counted, they must be mailed on or before election day. Under Plaintiffs' interpretation of NRS 293.269921, voters who comply with that deadline—*i.e.*, who have "follow[ed] the state's instructions to vote timely," *Gallagher*, 477 F. Supp. 3d at 45—will have their ballots invalidated if those ballots "through no fault of their own, are not postmarked." *DCCC*, 614 F. Supp. 3d at 56. That is unquestionably a "severe burden on the right to vote." *Id.* at 57. And "the state has available alternatives that will serve [the interest of ensuring the timeliness of ballots] equally well without disenfranchising voters." *Id.* In fact, the Nevada Legislature has enacted such an alternative: NRS 293.269921(2). For the reasons explained above, there is no sound policy reason to apply Subsection (2) to illegible postmarks but not to missing postmarks. The Secretary's interpretation is thus the only one that avoids these "serious constitutional doubts," *Degraw*, 134 Nev. at 333, and "conforms to reason and public policy." *Valenti*, 131 Nev. at 879.

C. The Secretary's Memorandum does not violate the procedural requirements of the Nevada APA.

The district court correctly concluded that Plaintiffs' procedural claim under the APA fails because the Secretary's Memorandum is not a regulation. It is instead an interpretation that the Secretary has statutory authority to issue, and therefore is not subject to the APA's procedural requirements. "When an agency's action is challenged as violating the APA's notice and hearing requirements, it must be determined whether the agency engaged in rulemaking, such that the APA's safeguards for promulgating regulations apply[.]" *Labor Comm'r of State of Nev. v. Littlefield*, 123 Nev. 35, 39, 153 P.3d 26, 29 (2007). An agency engages in "rulemaking" only when it "promulgates, amends, or repeals an 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," *Id.* at 39–40, 153 P.3d at 29 (cleaned up).

The APA's statutory definition of "regulation" explicitly excludes "an interpretation of an agency that has statutory authority to issue [such] interpretations," NRS 233B.038(2)(h). The Secretary has statutory authority to "provide interpretations and take other actions necessary for

the effective administration of the statutes and regulations governing the conduct of primary, presidential preference primary, general, special and district elections in this State." NRS 293.247(4). Such "interpretations" therefore are not "regulations," which the Secretary is separately authorized to promulgate under a different subsection, NRS 293.247(1). *See Nev. State Democratic Party v. Nev. Republican Party*, 256 P.3d 1, 6-7 (Nev. 2011) (explaining the distinction between a "regulation" and an "interpretation").

The May 29 Memorandum states that it is being "provided for consistent and clear *guidance* regarding the *interpretation* of NRS 293.269921(2)." JA0091 (emphasis added). It does nothing more than set forth the Secretary's (correct) interpretation of NRS 293.269921(2). And by explaining that 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. JA0092. The procedural rulemaking requirements of the APA do not apply. *Littlefield*, 123 Nev. at 39, 153 P.3d at 29.

In response, Plaintiffs first argue that NRS 233B.038(2)(h) cannot possibly mean what it says, because "it would mean the Secretary of State

would never need to comply with the APA." Br. at 47. They fail to grasp the difference between a regulation, which has the binding force of law, *see* NRS 233B.040(1), and an interpretation, which is merely guidance (and, for that reason, is not subject to the procedural rulemaking requirements of the APA).

This Court did not "reject[] this precise theory" in *Nevada State Democratic Party v. Nevada Republican Party*. Br. at 48. Quite the opposite. In that case, the Court declined to defer to an "interpretation" issued under the Secretary's statutory authority precisely *because* it was merely an "interpretation," and thus not a "regulation." 256 P.3d at 6-7. The Court recognized the clear statutory distinction between "regulations" and nonbinding "interpretations," which do not have the force of law and are not entitled to deference. *Id.* The former are subject to the APA's procedural rulemaking requirements, while the latter are not. NRS 233B.038(2)(h). And here, unlike in *Nevada State Democratic Party*, no party is asking the Court to afford any sort of deference to the Secretary's interpretation.

Plaintiffs next argue that the Memorandum is not a "mere interpretive ruling." Br. at 49. But a "mere interpretive ruling" is a

separate exception from rulemaking requirements. *See State Farm Mut. Auto Ins. Co. v. Comm'r of Ins.*, 114 Nev. 535, 543, 958 P.2d 733, 738 (1998). The Memorandum was issued not under that exception, but as "an interpretation of an agency that has statutory authority to issue [such] interpretations," and it therefore is explicitly exempted from the statutory definition of "regulation." NRS 233B.038(2)(h).[8]

II. Plaintiffs will not suffer irreparable harm absent an injunction.

Plaintiffs are not entitled to a preliminary injunction for the independent reason that they have failed to demonstrate they will suffer *any* harm as a result of the Secretary's interpretation. Again, they have not submitted any evidence to substantiate their supposed injuries, let alone "substantial evidence" of irreparable harm. *Shores*, 134 Nev. at 507, 422 P.3d at 1242. The district court therefore cannot have abused its discretion in rejecting Plaintiffs' claims of irreparable harm, which relied solely on the allegations of their Amended Complaint. *See* JA0055. The Amended Complaint is not evidence. And "in the absence of testimony or

[8] Plaintiffs alternatively argue that, if the Memorandum were a regulation, it would be invalid because it is contrary to NRS 293.269921. That is wrong for all the reasons explained *supra* I.B.

exhibits establishing the material allegations of the complaint" as to their claims of irreparable harm, their motion must be denied. *Coronet*, 84 Nev. at 437, 442 P.2d at 902.

But even if the Court could consider Plaintiffs' belated declarations, their claims of harm do not entitle them to preliminary injunctive relief. As explained above, Plaintiffs have failed to establish even the bare minimum harm needed to establish their standing to pursue their claims. For the same reasons, their speculative, generalized grievances about the conduct of elections do not establish that they are likely to suffer irreparable harm absent an injunction.

First, Plaintiffs claim a generic interest in elections conducted according to their view of the law. That does nothing to explain how they are harmed. As the case law set forth above establishes, it is merely a generalized grievance about the conduct of government. The only authority on which Plaintiffs rely for their supposed interest in "ensuring that the final vote tally accurately reflects the legally valid votes cast," *Carson v. Simon*, 978 F.3d 1051, 1058 (8th Cir. 2020), rested on flawed reasoning and has been repeatedly rejected by other federal courts. *See id.* at 1063 (Kelly, J., dissenting) (dissenting judge explaining the

plaintiffs' "claimed injury—a potentially 'inaccurate vote tally' . . . — appears to be 'precisely the kind of undifferentiated, generalized grievance about the conduct of government' that the Supreme Court has long considered inadequate for standing." (quoting *Lance v. Coffmann*, 549 U.S. 437, 442 (2007))); *see also Bognet*, 980 F.3d at 351 n.6 (3d Cir. 2020) (explaining *Carson*'s error); *Bost*, 2024 WL 3882901, at *6 ("[W]e question whether the Eighth Circuit's brief treatment of this issue without any citation to authority is consistent with the Supreme Court's holding in *Lance*."); *King v. Whitmer*, 505 F. Supp. 3d 720, 736 (E.D. Mich. 2020) ("This Court . . . is as unconvinced about the majority's holding in *Carson* as the dissent."); *Feehan v. Wis. Elections Comm'n*, 506 F. Supp. 3d 596, 612 (E.D. Wis. 2020) ("Judge Kelly's reasoning is the more persuasive."); *Bowyer v. Ducey*, 506 F. Supp. 3d 699, 710–11 (D. Ariz. 2020) (joining other courts in repudiating *Carson*'s reasoning); *Bost*, 684 F. Supp. 3d at 734 ("[T]he Court declines to follow *Carson*."). Even the rare courts that have accepted *Carson*'s premise have still required plaintiffs to "allege[] facts to show that it is plausible that the field is 'tilted'." *Lake v. Hobbs*, 623 F. Supp. 3d 1015, 1029 (D. Ariz. 2022). Plaintiffs have not done so here.

Second, Plaintiffs speculate that the challenged guidance will harm their electoral prospects because it will help Democratic voters more than it helps Republican voters. But Plaintiffs have submitted *no* competent evidence to establish that they are likely to suffer electoral harm because of the Secretary's interpretation of the no-postmark-date provision. In any event, to establish a cognizable "competitive" injury requires a structural "ongoing, unfair advantage." *Mecinas*, 30 F.4th at 898; *Cegavske*, 488 F. Supp. 3d at 1003. Here, the Secretary's interpretation equally benefits *all* voters, including Plaintiffs' supporters. Far from showing irreparable harm, Plaintiffs have alleged nothing more than a generalized interest in compliance with the law, coupled with rank speculation that Democratic ballots are more likely to be affected by their requested relief than Republican ballots.

III. The balance of hardships and the public interest weigh against a preliminary injunction.

Finally, the district court appropriately "weigh[ed] the potential hardships to the relative parties and others, and the public interest." *Univ. & Cmty. Coll. Sys. of Nev.*, 120 Nev. at 721, 100 P.3d at 187. While Plaintiffs will suffer no harm in the absence of a preliminary injunction, granting an injunction would work grave harm to Nevada voters—

including Intervenors' members and constituents—and the public interest. Of course, voters have no control over whether the postal service prints a visible postmark on their mail ballot. If Plaintiffs succeed in imposing their atextual interpretation of Nevada law, an untold number of qualified Nevada voters will be disenfranchised due to postal errors or omissions that are entirely out of their control. Plaintiffs do not dispute this—it is the *stated purpose* of their lawsuit. They argue that "[t]he 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." Br. at 53.

Plaintiffs ask the Court for an order directing Nevada elections officials to discard ballots cast by undisputedly qualified Nevada voters simply because Plaintiffs believe that those votes are more likely to be cast for their electoral opponents. Setting aside the truth of those allegations—which, again, Plaintiffs have not supported with competent evidence—basic principles of equity, fairness, and public policy militate against such arbitrary disenfranchisement. Plaintiffs' unsupported allegations of harm to their electoral prospects—even if accepted as

true—are far outweighed by the harms they seek to impose on voters to improve their electoral prospects.

Bizarrely, Plaintiffs claim that the balance of hardships tips in their favor because they "will suffer injury to their constitutional rights." Br. at 53. But there is no constitutional right to prevent the counting of another person's ballot. *Short v. Brown*, 893 F.3d 671, 677 (9th Cir. 2018) (explaining that a law that "makes it easier for some voters to cast their ballots by mail" "does not burden anyone's right to vote . . . ."). The only constitutional interests involved in this case cut exactly the other way. As explained above, Plaintiffs' interpretation of the no-postmark-date provision would lead to the absurd result that ballots lacking postmarks must be discarded even if they arrive on or before election day. That is not just inequitable—it is likely unconstitutional. *Kosinski*, 614 F. Supp. 3d at 56-57; *Gallagher*, 477 F. Supp. 3d at 44. Plaintiffs' nonexistent constitutional interest stands in sharp contrast to the very real harm they seek to impose on the voting rights of Nevadans.

Plaintiffs' attempt to arbitrarily disenfranchise undisputedly qualified voters based on unforeseeable postal errors runs directly counter to the public interest. Courts have long recognized that the public

interest "is best served by favoring enfranchisement and ensuring that qualified voters' exercise of their right to vote is successful" and "favors permitting as many qualified voters to vote as possible." *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012). The public has a "strong interest in exercising the fundamental political right to vote." *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006) (internal quotation marks omitted); *see also League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 247 (4th Cir. 2014) ("By definition, '[t]he public interest . . . favors permitting as many qualified voters to vote as possible.'" (quoting *Husted*, 679 F.3d at 437 (alterations in original)). It is not in the public interest for a court of equity to help Plaintiffs win elections by throwing out the ballots of qualified voters they do not like.

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CONCLUSION

Based upon the foregoing, Intervenor-Respondents respectfully request that the Court affirm the decision of the district court.

Dated this 13th day of September, 2024.

BRAVO SCHRAGER LLP

By: */s/ Bradley S. Schrager*

Bradley S. Schrager, Esq. (NSB 10217)
Daniel Bravo, Esq. (NSB 13078)
6675 South Tenaya Way, Suite 200
Las Vegas, Nevada 89113
Tele.: (702) 996-1724
Email: bradley@bravoschrager.com
Email: daniel@bravoschrager.com

David R. Fox, Esq. (NSB 16536)
Richard A. Medina, Esq. (*pro hac vice*)
Marcos Mocine-McQueen
ELIAS LAW GROUP LLP
250 Massachusetts Avenue NW, Suite 400
Washington, D.C. 20001
Tele.: (202) 968-4490
Email: dfox@elias.law
Email: dcohen@elias.law
Email: mmcqueen@elias.law

Attorneys for Intervenor-Respondents, Vet Voice Foundation and the Nevada Alliance for Retired Americans

CERTIFICATE OF COMPLIANCE

1. I certify that this Brief complies with the formatting requirements of N.R.A.P. 32(a)(4), the typeface requirements of N.R.A.P. 32(a)(5) and the type style requirements of N.R.A.P. 32(a)(6) because it has been prepared in a proportionally-spaced typeface, size 14, Century Schoolbook.

2. I further certify that this Brief complies with the type-volume limitations of N.R.A.P. 32(a)(7) because, excluding the parts of the Brief exempted by N.R.A.P. 32(a)(7)(C), it contains 9,843 words.

3. Finally, I hereby certify that I have read this 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 N.R.A.P. 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 where the matter relied on is to be found. I understand that I may be subject to

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sanctions in the event that the accompanying Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 13th day of September, 2024.

BRAVO SCHRAGER LLP

By: */s/ Bradley S. Schrager*

Bradley S. Schrager, Esq. (NSB 10217)
Daniel Bravo, Esq. (NSB 13078)
6675 South Tenaya Way, Suite 200
Las Vegas, Nevada 89113
Tele.: (702) 996-1724
Email: bradley@bravoschrager.com
Email: daniel@bravoschrager.com

David R. Fox, Esq. (NSB 16536)
Richard A. Medina, Esq. (*pro hac vice*)
Marcos Mocine-McQueen
ELIAS LAW GROUP LLP
250 Massachusetts Avenue NW, Suite 400
Washington, D.C. 20001
Tele.: (202) 968-4490
Email: dfox@elias.law
Email: rmedina@elias.law
Email: mmcqueen@elias.law

Attorneys for Intervenor-Respondents, Vet Voice Foundation and the Nevada Alliance for Retired Americans

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of September, 2024, a true and correct copy of **INTERVENOR-RESPONDENTS' BRIEF** was served upon all counsel of record by electronically filing the document using the Nevada Supreme Court's electronic filing system:

By: */s/ Dannielle Fresquez*
Dannielle Fresquez, an Employee of
BRAVO SCHRAGER LLP